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THE
LAWS OF ENGLAND.

VOLUME IV.

THE

LAWS OF ENGLAND

BEING

A COMPLETE STATEMENT OF THE WHOLE LAW OF ENGLAND.

BY

EARL OF HALSBURY

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

AND OTHER LAWYERS.

VOLUME IV.

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CHOSES IN ACTION.
CLUBS.
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See ADMIRALTY; SHIPPING AND NAVIGATION.

COLONIES.

See DEPENDENCIES AND COLONIES.

COMBINATIONS AFFECTING TRADE.

See TRADE AND TRADE UNIONS.

COMMERCE.

See TRADE AND TRADE UNIONS.

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COMMISSION TO EXAMINE WITNESSES.

See EVIDENCE; PRACTICE AND PROCEDURE.

COMMISSIONERS.

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Open Spaces - - - - - ,, OPEN SPACES.
Profits à prendre generally - - ,, EASEMENTS AND PROFITS A PRENDRE.
Sporting Rights - - - - ,, GAME.

COMMUTATION OF TITHES.

See ECCLESIASTICAL LAW.

ABBREVIATIONS

USED IN THIS WORK.

A. C. (preceded by date) .	Law Reports, Appeal Cases, House of Lords, since 1890 (*e.g.* [1891] A. C.)
A.-G.	Attorney-General
Act.	Acton's Reports, Prize Causes, 2 vols , 1809—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., 1843—1846
Bar. & Aust. .. .	Barron & Austin's Election Cases, 1 vol., 1842
Barn. (CH.) . ..	Barnardiston's Reports, Chancery, fol., 1 vol., 1740—1741
Barn. (K. B.) ..	Barnardiston's Reports, King's Bench, fol., 2 vols., 1726—1734
Barnes	Barnes' Notes of Cases of Practice, Common Pleas, 1 vol., 1732—1760
Batt.	Batty's Reports, King's Bench (Ireland), 1 vol., 1825—1826
Beat.	Beatty's Reports, Chancery (Ireland), 1 vol., 1813—1830
Beav.	Beavan's Reports, Rolls Court, 36 vols., 1838—1866
Beav. & Wal.	Beavan and Walford's Railway Parliamentary Cases, 1 vol., 1846
Beaw.	Beawes's Lex Mercatoria
Bellewe	Bellewe's Cases *temp.* Richard II., King's Bench, 1 vol.
Bell, C. C.	T. Bell's Crown Cases Reserved, 1 vol., 1858—1860
Bell, Ct. of Sess. ..	R. Bell's Decisions, Court of Session (Scotland), 1 vol., 1790—1792
Bell, Ct. of Sess. fol. ..	R. Bell's Decisions, Court of Session (Scotland), fol., 1 vol., 1794—1796
Bell, Dict. Dec. ..	S. S. Bell's Dictionary of Decisions, Court of Session (Scotland), 2 vols., 1808—1833
Bell, Sc. App.	S. S. Bell's Scotch Appeals, House of Lords, 7 vols., 1842—1850
Belt's Sup.	Belt's Supplement to Vesey Sen., Chancery, 1 vol., 1746—1756
Benl.	Benloe's (or Bendloe's) Reports, King's Bench and Common Pleas, fol., 1 vol., 1515—1627
Ben. & D.	Benloe and Dalison's Reports, Common Pleas, fol., 1 vol., 1357—1579
Bing.	Bingham's Reports, Common Pleas, 10 vols., 1822—1834
Bing. (N. C.)	Bingham's New Cases, Common Pleas, 6 vols., 1834—1840
Bitt. Prac. Cas. .. .	Bittleston's Practice Cases in Chambers under the Judicature Acts, 1873 and 1875, 1 vol., 1875—1876
Bitt. Rep. in Ch. ..	Bittleston's Reports in Chambers (Queen's Bench Division), 1 vol., 1883—1884
Bl. Com.	Blackstone's Commentaries
Bl. D. & Osb.	Blackham, Dundas, and Osborne's Reports, Practice and Nisi Prius (Ireland), 1 vol., 1846—1848
Bli.	Bligh's Reports, House of Lords, 4 vols., 1819—1821
Bli. (N. S.)	Bligh's Reports, House of Lords, New Series, 11 vols., 1827—1837
Bos. & P.	Bosanquet and Puller's Reports, Common Pleas, 3 vols., 1796—1804
Bos. & P. (N. R.) ..	Bosanquet and Puller's New Reports, Common Pleas, 2 vols., 1804—1807
Bract.	Bracton De Legibus et Consuetudinibus Angliæ
Bro. Abr. ..	Sir J. Brooke's Abridgment
Bro. C. C. ..	W. Brown's Chancery Reports, 4 vols., 1778—1794
Bro. Ecc. Rep. .	W. G. Brooke's Ecclesiastical Reports, Privy Council, 1 vol., 1850—1872
Bro. (N. C.) ..	Sir R. Brooke's New Cases, 1 vol., 1515—1558
Bro. Parl. Cas. . ..	J. Brown's Cases in Parliament, 8 vols., 1702—1800
Bro. Supp. to Mor. ..	M. P. Brown's Supplement to Morison's Dictionary of Decisions, Court of Session (Scotland), 5 vols.
Bro. Synop.	M. P. Brown's Synopsis of Decisions, Court of Session (Scotland), 4 vols., 1532—1827

Brod. & Bing.	Broderip and Bingham's Reports, Common Pleas, 3 vols., 1819—1822
Brod. & F.	Brodrick and Fremantle's Ecclesiastical Reports, Privy Council, 1 vol., 1705—1864
Broun	Broun's Justiciary Reports (Scotland), 2 vols., 1842—1845
Brown. & Lush. ..	Browning and Lushington's Reports, Admiralty, 1 vol., 1863—1866
Brownl.	Brownlow and Goldesborough's Reports, Common Pleas, 2 parts, 1569—1624
Bruce	Bruce's Decisions, Court of Session (Scotland), 1714—1715
Buchan.	Buchanan's Reports, Court of Session and Justiciary (Scotland), 1806—1813
Buck	Buck's Cases in Bankruptcy, 1 vol., 1816—1820
Bulst.	Bulstrode's Reports, King's Bench, fol., 3 parts in 1 vol., 1610—1626
Bunb.	Bunbury's Reports, Exchequer, fol., 1 vol., 1713—1741
Burr.	Burrow's Reports, King's Bench, 5 vols., 1756—1772
Burr. S. C.	Burrow's Settlement Cases, King's Bench, 1 vol., 1733—1776
Burrell	Burrell's Reports, Admiralty, ed. by Marsden, 1 vol., 1648—1840
C. A.	Court of Appeal
C. B.	Common Bench Reports, 18 vols., 1845—1856
C. B. (N. S.)	Common Bench Reports, New Series, 20 vols., 1856—1865
C. C. Ct. Cas.	Central Criminal Court Cases (Sessions Papers), 1834—(current)
C. L. R.	Common Law Reports, 3 vols.. 1853—1855
C. P. D.	Law Reports, Common Pleas Division, 5 vols., 1875—1880
C. & P.	Carrington and Payne's Reports, Nisi Prius, 9 vols., 1823—1841
Cab. & El.	Cababé and Ellis's Reports, Queen's Bench Division, 1 vol.. 1882—1885
Cald. Mag. Cas. ..	Caldecott's Magistrates Cases, 1 vol., 1777—1786
Calth.	Calthrop's City of London Cases, King's Bench, 1 vol., 1609—1618
Camp.	Campbell's Reports, Nisi Prius, 4 vols., 1807—1816
Carp. Pat. Cas.	Carpmael's Patent Cases, 2 vols., 1602—1842
Car. & Kir.	Carrington and Kirwan's Reports, Nisi Prius, 3 vols., 1815—1853
Car. & M.	Carrington and Marshman's Reports, Nisi Prius, 1 vol., 1841—1843
Cart.	Carter's Reports, Common Pleas, fol., 1 vol., 1664—1673
Carth.	Carthew's Reports, King's Bench, fol., 1 vol., 1687—1700
Cary	Cary's Reports, Chancery, 1 vol.
Cas. in Ch.	Cases in Chancery, fol., 3 parts, 1660—1697
Cas. Pract. K. B. ..	Cases of Practice, King's Bench, 1 vol., 1655—1775
Cas. Sett.	Cases of Settlements and Removals, 1 vol., 1689—1727
Cas. *temp.* Finch ..	Cases *temp.* Finch, Chancery, fol., 1 vol., 1673—1680
Cas. *temp.* King ..	Select Cases *temp.* King, Chancery, fol., 1 vol., 1724—1733
Cas. *temp.* Talb... ..	Cases in Equity *temp.* Talbot, fol., 1 vol., 1730—1737
Ch. (preceded by date) ..	Law Reports, Chancery Division, since 1890 (*e.g.* [1891] 1 Ch.)
Ch. App...	Law Reports, Chancery Appeals, 10 vols., 1865—1875
Ch. D.	Law Reports, Chancery Division, 45 vols. 1875—1890

Ch. Rob.	Christopher Robinson's Reports, Admiralty, 6 vols., 1798—1808
Char. Pr. Cas.	Charley's New Practice Reports, 3 vols., 1875—1876
Char. Cham. Cas. ..	Charley's Chamber Cases, 1 vol., 1875—1876
Chit.	Chitty's Practice Reports, King's Bench, 2 vols., 1770—1822
Cl. & Fin.	Clark and Finnelly's Reports, House of Lords, 12 vols., 1831—1846
Clay.	Clayton's Reports and Pleas of Assises at Yorke, 1 vol., 1631—1650
Clif. & Rick.	Clifford and Rickards' Locus Standi Reports, 3 vols., 1873—1884
Clif. & Steph. ..	Clifford and Stephens' Locus Standi Reports, 2 vols., 1867—1872
Cockb. & Rowe	Cockburn and Rowe's Election Cases, 1 vol., 1833
Co. Ent.	Coke's Entries
Co. Inst.	Coke's Institutes
Co. Litt.	Coke on Littleton (1 Inst.)
Co. Rep.	Coke's Reports, 13 parts, 1572—1616
Coll.	Collyer's Reports, Chancery, 2 vols., 1844—1846
Coll. Jurid. .. .	Collectanea Juridica, 2 vols.
Colles	Colles' Cases in Parliament, 1 vol., 1697—1713
Colt.	Coltman's Registration Cases, 1 vol., 1879—1885
Com.	Comyns' Reports, King's Bench, Common Pleas, and Exchequer, fol., 2 vols., 1695—1740
Com. Cas.	Commercial Cases, 1895 -(current)
Com. Dig.	Comyns' Digest
Comb.	Comberbach's Reports, King's Bench, fol., 1 vol., 1685—1698
Con. & Law.	Connor and Lawson's Reports, Chancery (Ireland), 2 vols., 1841—1843
Cooke & Al.	Cooke and Alcock's Reports, King's Bench (Ireland), 1 vol., 1833—1834
Cooke, Pr. Cas. ..	Cooke's Practice Reports, Common Pleas, 1 vol., 1706—1747
Cooke, Pr. Reg. . ..	Cooke's Practical Register of the Common Pleas, 1 vol., 1702—1742
Coop. G.	G. Cooper's Reports, Chancery, 1 vol., 1792—1815
Coop. Pr. Cas.	C. P. Cooper's Reports, Chancery Practice, 1 vol., 1837—1838
Coop. *temp.* Brough. ..	C. P. Cooper's Cases *temp.* Brougham, Chancery, 1 vol., 1833—1834
Coop. *temp.* Cott. ..	C. P. Cooper's Cases *temp.* Cottenham, Chancery, 2 vols., 1846—1848 (and miscellaneous earlier cases)
Corb. & D.	Corbett and Daniell's Election Cases, 1 vol., 1819
Couper	Couper's Justiciary Reports (Scotland), 5 vols., 1868—1885
Cowp.	Cowper's Reports, King's Bench, 2 vols., 1774—1778
Cox, C. C.	E. W. Cox's Criminal Law Cases, 1843—(current)
Cox & Atk. . ..	Cox and Atkinson's Registration Appeal Cases, 1 vol., 1843—1846
Cox, Eq. Cas.	S. C. Cox's Equity Cases, 2 vols., 1745—1797
Cox, M. & H.	Cox, Macrae, and Hertslet's County Courts Cases and Appeals, Vol. I., 1846—1852
Cr. & J.	Crompton and Jervis's Reports, Exchequer, 2 vols., 1830—1832
Cr. & M.	Crompton and Meeson's Reports, Exchequer, 2 vols., 1832—1834
Cr. M. & R.	Crompton, Meeson, and Roscoe's Reports, Exchequer, 2 vols., 1834—1835
Cr. & Ph.	Craig and Phillips' Reports, Chancery, 1 vol., 1840—1841
Craw. & D.	Crawford and Dix's Circuit Cases (Ireland), 3 vols., 1838—1846

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

Dow. & Ry. (K. B.)	Dowling and Ryland's Reports, King's Bench, 9 vols., 1822—1827
Dow. & Ry. (M. C.)	Dowling and Ryland's Magistrates' Cases, 4 vols., 1822—1827
Dow. & Ry. (N. P.)	Dowling and Ryland's Reports, Nisi Prius, 1 part, 1822—1823
Dowl.	Dowling's Practice Reports, 9 vols., 1830—1841
Dowl. (N. S.)	Dowling's Practice Reports, New Series, 2 vols., 1841—1843
Dr. & Wal.	Drury and Walsh's Reports, Chancery (Ireland), 2 vols., 1837—1841
Dr. & War.	Drury and Warren's Reports, Chancery (Ireland) 4 vols., 1841—1843
Drew.	Drewry's Reports, Chancery, 4 vols., 1852—1859
Drew. & Sm.	Drewry and Smale's Reports, Chancery, 2 vols., 1859—1865
Drinkwater	Drinkwater's Reports, Common Pleas, 1 vol., 1839
Drury *temp.* Nap.	Drury's Reports *temp.* Napier, Chancery (Ireland), 1 vol., 1858—1859
Drury *temp.* Sug.	Drury's Reports *temp.* Sugden, Chancery (Ireland), 1 vol., 1841—1844
Dugd. Orig.	Dugdale's Origines Juridiciales
Dunl. (Ct. of Sess.)	Dunlop, Court of Session Cases (Scotland), 2nd series, 24 vols., 1838—1862
Dunning	Dunning's Reports, King's Bench, 1 vol., 1753—1754
Durie	Durie's Decisions, Court of Session (Scotland), fol., 1 vol., 1621—1642
Dyer	Dyer's Reports, King's Bench, 3 vols., 1513—1581
E. & B.	Ellis and Blackburn's Reports, Queen's Bench, 8 vols., 1852—1858
E. & E.	Ellis and Ellis's Reports, Queen's Bench, 3 vols., 1858—1861
E. B. & E.	Ellis, Blackburn, and Ellis's Reports, Queen's Bench, 1 vol., 1858—1860
Eag. & Y.	Eagle and Younge's Tithe Cases, 4 vols., 1223—1825
East	East's Reports, King's Bench, 16 vols., 1800—1812
East, P. C.	East's Pleas of the Crown
Ecc. & Ad.	Spinks' Ecclesiastical and Admiralty Reports, 2 vols., 1853—1855
Eden	Eden's Reports, Chancery, 2 vols., 1757—1766
Edgar	Edgar's Decisions, Court of Session (Scotland), fol., 1724—1725
Edw.	Edwards' Reports, Admiralty, 1 vol., 1808—1812
Elchies	Elchies' Decisions, Court of Session (Scotland), 2 vols., 1733—1754
Eng. Pr. Cas	Roscoe's English Prize Cases, 2 vols., 1745—1858
Eq. Cas. Abr.	Abridgment of Cases in Equity, fol., 2 vols., 1667—1744
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Carriage by Sea - - - - - ,, SHIPPING AND NAVIGATION.
Insurance of Goods during Transit - ,, INSURANCE.
Liability of Carriers apart from Contract - - - - - ,, NEGLIGENCE.
Liability of Carriers as Bailees - - ,, BAILMENT.
Railways and Canals - - - ,, RAILWAYS AND CANALS.
Stoppage in transitu *in general* - ,, SALE OF GOODS.
Tramways - - - - - - ,, TRAMWAYS AND LIGHT RAILWAYS.

Part I.—Definitions.

SECT. 1.—*Common Carriers.*

Carriers and common carriers.

1. Any person who carries goods or passengers, for hire or gratuitously, by land or water, is a carrier, but a common carrier exercises the public employment of carrying goods (*a*).

Common carrier must carry for public generally.

A common carrier is one who holds himself out as being ready for hire to transport from place to place the goods of anyone wishing to employ him (*b*). It is essential that he should undertake to carry for all persons indifferently (*c*). If he carries for particular persons only, he is not a common carrier, and the relationship between him and the owner of the goods carried is one of special contract (*d*).

Termini immaterial.

A carrier is none the less a common carrier because one of the termini is out of the jurisdiction (*e*), or across the seas (*f*). He may be within the definition although he does not profess to carry between fixed termini at all, but is prepared to carry to a terminus selected by the owner of the goods (*g*).

Specified goods or termini.

A carrier may profess to carry only particular kinds of goods, in which case he is a common carrier only of such goods; or he may profess to carry only from one place to one other place, in which case he is not a common carrier to intermediate places or to any other place (*h*).

(*a*) *Coggs* v. *Bernard* (1703), 2 Ld. Raym. 909. By the Explosives Act, 1875 (38 & 39 Vict. c. 17, s. 108), for the purposes of that Act, it is provided that "the expression 'carrier' includes all persons carrying goods or passengers for hire by land or water"; see title EXPLOSIVES.

(*b*) Story defines a common carrier as "one who undertakes for hire or reward to transport the goods of such as choose to employ him from place to place." See Story on Bailments, s. 495. This definition was adopted by WILDE, C.J., in *Benett* v. *Peninsular and Oriental Steamboat Co.* (1848), 6 C. B. 775, at p. 787.

(*c*) *Gisbourn* v. *Hurst* (1709), 1 Salk. 249.

(*d*) *Ingate* v. *Christie* (1850), 3 Car. & Kir. 61. The real test is "whether he holds out, either expressly or by a course of conduct, that he will carry for hire, so long as he has room, the goods of all persons indifferently who send him goods to be carried" (*Nugent* v. *Smith* (1875), 1 C. P. D. 19, *per* BRETT, J., at p. 27).

(*e*) *Crouch* v. *London and North Western Rail. Co.* (1854), 14 C. B. 255.

(*f*) *Benett* v. *Peninsular and Oriental Steamboat Co.*, *supra*; *Pinciani* v. *London and South Western Rail. Co.* (1856), 18 C. B. 226.

(*g*) *Liver Alkali Co.* v. *Johnson* (1872), L. R. 7 Exch. 267.

(*h*) *Johnson* v. *Midland Rail. Co.* (1849), 4 Exch. 367: "A person may profess to carry a particular description of goods only, for instance, cattle or dry

One who does not follow the public employment of a common carrier may nevertheless assume the position of a common carrier by contract or warranty (*i*). Whether he has by contract undertaken the liabilities of a common carrier is a question of fact (*j*).

Carriers by water.

A common carrier may carry either by land or water (*k*); and the master of a general ship is a common carrier (*l*), but it is doubtful whether the master of a sea-going vessel, chartered for the carriage of the goods of one person, comes within the definition (*m*).

Lightermen etc.

2. Hoymen, lightermen, and bargemen are common carriers (*n*), and even though a barge owner lets out his vessel to only one person for a voyage, and each voyage is made under a separate agreement, he may be under all the liability of a common carrier (*o*). But where the hirer of a lighter puts his own servants on board, who lock up the hatches and accompany the goods to see them safe, the goods never come into the possession of the lighterman as carrier, for the hirers have hired the lighter to use themselves (*p*).

Wharfingers

A wharfinger who receives goods on his wharf for all comers, to carry them to ships in his lighters, is a common carrier (*q*); but a wharfinger who only carries for customers of the wharf is not (*r*).

Ferrymen.

A ferryman may be a common carrier; but it is a question of fact whether he contracts merely to provide a means of crossing the water, or whether he contracts to ferry and land goods. In the latter case only does he come within the definition (*s*).

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goods, in which case he could not be compelled to carry any other kind of goods, or he may limit his obligation to carrying from one place to another, as from Manchester to London, and then he would not be bound to carry to or from the intermediate places" (*ibid.*, *per* PARKE, B., at p. 373). "At common law no person is bound as a common carrier to carry any goods of a kind which he does not profess to carry" (*Dickson* v. *Great Northern Rail. Co.* (1886), 18 Q. B. D. 176, *per* LINDLEY, L.J., at p. 183). See also *Oxlade* v. *North Eastern Rail. Co.* (1857), 1 C. B. (N. S.) 454, at p. 498.

(*i*) *Robinson* v. *Dunmore* (1801), 2 Bos. & P. 416.

(*j*) *Tamvaco & Co.* v. *Timothy and Green* (1882), 1 Cab. & El. 1; *Brind* v. *Dale* (1837), 8 C. & P. 207. Where the defendant kept a booking office for the reception of goods over the door of which was written "Conveyance to all parts of the world," with a list of places, it was held that this was not proof that defendant was a common carrier (*Upston* v. *Stark* (1827), 2 C. & P. 598). The fact that defendants called themselves "wharfingers, lightermen, and carmen" was held not of itself sufficient to prove them to be common carriers (*Chattock & Co.* v. *Bellamy & Co.* (1895), 64 L. J. (Q. B.) 250).

(*k*) *Trent Navigation Proprietors* v. *Wood* (1785), 3 Esp. 127; *Richardson* v. *Sewell* (1805), 2 Smith, K. B. 205.

(*l*) *Morse* v. *Slue* (1672), 1 Vent. 190, 238; *Laveroni* v. *Drury* (1852), 8 Exch. 166; *Goff* v. *Clinkard* (1750), 1 Wils. 282; *Nugent* v. *Smith* (1876), 1 C. P. D. 423.

(*m*) *Nugent* v. *Smith*, *supra*.

(*n*) *Rich* v. *Kneeland* (1614), Cro. Jac. 330; *Trent Navigation Proprietors* v. *Wood*, *supra*; *Dale* v. *Hall* (1750), 1 Wils. 281; *Thomas* v. *Brown* (1899), 4 Com. Cas. 186.

(*o*) *Liver Alkali Co.* v. *Johnson* (1872), L. R. 7 Exch 267; *Hill* v. *Scott*, [1895] 2 Q. B. 371, and, on appeal, 713.

(*p*) *East India Co.* v. *Pullen* (1726), 2 Stra. 690.

(*q*) *Maving* v. *Todd* (1815), 1 Stark. 72.

(*r*) *Chattock & Co.* v. *Bellamy & Co.*, *supra*.

(*s*) *Walker* v. *Jackson* (1842), 10 M. & W. 161; *Willoughby* v. *Horridge* (1852), 12 C. B. 742.

SECT. 1. Common Carriers.

Carmen.

A carman who undertakes casual jobs for anyone who will hire him is not a common carrier (*t*), nor is a furniture remover who makes a special contract with each customer to pack and carry goods (*u*).

Stage-coach proprietors.

Stage-coach proprietors are common carriers, as well of their passengers' luggage as of goods carried for persons who are not passengers (*a*); but a cabman is not a common carrier of luggage carried for a fare on his cab (*b*).

Railway companies.

Railway companies are common carriers of all goods which they profess to carry, and in fact carry, without special agreement (*c*), including passengers' luggage (*d*).

SECT. 2.—*Other Carriers.*

Private carriers.

3. One who does not exercise the public employment of a common carrier, but carries goods on occasion, or only under a special agreement (*f*), has been called a private carrier. He is a bailee of the goods, and the general law as to the responsibility of a bailee for the goods intrusted to him applies to the private carrier (*g*). Whether he carries gratuitously or for reward, the carrier is bound to use due and proper care of the goods; but the degree of care

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(*t*) *Brind* v. *Dale* (1837), 8 C. & P. 207; but compare *Liver Alkali Co.* v. *Johnson* (1872), L. R. 7 Exch. 267.

(*u*) *Scaife* v. *Farrant* (1875), L. R. 10 Exch. 358. In this case the defendant did not hold himself out to carry at all events, but only to carry for those who were prepared to accept his special terms.

(*a*) *Brooke* v. *Pickwick* (1827), 4 Bing. 218; *Middleton* v. *Fowler* (1699), 1 Salk. 282.

(*b*) *Ross* v. *Hill* (1846), 2 C. B. 877. As to cab proprietors and cabmen, see further title STREET TRAFFIC.

(*c*) *Palmer* v. *Grand Junction Rail. Co.* (1839), 4 M. & W. 749. In *Dickson* v. *Great Northern Rail. Co.* (1886), 18 Q. B. D. 176, LOPES, L.J., at p. 188, said that apart from the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), "generally railway companies, like other carriers, were common carriers of goods which they were bound by statute to carry, and which they professed to carry, or actually carried, for persons generally, but not of goods which they did not profess to carry, and were not in the habit of carrying, or only carried under special circumstances or subject to express stipulations limiting their liability in respect of them." See *Pickford* v. *Grand Junction Rail. Co.* (1842), 10 M. & W. 399; *Johnson* v. *Midland Rail. Co.* (1849), 4 Exch. 367; *Crouch* v. *London and North Western Rail. Co.* (1854), 14 C. B. 255; *York, Newcastle, and Berwick Rail. Co.* v. *Crisp* (1854), 14 C. B. 527; *Garton* v. *Bristol and Exeter Rail. Co.* (1861), 1 B. & S. 112. By s. 89 of the Railways Clauses Consolidation Act, 1845 (8 Vict. c. 20), it is provided that railway companies shall be under no further liability than common carriers, and shall be entitled to any protection or privileges enjoyed by common carriers. They are not, however, bound to be common carriers (*Johnson* v. *Midland Rail. Co.*, *supra*).

(*d*) *Great Western Rail. Co.* v. *Bunch* (1888), 13 App. Cas. 31; *Richards* v. *London, Brighton, and South Coast Rail. Co.* (1849), 7 C. B. 839; *Talley* v. *Great Western Rail. Co.* (1870), L. R. 6 C. P. 44. See pp. 40 *et seq.*, *post*. As to animals, see *Palmer* v. *Grand Junction Rail. Co.* (1839), 4 M. & W. 749; *Blower* v. *Great Western Rail. Co.* (1872), L. R. 7 C. P. 655; *Kendall* v. *London and South Western Rail. Co.* (1872), L. R. 7 Exch. 373. See pp. 36 *et seq.*, *post*.

(*f*) For form of agreement by private carriers to deliver all goods of a firm of traders in a certain area, see Encyclopædia of Forms, Vol. III., p. 203.

(*g*) *Coggs* v. *Bernard* (1703), 2 Ld. Raym. 909; see title BAILMENT, Vol. I., pp. 544 *et seq.*

required is different in the cases of the gratuitous carrier and of the carrier for hire or reward (*h*).

Gratuitous carrier.

4. A gratuitous carrier is not liable for loss unless the loss is due to his gross negligence (*i*), that is to say, his failure to take proper care of what is intrusted to him (*k*). He is bound to exercise such care and skill as he uses in his own affairs, and as he possesses, but no more; and where his occupation or profession is such as necessarily to imply the possession of a certain degree of skill, he is liable for loss caused by his failure to use that degree of skill (*l*).

Carriers for reward.

5. Where one undertakes to carry goods for hire or reward, although not as a common carrier, he undertakes to answer for any loss arising from his own negligence or the negligence of his servants (*m*). He is presumed to have represented himself to be a person of competent skill, and the absence of such competent skill is negligence (*n*). If his occupation usually implies the possession of a certain degree of skill and the exercise of a certain degree of care, he is liable for loss arising from his failure to use that degree of skill or care (*o*).

Proof of negligence.

In any case, however, negligence must be proved by evidence, before a private carrier can be held liable for loss (*p*); and the negligence which must be proved is the absence of that degree of care which is required by law in the circumstances (*q*).

Carriers of passengers.

6. A carrier of passengers is not as such a common carrier (*r*). He undertakes to carry his passengers safely, *i.e.*, with due care (*s*); but his undertaking goes no farther, and he is not liable for personal injuries unless negligence is proved (*t*). Railway companies are not common carriers of passengers (*u*).

(*h*) *Coggs* v. *Bernard* (1703), 2 Ld. Raym. 909; *Beal* v. *South Devon Rail. Co.* (1864), 3 H. & C. 337, Ex. Ch.; *Ross* v. *Hill* (1846), 2 C. B. 877.

(*i*) *Beauchamp* v. *Powley* (1831), 1 Moo. & R. 38.

(*k*) *Nelson* v. *Macintosh* (1816), 1 Stark. 237.

(*l*) *Wilson* v. *Brett* (1843), 11 M. & W. 113. It was held in this case that a person conversant with horses was bound to use such care and skill in dealing with a horse of which he was the gratuitous bailee as a person conversant with horses might reasonably be expected to use. And see *Beal* v. *South Devon Rail. Co.*, *supra*.

(*m*) *Brind* v. *Dale* (1837), 8 C. & P. 207; *Wyld* v. *Pickford* (1841), 8 M. & W. 443. The proprietor of a cab is responsible for the negligence of the driver who hires the cab from him (*Powles* v. *Hider* (1856), 6 E. & B. 207, approved in *Venables* v. *Smith* (1877), 2 Q. B. D. 279). See also *Gates* v. *Bill & Son*, [1902] 2 K. B. 38; *King* v. *Spurr* (1881), 8 Q. B. D. 104; and see generally, titles NEGLIGENCE; STREET TRAFFIC.

(*n*) *Wilson* v. *Brett*, *supra*.

(*o*) *Beal* v. *South Devon Rail. Co.*, *supra*.

(*p*) *Whalley* v. *Wray* (1800), 3 Esp. 74; *Richardson* v. *North Eastern Rail. Co.* (1872), L. R. 7 C. P. 75.

(*q*) The expression "gross" negligence has been objected to by many judges and other authorities. In *Wilson* v. *Brett*, *supra*, it was said by ROLFE, B., that negligence and gross negligence are the "same thing with the addition of a vituperative epithet." In *Beal* v. *South Devon Rail. Co.*, *supra*, the Court of Exchequer laid it down that the failure to exercise reasonable care, skill, and diligence is gross negligence, but that what is reasonable varies in the cases of a gratuitous bailee and of a bailee for hire.

(*r*) *Middleton* v. *Fowler* (1699), 1 Salk. 282.

(*s*) *Harris* v. *Costar* (1825), 1 C. & P. 636.

(*t*) *Crofts* v. *Waterhouse* (1825), 3 Bing. 319; *Aston* v. *Heaven* (1796), 2 Esp. 533; *Christie* v. *Griggs* (1809), 2 Camp. 79; *Sharp* v. *Grey* (1833), 9 Bing. 457.

Part II.—Common Carriers.

SECT. 1. The Contract at Common Law.

SECT. 1.—*The Contract at Common Law.*

SUB-SECT. 1.—*Duty to carry.*

Duty to carry according to profession.

7. A common carrier exercises a public employment; and just as an innkeeper is bound at law to receive guests into his inn if he have no lawful excuse (*a*), so a common carrier is bound to accept goods which are offered to him for carriage if he have no lawful excuse (*b*). Therefore, if he wrongfully refuses to carry goods offered to him, he may be indicted for such refusal (*c*); he is also liable to an action for damages (*d*).

Excuses for refusal to carry.

His obligation, however, is only to carry according to his profession (*e*). It would therefore be a lawful excuse for refusing, that he did not hold himself out to carry the particular kind of goods offered, or that his operations did not extend to the suggested destination (*f*). He may also refuse on the ground that he has no room in his vehicle, or no convenience for carrying the goods in safety (*g*). And he may refuse to accept the goods if they are brought to him a long time before he is ready to start on his journey, for the goods must be tendered at a reasonable time (*h*).

Demand of price of carriage.

8. A common carrier is also entitled, when goods are offered to him, to demand and to be paid the full price of carriage; and if this is not paid he may lawfully refuse to carry at all (*i*). But he is not entitled to charge what he pleases; the price demanded must be a reasonable one (*k*). If he demand an unreasonable sum, or require the consignor to consent to unreasonable conditions,

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L.J., at p. 185; *Readhead* v. *Midland Rail. Co.* (1869), L. R. 4 Q. B. 379; see pp. 44 *et seq.*, *post*.

(*a*) See title INNS AND INNKEEPERS.

(*b*) *Jackson* v. *Rogers* (1684), 2 Show. 327; *Boson* v. *Sandford* (1691), 1 Show. 101, *per* HOLT, C.J., at p. 104.

(*c*) *Pozzi* v. *Shipton* (1838), 1 Per. & Dav. 4, *per* PATTESON, J., at p. 12; but there does not appear to be any case reported of a conviction on any such indictment.

(*d*) *Jackson* v. *Rogers*, *supra*; *Crouch* v. *London and North Western Rail. Co.* (1854), 14 C. B. 255. An action for damages lies against a railway company for refusing to carry the luggage of a passenger; see *Munster* v. *South Eastern Rail. Co.* (1858), 4 C. B. (N. S.) 676; see p. 40, *post*.

(*e*) *Johnson* v. *Midland Rail. Co.* (1849), 4 Exch. 367; *Carr* v. *Lancashire and Yorkshire Rail. Co.* (1852), 7 Exch. 707; see p. 2, *ante*.

(*f*) *Batson* v. *Donovan* (1820), 4 B. & Ald. 21; *Johnson* v. *Midland Rail. Co.*, *supra*; *Carr* v. *Lancashire and Yorkshire Rail. Co.*, *supra*; see p. 2, *ante*.

(*g*) *Jackson* v. *Rogers*, *supra*; *Batson* v. *Donovan*, *supra*; *Riley* v. *Horne* (1828), 5 Bing. 217.

(*h*) *Lane* v. *Cotton* (1701), 1 Ld. Raym. 646, 652; *Garton* v. *Bristol and Exeter Rail. Co.* (1861), reported on this point 30 L. J. (Q. B.) 273, *per* COCKBURN, C.J., at p. 293.

(*i*) *Wyld* v. *Pickford* (1841), 8 M. & W. 443; *Batson* v. *Donovan*, *supra*; *Jackson* v. *Rogers*, *supra*.

(*k*) *Harris* v. *Packwood* (1810), 3 Taunt. 264; *Crouch* v. *Great Northern Rail. Co.* (1856), 11 Exch. 742. There is, however, no obligation at common law upon a carrier to charge all customers equally. Provided the higher charge is reasonable, one customer may be preferred to another (*Brantley* v. *South Eastern Rail. Co.* (1862), 12 C. B. (N. S.) 63, *per* WILLES, J., at p. 75).

this amounts to a refusal to carry, for which an action for damages lies (l).

Tender of price unnecessary.

Although a common carrier is not bound to carry unless a reasonable sum is offered as the price of the carriage, there need not be a legal tender of such sum. It is sufficient if the person offering the goods is in fact ready and willing to pay (m).

Payment of unreasonable sum under protest.

If a reasonable sum for the carriage of the goods is offered, and refused by the carrier, and the owner of the goods accordingly pays a higher sum under protest, the excess of such sum above what is reasonable may be recovered in an action for money had and received to the use of the owner (n).

Goods not properly packed.

9. If goods which require to be packed are offered for carriage, the carrier may lawfully refuse to accept them unless they are properly packed (o).

Country in disturbed condition.

10. If the country through which the carrier's vehicle has to pass is in so disturbed a state that the goods cannot be carried safely, the carrier may lawfully refuse to accept them (p).

Carrier for one person only.

11. Where a carrier's business is confined to carrying the goods of one person at a time in his vehicle, the whole vehicle being at the disposal of that one person, he may be a common carrier (q); but it is probable that, in such case, he would not be held liable to an action for refusing the use of his vehicle to anyone demanding it (r).

Deviation.

12. A carrier is bound to carry by his usual and customary route, and must not deviate therefrom unnecessarily (s). He is not bound to carry by the shortest route, but only by the usual route which he professes to follow (t).

(l) *Garton* v. *Bristol and Exeter Rail. Co.* (1861), 1 B. & S. 112. Where a number of small parcels addressed to different persons are packed in one large parcel, it is unreasonable for a railway company to demand a larger sum for the carriage of such parcel from a consignor who is himself a carrier than from one who is not a carrier; and if the company is under a statutory obligation to treat all customers equally, such demand is a breach of this obligation. See also *Crouch* v. *Great Northern Rail. Co.* (1856), 11 Exch. 742; *Parker* v. *Great Western Rail. Co.* (1856), 6 E. & B. 77; *Piddington* v. *South Eastern Rail. Co.* (1858), 5 C. B. (N. S.) 111; *Baxendale* v. *London and South Western Rail. Co.* (1866), L. R. 1 Exch. 137. There is nothing unreasonable, however, in charging a greater sum for a number of parcels carried at one time addressed to different persons, than for a similar number addressed to the same person, although the former are all to be delivered to the plaintiff at the end of the journey (*Baxendale* v. *Eastern Counties Rail. Co.* (1858), 4 C. B. (N. S.) 63).

(m) *Pickford* v. *Grand Junction Rail. Co.* (1841), 8 M. & W. 372.

(n) *Baxendale* v. *London and South Western Rail. Co.*, *supra*; *Great Western Rail. Co.* v. *Sutton* (1869), L. R. 4 H. L. 226.

(o) *Munster* v. *South Eastern Rail. Co.* (1858), 4 C. B. (N. S.) 676; see p. 15, *post*.

(p) *Edwards* v. *Sherratt* (1801), 1 East, 604.

(q) *Liver Alkali Co.* v. *Johnson* (1872), L. R. 7 Exch. 267.

(r) *Nugent* v. *Smith* (1876), 1 C. P. D. 423, *per* COCKBURN, C.J., at p. 433.

(s) *Davis* v. *Garrett* (1830), 6 Bing. 716.

(t) *Hales* v. *London and North Western Rail. Co.* (1863), 4 B. & S. 66; *Myers* v. *London and South Western Rail. Co.* (1869), L. R. 5 C. P. 1.

The Contract at Common Law.

Common carrier an insurer of goods carried.

13. A common carrier is responsible for the safety of the goods intrusted to him in all events, except when loss or injury arises from the act of God or the King's enemies (*a*). He is therefore liable even where he is overwhelmed and robbed by an irresistible number of persons (*b*). He is an insurer of the safety of the goods against everything extraneous which may cause loss or injury except the act of God or the King's enemies (*c*).

This responsibility as an insurer is imposed upon a common carrier by the custom of the realm, and is independent of the contract between him and the owner of the goods (*d*). Failure on the part of the carrier to deliver the goods safely is a breach of a duty placed upon him by the common law; and therefore an action of tort lies against him for such breach, the owner not being bound to prove any contract (*e*).

Extent of liability.

A common carrier is liable for loss or injury, without any negligence on his part, caused wholly by the negligence of other persons over whom he has no control; as where the carrier's barge runs against an anchor wrongfully left in the water by a stranger (*f*), or where the goods which he is carrying are destroyed by accidental fire (*g*) or by rats (*h*), or where they are stolen from him, even though taken by force (*i*).

Loss caused by consignor.

14. A carrier is not, however, liable for loss or injury caused by the act or omission of the consignor himself (*k*), or by the act of a third party, brought about by the consignor (*l*). And where the consignor deliberately deceives the carrier as to the nature of the goods, so as to obtain their carriage at a lower rate, the carrier only incurs such liability as he would have been under, if the goods had been such as they were represented to be (*m*).

(*a*) *Morse* v. *Slue* (1672), 1 Vent. 190, 238; *Coggs* v. *Bernard* (1703), 2 Ld. Raym. 909.

(*b*) *Ibid.*; *Forward* v. *Pittard* (1785), 1 Term Rep. 27, 34.

(*c*) *Dale* v. *Hall* (1750), 1 Wils. 281; *Trent Navigation Proprietors* v. *Wood* (1785), 3 Esp. 127; *Covington* v. *Willan* (1819), Gow, 115; *Brooke* v. *Pickwick* (1827), 4 Bing. 218; *Riley* v. *Horne* (1828), 5 Bing. 217; *Brind* v. *Dale* (1837), 8 C. & P. 207.

(*d*) *Forward* v. *Pittard*, *supra*, at p. 33; *Riley* v. *Horne*, *supra*.

(*e*) *Pozzi* v. *Shipton* (1838), 8 Ad. & El. 963. The question whether an action is one of contract or of tort is still of importance in regard to remitting actions to the county courts, and with regard to costs. See County Courts Act, 1888 (51 & 52 Vict. c. 43), ss. 65, 66, 116, and County Courts Act, 1903 (3 Edw. 7, c. 42), s. 3; R. S. C., Ord. 65, r. 12; and see title ACTION, Vol. I., p. 48. If the plaintiff must rely upon a contract, then the action is one of contract; but if he can prove a breach of duty arising at common law without reference to the terms of any contract, then the action is one of tort (*Turner* v. *Stallibrass*, [1898] 1 Q. B. 56). See also *Pontifex* v. *Midland Rail. Co.* (1877), 3 Q. B. D. 23; *Kelly* v. *Metropolitan Rail. Co.*, [1895] 1 Q. B. 944.

(*f*) *Trent Navigation Proprietors* v. *Wood*, *supra*.

(*g*) *Forward* v. *Pittard*, *supra*; *Thorogood* v. *Marsh* (1819), Gow, 105; *Covington* v. *Willan*, *supra*.

(*h*) *Dale* v. *Hall*, *supra*; *Laveroni* v. *Drury* (1852), 8 Exch. 166.

(*i*) See note (*b*), *supra*; *Barclay* v. *Y Gana* (1784), 3 Doug. 389.

(*k*) See p. 15, *post*.

(*l*) *Butterworth* v. *Brownlow* (1865), 19 C. B. (N. S.) 409.

(*m*) *Gibbon* v. *Paynter* (1769), 4 Burr. 2299; *Bradley* v. *Waterhouse* (1828)

If the carrier asks no questions as to the contents of a parcel, no information need in general be given; but if he asks questions, and the owner of the goods answers falsely, to the prejudice of the carrier, the owner is guilty of fraud, and the carrier is not bound by his contract (*n*).

Agreement that owner shall protect goods.

If the owner agrees with the carrier that he himself will protect the goods, the carrier is excused from liability (*o*); but the fact that the owner accompanies the goods to watch over them does not of itself furnish any excuse (*p*).

Duty as regards excepted perils.

15. With regard to the excepted perils, the carrier must use all reasonable care, skill, and diligence to avoid their consequences; and if damage occurs which is attributable to a breach of this duty, he is liable (*q*).

Act of God.

The carrier is not responsible for the consequences of an act of God (*r*); but where goods are injured by such an extraordinary occurrence, the carrier is none the less liable for the damage, if any negligence of his has contributed to that damage (*s*). Nor is he excused where the injury would not have happened but for the intervention of some other person (*t*).

To avoid the consequences of an act of God the carrier must take all reasonable means to protect the goods; but he is not bound to make extraordinary efforts (*a*). The act of God is no excuse unless it was the immediate cause of the damage; and so where a great storm shifted a bank at the entrance to a harbour, and some time afterwards a vessel was injured by lying on this bank, the carrier was held liable for consequent injury to the goods which were being carried (*b*).

King's enemies.

That the injury was caused by the King's enemies is also an excuse; but if the carrier's vessel or other vehicle fall into the hands of the enemy because of the carrier's negligence, he is not protected (*c*).

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3 C. & P. 318; *M'Cance* v. *London and North Western Rail. Co.* (1861), 7 H. & N. 477.

(*n*) *Walker* v. *Jackson* (1842), 10 M. & W. 161; *Titchburne* v. *White* (1618), 1 Stra. 145.

(*o*) *East India Co.* v. *Pullen* (1726), 2 Stra. 690; *Brind* v. *Dale* (1837), 8 C. & P. 207.

(*p*) *Robinson* v. *Dunmore* (1801), 2 Bos. & P. 416.

(*q*) *Gill* v. *Manchester, Sheffield, and Lincolnshire Rail. Co.* (1873), L. R. 8 Q. B. 186.

(*r*) *Nugent* v. *Smith* (1876), 1 C. P. D. 423; *Coggs* v. *Bernard* (1703), 2 Ld. Raym. 909, 918; 1 Smith, L. C., 11th ed., 172, 185, 211; *Briddon* v. *Great Northern Rail. Co.* (1858), 28 L. J. (EX.) 51; *Forward* v. *Pittard* (1785), 1 Term Rep. 27; *Lloyd* v. *Guibert* (1865), L. R. 1 Q. B. 115, *per* WILLES, J., at p. 121.

(*s*) *Amies* v. *Stevens* (1718), 1 Stra. 127; *Siordet* v. *Hall* (1828), 4 Bing. 607; *Forward* v. *Pittard, supra.*

(*t*) *Oakley* v. *Portsmouth Steam Packet Co.* (1856), 11 Exch. 618.

(*a*) *Briddon* v. *Great Northern Rail. Co.* (1858), 28 L. J. (EX.) 51. In that case a railway was blocked by an extraordinary fall of snow, and the railway company made very great efforts and went to great expense to get its passenger trains through; but, although acting reasonably, it did not make the same efforts or go to the same expense to extricate a train loaded with the plaintiff's cattle, which were injured by long exposure and cold, and it was held that it was not liable.

(*b*) *Smith* v. *Shepherd* (1795), reported in Abbott on Shipping, 14th ed., p. 578.

(*c*) *Phillips* v. *Clark* (1857), 2 C. B. (N. S.) 156, *per* WILLES, J., at p. 161; *Holladay* v. *Kennard* (1870), 12 Wallace (Supreme Court U.S.A.), 254.

SECT. 1. The Contract at Common Law.

Loss arising from nature of thing carried.

16. A carrier is generally an insurer against harm occurring from the outside which no care on his part can avert; but no insurer is liable for loss which is brought about, not by adventitious causes, but by something incidental to the nature of the thing carried (*d*). A carrier therefore is not responsible for harm which arises to the goods from anything inherent in their own nature, over which he has no control and against which he cannot guard (*e*). Thus, although bound to make all reasonable provision against the ordinary and natural unruliness of animals carried, he is not liable if injury occurs through what may be called "inherent vice" or "proper vice" in the animal, or restiveness on the part of the animal of an extraordinary kind (*f*).

Inherent defect developed by carriage.

Where there is an inherent defect in the thing carried, which is developed by the act of being carried in the ordinary way without any negligence on the carrier's part, the carrier is not responsible (*g*). And where perishable goods of a soft nature, like fruit, are damaged entirely by their own weight and the shaking which is a necessary incident of the act of carriage, without any negligence on the part of the carrier, the carrier is not liable (*h*). But the carrier is liable where the injury could have been avoided by reasonable care on his part. Thus, fruit and such like goods, which necessarily require ventilation or other reasonable treatment while in transit, should be ventilated or otherwise reasonably treated (*i*). The carrier is also bound at his peril to supply a

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(*d*) *Blower* v. *Great Western Rail. Co.* (1872), L. R. 7 C. P. 655.

(*e*) *Nugent* v. *Smith* (1876), 1 C. P. D. 423, *per* COCKBURN, C.J., at p. 438; *Brass* v. *Maitland* (1856), 6 E. & B. 470; *Hutchinson* v. *Guion* (1858), 5 C. B. (N. S.) 149. Compare *Bull* v. *Robison* (1854), 10 Exch. 342.

(*f*) *Blower* v. *Great Western Rail. Co.*, *supra*. In this case the following statement of the law by Story was said by WILLES, J. (at p. 663), to be accurate: "Although the rule is thus laid down in general terms at the common law that the carrier is responsible for all losses not occasioned by the act of God, or of the King's enemies, yet it is to be understood in all cases that the rule does not cover any losses, not within the exception, which arise from the ordinary wear and tear and chafing of the goods in the course of their transportation, or from their ordinary loss, deterioration in quantity or quality, in the course of the voyage, or from their inherent natural infirmity and tendency to damage, or which arise from the personal neglect or wrong or misconduct of the owner or shipper thereof. Thus, for example, the carrier is not liable for any loss or damage from the ordinary decay or deterioration of oranges or other fruits in the course of the voyage from their inherent infirmity or nature, or from the ordinary diminution or evaporation of liquids, or the ordinary leakage from the casks in which the liquors are put, in the course of the voyage, or from the spontaneous combustion of goods, or from their tendency to effervescence or acidity, or from their not being properly put up and packed by the owner or shipper, for the carrier's implied obligations do not extend to such cases" (Story on Bailment, 492 a). See also *Kendall* v. *London and South Western Rail. Co.* (1872), L. R. 7 Exch. 373.

(*g*) *Lister* v. *Lancashire and Yorkshire Rail. Co.*, [1903] 1 K. B. 878: "The inherent unfitness for the carriage contemplated, although not known to either party, is inherent vice within the meaning of the exception that has been established by the decided cases" (*per* CHANNELL, J., at p. 881). In *Hudson* v. *Baxendale* (1857), 2 H. & N. 575, a carrier was held not liable for liquor lost in transit through leakage due to a defect in the cask.

(*h*) *Kendall* v. *London and South Western Rail. Co.*, *supra*, *per* BRAMWELL, B., at p. 377.

(*i*) *Davidson* v. *Gwynne* (1810), 12 East, 381.

vehicle which is sound and reasonably fit for the carriage of the goods (*k*).

Commencement of carrier's liability.

17. The duties and liability of a carrier do not begin until he has accepted the goods for carriage, either personally, or by his agent or servant with authority to accept them (*l*). If the carrier, by the usual course of his business, recognises a certain place as a receiving office, he is responsible as carrier for the goods from the time they are delivered at that place (*m*). And if he allows a person to receive goods for him in order to be carried by him, he is responsible for the goods from the time they are delivered to such person, even though such person is not paid for receiving (*n*). If a servant of the carrier, who is not authorised to receive goods for carriage by his employer, does in fact receive them, the carrier is not bound by his servant's unauthorised act (*o*).

With regard to the luggage of passengers, the liability of the carrier begins from the moment when such luggage is handed to a servant of the carrier for the purposes of the journey, provided it is not so handed to such servant an unreasonably long time before the journey is to commence (*p*).

Liability continues until delivery.

18. Having once accepted the goods for carriage, it becomes the duty of the carrier not only to carry safely, but also to deliver safely at the place to which the goods are directed (*q*). His liability ends only where there has been delivery, actual or constructive (*r*).

Place of delivery.

19. Whether the goods should be delivered to the consignee at his house, or at the station or office of the carrier, at the termination of the journey, depends on agreement, and on the usual course of business (*s*). If the goods are delivered at the house to which they are addressed, the carrier has done all he contracted to do; and the mere fact that he delivers to some other person than the consignee at that house is no proof of a breach of duty on his part (*t*). But he delivers at any other place, to any person other than the

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(*k*) *Lyon* v. *Mells* (1804), 5 East, 428; *Amies* v. *Stevens* (1718), 1 Stra. 127; *M'Manus* v. *Lancashire and Yorkshire Rail. Co.* (1859), 4 H. & N. 327.

(*l*) *Lovett* v. *Hobbs* (1691), 2 Show. 427, 428; *Cobban* v. *Downe* (1803), 5 Esp. 41; *Boehm* v. *Combe* (1813), 2 M. & S. 172; *Buckman* v. *Levi* (1813), 3 Camp. 414; *Leigh* v. *Smith* (1825), 1 C. & P. 638.

(*m*) *Colepepper* v. *Good* (1832), 5 C. & P. 380.

(*n*) *Burrell* v. *North* (1847), 2 Car. & Kir. 680.

(*o*) *Slim* v. *Great Northern Rail. Co.* (1854), 14 C. B. 647.

(*p*) *Great Western Rail. Co.* v. *Bunch* (1888), 13 App. Cas. 31. See p. 42, *post*.

(*q*) *Duff* v. *Budd* (1822), 3 Brod. & Bing. 177; *Chapman* v. *Great Western Rail. Co.* (1880), 5 Q. B. D. 278.

(*r*) *Shepherd* v. *Bristol and Exeter Rail. Co.* (1868), L. R. 3 Exch. 189. In *Chapman* v. *Great Western Rail. Co.*, *supra*, it was pointed out by COCKBURN, C.J. (at p. 281), that the liability of the carrier must usually extend beyond as well as precede the actual period of transit. First, there is usually an interval between the receipt of the goods and their departure; next, there is the time which in most cases must necessarily intervene between the arrival of the goods at the place of destination and the delivery to the consignee.

(*s*) *Golden* v. *Manning* (1773), 2 Wm. Bl. 916; *Storr* v. *Crowley* (1825), M'Cle. & Yo. 129.

(*t*) *M'Kean* v. *M'Ivor* (1870), L. R. 6 Exch. 36.

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consignee, at his peril (*a*). Where the goods are addressed to a place beyond the sphere of the carrier's business, so that from a certain point he must forward them by another carrier, he is responsible for the goods for the whole journey, unless he limits his liability by agreement (*b*).

Notice of arrival.

Where delivery is to be effected at the station or office of the carrier, it is ordinarily the duty of the carrier to give notice to the consignee of the arrival of the goods (*c*). But it must depend on circumstances whether this duty arises, for often such notice is not required, or it may be impossible to give it, as where goods are addressed to a railway station "to be left till called for" (*d*).

Termination of liability where carriage ceases on carrier's premises.

Where the carrier is not bound to deliver at the house of the consignee, his liability as carrier ceases when he has brought the goods to the station of destination, and given the consignee notice of arrival, and allowed the consignee a reasonable time in which to remove the goods (*e*). A reasonable time, however, must always be allowed for the removal (*f*). What that time is must depend on the circumstances of each case, but the consignee cannot, for his own convenience, or by his own laches, prolong the liability of the carrier as such (*g*).

Consignee not found or refusing delivery.

20. If the consignee is not found at the address given, the liability of the carrier, as such, ceases (*h*). It ceases also if the goods are refused by the consignee when tendered (*i*).

Carrier's duty where goods refused.

There is no rule that where the goods are refused by the consignee the carrier must give notice of such refusal to the consignor; but the carrier should do what is reasonable in the circumstances (*k*). Where the goods are refused because the consignee is not prepared to pay the carriage demanded, the goods should not be returned at once to the place of departure, but should be kept at the place of destination for a reasonable time (*l*).

Carrier's liability as warehouseman.

21. As soon as the liability of the carrier, as such, has come to an end, his liability as warehouseman begins (*m*). As warehouseman

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(*a*) *Stephenson* v. *Hart* (1828), 4 Bing. 476; *Hoare* v. *Great Western Rail. Co.* (1877), 37 L. T. 186.

(*b*) *Hyde* v. *Trent and Mersey Navigation Co.* (1793), 5 Term Rep. 389; *Muschamp* v. *Lancaster and Preston Junction Rail. Co.* (1841), 8 M. & W. 421; *Machu* v. *London and South Western Rail. Co.* (1848), 2 Exch. 415; *Shepherd* v. *Bristol and Exeter Rail. Co.* (1868), L. R. 3 Exch. 189.

(*c*) *Bourne* v. *Gatliffe* (1841), 3 Man. & G. 643; *Neston Colliery Co.* v. *London and North Western Rail. Co.* (1883), 4 Ry. & Can. Tr. Cas. 257.

(*d*) *Chapman* v. *Great Western Rail. Co.* (1880), 5 Q. B. D. 278.

(*e*) *Mitchell* v. *Lancashire and Yorkshire Rail. Co.* (1875), L. R. 10 Q. B. 256; *Bradshaw* v. *Irish North Western Rail. Co.* (1873), I. R. 7 C. L. 252.

(*f*) *Shepherd* v. *Bristol and Exeter Rail. Co., supra; Patscheider* v. *Great Western Rail. Co.* (1878), 3 Ex. D. 153; *Bourne* v. *Gatliffe, supra.*

(*g*) *Chapman* v. *Great Western Rail. Co., supra.*

(*h*) *Stephenson* v. *Hart* (1828), 4 Bing. 476.

(*i*) *Heugh* v. *London and North Western Rail. Co.* (1870), L. R. 5 Exch. 51; *Hudson* v. *Baxendale* (1857), 2 H. & N. 575; *Great Western Rail. Co.* v. *Crouch* (1858), 3 H. & N. 183; *Storr* v. *Crowley* (1825), M'Cle & Yo. 129.

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

(*l*) *Great Western Rail. Co.* v. *Crouch, supra.*

(*m*) *Re Webb* (1818), 8 Taunt. 443; *Bourne* v. *Gatliffe, supra; Cairns* v.

he is liable for negligence, and is bound to take proper care of the goods and to adopt reasonable means of protecting them, but he is not an insurer (*n*). In providing for the safety and preservation of the goods, the carrier may incur reasonable expenses, and can recover such expenses from the owner (*o*). But where the carrier exercises his lien upon the goods for unpaid carriage, he is not entitled to charge for warehousing (*p*).

Alteration of destination by owner.

22. Whilst goods are in transit, the owner of the goods has the right at any period of the transit to countermand the directions given to the carrier, and to demand delivery of the goods in accordance with his own fresh instructions (*q*). In the absence of any notice to the contrary, the carrier is justified in assuming that the consignee is the owner of the goods, and that the consignor is his agent to contract with the carrier (*r*). Subject to such notice, the carrier may deliver the goods at any place required by the consignee; and the contract of the carrier is to deliver at the place of address, unless the consignee otherwise requires (*s*).

Misdelivery

A common carrier is bound to deliver the goods to the right person, and is liable to an action for misfeasance if he delivers them to anyone else (*t*). As long as he deals with the goods merely as a carrier in the ordinary course of his business he is under no liability for conversion of the goods, for he is bound to carry goods delivered to him for carriage; but if a demand for the goods be made by one who has a right to demand them, and the carrier refuses to deliver them to him on the ground that they belong to a third party, an action lies against the carrier (*u*). If the carrier delivers goods in the ordinary course without notice that the consignee is not entitled to them, he is under no liability; and if he

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Robins (1841), 8 M. & W. 258; *Heugh* v. *London and North Western Rail. Co.* (1870), L. R. 5 Exch. 51; *Great Western Rail. Co.* v. *Crouch* (1858), 3 H. & N. 183; *Chapman* v. *Great Western Rail. Co.* (1880), 5 Q. B. D. 278 See title BAILMENT, Vol. I., pp. 543, *et seq.*

(*n*) *Mitchell* v. *Lancashire and Yorkshire Rail. Co.* (1875), L. R. 10 Q. B. 256; *Giles* v. *Taff Vale Rail. Co.* (1853), 2 E. & B. 823; *Garside* v. *Trent Navigation Proprietors* (1792), 4 Term Rep. 581.

(*o*) *Great Northern Rail. Co.* v. *Swaffield* (1874), L. R. 9 Exch. 132. A railway company is not obliged to keep goods at the station of destination beyond a reasonable time without payment (*London and North Western Rail. Co.* v. *Crooke & Co.* (1904), 20 T. L. R. 506).

(*p*) *Somes* v. *British Empire Shipping Co.* (1860), 8 H. L. Cas. 338.

(*q*) *Scotthorn* v. *South Staffordshire Rail. Co.* (1853), 8 Exch. 341.

(*r*) *Cork Distilleries Co.* v. *Great Southern and Western Rail. Co.* (*Ireland*) (1874), L. R. 7 H. L. 269.

(*s*) *Ibid.*; *London and North Western Rail. Co.* v. *Bartlett* (1861), 7 H. & N. 400.

(*t*) *Stephenson* v. *Hart* (1828), 4 Bing. 476. The "right person" means the consignee provided the goods are delivered to him in the ordinary course of business without notice to the carrier that he is not entitled, or a person who has a right to the possession of the goods. See *M'Kean* v. *M'Ivor* (1870), L. R. 6 Exch. 36. In that case BRAMWELL, B., said (at p. 41): "I assume that a misdelivery would have been a conversion." But after the liability of the carrier as such has come to an end, and he is in the position of an involuntary bailee of the goods, his liability for delivery to a wrong person will depend on whether he is guilty of negligence (*Heugh* v. *London and North Western Rail. Co.*, *supra*).

(*u*) *Greenway* v. *Fisher* (1824), 1 C. & P. 190, 192. See *Fowler* v. *Hollins* (1872), L. R. 7 Q. B. 616, at p. 633; *Hollins* v. *Fowler* (1875), L. R. 7 H. L. 757, at p. 800; *Caunce* v. *Spanton* (1844), 7 Man. & G. 903.

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delivers the goods on demand, out of the ordinary course, to one who is entitled to the possession of them, he is under no liability (*v*). If the goods are demanded, the carrier may give a qualified refusal, so as to have a reasonable opportunity of acquainting himself with the facts of the case (*w*). If, however, he absolutely refuses to comply with the demand, then the right of property may be tried in an action against him; but he is entitled to interplead (*x*). If he interpleads and claims no interest in the goods other than for his costs and charges, an order may be made that his costs and charges be paid on his dealing with the goods as the court directs (*y*).

Liability where some risks expressly excepted.

23. If a carrier makes a contract with a consignor excepting some risks, he nevertheless remains liable as a common carrier for all risks not so excepted (*z*).

Insurance by carrier.

24. If a carrier insures the goods carried, whether he does so on his own account or as agent for the owner, he does not by so insuring limit his liability, but remains himself liable (*a*).

Special directions to carrier.

25. Where any directions are given to the carrier, at the time of the delivery of the goods to him, as to the mode of dealing with the goods, and the carrier assents to such directions, he is bound to obey them, and is liable for any loss which occurs through disregarding them (*b*).

SUB-SECT. 3.—*Duty to deliver in Reasonable Time.*

Delay in delivery.

26. In the absence of any express contract as to the time of delivery of goods, a carrier is only bound to deliver within a reasonable time (*c*).

A reasonable time means the time within which by due diligence delivery can be effected; and therefore the carrier is not liable for the consequences of delay not due to any negligence on his part (*d*). He is bound to carry the goods by the ordinary route by which he professes to carry, and is therefore liable for damages for delay caused by unnecessary deviation from that route (*e*). If delay in

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(*v*) *Sheridan* v. *New Quay Co.* (1858), 4 C. B. (N. S.) 618.

(*w*) *Lee* v. *Robinson and Bayes* (1856), 18 C. B. 599.

(*x*) *Wilson* v. *Anderton* (1830), 1 B. & Ad. 450.

(*y*) R. S. C., Ord. 57, r. 2 (*a*); *De Rothschild Frères* v. *Morrison, Kekewich & Co.* (1890), 24 Q. B. D. 750. See title INTERPLEADER.

(*z*) *Sutton & Co.* v. *Ciceri & Co.* (1890), 15 App. Cas. 144; *Price & Co.* v. *Union Lighterage Co.*, [1904] 1 K. B. 412. See p. 16, *post*.

(*a*) *Hill* v. *Scott*, [1895] 2 Q. B 713, C. A.

(*b*) *Streeter* v. *Horlock* (1822), 1 Bing. 34. In an American case (*Hastings* v. *Pepper* (1831), 11 Pickering, 41) a carrier was held liable for the consequence of disregarding a direction to carry a parcel "this side up"; but it was said that he could have refused to accept the parcel with this direction.

(*c*) *Raphael* v. *Pickford* (1843), 5 Man. & G. 551; *Taylor* v. *Great Northern Rail. Co.* (1866), L. R. 1 C. P. 385; *Hales* v. *London and North Western Rail. Co.* (1863), 4 B. & S. 66. This is "a term engrafted by legal implication upon a promise or duty to deliver generally" (*Raphael* v. *Pickford*, *supra*, *per* TINDAL, C.J., at p. 558).

(*d*) *Taylor* v. *Great Northern Rail. Co.*, *supra*; *Hawes & Son* v. *South Eastern Rail. Co.* (1885), 52 L. T. 514; *Nicholls* v. *North Eastern Rail. Co.* (1888), 59 L. T. 137.

(*e*) *Hales* v. *London and North Western Rail. Co.*, *supra*; *Mallett* v. *Great Eastern Rail. Co.*, [1899] 1 Q. B. 309.

the delivery of goods has arisen from the fact that the carrier has not dealt with them in the ordinary way of his business, this fact, if unexplained, affords evidence of unreasonable delay (*f*).

The fact that a train arrives at its destination a long time after the hour at which it is advertised to arrive is evidence of negligence, calling for explanation on the part of the railway company (*g*). But a contract to carry goods by a train which ordinarily arrives at a certain hour is not a contract to deliver the goods at that hour (*h*).

The duty of the carrier is to carry without delay with reference to all the circumstances; and therefore, where an accident causing delay occurs from circumstances quite outside the carrier's control, although bound to act reasonably, he is not bound to make extraordinary efforts, or incur extraordinary expense, to avoid the consequences of such delay (*i*).

Where the carrier is exempted by contract from liability for delay, such contract gives protection only where delay occurs in the performance of the contract. It affords no protection against delay caused by the carrier doing something wholly at variance with the contract (*k*).

SUB-SECT. 4.—*Variations of Common Law Contract.*

Carrier not liable for consignor's negligence

27. A consignor of goods is not entitled to claim compensation from the carrier for any loss of, or injury to, the goods caused by his own fault, without any negligence on the part of the carrier (*l*).

Goods not properly packed.

Thus, although a common carrier is an insurer, it is a condition precedent to his liability that the goods, if liable to be injured unless carefully and properly packed, should be so packed (*m*). The carrier is not liable for injury to goods due to improper packing (*n*); and where goods are damaged in transit, and part of the damage can be ascribed to improper packing, such part is not recoverable from the carrier (*o*).

Refusal of goods improperly packed.

In some cases a carrier is justified in refusing goods on the ground that they are carelessly and improperly packed; but there is no general rule that every parcel not correctly packed may be

(*f*) *Wren* v. *Eastern Counties Rail.* (1859), 1 L. T. 5; *Paye* v. *Great Northern Rail. Co. of Ireland* (1868), I. R. 2 C. L. 228.

(*g*) *Roberts* v. *Midland Rail. Co.* (1877), 25 W. R. 323.

(*h*) *Lord* v. *Midland Rail. Co.* (1867), L. R. 2 C. P. 339.

(*i*) *Briddon* v. *Great Northern Rail. Co.* (1858), 28 L. J. (EX.) 51 (see note (*a*), p. 9, *ante*). There it was held that the railway company was not bound to make the same great efforts, or incur the same expense, to get cattle forwarded which it did in order to get passenger traffic forwarded.

(*k*) *Mallett* v. *Great Eastern Rail. Co.*, [1899] 1 Q. B. 309. The proposition in the text is based upon the judgment of the court in this case, and it is submitted that it is an accurate statement of the law. But whether the law, as stated, justified the actual decision upon the facts of the case is doubtful. See *Foster* v. *Great Western Rail. Co.*, [1904] 2 K. B. 306.

(*l*) *Talley* v. *Great Western Rail. Co.* (1870), L. R. 6 C. P. 44, *per* WILLES, J., at p. 52; *Barbour* v. *South Eastern Rail.* (1876), 34 L. T. 67; *Bradley* v. *Waterhouse* (1828), 3 C. & P. 318.

(*m*) *Hart* v. *Baxendale* (1867), 16 L. T. 390, 391.

(*n*) *Cox* v. *London and North Western Rail. Co.* (1862), 3 F. & F. 77; *Barbour* v. *South Eastern Rail.*, *supra*; *Baldwin* v. *London, Chatham, and Dover Rail. Co.* (1882), 9 Q. B. D. 582.

(*o*) *Higginbotham* v. *Great Northern Rail. Co.* (1861), 2 F. & F. 786.

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rejected (*p*). If the goods are imperfectly packed, but the imperfection is obvious to the carrier when he receives the goods, and he receives them without objection, he is not excused for any consequent damage (*q*). If a defect in the packing, from which damage is likely to occur, is discovered by the carrier on the journey, he should take reasonable means to arrest loss or deterioration therefrom (*r*); and if the defect be discovered in time to prevent the forwarding of the goods, they should not be forwarded in such condition (*s*).

Goods insufficiently addressed.

Again, it is the duty of the consignor to address the goods with an address sufficient to enable the carrier to find the intended place of delivery readily; and the carrier is not responsible for loss or delay due to an imperfect address (*t*). But if the carrier chooses to accept goods which bear no label, he is not excused from liability if the goods are lost on this account (*a*).

Liability varied by special contract.

28. The liability of the carrier for loss, injury, or delay in respect to the goods carried may be varied by contract (*b*). Such contract may be implied from conduct; but whether it is to be implied is a question of fact for a jury (*c*). The liability of the carrier at common law continues, except in so far as it is so varied; and where the contract exempts the carrier from some risks, he remains liable to all risks which are not excepted (*d*). A special contract with a carrier may, like other contracts, be vitiated by fraud; it may be vitiated, for example, by some deception practised upon the carrier (*e*).

Notice by carrier will not affect liability.

The common law liability of the carrier cannot be varied by any public notice given by him, but may be varied by a special contract with the consignor in relation to the goods carried (*f*).

(*p*) *Munster* v. *South Eastern Rail. Co.* (1858), 4 C. B. (N. S.) 676.

(*q*) *Stuart* v. *Crawley* (1818), 2 Stark. 323; *Richardson* v. *North Eastern Rail. Co.* (1872), L. R. 7 C. P. 75.

(*r*) *Beck* v. *Evans* (1812), 16 East, 244; *Notara* v. *Henderson* (1872), L. R. 7 Q. B. 225.

(*s*) *Cox* v. *London and North Western Rail. Co.* (1862), 3 F. & F. 77.

(*t*) *Caledonian Rail. Co.* v. *Hunter & Co.* (1858), 20 Dunl. (Ct. of Sess.) 1097; *William Wilson & Co.* v. *Scott* (1797), Hume, 302; *Bradley* v. *Dunipace* (1861), 7 H. & N. 200. In *Caledonian Rail. Co.* v. *Hunter*, *supra*, the consignor delivered to the railway company at Glasgow a parcel labelled to a person at "Sudbury." There are several places in England of that name; and the railway company, having no further directions, sent the parcel to Sudbury in Derbyshire. In fact, it was intended for Sudbury in Suffolk. A considerable delay in delivery was the consequence of the imperfect address; and it was held that the railway company was not liable in damages for this delay.

(*a*) *Campbell* v. *Caledonian Rail. Co.* (1852), 14 Dunl. (Ct. of Sess.) 806.

(*b*) See *Saife* v. *Farrant* (1875), L. R. 10 Exch. 358. This proposition does not seem to have ever been questioned. For form of consignment note for use by common carriers other than railway or canal companies, see Encyclopædia of Forms, Vol. III., p. 199.

(*c*) *Edwards* v. *Sherratt* (1801), 1 East, 604.

(*d*) *Sutton & Co.* v. *Ceceri & Co.* (1890), 15 App. Cas. 144; *Price & Co.* v. *Union Lighterage Co.*, [1904] 1 K. B. 412; *Beal* v. *South Devon Rail. Co.* (1864), 11 L. T. 184; *Phillips* v. *Clark* (1857), 2 C. B. (N. S.) 156.

(*e*) *Walker* v. *Jackson* (1842), 10 M. & W. 161.

(*f*) Carriers Act, 1830 (1 Will. 4, c. 68), ss. 4, 6. See p. 26, *post*.

With regard to carriers other than railway or canal companies, this special contract need not be in writing, nor signed by the consignor; but if the terms of the contract are contained in any ticket or document delivered to the consignor, such terms are not binding without the assent thereto of the consignor, which assent may either be express, or implied from the fact that the terms were sufficiently brought to his notice (*g*).

Form of special contract

Railway and canal companies can only limit their liability for loss of, or injury to, goods by negligence in the receiving, forwarding, or delivering thereof, by a contract in writing, signed by the consignor, the conditions of which with respect to the receiving, forwarding, and delivering of the goods are adjudged to be just and reasonable (*h*); but this provision only applies where negligence is proved (*i*).

SUB-SECT. 5.—*Measure of Damages.*

Loss of goods.

29. Where goods are entirely destroyed or lost by a common carrier, the measure of the damages recoverable (*j*) against the carrier is the value of the property lost (*k*). As to goods dealt with in the way of trade, the owner is entitled to the value of such goods, at the place to which they were consigned (*l*). If there is a market for that description of goods at such place, the damages are the market value of the goods there at the time when they ought to have been delivered; but if there is no market, then the damages are the cost price of the goods, together with the expenses of carriage, and such profits as might reasonably be expected to be made in the ordinary course of business (*m*). If the consignor has declared the value of the goods before carriage, he is bound by such declaration, and is estopped from giving evidence that the goods have any higher value (*n*).

Delay.

30. Where injury is caused by delay in the delivery of the goods, such damages are recoverable from the carrier as may fairly and reasonably be considered as arising in the ordinary and usual course of things from the carrier's breach of duty, or such as may reasonably be supposed to have been in the contemplation of both parties as a probable consequence of the delay in the circumstances as known to both (*o*).

(*g*) *Henderson* v. *Stevenson* (1875), L. R. 2 Sc. & Div. 470; *Harris* v. *Great Western Rail. Co.* (1876), 1 Q. B. D. 515. See p. 54, *post.*

(*h*) Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), s. 7; *Peek* v. *North Staffordshire Rail. Co.* (1863), 10 H. L. Cas. 473. See pp. 27 *et seq.*, *post.*

(*i*) *Duckham Brothers* v. *Great Western Rail. Co.* (1899), 80 L. T. 774.

(*j*) For the general principles as to measure of damages, see title DAMAGES.

(*k*) *Crouch* v. *London and North Western Rail. Co.* (1849), 2 Car. & Kir. 789; *Riley* v. *Horne* (1828), 5 Bing. 217, 222. Where goods are so badly injured in transit as not to be easily repaired, the owner may reject them, and the carrier is liable for their full value (*Dick* v. *East Coast Railways* (1901), 4 F. (Ct. of Sess.) 178).

(*l*) *Rice* v. *Baxendale* (1861), 7 H. & N. 96.

(*m*) *O'Hanlan* v. *Great Western Rail.* (1865), 6 B. & S. 484.

(*n*) *M'Cance* v. *London and North Western Rail. Co.* (1864), 3 H. & C. 343, Ex. Ch.; *Riley* v. *Horne, supra.*

(*o*) *Hadley* v. *Baxendale* (1854), 9 Exch. 341; *Horne* v. *Midland Rail. Co.* (1873), L. R. 8 C. P. 131; *Simpson* v. *London and North Western Rail. Co.* (1876), 1 Q. B. D. 274.

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When the consignor specially brings to the notice of the carrier the object with which he is sending the goods, or circumstances are brought to the knowledge of the carrier from which that object ought reasonably to be inferred, so that the object may fairly be taken to have been in the contemplation of the carrier, damages which are the natural consequences of the failure of that object are recoverable (*p*).

Damages increased by notice of special purpose.

In some circumstances extremely heavy losses may be the natural consequences of delay, losses out of all proportion to the profit made by the carrier; but it is doubtful to what extent a carrier to whom notice of such circumstances is brought is justified in refusing to accept liability arising therefrom (*q*). An agreement by the carrier to be liable for more than the ordinary amount of damages cannot, however, be implied from the mere fact that the goods were received by him with notice of extraordinary circumstances (*r*). Thus a notice, written upon a label, that the goods are being sent with a special object, is not sufficient of itself to bring such object to the knowledge of the carrier (*s*).

Depreciation by delay.

31. An ordinary consequence of delay is a diminution in value; and therefore the difference between the value of the goods when they ought to have been delivered and their value at the actual time of delivery may as a rule be recovered (*t*). Accordingly, when there is a regular market for the goods, and the price falls in this interval of time, the difference between the market price at the time of actual delivery and the market price at the time when the goods ought to have been delivered is recoverable as damages (*a*). Where

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(*p*) *Simpson* v. *London and North Western Rail. Co.* (1876) 1 Q. B. D. 274, *per* COCKBURN, C.J., at p. 277; *The Parana* (1877), 2 P. D. 118.

(*q*) In *Gee* v. *Lancashire and Yorkshire Rail. Co.* (1860), 3 H. & N. 211, *per* POLLOCK, C.B., at p. 15, it was said that if a carrier were told of extraordinary circumstances likely to lead to heavy loss in case there were delay in the delivery of the goods, the carrier might refuse the goods with such responsibility unless the consignor were prepared to pay a much higher price. In *Horne* v. *Midland Rail. Co.* (1873), L. R. 8 C. P. 131, some of the judges expressed opinions to the same effect. KELLY, C.B. (at p. 136), referred to the question as one of very great importance, which, however, it was unnecessary to decide; and although he did not agree with the opinion above stated, he said that there was no authority for the proposition that a railway company is bound to receive goods, with full liability for damages up to any amount, merely by reason of notice of extraordinary circumstances which made heavy damages a natural consequence of delay.

(*r*) *Ibid.*; *Wilson* v. *Lancashire and Yorkshire Rail. Co.* (1861), 9 C. B. (N. S.) 632.

(*s*) *Candy* v. *Midland Rail. Co.* (1878), 38 L. T. 226.

(*t*) *Wilson* v. *Lancashire and Yorkshire Rail. Co.*, *supra*, where it was held that in assessing damages the jury were entitled to take into account diminution in value through loss of season. In *Schulze* v. *Great Eastern Rail. Co.* (1887), 19 Q. B. D. 30, samples were expressly manufactured to be used in obtaining orders. The samples were so delayed in transit that when delivered the season for selling such goods was past, and the samples were worthless; and it was held that the measure of damages was the value of the samples at the time when they ought to have been delivered.

(*u*) *Collard* v. *South Eastern Rail. Co.* (1861), 7 H. & N. 79; *Simmons* v. *South Eastern Rail. Co.* (1861), 7 Jur. (N. S.) 849.

damages are claimed for loss of sale owing to delay, evidence must be given of a contract to sell (*b*).

Loss of profits.

32. Loss of profits is not an ordinary consequence of delay, and cannot be recovered unless the circumstances are brought to the knowledge of the carrier (*c*). But where the carrier has notice of circumstances which bring to his knowledge that delay will naturally cause loss of profits, such profits are not too remote and may be recovered (*d*). Where goods are lost, and in consequence the owner suffers pecuniary loss in respect of profits which he would have made by their use in the time which must elapse before the goods can be replaced, the value of the lost goods can be recovered, but not such profits, in the absence of notice (*e*).

Expenses caused by delay.

The reasonable expense of inquiry and searching for goods which have been delayed is generally recoverable, but not hotel and such like expenses incurred while waiting for the goods to arrive (*f*).

Delay injurious only through defect.

Where the delay would not of itself have caused any loss to the owner of the goods, or any harm to the goods, except for some defect in the condition or packing of the goods, which defect was unknown to the carrier, the carrier is not responsible for the consequences of the delay (*g*).

(*b*) *Hart* v. *Baxendale* (1867), 16 L. T. 390.

(*c*) In *Hadley* v. *Baxendale* (1854), 9 Exch. 341, a mill stood idle for some days as a consequence of delay in the delivery of the crank shaft of an engine by which the whole machinery of the mill was operated; and it was held that the carrier was not liable for the profits which would have been made if the mill had worked those days, it not having been brought to his knowledge that the want of the shaft alone would keep the mill idle. In *Horne* v. *Midland Rail. Co.* (1873), L. R. 8 C. P. 131, the railway company had notice that unless goods were delivered by a certain time they would be thrown on the plaintiff's (the seller's) hands; but, the company having had no notice that the plaintiff was to get an extraordinary price for the goods if delivered in time, it was held that the plaintiff could not recover the difference between the extraordinary price and the market price. In *Gee* v. *Lancashire and Yorkshire Rail. Co.* (1860), 6 H. & N. 211, a cotton mill stood idle for several days for want of the necessary cotton. This was caused by delay in the delivery of a consignment of cotton by the defendants. The loss of profits, and wages paid to idle workmen, were held too remote to be recovered as damages in the absence of notice of the circumstances to the defendants. See also *Wilson* v. *Lancashire and Yorkshire Rail. Co.* (1861), 9 C. B. (N. S.) 632; *Le Feintur* v. *South Eastern Rail. Co.* (1860), 2 L. T. 170; *Great Western Rail. Co.* v. *Redmayne* (1866), L. R. 1 C. P. 329; "*Den of Ogil*" *Co., Ltd.* v. *Caledonian Rail. Co.* (1902), 5 F. (Ct. of Sess.) 99.

(*d*) *Simpson* v. *London and North Western Rail. Co.* (1876), 1 Q. B. D. 274; *Jameson* v. *Midland Rail. Co.* (1884), 50 L. T. 426.

(*e*) *British Columbia and Vancouver Island Spar, Lumber, and Sawmill Co., Ltd.* v. *Nettleship* (1868), L. R. 3 C. P. 499.

(*f*) *Woodger* v. *Great Western Rail. Co.* (1867), L. R. 2 C. P. 318. This case throws doubt on the decision in *Black* v. *Baxendale* (1847), 1 Exch. 410, which was decided before the leading case of *Hadley* v. *Baxendale*, *supra*. See also *Candy* v. *Midland Rail. Co.* (1878), 38 L. T. 226; *Hales* v. *London and North Western Rail. Co* (1863), 4 B. & S. 66.

(*g*) *Baldwin* v. *London, Chatham, and Dover Rail. Co.* (1882), 9 Q. B. D. 582. In this case a consignment of rags was delayed an unreasonable time in transit. In consequence they heated and became rotten before delivery. This was caused by the rags being improperly packed whilst wet. If they had been packed dry they would have arrived safely, and in that event no loss would have been caused by the delay. Damages for the deterioration in value of the rags were not recoverable.

Where a railway company undertook to supply horse-boxes to take some

SECT. 1. The Contract at Common Law.

Loss of market.

33. Loss of market is not of itself an ordinary consequence of delay for which damages may be recovered (*h*). Where an article is sent to a place in order that it may compete with other similar articles at a show or competition, and the article is delayed on the journey and so excluded from the competition, damages for the loss of its chance of success are, as a rule, too remote (*i*). Again, where goods were sent by railway to a consignee who had agreed to hire them for use on a special occasion, but the company had no notice of this fact, and the goods were not delivered until the occasion was past, it was held that the consignor could not recover from the company the sum which he would have received for the use of the goods (*k*).

In another case the consignor was himself a carrier, who collected small parcels for different persons and forwarded them by the defendant company packed in a large parcel to be distributed by the agent of the consignor, and it was held that the fact that the plaintiff consignor lost custom by delay in the delivery of the packed parcel was not an element of damages to be considered where the defendants had no notice of the circumstances (*l*).

Conduct of owner.

In assessing damages the conduct of the owner of the goods must be taken into consideration; and the fact that he has not acted fairly and reasonably so as to avoid any loss due to the carrier's breach of contract is material (*m*).

Liability to third party.

34. Where the consignor is himself liable to a third party for damages for delay in delivery, and such damages, together with the costs of the action, are recovered against him, he can recover the damages from the defaulting carrier; and he may also recover the costs if he was justified in defending the action, but not if he acted unreasonably in doing so (*n*).

Delivery of wrong goods.

35. Again, a carrier may be liable in damages for delivering the

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horses to a sale and failed to have them at the station at the agreed time the horses were sent by road. If the horses had been sound it would not have hurt them to go by road, but, as they were in bad condition, they were injured. The company was held not liable for such injury (*Waller* v. *Midland Great Western Rail. (Ireland) Co.* (1879), 4 L. R. Ir. 376).

(*h*) *Hawes & Son* v. *South Eastern Rail. Co.* (1885), 52 L. T. 514.

(*i*) Thus, where the plaintiff made a model to compete for a prize, and, in consequence of delay in the delivery of the model, it arrived at its destination too late to compete, it was held that damages for the loss of the chance of winning were too remote, but that the cost of making the model could be recovered from the carrier (*Watson* v. *Ambergate, Nottingham, and Boston Rail. Co.* (1851), 15 Jur. 448). But where a contract was made on a show ground between the owner of samples there exhibited and an agent of a railway company for the carriage of the samples to another show ground, it was held that the damages for the non-arrival of the samples in time for the second show included loss of profit, and that it was not necessary for the owner to show what amount of profit he had lost (*Simpson* v. *London and North Western Rail. Co.* (1876), 1 Q. B. D. 274).

(*k*) *Hales* v. *London and North Western Rail. Co.* (1863), 4 B. & S. 66.

(*l*) *Mann* v. *General Steam Navigation Co.* (1856), 4 W. R. 254.

(*m*) *Davis* v. *London and North Western Rail. Co.* (1858), 4 Jur. (N. S.) 1303; *Irvine* v. *Midland Great Western Rail. (Ireland) Co.* (1880), 6 L. R. Ir. 55.

(*n*) *Baxendale* v. *London, Chatham, and Dover Rail. Co.* (1874), L. R. 10 Exch. 35. discussed and explained in *Hammond* v. *Bussey* (1887), 20 Q. B. D. 79, and in *Ayius* v. *Great Western Colliery Co.*, [1899] 1 Q. B. 413.

wrong goods, if the injury complained of was the natural result of his negligent delivery (*o*).

SECT. 2.—*Statutory Modifications of Common Law Contract.*

SUB-SECT. 1.—*Liability for Loss of Valuables.*

Statutory protection of carriers.

36. The Carriers Act, 1830 (*p*), was passed with the primary object of protecting common carriers from the great risk which they ran under the common law in carrying parcels containing articles of great value in a small compass. With regard to such property, the carrier attempted to protect himself by posting up notices limiting his liability; but there was great difficulty in fixing consignors with knowledge of such notices (*q*).

Carrier only liable above £10 in certain cases.

37. Accordingly the Act provides (*r*) that no common carrier by land (*s*) shall be liable for the loss of (*t*) or injury to any article or articles or property of certain specified descriptions (*a*), contained in any package (*b*) delivered to the carrier to be carried for hire or to accompany the person of a passenger in a public conveyance, where the value of such property contained in the package shall exceed £10 (*c*), unless at the time of the

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(*o*) But where the plaintiff was the maker of ketchup, and casks belonging to a third person were delivered to him by the mistake of the defendant railway company, and he filled the casks with ketchup, which was ruined through the casks having formerly contained turpentine, it was held that the plaintiff could not recover the value of the ketchup from the company (*Cunnington* v. *Great Northern Rail. Co.* (1883), 49 L. T. 392, C. A.).

(*p*) 11 Geo. 4 & 1 Will. 4, c. 68.

(*q*) *Ibid.*, title and preamble. It was held in *Owen* v. *Burnett* (1834), 4 Tyr. 133, that the words in the preamble "articles of great value in small compass" do not limit the meaning of the words used in s. 1 (see para. 39, *post*) to articles of small size.

(*r*) Carriers Act, 1830 (11 Geo. 4 & 1 Will. 4, c. 68), s. 1.

(*s*) The Act only applies to carriage by land. But where a carrier undertakes to carry partly by sea and partly by land, the contract is divisible, and the Act applies to the land part of the journey (*Le Conteur* v. *London and South Western Rail. Co.* (1865), L. R. 1 Q. B. 54; *Millen* v. *Brasch* (1882), 10 Q. B. D. 142). See also *Punciani* v. *London and South Western Rail. Co.* (1856), 18 C. B. 226; *Baxendale* v. *Great Eastern Rail. Co.* (1869), L. R. 4 Q. B. 244.

(*t*) "Loss" means loss by the carrier. It applies to cases where the carrier has temporarily mislaid or lost sight of the goods, as well as to cases where the goods are permanently lost. If the carrier loses the goods for a time, but recovers them, and delivers them within a reasonable time of so recovering them, he is protected (*Millen* v. *Brasch*, *supra*; *Wallace* v. *Dublin and Belfast Junction Rail. Co.* (1874), L. R. 8 C. L. 341; *Hearn* v. *London and South Western Rail. Co.* (1855), 10 Exch. 793; see note (*n*), p. 23, *post*).

(*a*) See p. 23, *post*.

(*b*) The words of the Act are "contained in any parcel or package." Where articles within the Act (pictures) were packed along with other goods in a wagon which had sides, but no top, and the wagon so loaded was sent by railway, and the goods were destroyed in a collision, it was held that the wagon was a "parcel or package" within the meaning of the Act (*Whaite* v. *Lancashire and Yorkshire Rail. Co.* (1874), L. R. 9 Exch. 67).

(*c*) The value of the goods is the invoice price to the consignee, not the price paid by the consignor. Therefore where the plaintiff bought goods for £9 19*s*., and agreed to sell them to the consignee for over £10, and they were lost in transit, it was held that the carriers were protected by the Act, as the value exceeded £10 (*Blankensee* v. *London and North Western Rail. Co.* (1882), 45 L. T. 761).

SECT. 2. **Statutory Modifications of Common Law Contract.**

delivery of the package at the carrier's office (*d*) or to his servant (*e*) the value and nature of such article, articles, or property shall have been declared by the person delivering the package, and an increased charge, above the ordinary carriage, paid or agreed to be paid (*f*).

Carrier's right to make increased charge.

When a package containing any of the specified articles has been delivered to the carrier, and the value and nature of the contents has been duly declared, the carrier is entitled to demand the increased charge provided he affixes in a conspicuous part of his office or receiving house (*g*) a legible notice stating the increased rate of charge above the ordinary rate of carriage (*h*).

Liability of carrier where value declared.

38. A consignor having made a declaration of the value and nature of the contents of a package, the carrier receives the goods under his full common law liability not only in cases where he demands, and is paid, the additional charge, but also in cases where he fails to demand it (*i*).

Effect of absence of notice.

The carrier is entitled to the protection of the Act whether he gives the prescribed notice or not; but he can only demand the additional charge where the notice has been given (*k*).

Carrier's negligence.

The fact that loss or injury is caused by gross negligence does not deprive the carrier of the protection of the Act (*l*); but if he

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(*d*) "Office, warehouse, or receiving house." These words include every office, warehouse, or receiving house used or appointed by a carrier for the purpose of receiving parcels to be carried (Carriers Act, 1830 (11 Geo. 4 & 1 Will. 4, c. 68), s. 5). Where a coach regularly stopped at an inn to pick up parcels, it was held that the inn was a "receiving house" (*Syms* v. *Chaplin* (1836), 5 Ad. & El. 634). An inn appointed by the carrier for the purpose of receiving parcels is an "office, warehouse, or receiving house"; and where goods are received at any house recognised by a railway company, that house is to be considered as part of the company's system for the purposes of the Act (*Stephens* v. *London and South Western Rail. Co.* (1886), 18 Q. B. D. 121). See *Burrell* v. *North* (1847), 2 Car. & Kir. 680.

(*e*) Where the carrier accepts goods at the house of the consignor, the carrier is entitled to the protection of the Act where no declaration is made (*Hart* v. *Baxendale* (1851), 6 Exch. 769).

(*f*) No form of declaration is prescribed or required. It is a sufficient declaration of the value and nature of the goods if words are used by the consignor which supply the carrier with the information necessary to enable him to calculate the additional charge he is entitled to make for the carriage (*Bradbury* v. *Sutton* (1872), 19 W. R. 800, and, on appeal, 21 W. R. 128, Ex. Ch., overruling on this point *Boys* v. *Pink* (1838), 8 C. & P. 361). Such words must be used by the consignor with the intention of making a declaration for the purposes of the Act. Thus, a declaration for customs purposes is not a declaration within the Act (*Hirschel and Meyer* v. *Great Eastern Rail. Co.* (1906), 12 Com. Cas. 11). Also information derived by the carrier outside any such declaration would probably be insufficient to justify him in making an additional charge. See *Robinson* v. *London and South Western Rail. Co.* (1865), 19 C. B. (N. S.) 51.

(*g*) See note (*d*), *supra*.

(*h*) Carriers Act, 1830 (11 Geo. 4 & 1 Will. 4, c. 68), s. 2.

(*i*) The consignor is not bound to tender the additional charge. The carrier must demand it if he requires it, and where a sufficient declaration is made the common law liability attaches to the carrier, although no such demand is made (*Behrens* v. *Great Northern Rail. Co.* (1861), 3 L. T. 863).

(*k*) *Hart* v. *Baxendale* (1851), 6 Exch. 769. Compare Carriers Act, 1830 (11 Geo. 4 & 1 Will. 4, c. 68), s. 3, note (*k*), p. 24, *post*.

(*l*) *Hinton* v. *Dibbin* (1842), 2 Q. B. 646; *Great Western Rail. Co.* v. *Rimell* (1857), 18 C. B. 575.

wilfully does an act inconsistent with his contract, or converts the goods to his own use, he is liable (*m*). The Act is no protection against liability for damage resulting from delay, unless the delay is caused by loss; and if the goods are temporarily lost, and recovered by the carrier, he should deliver them within a reasonable time of so recovering them, or he will be liable for delay (*n*).

SECT. 2. Statutory Modifications of Common Law Contract.

39. The Act applies (*o*) to gold and silver coin of any country, or any gold or silver in a manufactured or unmanufactured state, or any precious stones, jewellery, watches, clocks, or timepieces of any description (*p*), trinkets (*q*), bills (*r*), bank notes, orders, notes, or securities for the payment of money, stamps, maps (*s*), writings, title-deeds, paintings (*t*), engravings (*a*), pictures (*b*), gold or silver plate or plated articles, glass (*c*), china, silks in a manufactured or

Articles to which Act applies.

(*m*) The protection of the Act extends to cases where the goods have been carried beyond their destination, or lost or injured upon a journey which the consignor never contemplated, or delivered to the wrong person, provided these matters arise from negligence. But the carrier remains liable for all acts of wilful misfeasance, such as converting the goods to his own use or knowingly delivering them to the wrong person (*Morritt* v. *North Eastern Rail. Co.* (1876), 1 Q. B. D. 302; *Millen* v. *Brasch* (1882), 10 Q. B. D. 142). See *Wyld* v. *Pickford* (1841), 8 M. & W. 443.

(*n*) *Hearn* v. *London and South Western Rail. Co.* (1855), 10 Exch. 793. See note (*l*), p. 21, *ante*. See *Panciani* v. *London and South Western Rail. Co.* (1856), 18 C. B. 226.

(*o*) Carriers Act, 1830 (11 Geo. 4 & 1 Will. 4, c. 68), s. 1. Whether any particular thing comes within the list of things described in this section is a question of fact, not of law (*Brunt* v. *Midland Rail. Co.* (1864), 2 H. & C. 889; *Woodward* v. *London and North Western Rail. Co.* (1878), 3 Ex. D. 121; *Levi Jones & Co., Ltd.* v. *Cheshire Lines Committee* (1901), 17 T. L. R. 443). The Act applies to the things named where they are carried by a railway company as the personal luggage of a passenger without extra charge (*Casswell* v. *Cheshire Lines Committee*, [1907] 2 K. B. 499). See p. 43, *post*.

(*p*) This includes a ship's chronometer (*Le Conteur* v. *London and South Western Rail. Co.* (1865), L. R. 1 Q. B. 54); but not opera glasses and photographic apparatus (*Levi Jones & Co., Ltd.* v. *Cheshire Lines Committee*, *supra*).

(*q*) Trinkets are things which are primarily ornamental, though they may also be useful, *e.g.*, bracelets, shirt pins, rings and brooches (which do not come within the meaning of jewellery), tortoiseshell purses, and ornamental smelling bottles. But plain German silver pocket matchboxes are not trinkets (*Bernstein* v. *Baxendale* (1859), 6 C. B. (N. S.) 251). In *Davey* v. *Mason* (1841), Car. & M. 45, an eyeglass with a gold chain attached was held not to be a trinket. This case was overruled in *Bernstein* v. *Baxendale*, *supra*, but not upon this point. See also *Levi Jones & Co., Ltd.* v. *Cheshire Lines Committee*, *supra*.

(*r*) A parcel contained an incomplete bill of exchange which bore the acceptor's signature, but no drawer's signature. It was being sent to the drawer to be signed. It was held that the document was not a "bill," but merely a "writing," and of no value (*Stoessiger* v. *South Eastern Rail. Co.* (1854), 3 E. & B. 549). See further, title BILLS OF EXCHANGE ETC.

(*s*) This includes the case in which a set of maps is contained (*Wyld* v. *Pickford* (1841), 8 M. & W. 443).

(*t*) "Paintings" means works of art. A set of hand-painted carpet designs are not included in the word (*Woodward* v. *London and North Western Rail. Co.*, *supra*.

(*a*) Including prints and coloured prints (*Boys* v. *Pink* (1838), 8 C. & P. 361).

(*b*) Including also the frame of a picture as being merely an accessory of the picture (*Henderson* v. *London and North Western Rail. Co.* (1870), L. R. 5 Exch. 90).

(*c*) A looking-glass or mirror of large size is included (*Owen* v. *Burnett* (1834), 4 Tyr. 133).

SECT. 2. Statutory Modifications of Common Law Contract.

unmanufactured state and whether wrought up or not wrought up with other materials (*d*), furs (*e*), or hand-made lace (*f*).

Anything which is merely accessory to a thing within the Act, and which is with the principal thing in any package, is itself within the Act (*g*); and where a case contains only things within the Act, the case as well as its contents is within the Act (*h*). But where a case contains things not within the Act and also things which are within the Act, the carrier is not protected in respect either of the case or of such of its contents as are not within the Act (*i*).

Case containing specified articles.

Signed receipt by carrier.

40. Where the consignor has made the required declaration and paid the increased rate of charge (or else agreed with the carrier to pay it) the carrier is bound, if required, to give the consignor a signed receipt for the package, acknowledging it to have been insured; and if such receipt is not given when required the carrier loses all protection from the Act, and the amount of the increased charge may be recovered from him (*k*).

Recovery of extra charge as well as damages.

41. Where the value and contents of a parcel containing things within the Act have been duly declared, and the increased charge paid, the owner is entitled to recover from the carrier the amount of the increased charge, as well as the value of the things in case of loss or injury (*l*).

Proof of value in case of loss.

The carrier is not bound by the declaration as to the value of such things, but is entitled to put the owner to strict proof of the real value; the owner cannot, however, recover more than the value he has declared (*m*).

(*d*) Silk dresses are within the section. Therefore, where a trunk containing a lady's silk dresses exceeding £10 in value and other articles not within the Act was lost on a railway journey, it was held that the company was not liable in respect of the silk dresses, though the plaintiff was entitled to recover the value of the other articles (*Flowers* v. *South Eastern Rail. Co.* (1867), 16 L. T. 329). *Davey* v. *Mason* (1841), Car. & M. 45, was a decision to the opposite effect, but the case was overruled by the Court of Queen's Bench in *Wood* v. *Metropolitan Rail. Co.* (1867), referred to in *Flowers* v. *South Eastern Rail. Co.*, *supra*. Silk hose and tights are included (*Hart* v. *Baxendale* (1851), 6 Exch. 769); so are silk watch guards (*Bernstein* v. *Baxendale*, *supra*). Elastic silk webbing is "silk wrought up with other articles" (*Brunt* v. *Midland Rail. Co.* (1864), 2 H. & C. 889).

(*e*) This does not include articles made of felt composed of rabbits' fur and sheep's wool (*Mayhew* v. *Nelson* (1833), 6 C. & P. 58).

(*f*) Machine-made lace was excluded from the operation of the Act by the Carriers Act Amendment Act, 1865 (28 & 29 Vict. c. 94).

(*g*) *Henderson* v. *London and North Western Rail. Co.* (1870), L. R. 5 Exch. 90; *Treadwin* v. *Great Eastern Rail. Co.* (1868), L. R. 3 C. P. 308.

(*h*) *Wyld* v. *Pickford* (1841), 8 M. & W. 443.

(*i*) In *Treadwin* v. *Great Eastern Rail. Co.*, *supra*, a case contained a lace vestment known as a "corporal," which was being sent to an exhibition to be shown. There was also in the case a frame to be used for the purpose of exhibiting the vestment. It was held that, as a vestment is not usually framed, the frame was not an accessory of the vestment, and that, although no declaration had been made with regard to the vestment, the value of the case and of the frame could be recovered. See *Flowers* v. *South Eastern Rail. Co.*, *supra*.

(*k*) Carriers Act, 1830 (11 Geo. 4 & 1 Will. 4, c. 68), s. 3. The receipt is not liable to any stamp duty (*ibid.*).

(*l*) *Ibid.*, s. 7.

(*m*) *Ibid.*, s. 9 See *M'Cance* v. *London and North Western Rail. Co.* (1861), 3 H. & C. 343.

SECT. 2. **Statutory Modifications of Common Law Contract.**

42. The Act is no protection to a carrier against liability for loss of, or injury to, any goods arising from the felonious act of any servant of the carrier; nor is it any protection to any such servant against personal liability for loss or injury due to his own negligence or misconduct (*n*). Where the felonious act of a servant is relied upon by a plaintiff in answer to a defence claiming the protection of the Act, it is quite immaterial that the act of the servant was not facilitated by any negligence on the part of the carrier (*o*).

Loss through felony of carrier's servant.

The servant of the proprietor of a receiving house, recognised by the carrier, is a servant of the carrier in so far as to make the carrier responsible for his felonious act (*p*); and so is the servant of an agent employed by the carrier to perform part of the carrier's contract (*q*). But where possession of goods is obtained from the carrier by a person who falsely represents himself to be a servant of the carrier, and who, having got possession of the goods in the character of such servant, feloniously misappropriates them, the carrier is not estopped from denying that the felon is his servant (*r*).

Who is carrier's servant.

Where the plaintiff pleads the felony of a servant it is not necessary to give evidence sufficient to bring the felony home to an individual servant (*s*). On the other hand, it is not sufficient to show that it is more probable that the goods were stolen by a servant of the carrier than by any person not a servant, nor does such evidence establish a *primâ facie* case against the carrier (*t*).

Proof of felony.

If a *primâ facie* case is made out, proving felony against some unidentified servant of the carrier, which the carrier is unable or fails to answer, the plaintiff is entitled to succeed (*a*). A *primâ facie* case is not established merely by proving that goods have been lost (*b*), or that when last seen the goods were in the possession of a

Establishment of *primâ facie* case of felony.

(*n*) Carriers Act, 1830 (11 Geo. 4 & 1 Will. 4, c. 68), s. 8.

(*o*) *Great Western Rail. Co.* v. *Rimell* (1857), 18 C. B. 575; *Metcalfe* v. *London, Brighton, and South Coast Rail. Co.* (1858), 4 C. B. (N. S.) 307.

(*p*) *Stephens* v. *London and South Western Rail. Co.* (1886), 18 Q. B. D. 121.

(*q*) *Machu* v. *London and South Western Rail. Co.* (1848), 2 Exch. 415. See *Doolan* v. *Midland Rail. Co.* (1877), 2 App. Cas. 792, *per* Lord BLACKBURN, at p. 810.

(*r*) *Way* v. *Great Eastern Rail. Co.* (1876), 1 Q. B. D. 692.

(*s*) *Vaughton* v. *London and North Western Rail. Co.* (1874), L. R. 9 Exch. 93. In that case, KELLY, C.B. (at p. 96), said: "Suppose that a railway company have possession of a parcel to be forwarded on the day following its being received. Suppose that in the interval it is locked up in a cupboard to which two of their servants, and only two, have a key, and that it is stolen in the night under circumstances which irresistibly lead to the inference that one or other of these two persons must be the thief. It might well be that it would be impossible to bring home the crime to either, and that if either was put upon his trial, he would be entitled to an acquittal. But in such a case could it be doubted that a replication of felony to a plea of the Carriers Act would be proved?"

(*t*) *M'Queen* v. *Great Western Rail. Co.* (1875), L. R. 10 Q. B. 569; *Turner* v. *Great Western Rail. Co.* (1876), 34 L. T. 22; *Campbells* v. *North British Rail. Co.* (1875), 2 R. (Ct. of Sess.) 433.

(*a*) *McQueen* v. *Great Western Rail. Co., supra*; *Boyce* v. *Chapman* (1835), 2 Bing. (N. C.) 222; *Vaughton* v. *London and North Western Rail. Co., supra.*

(*b*) *Great Western Rail. Co.* v. *Rimell, supra*; *Metcalfe* v. *London, Brighton, and South Coast Rail. Co., supra.*

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servant of the carrier (*c*). But a *primâ facie* case is made out if the stolen goods are proved to have been dealt with by a servant of the carrier whose possession of them is not explained; and the fact that witnesses are not called who if called might explain such possession is a fact which may be taken into account by a jury (*d*).

Contract.

Special contract.

43. The common law liability of a common carrier in respect of any goods whatever cannot be limited by public notice given by the carrier (*e*), but nothing in the Act affects any special contract between the carrier and the consignor for the carriage of goods (*f*).

When writing necessary.

With regard to railway and canal companies, however, a contract purporting to relieve the company from liability for loss of, or injury to, goods caused by the neglect or default of the company or its servants is void unless such contract is in writing signed by the consignor, and unless the conditions of such contract are just and reasonable (*g*).

Effect of special contract on provisions of Act.

Where a special contract is made between the carrier and the consignor for the carriage of goods, the carrier is still entitled to the protection of the Act except in so far as the terms of the contract are inconsistent with the provisions of the Act (*h*). The carrier may protect himself by contract even against liability for the felonious act of his servant (*i*).

(*c*) *Gogarty* v. *Great Southern and Western Rail. Co.* (1874), I. R. 9 C. L. 233.

(*d*) *Boyce* v. *Chapman* (1835), 2 Bing. (N. C.) 222; *Vaughton* v. *London and North Western Rail. Co.* (1874), L. R. 9 Exch. 93. A stationmaster of a railway company asked a constable to make inquiries for a certain servant, saying that a parcel was missing, and that the servant (who would have had possession of the parcel in the ordinary course of business) had absconded. It was held that this statement was admissible in evidence against the railway company to establish a *primâ facie* case of larceny against a servant of the company (*Kirkstall Brewery Co.* v. *Furness Rail. Co.* (1874), L. R. 9 Q. B. 468).

(*e*) Carriers Act, 1830 (11 Geo. 4 & 1 Will. 4, c. 68), s. 4.

(*f*) *Ibid.*, s. 6. Where a paper containing the conditions upon which the carrier is prepared to carry goods offered for carriage is delivered to the consignor and received by him without objection, a special contract has been made by the parties, and such paper is not a public notice within s. 4. Such a document is binding upon the consignor when signed by him (*Great Northern Rail. Co.* v. *Morville* (1852), 7 Ry. & Can. Cas. 830); or if only handed to him without signature (*Carr* v. *Lancashire and Yorkshire Rail. Co.* (1852), 7 Exch. 707; *York, Newcastle, and Berwick Rail. Co.* v. *Crisp* (1854), 14 C. B. 527); or if served upon the consignor before any contract is proposed (*Walker* v. *York and North Midland Rail. Co.* (1853), 2 E. & B. 750). But where a carrier relies upon conditions contained in a paper or ticket handed to a consignor, he must prove that he used reasonable means to bring such conditions to the knowledge of the consignor so as to raise a presumption that the consignor accepted the conditions. See *Van Toll* v. *South Eastern Rail. Co.* (1862), 12 C. B. (N. S.) 75; *Henderson* v. *Stevenson* (1875), L. R. 2 Sc. & Div. 470; *Harris* v. *Great Western Rail. Co.* (1876), 1 Q. B. D. 515; *Hooper* v. *Furness Rail. Co.* (1907), 23 T. L. R. 451.

(*g*) Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), s. 7. See p. 28, *post*.

(*h*) *Baxendale* v. *Great Eastern Rail. Co.* (1869), L. R. 4 Q. B. 244; *Hirschel and Meyer* v. *Great Eastern Rail. Co.* (1906), 12 Com. Cas. 11.

(*i*) *Shaw* v. *Great Western Rail. Co.*, [1894] 1 Q. B. 373. In this case the carrier was by contract to be liable only in case of gross negligence, and it was held that he was protected from liability for felony of his servant. Where a notice was posted in a carrier's office embodying the terms of the Act, but omitting all

Where goods within the Act, which had not been declared, were destroyed in transit by fire, and the carrier had insured against fire all goods "in trust as carrier," it was held that the insurance company were liable for the value of the goods, as they did not merely insure the carrier's interest in them (*k*).

SUB-SECT. 2.—*Carriage of Dangerous and Explosive Goods.*

Sending of dangerous goods by railway.

44. No person has any right to carry by railway, or to require a railway company to carry, any goods of a corrosive or explosive nature, which in the judgment of the company are dangerous (*l*). If any person sends any such goods by railway, without giving the company notice in writing of their nature, either by marking the particulars distinctly on the outside of the package, or otherwise, he is guilty of an offence and liable to forfeit the sum of £20 to the company (*m*). If a railway company suspects a parcel to contain goods of a dangerous character, it may refuse to accept it, or it may require the parcel to be opened, that its contents may be ascertained (*n*).

Bye-laws as to explosives.

45. Every railway and canal company is required to make bye-laws, which must receive the sanction of the Board of Trade, for the conveyance, loading, and unloading of explosives (*o*). With regard to other carriers by land, a Secretary of State has power to make bye-laws for a like purpose (*p*).

Ammunition for His Majesty's forces.

A railway company must carry gunpowder and other ammunition for His Majesty's forces, upon such terms as are agreed to between the company and the Admiralty or a Secretary of State (*q*).

SUB-SECT. 3.—*Exemption of Railway and Canal Companies from Liability by Special Contract.*

General liability.

46. Every railway and canal company, except when protected as above mentioned (*r*), is liable for loss of, or injury to, goods in the receiving, forwarding, or delivering of them, caused by the neglect

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reference to the provisions of s. 8, and giving a list of increased charges, it was held that, even if the consignor did agree that the notice should be incorporated in his contract with the carrier, the carrier was not exonerated from liability where the goods were stolen by his servant (*Butt* v. *Great Western Rail. Co.* (1851), 11 C. B. 140).

(*k*) *London and North Western Rail. Co.* v. *Glyn* (1859), 1 E. & E. 652.

(*l*) Railways Clauses Consolidation Act, 1845 (8 Vict. c. 20), s. 105: "aquafortis, oil of vitriol, gunpowder, lucifer-matches, or any other goods which, in the judgment of the company, may be of a dangerous nature." See title RAILWAYS AND CANALS.

(*m*) *Ibid.* Under a similar provision in a special Act it was held that a consignor cannot be convicted unless guilty knowledge be proved (*Hearne* v. *Garton and Stone* (1859), 2 E. & E. 66). Apart from statute, it is the duty of a consignor who sends dangerous goods by a carrier to communicate their nature to the carrier, and if he fails in this duty, he is liable for any injury suffered in consequence (*Farrant* v. *Barnes* (1862), 11 C. B. (N. S.) 553; *Williams* v. *East India Co.* (1802), 3 East, 192; *Brass* v. *Maitland* (1856), 6 E. & B. 471).

(*n*) Railways Clauses Consolidation Act, 1845 (8 Vict. c. 20), s. 105.

(*o*) Explosives Act, 1875 (38 Vict. c. 17), ss. 35, 39.

(*p*) *Ibid.*, ss. 37, 39. See title EXPLOSIVES.

(*q*) Cheap Trains Act, 1883 (46 & 47 Vict. c. 34), s. 6 (1) (vi.); Cheap Trains Act, 1844 (7 & 8 Vict. c. 85), s. 12. See title RAILWAYS AND CANALS.

(*r*) See pp. 21 *et seq.*, *ante*.

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or default of the company or its servants, notwithstanding any notice, condition, or declaration given or made by the company limiting its liability (*s*).

The company may, however, by contract limit its liability for such neglect or default, provided that the conditions of the contract are such as are adjudged to be just and reasonable by the court before whom the question may be tried, and also provided that the contract is in writing, signed by the consignor or his agent (*a*).

Limitations of liability.

Through bookings.

47. These provisions apply only to a company's own lines; therefore, if a company accepts goods on a through booking, it may, without any writing signed by the consignor, contract itself out of liability in respect of such goods from the time that the latter are handed over to another carrier (*b*).

Goods carried by passenger train.

The provisions apply to goods carried by passenger train, although the company are not bound to carry them in this manner (*c*).

Where carriage partly by sea.

Where a railway company, by through bookings, contracts to carry goods partly by railway and partly by sea, these provisions do not apply to the sea part of the transit, unless the company has obtained its powers to use steamships by an Act of Parliament passed since July 25, 1863, which incorporates Part IV. of the Railways Clauses Act, 1863 (*d*).

In case of such through bookings the company may protect itself from liability for loss or injury at sea, by dangers peculiar to carriage by sea, provided a condition exempting the company from such liability is published in a conspicuous manner in its booking office, and is legibly printed on the receipt or freight note

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(*s*) Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), s. 7. The section does not make companies liable as common carriers for goods they do not profess to carry as such (*Dickson* v. *Great Northern Rail. Co.* (1886), 18 Q. B. D. 176); and only applies in cases of negligence (see p. 30, *post*).

(*a*) A contract purporting to limit the liability of a railway company for the neglect or default mentioned is null and void unless it fulfils two requisites: (1) it must be in writing signed by the consignor or his agent, and (2) its conditions must be just and reasonable (*Peek* v. *North Staffordshire Rail. Co.* (1863), 10 H. L. Cas. 473; *Beal* v. *South Devon Rail. Co.* (1864), 3 H. & C. 337; *Aldridge* v. *Great Western Rail. Co.* (1864), 15 C. B. (N. S.) 582).

(*b*) *Zunz* v. *South Eastern Rail. Co.* (1869), L. R. 4 Q. B. 539. But the onus is on the contracting company to prove that the goods were delivered to another carrier (*Kent* v. *Midland Rail. Co.* (1874), L. R. 10 Q. B. 1). See also *Flowers* v. *South Eastern Rail. Co.* (1867), 16 L. T. 329; and compare *Barratt* v. *Great Northern Rail. Co.* (1904), 20 T. L. R. 175.

(*c*) *Wilkinson* v. *Lancashire and Yorkshire Rail. Co.*, [1907] 2 K. B. 222. By their published time-tables the defendant company offered to permit commercial travellers to take with them free of charge certain quantities of luggage "on the condition that the company is relieved from all liability for loss, damage, misdelivery, or delay." The plaintiffs, who were commercial travellers, took with them a case of samples in pursuance of this offer, but signed no contract with regard thereto. This case was lost by the company. It was held that, as the plaintiffs had signed no contract, the condition was null and void, and the company was liable for the loss. See p. 33, *post*.

(*d*) 26 & 27 Vict. c. 92, ss. 30, 31. The Regulation of Railways Act, 1868 (31 & 32 Vict. c. 119), s. 16, extended the provisions of the Railway and Canal Traffic Act, 1854, generally to traffic carried in the steamships of a railway company (*Doolan* v. *Midland Rail. Co.* (1877), 2 App. Cas. 792). The part of the section having this effect was, however, repealed by the Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25). See *The Stella*, [1900] P. 161, at p. 169.

given to the consignor (*e*). Where a railway company owns ships, its liability for loss of life at sea may be limited to a sum not exceeding £15 for each ton of its ship's tonnage, and for loss of goods to £8 for each ton, if the loss occurs without the actual fault or privity of the company (*f*); and this limitation extends to passengers' luggage (*g*).

Contracts in which limitation allowed.

48. The limitation of liability by contract in writing has no application to the receipt of goods otherwise than for carriage. Therefore the contract made in depositing goods in a railway cloak-room is not affected by the provisions above mentioned (*h*). They apply, however, to all classes of goods, including animals (*i*) and passengers' luggage (*k*).

Evidence of contract to limit liability.

49. No evidence, other than a signed document, is admissible of any agreement by the consignor exempting a company from liability for negligence; and no notice, condition or declaration with the object of so exempting the company is binding on a consignor (*l*).

Company bound by contract.

50. The provisions referred to, however, have no application except when a company is attempting so to exempt itself, and therefore a contract may be binding on the company although not signed (*m*).

When consignor bound by contract.

A consignor, signing a document which he sees to contain "conditions," is none the less bound by them, if he does not choose to read them (*n*). But if he is, to the knowledge of the company's agent, unable to read the conditions, and is not in fact aware of their effect, he is not bound by them (*o*).

Where, however, the owner of goods sends an illiterate man to deliver goods for carriage to a railway company, the consignor will be bound by a contract signed by such a man to the same extent as

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(*e*) Regulation of Railways Act, 1868 (31 & 32 Vict. c. 119), s. 14. Where a railway company, under a contract to carry by sea, procures the goods to be carried in a ship not belonging to the company, the liability of the company is the same as if the ship did belong to it (Regulation of Railways Act, 1871 (34 & 35 Vict. c. 78), s. 12).

(*f*) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 503; *London and South Western Rail. Co.* v. *James* (1872), 8 Ch. App. 241. See titles ADMIRALTY, Vol. I., p. 73; SHIPPING AND NAVIGATION.

(*g*) *The Stella*, [1900] P. 161.

(*h*) *Van Toll* v. *South Eastern Rail. Co.* (1862), 12 C. B. (N. S.) 75. As to deposit of goods in cloak-rooms, see title BAILMENTS, Vol. I., p. 549.

(*i*) *M'Manus* v. *Lancashire and Yorkshire Rail. Co.* (1859), 4 H. & N. 327. The words of the section are "any horses, cattle, or other animals, or any articles, goods, or things." See p. 36, *post*.

(*k*) *Cohen* v. *South Eastern Rail. Co.* (1877), 2 Ex. D. 253; see p. 40, *post*.

(*l*) *Simons* v. *Great Western Rail. Co.* (1856), 18 C. B. 805.

(*m*) *Baxendale* v. *Great Eastern Rail. Co.* (1869), L. R. 4 Q. B. 244.

(*n*) *Lewis* v. *Great Western Rail. Co.* (1860), 5 H. & N. 867.

(*o*) On delivering goods to the defendant company, the plaintiff was asked to sign a document. He objected on the ground that he could not read it. On being told, however, by the company's clerk that it was a mere matter of form, he signed. The document was in fact a consignment note exempting the company from liability, and it was held that the jury were right in finding that there had been no special contract in the case (*Simons* v. *Great Western Rail. Co.* (1857), 2 C. B. (N. S.) 620).

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if he had signed it himself (*p*). A person acting as agent for the company may also act as agent for the consignor, and may sign a contract so as to bind the latter (*q*).

51. The above-mentioned provisions only apply to loss or injury to goods by neglect or default, *i.e.*, by negligence or default in the nature of negligence (*r*). Therefore railway companies may contract out of liability for causes other than negligence, irrespective of the statutory restrictions; and conditions brought to the knowledge of the consignor which do not seek to exempt the company from liability for negligence may be binding upon him although not signed by him nor reasonable (*s*).

Contract not limiting liability for negligence.

Extent of protection.

52. When a company is exempted by contract from liability for negligence in the performance of the contract, such contract does not protect the company when it deals with the goods in a manner wholly inconsistent with the contract (*t*).

"Owner's risk."

An agreement, signed by the consignor, that the goods should be carried at "owner's risk" applies only to the safety of the goods, and does not free the company from liability for delay due to negligence (*a*).

The provisions in question apply only to acts of negligence committed in the course of "receiving, forwarding, or delivering" of traffic; but they apply to all that is done or omitted in the course of receiving the goods, as well as in their actual carriage (*b*).

Companies are not only liable for the negligence of their servants strictly so called, but also for that of any agents employed by them to carry out their contract (*c*).

SUB-SECT. 4.—*Special Conditions.*

Company must show that conditions are just and reasonable.

53. Where a company seeks to limit its responsibility for negligence in the carriage of goods, the special contract signed by the consignee must in terms, or by distinct reference, set out or incorporate the conditions (*d*). These conditions must be just and

(*p*) *Kirby* v. *Great Western Rail. Co.* (1868), 18 L. T. 658; *Foreman* v. *Great Western Rail. Co.* (1878), 38 L. T. 851.

(*q*) *Aldridge* v. *Great Western Rail. Co.* (1864), 15 C. B. (N. S.) 582.

(*r*) *Shaw* v. *Great Western Rail. Co.*, [1894] 1 Q. B. 373.

(*s*) *Ibid.* It was held in this case that a consignor may bind himself by a contract exempting a company from liability for the larceny of a servant when such larceny is not due to negligence on the part of the company or its servants. See also *Duckham Brothers* v. *Great Western Rail. Co.* (1899), 80 L. T. 774; *Harrison* v. *London, Brighton, and South Coast Rail. Co.* (1862), 2 B. & S. 122.

(*t*) *Mallet* v. *Great Eastern Rail. Co.*, [1899] 1 Q. B. 309; *Foster* v. *Great Western Rail. Co.*, [1904] 2 K. B. 306.

(*a*) *Robinson* v. *Great Western Rail. Co.* (1865), Har. & Ruth. 97; *D'Arc* v. *London and North Western Rail. Co.* (1874), L. R. 9 C. P. 325; *Goldsmith* v. *Great Eastern Rail. Co.* (1881), 44 L. T. 181. Where a contract stated that in certain circumstances the company "do not admit liability," it was held that these words merely put the onus of proof on the consignor (*Great Western Rail. Co.* v. *McCarthy* (1887), 12 App. Cas. 218). See also *Martin* v. *Great Indian Peninsular Rail. Co.* (1867), L. R. 3 Exch. 9.

(*b*) *Hodgman* v. *West Midland Rail. Co.* (1864), 5 B. & S. 173. See p. 37, *post.*

(*c*) *Doolan* v. *Midland Rail. Co.* (1877), 2 App. Cas. 792. See *Machu* v. *London and South Western Rail. Co.* (1848), 2 Exch. 415.

(*d*) *Peek* v. *North Staffordshire Rail. Co.* (1863), 10 H. L. Cas. 473.

reasonable, and the onus is on the company to show that they are just and reasonable (*e*).

It is the duty of a railway company to carry all such goods as it holds itself out to carry, as a common carrier, for a reasonable charge, and without insisting upon the consignor signing any unreasonable contract (*f*). In many cases, however, it may be reasonable for a company to insist on being relieved from liability for loss arising apart from negligence (*g*).

Question of reasonableness.

Whether the conditions in a contract relieving a company from liability for negligence are just and reasonable is a question for the court and not for the jury (*h*), and it is a mixed question of fact and law (*i*). The question must in each case depend on the facts of the particular case, for there can be no abstract reasonableness or the reverse in any condition (*k*). A condition wholly exempting a carrier from liability for neglect or default is *primâ facie* unreasonable (*l*); so is a condition which frees a carrier from liability for misconduct on the part of his servants (*m*); so is a condition which requires the consignee to pay a percentage on the value of the goods by way of insurance (*n*).

Reasonable and unreasonable conditions severable.

Where a contract contains certain conditions which are unreasonable, and also conditions which are reasonable, the contract is severable and the company is entitled to take advantage of those that are reasonable (*o*).

Benefit of conditions of through booking.

Where two companies agree together that they will carry goods through at a special rate, provided the consignor contracts to send them at owner's risk, not only the contracting company, but also the other, is entitled to the advantage of the reasonable conditions of the contract (*p*).

Offer of fair alternative contract.

54. Where the conditions of a contract are *primâ facie* not just and reasonable, they may be shown to be just and reasonable by

(*e*) *Peek* v. *North Staffordshire Rail. Co.* (1863), 10 H. L. Cas. 473; *Dickson* v. *Great Northern Rail. Co.* (1886), 18 Q. B. D. 176; *Ruddy* v. *Midland Great Western Rail. Co.* (1880), 8 L. R. Ir. 224. But if a fair alternative was open to the consignor to send his goods by railway with the common law liability attaching to the company, the onus may be upon him to show that the contract he has made is unreasonable. See *Manchester, Sheffield, and Lincolnshire Rail. Co.* v. *Brown* (1883), 8 App. Cas. 703; *Lewis* v. *Great Western Rail. Co.* (1877), 3 Q. B. D. 195, at p. 204. See note (*q*), p. 32, *post*.

(*f*) *Garton* v. *Bristol and Exeter Rail. Co.* (1861), 1 B. & S. 112; *Allday* v. *Great Western Rail. Co.* (1864), 5 B. & S. 903.

(*g*) *Ashendon* v. *London, Brighton, and South Coast Rail. Co.* (1880), 5 Ex. D. 190.

(*h*) *Great Western Rail. Co.* v. *McCarthy* (1887), 12 App. Cas. 218; *Sheridan* v. *Midland Great Western (Ireland) Rail. Co.* (1888), 21 L. R. Ir. 146.

(*i*) *Lewis* v. *Great Western Rail. Co.*, *supra*.

(*k*) *Gregory* v. *West Midland Rail. Co.* (1864), 2 H. & C. 944.

(*l*) *Peek* v. *North Staffordshire Rail. Co.*, *supra*, *per* Lord BLACKBURN, at p. 511; *Lloyd* v. *Waterford and Limerick Rail. Co.* (1862), 15 I. C. L. R. 37.

(*m*) *Ronan* v. *Midland Rail. Co.* (1884), 14 L. R. Ir. 157; *Ashendon* v. *London, Brighton, and South Coast Rail. Co.*, *supra*; *M'Manus* v. *Lancashire and Yorkshire Rail. Co.* (1859), 4 H. & N. 327.

(*n*) *Peek* v. *North Staffordshire Rail. Co.*, *supra*. See note (*e*) p. 38, *post*.

(*o*) *M'Cance* v. *London and North Western Rail. Co.* (1861), 7 H. & N. 477, *per* BRAMWELL, B., at p. 489; *Simons* v. *Great Western Rail. Co.* (1856), 26 L. J. (C. P.) 25; *Rooth* v. *North Eastern Rail. Co.* (1867), L. R. 2 Exch. 173. But see *contra*, *Kirby* v. *Great Western Rail. Co.* (1868), 18 L. T. 658.

(*p*) *Barratt* v. *Great Northern Rail. Co.* (1904), 20 T. L. R. 175.

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proving that the consignor had a fair alternative offered to him of a contract the conditions of which were just and reasonable (*q*). In such circumstances there is a presumption that the person who has a fair alternative open to him makes a contract which is just and reasonable (*r*).

But if no fair alternative is offered to a consignor, and he receives no adequate consideration for accepting a condition exempting the company from liability for negligence, such condition is generally unreasonable (*s*); so also is a condition that the company shall only be liable in case of misconduct (*t*).

Where alternative is unreasonable.

If the alternative contract tendered to the consignor is not reasonable, conditions which have been accepted relieving the company from liability for negligence are not reasonable (*u*). But a condition may be reasonable which relieves the company from all liability of every kind, if the consignor has a *bonâ fide* option, and has the alternative of sending his goods at the company's risk for a fair charge, if he chooses (*a*).

An agreement that the goods shall be carried at a lower rate than would otherwise be charged on condition that the company shall only be liable in case of negligence is reasonable, and in such cases the onus of proving negligence is on the consignor (*b*).

(*q*) *Gallagher* v. *Great Western Rail. Co.* (1874), I. R. 8 C. L. 326; *M'Nally* v. *Lancashire and Yorkshire Rail. Co.* (1880), 8 L. R. Ir. 81; *Great Western Rail. Co.* v. *McCarthy* (1887), 12 App. Cas. 218; *Manchester, Sheffield, and Lincolnshire Rail. Co.* v. *Brown* (1883), 8 App. Cas. 703; *Simons* v. *Great Western Rail. Co.* (1856), 26 L. J. (C. P.) 25; *Ruddy* v. *Midland, Great Western Rail. Co.* (1880), 8 L. R. Ir. 224; *Robinson* v. *Great Western Rail. Co.* (1865), Har. & Ruth. 97. "Where an advantage has been conferred on the owner of the goods, that disentitles him from complaining of any unreasonableness in the condition; but in order that it may have that effect he must have an alternative offered him whether he will accept the advantages offered, and release the company from liability, or reject it and hold them to their common law liability as carriers" (*Rooth* v. *North Eastern Rail. Co.* (1867), 15 L. T. 624, *per* KELLY, C.B., at p. 626).

(*r*) *Manchester, Sheffield, and Lincolnshire Rail. Co.* v. *Brown*, *supra*; *Lewis* v. *Great Western Rail. Co.* (1877), 3 Q. B. D. 195.

(*s*) *Rooth* v. *North Eastern Rail. Co.* (1867), L. R. 2 Exch. 173.

(*t*) *Foreman* v. *Great Western Rail. Co.* (1878), 38 L. T. 851.

(*u*) *Dickson* v. *Great Northern Rail. Co.* (1886), 18 Q. B. D. 176; *Corrigan* v. *Great Northern and Manchester, Sheffield, and Lincolnshire Rail. Cos.* (1879), 6 L. R. Ir. 90.

(*a*) *Manchester, Sheffield, and Lincolnshire Rail. Co.* v. *Brown* (1883), 8 App. Cas. 703. In this case the plaintiff, a fish merchant, signed a contract by which he agreed with the defendants that they should carry his fish for 20 per cent. below the ordinary rate, on condition that he relieved the company "from all liability for loss or damage by delay in transit, or from whatever other cause arising," the contract to continue for five years. After this contract had been in operation some months a consignment of the plaintiff's fish was injured by delay in delivery caused by the defendants' negligence, and he brought his action for damages. The House of Lords held that the plaintiff had a *bonâ fide* option to send his fish at a rate which was reasonable and at which the defendants would have undertaken the liabilities of common carriers; and that the contract he had signed was just and reasonable and protected the defendants from liability.

A company may relieve itself even from liability for misconduct if a fair alternative be given (*Dickson* v. *Great Northern Rail. Co.*, *supra*, *per* Lord ESHER, M.R., at p. 181).

(*b*) *Harris* v. *Midland Rail. Co.* (1876), 25 W. R. 63.

Provided a fair alternative is in fact open to the consignor, it is unnecessary that the alternative should appear on the face of the written contract (*c*). But a statement in the written contract that there are two rates in operation—the one at company's risk and the other at owner's risk—when in fact there is only one rate in operation, and every consignor is required to sign a contract at that rate, does not bind the consignor; and no real alternative is offered to him (*d*). The alternative must be a real and *bonâ fide* one; therefore a condition that a company will not be liable in any case, except up to a small amount, unless a percentage be paid on the value of the goods, is *primâ facie* unreasonable; but it is open to a company in the case of some classes of goods to prove such a condition to be reasonable (*e*).

Alternative must be fair and real.

Although, when there is a fair alternative, a condition freeing the company from liability for delay or detention may be good, the deliberate refusal of the company to deliver goods because of a groundless claim does not come within this condition (*f*).

Railway companies are not bound to carry goods, except perishables and passengers' luggage, by passenger train; therefore, if they consent to carry such goods by passenger train, they are entitled to dictate the terms upon which they will so carry them (*g*). But although they are not bound to carry merchandise by passenger train, if they choose to do so without obtaining the signature of the owner to a special contract, any conditions they may make limiting their liability for negligence are null and void, and they carry such merchandise as common carriers (*h*).

Carriage of goods by passenger train.

55. The courts lean strongly against carriers seeking to relieve themselves of liability in case of misconduct on the part of their servants; and the "owner's risk" consignment note in ordinary use by railway companies does not attempt to do so (*i*). If a contract purports to relieve a company from liability for any "fault or

Misconduct.

(*c*) *Moore* v. *Great Northern Rail. Co.* (1882), 10 L. R. Ir. 95.

(*d*) *Duckham Brothers* v. *Great Western Rail. Co.* (1899), 80 L. T. 774; *Allday* v. *Great Western Rail. Co.* (1864), 5 B. & S. 903.

(*e*) *Lloyd* v. *Waterford and Limerick Rail. Co.* (1862), 15 I. C. L. R. 37; *Peek* v. *North Staffordshire Rail. Co.* (1863), 10 H. L. Cas. 473; *Ashendon* v. *London, Brighton, and South Coast Rail. Co.* (1880), 5 Ex. D. 190; *Dickson* v. *Great Northern Rail. Co.* (1886), 18 Q. B. D. 176; *Williams* v. *Midland Rail. Co.*, [1908] 1 K. B. 252. In *Dickson* v. *Great Northern Rail. Co.*, *supra*, a condition not to be responsible in any case for more than £2 for loss of, or injury to, a dog, unless a higher value were declared and 5 per cent. on its value above £2 were paid irrespective of distances, was held to be unreasonable. But in *Williams* v. *Midland Rail. Co.*, *supra*, a similar condition, where the percentage was 1½, was held by the Court of Appeal to be reasonable, the defendant company having given evidence that this had been for twenty years the usual charge by every railway company in England, and that the carriage of dogs involved peculiar risk.

(*f*) *Gordon* v. *Great Western Rail. Co.* (1881), 8 Q. B D. 44.

(*g*) *Stone & Co.* v. *Midland Rail. Co.*, [1904] 1 K. B. 669.

(*h*) *Wilkinson* v. *Lancashire and Yorkshire Rail. Co.*, [1907] 2 K. B. 222. See note (*c*), p. 28, *ante*.

(*i*) *Ashendon* v. *London, Brighton, and South Coast Rail. Co.* (1880), 5 Ex. D. 190; *Ronan* v. *Midland Rail. Co.* (1884), 14 L. R. Ir. 157; *Lewis* v. *Great Western Rail. Co.* (1877), 3 Q. B. D. 195, at p. 209. For form of consignment note, see Encyclopædia of Forms, Vol. III., p. 171.

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negligence," the company remains liable in case of misconduct (*j*). Misconduct is not necessarily established by proving even culpable negligence (*k*).

Wilful misconduct is misconduct to which the will is a party, and is something opposed to accident or negligence (*l*). It is the intentional doing of something which the doer knows to be wrong, or which he does recklessly, not caring what the result may be (*m*).

Proof of misconduct.

The onus of proving misconduct is on the party alleging it, and misconduct will not be presumed from the mere fact of misdelivery (*n*), or of unreasonable delay (*o*), or of unexplained injury (*p*); but when goods are not delivered at all, and no explanation is given to the consignee, there is evidence of misconduct (*q*).

It is also misconduct for a servant of the company to deliver goods to a person who, as he knows, is not the consignee or his agent (*r*). If misconduct on the part of a company's servants is alleged, it must be shown that the servants actually responsible for the transaction were guilty of a wrongful act; for knowledge on the part of the company, or of other servants, that an act was likely to cause injury, is not sufficient to prove misconduct on the part of servants not having that knowledge (*s*).

Through booking.

Where a company, by through booking, contracts to carry over the system of another company, and is liable for injury only in case of misconduct by its own servants, if misconduct is proved

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(*j*) *Ronan* v. *Midland Rail. Co.* (1884), 14. L. R. Ir. 157.

(*k*) *Glenister* v. *Great Western Rail. Co.* (1873), 29 L. T. 423; *Forder* v. *Great Western Rail. Co.*, [1905] 2 K. B. 532.

(*l*) *Lewis* v. *Great Western Rail. Co.* (1877), 3 Q. B. D. 195.

(*m*) *Forder* v. *Great Western Rail. Co.*, *supra*.

(*n*) *Stevens* v. *Great Western Rail. Co.* (1885), 52 L. T. 324. See *Webb* v. *Great Western Rail. Co.* (1877), 26 W. R. 111.

(*o*) *Graham* v. *Belfast and Northern Counties Rail. Co.*, [1901] 2 I. R. 13.

(*p*) *Haynes* v. *Great Western Rail. Co.* (1879), 41 L. T. 436.

(*q*) *Curran* v. *Midland Great Western Rail. Co.*, [1896] 2 I. R. 183.

(*r*) *Hoare* v. *Great Western Rail. Co.* (1877), 37 L. T. 186. See *Goldsmith* v. *Great Eastern Rail. Co.* (1881), 44 L. T. 181.

(*s*) *Forder* v. *Great Western Rail. Co.*, *supra*. In this case the plaintiff, who was a fellmonger, delivered to the company a parcel of sheepskins to be carried from London to Winchester at owner's risk on the terms of a consignment note, which he signed, and which purported to relieve the company from liability except upon proof of wilful misconduct on the part of the company's servants. The skins were damaged in transit owing to their having been packed in a truck upon a bedding of wood chips which became entangled in the wool. The plaintiff made a complaint to the company as to this injurious mode of carrying skins, and received a letter from an officer of the company at Winchester which stated that he had "asked our people at Paddington not to use the kind of litter you object to in the future." Later, the plaintiff sent a similar parcel of skins from London to Winchester under a precisely similar contract. This parcel was damaged in exactly the same way as the first parcel, and the plaintiff brought this action for damages, alleging misconduct on the part of the company's servants in packing his goods in a manner which they had had notice was likely to injure them. It was held that the knowledge which is necessary to prove a charge of wilful misconduct must be knowledge on the part, not of some official of the company, nor even of its highest officials, but of the person who is engaged in, or intrusted with, the control of the transaction in which the mischief has arisen; and that, failing proof of any such knowledge on the part of the particular servants of the company who were in control of the actual packing of these goods in the trucks, the plaintiff could not recover.

on the part of some person, the onus is on the contracting company to show that the guilty person was not its servant (*t*).

SECT. 2. Statutory Modifications of Common Law Contract.

56. Loss of market may or may not be due to delay for which a company would be responsible at common law; and a company is not bound to accept perishable goods with notice that they are intended for a particular market (*a*). Hence a condition that a company will not be responsible for loss of market is reasonable (*b*).

Loss of market.

So is a condition, in a through booking contract, that the contracting company will not be responsible after handing the goods over to another company (*c*). In such contracts the contracting company is agent for each of the other companies over whose lines the goods pass to make reasonable conditions of which those companies are entitled to take advantage (*d*).

Conditions through booking contract.

Again, it is reasonable for a company to stipulate that in case of loss or injury claims should be made within a reasonable time (*e*), or that it will not be responsible for goods falsely described (*f*).

Prompt claims.

False description of goods.

57. A condition that a company will not be liable for the loss or detention of goods improperly packed is unreasonable (*g*). So is a condition that a company will not be responsible for imperfections or defects in its own stations or premises (*h*), or for defects or insufficiency of its vehicles (*i*). A condition that a company will not be liable for delay or detention however caused is unreasonable (*k*). So are conditions that a company will not be responsible for passengers' luggage unless it is fully and properly addressed with the name and destination of the passenger (*l*); that a company will not be accountable for correct selection of owners' goods (*m*); that a

Unreasonable conditions.

(*t*) *Mahony* v. *Waterford, Limerick, and Western Rail. Co.*, [1900] 2 I. R. 273

(*a*) *Lord* v. *Midland Rail. Co.* (1867), L. R. 2 C. P. 339; *Duckham Brothers* v. *Great Western Rail. Co.* (1899), 80 L. T. 774. Most railway companies are obliged to carry perishables by passenger train. See London and North Western Railway Company (Rates and Charges) Confirmation Act, 1891 (54 & 55 Vict. c. ccxxi.), and similar Acts relating to other companies.

(*b*) *Duckham Brothers* v. *Great Western Rail. Co.*, *supra*; *White* v. *Great Western Rail. Co.* (1857), 2 C. B. (N. S.) 7; *Beal* v. *South Devon Rail. Co.* (1864), 3 H. & C. 337; *Finlay* v. *North British Rail. Co.* (1870), 8 Macph. (Ct. of Sess.) 959. See also *Allday* v. *Great Western Rail. Co.* (1864), 5 B. & S. 903.

(*c*) *Aldridge* v. *Great Western Rail. Co.* (1864), 15 C. B. (N. S.) 582; *Mahony* v. *Waterford, Limerick, and Western Rail. Co.*, *supra*. But contracts relating to matters not on a company's own line may be binding although not signed nor easonable; see *Zunz* v. *South Eastern Rail. Co.* (1869), L. R. 4 Q. B. 539; and p. 28, *ante*.

(*d*) *Barratt* v. *Great Northern Rail. Co.* (1904), 20 T. L. R. 175.

(*e*) *Lewis* v. *Great Western Rail. Co.* (1860), 5 H. & N. 867; *Moore* v. *Great Northern Rail. Co.* (1882), 10 L. R. Ir. 95.

(*f*) *Lewis* v. *Great Western Rail. Co.*, *supra*.

(*g*) *Simons* v. *Great Western Rail. Co.* (1856), 18 C. B. 806; *Garton* v. *Bristol and Exeter Rail. Co.* (1861), 1 B. & S. 112.

(*h*) *Booth* v. *North Eastern Rail. Co.* (1867), L. R. 2 Exch. 173.

(*i*) *Gregory* v. *West Midland Rail. Co.* (1861), 2 H. & C. 944; *M'Manus* v. *Lancashire and Yorkshire Rail. Co.* (1859), 4 H. & N. 327.

(*k*) *Kirby* v. *Great Western Rail. Co.* (1868), 18 L. T. 658; *Duckham Brothers* v. *Great Western Rail. Co.* (1899), 80 L. T. 774.

(*l*) *Cutler* v. *North London Rail. Co.* (1887), 19 Q. B. D. 64.

(*m*) *M'Nally* v. *Lancashire and Yorkshire Rail. Co.* (1880), 8 L. R. Ir. 81.

SECT. 2. Statutory Modifications of Common Law Contract.

company will not be liable for injury unless the alleged injury is pointed out at the time of unloading (*n*); that a company will not be liable for goods carried as empties (*o*); that on a through contract for a sea and land journey a company will be under no liability for negligence of the crew on the sea part of the journey (*p*).

SECT. 3.—*Carriage of Animals.*

Limitation of liability of railway and canal companies.

58. Railway and canal companies are bound to afford facilities for the carriage of animals (*r*), but they are not bound to carry animals with all the liabilities of common carriers (*s*). They may make conditions for the carriage of animals; but conditions which limit their liability for negligence are null and void, unless they are contained in a writing, signed by the consignor or his agent, and unless they are just and reasonable (*t*).

Horses, cattle, sheep, and pigs.

59. A railway or canal company is not liable beyond the sum of £50 for loss of, or injury to, any horse, or beyond the sum of £15 per head for cattle, or £2 per head for sheep or pigs, unless the consignor or his agent at the time of delivery to the company declare them to be of higher value, in which case the company may demand a reasonable percentage upon the excess of the value so declared above the sums mentioned, such increased charge to be notified by a notice posted in the company's office or station (*a*).

Declaration of value.

60. The declaration is a condition precedent to the right of the company to demand an increased charge; therefore the knowledge of the value of a horse derived from some source other than a declaration made with the intention that it shall operate as such, does not justify the company in demanding such percentage (*b*).

Proof of value on loss or injury.

Where loss or injury occurs, proof of the value of any animal in all cases lies upon the person seeking compensation (*c*). But a person making a declaration of the value of an animal for the purpose of

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(*n*) *Lloyd* v. *Waterford and Limerick Rail. Co.* (1862), 15 I. C. L. R. 37.

(*o*) *Aldridge* v. *Great Western Rail Co.* (1864), 15 C. B. (N. S.) 582.

(*p*) *Moore* v. *Midland Rail. Co.* (1875), I. R. 9 C. L. 20. For other conditions which have been considered by the courts, see pp. 37 *et seq.*, *post*.

(*r*) Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), ss. 1, 2. As to the liability of carriers of animals, see *Blower* v. *Great Western Rail. Co.* (1872), L. R. 7 C. P. 655. They may be insurers, but are not liable for injury caused by inherent vice in the animal (*Kendall* v. *London and South Western Rail. Co.* (1872), L. R. 7 Exch. 373). See *Nugent* v. *Smith* (1876), 1 C. P. D. 423; see also p. 10, *ante*.

(*s*) *Dickson* v. *Great Northern Rail. Co.* (1886), 18 Q. B. D. 176. As to animals which a company do not profess to carry as common carriers, they are liable for negligence as bailees (*Richardson* v. *North Eastern Rail. Co.* (1872), L. R. 7 C. P. 75). For forms of contract for carriage of animals, see Encyclopædia of Forms, Vol. III., pp. 176, 183.

(*t*) Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), s. 7. These provisions apply to horses, cattle, sheep and pigs, and also to all animals usually carried by railway companies, such as dogs (*M'Manus* v. *Lancashire and Yorkshire Rail. Co.* (1859), 4 H. & N. 327; *Harrison* v. *London, Brighton, and South Coast Rail. Co.* (1862), 2 B. & S. 122; *Dickson* v. *Great Northern Rail. Co.*, *supra*).

(*a*) Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), s. 7.

(*b*) *Robinson* v. *London and South Western Rail. Co.* (1865), 19 C. B. (N. S.) 51.

(*c*) Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), s. 7.

fixing the rate of carriage is estopped from saying that the animal is worth more than the sum declared (*d*).

61. This limitation of liability applies to everything done by the company in "receiving" as well as in "forwarding and delivering"; and so where a valuable horse was injured by the negligence of the company on the company's premises before the servant in charge of the horse had time to make a declaration of value, it was held that the company was not liable for more than £50 (*e*). The limitation applies in respect of the animals mentioned in all cases where no declaration or special contract is made (*f*). How far limitation applies.

With regard to animals other than those mentioned, it has been held, in the case of dogs, that it is unreasonable for a railway company to make a condition not to be liable in any case beyond a certain sum, unless a higher value be declared and a percentage be paid on the excess of such value above that sum (*g*). It is open to a company, however, to prove that such a charge is, in any particular case, in fact reasonable (*h*). Other animals.

62. Railway companies are bound to supply trucks reasonably suitable and sufficient for such animals as they undertake to carry (*i*), and it is *primâ facie* an unreasonable condition that a company should not be responsible for the sufficiency of its vehicles (*k*). Trucks.

It is also the duty of a company to provide fit and proper places for loading and unloading, and a condition relieving it from liability for failing to do so is unreasonable (*l*). Loading places.

63. It may be a reasonable condition that a company shall not be liable for injury to horses and cattle by kicking or plunging from fear and restiveness, but this only applies to fear or restiveness caused by the ordinary incidents of carriage; if the fear or Injury by kicking and plunging.

(*d*) *McCance* v. *London and North Western Rail. Co.* (1864), 3 H. & C. 343; *Nevin* v. *Great Southern and Western Rail. Co.* (1891), 30 L. R. Ir. 125. See p. 17, *ante*.

(*e*) *Hodgman* v. *West Midland Rail. Co.* (1864), 5 B. & S. 173.

(*f*) *Hill* v. *London and North Western Rail. Co.* (1880), 42 L. T. 513. Where one of a pair of horses was killed, so that the value of the other was affected, it was held that the liability was limited to £50 (*Berry* v. *South Eastern and Chatham Railways Committee* (1902), 18 T. L. R. 159).

(*g*) *Ashendon* v. *London, Brighton, and South Coast Rail. Co.* (1880), 5 Ex. D. 190, in which case it was decided that on this point *Harrison* v. *London, Brighton, and South Coast Rail. Co.* (1862), 2 B. & S. 122, was overruled by *Peck* v. *North Staffordshire Rail. Co.* (1863), 10 H. L. Cas. 473; *Dickson* v. *Great Northern Rail. Co.* (1886), 18 Q. B. D. 176; *Williams* v. *Midland Rail. Co.*, [1908] 1 K. B. 252, C. A.

(*h*) *Williams* v. *Midland Rail. Co.*, *supra*, where a charge of 1½ per cent. on the value of the dog in question above £2, which is the usual charge upon all English railways, was held to be reasonable; see note (*e*), p. 33, *ante*.

(*i*) *Blower* v. *Great Western Rail. Co.* (1872), L. R. 7 C. P. 655; *M'Manus* v. *Lancashire and Yorkshire Rail. Co.* (1859), 4 H. & N. 327; *Combe* v. *London and South Western Rail. Co.* (1875), 31 L. T. 613. See *Amies* v. *Stevens* (1718), 1 Stra. 128.

(*k*) *M'Manus* v. *Lancashire and Yorkshire Rail. Co.*, *supra*. But where owners choose to take the risk of sending horses in vehicles not intended for that purpose, and in return for taking such risk get the advantage of a cheap rate, there is no implied warranty that the vehicles are fit for the carriage of horses, and the condition of the contract is reasonable (*Nevin* v. *Great Southern and Western Rail. Co.*, *supra*).

(*l*) *Booth* v. *North Eastern Rail. Co.* (1867), L. R. 2 Exch. 173.

SECT. 3. Carriage of Animals.

restiveness is induced by the negligence of the company, it is not protected by such a condition (*m*).

Liability only in case of negligence.

Where cattle are carried at a lower rate, on condition that the company shall be liable for injury only in the case of negligence, this is a reasonable condition; and as in such case the company is not carrying as a common carrier, the onus of the proof of negligence is upon the person who charges the negligence (*n*). But where such animal is found injured in a wagon and it is proved that the mode by which the animal was carried was not a proper one, there is evidence that its injuries were caused by negligence (*o*).

Misconduct.

Where a fair alternative is offered to the consignor, it may be a reasonable condition that a company shall only be responsible for loss of, or injury to, cattle in case of wilful misconduct (*p*).

Delay.

64. It is *primâ facie* an unreasonable condition that a company shall not be responsible for injury from detention or delay in the delivery of cattle (*q*); and though such a condition may be reasonable where there is a fair alternative offered, a deliberate and unjustifiable refusal to deliver cattle is not detention within that condition (*r*).

Feeding in transit.

It may become the duty of a railway company to feed cattle in transit where there is delay, for loss of condition is "injury" (*s*). And, apart from its statutory obligations (*t*), where it is the custom of a company to feed animals in transit, it may be liable for any injury to the animals through leaving them unfed (*a*).

Delivery at end of transit.

65. It is the duty of the consignee of an animal to be ready to receive the animal at the end of the transit (*b*); if this duty is not performed the carrier is entitled to incur reasonable expense in

(*m*) *Gill* v. *Manchester, Sheffield, and Lincolnshire Rail. Co.* (1873), L. R. 8 Q. B. 186; *Moore* v. *Great Northern Rail. Co.* (1882), 10 L. R. Ir. 95.

(*n*) *Harris* v. *Midland Rail. Co.* (1876), 25 W. R. 63; *Smith* v. *Midland Rail. Co.* (1887), 57 L. T. 813.

(*o*) *Pickering* v. *North Eastern Rail. Co.* (1887), 4 T. L. R. 7. A horse was put into a horse box which was forwarded attached to a mineral train. At the end of the transit the horse was found much injured. It was proved that there were no proper couplings to the trucks composing this train, and that the train was subject to much shunting of a violent description. The court held that the horse had not been carried in a reasonable mode, and that there was evidence of negligence on the part of the company. But the mere fact that a horse is found in a horse box injured is no evidence of negligence on the part of the railway company (*Russell* v. *London and South Western Rail. Co.* (1908), 24 T. L. R. 548).

(*p*) *Great Western Rail. Co.* v. *McCarthy* (1887), 12 App. Cas. 218.

(*q*) *Allday* v. *Great Western Rail. Co.* (1864), 5 B. & S. 903; *Kirby* v. *Great Western Rail. Co.* (1868), 18 L. T. 658. But a person bringing cattle to a railway station is bound to inquire as to the times of running cattle trains, and cannot by so omitting to inquire put upon the company the obligation to forward cattle out of the ordinary course of their arrangements. Such arrangements cannot be left to a jury as evidence of unreasonable delay (*Tobin* v. *London and North Western Rail. Co.*, [1895] 2 I. R. 22).

(*r*) *Gordon* v. *Great Western Rail. Co.* (1881), 8 Q. B. D. 44.

(*s*) *Allday* v. *Great Western Rail. Co.*, *supra*. But where the delay was due to such a snowstorm as came under the description "act of God," the company were held not to be liable for such injury (*Briddon* v. *Great Western Rail. Co.* (1858), 28 L. J. (EX.) 51). See p. 9, *ante*.

(*t*) See p. 39, *post*.

(*a*) *Curran* v. *Midland Great Western Rail. Co.*, [1896] 2 I. R. 183.

(*b*) *Wise* v. *Great Western Rail. Co.* (1856), 1 H. & N. 63; *Great Northern Rail. Co.* v. *Swaffield* (1874), L. R. 9 Ex

having the animal cared for, and to recover this expense from the owner (*c*).

Where a railway company is ready to deliver cattle at the end of a transit, and the consignee takes possession of them, but does not remove them from the company's premises, the company is no longer responsible as a carrier (*d*).

A condition that the company shall not be responsible for the correct selection of the owner's cattle from other cattle is unreasonable (*e*).

Over-crowding.

66. Where overcrowding of cattle in a truck takes place at the request of the owner, a condition that a railway company shall not be liable for loss due to overcrowding is reasonable (*f*).

Means of securing animal.

Where an animal is delivered to a carrier to be carried, and the carrier is provided by the owner with means of securing it, the carrier cannot be convicted of negligence from the fact that the animal escaped through the insufficiency of those means for the purpose (*g*).

If, however, the nature of the means of securing the animal and their insufficiency can be seen by the carrier when the animal is delivered, the case may be different (*h*).

Powers of Board of Agriculture and Fisheries.

67. The Board of Agriculture and Fisheries have power (*i*) to make orders for prohibiting or regulating the movement of animals into, within, or out of an area infected with disease (*k*); for prohibiting or regulating the carrying of diseased animals; for regulating the cleansing and disinfecting of vehicles used for carrying animals; for protecting animals from unnecessary suffering during transit; for securing a proper supply of water and food to animals during detention on transit; and for other purposes (*l*).

Supply of food and water.

Every railway company is bound to provide, to the satisfaction of the Board, water and food, or either of them, at such stations as the Board directs. Such water or food must be supplied to any animal

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(*c*) *E.g.*, where a horse arrived by train at a station where there was no proper accommodation for horses, and no one was present to take delivery of the horse, it was held that the stationmaster was justified in sending the horse to a livery stable, and that the railway company could recover the cost from the owner (*Great Northern Rail. Co.* v. *Swaffield* (1874), L. R. 9 Exch. 132).

(*d*) *Shepherd* v. *Bristol and Exeter Rail. Co* (1868), L. R. 3 Exch. 189.

(*e*) *M'Nally* v. *Lancashire and Yorkshire Rail. Co.* (1980), 8 L. R. Ir. 81.

(*f*) *Sheridan* v. *Midland Great Western Rail. Co.* (1888), 24 L. R. Ir. 146.

(*g*) *Richardson* v. *North Eastern Rail. Co.* (1872) L. R. 7 C. P. 75. In this case a dog was sent by railway which when delivered to the company had on a collar with a strap attached to it. In the course of the transit it became necessary to fasten the dog up at a station, and it was fastened by the strap supplied by the owner. The dog slipped its head from the collar, got on the line, and was killed. It was held that, as there was nothing to show the company that the means of fastening the dog supplied by the owner was insufficient, there was no evidence of negligence on the part of the company.

(*h*) *Stuart* v. *Crawley* (1818), 2 Stark. 323.

(*i*) Diseases of Animals Act, 1894 (57 & 58 Vict. c. 57), s. 22. See title ANIMALS, Vol. I., pp. 421 *et seq.*

(*k*) A railway company may be convicted of being a party to moving cattle into an infected district if it takes any part in carrying the animals to the forbidden area; see *Midland Rail. Co.* v. *Freeman* (1884), 12 Q. B. D. 629.

(*l*) The Board has made such orders. See title ANIMALS, Vol. I., pp. 421 *et seq.*

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which is being carried by the company on the request of the consignor or of the person in charge of such animal. The consignor or person in charge is guilty of an offence if such request is not made and an animal in consequence goes without water for twenty-four consecutive hours; which period the Board may by order shorten to twelve hours in respect of any particular kind of animals.

Charges for food and water supplied.

The company supplying water or food may make such reasonable charges therefor as the Board by order approves; and the amount of such charges is a debt from the consignor and from the consignee to the company and recoverable by action from either. The company also has a lien for such charges upon the animal in respect of which they become due, and also upon any other animal at any time consigned by or to the same consignor or consignee to be carried by the company (*m*).

SECT. 4.—*Passengers' Luggage.*

Duty to carry without extra charge.

68. Railway companies are bound to afford reasonable facilities for the carriage of the luggage of their passengers (*n*). Almost all railway companies are by their private Acts obliged to carry without additional charge the "ordinary" or "personal" luggage of their passengers up to a certain weight (*o*). But a company may run an excursion train at low fares on condition that passengers take no luggage, and are entitled to enforce that condition (*p*). A man and his wife, travelling together, are entitled to take double the weight of luggage allowed to a single person (*q*).

Passengers' luggage is not carried gratuitously but for reward, the fare paid by the passenger being the consideration for the carriage of himself together with the permitted quantity of such goods as he is entitled to have carried as luggage (*r*).

What is passenger's luggage.

69. Ordinary or personal luggage includes articles of apparel, and such things as the passenger takes with him for his own personal use and convenience, according to the habits of the class of life to which he belongs (*s*). Goods do not come under this description unless they are for the passenger's personal use, and are of such kind as persons usually take with them in a package for use while they are away from home (*t*). Thus, articles carried for the

(*m*) Diseases of Animals Act, 1894 (57 & 58 Vict. c. 57), s. 23.

(*n*) Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), ss. 1, 2.

(*o*) *E.g.*, the Great Western Railway Act, 1847 (10 & 11 Vict. c. xci.), s. 51; the Great Northern Railway Act, 1850 (13 & 14 Vict. c. lxi.), s. 17. A company has no power to make a bye-law requiring luggage to be booked and paid for as a condition of responsibility therefor (*Williams* v. *Great Western Rail. Co.* (1854), 10 Exch. 15).

(*p*) *Rumsey* v. *North Eastern Rail. Co.* (1863), 8 L. T. 666.

(*q*) *Great Northern Rail. Co.* v. *Shepherd* (1852), 8 Exch. 30.

(*r*) See *Cohen* v. *South Eastern Rail. Co.* (1877), 2 Ex. D. 253, *per* MELLISH, L.J., at p. 258; *Great Western Rail. Co.* v. *Goodman* (1852), 12 C. B. 313; *Casswell* v. *Cheshire Lines Committee*, [1907] 2 K. B. 499, *per* A. T. LAWRENCE, J., at p. 506.

(*s*) *Macrow* v. *Great Western Rail. Co.* (1871), L. R. 6 Q. B. 612. A company is not justified in refusing to carry such things because it disapproves of the mode in which they are packed—as where articles of clothing are made up into a package by being wrapped in a shawl (*Munster* v. *South Eastern Rail. Co.* (1858), 4 C. B. (N. S.) 676). See p. 6, *ante*.

(*t*) *Britten* v. *Great Northern Rail. Co.*, [1899] 1 Q. B. 243.

purposes of trade or business are not passengers' luggage (*a*); neither are household goods, intended for the passenger's use, not in relation to the journey, but as a permanent part of his house furniture (*b*); neither is a child's large rocking horse (*c*); nor a bicycle (*d*); nor a bath-chair (*e*); nor an artist's sketches (*f*); nor deeds and banknotes in the bag of a solicitor travelling to attend the hearing of a law suit (*g*).

Liability for goods which are not properly luggage.

It is only goods which come properly under the description passengers' luggage that a passenger is entitled to have carried without extra charge; therefore where a passenger takes with him other goods, *e.g.*, merchandise, as if they were personal luggage, the railway company does not contract to carry such goods, and if they are lost or damaged the company is not liable (*h*). But if a company allows a passenger to take as luggage what obviously is not luggage, or what the company knows is not luggage, it cannot be heard afterwards to deny that it is luggage, and it is liable for its safety (*i*).

With regard to personal articles in the exclusive custody of a passenger, such as the watch in his pocket, the carrier's liability is measured by his liability in respect of the passenger's person, and not by his liability in respect of goods (*j*).

Servant travelling with luggage of his master or himself.

70. A railway company is only bound to carry without extra charge the luggage of the passenger himself; therefore when a servant is a passenger, and takes a portmanteau containing his master's clothes, the master not being a passenger, the company has not contracted to carry this luggage, and is not liable to the master as carriers for its safety (*k*). But a servant travelling along with his master has a right of action against the railway company for the loss of his personal luggage, notwithstanding that it was the master who paid for the tickets for both (*l*).

Right of action in tort.

And independently of contract, the owner of luggage which is on a company's premises to be carried or is being carried may have a right of action in tort against the company, if the luggage is injured by the wrongful act of the company (*m*).

(*a*) *Great Northern Rail. Co.* v. *Shepherd* (1852), 8 Exch. 30; *Cahill* v. *London and North Western Rail. Co.* (1862), 13 C. B. (N. S.) 818; *Gormully and Jeffrey Manufacturing Co.* v. *Midland Rail. Co.* (1898), 14 T. L. R. 84.

(*b*) *Macrow* v. *Great Western Rail. Co.* (1871), L. R. 6 Q. B. 612. The goods in this case consisted of sheets, blankets and quilts for bedding.

(*c*) *Hudston* v. *Midland Rail. Co.* (1869), L. R. 4 Q. B. 366.

(*d*) *Britten* v. *Great Northern Rail. Co.*, [1899] 1 Q. B. 243.

(*e*) *Cusack* v. *London and North Western Rail. Co.* (1891), 7 T. L. R. 452.

(*f*) *Mytton* v. *Midland Rail. Co.* (1859), 28 L. J. (EX.) 385.

(*g*) *Phelps* v. *London and North Western Rail. Co.* (1865), 19 C. B. (N. S.) 321.

(*h*) *Belfast and Ballymena Rail. Cos.* v. *Keys* (1861), 9 H. L. Cas. 556; *Cahill* v. *London and North Western Rail. Co.*, *supra*; *Great Northern Rail. Co.* v. *Shepherd*, *supra*.

(*i*) *Cahill* v. *London and North Western Rail. Co.*, *supra*; *Great Northern Rail. Co.* v. *Shepherd*, *supra*; *Wilkinson* v. *Lancashire and Yorkshire Rail. Co.*, [1907] 2 K. B. 222. See note (*c*), p. 28, *ante*.

(*j*) *Smitton* v. *Orient Steam Navigation Co., Ltd.* (1907), 96 L. T. 848.

(*k*) *Becher* v. *Great Eastern Rail. Co.* (1870), L. R. 5 Q. B. 241.

(*l*) *Marshall* v. *York, Newcastle, and Berwick Rail. Co.* (1851), 11 C. B. 655.

(*m*) *Meux* v. *Great Eastern Rail. Co.*, [1895] 2 Q. B. 387. In this case the plaintiff's servant took a ticket for a journey on the defendants' railway and took with him a portmanteau containing his livery, which was the property of the plaintiff.

SECT. 4. Passengers' Luggage.

If goods are taken as luggage which the passenger is not entitled to have carried without extra charge, the company may demand payment for the carriage of such goods, and has a lien upon them for such payment (*n*).

Luggage kept in passenger's control.

71. Railway companies carry passengers' luggage with the liability of common carriers (*o*). They are not necessarily relieved of this liability by the fact that the luggage is placed in the compartment along with the passenger; but in such circumstances, as the passenger takes the control partly out of the hands of the company, the liability of the company is modified, so that it is not responsible for loss due to this interference by the passenger, without negligence on its part (*p*).

Commencement of liability.

72. The liability of a railway company as a common carrier for the luggage of passengers begins as soon as a servant of the company receives the luggage; but it is outside the scope of a porter's authority to receive luggage for transit, except within a reasonable time of the starting of the train by which the passenger means to travel (*q*). It is part of the duty of a railway porter to take charge of luggage while the passenger goes to the booking office to take his ticket, and the company is liable for luggage so intrusted to a porter, in spite of notices that it will not be liable for luggage left with porters (*r*). But where a person, not intending to travel

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The portmanteau was negligently let fall upon the line by a porter and was run over by a train and its contents destroyed. In an action by the plaintiff for the value of the property destroyed, it was held that, although there was no contract with the plaintiff, the defendants were liable for the act of their servant.

(*n*) *Rumsey* v. *North Eastern Rail. Co.* (1863), 8 L. T. 666.

(*o*) *Richards* v. *London, Brighton, and South Coast Rail. Co.* (1849), 7 C. B. 839; *Munster* v. *South Eastern Rail. Co.* (1858), 4 C. B. (N. S.) 676; *Le Conteur* v. *London and South Western Rail. Co.* (1865), L. R. 1 Q. B. 54; *Agrell* v. *London and North Western Rail. Co.* (1876), 34 L. T. 134, n.; *Cohen* v. *South Eastern Rail. Co.* (1877), 2 Ex. D. 253; *Great Western Rail. Co.* v. *Bunch* (1888), 13 App. Cas. 31.

(*p*) *Richards* v. *London, Brighton, and South Coast Rail. Co., supra; Le Conteur* v. *London and South Western Rail. Co., supra; Talley* v. *Great Western Rail. Co.* (1870), L. R. 6 C. P. 44. In the last case the plaintiff's portmanteau had been by his request placed under the seat of the carriage in which he travelled. The train stopped for ten minutes at a junction, and the plaintiff left the carriage and spent the time in the refreshment room. On his return to the train, he got into another compartment, leaving his portmanteau with strangers, who broke it open and stole some of the contents. The jury found that there had been negligence on the part of the plaintiff, but no negligence on the part of the company, and the company was held not liable for the loss. See also *Great Western Rail. Co.* v. *Bunch, supra, per* Lord HALSBURY, L.C., at p. 42, and *per* Lord WATSON, at p. 47.

(*q*) *Great Western Rail. Co.* v. *Bunch, supra.* In this case a bag was handed to a porter with other luggage forty minutes before a train was timed to start, the porter being told to put the bag in the carriage and the other luggage in the van. The passenger then went to get a ticket, and on returning ten minutes later to the platform, failed to find either porter or bag, though the other luggage had been put in the van. The bag was never seen again; and in an action for its value, the county court judge, in giving judgment for the plaintiff, found that the luggage had not in the circumstances been delivered to the company an unreasonable time before the starting of the train, and that there had been negligence on the part of the porter. The House of Lords held that there was evidence to justify the finding of the county court judge.

(*r*) *Great Western Rail. Co.* v. *Bunch, supra; Lovell* v. *London, Chatham, and Dover Rail. Co.* (1876), 34 L. T. 127; *Leach* v. *South Eastern Rail. Co.* (1876), 34 L. T. 134.

immediately, hands his luggage to a porter and leaves the station, the company is not liable if the luggage is lost (*s*).

Duration of liability.

The liability of a railway company as a common carrier for passengers' luggage extends to the period when the luggage is being taken from or to any vehicle by which the passenger arrives at, or leaves, a station of departure or arrival (*t*). If, at the end of a journey, luggage be handed to a porter to put on a cab, the company is liable for its safety until the porter gives it into the passenger's custody at the cab (*a*). At the end of a journey it is the duty of the company to have luggage, carried in the van, ready on the platform for delivery to the passenger; and the liability of the company for its safety does not come to an end until the passenger has had a reasonable time in which to take possession of it (*b*). If a passenger fails to take possession of his luggage within a reasonable time of arrival, the company is no longer liable as a carrier (*c*); and a porter agreeing to take charge of luggage after such time is acting outside the scope of his authority and does not bind the company (*d*).

Special contract as to luggage.

73. The provisions limiting the liability of carriers for the loss of valuables apply to the luggage of passengers which is carried without additional charge (*e*). Such luggage is also within the provisions as to the limitation of liability by special contract (*f*), so that a company is liable for negligence, unless it is protected by a contract signed by the passenger, the conditions of which are reasonable (*g*). A condition that a company shall not be liable for the loss of luggage unless it is fully and properly addressed with the name and destination of the owner is unreasonable and void (*h*). But where a company gives a through ticket on condition that the contracting company will not be responsible for the loss of luggage unless such loss occurs on its own railway, such condition is

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(*s*) *Welch* v. *London and North Western Rail. Co.* (1886), 34 W. R. 166. As to the liability of railway companies for luggage deposited in cloak-rooms, see title BAILMENT, Vol. I., p. 549.

(*t*) *Agrell* v. *London and North Western Rail. Co.* (1876), 34 L. T. 134, *per* POLLOCK, B., at p. 135.

(*a*) *Butcher* v. *London and South Western Rail. Co.* (1855), 16 C. B. 13.

(*b*) *Richards* v. *London, Brighton, and South Coast Rail. Co.* (1849), 7 C. B. 839; *Patscheider* v. *Great Western Rail. Co.* (1878), 3 Ex. D. 153.

(*c*) *Firth* v. *North Eastern Rail. Co.* (1888), 36 W. R. 467. In this case the plaintiff drove off from the station of arrival with another person's portmanteau which he mistook for his own. Having arrived at his house, a mile distant, he discovered his mistake, and drove back to the station. His own portmanteau then had disappeared and was never found. In an action to recover its value, it was held that the company was not liable.

(*d*) *Hodkinson* v. *London and North Western Rail. Co.* (1884), 14 Q. B. D. 228.

(*e*) Carriers Act, 1830 (11 Geo. 4 & 1 Will. 4, c. 68), s. 1; see pp. 21 *et seq.*, *ante*. See *Flowers* v. *South Eastern Rail. Co.* (1867), 16 L. T. 329; *Dyke* v. *South Eastern and Chatham Railways Committee* (1901), 17 T. L. R. 651; *Casswell* v. *Cheshire Lines Committee*, [1907] 2 K. B. 499.

(*f*) Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), s. 7; see p. 28, *ante*.

(*g*) *Cohen* v. *South Eastern Rail. Co.* (1877), 2 Ex. D. 253; *Cutler* v. *North London Rail Co.* (1887), 19 Q. B. D. 64; *Wilkinson* v. *Lancashire and Yorkshire Rail. Co.*, [1907] 2 K. B. 222.

(*h*) *Cutler* v. *North London Rail. Co.*, *supra*.

SECT. 4. Passengers' Luggage.

good if brought to the knowledge of the passenger, for the restriction as to reasonableness of conditions applies only to traffic upon the contracting company's own railway (*i*). But notwithstanding a condition of this sort, where luggage is lost on a through journey, the contracting company is liable unless it can prove that the luggage was in fact handed over to another company (*j*). Where such proof can be given the second company is responsible for loss or injury due to its negligence irrespective of contract (*k*).

Part III.—Carriers of Persons.

SECT. 1.—*Degree of Care necessary.*

General duty.

74. Carriers of passengers are not insurers of the safety of the persons whom they carry, neither do they warrant the soundness or sufficiency of their vehicles. Their undertaking is to take all due care, and to carry safely as far as reasonable care and forethought can attain that end (*l*).

Degree of care required.

75. They are responsible for any negligence on the part of their servants (*m*), and railway companies are, in general, responsible for the negligence, not only of their own servants, but of all persons connected with the carrying, the signalling, and the maintenance of the road on which they run their trains (*n*). The obligation upon carriers of persons is to use all due, proper, and reasonable care, and the care required is a very high degree of care (*o*).

Dangers beyond control of carriers.

76. They are bound, so far as such high degree of care can accomplish it, to see that everything under their own control is complete and in proper order; but they are not liable for the acts of persons over whom they have no control (*p*). If, however, there is any

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(*i*) *Zunz* v. *South Eastern Rail. Co.* (1869), L. R. 4 Q. B. 539.

(*j*) *Kent* v. *Midland Rail. Co.* (1874), L. R. 10 Q. B. 1.

(*k*) *Hooper* v. *London and North Western Rail. Co.* (1880), 43 L. T. 570.

(*l*) *Christie* v. *Griggs* (1809), 2 Camp. 79; *Harris* v. *Costar* (1825), 1 C. & P. 636; *Crofts* v. *Waterhouse* (1825), 3 Bing. 319; *Aston* v. *Heaven* (1796), 2 Esp. 533; *Pym* v. *Great Northern Rail. Co.* (1861), 2 F. & F. 619; *Readhead* v. *Midland Rail. Co.* (1869), L. R. 4 Q. B. 379; *Gee* v. *Metropolitan Rail. Co.* (1873), L. R. 8 Q. B. 161; *East India Rail. Co.* v. *Kalidas Mukerjee*, [1901] A. C. 396.

(*m*) *Dudley* v. *Smith* (1808), 1 Camp. 167.

(*n*) *Daniel* v. *Metropolitan Rail. Co.* (*Directors*) (1871), L. R. 5 H. L. 45; *Wright* v. *Midland Rail. Co.* (1873), L. R. 8 Exch. 137.

(*o*) *Readhead* v. *Midland Rail. Co.*, *supra*.

(*p*) *Daniel* v. *Metropolitan Rail. Co.* (*Directors*), *supra*. In this case the Corporation of London were carrying out works over the tunnel in which the defendant company's trains ran. The company had no control whatever over the persons engaged on these works. The servants of the contractors allowed an iron girder to fall upon a passing train and to injure the plaintiff, and it was held that the company were not liable. In *Wright* v. *Midland Rail. Co.* (1873), L. R. 8 Exch. 137, the London and North Western Railway Company had powers of running over a short portion of the defendants' railway. At the junction the signals and points were under the control of the defendants. The signals were in favour of a train of the defendants in which the plaintiff was a passenger, and against a train of the North Western Company. In disobedience to the signals, the North

reasonable ground for apprehending danger from any external cause, carriers of passengers are bound to take steps to guard against it (*q*); and it may be negligence in them not to warn passengers against dangers of the road, which they should know of, but which are not necessarily obvious to the passengers (*r*).

Duty as to vehicles.

77. Carriers of passengers are answerable for the soundness and sufficiency of their vehicles, and are liable for any defect which careful and reasonable examination would reveal (*s*). Periodical testing and examination is a duty (*t*), and the fact that a vehicle breaks down is *primâ facie* evidence of negligence (*u*). But if they have taken all reasonable care, and used the best precautions in known practical use for securing safety, the carriers are not liable for accidents due to latent defects in their vehicles which such precautions would not discover (*b*). Where, however, such latent defects, though undiscoverable when the defective part is new, may be discovered later by proper examination when the part is worn, it is negligence to omit such examination (*c*).

When a railway company receives trucks from another company, or from traders, to be forwarded on its railway, it is not obliged to make so minute an examination of such trucks as it is of its own; but a reasonable examination should be made, according to opportunity and circumstances; and the existence of a defect which such examination would not reveal is no evidence of negligence (*d*).

Conduct in emergency.

78. Where an emergency arises, it may be negligence on the part of a carrier not to act with the best judgment in the circumstances (*e*).

Western Company's train ran on to the defendants' line and collided with the defendants' train, the plaintiff being injured in the collision. In an action for damages the jury found that there had been no negligence on the defendants' part, and the plaintiff was held not entitled to recover. See also *East India Rail. Co.* v. *Kalidas Mukerjee*, [1901] A. C. 396; *Latch* v. *Rumner Rail. Co.* (1858), 27 L. J. (EX.) 155.

(*q*) *Daniel* v. *Metropolitan Rail. Co.* (*Directors*) (1871), L. R. 5 H. L. 45; *Wyborn* v. *Great Northern Rail. Co.* (1858), 1 F. & F. 162.

(*r*) *Dudley* v. *Smith* (1808), 1 Camp. 167.

(*s*) *Christie* v. *Griggs* (1809), 2 Camp. 79; *Sharp* v. *Grey* (1833), 9 Bing. 457; *Bremner* v. *Williams* (1824), 1 C. & P. 414; *Mayor* v. *Humphries* (1824), 1 C. & P. 251; *Curtis* v. *Drinkwater* (1831), 2 B. & Ad. 169; *Hyman* v. *Nye* (1881), 6 Q. B. D. 685.

(*t*) *Bremner* v. *Williams*, *supra*; *Jones* v. *Page* (1867), 15 L. T. 619.

(*u*) *Christie* v. *Griggs*, *supra*.

(*b*) In *Readhead* v. *Midland Rail. Co.* (1869), L. R. 4 Q. B. 379, the plaintiff was injured in an accident to a train of the defendants caused by the breaking of the tyre of a wheel. Evidence was given that the break was caused by a latent defect in the tyre, which was not due to negligence in manufacture, and which could not have been discovered by any ordinary and reasonable test. The jury accordingly found that there was no negligence on the defendants' part, and it was held that the defendants were not liable. See also *Ford* v. *London and South Western Rail. Co.* (1862), 2 F. & F. 730; *Stokes* v. *Eastern Counties Rail. Co.* (1860), 2 F. & F. 691. The onus is upon the carrier in case of an alleged latent defect to show that all proper care and skill was used (*Holton and Wife* v. *London and South Western Rail. Co.* (1885), 1 Cab. & El. 542).

(*c*) *Manser* v. *Eastern Counties Rail. Co.* (1861), 3 L. T. 585.

(*d*) *Richardson* v. *Great Eastern Rail. Co.* (1876), 1 C. P. D. 342

(*e*) *Jackson* v. *Tollett* (1817), 2 Stark. 37.

SECT. 1. Degree of Care necessary.

Where a passenger is put in peril by the negligence of the carrier, it may be reasonable for him to leap from the vehicle; and in such case the carrier will be liable for injuries received by so leaping, though in fact the passenger would not have been injured if he had kept his seat (*f*). But when there is no real danger, and the passenger jumps out and is injured, under the influence of unreasonable fright, the carrier is not liable (*g*).

Passenger carrying article to common danger.

79. It is negligence on the part of a railway company to allow a passenger to take with him in the carriage any article which is likely to injure other passengers; but when such thing is contained in a parcel, and there is nothing in the appearance of the parcel to excite any reasonable suspicion as to its contents, the company is not liable for any injury done (*h*).

Persons to whom company may be liable for negligence.

80. The duty of a railway company to use a high degree of care towards its passengers does not depend on any contract with the passenger; it is bound not to injure by negligence any person lawfully on its railway, whether such person has made a contract with it or not (*i*).

An action for damages for personal injuries by negligence is an action of tort, whether the negligence consists of misfeasance or nonfeasance (*k*). Hence a railway company is liable for personal injuries, caused by negligence, to a person travelling with a free pass (*l*), to a Post Office servant travelling with the mails (*m*), and to a child carried free (*n*). It is also liable for negligence to

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(*f*) *Jones* v. *Boyce* (1816), 1 Stark. 493.

(*g*) *Kearney* v. *Great Southern and Western Rail. Co.* (1886), 18 L. R. Ir. 303.

(*h*) *East India Rail. Co.* v. *Kalidas Mukerjee*, [1901] A. C. 396. In this case a passenger took into a smoking carriage a parcel containing fireworks of a dangerous nature. In the course of the journey an explosion occurred, which no one in the carriage was left alive to explain. It was held that, as there was no evidence that there was anything in the appearance of the parcel to call the attention of the company's servants to its contents, and no evidence that any servant of the company knew or had any opportunity of knowing the nature of such contents, there was no evidence of negligence on the company's part.

(*i*) *Collett* v. *London and North Western Rail. Co.* (1851), 16 Q. B. 984; *Austin* v. *Great Western Rail. Co.* (1867), L. R. 2 Q. B. 442; *Foulkes* v. *Metropolitan District Rail. Co.* (1880), 5 C. P. D. 157; *Taylor* v. *Manchester, Sheffield, and Lincolnshire Rail. Co.*, [1895] 1 Q. B. 134. See title NEGLIGENCE.

(*k*) *Kelly* v. *Metropolitan Rail. Co.*, [1895] 1 Q. B. 944; *Taylor* v. *Manchester, Sheffield, and Lincolnshire Rail. Co.*, *supra*.

(*l*) *Great Northern Rail. Co.* v. *Harrison* (1854), 10 Exch. 376.

(*m*) *Collett* v. *London and North Western Rail. Co.*, *supra*.

(*n*) *Austin* v. *Great Northern Rail. Co.*, *supra*. In this case the child injured was in fact above three years of age, the age below which children are allowed to travel without payment; but the company made no inquiries, and the jury found that the mother, who took the child by train, had no intention to defraud.

Very young children are accepted as passengers by railway companies subject to the condition that they are properly looked after by some adult in charge of them. Hence such a child is so identified with such adult that the child cannot recover for personal injuries against the company, if the accident was caused by contributory negligence on the part of the adult sufficient to disentitle him to recover damages (*Waite* v. *North Eastern Rail. Co.* (1859), E. B. & E. 728). A person is not, however, identified with the driver of a train or a carriage in which he is riding so as to be disentitled to recover

persons, not intending to travel, who come to its stations on business (*o*), or merely to accompany friends who are about to travel (*p*). But where a person goes to a part of the premises of a railway company to which the company has no reason to expect him to go, and without any express or implied invitation, the company is not liable to such person if he is injured by negligence (*q*); and if a person is wrongfully in a company's train, or upon a company's premises, it seems that the company owes him no duty, and is not responsible if he is injured (*r*).

Proof of negligence.

81. Negligence must be proved by the party who alleges negligence; but where proof is given that something has happened on a railway, which as a rule would not have happened if proper care and skill had been used, *res ipsa loquitur*, and there is evidence of negligence (*s*). Thus the mere fact of two trains of the same company coming into collision may be evidence of negligence (*t*), as may the fact of a train leaving the rails (*a*). In such cases the happening of the accident is not conclusive, but only *primâ facie* proof of negligence (*b*), and the onus is on the company to rebut the presumption which arises (*c*). The presumption is rebutted by showing that the accident was due to the wilful act of a stranger (*d*), or to a cause which was beyond the control of the company, and which it could not have been reasonably expected to foresee (*e*). If, however, the accident is one which may reasonably have arisen from a cause for which the railway company is not responsible, the onus of proof is on the plaintiff (*f*).

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damages against another party where a collision occurs due partly to contributory negligence on the part of such driver (*Mills* v. *Armstrong* (1888), 13 App. Cas. 1, overruling *Armstrong* v. *Lancashire and Yorkshire Rail. Co.* (1867), L. R. 10 Exch. 47).

(*o*) *Holmes* v. *North Eastern Rail. Co.* (1871), L. R. 6 Exch. 121, Ex. Ch.

(*p*) *Thatcher* v. *Great Western Rail. Co.* (1893), 10 T. L. R. 13. In *Watkins* v. *Great Western Rail. Co.* (1877), 37 L. T. 193, it was held that a person going to a railway station to see a friend off is not a bare licensee, but is in the position of a person on lawful business and invited to go upon the premises.

(*q*) *Griffiths* v. *London and North Western Rail. Co.* (1866), 14 L. T. 797. See also *Batchelor* v. *Fortescue* (1883), 11 Q. B. D. 474.

(*r*) See *Austin* v. *Great Western Rail. Co.* (1867), L. R. 2 Q. B. 442.

(*s*) *Gee* v. *Metropolitan Rail. Co.* (1873), L. R. 8 Q. B. 161; *Kearney* v. *London, Brighton, and South Coast Rail. Co.* (1871), L. R. 6 Q. B. 759. See title NEGLIGENCE.

(*t*) *Skinner* v. *London, Brighton, and South Coast Rail. Co.* (1850), 5 Exch. 787; *Ayles* v. *South Eastern Rail. Co.* (1868), L. R. 3 Exch. 146.

(*a*) *Dawson* v. *Manchester, Sheffield, and Lincolnshire Rail. Co.* (1862), 5 L. T. 682.

(*b*) *Bird* v. *Great Northern Rail. Co.* (1858), 28 L. J. (EX.) 3.

(*c*) *Carpue* v. *London and Brighton Rail. Co.* (1844), 13 L. J. (Q. B.) 133; *Flannery* v. *Waterford and Limerick Rail. Co.* (1877), I. R. 11 C. L. 30; *Angus* v. *London, Tilbury, and Southend Rail. Co.* (1906), 22 T. L. R. 222, C. A.

(*d*) *Latch* v. *Rumner Rail. Co.* (1858), 27 L. J. (EX.) 155; *McDowall* v. *Great Western Rail. Co.*, [1903] 2 K. B. 331, C. A.

(*e*) *Hart* v. *Lancashire and Yorkshire Rail. Co.* (1869), 21 L. T. 261. In this case the accident was caused by the sudden illness of the driver of an engine, who fell in a fit on the footplate. The engine was only being moved from a coaling shed to a siding, and the man was alone upon it. It was held that there was no evidence of negligence on the part of the company.

(*f*) *Hanson* v. *Lancashire and Yorkshire Rail. Co.* (1872), 20 W. R. 297. Where a train collides with cattle, it must be shown that the cattle were on the

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82. Railway companies are bound to have and keep their premises to which the public have access in a safe condition; but this obligation is satisfied if the premises can be safely used with ordinary care (*g*). Companies are never liable for injuries received on their premises, unless negligence can be proved against them (*h*). And though railway companies are not bound to take the greatest possible precautions to guard passengers from danger, they are bound to take all reasonable precautions against dangers of the existence of which they are aware (*i*).

Duty to keep premises in safe condition.

Proof that premises are dangerous.

A mere opinion that premises are dangerous is irrelevant; proof must be given of the particular respect in which the danger is alleged to consist (*k*). Neither is it sufficient for a plaintiff to prove that the construction of any part of the premises is faulty, unless he can go further and show that the fault in construction was the cause of the accident (*l*).

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line through the negligence of the company (*Patchell* v. *Irish North Western Rail. Co.* (1871), I. R. 6 C. L. 117).

(*g*) *Cornman* v. *Eastern Counties Rail. Co.* (1859), 4 H. & N. 781; *Rigg* v. *Manchester, Sheffield, and Lincolnshire Rail. Co.* (1866), 14 W. R. 834. Where there were two doors on a platform, one marked "For Gentlemen," with a bright light over it, and the other marked "Lamp Room," with no light, and the plaintiff, entering the latter in mistake for the former, fell down some steps and was injured, it was held that there was no evidence of negligence against the company (*Toomey* v. *London, Brighton, and South Coast Rail. Co.* (1857), 3 C. B. (N. S.) 146).

(*h*) Hence a passenger at a station injured by the negligence of a stranger, or of the servant of an independent contractor employed by the company to repair the station, is not entitled to succeed in an action for damages against the company (*Welfare* v. *London, Brighton, and South Coast Rail. Co.* (1869), L. R. 4 Q. B. 693). See *Reedie* v. *London and North Western Rail. Co.* (1849), 4 Exch. 244. Again, where plaintiff was bitten by a stray dog at a railway station, and evidence was given that the dog had some time before torn the dress of another passenger and had been kicked out of the station, but had returned, it was held that there was no evidence of negligence by the railway company in not keeping the station in a safe condition (*Smith* v. *Great Eastern Rail. Co.* (1866), L. R. 2 C. P. 4).

(*i*) *Atherton* v. *London and North Western Rail. Co.* (1905), 21 T. L. R. 671. In this case the plaintiff was injured by a spark from an engine as he was leaving a railway station at the end of a journey. The way out was a path running close to the line for some 150 feet and not screened in any way from the railway. It was proved that complaints had been made to the company as to the danger from sparks to passengers using this exit, but no evidence was given of any negligence in the construction of the engine from which the sparks came. It was held that, as the defendants invited passengers to use this exit, and knew of the possible danger, and could at a moderate cost have guarded against the danger by screening the path, there was evidence of negligence against them.

(*k*) *Rigg* v. *Manchester, Sheffield, and Lincolnshire Rail. Co., supra*; *Crafter* v. *Metropolitan Rail. Co.* (1866), L. R. 1 C. P. 300.

(*l*) *Davis* v. *London and Brighton Rail. Co.* (1861), 2 F. & F. 588. But where it was proved that a bridge was improperly constructed so as to be dangerous on account of an aperture, and that the danger was not obvious, and that the plaintiff fell through the aperture, it was held that there was evidence of negligence (*Longmore* v. *Great Western Rail. Co.* (1865), 19 C. B. (N. S.) 183). A railway company must keep its premises in such condition as to be safe to anyone lawfully using them. Therefore, where a child fell through an aperture in the side of a bridge through which a grown person could not have fallen, the company was held to be liable (*Lay* v. *Midland Rail. Co.* (1876), 34 L. T. 30).

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The mere fact of an obstruction being on a platform is no evidence of negligence; and when a passenger falls over such obstruction it is a question for the jury whether in the circumstances a person using reasonable care would have perceived and avoided it (*m*). The fact that ice is allowed to remain on a floor or staircase may be evidence of negligence (*n*). Where a passenger slips and falls, without negligence on his own part, it is no answer for the railway company to show that he might, to his knowledge, have gone by a safer way (*o*).

Injury at level crossings.

83. Where passengers have to cross rails, on the level, in order to enter or leave a station, or to get from one part of the station to another, they must use due care; and where a person so crossing the rails is run over by a passing train in daylight, he is probably himself guilty of negligence, such as to disentitle him to damages from the railway company (*p*). In every such case, however, the liability must depend on the circumstances of the case and the nature of the locality, as, for example, on the absence of warning where warning is reasonably necessary (*q*), the failure by the engine driver on a proper occasion to whistle (*r*), the existence of a curve such as to prevent an approaching train being seen (*s*), or the state of the light (*t*).

Person on rails without invitation.

Where, however, a person goes on to the rails without any express or implied invitation from the company, as a rule the company cannot be held responsible if such person is injured (*a*). An invitation to use a level crossing may, however, be implied, notwithstanding the fact that the company has supplied another and safer means of crossing, and has put up notices forbidding passengers to cross on the level, where as a fact it allows persons constantly to use the level crossing without objection (*b*).

Embankments and bridges.

84. A railway company is bound to use due and proper care to see that its line is maintained in safe condition, and the fact that an embankment has given way is *primâ facie* evidence of negligence, which becomes conclusive in the absence of rebutting evidence (*c*). Embankments must be constructed of sufficient

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(*m*) *Cornman* v. *Eastern Counties Rail. Co.* (1859), 4 H. & N. 781; *Blackman* v. *London, Brighton, and South Coast Rail. Co.* (1869), 17 W. R. 769; *Sturges* v. *Great Western Rail. Co.* (1892), 56 J. P. 278, C. A.

(*n*) *Shepherd* v. *Midland Rail. Co.* (1872), 25 L. T. 879.

(*o*) *Osborne* v. *London and North Western Rail. Co.* (1888), 21 Q. B. D. 220.

(*p*) *Davey* v. *London and South Western Rail. Co.* (1883), 12 Q. B. D. 70; *Walker* v. *Midland Rail. Co.* (1866), 14 L. T. 796.

(*q*) *Ibid.*; *Coburn* v. *Great Northern Rail. Co.* (1891), 8 T. L. R. 31, n.

(*r*) *Coburn* v. *Great Northern Rail. Co., supra*; *Davey* v. *London and South Western Rail. Co., supra*; *Dublin, Wicklow, and Wexford Rail. Co.* v. *Slattery* (1878), 3 App. Cas. 1155; *James* v. *Great Western Rail. Co.* (1866), L. R. 2 C. P. 634, n.

(*s*) *Coburn* v. *Great Northern Rail. Co., supra.*

(*t*) *Nicholson* v. *Lancashire and Yorkshire Rail. Co.* (1865), 3 H. & C. 534.

(*a*) *Falkiner* v. *Great Southern and Western of Ireland Rail. Co.* (1871), I. R. 5 C. L. 213; *Wilby* v. *Midland Rail. Co.* (1876), 35 L. T. 244.

(*b*) *Rogers* v. *Rhymney Rail. Co.* (1872), 26 L. T. 879; *Dublin, Wicklow, and Wexford Rail. Co.* v. *Slattery, supra.*

(*c*) *Great Western Rail. Co. of Canada* v. *Fawcett* (1863), 8 L. T. 31.

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strength to withstand any cause of injury which can reasonably be anticipated (*d*). If an embankment gives way by reason of a storm of such extraordinary violence as could not have been anticipated, the company may not be liable for running a train on to the damaged line; but if it ought to have known of the state of the line in time, it will be liable (*e*). A railway company, again, would not be liable for the collapse of a bridge due to a defect which no care on its part could detect or prevent (*f*); but it would be negligence to allow a train to run over a part of the line known to be defective (*g*).

Station platforms.

85. The platform of a station must not only be safe in itself, but it must also be safe in reference to the trains which use it, so that passengers can alight without danger (*h*).

Railway companies being bound to manage their trains without negligence, if any evidence of negligence is given, it is in every case a question of fact for the jury whether or not there was negligence (*i*), and whether or not there was contributory negligence on the part of the plaintiff (*k*). The fact that a train is stopped short of a platform or overshoots a platform is not of itself evidence of negligence (*l*). A railway company is bound, however, to provide proper means of alighting from a train (*m*), and if a train stops where there are no such means, it becomes a material question whether the company has invited passengers to alight from the train at that place (*n*). Calling out the name of a station is not necessarily an invitation to alight (*o*); but where the name of the station is called out, and the train has stopped, and a reasonable interval has elapsed without any warning to passengers, there is

(*d*) *Great Western Rail. Co. of Canada* v. *Fawcett* (1863), 8 L. T. 31.

(*e*) *Withers* v. *North Kent Rail. Co.* (1858), 1 F. & F. 165; *Wyborn* v. *Great Northern Rail. Co.* (1858), 1 F. & F. 162.

(*f*) *Grote* v. *Chester and Holyhead Rail. Co.* (1848), 2 Exch. 251.

(*g*) *Pym* v. *Great Northern Rail. Co.* (1861), 2 F. & F. 619.

(*h*) *Foulkes* v. *Metropolitan District Rail. Co.* (1880), 5 C. P. D. 157. In *Manning* v. *London and North Western Rail. Co.* (1907), 23 T. L. R. 222, a passenger in alighting from a train standing at the platform fell and was injured. It was alleged that the footboard of the carriage was too high above the platform; and evidence was admitted to show that a large number of the defendant company's platforms in that district were of the same height, and that no other accident had occurred from this cause.

(*i*) *Bridges* v. *North London Rail. Co.* (*Directors*) (1874), L. R. 7 H. L. 213; *Rose* v. *North Eastern Rail. Co.* (1876), 2 Ex. D. 248; *Robson* v. *North Eastern Rail. Co.* (1876), 2 Q. B. D. 85; *London, Tilbury, and Southend Rail. Co.* v. *Glasscock* (1903), 19 T. L. R. 305.

(*k*) *Foy* v. *London, Brighton, and South Coast Rail. Co.* (1865), 18 C. B. (N. S.) 225.

(*l*) *Bridges* v. *North London Rail. Co.* (*Directors*), *supra*; *Robson* v. *North Eastern Rail. Co.*, *supra*; *Weller* v. *London, Brighton, and South Coast Rail. Co.* (1874), L. R. 9 C. P. 126.

(*m*) *Foulkes* v. *Metropolitan District Rail. Co.*, *supra*.

(*n*) *Bridges* v. *North London Rail. Co.* (*Directors*), *supra*; *Robson* v. *North Eastern Rail. Co.*, *supra*; *Cockle* v. *London and South Eastern Rail. Co.* (1872), L. R. 7 C. P. 321.

(*o*) *Lewis* v. *London, Chatham, and Dover Rail. Co.* (1873), L. R. 9 Q. B. 66; *Plant* v. *Midland Rail. Co.* (1870), 21 L. T. 836; *Bridges* v. *North London Rail. Co.* (*Directors*), *supra*; *London and North Western Rail. Co.* v. *Hellawell* (1872), 26 L. T. 557.

evidence of such invitation (*p*). It is not enough in such circumstances for a servant of the company to have given warning by calling out "Keep your seats," if such warning was not heard (*q*).

If, seeing the danger of alighting where there is no platform, or in spite of warning, a passenger chooses to alight, the company is not responsible if he is injured (*r*). In many of such cases it is also a material question whether the state of the light made it especially the duty of the company to give passengers warning of danger (*s*).

Stationary buffers.

There is evidence of negligence when a train runs into stationary buffers (*a*), when it moves or jerks while a passenger is in the act of entering or alighting (*b*), or when it is stopped in a violent and unusual manner (*c*).

Carriage doors and windows.

86. It is negligence on the part of a railway company not to fasten a carriage door securely before the train starts; and it is no proof of contributory negligence on the part of a passenger that he leaned against the door (*d*). But where a door flies open, it may not be reasonable for a passenger to voluntarily incur the risk of

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(*p*) *Bridges* v. *North London Rail. Co.* (*Directors*) (1874), L. R. 7 H. L. 213; *Robson* v. *North Eastern Rail. Co.* (1876), 2 Q. B. D. 85; *Cockle* v. *London and South Eastern Rail. Co.* (1872), L. R. 7 C. P. 321; *Whittaker* v. *Manchester, Sheffield, and Lincolnshire Rail. Co.* (1870), 22 L. T. 545; *Thompson* v. *Belfast, Holywood, and Bangor Rail. Co.* (1871), I. R. 5 C. L. 517; *Nicholls* v. *Great Southern and Western Rail. Co.* (1873), I. R. 7 C. L. 40; *Weller* v. *London, Brighton, and South Coast Rail. Co.* (1874), L. R. 9 C. P. 126; *Gill* v. *Great Eastern Rail. Co.* (1872), 26 L. T. 945, Ex. Ch. But see *Siner* v. *Great Western Rail. Co.* (1869), L. R. 4 Exch. 117, considered in *Robson* v. *North Eastern Rail. Co.*, *supra*.

(*q*) *Rose* v. *North Eastern Rail. Co.* (1876), 2 Ex. D. 248.

(*r*) *Harrold* v. *Great Western Rail. Co.* (1866), 14 L. T. 440; *Lewis* v. *London, Chatham, and Dover Rail. Co.* (1873), L. R. 9 Q. B. 66; *Plant* v. *Midland Rail. Co.* (1870), 21 L. T. 836; *Siner* v. *Great Western Rail. Co.*, *supra*; *Owen* v. *Great Western Rail. Co.* (1877), 36 L. T. 850.

(*s*) *Praeger* v. *Bristol and Exeter Rail. Co.* (1871), 24 L. T. 105. See also *Harrold* v. *Great Western Rail. Co.*, *supra*; *Plant* v. *Midland Rail. Co.*, *supra*; *Whittaker* v. *Manchester, Sheffield, and Lincolnshire Rail. Co.*, *supra*; *Gill* v. *Great Eastern Rail. Co.*, *supra*.

(*a*) *Burke* v. *Manchester, Sheffield, and Lincolnshire Rail. Co.* (1870), 22 L. T. 412.

(*b*) *London and North Western Rail. Co.* v. *Hellawell* (1872), 26 L. T. 557; *Stockdale* v. *Lancashire and Yorkshire Rail. Co.* (1863), 8 L. T. 289. See *Goldberg* v. *Glasgow and South Western Rail. Co.*, [1907] S. C. 1035.

(*c*) *Angus* v. *London, Tilbury, and Southend Rail. Co.* (1906), 22 T. L. R. 222. In this case a train was stopped suddenly and with great violence, so that the plaintiff, who was a passenger, and who happened to be standing up at the time, was thrown down and injured. It was held that the onus was on the company to prove that such an unusual occurrence was reasonable and proper in the circumstances, and also that the cause of so stopping was not due to negligence on the company's part. It was proved that the engine driver had acted properly, as he had stopped the train in this way to save the life of a man who was on the line. But as the man was on the line through negligence on the part of the company, it was held that there was evidence that the violent stopping was due to negligence on the part of the company.

(*d*) *Gee* v. *Metropolitan Rail. Co.* (1873), L. R. 8 Q. B. 161; *Richards* v. *Great Eastern Rail. Co.* (1873), 28 L. T. 711; *Warburton* v. *Midland Rail. Co.* (1870), 21 L. T. 835. The last case does not agree with the decision in the first as to leaning against the door; but *Gee* v. *Metropolitan Rail. Co.*, it is submitted, contains a correct statement of the law. There is also evidence of negligence when an open door of a moving train strikes and injures a person standing on a station platform (*Toal* v. *North British Rail. Co.*, [1908] A. C. 352). See also *Thatcher* v. *Great Western Rail. Co.* (1893), 10 T. L. R. 13.

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shutting it while the train is in motion; and where he chooses to run such risk there is evidence of contributory negligence on his part (*e*).

With regard to the windows of carriages, the responsibility of a railway company is very different, as it cannot reasonably be expected to examine them at every stop. Therefore the fact that a window fell open is no evidence of negligence (*f*).

Communication with guard and driver.

87. When a train runs more than twenty miles without stopping, the railway company is bound to provide, and keep in good order, means of communication between the passengers and the servants of the company in charge of the train (*g*); and if a company makes default in this obligation, and it is proved that an accident which has happened might have been avoided if the communication had been in proper order, there is evidence of negligence against the company (*h*).

Slamming doors.

88. The mere fact that the servant of a railway company shuts the door of a carriage with violence, or without warning, is no evidence in itself of negligence (*i*). And when a passenger is seated in a train, or is completely within a carriage, and the door is banged and pinches his hand or otherwise injures him, the passenger's own negligence is as a rule the cause of his injury, and the company is not liable (*k*). If, however, a door is slammed and injures a passenger while he is in the act of entering, and before he is completely inside the carriage, there is evidence of negligence against the company (*l*).

Overcrowding.

89. It is a breach of duty on the part of a railway company to allow a carriage to be overcrowded, and damages which are the natural result of overcrowding may be recovered (*m*); but it is not a natural result of overcrowding that a passenger should be robbed or assaulted by other passengers, and a company is not liable in damages in such event (*n*).

(*e*) *Adams* v. *Lancashire and Yorkshire Rail. Co.* (1869), L. R. 4 C. P. 739.

(*f*) *Murray* v. *Metropolitan District Rail. Co.* (1873), 27 L. T. 762.

(*g*) Regulation of Railways Act, 1868 (31 & 32 Vict. c. 119), s. 22. See title RAILWAYS AND CANALS.

(*h*) *Blamires* v. *Lancashire and Yorkshire Rail. Co.* (1873), L. R. 8 Exch. 283.

(*i*) *Metropolitan Rail. Co.* v. *Jackson* (1877), 3 App. Cas. 193; *Drury* v. *North Eastern Rail. Co.*, [1901] 2 K. B. 322; *Benson* v. *Furness Rail. Co.* (1903), 88 L. T. 268.

(*k*) *Ibid.*; *Richardson* v. *Metropolitan Rail. Co.* (1868), L. R. 3 C. P. 374, n.; *Bullner* v. *London, Chatham, and Dover Rail. Co.* (1885), 1 T. L. R. 534; *Maddox* v. *London, Chatham, and Dover Rail. Co.* (1878), 38 L. T. 458; *Richardson* v. *Metropolitan Rail. Co.* (1868), L. R. 3 C. P. 374, n. But see *Jones* v. *Great Western Rail. Co.* (1885), 1 T. L. R. 333, in which the court refused to interfere with the verdict of a jury for a plaintiff where the plaintiff had been some minutes in a carriage when the door had been banged and hurt him. MATHEW, J., said that each of these cases must depend upon its circumstances, and that it is difficult to decide any one upon the decision in another.

(*l*) *Coleman* v. *South Eastern Rail. Co.* (1866), 4 H. & C. 699; *Fordham* v. *London, Brighton, and South Coast Rail. Co.* (1868), L. R. 3 C. P. 368, affirmed 17 W. R. 896.

(*m*) *Metropolitan Rail. Co.* v. *Jackson*, *supra*; *Pounder* v. *North Eastern Rail. Co.*, [1892] 1 Q. B. 385. See *Israel* v. *Clark* (1803), 4 Esp. 259.

(*n*) *Pounder* v. *North Eastern Rail. Co.*, *supra*; *Cobb* v. *Great Western Rail. Co.*, [1894] A. C. 419. See p. 60, *post*.

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Where a railway company has reason to expect a crowd at a station, it should make reasonable arrangements to control the movements of the passengers, so as to prevent them from involuntarily injuring one another (*o*); but it is not bound to provide against voluntary disorder, or to protect passengers from assaults by their fellow-passengers (*p*).

Drunken passengers.

It is not negligence for a company to admit to its premises a person who is obviously drunk; but if it chooses to do so, it is its duty to protect other passengers from annoyance or injury by the drunken person (*q*). With regard to the drunken person himself, however, there is no duty on the company to care for him after he has reached his destination (*r*).

Damages for injury to servant.

90. Where a servant is injured while a passenger by railway by the negligence of the company, an action for damages for the loss of his services will lie by the master against the company (*s*).

SECT. 2.—*Special Terms of Contract.*

Contract by ticket.

91. The contract between a passenger and a railway company is usually made by the buying of a ticket, on which are printed the names of the stations from and to which the journey is to extend, and which must have legibly marked upon its face the fare chargeable (*t*). Every railway company is bound to exhibit, in a conspicuous place in the booking office of each of its stations, a legible list of the fares from such station to any place to which tickets are issued from that station (*a*). The agreement to carry a passenger implies a contract to carry him to the named destination in a reasonable time and without negligence; and the ordinary ticket is evidence of such a contract (*b*).

(*o*) *Hogan* v. *South Eastern Rail. Co.* (1873), 28 L. T. 271.

(*p*) *Cannon* v. *Midland Great Western Rail. Co.* (1879), 6 L. R. Ir. 199; *Pounder* v. *North Eastern Rail. Co.*, [1892] 1 Q. B. 385.

(*q*) *Adderley* v. *Great Northern Rail. Co.*, [1905] 2 I. R. 378.

(*r*) *M'Cormick* v. *Caledonian Rail. Co.* (1904), 6 F. (Ct. of Sess.) 362.

(*s*) *Berringer* v. *Great Eastern Rail. Co.* (1879), 4 C. P. D. 163. But compare *Alton* v. *Midland Rail. Co.* (1865), 19 C. B. (N. S.) 213, in which the decision was the reverse of the statement in the text. In that case, however, the plaintiff sued upon a breach of contract between the company and his servant, not upon a tort, and the case was decided merely on demurrer to the form of declaration. This was pointed out in *Taylor* v. *Manchester, Sheffield, and Lincolnshire Rail. Co.*, [1895] 1 Q. B. 134, and in *Meux* v. *Great Eastern Rail. Co.*, [1895] 2 Q. B. 387, at p. 394. See also *Mears* v. *George*, [1895] 2 Q. B. 387. See title MASTER AND SERVANT.

(*t*) Regulation of Railways Act, 1889 (52 & 53 Vict. c. 57), s. 6. See title RAILWAYS AND CANALS. A railway ticket has been held to be a chattel so as to render liable to indictment for misdemeanour any person obtaining such ticket by false pretences (*Reg.* v. *Boulton* (1849), 3 Cox, C. C. 576).

(*a*) Regulation of Railways Act, 1868 (31 & 32 Vict. c. 119), s. 15.

(*b*) *Blake* v. *Great Western Rail. Co.* (1862), 31 L. J. (EX.) 346; *Hurst* v. *Great Western Rail. Co.* (1865), 19 C. B. (N. S.) 310; *Hobbs* v. *London and South Western Rail. Co.* (1875), L. R. 10 Q. B. 111; *Cooke* v. *Midland Rail. Co.* (1892), 57 J. P. 388. Where a train was hired for an excursion by a benefit society of which the plaintiff was a member, and tickets were sold by the treasurer of the society to members, amongst whom was the plaintiff, it was held that the treasurer was the agent of the company to sell the tickets, and that there was a contract between the plaintiff and the company (*Skinner* v. *London, Brighton and South Coast Rail. Co.* (1850), 5 Exch. 787).

SECT. 2. Special Terms of Contract.

Terms incorporated with ticket.

92. The contract, however, may include other terms and conditions, either expressed on the ticket itself, or incorporated in the contract by a reference in the ticket to some other document containing such terms and conditions (*c*). Such terms and conditions are not binding upon the passenger unless he assents thereto, which assent may either be express, or implied from the fact that they were sufficiently brought to his notice (*d*).

Incorporation of conditions.

Where there is a reference on the face of a ticket to special conditions—as, for example, the words "This ticket is issued subject to the regulations and conditions stated in the company's time-tables and bills"—such conditions are incorporated in the contract between the company and the passenger (*e*). And the same is true where on the face of the ticket there are words referring to conditions more particularly referred to on the back (*f*). But if there are only words referring to the back, as "See back," such words are not necessarily sufficient to bring to the notice of the passenger the fact that there are special conditions (*g*). When a ticket, which sufficiently brings to the notice of the passenger the fact that it is issued subject to conditions, is accepted without objection by the passenger, he is bound by the conditions (*h*).

When passenger bound by conditions.

All such cases depend on the questions of fact whether the passenger knew of the conditions, or whether the company did what was reasonably necessary to bring the conditions to his notice. If both questions are answered in the negative, the conditions are not binding on the passenger (*i*). But where either question is answered in the affirmative, the ticket and the time-tables, regulations, and conditions referred to, together form the contract between the passenger and the company (*k*).

(*c*) *Thompson* v. *Midland Rail. Co.* (1875), 34 L. T. 34. See also cases in the notes following to note (*k*) inclusive.

(*d*) *Henderson* v. *Stevenson* (1875), L. R. 2 Sc. & Div. 470; *Harris* v. *Great Western Rail. Co.* (1876), 1 Q. B. D. 515; *Watkins* v. *Rymill* (1883), 10 Q. B. D. 178.

(*e*) *Le Blanche* v. *London and North Western Rail. Co.* (1876), 1 C. P. D. 286; *McCartan* v. *North Eastern Rail. Co.* (1885), 54 L. J. (Q. B.) 441.

(*f*) *Harris* v. *Great Western Rail. Co.*, *supra*.

(*g*) *Parker* v. *South Eastern Rail. Co.* (1877), 2 C. P. D. 416. And see *Woodgate* v. *Great Western Rail. Co.* (1884), 51 L. T. 826.

(*h*) *Duckworth* v. *Lancashire and Yorkshire Rail. Co.* (1901), 84 L. T. 774. The whole subject is reviewed in *Watkins* v. *Rymill*, *supra*.

(*i*) *Le Blanche* v. *London and North Western Rail. Co.*, *supra*. In *Henderson* v. *Stevenson*, *supra*, the plaintiff, a passenger, took a ticket which, on the face of it, was a ticket from X. to Y. There was nothing on the face of the ticket referring to the back, but on the back were conditions which the plaintiff did not read or know of; and it was held that the conditions were not binding on the plaintiff. In *Richardson, Spence & Co.* v. *Rowntree*, [1894] A. C. 217, a ticket was handed to the plaintiff folded up so that no writing was visible unless it was opened. There was nothing to draw the plaintiff's attention to conditions contained in this writing; and it was held that, as the plaintiff did not know of the conditions, and the carrier did not do what was reasonably sufficient to bring them to her notice, the conditions were not binding. In this case the plaintiff was an illiterate woman, a fact which at least one of the Lords thought material in dealing with the question whether the carrier had done what was reasonably necessary to bring the conditions to her notice. See also *Hooper* v. *Furness Rail. Co.* (1907), 23 T. L. R. 451.

(*k*) *McCartan* v. *North Eastern Rail. Co.*, *supra*; *Woodgate* v. *Great Western Rail. Co.*, *supra*; *Burke* v. *South Eastern Rail. Co.* (1879), 5 C. P. D. 1.

SECT. 2. Special Terms of Contract.

93. There is no statutory limit to the conditions which may be imposed upon passengers by railway companies contracting to carry them (*l*). Therefore, when a man agrees with a railway company that he shall be carried at his own risk, the company is not liable in case the passenger is injured, even though such injuries may be the result of gross negligence on its part (*m*). Such a condition also protects the company, when the passenger is injured by negligence on the station or premises of the company, as well as when he is injured in the actual journey (*n*). But a railway company could not take advantage of such a condition against an infant passenger (*o*).

Passenger agreeing to travel at his own risk.

94. When the time-tables and conditions contain provisions that a railway company will not be responsible for trains not running punctually, a passenger taking a ticket which incorporates such time-tables and conditions has no remedy for loss or inconvenience through delay, or through missing connections at junctions (*p*).

Time-tables and conditions.

Although a company may issue a through ticket for a journey partly on its own line and partly on the lines of other companies, it may entirely protect itself by conditions from liability for anything occurring on such other lines (*q*).

Where a train is notified in the time-tables, this amounts to a promise that such a train will run to accommodate any person who tenders the fare; and if the train does not run at all, there has been a breach of that promise, for which the company is liable in damages to any person who is deceived and suffers damage by the false representation (*r*). But the mere notifying of the time of starting of a train is no warranty that a train will start at that time; and the issuing of a ticket is not of itself evidence of breach

Departure from time-tables.

(*l*) *McCawley* v. *Furness Rail. Co.* (1872), L. R. 8 Q. B. 57; *Gallin* v. *London and North Western Rail. Co.* (1875), L. R. 10 Q. B. 212; *McCartan* v. *North Eastern Rail. Co.* (1885), 54 L. J. (Q. B.) 441; *Duckworth* v. *Lancashire and Yorkshire Rail. Co.* (1901), 84 L. T. 774.

(*m*) *McCawley* v. *Furness Rail. Co., supra*; *Hall* v. *North Eastern Rail. Co.* (1875), L. R. 10 Q. B. 437; *Gallin* v. *London and North Western Rail. Co., supra.* In each of these cases the passenger was travelling in charge of animals and agreed to be carried without payment on condition that the company should be under no liability for injury to him however caused, or on condition that he should travel at his own risk. In *Johnson* v. *Great Southern and Western Rail. Co.* (1874), 9 I. R. C. L. 108, the plaintiff was allowed on payment to travel in a carriage attached to a goods train. On the ticket was printed a condition freeing the company from any liability whatever for his safety. In an action for damages for personal injuries by negligence, it was held that the plaintiff could not recover, as he was bound by the condition in spite of his evidence that he did not see it.

Workmen's tickets are issued on a condition limiting the liability of the company for personal injuries to a certain sum. This condition is sometimes a matter of contract, but many companies have statutory protection of this description in their private Acts. See pp. 71, 72, *post.*

(*n*) *Gallin* v. *London and North Western Rail. Co., supra.*

(*o*) *Flower* v. *London and North Western Rail. Co.*, [1894] 2 Q. B. 65.

(*p*) *McCartan* v. *North Eastern Rail. Co., supra*; *Woodgate* v. *Great Western Rail. Co.* (1884), 51 L. T. 826; *Duckworth* v. *Lancashire and Yorkshire Rail. Co., supra.*

(*q*) *Burke* v. *South Eastern Rail. Co.* (1879), 5 C. P. D. 1; *Fitzgerald* v. *Midland Rail. Co.* (1876), 34 L. T. 771.

(*r*) *Denton* v. *Great Northern Rail. Co.* (1856), 5 E. & B. 860.

SECT. 2. Special Terms of Contract.

of contract on the part of the railway company if a train does not start when expected (*s*).

When a condition frees a railway company from liability for delay "from accident or other cause," the company is not protected by such condition, when delay is due to gross negligence (*t*); and where a condition purports to free a company from liability for delay, but contains a statement that "every attention will be paid to ensure punctuality," such statement is a promise to use diligence, and the company is liable for delay due to negligence (*a*).

The issuing of a ticket to a passenger is evidence of a contract to carry the passenger to the agreed destination in a reasonable time (*b*); and if he is not so carried, the company is liable in damages (*c*).

Damages for delay.

95. Where the company fails in carrying out its contract, the passenger is entitled to perform it for himself as nearly as possible, and to recover the expense of so doing from the railway company (*d*). He must not perform it, however, in an unreasonable, extravagant, or oppressive manner; and a test of what is reasonable in the circumstances, is, whether the passenger would have incurred the expense if he had been delayed through his own fault (*e*).

Breaking journey.

96. The contract made by the buying and selling of a ticket is a contract for a definite journey, and the passenger is not entitled to break the journey into two portions and require the company to carry him by two separate transits (*f*).

A passenger is only entitled to travel the agreed journey; and where it is a condition of the contract that if a ticket is used for any other station or any other train than that for which the ticket is issued the ticket will be forfeited and the full fare charged for the

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(*s*) *Hurst* v. *Great Western Rail. Co.* (1865), 12 L. T. 634; *Lockyer* v. *International Sleeping Car Co.* (1892), 61 L. J. (Q. B.) 501.

(*t*) *Buckmaster* v. *Great Eastern Rail. Co.* (1870), 23 L. T. 471.

(*a*) *Le Blanche* v. *London and North Western Rail. Co.* (1876), 1 C. P. D. 286; *Buckmaster* v. *Great Eastern Rail. Co.*, *supra*.

(*b*) *Hurst* v. *Great Western Rail. Co.*, *supra*.

(*c*) *Hobbs* v. *London and South Western Rail. Co.* (1875), L. R. 10 Q. B. 111; *Cooke* v. *Midland Rail. Co.* (1892), 57 J. P. 388, C. A. If a return ticket is issued to X. and back, the contract is broken by the company, if the train by which the passenger wishes and is entitled to return is so full that he cannot get in (*Great Northern Rail. Co.* v. *Hawcroft* (1852), 21 L. J. (Q. B.) 178).

(*d*) *Le Blanche* v. *London and North Western Rail. Co.*, *supra*; *Hamlin* v. *Great Northern Rail. Co.* (1856), 1 H. & N. 408; *Hobbs* v. *London and South Western Rail. Co.*, *supra*.

(*e*) *Le Blanche* v. *London and North Western Rail. Co.*, *supra*, in which case it was held that, when a railway company was liable for delay, it was not reasonable for a passenger to take a special train in order to reach a seaside place, which he was visiting merely for pleasure, a few hours earlier than he would otherwise have done. In *Buckmaster* v. *Great Eastern Rail. Co.*, *supra*, however, in the circumstances of that case, it was held reasonable to have taken a special train. It is often reasonable to hire a cab or carriage where the railway company fail in carrying a passenger to his destination in a reasonable time (*Hamlin* v. *Great Northern Rail. Co. supra*).

(*f*) *Ashton* v. *Lancashire and Yorkshire Rail. Co.*, [1904] 2 K. B. 313; *Bastable* v. *Metcalfe*, [1906] 2 K. B. 288. See also *London and North Western Rail. Co.* v. *Hinchcliffe*, [1903] 2 K. B. 32. See note (*g*), p. 57, *post*.

journey actually taken, the company is entitled to enforce the condition, if the ticket is used for any station beyond the agreed destination, or if it is used for any station short of that destination, in case the fare for the shorter journey is higher than that for the longer (*g*).

Deposit on taking season ticket.

Where a deposit is paid by a passenger taking a season ticket, such deposit is not recoverable if it is a condition of the contract that it shall be forfeited in case the ticket is not delivered up to the company at the agreed time, and the ticket is not so delivered up (*h*).

SECT. 3.—*Journey over several Systems.*

Contract by issue of through ticket.

97. A railway company, by issuing a ticket, not only contracts to carry the passenger to his destination, but also undertakes that it will use due care in the management of its trains, and as regards the condition of its line; and if it runs its trains for part of the journey on the line of another company, it gives the same undertaking in regard to the other line (*i*); and if the passenger is injured by the negligence of the other company, or their servants, while the train of the contracting company is on that other company's line, the contracting company is liable (*k*).

Liability of issuing company.

When a railway company issues a through ticket for a journey partly on its own line and partly on the line of another company, it contracts that the passenger shall be carried the whole journey with due care on the part of everyone who has any duty in respect to every train in which he is being carried; and part of this contract it performs by means of contracts with other persons (*l*). The contract is the same whether the train in which he is being carried is a train of the contracting company or of the other

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(*g*) *Great Northern Rail. Co.* v. *Winder*, [1892] 2 Q. B. 595; *Great Northern Rail. Co.* v. *Palmer*, [1895] 1 Q. B. 862; *London and North Western Rail. Co.* v. *Hinchcliffe*, [1903] 2 K. B. 32. In the last case it was a condition that any passenger using a ticket for any other station than that for which it was available would be required to pay the difference between the sum actually paid and the fare between the stations from or to which the passenger actually travelled, or at the option of the company the fare from the station to which he booked to the end of the journey. It was also a condition that no persons should rebook at an intermediate station by the same train. On the journey from X. to Z. there was an intermediate station Y. The fare from X. to Z. was 2*s.* 3*d.*, that from X. to Y. 1*s.* 6*d.*, and that from Y. to Z. 7*d.* The defendant, intending to travel from X. to Z., only took a ticket from X. to Y., and at Y. continued in the train and tendered 7*d.* The company demanded 9*d.* It was held that, according to the conditions of the contract, the company was right in its demand.

(*h*) *Cooper* v. *London, Brighton, and South Coast Rail. Co.* (1879), 4 Ex. D. 88.

(*i*) *Great Western Rail. Co.* v. *Blake* (1862), 7 H. & N. 987.

(*k*) *Ibid.*; *Thomas* v. *Rhymney Rail. Co.* (1871), L. R. 6 Q. B. 266. In the latter case the plaintiff took a ticket from the defendant company for a journey to a station on the Taff Vale Company's line, the defendant company having powers to run their trains over the other company's line to that station. While the defendants' train in which the plaintiff was travelling was on the Taff Vale line an accident happened to the train, owing to negligence on the part of the Taff Vale Company's servants, without any negligence on the part of the servants of the defendants. The defendants were held liable for damages for the injuries suffered by the plaintiff in the accident.

(*l*) *Thomas* v. *Rhymney Rail. Co.*,

SECT. 3. Journey over several Systems.

company (*m*). The non-contracting company, however, is also liable for the consequences of the negligence of any servant of that company (*n*).

Ticket available by either of two lines.

Where, by agreement between two companies which run trains between the same termini, a passenger taking a return ticket from one company may return by a train of the other company, the second or non-contracting company is liable for any negligence of itself or its servants towards the passenger when returning by its train (*o*).

Conditions incorporated in through ticket.

Where a through ticket is issued subject to a condition restricting the liability of the company for injuries to the passenger, the condition protects not only the company issuing the ticket, but also the other companies over whose lines the ticket is available (*p*). And when it is a condition of the contract that the liability of the company issuing a through ticket shall be limited to occurrences on its own trains or its own railway, it is not liable if the passenger is injured when travelling in the trains of other companies, or while on other companies' lines (*q*).

SECT. 4.—*Measure of Damages.*

Compensation for loss and for pain, and medical expenses.

98. When a person has a right to receive damages from a railway company for personal injuries, these damages may include compensation for pecuniary loss, compensation for bodily pain and suffering, and the actual expenses (such as for medical attendance etc.) which have been incurred in consequence of the injuries (*r*).

In assessing damages for such pecuniary loss the jury may take into consideration what the plaintiff's income would probably have been if he had not been injured, and how long he would have been likely to have earned it (*s*).

(*m*) *Buxton* v. *North Eastern Rail. Co.* (1868), L. R. 3 Q. B. 549.

(*n*) *Self* v. *London, Brighton, and South Coast Rail. Co.* (1880), 42 L. T. 173.

(*o*) *Foulkes* v. *Metropolitan District Rail. Co.* (1880), 5 C. P. D. 157.

(*p*) *Hall* v. *North Eastern Rail. Co.* (1875), L. R. 10 Q. B. 437. In this case the plaintiff was a drover travelling in charge of a number of sheep from a station on the North British Railway Company's line to a station on the defendants' railway. A ticket was issued to him by the former company allowing him to travel free in the same train as the sheep on condition that he travelled solely at his own risk. While the train was on the defendants' line it was in collision with another train through negligence on the part of the defendants' servants, and the plaintiff was injured in the collision. It was held that the defendant company was protected from liability by the conditions of the ticket.

(*q*) *Burke* v. *South Eastern Rail. Co.* (1879), 5 C. P. D. 1.

(*r*) *Phillips* v. *London and South Western Rail. Co.* (1879), 5 C. P. D. 280. In this case the plaintiff was an eminent physician who had been seriously injured in a railway accident, and a jury awarded him £16,000 damages. Lord COLERIDGE, C.J., in summing up, told the jury that absolute compensation was not the true measure of damages; they must be fair and reasonable; one element to be taken into account was the bodily pain and suffering the plaintiff had endured; another was the loss of his professional income for two years; another element to be considered was the probability that for a further term he would be unable to follow his profession. This direction was approved of by the Court of Appeal. See title DAMAGES.

(*s*) *Phillips* v. *London and South Western Rail. Co.* (1879), 5 Q. B. D. 78.

The Court of Appeal will not readily interfere with a verdict for damages for bodily injuries on the ground of amount (*t*).

Nervous shock.

Where negligence for which a railway company is responsible causes reasonable fear of immediate bodily injury, and the fright causes nervous shock, and the shock causes illness, damages for such illness are not too remote even though no immediate physical injury was caused by the negligence (*a*). Again, where negligence is the cause of such a degree of fright as to make it reasonable for a passenger to leap out of the carriage in which he is travelling in order to avoid the threatened danger, damages for injuries caused by so leaping out are recoverable (*b*).

Child injured before birth.

But where a pregnant woman was in a railway accident, and the shock affected the child before birth, so that the child was injured for life, it was held that the child could not recover damages against the company (*c*).

Where plaintiff is insured.

99. Where an injured person is entitled to damages for negligence from a railway company, the fact that the plaintiff was insured against accidents is irrelevant, and the company has no right to require the damages payable to be reduced by the amount insured (*d*).

Damages for delay.

100. In case a railway company has broken its contract to carry a passenger to the agreed destination within a reasonable time, the passenger is entitled to recover as damages from the company the reasonable expense to which he is put by the delay (*e*). Thus, the expense of hiring a carriage to reach his home or the expense of staying a night at an hotel may in proper cases be recovered as the natural result of the breach of contract by the company (*f*). As a rule, in such circumstances the cost of a special train could not be recovered, as it would be unreasonable to incur so heavy an

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(*t*) *Phillips* v. *London and South Western Rail. Co.* (1879), 5 Q. B. D. 78; *Saunders* v. *London and North Western Rail. Co.* (1860), 2 L. T. 153.

(*a*) *Bell* v. *Great Northern Rail. Co.* (1890), 26 L. R. Ir. 428; *Dulieu* v. *White & Sons*, [1901] 2 K. B. 669. In these cases the Irish and English courts respectively refused to follow the decision of the Privy Council in *Victorian Railways Commissioners* v. *Coultas* (1888), 13 App. Cas. 222, which is contradictory of the statement in the text, and which, it is submitted, cannot be upheld. See title DAMAGES. In *Byrne* v. *Great Southern and Western Rail. Co. of Ireland* (1884) (unreported, referred to in *Bell* v. *Great Northern Rail. Co.*, *supra*), the plaintiff was the manager of a telegraph office situated close to the defendants' railway. By the negligence of the defendants a train ran into this office and almost demolished it. The plaintiff was so frightened at seeing the building collapsing around him that the shock made him seriously ill, though in fact he was not touched by the falling walls. In an action for damages for the injury suffered the jury gave the plaintiff substantial damages, and it was held that the damages were not too remote.

(*b*) *Jones* v. *Boyce* (1816), 1 Stark. 493.

(*c*) *Walker* v. *Great Northern Rail. Co.* (1891), 28 L. R. Ir. 69.

(*d*) *Bradburn* v. *Great Western Rail. Co.* (1874), L. R. 10 Exch. 1; and in assessing damages in any action under the Fatal Accidents Act, 1846 (9 & 10 Vict. c. 93), there shall not be taken into account any sum paid or payable on the death of the deceased under any contract of assurance or insurance (Fatal Accidents Act, 1908 (8 Edw. 7, c. 7), s. 2). As to the liability of the insurers, see title INSURANCE.

(*e*) *Le Blanche* v. *London and North Western Rail. Co.* (1876), 1 C. P. D. 286. See note (*e*), p. 56, *ante*.

(*f*) *Hamlin* v. *Great Northern Rail. Co.* (1856), 1 H. & N. 408; *Hobbs* v. *London and South Western Rail. Co.* (1875), L. R. 10 Q. B. 111. See p. 56, *ante*.

SECT. 4. Measure of Damages.

expense (*g*); but if the circumstances were so urgent as to make the taking of a special train a reasonable thing to do, even this cost might be recovered (*h*).

No damages for impatience at delay.

No damages are recoverable for mere vexation and disappointment caused by delay; but damages may be recovered for real inconvenience which is appreciable and capable of being specifically stated (*i*).

Loss of business through delay.

Damages which are not the natural and probable result of the delay cannot be recovered (*k*); hence, as a rule, loss through missing business appointments is too remote (*l*); but in certain circumstances, where the company has notice of the object of the passenger's journey, such loss may be recovered (*m*). And when a working man loses a day's wages, through the train by which he is travelling being delayed by negligence, and the company is not protected from liability by contract, the man may recover a day's wages as damages (*n*).

Over-crowding.

101. For a railway company to allow its carriages to be overcrowded is a breach of its implied contract to afford its passengers reasonable accommodation. If substantial injury can be proved as the natural result of such overcrowding, no doubt damages for such injury may be recovered; but it is not a natural result of overcrowding for a passenger to be assaulted or robbed (*o*).

SECT. 5.—*Offences by Passengers.*

SUB-SECT. 1.—*By Statute.*

Duty to produce ticket.

102. Every passenger by railway is bound on request by a servant of the company to produce, and if required to deliver up, a ticket showing that his fare is paid, or else to pay the fare from the place whence he started, or else to give the servant of the company his name and address. If he make default, he is liable on summary conviction to a fine not exceeding forty shillings (*p*). If, having failed to produce or deliver up such ticket or to pay his fare, the passenger refuses to give the servant of the company his name and address, any officer of the company or constable may detain him till he can be brought before a magistrate (*q*).

Whether or not a passenger has failed to produce his ticket is a

(*g*) *Le Blanche* v. *London and North Western Rail. Co.* (1876), 1 C. P. D. 286. See note (*e*), p. 56, *ante*.

(*h*) *Buckmaster* v. *Great Eastern Rail. Co.* (1870), 23 L. T. 471.

(*i*) *Hamlin* v. *Great Northern Rail. Co.* (1856), 1 H. & N. 408; *Hobbs* v. *London and South Western Rail. Co.* (1875), L. R. 10 Q. B. 111.

(*k*) Where a passenger caught cold from having to walk home at night in rain, it was held that damages for her illness were too remote, and could not be recovered (*Hobbs* v. *London and South Western Rail. Co.*, *supra*); but the correctness of the decision has been doubted (*McMahon* v. *Field* (1881), 7 Q. B. D. 591).

(*l*) *Hamlin* v. *Great Northern Rail. Co.*, *supra*.

(*m*) *Buckmaster* v. *Great Eastern Rail. Co.*, *supra*.

(*n*) *Cooke* v. *Midland Rail. Co.* (1892), 57 J. P. 388, C. A.; and see *Duckworth* v. *Lancashire and Yorkshire Rail. Co.* (1901), 84 L. T. 774.

(*o*) *Jackson* v. *Metropolitan Rail. Co.* (1877), 3 App. Cas. 193; *Pounder* v. *North Eastern Rail. Co.*, [1892] 1 Q. B. 385; *Cobb* v. *Great Western Rail. Co.*, [1894] A. C. 419. See p. 52, *ante*.

(*p*) Regulation of Railways Act, 1889 (52 & 53 Vict. c. 57), s. 5 (1). A season ticket is within this provision; see *Woodard* v. *Eastern Counties Rail. Co.* (1861), 4 L. T. 336. See title RAILWAYS AND CANALS.

(*q*) Regulation of Railways Act, 1889 (52 & 53 Vict. c. 57), s. 5 (2).

question of fact (*r*). If the passenger gives a name and address, the company has no right to detain him to make inquiries whether the name and address given are correct; and if it does so detain him, it does so at its risk (*s*).

Travelling with intent to avoid payment of fare.

103. If any person travels, or attempts to travel, on a railway without having previously paid his fare, and with intent to avoid payment thereof (*t*); or having paid his fare for a certain distance, wilfully proceeds by train beyond that distance, with intent to avoid payment of the additional fare for the additional distance; or having failed to pay his fare, gives, in reply to a request by a servant of the company, a false name and address, he is liable on summary conviction to a fine not exceeding forty shillings, or in the case of a second or subsequent offence to a fine not exceeding twenty pounds, or, in the discretion of the court, to imprisonment for a term not exceeding one month (*a*).

The fare payable by a person who has travelled without payment may be recovered irrespective of that person's liability to punishment (*b*).

Where a passenger, who has arrived at the point to which he has paid his fare, wilfully refuses or neglects to quit the carriage in which he has travelled, he is liable to forfeit to the company a sum not exceeding forty shillings (*c*).

SUB-SECT. 2.—*Under Bye-laws.*

Bye-laws of railway companies.

104. Railway companies have power to make, under their common seal, bye-laws not repugnant to law, in order to prevent any nuisance

(*r*) If a passenger in fact has a ticket, but cannot find it when required to produce it, it is for a jury to say whether he has failed to produce it (*Brotherton* v. *Metropolitan and District Joint Committee* (1893), 9 T. L. R. 555, and, on appeal, *ibid.* 645).

(*s*) If the name and address given are in fact correct, there is no power to detain the passenger; and it is immaterial that the company had reasonable and probable cause to suspect that the address was incorrect (*Knights* v. *London, Chatham, and Dover Rail. Co.* (1893), 62 L. J. (Q. B.) 378).

(*t*) Where A. was found travelling with the forward half of a return ticket issued to B., which ticket had been issued at a cheap rate, and was marked "not transferable," it was held that there was evidence that A. was travelling "without having previously paid his fare and with intent to avoid payment thereof" (*Langdon* v. *Howells* (1879), 4 Q. B. D. 337). Where the defendant travelled in a second-class carriage with a third-class ticket with intent to defraud, it was held that he had not previously paid his fare, and that his conduct brought him within the same words (*Gillingham* v. *Walker* (1881), 44 L. T. 715). See also *Noble* v. *Killick* (1891), 60 L. J. (M. C.) 61.

(*a*) Regulation of Railways Act, 1889 (52 & 53 Vict. c. 57), s. 5 (3).

(*b*) *Ibid.*, s. 5 (4). The defendant was found travelling in a first-class carriage with a second-class ticket, and on being asked to pay the excess refused. He was then proceeded against for travelling without having previously paid his fare and with intent to avoid payment thereof. When the magistrate heard that the excess had been demanded he dismissed the summons, and it was held that the magistrate was wrong in dismissing the summons on such ground (*Noble* v. *Killick, supra*). Where it cost more to take a ticket to X., an intermediate station, than to Y., the more distant station, and the defendant took a ticket to Y., but left the train at X., it was held that a similar charge against him was not maintainable (*R.* v. *Frere* (1855), 4 E. & B. 598). As to civil liability for the difference of fares in such a case, see *Great Northern Rail. Co.* v. *Winder*, [1892] 2 Q. B. 595; and p. 57, *ante*.

(*c*) Railways Clauses Consolidation Act, 1845 (8 Vict. c. 20), s. 103.

SECT. 5. **Offences by Passengers.**

in their carriages or on their premises, and generally to regulate the travelling upon their railway (*d*), and to maintain order in and regulate the use of their stations and the approaches thereto (*e*). Such bye-laws have no effect unless approved by the Board of Trade (*f*).

Publication.

Notice of bye-laws must be posted at every station of the company; and no penalty imposed by any bye-law is recoverable unless such bye-law is so published (*g*).

Proof of bye-laws.

The bye-laws may be proved by the production of a copy examined and certified by an officer of the company; and if evidence is given that copies were posted at the stations material to the proceedings, it is not necessary to prove that copies were posted at all the stations on the system (*h*).

Bye-laws as to tramways.

Local authorities and tramway companies may make bye-laws for similar purposes with regard to tramways. Such bye-laws must be published by advertisement, and may be disallowed by the Board of Trade (*i*).

Validity of bye-laws.

105. Travelling without a ticket, travelling in a class of carriage superior to that by which the ticket authorises its purchaser to travel, using a ticket for a day or for a train for which it is not available, refusing to produce a ticket when required, are all offences under the statutes when there is an intention to defraud on the part of the traveller (*k*). A bye-law which purports to make such acts punishable in the absence of fraud is *ultra vires* and void (*l*).

Bye-law as to delivering ticket or paying fare.

A bye-law requiring a passenger by a tramway to deliver up a ticket if required, or else to pay the fare for the distance he has travelled, is reasonable and valid, as being necessary to enable the company to regulate the traffic (*m*); and a passenger who refuses either to deliver up a ticket or to pay the fare for the journey he has travelled may be convicted of an offence against such bye-law, even though he has paid for a ticket and lost it (*n*).

(*d*) Railways Clauses Consolidation Act, 1845 (8 Vict. c. 20), ss. 108, 109.

(*e*) Regulation of Railways Act, 1889 (52 & 53 Vict c. 57), s. 7.

(*f*) Railway Regulation Act, 1840 (3 & 4 Vict. c. 97), s. 7.

(*g*) Railways Clauses Consolidation Act, 1845 (8 Vict. c. 20), s. 110.

(*h*) *Motteram* v. *Eastern Counties Rail. Co.* (1859), 7 C. B. (N. S.) 58.

(*i*) Tramways Act, 1870 (33 & 34 Vict. c. 78), s. 46; see title TRAMWAYS AND LIGHT RAILWAYS.

(*k*) See p. 61, *ante*.

(*l*) *Dearden* v. *Townsend* (1865), L. R. 1 Q. B. 10; *Bentham* v. *Hoyle* (1878), 3 Q. B. D. 289; *London, Brighton, and South Coast Rail. Co.* v. *Watson* (1879), 4 C. P. D. 118; *Saunders* v. *South Eastern Rail. Co.* (1880), 5 Q. B. D. 456; *Dyson* v. *London and North Western Rail. Co.* (1881), 7 Q. B. D. 32; *Haffam* v. *North Staffordshire Rail. Co.*, [1894] 2 Q. B. 821. Since 1905 all the railway companies in England have issued fresh sets of bye-laws; and the bye-laws considered and disapproved of in the above cases have been altered or have disappeared. Except as illustrating the general principle stated in the text, these cases have therefore ceased to be of great importance.

(*m*) *Heap* v. *Day* (1886), 51 J. P. 213; *Hanks* v. *Bridgman*, [1896] 1 Q. B. 253.

(*n*) *Hunt* v. *Green* (1906), 71 J. P. 18. A passenger paid the fare demanded, but refused to accept the ticket offered him by the conductor on the ground that there was a condition upon it limiting the liability of the owner of the tramway for personal injuries. The ticket dropped on the floor and lay there. On an inspector soon afterwards asking the passenger for his ticket he pointed to it on the floor, but refused to further produce it or to pay a second time, and it was held that he could not be convicted under a similar bye-law (*Wilson* v. *Fearnley* (1905), 69 J. P. 165).

A bye-law which requires a passenger on a tramway, who has got a ticket, to show the ticket if required, is also reasonable (*o*). So is a bye-law requiring a passenger on a light railway to pay his fare to the conductor, upon demand; and a passenger who refuses to pay on demand may be convicted, even though he has no intention to defraud (*p*).

Bye-law as to showing ticket.

Where any local authority or company is given power to make bye-laws for preventing nuisances, it has power to declare that a particular thing, if capable of being a nuisance, is a nuisance when committed on its premises or in its vehicles. Hence a bye-law providing that no person shall swear or use offensive or obscene language in a tramcar is valid, and it is not necessary for the bye-law to contain such words as "so as to be a nuisance or annoyance to other persons" (*q*).

Bye-laws as to nuisances.

A bye-law may be divisible, and, if so, may be good in part and bad in part; and effect may be given to the part that is good (*r*).

Bye-law may be divisible.

Whether a bye-law is good as a bye-law or not, it may be binding as part of the contract if incorporated in the contract by reference on the ticket (*s*).

Where a sum of money, the amount of which depends on the circumstances of the case, is alleged to be due under a bye-law, summary proceedings under the bye-law to recover that sum cannot in general succeed, unless the specific sum claimed was demanded when the liability was incurred (*t*).

Sum due under a bye-law.

Where a company acts in such a way as expressly or impliedly to waive the obligation to obey a bye-law, it cannot enforce or avail itself of such bye-law (*u*).

Waiver of bye-law.

SECT. 6.—*Forcible Removal of Passengers.*

106. A trespasser, or a licensee whose licence has been revoked, may be removed from the premises of a railway company, and if he resists, reasonable force may be used to expel him (*a*).

Removal of trespassers.

It is within the scope of the authority of porters and other servants of a railway company to remove from the company's premises or trains persons misconducting themselves. Hence, if a porter erroneously believes that a passenger has misconducted

Removal for misconduct.

(*o*) *Lowe* v. *Volp*, [1896] 1 Q. B. 256. If the passenger when required to show his ticket had not yet had a ticket given him, or had lost his ticket, he could not be convicted under that bye-law of not showing it (*ibid.*, *per* LINDLEY, L.J., at p. 258).

(*p*) *Tuffley* v. *Tate* (1906), 96 L. T. 24.

(*q*) *Gentel* v. *Rappe*, [1902] 1 K. B. 160.

(*r*) *Dyson* v. *London and North Western Rail. Co.*, *supra*; see *R.* v. *Lundie* (1861), 31 L. J. (M. C.) 157.

(*s*) *Butler* v. *Manchester, Sheffield, and Lincolnshire Rail. Co.* (1888), 21 Q. B. D. 207, *per* Lord ESHER, M.R., at p. 211.

(*t*) *Brown* v. *Great Eastern Rail. Co.* (1877), 2 Q. B. D. 406.

(*u*) *Jennings* v. *Great Northern Rail. Co.* (1865), L. R. 1 Q. B. 7.

(*a*) See *Wood* v. *Ledbitter* (1845), 13 M. & W. 838; and title TRESPASS. A passenger by railway has not an easement over the railway; but persons unlawfully on the premises of a railway company may be removed (*Butler* v. *Manchester, Sheffield, and Lincolnshire Rail. Co.* (1888), 21 Q. B. D. 207, *per* Lord ESHER, M.R., at p. 211).

SECT. 6. **Forcible Removal of Passengers.**

himself, and forcibly removes him, the company is liable in damages for the tort of its servant (*b*). If, however, a servant of a railway company commits an assault which the company would not have been justified in authorising, he cannot be acting within the scope of his authority, and the company cannot be liable for the tort (*c*). If in the performance of a general duty such servant disobeys a particular order, the company may be responsible for his acts (*d*).

Removal of passenger from wrong train.

It is within the scope of the authority of a porter to prevent persons travelling in wrong trains; and if, in the mistaken belief that a passenger is in the wrong train, a porter forcibly pulls him from the train and injures him, the company is liable for the porter's act though it was committed in disobedience of particular instructions given to him (*e*).

Removal for non-payment of fare.

No one has a right to enter a railway train unless he has agreed with the company to carry him; and a person entering a train without having previously taken a ticket may be removed from the carriage, even though he be willing to pay the fare (*f*). The failure to produce a ticket on demand is *primâ facie* evidence of fraud (*g*);

(*b*) *Lowe* v. *Great Northern Rail. Co.* (1893), 62 L. J. (Q. B.) 524. By the new bye-laws of the English railway companies (see note (*l*), p. 62, *ante*) any person may be forcibly removed from a train or from the company's premises who refuses on request to leave in the following circumstances: where he enters a compartment which is already full, and remains in such compartment after being requested by any passenger therein to leave; where he, being a male person above eight years of age, travels or attempts to travel or remain in any carriage marked to be for the use of females only; where he mounts on the roof, or travels or attempts to travel in any van or part of a train not provided for the conveyance of passengers; where he is suffering from any infectious or contagious disease; where he is in a state of intoxication or otherwise in an unfit or improper condition for being a passenger, or where his dress or clothing is such as to be likely to injure the cushions of the carriages or the clothing of other passengers; where in any train or railway station he uses threatening, abusive, indecent, obscene, profane, or offensive language to the annoyance of other persons, or behaves in a riotous, disorderly, indecent, or offensive manner, or molests or wilfully interferes with the comfort or convenience of other passengers; where he smokes in any carriage not provided for smoking, or in any part of the company's premises where smoking is expressly prohibited; where he enters, remains in, or uses any carriage or part of the company's premises for the purposes of betting or wagering; or where he spits upon the floor or any part of any carriage, or on a platform, or on the floor or wall of a refreshment room, booking hall etc. It is submitted that all these matters amount to misconduct, and that the provisions for removal are valid.

(*c*) See title AGENCY, Vol. I., pp. 165, 166, and cases there cited.

(*d*) *Bayley* v. *Manchester, Sheffield, and Lincolnshire Rail. Co.* (1873), L. R. 8 C. P. 148.

(*e*) *Ibid.*

(*f*) *McCarthy* v. *Dublin, Wicklow, and Wexford Rail. Co.* (1870), I. R. 5 C. L. 244. By the bye-laws of the English railway companies now in force, it is provided that "no person shall enter any carriage or vehicle using the railway, for the purpose of travelling, unless and until he or someone on his behalf shall have obtained from the company, or from some other company or person duly authorised in that behalf by the company, a ticket entitling him to travel therein. Any person infringing or not observing this bye-law and regulation, and failing to leave the carriage or vehicle immediately on request by any duly authorised servant or agent of the company, may be removed therefrom by or under the direction of such servant or agent." This bye-law appears to be in accordance with the decision in the above case.

(*g*) *Saunders* v. *South Eastern Rail. Co.* (1880), 5 Q. B. D. 456, *per* COCKBURN, C.J., at p. 461.

SECT. 6. Forcible Removal of Passengers

but it is not conclusive, and if a passenger has duly taken a ticket, but fails to produce it on demand because he has mislaid it, and refuses to pay over again, he cannot be removed from the carriage, and if so removed may have a right of action for assault against the company (*h*). And where a company chooses to waive the benefit of any bye-law or regulation made entirely in its own interest, it cannot remove a person from a train for disobedience to such bye-law or regulation, except at the risk of an action for damages (*i*).

Part IV.—Statutory Control of Carriers' Business.

SECT. 1.—*Reasonable Facilities.*

Duty to afford reasonable facilities.

107. Railway companies and canal companies are bound according to their powers to afford all reasonable facilities for the receiving and forwarding and delivering of traffic upon the railways and canals belonging to or worked by them; and railway companies and canal companies which have or work railways or canals forming a continuous line of railway and canal, or having the terminus, station, or wharf of one near the terminus, station, or wharf of the other, are bound to afford all due and reasonable facilities for receiving and forwarding by one of such railways or canals all traffic arriving by the other without any unreasonable delay, and so as to afford the public all reasonable accommodation (*k*).

A railway station is to be considered as part of the railway, and a wharf or landing place used for public traffic as part of the canal; and a station, terminus, or wharf is deemed to be near another station, terminus, or wharf, if the distance between them does not exceed a mile, unless they are situated within five miles of St. Paul's Cathedral (*l*).

Nothing in any agreement which has not been confirmed by Act of Parliament, or by the Board of Trade, renders a company unable

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(*h*) *Butler* v. *Manchester, Sheffield, and Lincolnshire Rail. Co.* (1888), 21 Q. B. D. 207. But where the ticket incorporates a condition that the passenger will produce his ticket on demand, or, failing to do so, will pay, although he may not be forcibly removed for failing to produce the ticket, the company may recover by action the amount he has contracted to pay on such failure (*ibid.*).

(*i*) *Jennings* v. *Great Northern Rail. Co.* (1865), L. R. 1 Q. B. 7.

(*k*) Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), s. 2. "Traffic" includes passengers and their luggage, and all kinds of goods, animals, and other things carried by any railway and canal company, and also carriages, wagons, trucks, boats, and other vehicles suitable for a railway or canal (*ibid.*, s. 1). See title RAILWAYS AND CANALS.

(*l*) *Ibid.*, s. 1. These provisions only apply to railway companies and canal companies, and railway and canal companies. Thus they do not apply to a dock company which owns a line of railway connecting two docks belonging to the company (*East and West India Dock Co.* v. *Shaw, Savill and Albion Co.* (1888), 39 Ch. D. 524).

SECT. 1. Reasonable Facilities.

to afford, or authorises a company to refuse, such reasonable facilities for traffic as in the opinion of the Railway Commissioners (*m*) are required in the interest of the public (*n*).

Two or more companies may be compelled by the Commissioners (*n*) to carry into effect, by mutual arrangements, any order for the purpose of securing to the public such reasonable facilities as they are required to afford (*o*). The facilities which companies must afford to the public include the receiving, forwarding, and delivering by every company of through traffic at through rates or fares (*p*).

When order to afford facilities will be made.

108. Railway companies are only required to afford facilities according to their powers; and as the powers given to some companies by their special Acts of Parliament differ greatly from the powers given to other companies, so the facilities that can be required differ, and the special Acts must be read with the general Acts to see what facilities can be ordered (*q*).

In making an order against a railway company to afford facilities the Commissioners will consider chiefly the convenience of the public (*r*). It is not necessary for an applicant to prove an individual grievance, but it is necessary to prove an existing public inconvenience, and to show that the facilities applied for will be convenient to the general traffic of the company (*s*).

Such facilities, however, will not be ordered, even though proved to be convenient to the public, unless it is reasonable to require the company to afford them (*a*); and, from this point of view, it is material to consider the method in which the traffic of the railway can conveniently be worked, and the extent of the powers of the company (*b*).

(*m*) *I.e.*, the Commissioners of the Railway and Canal Commission appointed under the Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25). See title RAILWAYS AND CANALS.

(*n*) Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), s. 11; *Rishton Local Board* v. *Lancashire and Yorkshire Rail. Co.* (1893), 8 Ry. & Can. Tr. Cas. 74.

(*o*) Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), s. 14. This provision overrules the decision in *Toomer* v. *London, Chatham, and Dover Rail. Co.* (1877), 2 Ex. D. 450. Where two railway companies each had a station within a mile in a town, and there was in existence a line connecting the stations, which, however, was not used for passenger traffic, the Commissioners made an order on the companies to afford facilities for through passenger traffic, and ordered the two companies to make mutual arrangements for carrying that order into effect, and to submit a scheme to the court for that purpose (*Maidstone Town Council* v. *South Eastern Rail. Co. and London, Chatham, and Dover Rail. Co.* (1891), 7 Ry. & Can. Tr. Cas. 99).

(*p*) Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), s. 25. As to through rates, see p. 72, *post*.

(*q*) *Tharsis Sulphur and Copper Co* v. *London and North Western Rail. Co.* (1881), 3 Ry. & Can. Tr. Cas. 455.

(*r*) *Bradell* v. *Eastern Counties Rail. Co.* (1857), 2 C. B. (N. S.) 509; *Painter* v. *London, Brighton, and South Coast Rail. Co.* (1857), 2 C. B. (N. S.) 702; *Marriott* v. *London and South Western Rail. Co.* (1857), 1 Ry. & Can. Tr. Cas. 47.

(*s*) *Barrett* v. *Great Northern Rail. Co. and Midland Rail. Co.* (1857), 1 Ry. & Can. Tr. Cas. 38.

(*a*) *Newry Navigation Co.* v. *Great Northern Rail. Co.* (1889), 7 Ry. & Can. Tr. Cas. 176.

(*b*) *Great Western Rail. Co.* v. *Severn and Wye Rail. Co.* (1886), 5 Ry. & Can.

Facilities will not be ordered where the expense of affording them would be exorbitant, and out of proportion to the needs of the traffic (*c*); and the convenience and accommodation of the public will only be considered in relation to the facilitating of traffic on the railway (*d*).

Facilities at stations.

109. A railway company commits a breach of its duty to afford due facilities when the platforms, booking offices, and other structures at any station are kept in such condition as to cause confusion, delay, or other impediment to the proper reception, transmission, or delivery of the ordinary passenger or goods traffic of the station, provided the company has it within its powers to remedy the state of things (*e*). In such circumstances the Commissioners may order the enlargement, within the powers of the company, of spaces or structures insufficient for their professed purposes, and the provision of proper means for dealing with particular kinds of traffic; but they cannot control the discretion of the company as to the precise method in which the necessary alterations or improvements are to be carried out, or require it to execute particular specified works (*e*).

New stations.

The duty of railway companies to afford facilities at stations is limited to stations actually in existence; they cannot be called upon by the Commissioners to build a station where no station is (*f*). Nor can they be compelled to lay down a line of railway

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Tr. Cas. 156; *East London Rail. Co.* v. *London, Brighton, and South Coast Rail. Co.* (1876), 2 Ry. & Can. Tr. Cas. 413.

(*c*) *Sussex County Council* v. *London, Brighton, and South Coast Rail. Co. and London and South Western Rail. Co.* (1892), 8 Ry. & Can. Tr. Cas. 17; *Newington Local Board* v. *North Eastern Rail. Co.* (1878), 3 Ry. & Can. Tr. Cas. 306.

(*d*) *Holyhead Local Board* v. *London and North Western Rail. Co.* (1881), 4 Ry. & Can. Tr. Cas. 37.

(*e*) *South Eastern Rail. Co.* v. *Railway Commissioners and Hastings Corporation* (1881), 6 Q. B. D. 586. It was held in this case that the Commissioners may order that facilities be given, even though the giving of such facilities may involve the erection of new buildings and structural alterations; but they have no jurisdiction to order particular specified works, or to order buildings to be erected upon a particular spot. If existing buildings are insufficient, larger buildings may be ordered, but only provided the company own (or have power to acquire) land upon which additions can be erected.

(*f*) *Darlaston Local Board* v. *London and North Western Rail. Co.*, [1894] 2 Q. B. 694. The railway company in this case closed a station on a branch line for passenger traffic, as they were losing by keeping it open, and subsequently pulled it down. Five years afterwards the local authority obtained an order from the Commissioners directing the company to afford reasonable facilities for passenger traffic on the branch. Passengers could not be dealt with on the branch without rebuilding the station. On appeal against this order the Court of Appeal held that the Commissioners had no jurisdiction to make it, on the ground that facilities can only be ordered in the case of an existing thing, that the order involved the building of a station where no station was, and that the Railway and Canal Traffic Act, 1854, does not compel a railway company to use or maintain their railway. If, apart from that Act, there is any obligation upon a company to work their railway, that is a question of mandamus or injunction in the High Court. This case appears to overrule *Wingford Local Board* v. *Cheshire Lines Committee* (1890), 24 Q. B. D. 456; *Newington Local Board* v. *North Eastern Rail. Co.* (1878), 3 Ry. & Can. Tr. Cas. 306; and *Harris* v. *London and South Western Rail. Co.* (1879), 3 Ry. & Can. Tr. Cas. 331.

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although the laying of such a line is warranted by powers which they have not exercised (*g*).

Facilities for particular traffic at particular station.

How far accommodation can be ordered at a particular station for a particular class of traffic must depend on the powers of the company; and if such traffic cannot be delivered at that station unless the station be enlarged, and the company cannot enlarge it without buying land which it has no power to acquire, such accommodation cannot be ordered (*h*).

Again, where accommodation works cannot be carried out without the consent of some person or public body, the Commissioners cannot order such works to be executed (*i*).

Sidings and private branch lines.

110. The reasonable facilities which every railway company is required to afford include reasonable facilities for the junction of private sidings or private branch railways with any railway of the company, and reasonable facilities for receiving, forwarding, and delivering traffic upon and from such sidings and branch railways (*k*).

What are reasonable facilities.

111. A railway company cannot be called upon to make arrangements for the carriage of goods by road from places off its railway to its nearest station, nor to open booking offices at such places (*l*). Facilities which can be ordered to be given are facilities for the receiving, forwarding, and delivering of the traffic, and do not include what is merely for the comfort or convenience of passengers (*m*). Thus the failure to supply water-closets for the use of passengers, except on payment, is not a denial of reasonable facilities (*n*), but a cloak-room is a reasonable facility (*o*); so is a roof to protect passengers on a platform from the weather (*p*); so

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(*g*) *Glamorganshire County Council* v. *Great Western Rail. Co.* (1894), 8 Ry. & Can. Tr. Cas. 196. In this case the company owned a single line which was authorised to be used for passenger traffic, but had never been used except for mineral traffic. The Board of Trade would not sanction its use for passenger traffic unless it were doubled. The Commissioners decided that it was beyond their jurisdiction to order so large an alteration as the doubling of the line.

(*h*) *Thomas* v. *North Staffordshire Rail. Co.* (1876), 3 Ry. & Can. Tr. Cas. 1. See also note (*c*), p. 67, *ante*.

(*i*) *Arbroath Corporation* v. *Caledonian Rail. Co.* (1898), 10 Ry. & Can. Tr. Cas. 252.

(*k*) Railways (Private Sidings) Act, 1904 (4 Edw. 7, c. 19). See Railways Clauses Consolidation Act, 1845 (8 Vict. c. 20), s. 76. Where it is doubtful whether a junction would be approved of by the Board of Trade, the Commissioners will refuse to make an order for the construction of such junction (*Dublin Whisky Distillery Co., Ltd.* v. *Midland Great Western Rail. of Ireland Co.* (1881), 4 Ry & Can. Tr. Cas. 32).

(*l*) *Dublin and Meath Rail. Co.* v. *Midland Great Western Rail. of Ireland Co.* (1879), 3 Ry. & Can. Tr. Cas. 379.

(*m*) *South Eastern Rail. Co.* v. *Railway Commissioners and Hastings Corporation* (1881), 6 Q. B. D. 586.

(*n*) *West Ham Corporation* v. *Great Eastern Rail. Co.* (1895), 9 Ry. & Can. Tr. Cas. 7. This decision is, however, open to doubt, and was not assented to by one of the Commissioners (Sir Frederick Peel), who was of opinion that the provision of free water-closets at a station is a reasonable facility for passenger traffic which a railway company ought to be compelled to give.

(*o*) *Singer Manufacturing Co.* v. *London and South Western Rail. Co.*, [1894] 1 Q. B. 833, 836.

(*p*) *Caterham Rail. Co.* v. *Brighton and South Eastern Rail. Cos* (1856) 1 Ry.

is a waiting-room (*q*). A railway company may be ordered to provide passenger platforms of sufficient length, and siding and other accommodation proper for the safe and speedy receipt and delivery of goods of various descriptions (*r*).

Facilities for through traffic on application of public.

112. With regard to through traffic, the Commissioners may make a general order against two or more companies to afford facilities for such traffic upon their lines (*s*). Any member of the public may call upon several railway companies to combine to carry his traffic, for a single payment at a single booking (*t*). An application for such facilities is, however, not granted as a matter of right; it must be shown that the application is made in the general interests of the public, and that the suggested route is a reasonable one from the companies' point of view (*a*).

On application of one company.

The Commissioners also may order one railway company, on the application of another railway company, to afford facilities for through traffic on the two lines (*b*). And when through rates are actually in operation on two lines, but one company improperly delays or hinders traffic from or to the other company, the first company will be ordered to afford reasonable facilities for the through traffic (*c*).

Where continuous line exists.

Where two companies have each a station in a town, and there is a line between the stations, which is only used for goods traffic, the companies may be ordered to afford facilities for continuous passenger traffic (*d*). And where there is no physical difficulty in sending goods traffic of any particular description by two railways forming a continuous line, the companies will be ordered to afford facilities for so doing (*e*). There cannot, however, be said to be in existence a continuous line of railway communication until the

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& Can. Tr. Cas. 32; *Innes* v. *London, Brighton, and South Coast Rail. Co.* (1875), 2 Ry. & Can. Tr. Cas. 155.

(*q*) *London and South Western Rail. Co.* v. *Staines, Wokingham, and Woking Rail. Co.* (1877), 3 Ry. & Can. Tr. Cas. 48. It is somewhat doubtful, however, whether these last two propositions are reconcilable with the judgments in *South Eastern Rail. Co.* v. *Railway Commissioners and Hastings Corporation* (1881), 6 Q. B. D. 586.

(*r*) *South Eastern Rail. Co.* v *Railway Commissioners and Hastings Corporation, supra; London and South Western Rail. Co.* v. *Staines, Wokingham, and Woking Rail. Co., supra.*

(*s*) *Dublin, Wicklow, and Wexford Rail. Co.* v. *Midland Great Western Rail. of Ireland Co.* (1892), 8 Ry. & Can. Tr. Cas. 39. Through bookings may be ordered (*Innes* v. *London, Brighton, and South Coast Rail. Co., supra*).

(*t*) *Didcot, Newbury, and Southampton Rail. Co.* v. *Great Western Rail. Co.*, [1897] 1 Q. B. 33.

(*a*) *Ibid.*; Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), s. 25 (5). As to what is a reasonable route, see *Swindon, Marlborough, and Andover Rail Co.* v. *Great Western Rail. Co.* (1884), 4 Ry. & Can. Tr. Cas. 349.

(*b*) *Solway Junction Rail. Co.* v. *Caledonian Rail. Co.* (1894), 8 Ry. & Can. Tr. Cas. 177.

(*c*) *Great Northern Rail. Co.* (*Ireland*) v. *Donegal Rail. Co.* (1901), 11 Ry. & Can. Tr. Cas. 47.

(*d*) *Uckfield Local Board* v. *London, Brighton, and South Coast Rail. Co.* (1875), 2 Ry. & Can. Tr. Cas. 214; *James* v. *Taff Vale Rail. Co.* (1881), 3 Ry. & Can. Tr. Cas. 540; *Maidstone Town Council* v. *South Eastern Rail. Co.* (1891), 7 Ry. & Can. Tr. Cas. 99.

(*e*) *Victoria Coal and Iron Co.* v. *Neath and Brecon and Midland Rail. Cos.* (1877), 3 Ry. & Can. Tr. Cas. 37.

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necessary works for the interchange of traffic have been constructed and approved by the Board of Trade (*f*).

Where two railway companies have for a considerable time been giving a trader facilities for through traffic over their lines, and the arrangement has worked satisfactorily, there is a presumption in favour of the reasonableness of the arrangement, and the Commissioners may order it to be continued (*g*).

Locomotive power.

113. It is a breach of duty by a railway company not to supply according to its powers sufficient locomotive power to avoid delay and unreasonable detention of wagons; and the Commissioners will order companies to do their duty in this respect (*h*).

Number of trains.

114. The Commissioners will not readily interfere with the discretion of a company as to the number of trains it chooses to run, unless strong evidence is given that the convenience of the public is being disregarded (*i*); but in a proper case a company may be ordered to run more trains (*j*).

Excessive charges.

115. To make excessive charges for the carriage of goods is not a denial of reasonable facilities within the jurisdiction of the Commissioners (*k*). If a railway company exacts an excessive charge, the excess can be recovered by action (*l*); and if such charge is only threatened, an injunction can be obtained to restrain it. Hence the ordinary courts should deal with these questions, and the Commissioners have no jurisdiction (*m*).

Exclusion of persons not passengers.

116. It is not a denial of facilities for a railway company to exclude from its stations persons not using or wishing to use the railway (*n*).

Mails.

117. Every railway company is bound to carry mails and Post Office servants in charge of them, on receipt of the prescribed notice from the Postmaster-General requiring such services. The company must carry the mails by ordinary trains or, if required, by special trains; and must run trains at such times, and at such speeds, and subject to such conditions in other respects as, within certain limits, the Postmaster-General may direct (*o*).

(*f*) *Hammans* v. *Great Western Rail. Co.* (1883), 4 Ry. & Can. Tr. Cas. 181.

(*g*) *City of Dublin Steam Packet Co.* v. *Midland Great Western of Ireland Rail. Co.* (1891), 8 Ry. & Can. Tr. Cas. 1.

(*h*) *Watkinson* v. *Wrexham, Mold, and Connah's Quay Rail. Co.* (No. 3) (1880), 3 Ry. & Can. Tr. Cas. 446.

(*i*) *Caterham Rail. Co.* v. *Brighton and South Eastern Rail. Cos.* (1856), 1 Ry. & Can. Tr. Cas. 32.

(*j*) *Innes* v. *London, Brighton, and South Coast Rail. Co.* (1875), 2 Ry. & Can. Tr. Cas. 155.

(*k*) *Great Western Rail. Co.* v. *Railway Commissioners* (1881), 7 Q. B. D. 182; *R.* v. *Railway Commissioners* (1889), 22 Q. B. D. 642.

(*l*) *Crouch* v. *London and North Western Rail. Co.* (1849), 2 Car. & Kir. 799; *Baxendale* v. *London and South Western Rail. Co.* (1866), L. R. 1 Exch. 137; see pp. 75, 82, *post*.

(*m*) *Ibid.*; *Davis & Sons* v. *Taff Vale Rail. Co.*, [1895] A. C. 542. But if a company were to refuse to carry a certain class of goods except on special terms being made, this might be a denial of facilities, and the Commissioners might have jurisdiction (*Aberdeen Commercial Co.* v. *Great North of Scotland Rail. Co.* (1878), 3 Ry. & Can. Tr. Cas. 205; *Great Western Rail. Co.* v. *Railway Commissioners*, *supra*).

(*n*) *Perth General Station Committee* v. *Ross*, [1897] A. C. 479.

(*o*) Railways (Conveyance of Mails) Act, 1838 (1 & 2 Vict. c. 98), ss. 1—5. See title POST C

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The company may be required to provide carriages for the exclusive conveyance of the mails, and for the purpose of sorting letters in transit (*p*). The Postmaster-General may also require the whole of a special train to be exclusively appropriated to the service of the Post Office (*q*).

Any Post Office servant may be sent by any train as an ordinary passenger, and take with him bags of letters as luggage; but the company is not responsible for the safe custody or delivery of any bags so sent (*r*).

Carriage of mails without notice.

A railway company must carry mails by any train without notice, whether a Post Office servant be sent with the mails or not; and must afford all reasonable facilities for the receipt and delivery of the mails, and render Post Office servants such aid as they may require (*s*). The remuneration and compensation for these services is to be fixed (failing agreement) by arbitration, or, at the option of the railway company, by the Commissioners (*t*). Railway companies may be compelled by injunction of the High Court to carry mails according to their statutory obligations (*u*).

Accommodation for third class passengers and workmen

118. If the Board of Trade have reason to believe that any railway company does not provide sufficient accommodation for passengers at fares not exceeding one penny a mile, or that proper and sufficient workmen's trains are not provided for workmen going to and returning from work at such fares and at such times between 6 o'clock a.m. and 8 o'clock a.m. as appear to the Board to be reasonable, the Board may make such inquiry into the circumstances as they think proper, or may, if required by the company, refer the matter for decision to the Commissioners.

Cheap trains

If the result of such inquiry is to show that the necessity exists, then the Board or the Commissioners (as the case may be) may order the company to provide such accommodation, or workmen's trains, at such fares as appear to be reasonable. If such order is made by the Board, the company has the right, within six months of the making of the order, to appeal against it to the Commissioners, who in that case have the same power to deal with the matter as if it had originally been referred to them (*x*). A train

(*p*) Railways (Conveyance of Mails) Act, 1838 (1 & 2 Vict. c. 98), ss. 1—5.
(*q*) Regulation of Railways Act, 1868 (31 & 32 Vict. c. 119), s. 36.
(*r*) Railway Regulation Act, 1844 (7 & 8 Vict. c. 85), s. 11.
(*s*) Regulation of Railways Act, 1873 (36 & 37 Vict. c. 48), s. 18.
(*t*) Railways (Conveyance of Mails) Act, 1838 (1 & 2 Vict. c. 98), ss. 6, 16; Regulation of Railways Act, 1873 (36 & 37 Vict. c. 48), s. 19. For cases on the remuneration payable to railway companies for the carriage of mails, see *Waterford, Limerick, and Western Rail. Co.* v. *Postmaster-General* (1900), 11 Ry. & Can. Tr. Cas. 77; *Great Western Rail. Co.* v. *Postmaster-General* (1903), 12 Ry. & Can. Tr. Cas. 11.
(*u*) *Postmaster-General* v. *Highland Rail. Co.* (1874), 2 Ry. & Can. Tr. Cas. 34.
(*x*) Cheap Trains Act, 1883 (46 & 47 Vict. c. 34), s. 3. The section also provides that a company on whom an order is made refusing or neglecting to comply with the order shall lose the benefit, conferred on companies by the Act, of being free from passenger duty in respect of fares not exceeding one penny a mile. For cases in which the Commissioners have made orders relating to workmen's trains under these provisions, see *Re Metropolitan Rail. Co.* (1892), 8 Ry. & Can. Tr. Cas. 32, and *Re London Reform Union and Great Eastern Rail. Co.* (1899), 10 Ry. & Can. Tr. Cas. 280.

SECT. 1. Reasonable Facilities.

may be none the less a "workmen's train" because it is made up partly of first and second as well as third class carriages (*a*).

When order for workmen's trains will be made.

The Commissioners will not make an order for workmen's trains unless they are satisfied that a class of workmen who require the accommodation are actually living in a district served by the company (*b*), and that the demand for such trains is made by so large a number of persons as to show a reasonable proportion between the benefit conferred and the cost of conferring it (*c*). But proof by a company that the trains proposed cannot be run at a profit is not sufficient of itself to justify the Commissioners in refusing to order such trains (*d*).

SECT. 2.—*Through Rates, Fares, and Booking.*

Through rates.

119. The reasonable facilities which a railway or canal company are bound to afford, include the due and reasonable receiving, forwarding, and delivering of through traffic at through rates or fares. Any other such company, or any person interested in through traffic, may request the granting of through rates or fares; but no such person is entitled to apply to the Commissioners for an order, until he has first made a complaint to the Board of Trade of unreasonable charges, and the Board of Trade has failed to settle the question in dispute amicably (*e*).

When order for through rates will be made.

Where any company objects to the granting of a proposed rate, the Commissioners must consider whether the granting of such a rate is a due and reasonable facility, in the interests of the public, and can allow or refuse the proposed rate accordingly, or else fix such other rate as they think just and reasonable.

Apportionment of through rates.

When a through rate is made, the apportionment of such rate between the forwarding companies (*f*) is determined by the Commissioners, in default of agreement; and in making such apportionment they must take into consideration all the circumstances of

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(*a*) *Re Metropolitan Rail. Co.* (1892), 8 Ry. & Can. Tr. Cas. 32.

(*b*) *Re London Reform Union and Great Northern Rail. Co.* (1899), 10 Ry. & Can. Tr. Cas. 293.

(*c*) *Re Fawcett Association and London, Brighton, and South Coast Rail. Co.* (1899), 10 Ry. & Can. Tr. Cas. 299.

(*d*) *Re London Reform Union and Great Northern Rail. Co., supra; Re London Reform Union and Great Eastern Rail. Co.* (1899), 10 Ry. & Can. Tr. Cas. 280.

(*e*) For form of application to the Commissioners for a through rate, see Encyclopædia of Forms, Vol. III., p. 190.

(*f*) Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), s. 25. A railway company which owns a railway, but has no rolling stock, the line being worked by another company, is a forwarding company within this provision, and entitled to ask for a through rate; and traffic over such a railway is "through traffic" (*Great Western Rail. Co.* v. *Central Wales Rail. Co.* (1882), 10 Q. B. D. 231; *Greenock and Wemyss Bay Rail. Co.* v. *Caledonian Rail. Co.* (No. 3) (1878), 3 Ry. & Can. Tr. Cas. 145). A dock company possessing railway lines and sidings upon its own premises, and working traffic thereon with its own engines, is not a railway company entitled to propose a through rate (*London and India Docks Co.* v. *Great Eastern Rail. Co.*, [1902] 1 K. B. 568). A canal company authorised by Act of Parliament to construct railways on its own land, and to charge tolls for the use thereof, is a railway company entitled to propose a through rate (*Manchester Ship Canal Co.* v. *Midland Rail. Co.* (1897), 10 Ry. & Can. Tr. Cas. 54),

the case, including any special expense incurred in respect of the construction, maintenance, and working of any part of the route (*g*).

No company can be compelled to accept lower mileage rates than those which it is for the time legally charging for like traffic carried by a like mode of transit on any other line between the same points, being the points of departure and arrival of the through route (*h*).

The Commissioners have power to decide that a proposed through rate is just and reasonable, and to allow and apportion such rate, notwithstanding the fact that a less sum is allotted out of such rate to any forwarding company than the maximum rate which such company is entitled to charge (*i*).

Through rates with steamship lines.

When a railway or canal company uses, maintains, or works steamships for the purpose of carrying on communication between ports, the above provisions apply to such ships and the traffic carried by them (*j*).

Through booking.

120. A through rate necessarily implies through booking, and through booking necessarily implies a through rate, though such rate may not be less than the sum of the separate rates over different portions of the route; and in making an order for through booking the Commissioners must act on the same considerations, as to reasonableness and the interests of the public, as in making an order for a through rate (*k*).

The Commissioners have power to order through booking at a rate equal to the sum of the rates on the different parts of the route, where the interests of the public require it, and when it is reasonable (*l*).

The public as passengers have a right to a system of through booking by reasonable routes securing to them the full and unobstructed user of existing railways at reasonable fares; but where reasonable through fares are already in operation, and a new through route is opened, a company demanding new through fares must show good cause for interference; and if good cause is shown, new through fares at lower rates will be ordered (*m*).

Through booking without through trains.

Through booking for passengers may be ordered without any order being made for a through service of trains (*n*).

(*g*) Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), s. 25. See *Caledonian Rail. Co.* v. *North British Rail. Co.* (No. 4) (1880), 3 Ry. & Can. Tr. Cas. 403.

(*h*) *Ibid.*

(*i*) Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), s. 26.

(*j*) *Ibid.*, s. 25, which section also contains provisions relating to the procedure to be followed by any person or company proposing a through route.

(*k*) *Didcot, Newbury, and Southampton Rail. Co.* v. *Great Western Rail. Co.*, [1897] 1 Q. B. 33. In this case LOPES, L.J., differed from Lord ESHER, M.R., and RIGBY, L.J., and expressed the opinion that through booking may be granted without a through rate. All the judges, however, agreed that no one can demand through booking as a matter of right.

(*l*) *Didcot, Newbury, and Southampton Rail. Co.* v. *London and South Western Rail. Co.* (No. 2) (1897), 10 Ry. & Can. Tr. Cas. 9.

(*m*) *Great Western Rail. Co.* v. *Dublin and South Eastern Rail. Co.* (1907), *Times* (8 July, 1907).

(*n*) *Sussex County Council* v. *London, Brighton, and South Coast Rail. Co.* (1892), 8 Ry. & Can. Tr. Cas. 17.

SECT. 2. Through Rates, Fares, and Booking.

There is no presumption in favour of special low rates, and anyone proposing a reduced through rate must show that the company can carry the traffic at such a rate without being obliged to carry it for a less sum than it is entitled to receive (*o*).

In apportioning or fixing a through rate on the proposal of a company, the Commissioners cannot make an order contrary to a statutory agreement to which that company was a party (*p*).

Grounds of ordering through rate.

One object of this legislation is to prevent rates being raised in consequence of the disappearance of competition caused by amalgamation (*q*). The Commissioners will presume that it is in the interests of the public that there should be alternative routes and real competition (*r*). It is a good reason for the granting of through rates that through rates are in operation by an alternative route, and that the rates proposed are necessary to maintain competition (*s*). And if a new line is opened which materially shortens the railway communication between certain places, and lessens the cost of carriage, it is reasonable to grant a through rate by the new route (*t*).

All the circumstances must be considered by the Commissioners; and the fact that a station which is proposed for the exchange of traffic is not reasonably convenient or practicable for that purpose should have weight in showing that the proposed route is not reasonable (*a*).

SECT. 3.—*Undue Preference.*

Obligation to charge all persons equally.

121. Railway companies may, subject to certain restrictions (*b*), vary their charges so as to accommodate them to the circumstances of the traffic, provided they do not prejudice or favour particular parties, and provided all charges are made equally to all persons at the same rate for the carriage of passengers or goods of the same description passing only over the same portion of the line of railway under the same circumstances; and no reduction or advance in any such charges may be made, either directly or indirectly, in favour of or against any customer of the company (*c*).

Extent of obligation.

The obligation to charge all persons equally only applies to traffic between the same points of departure and arrival, and so it is no

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(*o*) *Belfast Central Rail. Co.* v. *Great Northern Rail. Co.* (*Ireland*) (1882), 4 Ry. & Can. Tr. Cas. 159; *Plymouth Incorporated Chamber of Commerce* v. *Great Western Rail. Co.* (1895), 9 Ry. & Can. Tr. Cas. 72.

(*p*) *North Monkland Rail. Co.* v. *North British Rail. Co.* (1878), 3 Ry. & Can. Tr. Cas. 282; *City of Dublin Steam Packet Co.* v. *London and North Western Rail. Co.* (1881), 4 Ry. & Can. Tr. Cas. 10.

(*q*) *Great Northern Rail. Co.* (*Ireland*) v. *Belfast Central Rail. Co.* (1880), 3 Ry. & Can. Tr. Cas. 411.

(*r*) *Great Western Rail. Co.* v. *Severn and Wye and Severn Bridge Rail. Co.* (1887), 5 Ry. & Can. Tr. Cas. 170.

(*s*) *Central Wales and Carmarthen Junction Rail. Co.* v. *London and North Western Rail. Co.* (1883), 4 Ry. & Can. Tr. Cas. 211.

(*t*) *East and West Junction Rail. Co.* v. *Great Western Rail. Co.* (1875), 2 Ry. & Can. Tr. Cas. 147.

(*a*) *Plymouth, Devonport, and South Western Junction Rail. Co.* v. *Great Western Rail. Co.* (1899), 10 Ry. & Can. Tr. Cas. 68.

(*b*) See pp. 86 *et seq.*, *post.*

(*c*) Railways Clauses Consolidation Act, 1845 (8 Vict. c. 20), s. 90.

breach of this duty to charge at unequal rates for different portions of the line (*d*). It applies to goods which are of the same description for the purposes of carriage, irrespective of the actual nature of the goods themselves (*e*); and it applies to goods which are carried under the same circumstances, as regards all services of the company rendered in respect of the goods (*f*).

It is not a circumstance justifying a less charge that the favoured customer has access to another route, and will probably use it if charged the same as the other party (*g*).

Remedy of person overcharged.

122. Where a charge is made in breach of the duty to charge equally the person overcharged may recover by action from the company the amount of the overcharge for the period during which the company was making a less charge to some other person (*h*). And an action for damages lies against a company which, in breach of this duty, refuses to carry for one person on the same terms as for another (*i*).

Equality of charges on steamers.

123. Where a railway company is authorised to acquire and use, or contract for the use of steam vessels, in order to carry on a communication between any towns or ports, and to take tolls in respect of such vessels, such tolls must be charged to all persons equally in respect of passengers carried in a like manner passing between the same places under like circumstances; and no difference in the charges may be made in consequence of any person having or not having travelled on the railway, or being or not being

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(*d*) *Denaby Main Colliery Co.* v. *Manchester, Sheffield, and Lincolnshire Rail. Co.* (1885), 11 App. Cas. 97.

(*e*) *Great Western Rail. Co.* v. *Sutton* (1869), L. R. 4 H. L. 226. In this case the company made higher charges to the respondent, who was a carrier, than they did to other customers, for the carriage of large parcels packed with a number of small parcels. Such packed parcels were alike for the purposes of carriage, and it was held that the company committed a breach of the above-mentioned section by charging more to the carrier than to general merchants for the carriage of such parcels, irrespective of the nature of their contents.

(*f*) *Denaby Main Colliery Co.* v. *Manchester, Sheffield, and Lincolnshire Rail. Co., supra.* Therefore where goods of the same description are carried for A. and for B. between the same points, the same services being rendered, B. cannot be allowed a rebate on the ground merely that his goods are being sent abroad by sea, and it is desired to develop this traffic.

(*g*) *London and North Western Rail. Co.* v. *Evershed* (1878), 3 App. Cas. 1029. The respondent in this case was a brewer at Burton, which town was served by the Midland and the appellant railway companies. Other brewers in the town had siding communication with the Midland, but not with the appellants' railway; and, in order to compete with the Midland for the custom of these brewers, the appellants charged them nothing for cartage and gave them other advantages. The respondent, however, who had no siding communication with any railway, was charged for cartage by the appellants and not given the other advantages, so that the rates charged to him were higher than those charged to the favoured customers for the same services. This was held to be an inequality within the meaning of the statute.

(*h*) *Great Western Rail. Co.* v. *Sutton, supra; London and North Western Rail. Co.* v. *Evershed, supra; Denaby Main Colliery Co.* v. *Manchester, Sheffield, and Lincolnshire Rail. Co., supra.* In such case, however, the plaintiff must prove that some other person has in fact been charged a lower rate; and it is not sufficient for him merely to show that a lower rate is contained in the rate-book (*Taylor* v. *Metropolitan Rail. Co.*, [1906] 2 K. B. 55).

(*i*) *Crouch* v. *Great Northern Rail. Co.* (1854), 9 Exch. 556.

SECT. 3. Undue Preference.

about to travel on the railway. And where a through fare is charged for conveyance by such vessel and the railway, the ticket issued to the passenger must show separately the charges for conveyance by the vessel and by the railway (*k*).

Preference forbidden if undue.

124. No railway or canal company may give any undue or unreasonable preference to any particular person or company or any particular description of traffic, in any respect whatever, nor may it subject any particular person or company or description of traffic to any undue or unreasonable prejudice in any respect whatever (*l*). It is not preference, but undue preference, that is forbidden. Therefore the mere fact that one customer of a railway company is given an advantage over another is no conclusive proof of undue preference, and it must always be a question of fact whether or not preference is undue (*m*). It is, however, a question of law whether there is, or is not, evidence proper to be considered in deciding the question of fact (*n*).

Proof that preference is not undue.

If there is no good reason shown to the contrary, similar charges ought to be made for similar services (*o*); and whenever it is shown that any railway company charges one trader or class of traders, or the traders of one district, less for the same kind of goods, or for similar services, than it charges other traders or classes of traders, or the traders of another district, or where the company in any other way prefers any such trader or traders, the burden of proving that such preference is not undue preference lies on the company (*p*).

It does not justify a preference to prove that the favoured customer threatened to promote another railway and so divert his traffic altogether (*q*), nor to show that the preference was given under an agreement made with the owners of the land taken for the railway (*r*). A preference of one trader over another which is held to be undue may be restrained by injunction (*a*).

(*k*) Regulation of Railways Act, 1868 (31 & 32 Vict. c. 119), s. 16; see *Southsea and Isle of Wight Steam Ferry Co.* v. *London and South Western Rail. Co.* (1876), 2 Ry. & Can. Tr. Cas. 341. But where a company runs vessels between a port in the United Kingdom and a foreign port, although the English law governs contracts made in England to carry to the foreign port, the *lex loci contractus* governs contracts made at the foreign port to carry to England (*Branley* v. *South Eastern Rail. Co.* (1862), 12 C. B. (N. S.) 63).

(*l*) Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), s. 2. This provision applies to traffic by sea in any vessels which a railway company owns, charters, or works, or in which it procures goods to be carried (Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), s. 28).

(*m*) *Palmer* v. *London and South Western Rail. Co.* (1866), L. R. 1 C. P. 588; *Denaby Main Colliery Co.* v. *Manchester, Sheffield, and Lincolnshire Rail. Co.* (1880), 3 Ry. & Can. Tr. Cas. 426; *Phipps* v. *London and North Western Rail. Co.*, [1892] 2 Q. B. 229.

(*n*) *Ibid.*; *Rhymney Iron Co., Ltd.* v. *Rhymney Rail. Co.* (1888), 6 Ry. & Can. Tr. Cas. 60.

(*o*) *Timm & Son* v. *North Eastern Rail. Co.* (1901), 11 Ry. & Can. Tr. Cas. 214.

(*p*) Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), s. 27 (1).

(*q*) *Harris* v. *Cockermouth and Workington Rail. Co.* (1858), 1 Ry. & Can. Tr. Cas. 97.

(*r*) *Rishton Local Board* v. *Lancashire and Yorkshire Rail. Co.* (1893), 8 Ry. Can. & Tr. Cas. 74.

(*a*) *Ransome* v. *Eastern Counties Rail. Co.* (No. 1) (1857), 1 Ry. & Can. Tr. Cas.

Where there are circumstances which make the cost to the company of carrying for one less than the cost of carrying for the other, a railway company may carry for the former for a less sum than for the latter (*b*), provided that the difference in the charges is fairly proportionate to the difference in the cost of carrying (*c*).

Where cost of carriage differs, charges may differ.

Where a company is subject to competition by sea or otherwise in its dealings with a certain place, it may be justifiable to charge less rates for that place than for a place to which there is no such competition (*d*).

Competition.

It is not necessarily undue preference for a company to make higher charges on one branch of its railway than it does for the same or greater distances on another branch (*e*). Every place, however, is presumed to be entitled to any advantage which its geographical position confers upon it; and to destroy the natural advantage which such place enjoys over another place without good reason by an arrangement of rates would be undue preference (*f*).

Charges varying with locality.

Where two products are competitive, and the cost of carrying them is the same, it is undue preference to charge more for the carriage of one than for equal services rendered to the other (*g*).

Competitive products.

A trader has a right to receive from a railway company equal treatment with all other traders of the same kind, doing the same business, and supplying the same traffic; but where the circumstances are different, and where one supplies traffic in much larger quantities than another, the company may make reasonable differences in its charges (*h*). And where a trader agrees with a company to supply large quantities of traffic, at regular times, or in full train loads, it is not undue preference to make lower charges to that trader than to others, provided the company is prepared to give the same terms to all who are willing to give the same

Lower charges to larger customers.

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63. But for a company to prefer a customer unduly is not *ultra vires*, and therefore a shareholder has no right to apply for an injunction against such preference (*Anderson* v. *Midland Rail. Co.*, [1902] 1 Ch 369).

(*b*) *Oxlade* v. *North Eastern Rail. Co.* (No. 1) (1857), 1 Ry. & Can. Tr. Cas. 72.

(*c*) *Thompson* v. *London and North Western Rail. Co.* (1875), 2 Ry. & Can. Tr. Cas. 115. Thus it would justify a difference to prove that the goods of A. had to be hauled up a steep incline, while the goods of B. were carried on the level (*Bellsdyke Coal Co.* v. *North British Rail. Co.* (1875), 2 Ry. & Can. Tr. Cas. 105). See also *Newry Town Commissioners* v. *Great Northern Rail. Co.* (*Ireland*) (1891), 7 Ry. & Can. Tr. Cas. 184.

(*d*) *Foreman* v. *Great Eastern Rail. Co.* (1875), 2 Ry. & Can. Tr. Cas. 202.

(*e*) *Caterham Rail. Co.* v. *Brighton and South Eastern Rail. Cos.* (1856), 1 Ry. & Can. Tr. Cas. 33; *Jones* v. *Eastern Counties Rail. Co.* (1858), 1 Ry. & Can. Tr. Cas. 45.

(*f*) *Ransome* v. *Eastern Counties Rail. Co.* (No. 2) (1858), 1 Ry. & Can. Tr. Cas. 109; *Richardson* v. *Midland Rail. Co.* (1881), 4 Ry. & Can. Tr. Cas. 1; *Newry Town Commissioners* v. *Great Northern Rail. Co.* (*Ireland*), *supra*; *Carrickfergus Harbour Commissioners* v. *Belfast and Northern Counties Rail. Co.* (1897), 10 Ry. & Can. Tr. Cas. 74; *Timm & Son* v. *North Eastern Rail. Co.* (1901), 11 Ry. & Can. Tr. Cas. 214.

(*g*) *Nitshill and Lesmahagow Coal Co.* v. *Caledonian Rail. Co.* (1874), 2 Ry. & Can. Tr. Cas. 39.

(*h*) *London and North Western Rail. Co.* v. *Evershed* (1878), 3 App. Cas. 1029. See note (*g*), p. 75, *ante*.

SECT. 8. Undue Preference.

consideration (*i*). But it would be undue preference to make lower charges, for the same services, to a person who agreed to employ the company exclusively for a certain term of years (*k*).

Company may not prefer itself.

125. A company in its capacity of carrier to and from its stations must not prefer itself unduly to other carriers performing similar services for the public, or unduly prejudice such other carriers (*l*). It is undue preference of itself for a company, without good cause, to admit its own vans or those of its agents to its yards after the gates have been closed for the day to the vans of other carriers bringing goods for carriage (*m*). It is also undue preference to charge customers a rate for carriage which includes the cost of collection and delivery, and to refuse to make a fair deduction from that rate to other carriers who collect and deliver themselves (*n*), or to collect and deliver free to the prejudice of such other carriers (*o*).

Company may not prefer its own agents.

A company may not give any undue preference to its own agents over other carriers who collect and deliver (*p*). Thus, where

(*i*) *Nicholson* v. *Great Western Rail. Co.* (No. 1) (1858), 1 Ry. & Can. Tr. Cas. 121; *Greenop* v. *South Eastern Rail. Co.* (1876), 2 Ry. & Can. Tr. Cas. 319; *Rhymney Iron Co., Ltd.* v. *Rhymney Rail. Co.* (1888), 6 Ry. & Can. Tr. Cas. 60; *Mansion House Association on Railway Traffic* v. *London and South Western Rail. Co.*, [1895] 1 Q. B. 927; *Hickleton Main Colliery Co., Ltd.* v. *Hull, Barnsley, and West Riding Junction Rail. and Dock Co.* (1903), 12 Ry. & Can. Tr. Cas. 63.

(*k*) *Diphwys Casson Slate Co., Ltd.* v. *Festiniog Rail. Co.* (1874), 2 Ry. & Can. Tr. Cas. 73. See also *Baxendale* v. *Great Western Rail. Co.* (1858), 5 C. B. (N. S.) 309.

(*l*) *Palmer* v. *London, Brighton, and South Coast Rail. Co.* (1871), L. R. 6 C. P. 194; *Parkinson* v. *Great Western Rail. Co.* (1871), L. R. 6 C. P. 554. See *Palmer* v. *London and South Western Rail. Co.* (1866), L. R. 1 C. P. 593.

(*m*) *Palmer* v. *London, Brighton, and South Coast Rail. Co., supra.* In this case the defendant company had opened receiving offices in various parts of London. At 6.30 p.m. it closed the gates of its goods yard against all persons bringing traffic to be forwarded that night, but admitted its own vans bringing goods from the receiving offices up to a much later hour. It was held that the company had unduly preferred its own traffic, and that it would be restrained from creating a monopoly in their own favour to the prejudice of others. But the public convenience, and the facilitating of traffic in the interests of the public, will be taken into consideration in deciding whether such preference is undue. Thus in *Palmer* v. *London and South Western Rail. Co.* (No. 2) (1892), 8 Ry. & Can. Tr. Cas. 53, in somewhat similar circumstances, it was proved that the company's vans were admitted to the yard later than those of other carriers, unless the latter were supplied with a special pass. This pass a carrier arriving late could procure by showing that all his papers relating to the consignment of the goods were in order. The company's vans arrived from the company's receiving offices with all their papers in order, so that there was little delay in dealing with the goods; and it was held that in such circumstances there was no undue prejudice of the carriers excluded. See also *Garton* v. *Great Western Rail. Co.* (1859), 5 C. B. (N. S.) 669.

(*n*) *Garton* v. *Bristol and Exeter Rail. Co., supra.* In *Pickford's, Ltd.* v. *London and North Western Rail. Co.* (1908), 98 L. T. 170, C. A., it was held that when cartage is done by a trader, the railway company is bound to allow a rebate from a collection and delivery rate which it charges for cartage; but this rebate need not be the sum which the company would charge for cartage, after carrying to a station at station rate; the correct basis is to consider the cost of the service rendered by the company, and the saving to the company when the trader does his own carting.

(*o*) *Baxendale* v. *Great Western Rail. Co., supra.*

(*p*) *Baxendale* v. *North Devon Rail. Co.* (1857), 1 Ry. & Can. Tr. Cas. 180 [illegible] v. *Bristol and Exeter Rail. Co.* (1862), 1 Ry. & Can. Tr. Cas. 229.

goods are consigned to a place beyond the station of destination on a railway company's system, and are addressed to the consignees to be forwarded by a certain named carrier, the company is bound to hand the goods over to that carrier, and may not forward them by another carrier whom it employs as their agent, or deliver them by its own vans (*q*). But a company is not bound to regard general orders given to it to deliver all goods addressed to certain consignees to a specified carrier (*r*); neither is it bound to give to all carriers the same facilities for dealing with traffic inside its stations as it gives to its own agents (*s*).

Exclusion of cabs.

A company is not giving undue preference by admitting to its passenger stations the cabs of some proprietors and excluding others, provided no public inconvenience is caused (*t*).

Preference in regard to competing routes.

126. Where a company has power to fix through rates by either of two routes, one of which is all its own, whereas the other is partly over the line of another company, it must not make such a difference in the rates as to starve the other company and prefer itself (*u*). And when a company controls two competing routes it ought to treat customers equally as far as is reasonable, and not unduly prefer one route, or without good reason give a worse service by one route than the other; but it may send traffic which it controls by whichever route suits itself (*x*). It is not necessarily giving undue preference when it disregards the instructions of the consignor as to which route it uses for his goods, if the consignor is in no way prejudiced as to cost or otherwise (*a*).

Considerations affecting question whether preference is undue.

127. In deciding whether a lower charge or other difference in treatment does or does not amount to undue preference, the court or the Commissioners may, so far as they think reasonable, in addition to other considerations affecting the case, take into consideration whether such preference is necessary in order to secure the traffic in question in the interests of the public, and whether the inequality cannot be removed (*b*).

(*q*) *Ford & Co.* v. *London and North Western Rail. Co.* (1890), 7 Ry. & Can. Tr. Cas. 111; *Fishbourne* v. *Great Southern and Western Rail. Co.* (*Ireland*) (1875), 2 Ry. & Can. Tr. Cas. 224.

(*r*) *John Wallis & Sons* v. *Great Northern Rail. Co.* (*Ireland*) (1903), 12 Ry & Can. Tr. Cas. 38.

(*s*) *Pickford & Co.* v. *Caledonian Rail. Co.* (1866), 1 Ry. & Can. Tr. Cas. 252.

(*t*) *Ex parte Painter* (1857), 2 C. B. (N. S.) 702; *Beadell* v. *Eastern Counties Rail. Co.* (1857), 2 C. B. (N. S.) 509. See, generally, as to cabs, title STREET TRAFFIC.

(*u*) *City of Dublin Steam Packet Co.* v. *London and North Western Rail. Co.* (1881), 4 Ry. & Can. Tr. Cas. 10.

(*x*) *Londonderry Port and Harbour Commissioners* v. *Great Northern Rail. Co.* (*Ireland*) (1887), 5 Ry. & Can. Tr. Cas. 282; *Ayrshire and Wigtonshire Rail. Co.* v. *Glasgow and South Western Rail. Co.* (1888), 6 Ry. & Can. Tr. Cas. 26.

(*a*) *Donald* v. *North Eastern Rail. Co.* (1888), 6 Ry. & Can. Tr. Cas. 53.

(*b*) Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), s. 27 (2). This is only an empowering section, and it leaves still to be taken into account by the Commissioners everything which was to be taken into account before this Act was passed (*Phipps* v. *London and North Western Rail. Co.* [1892] 2 Q. B. 229, *per* Lord HERSCHELL, at p. 243). "The public" signifies any considerable portion of the population not being the parties or their servants (*Castle Steam Trawlers, Ltd.* v. *Great Western Rail. Co.* (1908), 24 T. L. R. 317).

SECT. 3. Undue Preference.

Interests of public.

It is the interests of the public of the district affected that are chiefly to be considered; and so, if it is necessary for a railway company to give a preference to one place over another, in order to secure for the inhabitants of a third place the benefit of being supplied from both the other places, such preference may be justified (*c*). Thus it may be undue preference for a company to deliver at a private siding for one trader and to refuse to do so in similar circumstances for another trader (*d*); but it may be reasonable to deliver goods of a certain description at a certain station only for the corporation of a town, where such a course is for the benefit of the public of the town, and it would be inconvenient to the general traffic of the company to give the same advantage to all (*e*).

Interests of the company.

It is not, however, the interests of the public alone which are to be considered; the legitimate interests of the company and the necessity of meeting competition are also to be considered. Hence the Commissioners may consider not only the question whether the public interest requires the maintenance of the lower of two charges, but also whether the higher charges can be reduced without unfair interference with the interests of the company (*f*).

Competition.

Where one trader is charged lower rates than another, the Commissioners may consider whether the former has access to a competing railway to which the other has no access; and if such is the fact, the preference may be justified (*g*).

It may not be undue preference to charge lower rates to a certain place for goods intended for shipment from that place than for other goods carried to the same place when the reduced charges are necessary to secure the traffic in the public interest (*h*). In such circumstances there is no competition between the goods intended for shipment and the other goods, and no question of undue preference can properly arise (*i*).

Home and foreign goods to be treated alike.

128. No railway company, however, is allowed to make, nor can the court or the Commissioners sanction, any difference in the charges made for, or in the treatment of, home and foreign merchandise in respect of the same or similar services (*k*). If the company can prove facts which would justify a preference if the goods were home goods, it can rely on these facts in the case of foreign goods; but no weight can be given to anything necessarily

(*c*) *Liverpool Corn Traders' Association* v. *Great Western Rail. Co.* (1892), 8 Ry. & Can. Tr. Cas. 114.

(*d*) *Girardot, Flinn & Co.* v. *Midland Rail. Co.* (No. 2) (1885), 5 Ry. & Can. Tr. Cas. 60.

(*e*) *Lees* v. *Lancashire and Yorkshire Rail. Co.* (1874), 1 Ry. & Can. Tr. Cas. 352.

(*f*) *Liverpool Corn Traders' Association* v. *London and North Western Rail. Co.*, [1891] 1 Q. B. 120.

(*g*) *Phipps* v. *London and North Western Rail. Co.*, [1892] 2 Q. B. 229.

(*h*) *Spillers & Bakers, Ltd.* v. *Taff Vale Rail. Co.* (1903), 12 Ry. & Can. Tr. Cas. 70.

(*i*) *Lancashire Patent Fuel Co.* v. *London and North Western Rail. Co.* (1904), 12 Ry. & Can. Tr. Cas. 77.

(*k*) Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), s. 27.

peculiar to foreign goods as such over home goods (*l*). Thus, although in the case of home traffic it is a recognised principle that the charges for a long transit are less in proportion to distance than for a short transit, where goods have come from a foreign country, and are forwarded by railway in the United Kingdom, the part of the transit within the United Kingdom is not to be considered as part of a through route, for the purpose of fixing rates (*m*).

Lower charge for less distance.

It is also within the powers of the Commissioners to direct that in respect of similar services rendered, in regard to goods of like description and quantity, no higher charge shall be made for a less distance than for a greater distance on the same line (*n*).

Grouping places in same locality.

129. In fixing the rates to be charged for the carriage of goods from and to any place on their line, a railway company is entitled to group together any number of places in the same district, although situated at various distances from any point of destination or departure, and to charge uniform rates to and from all such places from or to any such point (*o*). Places must not be so grouped where the distances are unreasonable, or so as to create any undue preference of the nearer places (*p*). But commercial convenience will be taken into account in considering such grouping, and such convenience may justify a difference which otherwise might be undue (*q*).

Application to Commissioners as to group rate.

A railway company may apply to the Commissioners for their decision as to whether any proposed or existing group rate does or does not create an undue preference (*r*); but the approval by the Commissioners of any such rate does not prevent the company from subsequently dissolving the group and forming fresh groups (*s*).

(*l*) *Mansion House Association on Railway Traffic* v. *London and South Western Rail. Co.*, [1895] 1 Q. B. 927. In this case a complaint was made of undue preference of foreign over home produce, in the carriage by the respondent company of goods from Southampton Docks to London. The foreign goods, however, were delivered to the company in large quantities in full truck-loads, and packed in such a manner as to take up very little space in proportion to their weight; and the trains carrying the goods were run through to London without stopping. Home produce of the same sort, on the contrary, was delivered to the company in small and ill-packed quantities, and had to be picked up at numerous stations. There was therefore a very great economy in carrying the foreign goods, though this economy had nothing whatever to do with the fact that they were foreign. It was held that, if the facts would have justified the difference in the charges if the goods in both cases had been home goods, the railway company were not debarred from relying on those facts merely because the goods preferred were foreign goods.

(*m*) *Ibid.*

(*n*) Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), s. 27 (*i*).

(*o*) *Ibid.*, s. 29 (1).

(*p*) *Ibid.*, s. 29 (2). The grouping of such places is not contrary to s. 90 of the Railways Clauses Consolidation Act, 1845 (8 Vict. c. 20); see p. 74, *ante*. See *Denaby Main Colliery Co.* v. *Manchester, Sheffield, and Lincolnshire Rail. Co.* (1885), 11 App. Cas. 97.

(*q*) *North Lonsdale Iron and Steel Co., Ltd.* v. *Furness Rail. Co.* (1891), 7 Ry. & Can. Tr. Cas. 146.

(*r*) Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), s. 29 (3).

(*s*) *Millom and Askam Hematite Iron Co.* v. *Furness Rail. Co.* (1906), 12 Ry. & Can. Tr. Cas. 1.

SECT. 8. **Undue Preference.**

Undue preference of passengers.

130. Where undue preference is alleged with regard to passengers, the question is one of fact; and if the same preference is given to all passengers in a like position towards the company as regards business, the presumption is in favour of the preference being justifiable (*t*). And where a company issues season tickets at low fares subject to certain reasonable conditions, it is justified in refusing to grant such tickets to persons who refuse to comply with these conditions (*u*).

Remedy of persons prejudiced by preference.

Where a railway company has unduly prejudiced any person within the meaning of the above provisions (*a*), such person has no right to recover damages from the company in an action for such prejudice, or to set off such damages against a claim in an action by the company for charges (*b*). But where a complaint of undue preference is made to the Commissioners, they have power to award the complainant such damages as they find him to have sustained, which damages are to be in complete satisfaction of all overcharges, and of every claim arising out of the complaint. No such damages, however, can be awarded unless the party aggrieved has made complaint to the Commissioners within one year from the discovery by him of the matter complained of (*c*).

Complaint of undue preference.

Where any complaint of undue preference is made, no damages can be awarded if the rates objected to were duly published, while in operation, in the rate-books of the company (*d*), unless and until the complainant has given the company a written notice requiring it to remedy the matter of his complaint, and the company has failed within a reasonable time to do so (*e*). No formal notice is required; a letter making complaint and objecting to pay is sufficient (*f*).

(*t*) Thus, where the respondent company gave cheap season tickets to passengers who were customers of the company, and did a certain large amount of business with them, this was held to be no undue preference (*Inverness Chamber of Commerce* v. *Highland Rail. Co.* (1901), 11 Ry. & Can. Tr. Cas. 218).

(*u*) *Morrison* v. *Belfast and County Down Rail.* (1904), 12 Ry. & Can. Tr. Cas. 99.

(*a*) See note (*l*), p. 76, *ante*.

(*b*) *Lancashire and Yorkshire Rail. Co.* v. *Greenwood* (1888), 21 Q. B. D. 215; *Rhymney Rail. Co.* v. *Rhymney Iron Co.* (1890), 25 Q. B. D. 146. On the other hand, an overcharge under s. 90 of the Railways Clauses Consolidation Act, 1845 (8 Vict. c. 20)—the "equality clause"—may be recovered (see note (*h*), p. 75, *ante*). See the discussion on this subject in *Phipps* v. *London and North Western Rail. Co.*, [1892] 2 Q. B. 229, 246. See also *Charrington, Sells, Dale & Co.* v. *Midland Rail. Co.* (1901), 11 Ry. & Can. Tr. Cas. 222; *Denaby Main Colliery Co.* v. *Manchester, Sheffield, and Lincolnshire Rail. Co.* (1885), 11 App. Cas. 97.

(*c*) Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), s. 12. For form of complaint claiming damages, see Encyclopædia of Forms, Vol. III., p. 187.

(*d*) These are the books which every railway and canal company is obliged to keep at each station or wharf, under the provisions of s. 14 of the Regulation of Railways Act, 1873 (36 & 37 Vict. c. 48); see p. 85, *post*. A notice, on the flyleaf of such a book, that a certain rebate will be allowed on certain goods to persons agreeing to certain terms is not a sufficient publication (*Daldy & Co.* v. *Midland Rail. Co.* (1900), 10 Ry. & Can. Tr. Cas. 303).

(*e*) Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), s. 13.

(*f*) *Sheffield Coal Co., Ltd.* v. *London and North Western Rail. Co.* (1897), 10 Ry. & Can. Tr. Cas. 230.

SECT. 4.—*Maximum Rates.*

Revised schedule of maximum rates.

131. Provisions have been made by the special Acts of most railway companies limiting the rates which any company can charge for the carriage of goods; but in the year 1888 it was enacted (*g*) that, notwithstanding any provision in any general or special Act, every railway company should submit to the Board of Trade a revised classification of merchandise traffic, and a revised schedule of maximum rates applicable thereto, which the company proposed to charge, and should state therein the nature and amount of all terminal charges proposed in respect of each class of traffic, and the circumstances under which such terminal charges were to be made; and it was provided that terminal charges were to be fixed having regard only to the expenditure reasonably necessary for providing the accommodation for which the charges were made, irrespective of the outlay actually incurred. These classifications and schedules were considered and, after disputed matters had been settled in the manner provided, were embodied in provisional orders and confirmed by Acts of Parliament (*h*).

What services are included in maximum rates.

132. Under these Acts the maximum rate for conveyance is the maximum rate which the company may charge for the conveyance of merchandise by merchandise train, including the provision of trucks and locomotive power; but the company is not to be required to provide trucks for the carriage of certain very bulky descriptions of merchandise (as coal), nor for certain articles which are likely to injure its trucks (as creosote). With regard to such things, the maximum cost of conveyance does not include the provision of trucks, while in the case of other goods, if the company does not provide trucks, the rate authorised is to be reduced as provided (*i*).

Terminal charges.

133. In addition, a company may make terminal charges for station accommodation, and for services rendered in loading, unloading, covering, or uncovering, up to the maximum charges mentioned, the charges for services to include all charges for labour, machinery, plant, stores, and sheets; provided that where merchandise carried in a separate truck is loaded or unloaded elsewhere than in a shed or building of the company, the trader has a right to perform such services himself on requesting the company to allow him so to do, and the company has no right to charge for services where such request is made and unreasonably refused (*k*).

Additional charges authorised.

134. The company may charge a reasonable sum in addition to the maximum rates where, at the request of a trader, it renders services at, or in connection with, a siding not belonging to the company; where it collects or delivers goods outside the terminal station; where it weighs merchandise; where trucks are detained

(*g*) Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), s. 24.
(*h*) See London and North Western Railway Company (Rates and Charges) Order Confirmation Act, 1891 (54 & 55 Vict. c. ccxxi.), and similar Acts relating to other companies.
(*i*) *Ibid.*, Sched., clause 2.
(*k*) *Ibid.*, Sched., clauses 3 and 4.

SECT. 4. Maximum Rates.

or accommodation occupied by the trader beyond a reasonable time; where it loads or unloads, covers or uncovers, goods of certain descriptions; where coal drops are used; and where it provides accommodation at a waterside wharf, and renders services there in loading or unloading into vessels or barges; provided that no special charge for any of these matters is otherwise prescribed by Act of Parliament. Any difference arising as to the charges for these services is to be determined by an arbitrator appointed by the Board of Trade at the instance of either party (*l*).

Demurrage.

135. Where merchandise is carried in trucks not belonging to the company, the trader is entitled to recover from the company a reasonable sum by way of demurrage for detention of his trucks beyond a reasonable time (*m*). What is a reasonable time is a question of fact; but if the time during which a truck is detained is largely in excess of the average time, the onus is on the company to show that the time of detention was not unreasonable (*n*). It is not only in respect of detention before or after the transit that the trader has a claim: he is entitled to take into account the whole period, from the time when the company accepted the trucks to the time when they were actually returned (*o*).

Rent for sidings etc.

136. In addition to the authorised charges, a company is entitled to demand rent, or other payments, for sidings or accommodation provided by it for the private use of traders, and not required by the company for general purposes of traffic (*p*).

Maximum rates apply to goods trains only.

137. The specified rates and charges only apply to goods carried by merchandise trains; they have no application to carriage by

(*l*) London and North Western Railway Company (Rates and Charges) Order Confirmation Act, 1891 (54 & 55 Vict. c. ccxxi.), Sched., clause 5. As to what are reasonable sums, see *Midland Rail. Co.* v. *Black* (1899), 10 Ry. & Can. Tr. Cas. 142. Where a company brought an action for services under this section, the defendants objected to the jurisdiction of the court on the ground that the question could only be determined by an arbitrator; but it was held that, as no difference had arisen between the parties before action, the court, and not an arbitrator, had jurisdiction (*London and North Western and Great Western Joint Rail. Cos.* v. *J. H. Billington, Ltd.*, [1899] A. C. 79). But where a difference has arisen before action, the court has no jurisdiction, and an arbitrator appointed as provided can alone determine the matters in difference (*London and North Western Rail. Co.* v. *Donellan*, [1898] 2 Q. B. 7). Such arbitrator has sole jurisdiction to determine not only the reasonableness of charges for detention, but also any incidental question such as the reasonableness of the time during which trucks were detained (*Midland Rail.* v. *Loseby & Carnley*, [1899] A. C. 133).

(*m*) See London and North Western Railway Company (Rates and Charges) Order Confirmation Act, 1891 (54 & 55 Vict. c. ccxxi.), Sched., clause 6. Any difference arising under this section also is to be determined by an arbitrator appointed by the Board of Trade. Where a truck was detained, and the trader sued for damages in that he had to hire another truck to take the place of the one detained, it was held that this was a claim for demurrage, that a "difference" had arisen within the section, and that such difference could be determined only by an arbitrator appointed under the Act, and not in a court of law (*Great Western Rail. Co.* v. *Phillips & Co., Ltd.*, [1908] A. C. 101).

(*n*) *Charrington, Sells, Dale & Co.* v. *London and North Western Rail. Co.*, [1905] 2 K. B. 437.

(*o*) *Ibid.*

(*p*) London and North Western Railway Company (Rates and Charges) Order Confirmation Act, 1891 (54 & 55 Vict. c. ccxxi.), Sched., clause 7.

passenger trains; and no company is obliged to carry merchandise by passenger train, or other similar service, except perishables, for which special rates are provided (*q*). A company has, however, power to carry merchandise by passenger train; and if it does so, it can make any reasonable contract for carriage it chooses (*r*).

Charge for exceptional services.

For carriage of exceptional goods (such as articles of unusual size or weight, wild beasts, dangerous goods, or bullion), and also for any accommodation or services rendered by a railway company at the desire of a trader, in respect of which no provisions are made by statute, the company may charge such reasonable sum as it thinks fit (*s*).

Application of rates to through carriage.

The authorised maximum rates for carriage, which vary inversely with the length of transit, apply only to the company's own lines; and where goods are carried on a through route, the portion of the transit which is over the other company's line is to be regarded as a separate journey, for which the maximum rate is that authorised by that other company's Act, irrespective of the distance already carried by the contracting company (*t*).

With regard to very short transits, when merchandise is conveyed an entire distance, and this does not exceed a certain specified distance (which varies according to whether terminals are payable at both ends, or only at one or at neither end), the company may charge as for the specified distance; but in reckoning such short distances, the railway of the contracting company, and that of any other company over which it actually hauls the goods, are to be considered as one railway (*u*).

Rate-books.

138. Every railway and canal company is obliged to keep at each station or wharf books showing every rate for the time being charged for goods traffic from that station or wharf to any place to which it books; and every such book must be open to the inspection of any person, without charge, at any reasonable hour (*w*). The Commissioners have power on the application of any person interested (*a*) to order any company to distinguish in such book how much of each rate is for the conveyance of traffic, for the use of vehicles, or for

(*q*) London and North Western Railway Company (Rates and Charges) Order Confirmation Act, 1891 (54 & 55 Vict. c. ccxxi.), Sched., clause 27, and Part V.

(*r*) *Stone & Co.* v. *Midland Rail. Co.*, [1904] 1 K. B. 669.

(*s*) See London and North Western Railway Company (Rates and Charges) Order Confirmation Act, 1891 (54 & 55 Vict. c. ccxxi.), Sched., Part IV. Keeping wagons on sidings "to wait order" is an exceptional accommodation within the provision; but the question what is a reasonable charge is for the jury; see *Midland Rail. Co.* v. *Myers Rose & Co., Ltd.*, [1908] 2 K. B. 356. See also *London and North Western Rail. Co.* v. *Crooke & Co.* (1904), 20 T. L. R. 506.

(*t*) *Great Western Rail. Co.* v. *Caswell & Bowden, Ltd.*, [1904] 2 K. B. 508.

(*u*) London and North Western Railway Company (Rates and Charges) Order Confirmation Act, 1891 (54 & 55 Vict. c. ccxxi.), Sched., clause 11. If the goods are hauled by the other company over its line, the two railways are not to be considered as one (*Lancashire and Cheshire Coal Association* v. *London and North Western Rail. Co.*, [1907] 2 K. B. 902).

(*w*) Regulation of Railways Act, 1873 (36 & 37 Vict. c. 48), s. 14.

(*a*) "Person interested" may include others than those actually paying a rate; *e.g.*, the words include anyone paying a competitive rate (*Pelsall Coal and Iron Co.* v. *London and North Western Rail. Co.* (1889), 23 Q. B. D. 536). But a person applying must have a *bonâ fide* interest, and if no reasonable cause of complaint is shown, an order will be refused (*Tomlinson* v. *London and North Western Rail. Co.* (1890), 7 Ry. & Can. Tr. Cas. 22).

SECT. 4. Maximum Rates.

locomotive power, and how much is for other expenses, the nature and details of which must be specified (*b*).

Inspection of rate-books.

The book, tables, and other documents containing the classification of merchandise must also, in the same way, be open to inspection at every station at which merchandise is received for conveyance; and where merchandise is received at some place which is not a station, such books, tables, and documents must be open to inspection at the nearest station (*c*).

Separate accounts of charges for carriage.

139. On the application of any person interested in the carriage of any merchandise which has been, or is intended to be, carried over the railway of any company, the company must render an account, in which the charge made or claimed by the company for the carriage of such merchandise is divided, and the charge for conveyance over the railway is distinguished from terminal charges and dock charges, and if any terminal or dock charge is included, the nature and detail of such charge must be specified (*c*).

Where the total charge made by a company is less than the maximum which it may charge for conveyance, and the company makes no terminal charges, and states in its account that it makes no such charges, it has delivered a sufficient account to satisfy the obligation upon it (*d*).

Rate-books as to sea traffic.

140. Where a railway company carries merchandise partly by sea and partly by land, all the above-mentioned books, tables, and documents kept by the company at any port in the United Kingdom used by it must, besides the rates charged for the sea traffic, show what proportion of any through rate is appropriated to the conveyance by sea (*e*).

Rates for place where no station.

141. If traffic is received or delivered by a railway company at any place other than a station (*f*), the company must keep at its nearest station books showing every rate for the carriage of merchandise from that place to any place to which it books, including any rates charged under any special contract, and giving the distances to every such place (*g*).

Number and quantity of goods carried to be given to company.

142. Any person who is the owner of, or who has the care of, any carriage or goods passing upon a railway, must on demand give

(*b*) Regulation of Railways Act, 1873 (36 & 37 Vict. c. 48), s. 14. Where such an order is made, the company is bound to specify the charge made by it in respect of each and every service included in the rate other than conveyance (*Pickfords, Ltd.* v. *London and North Western Rail. Co.*, [1905] 1 K. B. 752).

(*c*) Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), s. 33. Provisions are also made that companies shall keep for sale copies of classifications.

(*d*) *New Union Mills Co.* v. *Great Western Rail. Co.*, [1896] 2 Q. B. 290.

(*e*) Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), s. 33 (5).

(*f*) *I.e.*, a station within the meaning of s. 14 of the Regulation of Railways Act, 1873 (36 & 37 Vict. c. 48), which is any place from which a rate is charged and which is accessible to the public (*Harborne Rail. Co.* v. *London and North Western Rail. Co.* (1875), 2 Ry. & Can. Tr. Cas. 168). A rate-book relating to a place not a station is not kept under the Act of 1873. There is no power in the Commissioners to order a rate in such book to be dissected into its component parts (*Tomlinson* v. *London and North Western Rail. Co.* (1890), 7 Ry. & Can. Tr. Cas. 22).

(*g*) Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), s. 34.

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to the proper officer of the company an exact account in writing, signed by him, of the number or quantity of goods conveyed by any such carriage; and if the goods conveyed by any such carriage or brought for conveyance be liable to the payment of different tolls, he is to specify the number or quantity liable to each toll. Failure to give such account, or giving a false account, with intent to avoid the payment of any toll, is an offence for which a penalty is incurred (*h*).

False consignment notes.

Where a person brings goods to a station to be carried by railway, and delivers to the servant of the company consignment notes in which the goods are falsely described, with the object of procuring the carriage of the goods at a lower rate than their nature entitles the company to demand, such person is guilty of this offence (*i*).

SECT. 5.—*Rebates on Sidings Rates.*

Dispute as to rebates.

143. Whenever merchandise is received or delivered by a railway company at a siding or branch railway not belonging to the company (*k*), and a dispute arises between the company and the consignor or consignee as to any allowance or rebate to be made from the rates charged on the ground that the company do not provide station accommodation or perform terminal services, the Commissioners have jurisdiction to hear and determine such dispute (*l*).

Owner of private siding not necessarily entitled to rebate.

Where a trader requires no accommodation or services at his private siding, it does not necessarily follow that he is entitled to any rebate, for on many grounds the siding may be a great expense to the railway company, and each case must depend on its own facts (*m*).

Proof of title to rebate.

Proof that a trader is the owner of sidings from which traffic is sent, and that the company renders him no terminal services and afford him no station accommodation, and that he has been charged a rate, is not sufficient to establish a *primâ facie* case that the rate includes a charge for station accommodation, or terminal services,

(*h*) Railways Clauses Consolidation Act, 1845 (8 Vict. c. 20), ss. 98, 99.

(*i*) *Barr, Moering & Co.* v. *London and North Western Rail. Co.*, [1905] 2 K. B. 113. In this case no express demand had been made by the company for an account of the goods, but the consignee was well aware from the course of business that the company would only receive the goods with consignment notes giving particulars. It was held that, whether or not it was necessary in the circumstances to prove a demand, there was evidence of a demand having been made. Whether or not particular goods come within a certain class in a company's books is a question for a court of law; see *Garmully and Jeffery Manufacturing Co.* v. *Midland Rail. Co.* (1897), 14 T. L. R. 84.

(*k*) It is not necessary, in the application of this provision, to inquire whether the company is the legal owner or has the freehold of the siding. The question is whether or not the company has the possession, use, and control of the siding (*Huntington* v. *Lancashire and Yorkshire Rail. Co.* (1901), 11 Ry. & Can. Tr. Cas. 237); see also *Pidcock & Co.* v. *Manchester, Sheffield, and Lincolnshire Rail. Co.* (1895), 9 Ry. & Can. Tr. Cas. 45, and *Girardot & Co.* v. *Great Eastern Rail. Co.* (1900), 11 Ry. & Can. Tr. Cas. 244.

(*l*) Railway and Canal Traffic Act, 1894 (57 & 58 Vict. c. 54), s. 4. This provision has no application to a siding entirely off the railway company's system (*Watson, Todd & Co.* v. *Midland Rail. Co.* (1896), 9 Ry. & Can. Tr. Cas. 90). For application to Commissioners to determine a dispute as to an allowance or rebate, see Encyclopædia of Forms, Vol. III., p. 194.

(*m*) *Gilstrap, Earp & Co.* v. *Great Northern Rail. Co.* (1901), 11 Ry. & Can. Tr. Cas. 265.

SECT. 5. Rebates on Sidings Rates.

or that the trader is entitled to a rebate; he must in every case give positive evidence of an overcharge (*n*). But where a company renders services and provides accommodation, a presumption arises that the rate charge includes a charge for such services and accommodation; and where it is proved that for similar traffic, over a similar route, in similar circumstances, another trader, who receives no such services or accommodation, is charged the same rate, the presumption arises that this second trader is entitled to a rebate (*o*).

Amount of rebate.

144. Traders are entitled to a rebate in proportion to the extent to which the company does not provide accommodation, or render services. Hence, if the company performs some services, the traders may have a right to some rebate (*p*). And where the corporation of a city had coal delivered to it by a railway company partly at a siding belonging to the company and partly at a siding belonging to the corporation, but the rates charged were the same in each case, it was held that a *primâ facie* case for a rebate was established, but that the company might set off, against such rebate, the performance of services at the corporation's sidings, for which it was entitled to charge (*q*).

Determination by Commissioners.

145. Where a company includes in its rate a charge for services at a private siding, it is not a condition precedent to the legality of such a charge that its reasonableness should be determined by arbitration. The Commissioners may determine whether such charge is reasonable, and their determination is one of fact, against which there is no appeal (*r*).

Where a rebate is granted, it runs as from the date of the application to the Commissioners unless otherwise ordered (*s*).

Right to rebate governed by special agreement.

146. Where traders have made a contract with a company for a through rate on certain special terms, and it is a term of the contract that there shall be no rebate, such traders have no right to claim a rebate (*t*). And where traders and a company, with knowledge of impending legislation, made an agreement in 1891 as to payment for certain services and accommodation at sidings, it was held that, such agreement not being incompatible with the Act (*a*), the traders were bound by their agreement (*b*).

(*n*) *Salt Union* v. *North Staffordshire Rail. Co.*, [1898] 2 Q. B. 435.

(*o*) *Tennant & Co.* v. *Caledonian Rail. Co.* (1898), 10 Ry. & Can. Tr. Cas. 194; *Vickers, Sons & Maxim, Ltd.* v. *Midland Rail. Co.* (1902), 11 Ry. & Can. Tr. Cas. 249.

(*p*) *Pidcock & Co.* v. *Manchester, Sheffield, and Lincolnshire Rail. Co.* (1895), 9 Ry. & Can. Tr. Cas. 45.

(*q*) *Birmingham Corporation* v. *Midland Rail. Co.* (1896), 9 Ry. & Can. Tr. Cas. 165.

(*r*) *Cowan & Sons* v. *North British Rail. Co.* (1901), 11 Ry. & Can. Tr. Cas. 271.

(*s*) *Gilstrap, Earp & Co.* v. *Great Northern Rail. Co.* (1901), 11 Ry. & Can. Tr. Cas. 265. As to the accommodation and services for which station and terminal services at sidings are chargeable, see also *Portway* v. *Colne Valley and Halstead Rail. Co.* (1899), 10 Ry. & Can. Tr. Cas. 211.

(*t*) *Watson, Todd & Co.* v. *Midland Rail. Co.* (1896), 9 Ry. & Can. Tr. Cas. 90.

(*a*) Railway and Canal Traffic Act, 1894 (57 & 58 Vict. c. 54), s. 4.

(*b*) *Crompton & Co.* v. *Lancashire and York hire Rail. Co.* (1902), 11 Ry. & Can. Tr. Cas. 285.

SECT. 6.—*Increase of Rates.*

SECT. 6. Increase of Rates.

147. When a railway company intends to increase any rate or charge published in the books it is required to keep (*c*), it must give (in manner prescribed by the Board of Trade) at least fourteen days' notice of such intended increase, stating in such notice the date on which the alteration is to take effect; otherwise no such increase has any effect (*d*).

Notice of intended increase.

148. Where a railway company, either alone or jointly with any other railway company or companies, since December 31, 1892, directly or indirectly (*e*) increases any rate or charge, then, if any complaint is made that such rate or charge is unreasonable, it lies upon the company to prove that the increase is reasonable, and for that purpose it is not sufficient to show that the rate and charge is less than any maximum authorised by Parliament (*f*).

Complaint that increase is unreasonable.

The Commissioners have jurisdiction to hear and determine any complaint with regard to such increase, but not until the complaint has first been made to, and considered by, the Board of Trade (*g*).

Jurisdiction to hear complaints.

Where a company increases its charges for cartage, and a complaint is made that such increase is unreasonable, the complaint is one which the Commissioners have jurisdiction to hear and determine (*h*).

Formerly there was a presumption that rates below the maximum for their class were reasonable. This is no longer the case, and rates raised since the date mentioned must stand the test of whether or not they are reasonable according to existing circumstances (*i*).

Increase must be justified in every case.

The rates and charges as they existed before 1893 are presumed

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(*c*) See p. 85, *ante*.

(*d*) Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), s. 33 (6).

(*e*) For an example of an indirect increase, see *Rickett, Smith & Co.* v. *Midland Rail. Co.*, [1896] 1 Q. B. 260.

(*f*) Railway and Canal Traffic Act, 1894 (57 & 58 Vict. c. 54), s. 1 (1). For form of complaint as to unreasonable increase of rates, see Encyclopædia of Forms, Vol. III., p. 192.

(*g*) Railway and Canal Traffic Act, 1894 (57 & 58 Vict. c. 54), s. 1 (3), *i.e.*, considered under the provisions of s. 31 of the Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25).

(*h*) *Mansion House Association on Railway Traffic* v. *London and North Western Rail. Co.*, [1896] 1 Q. B. 273. In this case it was argued that, as by the Schedule, clause 5, of the company's Provisional Order Confirmation Act, the reasonableness of cartage charges was to be determined by an arbitrator appointed by the Board of Trade (see p. 84, *ante*), the Commissioners had no jurisdiction. But it was held that, as the complaint was as to the increase of a charge, the Commissioners had jurisdiction.

(*i*) *Rickett, Smith & Co.* v. *Midland Rail. Co.*, *supra*. If rates have been lowered since 1892, and subsequently raised again, but not so as to be in excess of those in force at the end of 1892, the company can be called upon to justify the increase (*North Staffordshire Colliery Owners' Association* v. *North Staffordshire Rail. Co.*, [1907] 2 K. B. 191, C. A.). So held by COZENS-HARDY, M.R., and MOULTON, L.J. (KENNEDY, L.J., dissenting), overruling BIGHAM, J., and the Railway Commissioners. The point therefore is not free from doubt. But where the rates were so lowered because the coal trade was in a depressed state, it was held that the railway company were acting reasonably in raising them again when the trade became prosperous (*North Staffordshire Colliery Owners' Association* v. *North Staffordshire Rail. Co.*, [1908] 1 K. B. 771, affirmed [1908] 2 K. B. 765, C. A.). See also *Millom and Askam Hematite Iron Co., Ltd.* v. *Furness Rail. Co.* (1906), 12 Ry. & Can. Tr. Cas. 1, *per* WRIGHT, J., at p. 7.

SECT. 6. Increase of Rates.

to have been sufficiently high according to then existing circumstances; but there is nothing which absolutely precludes a company from bringing forward facts which existed before 1893 to justify an increase (*j*).

Circumstances as to reasonableness.

In inquiring into the reasonableness of an increase, the Commissioners will consider any circumstances which can fairly be said to show reasonableness or the reverse (*k*). Thus, evidence is admissible that the expense to the company of working the complainant's traffic has increased (*l*); but a rise of a merely temporary nature in such expense will not justify a permanent increase in rates (*m*).

Where the Commissioners have made an order against undue preference, and the company is able to prove that levelling the rates down to those charged to the preferred customer would mean substantial loss to the company, an increase of rates, by levelling up, may be reasonable (*n*).

New charge not an increase.

If a company makes a charge which it has a right to make, but which it has not previously made, this is not an increase either direct or indirect (*o*). And when a company allowed a certain reasonable time to traders to take delivery of goods, and after the lapse of that time had been accustomed to make a charge calculated according to the average time the trucks occupied the sidings, but made a change in its method, and calculated the time in respect of each separate truck, it was held there was no evidence of any direct or indirect increase (*p*).

Rate raised jointly with other companies.

When a company has raised a rate jointly with any other company or companies, any person making a complaint must join, as respondents, all the companies so joining in the increase (*q*).

Increase as to class of goods.

Where the complaint is that the company has increased its rates upon a whole class of goods, it is entitled to justify the increase on the class, as a whole, in the first place; and therefore until it has had an opportunity of so doing it is premature to call upon it to justify with regard to each article (*r*).

Who may complain of increase.

149. Any association of traders or freighters, or chamber of commerce, or chamber of agriculture, may make to the Commissioners

(*j*) *Smith and Forrest* v. *London and North Western Rail. Co.* (1900), 11 Ry. & Can. Tr. Cas. 156.

(*k*) *Ibid.*

(*l*) *Charlaw and Sacriston Collieries Co.* v. *North Eastern Rail. Co.* (1896), 9 Ry. & Can. Tr. Cas. 140; *South Yorkshire Coal Owners' Assurance Society* v. *Midland Rail. Co.* (1897), 10 Ry. & Can. Tr. Cas. 28. See these two cases for examples of facts justifying increase.

(*m*) *Black & Sons* v. *Caledonian Rail. Co.* (1901), 11 Ry. & Can. Tr. Cas. 176.

(*n*) *Rishworth, Ingleby, and Lofthouse, Ltd.* v. *North Eastern Rail. Co.* (1903), 12 Ry. & Can. Tr. Cas. 34.

(*o*) *Manchester and Northern Counties Federation of Coal Traders' Associations* v. *Lancashire and Yorkshire Rail. Co.* (1897), 10 Ry. & Can. Tr. Cas. 127. In this case the company made a charge for the use of siding accommodation where trucks were left an unreasonable time on the siding. This charge it was entitled to make by its Provisional Order Confirmation Act, Sched., clause 5 (iv.), but it had not previously insisted upon it.

(*p*) *Manchester and Northern Counties Federation of Coal Traders' Associations* v. *Midland Rail. Co.* (1896), 10 Ry. & Can. Tr. Cas. 121.

(*q*) *Mapperley Colliery Co.* v. *Midland Rail. Co.* (1896), 9 Ry. & Can. Tr. Cas. 147.

(*r*) *Mansion House Association on Railway Traffic* v. *Great Western Rail. Co.*, [1895] 2 Q. B. 141.

any complaint which the Commissioners have jurisdiction to determine, provided they obtain from the Board of Trade a certificate that such body is a proper body to make such complaint, and no proof need be given that such body is aggrieved by the matter complained of (*s*). Such an association making a complaint cannot be required by the respondent company to give particulars as to the individual traders represented by them; nor is it necessary for the association to communicate with any individual traders before making a complaint (*a*).

SECT. 6. Increase of Rates.

150. Where a complaint of an unreasonable increase is made, the complainant must, within fourteen days of filing his complaint, unless the court otherwise orders, pay to the company such sum as he would have had to pay, if the rate in force immediately before the increase, or the rate in force on December 31, 1892 (whichever is the lower), had been still in force (*b*). This provision does not, however, apply to a complaint by an association not itself aggrieved (*c*).

Payment by complainant of rate in force before increase.

Part V.—Remedies by and against Carriers.

SECT. 1.—*Remedies by Carriers.*

151. Unless a carrier receives goods with notice that the consignor is merely agent for the consignee, the only contract the carrier makes is with the consignor, and the consignor is liable in an action for the amount of the carriage (*d*). It is a question of fact to be decided in each case with whom the contract was made (*e*). And if the carrier agrees with the consignor to look only to the consignee for freight, the consignor is not liable (*f*). If the goods are delivered to the carrier by the consignor by order of the consignee, then the contract is with the consignee, and the consignee is liable (*g*). But a representation by the consignor that the consignee will pay does not bind the carrier, nor excuse the consignor, when the consignor is not in fact acting as the agent of the consignee (*h*).

With whom carrier contracts.

(*s*) Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), s. 7. Local authorities are given the right, by the same section, of making complaint to the Commissioners without proof of being aggrieved.

(*a*) *Mansion House Association on Railway Traffic* v. *Great Western Rail. Co.*, [1895] 2 Q. B. 141.

(*b*) Railway and Canal Traffic Act, 1894 (57 & 58 Vict. c. 54), s. 1 (4).

(*c*) *Mansion House Association on Railway Traffic* v. *Great Western Rail. Co.*, *supra*.

(*d*) *Great Western Rail. Co.* v. *Bagge* (1885), 15 Q. B. D. 625; *Fox* v. *Nott* (1861), 6 H. & N. 637. As to the rights of carriers as bailees, see title BAILMENT, Vol. I., pp. 556 *et seq.*

(*e*) *Great Western Rail. Co.* v. *Bagge*, *supra*; *Dickenson* v. *Lano* (1860), 2 F. & F. 188.

(*f*) *Drew* v. *Bird* (1828), 1 Mood. & M. 156.

(*g*) *Dawes* v. *Peck* (1799), 8 Term Rep. 330.

(*h*) *Great Western Rail. Co.* v. *Bagge*, *supra*. In this case the defendant had hired a trolley from E., and had agreed with E. to pay for the carriage of the trolley from E.'s place of business to the defendant's and back. At the end of

SECT. 1. **Remedies by Carriers.**

Action for freight.

152. Until the carrier has carried and is ready and willing to deliver the goods he cannot sue for the freight (*i*). In the absence of agreement, he can only recover a reasonable sum for carriage, but he is entitled to make a higher charge for the carriage of articles of great value than for other goods (*k*).

Set-off of excessive charges.

Where a railway company sues for charges for carriage, it is no defence *pro tanto* that the charges are excessive on the ground that other customers of the company are charged less, so that such customers are unduly preferred by the company within the meaning of the Railway and Canal Traffic Act, 1854; but if the company, by its charges, infringes the equality provisions contained in s. 90 of the Railways Clauses Consolidation Act, 1845, the excessive charges may be set off against a claim by the company (*l*).

Carrier's special property in goods carried.

153. A carrier, being answerable for the safety of the goods carried, has such a special property in the goods as to be able to maintain civil and criminal proceedings against any person wrongfully depriving him of them (*m*). He also has an insurable interest in the goods, so as to have the right to recover from an insurer the whole value of the goods if they are lost or destroyed while in his care (*n*).

Carrier's lien on goods carried.

154. Every common carrier has a particular lien on the goods carried for the freight payable (*o*). This right of lien exists as against the owner of the goods, even though they were delivered to the carrier against the owner's will, as by a thief, for the carrier cannot refuse to accept goods tendered to him for carriage (*p*). Apart from contract, express or implied, he has, however, no lien upon the goods for anything beyond the price of carriage (*q*).

General lien by contract.

A common carrier has at common law no lien upon the goods carried for a general balance of account due by the consignee for the carriage of other goods (*r*). A general lien, however, may exist by contract, express or implied; but the burden of proof of such a

Exercise of lien.

right is always upon him who claims it (*s*). And where by contract

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the hiring the defendant delivered the trolley to the plaintiff company to be carried to E., and on the consignment note, under the heading "Who pays carriage?" he wrote the word "consignee." E. refused to pay, and the company sued the defendant for the carriage. It was held that, in the circumstances, the defendant was not the agent of E. to make a contract for the carriage of the trolley, and that he was himself liable for the freight.

(*i*) *Barnes* v. *Marshall* (1852), 18 Q. B. 785.

(*k*) *Harris* v. *Packwood* (1810), 3 Taunt. 264.

(*l*) See note (*b*), p. 82, *ante*.

(*m*) See *Deakin's Case* (1800), 2 Leach, 862; *Nicolls* v. *Bastard* (1835) 2 Cr. M. & R. 659; *Claridge* v. *South Staffordshire Tramway Co.*, [1892] 1 Q. B. 422.

(*n*) *London and North Western Rail. Co.* v. *Glyn* (1859), 1 E. & E. 652. See title INSURANCE.

(*o*) *Skinner* v. *Upshaw* (1702), 2 Ld. Raym. 752. See title LIEN.

(*p*) *Exeter Carriers' Case*, cited in *Yorke* v. *Grenaugh* (1703), 2 Ld. Raym. 866, at p. 867.

(*q*) *Lambert* v. *Robinson* (1793), 1 Esp. 119.

(*r*) *Aspinall* v. *Pickford* (1802), 3 Bos. & P. 44, n.; *Wright* v. *Snell* (1822), 5 B. & Ald. 350.

(*s*) *Rushforth* v. *Hadfield* (1806), 7 East, 224. Such an implication may arise from a long course of dealing, provided many instances can be proved. Evidence that the carrier has, on previous occasions, claimed the right, and has

such right exists, it can only be exercised, as against the owner of goods, for a general account owing by him; it cannot be exercised, as against the owner, for a general account owing by the consignee, who is merely the factor of the owner (*t*).

Where by the established usage of a certain business the consignor pays the carriage of goods, the carrier has no right to retain the goods, as against a consignee who has paid for them, in respect of a general balance due by the consignor (*a*).

A usage giving the carrier a lien for a general account owing by the consignee cannot in any way affect the consignor's right of stoppage in transit (*b*).

Where lien destroyed by contract as to carriage.

155. There can be no lien where there is an agreement, either express or implied, that the carrier shall give credit for the carriage (*c*). An agreement, however, as to carriage does not destroy the lien, unless it is inconsistent with such a right (*d*).

Lien only exercisable at end of transit.

The right of a carrier to exercise either a general or a particular lien cannot arise until the transit of the goods is complete; hence in no case can he stop the goods at the commencement of a journey (*e*).

Over what goods lien exercisable.

Where separate parcels are carried at one time for the same consignee, the carriage having been paid on some and not on others, the carrier has no right to retain all the parcels as security for the carriage of those for which payment has not been made (*f*).

The delivery of part of one consignment of goods does not prevent the carrier from discontinuing delivery and retaining the remainder till the carriage of the whole consignment is paid (*g*).

Keeping of goods in exercise of lien.

156. When a carrier exercises his lien, he must keep the goods safely for a reasonable time, at a place reasonably convenient for the owner to obtain possession of them on tender of payment (*h*). While he so retains them, however, he does so in his own interests, and therefore he has no right, apart from agreement, to charge the owner for warehousing the goods (*i*).

Revival of lien by recaption.

If the consignee carries away goods, against the will of the carrier, while they are being retained in exercise of a lien for carriage, the lien revives on the carrier retaking the goods (*j*).

Carrier's duty where delivery not taken.

157. Where at the end of a transit the owner does not take delivery of his goods within a reasonable time, the carrier should take all reasonable means to preserve them safely; and though he may recover by action the charges to which he has been put in so

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been allowed to retain the goods, is material (*Aspinall* v. *Pickford* (1802), 3 Bos. & P. 44, n.). See further, as to the evidence necessary to establish a general lien, *Plaice* v. *Allcock* (1866), 4 F. & F. 1074. See, further, title LIEN.

(*t*) *Wright* v. *Snell* (1822), 5 B. & Ald. 350.
(*a*) *Butler* v. *Woollcott* (1805), 2 Bos. & P. (N. R.) 64.
(*b*) *Oppenheim* v. *Russell* (1802), 3 Bos. & P. 42.
(*c*) *Raitt* v. *Mitchell* (1815), 4 Camp. 146.
(*d*) *Crawshay* v. *Homfray* (1820), 4 B. & Ald. 50.
(*e*) *Wiltshire Iron Co.* v. *Great Western Rail. Co.* (1871), L. R. 6 Q. B. 776.
(*f*) *Trenty* v. *Midland Great Western Rail. Co.* (1866), 14 W. R. 314.
(*g*) *Re McLaren, Ex parte Cooper* (1879), 11 Ch. D. 68.
(*h*) *Crouch* v. *Great Western Rail. Co.* (1858), 27 L. J. (EX.) 345.
(*i*) *Somes* v. *British Empire Shipping Co.* (1860), 8 H. L. Cas. 338.
(*j*) *Wallace* v. *Woodyate* (1824), Ry. & M. 193.

SECT. 1. Remedies by Carriers.

preserving the goods, the lien for carriage does not extend to such charges (*k*).

Lien on goods in railway cloak-room.

A railway company has a lien on goods deposited in its cloak-rooms for the cloak-room charges. This is so against the owner, even where the goods have been deposited by another person, provided that other person had lawful possession of the goods when deposited (*l*).

Statutory right to sell.

Where a railway company hauls the carriage of any person upon its line, it may detain and sell such carriage, or all or any part of the goods which it contains, if the toll due for the use of the line is not paid on demand; but a railway company has no right, any more than any other owner, to sell goods detained in exercise of the company's lien for charges for the carriage of such goods (*m*).

SECT. 2.—*Remedies against Carriers.*

Who may sue for damages.

158. Where goods have been delivered to a common carrier, and they are lost or injured, the owner of the goods is the proper person to sue for damages (*n*). A consignor who consigns only as agent, and has no property in the goods, has no right of action, unless he is given such right by the special terms of the contract (*o*). But a consignor may have a special property in the goods, as bailee, sufficient to entitle him to sue, where the goods are at his risk until delivery to the consignee (*p*).

Action by consignee who is buyer of goods.

When, in pursuance of a contract of sale, the seller is authorised or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, to be carried to the buyer, is *primâ facie* delivery of the goods to the buyer (*q*); and unless the seller reserves the right of disposal, he is, by such delivery to a carrier, deemed to have unconditionally appropriated the goods to the contract (*r*). Hence, as a general rule, delivery of goods by a seller to a carrier, for conveyance to the buyer, places the goods at the risk of the consignee, and therefore the consignee is the proper person to sue, in case of loss or damage (*s*).

(*k*) *Great Northern Rail. Co.* v. *Swaffield* (1874), L. R. 9 Exch. 132. See *Mitchell* v. *Lancashire and Yorkshire Rail. Co.* (1875), L. R. 10 Q. B. 256.

(*l*) *Singer Manufacturing Co.* v. *London and South Western Rail. Co.*, [1894] 1 Q. B. 833. See also title BAILMENT, Vol. I., p. 549.

(*m*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 97, as interpreted in *Wallis* v. *London and South Western Rail. Co.* (1869), L. R. 5 Exch. 62. A company cannot under this section detain wagons belonging to a third party for tolls due for the carriage of goods in those wagons (*Manchester, Sheffield, and Lincolnshire Rail. Co.* v. *North Central Wagon Co.* (1888), 13 App. Cas. 554). See title LIEN.

(*n*) *Fragano* v. *Long* (1825), 4 B. & C. 219. As to the rights and liabilities of carriers as bailees, see title BAILMENT, Vol. I., pp. 556 *et seq.*

(*o*) *Murphy* v. *Midland Great Western (Ireland) Rail. Co.*, [1903] 2 I. R. 5; *Dawes* v. *Peck* (1799), 8 Term Rep. 330.

(*p*) *Freeman* v. *Birch* (1833), 3 Q. B. 492, n. In this case the plaintiff was a laundress, who, having washed her customers' linen, used to return it to them by the defendant, a common carrier, she paying carriage. In an action for the loss of some linen belonging to a customer, it was held that she had a special property in the goods, which enabled her to sue, as she was answerable for the safe return of the linen to its owner.

(*q*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 32; see title SALE OF GOODS.

(*r*) *Ibid.*, s. 18, r. 5.

(*s*) *Dunlop* v. *Lambert* (1838), 6 Cl. & Fin. 600; *Brown* v. *Hodgson* (1809), 2 Camp. 36; *Dutton* v. *Solomonson* (1803), 3 Bos. & P. 582.

Whenever goods are sent by a seller to a buyer by a common carrier, to whom the name of the consignee is made known, the ordinary inference is that the contract of carriage is between the carrier and the consignee, and that the consignor is merely the agent of the consignee to make the contract (*a*).

Action by consignor who remains owner of goods.

159. Delivery to a carrier, however, does not necessarily vest the property in the goods in the consignee; and so if the property in the goods has never passed to the consignee, the consignor should sue for loss or damage (*b*). And where goods are sent to the consignee for sale on approval, the consignor alone has a right to sue if the goods are lost or damaged in transit (*c*).

A carrier is usually the agent of a buyer to receive goods, but not to accept them (*d*). Therefore, when a verbal order only is given by a buyer to a seller to send him goods, of over £10 in value, the delivery of such goods to a carrier does not vest the property in the buyer without his acceptance. The risk remains with the consignor, and the consignor should sue (*e*), and not the consignee (*f*).

Where the owner of goods is induced by fraud to forward them to a person, who intends to misappropriate them, he has a right of action against the carrier for negligently dealing with the goods so as to cause him to lose them, as the property in the goods has never passed from him (*g*).

Special agreement enabling party to sue.

160. The general inference that the consignee is the person to sue may also be varied by special agreement between the parties. Thus by agreement between the consignor and the consignee the risk of the goods may remain with the former till delivery, and by agreement between the consignor and the carrier the carrier may be liable to the consignor (*h*).

Also, although the property in the goods has not passed to the consignee, if he has made a special contract with the carrier for their carriage (*i*), or if the consignor has delivered the goods to the carrier as agent for the consignee, the latter is the person to sue (*k*); and this may be the case even though the consignor has paid the

(*a*) *Cork Distilleries Co.* v. *Great Southern and Western Rail. Co.* (*Ireland*) (1874), L. R. 7 H. L. 269.

(*b*) *Sargent* v. *Morris* (1820), 3 B. & Ald. 277; *Dunlop* v. *Lambert* (1838), 6 Cl. & Fin. 600. As to when property passes by delivery to a carrier, see *Wait* v. *Baker* (1848), 2 Exch. 1; and as to the passing of property generally, see title SALE OF GOODS.

(*c*) *Swain* v. *Shepherd* (1832), 1 Mood. & R. 223.

(*d*) *I.e.*, "accept" in the sense in which the word is used in s. 4 (1) of the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71).

(*e*) *Coates* v. *Chaplin* (1842), 3 Q. B. 483. See *Hoare* v. *Great Western Rail. Co.* (1877), 37 L. T. 186, and *Smith* v. *Hudson* (1865), 6 B. & S. 431. See title SALE OF GOODS.

(*f*) *Coombs* v. *Bristol and Exeter Rail. Co.* (1858), 3 H. & N. 510.

(*g*) *Duff* v. *Budd* (1822), 6 Moore (C. P.) 469; *Stephenson* v. *Hart* (1828), 4 Bing. 476.

(*h*) *Dunlop* v. *Lambert*, *supra*. See *Cork Distilleries Co.* v. *Great Southern and Western Rail. Co.* (*Ireland*), *supra*; *Davis* v. *James* (1770), 5 Burr. 2680, as explained in *Great Western Rail. Co.* v *Bagge* (1885), 15 Q. B. D. 625.

(*i*) *Mead* v. *South Eastern Rail. Co.* (1870), 18 W. R. 735.

(*k*) *Dawes* v. *Peck* (1799), 8 Term Rep. 330; *King* v. *Meredith* (1811), 2 Camp. 639,

SECT. 2. Remedies against Carriers.

carrier, for, in the absence of any arrangement to the contrary, the consignor is always liable to pay the carrier (*l*).

Action by joint owners.

Where articles belonging to different persons are contained in one parcel, which is delivered to a carrier to be carried for them jointly, such persons may jointly sue for the loss of the goods, although the parcel is only consigned to one of them, and he has to pay the carriage (*m*).

Carrier to collect price on delivery.

Where goods are delivered by a seller to a carrier, under an agreement that the carrier shall collect the price of the goods from the buyer, the seller has a right of action against the carrier for the price if he delivers the goods without obtaining the price (*n*).

Servant travelling at master's expense.

A servant whose personal luggage is lost by a railway company may sue the company for damages in his own name, although his master paid for the ticket (*o*).

Action of contract or tort.

Whether an action against a carrier is an action of contract or tort depends on whether the plaintiff must prove a contract, or whether he can show a good cause of action independent of contract (*p*). Thus, an action against a carrier for delivering goods to the consignee contrary to a notice by the consignor to stop in transit is an action of tort (*q*); but an action for non-delivery of goods is one founded on contract (*r*).

Part VI.—The Duty of Carriers to Stop in Transit.

Nature of right to stop.

161. When goods have been delivered by an unpaid seller to a carrier, and the buyer becomes insolvent, the unpaid seller has the right of stopping the goods in transit (*s*), notwithstanding that the property in the goods may have passed to the buyer; and as long as they are in course of transit the unpaid seller may resume possession of them, and retain them until payment or tender of the price (*t*).

Termination of transit.

162. The goods are deemed to be in course of transit from the time when they are delivered to the carrier for transmission to the buyer, until the buyer or his authorised agent takes delivery of them from the carrier (*a*). If the buyer or his authorised agent obtains

(*l*) *Moore* v. *Wilson* (1787), 1 Term Rep. 659.
(*m*) *Metcalfe* v. *London, Brighton, and South Coast Rail. Co.* (1858), 4 C. B. (N. S.) 307, 318.
(*n*) *Jacobs* v. *Nelson* (1811), 3 Taunt. 423.
(*o*) *Marshall* v. *York, Newcastle, and Berwick Rail. Co.* (1851), 11 C. B. 655. See p. 41, *ante*.
(*p*) *Turner* v. *Stallibrass*, [1898] 1 Q. B. 56. The distinction seems to be now of little importance except when a question of costs arises under the County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 116, as amended by County Courts Act. 1903 (3 Edw. 7, c. 42), s. 3; see title ACTION, Vol. I., pp. 48—50.
(*q*) *Pontifex* v. *Midland Rail. Co.* (1877), 3 Q. B. D. 23.
(*r*) *Fleming* v. *Manchester, Sheffield, and Lincolnshire Rail. Co.* (1878), 4 Q. B. D. 81, disapproving *Tatlan* v. *Great Western Rail. Co.* (1860), 2 E. & E. 844.
(*s*) For a full discussion of stoppage *in transitu*, see title SALE OF GOODS.
(*t*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), ss. 44, 39.
(*a*) *Ibid.*, s. 45 (1).

delivery of the goods before their arrival at the appointed destination, the transit is at an end (*b*).

If after the arrival of the goods at the appointed destination the carrier acknowledges to the buyer, or his agent, that he holds them on his behalf, and continues in possession of them as bailee for the buyer, or his agent, the transit is at an end, and it is immaterial that a further destination may have been indicated by the buyer (*c*).

Goods in place of deposit.

Whether the carrier has been named by the buyer or not, the goods are deemed to be in transit not only while in the actual possession of the carrier, but also while they are in any place of deposit in which the carrier has put them for any purpose connected with their transmission or delivery, and until they come into the possession of the buyer, or of his agent who is to hold them at his disposal (*d*). But until the goods have reached the destination named by the buyer, and as long as they are in the hands of a carrier as carrier, whether he holds as agent of the buyer or not, they are in transit, and may be stopped (*e*). They may be stopped as long as the carrier holds them as carrier; but as soon as the carrier agrees with the buyer to hold them as his agent, and not as carrier, the transit is at an end, and with it the right to stop (*f*).

A mere demand by the buyer that the goods shall be delivered to him before the destination is reached does not end the transit (*g*),

(*b*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 45 (2); *Whitehead* v. *Anderson* (1842), 9 M. & W. 518. The appointed destination means the place mentioned by the buyer to the seller (*Coates* v. *Railton* (1827), 6 B. & C. 422). See *Kendal* v. *Marshall Stevens & Co.* (1883), 11 Q. B. D. 356; *Morley* v. *Hay* (1828), 3 Man. & Ry. 396. An appointed destination, however, means more than the mere mention of a place: it means the naming of a particular person who is to receive the goods at the place (*Re Isaacs, Ex parte Miles* (1885), 15 Q. B. D. 39, *per* BRETT, M.R., at p. 43).

(*c*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 45 (3); *Kendal* v. *Marshall Stevens & Co.*, *supra*. In this case the goods were bought on credit at Bolton, and it was not part of the contract that they should be delivered at any named place. The buyer subsequently ordered the goods to be sent to the defendants, who were shipping agents and carriers, at Garston, and agreed with the defendants that they should forward them to him at Rouen. The defendants were to keep the goods for the buyer until a ship should be ready to carry them to Rouen. The goods were sent by the buyer to the defendants by the London and North Western Railway. On their arrival at Garston the railway company gave the defendants the usual notice that the goods had arrived, and that if delivery were not taken in due course the company would hold them as warehousemen, and charge the defendants rent. Three days after the arrival of the goods at Garston, the buyer filed his petition. Seven days after their arrival, the goods being still in the hands of the railway company, the seller gave the defendants notice to stop delivery. The defendants obtained the goods from the railway company, and returned them to the seller. It was held that the transit had come to an end when the goods reached Garston, and were held by the railway company for the defendants, who were the agents of the buyer.

(*d*) *Kendal* v. *Marshall Stevens & Co.*, *supra*.

(*e*) *Bethell* v. *Clark* (1888), 20 Q. B. D. 615; *Lyons* v. *Hoffnung* (1890), 15 App. Cas. 391.

(*f*) *Re McLaren, Ex parte Cooper* (1879), 11 Ch. D. 68. Unless the carrier consents to hold them in another capacity, and the buyer consents to his so holding them, the transit is not at an end (*James* v. *Griffin* (1837), 2 M. & W. 623; *Kemp* v. *Falk* (1882), 7 App. Cas. 573). If the carriage has not been paid, there is a strong presumption that the transit is not at an end (*Kemp* v. *Falk*, *supra*, *per* Lord BLACKBURN, at p. 584). See also *Whitehead* v. *Anderson* (1842), 9 M. & W. 518.

(*g*) *Jackson* v. *Nichol* (1839), 5 Bing. (N. C.) 508.

PART VI. The Duty of Carriers to Stop in Transit.

nor does a mere promise by the carrier to deliver the goods to the buyer as soon as they can be got at (*h*).

If the goods are rejected by the buyer, and the carrier continues in possession of them, the transit is not at an end for the purpose of stoppage in transit, even if the seller has refused to take them back (*i*).

Delivery by carrier to forwarding agent.

If at the end of the journey the carrier delivers the goods to a warehouseman, forwarding agent, or other person who acts for the carrier, the transit still continues while they are in the custody of such person as agent for the carrier (*k*).

Where the carrier wrongfully refuses to deliver the goods to the buyer or his authorised agent, the transit is at an end (*l*).

The right of the unpaid seller to stop in transit cannot be defeated by a right in the carrier to exercise a general lien on the goods for the balance of an account owing to him by the buyer (*m*).

Stoppage after part delivery.

163. Where the carrier has delivered part of a consignment of goods to the buyer or his agent, the remainder of the goods may be stopped, unless the delivery of the part has been made in such circumstances as to show an agreement to deliver the whole (*n*).

Notice to carrier to stop in transit.

164. The unpaid seller may exercise his right of stoppage in transit either by actually taking possession of the goods, or by giving notice of his claim to the carrier (*o*). The notice to the carrier need not be in any particular form. For example, a request by telegraph may be sufficient (*p*).

Notice to carrier's principal.

The notice may be given to the person in actual possession of the goods, or to his principal; but in the latter case the notice, to be effectual, must be given at such time and under such circumstances that the principal, by the exercise of reasonable diligence, may communicate it to his servant or agent in time to prevent a delivery to the buyer (*q*). The duty of the principal is only to use reasonable diligence to prevent delivery (*r*).

Carrier's duty on receipt of notice.

165. When notice of stoppage in transit is given by the seller to the carrier, it is the duty of the carrier to redeliver the goods to, or according to the directions of, the seller (*s*). The expenses of

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(*h*) *Coventry* v. *Gladstone* (1868), L. R. 6 Eq. 44.

(*i*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 45 (4); *Bolton* v. *Lancashire and Yorkshire Rail. Co.* (1866), L. R. 1 C. P. 431.

(*k*) *Re Worsdell, Ex parte Barrow* (1877), 6 Ch. D. 783.

(*l*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 45 (6)—for example, where the carrier refused to deliver because of an invalid order to stop (*Bird* v. *Brown* (1850), 4 Exch. 786).

(*m*) *Oppenheim* v. *Russell* (1802), 3 Bos. & P. 42.

(*n*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 45 (7); *Bolton* v. *Lancashire and Yorkshire Rail. Co., supra*; *Re McLaren, Ex parte Cooper* (1879), 11 Ch. D. 68. If the consignment consisted of a number of different parts of a machine, delivery of one essential part might give to the buyer constructive possession of the whole (*ibid., per* COTTON, L.J., at p. 75).

(*o*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 46 (1).

(*p*) *Re Kiell, Ex parte Falk* (1880), 14 Ch. D. 446.

(*q*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 46 (1).

(*r*) *Whitehead* v. *Anderson* (1842), 9 M. & W. 518; *Re Kiell, Ex parte Falk, supra*

(*s*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 46 (2).

such redelivery must be borne by the seller (*t*), and the carrier has a lien for his costs and charges (*a*).

The Duty of Carriers to Stop in Transit.

If after notice the carrier wrongfully delivers the goods to the buyer, he is liable in an action for damages for conversion of the goods (*b*).

Where several persons claim to be entitled to the possession of the goods, and the carrier is in doubt as to their respective rights, he may interplead (*c*).

(*t*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 46 (2).

(*a*) See *Cotter* v. *Bank of England* (1834), 2 Dowl. 728.

(*b*) *Litt* v. *Cowley* (1816), 7 Taunt. 169. See *Jackson* v. *Nichol* (1839), 5 Bing. (N. C.) 508. This is an action "founded on tort" within s 116 of the County Courts Act, 1888 (51 & 52 Vict. c. 43); see title ACTION, Vol. I., p. 49, and title COUNTY COURTS. See *Pontifex* v. *Midland Rail. Co.* (1877), 3 Q. B. D. 23.

(*c*) *Wilson* v. *Anderton* (1830), 1 B. & Ad. 450. See p. 14, *ante*; see also title INTERPLEADER.

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Part I.—Legal Meaning of "Charity."

SECT. 1.—*Definition of "Charity" and General Essentials of Charitable Gifts.*

166. The term "charity" is probably incapable of definition (*a*). The popular meanings of the words "charity," "charitable," "charitable uses," and "charitable purposes" do not coincide with their legal or technical meanings according to the law of England (*b*). Charities by reference to statute of Elizabeth.

To decide whether a purpose is charitable or not in law, it is the practice of the courts to refer to the preamble to the statute of Elizabeth (*c*), which contains a comprehensive and varied list of charities (*d*). The objects there enumerated and all others "within its spirit and intendment" are charitable in the legal sense (*e*).

(*a*) *Re Nottage, Jones* v. *Palmer*, [1895] 2 Ch. 649, C. A., *per* RIGBY, L.J., at p. 656.

(*b*) *Income Tax Commissioners* v. *Pemsel*, [1891] A. C. 531, *per* Lord MACNAGHTEN, at pp. 580, 583. As to the popular meaning, see *ibid.* at pp. 552, 564, 572; and *Baird's Trustees* v. *Lord Advocate* (1888), 15 R. (Ct. of Sess.) 682, *Blair* v. *Duncan*, [1902] A. C. 37, 43; *Weir* v. *Crum-Brown*, [1908] A. C. 162, 168.

(*c*) Stat. 43 Eliz. c. 4, repealed by the Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42), except as regards the preamble, which is expressly preserved (*ibid.*, s. 13 (2)).

(*d*) *Income Tax Commissioners* v. *Pemsel*, *supra*, at p. 581; *Re Macduff, Macduff* v. *Macduff*, [1896] 2 Ch. 451, 467, C. A.; *Re Foveaux, Cross* v. *London Anti-Vivisection Society*, [1895] 2 Ch. 501, 504; *Re Nottage, Jones* v. *Palmer*, *supra*, at p. 656.

(*e*) *Morice* v. *Durham* (*Bishop*) (1804), 9 Ves. 399, 405; *Income Tax Commissioners* v. *Pemsel*, *supra*, at p. 581; *Re Macduff, Macduff* v. *Macduff*, *supra*, at p. 467.

SECT. 1. Definition of "Charity" etc.

Those named in the preamble, which has received a very wide construction (*f*), are to be regarded as instances, and not as the only objects of charity (*g*).

If a purpose is charitable in the legal sense, the court does not inquire whether if carried out it would actually benefit the community (*h*), nor is it concerned as to the motive of the donor (*i*), so long as the donor believed he was benefiting the public, and his belief was at least rational (*k*).

In Scotland.

In Scotland the construction of the words "charitable purposes" is not so wide as in England, though otherwise substantially the same (*l*). The expressions "charity" and "charitable" at any rate include there a wider range of objects than such as are of a merely eleemosynary character (*m*).

In Ireland.

In Ireland, though the statute of Elizabeth does not extend to that country, the legal and technical meaning of the term "charity" is precisely the same as in England (*n*), except in regard to masses (*o*).

For purposes of Charitable Trusts Acts.

For the purposes of the Charitable Trusts Acts the expression "charity" includes every non-exempted (*p*) endowed foundation and institution in England or Wales within the meaning of the statute of Elizabeth, or as to which the Chancery Division of the High Court has jurisdiction (*q*).

Objects mentioned in statute of Elizabeth.

167. The objects enumerated in the preamble to the statute of Elizabeth (*r*) are as follows:—

The relief of aged, impotent, and poor people; the maintenance of sick and maimed soldiers and mariners; schools of learning and free schools and scholars of universities; the repair of

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(*f*) *Cocks* v. *Manners* (1871), L. R. 12 Eq. 574, 585. As to the reluctance of the courts in modern times to extend the range of charitable objects, see also *Jeffries* v. *Alexander* (1860), 8 H. L. Cas. 594, 648.

(*g*) *London University* v. *Yarrow* (1857), 1 De G. & J. 72, 79; *Re Foveaux, Cross* v. *London Anti-Vivisection Society*, [1895] 2 Ch. 501, 504.

(*h*) *Ibid.*, at p. 507; *A.-G.* v. *Mansfield (Earl)* (1823), 2 Russ. 501, 520.

(*i*) *Re Delany, Conoley* v. *Quick*, [1902] 2 Ch. 642, 649.

(*k*) *Webb* v. *Oldfield*, [1898] 1 I. R. 431, 447.

(*l*) *Grimond* v. *Grimond* (1904), 6 F. (Ct. of Sess.) 285, *per* Lord MONCREIFF, at p. 291, and, on appeal, [1905] A. C. 124; *Re Pardoe*, [1906] 2 Ch. 184, 192; *Blair* v. *Duncan*, [1902] A. C. 37, 43; *Income Tax Commissioners* v. *Pemsel*, [1891] A. C. 531, 550, 555, 558, 563, 573, 582; and see *Hill* v. *Burns* (1826), 2 Wils. & S. 80; *Dundee Magistrates* v. *Morris* (1857), 3 Macq. 134, H. L.; *Ferguson* v. *Marjoribanks* (1853), 15 Dunl. (Ct. of Sess.) 637; *Aberdeen University* v. *Irvine* (1868), L. R. 1 Sc. & Div. 289; *Andrews* v. *M'Guffog* (1886), 11 App. Cas. 313; *Baird's Trustees* v. *Lord Advocate* (1888), 15 R. (Ct. of Sess.) 682. In Scotland, for example, a gift for a religious purpose is not necessarily charitable (*Re Pardoe, supra*, at p. 192).

(*m*) *Blair* v. *Duncan, supra*, at p. 43.

(*n*) *Income Tax Commissioners* v. *Pemsel, supra*, at pp. 544, 570, 582; and see *Arnott* v. *Arnott*, [1906] 1 I. R. 127; *O'Hanlon* v. *Logue*, [1906] 1 I. R. 247.

(*o*) See p. 122, *post*.

(*p*) For exempted charities, see Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 62; and p. 304, *post*.

(*q*) Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 66; Charitable Trusts Amendment Act, 1855 (18 & 19 Vict. c. 124), s. 48.

(*r*) 43 Eliz. c. 4, repealed except as to preamble by Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42), s. 13 (2).

bridges, ports, havens, causeways, churches, sea banks, and highways; the education and preferment of orphans; the relief, stock, or maintenance of houses of correction; marriages of poor maids; supportation, aid, and help of young tradesmen, handicraftsmen, and persons decayed; the relief or redemption of prisoners or captives; the aid or ease of any poor inhabitants concerning payment of fifteens, setting out of soldiers, and other taxes.

Purpose must be of public nature.

168. Only those purposes are charitable in the eye of the law which are of a public nature (*s*), whose object, that is to say, is to benefit the community or some part of it (*t*), not merely particular individuals pointed out by the donor (*u*).

Accordingly gifts which are directed to the abstract purposes of relieving poverty (*v*), advancing education (*a*) or religion (*b*), are charitable.

Persons to be selected by trustees.

A bequest for the relief of such poor persons as the testator's trustees may choose is charitable (*c*), but not where the choice is to be made from a number of named individuals (*d*).

Principal divisions of charitable objects.

169. "Charity" in its legal sense comprises four principal divisions: trusts for the relief of poverty, trusts for the advancement of education, trusts for the advancement of religion, and trusts for other purposes beneficial to the community not falling under any of the preceding heads (*e*). Within one of these divisions all charity to be administered by the court must fall, though every object which might be brought within one of them is not necessarily a charity (*f*).

(*s*) *Jones* v. *Williams* (1767), Amb. 651, where "charity" is defined as a gift to a general public use which extends to the poor as well as to the rich; *Goodman* v. *Saltash Corporation* (1882), 7 App. Cas. 633, 650; *Re Christchurch Inclosure Act* (1888), 38 Ch. D. 520, 532, C. A. As to the meaning and the difficulty of defining the expression "public charity," see further, *A.-G.* v. *Pearce* (1740), 2 Atk. 87; *Hall* v. *Derby Sanitary Authority* (1885), 16 Q. B. D. 163. As to the meaning of the expression "private charity," see p. 117, *post*, and the cases there cited.

(*t*) *Re Foveaux, Cross* v. *London Anti-Vivisection Society*, [1895] 2 Ch. 501, 504. The section of the community to be benefited may be restricted within narrow limits (see cases cited at pp. 108 *et seq.*, *post*), and on this principle gifts to the poor of a particular place (*Bristow* v. *Bristow* (1842), 5 Beav. 289; *A.-G.* v. *Comber* (1824), 2 Sim. & St. 93), class (*Nash* v. *Morley* (1842), 5 Beav. 177), or denomination (*A.-G.* v. *Wansay* (1808), 15 Ves. 231), or for the inhabitants of a particular town (*Re Mann*, [1903] 1 Ch. 232), are charitable.

(*u*) *A.-G.* v. *Pearce*, *supra*; *A.-G.* v. *Comber*, *supra*.

(*v*) *Nash* v. *Morley*, *supra*.

(*a*) *Whicher* v. *Hume* (1858), 7 H. L. Cas. 124.

(*b*) *Re Delany, Conoley* v. *Quick*, [1902] 2 Ch. 642, *per* FARWELL, J., at p. 648.

(*c*) *A.-G.* v. *Pearce*, *supra*; and see p. 166, *post*.

(*d*) *Liley* v. *Hey* (1842), 1 Hare, 580; *Thomas* v. *Howell* (1874), L. R. 18 Eq. 198. As to gifts for particular individuals, see p. 117, *post*.

(*e*) *Income Tax Commissioners* v. *Pemsel*, [1891] A. C. 531, *per* Lord MACNAGHTEN, at p. 583. This classification was taken from the argument of Sir SAMUEL ROMILLY in *Morice* v. *Durham* (*Bishop*) (1805), 10 Ves. 522, 532. See also *Re Macduff, Macduff* v. *Macduff*, [1896] 2 Ch. 451, 466, C. A.

(*f*) *Re Macduff, Macduff* v. *Macduff*, *supra*, at pp. 466, 474.

SECT. 2. Charitable Purposes.

SECT. 2.—*Charitable Purposes.*

SUB-SECT. 1.—*Relief of the Indigent.*

Poor persons generally or of particular class.

170. The relief of the aged, impotent and poor is charitable (*g*), whether the gift is general and indefinite (*h*) or for the poor of a particular parish, town, or other place (*i*), or even on a particular estate (*k*), or for a particular class of poor or the poor of a particular class, as poor gentlewomen (*l*), housekeepers (*m*), tradesmen of a particular kind (*n*), unsuccessful literary men (*o*), servants (*p*), old and worn-out clerks of a particular firm (*q*), "poor struggling youths of merit" (*r*), the relief of domestic distress (*s*), for poor pious persons (*t*), poor emigrants (*u*), inmates of a workhouse (*a*) or hospital (*b*), debtors (*c*), for fifty old men and fifty old women of a particular place, being "needy and deserving" (*d*), or for the widows and orphans of poor clergymen (*e*) or seamen (*f*), or living

(*g*) Preamble to stat. 43 Eliz. c. 4; see p. 106, *ante*. Purposes which may incidentally benefit the rich do not cease on that account to be charitable (*Jones* v. *Williams* (1767), Amb. 651; *A.-G.* v. *Haberdashers' Co.* (1833), 1 My. & K. 420, 429; *Income Tax Commissioners* v. *Pemsel*, [1891] A. C. 531, 583). But a trust for the rich exclusively would not be charitable (*A.-G.* v. *Northumberland* (*Duke*) (1877), 7 Ch. D. 745, 752; *Re Macduff*, *Macduff* v. *Macduff*, [1896] 2 Ch. 464, 471, C. A.).

(*h*) *A.-G.* v. *Matthews* (1676), 2 Lev. 167 (for the good of poor people for ever); *A.-G.* v. *Syderfen* (1683), 1 Vern. 224; *A.-G.* v. *Rance* (1728), cited Amb. 422; *Nash* v. *Morley* (1842), 5 Beav. 177; *Re Darling*, *Farquhar* v. *Darling*, [1896] 1 Ch. 50 (to the poor and the service of God).

(*i*) *Woodford Parish* v. *Parkhurst* (1639), Duke on Charitable Uses, 70; *A.-G.* v. *Pearce* (1740), 2 Atk. 87; *A.-G.* v. *Clarke* (1762), Amb. 422; *A.-G.* v. *Bovill* (1840), 1 Ph. 762; *A.-G.* v. *Blizard* (1855), 21 Beav. 233 (poor of a parish); *A.-G.* v. *Wilkinson* (1839), 1 Beav. 370; *Russell* v. *Kellett* (1855), 3 Sm. & G. 264 (poor of a township); *Bruce* v. *Deer Presbytery* (1867), L. R. 1 Sc. & Div. 96 (poor of a presbytery); *Re Lousada* (1887), 82 L. T. Jo. 358 ("London poor"); *Salter* v. *Feary* (1843), 7 Jur. 831; *Re Lambeth Charities* (1853), 22 L. J. (CH.) 959; *Re St. Alphage, London Wall* (1888), 59 L. T. 614.

(*k*) *Bristow* v. *Bristow* (1842), 5 Beav. 289. Distinguish *A.-G.* v. *Persse* (1842), 2 Dr. & War. 67; and compare *Browne* v. *King* (1885), 17 L. R. Ir. 448.

(*l*) *A.-G.* v. *Power* (1809), 1 Ball & B. 145; *Re Estlin* (1903), 72 L. J. (CH.) 687. In some cases the word "poor" or an intention to relieve poverty is to be implied from the terms of the gift (*Widmore* v. *Woodroffe* (1766), Amb. 636, 640; *Thompson* v. *Corby* (1860), 27 Beav. 649; *Re Dudgeon* (1896), 74 L. T. 613).

(*m*) *A.-G.* v. *Pearce*, *supra*.

(*n*) *Re White's Trusts* (1886), 33 Ch. D. 449.

(*o*) *Thompson* v. *Thompson* (1844), 1 Coll. 381, 395.

(*p*) *Reeve* v. *A.-G.* (1843), 3 Hare, 191; *Loscombe* v. *Wintringham* (1850), 13 Beav. 87.

(*q*) *Re Gosling* (1900), 48 W. R. 300.

(*r*) *Milnes' Executors* v. *Aberdeen University Court* (1905), 7 F. (Ct. of Sess.) 642.

(*s*) *Kendall* v. *Granger* (1842), 5 Beav. 300, 303.

(*t*) *Nash* v. *Morley*, *supra*.

(*u*) *Barclay* v. *Maskelyne* (1858), 4 Jur. (N. S.) 1294. See *Re Sidney*, [1908] 1 Ch. 488, C. A. ("emigration uses" not charitable).

(*a*) *A.-G.* v. *Vint* (1850), 3 De G. & Sm. 704.

(*b*) *Reading Corporation* v. *Lane* (1601), Duke on Charitable Uses, 361.

(*c*) *A.-G.* v. *Painter-stainers' Co.* (1788), 2 Cox, 51; *A.-G.* v. *Ironmongers' Co.* (1833), 2 My. & K. 576.

(*d*) *Re Reed* (1893), 10 T. L. R. 87.

(*e*) *Waldo* v. *Caley* (1809), 16 Ves. 206.

(*f*) *Powell* v. *A.-G.* (1817), 3 Mer. 48.

in a particular parish (*g*), or for indigent bachelors and widowers "who have shown sympathy with science" (*h*).

171. The relief of the poor of a particular church or religious denomination, as Jews (*i*), Presbyterians (*j*), Moravians (*k*), Unitarians (*l*), Irvingites (*m*), or Methodists (*n*), is charitable, and has always been so, notwithstanding the law of superstitious uses. So also a gift for ministers "persecuted . . . or in poverty" on account of preaching certain doctrines (*o*).

Poor of particular religion.

172. Perpetual trusts for the benefit of poor relations or descendants are charitable (*p*).

Poor relations.

Gifts for poor relations intended for immediate distribution are also charitable (*q*), unless they are intended to be confined to statutory next of kin (*r*), and such gifts are confined to the statutory next of kin unless a contrary intention appears from the will (*a*). Poor relations who become rich must not participate (*b*), and a gift for the poorest of the testator's kindred can only be charitable when intended for persons actually poor (*c*).

A gift for the poor giving a preference to poor relations is

(*g*) *A.-G.* v. *Comber* (1824), 2 Sim. & St. 93; *Russell* v. *Kellett* (1855), 3 Sm. & G. 264.

(*h*) *Weir* v. *Crum-Brown*, [1908] A. C. 162; *Murdoch's Trustees* v. *Weir*, [1907] S. C. 185.

(*i*) *De Costa* v. *De Paz* (1754), 2 Swan. 487, n.; and see *A.-G.* v. *Mathieson*, [1907] 2 Ch. 383, 392, C. A. (Mildmay Mission to the Jews).

(*j*) *A.-G.* v. *Wansay* (1808), 15 Ves. 231.

(*k*) *Income Tax Commissioners* v. *Pemsel*, [1891] A. C. 531.

(*l*) *A.-G.* v. *Shore* (1843), 11 Sim. 592, 619, affirmed *sub nom. Shore* v. *Wilson*, 9 Cl. & Fin. 355, H. L.

(*m*) *A.-G.* v. *Lawes* (1849), 8 Hare, 32.

(*n*) *Dawson* v. *Small* (1874), L. R. 18 Eq. 114.

(*o*) *A.-G.* v. *Lawes*, *supra*.

(*p*) *White* v. *White* (1802), 7 Ves. 423 (trust for apprenticing poor relations); *A.-G.* v. *Price* (1810), 17 Ves. 371 (poor kinsmen in a particular place); *Isaac* v. *Defriez* (1754), Amb. 595 (poorest relations); *Browne* v. *Whalley*, [1866] W. N. 386; *Gillam* v. *Taylor* (1873), L. R. 16 Eq. 581 (lineal descendants); *Bernal* v. *Bernal* (1838), 3 My. & Cr. 559 ("male descendants" construed as meaning descendants claiming through males); *A.-G.* v. *Northumberland* (*Duke*) (1877), 7 Ch. D. 745; *contrd*, *Liley* v. *Hey* (1842), 1 Hare, 580; *Peek* v. *Peek* (1869), 17 W. R. 1059.

(*q*) *A.-G.* v. *Buckland* (or *Bucknall*) (1741), cited Amb. 71, n.; *Mahon* v. *Savage* (1803), 1 Sch. & Lef. 111.

(*r*) *Carr* v. *Bedford* (1679), 2 Rep. Ch. 77; *Griffith* v. *Jones* (1687), 2 Rep. Ch. 179; *Edge* v. *Salisbury* (1749), Amb. 70 ("nearest relations"); *Brunsden* v. *Woolredge* (1765), Amb. 507 ("mother's poor relations"); *Widmore* v. *Woodroffe* (1766), Amb. 636 ("most necessitous of my relations"); *Gower* v. *Mainwaring* (1750), 2 Ves. Sen. 87, 110 ("friends and relations" means "relations"); see also *Roach* v. *Hammond* (1715), Prec. Ch. 401; *Anon.* (1716), 1 P. Wms. 327 ("poor relations"); *Green* v. *Howard* (1779), 1 Bro. C. C. 31 ("testator's relations"). As to such a bequest when not confined to statutory next of kin being void for uncertainty, see *Widmore* v. *Woodroffe*, *supra*, at p. 640; *Mahon* v. *Savage*, *supra*; *Brandon* v. *Brandon* (1819), 3 Swan. 312 ("nearest and next of kin").

(*a*) See *Carr* v. *Bedford*, *supra*; *Griffith* v. *Jones*, *supra*.

(*b*) *Mahon* v. *Savage*, *supra*.

(*c*) *A.-G.* v. *Northumberland* (*Duke*), *supra*; and see *A.-G.* v. *Price*, *supra*.

SECT. 2. Charitable Purposes.

charitable (*d*). An inquiry may be directed as to who are poor relations (*e*).

ndirect elief of overty.

173. The relief of poverty may also be effected indirectly. Thus, bequests in aid of the granting of allotments (*f*), the apprenticing of poor children (*g*), the pensioning of old clerks (*h*), and the distribution of doles (*i*), are charitable.

Similarly, the establishment, maintenance, and support of institutions or funds for the relief of various forms of poverty or distress, as soup kitchens (*k*), hospitals (*l*), asylums (*m*), almshouses (*n*), homes for lady teachers (*o*) or working girls (*p*), orphanages (*q*), institutions for the benefit of impoverished actors (*r*), sick and poor funds of a parish church (*s*), are charitable.

Gifts to religious communities having for their object the relief of the sick and poor (*t*), and to friendly societies where relief is given only to poor persons, but not otherwise (*a*), are charitable (*b*).

SUB-SECT. 2.—*Educational Purposes.*

dvancement f learning.

174. The advancement and propagation of education and learning generally are charitable purposes (*c*).

(*d*) *Waldo* v. *Caley* (1809), 16 Ves. 206.

(*e*) *A.-G.* v. *Price* (1810), 17 Ves. 371; *A.-G.* v. *Sidney Sussex College, Cambridge* (1865), 34 Beav. 654.

(*f*) *Crafton* v. *Frith* (1851), 4 De G. & Sm. 237.

(*g*) *A.-G.* v. *Minshull* (1798), 4 Ves. 11; *A.-G.* v. *Winchelsea* (*Earl*) (1791), 3 Bro. C. C. 374; *A.-G.* v. *Wansay* (1808), 15 Ves. 231.

(*h*) *Re Gosling* (1900), 48 W. R. 300.

(*i*) *A.-G.* v. *Minshull, supra*; *A.-G.* v. *Bovill* (1840), 1 Ph. 762; *Thompson* v. *Thompson* (1844), 1 Coll. 381, 392.

(*k*) *Biscoe* v. *Jackson* (1887), 35 Ch. D. 460.

(*l*) *Pelham* v. *Anderson* (1764), 2 Eden, 296; *A.-G.* v. *Gascoigne* (1832), 2 My. & K. 647; *A.-G.* v. *Kell* (1840), 2 Beav. 575; *Re Cox, Cox* v. *Davie* (1877), 7 Ch. D. 204.

(*m*) *Harbin* v. *Masterman* (1871), L. R. 12 Eq. 559; *Harbin* v. *Masterman*, [1894] 2 Ch. 184, C. A., affirmed *sub nom. Wharton* v. *Masterman*, [1895] A. C. 186; *Henshaw* v. *Atkinson* (1818), 3 Madd. 306.

(*n*) *London's* (*Mayor*) *Case* (1639), cited in Duke on Charitable Uses, 300; and see *Chamberlayne* v. *Brockett* (1872), 8 Ch. App. 206.

(*o*) *Re Estlin* (1903), 72 L. J. (CH.) 687, where the ladies in question paid part of the expenses of board and lodging.

(*p*) *Rolls* v. *Miller* (1884), 27 Ch. D. 71.

(*q*) *Hall* v. *Derby Sanitary Authority* (1885), 16 Q. B. D. 163; *Harbin* v. *Masterman, supra*; *Re Clergy Society* (1856), 2 K. & J. 615; *Re Douglas* (1887), 35 Ch. D. 472.

(*r*) *Spiller* v. *Maude* (1881), 32 Ch. D. 158, n.; *Re Lacy, Royal General Theatrical Fund Association* v. *Kydd*, [1899] 2 Ch. 149.

(*s*) *Re Garrard*, [1907] 1 Ch. 382.

(*t*) *Cocks* v. *Manners* (1871), L. R. 12 Eq. 574; *Re Delany, Conoley* v. *Quick*, [1902] 2 Ch. 642, and cases there cited.

(*a*) *Re Clark* (1875), 1 Ch. D. 497; *Cunnack* v. *Edwards*, [1896] 2 Ch. 697, C. A.

(*b*) *Spiller* v. *Maude, supra*; *Pease* v. *Pattinson* (1886), 32 Ch. D. 154; *Re Buck, Bruty* v. *Mackey*, [1896] 2 Ch. 727; *Re Lacy, Royal General Theatrical Fund Association* v. *Kydd, supra*. As to a charitable institution for the reception of the destitute being a lodging-house within the Common Lodging-houses Acts, 1851 and 1853 (14 & 15 Vict. c. 28; 16 & 17 Vict. c. 41), and the London County Council (General Powers) Act, 1902 (2 Edw. 7, c. clxxiii.), Part IX., see *Parker* v. *Talbot*, [1905] 2 Ch. 643, C. A.

(*c*) *Whicker* v. *Hume* (1858), 7 H. L. Cas. 124; *United States* (*President*) v. *Drummond* (1838), cited 7 H. L. Cas. 155. It is otherwise where the gift is for the mere increase of knowledge (*Whicker* v. *Hume* (1858), 7 H. L. Cas. 124, 154;

So also are the establishment and support of colleges (*d*), schools (*e*), professorships (*f*), fellowships (*g*), lectureships (*h*), scholarships (*i*), and prizes (*j*), and the providing of schoolmasters (*k*).

Advancement of science.

Gifts to learned societies and institutions for the advancement of science (*l*), such as the Royal Society (*m*) or the Royal Literary Society (*n*), are also charitable.

Education of particular classes.

So also are gifts for the education of special classes of persons, as the testator's descendants (*o*), the daughters of missionaries (*p*), or persons professing particular religious doctrines (*q*).

Education in particular subjects.

The promotion of education in particular subjects, such as the Irish language (*r*), economic and sanitary science (*s*), art (*t*), archæology (*a*), or Christian knowledge (*b*), is also a charitable purpose.

Re Macduff, Macduff v. *Macduff*, [1896] 2 Ch. 451, 473, C. A.). A gift to further "religious and mental improvement" is good (*Re Scowcroft, Ormrod* v. *Wilkinson*, [1898] 2 Ch. 638).

(*d*) *Porter's Case* (1592), 1 Co. Rep. 24 b; *Plate* v. *St. John's College* (1638), Duke on Charitable Uses, 379; *A.-G.* v. *Comber* (1824), 2 Sim. & St. 93; *Christ's College, Cambridge, Case* (1757), 1 Wm. Bl. 90; *A.-G.* v. *Whorwood* (1750), 1 Ves. Sen. 534, 536; *Walsh* v. *Gladstone* (1843), 1 Ph. 290 (Roman Catholic college); *Aberdeen University* v. *Irvine* (1868), L. R. 1 Sc. & Div. 289; *Wallis* v. *S.-G. for New Zealand*, [1903] A. C. 173. But not the establishment of a monastic order for teaching purposes (*MacLaughlin* v. *Campbell*, [1906] 1 I. R. 588); see p. 122, *post*.

(*e*) *Gibbons* v. *Maltyard* (1593), Poph. 6; *Rugby School Case* (1626), Duke on Charitable Uses, 633; *A.-G.* v. *Nash* (1792), 3 Bro. C. C. 588; *Kirkbank* v. *Hudson* (1819), 7 Price, 212; *Hartshorne* v. *Nicholson* (1858), 26 Beav. 58; *Re Peel's* (*Sir Robert*) *School at Tamworth* (1868), 3 Ch. App. 543; *Re Gilchrist Educational Trust*, [1895] 1 Ch. 367; *Smith* v. *Kerr*, [1902] 1 Ch. 774, 778, C. A. (ancient Inns of Chancery); *Re Hawkins* (1906), 22 T. L. R. 521 (school for religious teaching and elementary education).

(*f*) *Yates* v. *University College, London* (1873), 8 Ch. App. 454, affirmed (1875), L. R. 7 H. L. 438 (professorship of archæology); *Buckland* v. *Bennett* (1887), L. J. N. C. p. 7 (professorship of economic fish culture).

(*g*) *Jesus College Case* (1615), Duke on Charitable Uses, 363.

(*h*) *A.-G.* v. *Cambridge* (*Margaret Regius Professors*) (1682), 1 Vern. 55, n.

(*i*) *R.* v. *Newman* (1667), 1 Lev. 284; *Re Levitt* (1885), 1 T. L. R. 578; *North Wales University College* v. *Taylor*, [1908] P. 140, C. A.; *Re Williams, Taylor* v. *Wales* (*University*) (1908), *Times* (June 4, 1908).

(*j*) *Thompson* v. *Thompson* (1844), 1 Coll. 398; *Farrer* v. *St. Catherine's College, Cambridge* (1873), L. R. 16 Eq. 19.

(*k*) *Hynshaw* v. *Morpeth Corporation* (1629), Duke on Charitable Uses, 242; *A.-G.* v. *Winchelsea* (*Earl*), (1791), 3 Bro. C. C. 374.

(*l*) As to the meaning of "science," see *Weir* v. *Crum-Brown*, [1908] A. C. 162, 168, 169.

(*m*) *Beaumont* v. *Oliveira* (1869), 4 Ch. App. 309; *Royal Society of London and Thompson* (1881), 17 Ch. D. 407.

(*n*) *Thomas* v. *Howell* (1874), L. R. 18 Eq. 198.

(*o*) *Spencer* v. *All Souls' College* (1762), Wilm. 163; *Braund* v. *Devon* (*Earl*) (1868), 3 Ch. App. 800; *A.-G.* v. *Sidney Sussex College* (1869), 4 Ch. App. 722. But not the education of "any boy or man" of a particular surname (*Laverty* v. *Laverty*, [1907] 1 I. R. 9).

(*p*) *German* v. *Chapman* (1877), 7 Ch. D. 271.

(*q*) *Income Tax Commissioners* v. *Pemsel*, [1891] A. C. 531; *Walsh* v. *Gladstone* (1843), 1 Ph. 290; *Carbery* v. *Cox* (1852), 3 I. Ch. R. 231, n. (Roman Catholics); *Re Michel* (1860), 28 Beav. 39 (Jews).

(*r*) *A.-G.* v. *Flood* (1816), cited Hayes & Jo. App. at p. xxxviii; and see *Brownjohn* v. *Gale*, [1869] W. N. 133.

(*s*) *Re Berridge* (1890), 63 L. T. 470.

(*t*) *Re Allsop* (1884), 1 T. L. R. 4.

(*a*) *Yates* v. *University College, London*, *supra*.

(*b*) *A.-G.* v. *Stepney* (1804), 10 Ves. 22.

SECT. 2. SUB-SECT. 3.—*Religious Purposes.*

Charitable Purposes.

Religious purposes *primâ facie* charitable.

175. Gifts for religious purposes are *primâ facie* charitable, unless the contrary can be shown (*c*). Such purposes must be for the instruction or edification of the public (*d*).

Accordingly gifts for "promoting religion" (*e*), for the "worship of God" (*f*), for the "spread of the Gospel" (*g*) or of Christianity (*h*), or to be used "in the service of my Lord and Master" (*i*), for the support of missionaries (*j*), for "such missionary purposes as ——— selects" (*k*), for the distribution of Bibles (*l*) or of other religious books (*m*), or for the maintenance of institutions formed for the promotion of religion, as the Society for the Propagation of the Gospel (*n*), the Protestant Alliance (*o*), the Church Missionary Society (*p*), or the Society for Promoting Christian Knowledge (*q*), or "to the following religious societies, viz. ———" (*r*), are charitable.

Provision and support of clergy.

176. Similarly the establishment of a bishopric (*s*), the provision of clergy (*t*) or preachers (*u*), or the increase of their stipends (*x*), even though conditionally upon their preaching certain doctrines (*y*) or a particular sermon (*a*), or permitting free sittings (*b*) or providing a

(*c*) *Re White, White* v. *White*, [1893] 2 Ch. 41, 53, C. A.; *Re Macduff, Macduff* v. *Macduff*, [1896] 2 Ch. 465, 474, C. A.; *Arnott* v. *Arnott*, [1906] 1 I. R. 127. As to religious purposes void as being superstitious or against public policy, see pp. 117, 120, 122, *post*.

(*d*) *Cocks* v. *Manners* (1871), L. R. 12 Eq. 574, 585; *Re Delany, Conoley* v. *Quick*, [1902] 2 Ch. 642, 648.

(*e*) *A.-G.* v. *Stepney* (1804), 10 Ves. 22; *Baker* v. *Sutton* (1836), 1 Keen, 224; *Wilkinson* v. *Lindgren* (1870), 5 Ch. App. 570; *contrà*, *Browne* v. *Yeall* (1790), 7 Ves. 50, n., 10 Ves. 22, 27, doubted in *Morice* v. *Durham* (*Bishop*) (1805), 10 Ves. 522, 539, and in *Re Macduff, Macduff* v. *Macduff*, *supra*, at pp. 471, 472.

(*f*) *A.-G.* v. *Pearson* (1817), 3 Mer. 353, 409.

(*g*) *Re Lea* (1887), 34 Ch. D. 528.

(*h*) *A.-G.* v. *Stepney*, *supra*; *A.-G.* v. *London Corporation* (1790), 1 Ves. 243.

(*i*) *Powerscourt* v. *Powerscourt* (1824), 1 Mol. 616; *Felan* v. *Russell* (1842), 4 I. Eq. R. 701; *Re Darling, Farquhar* v. *Darling*, [1896] 1 Ch. 50.

(*j*) *Income Tax Commissioners* v. *Pemsel*, [1891] A. C. 531; but see *Scott* v. *Brownrigg* (1881), 9 L. R. Ir. 246.

(*k*) *Re Kenny* (1908), 97 L. T. 130, not following *Scott* v. *Brownrigg*, *supra*; see also *Allan's Executor* v. *Allan*, [1908] S. C. 807.

(*l*) *A.-G.* v. *Stepney*, *supra*.

(*m*) *Thornton* v. *Howe* (1862), 31 Beav. 14.

(*n*) *Re Maguire* (1870), L. R. 9 Eq. 632.

(*o*) *Re Delmar Charitable Trust*, [1897] 2 Ch. 163 (defence of doctrines of the Reformation).

(*p*) *Re Clergy Society* (1856), 2 K. & J. 615.

(*q*) *Ibid.*

(*r*) *Re White, White* v. *White*, *supra*. See *Re Macduff, Macduff* v. *Macduff*, *supra*, at pp. 466, 474; and compare *Grimond* v. *Grimond*, [1905] A. C. 124.

(*s*) *A.-G.* v. *Chester* (*Bishop*) (1785), 1 Bro. C. C. 444.

(*t*) *Dundee Magistrates* v. *Dundee Presbytery* (1861), 4 Macq. 228, H. L.; *Pennington* v. *Buckley* (1848), 6 Hare, 451, 453.

(*u*) *Pember* v. *Knighton* (1639), Duke on Charitable Uses, 381; *Penstred* v. *Payer* (1639), Duke on Charitable Uses, 381; *Grieves* v. *Case* (1792), 4 Bro. C. C. 66.

(*x*) *Durour* v. *Motteux* (1749), 1 Ves. Sen. 320; *A.-G.* v. *Brereton* (1752), 2 Ves. Sen. 425; *A.-G.* v. *Sparks* (1753), Amb. 201; *Middleton* v. *Clitherow* (1798), 3 Ves. 734; *Widmore* v. *Woodroffe* (1766), Amb. 636 (Queen Anne's Bounty); *Gibson* v. *Representative Church Body* (1881), 9 L. R. Ir. 1; *Re Maguire* (1870), L. R. 9 Eq. 632 (gift to Additional Curates' Aid Society).

(*y*) *A.-G.* v. *Molland* (1832), You. 562.

(*a*) *Re Parker's Charity* (1863), 32 Beav. 654.

(*b*) *Re Randell* (1888), 38 Ch. D. 213.

clergyman to preach on particular occasions (*c*) or to particular persons, as prisoners (*d*), or gifts in lieu of tithes (*e*), or for pensioning a perpetual curate, are charitable (*f*).

Gifts for the augmentation of livings or for the purchase of advowsons for the spread of particular religious views (*g*), or trusts for the benefit of parishioners to nominate the parson (*h*), or to a minister and his successors (*i*), or to a minister for the time being, are also charitable (*k*). A gift to a minister and churchwardens for the time being to be applied as they think fit, without any mention of charity, is a good charitable gift for ecclesiastical purposes in the parish (*l*). Gifts also for church expenses generally (*m*), to provide a clerk (*n*), an organist (*o*), or choristers (*p*), are charitable.

177. The repair of a parsonage is a charitable purpose (*q*). So also the provision and maintenance (*r*), repair and ornamentation (*s*) of a parish church or of the chapel or meeting-house of any particular Christian denomination (*a*), or the provision or repair of

Repair of buildings used for religious purposes.

(*c*) *Durour* v. *Motteux* (1749), 1 Ves. Sen. 320; *Re Parker's Charity* (1863), 32 Beav. 654.

(*d*) *Re Hussey's Charities* (1861), 7 Jur. (N. S.) 325.

(*e*) *Milbank* v. *Lambert* (1860), 28 Beav. 206.

(*f*) *A.-G.* v. *Parker* (1747), 1 Ves. Sen. 43; see also *A.-G.* v. *Brereton* (1752), 2 Ves. Sen. 425, 426, 427.

(*g*) *Re Hunter, Hood* v. *A.-G.*, [1897] 2 Ch. 105, C. A.; but not if no trust of the advowson is declared, on which ground the House of Lords reversed this decision, *sub nom. Hunter* v. *A.-G.*, [1899] A. C. 309.

(*h*) *Re St. Stephen, Coleman Street* (1888), 39 Ch. D. 492; *Hunter* v. *A.-G.*, *supra*, at p. 322; *Foley* v. *A.-G.* (1721), 2 Bro. Parl. Cas. 249; *A.-G.* v. *Scott* (1750), 1 Ves. Sen. 413; *A.-G.* v. *Webster* (1875), L. R. 20 Eq. 483, 491. Compare, on the other hand, *A.-G.* v. *Parker*, *supra*; *A.-G.* v. *Forster* (1804), 10 Ves. 335; *A.-G.* v. *Newcombe* (1807), 14 Ves. 1, where such a trust was considered valid but not charitable; see also *Edenborough* v. *Canterbury (Archbishop)* (1826), 2 Russ. 93. As to when a trust to purchase an advowson is not charitable, see p. 124, *post*. As to the meaning of parishioners, see note (*x*), p. 165, *post*.

(*i*) *A.-G.* v. *Molland* (1832), You. 562; *Thornber* v. *Wilson* (1855), 3 Drew. 245.

(*k*) *A.-G.* v. *Cock* (1751), 2 Ves. Sen. 273; *A.-G.* v. *Sparks* (1753), Amb. 201. But not a gift for the particular minister in office (*Doe* v. *Aldridge* (1791), 4 Term Rep. 264).

(*l*) *Re Garrard*, [1907] 1 Ch. 382. See also *Thornber* v. *Wilson*, *supra*; *Re Delany, Conoley* v. *Quick*, [1902] 2 Ch. 642, 646; *Re Davidson* (1908), 24 T. L. R. 766; and distinguish the cases where the gift fails for uncertainty (*Fowler* v. *Fowler* (1864), 33 Beav. 616); see p. 145, *post*.

(*m*) *Re Scowcroft, Ormrod* v. *Wilkinson*, [1898] 2 Ch. 638, 642.

(*n*) *Durour* v. *Motteux* (1749), 1 Ves. Sen. 320.

(*o*) *A.-G.* v. *Oakaver* (1736), cited 1 Ves. Sen. 536; *Re Scowcroft, Ormrod* v. *Wilkinson*, *supra*.

(*p*) *Turner* v. *Ogden* (1787), 1 Cox, Eq. Cas. 316; see, however, *A.-G.* v. *Oakaver*, *supra*.

(*q*) *A.-G.* v. *Chester (Bishop)* (1785), 1 Bro. C. C. 444.

(*r*) *Re Parker* (1859), 4 H. & N. 666; *Clephane* v. *Edinburgh Magistrates* (1864), 4 Macq. 603, H. L.

(*s*) *A.-G.* v. *Ruper* (1722), 2 P. Wms. 125; *A.-G.* v. *Vivian* (1826), 1 Russ. 226; *A.-G.* v. *Love* (1857), 23 Beav. 499; *Re Donington-on-Baine Church Estate* (1860), 6 Jur. (N. S.) 290; *Re Church Estate Charity, Wandsworth* (1871), 6 Ch. App. 296; *A.-G.* v. *Dartmouth Corporation* (1883), 48 L. T. 933; *Re Palatine Estate Charity* (1888), 39 Ch. D. 54 (sp...e); *Re St. Alphage, London Wall* (1888), 59 L. T. 614.

(*a*) *Re Manser, A.-G.* v. *Lucas*, [1905] 1 Ch. 68, 73.

SECT. 2. **Charitable Purposes.**

a chancel (*b*) or organ (*c*), bells (*d*), gallery (*e*), clock (*f*), or monument in a church (*g*), are charitable purposes.

So also gifts for maintaining or providing a churchyard (*h*), or cemetery (*i*), or burial ground for a particular sect (*k*), or for headstones to the graves of certain almshouse pensioners (*l*), are charitable.

Advancement of non-conformist religions.

178. The advancement of the Roman Catholic and Jewish religions and of all dissenting denominations and the maintenance and benefit of their schools and chapels are also charitable purposes (*m*).

SUB-SECT. 4.—*Public Purposes.*

General public utility.

179. Only those objects of general public utility are charitable which are mentioned, or are analogous to those mentioned, in the statute of Elizabeth (*n*).

Thus, gifts for the benefit of the country to be applied by the Chancellor of the Exchequer (*o*), for a peal of bells to be rung to commemorate the restoration of the monarchy (*p*), for the benefit of the commonwealth (*q*) or relief of taxes (*r*), in reduction of the National Debt (*s*), or for a county, city, borough (*t*), ward (*u*), or parish (*w*), or for inhabitants of particular localities (*x*), as of a

(*b*) *Hoare* v. *Osborne* (1866), L. R. 1 Eq. 585.

(*c*) *A.-G.* v. *Oakaver* (1736), cited 1 Ves. Sen. 536.

(*d*) *Turner* v. *Ogden* (1787), 1 Cox, Eq. Cas. 316; and see *Re Palatine Estate Charity* (1888), 39 Ch. D. 54, 59.

(*e*) *A.-G.* v. *Day*, [1900] 1 Ch. 31.

(*f*) *Re Church Estate Charity, Wandsworth* (1871), 6 Ch. App. 296; *Re Hendry* (1887), 56 L. T. 908.

(*g*) *Hoare* v. *Osborne* (1866), L. R. 1 Eq. 585; *Re Ripley's Trusts* (1866), 36 L. J. (CH.) 147. As to tombs and monuments not forming part of a church, see p. 118, *post*.

(*h*) *Re Vaughan* (1886), 33 Ch. D. 187; *Re Douglas, Douglas* v. *Simpson*, [1905] 1 Ch. 279; and see title BURIAL AND CREMATION, Vol. III., pp. 432 *et seq.*

(*i*) *A.-G.* v. *Blizard* (1855), 21 Beav. 233.

(*k*) *Re Manser, A.-G.* v. *Lucas*, [1905] 1 Ch. 68.

(*l*) *Re Pardoe*, [1906] 2 Ch. 184. As to private tombs, see p. 118, *post*.

(*m*) See p. 121, *post*.

(*n*) *Re Macduff, Macduff* v. *Macduff*, [1896] 2 Ch. 451, 466, 467, 473, 474, 475, C. A.; *Langham* v. *Peterson* (1903), 87 L. T. 744; *Re Good, Harington* v. *Watts*, [1905] 2 Ch. 60, 66; *Re Allen, Hargreaves* v. *Taylor*, [1905] 2 Ch. 400, 405; *Grimond* v. *Grimond*, [1905] A. C. 124; compare, however, *A.-G.* v. *Heelis* (1824), 2 Sim & St. 76, where it was held that all public purposes were charitable.

(*o*) *Nightingale* v. *Goulbourn* (1848), 2 Ph. 594.

(*p*) *Re Pardoe, supra.*

(*q*) *Smith* v. *Kerr*, [1902] 1 Ch. 774, C. A.

(*r*) *A.-G.* v. *Bushby* (1857), 24 Beav. 299.

(*s*) *Thellusson* v. *Woodford* (1799), 4 Ves. 226; *Newland* v. *A.-G.* (1809), 3 Mer. 684; *Ashton* v. *Langdale* (*Lord*) (1851), 4 De G. & Sm. 402, 403; *Income Tax Commissioners* v. *Pemsel*, [1891] A. C. 531, 544.

(*t*) *Howse* v. *Chapman* (1799), 4 Ves. 542; *Wrexham Corporation* v. *Tamplin* (1873), 21 W. R. 768; *A.-G.* v. *Dartmouth Corporation* (1883), 48 L. T. 933; *A.-G.* v. *Lonsdale* (*Earl*) (1827), 1 Sim. 105; *Mitford* v. *Reynolds* (1841), 1 Ph. 185 (public works in the city of Dacca).

(*u*) *Baylis* v. *A.-G.* (1741), 2 Atk. 239.

(*w*) *West* v. *Knight* (1670), 1 Ch. Cas. 134; *Dolan* v. *Macdermot* (1868), 3 Ch. App. 676; *A.-G.* v. *Hotham* (*Lord*) (1823), Turn. & R. 209; *A.-G.* v. *Lonsdale* (*Earl*) *supra*; *A.-G.* v. *Webster* (1875), L. R. 20 Eq. 483; *Re St. Bride's Parish Estate* (1877), 35 Ch. D. 147, n.; *Re St. Botolph Without Bishopsgate Parish Estates* (1887), 35 Ch. D. 142; *Re St. Alphage, London Wall* (1888), 59 L. T. 614; *Re St. Stephen, Coleman Street* (1888), 39 Ch. D. 492; *Re St. Nicholas Acons* (1889), 60 L. T. 532. See *Re Mann, Hardy* v. *A.-G.*, [1903] 1 Ch. 232.

(*x*) *Wrexham Corporation* v. *Tamplin* (1873), 21 W. R. 768. Compare the cases quoted p. 117, *post*, and in notes (*t*) and (*u*), *supra*.

borough (*y*), city (*z*), town (*a*), or village (*b*), or for the copyhold tenants of a manor (*c*) or the occupiers of cottages on a manor (*d*), are charitable.

Benefit of a section of the public.

180. Gifts for particular purposes benefiting the public or a section thereof, as for repairing highways (*e*), building bridges (*f*), protecting the sea coast against encroachment (*g*), providing a town with water (*h*), or light (*i*), or other improvements (*j*), or fortifications (*k*), or building a courthouse (*l*) or workhouse (*m*), or providing a cemetery (*n*), or for poor relief (*o*), or in reduction of rates (*p*), are charitable.

So also gifts for the benefit of a volunteer corps (*q*) or for teaching shooting (*r*), of a library and renewal funds to the officers' mess for the time being of a regiment (*s*), or for encouraging good domestic servants (*t*), or for providing a lifeboat (*u*), are charitable.

Gifts for public libraries (*w*), and museums (*x*), and reading-

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(*y*) *Goodman* v. *Saltash Corporation* (1882), 7 App. Cas. 633; *Re Norwich Town Close Estate Charity* (1888), 40 Ch. D. 298. See, however, *Prestney* v. *Colchester Corporation* (1882), 21 Ch. D. 111.

(*z*) *A.-G.* v. *Carlisle Corporation* (1828), 1 Sim. 437; *Mitford* v. *Reynolds* (1841), 1 Ph. 185. But not where the gift is intended for individuals (*Rogers* v. *Thomas* (1837), 2 Keen, 8).

(*a*) *A.-G.* v. *Cashel Corporation* (1842), 3 Dr. & War. 294; *A.-G.* v. *Galway Corporation* (1828), 1 Mol. 95.

(*b*) *Wright* v. *Hobert* (1723), 9 Mod. Rep. 64.

(*c*) *Wilson* v. *Barnes* (1886), 38 Ch. D. 507.

(*d*) *A.-G.* v. *Meyrick*, [1893] A. C. 1.

(*e*) *A.-G.* v. *Harrow School* (1754), 2 Ves. Sen. 551; *A.-G.* v *Day*, [1900] 1 Ch. 31.

(*f*) *Forbes* v. *Forbes* (1854), 18 Beav. 552.

(*g*) *A.-G.* v. *Brown* (1818), 1 Swan. 265.

(*h*) *Jones* v. *Williams* (1767), Amb. 651.

(*i*) *A.-G.* v. *Heelis* (1824), 2 Sim. & St 76, 77; *A.-G.* v. *Eastlake* (1853), 11 Hare, 205.

(*j*) *House* v. *Chapman* (1799), 4 Ves. 542; *A.-G.* v. *Heelis*, *supra*; *A.-G.* v. *Brown*, *supra*.

(*k*) *A.-G.* v. *Carlisle Corporation*, *supra*; *A.-G.* v. *Dartmouth Corporation* (1883), 48 L. T. 933.

(*l*) Duke on Charitable Uses, 109, 136.

(*m*) *A.-G.* v. *Blizard* (1855), 21 Beav. 233; *Re St. Botolph Without Bishopsgate* (1887), 35 Ch. D. 142; *Webster* v. *Southey* (1887), 36 Ch. D. 9; but compare *Burnaby* v. *Barsby* (1859), 4 H. & N. 690.

(*n*) *A.-G.* v. *Blizard*, *supra*; and see title BURIAL AND CREMATION, Vol. III, p. 432.

(*o*) *Luckraft* v. *Pridham* (1877), 6 Ch. D. 205; *Re St. Alphage, London Wall*, (1888), 59 L. T. 614.

(*p*) *Doe* v. *Howells* (1831), 2 B. & Ad. 744; and see *A.-G.* v. *Limerick Corporation* (1817), 6 Dowl. 136.

(*q*) *Re Stratheden and Campbell (Lord)*, *Ali* v. *Stratheden and Campbell (Lord)*, [1894] 3 Ch. 265.

(*r*) *Re Stephens* (1892), 8 T. L. R. 792.

(*s*) *Re Good*, *Harington* v. *Watts*, [1905] 2 Ch. 60.

(*t*) *Reeve* v. *A.-G.* (1843), 3 Hare, 191; *Loscombe* v. *Wintringham* (1850), 13 Beav. 87.

(*u*) *Johnston* v. *Swann* (1818), 3 Madd 457.

(*w*) *Abbott* v. *Fraser* (1874), L. R. 6 P. C. 96. Distinguish the cases where the institution is for the benefit of the founder and subscribers only (*Carne* v. *Long* (1860), 2 De G. F. & J. 75; *Re Russell Institution*, *Figgins* v. *Bagshaw*, [1898] 2 Ch. 72; *Re Jones* (1898), 67 L. J. (CH.) 504; *Re Pitt Rivers*, *Scott* v. *Pitt Rivers*, [1902] 1 Ch. 403, C. A., and cases there cited).

(*x*) *British Museum* v. *White* (1826), 2 Sim. & St. 594; *Re Allsop* (1884), 1

SECT. 2. Charitable Purposes.

rooms (*y*), a botanical garden (*z*), or to the Royal Lifeboat Institution (*a*) or Royal Humane Society (*b*), are similarly charitable.

Gifts for the prevention of cruelty to children (*c*) are charitable.

Protection of animals.

181. So also gifts to societies or institutions established for the protection of animals, as the Home for Lost Dogs (*d*), anti-vivisection societies (*e*), vegetarian societies (*f*), or the Society for the Prevention of Cruelty to Animals (*g*), or to establish a veterinary college (*h*) or an animals' hospital (*i*), or generally for the preservation of animals or vegetables useful to man, are charitable (*j*).

Spread of certain principles.

182. The promulgation of particular doctrines or principles may be charitable (*k*), as, for instance, Conservative principles combined with mental and moral improvement (*l*), Socialism (*m*), anti-vivisection principles (*n*), or the distributing of the writings of Joanna Southcote, a foolish and ignorant woman, whose works, however, were written obviously with a view to extend the influence of Christianity (*o*).

Test of charitable gift is the purpose.

In deciding whether a particular gift is charitable as being beneficial to the community, the main point to consider is the purpose. The source from which funds are derived is not one of the tests of a public charity (*p*), whether they are levied by taxation (*q*) or are

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T. L. R. 4; *Re Holburne* (1885), 53 L. T. 212. As to picture galleries, see *Gwynn* v. *Cardon*, cited in *Morice* v. *Durham* (*Bishop*) (1805), 10 Ves. 522, at p. 533; *Abbott* v. *Fraser* (1874), L. R. 6 P. C. 96; and as to the encouragement of art, see *McCaig* v. *Glasgow University*, [1907] S. C. 231; and p. 111, *ante*.

(*y*) *Re Scowcroft, Ormrod* v. *Wilkinson*, [1898] 2 Ch. 642. Even if the institution named, though used for charitable purposes, is not bound by a good charitable trust, the gift will be good (*Re Mann, Hardy* v. *A.-G.*, [1903] 1 Ch. 232).

(*z*) *Townley* v. *Bedwell* (1801), 6 Ves. 194; *Harrison* v. *Southampton Corporation* (1854), 2 Sm. & G. 387.

(*a*) *Thomas* v. *Howell* (1874), L. R. 18 Eq 198; *Re Richardson* (1888), 56 L. J. (CH.) 784; *Re David* (1889), 41 Ch. D. 168.

(*b*) *Beaumont* v. *Oliveira* (1869), 4 Ch. App. 309.

(*c*) *Income Tax Commissioners* v. *Pemsel*, [1891] A. C. 531, 572.

(*d*) *Re Douglas* (1887), 35 Ch. D. 472. C. A.; *Marsh* v. *Means* (1857), 3 Jur. (N.S.) 790; *Re Foveaux, Cross* v. *London Anti-Vivisection Society*, [1895] 2 Ch. 501, 507.

(*e*) *Tatham* v. *Drummond* (1864), 4 De G. J. & Sm. 484; *Re Douglas, supra*; *Re Joy* (1888), 60 L. T. 175; *Re Foveaux, Cross* v. *London Anti-Vivisection Society, supra*; *Armstrong* v. *Reeves* (1890), 25 L. R. Ir. 325.

(*f*) *Re Cranston*, [1898] 1 I. R. 431; *Re Slatter* (1905), 21 T. L. R. 295.

(*g*) *Tatham* v. *Drummond, supra*; *Re Douglas, supra*.

(*h*) *London University* v. *Yarrow* (1857), 1 De G. & J. 79, 80. See *Re Joy, supra*.

(*i*) *Ibid.*

(*j*) *Ibid.* Distinguish the cases of gifts for the benefit of specified animals (*Re Dean* (1889), 41 Ch. D. 552) and for animals not useful to man (*A.-G.* v. *Whorwood* (1750), 1 Ves. Sen. 534, 536 (trust to feed sparrows)), which are not charitable.

(*k*) This is not so where the doctrines are subversive of morality or otherwise pernicious; see p. 123, *post*. An inquiry into the nature of the doctrines may be ordered (*Russell* v. *Jackson* (1852), 10 Hare, 204).

(*l*) *Re Scowcroft, Ormrod* v. *Wilkinson, supra*.

(*m*) *Russell* v. *Jackson, supra*. See *Pare* v. *Clegg* (1861), 29 Beav. 589.

(*n*) *Re Foveaux, Cross* v. *London Anti-Vivisection Society, supra*.

(*o*) *Thornton* v. *Howe* (1862), 31 Beav. 14.

(*p*) *Re St. Botolph Without Bishopsgate* (1887), 35 Ch. D. 142, 150; *Hall* v. *Derby Sanitary Authority* (1885), 16 Q. B. D. 163, 171; *contrà*, *A.-G.* v. *Heelis* (1824), 2 Sim. & St. 67, 77.

(*q*) *A.-G.* v. *Brown* (1818), 1 Swan. 265; *A.-G.* v. *Dublin Corporation* (1827), 1 Bli. (N. S.) 312, 334, 336, H. L.; *A.-G.* v. *Eastlake* (1853), 11 Hare, 205; *Re St. Bride's, Fleet Street* (1877), 35 Ch. D. 147, n.; *Re St. Botolph Without*

a gift from the Crown (*r*). This principle is applicable also to land purchased under statutory authority for a public purpose (*s*).

SECT. 2. Charitable Purposes.

SECT. 3.—*Non-charitable Purposes.*

SUB-SECT. 1.—*Gifts for Private Charities or for Specified Individuals.*

How far "private" charities are legal charities.

183. Bequests for private charitable purposes are not recognised by the courts as charitable in the legal sense (*t*), except where by the use of the word "private" a testator may be said to have drawn a distinction between "charities available for all and charities which are restricted to a special class or administered by individuals without the intervention of any corporate organisation" (*u*).

Gifts for benefit of individuals.

184. Gifts for the benefit of particular individuals or a fluctuating body of particular individuals (*v*), whether named by the testator or to be selected by his trustees (*x*) or by any other person (*y*), as, for instance, gifts for persons residing in a particular street (*a*), for the children of the testator's tenants on a particular estate (*b*), for members of a city company whose property was impressed with no charitable trust (*c*), or for the members of a religious community associated only for the purpose of working out their own salvation (*d*), or for poor relations where limited to persons entitled under the Statute of Distributions (*e*), are never charitable, though

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Bishopsgate (1887), 35 Ch. D. 142, 150, 151; see also *A.-G.* v. *Shrewsbury Corporation* (1843), 6 Beav. 220.

(*r*) *A.-G.* v. *Blizard* (1855), 21 Beav. 233; *contrà*, *A.-G.* v. *Galway Corporation* (1828), 1 Mol. 95.

(*s*) *A.-G.* v. *Plymouth Corporation* (1845), 9 Beav. 67; *Re St. Pancras Burial Ground* (1866), L. R. 3 Eq. 173.

(*t*) *Ommanney* v. *Butcher* (1823), Turn. & R. 260; *Ellis* v. *Selby* (1836), 1 My. & Cr. 286, 292, 293; *Nash* v. *Morley* (1842), 5 Beav. 177, 183.

(*u*) *Re Sinclair* (1884), 13 L. R. Ir. 150 *per* PORTER, M.R., at p. 154. With this interpretation of the word "private," it may be possible to reconcile the cases of *Waldo* v. *Caley* (1809), 16 Ves. 206, where a gift for "charitable purposes as well of a public as a private nature" was held good; *Johnston* v. *Swann* (1818), 3 Madd. 457, where a trust for public and private charities was held good; and *Horde* v. *Suffolk* (*Earl*) (1833), 2 My. & K. 59, where a trust "to distribute in charity to private individuals or public institutions" was held good. As to the ambiguity of the expression "private charity," see *A.-G.* v. *Pearce* (1740), 2 Atk. 87: "Each particular object may be private, but it is the extensiveness which will constitute it a public charity"; *Nash* v. *Morley*, *supra*; *Hall* v. *Derby Sanitary Authority* (1885), 16 Q. B. D. 163, 171, 173; *Re Slevin*, *Slevin* v. *Hepburn*, [1891] 2 Ch. 236, C. A.

(*w*) *Goodman* v. *Saltash Corporation* (1882), 7 App. Cas. 633, 650.

(*x*) *Liley* v. *Hey* (1842), 1 Hare, 580; *Thomas* v. *Howell* (1874), L. R. 18 Eq. 198; *Edge* v. *Salisbury* (1749), Amb. 70.

(*y*) *A.-G.* v. *Hughes* (1689), 2 Vern. 105.

(*a*) *Rogers* v. *Thomas* (1837), 2 Keen, 8.

(*b*) *Browne* v. *King* (1885), 17 L. R. Ir. 448; and compare *Bristow* v. *Bristow* (1842), 5 Beav. 289.

(*c*) *A.-G.* v. *Haberdashers' Co.* (1834), 1 My. & K. 420.

(*d*) *Cocks* v. *Manners* (1871), L. R. 12 Eq. 574; *Stewart* v. *Green* (1871), I. R. 5 Eq. 470; *Re Delany* (1881), 9 L. R. Ir. 226. See also *Re Delany*, *Conoley* v. *Quick*, [1902] 2 Ch. 642, where the objects of the convent were charitable.

(*e*) *Edge* v. *Salisbury* *supra*, where "nearest relations" were construed to mean statutory next of kin; *Brunsden* v. *Woolredge* (1765), Amb. 507; *Widmore* v. *Woodroffe* (1766), Amb. 636; *Goodinge* v. *Goodinge* (1749), 1 Ves. Sen. 231; *Doyley* v. *A.-G.* (1735), 4 Vin. Abr. 485; *Salusbury* v. *Denton* (1857), 3 K. & J. 529. See also *Gower* v. *Mainwaring* (1750), 2 Ves. Sen. 87; and p. 109, *ante*.

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they may be upheld as gifts to individuals (*f*). So also bequests for the benefit of an orphan school, kept by an individual substantially at his own expense (*g*), for the support of any boy or man of a particular surname (*h*), for keeping in repair a portrait (*i*), for providing a particular estate with labourers' cottages (*j*), to a livery company for giving a dinner upon the testator's birthday to which certain churchwardens should be invited (*k*), for a private chapel with chaplain and choristers (*l*), for masses for the repose of the soul of the testator (*m*), for the suppression of cruelty to animals by the private prayers of members of a society (*n*), for the maintenance of the testator's horses and dogs (*o*), to feed sparrows (*p*), and a devise of a house to a college to be inalienable as a residence for a fellow who should "sometimes give entertainment to the poor" (*q*), are not charitable.

Monuments and tombs.

185. Nor can gifts for building, maintaining, or repairing a monument or tomb not forming part of the fabric or ornament of a church (*r*), whether as a memorial or burying place of the donor alone (*s*) or of himself and his family (*t*), be supported as charities, though they may be valid as private trusts, if not

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(*f*) *Cocks* v. *Manners* (1871), L. R. 12 Eq. 574. The principle differentiating the cases cited in the preceding notes and those cited at pp. 107, 108, *ante*, is not quite obvious. Both classes of cases deal with gifts to sections of the public, the former being held not charitable and the latter charitable. It is submitted that a gift to a section of the public is not charitable if the section is so small that the gift amounts to a gift to specified individuals, even though the motive of the donor may be to accomplish a purpose which would be legally charitable if the objects of his bounty had not been so restricted.

(*g*) *Clark* v. *Taylor* (1853), 1 Drew. 642.

(*h*) *Laverty* v. *Laverty*, [1907] 1 I. R. 9.

(*i*) *Re Gassiot* (1901), 70 L. J. (CH.) 242.

(*j*) *Re Tunno*, [1886] W. N. 154 (the object being the benefit of the owner of the estate).

(*k*) *Re Barnett* (1908), 24 T. L. R. 788.

(*l*) *Hoare* v. *Hoare* (1886), 56 L. T. 147, 150.

(*m*) *West* v. *Shuttleworth* (1835), 2 My. & K. 684; *Heath* v. *Chapman* (1854), 2 Drew. 424. As to superstitious uses, see also p. 120, *post*; and as to masses for souls in Ireland, p. 122, *post*.

(*n*) *Re Joy* (1888), 60 L. T. 175, 178, where the real object contemplated by the testator was the improvement of the members of the society, not the suppression of cruelty to animals, which is a valid charitable purpose (*Marsh* v. *Means* (1857), 3 Jur. (N. S.) 790; *Re Foveaux*, *Cross* v. *London Anti-Vivisection Society*, [1895] 2 Ch. 501); and see p. 116, *ante*.

(*o*) *Re Dean* (1889), 41 Ch. D. 552.

(*p*) *A.-G.* v. *Whorwood* (1750), 1 Ves. Sen. 534, 536.

(*q*) *Ibid.*

(*r*) *Trimmer* v. *Danby* (1855), 25 L. J. (CH.) 424; *Hoare* v. *Osborne* (1866), L. R. 1 Eq. 585; *Re Rigley's Trusts* (1866), 36 L. J. (CH.) 147.

(*s*) *Mellick* v. *Asylum* (*President and Guardians*) (1821), Jac. 180; *Adnam* v. *Cole* (1843), 6 Beav. 353; *Lloyd* v. *Lloyd* (1852), 2 Sim. (N. S.) 255; *Willis* v. *Brown* (1838), 2 Jur. 987.

(*t*) *Gravenor* v. *Hallum* (1767), Amb. 643; *Durour* v. *Motteux* (1749), 1 Ves. Sen. 320; *Doe* v. *Pitcher* (1815), 3 M. & S. 407; *Rickard* v. *Robson* (1862), 31 Beav. 244; *Fowler* v. *Fowler* (1864), 33 Beav. 616; *Hoare* v. *Osborne*, *supra*; *Re Rigley's Trusts*, *supra*; *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 Birkett* (1878), 9 Ch. D. 576; *Yeap Cheah Neo* v. *Ong Cheng Neo* (1875), L. R. 6 P. C. 381; *Re Vaughan* (1886), 33 Ch. D. 187; *Re Rogerson*, *Bird* v. *Lee*, [1901] 1 Ch. 715. And see *Re Tyler*, *Tyler* v. *Tyler*, [1891] 3 Ch. 252, 257, where a perpetual condition in a gift to a charity for keeping a

perpetuities (*a*). So, too, a bequest for erecting statues of the testator and his family and artistic towers on his estate is not charitable, even where the testator declares his wish to encourage art and directs prizes to be given for the best plans and designs (*a*).

Associations for benefit of members.

186. Similarly gifts for associations or institutions whose sole objects are the private advantage of their members are not charitable, as, for example, gifts for friendly and other mutual benefit societies (*b*), for the Corps of Commissionaires (*c*), a trade union or its benevolent fund (*d*), a sacred harmonic society (*e*), a mechanics' institute (*f*), a library (*g*), chess club (*h*), or museum (*i*) established for subscribers only.

On the winding up of associations of this kind the funds are divisible among the members for the time being (*j*), or where there are no existing members, lapse to the Crown as *bona vacantia*, at any rate in those cases where the members on making their payments finally part with their interest in the moneys subscribed in return for certain benefits (*k*).

Gifts to perpetual non-charitable institutions.

Gifts to perpetual but non-charitable institutions are valid if when paid they do not become subject to any trust which prevents the existing members of the association from spending the money

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tomb in repair was held valid; *Pirbright* v. *Salwey*, [1896] W. N. 86; *Toole* v. *Hamilton*, [1901] 1 I. R. 383 (maintenance of grave inclosure); *Re Moore*, *Prior* v. *Moore*, [1901] 1 Ch. 936, where a trust to keep up a tomb for the longest period allowed by law was held void for uncertainty. As to maintenance of graveyards, see p. 114, *ante*.

(*a*) *Mellick* v. *Asylum* (*President and Guardians*) (1821), Jac. 180; *Trimmer* v. *Danby* (1855), 25 L. J. (CH.) 424; *Roche* v. *M'Dermott*, [1901] 1 I. R. 394, 399; *Pirbright* v. *Salwey*, [1896] W. N. 86; and see title BURIAL AND CREMATION, Vol. III., p. 433.

(*a*) *McCaig* v. *Glasgow University*, [1907] S. C. 231. On the other hand, in two or three cases (*e.g.*, the Wellington Monument in Somerset and the Cobden Obelisk at Midhurst) the Charity Commissioners have held that the erection of monuments which are not monuments of the donor and are for the benefit of the public is charitable. Compare, however, *Re Allsop* (1884), 1 T. L. R. 4 (promotion of art charitable).

(*b*) *Re Clark's Trusts* (1875), 1 Ch. D. 497; *Cunnack* v. *Edwards*, [1896] 2 Ch. 679, C. A.; and see cases cited in note (*j*), *infra*; except where poverty is an essential element to entitle a member to the benefits of the society (*Spiller* v. *Maude* (1881), 32 Ch. D. 158, n.; *Pease* v. *Pattinson* (1886), 32 Ch. D. 154; *Re Buck*, *Bruty* v. *Mackey*, [1896] 2 Ch. 727; *Re Lacy*, *Royal General Theatrical Fund Association* v. *Kydd*, [1899] 2 Ch. 149). The receipt of donations and subscriptions is not sufficient to make a friendly society charitable (*Re Clark's Trusts*, *supra*, at p. 500; *Re Buck*, *Bruty* v. *Mackey*, *supra*, at p. 733).

(*c*) *Re Clarke*, *Clarke* v. *Clarke*, [1901] 2 Ch. 110.

(*d*) *Re Amos*, *Carrier* v. *Price*, [1891] 3 Ch. 159. See also *Re Estlin* (1903), 72 L. J. (CH.) 687.

(*e*) *Re Allsop*, *supra*.

(*f*) *Re Dutton* (1878), 4 Ex. D. 54; *Re Sheraton*, [1884] W. N. 174.

(*g*) *Carne* v. *Long* (1860), 2 De G. F. & J. 75; *Re Swain*, [1908] W. N. 209.

(*h*) *Re Swain*, *supra*.

(*i*) *Thomson* v. *Shakespear* (1860), 1 De G. F. & J. 399; see *Laverty* v. *Laverty*, [1907] 1 I. R. 9; *Re Joy* (1888), 60 L. T. 175.

(*j*) *Brown* v. *Dale* (1878), 9 Ch. D. 78; *Re Russell Institution*, *Figgins* v. *Baghino*, [1898] 2 Ch. 72; *Re Jones* (1898), 67 L. J. (CH.) 504; *Re Printers and Transferrers' Amalgamated Trades Protection Society*, [1899] 2 Ch. 184; *Re Lead Co.'s Workmen's Fund Society*, [1904] 2 Ch. 196.

(*k*) *Cunnack* v. *Edwards*, *supra*. As to the jurisdiction of the court to dissolve such societies on sufficient cause being shown, see *Blake* v. *Smither* (1906), 22 T. L. R. 698.

SECT. 3. **Non-charitable Purposes.**

as they please, or if they can be construed as gifts for the benefit of the individual members (*l*). If, however, the effect of the gift is to create or to tend to create a perpetuity, the gift is bad (*m*), except in the case of a gift for the benefit of an institution within the Literary and Scientific Institutions Act, 1854 (*n*), the members of which pay subscriptions, notwithstanding that such an institution is perpetual and non-charitable (*o*).

SUB-SECT. 2.—*Superstitious Uses and Purposes.*

Uses void as superstitious.

187. A superstitious use may be defined as "one which has for its object the propagation or the rites of a religion not tolerated by the law" (*p*).

There is no statute making superstitious uses void generally (*q*). The statute of Henry VIII. (*r*) related only to assurances of land to churches and chapels to secure the services of priests etc., which if for a longer term than twenty years were declared void, and the statute of Edward VI. (*s*) related only to superstitious uses of a particular description, such as the founding or maintenance of anniversaries or obits, or other purposes of a like nature, including praying for souls (*t*).

The courts, however, took the view that all gifts for superstitious purposes, and not only those named in the two statutes, were rendered void (*u*), and the result was that gifts for the benefit of the chapels (*v*) and clergy (*a*) of Protestant Dissenters, the maintenance of Roman Catholic priests (*b*), monasteries (*c*), or convents (*d*), bequests for masses for souls (*e*), for education in Roman Catholic principles (*f*), and for propagating the Jewish religion (*g*), were all held void for superstition.

(*l*) *Re Clarke, Clarke* v. *Clarke*, [1901] 2 Ch. 110, 114, and cases there cited. See also *Cocks* v. *Manners* (1871), L. R. 12 Eq. 574; *Morrow* v. *M'Conville* (1883), 11 L. R. Ir. 236; *Re Wilkinson* (1887), 19 L. R. Ir. 531; *Bradshaw* v. *Jackman* (1887), 21 L. R. Ir. 12; *Re Delany, Conoley* v. *Quick*, [1902] 2 Ch. 642.

(*m*) *Thomson* v. *Shakespear* (1860), 1 De G. F. & J. 399; *Carne* v. *Long* (1860), 2 De G. F. & J. 75; *Re Dutton* (1878), 4 Ex. D. 54; *Re Amos, Carrier* v. *Price*, [1891] 3 Ch. 159; *Re Swain*, [1908] W. N. 209.

(*n*) 17 & 18 Vict. c. 113. See title SCIENTIFIC AND LITERARY SOCIETIES.

(*o*) *Ibid.* s. 30; see *Re Badger, Mansel* v. *Cobham (Viscount)*, [1905] 1 Ch. 568.

(*p*) Boyle on Charities, p. 242. See also *R.* v. *Portington (Lady)* (1693), 1 Salk. 162; Duke on Charitable Uses, 106.

(*q*) *Cary* v. *Abbot* (1802), 7 Ves. 490, 495.

(*r*) 23 Hen. 8, c. 10, repealed by the Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42).

(*s*) 1 Edw. 6, c. 14.

(*t*) *Adams* v. *Lambert* (1602), 4 Co. Rep. 104 b; Duke on Charitable Uses, 90; *A.-G.* v. *Fishmongers' Co.* (1841), 5 My. & Cr. 11; *Re Elliott*, [1891] W. N. 9.

(*u*) *Heath* v. *Chapman* (1854), 2 Drew. 417, 424; Duke on Charitable Uses, 466; *De Costa* v. *De Paz* (1754), 2 Swan. 487, n.; *West* v. *Shuttleworth* (1835), 2 My. & K. 684, 697. In one case such purposes appear to have been held void at common law (*R.* v. *Portington (Lady)*, *supra*).

(*v*) *Doe* v. *Hawthorn* (1818), 2 B. & Ald. 96.

(*a*) *A.-G.* v. *Baxter* (1684), 1 Vern. 248.

(*b*) *Jones' Case* (1690), reported [1893] 2 Ch. 49, n.; *A.-G.* v. *Todd* (1837), 1 Keen, 803.

(*c*) *De Garcin* v. *Lawson* (1798), 4 Ves. 433, n.

(*d*) *Smart* v. *Prujean* (1801), 6 Ves. 560.

(*e*) *West* v. *Shuttleworth supra*; and as to Ireland, see p. 122, *post*.

(*f*) *Cary* v. *Abbot* (1802), 7 Ves. 490; *A.-G.* v. *Power* 1809,, 1 Ball & B. 145; *De Themmines* v. *De Bonneval* (1828), 5 Russ. 288.

(*g*) *De Costa* v. *De Paz, supra*; compare, however, *Straus* v. *Goldsmid* (1837), 8 Sim. 614.

SECT. 3. Non-charitable Purposes.

Effect of relieving Acts.

188. The effect, however, of a number of relieving Acts has been to remove the disabilities and penalties to which Protestant Dissenters (*h*), Roman Catholics (*i*), and Jews (*k*) were liable under the Superstitious Uses Acts, and to render valid trusts for charitable purposes generally, which formerly would have been void as superstitious uses, as, for example, trusts for the propagation of religions other than the one by law established. Accordingly, gifts for the benefit of Protestant Dissenting bodies, Unitarians (*l*), their clergy, chapels, and schools (*m*); for the establishment of Roman Catholic bishops (*n*), the maintenance and support of Roman Catholic priests (*o*), chapels (*p*), colleges, and schools (*q*), and the promotion of the Roman Catholic religion (*r*); for the promotion of the Jewish religion (*s*), and Jewish chapels and schools (*t*), are charitable, and

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(*h*) Toleration Act, 1688 (1 Will. & M. c. 18), repealed in part by Promissory Oaths Act, 1871 (34 & 35 Vict. c. 48); Nonconformist Relief Act, 1779 (19 Geo. 3, c. 44); Places of Religious Worship Act, 1812 (52 Geo. 3, c. 155); stat. 53 Geo. 3, c. 160; Statute Law Revision Act, 1873 (36 & 37 Vict. c. 91). See *Evans' Case* (1767), cited 3 Mer. 375, n., where Lord MANSFIELD said that the Toleration Act, 1688, rendered Nonconformity not only innocent "but lawful."

(*i*) Roman Catholic Charities Act, 1832 (2 & 3 Will. 4, c. 115). This Act is retrospective (*Bradshaw* v. *Tasker* (1834), 2 My. & K. 221; *A.-G.* v. *Drummond* (1842), 1 Dr. & War. 353, 379, 380; Liberty of Religious Worship Act, 1855 (18 & 19 Vict. c. 86), s. 2). See also Roman Catholic Charities Act, 1860 (23 & 24 Vict. c. 134). The provisions of the Roman Catholic Relief Act, 1829 (10 Geo. 4, c. 7), relating to the suppression of Jesuits, religious and monastic orders etc., were not affected by these relieving Acts.

(*k*) Religious Disabilities Act, 1846 (9 & 10 Vict. c. 59). This Act is retrospective (*Re Michel* (1860), 28 Beav. 39).

(*l*) Stat. 53 Geo. 3, c. 160, which excluded Unitarians from the protection of the Toleration Acts, was repealed by the Statute Law Revision Act, 1873 (36 & 37 Vict. c. 91); see also *Shrewsbury* v. *Hornby* (1846), 5 Hare, 406; *A.-G.* v. *Shore* (1843), 11 Sim. 592, 616; *Drummond* v. *A.-G.* (1849), 2 H. L. Cas. 837, 863; *Re Barnett* (1860), 29 L. J. (CH.) 871; *Re Wall* (1889), 42 Ch. D. 510.

(*m*) *A.-G.* v. *Guise* (1692), 2 Vern. 266 (Scottish Episcopalians); *A.-G.* v. *Cock* (1751), 2 Ves. Sen. 273 (Baptists); *A.-G.* v. *Lawes* (1849), 8 Hare, 32 (Irvingites); *A.-G.* v. *Fowler* (1808), 15 Ves. 85; *A.-G.* v. *Pearson* (1817), 3 Mer. 353, 409 (Protestant Dissenters); *Re Brown*, [1898] 1 I. R. 423 (Plymouth Brethren); *Re St. John Street Wesleyan Methodist Chapel, Chester*, [1893] 2 Ch. 629 (Wesleyans); *A.-G.* v. *Hickman* (1732), 2 Eq. Cas. Abr. 193 (Nonconforming preachers); *A.-G.* v. *Wansay* (1808), 15 Ves. 231 (Presbyterians); *Waller* v. *Childs* (1765), Amb. 524 (poor Dissenting ministers); *Dawson* v. *Small* (1874), L. R. 18 Eq. 114 (Methodists); *A.-G.* v. *Shore*, *supra* ("poor and godly preachers of Christ's holy Gospel"); *West* v. *Shuttleworth* (1835), 2 My. & K. 684, 696 (chapels and schools of Dissenters); *Bunting* v *Sargent* (1879), 13 Ch. D. 330 (Congregational); *Dilworth* v. *Stamps Commissioners*, [1899] A. C. 99; compare, however, *Doe* v. *Hawthorn* (1818), 2 B. & Ald. 96, 103.

(*n*) *Robb* v. *Dorrian* (1877), I. R. 11 C. L. 292; and see *A.-G.* v. *Power* (1809), 1 Ball & B. 145.

(*o*) *A.-G.* v. *Gladstone* (1842), 13 Sim. 7.

(*p*) *De Windt* v. *De Windt* (1854), 23 L. J. (CH.) 776; *Thornber* v. *Wilson* (1855), 3 Drew. 245; *Carbery* v. *Cox* (1852), 3 I. Ch. R. 231 (maintenance of organ and organist).

(*q*) *Walsh* v. *Gladstone* (1843), 1 Ph. 290.

(*r*) *Bradshaw* v. *Tasker*, *supra*; *West* v. *Shuttleworth*, *supra*; *Walsh* v. *Gladstone*, *supra*.

(*s*) *Straus* v. *Goldsmid* (1837), 8 Sim. 614; and see *De Costa* v. *De Paz* (1754), 2 Swan. 487, n.

(*t*) *Re Michel*, *supra*.

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the trusts of their charities, whether written or not (*a*), may be administered by the court (*b*).

Superstitious non-charitable trusts.

189. The relieving Acts, however, do not render valid trusts which are superstitious and at the same time not charitable. The result is that bequests for masses or prayers for the repose of souls, whether of the testator or of others, are void for superstition (*c*), for such purposes have no analogy to any of those enumerated in the statute of Elizabeth (*d*); and it makes no difference if the gift is for masses for the poor dead (*e*), or for masses in countries where such ceremonies are legal (*f*). For the same reason, a bequest for maintaining a lamp in a church (*g*) or for inculcating the doctrine of the supremacy of the Pope (*h*) is void.

Bequests for masses in Ireland.

In Ireland, however, bequests for masses generally, or in commemoration of named dead, including the testator and his family, are valid charitable gifts (*i*), and it makes no difference whether the masses are to be celebrated in public (*k*) or in private (*l*).

SUB-SECT. 3.—*Purposes contrary to Public Policy.*

Support of religious and monastic orders.

190. The Roman Catholic Relief Act, 1829 (*m*), was aimed, *inter alia*, at the suppression and prohibition of religious and monastic orders within the United Kingdom, and accordingly gifts for the use of a Franciscan convent (*n*) for the education and maintenance of

(*a*) *A.-G.* v. *Murdoch* (1849), 7 Hare, 445. As to the creation of charitable trusts without writing, see pp. 142, 163, *post*.

(*b*) *A.-G.* v. *Fowler* (1808), 15 Ves. 85, 88; *A.-G.* v. *Wansay* (1808), 15 Ves. 231; *Davis* v. *Jenkins* (1814), 3 Ves. & B. 151; *A.-G.* v. *Welsh* (1844), 4 Hare, 572. In *O'Hanlon* v. *Logue*, [1906] 1 I. R. 247, 260, C. A., it was said that all religions were equal in the eye of the law. The Charity Commissioners have jurisdiction over all endowed and non-exempted charities in England and Wales, whether conforming to the established religion or not (Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 66; Roman Catholic Charities Act, 1862 (23 & 24 Vict. c. 134), s. 1); see p. 303, *post*.

(*c*) *Adams* v. *Lambert* (1602), 4 Co. Rep. 104 b; Duke on Charitable Uses, 90, 466, and cases there cited; *West* v. *Shuttleworth* (1835), 2 My. & K. 684; *A.-G.* v. *Fishmongers' Co.* (1841), 5 My. & Cr. 11; *Re Blundell* (1861), 30 Beav. 360; *Re Fleetwood, Sidgreaves* v. *Brewer* (1880), 15 Ch. D. 609. Bequests for masses for the souls of individuals, besides being superstitious, are of the nature of private charities, and so void; see, however, *O'Hanlon* v. *Logue, supra*, where a different view of such masses is supported in Ireland; and compare *Re Michel* (1860), 28 Beav. 39, where a trust to say a particular prayer on the anniversary of the death of a Jewish testator, with no reference to praying for his soul, was held valid.

(*d*) *Heath* v. *Chapman* (1854), 2 Drew. 417, 425.

(*e*) *Ibid.*

(*f*) *Re Elliott* (1891), 39 W. R. 297. As to a gift for an analogous Chinese ceremony being invalid, see *Yeap Cheah Neo* v. *Ong Cheng Neo* (1875), L. R. 6 P. C. 396.

(*g*) *A.-G.* v. *Vivian* (1826), 1 Russ. 226.

(*h*) *De Themmines* v. *De Bonneval* (1828), 5 Russ. 288.

(*i*) *Read* v. *Hodgens* (1844), 7 I. Eq. R. 17; *Charitable Donations Commissioners* v. *Walsh* (1823), 7 I. Eq. R. 34, n.; *Richardson* v. *Murphy*, [1903] 1 I. R. 227; *O'Hanlon* v. *Logue, supra*, at p. 260.

(*k*) *A.-G.* v. *Hall*, [1897] 2 I. R. 426.

(*l*) *O'Hanlon* v. *Logue, supra*, overruling *A.-G.* v. *Delaney* (1875), I. R. 10 C. L. 104, the principle in the former class of cases being that public celebrations edify the community, and in the latter that the endowment of the celebrant priest is an advancement of religion.

(*m*) 10 Geo. 4, c. 7, s. 28; see also Charitable Donations and Bequests (Ireland) Act, 1844 (7 & 8 Vict. c. 97), s. 15; *Cussen* v. *Hynes*, [1906] 1 I. R. 549.

(*n*) *Walsh* v. *Walsh* (1869), I. R. 4 Eq. 396.

priests of the order of St. Dominic in Ireland (*o*), to establish a community of "Christian brothers" for teaching purposes (*p*), and to a Franciscan order to provide for the celebration of masses (*q*), have been held void as contrary to the policy of that statute.

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So also gifts in furtherance of the political restoration of the Jews to Jerusalem (*r*), and for paying the fines of imprisoned criminals (*s*), notwithstanding the mention in the statute of Elizabeth of the "relief or redemption of prisoners or captives" as a charitable purpose, or for propagating doctrines subversive of Christianity (*t*), or subversive of religion generally, or of morality (*u*), or for disseminating pernicious knowledge (*w*), or advocating atheism or sedition (*x*) or the ecclesiastical supremacy of the Pope (*y*), are contrary to public policy and void.

Other gifts against public policy.

SUB-SECT. 4.—*Miscellaneous Non-charitable Public Purposes.*

191. Every object of public utility is not necessarily a good charity (*z*). The question always is whether the particular object is within the purview of the statute of Elizabeth (*a*).

Test whether public purpose is charitable.

Thus, bequests for purposes of benevolence (*b*) or benevolence and liberality (*c*), for philanthropic (*d*), missionary (*e*), pious (*f*), or Roman Catholic (*g*) purposes, or purposes of hospitality (*h*) or general utility (*i*), or for emigration uses (*j*), or for increasing the sum of available knowledge (*k*), or for the storage of books (*l*), or for the encouragement of a mere sport or game such as cricket,

Non-charitable purposes.

(*o*) *Sims* v. *Quinlan* (1864), 17 I. Ch. R. 43; see also *Liston* v. *Keegan* (1881), 9 L. R. Ir. 531.
(*p*) *MacLaughlin* v. *Campbell*, [1906] 1 I. R. 588.
(*q*) *Burke* v. *Power*, [1905] 1 I. R. 119.
(*r*) *Habershon* v. *Vardon* (1851), 4 De G. & Sm. 467.
(*s*) *Thrupp* v. *Collett* (1858), 26 Beav. 125.
(*t*) *Briggs* v. *Hartley* (1850), 19 L. J. (CH.) 416.
(*u*) *Thornton* v. *Howe* (1862), 31 Beav. 14; *Thompson* v. *Thompson* (1844), 1 Coll. 381, 397; and see *Russell* v. *Jackson* (1852), 10 Hare, 204 (Socialism); *Pare* v. *Clegg* (1861), 29 Beav. 589.
(*w*) *Re Macduff*, *Macduff* v. *Macduff*, [1896] 2 Ch. 451, 471, C. A.
(*x*) *Thompson* v. *Thompson*, *supra*, at p. 397.
(*y*) *De Themmines* v. *De Bonneval* (1828), 5 Russ. 288.
(*z*) *Re Nottage*, *Jones* v. *Palmer*, [1895] 2 Ch. 649, 656, C. A.; *Langham* v. *Peterson* (1903), 87 L. T. 744; *Re Good*, *Harington* v. *Watts*, [1905] 2 Ch. 60, 66; compare *A.-G.* v. *Heelis* (1824), 2 Sim. & St. 76.
(*a*) *Re Good*, *Harington* v. *Watts*, *supra*; *Re Macduff*, *Macduff* v. *Macduff*, *supra*, at pp. 467, 472, 475; *Blair* v. *Duncan*, [1902] A. C. 37, 43, 48.
(*b*) *James* v. *Allen* (1817), 3 Mer. 17; *Re Jarman's Estate*, *Leavers* v. *Clayton* (1878), 8 Ch. D. 584.
(*c*) *Morice* v. *Durham* (*Bishop*) (1805), 10 Ves. 522; not so in Scotland (*Miller* v. *Rowan* (1837), 5 Cl. & Fin. 99, H. L.).
(*d*) *Re Macduff*, *Macduff* v. *Macduff*, *supra*.
(*e*) *Scott* v. *Brownrigg* (1881), 9 L. R. Ir. 246; see, however, *Re Kenny*, (1908) 97 L. T. 130.
(*f*) *Heath* v. *Chapman* (1854), 2 Drew. 417, 425, 426.
(*g*) *MacLaughlin* v. *Campbell*, *supra*; and see *Re Davidson* (1908), 24 T. L. R. 760.
(*h*) *Re Hewitt* (1884), 53 L. J. (CH.) 132; and see *A.-G.* v. *Whorwood* (1750), 1 Ves. Sen. 534.
(*i*) *Kendall* v. *Granger* (1842), 5 Beav. 300; *Re Woodgate* (1886), 2 T. L. R. 674.
(*j*) *Re Sidney*, [1908] 1 Ch. 488, C. A.
(*k*) *Whicker* v. *Hume* (1858), 7 H. L. Cas. 124, 155; *Re Macduff*, *Macduff* v. *Macduff*, *supra*, at pp. 472, 473.
(*l*) *Re Hawkins* (1906), 22 T. L. R. 521.

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football, fencing, yachting, bicycling, lawn tennis, or any other healthy exercise and recreation primarily calculated to amuse individuals, though such sport may be beneficial to the community (*m*), are not charitable.

A bequest "for such charitable or public purposes as my trustee thinks proper" is void for uncertainty (*n*).

Bequests of funds to be applied "in grants for or towards the purchase of advowsons or presentations" are not charitable where no trusts are declared (*o*), nor is a trust charitable which is merely to appoint a fit and pious person to a vacant living (*a*).

Land purchased by a city ward out of its common funds for the business purposes of the ward and conveyed to trustees for those purposes is not subject to an implied charitable trust (*b*).

Part II.—Assurances for Charitable Uses.

SECT. 1.—*In General.*

SUB-SECT. 1.—*Property which may be given to Charity.*

Realty and personalty.

192. As a general rule, and subject to certain restrictions (*c*), realty and personalty of all descriptions, including advowsons (*d*) and easements (*e*), may be given to a charity by deed or by will.

Copyhold.

Copyholds, however, cannot, without the consent of the lord, be surrendered to the use of a charitable corporation except through the intervention of a trustee, for otherwise the lord would lose his suits, services, and fines (*f*).

SUB-SECT. 2.—*Meaning of "Land" in the Mortmain and Charitable Uses Acts.*

What is included in definition.

193. Gifts of realty to charity are subject to the Mortmain and Charitable Uses Acts, 1888 and 1891, which contain provisions regulating assurances of land to charitable uses. "Land" as used

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(*m*) *Re Nottage, Jones* v. *Palmer*, [1895] 2 Ch. 649, C. A. The encouragement of skill in rifle shooting is a charitable purpose (*Re Stephens* (1892), 8 T. L. R. 792).

(*n*) *Blair* v. *Duncan*, [1902] A. C. 37; *Langham* v. *Peterson* (1903), 87 L. T. 744. As to trusts void for uncertainty, see further pp. 145—160, 166, *post*.

(*o*) *Hunter* v. *A.-G.*, [1899] A. C. 309, 315; *A.-G.* v. *Webster* (1875), L. R. 20 Eq. 483, 491.

(*a*) *Re Church Patronage Trust*, [1904] 2 Ch. 643, C. A.

(*b*) *Finnis and Young* to *Forbes and Pochin* (No. 1) (1883), 24 Ch. D. 587.

(*c*) Imposed by the Mortmain and Charitable Uses Acts, 1888 and 1891 (51 & 52 Vict. c. 42; 54 & 55 Vict. c. 73), for which see pp. 127 *et seq.*, *post*. As to the restrictions upon assurances in mortmain, see Part I. of the Act of 1888, and title CORPORATIONS.

(*d*) *A.-G.* v. *Ward* (1829), 7 L. J. (O. S.) (CH.) 114; *A.-G.* v. *York* (*Archbishop*) (1853), 17 Beav. 495; *A.-G.* v. *St. John's Hospital, Bedford* (1864), 10 Jur. (N. S.) 897; *Re St. Stephen, Coleman Street* (1888), 39 Ch. D. 492; *Hunter* v. *A.-G.*, *supra*, at p. 322; *Re Church Patronage Trust*, *supra*.

(*e*) The contrary is stated in Duke on Charitable Uses, ed. Bridgman, 137, 138, but there seems to be no reason why such a grant should not be made, and in many cases charities must be entitled to easements.

(*f*) Duke on Charitable Uses, ed. Bridgman, 137, 138; *Ranshaw and Robottom's Case* (1601), Duke on Charitable Uses, ed. Bridgman, 135. See also *Thornton* v. *Robin* (1837), 1 Moo. P. C. C. 438.

in those Acts includes (*g*) land of any tenure (*h*), corporeal, incorporeal (*i*) or reversionary (*j*), and "rents and profits" of land in cases where under the general law they would be deemed equivalent to the land itself (*k*). Money secured on land (*l*) by mortgages or charges (*m*) or other personal estate arising from or connected with land (*n*), such as the proceeds of sale of land (*o*) or a reversionary interest in land given on trust for sale (*p*), is not included in the definition of land in those Acts, and gifts of these classes of property are not subject to statutory restrictions (*q*).

Money secured on land.

(*g*) Mortmain and Charitable Uses Act, 1891 (54 & 55 Vict. c. 73), s. 3, repealing the definition of "land" in the Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42), s. 10 (iii.), and thereby rendering obsolete a long series of cases decided upon the former law, under which the statutory restriction extended to any estate or interest in land. As to the old law see Tudor, Law of Charities and Mortmain, 4th ed., pp. 448—463.

(*h*) The Charitable Uses Act, 1735 (9 Geo. 2, c. 36), which is replaced by the Act of 1888, applied to freeholds or copyholds (*Arnold* v. *Chapman* (1748), 1 Ves. Sen. 108; *Doe* v. *Waterton* (1819), 3 B. & Ald. 149), or leaseholds (*A.-G.* v. *Graves* (1752), Amb. 155; *Johnston* v. *Swann* (1818), 3 Madd. 457; *Bunting* v. *Sargent* (1879), 13 Ch. D. 330); and the Act of 1891 has not altered the law on this point.

(*i*) As, for example, rent-charges, advowsons, or tithes.

(*j*) *Re Hume, Forbes* v. *Hume*, [1895] 1 Ch. 422; *Re Bridger, Brompton Hospital for Consumption* v. *Lewis*, [1894] 1 Ch. 297, C. A. See also *Re Prichard* (1903), 88 L. T. 197. Under a gift by will, dated 1879, of securities as they stood at a future date, a charity was allowed to take only such securities as were personal property at that date (*Re Corcoran* (1893), 41 W. R. 311).

(*k*) Under the old law (*i.e.* before 1891) devises of "rents and profits" or rent-charges to charity were regarded as equivalent to devises of land and accordingly void (*A.-G.* v. *Weymouth* (*Lord*) (1743), Amb. 20, 24; *Ridgway* v. *Woodhouse* (1844), 7 Beav. 437; *Thornber* v. *Wilson* (1855), 3 Drew. 245; *A.-G.* v. *West* (1858), 27 L. J. (CH.) 789). So also devises of tithes (*Denton* v. *Manners* (*Lord John*) (1858), 2 De G. & J. 675; *Burr* v. *Miller*, [1872] W. N. 63). The Act of 1891 has made no change in respect to such kinds of property being regarded as land. A share during the life of an individual in the income of land which the trustees of the will are forbidden to sell without the consent of the tenant for life is land within the Act of 1891 (*Re Ryland, Roper* v. *Ryland*, [1903] 1 Ch. 467).

(*l*) Mortmain and Charitable Uses Act, 1891 (54 & 55 Vict. c. 73), s. 3.

(*m*) Prior to the Act of 1891, money secured by mortgage of land, or of any interest in land, could not be bequeathed to charity (*Johnston* v. *Swann* (1818), 3 Madd. 457; *Chester* v. *Chester* (1871), L. R. 12 Eq. 444; *Re Watts* (1885), 29 Ch. D. 947).

(*n*) Mortmain and Charitable Uses Act, 1891 (54 & 55 Vict. c. 73), s. 3.

(*o*) *Re Wilkinson, Esam* v. *A.-G.*, [1902] 1 Ch. 841. Prior to the Act of 1891 a bequest to charity of the proceeds of sale of land was void (*Waite* v. *Webb* (1821), 6 Madd. 71; *British Museum Trustees* v. *White* (1826), 2 Sim. & St. 594; *Robinson* v. *Robinson* (1854), 19 Beav. 494).

(*p*) *Re Ryland, Roper* v. *Ryland, supra.*

(*q*) Prior to the passing of the Mortmain and Charitable Uses Act, 1891 (54 & 55 Vict. c. 73), the following different kinds of property, indirectly connected with land, were for the purposes of charitable gifts held to be personalty, viz., tenants' fixtures (*Johnston* v. *Swann, supra*, at p. 467); tolls-thorough (*Re Christmas* (1886), 33 Ch. D. 332); improvement bonds (*Bunting* v. *Marriott* (1854), 19 Beav. 163); charges on rates not connected with land (*Re Harris* (1880), 15 Ch. D. 561, 565; *Jervis* v. *Lawrence* (1882), 22 Ch. D. 202; *Re Hallett* (1889), 5 T. L. R. 285; *Re Thompson* (1889), 45 Ch. D. 161; *Re Parker, Wignall* v. *Park*, [1891] 1 Ch. 682; but see *Re Holmes* (1890), 6 T. L. R. 485); profits of undertakings earned partly out of land (*Myers* v. *Perigal* (1852), 2 De G. M. & G. 599); policies of assurance (*March* v. *A.-G.* (1842), 5 Beav. 433); shares in banking (*Myers* v. *Perigal, supra; Ashton* v. *Langdale* (*Lord*) (1851), 4 De G. & Sm. 402), railway (*ibid.*); *Taylor* v. *Linley* (1860), 2 De G. F. & J. 84), canal (*Walker* v. *Milne* (1849), 11 Beav. 507; *Re Langham* (1853), 10 Hare, 446;

SECT. 1. In General.

SUB-SECT. 3. - *Form of Assurance.*

Intention regarded rather than form.

194. Assurances in favour of charity generally take the form of an express trust (*r*). But an express trust is not essential, since the Crown as *parens patriæ* is the trustee of funds given to charity without trustees or objects selected (*s*).

The court in the case of a charitable gift pays more regard to the intention than to the form of conveyance, and for this reason an estate in fee simple may pass to a charity though the conveyance contains no words of limitation, if it is clear that a gift to charity in perpetuity is intended (*t*).

A gift may be made to charity by means of a power of appointment (*u*). An exercise of a power defective as not complying with the terms of the power will be good if otherwise well executed (*x*), but an appointment is subject to the statutory restrictions applicable to other charitable gifts (*a*).

Edwards v. *Hall* (1855), 6 De G. M. & G. 74; but see, on the other hand, *Tomlinson* v. *Tomlinson* (1823), 9 Beav. 459; *Ware* v. *Cumberlege* (1855), 20 Beav. 503), waterworks (*Ashton* v. *Langdale* (*Lord*), (1851), 4 De G. & Sm. 402; *Edwards* v. *Hall*, (1855), 6 De G. M. & G. 74), dock (*Sparling* v. *Parker* (1846), 9 Beav. 450; *Pieschel* v. *Paris* (1825), 2 Sim. & St. 384; *Hilton* v. *Giraud* (1847), 1 De G. & Sm. 183; *Walker* v. *Milne* (1849), 11 Beav. 507), gas (*Thompson* v. *Thompson* (1844), 1 Coll. 381; *Edwards* v. *Hall*, *supra*; *Sparling* v. *Parker*, *supra*), land (*Entwistle* v. *Davis* (1867), L. R. 4 Eq. 272; and see title BUILDING SOCIETIES, Vol. III., p. 357), and cost-book mining companies (*Hayter* v. *Tucker* (1857), 4 K. & J. 243; *Watson* v. *Spratley* (1854), 10 Exch. 222; *contrd*, *Morris* v. *Glynn* (1859), 27 Beav. 218, where, however, it is not clear that the mining company was conducted on the cost-book principle); mortgages or charges on undertakings owning land, such as railway debentures (*Gardner* v. *London, Chatham, and Dover Rail. Co.* (1867), 2 Ch. App. 201; *Doe* v. *St. Helens Rail. Co.* (1841), 2 Q. B. 364; *Hart* v. *Eastern Union Rail. Co.* (1852), 7 Exch. 246; *Re Mitchell* (1877), 6 Ch. D. 655; *Attree* v. *Hawe* (1878), 9 Ch. D. 337; *Re Yerbury* (1889), 62 L. T. 55; see also *Re Pickard*, [1894] 3 Ch. 704; compare, on the other hand, *Ashton* v. *Langdale* (*Lord*), *supra*), waterworks company debentures (*Holdsworth* v. *Davenport* (1876), 3 Ch. D. 85; but see *Chandler* v. *Howell* (1876), 4 Ch. D. 651), canal bonds (*Walker* v. *Milne*, *supra*), mortgages on borough waterworks (*Re Thompson* (1889), 45 Ch. D. 161; *Re Parker*, *Wignall* v. *Park*, [1891] 1 Ch. 682), mortgages of municipal gas undertakings (*Re Hatton* (1888), 4 T. L. R. 311), municipal corporation debenture stock (*Re Pickard*, *supra*; but see *Re Hallett* (1889), 5 T. L. R. 285), corporation bonds (*Re Thompson*, *supra*), bonds of the Tyne Improvement Commissioners (*Re Deane* (1902), 19 T. L. R. 26), bonds of building societies (*Re Goulden* (1885), 1 T. L. R. 251), East India stock (*A.-G.* v. *Giles* (1836), 5 L. J. (CH.) 44), and surplus land stock of the Metropolitan Railway (*Re Hollon* (1893), 69 L. T. 425). Since the passing of the Act of 1891 the cases cited in this note are of little importance. They, however, show that certain classes of property are personalty, and therefore need not be sold under s. 5 of that Act.

(*r*) For forms of trust deeds for charities, see Encyclopædia of Forms, Vol. III., pp. 337 *et seq.*

(*s*) *Moggridge* v. *Thackwell* (1802), 7 Ves. 69, 83; *Morice* v. *Durham* (*Bishop*) (1805), 10 Ves. 522, 541; *Ommanney* v. *Butcher* (1823), Turn. & R. 260, 271; *Paice* v. *Canterbury* (*Archbishop*) (1807), 14 Ves. 372; and see p. 168, *post*.

(*t*) *A.-G.* v. *Berwick-upon-Tweed Corporation* (1829), Taml. 239, 246. If there is no indication that a gift to charity in perpetuity is intended, a grant to a person for the benefit of a charity containing no words of limitation would, it is conceived, give the charity the benefit of the grant merely during the life of the grantee.

(*u*) *Cook* v. *Duckenfield* (1743), 2 Atk. 567.

(*x*) *Sayer* v. *Sayer* (1849), 7 Hare, 377, affirmed *sub nom. Innes* v. *Sayer* (1851), 3 Mac. & G. 606, where a number of authorities are cited.

(*a*) For the definition of assurance, see note (*d*), p. 127, *post*.

A voluntary conveyance of lands to charity is not avoided by a subsequent conveyance for value (*b*).

The assurance may also take the form of a will, whether in the case of land (*c*) or of personal estate.

SECT. 2.—*Assurances inter vivos for Charitable Uses.*

SUB-SECT. 1.—*In General.*

General requirements

195. Assurances *inter vivos* (*d*) of land (*e*) or personal estate to be laid out in the purchase of land in favour of charity are subject to the following restrictions: they must take effect in possession; they may only be made subject to certain reservations; they must generally be by deed and attested by two witnesses; they must, if not for valuable consideration, be made a certain period before the death of the donor; and they are subject to certain provisions as to enrolment (*f*). If not made according to these requirements, such assurances are void (*g*).

SUB-SECT. 2.—*Assurances must take Effect in Possession.*

Immediate right to possession.

196. The assurance must take effect in possession (*h*). But possession need not actually be taken, if the right to take possession is immediate (*i*). The retention of the deed of assurance by the grantor is evidence that the charity was not given a right to immediate possession (*k*). A lease for charitable purposes, if otherwise valid, is good if made to commence and take effect in possession within one year after the date of the grant (*l*).

Reversionary grants.

Where the effect of a grant is a resulting trust for the benefit of the grantor during his life, and then for charitable purposes, the assurance is void (*m*). An immediate grant of a reversionary (*n*) or

(*b*) *Ramsay* v. *Gilchrist*, [1892] A. C. 412; Voluntary Conveyances Act, 1893 (56 & 57 Vict. c. 21). See also *Newcastle Corporation* v. *A.-G.* (1842), 5 Beav. 307, 312, affirmed on appeal (1845), 12 Cl. & Fin. 415, H. L.; *Tiye* v. *Gloucester Corporation* (1851), 14 Beav. 173.

(*c*) Mortmain and Charitable Uses Act, 1891 (54 & 55 Vict. c. 73). See p. 133, *post*. Prior to the passing of this Act a gift by will for charitable purposes dated or republished after June 24, 1736, of land or of personalty savouring of realty was void (Charitable Uses Act, 1735 (9 Geo. 2, c. 36), ss. 1, 3).

(*d*) Including gift, conveyance, appointment, lease, transfer, settlement, mortgage, charge, or incumbrance (Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42), s. 10).

(*e*) For the definition of land, see Mortmain and Charitable Uses Act, 1891 (54 & 55 Vict. c. 73), s. 3; and p. 125, *ante*.

(*f*) Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42), s. 4; and see *infra*, and pp. 128 *et seq*. This Act was in the main a consolidating enactment. The cases therefore which were decided on the Charitable Uses Act, 1735 (9 Geo. 2, c. 36), and the other repealed Mortmain Acts are equally applicable to the provisions of the Act of 1888.

(*g*) *Ibid.*, s. 4 (1); *Charcher* v. *Martin* (1889), 42 Ch. D. 312.

(*h*) Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42), s. 4 (2), re-enacting a provision of s. 1 of the Charitable Uses Act, 1735 (9 Geo. 2, c. 36).

(*i*) *Fisher* v. *Brierley* (1863), 10 H. L. Cas. 159.

(*k*) *A.-G.* v. *Brichnell* (1837), 1 Jur. 540 (but apparently not conclusive evidence); *A.-G.* v. *Munby* (1815), 1 Mer. 327, 337; *A.-G.* v. *Poulden* (1837), 8 Sim. 472, where secret charitable trusts were inferred from the circumstances.

(*l*) Charity Lands Act, 1863 (26 & 27 Vict. c. 106), s. 1; see *Webster* v. *Southey* (1887), 36 Ch. D. 9, where a lease not within the Act was held void.

(*m*) *Lambrey* v. *Durr* (1819), 6 Madd. 151; *Morris* v. *Owen*, [1875] W. N 134.

(*n*) *Doe* v. *Lloyd* (1839), 5 Bing. (N. C.) 741; *Re Hume, Forbes* v. *Hume*, [1895] 1 Ch. 422, C. A.; see also *Re Bridger, Brompton Hospital for Consumption* v. *Lewis*, [1893] 1 Ch. 44; *Re Prichard* (1903), 88 L. T. 197.

SECT. 2. Assurances inter vivos for Charitable Uses.

contingent (*o*) interest in land will be good unless the reversion has been created by the grantor for the purpose of allowing himself to retain the enjoyment of the property during his life (*p*).

A transfer to bankers of funds collected for the purpose of being laid out in land for a charitable object, which are invested in the names of trustees, but of which no trust is declared, does not constitute an assurance under which the charity takes immediate possession (*q*).

SUB-SECT. 3.—*What Reservations may be made.*

Reservations etc. not allowed.

197. The assurance also must, in the case of a gift, but not in the case of a *bonâ fide* sale (*r*), be without any power of revocation, reservation, condition, or provision for the benefit of the assuror, or of any person claiming under him (*s*). So a lease containing a reservation of rent for the grantor and a right of pre-emption is void (*t*).

Reservations allowed.

But if the same benefits are reserved to persons claiming under the assuror as to the assuror himself (*a*), the assurance may contain a grant or reservation of a nominal rent, or of mines, minerals, or easements, covenants or provisions as to the erection, repair, position or description of buildings, the formation or repair of streets or roads, drainage or nuisances, and similar covenants and provisions regarding the user of the land assured and the adjacent property (*b*). A right of entry on non-payment of the nominal rent or on breach of any covenant, and similar stipulations for the benefit of the grantor and persons claiming under him, may also be reserved (*c*). Such reservations as a proviso for redemption in a mortgage deed (*d*), a condition that a vault should be used by the assuror and his family (*e*), and a reservation by the donor of the right of regulating the charity (*f*) do not invalidate the assurances in question. Nor is a grant of premises in trust for the rectors of a parish in perpetuity rendered void by the fact that at the date of the grant the grantor is himself rector (*g*).

Reservation of rent-charge on sale.

If the assurance is made *bonâ fide* on a sale for full and valuable consideration (*h*), that consideration may consist wholly or partly of a rent, rent-charge, or other annual sum, payable to the vendor

(*o*) *Milbank* v. *Lambert* (1860), 28 Beav. 206.
(*p*) *Wickham* v. *Bath* (*Marquis*) (1865), L. R. 1 Eq. 17. See also *Morris* v. *Owen*, [1875] W. N. 134.
(*q*) *Girdlestone* v. *Creed* (1853), 10 Hare, 480.
(*r*) Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42), s. 4 (3).
(*s*) *Ibid.*, s. 4 (3), re-enacting a provision of s. 1 of the Charitable Uses Act, 1735 (9 Geo. 2, c. 36).
(*t*) *Webster* v. *Southey* (1887), 36 Ch. D. 9.
(*a*) Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42), s. 4 (4).
(*b*) *Ibid.*, s. 4 (i.)—(iv.).
(*c*) *Ibid.*, s. 4 (v.), (vi.).
(*d*) *Doe* v. *Hawkins* (1841), 2 Q. B. 212.
(*e*) *Doe* v. *Pitcher* (1815), 3 M. & S. 407. In this case the reservation was held not to confer a substantial benefit on the assuror.
(*f*) *Grieves* v. *Case* (1792), 2 Cox, Eq. Cas. 301.
(*g*) *A.-G.* v. *Munby* (1815), 1 Mer. 327.
(*h*) These words include such a consideration either actually paid upon or before the making of the assurance or reserved or made payable by way of rent, rent-charge or other annual payment in perpetuity or for any term of years or other period with or without a right of re-entry for non-payment thereof or partly paid and partly reserved as aforesaid (Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42), s. 10 (iv.)).

or any other person, with or without a right of re-entry for non-payment (*i*).

SUB-SECT. 4.—*Form of Assurance.*

198. An assurance of land (other than land assured by registered disposition (*k*) or land of copyhold or customary tenure) must be made by deed executed in the presence of at least two witnesses (*l*); and an assurance of personal estate, not being stock in the public funds, to be laid out in the purchase of land (*m*), must also be made by deed and attested by at least two witnesses (*n*). Deed with two witnesses.

The presence of two persons at the execution of the deed is not sufficient if they do not attest it (*o*). When the conveyance and the declaration of trust are contained in separate instruments, each should be attested by two witnesses (*p*). A deed confirming a prior invalid deed must comply with the requirements of the Act (*q*). The deed need not be executed by the grantee (*r*).

199. Copyholds and lands of customary tenure are conveyed to charitable purposes by means of a surrender to a trustee, and the trusts are, as a rule, declared by separate deed of even date, which must follow the provisions of the Act in regard to attestation and enrolment (*s*). Copyholds.

200. Assurances of land for charitable uses may be made by registered disposition under the Land Transfer Acts (*t*); but the registrar must be satisfied that the transfer is in accordance with the law relating to mortmain and charitable uses (*a*). Such assurances are exempt from the above-mentioned provisions as to attestation (*b*). Registered dispositions.

(*i*) Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42), s. 4 (5). As the assurance is to be made "on a sale," it seems that a lease at a rack-rent to charity would not be permissible under this sub-section.

(*k*) *Ibid.*, s. 9.

(*l*) *Ibid.*, s. 4 (6), re-enacting a provision of the Charitable Uses Act, 1735 (9 Geo. 2, c. 36), s. 1.

(*m*) Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42), s. 4 (1).

(*n*) *Ibid.*, s. 4 (6).

(*o*) *Doe* v. *Munro* (1844), 12 M. & W. 845; *Wickham* v. *Bath* (*Marquis*) (1865), L. R. 1 Eq. 17; see also *McSwaine* v. *Lascelles*, [1895] A. C. 618.

(*p*) *Doe* v. *Munro*, *supra*, *A.-G.* v. *Munro* (1848), 2 De G. & Sm. 122; *A.-G.* v. *Gardner* (1847), 2 De G. & Sm. 102. The practice of the Charity Commissioners is to accept as valid a declaration of trust attested by one witness only, if the assurance is attested by two witnesses. But *quære* whether such practice is not *ultra vires*.

(*q*) *Wickham* v. *Bath* (*Marquis*), *supra*; *A.-G.* v. *Munro*, *supra*.

(*r*) *Grieves* v. *Cas.* (1792), 2 Cox, Eq Cas. 301.

(*s*) *Doe* v. *Waterton* (1819), 3 B. & Ald. 149; Scriven on Copyholds, 7th ed., pp. 109, 110. See also *Arnold* v. *Chapman* (1748), 1 Ves. Sen. 108; *Browne* v. *Ramsden* (1818), 2 Moore (C. P.), 612; and title COPYHOLDS.

(*t*) Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42), s. 9. For form of instrument (except in cases exempted by the Mortmain and Charitable Uses Act, 1888) see the Land Transfer Rules, 1903, Sched. I., Form 37, and Encyclopædia of Forms, Vol. XI., p. 376. See also Land Transfer Act, 1875 (38 & 39 Vict. c. 87), s. 68, and Land Transfer Rules, 1903, rr. 29, 83–86, 145, 146, and 150, referring to charities. In *A.-G.* v. *National Hospital*, [1904] 2 Ch. 252, a charity incorporated by royal charter with power of sale applied to be registered with possessory title and free from any restriction as to disposing of the property under s. 29 of the Charitable Trusts Amendment Act, 1855 (18 & 19 Vict. c. 124), but the application was refused.

(*a*) Land Transfer Rules, 1903, r. 146.

(*b*) Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42), s. 9.

SECT. 2. SUB-SECT. 5.—*Time of Gift before Death of Donor.*

Assurances inter vivos for Charitable Uses.

201. An assurance of land or of personal estate, not being stock in the public funds, to be laid out in the purchase of land (*c*), must, if not made *bonâ fide* for full and valuable consideration, be made at least twelve months before the death of the assuror (*d*). Similarly assurances of stock in the public funds to be laid out in the purchase of land must, if not made *bonâ fide* for full and valuable consideration, be made by transfer in the public transfer books at least six months before the death of the assuror (*e*). Each of the above periods includes the day of making the assurance and the day of death (*f*).

Period required between grant and death of grantor.

Operation of grant.

If the grantor dies within the period, the assurance is void notwithstanding enrolment if not made *bonâ fide* for full and valuable consideration (*g*); but if the grantor survives the period, the deed takes effect as from the date of execution (*h*). Where trustees execute a declaration of trust of moneys given them by a donor to be laid out partly in the purchase of land, and the donor dies within twelve months of the execution, the gift is void (*i*).

Grant by joint tenants or tenants in common.

If A. and B., being joint tenants or tenants in common, together convey land to a charity, and A. dies before the expiration of twelve months, the conveyance to the charity is apparently valid so far as B.'s share is concerned, but void as regards A.'s share (*j*). But where A. and B. are joint tenants or tenants in common, and A. alone conveys his share, the charity takes nothing if A. does not survive the twelve months (*j*). If in case of a joint tenancy A. does survive, the charity becomes tenant in common of the land with B., the joint tenancy having been severed by A.'s alienation (*k*).

Assurances for full and valuable consideration.

Assurances for full and valuable consideration are not invalidated by the death of the assuror within twelve or six months, as the case may be (*l*), but they must nevertheless comply with the other requirements as to such assurances (*m*). The consideration must

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(*c*) Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42), s. 4 (1).

(*d*) *Ibid.*, s. 4 (7), re-enacting a provision of the Charitable Uses Act, 1735 (9 Geo. 2, c. 36), s. 1. Conveyances for certain purposes have been exempted by statute from this condition; see School Sites Act, 1844 (7 & 8 Vict. c. 37), s. 3; School Sites Act, 1849 (12 & 13 Vict. c. 49), s. 4; Literary and Scientific Institutions Act, 1854 (17 & 18 Vict. c. 112), s. 14; Recreation Grounds Act, 1859 (22 Vict. c. 27), s. 2; Places of Worship Sites Act, 1873 (36 & 37 Vict. c. 50), s. 4. Existing exceptions were preserved by s. 8 of the Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42).

(*e*) *Ibid.*, s. 4 (8).

(*f*) *Ibid.*, s. 4 (7), (8).

(*g*) *Price* v. *Hathaway* (1822), 6 Madd. 304; *Churcher* v. *Martin* (1889), 42 Ch. D. 312.

(*h*) *Trye* v. *Gloucester Corporation* (1851), 14 Beav. 173.
Hawkins v. *Allen* (1870), L. R. 10 Eq. 246.

(*i*) Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42), s. 4 (7).

(*k*) See *Denne* v. *Judge* (1809), 11 East, 288; *Re Wilks, Child* v. *Bulmer*, [1891] 3 Ch. 59, 61.

(*l*) Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42), s. 4 (7).

(*m*) *I.e.*, the requirements of *ibid.*, s. 4; see *A.-G.* v. *Day* (1748), 1 Ves. Sen. 218, 222; *Price* v. *Hathaway*, *supra*. See also *Vaughan* v. *Farrer* (1750), 2 Ves. Sen. 182, 188.

be paid by the party benefiting by the assurance (*n*), and must be "full" as well as "valuable" (*o*).

SECT. 2. Assurances inter vivos for Charitable Uses.

SUB-SECT. 6.—*Enrolment of Assurances.*

Enrolment of assurances.

202. Assurances of land or of personal estate, other than stock in the public funds to be laid out in the purchase of land, if not made by registered disposition under the Land Transfer Acts (*p*), must within six months after execution be enrolled (*q*) in the Central Office of the Supreme Court (*r*), unless in the case of land the charitable uses are declared by a separate enrolled instrument (*s*).

Operation of enrolled deed.

A deed duly enrolled takes effect from the date of its execution, not of its enrolment (*t*). A deed executed less than twelve months before the death of the grantor, if not made *bonâ fide* for full and valuable consideration, is not the less void because enrolled (*u*).

Effect of omission to enrol

Where a deed is void by reason of not being enrolled, charity trustees may make a good title under the Statutes of Limitation (*a*). On the other hand, a grantor or persons deriving title through him may take advantage of the non-enrolment of a deed and recover possession of the property (*b*).

Trustees who hold in trust for a charity may not claim beneficially owing to an enrolled conveyance not being produced (*c*), or to an enrolled deed being preceded by one not enrolled, both deeds purporting to have the same effect, but the former being executed by some persons not parties to the latter (*d*).

The court cannot enforce the trusts of a deed void for non-enrolment (*e*), but if the person entitled to take advantage of the lack of enrolment does not seek to do so, the court need not upon any ground of public policy take any objection (*f*).

Proof of enrolment.

Enrolment is proved by the production of the deed indorsed with the customary memorandum of enrolment (*g*), or by means of an office copy. After long enjoyment, and in the absence of proof of non-enrolment, an enrolment of a lost deed may be presumed (*h*).

(*n*) *Doe* v. *Howells* (1831), 2 B. & Ad. 744.
(*o*) *Doe* v. *Hawthorn* (1818), 2 B. & Ald. 96; see also note (*h*), p. 128, *ante*.
(*p*) Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42), s. 9.
(*q*) *Ibid.*, s. 4 (9), re-enacting a provision of the Charitable Uses Act, 1735 (9 Geo. 2, c. 36), s. 1, and in effect those of the stat. 24 & 25 Vict. c. 9, s. 2. Assurances for Roman Catholic charities not enrolled prior to August 28, 1860, are not thereby invalidated if they were enrolled within twelve months from that date (Roman Catholic Charities Act, 1860 (23 & 24 Vict. c. 134), s. 3).
(*r*) See R. S.C., Ord. 61, r. 9.
(*s*) Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42), s. 4 (9).
(*t*) *Trye* v. *Gloucester Corporation* (1851), 14 Beav. 173.
(*u*) See note (*g*), p. 130, *ante*.
(*a*) *Churcher* v. *Martin* (1889), 42 Ch. D. 312.
(*b*) *Doe* v. *Hawthorn*, *supra*; *Doe* v. *Wright* (1819), 2 B. & Ald. 710; *Doe* v. *Howells*, *supra*; *Bunting* v. *Sargent* (1879), 13 Ch. D. 330, where the charity had held for ninety-nine years under a lease for that term with a covenant for renewal; see also *Howard* v. *Fingall* (*Earl*) (1853), 1 W. R. 515.
(*c*) *A.-G.* v. *Moor* (1855), 20 Beav. 119.
(*d*) *A.-G.* v. *Gardner* (1848), 2 De G. & Sm. 102; *A.-G.* v. *Munro* (1848), 2 De G. & Sm. 122.
(*e*) *A.-G.* v. *Gardner*, *supra*.
(*f*) *A.-G.* v. *Ward* (1848), 6 Hare, 477, 484.
(*g*) *Doe* v. *Lloyd* (1840), 1 Man. & G. 671.
(*h*) *Macdougall* v. *Purrill* (1830), 2 Dow & Cl. 135, H. L.; *A.-G.* v. *Moor*, *supra*;

SECT. 2. Assurances inter vivos for Charitable Uses.

Permission to enrol out of time.

203. In the case of an assurance made in good faith and for full and valuable consideration and to take effect in possession without reservations not authorised by the Mortmain and Charitable Uses Act, 1888 (*i*), and under which enjoyment is held, but which was not enrolled within the requisite time, the court or the officer controlling the enrolment of deeds, on being satisfied that the omission to enrol arose from ignorance or inadvertence, or through the destruction or loss of the instrument by time or accident, may cause the enrolment of the instrument (*j*), or, when the instrument is destroyed or lost, of a copy or abstract thereof or some subsequent instrument (*k*). Subject to any pending proceedings or decree already obtained founded on the invalidity of the assurance (*l*), enrolment made in this way has the same effect as if it had been made within the requisite time (*m*). Application to enrol in cases of omission may be made by any trustee, governor, director, manager, or other person interested in the charity intended to be benefited (*n*).

Assurances not requiring enrolment.

204. Assurances of land made by registered disposition under the Land Transfer Acts (*o*), of land already in mortmain or devoted to charitable purposes (*p*), of land concerning which the charitable trusts are declared by a separate enrolled instrument (*q*), of stock in the public funds to be laid out in the purchase of land (*r*), of land for public parks, elementary schools, or public museums (*s*), of land for certain universities, colleges, and societies (*t*), and assurances specially exempted by statutes prior to the Mortmain and Charitable Uses Act, 1888 (*a*), or subsequent to that Act (*b*), and assurances by

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Haigh v. *West*, [1893] 2 Q. B. 19, 26, 31; compare, on the other hand, *Wright* v. *Smythies* (1809), 10 East, 409; *Doe* v. *Waterton* (1819), 3 B. & Ald. 149.

(*i*) See p. 128, *ante*.

(*j*) Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42), s. 5 (1), (2).

(*k*) *Ibid.*, s. 5 (4).

(*l*) *Ibid.*, s. 5 (3).

(*m*) *Ibid.* s. 5 (2).

(*n*) *Ibid.* s. 5 (5).

(*o*) *Ibid.*, s. 9.

(*p*) *Walker* v. *Richardson* (1837), 2 M. & W. 882; *A.-G.* v. *Glyn* (1841), 12 Sim. 84; *Ashton* v. *Jones* (1860), 28 Beav. 460. As the object of the Mortmain Acts was to distinguish what lands were in mortmain, it would seem that assurances of land already in mortmain need not comply with any of the formalities of the Act of 1888. An assurance, however, upon a reinvestment of the proceeds of sale of charity lands requires enrolment (*Re Christ's Hospital (Governors)* (1864), 12 W. R. 669)

(*q*) Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42), s. 4 (9).

(*r*) *Ibid.*

(*s*) *Ibid.*, s. 6. As to elementary schools, see Education Act, 1902 (2 Edw. 7, c. 42), s. 23 (5), and title EDUCATION.

(*t*) Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42), s. 7; and see p. 140, *post*.

(*a*) *Ibid.*, s. 8. *E.g.*, Poor Law Act, 1844 (7 & 8 Vict. c. 101), s. 73 (assurances for workhouse or asylum sites), which Act only dispenses with enrolment (*Webster* v. *Southey* (1887), 36 Ch. D. 9). See also *Burnaby* v. *Barsby* (1859), 4 H. & N. 690; *A.-G.* v. *Blizard* (1855), 21 Beav. 233.

(*b*) *E.g.*, Working Class Dwellings Act, 1890 (53 & 54 Vict. c. 16), s. 1; Technical and Industrial Institutions Act, 1892 (55 & 56 Vict. c. 29), s. 10.

will (*c*), assurances of personal estate, other than of personal estate to be laid out in the purchase of land (*d*), including probably assurances of mortgage debts on the ground that the present definition of land excludes "money secured on land" (*e*), or mortgages to charity trustees (*f*), need not be enrolled in the Central Office.

Public parks and museums.

205. Assurances of land, whether by will or deed, for public parks or museums, must be enrolled in the books of the Charity Commissioners within six months after the death of the testator in the case of a will, or in the case of a deed after the execution thereof (*g*).

Elementary schools.

An assurance for public elementary schools apparently need not be enrolled in the books of the Board of Education (*h*).

SECT. 3.—*Assurances by Will.*

SUB-SECT. 1.—*Land.*

Necessity for sale.

206. Land, including tenements and hereditaments corporeal or incorporeal of any tenure, may be assured (*i*) by will to or for the benefit of any charitable use (*j*). But, unless the recipient charity is authorised to retain the land by the court, the Charity Commissioners, or the Board of Education (*k*), the land must, notwithstanding any contrary direction contained in the will (*l*), be sold within one year of the testator's death (*m*), or such extended period as may be duly determined (*n*). If not sold within the appointed period, the land will vest in the official trustee of charity lands, and the Charity Commissioners must take steps to enforce the sale (*o*).

(*c*) S. 4 of the Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42), is inapplicable to assurances by will. See also *ibid.*, s. 6 (1).

(*d*) *Ibid.*, s. 4 (1), (9). The reference to personal estate in *ibid.*, s. 4 (9), no doubt refers only to personal estate to be laid out in the purchase of land; see *ibid.*, s. 4 (1).

(*e*) Mortmain and Charitable Uses Act, 1891 (54 & 55 Vict. c. 73), s. 3.

(*f*) Charitable Funds Investment Act, 1870 (33 & 34 Vict. c. 34), s. 1; see p. 237, *post*, and *Doe* v. *Hawkins* (1842), 1 Gal. & Dav. 551. In practice the Charity Commissioners do not require the enrolment in the Central Office of reconveyances of land mortgaged by charities. But *quære* whether this practice is not *ultra vires*.

(*g*) Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42), s. 6 (2). See also Charitable Trusts Amendment Act, 1855 (18 & 19 Vict. c. 124), s. 42.

(*h*) Education Act, 1902 (2 Edw. 7, c. 42), s. 23 (5), which provides that the Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42), shall not apply to any assurance of land for the purpose of a school-house for an elementary school.

(*i*) For the meaning of "assurance," see note (*d*), p. 127, *ante*; Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42), s. 10 (i); Mortmain and Charitable Uses Act, 1891 (54 & 55 Vict. c. 73), s. 4.

(*j*) Mortmain and Charitable Uses Act, 1891 (54 & 55 Vict. c. 73), s. 5. Prior to the passing of this Act a gift by will dated or republished after June 24, 1736, of land for charitable purposes, was void as a general rule (Charitable Uses Act, 1735 (9 Geo. 2, c. 36), s. 1), and the Act of 1888 made no difference, for, although the expression "assurance" in that Act was defined by s. 10 to include a will, a devise of land, unless it came within the exemptions contained in s. 6 of the Act of 1888, was void, as by no possibility could the conditions imposed by s. 4 of that Act be satisfied by an assurance by will (*Re Hume, Forbes* v. *Hume*, [1895] 1 Ch. 422, C. A.).

(*k*) Mortmain and Charitable Uses Act, 1891 (54 & 55 Vict. c. 73), s. 8; Board of Education Act, 1899 (62 & 63 Vict. c. 33), and Orders in Council made thereunder; and see p. 135, *post*.

(*l*) Thus, a power to postpone sale would be useless.

(*m*) Mortmain and Charitable Uses Act, 1891 (54 & 55 Vict. c. 73), s. 5.

(*n*) *Ibid.*; and see p. 135, *post*.

(*o*) *Ibid.*, s. 6; and see p. 135, *post*.

SECT. 8. Assurances by Will.

The above provisions apply to the wills of all testators who have died since August 5, 1891 (*p*), though the wills may have been made before that date (*q*).

In the case of a devise to a charitable corporation either beneficially or as a trustee for another charity, the above provisions do not relieve the corporation from the necessity of obtaining a licence to hold the land in mortmain (*r*).

The property which must be sold is the estate or interest in the land which is given to the charity, not necessarily the fee simple or the entire interest of the testator (*s*).

Assurance of proceeds of sale of land held on trust for sale.

207. If proceeds of sale of land subject to an immediate trust for sale form the subject-matter of a charitable gift, the land need not be sold within one year of the testator's death (*t*), but may be retained without the leave of the court. The sale, however, may not be postponed indefinitely (*a*), and the charity cannot elect to take the land unsold (*b*).

Reversionary interests.

In the case of a devise to charity of a reversionary interest in land, the sale under the statutory direction (*c*) cannot be postponed until the interest becomes one in possession (*d*); but where an immediate sale is undesirable, the period within which the sale must take place may be extended under the provisions mentioned below (*e*).

Choice of objects by trustees.

Trustees who have power to divide a residuary estate consisting of realty and personalty among charitable objects at their discretion may select charities capable of taking land as recipients of the realty and other charities as recipients of the personalty (*f*). If they do so, the statutory direction for sale will not apply (*g*).

By whom sale is effected.

208. Where the gift is to an existing charity the sale will be effected by the trustees, if any, of the charity, and not by the trustees of the will (*h*). If, however, the object of the devise is to

(*p*) Mortmain and Charitable Uses Act, 1891 (54 & 55 Vict. c. 73), s. 9.

(*q*) *Re Bridger, Brompton Hospital for Consumption* v. *Lewis*, [1894] 1 Ch. 297, C. A. Distinguish *Re Crossley, Birrell* v. *Greenhough*, [1897] 1 Ch. 928, where only "pure personal estate" was bequeathed by the will.

(*r*) Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42), s. 1. For the exemptions, see pp. 137, 138, *post*. As to mortmain and licences in mortmain, see generally, title CORPORATIONS.

(*s*) *Re Hume, Forbes* v. *Hume*, [1895] 1 Ch. 422, 436, C. A.; *Re Ryland, Roper* v. *Ryland*, [1903] 1 Ch. 467, 473.

(*t*) *Re Wilkinson, Esam* v. *A.-G.*, [1902] 1 Ch. 841; *Re Sidebottom, Beeley* v. *Waterhouse*, [1902] 2 Ch. 389, C. A.; *Re Ryland, Roper* v. *Ryland supra*, at p. 473, personal estate arising from land being excluded from the definition of land (Mortmain and Charitable Uses Act, 1891 (54 & 55 Vict. c. 73), s. 3).

(*a*) *Re Sidebottom, Beeley* v. *Waterhouse, supra*.

(*b*) The effect of the cases cited in the two preceding notes is apparently that the sale must be carried out sooner or later under the testamentary trust for sale, and not under the direction for sale contained in the Act of 1891.

(*c*) Mortmain and Charitable Uses Act, 1891 (54 & 55 Vict. c. 73), s. 5.

(*d*) *Re Bridger, Brompton Hospital for Consumption* v. *Lewis, supra*; *Re Hume, Forbes* v. *Hume, supra*, at p. 429.

(*e*) *Re Hume, Forbes* v. *Hume, supra*; see p. 135, *post*.

(*f*) *Lewis* v. *Allenby* (1870), L. R. 10 Eq. 668; *Re Levitt (Marmaduke)* (1885), 1 T. L. R. 578; *Re Ovey* (1885), 31 Ch. D. 113; *Re Piercy, Whitwham* v. *Piercy*, [1898] 1 Ch. 565, C. A.; see also *London University* v. *Yarrow* (1855), 24 Beav. 472; and distinguish *Re Clark* (1885), 54 L. J. (CH.) 1080.

(*g*) See Mortmain and Charitable Uses Act, 1891 (54 & 55 Vict. c. 73), s. 10.

(*h*) See *ibid.*, s. 6, under which in case of non-sale the Charity Commissioners are bound to see that a sale is effected by "the administering trustees."

establish a new charity, and not to benefit an existing institution, the trustees of the will would, it is conceived, be the proper persons to sell.

Extension of time for sale.

209. The court or the Charity Commissioners (*i*), or, in the case of devises to educational charities, the Board of Education (*k*), have jurisdiction to extend the time for sale, and will do so where such a course would benefit the charity (*l*). They may perhaps even have jurisdiction to do so after the property has vested in the official trustee (*m*). But they cannot avoid a vesting in the official trustee, which has already taken place, by an order extending the time on a subsequent application (*n*).

Retention of land unsold for occupation.

210. The court or the Charity Commissioners, or, in the case of educational charities, the Board of Education (*o*), may authorise the retention of land given for charitable purposes, provided they are satisfied that the land is required for actual occupation by the charity, and not for investment (*p*).

Vesting of unsold land in official trustee.

211. On the expiration of the time (*q*) limited for sale, and any extension thereof, if the land in question has not been sold, it vests immediately in the official trustee of charity lands (*r*), unless the retention of the land has been sanctioned by the proper authority (*s*). The duty then devolves on the Charity Commissioners, or, in the case of educational charities, on the Board of Education (*t*), of seeing that the sale of the land is effected or completed, with all reasonable speed, by the administering trustees, the legal estate being in the official trustee of charity lands (*u*).

The Commissioners or the Board of Education (*a*), as the case may be, may, in the execution of their duty, make any order (*b*)

(*i*) Mortmain and Charitable Uses Act, 1891 (54 & 55 Vict. c. 73), s. 5. Any application to the court should be by originating summons; see *Re Sidebottom, Beeley* v. *Waterhouse*, [1902] 2 Ch. 389, C. A.; *Re Church Patronage Trust*, [1904] 1 Ch. 41; R. S. C., Ord. 55, rr. 3—5.

(*k*) Board of Education Act, 1899 (62 & 63 Vict. c. 33), and Orders in Council made thereunder.

(*l*) *Re Hume, Forbes* v. *Hume*, [1895] 1 Ch. 422, C. A.; *Re Sidebottom, Beeley* v. *Sidebottom*, [1901] 2 Ch. 1, 7, C. A.

(*m*) Mortmain and Charitable Uses Act, 1891 (54 & 55 Vict. c. 73), s. 6; *Re Ryland, Roper* v. *Ryland*, [1903] 1 Ch. 467, *per* BYRNE, J., at p. 474.

(*n*) *Ibid.*

(*o*) See p. 317, *post.*

(*p*) Mortmain and Charitable Uses Act, 1891 (54 & 55 Vict. c. 73), s. 8. A certificate from the Charity Commissioners or Board of Education is not required for an application to the court under this section, nor need either of those bodies be made parties to the proceedings (*Re Ryland, Roper* v. *Ryland, supra*; *Re Church Patronage Trust, supra*).

(*q*) Mortmain and Charitable Uses Act, 1891 (54 & 55 Vict. c. 73), s. 5; and see p. 133, *ante.*

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

(*s*) *Ibid.*, s. 8; and see *supra.* It is conceived that if no order sanctioning the retention of the land has been made within a year from the testator's death, though the land has vested in the official trustee, the making of a retention order after the year will divest it.

(*t*) See p. 317, *post.*

(*u*) *Ibid.*, s. 6; Board of Education Act, 1899 (62 & 63 Vict. c. 33), and Orders in Council made thereunder.

(*a*) See *ibid.*

(*b*) The orders made by the Commissioners or Board of Education under s. 6 of the Mortmain and Charitable Uses Act, 1891 (54 & 55 Vict. c. 73), are

SECT. 3. Assurances by Will.

under their seal (1) directing the trustees administering the charity to proceed with or complete the sale, (2) removing such trustees and appointing others, (3) providing for the payment of the proceeds of sale to the official trustees of charitable funds in trust for the charity, and (4) providing for payment of the costs of the sale (*c*).

SUB-SECT. 2.—*Personal Estate to be laid out in the Purchase of Land.*

Personalty directed to be laid out in land not to be so laid out.

212. A bequest of personal estate to be laid out in the purchase of land (*d*) to or for the benefit of any charitable uses (*e*) is valid, but the property will be held for the charitable uses as if there had been no direction to lay it out in land (*f*).

Where land is required for occupation.

The court or the Charity Commissioners, or, in the case of educational charities, the Board of Education, may, however, authorise the acquisition of land proposed to be purchased out of personal estate directed to be laid out in the purchase of land, if satisfied that the land is required for actual occupation for the purposes of the charity, and not as an investment (*g*).

SECT. 4.—*Exemptions.*

SUB-SECT. 1.—*General Nature of Exemptions.*

Nature of exemptions.

213. Exemptions from the restrictions on assurances for charitable purposes differ in kind and degree. In some cases the exemption

enforceable in the same way as orders made by the Commissioners or Board of Education under the Charitable Trusts Acts; see Mortmain and Charitable Uses Act, 1891 (54 & 55 Vict. c. 73), s. 6; and p. 303, *post*.

(*c*) *Ibid.*

(*d*) *I.e.*, corporeal or incorporeal hereditaments of any tenure (*ibid.*, s. 3). The Act only applies to the wills of testators dying after August 5, 1891 (*ibid.*, s. 9).

(*e*) See *Re Sutton, Lewis* v. *Sutton*, [1901] 2 Ch. 640, where it was held that the words "charitable uses" were equivalent to "purposes of the charity."

(*f*) Mortmain and Charitable Uses Act, 1891 (54 & 55 Vict. c. 73), s. 7; *Re Sutton, Lewis* v. *Sutton, supra*. Formerly a bequest of personalty to a charity to be laid out in land was wholly void (*Corbyn* v. *French* (1799), 4 Ves. 418, 431; *Kirkmann* v. *Lewis* (1869), 38 L. J. (CH.) 570). But now, if the testator's intentions cannot be carried out without purchasing land, such a bequest, if a general charitable intention is shown, would be applicable *cy-près*; see p. 190, *post*. In the case of a gift to an existing institution the legacy would, no doubt, be paid into its general fund. The fact that the general fund is liable to be laid out in land is immaterial (*Wilkinson* v. *Barber* (1872), L. R. 14 Eq. 96, 100). It may be observed that the Gifts for Churches Act, 1803 (43 Geo. 3, c. 108), s. 1, under which a gift by will of personalty to be laid out in land for the purposes of that Act was authorised, has, in so far as it limited the amount of personalty to £500, been impliedly repealed by s. 7 of the Mortmain and Charitable Uses Act, 1891 (54 & 55 Vict. c. 73) (*Re Douglas, Douglas* v. *Simpson*, [1905] 1 Ch. 279).

(*g*) Mortmain and Charitable Uses Act, 1891 (54 & 55 Vict. c. 73), s. 8; Board of Education Act, 1899 (62 & 63 Vict. c. 33), and Orders in Council made thereunder. Apart from this statutory authority, the court may, under its general jurisdiction, authorise the purchase of land by a charity where it will be for its benefit, as for a new site (*Re Colston's Hospital* (1859), 27 Beav. 16), or for purposes of enlargement (*A.-G.* v. *Mansfield (Earl)* (1845), 14 Sim. 601). But investment of charity property in land is considered contrary to the policy of the Mortmain Acts, and is not as a rule sanctioned by the court under its general jurisdiction (*A.-G.* v. *Wilson* (1838), 2 Keen, 680); and see p. 238, *post*. The Charity Commissioners may also, under s. 15 of the Charitable Trusts Act, 1860 (23 & 24 Vict. c. 136), and under their general jurisdiction to establish schemes (see p. 185, *post*), authorise the purchase of land for the general benefit of a charity; see p. 239, *post*.

SECT. 4. Exemptions.

enables a corporation to acquire and hold for charitable purposes land or a limited quantity of land without licence in mortmain as required by Part I. of the Act of 1888 (*h*), but does not dispense with the formalities or conditions with regard to assurances to charities imposed by Part II. of the same Act (*i*). In other cases the exemption dispenses with compliance with the conditions of both Part I. and Part II. of the Act of 1888, or with compliance with the provisions of Part II. of the Act of 1888, leaving the assurance, if made to a corporation, subject to Part I. of the same Act.

Gifts by will

In other cases the exemption may authorise gifts to charity by will (*k*), in which case it would relieve the charity of the necessity of selling the land within a year of the testator's death (*l*), but would not dispense with the requirements as to assurances in mortmain.

SUB-SECT. 2.—*Exemptions from Restrictions on Assurances to Corporations.*

Exemptions from mortmain restrictions.

214. Land may be assured to or acquired by charitable corporations without licence in mortmain under the authority of any statute for the time being in force (*m*). Thus, many charitable or *quasi*-charitable incorporated public bodies (*n*), hospitals (*o*) and

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(*h*) As to this, see title CORPORATIONS.

(*i*) See, as to these, pp. 127—136, *ante*; *Mogg* v. *Hodges* (1750), 2 Ves. Sen. 52; *Robinson* v. *London Hospital* (*Governors*) (1852), 10 Hare, 24, 25; *Nethersole* v. *Indigent Blind School* (1870), L. R. 11 Eq. 1; *Chester* v. *Chester* (1871), L. R. 12 Eq. 444. For examples, see stat. 15 Car. 2, c. 17; Bank of England Act, 1696 (stat. 8 & 9 Will. 3, c. 20), s. 26; Charitable Trustees Incorporation Act, 1872 (35 & 36 Vict. c. 24), s. 1.

(*k*) For examples, see stat. 28 & 29 Vict. c 89, s. 43, by which property may be given by deed or will to Greenwich Hospital; Recreation Grounds Act, 1859 (22 Vict. c. 27), s. 7. Exemption from Part II. of the Act of 1888 would seem to have this effect. A power for a charity to acquire land by will implies a power for persons to devise land for its benefit (*Perring* v. *Trail* (1874), L. R. 18 Eq. 88; see also *Harrison* v. *Southampton Corporation* (1854), 2 Sm. & G. 387; *Luckraft* v. *Pridham* (1877), 6 Ch. D. 212, 213), but a power to hold land does not (*Nethersole* v. *Indigent Blind School*, *supra*).

(*l*) See p. 133, *ante*.

(*m*) Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42), s. 1 (1); *Ex parte St. Thomas' Hospital* (*Governors*) (1908), *Times* (October 23, 1908). As to the mortmain restrictions, see generally, title CORPORATIONS.

(*n*) Thus, exemption from mortmain restrictions exists in the case of, *inter alia*, county councils (Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 72), borough councils (Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 107), metropolitan borough councils (London Government Act, 1899 (62 & 63 Vict. c. 14), s. 5 (2)), urban district councils (Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 7), rural district councils (Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 24 (7)), parish councils (*ibid.*, s. 3 (9)), parish meetings in small parishes (*ibid.*, s. 19 (6)); and see generally, Mortmain and Charitable Uses Act Amendment Act, 1892 (55 Vict. c. 11); and title LOCAL GOVERNMENT.

(*o*) Foundling Hospital (stat. 13 Geo. 2, c. 29); Bath Infirmary (stat. 19 Geo. 3, c. 23); Chelsea Hospital (stat. 5 Geo. 4, c. 107; Chelsea and Kilmainham Hospitals Act, 1826 (7 Geo. 4, c. 16)); Greenwich Hospital (stat. 10 Geo. 4, c. 25, stat. 28 & 29 Vict. c. 89; Greenwich Hospital Act, 1898 (61 & 62 Vict. c. 24)); Seaman's Hospital Society (stat. 3 & 4 Will. 4, c. 9); St. George's Hospital (stat. 4 & 5 Will. 4, c. xxxviii., s. 1); Middlesex Hospital (stat. 6 & 7 Will. 4, c. vii., s. 4); Westminster Hospital (stat. 6 & 7 Will. 4, c. xx., s. 6). See also stat. 39 Eliz. c. 5, s. 1; stat. 21 Jac. 1, c. 1, giving power by deed enrolled to

SECT. 4. Exemptions.

institutions (*p*) are wholly or partially exempt from the mortmain restrictions, and are enabled to a greater or less extent to acquire and hold land. Charity trustees incorporated under the Charitable Trustees Incorporation Act, 1872 (*q*), and joint stock companies, formed for the purpose of promoting art, science, religion, charity or any other like object, not involving the acquisition of gain, are also empowered to acquire and hold land without licence in mortmain (*r*). Friendly societies have also certain powers of holding and disposing of land (*s*).

SUB-SECT. 3.—*Exemptions from Restrictions on Assurances whether to Corporations or to Charities.*

Exemptions from mortmain and charitable restrictions.

215. Parts I. and II. of the Mortmain and Charitable Uses Act, 1888 (*t*), do not apply to assurances by deed of land of any quantity for a public park (*a*), a public museum (*b*), or to any local authority for any purpose for which such authority is empowered by statute to acquire land (*c*); to assurances by will not exceeding twenty acres for a public park or two acres for a museum (*d*); or to assurances by will of personal estate for the purchase of land for any of the above purposes (*e*). But every such will or deed, unless in the latter case made for full and valuable consideration, must, except in the case of an assurance to a local authority (*f*), be executed not less than twelve months before the death of the assuror, unless reproducing a subsisting devise so executed (*g*), and must be enrolled in the books of the Charity Commissioners within six months after the death of the testator or the execution of the deed (*h*).

found hospitals to be incorporated and to have power to purchase and hold land to the yearly value of 200*l.*; see *Newcastle* v. *A.-G.* (1842), 12 Cl. & Fin. 402, H. L.

(*p*) Technical and Industrial Institutions Act, 1892 (55 & 56 Vict. c. 29), s. 10; Department of Science and Art Act, 1875 (38 & 39 Vict. c. 68).

(*q*) 35 & 36 Vict. c. 24, s. 1; see also Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 27; Charitable Trusts Amendment Act, 1855 (18 & 19 Vict. c. 124), ss. 35, 41.

(*r*) Companies Act, 1862 (25 & 26 Vict. c. 89), s. 18; but not more than two acres without the licence of the Board of Trade (*ibid.*, s. 21).

(*s*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 47.

(*t*) 51 & 52 Vict. c. 42; and see p. 137, *ante*.

(*u*) See Mortmain and Charitable Uses Act (51 & 52 Vict. c. 42), 1888, s. 6 (1).

(*b*) *Ibid.*

(*c*) Mortmain and Charitable Uses Act Amendment Act, 1892 (55 Vict. c. 11), s. 1. See note (*n*), p. 137, *ante*.

(*d*) Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42), s. 6 (1), (3); see *Worthing Corporation* v. *Heather*, [1906] 2 Ch. 532 (demise of land for a public park). As to assurance of land for a school-house for an elementary school, see also Education Act, 1902 (2 Edw. 7, c. 42), s. 23 (5); and title EDUCATION.

(*e*) Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42), s. 6 (1).

(*f*) Mortmain and Charitable Uses Act Amendment Act, 1892 (55 Vict. c. 11), s. 1.

(*g*) Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42), s. 6 (2).

(*h*) *Ibid.*

SECT. 4. Exemptions.

216. Parts I. and II. of the Mortmain and Charitable Uses Act, 1888 (*i*), are also inapplicable in the case of assurances of land or personal estate for the purpose of providing dwellings for the working classes in any populous place provided that the deed or will is enrolled in the books of the Charity Commissioners within six months from the execution in case of a deed, or probate in case of a will, and that in the case of a will the quantity of land does not exceed five acres (*k*).

Land for working class dwellings.

Parts I. and II. of the Act of 1888 and so much of the Mortmain and Charitable Uses Act, 1891, as requires the sale of land assured by will (*l*) do not apply to an assurance of land for the purpose of a school-house for an elementary school (*m*).

Land for elementary school-house

217. A series of enabling Acts authorises the conveyance of land or buildings on sale or by way of gift, free from all restrictions other than those specified in the Acts, for the purposes of a church (*n*), churchyard (*o*), parsonage house, glebe or other endowment (*p*). In most cases the enabling statute limits the amount of land which may be given and imposes conditions under which the assurance must be made.

Gifts for churches etc.

218. Where, by any statute in force at the date of the passing of the Mortmain and Charitable Uses Act, 1888, any provision of the enactments repealed (*q*) by the Act of 1888 is excluded either wholly or partially from application or is applied with modification, in every

Exemptions from earlier Acts.

(*i*) See p. 137, *ante*.

(*k*) Working Classes Dwellings Act, 1890 (53 & 54 Vict. c. 16), s. 1. This Act seems to enable five acres to be given by will free from the obligation to sell under the Mortmain and Charitable Uses Act, 1891 (54 & 55 Vict. c. 73), s. 5, p. 133, *ante*. See title PUBLIC HEALTH ETC.

(*l*) See p. 133, *ante*.

(*m*) Education Act, 1902 (2 Edw. 7, c. 42), s. 23 (5).

(*n*) Gifts for Churches Act, 1803 (43 Geo. 3, c. 108); see *Re Douglas, Douglas* v. *Simpson*, [1905] 1 Ch. 279. This Act applies to a gift for the repair of a churchyard (*Doe* v. *Pitcher* (1815), 3 M. & S. 407; *Re Vaughan* (1886), 33 Ch. D. 187; *Re Manser, A.-G.* v. *Lucas*, [1905] 1 Ch. 68, 74), or the provision of a clock (*Re Hendry* (1887), 56 L. T. 908); but not to a gift for repairing tombs not part of the fabric of a church (*Re Rigley's Trusts* (1867), 36 L. J. (CH.) 147; *Re Vaughan, supra*). See also Gifts for Churches Act, 1811 (51 Geo. 3, c. 115); Church Building Act, 1818 (58 Geo. 3, c. 45); Church Building Act, 1822 (3 Geo. 4, c. 72); Church Building Act, 1831 (1 & 2 Will. 4, c. 38); Church Building Act, 1838 (1 & 2 Vict. c. 107); New Parishes Acts, 1843, 1844, and 1856 (6 & 7 Vict. c. 37; 7 & 8 Vict. c. 94; 19 & 20 Vict. c. 104); Places of Worship Sites Act, 1873 (36 & 37 Vict. c. 50); Places of Worship Sites Amendment Act, 1882 (45 & 46 Vict. c. 21). As to these Acts, see further title ECCLESIASTICAL LAW, and for forms of conveyance Encyclopædia of Forms, Vol. III., pp. 604—610.

(*o*) See statutes in note (*n*), *supra*, and also Church Building Act, 1819 (59 Geo. 3, c. 134); Burial Acts, 1852 and 1853 (15 & 16 Vict. c. 85; 16 & 17 Vict. c. 134); Consecration of Churchyards Act, 1867 (30 & 31 Vict. c. 133); Public Health (Interment) Act, 1879 (42 & 43 Vict. c. 31); Encyclopædia of Forms, Vol. III., p. 613. See further, title BURIAL AND CREMATION, Vol. III., p. 434.

(*p*) See statutes in note (*n*), *supra*. Endowments may also be provided under stat. 29 Car. 2, c. 8; Queen Anne's Bounty Acts, 1706 and 1803 (2 & 3 Anne, c. 20, ss. 4, 5; 43 Geo. 3, c. 107); Glebe Exchange Act, 1815 (55 Geo. 3, c. 147); Augmentation of Benefices Acts, 1831 and 1854 (1 & 2 Will. 4, c. 45; 17 & 18 Vict. c. 84); Pluralities Act, 1838 (1 & 2 Vict. c. 106); Church Building Acts, 1839, 1840, and 1851 (2 & 3 Vict. c. 49; 3 & 4 Vict. c. 60; 14 & 15 Vict. c. 97); Ecclesiastical Commissioners Act, 1866 (29 & 30 Vict. c. 111). See also Encyclopædia of Forms, Vol. III., pp. 615—622.

(*q*) See Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42), s. 13,

SECT. 4. Exemptions.

such case the corresponding provision of the Act of 1888 is to be excluded or applied in like extent or manner (*r*).

SUB-SECT. 4.—*Exemptions from Restrictions on Assurances to Charities.*

Land for universities or colleges.

219. Part II. of the Mortmain and Charitable Uses Act, 1888, does not apply to assurances of land or personal estate to be laid out in land in favour of the universities of Oxford, Cambridge, London, Durham, and the Victoria University, or any colleges within them, or the colleges of Eton, Winchester and Westminster, for their foundation scholars, or of Keble College (*s*), but such assurances are not exempt from the restrictions contained in Part I. of the Act (*t*). The assurances must be for the benefit of the university or college as a body (*a*), or for the benefit of some of the particular members (*b*), and the purposes must be academical or collegiate (*c*). The exemption does not apply to an assurance to a college as trustee for other charitable purposes (*d*). Such assurances may, but need not, be enrolled in the Central Office (*e*).

Land for certain societies for building purposes

220. Part II. of the Mortmain and Charitable Uses Act, 1888, does not apply to assurances otherwise than by will made *bonâ fide* for full and valuable consideration to trustees on behalf of any society or body of persons associated together for religious purposes, or for the promotion of education, art, literature, science, or other like purposes, of land not exceeding two acres for building purposes, with or without buildings thereon (*f*). Such assurances may, but need not, be enrolled in the Central Office (*g*).

SUB-SECT. 5.—*Scotland, Ireland, and the Colonies.*

Scotland

221. The Mortmain and Charitable Uses Acts, 1888, 1891, and 1892, do not apply to Scotland or Ireland (*h*). The result is that

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and Schedule. These Acts, or some of them, included provisions similar to those contained in the Act of 1888.

(*r*) Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42), s. 8. This section preserves previously existing exemptions both as regards restrictions in the case of assurances to or the acquisition of land by charitable corporations, and restrictions in the case of assurances to charitable uses. For examples of exempting statutes in force at the date of the passing of the Act of 1888, see pp. 137, 138, *ante*.

(*s*) *Ibid.*, s. 7 (i).

(*t*) *I.e.*, the mortmain restrictions. Certain exemptions from the mortmain restrictions (see title CORPORATIONS) have been from time to time given by statute to the universities of Cambridge and Oxford (Cambridge University Act, 1856 (19 & 20 Vict. c. 88), s. 21; Oxford University Act, 1857 (20 & 21 Vict. c. 25), s. 4; 40 & 41 Vict. c. 48, s. 60); Durham (Ecclesiastical Commissioners Act, 1841 (4 & 5 Vict. c. 39), s. 13), and some of the public schools (stat. 31 & 32 Vict. c. 118, s. 5; stat. 32 & 33 Vict. c. 58, s. 2).

(*a*) *A.-G.* v. *Whorwood* (1750), 1 Ves. Sen. 534, 537.

(*b*) *A.-G.* v. *Tancred* (1757), 1 Eden, 10, 15; *Re Levitt* (*Marmaduke*) (1885), 1 T. L. R. 578; *A.-G.* v. *Sibthorp* (1830), 2 Russ. & M. 107.

(*c*) *A.-G.* v. *Whorwood*, *supra*.

(*d*) *A.-G.* v. *Tancred*, *supra*; *A.-G.* v. *Munby* (1815), 1 Mer. 327.

(*e*) Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42), s. 7.

(*f*) *Ibid.*, s. 7 (ii.). As to the assurance of land for institutions promoting science, literature and art, see stat. 17 & 18 Vict. c. 112; and title SCIENTIFIC AND LITERARY SOCIETIES; for the Department of Science and Art, stat. 38 & 39 Vict. c. 68; for public libraries, Library Act, 1892 (55 & 56 Vict. c. 53).

(*g*) Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42), s. 7.

(*h*) *Ibid.*, s. 11; Mortmain and Charitable Uses Act, 1891 (54 & 55 Vict.

there is no objection to a bequest by a person domiciled in England of personalty to be laid out in land or other heritable securities in Scotland (*i*). And a bequest by a person domiciled in England of money to be laid out in land (there being no indication that the land was to be in Scotland) for a Scotch charity, is valid save in so far as the direction to purchase land could be considered a direction to purchase land in England (*k*). But a devise by a person domiciled in Scotland of real estate in England is subject to English law (*l*). SECT. 4. Exemptions.

222. Gifts of land for charitable purposes in Ireland are regulated by the Irish Mortmain Acts (*m*). Ireland.

223. Apparently the Mortmain and Charitable Uses Acts do not apply to India (*n*) or the Colonies (*o*), or to real property owned by British subjects in foreign lands (*p*). India and the Colonies.

A person domiciled in the colony of Victoria may bequeath money for the purchase of land in England for charitable uses, and it would seem that the direction for the purchase of land would be binding (*q*).

Part III.—Charitable Trusts.

SECT. 1.—*Creation by Act of Party.*

SUB-SECT. 1.—*Modes of Creation.*

224. Assurances of land and of personal estate to be laid out in the purchase of land upon charitable trusts must comply with the requirements of the Mortmain and Charitable Uses Acts (*r*). Modes of creation.

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c. 73), s. 2; Mortmain and Charitable Uses Act Amendment Act, 1892 (55 Vict. c. 11), s. 3.

(*i*) *Oliphant* v. *Hendrie* (1784), 1 Bro. C. C. 571; *Mackintosh* v. *Townsend* (1809), 16 Ves. 330; *Forbes* v. *Forbes* (1854), 18 Beav. 552.

(*k*) Mortmain and Charitable Uses Act, 1891 (54 & 55 Vict. c. 73), s. 7; though it would have been void prior to that Act (*A.-G.* v. *Mill* (1837), 5 Bli. (N. S.) 593, H. L.).

(*l*) *Curtis* v. *Hutton* (1808), 14 Ves. 537; *Duncan* v. *Lawson* (1889), 41 Ch. D. 394; *Re Hewit, Lawson* v. *Duncan*, [1891] 3 Ch. 568.

(*m*) Charitable Donations and Bequests (Ireland) Act, 1844 (7 & 8 Vict. c. 97); Charitable Donations and Bequests (Ireland) Act, 1867 (30 & 31 Vict. c. 54); and Charitable Donations and Bequests Act (Ireland), 1871 (34 & 35 Vict. c. 102); see also *Incorporated Society* v. *Richards* (1841), 1 Dr. & War. 258; *Pollock* v. *Day* (1863), 14 I. Ch. R. 297.

(*n*) *Lyons Corporation* v. *East India Co.* (1836), 1 Moo. P. C. C. 175; *Mitford* v. *Reynolds* (1841), 1 Ph. 185, 192; *Macdonald* v. *Macdonald* (1872), L. R. 14 Eq. 60.

(*o*) *A.-G.* v. *Stewart* (1816), 2 Mer. 143 (West Indies); *Re Arnold* (1888), 37 Ch. D. 637 (Cape Colony); *Whicker* v. *Hume* (1858), 7 H. L. Cas. 124, 151 (New South Wales); *Abbott* v. *Fraser* (1874), L. R. 6 P. C. 96, 123 (Canada); *Jex* v. *McKinney* (1889), 14 App. Cas. 77 (British Honduras); *Yeap Cheah Neo* v. *Ong Chang Neo* (1875), L. R. 6 P. C. 381 (Penang).

(*p*) *Re Geck* (1893), 69 L. T. 819.

(*q*) *Canterbury Corporation* v. *Wyburn*, [1895] A. C. 89.

(*r*) Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42), especially s. 4; Mortmain and Charitable Uses Act, 1891 (54 & 55 Vict. c. 73); and see pp. 127, 133, *ante*.

Where, under the old Mortmain Acts, devises of land or bequests involving the purchase of land for charitable purposes were rendered void, a further bequest for the endowment of the charity was held to fail with the primary gift (*A.-G.* v. *Whitchurch* (1796), 3 Ves. 141; *Smith* v. *Oliver* (1848), 11 Beav. 481

SECT. 1. Creation by Act of Party.

Statute of Frauds.

The Statute of Frauds (*s*) is applicable to charitable trusts of land, including copyholds (*t*) and chattels real (*u*), and accordingly such trusts must be declared in writing (*x*). The statute applies also to agreements, not to be performed within a year, to pay moneys to a charity (*y*). But trusts of personalty may be created without writing (*z*) except in the case of personalty to be laid out in the purchase of land (*a*).

Technical language unnecessary.

A charitable trust (*b*), like a private trust (*c*), may be created by informal as well as by technical language, provided that the intention of the donor to devote the property to charity is clear. Thus, precatory or recommendatory words have frequently been held to create trusts where the intention of the testator has been considered imperative (*d*). So provisions in which the word "condition" occurs may create trusts (*e*).

Extent to which charitable trust is binding on grantee or devisee.

225. According to an ancient equitable doctrine that no person can acquire an estate with notice of a charitable use without being bound by it, the grantee or devisee of an estate subject to a charge in favour of a charity is a trustee, at any rate until separate trustees of the charge are appointed (*f*). If, however, the conveyance or will appoints trustees of the charge, it seems that no fiduciary obligation is imposed on the grantee or devisee (*g*).

(establishment of almshouses); *Dunn* v. *Bownas* (1855), 1 K. & J. 596 (hospital); *Re Cox, Cox* v. *Davie* (1877), 7 Ch. D. 201 (dispensary); *A.-G.* v. *Hinxman* (1820), 2 Jac. & W. 270 (school); *Green* v. *Britten* (1872), 42 L. J. (CH.) 187 (sailors' home)).

(*s*) 29 Car. 2, c. 3; non-compliance with the statute renders the trust void.

(*t*) *Withers* v. *Withers* (1752), Amb. 151 (non-charitable trust); and see title TRUSTS AND TRUSTEES.

(*u*) *Re De Nicols, De Nicols* v. *Curlier*, [1900] 2 Ch. 410 (non-charitable trust).

(*x*) Statute of Frauds (29 Car. 2, c. 3), s. 7; *A.-G.* v. *Barnes* (1707), 2 Vern. 597; *Addlington* v. *Cann* (1744), 3 Atk. 141. As to the creation of charitable trusts without writing, see *Boson* v. *Statham* (1760), 1 Eden, 509; p. 122, *ante;* p. 163, *post;* and title TRUSTS AND TRUSTEES.

(*y*) Statute of Frauds (29 Car. 2, c. 3), s. 4; *Re Hudson* (1885), 1 T. L. R. 447.

(*z*) *Lyell* v. *Kennedy* (1889), 14 App. Cas. 437, *per* Lord SELBORNE, at p. 457; see further, note (*a*), p. 122, *ante;* title TRUSTS AND TRUSTEES.

(*a*) Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42), s. 4 (1).

(*b*) *Salusbury* v. *Denton* (1857), 3 K. & J. 529; *Goodman* v. *Saltash Corporation* (1882), 7 App. Cas. 633, at p. 642, where Lord SELBORNE, L.C., said it was immaterial whether the words used were "trust," "intent," "purpose," "proviso," or "condition."

(*c*) *Brown* v. *Higgs* (1803), 8 Ves. 561; *Re Williams*, [1897] 2 Ch. 12, *per* LINDLEY, L.J., at pp. 21, 22. See title TRUSTS AND TRUSTEES. A private trust is for the benefit of ascertained or ascertainable individuals. In the case of a public or charitable trust the objects are uncertain and fluctuating, and the purposes must, as has been seen at pp. 105 *et seq.*, *ante*, be among those enumerated in the statute of Elizabeth, or analogous thereto. Moreover, a charitable trust is generally permanent.

(*d*) See title TRUSTS AND TRUSTEES; and also *A.-G.* v. *Davies* (1802), 9 Ves. 535, 546; *Kirkbank* v. *Hudson* (1819), 7 Price, 212; and *Pilkington* v. *Boughey* (1841), 12 Sim. 114. In these cases the trust was established, but held void as infringing the mortmain law then in force. Such trusts would not now be void (Mortmain and Charitable Uses Act, 1891 (54 & 55 Vict. c. 73), s. 5); see p. 133, *ante*.

(*e*) See p. 171, *post*.

(*f*) *Charitable Donations Commissioners* v. *Wybrants* (1845), 2 Jo. & Lat. 182, 198. See also the non-charitable cases of *Hodge* v. *Churchward* (1847), 16 Sim. 71; and *Cunningham* v. *Foot* (1878), 3 App. Cas. 974.

(*g*) *Ibid.*, at p. 987.

SECT. 1. Creation by Act of Party.

A charitable trust may be so limited as to affect part only of the property granted or devised, as where property is given subject to (*h*), or in trust to make (*i*), specified charitable payments which do not exhaust the whole estate (*j*). In those cases where the donor has not expressed a general intention to devote the whole property to charity, the donee takes beneficially subject only to the specific appropriation (*k*).

Ademption.

226. The ordinary law as to ademption applies to legacies given to charities (*l*). So where a legacy is given to the trustees of an endowment fund, it will be adeemed by a gift of the same amount to the same trustees by the testator during his life (*m*).

Charity established by voluntary subscriptions.

227. A charity created or established by means of voluntary subscriptions does not differ from charities established in other ways, except as regards the jurisdiction of the Charity Commissioners over it (*n*), provided that a fund exists which is subject to a charitable trust (*o*).

Application of lunatic's property for charity.

In some cases the court has allowed subscriptions and donations in favour of charity to be made out of a lunatic's estate (*p*), but the practice of granting allowances out of a lunatic's property to poor relations for whom he is under no obligation to provide is not regarded with favour by the court (*q*).

SUB-SECT. 2.—*Secret Trusts.*

Proof of secret trust.

228. The party seeking to establish a secret trust in favour of a charity must prove (*r*)—(1) that the testator in making a disposition in favour of a donee intended the gift to be applied for charitable

(*h*) *South Molton Corporation* v. *A.-G.* (1854), 5 H. L. Cas. 1; *A.-G.* v. *Windsor* (*Dean and Canons*) (1860), 8 H. L. Cas. 369. As to the distinction between a charge and a trust, see *Charitable Donations Commissioners* v. *Wybrants* (1845), 2 Jo. & Lat. 182.

(*i*) *Beverley Corporation* v. *A.-G.* (1857), 6 H. L. Cas. 310.

(*j*) *Merchant Taylors' Co.* v. *A.-G.* (1871), 6 Ch. App. 512, 520; *A.-G.* v. *Cordwainers' Co.* (1833), 3 My. & K. 534; *A.-G.* v. *Trinity College, Cambridge* (1856), 24 Beav. 383.

(*k*) *A.-G.* v. *Bristol Corporation* (1820), 2 Jac. & W. 294; *A.-G.* v. *Wax Chandlers' Co.* (1873), L. R. 6 H. L. 1, 9; *A.-G.* v. *Grocers' Co.* (1843), 6 Beav. 526; *A.-G.* v. *Skinners' Co.* (1826), 2 Russ. 407.

(*l*) *Twining* v. *Powell* (1845), 2 Coll. 262; *Makeown* v. *Ardagh* (1876), I. R. 10 Eq. 445.

(*m*) *Re Corbett*, [1903] 2 Ch. 326.

(*n*) See p. 305, *post*.

(*o*) *A.-G.* v. *Kell* (1840), 2 Beav. 575; *A.-G.* v. *Manchester* (*Bishop*) (1867), L. R. 3 Eq. 436, 453; *Strickland* v. *Weldon* (1885), 28 Ch. D. 426, 430; see also *Re Beard*, [1904] 1 Ch. 270. It is important to distinguish charities established in this way from societies which possess funds impressed with no charitable trust. Such funds on the dissolution of the societies have been held divisible among the members (*Re Printers and Transferrers' Amalgamated Trades Society*, [1899] 2 Ch. 184; *Re Abbott Fund Trusts, Smith* v. *Abbott*, [1900] 2 Ch. 326; *Re Lead Co.'s Workmen's Fund Society*, [1904] 2 Ch. 196).

(*p*) *Re Frost* (1870), 5 Ch. App. 699; *Re Strickland* (1871), 6 Ch. App. 226.

(*q*) *Re Evans* (1882), 21 Ch. D. 297, C. A.; *Re Darling* (1889), 39 Ch. D. 208, C. A.

(*r*) *Paine* v. *Hall* (1812), 18 Ves. 475; *Jones* v. *Badley* (1868), 3 Ch. App. 362, at p. 363, where Lord CAIRNS, L.C., repeats and amplifies the earlier judgment of WOOD, V.-C., in *Wallgrave* v. *Tebbs* (1855), 2 K. & J. 313; see also *Russell* v. *Jackson* (1852), 10 Hare, 204.

SECT. 1. Creation by Act of Party.

purposes, and not for the benefit of the donee; (2) that the donee was aware of the testator's intention (*s*); (3) that he either expressly promised or by silence (*t*) or conduct implied that he would carry the testator's wishes into effect; and (4) that upon these conditions the testator disposed of the property in favour of the donee.

Communication in testator's lifetime.

The testator's intention must be communicated to the donee during the testator's lifetime (*a*). Uncommunicated wishes or expectations of the testator, even though written, are not sufficient (*b*).

Proof of secret trust.

Where the existence of a secret trust is admitted, the devisee (*c*), or even his solicitor (*d*), may be compelled to give evidence of its terms, and if it is not admitted by the devisee it may be proved *aliunde* (*e*).

Devise to two persons.

The acceptance, tacit or explicit, of a trust by one of several tenants in common does not affect the others to whom no communication of the testator's intention has been made (*f*). If, however, the devise was to two persons as joint tenants, the trust binds both where the will was made on the faith of an antecedent promise by one of them accepting the trust (*g*). But where the will is left unrevoked on the faith of a subsequent promise by one of the two persons, he is bound, and not the other (*h*).

No secret trust proved.

Where no secret trust is established either by admission or proof the donee is entitled beneficially (*i*).

(*s*) *Jones* v. *Badley* (1868), 3 Ch. App. 362; *Juniper* v. *Batchellor* (1868), 19 L. T. 200; *Springett* v. *Jennings* (1870), L. R. 10 Eq. 488.

(*t*) *Jones* v. *Badley*, *supra*; *Tee* v. *Ferris* (1856), 2 K. & J. 357; *Rowbotham* v. *Dunnett* (1878), 8 Ch. D. 430, 437.

(*a*) *Lomax* v. *Ripley* (1855), 3 Sm. & Giff. 48; *Rowbotham* v. *Dunnett*, *supra*, at p. 439; *Re Boyes* (1884), 26 Ch. D. 531; *Re King* (1888), 21 L. R. Ir. 273, 277.

(*b*) *Ibid.*; *Wallgrave* v. *Tebbs* (1855), 2 K. & J. 313; *Carter* v. *Green* (1857), 3 K. & J. 591; *McCormick* v. *Grogan* (1869), L. R. 4 H. L. 82; *Littledale* v. *Bickersteth* (1877), 24 W. R. 507; *Scott* v. *Brownrigg* (1881), 9 L. R. Ir. 246.

(*c*) *Strickland* v. *Aldridge* (1804), 9 Ves. 516, and cases there cited.

(*d*) *Russell* v. *Jackson* (1851), 9 Hare, 387.

(*e*) *Edwards* v. *Pike* (1759), 1 Eden, 267.

(*f*) *Tee* v. *Ferris*, *supra*; *Rowbotham* v. *Dunnett*, *supra*, at p. 437; *Re Stead*, *Witham* v. *Andrew*, [1900] 1 Ch. 237, 241; and see *Geddis* v. *Semple*, [1903] 1 I. R. 73, the reason being that otherwise one beneficiary by setting up a secret trust could deprive the rest of their benefits.

(*g*) *Russell* v. *Jackson* (1852), 10 Hare, 204; *Jones* v. *Badley*, *supra*; *Re Stead*, *Witham* v. *Andrew*, *supra*, at p. 241, the principle being that no person can claim an interest under a fraud committed by another.

(*h*) *Burney* v. *Macdonald* (1845), 15 Sim. 6; *Moss* v. *Cooper* (1861), 1 John. & H. 352, 367; *Re Stead*, *Witham* v. *Andrew*, *supra*, at p. 241, the principle being that the gift is not tainted with any fraud in procuring the execution of the will.

(*i*) *Jones* v. *Badley*, *supra*; *McCormick* v. *Grogan*, *supra*; *Re Downing* (1888), 60 L. T. 140; *Re Pitt Rivers*, *Scott* v. *Pitt Rivers*, [1902] 1 Ch. 403, where a testator, who had established and maintained a museum and park for the benefit of the public, devised the same and an annuity of £300 for maintenance to his son, intending his son to allow the public access thereto as before, and the son accepted the devise, and it was held there was no trust enforceable as a charity on the ground that the testator intended no rights to be acquired by the public; and see *Lomax* v. *Ripley* (1854), 3 Sm. & G. 48; *Baldwin* v. *Baldwin* (No. 1) (1856), 22 Beav. 413; *Wheeler* v. *Smith* (1860), 29 L. J. (CH.) 194.

SECT. 2.—*Requisites of Creation.*

SUB-SECT. 1.—*Charitable Intention must be expressed.*

Charitable intention must be clear.

229. The question whether any particular testamentary gift is or is not charitable is not one for speculative reasoning as to what was the testator's intention, though his general wishes may be discoverable. The established rule is that no gift is to be deemed charitable unless the testator has in express terms, or by necessary implication, signified a clear intention to devote the property to charitable purposes (*k*). It is the function of the court to interpret, and not to make, wills (*l*). To ascertain the intention of the testator, a fair interpretation must be put upon the whole will taken together (*m*).

General intention for undefined purposes.

Purposes or objects which are not defined or indicated are not presumed to be charitable (*n*), except where a general intention to give to charity is to be gathered from the instrument, in which case indefiniteness as to the particular mode of execution does not invalidate the gift (*o*). But a general charitable intention cannot be deduced from the mere fact that the trustees of a will are a charitable society (*p*), or that the trustee of a gift holds a religious or charitable office (*q*).

Conditional charitable intention.

A charitable intention which is expressed to be conditional fails if the condition is not satisfied (*r*).

Effect of revocation.

A charitable intention declared by will may be revoked by codicil by necessary implication (*s*). If a testator revokes by codicil legacies given by will, stating as his reason for altering the disposition certain facts which turn out to be untrue, the revocation is inoperative (*a*).

(*k*) *Hunter* v. *A.-G.*, [1899] A. C. 309, 315, 319.

(*l*) *Ibid.* at p. 317.

(*m*) *Ibid.* at p. 320.

(*n*) *Buckle* v. *Bristow* (1864), 13 W. R. 68.

(*o*) *A.-G.* v. *Sibthorp* (1830), 2 Russ. & M. 107; *A.-G.* v. *Windsor* (*Dean and Canons*) (1858), 24 Beav. 679, 701, 702 (gifts to dean and canons); *Gloucester Corporation* v. *Wood* (1846), 3 Hare, 131; *Gloucester Corporation* v. *Osborn* (1846), 1 H. L. Cas. 272 (gifts to municipal corporation); and see *Doe* v. *Copestake* (1805), 6 East, 328; *Aston* v. *Wood* (1868), L. R. 6 Eq. 419 (gift to trustees of Nonconformist chapel); *Mills* v. *Farmer* (1815), 1 Mer. 55, 95.

(*p*) *Re Freeman*, [1908] 1 Ch. 720, C. A. (bequest to Charity Organisation Society in trust for other societies most in need of help); see also *Aston* v. *Wood*, *supra*.

(*q*) *Re Davidson* (1908), 24 T. L. R. 760 (gift to the Roman Catholic Archbishop of Westminster for the time being for purposes void for uncertainty). As to gifts to persons holding official positions, see also *Re Delany*, *Conoley* v. *Quicke*, [1902] 2 Ch. 642, and cases there cited; and p. 164, *post*.

(*r*) *De Themmines* v. *De Bonneval* (1828), 5 Russ. 288; *Thomas* v. *Howell* (1874), L. R. 18 Eq. 198, where a testator in error "presumed and believed" that his estate would realise a certain amount, and for that reason gave a legacy to a charity, and the gift failed, as the estate did not amount to that sum; see also *Chamberlayne* v. *Brockett* (1872), 8 Ch. App. 206, 211; *Re Swain*, [1905] 1 Ch. 669, 676, C. A., and cases there cited; *Re London University Medical Sciences Institute Fund* (1908), 24 T. L. R. 820

(*s*) *Wheeler* v. *Sheer* (1729), Mos. 288, where a gift for such charitable uses as the testator should appoint by codicil was held revoked by a codicil giving the property to such uses and purposes (omitting the word "charitable") as he should direct; explained in *Moggridge* v. *Thackwell* (1802), 7 Ves. 36, 79; *Mills* v. *Farmer*, *supra*, at p. 72. See also *Charitable Donations Commissioners* v. *Sullivan* (1841), 1 Dr. & War. 501, 507.

(*a*) *Campbell* v. *French* (1797), 3 Ves. 321; *Thomas* v. *Howell*, *supra*.

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It is otherwise where the revocation is based on a mistake of law (*b*) or on a doubt as to the facts (*c*).

Intention expressed during life not operative at death.

An expression during lifetime of intention to devote a certain sum to charity is not, in the absence of a binding contract, effective after death (*d*).

The court may direct an inquiry to ascertain whether the purposes specified by the testator are charitable or not (*e*).

SUB-SECT. 2.—*Application to Charity must be obligatory.*

Alternative charitable or other purposes.

230. To constitute a good charitable gift the application of the funds for charitable purposes must be obligatory. If the trustees are allowed an alternative as to whether the purposes to which they apply the subject-matter of the gift are to be charitable or something else, the trust cannot be maintained (*f*). So gifts for "charitable or other purposes" (*g*) or gifts expressed in other alternative terms (*h*) are not charitable; for they may be executed without any part of the property being applied to charitable purposes. The fact that the trustees have actually decided in favour of a charitable purpose does not make the gift good; for the question must be decided as at the date of the death of the testator (*i*). And in cases of this description, where no clear intention appears to

(*b*) *A.-G.* v. *Lloyd* (1747), 1 Ves. Sen. 32, questioned in *Thomas* v. *Howell* (1874), L. R. 18 Eq. 198, by MALINS, V.-C., at p. 211.

(*c*) *A.-G.* v. *Ward* (1797), 3 Ves. 327.

(*d*) *Re Hudson* (1885), 33 W. R. 819; and see *Sinnett* v. *Herbert* (1871), L. R. 12 Eq. 201, 206, where the testatrix deposited money in a savings bank to the use of a named person "as trustee for charitable purposes," but named no charitable purpose and communicated her intention to no intended *cestui que trust*.

(*e*) *Russell* v. *Jackson* (1852), 10 Hare, 204, 216.

(*f*) *Re Macduff, Macduff* v. *Macduff*, [1896] 2 Ch. 451, 465, 470, C. A.; see *A.-G.* v. *Lawes* (1849), 8 Hare, 32, 42; *Morice* v. *Durham* (*Bishop*) (1805), 10 Ves. 522, 541; *James* v. *Allen* (1817), 3 Mer. 17, 19; *Nash* v. *Morley* (1842), 5 Beav. 177, 183; *Re Douglas* (1887), 35 Ch. D. 472, 482. Distinguish the cases when part is clearly given to charity; see p. 150, *post*.

(*g*) *Ellis* v. *Selby* (1835), 7 Sim. 352.

(*h*) *Vezey* v. *Jamson* (1822), 1 Sim. & St. 69 ("such charitable or public uses or purposes or otherwise as the laws of the land would admit of"); *Re Harbison*, [1902] 1 I. R. 103 ("a Roman Catholic school or for whatever other purpose he pleases"); *Langham* v. *Peterson* (1903), 87 L. T. 744 ("charity or works of public utility"); *Re Jarman* (1878), 8 Ch. D. 584; *Re Riland*, [1881] W. N. 173 ("charitable or benevolent purposes"); *Shaw's Trustees* v. *Esson's Trustees* (1905), 8 F. (Ct. of Sess.) 52 ("charitable, benevolent, or religious objects" at discretion of trustees); and compare *Re Best*, [1904] 2 Ch. 354 ("charitable and benevolent institutions"); *Re Macduff, Macduff* v. *Macduff*, *supra* ("purposes charitable, philanthropic, or "); *Blair* v. *Duncan*, [1902] A. C. 37 ("such charitable or public purposes as my trustee thinks proper"); *Down* v. *Worrall* (1833), 1 My. & K. 561 ("pious and charitable purposes or otherwise" for the benefit of named persons); *Williams* v. *Kershaw* (1835), 5 Cl. & Fin. 111, H. L. ("such benevolent, charitable, and religious purposes" as the trustees should think most advantageous and beneficial), approved by PEARSON, J., in *Re Sutton* (1885), 28 Ch. D. 464, at p. 466, and distinguished from a gift to "charitable and deserving" objects, which was held valid on the ground that the objects chosen must be both charitable and deserving; *A.-G.* v. *Dartmouth Corporation* (1883), 48 L. T. 933 ("charitable, needful, and necessary" purposes for the benefit of a town). In this case and in *Down* v. *Worrall*, *supra*, the word "and" was construed to mean "or." Compare *Thompson* v. *Thompson* (1844), 1 Coll. 381, 399 ("deserving literary men or to meet expenses connected with my manuscript works"); *Re Sidney*, [1908] 1 Ch. 488 ("charitable or emigration uses"). As to emigration, see also *Briggs* v. *Hartley* (1850), 19 L. J. (CH.) 416.

(*i*) *Re Jarman supra*, *per* HALL, V.-C., at p. 587.

devote any particular portion of the property to charity, there can be no apportionment (*k*).

Indefinite charitable gifts.

231. Gifts also for indefinite purposes which may, but need not necessarily, be charitable, are not upheld (*l*).

Similarly the court will not establish a charity when a mere power is given by the testator to trustees to distribute an indefinite sum in charity (*m*). Nor will it execute an indefinite trust, as, for instance, a trust to distribute a fund among such persons (*n*) or purposes (*o*) as may appear just to the trustees, if no charitable intention is manifested.

But if there is an overriding intention that at least some part of the property shall be applied to charity, the gift may be good, though some of the objects or alternative methods of applying the property are *primâ facie* non-charitable (*p*), or even illegal (*q*).

When a clear charitable intention is expressed, it is immaterial that the objects are not defined (*r*). The general intention will be carried into effect by means of a scheme, notwithstanding that the particular objects are not stated (*s*).

Where, however, the copulative conjunction connects the adjective "charitable" with another adjective (*t*) to some extent restricting the meaning of "charitable," the gift is good (*u*).

(*k*) *Morice* v. *Durham* (*Bishop*) (1805), 10 Ves. 522; *Ellis* v. *Selby* (1836), 1 My. & Cr. 286, 299. As to apportionment, see p. 150, *post*.

(*l*) *Heath* v. *Chapman* (1854), 2 Drew. 417 ("pious purposes"); *Re Woodgate* (1886), 2 T. L. R. 674 ("utilitarian"); *James* v. *Allen* (1817), 3 Mer. 17 ("benevolent"); *Re Macduff*, *Macduff* v. *Macduff*, [1896] 2 Ch. 451, C. A. ("philanthropic"); *MacLaughlin* v. *Campbell*, [1906] 1 I. R. 588 ("Roman Catholic"); *Scott* v. *Brownrigg* (1882), 9 L. R. Ir. 246 ("missionary"; but see *Re Kenny* (1907), 97 L. T. 130); *Budget* v. *Hulford*, [1873] W. N. 175 ("servants of God"); *Re Hewitt* (1883), 53 L. J. (CH.) 132 ("hospitality"); *Morice* v. *Durham* (*Bishop*), *supra* ("objects of benevolence and liberality"); *Hunter* v. *A.-G.*, [1899] A. C. 309 (purchase of advowsons with no charitable trust attached).

(*m*) *Coxe* v. *Basset* (1796), 3 Ves. 155, at p. 164 (power given to trustees to continue charities and benefactions or to bestow any other).

(*n*) *Harris* v. *Du Pasquier* (1872), 20 W. R. 668; *Gibbs* v. *Rumsey* (1813), 2 Ves. & B. 295.

(*o*) *Fowler* v. *Garlike* (1830), 1 Russ. & M. 232; and see *Buckle* v. *Bristow* (1864), 13 W. R. 68.

(*p*) *Hunter* v. *A.-G.*, *supra*, at pp. 323, 324; *Wilkinson* v. *Lindgren* (1870), 5 Ch. App. 570; *Pocock* v. *A.-G.* (1876), 3 Ch. D. 342, C. A.; *Re Douglas* (1887), 35 Ch. D. 472, C. A.; *Re Hurley* (1900), 17 T. L. R. 115; *Re Allen*, [1905] 2 Ch. 400. See also *A.-G.* v. *Fletcher* (1835), 5 L. J. (CH.) 75; *Dolan* v. *Macdermot* (1868), 3 Ch. App. 676; *Wrexham Corporation* v. *Tamplin* (1873), 21 W. R. 768.

(*q*) *A.-G.* v. *Hartley* (1793), 4 Bro. C. C. 412; *Carter* v. *Green* (1857), 3 K. & J. 591.

(*r*) *Morice* v. *Durham* (*Bishop*), *supra*, *per* Lord ELDON, L.C., at pp. 527, 528: "If the bequest is in trust for charity, it is no objection that the charity is not particularly defined, neither is it necessary that the testator should use the word 'charity'"; *Ommanney* v. *Butcher* (1823), Turn. & R. 272; *Re Douglas*, *supra*, at p. 485; *Re Macduff*, *Macduff* v. *Macduff*, *supra*, at pp. 463, 469, 470; *Re Garrard*, [1907] 1 Ch. 382.

(*s*) See p. 183, *post*.

(*t*) Where there are more than two adjectives without any conjunction, copulative or disjunctive, between the first two, the rule in *Williams* v. *Kershaw* (1835), 5 Cl. & Fin. 111, H. L., applies, and unless all the adjectives are charitable the gift fails for uncertainty (*Re Sutton* (1885), 28 Ch. D. 464, 466).

(*u*) *Re Best*, [1904] 2 Ch. 354 ("charitable and benevolent"); *Jemmit* v. *Verril* (1826), Amb. 585, n., observed upon in *Ellis* v. *Selby*, *supra*, at p. 292;

SECT. 2. **Requisites of Creation.**

Benefit of class.

If the gift is intended for the benefit of a class, all that is required is that the class shall be sufficiently certain to enable men of common sense to carry out the expressed wishes of the testator (*w*). Thus, a bequest of residue "for the benefit of foreign missions" in certain named countries, "or any other in the foreign field suitable," coupled with the appointment of an executor with power to select the objects, is a valid charitable bequest (*x*); and a bequest of residue for charitable purposes is not rendered void for uncertainty because the trustees have a power to retain investments "indefinitely" (*a*).

SUB-SECT. 3.—*Amount of Gift must be ascertainable.*

Gift of uncertain amount.

232. If the amount of a gift purporting to be made in favour of a charity cannot be ascertained, the gift fails (*b*), though a gift of a sum "not exceeding" a named figure is construed as a gift of the named sum (*c*).

Apportionment between charitable and other gifts.

233. When a testator gives funds to be applied partly for objects which are charitable and partly for objects which either are not charitable (*d*) or fail (*e*), but does not specify the proportions in which the funds are to be applied for the different objects, the court will make an apportionment.

Gift of balance after gift of uncertain amount.

234. Where there is a gift of a fund to be applied in the first place to a particular purpose with a gift over of the surplus to charity, then if the first purpose cannot be carried out because it is

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Compare the following Scotch cases: *Hill* v. *Burns* (1826), 2 Wils. & S. 80; *Crichton* v. *Grierson* (1828), 3 Wils. & S. 329; *Miller* v. *Black's Trustees* (1837), 2 Sh. & Macl. 866, 891, also reported, *sub nom. Miller* v. *Rowan* (1837), 5 Cl. & Fin. 99, H. L.; and see *Re Sutton* (1885), 28 Ch. D. 464 ("charitable and deserving"); *A.-G.* v. *Herrick* (1772), Amb. 712 ("charitable and pious"); *Baker* v. *Sutton* (1836), 1 Keen, 224 ("religious and charitable institutions and purposes"); *Re Scowcroft, Ormrod* v. *Wilkinson*, [1898] 2 Ch. 638 ("furtherance of Conservative principles and religious and mental improvement"); *Re Darling*, [1896] 1 Ch. 50 ("to the poor and the service of God"); *Re Lloyd Greame* (1893), 10 T. L. R. 66 ("religious and benevolent societies or objects, chiefly the former"), the decision in which case is not easy to reconcile with the rule above stated, as the words "chiefly the former" might be taken to imply that the societies need not be both religious and benevolent. See *Blair* v. *Duncan*, [1902] A. C. 44, where Lord DAVEY said that a gift for charitable and public purposes might be good; *Grimond* v. *Grimond*, [1905] A. C. 124; *Dick* v. *Audsley*, [1908] A. C. 347. The principle underlying the cases cited in this note is that a gift must be charitable if it must necessarily fulfil two requirements, one of which is technically charitable.

(*w*) *Weir* v. *Crum-Brown*, [1908] A. C. 162, *per* Lord LOREBURN, L.C., at p. 167.

(*x*) *Allan's Executors* v. *Allan*, [1908] S. C. 807.

(*a*) *Dick* v. *Audsley*, *supra*, at p. 351.

(*b*) *Hartshorne* v. *Nicholson* (1858), 26 Beav. 58, where the amount of the gift was left in blank; see also *Ewen* v. *Bannerman* (1830), 2 Dow & Cl. 74, H. L.; *Cherry* v. *Mott* (1836), 1 My. & Cr. 123, where an amount could only be ascertained by entering into an impossible contract, and the non-charitable case *Asten* v. *Asten*, [1894] 3 Ch. 260.

(*c*) *Thompson* v. *Thompson* (1844), 1 Coll. 395; *Gough* v. *Bult* (1847), 16 Sim. 45; compare *Coxe* v. *Basset* (1796), 3 Ves. 155.

(*d*) *Adnam* v. *Cole* (1843), 6 Beav. 353; *Hoare* v. *Osborne* (1866), L. R. 1 Eq. 585; *Re Rigley's Trusts* (1866), 36 L. J. (CH.) 147; *Re Vaughan* (1886), 33 Ch. D. 187; and see p. 150, *post*.

(*e*) *Salusbury* v. *Denton* (1857), 3 K. & J. 529, following *Doyley* v. *A.-G.* (1735), 4 Vin. Abr. 485. Distinguish *Down* v. *Worrall* (1833), 1 My. & K. 561, where the trustees had a discretion to apply a fund either for charitable purposes or for an individual.

unlawful (*f*), and it is also so indefinite that the amount required for it cannot be reasonably ascertained, the gift fails entirely (*g*). The result is the same where the testator, though estimating the cost of effectuating the first purpose, gives his executors a discretion to exceed that amount (*h*).

Balance after gift of certain amount.

If, however, the amount necessary to satisfy the first purpose can be reasonably ascertained, the gift of the surplus to charity is valid (*i*).

Gift of residue after invalid gift to repair tomb.

235. In cases connected with the repair of private tombs (*k*), where a fund is bequeathed to trustees upon trust out of the income to keep a tomb in repair, and as to the residue (*l*), surplus (*m*), balance (*n*), or remainder (*o*), upon trust for charitable objects, the gift is construed as a bequest of the whole fund charged with a gift that fails, and not as a gift of the residue after a void gift, and accordingly the whole fund, including the amount necessary to satisfy the invalid object, is applicable to the valid charitable object (*p*).

SECT. 3.—*Ascertainment of the Subject-matter of the Trust.*

SUB-SECT. 1.—*Apportionment.*

Gift subject to charge for illegal purpose.

236. When a fund is given primarily for a charitable purpose, but is subject to a charge for an illegal purpose, as, for example, the perpetual repair of a tomb, there is no apportionment, for the whole

(*f*) *E.g.*, under the old law bequests involving the purchase of land or devises of land for charitable purposes (*A.-G.* v. *Davies* (1804), 9 Ves. 535; *A.-G.* v. *Hinxman* (1820), 2 Jac. & W. 270).

(*g*) *Chapman* v. *Brown* (1801), 6 Ves. 404, explained in *Re Birkett* (1878), 9 Ch. D. 576, *per* JESSEL, M.R., at p. 579; *Cherry* v. *Mott* (1836), 1 My. & Cr. 123, 134; *Cramp* v. *Playfoot* (1858), 4 K. & J. 479; *Peek* v. *Peek* (1869), 17 W. R. 1059; *Kirkmann* v. *Lewis* (1869), 38 L. J. (CH.) 570; *Re Taylor* (1888), 58 L. T. 538. The principle underlying this rule is that if the entire fund might, if it had been lawful, have been properly applied to the first purpose, there would of course be no ascertainable residue for the second.

(*h*) *Limbrey* v. *Gurr* (1819), 6 Madd. 151.

(*i*) *Dundee Magistrates* v. *Morris* (1858), 3 Macq. 134, H. L.; *Mitford* v. *Reynolds* (1841), 1 Ph. 185. See also *A.-G.* v. *Parsons* (1803), 8 Ves. 192.

(*k*) It is not easy to say on what principle this class of cases is to be distinguished from the class, of which *Mitford* v. *Reynolds*, *supra*, forms one, in which the charity took only the surplus after the amount necessary for the invalid object had been ascertained, and not the entire fund.

(*l*) *Fisk* v. *A.-G.* (1867), L. R. 4 Eq. 521; *Re Vaughan* (1886), 33 Ch. D. 187.

(*m*) *Hoare* v. *Osborne* (1866), L. R. 1 Eq. 585; *Dawson* v. *Small* (1874), L. R. 18 Eq. 114; *Re Williams* (1877), 5 Ch. D. 735.

(*n*) *Hunter* v. *Bullock* (1872), L. R. 14 Eq. 45; and compare *Re Taylor*, *supra*, where in a special case a bequest of "the balance" was not construed as residuary. As to what constitutes a residuary gift to charity, see generally, *Paice* v. *Canterbury (Archbishop)* (1807), 14 Ves. 364; *A.-G.* v. *Goulding* (1788), 2 Bro. C. C. 428; *Harbin* v. *Masterman* (1871), L. R. 12 Eq. 559; *Harbin* v. *Masterman*, [1895] 1 Ch. 351, C. A., affirmed, *sub nom.* *Wharton* v. *Masterman*, [1896] A. C. 186.

(*o*) *Re Birkett*, *supra*.

(*p*) *Re Rogerson*, *Bird* v. *Tee*, [1901] 1 Ch. 715, and cases cited in the preceding four notes. Compare *Fowler* v. *Fowler* (1864), 33 Beav. 616, where the gift of the surplus, after a trust to repair a tomb, was held void for uncertainty, on the ground that the amount required for repairing a tomb could not be ascertained; *Re Rigley's Trusts* (1866), 36 L. J. (CH.) 147, where the court directed an inquiry to ascertain in what proportions a gift valid as to part and invalid as to the other part, namely, the repair of a private tomb, should be divided. An affidavit of a competent person as to the cost of such repairs has been accepted (*Re Vaughan*, *supra*; see *Re Birkett*, *supra*, at p. 579).

SECT. 8. Ascertainment of the Subject matter of the Trust.

fund goes to charity (*q*). In cases of this kind the obligation to repair the tomb is a moral one and not legally binding (*r*).

If, however, a fund is bequeathed primarily for an illegal object and the surplus is given for a charitable purpose, and the amount required for the first purpose can be ascertained, an apportionment is necessary, unless it is manifest that no surplus can exist (*s*), and an inquiry may be directed to ascertain the amount needed to fulfil the primary illegal purpose (*t*).

Gift of surplus after illegal object.

Gift for several objects, some charitable, some not.

237. Again, where a fund is given for several objects, some charitable and some non-charitable or illegal, there being a clear intention to devote some part to the charitable objects, if it can be ascertained what are the proper proportions to be attributed to the several objects, the court directs an inquiry (*a*), but if from the nature of the gift it appears impracticable to fix the proportions, or the proportions were to be in the discretion of the trustees, the court divides the fund equally between the different objects (*b*). The amount sufficient for the non-charitable purpose may in simple cases be ascertained by affidavit (*c*).

When, however, the trustees have a discretion to apply property amongst various objects some of which are not charitable, and no clear intention appears to devote any particular portion to charity, there can be no apportionment, and the whole gift fails (*d*).

Division among objects at trustees' discretion.

238. If trustees are given a discretionary power to divide a fund among specified charitable objects, and fail to exercise such discretion, the fund is divided equally between the objects named (*e*), unless a contrary intention is shown in the will (*f*).

A discretionary power to dispose of rents for the benefit of the poor of a city was held not to be well exercised by an application of the rents to one only of three parishes in the city, and the rents were ordered to be divided between the three parishes in certain proportions (*g*),

(*q*) *Re Rogerson, Bird* v. *Tee*, [1901] 1 Ch. 715, following *Fisk* v. *A.-G.* (1867), L. R. 4 Eq. 521; *Re Birkett* (1878), 9 Ch. D. 576; and *Re Vaughan* (1886), 33 Ch. D. 187.

(*r*) *Hunter* v. *Bullock* (1872), L. R. 14 Eq. 45; *Dawson* v. *Small* (1874), L. R. 18 Eq. 114, 118; *Re Williams* (1877), 5 Ch. D. 735; *Re Taylor* (1888), 58 L. T. 538; *Re Rogerson, Bird* v. *Tee, supra*, at p. 719; *Re Manser, A.-G.* v. *Lucas*, [1905] 1 Ch. 68, 75.

(*s*) *Cramp* v. *Playfoot* (1858), 4 K. & J. 479; and see *Re Rogerson, Bird* v. *Tee, supra*, at p. 719.

(*t*) *Chapman* v. *Brown* (1801), 6 Ves. 404, 410; *Mitford* v. *Reynolds* (1841), 1 Ph. 185, 199; see also *Dundee Magistrates* v. *Morris* (1858), 3 Macq. 134, H. L. Where the illegal purpose was the repair of a tomb it was held that the gift failed "to the extent of the capital representing the annual amount necessary to keep that tomb in repair, treating the capital as invested in Consols" (*Re Vaughan, supra*, at p. 194).

(*a*) *Adnam* v. *Cole* (1843), 6 Beav. 353; *Hoare* v. *Osborne* (1866), L. R. 1 Eq. 585, 588; *Re Rigley's Trusts* (1866), 36 L. J. (CH.) 147.

(*b*) *Doyley* v. *A.-G.* (1735), 4 Vin. Abr. 485, 486; *Crafton* v. *Frith* (1851), 4 De G. & Sm. 237; *Re Hall's Charity* (1851), 14 Beav. 115; *Salusbury* v. *Denton* (1857), 3 K. & J. 529; *Hoare* v. *Osborne, supra*, at pp. 588, 589; *A.-G.* v. *Marchant* (1866), L. R. 3 Eq. 424; *Hunter* v. *A.-G.*, [1899] A. C. 309, 323, 324.

(*c*) *Re Vaughan, supra*, at p. 194.

(*d*) See note (*k*), p. 147, *ante*.

(*e*) *Re Hall's Charity, supra*.

(*f*) *Re Douglas* (1887), 35 Ch. D. 485.

(*g*) *A.-G.* v. *Rochester Corporation* (1675), Cas. *temp.* Finch, 193; *A.-G.* v. *Rochester Corporation* (1833), 6 Sim. 273; see also *A.-G.* v. *Buller* (1822), Jac. 407,

and when new parishes were admitted, an apportionment was made for their benefit (*h*).

239. Where a fund is given to specified charitable objects in fixed proportions, and the fund has increased, the rule is to apportion the accretions *pro ratâ* between the different objects (*i*).

Accretions to fund given in fixed proportions.

Where the funds of one charity are inextricably mixed with the funds of another charity, both charities are entitled to participate *pro ratâ* in the increased value of the aggregate funds (*k*).

If land is purchased partly with money belonging to a charity, the charity is entitled to such a proportion of the land as the purchase-money contributed by the charity bears to the whole price (*l*).

Lawful and unlawful purposes together.

240. Lawful charitable trusts for the benefit of Roman Catholics are not invalidated by the addition of superstitious or unlawful trusts, but the property may be apportioned by the court or the Charity Commissioners as to part to the lawful trusts and as to the remainder to other lawful Roman Catholic trusts (*m*).

Formation of new parishes.

241. On the formation or carving out of a parish of distinct or separate parishes (*n*) the court has a discretionary (*o*) jurisdiction (*p*) to apportion between the remainder of the original parish and the new parish any charitable devises, bequests, or gifts given for the use of the original parish (*q*), and to direct the proportionate distribution of the charity (*r*), and similarly to apportion any charges.

Registration.

The apportionment must be registered in the registry of the diocese (*s*).

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where the trustees exercised their discretion in a sense not contemplated by the will, and an equal division was directed.

(*h*) *A.-G.* v. *Buller* (1822), Jac. 407; and compare *A.-G.* v. *Grant* (1720), 1 P. Wms. 669. As to the discretion of trustees, see also p. 274, *post*.

(*i*) *A.-G.* v. *Marchant* (1866), L. R. 3 Eq. 424; see also p. 176, *post*.

(*k*) *Edinburgh Corporation* v. *Lord Advocate* (1879), 4 App. Cas. 823.

(*l*) *A.-G.* v. *Newcastle Corporation* (1842), 5 Beav. 307.

(*m*) Roman Catholic Charities Act, 1860 (23 & 24 Vict. c. 134), s. 1. It is otherwise, however, where the fund is devoted entirely to superstitious uses *Re Blundell* (1861), 30 Beav. 360).

(*n*) *I.e.*, under the provisions of the Church Building Act, 1845 (8 & 9 Vict. c. 70), or any of the Acts recited in it, namely, Church Building Acts, 1818 to 1832 (58 Geo. 3, c. 45; 59 Geo. 3, c. 134; 3 Geo. 4, c. 72; 5 Geo. 4, c. 103; 7 & 8 Geo. 4, c. 72; 1 & 2 Will. 4, c. 38; 2 & 3 Will. 4, c. 61); stat. 7 Will. 4 & 1 Vict. c. 75; Church Building Acts, 1838 to 1844 (1 & 2 Vict. c. 107; 2 & 3 Vict. c. 49; 3 & 4 Vict. c. 60; 7 & 8 Vict. c. 56); see *A.-G.* v. *Love* (1857), 23 Beav. 499, where a new district had been formed under stat. 6 & 7 Vict. c. 67, and it was held that there could in that case be no apportionment under the Church Building Act, 1845 (8 & 9 Vict. c. 70), s. 22.

(*o*) *Re West Ham Charities* (1848), 2 De G. & Sm. 218; *Ex parte Brompton (Incumbent)* (1852), 5 De G. & Sm. 626; *Re Lambeth Charities* (1853), 22 L. J. (CH.) 959; *Re Campden Charities* (No. 2) (1883), 24 Ch. D. 213.

(*p*) Under the Church Building Act, 1845 (8 & 9 Vict. c. 70), s. 22. This section extends the jurisdiction of the court, by means of the *cy-près* doctrine, to vary the instrument founding a charity; see *Re Campden Charities* (No. 2), *supra*, at p. 218. Applications under this Act may be made by petition under the Charities Procedure Act, 1812 (52 Geo. 3, c. 101), commonly called Romilly's Act, as well as under the Act of 1845 (*Re West Ham Charities*, *supra*).

(*q*) It is otherwise as to gifts for specific purposes, as for the repair of a particular church, even though it be a parish church (*A.-G.* v. *Love*, *supra*; *A.-G.* v. *Pascall* (1861), 7 Jur. (N. S.) 818; *Re Church Estate Charity, Wandsworth* (1871), 6 Ch. App. 296). See also *Re North Wingfield Charity* (1860), 3 L. T. 237; *Re Palatine Estate Charity* (1888), 39 Ch. D. 54.

(*r*) See *A.-G.* v. *Dalton* (1851), 13 Beav. 141.

(*s*) Church Building Act, 1845 (8 & 9 Vict. c. 70), s. 22.

SECT. 3. Ascertainment of the Subject-matter of the Trust.

The court has jurisdiction to apportion gifts made specifically to a particular division of a parish part of which has been formed into a chapelry district (*a*), or to apportion a fund applicable for the repair of a parish church and a chapel of ease on the latter being given an independent ecclesiastical district (*b*).

The court has jurisdiction to make fresh apportionments to meet change of circumstances, and may discharge or vary former orders made under the Church Building Act, 1845 (*c*).

Apportionment by Charity Commissioners.

242. Where parishes or ecclesiastical districts entitled to the benefit of a charity have been divided, the Charity Commissioners may, in the case of charities whose gross annual income does not exceed £30 (*d*), apportion the benefit of the charity between the new parishes or districts and the original parish or district (*e*). Where endowments are held partly for educational purposes and partly for other charitable uses, the Charity Commissioners in general make a scheme under their ordinary jurisdiction, and not under the Endowed Schools Act, 1869 (*f*), so as to determine the part held for educational purposes (*g*). The Charity Commissioners have power also to apportion the endowments of charities held partly for ecclesiastical and partly for other parochial purposes (*h*).

SUB-SECT. 2.—*Marshalling.*

Marshalling.

243. Where a testator who died before August 8, 1891 (*i*), has given charitable and other legacies payable out of pure personalty and realty or impure personalty (*j*), the charitable legacies fail so far as they are payable out of the realty and impure personalty; and if the pure personalty is insufficient to pay all the legacies and the debts, the court, in the absence of a direction by the testator (*k*), will not marshal the assets in favour of the charity by directing the payment of the ordinary legacies and debts out of the proceeds of sale of the realty or impure personalty, so as to leave the pure personalty to satisfy the charitable legacies (*l*).

(*a*) *Re West Ham Charities* (1848), 2 De G. & Sm. 218.

(*b*) *Re Cloudesley's (Richard) Charity* (1900), 17 T. L. R. 123.

(*c*) 8 & 9 Vict. c. 70; *Re Campden Charities* (No. 2) (1883), 24 Ch. D. 213.

(*d*) The certificate of the Commissioners is evidence of the annual income of a charity not exceeding £30 (Charitable Trusts Amendment Act, 1855 (18 & 19 Vict. c. 124), s. 11).

(*e*) Charitable Trusts Amendment Act, 1855, s. 10; *A.-G.* v. *Love* (1857), 23 Beav. 499, 506. Owing to the jurisdiction of the Charity Commissioners to establish schemes under the Charitable Trusts Act, 1860 (23 & 24 Vict. c. 136), s. 2, this power of apportioning charities is seldom used.

(*f*) 32 & 33 Vict. c. 56, s. 24; see *Re Christ's Hospital* (1889), 15 App. Cas. 179; *A.-G.* v. *Christ Church, Oxford (Dean and Chapter)*, [1894] 3 Ch. 535.

(*g*) See Board of Education Act, 1899 (62 & 63 Vict. c. 33), s. 2 (2); Board of Education (Powers) Order in Council, 1902; and title EDUCATION.

(*h*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 75. Ecclesiastical charities may also be parochial; see Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 14 (2). As to charities in the metropolis, see London Government Act, 1899 (62 & 63 Vict. c. 14), s. 23 (5).

(*i*) The date of the passing of the Mortmain and Charitable Uses Act, 1891 (54 & 55 Vict. c. 73).

(*j*) The proceeds of the sale of land or a legacy to be raised out of real estate are examples of impure personalty. The Act of 1891, by s. 3, expressly excludes from the definition of land "personal estate arising from, or connected with, land"; see also p. 125, *ante*.

(*k*) *Robinson* v. *Geldard* (1852), 3 Mac. & G. 735; *Tempest* v. *Tempest* (1857), 7 De G. M. & G. 470; *Re Arnold* (1888), 37 Ch. D. 637.

(*l*) *Hobson* v. *Blackburn* (1836), 1 Keen, 273; *Blann* v. *Bell* (1877), 7 Ch. D. 382.

SECT. 3. Ascertainment of the Subject-matter of the Trust.

As property of all kinds may now, as a rule, be devised or bequeathed to charity, the question as to when assets would be marshalled in favour of a charity and of the apportionment of assets cannot arise in the case of the estates of testators who have died since August 8, 1891 (*m*).

SECT. 4.—*Ascertainment of the Objects of the Trust.*

SUB-SECT. 1.—*In General.*

General charitable intention not allowed to fail.

244. Subject to certain statutory restrictions on gifts to charity (*n*), where a clear charitable intention is expressed it is never allowed to fail on account of the uncertainty or impracticability of the object, but the particular mode of application will be directed *cy-près* by the King in some cases, and by the court in others (*o*). The principle is that the court treats charity in the abstract as the substance and the particular disposition as the mode of the gift (*p*), and draws a distinction between the charitable intention, which must be clear, and the mode of executing it, which, though vague and indefinite, does not affect the validity of the gift.

Existence of charitable intention.

The existence or non-existence of a charitable intention is a matter of construction. It is not dependent on the use of any particular words (*q*), but is deemed to exist wherever a testator intended the subject-matter of the gift to be applied in charity, notwithstanding the failure of the particular object or mode of application indicated (*r*).

Benignant construction of charitable bequests.

245. A benignant construction is placed on charitable bequests (*s*). If a testator declares his intention to give the whole of his estate to charity, but specifically appropriates part only, the general intention in favour of charity prevails, and the proportion not appropriated by him will be appropriated by the court to charity (*a*). Similarly, precatory recommendations in favour of particular charities do not prevent partial application in other ways (*b*).

Inference in favour of charitable intention.

The court infers from very slight circumstances that a testator means to give the whole of an estate to charitable purposes (*c*); but no such inference is made if the testator is aware that the specific charitable payments which he directs do not exhaust the property

(*m*) See p. 124, *ante*. The case law on the subject, which may now be regarded as practically obsolete, and which in a few years will be quite obsolete, is accordingly omitted here. The subject will be found fully dealt with in Tudor, Law of Charities and Mortmain, 4th ed., pp. 154 *et seq.*

(*n*) See pp. 124 *et seq.*, *ante*.

(*o*) *Moggridge* v. *Thackwell* (1802), 7 Ves. 36, where Lord ELDON considers the earlier cases; *Mills* v. *Farmer* (1815), 1 Mer. 55; *Re White*, *White* v. *White*, [1893]2 Ch. 41, 53, C. A.; *Re Forester* (1897), 13 T. L. R. 555; *Re Pyne*, *Lilley* v. *A.-G.*, [1903] 1 Ch. 83.

(*p*) *Lyons Corporation* v. *Bengal* (*Advocate-General*) (1876), 1 App. Cas. 91, 113. See also *Mills* v. *Farmer*, *supra*, at p. 101.

(*q*) See pp. 155 *et seq.*, *post*.

(*r*) See *Clark* v. *Taylor* (1853), 1 Drew. 642, 644, and cases cited pp. 155, 156, *post*.

(*s*) *Weir* v. *Crum-Brown*, [1908] A. C. 162, 167; and see *Dundee Magistrates* v. *Morris* (1858), 3 Macq. 134, H. L., *per* Lord CRANWORTH, at p. 166: "There has always been a latitude allowed to charitable bequests, so that when the general intention is indicated the court will find the means of carrying the details into operation."

(*a*) *Beverley Corporation* v. *A.-G.* (1857), 6 H. L. Cas. 310, *per* Lord CRANWORTH, L.C., at p. 318, approving the doctrine laid down in *Arnold* v. *A.-G.* (1698), Show. Parl. Cas. 22, and in *A.-G.* v. *Johnson* (1753), Amb. 190.

(*b*) *Moggridge* v. *Thackwell*, *supra*.

(*c*) *A.-G.* v. *Skinners' Co.* (1826), 2 Russ. 407.

SECT. 4. Ascertainment of the Objects of the Trust.

given to the trustees (*d*); nor can a charitable intention be inferred from the fact that the trustees are a charitable society and are given a wide discretion (*e*).

A gift to a legatee "for the charitable purposes agreed upon between us" does not imply a general charitable intention, but only a limited charitable intention for the purposes agreed (*f*), and evidence is admissible to show what these purposes are, but not to limit the amount of the gift (*g*).

Fund raised by contributions.

246. When a fund raised from numerous contributories is vested in trustees, the latter have implied authority to declare the trusts; and trusts so declared will be binding until set aside at the instance of either the Attorney-General or one or more of the donors (*h*).

SUB-SECT. 2.—*Extrinsic Evidence.*

247. The true construction of ancient instruments of trust may be aided by evidence of long usage and acquiescence (*i*), and where such instruments may be construed in two ways the court inclines, if possible, to the one supported by long usage (*k*) rather than assume that a breach of trust has been committed (*l*). But usage cannot be held to sanction a clear breach of trust (*m*), nor as a rule can evidence of long usage be admitted to vary a trust the terms of which are free from ambiguity (*n*).

Evidence as to contemporaneous construction of gift.

248. Evidence is admissible of contemporaneous documents and usage (*o*), of the circumstances attending the execution of the trust document (*p*), of the contemporaneous acts of the donor (*q*),

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(*d*) *Beverley Corporation* v. *A.-G.* (1857), 6 H. L. Cas. 310, at p. 309. See *A.-G.* v. *Bristol Corporation* (1820), 2 Jac. & W. 294; *A.-G.* v. *Drapers' Co.* (1840), 2 Beav. 508; *A.-G.* v. *Windsor* (*Dean and Canons*) (1858), 24 Beav. 679. See further on this point p. 176, *post*.

(*e*) *Re Freeman*, [1908] 1 Ch. 720, C. A.; and see also p. 145, *ante*.

(*f*) *Re Huxtable*, [1902] 2 Ch. 793, 796, C. A.

(*h*) *A.-G.* v. *Mathieson*, [1907] 2 Ch. 394, C. A.; *A.-G.* v. *Clapham* (1855), 4 De G. M. & G. 626.

(*i*) *A.-G.* v. *Bristol Corporation* (1820), 2 Jac. & W. 294, 321; *A.-G.* v. *Smythies* (1831), 2 Russ. & M. 717, 749. As to extrinsic evidence, see also pp. 159, 160, 163 *et seq.*, *post*.

(*k*) *Ibid.*; and see *A.-G.* v. *Rochester Corporation* (1854), 5 De G. M. & G. 797, 822.

(*l*) *A.-G.* v. *Sidney Sussex College* (1869), 4 Ch. App. 722, 732. See also *Bruce* v. *Deer Presbytery* (1867), L. R. 1 Sc. & Div. 96.

(*m*) *A.-G.* v. *Bristol Corporation*, *supra*, at p. 321; *Drummond* v. *A.-G.* (1849), 2 H. L. Cas. 837, 861; *A.-G.* v. *Rochester Corporation*, *supra*, at p. 822; *A.-G.* v. *St. John's Hospital* (1865), 2 De G. J. & Sm. 621; and see *Re Swansea Grammar School*, [1894] A. C. 252. In some cases, however, a legal origin for long usage inconsistent with the instrument of trust has been presumed (*Queens' College Case* (1821), Jac. 1; *A.-G.* v. *Middleton* (1751), 2 Ves. Sen. 330; *Re St. Nicholas Acons* (*Parish*) (1889), 60 L. T. 532; *A.-G.* v. *Dulton* (1851), 13 Beav. 141).

(*n*) *A.-G.* v. *Calvert* (1857), 23 Beav. 248, 263; *A.-G.* v. *St. Cross Hospital* (1853), 17 Beav. 435; *A.-G.* v. *Gould* (1860), 28 Beav. 485, 501; *A.-G.* v. *West* (1858), 27 L. J. (CH.) 789; *A.-G.* v. *Ewelme Hospital* (1853), 17 Beav. 366.

(*o*) *Shore* v. *Wilson* (1842), 9 Cl. & Fin. 355, H. L.; *Drummond* v. *A.-G.*, *supra*, at p. 857; *Aberdeen University* v. *Irvine* (1868), L. R. 7 Sc. & Div. 289; *A.-G.* v. *Anderson* (1888), 57 L. J. (CH.) 543; and see p. 181, *post*.

(*p*) *A.-G.* v. *Anderson*, *supra*.

(*q*) *A.-G.* v. *Trinity College, Cambridge* (1856), 24 Beav. 383, 399; *A.-G.* v. *Windsor* (*Dean and Canons*) (1860), 8 H. L. Cas. 369, 402; *A.-G.* v. *Dartmouth Corporation* (1883), 48 L. T. 933.

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of the early application or distribution of the fund (*r*), and of the construction placed on doubtful questions which arose in the early administration of the trust (*s*). The contemporaneous acts of the donee are of little value for the purpose of placing a construction upon any instrument of gift executed by a donor. They only show the intention and the view with which the donee accepted the gift (*t*).

Determination by usage where no trust document.

249. In the absence of any document declaring the trusts of a fund, their nature may be determined by usage. So, where property has been held from time immemorial for the use and repairs of what originally was the only church in a parish, the moneys are not applicable for the purposes of a new church in the same parish (*a*).

Trustees' accounts as evidence of usage.

The trustees' accounts showing the application of the income of a fund for a long period may determine the charitable purposes on which the fund is held (*b*).

Parol evidence.

250. Parol evidence is not admissible for the purpose of interpreting a patent ambiguity, as where a blank is left in a trust deed or will (*c*), though it may be admitted to cure a latent ambiguity, that is to say, to ascertain the meaning the testator affixed to the expressions he used (*d*).

Error in description.

Evidence of intention is not admissible to cure an error in description (*e*).

Secondary evidence of lost document.

Where the document of trust is lost, the court will take into consideration existing copies (*f*).

SUB-SECT. 3.—*Failure or Uncertainty of Object at Date of Creation of Trust.*

(1) No particular objects specified.

251. The rule stated above that effect must be given to a clear charitable intention is applicable to gifts for general charitable purposes where the testator has neither specified the objects of his bounty nor indicated any particular way of carrying out his intention; as in the case of bequests for charitable purposes generally (*g*), or

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(*r*) *Shore* v. *Wilson* (1842), 9 Cl. & Fin. 355, 569, H. L.; *A.-G.* v. *Brazen Nose College* (1834), 2 Cl. & Fin. 295.

(*s*) *A.-G.* v. *Caius College* (1837), 2 Keen, 150.

(*t*) *A.-G.* v. *Trinity College, Cambridge* (1856), 24 Beav. 383, 399. It is not so where the trusts are accepted conditionally or subject to certain qualifications, which the court may collect from contemporaneous transactions as evidenced by documents or usage (*A.-G.* v. *Drapers' Co.* (1843), 6 Beav. 382, 386, and cases there cited).

(*a*) *Re Church Estate Charity, Wandsworth* (1871), 6 Ch. App. 296; but see p. 151, *ante*.

(*b*) *Re St. Bride's, Fleet Street* (1877), 35 Ch. D. 147, n.

(*c*) *Baylis* v. *A.-G.* (1741), 2 Atk. 239.

(*d*) *Shore* v. *Wilson*, *supra*, at p. 390 ("godly preachers of Christ's holy Gospel"); *Drummond* v. *A.-G.* (1849), 2 H. L. Cas. 837, 862 ("Protestant Dissenters"); *A.-G.* v. *Clapham* (1854), 4 De G. M. & G. 591, 627; *A.-G.* v. *Beverley Corporation* (1855), 6 De G. M. & G. 256, 268; *A.-G.* v. *Dartmouth Corporation* (1883), 48 L. T. 933 ("charitable, needful, and necessary uses"); *Edge* v. *Salisbury* (1749), Amb. 70 ("relations"); *Re Kenny* (1908), 97 L. T. 130 ("missionary"). See also *Re Kilvert's Trusts* (1871), 7 Ch. App. 170, 173; and p. 160, *post*.

(*e*) *British Home and Hospital for Incurables* v. *Royal Hospital for Incurables* (1903), 89 L. T. 495.

(*f*) *A.-G.* v. *Cashel Corporation* (1842), 3 Dr. & War. 294; *A.-G.* v. *York (Archbishop)* (1853), 17 Beav. 495.

(*g*) *A.-G.* v. *Herrick* (1772), Amb. 712; *Morice* v. *Durham (Bishop)* (1805), 10 Ves. 522, 540; *Miller* v. *Rowan* (1837), 5 Cl. & Fin. 99, 109.

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in relief of poverty (*h*), or for the advancement of education (*i*) or religion (*k*) generally. It also applies to charitable gifts where the testator has indicated the class of objects to be benefited, as the poor of a particular place (*l*) or the clergy of a particular sect (*m*), without prescribing the particular way in which his intention is to be carried into effect. In all of these cases the law supplies the mode of effectuating the intention (*n*).

Objects specified, but mode not defined.

Effect will also be given to a charitable intention where a testator omits the names of the charities he wishes to benefit (*o*), or directs a fund to be applied to such charitable uses as he shall direct, and leaves no direction (*p*).

Names of charities omitted.

252. Where the institution indicated by the testator cannot be identified (*q*), or has never existed (*r*), the gift does not fail, but will be applied *cy-près*.

Misdescription of charities.

A bequest to a charitable institution which at some time existed, but had ceased to do so in the testator's lifetime, whether before (*s*) or after (*a*) the date of his will, is construed to be a bequest for the benefit of the particular institution (*b*), and, unless a general charitable intention can be proved (*c*), lapses (*d*). There is no lapse, however, where the institution has not wholly ceased to exist (*e*), nor of course where there has merely been a change of name (*f*). So

Gift to institution which ceases to exist.

(*h*) *A.-G.* v. *Rance* (1728), cited Amb. 422.

(*i*) *Whicker* v. *Hume* (1858), 7 H. L. Cas. 124.

(*k*) *Re White, White* v. *White*, [1893] 2 Ch. 41, 52.

(*l*) *A.-G.* v. *Wilkinson* (1839), 1 Beav. 370.

(*m*) *A.-G.* v. *Hickman* (1732), 2 Eq. Cas. Abr. 193; *A.-G.* v. *Gladstone* (1842), 13 Sim. 7.

(*n*) *Mills* v. *Farmer* (1815), 1 Mer. 55, 95.

(*o*) *Re White, White* v. *White, supra*, where the gift was to "the following religious societies, viz., "; *Pieschel* v. *Paris* (1825), 2 Sim. & St. 384.

(*p*) *A.-G.* v. *Syderfen* (1683), 1 Vern. 224; *Anon.* (1702), cited 1 Mer. 59, n.; *Mills* v. *Farmer, supra*; *A.-G.* v. *Fletcher* (1835), 5 L. J. (CH.) 75; *Pocock* v. *A.-G.* (1876), 3 Ch. D. 342; *Re Pyne*, [1903] 1 Ch. 83; and compare *Wheeler* v. *Sheer* (1729), Mos. 288, 301, where failure to name any charitable purposes in a codicil was held to be a revocation of the charitable intention.

(*q*) *Simon* v. *Barber* (1828), 5 Russ. 112; *Gibson* v. *Coleman* (1868), 16 W. R. 892; *Re Kilvert's Trusts* (1871), 7 Ch. App. 170.

(*r*) *Loscombe* v. *Wintringham* (1850), 13 Beav. 87; *Bunting* v. *Marriott* (1854), 19 Beav. 163; *Re Clergy Society* (1856), 2 K. & J. 615; *Re Maguire* (1870), L. R. 9 Eq. 632; *Clark* v. *Taylor* (1853), 1 Drew. 642, 645; *Re Davis*, [1902] 1 Ch. 876, 881, where it was said that where there is a gift to a charity which never existed at all the court acts upon even a small indication to show that a purpose, and not a person, is intended. See also the Irish cases *Daly* v. *A.-G.* (1860), 11 I. Ch. R. 41; *Re Geary* (1890), 25 L. R. Ir. 171. But see *Re Brightwen* (1907), *Times* (February 7, 1907), where, the society intended to be benefited being non-existent, the legacy was held to have lapsed.

(*s*) *Langford* v. *Gowland* (1862), 3 Giff. 617; *Makeown* v. *Ardagh* (1876), L. R. 10 Eq. 445; *Re Ovey* (1885), 29 Ch. D. 560.

(*a*) *Re Rymer, Rymer* v. *Stanfield*, [1895] 1 Ch. 19, C. A.

(*b*) *Re Kilvert's Trusts, supra*, at p. 173.

(*c*) *Clark* v. *Taylor, supra*, at p. 644; *Marsh* v. *A.-G.* (1860), 2 John. & H. 61.

(*d*) *Russell* v. *Kellett* (1855), 3 Sm. & G. 264; *Fisk* v. *A.-G.* (1867), L. R. 4 Eq. 521; *Purday* v. *Johnson* (1888), 5 T. L. R. 117; and the other cases cited in the three preceding notes. As to the effect of the dissolution of the institution after the death of the testator, see pp. 160, 161, 169, *post*.

(*e*) *E.g.*, a school which was closed during the week, but used on Sundays (*Re Waring*, [1907] 1 Ch. 166); and see also *Re Bradfield* (1892), 36 Sol. Jo. 646, where the closing of a branch of a society did not create a lapse; and p. 160, *post*.

(*f*) *Re Souter* (1907), 89 L. T. 495.

there is no lapse where an institution which has ceased to exist was named merely as the channel for carrying out a charitable intention (*g*).

Where the institution disclaims the legacy it lapses (*h*), unless given upon special trusts, as distinguished from the general purposes of the institution (*i*).

Illegal or impossible application.

253. Where a general charitable intention is expressed, but the mode prescribed for carrying it into effect is illegal (*k*) or impracticable (*l*), the intention is executed *cy-près*. So also where the testator has intended to benefit a particular kind of charity, but the application directed by him is illegal or impossible (*m*).

Application only partly charitable.

254. Where there is a general overriding trust for charitable purposes, but some of the particular purposes to which the fund may be applied are not strictly charitable, or one of two alternative modes of application is invalid in law, the trust is good, but the trustees are restricted from applying the fund to the purposes or in the manner open to objection (*n*). Where, however, the charitable intention, apart from the particular mode of carrying it into effect, is repugnant to the provisions of the Mortmain and Charitable Uses Acts, the gift fails entirely (*o*).

Conditional or future gifts.

255. A gift to charity is not allowed to fail merely because the application to the particular purpose is postponed (*p*), as by a direction to accumulate (*q*). An immediate gift to a charity is valid, although the particular application of the fund directed by the will may not of necessity take effect within any assignable limit of time, or may never take effect at all except on the occurrence of events in their essence contingent and uncertain (*r*). Accordingly,

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(*g*) See *Re Ovey* (1885), 29 Ch. D. 560, 565.

(*h*) *Re Slevin*, [1891] 2 Ch. 236, 242, C. A.; *Cherry* v. *Mott* (1836), 1 My. & Cr. 123, 131. As to the effect of the death or disclaimer of a trustee, see p. 168, *post*.

(*i*) *A.-G.* v. *Andrew* (1798), 3 Ves. 633; *Denyer* v. *Druce* (1829), Taml. 32; *Reeve* v. *A.-G.* (1843), 3 Hare, 191; *Marsh* v. *A.-G.* (1860), 2 John. & H. 61; *Re Taylor* (1888), 58 L.T. 538, 543; and see *Re Mann*, *Hardy* v. *A.-G.*, [1903] 1 Ch. 232.

(*k*) *Da Costa* v. *De Pas* (1754), Amb. 228; *Cary* v. *Abbot* (1802), 7 Ves. 490; *Martin* v. *Margham* (1844), 14 Sim. 230 (illegal trust for accumulation); *A.-G.* v. *Vint* (1850), 3 De G. & Sm. 704 (legacy to provide the inmates of a workhouse with intoxicating liquor).

(*l*) *Moggridge* v. *Thackwell* (1802), 7 Ves. 36, 69; *A.-G.* v. *Bristol Corporation* (1820), 2 Jac. & W. 294, 308; *Chamberlayne* v. *Brockett* (1872), 8 Ch. App. 206; see also pp. 190 *et seq.*, *post*.

(*m*) *Biscoe* v. *Jackson* (1886), 35 Ch. D. 460 (establishment of soup kitchen); *A.-G.* v. *Guise* (1692), 2 Vern. 266 (propagation of particular religion); *Bunting* v. *Marriott* (1854), 19 Beav. 163 (reduction of debt on particular church).

(*n*) *Hunter* v. *A.-G.*, [1899] A. C. 309, *per* Lord DAVEY, at p. 324; *Sinnett* v. *Herbert* (1872), 7 Ch. App. 232; *Re Douglas* (1887), 35 Ch. D. 472.

(*o*) *Girdlestone* v. *Creed* (1853), 10 Hare, 480. See, however, the effect of the Mortmain and Charitable Uses Act, 1891 (54 & 55 Vict. c. 73), and p. 133, *ante*.

(*p*) This class of gift must be distinguished from gifts which are conditional upon a future and uncertain event (*Re Swain*, [1905] 1 Ch. 669, 676, C. A.).

(*q*) *Martin* v. *Margham*, *supra*; *Harbin* v. *Masterman* (1871), L. R. 12 Eq. 559; *Wharton* v. *Masterman*, [1895] A. C. 186; *Re Swain*, *supra*, at p. 676.

(*r*) *Re Swain*, *supra*, *per* STIRLING, L.J., at p. 676, stating the effect of the rule laid down in *Chamberlayne* v. *Brockett*, *supra*; and see *A.-G.* v. *Oglander* (1790), 3 Bro. C. C. 166; *Biscoe* v. *Jackson* (1886), 35 Ch. D. 460. Compare *A.-G.* v. *Craven* (*Earl*) (1856), 21 Beav. 392, where a trust apparently contingent was held immediately applicable.

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bequests for the erection of almshouses (*s*) or schools (*t*) when the necessary sites should be obtained, to endow a bishopric in a certain place in case a bishop should be appointed (*a*), or to endow any additional church which might be erected (*b*), or bequests the application of which is postponed until a licence in mortmain is obtained (*c*), have been supported.

Intention to carry out particular charitable purpose which fails.

256. Where a testator shows an intention, not of general charity, but merely to benefit some particular charitable institution, or to accomplish some particular charitable purpose (*d*), then if by force of circumstances it is impossible to carry out the testator's object, the gift fails, and is not applicable *cy-près* to other charitable purposes (*e*). Similarly, if subscriptions have been collected for a special charitable object which cannot be carried out, they must be repaid to the subscribers (*f*).

Where one gift depends on another.

257. Where a gift for the establishment of a charity is void as being illegal, a secondary bequest for the endowment of the charity also fails (*g*). If, however, an option is given so that the gift may be employed in other ways, the gift is good (*h*).

(*s*) *Chamberlayne* v. *Brockett* (1872), 8 Ch. App. 206; and see also *Philpott* v. *St. George's Hospital (President etc.)* (1857), 6 H. L. Cas. 338, 359.

(*t*) *Henshaw* v. *Atkinson* (1818), 3 Madd. 306.

(*a*) *A.-G.* v. *Chester (Bishop)* (1785), 1 Bro. C. C. 444; *Society for Propagation of the Gospel* v. *A.-G.* (1826), 3 Russ. 142.

(*b*) *Sinnett* v. *Herbert* (1872), 7 Ch. App. 232.

(*c*) *A.-G.* v. *Downing (Lady)* (1769), Amb. 571; *A.-G.* v. *Bowyer* (1798), 3 Ves. 714, 728; *Abbott* v. *Fraser* (1874), L. R. 6 P. C. 96.

(*d*) *E.g.*, to redeem a mortgage on a chapel (*Corbyn* v. *French* (1799), 4 Ves. 418, 433); repair a school (*A.-G.* v. *Hinxman* (1820), 2 Jac. & W. 270); purchase a right of presentation (*Cherry* v. *Mott* (1835), 1 My. & Cr. 123; *Re Welstead* (1858), 25 Beav. 612); erect special almshouses (*Re White* (1886), 33 Ch. D. 449); build a church (*A.-G.* v. *Oxford (Bishop)* (1786), 1 Bro. C. C. 444, n.), or college (*New* v. *Bonaker* (1867), L. R. 4 Eq. 655), or institution (*A.-G.* v. *Whitchurch* (1796), 3 Ves. 141); or to carry on a periodical (*Marsh* v. *Means* (1857), 3 Jur. (N. S.) 790).

(*e*) *A.-G.* v. *Minshull* (1798), 4 Ves. 11, 14; *Clark* v. *Taylor* (1853), 1 Drew. 642, 644; *Russell* v. *Kellett* (1855), 3 Sm. & G. 264; *Re Randell* (1888), 38 Ch. D. 213 (gift to an incumbent so long as the sittings were free); *Re Blunt*, [1904] 2 Ch. 767; *Re London University Medical Sciences Institute Fund* (1908), 24 T. L. R. 820, where there was a bequest to a fund for establishing a particular institute, and on the failure of a scheme to establish the institute there was a consequent failure of the charitable gift, the *cy-près* doctrine not being applicable. See also *Re Unite* (1906), 75 L. J. (CH.) 163, where the gift did not wholly fail; and p. 198, *post*.

(*f*) *Re London University Medical Sciences Institute Fund*, *supra*.

(*g*) *Smith* v. *Oliver* (1849), 11 Beav. 481; and see *A.-G.* v. *Goulding* (1788), 2 Bro. C. C. 428; *A.-G.* v. *Whitchurch*, *supra*; *Chapman* v. *Brown* (1801), 6 Ves. 404; *Limbrey* v. *Gurr* (1819), 6 Madd. 151; *Price* v. *Hathaway* (1822), 6 Madd. 304; *Re Taylor* (1888), 58 L. T. 538; *Edwards* v. *Hall* (1853), 17 Jur. 593; *Cramp* v. *Playfoot* (1858), 4 K. & J. 479; *A.-G.* v. *Hodgson* (1846), 15 Sim. 146. Gifts in these cases were under the old law held void because the money had to be laid out in the purchase of land or for other purposes obnoxious to the law of mortmain. As to personal estate directed by will to be laid out in land, see Mortmain and Charitable Uses Act, 1891 (54 & 55 Vict. c. 73), s. 7; and p. 136, *ante*. Where the testator directed or indicated that only land already in mortmain was to be purchased or used, the gift was not void (*Philpott* v. *St. George's Hospital (President etc.)* (1857), 6 H. L. Cas. 338, and cases there cited; *Re Cox* (1877), 7 Ch. D. 204).

(*h*) *Sorresby* v. *Hollins* (1740), 9 Mod. Rep. 221; *Faversham Corporation* v. *Ryder* (1854), 5 De G. M. & G. 350; *Dunn* v. *Bownas* (1855), 1 K. & J. 596, 601.

If, however, the primary trust, whether it be of a charitable (*i*) or a private (*j*) nature, is valid, it is not affected by the failure of a secondary trust.

Ascertainment of the Objects of the Trust.

258. A gift to establish a charity on property not itself devoted to charity (*k*), of which the testator has no power to dispose, fails *ab initio* (*l*).

(2) Uncertain description of existing charity.

259. Where a legacy has been bequeathed to a specified charitable institution, extrinsic evidence may be adduced to prove that such an institution exists (*m*), or to remove a latent ambiguity as to which of two societies a testator intended to benefit (*n*), and if necessary an inquiry may be ordered to decide the latter question (*o*). In short, the course to be adopted to find what legatee answers the description given in a will is the same in the case of a legacy to a charity as in the case of a legacy to an ordinary legatee (*p*).

Trivial error immaterial.

260. A trivial error in describing the legatee does not invalidate the gift, if the intention of the testator is clear (*q*); and where an institution is accurately described, a direction as to the utilisation of the money not applicable to the circumstances is immaterial (*r*).

Description by locality.

261. In case of ambiguity, where the testator describes the institution he intends to benefit as being in a particular locality, the legacy will *primâ facie* go to an institution situated in the locality named, though the name used is more like that of an institution in another locality (*s*).

On the other hand, a legacy to the hospitals of London was not limited to hospitals within the city of London (*t*); while a gift to "all and every the hospitals," without further description, was confined to hospitals in the locality where the testatrix resided (*u*).

262. The context of the will is also important, and may show that the description of a charity is exact, and not loose (*x*), or

(*i*) *A.-G.* v. *Stepney* (1804), 10 Ves. 22.

(*j*) *Blandford* v. *Thackerell* (1793), 2 Ves. 238.

(*k*) *A.-G.* v. *Lonsdale* (*Lord*) (1827), 1 Sim. 105 (school); and see also *Hoare* v. *Hoare* (1887), 56 L. T. 147.

(*l*) *Thomson* v. *Shakespear* (1860), 1 De G. F. & J. 399 (museum).

(*m*) *Wilson* v. *Squire* (1842), 1 Y. & C. Ch. Cas. 654.

(*n*) *Re Kilvert's Trusts* (1871), 7 Ch. App. 170, 173.

(*o*) *Middleton* v. *Clitherow* (1798), 3 Ves. 734; *Re Dymond* (1906), *Times* (2nd April, 1906).

(*p*) *Re Kilvert's Trusts*, *supra*, at p. 174.

(*q*) *Re Maguire* (1870), L. R. 9 Eq. 632; *Makeown* v. *Ardagh* (1876), I. R. 10 Eq. 445: *e.g.*, where a society had changed its name, but not its objects (*Re Kilvert's Trusts*, *supra*; *Re Souter* (1907), 89 L. T. 495.

(*r*) As where a vicar is described as rector (*Hopkinson* v. *Ellis* (1842), 5 Beav. 34; *Smith* v. *Ruger* (1859), 5 Jur. (N. S.) 905.

(*s*) *Wilson* v. *Squire*, *supra*; *Re Lycett* (1897), 13 T. L. R. 373, where the "King's Cross Hospital" was construed to mean the Great Northern Hospital, King's Cross, in preference to the King's Cross Hospital at Dundee; *Bradshaw* v. *Thompson* (1843), 2 Y. & C. Ch. Cas. 295, where the "Westminster Hospital, Charing Cross," was construed to mean the Charing Cross Hospital rather than the Westminster Hospital or the Royal Westminster Ophthalmic Hospital. See also *Re Clergy Society* (1856), 2 K. & J. 615; *Re Glubb* (1897), 14 T. L. R. 66.

(*t*) *Wallace* v. *A.-G.* (1864), 33 Beav. 384; and see *Ditcham* v. *Chivis* (1828), 4 Bing. 706; *Beckford* v. *Crutwell* (1832), 5 C. & P. 242.

(*u*) *Masters* v. *Masters* (1718), 1 P. Wms. 420, 425.

(*x*) *Bradshaw* v. *Thompson*, *supra*, where the description was ambiguous, and a general hospital was held entitled to take a legacy in preference to an

SECT. 4. Ascertainment of the Objects of the Trust.

that the testator did not intend to benefit institutions of a particular character (*a*).

Closing of branch society.

263. The closing of one branch of a society does not cause a legacy to it to lapse (*b*). Similarly, the conversion of a chapel of ease into a separate ecclesiastical district does not involve the forfeiture of a trust previously applied for the repair of the chapel (*c*).

Amalgamation.

Conversely the amalgamation of the institution intended with another institution does not affect the validity of the gift (*d*); and where both institutions were intended to receive legacies, the two legacies will be paid to the amalgamated institution (*e*).

Two societies answering description, of which one dissolved.

The fact that a dissolved institution satisfied the description given by the testator better than an existing society does not prevent an existing society, which answers the description sufficiently, from taking the legacy (*f*).

Change of method.

A legacy to an industrial school, which owing to the provision of free State education adopts a different method of attaining its objects, does not lapse on that account (*g*).

Extrinsic evidence to explain latent ambiguity.

264. Where the ambiguity is latent, as in the case of a description in a will applying equally to more than one institution, extrinsic evidence is admissible to determine which institution the testator had in his mind (*h*)—*e.g.*, evidence to show that one of the institutions which claimed the legacy did not exist when the testator was resident in the locality (*i*), or that the testator was interested in (*j*), or had declared he would leave a legacy to (*k*), or had subscribed to (*l*), a particular charity.

Division between charities equally within description.

Where it is impossible to determine which of several charities the testator meant to benefit, the legacy may be divided between them (*m*) in equal shares or otherwise (*n*), or, with the consent of one of two charities, the whole may be given to the other (*o*).

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ophthalmic hospital, because in other gifts in the same will, where the testator intended to benefit institutions for particular complaints, he had said so in express terms; *Re Alchin* (1872), L. R. 14 Eq. 230; and see *Wallace* v. *A.-G.* (1864), 33 Beav. 384, 392.

(*a*) *E.g.*, rate-supported (*Lechmere* v. *Curtler* (1855), 24 L. J. (CH.) 647; *Re Davies* (1872), 21 W. R. 154).

(*b*) *Re Bradfield* (1892). 36 Sol. Jo. 646; and see pp. 156, 157, *ante*.

(*c*) *Re Cloudesley's Charity* (1901), 17 T. L. R. 123.

(*d*) *Re Adams* (1888), 4 T. L. R. 757; and see *Re Wilson* (1854), 19 Beav. 594.

(*e*) *Re Joy* (1888), 60 L. T. 175.

(*f*) *Coldwell* v. *Holme* (1854), 2 Sm. & G. 31.

(*g*) *Playfair* v. *Kelso Ragged School* (1905), 7 F. (Ct. of Sess.) 751.

(*h*) *Middleton* v. *Clitherow* (1798), 3 Ves. 734; *Wilson* v. *Squire* (1842), 1 Y. & C. Ch. Cas. 654, 656; *Re Hussey's Charities* (1861), 7 Jur. (N. S.) 325; *Re Briscoe* (1872), 26 L. T. 149; *Re Fearn* (1879), 27 W. R. 392. See also the non-charitable case *Charter* v. *Charter* (1874), L. R. 7 H. L. 364, 370, 371, 376; *Re Beale* (1890), 6 T. L. R. 308, and p. 155, *ante*.

(*i*) *King's College Hospital* v. *Wheildon* (1854), 18 Beav. 30.

(*j*) *Gibson* v *Coleman* (1868), 18 L. T. 236.

(*k*) *A.-G.* v. *Hudson* (1720), 1 P. Wms. 674.

(*l*) *Bunting* v. *Marriott* (1854), 19 Beav. 163; *Re Kilvert's Trusts* (1871), 7 Ch. App. 170, 173; *Makeown* v. *Ardagh* (1876), L. R. 10 Eq. 445; *Re Fearn*, *supra*; *Re Bradley* (1887), 3 T. L. R. 668.

(*m*) *Simon* v. *Barber* (1829), cited 3 Hare, 195, n.; *Bennett* v. *Hayter* (1839), 2 Beav. 81; *Re Alchin*, *supra*; and see *Waller* v. *Childs* (1765), Amb. 524.

(*n*) *Bennett* v. *Hayter*, *supra*.

(*o*) *Bunting* v *Marriott*, *supra*.

265. Where a fund was given to trustees to pay one-tenth of the income to a named society, "or some one or more kindred institutions," the gift was alternative, and not substitutional (*p*).

SUB-SECT. 4.—*Failure of Object subsequently to Creation of Trust.*

Trust once charitable always charitable.

266. When a charitable trust has once come into operation, it can never cease during the period of its intended continuance, whether such period be perpetual or limited (*q*), and notwithstanding a misapplication of the property extending over many years (*r*).

Accordingly, if the dedication of the property devoted to charity was intended by the testator to be perpetual, and the trust took effect originally, but subsequently failed owing to the objects becoming impossible of accomplishment (*s*), the trust itself does not result for the benefit of the heir or next of kin or residuary legatees of the testator (*t*), but the intention of the testator will be carried out by means of the *cy-près* doctrine (*a*). If the dedication be perpetual it is immaterial that the objects specified are not of necessity a permanent class; for if they fail the court will administer the funds *cy-près* (*b*).

Institution dissolved after death, but before legacy paid.

Where a legacy is bequeathed to a charitable institution which is in existence at the death of the testator, but is dissolved prior to the payment of the legacy, the legacy is treated as part of the assets of the extinct institution and applied accordingly (*c*).

SUB-SECT. 5.—*Religious Trusts.*

How far gifts denominational.

267. One principle applicable to all charities without exception is that the intentions of the founder are to be carried into effect so far as they are capable of being so, and so far as they are not contrary to law or morality. If, therefore, the founder has directed that only persons conforming to particular religious doctrines shall be recipients of his bounty, his will must be followed (*d*).

(*p*) *Re Delmar Charitable Trust*, [1897] 2 Ch. 163, 167.

(*q*) *A.-G.* v. *Green* (1789), 2 Bro. C. C. 492; *Incorporated Society* v. *Price* (1844), 1 Jo. & Lat. 498; *A.-G.* v. *West* (1858), 27 L. J. (CH.) 789 (perpetual charitable rent-charge).

(*r*) *A.-G.* v. *St. John's Hospital, Bedford* (1864), 10 Jur. (N. S.) 897.

(*s*) *E.g.*, trusts for the benefit of the pupils (*Incorporated Society* v. *Price*, *supra*; *Re Templemoyle School* (1869), I. R. 4 Eq. 295), or master (*Aylet* v. *Dodd* (1741), 2 Atk. 238) of a particular school which was subsequently closed, or for a school which was purchased compulsorily and converted into a dock (*A.-G.* v. *Glyn* (1841), 12 Sim. 84), or of land for a burial ground which was subsequently closed (*Campbell* v. *Liverpool Corporation* (1870), L. R. 9 Eq. 579); and see *Re St. Pancras Burial Ground* (1866), L. R. 3 Eq. 173.

(*t*) See *A.-G.* v. *Green*, *supra*. As to the doctrine of resulting trusts not being as a general rule applicable to charities, see p. 180, *post*.

(*a*) *A.-G.* v. *London Corporation* (1790), 3 Bro. C. C. 171; *A.-G.* v. *Ironmongers' Co.* (1833), 2 My. & K. 576; (1844) 10 Cl. & Fin. 908, H. L. (redemption of British slaves in Barbary); *Re Prison Charities* (1873), L. R. 16 Eq. 129 (relief of poor prisoners, failure of trust on abolition of imprisonment for debt); *Dale* v. *Powell* (1897), 13 T. L. R. 466. As to *cy-près* application, see p. 190, *post*.

(*b*) *A.-G.* v. *Lawes* (1849), 8 Hare, 32.

(*c*) *Re Slevin*, *Slevin* v. *Hepburn*, [1891] 2 Ch. 236, C. A.; *Re Soley* (1900), 17 T. L. R. 118; *Re Brightwen* (1907), *Times* (February 7, 1907); and see also *Hayter* v. *Trego* (1828), 5 Russ. 113. As to whether an institution is or is not defunct, see *Re Buck*, *Bruty* v. *Mackey*, [1896] 2 Ch. 727. As to gifts to institutions ceasing to exist in the lifetime of the testator, see p. 156, *ante*.

(*d*) *A.-G.* v. *Calvert* (1857), 23 Beav. 248, *per* ROMILLY, M.R., at p. 255

SECT. 4. **Ascertainment of the Objects of the Trust.**

Presumption against exclusion of particular denomination.

268. In the absence of express direction, there is in the case of eleemosynary and educational charities a presumption against the intention of the founder being that the recipients shall be persons holding a particular form of religious belief. Thus, in eleemosynary charities the religious opinions and tenets of the founder are wholly to be disregarded. The presumption is that he intended to include persons of all persuasions, and the burden of proof lies on those who seek to exclude any (*e*).

Educational charities.

In gifts to educational charities the opinions of the founder are only of value where some directions may have been given by him relative to the religious instruction to be given to the pupils to be taught, and then only for the purpose of explaining and elucidating any obscurity or ambiguity which may be found in such direction

Presumptions in case of gift expressly for religious purpose.

269. In the case of a charity for the support of a religious establishment generally or the purpose of religious instruction, two presumptions arise: first, that the founder intended to support an establishment belonging to some particular form of religion, and that he intended some particular doctrine of religion to be taught; and secondly, that this establishment and doctrine were those which he himself supported and professed, and the court will look carefully at his course of life and conduct and spell out expressions not merely in the instrument of foundation, but in his will and works, to ascertain what were the doctrines and opinions entertained and professed by him (*g*).

Ascertainment of intention as to denomination to be supported.

270. A trust for the purpose of building a church or otherwise for maintaining and propagating the worship of God, containing no more precise expression of intention, is construed as a trust for the advancement of the established religion of the country (*h*). Where the instrument of foundation was made prior to the Reformation, it was construed as though made after that date (*i*).

The expression "Presbyterian" does not denote any particular doctrine or mode of worship (*k*).

The intention of the founder is a question of fact (*l*), not always easily ascertained (*m*).

Extrinsic evidence.

Where there is no expressed intention (*n*), or the language is ambiguous (*o*), and in those cases only, the objects and mode of

(Church of England); *Craigdallie* v. *Aikman* (1812), 1 Dow, 1, H. L. (Scottish seceders); *A.-G.* v. *Pearson* (1817), 3 Mer. 353, 410; *Milligan* v. *Mitchell* (1837), 3 My. & Cr. 72 (Scottish Dissenters).

(*e*) *A.-G.* v. *Calvert* (1857), 23 Beav. 248, *per* ROMILLY, M.R., at p. 259; *A.-G.* v. *St. John's Hospital, Bath* (1876), 2 Ch. D. 554.

(*f*) *A.-G.* v. *Calvert, supra*, at p. 258; *A.-G.* v. *Clifton* (1863), 32 Beav. 596; and see *Re St. Leonard, Shoreditch, Parochial Schools* (1884), 10 App. Cas. 304.

(*g*) *A.-G.* v. *Calvert, supra*, at p. 256; *Shore* v. *Wilson* (1842), 9 Cl. & Fin. 355, H. L.; *Free Church of Scotland* v. *Overtoun* (*Lord*), [1904] A. C. 515, 613.

(*h*) *A.-G.* v. *Pearson, supra*, at p. 409; *A.-G.* v. *Calvert, supra*, at p. 258.

(*i*) *A.-G.* v. *Calvert, supra*, at p. 260; and see *Glasgow College* v. *A.-G.* (1848), 1 H. L. Cas. 800.

(*k*) *A.-G.* v. *Bunce* (1868), L. R. 6 Eq. 563, 574. With regard to Presbyterian trusts, see *Westwood* v. *McKie* (1869), 21 L. T. 165; *Free Church of Scotland* v. *Overtoun* (*Lord*), *supra*.

(*l*) *Shore* v. *Wilson, supra*.

(*m*) *Foley* v. *Wontner* (1820), 2 Jac. & W. 245.

(*n*) *A.-G.* v. *Murdoch* (1849), 7 Hare, 445.

(*o*) *A.-G.* v. *Calvert, supra*, at p. 263; *A.-G.* v. *Gould* (1860), 28 Beav. 485.

executing the trust may be ascertained from a consideration of extrinsic circumstances. Thus, where vague expressions, as "Protestant Dissenters," are used, extrinsic evidence is admissible to show what denominations are intended to be included (*p*).

But evidence is not admissible to contradict an express trust (*q*), or to sanction a breach of trust (*r*), or to show the sense in which words were used by particular individuals (*s*), other than the authors of the trusts in question (*t*).

Ascertainment of trusts of denomination intended.

271. In order that the trusts of a congregation of Dissenters may be enforced by the court, it is not essential that the terms of the trust should be in writing (*u*). The court may ascertain what form of religious worship was intended from the established usage of the congregation (*w*).

Reference also may be made to contemporaneous Acts of Parliament to see in what sense the words were used in the age in which the deeds were executed (*a*), to contemporaneous deeds relating to the same chapel (*b*), or to a contemporaneous declaration of trust (*c*), or to the ecclesiastical history of the period (*d*), and where the trust is for the benefit of an existing congregation of Dissenters the character of the congregation may be made the subject of inquiry (*e*).

The meaning of the founder of the trust may be explained by evidence as to the character of the congregation for whose benefit the gift was made (*f*).

(*p*) *Shore* v. *Wilson* (1842), 9 Cl. & Fin. 390, H. L. In some cases Unitarians were held not entitled to participate; but it has been said that upon most occasions they would now be considered to be Protestant Dissenters (*Drummond* v. *A.-G.* (1849), 2 H. L. Cas. 837, 863).

(*q*) *A.-G.* v. *Clapham* (1854), 4 De G. M. & G. 591.

(*r*) *Drummond* v. *A.-G.*, *supra*.

(*s*) *Ibid.*, at p. 863.

(*t*) *Ibid.*, at p. 858; and see p. 155, *ante*.

(*u*) See also pp. 122, 142, *ante*.

(*w*) *A.-G.* v. *Pearson* (1817), 3 Mer. 353, 400; *A.-G.* v. *Murdoch* (1849), 7 Hare, 445; *Drummond* v. *A.-G.*, *supra*. For a form of order directing an inquiry as to usage, see *A.-G.* v. *Pearson*, *supra*, at p. 420. As to usage being presumptive evidence of trusts, see further, p. 181, *post*.

(*a*) *Drummond* v. *A.-G.*, *supra*, at p. 863; *Shore* v. *Wilson*, *supra*, at p. 413.

(*b*) *A.-G.* v. *Anderson* (1888), 57 L. J. (CH.) 543.

(*c*) *A.-G.* v. *Clapham*, *supra*, at p. 626.

(*d*) *A.-G.* v. *Bunce* (1868), L. R. 6 Eq. 563, 571, 572.

(*e*) *A.-G.* v. *Murdoch*, *supra*; and see *Dill* v. *Watson* (1836), 2 Jo. Ex. Ir. 48. Many denominations of Dissenters, in order to secure uniformity in the trusts of their chapels, schools, and other property, make use of model deeds which are in fact carefully prepared deeds relating to particular chapels, schools etc., by reference to which the trusts of other chapels etc. can be declared. The denominations which use such model deeds are the Wesleyan Methodists, the Welsh Calvinistic Methodists, the Primitive Methodists, the United Methodist Church (formed, under the United Methodist Church Act, 1907 (7 Edw. 7, c. lxxv.), from the union of the Methodist New Connexion, the Bible Christians, and the United Methodist Free Churches, each of which had its own model deed), and the United Free Gospel Churches. For a form of a model deed (Wesleyan Methodist), see Encyclopædia of Forms, Vol. III., pp. 213 *et seq.* Certain other denominations, *e.g.*, Congregationalists, Baptists, the Presbyterian Church in England, and the Free Church of England, "provide" forms of deeds, which it is generally expedient to use; see, as to such forms, Encyclopædia of Forms, Vol. III., pp. 228, 229.

(*f*) *A.-G.* v. *Molland* (1832), You. 562, where teaching "the Gospel of Christ under the name of orthodoxy" was so explained.

SECT. 4. **Ascertainment of the Objects of the Trust.**

Doctrines taught in Nonconformist chapels.

272. In the case of Nonconformist chapels where no particular religious doctrines or opinions or mode of regulating worship appear in the will, deed, or other instrument creating the trust, the usage for twenty-five years (*g*) immediately preceding any suit relating thereto is to be taken as conclusive evidence that such religious doctrines or opinions or mode of worship as have for that period been taught or observed in any meeting-house may properly be taught or observed therein; and the right of any congregation to hold such meeting-house and any fund for the benefit of such congregation or minister, or other officer of such congregation, is not to be called in question on account of the doctrines or opinions or mode of worship so taught or observed (*h*).

But where any minister's house, school, or fund shall be given or created by any deed, will, or other instrument which shall declare in express terms or by reference the particular religious doctrines or opinions for the promotion of which the same are intended, then they shall be applied to promoting the doctrines or opinions so specified, any usage of the congregation to the contrary notwithstanding (*i*).

And where the direction is clear it is immaterial that it was contained in a deed void under the Charitable Uses Act, 1735 (*k*).

Roman Catholic trusts.

273. In the case of Roman Catholic charities the trusts, in the absence of written documents, are to be ascertained from the usage during the last period of twenty years during which there has been consistent usage (*l*).

Meaning of "reparation" of a church.

274. A fund given for the "reparation" of a church may in a proper case be applied in the erection of new buildings (*m*) and paying the salaries of persons who look after the fabric or ornaments of the building (*n*).

The endowment of a church means that the income only of the fund is to be applied for the benefit of the incumbent (*o*)

Gifts to persons as holders of office etc.

A gift to a parish church may be construed to be a gift to the parson and parishioners and their successors for ever (*p*). So also gifts to a vicar (*q*) and a Dissenting minister (*r*) may be gifts for the

(*g*) *A.-G.* v. *Anderson* (1888), 57 L. J. (CH.) 543, 546, 547.

(*h*) Nonconformists' Chapels Act, 1844 (7 & 8 Vict. c. 45), s. 2.

(*i*) *Ibid.* A gift of a meeting-house "for Protestant Dissenters of the Presbyterian or Independent denomination to worship in as the same is now used" was held sufficiently express (*A.-G.* v. *Anderson*, *supra*; see also *A.-G.* v. *Bunce* (1868), L. R. 6 Eq. 563), but not a gift to a named Dissenting congregation "for the service and worship of God in that way" (*A.-G.* v. *Hutton* (1844), Drury *temp.* Sug. 480), nor a trust to instruct a congregation and their successors for ever "in the true principles of the Christian religion" (*ibid.*).

(*k*) 9 Geo. 2, c. 36; *A.-G.* v. *Ward* (1818), 6 Hare, 477, 483.

(*l*) Roman Catholic Charities Act, 1860 (23 & 24 Vict. c. 134), s. 5.

(*m*) *Re Palatine Estate Charity* (1888), 39 Ch. D. 54. See *A.-G.* v. *Wax Chandlers' Co.* (1873), L. R. 6 H. L. 1; *Re Booth's Charities* (1866), 14 W. R. 761.

(*n*) *Re Palatine Estate Charity*, *supra*, *e.g.*, verger or organ tuner, but not organist.

(*o*) *Re Robinson, Wright* v. *Tugwell*, [1892] 1 Ch. 95, 100.

(*p*) *Cheeseman* v. *Partridge* (1739), 1 Atk. 436. As to gifts to holders of offices, see also p. 145, *ante*.

(*q*) *Re Parker's Charity* (1863), 32 Beav. 654; see also *Re Garrard*, [1907] 1 Ch. 382.

(*r*) *A.-G.* v. *Cock* (1751), 2 Ves. Sen. 273; and see *Cheeseman* v. *Partridge*, *supra* (schoolmaster).

benefit of the office, and not merely personal legacies to the holder of the office for the time being.

A charitable bequest to a bishop "to be applied by him for such general or special purposes in connection with" a named cathedral church "as he in his absolute and uncontrolled discretion may think fit" may be applied in paying the stipend of an honorary canon having a stall in the cathedral, though his main work lies outside the parish in which the cathedral is situate, or of a canon missioner with duties inside the cathedral, though liable to be employed in the diocese outside the parish, but not of a canon missioner with general diocesan duties and having only an honorary stall in the cathedral (*s*).

SUB-SECT. 6.—*Objects of Miscellaneous Trusts.*

Gifts for some of the objects of an institution.

275. Where gifts are made to existing charitable institutions, or to the governors or treasurer, generally or for promoting certain definite objects, which are in fact the objects of such institutions, the gifts are applicable by the trustees, governors, or other officials for the general purposes of the institution (*t*).

Thus, a gift of a fund to a corporate body for apprenticing young men would be applicable for apprenticing them in the craft to which the corporate body belonged (*u*); and where there is a gift to a college for the purpose of educating the descendants of a testator, education at that particular college, and not elsewhere, is presumed to be intended (*w*).

Gifts for parishioners.

Where children of parishioners of a certain parish are alone eligible as objects of a charity, the word "parishioner" must be taken in its ordinary sense of a person occupying premises liable to be rated in the parish (*x*).

Persons in receipt of parochial relief.

Persons in receipt of parochial relief are not as a rule proper objects of a charity for the poor generally, on the ground that the application of charity funds in this way would directly benefit the rich (*y*). But this principle does not apply where the intention is clear that the gift is to be applied in aid of rates (*a*).

(*s*) *Re Whitehead* (1908), *Times* (October 14, 1908).

(*t*) *Green* v. *Rutherforth* (1750), 1 Ves. Sen. 463 (a gift to a college); *Incorporated Society* v. *Richards* (1841), 1 Dr. & War. 258, 294, 332; *A.-G.* v. *Sidney Sussex College* (1869), 4 Ch. App. 722, 730; *Re White, White* v. *White*, [1893] 2 Ch. 41, 52.

(*u*) *A.-G.* v. *Sidney Sussex College, supra.*

(*w*) *Ibid.*, at p. 731.

(*x*) *Etherington* v. *Wilson* (1875), 1 Ch. D. 160. See also *A.-G.* v. *Parker* (1747), 3 Atk. 576; *Edenborough* v. *Canterbury (Archbishop)* (1826), 2 Russ. 93; *A.-G.* v. *Rutter* (1768), 2 Russ. 101, n. ("inhabitants and parishioners"); *Carter* v. *Cropley* (1850), 8 De G. M. & G. 687; *Kensit* v. *St. Ethelburga, Bishopsgate Within (Rector etc.)*, [1900] P. 80. For a detailed analysis of the cases relating to "parishioners" or "inhabitants," see Tudor, Law of Charities and Mortmain, 4th ed., pp. 176 *et seq.*

(*y*) *A.-G.* v. *Leage* (1881), reported in Tudor, Law of Charities and Mortmain, 4th ed., p. 1041; *A.-G.* v. *Bovill* (1840), 1 Ph. 768; *St. Nicholas, Deptford (Churchwardens)* v. *Sketchley* (1847), 8 Q. B. 405; *A.-G.* v. *Wilkinson* (1839), 1 Beav. 373; *A.-G.* v. *Exeter Corporation* (1826), 2 Russ. 53, 54; (1827) 3 Russ. 395. See also *A.-G.* v. *Price* (1744), 3 Atk. 110; *A.-G.* v. *Gutch* (1830), cited Shelford, Law of Mortmain, p. 628; *A.-G.* v. *Clarke* (1762), Amb. 422; *Hereford (Bishop)* v. *Adams* (1802), 7 Ves. 324; *A.-G.* v. *Rochester Corporation* (1854), 5 De G. M. & G. 797; *Re Sekforde's Charity* (1861), 4 L. T. 321; *Kinloss Parish Council* v. *Morgan*, [1908] S. C. 192, where, in Scotland, a bequest to the poor of a parish was held not necessarily limited to persons in receipt of parochial relief.

(*a*) *A.-G.* v. *Blizard* (1855), 21 Beav. 233. See also p. 115, *ante.*

SECT. 4. Ascertainment of the Objects of the Trust.

SUB-SECT. 7.—*Delegation of Power to determine Object.*

276. Power to determine the particular object to be benefited may be delegated (*b*). Thus, a direction to trustees to divide a fund at their discretion among such charitable institutions or objects as they think expedient is valid (*c*).

Where delegated power is not exercised.

Where the power to determine the particular object is delegated to a person who fails to exercise the power, the gift to charity does not on that account fail. Thus, a gift is not invalidated by a trustee neglecting to appoint (*d*) or an executor renouncing (*e*), or by the appointment of an executor being revoked (*f*), or by the death in the testator's lifetime of any person intrusted with the nomination of the particular object (*g*), or by the name of the intended nominator being left blank (*h*), or by the trustees declining to act (*i*) or dying without exercising the discretion (*k*). The court will in such cases, after an inquiry, distribute the money (*l*).

An apportionment not in accordance with the testator's wishes will be modified by the court (*m*). Where, however, trustees are given the amplest possible discretion within certain limits in the choice of objects, they need not exercise their discretion in accordance with the known views of the testator (*n*).

A bequest to a definite class of charitable objects, coupled with the appointment of a person (the executor) having power to select the objects, is not void for uncertainty (*o*).

SUB-SECT. 8.—*Nomination of Beneficiaries.*

Right vested in founder.

277. The right of nominating the beneficiaries of a charity belongs naturally to the founder and his heirs or nominees (*p*) until forfeited by neglect or improper use (*q*).

Severance of right from land.

This right of nomination, while capable of alienation (*a*), does

(*b*) See also p. 273, *post*.

(*c*) *Waldo* v. *Caley* (1809), 16 Ves. 206; *Horde* v. *Suffolk* (*Earl*) (1833), 2 My. & K. 59; *Re Lea* (1887), 34 Ch. D. 528; *Cleland's Trustees* v. *Cleland*, [1907] 1 Ch. C. 591; *Dick's Trustees* v. *Dick*, [1907] S. C. 953, affirmed *sub nom. Dick* v. *Copland*, [1908] A. C. 347. See also the cases cited in notes (*t*) and (*u*), p. 147, *ante*; and compare *Blair* v. *Duncan*, [1902] A. C. 37, and other cases where the bequests were held void for uncertainty, cited at p. 146, *ante*.

(*d*) *A.-G.* v. *Boultbee* (1796), 3 Ves. 221; *Re Douglas* (1887), 35 Ch. D. 472, 485.

(*e*) *A.-G.* v. *Fletcher* (1835), 5 L. J. (CH.) 75. A power for executors to nominate is not exercisable by trustees subsequently appointed (*Hibbard* v. *Lamb* (1756), Amb. 309).

(*f*) *White* v. *White* (1778), 1 Bro. C. C. 12; *Moggridge* v. *Thackwell* (1803), 7 Ves. 36, 78.

(*g*) *Moggridge* v. *Thackwell*, *supra*.

(*h*) *Baylis* v. *A.-G.* (1741), 2 Atk. 239.

(*i*) *Doyley* v. *A.-G.* (1735), 2 Eq. Cas. Abr. 194, pl. 15; and see p. 274, *post*.

(*k*) *A.-G.* v. *Bucknall* (1741), 2 Atk. 328.

(*l*) *Doyley* v. *A.-G.*, *supra*.
A.-G. v. *Buller* (1822), Jac. 407.

(*m*) *Re Squire's Trusts* (1901), 17 T. L. R. 724.

(*n*) *Allan's Executors* v. *Allan*, [1908] S. C. 807.

(*o*) *A.-G.* v. *Leigh* (1721), 3 P. Wms. 145, n. (the inmates of almshouses); *Green* v. *Rutherforth* (1750), 1 Ves. Sen. 462; *Philips* v. *Bury* (1694), reported 2 Term Rep. 346, 352, 353.

(*q*) *A.-G.* v. *Leigh*, *supra*; Shelford, Law of Mortmain, p. 769.

(*a*) *A.-G.* v. *Brentwood School* (*Master and Wardens*) (1831), 1 L. J. (K. B.) 57; *A.-G.* v. *Boucherett* (1858), 25 Beav. 116 (cases of school patronage); *Re Church Patronage Trust*, [1904] 2 Ch. 643, C. A. (advowson). As to the right to nominate schoolmasters, see title EDUCATION

not necessarily pass upon the alienation of land to which it is attached. Thus, the owner of a manor to which a right of patronage is attached can alienate the manor without parting with the right of patronage (*b*). Again, where an owner in fee of lands grants thereout a perpetual rent-charge in support of a charity, and subsequently conveys away the fee simple, his heir is not thereby deprived of the right of nominating the objects of the charity (*c*).

Right vested in trustees or others.

278. Trustees to whom a testator gives the direction and management of a school provided by him are entitled to nominate and appoint the scholars (*d*). Where the right of electing almsmen is by the deed establishing a charity vested in the minister, churchwardens, overseers, and those of the parishioners who pay poor rates, it does not pass to a vestry created by the Metropolis Local Management Act, 1855 (*e*). Nor does that statute interfere with a right vested in trustees of electing the minister of a parish (*f*).

Powers of Ecclesiastical Commissioners.

279. The Charity Commissioners are not entitled in any order made by them under the Bishops' Trusts Substitution Act, 1858 (*g*), to make any order in relation to any advowson or right of patronage or presentation, part of the possessions of a see, which might be exchanged or otherwise disposed of by scheme of the Ecclesiastical Commissioners (*h*). Nor may any orders relating to any ecclesiastical patronage be made under that Act without the consent of the Ecclesiastical Commissioners (*i*).

Beneficiaries required to possess certain qualifications.

280. Where by the instrument establishing a charity the beneficiaries are required to possess certain qualifications, as, for example, to be parishioners of a certain parish (*k*), or to have been pupils for a number of years at a certain school (*l*), or where preference is to be given *cæteris paribus* to freemen of a certain town (*m*), the conditions imposed by the instrument must be complied with. But the parties exercising the right of nomination need not take into consideration the motives with which the proposed beneficiaries secured the necessary qualifications (*n*), and where compliance with certain religious forms is annexed as a condition to a charitable gift no further religious test can properly be required (*o*).

(*b*) *A.-G.* v. *Evelme Almshouse (Chaplains etc.)* (1853), 22 L. J. (CH.) 846.

(*c*) *A.-G.* v. *Rigby* (1732), 3 P. Wms. 145.

(*d*) *A.-G.* v. *Christ Church (Dean and Canons)* (1821), Jac. 474, 486; and see *A.-G.* v. *Scott* (1750), 1 Ves. Sen. 413.

(*e*) 18 & 19 Vict. c. 120; *A.-G.* v. *Drapers' Co.* (1858), 27 L. J. (CH.) 542. See also Metropolis Management Act, 1856 (19 & 20 Vict. c. 112), ss. 1, 3.

(*f*) *Carter* v. *Cropley* (1857), 26 L. J. (CH.) 246, C. A. See also *Shaw* v. *Thompson* (1876), 3 Ch. D. 233; and compare *Re Hayle* (1862), 31 L. J. (CH.) 612, where the right of appointing new trustees was vested in "the parishioners and inhabitants in vestry assembled," and the right was held to pass to the new vestry.

(*g*) 21 & 22 Vict. c. 71.

(*h*) *Ibid.*, s. 2; and see title ECCLESIASTICAL LAW.

(*i*) *Ibid.*

(*k*) *Etherington* v. *Wilson* (1875), 1 Ch. D. 160, C. A.

(*l*) *Re Storie's University Gift* (1860), 30 L. J. (CH.) 193.

(*m*) *Re Nettle's Charity* (1872), 41 L. J. (CH.) 694 (election to scholarship).

(*n*) *Etherington* v. *Wilson, supra*, where the proposed beneficiary had become a parishioner temporarily to obtain the required qualification.

(*o*) *A.-G.* v *Calvert* (1857), 26 L. J. (CH.) 688.

SECT. 4. **Ascertainment of the Objects of the Trust.**

Setting aside improper nomination.

281. A nomination which fails to comply with the directions of the instrument establishing the charity may be set aside (*p*), but not where it is made *bonâ fide* under a mistaken construction of a scheme (*q*). The court has no jurisdiction, on setting aside an improper nomination, to nominate proper beneficiaries, where by the constitution of the charity the nomination rests with the trustees (*r*).

An application to the court by a candidate for a scholarship to set aside an alleged improper election requires the consent of the Board of Education (*s*).

Where the objects of a charity have been nominated for many years by the wrong persons, the court will not compel them to account for the payments made (*t*).

Nomination by votes of subscribers.

282. Subscribers to a charity who are entitled to votes in proportion to the amount of their subscriptions may vote for any candidate they please. There is nothing illegal in a bargain between two subscribers by which the candidate of the one is to get the votes of both at a certain election in consideration of the candidate of the other having similar treatment at another election, and such a contract is enforceable at law (*u*).

SECT. 5.—*Trustees.*

SUB-SECT. 1.—*Initial Absence or Failure of Trustees*

Trustees or objects not defined.

283. The appointment of the first trustees of charity rests with the donor (*x*); but a charitable gift is not defeated by the failure of the donor to provide for carrying into effect his charitable object. Where money is given to charity generally and indefinitely without trustees or objects selected, the King, as *parens patriæ*, is the constitutional trustee, and disposes of the fund under the sign manual (*a*). So, too, where there is a devise for such charity as the testator has by writing appointed, and no such writing is to be found, the King will appoint (*b*). Where the donor intends to create a trust, but appoints no trustee, the court disposes of the fund by means of a scheme (*c*).

Death etc. before gift operates.

284. A gift will not fail by reason of the death of the trustee (*d*) or other person nominated by the testator to assist the trustees in the

(*p*) *Re Nettle's Charity* (1872), 41 L. J. (CH.) 694.
(*q*) *Re Storie's University Gift* (1860), 30 L. J. (CH.) 193, 199.
(*r*) *Ibid.*, at p. 198.
(*s*) Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 17; Education Act, 1899 (62 & 63 Vict. c. 37), s. 2 (2); Board of Education (Powers) Order in Council, 1902, s. 1; *Rooke* v. *Dawson*, [1895] 1 Ch. 480; and see pp. 310, 317, *post*.
(*t*) *A.-G.* v. *Rigby* (1732), 3 P. Wms. 145.
(*u*) *Bolton* v. *Maddan* (1873), 43 L. J. (Q. B.) 35.
(*x*) See p. 126, *ante*. For a case of ambiguity in the terms of a will appointing trustees of a charity, see *Re Lavers* (1908), *Times* (November 7, 1908), where a testator desired to vest a right of presentation in the hands of trustees "commonly called the Simeon trustees (the same who have the right of presentation of the vicarage of St. A., Plymouth)," and, such right of presentation being in fact vested in the Church Patronage Trustees, the court held that the testator intended to appoint the latter body.
(*a*) *Moggridge* v. *Thackwell* (1802), 7 Ves. 36, 83, 86; *Cary* v. *Abbot* (1802), 7 Ves. 490; *Morice* v. *Durham* (*Bishop*) (1805), 10 Ves. 521, 541; *Ommanney* v. *Butcher* (1823), Turn. & R. 271. See also p. 287, *post*.
(*b*) *A.-G.* v. *Syderfen* (1683), 1 Vern. 224.
(*c*) *Mills* v. *Farmer* (1815), 1 Mer. 94, 95; *Reeve* v. *A.-G.* (1843), 3 Hare, 196, 197. See also p. 295, *post*.
(*d*) *Moggridge* v. *Thackwell*, *supra*, at p. 80; *A.-G.* v. *Gladstone* (1842),

execution of the trust (*e*) in the testator's lifetime, or the closing of an institution, to the trustees of which a gift is made, before the gift takes effect (*f*).

Disclaimer.

Nor does the disclaimer of the trustee invalidate the gift (*g*), except where the gift is to a charitable institution for its general purposes (*h*), or for a foreign charity over which the court has no jurisdiction (*i*).

Objects to be named by executor who does not prove.

The charitable purpose will be carried into effect where a testator leaves a fund to such charitable uses as his executor shall appoint, and the executor renounces probate (*k*), or the testator revokes the appointment of the executor and appoints no one in his place (*l*).

Incapacity of trustee.

A charitable trust will not fail by reason of the incapacity of a trustee. So the gift of realty (*m*) or personalty (*n*) to a corporation will not fail by reason of the corporation being incapable of holding it.

SUB-SECT. 2.—*Subsequent Failure of Trustees.*

When gift invalidated.

285. Except where the discretion of the trustee is of the essence of the trust (*o*), the failure of the trust machinery set up by the donor will not invalidate a charitable gift.

The negligence or default of a trustee is not sufficient to nullify a charitable purpose (*p*), whether there is or is not a gift over (*q*), unless the testator expressly makes the gift over depend upon the conduct of the trustee (*r*). Similarly, a charitable gift does not fail owing to the neglect (*s*) or death (*t*) of the persons charged with the duty of apportioning it among specified charities. In such circumstances the specified objects take equally (*u*).

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13 Sim. 7; *Walsh* v. *Gladstone* (1843), 1 Ph. 290; *Re M'Auliffe*, [1895] P. 290; *Re Lalor* (1901), 85 L. T. 643.

(*e*) *A.-G.* v. *Hickman* (1732), 2 Eq. Cas. Abr. 193, pl. 14.

(*f*) *Marsh* v. *A.-G.* (1860), 2 John. & H. 61, where the gift was to the treasurer and president of a certain school, the income to be applied for certain educational purposes, but there was no provision that the educational purposes were to be carried out at the named school; see also *Hayter* v. *Trego* (1830), 5 Russ. 113, and cases cited p. 156, *ante*, of gifts to institutions which have dissolved.

(*g*) *Barclay* v. *Maskelyne* (1858), 4 Jur. (N. S.) 1294 (disclaimer by individual trustee); *Denyer* v. *Druce* (1829), Taml. 32 (disclaimer by trustees of a charity, and by governors of Christ's Hospital, and by Oxford University); *Reeve* v. *A.-G.* (1843), 3 Hare, 191 (disclaimer by charitable society); *A.-G.* v. *Andrew* (1798), 3 Ves. 633 (disclaimer by college); and compare *Bute's Trustees* v. *Bute (Marquess)* (1905), 7 F. (Ct. of Sess.) 49, where the gift was conditional, and, on the trustees being unable to fulfil the condition, lapsed; and see pp. 170 *et seq.*, *post*.

(*h*) *Re Slevin*, *Slevin* v. *Hepburn*, [1891] 2 Ch. 236, 242, C. A.

(*i*) *New* v. *Bonaker* (1867), L. R. 4 Eq. 655; and see *A.-G.* v. *Sturge* (1854), 19 Beav. 597.

(*k*) *A.-G.* v. *Fletcher* (1835), 5 L. J. (CH.) 75.

(*l*) *White* v. *White* (1778), 1 Bro. C. C. 12.

(*m*) *A.-G.* v. *Brentwood School* (*Master*) (1833), 1 My. & K. 376, 390. See also *Sonley* v. *Clockmakers' Co.* (1780), 1 Bro. C. C. 81; *A.-G.* v. *Flood* (1816), Hayes & Jo., Appendix, p. xxi.; *Incorporated Society* v. *Richards* (1841), 1 Dr. & War. 258, 331, 332; *Gravenor* v. *Hallum* (1767), Amb. 643.

(*n*) *Tufnell* v. *Constable* (1838), 7 Ad. & El. 798.

(*o*) *Reeve* v. *A.-G.*, *supra*; and see *Re Smith*, *Eastick* v. *Smith*, [1904] 1 Ch. 139, 144.

(*p*) *A.-G.* v. *Boultbee* (1794), 2 Ves. 380, 389, 390.

(*q*) *Re Upton Warren* (1833), 1 My. & K. 410.

(*r*) *Christ's Hospital* v. *Grainger* (1849), 1 Mac. & G. 460, 463.

(*s*) *Doyley* v. *A.-G.* (1735), 4 Vin. Abr. 485, pl. 16; *A.-G.* v. *Downing* (*Lady*) (1767), Wilm. 24.

(*t*) *Salusbury* v. *Denton* (1857), 3 K. & J. 529.

(*u*) *Ibid.*

SECT. 6. Rules applicable to the Creation of Charitable Trusts.

SECT. 6.—*Rules applicable to the Creation of Charitable Trusts.*

SUB-SECT. 1.—*Gifts subject to Conditions, and Conditions creating Trusts.*

Effect of conditions precedent.

286. A charitable gift may be made subject to conditions precedent, as that the institution which is to benefit shall perform some act (*v*), or that if the trust is declared unlawful it shall revert (*w*), or that the gift shall take effect only if the testator's estate be sufficient for the intended object (*x*), or amount to a certain sum (*y*). The gift fails if the condition precedent is impossible (*a*), or is not satisfied (*b*).

Conditions subsequent.

287. Charitable gifts may also be made subject to conditions subsequent, *i.e.*, that after the gift vests some act has to be performed (*c*), or some act is not to be done (*d*). But a mere intention to make the enjoyment of a gift conditional is inoperative if not carried out (*e*). Conditions subsequent include (1) common law conditions (*f*), a breach of which involves forfeiture to the grantor or his representatives (*g*), (2) conditions enforceable in equity (*h*), and (3) conditions followed by executory limitations or gifts over (*i*).

(*v*) *E.g.*, that a college should found certain scholarships (*A.-G.* v. *Andrew* (1798), 3 Ves. 633), or that a written undertaking be given to paint the ironwork of a tomb (*Roche* v. *M'Dermott*, [1901] 1 I. R. 394). See *Cherry* v. *Mott* (1836), 1 My. & Cr. 123, 131, 132; *Chamberlayne* v. *Brockett* (1872), 8 Ch. App. 206, 211; *Re Swain, Monckton* v. *Hands*, [1905] 1 Ch. 669, C. A.; *Re Emson* (1905), 74 L. J. (CH.) 565.

(*w*) *De Themmines* v. *De Bonneval* (1828), 5 Russ. 288.

(*x*) *Cherry* v. *Mott*, *supra*.

(*y*) *Thomas* v. *Howell* (1874), L. R. 18 Eq. 198; and see *Re Swain, Monckton* v. *Hands*, *supra*.

(*a*) *Re Emson*, *supra* (condition that the executors should become members of the charity, which had no members).

(*b*) *De Themmines* v. *De Bonneval*, *supra*; *A.-G.* v. *Craven* (1856), 21 Beav. 392; *Cherry* v. *Mott*, *supra*; *Chamberlayne* v. *Brockett*, *supra*; *Re Emson*, *supra*; *Bute's Trustees* v. *Bute* (*Marquess*) (1905), 7 F. (Ct. of Sess.) 49, where a testator directed his trustees to build two churches and convey them when built to certain bishops upon conditions which the bishops were unable to accept, and the gift accordingly lapsed.

(*c*) *A.-G.* v. *Christ's Hospital* (1790), 3 Bro. C. C. 165 (children from particular parish to be maintained); *Re Tyler*, [1891] 3 Ch. 252 (keeping a tomb in repair); *Re Conington* (1860), 8 W. R. 444 (incumbent of particular church to be maintained and special services to be held); *Re Robinson, Wright* v. *Tugwell*, [1892] 1 Ch. 95; affirmed [1897] 1 Ch. 85, C. A. (black gown to be worn in pulpit); *Re Parker's Charity* (1863), 32 Beav. 654 (anniversary sermon).

(*d*) *Milbank* v. *Lambert* (1860), 28 Beav. 206 (vicar not to collect tithes).

(*e*) *Yates* v. *University College, London* (1875), L. R. 7 H. L. 438, where the testator omitted to make rules compliance with which was required by the gift; *North Wales University College* v. *Taylor*, [1908] P. 140, where the condition intended to be attached to the gift was contained in a memorandum excluded from probate as not being sufficiently referred to in the will for identification.

(*f*) *Re Hollis' Hospital (Trustees) and Hague*, [1899] 2 Ch. 540. But see *Re Upton Warren* (1833), 1 My. & K. 410, where, in spite of a limitation over, the court applied the first gift *cy-près*.

(*g*) Shep. Touch. 117, 119, 120; Co. Litt. 201 a.

(*h*) See the cases cited at p. 171, *post*, where words of condition create a trust, and also the cases where charities accepting property subject to conditions were held bound to perform them (*A.-G.* v. *Andrew* (1798), 3 Ves. 633, 646; *A.-G.* v. *Caius College* (1837), 2 Keen, 150, 163; *Re Richardson's Will* (1887), 57 L. T. 17; and p. 259, *post*).

(*i*) See *Christ's Hospital* v. *Grainger* (1849), 1 Mac. & G. 460; *Re Conington* (1860), 8 W. R. 444; *Re Tyler*, *supra*.

If the condition is illegal (*k*), or involves a breach of trust (*l*), or is repugnant to the gift (*m*), the charity takes the gift discharged from the condition; and where there is a gift over, that also fails (*n*). Similarly, where there is a bequest to a legatee with an illegal condition attached in favour of a charity, the legatee takes the property free from the condition (*o*).

Vesting of subjects of conditional gifts

As a rule donees who accept conditional gifts are entitled to have the property vested in them (*p*). But where the condition is a continuing condition to be performed from time to time, and there are no special trustees to hold the fund, it may be retained in court, and the income paid so long as the conditions are performed (*q*).

Acceptance of conditional gift.

288. Where a gift subject to a condition is accepted, the condition must be fulfilled whether the subject-matter of the gift is adequate for the purpose or not (*r*). But charity trustees are not bound to accept property subject to a special trust or condition (*s*).

The subsequent abandonment of the benefit of a gift to which a condition is attached does not relieve the party who accepted it from the burden of fulfilling the condition (*t*).

Where condition creates a trust

289. Where the whole of the property is devoted to purposes which exclude all beneficial interest of the donee, a trust is created, though the words used are primarily words of condition (*u*). So also where property is given upon condition that a fixed and definite sum, which does not exhaust the entire revenue, shall be applied in a specified charitable way (*w*).

Where property is given on condition that an indefinite sum shall be expended for a certain purpose, it is a gift upon condition, and not a trust, and the donee is entitled to the beneficial interest in the

(*k*) *Re Amos, Carrier* v. *Price*, [1891], 3 Ch. 159, 167 (contrary to the Mortmain Acts).

(*l*) *Re Tyler*, [1891] 3 Ch. 252, 254.

(*m*) *Lydiatt* v. *Foach* (1700), 2 Vern. 410; *Watson* v. *Hinsworth Hospital* (1707), 2 Vern. 596 (condition that rent of property given to charity should never be raised); *A.-G.* v. *Catherine Hall* (1820), Jac. 381, 395; *A.-G.* v. *Greenhill* (1863), 33 Beav. 193 (conditions restricting alienation).

(*n*) See *Yates* v. *University College, London* (1876), L. R. 7 H. L. 438.

(*o*) *Doe* v. *Wrighte* (1819), 2 B. & Ald. 710; *Poor* v. *Mial* (1821), 6 Madd. 32; *Henchman* v. *A.-G.* (1834), 3 My. & K. 485 (gifts of land on condition that part should be assigned to charitable uses void under the old mortmain law).

(*p*) *A.-G.* v. *Christ's Hospital* (1790), 3 Bro. C. C. 165; *Re Richardson's Will* (1887), 57 L. T. 17.

(*q*) *Re Robinson, Wright* v. *Tugwell*, [1892] 1 Ch. 95; affirmed [1897] 1 Ch. 85, C. A.

(*r*) *A.-G.* v. *Christ's Hospital, supra*; *A.-G.* v. *Andrew* (1798), 3 Ves. 646; *A.-G.* v. *Caius College* (1837), 6 L. J. (CH.) 282; *Jack* v. *Burnett* (1846), 12 Cl. & Fin. 812, 828, H. L.; *A.-G.* v. *Wax Chandlers' Co.* (1873), L. R. 6 H. L. 1, 19; *Re Richardson's Will, supra*; and see *A.-G.* v. *Merchant Venturers' Society* (1842), 11 L. J. (CH.) 355.

(*s*) *A.-G.* v. *Andrew, supra*; *A.-G.* v. *Caius College, supra*.

(*t*) *A.-G.* v. *Christ's Hospital* (1831), 9 L. J. (CH.) (O. S.) 186.

(*u*) *A.-G.* v. *Wax Chandlers' Co., supra* ("for this intent and purpose and upon this condition"); *Merchant Taylors' Co.* v. *A.-G.* (1871), 6 Ch. App. 512 ("to this intent and upon this condition"); *Wright* v. *Wilkins* (1860), 7 Jur. (N. S.) 441. See also *Goodman* v. *Saltash Corporation* (1882), 7 App. Cas. 633, 642; *Re Christchurch Inclosure Act* (1888), 38 Ch. D. 520, 531, C. A.; Duke on Charitable Uses, ed. Bridgman, 123, 124, 137.

(*w*) *A.-G.* v. *Grocers' Co.* (1843), 6 Beav. 526. See also *Re Richardson* (1887), 56 L. J. (CH.) 784, where a condition to construct and maintain lifeboats attached to a legacy to a charitable society was construed as a trust.

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property (*x*). So also where the gift is on condition that the donees perform certain duties (*y*), or that a minister should preach in a black gown (*z*).

290. A perpetual condition, not being a trust, is valid (*a*).

An assurance of land to a charity, if a *bonâ fide* sale, but not if a gift, may be made revocable (*b*). There is apparently no objection to trusts of personalty in favour of a charity being made revocable (*c*).

SUB-SECT. 2.—*Limited Gifts.*

Termination of benefit of gift.

291. The interest of the charity may be made to terminate automatically on the happening of a particular event (*d*), or the interest of the charity may be made to depend on the continuance of a particular state of circumstances (*e*).

Gift by way of springing use.

Again, the gift to charity may be a springing use, that is, the gift is not to take effect until a particular event occurs (*f*).

The undisposed-of interest in these cases belongs not to the charity, but to the donor, and passes under his will, or if he dies intestate devolves as part of his estate (*g*).

SUB-SECT. 3.—*Gifts over.*

Condition with gift over on breach strictly enforced.

292. The rule of equity, under which a forfeiture on breach of condition is relieved against (*h*), does not apply where there is a gift over on such breach (*i*). Thus, where property is given upon certain charitable trusts, with a proviso that in certain events it is to be transferred and held upon other charitable trusts, the property will pass upon the happening of the particular event (*j*), notwithstanding the general rule that a charitable purpose is not defeated

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(*x*) *Jack* v. *Burnett* (1846), 12 Cl. & Fin. 812, H. L. (a gift to a college on condition that three bursars should be maintained); *Re Tyler*, [1891] 3 Ch. 252 (condition that a tomb should be kept in repair).

(*y*) *A.-G.* v. *Christ's Hospital* (1830), 1 Russ. & M. 626; *A.-G.* v. *Cordwainers' Co.* (1833), 3 My. & K. 534, *per* LEACH, M.R., at p. 543: "The imposition of a penalty for non-performance of the condition implies a benefit, if the condition be performed, and is inconsistent with any other intention, than that the testator meant to give a beneficial interest to the Company upon the terms of complying with the directions contained in his will."

(*z*) *Re Robinson*, [1897] 1 Ch. 85, C. A.

(*a*) *Re Tyler*, [1891] 3 Ch. 252.

(*b*) *Re Peel's* (*Sir Robert*) *School at Tamworth* (1868), 3 Ch. App. 513.

(*c*) Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42), s. 4 (3); and p. 128, *ante*.

(*d*) *Lyons Corporation* v. *Bengal* (*Advocate-General*) (1875), 1 App. Cas. 91 (legacy for redemption of prisoners, if none to fall into residue); *Re Randell* (1888), 38 Ch. D. 213, 218 (if payment was demanded for seats in a church). See also cases of gifts over, *infra*.

(*e*) *Re Hartshill Endowment* (1861), 30 Beav. 130 (so long as services were conducted in a particular way); *A.-G.* v. *Molland* (1832), You. 562 (preaching of particular doctrines); *A.-G.* v. *Pyle* (1738), 1 Atk. 435 (so long as a school continued to be endowed).

(*f*) *A.-G.* v. *Craven* (*Earl*) (1856), 21 Beav. 392, 400.

(*g*) *A.-G.* v. *Pyle*, *supra*; *Re Randell*, *supra*; *Re Blunt's Trusts*, *Wigan* v. *Clinch*, [1904] 2 Ch. 767.

(*h*) *Cage* v. *Russel* (1682), 2 Vent. 352; *Hollinrake* v. *Lister* (1826), 1 Russ. 500, 508. See title WILLS.

(*i*) *Simpson* v. *Vickers* (1807), 14 Ves. 341.

(*j*) *Christ's Hospital* v. *Grainger* (1849), 1 Mac. & G. 460; *Re Orchard Street Schools* (*Trustees*), [1878] W. N. 211.

by the neglect of the trustee or the failure or absence of trust machinery (*k*).

On the other hand, where the gift over to another charity is to be considered not as authorising the neglect of the prior trust, but as a collateral remedy to secure the testator's charitable intention as expressed in the prior gift, neglect on the part of the trustees to observe a condition (*l*) or perform a trust (*m*) does not occasion a forfeiture.

Forfeiture.

The onus of proof that a forfeiture has taken place is on the party alleging it (*n*). The court construes forfeiture clauses strictly (*o*). A forfeiture is not occasioned by the compulsory purchase of the property under statutory powers (*p*).

Validity of gift over.

293. Gifts over in case the previous charitable gifts should be void, as contrary to public policy or superstitious, have been supported (*q*); but a gift over in the event of a legacy to a charity not being laid out in a particular way within a definite period may in certain circumstances be repugnant and void (*r*).

A prior estate is not extended by the invalidity or failure of a gift over (*s*).

The Statute of Limitations is not applicable in the case of property held by trustees in trust for one or other of rival claimants (*t*), but lapse of time may operate to bar the right of a person claiming the benefit of a gift over (*u*).

Where there was a gift over in certain events from one charity

(*k*) *Brown* v. *Higgs* (1803), 8 Ves. 561, 574. As to the possibility of a gift over taking effect in part, see *Re Barnett* (1908), *Times* (July 10, 1908).

(*l*) *A.-G.* v. *Christ's Hospital* (1830), 1 Russ. & M. 626.

(*m*) *Re Upton Warren* (1833), 1 My. & K. 410; *Re Richardson's Will* (1887), 58 L. T. 45.

(*n*) *Re Hartshill Endowment* (1861), 30 Beav. 130; and see *Re Conington* (1860), 8 W. R. 444. In both of these cases the question was whether a condition requiring the performance of the Church of England service had been satisfied.

(*o*) *Re Beard's Trusts, Butlin* v. *Harris*, [1904] 1 Ch. 270, where a gift over on a school becoming subject to a school board was held not to take effect on the school coming under the control of a county council, and no forfeiture took place; and see *Re Blunt's Trusts, Wigan* v. *Clinch*, [1904] 2 Ch. 767, where a forfeiture was held to have taken place, inasmuch as there was a bequest of an annuity for the support of national schools with a gift over if funds necessary for carrying on the schools should be raised under powers of any Act of Parliament

(*p*) *Re Orchard Street Schools (Trustees)*, [1878] W. N. 211.

(*q*) *De Themmines* v. *De Bonneval* (1828), 5 Russ. 288 (gift over "if the previous trusts or any of them should be adjudged to be void or incapable of being performed"); *Sibley* v. *Perry* (1802), 7 Ves. 522; *Carter* v. *Green* (1857), 3 K. & J. 591; *Warren* v. *Rudall* (1858), 4 K. & J. 619, varied on appeal *sub nom. Hall* v. *Warren* (1861), 9 H. L. Cas. 420, where the majority of the judges held that the prior limitation, though in fact void under the Charitable Uses Act, 1735 (9 Geo. 2, c. 36), failed owing to the breach of the condition specified in the will. Compare, on the other hand, *A.-G.* v. *Tyndall* (1764), 2 Eden, 207. As to persons entitled on failure of superstitious gifts, see *West* v. *Shuttleworth* (1835), 2 My. & K. 684 (next of kin if gift of personalty); *Croft* v. *Evetts* (1605), Moore (K. B.), 784 (heir-at-law if gift of realty).

(*r*) *Re Restell* (1901), 17 T. L. R. 395. It may be doubted whether this proposition would be true in all cases. The court, however, in *Re Restell, supra*, enforced the condition by ordering payment of the legacy in instalments as the work desired by the testator progressed.

(*s*) *Robinson* v. *Wood* (1858), 27 L. J. (CH.) 726, following *Doe* d. *Blomfield* v. *Eyre* (1848), 5 C. B. 713, Ex. Ch.

(*t*) *Christ's Hospital* v. *Grainger* (1848), 1 Mac. & G. 465; see Trustee Act, 1888 (51 & 52 Vict. c. 59), s. 8.

(*u*) *Re Orchard Street Schools (Trustees), supra.*

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to another, and the trusts of the prior charity were remodelled by Act of Parliament, compensation was paid to the second charity in respect of their loss (*w*).

Where there is a bequest to an institution upon certain trusts, and a gift over in case the institution refuses the bequest, or accepts it and refuses to carry out the conditions attached, the gift over does not take effect if the bequest is accepted merely because the prior gift is declared by the court to be non-charitable (*x*).

SUB-SECT. 4.—*Rule against Perpetuities.*

Where rule avoids gifts.

294. A perpetual trust is invariably void unless it is also charitable (*a*). Thus, perpetual trusts for non-charitable institutions (*b*) or non-charitable objects (*c*) are void. But a legacy to a perpetual non-charitable institution is valid if, when paid, it will not become subject to any trust preventing the members for the time being of the institution from spending it as they please (*d*). On the other hand, a gift of income for an unlimited period to a non-charitable association, where there is no intention, express or implied, that the donee is to take the corpus, is void as a perpetuity (*e*).

A charity cannot be a trustee for a perpetual non-charitable purpose (*f*); and if the terms of a gift require a portion of the fund to be applied for a non-charitable purpose for ever, the gift will, at any rate to the extent of the sum required, be void as a perpetuity (*g*).

No limit where trust once established for charity.

295. Where, however, a charitable trust has once come into operation, the rule against perpetuities is not applicable (*h*), and therefore a charitable trust may be made to last for any period, whether perpetual, indefinite, or limited (*i*).

(*w*) Naval Knights of Windsor (Dissolution) Act, 1892 (55 & 56 Vict. c. 34).

(*x*) *Re Barnett* (1908), *Times* (July 10, 1908).

(*a*) *Thomson* v. *Shakespear* (1860), 1 De G. F. & G. 399; *Carne* v. *Long* (1860), 2 De G. F. & J. 75; *Rickard* v. *Robson* (1862), 31 Beav. 244; *Re Dutton* (1878), 4 Ex. D. 54; *Re St. Stephen, Coleman Street* (1888), 39 Ch. D. 492, 503; *Re Norwich Town Close Estate Charity* (1889), 40 Ch. D. 298, 307; *Income Tax Commissioners* v. *Pemsel*, [1891] A. C. 531, 581. As to the rule against perpetuities generally, see title PERPETUITIES.

(*b*) *Thomson* v. *Shakespear, supra*; *Carne* v. *Long, supra*; *Re Dutton, supra*; *Re Clark* (1875), 1 Ch. D. 497 (gift to non-charitable friendly society); *Yeap Cheah Neo* v. *Ong Cheng Neo* (1875), L. R. 6 P. C. 381 (gift for perpetual family burying ground); *Hoare* v. *Hoare* (1886), 56 L. T. 147; *Re Amos, Carrier* v. *Price*, [1891] 3 Ch. 159, 164 (trade union); *Re Gassiot* (1901), 70 L. J. (CH.) 242 (gift for benefit of class of persons without reference to poverty); *Re Swain*, [1908] W. N. 209 (gift, of income only, for library).

(*c*) *E.g.*, the repair of a tomb not forming part of the fabric of a church (*Gravenor* v. *Hallum* (1767), Amb. 643; *Doe* v. *Pitcher* (1815), 3 M. & S. 407; *Lloyd* v. *Lloyd* (1852), 2 Sim. (N. S.) 255; *Rickard* v. *Robson* (1862), 31 Beav. 244; *Fowler* v. *Fowler* (1864), 33 Beav. 616; *Hoare* v. *Osborne* (1866), L. R. 1 Eq. 585; *Toole* v. *Hamilton*, [1901] 1 I. R. 383); but see *Re Pardoe*, [1906] 2 Ch. 184, where a gift for the repair of tombstones for a particular class of persons was held valid.

(*d*) *Re Clarke*, [1901] 2 Ch. 110, 114.

(*e*) *Re Swain, supra.*

(*f*) *Re Tyler*, [1891] 3 Ch. 252, 258; see also *Re Freeman*, [1908] 1 Ch. 720, C. A. As to trusts for repairing tombs, see p. 118, *ante*.

(*g*) *Re Tyler, supra*, at p. 259.

(*h*) *Chamberlayne* v. *Brockett* (1872), 8 Ch. App. 206, 211; *A.-G.* v. *Webster* (1875), L. R. 20 Eq. 483, 491; *Goodman* v. *Saltash Corporation* (1882), 7 App. Cas. 633, 650, 651; *Income Tax Commissioners* v. *Pemsel, supra*, at pp. 581, 582.

(*i*) *Re Randell* (1888), 38 Ch. D. 213, 218; *Re Bowen, Lloyd Phillips* v. *Davis*, [1893] 2 Ch. 491, 494.

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296. Nor has the rule against perpetuities any application to a gift over in a certain event of property from charity A to charity B (*j*), even where the event is the non-repair by charity A of the testator's tomb (*k*). But this principle does not extend to cases where (1) an immediate gift in favour of private individuals is followed by an executory gift in favour of charity, or (2) an immediate gift in favour of charity is followed by an executory gift in favour of private individuals (*l*). Where there is a gift over to residue on failure of a charitable trust, it is unnecessary to consider whether the gift over is void as a perpetuity, as the fund in any case falls into residue by operation of law (*m*).

Application of rule where there is a gift over.

297. A charitable trust which may, but need not, take effect within the time allowed by the rule against perpetuities is void (*n*) unless the prior limitation is also charitable (*o*); and a future gift which is subject to a condition precedent which need not be fulfilled within that period fails (*p*). So also a trust for the benefit of a charity is void if limited to take effect after an indefinite failure of issue (*q*), or upon alienation (*r*).

Trust which may be too remote.

But the fact that the particular application of a charitable gift is indefinitely postponed does not render the gift void where the gift, as distinguished from the application of it, is immediate (*a*).

Postponement of application only of gift.

298. An option in a lease to a corporation for more than twenty-one years for public purposes enabling the corporation at any time during the term to purchase the land at a certain price is void as a perpetuity, notwithstanding that the option was given for charitable purposes (*b*).

Option to purchase.

A provision in a conveyance of land upon charitable trust that leases shall be granted to the descendants of the donor for ever (*c*), or that, if at any time thereafter the premises conveyed should be used for purposes other than those specified in the conveyance, the

Reverter.

(*j*) *Christ's Hospital* v. *Grainger* (1849), 1 Mac. & G. 460; *Re Tyler*, [1891] 3 Ch. 252.

(*k*) *Ibid.*

(*l*) *Re Bowen, Lloyd Phillips* v. *Davis*, [1893] 2 Ch. 491, 494; *Re Barnett* (1908), *Times* (July 10, 1908); and see *Chamberlayne* v. *Brockett* (1872), 8 Ch. App. 206, 211; *Worthing Corporation* v. *Heather*, [1906] 2 Ch. 537.

(*m*) *Re Blunt's Trusts, Wigan* v. *Clinch*, [1904] 2 Ch. 767.

(*n*) *Chamberlayne* v. *Brockett, supra*; *Re Roberts* (1881), 19 Ch. D. 520; *Re White* (1886), 33 Ch. D. 449, 453; *Re Bowen, Lloyd Phillips* v. *Davis, supra*; *Re Swain, Monckton* v. *Hands*, [1905] 1 Ch. 669, C. A.

(*o*) *Society for the Propagation of the Gospel* v. *A.-G.* (1826), 3 Russ. 142; *Christ's Hospital* v. *Grainger* (1849), 1 Mac. & G. 460; *Re Tyler*, [1891] 2 Ch. 225.

(*p*) *Chamberlayne* v. *Brockett, supra*; *Re White, supra*; *Re Stratheden and Campbell* (*Lord*), *Alt* v. *Stratheden and Campbell* (*Lord*), [1894] 3 Ch. 265; *Worthing Corporation* v. *Heather, supra.*

(*q*) *Charitable Donations and Bequests Commissioners* v. *De Clifford* (*Baroness*) (1841), 1 Dr. & War. 245; *Re Johnson* (1866), L. R. 2 Eq. 716, 720; and see *Re Roberts* (1881), 19 Ch. D. 520.

(*r*) *Pewterers' Co.* v. *Christ's Hospital* (*Governors*) (1683), 1 Vern. 161.

(*a*) *Chamberlayne* v. *Brockett, supra*; *Re Gyde* (1898), 79 L. T. 261; *Wallis* v. *S.-G. for New Zealand*, [1903] A. C. 173, 186; and see *Edwards* v. *Hall* (1851), 6 De G. M. & G. 74; *Thomson* v. *Shakespear* (1860), 1 De G. F. & J. 399, 407.

(*b*) *Worthing Corporation* v. *Heather, supra.*

(*c*) *Hope* v. *Gloucester Corporation* (1855), 7 De G. M. & G. 647; *A.-G.* v. *Greenhill* (1863), 33 Beav. 193.

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lands should revert to the right heirs of the party conveying (*d*), is also void as infringing the rule against perpetuities.

Undisposed of interests.

299. Undisposed-of interests do not come within the rule against perpetuities. Thus, where a sum of money is given to a charity so long as it shall continue endowed, it is only given *quousque*, and when it ceases, if it is a gift of real estate, it descends to the heir, and if personalty it falls into residue (*e*). Moreover, if an undisposed-of interest would by operation of law fall into residue, an express direction that it should do so does not bring the case within the rule against perpetuities (*f*).

Accumulations.

300. The statutory restriction on accumulations (*g*) is applicable to charitable funds which are directed to be accumulated beyond the time permitted by the statute (*h*); and if an accumulation is directed of a fund the capital and income whereof are given absolutely to a charity, the charity is entitled to stop the accumulation and demand immediate payment of the fund (*i*).

SUB-SECT. 5.—*Surplus Income.*

Surplus at date when gift takes effect.

301. Where at the date of the bequest the property given is more than sufficient to satisfy the purposes specified in the will, and it also appears that the testator intended to give the whole property to charity, but was mistaken only as to the *quantum*, the whole is applicable to increase the charities specified (*k*).

Where, however, it appears on the face of a will that the testator knew that the value of his estate was or might be more than the amount of the specific appropriation, and he has expressed no intention of devoting the whole to charity, the surplus does not go to charity, but beneficially to the donees to whom the property is given in trust for the charitable purposes (*l*).

Subsequent increase where whole income given.

302. If property or the whole of the income arising from it (*m*), as, for example, a rent-charge equal to the annual value of the land

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(*d*) *Re Hollis' Hospital (Trustees) and Hague*, [1899] 2 Ch. 540, 553, where the conveyance was made prior to the Charitable Uses Act, 1735 (9 Geo. 2, c. 36). The question cannot arise on a conveyance made after that Act, which provides (as does the Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 59), s. 4) that the conveyance must contain no reservation of this character for the benefit of the grantor; see p. 128, *ante*.

(*e*) *A.-G.* v. *Pyle* (1738), 1 Atk. 435; *Re Randell* (1888), 38 Ch. D. 213; and see *Walsh* v. *Secretary of State for India* (1863), 10 H. L. Cas. 367.

(*f*) *Re Randell, supra; Re Blunt's Trusts, Wigan* v. *Clinch*, [1904] 2 Ch. 767; and see *Lyons Corporation* v. *Bengal (Advocate-General)* (1876), 1 App. Cas. 91.

(*g*) Accumulations Act, 1800 (39 & 40 Geo. 3, c. 98); see title PERPETUITIES.

(*h*) *Martin* v. *Margham* (1844), 14 Sim. 230; *Re Swain, Monckton* v. *Hands*, [1905] 1 Ch. 669, C. A.

(*i*) *Wharton* v. *Masterman*, [1895] A. C. 186; *Re Travis, Frost* v. *Greatorex*, [1900] 2 Ch. 541, C. A.

(*k*) *A.-G.* v. *Winchilsea (Earl)* (1791), 3 Bro. C. C. 373; *A.-G.* v. *Minshull* (1798), 4 Ves. 11; *Arnold* v. *A.-G.* (1698), cited 2 Russ. p. 442; and see pp. 194, 195, *post*.

(*l*) *A.-G.* v. *Skinners' Co.* (1826), 2 Russ. 407, 443; (1833) 5 Sim. 596. See also *Re Jordeyn's Charity* (1833), 1 My. & K. 416; *A.-G.* v. *Trinity College* (1856), 24 Beav. 383; and cases cited, note (*l*), p. 179, *post*.

(*m*) *A.-G.* v. *Skinners' Co., supra*, at p. 441 (gift of rents and profits equivalent to gift of the lands themselves); *South Molton Corporation* v. *A.-G.* (1854), 5 H. L. Cas. 1, 31, 32; *Beverley Corporation* v. *A.-G.* (1857), 6 H. L. Cas. 310.

charged (*n*), is given to charity, any subsequent increase in the value of the property accrues to the charity (*o*).

303. Where there is a direction to make specific charitable payments out of the income it is a question of construction in each case whether the intention is to devote the whole property to charity (*p*).

Payments to charity out of income.

If a testator gives particular sums, not exhausting the entire income, for specified charitable purposes, and gives the remainder of the income for other charitable purposes, a question of construction arises whether any increase in the income is divisible *pro ratâ* among the specified objects and the objects entitled to the residue (*q*), or whether the whole residue of the augmented income passes to the objects entitled to the residue.

Where the surplus income is directed to be applied in repairing the premises given to the charity, the whole property is held to have been devoted to charity (*r*).

Remainder to person charged with payments.

304. If there is an express gift of surplus income to the donee who is charged with the payments, this may be interpreted in two ways: (1) as a gift of the residue, whatever it may amount to, in which case the residuary donee is entitled to any increased income (*s*); or (2) as a gift of an aliquot proportion of the whole, in which case the donee shares rateably with the other donees in any increase (*t*). The question into which of these two classes a gifts falls is a matter of construction, to be solved in each particular case by considering the instrument of foundation as a whole (*a*). Such words as "overplus," "surplus," or "residue" do not necessarily indicate that the gift is residuary (*b*).

(*n*) *Kennington Hastings' Almshouse* (1611), Duke on Charitable Uses, 71; *Hynshaw* v. *Morpeth Corporation* (1629), Duke on Charitable Uses, 69; *Eltham (Inhabitants)* v. *Warreyn* (1634), Duke on Charitable Uses, 67; *Sutton Coldfield Case* (1635), Duke on Charitable Uses, 68.

(*o*) *Ex parte Jortin* (1802), 7 Ves. 340; *A.-G.* v. *Bristol Corporation* (1820), 2 Jac. & W. 315; *A.-G.* v. *Wilson* (1834), 3 My. & K. 362.

(*p*) *A.-G.* v. *Bristol Corporation* (1820), 2 Jac. & W. 315, 318; *Beverley Corporation* v. *A.-G.* (1857), 6 H. L. Cas. 310, 333; *A.-G.* v. *Windsor (Dean and Canons)* (1860), 8 H. L. Cas. 369, 393, 394, 406.

(*q*) *A.-G.* v. *Caius College* (1837), 2 Keen, 150. See *A.-G.* v. *Coopers' Co.* (1812), 19 Ves. 187; *A.-G.* v. *Solly* (1835), 5 L. J. (CH.) 5.

(*r*) *Beverley Corporation* v. *A.-G.*, *supra*, at p. 324; *Merchant Taylors' Co.* v. *A.-G.* (1871), 6 Ch. App. 512; *A.-G.* v. *Wax Chandlers' Co.* (1873), L. R. 6 H. L. 1.

(*s*) *South Molton Corporation* v. *A.-G.* (1854), 5 H. L. Cas. 1; *Beverley Corporation* v. *A.-G.*, *supra*, at p. 326.

(*t*) *A.-G.* v. *Drapers' Co.* (1841), 4 Beav. 67; *A.-G.* v. *Jesus College, Oxford* (1861), 29 Beav. 163; and see the cases cited in the preceding note.

(*a*) *A.-G.* v. *Windsor (Dean and Canons)*, *supra*, at pp. 405, 406.

(*b*) *Beverley Corporation* v. *A.-G.*, *supra*; *South Molton Corporation* v. *A.-G.*, *supra*, at pp. 25, 26; see also as to the expression "or thereabouts," *A.-G.* v. *Trinity College* (1856), 24 Beav. 383, 392, 393. No difficulty arises where the instrument expressly directs the surplus income (*Re Jordeyn's Charity* (1833), 1 My. & K. 416; *South Molton Corporation* v. *A.-G.*, *supra*, at p. 5), or any subsequent increase (*Charitable Donations and Bequests Commissioners* v. *De Clifford (Baroness)* (1841), 1 Dr. & War. 245), to be applied for charitable or other purposes or for the benefit of the donees (*A.-G.* v. *Gascoigne* (1832), 2 My. & K. 647, where the executors took beneficially; *A.-G.* v. *Skinners' Co.* (1826), 2 Russ. 407; *A.-G.* v. *Drapers' Co.*, *supra*).

SECT. 6. Rules applicable to the Creation of Charitable Trusts.

An express gift of surplus will be disregarded where to give effect to it would defeat the intention of the donor (*c*).

305. If there is no express gift of surplus income, but the specific payments exhaust the entire income at the time of the gift, any subsequent increase (*d*) in the income is applicable to similar purposes and *primâ facie* in similar proportions (*e*). The court, however, may within certain limits vary the proportions (*f*).

Where income exhausted at date of gift.

The above rule is equally applicable whether the donor thought at the time that he was disposing of the entire income (*g*), or there are words that might have been interpreted as limiting the extent of the benevolent purpose had they stood alone, but such words are coupled with other words which show such benevolent purpose to operate to the extent of the whole fund, and the effect of the latter words will prevail (*h*).

Where whole income not exhausted at date of gift.

306. If at the time of the gift the specific payments do not exhaust the whole income, and there is no express gift of the surplus, but there is a clear intention, whether express or implied, to attach a charitable trust to the whole property, then, however deficient may be the appropriation of the whole income, the surplus will nevertheless be applicable to charity, for the general charitable intention will prevail (*i*).

Persons entitled to surplus.

The donees will not be entitled to the surplus or increase unless they are themselves a charity (*j*), or there are other circumstances

(*c*) *Re Ashton's Charity* (1859), 27 Beav. 115 (gift of surplus to six "almswomen" who would have ceased to be almswomen if they received the whole of the largely increased surplus income).

(*d*) *South Molton Corporation* v. *A.-G.* (1854), 5 H. L. Cas. 1, 32. The deficiency in case of a decrease in the income is apportionable in the same way (*Thetford School Case* (1610), 8 Co. Rep. 130 b).

(*e*) *Ibid.*; *Sutton Coldfield Case* (1635), Duke on Charitable Uses, 68; *A.-G.* v. *Townsend* (1670), Duke on Charitable Uses, 34; *Arnold* v. *A.-G.* (1698), Show. Parl. Cas. 22; *A.-G.* v. *Coventry Corporation* (1700), 2 Vern. 397; *A.-G.* v. *Johnson* (1753), Amb. 190; *A.-G.* v. *Haberdashers' Co.* (1792), 4 Bro. C. C. 103; *A.-G.* v. *Coopers' Co.* (1812), 19 Ves. 187; *A.-G.* v. *Bristol Corporation* (1820), 2 Jac. & W. 315, 317, 318, 322; *Mercers' Co.* v. *A.-G.* (1828), 2 Bli. (N. S.) 165, H. L.; *A.-G.* v. *Wilson* (1834), 3 My. & K. 362; *A.-G.* v. *Brazen Nose College* (1834), 2 Cl. & Fin. 295, 328, H. L.; *A.-G.* v. *Barham* (1835), 4 L. J. (CH.) 128; *A.-G.* v. *Coopers' Co.* (1840), 3 Beav. 29; *A.-G.* v. *Christ's Hospital* (1841), 4 Beav. 73; *A.-G.* v. *Gilbert* (1847), 10 Beav. 517; *South Molton Corporation* v. *A.-G.*, *supra*; *Beverley Corporation* v. *A.-G.* (1857), 6 H. L. Cas. 310, 320; *A.-G.* v. *Wax Chandlers' Co.* (1873), L. R. 6 H. L. 1, 22.

(*f*) *A.-G.* v. *Windsor* (*Dean and Canons*) (1860), 8 H. L. Cas. 369, 452; *A.-G.* v. *Marchant* (1866), L. R. 3 Eq. 424, 430.

(*g*) *A.-G.* v. *Marchant*, *supra*; and see *A.-G.* v. *Bristol Corporation*, *supra*, *per* Lord ELDON, at p. 332.

(*h*) Shelford, Law of Mortmain, p. 650; *A.-G.* v. *Painter-stainers' Co.* (1788), 2 Cox, Eq. Cas. 51, 55.

(*i*) *Arnold* v. *A.-G.*, *supra*; *A.-G.* v. *Sparks* (1753), Amb. 201; *A.-G.* v. *Painter-stainers' Co.*, *supra*; *A.-G.* v. *Haberdashers' Co.*, *supra*; *A.-G.* v. *Bristol Corporation*, *supra*, at p. 320; *A.-G.* v. *Skinners' Co.* (1826), 2 Russ. 407, 442; *Mercers' Co.* v. *A.-G.*, *supra*; *A.-G.* v. *Drapers' Co.* (1840), 2 Beav. 508; *A.-G.* v. *Coopers' Co.*, *supra*; *A.-G.* v. *Grocers' Co.* (1843), 6 Beav. 526, at p. 546; *South Molton Corporation* v. *A.-G.*, *supra*, at p. 32; *Beverley Corporation* v. *A.-G.*, *supra*, at p. 318; *A.-G.* v. *Windsor* (*Dean and Canons*), *supra*; *Shepherd* v. *Bristol Corporation* (1818), 3 Madd. 319, 352.

(*j*) *A.-G.* v. *Trinity College* (1856), 24 Beav. 383, 399; and see *A.-G.* v. *Bristol Corporation*, *supra*, at p. 308.

from which a contrary intention can be collected (*k*). If, however, in such a case there is no general intention to devote the whole to charity, the surplus income belongs to the parties charged with making the payments, and not to the charities (*l*), notwithstanding that such specific payments, by lapse of time or change of circumstances, have become insufficient to satisfy the purposes for which they were originally made (*m*). For the absence of any disposition of the surplus is *primâ facie* an indication of an intention to benefit the donee (*n*).

This rule has been frequently applied in the case of gifts to corporations, such as colleges (*o*), city companies (*p*), or municipal corporations (*q*), or a dean and canons (*r*), subject to or charged with specific charitable payments which do not exhaust the income, but the principle is not confined to gifts to such bodies (*s*).

Donee personally liable is entitled to surplus.

307. So, too, the donees are entitled to the surplus where it has been charged with the expense of repairs (*t*), or where they have bound themselves by penalties or covenanted to pay fixed sums to charity whether the income of the property is sufficient or not (*a*).

Where donees do not take surplus.

Donees will not take beneficially where there has been long usage to the contrary (*b*), or where by the instrument of foundation they are given power to regulate the charity (*c*).

Generally.

308. Speaking generally, the increase will belong to the donee, first, if the gift be to the donee subject to certain payments to others;

(*k*) *A.-G.* v. *Drapers' Co.* (1840), 2 Beav. 508.

(*l*) *A.-G.* v. *Bristol Corporation* (1820), 2 Jac. & W. 294, 315; *A.-G.* v. *Skinners' Co.* (1826), 2 Russ. 407, 443; *A.-G.* v. *Cordwainers' Co.* (1833), 3 My. & K. 534; *A.-G.* v. *Brazen Nose College* (1834), 2 Cl. & Fin. 295, H. L.; *A.-G.* v. *Fishmongers' Co.* (1841), 5 My. & Cr. 11; *A.-G.* v. *Grocers' Co.* (1843), 6 Beav. 526; *Jack* v. *Burnett* (1846), 12 Cl. & Fin. 812, H. L.; *South Molton Corporation* v. *A.-G.* (1854), 5 H. L. Cas. 1, 34; *A.-G.* v. *Trinity College* (1856), 24 Beav. 383; *A.-G.* v. *Windsor* (*Dean and Canons*) (1860), 8 H. L. Cas. 369; *Merchant Taylors' Co.* v. *A.-G.* (1871), 6 Ch. App. 512, 519.

(*m*) *A.-G.* v. *Gascoigne* (1833), 2 My. & K. 647; *Charitable Donations and Bequests Commissioners* v. *De Clifford* (*Baroness*) (1841), 1 Dr. & War. 245.

(*n*) *A.-G.* v. *Trinity College*, *supra*, at p. 92. See also *A.-G.* v. *Wax Chandlers' Co.* (1873), L. R. 6 H. L. 19 *et seq.*

(*o*) *A.-G.* v. *Catherine Hall* (1820), Jac. 381; *A.-G.* v. *Brazen Nose College*, *supra*; *Jack* v. *Burnett*, *supra*; *A.-G.* v. *Trinity College*, *supra*; *A.-G.* v. *Sidney Sussex College* (1869), 4 Ch. App. 722.

(*p*) *A.-G.* v. *Cordwainers' Co.*, *supra*; *A.-G.* v. *Fishmongers' Co.*, *supra*; *A.-G.* v. *Grocers' Co.*, *supra*; *A.-G.* v. *Wax Chandlers' Co.*, *supra*, at pp. 9, 19.

(*q*) *A.-G.* v. *Bristol Corporation*, *supra*; *South Molton Corporation* v. *A.-G.*, *supra*, at p. 34; *Beverley Corporation* v. *A.-G.* (1857), 6 H. L. Cas. 310.

(*r*) *A.-G.* v. *Windsor* (*Dean and Canons*), *supra*.

(*s*) *Merchant Taylors' Co.* v. *A.-G.*, *supra*, at p. 519. See *A.-G.* v. *Smythies* (1833), 2 Russ. & M. 717, 741 (master of an almshouse); and compare *A.-G.* v. *Brentwood School* (*Master*) (1833), 1 My. & K. 376; *A.-G.* v. *Atherstone Free School* (1834), 3 My. & K. 544.

(*t*) *A.-G.* v. *Skinners' Co.*, *supra*; *A.-G.* v. *Coopers' Co.* (1840), 3 Beav. 29.

(*a*) *Jack* v. *Burnett*, *supra*, at p. 828. See also *A.-G.* v. *Bristol Corporation*, *supra*, at p. 303; and compare, on the other hand, *A.-G.* v. *Merchant Venturers' Society* (1842), 5 Beav. 338.

(*b*) *Re St. Paul's School* (1870), 18 W. R. 448.

(*c*) *Ibid.*

SECT. 6. **Rules applicable to the Creation of Charitable Trusts.**

secondly, if the gift be upon condition of making certain payments subject to a forfeiture upon non-performance of the condition; or, thirdly, if the donee might be a loser by the insufficiency of the fund (*d*).

In the case of a gift to a particular body for the benefit of the body with a provision that certain members or officials are to receive specific annual sums, the body is entitled to the bulk of the property with the full increase, and the particular members or officers are entitled only to the sums specifically given them (*e*). So where property is given not for purposes of individual benefit, but for the performance of duties, any increase of income exceeding reasonable remuneration for such performance will be applied to other charitable purposes (*f*).

But a gift of the income of property to maintain poor scholars, each having so much a day, is a gift to them of the whole, and entitles them to the surplus (*g*).

SUB-SECT. 6.—*Resulting Trusts.*

No resulting trust where general intention for charity.

309. The doctrine of resulting trusts is not applicable where a clear intention to devote the property to charity is shown (*h*) and a period is fixed for the continuance of the trust, even though the application of the property may be suspended (*i*), or the objects may be uncertain (*k*) or fail (*l*).

Where a charitable corporation becomes extinct, there is no reverter, the case being merely one of failure of trust machinery, which is never fatal to a charitable trust (*m*).

Where resulting trust arises.

310. Where there is no general charitable intention to be gathered from the grant or will dedicating the property to charity, and the

(*d*) *Jack* v. *Burnett* (1846), 12 Cl. & Fin. 812, *per* Lord COTTENHAM, at p. 828.

(*e*) *South Molton Corporation* v. *A.-G.* (1854), 5 H. L. Cas. 1, 32, 33; and see *A.-G.* v. *Bristol Corporation* (1820), 2 Jac. & W. 295, 317. So in the case of a gift to a corporation consisting of a master and almsmen, with a direction that the almsmen should receive fixed stipends, the almsmen were not allowed to share rateably with the master in the increased income (*A.-G.* v. *Smythies* (1831), 2 Russ. & M. 717, 747, 748; *Re Ashton's Charity* (1859), 27 Beav. 115, where the increased income was applied to charity generally).

(*f*) *Thetford School Case* (1610), 8 Co. Rep. 130; *A.-G.* v. *Bristol Corporation*, *supra*; *A.-G.* v. *Smythies*, *supra*, at p. 747. Distinguish the case of a gift to a college for its maintenance with a provision that each scholar should have a certain sum, in which case the scholars are not entitled to share in any increased income (*ibid.*).

(*g*) *A.-G.* v. *Brentwood School* (*Master*) (1833), 1 My. & K. 376, 394; and see *A.-G.* v. *Atherstone Free School* (1834), 3 My. & K. 544, 555.

(*h*) *A.-G.* v. *Green* (1789), 2 Bro. C. C. 492; and see p. 195, *post*.

(*i*) *A.-G.* v. *Bowyer* (1798), 3 Ves. 714, 729; *Chamberlayne* v. *Brockett* (1872), 8 Ch. App. 206; *Abbott* v. *Fraser* (1874), L. R. 6 P. C. 96; and see *A.-G.* v. *Craven* (*Earl*) (1856), 21 Beav. 392.

(*k*) *Morice* v. *Durham* (*Bishop*) (1804), 9 Ves. 399, 405; *Re Shum* (1904), 91 L. T. 192.

(*l*) *Aylet* v. *Dodd* (1741), 2 Atk. 238; *A.-G.* v. *Green*, *supra*; *A.-G.* v. *West* (1858), 27 L. J. (CH.) 789; *Campbell* v. *Liverpool Corporation* (1870), L. R. 9 Eq. 579.

(*m*) *A.-G.* v. *Hicks* (1805), Highmore, Mortmain, 2nd ed. 336; and see *Hornsey District Council* v. *Smith*, [1897] 1 Ch. 834, 858 *et seq.* As to when a reverter takes place in grants to charities under the School Sites Act, 1841 (4 & 5 Vict. c. 38), s. 2, see *A.-G.* v. *Edalji* (1908), 97 L. T. 292; *A.-G.* v. *Price* (1908), 24 T. L. R. 761; and title EDUCATION.

gift fails, the subject-matter of the gift results to the donor or his heirs or next of kin according to the circumstances (*n*). So also where a conveyance is made on charitable trusts to be afterwards declared and no subsequent declaration is made (*o*). And when property is given for charitable purposes only on the happening of a particular event, the doctrine of resulting trusts applies until that event occurs (*a*).

SECT. 6. Rules applicable to the Creation of Charitable Trusts.

SECT. 7.—*Presumption of Charitable Trusts from Usage.*

311. Where the origin of a charity is obscure, or where the instrument of endowment is lost or is ambiguous, usage constitutes presumptive evidence of charitable trusts (*b*). The court will presume whatever may be necessary, even an Act of Parliament (*c*), to give this usage a legal origin and render it valid (*d*).

Usage as presumptive evidence of trusts.

But when the deed of foundation is produced and is clear, nothing can be presumed to the contrary of that which is established by such evidence (*e*).

The court will be guided by the earliest evidence of usage, and will if possible presume that what was then done and long afterwards continued was rightly done (*f*).

Thus, a charitable trust may be presumed from such circumstances as the receipt for a long period of a rent-charge by a charity (*g*), or the letting of certain rights of pasturage by a parish vestry (*h*), or the exercise by the free inhabitants of a borough of a right of oyster fishery (*i*).

Instances of usage.

(*n*) *A.-G.* v. *Oxford* (*Bishop*) (1786), cited at 4 Ves. 432; *A.-G.* v. *Winchilsea* (*Earl*) (1791), 3 Bro. C. C. 374, 379; and see *A.-G.* v. *Greenhill* (1863), 33 Beav. 193. There is no resulting trust in the case of a gift to charity subject to an illegal or void condition (see p. 171, *ante*). On the failure of an object not legally charitable, *e.g.*, a fund subscribed for two poor ladies, there is a resulting trust (*Re Abbott Fund* (*Trusts*), *Smith* v. *Abbott*, [1900] 2 Ch. 326). See also *A.-G.* v. *Bristol Corporation* (1820), 2 Jac. & W. 295, 307, 308; *Re Andrew's Trust*, *Carter* v. *Andrew*, [1905] 2 Ch. 48, 52.

(*o*) *A.-G.* v. *Windsor* (*Dean and Canons*) (1858), 24 Beav. 679.

(*a*) *A.-G.* v. *Craven* (*Earl*) (1856), 21 Beav. 392.

(*b*) *A.-G.* v. *St. Cross Hospital* (1853), 17 Beav. 435, 464; *A.-G.* v. *Ewelme Hospital* (1853), 17 Beav. 366; *A.-G.* v. *Gould* (1860), 28 Beav. 485, 501.

(*c*) *A.-G.* v. *Ewelme Hospital*, *supra*; *A.-G.* v. *Mercers' Co.* (1870), 18 W. R. 448, 449.

(*d*) *Ibid.*; *Cocksedge* v. *Fanshaw* (1783), 3 Bro. Parl. Cas. 703; *Goodman* v. *Saltash Corporation* (1882), 7 App. Cas. 640, 644, where from long enjoyment by free inhabitants of a borough of a right of fishery a charitable trust in their favour under a lost grant to the corporation was presumed; *Haigh* v. *West*, [1893] 2 Q. B. 19, 26, where enrolment of a lost grant was presumed; and see *Fitzhardinge* (*Lord*) v. *Purcell*, [1908] 2 Ch. 139, 165; *Chesterfield* (*Lord*) v. *Harris*, [1908] 2 Ch. 397.

(*e*) *A.-G.* v. *St. Cross Hospital*, *supra*; *A.-G.* v. *Ewelme Hospital*, *supra*; *A.-G.* v. *Gould*, *supra*; and see *Edinburgh Corporation* v. *Lord Advocate* (1879), 4 App. Cas. 823.

(*f*) *A.-G.* v. *Dalton* (1851), 13 Beav. 141, 152.

(*g*) *A.-G.* v. *West* (1858), 27 L. J. (CH.) 789; and see *Stanley* v. *Norwich Corporation* (1887), 3 T. L. R. 506, where certain rents had been paid to freemen of a city for a long period.

(*h*) *Haigh* v. *West*, *supra*; and see *A.-G.* v. *Cashel Corporation* (1842), 3 Dr. & War. 294.

(*i*) *Goodman* v. *Saltash Corporation*, *supra*; and compare *Fitzhardinge* (*Lord*) v. *Purcell*, *supra*.

SECT. 7. Presumption of Charitable Trusts from Usage.

Various periods of uninterrupted usage have been held sufficient to establish charitable trusts (*k*). In the absence of written documents, the trusts of Roman Catholic charities are established by twenty years' consistent and continuous usage (*l*), and the trusts of any Dissenting institution by twenty-five years' usage (*m*).

Period of usage.

Part IV.—Effectuation of Charitable Trusts by means of Schemes and the Cy-près Doctrine.

SECT. 1.—*In General.*

Jurisdiction.

312. When it becomes necessary to define the objects or prescribe the mode of administering a charity a scheme is usually directed (*n*) either by the court (*o*) or by the Charity Commissioners or Board of Education (*p*), though in some cases the disposition is made by the Crown (*q*).

Powers of the court where scheme not directed.

313. When the matter is before the court, and it is not thought necessary to direct a scheme, the court may, as the case requires, refer the apportionment of funds to the master (*r*), or retain a measure of control by giving any of the parties leave to apply if necessary (*s*), or by ordering the person applying the fund to account for its distribution (*t*), or by directing payment of the capital into court and payment of the dividends to the person intrusted with their distribution (*u*).

Property situate or payable out of the jurisdiction.

314. The court will not direct a scheme to be settled where the property of the charity is out of the jurisdiction, or is a fund payable to trustees out of the jurisdiction (*a*). In such a case the

(*k*) *A.-G.* v. *West* (1858), 27 L. J. (CH.) 789 (30 years); *A.-G.* v. *Moor* (1855), 20 Beav. 119 (100 years); *Re Parker's Charity* (1863), 32 Beav. 654 (100 years); *Bunting* v. *Sargent* (1879), 13 Ch. D. 330, 336 (105 years); *Re St. Nicholas Acons Parish* (1889), 60 L. T. 532 (200 years); *Queens' College, Cambridge, Case* (1821), Jac. 1 (250 years); *Re St. Alphage, London Wall* (1888), 59 L. T. 614 (300 years); *A.-G.* v. *Mercers' Co.*, *supra* (350 years).

(*l*) Roman Catholic Charities Act, 1860 (23 & 24 Vict. c. 134), s. 5; and see p. 164, *ante*.

(*m*) Nonconformists' Chapels Act, 1844 (7 & 8 Vict. c. 45), s. 2. See *A.-G.* v. *Pearson* (1817), 3 Mer. 353, 400; *A.-G.* v. *Hutton* (1844), Drury *temp.* Sug. 480; *A.-G.* v. *Bunce* (1868), L. R. 6 Eq. 563; *A.-G.* v. *Anderson* (1888), 57 L. J. (CH.) 643; and p. 164, *ante*.

(*n*) As to when a scheme will be directed, see p. 183, *post*. As to the practice on settling a scheme, see p. 337, *post*.

(*o*) See p. 185, *post*.

(*p*) See p. 185, *post*.

(*q*) See p. 287, *post*.

(*r*) *White* v. *White* (1778), 1 Bro. C. C. 15; *Re Hyde* (1873), 22 W. R. 69.

(*s*) *Waldo* v. *Caley* (1809), 16 Ves. 206, 211; *Horde* v. *Suffolk* (*Earl*) (1833), 2 My. & K. 59; *Re Lea* (1887), 34 Ch. D. 528, 535.

(*t*) *A.-G.* v. *Glegg* (1738), Amb. 584; *A.-G.* v. *Sherborne Grammar School* (*Governors*) (1854), 18 Beav. 256.

(*u*) *M'Coll* v. *Atherton* (1848), 12 Jur. 1042.

(*a*) *E.g.*, in Scotland (*Edinburgh Corporation* v. *Aubery* (1753), Amb. 236; *A.-G.* v. *Lepine* (1818), 2 Swan. 181; *Emery* v. *Hill* (1826), 1 Russ. 112);

court may direct an inquiry whether the trust can be carried into effect according to the law of the particular country (*b*), and may pay the money to the persons selected by the testator as the instruments of his benevolence, if they are proper persons to act as trustees (*c*), but not otherwise (*d*), or may appoint new trustees for the purpose (*e*), or may retain the fund in court and direct payment of the dividends to the persons intrusted by the testator with the application of them (*f*), or may retain the fund in court to await the result of an application to the foreign court (*g*).

Where charity nuisance.

315. Except under the authority of an Act of Parliament, a charity or charitable institution cannot be established in such manner or place as to constitute a nuisance (*h*).

Breach of restrictive covenant

Nor can such charitable institutions as hospitals, institutions for educating and lodging working girls, and the like, be established in premises subject to a restrictive covenant for user as a private dwelling-house only, and not for purposes of trade or business, if such establishment would be a breach of the covenant (*i*).

SECT. 2.—*Schemes.*

SUB-SECT. 1.—*When directed.*

Where schemes necessary.

316. A scheme is generally necessary on any *cy-près* application of a charitable trust (*k*) unless the trust is altered merely in detail (*l*).

Switzerland (*Minet* v. *Vulliamy* (1819), cited 1 Russ. 113, n.); France (*Martin* v. *Paxton* (1824), cited 1 Russ. 116); America (*Society for the Propagation of the Gospel etc.* v. *A.-G.* (1826), 3 Russ. 142; *New* v. *Bonaker* (1867), L. R. 4 Eq. 655).

(*b*) *Thompson* v. *Thompson* (1844), 1 Coll. 381, 394 (Scotland). See *New* v. *Bonaker* (1867), L. R. 4 Eq. 655 (United States); and pp. 194, 307, *post.*

(*c*) *Edinburgh Corporation* v. *Aubery* (1753), Amb. 236; *A.-G.* v. *Lepine* (1818), 2 Swan. 181; *Minet* v. *Vulliamy, supra; Martin* v. *Paxton, supra; Emery* v. *Hill* (1826), 1 Russ. 112; *Collyer* v. *Burnett* (1829), Taml. 79; *Mitford* v. *Reynolds* (1842), 1 Ph. 185, 197. See also *New* v. *Bonaker, supra; Lyons Corporation* v. *Bengal* (*Advocate-General*) (1876), 1 App. Cas. 110.

(*d*) *Lyons Corporation* v. *East India Co.* (1836), 1 Moo. P. C. C. 175.

(*e*) *A.-G.* v. *Stephens* (1834), 3 My. & K. 347. See also *A.-G.* v. *Fraunces*, [1866] W. N. 280, where a fund given to a school in a parish in America was directed to be paid to the governors of another school in the same parish, the original school having disappeared.

(*f*) *A.-G.* v. *Lepine, supra.* See also *A.-G.* v. *Sturge* (1854), 19 Beav. 597, where the official charged by the testator with the distribution of a fund had died, and the court directed payment to be made to the holder of the office for the time being.

(*g*) *Forbes* v. *Forbes* (1854), 18 Beav. 552; *Re Fraser* (1883), 22 Ch. D. 827.

(*h*) *Baines* v. *Baker* (1752), Amb. 158; *Metropolitan Asylum District* v. *Hill* (1881), 6 App. Cas. 193; *Fleet* v. *Metropolitan Asylums Board* (1886), 2 T. L. R. 361; *Matthews* v. *Sheffield Corporation* (1887), 31 Sol. Jo. 773; *Bendelow* v. *Wortley Guardians* (1887), 57 L. J. (CH.) 762; *A.-G.* v. *Manchester Corporation*, [1893] 2 Ch. 87; *A.-G.* v. *Nottingham Corporation*, [1904] 1 Ch. 673. For the class of hospital which has been held to constitute a nuisance, see *Tod-Heatly* v. *Benham* (1888), 40 Ch. D. 80.

(*i*) *German* v. *Chapman* (1877), 7 Ch. D. 271, C. A. (institution for education and lodging of girls); *Bramwell* v. *Lacy* (1879), 10 Ch. D. 691, and *Portman* v. *Home Hospital Association* (1879), 27 Ch. D. 81, n. (hospitals); *Rolls* v. *Miller* (1884), 27 Ch. D. 71, C. A. (institution for working girls); and see *Barnard Castle Urban Council* v. *Wilson*, [1901] 2 Ch. 817.

(*k*) *Martin* v. *Margham* (1844), 14 Sim. 230; *Biscoe* v. *Jackson* (1886), 35 Ch. D. 460, C. A. As to *cy-près* application, see p. 190, *post.*

(*l*) *Re Richardson* (1888), 56 L. J. (CH.) 784.

SECT. 2. Schemes.

Schemes are also required where the trusts of the instrument of foundation are ambiguous or insufficient and no particular objects are defined (*m*), or where there are no trustees, or the trustees are dead (*n*) or refuse to act (*o*), or where there has been an increase in the revenue of the charity (*p*), or the persons managing the charity have misapplied its property (*q*), or where for any other reason it is thought expedient to regulate the administration of the charity (*r*).

When schemes directed though not essential.

317. Schemes may be directed even where there is an unlimited discretion as to distribution left to trustees (*s*), but in such a case the scheme is framed as far as possible to meet the wishes of the trustees (*t*).

And where legacies (*a*) or annual sums (*b*) are given to be distributed in charity at the discretion of private individuals or public institutions, and no permanent trust is intended, schemes for the application of the moneys are not essential, though in many cases they are directed by the court (*c*).

Gifts to established institutions may be paid without a scheme.

318. Legacies to established institutions, whether incorporated (*d*) or not (*e*), or to the president (*f*), trustees, treasurer, or officers (*g*) thereof, as part of their general funds or upon similar trusts to those upon which the general funds are held, may be paid without a scheme being directed (*h*).

(*m*) *A.-G.* v. *Clarke* (1762), Amb. 422; *Re White*, [1893] 2 Ch. 41, C. A.

(*n*) *Moggridge* v. *Thackwell* (1802), 7 Ves. 36; *A.-G.* v. *Gladstone* (1842), 13 Sim. 7; *Re Stane's Will* (1853), 21 L. T. (o. s.) 261.

(*o*) *Reeve* v. *A.-G.* (1843), 3 Hare, 191.

(*p*) See, for example, *A.-G.* v. *Caius College* (1837), 2 Keen, 150; *A.-G.* v. *Louth Free School (Wardens)* (1851), 14 Beav. 201; *Re Campden Charities* (1881), 18 Ch. D. 310, C. A.

(*q*) *A.-G.* v. *Coopers' Co.* (1812), 19 Ves. 187.

(*r*) See *A.-G.* v. *St. Olave, Southwark (Free Grammar School)* (1837), Coop. Pr. Cas. 267; *A.-G.* v. *Dedham School* (1857), 23 Beav. 350.

(*s*) *A.-G.* v. *Stepney* (1804), 10 Ves. 22; *Waldo* v. *Caley* (1809), 16 Ves. 206, 211; *Jemmit* v. *Verril* (1826), Amb. 585, n.; *Barclay* v. *Maskelyne* (No. 2) (1858), 4 Jur. (N. S.) 1294; *Re Hurley* (1900), 17 T. L. R. 115; and compare *Re Barnett* (1860), 29 L. J. (CH.) 871; *Dick* v. *Audsley*, [1908] A. C. 347, 351.

(*t*) *Bennett* v. *Honywood* (1772), Amb. 708, 710; *A.-G.* v. *Gaskell* (1831), 9 L. J. (o. s.) (CH.) 188; *Re Delmar Charitable Trust*, [1897] 2 Ch. 163, 168.

(*u*) *A.-G.* v. *Glegg* (1738), Amb. 584; *Johnston* v. *Swann* (1819), Amb. 585. n.; *Re Barnett, supra; Re Lea* (1887), 34 Ch. D. 528; and see *Re Garrard*, [1907] 1 Ch. 382.

(*b*) *Horde* v. *Suffolk (Earl)* (1833), 2 My. & K. 59. See also *Waldo* v. *Caley, supra; Powerscourt* v. *Powerscourt* (1824), 1 Mol. 616; *Shrewsbury* v. *Hornby* (1846), 5 Hare, 406; *Mahon* v. *Savage* (1803), 1 Sch. & Lef. 114; *Re Lea, supra.*

(*c*) *Doyley* v. *Doyley* (1735), 7 Ves. 58, n.; *A.-G.* v. *Stepney* (1804), 10 Ves. 22; *Paice* v. *Canterbury (Archbishop)* (1807), 14 Ves. 364; *Baker* v. *Sutton* (1836), 1 Keen, 224; *Pocock* v. *A.-G.* (1876), 3 Ch. D. 342, C. A.; *Re Hurley, supra.*

(*d*) *Emery* v. *Hill* (1826), 1 Russ. 112; *Society for the Propagation of the Gospel* v. *A.-G.* (1826), 3 Russ. 142; *A.-G.* v. *Christ's Hospital* (1830), 1 Russ. & M. 626; *Re Richardson* (1887), 56 L. J. (CH.) 784 (Royal National Lifeboat Institution).

(*e*) *Re M'Auliffe*, [1895] P. 290. See also *Re Lalor* (1901), 85 L. T. 643.

(*f*) *Walsh* v. *Gladstone* (1843), 1 Ph. 290 (president of a college).

(*g*) *Wellbeloved* v. *Jones* (1822), 1 Sim. & St. 40, 43; *Emery* v. *Hill, supra.*

(*h*) See also *Minet* v. *Vulliamy* (1819), 1 Russ. 113, n.; *Carter* v. *Green* (1857), 3 K. & J. 591, where the gift was to an institution one of whose objects was the purchase of land; *Makeown* v. *Ardagh* (1876), I. R. 10 Eq. 445.

On the same principle legacies for the benefit of a parish church (*i*), or a Roman Catholic (*k*) or Dissenters' (*l*) chapel, may be paid to the churchwardens and trustees respectively.

When gifts subject to special conditions.

A scheme is not necessary in the case of a gift to an institution for its general purposes but subject to special conditions, as, for example, that certain lifeboats should be maintained (*m*), or that a particular person should have rights of nomination to an hospital (*n*).

SUB-SECT. 2.—*Settlement of Schemes by the Court.*

In what cases the court will settle a scheme.

319. Whether a scheme for the regulation of a charity should be settled by the court or by the Charity Commissioners depends on the circumstances in each case, though in many instances each authority may have equal jurisdiction (*o*).

As a rule the court will make schemes in contentious cases (*p*), or in proceedings taken by the Attorney-General *ex officio*, or where a scheme becomes necessary in the course of an administration action (*q*) or of any charitable proceedings (*r*).

Court does not administer charitable trusts.

Where the court undertakes the execution of a charitable trust, it does not as a rule retain control of the funds and give the necessary directions for its administration from time to time, but it directs the settlement of a scheme, leaving the trustees to administer the charity in accordance therewith (*s*).

The court may in its discretion direct a scheme, and at the same time order that it should not come into operation for a period, or until further application to the court is made (*t*).

SUB-SECT. 3.—*Settlement of Schemes by the Charity Commissioners or Board of Education.*

Application to Commissioners to establish a scheme.

320. The Charity Commissioners may, where the gross annual income of the charity is less than £50 (*a*), on the written application of the Attorney-General, or all or any of the trustees or persons administering, or claiming to administer, or interested in a charity, or any two or more inhabitants of any parish or place where the charity is administered (*b*), establish a scheme for the administration of the charity (*c*).

(*i*) *A.-G.* v. *Ruper* (1722), 2 P. Wms. 126.
(*k*) *De Windt* v. *De Windt* (1854), 23 L. J. (CH.) 776.
(*l*) *Bunting* v. *Marriott* (1854), 19 Beav. 163.
(*m*) *Re Richardson* (1887), 56 L. J. (CH.) 784.
(*n*) *A.-G.* v. *Christ's Hospital* (1830), 1 Russ. & M. 626.
(*o*) See Charitable Trusts Act, 1860 (23 & 24 Vict. c. 136), s. 2.
(*p*) *Ibid.*, s. 5. See also *Re Burnham National Schools* (1873), L. R. 17 Eq. 241.
(*q*) *Re Huxtable, Huxtable* v. *Crawfurd*, [1902] 2 Ch. 793, C. A.
(*r*) See *Wellbeloved* v. *Jones* (1822), 1 Sim. & St. 40; *A.-G.* v. *Haberdashers' Co.* (1852), 15 Beav. 397.
(*s*) *A.-G.* v. *Solly* (1835), 5 L. J. (CH.) 7; *A.-G.* v. *Haberdashers' Co.* (1791), 1 Ves. 295; *A.-G.* v. *Haberdashers' Co.*, *supra*, at p. 406. See *A.-G.* v. *Harrow School (Governors)* (1754), 2 Ves. Sen. 551; *A.-G.* v. *Townley* (1829), Shelford, Law of Mortmain, 442.
(*t*) *A.-G.* v. *Price* (1908), 24 T. L. R. 761, where it seemed possible that, if time were given, the original trusts might be carried out without modification.
(*a*) Charitable Trusts Act, 1860 (23 & 24 Vict. c. 136), s. 4.
(*b*) Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 43.
(*c*) Charitable Trusts Act, 1860 (23 & 24 Vict. c. 136), s. 2.

SECT. 2. Schemes.

Where, however, the gross annual income of the charity (exclusive of the yearly value of buildings or land used by the charity, and not yielding any pecuniary income (*d*)) amounts to or exceeds £50, the Commissioners may make a scheme only upon the written application of the administering trustees or a majority of them (*e*).

If application is once made for a scheme, it cannot be withdrawn by the applicant before completion (*f*).

The powers of the Charity Commissioners are similar in extent to those possessed by the court, and subject to similar limitations (*g*).

Schemes requiring sanction of Parliament.

321. The Charity Commissioners may provisionally approve and certify schemes which cannot be carried into effect except by means of an Act of Parliament (*h*).

Prison charities.

322. The Commissioners have power, upon the application of a Secretary of State, to establish schemes for prison charities (*i*).

Recreation grounds.

The Commissioners may also settle schemes for the appointment of managers and directors of recreation grounds conveyed to trustees under the Recreation Grounds Act, 1859 (*j*); and they have power in certain circumstances to make schemes in relation to the property of any corporation or court dissolved or abolished by the Municipal Corporations Act, 1883 (*k*), and sometimes an Act of Parliament directs that a scheme be made by the Commissioners (*l*).

Property of dissolved corporations etc.

Places of religious worship.

The Charity Commissioners have power to establish schemes relating to places of religious worship which would otherwise be exempt from their jurisdiction (*m*), upon the application of the trustees or persons acting in the administration of the charity (*n*).

(*d*) The question whether buildings occupied by a charitable institution are to be regarded as yielding income is discussed in *Re Stockport Ragged Industrial and Reformatory Schools*, [1898] 2 Ch. 687, 698, C. A.; and pp. 304, 307, *post*.

(*e*) Charitable Trusts Act, 1860 (23 & 24 Vict. c. 130), s. 4; Charitable Trusts Act, 1869 (32 & 33 Vict. c. 110), s. 5. For form of application to the Charity Commissioners for a scheme see Encyclopædia of Forms, Vol. III., p. 458; and for forms of schemes, see *ibid.* pp. 478 *et seq.* See also p. 315, *post*.

(*f*) *Re Poor's Lands Charity, Bethnal Green*, [1891] 3 Ch. 400.

(*g*) Charitable Trusts Act, 1860 (23 & 24 Vict. c. 136), s. 2. For an example of such limitations see the restricted jurisdiction of the court in matters relating to charities established by royal charter or Act of Parliament, pp. 187, 188, 296, *post*. The Commissioners decline to make schemes in contentious cases where it appears to them that a judicial court is better qualified to deal with the matter (Charitable Trusts Act, 1860 (23 & 24 Vict. c. 136), s. 5); see *Re Burnham National Schools* (1873), L. R. 17 Eq. 241.

(*h*) Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), ss. 54—60; Charitable Trusts Amendment Act, 1855 (18 & 19 Vict. c. 124), s. 43. Such schemes are in practice seldom necessary, owing to the wide application of the *cy-près* doctrine. See *A.-G.* v. *Mansfield (Earl)* (1823), 2 Russ. 501, 519; *A.-G.* v. *Norwich Corporation* (1848), 12 Jur. 424; *Re Shrewsbury Grammar School* (1849), 1 Mac. & G. 324; *Re Bedford Charity* (1857), 26 L. J. (CH.) 613.

(*i*) Prison Charities Act, 1882 (45 & 46 Vict. c. 65), s. 26.

(*j*) 22 Vict. c. 27, s. 5. See title OPEN SPACES AND RECREATION GROUNDS.

(*k*) 46 & 47 Vict. c. 18, ss. 3, 8.

(*l*) *E.g.*, the City of London (Union of Parishes) Act, 1907 (7 Edw. 7, c. cxl.); York (Micklegate Strays) Act, 1907 (7 Edw. 7, c. clxxvi.).

(*m*) Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 62.

(*n*) Charitable Trusts Act, 1869 (32 & 33 Vict. c. 110), s. 15. For form of application, see Encyclopædia of Forms, Vol. III., p. 460.

Scheme affecting a rural parish.

The draft of a scheme relating to a charity, other than an ecclesiastical charity (*o*), which affects a rural parish, must on or before the publication of the notice of the proposal to make an order for such scheme (*p*) be communicated to the parish council (if any), or to the chairman of the parish meeting, who have the same rights as the inhabitants (*q*) of the district affected (*r*), and may support or oppose the scheme.

Allotments.

323. Where a scheme is made by the Charity Commissioners in relation to any charity, and part of the charity property consists of land other than buildings, a provision must be inserted in the scheme authorising the trustees to set aside part of the land for allotments (*s*).

Direction to trustees to assist in preparing schemes.

324. The Commissioners may also, at their discretion, upon the application of the trustees or persons entitled to make such application, employ or authorise the trustees or administrators of a charity to employ competent persons to prepare schemes, orders, statements, or other proceedings for the purposes of the Charitable Trusts Acts, 1853 to 1869, with respect to the charity, or to make or assist in any survey or local inquiry for that purpose, and to defend such schemes and orders (*t*).

Schemes by Board of Education.

325. The powers formerly vested in the Charity Commissioners to frame schemes in respect of any endowment held solely for educational purposes in England or Wales are now exercisable by the Board of Education (*u*). Under schemes made by the Board of Education land and funds may be vested in the Official Trustees by an order of the Charity Commissioners (*a*). The question whether an endowment is held for, or ought to be applied to, educational purposes is determined by the Charity Commissioners (*b*).

SECT. 3.—*Alteration of Schemes and Trusts.*

Schemes established by statute.

326. Schemes established by statute cannot be altered by the court or Charity Commissioners (*c*), but matters not provided for

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(*o*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 75 (2).

(*p*) Charitable Trusts Act, 1860 (23 & 24 Vict. c. 130), s. 6.

(*q*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 14 (5).

(*r*) As to rights of the inhabitants to demand a local inquiry into any proposed scheme, see Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 57, which section, however, applies only to schemes to be certified with a view to establishment by an Act of Parliament.

(*s*) Allotments Extension Act, 1882 (45 & 46 Vict. c. 80), s. 14. For a clause of this nature see Encyclopædia of Forms, Vol. III., p. 480, clause 17. See title ALLOTMENTS, Vol. I., p. 338; and pp. 223, 230, *post*.

(*t*) Charitable Trusts Act, 1869 (32 & 33 Vict. c. 110), s. 9.

(*u*) Board of Education Act, 1899 (62 & 63 Vict. c. 33), and the Orders in Council, 1900, 1901, and 1902, made thereunder. See title EDUCATION.

(*a*) Board of Education (Powers) Order in Council, 1901, s. 1 (1). Such orders cannot be made by the Board of Education, even with the consent of the Commissioners.

(*b*) Board of Education Act, 1899 (62 & 63 Vict. c. 33), s. 2 (2).

(*c*) *Re Shrewsbury Grammar School* (1849), 1 Mac. & G. 324, 333; *A.-G.* v. *Christ's Hospital (Governors)*, [1896] 1 Ch. 879; see also *Warren* v. *Clancy*, [1898] 1 I. R. 127, C. A. In the matter of framing and altering schemes the

SECT. 3. **Alteration of Schemes and Trusts.**

by the statute may be regulated by the court (*d*). Recourse must therefore be had to Parliament where even slight alterations are necessary in the provisions of schemes possessing statutory sanction (*e*).

Schemes affecting allotments.

With respect, however, to allotments for recreation grounds or other public or parochial purposes contained in any of the Inclosure Acts or awards or orders made thereunder, any provisions may, on the application of any district or parish council interested in any such allotment, be dealt with by a scheme of the Charity Commissioners, as if those provisions had been established by the founder in the case of a charity having a founder (*f*).

Schemes of charities established by royal charter.

327. Schemes of charities established by royal charter cannot be altered by the court or the Commissioners (*g*). But the court has jurisdiction to interfere and alter a scheme where the charter of incorporation gives the corporators power to make rules for carrying out the intentions of the founder and it appears that the rules and regulations so made do not carry out such intentions (*h*).

Alteration of schemes settled by court.

328. A scheme settled by the court for the administration of a charity can be altered by the court if the lapse of time and change of circumstances render it for the interest of the charity that the alteration should be made (*i*). But schemes so settled are not altered except upon substantial grounds, and upon clear evidence not only that the existing scheme does not operate beneficially, but that it can be made to do so consistently with the object of the foundation (*j*). A scheme for applying the income of a charity

powers of the Charity Commissioners are similar to those of the court (Charitable Trusts Act, 1860 (23 & 24 Vict. c. 136), s. 2).

(*d*) *Re Shrewsbury Grammar School* (1849), 1 Mac. & G. 324, 331, 332; see also *Re Bedford Charity* (1833), 5 Sim. 578.

(*e*) See Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 54; *A.-G.* v. *Christ's Hospital (Governors)*, [1896] 1 Ch. 879, 889.

(*f*) Commons Act, 1899 (62 & 63 Vict. c. 30), ss. 2, 18; see titles ALLOTMENTS, Vol. I., p. 338; COMMONS AND RIGHTS OF COMMON, p. 595, *post*. The powers conferred by s. 18 of the Commons Act, 1899, are subject to the restrictions contained in the Commons Act, 1876 (39 & 40 Vict. c. 56), s. 19, as to which see titles ALLOTMENTS, Vol. I., p. 334, note (*q*); p. 336, note (*l*); COMMONS AND RIGHTS OF COMMON, p. 592, *post*. See also Forty-seventh Report of the Charity Commission, 1900, p. 23.

(*g*) See *A.-G.* v. *Smart* (1748), 1 Ves. Sen. 72; *A.-G.* v. *Christ's Hospital (Governors)*, *supra*, at p. 888.

(*h*) *A.-G.* v. *Dedham School* (1857), 23 Beav. 350, 356; *A.-G.* v. *Wygeston Hospital* (1849), 12 Beav. 113.

(*i*) *A.-G.* v. *St. John's Hospital, Bath* (1865), 1 Ch. App. 92, 106; *Glasgow College* v. *A.-G.* (1848), 1 H. L. Cas. 800; and see *A.-G.* v. *London Corporation* (1790), 3 Bro. C. C. 171; *A.-G.* v. *Bovill* (1840), 1 Ph. 762; *A.-G.* v. *Rochester Corporation* (1854), 5 De G. M. & G. 797; *Re Hussey's Charities* (1861), 7 Jur. (N. S.) 325, where a gift for a clergyman for prisoners was divided on a second prison being formed; *A.-G.* v. *Hankey* (1867), L. R. 16 Eq. 140, n.; and see cases cited in previous notes to this section. As to the alteration of a scheme of a charity abroad, see *A.-G.* v. *City of London* (1790), 1 Ves. 243; *Lyons Corporation* v. *Bengal (Advocate-General)* (1876), 1 App. Cas. 91, 110. As to procedure in settling schemes, see p. 337, *post*.

(*j*) *A.-G.* v. *Worcester (Bishop)* (1851), 9 Hare, 328; and see *Re Sekeford's Charity* (1861), 5 L. T. 488; *A.-G.* v. *Stewart* (1872), L. R. 14 Eq. 17.

remains in force only until further order or the establishment of a new scheme (*k*).

A scheme making an unfair division among the objects of a charity may be altered (*l*). Furthermore, provisions in schemes as to religious instruction (*m*), the number of governors (*n*), or the granting of building leases (*o*), may be varied.

Alterations allowed.

The Endowed Schools Acts, 1869 (*p*) and 1873 (*q*), and the Education Act, 1902 (*r*), also contain provisions for the alteration of schemes affecting schools.

329. The application or consent of the Attorney-General is probably necessary to an alteration of a scheme by the court (*s*). In a proper case it is his duty to make the necessary application (*t*).

Consent of Attorney-General.

The court will not, upon the motion of one of the interested parties (*u*), alter a scheme which it has settled with the approval of the Attorney-General.

330. When a scheme has been settled by the Charity Commissioners, the court will not interfere with it, unless the Commissioners have acted *ultra vires*, or the scheme contains something wrong in principle or in law (*a*).

When court will interfere with settled scheme.

331. After a charity has once been established, and trusts declared, the trusts cannot be varied or added to by the founder, whether an individual (*b*) or a body of subscribers (*c*), or by the trustees (*d*).

No alteration by founder or trustees allowed.

332. A condition of forfeiture upon alteration of a trust is not allowed to take effect if the trusts are altered by a scheme established by a competent authority (*e*).

No forfeiture on alteration by scheme.

(*k*) *Re Betton's Charity* (1907), 77 L. J. (CH.) 193.
(*l*) *A.-G.* v. *Buller* (1822), Jac. 407.
(*m*) *A.-G.* v. *St. John's Hospital, Bath* (1876), 2 Ch. D. 554.
(*n*) *Re Browne's Hospital* (1889), 60 L. T. 288; and see *Re Conyers' Free Grammar School at Yarm* (1853), 10 Hare, Appendix I., p. v.
(*o*) *Re Smith's (Henry) Charity, Hartlepool* (1882), 20 Ch. D. 516, C. A.
(*p*) 32 & 33 Vict. c. 56, s. 28.
(*q*) 36 & 37 Vict. c. 87, s. 10.
(*r*) 2 Edw. 7, c. 42, s. 21; see also *ibid.*, s. 17; and title EDUCATION.
(*s*) *A.-G.* v. *Stewart* (1872), L. R. 14 Eq. 17; and see *A.-G.* v. *Hall* (1875), Seton, Judgments and Orders, 6th ed. 1297.
(*t*) *A.-G.* v. *Worcester (Bishop)* (1851), 9 Hare, 328, 360.
(*u*) *Re Sekeford's Charity* (1861), 5 L. T. 488.
(*a*) *Re Campden Charities* (1881), 18 Ch. D. 310, C. A.; *Re Campden Charities* (No. 2) (1883), 24 Ch. D. 213. See also *Re Shaftoe's Charity* (1878), 3 App. Cas. 872; *Re Sutton Coldfield Grammar School* (1881), 7 App. Cas. 91.
(*b*) *Re Hartshill Endowment* (1861), 30 Beav. 130.
(*c*) *A.-G.* v. *Kell* (1840), 2 Beav. 575; *A.-G.* v. *Bovill*, cited 2 Beav. 578.
(*d*) See p. 189, *post*; p. 273, *post*.
(*e*) *Re Bacon's Charity, per* JESSEL, M.R., December 7, 1878, a report of which case is on the files at the office of the Charity Commissioners, and a note of it is to be found in Tudor, Law of Charities and Mortmain, 4th ed., p. 187, note (q). See also *Re Upton Warren* (1833), 1 My. & K. 410; *Christ's Hospital* v. *Grainger* (1849), 1 Mac. & G. 460, 464; *Re Orchard Street Schools (Trustees)*, [1878] W. N. 211.

SECT. 4. Cy-près Doctrine and its Application.

SECT. 4.—*Cy-près Doctrine and its Application.*

SUB-SECT. 1.—*The Cy-près Doctrine generally.*

The doctrine.

333. Where a clear charitable intention is expressed, it will not be permitted to fail because the mode, if specified, cannot be executed, but the law will substitute another mode *cy-près* (*f*), that is, as near as possible to the mode specified by the donor (*g*).

Donor's wishes to be observed.

334. The primary rule to be observed in the application of the *cy-près* doctrine is that the intention of the donor must be observed as far as possible. Thus, if the donor names a particular object which is capable of taking effect, any *cy-près* application that becomes necessary must be restricted within the limits of that object (*h*). So, too, the mode of application must as far as possible coincide with the donor's wishes (*i*).

A charity may be *cy-près* to the original object although it seems to have no trace of resemblance to it (*k*), if no other can be found having a nearer connection (*l*), but objects nearer the donor's intention will always be selected in preference to those more remote (*m*).

Where a testator intends to benefit several charitable objects one of which fails, the fund must not be distributed among the other objects, if the one that fails bears no resemblance to the others (*n*).

Lapsed gift where residue given to charity.

335. The *cy-près* doctrine may be applied in the case of a charitable legacy which has failed where the residue is given to charity (*o*), and even if there is a gift over to a second charity (*p*).

Objects to be chosen.

336. Objects already adequately provided for should not be chosen for the purpose of a *cy-près* application (*q*), nor should the application be made in such a way as merely to relieve the rates (*r*).

(*f*) See *Moggridge* v. *Thackwell* (1802), 7 Ves. 36, 69; *Mills* v. *Farmer* (1815), 1 Mer. 55; *A.-G.* v. *Bristol Corporation* (1820), 2 Jac. & W. 294, 308; *Chamberlayne* v. *Brockett* (1872), 8 Ch. App. 206; *A.-G.* v. *Price* (1908), 24 T. L. R. 763.

(*g*) *Ibid.* See also *A.-G.* v. *Whitchurch* (1796), 3 Ves. 140, 144; *Cary* v. *Abbot* (1802), 7 Ves. 490; *Clephane* v. *Edinburgh Corporation* (1869), L. R. 1 Sc. & Div. 417, 421; *Ironmongers' Co.* v. *A.-G.* (1844), 10 Cl. & Fin. 908, 922, H. L.

(*h*) *Ibid.*, at p. 924; *Clephane* v. *Edinburgh Corporation*, *supra*, at p. 421; *Re Prison Charities* (1873), L. R. 16 Eq. 129, 146.

(*i*) See *Re Lambeth Charities* (1853), 22 L. J. (CH.) 959; *A.-G.* v. *Price*, *supra*, at p. 763.

(*k*) *A.-G.* v. *Boultbee* (1794), 2 Ves. 388; *Clephane* v. *Edinburgh Corporation*, *supra*, at p. 421.

(*l*) *Ironmongers' Co.* v. *A.-G.* (1840), Cr. & Ph. 208, 227.

(*m*) See *Re Bridewell Hospital* (1860), 8 W. R. 718; *Re Prison Charities*, *supra*; *A.-G.* v. *Northumberland* (*Duke*) (1889), 5 T. L. R. 327.

(*n*) *Ironmongers' Co.* v. *A.-G.*, *supra*, at p. 927; and see *Lyons Corporation* v. *Bengal* (*Advocate-General*) (1876), 1 App. Cas. 91; *Thorley* v. *Byrne* (1830), 3 Hare, 195, n., a case to be supported only if the objects of the second society were *cy-près* to those of the first; and p. 193, *post*.

(*o*) *Lyons Corporation* v. *Bengal* (*Advocate-General*), *supra*, at p. 115.

(*p*) *Re Upton Warren* (1833), 1 My. & K. 410.

(*q*) *Re Prison Charities*, *supra*.

(*r*) *Ibid.*; *Re Poplar and Blackwall Free School* (1878), 8 Ch. D. 543; *A.-G.* v. *Northumberland* (*Duke*), *supra*.

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337. However desirable it may be, in no circumstances can trustees of a charity apply the trust funds *cy-près* on their own authority, without the direction of the court or the Charity Commissioners (*s*).

Application *cy-près* by trustees not allowed.

The court or the Charity Commissioners may direct the *cy-près* application of a charitable gift in any of the following cases in which the substance of the gift is charity, namely, where a particular purpose is named but fails either initially or subsequently (*a*), where the machinery for effectuating the charitable intention fails (*b*), and where a surplus remains after satisfying the named objects (*c*).

SUB-SECT. 2.—*Where a Particular Purpose named fails.*

Initial failure of purpose named.

338. If a general charitable intention is indicated, but the particular object named is illegal (*d*), or an accumulation is directed to extend beyond the legal limit (*e*), the gift may be applied *cy-près*.

The same principle applies where the particular purpose is for any other reason impracticable, but is coupled with a general charitable intention (*f*). Thus, if a bequest to found a scholarship is declined by the particular college it may be applied in establishing a scholarship at another college (*g*). Similarly, where the income of a fund is given for the support of young men natives of a particular locality, intending to enter the ministry of the Church of Scotland, and where for twenty years from the founding of the charity no application has been made from the locality, the court will approve of the area of the locality being extended (*h*).

Institutions which cannot be identified.

Under the same head must also be included gifts to non-existent or unidentifiable institutions.

Where there is a gift to a charity which has never existed, or

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(*s*) *A.-G.* v. *Coopers' Co.* (1812), 19 Ves. 187; *A.-G.* v. *Vivian* (1826), 1 Russ. 226; *A.-G.* v. *Kell* (1840), 2 Beav. 575; *A.-G.* v. *Bushby* (1857), 24 Beav. 299; *Ward* v. *Hipwell* (1862), 3 Giff. 547; *Re Campden Charities* (1881), 18 Ch. D. 310, 328, 329, C. A. See also p. 189, *ante;* p. 271, *post.*

(*a*) See *infra.*

(*b*) See p. 194, *post.*

(*c*) *Ibid.*

(*d*) *A.-G.* v. *Vint* (1850), 3 De G. & Sm. 704 (gift to provide the inmates of a workhouse with alcoholic drink). See also *A.-G.* v. *Combe* (1679), 2 Cas. in Ch. 18; *Mogyridge* v. *Thackwell* (1802), 7 Ves. 36, 75. Distinguish the cases where not only the particular mode of application, but the dedication to charity, is illegal; in such cases the gift fails entirely (*A.-G.* v. *Baxter* (1684), 1 Vern. 248; *Da Costa* v. *De Pas* (1754), Amb. 228).

(*e*) *Martin* v. *Margham* (1844), 14 Sim. 230.

(*f*) *A.-G.* v. *Bowyer* (1798), 3 Ves. 714; *Biscoe* v. *Jackson* (1887), 35 Ch. D. 460, C. A. Instances of such purposes are a gift for redeeming a mortgage on a particular chapel which had been already paid off (*Bunting* v. *Marriott* (1854), 19 Beav. 163; *Re Unite* (1905), 75 L. J. (CH.) 163; see also *Corbyn* v. *French* (1799), 4 Ves. 418, 431, 432), or for erecting a church in a particular place where a new church had already been built (*Corbyn* v. *French, supra*), or a gift of land under the old law (*A.-G.* v. *Whitchurch* (1796), 3 Ves. 141), or a gift void as being contrary to statute (*Sims* v. *Quinlan* (1864), 16 I. Ch. R. 191).

(*g*) *A.-G.* v. *Andrew* (1798), 3 Ves. 633.

(*h*) *Re Borland*, [1908] S. C. 852.

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cannot be identified, the court leans in favour of a general charitable purpose, and accepts even a small indication of the testator's intention as sufficient to show that a purpose, and not a particular charity, is intended (*i*). As a rule, therefore, such gifts are applicable *cy-près* (*k*), the name or description of the charity mentioned serving as an indication of the class of charity intended to be benefited (*l*). Thus, where a particular locality is named the funds will be given to institutions in that locality having similar objects to the society which cannot be identified (*m*). So also a gift to a charity which comes to an end after the death of the testator, but before the legacy is paid, will be applied *cy-près* (*n*).

Charity terminating before testator's death.

If the institution named as legatee has ceased to exist before the death of the testator, but it is clear that the testator meant to benefit an object rather than an individual society, the fund will be applied *cy-près* (*o*).

Where subsidiary purpose alone fails.

If the main purpose or object of a charitable gift is practicable, but the subsidiary purpose or object fails, the latter may be varied or dispensed with (*p*). Similarly, where the substance of the gift is charity, impracticable conditions may be modified or removed (*q*).

(*i*) *Re Davis*, [1902] 1 Ch. 876, 884; and see p. 156, *ante*.

(*k*) *Thorley* v. *Byrne* (1830), 3 Hare, 195, n.; *Bennett* v. *Hayter* (1839), 2 Beav. 81; *Loscombe* v. *Wintringham* (1850), 13 Beav. 87; *Bunting* v. *Marriott* (1854), 19 Beav. 163; *Re Clergy Society* (1856), 2 K. & J. 615; *Daly* v. *A.-G.* (1860), 11 I. Ch. R. 41; *Re Geary* (1890), 25 L. R. Ir. 171; *Re Davis, supra*; *Re Thompson* (1908), *Times* (November 16, 1908) (no charitable institution answering description). In two old cases which must be considered of doubtful authority such gifts have been applied in private charity (*Ware* v. *A.-G.* (1824), 3 Hare, 194, n.; *Sanford* v. *Gibbons* (1829), 3 Hare, 195, n.

(*l*) *Re Maguire* (1870), L. R. 9 Eq. 632; *Re Clergy Society, supra*; *Re Mann, Hardy* v. *A.-G.*, [1903] 1 Ch. 232; and see cases cited in preceding note.

(*m*) *Simon* v. *Barker* (1829), 3 Hare, 195, n.; *Bennett* v. *Hayter, supra*; *Re Alchin, Ex parte Furley, Ex parte Romney (Earl)* (1872), L. R. 14 Eq. 230; *Re Maguire, supra*; and see *Bunting* v. *Marriott, supra*.

(*n*) *Hayter* v. *Trego* (1830), 5 Russ. 113; *Re Slevin, Slevin* v. *Hepburn*, [1891] 2 Ch. 236, C. A.; and see *Re Villiers-Wilkes* (1895), 72 L. T. 323; *Re Buck, Bruty* v. *Mackey*, [1896] 2 Ch. 727.

(*o*) *Re Kilvert's Trusts* (1871), L. R. 12 Eq. 183; and see *Marsh* v. *A.-G.* (1860), 2 John. & H. 61 (gift to a school which closed before the testator's death); *Coldwell* v. *Holme* (1854), 2 Sm. & G. 31 (gift to an institution which changed its name before the testator's death). Distinguish the cases where the charity failed in the lifetime of the testator, and there was no overriding charitable intention, *e.g. Clark* v. *Taylor* (1853), 1 Drew. 642; *Fisk* v. *A.-G.* (1867), L. R. 4 Eq. 521; *Re Orey* (1885), 29 Ch. D. 560; *Re Rymer, Rymer* v. *Stanfield*, [1895] 1 Ch. 19, C. A., the result being lapsed legacies, if the failure was total (*Re Waring*, [1907] 1 Ch. 166); and distinguish also the cases where the charity never existed, *e.g., Re Davis, supra*; *Pieschel* v. *Paris* (1825), 2 Sim. & St. 384; *Re White*, [1893] 2 Ch. 41, C. A. See also *Re Macduff, Macduff* v. *Macduff* [1896] 2 Ch. 451, C. A.; and p. 156, *ante*.

(*p*) *Brantham* v. *East Burgold*, cited 2 Ves. 388; *A.-G.* v. *Leigh* (1721), 2 Ves. 389; *A.-G.* v. *Boultbee* (1796), 3 Ves. 220.

(*q*) *Glasgow College* v. *A.-G.* (1848), 1 H. L. Cas. 800; *Re Richardson* (1887), 58 L. T. 45; and see *Denyer* v. *Druce* (1829), Taml. 32, where the University of Oxford refused to accept a legacy subject to certain charitable trusts, and it fell to the Crown to direct the charitable application; *Andrew* v. *Merchant Taylors' Co.* (1802), 7 Ves. 223.

Subsequent failure of particular purpose.

339. Where the charitable purpose prescribed by the donor takes effect in the first instance, but subsequently fails, as by the abolition of a particular form of punishment (*r*), or of the state of slavery in the colonies (*s*), or the dying out of particular diseases (*t*), or the extinction of a particular class of foreign refugees (*u*) or of heathen (*w*), or by reason of a particular form of religious service ceasing to be required (*a*), or of a particular congregation changing its tenets (*b*), and there is an overriding charitable intention (*c*), the gift may be applied *cy-près* (*d*).

On the same principle the property of a charitable institution which becomes extinct will be applied *cy-près* for the purposes of another institution with similar objects (*e*).

Application postponed.

If the gift to charity is immediate, but the application is postponed until the happening of certain events, *cy-près* application may be necessary if strict compliance with the wishes of the donor becomes impossible, or if in process of time the fund becomes too great for the purposes named (*f*).

Change of circumstances.

Where the revenues of an ancient charity in a particular locality are considered to be inapplicable by reason of change of circumstances to the original objects, they may be applied *cy-près* in carrying out the principal intention of the donor by giving relief to the poor in that locality (*g*).

Failure of one of several objects.

Where a fund is given for several charitable objects one of which subsequently fails, the share intended for the object which failed is applied *cy-près*, but not necessarily in adding to the funds apportioned to the other objects (*h*). The share the object of

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(*r*) *A.-G.* v. *Hankey* (1867), L. R. 16 Eq. 140, n. (imprisonment for debt, funds applied for assisting discharged prisoners). See also *Re Prison Charities* (1873), L. R. 16 Eq. 129.

(*s*) *A.-G.* v. *Gibson* (1835), 2 Beav. 317, n.

(*t*) *A.-G.* v. *Hicks* (1809), Highmore, Mortmain, 336 (leprosy); *A.-G.* v. *Craven* (*Earl*) (1856), 21 Beav. 392 (plague funds applied for hospitals).

(*u*) *A.-G.* v. *Daugars* (1864), 12 W. R. 363 (French Protestants, funds applied for French Protestants in London).

(*w*) *A.-G.* v. *London Corporation* (1790), 3 Bro. C. C. 171.

(*a*) *A.-G.* v. *Stewart* (1872), L. R. 14 Eq. 17 (Gaelic service in London). See *Rodwell* v. *A.-G.* (1886), 2 T. L. R. 712 (English service in French in Paris).

(*b*) *A.-G.* v. *Bunce* (1807), L. R. 6 Eq. 563 (Presbyterian becoming Baptist, funds applied for same congregation). Distinguish *Free Church of Scotland* (*General Assembly*) v. *Overtoun* (*Lord*), [1904] A. C. 515.

(*c*) If there is no overriding charitable intention, and the particular charitable purpose fails, the gift fails entirely (*Biscoe* v. *Jackson* (1887), 35 Ch. D. 460, 465).

(*d*) *Ibid.*, at p. 460; *Clephane* v. *Edinburgh Corporation* (1869), L. R. 1 Sc. & Div. 417, 421.

(*e*) *Spiller* v. *Maude* (1881), 32 Ch. D. 158, n. (theatrical charity); *Incorporated Society* v. *Price* (1844), 1 Jo. & Lat. 498 (school which was closed); and see *Clephane* v. *Edinburgh Corporation*, *supra* (hospital taken by a railway company, proceeds applied for outdoor relief).

(*f*) *Chamberlayne* v. *Brockett* (1872), 8 Ch. App. 206, 210, 211; *Wallis* v. *S.-G. for New Zealand*, [1903] A. C. 173.

(*g*) *Re Campden Charities* (1881), 18 Ch. D. 310, C. A. (dole and apprenticeship). See also, as to doles, *A.-G.* v. *Marchant* (1866), L. R. 3 Eq. 424, 430; and, as to apprenticeship charities, *A.-G.* v. *Winchelsea* (*Earl*) (1791), 3 Bro. C. C. 373; *A.-G.* v. *Wansay* (1808), 15 Ves. 231. 234.

(*h*) *Ironmongers' Co.* v. *A.-G.* (1844), 10 Cl. & Fin. 908, 928, 929, H. L.; *Re*

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which has failed may be given to the other objects named in the will if there is an expressed intention that on failure of one of the objects the others should receive increased benefits (*i*). In the absence of such intention, it will be so given only if the latter are found to be *cy-près* to the one which has failed (*k*), and if there is no indication of a contrary intention (*l*).

SUB-SECT. 3.—*Where Machinery for effectuating Charitable Intention fails.*

Instances of failure of machinery.

340. Charitable gifts are also applied *cy-près* where the machinery for ascertaining the intended objects breaks down, as where the bequest is for charitable and non-charitable purposes in shares to be determined by persons who fail to make the necessary apportionment (*m*), or where objects are intended to be, but are not, named by the donor (*n*) or others (*o*), or where a fund is to be divided among a particular class at the discretion of persons who fail to make the division (*p*), or where the trustees decline to act (*q*), or the trustee appointed was appointed in the capacity of holder of an office which ceased to exist before the testator's death (*r*).

Where an institution charged with the administration of a charity became subject to a foreign State, the court refused to allow the funds to be administered by that institution, and directed a new scheme (*s*).

SUB-SECT. 4.—*Where a Surplus remains after satisfying the Prescribed Objects.*

When application made *cy-près*.

341. If the income of the fund should either originally or in process of time be or become greater than is necessary for the purpose named, the court has power to apply the surplus to such other purposes as it may deem proper upon the *cy-près* principle (*t*).

If the income of the fund is actually exhausted by the charitable purpose declared at the time of the gift, the court assumes that any subsequent increase in the fund is also intended for charity,

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Ashton's Charity (1859), 27 Beav. 115; *Lyons Corporation* v. *Bengal* (*Advocate-General*) (1876), 1 App. Cas. 91, 117. Prior to these cases the rule apparently was under these circumstances to augment the portions of the objects which had not failed (*A.-G.* v. *Llandaff* (*Bishop*) (1819), cited 2 My. & K. at p. 586; *A.-G.* v. *Ironmongers' Co.* (1834), 2 My. & K. 576, 586).

(*i*) *Re Hyde* (1873), 22 W. R. 69.

(*k*) *Ironmongers' Co.* v. *A.-G.* (1840), Cr. & Ph. 208, 222.

(*l*) *Ibid.* at p. 224.

(*m*) *Doyley* v. *A.-G.* (1735), 4 Vin. Abr. 485, pl. 16; *Salusbury* v. *Denton* (1857), 3 K. & J. 529.

(*n*) *A.-G.* v. *Syderfen* (1683), 1 Vern. 224; *Mills* v. *Farmer* (1815), 1 Mer. 55; and see *Charitable Donations Commissioners* v. *Sullivan* (1841), 1 Dr. & War. 501.

(*o*) *White* v. *White* (1778), 1 Bro. C. C. 12; *A.-G.* v. *Boultbee* (1796) 3 Ves. 220; *Moggridge* v. *Thackwell* (1803), 7 Ves. 36; *A.-G.* v. *Fletcher* (1835), 5 L. J. (CH.) 75; *Pocock* v. *A.-G.* (1876), 3 Ch. D. 342, C. A.

(*p*) *A.-G.* v. *Gladstone* (1842), 13 Sim. 7; and see *A.-G.* v. *Wansay* (1808), 15 Ves. 231; *Pease* v. *Pattinson* (1886), 32 Ch. D. 154.

(*q*) *A.-G.* v. *Andrew* (1798), 3 Ves. 633; *Denyer* v. *Druce* (1829), Taml. 32; *Reeve* v. *A.-G.* (1843), 3 Hare, 191.

(*r*) *A.-G.* v. *Stephens* (1834), 3 My. & K. 347.

(*s*) *A.-G.* v. *London Corporation* (1790), 3 Bro. C. C. 171.

(*t*) *Chamberlayne* v. *Brockett* (1872), 8 Ch. App. 206, 211; and see *A.-G.* v. *Haberdashers' Co.* (1792), 4 Bro. C. C. 103; *A.-G.* v. *Price* (1744), 3 Atk. 108; *A.-G.* v. *Sparks* (1753), Amb. 201; *A.-G.* v. *Johnson* (1753), Amb. 190. It is

and applies the surplus accordingly (*a*). But if it is not so exhausted, any surplus remaining at the time of the gift will be devoted to charity if a general charitable intention can be gathered from the terms of the instrument of gift (*b*), but not if the intention was to create a resulting trust (*c*).

The principle applies equally where the surplus is occasioned by the decay of the particular charity named (*d*).

How application made.

342. Accordingly, where the number of persons intended to be benefited by the charity was originally limited, surplus revenue may be disposed of by increasing the number of participants (*e*).

So also the amounts payable to the beneficiaries (*f*) or the area from which the beneficiaries are to be taken (*g*) may be enlarged, or a charity originally intended for males only may be extended to females (*h*). The shares in the increased revenues to be taken by the original objects need not be proportionate to their original shares (*i*).

But though *primâ facie* (*k*) increased revenue is divisible among the original objects of the charity there is no absolute rule to that effect (*l*).

SUB-SECT. 5.—*Where no Particular Purpose is named.*

Donor's intention followed if possible.

343. Where the mode of executing a charitable gift is originally undefined, it is impossible of course to select an object *cy-près* to that which has failed (*m*). The intention of the donor will, however, be carried out as far as possible by the gift being applied to charitable

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not so when the expenditure of the charity is liable to fluctuate (*A.-G.* v. *Love* (1857), 23 Beav. 499, 507); and see pp. 176, *et seq.*, *ante*.

(*a*) *A.-G.* v. *Coopers' Co.* (1812), 19 Ves. 187, 189; see further p. 178, *ante*.

(*b*) *A.-G.* v. *Arnold* (1698), Show. Parl. Cas. 22, cited 2 Jac. & W. at pp. 308, 319; *A.-G.* v. *Hurst* (1790), 2 Cox, Eq. Cas. 364; *A.-G.* v. *Minshull* (1798), 4 Ves. 11; *A.-G.* v. *Painter-stainers' Co.* (1788), 2 Cox, Eq. Cas. 51; *Pieschel* v. *Paris* (1825), 2 Sim. & St. 384; see also *A.-G.* v. *Bristol Corporation* (1820), 2 Jac. & W. 294. As to subsequent increase, see p. 176, *ante*.

(*c*) *A.-G.* v. *Wilson* (1834), 3 My. & K. 362; and see p. 180, *ante*.

(*d*) *A.-G.* v. *Ironmongers' Co.* (1834), 2 My. & K. 576; *Re Slevin*, *Slevin* v. *Hepburn*, [1891] 2 Ch. 236, 240, C. A. See also *A.-G.* v. *Craven* (*Earl*) (1856), 21 Beav. 392; *Chamberlayne* v. *Brockett* (1872), 8 Ch. App. 206; *Lyons Corporation* v. *Bengal* (*Advocate-General*) (1876), 1 App. Cas. 91.

(*e*) *Thetford School Case* (1610), 8 Co. Rep. 130 b; *A.-G.* v. *Johnson* (1753), Amb. 190; *A.-G.* v. *Winchelsea* (*Earl*) (1791), 3 Bro. C. C. 374; *A.-G.* v. *Wansay* (1808), 15 Ves. 231, 234; *Anon.*, cited 2 Jac. & W. 320; *A.-G.* v. *Bovill* (1840), 1 Ph. 762; and see *A.-G.* v. *Rochester Corporation* (1854), 5 De G. M. & G. 797; *A.-G.* v. *Holland* (1837), 2 Y. & C. (EX.) 683; *Re Ashton's Charity* (1859), 27 Beav. 115.

(*f*) *A.-G.* v. *Mercers' Co.* (1833), 2 My. & K. 654.

(*g*) *A.-G.* v. *Wansay*, *supra*; *Re Sekforde's Charity* (1861), 4 L. T. 321; *Re Latymer's Charity* (1869), L. R. 7 Eq. 353; *Re St. Leonard, Shoreditch, Parochial Schools* (1884), 10 App. Cas. 304, P. C.; *Re Borland*, [1908] S. C. 852; Endowed Schools Act, 1869 (32 & 33 Vict. c. 56), s. 9.

(*h*) *Anon.*, cited Jac. & W. 320; *A.-G.* v. *Wansay*, *supra*, at p. 235.

A.-G. v. *Johnson*, *supra*; *A.-G.* v. *Minshull*, *supra*; *A.-G.* v. *Bristol Corporation*, *supra*, at p. 320.

(*k*) See p. 176, *ante*.

(*l*) *Re Ashton's Charity*, *supra*, at p. 119, for such a disposal of the fund might operate to defeat the donor's intention; see *Re Campden Charities* (1881), 18 Ch. D. 310, C. A.

(*m*) *Barclay* v. *Maskelyne* (1858), 4 Jur. (N. S.) 1294, 1297.

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objects to be nominated by the court, Crown (*a*), or Charity Commissioners (*b*), as the case may be.

Ascertainment of intention.

344. In such cases any indications throwing light on the donor's intentions will be regarded (*c*), as, for example, his religious opinions (*d*), his interest in a particular locality (*e*), the nature of other charitable bequests in the same will (*f*), precatory directions in favour of a certain class (*g*), or even wishes expressed in an unattested codicil (*h*).

If no indication can be gathered as to the particular intention of the donor, his general intention must be considered. Thus, a gift for the poor generally could not properly be applied for a purpose unconnected with the relief of poverty, such as the rebuilding of a church (*i*).

Discretion of court.

But if no particular charitable purpose is indicated, and if the general charitable intention is subject to no restrictions express or implied, the discretion of the court in the application of the fund in what seems the most expedient manner is unlimited (*k*). Thus, gifts for charity generally may be applied for the benefit of hospitals (*l*), schools (*m*), or other charitable institutions (*n*); while bequests for the poor may be used for educational purposes (*o*), for the benefit of scholars at a particular school (*p*), for poor relations of the testator (*q*), and for poor foreign refugees of whom the testator himself was one (*r*).

(*a*) *White* v. *White* (1778), 1 Bro. C. C. 12; *Mills* v. *Farmer* (1815), 1 Mer. 55, 96, 102. As to the nomination of charitable objects by the court or Crown, see p. 287, *post*. Whether the selection of objects is by the court or the Crown, the same principles apply in either case (*Moggridge* v. *Thackwell* (1802), 7 Ves. 36, 87; *A.-G.* v. *Wansay* (1808), 15 Ves. 231, 233; *Re Slevin*, *Slevin* v. *Hepburn*, [1891] 2 Ch. 236, 243, C. A.).

(*b*) Charitable Trusts Act, 1860 (23 & 24 Vict. c. 136), s. 2.

(*c*) *Cook* v. *Duckenfield* (1743), 2 Atk. 568; *A.-G.* v. *Ironmongers' Co.* (1844), 10 Cl. & Fin. 908, 922, 924—929, H. L.

(*d*) *Re Ashton's Charity* (1859), 27 Beav. 115, 120. See also *A.-G.* v. *Ironmongers' Co.* (1844), 10 Cl. & Fin. 922, 924—929, H. L.

(*e*) *Re Mann*, *Hardy* v. *A.-G.*, [1903] 1 Ch. 232. A gift to the "ward of Bread Street" was directed to be disposed of as the aldermen of the ward thought fit (*Baylis* v. *A.-G.* (1741), 2 Atk. 239).

(*f*) *Mills* v. *Farmer*, *supra*, at pp. 103, 722; *A.-G.* v. *Ironmongers' Co.*, *supra*, H. L.; *Lyons Corporation* v. *Bengal* (*Advocate-General*) (1876), 1 App. Cas. 91, 114.

(*g*) Such as "clergymen who have large families and good characters" (*Moggridge* v. *Thackwell*, *supra*; see also *Re Clergy Society* (1856), 2 K. & J. 615).

(*h*) *A.-G.* v. *Madden* (1843), 2 Con. & Law. 519.

(*i*) *A.-G.* v. *Matthews* (1677), 2 Lev. 167.

(*k*) *Philpott* v. *St. George's Hospital* (1859), 27 Beav. 107; *Re Ashton's Charity*, *supra*. See also *Mills* v. *Farmer*, *supra*.

(*l*) *Legge* v. *Asgill* (1818), 3 Hare, 194, n.

(*m*) *A.-G.* v. *Syderfen* (1683), 1 Vern. 224. See also *Pieschel* v. *Paris* (1825), 2 Sim. & St. 384; *Re Campden Charities* (1881), 18 Ch. D. 310, C. A.

(*n*) *Re Dickason* (1837), 3 Hare, 195, n.

(*o*) *Hereford* (*Bishop*) v. *Adams* (1802), 7 Ves. 324; *Wilkinson* v. *Malin* (1832), 2 Cr. & J. 636; *A.-G.* v. *Bovill* (1840), 1 Ph. 762; *London School Board* v. *Faulconer* (1878), 8 Ch. D. 571. See, however, *Re Lambeth Charities* (1853), 22 L. J. (CH.) 959; *A.-G.* v. *Northumberland* (*Duke*) (1889), 5 T. L. R. 237.

(*p*) *A.-G.* v. *Matthews*, *supra* (Christ's Hospital).

(*q*) *Ware* v. *A.-G.* (1824), 3 Hare, 194, n.; *contrà*, *A.-G.* v. *Matthews*, *supra*.

(*r*) *A.-G.* v. *Rance* (1728), cited Amb. 422.

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345. Similarly, where the name of the charity legatee is left blank, the gift is applied under a scheme (*s*).

SUB-SECT. 6.—*Where the Doctrine is not applicable.*

Where gift not legally charitable.

346. On the failure of a gift which is not charitable in the legal sense the *cy-près* doctrine is not applicable (*t*). On the same principle the unexpended funds of a non-charitable society which is dissolved pass to the Crown as *bona vacantia* (*u*).

Where contrary intention expressed.

347. No *cy-près* application is possible in cases where a contrary intention is expressed or is to be implied from the language used by a testator; as, for example, where there is a direction that on failure of a bequest the property shall fall into residue (*v*), or where the objects of the original trust are capable of being carried into effect, but remain unsatisfied (*w*), or where the original trusts are still subsisting (*x*).

Where no failure.

348. Where the original foundation is capable of taking effect, the court has no authority to vary it and to apply the charity estates in a manner which it conceives to be more beneficial to the public, or even in a manner which the court may surmise that the founder would himself have contemplated could he have foreseen the changes which have taken place by lapse of time (*y*).

In like manner gifts for the poor of a particular locality (*z*), or for

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(*s*) *Pieschel* v. *Paris* (1825), 2 Sim. & St. 484; *Re White*, *White* v. *White*, [1893] 2 Ch. 41, C. A.; and see *Re Macduff*, *Macduff* v. *Macduff*, [1896] 2 Ch. 451, C. A.

(*t*) *A.-G.* v. *Haberdashers' Co.* (1834), 1 My. & K. 420; *Thomson* v. *Shakespear* (1860), 1 De G. F. & J. 399; *Carne* v. *Long* (1860), 2 De G. F. & J. 75; *Re Clark* (1875), 1 Ch. D. 497; and see *Pease* v. *Pattinson* (1886), 32 Ch. D. 154.

(*u*) *Cunnack* v. *Edwards*, [1896] 2 Ch. 679, C. A.; and see *Re Printers and Transferrers' Amalgamated Trades Protection Society*, [1899] 2 Ch. 184; *Re Lead Co.'s Workmen's Fund Society*, [1904] 2 Ch. 196.

(*v*) *Corbyn* v. *French* (1799), 4 Ves. 418, 431; *Lyons Corporation* v. *Bengal* (*Advocate-General*) (1876), 1 App. Cas. 91, 115; and see *A.-G.* v. *Liddell* (1871), 19 W. R. 297.

(*w*) *A.-G.* v. *Coopers' Co.* (1812), 19 Ves. 187, at pp. 189, 190; *A.-G.* v. *Love* (1857), 23 Beav. 499, 506; *Re Palatine Estate Charity* (1888), 39 Ch. D. 54.

(*x*) *Re St. Pancras Burial Ground* (1866), L. R. 3 Eq. 173, where the burial ground which was the subject of the trust was closed under an Order in Council, but under the terms of the Order not necessarily irrevocably; and see *A.-G.* v. *Price* (1908), 24 T. L. R. 761.

(*y*) *A.-G.* v. *Sherborne School* (*Governors*) (1854), 18 Beav. 256, 280; and see *A.-G.* v. *Boultbee* (1794), 2 Ves. 380, 388; *A.-G.* v. *Whiteley* (1805), 11 Ves. 241; *A.-G.* v. *Boucherett* (1855), 25 Beav. 116, 118, 119. Thus, a gift to erect and endow almshouses cannot be applied in building an hospital (*Philpott* v. *St. George's Hospital* (1859), 27 Beav. 107; see also *Anderson* v. *Glasgow* (*Wrights*) (1865), 12 L. T. 805, H. L.; *Clephane* v. *Edinburgh Corporation* (1869), L. R. 1 Sc. & Div. 417, 421), nor can a fund intended for the relief of physical destitution be applied for educational purposes (*Re Lambeth Charities* (1853), 22 L. J. (CH.) 959; *Re Stane* (1853), 21 L. T. (O. S.) 261; *A.-G.* v. *Northumberland* (*Duke*) (1889), 5 T. L. R. 237). Distinguish cases of gifts for the benefit of the poor, which as a rule may be applied for education (*Re Campden Charities* (1881), 18 Ch. D. 310, C. A.), but not for rebuilding a cathedral (*A.-G.* v. *Matthews* (1677), 2 Lev. 167). A gift for the reformation of vagrants could not be employed in the relief of destitute persons (*Re Bridewell Hospital* (1860), 8 W. R. 718; see also *Re Prison Charities* (1873), L. R. 16 Eq. 129), or a fund for the redemption of British slaves for purposes connected with negro slaves (*A.-G.* v. *Ironmongers' Co.* (1840), 2 Beav. 313, 325).

(*z*) *Re Campden Charities*, *supra*. But a gift for the benefit of a town need not be confined to freemen (*A.-G.* v. *Bushby* (1857), 24 Beav. 299).

SECT. 4. **Cy-près Doctrine and its Application.**

a particular church (*a*) or school (*b*), or for the benefit of a particular class of persons (*c*) or a particular congregation of Nonconformists (*d*), or to endow a particular lectureship (*e*), must be confined within the limits named, unless it can be said on failure of such purposes that they were merely modes of effectuating a wider charitable intention (*f*).

Unsatisfied possible condition.

If a gift to charity is conditional, and the condition, though possible (*g*), remains unsatisfied, the doctrine of *cy-près* is inapplicable (*h*).

Where failure uncertain.

If it is doubtful whether the named purpose can take effect, any application *cy-près* must be postponed until it is clear that the original purpose has failed (*i*).

Where no general charitable intention.

349. Again, where there is no general dedication of a fund to charity, or, in other words, where there is no overriding charitable intention, a gift for a particular purpose which cannot take effect cannot be applied *cy-près* (*j*). So a bequest to a particular charitable institution which has ceased to exist prior to the testator's death fails entirely (*k*).

Gifts for masses.

350. Bequests for the purpose of having masses said for the repose of the souls of particular persons, which are void for superstition, besides not being charitable, are not applicable *cy-près* (*l*).

Void gifts.

Gifts formerly rendered void by the Mortmain Acts were not

(*a*) *Anon.* (1702), 8 Freem. (CH.) 330; *A.-G.* v. *Oxford (Bishop)* (1786), 1 Bro. C. C. 444, n.; *A.-G.* v. *Boultbee* (1794), 2 Ves. 380, 387; *Corbyn* v. *French* (1799), 4 Ves. 418.

(*b*) *A.-G.* v. *Andrew* (1798), 3 Ves. 633, 649.

(*c*) *A.-G.* v. *Baxter* (1684), 1 Vern. 248 (ejected ministers), reversed on other grounds *sub nom. A.-G.* v. *Hughes* (1689), 2 Vern. 105.

(*d*) *A.-G.* v. *Wansay* (1808), 15 Ves. 231; *Free Church of Scotland (General Assembly)* v. *Overtoun (Lord)*, [1904] A. C. 515. But see *A.-G.* v. *Bunce* (1868), L. R. 6 Eq. 563.

(*e*) *A.-G.* v. *Cambridge (Margaret and Regius Professors)* (1682), 1 Vern. 55.

(*f*) See *Bunting* v. *Marriott* (1854), 19 Beav. 163; *Re Unite* (1906), 75 L. J. (CH.) 163.

(*g*) As to impossible conditions, see *Re Reed* (1893), 10 T. L. R. 87.

(*h*) *Chamberlayne* v. *Brockett* (1872), 8 Ch. App. 206, 211; and see *New* v. *Bonaker* (1867), L. R. 4 Eq. 655.

(*i*) *A.-G.* v. *Chester (Bishop)* (1785), 1 Bro. C. C. 444; *A.-G.* v. *Oglander* (1790), 3 Bro. C. C. 166; *A.-G.* v. *Craven (Earl)* (1856), 21 Beav. 392; *Sinnett* v. *Herbert* (1872), 7 Ch. App. 232, 241; and see *Re Gyde* (1898), 79 L. T. 261; *Wallis* v. *S.-G. for New Zealand*, [1903] A. C. 173; *A.-G.* v. *Price* (1908), 24 T. L. R. 761.

(*j*) *Biscoe* v. *Jackson* (1887), 35 Ch. D. 460, 465, C. A. See also *Clark* v. *Taylor* (1853), 1 Drew. 642, 644; *Re White* (1886), 33 Ch. D. 449; *Hoare* v. *Hoare* (1886), 56 L. T. 147, 149; *Re Randell* (1888), 38 Ch. D. 213; *A.-G.* v. *Oxford (Bishop)* (1786), 1 Bro. C. C. 444, n. (a gift to erect a church at a particular place, which was opposed by the bishop); *A.-G.* v. *Minshull* (1798), 4 Ves. 11, 14; and p. 158, *ante*.

(*k*) *Re Ovey* (1885), 29 Ch. D. 560; *Re Rymer, Rymer* v. *Stanfield*, [1895] 1 Ch. 19; *Re Davis, Hannen* v. *Hillyer*, [1902] 1 Ch. 876, 881. Distinguish the cases where the institution exists at the testator's death, but subsequently fails, p. 161, *ante*.

(*l*) *West* v. *Shuttleworth* (1835), 2 My. & K. 684; *Heath* v. *Chapman* (1854), 2 Drew. 425; *Re Blundell* (1861), 30 Beav. 360. See also p. 120, *ante*, and for the *cy-près* application in certain circumstances of gifts for Roman Catholic charities, see Roman Catholic Charities Act, 1860 (23 & 24 Vict. c. 134), s. 1; and p. 199, *post*.

applied *cy-près* (*m*). Such gifts, *e.g.*, gifts of money directed to be laid out in land or gifts of land, would not now fail (*n*).

SUB-SECT. 7.—*Statutory Cy-près Application.*

351. In several instances *cy-près* application has been authorised by statute.

Trusts for Roman Catholics.

Thus, charitable trusts for the exclusive benefit of Roman Catholics are not rendered void by the addition of unlawful or superstitious trusts, but the property may be apportioned by a scheme and the whole applied to lawful purposes (*o*).

Under Endowed Schools Act, 1869.

So, too, the Charity Commissioners may, with the consent of the governing body, apply certain non-educational endowments either wholly or partially, by means of a scheme under the Endowed Schools Act, 1869, for the advancement of education (*p*).

Allotments.

Again, the Charity Commissioners are empowered, upon the application of the trustees of any fuel allotment, to authorise the use of such fuel allotment as a recreation ground and field garden (*q*).

Further, all schemes made by the Charity Commissioners in relation to any charity the endowment whereof consists of land other than buildings must contain provisions (*r*) authorising the trustees of the charity to set apart portions of the land for allotments (*s*).

Part V.—Trust Property after the Trust is created.

SECT. 1.—*Recovery of the Trust Property.*

SUB-SECT. 1.—*In General.*

Action by Charity Commissioners.

352. In certain cases the Charity Commissioners are empowered by statute to sue for the recovery of property belonging to charities (*t*).

Payment to charitable beneficiaries.

353. Charitable beneficiaries who are entitled absolutely to legacies may demand immediate payment, notwithstanding any direction for accumulation (*a*). In the case of a charitable bequest

(*m*) *Sims* v. *Quinlan* (1864), 16 I. Ch. R. 191; and see *A.-G.* v. *Whitchurch* (1796), 3 Ves. 141; *A.-G.* v. *Stepney* (1804), 10 Ves. 22.

(*n*) See Mortmain and Charitable Uses Act, 1891 (54 & 55 Vict. c. 73); and p. 136, *ante*.

(*o*) Roman Catholic Charities Act, 1860 (23 & 24 Vict. c. 134), s. 1. This section does not apply if the property is entirely devoted to superstitious uses (*Re Blundell* (1861), 30 Beav. 360).

(*p*) Endowed Schools Act, 1869 (32 & 33 Vict. c. 56), s. 30; see *Re Charitable Gifts for Prisoners* (1872), 8 Ch. App. 199. For the definition of educational endowment, see s. 5 of the Act of 1869; and title EDUCATION.

(*q*) Commons Act, 1876 (39 & 40 Vict. c. 56), s. 19; Commons Act, 1899 (62 & 63 Vict. c. 30), s. 18. See titles ALLOTMENTS, Vol. I., p. 334; COMMONS AND RIGHTS OF COMMONS, p. 596, *post*.

(*r*) Allotments Extension Act, 1882 (45 & 46 Vict. c. 80), s. 14. See title ALLOTMENTS, Vol. I., p. 338.

(*s*) See, for example, Encyclopædia of Forms, Vol. III., p. 480, clause 17.

(*t*) Charitable Trusts (Recovery) Act, 1891 (54 Vict. c. 17), s. 3; see p. 322, *post*.

(*a*) *Harbin* v. *Masterman*, [1894] 2 Ch. 184, C. A., affirmed *sub nom*, *Wharton*

SECT. 1. **Recovery of the Trust Property.**

which remained unapplied and accumulated for thirty years, the accumulations were held to go with the original bequest (*b*).

Interest is allowed on a charitable legacy as from the end of a year after the testator's death (*c*).

Boundaries of charity lands.

354. A tenant of charity lands is under an obligation to the charity to keep such lands distinct from his own property during the tenancy (*d*). If the lands of the charity have become intermixed with other lands, the boundaries of the charity lands must be ascertained either by commission (*e*) or by inquiry at chambers (*f*); and if they cannot be pointed out, then the value of the lands formerly belonging to the charity must be ascertained (*g*).

SUB-SECT. 2.—*Following the Trust Property.*

Remedies to recover trust property.

355. Beneficiaries who have suffered from an improper alienation of the trust estate, in addition to their right of action against the trustees for breach of trust (*h*), may in many instances follow the trust estate into the hands of the alienee (*i*), or attach the property into which the trust estate has been improperly converted (*k*). They are entitled to take whichever remedy appears most beneficial (*l*).

Setting aside transactions.

Unless the purchaser can plead protection by reason of the Statutes of Limitation or on the ground that he is a purchaser for value without notice, a conveyance to him of charity property which constitutes a breach of trust is set aside (*m*). The same rule applies in the case of a lease in breach of trust (*n*). In the absence of collusion or fraud, the court may on setting aside a sale (*o*) or a lease (*p*) direct that an allowance should be made in respect of buildings or other permanent improvements erected or made on the land.

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v. *Masterman*, [1895] A. C. 186, overruling a previous doubt upon this point expressed in *Harbin* v. *Masterman* (1871), L. R. 12 Eq. 559.

(*b*) *Forbes* v. *Forbes* (1854), 18 Beav. 552.

(*c*) *Fisher* v. *Brierley* (No. 3) (1861), 30 Beav. 268.

(*d*) *A.-G.* v. *Fullerton* (1813), 2 Ves. & B. 263; *Spike* v. *Harding* (1878), 7 Ch. D. 871, where it was said that the obligation rests on the tenant not merely at the end of the term when he comes to deliver up the property, but during the subsistence of the term also.

(*e*) *A.-G.* v. *Fullerton*, *supra*, at p. 266. See also *Reresby* v. *Farrer* (1700), 2 Vern. 414; *A.-G.* v. *Bowyer* (1800), 5 Ves. 300; *S.-G.* v. *Bath Corporation* (1849), 18 L. J. (CH.) 275; *A.-G.* v. *Stephens* (1855), 25 L. J. (CH.) 888; and title BOUNDARIES AND FENCES, Vol. III., p. 117.

(*f*) *Spike* v. *Harding*, *supra*.

(*g*) *A.-G.* v. *Fullerton*, *supra*, at p. 266.

(*h*) See p. 276, *post*; and, generally, title TRUSTS AND TRUSTEES.

(*i*) *A.-G.* v. *Kell* (1840), 2 Beav. 575; *A.-G.* v. *Compton* (1842), 1 Y. & C. Ch. Cas. 417.

(*k*) *A.-G.* v. *Newcastle Corporation* (1842), 5 Beav. 307.

(*l*) *Ibid.*, at p. 314.

(*m*) *A.-G.* v. *Christ's Hospital* (1834), 3 My. & K. 344; *A.-G.* v. *Brettingham* (1840), 3 Beav. 91; *A.-G.* v. *Kerr* (1840), 2 Beav. 420; *A.-G.* v. *Manchester (Bishop)* (1867), L. R. 3 Eq. 436; see title TRUSTS AND TRUSTEES.

(*n*) *Re Lawford Charity, Ex parte Skinner* (1817), 2 Mer. 453, 457. As to setting aside improvident leases, see further, p. 224, *post*.

(*o*) *A.-G.* v. *Magdalen College, Oxford* (1854), 18 Beav. 223.

(*p*) *A.-G.* v. *Kerr*, *supra*. See also pp. 223 *et seq.*, *post*.

SECT. 1. Recovery of the Trust Property.

356. A purchaser for value of land subject to a legal rent-charge in favour of a charity, of which he had no notice, nevertheless takes subject to the rent-charge (*q*); and *à fortiori* where he had notice (*a*). If the charge is equitable only, a purchaser for value without notice, but no other purchaser, will take free from the charge (*b*).

Purchase subject to equitable rights of charity.

Where a person who purchased land with notice of an equitable right sells to another for value without notice, the latter is protected even where the right is vested in a charity (*c*).

A purchaser for value without notice of a trust cannot subsequently after getting notice of the trust protect himself by taking a conveyance of the legal estate from the trustee, for by taking such a conveyance he becomes a trustee himself (*d*).

Purchaser with notice.

357. A purchaser for value with notice that the property purchased is subject to charitable trusts takes subject to those trusts (*e*), and no length of possession will, apart from the Statutes of Limitation (*f*), protect him (*g*). Notice given at any time prior to the execution of the conveyance binds the purchaser (*h*).

Volunteer.

A person acquiring a charity estate for no valuable consideration is not entitled to protection whether he had notice of the trusts or not (*i*).

SUB-SECT. 3.—*Recovery of Rent-charges.*

Who may be sued.

358. Where a legal rent-charge has been created for charitable purposes, payment may be enforced by an action of debt against the freeholder of the whole (*k*) or of a portion of the land

(*q*) *East Grinsted Case* (1633), Duke on Charitable Uses, ed. Bridgman, 638; *Peacock* v. *Thewer* (1638), Duke on Charitable Uses, ed. Bridgman, 589; *Wharton* v. *Charles* (1673), Cas *temp.* Finch, 81; Sugden, Vendor and Purchaser, 14th ed. 722. See *Ind, Coope & Co.* v. *Emmerson* (1887), 12 App. Cas. 300, 306, 307; and compare *A.-G.* v. *Wilkins* (1853), 17 Beav. 285, where the defence of purchase for value without notice was held sufficient to defeat the claims of a charity to a rent-charge the legal estate in which was outstanding. See the discussion of this case, Sugden, Vendor and Purchaser, 14th ed., pp. 794 *et seq.*

(*a*) *Hide's Case* (1628), Duke on Charitable Uses, ed. Bridgman, 636.

(*b*) *Re Alms Corn Charity*, [1901] 2 Ch. 750, 760.

(*c*) *Ibid.*, where, however, the early cases to the contrary, namely, *East Grinsted Case*, *supra*; and *Sutton Coldfield Case* (1635), Duke on Charitable Uses, ed. Bridgman, 642, were not quoted. See also *Charitable Donations Commissioners* v. *Wybrants* (1845), 2 Jo. & Lat. 182, 194; *A.-G.* v. *Gower* (*Lord*) (1736), 2 Eq. Cas. Abr. 195, fol. 16; Dart, Vendor and Purchaser, 7th ed. 933; and title TRUSTS AND TRUSTEES.

(*d*) *Mumford* v. *Stohwasser* (1874). L. R. 18 Eq. 556, 563, approving *Saunders* v. *Dehew* (1692), 2 Vern. 271.

(*e*) *Harding* v. *Edge* (1682), 2 Cas. in Ch. 94; *A.-G.* v. *Christ's Hospital* (1834), 3 My. & K. 344; *A.-G.* v. *Flint* (1844), 4 Hare, 147; *A.-G.* v. *Hall* (1852), 16 Beav. 388, 392.

(*f*) See *Incorporated Society* v. *Richards* (1841), 1 Dr. & War. 258; *A.-G.* v. *Payne* (1859), 27 Beav. 168; *A.-G.* v. *Davey* (1859), 4 De G. & J. 136; and p. 204, *post*. As to the Statutes of Limitation generally, see title LIMITATION OF ACTIONS.

(*g*) *A.-G.* v. *Christ's Hospital*, *supra*; and see *Churcher* v. *Martin* (1889), 42 Ch. D. 312.

(*h*) *Woodford* (*Inhabitants*) v. *Parkhurst* (1639), Duke on Charitable Uses, 70; and see *Roots* v. *Williamson* (1888), 38 Ch. D. 485, 497, 498.

(*i*) *Mansell* v. *Mansell* (1732), 2 P. Wms. 678, 681; and see *Moody* v. *Walters* (1809), 16 Ves. 283, 302.

(*k*) *Thomas* v. *Sylvester* (1873), L. R. 8 Q. B. 368, 370; *Varley* v. *Leigh* (1848),

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charged (*l*), whether he has received any rents or not (*m*), though the rent-charge does not in itself constitute a debt (*n*). If the rent-charge issues out of lands belonging to several owners, the charity can enforce payment of the whole from the owner of one estate (*a*), leaving him to levy contribution from the owners of the other estates charged (*b*). The court may direct an inquiry whether any, and what, other property is chargeable, and in whose possession such land is and what is its value (*c*).

Liability of tenant for years.

But an action of debt will not lie against a tenant for years (*d*), though his goods may be distrained upon by charity trustees who are legal owners of a rent-charge to recover payment thereof (*e*).

Statutory remedies.

Certain remedies for recovery of annual sums charged on land by distress, sale, or mortgage are given by statute (*f*).

Proceedings by Attorney-General.

359. Actions to recover rent-charges which appear to belong to charities may be brought by the Attorney-General (*g*).

Proceedings by Charity Commissioners.

The Charity Commissioners may also, with the sanction of the Attorney-General, institute proceedings (*h*) for the recovery of rent-charges which do not in their opinion exceed £20 a year in value (*i*). For the purposes of any proceedings instituted by

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2 Exch. 446; *Searle* v. *Cooke* (1890), 43 Ch. D. 519; *Re Herbage Rents, Greenwich*, [1896] 2 Ch. 811. Real actions, it may be noted, were abolished by the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 36; see title ACTION, Vol. I., p. 46.

(*l*) *Christie* v. *Barker* (1884), 53 L. J. (Q. B.) 537.

(*m*) *Pertwee* v. *Townsend*, [1896] 2 Q. B. 129; *Re Herbage Rents, Greenwich, supra*, at p. 819; and compare, on the other hand, *Odlum* v. *Thompson* (1893), 31 L. R. Ir. 394, where it was held that the owner of the rent-charge was entitled only to the profits received by the owner of the land.

(*n*) *Re Blackburn and District Benefit Building Society, Ex parte Graham* (1889), 42 Ch. D. 343, 349.

(*a*) *A.-G.* v. *Shelly* (1712), Salk. 163; *A.-G.* v. *Wyburgh* (1719), 1 P. Wms. 599; *A.-G.* v. *Jackson* (1805), 11 Ves. 365; *Christie* v. *Barker, supra; Re Herbage Rents, Greenwich, supra*, at p. 821; Shelford, Law of Mortmain, pp. 433 *et seq.*

(*b*) *Christie* v. *Barker, supra*, at p. 542; *Re Herbage Rents, Greenwich, supra*, at p. 825.

(*c*) *A.-G.* v. *Wyburgh, supra; A.-G.* v. *Jackson, supra; A.-G.* v. *Naylor* (1863), 1 Hem. & M. 809; *Re Alms Corn Charity*, [1901] 2 Ch. 750.

(*d*) *Re Herbage Rents, Greenwich, supra.* Except where the tenant for years deliberately paid the rent-charge to a person not entitled (*Cutts* v. *West* (1557), 2 Dyer, fol. 141 b, pl. 47; *Re Herbage Rents, Greenwich, supra*, at pp. 822, 824).

(*e*) *Woodford (Inhabitants)* v. *Parkhurst* (1639), Duke on Charitable Uses, 70; *Holder* v. *Chambury* (1734), 3 P. Wms. 256; *Re Herbage Rents, Greenwich, supra*, at p. 815.

(*f*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 44. See title RENT-CHARGES AND ANNUITIES; and the non-charitable case *Hambro* v. *Hambro*, [1894] 2 Ch. 564. These remedies would seem to be available for the recovery of charitable rent-charges in proper cases.

(*g*) See *A.-G.* v. *Bolton* (1796), 3 Anst. 820; *A.-G.* v. *Jackson, supra; A.-G.* v. *Gascoigne* (1832), 1 L. J. (CH.) 122; *A.-G.* v. *Naylor, supra.*

(*h*) *I.e.*, action, petition, or other proceeding, such as an originating summons (Charitable Trusts (Recovery) Act, 1891 (54 Vict. c. 17), s. 3); see also *Bassano* v. *Bradley*, [1896] 1 Q. B. 645.

(*i*) Charitable Trusts (Recovery) Act, 1891 (54 Vict. c. 17), s. 3. For examples of proceedings instituted under this section, see *Re Gwynne's Charity* (1894), 10 T. L. R. 428; *Re Herbage Rents, Greenwich, supra; Re White's Charities*, [1898] 1 Ch. 659; and as to mode of procedure by the Charity Commissioners, see s. 4 of the same Act.

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the Commissioners for the recovery of charity rent-charges, the printed reports (*k*) of the former Commissioners for inquiring into charities are admitted as *primâ facie* evidence of the facts and documents stated therein, if notice by the party intending to use them has been given to the other party (*l*); and in such proceedings payment of a rent-charge for twelve years is *primâ facie* evidence of the perpetual liability of the land to such payment, no proof of the origin thereof being necessary (*m*).

Proceedings by trustees.

Charity trustees may also institute proceedings for the recovery of rent-charges and arrears, and such proceedings do not require the consent of the Charity Commissioners (*n*). Such actions may be brought in a county court, provided that the value of the rent-charge does not exceed £100 per annum (*o*).

Uncertainty as to land charged.

360. Where the boundaries of land subject to a rent-charge are confused, the court will give relief by directing the lands so charged to be ascertained (*p*); or, if this cannot be done, by compelling the negligent party or those claiming under him to render an equivalent in satisfaction of the rent-charge (*q*). Where there is a confusion of boundaries, or it is not known out of what land the rent-charge issues (*r*), or the legal title is not clear or is defective (*s*), a legal rent-charge may be enforced in equity in favour of a charity where the right could not be enforced at law (*t*).

Presumption from continued payment.

361. Long-continued payment may prove the existence of a rent-charge (*a*), especially if the amount paid coincides with the amount of the rent-charge (*b*). The defendant may, however, produce his title-deeds or other evidence to negative such inference and show that the payments were made for another reason (*b*).

Limitation of time for recovery.

A defence founded on the Statutes of Limitation may be a complete bar to an action to recover a charitable rent-charge (*c*).

(*k*) *E.g.*, the reports made under stat. 58 Geo. 3, c. 91, and other repealed Acts appointing commissioners to inquire into charities; see Charitable Trusts (Recovery) Act, 1891 (54 Vict. c. 17), s. 5 (1).

(*l*) *Ibid.* Where extracts from such reports are used in court, they are verified by affidavit of the secretary of the Charity Commission (*Re Alms Corn Charity*, [1901] 2 Ch. 750). See *Re Gwynne's Charity* (1894), 10 T. L. R. 428.

(*m*) Charitable Trusts (Recovery) Act, 1891 (54 Vict. c. 17), s. 5 (2); see *Irish Land Commission* v. *Grant* (1884), 10 App Cas. 14.

(*n*) *Bassano* v. *Bradley*, [1896] 1 Q. B. 645.

(*o*) *Ibid.*; County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 60, as amended by County Courts Act, 1903 (3 Edw. 7, c. 42), s. 3.

(*p*) *Ambler's Case* (1770), cited 4 Ves. 184; and see p. 200, *ante*; and title BOUNDARIES AND FENCES, Vol. III., p. 117.

(*q*) *A.-G.* v. *Stephens* (1855), 6 De G. M. & G. 111, 134.

(*r*) *A.-G.* v. *Wilkins* (1853), 22 L. J. (CH.) 830, 832.

(*s*) *Re Herbage Rents, Greenwich*, [1896] 2 Ch. 811, 825.

(*t*) The law here enunciated is in accordance with the well-established principle that equity will aid defective assurances in favour of charity (Shelford, Law of Mortmain, p. 514).

(*a*) *A.-G.* v. *West* (1858), 27 L. J. (CH.) 789 (thirty years' continuous payment).

(*b*) *A.-G.* v. *Stephens*, *supra*, at pp. 138, 139. Long-continued payment may estop the person paying a rent-charge from denying the ownership of lands chargeable (*ibid.* at p. 143).

(*c*) *A.-G.* v. *Wilkins* (1853), 17 Beav. 285, 293; *A.-G.* v. *Stephens*, *supra*, at p. 146; *St. Mary Magdalen, Oxford* (*President etc.*) v. *A.-G.* (1857), 6 H. L. Cas. 189. See also p. 204, *post*.

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But time does not run where by reason of the circumstances no beneficiary is in a position to make a claim (*d*).

SUB-SECT. 4.—*Application of the Statutes of Limitation to Charities.*

Protection of trustees.

362. In proceedings against charity trustees (whether express or constructive, but not including the Official Trustees of Charitable Funds) the rule is that, except in cases of fraud, retention of the trust property, or conversion by the trustee to his own use, the right of a *cestui que trust* to sue in respect of trust property, whether real or personal, is barred after the expiration of six years (*e*). Time runs from the date of the breach of trust (*f*). Subject to the last-mentioned rule, it may be stated generally that, except in cases of express trust (*g*), claims by charities to land or rent are barred after the expiration of twelve years (*h*).

Protection of purchaser from trustee.

In the case of a purchase for value of land or rent from an express trustee for a charity in breach of trust, time runs in favour of the purchaser from the date of the conveyance to him, and the claim of the charity to the land or rent is barred after the expiration of twelve years from that date (*i*). It makes no difference that the proceeding is instituted by the Attorney-General (*k*). The impeachment of improvident leases of charity lands may similarly be barred (*l*).

Land acquired under void conveyance.

363. Charity trustees may under the Statutes of Limitation acquire a valid title to lands of which they have enjoyed possession

(*d*) *A.-G.* v. *Persse* (1842), 2 Dr. & War. 67, where a rent-charge was given as a salary for a schoolmaster to be appointed by a certain person; no appointment was made for twenty-seven years, but nevertheless the rent-charge was not barred. See also *Incorporated Society* v. *Richards* (1841), 1 Dr. & War. 258, 288.

(*e*) Trustee Act, 1888 (51 & 52 Vict. c. 59), s. 8; see title TRUSTS AND TRUSTEES. As to the Statutes of Limitation generally, see title LIMITATION OF ACTIONS.

(*f*) *Thorne* v. *Heard and Marsh*, [1895] A. C. 495.

(*g*) Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 25; Supreme Court of Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (2); *Charitable Donations Commissioners* v. *Wybrants* (1845), 2 Jo. & Lat. 182; *Re Gwynne's Charity* (1894), 10 T. L. R. 428. As to the meaning of "express" trust, see *Soar* v. *Ashwell*, [1893] 2 Q. B. 390, 395; and see also title TRUSTS AND TRUSTEES.

(*h*) *Charitable Donations Commissioners* v. *Wybrants*, *supra*; *St. Mary Magdalen, Oxford* (*President etc.*) v. *A.-G.* (1857), 6 H. L. Cas. 189; see also *Incorporated Society* v. *Richards*, *supra*; *A.-G.* v. *Persse*, *supra*; *A.-G.* v. *Flint* (1844), 4 Hare, 147, 155, where the point was discussed. The time prescribed by the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 1, amending the previous Act of 1833 (3 & 4 Will. 4, c. 27), is twelve years.

The earlier Limitation Acts, 32 Hen. 8, c. 2, and 21 Jac. 1, c. 16, were held not to apply to charities in equity, though they did at law (see *A.-G.* v. *Coventry Corporation* (1700), 2 Vern. 397, 399; *A.-G.* v. *Exeter Corporation* (1822), Jac. 443, 448; *A.-G.* v. *Christ's Hospital* (1834), 3 My. & K. 344; *Incorporated Society* v. *Richards*, *supra*; *St. Mary Magdalen, Oxford* (*President etc.*) v. *A.-G.*, *supra*, at pp. 213, 214), except in the case of a purchaser for value without notice (*Charitable Donations Commissioners* v. *Wybrants*, *supra*, at p. 194). At law the old Acts did apply to charities (*ibid.*).

(*i*) Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 25; *St. Mary Magdalen, Oxford* (*President etc.*) v. *A.-G.*, *supra*; *A.-G.* v. *Flint*, *supra*, at p. 155.

(*k*) *St. Mary Magdalen, Oxford* (*President etc.*) v. *A.-G.*, *supra*.

(*l*) *A.-G.* v. *Davey* (1859), 4 De G. & J. 136; *A.-G.* v. *Payne* (1859), 27 Beav. 168. As to the right to impeach improvident leases, see pp. 224 *et seq.*, *post*.

SECT. 1. Recovery of the Trust Property.

under a conveyance rendered void for not complying with the requirements of the Mortmain and Charitable Uses Act, 1888 (*m*).

Title may also be acquired by possession under a void lease (*n*). If no rent is paid, no tenancy is created, and the statute runs from the date on which possession is acquired (*o*). The payment of rent, however small, establishes the relation of landlord and tenant, in which case the statute runs as from the last payment of rent (*p*).

Title acquired under a void lease.

364. The right to claim the benefit of a gift over of land from one charity to another may be barred by effluxion of time (*q*).

Gift over barred.

Time does not run in favour of a person who has got possession of charity land by fraud so long as the fraud is concealed, but it begins to run from the date of discovery (*r*).

Fraud.

The claim to a charity legacy is barred after twelve years where no sum has been appropriated for payment, no trust created, and no assets admitted (*s*).

Claim to legacy barred.

SECT. 2.—*Liabilities affecting the Trust Property.*

SUB-SECT. 1.—*Estate Duty.*

365. Apart from the special exemption mentioned below, there is nothing in the Finance Act, 1894 (*a*), generally exempting from liability to estate duty property passing upon a death to a charity.

No general exemption of property passing to charity.

Where a testamentary gift to charity is effected by the machinery of a present gift subject to a reservation of a life interest in the subject-matter of the gift, a succession within the meaning of the Succession Duty Act, 1853 (*b*), takes place on the death of the donor, and estate duty then becomes payable (*c*).

The fact that the property is situate abroad, and that the donor

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(*m*) 51 & 52 Vict. c. 42; *Churcher* v. *Martin* (1889), 42 Ch. D. 312. For a similar case of a devise void under the law before 1891, see *Re Lacy, Royal General Theatrical Fund Association* v. *Kydd*, [1899] 2 Ch. 149, where, according to a shorthand note of the proceedings on the files of the Charity Commission, the judge directed that whatever property had vested in the trustee should be conveyed and assigned in trust for the charity. As to the formalities required by the Act of 1888, see p. 127, *ante*.

(*n*) *Magdalen Hospital (President etc.)* v. *Knotts* (1879), 4 App. Cas. 324 (lease void under stat. 13 Eliz. c. 10); *Bunting* v. *Sargent* (1879), 13 Ch. D. 330; *Webster* v. *Southey* (1887), 36 Ch. D. 9, 19 (leases void under Mortmain Acts); *A.-G.* v. *Davey* (1859), 4 De G. & J. 136; *A.-G.* v. *Payne* (1859), 27 Beav. 168 (improvident leases). The same principle would no doubt apply in the case of a lease void under the Charitable Trusts Amendment Act, 1855 (18 & 19 Vict. c. 124), s. 29 (*Bangor (Bishop)* v. *Parry*, [1891] 2 Q. B. 277). As to void leases generally, see p. 227, *post*.

(*o*) *Magdalen Hospital (President etc.)* v. *Knotts*, *supra*, at p. 334.

(*p*) Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 8; *Bunting* v. *Sargent*, *supra*; *Webster* v. *Southey*, *supra*; see also *Magdalen Hospital (President etc.)* v. *Knotts*, *supra*, at p. 335.

(*q*) See *Re Orchard Street Schools (Trustees)*, [1878] W. N. 211; *Christ's Hospital* v. *Grainger* (1849), 19 L. J. (CH.) 33.

(*r*) *Hovenden* v. *Annesley (Lord)* (1806), 2 Sch. & Lef. 607, 634; and see *Charitable Donations Commissioners* v. *Wybrants* (1845), 2 Jo. & Lat. 182.

(*s*) *Cadbury* v. *Smith* (1869), L. R. 9 Eq. 37.

(*a*) 57 & 58 Vict. c. 30. See generally title DEATH DUTIES.

(*b*) 16 & 17 Vict. c. 51, s. 2.

(*c*) *A.-G.* v. *Jewish Colonization Society*, [1901] 1 K. B. 123; *A.-G.* v. *Johnson*, [1903] 1 K. B. 617; Finance Act, 1894 (57 & 58 Vict. c. 30), ss. 2 (1) (c), 3.

SECT. 2. Liabilities affecting the Trust Property.

is a foreigner, is not alone sufficient to exempt the subject-matter of the gift from payment of estate duty (*d*).

Estate duty is not payable on property in which the deceased or another person was interested as holder of an office, or recipient of the benefits of a charity, or as a corporation sole (*e*).

SUB-SECT. 2.—*Legacy Duty.*

Liability.

366. As a general rule legacies to charities, like other legacies, are subject to legacy duty (*f*), the rate being 10 per cent., as in the case of legacies to strangers in blood (*g*).

Gift free of legacy duty.

A gift of a clear annuity or a direction to set apart so much as would produce a clear income or sum of a specified amount is construed to be a gift free of legacy duty (*h*). But an intention that the legacy should be duty-free cannot be implied from the fact that if duty were deducted the residue would not be sufficient for the specified purpose (*i*).

Exemptions.

367. Where the entire personal estate of the testator is under £100, no legacy duty is payable (*j*). Nor is duty payable on legacies consisting of books, prints, pictures, statues, gems, coins, medals, specimens of natural history, or other specific articles, bequeathed to or in trust for any body corporate, whether aggregate or sole, or to any of the Inns of Court or any endowed school, in order to be kept and preserved by such body corporate, society, or school, and not for purposes of sale (*k*).

Remission of duty on gifts for national purposes.

The Treasury may remit any duty, including legacy duty, leviable in respect of bequests, such as pictures, prints, books, manuscripts, works of art, or scientific collections given for national purposes or to any university, county council, or municipal corporation (*l*).

(*d*) *A.-G.* v. *Jewish Colonization Society*, [1901] 1 K. B. 123, where the trustee was English.

(*e*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 2 (1) (b).

(*f*) *Re Francklin's Charity* (1829), 3 Sim. 147; *Re Wilkinson* (1834), 1 Cr. M. & R. 142, 151, affirmed *sub nom. A.-G.* v. *Nash* (1836), 1 M. & W. 237, Ex. Ch.; Shelford, Law of Mortmain, pp. 773 *et seq.* Prior to the Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), s. 42, where legacies under £20 were not liable to legacy duty, duty was payable on the total amount of legacies given to trustees for distribution among various charitable objects, though none of the recipients received £20 (*Re Francklin's Charity, supra; A.-G.* v. *Fitzgerald* (1843), 13 Sim. 83; *Re Griffiths* (1845), 14 M. & W. 510; *Re Pearce* (1857), 24 Beav. 491; *Harris* v. *Howe (Earl)* (1861), 30 L. J. (CH.) 612). Since the passing of the Mortmain and Charitable Uses Act, 1891 (54 & 55 Vict. c. 73), there would appear to be no objection to the payment out of impure personalty of duty on legacies given free of duty, though before that Act this was not possible; see *Wilkinson* v. *Barber* (1872), L. R. 14 Eq. 96. See generally title DEATH DUTIES.

(*g*) See Succession Duty Act, 1853 (16 & 17 Vict. c. 51); *A.-G.* v. *Fitzgerald, supra; Re Parker* (1859), 29 L. J. (EX.) 66.

(*h*) *Re Coles* (1869), L. R. 8 Eq. 271.

(*i*) *Re De Rosaz* (1886), 2 T. L. R. 871.

(*j*) Customs and Inland Revenue Act, 1880 (43 Vict. c. 14), s. 13.

(*k*) 39 Geo. 3, c. 73; 55 Geo. 3, c. 184, Schedule, Part III; see *Re Wilkinson, supra*, at p. 160.

(*l*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 15 (2).

SECT. 2. Liabilities affecting the Trust Property.

Exemption of gifts for Irish charities.

368. Legacies given for the education or maintenance of poor children or for the support of any charitable institution or other charitable purpose in Ireland are not chargeable with legacy duty (*m*). Thus, legacies for endowing a convent in Ireland (*n*) or for the public celebration of masses for the repose of the testator's soul (*o*) are exempt; but not legacies by persons domiciled in Ireland for charitable purposes outside Ireland (*p*), or for the benefit of the poor unless the objects are restricted to Ireland (*q*), or legacies which are absolute on the face of the will, but are impressed with a secret charitable trust to take effect in Ireland (*r*). A legacy for charitable purposes in Ireland by a British subject domiciled in France, the will and subject-matter of the legacy being French, is not liable to duty (*s*).

SUB-SECT. 3.—*Succession Duty.*

Liability.

369. Succession duty at the rate of 10 per cent. is payable upon the amount or principal value of property where it becomes subject to a trust for any charitable or public purposes under any past or future disposition which, if made in favour of an individual, would confer upon him a succession (*t*). Thus, where a donor by deed gives a fund to a trustee on condition that the income should be paid to the donor during his life, and that after his death the fund should be applied for charitable purposes, succession duty is payable on the principal value of the property on the death of the donor (*a*).

Exemptions.

Gifts exempt from the payment of legacy duty (*b*) are equally exempt as regards succession duty (*c*).

SUB-SECT. 4.—*Duties on Property of Bodies Corporate and Unincorporate.*

Exemptions.

370. The duty imposed (*d*) on the property of bodies corporate and unincorporate to compensate the revenue for the loss of probate (*e*), legacy, or succession duties, for which such bodies escape liability, is not payable in the case of the following properties: (1) property appropriated and applied for the benefit of the public at large, or of any county, shire, borough, or place, or the ratepayers or inhabitants

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(*m*) Stamp Duties (Ireland) Act, 1842 (5 & 6 Vict. c. 82), s. 38; Stamp Act, 1853 (16 & 17 Vict. c. 59), s. 20; *A.-G.* v. *Delaney* (1875), I. R. 10 C. L. 104, 131.

(*n*) *Mahony* v. *Duggan* (1880), 11 L. R. Ir. 260.

(*o*) *A.-G.* v. *Hall*, [1897] 2 I. R. 426. See, on the other hand, *Perry* v. *Tuomey* (1888), 21 L. R. Ir. 480.

(*p*) *A.-G.* v. *Hope* (1868), I. R. 2 C. L. 368; *A.-G.* v. *Delaney*, *supra*, at p. 131.

(*q*) *Kenny* v. *A.-G.* (1883), 11 L. R. Ir. 253.

(*r*) *Cullen* v. *A.-G. for Ireland* (1866), L. R. 1 H. L. 190.

(*s*) *Charitable Donations Commissioners* v. *Devereux* (1842), 11 L. J. (CH.) 362.

(*t*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 16; *Re Parker* (1859), 29 L. J. (EX.) 66, 72.

(*a*) *A.-G.* v. *Jewish Colonization Society*, [1901] 1 Q. B. 123, where the donor was a foreigner, but the trustee was an English company, and the deed was in English form; see also *A.-G.* v. *Johnson*, [1903] 1 K. B. 617.

(*b*) *E.g.*, legacies to charities in Ireland.

(*c*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 18.

(*d*) Customs and Inland Revenue Act, 1885 (48 & 49 Vict. c. 51); see title CORPORATIONS.

(*e*) Now estate duty; see title DEATH DUTIES.

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thereof, or in any manner expressly prescribed by Act of Parliament (*f*); (2) property appropriated and applied for any purpose connected with any religious persuasion, or for any charitable purpose (*g*), or for the promotion of education, literature, science, or the fine arts (*h*); and (3) property belonging to friendly societies or savings banks (*i*).

The property of the Institution of Civil Engineers is also exempt (*j*), but not that of the Royal Colleges of Surgeons of England (*k*) or Edinburgh (*l*).

If the main object of an institution is the promotion of science, the existence of subsidiary objects does not deprive the institution of the exemption (*m*).

The property of an institution in the nature of a mutual benefit society is not exempt (*n*).

SUB-SECT. 5.—*Income Tax.*

(1) Sched. A.

371. Certain charities and *quasi*-charitable institutions are exempt from that form of income tax commonly called property tax, which is assessable under Sched. A to s. 60 of the Income Tax Act, 1842 (*o*), on the annual value of lands, tenements, and hereditaments (*p*).

Limits of exemption.

The exemption applies, *inter alia*, (1) to the public buildings, offices, and premises of colleges and halls in universities (*q*), of hospitals (*r*), schools (*s*), almshouses (*t*), and literary and scientific institutions (*u*), where the buildings and premises are used solely for the purposes of such institutions; (2) to the cost of repairing

(*f*) Customs and Inland Revenue Act, 1885 (48 & 49 Vict. c. 51), s. 11 (2); see *Inland Revenue Commissioners* v. *Scott*, [1892] 2 Q. B. 152.

(*g*) The term "charitable purpose" in this sub-section has a less extended meaning than under the general law (*ibid.*, at pp. 165, 166).

(*h*) Customs and Inland Revenue Act, 1885 (48 & 49 Vict. c. 51), s. 11 (3).

(*i*) *Ibid.*, s. 11 (4); see title FRIENDLY SOCIETIES.

(*j*) *Ibid.*, s. 11 (3); *Inland Revenue Commissioners* v. *Forrest* (1890), 15 App. Cas. 334, reversing *Re Institution of Civil Engineers* (*Duty on Estate*) (1888), 20 Q. B. D. 621.

(*k*) *Re Royal College of Surgeons of England*, [1899] 1 Q. B. 871.

(*l*) *Sulley* v. *Royal College of Surgeons* (1892), 29 Sc. L. R. 620.

(*m*) *Inland Revenue Commissioners* v. *Forrest*, *supra*. The two colleges of surgeons had other and equally important objects besides the advancement of science, and so lost the benefit of the exemption; see *Re Royal College of Surgeons of England*, *supra*; *Sulley* v. *Royal College of Surgeons*, *supra*.

(*n*) *Re Linen and Woollen Drapers' etc. Institution* (1887), 58 L. T. 949.

(*o*) 5 & 6 Vict. c. 35, s. 60. See also title INCOME TAX. Exemption from taxation under Sched. A was extended to friendly societies by the Revenue Act, 1889 (52 & 53 Vict. c. 42), s. 12.

(*p*) *Ibid.*, s. 61, No. VI. In *Blake* v. *London Corporation* (1886), 18 Q. B. D. 437, 444, 445, DENMAN, J., said: "The enactment seems to have been drawn with a mixed intention, namely, to exempt charitable institutions, and to exempt certain institutions partly depending on charity, perhaps in view of the beneficial character of the objects of those institutions." See also *Dilworth* v. *Commissioner of Stamps*, [1899] A. C. 99.

(*q*) *Ex parte University College of North Wales* (1908), 98 L. T. 446.

(*r*) *Cawse* v. *Nottingham Lunatic Hospital Committee*, [1891] 1 Q. B. 585.

(*s*) *Blake* v. *London Corporation* (1887), 19 Q. B. D. 79, C. A. (City of London School).

(*t*) *Mary Clark Home* (*Trustees*) v. *Anderson*, [1904] 2 K. B. 645.

(*u*) *Musgrave* v. *Dundee Magistrates* (1897), 34 Sc. L. R. 702.

and maintaining such buildings and premises; and (3) to the rents and profits of lands, tenements, and hereditaments belonging to any hospital, public school, or almshouse, or vested in trustees for charitable purposes (*a*), so far as the same are applied to such purposes (*b*) or vested in the trustees of the British Museum (*c*).

Property not within exemption.

The exemption does not apply to buildings belonging to colleges or literary and scientific institutions, if occupied by a member of the college or an officer of the institution, or by any person paying rent for the same, nor to buildings belonging to hospitals, public schools and almshouses if occupied by an officer or master thereof whose income from any source amounts to or exceeds £150 per annum (*d*), or if occupied by any person paying rent for the same (*e*). Nor does the exemption apply to an assembly hall held in trust for the Free Church of Scotland, from which no profits are made (*f*).

Institutions partly supported by fees.

A school, to be a "public school," need not be wholly supported by charity. Maintenance in part by fees of scholars does not prevent a school from being exempt from property tax (*g*).

The same principle applies in the case of an hospital partly supported by fees of paying patients (*h*). It is not necessary for exemption that there should be an endowment. It is sufficient if the institution be maintained in whole or in part by voluntary contributions (*i*). The charitable character of an hospital is not destroyed by the fact that in certain years the fees of paying patients exceed the expenditure of the hospital (*k*). But an hospital which, though founded by charity, is subsequently supported entirely by paying patients, is not entitled to exemption (*l*).

An institution founded and endowed as a home for ladies in

(*a*) "Charitable purposes" include all such as are legally charitable (*Income Tax Commissioners* v. *Pemsel*, [1891] A. C. 531; *Inland Revenue Commissioners* v. *Scott*, [1892] 2 Q. B. 152; *Ex parte University College of North Wales* (1908), 98 L. T. 446).

(*b*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 61, No. VI. As to the mode of proof that property is applicable to charitable purposes only, see *ibid.*

(*c*) *Ibid.*, s. 149.

(*d*) *Ibid.*, s. 61, No. VI.; *Bray* v. *Lancashire Justices* (1889), 22 Q. B. D. 484, 488 (apartments in a county lunatic asylum occupied by the medical and other officers, and a house occupied by the chaplain); *Musgrave* v. *Dundee Magistrates* (1897), 34 Sc. L. R. 702 (buildings of free public library, in which accommodation was given to books belonging to a private society).

(*e*) 5 & 6 Vict. c. 35, s. 61, No. VI.

(*f*) *Maughan* v. *Free Church of Scotland* (1893), 30 Sc. L. R. 666.

(*g*) *Blake* v. *London Corporation* (1887), 19 Q. B. D. 79, C. A. As to the definition and characteristics of a public school, see *ibid.*, *per* FRY, L.J., at p. 82; and *Dilworth* v. *Commissioner of Stamps*, [1899] A. C. 99, 108, where it was said that the character of the school as public or private must depend not upon the scholars to whom education is given, but upon the terms on which and the circumstances in which education is given. A theological college supported partly by endowments and partly by fees of students is not a "public school" (*Bain* v. *Free Church of Scotland (Trustees)* (1897), 34 Sc. L. R. 351).

(*h*) *Cawse* v. *Nottingham Lunatic Hospital (Committee)*, [1891] 1 Q. B. 585.

(*i*) *Musgrave* v. *Dundee Royal Lunatic Asylum* (1895), 32 Sc. L. R. 579, 584.

(*k*) *Ibid.* See also *Blake* v. *London Corporation* (1886), 18 Q. B. D. 437, *per* DENMAN, J., at p. 444.

(*l*) *Needham* v. *Bowers* (1888), 21 Q. B. D. 436; *Musgrave* v. *Dundee Royal Lunatic Asylum*, *supra*. As to the meaning of "hospital" within the Poor Removal Act, 1846 (9 & 10 Vict. c. 66), s. 1, see *Ormskirk Union Guardians* v. *Charlton Union Guardians*, [1903] 2 K. B. 498, C. A.

SECT. 2. **Liabilities affecting the Trust Property.**

reduced circumstances, each inmate of which must be possessed of an income of £25 a year, is an almshouse (*m*), and as such exempt from property tax (*n*).

Public libraries are literary institutions within the exemption (*o*).

A dwelling-house belonging to the trustees of an elementary school, and occupied rent free without the power of letting it by the teacher, whose total income, without taking into account the annual value of the house, does not exceed £160 per annum, is exempt from property tax (*p*).

(2) Sched. C.

372. Charities are also exempt from income tax assessable under Sched. C to s. 88 of the Income Tax Act, 1842 (*q*), whereby persons and corporations who are intrusted with the payment of annual sums and dividends on behalf of persons, corporations, or societies entitled thereto are charged with the payment of the tax.

Property exempted.

The exemption extends, *inter alia*, to (1) the stock, dividends, or interest of legally established friendly societies where the sum assured to any individual does not exceed £200 or the annuity £30 per annum (*r*); (2) to the stock or dividends of any corporation or society of persons, or of any trust, established for charitable purposes (*s*) only, or which may be applicable by the corporation, society, or trustee for such purposes, in so far as the same shall be so applied; and (3) to the stock or dividends in the names of trustees applicable solely to the repairs of any cathedral, college, church, or chapel, or any building used solely for the purposes of Divine worship, in so far as the same shall be so applied (*t*).

Dividends certified to be free of tax by Commissioners.

Dividends on stock standing in the names of the official trustees of charitable funds, or in other names, certified by the Charity Commissioners to the Bank of England to be exempt from income tax, must be paid free of tax (*a*).

(3) Sched. D.

373. Charities are also exempt from income tax assessable under Sched. D (*b*) upon all property or profits not contained in Scheds. A, B, C, or E, and not otherwise exempted from the tax (*c*).

Extent of exemption.

Corporations, societies, and trustees for charitable purposes only (*d*) are entitled to the same exemption in respect of any yearly

(*m*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 61, Sched. A, r. 6.
(*n*) *Mary Clark Home (Trustees)* v. *Anderson*, [1904] 2 K. B. 645.
(*o*) *Manchester Corporation* v. *McAdam*, [1896] A. C. 500. Except where the building is not wholly used for a public library (*Musgrave* v. *Dundee Magistrates* (1897), 34 Sc. L. R. 702).
(*p*) See titles INCOME TAX; EDUCATION.
(*q*) 5 & 6 Vict. c. 35; and see title INCOME TAX.
(*r*) *Ibid.*, s. 88, Sched. C (1). See also Income Tax Act, 1853 (16 & 17 Vict. c. 34), s. 49; Finance Act, 1904 (4 Edw. 7, c. 7), s. 8; and title FRIENDLY SOCIETIES. As to exemption of industrial societies from taxation under Sched. C, see Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 24; and title INDUSTRIAL, PROVIDENT AND SIMILAR SOCIETIES.
(*s*) See note (*a*), p. 209.
(*t*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 88, Sched. C (3); see *St. Andrew's Hospital, Northampton* v. *Shearsmith* (1887), 19 Q. B. D. 624, 628.
(*a*) Charitable Trusts Amendment Act, 1855 (18 & 19 Vict. c. 124), s. 28.
(*b*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 100.
(*c*) *Ibid.*, s. 105.
(*d*) *Income Tax Commissioners* v. *Pemsel*, [1891] A. C. 531; *Re Bootham Ward Strays, York, Inland Revenue Commissioners* v. *Scott*, [1892] 2 Q. B. 152, C. A.

interest or other annual payment chargeable under Sched. D, in so far as the same shall be applied to charitable purposes only, as is granted to such corporations, societies, and trustees in respect of any stock or dividend chargeable under Sched. C, and applied to the like purposes (*e*).

To what profits exemption extends.

Where an hospital founded by voluntary contributions makes profits by receiving paying patients, and applies such profits partly in support of the patients and partly in executing works rendering the hospital efficient, the profits are not payments applicable to charitable purposes only so as to exempt the institution from payment of income tax under Sched. D (*f*). A charitable society which also carries on a commercial business may not for the purpose of income tax returns set the losses of the charitable side of the concern against the profits of the commercial side (*g*). The profits made by charity trustees on the sale of hymn-books are chargeable with income tax, though such profits are applied for the relief of certain widows and orphans (*h*). The mere application of profits to charitable purposes does not affect the liability to pay income tax (*i*).

(4) Sched. E.

374. The salary of an official of a charity incorporated by a special Act of Parliament (*k*) which provides for the payment of such salary without any deduction for taxes is nevertheless not exonerated from income tax under Sched. E of the Income Tax Act, 1842 (*l*).

B-SECT. 6.—*Rates.*

Charity property rateable unless in occupation of Crown.

375. The fact that houses and lands are held for public or charitable purposes does not exempt them from rateability to the relief of the poor (*m*), unless the property falls within the exemption accorded to property occupied by the Crown or its servants for Crown purposes (*n*).

(*e*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 105; and see p. 210, *ante*.

(*f*) *St. Andrew's Hospital, Northampton* v. *Shearsmith* (1887), 19 Q. B. D. 624.

(*g*) *Grove* v. *Young Men's Christian Association* (1903), 88 L. T. 696; see also *Religious Tract and Book Society of Scotland* v. *Surveyor of Taxes* (1896), 33 Sc. L. R. 289.

(*h*) *Psalms and Hymns* (*Trustees*) v. *Whitwell* (1890), 7 T. L. R. 164.

(*i*) See *Blake* v. *Imperial Brazilian and Nova Cruz Rail. Co.* (1884), 1 T. L. R. 68; *Paddington Burial Board* v. *Inland Revenue* (1884), 13 Q. B. D. 9.

(*k*) 10 Geo. 4, c. xv., s. 26.

(*l*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), ss. 102, 146, Sched. E (1), (6); *Re Liverpool School for the Indigent Blind*, [1898] 2 Ch. 669.

(*m*) *Mersey Docks* v. *Cameron* (1864), 1 H. L. Cas. 443; *Greig* v. *Edinburgh University* (1868), L. R. 1 Sc. & Div. 348, finally overruling earlier decisions to the effect that property occupied for public or charitable purposes was not rateable (see, for example, *R.* v. *St. George the Martyr, Southwark* (1847), 16 L. J. (M. C.) 129; *Re Oxford University and City of Oxford Poor Rate* (1857), 27 L. J. (M. C.) 33 (Bodleian and other university buildings held not rateable), and cases there cited); *Royal Commissioners of the Patriotic Fund* v. *Wandsworth Corporation* (1903), 67 J. P. 311 (charitable institution for maintenance and education of daughters of soldiers, sailors, and marines). As to property held for public purposes, such as harbours or docks, see *Clyde Navigation Trustees* v. *Adamson* (1865), 4 Macq. 931, H. L.; *Leith Harbour and Docks Commissioners* v. *Inspector of the Poor* (1866), L. R. 1 Sc. & Div. 17; *Swansea Union Assessment Committee* v. *Swansea Harbour Trustees* (1907), 71 J. P. 97; and generally, title RATES AND RATING.

(*n*) *Pearson* v. *Holborn Union Assessment Committee*, [1893] 1 Q. B. 389 (storehouse occupied by volunteer corps); and see *Rayner* v. *Drewitt* (1900), 64 J. P. 567.

SECT. 2. **Liabilities affecting the Trust Property.**

Thus, property held upon charitable trusts, as for a university (*o*), or for a school (*p*) other than a non-provided elementary school (*q*), or for an hospital (*r*), or home for the deaf and dumb (*s*), or for the purposes of a religious (*t*) or benefit society (*u*), is rateable.

Almspeople (*w*) or school teachers (*a*) occupying buildings belonging to a charity rent free are nevertheless rateable in respect of their occupation. So also are the chaplain and medical officer of an asylum who reside in premises belonging to the asylum (*b*).

Exemption in Ireland.

The laws of England and Scotland as to the rateability of charity property are alike (*c*). In Ireland property held exclusively for charitable purposes is exempt from rates (*d*).

Scientific etc. societies.

376. Land or buildings belonging to societies instituted for the purposes of science, literature, or the fine arts, exclusively, which are supported wholly or in part by voluntary contributions, and which distribute no profits to members, are exempted from local rates (*e*),

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(*o*) *Greig* v. *Edinburgh University* (1868), L. R. 1 Sc. & Div. 348.

(*p*) *R.* v. *Ellis* (1842), 12 L. J. (M. C.) 20; *R.* v. *Temple* (1853), 22 L. J. (M. C.) 129; *R.* v. *Stapleton Parish* (1863), 33 L. J. (M. C.) 17. As to national schools, see *West Bromwich School Board* v. *West Bromwich Overseers* (1884), 13 Q. B. D. 929; *Laughlin* v. *Saffron Hill Overseers* (1865), 12 L. T. 542; *R.* v. *London School Board* (1886), 55 L. J. (M. C.) 169; *London School Board* v. *Wandsworth and Clapham Union Assessment Committee* (1900), 16 T. L. R. 137; army training school, *R.* v. *Kneller Hall* (*Trustees*) (1858), 6 W. R. 605; reformatory school, *Tunnicliffe* v. *Birkdale Overseers* (1888), 20 Q. B. D. 450; industrial school, *Durham County Council* v. *Chester-le-Street Assessment Committee*, [1891] 1 Q. B. 330. The fact that a school produces no profit does not relieve it from rates (*Laughlin* v. *Saffron Hill Overseers*, *supra*).

(*q*) Voluntary Schools Act, 1897 (60 Vict. c. 5), s. 3, except to the extent of any profit derived from letting; and see *Royal Commissioners of the Patriotic Fund* v. *Wandsworth Corporation* (1903), 67 J. P. 311.

(*r*) *Anon.* (1702), 2 Salk. 527; *R.* v. *St. Giles, York* (*Inhabitants*) (1832), 3 B. & Ad. 573; *St. Thomas' Hospital* (*Governors*) v. *Stratton* (1875), L. R. 7 H. L. 477 (public hospital founded by charter); *R.* v. *Fulbourn Overseers* (1865), 34 L. J. (M. C.) 106.

(*s*) *Jews' Deaf and Dumb Home, Wandsworth* (*Trustees*) v. *Wandsworth and Clapham Union Assessment Committee* (1901), 65 J. P. 137.

(*t*) *R.* v. *Wilson* (1840), 12 Ad. & El. 94 (London Missionary Society); *R.* v *Sterry* (1840), 12 Ad. & El. 84 (Friends' School); *R.* v. *Baptist Missionary Society* (1849), 18 L. J. (M. C.) 194.

(*u*) *R.* v. *Licensed Victuallers' Society* (1861), 1 B. & S. 71.

(*w*) *R.* v. *Munday* (1801), 1 East, 584; *R.* v. *Green* (1829), 7 L. J. (O. S.) (M. C.) 94.

(*a*) *R.* v. *Catt* (1795), 6 Term Rep. 332; *R* v. *Stapleton Parish*, *supra*; see also *R.* v. *Field* (1794), 5 Term Rep. 587 (caretaker employed by philanthropic society, with no place set apart for her use except a bedroom, not rateable); and compare *Soane's Museum* (*Trustees*) v. *St. Giles and St. George's Vestry* (1900), 83 L. T 248; *Lewis* v. *Durham Union Assessment Committee* (1904), 68 J. P. 220.

(*b*) *Congreve* v. *Upton Overseers* (1864), 33 L. J. (M. C.) 83.

(*c*) See *Clyde Navigation Trustees* v. *Adamson* (1865), 4 Macq. 931.

(*d*) Valuation (Ireland) Act, 1852 (15 & 16 Vict. c. 63), ss. 15, 16; *Magee College* (*Trustees*) v. *Valuation Commissioners* (1870), 19 W. R. 328. See also Irish Church Act, 1869 (32 & 33 Vict. c. 42); *Representative Church Body* v. *Valuation Commissioner* (1872), I. R. 6 C. L. 561.

(*e*) Scientific Societies Act, 1843 (6 & 7 Vict. c. 36), s. 1; see title SCIENTIFIC AND LITERARY SOCIETIES. The following societies have been held to come within the exemption: Linnæan Society (*Linnæan Society* v. *St. Anne's, Westminster, Overseers* (1854), 23 L. J. (M. C.) 148); Royal College of Music (*Royal College of Music* v. *Westminster Vestry*, [1898] 1 Q. B. 809, C. A.); Vocal Musical Society (*R.* v. *Brandt* (1851), 16 Q. B. 462); Hornsey School of Art (*Hornsey School of Art* v. *Edmonton Union* (1906), 94 L. T. 203). The following societies

but not free libraries owned and occupied by municipal corporations (*f*).

Exemption under local or private Acts.

377. Charity property is sometimes exempted from rates by local or private Acts. An orphanage restricted to orphans of railway servants, and supported mainly by the general public, but to some extent by railway servants, is a public charity for the purposes of exemption under a local Act (*g*). A local Act exempting buildings used exclusively for the education of the poor from rates does not apply to an institution for the maintenance and education of children sent by the poor law guardians (*h*). Charity lands exempted by a private Act of Parliament from all public taxes, charges, and assessments are not liable to poor rates (*i*).

Other exemptions.

Sunday and ragged schools may, at the discretion of the rating authority, be exempted from poor rates (*k*).

Property which has no annual value is not rateable (*l*).

SUB-SECT. 7.—*Inhabited House Duty.*

Charity exempt.

378. Charity schools, hospitals, and houses for the reception or relief of the poor are exempted from inhabited house duty (*m*). Whether a building is taxable or not is to be determined by its status when the incidence of taxation arises (*n*). Thus, a school which was originally exempt from taxation as being a charity school will cease to be exempt when it becomes in the main self-supporting (*o*).

The expression "charity school" (*p*) means a school primarily intended for the gratuitous supply of education, and therefore a school where the students pay a considerable fee cannot claim exemption, though the students derive further advantages from the

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have been held not exempt: Working Men's Educational Union (*Scott* v. *St. Martin-in-the-Fields Churchwardens* (1855), 25 L. J. (M. C.) 42); Institute of Training Teachers (*R.* v. *Pocock* (1846), 8 Q. B. 729); United Service Institution (*R.* v. *St. Martin-in-the-Fields Churchwardens* (1852), 21 L. J. (M. C.) 53); Zoological Society (*R.* v. *Zoological Society* (1854), 23 L. J. (M. C.) 139); Institution of Civil Engineers (*R.* v. *Institution of Civil Engineers* (1879), 5 Q. B. D. 48); Art Union of London (*Savoy Overseers* v. *Art Union of London*, [1896] A. C. 296); Jenner Institute (*Jenner Institute* v. *St. George's, Hanover Square, Assessment Committee* (1900), 83 L. T. 344). In this section the word "voluntary" means without consideration; see *Savoy Overseers* v. *Art Union of London, supra*; *A.-G.* v. *Smyth*, [1905] 2 I. R. 552, 564. As to the distribution of "profits," see also *R.* v. *Jones* (1846), 15 L. J. (M. C.) 129.

(*f*) *Liverpool Corporation* v. *West Derby Union* (1905), 69 J. P. 277.

(*g*) 6 Geo. 4, c. cxxxii. s. 103; *Hall* v. *Derby Sanitary Authority* (1885), 16 Q. B. D. 163.

(*h*) Liverpool Corporation Act, 1893 (56 & 57 Vict. c. clxxxi.), s. 36; *Hadfield* v. *Liverpool Corporation* (1899), 80 L. T. 566.

(*i*) *R.* v. *Scot* (1790), 3 Term Rep. 602.

(*k*) Sunday and Ragged Schools (Exemption from Rating) Act, 1869 (32 & 33 Vict. c. 40); *Bell* v. *Crane* (1873), L. R. 8 Q. B. 481.

(*l*) *Lincoln Corporation* v. *Holmes Common* (1867), L. R. 2 Q. B. 482; *Lambeth Overseers* v. *London County Council*, [1897] A. C. 625 (public park).

(*m*) House Tax Act, 1808 (48 Geo. 3, c. 55), Sched. B, Exemptions, Case IV., repealed by House Tax Act, 1834 (4 & 5 Will. 4, c. 19), but re-enacted by the House Tax Act, 1851 (14 & 15 Vict. c. 36), s. 2. See title INHABITED HOUSE DUTY.

(*n*) *Charterhouse School (Governors)* v. *Lamarque* (1890), 25 Q. B. D. 121.

(*o*) *Ibid.* It is difficult to reconcile the cases on schools which are partially self-supporting and hospitals which receive paying patients.

(*p*) House Tax Act, 1808 (48 Geo. 3, c. 55), Sched. B, Exemptions, Case IV.; see note (*m*), *supra*.

SECT. 2 Liabilities affecting the Trust Property.

endowment (*q*). The expression "hospital" must be restricted to hospitals maintained wholly or in part by charity (*r*). Thus, the exemption applies to hospitals supported partially by charitable contributions and endowments and partially by paying patients (*s*), but not to hospitals wholly self-supported (*a*). The exemption also applies to an almshouse under the rules of which inmates must be possessed of not less than £25 a year (*b*).

SUB-SECT. 8.—*Land Tax.*

Exempted charities.

379. The following are exempted from land tax:—

(1) The colleges and halls of Oxford and Cambridge, Windsor, Eton, Winchester, Westminster, and Bromley; the Corporation of the Governors of the Charity for the Relief of Poor Widows and Children of Clergymen; and all hospitals in England, Wales, and Berwick-on-Tweed which were founded before 1798 (*c*), in respect of their sites and buildings (*d*):

(2) The houses and lands which on or before March 25, 1693, belonged to the sites of any college or hall in England, Wales, or Berwick-on-Tweed, or to Christ's Hospital, St. Bartholomew, Bridewell, St. Thomas, and Bethlehem Hospitals, or to the Corporation of the Governors of the Charity for the Relief of Poor Widows and Children of Clergymen, or the college of Bromley (*e*):

(3) All other hospitals or almshouses in England, Wales, or Berwick-on-Tweed in respect of rents payable to them before March 25, 1693, for the use of the poor of such hospitals and almshouses (*f*): and

(4) All lands, tenements, and hereditaments, revenues or rents, which in the fourth year of the reign of William and Mary belonged to any hospital or almshouse, or were settled to any charitable or pious uses (*g*), except those which were then assessed (*h*).

The removal of an hospital from an exempted site does not remove the exemption from land tax conferred on the site (*i*).

(*q*) *Southwell* v. *Royal Holloway College, Egham (Governors)*, [1895] 2 Q. B. 487, where the fees were £90 per annum. See also *Charterhouse School (Governors)* v. *Lamarque* (1890), 25 Q. B. D. 121. As to a schoolmaster's house being assessable with the school buildings, see *Browne* v. *Furtado*, [1903] 1 K. B. 723.

(*r*) House Tax Act, 1808 (48 Geo. 3, c. 55), Sched. B, Exemptions, Case IV.; *Needham* v. *Bowers* (1888), 21 Q. B. D. 436.

(*s*) *Cawse* v. *Nottingham Lunatic Hospital*, [1891] 1 Q. B. 585.

(*a*) *Needham* v. *Bowers*, *supra*.

(*b*) *Mary Clark Home (Trustees)* v. *Anderson*, [1904] 2 K. B. 645.

(*c*) *Colchester* v. *Kewney* (1867), L. R. 2 Exch. 253; *Cox* v. *Rabbits* (1878), 3 App. Cas. 473.

(*d*) Land Tax Act, 1797 (38 Geo. 3, c. 5), s. 25, made perpetual by the Land Tax Perpetuation Act, 1798 (38 Geo. 3, c. 60), s. 1.

(*e*) Land Tax Act, 1797 (38 Geo. 3, c. 5), s. 25. Lands which belong to the hospitals named in this section are exempt from land tax, whether in the occupation of the hospitals themselves or let to tenants (*St. Thomas', St. Bartholomew's, and Bridewell Hospitals* v. *Hudyell*, [1901] 1 K. B. 364).

(*f*) Land Tax Act, 1797 (38 Geo. 3, c. 5), s. 25. Lands belonging to the Clergy Corporation or to the unnamed hospitals and almshouses referred to at the end of the section, if let to tenants, are not exempt from land tax to the extent of the surplus value over and above what goes to the charity (*ibid.*, s. 26; *St. Thomas', St. Bartholomew's, and Bridewell Hospitals* v. *Hudyell*, *supra*).

(*g*) Land Tax Act, 1797 (38 Geo. 3, c. 5), s. 29.

(*h*) *Ibid.*

(*i*) *Cox* v. *Rabbits*, *supra*.

SUB-SECT. 9.—*Stamp Duty.*

SECT. 2. **Liabilities affecting the Trust Property.**

380. An order of the Charity Commissioners or Board of Education appointing a new trustee, whether directly or under a scheme, must be stamped 10*s.* (*k*), and with a further stamp of 10*s.* if the order vests the trust property in the new trustee (*l*).

Application for certificate of incorporation.

Applications for certificates of incorporation under the Charitable Trustees' Incorporation Act, 1872, and the certificates themselves, must be stamped 10*s.* (*m*).

Special exemptions.

381. No stamp duty is payable on petitions or proceedings under the Charities Procedure Act, 1812 (*n*), or on copies of such petitions or proceedings (*o*).

Bonds given to secure costs in cases of appeal from orders of county courts made upon applications under the Charitable Trusts Act, 1853, are exempt from stamp duty (*p*).

Certain documents relating to friendly societies are exempt (*q*).

Receipts for contributions.

In practice the Commissioners of Inland Revenue do not require receipts by charitable institutions for contributions to be stamped (*r*).

Apprenticeship deeds by public charities.

382. Instruments under which poor children are apprenticed by or at the sole charge of parishes, townships, or public charities, or pursuant to any Act for the regulation of parish apprentices, are exempt from stamp duty (*s*). A charity may be public within the meaning of the above provision where the fund is applicable at the discretion of trustees for apprenticeship or other charitable purposes (*t*), or where the charity is not permanent, as in the case of voluntary annual subscriptions by parishioners for putting out apprentices (*u*). But where trustees of a public charity have bound a party apprentice, a subsequent assignment of the apprenticeship made without the concurrence of the trustees is not exempt from duty (*w*).

Where no stamp duty is payable on indentures of apprenticeship, the amount of the premium need not be stated in the deed (*x*).

(*k*) Stamp Act, 1891 (54 & 55 Vict. c. 39), Sched. I., "Appointment."

(*l*) *Ibid.*, ss. 4, 62; *Hadgett* v. *Inland Revenue Commissioners* (1877), 3 Ex. D. 46.

(*m*) Charitable Trustees Incorporation Act, 1872 (35 & 36 Vict. c. 24), ss. 6, 9; see p. 285, *post*.

(*n*) 52 Geo. 3, c. 101 (Romilly's Act); see p. 330, *post*.

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

(*p*) Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 39. For form of bond, see Yearly County Court Practice, 1908, Vol. II., p. 94.

(*q*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 33; see title FRIENDLY SOCIETIES.

(*r*) See title REVENUE.

(*s*) Stamp Act, 1891 (54 & 55 Vict. c. 39), Sched. I., tit. "Apprenticeship." Similar provisions were contained in the earlier Stamp Acts (8 Anne, c. 9, s. 40; 55 Geo. 3, c. 184, Schedule, Part I.; 33 & 34 Vict. c. 97); see *R.* v. *Aylesbury* (*Inhabitants*) (1832), 3 B. & Ad. 569, and cases cited in the following notes.

(*t*) *R.* v. *Clifton-upon-Dunsmore* (*Inhabitants*) (1772), Burr. S. C. 697; see also *R.* v. *Quainton* (*Inhabitants*) (1814), 2 M. & S. 338.

(*u*) *R.* v. *St. Matthew's, Bethnal Green* (*Inhabitants*) (1767), Burr. S. C. 574, 577; *R.* v. *Skeffington* (*Inhabitants*) (1820), 3 B. & Ald. 382. As to the distinction between "public" and "private" charities, see also *R.* v. *Halesworth* (*Inhabitants*) (1832), 1 L. J. (M. C.) 71; *Hall* v. *Derby Sanitary Authority* (1885), 16 Q. B. D. 163; and p. 117, *ante*.

(*w*) *R.* v. *Fakenham* (*Inhabitants*) (1835), 4 Nev. & M. (K. B.) 553.

(*x*) *R.* v. *Quainton* (*Inhabitants*), *supra* (consideration wrongly stated); *R.* v. *Oadby* (*Inhabitants*) (1818), 1 B. & Ald. 477 (consideration omitted).

SECT. 2. Liabilities affecting the Trust Property.

But, in order to render the deed admissible as evidence, proof must be forthcoming that any premium recited to have been paid out of the funds of a public charity was so paid, and a recital to that effect is not itself evidence (*a*).

SECT. 3.—*Management of the Trust Property.*

SUB-SECT. 1.—*Sales.*

(1) General power of sale.

383. There is no positive rule of law absolutely prohibiting the sale of charity lands, but such a sale is rarely justifiable, the presumption being that persons who give lands to a charity intend that they should be devoted to that purpose in perpetuity (*b*).

Trustees of charities, apart from the restrictions imposed by the Charitable Trusts Acts (*c*), have power at law to sell the charity estates upon their own initiative, whether expressly authorised by the instrument of foundation (*d*) or not (*e*), if such sale is beneficial to the charity (*f*).

Onus of proof to support a sale.

But transactions of the kind are dangerous both for the trustees and for the purchaser (*g*), the onus being on the trustees to show that they have not been guilty of a breach of trust (*h*), and upon the purchaser to show that the sale was beneficial to the charity, and justified by the circumstances (*i*). Where, however, the origin of a charity does not appear, and a sale has taken place at a very distant date, and has since been acquiesced in, those facts may afford ground to presume that there was originally power to sell, and such presumption will be made in favour of long enjoyment (*k*).

(*a*) *R.* v. *Skeffington* (*Inhabitants*) (1820), 3 B. & Ald. 382.

(*b*) *St. Mary Magdalen, Oxford* (*President etc.*) v. *A.-G.* (1857), 6 H. L. Cas. 205. See also Shelford, Law of Mortmain, p. 687; *Newcastle Corporation* v. *A.-G.* (1845), 12 Cl. & Fin. 402, H. L.

(*c*) Charitable Trusts Amendment Act, 1855 (18 & 19 Vict. c. 124), s. 29. For the class of charities exempted, see also Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 62; and p. 304, *post*.

(*d*) *Re Mason's Orphanage and London and North Western Rail. Co.*, [1896] 1 Ch. at p. 604, C. A.

(*e*) *Ibid.* 603, 604. See also *Re Manchester New College* (1853), 16 Beav. 610, 628, 629; *St. Mary Magdalen, Oxford* (*President etc.*) v. *A.-G.*, *supra*, at p. 205.

(*f*) *A.-G.* v. *Hungerford* (1834), 2 Cl. & Fin. 374, 375, H. L.; *A.-G.* v. *South Sea Co.* (1841), 4 Beav. 458; *A.-G.* v. *Warren* (1818), 2 Swan. 302, 303; *A.-G.* v. *Pilgrim* (1849), 12 Beav. 60; *A.-G.* v. *Davey* (1854), 19 Beav. 525; *Re Clergy Orphan Corporation*, [1894] 3 Ch. 145, 154, C. A. As to the restrictions placed by the Charitable Trusts Acts on the sale of charity lands, see also Sugden, Law of Property, 535; and p. 218, *post*.

(*g*) Sugden, Law of Property, 535; *A.-G.* v. *Newark-upon-Trent Corporation* (1842), 1 Hare, 400.

(*h*) *A.-G.* v. *South Sea Co.*, *supra*, at pp. 458, 459. See *A.-G.* v. *Kell* (1840), 2 Beav. 575; *A.-G.* v. *Manchester* (*Bishop*) (1867), L. R. 3 Eq. 436.

(*i*) *A.-G.* v. *South Sea Co.*, *supra*; *Re Clergy Orphan Corporation*, *supra*, at p. 154; *A.-G.* v. *Brettingham* (1840), 3 Beav. 91, 95, where a sale in consideration of a perpetual rent-charge was set aside as not being beneficial to the charity; *Re Manchester New College*, *supra*, where the sale of a charity site with a view to changing the locality of the charity was upheld. See also the cases of long leases at fixed rents at p. 225, *post*.

(*k*) *St. Mary Magdalen, Oxford* (*President etc.*) v. *A.-G.* (1857), 6 H. L. Cas., *per* Lord CRANWORTH, L.C., at p. 205. See also *A.-G.* v. *Cross* (1817), 3 Mer.

SECT. 3. Management of the Trust Property.

384. The court has power to sanction a sale of charity lands where such a sale would benefit the charity, whether the charity is exempt from or subject to the jurisdiction of the Charity Commissioners (*l*).

Advowsons held in trust.

385. Advowsons vested in, or in trustees for, inhabitants, ratepayers, freeholders, or other persons forming a numerous class deriving no pecuniary advantage therefrom may be sold by the trustees, if any, or if there are none by trustees elected for the purpose, and the proceeds applied for various purposes for the benefit of the living, or the locality, or the poor (*m*).

Sale by charitable corporation.

386. Charitable corporations, like individual trustees, can sell and pass the legal estate to a purchaser, the latter being under the obligation of showing that the sale is beneficial to the charity (*n*); for when a corporation is duly created it acquires rights of selling and purchasing as extensive as those of an individual (*o*). A contract not under seal by a charitable corporation may be specifically enforced on the ground of part performance (*p*).

But a sale of land by a charitable corporation to a municipal corporation with which it is closely connected may be set aside on the ground that the two corporations are by reason of their affinity incapable of contracting, though the purchase-money appears to be adequate (*q*).

The incorporation of charity trustees under the Charitable Trustees Incorporation Act, 1872 (*r*), does not increase or diminish the powers previously possessed by them of conveying the charity property (*a*).

Land devised to charity.

387. Land assured to a charity by will must as a rule be sold within one year from the death of the testator; but the court, the

524, where certain leases were presumed to have been properly granted; *A.-G.* v. *Warren* (1818), 2 Swan. 306.

(*l*) See *Re Parke's Charity* (1841), 12 Sim. 329; *Re Ecclesall Overseers* (1852), 16 Beav. 297. See also p. 220, *post*.

(*m*) Sale of Advowsons Act, 1856 (19 & 20 Vict. c. 50); see preamble of the Act. The Act does not apply to charities within the Charitable Trusts Acts (*ibid.*, s. 1). The sales of advowsons belonging to the universities of Oxford, Cambridge, or Durham, and their colleges, or to the colleges of Winchester and Eton, are subject to the provisions of the Ecclesiastical Commission Act, 1840 (3 & 4 Vict. c. 113), ss. 69, 70, and the University College Estates Act, 1860 (23 & 24 Vict. c. 59), ss. 7—10. Those belonging to Shrewsbury School and Greenwich Hospital are respectively subject to the Public Schools Act, 1868 (31 & 32 Vict. c. 118), s. 22, and the Greenwich Hospital Act, 1865 (28 & 29 Vict. c. 89), s. 44; and those belonging to municipal corporations to the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 122.

(*n*) *St. Thomas' Hospital (Governors)* v. *Charing Cross Rail. Co.* (1861), 1 John. & H. 400; *Re Clergy Orphan Corporation*, [1894] 3 Ch. 145, 154, C. A.

(*o*) *Sutton's Hospital Case* (1613), 10 Co. Rep. 30 b; *Colchester Corporation* v. *Lowten* (1813), 1 Ves. & B. 226; *Riche* v. *Ashbury Railway Carriage Co.* (1874), L. R. 9 Exch. 224, 292; reversed as to statutory corporations, *sub nom. Ashbury Carriage Co.* v. *Riche* (1875), L. R. 7 H. L. 653; see also *Davis* v. *Leicester Corporation*, [1894] 2 Ch. 208, C. A. (municipal corporation); and title CORPORATIONS.

(*p*) *Steeven's Hospital* v. *Dyas* (1864), 15 I. Ch. R. 405; see title SPECIFIC PERFORMANCE.

(*q*) *A.-G.* v. *Plymouth Corporation* (1845), 9 Beav. 67.

(*r*) 35 & 36 Vict. c. 24; see p. 285, *post*.

(*a*) *Ibid.*, s. 1.

SECT. 3. **Management of the Trust Property.**

Charity Commissioners, and the Board of Education have in certain circumstances power to extend this period (*b*).

Enfranchisement.

388. Money received for the enfranchisement of copyholds belonging to a manor held on a charitable trust may, at the option of the lord, be paid to the official trustees of charitable funds in trust for the charity (*c*).

(2) Sales subject to the Charitable Trusts Acts.

389. Trustees or administrators of charities coming within the Charitable Trusts Acts (*d*) are absolutely prohibited from selling the charity estates except with one or other of the following sanctions (*e*), namely, (1) the express authority of Parliament under any statute (*f*); (2) the express authority of a court or judge of competent jurisdiction (*g*); (3) according to a scheme legally established (*h*); (4) with the approval of the Charity Commissioners (*i*), or, in the case of endowments held solely for educational purposes, of the Board of Education (*j*).

Sales under Lands Clauses Act.

390. Under the Lands Clauses Consolidation Act, 1845 (*k*), lands may be purchased from charity trustees compulsorily (*l*) or by agreement (*m*); and sales under this Act do not require the sanction of the Charity Commissioners (*n*); but a contract for the purchase of

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(*b*) See p. 133, *ante*.

(*c*) Copyhold Act, 1894 (57 & 58 Vict. c. 46), s. 76.

(*d*) For the class of charities exempted from the Charitable Trusts Acts, see Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 62, and p. 302, *post*, where charities subject to and exempt from the jurisdiction of the Charity Commissioners are distinguished.

(*e*) Charitable Trusts Amendment Act, 1855 (18 & 19 Vict. c. 124), s. 29. This section has no application to charities exempted from the jurisdiction of the Commissioners under the Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 62 (see Charitable Trusts Amendment Act, 1855, s. 48; *Charity for Relief of Poor Widows etc. (Governors)* v. *Sutton* (1860), 27 Beav. 651; *Royal Society of London and Thompson* (1881), 17 Ch. D. 407; *Finnis and Young* to *Forbes and Pochin* (No. 2) (1883), 24 Ch. D. 591; *Corporation of the Sons of the Clergy and Skinner*, [1893] 1 Ch. 178), or to land held by universities and colleges as trustees (Universities and Colleges Estates Act (21 & 22 Vict. c. 44), s. 49). As to the jurisdiction of the Charity Commissioners to authorise the sale of the estates of an exempted charity, see *Re Clergy Orphan Corporation*, [1894] 3 Ch. 145, C. A. See also p. 307, *post*.

(*f*) *E.g.*, Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 7; *Wycombe Rail. Co.* v. *Donnington Hospital* (1866), 1 Ch. App. 268; *Re Mason's Orphanage and London and North Western Rail. Co.*, [1896] 1 Ch. 596, C. A.

(*g*) See *A.-G.* v. *Newark-upon-Trent Corporation* (1842), 1 Hare, 395; *Re Ashton Charity* (1856), 22 Beav. 288. See also pp. 220, 294, *post*.

(*h*) See *Re Mason's Orphanage and London and North Western Rail. Co.*, *supra*, at p. 601; *A.-G.* v. *National Hospital for the Relief and Cure of the Paralysed and Epileptic*, [1904] 2 Ch. 252; and p. 220, *post*.

(*i*) See p. 221, *post*.

(*j*) Board of Education Act, 1899 (62 & 63 Vict. c. 33), s. 2 (2), and the three Orders in Council, 1900, 1901, 1902, made thereunder.

(*k*) 8 & 9 Vict. c. 18.

(*l*) Charitable Trusts Amendment Act, 1855 (18 & 19 Vict. c. 124), s. 29.

(*m*) 8 & 9 Vict. c. 18, ss. 6—8.

(*n*) *St. Thomas' Hospital (Governors)* v. *Charing Cross Rail. Co.* (1861), 1 John. & H. 400, 406. See also *Grosvenor (Lord)* v. *Hampstead Junction Rail. Co.* (1857), 1 De G. & J. 446; *Re Mason's Orphanage and London and North Western Rail. Co.*, *supra*, at p. 599.

lands from charity trustees will not be enforced against them unless the provisions of the Act have been strictly followed (*o*).

Payment of purchase-money.

Purchase and compensation money payable under the Lands Clauses Consolidation Act, 1845 (*p*), in respect of charity lands purchased by agreement or acquired compulsorily, must, if under £200 but exceeding £20, be paid into the Bank of England in the name of the Paymaster-General or to trustees (*q*), and, if amounting to or exceeding £200, must be paid into the Bank (*r*).

Money paid into court.

An application for the disposal of money paid into court under that Act does not require the sanction of the Charity Commissioners (*s*).

Money paid into court may be paid out to the official trustees of charitable funds on application being made with the consent of the Charity Commissioners (*t*).

Purchase-money paid into court under the Act cannot, without the consent of the Charity Commissioners, be paid out to charity trustees who have no power of sale (*a*). But if they have a power of sale, even with the consent of another (*b*), it may be paid to them without the consent of the Commissioners (*c*), though even then the court has a discretion to refuse payment out to them (*d*). In the case of charities exempt from the jurisdiction of the Commissioners the consent of the latter to payment out to the charity is not necessary (*e*).

The fact that the legal estate in charity lands sold under the Lands Clauses Consolidation Act, 1845 (*f*), is vested in the official trustee of charity lands, does not bind the official trustees of charitable funds to receive the purchase-money. If they decline, and the money is paid into court, the purchaser will nevertheless remain liable to pay the costs of investment (*g*). The purchase-

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(*o*) *Wycombe Rail. Co.* v. *Donnington Hospital* (1866), 1 Ch. App. 268; and see *Bridgend Gas and Water Co.* v. *Dunraven* (1885), 31 Ch. D. 219.

(*p*) 8 & 9 Vict. c. 18.

(*q*) *Ibid.*, s. 71.

(*r*) *Ibid.*, s. 69. As to payment into court under the Act, see further, title COMPULSORY PURCHASE AND COMPENSATION. Charity trustees with no power of sale are persons under disability within the Act.

(*s*) *Re Cheshunt College* (1855), 1 Jur. (N. S.) 995; *Re Lister's Hospital* (1855), 6 De G. M. & G. 184, C. A.

(*t*) As being persons absolutely entitled (*Re Bristol Free Grammar School Estates* (1878), 47 L. J. (CH.) 317; *Ex parte Horfield Trust* (1881), 29 W. R. 462). See title COMPULSORY PURCHASE AND COMPENSATION.

(*a*) *Re Faversham Charities* (1862), 10 W. R. 291; *Ex parte Norfolk Clergy (Governors)*, [1882] W. N. 53; see also *Re Clergy Orphan Corporation*, [1894] 3 Ch. 145, C. A.

(*b*) *Re Sheffield Corporation*, [1903] 1 Ch. 208.

(*c*) As being persons absolutely entitled (*Re Sheffield Corporation, supra*); see *Re Luthropp's Charity* (1866), L. R. 1 Eq. 467; *Re Rehoboth Chapel* (1875), L. R. 19 Eq. 180; *Ex parte St. Alphage (Parson)* (1886), 55 L. T. 314. In *Ex parte Tid St. Giles Charity (Trustees)* (1868), 17 W. R. 758, and in *Re Spurstowe's Charity* (1874), L. R. 18 Eq. 279, it was not stated whether the trustees had a power of sale or not.

(*d*) *Re Smith* (1888), 40 Ch. D. 386, C. A. (not a charity case, but the principle seems applicable).

(*e*) *Re Clergy Orphan Corporation, supra.*

(*f*) 8 & 9 Vict. c. 18.

(*g*) *Re Leeds Grammar School*, [1901] 1 Ch. 228. But not the costs of re-investment if the official trustees accept the purchase-money (*Ex parte Horfield, supra*).

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money of charity lands paid into court under that Act may be applied in the same manner as capital money arising under the Settled Land Acts (*h*). The same principle applies to the purchase-money of glebe lands (*i*) or of lands of a municipal corporation similarly paid into court (*j*).

Sale by order of court.

391. The court (*k*) has a general jurisdiction, as incident to the administration of a charity estate, to alienate charity property where such alienation is beneficial to the charity (*l*). This power may also be exercised under the Charities Procedure Act, 1812 (*m*). In neither case is the consent of the Charity Commissioners necessary to the exercise of these powers, though as a rule their consent to the institution of proceedings for sanctioning the sale is requisite (*n*). The court acts cautiously in sanctioning a sale (*o*), and may direct an inquiry as to whether a proposed sale is likely to be advantageous to the charity (*p*).

Sale according to a scheme legally established.

392. The expression "a scheme legally established" (*q*) means a scheme either sanctioned by the Court of Chancery or sanctioned by those other courts or authorities which under the Charitable Trusts Acts can sanction schemes (*r*). It does not include the original trust founding the charity unless such foundation was by statute (*s*). Even a royal charter incorporating a charity is not a scheme legally established (*t*).

(*h*) *Re Byron's Charity* (1883), 23 Ch. D. 171; see also *Re Bethlehem and Bridewell Hospitals* (1885), 30 Ch. D. 541 (construction of sea walls). As to the purposes for which capital money may be applied, see generally, title SETTLEMENTS.

(*i*) *Ex parte Castle Bytham (Vicar)*, [1895] 1 Ch. 348.

(*j*) *Re West Ham Corporation Act, 1898, Ex parte London Corporation* (1901), 17 T. L. R. 232.

(*k*) As to the jurisdiction of county courts, see Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 32; and title COUNTY COURTS.

(*l*) *Re Ashton Charity* (1856), 22 Beav. 288; *A.-G.* v. *Newark-upon-Trent Corporation* (1842), 1 Hare, 395, 400; *Re Colston's Hospital* (1859), 27 Beav. 16 (sale of site of a school in a town and purchase of site in the country sanctioned); *Anon.* (1811), cited 2 Swan. 300, 302 (sale of house belonging to a charity which the charity was too poor to repair); *A.-G.* v. *York (Archbishop)* (1853), 17 Beav. 495 (advowson belonging to, but at a distance from, a school sold because, owing to its distance, the schoolmaster could not hold it); see also *A.-G.* v. *St. John, Bedford, Hospital* (1864), 10 Jur. (N. S.) 897.

(*m*) 52 Geo. 3, c. 101 (Romilly's Act); *Re Parke's Charity* (1841), 12 Sim. 329; *Re Eccleshall Overseers* (1852), 16 Beav. 297; *Re Ashton Charity, supra; Re North Shields Old Meeting-house* (1859), 7 W. R. 541; *Re Congregational Church, Smethwick*, [1866] W. N. 196; and compare, on the other hand, *Re Suir Island Female Charity School* (1846), 3 Jo. & Lat. 171; *Re Lyford's Charity* (1852), cited 16 Beav. 297, n. As to this procedure, see p. 330, *post*.

(*n*) Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 17. See also p. 332, *post*.

(*o*) *A.-G.* v. *Buller* (1822), Jac. 407; *A.-G.* v. *Newark-upon-Trent Corporation, supra; St. Mary Magdalen, Oxford (President etc.)* v. *A.-G.* (1857), 6 H. L. Cas. 205.

(*p*) *Re Parke's Charity, supra*.

(*q*) Charitable Trusts Amendment Act, 1855 (18 & 19 Vict. c. 124), s. 29.

(*r*) *Re Mason's Orphanage and London and North Western Rail. Co.*, [1896] 1 Ch. 596, 601, 603, C. A. As to the establishment of schemes, see p. 183, *ante*.

(*s*) *Re Mason's Orphanage and London and North Western Rail. Co., supra*, at p. 603, C. A.; see also *Ogilvie* v. *Littleboy* (1897), 13 T. L. R. 399, C. A.

(*t*) *A.-G.* v. *National Hospital for the Relief and Cure of the Paralysed and Epileptic*, [1904] 2 Ch. 252. But see *Re Mason's Orphanage and London and*

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Sale with approval of Charity Commissioners.

393. The Charity Commissioners may, on the application of the trustees or persons acting in the administration of any charity, authorise the sale of land belonging to the charity on being satisfied that the proposed sale will be beneficial to the charity, and may give directions regarding the sale and the investment of the purchase-money (*a*). This jurisdiction is not impaired by the existence of a power of sale subject to the sanction of the court given by any private Act of Parliament or order of court (*b*).

Sales authorised by the Commissioners are as valid as if they had been authorised by the express terms of the trust affecting the charity (*c*), notwithstanding any disabling Act (*d*).

North Western Rail. Co., [1896] 1 Ch. 596, C. A., where KAY, L.J., at p. 603, said that the words "scheme legally established" do not mean the original trust unless that trust was a trust founded by the Crown or by Act of Parliament.

(*a*) Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 24. Sales under this section are not affected by the Allotments Extension Act, 1882 (45 & 46 Vict. c. 80), as to which see title ALLOTMENTS, Vol. I., pp. 338—341 (*Sutton (Parish)* to *Church* (1884), 26 Ch. D. 173). Charity trustees desirous of obtaining the sanction of the Commissioners to a sale of land should make application in the manner prescribed by the Charity Commission (Form No. 6; see Encyclopædia of Forms, Vol. III., p. 448), and at the same time furnish the Commissioners with a report of a competent surveyor acting in the interests of the charity. The report of the surveyor should be drawn up in accordance with a form of instructions issued by the Charity Commission (Form No. 90; see Encyclopædia of Forms, Vol. III., p. 327). If the proposed sale seems to be beneficial to the charity, the Commissioners, on receiving the formal application and report, direct notice of the proposed sale to be published in the district. Sometimes the Commissioners require a report to be made by a surveyor nominated by themselves. As a rule a sale is sanctioned only subject to the condition that the trustees' title is to be accepted, and the costs of and incidental to the sale, including surveyors' costs, are paid by the purchaser. Where trustees receive what apparently is a good offer for the property, the best course is for them immediately to enter into a contract conditional upon the sanction of the Commissioners being obtained.

In some cases the Commissioners direct a sale by auction, and in others the trustees desire to sell by auction in the first instance. The surveyor's report, if the sale is to be by auction, should indicate the number, extent, and separate value of the lots (if any) into which the property should be divided, which should be indicated on the plan, and the reserve price suggested. If the Commissioners approve of the proposed sale, they usually direct that special conditions (Forms Nos. 87 or 88; see Encyclopædia of Forms, Vol. III., pp. 470, 471) should be inserted in the conditions prepared by the trustees, which must be submitted to and approved by the Commissioners The reserve price is finally fixed by the Commissioners. If the lots are sold at or above the reserve, the Commissioners make the necessary orders for completion. If the reserve is not reached, but a subsequent offer is made to purchase at or over the reserve, the sale is carried out by private contract. For form of conveyance, see Encyclopædia of Forms, Vol. III., p. 473.

The purchase-money is as a rule directed to be paid by the trustees to the account of the official trustees of charitable funds at the Bank of England, and is eventually invested in the names of the official trustees, the dividends being made payable to the trustees of the charity.

(*b*) Charitable Trusts Act, 1862 (25 & 26 Vict. c. 112), s. 1.

(*c*) Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 26.

(*d*) Charitable Trusts Amendment Act, 1855 (18 & 19 Vict. c. 124), s. 38. The disabling Acts named in that section are 13 Eliz. c. 10; 14 Eliz. cc. 11, 14; 18 Eliz. cc. 6, 11; 39 Eliz. c. 5; 21 Jac. 1, c. 1. See also *Sutton (Parish)* to *Church* (1884), 26 Ch. D. 173.

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394. Sales of lands belonging to charities wholly or partially exempt from the jurisdiction of the Commissioners and not constituting a permanent endowment do not require their consent (*e*).

When consent not required.

In the case of a charity maintained wholly by voluntary subscriptions (*f*), or partly by voluntary subscriptions and partly by the income arising from an endowment (*g*), the consent of the Charity Commissioners is not required to the sale of land held in trust for the charity where the proceeds of sale thereof would be applicable as income. It is, moreover, immaterial whether the land represents an investment of voluntary contributions (*h*) or is the actual subject-matter of a gift (*i*).

If, however, land is purchased out of voluntary contributions, but is settled either at the time of purchase or subsequently upon trusts preventing the proceeds of sale being applied as income, a permanent endowment is created, and the consent of the Charity Commissioners is required for the sale of the land (*k*).

Concurrence of official trustee.

395. If the legal estate is vested in the official trustee of charity lands, the order directs his concurrence in the conveyance if the purchaser so requires (*l*), but as a majority of trustees, where they are entitled to determine on a sale, are empowered also to convey on behalf of all the trustees and of the official trustee, the concurrence of the latter is unnecessary (*m*). If he joins, he does not enter into any covenants (*n*).

Sale of rent-charges.

396. The Commissioners may also authorise the sale to the owners of the land charged of rent-charges belonging to any charity or applicable to charitable purposes, and give directions for the investment and proper application of the proceeds of sale (*o*).

Sale by parish council.

397. A parish council as trustee of parochial charities may, with the consent of the parish meeting, sell any land or buildings vested in

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(*e*) *Corporation of the Sons of the Clergy and Skinner*, [1893] 1 Ch. 178; and see p. 306, *post*.

(*f*) *Finnis and Young* to *Forbes and Pochin* (No. 2) (1883), 24 Ch. D. 591; *Re Society for Training Teachers of the Deaf and Whittle*, [1907] 2 Ch. 486, where in the case of an educational charity the consent of the Board of Education was held unnecessary.

(*g*) *Re Clergy Orphan Corporation*, [1894] 3 Ch. 145, C. A.; *Re Church Army* (1906), 75 L. J. (CH.) 467.

(*h*) *Finnis and Young* to *Forbes and Pochin* (No. 2), *supra*; *Re Clergy Orphan Corporation*, *supra*; *Re Parry and Horton* (1905), 49 Sol. Jo. 500; *Re Society for Training Teachers of the Deaf and Whittle*, *supra*.

(*i*) *Corporation of the Sons of the Clergy and Skinner*, *supra*; *Re Harding and Welsh Calvinistic Methodist Trustees* (1905), 92 L. T. 641.

(*k*) Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 62; Charitable Trusts Amendment Act, 1855 (18 & 19 Vict. c. 124), s. 29; *A.-G.* v. *Mathieson*, [1907] 2 Ch. 383, C. A., distinguishing *Re Clergy Orphan Corporation*, *supra*; and see *Re St. John Street Wesleyan Methodist Chapel, Chester*, [1893] 2 Ch. 618, and *Re Stockport Ragged Industrial and Reformatory Schools*, [1898] 2 Ch. 687, C. A., where the principle is similar. See also generally in this connection, p. 302, *post*.

(*l*) For form of order, see Encyclopædia of Forms, Vol. III., p. 472.

(*m*) Charitable Trusts Act, 1869 (32 & 33 Vict. c. 110), s. 12.

(*n*) For form of conveyance, see Charity Commission Form No. 92, Encyclopædia of Forms, Vol. III., p. 473. If the concurrence of the official trustee is not required, the conveyance need not be submitted to the Commissioners.

(*o*) Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 25. The same section

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the council, but only with the consent of the Charity Commissioners, unless the property has been acquired at the expense of any rate, or was at the date of the Local Government Act, 1894, applied in aid of any rate, or would but for want of income be so applied, in which cases the consent of the Local Government Board is necessary (*p*).

Grant to literary and scientific societies.

398. Trustees holding land upon charitable trusts may, with the consent of the Charity Commissioners, grant land for sites for institutions established for the promotion of literature, science, or the fine arts (*q*).

Sale with consent of Board of Education.

399. In the case of a sale of lands held upon charitable trusts which are solely educational, the Board of Education takes the place of the Charity Commissioners; and any consent to the sale which may be necessary must be given by the former body (*r*).

Sales of charitable property to be applied for the purposes of the Literary and Scientific Institutions Act, 1854 (*s*), or for public libraries (*t*), require the consent of the Charity Commissioners or the Board of Education, as the case may be. But conveyances by charities for the purpose of school sites do not require such consent (*u*).

Charity trustees who are required or authorised by the Allotments Extension Act, 1882 (*w*), or any other Act, to let lands in allotments to cottagers, labourers or others, in any place (*x*), may, if they think fit, in lieu of letting the lands in the manner prescribed by such Acts, sell or let them to the borough, district or parish council concerned, upon such terms as may be agreed on by the Charity Commissioners or the Board of Education, as the case may require (*y*).

SUB-SECT. 2.—*Leases.*

Generally.

400. The granting of leases by trustees of charity lands is governed by the same general principles as apply to sales (*a*).

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gives the trustees power, with the consent of the Commissioners, to purchase any rent-charge to which the charity estate is liable.

(*p*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 8 (2).

(*q*) Literary and Scientific Institutions Act, 1854 (17 & 18 Vict. c. 112), s. 6. *Quære* whether "grant" in this section includes "sale." In *ibid.*, s. 1, the expression used is "grant . . . by way of gift sale or exchange." In *ibid.*, s. 6, the latter words are omitted. See title SCIENTIFIC AND LITERARY SOCIETIES.

(*r*) Board of Education Act, 1899 (62 & 63 Vict. c. 33), and the Orders in Council made thereunder; see title EDUCATION. For the official form of application to the Board of Education for authority to sell, see Tudor on Charities, 4th ed., p. 952. For official forms of instructions to surveyors, of special conditions of sale where the property is vested in the Official Trustee of Charity Lands or in the trustees or governors of the charity, and of the conveyance, see *ibid.*, pp. 953—955.

(*s*) 17 & 18 Vict. c. 112; see s. 6. See also Board of Education Act, 1899 (62 & 63 Vict. c. 33), and the Order in Council, 1902, made thereunder.

(*t*) Public Libraries Act, 1892 (55 & 56 Vict. c. 53), s. 13 (2) (c); Board of Education Order in Council, 1902, Schedule. As regards public libraries, see also Public Libraries (Amendment) Act, 1893 (56 & 57 Vict. c. 11); and Public Libraries Act, 1901 (1 Edw. 7, c. 19). Public libraries have been determined in most cases by the Charity Commissioners not to be solely educational.

(*u*) School Sites Act, 1841 (4 & 5 Vict. c. 38), s. 6; Charitable Trusts Amendment Act, 1855 (18 & 19 Vict. c. 124), s. 29.

(*w*) 45 & 46 Vict. c. 80, s. 4.

(*x*) See p. 230, *post*.

(*y*) Small Holdings and Allotments Act, 1908 (8 Edw. 7, c. 36), s. 33 (2).

(*a*) *A.-G. v. Warren* (1818), 2 Swan. 302, 303; and see p. 216, *ante*.

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Leases also, like sales, of lands subject to the jurisdiction of the Charity Commissioners are valid only if made according to the requirements of the Charitable Trusts Acts (*b*).

General power of leasing.

401. It is the duty of trustees to administer the trust estate in a provident manner, and accordingly, independently of the statutory restrictions referred to, a lease which is consistent with provident administration may be valid whether the trustees have express powers to grant it or not (*c*).

It is a breach of trust to grant a lease at an inadequate rent (*d*), but as a ground for setting aside such a lease the undervalue of the rent reserved must be substantial (*e*). If at the time the lease was made the best rent obtainable was reserved, and there is no evidence or presumption of collusion or fraud (*f*), subsequent alterations of circumstances increasing the value of the property do not invalidate the lease (*g*).

The inadequacy of the rent reserved upon a lease of charity lands is less a badge of fraud than it would be in almost any other instance, for in the case of charity security of the rent is of primary importance (*h*).

Directions to let below rack-rent.

A recommendation by a college to its successors to renew a lease at less than the rack-rent (*i*) and a direction by a founder that the rents shall not be increased are not binding (*k*), and a direction that leases shall be granted at an undervalue to the founder's descendants is void for remoteness (*l*).

Improvements by lessee.

402. The fact that a tenant has expended money in permanent improvements upon the land on the faith of the lease may afford ground for granting him compensation if there has been no fraud (*m*), and the title of the lessee is not bad both at law and in

(*b*) Charitable Trusts Amendment Act, 1855 (18 & 19 Vict. c. 124), s. 29. See also p. 229, *post*.

(*c*) *A.-G.* v. *Warren* (1818), 2 Swan. 291. See also the cases cited in the following pages.

(*d*) For very ancient cases in support of this proposition, see Duke on Charitable Uses, 33, 42, 43, 46, 67, and Shelford, Law of Mortmain, 697; *Beresby* v. *Farrer* (1700), 2 Vern. 414; *A.-G.* v. *Gower* (*Lord*) (1740), 9 Mod. 229; *East* v. *Ryal* (1725), 2 P. Wms. 284; *A.-G.* v. *Green* (1801), 6 Ves. 452; *A.-G.* v. *Dixie* (1807), 13 Ves. 519; *A.-G.* v. *Magwood* (1811), 18 Ves. 315; *A.-G.* v. *Morgan* (1826), 2 Russ. 306; *A.-G.* v. *Dixon* (1842), 1 Y. & C. Ch. Cas. 615.

(*e*) *A.-G.* v. *Magwood, supra; A.-G.* v. *Cross* (1817), 3 Mer. 541.

(*f*) *Re Lawford Charity, Ex parte Skinner* (1817), 2 Mer. 457.

(*g*) *A.-G.* v. *Hungerford* (1834), 2 Cl & Fin. 357, H. L.; *A.-G.* v. *Pembroke Hall* (1825), 2 Sim. & St. 441, 447.

(*h*) *Re Lawford Charity, Ex parte Skinner, supra*, at p. 457.

(*i*) *Taylor* v. *Dulwich Hospital* (1720), 1 P. Wms. 655.

(*k*) *Lydiatt* v. *Foach* (*Sir John*) (1700), 2 Vern. 410; *Watson* v. *Hinsworth Hospital* (1707), 2 Vern. 596; *A.-G.* v. *Catherine Hall, Cambridge* (*Master*) (1820), Jac. 381; *A.-G.* v. *Wyggeston's Hospital* (1849), 12 Beav. 113, questioned in *A.-G.* v. *Payne* (1859), 27 Beav. 168; *A.-G.* v. *York* (*Archbishop*) (1853), 17 Beav. 495.

(*l*) *Hope* v. *Gloucester Corporation* (1855), 7 De G. M. & G. 647; *A.-G.* v. *Greenhill* (1863), 33 Beav. 193.

(*m*) *A.-G.* v. *Baliol College, Oxford* (1744), 9 Mod. Rep. 411; *A.-G.* v. *Green, supra; Shine* v. *Gough* (1811), 1 Ball & B. 444; *Swan* v. *Swan* (1820) 8 Price, 518; *A.-G.* v. *Kerr* (1840), 2 Beav. 420; *A.-G.* v. *Magdalen College, Oxford* (1854), 18 Beav. 255; *A.-G.* v. *Davey* (1854), 19 Beav. 521, reversed on other grounds (1859), 4 De G. & J. 136; *A.-G.* v. *Pretyman* (1854), 19 Beav. 538; *A.-G.* v.

equity (*n*); but it is not a proper reason for permitting him to renew his tenancy at his former rent if a higher rent is offered by another (*o*). The court will not recognise a custom of an ancient charity that leases shall be renewed on terms easy to the lessees, but it may direct that due regard shall be had to the outlay of capital and improvements by any lessee on the faith of such renewals (*p*).

Length of term.

403. Long leases amounting virtually to absolute alienation are *primâ facie* improper (*q*), but if proved to be beneficial to the charity may be upheld (*r*). Trustees who have a general power of leasing must nevertheless use their discretion as to the length and terms of the lease. Such a power would not authorise them to grant a lease for, *e.g.*, five hundred years at a fixed rent (*s*), or an agricultural lease for more than twenty-one years (*t*), or a building lease for more than ninety-nine years (*a*), except upon special grounds (*b*).

Covenants for renewal.

The court has regard to the nature of the covenants as well as the length of the term before setting aside a lease (*c*). Leases containing covenants for perpetual renewal are *primâ facie* objectionable (*d*), though if made for sufficient consideration they may be sustained (*e*). Where the founder has prescribed the duration of future leases, his intention is as a rule (*f*) binding (*g*), and it

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Wax Chandlers' Co. (*Master etc.*) (1873), L. R. 6 H. L. 1. Compare *A.-G.* v. *Pilgrim* (1850), 2 H. & Tw. 186, where no compensation for improvements was allowed, though the lease had run for 150 years.

(*n*) Where the title of the lessee is bad both at law and in equity, the consent of the Attorney-General is necessary before compensation for improvements can be given; see *A.-G.* v. *Lloyd* (1821), 6 Madd. 92.

(*o*) See cases in note (*m*), p. 224, *ante*, and note (*n*), *supra*; and *A.-G.* v. *Gaine* (1848), 11 Beav. 63; *A.-G.* v. *St. John's Hospital, Bath* (1865), 1 Ch. App. 92.

(*p*) *A.-G.* v. *St. John's Hospital, Bath, supra.* See also *Re Smith's* (*Henry*) *Charity, Hartlepool* (1882), 20 Ch. D. 516, C. A.; and as to the custom of the locality not being sufficient ground to support an improper lease, *A.-G.* v. *Pargeter* (1843), 6 Beav. 150. In two cases, however (*A.-G.* v. *Cross* (1817), 3 Mer. 524, and *Re Cross's Charity* (1859), 27 Beav. 592), some regard seems to have been paid to the local custom.

(*q*) *A.-G.* v. *Green* (1801), 6 Ves. 452; *A.-G.* v. *Pilgrim, supra*, at p. 188.

(*r*) *A.-G.* v. *South Sea Co.* (1841), 4 Beav. 453; and see *A.-G.* v. *Wray* (1821), Jac. 307; *Re Cross's Charity, supra*, and cases cited in note (*q*), *supra*.

(*s*) *A.-G.* v. *Davey* (1854), 19 Beav. 521.

(*t*) *A.-G.* v. *Owen* (1805), 10 Ves. 555; *A.-G.* v. *Backhouse* (1810), 17 Ves., 291; *A.-G.* v. *Hotham* (*Lord*) (1823), Turn. & R. 209; *A.-G.* v. *Pargeter, supra*; *A.-G.* v. *Hall* (1853), 16 Beav. 388.

(*a*) *A.-G.* v. *Green, supra*; *A.-G.* v. *Griffith* (1807), 13 Ves. 565; *A.-G.* v. *Foord* (1843), 6 Beav. 288.

(*b*) *Re Cross's Charity, supra.*

(*c*) *A.-G.* v. *Kerr* (1840), 2 Beav. 420; *A.-G.* v. *Hall, supra*, at p. 391.

(*d*) *Watson* v. *Hemsworth Hospital* (*Master etc.*) (1807), 14 Ves. 324; *A.-G.* v. *Brooke* (1811), 18 Ves., 326; *A.-G.* v. *St. John's Hospital, Bath* (1865), 1 Ch. App. 92; *Re Smith's* (*Henry*) *Charity, Hartlepool, supra*, at p. 518.

(*e*) *A.-G.* v. *Hungerford* (1834), 2 Cl. & Fin. 357, H. L.; see also *A.-G.* v. *Clements* (1823), Turn. & R. 58; *Gozna* v. *Grantham Corporation* (1827), 3 Russ. 261.

(*f*) Change of circumstances may render it necessary to depart from a founder's directions and intention (*A.-G.* v. *Wyggeston's Hospital* (1849), 12 Beav. 113).

(*g*) *A.-G.* v. *Griffith, supra*; *A.-G.* v. *Rochester Corporation* (1827), 2 Sim. 34; see also *Ward* v. *Hipwell* (1862), 3 Giff. 547.

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would consequently be improper to extend the term by means of a covenant for renewal (*h*).

Leases for lives are not invariably set aside, but the court views them as a rule with disfavour (*i*).

Leases by corporations.

404. Trustees of ecclesiastical and eleemosynary corporations may not lease the corporate lands devoted to charity for more than twenty-one years or three lives (*k*) unless the lands are in a town, when the term may extend to forty years (*l*). Leases by corporations not in conformity with these restrictions are void, not merely voidable (*m*); but leases may be authorised by the Charity Commissioners (*n*).

Lands held by a corporation sole in trust for charity do not come within the above restrictions (*o*).

Fines.

405. Leasing on fines is not generally held to be a provident manner of administering charity estates (*p*), though a general power of leasing may under special circumstances be considered sufficient to authorise such a mode of letting (*q*).

Tender.

The leasing of charity estates by tender is not objectionable (*r*).

Option to purchase etc.

Where trustees have a power of sale they may grant a lease with an option to purchase (*s*), but where they have merely a power to exchange it is improper for them to grant a lease in consideration of another lease (*a*).

Seal.

Leases by charitable corporations should be made under the corporate seal (*b*).

(*h*) *Lydiatt* v. *Foach* (*Sir John*) (1700), 2 Vern. 410; *Watson* v. *Hemsworth Hospital* (*Master etc.*), (1807), 14 Ves. 324, 333.

(*i*) *A.-G.* v. *Smith* (1716), 2 Vern. 746; *A.-G.* v. *Cross* (1817), 3 Mer. 524; *A.-G.* v. *Hungerford* (1834), 2 Cl. & Fin. 357, 376, 377, H. L.; *A.-G.* v. *Crook* (1836), 1 Keen, 127. See also *A.-G.* v. *Warren* (1818), 2 Swan. 303.

(*k*) Stat. 13 Eliz. c. 10; stat. 14 Eliz. cc. 11, 14; stat. 18 Eliz. c. 11; stat. 39 Eliz. c. 5, known as the disabling Acts. For recent cases on stat. 13 Eliz. c. 10, see *Ecclesiastical Commissioners* v. *Wodehouse*, [1895] 1 Ch. 552; *Power* v. *Banks*, [1901] 2 Ch. 487. As to eleemosynary corporations, see *Magdalen Hospital* (*President etc.*) v. *Knotts* (1879), 4 App. Cas. 324; *A.-G.* v. *Glyn* (1841), 12 Sim. 87; *Doe* v. *Yarborough* (*Lord*) (1822), 7 Moore (C. P.), 258; *York* (*Dean and Chapter*) v. *Middleburgh* (1827), 2 Y. & J. 196.

(*l*) Stat. 14 Eliz. c. 11; *Moore* v. *Clench* (1875), 1 Ch. D. 447.

(*m*) *Magdalen Hospital* (*President etc.*) v. *Knotts*, *supra*, overruling *Pennington* v. *Cardale* (1858), 3 H. & N. 666; *Moore* v. *Clench*, *supra*. See also *Southwell* (*Chapter*) v. *Lincoln* (*Bishop*) (1676), 2 Mod. Rep. 56; *Bettesworth* v. *St. Paul's, London* (*Dean and Chapter*) (1728), 1 Bro. Parl. Cas. 240; *Grumbrell* v. *Roper* (1820), 3 B. & Ald. 711; *Tailby* v. *Official Receiver* (1888), 13 App. Cas. 523, 552.

(*n*) *Banister's Case* (1602), Duke on Charitable Uses, 139; Grant on Corporations, 648.

(*o*) Charitable Trusts Amendment Act, 1855 (18 & 19 Vict. c. 124), s. 38.

(*p*) *A.-G.* v. *Wyggeston's Hospital* (1849), 12 Beav. 113; *A.-G.* v. *Payne* (1859), 27 Beav. 168; *Re Smith's* (*Henry*) *Charity*, *Hartlepool* (1882), 20 Ch. D. 516, C. A.; *A.-G.* v. *St. John's Hospital, Bath* (1865), 1 Ch. App. 92.

(*q*) *A.-G.* v. *Stamford Corporation* (1747), 2 Swan. 592. See also *A.-G.* v. *Cross*, *supra*, at p. 542; *A.-G.* v. *Price* (1744), 3 Atk. 108.

(*r*) *Re Peyton's* (*Lady*) *Hospital at Isleham* (1845), 14 L. J. (CH.) 129.

(*s*) *Re Female Orphan Asylum* (1867), 15 W. R. 1056; *Worthing Corporation* v. *Heather*, [1906] 2 Ch. 532.

(*a*) *Magdalen Hospital* (*President etc.*) v. *Knotts*, reported on this point (1877), 26 W. R. 141; and see p. 231, *post*.

(*b*) *Taylor* v. *Dulwich Hospital* (1720), 1 P. Wms. 655; *Drogheda Corporation* v.

406. Reversionary leases (*c*), leases by trustees of a charity to one of their number (*d*), even if expressly authorised by a power (*e*), and leases which contain provisions benefiting the trustees (*f*), are improper. Leases to relations of trustees are looked upon with suspicion (*g*).

Onus of proof that lease is beneficial.

407. In all cases where charity trustees grant leases for a term amounting to absolute alienation (*h*), or for a term of greater length than is usual having regard to the nature of the lease (*i*), or with covenants for perpetual renewal (*k*), or in any other way which is *primâ facie* improvident, the onus is upon the lessees as well as the trustees to show that the transaction is beneficial to the charity.

Control of leases by court.

408. The discretion of trustees in the exercise of their powers may be controlled by the court in the interests of a charity (*l*).

A building lease may be settled by the court as a model, and the charity trustees may be authorised to grant other building leases as they become necessary on similar terms without reference to chambers, the model lease being appended to the order (*m*).

The court will refuse to insert in a lease a provision against assignment to "an indigent or improper person" on the ground that such a provision would be likely to cause litigation (*n*).

The court sometimes authorises a lease of charity property instead of directing a sale (*o*).

Avoidance of leases.

409. Where a lease is declared void, it is entirely cancelled (*p*), the lessee being deprived of the benefit of all covenants, including the covenant for quiet enjoyment (*q*).

Holmes (1855), 5 H. L. Cas. 473; Charitable Trustees' Incorporation Act, 1872 (35 & 36 Vict. c. 24), s. 1.

(*c*) *A.-G.* v. *Kerr* (1810), 2 Beav. 420.

(*d*) *A.-G.* v. *Dixie* (1807), 13 Ves. 519, 541; *A.-G.* v. *Clarendon* (*Earl*) (1811), 17 Ves. 491; see also *A.-G.* v. *Cashel Corporation* (1842), 3 Dr. & War. 294; *Foord* v. *Baker* (1859), 27 Beav. 193.

(*e*) *Passingham* v. *Sherborne* (1846), 9 Beav. 424.

(*f*) *A.-G.* v. *Stamford Corporation* (1747), 2 Swan. 592; *A.-G.* v. *Wilson* (1812), 18 Ves. 518; *A.-G.* v. *Plymouth Corporation* (1845), 9 Beav. 67.

(*g*) *Re Lawford Charity, Ex parte Skinner* (1817), 2 Mer. 457; see also *A.-G.* v. *Dixie*, *supra*, at p. 540; *Ferraby* v. *Hobson* (1847), 2 Ph. 261.

(*h*) *A.-G.* v. *Brettingham* (1840), 3 Beav. 91.

(*i*) *A.-G.* v. *Stamford Corporation*, *supra*; *A.-G.* v. *Green* (1801), 6 Ves. 452; *A.-G.* v. *Owen* (1805), 10 Ves. 555; *A.-G.* v. *Griffith* (1807), 13 Ves. 575; *A.-G.* v. *Backhouse* (1810), 17 Ves. 283; *A.-G.* v. *Brooke* (1811), 18 Ves. 319, 326; *A.-G.* v. *Warren* (1818), 2 Swan. 304; *A.-G.* v. *Ward* (1829), 7 L. J. (o. s.) (CH.) 114; *A.-G.* v. *Brettingham*, *supra*; *A.-G.* v. *Hall* (1853), 16 Beav. 388.

(*k*) *Lydiatt* v. *Foach* (*Sir John*) (1700), 2 Vern. 410; *A.-G.* v. *Brooke*, *supra*; *A.-G.* v. *Hungerford* (1834), 2 Cl. & Fin. 357, H. L.

(*l*) *A.-G.* v. *Harrow School* (*Governors*) (1754), 2 Ves. Sen. 551; *Ex parte Berkhampstead Free School* (1813), 2 Ves. & B. 138; and see p. 274, *post*.

(*m*) *A.-G.* v. *Christ Church, Oxford* (1862), 3 Giff. 514.

(*n*) *A.-G.* v. *Donnington Hospital* (1852), 16 Jur. 899.

(*o*) *Re Suir Island Female Charity School* (1846), 3 Jo. & Lat. 171; *A.-G.* v. *Edulji*, [1907] W. N. 174.

(*p*) *A.-G.* v. *Morgan* (1826), 2 Russ. 306.

(*q*) *Ibid.*; *Bangor* (*Bishop*) v. *Parry*, [1891] 2 Q. B. 277, 280.

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The court may direct an inquiry as to whether proceedings to set aside a lease should be taken (*r*), and the lessee may be permitted to attend the inquiry (*s*).

Lessees without notice.

410. Lessees without notice that the property belongs to a charity are, like purchasers for valuable consideration without notice (*t*), entitled to protection (*a*), but not so lessees with notice (*b*).

Protection of underlessees.

If the rent paid by an underlessee is adequate, his interests may be protected though the head lease is set aside. In such circumstances the court may direct the underlessee to pay his rent direct to the charity (*c*). Notice to an underlessee that the lessor is a charity is not equivalent to notice that the granting of the superior lease was a breach of trust (*d*).

Time for impeachment.

411. Charities being within the operation of the Real Property Limitation Acts (*e*), an improvident lease of charity lands cannot as against the lessee be impeached by the Attorney-General on behalf of the beneficiaries except within twelve years (*f*).

Leases by library authorities.

412. Library authorities may let any houses or lands vested in them for the purposes of the Public Libraries Act, 1892, and for the time being not required for such purposes (*g*).

Universities etc.

Special statutory provision is made for leasing lands belonging to the universities of Oxford, Cambridge, and Durham, and to their respective colleges, and to the colleges of Winchester and Eton (*h*).

(*r*) Seton, Judgments and Orders, 6th ed., pp. 1324 *et seq.*

(*s*) *A.-G.* v. *Pretyman* (1845), 8 Beav. 316.

(*t*) See p. 201, *ante*.

(*a*) *A.-G.* v. *Hall* (1853), 16 Beav. 388. See also *Re Lawford Charity, Ex parte Skinner* (1817), 2 Mer. at p. 457, where the court expressed an opinion that a lessee who had acted fairly ought not to be disturbed; *A.-G.* v. *Dixon* (1842), 1 Y. & C. Ch. Cas. 614.

(*b*) *A.-G.* v. *Flint* (1844), 4 Hare, 147.

(*c*) *A.-G.* v. *Backhouse* (1810), 17 Ves. 283. See also *A.-G* v. *Griffith* (1807), 13 Ves. 565, where in similar circumstances the underlessees were not disturbed; *A.-G.* v. *Magwood* (1811), 18 Ves. 315, where an underlease for a fine was held not conclusive evidence that the lease was granted at an undervalue.

(*d*) *A.-G.* v. *Backhouse, supra*, at p. 293.

(*e*) Real Property Limitation Acts, 1833 (3 & 4 Will. 4, c. 27), and 1874 (37 & 38 Vict. c. 57).

(*f*) *St. Mary Magdulen, Oxford* (*President etc.*) v. *A.-G.* (1857), 6 H. L. Cas. 189; *A.-G.* v. *Davey* (1859), 4 De G. & J. 136, C. A.; *A.-G.* v. *Payne* (1859), 27 Beav. 168, in which cases the leases in question were voidable, not void; and the beneficiaries were therefore entitled to have them set aside, a right which accrued immediately upon execution. Compare *Magdalen Hospital* (*Governors*) v. *Knotts* (1879), 4 App. Cas. 324 (lease void under stat. 13 Eliz. c. 10); *Bunting* v. *Sargent* (1879), 13 Ch. D. 330 (lease void under the mortmain law).

(*g*) Public Libraries Act, 1892 (55 & 56 Vict. c. 53), s. 12 (4). See also note (*h*), *infra*, and title LOCAL GOVERNMENT.

(*h*) Universities and Colleges Estates Acts, 1858 (21 & 22 Vict. c. 44), 1877 (40 & 41 Vict. c. 48), 1880 (43 & 44 Vict. c. 46), and 1898 (61 & 62 Vict. c. 55). As to Winchester and Eton, see also the Public Schools Act, 1868 (31 & 32 Vict. c. 118), s. 24. It is apprehended that leases under these statutes and under the Public Libraries Act, 1892 (55 & 56 Vict. c. 53), do not require the sanction of the court or Charity Commissioners under s. 29 of the Charitable Trusts Amendment Act, 1855 (18 & 19 Vict. c. 124), on the ground that such leases are made under the express authority of Parliament. Moreover, the universities of Oxford, Cambridge, London, and Durham, and their colleges and halls, and

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413. In the case of charities which are subject to the Charitable Trusts Acts (*i*) the trustees or administrators are prohibited, except under the express authority of Parliament or of the court or according to a scheme legally established (*k*), or with the approval of the Charity Commissioners or of the Board of Education, as the case may be, from granting a lease of the charity estates in reversion after more than three years of any existing term, or for any term of life, or in consideration wholly or in part of a fine, or for any term exceeding twenty-one years (*l*). Leases by charities subject to Charitable Trusts Acts.

Accordingly a lease for more than twenty-one years made without the consent of the Charity Commissioners is wholly void, not merely voidable (*m*), and the tenant becomes on payment of rent a tenant from year to year on the terms of the lease (*n*), but no action would lie on the covenant for quiet enjoyment (*o*). Effect of invalid lease.

The consent of the Commissioners is not required to validate a lease granted in pursuance of a valid contract made prior to the Charitable Trusts Amendment Act, 1855 (*p*).

414. The Charity Commissioners may authorise the trustees or administrators of a charity to let the charity estates or any part of them on building, repairing, improving, mining, or other leases, if they consider such leases will be for the benefit of the charity (*q*). They may also prepare and approve schemes for the letting of any charity property, so that all leases granted by the trustees in pursuance of such schemes are valid (*r*). Leases authorised by the Commissioners have the same effect as if they had been authorised by the express terms of the trust (*s*). Leases authorised by Commissioners.

415. The acting trustees of any charity, or the majority of them, have the same power of granting leases of lands vested in the official trustee of charity lands as if the lands were vested in themselves (*t*). All covenants, conditions, and remedies contained in or Lands vested in official trustee.

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the colleges of Eton and Winchester, are expressly exempted from the jurisdiction of the Commissioners (Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 62; Charitable Trusts Amendment Act, 1855 (18 & 19 Vict. c. 124), s. 49).

(*i*) As to what charities are so subject, see p. 303, *post*.

(*k*) *Re Mason's Orphanage and London and North Western Rail. Co.*, [1896] 1 Ch. 596, C. A.; *A.-G.* v. *National Hospital for the Relief and Cure of the Paralysed and Epileptic*, [1904] 2 Ch. 252.

(*l*) Charitable Trusts Amendment Act, 1855 (18 & 19 Vict. c. 124), s. 29. The question whether this section applies to a lease made in consideration of the surrender of an existing lease has not yet been decided. Such a lease would, it is conceived, stand on the same footing as a reversionary lease.

(*m*) *Bangor (Bishop)* v. *Parry*, [1891] 2 Q. B. 277; and see *Magdalen Hospital (President etc.)* v. *Knotts* (1879), 4 App. Cas. 324.

(*n*) *Bangor (Bishop)* v. *Parry*, *supra*.

(*o*) *Ibid.*

(*p*) See *Moore* v. *Clench* (1875), 1 Ch. D. 447.

(*q*) Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 21. For a form of application to the Commissioners to authorise a lease, see Encyclopædia of Forms, Vol. III., p. 455, and for a form of authority to grant a lease, see *ibid.*, p. 474.

(*r*) Charitable Trusts Amendment Act, 1855 (18 & 19 Vict. c. 124), s. 39.

(*s*) Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 26.

(*t*) Charitable Trusts Amendment Act, 1855 (18 & 19 Vict. c. 124), s. 16

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incident to any lease so granted are enforceable by and against the trustees, their alienees or assigns (*a*).

Leases by majority of trustees.

416. Where trustees or administrators of a charity have power to lease, a majority of them who are present at a meeting of their body duly constituted and vote on the question shall have and be deemed to have always had full power to lease (*b*). Leases so granted are as valid as if they were executed by all the trustees or administrators and by the official trustee (*c*).

Incorporation of trustees.

The incorporation of charity trustees under the Charitable Trustees Incorporation Act, 1872 (*d*), does not affect their powers of leasing (*e*).

Leases of parish property.

417. Leases for more than a year of parochial property vested in parish councils, as trustees of parochial charities, require the consent of the Local Government Board if the property has been acquired at the expense of any rate, or was at the date of the Local Government Act, 1894, applied in aid of any rate, or would but for want of income be so applied. In other cases the consent of the Charity Commissioners is essential, except as regards leases for allotments (*f*).

Letting for allotments.

418. All trustees in whom are vested for the benefit of the poor in the neighbourhood lands the rents of which are distributed in doles, fuel, clothing, food etc., are required to take proceedings for letting such lands in allotments where they are not used for the purpose of a recreation ground or otherwise for the general public benefit (*g*). Such trustees may also let such lands to the district council of the district (*h*).

Schemes framed by the Charity Commissioners after the passing of the Allotments Extension Act, 1882, in relation to any charity the endowment of which consists in part of land other than buildings or their appurtenances, must contain provisions authorising the trustees to let portions of the land in allotments (*i*).

(*a*) Charitable Trusts Amendment Act, 1855 (18 & 19 Vict. c. 124), s. 16.

(*b*) Charitable Trusts Act, 1869 (32 & 33 Vict. c. 110), s. 12. Independently of this section, it has been held that a majority of charity trustees have power to grant a lease (*A.-G.* v. *Shearman* (1839), 2 Beav. 104); see also p. 276, *post*.

(*c*) Charitable Trusts Act, 1869 (32 & 33 Vict. c. 110), s. 12.

(*d*) 35 & 36 Vict. c. 24; and see p. 317, *post*.

(*e*) *Ibid.*, s. 1.

(*f*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 8 (2). As to sales under this section, see p. 223, *ante*.

(*g*) Allotments Extension Act, 1882 (45 & 46 Vict. c. 80), s. 4; see title ALLOTMENTS, Vol. I., p. 338. As to the letting of land in allotments, see also Allotments Act, 1832 (2 & 3 Will. 4, c. 42); Poor Allotments Management Act, 1873 (36 & 37 Vict. c. 19); Allotments Act, 1887 (50 & 51 Vict. c. 48); and title ALLOTMENTS, Vol. I., pp. 334, 336. It has been held that the Act of 1882 does not affect the powers of the Charity Commissioners under the Charitable Trusts Acts to authorise a sale of charity lands (*Sutton (Parish)* to *Church* (1884), 26 Ch. D. 173, 178).

(*h*) Allotments Act, 1887 (50 & 51 Vict. c. 48), s. 13 (2). As to sale instead of letting, see Small Holdings and Allotments Act, 1908 (8 Edw. 7, c. 36), s. 33 (2); and p. 223, *ante*. The district council was substituted for the sanitary authority named in this sub-section by the Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 25.

(*i*) Allotments Extension Act, 1882 (45 & 46 Vict. c. 80), s. 14; see p. 187,

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Effect of private Acts etc.

419. No provision contained in any private Act of Parliament or in any decree or order of the court relating to the leasing of any charity property under the order or with the approval of the court is allowed (in the absence of any express direction to the contrary to be contained in any future Act of Parliament, order, or decree) to exclude or impair any jurisdiction which might otherwise be properly exercised for the like purposes by the Charity Commissioners (*k*).

Places of religious worship.

420. The jurisdiction of the Charity Commissioners to establish schemes extends to registered places of religious worship (*l*). This provision does not expressly empower the Commissioners to authorise leases of such places of worship, but schemes made in accordance with the provision may authorise leases (*m*).

Land held on educational trusts.

421. In the case of a lease of lands held upon charitable trusts which are solely educational the Board of Education takes the place of the Charity Commissioners, and any consent to the lease which may be necessary must be given by the former body (*n*).

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Exchanges by trustees.

422. Trustees of charities coming within the Charitable Trusts Acts, though prohibited from selling, mortgaging, charging, or leasing the charity estate, except under some express authority (*o*), are not expressly prohibited by statute from effecting exchanges. It would seem, therefore, that exchanges effected by trustees of any charity upon their own responsibility, which are consistent with the provident administration of the charity estate, are valid.

A power to exchange does not authorise a demise in consideration of another demise (*p*).

Powers of majority of trustees.

Where trustees have power to determine upon an exchange, a majority may carry out the transaction on behalf of all the trustees and of the official trustee of charity lands (*q*).

ante; and title ALLOTMENTS, Vol. I., p. 338. For a provision of this kind, see Encyclopædia of Forms, Vol. III., p. 480, clause 17.

(*k*) Charitable Trusts Act, 1862 (25 & 26 Vict. c. 112), s. 1.

(*l*) Charitable Trusts Act, 1869 (32 & 33 Vict. c. 110), s. 15. Under s. 62 of the Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), buildings used *bonâ fide* as places of meeting for religious worship and duly registered were exempted from the Charitable Trusts Acts. S. 15 of the Act of 1869 partially removes that exemption.

(*m*) Charitable Trusts Act, 1860 (23 & 24 Vict. c. 136), s. 2. See also p. 229, *ante;* and for an example of a scheme authorising the leasing of charity property, see Encyclopædia of Forms, Vol. III., p. 481, clause 18.

(*n*) Board of Education Act, 1899 (62 & 63 Vict. c. 33), and the Orders in Council made thereunder. See also Elementary Education Act, 1870 (33 & 34 Vict. c. 75), s. 22, and title EDUCATION. For a form of application to the Board of Education for an authority to lease, together with instructions to surveyors, see Tudor, Law of Charities and Mortmain, 4th ed., pp. 947, 948; and for the clauses in a Board of Education scheme relating to leases, see *ibid.*, p. 1015.

(*o*) Charitable Trusts Amendment Act, 1855 (18 & 19 Vict. c. 124), s. 29; see pp. 218, 229, *ante*, and p. 235, *post.*

(*p*) *Magdalen Hospital (President etc.)* v. *Knotts* (1877), 26 W. R. 111; *Re Female Orphan Asylum* (1867), 15 W. R. 1056.

(*q*) Charitable Trusts Act, 1869 (32 & 33 Vict. c. 110), s. 12.

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An exchange beneficial to a charity may be authorised by the court (*r*).

Exchange authorised by Commissioners.

423. The Charity Commissioners may also on the application of trustees or administrators of a charity authorise an exchange of any land belonging to the charity on being satisfied that the proposed exchange will be beneficial to the charity, and may give directions for the investment of any moneys received by way of equality of exchange (*s*). The Commissioners may also authorise the application of charity funds in payments for equality of exchange, or in payment of any incidental expenses, and may sanction the mortgaging of lands acquired by the charity by exchange or already belonging to the charity to raise moneys for such purposes (*a*). Exchanges authorised by the Commissioners are as valid as if authorised or directed by the instrument of trust regulating the charity (*b*), even in the case of exchanges by ecclesiastical and eleemosynary corporations (*c*).

Exchange under Board of Agriculture and Fisheries.

424. Exchanges of charity lands may be effected by application to the Board of Agriculture and Fisheries (*d*).

The orders of the Board effecting an exchange are made independently of the Charity Commissioners, and the sanction of the latter body is not required to an application to the former (*e*). The powers exercised by the Board extend to hereditaments of any tenure, corporeal or incorporeal, held upon charitable trusts (*f*).

Advertisements of proposed exchanges must be published for a

(*r*) *Mildmay* v. *Methuen* (*Lord*) (1851), 14 Beav. 121, n. See also *Re Newton's* (*Alderman*) *Charity* (1848), 12 Jur. 1011.

(*s*) Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 24; and see Charitable Trusts Act, 1862 (25 & 26 Vict. c. 112), s. 1. For form of application to the Charity Commissioners for authority to exchange, see Encyclopædia of Forms, Vol. III., p. 451.

(*a*) Charitable Trusts Amendment Act, 1855 (18 & 19 Vict. c. 124), ss. 32, 34.

(*b*) Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 26.

(*c*) Charitable Trusts Amendment Act, 1855 (18 & 19 Vict. c. 124), s. 38. As to the disabling Acts, see note (*k*), p. 226, *ante*,

(*d*) See Forty-seventh Report of the Charity Commissioners, p. 7. The Board effect exchanges under the powers of the Land Commissioners under the Inclosure Acts, 1845—1882; Board of Agriculture Act, 1889 (52 & 53 Vict. c 30); Board of Agriculture and Fisheries Act, 1903 (3 Edw. 7, c. 31). Under these powers exchanges are carried out by the Board by attaching to the lands exchanged the like incidents of tenure and incumbrances which previously attached to each other. By this means investigation of title is rendered unnecessary, but evidence must be furnished that the parties exchanging are interested in the land within the meaning of the Acts. See Official Instructions issued by the Board of Agriculture and Fisheries; Encyclopædia of Forms, Vol. V., pp. 571 *et seq.* As to exchanges, see also title REAL PROPERTY AND CHATTELS REAL.

(*e*) As to the effect of an order of exchange, see *Minet* v. *Leman* (1855), 7 De G. M. & G. 340.

(*f*) Inclosure Acts, 1845 (8 & 9 Vict. c. 118); 1846 (9 & 10 Vict. c. 70); 1847 (10 & 11 Vict. c. 111); 1849 (12 & 13 Vict. c. 83); Inclosure Commissioners Act, 1851 (14 & 15 Vict. c. 53); Inclosure Acts, 1852 (15 & 16 Vict. c. 79), 1854 (17 & 18 Vict. c. 97), 1857 (20 & 21 Vict. c. 31), and 1859 (22 & 23 Vict. c. 43); Inclosure etc. Expenses Act, 1868 (31 & 32 Vict. c. 89); Commons Act, 1876 (39 & 40 Vict. c. 56).

period of two weeks, and a period of one month from the publication of the last advertisement must elapse before an order for exchange can be made (*g*).

425. Eleemosynary corporations are in general disabled from making exchanges (*h*). But the Charity Commissioners may authorise exchanges by such corporations when within their jurisdiction (*i*).

Fuel allotments.

426. The Charity Commissioners have power, on the application of the trustees of a fuel allotment made under the Inclosure Acts, to sanction the exchange of such allotment or any part of it for land of equal value situate within the parish or district for the benefit of the poor of which such allotment was set out (*k*).

Parish lands.

427. The exchange of lands or holdings vested in parish councils requires the consent of the parish meeting and of the Charity Commissioners, and in some cases of the Local Government Board (*l*).

SUB-SECT. 4.—*Partitions.*

General power to partition.

428. There is nothing in the Charitable Trusts Acts prohibiting trustees from partitioning the charity estate; and partitions may, it would seem, be carried out by charity trustees on their own responsibility, subject, however, to the well-established principle that dealings with the trust estate must be consistent with provident administration (*m*).

Powers of majority of trustees.

Where trustees have power to determine on a partition a majority may carry out the transaction on behalf of all the trustees and the official trustee of charity lands (*n*).

Powers of exchange do (*o*), but powers of sale do not (*p*), authorise partitions.

By order of court.

429. The court also has power to order a partition of trust estates, including charity estates, where such a course seems beneficial (*q*).

Powers of Commissioners.

430. There is no power expressly enabling the Charity Commissioners to authorise or order a partition. The Commissioners are,

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(*g*) Commons Act, 1899 (62 & 63 Vict. c. 30), s. 19.

(*h*) For a list of the disabling Acts, see note (*k*), p. 226, *ante*. Facilities for exchange are afforded in certain cases by stat. 14 Eliz. c. 11, s. 7.

(*i*) See Charitable Trusts Amendment Act, 1855 (18 & 19 Vict. c. 124), s. 38.

(*k*) Commons Act, 1876 (39 & 40 Vict. c. 56), s. 19. See also Inclosure Act, 1852 (15 & 16 Vict. c. 79), s. 21; and titles ALLOTMENTS, Vol. I., p. 335; COMMONS AND RIGHTS OF COMMON, p. 596, *post*.

(*l*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 8 (2); see p. 230, *ante*.

(*m*) See p. 224, *ante*.

(*n*) Charitable Trusts Act, 1869 (32 & 33 Vict. c. 110), s. 12.

(*o*) *Re Frith and Osborne* (1876), 3 Ch. D. 618.

(*p*) *M'Queen* v. *Farquhar* (1805), 11 Ves. 467, 477; *Brassey* v. *Chalmers* (1852), 16 Beav. 223; see title POWERS.

(*q*) See generally title PARTITION, and *Allen* v. *Allen* (1873), 42 L. J. (CH.) 839.

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however, expressly empowered to authorise the charity funds to be applied in payments for equality of partition and of incidental expenses (*a*).

By Board of Agriculture and Fisheries.

431. The Board of Agriculture and Fisheries has power to make partition orders of charity lands of every tenure and undivided shares of such lands, and all hereditaments, corporeal and incorporeal (*b*).

Where necessary, a combined order may be made for exchange and partition (*c*).

SUB-SECT. 5.—*Mortgages.*

General implied power of trustees.

432. Apart from the restrictions imposed by the Charitable Trusts Acts (*d*), trustees of charity lands may mortgage the estate on their own responsibility, whether they have express power to do so or not (*e*). The onus, however, would be on the mortgagee to show that such alienation was beneficial to the charity, and upon the trustees to show that they had exercised their power, if they possessed one, in accordance with provident management. Such mortgages are therefore not free from danger to both parties (*f*).

Invalid mortgages.

433. Improvident mortgages may be restrained by injunction (*g*). Mortgages by trustees to one of themselves are objectionable on principle (*h*), but in a special case one of the trustees of a charity may properly be a mortgagee of the charity estate (*i*).

Whether power of sale authorises mortgage.

As a rule the question whether a power of sale authorises trustees to mortgage depends upon the circumstances of the trust and the intention of the settlor as manifested in the instrument of trust (*k*).

Sanction of court.

434. The court may sanction mortgages of charity lands by trustees where beneficial to the charity, as, for example, for the acquisition of a new site (*l*), or the payment of costs (*m*). So, where

(*a*) Charitable Trusts Amendment Act, 1855 (18 & 19 Vict. c. 124), ss. 32, 34.

(*b*) See Inclosure Acts, 1845 (8 & 9 Vict. c. 118), 1846 (9 & 10 Vict. c. 70) 1847 (10 & 11 Vict. c. 111), 1848 (11 & 12 Vict. c. 99), s. 13 1849 (12 & 13 Vict. c. 83), s. 7, and 1859 (22 & 23 Vict. c. 43), s. 11; Board of Agriculture Act, 1889 (52 & 53 Vict. c. 30); Board of Agriculture and Fisheries Act, 1903 (3 Edw. 7, c. 31). This is the simplest and most effective method.

(*c*) Inclosure Act, 1852 (15 & 16 Vict. c. 79), s. 32.

(*d*) Charitable Trusts Amendment Act, 1855 (18 & 19 Vict. c. 124), s. 29; see also p. 235, *post*.

(*e*) See *A.-G.* v. *Warren* (1818), 2 Swan. 302, 303; and p. 216, *ante*, the principles laid down as regards sales of charity property being equally applicable to alienation by way of mortgage, on the ground that a mortgage is, in fact, a conditional sale; *Stroughill* v. *Anstey* (1853), 1 De G. M. & G. 635, 645.

(*f*) *A.-G.* v. *Brettingham* (1840), 3 Beav. 95; see p. 216, *ante*.

(*g*) *Rigall* v. *Foster* (1853), 18 Jur. 39.

(*h*) *Forbes* v. *Ross* (1788), 2 Cox, Eq. Cas. 113; *Pocock* v. *Reddington* (1801), 5 Ves. 799.

(*i*) *A.-G.* v. *Hardy* (1851), 20 L. J. (CH.) 450, where the mortgage was transferred to a trustee.

(*k*) *Stroughill* v. *Anstey, supra; Re Bellinger, Durell* v. *Bellinger*, [1898] 2 Ch. 534.

(*l*) *Re Stockport Ragged Industrial and Reformatory Schools*, [1898] 2 Ch. 687, C. A.

(*m*) *A.-G.* v. *York (Archbishop)* (1854), 17 Beav. 495; see also p. 350, *post*.

two charities have the same object, the court may authorise the application of the funds of one charity in discharging a mortgage upon the property of the other, and direct that the mortgage shall be kept alive in favour of the former charity (*u*).

By charities under the Charitable Trusts Acts.

Sanctions required.

435. Mortgages and charges by trustees of charity estates which are not exempt from the Charitable Trusts Acts (*o*) are absolutely prohibited, whether the trustees have or have not power to mortgage or charge under the instrument of trust (*p*), unless made with the express authority of Parliament (*q*) or of a judge or court of competent jurisdiction (*q*), or according to a scheme legally established (*r*), or with the approval of the Charity Commissioners (*s*), or, in the case of endowments held solely for educational purposes, with the approval of the Board of Education (*a*).

Overdraft at bank.

The borrowing of money by charity trustees from a bank by means of an overdraft is "a charge" of the estate within the above prohibition, even though no written document is used to carry out the transaction (*b*).

Sanction of Commissioners required unless land applicable as income.

436. The consent of the Charity Commissioners is required to an application to the court to sanction a mortgage of land purchased partly by means of savings of income and held, with the buildings erected thereon, upon trusts constituting a permanent endowment, and also to the mortgage itself (*c*). Their consent is not necessary if the land is held upon such trusts for the charity that it can lawfully be applied as income, *i.e.*, upon trusts not constituting a permanent endowment (*d*).

Purposes for which Commissioners sanction mortgage.

437. The Charity Commissioners may authorise the trustees to raise any sum of money by mortgage of all or part of the charity estates for building, repairs, and improvements on such estates (*e*), or for any other purposes which they may consider beneficial to the charity, and which shall not be inconsistent with the trusts or intentions of the foundation (*f*). They may also sanction mortgages

(*n*) *Cockburn* v. *Raphael*, [1891] W. N. 14.

(*o*) For the classes of exempted charities, see Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 62; and pp. 204 *et seq.*, *ante*.

(*p*) Charitable Trusts Amendment Act, 1855 (18 & 19 Vict. c. 124), s. 29; see *Re Mason's Orphanage and London and North Western Rail. Co.*, [1896] 1 Ch. 596, C. A.

(*q*) As to this, see p. 220, *ante*.

(*r*) *Re Mason's Orphanage and London and North Western Rail. Co.*, *supra*; and see p. 220, *ante*.

(*s*) *Re Stockport Ragged Industrial and Reformatory Schools*, *supra*.

(*a*) Board of Education Act, 1899 (62 & 63 Vict. c. 33), and the Orders in Council made thereunder.

(*b*) *Fell* v. *Official Trustee of Charity Lands*, [1898] 2 Ch. 44, 51, C. A.

(*c*) *Re Stockport Ragged Industrial and Reformatory Schools*, *supra*.

(*d*) See *Re Clergy Orphan Corporation*, [1894] 3 Ch. 145, C. A., and the other cases cited p. 222, *ante*, where the questions raised were as to the consent of the Commissioners to sales. But the principle applies equally to mortgages.

(*e*) Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 21.

(*f*) Charitable Trusts Act, 1860 (23 & 24 Vict. c. 136), s. 15.

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for the purpose of raising money for equality of exchange or partition (*g*).

When a mortgage is authorised by the Commissioners provision must be made by them for the loan to be discharged out of income by yearly or other instalments within thirty years from the date of the loan, or by means of a sinking fund (*h*).

Discharge of loan raised.

Mortgages authorised by the Commissioners do not as a rule contain powers of sale (*i*).

Power of majority of trustees.

438. Where trustees have power to mortgage, the transaction may effectually be carried out by a majority of them on behalf of all the trustees and the Official Trustee of Charity Lands (*k*).

Literary and scientific societies.

439. Money may be borrowed for necessary repairs to institutions established under the Literary and Scientific Institutions Act 1854, for the promotion of literature, science, or the fine arts (*l*). But an institution established under that Act has no implied general power of mortgaging, and it has no power to borrow for the erection or reconstruction of a billiard room (*m*).

Universities etc.

Special statutory provision has been made for mortgages by universities and colleges (*n*).

Agricultural land.

440. Charity trustees may not exercise the powers of charging the land conferred on landlords by the Agricultural Holdings Act, 1883, except with the previous approval in writing of the Charity Commissioners (*o*).

SUB-SECT. 6.—*Investment.*

Generally.

441. Funds in the hands of charity trustees requiring investment should be invested according to the provisions (if any) of the instrument creating the trust (*p*), or, if there are no such provisions, in ordinary trustee securities (*q*), which may be varied from time to time (*r*).

(*g*) Charitable Trusts Amendment Act, 1855 (18 & 19 Vict. c. 124), s. 32.

(*h*) *Ibid.*, s. 30.

(*i*) This is the general rule, but it appears in special cases to have been relaxed.

(*k*) Charitable Trusts Act, 1869 (32 & 33 Vict. c. 110), s. 12. The concurrence of the Official Trustee is therefore unnecessary, though he will join if required to do so, but he does not enter into any covenants.

(*l*) Literary and Scientific Institutions Act, 1854 (17 & 18 Vict. c. 112); see title SCIENTIFIC AND LITERARY SOCIETIES.

(*m*) *Re Badger*, [1905] 1 Ch. 568.

(*n*) Universities and Colleges Estates Acts, 1858 to 1898 (21 & 22 Vict. c. 44; 40 & 41 Vict. c. 48; 43 & 44 Vict. c. 46; 61 & 62 Vict. c. 55).

(*o*) Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61), s. 40; see title AGRICULTURE, Vol. I., p. 269.

(*p*) See *Ovey* v. *Ovey*, [1900] 2 Ch. 524, where the court refused to authorise funds directed to be invested in Consols, "and in no other securities," to be reinvested in other trustee securities; not following *Re Wedderburn* (1878), 9 Ch. D. 112.

(*q*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 1; see title TRUSTS AND TRUSTEES. See *Re Clergy Orphan Corporation* (1874), L. R. 18 Eq. 280, and *Re Manchester Royal Infirmary* (1889), 43 Ch. D. 420, cases decided upon statutes repealed, but substantially re-enacted by the Trustee Act, 1893. Investments of cash under the control of the court are regulated by R. S. C. 1883, Ord. 22, r. 17, and are not subject to restrictions contained in the instrument of foundation even if it be an Act of Parliament (*Re Birmingham Blue Coat School* (1866), L. R. 1 Eq. 632).

(*r*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 1.

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442. Trustees or treasurers of any charitable or provident institution or society, or charitable donation or bequest for the maintenance, education, or benefit of the poor, may, with the approval and subject to the regulations of the Commissioners for the Reduction of the National Debt or the Comptroller-General acting under them, invest their trust funds up to any amount in duly established trustee savings banks (*s*). They may also without such approval, but with the consent of the trustees and managers of the savings bank, invest in a similar manner their trust funds up to £100 a year; but in the last case the amount invested is not at any time to exceed £300 in the whole exclusive of interest (*t*). The receipt of the treasurer, trustee, or other officer for the time being of the charitable or provident institution or society apparently authorised to require payment discharges the savings bank (*a*). Notwithstanding any regulations to the contrary made by a charitable institution, a member of such institution is not liable to any penalty, forfeiture, or disability by reason of being a depositor in a savings bank (*b*).

Investments in savings banks.

443. Charity trustees may, unless expressly forbidden by the instrument (if any) creating the trust, invest the trust funds upon a mortgage of real estate in Great Britain or Ireland (*c*).

Mortgage of real estate.

Corporations and trustees in the United Kingdom holding moneys in trust for any public or charitable purpose may invest them in any real security (*d*) authorised by or consistent with the trust, without being deemed thereby to have acquired land within the meaning of the laws relating to mortmain (*e*). Conveyances (*f*) and contracts for the purpose only of such security are not, it seems, rendered void by failure to comply with the requirements of the Mortmain and Charitable Uses Act, 1888, Part II. (*g*). But upon foreclosure or release of the equity of redemption the land

Investments on real security by corporations etc.

(*s*) Savings Banks Act, 1863 (26 & 27 Vict. c. 87), s. 32.

(*t*) *Ibid.* As to establishment of trustee savings banks, see title BANKERS AND BANKING, Vol. I., pp. 576—578.

(*a*) *Ibid.*, s. 34.

(*b*) *Ibid.*, s. 35.

(*c*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 1; see title TRUSTS AND TRUSTEES. See also *Cockburn* v. *Raphael*, [1891] W. N. 14.

(*d*) "Real security" includes all mortgages or charges, legal or equitable, of or upon lands or hereditaments of any tenure, or of or upon any estate or interest therein or any charge or incumbrance thereon (Charitable Funds Investment Act, 1870 (33 & 34 Vict. c. 34), s. 3).

(*e*) *Ibid.*, s. 1; see Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42), Part I., and title CORPORATIONS.

(*f*) The expression "conveyance" is defined in s. 3 of the Charitable Funds Investment Act, 1870 (33 & 34 Vict. c. 34).

(*g*) Charitable Funds Investment Act, 1870 (33 & 34 Vict. c. 34), s. 1. A proviso for redemption is not a condition for the benefit of the assuror within the meaning of the Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42), s. 4 (3); see *Doe* v. *Hawkins* (1841), 2 Q. B. 212). Except as mentioned in the Act of 1870, investments by charity trustees on mortgage must satisfy the formalities prescribed by the Mortmain and Charitable Uses Act, 1888; see *ibid.*, s. 10 (1); and p. 133, *ante*. The Mortmain and Charitable Uses Act, 1888, Part II., replaces the Charitable Uses Act, 1735 (9 Geo. 2, c. 36), the statute mentioned in the Charitable Funds Investment Act.

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must be held upon trust for sale and conversion and be sold accordingly (*h*).

Trustees who have power to invest in real securities may, unless expressly forbidden by the instrument creating the trust, invest on mortgage of property held for an unexpired term of not less than two hundred years and not subject to a reservation of rent greater than a shilling a year, or to any right of redemption, or to any condition for re-entry except for non-payment of rent (*i*).

Long terms.

Investment in land.

444. So long as the formalities of the Mortmain and Charitable Uses Act, 1888 (*k*), are observed, trustees may invest charity funds in land where such investments would be beneficial to the charity (*l*). Trustees should not accept imperfect titles (*m*).

Added property.

Purchases of property out of charitable trust funds are, in the absence of any express declaration to the contrary, regarded as augmentations of the trust property (*n*). But the bare fact of charity trustees purchasing other and adjoining lands does not prove that the added property was purchased out of the charity funds (*o*).

Sanction by court.

Investments of charity funds in land are not usually allowed by the court (*p*), but the court may sanction the purchase of land when clearly beneficial to the charity, as for the purpose of enlarging schools (*q*).

Sanction by statute.

Sometimes the purchase of a site by a charity is authorised by a special Act of Parliament (*r*).

Purchase of rent-charge with consent of Commissioners.

445. The Charity Commissioners may authorise the purchase of any rent-charge to which a charity estate is liable (*s*).

Jurisdiction of Commissioners.

There are no provisions in the Charitable Trusts Acts expressly enabling the Charity Commissioners to authorise the purchase of land by charities, but the Commissioners in practice do so under their jurisdiction to establish schemes (*t*), and also under their

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(*h*) Charitable Funds Investment Act, 1870 (33 & 34 Vict. c. 34), s. 2.

(*i*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 5 (1) (a).

(*k*) 51 & 52 Vict. c. 42, s. 4; and see p. 129, *ante*.

(*l*) *Vaughan* v. *Farrer* (1751), 2 Ves. Sen. 182, 188; and see note (*g*), p. 136, *ante*.

(*m*) *Ex parte Christ's Hospital (Governors)* (1864), 2 Hem. & M. 166.

(*n*) *Dundee Magistrates* v. *Dundee Presbytery* (1861), 4 Macq 228. As to when added lands may be sold without the consent of the Commissioners, see p. 306, *post*.

(*o*) *A.-G.* v. *Wax Chandlers' Co.* (1873), L. R. 1 H. L. 1; see *Re Ambleside Charity* (1870), 18 W. R. 663, where charity trustees holding certain lands had acquired other property which was used for the purposes of the same charity, and MALINS, V.-C., held that the onus was on the trustees to show that such additional land had not been purchased out of the charity funds. Having regard to *A.-G.* v. *Wax Chandlers' Co.*, *supra*, this case seems of doubtful authority.

(*p*) *Mather* v. *Scott* (1837), 6 L. J. (CH.) 300; *A.-G.* v. *Wilson* (1838), 2 Keen, 680; and see note (*g*), p. 136, *ante*.

(*q*) *A.-G.* v. *Mansfield* (1845), 14 Sim. 601; *Re Honnor* (1855), 3 W. R. 429. See *Re Stockport Ragged Industrial and Reformatory Schools*, [1898] 2 Ch 687, C. A.

(*r*) *St. Thomas' Hospital (Governors)* v. *London Corporation* (1864), 11 L. T. 520; *Re Sion College, Ex parte London Corporation* (1887), 57 L. T. 743, C. A.

(*s*) Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 25; and see note (*o*) p. 222, *ante*.

(*t*) Charitable Trusts Act, 1860 (23 & 24 Vict. c. 136), s. 2.

general power to authorise the application of moneys belonging to charities for any purpose which they may consider beneficial (*u*).

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446. Any incorporated charity, or any charity trustees whether incorporated or not, may, with the consent of the Commissioners, invest money arising from any sale of land belonging to a charity or received by way of equality of exchange or partition in the purchase of land, and may hold such land without licence in mortmain (*v*). But the conveyance of such land must comply with the requirements of the Mortmain and Charitable Uses Act, 1888 (*a*).

Investment of proceeds of sale of land.

447. The Commissioners may also in the case of land required as a site for a charity sanction (*b*) its purchase and retention by charity trustees under the provisions (with respect to purchase by agreement) of the Lands Clauses Consolidation Act, 1845 (*c*), in cases where, by reason of the disability of any person having an estate or interest in the land or of any defect in title thereto, a valid assurance could not be made to them (*d*).

Purchase of site for charity.

Incorporated trustees of any charity may purchase and hold land for the above purpose without licence in mortmain (*e*).

448. The Charity Commissioners, in cases where they think such expenditure beneficial to the charity, may authorise expenditure out of capital for the purpose of making new roads, streets, drains, sewers, erecting buildings, repairing, altering, rebuilding, or removing existing buildings, or of making any other improvements or alterations in the state or condition of the charity lands (*f*), or for any other purposes beneficial to the charity, and not inconsistent with the trust or the intentions of the foundation (*g*). The court (*h*) and the Charity Commissioners, when they sanction

Repairs, improvements etc.

(*u*) Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 23; Charitable Trusts Act, 1860 (23 & 24 Vict. c. 136), s. 15. The Commissioners, in case of a proposed purchase of land, require a report and valuation from a surveyor and a certificate from the solicitors of the charity that the title is good. The conveyance is not, as a rule, made to the official trustee of charity lands. If the land is to be vested in him, it is done so subsequently by a vesting order.

(*v*) Charitable Trusts Amendment Act, 1855 (18 & 19 Vict. c. 124), s. 35. See Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42), Part I.; and title CORPORATIONS.

(*a*) *Ibid.*, s. 4; and see p. 129, *ante*.

(*b*) Sanctions may be certified under the hand of the secretary to the Commission (Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 27), or any other officer of the Commission (Charitable Trusts Act, 1887 (50 & 51 Vict. c. 49), s. 3).

(*c*) 8 & 9 Vict. c. 18; see p. 240, *post*; and title COMPULSORY PURCHASE AND COMPENSATION.

(*d*) Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 27; Charitable Trusts Amendment Act, 1855 (18 & 19 Vict. c. 124), s. 41.

(*e*) Charitable Trusts Amendment Act, 1855 (18 & 19 Vict. c. 124), s. 41. This clause does not render it unnecessary for the assurance to comply with the requirements of the Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42), Part II.; see pp. 127 *et seq.*, *ante*.

(*f*) Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 21. With regard to mortgages for these purposes, see p. 235, *ante*. Before authorising new buildings, repairs, improvements etc., the Commissioners require to be furnished with particulars, plans, specifications, and estimates.

(*g*) Charitable Trusts Act, 1860 (23 & 24 Vict. c. 136), s. 15. As to mortgages, see note (*f*), *supra*.

(*h*) *Andrews* v. *M'Guffog* (1886), 11 App. Cas. 329, 330; and see *Willenhall Chapel Estates* (1865), 2 Drew. & Sm. 467, where, under the special circumstances of the case, recoupment out of income was not directed.

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capital expenditure, require the amount expended to be recouped out of income, the payments to be extended over a number of years so as not to cripple the charity and thereby defeat its objects.

Carrying out orders of Commissioners.

449. The Charity Commissioners may, when they order a sale (*i*) or exchange (*k*) of charity lands or a sale of a charitable rent-charge or annuity charged on land (*l*), give directions for the investment of the purchase-money or money received by way of equality of exchange (*m*), but the trustees are the proper parties to carry out any orders made by the Commissioners relating to investment (*n*).

Moneys paid to official trustees.

450. Principal moneys belonging to any charity, when directed to be paid to the official trustees of charitable funds, must, subject to any order of the court or the Charity Commissioners, be invested in the public funds in the names of the Official Trustees for the benefit of the charity to which they belong (*o*).

Moneys paid on enfranchisement of copyholds.

451. The compensation moneys payable to the lord of a manor, whether being a corporation or an individual, for an enfranchisement of copyholds where the manor is held upon charitable trusts, and the lord is not authorised to make an absolute sale except under the Charitable Trusts Acts or the Copyhold Act, 1894, may be paid to the Official Trustees of Charitable Funds in trust for the charity (*p*). Moneys paid to the Official Trustees in this way are to be applied by them under the order of the Charity Commissioners just as if they had been paid into court under the Copyhold Act, 1894, and in the meantime are to be invested and the income applied as provided by the Charitable Trusts Acts with respect to charitable funds paid to the Official Trustees (*q*).

Payments under Lands Clauses Act.

452. Purchase or compensation moneys paid into court under the Lands Clauses Consolidation Act, 1845 (*r*), in respect of charity lands purchased by agreement or acquired compulsorily from charity trustees (*s*), must remain deposited until applied to one or more of the following purposes (*t*), namely, (1) in the purchase or redemption of land tax (*a*) or the discharge of any debt or incumbrance (as, for example, a term of years constituting an incumbrance

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(*i*) Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 24.
(*k*) *Ibid.*
(*l*) *Ibid.*, s. 25.
(*m*) *Ibid.*, s. 24.
(*n*) Charitable Trusts Amendment Act, 1855 (18 & 19 Vict. c. 124), s. 36.
(*o*) *Ibid.*, s. 23. The Commissioners have issued a form (No. 39A) giving a list of trustee investments approved by them. See also *Re Manchester Royal Infirmary* (1889), 43 Ch. D. 420.
(*p*) Copyhold Act, 1894 (57 & 58 Vict. c. 46), s. 76 (1).
(*q*) *Ibid.*, s. 76 (2). As to the application of money paid into court, see title COPYHOLDS. The provisions are similar to those in regard to money paid into court under the Lands Clauses Consolidation Acts, as to which see next paragraph.
(*r*) 8 & 9 Vict. c. 18, s. 71; see also pp. 219, 237, *ante;* and title COMPULSORY PURCHASE AND COMPENSATION.
(*s*) *Wycombe Rail. Co.* v. *Donnington Hospital* (1866), 1 Ch. App. 268.
(*t*) 8 & 9 Vict. c. 18, s. 69.
(*a*) See p. 242, *post.*

on the inheritance (*b*)), affecting the land in respect of which such money shall have been paid, or affecting other lands settled therewith upon the same or similar trusts; (2) in the purchase of other lands (*c*), which should as a rule be of the same tenure as the lands sold (*d*), to be settled upon similar trusts; (3) in removing or replacing buildings in respect of which compensation has been paid, or substituting other buildings for them, whether temporary (*e*) or permanent (*f*), or making alterations (*g*) or improvements generally (*h*); or, lastly, (4) in payment to any party becoming absolutely entitled (*i*).

Money paid into court as above mentioned may be applied as capital money under the Settled Land Acts (*k*).

Until the money can be applied in one of the ways specified it may be invested by order of the court in the securities mentioned in s. 70 of the Lands Clauses Consolidation Act, 1845, and the dividends may be paid to the party who would for the time being have been entitled to the rents and profits of the lands (*l*).

Purchase-money of college or university.

The purchase-money of lands belonging to a college or a university which have been compulsorily taken under the Lands Clauses Act may be invested in the construction of new buildings, with the consent of the Board of Agriculture and Fisheries (*m*). It is sufficient if the Board appear and consent by their counsel (*n*).

(*b*) *Re Manchester, Sheffield etc. Rail. Co., Ex parte Sheffield Corporation* (1855), 21 Beav. 162; *Ex parte London (Bishop)* (1860), 2 De G. F. & J. 14.

(*c*) When a reinvestment in other lands is ordered, the conveyance to the charity must, it is conceived, comply with the requirements of the Mortmain and Charitable Uses Act, 1888; see *Re Christ's Hospital (Governors)* (1864), 12 W. R. 669; and pp. 127 *et seq.*, *ante*.

(*d*) Thus, the purchase-money of freeholds should not, save in exceptional circumstances (*Re Rehoboth Chapel* (1874), L. R. 19 Eq. 180), be invested in the purchase of leaseholds (*Re Lancashire and Yorkshire Rail. Co., Ex parte Macaulay* (1854), 23 L. J. (CH.) 815); see also *Ex parte Trinity College, Cambridge (Master etc.)* (1868), 18 L. T. 849, and, as to the enfranchisement of copyholds, *Re Cheshunt College* (1855), 3 W. R. 638; *Dixon* v. *Jackson* (1856), 25 L. J. (CH.) 588.

(*e*) *Re St. Thomas' Hospital* (1863), 11 W. R. 1018.

(*f*) *Re Southampton and Dorchester Rail. Co., Ex parte Thorner's Charity* (1848), 12 L. T. (O. S.) 266; *Re Kent Coast Rail. Co., Ex parte Canterbury (Dean and Chapter)* (1862), 10 W. R. 505; *Re Partington* (1862), 11 W. R. 160; *Ex parte Jesus College, Cambridge* (1884), 50 L. T. 583; *Ex parte St. Alphage (Parson)* (1886), 55 L. T. 314.

(*g*) *Re Buckinghamshire Rail. Co.* (1850), 14 Jur. 1065; *Re Lymington Baptist Chapel (Trustees)*, [1877] W. N. 226; *Ex parte St. Botolph, Aldgate (Vicar)*, [1894] 3 Ch. 514.

(*h*) *Re Lathropp's Charity* (1866), L. R. 1 Eq. 467.

(*i*) As to when charity trustees are held to be "persons absolutely entitled," see note (*c*), p. 219, *ante*.

(*k*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 32; *Re Byron's Charity* (1883), 23 Ch. D. 171; *Re Bethlehem and Bridewell Hospitals* (1885), 30 Ch. D. 541; *Ex parte Jesus College, Cambridge* (1884), 50 L. T. 583; *Ex parte Castle Bytham (Vicar)*, [1895] 1 Ch. 348. For the Settled Land Acts generally, see title REAL PROPERTY AND CHATTELS REAL.

(*l*) 8 & 9 Vict. c. 18, s. 70; and see title COMPULSORY PURCHASE AND COMPENSATION.

(*m*) Universities and Colleges Estates Act, 1858 (21 & 22 Vict. c. 44), ss. 27, 28; Universities and Colleges Estates Amendment Act, 1880 (43 & 44 Vict. c. 46), ss. 2, 4; *Ex parte King's College, Cambridge* (No. 1), [1891] 1 Ch. 333; *Ex parte King's College, Cambridge* (No. 2), [1891] 1 Ch. 677. See also Board of Agriculture Act, 1889 (52 & 53 Vict. c. 30); Board of Agriculture and Fisheries Act, 1903 (3 Edw. 7, c. 31).

(*n*) *Ex parte King's College, Cambridge* (No. 2), *supra*.

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Applications for the investment or interim investment of money paid into court under the Lands Clauses Consolidation Act, 1845 (*o*), or under the Trustee Act, 1893 (*p*), may be made without the consent of the Charity Commissioners (*q*).

Dividends.

Dividends on funds paid into court may be ordered to be paid to the charity trustees (*r*), or to the treasurer of the charity, or, where there is no treasurer, to the secretary (*s*).

SUB-SECT. 7.—*Redemption of Land Tax.*

Power of trustees to redeem.

453. Owners (*t*) of land, including charity trustees having an estate or interest in the property (*a*), may redeem the land tax charged on such land (*b*). This rule applies also in the case of incorporated charity trustees, notwithstanding the mortmain restrictions (*c*).

Sale of land for redemption of land tax.

454. Where land charged with land tax is held for any purpose by trustees, any part of the land may be sold to raise money for redeeming the land tax (*d*).

(*o*) 8 & 9 Vict. c. 18, ss. 69, 70; *Re Cheshunt College* (1855), 1 Jur. (N. S.) 995; *Re Lister's Hospital* (1855), 6 De G. M. & G. 184; *Re St. Pancras Burial Ground* (1866), L. R. 3 Eq. 173; *Re William of Kyngeston Charity* (1881), 30 W. R. 78.

(*p*) 56 & 57 Vict. c. 53, s. 42; *Re St. Giles' and St. George's, Bloomsbury* (1858), 27 L. J. (CH.) 560. It may be observed that when trustees pay money into court under the Trustee Act, 1893, they are thereby discharged from their duties as trustees (*Re Poplar and Blackwall Free School* (1878), 8 Ch. D. 543). This is not the case when they pay money into court under the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18).

(*q*) As being applications in a "suit or matter actually pending" within the meaning of s. 17 of the Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137); see *Re Lister's Hospital*, *supra*; *Re St. Giles' and St. George's, Bloomsbury*, *supra*; *Braund* v. *Devon* (*Earl*) (1868), 3 Ch. App. 800; *Re Poplar and Blackwall Free School*, *supra*. As to whether such applications should be made by petition or summons, see pp. 335, 353, *post*.

(*r*) *A.-G.* v. *Bricklale* (1845), 8 Beav. 223; *Re Collins' Charity* (1852), 20 L. J. (CH.) 168; *Ex parte Shrewsbury Hospital* (*Trustees*) (1852), 9 Hare, Appendix I., p. xlv.; *Re Audenshaw School* (1863), 1 New Rep. 255; *Ex parte St. Thomas' Church Lands, Bristol* (*Trustees*) (1870), 23 L. T. 135; *Re Shakespeare Walk School* (1879), 12 Ch. D. 178. As to dividends on purchase-money of disused burial grounds, see *Re St. Pancras Burial Ground*, *supra*; *Ex parte St. Martin's, Birmingham* (*Rector*) (1870), L. R. 11 Eq. 23.

(*s*) *Re Davenant's Charity* (1854), 2 W. R. 344; *Re St. Benet's* (*Rector etc.*) (1865), 12 L. T. 762; *Re Codrington's Charity* (1874), L. R. 18 Eq. 658.

(*t*) For definition and meaning of "owner," see Finance Act, 1896 (59 & 60 Vict. c. 28), s. 35; Land Tax Redemption Act, 1802 (42 Geo. 3, c. 116), ss. 9—17. See generally, as to redemption of land tax, title LAND TAX.

(*a*) Land Tax Redemption Acts, 1802 (42 Geo. 3, c. 116), ss. 9, 20, and 1853 (16 & 17 Vict. c. 117), s. 1; Finance Act, 1896 (59 & 60 Vict. c. 28), s. 35. As to what charities are exempt from land tax, see p. 214, *ante*.

(*b*) Finance Act, 1896 (59 & 60 Vict. c. 28), s. 32 (1); and see two preceding notes.

(*c*) Land Tax Redemption Act, 1802 (42 Geo. 3, c. 116), s. 9. As to the mortmain restrictions, see title CORPORATIONS.

(*d*) Finance Act, 1896 (59 & 60 Vict. c. 28), s. 33 (b) (ii.). This Act repealed a number of sections of the earlier Land Tax Acts, which enabled charity trustees, under the direction of the authorities named in those Acts (see Land Tax Redemption Acts, 1802 (42 Geo. 3, c. 116), s. 76, and 1838 (1 & 2 Vict. c. 58), s. 1), to raise money for redemption of land tax by sale of part of the

455. Similarly, where money is held upon the same trusts as land charged with land tax, the money is applicable for the redemption of the tax (*e*).

Purchase by trustees of land sold.

456. Under the Land Tax Redemption Acts the Treasury Commissioners were regarded as vendors in the case of a sale of land to raise money for the redemption of land tax, and accordingly lands belonging to a charity sold for that purpose might properly be purchased by the trustees of the charity (*f*).

Application of money received on compulsory sale.

457. Purchase or compensation money which has been paid into court in respect of charity lands under the Lands Clauses Consolidation Act, 1845 (*g*), may be applied in the purchase or redemption of land tax charged on the land in respect of which such money shall have been paid or on other lands held on the same trusts without the consent of the Charity Commissioners (*h*).

Redemption of tax on parish lands.

458. Land tax charged on lands settled to charitable uses for the benefit of any parish or place may, with the approbation of two justices of the peace, be redeemed out of the rates (*i*).

Any property held upon charitable trusts for the benefit of any parish or place may be applied in the redemption of the land tax charged on lands held upon the same trusts, and the lands may then be charged with an annuity equal to the trust property so applied (*k*).

General moneys applicable to redemption.

459. Legacies and donations given for the benefit of hospitals and other charitable institutions and not directed to be applied in any particular manner (*l*), and *à fortiori* any moneys given by will or otherwise expressly for the purpose (*m*), may be utilised in redeeming land tax.

Special provisions relating to certain charities.

460. Special provisions apply to redemption of land tax by the Governors of Queen Anne's Bounty (*n*), the trustees of property

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lands charged, whether leasehold (other than leasehold at a rack rent), copyhold, or freehold, or by mortgage or by granting rent-charges thereout (see Land Tax Redemption Act, 1802 (42 Geo. 3, c. 116), s. 69; Land Tax (Exoneration and Redemption) Act, 1817 (57 Geo. 3, c. 100), s. 16), or by enfranchising copyholds or by sale of heriots, fee farm, chief, and quit rents (see Land Tax Redemption Act, 1802 (42 Geo. 3, c. 116), ss. 70 (copyholds), 84, 85, 89, 93, 94). As to reservation of minerals in such sales, see *Whidborne* v. *Ecclesiastical Commissioners for England* (1877), 7 Ch. D. 375.

(*e*) Finance Act, 1896 (59 & 60 Vict. c. 28), s. 33 (b) (ii.).

(*f*) *Beadon* v. *King* (1852), 9 Hare, 499. It is conceived that this principle is equally applicable in the case of a sale under the Finance Act, 1896 (59 & 60 Vict. c. 28), s. 33 (b) (ii.).

(*g*) 8 & 9 Vict. c. 18, s. 69; see also Settled Land Act, 1882 (45 & 46 Vict. c. 38), ss. 21 (ii.), 32; *Re Byron's Charity* (1883), 23 Ch. D. 171.

(*h*) *Re Lister's Hospital* (1855), 6 De G. M. & G. 184; *Re William of Kyngeston Charity* (1881), 30 W. R. 78.

(*i*) Land Tax Redemption Act, 1802 (42 Geo. 3, c. 116), s. 46.

(*k*) *Ibid.*, s. 47.

(*l*) *Ibid.*, s. 48.

(*m*) *Ibid.*, s. 50. The section exempts such gifts from all mortmain restrictions.

(*n*) *Ibid.*, s. 44; and see title LAND TAX.

SECT. 3. Management of the Trust Property.

given for the benefit of poor clergy (*o*) and the colleges of Oxford, Cambridge, Eton, and Winchester (*a*).

SUB-SECT. 8.—*Registration.*

(1) Charitable Donations Registration Act, 1812.

461. Subject to certain exceptions mentioned below, memorials of charities founded, increased, or secured by any deed, will, or other instrument, must, according to a statute still in force, though apparently no longer observed, be registered with the county council of the county benefited within twelve months after the decease of the person or persons making such will, deed, or other instrument (*b*).

Registration of memorials with county council.

The memorials must state the real and personal estate, income, investments, and objects of such charities and charitable donations, the names of the respective founders, benefactors, and custodians of the instruments founding, increasing, or securing the charities, and of the trustees (*c*). A copy of the memorial has also to be enrolled in the central office (*d*). If the persons to be benefited are not wholly within one county, notice must be given in the *London Gazette* (*e*).

Provision is also made for enforcing registration by petition (*f*), extending the time for registration in certain cases (*g*), for the payment of the costs (*h*), for proper registers to be kept, which must be open to public inspection (*i*), and for searches to be made and copies given to any person (*k*) according to a fixed scale of fees (*l*).

Proceedings under the Act cannot decide any right or title (*m*).

Excepted charities.

462. The following excepted charities do not require to be registered, namely:—

(1) Charities or charitable donations not issuing out of or secured upon any lands, tenements, or hereditaments, or directed by the founder or donor to be secured thereon or to be permanently invested in Government or any public stocks or funds (*n*).

(2) Charitable donations which by the direction of the donor or by the lawful rules of any charitable institution may be wholly or in

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(*o*) Land Tax Redemption Act, 1802 (42 Geo. 3, c. 116), s. 16.
(*a*) *Ibid.*, ss. 17, 78.
(*b*) Charitable Donations Registration Act, 1812 (52 Geo. 3, c. 102), ss. 1, 2; Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 3 (xv.).
(*c*) Charitable Donations Registration Act, 1812 (52 Geo. 3, c. 102), s. 1. For form of memorial, see *ibid.*, Schedule. One memorial may be used where several charities are held by one corporation (*ibid.*, s. 14).
(*d*) Formerly the enrolment office of the High Court of Chancery (*ibid.*, s. 1).
(*e*) *Ibid.*, s. 4.
(*f*) *Ibid.*, s. 5.
(*g*) *Ibid.*, s. 9.
(*h*) *Ibid.*, s. 10.
(*i*) *Ibid.*, s. 3.
(*k*) *Ibid.*, s. 7.
(*l*) *Ibid.*, s. 8.
(*m*) *Ibid.*
(*n*) *Ibid.*, s. 10.

part expended for charitable purposes at the discretion of the trustees or persons administering such institutions (*o*).

(3) Hospitals, schools, or other charitable institutions founded, improved, or regulated by the Crown or a special Act of Parliament, and charitable donations under their superintendence; the Corporation of the Charity for the Relief of Poor Widows and Children of Clergymen; friendly societies; the universities of Oxford and Cambridge and their respective colleges and halls, and all charitable bequests, devises, gifts, or foundations belonging to or under the control of such universities, colleges, and halls; the Radcliffe Infirmary; the colleges of Westminster, Eton, and Winchester; all cathedral or collegiate churches in England and Wales; the Charterhouse; the Corporation of the Trinity House of Deptford Strond; and charities for the benefit of Jews (*p*) or Quakers (*q*).

(4) Charities whose accounts are directed to be passed annually in the High Court of Justice, Chancery Division (*r*).

(2) Parochial charities.

Annual statement.

463. Where any parish adopts the Vestries Act, 1831 (*s*), the parish meeting must cause to be made out once a year a list of the freehold, copyhold, and leasehold estates and of all charitable foundations and bequests belonging to the parish and under the control of the parish meeting, the situations of the estates and charitable foundations, particulars of investments, names of beneficiaries except where the charity is for the parish generally, and the names of trustees (*t*). The list must be open to the inspection of the ratepayers at the same time as the audited accounts (*a*).

(3) Places of religious worship.

464. Every place of meeting for religious worship of Protestant Dissenters or other Protestants, Roman Catholics and Jews, not already certified and registered under the former Acts (*b*), and every place of meeting for religious worship of any other body or denomination of persons, may be certified in writing to the Registrar-General of Births, Deaths, and Marriages in England (*c*), who must keep a record of the places certified (*d*).

(*o*) Charitable Donations Registration Act, 1812 (52 Geo. 3, c. 102).

(*p*) *Ibid.*, s. 11.

(*q*) *Ibid.*, s. 12.

(*r*) *Ibid.*, s. 13. Charities existing at the date of the Act whose gross annual income did not exceed forty shillings were also exempted if a memorial thereof was deposited with the minister of the parish within six months after the passing of the Act.

(*s*) 1 & 2 Will. 4, c. 60.

(*t*) *Ibid.*, s. 39. The powers and duties of the vestry are under the Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 19 (4), transferred, except in certain instances, to the parish meeting. Similar provisions are contained in the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 199; neither this section nor s. 39 of the Vestries Act, 1831 (1 & 2 Will. 4, c. 60), has been repealed.

(*a*) *Ibid.*

(*b*) Toleration Act, 1688 (1 Will. & Mar. sess. 1, c. 18); Roman Catholic Relief Act, 1791 (31 Geo. 3, c. 32); Places of Religious Worship Act, 1812 (52 Geo. 3, c. 155); stat. 15 & 16 Vict. c. 36, repealed by s. 1 of Places of Worship Registration Act, 1855 (18 & 19 Vict. c. 81). See generally, title ECCLESIASTICAL LAW.

(c) Places of Religious Worship Registration Act, 1855 (18 & 19 Vict. c. 81), s. 2. The Act does not apply to Scotland or Ireland (*ibid.*, s. 14). For forms of certification, see *ibid.*, Schedules.

(*d*) *Ibid.*, s. 3. A fee of 2*s.* 6*d.* is payable (*ibid.*, s. 5).

SECT. 3. Management of the Trust Property.

Places of meeting already certified under the earlier Acts may also, with certain exceptions (*e*), be certified under the same Act to the Registrar-General (*f*).

Place ceasing to be used for religious worship.

Notice must be given to the Registrar-General when any certified place of meeting ceases to be used for that purpose (*g*), whereupon the Registrar must cancel the record of certification and publicly advertise the cancellation (*h*).

Lists of certified places are open to the public (*i*), and certificates may be obtained (*k*) on payment of the prescribed fee, and such certificates are receivable as evidence (*l*).

Established Church excepted.

The Act does not affect churches and chapels of the Established Church (*m*).

Partial exemption from Charitable Trusts Act, 1853.

465. Except so far as relates to the appointment and removal of trustees, the vesting of real or personal property, and the establishment of schemes (*n*), every place of meeting for religious worship certified to the Registrar-General and recorded by him, so long as the same continues to be *bonâ fide* used as a place of religious worship and the record is not cancelled, is exempt from the operation of the Charitable Trusts Act, 1853 (*o*).

Extent of exemption.

This partial exemption extends also to yards, gardens, burial grounds, vestries, and caretakers' houses connected with and held upon the same trusts as the registered places of worship, and to Sunday-school houses and other land and buildings certified by the Charity Commissioners to be held upon the same or like trusts as the registered places, and so connected in respect of situation that they cannot conveniently be separated therefrom (*p*).

(4) Land Transfer Acts.

466. Charity trustees who hold land on trust for sale or have a power of selling land, other than land vested in the official trustee of charity lands, may apply to be registered in the Land Registry with any title with which a proprietor is authorised to be registered (*q*).

Sanction of Commissioners or Board of Education.

But, except as regards land held for charitable uses which can be sold without the consent of the Charity Commissioners (*r*), such

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(*e*) *I.e.*, those certified under the repealed Act 15 & 16 Vict. c. 36.
(*f*) Places of Religious Worship Registration Act, 1855 (18 & 19 Vict. c. 81), s. 4.
(*g*) *Ibid.*, s. 6.
(*h*) *Ibid.*, s. 8.
(*i*) *Ibid.*, s. 7.
(*k*) *Ibid.*, s. 11.
(*l*) *Ibid.*
(*m*) *Ibid.*, s. 10.
(*n*) Charitable Trusts Act, 1869 (32 & 33 Vict. c. 110), s. 15.
(*o*) Places of Religious Worship Registration Act, 1855 (18 & 19 Vict. c. 81), s. 9; Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 62.
(*p*) Charitable Trusts (Places of Religious Worship) Amendment Act, 1894 (57 & 58 Vict. c. 35), s. 4. See also *Re St. John Street Wesleyan Methodist Chapel, Chester*, [1893] 2 Ch. 618, the decision of which led to the passing of the Act of 1894, and p. 305, *post*.
(*q*) Land Transfer Rules, 1903, r. 83.
(*r*) Land Transfer Rules, 1903, r. 85; *Re Church Army* (1906), 75 L. J. (CH.) 467; and see Land Transfer Act, 1875 (38 & 39 Vict. c. 87), s. 68; and note (*b*), p. 306, *post*.

applications, like actual sales, must be sanctioned by the Charity Commissioners (*s*) or Board of Education (*t*), as the case may be, or the applicants must show that they are empowered to make the application by the authority of Parliament, according to a scheme legally established, or by the authority of the court (*u*).

Where a charity which claims to be, but is not in fact, exempt from the jurisdiction of the Charity Commissioners has been registered as proprietor of land, an entry will on the application of the Attorney-General be ordered to be made on the register restraining the alienation of the land without the consent of the Charity Commissioners (*w*).

Where the land is vested in the official trustee of charity lands, he is registered as the first proprietor of it, (1) on the production of a conveyance to him, or (2) on the production of an official copy of the order of the court or of the Charity Commissioners vesting the land in him, accompanied in either case by a conveyance, if any, to the administering trustees, or (3) on showing that under some statute the land is vested in him, and on production of evidence that the requirements of such statute have been complied with (*x*).

Part VI.—Appointment and Removal of Officers, Ministers etc.

SECT. 1.—*College Elections etc.*

467. The Charitable Trusts Acts do not extend to the universities of Oxford, Cambridge, London, or Durham, or any college or hall in such universities (*a*), or to the colleges of Eton and Winchester (*b*); so that neither the Charity Commissioners nor the Board of Education are entitled to interfere in the administration of such universities and colleges. Exclusion Commissioners and Board of Education.

Questions relating to college and hospital elections generally are determined by the visitors in accordance with the statutes which Regulation of elections.

(*s*) Land Transfer Rules, 1903, r. 83; Charitable Trusts Amendment Act, 1855 (18 & 19 Vict. c. 124), s. 29. The Charity Commissioners do not as a rule consent to registration unless the land is first vested in the Official Trustee of Charity Lands. If the Charity Commissioners are satisfied that the land is exempt from their jurisdiction, they give a certificate to that effect, which may be produced at the Land Registry (50th Report of the Charity Commissioners, 1903).

(*t*) Land Transfer Rules, 1903, r. 86.

(*u*) Charitable Trusts Amendment Act, 1855 (18 & 19 Vict. c. 124), s. 29.

(*w*) *A.-G.* v. *National Hospital for the Relief and Cure of the Paralysed and Epileptic*, [1904] 2 Ch. 252; see also *Re Church Army* (1906), 75 L. J. (CH.) 467.

(*x*) Land Transfer Rules, 1903, r. 83.

(*a*) Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 62; and see p. 304, *post*.

(*b*) Charitable Trusts Amendment Act, 1855 (18 & 19 Vict. c. 124), s. 49; and see p. 304, *post*.

SECT. 1. College Elections etc.

govern such institutions (*c*), but, as will be seen, these elections are regulated to a certain extent by Act of Parliament (*d*).

Powers of court and visitor.

468. Neither the court (*e*) nor the visitor (*f*) can compel the election of any particular candidate, if the college is by its statutes given absolute discretion in the matter (*e*), except where the discretion is exercised corruptly (*g*).

Powers of majority.

469. Elections by the dean, warden, provost, master, president, or other governor of any hospital or college, by whatsoever name it may be incorporated or founded, with the consent of the majority of the fellows or brethren of the corporation who have power to consent, are as valid as if made by all the members of the corporation (*h*).

Every regulation or statute made by a founder of any hospital or college is void if it enables a dissentient minority, contrary to common law, to invalidate an election of a governor or ruler of an hospital or college which was made with the consent of the majority of the corporators (*i*).

Corrupt elections.

470. Elections of fellows, scholars, officers, and other persons as members of colleges, schools, hospitals, halls, or societies, if made corruptly or for any money consideration, direct or indirect, are void (*k*).

Penalties are also payable by any fellow, officer, or scholar receiving a bribe for resigning his office or place, and the persons giving such bribes are disqualified for the office at the next election (*l*).

Concurrence of president etc. in election.

471. Where college statutes direct fellows to be elected by the president or head of the college and the majority of the fellows, the concurrence of the president is necessary (*m*).

Qualifications of candidates.

472. Where by the endowment deed of a college the person to be elected to a fellowship is directed to be a native of a particular town if any such shall be found able within the university, a person not

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(*c*) As to visitors, see p. 287, *post*. The majority of the cases cited in this section are decisions of visitors.

(*d*) *E.g.*, stat. 33 Hen. 8, c. 27; stat. 31 Eliz. c. 6; Universities Tests Act, 1871 (34 & 35 Vict. c. 26); Universities of Oxford and Cambridge Act, 1877 (40 & 41 Vict. c. 48).

(*e*) *R.* v. *Hertford College* (1878), 3 Q. B. D. 693, 705, C.A.; see also p. 299, *post*.

(*f*) *Ex parte Wrangham* (1795), 2 Ves. 609, 625; see also p. 291, *post*.

(*g*) *R.* v. *Hertford College*, *supra*, at p. 701.

(*h*) This is the rule at common law; see the recitals in stat. 33 Hen. 8, c. 27; and see title CORPORATIONS.

(*i*) Stat. 33 Hen. 8, c. 27. This Act applies only to elections to be made by all the members of a corporation, and not to elections to be made by a particular number of the members (*Case of New College, Oxford* (1566), 2 Dyer, 247 a; 1 Bl. Com. 478; Shelford, Law of Mortmain, 718).

(*k*) Stat. 31 Eliz. c. 6, ss. 1, 2. As to elections of medical officers of a hospital by the votes of the governors, see *Worthington* v. *Hargood* (1873), 27 L. T. 786; *Howard* v. *Hill* (1888), 37 W. R. 219.

(*l*) Stat. 31 Eliz. c. 6, s. 3.

(*m*) *Catherine Hall* (*Case of*) (1802), 5 Russ. 85, n.; *Re Queens' College, Cambridge* (1828), 5 Russ. 64; the contrary was formerly held, see *Clare Hall* (*Case of*) (1788), 5 Russ. 73, n.; *Gonville and Caius College* (*Case of*) (1617), 5 Russ. 76, n. As to removal of fellows by visitors, see p. 292, *post*.

having the requisite birth qualification, but being eligible as regards capacity, may be elected if the persons who are qualified by birth do not attain to the fellowship standard of ability (*n*).

So also, if there is only one candidate for a close fellowship, he must none the less pass the usual fellowship examination (*o*). Regard should be had to the qualifications of a candidate generally, and not in relation to the qualifications of his competitors (*p*).

Property qualification restricted to land.

Only real estate is as a rule to be taken into account where by college statutes the possession of property qualifies or disqualifies a person from holding a fellowship (*q*). But when the possession of real estate is a necessary qualification for certain college offices, the modern doctrines of equity are not strictly applied, and an interest in land which in equity would be considered personal estate may be sufficient (*r*).

Holy orders.

If a qualification for a fellowship is that a candidate shall be *in sacerdotio constitutus*, an admission to deacons' orders is enough (*s*).

Religious qualifications.

473. No religious qualification is required for a person taking a degree (other than a degree in divinity) at the universities of Oxford, Cambridge, or Durham, or to enable a person to hold office in any of the said universities or such of their colleges as existed before June 16, 1871 (*t*), except where such office is, either by Act of Parliament or by university or college statute in force at that date, restricted to persons in holy orders, or is confined to members of the Church of England by reason of a degree in divinity being a qualification for holding that office (*a*). But there is no objection to new colleges being created subsequently to 1871 with endowments limited to members of particular religious communities (*b*).

Where the University Commissioners (*c*) by any statute made by them under the powers of the Universities of Oxford and Cambridge Act, 1877 (*d*), erect or endow an office (other than a headship or fellowship of a college) and declare that the holder of it must have a theological qualification, then the above provisions prohibiting religious qualification take effect with reference to that office as if the statute made by the Commissioners had been made before June 16, 1871 (*e*).

(*n*) *Ex parte St. John's College, Cambridge* (1831), 2 Russ. & M. 603. In open fellowships the principle is "*detur digniori*"; in proprieties, "*detur, sed digno*" (*ibid.* at p. 605).

(*o*) *Re Catherine Hall, Ex parte Inge* (1831), 2 Russ. & M. 590.

(*p*) *Ibid.*

(*q*) *Queens' College, Cambridge (Case of)* (1821), Jac. 1, 37, 38.

(*r*) *Ibid.* at p. 38.

(*s*) *Re University College, Oxford* (1848), 17 L. J. (CH.) 298; see also *Glasgow College* v. *A.-G.* (1848), 1 H. L. Cas. 800; *Re St. Catherine's Hall, Cambridge* (1849), 1 Mac. & G. 473.

(*t*) *I.e.*, the passing of the Universities Tests Act, 1871 (34 & 35 Vict. c. 26); *R.* v. *Hertford College* (1878), 3 Q. B. D. 693.

(*a*) Universities Tests Act, 1871 (34 & 35 Vict. c. 26), s. 3. For a case prior to that Act, see *Queens' College, Cambridge (Case of)*, *supra*.

(*b*) *R.* v. *Hertford College*, *supra*, at p. 707.

(*c*) As to the jurisdiction of the University Commissioners to alter conditions of eligibility for any emolument or office connected with a college, see *Re Pauncefort* (1889), 42 Ch. D. 624; and generally, title EDUCATION.

(*d*) 40 & 41 Vict. c. 48.

(*e*) *Ibid.*, s. 58.

SECT. 1. College Elections etc.

474. The passing of an examination may be a condition precedent to election to a fellowship, but it does not follow that superiority in the examination gives an absolute and unqualified title to be elected, unless there are words to this effect in the college statutes (*f*).

Forfeiture of fellowship.

475. The acceptance of a professorship may under college statutes cause the professor to forfeit his fellowship (*g*).

Non-compliance with condition of fellowship.

Where a condition, *e.g.* that a certain portion of the fellowship term should be spent abroad, is attached to a fellowship, and the fellow, after receiving the emoluments for some years at home, resigns the fellowship without going abroad, acceptance by the trustees of the fellow's resignation dispenses, it seems, with the condition, and consequently the money received by the fellow need not be refunded. But in such circumstances the trustees might refuse to accept the resignation and compel the fellow either to comply with the condition or refund (*h*).

Forfeiture under college statutes.

Where the question is whether a fellowship has been forfeited under college statutes, the expression "*a collegii emolumentis recedere*" means absolute forfeiture, not merely temporary suspension, and the word *discedere* as applied to a fellow vacating his fellowship is not confined to a vacancy created by death (*i*).

Qualification for college living.

476. If the qualification for holding a college living is that the person to be presented shall not when the living is vacant "be presented, instituted, or inducted into any other living," a previous resignation of another living is sufficient compliance with the condition (*k*).

SECT. 2.—*Ministers of the Established Church and of Chapels of Ease and Perpetual Curates.*

Right of nomination to a living.

477. According to the general ecclesiastical constitution, the right of nomination to a living is vested in the bishop of the diocese or in a private patron (*l*). The right of nomination to a living may, however, be vested in trustees, parishioners, or inhabitants.

Election by inhabitants and parishioners.

Where an advowson is held in trust for the inhabitants and parishioners of a particular place (*m*), the majority of the electors are entitled to nominate the parson, and the trustees must present

(*f*) *R.* v. *Hertford College* (1878), 3 Q. B. D. 693, 698, 699, 701. Other cases relating to the construction of college statutes with respect to fellowship examinations are *Ex parte St. John's College, Cambridge* (1831), 2 Russ. & M. 603; *Re Downing College* (1837), 2 My. & Cr. 642; *Watson* v. *All Souls' College, Oxford* (1864), 11 L. T. 166.

(*g*) *Ex parte Edleston* (1854), 3 De G. M. & G. 742.

(*h*) *A.-G.* v. *Stephens* (1737), 1 Atk. 358. *Quære* whether it would not be the duty of the trustees to refuse to accept the resignation.

(*i*) *Re St. Catherine's Hall, Cambridge* (1849), 1 Mac. & G. 473.

(*k*) *Heyes* v. *Exeter College, Oxford* (1806), 12 Ves. 336.

(*l*) *Herbert* v. *Westminster* (*Dean and Chapter*) (1721), 1 P. Wms. 773; *A.-G.* v. *Scott* (1750), 1 Ves. Sen. 413, 414. See further, title ECCLESIASTICAL LAW. As to when the trust of an advowson is charitable, see pp. 113, 124, *ante*; *A.-G.* v. *Webster* (1875), L. R. 20 Eq. 483, 491; *Re St. Stephen, Coleman Street* (1888), 39 Ch. D. 492, 504.

(*m*) As to the meaning of "parishioners and inhabitants," see note (*x*), p. 165, *ante*; *A.-G.* v. *Parker* (1747), 3 Atk. 576, 577; *Fearon* v. *Webb* (1802), 14 Ves. 13, 24; *Edenborough* v. *Canterbury* (*Archbishop*) (1826), 2 Russ. 93, 104.

the nominee of the electors (*n*), if on other grounds the election is valid (*o*).

Where the right of election is vested in the parishioners, the question whether they must also be ratepayers may be determined by usage (*p*). Where the ratepayers are the electors, only those who have actually paid rates may vote (*q*).

In the election by parishioners of a vicar, Jews are entitled to vote, but not Roman Catholics (*r*).

Mode of election.

478. Inhabitants and parishioners who have the right of nominating a minister may by common consent bind themselves to a particular mode of election (*s*).

Elections by parishioners may be by ballot (*t*), but voting by proxy is not allowed, unless authorised by the trust deed (*a*).

Nomination to a perpetual curacy may be made by parol (*b*).

The right of nominating a parson which was vested in parishioners of parishes in London is not transferred to the borough council (*c*).

Right to elect vested in parishioners and trustees.

479. Where the right to elect a vicar is vested in the parishioners and the trustees jointly, an election by the parishioners and a majority of the trustees is valid (*d*), and the majority of the trustees may require the dissentient minority to concur in the presentation (*e*).

Elections (*f*) and presentations (*g*) by trustees are not invalidated

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(*n*) *A.-G.* v. *Parker* (1747), 3 Atk. 576, 577; *Fearon* v. *Webb* (1802), 14 Ves. 13; *A.-G.* v. *Rutter* (1768), 2 Russ. 101, n.; *Edenborough* v. *Canterbury* (*Archbishop*) (1826), 2 Russ. 93, 104, 105. As to the proper remedy when trustees refuse to present, see *R.* v. *Orton Vicarage Trustees* (1849), 18 L. J. (Q. B.) 321.

(*o*) *A.-G.* v. *Cuming* (1843), 2 Y. & C. Ch. Cas. 139, 151.

(*p*) *A.-G.* v. *Parker*, *supra*, at p. 577; *A.-G.* v. *Forster* (1805), 10 Ves. 335, 338; *A.-G.* v. *Newcombe* (1807), 14 Ves. 1; *Edenborough* v. *Canterbury* (*Archbishop*), *supra*, at p. 107. See also *Faulkner* v. *Elger* (1825), 4 B. & C. 449.

(*q*) *Edenborough* v. *Canterbury* (*Archbishop*), *supra*, at pp. 110, 111; compare, on the other hand, *A.-G.* v. *Forster*, *supra*, at p. 339.

(*r*) *Edenborough* v. *Canterbury* (*Archbishop*), *supra*, at p. 111, n.

(*s*) *A.-G.* v. *Newcombe*, *supra*, at p. 10.

(*t*) *Shaw* v. *Thompson* (1876), 3 Ch. D. 233; see, however, *Faulkner* v. *Elger*, *supra*; *Edenborough* v. *Canterbury* (*Archbishop*), *supra*, at p. 93, where it was held that such elections must be by open polling. As to when the court will interfere to set aside an irregular election, see *Davies* v. *Banks* (1836), 5 L. J. (CH.) 274; *R.* v. *St. Mary, Lambeth* (1838), 3 Nev. & P. (K. B.) 416; *Shaw* v. *Thompson*, *supra*, at p. 251.

(*a*) *Wilson* v. *Dennison* (1749), Amb. 82, 87, also reported *sub nom.* *A.-G.* v. *Scott* (1749), 1 Ves. Sen. 413. The rule is different with regard to signing presentation (*ibid.*). As to proxies, see also *Howard* v. *Hill* (1888), 37 W. R. 219.

(*b*) *A.-G.* v. *Brereton* (1752), 2 Ves. Sen. 425, 429.

(*c*) *Carter* v. *Cropley* (1857), 26 L. J. (CH.) 246, C. A.; and see Metropolis Management Acts, 1855 (18 & 19 Vict. c. 120), and 1856 (19 & 20 Vict. c. 112), as amended by London Government Act, 1899 (62 & 63 Vict. c. 14), s. 4. See also *A.-G.* v. *Drapers' Co.* (1857), 27 L. J. (CH.) 542; *Re Hayle's Estate* (1862), 31 L. J. (CH.) 612; and generally title METROPOLIS.

(*d*) *A.-G.* v. *Cuming* (1843), 2 Y. & C. Ch. Cas. 139 (dissentient trustee); *A.-G.* v. *Lawson* (1867), 36 L. J. (CH.) 130 (one trustee incapable of acting).

(*e*) Co. Litt. 186 b; *A.-G.* v. *Scott*, *supra*; *A.-G.* v. *Cuming*, *supra*; *A.-G.* v. *Powis* (*Earl*) (1853), Kay, 186, 201; *contrà*, *Seymour* v. *Bennet* (1742), 2 Atk. 482, 483.

(*f*) *A.-G.* v. *Cuming*, *supra*; *A.-G.* v. *Scott*, *supra*, at p. 415; see also *Davis* v. *Jenkins* (1814), 3 Ves. & B. 151, 159.

(*g*) *A.-G.* v. *Litchfield* (*Bishop*) (1801), 5 Ves. 825; see also *A.-G.* v. *Floyer* (1716), 2 Vern. 748 (presentation by sole surviving trustee).

SECT. 2. Ministers of the Established Church etc.

on the ground that the full number of trustees directed by the instrument of trust has not been kept up.

480. Notice of a meeting to elect is not a mere formality (*h*). Unless all the electors have notice of the meeting, the election is invalid (*i*), but it is not rendered invalid by the fact that the meeting took place after the expiration of the prescribed period (*k*). The notice need not be in writing (*l*).

Notice of meeting to elect.

Chapels of ease.

481. No person can, in the absence of special custom (*m*), be authorised to preach publicly within a chapel of ease, open to the inhabitants of the district, without the consent of the rector or vicar of the parish (*n*). So, too, in the absence of agreement to the contrary, whenever a chapel of ease is erected, the incumbent of the mother church has a right to nominate the minister (*o*), but he has no right to nominate the chaplain of a private chapel (*p*).

Jurisdiction of court.

482. The court may restrain by injunction the presentation to the bishop of a minister improperly elected (*q*), but cannot order a bishop to induct a minister who has been validly elected (*r*).

Perpetual curates.

483. The policy of the Established Church is to give the minister an estate for life in his office (*s*). Perpetual curates also hold office for life, unless deprived by the ordinary (*t*). The appointment of a private chaplain by the owner of the chapel does not confer a freehold interest; it merely gives him a permission to enter (*a*).

SECT. 3.—*Ministers of Dissenting Bodies.*

Regulations deed.

484. Ministers of dissenting bodies must be appointed or elected in accordance with the provisions, if any, of the trust deed establishing or regulating the meeting-house or chapel (*b*).

Where the right to elect a minister is vested in the congregation,

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(*h*) *A.-G.* v. *Cuming* (1843), 2 Y. & C. Ch. Cas. 139, 151.

(*i*) *A.-G.* v. *Scott* (1749), 1 Ves. Sen. 413, 416, 417, where notice was necessary under the express terms of the trust; but it is conceived that the proposition would be true generally.

(*k*) *Ibid.* at p. 415.

(*l*) *A.-G.* v. *Cuming*, *supra*.

(*m*) *Farnworth* v. *Chester* (*Bishop*) (1825), 4 B. & C. 555, 568.

(*n*) Shelford, Law of Mortmain, p. 721. See *MacAllister* v. *Rochester* (*Bishop*) (1880), 5 C. P. D. 194; *Neslitt* v. *Wallace*, [1901] P. 354.

(*o*) *Dixon* v. *Kershaw* (1766), Amb. 528; *MacAllister* v. *Rochester* (*Bishop*), *supra*.

(*p*) *Herbert* v. *Westminster* (*Dean and Chapter*) (1721), 1 P. Wms. 774.

(*q*) *Carter* v. *Cropley* (1857), 26 L. J. (CH.) 246, 256, C. A.; see also *A.-G.* v. *Forster* (1804), 10 Ves. 335, 341; *A.-G.* v. *Powis* (*Earl*) (1853), Kay, 186, 230. In *A.-G.* v. *St. Cross Hospital* (1854), 24 L. J. (CH.) 148, the court by injunction restrained a churchwarden from interfering with the performance of service by a minister in a church to test the question whether the building was a parish church or not.

(*r*) *A.-G.* v. *Cuming*, *supra*, at p. 155, n., commenting on *Edenborough* v. *Canterbury* (*Archbishop*) (1826), 2 Russ. 93, 112.

(*s*) *A.-G.* v. *Pearson* (1817), 3 Mer. 353, 403; and see title ECCLESIASTICAL LAW.

(*t*) *A.-G.* v. *Brereton* (1752), 2 Ves. Sen. 429.

(*a*) Shelford, Law of Mortmain, 721.

(*b*) *A.-G.* v. *Pearson*, *supra*, at pp. 402, 403. As to ministers in general, see title ECCLESIASTICAL LAW.

it is exercisable by the majority of the congregation (*c*), and as a rule the electors must be communicants, and not merely seat-holders (*d*).

If the right is vested in the trustees, an election by a majority of an appointment by the representative of the last surviving them (*e*) or by a majority of the survivors (*f*) is valid, but not trustee (*g*).

No provisions in trust deed.

If the trust deed does not provide for the mode of election, an inquiry may be ordered to ascertain the established usage (*h*), though the court will not necessarily be governed by usage (*i*). In such cases the majority of the congregation is generally entitled to choose the minister (*k*).

Usage.

The enactment (*l*) which, in the absence of express provision in the deed of trust, makes twenty-five years' usage conclusive as to the particular doctrines for the teaching of which a meeting-house is to be employed, does not apply to questions whether the provisions of the trust deed have been observed with regard to the election of a minister (*m*).

Invalid election by congregation.

485. Where the congregation are entitled to elect, an election of a minister is invalid if due notice of the meeting to elect is not given, or if the electors are not confined to members of the congregation (*n*).

Duration of appointment.

486. The office of a minister of a dissenting body is not comparable with that of a clergyman of the Church of England. The tenure of the latter is permanent in the sense that the congregation have no power to terminate it (*o*), but a dissenting minister is engaged on a private contract (*p*). Such ministers may under the provisions of the trust deed (*q*), or, in the absence of express provision, according to usage (*r*), be appointed for limited periods,

(*c*) *Davis* v. *Jenkins* (1814), 3 Ves. & B. 151, 155; and compare *Fearon* v. (1807), 14 Ves. 13, 24, where the majority of the congregation was held entitled to elect a vicar.

(*d*) *Leslie* v. *Birnie* (1826), 2 Russ. 114; *A.-G.* v. *Aked* (1835), 7 Sim. 321.

(*e*) *A.-G.* v. *Lawson* (1866), 36 L. J. (CH.) 130. See also *Perry* v. *Shipway* (1859), 28 L. J. (CH.) 660, C. A.; *Cooper* v. *Gordon* (1869), L. R. 8 Eq. 249; and compare *Cooper* v. *Whitehouse* (1834), 6 C. & P. 545.

(*f*) *A.-G.* v. *Lawson*, *supra*.

(*g*) *Davis* v. *Jenkins*, *supra*, at p. 159; see, on the other hand, *A.-G.* v. *Litchfield* (*Bishop*) (1801), 5 Ves. 825 (church patronage).

(*h*) *Davis* v. *Jenkins*, *supra*, at p. 159; *Leslie* v. *Birnie*, *supra*; *A.-G.* v. *Pearson* (1817), 3 Mer. 353, 403, 420.

(*i*) *Ibid.*, at p. 403.

(*k*) *Davis* v. *Jenkins*, *supra*; *A.-G.* v. *Aked*, *supra*; *A.-G.* v. *Jones* (1835), Shelford, Law of Mortmain, 765, n.; *Cooper* v. *Gordon*, *supra*.

(*l*) Nonconformists' Chapels Act, 1844 (7 & 8 Vict. c. 45).

(*m*) *A.-G.* v. *Murdoch* (1852), 1 De G. M. & G. 86, 144, C. A.

(*n*) *Perry* v. *Shipway* (1859), *supra*, at p. 666; see also *R.* v. *Dagger Lane Chapel* (*Trustees*) (1804), 2 Smith, K. B. 20.

(*o*) Shelford, Law of Mortmain, 762; *A.-G.* v. *Pearson*, *supra*, at pp. 402, 420; *Cooper* v. *Gordon*, *supra*.

(*p*) *Ibid.*

(*q*) *Perry* v. *Shipway*, *supra*; *Dean* v. *Bennett* (1870), 6 Ch. App. 489.

(*r*) *A.-G.* v. *Pearson*, *supra*, at pp. 412, 413, 420; *A.-G.* v. *Aked*, *supra*.

SECT. 3. **Ministers of Dissenting Bodies.**

or for life (*s*). If no period of office is agreed upon, the minister is removable at pleasure (*t*). A life appointment is terminable on grounds of misconduct (*a*).

Position of minister as to buildings.

487. The minister of a dissenting chapel has not in that character any legal estate in the buildings. He is merely a tenant at will of the trustees in whom the legal estate is vested (*b*). The use of the pulpit is only a privilege in the nature of an easement (*c*).

If the trustees demand possession of a meeting-house, and the minister refuses to deliver it up, he becomes a trespasser; but if he has been improperly removed, he has his remedy against the trustees in equity (*d*).

Jurisdiction of court.

488. The court will interfere by injunction to restrain the election of an improper person (*e*), or to restrain a minister who has been properly dismissed from officiating (*f*), unless the power of removal has been exercised oppressively (*g*), or to restrain a minister improperly appointed (*h*) from officiating or retaining possession of the meeting-house (*i*). But a minister, whether duly appointed or not, who is officiating in accordance with the trust deed will not be removed by the court pending an action for the regulation of the meeting-house (*k*).

The court will grant a mandamus to compel the trustees of a meeting-house to admit a duly elected minister (*l*), but will not grant a mandamus for restoring one dispossessed unless he can prove a *primâ facie* title to his office (*m*).

(*s*) *A.-G.* v. *Pearson* (1817), 3 Mer. 353, 413; *Porter* v. *Clarke* (1829), 2 Sim. 520; *Cooper* v. *Gordon* (1869), L. R. 8 Eq. 249, 258, 259.

(*t*) *Ibid.*

(*a*) Cru. Dig. tit. xxv., pl. 28; see *Leeson* v. *General Council of Medical Education and Registration* (1890), 43 Ch. D. 366, 383.

(*b*) *Doe* v. *Jones* (1830), 8 L. J. (o. s.) (K. B.) 310; *Doe* v. *McKaeg* (1830), 8 L. J. (o. s.) (K. B.) 311; *Perry* v. *Shipway* (1859), 28 L. J. (CH.) 660, C. A.; *Cooper* v. *Gordon*, *supra*; see also *Spurgin* v. *White* (1860), 2 Giff. 473, where an injunction was granted restraining the agent of a religious society who had been properly dismissed from disturbing the possession of the managing body of the society.

(*c*) *Doe* v. *Jones*, *supra*.

(*d*) *Ibid.*

(*e*) *Milligan* v. *Mitchell* (1833), 1 My. & K. 446.

(*f*) *A.-G.* v. *Welsh* (1844), 4 Hare, 572; *A.-G.* v. *Munro* (1848), 2 De G. & Sm. 122, 196; *A.-G.* v. *Murdoch* (1852), 21 L. J. (CH.) 694, C. A.; *Cooper* v. *Gordon*, *supra*; *Glen* v. *Greg* (1882), 21 Ch. D. 513.

(*g*) *Dean* v. *Bennett* (1870), 6 Ch. App. 489, 494; see also *Daugars* v. *Rivaz* (1860), 28 Beav. 233.

(*h*) *Perry* v. *Shipway*, *supra*; see also *Porter* v. *Clarke* (1829), 2 Sim. 520.

(*i*) *Broom* v. *Summers* (1840), 10 L. J. (CH.) 71.

(*k*) *Foley* v. *Wontner* (1820), 2 Jac. & W. 245, 247.

(*l*) *R.* v. *Barker* (1762), 3 Burr. 1265; see also *Davis* v. *Jenkins* (1814), 3 Ves. & B. 155.

(*m*) *R.* v. *Jotham* (1790), 3 Term Rep. 575.

SECT. 4.—*Schoolmasters.*

SECT. 4. Schoolmasters.

489. As schools are in many cases charitable institutions, so schoolmasters may be officers of charities (*n*). Schoolmasters.

Regard must be paid to the instrument of trust founding or establishing the school where it provides for the appointment or removal of schoolmasters (*o*).

In certain cases the founder, or his heirs (*p*), or his grantees (*q*), or the visitor (*r*) have the right of appointing masters.

Part VII.—Trustees.

SECT. 1.—*Corporations and quasi-Corporations as Trustees.*

490. Corporations no less than individuals may as a rule be trustees for charitable purposes (*a*). Corporations generally.

Eleemosynary corporations, whether the members thereof participate in the charity (*b*) or not (*c*), are trustees of their corporate property. They may also undertake the execution of special trusts connected with the objects of their foundation (*d*). Eleemosynary corporations.

Civil corporations, as, for example, livery companies of the City Civil corporations.

(*n*) See this subject fully dealt with under title EDUCATION.

(*o*) *A.-G.* v. *Carrington (Lord)* (1850), 4 De G. & Sm. 140; and see *Wright* v. *Zetland (Marquis)*, [1908] 1 K. B. 63, C. A. The tenure of masters of endowed schools is rendered more secure by the Endowed Schools (Masters) Act, 1908 (8 Edw. 7, c. 39).

(*p*) *Legh* v. *Lewis* (1801), 1 East, 391, 395.

(*q*) *A.-G.* v. *Ewelme Almshouse (Chaplains etc.)* (1853), 22 L. J. (CH.) 846, where it was held that the right of appointing a master of a hospital may be severed from a manor.

(*r*) *Legh* v. *Lewis*, *supra*.

(*a*) *Flood's Case* (1615), Hob. 136; *A.-G.* v. *Tancred* (1757), 1 Eden, 10, 14; *A.-G.* v. *Brentwood School (Master)* (1833), 1 My. & K. 376, 390; *A.-G.* v. *Liverpool Corporation* (1835), 1 My. & Cr. 171, 201; *Incorporated Society* v. *Richards* (1841), 1 Dr. & War. 258, 302, 303, 307, 331. For other instances of corporations acting as trustees for charities, see also *Bennet College* v. *London (Bishop)* (1778), 2 Wm. Bl. 1182 (devise to college for charitable use); *A.-G.* v. *Lauderfield* (1743), 9 Mod. Rep. 286 (devise to hospital); *Society for Propagation of the Gospel* v. *A.-G.* (1826), 3 Russ. 142; *Re Manchester Royal Infirmary* (1889), 43 Ch. D. 420; Grant on Corporations, 109, 116. As to the incorporation of charity trustees, see p. 314, *post*. As to the capacity of a corporation to be a trustee jointly with an individual or individuals, see Bodies Corporate (Joint Tenancy) Act, 1899 (62 & 63 Vict. c. 20); *Re Thompson*, [1905] 1 Ch. 229; and title TRUSTS AND TRUSTEES.

(*b*) *Lydiatt* v. *Foach (Sir John)* (1700), 2 Vern. 410, 412; and see pp. 282 *et seq.*, *post*.

(*c*) *Ibid.*

(*d*) *E.g.*, in the case of educational foundations, trusts for additional fellowships (*A.-G.* v. *Talbot* (1747), 3 Atk. 662; *A.-G.* v. *Whorwood* (1750), 1 Ves. Sen. 534, 537; *A.-G.* v. *Flood* (1816), Hayes & Jo. Appendix xxi., xxxv.; *Ex parte Inge* (1831), 2 Russ. & M. 590, 596; and see *A.-G.* v. *Catherine Hall (Master)* (1820), Jac. 381, 400, as to the necessity for visitor's consent); for scholarships or prizes (*A.-G.* v. *Talbot*, *supra*); for maintenance of schools connected with the foundation (*A.-G.* v. *Caius College* (1837), 2 Keen, 150); for presentation to livings connected with the foundation (*Green* v. *Rutherforth* (1750), 1 Ves. Sen. 462, 473).

SECT. 1. Corporations and quasi-Corporations as Trustees.

of London (*e*) and municipal corporations (*f*), are in many cases also trustees of charities. Since 1835 (*g*) municipal corporations must be regarded as charity trustees of the borough property (*h*).

Corporations with limited capacity.

491. Corporations may have merely a limited capacity for holding property on trust (*i*). Thus, colleges in the universities cannot undertake trusts inconsistent with their foundation (*k*). Nor has a corporation created by statute (*l*) or otherwise (*m*) for a particular purpose any capacity beyond the object for which it was established.

Parsons.

Parsons, as corporations sole, may not hold copyholds (*n*) or chattels real or personal (*o*) for charitable uses; their capacity to hold freeholds for such uses is doubtful (*p*).

(*e*) *A.-G.* v. *Grocers' Co.* (1843), 6 Beav. 526.

(*f*) Shelford, Law of Mortmain, 738; *Colchester Corporation* v. *Lowten* (1813), 1 Ves. & B. 226; *A.-G.* v. *Shrewsbury Corporation* (1843), 6 Beav. 220; *Gort* v. *A.-G.* (1817), 6 Dow, 186; *Christ's Hospital* v. *Grainger* (1848), 16 Sim. 83; *Re Ludlow Charities* (1837), 3 My. & Cr. 262.

Under the Municipal Corporations Act, 1835 (5 & 6 Will. 4, c. 76), s. 71 (since repealed), all property real and personal then held by any municipal corporation or any of the members thereof as such upon any charitable trusts was vested in individual trustees appointed by the Lord Chancellor; see *A.-G.* v. *Exeter Corporation* (1852), 2 De G. M. & G. 507, 515. As to the cases to which the Act applied, see Tudor, Law of Charities and Mortmain, 4th ed., p. 793. Provision for vesting in the new trustees the legal estate in charity property which remained (*Christ's Hospital* v. *Grainger*, *supra*, at p. 102) in the corporation under s. 71 of the Act of 1835 was made by the Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 65; see *Re Huntingdon Municipal Charities* (1859), 27 Beav. 214.

(*g*) *I.e.*, the passing of the Municipal Corporations Act, 1835 (5 & 6 Will. 4, c. 76).

(*h*) See p. 284, *post*.

(*i*) Shelford, Law of Mortmain, 28.

(*k*) *A.-G.* v. *Whorwood* (1750), 1 Ves. Sen. 534, 537; *A.-G.* v. *Tancred* (1757), 1 Eden, 10, 15; Grant on Corporations, 109, 124.

(*l*) See *National Manure Co.* v. *Donald* (1859), 28 L. J. (EX.) 185, 188; *Putney Overseers* v. *London and South Western Rail. Co.* (1891), 60 L. J. (Q. B.), *per* Lord ESHER, M.R., at p. 439. It follows from these cases that statutory corporations, such as railway or canal companies, cannot, unless expressly empowered by statute, be trustees for charitable purposes.

(*m*) See *Incorporated Society* v. *Price* (1844), 1 Jo. & Lat. 498. The Chamberlain of the City of London is a corporation sole for the purpose of taking recognisances, obligations etc., in trust for the portions of orphans (Grant on Corporations, 629; *Fulwood's Case* (1591), 4 Co. Rep. 64 b, 65 a; *Byrd* v. *Wilford* (1593), Cro. Eliz. 464).

(*n*) Grant on Corporations, 630. See titles COPYHOLDS; CORPORATIONS.

(*o*) Shelford, Law of Mortmain, 28; and see title CORPORATIONS; *Fulwood's Case*, *supra*; *A.-G.* v. *Ruper* (1722), 2 P. Wms. 125; see *Rennell* v. *Lincoln* (*Bishop*) (1827), 5 L. J. (O. S.) (K. B.) 320, 329, 332; *Hopkinson* v. *Ellis* (1842), 5 Beav. 34.

(*p*) As an ecclesiastical corporation sole has, according to some authorities, merely a qualified or limited fee of the estate of which he is seised as in right of his church (see Littleton, s. 644; 1 Co. Inst. 300 b, 341 b; *Marlborough* (*Duke*) v. *St. John* (1852), 5 De G. & Sm. 174, 178 *et seq.*; *Ecclesiastical Commissioners* v. *Wodehouse*, [1895] 1 Ch. 552), it is submitted that such a corporation sole has no capacity to take a complete and unqualified fee simple upon trusts which may, for example, involve leasing, conveying, cutting timber etc.—things which an ecclesiastical corporation sole has not an unlimited power to do (*Marlborough* (*Duke*) v. *St. John*, *supra*). On the other hand, it may be said that, assuming the corporation sole has a licence in mortmain, there is no legal objection to a conveyance being made to such corporation for charitable uses; see *Banister's Case* (1600), Duke on Charitable Uses, 139; Grant on Corporations, 648.

Churchwardens and overseers.

492. Churchwardens possess a *quasi*-corporate capacity to hold property, including personalty (*a*), but not realty (*b*), for church purposes (*c*).

Churchwardens and overseers are also a *quasi*-corporation (*d*) for the purpose of holding property connected with the affairs of the church or for ecclesiastical charities in rural parishes (*e*), and in parishes within a metropolitan borough (*f*).

The legal interest in all property formerly (*g*) vested in overseers

(*a*) Shelford, Law of Mortmain, 28; *A.-G.* v. *Ruper* (1722), 2 P. Wms. 125; and see *Tuffnell* v. *Constable* (1838), 7 L. J. (Q. B.) 106.

(*b*) Shelford, Law of Mortmain, 29; *A.-G.* v. *Ruper, supra; Gravenor* v. *Hallum* (1767), Amb. 643, 644; *Withnell* v. *Gartham* (1795), 6 Term Rep. 388, 396; except in the City of London (*Fell* v. *Official Trustee of Charity Lands*, [1898] 2 Ch. 44, 51, C.A.). In some early cases it appears that churchwardens were created corporations by letters patent with power to hold land (Shelford, Law of Mortmain, 29; Kyd on Corporations, Vol. I., 31). Churchwardens, in the absence of statutory power (see, for example, Poor Relief Act, 1819 (59 Geo. 3, c. 12)), cannot sue or be sued in any corporate name (*Fell* v. *Official Trustee of Charity Lands, supra*, at p. 51).

(*c*) Property vested in churchwardens alone was not transferred to the parish council by the Local Government Act, 1894 (56 & 57 Vict. c. 73) (see s. 5 (2) (c)), nor were their powers, duties, and liabilities, so far as they related to the affairs of the church (*ibid.*, s. 75) or to charities generally, interfered with (*ibid.*, s. 6 (1) (b)). As to churchwardens generally, see title ECCLESIASTICAL LAW.

(*d*) See Poor Relief Act, 1819 (59 Geo. 3, c. 12), s. 17, for the purposes of which the body corporate must consist of two overseers and a churchwarden or churchwardens (*Woodcock* v. *Gibson* (1825), 4 B. & C. 462; *Uthwatt* v. *Elkins* (1845), 13 M. & W. 772; *Doe* v. *Hiley* (1830), 10 B. & C. 885; *Ex parte Annesley* (1836), 2 Y. & C. (EX.) 350; *Smith* v. *Adkins* (1841), 8 M. & W. 362, 370; *Gouldsworth* v. *Knights* (1843), 11 M. & W. 337). See also *Ward* v. *Clarke* (1844), 12 M. & W. 747; *Klenck* v. *Farris* (1904), 69 J. P. 41; *Westminster Corporation* v. *St. Martin-in-the-Fields* (*Vicar*) (1906), 23 T. L. R. 112; *Haigh* v. *West*, [1893] 2 Q. B. 19, C. A.

(*e*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 5 (2) (c). As to the transfer to the parish council of a rural parish of the legal interest in other property vested in them, see *ibid.* As to the meaning of "ecclesiastical charities," see *ibid.*, s. 75; *Re Perry Almshouses, Re Ross' Charity*, [1899] 1 Ch. 21, C. A.; *Re Spendluffe's Charity* (1900), 83 L. T. 498; and of "affairs of the church," see Local Government Act, 1894, s. 75. In *Simcoe* v. *Pethick*, [1898] 2 Q. B. 555, C. A., it was held that an allotment of land made under the Inclosure Act, 1845 (8 & 9 Vict. c. 118), ss. 34, 73, to the churchwardens and overseers of a parish for certain charitable trusts, vested the legal estate in the land in them. The effect of the Local Government Act, 1894, s. 5 (2) (c) (see note (*h*), p. 258, *post*), would, no doubt, be to transfer such an estate to the parish council. As regards property held by the body corporate contemplated by the Poor Relief Act, 1819 (59 Geo. 3, c. 12), s. 17 (see note (*d*), *supra*), the Act of 1894 has made no alteration in the law, except that under s. 14 (2) the overseers may be replaced by other persons.

(*f*) London Government Act, 1899 (62 & 63 Vict. c. 14), s. 23 (4). As to the transfer to the borough council of the legal interest of all other property vested either in the overseers or churchwardens and overseers of any parish within a metropolitan borough, see *ibid.*, s. 23 (3).

(*g*) Poor Relief Act, 1819 (59 Geo. 3, c. 12), s. 17, the chief object of which was the protection and administration of parochial property (*Gouldsworth* v. *Knights, supra*), vested in churchwardens and overseers as a *quasi*-corporation, or empowered them to take and hold (*Ex parte Annesley, supra; Smith* v. *Adkins, supra; Ward* v. *Clarke, supra*), lands assured to them in trust for the parish or already belonging to the parish, including freeholds (*Ex parte Annesley, supra; Doe* v. *Billett* (1845), 7 Q. B. 976; *Re Paddington Charities* (1837), 8 Sim. 629; *Re Dixon* (1853), 1 W. R. 244; *Re Hackney Charities, Ex parte Nicholls* (1864), 34 L. J. (CH.) 169). Lands "belonging to the

SECT. 1. Corporations and quasi-Corporations as Trustees.

or churchwardens and overseers of rural parishes for parochial purposes other than ecclesiastical is now vested in the parish council (*h*), or, where no council exists, in the chairman of the parish meeting and the overseers of the parish as a corporation (*i*). So, too, the powers, duties, and liabilities of the overseers or of the churchwardens and overseers with regard to the holding and management of property so transferred are vested in the parish council or parish meeting (*k*).

Sites for schools held by minister and churchwardens.

493. Under the School Sites Acts grants may be made of land to the minister, churchwardens, and overseers of the poor (*l*), or to the minister and churchwardens alone (*m*) and their successors as a corporation, for the charitable purposes mentioned in the Acts, but otherwise a minister and churchwardens do not as a rule form a corporation (*n*).

Non-corporate bodies.

494. A Roman Catholic bishop (*o*), a Dissenting minister (*p*), a principal of a college, a mayor or bailiff of a city (*q*), or the officers of a corporate body (*r*), and their respective successors, are not recognised by the law as corporations, and consequently cannot be trustees for charitable purposes in a corporate capacity, though the particular individuals named may act as trustees (*s*).

Incumbent and householders of parish.

495. Trustees consisting of the incumbent and two householders owners or occupiers of land in a parish, and forming a

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parish" include lands belonging to, or the rents of which are applicable to the repair of, the parish church (*Doe* v. *Hiley* (1830), 10 B. & C. 885; *Doe* v. *Terry* (1835), 4 Ad. & El. 274; *Doe* v. *Cockell* (1836), 4 Ad. & El. 478; *Allason* v. *Stark* (1838), 9 Ad. & El. 255, 267; *Gouldsworth* v. *Knights* (1843), 11 M. & W. 337; *Rumball* v. *Munt* (1846), 8 Q. B. 382), and leaseholds (*Alderman* v. *Neate* (1839), 4 M. & W. 704; *Doe* v. *Rugeley Overseers* (1844), 6 Q. B. 107), but not copyholds (*A.-G.* v. *Lewin* (1837), 8 Sim. 366, 370; *Re Paddington Charities* (1837), 8 Sim. 629).

The Act did not vest in them property subject to special trusts wholly or partially limiting the discretion of the trustees as regards the objects or the mode of applying relief (*St. Nicholas, Deptford (Churchwardens)* v. *Sketchley* (1847), 8 Q. B. 394, 404; *A.-G.* v. *Lewin, supra; Allason* v. *Stark, supra; Re Hackney Charities, Ex parte Nicholls* (1864), 34 L. J. (CH.) 169), nor, it seems, property vested in known existing trustees (*St. Nicholas, Deptford (Churchwardens)* v. *Sketchley, supra*, at pp. 408, 409; *contrà, Ex parte Annesley* (1836), 2 Y. & C. (EX.) 350; *Gouldsworth* v. *Knights, supra; Doe* v. *Billett* (1845), 7 Q. B. 975; *Rumball* v. *Munt, supra.*

(*h*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 5 (2) (c).

(*i*) *Ibid.*, ss. 5 (2) (c), 19 (6), (7).

(*k*) *Ibid.*, s. 6 (1) (c) (iii.).

(*l*) School Sites Act, 1841 (4 & 5 Vict. c. 38), s. 7; and see title EDUCATION.

(*m*) School Sites Act, 1844 (7 & 8 Vict. c. 37), s. 5.

(*n*) The minister and churchwardens may by custom in the City of London be a corporation for the execution of charitable trusts (see Tudor, Law of Charities and Mortmain, 4th ed., p. 264, note (f); *A.-G.* v. *Leage* (1881), *Times* (December 13, 1881), set out in Tudor, Law of Charities and Mortmain, 4th ed., p. 1041), or may be incorporated for such purposes by a private Act, as in the case of the vicar and churchwardens of St. Martin's-in-the-Fields (stat. 1 Anne, sess. 2, c. xxi.).

(*o*) *A.-G.* v. *Power* (1809), 1 Ball & B. 145, 149; and see *Re Lalor* (1901), 85 L. T. 643.

(*p*) *A.-G.* v. *Lee* (1869), 4 I. R. Eq. 84.

(*q*) *A.-G.* v. *Gilbert* (1847), 10 Beav. 517.

(*r*) *A.-G.* v. *Tancred* (1757), 1 Eden, 10, 14.

(*s*) See the cases cited in preceding three notes.

corporate body, may be appointed in any parish for the purpose of accepting and holding contributions for ecclesiastical purposes in the parish (*a*).

496. A local education authority may be constituted trustees for any educational endowment or charity for purposes connected with education (*b*).

497. The public trustee, who is a corporation sole, may not accept any trust exclusively for religious or charitable purposes (*c*). trustee.

The bodies corporate entitled to act as custodian trustees under the Public Trustee Act, 1906 (*d*), include any such friendly society or body corporate established for charitable or philanthropic purposes as may be approved by the public trustee and the Treasury (*e*). Custodian trustees.

498. A bequest to trustees to be applied for the poor of a parish is not within a local Act by which moneys payable for the use of the poor of the parish, not being directed to support any private charity, are vested in the guardians (*f*). Guardians.

SECT. 2.—*Appointment of New Trustees.*

SUB-SECT. 1.—*Who may or should be appointed.*

499. Vacancies among trustees should be filled with persons who are likely best to discharge the duties imposed upon them by the trust (*g*). General principles.

A suspicion that former trustees have used their powers for political ends is sufficient to prevent their reappointment (*h*).

There is no objection to trustees being related to one another (*i*), and the fact that three new trustees are appointed of whom two hold opposite views on an important matter affecting the charity is not sufficient reason for upsetting an appointment (*j*).

500. In selecting trustees, regard must be had to any directions contained in the scheme (*k*) or other instrument (*l*) regulating the charity. Thus, where trustees are required to be residents in a Qualification required by instrument regulating the charity.

(*a*) Compulsory Church Rates Abolition Act, 1868 (31 & 32 Vict. c. 109), s. 9; and see title ECCLESIASTICAL LAW.

(*b*) Elementary Education Act, 1873 (36 & 37 Vict. c. 86), s. 13; Education Act, 1902 (2 Edw. 7, c. 42), s. 5; and see title EDUCATION.

(*c*) Public Trustee Act, 1906 (6 Edw. 7, c. 55), ss. 1 (2), 2 (5).

(*d*) *Ibid.*, s. 4 (3).

(*e*) Public Trustee Rules, 1907, r. 36 (1).

(*f*) *A.-G.* v. *Freeman* (1818), 5 Price, 425, Ex. Ch.

(*g*) *Baker* v. *Lee* (1860), 8 H. L. Cas. 495, 513. As to the appointment of the first trustees of a charity, see p. 168, *ante*.

(*h*) *Re Norwich Charities* (1837), 2 My. & Cr. 275.

(*i*) *Re Lancaster Charities* (1860), 7 Jur. (N. S.) 96. The Charity Commissioners sometimes take objection in cases of charities in small parishes, with small bodies of trustees, to a preponderance of members of one family if the trustees are co-optative.

(*j*) *Re Burnham National Schools* (1873), L. R. 17 Eq. 241, 250.

(*k*) *Foord* v. *Baker* (1859), 27 Beav. 193, where the scheme provided that no person should act as a trustee who had a beneficial interest in the charity estate.

(*l*) *A.-G.* v. *Stamford* (*Earl*) (1840), 10 L. J. (CH.) 58, 65, 68, where a residential qualification was required by the trust deed; see also *A.-G.* v. *Pearson* (1817), 3 Mer. 353, at p. 403, where, however, the deed of trust was silent on this point.

SECT. 2. Appointment of New Trustees.

certain locality, persons not possessing the necessary qualification should not be appointed (*m*), though in special circumstances the residential area may be extended (*n*).

Residence.

501. In the absence of express direction in the instrument regulating the charity, new trustees who reside at a distance from the charitable institution may be appointed (*o*); but as a rule it is expedient to appoint trustees from the neighbourhood (*p*).

Religious opinions of trustees.

502. Independently of any express provision (*q*) in the instrument regulating the charity, where a charity is established exclusively for the benefit of members of the Church of England or for the instruction of children on Church of England lines, none but members of that Church should be appointed trustees (*r*). The same principle applies in the case of charities for the exclusive benefit of dissenting sects (*s*). So far as Church of England charities are concerned, the rule is not affected by anything in the Charitable Trusts Act, 1853 (*t*).

Where a charity is substantially eleemosynary in character, the religious opinions of proposed trustees or governors are not taken into consideration (*a*).

Where a charity is established for purposes connected with a parish church, it is proper, though of course not necessary, to appoint the parson and the churchwardens as trustees (*b*). In one case in Ireland the Ecclesiastical Commissioners for Ireland were made trustees (*c*).

(*m*) *A.-G.* v. *Cowper* (1785), 1 Bro. C. C. 439; *A.-G.* v. *France* (1780), cited *ibid.*, p. 439; *A.-G.* v. *Stamford (Earl)* (1840), 10 L. J. (CH.) 58; see also *A.-G.* v. *Devon (Earl)* (1846), 16 L. J. (CH.) 34, 45, where the trustees were to be "near inhabiting."

(*n*) *Re Sekforde's Charity* (1861), 4 L. T. 321 (radius of six miles from charitable institution).

(*o*) *Re Lancaster Charities* (1860), 7 Jur. (N. S.) 96. "It is not always desirable to intrust the management of charities to a purely local interest" (*ibid.*, *per* WOOD, V.-C., at p. 97).

(*p*) *A.-G.* v. *Moises* (1879), reported in Tudor, Law of Charities and Mortmain, 4th ed., pp. 1036, 1038.

(*q*) For example of express provision, see *Re Church Patronage Trust*, [1904] 2 Ch. 643.

(*r*) *Re Norwich Charities* (1837), 2 My. & Cr. 275, 305; *Re Scarborough Charity* (1837), 1 Jur. 36; *Re Stafford Charities* (1857), 25 Beav. 28; *Baker* v. *Lee* (1860), 8 H. L. Cas. 495, 513; *A.-G.* v. *Clifton* (1863), 32 Beav. 596; *Re Burnham National Schools* (1873), L. R. 17 Eq. 241, 247; *A.-G.* v. *Limerick (Bishop)* (1870), 5 I. R. Eq. 403; and see *Re Hodgson's School* (1878), 3 App. Cas. 857, 866; and title EDUCATION.

(*s*) *A.-G.* v. *Pearson* (1817), 3 Mer. 353; *Shore* v. *Wilson* (1842), 9 Cl. & Fin. 355, 389, H. L.; *Re Drogheda Charity Estates* (1846), 3 Jo. & Lat. 422; *A.-G.* v. *Calvert* (1857), 23 Beav. 248; *Baker* v. *Lee, supra*; *A.-G.* v. *St. John's Hospital, Bath* (1876), 2 Ch. D. 554, 565, 566.

(*t*) Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 46.

(*a*) *Re Norwich Charities, supra*; *A.-G.* v. *Calvert, supra*; *Baker* v. *Lee, supra*, at p. 513; *A.-G.* v. *Tottenham* (1870), 5 I. R. Eq. 241; *A.-G.* v. *St. John's Hospital, Bath, supra.*

(*b*) *Re Donington-on-Baine Church Estate* (1860), 6 Jur. (N. S.) 290. In this case the court declined to appoint the overseers of the poor and the surveyor of highways as trustees, apparently on the ground that they would probably be dissenters, and because the rector and churchwardens objected to their appointment.

(*c*) *Re Gore's (Bishop) Charity* (1844), Drury *temp.* Sug. 536.

Strict and directory powers.

503. Express powers for the appointment of new trustees contained in the instrument or scheme founding or regulating a charity (*d*) may be construed by the courts as being in character either strict powers or directory powers. The former can only be exercised in accordance with the exact circumstances prescribed by the settlement (*e*). In the latter class non-fulfilment of the prescribed conditions does not prevent the execution of the power (*f*). The same principle of construction applies also to directions contained in decrees of the court (*g*) and Acts of Parliament (*h*).

Company as sole trustee.

The court may sanction the appointment of an association registered under the Companies Acts as sole trustee in place of retiring trustees, notwithstanding that the trust deed does not authorise the appointment of a sole trustee (*i*).

Appointment whilst court is administering trust.

Where the court is administering a charitable trust, trustees ought not to exercise their power (if any) of appointing new trustees without the sanction of the court (*k*). If, however, proper persons are selected, the appointment is valid (*l*).

Trust deed lost or ambiguous.

Where the instrument of trust is lost, but there have been many appointments in the past, the court presumes that the earliest usage was in accordance with the terms of the lost instrument (*m*). Where the instrument is not explicit the court may direct an inquiry as to who are entitled to appoint new trustees (*n*).

Vesting of property in new trustees.

504. Where trustees for any congregation, society, or body associated for religious or educational purposes hold land for the purpose of a chapel or meeting-house, or hold a house and land for a minister, or for a schoolhouse with schoolmaster's house and garden or playground, or for a college or seminary and grounds, or for rooms for meetings or transaction of business, the property on an appointment of new trustees vests in the new trustees jointly with the continuing trustees, if any, without conveyance; provided that the appointment is evidenced by a deed under the hand and seal of

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(*d*) For examples of express powers in charitable trust deeds, see Encyclopædia of Forms, Vol. III., pp. 340, 345, 350, in schemes, *ibid.*, pp. 406, 480.

(*e*) For a case where a power was apparently construed as strict, see *Foley* v. *Wontner* (1820), 2 Jac. & W. 245.

(*f*) *A.-G.* v. *Floyer* (1716), 2 Vern. 748, where there was a direction in a will that when six trustees were reduced to three others should be appointed, and the sole surviving trustee was allowed to appoint others; and see title TRUSTS AND TRUSTEES. See also *A.-G.* v. *Litchfield* (*Bishop*) (1801), 5 Ves. 825; *A.-G.* v. *Cuming* (1843), 2 Y. & C. Ch. Cas. 139; *Doe* v. *Roe* (1792), 1 Anst. 86, 91 (new trustees validly appointed before number reduced to figure named in trust deed); *A.-G.* v. *Cowper* (1785), 1 Bro. C. C. 439 (residential qualification construed as directory).

(*g*) *A.-G.* v. *Scott* (1750), 1 Ves. Sen. 413, 415.

(*h*) *Doe* v. *Godwin* (1822), 1 Dow. & Ry. (K. B.) 259.

(*i*) *Re Barnardo's Trust* (1907), *Times* (January 12, June 14, 1907).

(*k*) *A.-G.* v. *Clack* (1839), 1 Beav. 467.

(*l*) *A.-G.* v. *Lawson* (1866), 36 L. J. (CH.) 130, 135.

(*m*) *A.-G.* v. *Dalton* (1851), 20 L. J. (CH.) 569, 573, 574. As to usage, see also *A.-G.* v. *Pearson* (1817), 3 Mer. 353, 403; *A.-G.* v. *St. Cross Hospital* (1853), 17 Beav. 435.

(*n*) *Davis* v *Jenkins* (1814), 3 Ves. & B. 155, 159.

SECT. 2. Appointment of New Trustees.

the chairman of the meeting at which the appointment is made, executed at the meeting and attested by two witnesses (*o*).

The court may upon summons vest any land stock or chose in action in any new trustee of any charity over which the court would have jurisdiction upon action brought, whether the appointment was made by an instrument under a power or by the court (*p*).

SUB-SECT. 3.—*Appointments under Statutory Powers.*

Statutory Powers.

505. Appointments of new trustees of charities may in certain cases be made under powers conferred by statute.

Trustees of societies for religious or educational purposes.

Where any freehold, leasehold, copyhold, or customary property in England or Wales is held for certain purposes already mentioned (*q*) by trustees for any congregation, society, or body of persons associated for religious or educational purposes (*r*), and no mode of appointing new trustees has been prescribed, or the prescribed power has lapsed, the congregation, society, or body is empowered to appoint new trustees (*s*). Every such appointment must be evidenced by deed under the hand and seal of the chairman for the time being of the meeting at which the appointment is made, and the deed must be executed in the presence of the meeting and attested by two or more credible witnesses (*a*). Upon any such appointment the property vests without conveyance in the new trustees jointly with the continuing trustees, if any (*b*).

The above provisions are applicable to land acquired 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 purpose, when such land is held in trust for any of the following purposes: (1) a place for religious worship; (2) an endowment or provision for the maintenance of a place of religious worship or the minister thereof or provision for expenses connected therewith; (3) a burial ground (*c*); (4) a place for the education and training of students, whether for the ministry or for any other purpose; (5) a schoolhouse for a Sunday-school, day-school, or other school; (6) a residence for a minister

(*o*) Trustee Appointment Act, 1850 (13 & 14 Vict. c. 28), ss. 1, 3. A form of deed is contained in the schedule to the Act. The Act was extended to burial grounds by the Trustee Appointment Act, 1869 (32 & 33 Vict. c. 26); see note (*a*), *infra*.

(*p*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 39; R. S. C., Ord. 55, r. 13 A (b); and see title TRUSTS AND TRUSTEES. Whether the power to make vesting orders extends to an appointment of new trustees by resolution seems uncertain.

(*q*) For the purposes see p. 261, *ante*.

(*r*) The Act is intended to apply to bodies associated together for charitable purposes and holding their property for such purposes (*Bunting* v. *Sargent* (1879), 13 Ch. D. 330, 336).

(*s*) Trustee Appointment Act, 1850 (13 & 14 Vict. c. 28), s. 1. The Act is commonly known as Sir Morton Peto's Act. It is not clear whether trustees appointed under this Act take only the legal estate, or whether the Act also enables them to exercise the powers vested in the former trustees; see also *Bunting* v. *Sargent*, *supra*, where new trustees of an Independent chapel were appointed under the Act.

(*a*) *Ibid.*, s. 3; see also s. 7 of the Trustee Appointment Act, 1890 (53 & 54 Vict. c. 19).

(*b*) Trustee Appointment Act, 1850 (13 & 14 Vict. c. 28), s. 1.

(*c*) See Trustee Appointment Act, 1869 (32 & 33 Vict. c. 26).

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or schoolmaster, or for the caretaker of a place of religious worship, or of a schoolhouse or a meeting-house, or offices or other buildings for or in connection with religious or educational purposes (*d*).

Power under Trustee Act, 1893.

506. The power of appointing new trustees conferred by the Trustee Act, 1893, applies to all land acquired and held on trust for any purpose to which the Trustee Appointment Acts, 1850 to 1890, apply (*e*). This statutory power may be exercised either by the person or persons and in the manner provided by the statutory power, or by the person or persons and by resolution at a meeting or in any other mode in which, under the instrument creating the trust or any other instrument the appointment of a new trustee in place of a deceased trustee can be effected (*f*). But if a trustee can be appointed under a power in an instrument, as well as under a statutory power, no appointment may be made under the statutory power until twelve months from the date of the vacancy (*g*).

Any provisions in the trust deed requiring the appointment as trustees of persons specially qualified or nominated in a special manner must be regarded, whether the appointment is under the trust deed or a statutory power (*h*).

Vesting of property.

The provisions as to vesting contained in the Trustee Appointment Act, 1850 (*i*), apply also in the case of appointments under any statutory power (*k*).

Transfer by trustees to parish council.

507. Trustees (*l*) holding property for the purposes of a public recreation ground, or of public meetings, or of allotments (*m*), whether under Inclosure Acts or otherwise, for the benefit of the inhabitants of a rural parish or any of them, or for any public purpose connected with a rural parish, except for an ecclesiastical charity (*n*), may, with the approval of the Charity Commissioners, transfer the property to the parish council or their appointees upon the same trusts on which the trustees held the property (*o*). It is optional for the parish council to accept or decline the trust (*p*).

(*d*) Trustee Appointment Act, 1890 (53 & 54 Vict. c. 19), s. 2. This statute, also known as Fowler's Act, sets at rest certain doubts raised in *Re Hoghton Chapel* (1854), 2 W. R. 631, 632.

(*e*) Trustee Appointment Act, 1890 (53 & 54 Vict. 19), s. 3 (1); Trustee Act, 1893 (56 & 57 Vict. c. 53), ss. 10, 11, 12, and 37, repealing and re-enacting Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), ss. 31—34; *Re Coates to Parsons* (1866), 34 Ch. D. 370 (decided on the repealed s. 31 of the Act of 1881). See title TRUSTS AND TRUSTEES.

(*f*) Trustee Appointment Act, 1890 (53 & 54 Vict. c. 19), s. 3 (2).

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

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

(*i*) See p. 261, *ante*.

(*k*) Trustee Appointment Act, 1890 (53 & 54 Vict. c. 19), s. 4.

(*l*) Where churchwardens and overseers are trustees, see Local Government Act, 1894 (56 & 57 Vict. c. 73), ss. 5 (2) and 6 (1); and p. 258, *ante*. For the definition of "trustees," see *ibid.*, s. 75 (2).

(*m*) See title ALLOTMENTS, Vol. I., p. 339.

(*n*) See *Re Ross' Charity*, [1899] 1 Ch. 21.

(*o*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 14 (1). This Act does not affect the appointment of trustees of elementary schools (*ibid.*, s. 66), as to which see title EDUCATION. See also *ibid.*, s. 75 (2).

(*p*) *Ibid.*, s. 14 (1).

SECT. 2. Appointment of New Trustees.

508. Where the overseers of a rural parish as such are, either alone or jointly with any other persons, trustees of any parochial charity, the parish council may appoint others, not exceeding the number of the overseers, in their place as trustees (*q*). The parish council has similar powers of replacing churchwarden trustees in the case of charities which are not ecclesiastical (*r*).

Power of parish council to appoint representative trustees.

509. Where the governing body of a non-ecclesiastical parochial charity does not include any persons elected by the ratepayers, parochial electors, or inhabitants of the parish or appointed by the parish council or parish meeting, the parish council may appoint additional members of such governing body, who must not exceed the number allowed by the Charity Commissioners (*s*). If the management of the charity is in the hands of a sole trustee, the number may, subject to the approval of the Commissioners, be increased to three, one of the new trustees being nominated by the existing sole trustee and the other by the parish council or meeting (*t*). These powers do not prejudicially affect the powers of the Charity Commissioners to settle schemes for regulating any charity (*t*).

Powers formerly vested in vestry of rural parish.

In cases where the vestry of a rural parish were entitled under the trusts of any charity (*a*) other than an ecclesiastical charity (*b*) to appoint new trustees, the power of appointment is exercisable by the parish council, if any (*c*), or where there is no parish council by the parish meeting (*d*).

Tenure of office.

Trustees appointed under the provisions mentioned in this and the preceding paragraph continue in office for four years, but it is conceived that at the expiration of that period they are eligible for reappointment (*e*).

Operation of provisions.

The above provisions relating to the appointment of trustees, except so far as the power of appointment is transferred from the vestry, do not apply to any charity until forty years from the date of its foundation, or, in the case of a charity which before March 5, 1894, was founded by a donor or several donors any one of whom was living on that date, until March 5, 1934, without the consent of the surviving donor or donors (*f*).

(*q*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 14 (2). The legal interest in non-ecclesiastical charity property vested in churchwardens and overseers or overseers of rural parishes was transferred to the parish councils by *ibid.*, s. 5 (2) (c). As regards metropolitan charities, provision has been made for the substitution of nominees of the borough councils for overseers as trustees, see London Government Act, 1899 (62 & 63 Vict. c. 14), s. 23 (4).

(*r*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 14 (2). See *Re Ross' Charity*, [1899] 1 Ch. 21, C. A., where the parish council was held empowered to appoint trustees of a charity for providing garments for six old and poor widows of a parish in place of the churchwardens.

(*s*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 14 (3).

(*t*) *Ibid.*

(*a*) See *A.-G.* v. *Dalton* (1850), 20 L. J. (CH.) 569; *Re Hayle* (1862), 31 L. J. (CH.) 612.

(*b*) As to the meaning of "ecclesiastical charity," see *Re Ross' Charity*, *supra*.

(*c*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 14 (4).

(*d*) *Ibid.*, s. 19 (4).

(*e*) *Ibid.*, s. 14 (7).

(*f*) *Ibid.*, s. 14 (8).

Neither a trustee of a parochial charity nor his wife or children may receive any benefit from the charity while he is trustee (*g*).

SECT. 2. Appointment of New Trustees.

SUB-SECT. 4.—*Appointments by the Court.*

General jurisdiction of court.

510. The Chancery Division of the High Court (*h*), apart from any statutory jurisdiction, has an inherent jurisdiction to appoint new trustees of charities (*i*), even where there is in existence a power of appointment capable of being executed (*k*), and under this jurisdiction can appoint additional trustees (*l*). The Charities Procedure Act, 1812 (*m*), did not confer a new jurisdiction on the court. It merely allowed the former jurisdiction to be invoked in a summary way, *i.e.*, on petition (*n*).

Power to direct conveyance by representative of last trustee.

511. The court may also, where all the trustees of any estate (including leaseholds (*o*)) for any charity or charitable or public purpose are dead, on petition require the representative of the last surviving trustee to prove his title as trustee. In default the court is empowered to appoint new trustees and to order a conveyance to be made to them of the estate (*p*).

Under Trustee Act, 1893.

512. Whenever it is expedient to appoint a new trustee or new trustees of any trust, whether charitable or otherwise, and it is found inexpedient, difficult, or impracticable to do so without the assistance of the court, the court may make orders for the appointment of a new trustee or new trustees either in substitution for or in addition to any existing trustee or trustees, or although there is no existing trustee (*q*), and for vesting the property in the new trustee or trustees without any conveyance (*r*).

(*g*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 14 (9).

(*h*) As to the practice on appointment, see pp. 267, 332, 335, *post*.

(*i*) *A.-G.* v. *London Corporation* (1790), 3 Bro. C. C. 171; *A.-G.* v. *Stephens* (1834), 3 My. & K. 347; Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 28. The jurisdiction with regard to charities which was formerly exercised by the Court of Chancery was transferred by the Supreme Court of Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 34, to the Chancery Division of the High Court of Justice.

(*k*) *A.-G.* v. *Clack* (1839), 1 Beav. 467. In ordinary cases where a power of appointment is capable of being exercised, it is not proper to apply to the court (*Re Gibbon* (1882), 30 W. R. 287; *Re Higginbottom*, [1892] 3 Ch. 132).

(*l*) *Re Burnham National Schools* (1873), L. R. 17 Eq. 241, 246; *A.-G.* v. *Browne's Hospital, Stamford* (1889), 60 L. T. 288.

(*m*) Charities Procedure Act, 1812 (52 Geo. 3, c. 101), commonly called Romilly's Act; and see p. 330, *post*.

(*n*) *Ludlow Corporation* v. *Greenhouse* (1827), 1 Bli. (N. S.) 17, 64, H. L.

(*o*) *Re St. Antholin Trust Estates* (1838), 7 L. J. (CH.) 269.

(*p*) Charities Procedure Act, 1832 (2 Will. 4, c. 57), s. 3, re-enacting and extending s. 23 of stat. 11 Geo. 4 & 1 Will. 4, c. 60. For cases on these two statutes, see *Re Fowey Charities* (1841), 4 Beav. 225; *Re Nightingale's Charity* (1844), 3 Hare, 336; *A.-G.* v. *Randles* (1845), 8 Beav. 185; *Re Belke's Charity* (1849), 18 L. J. (CH.) 152.

(*q*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 25. This Act applies to charities; see *Re Coates* to *Parsons* (1886), 34 Ch. D. 370, a case decided on the corresponding section (s. 31) of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41). As to the appointment of a new trustee in place of a corporation which had become extinct, see *Re Conyers' Free Grammar School at Yarm* (1853), 10 Hare, Appendix I., p. v.; *Re No.* 9, *Bomore Road*, [1906] 1 Ch. 359 (a non-charity case); and title TRUSTS AND TRUSTEES.

(*r*) Trustee Act, 1893 (56 & 57 Vict. c. 53), ss. 26—36, 39; see *A.-G.* v. *Langham* (1887), L. T. Jo. 246, where the court vested charity lands in the Attorney-General, the trustee being lunatic.

SECT. 2. Appointment of New Trustees.

The court may appoint new trustees of charities where the old trustees have died (*s*), where an official person nominated as trustee no longer exists in his official character (*t*), and where the trustees disclaim or decline to act (*a*), or become bankrupt (*b*), or are abroad (*c*), or where the existing trustees are removed for misconduct (*d*).

Deed not enrolled.

513. The court may also appoint new trustees where the trust deed has not been enrolled but the existing trustees do not claim that the deed is therefore void (*e*).

Where a person and his heirs are trustees.

If the founder of a charity has constituted a person and his heirs as trustees, the court will not appoint new trustees while any heirs are living (*f*). Proof of heirship in such cases need not be strict (*g*).

Determination of trusteeship of corporation.

514. Where by virtue of the Municipal Corporations Acts, 1835 (*h*) and 1882 (*i*), the trusteeship of a corporation has been put an end to (*k*), the court has power to appoint new trustees (*l*). Upon any such appointment the legal estate in any land held on trust vests in the trustees for the time being without conveyance (*m*).

When vacancies will be filled.

515. Where it was not intended that the whole number of trustees originally appointed should always be kept up, the court before filling vacancies requires to be satisfied that the number of the existing trustees is insufficient (*n*). Thus, the court refused to appoint new trustees at the expense of the charity where ten trustees out of fifteen (*o*), and eleven out of thirteen (*p*), remained to execute

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(*s*) *Re Nightingale's Charity* (1844), 3 Hare, 336. As to the principles upon which the court proceeds in appointing trustees, see generally, *Re Tempest* (1866), 1 Ch. App. 485.

(*t*) *A.-G.* v. *Stephens* (1834), 3 My. & K. 347.

(*a*) *Re Beverley Charities* (1839), 9 L. J. (CH.) 91; and see *Re Lincoln Primitive Methodist Chapel* (1855), 1 Jur. (N. S.) 1011, where the appointment of the new trustees was confirmed by the court.

(*b*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 25 (1); and see title TRUSTS AND TRUSTEES.

(*c*) See *Re Lincoln Primitive Methodist Chapel, supra.*

(*d*) *Ex parte Greenhouse* (1815), 1 Madd. 92.

(*e*) *A.-G.* v. *Ward* (1848), 6 Hare, 477.

(*f*) See *A.-G.* v. *Gaunt* (1790), 3 Swan. 148, n.; *Ludlow Corporation* v. *Greenhouse* (1827), 1 Bli. (N. S.) 17, 80, 81, H. L.; *A.-G.* v. *Boucherett* (1855), 25 Beav. 116, 119, 120. Not so where a minister for the time being and his successors were appointed trustees by the founder (*A.-G. for Ireland* v. *Lee* (1870), 18 W. R. 247).

(*g*) *A.-G.* v. *Boucherett, supra*, at p. 121.

(*h*) 5 & 6 Will. 4, c. 76, s. 71, repealed and superseded by the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 133; see title LOCAL GOVERNMENT.

(*i*) 45 & 46 Vict. c. 50, s. 133.

(*k*) See p. 268, *post*.

(*l*) *Re St. John's Hospital, Bath* (1851), 3 Mac. & G. 235; *A.-G.* v. *Exeter Corporation* (1853), 2 De G. M. & G. 507; *Re Gloucester Charities* (1853), 10 Hare, Appendix I., p. iii.; *Re Northampton Charities* (1853), 22 L. J. (CH.) 611.

(*m*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 52), s. 133 (1).

(*n*) *Re Worcester Charities* (1847), 2 Ph. 284; *Re Shrewsbury Charities* (1849), 1 Mac. & G. 84; and see *Re Hereford Charities* (1842), 6 Jur. 289. Where the appointment was by donees of a power, JESSEL, M.R., apparently considered that it was the rule in charity cases to keep up the full number of trustees (*Re Cunningham and Bradley and Wilson*, [1877] W. N. 258).

(*o*) *Re Worcester Charities, supra.* See also *Re Gloucester Charities, supra; Re Coates to Parsons* (1886), 34 Ch. D. 370, 377, 378.

(*p*) *Re Marlborough School* (1843), 13 L. J. (CH.) 2.

the trusts. In other cases where two-thirds or three-quarters of the trustees remained (*q*), or where the intention was that the full number should be kept up (*r*), the court filled up the vacancies.

In making an order appointing new trustees (*s*), or on the settlement of a scheme (*t*), the court may give directions or provide for future appointments, even allowing the trustees to appoint others as occasion requires (*a*).

Provision for future appointments.

516. Under the Charitable Trusts Act, 1853, judges at chambers have jurisdiction, similar to that exercisable in a suit regularly instituted or upon petition, to appoint new trustees of a charity where the annual income of the charity exceeds £30 (*b*); and vesting orders may also be made at chambers (*c*). Under the rules of court applicable in ordinary cases, applications for the appointment of new trustees and for vesting orders may be made by summons (*d*).

Procedure.

517. Except where the Attorney-General makes the application *ex officio* (*e*), or the application is made in a suit or matter actually pending (*f*), applications to the court for the appointment of new trustees require the sanction of the Charity Commissioners (*g*) or of the Board of Education (*h*), as the case may be.

Sanction of Commissioners to application to court.

Orders of county courts for the appointment of charity trustees are not valid unless approved by the Charity Commissioners (*i*).

Orders by county courts.

When proper evidence is before the court that the proposed trustees are suitable and will accept the trust, the court makes the appointment without a reference (*k*).

(*q*) *Re Hereford Charities* (1842), 6 Jur. 289; *Re Bedford Charity*, cited 10 Hare, Appendix I., p. iv., n.

(*r*) *Davis* v. *Jenkins* (1814), 3 Ves. & B. 151, 158, 159. As to the number of new trustees appointed by the court, see generally, title TRUSTS AND TRUSTEES.

(*s*) *Re East Bergholt Town Lands* (1853), 2 Eq. Rep. 90.

(*t*) *Re Conyers' Free Grammar School at Yarm* (1853), 10 Hare, Appendix I., p. v.

(*a*) *Re Puckering's Charity* (1854), Seton, 6th ed., Judgments and Orders, 1302.

(*b*) Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 28; *Re Davenport's Charity* (1855), 4 De G. M. & G. 839; and see *R.* v. *Charity Commissioners*, [1897] 1 Q. B. 407; and p. 332, *post*. Where the income does not exceed £50 the like jurisdiction is given to county courts (Charitable Trusts Act, 1860 (23 & 24 Vict. c. 136), s. 11, amending the Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 32).

(*c*) *Re Davenport's Charity*, *supra*. In *Re Lincoln Primitive Methodist Chapel* (1855), 1 Jur. (N. S.) 1011, a petition was thought necessary. As to vesting property in charity trustees under the lunacy jurisdiction of the court, see Lunacy Act, 1890 (53 Vict. c. 5), s. 138.

(*d*) R. S. C., 1883, Ord. 55, r. 13 A; and see p. 335, *post*.

(*e*) Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 18.

(*f*) *Ibid.*, s. 17; *Re Bingley Free School* (1854), 2 Drew. 283; *Re Ford's Charity* (1855), 3 Drew. 324; *Re Jarvis' Charity* (1859), 1 Drew. & Sm. 97.

(*g*) Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 17; *Re Duncan* (1867), 2 Ch. App. 356.

(*h*) Board of Education Act, 1899 (62 & 63 Vict. c. 33), s. 2, and the Orders in Council made thereunder.

(*i*) Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 36. See *Re Donington-on-Baine Church Estate* (1860), 6 Jur. (N. S.) 290.

(*k*) See Seton, Judgments and Orders, 6th ed., 1307, for form of order. Formerly a reference was invariably directed (*A.-G.* v. *Arran* (*Earl*) (1820), 1 Jac. & W. 229; *Re Shrewsbury School* (1849), 1 Mac. & G. 85). See also *Re Norwich Charities* (1837), 2 My. & Cr. 275.

SECT. 2. Appointment of New Trustees.

518. The court has no power to appoint judicial trustees for any charity, whether exempted from or subject to the Charitable Trusts Acts (*l*).

SUB-SECT. 5.—*Appointments by the Charity Commissioners.*

Jurisdiction of Commissioners.

519. The Charity Commissioners have, subject to certain restrictions (*m*), jurisdiction similar to that possessed by judges of the Chancery Division sitting at chambers, or by county courts (*n*), to make orders appointing trustees of charities and vesting in them the charity estate (*o*). Under these powers they may appoint additional trustees (*p*). One calendar month's public notice of the proposed order must be given prescribing a reasonable time within which objections may be made (*q*). An appeal lies to the Chancery Division of the High Court against any order appointing new trustees (*r*), but the court will not interfere except in cases of gross miscarriage (*s*).

Appointments of new trustees by the Commissioners are generally less costly than when effected under a power in the instrument of foundation or by the court. In consequence the Commissioners often make appointments under their statutory powers, notwithstanding the existence of a power of appointment which might be exercised (*t*).

Practice of Commissioners.

When appointing trustees on the settlement of a scheme, the practice of the Commissioners is to introduce a representative element, and to arrange that the representative element shall constitute a majority of the trustees. In framing new schemes they sometimes increase the number of the trustees, and sometimes reduce it (*u*). Provision is also frequently made for *ex officio* and co-optative trustees (*a*).

SECT. 3.—*Removal of Trustees.*

SUB-SECT. 1.—*By the Court.*

General jurisdiction of court.

520. In all cases requiring such a remedy the court has jurisdiction to remove existing trustees and substitute new ones. This jurisdiction is merely ancillary to the principal duty of the court, which is the protection of trusts (*b*), and does not depend upon the

(*l*) Judicial Trustees Act, 1896 (59 & 60 Vict. c. 35), s. 6 (2); and see title TRUSTS AND TRUSTEES.

(*m*) See Charitable Trusts Act, 1860 (23 & 24 Vict. c. 136), ss. 3—6, and p. 315, *post*.

(*n*) As to the jurisdiction of the court, see pp. 265 *et seq.*, *ante*.

(*o*) Charitable Trusts Act, 1860 (23 & 24 Vict. c. 136), s. 2; and see note (*m*), *supra*. The powers of the Charity Commissioners of appointing trustees of educational charities are now transferred to the Board of Education (Board of Education Act, 1899 (62 & 63 Vict. c. 33), s. 2, and the Orders in Council made thereunder); see title EDUCATION.

(*p*) *Re Burnham National Schools* (1873), L. R. 17 Eq., p. 246.

(*q*) Charitable Trusts Act, 1860 (23 & 24 Vict. c. 136), s. 6.

(*r*) *Ibid.*, s. 8; and see p. 316, *post*.

(*s*) *Re Burnham National Schools*, *supra*.

(*t*) See Tudor, Law of Charities and Mortmain, 4th ed., p. 595.

(*u*) See Encyclopædia of Forms, Vol. III., pp. 478, 479; Tudor, Law of Charities and Mortmain, p. 973.

(*a*) See Encyclopædia of Forms, Vol. III., pp. 478, 479.

(*b*) *Letterstedt* v. *Broers* (1884), 9 App. Cas. 371, 386. For form of decree removing a trustee, see *A.-G.* v. *Drummond* (1842), 3 Dr. & War. 162.

existence in the instrument of foundation of an express power of removal (*c*).

Removal for breach of trust.

521. Thus, where trustees have wilfully committed breaches of trust, as by converting a dissenting chapel to the use of a sect contrary to the founder's wishes (*d*), transferring the property of one charity to another (*e*), misapplying increased revenues (*f*), or allowing Unitarians to participate in a charity founded for Protestant dissenters (*g*), the court has removed them. Corporations who are trustees of charities may likewise be removed for breaches of trust (*h*). But charity trustees are not necessarily removed where they have innocently committed a breach of trust (*i*).

Cost of proceedings for removal.

Trustees who, having committed breaches of trust, refuse to retire voluntarily, may be made to pay the costs of proceedings necessary for the appointment of other trustees (*k*).

Partial removal.

Where inconvenience as regards the receipt of dividends arose from the trustees being holders of annual offices, the court appointed others to hold the funds, but allowed the office-holders to retain certain rights of nomination (*l*). So, a trustee who was lessee of part of the charity estate in defiance of the provisions of the scheme was ordered to resign his office or give up his lease (*m*).

Insufficient ground for removal.

522. A reason sufficient to prevent the appointment of a trustee is not necessarily a sufficient ground for removing an existing trustee (*n*). So, where no breach of trust has been committed, trustees, if otherwise unexceptionable, are not removed merely on the ground of not possessing the required religious (*o*) or residential (*p*) qualification, or on the ground of temporary absence from the United Kingdom (*q*), or because they were appointed

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(*c*) As to exercise of express powers of removal, see *A.-G.* v. *Pearson* (1817), 3 Mer. 353, 412—415.

(*d*) *A.-G.* v. *Pearson* (1835), 7 Sim. 290, 309; *A.-G.* v. *Aust* (1865), 13 L. T. 235; see also *A.-G.* v. *Munro* (1848), 2 De G. & Sm. 122, where a minister of the Established Church of Scotland seceded from that body to the Free Church, and was removed from his charge; *A.-G.* v. *Anderson* (1888), 57 L. J. (CH.) 543.

(*e*) *Newsome* v. *Flowers* (1861), 30 Beav. 461.

(*f*) *Coventry Corporation* v. *A.-G.* (1720), 7 Bro. Parl. Cas. 235.

(*g*) *Shore* v. *Wilson* (1842), 9 Cl. & Fin. 355, H. L.; *Drummond* v. *A.-G.* (1849), 2 H. L. Cas. 837, 861.

(*h*) *A.-G.* v. *Clarendon* (*Earl*) (1811), 17 Ves. 491, 499; see also *A.-G.* v. *Foundling Hospital* (*Governors*) (1793), 2 Ves. 42, 46; *A.-G.* v. *Dixie* (1805), 13 Ves. 519; *Ex parte Kirkby Ravensworth Hospital* (1808), 15 Ves. 305, 314; *Ex parte Greenhouse* (1815), 1 Madd. 92.

(*i*) *A.-G.* v. *Stafford Corporation* (1740), Barn. (CH.) 33; *A.-G.* v. *Caius College* (1837), 2 Keen, 150.

(*k*) *A.-G.* v. *Murdoch* (1856), 2 K. & J. 571.

(*l*) *Ex parte Blackburne* (1820), 1 Jac. & W. 297.

(*m*) *Foord* v. *Baker* (1859), 27 Beav. 193.

(*n*) *A.-G.* v. *Clapham* (1853), 10 Hare, 540, 613 (trustees of a chapel).

(*o*) *Baker* v. *Lee* (1860), 8 H. L. Cas. 495, 513; *A.-G.* v. *Clifton* (1863), 32 Beav. 596, 601; *A.-G.* v. *Limerick* (*Bishop*) (1870), 5 I. R. Eq. 403.

(*p*) *A.-G.* v. *Clarendon* (*Earl*), *supra*; *A.-G.* v. *Stamford* (*Earl*) (1839), 1 Ph. 737, 747, 748; and see *A.-G.* v. *Clifton*, *supra*, at p. 601.

(*q*) *Re Moravian Society* (1858), 4 Jur. (N. S.) 703.

SECT. 3. **Removal of Trustees.**

irregularly (*r*). Nor is bankruptcy necessarily (*s*), though it is usually (*t*), a ground for removal.

Removal by county court.

523. Orders of a county court for the removal of charity trustees are not valid unless approved by the Charity Commissioners (*u*).

SUB-SECT. 2.—*By the Charity Commissioners.*

Removal by Charity Commissioners.

524. The removal of a trustee, when necessary, is as a rule effected by an order of the Charity Commissioners (*a*), of which one calendar month's notice must be given to the trustee and also to the public (*b*).

The Commissioners may not remove any trustee on the ground only of his religious belief (*c*).

SECT. 4.—*Duties of Ordinary Trustees.*

Protection of trust property.

525. The primary duty of charity trustees is the protection of the trust property (*d*). But they are not bound to look with more prudence to the affairs of the charity than to their own (*e*). The destruction of charity property is a gross breach of trust (*f*).

Retention of property.

526. It is improper conduct on the part of an executor not to inform charitable beneficiaries of the existence of a bequest in their favour (*g*).

Even if the proper beneficiaries are not ascertainable or the particular charitable object has failed, it is improper for the trustees to retain charitable funds in their hands (*h*). Similarly the owner of land subject to a charitable rent-charge must pay or account for

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(*r*) *A.-G.* v. *Cuming* (1843), 2 Y. & C. Ch. Cas. 139, 150, 151; *A.-G.* v. *Daugars* (1864), 33 Beav. 621.

(*s*) *Archbold* v. *Charitable Bequests Commissioners for Ireland* (1849), 2 H. L. Cas. 440.

(*t*) *Bainbrigge* v. *Blair* (1839), 1 Beav. 495; *Re Roche* (1842), 1 Con. & Law. 306; *Re Barker* (1875), 1 Ch. D. 43.

(*u*) Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 36.

(*a*) Charitable Trusts Act, 1860 (23 & 24 Vict. c. 136), s. 2. As to the jurisdiction of the Commissioners, see further, p. 314, *post*. As to the removal by the Commissioners in certain cases of administering trustees upon whom is cast the duty of selling land devised to charity, see Mortmain and Charitable Uses Act, 1891 (54 & 55 Vict. c. 73), s. 6; and p. 136, *ante*.

(*b*) Charitable Trusts Act, 1860 (23 & 24 Vict. c. 136), s. 6.

(*c*) *Ibid.*, s. 4.

(*d*) Duke on Charitable Uses, 116. See also title TRUSTS AND TRUSTEES, and as to the duty of charity trustees in dealing with the trust property, see p. 216, *ante*.

(*e*) *A.-G.* v. *Dixie* (1805), 13 Ves. 534; *Learoyd* v. *Whiteley* (1887), 12 App. Cas. 727, 733. See also *A.-G.* v. *Kerr* (1840), 9 L. J. (CH.) 194; and title TRUSTS AND TRUSTEES.

(*f*) *Ex parte Greenhouse* (1815), 1 Madd. 92, 108, where the trustees of a chapel pulled it down.

(*g*) *A.-G.* v. *Alford* (1855), 4 De G. M. & G. 843, 852. Compare the rule in the case of non-charitable legacies that an executor is under no obligation to give notice of a legacy to the legatee (*Re Lewis*, [1904] 2 Ch. 656, C. A.; *Re Mackay*, [1906] 1 Ch. 25; and see title EXECUTORS AND ADMINISTRATORS).

(*h*) *Aylet* v. *Dodd* (1741), 2 Atk. 238; *Incorporated Society* v. *Price* (1844), 1 Jo. & Lat. 498, 500 (trusts to pay salary of schoolmasters and maintain schools and schools discontinued); *A.-G.* v. *Cambridge Corporation* (1836), 5 L. J. (CH.) 357.

the charge, even if there happens to be no person or body answering the description of the charity (*i*).

527. Observance of the trust, whether contained in a deed, will, or scheme, is also incumbent upon the trustees (*k*).

Where strict observance impracticable.

If for any reason the purpose of the trust cannot be efficiently accomplished without departing from the terms of the trust, it is the duty of the trustees to apply to the court (*l*) or to the Charity Commissioners (*m*) for directions or a scheme. *A cy-près* application of a charitable trust, however desirable, must not be made by trustees on their own authority (*n*), even where they are fortified by the consent and direction of the original subscribers or their representatives (*o*).

Misapplication of funds.

It is therefore a breach of trust for trustees to divert a charitable fund given for one object to another not contemplated by the donor (*p*), or for a trustee of more than one charity to mix the funds and apply them indiscriminately for the charities (*q*). So too it is a breach of trust for trustees to vary the specific mode of application directed by the founder (*r*). If capital has been applied for income purposes, it should if possible be replaced out of future income (*s*).

It is a breach of trust to extend the benefits of a charity intended

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(*i*) *Aylet* v. *Dodd* (1741), 2 Atk. 238; *Incorporated Society* v. *Price* (1844), 1 Jo. & Lat. 498, 500; *A.-G.* v. *Bolton* (1796), 3 Anst. 820; *A.-G.* v. *West* (1858), 27 L. J. (CH.) 789. It is conceived that the owner of land subject to a rent-charge, charitable or otherwise, is not a trustee for the owner of the rent-charge; see title RENT-CHARGES AND ANNUITIES.

(*k*) See Duke on Charitable Uses, 116; *Andrews* v. *M'Guffog* (1886), 11 App. Cas. 313, 329.

(*l*) *Re Manchester School Case* (1867), 2 Ch. App. 497; *Andrews* v. *M'Guffog*, *supra*.

(*m*) See p. 182, *ante*.

(*n*) *A.-G.* v. *Coopers' Co.* (1812), 19 Ves. 187; *A.-G.* v. *Vivian* (1826), 1 Russ. 226, 237; *A.-G.* v. *Bushby* (1857), 24 Beav. 299; *Ward* v. *Hipwell* (1862), 3 Giff. 547; *Re Campden Charities* (1881), 18 Ch. D. 310, 328, 329, C. A.; and see p. 191, *ante*.

(*o*) *A.-G.* v. *Kell* (1840), 9 L. J. (CH.) 389, where a fund was raised by subscriptions of the borough inhabitants to establish a pesthouse, which, when it ceased to be used for that purpose, was, in contravention of the trust, sold by the direction of a general meeting of the inhabitants, and the money applied to other purposes; see also *Man* v. *Ballet* (1682), 1 Vern. 43.

(*p*) *A.-G.* v. *Brandreth* (1842), 1 Y. & C. Ch. Cas. 200, where a gift for the poor of one parish was wrongfully applied in aid of the poor of another parish; *Re St. John the Evangelist, D'Aungre's Charity* (1888), 4 T. L. R. 765, where funds given for the repair of one church were applied for another. See also Duke on Charitable Uses, 116; *Wivelescom's Case* (1629), Duke on Charitable Uses, 94; *A.-G.* v. *Vivian*, *supra*; *A.-G.* v. *Goldsmiths' Co.* (1833), Coop. Pr. Cas. 292, 309; *Re Church Estate Charity, Wandsworth* (1871), 6 Ch. App. 296.

(*q*) *A.-G.* v. *Newbury Corporation* (1838), Coop. Pr. Cas. 72, 77; *Andrews* v. *M'Guffog*, *supra*. The rule is different where one fund is given for several charities (*A.-G.* v. *Geary* (1817), 3 Mer. 513).

(*r*) *E.g.*, a gift for the benefit of decayed householders cannot be applied for the poor of the parish generally (*Ex parte Fowlser* (1819), 1 Jac. & W. 70). Nor can a fund to provide a preacher be applied in aid of the poor (Duke on Charitable Uses, 116), or property devised to discharge a tax be diverted to the use of certain poor persons (*A.-G.* v. *Bushby*, *supra*), or a grammar school, founded for classical teaching, be used for instruction in English, writing, and arithmetic, or its surplus revenue be applied for enlarging the school chapel for the use of the town (*A.-G.* v. *Mansfield (Earl)* (1823), 2 Russ. 501).

(*s*) *Andrews* v. *M'Guffog*, *supra*, at p. 329.

SECT. 4. Duties of Ordinary Trustees.

exclusively for members of one religion or sect to persons holding different religious beliefs (*t*). This rule applies equally in the case of charities not established for purely religious purposes, if an intention to that effect is expressed (*u*), but not otherwise (*a*).

Chapels established for particular forms of worship or doctrinal teaching must not be converted by the trustees to other forms (*b*), even with the consent of the congregation (*c*). Congregations of the same sect may, however, differ upon non-fundamental (*d*) doctrines and yet remain proper objects of the same charity (*e*).

Alteration of regulations.

Though it is a breach of trust to alter or depart from the trusts of the foundation, it is competent for a congregation, or the majority if power is given to it, in matters not involving a contravention of the trusts, to make new regulations or alter those in existence (*f*).

Liberal construction of trust.

A charitable trust will, however, be construed liberally and an expenditure will be allowed though not within a narrow reading of the words declaring the trust (*g*). So where a charity was established for the benefit of a guild and its poor brethren, the trustees committed no breach of trust by subscribing out of the trust funds towards the erection of a school in return for a right to have a number of boys educated there gratuitously (*h*).

Over-payment by trustee.

Where a trustee of charity property inadvertently pays more than the income of the property to the charity he has no claim against the charity for reimbursement (*i*).

(*t*) *Shore* v. *Wilson* (1842), 9 Cl. & Fin. 355, H. L.; and *A.-G.* v. *Calvert* (1857), 26 L. J. (CH.) 682 (charity restricted to members of Church of England); see also *Baker* v. *Lee* (1860), 8 H. L. Cas. 495 (non-eligibility of dissenters as trustees of Church of England charity); *A.-G.* v. *Murdoch* (1850), 19 L. J. (CH.) 3; *A.-G.* v. *Anderson* (1888), 57 L. J. (CH.) 543, 550 (charities confined to Protestant dissenters and Presbyterians); *Shore* v. *Wilson, supra; Drummond* v. *A.-G.* (1849), 2 H. L. Cas. 837 (Unitarians excluded).

(*u*) *A.-G.* v. *Calvert, supra*, at p. 686.

(*a*) *Ibid.*; *Re Ross' Charity*, [1899] 1 Ch. 21.

(*b*) *Craigdallie* v. *Aikman* (1812), 1 Dow, 1; *A.-G.* v. *Pearson* (1817), 3 Mer. 353, 400, 418, 419; *Foley* v. *Wontner* (1820), 2 Jac. & W. 245, 247; *Dill* v. *Watson* (1836), 2 Jo. Ex. Ir. 48; *Milligan* v. *Mitchell* (1837), 7 L. J. (CH.) 37; *A.-G.* v. *Munro* (1848), 2 De G. & Sm. 122; *A.-G.* v. *Wilson* (1848), 16 Sim. 210; *Free Church of Scotland (General Assembly)* v. *Overtoun (Lord)*, [1904] A. C. 515, 613 *et seq.* But see *Westwood* v. *McKie* (1869), 21 L. T. 165.

(*c*) *Broom* v. *Summers* (1840), 10 L. J. (CH.) 71; *A.-G.* v. *Welsh* (1844), 4 Hare, 572; *A.-G.* v. *Murdoch, supra; A.-G.* v. *Rochester Corporation* (1854), 5 De G. M. & G. 797; *Ward* v. *Hipwell* (1862), 2 Giff. 547; *A.-G.* v. *Aust* (1865), 13 L. T. 235; and see *A.-G.* v. *Anderson, supra.* As to the effect of acquiescence in a change of doctrine, see *Cairncross* v. *Lorimer* (1860), 3 Macq. 827.

(*d*) It is for the court, not for the trustees, to decide what doctrines are fundamental and must be held by congregations to entitle them to participate in a charity (*Newsome* v. *Flowers* (1861), 10 W. R. 26).

(*e*) *A.-G.* v. *Gould* (1860), 30 L. J. (CH.) 77; *A.-G.* v. *Etheridge* (1862), 32 L. J. (CH.) 161, cases relating to the doctrines of strict or free communion, both being admissible among the sect of Particular Baptists.

(*f*) *Milligan* v. *Mitchell* (1837), 7 L. J. (CH.) 37; *A.-G.* v. *Murdoch, supra; A.-G.* v. *Gould, supra; A.-G.* v. *Anderson, supra*, at p. 549.

(*g*) *A.-G.* v. *Stamford Corporation* (1747), 2 Swan. 591; *Wilkinson* v. *Malin* (1832), 2 Tyr. 544, 570; *A.-G.* v. *Foyster* (1792), 1 Anst. 116, 122.

(*h*) *Anderson* v. *Glasgow* (*Wrights*) (1865), 12 L. T. 805.

(*i*) *A.-G.* v. *Gibbs* (1847), 1 De G. & Sm. 156, 160.

SECT. 4. Duties of Ordinary Trustees.

528. Trustees of charities not exempted from the operation of the Charitable Trusts Acts (*j*) are required to keep full and true accounts of all money received and paid on account of the charity (*k*) and to furnish annual accounts to the Charity Commissioners of (1) the gross income arising, or which ought to have arisen, from the endowments, (2) all balances in hand at the commencement of the year and all moneys received during the year on account of the charity, (3) all payments for the year, and (4) all moneys owing to or from the charity; such accounts to be certified by one or more of the trustees, and audited by the auditor (if any) of the charity (*l*).

Annual accounts.

A copy of the annual accounts of non-ecclesiastical rural parochial charities must also be delivered to the chairman of the parish meeting (*m*), and of non-ecclesiastical parochial charities in the county of London to the borough council of the parish concerned (*n*). In the case of ecclesiastical parochial charities a copy must be delivered to the churchwardens to be presented to the vestry (*o*).

Delivery of copies of accounts of parochial charities.

The fact that a fund for the time being devoted to charitable purposes may subsequently be diverted to non-charitable objects (*p*), or that the trustees have a discretionary power to apply the corpus as income, does not render them less liable to account (*q*).

529. Charity trustees must also return written answers to any questions or inquiries addressed to them by the direction of the Charity Commissioners (*r*).

Answers to inquiries of Charity Commissioners.

Trustees refusing to account to the Charity Commissioners or to reply to their inquiries are guilty of contempt of court (*s*).

SECT. 5.—*Powers of Ordinary Trustees.*

530. The question as to who are entitled to exercise a power given to trustees of prescribing the mode of applying a charitable gift is one of construction (*t*). Where a power is exercisable at the discretion of a particular person, another cannot exercise it (*u*).

Power to prescribe mode of application.

(*j*) As to what charities are exempt, see p. 304, *post*.

(*k*) Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 61.

(*l*) *Ibid.*, s. 10; Charitable Trusts Amendment Act, 1855 (18 & 19 Vict. c. 124), ss. 44, 45; see *Ogilvie* v. *Littleboy* (1897), 13 T. L. R. 399. The Charity Commissioners supply special forms for rendering statements of accounts; see Encyclopædia of Forms, Vol. I., "Accounts," pp. 126—151. Independently of the Charitable Trusts Acts, charity trustees must account to any person entitled to demand an account (*A.-G.* v. *Gibbs* (1847), 1 De G. & Sm. 156).

(*m*) Charitable Trusts Amendment Act, 1855 (18 & 19 Vict. c. 124), s. 44; Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 14 (6).

(*n*) London Government Act, 1899 (62 & 63 Vict. c. 14), s. 31 (2).

(*o*) Charitable Trusts Amendment Act, 1855 (18 & 19 Vict. c. 124), s. 44.

(*p*) *Re Tamworth School* (*Sir Robert Peel's*), *Ex parte Charity Commissioners* (1868), 3 Ch. App. 543.

(*q*) *Re Gilchrist Educational Trust*, [1895] 1 Ch. 367.

(*r*) Charitable Trusts Act, 1853 (16 & 77 Vict. c. 137), s. 10.

(*s*) *Ibid.*, s. 14; *Re Gilchrist Educational Trust*, *supra*; see also *Re St. John Street Wesleyan Methodist Chapel*, *Chester*, [1893] 2 Ch. 618; *Re St. Bride's*, *Fleet Street*, [1877] W. N. 149, C. A. For contempt of court, see title CONTEMPT AND ATTACHMENT.

(*t*) *Crawford* v. *Forshaw*, [1891] 2 Ch. 261, 267, 268, C. A.; and see the non-charitable case, *Re Smith*, [1904] 1 Ch. 139.

(*u*) *Re M'Auliffe*, [1895] P. 290; *Re Lalor* (1902), 85 L. T. 643. As to the powers of trustees generally, see Trustee Act, 1893 (56 & 57 Vict. c. 53), ss. 17—24; and title TRUSTS AND TRUSTEES.

SECT. 5. **Powers of Ordinary Trustees.**

A power given to executors is exercisable by continuing (*a*) or surviving executors (*b*), but not by one who renounces (*c*), or by persons subsequently appointed trustees (*d*).

Powers given to trustees.

Powers given to trustees, even to a testator's "said trustees" who were named earlier in the will, are *primâ facie* regarded as annexed to the office and therefore exercisable by the trustees for the time being (*e*).

Where a power of selection is given to a trustee with general or some objects pointed out, and the trustee fails to execute the trust, the power of disposition is exercised by the court (*f*).

Exercise of discretionary powers.

531. Trustees invested with discretionary powers must exercise them honestly and with a fair consideration of the subject (*g*). They need not give reasons for their actions (*h*). Where they state reasons which do not justify their conclusions (*i*), or where they have acted corruptly or improperly (*k*), the court interferes. But the court is generally reluctant to interfere with the discretion of trustees by means of schemes (*l*), though in order to retain some control over the trustees it may refuse to dismiss an action seeking the interference of the court (*m*), or may refuse to order payment out of a fund in court to trustees without an affidavit by them stating how they propose to apply the money (*n*).

Restricted discretion.

The discretion may apply only to part of the charitable gift (*o*), or be otherwise fettered by directions (*p*) or implications (*q*) in the instrument.

(*a*) *Crawford* v. *Forshaw*, [1891] 2 Ch. 261, C. A.

(*b*) *A.-G.* v. *Glegg* (1738), Amb. 584.

(*c*) *A.-G.* v. *Fletcher* (1835), 5 L. J. (CH.) 75.

(*d*) *Hibbard* v. *Lamb* (1756), Amb. 309.

(*e*) *Re Smith*, [1904] 1 Ch. 139; see *Ex parte Blackburne* (1820), 1 Jac. & W. 297, where the selection of objects was left with the persons nominated by the testator as trustees, though new trustees were appointed; see also Trustee Act, 1893 (56 & 57 Vict. c. 53), ss. 10 (3), 22, 37; Conveyancing Act, 1882 (45 & 46 Vict. c. 39), s. 6.

(*f*) *Moggridge* v. *Thackwell* (1792), 1 Ves. 464, 475; (1803) 7 Ves. 36, 86; see also p. 169, *ante*.

(*g*) *Re Wilkes' (Beloved) Charity* (1851), 20 L. J. (CH.) 588, 597; and see p. 166, *ante*.

(*h*) *Ibid.*

(*i*) *Ibid.* See, however, *A.-G.* v. *Mosley* (1848), 17 L. J. (CH.) 446, where it was said that a discretionary consent might be withheld for an insufficient reason or none.

(*k*) *A.-G.* v. *Glegg, supra*; *A.-G.* v. *Harrow School (Governors)* (1754), 2 Ves. Sen. 551; *Waldo* v. *Caley* (1809), 16 Ves. 206, 212; *Ex parte Berkhampstead Free School* (1813), 2 Ves. & B. 134, 138; *Re Bedford Charity* (1833), 5 Sim. 578; *A.-G.* v. *Boucherett* (1858), 25 Beav. 116; see also *A.-G.* v. *Sherborne Grammar School* (1854), 18 Beav. 256 (discretion of visitor).

(*l*) *Powerscourt* v. *Powerscourt* (1824), 1 Mol. 616 (trust of a temporary nature); *A.-G.* v. *Gaskell* (1831), 9 L. J. (O. S.) (CH.) 188; *Re Lea* (1887), 34 Ch. D. 528, where no permanent charity was intended. In *Re Hurley* (1900), 17 T. L. R. 115, though the trustees were given a discretionary power, a scheme was ordered by the court.

(*m*) *A.-G.* v. *Harrow School (Governors)*, *supra*.

(*n*) *Hagan* v. *Duff* (1889), 23 L. R. Ir. 516.

(*o*) *Re Hall's Charity* (1851), 14 Beav. 115.

(*p*) *Armitage* v. *Gordon* (1899), 15 T. L. R. 453, where, after giving his trustees an unlimited discretion to distribute a fund among charities, the testator expressed a desire that certain named institutions should benefit most; and compare *Re Whitehead* (1908), *Times* (October 14, 1908), and p. 165, *ante*.

(*q*) *Re Delmar Charitable Trust*, [1897] 2 Ch. 163.

A discretionary power of selection is sometimes exercisable by will (*r*)

532. In the absence of fraud, wilful concealment or misrepresentation, trustees of charities may obtain immunity from liability by applying to the Charity Commissioners for advice or direction respecting the charity or its administration and acting upon such advice (*s*). Advice of Commissioners.

533. Trustees of charities exempted from the operation of the Charitable Trusts Acts (*t*) may apply to the Commissioners to have the benefits of those Acts extended to them (*a*). Exempted charities.

534. Trustees or other persons having the custody of any deeds or muniments of or relating to charities may deposit the same for security in a repository provided by the Charity Commissioners (*b*). Deposit of deeds.

535. On obtaining an order of the Commissioners trustees may transfer any stock or pay any money to the official trustees of charitable funds in trust for any charity (*c*). Transfer to official trustees.

536. Payment into court of charity funds may be made by trustees without the consent of the Charity Commissioners (*d*). As a rule, however, the proper course is to apply either to the court or to the Commissioners for a scheme and not to pay the money into court (*e*). Payment into court.

537. Apart from the powers exercisable by a majority of trustees under the Charitable Trusts Acts, in trusts of a public or charitable nature a majority of the trustees acting within the limits of the instrument of foundation (*f*) may as a rule bind the minority (*g*). This rule, however, does not apply in the case of special powers (*h*). Powers of majority of trustees.

(*r*) *Copinger* v. *Crehane* (1877), 11 I. R. Eq. 429.

(*s*) Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 16; see also p. 310, *post*.

(*t*) As to what charities are exempt, see p. 304, *post*.

(*a*) Charitable Trusts Act, 1869 (32 & 33 Vict. c. 110), s. 14. As to exempted charities, see p. 304, *post*.

(*b*) Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 53. As to the custody of deeds etc. belonging to parochial charities, see Local Government Act, 1894 (56 & 57 Vict. c. 73), ss. 17 (8), 36 (3), 38 (3), 40; *Lewis* v. *Poole*, [1898] 1 Q. B. 164. As to the right of the Charity Commissioners to retain documents relating to charities, see Charitable Trusts Act, 1860 (23 & 24 Vict. c. 136), s. 19.

(*c*) Charitable Trusts Amendment Act, 1855 (18 & 19 Vict. c. 134), s. 22.

(*d*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 42; *Re St. Giles' and St. George's, Bloomsbury* (1858), 27 L. J. (CH.) 560 (decided under a similar clause in 10 & 11 Vict. c. 96). As to investment of moneys paid into court, see p. 241, *ante*.

(*e*) See *Re Poplar and Blackwall Free School* (1878), 8 Ch. D. 545, 546.

(*f*) *Ward* v. *Hipwell* (1862), 3 Giff. 547.

(*g*) *Doe* v. *Godwin* (1822), 1 Dow. & Ry. (K. B.) 259 (conveyance by majority); but see *Re Ebsworth and Tidy's Contract* (1889), 42 Ch. D. 23, C. A., where it was held that without statutory authority a majority of trustees could not pass the legal estate if vested in all; *A.-G.* v. *Shearman* (1839), 2 Beav. 104 (lease); *Doe* v. *Roe* (1792), 1 Anst. 86 (action of ejectment); *Withnell* v. *Gartham* (1795), 6 Term Rep. 388; *Wilkinson* v. *Malin* (1832), 2 Tyr. 544; *Re Butterwick Free School* (1851), 15 Jur. 913 (appointment of schoolmasters); *A.-G.* v. *Scott* (1750), 1 Ves. Sen. 413, 416; *A.-G.* v. *Cuming* (1843), 2 Y. & C. Ch. Cas. 139 (election of minister of Established Church by advowson trustees); *Davis* v. *Jenkins* (1814), 3 Ves. & B. 151, 159; *Perry* v. *Shipway* (1859), 4 De G. & J. 353; *A.-G.* v. *Lawson* (1866), 36 L. J. (CH.) 130 (appointment and dismissal of minister of dissenting chapel).

(*h*) See *Re Congregational Church, Smethwick*, [1866] W. N. 196.

SECT. 5. **Powers of Ordinary Trustees.**

Sale etc. of property.

Where trustees or administrators of a charity have power to determine on any sale, exchange, partition, mortgage, lease or other disposition of the charity property, a majority of them who are present at a meeting of their body duly constituted and vote on the question can carry out any of the above transactions as effectively as if all joined, including the official trustee of charity lands (*i*).

Legal proceedings.

A majority may also, with the consent of the Charity Commissioners, institute and maintain legal proceedings (*k*).

Quorum of trustees.

Schemes settled by the court (*l*) or Charity Commissioners (*m*) may contain a provision that a certain number of trustees shall constitute a *quorum*.

The powers conferred by the Agricultural Holdings Act, 1908 (*n*), on landlords in respect of charging lands with the amount paid or expended as compensation for improvements (*o*), are not exercisable by trustees for charitable purposes except with the approval in writing of the Charity Commissioners or of the Board of Education, as the case may require (*p*).

SECT. 6.—*Liabilities of Ordinary Trustees.*

Presumption against breach of trust.

538. It is presumed, in the absence of evidence to the contrary, that trustees have faithfully discharged their duty (*q*).

Misapplication of trust money.

Charity trustees, whether a corporate body or individuals, using trust moneys for their own purposes (*r*), or for purposes not in accordance with the trusts (*a*), occasioning the destruction of the trust property (*b*), improperly alienating it (*c*), or negligently allowing others to misappropriate it (*d*), are strictly liable to make good any deficiency or loss.

Mistake honestly made.

Though the court is severe with trustees who wilfully, corruptly, or negligently misapply the trust property, it acts leniently where

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(*i*) Charitable Trusts Act, 1869 (32 & 33 Vict. c. 110), s. 12. As to dealings by trustees with the charity estate, see further p. 216, *ante*.

(*k*) *Ibid.*, s. 13. See also Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137) s. 17; and p. 329, *post*.

(*l*) *Re Beverley Charities* (1839), 9 L. J. (CH.) 91.

(*m*) For an example, see Encyclopædia of Forms, Vol. III., p. 480.

(*n*) 8 Edw. 7, c. 28.

(*o*) *Ibid.*, s. 15.

(*p*) *Ibid.*, s. 41.

(*q*) *A.-G.* v. *Stamford* (*Earl*) (1839), 1 Ph. 737, 747. As to the liabilities of trustees generally, see Trustee Act, 1893 (56 & 57 Vict. c. 53), ss. 17—24; and title TRUSTS AND TRUSTEES.

(*r*) *Kennington Hastings Case* (1612), Duke on Charitable Uses, 71 (retainer by trustee of increase of rent on reletting of charity lands); *A.-G.* v. *Bedford Corporation* (1754), 2 Ves. Sen. 504 (retainer by schoolmaster of charity school of usher's salary); *A.-G.* v. *Bolton* (1796), 3 Anst. 820 (retainer by vicar of charity annuity payable to preacher); *A.-G.* v. *Dixie* (1805), 13 Ves. 519; see also *A.-G.* v. *Pretyman* (1841), 4 Beav. 462.

(*a*) *A.-G.* v. *Brewers' Co.* (1816), 1 Mer. 495; *A.-G.* v. *Cambridge Corporation* (1836), 5 L. J. (CH.) 357.

(*b*) *Ex parte Greenhouse* (1815), 1 Madd. 92, 109 (chapel pulled down by trustees).

(*c*) *A.-G.* v. *East Retford Corporation* (1838), 3 My. & Cr. 484; *A.-G.* v. *Wisbeach Corporation* (1842), 11 L. J. (CH.) 412 (innocent but improper sale of charity lands in redemption of land tax on other lands belonging to the trustees); and see *A.-G.* v. *Newark Corporation* (1842), 11 L. J. (CH.) 270.

(*d*) *A.-G.* v. *Leicester Corporation* (1844), 7 Beav. 176.

SECT. 6. Liabilities of Ordinary Trustees.

the administration of the funds has been honest but mistaken (*e*), as, for example, where a wrong construction has been put on an ambiguous instrument of trust (*f*).

Where a corporation is trustee the court tends to leniency more than in the case of individual trustees (*g*).

Accounts against defaulting trustees.

The general rule is that in the absence of special circumstances (*h*) accounts are to be taken against the trustees from the date at which the misapplication commenced (*i*). Each case is, however, decided on its merits at the discretion of the court, and therefore the dates to which accounts against charity trustees are carried back differ widely (*k*). The court may decline to direct an account where the litigation would be expensive and the benefit to the charity problematical or trifling (*l*).

As a rule, where the misapplication has been innocent, accounts are directed from the commencement of the action (*m*); but they may also be ordered from the date at which notice was given to the trustees questioning the propriety of the application (*n*), from the date of the decree declaring the application improper (*o*), or from the date of the last appointment of a new trustee (*p*). An account

(*e*) *A.-G.* v. *Exeter Corporation* (1826), 2 Russ. 45, *per* Lord ELDON, at p. 54: "to act on any other principles would be to deter all prudent persons from becoming trustees of charities"; *A.-G.* v. *Christchurch* (*Dean and Canons*) (1826), 2 Russ. 321; *A.-G.* v. *Pretyman*, *supra*, at p. 464; *Andrews* v. *M'Guffog* (1886), 11 App. Cas. 313, 324. See also *A.-G.* v. *Bowyer* (1798), 3 Ves. 714, 729.

(*f*) *A.-G.* v. *Wax Chandlers' Co.* (1873), L. R. 6 H. L. 1, where there was a question whether on the construction of an instrument the surplus income belonged to the charity or to the donees.

(*g*) *A.-G.* v. *Baliol College, Oxford* (1744), 9 Mod. Rep. 407, 409, 410; *A.-G.* v. *East Retford Corporation* (1833), 2 My. & K. 35, 37, 38; *A.-G.* v. *Newbury Corporation* (1834), 3 My. & K. 647, 651; *A.-G.* v. *Caius College* (1837), 2 Keen, 150, 169; *Edinburgh Corporation* v. *Lord Advocate* (1879), 4 App. Cas. 823.

(*h*) *E.g.*, innocent misapplication, see *infra*.

(*i*) *A.-G.* v. *Cashel Corporation* (1842), 3 Dr. & War. 294; *A.-G.* v. *Davey* (1854), 19 Beav. 521, 527, where accounts were ordered from the dates when improper leases were granted. See also *A.-G.* v. *Newbury Corporation* *supra*, at p. 653, where the question of directing an account from the date of the foundation of the charity was discussed. The application of the Statutes of Limitation in the case of proceedings against trustees is stated at p. 204, *ante*.

(*k*) *A.-G.* v. *Davey* (1854), 19 Beav. 521, 527. In *A.-G.* v. *Pretyman* (1841), 4 Beav. 462, 467, the question was referred by the court to the consideration of the Attorney-General. See also on the power of the Attorney-General to sanction compromises in such cases *A.-G.* v. *Exeter Corporation* (1822), Jac. 443, 448; *A.-G.* v. *Exeter Corporation* (1826), 2 Russ. 362; *A.-G.* v. *Carlisle Corporation* (1831), 4 Sim. 275, 279; *A.-G.* v. *Brettingham* (1840), 3 Beav. 91.

(*l*) *A.-G.* v. *Dixie* (1805), 13 Ves. 519; *A.-G.* v. *Cullum* (1836), 5 L. J. (CH.) 220; *A.-G.* v. *Shearman* (1839), 2 Beav. 104.

(*m*) *A.-G.* v. *Jolliffe* (1822), 1 L. J. (O. S.) (CH.) 43; *A.-G.* v. *Winchester Corporation* (1824), 3 L. J. (O. S.) (CH.) 64; *A.-G.* v. *Stationers' Co.* (1831), 9 L. J. (O. S.) (CH.) 229; *A.-G.* v. *Caius College*, *supra*, at p. 166; *A.-G.* v. *Harper* (1838), 8 L. J. (CH.) 12; *A.-G.* v. *Drapers' Co.* (1841), 4 Beav. 67; (1847), 10 Beav. 558; *A.-G.* v. *Christ's Hospital* (1841), 4 Beav. 73; *A.-G.* v. *Hall* (1853), 16 Beav. 388, 395; *A.-G.* v. *Davey*, *supra*; *A.-G.* v. *Wax Chandlers' Co.* (1873), L. R. 6 H. L. 15. See also *Aberdeen University* v. *Irvine* (1868), L. R. 1 Sc. & Div. 289; *Lord Advocate* v. *Drysdale* (1874), L. R. 2 Sc. & Div. 308.

(*n*) *A.-G.* v. *Berwick-upon-Tweed Corporation* (1829), Taml. 239; *A.-G.* v. *East Retford Corporation*, *supra*, at p. 37; *A.-G.* v. *Cambridge Corporation* (1836), 5 L. J. (CH.) 357.

(*o*) *A.-G.* v. *Drapers' Co.*, *supra*, at pp. 389, 390; *A.-G* v. *Tufnell* (1849), 12 Beav. 35

SECT. 6. Liabilities of Ordinary Trustees.

is not, it seems, directed against innocent trustees where their co-trustees are entirely responsible for the breach of trust (*q*).

Liability of parochial and municipal trustees.

539. Parish officials are not liable for breaches of trust committed by their predecessors in office (*r*). But municipal corporations created under the Municipal Corporations Act, 1835 (*s*), are liable in respect of the debts incurred and breaches of trust committed by the old corporations which they succeeded, for they are but a continuance of the old corporations (*t*). A parish council to which is transferred all non-ecclesiastical property previously vested in the overseers or in the overseers and churchwardens of a rural parish takes subject to the existing liabilities affecting the property (*a*).

Use of charity fund for private trading.

540. Where a charity trustee uses the trust funds for trading purposes he is accountable to the charity for any profit made, or for interest at the rate of 5 per cent. if the latter is the larger amount (*b*). But in general a defaulting trustee is charged with interest at 4 per cent. (*c*). Whether the interest is simple or compound is in the discretion of the court (*d*).

Liability of trustee's agent.

541. Where a trustee administers a charity by means of a mere agent, the latter is as a rule accountable in case of default only to his principal and not to the charity, as the ordinary law of agency is applicable to charity cases (*e*). But if the agent, knowing that a breach of trust is being committed, interferes and assists in the breach, or if a stranger intermeddles with the affairs and administration of a charity, each makes himself a *quasi*-trustee and as such personally answerable (*f*).

(*q*) *A.-G.* v. *Jolliffe* (1822), 1 L. J. (o. s.) (CH.) 43; *A.-G.* v. *Holland* (1837), 2 Y. & C. (EX.) 683, where co-trustees of a charity under a will were directed to act annually in rotation.

(*r*) *Ex parte Fowlser* (1819), 1 Jac. & W. 70; and see *Battily* v. *Cooke* (1692), 2 Vern. 262; *Greenfield* v. *Reynall* (1780), 2 P. Wms. 634, n.; *French* v. *Dear* (1800), 5 Ves. 547.

(*s*) 5 & 6 Will. 4, c. 76, repealed and superseded by the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50).

(*t*) *A.-G.* v. *Leicester Corporation* (1846), 9 Beav. 546; and see *A.-G.* v. *Kerr* (1840), 2 Beav. 420; *A.-G.* v. *Newcastle Corporation* (1842), 5 Beav. 307, 314.

(*a*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 5 (2) (c).

(*b*) *A.-G.* v. *Solly* (1829), 2 Sim. 518, where a charity trustee who used the trust property for trading purposes was charged 5 per cent., but not compound interest; *A.-G.* v. *Cambridge Corporation* (1836), 5 L. J. (CH.) 357; *Re Davis*, [1902] 2 Ch. 314.

(*c*) *Jones* v. *Foxall* (1852), 15 Beav. 388, 392; *A.-G.* v. *Alford* (1855), 4 De G. M. & G. 843, 851; *Re Emmet* (1881), 17 Ch. D. 142. In *A.-G.* v *Cambridge Corporation*, *supra*, the interest was 5 per cent.

(*d*) See the cases cited in two preceding notes where employment of trust funds in trade constituted a ground for charging compound interest; *Incorporated Society* v. *Richards* (1841), 1 Dr. & War. 258, where a trustee who set up a title adverse to the charity was charged compound interest; *A.-G.* v. *Alford*, *supra*, at p. 851. Other cases relating to private trusts (*Heighington* v. *Grant* (1840), 5 My. & Cr. 258; *Jones* v. *Foxall*, *supra*) show that the present practice is to charge compound interest where trust funds have been employed in trade; see also the non-charitable cases, *Burdick* v. *Garrick* (1870), 5 Ch. App. 233; *Re Davis*, [1902] 2 Ch. 314; and title TRUSTS AND TRUSTEES.

(*e*) *A.-G.* v. *Chesterfield* (*Earl*) (1854), 18 Beav. 596; and see title AGENCY, Vol. I., pp. 171, 172.

(*f*) *A.-G.* v. *Chesterfield* (*Earl*), *supra*, at p. 599. See also *A.-G.* v. *Leicester Corporation* (1844), 7 Beav. 176, where a town clerk who retained trust funds with the consent of a municipal corporation, the actual trustee of the charity.

SECT. 6. LIABILITIES OF ORDINARY TRUSTEES.

542. When a corporation is declared liable to make good a loss caused by a breach of trust, the court does not charge the loss upon the general property of the corporation. The remedy is enforceable by process of sequestration (*g*).

Compensation for injury from breach of trust.

543. Charity property cannot be taken to indemnify a person injured by a breach of trust committed by the trustees of the charity (*h*).

SECT. 7.—*Powers, Duties and Liabilities of Official Trustees.*

SUB-SECT. 1.—*The Official Trustee of Charity Lands.*

Corporate capacity.

544. The official trustee of charity lands (who is the secretary for the time being of the Charity Commission) is a corporation sole for the purpose of holding or conveying real property, including leaseholds (*i*).

When land vested in official trustee.

Land, or any term or estate therein, including hereditaments corporeal and incorporeal (*j*), held upon charitable trusts, may be vested in the official trustee, with or without conveyance (*k*), by order of the court (*l*) or of the Charity Commissioners (*m*), in any of the following cases, namely, where the land is vested in persons other than the administering trustees of the charity; where there are no trustees or it is uncertain in whom the estate is vested; where all or any of the trustees are unwilling to act or cannot be found, or are infants or lunatics or otherwise incapable of acting, or are out of the jurisdiction; where no valid appointment of new trustees can be made; or where for any other reason such a measure seems desirable to the court or Charity Commissioners, as the case may be (*n*).

Copyholds.

The vesting of copyholds in the official trustee requires the consent of the lord of the manor (*o*).

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was held jointly liable with the corporation for the breach of trust; *A.-G.* v. *Wilson* (1840), 10 L. J. (CH.) 53, where a corporation was trustee of a charity and the members of the governing body were held liable for injury to the charity occasioned by their default; *Charitable Corporation* v. *Sutton* (1742), 2 Atk. 400, 405.

(*g*) *A.-G.* v. *East Retford Corporation* (1838), 3 My. & Cr. 484.

(*h*) *Heriot's Hospital (Feoffees)* v. *Ross* (1846), 12 Cl. & Fin. 507, H. L. (a Scotch case).

(*i*) Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 47; Charitable Trusts Amendment Act, 1855 (18 & 19 Vict. c. 124), s. 15. Where land is being conveyed to a charity and it is desired that the legal estate be vested in the official trustee of charity lands, the practice of the Commissioners is to require the conveyance to be made in the first place to the trustees of the charity; the legal estate is subsequently vested in the official trustee by means of an order.

(*j*) Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 3; see also the repealed definition of "land" in s. 66 of the Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137).

(*k*) Charitable Trusts Act, 1887 (50 & 51 Vict. c. 49), s. 5.

(*l*) Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 48.

(*m*) Charitable Trusts Act, 1860 (23 & 24 Vict. c. 136), s. 2. As to application and notices, see p. 315, *post*; and as to the powers of the Board of Education, see p. 280, *post*, and title EDUCATION.

(*n*) Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 48. As the official trustee holds as a bare trustee (see note (*q*), p. 280, *post*), vesting the charity lands in him in several of the circumstances mentioned in the text does not seem sufficient to get over the difficulty.

(*o*) *Ibid.* See also Charitable Trusts Incorporation Act, 1872 (35 & 36 Vict. c. 24), s. 2; Copyhold Act, 1894 (57 & 58 Vict. c. 46), s. 76.

SECT. 7. Powers, Duties and Liabilities of Official Trustees.

Land vested in the official trustee may be revested in the trustees of the charity by the authority which made the vesting order (*p*). The official trustee holds as a bare trustee (*q*).

545. The official trustee may be directed to convey or concur in a conveyance of land vested in him (*r*), but he does not enter into covenants of any kind (*s*).

Revesting in trustees of charity.

Powers of trustees of charity unaffected.

546. Vesting land in the official trustee does not deprive the acting trustees of the possession, control, and management of the trust estates, or of the application of the income thereof (*a*). Sales and other dispositions of the charity property can be effected as freely as if the property was not vested in him (*b*).

Land vested in churchwardens and overseers.

547. A vesting order made under the Charitable Trusts Acts in cases where the legal estate is vested in the churchwardens and overseers of any parish, as a corporation, does not require their consent (*c*).

Registration under Land Transfer Acts.

548. The official trustee may under certain circumstances be registered as the proprietor of lands under the Land Transfer Acts (*d*).

Educational charities.

549. The powers of appointing the official trustees of charitable funds, and of making orders for vesting or transferring lands or funds into or from the official trustee of charity lands and the official trustees of charitable funds conferred on the Charity Commissioners under the Charitable Trusts Acts, have not been transferred to the Board of Education, even where they relate to purely educational charities (*e*).

Public trustee.

550. The powers and duties of the public trustee (*f*) do not affect the powers or duties of the official trustees of charity lands or charitable funds.

SUB-SECT. 2.—*The Official Trustees of Charitable Funds.*

Official trustees of charitable funds.

551. The official trustees of charitable funds are certain officials in the Charity Commission appointed by the Charity Commissioners with the approval of the Treasury (*g*).

(*p*) Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 49.

(*q*) *Ibid.* s. 50. Whether they have power or not to confer active duties upon the official trustee, it is the practice of the Charity Commissioners never to do so.

(*r*) Charitable Trusts Amendment Act, 1855 (18 & 19 Vict. c. 124), s. 37.

(*s*) For form of conveyance where the official trustee joins, see Encyclopædia of Forms, Vol. III., p. 473, and for form of order directing the concurrence of the official trustee, see *ibid.*, p. 472.

(*a*) Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 50. The chief advantages of such vesting are that the title to the charity property is simplified and the expenses incident to the reconveyance of the property on each appointment of new trustees are done away with.

(*b*) Charitable Trusts Amendment Act, 1855 (18 & 19 Vict. c. 124), s. 16; Charitable Trusts Act, 1869 (32 & 33 Vict. c. 110), s. 12.

(*c*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 52 (4); see *Re Hackney Charities, Ex parte Nicholls* (1864), 34 L. J. (CH.) 169; *Fell* v. *Official Trustee of Charity Lands*, [1898] 2 Ch. 44, 51, 59, C. A.

(*d*) See p. 247, *ante*.

(*e*) Board of Education Act, 1899 (62 & 63 Vict. c. 33), s. 3, and the Orders in Council made thereunder.

(*f*) See Public Trustee Act, 1906 (6 Edw. 7, c. 55), s. 2 (5); Public Trustee Rules, 1907.

(*g*) Charitable Trusts Act, 1887 (50 & 51 Vict. c. 49), s. 4 (1). See also

They have perpetual succession, and may hold funds and other securities and moneys in their official name (*h*). The court (*i*) or the Charity Commissioners (*k*) may order stocks, shares, and other securities held upon charitable trusts to be transferred to the official trustees, either at the request of the administering trustees or for the purpose of security or convenient administration without their consent (*l*); and any trustee or other person may, on obtaining an order from the Charity Commissioners, transfer any stock or pay any money to the official trustees in trust for any charity (*m*).

Vesting of funds.

By vesting charity funds in the official trustees safety of the capital is secured. But the official trustees have no power to interfere with the application of the income or the management of the charity (*n*).

552. The duties of the official trustees are (1) to pay the income of the funds invested in their names free of charge to the administering trustees of the charity, or otherwise dispose thereof; (2) to transfer the funds when occasion requires (*o*), according to the direction of the court (*p*) or Charity Commissioners (*q*); (3) to keep a banking account at the Bank of England (*r*), and to draw thereon in manner prescribed (*s*); (4) to invest moneys paid to their account at the Bank of England (*t*), and generally (5) to keep proper accounts (*a*). All dividends due to the official trustees must be paid into their account at the Bank of England (*b*).

Duties

553. The official trustees may be authorised by the court or Charity Commissioners to call for a transfer of and to transfer stocks or shares. Similarly payment of any charity moneys may be ordered to be made to them (*c*).

Order as to transfer to official trustees.

Treasury Regulations made under that section, which came into operation April 1, 1889, printed in Tudor, Law of Charities and Mortmain, 4th ed. p. 931.

(*h*) Charitable Trusts Amendment Act, 1855 (18 & 19 Vict. c. 124), s. 18.

(*i*) Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 51.

(*k*) Charitable Trusts Act, 1860 (23 & 24 Vict. c. 136), s. 2.

(*l*) For form of application for order under this section, see Encyclopædia of Forms, Vol. III., p. 446.

(*m*) Charitable Trusts Amendment Act, 1855 (18 & 19 Vict. c. 124), s. 22. For forms of application for order under this section, see Encyclopædia of Forms, Vol. III., pp. 442, 444. See also Treasury Regulations, note (*g*), *supra*.

(*n*) See Memorandum No. 93 of the Charity Commissioners, set out in Tudor, Law of Charities and Mortmain, 4th ed. p. 959.

(*o*) Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 52.

(*p*) *Ibid.*

(*q*) Charitable Trusts Act, 1860 (23 & 24 Vict. c. 136), s. 2. See also Treasury Regulations, note (*g*), *supra*.

(*r*) Charitable Trusts Amendment Act, 1855 (18 & 19 Vict. c. 124), s. 20; Treasury Regulations, note (*g*), *supra*.

(*s*) Charitable Trusts Amendment Act, 1855 (18 & 19 Vict. c. 124), s. 21; Treasury Regulations, note (*g*), *supra*.

(*t*) Charitable Trusts Amendment Act, 1855 (18 & 19 Vict. c. 124), ss. 23, 24, 28; and see p. 240, *ante*.

(*a*) Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 52; Charitable Trusts Act, 1887 (50 & 51 Vict. c. 49), s. 4 (2); Treasury Regulations, note (*g*), *supra*. The accounts must be laid before Parliament (Charitable Trusts Act, 1860 (23 & 24 Vict. c. 136), s. 18), but official trustees are not responsible for loss except from their own neglect (s. 17).

(*b*) Charitable Trusts Amendment Act, 1855 (18 & 19 Vict. c. 124), s. 24.

(*c*) *Ibid.*, ss. 12, 25, 37; Charitable Trusts Act, 1860 (23 & 24 Vict. c. 136),

Part VIII.—Charitable Corporations.

SECT. 1. In General

SECT. 1.—*In General.*

Definitions.

554. A charitable corporation is one whose corporate purpose is charitable. An eleemosynary corporation is a corporation established for the perpetual distribution of the free alms or bounty of the founder (*d*).

Colleges and hospitals.

555. The two principal kinds of charitable corporations are hospitals and colleges; the former being created for the maintenance and relief of the poor and impotent, and the latter for the promotion of learning and the support of persons engaged in literary pursuits (*e*).

Colleges and hospitals, in the strict legal sense of the latter term, are both institutions where the persons benefited by the charity are themselves incorporated (*f*).

In other than the strict legal sense (*g*), however, the expression "hospital" has been used to denote various kinds of corporate institutions (*h*) for the relief of the poor or infirm; such as corporations where the estate of inheritance only is vested in the master or warden (*i*), or hospitals managed by an incorporated body of governors or trustees (*k*).

Hospital supported partly by fees.

Whether a hospital, supported partly by fees and partly by charity, is a charitable corporation depends on the character of the

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ss. 2, 12; Charitable Trusts Act, 1887 (50 & 51 Vict. c. 49), s. 4 (2). As to indemnity to the bank and others for acting on orders for transfer or payment, see Charitable Trusts Amendment Act, 1855 (18 & 19 Vict. c. 124), s. 27.

(*d*) 1 Bl. Com. 470; Kyd on Corporations, Vol. I., p. 25; Shelford, Law of Mortmain, 23; and see pp. 255 *et seq.*, *ante*. As to the different classes of corporation, and as to the powers of corporations to hold land, see title CORPORATIONS. As to the incorporation of charity trustees, see p. 314, *post*.

(*e*) Kyd on Corporations, Vol. I., p. 25; *Philips* v. *Bury* (1694), reported 2 Term Rep. 346, 352.

(*f*) Shelford, Law of Mortmain, 24; *Philips* v. *Bury*, *supra*, at p. 353: "if in an hospital the master and poor are incorporated, it is a college, having a common seal to act by, although it hath not the name of a college." See also *A.-G.* v. *Wyggeston's Hospital* (1853), 1 W. R. 115; *A.-G.* v. *St. Cross Hospital* (1853), 17 Beav. 435; *A.-G.* v. *St. John's Hospital, Bedford* (1865), 2 De G. J. & Sm. 621, C. A.; *Sutton's Hospital Case* (1613), 10 Co. Rep. 31 a; *Colchester* (*Lord*) v. *Kewney* (1866), 35 L. J. (EX.) 204, 206.

(*g*) See 10 Co. Rep. 31 a; Shelford, Law of Mortmain, p. 24.

(*h*) *Moses* v. *Marsland*, [1901] 1 K. B. 668; and see *York* (*Dean and Chapter*) v. *Middleburgh* (1827), 2 Y. & J. 196, 216.

(*i*) Co. Litt. 342 a; Shelford, Law of Mortmain, p. 24.

(*k*) There are many modern hospitals of this kind. The Charterhouse and Sutton's Hospital are ancient examples of this class (see *Sutton's Hospital Case*, *supra*. The word "hospital" is of course used also in reference to unincorporated institutions or hospitals managed by unincorporated bodies of governors or trustees. Some modern hospitals are of this latter kind, especially those which have no endowment and are supported by voluntary subscriptions. The word "hospital" has also been defined in certain statutes (stat. 13 Eliz. c. 10, s. 3; stat. 14 Eliz. c. 14; Idiots Act, 1886 (49 & 50 Vict. c. 25), s. 17; Lunacy Act, 1890 (53 Vict. c. 5), s. 341; Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 141); see also pp. 209, 212, 213, 214, *ante*, where the meaning of "hospital" in connection with taxing Acts is dealt with; and *Dilworth* v. *Stamps Commissioner*, [1899] A. C. 99, 107. As to hospitals, see further, title PUBLIC HEALTH ETC.

institution itself. If it possesses a substantial charitable endowment, it is a charitable corporation (*l*). But the question is one of degree to be determined upon the facts of each particular case (*m*). A hospital supported entirely by the fees of patients is of course not a charitable institution (*n*).

The colleges of Oxford and Cambridge are charitable corporations (*o*), but the halls are not (*p*), nor are the universities of Oxford and Cambridge (*q*).

Other charitable corporations.

556. Besides colleges and hospitals, there are other corporations created solely for the fulfilment of charitable purposes, as where charity trustees (*r*), governors (*s*), or the schoolmaster (*t*), or the schoolmaster and usher (*u*), have been respectively incorporated for charitable or educational objects. Charitable corporations have also in many cases been created by Act of Parliament (*a*), and by charter (*b*), to carry into effect various charitable purposes.

Jurisdiction of court.

557. As charitable corporations exist solely for the accomplishment of charitable purposes, they are necessarily trustees of their corporate property (*c*), whether the beneficiaries are members of the corporation, as in the case of hospitals (*d*) and colleges (*e*), or not (*f*). Accordingly, like other trustees, charitable or otherwise, they are subject to the jurisdiction of the court (*g*).

(*l*) *Blake* v. *London Corporation* (1887), 19 Q. B. D. 79, C. A.; *Charterhouse School (Governors)* v. *Lamarque* (1890), 25 Q. B. D. 121, 127; *Cawse* v. *Nottingham Lunatic Hospital Committee*, [1891] 1 Q. B. 585, 591, 592; *Mary Clark Home (Trustees)* v. *Anderson*, [1904] 2 K. B. 645; and see *Horner* v. *Lewis* (1898), 78 L. T. 792; *Ormskirk Union* v. *Chorlton Union*, [1903] 2 K. B. 498.

(*m*) *Southwell* v. *Royal Holloway College, Egham (Governors)*, [1895] 2 Q. B. 487.

(*n*) *Needham* v. *Bowers* (1888), 21 Q. B. D. 436.

(*o*) *R.* v. *Cambridge (Vice-Chancellor)* (1765), 3 Burr. 1647, 1652, 1656; and see *Parkinson's Case* (1689), Carth. 92, 93; *Anon.* (1699), 12 Mod. Rep. 232; *Philips* v. *Bury* (1694), Skin. 447, 494.

(*p*) *R.* v. *Hertford College* (1878), 3 Q. B. D. 693, 694, C. A.

(*q*) *R.* v. *Cambridge (Vice-Chancellor)*, *supra*; Shelford, Law of Mortmain, p. 25.

(*r*) See p. 317, *post*.

(*s*) *Eden* v. *Foster* (1725), 2 P. Wms. 325 (grammar school).

(*t*) *Whiston* v. *Rochester (Dean and Chapter)* (1849), 7 Hare, 532 (cathedral school).

(*u*) *A.-G. v. Price* (1744), 3 Atk. 108, 109 (free school); *A.-G.* v. *Magdalen College, Oxford* (1847), 10 Beav. 402 (college school); *Re Chelmsford Grammar School* (1855), 1 K. & J. 543, 561.

(*a*) *E.g.*, Governors of Queen Anne's Bounty (stat. 2 & 3 Anne, c. 11; stat. 5 Anne, c. 24; stat. 6 Anne, c. 27; Queen Anne's Bounty Act, 1714 (1 Geo. 1, stat. 2, c. 10); Queen Anne's Bounty Act, 1716 (3 Geo. 1, c. 10); see also Shelford, Law of Mortmain, p. 24); the Church Building Society incorporated under stat. 9 Geo. 4, c. 42 (see *Church Building Society* v. *Barlow* (1853), 3 De G. M. & G. 120); the Clergy Orphan Corporation, incorporated under stat. 49 Geo. 3, c. 18 (see *Re Clergy Orphan Corporation* (1874), 18 L. R. Eq. 280).

(*b*) *E.g.*, the Clergy Society; see *Re Clergy Society* (1856), 2 K. & J. 615.

(*c*) *Lydiatt* v. *Foach (Sir John)* (1700), 2 Vern. 410; and see cases cited in the four following notes.

(*d*) *Lydiatt* v. *Foach (Sir John)*, *supra*; *A.-G.* v. *Wyggeston's Hospital* (1849), 12 Beav. 113.

(*e*) *Thetford School Case* (1610), 8 Co. Rep. 130 b; *A.-G.* v. *Whorwood* (1750), 1 Ves. Sen. 534, 537.

(*f*) *A.-G.* v. *St. Cross Hospital* (1853), 17 Beav. 435; *Re Manchester Royal Infirmary* (1889), 43 Ch. D. 420, 428.

(*g*) *Green* v. *Rutherforth* (1750), 1 Ves. Sen. 462; *Ex parte Berkhampstead*

SECT. 1. In General.

Municipal corporations.

558. Municipal corporations are also trustees of the municipal property (*h*), including the borough fund (*i*), moneys derived from rates (*k*), and property held on special trusts for the benefit of the borough freemen (*l*); and are similarly subject to the jurisdiction of the court. As the objects for which such property is held are charitable in the legal sense, the corporations themselves are charitable trustees (*m*); but, being established partly for purposes of local administration and not entirely to carry into effect charitable purposes, they do not come within the definition applicable to charitable corporations (*n*).

Ecclesiastical and civil corporations.

The court has no jurisdiction over the application or administration of the corporate property of ecclesiastical (*o*) or civil corporations (*p*), to which, as is frequently the case, no trust is attached (*q*). But if property is held by a corporation as a trustee, if the corporation holds it clothed with public duties, the court has always asserted its right to interfere (*r*).

Number of members.

559. A charitable corporation may apparently add to the members of the corporate body if the numbers were not originally fixed (*s*).

SECT. 2.—*Foundation.*

Definition.

560. The expression "foundation" as applied to the establishment of charitable corporations is used in two distinct senses. It denotes (1) the incorporation of a body of persons (*fundatio incipiens*) and (2) the original endowment of the incorporated body (*fundatio percipiens*) (*t*).

Free School (1813), 2 Ves. & B. 134; *A.-G.* v. *St. Cross Hospital* (1853), 17 Beav. 435, 466; and see p. 294, *post*.

(*h*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), repealing and re-enacting the Municipal Corporations Act, 1835 (5 & 6 Will. 4, c. 76); and see Municipal Corporations Act, 1883 (46 & 47 Vict. c. 18). Prior to the passing of the Municipal Corporations Act, 1835, such corporations were not considered to be trustees (*A.-G.* v. *Carmarthen Corporation* (1805), Coop. G. 30; *Colchester Corporation* v. *Lowten* (1813), 1 Ves. & B. 226; *Davis* v. *Leicester Corporation*, [1894] 2 Ch. 208, 228, C. A.); and see p. 256, *ante*. As to whether municipal corporations as charity trustees are subject to the jurisdiction of the Charity Commissioners, see p. 304, *post*.

(*i*) As to the borough fund, see Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), ss. 139, 140, 144, 205; and title LOCAL GOVERNMENT.

(*k*) *A.-G.* v. *Dublin Corporation* (1827), 1 Bli. (N. S.) 312, H. L.; *A.-G.* v. *Eastlake* (1853), 11 Hare, 205.

(*l*) *Goodman* v. *Saltash Corporation* (1882), 7 App. Cas. 633; *Prestney* v. *Colchester Corporation* (1882), 21 Ch. D. 111.

(*m*) *A.-G.* v. *Dublin Corporation, supra*; *A.-G.* v. *Liverpool Corporation* (1835), 1 My. & Cr. 171, 201; *A.-G.* v. *Stafford Corporation*, [1878] W. N. 74.

(*n*) See p. 282, *ante*.

(*o*) *A.-G.* v. *St. John's Hospital, Bedford* (1865), 2 De G. J. & Sm. 621, 635. See *A.-G.* v. *Wray* (1821), Jac. 307, 310.

(*p*) *Colchester Corporation* v. *Lowten, supra*, at pp. 244, 245; *A.-G.* v. *Liverpool Corporation, supra*, at p. 201.

(*q*) *E.g.*, the property of building societies (*Re National Permanent Mutual Benefit Building Society* (1889), 43 Ch. D. 431, 434), of livery companies (*A.-G.* v. *Haberdashers' Co.* (1834), 1 My. & K. 420), and of wards of the City of London (*Finnis and Young* to *Forbes and Pochin* (No. 1) (1883), 24 Ch. D. 587).

(*r*) *A.-G.* v. *Liverpool Corporation, supra, per* Lord LANGDALE, M.R., at p. 201. See also *A.-G.* v. *Dublin Corporation, supra*.

(*s*) *A.-G.* v. *Talbot* (1747), 3 Atk. 662, 675.

(*t*) Shelford, Law of Mortmain, pp. 323, 324; *Sutton's Hospital Case* (1613), 10 Co. Rep. 1, 33 a.

SECT. 2. Foundation.

Modes of creation.

561. A charitable corporation may be created (1) by royal charter (*a*), (2) by royal charter giving authority to the holder of an office to create corporations indefinitely (*b*), (3) by persons acting under royal licence (*c*), (4) by special Act of Parliament (*d*), (5) by deed enrolled in Chancery under 39 Eliz. c. 5 (*e*), (6) under the Companies Act, 1867 (*f*), and (7) by the Charity Commissioners under the Charity Trustees Incorporation Act, 1872 (*g*).

No particular form of words need be used for the creation of a corporation by charter or Act of Parliament provided the intention to incorporate is clear (*h*).

It is competent for the Crown to establish or found a corporation which has had no previous embryonic existence as an unincorporated body of persons, but as a matter of history and of practice this never occurs (*i*).

Founder.

562. The person providing the original endowment is usually regarded as the founder, rather than the person performing the act of incorporation (*k*).

If the King joins with an individual in endowing a corporation, the King alone is founder (*l*), but if two or more individuals contribute to the original endowment they together constitute the founder (*m*). A private individual who has founded a charitable corporation does not cease to be founder by reason of the corporation being subsequently endowed by the King (*n*).

Where a charity is established by subscriptions the original

(*a*) This is the most usual form of incorporation. For an example see *Re Clergy Society* (1856), 2 K. & J. 615.

(*b*) "In this manner the Chancellor of the University of Oxford has power by charter to erect corporations and has actually often exerted it" (1 Bl. Com. 474).

(*c*) For examples see *Sutton's Hospital Case* (1613), 10 Co. Rep. 23 a, 31 a; *Ex parte Kirkby Ravensworth Hospital* (1808), 15 Ves. 305; *A.-G.* v. *Dulwich College* (1841), 4 Beav. 255.

(*d*) *E.g.*, the Church Building Society.

(*e*) This statute was made perpetual by stat. 21 Jac. 1, c. 1. Under stat. 39 Eliz. c. 5, all and every person and persons are enabled to found "hospitalls, measons de Dieu, abiding places or howses of correction" for the poor to be "incorporated and have perpetual succession." In this section the expression "person or persons" includes "corporation" (*Newcastle Corporation* v. *A.-G.* (1845), 12 Cl. & Fin. 402, H. L.).

(*f*) Companies Act, 1867 (30 & 31 Vict. c. 131), s. 23; and see Companies Act, 1862 (25 & 26 Vict. c. 89), ss. 18, 21. For an example of a corporation formed in this way, see *Re St. Hilda's Incorporated College, Cheltenham*, [1901] 1 Ch. 556.

(*g*) 35 & 36 Vict. c. 24. The powers conferred by this Act have seldom been used, it being found more convenient to make use of the corporate capacity of the official trustees; see also p. 314, *post*.

(*h*) *Sutton's Hospital Case*, 10 Co. Rep. 23 a, 28 a; Shelford, Law of Mortmain, p. 27.

(*i*) *A.-G.* v. *National Hospital for the Relief and Cure of the Paralysed and Epileptic*, [1904] 2 Ch. 252, 256.

(*k*) *Sutton's Hospital Case, supra*, 33 a; Shelford, Law of Mortmain, pp. 323, 324; *Anon.* (1699), 12 Mod. Rep. 232. See also *St. John's College* v. *Todington* (1757), 1 Burr. 158, 200.

(*l*) 2 Co. Inst. 68.

(*m*) *Re St. Leonard, Shoreditch, Parochial Schools* (1884), 10 App. Cas. 304, 308.

(*n*) 2 Co. Inst. 68.

SECT. 2. Foundation.

subscribers alone are the founders. Additional contributions do not constitute a new foundation (*o*).

SECT. 3.—*Rights of the Founder.*

Rights of founder.

563. A charitable corporation, in so far as it is charitable, is the "creature of the founder" (*p*). The founder may accordingly provide for the government and administration of his "creature" and the application in perpetuity of the revenues (*q*). Moreover, he, his heirs or appointees, have the perpetual right of patronage and visitation (*r*).

But he may not alter the constitution of the corporation by increasing the number of corporators, or vary the trusts or application of the endowment or revenues (*s*), unless special powers for this purpose are reserved by the charter of incorporation (*t*).

Corporations created by royal charter.

564. Though charitable corporations created by royal charter are the "creatures of the Crown," yet so long as they exist and are capable of discharging their functions, they are not subject to control by the Crown other than that reserved by the charter (*a*). But when a corporation is dissolved or an integral part of it is gone, the Crown may grant a new charter (*b*), or on failure of objects the Court may dispose of the funds *cy-près* (*c*).

Part IX.—Jurisdiction over Charities.

SECT. 1.—*The Crown.*

The Crown the protector of charitable trusts.

565. The Crown as *parens patriæ* is the constitutional protector of all property subject to charitable trusts, such trusts being essentially matters of public concern (*d*). And the Attorney-General, who represents the Crown for all forensic purposes, is accordingly

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(*o*) *Re St. Leonard, Shoreditch, Parochial Schools* (1884), 10 App. Cas. 304, 308.

(*p*) *St. John's College* v. *Todington* (1757), 1 Burr. 158, 200.

(*q*) *Green* v. *Rutherforth* (1750), 1 Ves. Sen. 462, 472; *Philips* v. *Bury* (1694), reported 2 Term Rep. 346, 352.

(*r*) As to patronage, see pp. 166, 250, *ante*, and as to visitation, see p. 287, *post*.

(*s*) *A.-G.* v. *Dulwich College* (1841), 4 Beav. 255; and see *Ex parte Bolton School* (1789), 2 Bro. C. C. 662.

(*t*) *R.* v. *Cambridge* (*Vice-Chancellor*) (1765), 3 Burr. 1647, 1656; *St. John's College* v. *Todington*, *supra*. A power to alter the statutes or bye-laws does not imply a power to alter the objects or constitution of the corporation (*Ex parte Bolton School*, *supra*; *A.-G.* v. *Dulwich College*, *supra*, at p. 266).

(*a*) *R.* v. *Pasmore* (1789), 3 Term Rep. 199. See, however, *Queens' College, Cambridge, Case* (1821), Jac. 1, 20, 21, where it was held that the Crown, in the case of a royal foundation, had an implied power to dispense with the statutes.

(*b*) *R.* v. *Pasmore*, *supra*.

(*c*) *A.-G.* v. *Hicks* (1809), 3 Bro. Ch. Cas. 166, n.

(*d*) *A.-G.* v. *Brown* (1818), 1 Swan. 265, 291; *A.-G.* v. *Compton* (1842), 1 Y. & C. Ch. Cas. 427.

the proper person to take proceedings on behalf of and to protect charities (*e*).

Where gift to charity generally, without trust.

566. When no trust is created and property is given to charity generally, that is to say, where no trustees are nominated and the charitable objects are not defined, the duty devolves on the Crown, as constitutional trustee, of disposing of the property (*f*). Thus, in the case of an assurance, devise or bequest to charity (*g*), or to the poor (*h*), *simpliciter*, or where the testator intended but failed to name the objects of his bounty (*i*), the disposition of the property is made not by means of a scheme settled by the court, but by the Crown in its character of *parens patriæ*. So also a legacy in exoneration of the National Debt (*k*), or a legacy to an institution dissolved after the testator's death but before payment (*l*), is disposable by the Crown. The result is the same as when a charitable purpose is carried out by the court, though the procedure differs (*m*).

Disposition of property by Crown.

567. Where the disposition is to be made by the Crown, the Attorney-General applies to the King for a warrant under the sign-manual disposing of the property (*n*).

Visitatorial jurisdiction of Crown.

568. The Crown also, acting through the Lord Chancellor, exercises a visitatorial jurisdiction over certain charitable corporations (*o*).

SECT. 2.—*The Visitor.*

SUB-SECT. 1.—*Nature of Visitatorial Power.*

General nature of power.

569. A visitatorial power attaches as a necessary incident to all eleemosynary corporations (*p*). It enables the person exercising

(*e*) *Eyre* v. *Shaftesbury* (*Countess*) (1722), 2 P. Wms. 102, 118; *Wellbeloved* v. *Jones* (1822), 1 Sim. & St. 40, 43; *A.-G.* v. *Magdalen College, Oxford* (1854), 18 Beav. 223, 241; *A.-G.* v. *Windsor* (*Dean and Canons*) (1860), 8 H. L. Cas. 369; *Wallis* v. *S.-G. for New Zealand*, [1903] A. C. 182; and see p. 318, *post*.

(*f*) *Moggridge* v. *Thackwell* (1803), 7 Ves. 36, 83; *Cary* v. *Abbot* (1802), 7 Ves. 490; *Morice* v. *Durham* (*Bishop*) (1805), 10 Ves. 541; *Paice* v. *Canterbury* (*Archbishop*) (1807), 14 Ves. 364; *Ommanney* v. *Butcher* (1823), Turn. & R. 260, 271; *Re Davis*, [1902] 1 Ch. 876; *Re Pyne*, [1903] 1 Ch. 83. Formerly, *i.e.*, before the series of relieving Acts (see p. 121, *ante*), the Crown was also called upon to exercise its prerogative in the case of gifts to superstitious uses which were also charitable; see Boyle on Charities, pp. 242—280; *A.-G.* v. *Bowyer* (1798), 3 Ves. 714, 729.

(*g*) *Clifford* v. *Francis* (1679), Freem. (K. B.) 330; *A.-G.* v. *Syderfen* (1683), 1 Vern. 224; *Jones' Case* (1690), cited [1893] 2 Ch. 49, n.; *A.-G.* v. *Herrick* (1772), Amb. 712; *A.-G.* v. *Bowyer*, *supra*, 729; *Legge* v. *Asgill* (1818), Turn. & R. 265, n.; *Kane* v. *Cosgrave* (1873), I. R. 10 Eq. 211.

(*h*) *A.-G.* v. *Peacock* (1675), Finch, 245; *Ware* v. *A.-G.* (1824), 3 Hare, 194, n.

(*i*) *A.-G.* v. *Syderfen*, *supra*; *Moggridge* v. *Thackwell*, *supra*, at p. 75. Compare the cases as to the jurisdiction of the court, p. 295, *post*.

(*k*) *Newland* v. *A.-G.* (1809), 3 Mer. 684.

(*l*) *Re Slevin*, *Slevin* v. *Hepburn*, [1891] 2 Ch. 236.

(*m*) *A.-G.* v. *Matthews* (1676), 2 Lev. 167; *Moggridge* v. *Thackwell*, *supra*, at p. 87; Boyle on Charities, pp. 239, 240.

(*n*) *Da Costa* v. *De Pas* (1754), Amb. 228; *A.-G.* v. *Herrick*, *supra*; *Kane* v. *Cosgrave*, *supra*, where a form of letter or warrant under the sign-manual is set out; and see p. 327, *post*.

(*o*) See p. 288, *post*.

(*p*) Shelford, Law of Mortmain, p. 329; *Appleford's* (*Daniel*) *Case* (1672), 1 Mod.

SECT. 2. **The Visitor.**

it, who is called the visitor, to settle disputes between the members of the corporation, to inspect and regulate their actions and behaviour, and generally to correct all abuses and irregularities in the administration of the charity (*q*).

Visitor's jurisdiction.

The tribunal of the visitor is *forum domesticum*, in other words, the court of the founder (*r*), its jurisdiction being derived from the right of the founder to determine concerning his own creation (*s*).

A visitor is not a court, but rather an arbitrator under certain directions (*t*); and his decision on matters within his jurisdiction is final, and not subject to review by the court (*a*). Even the visitor himself cannot relieve against his own sentence (*b*). But an action for damages will lie against him for exceeding his jurisdiction (*c*).

Limits of jurisdiction.

The extent of the power varies according to the terms of the foundation. If the power given to the visitor is unlimited and universal he has in respect of the foundation and property moving from the founder no rule but his sound discretion. If there are particular statutes they are the rule by which he is bound, and if he acts contrary to or exceeds them, he acts without jurisdiction, and consequently his act is a nullity (*d*).

Objects of power.

570. Though in general confined to corporations, visitatorial powers may also extend to non-corporate bodies, such as unincorporated grammar schools (*e*).

Similarly a *quasi*-visitatorial power may be exercised by the Charity Commissioners or the Board of Education, if reserved to them in schemes made under the Endowed Schools Acts and Charitable Trusts Acts (*f*).

SUB-SECT. 2.—*Constitution of Visitor.*

Who is visitor.

571. Where no visitor has been appointed by the founder (*g*), the rule is that the King and his successors are visitors of all lay charitable corporations founded by the Crown alone (*h*), or by the

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Rep. 85; *Philips* v. *Bury* (1694), as reported 2 Term Rep. 346, 353. As to the meaning of the term eleemosynary corporation, see p. 282, *ante*.

(*q*) 1 Bl. Com. 480; *Philips* v. *Bury*, *supra*.

(*r*) *Green* v. *Rutherforth* (1750), 1 Ves. Sen. 462, 472; *St. John's College* v. *Todington* (1757), 1 Burr. 158, 200; *Spencer* v. *All Souls' College* (1762), Wilm. 163; *Philips* v. *Bury*, *supra*.

(*s*) *Green* v. *Rutherforth*, *supra*, at p. 472. Compare the maxim, *Cujus est dare, ejus est disponere*.

(*t*) *Philips* v. *Bury* (1694), as reported Show. 35, 52.

(*a*) *A.-G.* v. *Lock* (1744), 3 Atk. 164, 165; *A.-G.* v. *Talbot* (1747), 3 Atk. 662, 674; *A.-G.* v. *Catherine Hall* (*Master and Fellows*) (1820), Jac. 381, 392; *A.-G.* v. *Dedham School* (1857), 23 Beav. 350.

(*b*) *Philips* v. *Bury* (1694), as reported Show. 35, 52.

(*c*) *Green* v. *Rutherforth*, *supra*, at p. 470.

(*d*) Shelford, Law of Mortmain, p. 360; *Philips* v. *Bury* (1694), as reported 1 Ld. Raym. 5. As to the extensive and arbitrary nature of the visitatorial power, see also *A.-G.* v. *York* (*Archbishop*) (1831), 2 Russ. & M. 461, *per* Lord BROUGHAM, at p. 468; and as to the control of the court over the visitor, p. 299, *post*.

(*e*) Grammar School Act, 1840 (3 & 4 Vict. c. 77), s. 15; and see p. 291, *post*.

(*f*) See p. 291, *post*.

(*g*) *A.-G.* v. *Dedham School*, *supra*, at p. 356.

(*h*) *Ibid.*; *Eden* v. *Foster* (1725), 2 P. Wms. 325; and see *Re Christ Church, Oxford* (1866), 1 Ch. App. 526.

SECT. 2. The Visitor.

Crown jointly with a private person, and of all royal foundations endowed by a private person (*i*).

Where a private person alone is founder, he and his heirs are visitors (*j*), unless the jurisdiction of the heirs is expressly excluded (*k*). And if the heirs of the founder fail (*l*), are not discoverable (*m*), or are lunatic (*n*), the visitatorial power, in the absence of appointment by the founder, devolves on the Crown.

The visitor of an ecclesiastical charitable corporation is the ordinary (*o*).

Appointment of visitors by founder.

572. The founder may delegate the visitatorial power wholly or partially to any other person and his heirs (*p*), thereby appointing them general or special visitors.

General and special visitors.

A person appointed in general terms is a general visitor, having the same jurisdiction as the founder (*q*), unless his powers are expressly restricted (*r*). Special visitors are those who are appointed for particular purposes, and their jurisdiction is limited accordingly (*s*). A general visitor may also have jurisdiction as a special visitor and may proceed in either character in appropriate circumstances (*t*). There may also be, in addition to a general, a special visitor for a particular purpose, which purpose will be excluded from the powers of the general visitor (*u*). The visitatorial power may be divided among a number of special visitors, each appointed for special purposes (*a*).

Appointment and removal of visitors.

The power of appointing and removing visitors may be vested in the heirs of a named person (*b*).

(*i*) Shelford, Law of Mortmain, pp. 332, 339, 340.

(*j*) *Eden* v. *Foster* (1725), 2 P. Wms. 325 ; *Philips* v. *Bury* (1694), as reported 2 Term Rep. 346, 352.

(*k*) *St. John's College* v. *Todington* (1757), 1 Burr. 158, 200.

(*l*) *Anon.* (1699), 12 Mod. Rep. 232; *R.* v. *St. Catherine's Hall* (*Master and Fellows*) (1791), 4 Term Rep. 233; *Ex parte Wrangham* (1795), 2 Ves. 609; *A.-G.* v. *Clarendon* (*Earl*) (1811), 17 Ves. 491, 498 ; and see Shelford, Law of Mortmain, pp. 337 *et seq.*; *A.-G.* v. *Ewelme Hospital* (1853), 17 Beav. 366, 381.

(*m*) *A.-G.* v. *Black* (1805), 11 Ves. 191.

(*n*) *A.-G.* v. *Dixie* (1801), 13 Ves. 519, 533.

(*o*) *Philips* v. *Bury*, *supra*; *A.-G.* v. *York* (*Archbishop*) (1831), 2 Russ. & M. 461, 466. Some of the colleges of Oxford are visitable by the Bishop of Lincoln, in whose diocese Oxford originally was included. The colleges were formerly deemed ecclesiastical foundations; hence the jurisdiction of the bishop; see 1 Bl. Com. p. 483.

(*p*) *Eden* v. *Foster*, *supra*; *A.-G.* v. *Lock* (1744), 3 Atk. 164; *A.-G.* v. *Talbot* (1747), 1 Ves. Sen. 78; *St. John's College* v. *Todington*, *supra*.

(*q*) *A.-G.* v. *Talbot*, *supra*; *St. John's College* v. *Todington*, *supra*.

(*r*) *R.* v. *Worcester* (*Bishop*) (1815), 4 M. & S. 415, *per* Lord ELLENBOROUGH, C.J., at p. 420.

(*s*) *St. John's College* v. *Todington*, *supra*, at p. 200. See also Shelford, Law of Mortmain, pp. 343 *et seq.*; *Ely* (*Bishop*) v. *Bentley* (1732), 2 Bro. Parl. Cas. 220; *R.* v. *Ely* (*Bishop*) (1788), 2 Term Rep. 290, 336; *R.* v. *Worcester* (*Bishop*), *supra*, at p. 420.

(*t*) *Ely* (*Bishop*) v. *Bentley*, *supra*.

(*u*) *St. John's College* v. *Todington*, *supra*.

(*a*) *A.-G.* v. *Middleton* (1751), 2 Ves. Sen. 327, 329.

(*b*) *Ibid.*; see also *A.-G.* v. *Talbot* (1747), 3 Atk. 662; *St. John's College* v. *Todington*, *supra*.

Mode of appointment.

573. No technical words are necessary for the appointment of a visitor. It is sufficient if the intention to appoint is manifested (*c*). The question is invariably one of construction (*d*).

Moreover, a visitor may be appointed by implication (*e*), but the power of construing statutes does not of itself constitute a person visitor if other visitatorial functions are exercisable by other persons (*f*). And the express exclusion of the jurisdiction of the founder's heirs implies an intention to appoint another as visitor (*g*).

Person interested beneficially cannot be visitor.

A beneficial interest in a charity prevents a person becoming visitor of that charity (*h*).

When governors are visitors.

Persons by being appointed governors do not *ipso facto* become visitors (*i*), unless an appointment as visitors is implied or expressed (*k*). But the appointment as governors may constitute them visitors as well, if they are not concerned in the management of the charity property, and if there is a manifested intention that they should visit (*l*). The receipt and application of the charity revenues, however, excludes governors from exercising visitatorial jurisdiction (*m*), though the bare possession of the legal estate does not do so (*n*).

Charity property in trustees.

If the charity property is not vested in the persons who are to partake, but in trustees for their benefit, there can be no visitor by implication, but the trustees have the powers of a visitor (*o*).

Suspension of visitatorial powers.

If the visitatorial power is at any time suspended, the jurisdiction vests in the Supreme Court (*p*). Such powers may cease and revive in appropriate circumstances (*q*).

Hospitals.

574. Hospitals, whether of the King's foundation or not, are visitable by the ordinaries by virtue of the King's commission, and provision is made for the "correction and reformation" of the latter class according to ecclesiastical law (*r*). Again, hospitals

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(*c*) *A.-G.* v. *Talbot* (1747), 3 Atk. 662; *A.-G.* v. *Middleton* (1751), 2 Ves. Sen. 327; *St. John's College* v. *Todington* (1757), 1 Burr. 158.

(*d*) *Ibid.*; *Ely (Bishop)* v. *Bentley* (1732), 2 Bro. Parl. Cas. 220, 232, where the words "*visitator Episcopus Eliensis sit*," no Christian name being mentioned, were held to confer the visitatorial power on the Bishop of Ely and his successors; and see *Ex parte Kirkby Ravensworth Hospital* (1808), 15 Ves. 305, 315.

(*e*) *E.g.*, by conferring powers of correction, amotion or of construing statutes upon a person (*A.-G.* v. *Lock* (1744), 3 Atk. 164; *A.-G.* v. *Talbot*, *supra*, at p. 673; *St. John's College* v. *Todington*, *supra*.

(*f*) *Ex parte Kirkby Ravensworth Hospital*, *supra*.

(*g*) *St. John's College* v. *Todington*, *supra*.

(*h*) *R.* v. *Chester* (*Bishop*) (1791), 2 Stra. 797; *R.* v. *Rochester* (*Dean*) (1851), 17 Q. B. 1; on the principle that a man cannot visit himself.

(*i*) *Eden* v. *Foster* (1725), 2 P. Wms. 325; *A.-G.* v. *Harrow School* (*Governors*) (1754), 2 Ves. Sen. 551.

(*k*) *Sutton's Hospital Case* (1613), 10 Co. Rep. 23 a, 31 a; *A.-G.* v. *Lock*, *supra*.

(*l*) *Eden* v. *Foster*, *supra*.

(*m*) *Ibid.* In these circumstances they are simply trustees (*A.-G.* v. *Lubbock* (1837), Coop. Pr. Cas. 15).

(*n*) *A.-G.* v. *Middleton*, *supra*, at p. 329.

(*o*) *Green* v. *Rutherforth* (1750), 1 Ves. Sen. 462, 472.

(*p*) *R.* v. *Chester* (*Bishop*) *supra*, where the visitor was appointed warden of the college and therefore could not visit himself; and see *R.* v. *Ely* (*Bishop*) (1788), 2 Term Rep. 290; *Green* v. *Rutherforth*, *supra*, at p. 471.

(*q*) *R.* v. *Chester* (*Bishop*), *supra*; Shelford, Law of Mortmain, 368.

(*r*) Stat. 2 Hen. 5, stat. 1, c. 1; this statute appears to be still in force. See

founded pursuant to 39 Eliz. c. 5 are visitable by the appointees of the founders (*s*).

Grammar schools.

575. The bishop of the diocese may be empowered by the court to visit a grammar school in respect of discipline, where such visitatorial jurisdiction is not vested in any known person (*t*); and where the visitor refuses or neglects to visit, or it is uncertain who the visitor is, the court may appoint a visitor *pro hâc vice* (*a*).

Substitution of bishops by Commissioners.

576. The powers of the Charity Commissioners under the Bishops' Trust Substitution Act, 1858 (*b*), to substitute the bishop of one diocese for the bishop of another as trustee of charitable trusts do not extend to or affect trusts of a visitatorial nature exercised in or over the colleges, halls, or schools of the universities of Oxford or Cambridge, or the schools of Eton, Winchester, or Westminster (*c*).

Endowed schools.

577. Schemes under the Endowed Schools Acts relating to endowed schools other than cathedral schools may contain provisions for the transfer of visitatorial powers to the Charity Commissioners (*d*), whose powers as regards educational endowments are now vested in the Board of Education (*e*).

Jurisdiction of Commissioners under schemes.

So too schemes made under the Endowed Schools Acts and the Charitable Trusts Acts frequently contain clauses vesting a *quasi*-visitatorial jurisdiction in the Charity Commissioners (*f*).

SUB-SECT. 3.—*Powers and Duties of Visitor.*

Limits of jurisdiction.

578. The general jurisdiction (*g*) of a visitor is limited by the statutes regulating the charity (*h*), though under express powers he may be authorised to dispense with or alter such statutes (*i*). The powers of a special visitor are confined within the limits imposed by the founder (*k*).

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also Shelford, Law of Mortmain, p. 327; stat. 14 Eliz. c. 5 (repealed by Statute Law Revision Act, 1863 (26 & 27 Vict. c. 125)), under which bishops were constituted visitors of hospitals where no visitor was appointed by the founder; and title ECCLESIASTICAL LAW.

(*s*) Stat. 39 Eliz. c. 5, made perpetual by stat. 21 Jac. 1, c. 1; see note (*e*), p. 285, *ante*.

(*t*) Grammar School Act, 1840 (3 & 4 Vict. c. 77), s. 15.

(*a*) *Ibid.*, s. 16. Grammar schools regulated by schemes under the Endowed Schools Act, 1869 (32 & 33 Vict. c. 56), are now subject to the visitatorial jurisdiction of the Board of Education; see notes (*d*) and (*e*), *infra*; and title EDUCATION.

(*b*) 21 & 22 Vict. c. 71.

(*c*) *Ibid.*, s. 4.

(*d*) Endowed Schools Act, 1869 (32 & 33 Vict. c. 56), s. 20; see *Re Hodgson's School* (1878), 3 App. Cas. 857.

(*e*) Board of Education Act, 1899 (62 & 63 Vict. c. 33), s. 2, and Orders in Council made thereunder. The Orders in Council referred to are set out in full in Tudor, Law of Charities and Mortmain, 4th ed., pp. 760—769.

(*f*) See for example, Encyclopædia of Forms, Vol. III. p. 490; Form No. 44, clause 51; *Re Hodgson's School*, *supra*.

(*g*) As to procedure of visitors, see p. 339, *post*.

(*h*) *Green* v. *Rutherforth* (1750), 1 Ves. Sen. 462, 472; *Philips* v. *Bury* (1694), reported 2 Term Rep. 346, 357, 358.

(*i*) *St. John's College* v. *Todington* (1757), 1 Burr. 158, 201: "It must be collected from the whole purview of the statutes considered together what power the founder meant to give the visitor."

(*k*) *Philips* v. *Bury*, *supra*, at p. 348.

SECT. 2. The Visitor.

Time of visitations.

579. As a rule the statutes of a corporation provide for general visitations being made at fixed intervals of time, or upon the special request of the corporators. If made otherwise the proceedings are void (*l*). But a visitor may at all times hear complaints and appeals of individual members of the corporation and decree an appropriate remedy (*m*).

Power to settle questions.

580. The duties of visitors include the settling of questions arising as to the internal management of a charitable corporation (*n*), and the interpretation of the statutes relating to the foundation (*o*). A visitor has power also to determine whether a person is entitled to become a member of the corporation (*p*).

A member of a corporation refusing to recognise the authority of the visitor may be amoved, whether the statutes expressly authorise this or not (*q*).

Restrictions of visitor's power.

581. A visitor is not entitled to interfere with the proceedings of corporators in matters over which they have discretion (*r*) unless their discretion has been exercised improperly (*s*), or to insist upon a corporation performing some act which according to the statutes regulating the corporation may be performed by another if the corporation fail to do it (*t*), or to interfere with the internal management of the charitable corporation unless the trusts of the foundation are disregarded (*a*), or to appoint a master of a free school on the

(*l*) *Philips* v. *Bury* (1694), reported 2 Term Rep. 346, 348. Visitors of grammar schools are nevertheless enabled to exercise their functions when and as often as they think fit (Grammar Schools Act, 1840 (3 & 4 Vict. c. 77), s. 13); see also *ibid.*, ss. 14, 15, 17; and note (*a*), p. 291.

(*m*) *Philips* v. *Bury*, *supra*, at p. 348; *A.-G.* v. *Price* (1744), 3 Atk. 108; Com. Dig. tit. Visitor, C.; Shelford, Law of Mortmain, p. 378.

(*n*) *E.g.*, the conduct of examinations by a university (*Thomson* v. *London University* (1864), 10 Jur. (N. S.) 669); whether a master of a hospital should reside in the master's house (*Re St. Mary Magdalen, Colchester, Hospital* (1843), 12 L. J. (CH.) 375; *Ex parte Berkhampstead School* (1813), 2 Ves. & B. 134; *A.-G.* v. *Smythies* (1836), 2 My. & Cr. 135, 142), or perform divine service (*A.-G.* v. *Crook* (1837), 1 Keen, 121); inquiry into abuses in the internal regulation (*A.-G.* v. *Dulwich College* (1840), 4 Beav. 255; *A.-G.* v. *Magdalen College, Oxford* (1847), 10 Beav. 402), and the election or amotion of members of the corporation such as governors (*A.-G.* v. *Dixie* (1805), 13 Ves. 519; *A.-G.* v. *Clarendon* (*Earl*) (1811), 17 Ves. 491, 498), schoolmasters (*Whiston* v. *Rochester* (*Dean and Chapter*) (1849), 7 Hare, 532), fellows of a college (*A.-G.* v. *Talbot* (1747), 3 Atk. 662, 675; *Ex parte Wrangham* (1795), 2 Ves. 609; *Ex parte Inge* (1831), 2 Russ. & M. 590), or the master of a hospital (*A.-G.* v. *York* (*Archbishop*) (1831), 2 Russ. & M. 461, 468), and as to the increase of a professor's stipend out of unappropriated revenue (*Re Christ Church* (1866), 1 Ch. App. 526).

(*o*) *A.-G.* v. *Stephens* (1737), 1 Atk. 358, 360; *Ex parte Berkhampstead School*, *supra*; *A.-G.* v. *Smythies*, *supra*, where the question was whether a fellow of a college might let his rooms.

(*p*) *E.g.*, in cases of claims of rejected candidates for fellowships and scholarships (*R.* v. *All Souls' College* (*Warden*) (1682), T. Jo. 174; *St. John's College* v. *Todington* (1757), 1 Burr. 158; *R.* v. *St. Catherine's Hall* (*Master and Fellows*) (1791), 4 Term Rep. 233; *Ex parte Wrangham*, *supra*; *R.* v. *Hertford College* (1878), 3 Q. B. D. 693, C. A.

(*q*) *Philips* v. *Bury*, *supra*, at p. 348; *Re Christ Church*, *supra*.

(*r*) *Ex parte Wrangham*, *supra*, at p. 625 (election of fellows).

(*s*) *Ex parte Inge*, *supra*, at p. 601; *R.* v. *Hertford College*, *supra*, at p. 701.

(*t*) *Ex parte Wrangham*, *supra*, at p. 621, where the statutes provided that if a college failed to elect fellows the right should be exercised by the master.

(*a*) *A.-G.* v. *Clarendon* (*Earl*), *supra*, at p. 507.

ground that the appointments previously made by the proper electors were invalid (*b*).

So, too, as the jurisdiction of the visitor extends only over the members of the corporation, he has no power to compel specific performance of an agreement between the corporators and other parties (*c*), or to reverse a decision of a corporation concerning strangers to the foundation (*d*).

A visitor cannot, except under an express power, be judge in his own cause (*e*), nor can he alter the general constitution of the trust (*f*).

Accession of new to old foundation.

582. In the case of an accession of a new to an old foundation the visitor of the old foundation has no jurisdiction over the new foundation unless the visitatorial power is especially given to him by the subsequent founder, or his appointment as visitor is to be implied (*g*). Where new property is annexed to an old foundation without a special trust being declared or a new visitor being appointed, the necessary implication is that the new property is intended to be subject to the existing visitatorial jurisdiction (*h*). The visitor, however, of the old foundation has no jurisdiction over an annexed estate concerning which a special trust has been declared (*i*). If the King is visitor of an old foundation, which accepts an accession, the King, it seems, becomes visitor of the new foundation, even if the founder declares there shall be no visitor (*k*).

Incorporation of new members.

A lay corporation composed of an indefinite number of members may incorporate additional members, who will thereupon become subject to the jurisdiction of the visitor (*l*).

Visitor's rights as to orders affecting grammar schools.

583. By the Grammar Schools Act, 1840 (*m*), the visitor (if any) has a right to be heard by the court before orders are made under that Act (*n*), and in certain events the consent of the visitor is required (*o*).

As to orders of Commissioners.

So, too, the consent of the visitor (if any) must be obtained before the removal of officers of a charity can be authorised by the

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(*b*) *A.-G.* v. *Black* (1805), 11 Ves. 191.

(*c*) *R.* v. *Windham* (1776), Cowp. 377.

(*d*) *Davison's Case* (1772), cited Cowp. 319 (expulsion of commoners by a college); see also *R.* v. *Grundon* (1775), Cowp. 315.

(*e*) Upon the principle that the same person cannot be visitor and visited (*R.* v. *Ely, (Bishop)* (1788), 2 Term Rep. 290; *A.-G.* v. *Middleton* (1751), 2 Ves. Sen. 327, 329); and see *R.* v. *Hertford College* (1878), 3 Q. B. D. 693, 703, C. A.

(*f*) *Ex parte Bolton School* (1789), 2 Bro. C. C. 662.

(*g*) *Green* v. *Rutherforth* (1750), 1 Ves. Sen. 462, 472.

(*h*) *Ibid.*, at p. 473; *A.-G.* v. *Talbot* (1747), 3 Atk. 662 (accession of fellowship to college foundation); *A.-G.* v. *Flood* (1816), Hayes & Jo. App. xxi, xxxv. See also *Ex parte Inge* (1831) 2 Russ. & M. 590, 596.

(*i*) *Green* v. *Rutherforth*, *supra*, at pp. 468, 469, 473.

(*k*) *A.-G.* v. *Catherine Hall (Master and Fellows)* (1820), Jac. 381, 400. It was doubted (*ibid.*) whether a college of which the King was visitor could accept an accession without the King's consent.

(*l*) *A.-G.* v. *Talbot*, *supra*, at p. 675.

(*m*) 3 & 4 Vict. c. 77.

(*n*) *Ibid.*, s. 1.

(*o*) *Ibid.*, s. 9.

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Charity Commissioners (*p*), and in some cases notice of a proposed order must be given to the visitor (*q*).

SECT. 3.—*The Courts.*

SUB-SECT. 1.—*In General.*

General jurisdiction to enforce trusts.

584. As a general rule the Chancery Division of the High Court has jurisdiction to enforce the observance or redress breaches of all trusts, charitable as well as private (*r*). That court cannot exercise its charitable jurisdiction if no trust is ascertained (*s*). The jurisdiction in the case of charities is more extensive than in the case of private trusts (*t*). Where the trust is charitable the court has jurisdiction not only to enforce it and to redress all breaches (*a*), but also, under certain circumstances, to alter or modify the trust to a greater or less degree by virtue of the *cy-près* doctrine (*b*).

The court equally enforces the execution of trusts where corporations eleemosynary (*c*), ecclesiastical (*d*), or civil (*e*) are trustees for charitable or public purposes.

(*p*) Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 22; see also Charitable Trusts Act, 1860 (23 & 24 Vict. c. 136), ss. 8, 14.

(*q*) Charitable Trusts Amendment Act, 1855 (18 & 19 Vict. c. 124), s. 14.

(*r*) *Dick* v. *Audsley*, [1908] A. C. 347, 351. This jurisdiction, formerly exercised by the Court of Chancery, is now vested in the High Court of Justice, Chancery Division (Supreme Court of Judicature Act, 1873 (36 & 37 Vict. c. 66), ss. 16, 34). The jurisdiction has been exercised by the court from the earliest times; *Wakeryng* v. *Bayle* (*temp.* Hen. 6), 1 Calendar of Proceedings in Chancery, lvii; *Lyon* v. *Hewe* (*temp.* Edw. 4), 2 Cal. Proc. Ch. xliv; *Payne's Case* (*temp.* Eliz.), Duke on Charitable Uses, ed. Bridgman, 154. For an account of the early history of charitable trusts and uses, see Tudor, Law of Charities and Mortmain, p. 1.

(*s*) *Ommanney* v. *Butcher* (1823), Turn. & R. 260, 270; *A.-G.* v. *St. John's Hospital, Bedford* (1865), 2 De G. J. & Sm. 621, 635; and see p. 295, *post*.

(*t*) *A.-G.* v. *Sherborne Grammar School* (*Governors*) (1854), 18 Beav. 256, 280; *Clephane* v. *Edinburgh Corporation* (1869), L. R. 1 Sc. & Div. 417, 421; *Andrews* v. *M'Guffog* (1886), 11 App. Cas. 313, 316.

(*a*) *A.-G.* v. *Sherborne Grammar School* (*Governors*), *supra*; see also *Incorporated Society* v. *Richards* (1841), 1 Con. & Law. 58; *A.-G.* v. *Dublin Corporation* (1827), 1 Bli. (N. S.) 312, 347, H. L.; *A.-G.* v. *St. John's Hospital, Bedford*, *supra*.

(*b*) See p. 189, *ante*.

(*c*) As to the jurisdiction of the court over eleemosynary corporations, see p 283, *ante*; and *A.-G.* v. *Magdalen College, Oxford* (1847), 10 Beav. 402, 409, where a college was trustee of a grammar school; *Whiston* v. *Rochester* (*Dean and Chapter*) (1849), 7 Hare, 532, 560 (dean and chaptor trustees); *Daugars* v. *Rivaz* (1859), 28 Beav. 233. The duty of appointing and removing schoolmasters may be (*Willis* v. *Childe* (1851), 13 Beav. 117), but is not necessarily, in the nature of a trust (*A.-G.* v. *Magdalen College, Oxford*, *supra*, at p. 409; *Whiston* v. *Rochester* (*Dean and Chapter*), *supra*). If it is a trust an improper removal is restrained by injunction. If it is not a trust, but only a duty imposed on trustees, any breach must be redressed by the visitor and not by the court (*ibid.*).

(*d*) *A.-G.* v. *St. John's Hospital, Bedford*, *supra*, at p. 635. See also *A.-G.* v. *Brereton* (1752), 2 Ves. Sen. 425.

(*e*) *Coventry Corporation* v. *A.-G.* (1720), 7 Bro. Parl. Cas. 235; *A.-G.* v. *Shrewsbury Town* (1726), Bunb. 215; *A.-G.* v. *Foundling Hospital* (*Governors*) (1793), 2 Ves. 42, 46; *Gort* v. *A.-G.* (1817), 6 Dow, 136; *A.-G.* v. *Brewers' Co.* (1816), 1 Mer. 495; *A.-G.* v. *Stafford Corporation* (1826), 1 Russ. 547; *A.-G.* v. *Exeter Corporation* (1826), 2 Russ. 362; *A.-G.* v. *Dublin Corporation*, *supra*; *A.-G.* v. *Carlisle Corporation* (1828), 2 Sim. 437, 449; *A.-G.* v. *Liverpool Corporation* (1835), 1 My. & Cr. 171, 201; *R.* v. *Liverpool Corporation* (1839), 9 Ad. & El. 435; and see *A.-G.* v. *Plymouth Corporation* (1845), 9 Beav. 67.

Extent of jurisdiction.

585. After some conflict of judicial opinions (*f*) the rule is now established that wherever there is a gift to charity and the donor either created or intended to create a trust, and whether the objects are specified or indefinite, the court has jurisdiction to enforce the execution of the trust, and, if necessary, to apply the gift to charitable purposes by means of a scheme (*g*).

In accordance with this rule legacies to charitable institutions which disclaim (*h*), to non-existing (*i*) or defunct (*k*) charitable societies, and to societies the names of which are left blank (*l*), are applied by the court.

Trusts of nonconformist charities.

586. The jurisdiction of the court also extends to the charitable trusts of Roman Catholics, Nonconformists and Jews, and to the trusts relating to their places of worship (*m*).

When court will interfere.

587. The court does not interfere with the execution of a charitable trust unless it appears that such interference will benefit the charity (*n*). The court has, however, a general controlling power over all charitable institutions (*o*). Thus it can always enforce the performance of trusts and redress breaches of trust, whether the trustee is an individual or an eleemosynary corporation (*p*), and whether the corporation is subject to the control of a visitor or not (*a*). On this ground it exercises jurisdiction with respect to the dealings and conduct of governors who receive and apply the revenues of charity property or manage charity estates (*b*).

(*f*) *A.-G.* v. *Berryman* (1755), 1 Dick. 168; *A.-G.* v. *Herrick* (1772), Amb. 712; *A.-G.* v. *Londonderry* (*Marchioness*) (1825), Shelford, Law of Mortmain, p. 272; *A.-G.* v. *Fletcher* (1835), 5 L. J. (CH.) 75; *Felan* v. *Russell* (1842), 4 I. Eq. R. 701; in which last-mentioned cases, though a trust was created, the disposition of the property was held to devolve on the Crown and not on the court.

(*g*) *Cook* v. *Duckenfield* (1743), 2 Atk. 562, 567, 569; *Moggridge* v. *Thackwell* (1802), 7 Ves. 36; *Mills* v. *Farmer* (1815), 1 Mer. 55; *Paice* v. *Canterbury* (*Archbishop*) (1807), 14 Ves. 364; *Ommanney* v. *Butcher* (1823), Turn. & R. 260, 271; *Hayter* v. *Trego* (1830), 5 Russ. 113; *A.-G.* v. *Ironmongers' Co.* (1833), 2 My. & K. 576; *Reeve* v. *A.-G.* (1843), 3 Hare, 191, 197; *Re Davis*, [1902] 1 Ch. 876, 888; *Re Pyne*, [1903] 1 Ch. 83.

(*h*) *Reeve* v. *A.-G.*, *supra*; *contrà*, *Denyer* v. *Druce* (1829), Taml. 32.

(*i*) *Bennett* v. *Hayter* (1839), 2 Beav. 81; *Re Clergy Society* (1856), 2 K. & J. 615; *Re Maguire* (1870), L. R. 9 Eq. 632; *contrà*, *Simon* v. *Barber* (1829), Taml. 14. See also *Sanford* v. *Gibbons* and *Thorley* v. *Byrne*, cited in *Reeve* v. *A.-G.*, *supra*, at p. 195, n.

(*k*) *Hayter* v. *Trego*, *supra*; *Spiller* v. *Maude* (1881), 32 Ch. D 158, n.; *Re Soley* (1900), 17 T. L. R. 118; and compare *Re Slevin*, *Slevin* v. *Hepburn*, [1891] 2 Ch. 236, C. A., where a charitable bequest to an institution which came to an end after the death of the testator, but before payment of the legacy, was applied by the Crown.

(*l*) *Re White*, [1893] 2 Ch. 41; *Re Macduff*, *Macduff* v. *Macduff*, [1896] 2 Ch. 451, C. A.

(*m*) See p. 121, *ante*.

(*n*) *A.-G.* v. *Bosanquet* (1842), 11 L. J. (CH.) 43.

(*o*) See *A.-G.* v. *Foundling Hospital* (*Governors*) (1793), 2 Ves. 42, 49.

(*p*) *Green* v. *Rutherforth* (1750), 1 Ves. Sen. 462, 475; *Re Chertsey Market* (1819), 6 Price, 261; *A.-G.* v. *Clarendon* (*Earl*) (1811), 17 Ves. 491; *A.-G.* v. *Mansfield* (*Earl*) (1823), 2 Russ. 501; *A.-G.* v. *Lubbock* (1837), Coop. Pr. Cas. 15; *A.-G.* v. *Dedham School* (1857), 23 Beav. 350; *A.-G.* v. *St. Cross Hospital* (1853), 17 Beav. 435; *Willis* v. *Childe* (1851), 13 Beav. 117; and see also *A.-G.* v. *Bedford Corporation* (1754), 2 Ves. Sen. 505.

(*a*) *Daugars* v. *Rivaz* (1859), 28 Beav. 233; and see also cases cited in previous note.

(*b*) *Eden* v. *Foster* (1725), 2 P. Wms. 325; *A.-G.* v. *Lock* (1744), 3 Atk.

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Thus, the court may set aside a lease of charity property to one of the governors, though there is no suggestion that the transaction was fraudulent (*c*), and interfere when a school chapel is turned into a chapel of ease (*d*), and where the master of a school is collusively appointed and takes his salary without fulfilling the duties of his post (*e*).

Charity founded by royal charter.

588. On the principle that the authority of the Crown is higher than that of the court (*f*), the latter has no general jurisdiction to establish or regulate charities founded by royal charter (*g*). But it has jurisdiction to see that the provisions of the charter are observed (*h*) where improper conduct is alleged (*i*), and to direct a *cy-près* application if the corporation is dissolved (*k*) or the revenues become insufficient to carry out the original intention of the founder (*l*), or if, owing to a compulsory sale, the property is converted from land into money (*m*).

Charity regulated by statute.

589. The court has no jurisdiction to interfere in the administration of a charity established and completely regulated by Act of Parliament (*n*), unless authorised by the Act itself (*a*); but the court may make a scheme in respect of matters not provided for by the Act (*b*), and may enforce the observance of the provisions contained in the Act (*c*).

164, 165; *A.-G.* v. *Foundling Hospital* (*Governors*) (1793), 2 Ves. 42; *A.-G.* v. *Middleton* (1751), 2 Ves. Sen. 327; *Ex parte Kirkby Ravensworth Hospital* (1808), 15 Ves. 305, 314; and note *Hynshaw* v. *Morpeth Corporation* (1629), Duke on Charitable Uses, ed. Bridgman, 242; and *Sutton Colfield Case* (1635), Duke on Charitable Uses, ed. Bridgman, 642.

(*c*) *A.-G.* v. *Clarendon* (*Earl*) (1811), 17 Ves. 491, 500.

(*d*) *A.-G.* v. *Mansfield* (*Earl*) (1823), 2 Russ. 501.

(*e*) *A.-G.* v. *Bedford Corporation* (1754), 2 Ves. Sen. 505.

(*f*) *A.-G.* v. *Smart* (1748), 1 Ves. Sen. 72; *A.-G.* v. *Middleton*, *supra*; *A.-G.* v. *Bedford Corporation* (1754), 2 Ves. Sen. 505; *A.-G.* v. *Foundling Hospital* (*Governors*), *supra*, at p. 47; *A.-G.* v. *Clarendon* (*Earl*), *supra*; *A.-G.* v. *Dedham School* (1857), 23 Beav. 350, 356; *A.-G.* v. *Christ's Hospital* (*Governors*), [1896] 1 Ch. 879, 888; and see *Re Chertsey Market* (1819), 6 Price, 261; *A.-G.* v. *Browne's Hospital, Stamford* (1889), 60 L. T. 288.

(*g*) Except where the charter is subsequent to the original foundation (*A.-G.* v. *Dedham School*, *supra*, at p. 356); see also *A.-G.* v. *St. Olave's School, Southwark* (1837), Coop. Pr. Cas. 267.

(*h*) *Green* v. *Rutherforth* (1750), 1 Ves. Sen. 462, 468; *A.-G.* v. *Foundling Hospital* (*Governors*), *supra*; *A.-G.* v. *Mansfield* (*Earl*), *supra*; *A.-G.* v. *Smythies* (1833), 2 Russ. & M. 717, 749; *A.-G.* v. *Wyggeston's Hospital* (1849), 12 Beav. 113, 123; and see *A.-G.* v. *St. John's Hospital, Bedford* (1865), 34 L. J. (CH.) 441.

(*i*) *A.-G.* v. *Bedford Corporation*, *supra*.

(*k*) *A.-G.* v. *Hicks* (1790), Highmore, Mortmain, 336; *Re Conyers' Free Grammar School at Yarm* (1853), 10 Hare, Appendix I., p. v., where new trustees of an extinct corporation were appointed by the court with the assent of the Crown.

(*l*) *Re Berkhampstead Grammar School*, [1908] 2 Ch. 25; *Manchester School Case* (1867), 2 Ch. App. 497; and see *Berkhampstead School Case* (1865), L. R. 1 Eq. 102.

(*m*) *Clephane* v. *Edinburgh Corporation* (1869), L. R. 1 Sc. & Div. 417.

(*n*) *Re Shrewsbury Grammar School* (1849), 1 Mac. & G. 324, 333.

(*a*) *Ibid.*, at p. 331; *Ex parte Bolton School* (1789), 2 Bro. C. C. 662; *Re Bedford Charity* (1833), 5 Sim. 578. In the Commons Act, 1899 (62 & 63 Vict. c. 30), for example by s. 18, the Charity Commissioners, who have sundry judicial functions, are given power to modify statutory provisions; see further title COMMONS, pp. 591, 595, 596, *post*.

(*b*) *Re Shrewsbury Grammar School*, *supra*, at p. 332.

(*c*) *A.-G.* v. *Wyggeston's Hospital*, *supra*.

Gift not strictly charitable.

590. Nor can the court exercise its charitable jurisdiction where the gift is not charitable in the legal sense, as in the case of a private charity (*d*), or where a gift fails entirely owing to the charitable intention not taking effect (*e*), or where the gift was never subject to a charitable trust (*f*), as in the case of a gift to charity subject to the fulfilment of a condition which was never satisfied (*g*), or in the case of voluntary subscriptions or funds impressed with no charitable trust (*h*).

Matters beyond jurisdiction.

It is not within the jurisdiction of the court to determine whether ecclesiastical duties enjoined under a charitable foundation are properly performed (*i*). Nor can the court prevent a forfeiture or a transfer of property from one charity to another in circumstances expressly contemplated by the donor (*k*), or give a charity a larger interest in property than that intended by the testator (*l*).

Mode of executing trusts.

591. In accordance with the principle that the charitable jurisdiction of the court depends on the existence of a trust and must be utilised for the purpose of giving effect to the donor's charitable intentions, it may be laid down as a general rule that a definite charitable trust must if possible be executed literally (*m*).

Observance of founder's intention.

The court has no authority to vary the original foundation and to apply the charity estates in a manner which it conceives to be more beneficial to the public, or even such as the court may surmise that the founder would himself have contemplated could he have foreseen the changes which have taken place by lapse of time (*n*).

The founder, and not the court, is the proper person to judge how far a charity founded by him is likely to benefit the community (*o*), and it is not the function of the court to express an opinion whether an institution which is charitable in the legal sense is or is not actually beneficial to the public (*p*), though it may

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(*d*) *Ommanney* v. *Butcher* (1823), Turn. & R. 260, 273. As to private charities, see p. 117, *ante*.

(*e*) *A.-G.* v. *Boultbee* (1794), 2 Ves. 380, 387 (charitable object to build a church in parish of A. which the parish did not permit); *Biscoe* v. *Jackson* (1887), 35 Ch. D. 460, 463, C. A.

(*f*) *De Themmines* v. *De Bonneval* (1828), 5 Russ. 288.

(*g*) *Chamberlayne* v. *Brockett* (1872), 8 Ch. App. 206, 211; and see *Re Gyde* (1898), 79 L. T. 261.

(*h*) *Anon.* (1745), 3 Atk. 277; *Leslie* v. *Birnie* (1826), 2 Russ. 114, 119.

(*i*) *A.-G.* v. *Smithies* (1836), 1 Keen, 289.

(*k*) *Christ's Hospital* v. *Grainger* (1849), 1 Mac. & G. 460; *Re Tyler*, [1891] 3 Ch. 252, C. A.

(*l*) *Re Randell* (1888), 38 Ch. D. 213; *Re Blunt*, [1904] 2 Ch. 767.

(*m*) *A.-G.* v. *Boultbee*, *supra*, at pp. 387, 388; *A.-G.* v. *Whitchurch* (1796), 3 Ves. 141, 144; *A.-G.* v. *Whiteley* (1805), 11 Ves. 241, 247; *Re Campden Charities* (1881), 18 Ch. D. 310, 319, C. A.; and see pp. 294, 295, *ante*.

(*n*) *A.-G.* v. *Sherborne Grammar School* (1854), 18 Beav. 256, *per* ROMILLY, M.R., at p. 280. See also *Hereford (Bishop)* v. *Adams* (1802), 7 Ves. 324, 329. See the cases quoted at p. 197, *ante*.

(*o*) *A.-G.* v. *Whiteley*, *supra*, at p. 247; *A.-G.* v. *Mansfield (Earl)* (1823), 2 Russ. 501, 521; *A.-G.* v. *Boucherett* (1855), 25 Beav. 116, 118, 119; *Philpott* v. *St. George's Hospital* (1859), 27 Beav. 107, 111, 112; *Barclay* v. *Maskelyne* (1858), 4 Jur. (N. S.) 1294, 1297.

(*p*) *Re Foveaux, Cross* v. *London Anti-Vivisection Society*, [1895] 2 Ch. 501, 507.

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decide whether any particular gift is or is not inconsistent with any existing law (*q*).

How far trusts may be varied.

The rule just stated, that a charitable trust capable of being executed cannot be varied, does not, however, always apply in the case of charities where, owing to change of circumstances, as the disappearance of the class sought to be benefited (*r*) or an increase in the income of the charity altogether disproportionate to its original objects (*s*), the directions of the founder with respect to particular objects, if carried out, so far from being beneficial would be detrimental to the objects he meant to benefit (*t*); in such cases the court may alter the mode of applying the charitable funds, but the objects of the trust must as far as possible be preserved while the mode of their attainment is varied (*a*).

Accordingly schemes for regulating grammar schools which were founded for instruction in Latin and Greek may contain provisions for teaching reading, writing, arithmetic and modern languages (*b*).

And on the same principle the increased revenues of charities for apprenticing boys and granting doles may be diverted to other charitable purposes on the ground that the custom of apprenticing is practically obsolete (*c*) and that the granting of doles is mischievous (*d*).

Inquiry whether specified objects can be attained.

592. Where there is an immediate gift for specified charitable objects, the application of which is postponed (*e*), the fund may be retained, though not indefinitely (*f*), by the court until it is ascertained whether the specified objects can be effected or not (*g*); and the court may direct an inquiry for that purpose (*h*), unless it is manifest that such an inquiry would be fruitless (*i*). Until the

(*q*) *A.-G.* v. *Boucherett* (1855), 25 Beav. 116, 118.

(*r*) *Ironmongers' Co.* v. *A.-G.* (1844), 10 Cl. & Fin. 908, 924, H. L. (charity for the redemption of British slaves in Turkey). See also p. 193, *ante*, for other examples of failure of objects subsequently to creation of trusts.

(*s*) *Re Latymer's Charity* (1869), L. R. 7 Eq. 353; *Re Campden Charities* (1881), 18 Ch. D. 310, C. A.; and see *Incorporated Society* v. *Price* (1844), 1 Jo. & Lat. 498; *Re Templemoyle School* (1869), I. R. 4 Eq. 294.

(*t*) *A.-G.* v. *Marchant* (1866), L. R. 3 Eq. 424, 430.

(*a*) *Re Campden Charities*, *supra*, at p. 323; *Andrews* v. *M'Guffog* (1886), 11 App. Cas. 313, 316.

(*b*) See *A.-G.* v. *Dixie* (1825), 3 Russ. 534, n.; *A.-G.* v. *Haberdashers' Co.* (1827), 3 Russ 530; *A.-G.* v. *Gascoigne* (1832), 2 My. & K. 647; *A.-G.* v. *Caius College* (1837), 2 Keen, 150; *A.-G.* v. *Devon (Earl)* (1846), 15 Sim. 193; *Berkhampstead School Case* (1865), L. R. 1 Eq. 102; *Manchester School Case* (1867), 2 Ch. App. 497. See also *Re Rugby School* (1839), 1 Beav. 457; *Re Latymer's Charity*, *supra*, at pp. 358, 359.

(*c*) *Re Campden Charities*, *supra*, at p. 326. But in 1904 provisions for apprenticing children were inserted in a scheme of the Charity Commissioners for regulating Bishop Porteous' Charity (see Tudor, Law of Charities and Mortmain, 4th ed., pp. 972, 976, Scheme No. 1).

(*d*) *A.-G.* v. *Marchant*, *supra*, at p. 431.

(*e*) *Chamberlayne* v. *Brockett* (1872), 8 Ch. App. 206, where there was a bequest for the erection of almshouses as soon as a suitable site should be given; see also *Re Swain*, [1905] 1 Ch. 669, C. A; and cases cited pp. 157, 158, *ante*.

(*f*) *Sinnett* v. *Herbert* (1872), 7 Ch. App. 232, 243.

(*g*) *A.-G.* v. *Chester (Bishop)* (1785), 1 Bro. C. C. 444.

(*h*) *A.-G.* v. *Oxford (Bishop)* (1786), 1 Bro. C. C. 444, n.; *Sinnett* v. *Herbert*, *supra*; *Chamberlayne* v. *Brockett*, *supra*.

(*i*) *Re White's Trusts* (1886), 33 Ch. D. 449; *Hoare* v. *Hoare* (1886), 56 L. T. 147.

result of the inquiry is ascertained, the income is accumulated, and according to the result the accumulations will be applicable to charity or be dealt with as a lapsed legacy (*k*). If ultimately the prescribed objects take effect the heir has no right to the rents and profits accrued while the application is suspended (*l*), nor can there be a resulting trust (*m*).

So, too, the court may exercise its jurisdiction where there is a gift over on failure of a prior gift by directing a *cy-près* application in favour of the prior object (*n*).

593. The fact that special remedies are given by a statute to another authority for the infringement of a right does not exclude the ordinary jurisdiction of the court. In such cases if a trust exists the beneficiaries are entitled to all their legal remedies (*o*), unless the jurisdiction of the court is expressly excluded by the statute (*p*).

Jurisdiction not excluded by special remedies.

SUB-SECT. 2.—*Control of the Court over Visitors.*

594. The court controls the discretionary powers of a visitor if exercised corruptly or dishonestly (*a*).

General jurisdiction.

The court will grant a prohibition if a visitor exceeds the limits of his visitatorial authority (*b*), or proceeds contrary to his citation or inflicts different penalties from those which the statutes prescribe (*c*); or where a person assumes to act as visitor, having no jurisdiction (*d*). But mere irregularity in the proceedings or informality in the acts of a visitor will not render him liable to a prohibition (*e*). Appearance or answer in cases where a visitor has no jurisdiction does not give him jurisdiction. If there is a want of jurisdiction it may be called in question at any time, even after sentence (*f*).

Prohibition.

595. The jurisdiction of the court does not extend to matters within the discretion (if properly exercised) of the visitor (*g*), or the trustee (*h*), governors (*i*), or other authority (*j*).

Matters of discretion.

(*k*) See *A.-G.* v. *Bowyer* (1798), 3 Ves. 714.

(*l*) *Ibid.* at p. 729.

(*m*) See p. 180, *ante*.

(*n*) *Re Upton Warren* (1833), 1 My. & K. 410; *Christ's Hospital* v. *Grainger* (1848), 1 Mac. & G. 460, 465; *Re Richardson* (1888), 56 L. J. (CH.) 784.

(*o*) *A.-G.* v. *Aspinall* (1837), 2 My. & Cr. 613, 627; *Stevens* v. *Chown*, [1901] 1 Ch. 894, 905; *A.-G.* v. *De Winton*, [1906] 2 Ch. 106, 115.

(*p*) *A.-G.* v. *Aspinall*, *supra*, at p. 618.

(*q*) *A.-G.* v. *Harrow School* (*Governors*) (1754), 2 Ves. Sen. 551; *Ex parte Kirkby Ravensworth Hospital* (1808), 15 Ves. 305, 314.

(*b*) *Chichester* (*Bishop*) v. *Harward and Webber* (1787), 1 Term Rep. 650.

(*c*) *Ely* (*Bishop*) v. *Bentley* (1732), 2 Bro. Parl. Cas. 220.

(*d*) *R.* v. *Chester* (*Bishop*) (1747), 1 Wm. Bl. 23; *Whiston* v. *Rochester* (*Dean and Chapter*) (1849), 7 Hare, 532, 558.

(*e*) *Ely* (*Bishop*) v. *Bentley*, *supra*.

(*f*) *Green* v. *Rutherforth* (1750), 1 Ves. Sen. 462, 471.

(*g*) *A.-G.* v. *Harrow School* (*Governors*), *supra*; *A.-G.* v. *Dulwich College* (1841), 4 Beav. 255; *A.-G.* v. *Magdalen College, Oxford* (1847), 10 Beav. 402. As to what matters are within the discretion of the visitor, see pp. 287—294, *ante*.

(*h*) *A.-G.* v. *Harrow School* (*Governors*), *supra*.

(*i*) *Eden* v. *Foster* (1725), 2 P. Wms. 326.

(*j*) *A.-G.* v. *Bedford Corporation* (1754), 2 Ves. Sen. 505; *Costabadie* v. *Costabadie* (1847), 6 Hare, 410; *Hayman* v. *Rugby School* (*Governors*) (1874), L. R. 18 Eq. 28.

SECT. 3. The Courts.

596. Where visitatorial jurisdiction is reserved by a scheme to the Charity Commissioners or to the Board of Education (*k*), the court will not interfere in matters coming within such jurisdiction which have already been "determined conclusively" within the meaning of the scheme, before any application is made to the court (*l*).

Effect of mandamus.

597. The object and effect of a mandamus is no more than to put the visitatorial power in motion, whereupon the visitor is at liberty to pursue his own course without review by the court (*m*).

When mandamus will issue.

A mandamus may be issued by the court in the following circumstances, namely: to compel a visitor to exercise his visitatorial power where he has not acted, declines to act, or acts improperly (*a*); or to compel him to receive and hear an appeal, though the court cannot force him to decide on the merits if he considers the appeal is brought too late (*b*); so, too, the court may issue a mandamus to the head of a college and to the fellows where the laws of the land have been disobeyed by the fellows, even though there is a visitor (*c*).

When mandamus refused.

But the court refuses to issue a mandamus where it is doubtful whether the visitatorial power is in the persons required to exercise it (*d*), or to compel an inferior officer of a college to execute the sentence of the visitor in accordance with the statutes (*e*), or to restore a fellow or member of a college (*f*), or a chaplain (*g*) or a sister of a hospital (*h*).

Remedies against visitor.

598. The remedy (if any) of a person deprived or amoved by a visitor appears to lie in an action of ejectment (*i*), or, if the visitor

(*k*) See the powers of Commissioners under s. 23 of the Endowed Schools Act, 1869 (32 & 33 Vict. c. 56), and the decision thereunder in *Re Hodgson's School* (1878), 3 App. Cas. 857. As to the Board of Education and the transfer of powers to them, see Board of Education Act, 1899 (62 & 63 Vict. c. 33), and Orders in Council made thereunder.

(*l*) *R.* v. *Wilson*, [1888] W. N. 12, where the court refused to consider a question regarding the validity of the election of a governor which had already been "determined conclusively" by the Charity Commissioners under the scheme.

(*m*) *A.-G.* v. *York* (*Archbishop*) (1831), 2 Russ. & M. 461, 468. As to the issue of a mandamus generally, see title CROWN PRACTICE.

(*a*) *R.* v. *Ely* (*Bishop*) (1788), 2 Term Rep. 290; *R.* v. *Cambridge University* (1723), 8 Mod. Rep. 148; *R.* v. *Worcester* (*Bishop*) (1815), 4 M. & S. 415; *Whiston* v. *Rochester* (*Dean and Chapter*) (1849), 7 Hare, 532, 558; and see *Gunston* v. *Dare* (1738), West *temp.* Hard. 573, 576.

(*b*) *R.* v. *Ely* (*Bishop*) (1794), 5 Term Rep. 475; and see *R.* v. *Lincoln* (*Bishop*) (1788), cited 2 Term Rep. 338; *Ferguson* v. *Kinnoull* (1842), 4 State Tr. (N. S.) 785, *per* Lord BROUGHAM, at p. 820.

(*c*) *R.* v. *St. John's College, Cambridge* (1694), 4 Mod. Rep. 233; but see *R.* v. *Gower* (1694), 3 Salk. 230.

(*d*) *R.* v. *Ely* (*Bishop*) (1750), 1 Wm. Bl. 52, citing *Brideoak's Case* (1713).

(*e*) *R.* v. *Ely* (*Bishop*) (1738), Andr. 176; *Walker's* (*Dr.*) *Case* (1735), Lee *temp.* Hard. 212, 218.

(*f*) *Widdrington's* (*Dr.*) *Case* (1662), 1 Lev. 23; *Appleford's Case* (1672), 1 Mod. Rep. 82; *Parkinson's Case* (1689), 3 Mod. Rep. 265; *R.* v. *All Souls' College* (*Warden*) (1682), T. Jo. 174; *A.-G.* v. *Atherstone Free School* (*Governors*) (1834), 3 My. & K. 544, 550; *R.* v. *Hertford College* (1878), 3 Q. B. D. 693, C. A.

(*g*) *Prohurst's Case* (1691), Carth. 168.

(*h*) *R.* v. *Wheeler* (1675), 3 Keb. 360.

(*i*) *R.* v. *Chester* (*Bishop*) (1747), 1 Wils. 206, 209.

has acted contrary to or exceeded his jurisdiction, in an action against him on that ground (*j*).

SUB-SECT. 3.—*County Courts.*

599. In the case of a charity whose gross annual income (*k*) does not exceed £50 (*l*), the county court of the district has similar jurisdiction to that exercised by the Chancery Division of the High Court where the appointment or removal of trustees, or any other relief, order, or direction is required (*m*). Limit of jurisdiction.

Application to the county court may be made by the Attorney-General or by any person authorised by the order or certificate of the Charity Commissioners (*n*). Application.

600. County court judges may not vary any decree, order, or direction of the High Court, or make any order inconsistent therewith (*o*). Orders of High Court may not be varied etc.

601. Orders of county courts appointing or removing trustees or approving schemes are invalid unless confirmed by the Charity Commissioners (*p*). The Commissioners may also, if dissatisfied with the order of the county court, remit the same for reconsideration, or may transfer the matter to the High Court (*q*), or direct any applications within the jurisdiction of a county court to be made to the High Court (*r*). Control by Commissioners.

If two or more county courts have concurrent jurisdiction with respect to any charity, applications can be made to one only of such courts at the same time, and the Commissioners may decide to which (*s*). Concurrent jurisdictions.

602. The county courts have no jurisdiction in any proceedings under the Charitable Trusts Act, 1853, to try or determine the title at law or in equity to any property as between the charity and a person holding or claiming adversely, or to determine any question as to the existence or extent of any charge or trust (*t*). But an action by charity trustees to recover arrears of a charity rent-charge Proceedings under Charitable Trusts Act, 1853.

(*j*) See *Green* v. *Rutherforth* (1750), 1 Ves. Sen. 462, 472.

(*k*) A question concerning a rent-charge of £10 issuing out of land valued at over £50 per annum is within the jurisdiction of the county court (*Bassano* v. *Bradley*, [1896] 1 Q. B. 645).

(*l*) Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 32; Charitable Trusts Act, 1860 (23 & 24 Vict. c. 136), s. 11. The income of any charity may be proved by the certificate of the Charity Commissioners (Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 44).

(*m*) Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 32. As to the jurisdiction of the Palatine Court, see Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 29. See generally, as to jurisdiction and practice of county courts, title COUNTY COURTS.

(*n*) Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), ss. 17, 42, 43. The practice in the county courts under this Act is regulated by the County Court Rules, 1903, Ord. 48; see title COUNTY COURTS.

(*o*) Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 32.

(*p*) *Ibid.*, s. 36.

(*q*) *Ibid.*, s. 37.

(*r*) *Ibid.*, s. 35.

(*s*) *Ibid.*, s. 32.

(*t*) *Ibid.*, s. 41

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is not a "proceeding" of the kind mentioned, and is therefore not within the above rule (*a*), nor is an action by school managers to recover moneys collected by a person for the purposes of the school (*b*).

How orders enforced.

603. The orders made by county courts under their charitable jurisdiction are enforceable in the same way as orders made under their ordinary jurisdiction (*c*).

Appeals.

604. Appeals may be made from orders of county courts, but only with the consent of the Charity Commissioners (*d*), to the Chancery Division of the High Court (*e*).

SECT. 4.—*The Charity Commissioners.*

SUB-SECT. 1.—*In General.*

Charitable Trusts Acts, 1853—1894.

605. The powers exercised by the Charity Commissioners in relation to charities are derived mainly from the Charitable Trusts Acts, 1853 to 1894. The object of these Acts is, shortly, to protect property belonging to charities against loss, and to provide a simple and economical way of carrying out the charitable intentions of founders where such intentions are inadequately expressed in the instruments of foundation (*f*).

Powers of Commissioners.

606. The powers of the Commissioners are, on the one hand, of an inquisitorial and administrative nature (*g*), and, on the other, of a judicial character, similar to those previously exercised by the courts (*h*).

Construction of Acts.

The Charitable Trusts Acts are so construed by the courts as to further rather than to restrict the jurisdiction vested by them in the Commissioners (*i*).

Commissioners concerned with capital, not income.

607. The Commissioners are concerned with all dealings with capital of charities, as well as all variations of the prescribed mode of giving effect to the objects of a charity (*k*).

(*a*) *Bassano* v. *Bradley*, [1896] 1 Q. B. 645.

(*b*) *Christie* v. *Sandberg*, [1880] W. N. 159.

(*c*) Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 38; and see ss. 146—163 of the County Courts Act, 1888 (51 & 52 Vict. c. 43); and title COUNTY COURTS.

(*d*) Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 39.

(*e*) For an example of such an appeal, see *Re Donington-on-Baine Church Estate* (1860), 6 Jur. (N. S.) 290. For proceedings on appeal see Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 40, and for forms of orders etc. see County Court Rules, 1903, Forms 434—442, printed in Yearly County Court Practice, 1908, Vol. II., pp. 91—95. See also title COUNTY COURTS.

(*f*) See Twenty-ninth Report of the Charity Commissioners, Appendix, p. 21. As to the jurisdiction of the Board of Education over purely educational charities, see p. 317, *post*; and title EDUCATION.

(*g*) Conferred by the Charitable Trusts Acts of 1853 (16 & 17 Vict. c. 137) and 1855 (18 & 19 Vict. c. 124).

(*h*) Conferred by the Charitable Trusts Act, 1860 (23 & 24 Vict. c. 136).

(*i*) *Re Duncan* (1867), 2 Ch. App. 356, 359. See also *Re Meyricke* (1872), 7 Ch. App. 505, 506.

(*k*) See Twenty-ninth Report of the Charity Commissioners.

They are in no sense administrators of income, which must be dealt with by the trustees within the limits prescribed by the founder, or according to duly authorised variations (*l*).

Jurisdiction, once invoked, cannot be terminated.

608. The jurisdiction of the Commissioners, once brought into operation by an application, cannot be put an end to by withdrawal of the application before an order has been made (*m*).

Enforcement of orders.

609. Persons not complying with requisitions or orders of the Commissioners made under the Charitable Trusts Acts are guilty of contempt of court, and may be attached or committed (*n*).

SUB-SECT. 2.—*Charities subject to the Jurisdiction.*

In general.

610. The Charity Commissioners exercise jurisdiction over all foundations or institutions in England or Wales, including Roman Catholic charities (*a*), which are endowed (*b*) for charitable purposes (*c*) and are not expressly exempted from the operation of the Charitable Trusts Acts (*d*).

Their jurisdiction extends over endowments which are not perpetual, as where the trustees have power to spend the corpus (*e*), or where the endowment is revocable (*f*); and also over all charities founded and endowed in England or Wales the revenues of which are applied abroad (*g*), and over all charities the endowments of which are abroad; but the proceeds of which are applicable in England or Wales (*h*).

Endowment.

611. By an endowment is meant all property of every description belonging to or held in trust for a charity, and whether held for its general purposes or any special purpose, and whether upon trusts or

(*l*) *Re Campden Charities* (1881), 18 Ch. D. 310, C. A.

(*m*) *Re Poor's Lands Charity, Bethnal Green*, [1891] 3 Ch. 400. An application for a scheme to regulate part only of a charitable trust, *e.g.*, a particular legacy, would not, it is conceived, give the Commissioners jurisdiction to settle a scheme for the regulation of the entire charity against the wishes of the trustees.

(*n*) Charitable Trusts Amendment Act, 1855 (18 & 19 Vict. c. 136), s. 9; see also Charitable Trusts Act, 1883 (46 & 47 Vict. c. 137), s. 14; and p. 309, *post*. As to contempt of court generally, see title CONTEMPT AND ATTACHMENT.

(*a*) Roman Catholic Charities Act, 1860 (23 & 24 Vict. c. 134).

(*b*) An "endowed foundation" is, it is conceived, a foundation having an endowment within the meaning of s. 66 of the Charitable Trusts Act, 1853 (46 & 47 Vict. c. 137), as to which see *infra*.

(*c*) As to the meaning of the expression "charitable purposes," regard must be had to the preamble of the statute of Elizabeth (see p. 106, *ante*); see also Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 66.

(*d*) *Ibid.*; Charitable Trusts Amendment Act, 1855 (18 & 19 Vict. c. 124), s. 48. The list of exempted charities is contained in s. 62 of the Act of 1853; see p. 304, *post*. As to charities partially exempted, see *Sons of the Clergy Corporation and Skinner*, [1893] 1 Ch. 187; and p. 307, *post*.

(*e*) *Re Gilchrist Educational Trust*, [1895] 1 Ch. 371.

(*f*) *Re Peel's School (Sir Robert) at Tamworth* (1868), 3 Ch. App. 543.

(*g*) *Re Duncan* (1867), 2 Ch. App. 356.

(*h*) *Ibid.*; and see *A.-G.* v. *Gibson* (1835), 2 Beav. 317; *Ironmongers' Co.* v. *A.-G.* (1844), 10 Cl. & Fin. 908, H. L.

SECT. 4. The Charity Commissioners.

conditions which render it lawful to apply the capital to the maintenance of the charity or upon trusts which confine the charitable application to the income (*i*). Freehold (*k*) or leasehold (*l*) land occupied by the charity, but not producing income, is an endowment.

Charities vested in corporations.

612. The jurisdiction of the Commissioners is also exercisable over charities vested in corporations sole or aggregate who, either solely or jointly with any other person or persons, are the recipients of the benefits (*m*), and over charities whose trustees are municipal corporations or trustees appointed in their place (*n*).

A charity does not become exempt from the jurisdiction of the Commissioners by being registered as a limited company (*o*).

Cathedral and collegiate schools.

613. Though cathedral and collegiate churches are exempt from the jurisdiction of the Commissioners (*a*), cathedral, collegiate (*b*), chapter, and other schools of the same kind are not (*c*).

SUB-SECT. 3.—*Charities exempt from the Jurisdiction.*

Unendowed charities.

614. Unendowed charities are not subject to the jurisdiction of the Commissioners (*d*).

The onus of proving that a particular charity is exempt from the jurisdiction lies on the party claiming the exemption (*e*).

Universities and colleges.

615. The jurisdiction of the Charity Commissioners does not extend to the universities or colleges of Oxford, Cambridge, London, or Durham (*f*), or to the colleges of Eton or Winchester (*g*), or to

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(*i*) *Re Clergy Orphan Corporation*, [1894] 3 Ch. 145, 151, C. A.; Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 66.

(*k*) *Re Clergy Orphan Corporation, supra; Re Stockport Ragged Industrial and Reformatory Schools*, [1898] 2 Ch. 687, 700, C. A.; *A.-G.* v. *Mathieson*, [1907] 2 Ch. 393, 395, C. A.

(*l*) See *Re Church Army* (1906), 75 L. J. (CH.) 467, C. A.

(*m*) Charitable Trusts Act, 1860 (23 & 24 Vict. c. 136), s. 10.

(*n*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 133; and see p. 284, *ante*.

(*o*) The contrary was argued in *Re Church Army, supra;* but COZENS-HARDY, L.J., intimated at p. 474, without expressly deciding the point, that it was impossible to evade the jurisdiction of the Commissioners by such means; see also *Re Society for Training Teachers of the Deaf and Whittle's Contract*, [1907] 2 Ch. 492, 493, where NEVILLE, J., assumes that a charity is not less within the Charitable Trusts Acts because it is a limited company.

(*a*) See note (*h*), p. 305, *post*.

(*b*) As to the meaning of "collegiate school," see *Re Stockport Ragged Industrial and Reformatory Schools, supra*, at p. 616.

(*c*) Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 62; *Re Stockport Ragged Industrial and Reformatory Schools, supra*.

(*d*) *Royal Society of London and Thompson* (1881), 17 Ch. D. 407; *Finnis and Young* to *Forbes and Pochin* (No. 2), *supra*. As to the meaning of endowment, see p. 303, *ante*. As to unendowed charities becoming subject to the jurisdiction of the Commissioners, see p. 307, *post*.

(*e*) *Re Clergy Orphan Corporation, supra*, at p. 154; *Re Gilchrist Educational Trust*, [1895] 1 Ch. 370; and see *Finnis and Young* to *Forbes and Pochin* (No. 2) (1883), 24 Ch. D. 591.

(*f*) Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 62.

(*g*) Charitable Trusts Amendment Act, 1855 (18 & 19 Vict. c. 124), s. 48.

any cathedral or collegiate church (*h*), regarded as a corporate body consisting of dean, prebendaries and other members (*i*).

Buildings used for religious worship.

616. Except so far as relates to the appointment and removal of trustees, the vesting of real and personal estate, and the establishment of schemes (*k*), the jurisdiction does not extend to any building registered and used as a place of meeting for religious worship (*l*) or any lands and buildings held upon the same or similar trusts as the place of meeting (*m*). Accordingly the consent of the Commissioners to an action for the removal of a minister of a registered place of religious worship is not required (*n*).

Queen Anne's Bounty etc.

617. The Commissioners of Queen Anne's Bounty, the British Museum, and friendly or benefit societies or savings banks are also exempt from the jurisdiction (*o*).

Institutions wholly maintained by voluntary contributions.

618. Nor does it extend to any institution, establishment, or society for religious or other charitable purposes wholly maintained by voluntary contributions, or to any auxiliary or branch associations connected therewith, and also carried on by voluntary contributions only (*p*).

A charity "wholly maintained by voluntary contributions" is one which has no invested endowment yielding an income for its support, but is dependent on the gifts of the benevolent, whether recurrent or occasional and whether *inter vivos* or by will (*q*). A charity wholly supported by voluntary subscriptions, payments by or on behalf of scholars, and grants from the Board of Education and from local education authorities out of rates, comes within this definition, and is therefore exempt from the jurisdiction of the Board of Education, which exercises jurisdiction over purely educational charities in lieu of the Charity Commissioners (*r*).

(*h*) Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 62. But an endowment for the benefit of minor canons of a cathedral does not fall within the exemption if the endowment is not part of the cathedral property (*Re Dod's Charity*, [1905] 1 Ch. 442); nor does an endowment consisting of the surplus revenues of a collegiate church, and applied for augmenting impoverished benefices (*A.-G.* v. *Manchester (Dean and Canons)* (1881), 18 Ch. D. 596).

(*i*) See *Re St. John Street Wesleyan Methodist Chapel, Chester*, [1893] 2 Ch. 618, 630, 631.

(*k*) Charitable Trusts Act, 1869 (32 & 33 Vict. c. 110), s. 15.

(*l*) Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 62; see also Places of Religious Worship Registration Act, 1855 (18 & 19 Vict. c. 81), s. 9.

(*m*) Charitable Trusts (Places of Religious Worship) Amendment Act, 1894 (57 & 58 Vict. c. 35), s. 4, passed in consequence of the decision in *Re St. John Street Wesleyan Methodist Chapel, Chester, supra.*

(*n*) *Glen* v. *Gregg* (1882), 21 Ch. D. 513, C. A.

(*o*) Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 62.

(*p*) *Ibid.* See also *Strickland* v. *Weldon* (1885), 28 Ch. D. 426, 430; *Pease* v. *Pattinson* (1886), 32 Ch. D. 154 (fund raised by voluntary subscriptions for relief of sufferers in colliery accident). In these two cases the distinction between a fund arising from voluntary contributions and a charity maintained by voluntary contributions was not made. The latter case, as to a fund arising from voluntary contributions, was overruled by *Re Clergy Orphan Corporation*, [1894] 3 Ch. 145, 150, C. A.

(*q*) *Re Clergy Orphan Corporation, supra*, at p. 150.

(*r*) *Re Society for Training Teachers of the Deaf and Whittle's Contract*, [1907] 2 Ch. 486; and as to the jurisdiction of the Board of Education, see p. 317, *post*. See, however, the suggestion to the contrary in *Re Stockport Ragged Industrial*

SECT. 4. The Charity Commissioners.

If the trustees of a charity wholly maintained by voluntary contributions invest, or retain the investments of, some part of such contributions, the charity is then treated as having an income-producing endowment, and accordingly no longer as a charity supported wholly by voluntary contributions (*s*).

Investment of contributions constitutes endowment.

The result is the same when the contributions are applied in the purchase of land to be occupied by the charity and therefore not actually producing income (*t*). In each case the charity becomes a "mixed" charity, that is, a charity partly maintained by voluntary subscriptions and partly by an endowment (*u*). If the capital of this endowment is applicable as income for the maintenance of the charity, as it would *primâ facie* be in such cases (*a*), both the voluntary subscriptions and the endowment are exempt from the jurisdiction of the Commissioners (*b*); but this is not so if trusts are declared of the capital which prevent its application as income (*c*).

Mixed charities.

Funds of societies carrying out objects abroad.

619. The funds and property of missionary and similar societies, or of the missionaries, or the teachers or officers of such societies or their branches, are not subject to the jurisdiction of the

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and Reformatory Schools, [1898] 2 Ch. 687, C. A., *per* LINDLEY, M.R., at pp. 697, 698, C. A., that charities maintained partly by voluntary subscriptions and partly by other means, such other means not being income of an endowment, might be entirely subject to the jurisdiction of the Commissioners even as regards the voluntary subscriptions. The class of charities to which LINDLEY, M.R., was referring, would include hospitals supported partly by voluntary contributions and partly by paying patients, or schools supported partly by earnings of scholars, as in *Re Stockport Ragged Industrial and Reformatory Schools*, *supra*, or partly by fees of scholars, as in *Re Society for Training Teachers of the Deaf and Whittle's Contract*, [1907] 2 Ch. 486; *Barnard Castle Urban District Council* v. *Wilson*, [1902] 2 Ch. 746, 755, C. A.

(*s*) See *Re Clergy Orphan Corporation*, [1894] 3 Ch. 145, 151, C. A., overruling *Sons of the Clergy Corporation* v. *Sutton* (1860), 27 Beav. 651, 665; *Royal Society and Thompson* (1881), 17 Ch. D. 407; and *Finnis and Young* to *Forbes and Pochin* (No. 2) (1883), 24 Ch. D. 591, so far as those cases decided that contributions for the general purposes of a charity did not when invested constitute an "endowment" within the meaning of the Charitable Trusts Acts.

(*t*) *Re Clergy Orphan Corporation*, *supra*; *A.-G.* v. *Mathieson*, [1907] 2 Ch. 383, C. A.

(*u*) *Re Clergy Orphan Corporation*, *supra*, at p. 150, where the property in question was the purchase-money of the site occupied by the charity. See, however, the doubt expressed by COZENS-HARDY in *A.-G.* v. *Mathieson*, *supra*, at p. 394 (where the endowment produced no income), and the judgment of LINDLEY, M.R., in *Re Stockport Ragged Industrial and Reformatory Schools*, *supra*, at p. 697. As to "mixed" charities, see further p. 307, *post*.

(*a*) *Re Clergy Orphan Corporation*, *supra*.

(*b*) *Ibid.*; Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 62; *Re Church Army* (1906), 75 L. J. (CH.) 467 (where the "endowment" consisted of leaseholds purchased with donations); *Re Harding and the Trustees of the Welsh Calvinistic Methodist Connexion* (1905), 92 L. T. 641 (chapel and cottages); *Re Parry and Horton* (1905), 49 Sol. Jo. 500 (chapel and cottages). The decision in *Re Society for Training Teachers of the Deaf and Whittle's Contract*, *supra*, could probably be supported on this ground, though the actual reasons given in the judgment seem inconsistent with the definition of "endowment" in *Re Clergy Orphan Corporation*, *supra*.

(*c*) *A.-G.* v. *Mathieson*, *supra*; and compare *Re Stockport Ragged Industrial and Reformatory Schools*, *supra*, where the land was not purchased out of voluntary contributions; and see p. 222, *ante*.

Commissioners if such funds or property are outside the limits of England and Wales (*d*).

Extension of jurisdiction to exempted charity with annual income under £50.

620. Where the annual income of a charity exempted from the operation of the Charitable Trusts Acts is less than £50, all or any one or more of the trustees or persons administering the charity may apply to the Commissioners to have the Charitable Trusts Acts, 1853 to 1869, or any specified provisions thereof, extended to such charity (*e*). If the income of the charity amounts to or exceeds £50, the application must be made by the trustees or persons acting in the administration of the charity or a majority of them (*f*). Before making any order proper notice must be given by the Commissioners (*g*).

SUB-SECT. 4.—*Charities partly exempt from the Jurisdiction.*

Jurisdiction over mixed charities.

621. In the case of "mixed charities," that is to say, charities maintained partly by voluntary subscriptions (*h*) and partly by the income of an endowment (*i*), the jurisdiction of the Charity Commissioners does not extend to the voluntary subscriptions (*k*). When in such a case the capital of the endowment is applicable as income, the endowment is also exempt from the jurisdiction (*l*); but when the capital is not so applicable, the jurisdiction extends to both capital and income of the endowment (*m*).

Accordingly, if land or buildings are acquired by a mixed charity for occupation purposes, and the land or buildings are conveyed to the charity in order to form a permanent endowment, the charity (so far, at all events, as the land is concerned) comes under the jurisdiction of the Commissioners, whether the purchase-money was voluntarily contributed or derived from other sources (*n*).

Gifts for general purposes of mixed charities.

622. Donations and bequests to mixed charities for their general purposes, that is to say, of which no special application or appropriation is directed or declared by the donor or testator, and

(*d*) Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 62.

(*e*) *Ibid.*, s. 32; Charitable Trusts Act, 1860 (23 & 24 Vict. c. 136), ss. 2, 11; Charitable Trusts Act, 1869 (32 & 33 Vict. c. 110), s. 14.

(*f*) Charitable Trusts Act, 1860 (23 & 24 Vict. c. 136), ss. 2, 4; Charitable Trusts Act, 1869 (32 & 33 Vict. c. 110), s. 14. See also *Hamilton* v. *Spottiswoode* (1866), 15 W. R. 118, where the application was by an improperly constituted governing body; *A.-G.* v. *Manchester* (*Dean and Canons*) (1881), 18 Ch. D. 596, 609.

(*g*) Charitable Trusts Act, 1860 (23 & 24 Vict. c. 136), ss. 3, 6; Charitable Trusts Act, 1869 (32 & 33 Vict. c. 110), ss. 4, 14. As to the notices required, see p. 315, *post*.

(*h*) See *Re Clergy Orphan Corporation*, [1894] 3 Ch. 145, 151, C.A.

(*i*) As to what is an endowment, see p. 303, *ante*.

(*k*) Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 62.

(*l*) See cases in note (*b*), p. 306, *ante*.

(*m*) *Re Stockport Ragged Industrial and Reformatory Schools*, [1898] 2 Ch. 687, C. A.; *A.-G.* v. *Mathieson*, [1907] 2 Ch. 383, C. A. In earlier cases the jurisdiction of the Commissioners was treated as extending to the income only; see *Royal Society of London and Thompson* (1881), 17 Ch. D. 407, 414; *Re Sons of the Clergy Corporation* (*Governors*) *and Skinner*, [1893] 1 Ch. 178, 184. As to the effect of a charity owning its site, see p. 306, *ante*.

(*n*) *A.-G.* v. *Mathieson*, *supra*; *Re Stockport Ragged Industrial and Reformatory Schools*, *supra*, at pp. 699, 700.

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which the charities may apply as income, are not subject to the jurisdiction of the Commissioners (*o*). So, too, funds or voluntary subscriptions given for the general purposes of a "mixed charity," if invested or appropriated by the governing body for some definite object connected with the charity, and any donation or bequest in aid of such funds, are exempt from the jurisdiction of the Commissioners (*p*) so long as it is legally competent to the governing body to convert such investments into money and apply it as income (*q*).

If, however, a donation given for the general purposes of a "mixed charity" is subsequently invested in such a way that the invested funds cannot be applied as income, the exemption ceases to apply (*r*). Nor is there any exemption in the case of an endowment of which the income only is applicable for the general purposes of a charity (*s*). Nor are funds exempt when given for particular objects, as the erection of a chapel (*t*) or the support of a school (*a*).

Extent of exemption.

623. No charity which is partly maintained by voluntary contributions is, so far as it is so maintained, within the jurisdiction of the Commissioners (*b*).

SUB-SECT. 5.—*Nature of the Jurisdiction.*

(1) Inquisitorial.

624. The Charity Commissioners may, acting personally or through assistant Commissioners (*c*), inquire into the condition and management of all charities in England and Wales which are not expressly exempted from their jurisdiction (*d*).

(*o*) Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 62; *Re Wilson* (1854), 19 Beav. 594, where the consent of the Commissioners was not required to authorise the payment out of court of a legacy given to a "mixed charity" for its general purposes. See also *A.-G.* v. *Mathieson*, [1907] 2 Ch. 383, 393, C. A.; and as to what constitutes a special appropriation, see *ibid.* at p. 395; *Re Society for Training Teachers of the Deaf and Whittle's Contract*, [1907] 2 Ch. 486, 494; *Re Church Army* (1906), 75 L. J. (CH.) 467, C. A.; *Re Harding and Trustees of the Welsh Calvinistic Methodist Connexion* (1905), 92 L. T. 641; *Re Parry and Horton* (1905), 49 Sol. Jo. 500.

(*p*) Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 62; *Re Clergy Orphan Corporation*, [1894] 3 Ch. 152, C. A. (where the investment was in land). It will be observed that this exemption applies only to a "mixed charity" (*ibid.*). See also *Re St. John Street Wesleyan Methodist Chapel, Chester*, [1893] 2 Ch. 636.

(*q*) *A.-G.* v. *Mathieson*, *supra*, at p. 393.

(*r*) *Ibid.*

(*s*) *Re St. John Street Wesleyan Methodist Chapel, Chester*, *supra*, at p. 636; *Re Clergy Orphan Corporation*, [1894] 3 Ch. 151, C. A.

(*t*) *Re St. John Street Wesleyan Methodist Chapel, Chester*, *supra*.

(*a*) *Re Peel's (Sir Robert) School at Tamworth* (1868), 3 Ch. App. 543, 554.

(*b*) *Re Stockport Ragged Industrial and Reformatory Schools*, [1898] 2 Ch. 687, 698, 700, C. A.; *Re Sons of the Clergy Corporation (Governors) and Skinner*, [1893] 1 Ch. 184.

(*c*) See Charitable Trusts Act, 1887 (50 & 51 Vict. c. 49), s. 2. Assistant Commissioners were formerly called "inspectors."

(*d*) Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), ss. 9, 19. As to what charities are within the jurisdiction of the Commissioners, see pp. 303, 304, *ante*. Councils of counties or county boroughs are authorised to contribute out of the county funds or borough funds or rates to expenses of inquiries conducted by the Charity Commissioners into charities affecting such counties or county boroughs (Charity Inquiries Expenses Act, 1892 (55 & 56 Vict. c. 15).

Accounts and inquiries.

625. For this purpose they may require accounts, statements, and written answers to inquiries, verified by oath or otherwise, to be furnished by the following persons, namely, (1) trustees or persons acting or concerned in the management or administration of such charities, (2) agents of any such trustees or persons, (3) depositaries of any funds or moneys of such charities, (4) beneficial recipients of any funds of a charity or of any income therefrom, and (5) persons having the possession or control of any documents concerning a charity or its property (*e*).

Examination on oath.

Such persons may also be required to attend, within a radius of ten miles from their place of abode, before the Commissioners for examination on oath or otherwise, and to bring and produce documents in their custody relating to the charity (*f*).

Copies and extracts of documents.

The Commissioners may require officers having the custody of enrolments, decrees, reports, records, and other documents relating to any charity to furnish copies or extracts to them, and may examine registers and records of the courts, public registries, and offices of records and take copies and extracts without payment (*g*).

Transmission of documents for examination.

The Commissioners may also require documents belonging solely to a charity to be transmitted to them at the office of the Commission for examination (*h*).

All the above-mentioned requisitions must be made by an order of the Board or by precept under the hand of the Commissioner or assistant Commissioner making the same (*i*).

False evidence.

626. Persons wilfully giving false evidence to the Commissioners are guilty of misdemeanour (*k*).

Refusal of information etc.

Persons improperly refusing or neglecting to render accounts or statements, or to make answers to inquiries by the Commissioners, or to attend before them or give evidence, or altering, destroying, withholding, or refusing to produce documents, are guilty of contempt of court, and may be attached and committed (*l*).

Persons making claims adverse to the charity.

627. The Commissioners have no power to require any information or the production of any document relating to a charity from any persons holding or claiming to hold any property adversely to any charity or free from any charitable trust (*m*), though they may procure information elsewhere if they can. The mere setting up of

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(*e*) Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 10; Charitable Trusts Amendment Act, 1855 (18 & 19 Vict. c. 124), s. 6.

(*f*) Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 12; Charitable Trusts Amendment Act, 1855 (18 & 19 Vict. c. 124), s. 7.

(*g*) Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 11.

(*h*) Charitable Trusts Act, 1860 (23 & 24 Vict. c. 136), s. 19.

(*i*) Charitable Trusts Amendment Act, 1855 (18 & 19 Vict. c. 124), s. 8; Charitable Trusts Act, 1887 (50 & 51 Vict. c. 49), s. 2.

(*k*) Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 13.

(*l*) *Ibid.*, s. 14; Charitable Trusts Amendment Act, 1855 (18 & 19 Vict. c. 124), s. 9. For an example of a motion by the Charity Commissioners to issue a writ of attachment against charity trustees for neglecting to deliver accounts, see *Re Gilchrist Educational Trust*, [1895] 1 Ch. 367, 373, where a form of order is given.

(*m*) Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 15; Charitable Trusts Amendment Act, 1855 (18 & 19 Vict. c. 124), s. 6.

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an adverse claim is not sufficient to oust the jurisdiction of the Commissioners. It is for the court to decide whether such a claim is well-founded (*n*).

(2) Administrative.

Opinions or advice as to administration.

628. The Charity Commissioners may, if applied to by the trustees or other persons concerned in the administration of a charity, give their opinion, advice, or direction (*o*) respecting the administration of such charity, or the management or application of the charity property, or any question or dispute relating thereto; and any person acting in accordance with the advice or opinion of the Commissioners is indemnified against all liability, unless the advice or opinion has been obtained fraudulently or by wilful concealment or misrepresentation (*p*).

Reference of disputes to arbitration of Commissioners.

629. Any question or dispute among the members of any charity, whether exempted or not from the operation of the Charitable Trusts Acts (*q*), and including rural parish charities (*r*), in relation to any office or the fitness or disqualification of any trustee or officer, or his election or removal, or generally in relation to the management of the charity, may, with the authority of two-thirds of the members present at any special meeting duly convened by notice in manner provided by the rules of the charity as to meetings, be referred to the arbitration of the Commissioners, whose decision will be final, and may be made a rule of court (*s*).

The Commissioners have similar powers in connection with questions or disputes among members of certified places of religious worship, if such members choose to avail themselves of those powers (*t*).

Sanction to legal proceedings.

630. Subject to certain exceptions (*a*), no legal proceedings in any court may be taken for obtaining any relief order or direction concerning a charity, its property or income, except with the sanction of the Charity Commissioners or of the Board of Education, as the case may be (*b*). This rule applies to legal proceedings which

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(*n*) *Re Peel's* (*Sir Robert*) *School at Tamworth* (1868), 3 Ch. App. 543, 550.

(*o*) A formal order or certificate signed by two or more of the Commissioners and sealed with their seal is necessary (Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 16; *Thomas* v. *Harford* (1883), 48 L. T. 262); and see *A.-G.* v. *Hughes* (1899), 81 L. T. 679.

(*p*) Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 16. For a form of application to the Charity Commissioners under this section, see Encyclopædia of Forms, Vol. III., p. 468.

(*q*) Charitable Trusts Amendment Act, 1855 (18 & 19 Vict. c. 124), s. 46.

(*r*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 70 (2).

(*s*) Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 64.

(*t*) Places of Worship Registration Act, 1855 (18 & 19 Vict. c. 81), s. 9.

(*a*) See pp. 311, 320, *post*.

(*b*) Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 17. For a form of application to the Commissioners for authority to take legal proceedings, see Encyclopædia of Forms, Vol. III., p. 457. S. 17 prevents the needless institution of proceedings whose object is merely to create costs; see *Re Lister's Hospital* (1855), 6 De G. M. & G. 184, 186; *Re Jarvis' Charity* (1859), 1 Drew. & Sm. 97, 100; *Braund* v. *Devon* (*Earl*) (1868), 3 Ch. App. 800, 804; *Holme* v. *Guy* (1877), 5 Ch. D. 901, 903, C. A.; *Rendall* v. *Blair* (1890), 45 Ch. D. 139, 154, C. A. As to the powers of the Charity Commissioners, see *A.-G.* v. *Manchester* (*Dean and Canons*) (1881), 18 Ch. D. 596, 609.

either wholly or partially involve administration of the trusts of a charity (*c*), and to proceedings taken in pursuance of a private Act of Parliament (*d*).

Applications not requiring consent of Commissioners.

631. Applications to the court "in any suit or matter actually pending" (*e*); actions, whether legal (*f*) or equitable (*g*), to enforce common law rights or to enforce individual equitable rights not relating to the administration of a charitable trust (*h*); applications to the court for an order sanctioning the retention of land devised to a charity or the acquisition of land out of personal estate

(*c*) For examples of proceedings requiring the sanction of the Commissioners or of the Board of Education, as the case may be, see *Re Ford's Charity* (1855), 3 Drew. 324 (petition for erection of new school); *Re Jarvis' Charity* (1859), 1 Drew. & Sm. 97; *Re Duncan* (1867), 2 Ch. App. 356 (petition for appointment of new trustees); *Braund* v. *Devon (Earl)* (1868), 3 Ch. App. 800 (action against trustees by persons claiming to participate in an educational charity); *Hodgson* v. *Forster*, [1877] W. N. 74 (action by minister and churchwardens against former churchwardens to enforce transfer of charitable legacy); *Brittain* v. *Overton* (1877), 25 Ch. D. 41, n. (action by schoolmaster claiming an account and payment); *A.-G.* v. *Manchester (Dean and Canons)* (1881), 18 Ch. D. 596 (mandamus compelling accounts to be rendered of income applicable to charity); *Benthall* v. *Kilmorey (Earl)* (1883), 25 Ch. D. 39, C. A. (action by medical officer against committee of hospital claiming declaration that he held office during good behaviour); *Rooke* v. *Dawson*, [1895] 1 Ch. 480 (action by examiner against trustees of educational foundation claiming scholarship); *Llanbadarn-fawr School Board* v. *Official Trustees of Charitable Funds*, [1901] 1 K. B. 430, C. A. (action by school board against the official trustees, to whom the charity endowments had been transferred, claiming execution of the trusts); *Re Stockport Ragged Industrial and Reformatory Schools*, [1898] 2 Ch. 687, C. A. (petition to court by trustees to sanction proposed mortgage of charity lands).

(*d*) *Re Bingley Free School* (1854), 2 Drew. 283.

(*e*) Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 17; *Re Lister's Hospital* (1855), 6 De G. M. & G. 184, C. A., overruling *Re Markwell's Legacy* (1854), 17 Beav. 618; *Re St. Giles' and St. George's, Bloomsbury* (1857), 27 L. J. (CH.) 560; *Re Poplar and Blackwall Free School* (1878), 8 Ch. D. 543 (applications respecting funds in court). When a final order has been made on a petition, the matter is no longer actually pending (*Re Jarvis' Charity, supra; Re Ford's Charity, supra*); see also *Re Duncan, supra*. As to the consent of the Commissioners not being necessary for applications relating to investments of money in court, see pp. 219, 242, *ante*.

(*f*) Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 17; *Holme* v. *Guy* (1877), 5 Ch. D. 901; *Alexander* v. *Drewitt* (1886), 2 T. L. R. 762; *Bassano* v. *Bradley*, [1896] 1 Q. B. 646 (actions of ejectment or to recover rent or arrears from tenants of charity estates). As to ejectment actions against ministers of dissenting chapels by the persons in whom the chapels are vested, see *Doe* v. *Jones* (1830), 10 B. & C. 718; *Doe* v. *M'Kaeg* (1830), 5 Man. & Ry. 620; *Doe* d. *Kischner* v. *Roe* (1838), 7 Dowl. 97; *Doe* d. *Dickens* v. *Roe* (1838), 7 Dowl. 121; *Doe* d. *Somers (Earl)* v. *Roe* (1840), 8 Dowl. 292; *Doe* d. *Smith* v. *Roe* (1840), 8 Dowl. 509; *Doe* d. *Fishmongers' Co.* v. *Roe* (1843), 2 Dowl. (N. S.) 689; *Doe* v. *Fletcher* (1828), 8 B. & C. 25.

(*g*) *Holme* v. *Guy, supra* (injunction against wrongful possession of charity property); *Rendall* v. *Blair* (1890), 45 Ch. D. 139, 154, 155, C. A. (injunction to restrain trespass); *contrà, Thomas* v. *Harford* (1883), 48 L. T. 262 (consent of Commissioners required to action by charity trustees to prevent interference to light).

(*h*) *Rendall* v. *Blair, supra*, at p. 160; *Fisher* v. *Jackson*, [1891] 2 Ch. 84 (injunction to restrain improper dismissal of schoolmasters); see also *Benthall* v. *Kilmorey (Earl), supra*, where the question was discussed, but not decided; *Lane* v. *Norman* (1891), 61 L. J. (CH.) 149, where the question of the consent of the Commissioners was not raised.

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bequeathed to a charity for that purpose (*i*); applications where the trust is not charitable (*k*), or for determining whether a trust is charitable or not (*l*); applications claiming any property or seeking any relief adversely to a charity (*m*); and actions concerning charities exempted from the Charitable Trusts Acts (*n*), do not require the consent of the Commissioners. Nor is such consent required where property belongs partly to an exempted and partly to a non-exempted charity, if the legal proceeding concerns only the exempted charity (*o*).

Nature of Commissioners' consent.

632. The certificate required is not to the effect that the Commissioners approve of the particular proposal, but that the application is made with their permission (*p*).

Proceedings commenced without consent.

633. Proceedings taken without the necessary certificate of the Charity Commissioners are not dismissed immediately, but are ordered to stand over until it has been ascertained whether or not the certificate can be obtained (*q*). If the certificate cannot be obtained, the proceedings must be dismissed (*r*), even though all the parties assent to the application being heard (*s*), or the question at issue is an urgent one (*t*).

Proceedings by Attorney-General.

634. The sanction of the Charity Commissioners is not required to enable the Attorney-General, acting *ex officio*, to make such applications and take such proceedings with respect to any charity in the Chancery Division of the High Court or otherwise as he may think fit (*a*), including petitions under the Charities Procedure Act, 1812 (*b*).

(*i*) Mortmain and Charitable Uses Act, 1891 (54 & 55 Vict. c. 73), s. 8; *Re Church Patronage Trust*, [1904] 2 Ch. 643, C. A.

(*k*) *Prestney* v. *Colchester Corporation* (1882), 21 Ch. D. 120.

(*l*) *Re St. Giles' and St. George's, Bloomsbury* (1858), 25 Beav. 316; *Re Shum's Trusts* (1904), 91 L. T. 192.

(*m*) Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 17; *Brittain* v. *Overton* (1877), 25 Ch. D. 41, n.; *Benthall* v. *Kilmorey (Earl)* (1883), 25 Ch. D. 39, 44, 45, C. A. See also *Re Peel's (Sir Robert) School at Tamworth* (1868), 3 Ch. App. 543.

(*n*) *Re Wilson's Will* (1854), 19 Beav. 594; *Glen* v. *Gregg* (1882), 21 Ch. D. 513, C. A.; *Pease* v. *Pattinson* (1886), 32 Ch. D. 154; and see *A.-G.* v. *Sidney Sussex College, Cambridge* (1866), 21 Ch. D. 514, n., where Lord CHELMSFORD, L.C., expressed an opinion to the contrary; *Strickland* v. *Weldon* (1885), 28 Ch. D. 426, where the point was argued, but not decided.

(*o*) See *Re Meyrick's Charity* (1855), 1 Jur. (N. S.) 438, explained in *Re Dod's Charity*, [1905] 1 Ch. 442, 448. It is otherwise where the proceedings concern the non-exempted charity (*A.-G.* v. *Manchester (Dean and Canons)* (1881), 18 Ch. D. 596, 611; *Re Dod's Charity, supra*).

(*p*) *Ex parte Watford Burial Board* (1856), 2 Jur. (N. S.) 1045. For form of application for authority to take legal proceedings, see Encyclopædia of Forms, Vol. III., p. 457.

(*q*) *Re Bingley Free School* (1854), 2 Drew. 283; *Re Markwell's Legacy* (1854), 17 Beav. 618, 622; *Re London, Brighton, and South Coast Rail. Co.* (1854), 18 Beav. 608, 609; *Re Skeat's Charity* (1855), 25 L. J. (CH.) 49; *A.-G.* v. *Manchester (Dean and Canons), supra; Rendall* v. *Blair* (1890), 45 Ch. D. 139, C. A.; *Rooke* v. *Dawson*, [1895] 1 Ch. 480; *Re Dod's Charity, supra.*

(*r*) *Rendall* v. *Blair, supra.*

(*s*) *Glen* v. *Gregg, supra.*

(*t*) *Ex parte Watford Burial Board, supra.*

(*a*) Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 18.

(*b*) *Ibid.*, s. 43; Charities Procedure Act, 1812 (52 Geo. 3, c. 101).

Except as regards applications made under the jurisdiction created by the Charitable Trusts Act, 1853, that Act does not dispense with the fiat of the Attorney-General to any proceeding where such fiat was previously required (*c*).

Proceedings by Attorney-General at instance of Commissioners.

The Charity Commissioners may certify in writing cases to the Attorney-General where it appears to the Board that the institution of legal proceedings is requisite or desirable with respect to any charity or the estates, funds, property, or affairs thereof, and that under the circumstances it is desirable that such proceedings should be instituted by the Attorney-General. Thereupon, if the Attorney-General, upon consideration of the circumstances, thinks fit, he will institute and prosecute the requisite proceedings by action, petition, or application to a judge in chambers or to a county court, as the case may be (*d*).

Proceedings by majority of trustees.

635. If authorised by the Commissioners, the majority of the trustees of a charity may take or defend any legal proceedings as if they were sole trustees, and the death or removal from office of any of such trustees does not cause the discontinuance of the proceedings (*e*).

Proceedings instituted by Commissioners.

636. The Commissioners may themselves, with the consent of the Attorney-General, institute proceedings for the recovery of property belonging to a charity where the annual value of such property does not exceed £20 (*f*).

Sanction of compromises.

The Commissioners may sanction compromises of claims on behalf of a charity (*g*) or against a charity or its trustees (*h*).

Sanction of sales etc.

The Commissioners may also, in certain circumstances, sanction sales (*i*), mortgages (*k*), leases (*l*), and exchanges (*m*) of charity

(*c*) Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 18. The fiat of the Attorney-General is required, for example, to actions in the nature of informations and also to petitions under the Charities Procedure Act, 1812 (52 Geo. 3, c. 11); see pp. 325, 333, *post*.

(*d*) Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 20; and see, *e.g.*, *A.-G.* v. *Christ's Hospital (Governors)*, [1896] 1 Ch. 879 (adjourned summons); *Re Manser*, [1905] 1 Ch. 68 (adjourned summons).

(*e*) Charitable Trusts Act, 1869 (32 & 33 Vict. c. 110), s. 13.

(*f*) Charitable Trusts Recovery Act, 1891 (54 Vict. c. 17), s. 3; and see p. 202, *ante*.

(*g*) Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 23. Orders for the redemption of rent-charges are frequently made under the powers conferred by this section. If a compromise includes a partition, it seems that an order for partition is valid. See also p. 233, *ante*.

(*h*) Charitable Trusts Amendment Act, 1855 (18 & 19 Vict. c. 124), s. 31. The claims referred to are, it is conceived, claims by persons who do not claim to be beneficiaries.

(*i*) Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), ss. 24, 26; Charitable Trusts Amendment Act, 1855 (18 & 19 Vict. c. 124), ss. 29, 38. The law as to the sale, mortgage, leasing, and exchange of charity estates is fully dealt with at p. 216, *ante*.

(*k*) Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 21; Charitable Trusts Amendment Act, 1855 (18 & 19 Vict. c. 124), s. 29; and see p. 235, *ante*.

(*l*) Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), ss. 21, 26; Charitable Trusts Amendment Act, 1855 (18 & 19 Vict. c. 124), ss. 16, 29, 38, 39; and see p. 229, *ante*.

(*m*) Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), ss. 24, 26; Charitable Trusts Amendment Act, 1855 (18 & 19 Vict. c. 124), s. 38; and see p. 232, *ante*.

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estates, the sale or redemption of charity rent-charges (*n*), the purchase of sites for charitable institutions from persons under disabilities (*o*), or the purchase of land generally for the benefit of a charity (*p*).

Removal of officers.

They may authorise charity trustees to remove officers from their posts subject to the consent in writing of the visitor (if any) of the charity, and to charge the salary of any successor or any of the revenues of the charity with retiring allowances (*q*).

Approval of schemes.

They have jurisdiction provisionally to approve and certify schemes the carrying into effect of which requires parliamentary sanction (*r*), and they may approve schemes for the leasing of charity property (*s*).

Certificate of incorporation of trustees.

637. The Charity Commissioners may also grant certificates of incorporation to the trustees of any charity for religious, educational, literary, scientific, or public purposes (*t*).

(3) Judicial.

General jurisdiction.

638. The Charity Commissioners have jurisdiction to make orders for the appointment or removal of trustees (*u*), or for the removal of schoolmasters (*a*) or other officers (*b*) of any charity, or for or relating to the assurance, transfer, payment, or vesting of any real or personal estate belonging to a charity, or entitling the official trustees of charitable funds (*c*) or any other trustees to call for a transfer of and to transfer any stock belonging to such estate, or for the establishment of any scheme (*d*) for the administration of

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(*n*) Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 25; and see p. 222, *ante*.

(*o*) *Ibid.*, s. 27.

(*p*) *Ibid.*, s. 21; Charitable Trusts Act, 1860 (23 & 24 Vict. c. 136), ss. 2, 15.

(*q*) Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 22. See also Charitable Trusts Act, 1860 (23 & 24 Vict. c. 136), ss. 2, 6, 8, 13, 14; and p. 247, *ante*.

(*r*) Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), ss. 54—60; and see p. 186, *ante*.

(*s*) Charitable Trusts Amendment Act, 1855 (18 & 19 Vict. c. 124), s. 39; and see pp. 185, 229, *ante*.

(*t*) Charity Trustees Incorporation Act, 1872 (35 & 36 Vict. c. 24); and see p. 285, *ante*.

(*u*) Charitable Trusts Act, 1860 (23 & 24 Vict. c. 136), s. 2; and see pp. 268, 270, *ante*. The Commissioners may not remove a trustee merely on account of his religious belief (Charitable Trusts Act, 1860 (23 & 24 Vict. c. 136), s. 4). The powers of the Commissioners under s. 2 of the Charitable Trusts Act, 1860 (23 & 24 Vict. c. 136) (other than those relating to the official trustees), have, so far as they relate to endowments of a solely educational nature, been transferred to the Board of Education (Board of Education Act, 1899 (62 & 63 Vict. c. 33), and Orders in Council made thereunder).

(*a*) Charitable Trusts Act, 1860 (23 & 24 Vict. c. 136), s. 2; and see p. 255, *ante*. As to the Board of Education, see note (*u*), *supra*.

(*b*) *Ibid.*

(*c*) *Ibid.* See also p. 281, *ante*.

(*d*) *Ibid.* See also p. 185, *ante*. Forms of application for use under this section, together with printed instructions, are obtainable from the Charity Commission Office (Charity Commission Forms Nos. 9, 11, 12, and 13). See also Encyclopædia of Forms, Vol. III., pp. 458, 467, and p. 460, where a similar form for use in cases of registered places of worship is given. A copy of the instructions issued by the Charity Commissioners will be found in Tudor, Law of Charities and Mortmain, 4th ed. at p. 960.

a charity (*e*). Orders of this kind may also be made in regard to buildings registered as places of meeting for religious worship on application by the trustees (*f*).

The Board may also make orders for the apportionment of Roman Catholic charities applicable partly to superstitious uses (*g*).

Persons to make applications to Commissioners.

639. Applications for appointing or removing trustees, removing schoolmasters or officers, establishing schemes, or vesting charity property in the official trustee of charity lands must be made in the case of a charity having a gross annual income of £50 or upwards by either (1) all the trustees or persons acting in the administration of the charity, or (2) a majority of such trustees or of such persons present at a duly constituted meeting (*h*); and in the case of a charity having a gross annual income of less than £50 by either (1) all or any one or more of the trustees of, or the persons administering or claiming to administer or interested in, the charity, or (2) any two or more inhabitants of any parish or place within which the charity is administered or applicable (*i*).

Form of application.

The application must be in writing (*k*), and, unless the applicants are a body corporate, must be signed either by the applicants (*l*) or, if the applicants are the trustees or persons acting in the administration of a charity, by any person authorised in that behalf by a resolution passed by a majority of those trustees or persons who are present at a meeting of their body duly constituted and vote on the question (*m*).

An application by a body corporate must be made under their common seal (*n*).

Notice of proposed order to trustees etc.

640. Before making any order of the kind above mentioned the Commissioners must give written notice to the trustees or

(*e*) Charitable Trusts Act, 1860 (23 & 24 Vict. c. 136), s. 2. The jurisdiction exercisable by the Commissioners under this section is not excluded or impaired by similar powers contained in private Acts of Parliament and decrees and orders of the High Court containing directions that the same shall only be exercisable by or with the sanction of the court (Charitable Trusts Act, 1862 (25 & 26 Vict. c. 112), s. 1).

(*f*) Charitable Trusts Act, 1869 (32 & 33 Vict. c. 110), s. 15; and see Charitable Trusts (Places of Religious Worship) Act, 1894 (57 & 58 Vict. c. 35).

(*g*) Roman Catholic Charities Act, 1860 (23 & 24 Vict. c. 134), s. 1; see p. 151, *ante*.

(*h*) Charitable Trusts Act, 1860 (23 & 24 Vict. c. 136), s. 4. Applications of this kind relating to solely educational endowments are made to the Board of Education, and not to the Charity Commissioners (Board of Education Act, 1899, and Orders in Council made thereunder). As to the hearing of counsel by the Commissioners, see title BARRISTERS, Vol. II., p. 376.

(*i*) Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), ss. 30, 43; Charitable Trusts Act, 1860 (23 & 24 Vict. c. 136), s. 11. The Charity Commissioners have power to declare the annual incomes of charities for the purpose of determining the jurisdiction (Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 44).

(*k*) Charitable Trusts Act, 1860 (23 & 24 Vict. c. 136), s. 4. The Commissioners recognise applications partly written and partly printed. For a form of application, see Encyclopædia of Forms, Vol. III., p. 458.

(*l*) Charitable Trusts Act, 1860 (23 & 24 Vict. c. 136), s. 4.

(*m*) Charitable Trusts Act, 1869 (32 & 33 Vict. c. 110), s. 5.

(*n*) Charitable Trusts Act, 1860 (23 & 24 Vict. c. 136), s. 4.

SECT. 4. The Charity Commissioners.

administrators of the charity affected (*o*) who have not been privy to the application (*p*).

Public notice.

Public notice of a proposed order appointing or removing trustees or establishing a scheme of a charity must be given by the Commissioners one calendar month before the order is made (*q*); and the draft of every scheme relating to a non-ecclesiastical rural parochial charity must be communicated to the parish council or the chairman of the parish meeting, as the case may be (*r*).

In regard to the publication of a proposed scheme, the Charity Commissioners or the Board of Education, as the case may be, have an absolute discretion in any particular case to decide whether any modifications made in the scheme render a fresh public notice necessary (*s*).

Notice as to removal of officers.

One calendar month's notice also must be given to trustees, schoolmasters, or other officers of a charity whom it is proposed to remove, before the order for removal is made (*t*).

Insertion of incidental provisions in orders.

641. The Commissioners may insert in any order incidental provisions not included in the application which they think expedient for carrying into effect the substantial objects of the application (*u*).

Discharge of orders.

They may also within twelve months of the date of an order, and with or without any application, discharge the whole or any part of it, if it appears to have been made by mistake or on misrepresentation or to be *ultra vires* (*a*), but until discharged or varied it is valid according to its tenor (*b*).

Contentious cases.

The Commissioners may, but are not bound to, exercise jurisdiction in cases of a contentious character (*c*).

Appeals to court.

642. In every case, whatever may be the yearly income of the charity, only the Attorney-General or a person authorised by him or by the Charity Commissioners may appeal to the court against an order by the Commissioners (*d*).

Time for appeal.

The appeal must be brought within three calendar months from the time fixed for the final publication of the order (*e*). Notice of

(*o*) Charitable Trusts Act, 1860 (23 & 24 Vict. c. 136), s. 3.

(*p*) Charitable Trusts Act, 1869 (32 & 33 Vict. c. 110), s. 4. As to notice of the order, see *ibid.*, ss. 7, 14.

(*q*) Charitable Trusts Act, 1860 (23 & 24 Vict. c. 136), s. 6.

(*r*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 14 (5).

(*s*) Charitable Trusts Act, 1869 (32 & 33 Vict. c. 110), s. 7, amending Charitable Trusts Act, 1860 (23 & 24 Vict. c. 136), s. 6; *Re Berkhampstead Grammar School* (1908), 24 T. L. R. 514.

(*t*) Charitable Trusts Act, 1860 (23 & 24 Vict. c. 136), s. 6. The Commissioners receive and consider objections to the proposed orders if transmitted within the prescribed time (*ibid.*).

(*u*) Charitable Trusts Act, 1869 (32 & 33 Vict. c. 110), s. 6.

(*a*) *Ibid.*, s. 8.

(*b*) *Ibid.*

(*c*) Charitable Trusts Act, 1860 (23 & 24 Vict. c. 136), s. 5; *Re Burnham National Schools* (1873), L. R. 17 Eq. 241; *contra*, *Re Hackney Charities, Ex parte Nicholls*, reported on this point (1865), 34 L. J. (CH.) 169, where the opinion was expressed, *per* ROMILLY, M.R., that this section deprived them of jurisdiction.

(*d*) Charitable Trusts Act, 1860 (23 & 24 Vict. c. 136), s. 8; Charitable Trusts Act, 1869 (32 & 33 Vict. c. 110), s. 10; and see *Re Hackney Charities, Ex parte Nicholls* (1865), 4 De G. J. & Sm. 588.

(*e*) Charitable Trusts Act, 1860, s. 8; *Re Hackney Charities*, reported on this point (1865), 10 Jur. (N. S.) 941.

appeal, if not brought by the Attorney-General, must be given to the Commissioners (*f*), and to the Attorney-General (*g*) at least twenty-one days prior to its presentation.

The Attorney-General or any person authorised by him or by the Charity Commissioners may appear as respondent upon any appeal (*h*).

The court will not interfere with the discretion of the Commissioners except in cases of gross and palpable miscarriage (*i*).

Substitution of bishops as trustees.

643. The Charity Commissioners may, upon the application of the bishops concerned or one of them, make orders vesting charity property held upon trust by a bishop of one diocese in the bishop of another diocese and substituting one bishop for another as trustee in cases where the limits of the dioceses have been altered (*k*).

Questions as to trustees under Local Government Act, 1894.

644. Questions arising under the Local Government Act, 1894, as to the appointment of the trustees or beneficiaries of any charity, or as to the persons in whom the property of any charity is vested, are determinable at the request of any trustee, beneficiary, or other person interested, in the first instance by the Charity Commissioners, subject to appeal to the court (*l*).

SECT. 5.—*The Board of Education.*

Constitution of Board.

645. The Board of Education was established in 1899 (*m*), and was charged with the superintendence of matters relating to education in England and Wales (*n*).

The Board takes the place of, and exercises the jurisdiction formerly vested in, the Education Department, including the Department of Science and Art (*o*).

Powers of Board.

All powers (except the power of appointing the official trustees of charitable funds and of making orders for vesting or transferring lands or funds in, to, or from the official trustee of charity lands or the official trustees of charitable funds) conferred on the Charity Commissioners and their officers (except the official trustees) by any statute (*p*), charter, deed, will, order, scheme, rule, or regulation, so far as those powers related to endowments held solely for educational purposes, are now transferred to the Board of Education (*q*).

(*f*) Charitable Trusts Act, 1860 (23 & 24 Vict. c. 136), s. 8.
(*g*) Charitable Trusts Act, 1869 (32 & 33 Vict. c. 110), s. 11.
(*h*) Charitable Trusts Act, 1860 (23 & 24 Vict. c. 136), s. 9.
(*i*) *Re Hackney Charities* (1865), 4 De G. J. & Sm. 588, 592; *Re Burnham National Schools* (1873), L. R. 17 Eq. 241; and see *Re Campden Charities* (1881), 18 Ch. D. 310, 330, 334, C. A.
(*k*) Bishops' Trusts Substitution Act, 1858 (21 & 22 Vict. c. 71).
(*l*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 70 (2); and see pp. 263, 264, *ante*.
(*m*) Board of Education Act, 1899 (62 & 63 Vict. c. 33).
(*n*) *Ibid.*, s. 1 (1).
(*o*) *Ibid.*, s. 2 (1).
(*p*) For details of the jurisdiction transferred, see title EDUCATION.
(*q*) Board of Education (Powers) Order in Council, 1902, s. 1, printed in Lely's Annual Statutes, 1902, p. 91.

SECT. 5. **The Board of Education.**

Whether an endowment or any part of an endowment is held for, or ought to be applied to, educational purposes is a question to be decided by the Charity Commissioners, and not by the Board of Education (*r*).

Part X.—Practice.

SECT 1.—*Actions.*

SUB-SECT. 1.—*In General.*

Actions must be brought by Attorney-General.

646. Where an action (*a*) is necessary to enforce the execution of a charitable purpose, to remedy any abuse or misapplication of charitable funds, or to administer a charity (*b*), the Attorney-General is the proper plaintiff (*c*); whether he is acting alone *ex officio* as the officer of the Crown, and as such the protector of charities, or *ex relatione*, that is to say, at the request of a private individual called a relator who thinks the charity is being or has been abused (*d*). Similarly, in actions relating to other public

(*r*) Board of Education Act, 1899 (62 & 63 Vict. c. 33), s. 2 (2); Board of Education (Powers) Orders in Council, 1900 to 1902. These Orders are set out in full in Tudor, Law of Charities and Mortmain, 4th ed., pp. 760—769. By the combined operation of the three Orders the Board of Education now stands in the place formerly occupied by the Charity Commissioners with regard to endowments held solely for educational purposes (Board of Education Report, 1902-3, at p. 68). See also Board of Education (Powers) Order in Council, 1902, s. 2, as to "mixed" endowments, *i.e.*, endowments held partly for educational purposes and partly for other purposes. As soon as the Charity Commissioners have decided what part of a "mixed" endowment is held for educational purposes, that part, and that part only, falls within the jurisdiction of the Board of Education (*ibid.*). For the law relating to educational charities, see the title EDUCATION.

(*a*) Formerly suits of this nature were termed "informations," but since the Supreme Court of Judicature Act, 1873 (36 & 37 Vict. c. 66), such suits are called "actions" and are commenced by writ of summons (*A.-G.* v. *Shrewsbury Bridge Co.* (1880), 42 L. T. 79; Daniel's Chancery Forms, 5th ed. 1051; R. S. C., Ord. 1, r. 1; Ord. 72, r. 2); see also title CROWN PRACTICE.

(*b*) *Wellbeloved* v. *Jones* (1822), 1 Sim. & St. 43; *A.-G.* v. *Compton* (1842), 1 Y. & C. Ch. Cas. 427; *Christ's Hospital* (*Governors*) v. *A.-G.* (1846), 5 Hare, 257; *Strickland* v. *Weldon* (1885), 28 Ch. D. 426, 430.

(*c*) The right of the Attorney-General to file "an information" is founded on the prerogative of the Crown, as *parens patriæ*, through the medium of its proper officer to inform the court of and demand a remedy for an injustice perpetrated against such subjects of the Crown, *e.g.*, charities, as are incompetent to enforce their claims in person. Hence the name "information." See Shelford, Law of Mortmain, p. 399; *A.-G.* v. *Brown* (1818), 1 Swan. 291; *A.-G.* v. *Magdalen College* (1854), 23 L. J. (CH.) at p. 852. Though nominally the plaintiff, the Attorney-General, when appearing on behalf of a charity, is not like an ordinary plaintiff endeavouring to obtain redress for a private wrong, for it is one of his duties to protect the defendant against any hardship he may suffer at the hands of the relators, *e.g.*, if they mislead him or withhold documents or other necessary information (*A.-G.* v. *Clapham* (1853), 10 Hare, Appendix II., p. lxx., *per* WOOD, V.-C.). As to informations generally, see title CROWN PRACTICE.

(*d*) *A.-G.* v. *Logan*, [1891] 2 Q. B. 103; and see *A.-G.* v. *Cockermouth Local Board* (1874), L. R. 18 Eq. 172, 176; *A.-G.* v. *Newcastle-upon-Tyne Corporation*, [1897] 2 Q. B. 384, C. A. Except for purposes of costs there is no practical difference between an action *ex officio* and one *ex relatione*. As to relators, see further, pp. 323 *et seq.*, *post*.

rights the Attorney-General sues at the relation of the local authority (*e*).

When trustee may institute proceedings.

647. Actions of this kind, if instituted by parties other than the Attorney-General, or, in the event of his illness or a vacancy in the office (*f*), the Solicitor-General, are dismissed (*g*). If, however, the Attorney-General declines to interfere and the trustees of the charity differ amongst themselves as to the proper mode of administration, a certain number may bring the matter before the court by an action on behalf of themselves and others, making some of the dissentients and the Attorney-General defendants (*h*).

Control of action by Attorney-General.

648. The Attorney-General has entire control of the action, whether it be *ex relatione* or *ex officio* (*i*), even where he does not act personally (*k*). No amendment can be made (*l*), or notice of motion given (*m*), without his consent. He may at any time stay the proceedings (*n*), and a reference to arbitration can only be made with his sanction (*o*). His consent is also necessary before an award can be acted upon (*p*).

Enforcement of rights of Attorney-General.

649. It is not the duty of the Attorney-General in all charity cases to contend for his strict legal rights when the result of enforcing them would be oppressive to individuals. If, however, he insists on his strict rights the court will enforce them (*q*).

Duty of court.

650. In an action by the Attorney-General for the regulation of a charity it is the duty of the court to give proper directions without any regard to the propriety or impropriety of the relief sought (*a*).

(*e*) See, *e.g.*, *Stoke Parish Council* v. *Price*, [1899] 2 Ch. 277.

(*f*) Shelford, Law of Mortmain, p. 399; *R.* v. *Wilkes* (1770), 4 Burr. 2554; *Ludlow Corporation* v. *Greenhouse* (1827), 1 Bli. (N. S.). 51, H. L.

(*g*) *A.-G.* v. *Hewitt* (1804), 9 Ves. 232; *A.-G.* v. *Green* (1820), 1 Jac. & W. at p. 305; *Strickland* v. *Weldon* (1885), 28 Ch. D. 426; *A.-G.* v. *Wyggeston's Hospital* (1852), 16 Beav. 313, where a petition presented in the name, but without the authority, of the Attorney-General was dismissed.

(*h*) *Lang* v. *Purves* (1862), 8 Jur. (N. S.) 523, P. C., *per* Lord KINGSDOWN, at p. 525. As to one or more of numerous parties' suing or defending on behalf of all, see R. S. C., Ord. 16, r. 9; *A.-G.* v. *Fowler* (1808), 15 Ves. at p. 87; *Milligan* v. *Mitchell* (1837), 7 L. J. (CH.) 37; and title PRACTICE AND PROCEDURE.

(*i*) *Andrew* v. *Merchant Taylors' Co.* (1802), 7 Ves. 223; *A.-G.* v. *Hewitt*, *supra*; *Ludlow Corporation* v. *Greenhouse*, *supra*, at p. 65; *A.-G.* v. *Ironmongers' Co.* (1840), 2 Beav. 313, 328, 329; *A.-G.* v. *Haberdashers' Co.* (1852), 15 Beav. 397; see also the non-charitable case *London County Council* v. *A.-G.*, [1902] A. C. 165).

(*k*) Shelford, Law of Mortmain, p. 400; *A.-G.* v. *Hewitt*, *supra*.

(*l*) Shelford, Law of Mortmain, p. 403; *A.-G.* v. *Fellows* (1820), 1 Jac. & W. 254.

(*m*) *A.-G.* v. *Wright* (1841), 3 Beav. 447.

(*n*) *A.-G.* v. *Ironmongers' Co.*, *supra*, at p. 329; *A.-G.* v. *Newark Corporation* (1842), 11 L. J. (CH.) 270.

(*o*) *A.-G.* v. *Hewitt*, *supra*; *A.-G.* v. *Fea* (1819), 4 Madd. 274; and see *Prior* v. *Hembrow* (1841), 8 M. & W. 873.

(*p*) *A.-G.* v. *Hewitt*, *supra*; and see *A.-G.* v. *Clements* (1823), Turn. & R. 61.

(*q*) *A.-G.* v. *Brettingham* (1840), 3 Beav. 95.

(*a*) R. S. C., Ord. 20, r. 6, under which general relief, whether claimed or not, may always be given. Formerly the decree was founded on the prayer of

SECT. 1. Actions.

Defects in form.

651. As a rule actions in the nature of informations are not dismissed for any want of form (*b*), but the court is careful not to injure defendants by overlooking defects in form (*c*). But actions which are defective in substance are dismissed (*d*).

Signature of writ.

652. Where there are relators the Attorney-General must sign the original writ. Before signing he may require to see the statement of claim (*e*).

Conversion of ordinary action into information.

653. An ordinary action may, with the sanction of the Attorney-General, by amendment of the writ and statement of claim be turned into an action in the nature of an information (*f*).

Sanction of Commissioners or Board of Education.

654. Legal proceedings (*g*) for obtaining any relief, order, or direction relating to any charity, or the estate, fund, property or income thereof, require the sanction either of the Charity Commissioners or, as the case may be, of the Board of Education (*h*), except

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the bill (Shelford, Law of Mortmain, p. 444), except in charity cases; see *A.-G.* v. *Smart* (1747), 1 Ves. Sen. 72; *A.-G.* v. *Whiteley* (1805), 11 Ves. 241 (wrong relief sought); *A.-G.* v. *Brooke* (1811), 18 Ves. 324; *A.-G.* v. *Rochester Corporation* (1854), 5 De G. M. & G. 797 (proper relief given without specific prayer); *A.-G.* v. *Middleton* (1751), 2 Ves. Sen. 327 (particular relief sought, but other relief granted); *A.-G.* v. *Coopers' Co.* (1812), 19 Ves. 194 (no relief sought with regard to particular objects); *A.-G.* v. *Brereton* (1752), 2 Ves. Sen. 426 (no relief sought with regard to a particular person). See also *A.-G.* v. *Gower* (*Lord*) (1740), 9 Mod. Rep. 228; *A.-G.* v. *Jeanes* (1737), 1 Atk. 355; *A.-G.* v. *Gore* (*Lord*) (1740), Barn. (CH.) 151; *A.-G.* v. *Gardner* (1741), Barn. (CH.) 490; *A.-G.* v. *Parker* (1747), 1 Ves. Sen. 43; *A.-G.* v. *Stamford Corporation* (1747), 2 Swan. 591; *A.-G.* v. *Harrow School* (*Governors*) (1754), 2 Ves. Sen. 552; *A.-G.* v. *Foyster* (1793), 1 Anst. 123.

(*b*) Shelford, Law of Mortmain, p. 446. This rule apparently is not applicable where the charity is regulated by Royal Charter (*A.-G.* v. *Smart*, *supra*; *A.-G.* v. *Middleton*, *supra*).

(*c*) *A.-G.* v. *Warren* (1818), 2 Swan. 291, 310, where the court declined to set aside a decree upon an information which did not pray for such relief; *A.-G.* v. *Daugars* (1864), 33 Beav. 621, where in a suit to establish a charity by means of a scheme, the court declined to consider the validity of the appointment of existing officers of the charity against whom there was no imputation, or to remove them.

(*d*) See, *e.g.*, *A.-G.* v. *Oglender* (1790), 1 Ves. 246, where the information claimed a legacy on behalf of a charity to which another charity was entitled, and the court refused on that information to give directions for the administration of the second charity; *A.-G.* v. *Grocers' Co.* (1837), 1 Keen, 506, where the facts were untruly stated, and the relief claimed was founded on the untrue statement.

(*e*) Yearly Practice of the Supreme Court, 1909, p. 4, notes to Ord. 1, r. 1.

(*f*) *Caldwell* v. *Pagham Harbour Reclamation Co.* (1876), 2 Ch. D. 221; *Wallasey Local Board* v. *Gracey* (1887), 36 Ch. D. 599; Seton, Judgments and Orders, 6th ed., pp. 614, 621. Under the old practice the court gave leave in charity cases, where it was necessary, to amend a bill by converting it into a bill and information, or into an information alone (*St. Mary Magdalen, Oxford* (*President*) v. *Sibthorp* (1826), 1 Russ. 154), or to amend a bill and information by converting it into an information; see *A.-G.* v. *Newcombe* (1807), 14 Ves. 6; *A.-G.* v. *Vivian* (1826), 1 Russ. 226; *A.-G.* v. *East India Co.* (1840), 11 Sim. 380; *A.-G.* v. *Cuming* (1843), 2 Y. & C. Ch. Cas. 149.

(*g*) *E.g.*, "suit, petition or other proceeding"; Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 17.

(*h*) If an endowment is held solely for educational purposes the consent of the Board of Education is necessary instead of that of the Charity Commissioners (Board of Education Act, 1899 (62 & 63 Vict. c. 33), and the Orders in Council made thereunder; see p. 317, *ante*).

where the application is in any suit or matter actually pending or where relief is claimed adversely to a charity (*i*), or where the charity is exempt from the jurisdiction of the Charity Commissioners or the Board of Education (*k*), or where the Attorney-General institutes the proceedings *ex officio* (*l*).

Pleading sanction.

The certificate of the Charity Commissioners ought to be obtained before the commencement of proceedings (*m*), and the plaintiff should plead that it has been obtained (*n*).

Motion for stay if no sanction obtained.

Where an action relating to a charity has been commenced without the certificate of the Charity Commissioners, a motion for stay of proceedings is the simplest way of testing the question whether such certificate is or is not required (*o*).

Where consent of Attorney-General also necessary.

Except in the case of applications under the jurisdiction created by the Charitable Trusts Act, 1853, the consent of the Charity Commissioners to legal proceedings does not dispense with the sanction of the Attorney-General thereto where it was necessary before the passing of the Charitable Trusts Act, 1853 (*p*).

Proceedings commenced on report of assistant commissioner.

The Charity Commissioners may also, without previous notice being given to them, authorise or direct proceedings to be taken whenever upon the report of an assistant commissioner (*q*) or otherwise it appears expedient (*r*).

Action by Attorney-General on certificate of Commissioners.

Again, the Commissioners may, where they think the institution of legal proceedings by the Attorney-General is requisite or desirable with respect to any charity or its property or affairs, certify such case to the Attorney-General, with statements and particulars explaining the circumstances. Then, if after consideration the Attorney-General thinks fit to institute proceedings, he may do so *ex officio* by action or petition in the High Court, or by application to a High Court judge in chambers, or to a county court (*s*).

(*i*) Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 17; and see pp. 310, 311, *ante*. Under this section notice in writing of the proposed proceedings must be given to the Commissioners.

(*k*) Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 62; and see note (*h*), p. 320, *ante;* and p. 317, *ante*.

(*l*) *Ibid.*, s. 18.

(*m*) *Rendall* v. *Blair* (1890), 45 Ch. D. 139, C. A.

(*n*) *Braund* v. *Devon (Earl)* (1868), 3 Ch. App. 800.

(*o*) *Hodgson* v. *Forster*, [1877] W. N. 74; *Rooke* v. *Dawson*, [1895] 1 Ch. 480.

(*p*) Charitable Trusts Act, 1853 (16 & 17 Vict. c 137), s. 18. Thus, a petition under the Charities Procedure Act, 1812 (52 Geo. 3, c. 101), requires the consent of the Charity Commissioners when it relates to a charity within their jurisdiction, and is not presented by the Attorney-General acting *ex officio* (Charitable Trusts Act, 1853, ss. 18, 43), or "in a suit or matter actually pending" (Charitable Trusts Act, 1853, s. 17), but the sanction of the Attorney-General under s. 2 of the Charities Procedure Act, 1812, is still also necessary.

(*q*) See Charitable Trusts Act, 1887 (50 & 51 Vict. c. 49), s. 2 (3).

(*r*) Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 19. This section is in fact merely a proviso to s. 17. Under that section the Commissioners can authorise proceedings only after written notice of the proposed proceedings. S. 19 dispenses with such notice.

(*s*) Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 20. Proceedings have been taken under this section in numerous cases; see *A.-G.* v. *Blizard* (1855), 25 L. J. (CH.) 171; *Philpotts* v. *St. George's Hospital* (1859), 28 L. J. (CH.) 657 (information); *A.-G.* v. *Christ's Hospital (Governors)*, [1896] 1 Ch. 879; *Re Manser, A.-G.* v. *Lucas*, [1905] 1 Ch. 68 (adjourned summonses).

SECT. 1. Actions.

Proceedings by Commissioners to recover property not exceeding £20 a year.

655. The Charity Commissioners may themselves, by action, petition, or other proceedings, sue on behalf of a charity for the recovery of any property the gross annual income of which does not in the opinion of the Commissioners exceed twenty pounds a year, and which appears to belong to the charity (*t*). The sanction of the Attorney-General is necessary to such proceedings (*a*). The proceedings may be instituted in the name of "the Charity Commissioners for England and Wales" (*b*); and a change in the persons who are Commissioners does not cause the proceedings to abate or become defective (*c*). For the purpose of such proceedings any document may be served on the Commissioners by being addressed to them and delivered at, or sent by post to, the Charity Commission office, or by being served on the secretary to the Commission (*d*).

Applications by the Commissioners of the above nature may be commenced by originating summons (*e*), and neither the trustees (if any) or persons acting in the administration of the charity, nor the official trustee of charity lands, nor the official trustees of charitable funds are necessary parties, unless the court or a judge otherwise orders; the Commissioners being deemed for the purposes of such proceedings to represent all parties interested in the charity.

Consideration by court of expediency of proceedings.

656. The court has not the power of taking into its consideration whether a particular action is or is not beneficial to the objects of the charity; but by its absolute power over costs the court can discourage parties taking useless proceedings even though such proceedings are sanctioned by the Attorney-General (*f*).

The court disapproves of charity actions being got up by public meetings and supported by public subscriptions (*g*).

Alteration of scheme by court.

657. The court has jurisdiction in an action to alter a scheme which was originally settled on petition (*h*).

Compromises.

658. Questions relating to charities may be compromised and the terms of the compromise confirmed by the court (*i*). The

(*t*) Charitable Trusts (Recovery) Act, 1891 (54 & 55 Vict. c. 17), s. 3. For instances of proceedings taken under this section, see *Re Gwynne's Charity* (1894), 10 T. L. R. 428; *Re Herbage Rents, Greenwich*, [1896] 2 Ch. 811; *Re White's Charities, Charity Commissioners* v. *London Corporation*, [1898] 1 Ch 659.

(*a*) Charitable Trusts (Recovery) Act, 1891 (54 & 55 Vict. c. 17), s. 3.

(*b*) *Ibid.*, s. 4 (1).

(*c*) *Ibid.*, s. 4 (2).

(*d*) *Ibid.*, s. 4 (3).

(*e*) *Ibid.*, s. 4 (4), s. 6; Rules of the Supreme Court (Charitable Trusts Recovery), 1892, printed in Yearly Practice of the Supreme Court, 1909, p. 1503; see *Re Alms Corn Charity*, [1901] 2 Ch. 750. The printed reports of the former Commissioners for inquiring concerning charities are *primâ facie* evidence in such proceedings upon notice being given (s. 5 (1) of the Act of 1891). As to the nature of such notice, and also as to discovery from the Commissioners, see the above-mentioned rules.

(*f*) *A.-G.* v. *Merchant Taylors' Co* (1835), 5 L. J. (CH.) 62.

(*g*) *A.-G.* v. *Worcester (Bishop)* (1851), 21 L. J. (CH.) 46.

(*h*) *A.-G.* v. *Stamford (Earl)* (1839), 1 Ph. 737.

(*i*) As, for example, in cases where it is doubtful whether a bequest or

Charity Commissioners also may sanction a compromise of claims on behalf of (*j*) or against (*k*) a charity without taking or continuing any proceedings at law or in equity (*l*).

Reference of matters to consideration of Attorney-General.

659. The court has discretion, instead of acting according to the strict rules of law, to refer matters arising out of an action to the consideration of the Attorney-General, and to act on his certificate or report (*m*). Questions arising on the construction of wills and other documents are not referred to the Attorney-General (*n*).

Injunctions.

660. Breaches of trust, actual or contemplated, may be restrained by injunction (*o*). When necessary an action for an injunction may be brought by a trustee against his co-trustees (*p*).

SUB-SECT. 2.—*The Relator.*

Introduction of relator.

661. The introduction of a relator in actions relating to charities is not essential (*q*). The Attorney-General may, if he pleases, take proceedings without a relator (*r*), or may require one to be introduced even in cases certified by the Charity Commissioners (*s*); the object being to have a person before the court who, in the event of costs being given against the Crown, may be made liable for them (*t*).

devise to charity is valid, and a compromise is arrived at by a division of the property between the charity and other claimants, such as the heir-at-law, next of kin, and residuary legatee (*A.-G.* v. *Lauderfield* (1744), 9 Mod. Rep. 286; *Simpson's Case*, cited 5 Ves. 304; *A.-G.* v. *Oxford (Bishop)* (1786), cited 4 Ves. 431; *Andrew* v. *Merchant Taylors' Co.* (1802), 7 Ves. 223; *Andrew* v. *Trinity Hall, Cambridge* (1804), 9 Ves. 532, 533); see also *A.-G.* v. *Trevelyan* (1847), 16 L. J. (CH.) 521; and p. 313, *ante*.

(*j*) Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 23.

(*k*) Charitable Trusts Amendment Act, 1855 (18 & 19 Vict. c. 124), s. 31.

(*l*) See p. 313, *ante*.

(*m*) *A.-G.* v. *Exeter Corporation* (1827), 2 Russ. 362, where the court referred it to the Attorney-General to certify whether a charity might accept from its debtor a smaller sum than was actually due; *A.-G.* v. *Green* (1820), 1 Jac. & W. 303; *A.-G.* v. *Carlisle Corporation* (1831), 4 Sim. 275; *A.-G.* v. *Pretyman* (1841), 4 Beav. 467; *A.-G.* v. *Tufnell* (1849), 12 Beav. 35, 41); and see *A.-G.* v. *Brettingham* (1840), 3 Beav. 91, where, in a hard case, the decision was postponed in order that the Attorney-General might come to some arrangement.

(*n*) *A.-G.* v. *Fea* (1819), 4 Madd. 274.

(*o*) *Rigall* v. *Foster* (1853), 18 Jur. 39 (to restrain improper mortgage by charity trustees); *A.-G.* v. *Welsh* (1844), 4 Hare, 572 (to prevent user of chapel for unauthorised form of worship); *A.-G.* v. *Murdoch* (1850), 7 Hare, 445; *Cooper* v. *Gordon* (1869), L. R. 8 Eq. 249 (to restrain ministers from officiating); *Milligan* v. *Mitchell* (1833), 1 My. & K. 446 (to prevent election of unlicensed minister).

(*p*) *Re Chertsey Market* (1819), 6 Price, 279; *Perry* v. *Shipway* (1859), 4 De G. & J. 353, where an improper retainer of a chapel by the minority of the trustees was prevented by the majority.

(*q*) *Mucklow* v. *A.-G.* (1816), 4 Dow, 1, 15, H. L.; *Re Bedford Charity (Masters)* (1819), 2 Swan. 470, 520; *A.-G.* v. *Dublin Corporation* (1827), 1 Bli. (N. S.) 351, H. L.

(*r*) *A.-G.* v. *Logan*, [1891] 2 Q. B. 100, 107; *A.-G.* v. *Lewis* (1845), 8 Beav. 179.

(*s*) *A.-G.* v. *Boucherett* (1858), 25 Beav. 116.

(*t*) Shelford, Law of Mortmain, pp. 424, 425; *A.-G.* v. *Brown* (1818), 1 Swan. 305, n.; *Re Bedford Charity (Masters)*, *supra*; *A.-G.* v. *Dublin*

SECT. 1. Actions.

Who may be relators.

662. The following persons and bodies may act as relators, namely, any private individual who thinks that a charity has been abused (*a*), several individuals (*b*), the trustees of the charities concerned or any of them (*c*), corporations (*d*), companies (*e*), district councils (*f*), local education authorities (*g*), and ratepayers (*h*). A relator need not have any interest in the charity, its administration, or the subject of the suit (*i*), but he must not be a person in indigent circumstances (*j*).

Relator not a plaintiff.

663. The introduction of a relator's name does not make him a plaintiff (*k*), except where he is personally interested in the relief sought (*l*). The Crown, acting through the Attorney-General, is the real plaintiff (*m*).

Relator and Attorney-General.

664. A relator's action is the action of the Attorney-General, and therefore the relator cannot appear separately (*n*), or take an opposite view (*o*) from the Attorney-General; nor when a relator is

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Corporation (1827), 1 Bli. (N. S.) 351, 352, H. L.; *A.-G.* v. *Boucherett* (1858), 25 Beav. 116, 120; *A.-G.* v. *Logan*, [1891] 2 Q. B. 100, *per* VAUGHAN WILLIAMS, J., at p. 106: "The practice of making the relator directly responsible for the costs of the action had its origin not in the protection of the defendant but of the Crown"; but see *Ludlow Corporation* v. *Greenhouse* (1827), 1 Bli. (N. S.) 17, 48, H. L., where Lord REDESDALE suggests that a relator was joined in the interests of the defendant.

(*a*) Shelford, Law of Mortmain, 424.

(*b*) *A.-G.* v. *Clarendon (Earl)* (1811), 17 Ves. 491 (several inhabitants).

(*c*) *A.-G.* v. *Griffith* (1807), 13 Ves. 565, 571, citing *A.-G.* v. *Talbot* (not reported).

(*d*) *A.-G.* v. *Logan, supra*, at p. 104; *A.-G.* v. *Ashborne Recreation Ground Co.*, [1903] 1 Ch. 101.

(*e*) *A.-G.* v. *Merthyr Tydfil Union*, [1900] 1 Ch. 516, C. A.

(*f*) *A.-G.* v. *Wimbledon House Estate Co., Ltd.*, [1904] 2 Ch. 34.

(*g*) *A.-G.* v. *Price* (1908), 24 T. L. R. 761.

(*h*) *London County Council* v. *A.-G.*, [1902] A. C. 165.

(*i*) *A.-G.* v. *Bucknall* (1741), 2 Atk. 328; *A.-G.* v. *Green* (1789), 2 Bro. C. C. 497; *A.-G. v. Vivian* (1826), 1 Russ. 226, 236; see *South Molton Corporation* v. *A.-G.* (1854), 5 H. L. Cas. 1, 27, where the court appeared to look with disfavour upon a relator who was a complete stranger to the charity.

(*j*) *Fellows* v. *Barrett* (1836), 1 Keen, 120; because he is liable for costs (see p. 343, *post*). A certificate of a solicitor as to the relator's competency is necessary; see Chitty's King's Bench Forms, 664, 665 (3), (4), (5).

(*k*) *A.-G.* v. *Logan, supra*, at p. 106.

(*l*) *A.-G.* v. *Heelis* (1824), 2 L. J. (O. S.) (CH.) 189; *A.-G.* v. *Vivian, supra*, at p. 236; *Lang* v. *Purves* (1862), 8 Jur. (N. S.) 523, P. C. Under the old practice, where the relator joined as plaintiff, the proceeding was called "a bill and information." As to "bills and informations," see, further, *Nash* v. *Morley* (1842), 11 L. J. (CH.) 336; *Braund* v. *Devon (Earl)* (1868), 3 Ch. App. 800; *Prestney* v. *Colchester Corporation* (1882), 21 Ch. D. 111. Bills and informations filed together are severable (*A.-G.* v. *Cuming* (1843), 2 Y. & C. Ch. Cas. 149), and where a legacy was bequeathed to charity, the trustees of the charity were held entitled to file a bill for enforcing payment without an information (*Mayor* v. *Nixon* (1827), 2 Y. & J. 60).

(*m*) *A.-G.* v. *Logan, supra.*

(*n*) *A.-G.* v. *Ironmongers' Co.* (1840), 2 Beav. 313, 328. But see *A.-G.* v. *Wyggeston's Hospital* (1855), Seton, Judgments and Orders, 6th ed., 1290, 1297, 1325.

(*o*) *A.-G.* v. *Sherborne Grammar School (Governors)* (1854), 24 L. J. (CH.) 74, 76.

plaintiff can he be heard in person on behalf of the Attorney-General (*p*).

The Attorney-General may appear either in person or by counsel (*q*), or he may authorise the relator to conduct the case and instruct counsel on his behalf. The Attorney-General cannot then appear independently (*r*) except by special permission of the court (*s*).

Death of relator.

665. Where there are several relators the death of one does not affect the proceedings, but if all die, or if the sole relator dies (*t*) or becomes lunatic (*a*), the court will stay the action until a new relator is appointed in order that some person may be made answerable for costs (*b*). The consent of the Attorney-General is required for obtaining an order appointing a new relator (*c*), or the Attorney-General must make the application himself (*d*). Where a relator, who is also plaintiff, dies and his interest does not pass to a co-plaintiff, an order to continue the proceedings is required (*e*).

Pleading relator's interest.

666. A clause in the statement of claim indicating the interest of a relator is not irrelevant, as in the event of the suit failing the costs may be more easily apportioned (*f*).

SUB-SECT. 3.—*The Attorney-General as a Party.*

Generally a necessary party.

667. As a rule the Attorney-General is a necessary party to all actions relating to charities (*g*). He represents the beneficial interest, in other words the objects, of the charity (*h*). Even if all the subscribers to a charitable fund are made plaintiffs, an action for the regulation of the charity is defective unless the Attorney-General is also a party (*i*).

(*p*) *A.-G.* v. *Barker* (1838), 4 My. & Cr. 262.

(*q*) *A.-G.* v. *Green* (1820), 1 Jac. & W. 305; *Ludlow Corporation* v. *Greenhouse* (1827), 1 Bli. (N. S.) 65, H. L.

(*r*) *A.-G.* v. *Sherborne Grammar School* (*Governors*) (1854), 18 Beav. 264; see also *A.-G.* v. *Dove* (1823), Turn. & R. 328; *A.-G.* v. *Barker*, *supra*; *A.-G.* v. *Ironmongers' Co.* (1840), 2 Beav. 313.

(*s*) *A.-G.* v. *Dove*, *supra*; *A.-G.* v. *Stamford* (*Earl*) (1840), 10 L. J. (CH.) 58, 66; and see *Re Hanson's Trusts* (1852), 9 Hare, App. I., p. liv.; Seton, Judgments and Orders, 6th ed., 1285.

(*t*) *A.-G.* v. *Powel* (1763), Dick. 355; *A.-G.* v. *Haberdashers' Co.* (1852), 15 Beav. 397, 404.

(*a*) *A.-G.* v. *Tyler* (1764), 2 Eden, 230.

(*b*) *A.-G.* v. *Smart* (1741), 1 Ves. Sen. 72.

(*c*) *Anon.* (1726), Sel. Cas. Ch. 69.

(*d*) *A.-G.* v. *Plumptree* (1820), 5 Madd. 452. For a form of petition for a new relator, see Daniel's Chancery Forms, 5th ed. 35.

(*e*) R. S. C., Ord. 17.

(*f*) *Rickards* v. *A.-G.* (1845), 12 Cl. & Fin. 30, H. L.

(*g*) Shelford, Law of Mortmain, p. 411; *Wellbeloved* v. *Jones* (1820), 1 Sim. & St. 40; see p. 318, *ante*.

(*h*) *A.-G.* v. *Brodie* (1846), 6 Moo. P. C. C. 12; *A.-G.* v. *Worcester* (*Bishop*) (1851), 9 Hare, 361; *Ware* v. *Cumberlege* (1855), 24 L. J. (CH.) 630; *Re Sekeford's Charity* (1861), 5 L. T. 488.

(*i*) *Strickland* v. *Weldon* (1885), 28 Ch. D. 426; and see *Minn* v. *Stant* (1851), 15 Beav. 49, where for a special transaction it was held that the subscribers were necessary parties.

SECT. 1. Actions.

Where validity of gift in question.

668. So, too, the Attorney-General is a necessary party to proceedings instituted to test the validity of an alleged charitable gift (*k*), or to determine whether a claim to the benefit of a charity which had for many years been otherwise applied is properly founded (*l*).

When not a necessary party.

669. The Attorney-General is not a necessary party where the action concerns a private charity (*m*), or where the trust is not charitable (*n*), or where (whether the trust is charitable or not) the parties suing do so under express statutory powers (*o*), or where third parties are suing charity trustees for specific performance of an agreement (*p*).

Parties bound by proceedings.

670. All beneficiaries are bound by the result of proceedings to which the Attorney-General is a party (*q*), but the Attorney-General is not bound by any proceedings taken by beneficiaries to which he is not made a party (*r*).

Compromises.

671. Where the Attorney-General is a party to any legal proceedings affecting a charity no compromise can be enforced without his sanction (*s*).

(*k*) *Kirkbank* v. *Hudson* (1819), 7 Price, 212; and see p. 327, *post*.

(*l*) *Re Magdalen Land Charity* (1852), 9 Hare, 624.

(*m*) *Anon.* (1745), 3 Atk. 277; *Brown* v. *Dale* (1878), 9 Ch. D. 78; compare *Spiller* v. *Maude* (1881), 32 Ch. D. 158, n.; *Pease* v. *Pattinson* (1886), 32 Ch. D. 154, where the circumstances were somewhat similar, and the Attorney-General was present. As to the meaning of "private charity," see p. 117, *ante*.

(*n*) *A.-G.* v. *Hewer* (1700), 2 Vern. 387 (school not a charity school); *A.-G* v. *Whorwood* (1750), 1 Ves. Sen. 534, 536, where it was held, in the case of a devise to a college, that there were no grounds for an information by the Attorney-General; *A.-G.* v. *Middleton* (1751), 2 Ves. Sen. 327; *A.-G.* v. *Brereton* (1752), 2 Ves. Sen. 426; *A.-G.* v. *Newcombe* (1807), 14 Ves. 1, 7; *Prestney* v. *Colchester Corporation* (1882), 21 Ch. D. 111.

The cases deciding that advowsons held on trust for parishioners were not charity property, and that therefore an information by the Attorney-General was not maintainable with regard to such trusts (see *A.-G.* v. *Parker* (1747), 1 Ves. Sen. 43; *A.-G.* v. *Forster* (1804), 10 Ves. 335; *A.-G.* v. *Newcombe*, *supra*; *A.-G.* v. *Webster* (1875), L. R. 20 Eq. 483, 491) cannot be supported on that point since the cases of *Re St. Stephen, Coleman Street* (1888), 39 Ch. D 492, and *Hunter* v. *A.-G.*, [1899] A. C. 309, 315, which decided that trusts of advowsons for parishioners are charitable.

(*o*) *Prestney* v. *Colchester Corporation*, *supra*, at pp. 119, 120 (action by some freemen of a borough, on behalf of all, to establish a right for the benefit of all the freemen, suing under powers conferred by the Municipal Corporations Act, 1835 (5 & 6 Will. 4, c. 76), s. 2); compare *A.-G.* v. *Meyrick*, [1893] A. C. 1, where the Act did not contain similar provisions and the Attorney-General was a party.

(*p*) *A.-G.* v. *Warren* (1818), 2 Swan. 291, 311.

(*q*) *Vince* v. *Walsh* (1854), 3 W. R. 7.

(*r*) *A.-G.* v. *Leage* (1881), Tudor, Law of Charities and Mortmain, 4th ed., p. 1041, *per* KAY, J., at p. 1044, discussing *Saunders* v. *Howes* (1857), not reported.

(*s*) *Andrew* v. *Merchant Taylors' Co.* (1802), 7 Ves. 223; *Andrew* v. *Trinity Hall, Cambridge* (1804), 9 Ves. 532, 533; *A.-G.* v. *Exeter Corporation* (1827), 2 Russ. 362; *A.-G.* v. *Fishmongers' Co.* (1837), Coop. Pr. Cas. 85; *A.-G.* v. *Ludlow Corporation* (1842), 6 Jur. 1003; *A.-G.* v. *Trevelyan* (1847), 16 L. J. (CH.) 521; *A.-G.* v. *Boucherett* (1858), 25 Beav. 116.

Administration proceedings.

672. In administration proceedings where a question arises as to the application of a gift to charity generally, the Attorney-General is a necessary party to represent the interests of charity in general (*l*). Where there are gifts to specified individual charities, the presence of the Attorney-General is necessary, if the establishment of a scheme or rules is required for the regulation of the internal conduct of the charity (*a*). He is similarly a necessary party, when the question is whether a particular bequest is charitable (*b*), or is applicable *cy-près* (*c*), or where there is a gift to an established charitable institution to be held upon trusts differing from those upon which the general funds of the institution are held (*d*).

The Attorney-General is not a necessary party in administration proceedings where the legacy is to an established charitable institution as part of its general funds (*e*), or to an action for account in respect of a legacy given to a charity (*f*), or where annual sums are given to specified trustees, to be distributed in charity (*g*), or where a capital sum is given for immediate distribution (*h*). Where the question is whether a charity is entitled to a particular legacy or not, the Attorney-General may be made a party as being in the nature of a trustee for the charity, but his presence is not necessary, and the court prefers that the charity should itself appear rather than that the Attorney-General should represent it (*i*).

Claims by Crown beneficially.

673. The Attorney-General represents the Crown, where the Crown is claiming beneficially (*k*). Therefore when the private rights of the Crown are in conflict with its rights as protector of charities, one of the law officers appears on behalf of the private interests of the Crown, and the other supports the claims of the charity (*l*).

Question as to right of Crown to appoint under sign manual.

674. The Attorney-General must also be a party to legal proceedings where the question concerns the right of the Crown to appoint under the sign-manual (*m*).

(*l*) *Ware* v. *Cumberlege* (1855), 20 Beav. 511. See *A.-G.* v. *Bowyer* (1798), 3 Ves. 714, 726; *Re Pyne*, [1903] 1 Ch. 83.

(*a*) *Ware* v. *Cumberlege*, *supra*.

(*b*) *Cook* v. *Duckenfield* (1743), 2 Atk. 562, 564.

(*c*) *Re Taylor* (1888), 58 L. T. 538.

(*d*) *Wellbeloved* v. *Jones* (1820), 1 Sim. & St. 40; *Sons of the Clergy Corporation* v. *Mose* (1839), 9 Sim. 610; and see *A.-G.* v. *Warren* (1818), 2 Swan. 291.

(*e*) *Wellbeloved* v. *Jones*, *supra*; *Re M'Auliffe*, [1895] P. 290.

(*f*) *Chitty* v. *Parker* (1792), 4 Bro. C. C. 38.

(*g*) *Waldo* v. *Caley* (1809), 16 Ves. 206; *M'Coll* v. *Atherton* (1848), 12 Jur. 1042; see also *Horde* v. *Suffolk* (*Earl*) (1833), 2 My. & K. 59, where the Attorney-General was a party but appeared to claim the legacy on behalf of the Crown, alleging failure of the charitable bequest and of the next-of-kin.

(*h*) *Re Barnett* (1860), 29 L. J. (CH.) 871. But see *Re Lea* (1887), 34 Ch. D. 528, where the Attorney-General was a party, the question being whether a charitable legacy should be paid over without a scheme.

(*i*) *Ware* v. *Cumberlege*, *supra*.

(*k*) *A.-G.* v. *Magdalen College*, *Oxford* (1854), 18 Beav. 241.

(*l*) *A.-G.* v. *Bristol Corporation* (1820), 2 Jac. & W. 312; *A.-G.* v. *Ironmongers' Co.* (1833), 2 My. & K. 578, n.; *A. G.* v. *Windsor* (*Dean and Canons*) (1860), 8 H. L. Cas. 369.

(*m*) *De Themmines* v. *De Bonneval* (1828), 5 Russ. 293. As to the Crown's right so to appoint, see p. 287, *ante*.

SECT. 1. Actions.

Attorney-General as defendant.

675. The Attorney-General may be made a defendant in an action by charity trustees claiming an account of the charity property and a personal discharge (*n*), or for the purpose of protecting the interests of a charity (*o*); as for example where a summons is taken out by executors, to determine the validity of a doubtful charitable bequest (*p*), or to decide whether a testator's general charitable intention should be carried into effect by a scheme under the court or the sign manual (*q*), or, again, when a summons is taken out by trustees for the court's sanction to the retention by them of property, which would otherwise have to be sold, under s. 8 of the Mortmain and Charitable Uses Act, 1891 (*r*).

Appeal by Attorney-General.

676. It is improper for the Attorney-General, after a decree which he did not oppose, to reopen the discussion by an appeal on rehearing, but in the case of a charity the court will not on that ground alone dismiss the appeal (*s*).

Payment into court by trustees.

677. When payment is made into court of charitable funds by trustees under the Trustee Act, 1893 (*t*), the affidavit should state that the Attorney-General as representing the public has an interest in the funds, and he should be served with notice (*a*). The payment into court discharges the trustees, and all future applications in regard to the fund so paid in must be made by the Attorney-General only (*b*).

SUB-SECT. 4.—*Parties other than the Attorney-General.*

Persons interested.

678. Generally speaking, all persons interested in the subject of the action ought to be parties, if within the jurisdiction of the court (*c*).

(*n*) *Clun Hospital* (*Warden and Brethren*) v. *Powys* (*Lord*) (1842), 6 Jur. 252; *Christ's Hospital* (*Governors*) v. *A.-G.* (1846), 5 Hare, 257. In such actions the trustees must render such accounts as the Attorney-General demands, and if the Attorney-General desires it, the court may direct a scheme (*ibid.*).

(*o*) *Ludlow Corporation* v. *Greenhouse* (1827), 1 Bli. (N. S.) 17, 66, H. L.

(*p*) See *Re Waring*, [1907] 1 Ch. 166; *Re Pardoe*, [1906] 2 Ch. 184; *Re Mann*, [1903] 1 Ch. 232.

(*q*) *Re Pyne*, [1903] 1 Ch. 83.

(*r*) *Re Church Patronage Trust*, [1904] 2 Ch. 643, C. A.; and see *Re Wilkinson*, [1902] 1 Ch. 841.

(*s*) *Christ's Hospital* v. *Grainger* (1849), 19 L. J. (CH.) 36.

(*t*) 56 & 57 Vict. c. 53, s. 42; see title TRUSTS AND TRUSTEES.

(*a*) R. S. C., Ord. 54 B, r. 4 (2); see *Re Poplar and Blackwall Free School* (1878), 8 Ch. D. 543, 546.

(*b*) *Re Poplar and Blackwall Free School, supra.*

(*c*) Shelford, Law of Mortmain, p. 430. *E.g.*, purchasers of land subject to a charge in favour of charity, and alleged to have been improperly sold (*South Molton Corporation* v. *A.-G.* (1854), 5 H. L. Cas. 1); executors where a legacy charged on land was given to a charity, and an action to ascertain the profits of the lands was instituted (*A.-G.* v. *Twisden* (1678), Cas. *temp.* Finch, 336); one tenant in common of lands where a charity was claiming against the other tenant in common (*A.-G.* v. *Flint* (1844), 4 Hare, 147); the heir-at-law where the proceedings were to decide whether surplus funds belonged to him or to a charity (*A.-G.* v. *Haberdashers' Co.* (1792), 4 Bro. C. C. 106; *Ludlow Corporation* v. *Greenhouse, supra*, at p. 55, H. L.), or whether there was a resulting trust for his benefit (*A.-G.* v. *Green* (1789), 2 Bro. C. C. 492), or where he was by implication visitor of a charity and an action was instituted for the execution

In an action to establish a charity rent-charge it is not necessary for all the persons whose estates may be liable to be joined as parties. The court will decide whether the rent-charge in question is charged on the estate of the person actually before the court (*d*).

Persons with contingent interests.

It depends upon the circumstances in each case whether persons who have a contingent interest in a charitable fund should be made parties to any proceedings concerning it (*e*).

Strangers to a charitable fund.

Strangers to a charitable trust who are not joined as relators (*f*) are not proper parties to any legal proceedings relating to it (*g*); as for example the original subscribers to a charitable fund (*h*), or an agent employed by charity trustees to manage the affairs of the charity (*i*).

Unincorporate body

It is improper to join a body of persons who do not form a corporation as parties under a corporate name (*k*).

Intervention and alteration of parties.

679. Persons showing a *primâ facie* right of intervention in legal proceedings to which they are not parties may be allowed by the court to attend (*l*). Again, if any necessary parties are omitted or unnecessary parties are added, the court upon application will usually allow the proper alterations to be made (*m*).

Action by majority of trustees.

680. The majority of the trustees of any charity within the jurisdiction of the Charity Commissioners, if authorised by the Charity Commissioners, may institute and maintain any legal proceedings in the same way as if they were the sole trustees of the charity (*n*). Legal proceedings instituted in such manner do not

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of the trusts (*A.-G.* v. *Gaunt* (1790), 3 Swan. 148, n.); a schoolmaster where the action was to have surplus charity funds applied for his benefit (*A.-G.* v. *Smart* (1748), 1 Ves. Sen. 72); lessees, underlessees and assignees of charity lands in an action to set aside the lease (*A.-G.* v. *Backhouse* (1810), 17 Ves. 285; *Ludlow Corporation* v. *Greenhouse* (1827), 1 Bli. (N. S.) 17, 73; *A.-G.* v. *Greenhill* (1863), 33 Beav. 193; see also *A.-G.* v. *Pretyman* (1845), 8 Beav. 316, where a lessee, though not made a party, was given leave to attend).

(*d*) *A.-G.* v. *Jackson* (1805), 11 Ves. 367, 372; *A.-G.* v. *Naylor* (1863), 1 Hem. & M. 809. It is otherwise where the rent-charge is not charitable (*A.-G.* v. *Jackson*, *supra*, at p. 367).

(*e*) *A.-G.* v. *St. John's College* (1835), 7 Sim. 241, where the information was held defective for want of parties because the person who was entitled to appoint the master of a charity school if he were not appointed by other persons within a limited period was not joined as party; *A.-G.* v. *Goddard* (1823), Turn. & R. 348, where trustees of a charity who had a contingent interest in a legacy given to another charity were not held to be necessary parties to a suit establishing the second charity.

(*f*) See p. 323, *ante*.

(*g*) *Lany* v. *Purves* (1862), 8 Jur. (N. S.) 523, P. C.

(*h*) *A.-G.* v. *Gardner* (1848), 2 De G. & Sm. 102; *A.-G.* v. *Munro* (1848), 2 De G. & Sm. 161, 162. See, however, *Minn* v. *Stant* (1851), 15 Beav. 49, where the original subscribers were under special circumstances held still to have an interest, and were joined as parties.

(*i*) *A.-G.* v. *Chesterfield* (*Earl*) (1854), 18 Beav. 596. See also as regards actions by some agents against others, *Strickland* v. *Weldon* (1885), 28 Ch. D. 426.

(*k*) *A.-G.* v. *Chester Corporation* (1849), 1 H. & Tw. 46.

(*l*) *A.-G.* v. *Shore* (1836), 1 My. & Cr. 394; *A.-G.* v. *Pretyman*, *supra*; *Re Shrewsbury Grammar School* (1849), 1 Mac. & G. 324; and see p. 338, *post*.

(*m*) Shelford, Law of Mortmain, p. 431; 1 Redesdale's Pleadings, 4th ed., p. 39; R. S. C., Ord. 16, r. 11.

(*n*) Charitable Trusts Act, 1869 (32 & 33 Vict. c. 110), s. 13; see p. 275, *ante*.

SECT. 1. Actions.

abate or become of no effect by reason of the death or removal from office of any of the trustees, or of the addition of any new trustee (*o*).

Proceedings against trustees.

Where proceedings are taken against charity trustees, all must be joined, and not only the acting trustees (*p*). But in an action to remedy a breach of trust it is not necessary to make every person participating in the breach party to the suit (*q*).

Trustees appointed *pendente lite*.

New trustees appointed *pendente lite* who ought to be, but are not, made parties to proceedings for the administration of a charity are not so bound by a decree made in such proceedings as to be absolutely precluded from making a case by way of defence to the suit (*r*).

Argument by trustees.

Where the Attorney-General appears on behalf of a charity the court may allow the trustees to argue in support of the Attorney-General (*s*), and it will hear the trustees when they differ *bonâ fide* from the relators (*t*).

Official trustee of charity lands.

681. The proper defendant in a summons to sanction the retention, after the expiration of a year from the testator's death, of land devised to a charity (*a*) is the official trustee of charity lands, and not the Charity Commissioners (*b*).

The official trustee of charity lands is not a necessary party to proceedings under the Charitable Trusts (Recovery) Act, 1891 (*c*), unless the court otherwise orders (*d*).

SECT. 2.—*Petitions.*

When application may be by petition.

682. In every case of a breach or supposed breach of any charitable trust, and whenever the direction or order of the court is deemed necessary for the administration of any charitable trust, application may be made to the court by petition for such relief as the nature of the case may require (*e*).

(*o*) Charitable Trusts Act, 1869 (32 & 33 Vict. c. 110), s. 13; see R. S. C., 1883, Ord. 17, r. 1.

(*p*) *Re Chertsey Market* (1819), 6 Price, 261.

(*q*) *A.-G.* v. *Leicester Corporation* (1844), 7 Beav. 176. But see R. S. C., Ord. 16, r. 9, and the non-charitable case *McCheane* v. *Gyles* (No. 2), [1902] 1 Ch. 911, where an action was brought by a beneficiary against one of two trustees liable for breach of trust.

(*r*) *A.-G.* v. *Foster* (1842), 2 Hare, 81.

(*s*) *S.-G.* v. *Bath Corporation* (1849), 18 L. J. (CH.) 275; *Whicker* v. *Hume* (1851), 14 Beav. 528.

(*t*) *S.-G.* v. *Bath Corporation*, *supra*, at p. 277.

(*a*) See Mortmain and Charitable Uses Act, 1891 (54 & 55 Vict. c. 73), s. 8; and p. 135, *ante*.

(*b*) *Re Church Patronage Trust*, [1904] 1 Ch. 41.

(*c*) 54 & 55 Vict. c. 17; see p. 313, *ante*.

(*d*) R. S. C. (Charitable Trusts Recovery), 1892, r. 3 (Yearly Supreme Court Practice, 1905, p. 1451).

(*e*) Charities Procedure Act, 1812 (52 Geo. 3, c. 101), s. 1; see *Re Dod's Charity*, [1905] 1 Ch. 442 (petition for administration). The Act did not create a new jurisdiction, but it enabled summary proceedings to be taken under the old jurisdiction in certain cases (*Ludlow Corporation* v. *Greenhouse* (1827), 1 Bli. (N. S.) 17, 65, H. L.). The preamble states that the object of the Act was to provide a more summary remedy in cases of breaches of charitable trusts, as well as for the just and upright administration of the same. The jurisdiction is now vested in the Chancery Division of the High Court (Supreme Court of Judicature Act, 1873 (36 & 37 Vict. c. 66), ss. 16, 34, 76).

This jurisdiction on petition applies only between the trustees and the objects of the trust (*f*).

The court may refuse to make an order upon a petition and direct the parties to proceed by action (*g*). There is no fixed rule laid down by which the court is governed in the exercise of its discretion (*h*). The procedure by petition may safely be resorted to in all cases where the objects of the charity have no distinct interests and where, therefore, the Attorney-General represents them all; and in all cases where, although there may be distinct interests, no substantial question of principle can arise between the several objects (*i*).

Jurisdiction on petition.

683. The court has jurisdiction on petition to give the necessary directions for the sale (*k*), mortgage (*l*), or exchange (*m*) of charity property, to order a *cy-près* application (*n*), to establish (*o*) or alter (*p*) schemes, to consider the expediency of applying for an Act of Parliament to regulate a charity (*q*), to regulate the internal administration of a charity (*r*), to determine whether parties have

(*f*) *A.-G.* v. *Worcester* (*Bishop*) (1851), 9 Hare, 328; see also *Re Lawford Charity, Ex parte Skinner* (1817), 2 Mer. 453.

(*g*) *Ex parte Rees* (1814), 3 Ves. & B. 10; *A.-G.* v. *Devon* (*Earl*) (1846), 15 Sim. 259, 261.

(*h*) *A.-G.* v. *Worcester* (*Bishop*), *supra*, at p. 357.

(*i*) *Ibid.*; and see *Ludlow Corporation* v. *Greenhouse* (1827), 1 Bli. (N. S.) 17, 66, H. L.; *Re Manchester New College* (1853), 16 Beav. 617.

(*k*) *Re Parke's Charity* (1842), 12 Sim. 329; *Re Ecclesall Overseers* (1852), 16 Beav. 297; *Re Ashton Charity* (1856), 22 Beav. 288; *Re North Shields Old Meeting House* (1859), 7 W. R. 541; *Re Congregational Church, Smethwick*, [1866] W. N. 196; *Cullen* v. *O'Meara* (1867), I. R. 1 C. L. 640; and compare, *contrà*, *Re Suir Island Female Charity School* (1846), 3 Jo. & Lat. 171; *Re Lyford's Charity* (1852), cited 16 Beav. 297, n.; *Re Bradford School of Industry*, [1893] W. N. 60.

(*l*) *Re Stockport Ragged Industrial and Reformatory School*, [1898] 2 Ch. 687, C. A.

(*m*) *Re Newton's Charity* (1848), 12 Jur. 1011; *Mildmay* v. *Methuen* (*Lord*) (1851), cited 14 Beav. 121, n.

(*n*) *Re Upton Warren Parish* (1833), 1 My. & K. 410; *Re Belvedere's* (*Lady*) *Charity* (1840), 2 I. Eq. R. 354.

(*o*) *Ex parte Berkhampstead Free School* (1813), 2 Ves. & B. 134; *Re Chertsey Market* (1819), 6 Price, 261; *Re Rugby School* (1839), 1 Beav. 457; *Re Royston Free Grammar School* (1839), 2 Beav. 228; *Re Storey's Almshouses* (1839), 9 L. J. (CH.) at p. 95; *Re Shrewsbury Grammar School* (1849), 1 Mac. & G. 324.

(*p*) *A.-G.* v. *Worcester* (*Bishop*) (1851), 21 L. J. (CH.) 25, 40 (scheme previously settled in an action); see *Re Manchester New College* (1853), 22 L. J. (CH.) 571, where the court determined on petition whether resolutions by some of the trustees of a college for changing its locality would be beneficial to the institution.

(*q*) *Re Shrewsbury Grammar School*, *supra*.

(*r*) *E.g.*, by setting aside an improper election of a scholar (*Re Nettle's Charity* (1872), L. R. 14 Eq. 434; see also *Re Rugby School*, *supra*), reinstating an improperly dismissed official (*Re Phillips' Charity, Ex parte Newman* (1845), 9 Jur. 959; *Re Fremington School, Ex parte Ward* (1846), 10 Jur. 512). Compare, *contrà*, *A.-G.* v. *Bristol Corporation* (1845), 14 Sim. 648, where it was said that a question as to the power of trustees to dismiss an official referred to the original constitution, not merely to the management, of a charity, and could not be decided on petition. See also on the same point *A.-G.* v. *East Retford Grammar School* (1848), 17 L. J. (CH.) 450; *Re Godmanchester Grammar School* (1850), 15 Jur. 833; and *Re Bedford Charity* (1833), 5 Sim. 578, 594, 595, where, however, the petition complaining of irregular dismissal was under a special Act.

SECT. 2. Petitions

acted according to clear rules laid down for the management of a charity (*s*), to appoint (*t*) or remove (*a*) trustees, to determine between the conflicting claims of two charities where the question depends upon the construction of a particular instrument (*b*), and to apportion funds between charitable objects (*c*).

Matters which cannot be dealt with on petition.

684. The court has no jurisdiction upon petition under the Charities Procedure Act, 1812, to authorise any alteration in the fundamental trusts of a charity (*d*), to adjudicate as between charity trustees and strangers (*e*), to determine what powers trustees or other officers have under the foundation (*f*), to ascertain in whom the legal estate is vested (*g*), to determine whether trustees have been validly appointed (*h*), to repair a former misapplication of trust funds (*i*), to order accounts to be taken of estates of persons who have wrongfully received charity rents (*k*), or to set aside an improper lease of charity lands (*l*). Questions also involving constructive trusts (*m*) and matters of great intricacy (*n*) cannot be dealt with on petition.

Presentation of petition.

685. A petition when not presented by the Attorney-General acting *ex officio* (*o*) must be presented by two or more persons (*p*)

(*s*) *A.-G.* v. *Bristol Corporation* (1845), 14 Sim. 648, 652, 653.

(*t*) *Re Norwich Charities, Bignold* v. *Springfield* (1839), 7 Cl. & Fin. 71, H. L.; see *Re Peyton's (Lady) Hospital at Isleham* (1845), 14 L. J. (CH.) 129, where, however, the petition was dismissed for informality; *Re Hereford Charities* (1842), 6 Jur. 289; and p. 267, *ante*.

(*a*) *Ex parte Seagears* (1813), 1 Ves. & B. 496.

(*b*) *Re Upton Warren Parish* (1833), 1 My. & K. 410; *Re Hospital for Incurables* (1884), 13 L. R. Ir. 361. But see *Re Clarke's (Dean) Charity* (1836), 8 Sim. 34, 42.

(*c*) *Re Hall's Charity* (1851), 14 Beav. 115.

(*d*) *E.g.*, by increasing the number of trustees limited by the founder (*Re Storey's Almshouses* (1839), 9 L. J. (CH.) 93, 95) or by amalgamating two charitable institutions (*Re Reading Dispensary* (1839), 10 Sim. 118). Compare *Re Bradford School of Industry*, [1893] W. N. 60); see also *A.-G.* v. *Devon (Earl)* (1846), 15 Sim. 262.

(*e*) *A.-G.* v. *Worcester (Bishop)* (1851), 21 L. J. (CH.) 41; *Re Phillipott's Charity* (1837), 8 Sim. 381; *Re West Retford Charities* (1839), 8 L. J. (CH.) 317 (adverse claims of right to administer a charity); *Ex parte Rees* (1814), 3 Ves. & B. 10; *Re Norris' (Sir John) Charity, Ex parte Brown* (1815), Coop. G. 295 (adverse claims to charity land); *Re Bedford Charity* (1833), 5 Sim. 578; *Re Dean Clarke's Charity, supra; Re Magdalen Land Charity* (1852), 9 Hare, 624 (disputes between parties adversely claiming to be objects of a charity).

(*f*) *Re Newark Charities* (1837), 6 L. J. (CH.) 215 (powers of trustees appointed in pursuance of the Municipal Corporations Act, 1835 (5 & 6 Will. 4, c. 76)); *A.-G.* v. *Bristol Corporation, supra*, at p. 653 (power to remove schoolmaster); *A.-G.* v. *East Retford Grammar School* (1848), 17 L. J. (CH.) 450 (power to alter regulations of a school).

(*g*) *Re Phillipott's Charity, supra; Re Olney Charities* (1847), 11 Jur. 420.

(*h*) *Re Phillipott's Charity, supra.*

(*i*) *Re Hall's Charity, supra.*

(*k*) *Re St. Wenn's Charity* (1824), 2 Sim. & St. 66.

(*l*) *Re Norris' (Sir John) Charity, Ex parte Brown* (1815), Coop. G. 295; *Re Lawford Charity, Ex parte Skinner* (1817), 2 Mer. 453.

(*m*) *Re Norris' (Sir John) Charity, Ex parte Brown, supra.*

(*n*) *Ludlow Corporation* v. *Greenhouse* (1827), 1 Bli. (N. S.) 17, H. L.; *Re Phillipott's Charity, supra*, at p. 391; *Re Sair Island Female Charity School* (1846), 3 Jo. & Lat. 171.

(*o*) Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 43.

(*p*) Charities Procedure Act, 1812 (52 Geo. 3, c. 101), s. 1; *Re Garstang*

who must be directly interested in the charity (*q*). The petitioners may not be a corporation (*r*) or an improperly constituted governing body of a charity (*s*).

The petition must be (1) signed by the petitioners in the presence of and attested by their solicitor (*t*), (2) certified by the counsel who prepared it as being in his opinion a proper petition under the Act (*u*), and (3) certified by the Attorney-General (*b*), or, in case of the office being vacant, by the Solicitor-General (*c*).

Sanction of Charity Commissioners.

686. Petitions relating to charities within the jurisdiction of the Charity Commissioners (*d*), unless presented by the Attorney-General in his official capacity (*e*) or in a suit or matter actually pending (*f*), require the sanction of the Charity Commissioners (*g*).

Service of petition.

687. A petition must be served upon all persons whose rights or interests will be affected by the order (*h*). It need not be served upon persons whose interests will not be affected (*i*), or as a matter of course upon the Attorney-General, though the court may direct service upon him if his presence is desirable (*k*).

Respondents.

It is necessary that there should be a respondent to a petition (*l*).

Church Town School, Ex parte Pelder (1829), 7 L. J. (o. s.) (CH.) 169, where a petition preferred by one person was dismissed though certified by the Attorney-General.

(*q*) *Re Bedford Charity* (*Masters*) (1819), 2 Swan. 470, 518, 525; *Ludlow Corporation* v. *Greenhouse* (1827), 1 Bli. (N. S.) 17, 91, H. L.

(*r*) *Re London, Brighton, and South Coast Rail. Co.* (1854), 18 Beav. 608.

(*s*) *Hamilton* v. *Spottiswoode* (1866), 36 L. J. (CH.) 51.

(*t*) Charities Procedure Act, 1812 (52 Geo. 3, c. 101), s. 2. The solicitor must also certify that the petitioners are able to answer the costs of the application (see Daniel's Chancery Forms, 5th ed., p. 1055).

(*u*) Daniel's Chancery Forms, *supra*.

(*b*) Charities Procedure Act, 1812 (52 Geo. 3, c. 101), s. 2; Daniel's Chancery Forms, 5th ed., p. 1056.

(*c*) *Re Lawford Charity, Ex parte Skinner* (1817), 2 Mer. 453; *Ludlow Corporation* v. *Greenhouse*, *supra*, at p. 65.

(*d*) See p. 303, *ante*.

(*e*) Charitable Trusts Act, 1853, (16 & 17 Vict. c. 137), ss. 18, 43.

(*f*) As to the meaning of these words, see p. 311, *ante*.

(*g*) Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 17; see also Daniel's Chancery Forms, 5th ed., p. 1055.

(*h*) *E.g.*, upon all the trustees if the petition is for removal of trustees (*Ex parte Seagears* (1813), 1 Ves. & B. 496), or upon the surviving or continuing trustees if the petition is for the appointment of new trustees (*Re Hereford Charities* (1842), 6 Jur. 289).

(*i*) *Ex parte Fowler* (1819), 1 Jac. & W. 70 (not necessary to serve parish officers with petition respecting arrears of charity revenues applicable to parochial purposes); *Re Shrewsbury Grammar School* (1849), 1 Mac. & G. 85 (petition for appointing new trustees where old trustees had been appointed in place of a municipal corporation, not necessary to serve corporation).

(*k*) *Re Warwick Charities* (1845), 1 Ph. 559 (petition for filling up vacancies in charity trustees); *Re Bradford School of Industry*, [1893] W. N. 60; *Re Stockport Ragged Industrial and Reformatory School*, [1898] 2 Ch. 687, C. A. (petition for sanction of court to schemes providing for sale or mortgage of charity estate); see *contrà*, *Re Oxford Charity* (1862), cited Seton, Judgments and Orders, 6th ed., 1301. The Attorney-General is always served with the summons to proceed on the order (*Re Hanson's Trusts* (1852), 9 Hare, App. I., p. liv.

(*l*) *Ex parte Rees* (1814), 3 Ves. & B. 10.

SECT. 2. Petitions.

It is within the discretion of the court to hear counsel for parties who are not respondents to a petition (*m*).

Evidence.

688. The evidence in support of a petition may be by affidavit (*n*) or oral (*o*), but in practice oral evidence is only adduced under some special circumstances.

Petition not certified by Attorney-General.

689. An order made upon a petition not certified by the Attorney-General is void (*p*), unless the petition concerns something done by the court upon a previous properly certified petition (*q*).

Petition informally presented.

An order made upon a petition informally presented may be discharged on motion, and the removal from the file of the petition may be ordered (*r*).

Proceedings in chambers.

The Attorney-General must be a party to all inquiries before the master under the Charities Procedure Act, 1812, and any proceedings taken in his absence are irregular (*s*). The petitioners and respondents are entitled to attend proceedings in chambers taken in pursuance of an order made upon a petition (*t*).

Order not carried out.

690. If an order has been made on petition and the petitioners fail to carry it into effect, this may be done by the Attorney-General or any of the respondents (*a*).

Further order.

Where an order has been made on petition, a further order in the same matter may be made on motion (*b*).

Action and petition simultaneously.

691. Where an action and a petition relating to the same or some of the same objects are proceeding simultaneously, the court may refer the question to the Attorney-General to determine which proceeding should be continued (*c*).

Petitions under private Acts.

692. In some private Acts of Parliament regulating charities, applications to the court are directed to be made by petition (*d*). Petitioners who claim to be entitled to relief under a private Act and under the Charities Procedure Act, 1812, must elect under which Act they will proceed, for the court cannot proceed under two jurisdictions (*e*).

(*m*) *A.-G.* v. *Devon* (*Earl*) (1846), 15 Sim. 259.

(*n*) Charities Procedure Act, 1812 (52 Geo. 3, c. 101), s. 1; *Ex parte Greenhouse* (1818), 1 Swan. 60; *Re Merchant Taylors' Charity* (1870), 23 L. T. 486.

(*o*) Charities Procedure Act, 1812 (52 Geo. 3, c. 101), s. 1.

(*p*) *A.-G.* v. *Green* (1820), 1 Jac. & W. 303, 305.

(*q*) *A.-G.* v. *Devon* (*Earl*), *supra*, at p. 262; *Re Godmanchester Grammar School* (1851), 15 Jur. 833.

(*r*) *Re Dovenby Hospital* (1836), 1 My. & Cr. 279.

(*s*) *Ludlow Corporation* v. *Greenhouse* (1827), 1 Bli. (N. S.) 17, 65, H. L.; *A.-G.* v. *Stamford* (*Earl*) (1839), 1 Ph. 737.

(*t*) Daniel's Chancery Practice, 7th ed., p. 1748.

(*a*) *Re Bedford Charity* (1857), 26 L. J. (CH.) 613.

(*b*) *Re Slewringe's Charity* (1814), 3 Mer. 707; *Re Chipping Sodbury School* (1832), 5 Sim. 410.

(*c*) *A.-G.* v. *Green*, *supra*. Compare *Re Lawford Charity*, *Ex parte Skinner* (1817), 2 Mer. 453, where the court refused to make an order on petition in respect to certain matters which formed the subject of an action already instituted.

(*d*) Shelford, Law of Mortmain, pp. 508 *et seq.* See, *e.g.*, stat. 59 Geo. 3, c. 22, s. 50; Custos Rotulorum (Ireland) Act, 1831 (1 & 2 Will. 4, c. 17), s. 29, stat. 7 Geo. 4, c. 29, s. 15.

(*e*) *Re Bedford Charity* (*Masters*) (1819), 2 Swan. 470, 525.

SECT. 2. Petitions.

693. The procedure under the Charities Procedure Act, 1812, applies to petitions under the Grammar Schools Act, 1840 (*f*), and the Church Building Act, 1845 (*g*).

Petitions under other Acts.

Petitions under the Municipal Corporations Act, 1835 (*h*), the Church Building Act, 1845 (*i*), and the Lands Clauses Consolidation Act, 1845 (*j*), require to be entitled also in the matter of the Charities Procedure Act, 1812.

A petition under s. 28 of the Charitable Trusts Act, 1853 (*k*), for appointing new trustees must be entitled in the matter of that Act and of the Trustee Act, 1893 (*l*), but not necessarily in the matter of the Charities Procedure Act, 1812 (*m*).

Petitions entitled in the matter of the Charities Procedure Act, 1812, and of some other Act must comply with the requirements of the former Act (*n*).

Whether the fiat of the Attorney-General is required for a petition presented in an action is a matter within the discretion of the court (*o*).

Affidavits

694. Affidavits in support of petitions or summonses made under s. 80 of the Lands Clauses Consolidation Act, 1845 (*p*), may if more convenient, as, for example, where the charity trustees are very numerous, be made by the clerk to the trustees (*q*).

SECT. 3.—*Summonses.*

Jurisdiction of judge in chambers.

695. In cases of charities the gross income of which exceeds £30 per annum (*r*), and of all charities in the city of London (*s*), orders for the appointment or removal of trustees (*t*) or for establishing schemes (*u*), vesting orders (*w*), orders vesting charity land

(*f*) 3 & 4 Vict. c. 77, s. 21. For examples of petitions under this Act, see *Re Marlborough Grammar School* (1843), 7 Jur. 1047; *Re Chelmsford Grammar School* (1855), 24 L. J. (CH.) 742.

(*g*) 8 & 9 Vict. c. 70, s. 22 (apportionment of charities on formation of new districts).

(*h*) 5 & 6 Will. 4, c. 76, s. 71 (replaced by s. 133 of the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50)); *Re Norwich Charities, Bignold* v. *Springfield* (1839), 7 Cl. & Fin. 71, H. L.; *Re Warwick Charities* (1845), 1 Ph. 559, *A.-G.* v. *Exeter Corporation* (1852), 2 De G. M. & G. 507 (petitions for appointing new trustees). Sometimes these petitions were entitled also in the matter of the Trustee Act, 1850 (13 & 14 Vict. c. 28); *Re Northampton Charities* (1853), 3 De G. M. & G. 179; *Re Gloucester Charities* (1853), 10 Hare, App. I., p. iii.

(*i*) 8 & 9 Vict. c. 70; *Re West Ham Charities* (1848), 17 L. J. (CH.) 441. Probably the same rule applies to petitions presented under the Grammar Schools Act, 1840.

(*j*) 8 & 9 Vict. c. 18; *Re London, Brighton, and South Coast Rail. Co.* (1851), 18 Beav. 608 (petition for investment of charity funds in court).

(*k*) 16 & 17 Vict. c. 137.

(*l*) 56 & 57 Vict. c. 53.

(*m*) *Re Lincoln Primitive Methodist Chapel* (1855), 1 Jur. (N. S.) 1011; *Re Davenport's Charity* (1855), 4 De G. M. & G. 839.

(*n*) *Re Warwick Charities, supra; Re Rolle's Charity* (1853), 3 De G. M. & G. 153; *Re London, Brighton, and South Coast Rail. Co., supra.*

(*o*) *A.-G.* v. *Cooper* (1861), 8 Jur. (N. S.) 50.

(*p*) 8 & 9 Vict. c. 18.

(*q*) *Re Edward the Sixth's Almshouses* (1868), 16 W. R. 841.

(*r*) Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 28.

(*s*) *Ibid.*, s. 30.

(*t*) *Ibid.*, s. 28; R. S. C., Ord. 55, r. 13.

(*u*) *Re Sion Hospital* (1876), Seton, Judgments and Orders, 6th ed., 1283, 1309; *Re Charitable Gifts for Prisoners, Ex parte Christ's Hospital (Governors)* (1872), 8 Ch. App. 199.

(*w*) *Re Davenport's Charity, supra.* But see *Re Lincoln Primitive Methodist Chapel, supra*, where a petition was held necessary.

SECT. 8. Summonses.

in the official trustee of charity lands (*a*) or for transferring stock to, depositing securities with, or paying money to the official trustees of charitable funds, and for investment and payment of dividends (*b*), and any other relief order or direction relating to the charity (*c*), may be made or given by a judge of the Chancery Division (*d*) in chambers (*e*) instead of in an action or on a petition.

It is within the power of the judge at chambers to direct proceedings to be taken by action or petition and to abstain from further proceedings on the summons (*f*).

Application by originating summons.

696. Applications in chambers are made by originating summons (*g*). If the application is not made by the Attorney-General acting *ex officio* (*h*), or is in respect of a charity not exempted from the Charitable Trust Acts (*i*), the consent of the Charity Commissioners to the proceedings is necessary (*k*); and when the summons is issued a copy of the certificate (*l*) of the Charity Commissioners must also be left at the judge's chambers (*m*).

When right of appeal exists.

697. Where the gross annual income of the charity does not exceed £100, orders made in chambers under s. 28 of the Charitable Trusts Act, 1853, are not subject to appeal except on a judge's certificate (*n*). Where, however, the aggregate income of several charities concerned exceeds £100, there is a right of appeal, although the income of each separate charity is less than that amount (*o*). No appeal can be made by a person who did not appear in the court below (*p*).

(*a*) *Re Beckenham Charity* (1854); *Re Titchmarsh* (1857); *Re Saffron Walden Charity* (1857); *Re Westfield's Charity* (1860), all cited in Seton, Judgments and Orders, 6th ed., 1309.

(*b*) *Re Wharton's Charities* (1859); *Re Reigate Charities* (1860); *Re Cranbourn Schools* (1863), all cited in Seton, Judgments and Orders, 6th ed., 1310, 1311.

(*c*) Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 28.

(*d*) Supreme Court of Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 34; R. S. C., Ord. 55, r. 13.

(*e*) Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 28. This section gives to the judge in chambers the same powers which could previously have been exercised in an action or on a petition (*Re Davenport's Charity* (1855), 4 De G. M. & G. 839; see *R.* v. *Charity Commissioners*, [1897] 1 Q. B. 407. Under this section the court may decide whether property is or is not held on a charitable trust (*Re Norwich Town Close Estate Charity* (1888), 40 Ch. D. 298, C. A.), but may not deal with adverse claims to title (*ibid.* at pp. 309, 310; Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 41).

(*f*) Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 28.

(*g*) R. S. C., Ord. 55, r. 13; Daniel's Chancery Forms, 5th ed., p. 514.

(*h*) Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 18.

(*i*) *Ibid.*, s. 62.

(*k*) *Ibid.*, s. 17. This consent is not necessary for an application to determine whether charitable trusts have failed (*Re Shum* (1904), 117 L. T. Jo. 219).

(*l*) For form of certificate, see Daniel's Chancery Forms, 5th ed., p. 1053.

(*m*) Daniel's Chancery Practice, 7th ed., p. 1754.

(*n*) Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 28; R. S. C., Ord. 55, r. 14.

(*o*) *Re Charitable Gifts for Prisoners, Ex parte Christ's Hospital (Governors)* (1872), 8 Ch. App. 199.

(*p*) *Christ's Hospital* v. *Grainger* (1849), 1 Mac. & G. 460; *Ludlow Corporation* v. *Greenhouse* (1827), 1 Bli. (N. S.) 17, H. L.

698. Application may be made by originating summons to apportion Roman Catholic charities partly applicable to superstitious uses, and to apply such part to lawful charitable trusts (*q*).

Applications as to investment of funds in court.

699. Applications for interim and permanent (*r*) investment of charitable funds paid into court under the Lands Clauses Consolidation Act, 1845 (*s*), or the Settled Land Act, 1882 (*t*), and for payment of the dividends thereon, may be made by summons or by petition (*a*). The option of proceeding by summons or petition is at the applicant's risk (*b*). The rule is that procedure by summons is proper in simple cases, by petition in complicated matters (*c*).

The general rule is that if the funds in court do not exceed £1,000, applications for payment out are made by summons; if they exceed that sum, by petition (*d*).

Affidavit in support of claim to funds.

700. Persons claiming to be entitled to funds in court (*e*), or applying for investment of such funds and payment of dividends (*f*), must as a rule verify their title by affidavit, which may be made by the clerk of the charity trustees (*g*) or one of the petitioners (*h*).

Service of summons.

701. The summonses must in general be served on all persons whose interests are concerned (*i*), and if not taken out by the Attorney-General must be served on his solicitors, except where the summons asks merely for the appointment of trustees, or a vesting order, or an order for the transfer of stock consequent upon a vesting order (*k*).

SECT. 4—*Procedure in settling Schemes.*

Reference to master.

702. Schemes directed by the court (*l*) are generally referred to a master and settled in chambers before the judge (*m*); but in simple

(*q*) Roman Catholic Charities Act, 1860 (23 & 24 Vict. c. 134), s. 1; see p. 151, *ante*.

(*r*) Expenditure in building is not a "permanent investment" (*Ex parte Jesus College, Cambridge* (1884), 50 L. T. 583).

(*s*) 8 & 9 Vict. c. 18.

(*t*) 45 & 46 Vict. c. 38, s. 32; *Re Bethlehem and Bridewell Hospitals* (1885), 30 Ch. D. 541.

(*a*) R. S. C., Ord. 55, r. 2 (7).

(*b*) *Re Bethlehem and Bridewell Hospitals, supra*, where the costs of the petition were allowed.

(*c*) *Ibid.*; see also *Re Stafford's Charity* (1887), 57 L. T. 846, where the costs of a petition were allowed; *A.-G. v. St. John's Hospital, Bath*, [1893] 3 Ch. 151; *Re St. Alban's, Wood Street (Rector and Churchwardens)* (1892), 66 L. T. 51, where the costs of a summons only were allowed.

(*d*) R. S. C., Ord. 55, r. 2 (2).

(*e*) R. S. C., Ord. 52, r. 18.

(*f*) *Ex parte St. Mary's College, Winchester (Wardens)* (1866), 14 W. R. 788. But see *Re Merchant Taylors' Charity* (1870), 23 L. T. 486; *Re Magdalen College, Oxford (President)* (1880), 42 L. T. 822, where in special circumstances the affidavit was dispensed with.

(*g*) *Re Edward the Sixth's Almshouses* (1868), 16 W. R. 841.

(*h*) *Re Vale of Neath Railway Act*, 1863, [1866] W. N. 78.

(*i*) Daniel's Chancery Practice, 7th ed., p. 1754.

(*k*) *Ibid.*

(*l*) See p. 185, *ante*.

(*m*) *Wellbeloved* v. *Jones* (1820), 1 Sim. & St. 40; and see *Doyley* v. *Doyley* (1735), 7 Ves. 58, n.; *Baylis* v. *A.-G.* (1741), 2 Atk. 240, n.; *Paice* v. *Canterbury*

SECT. 4. Procedure in settling Schemes.

cases, where a slight modification of a trust is required (*n*) or where the fund is small (*o*), a reference to the master may be dispensed with and the scheme set out in the order (*p*). Sometimes a reference to the master is directed to apportion a fund without settling a scheme (*q*).

Settlement of draft scheme.

When a scheme is directed to be settled, the draft may be prepared by the Attorney-General (*r*), or by other applicants, who would usually be the trustees of the charity (*s*). If the draft is not prepared by the Attorney-General it must be submitted to him. The draft scheme is brought before the judge in chambers for approval (*t*). If there are any points objected to, the summons may be adjourned into court (*a*).

Objections by Attorney-General.

The Attorney-General, whose presence at the settlement of a scheme is generally (*b*), but not invariably (*c*), required, should be served with a summons to attend (*d*), and he may then raise any objections (*e*).

Parties entitled to attend settlement of scheme.

703. As the Attorney-General attends the settlement of a scheme to protect the interests of all concerned in the charity, the court may refuse to allow the attendance of interested persons, even at their own expense (*f*). As a rule strangers to the suit are not allowed to intervene or to attend the settlement of a scheme by the Attorney-General (*g*), unless their intervention or attendance will clearly be beneficial to the charity (*h*). But leave to attend may be given to persons who are not parties, on the understanding that only one set of costs will be allowed (*i*), or that they do so at their

(*Archbishop*) (1807), 14 Ves. 364, 372; *Waldo* v. *Caley* (1809), 16 Ves. 211; *Re Hanson's Trust* (1852), 9 Hare, App. I., p. liv.

(*n*) *Re Richardson's Will* (1887), 58 L. T. 45.

(*o*) *Re Lousada* (1887), 82 L. T. Jo. 358.

(*p*) *A.-G.* v. *Brandreth* (1842), 1 Y. & C. Ch. Cas. 200; *Clum Hospital* (*Warden*) v. *Powys* (*Lord*) (1842), 6 Jur. 31; *Re Delmar Charitable Trust*, [1897] 2 Ch. 163, 168; see also *Gillan* v. *Gillan* (1878), 1 L. R. Ir. 114; *A.-G.* v. *Mansfield* (1845), 14 Sim. 601.

(*q*) *White* v. *White* (1778), 1 Bro. C. C. 15; *Re Hyde's Trusts* (1873), 22 W. R. 69.

(*r*) *Smith* v. *Kerr* (No. 2) (1905), 74 L. J. (CH.) 767.

(*s*) *A.-G.* v. *Stepney* (1804), 10 Ves. 29; *Jemmit* v. *Verrel* (1826), Amb. 585, n.; and compare *Re Lea* (1887), 34 Ch. D. 523, 533.

(*t*) *Re Wyersdale School* (1853), 10 Hare, App. II., p. lxxiv.

(*a*) *Ibid.*

(*b*) *Re Hanson's Trust, supra*; *A.-G.* v. *Goldsmiths' Co.* (1833), Coop. Pr. Cas. 312; *A.-G.* v. *Stamford* (*Earl*) (1840), 1 Ph. 749; *A.-G.* v. *St. Cross Hospital* (1854), 18 Beav. 475; *Re Clergy Society* (1856), 2 K. & J. 615; *Re Taylor* (1888), 58 L. T. 538; *Re Stockport Ragged Industrial and Reformatory Schools*, [1898] 2 Ch. 687, C. A.

(*c*) *E.g.*, where the fund is small (*A.-G.* v. *Haberdashers' Co.* (1835), 2 My. & K. 817 (fund £1,100)).

(*d*) *Re Hanson's Trust, supra.*

(*e*) *Re Lea, supra.*

(*f*) *A.-G.* v. *St. Cross Hospital, supra*; *A.-G.* v. *Wimborne School* (1847), 10 Beav. 209 (Ecclesiastical Commissioners refused leave to attend); *Re Shrewsbury Grammar School* (1849), 1 Mac. & G. 334, 335; *Re Sekeford's Charity* (1861), 5 L. T. 488.

(*g*) *Ibid.*; *A.-G.* v. *Attwood* (1852), 1 W. R. 64, 91; *Smith* v. *Kerr* (No. 2), *supra*, at p. 767.

(*h*) *Smith* v. *Kerr* (No. 2), *supra.*

(*i*) *A.-G.* v. *Shore* (1836), 1 My. & Cr. 394

own expense (*k*). The Attorney-General is, however, always ready to listen to any suggestion made by persons who have any real interest in the matter (*l*).

704. On an application for the confirmation of a report approving a scheme for the administration of a charity estate, a newly-appointed trustee, who has not been served with the proceedings, may present a cross-petition opposing the confirmation, upon grounds not appearing upon the report or brought before the master (*m*). Opposition by newly appointed trustee.

705. When the judge has settled a scheme it is filed in the Central Office, notice being sent to the Charity Commissioners or Board of Education, as the case may be, from the Central Office. Office copies are obtainable in the usual way at the Central Office (*n*). The order of the court, where the case is simple, sometimes sets out the scheme (*o*), but as a rule it merely refers to the filed copy (*p*). Filing of order.

SECT. 5.—*Procedure of Visitor.*

706. Whether a visitor is exercising his jurisdiction upon a general visitation or upon a special appeal (*q*), he need not proceed according to the rules of common law (*r*) so long as he pays regard to the positive forms prescribed by the statutes regulating the foundation (*s*), and subject to this condition the actual manner of hearing is within his discretion (*a*). Discretion of visitor.

707. He must hear all appeals not of a frivolous nature (*b*). Appeals.

708. No proceedings ought to be taken against an absent party until he has been cited (*c*). Absent parties.

A visitor should cite the interested parties to appear before him (*d*), and he may decide questions upon written or oral evidence (*e*) on oath or otherwise (*f*). But he cannot give his decision without hearing or receiving a written statement from the parties concerned (*g*). Appearance of parties.

(*k*) *Re Shrewsbury Grammar School* (1849), 1 Mac. & G. 335.
(*l*) *Smith* v. *Kerr* (No. 2) (1905), 74 L. J. (CH.) 767.
(*m*) *Re Loppington Parish* (1850), 8 Hare, 198.
(*n*) See Daniel's Chancery Practice, 7th ed. p. 1751.
(*o*) *A.-G.* v. *Brandreth* (1842), 1 Y. & C. Ch. Cas. 200; see note (*p*), *supra*.
(*p*) *Re Conyers' Free Grammar School at Yarm* (1853), 10 Hare, Appendix I., p. v.
(*q*) As to the two-fold jurisdiction of visitors, see p. 289, *ante*.
(*r*) *R.* v. *Ely* (*Bishop*) (1788), 2 Term Rep. 290, 338.
(*s*) Com. Dig. tit. Visitor, C.
(*a*) *A.-G.* v. *Atherstone Free School* (*Governors*) (1834), 3 My. & K. 550; see also *Re York* (*Dean*) (1841), 2 Q. B. 1.
(*b*) Shelford, Law of Mortmain, p. 379.
(*c*) Com. Dig. tit. Visitor, C.
(*d*) *R.* v. *Cambridge University* (1722), 8 Mod. Rep. 148, 163; see also *Watson* v. *All Souls' College, Oxford* (*Warden*) (1864), 11 L. T. 166.
(*e*) *R.* v. *Ely* (*Bishop*) (1794), 5 Term Rep. 475.
(*f*) Shelford, Law of Mortmain, p. 379; but see *Green* v. *Rutherforth* (1750), 1 Ves. Sen. 473.
(*g*) *R.* v. *Ely* (*Bishop*) (1738), as reported 2 Term Rep. 336; *R.* v. *Cambridge*

SECT. 5. Procedure of Visitor.

Jurisdiction of Crown as visitor.

709. The visitatorial jurisdiction of the Crown is exercised by the Lord Chancellor (*h*) upon application by petition (*i*). Like a private visitor, he is not bound by any particular forms of procedure (*k*). Unless the petitioner can prove that the Crown is in fact visitor, the Lord Chancellor has no authority to hear the petition (*l*).

SECT. 6.—*Service of Notices.*

Service by post.

710. All notices to the governors, or members of or subscribers to, any charitable institution in England, whether incorporated or not, which by the charter, statutes, or rules are required to be given, may be served through the post directed to the address given in the list of governors, members or subscribers for the time being in use at the chief establishment of the institution; and evidence of the same being posted properly addressed is evidence of service. Notices need not be served on governors, members or subscribers outside the United Kingdom, notwithstanding anything to the contrary in the charter, statutes, laws or rules of the institution (*m*).

SECT. 7.—*Costs.*

SUB-SECT. 1.—*The Attorney-General.*

Attorney-General never pays costs.

711. The Attorney-General never pays costs when he sues as an officer of the Crown in performance of a public duty, *e.g.*, on behalf of a charity, even when he loses his case (*n*).

University (1722), 8 Mod. Rep. 148, 163; see also *R.* v. *Gaskin* (1799), 8 Term Rep. 209; *Doe* v. *Gartham* (1823), 8 Moore (C. P.), 368, 371.

(*h*) Co. Litt. 96 *a*; Shelford, Law of Mortmain, p. 333; *R.* v. *St. Catherine's Hall* (*Master*) (1791), 4 Term Rep. 233, 244; *A.-G.* v. *Dixie* (1807), 13 Ves. 519; *A.-G.* v. *Clarendon* (*Earl*) (1811), 17 Ves. 498; *Re Christ Church* (1866), 1 Ch. App. 526; see Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 17 (5). It seems that the King may also visit by special commissioners (Com. Dig. tit. Visitor, A.; Shelford, Law of Mortmain, p. 333; *Eden* v. *Foster* (1725), 2 P. Wms. 326; see p. 287, *ante*.

(*i*) *Ex parte Wrangham* (1795), 2 Ves. Jun. 609; *A.-G.* v. *Black* (1805), 11 Ves. 191; *Ex parte Inge* (1831), 2 Russ. & M. 590; *Re Queens' College, Cambridge* (1828), 5 Russ, 64; *Re University College, Oxford* (1848), 2 Ph. 521; *Re Christ Church, supra*.

(*k*) *Queens' College Case* (1821), Jac. 19.

(*l*) *Re Garstang Church Town School, Ex parte Pedder* (1829), 7 L. J. (O. S.) (CH.) 172. As to the costs of petitions to the Lord Chancellor, see *Ex parte Dann* (1804), 9 Ves. 547; *Re Bedford Charity* (*Masters*) (1819), 2 Swan. 470, 532; *Queens' College Case, supra*, at p. 47; *A.-G.* v. *Catherine Hall, Cambridge* (*Master*), *ibid.* at p. 401; and p. 356, *post*.

(*m*) Service of Notices Act, 1851 (14 & 15 Vict. c. 56) s. 2.

(*n*) Shelford, Law of Mortmain, p. 474; *A.-G.* v. *Ashburnham* (*Earl*) (1823), 1 Sim. & St. 394, 397; *A.-G.* v. *Dublin Corporation* (1827), 1 Bli. (N. S.) 351, 352, H. L.; *Ludlow Corporation* v. *Greenhouse* (1827), 1 Bli. (N. S.) 48, H. L.; *A.-G.* v. *Chester Corporation* (1851), 14 Beav. 338; *Re Macduff, Macduff* v. *Macduff*, [1896] 2 Ch. 451, 475, C. A. As to the general principle said to apply in courts of common law that "the Crown neither receives nor pays costs," see also *A.-G.* v. *London Corporation* (1850), 2 Mac. & G. 247, 271; *R.* v. *Canterbury* (*Archbishop*), [1902] 2 K. B. 572; *Thomas* v. *Pritchard*, [1903] 1 K. B. 215; *Sanderson* v. *Blyth Theatre Co.*, [1903] 2 K. B. 533, 542, C. A. The Crown Suits Act, 1855 (18 & 19 Vict. c. 90), which provides for the payment of costs to or by the Crown in certain proceedings, does not apply to charities (*A.-G.* v. *Windsor* (*Dean and Canons*) (1860), 8 H. L. Cas. 459. In the case of petitions of right costs may be

712. As a rule in charity cases the Attorney-General is entitled to receive costs which would have been awarded to him as a private litigant. But in suits brought by him he is not entitled to receive costs where, if he had sued as a private individual, he could have been called upon to pay them (*o*). When Attorney-General receives costs.

Where an application to Parliament to effect certain changes in the constitution of a charity is sanctioned by the court, the costs of the Attorney-General are allowed out of the charity estate, although the application fails (*p*). Application to Parliament.

Costs may also be given him in interlocutory applications made independently of the relator (*q*). Interlocutory applications.

If a defendant who has been ordered to pay the costs of the Attorney-General becomes insolvent, the costs may be ordered to be paid out of the charity estate (*r*). Insolvent defendant.

713. In administration suits where the Attorney-General is joined as the guardian of a charitable, or supposed charitable, legacy, he may be given his costs out of the estate, particularly if the estate is large (*s*), even if the proceedings are unsuccessful so far as the charity is concerned (*t*). Administration suits.

714. If the Attorney-General, or any person authorised by him, appears as the respondent upon any appeal made against an order of the Charity Commissioners (*a*), the court may make any order respecting the costs, charges and expenses of the Attorney-General or other defendant (*b*). Appeals against orders of Commissioners.

715. Where the Attorney-General takes proceedings at the instance of relators, he is not allowed the costs of attending separately by his own solicitor (*c*); but if there is a suspicion of collusion between the relators and the defendant—*e.g.*, where the same solicitor appears for both—application ought to be made to the court for leave for the Attorney-General to appear separately (*d*). Attorney-General severing from relators.

716. Even when the Attorney-General does not appear personally at the hearing of an action instituted by him, the costs of his brief should be allowed upon taxation, on the ground that Costs of brief.

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payable to or by the Crown (*James* v. *R.* (1874), L. R. 17 Eq. 502; *Re Brain* (1874), L. R. 18 Eq. 389; see title CROWN PRACTICE).

(*o*) *A.-G.* v. *London Corporation* (1850), 2 Mac. & G. 247, 269.

(*p*) *Re Bedford Charity* (1857), 26 L. J. (CH.) 613, C. A.

(*q*) Shelford, Law of Mortmain, p. 474; *A.-G.* v. *Ashburnham* (*Earl*) (1823), 1 Sim. & St. 394.

(*r*) *A.-G.* v. *Lewis* (1845), 8 Beav. 179.

(*s*) *Hunter* v. *A.-G.*, [1899] A. C. 309, 325, where the Attorney-General attempted unsuccessfully to support a judgment of the Court of Appeal in his favour; and the court intimated that, if the estate had not been large, costs would not necessarily have been given to the Attorney-General.

(*t*) *Moggridge* v. *Thackwell* (1803), 7 Ves. 36, 68; *A.-G.* v. *Ashburnham* (*Earl*), *supra*, at p. 396.

(*a*) Charitable Trusts Act, 1860 (23 & 24 Vict. c. 136), s. 8.

(*b*) *Ibid.*, s. 9.

(*c*) *A.-G.* v. *Dove* (1823), Turn. & R. 328.

(*d*) *A.-G.* v. *Wyggeston's Hospital* (1855), Seton, Judgments and Orders, 6th ed. 1290; *A.-G.* v *Dove*, *supra*.

SECT. 7. Costs.

the duty of the Attorney-General is distinct from the mere duty and responsibility of counsel attending at the hearing to argue the cause (*e*).

Amount of costs given to Attorney-General.

717. If successful in his application, the Attorney-General is usually given costs as between solicitor and client (*f*), and in addition he may receive charges and expenses properly incurred by him in relation to the matter (*g*). But if the Attorney-General wants costs, not being costs in the matter, a statement must be furnished—in the form of an affidavit if the claim is contested—to the court, giving the ground of his claim, though the actual bill of costs need not be submitted to the court (*h*).

Costs of particular proceedings taken and abandoned by the Attorney-General in the course of an *ex officio* action may be excepted from the general costs of the action (*i*).

Costs of application for fiat.

718. The costs of obtaining the fiat of the Attorney-General before taking proceedings requiring such fiat, and the costs of proceedings before the Attorney-General with reference to the withdrawal of his fiat pending an appeal, may be made costs in the action (*k*).

But where an application is made by way of memorial to the Attorney-General, without the direction or sanction of the court, the court has no jurisdiction to order payment of the costs occasioned by it (*l*).

Persons giving advice on public grounds.

719. Costs of persons who on public grounds give advice to the Attorney-General to secure the appointment of fit persons as charity trustees are not allowed out of the charity funds (*m*).

Proceedings instituted by Commissioners.

720. Where the Charity Commissioners institute proceedings under the Charitable Trusts (Recovery) Act, 1891 (*n*), their expenses

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(*e*) *A.-G.* v. *Drapers' Co.* (1841), 4 Beav. 305.

(*f*) *A.-G.* v. *Carte* (1746), 1 Dick. 113; *Moggridge* v. *Thackwell* (1803), 7 Ves. 36, 68; *Mills* v. *Farmer* (1815), 1 Mer. 55; *A.-G.* v. *Stewart* (1872), L. R. 14 Eq. 17, 25.

(*g*) *Re Dulwich College* (1873), L. R. 15 Eq. 294.

(*h*) *Ibid.*, *per* ROMILLY, M.R., at p. 296: "The province of the taxing master is to determine whether the costs incurred are properly charged in particular matters, which are specified; but it is not his province to determine whether the trustees or the Attorney-General properly embarked in certain proceedings; that is the province of the court; and when the court has determined that they properly did so embark, then the taxing master is to determine whether the costs charged for that purpose are proper."

(*i*) *A.-G.* v. *Ward* (1848), 11 Beav. 203, 208.

(*k*) *A.-G.* v. *Halifax Corporation* (1871), L. R. 12 Eq. 262.

(*l*) *A.-G.* v. *Harper* (1838), 8 L. J. (CH.) 12, where certain persons, who were *bond fide* purchasers of an improvident lease of charity lands, presented a memorial to the Attorney-General praying that the matter might be referred to the master to approve of a proper lease. No recent example of a memorial to the Attorney-General is to be found in the Reports.

(*m*) *Re Gloucester Charities* (1853), 10 Hare, App. I., p. iii., where prior to the appointment by the court of new trustees of a charity under the Municipal Corporations Act, 1835, a public notice was issued inviting parties to lay before the Attorney-General any objections or suggestions with reference to the proposed appointments.

(*n*) 54 Vict. c. 17.

are payable in the same manner as costs of the Attorney-General in a charity matter (*o*).

SUB-SECT. 2.—*The Relator.*

Security for costs.

721. As the relator is answerable for costs, he should be a person of substance (*p*). He may be directed to give security for costs (*q*), but this is not done where he sues as plaintiff as well as relator (*r*).

When relator ordered to pay costs.

722. When proceedings are unnecessary (*s*), or are instituted from improper motives, *e.g.*, for private revenge (*t*), or where wrong parties are joined (*a*), the court may order the relator to pay the costs, or such part as are occasioned by his misconduct.

When no costs given to relator.

723. Where a relator totally fails in substantiating the case, no costs can be given to him—the utmost he can then claim is to be discharged without costs (*b*). This rule is applied where a relator acts *bonâ fide* but in error with a view to protecting a charity (*c*), or with similar motives seeks to divert charitable funds to purposes not contemplated by the trust (*d*). Even if his application is partially successful, the relator may not get his costs, where the proceedings have been conducted with unnecessary expense (*e*)—as, for example, where an action is brought when a petition or summons would be sufficient (*f*).

Costs given to relator.

724. The relator in a charity action which terminates successfully is entitled, where there is nothing to impeach the propriety of the

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(*o*) 54 Vict. c. 17, s. 3; see *Re Alms Corn Charity*, [1901] 2 Ch. 750.

(*p*) *A.-G.* v. *Knight* (1837), 3 My. & Cr. 154. For form of certificate by the relator's solicitor that he is possessed of substantial means and able, if necessary, to answer the costs of the proposed proceedings, see Daniel's Chancery Forms, 5th ed., p. 34. As to the relator, see further, p. 323, *ante*.

(*q*) *A.-G.* v. *Rochester Corporation* (1680), Shelford, Law of Mortmain, p. 425.

(*r*) *A.-G.* v. *Knight*, *supra*.

(*s*) *A.-G.* v. *Gley* (1738), 1 Atk. 356, where the relators were charged with costs on the dismissal of an information which sought specific performance of an agreement between three executors, trustees of a charity, for giving to each a right to nominate to a third part of the charity funds absolutely; *A.-G.* v. *Parker* (1747), 3 Atk. 576; *A.-G.* v. *Smart* (1748), 1 Ves. Sen. 72 (information in contradiction to the rights of the charity as established by its charter); *A.-G.* v. *Hartley* (1820), 2 Jac. & W. 353, 370, where an information was filed involving most expensive inquiries, containing gross imputations on the conduct of individuals and allegations not proved, upon which no relief was or could be given; *A.-G.* v. *Mansfield (Earl)* (1823), 2 Russ. 501, 538 (information containing unfounded charges against officers of a charity); see *South Molton Corporation* v. *A.-G.* (1859), 5 H. L. Cas. 1, 39.

(*t*) *A.-G.* v. *Middleton* (1751), 2 Ves. Sen. 326, 330; *A.-G.* v. *Bosanquet* (1841), 11 L. J. (CH.) 43.

(*a*) *A.-G.* v. *Berry* (1847), 11 Jur. 114.

(*b*) *A.-G.* v. *Oglender* (1790), 1 Ves. 246.

(*c*) *A.-G.* v. *Bolton* (1796), 3 Anst. 820; see *A.-G.* v. *Bosanquet*, *supra*.

(*d*) *A.-G.* v. *Braithwaite* (1885), 2 T. L. R. 56, C. A.

(*e*) *A.-G.* v. *Cullum* (1836), 1 Keen, 104, where no costs up to the hearing were given to the relators.

(*f*) *A.-G.* v. *Holland* (1837), 2 Y. & C. (EX.) 683, where the relators received no costs up to the hearing; *A.-G.* v. *Berry*, *supra*.

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proceeding, and no special circumstances to justify a special order, to have his costs as between solicitor and client, and to be paid out of the charity estate the difference between the amount of such costs and the amount recovered from the defendant (*g*). Under special circumstances a relator may also be given his charges and expenses (*h*). On the other hand, he may be allowed only costs as between party and party, and no extra costs out of the charity fund where the action, though partially successful, does not substantially benefit the charity (*i*). Or, again, though costs may be refused him, he may be allowed the moneys actually expended by him without the sanction of the master, if in the result the expenditure has been of use to the charity (*k*).

A relator who, with the consent of the Attorney-General, proceeds by action, when the relief desired might have been obtained on petition, may be allowed his costs (*l*). So also costs may be given to a relator who is changed before the hearing of the action (*m*), or to a relator who acts in error but with the *bonâ fide* intention of benefiting the charity (*n*).

When intervention of further parties allowed.

Where relators, owing to their peculiar character and position, are incapable of adequately representing and protecting the interests of all the objects of a charity, persons who are not parties to the proceedings may be allowed to intervene in the proceedings, on the understanding, however, that only one bill of costs will be allowed against the charity estate (*o*).

SUB-SECT. 3.—*Charity Trustees.*

Generally.

725. The rules with respect to the costs of trustees of charities are for the most part the same as those with respect to the costs of trustees for other purposes (*p*).

Thus charity trustees, who have not been guilty of misconduct, are entitled to be paid out of the trust funds all costs, charges, and expenses properly incurred by them in the execution of or in connection with the trust (*q*). If the parties in an action, who are ordered to pay the trustees' costs, are unable to do so, the trustees may recoup themselves out of the charity funds or

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(*g*) *A.-G.* v. *Berwick-upon-Tweed Corporation* (1829), Taml. 239; *A.-G.* v. *Kerr* (1841), 4 Beav. 297.

(*h*) *Ibid.*, at p. 303; *Osborne* v. *Denne* (1802), 7 Ves. 424 (costs allowed beyond those taxed); *A.-G.* v. *Skinners' Co.* (1821), Jac. 629, 630; *A.-G.* v. *Winchester Corporation* (1825), 3 L. J. (o. s.) (CH.) 64.

(*i*) *A.-G.* v. *Fishmongers' Co.* (1837), 1 Keen, 501. See *A.-G.* v. *Drummond* (1842), 3 Dr. & War. 165.

(*k*) *A.-G.* v. *Ironmongers' Co.* (1847), 10 Beav. 194.

(*l*) *A.-G.* v. *Biddulph* (1853), 22 L. T. (o. s.) 114. But not where the sanction of the Attorney-General is not first obtained (*A.-G.* v. *Holland* (1837), 2 Y. & C. (EX.) 683.

(*m*) *A.-G.* v. *Tyler* (1838), Coop. Pr. Cas. 358.

(*n*) *A.-G.* v. *Bosanquet* (1841), 11 L. J. (CH.) 43.

(*o*) *A.-G.* v. *Shore* (1836), 1 My. & Cr. 394.

(*p*) Shelford, Law of Mortmain, p. 467; *Man* v. *Ballet* (1382), 1 Vern. 44; and see *A.-G.* v. *Drummond*, *supra*, at pp. 163, 164, where SUGDEN, L.C., pointed out how in some ways charity trustees are more favoured than ordinary trustees. As to the costs of trustees generally, see title TRUSTS AND TRUSTEES.

(*q*) *A.-G.* v. *Norwich Corporation* (1837), 2 My. & Cr. 406, 424.

estate (*r*); and if they recover only party and party costs from an opponent, they are entitled to reimburse themselves out of the trust funds the difference between party and party and solicitor and client costs. Moreover, the right of trustees to costs as between themselves and their *cestuis que trustent* is based upon contract, and is not within the discretion of the court. Trustees, therefore, who have not been guilty of culpable neglect of their duty under the contract cannot be deprived of their costs (*s*).

Trustees ordered to pay costs personally.

Where the court orders charity trustees to pay costs personally, they may not pay them out of the charity fund. If they do so they will be directed to refund the amount so misapplied, possibly with interest at 4 per cent. (*t*).

Where trustees not ordered to pay costs.

726. Where a succession of charity trustees has for a long period acted wrongly but innocently in the administration of the trust, the court may refuse to visit the error of their predecessors upon the present trustees by depriving the latter of their costs (*a*), but the discretion of the court is guided by the circumstances of each case (*b*). So, too, if trustees take steps promptly to remedy an innocent and accidental breach of trust, they will not be made to pay the costs (*c*).

Charity trustees ought not to be visited with costs because of the misapprehension of the Charity Commissioners as to the construction of a public statute (*d*).

Costs of application to Parliament.

The court may give charity trustees the costs of a successful application to Parliament for an Act to regulate the charity, though the application is made without the previous sanction of the court (*e*); or of an unsuccessful application to which the consent of the court has previously been given (*f*).

Charity benefited by breach of trust.

727. Where a breach of trust has been committed the trustees may be refused the costs of an inquiry into the matter, even where the breach has benefited the charity, though the fact that the property has been improved may be properly taken into account in disposing of the costs (*g*).

(*r*) *A.-G.* v. *Lewis* (1845), 8 Beav. 179.

(*s*) See *Cotterell* v. *Stratton* (1872), 8 Ch. App. 295, 302; *Turner* v. *Hancock* (1882), 20 Ch. D. 303, C. A.; and titles TRUSTS AND TRUSTEES; PRACTICE AND PROCEDURE.

(*t*) *A.-G.* v. *Daugars* (1864), 33 Beav. 621, 624; and see *Re St. Paul's School* (1870), 18 W. R. 448.

(*a*) *A.-G.* v. *Drummond* (1842), 3 Dr. & War. 162, 163, where the trustees had in error allowed Unitarians to participate in a trust property confined to another body; *A.-G.* v. *Caius College* (1837), 6 L. J. (CH.) 282, where, notwithstanding certain misapplications, the trustees and their predecessors had accumulated a large amount for the benefit of the foundation.

(*b*) *Shore* v. *Wilson* (1842), 9 Cl. & Fin. 355, H. L., where the trustees in similar circumstances were not allowed their costs.

(*c*) *A.-G.* v. *Drapers' Co.* (1841), 4 Beav. 67.

(*d*) *Moore* v. *Clench* (1875), 1 Ch. D. 447, 450, 451.

(*e*) *A.-G.* v. *Vigor, Downing College Case*, cited 2 Russ. at p. 519. But not where the application is unsuccessful (*A.-G.* v. *Mansfield (Earl)* (1823), 2 Russ. 501, 519); see also *S.-G. for Ireland* v. *Dublin Corporation* (1877), 1 L. R. Ir. 166.

(*f*) *Re Bedford Charity* (1857), 26 L. J. (CH.) 613.

(*g*) *S.-G.* v. *Bath Corporation* (1849), 18 L. J. (CH.) 275, 277, distinguishing

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Severance of defence in breach of trust.

728. Where in an action against charity trustees charged with breaches of trust one of the trustees severs his defence and adopts the view taken by the plaintiff, he may be allowed to recover his costs as between solicitor and client out of the charity property, the costs to be recovered over against the other trustees as between party and party (*h*).

Action occasioned by misconduct of trustees.

729. If an action is rendered necessary by any particular instance of misconduct on the part of trustees, whether they be private individuals or a corporation (*i*), or by their general dereliction of duty, even where they have not acted corruptly (*k*), they must pay the costs occasioned by their improper behaviour (*l*). Thus they may be fixed with the costs of the action where they have claimed unsuccessfully to be entitled beneficially to property belonging to a charity (*m*), or have committed a breach of trust and acted in a spirit of animosity (*n*), or have wilfully suppressed evidence thereby obstructing the course of justice (*o*), or have negligently professed ignorance of matters which they might have ascertained from an examination of their documents (*p*); or when they adopt a wrong mode of procedure (*q*); or when, pending proceedings instituted for the purpose of having new trustees appointed, they appoint new trustees themselves, such appointment being subsequently set aside (*r*).

A.-G. v. *Caius College* (1837), 6 L. J. (CH.) 282, where in somewhat similar circumstances costs were given to trustees who had innocently misapplied trust property to the advantage of the charity; *A.-G.* v. *Armitstead* (1854), 19 Beav. 584, where trustees greatly exceeded the estimate authorised by the court for erecting a building.

(*h*) *Re St. Paul's School* (1870), 18 W. R. 448.

(*i*) *E.g.*, an appointment of officials contrary to the terms of the trust (*Salop Town* v. *A.-G.* (1726), 2 Bro. Parl. Cas. 402; *A.-G.* v. *Carrington* (*Lord*) (1850), 4 De G. & Sm. 140).

(*k*) *East* v. *Ryal* (1725), 2 P. Wms. 284; *A.-G.* v. *Stafford Corporation* (1740), Barn. (CH.) 33.

(*l*) *Haberdashers' Co.* v. *A.-G.* (1702), 2 Bro. Parl. Cas. 370 (negligent trustees ordered to pay costs of original suit and part of those of the appeal); *A.-G.* v. *Wilson* (1840), Cr. & Ph. 1; *A.-G.* v. *Mercers' Co.* (1833), 2 My. & K. 654, where a corporation, trustee of a charity, which had failed to apply properly a number of charitable legacies, was ordered to pay the costs of an information filed against it, but not of the subsequent reference to the master to settle a scheme.

(*m*) *A.-G.* v. *Drapers' Co.* (1841), 4 Beav. 67; *A.-G.* v. *Christ's Hospital* (1841), 4 Beav. 73, where trustees, who had for a long period administered charitable funds erroneously, on being called upon to administer them duly, unsuccessfully insisted on their own rights adversely to the charity; *A.-G.* v. *Webster* (1875), L. R. 20 Eq. 483, 492, where the trustees disregarded the opinion of their own counsel that the property was charitable, but the Attorney-General, this being an *ex officio* information by him, did not press for costs against the trustees personally; *Re St. Stephen, Coleman Street* (1888), 39 Ch. D. 492 (a test case instituted by trustees claiming that certain property was not charitable); and see *A.-G.* v. *Brewers' Co.* (1717), 1 P. Wms. 376; *A.-G.* v. *Gibbs* (1847), 1 De G. & Sm. 156; *Re St. Paul's School*, *supra*.

(*n*) *A.-G.* v. *Stroud* (1868), 19 L. T. 545.

(*o*) *Hertford Borough* v. *Hertford Poor* (1713), 2 Bro. Parl. Cas. 377.

(*p*) *A.-G.* v. *East Retford Corporation* (1833), 2 My. & K. 35. In *S.-G.* v. *Bath Corporation* (1849), 18 L. J. (CH.) 277, it was suggested that the court might be compelled to fix charity trustees with constructive notice of a document which they had innocently failed to disclose.

(*q*) *E.g.*, petition instead of action (*Ludlow Corporation* v. *Greenhouse* (1827), 1 Bli. (N. S.) 17, 93, 94, H. L.).

(*r*) *A.-G.* v. *Clack* (1839), 1 Beav. 467.

So, too, charity trustees on being removed from the trusts on account of their misconduct may be ordered to pay the cost of vesting the trust property in the new trustees (*s*). Again, where trustees of a religious congregation who refuse to retire on account of holding opinions incompatible with the terms of the trust are removed by the court, they will be made to pay the costs of the appointment of new trustees (*t*).

Where trustees of charities or other persons are, on the application of the Charity Commissioners, attached and committed for contempt for neglecting to obey some proper order of the Charity Commissioners, they may be ordered to pay the costs of the Commissioners (*a*).

Petition for scheme.

730. Where charity trustees, after having paid a fund into court and thereby discharged themselves from the office of trustees, prepare a petition to the court for a scheme to administer the charity, to which the Attorney-General refuses his fiat, the trustees are not allowed the costs of the abortive petition, though they may be given their costs in connection with a petition for the same purpose presented by the Attorney-General (*b*).

Proceedings to obtain accounts.

731. As it is the duty of charity trustees to render accounts without requisition to those to whom they are accountable, they are liable to the costs of an action to compel an account, even if in the result the charity prove to be indebted to the trustees. But if the accounts show that the trustees are not debtors to the trust, no subsequent costs on either side will be given (*c*). So, too, trustees refusing to render accounts to the Charity Commissioners may be ordered to pay the costs of an order for committal (*d*).

Striking out plaintiffs.

732. Trustees who without their consent are made plaintiffs in an action are allowed their costs of having their names struck out (*e*).

Unjustifiable proceedings against trustees.

733. Where unjustifiable proceedings are taken against trustees of a charity, the plaintiff may be ordered to pay the trustees' costs as between solicitor and client, so that the charity fund may be preserved intact (*f*).

(*s*) *Coventry Corporation* v. *A.-G.* (1720), 7 Bro. Parl. Cas. 235, 237, 238; *Ex parte Greenhouse* (1815), 1 Madd. 92, 109.

(*t*) *A.-G.* v. *Murdoch*, (1856) 2 K. & J. 571. They will not be made to pay costs where they retire voluntarily, though whether they will receive them is a question for the discretion of the court, and may depend upon the circumstances of their retirement (*ibid.*, *per* WOOD, V.-C. at p. 573).

(*a*) Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 14; Charitable Trusts Amendment Act, 1855 (18 & 19 Vict. c. 124), s. 9; *Re St. Bride's, Fleet Street* (1877), 35 Ch. D. 147, n.; for form of order, see *Re Gilchrist Educational Trust*, [1895] 1 Ch. 367; and p. 303, *ante*.

(*b*) *Re Poplar and Blackwall Free School* (1878), 8 Ch. D. 543.

(*c*) *A.-G.* v. *Gibbs* (1847), 2 Ph. 327.

(*d*) *Re Gilchrist Educational Trust*, *supra*.

(*e*) *A.-G.* v. *Maryatt* (1838), 2 Jur. 1060.

(*f*) *Edenborough* v. *Canterbury* (*Archbishop*) (1826), 2 Russ. 93, 112; *A.-G.* v. *Cuming* (1843), 2 Y. & C. Ch. Cas. 155; *Andrews* v. *Barnes* (1888), 39 Ch. D. 133, C. A.; see *A.-G.* v. *Holland* (1837), 2 Y. & C. (EX.) 683, where an information which contained false charges against the existing trustees of

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Claiming forfeited property.

734. Where owing to a breach of condition by charity trustees part of the charity property is held to be forfeited, the trustees are not entitled to their costs of an unsuccessful appeal against the decision, the only fund out of which such costs would be payable being no longer in their possession (*g*).

Municipal corporation as trustees.

735. A municipal corporation, as altered by the Municipal Corporations Act, 1835 (*h*), is legally the same corporation under a new government, and the liabilities of the old corporation pass with the corporate property to the new. The latter, therefore, is liable for the costs of an action brought against it to remedy a breach of trust committed by the former, though the members of the new corporation are not personally delinquent (*i*)—or at any rate, in such circumstances, it is not entitled to receive costs (*k*).

Official trustee of charity lands.

736. When the official trustee of charity lands has been made a party to legal proceedings the plaintiffs have been ordered to pay his costs (*l*).

SUB-SECT. 4.—*Costs in Relation to Charitable Gifts by Will.*

Administration action for construction.

737. As a rule the costs of an administration action occasioned by obscurity in a will, *e.g.*, to determine whether a particular charitable bequest is valid (*m*), are payable out of the testator's residuary personal estate (*n*). Such costs are included in the words "testamentary expenses," a direction as to which is often included in wills (*o*).

If a dispute arises between persons claiming a charitable legacy and persons claiming the residue as to whether the legacy is or is not payable, the costs of the litigation are payable out of the estate (*p*). An executor cannot by paying a disputed charitable legacy into court relieve the residue of its proper burden (*q*).

Dispute as to legacy severed from estate.

738. If executors admit a legacy to be payable and sever it from the estate, and a dispute afterwards arises between the persons

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culpable mismanagement was in part dismissed with costs, though the earlier part of the information was successful.

(*g*) *A.-G.* v. *Grainger* (1859), 7 W. R. 684.

(*h*) 5 & 6 Will. 4, c. 76, repealed by Municipal Corporations Act, 1883 (46 & 47 Vict. c. 18).

(*i*) *A.-G.* v. *Leicester Corporation* (1846), 9 Beav. 546; *A.-G.* v. *Newcastle Corporation* (1842), 5 Beav. 314.

(*k*) *A.-G.* v. *Kerr* (1840), 2 Beav. 420. See now the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 60), s. 1, limiting the time within which such an action may be brought; and title PUBLIC AUTHORITIES AND PUBLIC OFFICERS.

(*l*) *Re Church Patronage Trust, Laurie* v. *A.-G.*, [1904] 1 Ch. 41, 51, where the plaintiffs failed in their summons and were ordered to pay the costs of the official trustee.

(*m*) *Kirkbank* v. *Hudson* (1819), 7 Price, 212, 222; *A.-G.* v. *Hinxman* (1820), 2 Jac. & W. 270, 278; *Giblett* v. *Hobson* (1833), 5 Sim. 662; *Daly* v. *A.-G.* (1860), 11 I. Ch. R. 41.

(*n*) *Philpott* v. *St. George's Hospital (Governors)* (1857), 6 H. L. Cas. 338, 374; *Wilson* v. *Squire* (1842), 13 Sim. 212; *Daly* v. *A.-G.* (1860), 11 I. Ch. R. 41, 49; and see title WILLS.

(*o*) *Penny* v. *Penny* (1879), 11 Ch. D. 440.

(*p*) *A.-G.* v. *Lawes* (1849), 8 Hare, 43.

(*q*) *Re Birkett* (1878), 9 Ch. D. 576, 581.

to whom or some of whom the legacy belongs, and the court has to decide to whom it belongs, the legacy bears the cost (*r*). Thus, where executors have appropriated a charitable legacy and divided the residue, the costs of a suit to secure the legacy must be paid thereout (*s*). But the mere fact that executors have set apart a sum to meet the legacy, if payable, does not constitute a severance (*t*).

Admission of assets.

An admission by an executor of assets for the payment of a charitable legacy extends to an admission of assets for the payment of costs to secure payment of the legacy, if the court thinks fit to direct them (*u*).

Proceedings to ascertain charity intended by testator.

739. Where a testator occasions difficulty to his executors in administering his estate by misdescribing a charitable institution which he intends should receive a legacy, and more than one institution claims the legacy, the costs even of the unsuccessful claimants, as between solicitor and client, notwithstanding the opposition of the residuary legatees, are payable out of the estate, except where in the opinion of the court a claim is hopeless and not made *bonâ fide* (*a*).

Costs of heir-at-law.

740. Where the heir-at-law is made a party to an administration suit relating to a charity, and raises no improper point, he is as a rule, though not as of right (*b*), allowed his costs as between solicitor and client, even where his claim does not succeed (*c*), and he may be allowed charges and expenses as well (*d*). But if he brings an unnecessary suit the costs are payable out of the real estate (*e*). And if the heir takes proceedings against residuary devisees suggesting a secret void trust for charitable purposes and produces no evidence in support, he is saddled with the costs (*f*).

Next of kin.

Similarly next of kin are frequently (*g*), though not as of right (*h*), allowed costs as between solicitor and client.

Lapse of share given to charity.

741. The rule that the costs of an administration suit are payable out of residue generally, and not primarily out of a lapsed share, applies when such share is given to a charity and lapses (*i*).

(*r*) *A.-G.* v. *Lawes* (1849), 8 Hare, 43; *Re Lycett* (1897), 13 T. L. R. 373 (ambiguous bequest to charitable institution wrongly described); compare *Re Clarke* (1907), 97 L. T. 707; and see R. S. C., Ord. 65. r. 14 B.

(*s*) *Governesses' Benevolent Institution* v. *Rusbridger* (1854), 18 Beav. 467.

(*t*) *A.-G.* v. *Lawes*, *supra*.

(*u*) *Philanthropic Society* v. *Hobson* (1833), 2 My. & K. 357.

(*a*) *Re Clarke*, *supra*; and compare *Re Lycett*, *supra*, where the costs were made payable out of the legacy, presumably on the ground that it had been severed from the estate.

(*b*) *Whicker* v. *Hume* (1851), 14 Beav. 509, 528, where the heir got party and party costs only; *Aria* v. *Emanuel* (1861), 9 W. R. 366.

(*c*) *A.-G.* v. *Haberdashers' Co.* (1793), 4 Bro. C. C. 178; *Currie* v. *Pye* (1811), 17 Ves. 462; *A.-G.* v. *Kerr* (1841), 4 Beav. 297, 299; *James* v. *James* (1849), 11 Beav. 397.

(*d*) *A.-G.* v. *Haberdashers' Co.*, *supra*; *A.-G.* v. *Kerr*, *supra*.

(*e*) *Leacroft* v. *Maynard* (1791), 1 Ves. 279.

(*f*) *Paine* v. *Hall* (1812), 18 Ves. 475.

(*g*) *Gaffney* v. *Hevey* (1837), 1 Dr. & Wal. 25; *Carter* v. *Green* (1857), 3 K. & J. 591, 608; *Lewis* v. *Allenby* (1870), 18 W. R. 1127.

(*h*) *Wilkinson* v. *Barber* (1872), L. R. 14 Eq. 96, 99.

(*i*) *Blann* v. *Bell* (1877), 7 Ch. D. 382; *contrà*, *Taylor* v. *Mogg* (1858), 27 L. J. (CH.) 816; and see *Linley* v. *Taylor* (1859), 28 L. J. (CH.) 686.

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SUB-SECT. 5.—*Payment and Apportionment of Costs payable out of Charity Estates.*

Mortgage.

742. A mortgage (*k*) of the whole or part of the charity estates may be ordered for the payment of costs.

Payment out of income.

Sometimes the payment of costs may be directed out of the income of a charity fund (*l*).

Charge upon proceeds of sale.

743. Where payment of costs is decreed against a charitable corporation, which is entitled to a fund representing the proceeds of sale of part of its property, the party to whom the costs are payable may charge them upon that fund (*m*).

Payment out of gift the subject of proceedings.

744. Where proceedings are taken in respect of one only of several gifts belonging to a charity, the costs should in the first instance fall on the property which is the subject of the proceedings. But a different provision may be made if justice to the relator or the interests of the charity require it (*n*).

Apportionment of costs.

745. The costs of settling one scheme for a number of charities are apportioned rateably, though primarily they may be made payable out of a fund not belonging to all the charities (*o*). Where a charity includes two classes of estates, both of which are the subject of proceedings, the costs of establishing a scheme for the regulation of one estate only are borne by that estate (*p*). Similarly, where several distinct charities are vested in the same set of trustees, the costs of proceedings relating to one charity alone must be borne entirely by that charity (*q*).

SUB-SECT. 6.—*Costs where Charity Land is taken compulsorily.*

Costs payable by promoters.

746. Where promoters of an undertaking (*r*) take land belonging to a charity compulsorily under any Act incorporating the Lands Clauses Consolidation Act, 1845 (*s*), the court may order them to

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(*k*) *A.-G.* v. *Atherstone School* (*Governors*) (1833), Shelford, Law of Mortmain, p. 478; *A.-G.* v. *St. David's* (*Bishop*) (1849), *Re Lambeth Charities* (1853), Seton, Judgments and Orders, 6th ed., p. 1290; *A.-G.* v. *York* (*Archbishop*) (1853), 17 Beav. 495; *A.-G.* v. *Murdoch* (1856), 2 K. & J. 571. Possibly even a sale of part of the charity estates might be ordered by the court for the same purpose under its general power to authorise a sale of charity lands (*A.-G.* v. *Newark-upon-Trent Corporation* (1842), 1 Hare, 395; *A.-G.* v. *Nethercoat* (1840), cited 1 Hare, 400).

(*l*) *A.-G.* v. *Smythies* (1853), 16 Beav. 385, where the costs of an application by a new master of a hospital for payment of the income of a fund in court was held payable out of the income.

(*m*) *A.-G.* v. *Thetford Corporation* (1860), 8 W. R. 467.

(*n*) *A.-G.* v. *Kerr* (1841), 4 Beav. 297, *per* Lord LANGDALE, at p. 303.

(*o*) *Re Stafford Charities* (1858), 26 Beav. 567. For form of order apportioning costs, see *Re Saffron Walden Charities* (1857), Seton, Judgments and Orders, 6th ed., pp. 1289, 1330, 1351.

(*p*) *A.-G.* v. *Skinners' Co.* (1827), 2 Russ. 407, 446.

(*q*) *A.-G.* v. *Grainger* (1859), 7 W. R. 684.

(*r*) See title COMPULSORY PURCHASE AND COMPENSATION.

(*s*) 8 & 9 Vict. c. 18, s. 7. The sanction of the Charity Commissioners to a sale under this Act is not required (Charitable Trusts Amendment Act, 1855 (18 & 19 Vict. c. 124), s. 29; *St. Thomas's Hospital* (*Governors*) v. *Charing Cross Rail. Co.* (1861), 1 John. & H. 400, 406; see *Re Mason's Orphanage and London and North Western Rail. Co.*, [1896] 1 Ch. 596, 599, C. A.; and pp. 218, 219, *ante*.

pay the costs of the following matters, including all reasonable incidental charges and expenses, namely, (1) the costs of the purchase or taking of the lands, or incurred in consequence thereof, other than such costs as are otherwise provided for (*t*); (2) the costs of the investment of the purchase-money in Government or real securities (*u*) and of the re-investment thereof in the purchase of other lands, and the costs of obtaining the proper orders for any of the purposes aforesaid, and of the orders for the payment of the dividends and interest of the securities upon which such moneys shall be invested, and for the payment out of court of the principal of such moneys or of the securities whereon the same shall be invested, and of all proceedings relating thereto except such as are occasioned by litigation between adverse claimants (*a*). The costs of one application only for investment in land are allowed, unless in the opinion of the court it is for the benefit of the parties interested in the moneys that the same should be invested in the purchase of lands in different sums and at different times, in which case the court may order the costs of any such investments to be paid by the promoters of the undertaking (*b*).

Cost of conveyance of land purchased with proceeds of compulsory sale.

747. The cost of a conveyance to a charity of lands purchased out of moneys paid into court under the Lands Clauses Consolidation Act, 1845, including enrolment (*c*), is payable by the promoters of the undertaking (*d*). So also the promoters bear the cost of applications by charities to have money paid into court invested in redemption of land tax (*e*), in rebuilding (*f*) or in erecting temporary buildings (*g*), or in improving the water supply of a town in which the charity property is situated, in a case where the trustees have by a former order been directed to apply the money for that purpose (*h*).

(*t*) See Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 80.

(*u*) They must also pay the increased cost (brokerage etc.) of interim investment in other securities sanctioned by the court (*Re Gaselee*, [1901] 1 Ch, 923), and they may be ordered to pay the costs of a second interim investment (*Re Nepton's Charity* (1906), 22 T. L. R. 442).

(*a*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 80. As to what is adverse litigation, see *Re Clergy Orphan Corporation*, [1894] 3 Ch. 145, C. A.

(*b*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 80. The costs of more than one investment were allowed in *Re St. Bartholomew's Hospital (Trustees)* (1859), 4 Drew. 425; and *Ex parte Hospital of St. Katharine* (1881), 17 Ch. D 378. See also *Ex parte Christ's Hospital (Governors)* (1864), 2 Hem. & M. 169. See further, title COMPULSORY PURCHASE AND COMPENSATION.

(*c*) *Re Christ's Hospital (Governors)*, reported on this point (1864), 12 W. R. 669.

(*d*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 82.

(*e*) *Re London, Brighton and South Coast Rail. Co.* (1854), 18 Beav. 608; *Re Queen Camel (Vicar)* (1863), 11 W. R. 503; *Re Bethlehem Hospital* (1875), L. R. 19 Eq. 457; *Ex parte Hospital of St. Katharine, supra.*

(*f*) *Re Southampton and Dorchester Railway Act, Ex parte Thorner's Charity* (1848), 12 L. T. (o. s.) 266; *Re Kent Coast Rail. Co., Ex parte Canterbury (Dean and Chapter)* (1862), 10 W. R. 505; *Re Lymington Baptist Chapel (Trustees)*, [1877] W. N. 226; *Ex parte Jesus College, Cambridge* (1884), 50 L. T. 583; *Ex parte St. Alphage (Parson)*, 55 L. T. 314. But see *Re Buckinghamshire Rail. Co.* (1850), 14 Jur. 1050, where the costs of obtaining orders for the investment of purchase-money in alterations of almshouses were not ordered to be borne by the promoters.

(*g*) *Re St. Thomas' Hospital* (1863), 11 W. R. 1018.

(*h*) *Re Lathropp's Charity* (1866), L. R. 1 Eq. 467.

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The costs allowed on a re-investment in land are those payable by the purchaser under an open contract (*i*).

Apportionment between several purchasers.

748. Where land belonging to a charity is taken by several public bodies and the purchase-moneys are re-invested in land, the general rule is that the costs are borne by the purchasers in equal shares (*k*). But where the system of scale fees is adopted in the purchase, and there is great inequality in the amounts respectively contributed by the various purchasers, the costs with reference to the scale fees, *ad valorem* stamp and surveyor's fee are apportioned according to the amounts contributed, but all other costs are paid equally by the purchasers (*l*).

Where charity lands are being purchased as an investment out of moneys paid into court the promoters are not liable for extra costs, the payment of which has been voluntarily undertaken by the charity (*m*).

Brokerage on interim investment.

749. The promoters must pay the brokerage where an interim investment in stock has been made and the investments are sold in accordance with an order for payment out (*n*).

Petition for transfer to official trustees.

750. A petition by charity trustees for the transfer to the account of the official trustees of charitable funds of a fund paid into court and invested in Government securities is regarded as a petition for payment of money out of court, and the promoters are liable for the costs of the application (*o*).

But after the fund has been paid or transferred to the official trustees of charitable funds, the costs of the subsequent re-investment are not payable by the promoters (*p*).

Costs due to appointment of new trustees.

751. The promoters are not liable for costs, where the dividends arising from a fund in court have been ordered to be paid to existing trustees of a charity and a fresh application to the court is rendered necessary owing to the appointment of new trustees (*q*).

Where scheme supervenes.

752. Where after land belonging to a charity has been compulsorily taken and the usual order for investment of the purchase-money and payment of the dividend to the then trustees of the

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(*i*) *Ex parte Thavie's Charity (Trustees)*, [1905] 1 Ch. 403.

(*k*) *Ex parte London (Bishop)* (1860), 2 De G. F. & J. 14; *Ex parte Trinity College, Cambridge (Master etc.)* (1868), 18 L. T. 849.

(*l*) *Ex parte Christ's Hospital (Governors)* (1864), 2 Hem. & M. 166; *Ex parte St. Bartholomew's Hospital (Governors)* (1875), L. R. 20 Eq. 369; *Re Bishopsgate Foundation*, [1894] 1 Ch. 185.

(*m*) *Re North Staffordshire Rail. Co., Ex parte Alsager (Incumbent)* (1851), 3 W. R. 324.

(*n*) *Re Magdalen College, Oxford*, [1901] 2 Ch. 786.

(*o*) *Re Bristol Free Grammar School Estates* (1878), 47 L. J. (CH.) 317; *Ex parte Bishop Monk's Horfield Trust (Trustees)* (1881), 29 W. R. 462; *Re St. Albans, Wood Street (Rector)* (1891), 66 L. T. 51. See *Re London, Brighton, and South Coast Rail. Co.* (1854), 18 Beav. 608.

(*p*) *Ex parte Bishop Monk's Horfield Trust (Trustees)*, *supra*.

(*q*) *Re Audenshaw School* (1863), 1 New Rep. 255. It is otherwise where the charity has been reconstituted under a scheme (*Re Shakespeare Walk School* (1879), 12 Ch. D. 178); compare *Re St. Paul's Schools, Finsbury* (1883), 52 L. J. (CH.) 454.

charity has been made, the constitution of the charity is altered by a scheme, the promoters may be directed to pay the cost of an application for payment out of part of the fund to cover the expenses of the new scheme (*r*). Again, where in such a case an application is made to sanction a scheme applying the purchase-money *cy-près* and for payment out to trustees to carry out the scheme, the costs, so far as they are increased by the necessity for a scheme, may be excepted from the costs payable by the promoters (*s*).

Attorney-General.

753. If the Attorney-General is a necessary party to an application under the Lands Clauses Consolidation Act, 1845, his costs are payable by the promoters (*t*).

Application by petition or summons.

754. Where the application by petition is under the circumstances cheaper and more expeditious than by summons, the costs of the former procedure are allowed; but the option of proceeding by petition or summons is at the applicant's risk (*a*).

Payment of purchase-money to official trustees.

755. Where the legal estate in charity lands taken under the Lands Clauses Consolidation Act, 1845, is vested in the official trustee of charity lands, and the price has been fixed by arbitration, the official trustees of charitable funds are under no obligation to receive the purchase-money, if tendered, so as to relieve the promoters from the cost of payment into court and investment (*b*).

Order as to costs against charitable corporation.

756. A charitable corporation empowered by a special Act to acquire land compulsorily is not "an undertaking" within the meaning of s. 1 of the Lands Clauses Consolidation Act, 1845. Consequently that Act is not incorporated in the special Act, and no such order as to costs as above mentioned can be made against the corporation (*c*). But the court has power to make a similar order under the Judicature Act, 1890 (*d*).

(*r*) *Re Shakespeare Walk School* (1879), 12 Ch. D. 178.

(*s*) *Re St. Paul's Schools, Finsbury* (1883), 52 L. J. (CH.) 454.

(*t*) *Re London, Brighton, and South Coast Rail. Co.* (1854), 18 Beav. 608.

(*a*) *Re Bethlehem and Bridewell Hospitals* (1885), 30 Ch. D. 541. See *Ex parte Jesus College, Cambridge* (1884), 50 L. T. 583; *A.-G.* v. *St. John's Hospital, Bath*, [1893] 3 Ch. 151; and see p. 331, *ante*.

(*b*) *Re Leeds Grammar School*, [1901] 1 Ch. 228. As payment to the Official Trustees relieves the promoters of the expenses under s. 80 of the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), of payment into court and investment, the practice of the Charity Commissioners is not to sanction such payment unless the promoters consent to make some small extra payment—generally from 2½ to 5 per cent. on the amount of the fund—for the benefit of the charity. The practice of the Commissioners is similar in case of an application for payment out of court or transfer to the official trustees.

(*c*) *Re Sion College, Ex parte London Corporation* (1887), 57 L. T. 743.

(*d*) 53 & 54 Vict. c. 44, s. 5; see *Re Fisher*, [1894] 1 Ch. 53; *Re Schmarr*, [1902] 1 Ch. 326, 328, C. A. Prior to the Supreme Court of Judicature Act, 1890 (53 & 54 Vict. c. 44), the court had no power in such cases to order the costs of dealing with the purchase-money of lands so acquired to be paid by the corporation, unless there was an express provision for that purpose in the special Act (*Re St. Dunstan's-in-the-West Charity Schools* (1871), L. R. 12 Eq. 537; *Re Mills' Estate, Ex parte Commissioners of Works* (1886), 34 Ch. D. 24, C. A.).

SECT. 7. Costs.

SUB-SECT. 7.—*Miscellaneous Provisions as to Costs.*

Taxation on order of Commissioners.

757. The Charity Commissioners may order a solicitor's bill of costs for work done on behalf of a charity or of charity trustees to be taxed by the taxing masters. If the bill is reduced by one-sixth of the amount, or more, the solicitor pays the costs of taxation; otherwise these costs are paid by the trustees out of the charity funds. The Commissioners may also at any time within six months of the payment of such a bill by charity trustees, if satisfied that it contains exorbitant charges, order it to be taxed, and any amount taxed off such paid bill must forthwith be repaid by the solicitor to the trustees (*e*).

Costs as between solicitor and client.

758. In matters of equitable jurisdiction the court has power to order an unsuccessful litigant to pay the costs of the action as between solicitor and client (*f*). In many cases such costs have been allowed out of a charity fund to all parties (*g*), or to some of them (*h*). But there is no rule binding the discretion of the court in the matter of costs (*i*), though it has been said in the case of a settlement of a scheme by the court that it is not customary to give costs between solicitor and client except with consent (*k*).

Interest on costs.

759. Though interest is recoverable (*l*) on costs which one party is ordered to pay to another, it is not so recoverable on costs directed to be raised out of a charity estate (*m*). But the question is one for the discretion of the court under its general jurisdiction as to costs (*n*). Under the Solicitors Act, 1860 (*o*), payment of costs already taxed may be ordered with interest at 4 per cent. (*p*).

When costs allowed out of charity funds.

760. The costs of making an unsuccessful application to the court in a charity matter may be given out of the charity funds, if there are substantial grounds for the application, though it may be induced by private interest (*q*), or even if the grounds of the application are based on a *bonâ fide* misconception of law (*r*). But the

(*e*) Charitable Trusts Amendment Act, 1855 (18 & 19 Vict. c. 124), s. 40. The Commissioners in practice examine bills of costs and make such deductions as they think fit. Unless the solicitor acquiesces in the deductions or gives a satisfactory explanation of the items deducted which results in their restoration, the bill is ordered to be taxed. In some cases the Commissioners order taxation at once. See generally, as to taxation of costs, title SOLICITORS.

(*f*) *Andrews* v. *Barnes* (1888), 39 Ch. D. 133, C. A.

(*g*) *A.-G.* v. *Carte* (1746), 1 Dick. 113; *Moggridge* v. *Thackwell* (1802), 7 Ves. 69, 88; *Hereford (Bishop)* v. *Adams* (1802), 7 Ves. 324, 332; *Mills* v. *Farmer* (1815), 1 Mer. 55; *Gaffney* v. *Hevey* (1837), 1 Dr. & Wal. 25; *Wickham* v. *Bath (Marquis)* (1865), L. R. 1 Eq. 17, 25.

(*h*) *A.-G.* v. *Stewart* (1872), L. R. 14 Eq. 17.

(*i*) *Aria* v. *Emanuel* (1861), 9 W. R. 366; *Wilkinson* v. *Barber* (1872), L. R. 14 Eq. 96, 99.

(*k*) *Martin* v. *Maugham* (1844), 13 L. J. (CH.) 394.

(*l*) See Judgments Act, 1838 (1 & 2 Vict. c. 110), ss. 17, 18. See the non-charitable case *Taylor* v. *Roe*, [1894] 1 Ch. 413; and title COSTS.

(*m*) *A.-G.* v. *Nethercote* (1841), 11 Sim. 529.

(*n*) *A.-G.* v. *St. David's (Bishop)* (1849), Seton, Judgments and Orders, 6th ed., pp. 1290, 1306, where 4 per cent. interest was given.

(*o*) 23 & 24 Vict. c. 127. See title SOLICITORS.

(*p*) *Ibid.*, s. 27.

(*q*) *Re Stone's University Gift* (1860), 2 De G. F. & J. 529.

(*r*) *Re Bitton's Charity* (1907), 77 L. J. (CH.) 197

costs of vexatious proceedings (*s*), or of preparing a petition under the Charities Procedure Act, 1812, to which the Attorney-General refuses his fiat (*t*), or of presenting a petition under the same Act (*a*), where, the case being complex, an action would have been the proper mode of procedure (*b*), are not allowed out of the charity funds. In some cases unsuccessful applications in charity matters are dismissed without costs (*c*).

Costs of unnecessary parties.

Where an unnecessary party, by setting up a claim, renders service of a petition upon him necessary, costs will not be paid to him out of the charity fund (*d*). Where a person who is personally interested in a charity attends proceedings before a master, he is entitled to his costs. If not so interested he ought not to go before the master at all; at any rate, if he does attend he will not get his costs out of the charity fund (*e*), unless he can show that the charity is likely to derive benefit from his attendance (*f*).

Costs of appeals.

761. There must be a substantial ground for an appeal by defendants in a charity suit to exempt them from payment of costs if the appeal is unsuccessful (*g*). As a rule, in the case of appeals, costs of all parties should not be given out of the charity funds, as such a practice tends to encourage groundless appeals (*h*).

Appeals from Commissioners.

In the case of an appeal from an order of the Charity Commissioners, the court may make any order respecting the costs, charges or expenses incident to the appeal, and may also, before hearing or proceeding with it, require from any appellant other than the Attorney-General proper security for such costs, charges and expenses as may be eventually payable by the appellant (*i*).

Appeals from county courts.

Persons appealing from an order of the county court made upon any application under the Charitable Trusts Act, 1853, may be required by the Charity Commissioners to become bound with two sufficient sureties, to be approved by the registrar of the county court, in any sum thought reasonable by the Charity Commissioners, to pay such costs of the proceedings on the appeal as shall be ordered to be paid by such appellant, and also (if the Commissioners think fit) to indemnify the charity against the costs and expenses of attending such appeal (*k*). In case of non-payment

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(*s*) *Re Chertsey Market* (1819), 6 Price, 261, where there was great delay in bringing forward charges of breach of trust against the representatives of deceased trustees and the petition was accordingly held vexatious.

(*t*) *Re Poplar and Blackwall Free School* (1878), 8 Ch. D. 543.

(*a*) In *Ludlow Corporation* v. *Greenhouse* (1827), 1 Bli. (N. S.) 17, H. L., it was laid down by Lord ELDON and Lord REDESDALE that Romilly's Act was meant to apply to simple cases only.

(*b*) *Re Phillipott's Charity* (1837), 8 Sim. 391.

(*c*) *A.-G.* v. *Stewart* (1872), L. R. 14 Eq. 17, 25.

(*d*) *Re Shrewsbury School* (1849), 1 Mac. & G. 86.

(*e*) *Ibid.*, *per* Lord COTTENHAM, L.C., at p. 334.

(*f*) *Ibid.* at p. 335. See also R. S. C., Ord. 55, rr. 40—43, as to costs of attendances at chambers.

(*g*) *A.-G.* v. *Rochester Corporation* (1854), 5 De G. M. & G. 797.

(*h*) *Bruce* v. *Deer* (*Presbytery*) (1867), L. R. 1 H. L. Sc. & Div. 96, *per* Lord CRANWORTH, at p. 98.

(*i*) Charitable Trusts Act, 1860 (23 & 24 Vict. c. 136), s. 8.

(*k*) Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 39. For form of

SECT. 7. Costs.

of costs ordered to be paid by the appellant the bond may be enforced and the money recovered applied to indemnify the charity estate, or the person damnified, or otherwise as the court thinks fit (*l*).

Costs depending on form of application.

762. Though it is the duty of the court in charity cases to grant the proper relief, whether it has been asked or not, the question of costs may depend on the form of the application (*m*).

Co-defendant liable for costs of trustee defendants.

763. Where the Attorney-General takes proceedings on behalf of a charity and there are two sets of defendants, namely, the trustees of the charity and another party who in the event is adjudged liable to pay the costs, the court may direct the defendant so liable to pay the costs of the trustees directly instead of ordering the trustees' costs to be paid out of the charity fund and afterwards to be repaid by such defendant (*n*).

Costs of proceedings to set aside lease.

764. As a rule the costs of proceedings to set aside an improvident lease of charity lands are paid by the lessee (*o*). But the costs of setting aside a lease at an undervalue made in pursuance of a direction in a will which the court holds to be void as a perpetuity may be directed to be paid by the lessor (*p*). Where the lessee is the personal representative of the original lessee and long possession is proved, the lease may be set aside without costs (*q*).

Application under special Act.

765. In all cases where an application is made under a special Act, the court may give costs, even though not authorised to do so by the special Act (*r*).

Hearing before Lord Chancellor as visitor.

766. The Lord Chancellor has power to award costs on the hearing of petitions brought before him as visitor of a royal foundation (*s*).

Proceedings in county courts.

767. The costs of proceedings in the county courts under the Charitable Trusts Acts are governed by the County Court Rules, 1903 (*t*).

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notice of appeal and bond, see Yearly County Court Practice, 1908, Vol. II., p. 94; County Court Rules, 1903.

(*l*) Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 40.

(*m*) *A.-G.* v. *Hartley* (1820), 2 Jac. & W. 369; and see p. 319, *ante*.

(*n*) *A.-G.* v. *Chester Corporation* (1851), 14 Beav. 338, 341. See also *Re St. Paul's School* (1870), 18 W. R. 450, and the non-charitable case *Rudow* v. *Great Britain Mutual Life Assurance Society* (1881), 17 Ch. D., *per* JESSEL, M.R., at p. 608, C. A.; *Sanderson* v. *Blyth Theatre Co.*, [1903] 2 K. B. 533.

(*o*) *A.-G.* v. *Hotham* (*Lord*) (1823), Turn. & R. 209, 220—222.

(*p*) *A.-G.* v. *Greenhill* (1863), 33 L. J. (CH.) 208 (costs given as between solicitor and client).

(*q*) *A.-G.* v. *Owen* (1805), 10 Ves. 555, where Lord ELDON said, however, at p. 562, that this case was not to be taken as a precedent for such lenient treatment.

(*r*) Supreme Court of Judicature Act, 1890 (53 & 54 Vict. c. 44), s. 5. Prior to the passing of this Act the court had no such power (*Re Bedford Charity* (*Masters*) (1819), 2 Swan. 470, 532). See as to the present law, *Re Fisher*, [1894] 1 Ch. 450, C. A.

(*s*) *Queens' College* (*Case of*) (1821), Jac. 47. See also *A.-G.* v. *Catharine Hall, Cambridge* (*Master*) (1820), Jac. 401, 402; and p. 287, *ante*.

(*t*) See County Court Rules, 1903, Ord. 48, r. 24, and Appendix IV. (2).

SECT. 7. Costs. County charities.

768. In the case of charities which are by the trusts governing their administration expressly appropriated in whole or in part for the benefit of their county or county borough or any part thereof, the county council or county borough council are empowered to contribute out of the county fund or borough fund or rate towards the expenses of inquiries conducted by the Charity Commissioners into these charities (*a*).

(*a*) Charity Inquiries (Expenses) Act, 1892 (55 & 56 Vict. c. 15), s. 1.

CHARTER.

See COMPANIES; CORPORATIONS.

CHARTERPARTY.

See SHIPPING AND NAVIGATION.

CHATTELS PERSONAL.

See PERSONAL PROPERTY; SALE OF GOODS.

CHATTELS REAL.

See REAL PROPERTY AND CHATTELS REAL.

CHEAP TRAINS.

See CARRIERS.

CHEMICAL MANURES AND FEEDING STUFFS.

See AGRICULTURE; NUISANCE.

CHEMISTS.

See MEDICINE AND PHARMACY.

CHEQUES.

See BILLS OF EXCHANGE, PROMISSORY NOTES AND NEGOTIABLE INSTRUMENTS.

CHICORY.

See FOOD AND DRUGS; REVENUE.

CHILDREN.

See BASTARDY; CRIMINAL LAW AND PROCEDURE; HUSBAND AND WIFE; INFANTS AND CHILDREN.

CHILTERN HUNDREDS.

See PARLIAMENT.

CHOSES IN ACTION.

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,, ,, *Copyright*	,, COPYRIGHT.
Effect of Bankruptcy on Choses in Action	,, BANKRUPTCY AND INSOLVENCY.
Mortgages	,, MORTGAGE.
Transfers of Bills of Exchange and other Negotiable Instruments	,, BILLS OF EXCHANGE, PROMISSORY NOTES AND NEGOTIABLE INSTRUMENTS.
Transfers of Bills of Lading	,, SHIPPING AND NAVIGATION.
Transfer of Shares	,, COMPANIES.

Part I.—Description and Classification.

SECT. 1. General Description.

SECT. 1.—*General Description.*

Meaning.

769. The expression "chose in action" in the literal sense means a thing recoverable by action (*a*), as contrasted with a chose in possession, *i.e.*, a thing of which a person has not only ownership, but also actual physical possession. The meaning of the expression has varied from time to time (*b*), but it is now used to describe all personal rights of property which can only be claimed or enforced by action, and not by taking physical possession (*c*). It is used in respect of both corporeal and incorporeal personal property which is not in possession (*d*).

(*a*) For definitions of "chose in action" in the old writers, see Termes de la Ley (1708), *sub voc.* Chose in Action; 2 Bl. Com. 389, 396; Blount, Law Dictionary, *sub voc.* Chose in Action; Shep. Touch. 231, 430; Jacob's Law Dictionary (1729); Bro. Abr. tit. Chose in Action; Co. Litt. 120 a, 213 a, 292 b, 351; and for modern definitions of the expression, see Williams, Personal Property, 16th ed. (1906), 27 and 29; Goodeve, Personal Property, 4th ed. (1904), 123, 124; Wharton, Law Lexicon, 10th ed. (1907), *sub voc.* Chose in Action; Sweet, Law Dictionary (1882), *sub voc.* Chose in Action; Stroud, Judicial Dictionary, 2nd ed. (1903), *sub voc.* Chose in Action. And see generally Law Quarterly Review, Vol. IX., p. 311; Vol. X., pp. 143, 303; Vol. XI., pp. 64, 223, 238; Pollock, Law of Contracts, 7th ed. (1902), p. 217, Appendix F. The expression is found in the history of English law with so many meanings attached to it, and has been and still is employed to denote so many and such various classes of things, that it is impossible to give an accurate and complete definition of what it means and may include at the present day. The various kinds of property included under the term have little in common beyond the characteristic fact of their not being subjects of actual physical possession.

(*b*) The phrase seems to have been once used as almost equivalent to a right of action. See Shep. Touch. 231, 430; Bro. Abr. tit. Chose in Action, pl. 8; Co. Litt. 292 b. Compare the old classification of choses in action into real, personal, and mixed (Bro. Abr. tit. Chose in Action; Sheppard's Abridgment (1675), tit. Chose in Action; *Colonial Bank* v. *Whinney* (1885), 30 Ch. D. 261, *per* FRY, L.J., at p. 286, C. A.); see title ACTION, Vol. I., pp. 31 *et seq.*

(*c*) *Torkington* v. *Magee*, [1902] 2 K. B. 427, *per* CHANNELL, J., at p. 430; *Colonial Bank* v. *Whinney* (1886), 11 App. Cas. 426, 440. There are, however, certain subjects of property usually claimed as choses in action which are not in fact recoverable by action, and are therefore not strictly choses in action, *e.g.*, debts due on foreign bonds (*Re Huggins, Ex parte Huggins* (1882), 21 Ch. D. 85, 90, 91; *Picker* v. *London and County Banking Co.* (1887), 18 Q. B. D. 515, 519, C. A.), Government stock (*Re Huggins, Ex parte Huggins, supra*), and probably patent right and copyright; see Law Quarterly Review, Vol. X., p. 303. As to the cases generally in which an action will not lie, see title ACTION, Vol. I., p. 17.

(*d*) 2 Bl. Com. 396; *Colonial Bank* v. *Whinney, supra*, in C. A., *per* FRY, L.J., at p. 285; and compare *Franklin* v. *Neate* (1844), 13 M. & W. 481. "Chose in action" has been used to describe both a right of action in respect of a chattel and the chattel itself (Jacob's Law Dictionary (1744), *sub voc.* Choses; 1 Brownl. 33), and further includes in some writers mere symbols of property, *e.g.*, a bond (Co. Litt. 120 a, 232; Tomlin's Law Dictionary, *sub voc.* Assignment) or a bill of exchange (*Ryall* v. *Rowles* (1749), 1 White & Tud. L. C. 96, and notes thereto; *Master* v. *Miller* (1791), 4 Term Rep. 320, 340). It includes some forms of property of which no manual possession is possible, *e.g.*, shares in a joint stock company (*Colonial Bank* v. *Whinney, supra*. A shareholder's right to obtain payment of his proportion of a declared dividend is a debt, and

SECT. 1. General Description.

770. A chose in action, being in effect a mere right to recover by action, has no absolute local existence (*e*). But a debt is for some purposes treated as possessing a locality, which in the case of a simple contract debt is that of the debtor, and in the case of a specialty, which has a species of corporeal existence in the sealed instrument, the place where that instrument is situated (*f*). Locality.

SECT. 2.—*Classification.*

SUB-SECT. 1.—*Modes of Classification.*

771. Choses in action have been variously classified, sometimes according to the incidents of the rights or property concerned (*g*), at other times according to their assignability (*h*), and yet again according to the mode of procedure necessary for reducing them into possession. The latter is the basis of the classification now in use (*i*). Modes of classification.

772. By this classification choses in action are divided into—(1) legal choses in action; and (2) equitable choses in action. Such a classification is neither logical nor exhaustive, since it neither embraces all choses in action nor carries with it a sufficiently clear indication as to what choses in action are thereby denoted. For there are choses in action which are not enforceable in any court, but depend for their reduction into possession, if they are so reducible at all, upon a variety of circumstances and conditions (*k*). By procedure for reduction into possession.

therefore a separate chose in action (*Dalton* v. *Midland Counties Rail. Co.* (1853), 13 C. B. 474; *Re Severn and Wye and Severn Bridge Rail. Co.*, [1896] 1 Ch. 559).

(*e*) *Lee* v. *Abdy* (1886), 17 Q. B. D. 309, 311, 312; *Commissioners of Stamps* v. *Hope*, [1891] A. C. 476, 481, P. C.

(*f*) Bac. Abr. tit. Executors and Administrators E; Roll. Abr. tit. Executor, 908; *Commissioners of Stamps* v. *Hope*, *supra*, at p. 482 (probate duty case), approving *Gurney* v. *Rawlins* (1836), 2 M. & W. 87; see *King* v. *Sutton* (1670), 1 Wms. Saund. 274; *Re Queensland Mercantile and Agency Co., Ex parte Australasian Investment Co., Ex parte Union Bank of Australia*, [1892] 1 Ch. 219, C. A.; *Re Maudslay, Sons and Field*, [1900] 1 Ch. 602; *Kelly* v. *Selwyn*, [1905] 2 Ch. 117; *Easton* v. *Carter* (1850), 5 Exch. 8; *Lysons* v. *Burrow* (1836), 2 Bing. (N. C.) 486.

(*g*) *Lee* v. *Abdy*, *supra*, at pp. 311, 312. The division of choses in action into personal, real, and mixed, according to whether they arose out of personal rights or obligations (*e.g.*, debt) or out of real rights and obligations (*e.g.*, rights and titles to land either of entry or of action), or out of a combination of both (*e.g.*, wardship), was recognised as early as 33 Hen. 8 (Bro. Abr. tit. Chose in Action; Sheppard's Abridgment, tit. Chose in Action).

(*h*) Before the Judicature Act, 1873 (36 & 37 Vict. c. 66), choses in action were divided into—(1) those assignable at common law (as to which see note (*n*), p. 365, *post*); (2) those assignable in equity only (as to which see pp. 374 *et seq.*, *post*); (3) those assignable by statute (as to which see pp. 393 *et seq.*, *post*); (4) those not assignable at all (as to which see pp. 400 *et seq.*, *post*).

(*i*) Another classification of choses in action sometimes made is that which divides them into—(1) those which are immediately reducible into possession (*e.g.*, a debt due and payable *in præsenti*); and (2) those which are not immediately reducible into possession (*e.g.*, a reversionary interest in Consols or a reversionary interest under a testamentary disposition) (*Purdew* v. *Jackson* (1824), 1 Russ. 1).

(*k*) See note (*c*), p. 360, *ante*.

SECT. 2. Classification.

SUB-SECT. 2.—*Legal Choses in Action.*

Legal choses in action.

773. Legal choses in action (*l*) are those which can be recovered or enforced by action at law, as, for instance, a debt, a bill of exchange, or a claim on a policy of insurance (*m*).

SUB-SECT. 3.—*Equitable Choses in Action.*

Equitable choses in action.

774. Equitable choses in action are those which were enforceable only by what was formerly called a suit in equity, now represented by proceedings in the Chancery Division of the High Court of Justice, though they may be enforced at the present time in any division of the High Court (*n*).

Such choses in action arise out of those kinds of property and rights in respect of which the Court of Chancery formerly had, and the Chancery Division now has, exclusive or peculiar jurisdiction, such as a beneficial interest in a partnership (*o*), a share or other pecuniary interest in an incorporated company (*p*), an interest in trust funds (*q*), a legacy (*r*), or a reversionary interest under a will (*s*).

SECT. 3.—*Enumeration of Choses in Action.*

Enumeration of choses in action.

775. In order that a better and more comprehensive idea as to the true nature and extent of the expression may be formed, it may be convenient to show in some detail what things and kinds of property have been held to be choses in action. The following enumeration is accordingly given of things which have been held to be choses in action, and which are grouped in four divisions for purposes of convenience only (*t*) :—

Debts.

776. Debts (*u*), whether due by specialty or by simple contract, and whether debts of record or judgment debts (*a*).

Mortgage debts (*b*).

(*l*) In the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (6), the expression "legal chose in action" is employed with a special and peculiar meaning (as to which see p. 369, *post*).

(*m*) See p. 395, *post*.

(*n*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 24.

(*o*) *Re Bainbridge, Ex parte Fletcher* (1878), 8 Ch. D. 218.

(*p*) *Colonial Bank* v. *Whinney* (1885), 30 Ch. D. 261, 284, C. A.

(*q*) *Piggott* v. *Stewart*, [1875] W. N. 69.

(*r*) *Deeks* v. *Strutt* (1794), 5 Term Rep. 690; *Jennings* v. *Bond* (1845), 8 I. Eq. R. 755.

(*s*) *Re Tritton, Ex parte Singleton* (1889), 61 L. T. 301.

(*t*) Reference should also be made to the list of things which have been held to be legal choses in action within the Judicature Act, 1873 (36 & 37 Vict. c. 66), see p. 368, *post*.

(*u*) Y. B. 37 Hen. 6, 13; Co. Litt. 292 b; Bro. Abr. tit. Chose in Action; *Brice* v. *Bannister* (1878), 3 Q. B. D. 569, 573, C. A.; *Buck* v. *Robson* (1878), 3 Q. B. D. 686; *Walker* v. *Bradford Old Bank* (1884), 12 Q. B. D. 511, 516; *Re Turcan* (1889), 40 Ch. D. 5, C. A.

(*a*) Including future book debts (*Tailby* v. *Official Receiver* (1888), 13 App. Cas. 523, 533) and debts due but not payable till a future time (*Re Davis & Co., Ex parte Rawlings* (1888), 22 Q. B. D. 193, C. A.).

(*b*) *Taylor* v. *London and County Banking Co.*, [1901] 2 Ch. 231, C. A., *per* STIRLING, L.J., at p. 254.

Debentures of various kinds (*c*).
Debenture stock (*c*).
Dividends on bank stock (*d*).
Dividends on a share in a company (*e*).
Dividends declared in a bankruptcy (*f*).
Right to rent (*g*).
Copyhold fines which have accrued due (*h*).
Tithes (*i*).
Annuities (*j*) in fee, for life or for years (*k*), an annuity due under a covenant (*l*), but not one charged on leaseholds (*m*).
Fund payable out of the Exchequer for public services (*n*).
Negotiable instruments (*o*), including bills of exchange, promissory notes, and cheques (*p*).

Subjects of property not capable of physical possession.

777. Stock in public funds (*q*).
Share of stock (*r*).
Shares in joint stock companies (*s*), railways, and canals (*t*), and presumably now in every kind of company (*u*).
Fund in court (*w*).
Policies of assurance and insurance of every kind (*x*).
Pensions, both full and half-pay (*a*).
Patents (*b*).

(*c*) *Re Northern Assam Tea Co., Ex parte Universal Life Assurance Co.* (1878), L. R. 10 Eq. 458, 463; *Re Pryce, Ex parte Rensburg* (1877), 4 Ch. D. 685, 688.
(*d*) *McCarthy* v. *Goold* (1810), 1 Ball & B. 387.
(*e*) *Dalton* v. *Midland Counties Rail. Co.* (1853), 13 C. B. 474; *Re Severn and Wye and Severn Bridge Rail. Co.*, [1896] 1 Ch. 559.
(*f*) *Re Irving, Ex parte Brett* (1877), 7 Ch. D. 419, 422.
(*g*) *Re Whitting, Ex parte Rowell* (1878), 39 L. T. 259; *Knill* v. *Prowse* (1884), 33 W. R. 163; Jacob's Law Dictionary (1732), *sub voc.* Choses.
(*h*) *Shuttleworth* v. *Garnet* (1689), 3 Lev. 261, 262.
(*i*) Y. B. 5 Edw. 4; Bro. Abr. tit. Chose in Action.
(*j*) Y. B. 21 Edw. 4, 84; *Gerrard* v. *Boden* (1627), Het. 80.
(*k*) 5 Co. Rep. 89; Fitzherbert, Grand Abridgment, tit. Grant, 45; Sheppard's Abridgment, tit. Chose in Action; Blount, Law Dictionary, *sub voc.* Chose in Action.
(*l*) *Norcutt* v. *Dodd* (1841), Cr. & Ph. 100.
(*m*) *Wiltshire* v. *Rabbits* (1844), 14 Sim. 76 (being a chattel interest in land).
(*n*) *Row* v. *Dawson* (1749), 1 Ves. Sen. 331.
(*o*) See generally title BILLS OF EXCHANGE ETC., Vol. II., pp. 457 *et seq.*
(*p*) *Master* v. *Miller* (1791), 4 Term Rep. 321, 340; *Colonial Bank* v. *Whinney* (1885), 30 Ch. D. 261, 282, C. A.
(*q*) *Dundas* v. *Dutens* (1790), 1 Ves. 196; see *Wildman* v. *Wildman* (1803), 9 Ves. 174; *R.* v. *Capper* (1817), 5 Price, 217.
(*r*) *Re Butler* (1888), 38 Ch. D. 286, C. A.; *R.* v. *Capper*, *supra*.
(*s*) *Humble* v. *Mitchell* (1839), 11 Ad. & El. 205, 208.
(*t*) Williams, Personal Property, 1st ed., 13.
(*u*) *Colonial Bank* v. *Whinney* (1886), 11 App. Cas. 426; see *Torkington* v. *Magee*, [1902] 2 K. B. 430.
(*w*) *Cockell* v. *Taylor* (1852), 15 Beav. 103; *Barnard* v. *Hunter* (1856), 2 Jur. (N. S.) 1213, 1215.
(*x*) *Re Moore, Ex parte Ibbetson* (1878), 8 Ch. D. 519, C. A.
(*a*) Goodeve, Personal Property, 4th ed. (1901), 136, 137; and see p. 401, *post*.
(*b*) See note (*e*), p. 360, *ante*, and including future patent rights (*Printing and Numerical Registering Co.* v. *Sampson* (1875), L. R. 19 Eq. 462).

SECT. 3. **Enumeration of Choses in Action.**

Copyrights (*c*).
Bills of lading (*d*).
Charterparties (*e*).
Right of presentation to a church when vacant by the owner of an advowson (*f*).

Equitable rights to property.

778. Trusts (*g*) and trust funds (*h*).
Uses (*i*).
Legacies (*k*) and the like, including equitable interests in a fund etc. (*l*).
Share under an intestacy (*m*).
Reversionary interests in trust funds (*n*).
Share in a partnership (*o*).

Rights enforceable by action.

779. Right of action (*p*) arising under contract (*q*), including claim for unliquidated damages for breach of contract (*r*).
Right of action arising out of tort (*a*).
Claims against directors of a company for misfeasance (*b*).

(*c*) Williams, Personal Property, 1848, 1st ed. 7, where the author says: "For want of a better classification, these subjects (patents, copyrights etc.) of personal property are now usually spoken of as choses in action. They are, in fact, personal property of an incorporeal nature, and a recurrence to the history of their classification amongst choses in action will help to explain some of their peculiarities." But see Law Quarterly Review, Vol. IX., 311, 314; Vol. X., 314; Vol. XI., 71, 238.

(*d*) *Caldwell* v. *Ball* (1786), 1 Term Rep. 205, 216; and see p. 395, *post*.

(*e*) *Mangles* v. *Dixon* (1852), 3 H. L. Cas. 702, 726.

(*f*) *Stephens* v. *Wall* (1569), 3 Dyer, 282 b; *Brooksbie's Case* (1589), Cro. Eliz. 174; Co. Litt. 90 a, 212 a, 351 a; *Ryall* v. *Rowles* (1749), 1 White & Tud. L. C. 96.

(*g*) 4 Co. Inst. 85.

(*h*) *Piggott* v. *Stewart*, [1875] W. N. 69.

(*i*) 4 Co. Inst. 85; and compare Gilbert, Uses, p. 198, and Sugden's edition, p. 399; Holmes, Common Law (1882), p. 407.

(*k*) *Jennings* v. *Bond* (1845), 8 I. Eq. R. 755; *Seys* v. *Price* (1710), 9 Mod. Rep. 217.

(*l*) *Grosvenor* v. *Lane* (1741), 2 Atk. 186; *Re Freshfield* (1879), 11 Ch. D. 198, 200; *Dearle* v. *Hall* (1823), 3 Russ. 1, 11; *Wilkinson* v. *Charlesworth* (1847), 10 Beav. 324, 328.

(*m*) *Widgery* v. *Pepper* (1877), 26 W. R. 546, C. A.; *Re Barber* (1879), 11 Ch. D. 442; *Bates* v. *Dandy* (1741), 2 Atk. 207.

(*n*) *Honner* v. *Morton* (1828), 3 Russ. 65, 68; *Curtis* v. *Sheffield* (1836), 8 Sim. 176; *Re Butler* (1888), 38 Ch. D. 286, 292, C. A.; *Re Tritton, Ex parte* (1889), 61 L. T. 301; *Le Vassur* v. *Scratton* (1844), 14 Sim. 116; *Hornsby* v. *Lee* (1816), 2 Madd. 16; *Robinson* v. *Bavasor* (1734), Vin. Abr. tit. Assignment, D 29.

(*o*) *Re Bainbridge, Ex parte Fletcher* (1878), 8 Ch. D. 218.

(*p*) Shep. Touch. 231; 2 Bl. Com. 397, 436; Jacob, Law Dictionary (1744), *sub voc.* Choses.

(*q*) *Brice* v. *Bannister* (1878), 3 Q. B. D. 569, C. A.; *Walker* v. *Bradford Old Bank* (1884), 12 Q. B. D. 511; Bro. Abr. tit. Chose in Action; but see *May* v. *Lane* (1894), 64 L. J. (Q. B.) 236, 238, C. A.; *Dawson* v. *Great Northern and City Rail. Co.*, [1905] 1 K. B. 260, 270, 271, C. A.

(*r*) *Ogdens, Ltd.* v. *Weinberg* (1906), 95 L. T. 567, H. L.

(*a*) Jacob's Law Dictionary (1744), *sub voc.* Choses; Termes de la Ley (1708), *sub voc.* Choses; see *Rogers* v. *Spence* (1846), 12 Cl. & Fin. 700, H. L.; *Rose* v. *Buckett*, [1901] 2 K. B. 449, C. A.; *Gibbon* v. *Dudgeon* (1881), 45 J. P. 748; and the cases cited in note (*q*), p. 369, *post*; note (*x*), p. 402, *post*.

(*b*) *Re Park Gate Waggon Works Co.* (1881), 17 Ch. D. 234, C. A., decided on Companies Act, 1862 (25 & 26 Vict. c. 89), s. 95 (3).

The right of a trustee to recover trust funds from a former trustee guilty of breach of trust (*c*).

An assignor's right to be indemnified by an assignee against the covenants in a lease assigned (*d*).

Lessee's right in equity to be relieved against a forfeiture of the lease (*e*).

Licence to take possession of chattels (*f*).

Right of re-entry on non-payment of rent (*g*).

Right of re-entry upon land under a condition arising by virtue of deed or feoffment (*h*).

Right or title of entry into land of which a person is disseised (*i*).

Right to a property in title-deeds when in the hands of third persons (*j*).

Mortgage deeds, being securities for the payment of money (*k*).

Ticket in a Derby sweepstakes (*l*).

Benefit of a contract to purchase a reversionary interest (*m*).

Part II.—Assignment of Choses in Action.

SECT. 1.—*In General.*

780. As a general rule choses in action may be transferred from one person to another by assignment *inter vivos* (*n*). There are, General power of assignment.

(*c*) *Re Benett*, [1906] 1 Ch. 216, 230, C. A.

(*d*) *Re Perkins*, [1898] 2 Ch. 182, 187, C. A.

(*e*) *Howard* v. *Fanshawe*, [1895] 2 Ch. 581, 589, decided upon Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 50.

(*f*) *Re Davis & Co., Ex parte Rawlings* (1888), 22 Q. B. D. 193, C. A.; *Brown* v. *Metropolitan Counties Life Assurance Society* (1859), 28 L. J. (Q. B.) 236.

(*g*) Sheppard's Abridgment, tit. Choses.

(*h*) Co. Litt. 214; *Wynter's Case* (1572), Dyer, 308 b.

(*i*) Bro. Abr. tit. Chose in Action, 141, pl. 14; Shep. Touch. 231; Tomlin's Law Dictionary, *sub voc.* Choses; Vin. Abr. tit. Assignment.

(*j*) Y. B. 9 Hen. 6, pl. 64; Bro. Abr. tit. Chose in Action; *Hobson* v. *Mellond* (1841), 2 Mood. & R. 342.

(*k*) *R.* v. *Powell* (1852), 21 L. J. (M. C.) 78; and compare *Re Richardson, Shillito* v. *Hobson* (1885), 30 Ch. D. 396, C. A.

(*l*) *Jones* v. *Carter* (1845), 8 Q. B. 134, 138.

(*m*) *Torkington* v. *Magee*, [1902] 2 K. B. 427.

(*n*) At common law choses in action could not as a rule be assigned (2 Bl. Com. 442; *Lampet's Case* (1613), 10 Co. Rep. 48 a; Termes de la Ley, *sub voc.* Chose in Action; *Master* v. *Miller* (1791), 4 Term Rep. 320; see *Picker* v. *London and County Banking Co.* (1887), 18 Q. B. D. 515, 519, C. A.), there being, however, an exception in the case of an annuity (Co. Litt. 144 b; *Baker* v. *Brooke* (1548), 1 Dyer, 65 a; *Maund's Case* (1601), 7 Co. Rep. 28 b). But an assignee of a chose in action was even at common law generally allowed to sue in the name of the assignor (*Master* v. *Miller*, *supra*, at p. 340; *Legh* v. *Legh* (1799), 1 Bos. & P. 447; *Roxburghe* v. *Cox* (1881), 17 Ch. D. 520, C. A., *per* JAMES, L.J., at p. 526; Y. B. 15 Hen. 7, 2; Bro. Abr. tit. Chose in Action, pl. 3; Freem. (CH.) 144), and in some cases a power of attorney was given for this purpose (Ames, Harvard Law Review, iii. 340 and note; 1 Lilly's Abridgment, tit. Assignment, 103). See also *Deering* v. *Carringdon* (or *Farrington*) (1675), 3 Keb. 304; *Baker* v. *Edmonds* (1647), Sty. 62; *Fowke* v. *Boyle* (1652), Sty. 348; Williams, Personal Property, 1st ed. (1848), 101. In equity assignments of choses in action have from an early date been permitted (see p. 374, *post*), and now such assignments will be given effect to in all courts

SECT. 1. In General.

however, certain exceptions to this rule which will be dealt with hereafter (*o*).

Modes of transfer.

The transfer may be effected either (1) by a legal assignment in accordance with the provisions of the Judicature Act, 1873 (*p*); or (2) by an equitable assignment, that is, an assignment which is effective to pass an equitable, though not a legal, right to the chose in action (*q*); or (3), in the case of certain particular choses in action, by an assignment in accordance with the provisions of special statutory enactments (*r*); or (4), in the case of certain negotiable instruments, by delivery of the document under the law merchant (*s*); or (5), in the case of a transfer by or to the Crown, under the special privileges the law allows in such a case (*t*).

Choses in action may, as a rule, be transferred by will (*u*).

Choses in action are also subject to transfer by operation of law upon death, bankruptcy etc. (*x*).

Assignments executed abroad.

781. Generally speaking, the validity of a transfer of a chose in action represented by a document depends on the law of the country where the transfer takes place (*a*). Thus, the transfer of an English policy, if invalid by the law of the country where it was executed, will be treated as invalid here, although it would have been good according to English law (*b*).

Where the chose in action is not represented by a document, the principle that a debt has a *quasi*-local existence applies (*c*), and an assignment of a chose in action owing from a person residing in a foreign country, if valid according to the law of that country, will be treated as valid in England (*d*); and will in English courts prevail over a prior assignment which is good according to English law but invalid according to the law of the foreign country (*e*).

On the same principle, where an English trust fund, settled by the will of an English testator, is being administered by the English court, the rights of claimants to the fund will be regulated by English law, and consequently an assignment executed in a country

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to the same extent and in the same manner as formerly in a court of equity (see Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 24; *Fitzroy* v. *Cave*, [1905] 2 K. B. 364, 374, C. A).

(*o*) See p. 400, *post*.

(*p*) 36 & 37 Vict. c. 66, s. 25 (6); see p. 367, *post*. The statute is retrospective (*Dibb* v. *Walker*, [1893] 2 Ch. 429).

(*q*) See p. 374, *post*.

(*r*) See p. 393, *post*.

(*s*) See p. 397, *post*.

(*t*) See p. 397, *post*.

(*u*) See title WILLS.

(*x*) See p. 399, *post*.

(*a*) *Colonial Bank* v. *Cady and Williams* (1890), 15 App. Cas. 267 (shares in a company); *Alcock* v. *Smith*, [1892] 1 Ch. 238, 255, C. A. (bill of exchange); *Embiricos* v. *Anglo-Austrian Bank*, [1905] 1 K. B. 677, C. A. (cheque); *Bradlaugh* v. *De Rin* (1870), L. R. 5 C. P. 473, Ex. Ch. (bill of exchange); see *Lebel* v. *Tucker* (1867), L. R. 3 Q. B. 77 (bill of exchange). As to conflict of laws generally, see title CONFLICT OF LAWS.

(*b*) *Lee* v. *Abdy* (1886), 17 Q. B. D. 309.

(*c*) See p. 361, *ante*.

(*d*) *Re Queensland Mercantile and Agency Co., Ex parte Australasian Investment Co., Ex parte Union Bank of Australia*, [1892] 1 Ch. 219, C. A.

(*e*) *Re Maudslay, Sons and Field*, [1900] 1 Ch. 602, 609, 610; see *Re Queensland Mercantile and Agency Co., supra*.

where notice is not necessary to give priority will be postponed to a subsequent assignment executed in England, but of which prior notice was given to the trustees (*f*).

Where an assignment is executed in a country the laws of which allow the assignee to sue in his own name, the assignee may sue in England in his own name (*g*).

SECT. 2.—*Assignments under the Judicature Act*, 1873, *s.* 25 (6).

SUB-SECT. 1.—*General Statement.*

Provisions of the Judicature Act.

782. Provided certain conditions are complied with, any debt or other legal chose in action may be assigned so as to vest in the assignee the legal right to the same and all the remedies therefor, with power to give a good discharge (*h*).

The conditions which must be complied with are—(1) the assignment must be in writing under the hand of the assignor; (2) the assignment must be absolute, and not purporting to be by way of charge only; and (3) express notice in writing of the assignment must be given to the debtor, trustee, or other person from whom the assignor would have been entitled to claim the debt or chose in action (*i*).

Such an assignment takes effect from the date of the notice (*j*), and will be subject to equities which would have been entitled to priority if the Judicature Act, 1873, had not been passed (*k*).

General effect.

783. The above provisions of the Judicature Act, 1873, do not create any new rights, but enable the legal right to a debt or other chose in action to be transferred to the assignee, together with all legal remedies, including the right to sue in his own name (*l*). The sub-section has not made assignable contracts which were not assignable in equity before (*m*). Nor, on the other hand, does it impair

(*f*) *Kelly* v. *Selwyn*, [1905] 2 Ch. 117.

(*g*) *O'Callaghan* v. *Thomond* (*Marchioness*) (1810), 3 Taunt. 81; *Alivon* v. *Furnival* (1834), 1 Cr. M. & R. 277, *per* PARKE, B., at p. 256.

(*h*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (6). The sub-section runs as follows:—"Any absolute assignment, by writing under the hand of the assignor (not purporting to be by way of charge only), of any debt or other legal chose in action, of which express notice in writing shall have been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be, and be deemed to have been, effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed) to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor; Provided always that if the debtor, trustee, or other person liable in respect of such debt or chose in action shall have had notice that such assignment is disputed by the assignor or anyone claiming under him, or of any other opposing or conflicting claims to such debt or chose in action, he shall be entitled, if he think fit, to call upon the several persons making claim thereto to interplead concerning the same, or he may, if he think fit, pay the same into the High Court of Justice under and in conformity with the provisions of the Acts for the relief of trustees."

(*i*) *Ibid.*

(*j*) *Ibid.* See p. 372, *post.*

(*k*) *Ibid.* As to these equities, see p. 373, *post.*

(*l*) *Schroeder* v. *Central Bank of London* (1876), 24 W. R. 710; *Walker* v. *Bradford Old Bank* (1884), 12 Q. B. D. 511; *Read* v. *Brown* (1888), 22 Q. B. D. 128, 132, C. A. See *Tolhurst* v. *Associated Portland Cement Manufacturers* (1900), [1902] 2 K. B. 660, 676, C. A.; and p. 373, *post.*

(*m*) *Tolhurst* v. *Associated Portland Cement Manufacturers* (1900), [1903] A. C. 414, 424.

SECT. 2. Assignments under the Judicature Act, 1873, s. 25 (6).

the efficacy of equitable assignments which would previously have been valid (*n*).

SUB-SECT. 2.—*What Choses in Action are within the Act.*

Debts.

784. With regard first to debts, the debt must be a definite sum (*o*). Whether an assignment of a definite part of an entire debt is within the section is open to question (*p*). An assignment of the balance which may remain after satisfying a garnishee order is effective and attaches to the balance in the hands of the debtor after payment into court under the order (*q*).

An absolute assignment of a specified future debt is within the section (*r*); as, for example, the balance standing at any time after the date of the assignment to the credit of the assignor at a bank (*s*), or future rents (*t*).

As examples of debts within the section may be mentioned—a debt due on the covenant in a mortgage deed (*a*); rent already accrued due under a lease (*b*); a judgment debt (*c*); a balance standing to the assignor's credit at his bank (*d*); the amount due on a solicitor's bill of costs, even before the delivery of a signed bill (*e*); a debt due from a solicitor to a town agent (*f*); a debt certified

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(*n*) *Brandt's (William) Sons & Co.* v. *Dunlop Rubber Co.*, [1905] A. C. 454, 461.

(*o*) *Jones* v. *Humphreys*, [1902] 1 K. B. 10, 13, where an assignment of so much of a salary as should be necessary to pay a definite sum, "and any further sums in which I may hereafter become indebted to you," was held not within the section.

(*p*) In *Brice* v. *Bannister* (1878), 3 Q. B. D. 569, Lord COLERIDGE, C.J., assumed, at p. 574, that an assignment of a definite part fell within the enactment, but the case was treated on appeal as a case of equitable assignment (see *ibid.*, *per* COTTON, L.J., at p. 576, and *Re Jones, Ex parte Nichols* (1883), 22 Ch. D. 782, *per* LINDLEY, L.J., at p. 787 C. A.); and it is clear that there may be an equitable assignment of a portion of a specified fund (*ibid.*; *Durham Brothers* v. *Robertson*, [1898] 1 Q. B. 765, *per* CHITTY, L.J., at p. 769, C. A.; *Yeates* v. *Groves* (1791), 1 Ves. 280; *Re Row, Ex parte South* (1818), 3 Swan. 392; and see pp. 375, 376, *post*). The correctness of Lord COLERIDGE'S decision in *Brice* v. *Bannister*, *supra*, was questioned in *Durham Brothers* v. *Robertson*, *supra*, for the reasons given by CHITTY, L.J., at p. 774: "The section speaks of an absolute assignment of any debt or other chose in action. It does not say 'or any part of a debt or chose in action.' It appears to me as at present advised to be questionable whether an assignment of part of an entire debt is within the enactment. If it be, it would seem to leave it in the power of the original creditor to split up the single legal cause of action for the debt into as many separate legal causes of action as he might think fit"; and see the doubt expressed in *Jones* v. *Humphreys*, *supra*, *per* DARLING, J., at p. 14, where, however, the rest of the court (Lord ALVERSTONE, C.J., and CHANNELL, J.) refused to express an opinion; *Hughes* v. *Pump House Hotel Co.*, [1902] 2 K. B. 190, C. A., *per* MATHEW, L.J., at p. 195.

(*q*) *Yates* v. *Terry*, [1902] 1 K. B. 527, C. A.

(*r*) *Jones* v. *Humphreys*, *supra*. Compare *Re Davis & Co.*, *Ex parte Rawlings* (1888), 22 Q. B. D. 193, C. A. (instalments of purchase-money of furniture); *Brice* v. *Bannister*, *supra* (instalments of purchase-money of a ship).

(*s*) *Walker* v. *Bradford Old Bank* (1884), 12 Q. B. D. 511.

(*t*) *Knill* v. *Prowse* (1884), 33 W. R. 163; *Southwell* v. *Scotter* (1880), 49 L. J. (Q. B.) 356, C. A.

(*a*) *Dibb* v. *Walker*, [1893] 2 Ch. 429.

(*b*) *Knill* v. *Prowse*, *supra*.

(*c*) *Goodman* v. *Robinson* (1886), 18 Q. B. D. 332.

(*d*) *Walker* v. *Bradford Old Bank*, *supra*.

(*e*) *Ingle* v. *M'Cutchan* (1884), 12 Q. B. D. 518.

(*f*) *Burlinson* v. *Hall* (1884), 12 Q. B. D. 347.

as due from a company in liquidation (*g*); the balance due to a legatee of his share in the residuary estate of a deceased person (*h*).

785. The term "chose in action" in the sub-section is not confined to legal choses in action strictly so called, but includes any right which the common law looked on as not assignable by reason of its being a chose in action, but which a court of equity dealt with as being assignable (*i*).

Rights included in "choses in action."

The following choses in action are within the statute: a claim under s. 68 of the Lands Clauses Consolidation Act, 1845, to compensation in respect of lands injuriously affected (*k*); the benefit of a contract to supply goods of a particular kind (*l*); the benefit of a contract for the purchase of a reversionary interest (*m*); the benefit of a covenant by the tenant of an hotel to purchase all beer from a particular brewery (*n*).

On the other hand, the following choses in action are not within the statute: the equity of redemption in a mortgage debt already assigned by way of mortgage (*o*); the right to sue for damages for a breach of contract already committed (*p*), or for damages for tort (*q*); the benefit of a contract to lend money (*r*); shares in a

(*g*) *Re Moss Bay Hematite Iron and Steel Co.* (1891), 8 T. L. R. 475, C. A.

(*h*) *Harding* v. *Harding* (1886), 17 Q. B. D. 442.

(*i*) *Torkington* v. *Magee*, [1902] 2 K. B. 427, 430, 431. See *Victoria Insurance Co.* v. *King* (1895), 6 Queensland L. J. R. 203, affirmed without expression of opinion on this point *sub nom. King* v. *Victoria Insurance Co.*, [1896] A. C. 250, P. C.; *Manchester Brewery Co.* v. *Coombs*, [1901] 2 Ch. 608, per FARWELL, J., at p. 619, where the learned judge seems to have regarded the quotation from the judgment in the Queensland court in *King* v. *Victoria Insurance Co.*, *supra*, at p. 254, as part of the judgment of the Privy Council, but as to this see *ibid.* at p. 256, and *Torkington* v. *Magee*, *supra*, *per* CHANNELL, J., at p. 433; compare *Mercantile Bank of London, Ltd.* v. *Evans*, [1899] 2 Q. B. 613, C. A.

It is to be observed that the sub-section speaks of notice to "the . . . trustee," implying that the enactment is applicable to an assignment of the beneficial interest in funds in the hands of a trustee, yet a claim to such an interest would before the Act have been primarily enforceable in a court of equity and not in a court of law. Further, the provision that the assignment is to be subject to all equities which would have had priority before the Act seems to show that cases are included in which the right of the assignee had been previously recognised by the court of equity; see *Torkington* v. *Magee*, *supra*, at p. 431.

(*k*) *Dawson* v. *Great Northern and City Rail. Co.*, [1905] 1 K. B. 260, 275, C. A.

(*l*) *Tolhurst* v. *Associated Portland Cement Manufacturers* (1900), [1903] A. C. 414. But the contract must not be of a personal nature (*Kemp* v. *Baerselman*, [1906] 2 K. B. 604, C. A.).

(*m*) *Torkington* v. *Magee*, *supra*, at pp. 431, 432, 434; and see *Ogdens, Ltd.* v. *Weinberg* (1906), 95 L. T. 567, H. L.

(*n*) *Manchester Brewery Co.* v. *Coombs*, *supra*.

(*o*) *Cronk* v. *M'Manus* (1892), 8 T. L. R. 449.

(*p*) *May* v. *Lane* (1894), 64 L. J. (Q. B.) 236, C. A.; *Torkington* v. *Magee*, *supra*, at p. 434; compare *Ogdens, Ltd.* v. *Weinberg*, *supra*, *per* Lord DAVEY, at p. 568, where an assignment of such a right was held good, apparently, because incident to the transfer of a business; see *Dawson* v. *Great Northern and City Rail. Co.*, *supra*, at p. 271; *Williams* v. *Protheroe* (1829), 5 Bing. 309.

(*q*) *E.g.*, assault, *May* v. *Lane*, *supra*, *per* RIGBY, L.J., at p. 238; see *Dawson* v. *Great Northern and City Rail. Co.*, *supra*, at pp. 270, 271, and the cases cited in note (*x*), p. 402, *post*. Compare, however, *King* v. *Victoria Insurance Co.*, *supra*, where a right of action for damages for negligence was held within the corresponding Queensland Act.

(*r*) *May* v. *Lane*, *supra*. See *Western Wagon and Property Co.* v. *West*, [1892] 1 Ch. 271.

SECT. 2. Assignments under the Judicature Act, 1873, s. 25 (6).

company (*s*); contracts involving special personal qualifications on the part of the person claiming performance (*a*).

SUB-SECT. 3.—*What Assignments are within the Act.*

786. In order that an assignment may be within the statute it must be absolute, and not purporting to be by way of charge only (*b*).

Absolute and not purporting to be by way of charge.

A conditional assignment, as, *e.g.*, an assignment expressed to be until money advanced is repaid, is not within the statute (*c*).

The existence of a trust in favour of the assignor, whether of the whole debt assigned (*d*) or of the surplus after retainer thereout of a definite sum by the assignee (*e*), does not prevent the assignment being "absolute," if it is such in point of form.

To be within the statute the assignment must not purport to be by way of charge only. A document given by way of charge is a document which only gives a right to payment out of a particular fund or property, and does not absolutely transfer the fund or property (*f*).

In order to determine whether an assignment purports to be by way of charge only, all the terms of the instrument must be considered, and whatever may be the phraseology adopted in some particular part, the intention must be determined on consideration of the whole (*g*). It is immaterial whether the consideration is a fixed sum or a current account, nor does it matter that the assignee has obtained a power of attorney and a covenant for further assurance (*h*). The fact that the assignment is expressed to be by way of security is not by itself sufficient to make it purport to be by way of charge only (*i*), but such an expression coupled with other circumstances may have that effect (*k*). An assignment of so much of a future debt as shall be enough to satisfy an uncertain future indebtedness is an assignment by way of charge only (*l*).

(*s*) *Torkington* v. *Magee*, [1902] 2 K. B. 427 430.

(*a*) *Tolhurst* v. *Associated Portland Cement Manufacturers* (1900), [1902] 2 K. B. 660, 670, 677, C. A.; *Kemp* v. *Baerselman*, [1906] 2 K. B. 604, C. A.; and see p. 403, *post*.

(*b*) See note (*h*), p. 367, *ante*; *Durham Bros.* v. *Robertson*, [1898] 1 Q. B. 765, 771, C. A.

(*c*) *Durham Bros.* v. *Robertson*, *supra*, at p. 773.

(*d*) *Comfort* v. *Betts*, [1891] 1 Q. B. 737, C. A., where several creditors of a debtor assigned their debts to a trustee for collection; *Wiesener* v. *Rackow* (1897), 76 L. T. 448, C. A.; *Fitzroy* v. *Cave*, [1905] 2 K. B. 364, C. A.

(*e*) *Burlinson* v. *Hall* (1884), 12 Q. B. D. 347.

(*f*) *Tancred* v. *Delagoa Bay and East Africa Rail. Co.* (1889), 23 Q. B. D. 239, 242.

(*g*) *Hughes* v. *Pump House Hotel Co.*, [1902] 2 K. B. 190, 193, C. A.

(*h*) *Ibid.* at pp. 197, 198. See, however, as to a power of attorney, *Mercantile Bank of London* v. *Evans*, [1899] 2 Q. B. 613, 616, C. A.

(*i*) *Hughes* v. *Pump House Hotel Co.*, *supra*; and compare *Mercantile Bank of London* v. *Evans*, *supra*, *per* VAUGHAN WILLIAMS, L.J., at p. 617; *Knill* v. *Prowse* (1884), 33 W. R. 163.

(*k*) *Mercantile Bank of London* v. *Evans*, *supra*, at p. 616, where the right of suing on the contract remained in the assignor.

(*l*) *Jones* v. *Humphreys*, [1902] 1 K. B. 10, 13, 14. A direction to pay a definite sum out of money due or to become due has been said to be only a charge (*Durham Bros.* v. *Robertson*, *supra*, at p. 774); see further, note (*p*), p. 368, *ante*.

A mortgage in ordinary form which transfers the property with a proviso for redemption and reconveyance is an absolute assignment within the statute (*m*). And where there is an assignment of a debt, absolute in form but in fact made by way of security, it will be within the statute, although an equitable right to reassignment on redemption will be implied (*n*).

Voluntary assignment.

787. A voluntary assignment is within the statute (*o*). And even if it is such a voluntary assignment as is not enforceable in equity by the assignee against the assignor, the debtor whose debt has been assigned cannot set this up as a ground of defence to an action by the assignee (*p*).

Object of assignment.

The object with which the assignment is made is immaterial (*q*). Thus, an assignment of debts, taken to enable the assignee to make the debtor a bankrupt and so disqualify him from being director of a company, is not by reason of its object invalid (*r*).

Form of assignment.

788. No particular form of assignment is required (*s*). A direction (*t*) or order (*a*) by the creditor to the debtor to pay the assignee is sufficient; or the indorsement to a particular person and handing over of a promissory note (*b*). But an order to pay as expressed in a cheque is not within the statute (*c*).

The assignment must be in writing under the hand of the assignor (*d*). The fact that the assignment is also under seal does not take it out of the operation of the statute (*e*). It is apprehended that signature by an agent is not sufficient (*f*).

(*m*) *Tancred* v. *Delagoa Bay and East Africa Rail. Co.* (1889), 23 Q. B. D. 239, disapproving *National Provincial Bank* v. *Harle* (1881), 6 Q. B. D. 626, and following *Burlinson* v. *Hall* (1884), 12 Q. B. D. 347; *Durham Bros.* v. *Robertson*, [1898] 1 Q. B. 765; *Hughes* v. *Pump House Hotel Co.*, [1902] 2 K. B. 190, C. A.; and compare *Mercantile Bank of London* v. *Evans*, [1899] 2 Q. B. 613, C. A.

(*n*) *Durham Bros.* v. *Robertson*, *supra*, at p. 772; and compare *Ibberson* v. *Neck* (1886), 2 T. L. R. 427.

(*o*) *Harding* v. *Harding* (1886), 17 Q. B. D. 442; *Lee* v. *Magrath* (1882), 10 L. R. Ir. 45, 49.

(*p*) *Walker* v. *Bradford Old Bank* (1884), 12 Q. B. D. 511.

(*q*) *Wiesener* v. *Rackow* (1897), 76 L. T. 448, C. A., where the assignment was to a debt collecting agency, the object being to enable an action to be brought in England for the benefit of the assignor, a foreigner resident abroad.

(*r*) *Fitzroy* v. *Cave*, [1905] 2 K. B. 364, C. A.

(*s*) Except, of course, where a special form is required by statute; see p. 391, *post*.

(*t*) *Harding* v. *Harding*, *supra*. See also note (*g*), p. 377, *post*.

(*a*) *Brice* v. *Bannister* (1878), 3 Q. B. D. 569, C. A.

(*b*) *Lee* v. *Magrath*, *supra*.

(*c*) *Schroeder* v. *Central Bank* (1876), 24 W. R. 710; compare *Hopkinson* v. *Forster* (1874), L. R. 19 Eq. 74; and see Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 53 (1); and note (*s*), p. 378, *post*.

(*d*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (6); and see note (*h*), p. 367, *ante*.

(*e*) See *Marchant* v. *Morton Down & Co.*, [1901] 2 K. B. 329, 832; *Torkington* v. *Magee*, [1902] 2 K. B. 427.

(*f*) See *Wilson* v. *Wallani*, 5 Ex. D. 155 (a case on s. 23 of the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71)). But see *Re Briggs & Co., Ex parte Wright*, [1906] 2 K. B. 209, where a deed assigning the book debts of a firm, executed by one partner, who also forged his partner's signature to it, was held to be a good equitable assignment, even if invalid as a deed, inasmuch as the making of such an assignment was within the partner's authority.

SECT. 2. Assignments under the Judicature Act, 1873, s. 25 (6).

789. An assignment of a debt or chose in action must be stamped as a conveyance (*g*). An unstamped document which is an assignment of a debt, though in form an order for payment of money, may be put in evidence on payment of the duty and penalty (*h*).

SUB-SECT. 4.—*Notice required by the Act.*

Notice in writing.

790. In order that the assignee may obtain the benefit of the statute, express notice in writing of the assignment must be given to the debtor, trustee or other person from whom the assignor would have been entitled to receive or claim the debt or chose in action (*i*). The assignment only operates under the statute as from the date of such notice (*k*). Consequently, if the debt is released or extinguished by payment or otherwise before notice is given, there is no transfer under the statute (*l*).

It has been held that if the date of the assignment is wrongly stated the notice is ineffectual (*m*).

The statute prescribes no limit of time within which the notice must be given (*n*), and a notice given after the death of the assignor (*o*), or after the death of the assignee (*p*), is effectual.

The statute does not prescribe that the notice must be given by any particular person (*q*). And a notice by the person in whom the equitable right is for the time being vested is sufficient to make the statute operate in his favour, although no notice was given by the original or by any intermediate assignee (*r*).

In the case of a company notice to the manager at the works, not communicated by him to the head office, may be sufficient (*s*).

It is apprehended that where there have been two assignments of the same debt, of both of which notice has been given to the debtor, if the assignee under the second assignment, without having notice of the first, gave notice to the debtor of his assignment before notice was given of the first assignment, he will have priority (*t*).

If a debtor has given a negotiable instrument, *e.g.*, a cheque, in payment of the debt, a subsequent notice that the debt has been

(*g*) See title REVENUE; and compare title BILLS OF EXCHANGE ETC., Vol. II., p. 571.

(*h*) *Buck* v. *Robson* (1878), 3 Q. B. D. 686; and see p. 379, *post*.

(*i*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (6); and see note (*g*), p. 367, *ante*. An assignment will be good in equity as between assignor and assignee without notice (*Gorringe* v. *Irwell India-Rubber and Gutta-Percha Works* (1886), 36 Ch. D. 128, C. A.); see further, p. 379, *post*.

(*k*) See note (*h*), p. 367, *ante*.

(*l*) *Lee* v. *Magrath* (1882), 10 L. R. Ir. 313, 319, 326, C. A., where the transferor appointed the debtor her executor. Compare *Harding* v. *Harding* (1886), 17 Q. B. D. 442, 445; *Re Bristow*, [1906] 2 I. R. 215.

(*m*) *Stanley* v. *English Fibres Industries, Ltd.* (1899), 68 L. J. (Q. B.) 839. But it is not so in the case of an equitable assignment (*Whittingstall* v. *King* (1882), 46 L. T. 520).

(*n*) See *Bateman* v. *Hunt*, [1904] 2 K. B. 530, 538, C. A.

(*o*) *Walker* v. *Bradford Old Bank, Ltd.* (1884), 12 Q. B. D. 511; *Dibb* v. *Walker*, [1893] 2 Ch. 429.

(*p*) *Bateman* v. *Hunt*, *supra*.

(*q*) See *ibid.* at p. 538.

(*r*) *Ibid.*, where the notice was given by the executor of a sub-assignee.

(*s*) *Brandt's* (*William*) *Sons & Co.* v. *Dunlop Rubber Co., Ltd.*, [1905] A. C. 454.

(*t*) See *Marchant* v. *Morton Down & Co.*, [1901] 2 K. B. 829.

assigned may be disregarded by the debtor even if the creditor still holds the cheque (*u*).

SECT. 2. Assignments under the Judicature Act, 1873, s. 25 (6).

SUB-SECT. 5.—*Effect of Assignment.*

791. An assignment operating under the statute transfers the legal right to the chose in action to the assignee as from the date of the notice, with power to give a good discharge for the same (*a*). The chose in action no longer belongs to the assignor, and he cannot sue for it (*b*). Consequently, in the case of an action on a debt assigned by instrument executed within the City of London, the assignment is part of the cause of action, and if the claim does not exceed £50 (*c*) the mayor's court has jurisdiction (*d*).

Transfer of legal right.

There is no machinery provided by the statute for the reverter of the legal right to the assignor; the only method is by retransfer, followed by notice in writing to the debtor as in the case of the first transfer (*e*).

An assignment operating under the statute passes all legal and other remedies for the chose in action (*f*). The primary result is that the assignee can bring an action in his own name where previously he could only have sued in the name of the assignor (*g*). But the assignee can only sue in his own name in cases in which before the statute he could have sued in the name of the assignor (*h*). He can also present a petition in bankruptcy, but if he is only a trustee the beneficial owner, if *sui juris*, must join in the petition (*i*). He can also present a petition for winding up a company (*j*). The assignee of a judgment debt may enforce payment by garnishee proceedings (*k*), by writ of *fi. fa.* or *elegit* (*l*), or by judgment summons, provided he complies with the formalities prescribed by the rules (*m*). He cannot, however, issue a bankruptcy notice (*n*).

Transfer of remedies.

792. An assignment under the statute is, however, subject to all equities which would have been entitled to priority over the assignee if the statute had not been passed (*o*), such as, for example, equities arising by reason of the doctrine of constructive notice (*p*).

Subject to equities.

(*u*) *Bence* v. *Shearman*, [1898] 2 Ch. 582, C. A.
(*a*) See note (*h*), p. 367, *ante*; *Torkington* v. *Magee*, [1902] 2 K. B. 427, 432; *Durham Bros.* v. *Robertson*, [1898] 1 Q. B. 765, 773.
(*b*) *Read* v. *Brown* (1888), 22 Q. B. D. 128, 132, C. A.
(*c*) Mayor's Court of London Procedure Act, 1857 (20 & 21 Vict. c. clvii.), s. 12.
(*d*) *Read* v. *Brown*, *supra*.
(*e*) *Durham Bros.* v. *Robertson*, *supra*, at p. 773.
(*f*) See note (*h*), p. 367, *ante*.
(*g*) *Marchant* v. *Morton Down & Co.*, [1901] 2 K. B. 829, 832; and see *King* v. *Victoria Insurance Co.*, [1896] A. C. 250, P. C.; *Manchester Brewery Co.* v. *Coombs*, [1901] 2 Ch. 608, 619; *Read* v. *Brown*, *supra*, at pp. 131, 132.
(*h*) *Marchant* v. *Morton Down & Co.*, *supra*; *Torkington* v. *Magee*, *supra*, at p. 435.
(*i*) *Re Adams*, *Ex parte Culley* (1878), 9 Ch. D. 307, C. A.; *Re Hastings*, *Ex parte Dearle* (1884), 14 Q. B. D. 184, C. A.; and see *Re Macoun*, [1901] 2 K. B. 700, C. A.
(*j*) See *Re Montgomery Moore Ship Collision Doors Syndicate* (1903), 72 L. J. (CH.) 624 (a case of equitable assignment).
(*k*) *Goodman* v. *Robinson* (1886), 18 Q. B. D. 332.
(*l*) *Ibid.* at p. 335.
(*m*) *East End Benefit Building Society* v. *Slack* (1891), 60 L. J. (Q. B.) 359.
(*n*) *Re Keeling*, *Ex parte Blanchett* (1886), 17 Q. B. D. 303, C. A.
(*o*) See note (*h*), p. 367, *ante*. As to these equities, see further p. 386, *post*.
(*p*) See *Buteman* v. *Hunt*, [1904] 2 K. B. 530, 538, C. A.

SECT. 2. Assignments under the Judicature Act, 1873, s. 25 (6).

So, although the assignment may only transfer the benefit and not the burden of a contract, the assignee will take subject to any claim under the contract, which would have been good against his assignor (*q*). The debtor, however, cannot impeach the assignment on the ground of its being voluntary (*r*). The equities must be existing, or arising out of circumstances existing, before notice is given of the assignment (*s*).

SUB-SECT. 6.—*Provisions for the Protection of the Debtor or Fundholder.*

Right to interplead.

793. Where the debtor or person liable in respect of the debt or chose in action has notice that the assignment is disputed by the assignor or anyone claiming through him or of any other opposing or conflicting claims to the debt or chose in action, he may interplead (*t*). Interpleader will not be allowed where there has not been sufficient notice of an absolute written assignment (*u*). If an action has been commenced against the debtor, the judge making an order in separate proceedings under this sub-section of the statute cannot stay the proceedings in the action (*w*). The debtor interpleading will ordinarily be entitled to deduct his costs (*a*).

Payment into court.

794. When the debtor or person liable has notice that the assignment is disputed by the assignor, or of other opposing or conflicting claims, he may pay the debt or chose in action into court under the Trustee Act, 1893 (*b*). This provision only applies where there has been an absolute assignment in writing in accordance with the previous part of the sub-section (*c*).

SECT. 3.—*Equitable Assignments.*

SUB-SECT. 1.—*What amounts to an Equitable Assignment.*

Recognition of assignment in equity.

795. From the earliest times courts of equity have always permitted and given effect to assignments of all kinds of choses in action when made for valuable consideration and not contrary to public policy (*d*).

(*q*) *Torkington* v. *Magee*, [1902] 2 K. B. 427, 432.

(*r*) *Walker* v. *Bradford Old Bank* (1884), 12 Q. B. D. 511; *Bruce* v. *Bannister* (1878), 3 Q. B. D. 569, 578, C. A.

(*s*) See further, p. 386, *post*.

(*t*) *Robinson* v. *Jenkins* (1890), 24 Q. B. D. 275, C. A., *per* FRY, L.J., at p. 279; see note (*h*), p. 367, *ante*. For a case of interpleader, see *Buck* v. *Robson* (1878), 3 Q. B. D. 686. As to interpleader, see title INTERPLEADER.

(*u*) *Re New Hamburg and Brazilian Rail. Co.*, [1875] W. N. 239.

(*w*) *Reading* v. *London School Board* (1886), 16 Q. B. D. 686.

(*a*) *Re Bristow*, [1906] 2 I. R. 215, 219; and see, further, title INTERPLEADER.

(*b*) See note (*h*), p. 367, *ante*. S. 42 of the Trustee Act, 1893 (56 & 57 Vict. c. 42), replaces the Trustee Relief Acts, 1847 (10 & 11 Vict. c. 96), and 1849 (12 & 13 Vict. c. 74). As to payment into court under the Trustee Act, 1893 (56 & 57 Vict. c. 42), see title TRUSTS AND TRUSTEES.

(*c*) *Re Sutton* (1879), 12 Ch. D. 175.

(*d*) *Warmstrey* v. *Tanfield* (*Lady*) (1629), 1 Rep. Ch. 16; *Goring* v. *Bickerstaffe* (1663), 1 Cas. in Ch. 4, 8; *Anon.* (1676), Freem. (CH.) 145; *Wyn* v. *Squib* (1717), 1 P. Wms. 378; *Row* v. *Dawson* (1749), 1 Ves. Sen. 331, 1 White & Tud. L. C. 93; *Wright* v. *Wright* (1750), 1 Ves. Sen. 409; *Whitfeld* v. *Fausset* (1750), 1 Ves. Sen. 387; *Burn* v. *Carvalho* (1839), 4 My. & Cr. 690; *Prosser* v. *Edmonds* (1835), 1 Y. & C. (EX.) 481; *Holloway* v. *Headington* (1837), 8 Sim. 324; *Re Clarke* (1887), 36 Ch. D. 348, C. A.; *Fitzroy* v. *Cave*, [1905] 2 K. B. 364, 372, C. A.

SECT. 3. Equitable Assignments.

Mode and form of assignment immaterial.

796. The mode or form of assignment is immaterial provided the intention of the parties is clear (*e*). The assignment may be verbal (*f*), unless in the particular case writing is required by law (*g*), and no particular form of words is necessary so long as they clearly show an intention that the assignee is to have the benefit of the chose in action (*h*). It may be addressed either to the debtor or to the assignee (*i*). An agreement amounting to an equitable charge may even be made out from a course of dealing between the parties (*j*).

An engagement or direction to pay a sum of money out of a specified debt or fund constitutes an equitable assignment, though not of the whole debt or fund (*k*). But it is necessary to specify the debt or fund (*l*). So also a mere charge on a debt or fund operates as a partial equitable assignment (*m*).

It is immaterial that the amount of the debt assigned is not ascertained at the date of the assignment (*n*).

Future debts.

797. In the case of future choses in action an assignment for value in terms present and immediate is sufficient, and will bind the subject-matter when it comes into existence, if it is of such a nature and so described as to be capable of being ascertained (*o*). Such an assignment will be good against the trustee in bankruptcy of the assignor with regard to debts due at the date of the assignment,

(*e*) *Tailby* v. *Official Receiver* (1888), 13 App. Cas. 523, 543; and see *Morgan* v. *Larivière* (1875), L. R. 7 H. L. 423.

(*f*) *Riccard* v. *Prichard* (1855), 1 K. & J. 277; *Brown, Shipley & Co.* v. *Kough* (1885), 29 Ch. D. 848, 854, C. A.; *Lee* v. *Mayrath* (1882), 10 L. R. Ir. 45, 49; *Tibbett* v. *George* (1836), 6 Nev. & M. (K. B.) 804; *Gurnell* v. *Gardiner* (1863), 4 Giff. 626; *Heath* v. *Hall* (1814), 4 Taunt. 326; and compare *London and Yorkshire Bank* v. *White* (1895), 11 T. L. R. 570.

(*g*) *E.g.*, when an interest in land, such as future rents, is assigned (*Re Whitting, Ex parte Hall* (1878), 10 Ch. D. 615).

(*h*) *Row* v. *Dawson* (1749), 1 Ves. Sen. 331, 1 White & Tud. L. C. 93; *Choone* v. *Baylis* (1862), 31 Beav. 351; *Brandt's* (*William*) *Sons & Co.* v. *Dunlop Rubber Co.*, [1905] A. C. 454, *per* Lord MACNAGHTEN, at p. 462; see *Gorringe* v. *Irwell India-Rubber and Gutta-Percha Works* (1886), 34 Ch. D. 128, 134, C. A.; *Durham Bros.* v. *Robertson*, [1898] 1 Q. B. 765, 769, C. A.; *Re Griffin*, [1899] 1 Ch. 408, 412; *Tailby* v. *Official Receiver*, *supra*.

(*i*) *Brandt's* (*William*) *Sons & Co.* v. *Dunlop Rubber Co.*, *supra*, *per* Lord MACNAGHTEN, at p. 462.

(*j*) *Brown, Shipley & Co.* v. *Kough*, *supra*, at pp. 854, 866.

(*k*) *Durham Bros.* v. *Robertson*, *supra*, *per* CHITTY, L.J., at p. 769; *Yeates* v. *Groves* (1791), 1 Ves. 280; *Re Row, Ex parte South* (1818), 3 Swan. 392.

(*l*) *Percival* v. *Dunn* (1885), 29 Ch. D. 128; *Lambe* v. *Orton* (1860), 1 Drew. & Sm. 125; *Burn* v. *Carvalho* (1839), 4 My. & Cr. 690; *Rodick* v. *Gandell* (1852), 1 De G. M. & G. 763; *Brice* v. *Bannister* (1878), 3 Q. B. D. 569, C. A., *per* COTTON, L.J., at p. 577; *Yeates* v. *Groves*, *supra*; *Watson* v. *Wellington* (*Duke*) (1830), 1 Russ. & M. 602; *Diplock* v. *Hammond* (1854), 5 De G. M. & G. 320.

(*m*) *Ibid.* As to charges, see p. 370, *ante*; and title MORTGAGE.

(*n*) *Crowfoot* v. *Gurney* (1832), 9 Bing. 372, 376.

(*o*) *Tailby* v. *Official Receiver*, *supra*, at pp. 533, 543, where an assignment of all future book debts was held not too vague; *Brown* v. *Tanner* (1868), 3 Ch. App. 597 (future freight); *Re Irving, Ex parte Brett* (1877), 7 Ch. D. 419 (future dividends in bankruptcy); *Printing and Numerical Registering Co.* v. *Sampson* (1875), L. R. 19 Eq. 462 (future patent rights); *Re Pyle Works* (1890), 44 Ch. D. 534, C. A. (uncalled capital); and compare *Holroyd* v. *Marshall* (1862), 10 H. L. Cas. 191; *Langton* v. *Horton* (1842), 1 Hare, 549; *Addison* v. *Cox* (1872), 8 Ch. App. 76; *Re Clarke* (1887), 36 Ch. D. 348, C. A.; *Robinson* v. *Bavasor* (1734), Vin. Abr. tit. Assignment, D. 29.

SECT. 3. **Equitable Assignments.**

though payable after the date of the bankruptcy (*p*). If, however, at the date of the assignment the chose in action does not exist as a debt, and the assignor becomes bankrupt before it becomes due, the assignment is inoperative against the trustee in bankruptcy (*q*).

Expectancies.

An expectancy or *spes successionis* is not a title to property by English law (*r*), and an assignment of an expectancy is therefore only a contract (*s*). But if the assignment is for value, it will be given effect to as a contract binding on the conscience of the assignor, and so binding the subject-matter of the contract when it comes into existence, if it is of such a nature and so described as to be capable of being identified (*t*).

Communication of assignment.

798. An equitable assignment does not become binding as between the assignor and assignee unless and until it is communicated to the assignee (*u*), and it may be revoked at any time before such communication (*a*). But where an equitable assignment is effected by means of a letter, and notice of this assignment is at the same time sent by letter to the assignee, the assignment is complete from the date of the posting of the letters (*b*).

Voluntary assignment.

799. An equitable assignment will be enforced, even though voluntary, provided that the donor has done everything required to be done by him in order to transfer the debt or fund (*c*).

Instances of equitable assignments.

800. The following transactions are good equitable assignments:—

An order given by an assignor to an assignee upon a third person to pay the assignee out of funds in his hands (*d*), or which will come to his hands (*e*);

(*p*) *Re Davis & Co., Ex parte Rawlings* (1888), 22 Q. B. D. 193.

(*q*) *Re Whitting, Ex parte Hall* (1878), 10 Ch. D. 615 (future rents); *Re Jones, Ex parte Nichols* (1883), 22 Ch. D. 782, C. A. (receipts from a business); *Wilmot* v. *Alton*, [1897] 1 Q. B. 17, C. A. (receipts from a business).

(*r*) *Re Parsons, Stockley* v. *Parsons* (1890), 45 Ch. D. 51, 56.

(*s*) *Meek* v. *Kettlewell* (1843), 1 Ph. 342.

(*t*) *Tailby* v. *Official Receiver* (1888), 13 App. Cas. 523, 543; compare *Flower* v. *Buller* (1880), 15 Ch. D. 665; *Re Coleman, Henry* v. *Strong* (1888), 39 Ch. D. 443, C. A.

(*u*) *Harland* v. *Binks* (1850), 15 Q. B. 713; *Siggers* v. *Evans* (1855), 5 E. & B. 367; *Kirwan* v. *Daniell* (1847), 5 Hare, 493, 500; *Smith* v. *Keating* (1848), 6 C. B. 136, 158; *Fitzgerald* v. *Stewart* (1831), 2 Russ. & M. 457; *Wigan* v. *English and Scottish Law Life Association, Ltd.* (1908), 126 L. T. Jo. 79; and compare the cases cited in note (*f*), p. 377, *post*; and note (*t*), p. 378, *post*.

(*a*) *Garrard* v. *Lauderdale* (*Lord*) (1830), 3 Sim. 1; *Acton* v. *Woodgate* (1833), 2 My. & K. 492; *Siggers* v. *Evans*, *supra*, *per* Lord CAMPBELL, C.J., at p. 376. See also *Scott* v. *Porcher* (1817), 3 Mer. 652, 664; *Morrell* v. *Wooten* (1852), 16 Beav. 197; *Re Russell* (1893), 37 Sol. Jo. 212.

(*b*) *Alexander* v. *Steinhardt, Walker & Co.*, [1903] 2 K. B. 208.

(*c*) *Harding* v. *Harding* (1886), 17 Q. B. D. 442; *Re Griffin*, [1899] 1 Ch. 408. See also *Re King* (1879), 14 Ch. D. 179; *Re Patrick*, [1891] 1 Ch. 82, C. A.; *Nanney* v. *Morgan* (1887), 37 Ch. D. 346, C. A.; *Paul* v. *Paul* (1882), 20 Ch. D. 742, C. A. See further, p. 371, *ante*; and title FRAUDULENT AND VOIDABLE CONVEYANCES; and as to *donatio mortis causa*, title GIFTS.

(*d*) *Re Row, Ex parte South* (1818), 3 Swan. 392; *Diplock* v. *Hammond* (1854), 5 De G. M. & G. 320; *Jones* v. *Farrell* (1857), 1 De G. & J. 208; *Burn* v. *Carvalho* (1839), 4 My. & Cr. 690; *McGowan* v. *Smith* (1856), 26 L. J. (CH.) 8; *Fisher* v. *Calvert* (1879), 27 W. R. 301; *Durham Bros.* v. *Robertson*, [1898] 1 Q. B. 765, 769; *Re Sheward*, [1893] 3 Ch. 502. As to a direction to pay when no fund is indicated, see note (*g*), p. 378, *post*.

(*e*) *Lett* v. *Morris* (1831), 4 Sim. 607; *Brice* v. *Bannister* (1878), 3 Q. B. D. 569, C. A. *Yeates* v. *Groves* (1791), 1 Ves. 280.

A direction by a person who has, or will have, funds in the hands of another to that other to pay thereout a sum to a third person, provided the direction is communicated to the third person (*f*);

A letter by a creditor to a debtor requesting the latter to sign an undertaking (which is attached to the letter) to pay the debt to a third party, the documents being transmitted by the third party to the debtor (*g*);

An agreement between an assignor and an assignee that the debt shall be paid out of a specific fund coming to the debtor (*h*);

A direction to a person holding funds of the assignor to pay them over to a third party (*i*);

A request to a person having funds of the assignor to pay the assignee and charge to the assignor's account (*j*);

A declaration by the legal owner of a chose in action that he holds it in trust for another (*k*).

A declaration in writing by the assignor that he holds at the disposal of the assignee a sum due to him from a third party (*l*);

An undertaking to pay over to another moneys to be received from a particular source (*m*);

A letter by the assignor to his solicitors directing them to take proceedings to recover a debt and to hold the proceeds at the disposal of the assignee, a copy of the letter being sent to the assignee (*n*);

The passing of the name of the assignee as that of the transferee of stock purchased on the Stock Exchange by the assignor, even if the assignor dies before the transfers are completed (*o*);

The indorsing in blank and handing over a debenture issued by a company (*p*), or a banker's deposit receipt (*q*);

(*f*) *Morrell* v. *Wootten* (1852), 16 Beav. 197; *Lambe* v. *Orton* (1860), 1 Drew. & Sm. 125; *Alexander* v. *Steinhardt, Walker & Co.*, [1903] 2 K. B. 208, where it was held that the assignment took effect upon the posting of the letter containing the direction. See also *Fitzgerald* v. *Stewart* (1831), 2 Russ. & M. 457; *Malcolm* v. *Scott* (1843), 3 Hare, 39; *Hutchinson* v. *Heyworth* (1838), 9 Ad. & El. 375.

(*g*) *Brandt's* (*William*) *Sons & Co.* v. *Dunlop Rubber Co.*, [1905] A. C. 454. *Quære* whether this is not also an assignment under the Judicature Act (*ibid.*, *per* Lord MACNAGHTEN, at p. 461).

(*h*) *Rodick* v. *Gandell* (1852), 1 De G. M. & G. 763, 777; *Riccard* v. *Prichard* (1855), 1 K. & J. 277; and see *London and Yorkshire Bank* v. *White* (1895), 11 T. L. R. 570.

(*i*) *Harding* v. *Harding* (1886), 17 Q. B. D. 442.

(*j*) *Webb* v. *Smith* (1885), 30 Ch. D. 192, C. A.

(*k*) *Milroy* v. *Lord* (1862), 4 De G. F. & J. 264, C. A.; *Re Turcan* (1888), 40 Ch. D. 5, C. A., *per* COTTON, L.J., at p. 10. But an attempted assignment by transfer, which fails as a transfer, cannot be treated as a declaration of trust (*Antrobus* v. *Smith* (1805), 12 Ves. 39; *Searle* v. *Law* (1846), 15 Sim. 95; and compare *Re Richardson* (1885), 30 Ch. D. 396, C. A.).

(*l*) *Gorringe* v. *Irwell India-Rubber and Gutta-Percha Works* (1886), 34 Ch. D. 128, C. A.

(*m*) *Re Irving, Ex parte Brett* (1877), 7 Ch. D. 419 (dividends receivable in a particular bankruptcy); *West and Wright* v. *Newing* (1900), 82 L. T. 260 (undertaking to indorse and hand over cheques from a particular source), but not a conditional promise to pay a debt when certain funds are received (*Field* v. *Megaw* (1869), L. R. 4 C. P. 660).

(*n*) *Palmer* v. *Culverwell, Brooks & Co.* (1901), 85 L. T. 758, where such an assignment was held good as against a trustee under a subsequent assignment for creditors.

(*o*) See *Re Smith* (1901), 84 L. T. 835.

(*p*) *Re Pryce, Ex parte Rensburg* (1877), 4 Ch. D. 685; *Re Jenkinson, Ex parte Nottingham and Nottinghamshire Bank* (1885), 15 Q. B. D. 441.

(*q*) *Re Griffin*, [1899] 1 Ch. 408; see *Moore* v. *Ulster Bank* (1877), I. R. 11 C. L. 512.

SECT. 3. Equitable Assignments.

Transactions not equitable assignments.

801. On the other hand, the following transactions do not operate as equitable assignments:—

A mere order by a creditor to his debtor to pay a sum of money to a third party, where no fund is specified out of which payment is to be made (*r*);

A bill of exchange drawn on a debtor, though for the exact amount of the debt (*s*);

A request by a person who has funds in the hands of another to that other to pay a sum to a third party, when the request is not communicated to the latter (*t*);

A direction to pay to the account of the creditor at a bank (*a*);

An authority by a creditor to the solicitors of his debtor to receive the debt and pay it to a third party (*b*);

A mere intimation to the fundholder that a third party has a claim on the fund (*c*).

A garnishee order (*d*).

A reference on a bill of exchange to proceeds of certain cargoes against which the bills are to be charged is not an equitable assignment of those proceeds (*e*); nor is a representation by the drawer that bills of exchange will be paid, as the drawer has remitted funds to the drawee, an assignment of those funds (*f*). So a promise to pay a debt when certain funds are received does charge those funds (*g*). An assignment of the benefit of a contract to lend a sum of money does not give the assignee any right against the intended lender, though it would bind the loan in the hands of the assignor, and if the money were remitted by a bank bill or in some other like manner, the assignee could intervene by injunction or receiver and obtain payment to himself (*h*). A letter

(*r*) *Percival* v. *Dunn* (1885), 29 Ch. D. 128, where the order was handed to the third party; and similarly in the case of a cheque (*Hopkinson* v. *Forster* (1874), L. R. 19 Eq. 74; *Schroeder* v. *Central Bank of London* (1876), 24 W. R. 710); compare *Re Beaumont*, [1902] 1 Ch. 889, 895.

(*s*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 53 (1); *Shand* v. *Du Buisson* (1874), L. R. 18 Eq. 283; see *Brown, Shipley & Co.* v. *Kough* (1885), 29 Ch. D. 848, 875, C. A. But the bill itself may be assigned (*Re Barrington* (1804), 2 Sch. & Lef. 112); and there may be a collateral agreement amounting to an assignment of the funds in the drawee's hands (*Citizens' Bank of Louisiana* v. *Bank of New Orleans* (1873), L. R. 6 H. L. 352, 360, 366; *Thomson* v. *Simpson* (1870), 5 Ch. App. 659).

(*t*) *Morrell* v. *Wootten* (1852), 16 Beav. 197; see *Scott* v. *Porcher* (1817), 3 Mer. 652; *Hill* v. *Royds* (1869), L. R. 8 Eq. 290; and p. 376, *ante*.

(*a*) *Bell* v. *London and North Western Rail. Co.* (1852), 15 Beav. 548, where such a direction was held not to be a good assignment to the bank.

(*b*) *Rodick* v. *Gandell* (1852), 1 De G. M. & G. 763; and compare *Re Russell* (1893), 37 Sol. Jo. 212.

(*c*) *Watson* v. *Wellington* (*Duke*) (1830), 1 Russ. & M. 602.

(*d*) *Re Combined Weighing and Advertising Machine Co.* (1889), 43 Ch. D. 99, 104, 105, C. A.

(*e*) *Robey & Co.'s Perseverance Ironworks* v. *Ollier* (1872), 7 Ch. App. 695; *Phelps, Stokes & Co.* v. *Comber* (1885), 29 Ch. D. 813, C. A.; *Brown, Shipley & Co.* v. *Kough*, *supra*, where the effect of letters of advice accompanying bills of exchange was also discussed; see also *Frith* v. *Forbes* (1862), 4 De G. F. & J. 409.

(*f*) *Thomson* v. *Simpson*, *supra*; *Citizens' Bank of Louisiana* v. *Bank of New Orleans*, *supra*.

(*g*) *Field* v. *Megaw* (1869), L. R. 4 C. P. 660. See *Malcolm* v. *Scott* (1843), 3 Hare, 39; *Mercer* v. *Vane Colina* (1897), [1900] 1 Q. B. 130, n. (a promise to pay half a commission when earned).

(*h*) *Western Wagon and Property Co.* v. *West*, [1892] 1 Ch. 271, 276; see *May* v. *Lane* (1894), 64 L. J. (Q. B.) 236, C. A.

from bankers stating that they have opened a credit for a certain sum is not an equitable assignment of that sum (*i*).

Stamp.

802. An equitable assignment in writing should be stamped as a conveyance or mortgage, as the case may be, even if it is in form an order for the payment of money (*k*).

SUB-SECT. 2.—*Notice of the Assignment.*

Notice to debtor not necessary as between assignor and assignee.

803. In order to perfect an equitable assignment, whether voluntary or for value, as between the assignor and assignee, no notice to the debtor or fundholder is necessary (*l*); for notice does not render the title perfect (*m*), and formerly was not even a step in the title (*n*). Moreover, notice is not necessary as against third persons who stand in the same position as the assignor, such as persons claiming under a subsequent assignment as volunteers (*o*), or a creditor who has obtained a charging order (*p*), or an order appointing a receiver (*q*), or a garnishee order (*r*), even though in the last case the judgment creditor give notice to the trustee before the assignee (*s*), or the trustee in bankruptcy of the debtor (*t*).

804. But in order to make the assignee's title effective against the debtor or fundholder and third parties notice of the assignment must be given to the debtor or fundholder (*a*), though no

(*i*) *Morgan* v *Larivière* (1875), L. R. 7 H. L. 423.

(*k*) *Diplock* v. *Hammond* (1854), 5 De G. M. & G. 320; *Buck* v. *Robson* (1878), 3 Q. B. D. 686; see *Re Adams, Ex parte Shellard* (1873), L. R. 17 Eq. 109; *Fisher* v. *Calvert* (1879), 27 W. R. 301; *Adams* v. *Morgan* (1883), 14 L. R. Ir. 140, C. A. In *McGowan* v. *Smith* (1850), 26 L. J. (CH.) 8, it was said that an order for payment of money which operated as an equitable assignment would be received in evidence whether it was stamped as an order or as an assignment. See also title BILLS OF EXCHANGE ETC., Vol. II., p. 571.

(*l*) *Burn* v. *Carvalho* (1839), 4 My. & Cr. 702; *Rodick* v. *Gandell* (1852), 1 De G. M. & G. 780; *Gorringe* v. *Irwell* (1886), 34 Ch. D. 128, C. A.; *Donaldson* v. *Donaldson* (1854), Kay, 711; *Withington* v. *Tate* (1869), 4 Ch. App. 288; *London and Yorkshire Bank* v. *White* (1895), 11 T. L. R. 570; *Brandt's (William) Sons & Co.* v. *Dunlop Rubber Co.*, [1905] A. C. 454, citing with approval *Re Row, Ex parte South* (1818), 3 Swan. 392; *Jones* v. *Farrell* (1857), 1 De G. F. & J. 208; *Diplock* v. *Hammond, supra*. Communication to the assignee is necessary to bind the assignor (see p. 376, *ante*).

(*m*) *Ward* v. *Duncombe*, [1893] A. C. 369, 392.

(*n*) *Foster* v. *Cockerell* (1835), 3 Cl. & Fin. 456, H. L.

(*o*) *Justice* v. *Wynne* (1866), 12 L. Ch. R. 289.

(*p*) *Beavan* v. *Oxford (Earl)* (1855), 6 De G. M. & G. 492; *Eyre* v. *M'Dowell* (1861), 9 H. L. Cas. 619; *Kinderley* v. *Jervis* (1856), 22 Beav. 1.

(*q*) *Arden* v. *Arden* (1885), 29 Ch. D. 703; *Re Bristow*, [1906] 2 I. R. 215. A receivership order, however, may prevent a subsequent mortgagee from obtaining priority by stop order (*Re Anglesey (Marquis)*, [1903] 2 Ch. 727).

(*r*) *Pickering* v. *Ilfracombe Rail. Co.* (1868), L. R. 3 C. P. 235; *Robinson* v. *Nesbitt* (1868), L. R. 3 C. P. 264; *Re General Horticultural Co., Ex parte Whitehouse* (1886), 32 Ch. D. 512; *Badeley* v. *Consolidated Bank* (1888), 38 Ch. D. 238, C. A.; *Davis* v. *Freethy* (1890), 24 Q. B. D. 519, C. A.

(*s*) *Arden* v. *Arden, supra*.

(*t*) *Re Wallis, Ex parte Jenks*, [1902] 1 K. B. 719.

(*a*) *Ryall* v. *Rowles* (1749), 1 Ves. Sen. 348, 1 White & Tud. L. C., 7th ed., 96; *Dearle* v. *Hall* (1823), 3 Russ. 1, 23; *Meux* v. *Bell* (1841), 1 Hare, 73. This has been said to be tantamount to taking possession; compare also *Webb* v. *Smith* (1885), 30 Ch. D. 192, 199, C. A.; *Kelly* v *Selwyn*, [1905] 2 Ch. 117, 121. Such notice does not require registration as a bill of sale (*London and Yorkshire Bank* v. *White* (1895), 11 T. L. R. 570; *Ward* v. *Duncombe*, [1893] A. C. 369).

SECT. 3. Equitable Assignments.

assent or acquiescence on the part of the debtor or fundholder is necessary (*b*).

Payment to assignor before notice.

805. If no notice be given to the debtor or other fundholder the assignee will have to give credit to him for any payment made by him to the assignor while he is in ignorance of the assignment (*c*). If before receiving notice of the assignment, of a debt the debtor has handed a cheque to the creditor in payment, he may disregard any subsequent notice of an assignment, even though when the notice is received the cheque is still outstanding in the hands of the creditor (*d*); and a release of the debt by the assignor before notice will be good against the assignee (*e*).

Priority determined by notice.

806. So also, if no notice be given, the assignee will be postponed to a subsequent assignment of which prior notice has been given (*f*), provided that the subsequent assignee does not know of the prior assignment at the time when he takes his security (*g*). If the subsequent assignee does not know of the prior assignment when he takes his security, knowledge at the time when he gives his notice is immaterial (*h*). Constructive notice to a second assignee of a prior assignment is sufficient to prevent him from obtaining priority by giving prior notice (*i*), but not merely notice of the existence of a prior document which may, or may not, affect the property (*k*).

The above principle applies where the second assignee has taken his assignment from the legal personal representative of the person who assigned to the first assignee (*l*).

Where the second assignee has alone given notice, the first assignee will be postponed even if he has contracted not to give notice, or holds a security (as, for example, a debenture of a company giving a general floating charge) which from its nature prevents notice from being effectively given (*m*).

(*b*) *Burn* v. *Carvalho* (1839), 4 My. & Cr. 690; *Morrell* v. *Wootten* (1852), 16 Beav. 197; *Bell* v. *London and North Western Rail. Co.* (1852), 15 Beav. 548; *Re Row, Ex parte South* (1818), 3 Swan. 393; approved in *Brandt's (William) Sons & Co.* v. *Dunlop Rubber Co.*, [1905] A. C., *per* Lord MACNAGHTEN, at p. 461; so, too, his express dissent is immaterial (*M'Gowan* v. *Smith* (1856), 26 L. J. (CH.) 8; *Brice* v. *Bannister* (1878), 3 Q. B. D. 569, C. A.; *Tibbits* v. *George* (1836), 5 Ad. & El. 107). As to the position of the debtor after notice, see p. 392, *post*.

(*c*) *Norrish* v. *Marshall* (1821), 5 Madd. 475; *Stocks* v. *Dobson* (1853), 4 De G. M. & G. 11; *Leslie* v. *Baillie* (1843), 2 Y. & C. Ch. Cas. 91, 97; *Donaldson* v. *Donaldson* (1854), Kay, 711; see *Re Southampton (Lord)* (1880), 16 Ch. D. 178, 186. The assignor must account to the assignee for the money so paid (*Fortescue* v. *Barnett* (1854), 3 My. & K. 36; *Re Patrick*, [1891] 1 Ch. 82, C. A.).

(*d*) *Bence* v. *Shearman*, [1898] 2 Ch. 582, C. A.

(*e*) *Stocks* v. *Dobson*, *supra*.

(*f*) *Dearle* v. *Hall* (1823), 3 Russ. 1; *Ward* v. *Duncombe*, [1893] A. C. 369.

(*g*) *Warburton* v. *Hill* (1854), Kay, 470; *Re Hamilton's Windsor Ironworks, Ex parte Pitman and Edwards* (1879), 12 Ch. D. 707, 711; *Newman* v. *Newman* (1885), 28 Ch. D. 674; *Re Holmes (A. D.)* (1885), 29 Ch. D. 786, C. A.

(*h*) *Mutual Life Assurance Society* v. *Langley* (1886), 32 Ch. D. 460, C. A.

(*i*) *English and Scottish Mercantile Investment Trust* v. *Brunton*, [1892] 2 Q. B. 1; *Spencer* v. *Clarke* (1878), 9 Ch. D. 137.

(*k*) *English and Scottish Mercantile Investment Trust* v. *Brunton*, *supra*.

(*l*) *Re Freshfield* (1879), 11 Ch. D. 198; *Montefiore* v. *Guedalla*, [1903] 2 Ch. 26.

(*m*) *English and Scottish Mercantile Investment Trust* v. *Brunton*, *supra*, at p. 8; compare *Etty* v. *Bridges* (1843), 2 Y. & C. Ch. Cas. 486, where, there being no

Where the notices of several incumbrances are simultaneous the incumbrances will rank in order of date (*a*), and in considering whether notices are simultaneous portions of days will be taken into account (*b*). As between volunteers notice has no effect on priority (*c*).

Absence of negligence on part of first assignee immaterial.

It is immaterial that there has been no negligence on the part of the first assignee (*d*). Consequently, where the interest charged is an expectant one under the will of a living person, and the second assignee happens to be the first to hear of administration having been taken out and to give notice to the administrator, he will have priority, though the first assignee gives notice as soon as he finds out who is administrator (*e*).

Trustee in bankruptcy.

807. A trustee in bankruptcy may lose his priority over subsequent assignees by failing to give notice of the bankruptcy (*f*), and may gain such priority by giving notice (*g*). But he cannot obtain priority over prior assignees by giving prior notice; for he takes subject to all equities (*h*).

Nature of notice required.

808. It is not necessary that a formal notice should be given, for any informal notice is sufficient, provided the fact of the assignment is definitely brought to the mind of the debtor or fundholder (*i*). The notice may, indeed, be received by the debtor otherwise than from either of the parties to the assignment, as, for instance, by reading of the fact in a newspaper (*j*). It is sufficient to show that the debtor has had knowledge of the assignment, regardless of the source or mode of his knowledge (*k*). But a statement made casually in the course of general conversation is not sufficient notice (*l*).

person to whom notice of a charge on stock could be given, the second incumbrancer obtained priority by a distringas.

(*a*) *Calisher* v. *Forbes* (1871), 7 Ch. App. 109; *Johnstone* v. *Cox* (1880), 16 Ch. D. 571.

(*b*) *Ibid.* at p. 575.

(*c*) *Justice* v. *Wynne* (1860), 12 I. Ch. R. 289.

(*d*) *Ward* v. *Duncombe*, [1893] A. C. 369, 390; *Re Dallas*, [1904] 2 Ch. 385, 413, C. A.

(*e*) *Re Dallas*, *supra*; see *Re Lake*, *Ex parte Cavendish*, [1903] 1 K. B. 151; *Johnstone* v. *Cox*, *supra*.

(*f*) *Stuart* v. *Cockerell* (1869), L. R. 8 Eq. 607; *Re Russell's Policy Trusts* (1872), L. R. 15 Eq. 26; *Palmer* v. *Locke* (1881), 18 Ch. D. 381, C. A.

(*g*) *Mercer* v. *Vans Colina* (1897), [1900] 1 Q. B. 130, n.; *Re Beall*, *Ex parte Official Receiver*, [1899] 1 Q. B. 688; and see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 160, 165, 189.

(*h*) *Re Wallis*, *Ex parte Jenks*, [1902] 1 K. B. 719.

(*i*) *Lloyd* v. *Bankes* (1868), 3 Ch. App. 488; *Smith* v. *Smith* (1833), 2 Cr. & M. 231; *Browne* v. *Savage* (1859), 4 Drew. 635, 640; *Newman* v. *Newman* (1885), 28 Ch. D. 674; see *Re Eyles*, *Ex parte Stright* (1832), 2 Deac. & Ch. 314; *Re Croggan*, *Ex parte Carbis* (1834), 4 Deac. & Ch. 354, 357. The knowledge may be acquired during an action to recover the sum assigned (*Mercer* v. *Vans Colina*, *supra*, at p. 131, n.).

(*j*) *Lloyd* v. *Bankes*, *supra*; *Arden* v. *Arden* (1885), 29 Ch. D. 702, 708.

(*k*) *Smith* v. *Smith*, *supra*; *Ward* v. *Duncombe*, *supra*; see *Re Worcester*, *Ex parte Agra Bank* (1868), 3 Ch. App. 555, 559.

(*l*) *Re Tichener* (1865), 35 Beav. 317; *Re Brown* (1867), L. R. 5 Eq. 88; *Lloyd* v. *Banks*, *supra*, at p. 490; *Saffron Walden Second Benefit Building Society* v. *Rayner* (1880), 14 Ch. D. 406, C. A.; *Re Croggon*, *Ex parte Carbis*, *supra* (conversation with clerk in office of company). But a verbal notice in the ordinary course of business is good (*Re Worcester*, *Ex parte Agra Bank*, *supra*).

SECT. 3. Equitable Assignments.

Incumbrances will not rank in order of accidental knowledge obtained by the trustees (*m*).

The question in bankruptcy of what is sufficient notice to prevent a thing from being in the order and disposition of an apparent owner is not analogous to the question of what is sufficient notice of an equitable assignment (*n*).

Form of notice.

The notice need not specify the amount of the charge (*o*). But when two charges are given by one deed, and the notice only mentions one of them, the notice will not operate as constructive notice of the other charge so as to give the other priority over a subsequent incumbrancer (*p*).

A mistake, however, as to the date of the assignment does not make the notice invalid (*q*).

Notice after death of assignee.

809. Notice after the death of the assignee is sufficient, so long as the fund is still in the hands of the person to whom notice is given (*r*).

To whom notice should be given.

810. The notice to be effectual must be given to a person who at the time of the notice is the legal holder and has control of the fund for the benefit of the assignor (*s*). Notice, therefore, to an executor who afterwards renounces is ineffectual (*t*); so also is notice to a person who only becomes the holder of the fund for the benefit of the assignor after the date of the notice (*u*).

On the same principle, when there is an original settlement and a sub-settlement, and one of the beneficiaries under the sub-settlement charges his interest thereunder, his incumbrancers should give notice to the trustees of the sub-settlement, and notice to them will give priority over an assignment of which prior notice is given to the trustees of the original settlement (*w*).

Where notice has been given to the debtor, no notice to any other person is necessary to complete the assignee's title (*a*).

Where the sole legal holder of a fund is also the equitable assignor, the knowledge which he as assignor possesses of the assignment

(*m*) *Arden* v. *Arden* (1885), 29 Ch. D. 702.

(*n*) *Saffron Walden Second Benefit Building Society* v. *Rayner* (1880), 14 Ch. D. 406, 409, C. A.; *Mutual Life Assurance Society* v. *Langley* (1886), 32 Ch. D. 460, 470, C. A.; *Lloyds' Bank* v. *Pearson*, [1901] 1 Ch. 865, 872.

(*o*) *Re Bright* (1856), 21 Beav. 430, 434; see form of notice in *Re Russell's Policy Trusts* (1872), L. R. 15 Eq. 26.

(*p*) *Re Bright, supra;* compare *Woodburn* v. *Grant* (1856), 22 Beav. 483.

(*q*) *Whittingstall* v. *King* (1882), 46 L. T. 520. As to the different rule in the case of a legal assignment, see p. 372, *ante*.

(*r*) *Re Russell's Policy Trusts, supra*, at p. 29. See the cases quoted note (*o*), p. 372, *ante*.

(*s*) *Addison* v. *Cox* (1872), 8 Ch. App. 76, 79; *Re Dallas*, [1904] 2 Ch. 385, 398, 411, C. A.

(*t*) *Re Dallas, supra*.

(*u*) *Buller* v. *Plunkett* (1860), 1 John. & H. 441; *Webster* v. *Webster* (1862), 31 Beav. 393; *Somerset* v. *Cox* (1865), 33 Beav. 634; *Yates* v. *Cox* (1868), 17 W. R. 20; *Johnstone* v. *Cox* (1880), 16 Ch. D. 571; *Roxburghe* v. *Cox* (1881), 17 Ch. D. 520, C. A.; and compare *Addison* v. *Cox, supra*.

(*w*) *Holt* v. *Dewell* (1845), 4 Hare, 446; *Stephens* v. *Green*, [1895] 2 Ch. 148, C. A., overruling *Re Booth* (1853), 1 W. R. 444. Compare *Bridge* v *Beadon* (1867), L. R. 3 Eq. 664.

(*a*) *Liquidation Estates Purchase Co.* v. *Willoughby*, [1898] A. C. 321, 336; *e.g.*, notice to the person from whom the fund assigned would come to the debtor, or to the persons jointly interested with the assignor (*ibid.*)

is not equivalent to notice for the purpose of giving an equitable incumbrancer priority (*b*).

Notice where several trustees of fund.

811. Where the fund is in the hands of several trustees notice should be given to each of them (*c*). The effect of giving such notice is that the assignee will have priority over a subsequent assignee taking his assignment after the death or retirement of all the trustees to whom the prior notice was given, even though the subsequent assignee has given notice to the new trustees and the latter have no notice of the first assignment (*d*). The new trustees, however, will not be personally liable if, without actual notice of the first assignment, they pay over the assigned fund to the second assignee (*e*).

Where the fund assigned is in the hands of several trustees notice to, or knowledge by, any one of those trustees, even if he is not the acting trustee, is sufficient to protect the assignment against a subsequent assignment with notice to all or any of the trustees (*f*) so long as the trustee affected with notice of the prior assignment remains a trustee (*g*). The priority so acquired is retained even though the one trustee who has notice dies after the notice of the second assignment has been given without his co-trustees having been informed of the first assignment (*h*). If, however, at the time when the second assignment is made and notice thereof given the trustee who alone had notice of the first assignment has ceased to be trustee, the second assignee will get priority (*i*). Where the one trustee who has notice of the assignment only has such notice by reason of his being the assignor, such notice will not be sufficient to give priority over a subsequent incumbrancer who gives notice to the other trustees (*j*). But if the one trustee acquires notice by reason of his being assignee such notice will be sufficient to give such priority (*k*). Notice to one of several trustees will not operate

(*b*) *Re Dallas*, [1904] 2 Ch. 385, 401, 402, C. A.; *Thompson* v. *Speirs* (1845), 13 Sim. 469; *Martin* v. *Sedgwick* (1846), 9 Beav. 333; see *Public Works Commissioners* v. *Harby* (1857), 23 Beav. 508.

(*c*) *Re Hall* (1880), 7 L. R. Ir. 180. It may be advisable, if it can be arranged, to have notice indorsed on the trust deed, if any; see *Phipps* v. *Lovegrove* (1873), L. R. 16 Eq. 80, 90; and compare *London Chartered Bank of Australia* v. *Lemprière* (1873), L. R. 4 P. C. 572.

(*d*) *Re Wasdale, Britten* v. *Partridge*, [1899] 1 Ch. 163; see *Ward* v. *Duncombe*, [1893] A. C. 369, 394.

(*e*) *Hallows* v. *Lloyd* (1888), 39 Ch. D. 686. As to the duty of new trustees to make inquiries, see *ibid.* at p. 691; *Phipps* v. *Lovegrove* (1873), L. R. 16 Eq. at p. 90.

(*f*) *Smith* v. *Smith* (1833), 2 Cr. & M. 231; *Meux* v. *Bell* (1841), 1 Hare, 73.

(*g*) See note (*i*), *infra*.

(*h*) *Ward* v. *Duncombe*, *supra*.

(*i*) *Timson* v. *Ramsbottom* (1837), 2 Keen, 35, 50; *Re Phillips*, [1903] 1 Ch. 183; *Re Hall*, *supra*; *Ward* v. *Duncombe*, *supra*, at p. 382; see, however, *ibid.* at p. 394. Compare *Re Wasdale*, *supra*; *Freeman* v. *Laing*, [1899] 2 Ch. 355, 358.

(*j*) *Browne* v. *Savage* (1859), 4 Drew. 635; *Lloyd's Bank* v. *Pearson*, [1901] 1 Ch. 865; *Re Dallas*, *supra*; and compare *Ex parte Hennessey* (1842), 1 Con. & Law. 559; *Thompson* v. *Speirs*, *supra*, where the assignor was member of the society issuing the policy assigned; *Re Sketchley, Ex parte Boulton* (1857), 1 De G. & J. 163, 175, where the assignor was a secretary of the company shares in which were assigned. Notice to the husband of the assignor, where he is one of the trustees, is sufficient (*Willes* v. *Greenhill* (1861), 4 De G. F. & J. 147).

(*k*) *Browne* v. *Savage*, *supra*; *Willes* v. *Greenhill* (No. 1) (1860), 29 Beav. 376. See *Newman* v. *Newman* (1885), 28 Ch. D. 674; *Elder* v. *Maclean* (1857), 5 W. R. 447; and he does not lose his priority by failing to inform the

SECT. 3. Equitable Assignments.

to make the other trustees personally liable for what they may do in ignorance of the notice (*l*).

Notice impossible at date of assignment.

812. The fact that at the date of the assignment, or when the fund charged comes into existence, there is no person to whom effective notice can be given does not affect the priorities obtained by notices given after there is such a person (*m*). In the case of stock or shares standing in the books of the Bank of England or of any public company priority may be gained, in the absence of any person to whom notice can be given, by service of an affidavit and notice under R. S. C., Ord. 46, rr. 2—11 (*n*).

Fund in court.

813. If the fund is in court the notice must take the form of a stop order (*o*); and a notice to the trustees will not give priority over an assignee who subsequently obtains a stop order (*p*). The stop order, however, must be one which operates as notice to the persons who are entitled to the fund as trustees for the assignor, not merely as notice to the trustees of a prior settlement (*q*). Where part of a fund is in court and part in the hands of trustees, the assignee, in order to have priority, must, as regards the funds in court, obtain a stop order, and, as regards the funds in the hands of the trustees, give notice to them (*r*). Where an assignee has obtained a stop order on a fund in court, and the share of the assignor is subsequently carried over to a separate account of him and his incumbrancers, a second assignee does not obtain priority by a stop order on the separate account (*s*).

A stop order on a fund paid into court by trustees will not, however, give priority over an assignment of which notice was given to the trustees prior to the payment in (*t*); or over a prior assignment of which the assignee who obtains the stop order has notice at the date when he takes his security (*u*), though notice of the prior assignment after that date but before obtaining the stop order is immaterial (*b*).

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subsequent assignee of his own assignment (*Re Lewer, Ex parte Garrard* (1877), 5 Ch. D. 61, C. A.).

(*l*) *Low* v. *Bouverie*, [1891] 3 Ch. 82, C. A.

(*m*) *Johnstone* v. *Cox* (1884), 16 Ch. D. 571.

(*n*) *Etty* v. *Bridges* (1843), 2 Y. & C. Ch. Cas. 486, where priority was obtained by a distringas, for which proceeding the above-mentioned proceedings are now substituted; see title PRACTICE AND PROCEDURE.

(*o*) *Haly* v. *Barry* (1868), 3 Ch. App. 452, 456; *Re Holmes* (*A. D.*) (1885), 29 Ch. D. 786, C. A.; *Elder* v. *Maclean* (1857), 5 W. R. 447, where the first assignee was himself a trustee of the fund. If a life interest only is charged, the order should mention that the income is restrained (*Mack* v. *Postle*, [1894] 2 Ch. 449). As to stop orders, see title PRACTICE AND PROCEDURE.

(*p*) *Pinnock* v. *Bailey* (1883), 23 Ch. D. 497.

(*q*) *Stephens* v. *Green*, [1895] 2 Ch. 148, where the fund was in court in an action to administer the will of A., and B., a beneficiary under the will, had bequeathed his interest to the assignor, and a notice to the executor of B. was held to give priority over a stop order previously obtained, which had the effect only of a notice to the executors of A.; see p. 382, *ante*.

(*r*) *Mutual Life Assurance Society* v. *Langley* (1886), 32 Ch. D. 460, C. A.

(*s*) *Lister* v. *Tidd* (1867), L. R. 4 Eq. 462.

(*t*) *Livesey* v. *Harding* (1856), 23 Beav. 141; *Thompson* v. *Tomkins* (1862), 2 Drew. & Sm. 8, 20; *Re Anglesey* (*Marquis*), [1903] 2 Ch. 727, 732.

(*u*) *Re Holmes* (*A. D.*), *supra*.

(*b*) *Mutual Life Assurance Society* v. *Langley*,

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Notice to company.

814. In order that notice to a company of an assignment may be effectual, it must be given to the proper officers when engaged in the business of the company (*c*). Casual knowledge acquired by the secretary while not transacting the business of the company is not sufficient (*d*), nor is casual conversation with a clerk in the office (*e*), but verbal notice to the directors at a board meeting is sufficient (*f*).

The principle that notice determines priority in the case of equitable assignments does not apply to the case of shares in companies incorporated under the Companies Act, 1862 (*g*), so far as the company itself is concerned (*h*). But the directors may be personally liable if they give effect to a transfer of shares when they have notice of a previous equitable assignment (*i*).

Notice to solicitor.

815. The fact that the solicitor who negotiates the mortgage of a policy is the local agent of the insurance office is not sufficient to affect the office with notice of the charge (*k*), unless he has express authority from the office to receive notice on its behalf (*l*).

Notice to the solicitors of the trustees of an assignment of a fund is not sufficient, unless they have authority, express or implied, to receive such notice (*m*).

Statements by trustees as to notice.

816. It is no part of the duty of a trustee of a fund to tell the beneficiaries or intending purchasers or mortgagees from them what incumbrances have been created or which incumbrancer has given notice of his charge; if, however, he does answer such inquiries honestly to the best of his belief, he will not be liable, unless his statement amounts to a warranty or an estoppel (*n*). Nor can a written statement by a trustee that no notice has been received be relied upon, if it was obtained by the proposed

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(*c*) *Société Générale de Paris* v. *Tramways Union Co.* (1884), 14 Q. B. D. 424, C. A.; *Gale* v. *Lewis* (1846), 9 Q. B. 730 (secretary); *Re Raikes, Ex parte Waithman* (1835), 4 Deac. & Ch. 412, where a director of an insurance company deposited his life policy issued by the company with a banker, who was also auditor of the company, and the company was held affected with notice; *Re Kidder, Ex parte Watkins* (1834), 4 Deac. & Ch. 87, where the transaction was known to one of the directors and to the actuary.

(*d*) *Société Générale de Paris* v. *Tramways Union Co., supra.* As to what will not constitute notice of a trust to a bank, see also *Simpson* v. *Molson's Bank*, [1895] A. C. 270.

(*e*) *Re Croggon, Ex parte Carbis* (1834), 4 Deac. & Ch. 354.

(*f*) *Re Worcester, Ex parte Agra Bank* (1868), 3 Ch. App. 555.

(*g*) 25 & 26 Vict. c. 89; see s. 30.

(*h*) *Société Générale de Paris* v. *Walker* (1885), 11 App. Cas. 20, 30.

(*i*) *Société Générale de Paris* v. *Tramways Union Co., supra;* see, however, *Société Générale de Paris* v. *Walker, supra,* at p. 30.

(*k*) *Re Russell* (1872), L. R. 15 Eq. 26, 30.

(*l*) *Gale* v. *Lewis, supra;* see also Policies of Insurance Act, 1867 (30 & 31 Vict. c. 144).

(*m*) *Willes* v. *Greenhill* (1860), 29 Beav. 376, 392; *Saffron Walden Second Benefit Building Society* v. *Rayner* (1880), 14 Ch. D. 406, C. A.; *Arden* v. *Arden* (1885), 29 Ch. D. 702, 709; *Rickards* v. *Gledstanes* (1861), 3 Giff. 298; *Whittingstall* v. *King* (1882), 46 L. T. 520; and see *Re Cousins* (1886), 31 Ch. D. 671; *Re Durand* (1859), 8 W. R. 33; *Re Southampton (Lord)* (1880), 16 Ch. D. 178.

(*n*) *Low* v. *Bouverie*, [1891] 3 Ch. 82, C. A.; see *Re Tillott*, [1892] 1 Ch. 86; *Ward* v. *Duncombe*, [1893] A. C. 369, 383; and title TRUSTS AND TRUSTEES.

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mortgagee by concealment of a material fact calculated to deter the trustee from signing it (*o*).

817. On the purchase of a reversionary interest from a mortgagee it is not an essential blot on the title that notice of the mortgage has not been given to the trustees, if it can be shown that no subsequent incumbrancer has given notice (*p*).

Solicitor's lien.

818. A solicitor's lien on a policy, which only gives the right to hold the document, but no right to the fund, is not lost by not giving notice to the insurance company, as against a subsequent assignee who has given notice (*q*).

Doctrine not applicable to land.

819. The principle of obtaining priority by notice does not apply to equitable interests in land (*r*), but it does apply to such interests in land as can only reach the hands of the beneficiary or assignor in the shape of money, *e.g.*, proceeds of sale of real estate (*s*).

Registration in the Yorkshire registry does not affect the priority of incumbrancers on such last-mentioned interests (*t*).

SUB-SECT. 3.—*Assignee takes subject to all Equities.*

Assignee subject to equities.

820. In the case of an equitable assignment of a chose in action the debtor or fundholder has as against the assignee the same equities (*u*) and the same rights of set-off and other defences (*a*) as he would have had against the assignor at the date at which notice of the assignment is given to him (*b*).

Duty of fundholders.

821. It is the duty of the assignee to make inquiries, and the debtor or fundholder is not bound on receiving notice to volunteer information, unless the notice shows that the assignees have been deceived; in the latter case, if the debtor does not undeceive the assignee he may be prevented from taking advantage of equities between himself and the assignor (*c*).

(*o*) *Porter* v. *Moore*, [1904] 2 Ch. 367.

(*p*) *Hobson* v. *Bell* (1839), 2 Beav. 17; see *ibid.* as to the duties of a vendor in such a case.

(*q*) *West of England Bank* v. *Batchelor* (1882), 51 L. J. (CH.) 199.

(*r*) *Ward* v. *Duncombe*, [1893] A. C. 369, 390; *Wiltshire* v. *Rabbits* (1841), 14 Sim. 76; *Lee* v. *Howlett* (1856), 2 K. & J. 531. As, for example, equitable mortgages by deposit (*Re Richards, Humber* v. *Richards* (1890) 45 Ch. D. 589; *Hopkins* v. *Hemsworth*, [1898] 2 Ch. 347).

(*s*) *Ward* v. *Duncombe, supra; Lee* v. *Howlett, supra; Foster* v. *Cockerell* (1835), 3 Cl. & Fin. 456, H. L.; *Consolidated Investment and Insurance Co.* v. *Riley* (1859), 1 Giff. 371; *Re Hughes* (1864), 2 Hem. & M. 89.

(*t*) *Malcolm* v. *Charlesworth* (1836), 1 Keen, 63; *Arden* v. *Arden* (1885), 29 Ch. D. 702.

(*u*) *Phipps* v. *Lovegrove* (1873), L. R. 16 Eq. 80, 88; *Douglas* v. *Russell* (1831), 4 Sim. 524, 533; *Tooth* v. *Hallett* (1869), 4 Ch. App. 242; and compare *Burr* v. *Wimbledon Local Board* (1887), 56 L. T. 329.

(*a*) *Roxburghe* v. *Cox* (1881), 17 Ch. D. 520, C. A. *per* JAMES, L.J., at p. 526; and see *Buck* v. *Robson* (1878), 3 Q. B. D. 686, 690.

(*b*) *Mangles* v. *Dixon* (1852), 3 H. L. Cas. 702; *Phipps* v. *Lovegrove, supra*, at p. 88; *Bergmann* v. *Macmillan* (1881), 17 Ch. D. 423; *Horsfall* v. *Halifax and Huddersfield Union Banking Co.* (1883), 52 L. J. (CH.) 599; *Re Taunton, Delmar, Lane & Co.*, [1893] 2 Ch. 175; *Jeffryes* v. *Agra and Masterman's Bank* (1866), L. R. 2 Eq. 674; *Graham* v. *Johnson* (1869), L. R. 8 Eq. 36; *Watts* v. *Driscoll*, [1901] 1 Ch. 294, C. A.

(*c*) *Mangles* v. *Dixon, supra*, at p. 734; and see further note (*d*), p. 390, *post*

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822. The assignee of a bond takes it subject to all equities. So if it is satisfied (*d*) or void or voidable (*e*) the assignee has no better right than the assignor, unless, in the latter case at all events, the intention that it should be negotiable is expressed on the face of it (*f*).

Securities issued by companies.

The same principle applies to debentures or like securities issued by companies (*g*) unless there is some contract antecedent to their issue that they should be negotiable (*h*), or the form of the instruments is such as to induce the belief that they are legally transferable (*i*), or the company by its subsequent conduct, as by recognising the assignment, precludes itself from raising any equity (*k*). When a company has power to issue legally transferable securities, it cannot set up an irregularity of issue or other equity as against a *bonâ fide* assignee (*l*).

Shares in companies.

When shares in a company are charged and notice of the charge given to the company, the lien of the company under its articles on the shares for a claim arising after the notice will be postponed to the charge (*m*).

Set-off and cross-claims

823. Where the right of the assignor is subject to a set-off on the part of the debtor, the debtor may, provided the right has accrued before notice of assignment (*n*), equally avail himself of this right against the assignee (*o*). Similarly in the case of a debt

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(*d*) *Turton* v. *Benson* (1718), 1 P. Wms. 496, approved in *Mangles* v. *Dixon* (1852), 3 H. L. Cas. 702; *Coles* v. *Jones* (1715), 2 Vern. 692; *Ord* v. *White* (1840), 3 Beav. 357; *Cavendish* v. *Greaves* (1857), 24 Beav. 163. See, generally, title BONDS, Vol. III., p. 97.

(*e*) *Graham* v. *Johnson* (1869), L. R. 8 Eq. 36; compare *Hawker* v. *Hallewell* (1856), 3 Sm. & G. 194, where a bond given for a gambling debt was held good in the hands of an assignee.

(*f*) *Graham* v. *Johnson*, *supra*, at p. 44.

(*g*) *Re Natal Investment Co.* (1868), 3 Ch. App. 355; *Athenæum Life Assurance Society* v. *Pooley* (1858), 3 De G. & J. 294; *Crouch* v. *Credit Foncier of England* (1873), L. R. 8 Q. B. 374.

(*h*) *Re Blakeley Ordnance Co., Ex parte New Zealand Banking Corporation* (1867), 3 Ch. App. 154; *Dickson* v. *Swansea Vale Rail. Co.* (1868), L. R. 4 Q. B. 44 (bonds issued for the purpose of raising money).

(*i*) *Higgs* v. *Northern Assam Tea Co.* (1869), L. R. 4 Exch. 387; *Re General Estates Co., Ex parte City Bank* (1868), 3 Ch. App. 758; *Re Agra and Masterman's Bank, Ex parte Asiatic Banking Corporation* (1867), 2 Ch. App. 391; *Re Taunton, Delmar, Lane & Co.*, [1893] 2 Ch. 175; *Re Goy & Co., Ltd.*, [1900] 2 Ch. 149. See *Re Brown & Gregory, Ltd.*, [1904] 2 Ch. 448, C. A.; *Re Smith & Co.*, [1901] 1 I. R. 73.

(*k*) *Re Northern Assam Tea Co., Ex parte Universal Life Assurance Co.* (1870), L. R. 10 Eq. 458; *Re Hercules Insurance Co., Brunton's Claim* (1874), L. R. 19 Eq. 302.

(*l*) *Webb* v. *Herne Bay Commissioners* (1870), L. R. 5 Q. B. 642; *Re Romford Canal Co.* (1883), 24 Ch. D. 85.

(*m*) *Bradford Banking Co.* v. *Briggs* (1886), 12 App. Cas. 29.

(*n*) *Watson* v. *Mid Wales Rail. Co.* (1867), L. R. 2 C. P. 593; *Roxburghe* v. *Cox* (1881), 17 Ch. D. 520, 526, C. A.; *Jeffryes* v. *Agra and Masterman's Bank* (1866), L. R. 2 Eq. 674; *Wilson* v. *Gabriel* (1863), 4 B. & S. 243. This does not apply to notice of debentures giving a floating charge (*Biggerstaff* v. *Rowatt's Wharf, Ltd.*, [1896] 2 Ch. 93, C. A.).

(*o*) *Re South Blackpool Hotel Co., Ex parte James* (1869), L. R. 8 Eq. 225, where a company's right of set-off against the assignor of debentures was held available against the assignee, following *Re Natal Investment Co.* (1868), 3 Ch. App. 355; *Young* v. *Kitchin* (1878), 3 Ex. D. 127; *Newfoundland Government*

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which accrues due before the date of the notice, but is not payable till after that date (*p*). He may not set off an independent debt which has accrued since notice of assignment, though due upon a contract made before such notice (*q*), but he may set off a debt which has accrued since notice of assignment if it has arisen out of a transaction inseparably connected with the original debt (*r*). He may also meet the plaintiff's claim by a counterclaim for unliquidated damages, provided that they arise out of the same contract; but he is not, of course, entitled to recover any damages, but only to set them off against the plaintiff's claim (*s*).

A debt due at the date of assignment includes a debt due from a shareholder to a company being wound up in respect of a call, though the call is not made till after the assignment, so that where a shareholder assigns a debt due to himself from the company being wound up, and notice of assignment is given to the liquidator, the assignee's title is subject to a call subsequently made by the company upon the assignor (*t*). If, however, the assignment and notice are before the winding-up, calls in the winding-up cannot be set off (*u*).

A right of set-off which is only available against the assignor on bankruptcy or winding up by virtue of the "mutual credit" clause (*a*) is not available against the assignee (*b*).

Equities against intermediate assignor not available.

824. Though the assignee takes subject to equities available against the assignor, he is only thereby made liable to equities against the original assignor, not to those available against an intermediate assignor, so that where a liability (such as a set-off) only attaches to the intermediate assignor the ultimate assignee can maintain his action freed from the equity (*c*).

Equities in case of trust funds.

825. The assignee of a share of a fund in court in an administration action when all debts have been certified to have been paid will take subject to the claim of creditors subsequently coming in (*d*).

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v. *Newfoundland Rail. Co.* (1888), 13 App. Cas. 199; *Cavendish* v. *Geaves* (1857), 24 Beav. 163; *Wilson* v. *Gabriel* (1863), 4 B. & S. 243.

(*p*) *Re Taunton, Delmar, Lane & Co.*, [1893] 2 Ch. 175, 183.

(*q*) *Watson* v. *Mid Wales Rail. Co.* (1867), L. R. 2 C. P. 593; *Re China Steamship Co., Ex parte Mackenzie* (1869), L. R. 7 Eq. 240, 243; *Re Milan Tramways Co., Ex parte Theys* (1884), 25 Ch. D. 587, C. A.; *Stephens* v. *Venables* (1862), 30 Beav. 625.

(*r*) *Watson* v. *Mid Wales Rail. Co., supra*, at pp. 597, 598; *Smith* v. *Parkes* (1852), 16 Beav. 115, 119; *Newfoundland Government* v. *Newfoundland Rail. Co., supra*; *Webb* v. *Smith* (1885), 30 Ch. D. 192, C. A.

(*s*) *Young* v. *Kitchin* (1878), 3 Ex. D. 127, followed in *Newfoundland Government* v. *Newfoundland Rail. Co., supra*.

(*t*) *Re China Steamship Co., Ex parte Mackenzie, supra*; *Re Gwelo etc. Co., Williamson's Claim*, [1901] 1 I. R. 38, C. A. For assignment of rights by a partner, see title PARTNERSHIP; and *Watts* v. *Driscoll*, [1901] 1 Ch. 294, C. A.; *Re Garwood*, [1903] 1 Ch. 236.

(*u*) *Re Taunton, Delmar, Lane & Co., supra*.

(*a*) See title BANKRUPTCY, Vol. II., pp. 211 *et seq.*

(*b*) *Re Asphaltic Wood Pavement Co., Lee and Chapman's Case* (1885), 30 Ch. D. 216, 221—223, C. A.

(*c*) *Re Milan Tramways Co., Ex parte Theys, supra*, at p. 593.

(*d*) *Hooper* v. *Smart* (1875), 1 Ch. D. 90. Compare *Graham* v. *Drummond*,

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When the assignor of a share in a trust fund is also trustee, his assignee will take subject to the obligation of making good breaches of trust by the assignor, whether committed before or after the assignment (*e*), and the effect will be the same where the interest assigned was purchased by the assignor, not taken directly under the trust instrument (*f*). The assignee will not be so liable if the assignor became trustee after the date of the assignment (*g*). Similarly, the assignee of a beneficiary will take subject to his assignor's liability to make good a breach of trust (*h*). Where the fund is in court to the separate account of the assignor, the assignee is not subject to such liability (*i*).

So the assignee of a legacy will only take it subject to any debt due by the legatee to the estate or to any costs incurred by the executor (*k*).

Trustees who deal with trust funds by the direction of their beneficiaries may set up the equities so created against an assignee of whom they had no notice (*l*).

Assignment of mortgage debt.

826. In the case of an assignment of a mortgage debt by the mortgagee without the privity of the mortgagor, the assignee's rights are subject to the state of account between the mortgagor and the mortgagee assignor at the date of the assignment (*m*), and whatever the mortgagor could have claimed against the mortgagee assignor, as, for example, by way of set-off, he can claim equally against the assignee (*n*).

[1896] 1 Ch. 968, where the assignor was executrix as well as beneficiary, and the assignment accordingly good against creditors.

(*e*) *Morris* v. *Livie* (1842), 1 Y. & C. Ch. Cas. 380; *Barnett* v. *Sheffield* (1852), 1 De G. M. & G. 371; *Wilkins* v. *Sibley* (1863), 4 Giff. 442; *Cole* v. *Muddle* (1852), 10 Hare, 186; *Dibbs* v. *Goren* (1849), 11 Beav. 483.

(*f*) *Doering* v. *Doering* (1889), 42 Ch. D. 203.

(*g*) *Irby* v. *Irby* (1858), 25 Beav. 632; and compare *British Mutual Investment Co.* v. *Smart* (1875), 10 Ch. App. 567.

(*h*) *Priddy* v. *Rose* (1817), 3 Mer. 86; *Stephens* v. *Venables* (1862), 30 Beav. 625; *Re Weston*, [1900] 2 Ch. 164; *Clack* v. *Holland* (1854), 19 Beav. 262; *Wilkins* v. *Sibley*, *supra*; *Barnett* v. *Sheffield*, *supra*; *Bolton* v. *Curre*, [1895] 1 Ch. 544.

(*i*) *Re Peyton*, *Bartlett* v. *Charles* (1890), 45 Ch. D. 458; *Edgar* v. *Plomley*, [1900] A. C. 431, P. C.

(*k*) *Re Knapman* (1880), 18 Ch. D. 300, C. A.; *Willes* v. *Greenhill* (1860), 29 Beav. 376; *Davies* v. *Austen* (1790), 1 Ves. 247; see *Molloy* v. *French* (1849), 13 I. Eq. R. 261; *Stephens* v. *Venables*, *supra*; *Re Jones*, *Christmas* v. *Jones*, [1897] 2 Ch. 190; *Ballard* v. *Marsden* (1880), 14 Ch. D. 376.

(*l*) *Phipps* v. *Lovegrove* (1873), L. R. 16 Eq. 80, 88; see *Newman* v. *Newman* (1885), 28 Ch. D. 674.

(*m*) *Chambers* v. *Goldwin* (1804), 9 Ves. 254, 264; *Matthews* v. *Wallwyn* (1798), 4 Ves. 118; *Norrish* v. *Marshall* (1821), 5 Madd. 475, 481; *Bickerton* v. *Walker* (1885), 31 Ch. D. 151, 158, C. A.; *Dixon* v. *Winch*, [1900] 1 Ch. 736, C. A. The principle of obtaining priority by notice does not apply to equitable mortgages of land; and see p. 386, *ante*.

(*n*) *Turner* v. *Smith*, [1901] 1 Ch. 213, where a mortgagor having given money to her solicitor to pay off the whole of her mortgage debt, the solicitor fraudulently retained the money and subsequently purported to take an assignment of the debt to himself and assign it to the defendant without privity of the mortgagor; and it was held that the right of the defendant was subject to the state of accounts between the mortgagor and the mortgagee assignor, and that, since as between them the debt was non-existent, the defendant had no right available against the mortgagor, but was bound to reconvey.

SECT. 3. Equitable Assignments.

When a mortgage is void or voidable, a transferee will take subject to the right of the mortgagor to set it aside (*o*), even though the mortgagor, in ignorance of his rights, joins in the transfer (*p*).

Where, however, a mortgagor acknowledges the receipt of a loan which he has never in fact received, a transferee takes the assignment freed from the equity which belongs to the mortgagor as against the mortgagee to redeem on payment of the sum actually received (*q*), or, when he has received nothing, to have the mortgage set aside (*r*).

The rule of estoppel does not, however, apply in favour of the assignee by reason of any statement made by the debtor unless the assignee has altered his position on the faith of such statement (*s*).

Burdensome contract.

827. When the benefit of a burdensome contract is assigned, the assignee will take subject to the rights of the other party to the contract (*a*).

Release of equities.

828. The debtor may contract himself out of the right of enforcing against the assignee his equities against the assignor (*b*), or may release those equities (*c*), or may so conduct himself as to lose his right to enforce them (*d*).

(*o*) *Parker* v. *Clarke* (1861), 30 Beav. 54; and compare *Judd* v. *Green* (1875), 45 L. J. (CH.) 108, 111; but see *French* v. *Hope* (1887), 56 L. J. (CH.) 363, where it was said that *Parker* v. *Clarke*, *supra*, was overruled by *Bickerton* v. *Walker* (1885), 31 Ch. D. 151. Compare *Davies* v. *Bolton* (*R.*) *& Co.*, [1894] 3 Ch. 678.

(*p*) *Cockell* v. *Taylor* (1852), 15 Beav. 103.

(*q*) *Bickerton* v. *Walker*, *supra*; *Bateman* v. *Hunt*, [1904] 2 K. B. 530, where the question of constructive notice in such cases is dealt with.

(*r*) *French* v. *Hope*, *supra*.

(*s*) *Horsfall* v. *Halifax and Huddersfield Union Banking Co.* (1883), 52 L. J. (CH.) 599, 602.

(*a*) *Newfoundland Government* v. *Newfoundland Rail. Co.* (1888), 13 App. Cas. 199, where set-off of damages for breach of obligation under the contract was allowed; see *Smith* v. *Parkes* (1852), 16 Beav. 115, where a set-off of partnership debts was allowed against the assignee of a share in a dissolved partnership; *Bergmann* v. *Macmillan* (1881), 17 Ch. D. 423; *Tooth* v. *Hallett* (1869), 4 Ch. App. 242; *Webb* v. *Smith* (1885), 30 Ch. D. 192; *Drew* v. *Josolyne* (1887), 18 Q. B. D. 590; *Re Toward*, *Ex parte Moss* (1887), 14 Q. B. D. 310, C. A.; *Brice* v. *Bannister* (1878), 3 Q. B. D. 569, 577, C. A.

(*b*) *Re Blakeley Ordnance Co.*, *Ex parte New Zealand Banking Corporation* (1867), 3 Ch. App. 154, 158; *Re Natal Investment Co.* (1868), 3 Ch. App. 355; see *Ord* v. *White* (1840), 3 Beav. 357; and cases cited in note (*i*), p. 387, *ante*.

(*c*) *Re Northern Assam Tea Co.*, *Ex parte Universal Life Assurance Co.* (1870), L. R. 10 Eq. 458, 463.

(*d*) *Higgs* v. *Northern Assam Tea Co.* (1869), L. R. 4 Exch. 387, where the assignees of debentures, to whom certificates were issued describing them as "registered proprietors" and who were otherwise dealt with as proprietors, were held not to be liable to a set-off given by the articles of the company in question against the assignor in respect of the debentures, followed in *Re Northern Assam Tea Co.*, *Ex parte Universal Life Assurance Society*, *supra*, where the assignees were asked to renew their securities for three years; *Re South Essex Estuary Co.*, *Ex parte Chorley* (1870), L. R. 11 Eq. 157, where, the assignment of an invalid bond having been registered without objection in the books of the company issuing it, and judgment having been recovered by consent for principal and interest, it was held that in the winding-up the validity of the bond could not be questioned; *Re Hercules Insurance Co.*, *Brunton's Claim* (1874), L. R. 19 Eq. 302, where the registration of an assignment of an invalid bond was held to amount to a representation that it was valid; *Re General Estates Co.*, *Ex parte City Bank* (1868), 3 Ch. App. 758, where the instrument assigned was held either to be a promissory note, or to be represented as free from equities;

The assignee in due course of a negotiable instrument holds it free from all equities (*e*). This rule applies to bills of exchange (unless restrictively indorsed or overdue at the date of negotiation), to promissory notes and cheques (*f*), and also to other documents which are by the law merchant or custom of trade negotiable instruments (*g*).

SUB-SECT. 4.—*Effect of Equitable Assignment.*

Right of assignee to sue in his own name.

829. In cases which do not fall within s. 25 (6) of the Judicature Act, 1873 (*h*), an equitable assignment of a chose in action passes to the assignee the right to sue for its recovery (*i*). If the chose in action is equitable (*k*) and the assignment is absolute, the assignee can sue in his own name without making the assignor a party to the action (*l*). If, however, the chose in action is legal (*m*), the assignor, or if he is dead his legal personal representative, must be a party to the action either as plaintiff or defendant, even where the assignment is absolute (*n*), and *à fortiori* where the assignment is by way of security only, for he then has a right to redeem (*o*). If the assignor does not bring the action himself, the assignee is entitled to do so in the name of the assignor, on giving him a proper indemnity against all costs and charges consequent on the use of his name (*p*); or, on proving his failure or refusal to sue or to allow the use of his name, may make him a defendant (*q*), leave to amend being granted, if necessary (*r*). Where the assignor's interest in the subject-matter has ceased, his presence before the court may be dispensed with (*s*). If, in the case of the assignment of a debt,

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Macfarlane v. *Lister* (1887), 37 Ch. D. 88, where the debtor accepted and delivered to the assignee a written order directing him to pay the assignee out of a fund on which the debtor had prior claims; contrast *Graham* v. *Johnson* (1869), L. R. 8 Eq. 36; and see p. 386, *ante*.

(*e*) *London Joint Stock Bank* v. *Simmons*, [1892] A. C. 201.

(*f*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), ss. 36, 38, 73, 89. See further title BILLS OF EXCHANGE ETC., Vol. II., pp. 506, 508, 514.

(*g*) As to what are negotiable instruments, see title BILLS OF EXCHANGE ETC., Vol. II., pp. 564 *et seq.*

(*h*) 36 & 37 Vict. c. 66; see p. 369, *ante*.

(*i*) *Durham Brothers* v. *Robertson*, [1898] 1 Q. B. 765, 769, C. A.

(*k*) As to what choses in action are equitable, see p. 362, *ante*.

(*l*) *Cator* v. *Croydon Canal Co.* (1841), 4 Y. & C. (EX.) 405, 412; *Fulham* v. *McCarthy* (1848), 1 H. L. Cas. 703; *Bagshaw* v. *Eastern Union Rail. Co.* (1849), 7 Hare, 114; *Jones* v. *Farrell* (1858), 1 De G. & J. 208, C. A.; *Goodson* v. *Ellisson* (1827), 3 Russ. 583.

(*m*) As to what choses in action are legal, see p. 362, *ante*.

(*n*) *Durham Brothers* v. *Robertson*, *supra*, at p. 769; *Cathcart* v. *Lewis* (1792), 1 Ves. 463.

(*o*) *Durham Brothers* v. *Robertson*, *supra*, at pp. 770, 774.

(*p*) *Hammond* v. *Messenger* (1838), 9 Sim. 327, 332; *Wood* v. *Griffith* (1818), 1 Swan. 43, *per* Lord ELDON, L.C., at p. 56; *Pickford* v. *Ewington* (1835), 4 Dowl. 451; *Crouch* v. *Credit Foncier of England* (1873), L. R. 8 Q. B. 374, *per* BLACKBURN, J., at p. 380; *Turquand* v. *Fearon* (1879), 4 Q. B. D. 280. If after action brought it is sought to add the assignor, his consent in writing is necessary (*Tryon* v. *National Provident Institution* (1886), 16 Q. B. D. 678). The assignor's name may be used even where the assignor is bankrupt (*Winch* v. *Keeley* (1787), 1 Term Rep. 619); and compare *The Wasp* (1867), L. R. 1 A. & E. 367.

(*q*) *Bowden's (E. M.) Patents Syndicate, Ltd.* v. *Smith (Herbert) & Co.*, [1904] 2 Ch. 86, *per* WARRINGTON, J., at p. 91.

(*r*) *Ibid.*

(*s*) See *Brandt's (William) Sons & Co.* v. *Dunlop Rubber Co.*, [1905] A. C. 454,

the action has been commenced, without any previous notice to the debtor, in the name of the assignee alone, and after the issue of the writ time under the Statute of Limitations has run against the claim, leave will not be given to add the assignor, and the action will fail (*t*). Where the assignee fails to join the assignor, the assignor cannot, on the application of the debtor, be added as defendant, nor, without notice to him and hearing him as to his interest and the terms on which he should be added, as plaintiff (*a*).

Inasmuch as the assignee takes subject to all equities (*b*), the action may fail if all parties interested or claiming to be interested are not parties (*c*). So also where the subject-matter of the assignment is such that an account has to be taken—*e.g.*, a share of profits—and there are several assignees, they must all be made parties (*d*).

In an action by the assignee the original debtor, whether he admits the debt or not, is not concerned with the state of the accounts between the assignor and the assignee where the debt was assigned by way of security, and if he does not dispute the debt he is entitled to his costs of the action out of the debt (*e*).

The above propositions apply to any action, wherever brought (*f*).

An equitable assignment of a debt entitles the assignee to present a petition in bankruptcy against the debtor without joining the assignor as co-petitioner (*g*), and an equitable assignment of a debt due from a company entitles the assignee to present a winding-up petition against the company (*h*).

630. A debtor or fundholder who has received notice of an equitable assignment must withhold all further payments to the assignor unless made with the consent of the assignee (*i*), for if he pays to the assignor without such consent he will have to pay over again to the assignee (*k*). After notice the debtor or fundholder becomes trustee for the assignee and cannot obtain a good discharge without the concurrence of the assignee (*l*). If the assignor

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where the assignor had been wrongly paid the assigned debt. It would seem that an action would not now be dismissed merely because the assignor was not made a party in the first instance (*ibid.*, at p. 462). See, however, *Durham Brothers* v. *Robertson*, [1898] 1 Q. B. 765, 774, C. A.

(*t*) *Hudson* v. *Fernyhough* (1889), 61 L. T. 722.

(*a*) *Sanders & Co.* v. *Peek* (1884), 50 L. T. 630.

(*b*) See p. 386, *ante*.

(*c*) *Durham Brothers* v. *Robertson*, *supra*, at p. 774; see, however, note (*s*), p. 391, ante.

(*d*) *Bergmann* v. *Macmillan* (1881), 17 Ch. D. 423.

(*e*) *Durham Brothers* v. *Robertson*, *supra*, at p. 770.

(*f*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 24; *Fitzroy* v. *Cave*, [1905] 2 K. B. 364, 374, C. A.

(*g*) *Re Baillie, Ex parte Cooper* (1875), L. R. 20 Eq. 762; unless the assignee is trustee only, when the beneficial owner must join (*Re Adams, Ex parte Culley* (1878), 9 Ch. D. 307, C. A.; and see *Re Hastings, Ex parte Dearle* (1884), 14 Q. B. D. 184, C. A.).

(*h*) *Re Montgomery Moore Ship Collision Doors Syndicate, Ltd.* (1903), 72 L. J. (CH.) 624; see *Re Combined Weighing and Advertising Machine Co.* (1889), 43 Ch. D. 99, 104, C. A.

(*i*) *Stephens* v. *Venables* (1862), 30 Beav. 625; *Brandt's (William) Sons & Co.* v. *Dunlop Rubber Co.*, *supra*, at p. 462.

(*k*) *Jones* v. *Farrell* (1858), 1 De G. & J. 208, C. A.; *Brice* v. *Bannister* (1878), 3 Q. B. D. 569, C. A.; and compare *Hodgson* v. *Hodgson* (1837), 2 Keen, 704.

(*l*) *Dearle* v. *Hall* (1828), 3 Russ. 1, 12; *West of England Bank* v. *Batchelor* (1882), 51 L. J. (CH.) 199; *Kelly* v. *Selwyn*, [1905] 2 Ch. 117, 121 · *Société*

has commenced proceedings against him, he may interplead (*m*), and cannot justify payment to the assignor on the ground that the assignee has refused to indemnify him (*n*). If, however, the assignor disputes the assignment of a debt payable by instalments, the whole amount being due on default in payment of any instalment, the debtor may continue to pay the instalments to the assignor until the assignee has obtained an injunction (*o*). Payments made by the debtor to the assignee, without notice that the latter has himself assigned over, will be good against the sub-assignee (*p*).

Mortgage of trust funds.

In the case of a mortgage of trust funds, the trustees may safely pay over the funds to the mortgagee upon his written receipt, and are not concerned to inquire whether any money remains due on the mortgage or not (*q*). But they are not bound to pay over the whole fund when a lesser sum only is due on the mortgage, especially if they have notice of subsequent incumbrances (*r*), and if they have reason to believe there may be doubt as to what amount is due they may refuse to pay over any sum until a proper account has been taken (*s*).

When assignee may give valid discharge.

831. The equitable assignee of a legal chose in action cannot give a valid discharge to the original debtor unless expressly empowered so to do (*t*).

SECT. 4.—*Assignments under Particular Statutes.*

Relaxation of common law rule by statute.

832. The strictness of the common law rule against the assignment of choses in action has been relaxed by various statutes, which have from time to time expressly provided for the assignment of particular kinds of choses in action under definitely circumscribed conditions (*a*).

Bonds.

833. Bonds of various kinds have from time to time been made assignable by statute, namely, bail bonds in 1704 (*b*), replevin bonds in 1737 (*c*), East India bonds in 1811 (*d*), and administration bonds, which are assignable by the court on breach, in 1857 (*e*).

Générale de Paris v. *Tramways Union Co.* (1884), 14 Q. B. D. 424, 446, C. A.; *Liquidation Estates Purchase Co.* v. *Willoughby*, [1898] A. C. 321, 336.

(*m*) *Robinson* v. *Jenkins* (1890), 24 Q. B. D. 275, C. A., *per* FRY, L.J., at p. 279; *Prudential Assurance Co.* v. *Thomas* (1867), 3 Ch. App. 74.

(*n*) *Jones* v. *Farrell* (1858) 1 De G. & J. 208, C. A.

(*o*) *Aplin* v. *Cates* (1860), 30 L. J. (CH.) 6.

(*p*) *Stocks* v. *Dobson* (1853), 4 De G. M. & G. 11, C. A.

(*q*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 22; *Hockey* v. *Western*, [1898] 1 Ch. 350, 356, C. A.; see *Re Hancock, Hancock* v. *Berrey* (1888), 59 L. T. 197.

(*r*) *Re Bell, Jeffery* v. *Sayles*, [1896] 1 Ch. 1, C. A.

(*s*) *Hockey* v. *Western*, *supra*. In such a case the best course may be to pay the fund into court (*ibid.*).

(*t*) *Durham Brothers* v. *Robertson*, [1898] 1 Q. B. 765, C. A.; and see *Jones* v. *Farrell*, *supra*, at p. 218.

(*a*) For the operation and effect of the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (6), see pp. 367—374, *ante*.

(*b*) Stat. 4 & 5 Anne, c. 16, s. 20.

(*c*) Distress for Rent Act, 1737 (11 Geo. 2, c. 19), s. 23.

(*d*) East India Company Bonds Act, 1811 (51 Geo. 3, c. 64), s. 4.

(*e*) Court of Probate Act, 1857 (20 & 21 Vict. c. 77), ss. 81, 83; Court of Probate Act, 1858 (21 & 22 Vict. c. 95), s. 15.

SECT. 4. Assignments under Particular Statutes.

834. Bills of exchange, promissory notes, and cheques, formerly governed mainly by the custom of merchants, are now regulated by the Bills of Exchange Act, 1882 (*f*), which is a codifying statute, and provides for the transfer of these instruments under various conditions attached by the statute to each of them.

Government stock.

835. All shares or interests in public stock standing in the name of any person in the books of the Bank of England are transferable by such person or, in case of his death, by his personal representatives (*g*).

Local loan debentures.

836. Local loan debentures also have by statute been made assignable by delivery when the debentures are issued as payable to bearer (*h*); and where the principal sum mentioned in such a debenture is made payable to a person named therein, his executors, administrators, or assigns, such a debenture (called by the statute a nominal debenture) is transferable by writing in the manner prescribed by the local authority (*i*). The title of any person to any share in debenture stock must be evidenced by entry in the register of the name of such person as owner of such share (*k*). The statute contains further provisions for the issue of stock certificates to bearer (*k*) and annuity certificates, and in each case for their transfer (*l*).

Mortgages etc. under Companies Clauses Act.

837. Mortgages and bonds for securing money borrowed by any company regulated by the Companies Clauses Consolidation Act, 1845 (*m*), may be assigned by the holder by a deed duly stamped, and duly stating the consideration (*n*).

Shares etc. of companies under Companies Act.

838. Shares in companies formed and registered under the Companies Act, 1862 (*o*), are by that Act made capable of transfer in the manner provided by the regulations of each particular company (*a*). And shares in such companies cannot be made

(*f*) 45 & 46 Vict. c. 61. See title BILLS OF EXCHANGE ETC., Vol. II. Promissory notes were originally made negotiable by stat. 3 & 4 Anne, c. 9.

(*g*) National Debt Act, 1870 (33 & 34 Vict. c. 71), ss. 22, 23. The transfer of stock in the public funds is effected by signature in the proper book at the Bank of England, either by the transferor personally or by his attorney, lawfully authorised under seal, attested by two or more witnesses (*ibid.*, s. 22).

(*h*) Local Loans Act, 1875 (38 & 39 Vict. c. 83), s. 5. See further, title LOCAL GOVERNMENT.

(*i*) Local Loans Act, 1875 (38 & 39 Vict. c. 83), s. 5.

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

(*l*) *Ibid.*, s. 7.

(*m*) 8 & 9 Vict. c. 16. As to such mortgages and bonds, see titles RAILWAYS AND CANALS; CORPORATIONS. For the forms of such mortgages and bonds, see Encyclopædia of Forms, Vol. V., pp. 127, 128.

(*n*) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 46. The deed of transfer is to be produced to the secretary to the company for registration (*ibid.*, s. 47). For the form of transfer, see Encyclopædia of Forms, Vol. V., p. 129. This Act has been incorporated with many railway and other special Acts; see *Vertue* v. *East Anglian Railways Co.* (1850), 5 Exch. 280.

(*o*) 25 & 26 Vict. c. 89. For such companies, see title COMPANIES.

(*a*) *Ibid.*, s. 22. The Table A, now in force under the Act of 1862 contains a form of transfer, and requires it to be executed by the transferor and transferee; see further, title COMPANIES.

transferable by delivery only, except in the case of fully paid-up shares in limited companies (*h*).

When debts and other things in action of a company have been assigned in the course of a winding-up, any person who is an assignee under such an assignment may bring or defend an action or suit relating to such thing in action in his own name (*c*).

Policies of assurance.

839. Any person who is entitled by assignment or other derivative title to a policy of life assurance, and who possesses, when he brings his action, the right in equity to receive and give to the company liable an effectual discharge for the moneys assured or secured under such policy, may sue at law in his own name to recover such moneys after due written notice of the assignment has been given to the company concerned (*d*).

Assignees of marine policies may also sue in their own names (*e*). The assignment of such a policy may be made by indorsement on the policy in the words of a form scheduled to the Act, or to the like effect (*f*).

Bills of lading.

840. Bills of lading are assignable, and the assignees are entitled to sue upon them in their own names and are subject to the same liabilities as if the original contract had been made with them (*g*).

Copyright.

841. The copyright in dramatic works is assignable in writing under the hand of the author (*h*) or that of his lawful agent, whose signature is sufficient evidence of the assignment (*i*). Such assignment need not be under seal (*k*). But a part owner cannot assign the whole copyright without the consent of his co-owners (*l*).

The copyright in any book (*m*) may be assigned by entering in the register book the assignment and the name and address of the

(*b*) Companies Act, 1867 (30 & 31 Vict. c. 131), ss. 27 *et seq.*

(*c*) Companies Act, 1862 (25 & 26 Vict. c. 89), s. 157.

(*d*) Policies of Assurance Act, 1867 (30 & 31 Vict. c. 144), s. 1. Before this Act life policies were assignable, but the assignee of such a policy had no right to sue on it in his own name (*Chowne* v. *Baylis* (1862), 31 Beav. 351); compare *Re Turcan* (1888), 40 Ch. D. 5, C. A. Policies issued under the Friendly Societies Acts are assignable in the ordinary way (*Re Griffin*, [1902] 1 Ch. 135, C. A.). As to what amounts to an assignment of a life policy, see *Dufaur* v. *Professional Life Assurance Co.* (1858), 25 Beav. 599; *Spencer* v. *Clarke* (1878), 9 Ch. D. 137. But a second assignee with notice of the first assignment does not gain priority by reason of his giving notice first (*Re Holmes* (*A. D.*) (1885), 29 Ch. D. 786, C. A.; *Newman* v. *Newman* (1885), 28 Ch. D. 674. As to fire policies, see p. 403, *post*; and, generally, title INSURANCE.

(*e*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 50 (2); see note (*k*), p. 397, *post*.

(*f*) *Ibid.*, s. 50 (3). A marine policy may be assigned after loss (*Lloyd* v. *Fleming* (1872) (L. R. 7 Q. B. 299), but not after a transfer of the subject-matter of the policy (*North of England Oil-Cake Co.* v. *Archangel Insurance Co.* (1875), L. R. 10 Q. B. 249), except in pursuance of an agreement to assign before the cesser of interest (*ibid.*, *per* LUSH, J., at p. 254).

(*g*) Bills of Lading Act, 1855 (18 & 19 Vict. c. 111), s. 1. See note (*i*), p. 397, *post*; and title SHIPPING AND NAVIGATION.

(*h*) Dramatic Copyright Act, 1833 (3 & 4 Will. 4, c. 15), s. 2. As to the extent and operation of the assignment, see title COPYRIGHT.

(*i*) *Morton* v. *Copeland* (1855), 16 C. B. 517.

(*k*) *Marsh* v. *Conquest* (1864), 17 C. B. (N. S.) 418.

(*l*) *Powell* v. *Head* (1879), 12 Ch. D. 686.

(*m*) Copyright Act, 1842 (5 & 6 Vict. c. 45), s. 2. And see *Davis* v. *Benjamin*, [1906] 2 Ch. 491; *Ward, Lock & Co.* v. *Long, Ltd.*, [1906] 2 Ch. 550. As to copyright in books generally, see title COPYRIGHT.

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assignee (*n*); and registration of the assignment is a condition precedent to the bringing of an action by the assignee for infringement of copyright (*o*). But an assignee by a written instrument outside the register need only enter himself as proprietor in the register, without entering his assignment or seeing that his assignor is registered (*p*).

Copyright in engravings may be assigned in writing signed by the proprietor in the presence of two credible witnesses (*q*). Copyright in paintings etc. may be assigned in writing; but, in order that the assignee may sue for infringement, he must be registered previously as proprietor or assignee (*r*). Such registration must contain the date of assignment, the names of parties, the name and address of assignee, the like particulars of the author, and the name and description of the work (*s*).

Patents.

842. The right to assign a patent has long been recognised (*t*). Statutory provision has been made for the keeping of a register of patents and for entering therein a notification of the assignment of any patent (*u*). Any person becoming entitled by assignment to a patent is to be registered as its proprietor at his request and on proving his title to the satisfaction of the Comptroller-General of Patents, Designs and Trade Marks (*w*), and upon registration acquires power absolutely to deal with the patent, including the power to assign it (*a*).

An assignment can only be completely effected by deed (*b*). But an assignment not under seal, yet purporting to transfer the patent rights, will effectively pass the equitable interest in them if made for value and properly registered as a document affecting the proprietorship of the letters patent (*c*).

(*n*) Copyright Act, 1842 (5 & 6 Vict. c. 45), s. 13.

(*o*) *Ibid.*, s. 24.

(*p*) *Liverpool General Brokers' Association* v. *Commercial Press Telegram Bureaux*, [1897] 2 Q. B. 1, *per* KENNEDY, J., at p. 4, citing with approval Scrutton, Copyright, 3rd ed., p. 146 (now 7th ed., p. 154).

(*q*) Prints Copyright Act, 1777 (17 Geo. 3, c. 57). See further, title COPYRIGHT.

(*r*) Fine Arts Copyright Act, 1862 (25 & 26 Vict. c. 68), ss. 3, 4. This Act differs from the Copyright Act, 1842 (5 & 6 Vict. c. 45), by requiring registration to precede the infringement complained of, instead of simply preceding the action for such infringement. When once registration has been effected, all subsequent assignments must be registered (Fine Arts Copyright Act, 1862 (25 & 26 Vict. c. 68), s. 4). See further, title COPYRIGHT.

(*s*) *Ibid.*

(*t*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 14 (1), re-enacting Patents, Designs, and Trade Marks Act, 1883 (46 & 47 Vict. c. 57), s. 36. As to patents generally, see title PATENTS AND INVENTIONS.

(*u*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 28 (1). Such register is to be *primâ facie* evidence of any matters directed by the Act to be inserted therein (*ibid.*, s. 28 (3)); and a copy of any entry therein is to be deemed *primâ facie* proof of the assignment, and until such entry of assignment be made the grantee of such letters patent is to be deemed to be the sole and exclusive proprietor of such letters patent (*Walton* v. *Lavater* (1860), 8 C. B. (N. S.) 162).

(*w*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 71 (1).

(*a*) *Ibid.*, s. 71 (3). This power is subject to the provisions of the Act and to any rights appearing from the register to be vested in any other person (*ibid.*).

(*b*) *Re Casey's Patents*, [1892] 1 Ch. 104, C. A.; Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 71 (3).

(c) *Ibid.*

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843. A right of entry, whether immediate or future and whether vested or contingent, into or upon any tenements or hereditaments in England, of any tenure, may be assigned by deed (*d*).

Provision has been made in certain cases for the passing of the benefit and burden of covenants in a lease upon the assignment, whether in whole or in part, of the reversion or the term (*e*).

SECT. 5.—*Assignments by the Law Merchant.*

Negotiable instruments.

844. The law merchant, which is part of the law of England (*f*), recognised the assignability of various choses in action (*g*), *e.g.*, bills of exchange, promissory notes and drafts payable to bearer (*h*), bills of lading (*i*), and policies of marine insurance (*j*). But the assignment of these choses in action is now regulated by statute (*k*), except in the case of those negotiable instruments which do not come within the terms of the Bills of Exchange Act, 1882 (*l*), as to which the law merchant still continues to apply (*m*).

SECT. 6.—*Assignments by and to the Crown.*

Assignments by Crown.

845. The Crown has always been able to assign choses in action provided that they are certain in amount, as, for instance, a

(*d*) Real Property Act, 1845 (8 & 9 Vict. c. 106), s. 6. But this section does not apply to the right of re-entry on condition broken before alienation of the reversion, but only to an original right where there has been disseisin, or where the party has a right to recover lands, and his right of entry, and nothing but that, remains; it means a righ tof entry in the nature of an estate or interest (*Hunt* v. *Bishop* (1853), 8 Exch. 675; *Hunt* v. *Remnant* (1854), 9 Exch. 635, Ex. Ch.). And the reason given for this restriction is, that it was at the election of the person entitled to enter whether he would take advantage of the breach of the condition (*Jenkins* v. *Jones* (1882), 9 Q. B. D. 128, C. A.).

(*e*) Stat. 32 Hen. 8, c. 34; Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), ss. 10—12. See further, title LANDLORD AND TENANT.

(*f*) Co. Litt. 182 a; *Barnett* v. *Brandao* (1843), 6 Man. & G. 630, 665, Ex. Ch. See also *Edie* v. *East India Co.* (1761), 2 Burr. 1216, 1226.

(*g*) *Bechuanaland Exploration Co.* v. *London Trading Bank*, [1898] 2 Q. B. 658; *Edelstein* v. *Schuler & Co.*, [1902] 2 K. B. 144; Law Quarterly Review, Vol. V., 130, 245.

(*h*) *Goodwin* v. *Robarts* (1875), L. R. 10 Exch. 337, 343, Ex. Ch.; *Pillan* v. *Van Mierop and Hopkins* (1765), 3 Burr. 1663, *per* Lord MANSFIELD, at p. 1665. See also *Master* v. *Miller* (1791), 4 Term Rep. 320, *per* BULLER, J., at p. 342; *Wookey* v. *Pole* (1820), 4 B. & Ald. 1. See title BILLS OF EXCHANGE ETC., Vol. II., pp. 459 *et seq.* As to promissory notes, see note (*f*), p. 394, *ante*.

(*i*) *Lickbarrow* v. *Mason* (1794), 5 Term Rep. 683; *Newsom* v. *Thornton* (1805), 6 East, 17, *per* Lord ELLENBOROUGH, C.J., at p. 40. But the assignee was not entitled at common law to sue in his own name (*Thompson* v. *Dominy* (1845), 14 M. & W. 403); and see *Sewell* v. *Burdick* (1884), 10 App. Cas. 74, *per* Lord BLACKBURN, at p. 91; "*The Freedom*" (1871), L. R. 3 P. C. 594.

(*j*) The assignee could not sue in his own name, but the action was brought by the assignor, being the original holder of the policy, as trustee for his assignee (*Powles* v. *Innes* (1843), 11 M. & W. 10, *per* PARKE, B., at p. 13; *Sparkes* v. *Marshall* (1836), 2 Bing. (N. C.) 761, 774; *Boddington* v. *Castelli* (1853), 1 E. & B. 879, Ex. Ch. Respondentia bonds were also assignable by the law merchant (*Master* v. *Miller*, *supra*, *per* BULLER, J., at p. 342).

(*k*) Namely, Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61); Bills of Lading Act, 1855 (18 & 19 Vict. c. 111); Policies of Marine Insurance Act, 1868 (31 & 32 Vict. c. 86), repealed and replaced by Marine Insurance Act, 1906 (6 Edw. 7, c. 41); and see pp. 394, 395, *ante*.

(*l*) 45 & 46 Vict. c. 61. For such instruments, see title BILLS OF EXCHANGE ETC., Vol. II., pp. 564 *et seq.*

(*m*) See generally, as to what instruments are negotiable, title BILLS OF

SECT. 6. **Assignments by and to the Crown.**

specialty debt, but not those which are uncertain, as, for instance, a claim for unliquidated damages (*n*).

Where the Crown can assign a chose in action the assignee is entitled to sue for it in his own name (*o*). Such an assignment, however, does not entitle the assignee to assign over the chose in action to another subject (*p*).

There are some choses in action which cannot at common law be assigned by the Crown (*q*), as, for instance, a debt due upon a simple contract only and not by specialty (*r*).

It has also been said that the King cannot in every case grant an annuity over, for his person is not chargeable; but that he may do so if the annuity be charged on any of his possessions (*a*).

Assignments to the Crown.

846. A subject may generally assign to the Crown choses in action which are certain (*b*). But a portion of a debt cannot be assigned to the Crown (*c*); nor can a debt by simple contract (*d*). And an old statute (*e*) is still in force which prohibits any person who is a debtor or accountant to the Crown from assigning to the Crown any debt which is not *bonâ fide* due to him.

EXCHANGE ETC., Vol. II., pp. 564 *et seq.* A covenant to pay money is not negotiable by the law merchant (*Crouch* v. *Crédit Foncier of England* (1873), L. R. 8 Q. B. 374, 382); but see *Bechuanaland Exploration Co.* v. *London Trading Bank*, [1898] 2 Q. B. 658.

(*n*) Com. Dig. tit. Assignment, D; Bro. Abr. tit. Chose in Action; Termes de la Ley, *sub voc.* Chose in Action; Co. Litt. 232 b, note 1; *Willion* v. *Berkley* (1662), 1 Plowd. 223; *Breverton's Case* (1536), Dyer, 30 b; *Miles* v. *Williams* (1714), 1 P. Wms. 49; *Master* v. *Miller* (1791), 4 Term Rep. 320, *per* BULLER, J., at p. 340; Y. B. 2 Hen. 7, 8, pl. 25. This exception may be derived from the universal succession accruing to the Crown on forfeitures (Pollock, Law of Contracts, 7th ed. 704). It is suggested that the following considerations also may have operated in favour of creating the exception in question, namely, (1) the maxim that the King is the fountain of justice, and therefore cannot be guilty of maintenance or champerty, or be likely to use such assignments for oppression of his subjects, and (2) that the King is *super legem*, and therefore the principles and usage of common law do not avail against him.

(*o*) Y. B. 39 Hen. 6, 26, pl. 36; Vin. Abr. tit. Prerogative of the King, M. book 9; Pulton, 228; Saville, 3, 133; Bro. Abr. tit. Prerogative 45; *Breverton's Case*, *supra*; *R.* v. *Wendman* (1606), Cro. Jac. 82; *Lambert* v. *Taylor* (1825), 4 B. & C. 138. It has also been said that the King's grantee may prosecute an extent in the King's name, on the ground of the grant being a warrant to him to prosecute in that name (Y. B. 3 Hen. 4, 8, pl. 34; Bro. Abr. tit. Chose in Action, pl. 1; Y. B. 19 Hen. 6, 47, pl. 100). As to extents, see title CROWN PRACTICE.

(*p*) *R.* v. *Twine* (1608), Cro. Jac. 179.

(*q*) It is doubtful whether the Crown can assign to a subject in general terms choses in action which are real, such as rights of action in relation to land (Bro. Abr. tit. Patents, pl. 98; tit. Chose in Action, pl. 14; *Priddle and Napper's Case* (1613), 11 Co. Rep. 12; Leon. 21; Chitty, Prerogatives of the Crown, 388). The Crown may, however, by special words, assign to a subject a right of entry (Vin. Abr. tit. Prerogative of the King, G, book 3).

(*r*) Sheppard's Abridgment, fo. 338.

(*a*) Salk. 58, pl. 1; Freem. (K. B.) 331; Chitty, Prerogatives of the Crown, 388, 389. See also T. Raym. 241.

(*b*) Sheppard's Abridgment, fo. 339.

(*c*) Owen, 2.

(*d*) Sheppard's Abridgment, fo. 338.

(*e*) Stat. 7 Jac. 1, c. 12.

SECT. 7.—*Assignments by Operation of Law.* SECT. 7.

Assignments by Operation of Law.

847. The right to a chose in action is in many cases transferred by operation of law.

Upon the death of an individual all choses in action to which he was entitled pass as a general rule to his personal representative (*f*). There are, however, some exceptions (*g*). For instance, the interest that the deceased person has in a chose in action jointly with another person does not pass to his personal representative, but to the other joint holder (*h*), unless they are entitled as partners in trade, in which case the beneficial interest in the deceased person's share passes to his executor, but the right to recover it passes to the surviving partner (*i*).

Death.

In the case of a corporation sole, *e.g.*, a bishop or rector, a chose in action will not as a rule pass to the successor, but to the executor of the deceased (*k*).

848. Upon a person being adjudicated bankrupt the property of the bankrupt, including his choses in action (*l*), vests in the official receiver, and on the appointment of a trustee in the trustee (*m*), and, with the exception of stocks and shares (*n*), is to be deemed to have been duly assigned to the trustee (*o*).

Bankruptcy

849. Under the law in force prior to the year 1883 marriage vested in the husband a certain qualified title in the choses in action of the wife, but since the coming into operation of the Married Women's Property Act, 1882 (*p*), this is no longer the case (*q*).

Marriage.

850. Choses in action belonging to a pauper may be made available for defraying the expenses incurred for his maintenance and burial (*r*).

Pauperism.

851. The right to a chose in action may be transferred to a judgment creditor by various forms of execution, *e.g.*, the attachment of a debt or the appointment of a receiver (*s*).

Execution.

(*f*) 1 Saund. 216 a, note to *Wheatley* v. *Lane*. See title EXECUTORS AND ADMINISTRATORS; and, as to the choses in action of a married woman, title HUSBAND AND WIFE.

(*g*) See generally, title EXECUTORS AND ADMINISTRATORS.

(*h*) *Southcote* v. *Hoare* (1818), 3 Taunt. 87.

(*i*) See title PARTNERSHIP.

(*k*) *Howley* v. *Knight* (1869), L. R. 14 Q. B. 240; see further, title CORPORATIONS.

(*l*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 168.

(*m*) *Ibid.*, s. 54 (1), (2).

(*n*) *Ibid.*, s. 50 (3).

(*o*) *Ibid.*, s. 50 (5). See further, title BANKRUPTCY, Vol. II., p. 189.

(*p*) 45 & 46 Vict. c. 75.

(*q*) See generally, title HUSBAND AND WIFE.

(*r*) Poor Law Amendment Act, 1849 (12 & 13 Vict. c. 103), s. 16. See title POOR LAW.

(*s*) See title EXECUTION.

PART III. Choses in Action not capable of Assignment.

Part III.—Choses in Action not capable of Assignment.

Pensions and salaries to public officers.

852. There are some choses in action which have never been assignable; and, broadly speaking, it may be said that the ground of their non-assignability is denoted by that comprehensive expression "public policy" (*t*).

Thus, public policy forbids that effect should be given to assignments of pensions and salaries of public officers payable to them for the purpose of maintaining the dignity of their office, or to assure a due discharge of its duties (*a*). But the office must be a public one, or in some way connected with the public service (*b*), and to make the office a public office the pay must come out of national, and not out of local, funds, and the office must be public in a very strict sense of that term. It is not enough that the due discharge of the duties of the office should be for the public benefit in a secondary and remote sense (*c*), for if the office is a sinecure, and the duties have ceased, the pensions or annuities in respect thereof are assignable (*d*).

Salaries not assignable.

853. Thus, the salaries of the following public offices cannot be assigned: a judge (*e*), a clerk of the peace (*f*), an assistant parliamentary counsel to the Treasury (*g*), officer in the army or navy (*h*)

(*t*) For the avoidance of fraudulent and voluntary assignments, see titles BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 275 *et seq.*; FRAUDULENT AND VOIDABLE CONVEYANCES.

(*a*) *Stone* v. *Lidderdale* (1795), 2 Anst. 533; *Grenfell* v. *Windsor* (*Dean*) (1840), 2 Beav. 544, 549; and see *Re Huggins, Ex parte Huggins* (1882), 21 Ch. D. 85, C. A.

(*b*) *Grenfell* v. *Windsor* (*Dean*), *supra*.

(*c*) *Re Mirams*, [1891] 1 Q. B. 594, where the assignment of the salary of a workhouse chaplain payable out of the poor rate was held valid. A clergyman having the cure of souls is not a public officer, and there has been no decision against the assignment of his interest. At common law a beneficed clergyman can charge his benefice; and although this was made unlawful by stat. 13 Eliz. c. 20, yet when that Act was repealed in 1803 by stat. 43 Geo. 3, c. 84, s. 10, a charge given between 1803 and 1817 (when stat. 43 Geo. 3, c. 84, was repealed, and stat. 13 Eliz. c. 20 revived by stat. 57 Geo. 3, c. 99) was held valid (*Metcalfe* v. *York* (*Archbishop*) (1836), 1 My. & Cr. 547).

(*d*) *Arbuthnot* v. *Norton* (1846), 5 Moo. P. C. C. 219; *Grenfell* v. *Windsor* (*Dean*), *supra*, at p. 550.

(*e*) *Arbuthnot* v. *Norton*, *supra*; *Flarty* v. *Odlum* (1790), 3 Term Rep. 681.

(*f*) *Palmer* v. *Bate* (1821), 2 Brod. & Bing. 673; *Hill* v. *Paul* (1840), 8 Cl. & Fin. 295, H. L. As to clerks of the peace, see titles MAGISTRATES; PUBLIC OFFICERS.

(*g*) *Cooper* v. *Reilly* (1829), 2 Sim. 560.

(*h*) *Stone* v. *Lidderdale* (1795), 2 Anst. 533; *Flarty* v. *Odlum*, *supra*; *Lidderdale* v. *Montrose* (*Duke*) (1791), 4 Term Rep. 248; *Barwick* v. *Read* (1791), 1 Hy. Bl. 627; *McCarthy* v. *Goold* (1810), 1 Ball & B. 387. But arrears of half-pay or full pay are assignable, since the right there has become absolute (*Price* v. *Lovett* (1851), 20 L. J. (CH.) 270); compare *Crowe* v. *Price* (1889), 22 Q. B. D. 429, C. A.; and see also *Tunstall* v. *Boothby* (1840), 10 Sim. 542; *Grenfell* v. *Windsor* (*Dean*), *supra*; *Ellis* v. *Grey* (*Earl*) (1833), 6 Sim. 214.

Pension.

whether on half-pay or full pay (*i*); and, as a general rule, the profits of a public office are not assignable (*k*).

854. Where a pension is granted by the Crown to one who, though not for the time engaged in any active duties, is still liable to be called to active service, and is therefore to be considered in the service of the Crown, the pension is to be considered as to some extent granted in order to maintain the grantee until he is called on to serve again (*l*). So compensation to a civil servant on reduction in an office, he being liable to be called upon to serve again, is not assignable (*m*). And a pension having for its object a perpetual memorial of national gratitude for public services is not alienable (*n*).

But a man may assign a pension given to him entirely for past services, whether granted to him for life or during pleasure (*o*), except where such assignment is forbidden by statute, as, for instance, deferred pay or military reward payable to any officer or soldier of the army, Royal Marines, or His Majesty's Indian forces, or of the Royal Malta Fencible Artillery, or any pension, allowance, or relief payable to any such officer or soldier, or to his widow, child, or other relative, or to any person in respect of military service (*p*); naval pensions payable to an officer in the navy, seaman, or marine, or to an officer's widow; allowances from

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(*i*) *Collyer* v. *Fallon* (1823), 1 Turn. & R. 459, 474; *Apthorpe* v. *Apthorpe* (1887), 12 P. D. 192, C. A. See also *Law* v. *Law* (1735), Cas. *temp.* Talb. 140; *Stuart* v. *Tucker* (1777), 2 Wm. Bl. 1137; *Mouys* v. *Leake* (1799), 8 Term Rep. 411, 414; *Davis* v. *Edgar* (1811), 4 Taunt. 63; stat. 1 Geo. 2, st. 2, c. 14, and stat. 1 Geo. 4, c. 119, s. 38; *Priddy* v. *Rose* (1817), 3 Mer. 86; *Cathcart* v. *Blackwood* (1765), Cooke's Bankruptcy Laws, 8th ed. 318, H. L.; *Re Keeley, Ex parte Hawker* (1872), 7 Ch. App. 214. But military prize-money, though resting on the mere bounty of the Crown, is different in its nature and objects from military pay, and may be effectually assigned (*Alexander* v. *Wellington* (*Duke*) (1831), 2 Russ. & M. 35; *Stevens* v. *Bagwell* (1808), 15 Ves. 139, 152).

(*k*) *Hill* v. *Paul* (1840), 8 Cl. & Fin. 295, 307, H. L.; *Palmer* v. *Bate* (1821), 2 Brod. & Bing. 673; and compare *Nichols* v. *Davis* (1868), L. R. 4 C. P. 80; see, however, *Arbuthnot* v. *Norton* (1846), 5 Moo. P. C. C. 219. The profits of a college fellowship are assignable (*Feistel* v. *King's College, Cambridge* (1847), 10 Beav. 491); but see *Berkeley* v. *King's College, Cambridge* (1830), 10 Beav. 602.

(*l*) *Wells* v. *Foster* (1841), 8 M. & W. 149, 152.

(*m*) *Ibid.* Compare the half-pay cases of *Flarty* v. *Odlum* (1790), 3 Term Rep. 681; *Lidderdale* v. *Montrose* (*Duke*) (1791), 4 Term Rep. 248; *McCarthy* v. *Goold* (1810), 1 Ball & B. 387.

(*n*) *Davis* v. *Marlborough* (*Duke*) (1818), 1 Swan. 74.

(*o*) *Wells* v. *Foster, supra, per* PARKE, B., at p. 152, approved in *Willcock* v. *Terrell* (1878), 3 Ex. D. 323, C. A. (pension of former county court judge); *M'Carthy* v. *Goold, supra*, distinguishing *Stone* v. *Lidderdale* (1795), 2 Anst. 533. See also *Arbuthnot* v. *Norton, supra* (sum payable to executors of a judge); *Dent* v. *Dent* (1867), L. R. 1 P. & D. 366 (Indian navy officer's pension); *Sansom* v. *Sansom* (1879), 4 P. D. 69 (civil service pension); *Re Huggins, Ex parte Huggins* (1882), 21 Ch. D. 85, C. A. (pension of retired colonial judge); *McBean* v. *Deane* (1885), 30 Ch. D. 520, where an annuity to a retiring incumbent under the Union of Benefices Act, 1860 (23 & 24 Vict. c. 142), was held assignable; and contrast *Gathercole* v. *Smith* (1881), 17 Ch. D. 1, C. A.; 7 Q. B. D. 626, C. A., where the annuity was payable to the retiring incumbent under the Incumbents Resignation Act, 1871 (34 & 35 Vict. c. 44), s. 10.

(*p*) Army Act, 1881 (44 & 45 Vict. c. 58), ss. 141, 190; *Birch* v. *Birch* (1883), 8 P. D. 163; *Lucas* v. *Harris* (1886), 18 Q. B. D. 127, C. A.; *Crowe* v. *Price* (1889), 22 Q. B. D. 429, C. A.

PART III. Choses in Action not capable of Assignment.

the Compassionate Fund; marine half-pay; and payments and rewards etc. in respect of services in the navy and marines to a subordinate officer, seaman, or marine (*q*); a pension allowed to a retired incumbent under the Incumbents' Resignation Act, 1871 (*r*).

Bankruptcy.

A trustee in bankruptcy, however, may apply to the court for an order appropriating the pension or other similar income for the benefit of the creditors, after setting aside sufficient for the bankrupt's support (*s*).

Alimony.

855. Alimony granted to a wife is not assignable. It is not in the nature of property, but only money paid by the order of the court from time to time to provide for the maintenance of the wife (*t*). So also maintenance ordered under the Divorce and Matrimonial Causes Act, 1866, is not alienable (*u*), but a life annuity secured to a divorced wife under the Divorce Act, 1857, is assignable (*v*).

Allowance to committee of lunatic.

856. An allowance to the committee of a lunatic for the purpose of keeping up an establishment for the lunatic and other members of his family cannot be mortgaged (*w*).

Right to litigate.

857. A bare right of litigation, such as a mere right to damages for a wrongful act, is not assignable (*x*).

So, too, assignments of the following kinds are void, namely, an assignment of the mere right to sue a trustee on the chance of recovering from him some interest or profits in respect of part of the trust funds formerly in his hands (*y*); an assignment of a

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(*q*) Naval and Marine Pay and Pensions Act, 1865 (28 & 29 Vict. c. 73), s. 4.

(*r*) 34 & 35 Vict. c. 44; see *Gathercole* v. *Smith* (1881), 17 Ch. D. 1, C. A.; 7 Q. B. D. 626, C. A.

(*s*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), ss. 44, 52, 53. See title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 191; *Re Cox, Ex parte Corser* (1847), 11 Jur. 212; *Re Payne, Ex parte Spooner* (1847), 11 Jur. 963; *Re Huggins, Ex parte Huggins* (1880), 21 Ch. D. 85, C. A. (retired judge of a Crown colony); *Spooner* v. *Payne* (1852), 1 De G. M & G. 383, where the right to the annuity awarded as compensation to a commissioner of bankruptcy whose duties had been abolished by law was held to pass to his trustee in bankruptcy, although the annuity depended upon the annuitant's making an affidavit of certain facts before each payment.

(*t*) *Re Robinson* (1884), 27 Ch. D. 160, C. A. See *Vandergucht* v. *De Blaquiere* (1839), 5 My. & Cr. 229, and title HUSBAND AND WIFE.

(*u*) 29 & 30 Vict. c. 32, s. 1; *Watkins* v. *Watkins*, [1896] P. 222, C. A.

(*v*) 20 & 21 Vict. c. 85, s. 32; *Harrison* v. *Harrison* (1888), 13 P. D. 180, C. A.

(*w*) *Re Weld* (1882), 20 Ch. D. 451, C. A.

(*x*) *Dawson* v. *Great Northern and City Rail. Co.*, [1905] 1 K. B. 260, C. A., *per* STIRLING, L.J., at p. 271, approving *Prosser* v. *Edmonds* (1835), 1 Y. & C. (EX.) 481, 496—499; *Fitzroy* v. *Cave*, [1905] 2 K. B. 364, C. A., *per* COZENS-HARDY, L.J., at p. 371; *Hill* v. *Boyle* (1867), L. R. 4 Eq. 260; *Wood* v. *Downes* (1811), 18 Ves. 120. See also *Powell* v. *Knowler* (1741), 2 Atk. 224; *Kenney* v. *Browne* (1796), 3 Ridg. Parl. Rep. 462, 498, 501; *Bayly* v. *Tyrrell* (1813), 2 Ball & B. 358; *Stanley* v. *Jones* (1831), 7 Bing. 369; *Sprye* v. *Porter* (1856), 7 E. & B. 58; *Twiss* v. *Noblett* (1869), 4 I. R. Eq. 64; *Keogh* v. *McGrath* (1880), 5 L. R. Ir. 478. But a right of action to recover unliquidated damages for breach of contract may be assigned when incident to the transfer of a business; see note (*p*), p. 369, *ante*. As to assignments of choses in action void as savouring of champerty or maintenance, see generally, title ACTION, Vol. I., p. 51.

(*y*) *Hill* v. *Boyle*, *supra*.

licence to take possession of goods (*z*); an assignment of a right to set aside a deed on the ground of fraud (*a*); and an assignment of a debt due from a company, coupled with the right to proceed with a winding-up petition against the company already filed by the assignor with the view of obtaining payment of the debt (*b*).

Again, policies of fire assurance are not assignable nor intended to be assigned from one person to another without the consent of the office (*c*).

Personal contracts and covenants.

858. Where a contract involves personal skill or confidence, such as a contract between an author and publisher that the one shall write and the other publish a book, it is not assignable (*d*). An agreement, however, by the vendor of a patent to assign to the purchaser all future patent rights which the vendor may hereafter acquire of a like nature to the patent sold, is not contrary to public policy (*e*). The benefit of a covenant entered into for the personal advantage of an individual, not for the protection of property, is not assignable (*f*).

Condition against assignment.

859. The mere insertion in a contract, as, for example, in a policy of life insurance, of an express condition that it shall not be assignable in any case whatever will not necessarily prevent the assignment of the beneficial interest in the contract (*g*).

(*z*) *Re Davis & Co., Ex parte Rawlings* (1888), 22 Q. B. D. 193, C. A., following *Brown* v. *Metropolitan Counties Life Assurance Co.* (1859), 28 L. J. (Q. B.) 236.

(*a*) *Fitzroy* v. *Cave*, [1905] 2 K. B. 364, C. A., *per* COZENS-HARDY, L.J., at p. 371.

(*b*) *Re Paris Skating Rink Co.* (1877), 5 Ch. D. 959.

(*c*) *Lynch* v. *Dalzell* (1729), 4 Bro. Parl. Cas. 431; *Sadlers' Co.* v. *Badcock* (1743), 2 Atk. 554.

(*d*) *Stevens* v. *Benning* (1854), 1 K. & J. 168; *Gibson* v. *Carruthers* (1841), 8 M. & W. 321; *Robson* v. *Drummond* (1831), 2 B. & Ad. 303; and compare *British Waggon Co.* v. *Lea* (1880), 5 Q. B. D. 149. See also *International Fibre Syndicate* v. *Dawson* (1901), 84 L. T. 803, H. L.; *Berlitz School of Languages* v. *Duchêne* (1903), 6 F. (Ct. of Sess.) 181; *Kemp* v. *Baerselman*, [1906] 2 K. B. 604, C. A.; *Borland's Trustee* v. *Steel Brothers & Co., Ltd.*, [1901] 1 Ch. 279; *Tolhurst* v. *Associated Portland Cement Manufacturers* (1900), [1903] A. C. 414; and for the full treatment of the assignment of contract, see title CONTRACT.

(*e*) *Printing and Numerical Registering Co.* v. *Sampson* (1875), L. R. 19 Eq. 462.

(*f*) *Davies* v. *Davies* (1887), 36 Ch. D. 359, 388, 394, C. A.

(*g*) *Re Turcan* (1888), 40 Ch. D. 5, C. A. Compare *Brunton* v. *Electrical Engineering Corporation*, [1892] 1 Ch. 434; *English and Scottish Mercantile Investment Corporation* v. *Brunton*, [1892] 2 Q. B. 700, C. A.; *Robson* v. *Smith*, [1895] 2 Ch. 118.

CHURCHES AND CHURCHWARDENS.

See ECCLESIASTICAL LAW.

CHURCH RATES.

See ECCLESIASTICAL LAW.

CINQUE PORTS.

See COURTS; ADMIRALTY.

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CLUBS.

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For Building and other Societies *See title* BUILDING SOCIETIES; FRIENDLY SOCIETIES; INDUSTRIAL, PROVIDENT AND SIMILAR SOCIETIES; LOAN SOCIETIES.

Gaming and Wagering - ,, GAMING AND WAGERING.

Intoxicating Liquors - ,, INTOXICATING LIQUORS.

Literary and other Societies ,, SCIENTIFIC AND LITERARY SOCIETIES.

Trade Unions - - - ,, TRADE AND TRADE UNIONS.

Part I.—Different Kinds of Clubs.

SECT. 1. Definition and Classification.

SECT. 1.—*Definition and Classification.*

Definition and Classification. Definition.

860. A club may be defined as a society of persons associated together for social intercourse, for the promotion of politics, sport, art, science, or literature, or for any purpose except the acquisition of gain. The purpose of social intercourse may be combined with any other purpose, subject to the exception mentioned. The purposes for which a club exists may be altered or modified, and there is no rule of law that requires a club to fulfil each and every separate purpose for which it was originally formed (*a*).

Classification.

861. There are various kinds of clubs, which are governed, according to the nature of their constitution, by different rules of law. They may conveniently be divided into the following classes:—

(1) Unincorporated members' clubs;

(2) Unincorporated proprietary clubs;

(3) Clubs incorporated under the Companies Acts, 1862 to 1907 (*b*);

(4) Working men's clubs registered under the Friendly Societies Act, 1896 (*c*);

(5) Shop clubs.

SECT. 2.—*Members' Clubs.*

Unincorporated members' clubs.

862. An unincorporated members' club is a society of persons each of whom contributes to the funds out of which the expenses of conducting the society are paid. Such contribution is generally made by means of entrance fees or subscriptions, or both (*d*). The society is not a partnership, because the members are not associated with a view to profit (*e*), nor, for the same reason, is it an association requiring registration as a company (*f*). It is not recognised as having any legal existence apart from the members of which it is composed (*g*).

Members' interest in club property.

The members for the time being are jointly entitled to all the property and funds of the club, the property usually being vested in trustees. It is only upon a dissolution (*h*), however, that the individual interests of the members in the property become capable of realisation. Until then their rights are merely to enjoy the use of the club premises and other privileges of the society, in accordance

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(*a*) See *Thellusson* v. *Valentia* (*Viscount*), [1907] 2 Ch. 1, C. A.

(*b*) For these Acts, see title COMPANIES.

(*c*) 59 & 60 Vict. c. 25; see title FRIENDLY SOCIETIES.

(*d*) But the rules of a club may provide for the election of honorary members who make no contribution to the club funds, and, generally, are precluded from any voice in the management.

(*e*) *Flemyng* v. *Hector* (1836), 2 M. & W. 172; see Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 1.

(*f*) Companies Act, 1862 (25 & 26 Vict. c. 89), s. 4; and see *Re St. James's Club* (1852), 2 De G. M. & G. 383.

(*g*) *Steele* v. *Gourley* (1886), 3 T. L. R. 118, *per* DAY, J., at p. 119.

(*h*) As to dissolution, see p. 437, *post*.

with the rules, so long as they duly pay their subscriptions and continue to be members (*i*).

863. The rights and duties of the members of such a club as between themselves, and the internal arrangements for carrying it on, depend upon the rules. Subject to any rule to the contrary, the property and funds of the club belong to the members for the time being jointly in equal shares; and if provisions are supplied to a member, at a given price, this does not constitute a sale; it is in effect a release by the other members of their interest in the goods supplied (*k*). Rights and duties of members *inter se*.

The entire management of the club and its property is in the hands of the members. The business of the club is either conducted by them jointly in general meeting, or, as is usually the case, delegated by them to committees in accordance with the rules (*l*). Management.

No portion of the property may, however, be alienated by the club, except in the ordinary course of the administration of its affairs, and for purposes incidental to its objects, without the consent of every member (*m*).

864. If a member of a club, whether a members' or proprietary club, and whether incorporated or not, steals or embezzles any of the property or moneys of the club, he may be convicted of larceny or embezzlement (*n*). Criminal liability of members.

SECT. 3.—*Proprietary Clubs.*

865. An unincorporated proprietary club is of an entirely different nature. The property and funds of the club belong to the proprietor, who usually conducts it with a view to profit (*o*). The members, in consideration of the payment by them to the proprietor of entrance fees and subscriptions, are entitled to make such use of the premises and property, and to exercise such other rights and privileges, as the contract between them and the proprietor justifies. Unincorporated proprietary clubs.

In relation to the property of the club, the members are in the position of licensees; and if wrongfully excluded from the privileges for which they have paid, their only remedy is an action against Property.

(*i*) For precedents of rules of members' clubs, see Encyclopædia of Forms, Vol. III., pp. 737, 755 *et seq.*

(*k*) *Graff* v. *Evans* (1882), 8 Q. B. D. 373, 378, 379.

(*l*) The interest of a member in the property of the club is not transferable or transmissible, and continues only during membership.

(*m*) *Murray* v. *Johnstone* (1896), 23 R. (Ct. of Sess.) 981, where it was resolved by a majority in general meeting of a curling club to present a cup, which had been won by the club, to the person who had acted as skip of the rink at the contests when the cup was won, and it was held that the resolution was *ultra vires*.

(*n*) Larceny Act, 1868 (31 & 32 Vict. c. 116), s. 1. As to the form of indictment in the case of an unincorporated members' club, see *R.* v. *Robson* (1885), 16 Q. B. D. 137. In the case of a registered working men's club, the property may be stated to be the property of the trustees in their proper names, as trustees for the club, without further description (Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 51). See, generally, title CRIMINAL LAW AND PROCEDURE.

(*o*) The proprietor of a club formed for the purpose of exhibiting and selling pictures does not carry on the business of a picture dealer so as to exempt the pictures exhibited on the club premises from distress for rent (*Challoner* v. *Robinson*, [1908] 1 Ch. 49, C. A., *per* COZENS-HARDY, M.R., at p. 60).

SECT. 3. Proprietary Clubs.

the proprietor for damages for breach of contract (*p*). Members may be sued by the proprietor for articles consumed, as for goods sold and delivered (*q*).

Management.

The management of a proprietary club is usually given wholly or in part to a committee of the members (*r*).

SECT. 4.—*Incorporated Clubs.*

Constitution of incorporated clubs.

866. A club incorporated under the Companies Acts, 1862 to 1907, may be in substance a members' club, with the advantages incident to incorporation as a company, especially that of suing and being sued as a legal entity, or may be a proprietary club, with an incorporated company as proprietor instead of an individual. The company may be limited by shares or by guarantee (*s*), and in either case the liability may be merely nominal in amount. In the case of a company limited by shares, it may be provided that every member of the club shall be a shareholder in the company, and every shareholder in the company a member of the club, provision being made for the acquisition by existing members of the shares of those who cease to be members, whether by death, resignation, or otherwise (*t*). But the most convenient method, when a members' club is incorporated, is to register it as a company limited by guarantee, the members of the club for the time being constituting the company (*u*).

Memorandum and articles of association.

If a members' club is incorporated as a company limited by shares, the articles of association to some extent take the place of club rules, and may be supplemented by bye-laws. If it is registered as an association limited by guarantee, the rules governing the relations of the members *inter se* are generally appended to the memorandum of association, and they together form the regulations of the company. In either case the objects of the club are set forth in the memorandum of association.

Liabilities of members.

867. No member is liable in respect of the debts and liabilities of the company except in the event of a winding-up, and then the liability is limited to the amount unpaid on his shares or the amount of his guarantee, as the case may be (*a*).

The relations between the members *inter se* of an incorporated members' club are, generally speaking, similar to those which exist in the case of an unincorporated members' club, but as regards external relations, that is to say, as between the club and persons who are not members, the ordinary rules applicable to incorporated companies apply.

(*p*) See p. 417, *post*.

(*q*) Compare *Bowyer* v. *Percy Supper Club*, [1893] 2 Q. B. 154; *Baird* v. *Wells* (1890), 44 Ch. D. 661, *per* STIRLING, J., at p. 676; and p. 430, *post*.

(*r*) For a precedent of rules of a proprietary club, see Encyclopædia of Forms, Vol. III., p. 749.

(*s*) Companies Act, 1862 (25 & 26 Vict. c. 89), s. 7.

(*t*) See title COMPANIES. The shares cannot, however, be acquired by the company (*Trevor* v. *Whitworth* (1887), 12 App. Cas. 409).

(*u*) For a precedent of the memorandum and articles of association of an incorporated club limited by guarantee, see Encyclopædia of Forms, Vol. III., p. 781.

(*a*) Companies Act, 1862 (25 & 26 Vict. c. 89), s. 38; see further, title COMPANIES.

SECT. 4. Incorporated Clubs.

868. Where an incorporated club is in substance a members' club not established with a view to profit, it may, with the sanction of the Board of Trade, be registered without the word "limited" (*b*), and the word "club" may be used as part of the name instead of the word "company." Name of club.

869. In the case of an incorporated proprietary club, the relations between the members of the club and the company are governed by the same rules as those which govern the relations between the members and proprietor of an unincorporated proprietary club. The company is quite distinct from the club, the company merely taking the place of the proprietor; the relations of the members of the club *inter se* are governed by rules, as in the case of an unincorporated members' club, and the rights and liabilities of the shareholders in the company depend upon the memorandum and articles of association, as in the case of an ordinary trading company. Incorporated proprietary clubs.

SECT. 5.—*Working Men's Clubs.*

870. Working men's clubs, which are defined as "societies for purposes of social intercourse, mutual helpfulness, mental and moral improvement, and rational recreation" (*c*), may be registered as friendly societies without payment of any fee (*d*), and then become subject for the most part to the statutory provisions relating to registered friendly societies generally (*e*). Every club so registered must have a registered office (*f*), must appoint one or more trustees (*g*), must annually submit its accounts for audit either to a public auditor or to two or more persons appointed by the rules of the club (*h*), and must send annual returns of its receipts and expenditure, funds and effects, to the Registrar of Friendly Societies (*i*), and supply a copy thereof to any member gratuitously on application (*k*). A club so registered may by special resolution (*l*), duly registered (*m*), convert itself into a company under the Companies Acts, 1862 to 1907 (*n*). Registered working men's clubs.

871. There is no necessity for a working men's club to be registered as a friendly society, and associations of working men, when unregistered, are in the same legal position as unincorporated members', or proprietary clubs, as the case may be. Among the advantages of registration are exemption from stamp duty upon receipts and some other documents (*o*); certain facilities for the Advantages of registration.

(*b*) Companies Act, 1867 (30 & 31 Vict. c. 131), s. 23.
(*c*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 8 (1).
(*d*) *Ibid.*, s. 96.
(*e*) See title FRIENDLY SOCIETIES.
(*f*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 24.
(*g*) *Ibid.*, s. 25.
(*h*) *Ibid.*, ss. 26, 30.
(*i*) *Ibid.*, s. 27.
(*k*) *Ibid.*, s. 39.
(*l*) *Ibid.*, s. 74.
(*m*) *Ibid.*, s. 75.
(*n*) *Ibid.*, s. 71, referring to the Acts then in force, which were extended by the Companies Act, 1900 (63 & 64 Vict. c. 48); and by the Companies Act, 1907 (7 Edw. 7, c. 50).
(*o*) *Ibid.*, s. 33.

SECT. 5. Working Men's Clubs.

investment of funds (*p*); priority of claims against officers who die, become bankrupt, or have execution issued against them (*q*); and devolution of property on death, resignation, or removal of a trustee (*r*). Any member is entitled to inspect the books of the club at all reasonable hours (*s*). Machinery is provided for the settlement of disputes (*t*), and for the dissolution of the club (*u*).

SECT. 6.—*Shop Clubs.*

Definition.

872. A shop club (or thrift fund) is defined as any club or society for providing benefits to workmen in connection with a workshop, factory, dock, shop or warehouse (*a*).

Compulsory membership prohibited.

873. It is an offence (*b*) for an employer to make it a condition of employment that any workman shall join a shop club, unless it is registered (*c*), or certified by the Registrar of Friendly Societies (*d*), or to make it a condition of employment that any workman shall discontinue his membership of any friendly society, or not become a member of any such society other than the shop club (*e*).

Exception in case of railway employees.

These provisions do not prohibit the compulsory membership of any superannuation fund, insurance or other society, existing on January 1, 1903, for the benefit of persons employed by any railway company, to the funds of which the company contributes (*f*).

Certification.

874. No shop club may be certified unless the Registrar of Friendly Societies is satisfied that it affords to the workmen benefits of a substantial kind, in the form of contributions or benefits at the cost of the employer in addition to those provided by the contributions of the workmen; that it is of a permanent character and not a society that annually or periodically divides its funds; and that no member may be required to cease his membership on leaving the firm with which the club is connected, except as hereinafter mentioned (*g*).

Workmen to be consulted.

Before certifying any shop club, the registrar must be satisfied, after taking steps to ascertain the views of the workmen, that at least three-fourths of them desire its establishment, and must consider any objections they may make to the certification (*h*).

(*p*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 44.
(*q*) *Ibid.*, s. 35.
(*r*) *Ibid.*, s. 50.
(*s*) *Ibid.*, s. 40.
(*t*) *Ibid.*, s. 68.
(*u*) *Ibid.*, ss. 78—83. For these advantages in detail, see title FRIENDLY SOCIETIES.
(*a*) Shop Clubs Act, 1902 (2 Edw. 7, c. 21), s. 7.
(*b*) The penalty is a fine, on summary conviction, not exceeding £5, or, in the case of a second or subsequent conviction within one year of a previous conviction, a fine not exceeding £20 (*ibid.*, s. 4).
(*c*) Under the Friendly Societies Act, 1896 (59 & 60 Vict. c. 25); see title FRIENDLY SOCIETIES.
(*d*) Shop Clubs Act, 1902 (2 Edw. 7, c. 21), s. 2.
(*e*) *Ibid.*, s. 3.
(*f*) *Ibid.*, s. 5.
(*g*) *Ibid.*, s. 2; see p. 411, *post*.
(*h*) *Ibid.*

875. In any case where a workman by the conditions of his employment is a member of a shop club, he is entitled, on being dismissed from or leaving his employment, unless contrary to the rules of the club, to the option of remaining a member or having returned to him the amount of his share of the funds of the club, to be ascertained by actuarial calculation; but if he exercises the option to remain a member he is not entitled, so long as he remains out of such employment, to take any part in the management of the club, or to vote in respect thereof (*i*).

Rights of member on leaving employment.

Part II.—Constitution and Internal Arrangements.

SECT. 1.—*Rules.*

876. Every club is governed by rules, which generally specify the purposes for which it is instituted, and make provision as to the admission of members, the payment of entrance fees and subscriptions, the resignation and expulsion of members, the management of the affairs of the club, ordinary and extraordinary general meetings of the members, alteration of the rules and making of new rules, hours of opening and closing, admission of guests, and such other matters as may be thought expedient, having regard to the nature and objects of the club.

Matters usually provided for by rules

877. The rules form part of the contract between the members in the case of a members' club, and between the members on the one hand and the proprietor on the other in the case of a proprietary club (*a*).

Rules as part of contract.

878. It is usual for the secretary to send a copy of the rules to every new member on admission, but this is not necessary. If the rules are accessible to the members, they are deemed to have notice of them, and are bound by them (*b*).

879. The rules of a registered working men's club must specify the name and registered office of the club, and the objects for which it is established, and must provide for the following matters: the terms of admission of members, and the consequences of non-payment of any subscription; the mode of holding meetings, the right of voting, and the manner of making, altering, or rescinding rules; the appointment and removal of a committee of management, of a

Rules of registered working men's clubs.

(*i*) Shop Clubs Act, 1902 (2 Edw. 7, c. 21), s. 6.

(*a*) *Lyttelton* v. *Blackburne* (1875), 45 L. J. (CH.) 219; *Innes* v. *Wylie* (1844), 1 Car. & Kir. 257.

(*b*) *Baggett* v. *Musgrave* (1827), 2 C. & P. 556, where the rules were contained in a book, kept at the club premises, and accessible to such of the members as chose to inspect them. For precedents of rules adapted for clubs of various kinds, see Encyclopædia of Forms, Vol. III., pp. 737 *et seq.*

SECT. 1. Rules.

treasurer and other officers, and of trustees; the keeping of accounts and audit of the same at least once a year; annual returns to the Registrar of Friendly Societies of the receipts, funds, effects, and expenditure, and number of members; inspection of the books by members; and the manner in which disputes are to be settled (*c*). Copies of the rules must be sent to the registrar on the application for registration (*d*), and must be furnished to any member on demand, on payment of a sum not exceeding one shilling (*e*). No amendment or alteration of the rules is valid until registered (*f*).

Rules of shop clubs.

880. The rules of a certified shop club must provide for all the matters above mentioned with regard to working men's clubs, and for the following matters in addition: the purposes for which the funds are applicable, the conditions under which any member may become entitled to any benefits, and the fines and forfeitures to be imposed on any member; the investment of the funds; the keeping separate accounts of all moneys received or paid on account of every particular fund or benefit assured for which a separate table of contributions payable shall have been adopted, and a separate account of the expenses of management and contributions on account thereof; a valuation once at least in every five years of the assets and liabilities, including the estimated risks and contributions; the voluntary dissolution of the club by consent of not less than five-sixths in value of the persons contributing to its funds, and of every person for the time being entitled to any benefit from its funds, unless his claim be first satisfied or adequately provided for; and the right of one-fifth of the total number of members, or of 100 members in the case of a society of 1,000 and not exceeding 10,000, or 500 in the case of a society of more than 10,000 members, to apply to the Chief Registrar of Friendly Societies for an investigation of the affairs of the society or for winding up the same (*g*).

Alteration of rules of unincorporated members' club.

881. The rules of an unincorporated members' club can only be altered or added to in accordance with the express provisions of the rules themselves, except where the alteration or addition is made with the consent of every member (*h*). Thus, where the rules of such a club contain no express provision for their amendment or alteration, but have been altered from time to time in general meeting, and the members have acquiesced in the alterations, a member who declines to pay an increased subscription which has been resolved upon in general meeting, and who is posted in default, is entitled to an injunction restraining the committee from excluding him from the privileges of the club, although he has

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(*c*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 9 (3) and Sched. I; see title FRIENDLY SOCIETIES. For forms of rules of a registered working men's club, see Encyclopædia of Forms, Vol. III., p. 772.

(*d*) *Ibid.*, s. 9 (2).

(*e*) *Ibid.*, s. 38.

(*f*) *Ibid.*, s. 13.

(*g*) Shop Clubs Act, 1902 (2 Edw. 7, c. 21), s. 3, and Schedule.

(*h*) *Harington* v. *Sendall*, [1903] 1 Ch. 921; *Dawkins* v. *Antrobus* (1881), 17 Ch. D. 615.

himself acquiesced in some of the previous alterations, and the reasonableness or otherwise of the alteration objected to is immaterial (*i*).

Alteration of rules of incorporated club.

882. In the case of an incorporated club, the question whether there is power to alter rules, which do not themselves contain provisions for alteration, depends upon the articles of association.

Bye-laws.

883. Where the rules of a club provide that all the concerns of the club, and all arrangements for its management, shall be conducted by a committee consisting of not less than a specified number of members, and that the committee shall possess all needful powers for the government of the club, and for the election of new members and of additional committee members, and shall have power from time to time to publish such bye-laws as they deem expedient, the committee have power to pass a bye-law providing that retired members may be readmitted on payment of subscriptions in arrear, not only without payment of an entrance fee, but without any of the other formalities required for the election of new members (*j*).

Alterations authorised.

884. Where the rules of a club provide generally that alterations may be made by a specified majority in general meeting, it is competent to the requisite majority to pass a resolution discontinuing some of the objects for which the club was originally formed (*k*). Thus, in the case of a club instituted for the purpose of providing a ground for pigeon shooting, polo, or other sports, the rules of which provide that the club shall be managed by a committee, and require that any alterations therein shall be adopted by a majority of two-thirds in general meeting, a resolution, passed by the necessary majority, that pigeon shooting should be discontinued, and the committee authorised to discourage this particular kind of sport, is valid (*l*). Again, where power is given to alter the rules or make new rules, any such alteration or addition to be adopted by a general meeting, at which a specified number of members shall be present, a new rule, duly adopted in general meeting, providing for the expulsion of members for conduct injurious to the interests of the club, is valid; but such a rule cannot be made retrospective, so as to apply to things which have already taken place (*m*).

Special notice of proposal to alter rules.

When it is desired to alter rules at a general meeting, special notice thereof should be given to the members. Alteration of rules is not included in such a term as "general business" or "general purposes" (*n*).

Alteration of rules of working men's club.

885. No amendment in the rules of a registered working men's club is valid, until it has been registered by the Registrar of Friendly Societies, for which purpose copies of the amendment, signed by three members and the secretary, must be sent to the registrar, who,

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(*i*) *Harington* v. *Sendall*, [1903] 1 Ch. 921.
(*j*) *Lambert* v. *Addison* (1882), 46 L. T. 20.
(*k*) *Thellusson* v. *Valentia* (*Viscount*), [1907] 2 Ch. 1, C. A.
(*l*) *Ibid.*
(*m*) *Dawkins* v. *Antrobus* (1881), 17 Ch. D. 615.
(*n*) *Harington* v. *Sendall*, *supra*, *per* JOYCE, J., at p. 926.

SECT. 1. Rules.

on being satisfied that the amendment is not contrary to law, will issue an acknowledgment of registry, which is conclusive evidence of due registration (*o*).

Service of notices.

886. Where there is no rule prescribing the manner of serving notices on members, it is within the general functions of the committee to say how notices should be given on each particular occasion (*p*). In matters which concern only those who habitually use the club, the posting of a notice in the coffee room or library is sufficient. But in the case of more important matters, involving some organic change, or connected with the general mode of conducting the club, or with the conduct of a particular member, notice by circular should be given to those who do not habitually or daily use the club (*q*).

SECT. 2.—*Admission, Resignation, and Expulsion of Members.*

Election and admission.

887. It is generally provided by the rules that candidates for membership shall be proposed and seconded by members, and shall be elected by ballot, either of the whole society, or of the committee of management; and that the secretary, on a candidate being duly elected, shall notify him of the fact, at the same time furnishing him with a copy of the rules, and asking him to pay the entrance fee and subscription for the current year. If, as is usually the case, the rules provide that an elected candidate shall not be entitled to the privileges of membership until he has paid the entrance fee and first year's subscription, the candidate on receiving notice of his election, with a copy of the rules, has a right either to accept or reject the membership so offered, the contract not being complete until he fulfils the condition by payment of the sums mentioned (*r*).

Resignation from members' club.

888. Subject to any provision in the rules to the contrary, a member of an unincorporated members' club may at any time resign his membership by communicating to the secretary his intention to resign (*s*). The resignation does not require any acceptance by the committee, and cannot be withdrawn or revoked (*t*). A member who sends a letter of resignation thereupon ceases to be a member, and, in the absence of a bye-law to the contrary (*u*), can only be reinstated by re-election (*w*).

Resignation from other clubs.

889. The right of a member of a proprietary club to resign, or discontinue payment of his subscription, depends upon the terms of the contract between him and the proprietor; and the right of a

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(*o*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 13.

(*p*) *Labouchere* v. *Wharncliffe* (*Earl*) (1879), 13 Ch. D. 346, *per* JESSEL, M.R., at p. 352.

(*q*) *Ibid.*, at p. 353. For form of notice of general meeting, see Encyclopædia of Forms, Vol. III., p. 798.

(*r*) *Re New University Club* (*Duty on Estate*) (1887), 18 Q. B. D. 720, 727. For form of proposal of a candidate for election, see Encyclopædia of Forms, Vol. III., p. 798.

(*s*) *Finch* v. *Oake*, [1896] 1 Ch. 409.

(*t*) *Ibid.*; *Dawkins* v. *Antrobus* (1881), 17 Ch. D. 615.

(*u*) *Lambert* v. *Addison* (1882), 46 L. T. 20; and see p. 413, *ante*.

(*w*) *Finch* v. *Oake*,

member of a club incorporated under the Companies Acts to do so depends upon the rules of the club and the regulations governing the company.

Expulsion from members' club.

890. There is no implied power to expel a member from an unincorporated members' club, whatever may be the grounds for expulsion, nor can the rules of such a club be altered, without the consent of every member, so as to create a power of expulsion, unless such rules provide for their own alteration. But where it is provided that the rules may be altered, or new rules made, a new rule, providing for the expulsion of any member whose conduct is injurious to the interests of the club, is *intra vires* (*x*).

Rules as to expulsion must be observed strictly.

891. A power of expulsion must be exercised in strict conformity with the rules by which it is given, otherwise the purported expulsion will be inoperative (*a*).

If the rules provide that a meeting of the committee shall be specially summoned to consider the conduct of any member whom it is proposed to expel, it is not sufficient for the committee to take such a matter into consideration at an ordinary meeting (*b*). Where it is provided that a certain number of days' notice of the meeting to consider the question shall be given, the expulsion will be void, if the notice is given a day too late (*c*). The notice should not merely be posted up in the coffee room or library, but should be given by circular, at all events to such of the members as do not habitually or daily use the club (*d*). If the rules require that the resolution shall be passed by a specified majority of the members present at the meeting, not only those who vote, but all who are present at the meeting, must be counted in ascertaining whether it is carried by the requisite majority, and the question must be put in proper form (*e*). Under a rule which provides that a member may be expelled if in the opinion of the committee, after inquiry, his conduct is injurious to the welfare and interests of the club, the committee must make a fair inquiry into the truth of the alleged facts, after giving notice to the member concerned that his conduct is about to be inquired into, and giving him an opportunity of stating his case to them (*f*).

Expulsion must be *bonâ fide* in interests of the club.

892. It is also necessary that a power of expulsion should be exercised in good faith for the benefit of the club, and not from any indirect or improper motive (*g*).

(*x*) *Finch* v. *Oake*, [1896] 1 Ch. 409; *Dawkins* v. *Antrobus* (1881), 17 Ch. D. 615.

(*a*) *Innes* v. *Wylie* (1844), 1 Car. & Kir. 257.

(*b*) *Fisher* v. *Keane* (1878), 11 Ch. D. 353.

(*c*) *Labouchere* v. *Wharncliffe* (*Earl*) (1879), 13 Ch. D. 346. In *James* v. *Chartered Accountants* (*Institute*) (1907), 98 L. T. 225, C. A., it was held that a notice posted to the registered address of a member proposed to be expelled was sufficient, although, having changed his address, he never actually received it, and it had been returned through the Dead Letter Office, the member having neglected to notify his change of address.

(*d*) *Labouchere* v. *Wharncliffe* (*Earl*), *supra*, at p. 353.

(*e*) *Ibid.*, at p. 355.

(*f*) *Ibid.*, at p. 350. For forms of resolution expelling a member, and notice of expulsion, see Encyclopædia of Forms, Vol. III., p. 801.

(*g*) *Tantussi* v. *Molli* (1886), 2 T. L. R. 731, where, an action having been

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Expulsion to be just and after hearing both sides.

893. The principles of natural justice must also be observed in exercising a power of expulsion, unless it plainly appears, on the true construction of the rules, that the power was intended to be absolute (*h*). If the rules refer the consideration of questions concerning the conduct of members to the committee, the committee are in a *quasi*-judicial position, and must give reasonable notice to any member whose conduct is impugned, and also a reasonable opportunity of defending himself and meeting the accusations brought against him (*i*); and they should not act on *ex parte* evidence (*k*).

894. Under a rule which provides that a member may be expelled if his conduct, in the opinion of the committee, is injurious to the character and interests of the club, the committee must not only act in good faith, and after due notice to the member whose conduct is attacked, but also must act "with some cause, or, as the law phrases it, with reasonable and probable cause" (*l*). The question what is reasonable and probable cause, in such a case, depends in some measure upon the objects of the club (*m*). In the case of a political club, voting for a candidate belonging to the opposite party might reasonably be considered injurious to the interests of the club; but this would not be sufficient in the case of a club whose objects were mainly social, even if the great majority of the members had in fact similar political views (*m*).

Interference by court to prevent expulsion.

895. Where, however, the conditions above referred to are satisfied, namely, that the rules providing for expulsion have been strictly observed, that the member expelled has had due notice, and full opportunity of answering the charges made against him, that there has been no want of good faith in the exercise of the power of expulsion, and that the decision arrived at is not manifestly absurd, the court will not interfere, even though it considers that the committee, or members voting for the expulsion, have in fact come to a wrong conclusion (*n*). The burden of proving want of good faith lies on the person who alleges that he has been wrongfully expelled (*o*).

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brought for a declaration that a purported expulsion of the plaintiff was void, and an offer having been made to readmit him, if he would discontinue the action and pay the costs, a fresh resolution in due form expelling the plaintiff, which had been passed in order to put a stop to the proceedings, was held to be void.

(*h*) *Wood* v. *Woad* (1874), L. R. 9 Exch. 190, 196; *Russell* v. *Russell* (1880), 14 Ch. D. 471, 478. Such a power is considered of a *quasi*-judicial character unless the contrary intention clearly appears.

(*i*) *Fisher* v. *Keane* (1878), 11 Ch. D. 353; *Innes* v. *Wylie* (1844), 1 Car. & Kir. 257; *Wood* v. *Woad*, *supra*; *Russell* v. *Russell*, *supra*.

(*k*) *Fisher* v. *Keane*, *supra*.

(*l*) *Dawkins* v. *Antrobus* (1881), 17 Ch. D. 615, *per* JESSEL, M.R., at p. 622; *Andrews* v. *Salmon*, [1888] W. N. 102.

(*m*) *Hopkinson* v. *Exeter* (*Marquis*) (1867), L. R. 5 Eq. 63.

(*n*) *Richardson-Gardner* v. *Fremantle* (1870), 24 L. T. 81; *Hopkinson* v. *Exeter* (*Marquis*), *supra*; *Lyttelton* v. *Blackburne* (1875), 45 L. J. (CH.) 219; *Dawkins* v. *Antrobus*, *supra*; *Lambert* v. *Addison* (1882), 46 L. T. 20; *Harrison* v. *Abergavenny* (*Marquis*) (1887), 3 T. L. R. 653; *Seaton* v. *Gould* (1889), 5 T. L. R. 309.

(*o*) *Dawkins* v. *Antrobus*, *supra*; *Lambert* v. *Addison*, *supra*. For forms of

896. The remedy of a member irregularly or improperly expelled from a members' club is by action, which may be brought against the committee or against the trustees and committee, for a declaration that the expulsion is void, and that the plaintiff is still a member of the club, and for an injunction to restrain the committee and their servants, and the servants of the club, from excluding him from the club premises, or preventing him from exercising the rights and privileges of membership (*p*).

Wrongful expulsion from members' club.

The foundation of the jurisdiction of a court of equity to interfere, at the instance of a member improperly expelled, in order to reinstate him, is the right of property vested in the member, of which he is unjustly deprived by the unlawful expulsion (*q*).

In the case of a proprietary club, the only remedy of a member who alleges that he has been wrongfully expelled is an action against the proprietor for damages for breach of contract (*r*). There being no property in which the members have an interest, there is no foundation for the exercise of the equitable jurisdiction of the court (*r*). The same observation applies to the case of a mere association of members which does not own any property.

Wrongful expulsion from proprietary club.

Where a club is incorporated under the Companies Acts, the question whether a member who has been wrongfully expelled is entitled to an injunction, or merely to damages, would seem to depend upon whether he is also a shareholder in, or member of, the company. If he is, he is probably entitled to the same remedy as in the case of an unincorporated members' club; but if not, his only remedy would appear to be an action for damages against the company.

Wrongful expulsion from incorporated club.

If a working men's club is registered, and a member alleges that he has been wrongfully expelled, the question must be decided in the manner directed by the rules, the decision being binding on all parties without appeal, and being enforceable by application to the county court (*s*); or, if the rules do not expressly forbid it, the question may, by consent, be referred to the decision of the Chief Registrar of Friendly Societies, his decision being enforceable in like manner (*t*). Where the rules direct that disputes shall be referred to justices, the reference may be to a court of summary jurisdiction, or, by consent, to the county court (*a*); and where the rules contain no direction as to disputes, or where no decision is made within forty days after application for a reference

Wrongful expulsion from registered working men's club

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resolutions in connection with the expulsion of a member, see Encyclopædia of Forms, Vol. III., p. 801.

(*p*) There is no direct authority on the question whether an action for damages will lie in the case of a members' club. On principle there seems to be no reason why it should not, though the measure of damages might be a difficult matter to determine; see *Chamberlain* v. *Boyd* (1883), 11 Q. B. D. 407.

(*q*) *Rigby* v. *Connol* (1880), 14 Ch. D. 482, *per* JESSEL, M.R., at p. 487; *Innes* v. *Wylie* (1844), 1 Car. & Kir. 257.

(*r*) *Baird* v. *Wells* (1890), 44 Ch. D. 661; *Lyttelton* v. *Blackburne* (1875), 45 L. J. (CH.) 219; *Rigby* v. *Connol*, *supra*, at p. 487; *Wright* v. *Stavert* (1860), 2 E. & E. 721.

(*s*) *R.* v. *Catley* (1887), 19 Q. B. D. 491; Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 68 (1).

(*t*) *Ibid.*, s. 68 (2)—(4).

(*a*) *Ibid.*, s. 68 (5).

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under the rules, the member aggrieved may apply either to the county court or to a court of summary jurisdiction to hear and determine the matter (*b*).

Where a working men's club is not registered, it is governed by the same principles, as regards the expulsion of members and the remedy for wrongful expulsion, as an unincorporated members' club or proprietary club, as the case may be.

SECT. 3.—*Entrance Fees and Subscriptions.*

Liability for entrance fees and subscriptions.

897. An action will not lie, as a general rule, to compel payment of the entrance fee or initial subscription to a club, because the contract to become a member is generally not complete until those sums have been paid (*c*). But when all the conditions imposed by the rules have been complied with, and the candidate has become a member, he may be sued, in the case of a proprietary club by the proprietor, in the case of an incorporated club by the company (*d*), and in the case of an unincorporated members' club by the members jointly (*e*), for all sums payable by him as a member in accordance with the rules. The liability of a member for subscriptions *primâ facie* continues until he has duly ceased to be a member, in accordance with the rules, either by resignation or expulsion (*f*). No action will lie, however, for the recovery of subscriptions payable by members of registered working men's clubs (*g*).

When subscriptions in arrear.

898. Where the rules provide that subscriptions shall be due on the first day of a specified month, and payable at any time during that month, they are not in arrear until the end of the month, and members are entitled to vote and exercise all the other rights of membership during the month, whether they have paid the current subscription or not, even if it is provided by the rules that no member shall be qualified to vote until his subscription for the current year has been paid (*h*).

SECT. 4.—*Management.*

Committee.

899. The management of the affairs of a club is generally intrusted to a committee of the members elected in accordance with provisions in the rules. The extent of the powers of the committee to bind the members, whether as between themselves (*i*) or as regards contracts with tradesmen and others (*k*), depends

(*b*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 68 (6).
(*c*) See p. 414, *ante*.
(*d*) *Raggett* v. *Musgrave* (1827), 2 C. & P. 556; *Raggett* v. *Bishop* (1826), 2 C. & P. 343; *Re New University Club* (*Duty on Estate*) (1889), 18 Q. B. D. 720 *per* HAWKINS, J., at p. 727.
(*e*) *Labouchere* v. *Wharncliffe* (*Earl*) (1879), 13 Ch. D. 346, 354. As to the power to sue in the case of unincorporated clubs, see further, p. 426, *post*.
(*f*) *Raggett* v. *Bishop*, *supra*; *Labouchere* v. *Wharncliffe* (*Earl*), *supra*.
(*g*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 23.
(*h*) *Innes* v. *Wylie* (1844), 1 Car. & Kir. 257.
(*i*) As to the construction of a power to make bye-laws, see *Lambert* v. *Addison* (1882), 46 L. T. 20; and p. 413, *ante*.
(*k*) See pp. 420 *et seq.*, *post*.

upon the rules, which generally provide what shall be a sufficient quorum for the transaction of the various classes of business. In the absence of a rule providing that a certain number shall form a quorum, all the members of the committee must join in the exercise of any powers conferred upon them (*l*). Sometimes the rules provide for the appointment by the committee of sub-committees for specified purposes.

Secretary and steward.

900. The functions of the secretary of a club are to conduct the correspondence, collect subscriptions from members, and perform such other work of a clerical nature as may be necessary, under the direction of the committee or proprietor, as the case may be (*m*). The functions of the steward are to attend to the culinary arrangements and the engagement of servants, also under the direction of the committee or proprietor.

Trustees.

901. In an unincorporated members' club there are usually trustees, appointed in pursuance of provisions in the rules, in whom the property and assets of the club are vested in trust for the members for the time being, and who are given power to invest the funds of the club, sometimes at their own discretion, and sometimes according to the directions of the committee.

Registered working men's clubs

Every registered working men's club must have one or more trustees appointed by a resolution of a majority of the members present at a general meeting (*n*). A copy of every resolution appointing a trustee, signed by the trustee so appointed and by the secretary, must be sent to the Registrar of Friendly Societies; and the same person may not be secretary or treasurer as well as trustee (*o*). All property belonging to such a club, whether acquired before or after registration, vests in the trustees for the time being, for the use and benefit of the members (*p*); and the trustees may, with the consent of the committee or of a majority of the members present and entitled to vote in general meeting, invest the funds of the club in the purchase of land, or in the erection or alteration of club buildings, or in certain other specified investments (*q*).

Trustees are not necessary in the case of a proprietary club, or of a club incorporated under the Companies Acts, 1862 to 1907.

Lien of trustees and members of committee.

902. The trustees of a club have a lien on the trust property vested in them for all liabilities properly incurred by them on behalf of the club. Similarly, where, by a resolution at a general meeting, the managing committee of a club were authorised to raise £1,000 for the purpose of improving and adding to the club premises and providing fittings and furniture, and the committee, being unable

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(*l*) *Brown* v. *Andrew* (1849), 18 L. J. (Q. B.) 153; *Re Liverpool Household Stores Association, Ltd.* (1890), 59 L. J. (CH.) 616.

(*m*) For form of agreement for employment of a secretary, see Encyclopædia of Forms, Vol. III., p. 802.

(*n*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 25 (1), (2).

(*o*) *Ibid.*, s. 25 (3), (4).

(*p*) *Ibid.*, s. 49 (1).

(*q*) *Ibid.*, s. 44.

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to raise the money on mortgage, raised it on the security of a guarantee given by certain individual members of the committee, and this was afterwards approved at the annual general meeting, the money being duly expended for the purposes for which it was borrowed, it was held that the committeemen who guaranteed the loan, and were compelled to repay it, had a lien on the club premises so added to and improved, and on the furniture and other property acquired by means of the money so borrowed, and were entitled to a decree for sale of the property in default of repayment (*r*).

Indemnity.

But neither the trustees nor committee are entitled to be indemnified by individual members of the club against liabilities incurred by them on behalf of the club, in the absence of provisions in the rules giving such a right of indemnity (*s*). Clubs are societies the members of which are continually changing, and no member, as such, becomes liable, in the absence of a rule imposing such liability (*t*), to pay to the funds of the society, or to the trustees, or anyone else, any sums beyond the subscriptions which the rules require him to pay, so long as he remains a member. It is upon this fundamental condition, not usually expressed, but generally understood, that clubs are formed (*s*).

Part III.—Rights and Liabilities of Clubs and Members.

SECT. 1.—*In Contract.*

SUB-SECT. 1.—*Unincorporated Members' Clubs.*

General principles of agency apply.

903. It has already been stated that an unincorporated members' club is not a partnership nor an association which, as an association, is legally recognised (*a*); and questions frequently arise as to who are the persons liable for goods supplied to such a club, or on contracts professedly made on its behalf. These questions depend on

(*r*) *Minnitt* v. *Talbot* (*Lord*) (1876), L. R. 1 Ir. 143. In this case the property, being sold, proved insufficient to discharge the liability, and the final decree ((1881), L. R. 7 Ir. 407) declared that the plaintiffs were entitled to be indemnified by the members of the club in respect of the unsatisfied balance, but this portion of the decision cannot now be considered good law; see *Wise* v. *Perpetual Trustee Co.*, [1903] A. C. 139, P. C.

(*s*) *Wise* v. *Perpetual Trustee Co.*, *supra*, distinguishing *Hardoon* v. *Belilios*, [1901] A. C. 118, and disapproving the final decree in *Minnitt* v. *Talbot* (*Lord*), *supra*. But members of the committee may be entitled to contribution *inter se* as joint contractors (*Mountcashell* (*Earl*) v. *Barber* (1853), 14 C. B. 53).

(*t*) For an instance of such a rule, see *Hall* v. *Sim* (1894), 10 T. L. R. 463, where the defendants, the committee, were held entitled to bring in the members of the club as third parties for the purpose of obtaining indemnity.

(*a*) See p. 406, *ante*.

the ordinary principles of agency (*b*). The person supplying the goods must proceed against the persons who gave or authorised the giving of the order; he must prove that the defendants, either by themselves or by their agent, entered into the contract (*c*). The trustees and committee of management have only such authority to contract on behalf of the members generally as may be given to them expressly or by necessary implication by the rules (*d*). Members of the committee of management, as such, have no power to pledge the credit of other members of the committee (*e*).

Power to pledge credit of members.

904. Neither the trustees, nor the members of the managing committee, the steward, the secretary, nor any other officials of a members' club, have any authority, merely by reason of acting in that capacity, to pledge the credit of the members by contracting on their behalf (*f*). They have only such authority as may be given, expressly or by implication, by the rules (*f*); and rules will not be construed as giving authority to pledge the credit of the members in the absence of a plain indication of an intention to that effect, because it is generally understood that persons, by joining such a club, do not intend to incur any liability beyond the subscriptions payable according to the rules, so long as they remain members (*g*). A rule providing that all the concerns of the club, the domestic and other arrangements, shall be conducted by a committee, does not of itself empower the committee to pledge the credit of the members by borrowing on debentures or otherwise (*h*); nor under such a rule has the committee authority to purchase wine or provisions on credit for consumption in the club; for it is presumed, in the absence of a plain indication of a contrary intention, that they are intended to purchase such things for ready money and to pay for them out of the funds in hand (*i*), though it may be different, perhaps, in the case of hiring the servants of the establishment, where there must necessarily be credit for a certain period, because wages cannot be paid down (*k*).

Payment out of funds for expenses.

905. Whenever the committee of management or other agents of a club are provided with funds, it is their duty to pay all the expenses out of such funds, and, if they find that they are insufficient, to call a meeting of the members and ask for further

(*b*) As to which, see title AGENCY, Vol. I., pp. 145 *et seq.*

(*c*) *Flemyng* v. *Hector* (1836), 2 M. & W. 172, *per* PARKE, B., at p. 183; *Andrew's and Alexander's Case* (1869), L. R. 8 Eq. 176, *per* JAMES, V.-C., at p. 195; *Hawke* v. *Cole* (1890), 62 L. T. 658; *Draper* v. *Manvers* (*Earl*) (1892), 9 T. L. R. 73.

(*d*) *Re St. James's Club* (1852), 2 De G. M. & G. 383; *Steele* v. *Gourley* (1887), 3 T. L. R. 772, C. A.; *Cockerell* v. *Aucompte* (1857), 2 C. B. (N. S.) 440.

(*e*) *Overton* v. *Hewett* (1886), 3 T. L. R. 246; *Steele* v. *Gourley*, *supra*; *Whillier* v. *Roberts* (1873), 28 L. T. 668.

(*f*) *Cockerell* v. *Aucompte*, *supra*; *Re St. James's Club*, *supra*.

(*g*) *Wise* v. *Perpetual Trustee Co.*, [1903] A. C. 139, P. C.

(*h*) *Re St. James's Club*, *supra*.

(*i*) *Todd* v. *Emly* (1841), 7 M. & W. 427 (motion for new trial); on second motion for new trial, 8 M. & W. 505; *Flemyng* v. *Hector*, *supra*.

(*k*) *Todd* v. *Emly*, *supra*, *per* PARKE, B., at p. 434.

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subscriptions (*l*). In such a case they have no power to pledge the credit of the members without express authority (*m*); and in the absence of such authority, the mere fact that the articles purchased on credit have been used by, or applied for the benefit of, the members generally will not render them liable (*n*).

But where the rules of a coal club provided that the members, on making certain weekly payments to the secretary, should be entitled to the delivery of certain quantities of coal, and the contracts for the purchase of the coal were to be made by the secretary with dealers selected by the members, the coal, after each delivery, to be paid for by the treasurer of the club on receipt of an order signed by the secretary and chairman, it was held that, contracts having been made by the secretary and coal having been delivered thereunder, for which the treasurer, owing to the secretary's default, had not sufficient funds in hand to pay, the members of the club were liable (*o*). In this case the secretary had authority, under the rules, to make the contracts, but had no control over the funds out of which the liability should have been discharged.

Grounds on which members may be liable.

906. The members of a club may be liable on contracts entered into by the trustees, committee of management, or other agents, either because the contracts are within the scope of the authority given by the rules, or because, though they are beyond the scope of such authority, the members sought to be made liable can be shown to have sanctioned or subsequently ratified the particular transactions (*p*), or to have held out the persons entering into them as being authorised to do so (*q*).

Contract within agent's authority.

907. Where the contract is within the scope of the agent's actual authority to bind the members generally, and is in fact made on their behalf, they are liable, even if it is made by the agent in his own name, and without disclosing his agency, unless the other contracting party, after acquiring knowledge of the circumstances, elects to give credit to the agent exclusively (*r*). Bills of exchange and other negotiable instruments, and contracts under seal, are exceptions to this rule (*r*).

Contract beyond authority.

Where the contract is beyond the scope of the agent's actual authority, and the fact of his agency is not disclosed at the time that the contract is entered into, members cannot become bound by a subsequent ratification, even if the agent intended to act on behalf of the members generally (*s*), nor can members become bound by ratification if the other contracting party erroneously gave

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(*l*) *Flemyng* v. *Hector* (1836), 2 M. & W. 172, *per* Lord ABINGER, C.B., at p. 182.
(*m*) *Overton* v. *Hewett* (1886), 3 T. L. R. 246; *Wood* v. *Finch* (1861), 2 F. & F. 447; *Draper* v. *Manvers* (*Earl*) (1892), 7 T. L. R. 73; *Flemyng* v. *Hector*, *supra*.
(*n*) *Flemyng* v. *Hector*, *supra*; *Draper* v. *Manvers* (*Earl*), *supra*.
(*o*) *Cockerell* v. *Aucompte* (1857), 2 C. B. (N. S.) 440.
(*p*) *Delauney* v. *Strickland* (1818), 2 Stark. 416; *Steele* v. *Gourley* (1887), 3 T. L. R. 772, C. A.; *Flemyng* v. *Hector*, *supra*, *per* PARKE, B., at p. 185.
(*q*) *Steele* v. *Gourley*, *supra*.
(*r*) See title AGENCY, Vol. I., pp. 206—209.
(*s*) *Keighley*, *Maxsted & Co.* v. *Durant*, [1901] A. C. 240.

credit to the club as a legal entity, and not to the members individually (*t*).

Right of members to sue on contract.

908. The right of the members of a club to sue on a contract made on their behalf depends, as a general rule, upon the same principles as govern their liability to be sued, whether by reason of ratification or otherwise; that is to say, whenever the circumstances are such that the members are bound by a contract, they also have, generally speaking, a right to enforce it (*a*).

All members must be parties to action.

909. The rights and liabilities of members of a club on contracts made on their behalf are *primâ facie* joint only, and all the members should be joined as plaintiffs or defendants, as the case may be, in any action on such a contract (*b*). If an action is brought against some only of the members jointly liable, and judgment is recovered against them, the judgment, though unsatisfied, is a bar to any proceedings against the others on the contract (*c*); but any member who discharges more than his own proper share of the liability is entitled to claim contribution from the other members, whether they were parties to the proceedings on the contract or not (*d*).

Contribution.

Liability of resigning member.

910. The resignation of a member does not affect his liability in respect of any contracts entered into prior to the resignation (*e*), but it protects him against liability in regard to subsequent transactions, unless he has continued to hold himself out as a member.

Personal liability of club's agents.

911. Trustees, members of the managing committee, or other agents, contracting or purporting to contract on behalf of a club, may incur a personal liability, either by reason of the form or terms of the contract (*f*), or because in making the contract they are acting in excess of their authority (*f*).

If they contract in their own names, they are *primâ facie* personally liable, and may be sued without joining other members of the club, even though they may have been duly authorised to enter into the contract on behalf of the members generally (*g*). If they were so authorised, the other contracting party may elect either to sue them,

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(*t*) *Jones* v. *Hope* (1880), 3 T. L. R. 247, n.; *Overton* v. *Hewett* (1886), 3 T. L. R. 216.

(*a*) See title AGENCY, Vol. I., pp. 206—211, for authorities and details.

(*b*) *Everett* v. *Tindall* (1804), 5 Esp. 169, where a contract for the purchase of a quantity of coal was made on behalf of the members of a coal club, and it was held that no member could sue separately in respect of alleged short measure, although separate deliveries were made to each member by the seller. On the subject of actions by and against clubs, see further, p. 426, *post*.

(*c*) *Kendall* v. *Hamilton* (1879), 4 App. Cas. 504.

(*d*) *Boulter* v. *Peplow* (1850), 9 C. B. 493; *Batard* v. *Hawes* (1853), 2 E. & B. 287.

(*e*) *Parr* v. *Bradbury* (1885), 1 T. L. R. 285, 525, where the managing committee, in pursuance of authority given by the rules, borrowed money and gave bonds for securing repayment, and it was held that a member who had resigned was liable in respect of bonds so given during his membership.

(*f*) See title AGENCY, Vol. I., pp. 219 *et seq.*; *Mountcashell* (*Earl*) v. *Barber* (1853), 14 C. B. 53; *Williams* v. *Hathaway* (1877), 6 Ch. D. 544. As to the right of the trustees or committee to indemnity, see p. 420, *ante*.

(*g*) *Queensberry* (*Duke*) v. *Cullen* (1787), 1 Bro. Parl. Cas. 396; *Todd* v. *Emly* (1841), 7 M. & W. 427, 430; *Lee* v. *Bissett* (1856), 4 W. R. 233; *Bromley* v. *Williams* (1863), 32 Beav 177; compare *Walker* v. *Roberts* (1873), 28 L. T. 668.

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as having contracted personally, or to sue the members, as the principals on whose behalf the contract was made (*h*). This rule applies whether the principals were or were not disclosed at the time of the making of the contract, except in the case of deeds and bills of exchange or other negotiable instruments (*i*).

Warranty of authority.

Every person who purports to contract on behalf of another is deemed to warrant the existence in fact of the necessary authority to bind the other (*k*). It follows, that if a person professes to contract on behalf of a club without having any authority to bind the members generally, he is liable to be sued by the other contracting party for damages for breach of warranty of authority, and it is immaterial that he acted in the *bonâ fide* belief that he was duly authorised (*l*). There is, however, no implied warranty of the existence of the authority in point of law, where the other contracting party is fully acquainted with the facts from which its existence may be inferred (*m*). If, for instance, a person purported to contract on behalf of an unincorporated members' club as a legal entity, and the other contracting party was aware of the nature of the constitution of the club, but contracted in the belief that it might, as a legal entity, be bound, he would have no right of action as for breach of an implied warranty of authority (*n*). Nor can the other contracting party recover damages as for breach of warranty unless he was misled by the assumption of authority on the part of the professing agent (*o*).

Liability of managing committee.

Where the steward or secretary orders goods on credit by the authority of members of the managing committee, such of the members as gave the authority or acquiesced in the dealing on credit are personally liable (*p*). It is not necessary to show that the members sought to be made liable specifically authorised or acquiesced in the particular transaction, or even that they had actual knowledge of it (*q*). It is sufficient if they knew of, and acquiesced in, other transactions of the same kind, and so held themselves out, or allowed themselves to be held out, as having authorised dealings on credit (*q*).

But if the steward or secretary is merely authorised to buy for ready money, and is furnished with a fund out of which to pay for goods ordered, the trustees and members of the managing committee are under no liability in respect of dealings by him on

(*h*) *Queensberry* (*Duke*) v. *Cullen* (1787), 1 Bro. Parl. Cas. 396; and see title AGENCY, Vol. I., pp. 206 *et seq.*, 219 *et seq.*

(*i*) See titles AGENCY, Vol. I., pp. 206 *et seq.*, 219 *et seq.*; BILLS OF EXCHANGE, Vol. II., p. 523.

(*k*) *Collen* v. *Wright* (1857), 8 E. & B. 647; and see title AGENCY, Vol. I., pp. 221—223.

(*l*) *Overton* v. *Hewett* (1886), 3 T. L. R. 246.

(*m*) *Eaglesfield* v. *Londonderry* (*Marquis*) (1878), 38 L. T. 303; *Jones* v. *Hope* (1880), 3 T. L. R. 247.

(*n*) *Jones* v. *Hope*, *supra*; *Overton* v. *Hewett*, *supra*.

(*o*) *Halbot* v. *Lens*, [1901] 1 Ch. 344.

(*p*) *Stansfield* v. *Ridout* (1889), 5 T. L. R. 656.

(*q*) *Harper* v. *Granville-Smith* (1891), 7 T. L. R. 284; *Steele* v. *Gourley* (1887), 3 T. L. R. 772, C. A.; *Barnett* v. *Wood* (1888), 4 T. L. R. 278; and see *Pilot* v. *Craze* (1888), 4 T. L. R. 453, where the stewards of a *fête* were held liable on orders given by the manager for tents etc.

credit (*r*); and although some members of the managing committee may sanction dealings on credit, it does not follow that they are all liable (*s*). If the committee have control of a fund for payment of expenses, and the rules of the club do not contemplate dealings on credit, only those who individually authorise or acquiesce in such dealings are liable (*s*).

SUB-SECT. 2.—*Proprietary and Incorporated Clubs.*

Contracts on behalf of proprietary and incorporated clubs.

912. The rights and liabilities arising out of contracts made on behalf of proprietary and incorporated clubs depend on the ordinary rules and principles applicable to the contracts of traders and trading companies generally (*t*). The committee, steward, and secretary, in regard to the making of contracts, must *primâ facie* be deemed to be acting, in the case of a proprietary club, on behalf of the proprietor, and in the case of an incorporated club, on behalf of the company. The proprietor (or proprietors, if more than one) may be sued in the club name on any contract made in connection with a proprietary club (*u*).

Goods upon the club premises belonging to members are liable to be seized under a distress for rent (*a*).

SECT. 2.—*In Tort.*

Liability of members for torts of committee or servants.

913. The question how far the members of a club are liable in tort for the wrongful acts and omissions of the committee, or of officers or servants of the club, is one in regard to which there is practically no authority. In the case of proprietary and incorporated clubs, it would seem that the ordinary rules as to the liability of a master or principal for the torts of his servants or agents apply (*b*). As to unincorporated members' clubs, the only reported case is one where the committee of a football club had employed an incompetent person to repair a stand for the accommodation of visitors to view matches, and a visitor, who had sustained injury by the collapse of the stand, brought an action for damages against the committee as representing the whole club. The county court judge at the trial amended the claim, and gave judgment against the members of the committee personally, and on appeal the judgment was affirmed, on the ground that the members of the committee were the persons primarily liable (*c*). On principle, the

(*r*) *Overton* v. *Hewett* (1886), 3 T. L. R. 246; *Wood* v. *Finch* (1861), 2 F. & F. 447.

(*s*) *Steele* v. *Gourley* (1887), 3 T. L. R. 669, 772; *Draper* v. *Manvers* (*Earl*) (1892), 9 T. L. R. 73; *Todd* v. *Emly* (1841), 7 M. & W. 427; *Queensberry* (*Duke*) v. *Cullen* (1787), 1 Bro. Parl. Cas. 396; and see *Hawke* v. *Cole* (1890), 62 L. T. 658, where it was held that an individual member of an officers' mess was not liable on orders of the wine-caterer in the absence of evidence of authority to pledge his credit.

(*t*) As to which see titles AGENCY, Vol. I., pp. 145 *et seq.*; CONTRACT; COMPANIES; SALE OF GOODS.

(*u*) *Firmin* v. *International Club* (1889), 5 T. L. R. 694.

(*a*) *Challoner* v. *Robinson*, [1908] 1 Ch. 49, C. A., where pictures exhibited by members of a proprietary club formed (*inter alia*) for the purpose of exhibiting such pictures were held liable to be seized by the head lessee under a distress for rent.

(*b*) See titles AGENCY, Vol. I., pp. 211 *et seq.*; MASTER AND SERVANT; see also *Bellamy* v. *Wells* (1890), 60 L. J. (CH.) 156.

(*c*) *Brown* v. *Lewis* (1896), 12 T. L. R. 455.

SECT. 2. In Tort.

liability of the members of such a club generally would seem to depend on whether the actual wrongdoer stands in the relation to them of an agent or servant, and if so, whether at the time of the wrongful act or omission he is acting on their behalf, and within the scope of his express or implied authority.

SECT. 3.—*Actions by and against Clubs.*

Unincorporated members' club.

914. An unincorporated members' club, not being a partnership or legal entity, cannot sue or be sued in the club name (*d*), nor can the secretary or any other officer of such a club sue or be sued on behalf of the club, even if the rules purport to give him power to sue and provide for his being sued (*e*). Service of a writ of summons on the secretary, in an action against the club, is bad (*f*).

The trustees may, however, sue or be sued in respect of club property vested in them; and in any action in regard to such property are considered to represent the members beneficially interested therein (*g*).

Further, in any action by or against a members' club, one or more of the members may sue or be sued, and may be authorised by the court to defend, on behalf, or for the benefit, of them all (*h*).

Proprietary and incorporated clubs.

915. In the case of an unincorporated proprietary club, the proprietor may sue or be sued, either in his own name or in the name of the club (*i*); and a club incorporated under the Companies Acts may, of course, sue or be sued in its corporate name.

Working men's clubs.

916. If a working men's club is registered, the trustees, or other officers authorised by the rules, may bring or defend any action or legal proceeding concerning any property, right, or claim of the club, and may sue and be sued in their proper names, without other description than the title of their office (*j*), and no

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(*d*) *Grossman* v. *Granville Club* (1884), 28 Sol. Jo. 513. As to proceedings in respect of the duty on club property, see, however, Customs and Inland Revenue Act, 1885 (48 & 49 Vict. c. 51), ss. 12, 18, and 19; *Re New University Club (Duty on Estate)* (1887), 18 Q. B. D. 720.

(*e*) *Gray* v. *Pearson* (1870), L. R. 5 C. P. 568; *Evans* v. *Hooper* (1875), 1 Q. B. D. 45. Statutory provisions are required to enable an unincorporated society to sue or be sued by a public officer; see title PRACTICE AND PROCEDURE.

(*f*) R. S. C., Ord. 9, r. 8.

(*g*) R. S. C., Ord. 16, r. 8.

(*h*) *Ibid.*, r. 9; *Richardson* v. *Hastings* (1844), 7 Beav. 301; *Lloyd* v. *Loaring* (1802), 6 Ves. 773; *Harrison* v. *Abergavenny (Marquis)* (1887), 57 L. T. 360 (action by a member on behalf of himself and all other members, except the defendants, against the trustees and members of the committee); *Andrews* v. *Salmon*, [1888] W. N. 102, where an action was brought by a member to restrain the club from expelling him, and there being thirty members of the committee, it was ordered that the chairman of the committee and the secretary, who were made defendants, should be authorised to represent the committee, and defend on behalf, and for the benefit, of them all, although the defendants objected to the order; and see *Wood* v. *McCarthy*, [1893] 1 Q. B. 775. As to the right to discovery and inspection of documents in an action by a member on behalf of himself and all other members, except the defendants, against other members of the club, see *Richardson* v. *Hastings*, *supra*.

(*i*) *Firmin* v. *The International Club* (1889), 5 T. L. R. 694.

(*j*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 94 (1). In all proceedings concerning any property vested in the trustees, the property may be

SECT. 3. Actions by and against Clubs.

such action or proceeding is subject to abatement or discontinuance by the death, resignation, or removal from office of any officer, or by any act of his after the commencement of the proceedings (*k*). In any proceedings against the club the writ, summons, or other process, is sufficiently served by personally serving the officers or other persons sued, or by leaving a true copy thereof at the registered office, or, if it is closed, by affixing a copy on the outer door, and posting a copy in a registered letter addressed to the committee at the registered office (*l*).

If a working men's club is not registered, it is in the same position as to suing or being sued as an ordinary unincorporated members' club.

Part IV.—Club Debentures (*m*).

Authority to issue debentures.

917. Clubs sometimes borrow money on the security of debentures charging the club property and assets. The authority to issue debentures must be expressly conferred by the memorandum and articles of association in the case of an incorporated club, or by the rules in the case of an unincorporated club.

Liability on debentures.

918. Debentures generally contain an undertaking to pay the moneys secured. In the case of an incorporated club the undertaking is given in the name of the company; and neither the shareholders nor club members incur any personal liability apart from their liability as contributories in the event of a winding-up (*n*). In the case of an unincorporated members' club, however, a difficulty arises. It would not, as a general rule, be considered convenient that all the members, who may be very numerous, should be jointly bound; and the trustees or committee may not be willing to accept the responsibility, if the amount is large (*o*). In such cases the undertaking may be by the trustees or the committee to pay out of the funds of the club, but not otherwise. The effect of this is to make the property and assets charged by the debentures, and the funds of the club, the only security for repayment of the loan.

Registration of debentures.

919. The debentures of a club incorporated under the Companies Acts, 1862 to 1907, are exempt from the provisions of the

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stated to be the property of the trustees, in their proper names, as trustees for the club, without further description (Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 51).

(*k*) *Ibid.*, s. 94 (3).

(*l*) *Ibid.*, s. 94 (4), (5).

(*m*) As to the law relating to debentures generally, and the rights and remedies of debenture-holders, see title COMPANIES. For forms of resolution authorising creation of debentures, and of the debenture, see Encyclopædia of Forms, Vol. III., pp. 792, 793.

(*n*) See title COMPANIES.

(*o*) See *Parr* v. *Bradbury* (1885), 1 T. L. R. 525. For a form of debenture of an unincorporated members' club, see Encyclopædia of Forms, Vol. III., p. 793.

PART IV. Club Debentures.

Bills of Sale Acts (*p*), but must be registered in accordance with the provisions of the Companies Act, 1900 (*q*). This exemption from the operation of the Bills of Sale Acts does not, however, extend to debentures given by clubs which are unincorporated, even if they are registered under the Friendly Societies Act, 1896 (*r*). Debentures given by unincorporated clubs should not, therefore, include in the property charged furniture or other personal chattels, because, even if registered under the Bills of Sale Acts (*s*), they would be void, at all events so far as concerns the personal chattels, as not being made in accordance with the form in the schedule to the Act of 1882 (*t*).

Deed not necessary.

920. The debentures need not be under seal. They are valid if signed by the person or persons authorised by the company, or the members of the club, as the case may be (*a*).

Part V.—Duty on Club Property.

Duty on annual valuc.

921. All real and personal property vested in or belonging to any members' club or club incorporated under the Companies Acts is chargeable with a duty at the rate of 5 per cent. per annum on the annual value, income, or profits (*b*) of such property accrued to the club in the yearly period ending on April 5th in each year, after deducting all necessary outgoings and all expenses incurred in the management of the property (*c*).

Exemptions.

Working men's clubs are exempt from this duty if they are registered as friendly societies, but not otherwise (*d*).

There is also an exemption in respect of property acquired by or with funds voluntarily contributed to the club within a period

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(*p*) Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43), s. 17; *Re Standard Manufacturing Co.*, [1891] 1 Ch. 627; see title BILLS OF SALE, Vol. III., p. 19.

(*q*) 63 & 64 Vict. c. 48, s. 14.

(*r*) *Great Northern Rail. Co.* v. *Coal Co-operative Society*, [1896] 1 Ch. 187.

(*s*) The effect of non-registration would be to make them void in respect of the personal chattels (Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43), s. 8).

(*t*) *Ibid.*, s. 9; see further on this subject, title BILLS OF SALE, Vol. III., p. 34.

(*a*) *British India Steam Navigation Co.* v. *Commissioners of Inland Revenue* (1881), 7 Q. B. D. 165.

(*b*) As to the proper method of arriving at the "annual value, income, or profits" for the purpose of assessing the duty, see *Re Surrey County Cricket Club*, [1901] 2 K. B. 400, where it was held that gate-money received from the public for admission to the grounds of a cricket club to see matches played was chargeable as profits, and that the land and buildings belonging to the club should be assessed in the same way as for the purpose of income-tax under Sched. A, the estimated cost of repairs being a proper deduction. In assessing the annual value of the property, all profits derived from the management and use of the property must be taken into consideration.

(*c*) Customs and Inland Revenue Act, 1885 (48 & 49 Vict. c. 51), ss. 11, 12; see title REVENUE.

(*d*) *Ibid.*, s. 11 (4).

of thirty years immediately preceding (*e*); but entrance fees and subscriptions of members, and moneys raised by the issue of debentures, are not funds voluntarily contributed within the meaning of the exemption (*f*).

Duty a charge on the property.

The duty is a first charge on all the property in respect whereof it is payable while such property remains in possession or under the control of the club chargeable with the duty, or of any persons acquiring it with notice of any duty being in arrear; and the club is answerable for the payment of the duty, and so also is every "accountable officer," that is to say, every treasurer, secretary, or other officer, trustee, or member of the club, receiving or having possession or control of the annual income or profits (*g*).

Annual account.

Every club chargeable with duty is required, on or before October 1st in every year, to deliver to the Commissioners of Inland Revenue or their officers a full and true account of all property in respect of which the duty is payable, and of the gross annual value, income, or profits accrued to the club in the year ending on the preceding April 5th, and of all deductions claimed in respect thereof. Every "accountable officer" is also answerable for the due delivery of the account (*h*).

Part VI.—Sale of Intoxicating Liquors in Clubs.

SECT. 1.—*Application of Licensing Acts generally to Clubs.*

Members clubs.

922. Apart from the provisions as to registration and the supply of intoxicating liquors in unregistered clubs, hereafter referred to (*i*), the Licensing Acts have no application to *bonâ fide* members' clubs, in which intoxicating liquors are supplied to members only, whether for consumption on or off the club premises (*j*). The members being the joint owners of all the club property, including the excisable liquors, the supply of such liquors to a member at a fixed price is not a sale within the meaning of the Acts, but a transaction in the nature of a release by the other members of their shares in the property (*j*).

Consumption off club premises.

The supply of intoxicating liquor to a duly authorised agent of a member, for consumption off the club premises, is not a sale

(*e*) Customs and Inland Revenue Act, 1885 (48 & 49 Vict. c. 51), s. 11 (6).
(*f*) *Re New University Club* (*Duty on Estate*) (1887), 18 Q. B. D. 720.
(*g*) Customs and Inland Revenue Act, 1885 (48 & 49 Vict. c. 51), ss. 12, 14. As to the penalty for neglecting to pay the duty, see *ibid.*, s. 18 (2).
(*h*) *Ibid.*, ss. 13 and 15. As to the penalty for neglecting to deliver an account, see *ibid.*, s. 18 (1); as to the assessment and management of the duty, and appeals from assessments, *ibid.*, ss. 13, 17, 19, 20; and as to the right of an accountable officer to retain or raise the amount of the duty out of moneys of the club held by him or coming to his hands, *ibid.*, s. 16.
(*i*) See pp. 431—434, *post*.
(*j*) *Graff* v. *Evans* (1882), 8 Q. B. D. 373.

SECT. 1. **Application of Licensing Acts generally to Clubs.**

on unlicensed premises within the meaning of the licensing Acts (*k*); but the supply of such liquor in a club, for consumption off the premises, is now prohibited, except to a member on the premises, under the penalty of a fine, on summary conviction, of not exceeding £10; and both the person supplying and the person obtaining the liquor are liable to the penalty (*l*).

Sale of liquor to non-members.

923. If intoxicating liquor is supplied to, and paid for by, a person who is not a *bonâ fide* member of the club or his duly authorised agent, that is a sale without a licence within the meaning of the Licensing Acts (*m*). But where a steward sells intoxicating liquors on the club premises to persons who are not members, contrary to the instructions, and without the knowledge, of the trustees and managing committee, neither the trustees nor the members of the managing committee are liable for the unauthorised sales, although the proceeds are paid in to the account of the club (*n*).

Temporary exchange of members.

Arrangements are sometimes made between clubs for the temporary exchange of members during cleaning operations. If by such an arrangement all the members of one club become members for the time being of the other in accordance with the rules, the supply of intoxicating liquor to such temporary members would probably be held not to be a breach of the Licensing Acts. The point, however, has not been decided.

Proprietary clubs.

924. Proprietary clubs stand on a different footing. The members not being the owners of nor interested in the property of the club, the supply to them of food or liquor, though at a fixed tariff, is a sale, and accordingly, if intoxicating liquors are supplied, the premises must be duly licensed (*o*).

Pretended club.

925. If a club is not a *bonâ fide* members' club, but only a pretended club, the provisions of the Licensing Acts apply (*p*).

(*k*) *Davies* v. *Burnett*, [1902] 1 K. B. 666 (not a sale within the Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 3).

(*l*) Licensing Act, 1902 (2 Edw. 7, c. 28), s. 27.

(*m*) *Stevens* v. *Wood* (1890), 54 J. P. 742, where a non-member entered a working men's club, the rules of which prohibited the payment of money by visitors direct to the manager, and, his name having been entered by a member in the visitors' book, called for intoxicating liquor and put down the money in payment, and the liquor was then supplied to the member, and handed by him to the visitor; a conviction for selling without a licence was upheld. In *R.* v. *Glamorganshire Justices* (1889), 5 T. L. R. 636, where it was not proved that the person supplied was a member, but the defendant offered to bring further evidence if an adjournment was granted, and the justices refused the adjournment and convicted the defendant, a motion for a *certiorari* to quash the conviction was unsuccessful; and see *Woodley* v. *Simmonds* (1896), 60 J. P. 150, where intoxicating liquor was supplied to the wife of a member who was not on the club premises at the time.

(*n*) *Newman* v. *Jones* (1886), 17 Q. B. D. 132.

(*o*) *National Sporting Club* v. *Cope* (1900), 82 L. T. 352; *Bowyer* v. *Percy Supper Club*, [1893] 2 Q. B. 154.

(*p*) *Evans* v. *Hemingway* (1887), 52 J. P. 134, where the premises were fitted up like a public-house, but had a sign-board over the door, on which the words "The —— Working Men's Club" were painted; the defendant professed

SECT. 1. Application of Licensing Acts generally to Clubs.

Thus, where, a members' club as constituted being unsuccessful, formal resolutions were passed placing the affairs of the club in the hands of a manager, on the terms that he should be entitled to receive all the profits by way of remuneration for his services if he conformed to the requirements of the members and paid all expenses, and he subsequently received the entrance fees and subscriptions and supplied intoxicating liquor to members at the club tariff, it was held that there was no evidence to sustain a finding that it was a *bonâ fide* club in which the members had a common property or interest in the excisable liquors, and that the manager ought to have been convicted of selling without a licence (*q*).

Incorporated clubs.

926. With regard to clubs incorporated under the Companies Acts, a distinction must be drawn, in order to reconcile the authorities. Where such a club has all the characteristics of a members' club consistent with its incorporation, that is to say, where every member is a shareholder, and every shareholder a member, there is authority for the proposition that the Licensing Acts do not apply if intoxicating liquors are supplied only to members (*r*). But if some of the shareholders are not members, or some of the members are not shareholders, though most of them may be, a licence is required for the sale of intoxicants, as in the case of an ordinary proprietary club (*s*).

SECT. 2.—*Registration.*

Registration required.

927. The secretary (*t*) of every club which occupies a house or part of a house or other premises which are habitually used for the purposes of a club, and in which any intoxicating liquor is supplied to members or their guests, must cause the club to be registered (*a*). The registration does not constitute the club licensed premises, nor does it authorise any sale of intoxicating liquor therein which would otherwise be illegal (*b*).

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to be the manager, but he was unable to show how the accounts were kept or to give the names of the members, and it did not appear that either the committee or the secretary had any means of checking him; and it was held that he was rightly convicted of selling without a licence.

(*q*) *Lynam* v. *O'Reilly*, [1898] 2 I. R. 48.

(*r*) *Newell* v. *Hemingway* (1888), 60 L. T. 544. On principle it may be questioned whether this decision is sound. The amount paid up on the shares was merely nominal (one shilling per share), and the receipts from the supply of food and liquors were the main source of the company's income, there being no entrance fees or subscriptions. An incorporated company is a legal entity, having an existence, in the eyes of the law, separate and distinct from the shareholders, and it is not easy to see why there was not a sale of the liquors by the company to the members.

(*s*) *National Sporting Club* v. *Cope* (1900), 82 L. T. 352; and see *Bowyer* v. *Percy Supper Club*, [1893] 2 Q. B. 154.

(*t*) "Secretary" includes any officer of a club or other person performing the duties of a secretary, and in the case of a proprietary club where there is no secretary, the proprietor of the club (Licensing Act, 1902 (2 Edw. 7, c. 28), s. 32). For the law as to intoxicating liquors generally, see title INTOXICATING LIQUORS.

(*a*) *Ibid.*, s. 24 (1).

(*b*) *Ibid.*, s. 24 (2).

SECT. 2. Registration.

Contents of register.

It is the duty of the clerk to the justices (*c*) of every petty sessional division to keep the register of all clubs within the division (*d*), and the register must contain—(1) the name and objects of the club; (2) the address of the club; (3) the name of the secretary; (4) the number of members; (5) the rules of the club relating to the election of members and the admission of temporary and honorary members and of guests, the terms of subscription and entrance fee, if any, the cessation of membership, the hours of opening and closing, and the mode of altering the rules (*e*).

Return by secretary.

The registration is effected by the secretary furnishing to the clerk to the justices in the month of January in each year (*f*) a return, signed by him, giving the above-mentioned particulars, together with a signed statement that there is kept upon the club premises a register of the names and addresses of the members, and a record of the latest payment of their subscriptions (*g*). Where a new club is about to be opened, the return must be furnished by the secretary before the opening (*h*).

Neglect to make return or making false return.

928. If the secretary omits to make the required return for the purpose of registration, he is liable on summary conviction to a fine not exceeding £20, and in the case of a second or subsequent offence to imprisonment, with or without hard labour, for not exceeding one month, or a fine not exceeding £50, or to both (*i*); and if he knowingly makes a return which is false in any material particular, he is liable to imprisonment, with or without hard labour, for not exceeding three months, or a fine not exceeding £50, or to both (*k*). But the liability for omitting to make a return does not attach until the month of January has expired (*l*).

Inspection of register.

929. It is the duty of the clerk to the justices to keep the register corrected up to date in accordance with the returns furnished by the secretaries, and the register must, at all reasonable hours, be open to the inspection of inspectors and superintendents of

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(*c*) In the city of London the clerk of special sessions, and in places within the jurisdiction of a metropolitan police court the clerk to such court, is substituted for the clerk to the justices (Licensing Act, 1902 (2 Edw. 7, c. 28), s. 31); and in Oxford the registrar of the Court of the Chancellor of the University is so substituted in the case of any club mainly composed of past or present members of the university (*ibid.*, s. 25 (7)).

(*d*) *Ibid.*, s. 25 (1).

(*e*) *Ibid.*, s. 25 (2).

(*f*) Where a secretary resigned, and his successor was appointed, during January, it was held that the secretary who so resigned was not liable for neglecting to make the return within the proper time, although he called at the office of the clerk to the justices for the necessary forms on February 1, the return being made by his successor on February 4 (*Booth* v. *Weightman* (1904), 91 L. T. 532).

(*g*) Licensing Act, 1902 (2 Edw. 7, c. 28), s. 25 (3). A fee of five shillings is payable to the clerk to the justices on each return (*ibid.*, s. 25 (6)). For form of return, see Encyclopædia of Forms, Vol. III., p. 790.

(*h*) Licensing Act, 1902 (2 Edw. 7, c. 28), s. 25 (4).

(*i*) *Ibid.*, s. 30 (1).

(*k*) *Ibid.*, s. 30 (2).

(*l*) *Booth* v. *Weightman*, *supra*.

police and inland revenue officers without fee, and of any other person on payment of a fee not exceeding one shilling (*m*).

SECT. 2. Registration.

Striking club off register.

930. A court of summary jurisdiction (*n*) may, on complaint (*o*) in writing by any person, make an order directing a registered club to be struck off the register on all or any of the following grounds, namely—

(1) That the club has ceased to exist, or that the number of members is less than twenty-five;

(2) That it is not conducted in good faith as a club (*p*), or that it is kept or habitually used for any unlawful purpose;

(3) That there is frequent drunkenness on the club premises;

(4) That illegal sales of intoxicating liquor have taken place on the club premises;

(5) That persons who are not members are habitually admitted to the club merely for the purpose of obtaining intoxicating liquor;

(6) That the club occupies premises in respect of which, within twelve months next preceding its formation, a licence has been forfeited or the renewal of a licence refused, or in respect of which an order has been made that they shall not be used for the purposes of a club;

(7) That persons are habitually admitted as members without an interval of at least forty-eight hours between their nomination and admission;

(8) That the supply of intoxicating liquor to the club is not under the control of the members or the committee appointed by the members (*q*).

Order that premises be not used as club.

Where an order is made striking a club off the register, the court may, by the order, further direct that the premises occupied by the club shall not be used for the purposes of any club requiring registration for a specified period, which may extend to twelve months in case of a first order, or to five years in the case of a second or subsequent order; and any such direction may, for good cause, be subsequently cancelled or varied by the court (*r*).

Intoxicants in unregistered clubs.

931. If any intoxicating liquor is supplied or sold to any member or guest on the premises of an unregistered club (*s*), the person supplying or selling the liquor, and every person authorising the supply or sale, is liable on summary conviction to imprisonment,

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(*m*) Licensing Act, 1902 (2 Edw. 7, c. 28), s. 25 (5).

(*n*) In Oxford, in the case of any club mainly composed of past or present members of the university, the Court of the Chancellor of the University, sitting and acting under the Oxford University (Justices) Act, 1886 (49 & 50 Vict. c. 31), acts as the court of summary jurisdiction, provided that it has no power to order that premises occupied by the club shall not be used for the purposes of a club (Licensing Act, 1902 (2 Edw. 7, c. 28), s. 28 (5)).

(*o*) If a summons is granted on the complaint, the summons must be served on the secretary and on such other person, if any, as the court may direct (*ibid.*, s. 28 (3)).

(*p*) In determining whether a club is conducted in good faith as a club, regard must be had to the nature of the premises occupied by the club (*ibid.*, s. 28 (2)); see also pp. 430, 431, *ante*.

(*q*) *Ibid.*, s. 28 (1).

(*r*) *Ibid.*, s. 28 (4).

(*s*) *I.e.*, a club requiring registration which is not registered, or which has been struck off the register (*ibid.*, s. 32).

SECT. 2. Registration.

with or without hard labour, for a term not exceeding one month, or to a fine not exceeding £50, or to both (*t*); and if any such liquor is kept for supply or sale on any such premises, every officer and member of the club is liable on summary conviction to a fine of £5, unless he proves to the satisfaction of the court that it was so kept without his knowledge or against his consent (*a*).

SECT. 3.—*Search Warrants.*

Search warrants.

932. A justice of the peace, if satisfied by information on oath that there is reasonable ground for supposing that any registered club is so managed or carried on as to constitute a ground for striking it off the register (*b*), or that any intoxicating liquor is sold or supplied or kept for sale or supply on the premises of an unregistered club (*c*), may grant a search warrant to any constable named therein (*d*). Such a search warrant authorises the constable named to enter the club, if need be by force, and to inspect the premises of the club, to take the names and addresses of any persons found therein, and to seize any books and papers relating to the business of the club (*e*).

SECT. 4.—*Use of Club Premises for Election Purposes.*

Use for committee rooms or meetings.

933. Premises where intoxicating liquors are sold or supplied to members of a club, other than a permanent political club, may not be used as a committee room, or for holding a meeting, for the purpose of promoting or procuring the election of a candidate at any parliamentary or municipal election. Any person hiring or using such premises or part thereof for any such purpose, and also the person letting the premises, if he knows the purpose for which they are intended to be used, is guilty of illegal hiring (*f*).

A permanent political club means a club not formed for the purposes of the particular election, but founded with the *bonâ fide* intention of being continued for an indefinite period. If a room in such a club be used as a committee room at an election, it ought, during the election, to be placed under the sole control of the election agent, and no food or drink should be sold or supplied therein. If the club meets on licensed premises, its rooms cannot be used as committee rooms (*g*).

(*t*) Licensing Act, 1902 (2 Edw. 7, c. 28), s. 26 (1).
(*a*) *Ibid.*, s. 26 (2).
(*b*) For these grounds, see p. 433, *ante*.
(*c*) See note (*s*), p. 433, *ante*.
(*d*) Licensing Act, 1902 (2 Edw. 7, c. 28), s. 29 (1).
(*e*) *Ibid.*, s. 29 (2). As to entry by the police without a warrant under s. 16 of the Licensing Act, 1874 (37 & 38 Vict. c. 49), see *Duncan* v. *Dowding*, [1897] 1 Q. B. 575.
(*f*) Corrupt and Illegal Practices Prevention Act, 1883 (46 & 47 Vict. c. 51), s. 20; Municipal Elections (Corrupt and Illegal Practices) Act, 1884 (47 & 48 Vict. c. 70), s. 16. This does not apply to any part of the premises ordinarily let for the purpose of chambers and offices, or for holding public meetings or arbitrations, if such part has a separate entrance, and no direct communication with the portion of the premises on which the intoxicating liquor is sold or supplied (*ibid.*). See also title ELECTIONS.
(*g*) Corrupt and Illegal Practices Prevention Act, 1883 (46 & 47 Vict. c. 51), s. 29 (a), (d).

Part VII.—Betting and Gaming in Clubs.

SECT. 1.—*Betting.*

SECT. 1. Betting

934. A *bonâ fide* club is not subject to the provisions of the Betting Houses Act, 1853 (*h*), even though the members thereof habitually bet with one another on the club premises, and there is a special room, or portion of the premises, set apart for betting (*i*), provided that the betting is confined to members, and that they bet with one another indiscriminately (*j*). It is not illegal for members of such a club to bet with one another on the club premises (*k*).

Betting in *bonâ fide* club.

935. But if persons who are not members are admitted to the premises for the purpose of betting with members, or if the club is not a *bonâ fide* club, but "a mere blind" for betting purposes, the provisions of the Act apply (*l*). Thus, where the members of a club did not bet indiscriminately with one another, but were divided into two classes, one consisting of bookmakers, and the other of members who were in the habit of betting with the bookmakers, and there was some evidence that particular bookmakers were generally to be found in particular portions of the betting room, it was held that there was evidence on which the jury might properly find that offences against the Act had been committed (*m*).

Betting in pretended club.

SECT. 2.—*Gaming.*

936. Gaming at clubs may be unlawful either because the club premises are a common gaming-house, in which all gaming, even at games which are not unlawful in themselves, is unlawful, or because the particular game is itself an unlawful game (*n*).

When gaming is unlawful.

937. A common gaming-house may be defined as a place to which large numbers of persons are invited habitually to congregate for the purpose of unlawful gaming (*o*); and, in default of other evidence to show that a club is a common gaming-house, it is sufficient to prove that it is used for the purpose of playing at any unlawful game in which a bank is kept by one or more players exclusively of others, or that the chances of any game played there are not alike favourable to all, including the banker or other person by whom the game is managed or against whom

Where premises are a common gaming house.

(*h*) 16 & 17 Vict. c. 119. For the law of betting generally, see title GAMING AND WAGERING.

(*i*) *Oldham* v. *Ramsden* (1875), 32 L. T. 825 (an ordinary members' club); *Downes* v. *Johnson*, [1895] 2 Q. B. 203 (a club incorporated under the Companies Acts, every member being required to hold at least one share in the capital, and disputes in reference to bets being decided by a committee).

(*j*) *Oldham* v. *Ramsden*, *supra*; *R.* v. *Corrie and Watson* (1904), 68 J. P. 294.

(*k*) *Oldham* v. *Ramsden*, *supra*; *Downes* v. *Johnson*, *supra*.

(*l*) *Oldham* v. *Ramsden*, *supra*; *R.* v. *Corrie and Watson*, *supra*.

(*m*) *R.* v. *Corrie and Watson*, *supra*.

(*n*) *Jenks* v. *Turpin* (1884), 13 Q. B. D. 505, 513. For the law of gaming generally, see title GAMING AND WAGERING.

(*o*) *Ibid.*, at p. 516.

SECT. 2. Gaming.

the other players stake, play, or bet (*p*). It is immaterial whether it is the owner or occupier of the premises, or one of the players, who keeps the bank or manages the game; and a club may be a common gaming-house although the gaming is restricted to members, and the club exists for other purposes than that of gaming (*q*).

Penalties.

If a club is a common gaming-house, the keeper is indictable at common law; and though not a common gaming-house, if it is open, kept, or used for unlawful gaming, the owner or occupier who opens, keeps, or uses it, or knowingly and wilfully permits it to be opened, kept, or used, for that purpose, and also any person having the care or management of the club or in any way assisting in the conduct of its business, or advancing money for the purpose of gaming therein, is liable by statute to a heavy penalty (*r*).

Unlawful games.

938. The following games are unlawful: chemin de fer (*s*), baccarat (*t*), ace of hearts, faro, basset, hazard, roulette, any game with dice except backgammon, all games of cards except games of mere skill, and any game of mere chance (*a*).

Whether a certain game is or is not unlawful is a question of law for the judge and not of fact for the jury (*b*). A game, in itself lawful, may become unlawful if played for money or money's worth (*c*).

Entry by police.

939. In the metropolitan police district the Commissioner of Police may authorise a superintendent to enter, if necessary by force, any club suspected to be a common gaming-house, and to search for and seize all instruments of gaming, and take into custody all persons found therein (*d*). Outside the metropolitan police district, similar authority may be given to a constable by a justice of the peace (*e*). Any person found on the premises who refuses to give his name and address, or gives a false name or address (*f*), or who wilfully obstructs or delays any constable or

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(*p*) Gaming Act, 1845 (8 & 9 Vict. c. 109), s. 2.

(*q*) *Jenks* v. *Turpin* (1884), 13 Q. B. D. 505, 513.

(*r*) Gaming Act, 1854 (17 & 18 Vict. c. 38), s. 4. In *Jenks* v. *Turpin*, *supra*, it was held that the proprietor and members of the committee of management of a proprietary club were rightly convicted under the section, the proprietor for opening and keeping the premises for the purpose of unlawful gaming, and the members of the committee for assisting in the conduct thereof; but that members who had merely played at the unlawful game and who took no part in the care or management of the club were not liable. See also Unlawful Games Act, 1541 (33 Hen. 8, c. 9), ss. 11, 12.

(*s*) *Fairtlough* v. *Whitmore* (1895), 43 W. R. 421.

(*t*) *Jenks* v. *Turpin*, *supra*. In *St. Croix* v. *Morris* (1885), Cab. & El. 485, it was held that an action brought by the secretary of a club on a cheque given in payment for counters by the defendant for the purpose of playing baccarat, the secretary watching him play, was not maintainable.

(*a*) *Jenks* v. *Turpin*, *supra*.

(*b*) *R.* v. *Davies*, [1897] 2 Q. B. 199.

(*c*) *Dyson* v. *Mason* (1889), 22 Q. B. D. 351. As to playing for prizes, see *Lockwood* v. *Cooper*, [1903] 2 K. B. 428. For unlawful games generally, see title GAMING AND WAGERING.

(*d*) Gaming Act, 1845 (8 & 9 Vict. c. 109), ss. 6, 7.

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

(*f*) Gaming Act, 1854 (17 & 18 Vict. c. 38), s. 3.

officer so authorised (*g*), is liable to a heavy penalty. If any cards, dice, tables, or other instruments of gaming used in playing an unlawful game are found on any premises so entered (*h*), or if any constable or officer so authorised is wilfully obstructed or delayed, or any door or means of access to any part of the premises is found to be provided with any bolt, bar, or other means of contrivance for the purpose of preventing, delaying, or obstructing the entry into the premises or any part thereof, or for giving alarm in case of entry by the police, that is *primâ facie* evidence that the club is a common gaming-house (*i*).

Part VIII.—Dissolution of Clubs.

Unincorporated members' clubs.

940. The High Court has jurisdiction to dissolve and wind up an unincorporated members' club or unregistered working men's club (*k*); but it will not, as a general rule, interfere where the rules provide for a dissolution, nor even in the absence of such provision, unless it clearly appears that the majority of the members desire to dissolve, or there are special circumstances which make it impossible or impracticable to continue to carry on the club (*k*). A working men's club registered under the Friendly Societies Act, 1896 (*l*), may be wound up compulsorily as an unregistered society (*m*).

Division of property.

On the dissolution of a members' club the property and assets should be sold and realised, and after the discharge of the debts and liabilities of the club the surplus should be equally divided amongst the members for the time being, other than the honorary members, subject to any provisions in the rules to the contrary (*n*). An action will lie in the Chancery Division for the administration of the assets if it is alleged that they are not being properly administered (*o*), and such an action may be brought by one member suing on behalf of himself and all other members except the defendants (*p*).

(*g*) Gaming Act, 1854 (17 & 18 Vict. c. 38), s. 1.

(*h*) Gaming Act, 1845 (8 & 9 Vict. c. 109), s. 8.

(*i*) Gaming Act, 1854 (17 & 18 Vict. c. 38), s. 2.

(*k*) Companies Act, 1862 (25 & 26 Vict. c. 89), s. 199; *Blake* v. *Smither* (1906), 22 T. L. R. 698, where in the case of an unregistered friendly society, the rules of which contained no provisions as to dissolution, at a general meeting, twenty-seven members being present, the majority decided to dissolve, but at a meeting of the committee, subsequently held, it was decided to continue the society, and at a subsequent general meeting thirty-two of the members who were present paid their subscriptions, and it was held that the court had jurisdiction to decree a dissolution, but that no sufficient reason was shown for such a decree.

(*l*) 59 & 60 Vict. c. 25.

(*m*) Under s. 199 of the Companies Act, 1862 (25 & 26 Vict. c. 89); *Re Irish Mercantile Loan Society*, [1907] 1 I. R. 98. The fact that such a club has passed a resolution to dissolve, and is in favour of dissolution, does not prevent a creditor from obtaining a winding-up order (*ibid.*).

(*n*) *Brown* v. *Dale* (1878), 9 Ch. D. 78.

(*o*) *Re St. James's Club* (1852), 2 De G. M. & G. 383; *Richardson* v. *Hastings* (1844), 7 Beav. 301.

(*p*) *Richardson* v. *Hastings*, *supra*, where two of the members of the managing committee had obtained possession of the assets, and applied them in the

PART VIII. **Dissolution of Clubs.**

Proprietary clubs.

941. The proprietor of an unincorporated proprietary club is not, in the absence of an express agreement to that effect, bound to continue carrying it on beyond the date of the expiration of the current subscriptions, and he can therefore dissolve the club by simply refusing to accept further subscriptions.

Incorporated clubs.

942. The dissolution and winding up of clubs incorporated under the Companies Acts are governed by the law relating to the dissolution and winding up of companies under those Acts generally (*q*).

Registered working men's clubs.

943. Registered working men's clubs may be dissolved—

(a) Upon the happening of any event declared by the rules to be the termination of the club; or

(b) By the consent of three-fourths of the members, testified by their signatures (*r*) to the instrument of dissolution (*s*); or

(c) In certain cases (*t*), by the award of the Chief Registrar or Assistant Registrar of Friendly Societies (*a*).

Shop clubs.

944. The dissolution and winding up of shop clubs are matters which must be provided for by the rules of the club (*b*).

winding-up, and it was held that one member might, on behalf of himself and the other members, sue for an account of the receipts and disbursements, without asking for an order for a general winding up by the Court.

(*q*) See title COMPANIES.

(*r*) The instrument may be signed by a duly authorised agent (*Dennison* v. *Jeffs*, [1896] 1 Ch 611).

(*s*) As to the instrument of dissolution, see Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 79.

(*t*) *Ibid.*, s. 80.

(*a*) *Ibid.*, s. 78; see further on this subject, *ibid.*, ss. 79—83; and title FRIENDLY SOCIETIES.

(*b*) See p. 412, *ante*.

COAL.

See MINES, MINERALS AND QUARRIES; TRADE AND TRADE UNIONS.

COCK-FIGHTING.

See ANIMALS; CRIMINAL LAW AND PROCEDURE.

CODICIL.

See WILLS.

COGNOVIT.

See PRACTICE AND PROCEDURE.

COINAGE AND COINS.

See CONSTITUTIONAL LAW; CRIMINAL LAW AND PROCEDURE; MONEY AND MONEY-LENDING.

COLLECTING SOCIETIES.

See FRIENDLY SOCIETIES.

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See CHARITIES; EDUCATION.

COLLIERY.

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COLONIES.

See DEPENDENCIES AND COLONIES.

COMBINATIONS AFFECTING TRADE.

See TRADE AND TRADE UNIONS.

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See TRADE AND TRADE UNIONS.

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COMMISSION TO EXAMINE WITNESSES.

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COMMON CARRIERS.

See CARRIERS.

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See CRIMINAL LAW AND PROCEDURE.

COMMON, TENANCY IN.

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Part I.—Nature, Definitions, and General Description.

SECT. 1.—*Introductory: Origin etc.*

Different meanings of the term "common."

945. The term "common" in the old writers and reports usually refers to rights of common which are exercisable over land rather than to the place on which those rights are exercised, whereas at the present time when standing alone and unaccompanied by some reference to a particular kind of common, such as common of pasture, common of piscary etc., it usually denotes the land where rights of common are exercised, *i.e.* open (*a*) and uncultivated ground over which the owners and occupiers of inclosed land in the vicinity have certain rights, although they are not the owners of such ground.

(*a*) In the early cases and pleadings land which is the subject of an action is frequently referred to as a "close," although it is manifestly open and uninclosed land. The word merely denotes land without reference to its condition.

SECT. 1. Introductory: Origin etc.

Relation of rights of common to population.

946. Whatever may have been the origin of rights of common, a subject which has been much discussed, and on which many different theories have been put forward, but which does not fall within the province of the present work, rights of common have always been co-existent with the disproportion of land to population; they are exercised freely where the population is scanty; they grow restricted as the population increases, and there are more frequent disputes when the herbage becomes insufficient for all who desire to use the rights of common, and the value of the waste land for other purposes increases; and they finally disappear when the disproportion of land to population ceases (*b*).

Origin of rights of common.

947. Formerly the origin of rights of common was usually referred to the feudal tenure under the Norman law and to the grants made by lords of manors to their tenants (*c*), but modern researches have raised considerable doubt whether this theory is universally true, and whether the origin of common appendant in particular is not to be traced to the vill, town, or township (*d*). A vill or township had a considerable share of self-government, and subsequently the lordship of the vill, including the soil of the waste lands, was granted to some person who thereby became lord of the manor, the vill or township being frequently co-extensive with the manor or the parish (*e*). As population increased the lands in the neighbourhood of a town passed into the control of the corporation for the benefit of the citizens or burgesses, while in localities where population was scanty some individual by his own power or by grant from the King acquired a large tract and laid the foundation of a manor. The modern recognition of the importance of the vill or township is to some extent responsible for the increasing favour with which claims on behalf of inhabitants and householders of parishes in respect of common as distinguished from claims in respect of land have been regarded by the courts in the last thirty or forty years as compared with the old common law courts (*f*).

(*b*) Cooke, Inclosure Acts, p. 2. The large commons of the North of England and Wales show a similar state of things. Much valuable information as to the frequent contests between farmers in the north of England as to the pasturage for their stock and the way in which the small owners were driven off the best pastures by the shepherds and dogs of the large farmer will be found in the Report of the Royal Commission of 1844, which resulted in the passing of the General Inclosure Act, 1845 (8 & 9 Vict. c. 118). See too the evidence before the Select Committee on East Stainmore Common, Westmorland, in 1877.

(*c*) See the principles laid down by Lord COKE in *Tyrringham's Case* (1584), 4 Co. Rep. 36 a; Tudor, L. C. Real Prop., 4th ed., p. 700.

(*d*) Williams, Rights of Common, pp. 31 *et seq.*, 71 *et seq.*

(*e*) For references to the lord of a vill, see Y. B. 21 Hen. 7, Mich. pl. 20; Vin. Abr. tit. Prescription, K 3; Fitz. Nat. Brev. p. 180; and for claims of common in respect of a town, see Co. Litt. 110 b; *Ellard* v. *Hill* (1664), Sid. 226; *Pate* v. *Brownlow* (1665), 1 Keb. 876 (a case of a marsh in common to two vills). The vill was originally a more important division than the parish (Statute of Additions (1 Hen. 5, c. 5); *Stock* v. *Fox* (1604), Cro. Jac. 120; *Gibson* v. *Clarke* (1819), 1 Jac. & W. 159), but was, in the absence of evidence to the contrary, presumed to be co-extensive with the parish. See 1 Bl. Com. 115.

(*f*) See *Warrick* v. *Queen's College, Oxford* (1871), 6 Ch. App. 716; *Goodman* v. *Saltash Corporation* (1882), 7 App. Cas. 633; and as to evidence of reputation in support of claims of common contrast *Warrick* v. *Queen's College, Oxford*,

SECT. 2.—*Definitions.*

SECT. 2. Definitions.

948. A right of common has been defined to be "a right which one or more persons may have to take or use some portion of that which another man's soil naturally produces" (*g*). This definition may be slightly amplified as follows, namely, a right which one or more persons may have to take for his or their own use part of the natural produce of another man's land, the landowner being entitled to all that the commoners do not lawfully take.

Definition of right of common.

SECT. 3.—*Distinction between a Profit and an Easement.*

949. A right of common, being a right to take part of the produce of another man's land, is a profit, and is commonly referred to as a *profit à prendre*, as distinguished from rents, dues, and services and other profits of a similar nature, which are said to lie *in render*, because it is the duty of the tenant to pay or tender them to his lord (*h*). It must be distinguished from an easement, which, though a right over another man's land, confers no right to a participation in the profits arising from the land (*i*).

Right of common a *profit à prendre*.

950. The distinction between the two is sometimes rather fine, but a *profit à prendre* may generally be distinguished by seeing whether the right claimed involves taking either produce of the soil, the soil itself, or the minerals under the soil for the use and benefit of the person claiming the right, and whether what is taken is capable of ownership, and also by remembering that certain things, such as air, light and water, whether flowing in a stream, running in underground channels, or issuing from the ground, are by the law of nature common to all (*j*).

Distinction between *profit à prendre* and easement.

A right to sink pits, excavate the soil, and get stone or other minerals from a waste, and to make spoil-banks on other parts of the waste, is a *profit à prendre* when the minerals under the waste are in the same ownership as the surface; but when the minerals and the surface belong to different owners, and the acts done are done in the process of getting the minerals, and damage done to the surface is the necessary consequence of the exercise of the right to get the minerals, the right is an easement (*k*).

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supra, *per* Lord HATHERLEY, L.C., at p. 725. with *Dunraven* (*Earl*) v. *Llewellyn* (1850), 15 Q. B. 791, *per* PARKE, B., at p. 811.

(*g*) Cooke, Inclosure Acts, p. 5. For other definitions, see Elton, Commons, p. 2; Woolrych, Commons, p. 13; Bract. 222; Britton, 143; and Fleta, 254.

(*h*) See Sweet's Law Dictionary, p. 646.

(*i*) An easement is "a privilege without profit which the owner of one neighbouring tenement hath of another, existing in respect of their several tenements, by which the servient owner is obliged to suffer or not to do something on his own land for the advantage of the dominant owner" (Gale, Easements, 8th ed., p. 8); and see title EASEMENTS AND PROFITS À PRENDRE.

(*j*) See *Mason* v. *Hill* (1833), 5 B. & Ad. 1, 24; *Embrey* v. *Owen* (1851), 6 Exch. 353; *Chasemore* v. *Richards* (1859), 7 H. L. Cas. 349.

(*k*) *Rogers* v. *Taylor* (1857), 1 H. & N. 706; and compare *Pye* v. *Mumford* (1848), 11 Q. B. 666, where a claim to cart muck and dung from the plaintiff's land and to mix it for manure on the land of the defendant appears to have been pleaded by mistake as a *profit à prendre*.

SECT. 3. **Distinction between a Profit and an Easement.**

Importance of distinguishing between *profit à prendre* and easement.

951. The distinction between a *profit à prendre* and an easement is important, because, while they both involve the enjoyment of rights over another man's land, the respective periods of enjoyment necessary to sustain a claim under the Prescription Act, 1832 (*l*), are for a *profit à prendre* thirty years and sixty years, and for an easement other than light twenty years and forty years (*m*), and also because a *profit à prendre* cannot, except in the case of copyholders of a manor, be claimed by custom (*n*), while an easement can, and therefore can be claimed by inhabitants of a vill or district (*o*).

Part II.—Different Kinds of Rights of Common.

SECT. 1.—*Classification.*

Classification.

952. Rights of common are either (1) appendant, (2) appurtenant, (3) in gross, or (4) pur cause de vicinage (*p*).

Common appendant.

Right of common appendant is a right by common law incident to the grant to certain tenants of arable land before the Statute of "Quia Emptores" (*q*), by which the tenant is entitled to the use of the manorial waste for such purposes as are necessary to the maintenance of his husbandry (*r*).

Common appurtenant.

Right of common appurtenant is a right depending upon a grant, or upon a prescription which supposes a grant, annexing to particular lands a right of user of a particular waste.

Common in gross.

Right of common in gross is a right depending upon a grant or prescription entitling the possessor to some user of a particular waste without reference to any particular land.

Common by reason of vicinage.

Right of common pur cause de vicinage is the right which the

(*l*) 2 & 3 Will. 4, c. 71.

(*m*) *Ibid.*, ss. 1, 2.

(*n*) *Gateward's Case* (1607), 6 Co. Rep. 59 b; *Race* v. *Ward* (1855), 4 E. & B. 702. The reason why a *profit à prendre* cannot be supported by a custom in an indefinite number of people is that the subject of the profit would in that case be liable to be entirely destroyed (*Bland* v. *Lipscombe* (1854), 4 E. & B. 713, n.; *A.-G.* v. *Mathias* (1858), 4 K. & J. 579; *Constable* v. *Nicholson* (1863), 14 C. B. (N. S.) 230; *Knight* v. *King* (1869), 20 L. T. 494; *Blewitt* v. *Tregonning* (1835), 3 Ad. & El. 554); compare *Hough* v. *Clark* (1907), 23 T. L. R. 682.

(*o*) *Race* v. *Ward*, *supra*.

(*p*) Cooke, Inclosure Acts, p. 5.

(*q*) 18 Edw. 1, c. 1 (1290). This statute declared that where a man thereafter conveyed land the purchaser should hold of the same lord and by the same services as the vendor. As after that statute no subject could grant land to be held freely of himself, all the freehold tenements of a manor must date from before that time. Subsequent sales by a lord of a manor sever the land from the manor. The land sold, therefore, cannot enjoy a right of common appendant, which attaches to land held freely of a manor or, if attached to other arable lands, must date from time immemorial. As to the effect of a sale by the lord of the manor since the Statute of "Quia Emptores" of lands owned by him, see further p. 524, *post*.

(*r*) *Dunraven (Earl)* v. *Llewellyn* (1850), 15 Q. B. 791.

commoners of certain adjoining wastes have of suffering their cattle to stray over the dividing boundary.

SECT. 1. Classification.

In these definitions it must be understood that the word "waste" is intended to include all lands which are the subject of a right of common.

953. These several kinds of rights of common are exercisable in different ways, according to the subject-matter of the right, which includes generally all things which the soil naturally produces; and these natural productions have caused our law writers to divide the kinds of common into four main classes, namely, (1) *common of pasture*, or the right of feeding cattle, horses, sheep, or other animals on the land of another, which may exist either as appendant, as appurtenant, in gross, or by reason of vicinage; (2) *common of piscary*, or the right of fishing in another's water; (3) *common of turbary*, or the right of digging turves or peat out of another's soil; and (4) *common of estovers*, or the right of taking from another's land the wood necessary for the sustenance of the commoner's house or agriculture (*s*).

Classification by subject-matter.

To these four classes a fifth has sometimes been added, namely, the right of taking sand, gravel, stone, and even minerals from another's soil, which is sometimes called *common in the soil* (*t*); and there are various miscellaneous profits which will be referred to later, but which mostly come under one or other of the principal classes.

SECT. 2.—*Common of Pasture.*

SUB-SECT. 1.—*Common of Pasture Appendant.*

954. Common of pasture appendant to ancient arable land must have existed beyond the time of legal memory, *i.e.* before the reign of Richard I. (*a*), although it is unnecessary now to prove this early origin. Therefore it cannot be created at the present day.

Common of pasture appendant.

It is confined to such cattle as serve for the maintenance of the plough, as horses and oxen to plough the land, and sheep and kine to compester (that is, to manure) it (*b*). Hogs, goats, geese, or such-like are not commonable by virtue of a right of common appendant (*c*).

955. Common of pasture appendant is said to be of "common right" and to be a manorial privilege attached by the common law

Nature of the right.

(*s*) The word "estover" is derived from the Norman verb *estoffer*, to furnish, but the right itself was known in England before the time of the Normans by the Saxon word "bote." Thus, house-bote is the wood necessary to repair the house, fire-bote the wood sufficient to burn in the house, plough-bote and cart-bote the wood necessary to make and repair implements of agriculture, and hay-bote the wood necessary for making or repairing hays, *i.e.*, hedges or fences (*Dowglas* v. *Kendall* (1609), 1 Bulst. 93). All of them are included under the general term of estovers.

(*t*) Co. Litt. 41 b, 122 a.

(*a*) As to legal memory, see title EASEMENTS AND PROFITS À PRENDRE.

(*b*) Co. Litt. 122 a. Elton (Commons, p. 47) defines it as "a prescriptive right in freehold tenants of a manor of feeding their cattle used in agriculture upon the lord's waste," and refers to Y. B. 37 Hen. 6, c. 34, and Bro. Abr. tit. Common, 13, 16.

(*c*) Co. Litt. 122 a; and compare *Standred* v. *Shorditch* (1621), Cro. Jac. 583

SECT. 2. Common of Pasture.

to a grant by a lord (before the Statute of "Quia Emptores" (*d*)) of arable land, on the ground that in every original feoffment of arable land to be held of the manor in socage the law without express words included a grant of sufficient pasture in the waste for the beasts levant and couchant on the land. It has therefore been described as the common law right of every free tenant on the lord's wastes (*e*).

Some confusion has arisen in the early cases as to whether rights of common were appendant or appurtenant from the fact that the Latin word *pertinens* is used for both rights, and that the two terms are frequently used to describe the same right in different reports of the same case. The circumstances of each case must decide whether the word *pertinens* should be translated "appurtenant" or "appendant" (*f*).

Prescription implied.

956. Common of pasture appendant being of common right, it is unnecessary to prescribe for it in the usual form (*g*), since appendancy always implies prescription (*h*).

Proof of user unnecessary.

957. As common of pasture appendant must have existed from time out of mind (*i*), and in many cases has been destroyed by repurchase or other unity of possession of the tenement to which it

(*d*) 18 Edw. 1, c. 1 (1290). See note (*q*), p. 446, *ante*.

(*e*) See *Mellor* v. *Spateman* (1669), 1 Wms. Saund. 343, 346 d; *Bennett* v. *Reeve* (1740), Willes, 227; Co. Litt. 122 a; Com. Dig. tit. Common, B; 1 Roll. Abr. 396, l., 44, 45; 2 Co. Inst. 85; 4 Co. Rep. 37. The proposition in the text was not accepted by PARKE, B., in delivering judgment in *Dunraven (Earl)* v. *Llewellyn* (1850), 15 Q. B. 791, at p. 810, where he said: "The right, therefore, is not a common right of all tenants, but belongs only to each grantee before the Statute of 'Quia Emptores' of arable land by virtue of his individual grant and as an incident thereto; and it is as much a peculiar right of the grantee as one derived by express grant or prescription, though it differs in its extent." This judgment has been severely criticised by Mr. Joshua Williams (Real Property, 17th ed., Appendix F, p. 628), not only on an examination of the authorities referred to in the judgment, but also on the ground that the principle that common appendant is the common law right of all tenants has produced two doctrines of law which are undeniable, and which turn solely on the distinction that this kind of common is of common right, whilst other kinds are not, the first being that, because common appendant is of common right, a man does not prescribe for it (see *supra*), and the second that if a man purchases part of the land wherein common appendant is to be had, the common is apportioned because it is of common right, but not so of a common appurtenant or of any other common of what nature soever (see pp. 449, 456, *post*). He also gives other grounds connected with the modern theory of the origin of rights of common. And see *Warrick* v. *Queen's College, Oxford* (1871), 6 Ch. App. 716; *Chesterfield* v. *Fountaine* (1895), reported in [1908] 1 Ch. 243, n.

(*f*) *Tyrringham's Case* (1584), 4 Co. Rep. 36 a, 37. The matter is not of much importance as regards common of pasture, and will be dealt with more fully when the question whether common of estovers can be appendant is considered; see note (*p*), p. 466, *post*.

(*g*) Co. Litt. 121 b.

(*h*) Co. Litt. 122 a, and see note (i) to *Tyrringham's Case* (1584), 4 Co. Rep. 36 a, 37 a; *Bennett* v. *Reeve* (1740), Willes, 227; *Hayes* v. *Bridges and Guess* (1795), Ridg. L. & S. 390, 410: and a case from Y. B. 4 Hen. 6, H. T., case 10, quoted in Hall, Profits à Prendre, p. 247.

(*i*) Vin. Abr. tit. Common, C, p. 1; Com. Dig. tit. Common, B.

was attached and the manor in the hands of the lord (*k*), it is not so frequently met with as common of pasture appurtenant, but it has one important characteristic, that to establish a claim it is not necessary to prove actual user of the right. When once it is proved that the land is held freely of the manor, and that it is in such a condition that it could be restored to arable land, if it is not such in its present condition, a right of common for commonable cattle necessarily attaches to the land, and may be exercised by the owner or occupier (*l*). If, however, the character of the land has been so entirely altered that it is incapable of producing any grass or other natural product, as, for instance, if it has been entirely covered with houses or is the site of a reservoir (*m*), or for a lengthened period has ceased to produce grass or herbage (*n*), the question of the abandonment of the right of common will arise (*o*).

Land anciently arable.

958. Common of pasture appendant must exist in respect of land which was anciently arable (*p*). The law, however, will intend that all land which has immemorially had common of pasture appendant to it was originally arable, whatever may be its present state of cultivation; and therefore, where all the land was originally arable, the mere fact of a house having been built upon part of the land or part of it having been converted into meadow or pasture will not, if there has been a continual enjoyment of pasturage for cattle levant and couchant, destroy the original right (*q*).

Right incapable of being severed from land.

959. As common of pasture appendant belongs to arable land, so it is also so necessarily incident to it that it cannot be severed, and therefore, if the land be divided ever so often, every little parcel is entitled to common appendant, and the right is apportionable (*r*); whereas with common of pasture appurtenant, which stands upon a different footing, the right of common is not apportionable, and if for a number certain may be severed from the land (*s*).

Claim in case of manor etc.

960. Although common of pasture appendant cannot be claimed for meadow or pasture land *eo nomine*, yet it may be claimed for a manor containing pasture meadow or wood, for the claim will be

(*k*) See p. 523, *post*.

(*l*) Common appendant being of common right, this sometimes becomes important in estimating whether or not sufficient common has been left in a case of approvement by the lord of the manor; see *Robertson* v. *Hartopp* (1889), 43 Ch. D. 484, C. A.

(*m*) See *Carr* v. *Lambert* (1866), L. R. 1 Exch. 168, Ex Ch.

(*n*) *Scrutton* v. *Stone* (1893), 9 T. L. R. 478.

(*o*) See p. 525, *post*.

(*p*) *Tyrringham's Case* (1584), 4 Co. Rep. 36 a, 37, which is the leading case on the subject of common appendant.

(*q*) *Ibid.* In that case a right of common was pleaded as appendant to a house, meadow, and pasture, and it was held that of his own showing the claimant had made it appear that it had been at all times a house, meadow, and pasture, and consequently that it could not be common appendant, but must be common appurtenant; see also *Carr* v. *Lambert*, *supra*.

(*r*) *Tyrringham's Case*, *supra*; Co. Litt. 122 a; *Bennett* v. *Reeve* (1740), Willes, 227, where WILLES, C.J., relies on this doctrine to dispose of the idea that the origin of common appendant was the obligation of the tenants to plough the lands of their lords.

(*s*) See p. 456, *post*.

SECT. 2. Common of Pasture.

applied to such parts of the land as agree with the nature and qualities of common appendant *reddendo singula singulis*, and either the demesnes of the manor will be presumed to have consisted of ancient arable entirely, or the claim will be referred to the ancient portions, and not to those parts which the lord may have approved out of the wastes and moors parcel of the manor (*t*).

On the same principle claims have been allowed for a messuage or cottage, but only where land or a curtilage was attached (*u*), and as under an early Act every cottage was bound to have four acres of land annexed to it (*x*), a yard or curtilage would be presumed.

Extent of right.

961. The number of commonable cattle which may be turned upon the common was originally limited to the number required in the tillage of the farm (*a*). This limitation, however, was probably found difficult of application, as the number necessary to till would vary in different years according to the circumstances of the tillage. The courts therefore adopted a rule more certain in its application, namely, that a right of common of pasture appendant gives a right to turn upon the common as many commonable cattle as the land to which the right is appendant will maintain by its produce through the winter. These cattle are said to be levant and couchant upon that land (*b*).

Levancy and couchancy.

The original right, which was measured by the number necessary to plough and compester the land, has undoubtedly been enlarged in some of the numerous cases as to cattle levant and couchant by the admission to common rights of all cattle which the land will winter, although they may not be necessary to its tillage; but it is submitted that none of them go to abridge that original right, and cattle levant and couchant commonable in respect of right of common appendant may therefore be defined to be such cattle as the land can maintain during the winter by its produce or requires to plough and compester it (*c*).

(*t*) *Tyrringham's Case* (1584), 4 Co. Rep. 36 a, 37; and compare *Ricketts* v. *Salwey* (1819), 2 B. & Ald. 360, where an allegation in a declaration that a plaintiff was possessed of a messuage and land with the appurtenants, and therefore ought to have common of pasture etc., was held divisible.

(*u*) Co. Litt. 5 b and cases there cited; *Scholes* v. *Hargeaves* (1792), 5 Term Rep. 46, where the claim was for a house with neither land, curtilage, nor stable, but only a small sheephold attached to a butcher's shop; *Benson* v. *Chester* (1799), 8 Term Rep. 396; *Emerton* v. *Selby* (1703), 2 Ld. Raym. 1015; *Carr* v. *Lambert*, (1866), L. R. 1 Exch. 168, Ex. Ch.

(*x*) Stat. 31 Eliz. c. 7, repealed by stat. 15 Geo. 3, c. 32, which is itself repealed by the Statute Law Revision Act, 1871 (34 & 35 Vict. c. 116).

(*a*) See *Bennett* v. *Reeve* (1740), Willes, 227. *Quære*, whether the right can be claimed in respect of a fraction of an animal (*Nicholls* v. *Chapman* (1860), 5 H. & N. 643).

(*b*) Cooke, Inclosure Acts, p. 10; *Scholes* v. *Hargreaves*, *supra*; *Whitelock* v. *Hutchinson* (1839), 2 Mood. & R. 205; *Carr* v. *Lambert*, *supra*, *per* WILLES, J., at p. 176; *Robertson* v. *Hartopp* (1889), 43 Ch. D. 484, C. A., *per* FRY, L.J., at p. 517: "Levancy and couchancy may now be said to be the measure of capacity of the land to maintain stock rather than a condition to be literally complied with by the cattle lying down and getting up or by their being fed off the land."

(*c*) Cooke, Inclosure Acts, p. 10. The origin of this double definition may have been that the number requisite to plough and compester was the limit to common appendant, and the capacity of wintering was the limit to common appurtenant, and that the latter admeasurement had been adopted by the courts

Number certain.

962. It is a matter of question whether common appendant can be limited by a number certain; but the better opinion would seem to be that it cannot, and that the measure of the right should always be referred to levancy and couchancy (*d*), except in the case of a special custom to the contrary existing in a manor (*e*).

Cattle in respect of which right exercised.

963. As the cattle turned upon the common by virtue of the right of common of pasture appendant must be the cattle which plough and compester the land to which the right is appendant (*f*), the commoner cannot agist the cattle of a stranger for hire (*g*); that is to say, he cannot let his right. But if, having no beasts of his own, he borrows those of a stranger for the purpose of ploughing or compestering his land, he has then a special property in such cattle sufficient to entitle him to turn them on the common (*h*).

Failure to turn out cattle.

964. If a man claims common of pasture for all his commonable cattle levant and couchant, and proves that he has turned on all the commonable cattle he has, but that he has never kept any sheep, this has been held evidence to go to the jury for all commonable cattle, including sheep where other freeholders have turned on sheep (*i*), and it is for the jury to judge of the effect of it (*k*).

Understocking.

The right of a commoner to common appendant is not affected by the fact that his farm is understocked, or by the land being temporarily put to a purpose which renders the maintenance of sheep or cattle upon it impossible (*l*).

Copyholds.

965. As appendancy lies in prescription, and copyholders cannot prescribe, copyholders cannot have common of pasture appendant, but commonly enjoy by custom similar rights of common of pasture appurtenant (*m*).

Demesne lands.

966. As a man cannot prescribe against himself, common of pasture appendant cannot exist in respect of the demesne lands of

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as the most liberal and convenient in both cases; but they have never denied the right of common appendant to be admeasured by its original standard (Cooke, Inclosure Acts, p. 10).

(*d*) Elton, Commons, pp. 54, 55. Williams, Rights of Common, p. 156, states that in some cases the right is stinted or limited to a certain number, and that it does not follow that the right is not common appendant, and quotes the authority of Lord Coke, that an upland town may make bye-laws for the regulation of its commons.

(*e*) It was decided in *Follet* v. *Troake* (1704), 2 Ld. Raym. 1186, that a right of common by prescription may be regulated by custom—and this is probably the explanation of the limitation where it occurs, as in *Hall* v. *Byron* (1877), 4 Ch. D. 667; *Robertson* v. *Hartopp* (1889), 43 Ch. D. 484, C. A.—and that it has been adopted as a matter of convenience.

(*f*) Y. B. 45 Edw. 3, p. 25, c. 38.

(*g*) 22 Lib. Ass. pl. 84; Y. B. 11 Hen. 6, p. 22, c. 19. As to agistment generally, see title ANIMALS, Vol. I., pp. 386—388.

(*h*) *Rumsey* v. *Rawson* (1670), 1 Vent. 18.

(*i*) *Manifold* v. *Pennington* (1825), 4 B. & C. 161.

(*k*) Compare *Ballard* v. *Dyson* (1808), 1 Taunt. 279.

(*l*) *Leech* v. *Widsley* (1670), 1 Vent. 54; *Robertson* v. *Hartopp*, *supra*, *per* FRY, L.J., at p. 516; and compare *Musgrave* v. *Inclosure Commissioners for England and Wales* (1874), L. R. 9 Q. B. 162. See also *Willis* v. *Ward* (1818), 2 Chit. 297, where a right for all the commoners' cattle levant and couchant was held to be good, though the common was not sufficient to support all for any length of time.

(*m*) See p. 453, *post*.

SECT. 2. Common of Pasture.

the manor over the wastes of the manor. The rights of pasturage enjoyed by the tenants of the lord of the manor in respect of farms forming part of the manor are not strictly rights of common at all, but are incident to the rights of the lord as owner of the soil (*n*). They are, however, frequently spoken of as rights of common, or more accurately as *quasi*-rights of common; and on the inclosure of a common the lord almost invariably receives an allotment in respect of them in the same way as the commoners (*o*).

Customary freeholds.

967. It has been questioned whether a right of common appendant can exist in respect of customary freeholds held of a manor, and the answer would seem to depend upon the nature of the customary freehold. Prescription by a customary freeholder in a *que* estate is good (*p*), but with the qualification that the lands pass by feoffment or grant. If the lands are held not at the will of the lord, but according to the custom of the manor, and pass by surrender and admittance, the freehold is in the lord, and the customary freeholds are in the nature of copyholds (*q*). In the former case they may, it is submitted, have common appendant, but not in the latter.

Royal forests.

968. Common appendant as well as common appurtenant may be exercised within a royal forest, as the Charter of the Forest (*r*) provided that all commoners upon lands which were afforested should continue to exercise their rights over herbage and other profits so long as they conformed to the forest law.

SUB-SECT. 2.—*Common of Pasture Appurtenant.*

Common of pasture appurtenant.

969. A right of common of pasture appurtenant is a right appertaining to certain lands by which the owner of those lands feeds cattle and, it may be, other animals on the soil of another person (*s*).

As distinguished from common of pasture appendant.

This right differs from the right of common of pasture appendant in that it does not arise of common right, and is not a manorial privilege attached by the common law to a grant of arable land by a lord before the statute of "Quia Emptores" (*t*). Being in all cases

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(*n*) *Musgrave* v. *Inclosure Commissioners* (1874), L. R. 9 Q. B. 162, *per* BLACKBURN, J., at p. 175: "It is not an uncommon thing that the lord has farms on parts of the estates which have never been separated from the main estate, demesne farms, that have always been his freehold, and which therefore could never strictly acquire the right of common. Nevertheless, that distinction not being recognised by those who practically managed these things in days of old, the tenants of these demesne lands under the lord did enjoy the same rights of common over the wastes as those persons to whom lands had been conveyed; and they did *de facto* enjoy and use the rights of common, just as if the freeholder of the demesne lands was not possessed of the freehold of the land over which the right of common was used."

(*o*) See *ibid.*; *Lloyd* v. *Powis* (*Earl*) (1855), 4 E. & B. 485; and note (*a*), p. 579, *post*.

(*p*) *Follet* v. *Troake* (1704), 2 Ld. Raym. 1186.

(*q*) See *Portland* (*Duke*) v. *Hill* (1866), L. R. 2 Eq. 765, where the status of customary freeholders is fully discussed.

(*r*) 9 Hen. 3, c. 1. See Manwood, Forest Laws, pp. 216 *et seq.*

(*s*) Cooke, Inclosure Acts, p. 19.

(*t*) 18 Edw. 1, c. 1 (1290). See note (*q*), *ante*, p. 446.

created by the grant of a private person, and not by the law for the encouragement of tillage, it is said to be against common right, but is nevertheless specially favoured by the courts if it can in any way be made good (*a*). For the same reason it may be created at the present day (*b*).

It is assumed by the law to have been created by grant from the owner of the soil, and is therefore almost as unfettered in its character as would be the power of the grantor (*c*).

By whom it may be taken.

970. It also differs from the right of common of pasture appendant in all those incidents which are occasioned by the origin of the latter in the connection between the arable land of the manor and the waste (*d*).

Thus, it may be taken by freeholders in a manor whether their lands have been held by the lord within time of legal memory or not (*e*), by the copyholders or customary freeholders as appertaining to their customary estates by force of a special custom (*f*), by the corporation of a borough or trustees for a body of inhabitants having cattle levant and couchant within their borough or township (*g*), or by any strangers to the manor who by grant or long acquiescence of the lord have gained this privilege upon the waste (*h*); and the tenants of a manor may have common appurtenant in the waste of another lordship (*i*).

In fact, it may be claimed by any person or body who is or are legally capable of taking by grant, which is supposed to be the foundation of the right; but inhabitants, occupiers, or any fluctuating class of persons unless incorporated or unless an incorporation for the purpose can be presumed are incapable of prescribing (*k*).

By what cattle.

971. Common appurtenant is not confined to cattle used to plough and compester; but if the prescription should so run, it may be for hogs, goats, geese, and all other animals which may be sustained upon the common (*l*).

In the absence of an express grant, evidence of user will establish

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(*a*) Elton, Commons, p. 63. See *Stonesby* v. *Mussenden* (1658), 2 Sid. 87.

(*b*) *Ibid.*; *Pretty* v. *Butler* (1658), 2 Sid. 87; *Sacheverell* v. *Porter* (1635), W. Jo. 396; *Cowlam* v. *Slack* (1812), 15 East, 108, where the question was definitely settled by Lord ELLENBOROUGH, C.J., after a careful review of the earlier authorities; and see *Baring* v. *Abingdon*, [1892] 2 Ch. 374, 378, C. A.

(*c*) Cooke, Inclosure Acts, p. 19.

(*d*) See *Dunraven (Earl)* v. *Llewellyn* (1850), 15 Q. B. 791.

(*e*) Because it may be granted at the present day; and see note (*b*), *supra*.

(*f*) *Robertson* v. *Hartopp* (1889), 43 Ch. D. 484, C. A.; *Hall* v. *Byron* (1877), 4 Ch. D. 667, 681.

(*g*) *Boteler* v. *Bristow* (1476), Y. B. 15 Edw. 4, fos. 29, 32, 33.

(*h*) Elton, Commons, p. 63, and cases cited in the following note.

(*i*) *Sacheverell* v. *Porter*, *supra*; Fitz. Nat. Brev. p. 180, N.; *Clarkson* v. *Woodhouse* (1782), 5 Term Rep. 412, n.

(*k*) See p. 457, *post*. The statement made by Lord COKE that "for common appurtenant one must prescribe" (Co. Litt. 122 a) means only that when no grant thereof can be produced the claimant must rely upon a prescriptive title, as is clear from other passages in his own writings and many subsequent authorities; see *ibid.* 121 a; *Sacheverell* v. *Porter*, *supra*; *Cowlam* v. *Slack*, *supra*.

(*l*) Co. Litt. 122 a; Bac. Abr. tit. Common, A; 2 Bl. Com. 33. In *Withers* v. *Iseham* (1551), 1 Dyer, 70 a, a claim of common for hogs was raised, but not decided.

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the prescription, but where the grant is produced, as sometimes happens, the courts have to read the rights of the commoners in the terms of the instrument (*m*).

Measure of right.

972. Common of pasture appurtenant may either be for a number certain, or the measure of the right may be referred to levancy and couchancy; but it is now clearly settled that there must be some limit to the right (*n*). Any user of common of pasture claimed as appurtenant not limited in number, and not capable of being limited by levancy and couchancy, is not the exercise of a right, but the doing that which cannot possibly be other than a wrong (*o*). Consequently such user will not be recognised by the courts even when granted by deed (*p*).

Common *sans nombre.*

The expression "common *sans nombre*," which is frequently met with in the early cases, or "common without stint," means common for beasts levant and couchant, it being uncertain how many there are in any particular year, and does not mean common for any number of beasts. It is used in distinction to "common for a number certain" (*q*), and is a common certain in its nature, because *id certum est quod certum reddi potest* (*r*).

Where in inclosure proceedings a claim is made to any right of common or other right which in the judgment of the valuer or of the Inclosure Commissioners or assistant commissioner could not be sustained in law, but satisfactory proof of enjoyment under the right so claimed for the space of sixty years or upwards is made, the claim may be allowed in the same manner as if the right might have been legally sustained and established (*s*).

(*m*) See *Smith* v. *Feverel* (1675), 2 Mod. Rep. 7, where defendant pleaded a licence from the lord to put his cattle (*averia sua*) on the waste, which was agreed to comprehend hogs as well as other cattle in the most general sense; and NORTH, C.J., said, and it was admitted, that, the licence being general to put in beasts, it should be intended only of commonable cattle, not of hogs, but that it would be otherwise if the licence had been for a particular time. Another report of the same case (Freem. (K. B.) 190) states that leave to put in *averia sua* extends to all sorts of cattle, including hogs. A claim to turn out geese has been rejected on the ground that the user was not shown to have been in any way connected with the copyhold tenement (*Morley* v. *Clifford* (1882), 20 Ch. D. 753).

(*n*) *Benson* v. *Chester* (1799), 8 Term Rep. 396; *Bennett* v. *Reeve* (1740), Willes, 227; and see *Morley* v. *Clifford*, *supra*.

(*o*) Cooke, Inclosure Acts, p. 23; 1 Roll. Abr. 398 I., pl. 3; and see Fitz. Nat. Brev. 180, N., for a full explanation of this proposition. It may be noted that in the passage referred to "manor" is probably used in a wide sense, and does not mean strictly a manor in the legal sense.

(*p*) *Benson* v. *Chester*, *supra*, where a common was conveyed to trustees upon trust to allow the commoners such user of the common as they had been accustomed to have, and it was held that such user must be taken to mean a legal user, and that a claim unlimited by levancy and couchancy could not be supported; and see *Ivatt* v. *Mann* (1842), 4 Scott (N.R.), 342.

(*q*) Vin. Abr., tit. Common, I; *Chichly's Case* (1658), Hard. 117.

(*r*) See note to *Manchester* (*Earl*) v. *Vale* (1666), 1 Wms. Saund. 28 c. Experience in inclosure cases shows that there is a widespread belief that a right of common may be unlimited, arising from the fact that no limits have been put upon the user of individual commoners and the belief that age may have turned the illegal user into a right.

(*s*) Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 54. As to the probable intention of the section, see Cooke, Inclosure Acts, pp. 214 *et seq.* No case has come before the courts upon the construction of this section, but the assistant

973. Common limited to a certain number may be either for a definite number of one particular kind of stock or a definite number of several kinds, or it may be limited to a certain number for each acre or each yard land of the tenement, or according to its rental (*t*).

Number certain when fixed by acreage or rental.

Where the method of fixing the number by acreage or rental has been adopted, it is merely a matter of agreement, only binding upon those who assent to it (*u*), unless long user has established a custom; and such a custom, though valid within a manor, is not binding on a stranger (*x*).

How far connection with land necessary.

Although in order to maintain a claim for common of pasture appurtenant to land it is necessary to show some connection between the commonable beasts and the land to which the right is claimed to be appurtenant (*a*), there is not the same necessity where the claim is for a number certain, since the question whether the right has been used to excess cannot arise (*b*). So, when the number is once certainly ascertained, it has been said that the right may be attached to a dwelling-house or a cottage without land (*c*). The right of common for a number certain may be appurtenant also to a manor without land (*d*).

Common of pasture for a number certain may be parcel of a manor and demised and demisable by copy of court roll; and if it be thus claimed in pleading by the lord of the manor without describing the common as appendant, appurtenant, or in gross, it will be taken to be common appurtenant (*e*). In fact, this right when so limited appears to lose all necessity of appurtenancy to land. It may be severed from the land and the appurtenancy

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commissioners of the Board of Agriculture and Fisheries have always held that the right claimed must be confined within legal limits.

(*t*) Where this is proved to be the case, it has been generally considered by the courts to be a convenient method of measuring the number of cattle which might be turned on in respect of each tenement, and to be practically the measure of levancy and couchancy, *e.g.*, not more than one sheep per acre (*Hall* v. *Byron* (1877), 4 Ch. D. 667); two sheep per acre (*Robertson* v. *Hartopp* (1889), 43 Ch. D. 484, C. A.); twelve cows for every yard land, three for a quarter of a yard land, and one and a half for half a quarter (*Ellard* v. *Hill* (1664), Sid. 226); four wether beasts, two horse beasts, and sixty sheep for two yard lands (*Mors* v. *Webb* (1609), 2 Brownl. 297); one mare or gelding or two cows for every 80*s.* of rental in Epping Forest (*Commissioners of Sewers* v. *Glasse* (1874), L. R. 19 Eq. 134, 161); so many head according to rental with a fixed scale (*Fox* v. *Amhurst* (1875), L. R. 20 Eq. 403, 404).

(*u*) *Bruges* v. *Curwin* (1706), 2 Vern. 575. See *contrà*, *Delabeere* v. *Beddington* (1689), 2 Vern. 103, a case, however, of doubtful authority.

(*x*) See Scriven on Copyholds, 7th ed., p. 444; Elton, Copyholds, pp. 307—308.

(*a*) *Jones* v. *Richard* (1837), 6 Ad. & El. 530; *Hoskins* v. *Robins* (1671), Poll. 13; *Scholes* v. *Hargreaves* (1792), 5 Term Rep. 46; *Baylis* v. *Tyssen-Amhurst* (1877), 6 Ch. D. 500.

(*b*) See *Richards* v. *Squibb* (1698), 1 Ld. Raym. 726, *per* HOLT, C.J.

(*c*) *Leniel* v. *Harslop* (1672), 3 Keb. 66, where the possession of the least cottage in Lincolnshire was said to give a right of common appurtenant for a thousand sheep; but on this case see Cooke, Inclosure Acts, s. 21, and Elton, Commons, p. 64.

(*d*) *Spooner* v. *Day and Mason* (1630), Cro. Car. 432; 4 Vin. Abr. tit. Common, M, 4, p. 591; *Musgrave* v. *Cave* (1741), Willes, 319; *Stamford* v. *Burges* (before 1675), Sheppard, Abridgment, 381.

(*e*) *Musgrave* v. *Cave*, *supra*.

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destroyed (*f*). It may certainly be appurtenant to an office, as to a burgager in a borough (*g*), perhaps even to an inhabitant of a vill (*h*); and it has been said that a man may prescribe to have this right by reason of his person, in which case the right of common appurtenant becomes a simple right of common in gross (*i*).

When levancy and couchancy measure of right.

974. When there is nothing to show that the right is limited by any specific number, levancy and couchancy will invariably be taken to be the measure of the right.

Extent of right.

975. A person entitled to a right of common of pasture appurtenant must, as in the case of common of pasture appendant, use it in general with his own cattle; but if he employ the cattle of others to manure his own land, he may feed them on the land over which he has a right of common (*k*). But he cannot agist for money other cattle which do not manure his land, nor can he use the common with his own cattle levant and couchant upon any other land than that to which he has common appurtenant (*l*).

But where the right is for a number certain he may license a stranger to put in his cattle; for it is no wrong to the lord or owner of the soil, because it cannot be a surcharging (*m*), and for the same reason the cattle may be levant and couchant upon other land.

Effect of purchase of part of waste.

976. It has already been shown that if a man purchases part of the land wherein common appendant is to be had the common must be apportioned, because it is of common right (*n*); but this is not the case with common appurtenant or with any other common of what nature soever (*o*), and a purchase of part of the waste on

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(*f*) *Bunn* v. *Channen* (1813), 5 Taunt. 244; *Daniel* v. *Hanslip* (1671), 2 Lev. 67: "If a man hath common appurtenant to a messuage and land for certain number of beasts, he may alien the same; *aliter*, if it be for all his beasts levant and couchant upon the land, he cannot by his alienation sever that from the land"; and see *Drury* v. *Kent* (1603), Cro. Jac. 14. For the proposition that the right cannot be severed except when the number is certain, see *Daniel* v. *Hanslip*, *supra*; Vin. Abr. tit. Common, O; *Drury* v. *Kent*, *supra*; *Musgrave* v. *Cave* (1741), Willes, 319, 322; and *Smith* d. *Jerdon* v. *Midward* (1782), 3 Doug. (K. B.) 70. This case is referred to by Cooke, Inclosure Acts, at p. 22, n., as opposed to *Bunn* v. *Channen*, *supra*, but it contains no reference to any certain number, and the right of common may have been either appendant or appurtenant.

(*g*) *Miller* v. *Walker* (1670), 1 Sid. 462; and compare *Withers* v. *Iscam* (1551), Dyer, 70 a (park-keeper).

(*h*) *Mellor* v. *Spateman* (1669), 1 Wms. Saund. 343; *Fowler* v. *Dale* (1593), Cro. Eliz. 363; *Weekly* v. *Wildman* (1698), 1 Ld. Raym. 405. But a plea claiming an immemorial right of common in occupiers for the time being is bad even after verdict (*Davies* v. *Williams* (1851), 16 Q. B. 546).

(*i*) Y. B. 15 Edw. 4, c. 33.

(*k*) Fitz. Nat. Brev. 180 B; Y. B. 14 Hen. 6, p. 6, c. 29; *Mollitor* v. *Trevilian* (1683), Skinner, 137, also reported, *sub nom.* *Manneton* v. *Trevilian* (1683), 2 Show. 328 (case 333).

(*l*) See cases cited in last note; and *Rumsey* v. *Rawson* (1670), 1 Vent. 18; Vin. Abr. tit. Common, H, N; *Monk* v. *Butler* (1620), Cro. Jac. 574.

(*m*) *Hoskins* v. *Robins* (1671), 2 Saund. 324, 327; and see Fitz. Nat. Brev 180 B.

(*n*) See note (*e*), p. 448, *ante*.

(*o*) Co. Litt. 122 a; *Tyrringham's Case* (1584), 4 Co. Rep. 36 a, b.

which common appurtenant is enjoyed extinguishes the whole right (*p*).

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SUB-SECT. 3.—*Common of Pasture in Gross.*

Nature of common of pasture in gross.

977. Common of pasture in gross is so called "for that it appertaineth to no land, and must be by writing or prescription" (*q*). It is neither appendant nor appurtenant to land, but is a separate inheritance, entirely distinct from any landed property, and may be vested in one who hath not a foot of land in the manor (*r*). It may commence at this day by grant or be acquired by prescription (*s*).

It can only be prescribed for by persons or bodies capable of taking by grant. Inhabitants or occupiers as such cannot so take, and therefore cannot so prescribe (*t*); but the parson of a church, or similar corporation sole, or a lay corporation, though these last may have an origin posterior to the time of legal memory, or a person claiming in respect of an office, may prescribe for common in gross (*a*); and the mayor and corporation of a borough may prescribe in favour of all the burgesses, or a body of trustees for classes of inhabitants, ratepayers, occupiers, and the like who cannot prescribe in their own names (*b*).

Measure of right.

978. Common of pasture in gross may be either for a number certain or *sans nombre*, which, as has already been explained, does not mean without limit (*c*).

Common of pasture appurtenant for a number certain may be severed from the land, and then becomes a common in gross, and it is in this form that common in gross is most commonly found (*d*).

The conclusion to be drawn from the authorities with reference to common of pasture in gross *sans nombre* is that it is a right possible in law, but one which in fact very rarely exists (*e*). The

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(*p*) See further p. 524, *post*.

(*q*) Co. Litt. 122 a.

(*r*) 2 Bl. Com. 34.

(*s*) *Tyrringham's Case* (1584), 4 Co. Rep. 36 a, b.

(*t*) *Boteler* v. *Bristow* (1476), Y. B. 15 Edw. 4, 32 b, 33, where certain inhabitants claimed to prescribe generally for all manner of beasts without alleging levancy and couchancy; and see *Parry* v. *Thomas* (1850), 5 Exch. 37.

(*a*) 2 Bl. Com. 34; and see *Mellor* v. *Spateman* (1669), 1 Wms. Saund. 339, 343; *Miller* v. *Walker* (1670), 1 Sid. 462.

(*b*) *Mellor* v. *Spateman, supra; Clarkson* v. *Woodhouse* (1782), 5 Term Rep. 412, n.; and see *Parry* v. *Thomas, supra*, from which it appears that a plea of a grant of a right of common to a corporation will not be sufficient as regards a member of that corporation, but he must show that the grant was to the corporation for the benefit of the individual members. The same doctrine was reasserted in *Constable* v. *Nicholson* (1863), 14 C. B. (N. S.) 230. Compare *Weekly* v. *Wildman* (1698), 1 Ld. Raym. 405.

(*c*) See p. 454, *ante*. "A claim of common *sans nombre* cannot mean a claim of feeding for innumerable beasts, but for a number not certain" (Y. B. 11 Hen. 6, 22 b, *per* BABINGTON, C.J.). See also *Mellor* v. *Spateman, supra*, where it was held that a corporation might prescribe for common in gross for cattle levant and couchant within the town, but not for common in gross without number, on the ground that otherwise the corporation might surcharge the common.

(*d*) See note (*i*), p. 456, *ante*; *Bunn* v. *Channen* (1813), 5 Taunt. 244; *Lincoln Corporation* v. *Holmes Common* (1867), L. R. 2 Q. B. 482.

(*e*) *Save's Case* (1641), March, 83; *Mellor* v. *Spateman, supra; Stables* v. *Mellon*

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authorities, however, on which this possibility in law rests, show that a right of common of pasture in gross *sans nombre* is limited to a right to turn on so many cattle as the common will maintain beyond the levant and couchant cattle of the lord and the commoners (*f*).

SUB-SECT. 4.—*Common of Pasture by reason of Vicinage.*

Nature of common of pasture by reason of vicinage.

979. Common of pasture by reason of vicinage exists where the commonable beasts belonging to the inhabitants of one vill or manor have been accustomed time out of mind to stray into the fields or wastes of an adjoining vill or manor without molestation. It has been said not to be a right, but only an excuse for trespass (*g*). It is, however, a right capable of being established, like other rights of common, under the Prescription Act (*h*). The principle on which common of pasture by reason of vicinage rests is that the parties interested in the respective lands over which it is claimed have for their mutual benefit acquiesced in the practice. It may be claimed by prescription, but is rather matter of immemorial custom (*i*). The substance of the custom is that cattle lawfully on one common have been used to stray upon the other. It is necessary therefore to allege in support of the claim that the cattle were lawfully on their own common before they strayed, which can be done by showing thirty years' user under the statute, and to allege and prove the custom to stray (*j*).

Where cattle are pastured over adjoining commons with uncertain boundaries it is a question of fact whether the pasturage is in exercise of a right of common by reason of vicinage or is attributable to a mistake of the boundary (*k*).

Contiguity.

980. The right of common of pasture by reason of vicinage can only exist between contiguous wastes, for if there be three vills, A., B., and C., and B. lies in the middle between the other two, B. may

(1679), 2 Lev. 246; *Stamford* v. *Burges* (before 1675), Sheppard, Abridgment, 381; and see 3 Bl. Com. 239.

(*f*) Cooke, Inclosure Acts, p. 79; and see Elton, Commons, p. 27. Some of the cases where the existence of common in gross *sans nombre* has been discussed appear to have related rather to separate properties in herbage vested in the corporation of a borough which was wrongly described in pleadings as a common (*Mellor* v. *Spateman* (1669), 1 Wms. Saund. 343; *Stables* v. *Mellon* (1679), 2 Lev. 246). Compare *Beadsworth* v. *Torkington* (1841), 1 Q. B. 782; *Benson* v. *Chester* (1799), 8 Term Rep. 396. Rights of sheepwalk, foldcourse, and freefold have also been wrongly classed as rights of common in gross, whereas they are in fact reserved rights of the lord of the manor; see p. 463, *post*.

(*g*) Co. Litt. 122 a.

(*h*) *Ibid.*; *Prichard* v. *Powell* (1845), 10 Q. B. 589, and authorities there cited.

(*i*) *Jones* v. *Robin* (1847), 10 Q. B. 620, Ex. Ch.; *Clarke* v. *Tinker* (1845), 10 Q. B. 604, and the earlier authorities there referred to.

(*j*) See *Prichard* v. *Powell*, *supra*, *per* DENMAN, C.J., at p. 603. In the same case it was decided on the authority of *Weeks* v. *Sparke* (1813), 1 M. & S. 679, that where an enjoyment in fact has been shown evidence of reputation may be given to prove an immemorial common of vicinage between two commons, the right, though in some sense private, being, as respects the number of persons affected by it, public and therefore a matter of notoriety.

(*k*) *Hetherington* v. *Vane* (1821), 4 B. & Ald. 428.

intercommon with A. and C., but A. shall not intercommon with C. because B. intervenes (*l*).

Two private owners of estates may have a right of interpasturing. It is not a necessity that there should be commoners on both sides in order to give validity to a claim of common of pasture by reason of vicinage, though, where such common exists, most frequently there are commoners. But such claim in a private estate must be by prescription, and not by custom (*m*).

Private owners.

981. The right must be mutual between the commoners or owners of the two commons. Mere rambling of stock from downs over which there are rights of common of pasture into downs of which the owner is in exclusive possession cannot be justified under common of pasture by reason of vicinage (*n*). Also the intercommoning must take place at the same time, for if one have common in one vill during one season of the year, and the other have common in the first during another season or every second year, that is not common of pasture by reason of vicinage (*o*).

Necessity for mutuality.

982. The right must have existed from time immemorial (*p*), or for a period which the law accepts as proof that it has so existed (*q*).

Existence from immemorial.

983. The right does not extend to the turning of cattle on the neighbouring common, but only to the allowing of cattle originally turned upon the home common to stray upon the other (*r*).

Extent of right.

984. The right can only exist between commons lying open the one to the other, and may at any time be destroyed by a division of the two commons by such a fence as will keep out cattle (*s*). This division, however, must be complete (*t*); and the

Destruction of right.

(*l*) So taken for granted in *Anon.* (1540), Dyer, 47 b, quoted in *Commissioners of Sewers* v. *Glasse* (1874), L. R. 19 Eq. 134, at p. 160, where JESSEL, M.R., held that common of vicinage could not exist between the inhabitants of more than two townships, parishes, or manors, and that the statement in Com. Dig. tit. Common E that it might exist between two or more manors was a mistake which had been copied into some of the text-books. He quoted 2 Bl. Com. 33, and *Bromfeild* v. *Kerber* (1705), 11 Mod. Rep. 72, *per* HOLT, C.J., at p. 73. But it appears from the argument in *Bromfeild* v. *Kerber*, *supra*, that there was in that case intermediate land which was not waste; and where the wastes adjoin, common of vicinage might exist between more than two manors or lordships, as, for instance, in a case within the writer's knowledge where the boundaries of the wastes of five manors or lordships converged on the top of a high fell in Westmorland, and the tenants of all five manors used the whole fell indiscriminately. Although in the early books two are usually mentioned, the larger number does not appear to be excluded.

(*m*) *Jones* v. *Robin* (1847), 10 Q. B. 620, 635, Ex. Ch., and authorities there cited.

(*n*) *Heath* v. *Elliott* (1838), 4 Bing. (N. C.) 388.

(*o*) *Anon.*, *supra*, *per* BALDWIN, J.; *Clarke* v. *Tinker* (1845), 10 Q. B. 604.

(*p*) *Tyrringham's Case* (1584), 4 Co. Rep. 36 a, *per* WRAY, C.J., at p. 38 a, and see Cooke, Inclosure Acts, p. 31.

(*q*) See pp. 488 *et seq.*, *post*.

(*r*) Co. Litt. 122 a; *Jones* v. *Robin*, *supra*; *Clarke* v. *Tinker*, *supra*; *Prichard* v. *Powell* (1845), 10 Q. B. 589; *Commissioners of Sewers* v. *Glasse*, *supra*.

(*s*) *Jones* v. *Robin*, *supra*.

(*t*) Where one of two adjoining commons with common of vicinage was inclosed and fenced off by the owner of the soil, but a passage was left open sufficient for the highway leading over the one to the other, so that the cattle

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passing of an Inclosure Act and an award thereunder putting an end to the rights of common over one common do not of themselves put an end to rights of common by reason of vicinage which previously existed (*a*). When the inclosure is completed, and the adjoining common is completely fenced off, the right of course ceases.

Limitation on right.

985. The right is subject to the limitation that the commoners of neither of the commons shall turn on their common more beasts than their own common will feed (*b*).

Resemblance to common appendant or appurtenant.

986. The right of common by reason of vicinage has many points of resemblance to a right of common appendant or appurtenant, and when a user of common is claimed by reason of vicinage, but offending in some of its circumstances against the foregoing rules, it may be found that such user, though bad as a common of vicinage, may be good as a common appendant or as a common appurtenant (*c*).

SUB-SECT. 5.—*Distinction between a Right of Common of Pasture and the Rights of Sole or Several Vesture and Herbage and of Sole or Several Pasture.*

Rights not strictly rights of common.

987. The rights of pasture which have been so far described are rights of common, that is to say, rights of pasturage which are exercised in common with and without excluding the owner of the soil; but other rights are frequently found to exist over commons and commonable lands which, without giving any interest in the soil, exclude the owner of the soil from all enjoyment of some particular product of the soil, and are therefore not in strictness rights of common, though for practical purposes they are of that nature (*d*).

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could stray from one to the other, the common of vicinage was not destroyed (*Gullett* v. *Lopes* (1811), 13 East, 348); see *Conway's* (*Sir John*) *Case* (1572), Dyer, 316 b.

(*a*) *Wells* v. *Pearcy* (1835), 1 Bing. (N. C.) 556; *Clarke* v. *Tinker* (1845), 10 Q. B. 604.

(*b*) *Corbet's* (*Sir Miles*) *Case* (1584), 7 Co. Rep. 5 a; and see *Prichard* v. *Powell* (1845), 10 Q. B. 589; *Commissioners of Sewers* v. *Glasse* (1874), L. R. 19 Eq. 134.

(*c*) Cooke, Inclosure Acts, p. 33; see also *Hollinshed* v. *Walton* (1806), 7 East, 485, where it was held that the owner of a tenement may have two distinct rights of common for his cattle levant and couchant upon such tenement upon different wastes in different manors under several lords; and therefore an allotment under one Inclosure Act in lieu of his right of common upon one of such wastes will not do away with or lessen his claim for an equal allotment with other commoners under a subsequent Act for inclosing the other waste. It would appear to be otherwise if the different wastes had been originally holden under the same lord.

(*d*) Co. Litt. 122 a: "If a man claim by prescription any manner of common in another man's land, and that the owner of the land shall be excluded to have pasture, estovers, or the like, this is a prescription or custom against the law to exclude the owner of the soil, for it is against the nature of this word 'common,' and it was implied in the first grant that the owner of the soil should take his reasonable profit there as it hath been adjudged. But a man may prescribe or allege a custom to have and enjoy *solam vesturam terræ* from such a day to such a day, and hereby the owner of the soil shall be excluded to pasture or feed there; and so he may prescribe to have *separalem pasturam* and exclude the owner of the soil from feeding there"; and see Hunter, Open Spaces, p. 79.

These rights, which are various, may be classified according to the extent of the products taken as a right of sole or several vesture and herbage, and a right of sole or several pasture. Each right may be enjoyed either during the whole year or for a limited period, and while they are enjoyed exclude the owner of the soil from any enjoyment of the particular right (*e*).

Sole vesture.

988. The right of sole vesture extends to the enjoyment of the corn, grass, underwood, sweepage (*f*), and the like, but not to houses, timber, trees, or mines, or in any way to the land itself. Those who enjoy it may bring an action of trespass against anyone entering upon the land (*g*), and may let the vesture reserving a rent (*h*).

A prescription to take all of a particular product, as all the thorns growing upon certain land to be consumed upon a messuage and three acres of land, is good (*i*). It is clear, therefore, that the right will include many of the products which, if a right of common existed, would come under the heads of turbary and estovers (*j*).

Sole and several pasture etc.

989. A right of sole pasture may exist during the whole year (*k*) or during part only of the year (*l*). Even where the right exists during the whole year it does not exclude the lord from all the profits of the land; for he remains entitled to the trees and quarries. Sole common of pasture means a right of pasture for the commoners sole as against the lord, but in common between themselves (*m*).

Sole pasture is not so wide as sole vesture, being the right to take everything growing on the land by the mouths of the cattle of the persons entitled, but not otherwise.

Extent of right.

990. As the lord is excluded from the pasturage either for the whole year or for the period during which the right exists, the owners of the right are under no restrictions as to the cattle they turn out, except such as they or their predecessors may have made; and they

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(*e*) Co. Litt. 4 b, 122 a; *Dowglass* v. *Kendal* (1610), Cro. Jac. 256. In many cases there is little doubt that cattlegates, as to which see p. 479, *post*, are in the nature of a sole pasture, the lord being excluded from any right to the pasture (*Rigg* v. *Lonsdale* (*Earl*) (1857), 1 H. & N. 923, Ex. Ch.).

(*f*) *I.c.*, all that comes in the sweep of the scythe (*ibid.*, at p. 554).

(*g*) Co. Litt. 4 b.

(*h*) *Ibid.* 47 a. But such a licence or letting must be by deed (*Monk* v. *Butler* (1619), Cro. Jac. 574; *Hoskins* v. *Robins*, *supra*).

(*i*) *Dowglass* v. *Kendal*, *supra*.

(*j*) As in *R.* v. *Warkworth* (*Inhabitants*), *supra*, where the freemen of Alnwick had the right, in addition to pasturage rights, to dig and cut peat, furze, turves, and bushes for their own use, and to get limestone, slates, and freestone in the open quarries on the moor, and these rights were expressly held not to be rights of common.

(*k*) *Hoskins* v. *Robins* (1671), 2 Saund. 319 f, 324; *R.* v. *Warkworth* (*Inhabitants*) (1813), 1 M. & S. 473; and see *Potter* v. *North* (1669), 1 Vent. 383, 395; *Jones* v. *Richard* (1837), 6 Ad. & El. 530; *Welcome* v. *Upton* (1840), 6 M. & W. 536. This proposition was once doubted (*North* v. *Cox* (1667), 1 Lev. 253).

(*l*) *Cox* v. *Glue* (1848), 5 C. B. 533; and compare *Wright* v. *Hobert* (1723), 9 Mod. Rep. 65.

(*m*) *De la Warr* (*Earl*) v. *Miles* (1881), 17 Ch. D. 535, 587, C. A.

SECT. 2. Common of Pasture.

are not confined to cattle which are levant and couchant upon their own lands, and the rights may be let or agisted (*n*).

It has been suggested that the joint owners of the surface or pasture may have the right of feeding an unlimited number of cattle (*o*). A measure, however, is usually provided either by bye-laws (*p*) or by the custom or usage which gives the property in the herbage.

Grant or prescription.

991. All of these exclusive rights may be claimed either by an actual grant or by prescription (*q*), and consequently by user which will establish a claim by prescription at common law, or by lost grant or under the Prescription Act (*r*); and it should be borne in mind that, in order to establish a claim under the latter Act, it is only necessary to show that the benefit claimed has been enjoyed by the claimant for the requisite period as of right, and not by permission, and that the right claimed is one which could have a legal origin by custom, prescription, or grant, although the claimant may have proceeded upon a mistaken idea as to the nature of his right (*a*).

Damage to subsoil.

992. The existence of an exclusive right to take the forecrop of a piece of land in other persons does not prevent the owner in fee simple of the land from suing for damage to the subsoil by a stranger done at a time when the persons exercising the right have possession of the surface (*b*).

Rights of inhabitants.

993. The exclusive right of pasture is frequently vested in a corporation for the benefit of burgesses, inhabitant householders etc., of a town (*c*).

(*n*) *Hoskins* v. *Robins* (1671), 2 Saund. 319 f, also reported *sub nom.* *Hopkins* v. *Robinson* (1671), 2 Lev. 2. See too *Welcome* v. *Upton* (1840), 6 M. & W. 536, which decided that a sole and several herbage and pasturage in gross which had been proved to exist might be assigned as a valuable interest and demised.

(*o*) See Elton, Commons, p. 38, quoting *Revell* v. *Jodrell* (1788), 2 Term Rep. 415; *Benson* v. *Chester* (1799), 8 Term Rep. 396; and *Ivatt* v. *Mann* (1842), 4 Scott (N. R.), 342; but the first-mentioned case is no authority on the subject, which is not referred to in it. The case of *Mellor* v. *Spateman* (1669), 1 Wms. Saund. 343, was treated by the court as a case of common in gross vested in the corporation of Derby for the benefit of the burgesses, and it was held that the prescription must be for cattle levant and couchant within the town; but it is not improbable that the right was one of sole pasturage. See *Johnson* v. *Barnes* (1873), L. R. 8 C. P. 527, Ex. Ch., *per* BLACKBURN, J., at p. 532, discussing *R.* v. *Churchill* (1825), 4 B. & C. 750, where a right of sole pasturage was spoken of as a right of common. If this theory that the right was one of sole pasturage be correct, *Mellor* v. *Spateman*, *supra*, would be an authority against the proposition that the right can be unlimited.

(*p*) See *James* v. *Tutney* (1635), Cro. Car. 497; *Exeter* (*Earl*) v. *Smith* (1666), Cart. 177; *Tinteny* v. *James* (1638), 4 Vin. Abr. 306.

(*q*) Co. Litt. 4 b, 122 a; and see note (*k*), p. 461, *ante*.

(*r*) 2 & 3 Will. 4, c. 71.

(*a*) *De la Warr* (*Earl*) v. *Miles* (1881), 17 Ch. D. 535, C. A., where the defendant was able to prove open enjoyment of a right to cut and carry away litter for a lengthened period, but had always exercised the right under the mistaken idea that he and other commoners were entitled to do so under a decree.

(*b*) *Cox* v. *Glue* (1848), 5 C. B. (N. S.) 533, where the rights of the owner in such circumstances are fully considered.

(*c*) *R.* v. *Churchill*, *supra* (the corporation of Nottingham for the burgesses);

Distraint against lord.

994. In one case a custom was proved for the tenants of a manor to have the sole pasturage of land after Lammas Day; and the lord, who had the place entirely to himself till that time, was then restricted to a right to turn out three horses, being thus reduced to the position of a commoner on his own land, the effect being that when he turned on more horses than he had a right to do a commoner was held to be justified in distraining the surcharge, which he could not do unless the tenants had the exclusive right (*d*).

SUB-SECT. 6.—*Foldage and Foldcourse.*

Rights of turning out stock.

995. There are two other rights of turning out stock on the land of another, which in their origin were not rights of common, but, like sole or several pasture, have been sometimes confounded with them, and, therefore, may be dealt with here. They are known as foldage, or faldage, or free fold, and foldcourse, and were originally reserved rights of the lord of the manor, though the latter is now considered to be in some cases common appurtenant.

Foldage.

996. Foldage, faldage, free fold, or frank foldage (*faldagium*) is a right of the lord of the manor or other person to whom it has been granted by the lord to have the sheep of the tenants folded on his land at night for the purpose of manuring it (*e*). The term is also used in parts of Norfolk for the customary fee paid to the lord of the manor for exemption from this duty (*f*).

Johnson v. *Barnes* (1873), L. R. 8 C. P. 527, Ex. Ch. (the corporation of Colchester for the free burgesses, limited by a bye-law of the corporation in the reign of Elizabeth to three head of great cattle or ten sheep for each burgess); *R.* v. *Tewkesbury Trustees* (1810), 13 East, 155 (a common vested in trustees under an Inclosure Act where, before the passing of the Act, the resident burgesses and the occupiers of certain houses in the borough were entitled to rights of common for their cattle); *R.* v. *Watson* (1804), 5 East, 480 (the corporation of Huntingdon seised in fee of common lands which by custom were annually stocked by resident burgesses who desired to stock, according to a stint fixed by a leet jury (burgesses) under the control of the mayor, those who did not stock receiving a money payment provided by those who did); *Cox* v. *Glue* (1848), 5 C. B. (N. S.) 533 (land at Derby held in fee and the owners entitled to the forecrop and possession from February 14 to July 6 in each year, the burgesses and freemen of the borough of Derby having exclusive possession during the remainder of the year for turning thereon horses, cows, sheep, and calves).

(*d*) *Kentick* v. *Pargiter* (1608), Cro. Jac. 208. A commoner is not entitled to distrain the cattle of a lord who surcharges; see p. 517, *post*.

(*e*) Spelman's Glossary, p. 210; *Sharpe* v. *Bechenowe* (1687), 2 Lut. 1249; *Dickman* v. *Allen* (1688), 2 Vent. 138; *Rowles* v. *Mason* (1611), 2 Brownl. 85, 197. "Faldage is a custom in Norfolk and Suffolk for the owner of sheep to put them into the lord's land and fold them there, for which convenience the lord finds the hurdles and prepares the fold; but the word 'faldage,' in law, will not imply all this without alleging the custom specially" (Woolrych, Commons, p. 223) It was decided in *Sharpe* v. *Bechenowe*, *supra*, that a prescription to have foldage cannot extend to depasturing the sheep of the person who claimed under the prescription, because "the nature of foldage is only to have the sheep, but not my own, folded in my lands in the night-time. It is true that he hath prescribed likewise for a foldcourse, which is a sheepwalk or feeding for sheep; but this is inconsistent with foldage, for that is a liberty to have another man's sheep folded on my land, and a foldcourse is to have pasture for a certain number of my own sheep on another man's land" (*ibid.*, quoted in Williams, Rights of Common, pp. 277, 278, from Nelson's translation).

(*f*) Beckwith Blount, Ancient Tenures of Land etc., 441.

SECT. 2. Common of Pasture.

Free fold.

The right of foldage or free fold, or of having the benefit of the sheep of the tenants to manure the lord's land, is one which can hardly be said to exist at the present day (*g*). It is only necessary to refer to it briefly, because it is closely connected with the right of foldcourse, which still exists, and with which it has been sometimes confounded (*h*).

Foldcourse.

997. Foldcourse, on the other hand, is a right of feeding sheep or a sheepwalk (*i*) which grew out of the ancient right of frank foldage, and could not exist except in cases where the lord of the manor or other lord paramount claimed the right of frank foldage (*k*). It is called in the old books *libertas faldagii et cursus ovium* (*l*), and is said to be a compound right, namely, for a man to have a fold of his own on certain land or on his own sub-manor, and a right for the sheep so folded to run for pasture over the commonable grounds of the manor or superior lordship (*m*).

When common appurtenant.

The owners of the right are sometimes referred to as flock-masters (*n*), and the right has been said to be not properly a right of common, but something reserved out of the original grant by the lord (*o*). The general tendency of the cases, however, has been to regard it as a common appurtenant where it has been granted away by the lord, and this has now been clearly settled (*p*).

SECT. 3.—*Common of Turbary.*

Nature of right.

998. Common of turbary (*q*) is a right of digging turf or peat in another man's ground for fuel in the commoner's house.

Whether it can be appendant is a matter of dispute (*r*), but if

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(*g*) The duty of the tenant to fold his sheep on the lord's land has been defined as *secta faldæ*, or suit of fold (Spelman's Glossary, *sub voce* "Faldagium," p. 210).

(*h*) See Williams, Rights of Common, p. 274, for early cases relating to the right of the lord exclusively to have a sheepfold in the manor or vill, showing that the right was one which could be maintained.

(*i*) See *Sharpe* v. *Bechenowe* (1687), 2 Lut. 1249.

(*k*) See Williams, Rights of Common, p. 277.

(*l*) *Punsany and Leader's Case* (1583), 1 Leon. 11.

(*m*) Williams, Rights of Common, p. 277. Lord COKE states that by a grant of a foldcourse or the like lands and tenements may pass (Co. Litt. 6 a); and in a note on this passage Hargrave and Butler state: "Here 'foldcourse' seems to be understood for land used as a sheepwalk; but the word has various other senses. Sometimes it signifies land to which is appurtenant the sole right of folding the cattle of others; sometimes it means merely such right of folding. It is also used to denote the right of folding on another's land, which is called common of foldage."

(*n*) Cooke, Inclosure Acts, p. 28.

(*o*) *Ivatt* v. *Mann* (1842), 4 Scott (N. R.), 342, *per* TINDAL, C.J., at p. 365, who was not prepared to say that the law which imposed the restriction of levancy and couchancy would apply to a claim of this nature.

(*p*) *Robinson* v. *Duleep Singh* (1879), 11 Ch. D. 798, C. A., citing and discussing all the earlier cases, including *Musgrave* v. *Cave* (1742), Willes, 319; *Spooner* v. *Day and Mason* (1635), Cro. Car. 432; and *Ivatt* v. *Mann*, *supra*. See also *Brook* v. *Willet* (1793), 2 Hy. Bl. 224.

(*q*) Common of turbary resembles common of estovers in almost all its incidents, so that cases relating to the one right are frequently quoted and treated as authorities concerning the nature of the other. As to approving against common of turbary, see p. 508, *post*.

(*r*) The arguments for and against common of turbary being appendant are

appendant it must be appendant to an ancient messuage within the manor. It may be appurtenant to an ancient messuage either within or without the manor, or may be appurtenant to a modern messuage if there be a specific grant. The right passes under a grant of a house and its appurtenances (*a*). Where the right is limited to a specific quantity it may also be a right of common in gross (*b*).

Common of turbary from its nature can only extend to grounds capable of producing fuel (*c*). The right may be either to take turves or peat from a peat moss or marshy ground or a right of paring the surface (*d*). Sometimes a right is claimed of paring the turf (*e*), but where the turf is fit for pasture this practice is of doubtful legality.

Extent of right.

999. The turves must be expended on the premises to which the right is appendant or appurtenant, and this even though the quantity is certain (*f*).

A claim in respect of a tenement to cut and sell turf is bad (*g*); and a custom to take turves covered with grass to be spent upon the tenements of the copyholders for the purpose of making and repairing grass plots in their gardens and for improvements therein is unreasonable and uncertain (*h*).

Who may prescribe.

1000. Inhabitants and occupiers cannot prescribe for a right of common of turbary (*i*), but it has been said that a freeman may have a right to take turves for his own use (*k*), and a mayor and burgesses may prescribe to have such a right of common for themselves and the inhabitants of the town (*l*).

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stated on p. 466, *post*, in dealing with common of estovers, which in its nature is closely allied to common of turbary. The point is of less importance than formerly, having regard to the greater latitude allowed in pleadings and the extended powers of amendment.

(*a*) *Solme* v. *Bullock* (1684), 3 Lev. 165.

(*b*) See *Brown* v. *Tucker* (1610), 4 Leon. 241; Cooke, Inclosure Acts, p. 37 (estovers).

(*c*) *Peardon* v. *Underhill* (1850), 16 Q. B. 120.

(*d*) See Elton, Commons, pp. 96, 97; "*Turba* differs from *blestia* (flags) in this way: the former is dug out of the body of the ground; the latter is skimmed from the surface. Both are used for fuel in marshy regions" (Spelman, Glossary, *sub voc.*). The right of paring the surface is exercised on dry heaths.

(*e*) See *Wilson* v. *Willes* (1806), 7 East, 121; and compare *Robertson* v. *Hartopp* (1889), 43 Ch. D. 484, C. A., though in that case the property over which the right was claimed included a good deal of heath land.

(*f*) *Hayward* v. *Cunnington* (1667), 1 Lev. 231, where the right was to take as much turf as two men could dig in one day.

(*g*) *Valentine* v. *Penny* (*circa* 1606), Noy, 145.

(*h*) *Wilson* v. *Willes*, *supra*, *per* Lord ELLENBOROUGH, C.J., at pp. 127, 128. "A custom, however ancient, must not be indefinite and uncertain. A custom of this description ought to have some limit, but here there is no limitation."

(*i*) *Ely* (*Dean and Chapter*) v. *Warren* (1741), 2 Atk. 189; *Wilkinson* v. *Hagarth* (1847), 12 Q. B. 837.

(*k*) *R.* v. *Warkworth* (*Inhabitants*) (1813), 1 M. & S. 473, where, however, some at least of the rights claimed were held not to be rights of common.

(*l*) *White* v. *Coleman* (1673), Freem. (K. B.) 134. Compare *R.* v. *Warkworth* (*Inhabitants*), *supra*.

SECT. 4. Common of Estovers.

SECT. 4.—*Common of Estovers.*

Nature of right.

1001. Common of estovers (*m*) is the profit which a man has in the soil of another to cut or prune from his forest or other wastes wood for his building, inclosing, and firing or other necessary purposes (*n*).

Whether this common may be appendant is a matter of doubt. Some authorities assert that it can, and in old cases reference is not infrequently made to common of estovers appendant (*o*). Modern writers, however, consider that common of pasture only can be appendant (*p*).

Common of estovers may be appurtenant or in gross, but it cannot be by reason of vicinage, as the reason which allows common of vicinage does not apply.

Property in respect of which right exists.

1002. The claim must be in respect of an ancient tenement, and the wood or underwood taken must be used upon the tenement to which the right is appurtenant, for even if a man have a common

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(*m*) For the derivation and meaning of the word, see note (*s*), p. 447, *supra*.

(*n*) Bract. 136. The use of coal and the disuse of cottage ovens for baking has materially diminished the value of rights of turbary and of estovers in modern times, so that in most of the recent cases stress has been laid upon the value of the rights more in connection with the farm than for fuel.

(*o*) Woolrych, Rights of Common, p. 76; Cooke, Inclosure Acts, p. 35. Lord COKE (Co. Litt. 121 b) cites a case from Lib. Ass. 5 Edw. 3, c. 9: "Thus common of estovers or turbary cannot be appendant or appurtenant to land, but to a house to be spent there," to illustrate a proposition; but see the following quotations from another case in Y. B. 11 Hen. 6, 11 b: "If a man hath, time out of mind, had common of estovers in a certain place to be burnt in such a house and to mend the old houses and the old hedges, this is not common appendant, but common appurtenant" (cited in 4 Vin. Abr. 589); and "if a man prescribes to have common of estovers to his freehold, *scilicet* a house, he cannot prescribe to sell the wood, for this cannot be appurtenant" (cited *ibid.* 591).

(*p*) See Elton, Commons, p. 88. Elton bases his opinion on the indiscriminate use of "appendant" and "appurtenant" as the translation of *pertinens* in the old writers, on the references from Vin. Abr. given in note (*o*), *supra*, and also on the fact that if the law had presumed a grant of common of estovers (and other descriptions of commons) on every ancient feoffment of arable lands, in the same way as common of pasture was made appendant to the freeholders' estates, the two rights would be found to exist together in almost every waste, which is not found to be the case, notwithstanding the frequency with which the lords of manors in early times granted the right to their tenants or acquiesced in the growth of a custom to take it. See too Fitzherbert, Reading on the Statute "Extenta Manerii," 19: "Moors, heaths, and wastes go in like manner as the herbage of the towns (the pastures of the township or vill); for the lord's tenants have common in all such outgrounds with their cattle, but they shall have no wood, thorns, turves, gorse, ferns etc., but by custom or else special words in their deeds"; and in *Grant* v. *Gunner* (1809), 1 Taunt. 435, where it was decided that there could be no approvement against common of turbary, and the question was argued whether the right of approvement was derived from the Statute of Merton or was a common law right confirmed by the statute, LAWRENCE, J., said at p. 447: "At common law the lord might perhaps inclose against common appendant, which was not an express grant, but was exercised where the lord granted arable land to be held of himself, but it does not follow that he could approve against his own grant. Now, must not common of turbary necessarily be by grant?" and to this opinion Lord MANSFIELD, C.J., assented.

The same principles would apply to common of estovers as to common of turbary; and it would therefore seem that no rights of common except common of pasture can be appendant in the true sense of the word.

of this nature by grant, he cannot build new houses and extend his rights to these (*q*).

An alteration or rebuilding of a house will not destroy the right, provided that no prejudice accrues to the owner of the wood by the alteration; but if a house be enlarged, the right shall remain to the old chimneys, and the estovers cannot be employed or spent in the part newly added; and if the character of the right be altered so as to increase the burden on the owner of the wood, as, for instance, by converting a hall into a kitchen or malthouse, the right will be lost (*r*).

Distinction from right of estovers.

1003. A right of common of estovers must not be confused with the right of botes or estovers given by the law to all tenants for life or for years of freehold lands, and to copyholders upon their customary tenements, for the repair of, or for use on such lands or tenements, and to be taken from the lands themselves, and not from the waste (*s*). The characteristics of the two rights do not, however, appear to differ materially.

Extent of right.

1004. Unless the right claimed is for the repair of a house, the commoner, as a rule, is confined to the taking of underwood, shrubs, or loppings or trees of little value, such as birch, willow, and alder (*t*), but the right to cut down oaks may sometimes be vested in him (*a*).

Under the common law right of fire-bote the rule is the same, but if there has been an express grant of fire-bote, timber may be taken if there is no underwood to satisfy the grant (*b*).

In many cases the common must not be used except in places marked out by the owner of the waste or his bailiff, and the commoner will be liable for trespass if he takes any estovers without supervision where such a restriction exists (*c*).

(*q*) *Luttrel's Case* (1602), 4 Co. Rep. 86 a; Fitz. Nat. Brev. 180 H.

(*r*) *Luttrel's Case, supra; Brown and Tucker's Case* (1610), 4 Leon. 241; and other cases to the same effect referred to in Hall, Profits à Prendre, pp. 321, 323. It was held in *Arundel (Countess)* v. *Steere* (1604), Cro. Jac. 25, that a prescription to take estovers to build new houses might be good, but that decision is in conflict with many other authorities, and cannot now be relied on.

(*s*) Co. Litt. 41 b: "Note that to every tenant for life the law as incident to his estate without provision of the party giveth him three kinde of *estovers*, that is *hous-bote*, which is twofold, viz., *estoverium ædificandi et ardendi*, *plough-bote*, that is, *estoverium arandi*, and, lastly, *hay-bote*, and that is *estoverium claudendi*, and these estovers must be reasonable, *estoverea rationabilia*. And these the lessee may take upon the land demised without any assignment unless he be restrained by speciall covenant. . . . And the same estovers that tenant for life may have tenant for years shall have."

(*t*) Bac. Abr. tit. Common, A; *Anon.* (1572), 3 Leon. 16; and compare *De la Warr (Earl)* v. *Miles* (1881), 17 Ch. D. 535, C. A.

(*a*) *Russel and Broker's Case* (1586), 2 Leon. 209.

(*b*) *Anon., supra.* A lessee for life or years cannot take fuel but of bushes and small wood, and not of timber trees (*Berriman* v. *Peacock* (1832), 9 Bing. 384; *Channon* v. *Patch* (1826), 5 B. & C. 897). If, however, he had an express grant of fire-bote, he might take great trees; compare *Fisher* v. *Wren* (1688), 3 Mod. Rep. 250.

(*c*) Elton, Commons, p. 86; and compare 2 Co. Inst. 411; Manwood, Forest Laws, p. 48, referring to 5 Co. Rep. 25.

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Estovers may also extend to taking gorse, heather, fern, or bracken, and similar growths. They do not extend strictly to fodder for cattle, but the right to take heather, fern, or bracken, and long grass, that can be mown or cut for litter, has been established in several comparatively recent cases (*d*).

Limitation on right.

1005. A claim to estovers, in order to be valid, must be made with some limitation or restriction, either by reference to the necessities of the tenement in respect of which it is claimed (*e*), or by defining the quantity of the profit to be taken, as, for instance, a right to take so many cartloads of fuel (*f*).

The estovers taken must be spent upon the premises which give the right to take them, and, unless the quantity to be taken is fixed, cannot be used independently of those premises (*g*). So, unless the quantity is certain, they are inseparable from the premises which gave the right to them, and under a grant to a tenant for life of sufficient estovers to be burnt in a house the right will pass with the house to the remainderman (*h*).

(*d*) *Smith* v. *Brownlow* (*Earl*) (1869), L. R. 9 Eq. 241, where the claim established was for common of pasture and pannage and a right to cut so much furze, grass, and underwood as might be required for the purpose of fodder or litter for all commonable cattle and swine levant and couchant on the tenements, and for fuel and other purposes of agriculture and husbandry necessary for the beneficial and profitable enjoyment and use of the tenements; *Warrick* v. *Queen's College, Oxford* (1871), 6 Ch. App. 716, where the freehold tenants of a manor were declared to be entitled to a right of common appurtenant to their freehold lands held of the manor to cut turf for use as fuel in their dwelling-houses, and to cut such furze, gorse, and fern upon the common as might be required for fuel to be consumed in the said hereditaments, and for the purpose of fodder and litter for cattle levant and couchant on the same; *De la Warr* (*Earl*) v. *Miles* (1881), 17 Ch. D. 535, C. A., where a prescriptive right of cutting and carrying away bracken, fern, heather, and litter sufficient for the manurage, improvement, maintenance, sustaining, repairing, and amending the commoner's tenement was established; and see *Hollinshead* v. *Walton* (1806), 7 East, 485; *Robertson* v. *Hartopp* (1889), 43 Ch. D. 484, C. A.

(*e*) *Clayton* v. *Corby* (1843), 5 Q. B. 415, *per* Lord DENMAN, C.J., at pp. 419, 420: "Again, in the case of common of estovers or a liberty of taking wood, called in the books house-bote, plough-bote, and hay-bote, such liberty is not wholly vague and indeterminate, but confined to some certain and definite use. The like of common of piscary. The nature of these rights is thus compendiously, but, we believe, accurately, given by Mr. Justice Blackstone (2 Com. 35): 'These several species of commons do all originally result from the same necessity as common of pasture, viz., for the maintenance and carrying on of husbandry, common of piscary being given for the sustenance of the tenant's family, common of turbary and fire-bote for his fuel, and house-bote, plough-bote, cart-bote, and hedge-bote for repairing his house, his instruments of tillage, and the necessary fences of his grounds,' that is, for a certain and definite purpose." Compare *Chesterfield* (*Lord*) v. *Harris*, [1908] 2 Ch. 397, C. A., *per* COZENS-HARDY, M.R., at pp. 410, 411.

(*f*) See *De la Warr* (*Earl*) v. *Miles*, *supra*.

(*g*) *Pembroke's* (*Earl*) *Case* (1636), Clayton, 47, where a commoner having house-bote cut down four trees for the purpose of repairing the posts that sustained the mud walls of his house, and the wood proving unfit for the purpose, it was held that he could not exchange it for other or enlarge the house with it, or board up the sides of the mud walls. But it is doubtful whether this case would be now followed, as it would seem that the purposes for which the commoner intended to apply the wood were substantially those for which the right had been granted, namely, the repair of his house.

(*h*) *Sym's Case* (1608), 8 Co. Rep. 51 a, 54 a.

SECT. 4. Common of Estovers.

It has been said that if a man have reasonable estovers, as housebote, hay-bote etc., appendant (*i*) to his freehold, they are so entire as they shall not be divided between coparceners (*j*).

The rules referred to under the head of turbary that the right can only be claimed by persons capable of taking under a grant, and that inhabitants and other fluctuating bodies cannot sustain a claim, apply equally to common of estovers (*k*).

So the right can only be exercised on such parts of the waste as are capable of producing the necessary product (*l*).

Right to whole of product.

1006. The right to take the whole of a particular product, as all the thorns growing on a particular waste, though it may be established, is not a right of common, but an exclusive right of the same nature as a sole or several pasture (*m*).

How far exercisable in gross.

1007. The necessity for using the right in connection with the tenement to which it is appurtenant has sometimes been alleged as a reason for this right not being exercisable in gross, but where the quantity of the product to be taken is certain, as, for instance, so many cartloads of wood for fuel, there seems to be no reason why a prescription for that quantity should not only be good as a right in gross, but, if appurtenant, also severable from the tenement to which it was appurtenant. The principle applicable to other descriptions of common, that it may be so severed when no extra burden is thrown upon the owner of the land by the severance, would apply (*n*).

SECT. 5.—*Common of Piscary.*

Nature of right.

1008. Common of piscary (*a*) is a right of fishing with other persons in another man's water, and does not differ from other rights of common (*b*). It may be either appurtenant or in

(*i*) But whether appendant should not be appurtenant, see p. 466, *supra*.

(*j*) Co. Litt. 164 b. Lord COKE further states that where an inheritance is such that it cannot be divided the eldest sister is to have the reasonable estovers etc. where they are not certain, and the other sister or sisters shall have an allowance of the value out of some other of the inheritance, or, if no recompense can be given, that each shall enjoy the right for a time, whereby no prejudice can grow to the owner of the soil (*ibid.* 165 a).

(*k*) See p. 465, *ante*; *Selby* v. *Robinson* (1788), 2 Term Rep. 758; *Willingale* v. *Maitland* (1866), L. R. 3 Eq. 103; *Chilton* v. *London Corporation* (1878), 7 Ch. D. 735 (the last two cases relating to the right of "lopwood" for fuel in Epping Forest).

(*l*) *Peardon* v. *Underhill* (1850), 16 Q. B. 120.

(*m*) *Dowglass* v. *Kendal* (1610), Cro. Jac. 256; and compare *R.* v. *Warkworth* (*Inhabitants*) (1813), 1 M. & S. 473; *Bean* v. *Bloom* (1774), 2 Wm. Bl. 926; see p. 465, *ante*.

(*n*) See Cooke, Inclosure Acts, p. 37. Elton, Commons, p. 87, indorses this view. See note (*f*), p. 456, *ante*; note (*k*), p. 525, *post*.

(*a*) Common of piscary must be distinguished from a free or a several fishery, which is not a right of common, but is an exclusive right of fishing from which the owner of the soil may be excluded, and in which the ownership of the soil is frequently in the ownership of the fishery. The distinction between the two rights is clearly drawn in *Malcolmson* v. *O'Dea* (1862), 10 H. L. Cas. 593, *per* WILLES, J., at p. 619. For the law as to fisheries in general see title FISHERIES.

(*b*) *Smith* v. *Kemp* (1692), 2 Salk. 637; *Chesterfield* (*Lord*) v. *Harris*, [1908] 2 Ch. 397, C. A., *per* COZENS-HARDY, M.R., at p. 412, and cases there cited.

SECT. 5. Common of Piscary.

gross (*c*). It may be annexed to copyhold tenements of a manor, and in that case may be claimed by custom (*d*); but in all other cases it must be based on grant or prescription (*e*). The right may exist in common not only with other persons, but also with the owner of the soil.

Common of piscary being a *profit à prendre* and not an easement, a custom for all the inhabitants of a parish to angle for, catch, and carry away fish is bad; and even if limited to a claim to angle for and catch the fish the custom would also be bad as equally destructive of the subject-matter (*f*).

Protection of right.

1009. The owner of a right of common of fishing in a defined part of a river has a *profit à prendre* which gives him a right of action against any person who disturbs him either by trespass or nuisance, or in any other substantial manner (*g*).

Extent of right.

1010. When common of piscary is claimed by prescription as appurtenant to a house, the house in respect of which it is claimed must be an ancient house, or built upon the site of an ancient house, as in the case of common of estovers (*h*); and it would seem that the fish should be taken for use in the house to which the right is attached and not for sale (*i*). Where the right is appurtenant to a tenement, a claim to take an unlimited quantity for sale, though proved to have been exercised for three hundred years, cannot be supported (*k*). The right must be exercised in a reasonable manner and according to the terms of the prescription, or custom, which must be both reasonable and certain (*l*).

(*c*) Cooke, Inclosure Acts, p. 40, where the author considers that it may also be appendant; but on this question see p. 466, *ante*.

(*d*) *Tilbury* v. *Silva* (1890), 45 Ch. D. 98, C. A.

(*e*) *Lloyd* v. *Jones* (1848), 6 C. B. 81; *Bland* v. *Lipscombe* (1854), 4 E. & B. 713, n.; and compare *Fitzhardinge* (*Lord*) v. *Purcell*, [1908] 1 Ch. 139.

(*f*) *Bland* v. *Lipscombe*, *supra*; and see *Lloyd* v. *Jones*, *supra*; *Allgood* v. *Gibson* (1876), 34 L. T. 883; *Goodman* v. *Saltash Corporation* (1882), 7 App. Cas. 633, *per* CAIRNS, L.C., at p. 648; and compare *Chesterfield* (*Lord*) v. *Harris*, [1908] 2 Ch. 397, C. A.

(*g*) *Fitzgerald* v. *Firbank*, [1897] 2 Ch. 96, C. A., where the plaintiff claimed an exclusive right of fishing under a deed, and brought his action against a railway contractor for turning into the river quantities of water loaded with mud and so disturbing the fish, but the case would apply equally to an ordinary trespass and to a commoner with right of fishing.

(*h*) *Costard* v. *Wingfield* (1587), 2 Leon. 44.

(*i*) 2 Bl. Com. 35, cited in *Clayton* v. *Corby* (1843), 5 Q. B. 415, *per* DENMAN, C.J., at p. 420; see note (*e*), p. 468, *ante*. See also *Chesterfield* (*Lord*) v. *Harris*, *supra*, where COZENS-HARDY, M.R., at pp. 410, 411, relies on *Clayton* v. *Corby*, *supra*, and *Bailey* v. *Stephens* (1862), 12 C. B. (N. S.) 91, to support the proposition that a claim to a *profit à prendre* in a *que* estate, or in other words a claim appurtenant to land, necessarily involves some relation between the needs of the estate or its owner and the extent of the *profit à prendre*, and that a right in an indefinite number of people to take a *profit à prendre* without stint and for sale must tend to the entire destruction of the property, and is bad; and compare *Elgar* v. *Special Commissioners for English Fisheries* (1871), 23 L. T. 733.

(*k*) *Chesterfield* (*Lord*) v. *Harris*, *supra*.

(*l*) A prescription to be good must be reasonable in its nature and certain (Com. Dig. tit. Prescription, E, 3 & 4; *Chesterfield* (*Lord*) v. *Harris*, *supra*, which practically overrules *Chesterfield* v. *Fountaine* (1895), reported in [1908] 1 Ch. at 243, n., where the same rights were in question, and WILLS and

Whether any commoner who has common of piscary has the legal right to sell the fish taken is doubtful, though the practice has prevailed in many places. The principles applicable to common of estovers and common of turbary would negative the right unless the quantity to be taken is fixed (*m*).

Where right may exist.

1011. Common of piscary cannot exist in the sea, or, as a rule, in a tidal navigable river; for these are open to all the King's subjects (*n*). It can therefore be generally exercised only in a pond, lake, or river that is not navigable; but although the presumption is that navigable rivers and arms of the sea belong to the Crown, the presumption may be rebutted (*o*), and they may be appropriated by prescription.

SECT. 6.—*Common in the Soil.*

Nature of right.

1012. The right of digging for sand, stone, coals, minerals etc., has also been recognised as a right of common from early times (*a*). It is similar in nature to the commons of estovers and turbary, and may be appurtenant to land or held in gross. Except in the case of copyholders of a manor the right must be claimed by grant or prescription (*b*).

These rights may be claimed by copyholders within a manor by custom (*c*), but a custom for inhabitants of a district or for any other class incapable of taking under a grant to take them is bad, and cannot be supported (*d*).

WRIGHT, JJ., held that though a custom must be reasonable a prescription need not). The question, however, in *Chesterfield* v. *Fountaine*, *supra*, was whether the right could have a legal existence and the facts were not fully gone into. See also note (*b*), p. 485, *post*.

(*m*) Woolrych, Commons, p. 91, is of opinion that the sale is possibly lawful where the quantity is fixed.

(*n*) *Ward* v. *Cresswell* (1741), Willes, 265; and see Co. Litt. 122 a, and Butler's note thereon as to several fishery, common of fishery and free fishery. Compare *Carter* v. *Murcot* (1768), 4 Burr. 2162, *per* Lord MANSFIELD, C.J., at p. 2164: "The rule of law is uniform. In rivers not navigable the proprietors of the land have the right of fishing on their respective sides; and it generally extends *ad medium filum aquæ*. But in navigable rivers the proprietors of the land on either side have it not; the fishing is common; it is *primâ facie* in the King, and is public."

(*o*) *Carter* v. *Murcot*, *supra*; and compare *Bagott* v. *Orr* (1801), 2 Bos. & P. 472. See generally title WATERS AND WATERCOURSES.

(*a*) Co. Litt. 122 a.

(*b*) *Gateward's Case* (1607), 6 Co. Rep. 59 b, Resolution 8; and compare *Grimstead* v. *Marlowe* (1792), 4 Term Rep. 717; *Blewitt* v. *Tregonning* (1835), 3 Ad. & El. 554; *Race* v. *Ward* (1855), 4 E. & B. 702.

(*c*) *Rogers* v. *Brenton* (1847), 10 Q. B. 26, *per* Lord DENMAN, C.J., at p. 61; *Heath* v. *Deane*, [1905] 2 Ch. 86.

(*d*) *Race* v. *Ward*, *supra*, *per* Lord CAMPBELL, C.J., at p. 709, where a claim to take water from a spring and to pass over a field for that purpose was held to be an easement, and not a *profit à prendre*: "This is no part of the soil, like sand, clay, or stones, nor the produce of the soil, like grass, turf, or trees. A right to take these by custom claimed by all the inhabitants of a district would clearly be bad; they all come under the category of *profits à prendre*, being part of the soil or the produce of the soil, and such a claim, which might leave nothing for the owner of the soil, is wholly inconsistent with the right of property in the soil." See too *Gateward's Case*, *supra*; *Grimstead* v. *Marlowe*, *supra*; *Blewitt* v. *Tregonning*, *supra*; *Constable* v. *Nicholson* (1863), 14 C. B. (N. S.) 230, followed in *Hough* v. *Clark and Hall* (1907), 23 T. L. R. 682.

SECT. 6. Common in the Soil.

1013. The right can only be claimed in places which produce the particular profit claimed, as sand, stone etc., and can have no existence on other parts of the waste (*e*).

Where right may be claimed.

Where the right has been admitted by the lord, of which admission the court rolls are evidence, it is not necessary to prove that the right is reasonable, as in cases where the existence of the right and a legal origin for it have to be presumed from evidence merely of acts done within living memory (*f*).

Extent of right.

1014. A prescription to dig stones for the purpose of repairing the commoner's house and for use on freehold tenements held of the manor has been recognised (*g*), and the practice of digging sand and gravel is one of very general occurrence (*h*). The right to take brick earth (*i*) and even coal to be used for fuel (*k*) has also been established.

Prescriptions for these rights must fall within the usual rules. The right must be claimed by persons capable of taking by grant, must be reasonable and certain in its nature, and must (except perhaps when the quantity to be taken is certain) be exercised by the commoner himself (*l*).

Sea-shore.

1015. There have been various cases as to the right to take sand from the sea-shore for manuring fields etc., but such a right is not a right of common (*m*).

Part III.—Various Descriptions of Common Lands.

SECT. 1.—*In General.*

Common and commonable lands.

1016. The lands to which rights of common attach may be divided into "common lands," which are uncultivated wastes, upon which no severalty rights attach, and "commonable lands," which are held

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(*e*) *Peardon* v. *Underhill* (1850), 16 Q. B. 120; *Ely* (*Dean and Chapter*) v. *Warren* (1741), 2 Atk. 189; *Maxwell* v. *Martin* (1830), 6 Bing. 522.

(*f*) *Heath* v. *Deane*, [1905] 2 Ch. 86, where the plaintiff, who claimed the right to take stone from a quarry on the waste, was both a freehold and a copyhold tenant, so that it was unnecessary to decide whether a freehold tenant could claim otherwise than by prescription.

(*g*) *Incledon* v. *Burgess* (1688). Carth. 65; *Heath* v. *Deane*, *supra*.

(*h*) *R.* v. *Tewkesbury* (*Trustees*) (1810), 13 East, 155; *Duberley* v. *Page* (1788), 2 Term Rep. 391; and compare *Hough* v. *Clark and Hall* (1907), 23 T. L. R. 682.

(*i*) *Church* v. *Inclosure Commissioners* (1862), 11 C. B. (N. S.) 664; *Salisbury* (*Marquis*) v. *Gladstone* (1861), 9 H. L. Cas. 692, 701.

(*k*) Co. Litt. 122 a; *Portland* (*Duke*) v. *Hill* (1866), L. R. 2 Eq. 765.

(*l*) See *Clayton* v. *Corby* (1843), 5 Q. B. 415, where all the cases on this subject were considered; and compare *Heath* v. *Deane*, *supra*.

(*m*) *Blewitt* v. *Tregonning* (1835), 3 Ad. & El. 554; and see p. 474, *post*. In the same way the Cornish custom of tinbounding and the customs relating to the lead mines in the Mendip Hills are outside the province of this article. See title EASEMENTS AND PROFITS À PRENDRE.

in severalty during a portion of the year, but which become commonable after the severalty crop has been removed, and in many cases during the whole of the year in which they lie fallow. Common lands as a rule are waste of a manor; commonable lands as a rule are not, the ownership of the soil being in the severalty owners.

SECT. 2.—*Common Lands, including Woodlands.*

Manorial waste.

1017. The most usual species of common lands is the manorial waste, the lord of the manor being owner of the soil, and entitled to all rights of sporting and other rights of ownership in and over it, including the minerals, subject only to the rights of the commoners either as free tenants of the manor, or as copyholders under the custom of the manor, and to such other rights as he or his predecessors have granted, or may be presumed to have granted, when such rights have been enjoyed for a period sufficient to establish a title by prescription, or on the supposition of a lost grant.

Common lands may be subject to any of the rights of common already mentioned (*n*); it follows of necessity that such rights can be exercised only in such parts of the waste as supply the particular product (*o*).

Woodlands.

1018. Woodlands do not differ materially from ordinary wastes, except that they peculiarly bear the burden of the common of estovers, and that there is often a right, the measure of which is determined by usage, of shutting out the commoner's stock for some reasonable time after felling, to secure the preservation of the young trees: There is also the right of feeding swine on beech mast or acorns, which is known as pannage or pawnage (*p*).

Various statutes have been passed from time to time restricting the rights of pasturage in woodlands for the encouragement of the growth of timber (*q*).

Seaside waste.

1019. In wastes abutting on the sea-shore, the lord of the manor or owner of the soil is entitled to all land down to the line of high-water mark at ordinary spring tides (*r*). Land which has been added by accretion takes the character of the land to which it has been added, and is subject to the same customs and rights as affect such land (*s*).

(*n*) See pp. 446 *et seq.*, *ante*.

(*o*) *E.g.*, a right of turbary, as distinguished from a right to pare the turf, can be exercised only where there is peat; and if no fuel has ever been or in the ordinary course of nature could be found on a particular part of the common, as on a bed of gravel or granite, the right cannot be sustained in that part (*Peardon* v. *Underhill* (1850), 16 Q. B. 120); see also *Morewood* v. *Wood* (1791), 4 Term Rep. 157; *Maxuell* v. *Martin* (1830), 6 Bing. 522.

(*p*) See p. 475, *post*.

(*q*) See pp. 513, 514, *post*.

(*r*) See *Mercer* v. *Denne*, [1905] 2 Ch. 535, C. A., and on the whole subject of foreshores, title WATERS AND WATERCOURSES.

(*s*) *Mercer* v. *Denne*, *supra*, *per* COZENS-HARDY, L.J., at p. 584. As to accretions, see further 2 Bl. Com. 262; *A.-G.* v. *Chambers*, *A.-G.* v. *Rees* (1859), 4 De G. & J. 55, 58, referring to *Re Hull and Selby Rai*, *Co.* (1839), 5 M. & W.

SECT. 2. Common Lands, including Woodlands.

Anything in the nature of soil blown or lodged upon a man's land becomes part of the land, *e.g.* sand blown and drifted from the sea-shore (*t*).

SECT. 3.—*Forests.*

Reservation of commoners' rights.

1020. Another class of common lands are those which are, or formerly were, royal forests (*u*). When our early kings, by virtue of their stringent prerogative, laid waste wide tracts of country to form their forests, they expressly reserved to all who had common within the territory their prescriptive rights of herbage and other

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327; *Foster* v. *Wright* (1878), 4 C. P. D. 438 (a case which arose from a change in the bed of the river Lune).

(*t*) *Blewitt* v *Tregonning* (1835), 3 Ad. & El. 554, where an alleged custom to take sand from a certain place for manuring land was held bad on the ground that the blown sand had become part of the soil, and the alleged right was therefore to take a profit *alieno solo*, which could not be supported by custom; *Dearden* v. *Evans* (1839), 5 M. & W. 11, where large masses of stone which had fallen from time to time from cliffs above upon the field of a copyholder and had become more or less imbedded in the soil, in the absence of evidence to show when any particular portion of them had fallen, were held to be a portion of the soil which belonged to the lord of the manor, and that the copyholder was therefore not entitled to remove them for his own benefit.

(*u*) Although the special jurisdiction of the forest courts etc. has long been abolished, a very short account of them here will not be out of place, especially as the existence of a royal forest has in several cases led to the presumption of a grant from the Crown and the establishment of rights in inhabitants and other fluctuating bodies which could not otherwise have been supported.

The jurisdiction over the forests and the rights in them was taken from the ordinary courts, and vested in the justices in eyre of the King's forests, one of whom was appointed for the forests north of the Trent, and another for the forests south thereof. The King's lieutenant of the forest, the verderers, and chief foresters formed a court of apportionment in case of complaints of surcharging of forests; and these officers, by virtue of a writ issuing out of chancery, inquired into the size of the waste and of the lands which had common thereon, and apportioned each man's cattle which ought to feed therein, a proceeding in the nature of a writ of admeasurement at common law (Manwood, Forest Laws, pp. 100 *et seq.*).

The office of justice in eyre of the forests, which in the time of the Norman kings was one of high dignity and important functions (see the Capitula Itineris in Hoveden, Anglicarum Rerum Scriptores, 744, 784), fell into disuse as the rigours of the forest law became relaxed. The duties were discharged by deputy (32 Hen. 8, c. 35), and at length were abolished by statute (57 Geo. 3, c. 61). Some of the minor offices and courts are retained, and fees in respect of them, especially for pawnage or pannage, are still paid by the commoners upon the forests.

As the forests were of large extent and comprised within their area not only arable lands, but houses, villages, and towns, the rights of common were exercisable in forests not by the tenants of a manor, but generally by all the owners and occupiers of land within the forest. Such rights were probably granted as some compensation for the burdens and hardships imposed by the forest laws to secure the preservation and free roam of the deer and the restrictions placed upon the cultivation of the lands: *e.g.*, no arable land could be turned into pasture (Assart); no inclosed woods might be felled, except under conditions which would ensure their restoration; no buildings or inclosures (*purprestures*) might be made without licence; no fences except low fences that the deer could jump might exist; no deer might be killed even though found in the crops etc. See the Charter of the Forest (9 Hen. 3, c. 1), and Manwood, Forest Laws. But it is clear from the cases relating to Epping and Hainault Forests and from the disafforesting Acts relating to others that many parishes enjoyed rights over all the wastes of these forests irrespective of the boundaries of the manors within them.

articles of common user not inconsistent with the new purpose for which the land was then set apart (*a*).

1021. There are some few points in which common of pasture in a forest differs from a similar common over an ordinary waste.

Differences between common in forest and in waste.

Rights of common of pasture may be either appendant or appurtenant, but the land in respect of which the right accrues must be within the forest; and if this land be disafforested, the right of common within the forest is gone (*b*).

(1) Land.

Common appendant and common appurtenant within a forest are for horses and cattle only. Goats, sheep, swine, and geese, except in special circumstances, are excluded as being repugnant to the deer or because of the closeness with which they feed the pasture (*c*). But with a special prescription sheep may be turned out (*c*), and in some forests they are recognised (*d*). None of the cases refer to goats, swine, or geese, but there seems no reason to doubt that, if an immemorial usage can be shown to admit these animals to pasture, it would be upheld (*e*).

(2) Cattle.

Rights of common in a forest cannot be exercised during the fence month, fifteen days before and fifteen days after Midsummer Day (*f*); and in some forests there is also a winter close time, when the pasture is scanty and reserved for the deer, called the winter heyning (*g*); but in consequence of the disafforestation of many of the forests these restrictions are probably now rare.

(3) Fence month and close time.

1022. Although swine are not as a rule commonable in a forest, there is in most forests a right to turn out swine during a limited period to feed on the beech mast and acorns. This is known as pannage or pawnage, and is exercisable either by the persons

(4) Pannage.

It should perhaps be mentioned that in a forest a surcharger was considered a trespasser and was punishable under the law of the forest by fine, with imprisonment in default of payment (Manwood, Forest Laws, p. 94); and that staff-herding, or tending the cattle, was not allowed as tending to frighten the deer, which would otherwise feed with the cattle (*ibid.*, p. 98).

(*a*) Charter of the Forest (9 Hen. 3, c. 1).

(*b*) Ordinatio Forestæ (33 Edw. 1, c. 3), which refers to the disafforesting of lands by purlieus or perambulations made in pursuance of the Charter of the Forest (9 Hen. 3, c. 1), and enacts that the lands so excluded may remain disafforested, but that they shall have no rights of common; at the same time the owners are empowered to bring them again within the forest if they desire it. See also *Woolridge* v. *Dovey* (1656), Hard. 87; *Burrington's* (*Sir F.*) *Case* (1611), 8 Co. Rep. 136 b.

(*c*) *Webb's Habeas Corpus* (1616), 3 Bulst. 213, *per* DODDERIDGE, J.: "You cannot have common of pasture for sheep by the forest law." COKE, C.J., "agreed with him herein unless it be by prescription. Here a wrong hath been done in the forest by which the *verte* is destroyed, for sheep do bite very low; the statute of Charta de Forestæ is an affirmance of the common law, and therefore you may prescribe against this." And see the *Leicester Forest Case* (1608), Cro. Jac. 155.

(*d*) Exmoor (see 55 Geo. 3, c. 138); Dartmoor (see Sir Robert Hunter, Open Spaces etc., p. 187).

(*e*) This is disputed by Elton, Commons, p. 70, but *Webb's Habeas Corpus*, *supra*, which he cites as an authority, refers only to sheep.

(*f*) Manwood, Forest Laws, p. 73, so that the deer may have quiet during the fawning season.

(*g*) In the Forest of Dean it was from the 11th November to the 23rd April (stat. 20 Car. 2, c. 3, s. 11).

SECT. 3. Forests.

having rights of common of pasture or by agistment, *i.e.* payment to the officers of the forest (*h*).

Extent of right.

Freeholders and all other men who have woods and lands within the regard of the forest may agist the same at convenient times when the mast is ripe; but if there is no mast, they must not put their hogs there, and when the woods are near the King's woods they may not agist theirs until the King's woods have been agisted (*i*). Although a man may not have common of pasture in a forest for the beasts of strangers, but must take his common with his own beasts (*k*), he may take in hogs to agist for pannage (*l*).

Where pannage exists as a right it is only to take the mast or acorns which have fallen, and does not entitle the owner of the right to interfere with the owner of the land in the proper management of his woods or to complain of his lopping or cutting down the trees (*m*).

Presumption of incorporation of inhabitants.

1023. Although the royal forests were very numerous, they have now been nearly all disafforested or are in the hands of private owners (*n*). The previous existence of a royal forest has, however, been treated as a ground for presuming an incorporation by the Crown of inhabitants and other fluctuating bodies who would otherwise have been incapable of taking by grant (*o*).

(*h*) The word "pannage" bears a double meaning, namely, the produce of the trees which is taken or the money paid for that produce. It is described by Manwood, Forest Laws, p. 228, as follows: "Agistment means the herbage or the profit made thereof. Pannage is the agistment of the fruit of trees or the money paid for the same," and he quotes s. 8 of the Charter of the Forest (9 Hen. 3, c. 1), that "the agister is to receive our pannage," as an authority for pannage meaning properly the money payment.

In the King's woods pannage begins on Holyrood Day, which is fifteen days before Michaelmas, and ends forty days after Michaelmas (Manwood, Forest Laws, p. 228).

(*i*) Manwood, Forest Laws, p. 228.

(*k*) *Ibid.*, p. 91.

(*l*) *Ibid.*, p. 231.

(*m*) *Chilton* v. *London Corporation* (1878), 7 Ch. D. 562.

(*n*) Many of the royal forests which had been granted to religious houses on the dissolution of the monasteries reverted to the Crown, and were regranted to subjects. Others have been disafforested by statute (see Chronological Table of Statutes, Appendix III.) and by private Inclosure Acts, and, no doubt, many came under the statute 16 Car. 1, c. 16, which enacted that no place in England or Wales where forestal courts had not been held, verderers chosen, or regard made within sixty years before the commencement of that reign, should thereafter be taken to be forest or within the bounds or metes of the forest, but should be disafforested and exempted from all forest laws. Commissioners were to be appointed to ascertain the bounds of the different forests, and all lands outside the ascertained bounds were to be thenceforth free as if they had never been forest or so reputed. But provision was made that the tenants, owners, and occupiers of lands which should be excluded from forest bounds when returned and certified should enjoy all such common and other profits and easements within the forests as anciently or accustomably they had used and enjoyed.

(*o*) *E.g.*, *Willingale* v. *Maitland* (1866), L. R. 3 Eq. 103; *Chilton* v. *London Corporation* (1878), 7 Ch. D. 735. Where inhabitants are so entitled, they must be lawful inhabitants, *i.e.*, inhabitants of houses lawfully erected and not liable to be pulled down as encroachments (*ibid.*, *per* JESSEL, M.R., at p. 744); and compare *Hough* v. *Clark and Hall* (1907), 23 T. L. R. 682, where evidence of acts done by persons claiming to do them as ratepayers was held not to support a claim for inhabitants.

SECT. 4.—*Commonable Lands.*

SUB-SECT. 1.—*Lammas Lands.*

Lammas lands.

1024. The first and most important class of commonable lands (*p*) are Lammas lands (*q*). These are open arable and meadow lands held in severalty during a portion of the year, but which after the severalty crop has been removed are commonable not only to the parties who have the severalty right, but also to other classes of commoners.

Persons entitled.

The commoners upon Lammas lands are sometimes a class of inhabitants, as the freemen of the neighbouring town (*r*), or even the householders (*s*), sometimes the inhabitants of the parish (*t*), and perhaps more generally the owners and occupiers of ancient tenements within the parish, frequently designated as tofts (*a*). There is infinite variety in the classes of commoners over these Lammas lands as well as in the periods during which they are entitled to exercise their various rights. Where the rights are limited by number or by levancy and couchancy immemorial usage makes them good in law; but if there be no such limit, the user is illegal, and no continuance of it can ever turn it into a right (*b*).

Indefinite classes of persons.

1025. Inhabitants as such and all other indefinite and unincorporated classes of persons are incapable of taking by grant, and no user, however long, will make that good which could not have a legal beginning (*c*).

But any such indefinite class of persons is capable of taking the benefit of these rights if they are vested in some person or corporate body which is capable of taking by grant; and accordingly various rights are frequently found vested in the mayor and corporation of a town (*d*) or other trustees for the benefit of the inhabitants;

(*p*) The extent of commonable lands has been largely reduced during the last century by inclosure under the various Inclosure Acts; and as their physical character is that of ordinary arable and pasture lands, and the public have not enjoyed rights or privileges over them as they have over wastes or commons in the popular sense of the word, they are the only class of common lands the inclosure of which is as a rule sanctioned by the Board of Agriculture and Fisheries as being for the benefit of the neighbourhood without the existence of special circumstances.

(*q*) So called because Lammas Day (1st August) was the usual day on which they were thrown open. They usually remained open till the following Lady Day (25th March).

(*r*) See *Stables* v. *Mellon* (1679), 2 Lev. 246; *Hinks* v. *Clerk* (1679), 2 Lev. 252; *Cox* v. *Glue* (1848), 5 C. B. (N. S.) 533; *Re Norwich Town Close Estate Charity* (1888), 40 Ch. D. 298, C. A.; *Johnson* v. *Barnes* (1873), L. R. 8 C. P. 527, Ex. Ch.

(*s*) See *Hardy* v. *Hollyday* (1765), quoted by BULLER, J., in *Grimstead* v. *Marlowe* (1792), 4 Term Rep. 717, where the proper mode of pleading was shown.

(*t*) *Grimstead* v. *Marlowe*, *supra* (a case of bad pleading).

(*a*) Cooke, Inclosure Acts, p. 48.

(*b*) 1 Roll. Abr. 398, pl. 3; *Benson* v. *Chester* (1799), 8 Term Rep. 396; and compare *Selby* v. *Robinson* (1788), 2 Term Rep. 758; *Chilton* v. *London Corporation* (1878), 7 Ch. D. 735.

(*c*) *Gateward's Case* (1607), 6 Co. Rep. 59 b; *Rivers* (*Lord*) v. *Adams* (1878), 3 Ex. D. 361 etc.

(*d*) *Mellor* v. *Spateman* (1669), 1 Wms. Saund. 343; *Johnson* v. *Barnes*, *supra*, where the sole pasturage during certain times of the year was held

SECT. 4. Commonable Lands.

and the courts will always endeavour to discover a legal origin for user which has continued for a great number of years.

Shifting severalties and lot meadows.

1026. This class of commonable lands is not only subject to extensive variations in the character of the persons by whom and the times at which the rights of common over them are exercisable, but also varies extensively in the way in which the lands are held by the severalty owners. In many instances the severalty holding varies from year to year, or in the case of arable lands not annually, but periodically according to the rotation of the crops. In large open fields this is frequently the custom; and there are also the old lot meadows, in which the several portions are undivided, but are marked off by boundary stones or other marks, and the owners of the different portions draw lots for the choice each year (*e*).

The feature common to all Lammas and commonable lands, whether there are shifting severalties or permanent severalties, is that so soon as the crops are removed they become commonable.

SUB-SECT. 2.—*Shack.*

Common of shack.

1027. Another description of commonable lands is shack land, land over which a custom to go at shack, *i.e.* at large, prevails.

This shack land is open arable land held in severalty during a portion of the year until the crop has been removed and then becoming commonable to all the parties having severalty rights,

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to be vested in the corporation, though the rights had always been treated as rights of common; *Re Norwich Town Close Estate Charity* (1888), 40 Ch. D. 298. C. A.; and many earlier cases. See Elton, Commons, p. 37, where the author mentions the churchwardens of a parish; and they might be trustees for the purpose, but none of the cases cited by him refer to churchwardens. It must appear that the grant to the corporation or other trustees was made for the benefit of the class entitled. A plea of a grant of a right of common to a corporation is not sufficient as regards a member of that corporation, but he must show that the grant was to the corporation for the benefit of the individual members (*Parry* v. *Thomas* (1850), 5 Exch. 37). The same doctrine was reasserted in *Constable* v. *Nicholson* (1863), 14 C. B. (N. S.) 230.

(*e*) Lord COKE refers to these shifting severalties (Co. Litt. 4 a). After stating that land is the most firm and fixed inheritance, and fee simple the highest and most absolute estate that a man may have, and that they may be movable both as to person and place, he says: "as, for example, if there be eighty acres of meadow which have been used time out of mind of man to be divided betweene certaine persons, and that a certaine number of acres appertaine to every of these persons, as, for example, to A. thirteen acres to be yearly assigned and lotted out, so as some time the thirteen acres lie in one place, and some time in another, and so of the rest, A. hath a movable fee simple in thirteen acres, and they may be parcel of his manor, albeit they have no certaine place, but are yearly set out in several places, so as the number only is certaine, and the particular acres or place where they lie after the year incertaine." And subsequently, in reference to the same example, he states where livery of seisin of the thirteen acres is to be made: "First, if they be parcel of a mannor they may pass by the name of the mannor; but if they be in grosse, then the charter of feoffment must be for thirteen acres lying and being in the meadow of eighty acres generally without bounding or describing of the same in certaintie; and livery of the seisin of any thirteen acres allotted to the feoffee for a year *secundum formam chartæ* is a good livery to pass the content of thirteen acres wheresoever the same lie in that meadow" (*ibid.* 48 b).

but to no others; and in this respect may be said to lie the difference between shack lands and Lammas lands which are commonable by others besides the severalty owners (*f*).

Origin of right.

Common of shack was said to have been originally in the nature of common of vicinage, and to have arisen from the division of fields into small parcels without inclosure (*g*) and the consequent inconvenience, and in some cases impossibility, of each owner of these small parcels keeping his cattle on his own land (*h*); but whether the original nature has been retained, or whether by the custom of the locality it has been altered into the nature of a common appendant or appurtenant, is a question to be determined by the custom and usage of every town or place (*i*). It has been already stated that where common of pasture by reason of vicinage exists one town or manor can inclose their waste against the other (*k*), and so put an end to the right of common. With common of shack one owner cannot inclose against the others unless he can prove a special custom (*l*).

Measure of right.

1028. The measure of right of common must be determined by some rule, and the rule of levancy and couchancy is applicable in the absence of any other rule, such as the acreage of the different owners (*m*).

Common meadows.

1029. Rights of common of pasture may also be exercised over common or lot meadows in the same way after the hay has been mown, or, as it is sometimes termed, "the first mowth" has been taken.

Balks.

1030. In many Lammas lands and commonable lands the strips of arable land are divided by balks or driftways of grass. These, where there is a waste of a manor, are usually found to be part of the waste and to belong to the lord of the manor; but the presumption that they are waste may of course be rebutted.

SUB-SECT. 3.—*Gated or Stinted Pastures.*

Gated or stinted pastures.

1031. Another description of commonable lands are gated or stinted pastures, which prevail largely in the north of England, and the rights over which are known by a number of different names, such as cattlegate, beastgate, pasturegate (*n*).

(*f*) See Cooke, Inclosure Acts, p. 50; *Corbet's (Sir Miles) Case* (1584), 7 Co. Rep. 5 a.

(*g*) *Ibid.*

(*h*) *Cheeseman* v. *Hardham* (1818), 1 B. & Ald. 706.

(*i*) *Corbet's (Sir Miles) Case, supra.*

(*k*) See p. 459, *ante.*

(*l*) *Cheeseman* v. *Hardham, supra,* where BAYLEY, J., at p. 712, corrects a statement in Com. Dig. tit. Common, E, that if several freeholders who have lands in a field intercommon one of them cannot prescribe to inclose against the others, and said that the true rule was laid down in *Hickman* v. *Thorne* (1676), 2 Mod. Rep. 105, namely, that where several freeholders had right of common in a common field a custom to inclose was good, because the remedy was reciprocal; one might inclose against the other, and that rule was not inconsistent with *Corbet's (Sir Miles) Case, supra.*

(*m*) *Cheeseman* v. *Hardham, supra.*

(*n*) "Cattlegate" is the most common term to express the right; but "beastgate" in Suffolk (*Mellington* v. *Goodtitle* (1737), Andr. 106, also reported

SECT. 4. Commonable Lands.

Cattlegates.

1032. Cattlegates, at any rate in the north of England, where they are most prevalent, are in the nature of copyhold tenements; they are held of the lord of the manor, and, independently of any acts of ownership, the cattlegate owner is not in possession of the soil, but the ownership of the soil remains in the lord of the manor, subject to the right of several pasture upon it by the cattlegate owners (*o*).

The ownership, however, of the soil of land subject to cattlegates, though usually in the lord of the manor (*p*), at any rate in the north of England, is by no means always so (*q*).

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sub nom. Bennington v. *Goodtitle* (1737), 2 Stra. 1084), "cattlegates" or "beastgrasses" (*Rigg* v. *Lonsdale* (*Earl*) (1857), 1 H. & N. 923, Ex. Ch.), "cowgrasses" (*ibid.*), "pasture gates" (*Doe* d. *Haxby* v. *Preston* (1847), 5 Dow. & L. 7), are practically synonymous terms. They are not strictly rights of common, as the cattlegate owners are almost invariably entitled to the exclusive right to the pasturage, but it is convenient to deal with them here. See further, as to a sole or several pasture, p. 461, *ante*.

(*o*) *Rigg* v. *Lonsdale* (*Earl*), *supra*, where it was found by the special case on which the action was decided that the cattlegates were held of the lord of the manor according to the custom of the manor as customary estates of inheritance by payment of fine and customary rents of small amount and by and under dues, duties, suits, and services of right accustomed; they also passed by customary deeds followed by admittance at the next lord's court, or out of court by the steward of the manor, and a fine was payable on admittance, the lord being entitled to seize *quousque* for non-payment of fines; and each cattlegate conferred on the owner the right of depasturing on a tract of inclosed pasture land called Bretherdale Bank one head of cattle from the 26th May till the 24th April and of depasturing as many sheep as the cattlegate owner had from the 10th October till the 24th April.

(*p*) *Ibid.*, *per* COLERIDGE, J., at p. 936, referring to the statements in Co. Litt. 58 b that underwoods without the soil and also the herbage and vesture of land may be granted by copy of court roll, and in Co. Litt. 4 b that the grant of *vesturam terræ* or *herbagium terræ* does not pass the land or soil itself, as conclusively establishing this point; and the language of the conveyance on which the admittance was made, "all those four cattlegates or beastgrasses in, upon, or over the close of pasture land called Bretherdale Bank," was held also to show exclusion of the soil, certain acts of ownership relied upon by both sides being held to be quite consistent with the supposition that the owner of the cattlegates had only a right to the feeding of his beasts upon the land in question, with no right to the soil itself, and that the lord of the manor was in possession of the soil, and so had a right to maintain trespass against the cattlegate owner for sporting thereon.

(*q*) In *R.* v. *Whixley* (*Inhabitants*) (1786), 1 Term Rep. 137, it was held that the occupation of cattlegates passing by lease and release (the necessary assurance for a corporeal hereditament), which must have comprised an interest in the soil, constituted a tenement within the meaning of the Poor Relief Act, 1662 (13 & 14 Car. 2, c. 12), for the purpose of enabling a pauper to gain a settlement. Lord MANSFIELD, C.J., and BULLER, J., appear to have adopted the arguments of counsel who thus described them: "These cattlegates are not like commons: they are conveyed by lease and release. The owners of them are tenants in common; they have a joint possession and a several inheritance; they are as much demisable as any several tenement whatsoever. There is a material difference between cattlegates and rights of common. Lord COKE enumerates four sorts of common, but a cattlegate does not come within the description of either of them. The owner of a cattlegate has it not in respect of any custom, but as having a joint interest in the soil which a person having a right of common has not." See too *Barnes* v. *Peterson* (1736), 2 Stra. 1063; *Bennington* v. *Goodtitle*, *supra*, more fully reported *sub nom. Mellington* v. *Goodtitle*, Andr. 106, which decided that ejectment would lie for land and a beastgate, whether the term "beastgate"

The existence of cattlegates as incorporeal and corporeal hereditaments has been recognised by the Legislature (*r*).

But, whatever their nature, cattlegates appear to have been always for a number of beasts certain, with equivalents according to the nature of the stock used (*s*), to be capable of separate demise or alienation and to be capable of being held as ordinary freeholds or of a manor as freehold, customary freehold, or copyhold tenements (*t*).

Sheep heaves.

1033. Of a somewhat similar character to cattlegates are the sheep heaves of the north of England, which are small plots of pasture, often in the middle of a waste, the soil of which may or may not be in the lord, but the pasture of which is private property and is leased and sold as such (*a*).

They are generally in the hands of a single individual, and therefore are not rights of common, though described as such in ordinary parlance, and probably owe their origin to grants made in early times to persons who performed duties of watch and ward necessitated by the state of continual border warfare. Now that the duties have ceased, the rights come down evidenced only by their immemorial enjoyment, and are held, and well held, by prescription (*b*).

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was taken to mean a certain quantity of land by a term well understood in the county (Suffolk) where the action was brought, or a right of common appurtenant to the land previously mentioned in the declaration. The earlier case of *Metcalf* v. *Roe* (1735), Lee *temp.* Hard. 167, which was referred to, was decided on similar lines.

(*r*) In the Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 11, by the enumeration among the lands subject to be inclosed under that Act of "all gated and stinted pastures in which the property of the soil or of some part thereof is in the owners of the cattlegates or other gates or stints or any of them, and also all gated and stinted pastures in which no part of the property of the soil is in the owners of the cattlegates or other gates or stints or any of them." In the former case the ownership of the mines and minerals and the right of sporting over the pasture would belong exclusively to the owners of the cattlegates, who would be owners as tenants in common of the pasture in undivided shares corresponding with the number of cattlegates they respectively held; in the latter the mining and sporting rights would belong to the lord of the manor or other owner of the soil. As Elton, however, points out (Commons, pp. 27, 28), the Act was passed in the interests of agriculture, and was intended to apply to rights of every description, whether strictly rights of common or not, which could impede the free cultivation of the soil.

(*s*) These vary in different places, and, so far as the writer is aware, a complete list is not given in any of the cases. In Epping Forest one mare or gelding or two cows were allowed (*Commissioners of Sewers* v. *Glasse* (1874), L. R. 19 Eq. 134). Experience in inclosure cases shows that a horse is usually equivalent to two cows, and a cow to five sheep, foals and calves being allowed to run with their mothers till weaned.

(*t*) See *Rigg* v. *Lonsdale* (*Earl*) (1857), 1 H. & N. 923, Ex. Ch.; *Pochin* v. *Duncombe* (1857), 1 H. & N. 842; *R.* v. *Whixley* (*Inhabitants*) (1786), 1 Term Rep. 137; *Welcome* v. *Upton* (1840), 6 M. & W. 536; and other cases cited *supra*. There would seem to be no reason why they should not be conveyed in individual shares or otherwise, and it is believed that they have been so dealt with.

(*a*) Cooke, Inclosure Acts, p. 44.

(*b*) *Ibid.*, p. 45. Although not mentioned, so far as the writer is aware, in any of the law books, the word *heaf* is also commonly used in the north of England to denote a particular part of a common or moor which has been chosen by a commoner for the pasturage of his flock, and which is well known

SECT. 4. Commonable Lands.

Regulated pastures under Inclosure Act, 1845.

1034. There is also another form of stinted pasture of modern creation to which allusion should be made. Under the Inclosure Act, 1845 (*c*), after the confirmation of a provisional order for inclosure, the whole or part of the land may be converted into a regulated pasture, of which the soil (subject to any reservations of mines, minerals etc., to the lord of the manor) is to belong to the owners of the stints as tenants in common in the proportions in which they are rated for the expenses of management; and those expenses are in a ratio corresponding with the extent to which the owners were entitled to the original rights of common which were extinguished by the inclosure.

No inclosure of such lands can take place, as, in consequence of the recent creation of the rights over them, no custom to inclose can be alleged; but there seems no reason to doubt that the stinted rights may be demised or transferred in the same way as other rights of common which are certain and defined.

Part IV.—Creation and Proof of Rights of Common.

SECT. 1.—*In General.*

Time and mode of creation.

1035. A right of common appendant cannot be created at the present day, as common appendant must have existed time out of mind (*d*), *i.e.*, before the time of legal memory; but it is otherwise with common appurtenant (*e*).

Every right of common is created either by some authority equivalent to an Act of Parliament, evidenced in modern times by a custom, or by a grant, which may be evidenced either by a prescription or by the deed itself (*f*).

by both dogs and sheep. After long user claims have been sometimes made to an exclusive right of pasturage over this portion, but it has always been held in inclosure proceedings that the system has only been adopted as a convenient mode of exercising the right over the whole common by the different commoners. The same practice prevails in many parts of Wales under the term *arosfa*, and the belief in the exclusive right led to the action of *Richards* v. *De Winton*, [1901] 2 Ch. 566. The same practice prevailed on Coulsdon Common, in Surrey (*Hall* v. *Byron* (1877), 4 Ch. D. 667).

(*c*) 8 & 9 Vict. c. 118, ss. 113—120; see pp. 568 *et seq.*, 601 *et seq.*, *post*. The creation of these regulated pastures has been practically superseded by regulation under the Commons Act, 1876 (39 & 40 Vict. c. 56).

(*d*) Vin. Abr. tit. Common, C 1; Com. Dig. tit. Common, B.

(*e*) Y. B. 26 Hen. 8, Trin., p. 4, c. 15, *per* FITZHERBERT, J.: "One can create common appurtenant at this day, and one can alienate it and sever it from the land to which it is appurtenant, but this he cannot do with common appendant."

(*f*) Cooke, Inclosure Acts, p. 53, and note. Every custom supposes an Act of Parliament or a law made in former times by an equivalent power, but a prescription supposes only a grant (*Harland* v. *Cocke* (1673), Freem. (K. B.) 317, 319). An Act, however, will not be presumed in favour of an unreasonable

SECT. 2.—*By Deed or Statute.*

SECT. 2. By Deed or Statute.

1036. A right of common, being an incorporeal hereditament, must be granted by deed (*g*).

Creation by grant.

A right of common and any other *profit à prendre* may of course be created by statute, and instances of such creations are to be found in Inclosure Acts where a new right has been granted to a lord of a manor in lieu of his interest in the soil or otherwise. These cases, however, are more usually found under the head of sporting rights than rights of common in the ordinary sense (*h*).

Creation by statute.

SECT. 3.—*Prescription and Custom.*

SUB-SECT. 1.—*In General.*

1037. Rights of common, like other *profits à prendre* and easements, depend largely for their establishment upon prescription and custom (*i*).

General principles applicable.

The main distinction between the two is that prescription is personal (*k*) and is laid in a man and his ancestors, in a man and all those whose estate he hath, in a particular manor or tenement as to that manor or tenement belonging or appertaining (generally referred to in the books and cases as a prescription in a *que* estate), or in the corporation of a town and their predecessors etc., while custom is local (*l*) and is laid as existing within a manor, vill, parish or other definite locality.

custom, and a prescription cannot exist in that which cannot be granted (*Weekly* v. *Wildman* (1698), 1 Ld. Raym. 405).

(*g*) There are many early authorities, but the judgment of ALDERSON, B., in *Wood* v. *Leadbitter* (1845), 13 M. & W. 838, at pp. 842, 843, well expresses the law: "That no incorporeal inheritance affecting land can either be created or transferred otherwise than by deed is a proposition so well established by law that it would be mere pedantry to cite authorities in its support. All such inheritances are said emphatically to lie in grant, and not in livery, and to pass by mere delivering of the deed. . . . There is no doubt but that the principle does not depend on the quality of interest granted or transferred, but on the nature of the subject-matter. A right of common, for instance, which is a *profit à prendre*, or a right of way which is an easement or right in nature of an easement, can no more be granted for life or for years without a deed than in fee simple."

(*h*) See pp. 576—578, *post*, and the cases there cited.

(*i*) For a full discussion of the rights depending upon prescription and custom, see titles CUSTOMS AND USAGES; EASEMENTS AND PROFITS À PRENDRE.

(*k*) See Co. Litt. 113 b: "In the common law a prescription which is personal is for the most part applied to persons, being made in the name of a certain person and his ancestors or those whose estate he hath, or in bodies politic or corporate and their predecessors, for as a natural body is said to have ancestors, so a body politic or corporate is said to have predecessors."

(*l*) *Ibid.*: "And a custom which is local is alleged in no person, but laid within some manor or other place. . . . A custom is in this manner: a copyholder of the manor of D. doth plead that within the same manor there is and hath been a custom time out of mind of man used that all the copyholders of the said manor have had and used to have common of pasture etc. in such a waste of the lord, parcel of the said manor etc. where the person neither doth nor can prescribe but allegeth the custom within the manor. But both to customs and prescriptions these two things are incidents inseparable, viz., possession or usage and time. Possession must have three qualities: it must be long, continual, and peaceable."

SECT. 3. **Prescription and Custom.**

SUB-SECT. 2.—*Rights depending upon Prescription.*

Presumption of grant.

1038. A prescription by immemorial usage can in general only be for things which can be created by grant, for the law allows prescriptions only to supply the loss of a grant. Therefore for such things as can have no lawful beginning nor be created at this day by any manner of grant, or reservation, or deed that can be supposed, a prescription is not good (*m*).

As prescription at common law presupposes a grant to have previously existed, it must not only be for things which can be created by grant, but must be claimed by persons who are capable of taking by grant. Thus inhabitants and other fluctuating bodies cannot prescribe (*n*), nor can occupiers or tenants (*o*).

1039. Every prescription has two inseparable incidents, namely, (1) possession or usage and (2) time (*p*).

Time.

The time is that of legal memory, supposed to be from the commencement of the reign of Richard I.; but in point of fact the continuance of a usage for many years in modern times is taken as *primâ facie* proof of its continued existence from time immemorial (*q*). The actual number of years in claims by prescription at common law as distinguished from claims under the Prescription Act, 1832, is not fixed.

Evidence carrying back the enjoyment of the right so far as living witnesses can testify, which may be taken as from forty to fifty years, is, unless rebutted by other circumstances, presumptive evidence that the right has existed from time immemorial and a sufficient foundation for establishing a prescriptive right. A regular usage even for twenty years unexplained and uncontradicted

(*m*) 3 Cru. Dig. tit. xxxi., chap. 1, s. 1, 11; see *Addington* v. *Clode* (1775), 2 Wm. Bl. 989, where the production of ancient but undated grants in support of a prescriptive claim to a right of common was held not necessarily inconsistent with the prescriptive claim, as the grants might have been either before the time of legal memory, or have confirmed a previously existing right.

(*n*) *Gateward's Case* (1607), 6 Co. Rep. 59 b; *Rivers* (*Lord*) v. *Adams* (1878), 3 Ex. D. 361; unless incorporation can be presumed (*ibid.*); see p. 476, *ante*.

(*o*) See p. 520, *post*; *Tilbury* v. *Silva* (1890), 45 Ch. D. 98, C. A.

(*p*) Co. Litt. 113 b. See note (*l*), p. 483, *ante*; and as to claims under the Prescription Act, 1832 (2 & 3 Will. 4, c. 71), see p. 488, *post*. "Every species of prescription by which property is acquired or lost is founded on this presumption, that he who has a quiet and uninterrupted possession of anything for a certain number of years is supposed to have a just right, without which he would not have been suffered to continue in the enjoyment of it, for a long possession may be considered as a better title than can commonly be produced, as it supposes an acquiescence in all other claimants, and that acquiescence also supposes some reason for which the claim was foreborne" (1 Domat, Loix Civiles (Translation), Vol. I., at p. 461, quoted in Carson's Real Property Statutes, p. 26).

(*q*) *Bailey* v. *Appleyard* (1838), 8 Ad. & El. 161, *per* LITTLEDALE, J., at p. 166: "If the claim had been made by virtue of immemorial user, or of a non-existing grant, as was done before the statute (*i.e.*, the Prescription Act, 1832 (2 & 3 Will. 4, c. 71), twenty-eight years' enjoyment would have been some evidence." But the claim in that case, being clearly under the Prescription (2 & 3 Will. 4, c. 71), which required thirty years' user.

has been held sufficient to warrant a jury in finding that a custom has existed from time immemorial (*r*).

But as such evidence is only presumptive, and an element to be taken into consideration by a jury in finding a verdict, it may be rebutted by evidence showing either that the usage has actually commenced or that it must necessarily have commenced within the time of legal memory (*s*).

Rebuttal of presumption.

1040. Prescription in a man and his ancestors or in a corporation and their predecessors is rarely, if ever, found in connection with rights of common (*t*), and nearly all the cases relating to prescription for rights of common are for prescription in a *que* estate (*u*), under which nothing is claimable but such things as are incident, appendant, or appurtenant to land (*w*).

Prescription in *que* estate usual.

A right claimed by prescription in a *que* estate must, therefore, have some connection with the land in respect of which it is claimed (*a*).

1041. A prescription must also be certain and reasonable (*b*).

Certain and reasonable.

1042. The user necessary to establish a prescription, as to establish a custom, must be continuous, and neither by violence, nor by stealth, nor by leave asked from time to time (*c*), requirements which have been frequently made use of to express the requirement "as of right" in cases of claims under the Prescription Act, 1832 (*d*). If one of these requirements is unsatisfied, the prescription will fail. Modern intermissions, however, in the exercise of the enjoyment shown to have existed for a long time, will not invalidate

Mode of user requisite.

(*r*) *R.* v. *Joliffe* (1823), 2 B. & C. 54; and see also *Bealey* v. *Shaw* (1805), 6 East, 208, *per* Lord ELLENBOROUGH, C.J., at p. 215, as to a similar presumption from twenty years' user of water; *Gann* v. *Whitstable* (*Free Fishers*) (1865), 11 H. L. Cas. 192, *per* Lord WENSLEYDALE, at p. 210. But in claims to *profits à prendre* it will not be safe to rely on a less period than thirty years, which is the time fixed by the Prescription Act, 1832 (2 & 3 Will. 4, c. 71).

(*s*) See *Addington* v. *Clode* (1775), 2 Wm. Bl. 989; and compare *R.* v. *Ashby Folville* (*Inhabitants*) (1866), L. R. 1 Q. B. 213; *Bryant* v. *Foot* (1868), L. R. 3 Q. B. 497, Ex. Ch.; *Mill* v. *New Forest Commissioner* (1856), 18 C. B. 60 (a case under the Prescription Act, 1832 (2 & 3 Will. 4, c. 71)).

(*t*) *Welcome* v. *Upton* (1840), 6 M. & W. 536, one of the few cases on the subject, was a case of a sole and several pasturage and herbage, which is not a right of common; see p. 460, *ante*. *Shuttleworth* v. *Le Fleming* (1865), 19 C. B. (N. S.) 687, was a claim to a free fishery in a man and his ancestors, while in *Johnson* v. *Barnes* (1873), L. R. 8 C. P. 527, Ex. Ch., a right in the corporation of Colchester, though treated by them as a right of common, was found to be also an exclusive right of pasturage; see p. 462, *ante*.

(*u*) See p. 483, *ante*.

(*w*) 2 Bl. Com. 265.

(*a*) *Ibid.*; *Cowlam* v. *Slack* (1812), 15 East, 108; *Baring* v. *Abingdon*, [1892] 2 Ch. 374, C. A. See, for instance, *Chilton* v. *London Corporation* (1878), 7 Ch. D. 562 (pannage); *De la Warr* (*Earl*) v. *Miles* (1881), 17 Ch. D. 535, C. A. (right to take bracken); *Clayton* v. *Corby* (1843), 5 Q. B. 415 (right to take sand, stone, and gravel); and compare *Chesterfield* (*Lord*) v. *Harris*, [1908] 2 Ch. 399, *per* COZENS-HARDY, M.R., at p. 410.

(*b*) Co. Litt. 122 a; *Clayton* v. *Corby*, *supra*; *Hayward* v. *Cunnington* (1666), 1 Lev. 231; and see note (*l*), p. 470, *ante*.

(*c*) *Mills* v. *Colchester Corporation* (1867), L. R. 2 C. P. 476, *per* WILLES, J., at p. 486, translating "*Longus usus, nec per vim, nec clam, nec precario* etc." (Co. Litt. 114 a).

(*d*) See note (*k*), p. 489.

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the proof, if the court or jury are satisfied that the right was exercised as often as the claimant had occasion for it (*e*).

Lost grant.

1043. To meet the difficulty that sometimes occurred in establishing a claim from immemorial user where the origin of the right could be shown since the time of legal memory, as where there was unity of possession of the land in respect of which the right was claimed and the land over which the enjoyment was had, an alternative claim was invented, namely, the loss of the grant which had been originally made; and this doctrine of lost grant (*f*) has been successfully invoked not only in aid of claims which were liable to be defeated as claims by prescription at common law, but also of claims under the Prescription Act, 1832 (*g*).

When lost grant not presumed.

1044. A lost grant will not be presumed where such a grant would have been in contravention of a statute (*h*), unless it be merely a private Act the provisions of which may be subsequently waived (*i*). Nor will any user, however long, establish a right which is unlawful in itself, whether the claim be by custom, prescription, or lost grant (*k*).

A grant cannot be presumed either where the owner of the land

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(*e*) *Musgrave* v. *Inclosure Commissioners for England and Wales* (1874), L. R. 9 Q. B. 162, where a right was established in respect of a particular farm, though for several periods the tenant had turned out no sheep upon the waste, when he had no fell flock. As to proof of continuous user under the Prescription Act, 1832 (2 & 3 Will. 4, c. 71), see also *De la Warr (Earl)* v. *Miles* (1881), 17 Ch. D. 535, C. A., *per* JAMES, L.J., at p. 600: "I think also it requires some further consideration before we entirely adopt what was said in one of the cases" (presumably *Lowe* v. *Carpenter* (1851), 6 Exch. 825, 831, 832), "that to establish under the statute a claim to a *profit à prendre* it must be shown to have been exercised in every one of the years. If from any accident, or if merely for the convenience of the man himself, the right was in some years not exercised, I think it deserves consideration whether such a pretermission as that would defeat the right if the user was shown to have begun more than sixty years ago, and to have continued whenever it was wanted during the whole sixty years." See also *Carr* v. *Foster* (1842), 3 Q. B. 581. Apparently proof of continuous user must be more strict in a claim under the Prescription Act, 1832 (2 & 3 Will. 4, c. 71), than in one by prescription at common law; see *Lowe* v. *Carpenter*, *supra*, where the court held that the claim under the Prescription Act, 1832, failed, as the defendant failed to prove any act of user for fourteen months before the action, but suggested that the defendant might claim a right by prescription or a non-existing grant. On this point see further p. 489, *post*.

(*f*) For the growth of the doctrine see *Angus* v. *Dalton* (1877), 3 Q. B. D. 85, *per* COCKBURN, C.J., at p. 105; and for the leading case establishing rights of common *Cowlam* v. *Slack* (1812), 15 East, 108.

(*g*) 2 & 3 Will. 4, c. 71.

(*h*) *Neaverson* v. *Peterborough Rural District Council*, [1902] 1 Ch. 557, C. A. where a lost grant was attempted to be set up in justification of a practice, which had existed for more than fifty years, of letting the pasturage of roads in a fen district for horses and cattle contrary to the provisions of an award made in conformity with an Inclosure Act under which sheep only were to be depastured on the roads; *Mill* v. *New Forest Commissioner* (1856), 18 C. B. 60, where a right of common had been exercised for more than thirty years over the waste lands of the New Forest, and it was shown that the Crown was incapacitated by statute from making any such grant.

(*i*) See *Great Eastern Rail. Co.* v. *Goldsmith* (1884), 9 App. Cas. 927.

(*k*) See *A.-G.* v. *Mathias* (1858), 4 K. & J. 579, *per* BYLES, J., at p. 590, where the reasons against a claim under each of these three grounds are fully stated with earlier authorities; and compare *Chesterfield (Lord)* v. *Harris*, [1908] 2 Ch. 399, C. A.

is incapable of resisting the user upon which the presumption of a lost grant is to be founded (*l*), or where he is ignorant of the user of his land (*m*); but such cases can hardly occur in the user of rights of common, and are mentioned merely with the view of illustrating one of the fundamental principles which lie at the root of prescription and of the fiction of a lost grant, namely, consent or acquiescence on the part of the owner of the servient tenement, the acquisition of a right being precluded where the user has been either by violence, or by stealth, or by leave asked from time to time (*n*).

A grant will not be presumed when some other origin can be offered as an explanation of the user (*o*).

User under mistaken idea of right.

1045. On the question whether user under a mistaken idea of right can be supported by the presumption of a lost grant there has been difference of opinion; but where the user has been open, continuous, and uninterrupted, the fact that both parties were under a mistake as to the nature of the user is probably not a ground for refusing the presumption of a lost grant (*p*).

Pleading lost grant.

1046. It was formerly, but is not now, necessary to state the date and parties in pleading a lost grant, but sufficient particulars must be stated to give fair notice of the issues intended to be raised (*q*).

(*l*) In the same way that a user under such circumstances cannot be taken into account in calculating the periods necessary to establish a claim under the Prescription Act, 1832 (2 & 3 Will. 4, c. 71); see *Winship* v. *Hudspeth* (1854), 10 Exch. 5, where a right of way over a yard had been enjoyed for twenty years, during the first seven of which the house to which it belonged had been let to tenants; and compare *Sturges* v. *Bridgeman* (1879), 11 Ch. D. 852, C. A.

(*m*) See *Union Lighterage Co.* v. *London Graving Dock Co.*, [1901] 2 Ch. 300.

(*n*) *Sturges* v. *Bridgeman*, *supra*, *per* THESIGER, L.J., at p. 863, quoted in *Union Lighterage Co.* v. *London Graving Dock Co.*, *supra*, *per* COZENS-HARDY, J., at p. 306; *Dalton* v. *Angus* (1881), 6 App. Cas. 740, *per* FRY, J., at p. 772. As to contentious user being insufficient, see *Eaton* v. *Swansea Waterworks Co.* (1851), 17 Q. B. 267; and p. 490, *post*.

(*o*) See *A.-G.* v. *Simpson*, [1901] 2 Ch. 671, *per* FARWELL, J., at p. 698; *A.-G.* v. *Antrobus*, [1905] 2 Ch. 188; and compare *A.-G.* v. *Horner* (1885), 14 Q. B. D. 245, C. A.

(*p*) *De la Warr* (*Earl*) v. *Miles* (1881), 17 Ch. D. 535, C. A., where a prescriptive right of cutting litter was established, although all parties wrongly believed that the right was established by a previous decree; *Campbell* v. *Wilson* (1803), 3 East, 294, where, there being an inclosure under which in 1778 all rights of way except those set out in the award were extinguished, a certain right of way was set out to an allotment; but the owner, instead of using it, used another over the plaintiff's land, and it was argued that the way had been used by mistake for that set out in the award, but it was held that a grant made since the inclosure and lost might be presumed, though it would have been otherwise if it had been shown that the user was in fact under the award. On the other hand, see *Rivers* (*Lord*) v. *Adams* (1878), 3 Ex. D. 361, where KELLY, C.B., said that, if user is referred to any other right than the one in respect of which it was actually exercised, great injustice may be done; for a lord might allow the inhabitants of cottages to exercise a right as inhabitants, knowing that it was a right which could not be established in law, and which there was no necessity to interrupt; and he might afterwards be bound by his own inaction because another right might be acquired.

(*q*) *Palmer* v. *Guadagni*, [1906] 2 Ch. 494. The other side might be able to

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It is open to question whether direct evidence can be given to rebut the presumption of a lost grant (*a*).

Prescription Act, 1832.

1047. The doctrine of a lost grant is also frequently pleaded in aid of and as an alternative to claims of rights of common under the Prescription Act, 1832 (*b*). The latter as a rule are difficult to establish, partly in consequence of the length of time for which user must be proved in order to establish the right in cases where manors form parts of settled estates, and there has been a succession of tenants for life, against whom sixty years' user must be shown, and partly in consequence of the diminished value of rights of pasturage on an open common and the consequent difficulty of proving continuous user.

The general features of a claim by prescription at common law, by the doctrine of a lost grant, and by virtue of the Prescription Act, 1832, are much the same, and what has been written in the preceding pages will for the most part apply to claims under that Act (*c*).

Provisions of the Act as to rights of common.

1048. So far as relates to rights of common and other *profits à prendre*, the Prescription Act, 1832, provides (*d*) that no claim which may be lawfully made at common law by custom, prescription, or grant, to any right of common (*e*) or other profit or benefit to be taken and enjoyed from any land (*f*), where such right, profit, or benefit has been actually taken and enjoyed by any person claiming right thereto without interruption for the full period of thirty years, is to be defeated or destroyed by showing only that such right, profit or benefit was first taken or enjoyed at any time prior to such period of thirty years, but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated; and when such right, profit, or benefit has been so taken and enjoyed as aforesaid for the full period of sixty years, the right

v, if the lost grant was subsequent to the Act, that there was no one who was capable of making the grant, as in *Neaverson* v. *Peterborough Rural District Council*, [1902] 1 Ch. 557, C. A.

(*a*) See the different opinions of the judges on this point in *Dalton* v. *Angus* (1881), 6 App. Cas. 740.

(*b*) 2 & 3 Will. 4, c. 71.

(*c*) The Prescription Act, 1832 (2 & 3 Will. 4, c. 71), did not supersede the old form of prescription, but gave a new one, and it was formerly held that if the new plea was used, and it was desired to allege enjoyment "as of right," the very words of the Act must be used, and the terms of the Act adhered to in all respects (*Holford* v. *Hankinson* (1844), 5 Q. B. 584); but under the modern form of pleading and powers of amendment the same strictness is not now required. As to pleading in cases of prescription, see title EASEMENTS AND PROFITS À PRENDRE.

(*d*) 2 & 3 Will. 4, c. 71, s. 1.

(*e*) Rights of common in gross do not come within the Prescription Act, 1832 (2 & 3 Will. 4, c. 71), as, although the words "rights of common or other profit or benefit to be taken and enjoyed from or upon any land" in *ibid.*, s. 1, would be wide enough to include them, the rule as to pleading laid down in s. 5 precludes that view (*Shuttleworth* v. *Le Fleming* (1865), 19 C. B. (N. S.) 687). The question was raised in argument in *Mercer* v. *Denne*, [1904] 2 Ch. 534, affirmed, [1905] 2 Ch. 538, C. A., but no decision was given on it.

(*f*) As the section expressly mentions land of "our sovereign lord the King," the Crown is bound by it.

thereto is to be deemed absolute and indefeasible, unless it appears that the same was taken and enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing.

Each of these two periods of thirty years and sixty years is to be deemed to be the period next before some suit or action wherein the claim or matter to which such period may relate has been or is brought into question (*g*); and no act or other matter is to be deemed to be an interruption within the meaning of the statute unless the same has been submitted to or acquiesced in for one year after the party interrupted has had or has notice thereof, and of the person making or authorising the same to be made (*h*).

Consequently, in claims under the Prescription Act, 1832, to rights of common a continuous enjoyment as of right and without interruption for either thirty or sixty years must be shown to have been exercised by the occupiers of the tenement in respect of which the right is claimed, and where enjoyment for the latter period can be shown the right is absolute and indefeasible unless enjoyed by some consent or agreement evidenced by deed or writing. Parol consent or agreement is insufficient to bar the right (*i*).

Enjoyment as of right.

1049. Enjoyment as of right means an enjoyment had, not secretly or by stealth, or by tacit sufferance, or by permission asked from time to time, on each occasion or even on many occasions of using it, but an enjoyment had openly, notoriously, without particular leave at the time, by a person claiming to use, without danger of being treated as a trespasser, as a matter of right, whether strictly legal by prescription and adverse user or by deed conferring the right, or, though not strictly legal, yet lawful to the extent of excusing a trespass, as by a consent or agreement in writing not under seal in case of a plea for sixty years or by such writing or parol consent or agreement, contract, or licence in case of a plea for thirty years (*k*).

Proof of user during whole of period.

1050. Proof of the user must be shown substantially during the whole period next before some suit or action in which the claim shall be brought in question (*l*), and particularly in the first and last years of the period over which the user extends (*m*), and in this

(*g*) *I.e.*, any action raising the question, not necessarily the pending action (*Cooper* v. *Hubbuck* (1862), 12 C. B. (N. S.) 456).

(*h*) Prescription Act, 1832 (2 & 3 Will. 4, c. 71), s. 4. As to pleading in cases of prescription, see title EASEMENTS AND PROFITS À PRENDRE.

(*i*) *Gardner* v. *Hodgson's Kingston Breweries Co.*, [1903] A. C. 229.

(*k*) See *Tickle* v. *Brown* (1836), 4 Ad. & El. 369; *Bennison* v. *Cartwright* (1864), 5 B. & S. 1, 18; *De la Warr* (*Earl*) v. *Miles* (1881), 17 Ch. D. 535, C. A. As to "tacit sufferance," see *Gardner* v. *Hodgson's Brewery Co.*, [1901] 2 Ch. 198, C. A., *per* ROMER, L.J., at p. 217.

(*l*) *Richards* v. *Fry* (1838), 7 Ad. & El. 698. Compare *Cooper* v. *Hubbuck* (1862), 12 C. B. (N. S.) 456; and note (*e*), p. 486, *ante*.

(*m*) *Bailey* v. *Appleyard* (1838), 8 Ad. & El. 161; *Carr* v. *Foster* (1842), 3 Q. B. 581; *Lowe* v. *Carpenter* (1851), 6 Exch. 825; *Parker* v. *Mitchell* (1840), 11 Ad. & El. 788; *De la Warr* (*Earl*) v. *Miles*, *supra*. But on the question of a temporary non-user for a year, at the beginning or the end or in the middle of the statutory period, see *Hollins* v. *Verney* (1884), 13 Q. B. D. 304, 314, 315, C. A., where the court considered that, though the total absence of user for any year of the statutory period would be fatal unless explained in

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respect the proof differs from that required in case of a lost grant (*n*). No presumption will be drawn from evidence as to user during part of the period (*o*); but the user need not necessarily be shown to have been exercised over the whole of the common (*p*).

Interruption.

1051. Interruption of the enjoyment must be acquiesced in for a year to constitute a break in the enjoyment (*q*), but interruptions acquiesced in for less than a year may be of great weight as evidence on the question whether there ever was a commencement of an enjoyment as of right, and are explanatory of what the user really was (*r*).

SUB-SECT. 3.—*Rights depending upon Custom.*

Applicable to copyholders.

1052. A right of common cannot, as stated above, be claimed by custom (*s*) except in the case of copyholders of a manor (*a*); and for this rule two reasons have been assigned, one that the right cannot be released (*b*) and the other that the subject of a *profit à prendre* would be liable to be entirely destroyed if it were vested in an indefinite number of people (*c*). But copyholders are allowed to claim by custom, as they cannot claim by prescription by reason of the weakness of their estate (*d*).

Requirements of custom.

1053. Custom is local law as distinguished from the general common law, and is the local common law of the particular locality, district, or manor in which it exists (*e*). The requirements of a custom are that it shall be certain, reasonable and continuous, or rather that the evidence of user adduced in support of an alleged

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such a way as to warrant the inference of continued actual enjoyment notwithstanding such temporary non-user, a cessation of user which did not exclude the inference of actual enjoyment as of right for the full statutory period would not necessarily be fatal even although it occurred at the beginning or the end of the period. The question to be considered is whether non-user is to be attributed to an intermission or to an interruption of the enjoyment.

(*n*) See *Gardner* v. *Hodgson's Brewery Co.*, [1900] 1 Ch. 599; and pp. 486, 487, *ante*.

(*o*) *Bailey* v. *Appleyard* (1838), 8 Ad. & El. 161.

(*p*) *Peardon* v. *Underhill* (1850), 16 Q. B. 120.

(*q*) Prescription Act, 1832 (2 & 3 Will. 4, c. 71), s. 4.

(*r*) *Eaton* v. *Swansea Waterworks* (1851), 17 Q. B. 267, *per* Lord CAMPBELL, C.J., at p. 274.

(*s*) See generally, as to custom, title CUSTOM AND USAGE.

(*a*) *Gateward's Case* (1607), 6 Co. Rep. 59 b; *Lloyd* v. *Jones* (1848), 6 C. B. 81; Co. Litt. 113 b. Any person who had an estate less than a fee simple was obliged to prescribe in the name of the owner of the fee (2 Bl. Com. 264, 265; and see *Davies* v. *Williams* (1851), 16 Q. B. 546, 559; *Hoskins* v. *Robins* (1671), 2 Wms. Saund. 324; *Mellor* v. *Spateman* (1669), 1 Wms. Saund. 343). This might be done in the case of tenants for life or for years or at will; but if a copyholder were to prescribe in the name of the lord of the manor, it would be a prescription by the lord against himself as owner of the soil, and a man cannot prescribe against himself or claim a right of common in his own land. But since the passing of the Prescription Act, 1832 (2 & 3 Will. 4, c. 71), s. 5, enjoyment of the right claimed by the occupiers of the tenement in respect whereof it is claimed as of right for the necessary periods may be alleged.

(*b*) *Mellor* v. *Spateman*, *supra*.

(*c*) *Race* v. *Ward* (1855), 4 E. & B. 702, *per* Lord CAMPBELL, C.J., at p. 712.

(*d*) See p. 451, *ante*.

(*e*) *Hammerton* v. *Honey* (1876), 24 W. R. 603, *per* JESSEL, M.R., at p. 603. See further title CUSTOM AND USAGE.

custom shall satisfy these requirements (*f*). It must also have existed from time immemorial (*g*).

The rule laid down in claims by prescription that the long enjoyment necessary to establish the right must have been as of right, and therefore neither by violence, nor by stealth, nor by leave asked from time to time, applies equally in the case of a claim by custom (*h*).

Proof of custom.

1054. As claims to right of common by custom are necessarily made by copyholders, they will be established by proof that the custom as alleged exists within the manor, and the best evidence is obtainable from the court rolls of the manor (*i*). If, however, the court rolls have been lost or so kept that they do not show what customs exist, evidence of old people will establish the custom, and it is not necessary to show the user in respect of the particular tenement in respect of which the right is claimed, but evidence of reputation and of user by other copyholders will be admissible (*j*).

Part V.—Alienation of Rights of Common.

Common appendant.

1055. Common appendant will pass under a conveyance of the land to which it is appendant, and it is so necessarily incident to the land that it cannot be severed from it. Therefore it cannot be conveyed otherwise than with the land to which it is appendant (*k*).

Common appurtenant.

Common appurtenant, on the other hand, may be granted separately from the land to which it is appurtenant, but only when it is for a fixed number of cattle, the reason for the distinction being that with a fixed number of cattle the burden on the land is not increased and the owner of the waste is not affected by the severance of the right of common from the land. If conveyed separately from the land, it is converted into a common in gross.

Common appurtenant, so long as it continues appurtenant, will, like common appendant, pass by any deed which grants, bargains and sells, leases and releases, licences, or devises the land to which it is appurtenant.

(*f*) *Hammerton* v. *Honey* (1876), 24 W. R. 603, *per* JESSEL, M.R., at p. 603. For an explanation of what constitutes reasonableness, see *Tyson* v. *Smith* (1838), 9 Ad. & El. 406, Ex. Ch., *per* TINDAL, C.J., at p. 421.

(*g*) *Mercer* v. *Denne*, [1905] 2 Ch. 538, 577, 583, C. A.

(*h*) *Mills* v. *Colchester Corporation* (1867), L. R. 2 C. P. 476, 486.

(*i*) In many of the cases "custumals," or customaries of the manor, have been produced, *e.g.*, *Portland* (*Duke*) v. *Hill* (1866), L. R. 2 Eq. 765; in others the customs appear from entries in the court rolls, *e.g.*, *Chesterfield* (*Lord*) v. *Harris*, [1908] 1 Ch. 230; *Coote* v. *Ford* (1900), 83 L. T. 482. Where a custumal exists even though compiled within the time of legal memory, it is conclusive evidence against the existence of any custom not mentioned therein (*Portland* (*Duke*) v. *Hill*, *supra*).

(*j*) *Dunraven* (*Lord*) v. *Llewellyn* (1850), 15 Q. B. 791, *per* PARKE, B., at p. 812, explaining *Weeks* v. *Sparke* (1813), 1 M. & S. 179, and *Prichard* v. *Powell* (1845), 10 Q. B. 589, 603; *Warrick* v. *Queen's College, Oxford* (1871), 6 Ch. App. 732; *Evans* v. *Merthyr Tydfil Urban District Council*, [1899] 1 Ch. 241.

(*k*) *Bennett* v. *Reeve* (1740), Willes, 246. The result is that, however often the land may be subdivided, every little parcel is entitled to common appendant provided that there are cattle levant and couchant upon it (*ibid.*); and see p. 449, *ante*.

PART V. Alienation of Rights of Common.

When deed necessary.

1056. A deed is necessary both for a demise and surrender of a *profit à prendre* that is not appendant or appurtenant to land (*l*). Where a lease of a fishery has been granted by an agreement not under seal, even though the lessee is in possession of the fishery, which is an incorporeal hereditament, the agreement, not being under seal, cannot operate as a demise for years; and the right to sue for trespass remains in the lessor (*m*).

But if there has been an actual enjoyment of an incorporeal hereditament by virtue of a lease which, not being under seal, is invalid, the lessor can recover rent for that enjoyment (*n*).

Part VI.—Acquisition of Commons under Compulsory Powers.

SECT. 1.—*Proceedings prior to Acquisition.*

Provisions prior to acquisition.

1057. The acquisition of commons and waste land by railway companies and other public or semi-public bodies, which in the early days of railroads was largely resorted to on account of the comparatively small value of such land, is now safeguarded by various restrictions to ensure publicity and the attention of Parliament (*o*).

Special machinery for the acquisition of common lands is provided by the Lands Clauses Consolidation Act, 1845 (*p*), but before the procedure under that Act can be brought into operation certain special provisions have to be complied with.

The standing orders of each House of Parliament require that in the November advertisements (*q*) of a Bill the promoters are to state the particulars of any common land which they propose to acquire by means of the Bill, and that a copy of every Bill proposing to take common land shall be deposited with the Board of Agriculture and Fisheries, who are to report upon the Bill to the committee to whom it is referred from the same point of view with reference

(*l*) Co. Litt. 338 a; 1 Wms. Saund. 236 a.

(*m*) *Somerset* (*Duke*) v. *Fogwell* (1826), 5 B. & C. 875. So, too, in an action to recover rent on an agreement for a lease of a house and shooting and fishing, where the lessee had not occupied the house or enjoyed the sporting rights, the alleged lease was held invalid (*Bird* v. *Higginson* (1837), 6 Ad. & El. 824, Ex. Ch.); compare *Bird* v. *Great Eastern Rail. Co.* (1865), 19 C. B. (N. S.) 268.

(*n*) *Jones* v. *Reynolds* (1836), 4 Ad. & El. 805; *Sutton* v. *Temple* (1843), 12 M. & W. 52, where the agreement was to take twenty acres of eddish or eatage in a certain parish; *Holford* v. *Pritchard* (1849), 3 Exch. 793 (a case involving a right of fishing).

(*o*) For precedents of the notices and other forms required in relation to this subject see Encyclopædia of Forms, Vol. VIII., pp. 114—124. As to the law of compulsory purchase generally, see title COMPULSORY PURCHASE AND COMPENSATION; and for the law relating to railways, title RAILWAYS AND CANALS.

(*p*) 8 & 9 Vict. c. 18, ss. 99—107.

(*q*) As to these, see title PARLIAMENT.

to such land, as if an application had been made to them to recommend an inclosure under the Inclosure Acts (*r*). A copy of the Bill is also to be deposited with the Home Office.

1058. Provision is also made for the protection of commons in the case of land acquired for a light railway (*s*).

Provisions in case of light railways.

No land being part of any common, and no easement over or affecting any common, can be acquired for a light railway without the consent of the Board of Agriculture and Fisheries, and the Board are not to give their consent unless satisfied (1) that, regard being had to all the circumstances of the case, such acquisition is necessary; (2) that the exercise of the powers conferred by the order authorising the railway will not cause any greater injury to the common than is necessary; and (3) that all proper steps have been taken in the interest of the commoners and of the public to add other land to the common (where this can be done) in lieu of the land taken, and, where a common is divided, to secure convenient access from one part of the common to the other (*t*).

Provision is made for the consideration of objections to the application or the draft order and for proper opportunities being given to the objectors of being heard in support of the objections (*u*).

Definition of "common."

"Common" includes any land subject to be inclosed under the Inclosure Acts, 1845 to 1882 (*x*), which practically means all land that is not held in severalty (*a*), any metropolitan common within the meaning of the Metropolitan Commons Acts, 1866 to 1878 (*i.e.*, land within the metropolitan police district) (*b*), and any town green or village green (*c*).

Private Bills generally.

The Board in their report to the Committee of the House of Commons upon a private Bill for the acquisition of common land take into account the provisions applicable to land required for a light railway (*d*), and especially the desirability of providing other land in substitution for that taken from the common, or, when that is not practicable, of securing proper access between any severed portions of the common.

It would seem that urban sanitary authorities and district councils have a *locus standi* before the Committee to which

(*r*) *I.e.*, whether the inclosure will be for the benefit of the neighbourhood. See p. 540, *post*.

(*s*) Light Railways Act, 1896 (59 & 60 Vict. c. 48), under which the Light Railway Commissioners have power to authorise the acquisition of land for a light railway by a provisional order which only requires confirmation by the Board of Trade, and does not involve the necessity of bringing the matter before Parliament, as is required in cases of provisional orders for the inclosure or regulation of commons under the Inclosure Acts by the Board of Agriculture and Fisheries, except in cases where a scheme for the management of a common is made by a local authority under the Commons Act, 1899 (62 & 63 Vict. c. 30).

(*t*) Light Railways Act, 1896 (59 & 60 Vict. c. 48), s. 21. As to light railways generally, see title TRAMWAYS AND LIGHT RAILWAYS.

(*u*) *Ibid.*, s. 22.

(*x*) See p. 541, *post*.

(*a*) See note (*b*), p. 542, *post*.

(*b*) See p. 606, *post*.

(*c*) Light Railways Act, 1896 (59 & 60 Vict. c. 48), s. 21 (2).

(*d*) See *supra*.

SECT. 1. Proceedings prior to Acquisition.

any private Bill is referred with reference to commons which are suburban or which lie within their districts respectively (*e*).

SECT. 2.—*Procedure under the Lands Clauses Acts.*

SUB-SECT. 1.—*Acquisition of Rights of Owner of Soil.*

Procedure where compulsory powers obtained.

1059. Assuming that the powers for compulsory purchase of a common or part of a common have been obtained, special provisions come into operation (*f*), and the purchase of the soil and the purchase of the commonable and other rights in or over the common have to be negotiated for separately, unless the commoners happen to be also owners of the soil.

Compensation to owner of soil.

The promoters must first agree upon or settle by arbitration, as in a case of disputed compensation for other lands, the amount of compensation to be paid to the lord of the manor or other person entitled to the right in the soil of the lands in respect of such right, independently of any commonable or other rights to which he may be entitled (*g*). Upon payment or tender to the lord of the manor or such other person entitled as aforesaid of the compensation which has been agreed upon or determined, or on deposit of such compensation in the Bank of England, the lord or other owner of the soil executes a conveyance to the promoters, or in default thereof the promoters may execute a deed poll, either of which deeds will vest the land in them.

Such vesting, however, is subject to the commonable and other rights affecting the land until such rights shall have been extinguished by payment or deposit of the compensation for the same (*h*); and the promoters are not entitled to enter and use the land for their work until such compensation has been ascertained and paid (*i*).

SUB-SECT. 2.—*Acquisition of Commonable and other Rights.*

Compensation for commonable rights.

1060. The compensation to be paid for the commonable and other rights in or over common lands, and also the compensation for the soil where the right in the soil belongs to the commoners, is then to be determined, if possible, by agreement between the promoters and a committee of commoners appointed for the purpose (*k*). For the purpose of appointing this committee a meeting of the parties entitled to commonable or other rights must be convened by the promoters at some convenient place in the neighbourhood of the common (*l*).

(*e*) Commons Act, 1876 (39 & 40 Vict. c. 56), s. 8; Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 26. See too pp. 597 *et seq.*, *post*.

(*f*) See Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), ss. 99—107.

(*g*) *Ibid.*, s. 99. For the procedure for determining compensation see ss. 16—68 of the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), and title COMPULSORY PURCHASE AND COMPENSATION.

(*h*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 100.

(*i*) *Stoneham* v. *London, Brighton, and South Coast Rail. Co.* (1871), L. R. 7 Q. B. 1.

(*k*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 101.

(*l*) *Ibid.*, s. 102. The meeting is to be called by public advertisement inserted once at least in two consecutive weeks in some local newspaper,

SECT. 2. Procedure under the Lands Clauses Acts.

The meeting appoints a committee, not exceeding five in number, of the parties entitled to commonable or other rights, and at such meeting the decision of the majority of the persons entitled to commonable rights present binds the minority and all absent parties (*m*).

The committee are empowered to enter into an agreement with the promoters, which binds all the commoners, for the compensation to be paid for the extinction of all commonable and other rights and all matters relating thereto, and may receive the compensation; and the receipt of the committee or of any three of them is an effectual discharge, and the promoters are not bound to see to the apportionment or to the application of the compensation, and are not liable for misapplication or non-application thereof (*n*).

Agreement as to compensation.

If, however, the committee and promoters fail to agree, the amount of compensation is to be determined as in other cases of disputed compensation (*o*). If upon being duly convened by the promoters no effectual meeting takes place, or if the meeting fails to appoint a committee, the compensation is to be determined by a surveyor appointed by two justices, as when parties cannot be found (*p*).

The above provisions are, however, not imperative so as to preclude specific performance of an agreement which does not strictly comply with them (*q*).

1061. Upon payment or tender to the committee, or, if no committee has been appointed, upon deposit in the Bank of England, of the agreed or determined compensation, the promoters may execute a deed poll, as in other cases of purchase of lands, and thereupon the lands will vest in the promoters freed and discharged from all commonable and other rights, and the promoters become entitled to immediate possession (*r*).

Procedure on payment of compensation.

SECT. 3.—*Apportionment and Application of Compensation Money.*

1062 The Lands Clauses Consolidation Act, 1845 (*s*), provided that the compensation when received by the committee should be

Calling of meeting by Board of Agriculture and Fisheries.

the last of such insertions being not more than fourteen nor less than seven days prior to any such meeting; and notice of the meeting is also not less than seven days previous to the holding thereof to be affixed upon the door of the parish church where such meeting is intended to be held, or if there be no such church, some other place in the neighbourhood to which notices are usually affixed. If the lands are parcel or holden of a manor, a like notice is to be given to the lord of the manor.

(*m*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 103. As the section expressly refers to the persons entitled present, and no power is given to the persons entitled, as in the Inclosure Acts, to appoint an agent or attorney to represent them, it seems clear that the committee must be appointed only by the persons entitled who are present, and that a solicitor or agent cannot vote.

(*n*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 104.

(*o*) *Ibid.*, s. 105.

(*p*) *Ibid.*, s. 106. See title COMPULSORY PURCHASE AND COMPENSATION.

(*q*) *Bee* v. *Stafford and Uttoxeter Rail. Co.* (1875), 23 W. R. 868.

(*r*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 107.

(*s*) 8 & 9 Vict. c. 18.

SECT. 3. Apportionment and Application of Compensation Money.

apportioned by them among the several persons interested therein according to their respective interests; but as it was found that in many cases this was a task beyond their powers, the committee are now empowered (*a*), when they are of opinion that the provisions of the Lands Clauses Act cannot be satisfactorily carried into effect, to apply in writing to the Board of Agriculture and Fisheries to call a meeting of the persons interested in the compensation money for the appointment of trustees of such compensation money and instructions as to investment of the money and application of the income to such purposes, for the benefit of the persons interested therein, as the Board shall approve.

Majority in number and interest requisite.

If the Board see fit to proceed with the application, they call a meeting accordingly at which the majority in number and the majority in respect of interest bind the minority and absentees. This double majority is required at this and other meetings dealing with compensation money, although at the meeting to appoint a commoners' committee a numerical majority only is requisite. In all cases it should be shown to the Board that the necessary majority has been obtained. Where there is any doubt as to the majority of interest, it should generally be calculated from the rateable value of the tenements in respect of which the right of common was exercised, or in the case of a stinted pasture from the number of stints (*b*). At the meeting persons interested can vote by proxy (*c*).

Powers of Board to appoint trustees etc.

But if at the meeting no instructions are resolved upon, or if the Board deem such instructions unjust or unreasonable, the Board may, by order under their seal, give such instructions for the investment of the compensation money and for the application of the income as they think fit. Any order made by the Board, whether original or approving instructions passed at the meeting, is to contain provision for the appointment of new trustees from time to time, and is to be deposited and kept in the same way as inclosure awards (*d*). Payment to the trustees discharges the committee from all liability, and the trustees, after payment of the expenses incurred by the Board (*e*) in relation to the application and order, deal with the balance of the fund as directed by the order (*f*).

Apportionment of compensation money.

1063. These powers were further extended by the Inclosure Act, 1854 (*g*), under which a majority of the committee may apply to the Board to call a meeting of persons interested in the money to determine whether or not it shall be apportioned among them under

(*a*) Inclosure Act, 1852 (15 & 16 Vict. c. 79), s. 22. The Act gave power to apply to the Inclosure Commissioners, but their powers are now vested in the Board of Agriculture and Fisheries, who are throughout this article referred to as the Board; see note (*a*), p. 544, *post*.

(*b*) See Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 22.

(*c*) See p. 498, *post*.

(*d*) As to the deposit and custody of inclosure awards, see Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 146; and p. 586, *post*.

(*e*) In the Act the expenses of the Board only are provided for, but in practice the Board include in their expenses costs of the applicants properly incurred in connection with the application and meeting.

(*f*) Inclosure Act, 1852 (15 & 16 Vict. c. 79), s. 22.

(*g*) 17 & 18 Vict. c. 97.

SECT. 3. Apportionment and Application of Compensation Money.

provisions contained in the Act (*h*). If the requisite majority in number and interest resolve upon apportionment, the compensation money is to be paid into the Bank of England to the credit of an account to be named by the Board, and the committee are thereupon discharged from all liability (*i*). The Board, acting by themselves or an assistant Commissioner appointed for the purpose, are then empowered to determine and award the compensation money to the persons interested according to their respective interests in the land taken, with power to hold meetings, call for evidence, employ a surveyor etc. (*k*). At these meetings persons may vote by proxy.

Commonable Rights Compensation Act, 1882.

1064. The Commonable Rights Compensation Act, 1882, provides additional modes of dealing with compensation money, and under it the committee or a majority thereof, or after the expiration of twelve months from the payment of the money to the committee any three of the persons claiming to be interested in the money may apply in writing to the Board to call a meeting of the persons interested to consider the application of the money, and at such meeting resolutions may be passed by a majority in number and in value of interests for the application of the money in one or more of the following ways:—(1) In the improvement of the remainder of the common; (2) in defraying the expenses of a scheme under the Metropolitan Commons Acts, or a provisional order for regulation under the Inclosure Acts, or an application to Parliament for a private Bill or otherwise for the preservation and management of the common as an open space; (3) in defraying the expenses of any legal proceedings for the protection of the common or the commoners' rights over it; (4) in the purchase of additional land to be used as common land; and (5) in the purchase of additional land to be used as a recreation ground for the neighbourhood (*l*).

Modes in which compensation money may be applied.

The terms of the resolution, which is made binding on the minority and absent parties, are embodied in an order of the Board, and the money is applied as directed by the order (*m*).

Purchase of additional common lands etc.

1065. Where additional common land is purchased it is conveyed to trustees, who are appointed by, and their powers and duties defined in a further order of, the Board (containing also provisions for the appointment of new trustees), all pursuant to resolutions passed as before at a special meeting convened by the Board (*n*). Land purchased for a recreation ground is conveyed to a local authority, as

(*h*) Inclosure Act, 1854 (17 & 18 Vict. c. 97), s. 15.

(*i*) *Ibid.*, s. 16.

(*k*) *Ibid.*, s. 17. In practice, these cases have always been referred by the Board to one of their assistant commissioners, who are practising barristers holding appointments under the Board. The assistant commissioner issues notices by advertisement and otherwise to all persons interested to send in claims, calls a meeting or meetings in the locality to determine the claims, and makes his award in due course.

(*l*) Commonable Rights Compensation Act, 1882 (45 Vict. c. 15), s. 1.

(*m*) *Ibid.*, s. 2. Copies of all orders made by the Board are to be deposited and kept as inclosure awards are directed to be kept (*ibid.*, s. 5); see Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 146; and p. 586, *post*.

(*n*) Commonable Rights Compensation Act, 1882 (45 Vict. c. 15), s. 2 (2).

SECT. 3. Apportionment and Application of Compensation Money.

specified in the Act, and held and managed in accordance with the provisions relating to recreation grounds contained in the Inclosure Acts (*o*).

Recreation grounds etc.

1066. Compensation money for any recreation ground or field garden taken under compulsory powers is to be applied in the manner provided by the Inclosure Acts with respect to the surplus rents arising from recreation grounds and field gardens respectively (*p*).

Voting at meetings.

1067. The Commonable Rights Compensation Act, 1882, does not embody the provisions of the Inclosure Acts, and contains no power for a person interested to appoint an agent or attorney. It would seem, therefore, that at meetings held under this Act persons interested must be personally present in order to vote, and that in this respect such meetings differ from those held under the Inclosure Acts, 1852 and 1854 (*q*), relating to the division of the compensation money among the persons interested.

Irregular application of compensation money

1068. Provision is also made for legalising by an order of the Board the previous application of compensation money by a committee in one or more of the ways authorised by the Act, and for discharging the committee from liability in respect of such application. The order is to be made in pursuance of a resolution passed at any meeting of the persons interested called by the Board in manner provided for meetings under that Act (*r*) and by a majority in number and a majority in value of interests. The provisions as to the purchase of additional common land or the purchase of a recreation ground are to apply where the money has been laid out in the purchase of land (*s*).

The New Forest is excluded from the operation of the Act (*a*).

SECT. 4.—*Proper Tribunal to deal with Compensation Money.*

Tribunal to ascertain interests.

1069. The committee of commoners, and in cases of difficulty the Board, are the proper tribunal to ascertain who are the persons interested in the compensation money, and what are their interests. In the absence of fraud or misconduct on the part of the committee, the Chancery Division of the High Court has no original power to interfere with the jurisdiction of either body (*b*); but in

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(*o*) Commonable Rights Compensation Act, 1882 (45 Vict. c. 15), s. 2 (5). For these provisions, see p. 591, *post*.

(*p*) *Ibid.*, s. 3. For the application of these rents, see p. 592, *post*.

(*q*) Inclosure Act, 1852 (15 & 16 Vict. c. 79), s. 35; Inclosure Act, 1854 (17 & 18 Vict. c. 97), s. 21; Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 21.

(*r*) See Commonable Rights Compensation Act, 1882 (45 Vict. c. 15), s. 2 (4). This provision was made as it was found by the Board that committees had in some cases so irregularly applied compensation money instead of dividing it. The cases in which relief was required have probably all been disposed of, so that it is unnecessary to state the procedure at length.

(*s*) Commonable Rights Compensation Act, 1882 (45 Vict. c. 15), s. 4. For a form of application under such circumstances, see Encyclopædia of Forms, Vol. VIII., p. 124, Form No. 60.

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

(*b*) *Richards* v. *De Winton*, [1901] 2 Ch. 566, *per* KEKEWICH, J., dismissing,

several cases where there was considerable complication, and no objection was raised, the rights of persons entitled to compensation money have been determined by the Chancery Division (*c*).

SECT. 4. Proper Tribunal to deal with Compensation Money.

Part VII.—Rights of the Lord of the Manor and Owner of the Soil

SECT. 1.—*General Rights.*

1070. The lord of the soil is owner of everything upwards to the heaven and downwards to the centre of the earth except such things as custom, usage, or grant has conferred upon the commoners. So long as he does not interfere with the commoners' rights, he may use the land and the produce thereof as absolutely as if no right of common had place on it (*d*).

Ownership absolute subject to common rights.

If sufficient common is left to the commoners, the lord of the

after carefully considering the enactments above referred to, for want of jurisdiction, an action against a committee of commoners in which the plaintiff claimed to be entitled as sole commoner to all the compensation money. The decision was appealed against, but during the hearing the parties agreed to refer to an arbitrator the ascertainment of the persons entitled, and on his finding the court dismissed the appeal without deciding the question of jurisdiction (*Richards* v. *De Winton*, [1903] 1 Ch. 507, C. A.).

(*c*) *Nash* v. *Combs* (1868), L. R. 6 Eq. 51, where a bill was filed by the committee for the direction of the court as to the application of money arising from the taking of a common in which the resident and non-resident freemen of Bedford were interested, and questions had arisen; *Fox* v. *Amhurst* (1875), L. R. 20 Eq. 403, where the court decided questions between the freeholders, copyholders, and enfranchised copyholders of the manor of Hackney arising in respect of several compensation funds; *Austin* v. *Amhurst* (1877), 7 Ch. D. 689 (claim by occupiers against owners in respect of the same funds); *A.-G.* v. *Meyrick*, [1893] A. C. 1, where a railway company had paid into court the purchase-money of part of a turbary allotment, and the questions were dealt with on petition; *Weatherley* v. *Layton*, [1892] W. N. 165. See also the case of *Evans* v. *Merthyr Tydfil Urban District Council*, [1899] 1 Ch. 241, C. A., where in an action for specific performance against the promoters the question was whether or not part of the land taken was subject to any commonable rights.

The decision of KEKEWICH, J., in *Richards* v. *De Winton*, [1901] 2 Ch. 566, appears to be in accordance both with the provisions of the statutes and with the intention of the legislature to provide an inexpensive tribunal for the division of the money; but the other cases quoted show that, if all the parties are agreed, the court will entertain the question of distribution, and, as KEKEWICH, J., suggested (*ibid.*, p. 576), would equally do so on representation made by the Board of Agriculture and Fisheries.

(*d*) 3 Cru. Dig. 93; *Doe* v. *Davidson* (1813), 2 M. & S. 175, *per* Lord ELLENBOROUGH, C.J., at p. 184. See also *Arlett* v. *Ellis* (1827), 7 B. & C. 346, *per* BAYLEY, J., at p. 369: "The lord has rights of his own reserved upon the waste, I do not say subservient to, but concurrent with, the rights of the commoners. He has a right to stock the common and to every benefit to be derived from the soil not inconsistent with the rights of the commoners; and when it is ascertained that there is more common than is necessary for the cattle of the commoners, the lord, as it seems to me, is entitled to take that for his own purposes." See also *Hall* v. *Byron* (1877), 4 Ch. D. 667, 675; *Robinson* v. *Duleep Singh* (1879), 11 Ch. D. 798, C. A.

SECT. 1. General Rights.

soil by common law right, independently of any statute, may plant trees, breed conies, depasture cattle, grant licences to strangers to take the herbage and pasturage and other products of and in the soil (*e*), and inclose or, to use the technical term, approve the waste. The right of approvement, however, has, in the interests of the population of the neighbourhood and the general public, been subjected to material restriction and supervision by recent legislation (*f*).

The right of planting trees or of making a rabbit warren must necessarily be exercised only to a limited extent, as it involves interference with the pasturage, and if the commoners can prove insufficiency of pasture, they are entitled to bring an action against the lord, though they must not themselves cut down the trees or fill up the rabbit holes (*g*).

Pasturage for lord's cattle.

1071. The right of the lord to have pasturage for his own cattle on the common is always one of the characteristics of a waste on which rights of common exist, and so long as it continues a common no prescription can deprive him of the right, nor is it dependent upon there being a sufficiency of common for the other commoners (*h*). Where a right is established to exclude the lord from the common it will be found to be a sole or several pasture or herbage, and not a right of common (*i*).

Licence by lord to strangers.

The lord or owner of the soil may also license strangers to put their cattle on the common, but not to the prejudice of the commoners so that they have not sufficient common (*k*), and where in an action by a commoner for interference with his rights of common the defendant pleads a licence from the lord, he should aver that sufficient common is left (*l*). A licence from the lord for a time certain must be by deed, for that is tantamount to a grant; otherwise if the licence is only *pro hâc vice* (*m*).

Driving the common.

1072. A custom frequently exists for the lord of the manor to drive the common at stated periods to ascertain whether there are

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(*e*) See cases cited in note (*d*), p. 499, *ante*.

(*f*) See p. 509, *post*. These rights of the owner of the soil in ancient times were unquestionably of much greater value than at the present day, when it is unusual to find a common which will sustain more stock than can establish rights by reason of levancy and couchancy upon the old inclosures to which it is attached; but where any such common is now left there is no doubt that, in the absence of an express prescription to the contrary, the overplus belongs to the owner of the soil (Cooke, Inclosure Acts, p. 65). The circumstances connected with the Banstead commons brought out in *Robertson* v. *Hartopp* (1889), 43 Ch. D. 484, C. A., afford a notable example of how rights of common practically dormant may be discovered.

(*g*) As to trees, see *Kirby* v. *Sadgrove* (1797), 1 Bos. & P. 13, where EYRE, C.J., twice refers to a right of common as an easement instead of as a *profit à prendre*; *Arlett* v. *Ellis* (1827), 7 B. & C. 346. As to rabbits, see *Cooper* v. *Marshall* (1757), 1 Burr. 259; *Robinson* v. *Duleep Singh* (1879), 11 Ch. D. 798, C. A.

(*h*) Co. Litt. 122 a, cited in full in note (*d*), p. 460, *ante*.

(*i*) *Ibid.*

(*k*) *Mellor* v. *Spateman* (1619), 1 Wms. Saund. 343 (notes); *Atkinson* v. *Teasdale* (1772), 3 Wils. 278; *Greenhow* v. *Ilsley* (1747), Willes, 619.

(*l*) *Smith* v. *Fetherwell* (1674), Freem. (K. B.) 190.

(*m*) *Monk* v. *Butler* (1619), Cro. Jac. 574; *Ramsey* v. *Rawson* (1670), 1 Vent. 18.

too many cattle of commoners on the wastes, and whether there are cattle of strangers there; and it is apprehended that the lord would have this right in the absence of special custom. The custom has fallen into abeyance in many places, but is regularly exercised in many of the large fells in the north of England and other mountainous areas.

Distress is incident as of common right to a right to drive the common when cattle are found to be unlawfully upon it (*n*); and the lord may drive the cattle of the commoners with those of strangers which he has seen to a convenient place to separate them without alleging any custom (*o*). But if the usage is at certain times in the year to drive the common to ascertain whether there are cattle of strangers there, or the common is surcharged, the custom must be shown (*p*).

Shooting and game rights.

1073. The right of shooting and of taking the game on the common, which belongs to the lord as owner of the soil, is an interest in the realty, and a grant of it is a licence of a *profit à prendre* (*q*). The owner of the fee may sever it from the ownership of the soil and grant it as a separate tenement to another in fee (*r*).

Free warren.

1074. Free warren, or the right to keep and maintain beasts and birds of warren within the precincts of a manor or other place, is not a manorial right, but a franchise to which title must be made either by a grant from the Crown or by prescription which supposes such a grant (*s*), and may be held as well by a person not lord of a manor as by one who is. It is so separate from the manor that when the lord has also acquired a right of free warren over the manor and conveys the manor with all rights of fishing, fowling, hunting, and shooting belonging to it, that will not carry the free warren, not because the words are not large enough, but because it does not belong to the manor (*t*). It may be appurtenant to the manor by prescription or by the terms of the original grant, like any other *profit à prendre* or easement, so as to pass by a conveyance of the manor with the appurtenants, but that does not make it a manorial right (*u*).

The grant of a warren by a person who is owner of the soil and

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(*n*) *Bromfield* v. *Teigh* (1672), 2 Lev. 87.

(*o*) *Thomas* v. *Nichols* (1680), 3 Lev. 40.

(*p*) *Ibid.*

(*q*) *Ewart* v. *Graham* (1859), 7 H. L. Cas. 331.

(*r*) *Wickham* v. *Hawker* (1840), 7 M. & W. 63, adopted in *Musgrave* v. *Forster* (1871), L. R. 6 Q. B. 590, 592.

(*s*) See 2 Bl. Com. 38, where the author gives an account of forests, chases, parks, and warrens. Beasts and fowls of warren are the hare, coney, pheasant, and partridge, and, apparently, wild duck (*Fitzhardinge* (*Lord*) v. *Purcell*, [1908] 2 Ch. 139, *per* PARKER, J., at p. 163); see Manwood, Forest Laws, chap. 1, s. 3; *Devonshire* (*Duke*) v. *Lodge* (1827), 7 B. & C. 36, which decided that grouse were not birds of warren, though in an early Game Act (1 Jac. 1, c. 27), which was repealed by the Game Act, 1831 (1 & 2 Will. 4, c. 32), they are included as game.

(*t*) *Morris* v. *Dimes* (1831), 1 Ad. & El. 654.

(*u*) See *Sowerby* v. *Smith* (1874), L. R. 9 C. P. 524, *per* CLEASBY, B., at p. 545, Ex. Ch.

SECT. 1. General Rights.

has also a right of free warren in it, may pass an estate in the soil if the context of the instrument shows the intention to be such, but that is not its *primâ facie* construction (*w*).

Origin of free warren.

The right of free warren was originally granted by the Crown over the lands of the grantee, and not over the lands of a third person, and was after the Norman conquest utilised as a means of protecting the game, which was regarded in early times as the sole property of the monarch, the sole and exclusive power of killing the game, so far as the warren of the grantee extended, being given to him on condition of his preventing other persons from doing so, and the grantee was in reality no more than a royal gamekeeper. The right of free warren over another's ground arose where men who were keen sportsmen sold their estates and reserved the free warren, or right of killing game (*x*).

An action of trespass will lie by the owner of a free warren against one who enters the warren and takes or drives away the beasts or fowls of warren (*a*).

Effect of inclosure.

The right of free warren is of importance in cases of inclosure, as it remains in the lord of the manor unless he is expressly deprived of it by the provisional order and Act, whereas a right of sporting over the waste which is merely an incident of his ownership of the soil is destroyed when the soil is taken away from him and allotted to others by virtue of the Act (*b*).

Rights of lord in respect of adjoining manors.

1075. A lord may have a right in respect of the waste of his own manor to turn cattle on the waste of an adjoining manor, but such a right would be difficult to prove if there were old inclosed lands of the adjoining manor in respect of which the right was also claimed (*c*).

(*w*) *Beauchamp* (*Earl*) v. *Winn* (1873), L. R. 6 H. L. 223; and see *Robinson* v. *Duleep Singh* (1879), 11 Ch. D. 798, C. A.

(*x*) See 2 Bl. Com. 38. "A grant of free warren is in general confined to the lands of the grantee. The King could not grant it over the lands of a third person, and though he might grant it over his own lands, we are not aware of any instance of its having been done. Unless the words are such as to show unequivocally that such is the intention, we think they would not have that effect" (*A.-G.* v. *Parsons* (1832), 2 Cr. & J. 279, 302, *per* Lord LYNDHURST, C.B., at pp. 308, 309, where a grant of free warren within the demesne lands of the grantee, his heirs and assigns, and in all other lands and woods in the same hundred, manor, town etc., was held only to include free warren in the demesne lands and tenemental lands of the grantee). For a case of a right of free warren over all the lands in the manor acquired by prescription, see *Carnarvon* (*Earl*) v. *Villebois* (1844), 13 M. & W. 313.

(*a*) Com. Dig. tit. Trespass, A 2.

(*b*) See the cases on this subject collected at pp. 576 *et seq.*, *post*.

(*c*) *Sefton* (*Earl*) v. *Court* (1826), 5 B. & C. 917, where the commons of one manor had been inclosed under an Inclosure Act, and an adjoining common was inclosed some twenty-five years afterwards; the tenant of the lord of the manor of which the commons had been first inclosed had exercised rights of common over the waste of the second manor by cattle kept not only on the old inclosures, but on what had been formerly waste, and the lord claimed to be entitled to an allotment in respect of all the land; and it was held that the right as stated above might exist, and as the attention of the jury had not been sufficiently directed to the question whether the cattle had been turned out in respect of what was formerly waste, a new trial was ordered, but the lord subsequently abandoned his claim.

A lord may inclose his own manor against an adjoining manor where there is common of vicinage (*d*).

Right to get coal etc.

1076. Again, the lord may sink shafts to work mines and use all necessary and lawful means to procure coal or other materials from the soil, doing as little damage as possible (*e*); he may dig brick earth (*f*), take gravel, marl, loam, and subsoil, for his own use and for the purpose of sale (*g*), and do other acts of a like nature; but he must always in the exercise of rights of this nature exercise them in moderation, and not with excess or wantonness (*h*), and, unless he can prove a special custom, must not infringe upon the rights of the commoners (*i*).

Lord's rights subject to prescription or custom.

1077. The lord may be controlled in the exercise of all these rights by prescription or custom, and an action will lie against him at the suit of a commoner for a surcharge of any kind or for any unnecessary opening of the soil whereby the commoners' cattle are injured (*k*), but the rights of the commoners may be subservient to the rights of the lord when the two are in conflict (*l*).

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Statute of Merton.

1078. The right of inclosing the superfluous waste, or, as it is technically called, the right of approvement, was granted, or more properly confirmed (*m*), to the owners of the soil of waste lands by the Statute of Merton (*n*), which was passed "because many great men of England (which have enfeoffed knights and their freeholders of small tenements in their great manors) have complained that they cannot make their profit of the residue of their manors, as of wastes, woods, and pastures, whereas the same feoffees have sufficient pasture as much as belongeth to their tenements," and

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(*d*) *Tyrringham's Case* (1584), 4 Co. Rep. 36 a, 38 b; and see p. 459, *ante*.

(*e*) *Coo* v. *Cauthorn* (1662), 1 Keb. 390; *Benfieldside Local Board* v. *Consett Iron Co.* (1877), 3 Ex. D. 54; and other cases cited in the notes on pp. 573 *et seq.*, *post*, where the manorial rights of the Bishop of Durham in a great number of manors in the north of England are referred to.

(*f*) Vin. Abr. tit. Common, A a, s. 33; *Lascelles* v. *Onslow* (*Lord*) (1877), 2 Q. B. D. 433.

(*g*) *Hall* v. *Byron* (1877), 4 Ch. D. 667.

(*h*) *Place* v. *Jackson* (1824), 4 Dow. & Ry. (K. B.) 318.

(*i*) *Hall* v. *Byron*, *supra*.

(*k*) See pp. 516, 517, *post*, and cases there referred to.

(*l*) *Bateson* v. *Green* (1793), 5 Term Rep. 411, where it was held that a right of the lord to dig clay pits and license others to do so, though there was not sufficiency of pasture even if the pits were not dug, might be proved by long evidence of user of the right by the lord without interruption or complaint and the absence of any evidence to show that his right was limited. See the opinions upon this case in *Hall* v. *Byron*, *supra*, and *Hilton* v. *Granville* (*Earl*) (1845), 5 Q. B. 701. Though its soundness has been questioned, there appears to be no objection to the principle which underlies it, that when the lord made the original grant he may have reserved to himself rights which would restrict the enjoyment of those which he granted to the commoners. On the same subject see *Place* v. *Jackson*, *supra*.

(*m*) This question is fully discussed in Elton, Commons, chap. x., pp. 170 *et seq.*

(*n*) Stat. 20 Hen. 3, c. 4 (1236).

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which enacted that when such feoffees brought an assise of novel disseisin (which was then the proper method for a commoner to adopt who was deprived of his right of common), and it was either acknowledged or proved by the assise that they had as much pasture as sufficed for their tenements, and that they had free egress and regress from their tenement unto the pasture, the lords on whom the complaint was made were to go quit of as much as they had made their profit of their lands, wastes, woods, and pastures and of the assise, or, in other words, that they might retain the inclosures which they had made without further question.

This statute was confined to cases between the lord and tenant, and did not extend to cases in which common belonging to a tenement held of one lord was exercised over waste belonging to another lord (*o*).

Statute of Westminster II.

1079. The Statute of Merton was extended by the Statute of Westminster II. (*p*) to meet these latter cases. After reciting that, forasmuch as no mention was made (in the Statute of Merton) between neighbour and neighbour, many lords of wastes, woods, and pastures had been hindered by the contradiction of neighbours having sufficient pasture, and forasmuch as foreign tenants had no greater right of commoning in the woods, wastes and pasture of any lord than the proper tenants of the same lord, it was ordained that the Statute of Merton should thenceforth hold place between lords of wastes, woods, and pastures, and neighbours, saving sufficient pasture to their men (*i.e.*, tenants) and neighbours, so that the lords of such wastes etc. might approve themselves of the residue. And this was to be observed by such as claimed pasture as appurtenant to their tenements.

But if any claimed common of pasture by special feoffment or grant for a certain number of beasts or otherwise than of common right (*q*), he ought to have it; and as covenant did abrogate the common law, he should have such recovery as he ought to have by the form of grant made unto him.

The statute also provided that by occasion of a windmill, sheep-house, dairy, enlarging of a court necessary, or courtelage (curtilage), no man was to be grieved by assise of novel disseisin of common of pasture (*r*).

(*o*) Williams, Rights of Common, p. 109; and see the interpretation of the statute by Bracton, quoted by him on p. 106, and his arguments in favour of the non-manorial origin of rights of common of pasture from the terms of the amending Statute of Westminster II. (13 Edw. 1, c. 46).

(*p*) 13 Edw. 1, c. 46 (1275).

(*q*) There is a curious mistranslation of this expression in some editions of the statutes (pointed out in Williams, Rights of Common, p. 111), which is adopted in 2 Co. Inst., p. 473, where the statute and translation are set out at length. That the translation given above is correct appears from the recital of the Act in the confirming Act of 3 & 4 Edw. 6, c. 3, s. 2.

(*r*) This Act has been liberally construed by the courts, and Lord COKE observes that these five kinds of improvements which may be done both between lord and tenant and neighbour and neighbour without leaving sufficient common to them that have it are put but for examples, "for the lord may erect a house

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1080. The Statutes of Merton and of Westminster II. (*s*) were confirmed by a statute of Edward VI. (*t*), which recited that they had been thought beneficial to the commonwealth.

Confirmation by statute of Edward VI.

The same Act (*u*) also legalised encroachments from wastes on which "certain necessary houses" had been built and ground not exceeding three acres had been inclosed with the same, and also inclosures for gardens, orchards, and ponds not exceeding two acres, but provided that the owner or owners of the waste might lay open any excess where more than three acres had been inclosed (*w*).

Approvement not confined to lords of manors.

1081. These powers of approvement under the statutes are not confined to lords of manors, but may be exercised by any owner of a waste (*x*). It is not necessary that he should be owner in fee; the right may be exercised by an owner *pur autre vie* (*y*). The Statute of Merton says nothing about the nature or interest of the lord in the soil, and it is immaterial to the commoner if sufficient common is left to him whether the lord incloses in his own right or as grantee of another (*a*).

Sufficiency of pasture to be left.

1082. It is essential, except in cases coming under the provisions of the Statute of Westminster II. above referred to (*b*), and possibly in cases of statutory grant or inclosure for particular purposes (*c*), that the lord should in any approvement under the Statutes of Merton and of Westminster II. leave sufficiency

for the dwelling of a beast keeper for the safe custody of the beasts as well of the lord as of the commoners there depasturing in that soil, and yet it is not within the letter of this law" (2 Co. Inst., p. 476). So, the erection of two cottages by the owner of a waste for the habitation of two woodwards to preserve the woods, and for the safe custody of the cattle of the plaintiff and of other persons entitled to rights of common, was held justified in *Patrick* v. *Stubbs* (1842), 9 M. & W. 830. See also *Nevill* v. *Hancerton* (*or Hamerton*) (1662), 1 Lev. 62; *Robinson* v. *Duleep Singh* (1879), 11 Ch. D. 798, 822, C. A., In *Patrick* v. *Stubbs*, *supra*, PARKE, B., at p. 837, stated that the right of the lord to inclose so much common as was necessary for the curtilage of his mansion-house explained the case of *Nevill* v. *Hancerton*, *supra*, and the *dictum* of WINDHAM, J., therein that it was necessary to aver that sufficient common was left "only where the inclosure is for the improvement of the land, not where it is for the enlargement of the curtilage."

"Necessary curtilage" is explained by Lord COKE to relate not to the quantity of the freehold the lord has, but to his person, estate, or degree, and for his necessary dwelling and abode, "for if he have no freehold there in that town but his house only, yet may he make a necessary enlargement of his curtilage" (2 Co. Inst., p. 476).

(*s*) 20 Hen. 3, c. 4 (1236); 13 Edw. 1, c. 46 (1275).

(*t*) 3 & 4 Edw. 6, c. 3, s. 3.

(*u*) *Ibid.*, ss. 5, 6.

(*w*) From the wording of *ibid.*, s. 4, it is not clear whether a house and grounds standing on three acres and a further inclosure of three acres from the waste are referred to, but it would seem from s. 6 that the whole encroachment was not to exceed three acres. See also the repealed stat. 31 Eliz. c. 7, referred to at p. 450, *ante*, which required that every new cottage should have at least five acres of land.

(*x*) *Glover* v. *Lane* (1789), 3 Term Rep. 445; *Patrick* v. *Stubbs*, *supra*.

(*y*) *Patrick* v. *Stubbs*, *supra*.

(*a*) *Ibid.*, *per* ROLFE, B., at p. 838.

(*b*) See note (*r*), p. 504, *ante*.

(*c*) See p. 510, *post*.

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of pasture for the commoners (*d*), and the onus of proving that sufficient pasture has been left lies upon the lord (*e*).

Rule for ascertaining sufficiency.

1083. The early rule to ascertain sufficiency of common was to see how much cattle the hay and straw which the husbandman got upon his own tenement would find sufficiently in winter if they lay in house and to be kept therewith all the winter season; for so much should he have common in summer, and that is sufficient (*f*).

It has been contended that in determining the question of sufficiency of common the average number of stock turned out and the probability of all the commoners exercising their rights to the full might be taken into account (*g*). The law, however, may now be regarded as established (*h*) that in considering the question of

(*d*) Statute of Merton, 1236 (20 Hen. 3, c. 4); *Arlett* v. *Ellis* (1829), 9 B. & C. 671. Compare *Badger* v. *Ford* (1819), 3 B. & Ald. 153.

(*e*) *Arlett* v. *Ellis*, *supra*; *Betts* v. *Thompson* (1871), 6 Ch. App. 732, 741; *Hall* v. *Byron* (1877), 4 Ch. D. 667. Where the commoner brings an action for surcharge or other exercise of the rights of the lord over the common, the onus of proof is reversed (*ibid.*); and see p. 518, *post*.

(*f*) Surveyenge (1539), usually attributed to Sir Anthony Fitzherbert. The quotation is given by FRY, L.J., in the original language in *Robertson* v. *Hartopp* (1888), 43 Ch. D. 484, C. A., where he quotes also from *Smith* v. *Bonsall* (1597), Gouldsb. 117, and *Cole* v. *Foxman* (1616), Noy, 30.

(*g*) *Lake* v. *Plaxton* (1854), 10 Exch. 196, where it was held that the right of the Crown to turn deer upon the waste did not form an element in determining the question of sufficiency (but in that case no deer had been turned on for upwards of twenty years, and the case is further inconsistent with *Commissioners of Sewers* v. *Glasse* (1874), L. R. 19 Eq. 134); *Lascelles* v. *Onslow* (*Lord*) (1877), 2 Q. B. D. 433, where, in an action for disturbance of rights of common against a lord of a manor who had granted leases of parts of a very large common for brick-kilns and brickworks, and had made other grants of small portions of the common, a special case stated by an arbitrator having found that there was sufficiency of pasture for all persons entitled except in very dry seasons, and that there was always a sufficiency for the average number of stock which had been turned on during the last ten years, and also that the rights of turbary and of estovers had not been materially interfered with, the court, while recognising that the burden of proof was on the lord, considered that he had shown that sufficient pasture was left, and decided in his favour.

(*h*) By *Robertson* v. *Hartopp* (1889), 43 Ch. D. 484, C. A. The action was brought by freehold and copyhold tenants of the manor of Banstead and owners of lands formerly copyhold, but afterwards enfranchised, on behalf of themselves and all other owners and occupiers of such lands, against the lord of the manor and his mortgagees to establish the rights of common of pasture for cattle levant and couchant; rights of estovers of heath, gorse, and rushes for fodder and litter and other purposes of husbandry, and for fuel; the right of turbary and taking turves for burning in ancient messuages; and the right of digging sand, loam, and gravel for repairing such messuages and dressing the land; and to restrain the lord from maintaining and making inclosures and destroying the pasturage by cutting turves, digging loam and sand, gravel etc., so as to interfere with the rights claimed. A referee found that practically the rights claimed existed as appendant or appurtenant in the freehold, customary freehold, and copyhold tenants of the manor, and in owners of certain other lands not held of the manor, over certain large wastes known as the Banstead commons; that, on the assumption (which had been agreed upon) of two sheep per acre, rights of common were exercisable for 2,376 sheep (reduced by the judge to 1,440 sheep); that, notwithstanding the inclosures, there was a sufficiency of estovers and turbary, but an insufficiency of common of pasture; that the common could carry 1,200 sheep if they were turned out according to the modern practice of farming under which the sheep would not obtain their whole sustenance from the common during the summer; that the number of sheep for which rights had been admitted by the defendants was 543, for which the commons

sufficiency of pasture the number to be taken into account is to be determined not according to the average number turned out, but according to the number which each commoner is entitled to turn out (*i*); that the right of a commoner is to have pasture for the stock which his tenement is capable of maintaining during the winter (*j*); and that the right of the owner of a tenement entitled to common appendant or appurtenant is not affected by the fact that his farm is understocked (*k*), nor by the conversion of arable into pasture land (*l*), nor by the fact that his land may have been put to a use which at least temporarily renders the maintenance of sheep or cattle upon it impossible. Levancy and couchancy is rather the measure of the capacity of the land than a condition to be actually and literally complied with by the cattle lying down and getting up or by their being fed off the land (*m*).

The question whether, in making the calculation, regard ought to be had to the modern system of farming under which sheep do not during the summer get all their sustenance from the common,

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would be insufficient if they were to get all their sustenance therefrom during the usual times of commoning; and that, according to what had taken place during recent years, it was improbable that the commons would ever be required for more than 1,200 sheep at any one time.

Robertson v. *Hartopp* (1889), 43 Ch. D. 484, C. A., is a very important case at the present time, when the commoners' rights, though of little value in themselves, are generally made use of as a means of preserving, as open spaces, the large extent of commons and waste lands which remain uninclosed throughout England and Wales; and the inquiries made for the purposes of the case brought to light the existence of rights attached to many properties which had previously escaped notice, although the rights over the commons had been the subject of inquiry when a large sum of money paid by a railway company for purchase of parts of the commons was divided in accordance with the provisions of the Lands Clauses Acts.

The Court of Appeal considered that *Lake* v. *Plaxton* (1854), 10 Exch. 196, merely held that the right of the Crown to turn deer upon the waste did not form an element for the consideration of the jury on the question of sufficiency where no deer had been turned on for upwards of twenty years, and that the judgment did not state clearly the grounds of the decision, which might have gone upon the peculiar nature of the Crown's right; if it were otherwise, the case might require further consideration. They also were of opinion that *Lascelles* v. *Onslow* (*Lord*) (1877), 2 Q. B. D. 433, might have been decided on the view that, in the absence of any evidence to the contrary, the average user for ten years was some evidence of the extent of the commoners' rights; if it went beyond that, it was a question whether the decision could be maintained.

(*i*) Compare *Musgrave* v. *Inclosure Commissioners for England and Wales* (1874), L. R. 9 Q. B. 162.

(*j*) Compare *Whitelock* v. *Hutchinson* (1839), 2 Mood. & R. 205; *Scholes* v. *Hargreaves* (1792), 5 Term Rep. 46, 48.

(*k*) *Leech* v. *Widsley* (1670), 1 Vent. 54.

(*l*) *Carr* v. *Lambert* (1866), L. R. 1 Exch. 168, Ex. Ch., *per* WILLES, J., at p. 175, adopted in *Robertson* v. *Hartopp*, *supra*; and see *North* v. *Cox* (1667), 1 Lev. 253; *Scholes* v. *Hargreaves*, *supra*.

(*m*) *Carr* v. *Lambert*, *supra*, where the defence to an action of trespass in throwing open an inclosure was a claim to a right of common of pasture for cattle levant and couchant upon a toftstead, consisting of a cottage and stable with a garden and orchard of about two acres, which had been planted with fruit trees about fifty years before the commencement of the action, but which had previously been pasture; and it was proved that for upwards of thirty years the owners of the toftstead had as of right turned upon the waste part of which had been inclosed the cattle housed upon the toftstead, but not deriving their sustenance therefrom.

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but the pasturage is supplemented by roots or other food, has not yet been decided (*n*).

The lord is bound to leave pasture enough to satisfy each commoner's separate right, whether such right is likely to be exercised or no, and therefore in an action by one commoner on behalf of himself and all the other commoners the measure of the common which should be left for all ought to be that amount which will be sufficient for the enjoyment of all their existing rights, if such rights are to be fully enjoyed (*o*).

Approvement against common of turbary etc.

1084. The Statutes of Merton and Westminster II. relate only to common of pasture; and the right of approvement under them does not extend to common of piscary, of turbary, of estovers, or the like (*p*); nor may the lord approve against a right of digging sand or gravel (*q*). But where approvement against any of these rights is complained of, an interruption of or interference with the right must be distinctly alleged and proved (*r*).

Approving a part of the common on which no fuel has ever been nor in the ordinary course of nature ever could be found is not wrongful against commoners having a right of turbary (*s*).

Approvement against copyholders.

1085. Although the statutes of approvement make no mention of copyholds, and the right of the lord to approve against copyholders who have by custom rights of common of pasture over the wastes has been questioned (*t*), it is now settled that, as at common law the lord may inclose against his tenants generally, no exception being made of copyhold tenants (*a*), he may also inclose under the

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(*n*) *Robertson* v. *Hartopp* (1889), 43 Ch. D. 484, C. A., at p. 516.

(*o*) *Ibid.*

(*p*) 2 Co. Inst., p. 87. See *Fawcett* v. *Strickland* (1738), Willes, 57; *Grant* v. *Gunner* (1809), 1 Taunt. 435; *Shakespear* v. *Peppin* (1796), 6 Term Rep. 741.

(*q*) *Ibid.*; *Duberley* v. *Page* (1788), 2 Term Rep. 391.

(*r*) See *Fawcett* v. *Strickland*, *supra*, at p. 60: "Although it is settled that a lord may not approve against common of turbary, the commoner entitled to common of turbary, estovers etc., must allege that the approvement is detrimental to his rights of common of turbary. Common of pasture and common of turbary are distinct rights, and even though they are united in the same person, if the commoner only complains of interruption of his right of common of pasture, he is not justified in throwing down the lord's fences or in bringing an action; but if the right of common, of estovers, or of turbary is affected, or if he is interrupted in the enjoyment of either of those rights, he might certainly bring an action, and the lord in such case could not justify an inclosure in prejudice of those rights." See too *Shakespear* v. *Peppin*, *supra*, in which the correctness of this statement of the law was fully recognised; *Grant* v. *Gunner*, *supra*, *per* Lord MANSFIELD, C.J., at p. 417.

In *Lascelles* v. *Onslow* (*Lord*) (1877), 2 Q. B. D. 433, where a disturbance by inclosure of (among other rights) a right of common of turbary was complained of, the special case stated by an arbitrator appointed for the purpose found that the rights of turbary and estovers had not been materially interfered with, and the court held that the lord was justified in making the inclosures complained of.

(*s*) *Peardon* v. *Underhill* (1850), 16 Q. B. 120. Even if a grant to take turf on the common wherever turf was to be found was produced, it ought not to be construed to extend to a part of the common in which no fuel could in the ordinary course of nature be expected to be found (*ibid.*, p. 127).

(*t*) See Elton, Commons, p. 209.

(*a*) *Procter* v. *Mallorie* (1616), 1 Roll. Rep. 365, *per* Lord COKE.

statutes against copyholders (*b*); but the necessity for leaving sufficiency of pasture has always been insisted on, and in cases in which the right has been recognised by the court issues have been directed to ascertain whether sufficient pasture has been left (*c*).

Statutory restrictions on approvements.

1086. The right of approvement has been, as stated above (*d*), materially restricted by successive modern enactments, and will in future be of rare occurrence.

The first step was in the interests of the public to secure publicity to any attempted approvement, and it was enacted (*e*) that any person intending to inclose or approve a common or part of a common otherwise than by application to the Inclosure Commissioners (whose powers and duties are now vested in the Board of Agriculture and Fisheries) should give notice to all persons claiming any legal right in such common or part of a common by publishing at least three months beforehand a statement of his intention to make such an inclosure for three successive times, in two or more of the principal local newspapers in the county, town, or district in which the common or part of a common proposed to be inclosed was situate.

The next step in the same interest was to enact that an inclosure or approvement of any part of a common purporting to be made under the Statute of Merton and the Statute of Westminster II. (*f*), or either of such statutes, should not be valid unless made with the consent of the Board of Agriculture and Fisheries (*g*). In giving or withholding their consent the Board are to have regard to the same considerations (*h*), and, if necessary, hold the same inquiries, as are directed by the Commons Act, 1876, to be taken into consideration and held by the Board before forming an opinion whether an application under the Inclosure Acts shall be acceded to or not.

(*b*) Coke, The Compleat Copy-Holder, s. 53; and see *Hoskins* v. *Robins* (1671), 2 Saund. 324; *Shakespear* v. *Peppin* (1796), 6 Term Rep. 741; *Duberley* v. *Page* (1788), 2 Term Rep. 391; *Grant* v. *Gunner* (1809), 1 Taunt. 435; *Arlett* v. *Ellis* (1827), 7 B. & C. 346.

(*c*) See *Arlington* v. *Fawkes* (1697), 2 Vern. 356; *Weeks* v. *Straker* (1693), 2 Vern. 301. For grants or leases of parts of the waste by a lord of the manor under special customs, which do not come under the head of approvement, see p. 531, *post*.

(*d*) See p. 500, *ante*.

(*e*) Commons Act, 1876 (39 & 40 Vict. c. 56), s. 31. The section was not to apply to any commons or waste lands whereon the rights of common were vested solely in the lord of the manor; but in such cases the land would in all probability have ceased to be a common. "Common" in the Act means any land subject to be inclosed under the Inclosure Acts (*ibid.*, s. 37); see p. 541, *post*.

(*f*) 20 Hen. 3, c. 4 (1236); 13 Edw. 1, c. 46 (1275).

(*g*) Law of Commons Amendment Act, 1893 (55 & 56 Vict. c. 57), ss. 2, 3.

(*h*) *I.e.*, whether the proposed approvement will be for the benefit of the neighbourhood, which is explained in the preamble of the Commons Act, 1876 (39 & 40 Vict. c. 56), to mean the health, comfort, and convenience of the inhabitants of any cities, towns, villages, or populous places in or near any parish in which the land is situate. Unless the case is absolutely free from doubt, the Board hold a local inquiry by one of their assistant commissioners to ascertain the feeling of the locality with reference to the proposal.

SECT. 3. Inclosure of Small Portions of Commons for Special Public Purposes.

SECT. 3.—*Inclosure of Small Portions of Commons for Special Public Purposes.*

1087. Besides the general right of approvement in the lord of the manor for his own purposes, the grant and inclosure of small portions of commons and waste lands for special purposes have been from time to time authorised by various statutes.

Partial inclosure for special purposes.

Now, however, such grants or inclosures are not valid unless (1) specially authorised by Act of Parliament, or (2) made to or by any Government department, or (3) made with the consent of the Board of Agriculture and Fisheries; and in giving or withholding their consent the Board are to have regard to the same considerations, and, if necessary, hold the same inquiries, as on an application under the Inclosure Acts (*i*).

Poor Relief Act, 1601.

1088. The earliest statute dealing with such grants or inclosures was the Poor Relief Act, 1601 (*k*), which empowers the churchwardens and overseers of a parish by the leave of and under agreement with the lord of the manor, or according to an order of quarter sessions with the like leave and agreement, to erect on a waste or common, at the general expense of the parish or of the hundred or county, convenient places of habitation for the impotent poor (*l*).

Poor Relief Act, 1831.

The Poor Relief Act, 1831 (*m*), extending the provisions of an earlier Act (*n*), for the relief and employment of the poor, empowered the churchwardens and overseers of any parish to inclose from any common or waste within the parish land not exceeding fifty acres,

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(*i*) Commons Act, 1899 (62 & 63 Vict. c. 30) s. 22, and Sched. I. The Acts to which the above provisions apply are the following: Poor Relief Act, 1601 (43 Eliz. c. 2); Clergy Residences Repair Act, 1776 (17 Geo. 3, c. 53); Gifts for Churches Act, 1811 (51 Geo. 3, c. 115); Church Building Act, 1818 (58 Geo. 3, c. 45); Poor Relief Act, 1831 (1 & 2 Will. 4, c. 42); Crown Lands Allotment Act, 1831 (1 & 2 Will. 4, c. 59); Union and Parish Property Act, 1835 (5 & 6 Will. 4, c. 69); Schools Sites Act, 1841 (4 & 5 Vict. c. 38); Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18); Literary and Scientific Institutions Act, 1854 (17 & 18 Vict. c. 112). For the considerations on which the Board are to act, see note (*h*), p. 509, *ante*. Many of these Acts confer powers of inclosing portions of a common on persons other than the lord of the manor, and therefore do not come strictly under this heading; but it has been thought convenient to collect them all together. Some of the Acts are practically obsolete, and, having regard to the restrictions imposed by requiring the consent of the Board of Agriculture and Fisheries, they are not likely to be used to any great extent with the exception of those relating to military and naval requirements. Still there have been cases in which application has been made to the Board for the necessary consent, principally relating to sites for schools and for extension of churchyards and burial grounds.

For the special provisions relating to the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), see p. 492, *ante;* and for those relating to the Light Railways Act, 1896 (59 & 60 Vict. c. 48), see p. 493, *ante*.

(*k*) 43 Eliz. c. 2.

(*l*) Few parishes now maintain their own poor, and the enactment does not extend to guardians of poor law unions, so that its power is practically spent (Hunter, Commons and Open Spaces, p. 236).

(*m*) 1 & 2 Will. 4, c. 42.

(*n*) 59 Geo. 3, c. 59.

and to cultivate such land for the benefit of the parish and the poor persons within it, or to let any parts to poor and industrious inhabitants; and by the Crown Lands Allotments Act, 1831 (*o*), like authority was given with reference to forests and waste lands belonging to the Crown, with the consent of the Lord High Treasurer or the Treasury Commissioners.

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The Union and Parish Property Act, 1835 (*p*), extended the exercise of the powers of the last-mentioned Acts (subject to the control of the Poor Law Commissioners) to the overseers of the poor and guardians of poor law unions, and gave powers for the acquisition of land as a site for, or to be occupied with a workhouse, or for other purposes mentioned in the Poor Law Amendment Act, 1834 (*a*).

Union and Parish Property Act, 1835.

1089. The Clergy Residences Repair Act, 1776 (*b*), empowers any archbishop or bishop of any diocese or ecclesiastical corporation sole or aggregate, being lord or lords of a manor, to grant parts of the waste of such manor in perpetuity as a site for the erection of a residence for the clergyman of the parish if conveniently situate for the purpose, provided that sufficient common is left for the commoners (*c*).

Churches and residences for clergy.

By the Gifts for Churches Act, 1811 (*d*), any person or body seised in fee of a manor was empowered to grant by deed enrolled in chancery to the minister of a parish a parcel, not exceeding five acres, of the waste of the manor for the erection or enlarging of a church or chapel, or for making or enlarging a churchyard or burying ground, or for glebe to erect a mansion-house or make other conveniences for the residence of such minister, freed from all rights of common, notwithstanding any statute prohibiting alienation in mortmain or other statute or custom to the contrary (*e*).

Church or churchyard.

The Church Building Act, 1818 (*f*), which empowered the Commissioners appointed thereunder to acquire land for building churches in populous places, and to expend £1,000,000 granted for the purpose, provided that, if part of a waste was required as a site for a church, the conveyance of the lord of the manor should be sufficient, and that compensation to the commoners for loss of common rights should be paid to the churchwardens and applied by them to parochial purposes as the vestry should determine.

The duty to receive the compensation money is obligatory on the churchwardens, and not permissive (*g*).

(*o*) 1 & 2 Will. 4, c. 59.
(*p*) 5 & 6 Will. 4, c. 69, s. 4.
(*a*) 4 & 5 Will. 4, c. 76. See further, title POOR LAW.
(*b*) 17 Geo. 3, c. 53, s. 21.
(*c*) As to the scope of this Act as regards the incumbent, see *Boyd* v. *Barker* (1859), 4 Drew. 582.
(*d*) 51 Geo. 3, c. 115, s. 2.
(*e*) This only means a power to grant the lands discharged of all rights of common and other manorial rights of a like nature, and does not extend to enable a lord of a manor to grant part of a waste which was a village green subject to rights of recreation in the inhabitants (*Forbes* v. *Ecclesiastical Commissioners for England* (1872), L. R. 15 Eq. 51).
(*f*) 58 Geo. 3, c. 45, s. 38.
(*g*) New Parishes Act, 1856 (19 & 20 Vict. c. 104), s. 28. See further, title ECCLESIASTICAL LAW.

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1090. The Schools Sites Act, 1841 (*h*), authorised the gift or sale of any quantity not exceeding one acre of land as a site for a school or for the residence of a master or mistress, and where a gratuitous conveyance of waste or commonable land was made by a lord of a manor, the rights and interests of all persons were to be barred by the conveyance. If the land ceased to be used for the purpose for which it was granted, it was to revert to its original condition.

Sites for schools.

1091. The Literary and Scientific Institutions Act, 1854 (*i*), provided in almost similar terms for the acquisition of sites for literary and scientific institutions.

Literary and scientific institutions.

Defence Acts

1092. Various Acts, under the collective title of the Defence Acts (*j*), give the Secretary of State for War, as successor of the Ordnance Department, exclusive powers of acquiring land for the service of the Ordnance Department and the defence of the realm. By the Defence Act, 1854 (*k*), extended by the Defence Act, 1859 (*l*), the provisions of the Lands Clauses Consolidation Act, 1845, for the ascertaining and payment of compensation for the extinguishment of rights of common, were made applicable to lands purchased by the Secretary of State for War, or the soil of which was vested in him, and, in the event of the inclosure of a common being in progress, the inclosure proceedings could be stopped (*m*). The sanction of Parliament is not required in the case of land taken under these Acts.

Military Lands Act, 1892.

The acquisition of land for military purposes other than those coming within the scope of the Defence Acts is governed by the Military Lands Act, 1892 (*n*), which authorises the Secretary of State and, with his consent, volunteer corps and county or borough councils to acquire land (*o*) for military purposes (*p*). This Act incorporates the Lands Clauses Acts, with slight modifications which are immaterial to the present subject, and for the purposes of these Acts is to be deemed the special Act. Before putting in force

(*h*) 4 & 5 Vict. c. 38. See title EDUCATION.

(*i*) 17 & 18 Vict. c. 112. See title SCIENTIFIC AND LITERARY SOCIETIES.

(*j*) Short Titles Act, 1896 (59 & 60 Vict. c. 10). The earliest of these Acts now in force is the Defence Act, 1842 (5 & 6 Vict. c. 94), which repealed and consolidated the provisions of earlier Acts. The powers of the Ordnance Department were transferred to the Secretary of State for War by the Ordnance Board Transfer Act, 1855 (18 & 19 Vict. c. 117). See generally title ROYAL FORCES.

(*k*) 17 & 18 Vict. c. 67.

(*l*) 22 Vict. c. 12.

(*m*) Defence Act, 1854 (17 & 18 Vict. c. 67), s. 2.

(*n*) 55 & 56 Vict. c. 43.

(*o*) "Land" includes easements in or over lands and also any right of firing over lands or other user (*ibid.*, s. 23 (2)), and also the bed of the sea or any tidal water, and the right of interference with the free use of any land; see Military Lands Act, 1900 (63 & 64 Vict. c. 56), s. 3.

Under the Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c 9), lands etc. required for the Territorial Force will be acquired by the county associations constituted by schemes under that Act (*ibid.*, s. 1), and with powers conferred by the scheme or by general regulations made by the Army Council (*ibid.*, ss. 1, 2, 4).

(*p*) "Military purposes" includes rifle and artillery practice, building and enlarging of barracks and camps, erection of butts, targets, and batteries, and other accommodation, storing of arms, military drill, and any other purpose connected with military matters approved by the Secretary of State (Military Lands Act, 1892 (55 & 56 Vict. c. 43), s. 23).

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the compulsory powers of purchase, the Secretary of State must issue a provisional order after due notice, and, if objections are made, after holding a public local inquiry by a competent officer into the objections made by persons interested in the land required to be taken, and any other persons interested in the subject-matter of the inquiry. In the case of land required by a volunteer corps or county or borough council, or by a county association under the Territorial and Reserve Forces Act, 1907 (*q*), the body requiring it must petition the Secretary of State, giving full information, and the same procedure is followed. The provisional order when issued must be submitted to Parliament for confirmation by a Bill introduced by the Secretary of State, which, in the event of opposition, may be referred to a Select Committee and opposed as in the case of a private Bill.

When land has been acquired for military purposes the Secretary of State may make bye-laws for regulating the use of the land and for securing the public from danger, but no right of common is to be taken away or prejudicially affected by such bye-laws (*r*).

Provision is made for settlement of any compensation by arbitration, and not by a jury (*s*); and the taking of any part of the New Forest for the purposes of the Act except by a provisional order and the subsequent approval of Parliament is prohibited (*t*).

Common lands may also be affected by the Military Manœuvres Act, 1897 (*u*), but as any interference is necessarily temporary, it is unnecessary to do more than mention the Act.

Naval Works Act, 1895.

1093. By the Naval Works Act, 1895 (*w*), the Admiralty are invested with the powers of a Secretary of State for the purchase of land under the Defence Acts and the Military Lands Act, 1892 (*a*), and with the powers of making bye-laws with respect to land appropriated or used for any naval purpose which may be put in force with respect to land appropriated or used for any military purpose, including any sea, tidal water, or shore over which rifle or artillery practice can be carried on, subject to compensation being made if private rights are affected (*b*), and to the consent of the Board of Trade if public rights are restricted or affected (*c*), and before consenting to any bye-law under the section the Board of Trade are to give local notice by advertisement and make necessary inquiries to ascertain that public rights (*d*) will not be unnecessarily interfered with.

1094. There is an old Act (*e*) passed for the encouragement of the growth of timber in "forests, chases, and purlews," which is

(*q*) See note (*o*), p. 512, *ante*.
(*r*) Military Lands Act, 1892 (55 & 56 Vict. c. 43), s. 14.
(*s*) *Ibid.*, s. 20.
(*t*) *Ibid.*, s. 24.
(*u*) 60 & 61 Vict. c. 43.
(*w*) 58 & 59 Vict. c. 35, s 2 (1).
(*a*) See p. 512, *ante*.
(*b*) Naval Works Act, 1895 (58 & 59 Vict. c. 35), s. (2) (a).
(*c*) *Ibid.*, s. 2 (2) (b).
(*d*) "Public right" means any right of navigation, anchoring, grounding, fishing, bathing, walking, and recreation (*ibid.*, s. 2 (4)).
(*e*) 22 Edw. 4, c. 7.

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still in force, and which enacts that where wood is cut in royal forests etc. by licence of the King, or in other forests etc. without licence, it is lawful for the owner of the ground whereon the wood was felled to inclose and fence the same for seven years, so as to keep out beasts and cattle and preserve the young spring.' This Act, however, does not contain any provision for the rights of commoners (*f*); and it has been held that no inclosure thereunder is good against commoners (*g*).

Part VIII.—Rights and Remedies of Commoners.

SECT. 1.—*As against the Lord of the Manor.*

Extent of commoner's interest.

1095. The interest which a commoner has in the common is, in the legal phrase, to eat the grass with the mouths of his cattle, or to take such other produce of the soil as he may be entitled to. He must not meddle at all with the soil, nor with the fruit or produce, except as aforesaid, even though thereby he may eventually improve and meliorate the common (*h*).

Abatement by commoner.

Except in a few cases, the commoner is not allowed to take the law into his own hands and abate the nuisance which prevents his enjoyment of his rights of common. But where the acts of the lord are directly contrary to the nature of the common, the law allows an abatement by the commoner. By the grant of the right of common the grantor gives everything

(*f*) A subsequent Act (35 Hen. 8, c. 17) contained such provision, but it was repealed by stat. 7 & 8 Geo. 4, c. 27, s. 1.

Two other Acts, also to encourage planting and preserving timber (29 Geo 2, c. 36; 31 Geo. 2, c. 41), which empowered owners of wastes, with the assent of a majority in number and value of persons having rights of common of pasture over them, to inclose parts of the wastes for the growth and preservation of timber and underwood, or to grant the same to other persons for the like purpose, were repealed by the Commons Act, 1899 (62 & 63 Vict. c. 30), s. 22 and Sched. II. These Acts and an agreement under them gave rise to the case of *Nicholls* v. *Mitford* (1882), 20 Ch. D. 380, where it was decided that the first-mentioned Act applied only to agreements made between the owner of the soil and persons having rights of common of pasture, and not to agreements where the persons who had such rights of common were also collectively the owners of the bushes and underwood growing on the wastes of the manor; and consequently an agreement entered into in 1769 between the lord of the manor and persons who constituted a majority of the owners of the bushes and underwood, though acted on down to 1876, was held inoperative against such owners, and the lord was prevented from inclosing parts of the waste for the purposes mentioned in the Act. The Acts were treated in the case as an extension of the Statute of Merton, and the report contains a valuable collection of the authorities relating to the relative rights of the lord of the manor and commoners under that statute.

(*g*) *Barrington's (Sir Francis) Case* (1611), 8 Co. Rep. 136 b.

(*h*) Adapted from 1 Roll. Abr. 406, quoted in 1 Wms. Saund. 353 *a*.

which is incident to it, such as free ingress, egress etc. Therefore, if the lord erect a wall, gate, hedge, or fence round the common, the commoner may abate the erection, because it is inconsistent with the terms of the grant (*i*); and where a fence has been erected upon a common inclosing and separating parts of it from the residue, and thereby interfering with the rights of the commoners, they are not by law restrained in the exercise of those rights to pulling down so much of the fence as it may be necessary for them to remove for the purpose of enabling their cattle to enter and feed upon the residue of the common, but are entitled to consider the whole of the fence as a nuisance and to remove it accordingly. If, however, the fence is on other land which is no part of the common, but surrounds the common, a commoner can only abate so much of the erection as to make a way for his cattle to go into the common (*k*).

No interference with rabbits etc.

1096. So a commoner may not fill up coney burrows (*l*) or kill the conies, though the lord surcharge the common by their maintenance (*m*), on the ground that the commoner hath nothing to do with the land, and may not meddle with anything of the lord's there. It has, however, been suggested (*n*) that a custom for the

(*i*) 2 Roll. Abr. 145, (W), pl. 2; *Cooper* v. *Marshall* (1757), 1 Burr. 259; *Sadgrove* v. *Kirby* (1797), 1 Bos. & P. 13, Ex. Ch. As to the duty to fence in dangerous excavations against cattle lawfully on the land, see title BOUNDARIES AND FENCES, Vol. III., p. 129.

(*k*) *Arlett* v. *Ellis* (1827), 7 B. & C. 346; *Sadgrove* v. *Kirby*, *supra*, where the defendant, a commoner, claimed to justify cutting down trees in a common field on the ground that he could not enjoy his common of pasture in so ample and beneficial a manner as he might otherwise have done, but Lord KENYON, C.J., after carefully considering the authorities, came to the conclusion that the commoner was not justified in cutting down the trees: "The distinction seems to be this: if the lord of the manor make a hedge round the common or do any act which entirely excludes the commoner from exercising his right, the latter may do whatever is necessary to let himself into the common; but if the commoner can get at the common and enjoy it to a certain extent, and his right be merely abridged by the act of the lord, in that case his remedy is by an action on the case or by an assize [see p. 516, *post*], and he cannot assert his right by any act of his own. The trees had become part of the inheritance." See too *Howard* v. *Spencer* (1665), 1 Sid. 251. An earlier case of *Mason* v. *Cæsar* (1675), 2 Mod. Rep. 65, which apparently justified the breaking down of an entire hedge by a commoner instead of merely pulling down so much as might have opened a way to the common on the ground that it was not interfering with the soil, but only pulling down an erection on the common, was described by Lord KENYON, C.J., in *Sadgrove* v. *Kirby*, *supra*, at p. 486, as a short loose note; and he added that it did not appear clearly that the defendant in that case did more than make a gap in the hedge to let his cattle into the common. In any case *Mason* v. *Cæsar*, *supra*, is clearly inconsistent with *Sadgrove* v. *Kirby*, *supra*, and *Arlett* v. *Ellis*, *supra*, which are both decisions of the Exchequer Chamber.

(*l*) *Cooper* v. *Marshall*, *supra*. Compare *Horsey* v. *Hagberton* (1609), Cro. Jac. 229.

(*m*) *Hadesden* v. *Gryssel* (1607), Cro. Jac. 195. There are several earlier cases to the same effect.

(*n*) In *Coote* v. *Ford* (1900), 83 L. T. 482, where there were entries in the court rolls of a manor in Wiltshire of presentments extending over a hundred years that rabbits should be destroyed in the lordship with guns or dogs, or in any other way without hindrance of any person whomsoever; and compare the Custumary of the Manor of Bolsover, quoted in *Portland* (*Duke*) v. *Hill* (1866), L. R. 2 Eq.

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commoners to kill rabbits upon the waste may be good, though a custom for anyone in the parish to do so would be unreasonable and bad.

A commoner cannot fill up a trench in the common cut by the lord, or dig down molehills, or cut the grass, wood, bushes, fern, or other things growing on the common (*o*).

Abatement at commoner's risk.

1097. Where a commoner abates an inclosure on the common he does so of course at his own risk, since the lord, having the right to approve, may bring an action for trespass, if he can show that he had left a sufficiency of common (*p*).

A commoner may pull down a building erected on the common which interferes with the exercise of his right, though he cannot do so when the house is inhabited (*q*) unless he has previously given notice of his intention to remove it (*r*).

Commoner's remedy enforceable by action.

1098. In all cases of interference with rights of common by a lord of a manor, except the absolute exclusion of the commoner and his beasts, the remedy of the commoner was formerly by an action on the case or an assize, *i.e.*, a writ of assize for the admeasurement of the common (*s*), and is now by an action for damages with, if necessary, a claim for an injunction.

Order for removal.

1099. As commoners are themselves entitled to remove inclosures which would permanently exclude them from a portion of the common where there is insufficiency of pasture (*t*), so *à fortiori* when they bring an action against the lord in respect of such inclosures they are entitled to have an order for their removal (*a*).

Surcharges by lord.

1100. Where the lord surcharges the common with his own stock, so that the commoner cannot enjoy his right in as full and ample a manner as he ought, the commoner must not take the

765, at p. 768, for a custom for the tenants and sokemen to hunt and take foxes, hares, and birds, and fish in all places, except in the park and mill pools, for their own benefit.

(*o*) *Howard* v. *Spencer* (1665), 1 Sid. 251; *Potter* v. *North* (1669), 1 Vent. 383, 1 Wms. Saund. 353 a.

(*p*) *Robinson* v. *Duleep Singh* (1879), 11 Ch. D. 798, C. A. The restrictions imposed by statute upon the lord's right of approvement (see p. 509, *ante*) will not affect his right to maintain an action for trespass.

(*q*) *Perry* v. *Fitz Howe* (1846), 8 Q. B. 757, followed in *Jones* v. *Jones* (1862), 1 H. & C. 1.

(*r*) *Davies* v. *Williams* (1851), 16 Q. B. 546; and see *Lane* v. *Capsey*, [1891] 3 Ch. 411, where CHITTY, J., though it was unnecessary to decide the point, was clearly of opinion that *Davies* v. *Williams*, *supra*, was to be followed.

(*s*) *Hadesden* v. *Gryssell* (1607), Cro. Jac. 195; *Cooper* v. *Marshall* (1757), 1 Burr. 259; *Sadgrove* v. *Kirby* (1797), 1 Bos. & P. 13, Ex. Ch. For a description of the assize for admeasurement of the common, see 3 Bl. Com. 238, quoted in Williams, Rights of Common, p. 121. It was the early form of ascertaining the extent of everyone's rights on a common, and, with many other old forms of action, was abolished by the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 36.

(*t*) *Arlett* v. *Ellis* (1829), 9 B. & C. 346; and other cases referred to in note (*k*), p. 515, *ante*.

(*a*) *Robertson* v. *Hartopp* (1889), 43 Ch. D. 484, C. A., *per* STIRLING, J., at p. 496.

law into his own hands and distrain the surcharge (*b*). His remedy is by action (*c*).

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Individual commoner's right of action.

1101. An action may be brought by an individual commoner against the lord for interference with rights of common by surcharging the common with his own stock or by approving without leaving sufficiency of pasture, or for digging marl, loam, sand etc., to the detriment of the pasturage (*d*).

Necessity of proving insufficiency of common.

1102. In the case of approvement the burden of proving that sufficiency of pasture is left is upon the lord (*e*); but in an action against the lord for surcharge or for digging marl, loam, sand etc., the *onus probandi* is on the commoner, the distinction arising from this, namely, that, the lord having made a grant over the whole waste, his right to inclose is treated as a right conditional upon his establishing that there is sufficient waste left for the tenant to enjoy the right of common granted, whereas the exercise of the right of turning on stock or of getting marl, loam, and sand is by virtue of his ownership of the soil, and is subject only to the tenants complaining, if they can establish their complaint, of his unduly availing himself of that ownership (*f*).

Where the tenants of the manor are entitled to the exclusive pasturage of the common, or the lord is limited to a number of stock certain, the lord is reduced to the position of a stranger

(*b*) *Coney's Case* (1586), Godb. 122; *Hall* v. *Harding* (1769), 4 Burr. 2426; *Cape* v. *Scott* (1874), L. R. 9 Q. B. 269; and see title ANIMALS, Vol. I., pp. 378 *et seq.*

(*c*) *Hall* v. *Harding*, *supra*, *per* Lord MANSFIELD, C.J., at p. 2430: "But if there be no custom to exclude the lord totally during the commoning season, his property in the soil would at least give him a colour for putting his cattle there; and though he overcharged the common, no cattle of the lord's can be deemed trespassers, or the lord a stranger in his own soil. The commoners therefore could have no authority in themselves to take an immediate and summary execution against the cattle of the lord by distraining them *damage feasant*, as they may the cattle of a stranger, who has no pretence or colour of right."

It was considered at one time that a commoner might distrain the cattle of the lord; see *Kentick* v. *Pargiter* (1608), Cro. Jac. 208; Vin. Abr. tit. Commoner, A, s. 6; *Trulock* v. *White* (1638), 1 Roll. Abr. 405. But in *Kentick* v. *Pargiter*, *supra*, the lord was reduced to the position of a commoner on his own land, the exclusive right to the pasturage after Lammas Day being in the tenant of the manor, and the lord was restricted to turning out three horses. *Hall* v. *Harding*, *supra*, has been constantly followed (see *Cape* v. *Scott*, *supra*); and there are other cases to the same effect; see *Anon.* (1611), Godb. 182; and compare *Atkinson* v. *Teasdale* (1772), 3 Wils. 278; *Whiteman* v. *King* (1791), 2 Hy. Bl. 4, where A., who was possessed of a quantity of land in a common field with a right of common over the whole field, and B., who had also a right of common over the whole field, entered into an agreement for their mutual advantage and convenience, with mutual covenants not to exercise their respective rights for a term of years, and it was held that if during the term the cattle of B. should come upon the land of A. he might distrain them damage feasant, the case being taken out of the rule relating to rights of common by the mutual covenants, and B. being in the position of a stranger as regards his rights of common.

In an action against the lord for surcharging, the commoner must particularly show the surcharge, though in an action against a stranger he need not (*Smith* v. *Feverell* (1675), 2 Mod. Rep. 6); and see p. 522, *post*.

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

(*e*) *Coney's Case*, *supra*; *Robertson* v. *Hartopp* (1889), 43 Ch. D. 484, C. A. *per* FRY, L.J., at p. 515.

(*f*) *Hall* v. *Byron* (1877), 4 Ch. D. 667, *per* HALL, V.-C., at 680.

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or of another commoner, and it is not necessary for the commoner to prove special damage to enable him to maintain an action against the lord (*g*), but in all other cases the commoner must prove that he has not sufficient common left for him (*h*).

Consequently in an action against a lord of a manor or against a person who has put cattle on the common with the licence of the lord the commoner must show that he has sustained a specific injury. It is not enough to show that the cattle consumed the grass, as in the case of a stranger, but it must appear that there was not a sufficiency of common left (*i*).

The question of what is a sufficiency of common has been already dealt with (*k*), but where a lord of the manor fails to show that sufficiency of common is left for the commoners, and acts of inclosure and digging turf, loam, sand etc., have been going on for several years and might, if unrestrained, constitute evidence of a custom in diminution of the commoners' rights (*l*), the commoners are entitled to a declaration that the acts complained of constitute an injury to their rights and to an order for the removal of such inclosures (*m*).

Acts which, if done by a stranger, will support an action at law against him (*n*), will also support an action against the lord, provided that the commoner can show that sufficiency of common is not left for him (*o*).

Rights of freeholder of manor.

1103. A freehold tenant of the manor does not by ceasing to pay quit-rents and by neglecting to claim admittance lose his rights as against the lord (*p*).

Representative actions.

1104. Commoners may join for the protection of their rights, and an action may be brought by one on behalf of himself and on behalf of the other commoners, or where there are different classes entitled, as, for instance, freehold tenants of the manor, copyholders, and owners of enfranchised copyholds, a representative of each class may sue on behalf of himself and on behalf of the other members of the class. The action is in the nature of a bill of peace, and is the most effectual remedy for establishing the rights of the commoners and for quieting them in the enjoyment of those rights when they are menaced by the lord (*q*).

(*g*) Because the lord's cattle, or his cattle in excess of the number which he is entitled to put on, are not there under colour of any right.

(*h*) *Smith* v. *Feverell* (1675), 2 Mod. Rep. 6; Com. Dig. tit. Action on the Case for a Disturbance, A 1.

(*i*) *Robertson* v. *Hartopp* (1889), 43 Ch. D. 484, C. A., *per* STIRLING, J., at p. 501.

(*k*) See p. 506, *ante*.

(*l*) See *Bateson* v. *Green* (1793), 5 Term Rep. 411.

(*m*) *Robertson* v. *Hartopp*, *supra*; and see p. 516, *ante*.

(*n*) See p. 522, *post*.

(*o*) *Robertson* v. *Hartopp*, *supra*, *per* STIRLING, J., at p. 501, following *Hall* v. *Byron* (1877), 4 Ch. D. 667; *Coney's Case* (1586), Godb. 122; *Atkinson* v. *Teasdale* (1772), 3 Wils. 278; and *Mellor* v. *Spateman* (1669), 1 Wms. Saund. 343, 346 b.

(*p*) *Warrick* v. *Queen's College, Oxford* (1871), 6 Ch. App. 716, following *Chichester (Earl)* v. *Hall* (1851), 17 L. T. (o. s.) 121.

(*q*) See *Powell* v. *Powis (Earl)* (1826), 1 Y. & J. 159, the earliest case to

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A judgment made against representative defendants in an action will bind other persons who are not parties to the action, but whose interest is similar to that of the representative defendants or some of them, unless such other persons can show fraud or collusion, or that the court has been misled by the case being not properly fought or fairly represented, or unless they can show some special ground of exception, all of which defences are open when the decree establishes only general rights. An action in such a case against a person who was not represented in the original action is not a supplemental proceeding, but an original action, and any restrictions upon bringing actions imposed by the decree must be complied with (*r*).

Effect of judgment on lord's grantee.

1105. A judgment in an action which establishes rights of common over waste land sold by a lord of a manor to a grantee who inclosed it, is not, in the absence of any evidence of entry on the land or actual disturbance of possession, breach of a covenant for quiet enjoyment, even though, in consequence of the judgment, an Act is passed under which the grantee's interest in the property is purchased as in land subject to rights of common; and, in the absence of any evidence of a grant of rights of common by the lord or his predecessors in title, the court will not infer that there must have been such a grant so as to entitle the grantee to damages for a breach of covenants for title (*s*).

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which it is necessary to refer. A bill of peace has to a certain extent been superseded in practice by R. S. C., Ord. 16, r. 9, under which one or more of numerous persons having the same interest in one cause or matter may sue or be sued, or may be authorised by the court or a judge to defend, on behalf of all persons so interested, but care has to be exercised in deciding what classes can be represented, and the earlier cases afford a guide. Thus, bills have been maintained by freehold tenants on behalf of themselves and other freehold tenants (*Powell* v. *Powis* (*Earl*) (1826), 1 Y. & J. 159, and cases in note thereto); by a freehold tenant on behalf of the freehold and copyhold tenants of the manor (*Smith* v. *Brownlow* (*Earl*) (1870), L. R. 9 Eq. 241); by three freeholders of a manor on behalf of themselves and all other freeholders where there were no copyholders (*Warrick* v. *Queen's College, Oxford* (1871), 6 Ch. App. 716); by a freeholder suing on behalf of himself and all other freehold tenants of the manor, though he only proved rights on behalf of the freeholders within a certain area of the manor, and although he might have sued on behalf of the copyholders also who had co-extensive rights with the freeholders (*Betts* v. *Thompson* (1871), 6 Ch. App. 732); and compare *York Corporation* v. *Pilkington* (1737), 1 Atk. 282.

(*r*) *Commissioners of Sewers* v. *Gellatley* (1876), 3 Ch. D. 610, where, after an earlier action (*Commissioners of Sewers* v. *Glasse* (1874), L. R. 19 Eq. 134), had established general rights of common in Epping Forest, and an injunction had been granted against the continuance of numerous inclosures recently made by numerous lords of manors and grantees from them, there being representative defendants from each manor, the defendant, who was a grantee from one of the lords, but had not been made a party to the previous action, alleged that he was not bound by the decree, but his contention failed on the grounds above stated; and it was also held that, as by the Epping Forest Amendment Act, 1872 (35 & 36 Vict. c. 95), no new legal proceedings except such supplemental or amended Bills as might be filed by the Commissioners of Sewers for the purpose of making effectual the suit of *Commissioners of Sewers* v. *Glasse*, *supra*, were to be instituted without leave of the Epping Forest Commissioners, the action against Gellatley required the leave of the Epping Forest Commissioners.

(*s*) *Howard* v. *Maitland* (1883), 11 Q. B. D. 695, C. A., which also arose out of the decree in *Commissioners of Sewers* v. *Glasse*, *supra*.

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As against the Lord of the Manor.

Evidence of rights of common.

1106. Copyholders claim their rights by custom, while freeholders claim by prescription (*a*), a distinction which is sometimes important when the nature of the evidence has to be considered; for a custom may be proved by reputation, and hearsay evidence is admissible, while such evidence is, as a rule, not admissible in support of a prescriptive claim. The freehold tenants of a manor, however, must have in common some rights over the waste as against the lord, although such rights may vary *inter se;* and although they cannot, like copyholders, allege a custom on which hearsay evidence is admissible, yet when there is evidence of rights sufficient to justify the conclusion that the original grants included these rights to the original freeholders, and that such rights have been exercised for all time, a general right of so large a description is established that the evidence of all other persons holding in the exact position of a plaintiff becomes admissible (*a*).

Where rights have been exercised for many years the court is bound to try to find a legal origin for such rights; and consequently where the evidence shows that the rights have been exercised by the freehold tenants of a manor and also by the inhabitants it will be presumed that the inhabitants claimed through the freehold tenants (*b*).

Where commoner sues on his own behalf alone.

1107. But although one commoner may bring an action in the nature of a bill of peace on behalf of himself and other commoners who are numerous, to have the rights of the commoners established and to prevent interference with those rights by a lord of a manor, he will not be allowed to bring such an action when he sues on behalf of himself alone. In such a case his remedy is to bring an action for disturbance of his rights, in which, if he proves his rights of common and that the lord has invaded those rights, he will be able to recover (*c*).

Lessees and occupiers.

1108. Lessees or occupiers cannot prescribe to have rights of common, and consequently any action on the part of lessees or occupiers must be by prescribing in the names of their landlords (*d*).

No liability for damage caused by exercise of rights.

1109. In the due exercise of his rights the commoner is not answerable for any damage which accrues to others from their own negligence or misconduct. Thus, if the lord sets up a stack of corn

(*a*) *Warrick* v. *Queen's College, Oxford* (1871), 6 Ch. App. 716. The position of freeholders was there described as that of shareholders of different classes claiming against a fraudulent director of a company; they may join against a common enemy, though, after the common right is established, there may be litigation among themselves as to who are entitled to the gains obtained (*ibid.*, *per* Lord HATHERLEY, L.C., at p. 726).

(*b*) *Ibid.* at p. 727. But see *contrà Rivers* (*Lord*) v. *Adams* (1878), 3 Ex. D. 361, for the reasons against such a presumption.

(*c*) *Phillips* v. *Hudson* (1867), 2 Ch. App. 243, where a bill filed against the lord of the manor by a copyholder who alleged that he had been admitted to all the lands and hereditaments held of a manor except one small tenement, and claimed that he and the owner of the small tenement were entitled to all the profits arising from a waste of the manor (except certain woods), was on appeal dismissed with costs, as not being in the nature of a bill of peace.

(*d*) *Grimstead* v. *Marlowe* (1792), 4 Term Rep. 717; *Tilbury* v. *Silva* (1890), 45 Ch. D. 98, C. A.; *Austin* v. *Amhurst* (1877), 7 Ch. D. 689, though in that case it appeared that under a bye-law made by the homage in pursuance of a deed of arrangement in the time of James I. occupiers had rights of common.

upon the common, and the commoners' cattle eat it, or if the owner of land in an open field leaves his corn or other crop uncut after the day appointed for throwing the field open to the commoners, and it is eaten by the commoners' cattle, in neither case will there be any remedy against the commoners (*e*), nor is the owner entitled to drive out the commoners' cattle (*f*).

SECT. 1. **As against the Lord of the Manor.**

1110. Where a man has common in a field while it lies fresh, and not sown, the owner will not be able to defeat the right of the commoner by only sowing part of it, but the commoner is entitled to common in the residue, for otherwise a part might be sown every year to deprive the commoner of his right (*g*).

Effect of partial sowing on rights of common.

SECT. 2.—*As against other Commoners.*

1111. In many respects the rights and remedies of a commoner against another commoner who prevents him from enjoying his right of common to its full extent by surcharging the common, which is the most usual form of interference, are the same as against the lord of the manor or owner of the soil. He is not entitled to constitute himself a judge in his own case where cattle or other stock are on the common under colour of a right, even though that right may be exceeded, and therefore he may not distrain the cattle of another commoner, but his remedy is by action (*h*), formerly an action on the case or an assize (*i*).

Surcharging.

But if the right of common is for a number certain, and one commoner surcharges by putting on more than the number to which he is entitled, another commoner may distrain (*k*). Where the number is not absolutely certain in point of number, but is settled with relation to the quantity of land, as, for instance, two sheep for every acre, one commoner cannot distrain the supernumerary cattle of another commoner (*l*).

It is no defence to an action for surcharging the common that the plaintiff himself has surcharged (*m*), and the plaintiff need not show that he turned on any cattle of his own at the time of the surcharge, but only that he could not have enjoyed his common as beneficially as he ought (*n*).

In an action by one commoner against another for surcharging the plaintiff need not particularly show the surcharge (*o*), but in an action against the lord he must (*p*).

(*e*) *Farmor* v. *Hunt* (1610), Cro. Jac. 271.
(*f*) *Ibid.*
(*g*) *Trulock* v. *Riggsby* (1610), Yelv. 185.
(*h*) *Atkinson* v. *Teasdale* (1772), 2 Wm. Bl. 817; *Hall* v. *Harding* (1769), 4 Burr. 2426; *Whiteman* v. *King* (1791), 2 Hy. Bl. 4.
(*i*) See p. 516, *ante*.
(*k*) *Dixon* v. *James* (1698), Freem. (K. B.) 273; and compare *Kentick* v. *Pargiter* (1608), Cro. Jac. 208; and p. 517, *ante*.
(*l*) *Hall* v. *Harding*, *supra*. But if the number of acres held by the surcharging commoner is known, the number is certain, on the principle *Id certum est quod certum reddi potest*. Possibly under the present rules of pleading the legality of a distress might be upheld in such a case.
(*m*) Com. Dig. tit. Common, I; *Hobson* v. *Todd* (1790), 4 Term Rep. 71.
(*n*) *Ibid.*; *Wells* v. *Watling* (1778), 2 Wm. Bl. 1233.
(*o*) *Atkinson* v. *Teasdale* (1772), 3 Wils. 278.
(*p*) *Smith* v. *Feverel* (1675), 2 Mod. Rep. 6; see note (*c*), p. 517, *ante*.

SECT. 2. **As against other Commoners.**

A commoner may maintain an action for surcharge where the right of common claimed is common of vicinage (*q*).

Encroachment.

1112. In cases of encroachment on the common by a commoner, another commoner would presumably have a right of action if he could prove that the inclosure was such that his right of common was interfered with, but he could not bring an action of trespass, as the ownership of the soil is in the lord; and the same principle would apply in other cases of interference with the common.

Diseased cattle.

1113. In many manors there are customary bye-laws with reference to turning out diseased cattle or stock upon the waste; but it does not appear that, in the absence of such a custom, a commoner would have any remedy against another commoner who turned out diseased stock (*r*).

SECT. 3.—*As against Strangers.*

Actual damage unnecessary.

1114. Any act of a stranger whereby the commoner is prevented from having the use and enjoyment of his common of pasture in as ample and beneficial a manner as he otherwise would is a legal injury, for which an action will lie, even though no actual damage be proved (*s*). Therefore, in bringing an action against a stranger it is not necessary for a commoner to show that he has not sufficiency of pasture left. It is quite sufficient to prove that the beasts of the stranger consumed the grass. This follows the principle above stated (*t*), that where beasts are on a common under colour of a right it is necessary to prove damage or insufficiency of pasture, but that where there is no colour of right the commoner may take the matter into his own hands.

Consequently, if a stranger turns beasts upon the common, a commoner may distrain them, damage feasant, or may chase them off the common, for a stranger has no colour to have his cattle there (*u*).

(*q*) *Cape* v. *Scott* (1874), L. R. 9 Q. B. 269.

(*r*) The question whether a lord of a manor was justified in impounding a mangy mare upon a common was discussed in *Palmer* v. *Stone* (1759), 2 Wils. 96, but the case turned upon pleadings which were bad on both sides, and was eventually decided on a plea of a custom of the forest of Waltham. By stat. 32 Hen. 8, c. 13, repealed as an obsolete statute by stat. 19 & 20 Vict. c. 64, persons were prohibited from putting to pasture any horse, gelding, or mare infected with scab or mange upon any forests, chases, moors, marshes, heaths, commons, waste grounds, or common fields under a penalty, the offence to be presentable at the court leet and the penalty to be paid to the lord of the manor. As to the possible criminal liability for turning out a horse or other animal known to be dangerous upon a common where there are numerous public footpaths, see *R.* v. *Dant* (1865), Le. & Ca. 567.

(*s*) *Robertson* v. *Hartopp* (1889), 43 Ch. D. 484, C. A., *per* STIRLING, J., at p. 500, summing up the law as gathered from Lord COKE in *Marys' (Robert) Case* (1613), 9 Co. Rep. 111 b; *Wells* v. *Watling* (1778), 2 Wm. Bl. 1233; *Hobson* v. *Todd* (1790), 4 Term Rep. 71; and *Pindar* v. *Wadsworth* (1802), 2 East, 154. No action, however, will lie where the damage is caused by the lawful user of his land by an adjoining owner (*George* v. *Lysaght and Meade-King* (1883), 49 L. T. 49).

(*t*) See pp. 518, 521, *ante*.

(*u*) *Atkinson* v. *Teasdale* (1772), 3 Wils. 278, *per* DE GREY, C.J., at p. 290; *Dixon* v. *James* (1698), Freem. (K. B.) 273; *Pindar* v. *Wadsworth*, *supra*. *Woolton* v. *Salter* (1682), 3 Lev. 104, in which it was decided that a commoner could not distrain the cattle of a stranger without alleging special damage, must be taken to have been overruled by *Pindar* v. *Wadsworth*, *supra*, and the other cases above cited.

Part IX.—Suspension and Extinguishment of Rights of Common otherwise than by Statute.

SECT. 1.—*By Unity of Seisin or Possession.*

SECT. 1. By Unity of Seisin or Possession.

1115. When the ownership of the whole of the land which gives the right and that of the land which is the subject of the right unite by purchase in the same person the right of common becomes extinguished, whether the right be appendant or appurtenant (*a*). But the estates in fee simple must be equal in duration, quality, and all other circumstances of right. If the one be only a fee simple qualified or a base fee, it will not be sufficient to work an extinguishment (*b*).

Unity of ownership.

If there is unity of possession only, but not unity of seisin, as where a man, having a right of common, takes a lease for years of the land over which the right is exercised, the right is suspended, and revives upon the expiration of the lease (*c*).

1116. But where a copyhold tenement to which a right of common is attached vests in the lord by forfeiture, and he regrants it as copyhold to hold according to the custom of the manor, a right of common continues appertaining to the land (*d*); and where the tenant of a particular farm having rights of common appendant or appurtenant

Forfeiture and regrant of copyhold.

(*a*) *Tyrringham's Case* (1584), 4 Co. Rep. 36 a, 38 a; Tudor, L. C. Real Prop., 4th ed., p. 700. This decision, which was in opposition to some earlier cases in the Year Books, was based on the principle that it was against a rule of law that a rent, common, or other profit issuing out of land should exist when a man had as high and perdurable estate in the rent, common, or profit issuing out of the land as in the land itself, and therefore the rent, common, or profit was held to be extinct. See too *Nelson's Case* (1584), 3 Leon. 128, where, the Abbot of D. being seised of a common out of the lands of the abbey of S. as appendant to lands of the Abbot of D., the King after the dissolution granted the possessions of the abbeys to different grantees, and it was held that the right of common was extinguished by the unity of possession in the Crown; see also *Sir William Sawyer's Case* (1630), W. Jo. 285; and compare *Musgrave* v. *Inclosure Commissioners for England and Wales* (1874), L. R. 9 Q. B. 162, *per* BLACKBURN, J., at p. 174.

(*b*) *R.* v. *Hermitage (Inhabitants)* (1691), Carth. 239, where Henry VIII. had before the birth of Edward VI. acquired a manor of Fordington, which was parcel of the Duchy of Cornwall, and a common which was parcel of that manor, and over which rights of common were claimed, and was therefore seised in fee simple determinable upon the birth of a Duke of Cornwall, which was a base fee; he also acquired in right of the Crown the lands in respect of which the rights of common were claimed, and having therefore a pure fee simple indeterminable in those lands, he had granted all the lands to tenants after the unity of possession; after much argument it was unanimously resolved by HOLT, C.J., and the whole court that this was not such a unity of possession as would destroy the prescription. See too Co. Litt. 313 b: "A disseisor or tenant in fee upon condition hath as high and great an estate, but not so perdurable an estate as shall make an extinguishment"; and compare *Warburton* v. *Parke* (1857), 2 H. & N. 64, where the lessor of the tenants who occupied the dominant tenement and enjoyed the common, was tenant for life of, and occupier of the common.

(*c*) Co. Litt. 114 b; *Wyat Wild's Case* (1609), 8 Co. Rep. 78 b.

(*d*) *Swayne's Case* (1608), 8 Co. Rep. 63 a, the title of the copyholder by custom under the grant which was originally made in respect of the lands being paramount to the subsequent title of the lord; *Badger* v. *Ford* (1819), 3 B. & Ald. 153.

SECT. 1. By Unity of Seisin or Possession.

thereto becomes by inheritance lord of the manor, although the right of common merges, yet the lord retains an interest which may properly be the subject of an allotment under an Inclosure Act, and such allotment should be measured by the value of the right of common (*e*).

Purchase of part of land having right of common.

1117. The purchase of part of the land to which a right of common is appendant or appurtenant does not effect an extinguishment of the right of common over the whole, for the right is apportioned (*f*).

Common appendant, being of common right, is apportioned on the purchase by the commoner of any part of the land in which he has common (*g*). But common appurtenant (except shack (*h*)) to a house or to land is extinguished by the purchase of any portion of the waste, and is suspended by a lease (*i*); and the same rule applies to common in gross, and any other kind of common (*a*).

Re-grant.

1118. Where a right of common appendant has been extinguished by unity of possession, it cannot be re-created at the present day, as common appendant must have been granted before the Statute of "Quia Emptores" (*b*); but a right of common appurtenant may be granted at any time by the use of special words in a grant or conveyance (*c*), though not by the use of mere general words (*d*).

(*e*) *Lloyd* v. *Powis* (*Earl*) (1855), 4 E. & B. 485. So with the demesne lands of a lord, in which there is a similar unity of possession (*Arundell* v. *Falmouth* (*Lord*) (1814), 2 M. & S. 440).

(*f*) Co. Litt. 122 a; *Tyrringham's Case* (1584), 4 Co. Rep. 36 a, 37 b; Tudor, L. C. Real Prop. 700.

(*g*) *Ibid.*; and see *Wyat Wild's Case* (1609), 8 Co. Rep. 78 b.

(*h*) From a case quoted in Rolle's Abridgment it would appear that common of shack is not extinguished by unity of possession, but it is doubtful whether more than common of vicinage is intended, and to this common of shack was supposed to be closely allied (1 Roll. Abr. 935). Common of shack, or mutual commoning, will not be extinguished by unity of possession for the necessity of the public good to use it without inclosure. *London's* (*Bishop*) *Case* (not reported) was referred to by the court.

(*i*) *Wyat Wild's Case*, *supra*; *Tyrringham's Case*, *supra*; *Bradshaw* v. *Eyre* (1597), Cro. Eliz. 570; and see *Morse* v. *Well* (1609), 1 Brownl. 180, also reported *sub nom. More* v. *Webb*, 2 Brownl. 297; and *Smith* v. *Bonsall* (1598), Gouldsb. 117.

(*a*) *Sawyer's Case* (1630), W. Jo. 285; 5 Vin. Abr. 18.

(*b*) 18 Edw. 1, c. 1 (1290); see p. 448, *ante*.

(*c*) *Bradshaw* v. *Eyre* (1597), Cro. Eliz. 570; *Cowlam* v. *Slack* (1812), 15 East, 108, *per* Lord ELLENBOROUGH, C.J., at p. 114, approving *Bradshaw* v. *Eyre*, *supra*, and *Sacheverell* v. *Porter* (1635), W. Jo. 396; compare *Warburton* v. *Parke* (1857), 2 H. & N. 64, *per* BRAMWELL, B., at p. 70.

(*d*) Thus, the use of the words "with all commons etc. thereto belonging or appertaining" where there is at the time of the grant no right of common existing is insufficient (*Clements* v. *Lambert* (1808), 1 Taunt. 205; *Grimes* v. *Peacock*, Bulst. 17; *Bradshaw* v. *Eyre*, *supra*); but a grant coupled with such words as "with all commons etc. thereto appertaining or occupied or used therewith" (*Worledge* v. *Kingswell* (1599), Cro. Eliz. 794) or "in any way thereto appertaining and usually demised therewith" (*Styant* v. *Staker* (1691), 2 Vern. 250), or "with such common as the last tenant had enjoyed" (*Hall* v. *Byron* (1877), 4 Ch. D. 667; *Baring* v. *Abingdon*, [1892] 2 Ch. 374, C. A.), will create a new right of the same nature as that previously enjoyed, for, although it was not common in the hands of the grantor, it is *quasi*-common used with the land (*Bradshaw* v. *Eyre*, *supra*); compare *Ballard* v. *Dyson* (1808), 1 Taunt. 279, *per* Lord MANSFIELD, C.J., at p. 284; and see p. 528, *post*.

SECT. 2.—*By Severance.*

SECT. 2. By Severance.

1119. Whether a right of common is extinguished by severance from the land or tenement to which it is appendant or appurtenant depends upon the way in which it can be measured after alienation.

Severance of right from land.

Common appendant, which is always measured by the capacity and requirements of the land or tenement to which it is appendant, as in the case of common of pasture by levancy and couchancy and in the case of common of turbary, estovers, piscary etc. (if such commons can be appendant (*e*)) by the requirements of the house or farm, cannot be severed, and an exception of the rights of common from a conveyance of the land or tenement or a conveyance of the rights of common separately from the land or tenement will extinguish the right (*f*).

The same rule applies to common appurtenant where the measure of the right is the same, but not where the number of beasts that may be turned out or the quantity of turf, peat, wood, fish etc. that may be taken is fixed (*g*).

If the number of beasts to be turned out is certain, levancy and couchancy need not be prescribed or shown (*h*), and the right may either be excepted on a conveyance or demise of the land or may be granted separately (*i*), in any of which cases it ceases to be common appurtenant and becomes a common in gross; and so with a right to take a certain number of cartloads of wood, turf, or peat or a certain number of fish (*k*).

SECT. 3.—*By Non-user.*

1120. It is apprehended that if a person who has acquired a right of common fails for a long period of time to exercise it he may lose such right if circumstances permit of the presumption that he

Non-user.

(*e*) But as to this, see p. 466, *ante*.

(*f*) Y. B., 26 Hen. 8, Trin., p. 4, c. 15; 1 Roll. Abr 396; Vin. Abr. tit. Common, O.

(*g*) *Drury* v. *Kent* (1603), Cro. Jac. 14; and compare *Bunn* v. *Channen* (1813), 5 Taunt. 244; *Daniel* v. *Hanslip* (1672), 2 Lev. 67; and *Lathbury* v. *Arnold* (1823), 1 Bing. 217.

(*h*) *Stevens* v. *Austin* (1676), 2 Mod. Rep. 185; *Manchester* (*Earl*) v. *Vale* (1666), 1 Wms. Saund. 28 d; *Richards* v. *Squibb* (1698), 1 Ld. Raym. 726; *Thornel* v. *Lassels* (1604), Cro. Jac. 26.

(*i*) *Drury* v. *Kent*, *supra*; Y. B. 26 Hen. 8, Trin., p. 4, c. 15.

(*k*) It was at one time thought that common of estovers etc. could not exist in gross because the reasonableness of the quantity must be limited by the necessity for fuel and repairs (Y. B. 5 Hen. 7, 7 b, *per* FAIRFAX, J.); and a right to take an uncertain quantity without such a limit might result in the total destruction of the product, to the detriment of the owner of the land; but where the right is for a quantity certain of estovers these objections do not apply, and the better opinion is that such a right would be good in gross, and that consequently the right may be severed from the premises to which it is appurtenant; see *Clayton* v. *Corby* (1843), 5 Q. B. 415; *Hayward* v. *Cannington* (1666), 2 Keb. 290, 311, where a prescription for so many turves as two men could dig in fourteen days as belonging to a messuage, but without an allegation that they were to be spent upon the messuage, failed; but there was a distinct expression of opinion that if it had been alleged as a claim in gross it would have succeeded.

SECT. 3. By Non-user.

has released it (*l*); but mere non-user, though evidence of abandonment, is not conclusive evidence, and may be explained by the circumstances of the particular case.

Question of intention.

The period of time during which the right has not been used is material only as an element from which the intention to abandon the right may be inferred. In each case the particular circumstances must be examined to ascertain the intention (*m*), the number of times the right has been exercised being immaterial if the claimant proves that he exercised it as often as he chose (*n*). In the absence of explanation, non-user for twenty years would probably be held to amount to abandonment (*o*).

If the non-user is accompanied by circumstances which show an intentional abandonment, such as the pulling down of a mill or house to which a right of common of turbary is attached, the right of common will *primâ facie* cease; but if an intention to build another mill or another house is shown, the right continues (*p*). So if the cesser has been during a period in which the commoner had no stock to turn out, the right will not be extinguished (*q*).

SECT. 4.—*By Release.*

Release to lord.

1121. A right of common may be extinguished by a release of the right to the lord; and in several early cases it was held that by a release of any part of the right, even yielding up the profit in one acre only, the right of common in the whole waste was gone (*r*).

(*l*) The earlier authorities are clear on the point that a right of common may be lost by non-user; see Bract. 223; Fleta, 255; and see also Elton, Commons, pp. 133, 134. The value of rights of common is nowadays comparatively small in many places, and in recent cases these rights have been claimed more for the purpose of preserving open spaces than on account of their intrinsic value.

(*m*) The above statement is based to a great extent on the analogy of cases relating to the abandonment of easements. See *Ward* v. *Ward* (1852), 7 Exch. 838; *R.* v. *Chorley* (1848), 12 Q. B. 515 (rights of way); *Stokoe* v. *Singers* (1857), 8 E. & B. 31; *Moore* v. *Rawson* (1824), 3 B. & C. 332 (rights to light), where LITTLEDALE, J., at p. 339, suggested that the same considerations might apply to rights of common.

(*n*) See *Carr* v. *Foster* (1842), 3 Q. B. 581, *per* PATTESON, J., at p. 588; and compare *Flight* v. *Thomas* (1840), 11 Ad. & El. 688, Ex. Ch. (right to light); *Eaton* v. *Swansea Waterworks Co.* (1851), 17 Q. B. 267 (right to water); *Bailey* v. *Appleyard* (1838), 8 Ad. & El. 161, 168, n.; *Payne* v. *Shedden* (1834), 1 Mood. & R. 382. In *Musgrave* v. *Inclosure Commissioners for England and Wales* (1874), L. R. 9 Q. B. 162, a right of pasturage usually enjoyed with a demesne farm of the lord of the manor was held not to have been abandoned though no stock had been turned out for upwards of ten years.

(*o*) See *Scrutton* v. *Stone* (1893), 9 T. L. R. 478; *Moore* v. *Rawson* (1824), 3 B. & C. 332; *R.* v. *Chorley* (1848), 12 Q. B. 515.

(*p*) See *Moore* v. *Rawson*, *supra*, *per* HOLROYD, J., at p. 337, and *R.* v. *Chorley*, *supra*, *per* DENMAN, C.J., at p. 519.

(*q*) *Carr* v. *Foster* (1842), 3 Q. B. 581.

(*r*) *Rotherham* v. *Green* (1597), Cro. Eliz. 593; *Morse* v. *Well* (1609), 1 Brownl. 180; *Miles* v. *Etteridge* (1692), 1 Show. 207, the reason assigned being that the common is entire throughout the whole land; therefore a release in part shall discharge the whole. Doubts have been entertained as to the correctness of this view (*Benson* v. *Chester* (1799), 8 Term Rep. 396, *per* Lord KENYON, at p. 401), but in *Johnson* v. *Barnes* (1873), L. R. 8 C. P. 527, Ex. Ch. (where the right in question in the case was held to be an exclusive right of pasture, and

SECT. 4. By Release.

A release in express words must be by deed (*s*); but a release may be presumed from acts showing the intention, as by a licence to inclose part of the land, which has been held good by way of release (*t*).

SECT. 5.—*By Alteration of Commoner's Tenement.*

Intention to abandon.

1122. In all cases of alteration of the commoner's tenement the question to be determined from the circumstances of each case is whether or not an intention to abandon the right can reasonably be presumed.

Common of pasture.

1123. An alteration of the character of the land to which a right of pasture is appendant or appurtenant effects an extinguishment of the right if the alteration be such that no cattle can be kept upon the land or be maintained from its produce; for in such a case a release of the right will be presumed (*a*), as, for instance, if a row of houses be built upon the land or a reservoir made, so that it cannot be restored to its original state or at least not without great difficulty.

But if the alteration is such that the land might easily be turned again to the purpose of feeding cattle, the right will not be extinguished. So long as it can be supposed that the commoner may have the intention of resuming his right of pasture, the right will remain in suspense though the accommodation for cattle may be destroyed (*b*).

Estovers and turbary.

1124. Common of estovers or of turbary will be destroyed if the house or mill to which the right is appurtenant is pulled down, and no intention of rebuilding is shown. If, however, an intention to build another house or mill is shown, the right continues (*c*). This proposition, however, must be taken with the qualification that the rebuilding must be a restoration of the old tenement, and that no extension of the right is involved (*d*).

SECT. 6.—*By Exhaustion or Destruction of the Product.*

Exhaustion of product.

1125. Exhaustion of the product which is the subject-matter of a right of common will necessarily put an end to the right, as, for instance, if houses are built on the land over which the right was exercisable, or the land is converted to such uses that no grass can possibly grow, a right of common of pasture will be

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not a right of common), it was urged in argument without dispute, and adopted by the court as good law. The real reason was alleged by WILLES, J., in the court below (*Johnson* v. *Barnes* (1872), L. R. 7 C. P. 592, at p. 600), to be that it casts a greater burden on the rest of the land.

(*s*) Co. Litt. 264 b.

(*t*) *Miles* v. *Etteridge* (1692), 1 Show. 207.

(*a*) *Carr* v. *Lambert* (1866), L. R. 1 Exch. 168, Ex. Ch., where WILLES, J., in an exhaustive judgment, enunciated the principles and illustrations above stated which have since been generally approved.

(*b*) *Ibid.*

(*c*) *Moore* v. *Rawson* (1824), 3 B. & C., 332, *per* HOLROYD, J., at p. 337.

(*d*) See *Luttrel's Case* (1602), 4 Co. Rep. 86 a; and other cases on p. 467, *ante*.

SECT. 6. By Exhaustion or Destruction of the Product.

extinguished (*e*). On commons by the sea-shore encroachments of the sea may destroy rights of common by covering pasture land with shingle (*f*). Common of turbary may be extinguished by the complete digging out of the peat bed (*g*) or by the draining of a marsh so that peats can no longer be obtained (*h*).

Suspension of right.

1126. As some rights of common can only be exercised on such parts of the waste as produce the particular product, the right will be held to be extinguished or not to have existed if the land is incapable of producing it (*i*). But where after an interval the product will reappear (*k*), or where there is no reason to suppose that the land is permanently incapable of producing it, the right will be held to be only suspended, and not extinguished (*k*).

SECT. 7.—*By Alteration of Commoner's Estate.*

Purchase of freehold.

1127. At common law if a copyholder purchases the freehold of his estate, and the soil of the common belongs to the lord of the manor, he loses the right of common annexed to his estate (*l*), unless the right of common be specifically regranted to him; for the common first used was gained by custom and annexed to the copyhold estate, not being of its proper nature incident to the copyhold estate, but a collateral incident gained by usage (*m*).

Presumption of regrant.

1128. On enfranchisement of a copyhold tenement mere general words, such as "with the appurtenances" (*n*) or "all commons thereto belonging or appertaining" (*o*), will not effect a regrant. But if the words "commons used, occupied, or enjoyed therewith" or other words sufficient to show the intention that such rights of common as had previously been enjoyed with the land should pass, the rights will be revived (*p*).

The existence of a special relationship between the parties might

(*e*) See *Carr* v. *Lambert* (1866), L. R. 1 Exch. 168, Ex. Ch.

(*f*) See *Scrutton* v. *Stone* (1893), 9 T. L. R. 478.

(*g*) *Clarkson* v. *Woodhouse* (1783), 5 Term Rep. 412, n., where a custom for commoners having rights of turbary in a moss to hold certain moss dales in severalty when cleared of the turves was held good.

(*h*) *Ely (Dean and Chapter)* v. *Warren* (1741), 2 Atk. 189.

(*i*) See *Peardon* v. *Underhill* (1850), 16 Q. B. 120; *Morewood* v. *Wood* (1791), 4 Term Rep. 157; *Maxwell* v. *Martin* (1830), 6 Bing. 522.

(*k*) See *Robertson* v. *Hartopp* (1889), 43 Ch. D. 484, C. A., where turves were cut on the waste, and the evidence showed that the land took from two to six years to recover.

(*l*) As to the different effect of enfranchisement under the Copyhold Acts, see p. 529, *post*.

(*m*) *Massam* v. *Hunter* (1610), Yelv. 189; *Bradshaw* v. *Eyre* (1597), Cro. Eliz. 570; *Worledge* v. *Kingswell* (1600), *ibid.* 794; and see note (*d*), p. 524, *ante*.

(*n*) *Massam* v. *Hunter*, *supra*.

(*o*) *Styant* v. *Staker* (1691), 2 Vern. 250, though in that case relief was given in equity after the lord had obtained a verdict at law. It appears from a note to the case that the enfranchisement had taken place many years before, and that there was a defect in the enfranchisement deed of which the lord was able at law to take advantage, but that relief had been given in equity to a former owner. See also *Baring* v. *Abingdon*, [1892] 2 Ch. 374, C. A.

(*p*) See *Hall* v. *Byron* (1877), 4 Ch. D. 667; *Baring* v. *Abingdon*, *supra*; and earlier cases therein referred to.

have the effect of raising the presumption that a right of common was intended to be granted or revived by the use of mere general words, as where a tenant exercised rights of common in respect of a farm held for many years under a lease, and took a conveyance of the whole farm (*q*); but in the absence of a special relationship no such presumption will be drawn (*r*).

But when a copyholder claims common outside the manor, not by custom, but by prescribing in the name of his lord for him and all his copyholders, the common belongs to the lord, and not to his estate, and is not lost by enfranchisement, and is enjoyed by all tenants of the land as it was before by the copyholder (*s*).

Forfeiture and escheat.

1129. When a copyhold tenement comes into the hands of the lord by forfeiture or escheat it does not thereby lose its right of common, for that right is annexed to all customary tenements demised or demisable by copy of court roll, and while the estate remains in the hands of the lord it continues demisable, so that if granted as copyhold to a new tenant the right of common would remain, but if the freehold be granted to a copyholder, it ceases to be demisable by copy of court roll, and the right of common is extinguished (*t*).

Enfranchisement under Copyhold Acts.

1130. An enfranchisement under the Copyhold Acts does not deprive a tenant of any commonable right to which he is entitled in respect of the land enfranchised, but where any such right exists in respect of any land at the date of the enfranchisement thereof, it continues attached to the land notwithstanding the land has become freehold (*u*).

Release of seigniorial rights.

1131. But although rights of common annexed to copyholds are extinguished on enfranchisement (except under the Copyhold Acts), there is no similar doctrine with reference to the extinguishment of rights of common on the release of seigniorial rights in ancient arable lands of customary freehold tenure, the reason being that as regards freeholds common appendant was in ancient times a thing necessary and incident to the feoffment of arable lands to be held of the manor in common socage (*a*).

(*q*) *Doidge* v. *Carpenter* (1817), 6 M. & S. 47.

(*r*) *Baring* v. *Abingdon*, [1892] 2 Ch. 374, C. A., where a stranger took a conveyance of a small part of a farm forming part of the demesne lands of a manor, but in terms which were inadequate to create a right of common, and the tenant of the farm had by virtue of the lord's ownership of the waste enjoyed rights of common for many years.

(*s*) *Crowder* v. *Oldfield* (1703), 6 Mod. Rep. 19; and see *Field* v. *Boothby* (1658), 2 Sid. 81.

(*t*) *Badger* v. *Ford* (1819), 3 B. & Ald. 153; *Massam* v. *Hunter* (1610), Yelv. 189, Cro. Jac. 253; *Baring* v. *Abingdon*, *supra*.

(*u*) Copyhold Act, 1894 (57 & 58 Vict. c. 46), s. 22, which takes the place of s. 81 of the Copyhold Act, 1841 (4 & 5 Vict. c. 35), and s. 45 of the Copyhold Act, 1852 (15 & 16 Vict. c. 51). Enfranchisement under the Act includes the discharge of freehold lands from heriots and other manorial rights (*ibid.*, s. 94).

(*a*) *Baring* v. *Abingdon*, *supra*, approved in *Broome* v. *Wenham* (1893), 68 L. T. 651. In the case of copyholds a right of common is a collateral incident; see p. 528, *ante*.

SECT. 8. By Agreement and by Custom of the Manor.

SECT. 8.—*By Agreement and by Custom of the Manor.*

SUB-SECT. 1.—*In General.*

Lawful inclosure.

1132. Lawful inclosure of the common necessarily effects an extinguishment of common rights; and, besides the inclosures of the whole or parts of commons under statutes for that purpose and inclosure by the lord of the manor under his powers of approvement (*b*), inclosures may be made (1) by agreement between the lord and commoners, (2) by the lord under a custom of the manor, and (3) by usurpation or encroachment, which, though originally illegal, has become legalised by lapse of time.

SUB-SECT. 2.—*By Agreement between Lord and Commoners.*

By agreement.

1133. As the lord of the manor or other owner or owners of the soil of a common and the persons entitled to rights of common over it represent all the interests in the land, they can inclose and divide it by mutual agreement, provided that all agree, and that they are all legally capable of entering into an agreement for the purpose, subject only to such restrictions as have been imposed by Parliament (*c*).

The difficulty of obtaining the concurrence of all the commoners where they are at all numerous and the probability that some of them are incapable of giving a legal consent make the extinguishment of rights of common by mutual agreement a matter of rare occurrence; and there is always the risk that, after all arrangements have been completed, further research may discover other persons entitled to rights of common and that all the proceedings may be rendered nugatory (*d*).

(*b*) See pp. 503, *et seq.*, *ante*. In early times, when the inclosure and bringing into cultivation of waste lands was considered beneficial to the State, such extinguishment of rights of common by mutual consent was much favoured by the courts, and agreements for the purpose were even confirmed where a few commoners had held out. Now, however, public feeling and the tendency of the courts is entirely in the opposite direction. Public attention is drawn to any attempt to inclose a common by agreement by the necessity of advertising the intention three months previously in local newspapers (see Commons Act, 1876 (39 & 40 Vict. c. 56), s. 31), and the resistance or want of concurrence of a single commoner would be fatal to any agreement. See 5 Vin. Abr. 1; *Piggott* v. *Kniveton* (1606), Toth. s. 84, where lands which had been inclosed for thirty years by consent of most of the parishioners, but not of all, were ordered to continue to be inclosed; *Magdalen College, Oxford* v. *Hide* (1612), Toth. s. 84; *Rothwell* v. *Widdrington* (1687), 1 Vern. 456. In *Delabeere* v. *Bedingfield* (1689), 2 Vern. 103, however, preference was expressed for a stint, which was considered a natural and proper equity to have decreed, though one or two humoursome tenants stood out.

(*c*) Namely, the necessity of advertising the intention to inclose (see note (*b*), *supra*, and p. 509, *ante*). An inclosure by agreement between the lord of the manor and the commoners, not being an approvement under the Statute of Merton etc. (see p. 509, *ante*), does not require the consent of the Board of Agriculture and Fisheries to make it legal.

(*d*) See *Robertson* v. *Hartopp* (1889), 43 Ch. D. 484, C. A., where the lord of the manor of Banstead imagined that he had bought up the rights of all the commoners, relying on the number who had claimed a share of the purchase-money of parts of the commons which had been taken by a railway company, but others having rights of considerable value were subsequently discovered. For a form of agreement to inclose, see Encyclopædia of Forms, Vol. IV., p. 122.

SUB-SECT. 3.—*Customary Inclosure by the Lord.* SECT. 8.

By Agreement and by Custom of the Manor.

1134. Approvements by the lord of the manor under the Statutes of Merton and Westminster II., and inclosures of certain parts of the waste by statute for special purposes of course put an end to rights of common over the lands so inclosed. These, however, are dealt with elsewhere (*e*); and it is intended to deal here only with inclosures of parts of the waste by which rights of common are extinguished under a custom of the manor.

By custom.

1135. A custom for the lord to grant or lease parts of the waste without restriction is bad in law, and a reservation of such a right by the lord will not be presumed in spite of long-continued user (*f*); but a custom for the lord to grant parcels of the waste with the consent of the homage, even though sufficiency of pasture be not left, is good (*g*), and may be exercised as against an enfranchised copyholder who by reason of the enfranchisement is debarred from attending the manor courts (*h*). In such a case the consent of the homage means the consent of the majority of the homage (*i*).

Restrictions on such inclosure.

Although the lord may by custom be entitled to inclose with the consent of the homage, yet if there are others, strangers to the manor, who are entitled to rights of common, the custom is ineffectual as against them, and any inclosures are bad (*j*).

These rights of inclosing parcels of the waste by special custom with the consent of the homage, which may be exercised either by the lord of the manor or by other persons interested in the waste, are of great variety.

1136. The power of the lord of the manor to grant, with the consent of the homage, parcels of the waste to be held of him by copy of court roll, is quite distinct from his right as owner of the soil to approve leaving sufficiency of common, which is a common law right superior to any custom (*k*). Inclosures made by approvement are of freehold tenure, while the inclosures made under these special customs are for the benefit of a new tenant, the land being held by copy of court roll (*l*). The right of approvement may exist in a manor where there is also a right of granting land to hold by copy of court roll with the consent of the homage (*m*).

Distinction from right to approve.

1137. This power of creating new copyholds by special custom is an exception to the general rule that copyholds cannot be created at the present day (*n*); and it can only be supported by

Necessity for special custom.

(*e*) See pp. 503 *et seq.*, 510 *et seq.*, *ante*.

(*f*) *Badger* v. *Ford* (1819), 3 B. & Ald. 153, where the lord had granted leases of parcels of the waste for upwards of a hundred and fifty years; *Arlett* v. *Ellis* (1829), 9 B. & C. 671, Ex. Ch.

(*g*) *Boulcott* v. *Winmill* (1809), 2 Camp. 261; *Folkard* v. *Hemmett* (1776), 5 Term Rep. 417, n.; *Wentworth* (*Lady*) v. *Clay* (1676), Cas. *temp.* Finch, 263.

(*h*) *Ramsey* v. *Cruddas*, [1893] 1 Q. B. 228, C. A. Compare *Lascelles* v. *Onslow* (*Lord*) (1877), 2 Q. B. D. 433.

(*i*) *Wentworth* (*Lady*) v. *Clay*, *supra*; *Ramsey* v. *Cruddas*, *supra*.

(*j*) *Commissioners of Sewers* v. *Glasse* (1872), 7 Ch. App. 456.

(*k*) See, as to this distinction, *Duberley* v. *Page* (1788), 2 Term Rep. 392, n.

(*l*) *Arlett* v. *Ellis*, *supra*.

(*m*) *Duberley* v. *Page*, *supra*.

(*n*) See *Hughes* v. *Games* (1726), Sel. Cas. Ch. 62. Elton, Commons, p. 257, gives some instances of copyholds having been established by private Acts which had

SECT. 8. By Agreement and by Custom of the Manor.

the authority of a custom, though it has been said in one case that it was rather a reserved right of the lord than a custom, and that the reason of such a reservation might be the vicinity of the land to London (*o*). It is undoubtedly true that such customs exist in many manors near London (*p*), but instances have been found in many other parts of the country (*q*) and in manors within royal forests (*r*).

In most cases the customary grant of waste land may be made to any person willing to take the same, whether previously a tenant of the manor or not (*s*); but in others the grantee must necessarily be a tenant (*t*).

Consent of homage.

1138. The Copyhold Acts point to the diversity in the customs of different manors in the mode of obtaining the consent of the homage and of exercising the privilege, while recognising the necessity of obtaining that consent (*a*).

Consent of Board of Agriculture and Fisheries.

But no such grant may now be made without the consent of the Board of Agriculture and Fisheries, who in giving or withholding their consent are to have regard to the same considerations as are to be taken into account by them in giving or withholding their consent to an inclosure of common lands (*b*); and when a grant has been lawfully made under the Copyhold Act, 1894, the land therein comprised is to cease to be of copyhold tenure and to be vested in the grantee thereof to hold for the interest granted as in free and common socage (*c*).

The custom of the manor and the statutory requirements must be strictly followed where a customary right of granting land from the waste is claimed by the lord (*d*).

Inclosure by tenants.

1139. Besides the customary inclosures by the lord of the manor in many parts of the country, customs have been proved in some manors for the tenants of the manor to make inclosures for their own benefit, which may be either permanent or temporary. Customs for the tenants of a manor entitled to rights of turbary in

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not been so before, and allotments under Inclosure Acts are generally to be of the same tenure as the land in respect of which they are allotted (Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 94). So with land exchanged under those Acts (*ibid.*, s. 147; *Minet* v. *Leman* (1855), 7 De G. M. & G. 340, C. A.).

(*o*) *Folkard* v. *Hemmett* (1776), 5 Term Rep. 417, n., *per* DE GREY, C.J.

(*p*) *E.g.*, Stepney (*Wentworth* (*Lady*) v. *Clay* (1676), Cas. *temp.* Finch, 263); Hackney (*Tyssen* v. *Clarke* (1774), 3 Wils. 541).

(*q*) *E.g.*, Durham (*R.* v. *Warblington* (*Inhabitants*) (1786), 1 Term Rep. 242); Framfield, Sussex (2 Watkins, Copyholds, p. 493); and see other instances in Watkins' list of customs of particular manors.

(*r*) West Ham, in Waltham Forest (*Boulcott* v. *Winmill* (1809), 2 Camp. 261); Woodford, also in Waltham Forest (*Schwinge* v. *Dowell* (1862), 2 F. & F. 845); Windsor Forest (*Chapman* v. *Cripps* (1862), 2 F. & F. 864); and see *Commissioners of Sewers* v. *Glasse* (1872), 7 Ch. App. 456.

(*s*) See *Boulcott* v. *Winmill* (1809), 2 Camp. 261; 2 Watkins, Copyholds, p. 543.

(*t*) *E.g.*, in Hackney (*Tyssen* v. *Clarke*, *supra*).

(*a*) Copyhold Act, 1894 (57 & 58 Vict. c. 46), s. 83, replacing s. 91 of the Copyhold Act, 1841 (4 & 5 Vict. c. 35).

(*b*) Copyhold Act, 1894 (57 & 58 Vict. c. 46), s. 81 (1) and (2); as to these considerations, see p. 540, *post*.

(*c*) *Ibid.*, s. 81 (3).

(*d*) As to the composition of the manor courts, the summoning of the courts, and the constitution and duties of the homage jury, see title COPYHOLDS.

certain parts of a waste to inclose them for their own use when all the peat was exhausted (*e*), and for the commoners to elect a jury of twelve to manage the moor for one year, with power to inclose portions for their own use during their year of office, have been held good (*f*). Of temporary inclosures there are many instances (*g*).

SECT. 9.—*Encroachment.*

Lapse of time.

1140. Rights of common may also be lost upon part of the waste by an encroachment upon the waste which has become lawful through lapse of time; and a commoner is in no better position than a lord of the manor whose right of entry is barred by the Statutes of Limitation (*h*).

This principle has been recognised in the Inclosure Acts, which provide that unauthorised inclosures of less than twenty years at the date of the first meeting for the receipt of claims in inclosure proceedings are to be deemed parcel of the land subject to be inclosed, but that all encroachments of more than twenty years' standing are to be deemed ancient inclosures, but not so as to carry any right of common or an allotment in respect thereof which might be claimed in respect of ancient inclosures (*i*).

Tenant's encroachments presumably for lord's benefit.

1141. Encroachments made from the waste by a tenant will be presumed to have been made for the benefit of his landlord unless it appears clearly from some act done at the time that the tenant intended to make the encroachment for his own benefit, and not to hold it as he held the farm to which the encroachments were adjacent (*k*). The doctrine above laid down, though questioned (*l*),

(*e*) *Clarkson* v. *Woodhouse* (1783), 5 Term Rep. 412, n.; and see 2 Watkins, Copyholds, p. 493, where a custom for the old tenants to cultivate those portions of the waste which adjoin their tenements and to make small inclosures for special purposes of farming is mentioned as existing in the manor of Framfield, Sussex.

(*f*) *Smith* v. *Barrett and Clifford* (1663), 1 Sid. 161.

(*g*) *E.g.*, "to take and make tillage on the waste and the commons by appointment of the bailiff or other officer of the lord paying a yearly rent, and after two crops taken off the same ground the land shall be common again" (2 Watkins, Copyholds, pp. 498, 504; and see *ibid.*, pp. 548, 552, 565, 567).

(*h*) *Creach* v. *Wilmot* (1752), 2 Taunt. 160, n.; *Hawke* v. *Bacon* (1809), 2 Taunt. 156, recognised in *Tapley* v. *Wainwright* (1833), 5 B. & Ad. 395. See Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), ss. 2, 17, and Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), ss. 1, 5, which reduced the times within which an action may be brought to recover possession to twelve years and thirty years respectively.

(*i*) Inclosure Act, 1845 (8 & 9 Vict. c. 118), ss. 50, 52. Questions may arise under the latter section in consequence of the reduction of time under the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), as to whether the valuer acting under the Inclosure Acts (see p. 550, *post*) can be in a better position in bringing ejectment to recover possession of an encroachment than any other person. It is submitted, however, that, if the case should arise, the encroacher would have the benefit of the later Act

As to these sections and as to the effect of a finding in the inclosure proceedings contrary to the fact that an encroachment has been made for less than twenty years, see pp. 556, 557, *post*.

(*k*) *Doe* d. *Lewis* v. *Rees* (1834), 6 C. & P. 610, *per* PARKE, B.

(*l*) *Doe* d. *Colcough* v. *Mulliner* (1795), 1 Esp. 460, *per* Lord KENYON, on the ground that, if the landlord could recover, the act of the tenant would

SECT. 9. Encroachment.

has been adopted in subsequent cases (*m*), with the slight alteration that it is better to say that the tenant is estopped from disputing the title of the lord to the encroachment as much as to the rest of the holding (*n*), or that the encroachment is annexed to the holding (*o*).

It seems that the rule applies to a copyholder so as to make an encroachment made by a copyholder part of the copyhold tenement (*p*).

Rule where encroachment not contiguous.

1142. The application of the rule as to an encroachment enuring for the benefit of the holding or of the landlord is not confined to encroachments actually conterminous with the holding. It is enough if the encroachment be so near that by reason of its nearness the tenant gained the opportunity of making it, and the landlord might have tacitly acquiesced in it (*q*). Thus, the intervention of a small river and fence and a narrow strip of waste (*r*), or of a road (*s*), was held not to rebut the presumption.

Effect of lease on encroachment.

1143. The fact that an encroacher in possession of land in such circumstances that the statute is running in his favour takes a lease of adjoining land from the owner of the land of which he is in possession does not alter the character of his previous possession so as to raise the presumption that after he had accepted the lease he was occupying the land as part of the demised premises, and not on his own account (*t*); nor is he precluded from showing enjoyment of the land for upwards of twenty years by the fact that

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make the landlord a trespasser; and see *Andrews* v. *Hailes* (1853), 2 E. & B. 349, *per* Lord CAMPBELL, C.J., at p. 353.

(*m*) *Doe* d. *Croft* v. *Tidbury* (1854), 14 C. B. 304; *Doe* d. *Lloyd* v. *Jones* (1846), 15 M. & W. 580; *Andrews* v. *Hailes*, *supra*; *Kingsmill* v. *Millard* (1855), 11 Exch. 313; *Whitmore* v. *Humphries* (1871), L. R. 7 C. P. 1, *per* WILLES, J., at p. 5: "The rule is based upon the obligation of the tenant to protect his landlord's rights and to deliver up the subject of his tenancy in the same condition, fair wear and tear excepted, as that in which he enjoyed it. There is often great temptation and opportunity afforded to the tenant to take in adjoining land which may or may not be his landlord's, and it is considered more convenient and more in accordance with the rights of property that the tenant who has availed himself of the opportunity afforded him by his tenancy to make encroachments should be presumed to have intended to have made them for the benefit of the reversioner except under circumstances pointing to an intention to take the land for his own benefit exclusively. The result is to avoid questions which would otherwise frequently arise as to the property in land and to exclude persons who have come in as tenants, and who are likely to encroach, from raising such questions." See too *A.-G.* v. *Tomline* (1880), 15 Ch. D. 150, C. A., *per* COTTON, L.J., at p. 160, approving *Whitmore* v. *Humphries*, *supra*.

(*n*) *Andrews* v. *Hailes*, *supra*, *per* CAMPBELL, C.J., at p. 353.

(*o*) *Kingsmill* v. *Millard*, *supra*, *per* PARKE and ALDERSON, BB., at p. 319, 320.

(*p*) *A.-G.* v. *Tomline*, *supra*, *per* FRY, J., at p. 766. In that case, which is the only reported case on the subject, the Court of Appeal, however, held on the facts that the encroachment, even if made, was not in fact made as an accretion to the holding.

(*q*) *Lisburne* (*Earl*) v. *Davies* (1866), L. R. 1 C. P. 259, *per* WILLES, J., at p. 268; *Kingsmill* v. *Millard*, *supra*.

(*r*) *Lisburne* (*Earl*) v. *Davies*, *supra*.

(*s*) *Andrews* v. *Hailes*, *supra*; *Doe* d. *Lloyd* v. *Jones*, *supra*.

(*t*) *Dixon* v. *Baty* (1866), L. R. 1 Exch. 259.

while the time was running he took a conveyance by the homage of land contiguous to that in dispute in which the latter was described as waste land (*a*).

Intention of tenant.

1144. Although as a general rule the intention of the tenant to make an encroachment for his own benefit must be shown at the time when the encroachment is made, a subsequent severance of the encroachment from the demised premises may have the same effect if brought to the knowledge of the landlord; but if the landlord is allowed to remain under the belief that the encroachment is part of the holding, the tenant is estopped from denying it (*b*).

Land subject to rule.

1145. The rule applies whether the land taken belongs to the landlord or to a stranger, and the fact that the landlord has given his assent to the encroachment is immaterial (*c*); but if the landlord on application refuses his consent, and the tenant nevertheless incloses and builds, the presumption is rebutted (*d*).

Part X.—Inclosure of Commons and Common Fields.

SECT. 1.—*Introductory; Inclosure before* 1845.

Statutory provisions and authorities.

1146. Prior to 1845 the inclosure of commons and the substitution of allotments in land for the rights of common and other rights which existed in or over commons was almost entirely carried out at great expense by private Inclosure Acts (*e*).

Since that date all inclosures, with very few exceptions, have been made under the machinery provided by the Inclosure Act, 1845 (*f*), and its numerous amending Acts, under the supervision of the Inclosure Commissioners and their successors.

Inclosure Commissioners for England and Wales.

1146a. The Act of 1845 provided for the appointment of two commissioners to act with the First Commissioner of Her Majesty's Woods, Forests etc., as commissioners to carry the Act into execution, under the title of "The Inclosure Commissioners for England

(*a*) *Doe* v. *Wright* (1816), 1 Stark. 349, where the land was a small piece of waste adjoining the workshop and premises of a carpenter and between them and a road across the common; and putting up stakes, depositing timber, and raising a small bank between the land and the road were held to be sufficient to amount to an inclosure. Encroachment in this way on a village green or common is of frequent occurrence.

(*b*) *Kingsmill* v *Millard* (1855), 11 Exch. 313; *Doe* d. *Lloyd* v. *Jones* (1846), 15 M. & W. 580, where the tenant made an indorsement on his lease that inclosures made by him were to be delivered up at the end of the term, but subsequently executed a conveyance of them to his son, which was not delivered nor followed by any possession.

(*c*) *Kingsmill* v. *Millard*, *supra*, *per* PARKE, B., at p. 318; *Whitmore* v. *Humphries* (1871), L. R. 7 C. P. at p. 6; *A.-G.* v. *Tomline* (1877), 5 Ch. D. 750.

(*d*) See *Doe* d. *Baddeley* v. *Massey* (1851), 17 Q. B. 373.

(*e*) Nearly 4,000 such Acts were passed during the preceding hundred years.

(*f*) 8 & 9 Vict. c. 118.

SECT. 1. Introductory; Inclosure before 1845.

and Wales." In 1851 the work of the Inclosure, Copyhold, and Tithe Commissioners was amalgamated in one office under the Inclosure Commissioners Act, 1851 (*g*), though the separate titles were preserved, and the three commissioners were subject to periodical reappointment. They were from time to time intrusted with the execution of numerous Acts dealing with or relating to landed property, and in 1882 became the Land Commissioners for England (*h*). In 1889 their powers and duties were transferred to and vested in the Board of Agriculture (*i*), which took over in 1903 the powers and duties of the Board of Trade under the Acts relating to fisheries and fishing with the title of "The Board of Agriculture and Fisheries" (*k*). That is now the designation of the Board.

Inclosure Act, 1773.

1147. One of the earliest Acts for the improvement of common fields and the regulation of the common rights thereon was passed in 1773 (*l*), intituled "An Act for the better Cultivation, Improvement, and Regulation of the Common Arable Fields, Wastes, and Commons of Pasture of this Kingdom." It provides for fencing off the tillage or arable lands lying in common or open fields and cultivating them under such rules, regulations, and restrictions as shall be agreed upon by three-fourths in number and value of the occupiers, with the consent of the owners and the rector or tithe-owner, at a parish meeting called for the purpose. Such rules and regulations were to remain in force for not more than six years, and field masters or field reeves might be elected to superintend the fencing and enforce the course of husbandry agreed upon (*m*). Expenses incurred were to be deemed common expenses, and might be assessed upon the different occupiers in proportion to the value of their holdings. The time of opening the common fields might also be varied by agreement (*n*), but the rights of cottagers who had rights of common over, but no land in, the common fields were protected either by a provision for compensation or by setting apart such portions to be used by them exclusively as they might agree to accept (*o*); and the rights of any persons having separate sheepwalks or pasture of cattle (*p*) were to be preserved unless they gave their consent in writing to a composition for the same or to a limitation of their rights. Provision was also made by which "balks, slades, or meers" (*q*) which might be waste and

(*g*) 14 & 15 Vict. c. 53.
(*h*) See Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 48.
(*i*) Board of Agriculture Act, 1889 (52 & 53 Vict. c. 30).
(*k*) Board of Agriculture and Fisheries Act, 1903 (3 Edw. 7, c. 31).
(*l*) 13 Geo. 3, c. 81. This Act, though still unrepealed, is of little practical importance, owing to the inclosure of so many of the common and open field lands in England and Wales either under private Acts or under subsequent Inclosure Acts.
(*m*) *Ibid.*, s. 3.
(*n*) *Ibid.*, s. 7.
(*o*) *Ibid.*, ss. 8 and 9.
(*p*) *Ibid.*, ss. 8, 9 and 10. Presumably either common in gross is here referred to, or a right of common exercisable in respect of lands other than those in the common fields.
(*q*) These balks or meers were narrow strips of grass running between the

were inconveniently interspersed among the arable lands of a common field, other than those which had been used as public or private roads, might with the consent of the lord, of persons having a separate sheepwalk, and of three-fourths in number and value of the occupiers of the common field lands, be ploughed up and converted into tillage, an equivalent being provided and laid down as common under the direction of the field master or field reeve in a more convenient part of the field (*r*). The boundaries between the lands were to be shown by stones (*s*). To meet expenses of draining, fencing, or otherwise improving wastes and commons, the lord of the manor, with the consent of three-fourths of the commoners, given at a meeting held for the purpose, was empowered to lease for not exceeding four years any part of the waste or common not exceeding one-twelfth (*t*), or in case of stinted commons assessments might be made and levied in a similar manner for the like purpose (*u*). The times of opening and closing stinted pastures might be varied and a close time fixed in the case of commons open all the year round in a similar way, the rights of dissentients being protected by the setting apart of a particular portion of the common for their use (*a*). The admission of sheep to a common which was fed and depastured only by horses and cattle might be agreed upon, and the turning out of rams on a common between August and November was prohibited (*b*).

Inclosure (Consolidation) Act, 1801.

1148. The Inclosure (Consolidation) Act, 1801, for consolidating in one Act provisions usually inserted in Acts of inclosure, and for facilitating the mode of proving the several facts usually required on the passing of such Acts, was an Act which occupied in regard to inclosures much the same position that the Lands Clauses Consolidation Act, 1845, occupied with reference to railways and other undertakings of a public nature. Many of its provisions were embodied in the Inclosure Act, 1845, but it was not repealed until the year 1899 (*c*). Such of the cases arising upon it as are still of practical utility will be referred to under the Inclosure Acts, 1845 to 1899.

Land Tax Redemption Act, 1817.

1149. The Land Tax Redemption Act, 1817 (*d*), provides that on any inclosure of commons or waste lands an allotment or allotments may be made to the owners of fee farm rents payable out of lands in the parish or district in which the inclosure takes place in

different fields or between the "lands" in the fields, and would usually, though not invariably, be waste of the manor. They would naturally be used as roads or ways to give access to the lands, but where several "lands" adjoining were in the same ownership, their removal would facilitate cultivation.

(*r*) Inclosure Act, 1773 (13 Geo. 3, c. 81), ss. 11—13.
(*s*) *Ibid.*, s. 14.
(*t*) *Ibid.*, s. 15.
(*u*) *Ibid.*, s. 16.
(*a*) *Ibid.*, ss. 18, 19.
(*b*) *Ibid.*, ss. 20, 21.
(*c*) 41 Geo. 3, c. 109. The whole Act was repealed by the Commons Act, 1899 (62 & 63 Vict. c. 30), which also repealed an amending Act of 1821 (1 & 2 Geo. 4, c. 23).
(*d*) 57 Geo. 3, c. 100, ss. 20, 21. This enactment is still in force.

SECT. 1. Introductory; Inclosure before 1845.

respect of land tax purchased under the Land Tax Redemption Acts in lieu of such fee farm rents; and the provisions of any Inclosure Act, so far as applicable, are to apply to any such allotments (*e*).

Inclosure and Drainage (Rates) Act, 1833.

1150. The Inclosure and Drainage (Rates) Act, 1833 (*f*), provides a remedy for the recovery of rates or assessments made under Inclosure and Drainage Acts or awards for defraying the expenses of repairing or renewing private roads and drains, banks, bridges, sluices, and other works set out under such Acts or awards, and for the recovery of which, after the final award, no remedy was provided by the award or otherwise. After due notice of the rate has been served upon the person liable to pay or the occupier, and the rate is twenty-one days in arrear, two justices in petty sessions are empowered to summon the party in arrear and give judgment, and by warrant to levy the amount of the rate and costs by distress on the goods of the debtor or of the occupier of his lands. Tenants whose goods are distrained on may deduct the amount paid from their rent. Right of appeal is given to quarter sessions (*g*).

Inclosure Act, 1833.

1151. The Inclosure Act, 1833 (*h*), provided against difficulties which arose on titles to land allotted under inclosure awards where the requirements of the Act as to enrolling the award with the clerk of the peace for the county or in one of the courts of record at Westminster within a specified time after the date of execution had not been followed (*i*).

(*e*) For the provisions relating to redemption of land tax, see title LAND TAX.

(*f*) 3 & 4 Will. 4, c. 35.

(*g*) The Inclosure Act, 1848 (11 & 12 Vict. c. 99), makes full provision for the appointment of a rating officer to look after the repair of works of this nature, and the collection and recovery of rates to meet such repairs, in cases of inclosure under the Inclosure Act of 1845 and its amending Acts; see p. 567, *post*.

(*h*) 3 & 4 Will. 4, c. 87.

(*i*) All such awards are to be good and valid from the date of execution notwithstanding non-enrolment. The same Act gave facilities for securing the enrolment of such awards and for their safe custody. The Act also provided for the appointment of commissioners to carry out Inclosure Acts where the appointment of new commissioners became necessary by reason of death or otherwise, and a fresh appointment had been neglected or omitted to be made.

All defects in titles have probably long since been cured by lapse of time; and as the powers of commissioners under local Acts must have expired or been supplied by orders of the Inclosure Commissioners under the Inclosure Act, 1845 (8 & 9 Vict. c. 118), ss. 153, 154, these provisions may be regarded as obsolete. The directions for the enrolment of inclosure awards vary very much in the numerous private and local Acts. Sometimes they were directed to be enrolled with the clerk of the peace for the county only, sometimes with the clerk of the peace and a specified court of record; sometimes the particular court was not mentioned. But where enrolment in more than one place was directed, the parties were frequently content with making one enrolment, or did not enrol at all. The enrolments of all awards directed to be made with the courts at Westminster are supposed to be now preserved at the Record Office, but are frequently not to be found there. In such cases, the directions as to enrolment were probably disregarded. A return of all inclosure awards in the custody of the clerks of the peace for the different counties was furnished to Parliament in 1904, and is published as a parliamentary paper (1904, 50).

Inclosure Act, 1836.

1152. The Inclosure Act, 1836 (*j*), commonly known as Lord Worsley's Act, amended by the Inclosure Act, 1840 (*k*) (both of which are now repealed (*l*)), enabled two-thirds in number and value of the persons interested in and having rights of common over any open and common arable fields, including any untilled slips or balks therein, or any open and common meadow or pasture lands or fields, to inclose such lands and extinguish any right of commonage without the assent of Parliament, provided that the necessary consents were given in writing at or subsequently to a meeting of the persons called for the purpose. Commissioners were to be appointed to carry out the inclosure, divide the lands, and make an award, with full powers of receiving and adjudicating upon claims and objections, settling disputes other than questions of title, ascertaining and straightening boundaries etc., and other powers usual in Inclosure Acts, but the Act was not to authorise the inclosure of any waste (*m*) whatsoever, whether with or without the assent of the lord of the manor, nor the inclosure of open fields within certain distances of large towns (*n*).

Passing of Inclosure Act, 1845.

1153. The expense of private Inclosure Acts and the irregularities and delay which often occurred in carrying out their provisions were fully brought out in the evidence taken by the Select Committee on Commons Inclosure in 1844, under the chairmanship of Lord Worsley, and their report, dated the 5th August, 1844, concludes with a recommendation that the superintendence of all applications for the inclosure of land and the carrying the same into operation should be intrusted to some central body to whom all local functionaries should be responsible, but that the sanction of Parliament in regard to all inclosures authorised by a central board of commissioners should be requisite before their decision should have legal effect.

The report of this Committee resulted in the passing of the Inclosure Act, 1845 (*o*), and the establishment of the Inclosure Commissioners for England and Wales, whose functions are now discharged by the Board of Agriculture and Fisheries.

(*j*) 6 & 7 Will. 4, c. 115.

(*k*) 3 & 4 Vict. c. 31.

(*l*) By the Commons Act, 1899 (62 & 63 Vict. c. 30), s. 23, and Sched. II.

(*m*) In a case within the writer's knowledge, where an application to the Land Commissioners for the inclosure of a large extent of open fields and a small portion of waste was refused, the parties interested divided the open fields under this Act, leaving the waste out of consideration, and thereby the parish lost the benefit of large allotments for recreation and field gardens which would have been provided if the application had been granted by the Land Commissioners.

(*n*) These two Acts were largely used, but it was found that in many cases the proceedings under them were informal, that their machinery was applied to waste and other lands which the courts considered to be excluded from the sphere of their operation, and in consequence that the title to lands which had been allotted and inclosed under awards made in pursuance of them in many cases proved defective. They have been little used during the last forty years, and were finally repealed as stated in note (*l*), *supra*.

(*o*) 8 & 9 Vict. c. 118.

SECT. 2. **Scope of the Inclosure Acts, 1845 to 1899.**

SECT. 2.—*Scope of the Inclosure Acts, 1845 to 1899.*

SUB-SECT. 1.—*In General.*

Scope of Inclosure Act, 1845.

1154. The scope of the Inclosure Act, 1845, which marked the commencement of a new era in the history of legislative dealing with the inclosure of commons, appears from its title: "An Act to facilitate the Inclosure and Improvement of Commons and Lands held in common, the Exchange of Lands, and the Division of intermixed Lands; to provide Remedies for the defective or incomplete Execution and for the Non-execution of the Powers of General and Local Inclosure Acts; and to provide for the Revival of such Powers in certain Cases."

Commons Act, 1876.

A series of amending Acts was passed to supply omissions and deficiencies which practice discovered in the original Act down to the year 1876, when, in consequence of the altered feeling of Parliament and the country with reference to the inclosure of commons, as shown by the fact that no inclosures had been sanctioned by Parliament during the preceding ten years, the Commons Act, 1876 (*p*), was passed, which, after reciting that "inclosure in severalty as opposed to regulation of commons should not be hereinafter made unless it can be proved to the satisfaction of the said Inclosure Commissioners and of Parliament that such inclosure will be of benefit to the neighbourhood (*q*) as well as to private interests (*r*), and to those who are legally interested in any such commons," makes provision for much fuller information being given to the Commissioners in any application relating to a common with reference to the land proposed to be dealt with, its situation and characteristics, and the circumstances of the neighbourhood; and also provides for a method of regulation under which, while the common remains in its natural state, the rights of common and other rights of the commoners and of the lord of the manor can be ascertained and put under proper regulation, and the common itself can be improved by drainage, manuring, planting, and put under the management of a body of conservators, with bye-laws and regulations for the prevention of nuisances and for keeping order on the common (*s*).

(*p*) 39 & 40 Vict. c. 56.

(*q*) Defined in the preamble to the Act to be "the health, comfort, and convenience of the inhabitants of any cities, towns, villages, or populous places in or near any parish in which the land proposed to be inclosed or any part thereof may be situate."

(*r*) *I.e.*, the advantage of the persons interested as lord of the manor and commoners in the common to which an application relates.

(*s*) Although regulation of commons in the full sense was only introduced by the Commons Act, 1876 (39 & 40 Vict. c. 56), some provision in that direction was made by the Inclosure Act, 1845 (8 & 9 Vict. c. 118), but principally in providing that parts of a common for which an Inclosure Act had been passed might be retained as stinted pastures, with provisions for their management (see p. 568, *post*), and in the interests of the persons directly interested as commoners. The Commons Act, 1876, has in view the interests of the neighbourhood and the general public to a much greater extent, and with that object requires much fuller information to be given to the Board in all applications relating to a common, has extended the scope of the inquiries to be held by the assistant commissioner, and in other respects has amended the provisions of

SECT. 2.
Scope of the Inclosure Acts, 1845 to 1899.

Jurisdiction of Board of Agriculture and Fisheries.

1155. The jurisdiction of the Board of Agriculture and Fisheries over the inclosure and regulation of commons in general is conferred by the Inclosure Acts, 1845 to 1899 (*t*), and over the regulation of metropolitan commons, *i.e.*, commons the whole or any part of which is situated within the metropolitan police district as existing in 1866 (*u*), by the Metropolitan Commons Acts, 1866 to 1898 (*w*).

The consolidation of these Acts is much to be desired (*x*).

SUB-SECT. 2.—*Lands dealt with and Persons interested.*

Lands which may be dealt with.

1156. Lands which may be dealt with under the Inclosure Acts include not only commons or waste lands in the ordinary acceptation of the word, but also (*a*)—

(1) All lands subject to any rights of common whatsoever, and whether such rights may be exercised or enjoyed at all times, or may be exercised or enjoyed only during limited times, seasons, or periods, or be subject to any suspension or restriction whatsoever in respect of the time of the enjoyment thereof;

(2) All gated and stinted pastures in which the property of the soil or of some part thereof is in the owners of the cattlegates or other gates or stints, or any of them;

(3) All gated and stinted pastures in which no part of the property of the soil is in the owners of the cattlegates or other gates or stints, or any of them;

(4) All lands held, occupied, or used in common, either at all times, or during any time or season, or periodically, and either for

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the Act of 1845, so that in cases of inclosure and regulation at the present day the procedure is regulated by the Act of 1876 down to the time when the provisional order receives the confirmation of Parliament.

(*t*) The group of Acts so designated by the Short Titles Act, 1896 (59 & 60 Vict. c. 14), comprises the following: Inclosure Act, 1845 (8 & 9 Vict. c. 118); Inclosure Act, 1846 (9 & 10 Vict. c. 70); Inclosure Act, 1847 (10 & 11 Vict. c. 111); Inclosure Act, 1848 (11 & 12 Vict. c. 99); Inclosure Act, 1849 (12 & 13 Vict. c. 83); Inclosure Commissioners Act, 1851 (14 & 15 Vict. c. 53); Inclosure Act, 1852 (15 & 16 Vict. c. 79); Inclosure Act, 1854 (17 & 18 Vict. c. 97); Inclosure Act, 1857 (20 & 21 Vict. c. 31); Inclosure Act, 1859 (22 & 23 Vict. c. 43); Inclosure etc. Expenses Act, 1868 (31 & 32 Vict. c. 89); Commons Act, 1876 (39 & 40 Vict. c. 56); Commons (Expenses) Act, 1878 (41 & 42 Vict. c. 56); Commons Act, 1879 (42 & 43 Vict. c. 37); Commonable Rights Compensation Act, 1882 (45 & 46 Vict. c. 15); Commons Act, 1899 (62 & 63 Vict. c. 30).

(*u*) See Metropolitan Police Act, 1829 (10 Geo. 4, c. 44), s. 4, and Schedule; Metropolitan Police Act, 1839 (2 & 3 Vict. c. 47), s. 2.

(*w*) Metropolitan Commons Act, 1866 (29 & 30 Vict. c. 122); Metropolitan Commons Amendment Act, 1869 (32 & 33 Vict. c. 107); Metropolitan Commons Act, 1878 (41 & 42 Vict. c. 71); Metropolitan Commons Act, 1898 (61 & 62 Vict. c. 43).

(*x*) A Bill for the purpose was prepared in 1889, and was revised by the present writer on behalf of the Land Commissioners for England, but, with some two hundred similar Consolidation Bills, it still awaits the attention of Parliament. An apparent misunderstanding led the House of Commons to withdraw the work of consolidation of statutes from the Statute Law Revision Committee, a step which has practically resulted in the work of consolidation of statutes being suspended, with the above consequence; see Sir Courtenay Ilbert, Legislative Methods and Forms, p. 73.

(*a*) Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 11; Commons Act, 1876 (39 & 40 Vict. c. 56), ss. 2, 37. "Common" in the Act of 1876 means and includes any land subject to be inclosed under the Inclosure Acts.

SECT. 2. Scope of the Inclosure Acts, 1845 to 1899.

all purposes or for any limited purpose, and whether the separate parcels of the several owners of the soil shall or shall not be known by metes or bounds or otherwise distinguishable;

(5) All lands in which the property or right of or to the vesture or herbage or any part thereof during the whole or any part of the year, or the property or right of or to the wood or underwood growing and to grow thereon, is separated from the property of the soil;

(6) All lot meadows and other lands the occupation or enjoyment of the separate lots or parcels of which is subject to interchange among the respective owners in any known course of rotation or otherwise (*b*).

Lands excluded.

1157. The New Forest and the Forest of Dean are expressly excluded from inclosure by the Act of 1845, and impliedly from regulation or inclosure under the Act of 1876 (*c*).

The inclosure of town greens or village greens is also prohibited (*d*).

Persons interested.

1158. For the purpose of applications for inclosure and regulation and in inclosure and regulation proceedings the persons interested in lands are the persons in actual possession or enjoyment of the land or any common right thereon or the manor of which the land is waste, or the persons in receipt of the rents and profits thereof respectively (*e*), subject to the following exceptions: (a) lessees for life or lives or years holding at a rent of not less than two-thirds of the clear yearly value; (b) lessees for a term originally not exceeding fourteen years; (c) tenants from year to year; (d) tenants at will; in all of which cases the reversioner is to be deemed the person interested.

In the case of lessees for life or lives or for years where the rent reserved is less than two-thirds of the clear yearly value, and the original term exceeded fourteen years, the lessee and reversioner are to be deemed jointly interested; and similarly a person in possession under a writ of execution or as a receiver is deemed to be jointly interested with the person dispossessed (*f*).

Where land has been leased for a term exceeding a hundred years, and no rent has been paid for the last twenty years, or where the reversioner is unknown, the owner of the term is deemed to be the person interested (*g*).

Co owners.

1159. Co-trustees and joint tenants are to be considered as jointly interested, and entitled to one vote in respect of their joint

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(*b*) These divisions of land include lands subject to any rights of common during the whole or any part of the year, or to any right which is inconsistent with ownership in severalty, and which would interfere with free and unfettered cultivation of the soil.

(*c*) Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 13; Commons Act, 1876 (39 & 40 Vict. c. 56), ss. 2, 37. This restriction, so far as it related to two commons in the Forest of Dean (Walmore Common and the Bearce Common), was removed by stat. 29 & 30 Vict. c. 70, and they were subsequently inclosed.

(*d*) Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 15.

(*e*) *Ibid.*, s. 16, and "without regard to the real amount of interest of such persons"; *i.e.*, without regard to the real title, which under s. 49 the valuer and the Board and their officers are precluded from determining.

(*f*) Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 16.

(*g*) Inclosure Act, 1854 (17 & 18 Vict. c. 97), s. 4.

interest; but one may act on behalf of all, and the vote of the majority in case of dissent shall prevail (*h*).

Tenants in common and coparceners are, to the extent of the value of their respective shares, to be deemed separately interested.

Disputed ownership.

1160. Where the title to a manor, land, or right is in dispute, the consent of both claimants (*i*) is to be deemed the consent of the person interested; and where more persons than one may, if the claim is successful, be the persons interested, their assent may be given as in the case of trustees or joint tenants (*k*).

Persons under disability.

1161. Guardians, trustees, committees of the estate, husbands, and attorneys may act for infants and other persons under disability, and the Board has power to nominate representatives where such do not exist (*l*).

Notice to reversioners.

1162. The Board may, before certifying the expediency of a provisional order or at any subsequent stage in inclosure or regulation proceedings, require notice of the proceedings to be given to immediate reversioners or remaindermen and other persons to whom they think notice ought to be given (*m*).

SUB-SECT. 3.—*Application to the Board of Agriculture and Fisheries.*

Notice of application

1163. Notice of an intended application for inclosure or regulation to the Board of Agriculture and Fisheries must be given by advertisement in a local newspaper (*n*).

In the case of a suburban common (*o*) notice of the intended application must be served upon the local authority of the town or towns in respect of which the common is suburban, and in the case of any common notice of the application must be served upon the council of every parish and urban or rural district in which any part of the common to which the application relates is situate (*p*).

By whom application made.

1164. The application to the Board must be made by persons representing at least one-third in value of the interests in the lands proposed to be affected by the provisional order which the Board

(*h*) Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 19.
(*i*) *Ibid.*
(*k*) Inclosure Act, 1847 (10 & 11 Vict. c. 111), ss. 1, 2.
(*l*) Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 20.
(*m*) *Ibid.*, s. 145.
(*n*) Commons Act, 1876 (39 & 40 Vict. c. 56), s. 10 (1). In ordinary cases two insertions of the advertisement, with an interval of a week, are sufficient. For a form, see Encyclopædia of Forms, Vol. IV., p. 37.
(*o*) *I.e.*, a common situate wholly or partly in any town or towns or within six miles of any town or towns. "Town" means any municipal borough or urban district having a population of not less than 5,000 according to the last published census. The distance is to be reckoned in a direct line from the town hall, or if there is no town hall, then from the cathedral or church if only one, or if there are more churches than one, then from the principal market-place to the nearest point of the common (Commons Act, 1876 (39 & 40 Vict. c. 56), s. 8).
(*p*) Local Government Act, 1894 (56 & 57 Vict. c. 73), ss. 8 (4) and 26 (2).

SECT. 2. Scope of the Inclosure Acts, 1845 to 1899.

are asked to issue on forms supplied by the Board (*q*), which contain a number of questions embodying the requirements of the Commons Act, 1876 (*r*), as to the advantages the applicants anticipate from inclosure of the common as compared with its regulation, and also as to the reasons why an inclosure is expedient when viewed in relation to the benefit of the neighbourhood, or, if the application is for regulation, information bearing on the expediency of the application considered in relation to the benefit of the neighbourhood as well as to private interests.

SECT. 3.—*Inclosure and Regulation Proceedings down to Confirmation of Provisional Order and Appointment of Valuer.*

What may be applied for.

1165. Application may be made for a provisional order (1) for the regulation of a common; (2) for the inclosure of a common or parts of a common; (3) as regards the same common, for the regulation of part and inclosure of the residue, in which case the application is dealt with as if the parts were separate commons, but the boundaries of the two parts may be subsequently modified (*s*).

Local inquiry.

1166. If, when they have taken into consideration the information supplied with the application (*t*), the Board (*a*) are of opinion that it is desirable to proceed further in the matter, they order a local inquiry to be held by an assistant commissioner (*b*). Having

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(*q*) Forms of application, both for inclosure and regulation, can be obtained on application to "The Secretary, Board of Agriculture and Fisheries, 3, St James' Square, London, S.W." See, too, Encyclopædia of Forms, Vol. IV., pp. 38 and 46. The Board issues, for the guidance of persons intending to apply for inclosure or regulation, a pamphlet, "Information and directions as to the mode in which applications for the regulation or inclosure of commons under the Inclosure Acts, 1845 to 1882, are to be made to the Board of Agriculture and Fisheries, with explanations respecting the law relating to the regulation and inclosure of commons," giving a very clear explanation of the provisions of the Commons Act, 1876 (39 & 40 Vict. c. 56), and the requirements of the Board in cases of application either for inclosure or regulation, which is furnished on application as above with the forms of application, and is also to be found in Encyclopædia of Forms, Vol. IV., p. 11.

(*r*) 39 & 40 Vict. c. 56.

(*s*) Commons Act, 1876 (39 & 40 Vict. c. 56), s. 2. From this section it might appear doubtful whether an application can be made for the regulation of part only of a common. In most cases regulation of the whole common would be desired, but there may be cases, especially where the common consists of different tracts separated from each other, where it is desired to deal only with part. Having regard to the definition of "common" in s. 37 as "any land subject to be inclosed under the Inclosure Acts" (see note (*a*), p. 541, *ante*) with respect to which any persons may make application to the Board, it would seem that "any common" must be read as equivalent to "any land subject to be inclosed," and that consequently the Board may entertain an application for regulation of part of a common.

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

(*a*) Throughout this article the Board of Agriculture and Fisheries is usually referred to as "the Board," and where duties are in the Acts directed to be performed by the Inclosure Commissioners, the Board as the existing authority is generally mentioned.

(*b*) Commons Act, 1876 (39 & 40 Vict. c. 56), s. 10 (6). As to assistant commissioners see note (*k*), p. 497, *ante*.

given twenty-one days' notice of the inquiry by advertisement and notices in the neighbourhood (*c*), the assistant commissioner presides at the meeting, at which the attendance of all persons interested, whether pecuniarily or not, in the subject-matter of the inquiry, is particularly invited (*d*), hears all persons desirous of being heard, makes such inquiries as he deems advisable, inspects the common and the locality, especially with regard to the requirements of the neighbourhood for recreation grounds and field gardens (*e*) and the sufficiency of the allotments proposed for the purpose, the desirability of adopting all or any of the statutory provisions for the benefit of the neighbourhood (*f*), and any other matters which he considers that the Board should have brought to their notice. He then makes his report to the Board.

In most cases two meetings are held, one in the morning and the other in the evening on successive days, with the inspection of the common and neighbourhood between, but one meeting must in any case be held in the evening between the hours of seven and ten (*g*).

Draft provisional order

1167. The Board, if satisfied by the report of the assistant commissioner and any further inquiries they deem it desirable to have made that, having regard as well to the benefit of the neighbourhood as to private interests, it is advisable to proceed, frame a draft provisional order embodying such provisions for the benefit of the neighbourhood and otherwise as may be suitable to the case (*h*). Certain provisions, which are referred to as "statutory provisions," are inserted where applicable. The statutory provisions relate to (1) securing free access to any particular point of view; (2) the preservation of particular trees or objects of historical interest; (3) the reservation of a right of playing games or of enjoying other species of recreation on particular parts of the common where a recreation ground is not set out; (4) the setting out of carriage roads, bridle paths, and foot-paths; and (5) doing any other specified thing which may be thought equitable or expedient, regard being had to the benefit of the neighbourhood (*i*).

Statutory provisions for the benefit of the neighbourhood.

Protection of private interests.

For the protection of private interests, a statement of the allotment or other compensation to be made to the lord of the manor in respect of any interest of his which may be affected is inserted in the order, and the provisions and reservations as to minerals belonging to persons other than the lord of the manor and the

(*c*) Commons Act, 1876 (39 & 40 Vict. c. 56), s. 11 (4). All the bodies to which notice of the application to the Board has to be given (see p. 513, *ante*) are served with notice of the inquiry.

(*d*) *Ibid.*, s. 11 (3).

(*e*) *Ibid.*, s. 11 (5)—(8). The Inclosure Acts only require the Board to make provision for recreation grounds and field garden allotments in the case of an inclosure of a common being waste land of a manor, but in practice little distinction is drawn between waste and other lands, if land suitable for the purpose can be obtained, and such provision will be beneficial to the neighbourhood.

(*f*) *Ibid.*, s. 7; and see *infra*.

(*g*) *Ibid.*, s. 11 (1).

(*h*) *Ibid.*, s. 12 (1).

(*i*) *Ibid.*, s. 7.

SECT. 3. Inclosure and Regulation Proceedings etc.

provisions or exceptions to be made in respect of any other rights which the Board consider ought to be specially provided for or excepted from the operation of the order are also specified (*k*).

The order may also set forth any special agreement or matter relating to the land to be dealt with (including an agreement to bring old inclosed land within the operation of the order), and may make such agreement a condition of the order (*l*).

Special agreements.

Deposit of draft provisional order.

1168. The draft provisional order is then deposited at some convenient place in the parish for the consideration of persons interested, and notice of such deposit and of the intention of the Board to certify its expediency, provided that the necessary consents are given, is published (*m*).

The provisions of an order may be modified at any time before its expediency is certified, either by the Board on its own motion, or at the suggestion of the parties, but the modifications must be consented to in the same way as the original draft order (*n*).

Consents necessary.

1169. Before the Board can certify the expediency of a provisional order they must be satisfied that persons representing at least two-thirds in value of such interests in the common as are affected by it consent thereto; and where the land is waste of a manor, or the lord of the manor is entitled to the soil in right of his manor (*o*), the

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(*k*) Commons Act, 1876 (39 & 40 Vict. c. 56), s. 12 (3).

(*l*) Inclosure Act, 1848 (11 & 12 Vict. c. 99), s. 1. Under this provision the exclusive right of sporting over the allotments after inclosure was frequently reserved to the lord of the manor, but such a reservation would not now be assented to by the Board. Where such a reservation was made under a private Inclosure Act and award, a subsequent concurrent enjoyment of sporting for more than twenty years by the owners of the allotments claiming to do so as of right was held not to deprive the lord of his exclusive right (*Graham* v. *Ewart* (1859), 7 H. L. Cas. 331). See also *Leconfield (Lord)* v. *Dixon* (1867), L. R. 2 Exch. 202; and *Musgrave* v. *Foster* (1871), L. R. 6 Q. B. 590, which decided that under this section coupled with s. 27 of the Inclosure Act, 1845, an agreement that the right of sporting shall be severed from the soil, and the tenement thus created remain in the lord while the soil is allotted to others, can be validly inserted in a provisional order. The power of bringing old inclosed land within the operation of the order in consideration of an allotment on the common or other compensation has been exercised effectually where such land from its position or character would be suitable for allotments for field gardens or a recreation ground and the common is too far from the village or is otherwise unsuitable for allotments.

(*m*) Commons Act, 1876 (39 & 40 Vict. c. 56), s. 12 (4).

(*n*) *Ibid.*, s. 12 (8).

(*o*) In *ibid.*, s. 37, the expression "waste land of a manor" is declared to mean and include any land consisting (1) of waste land of any manor on which the tenants of such manor have rights of common, and (2) of any land subject (a) to any rights of common which may be exercised at all times of the year for cattle levant and couchant, or (b) to any rights of common which may be exercised at all times of the year and are not limited by numbers or stints. This definition therefore includes land which may not be waste of any manor at all provided that it is subject to the rights of common (a) or (b) above; and in such a case the owner of the soil is not entitled to the soil in right of his manor, and his consent to the provisional order is not essential. The same result follows where land which is really waste of a manor is conveyed separately from the manor. The grantee is not entitled in right of his manor, and therefore has no right of veto.

consent of the lord or his substitute (*p*) is essential. But if there are more persons than one interested in the manor, the Board cannot certify in case such persons or a majority of such persons signify their dissent within a time limited by the Board (*q*).

Where freemen, burgesses, or inhabitant householders of a city, borough, or town are entitled to rights of common or other interest in the common, the Board cannot certify the expediency of a provisional order unless two-thirds in number of such freemen and burgesses as reside in or within seven miles of the city or town or of such inhabitant householders have consented to the order (*r*).

For the purpose of obtaining the necessary consents, or of ascertaining the interests of consenting or dissenting parties, the Board may cause a meeting to be held by an assistant commissioner, or may cause the consents or dissents to be ascertained in such other manner as they think fit (*s*).

Report to Parliament.

1170. When the necessary consents have been obtained to the original or modified order it is deemed to be final, and the Board in certifying its expediency report to Parliament their reasons for certifying the expediency, the information given to them by the applicants, the result of the local inquiry, with the number and description of the persons who attended the meetings, the nature of the objections (if any) made to the application, the suggestions (if any) with reference to the provisions for the benefit of the neighbourhood or for the protection of private interests, and generally any information which they consider best adapted to enable Parliament to judge of the expediency of confirming the provisional order (*t*).

Confirmation by Parliament.

1171. When confirmed by Act of Parliament (*a*) the regulation or inclosure of a common is proceeded with according to the

(*p*) The consent of the lord of the manor may be given by the steward of the manor or his authorised deputy (Inclosure Act, 1846 (9 & 10 Vict. c. 70), s. 10).

(*q*) Commons Act, 1876 (39 & 40 Vict. c. 56), s. 12 (5). As to persons interested, see p. 542, *ante*.

(*r*) *Ibid.*, s. 12 (6).

(*s*) *Ibid.*, s. 12 (7). The attendance of an assistant commissioner is rarely necessary. The Board, however, have, at the request of the persons promoting the issue of a provisional order, occasionally authorised the holding of such a meeting where the persons interested are very numerous, and an explanation by an independent person of the procedure and of the effect of an order would be of service.

(*t*) *Ibid.*, s. 12 (9).

(*a*) The report of the Board is presented to Parliament in each case, and is referred to a Select Committee of the House of Commons, which examines the secretary or other official of the Board, the assistant commissioner who held the local inquiry, witnesses from the locality, and any others who desire to give evidence. If satisfied, the Committee reports to the House that the order should be confirmed; but if not satisfied, it reports either that it should not be confirmed or should only be confirmed with modifications, in which case it is sent back to the Board for them to obtain the consents of the parties as before to those modifications (*ibid.*, s. 12 (11)). If the necessary consents are obtained, the Board present a special report thereon. The same procedure is followed in the House of Lords, except that the evidence taken by the Select Committee of the Commons is as a rule accepted, and witnesses are rarely called. The confirmation Bill is then introduced by the Government and passed without further

SECT. 8. Inclosure and Regulation Proceedings etc.

terms of the provisional order and the Inclosure Acts, and the confirmatory Act is deemed to be a public general Act (*b*).

Provisions as to regulation.

1172. The Board may insert in any provisional order for regulation any provisions they consider necessary for carrying the order into effect, but, subject as aforesaid, the subsequent proceedings in a case of regulation are so far as they are practicable to be the same as on inclosure (*c*).

Appointment of valuer.

1173. As soon as conveniently may be after the passing of an Act confirming a provisional order the Board call a meeting of the persons interested, of which twenty-one days' notice is given by advertisement (*d*), for the appointment of a valuer to carry out the inclosure or regulation under the superintendence of the Board. Such valuer must not be a person interested or the estate agent of a person interested, and must be elected by a majority in number and a majority in value of the persons present personally or by proxy (*e*) at the meeting. The Board may, if they think fit, appoint an assistant commissioner to preside at the meeting and take the votes. If the majority in number and the majority in value cannot agree upon the appointment, it is made by the Board. No appointment is valid until confirmed by the Board, who may disapprove of a valuer on the ground of incompetence, interest, want of impartiality, or other reasonable cause (*f*). If the Board so disapprove, they call another meeting of the parties interested as before, and so on until an approved valuer is appointed (*g*).

Instructions to valuer.

1174. At the meeting to appoint a valuer, or at some other meeting called for the purpose by the Board (*h*), a similar majority

expense to the parties. It is of course possible for objection to be taken to a Bill for the confirmation of a provisional order when the Bill is introduced in the House on the report of the Select Committee, but this has only been done in one case, and the attempt to stop the Bill did not succeed.

(*b*) Commons Act, 1876 (39 & 40 Vict. c. 56), s. 12 (10).

(*c*) *Ibid.*, s. 13.

(*d*) Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 33. This and the subsequent meetings are only for persons interested. Residents in the neighbourhood who are not interested are not entitled to attend or vote.

(*e*) The appointment of an agent or proxy to represent a person interested at the numerous meetings held during the progress of inclosure or regulation proceedings should be in the following form: "I, , of , do hereby appoint , of , to be my attorney for all the purposes of an Act passed in the and years of His present Majesty intituled " (*ibid.*, s. 21). The title to be supplied will be the short title of the Inclosure or Regulation Act. The power of attorney, or a copy authenticated by the signature of a witness or witnesses, is to be deposited with the Board, and is usually sent to the Board by the chairman of the meeting with the resolutions which are passed. The power of attorney requires no stamp (*ibid.*, s. 163). An ordinary power of attorney, if sufficient in terms, would be equally effectual, but would require the 10*s.* stamp. By requiring the double majority of the persons present and of the value of interests the Act prevents either one or two large landowners from overruling the wishes of the small owners or the small owners from combining against the valuable interests of the large landowners.

(*f*) Commons Act, 1876 (39 & 40 Vict. c. 56), s. 32.

(*g*) *Ibid.*

(*h*) Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 34; Inclosure Act, 1849 (12 & 13 Vict. c. 83), s. 3.

in number and in value of interests (*i*) may resolve upon instructions to the valuer for the appropriation of parts of the land to be dealt with for certain public purposes; namely, the formation, widening, and improvement of public roads and ways and the supply of materials therefor; the formation of public drains, watercourses, and embankments; the formation or improvement of public ponds, wells, and watering-places; recreation, field garden, and fuel allotments; for land for making or enlarging a burying ground; for the site of a church or chapel, parsonage house, school (*j*), workhouse, or garden to be attached thereto respectively, and generally any other purpose of public utility or convenience or the general convenience or accommodation of the persons interested. Instructions may also be given in like manner for the formation, alteration, or improvement of private or occupation roads or ways, ponds, ditches, watercourses, embankments, tunnels, bridges, and fences etc.; for the adoption and use of an existing tithe or other map, or for making a new survey and map (*k*); for raising the expenses of the inclosure or regulation by sale of part of the land or by rate; and for all other matters and things proper to be done in the matter of the inclosure or regulation.

Remuneration.

The meeting may also make an agreement with the valuer for his remuneration, which, with the resolutions passed, is to be reduced into writing, and forwarded by the assistant Commissioner or other chairman of the meeting to the Board (*l*).

Modifications etc. by Board.

1175. The instructions and agreement may be modified or disallowed by the Board, who may frame other instructions in place of those disallowed (or original instructions if none have been sent) and may make an order for the remuneration of the valuer if no agreement has been come to; but any modifications made by the Board in the instructions and any instructions framed by them and their order for the remuneration of the valuer must receive the assent of the parties interested in the same way as before; and when finally assented to both the instructions and the order must be allowed by the Board, who send a copy under their seal of the instructions so allowed with a copy of the provisional order and confirmatory Act to the valuer (*m*). Before entering on his duties the valuer is required to make a statutory declaration as to the faithful and impartial discharge of his duties (*n*).

Removal of valuer.

1176. In case of incapacity from illness or otherwise, of desire to be discharged, or of neglect or misconduct of the valuer, he may be removed by an order of the Board, and if he is

(*i*) See end of note (*e*), p. 548, *ante*.

(*j*) If, in case of a resolution for the site of a school, the instructions do not show clearly for what class of children the school is to be provided, how it is to be managed, or to whom the site is to be conveyed, the Board may, if necessary, call a further meeting (Inclosure Act, 1857 (20 & 21 Vict. c. 31), s. 13).

(*k*) Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 34. A surveyor may be appointed to assist the valuer (*ibid.*, s. 37).

(*l*) *Ibid.*, s. 34.

(*m*) *Ibid.*, ss. 34, 36.

(*n*) *Ibid.*, s. 38.

SECT. 3. Inclosure and Regulation Proceedings etc.

so removed or dies, the Board may appoint another in his place (*o*). A valuer is incapable of being a purchaser of any land in the parish within seven years from the confirmation of his award (*p*).

SECT. 4.—*Powers and Duties of Valuer and of Board after Appointment of Valuer* (*q*).

SUB-SECT. 1.—*Settlement of Boundaries.*

Settlement of disputed boundaries by assistant commissioner.

1177. If the valuer represents to the Board that the boundaries of any parish (*r*), manor, township, vill, hamlet, or tithing not having separate overseers of the poor, and whether such manor abuts or adjoins upon any other manor or not (*s*), in which any land to be inclosed or regulated is situate, and the boundaries of any adjoining parish, manor etc., are not sufficiently ascertained and distinguished, the Board may appoint an assistant commissioner to ascertain and set out the boundaries in question after such notice for the protection of the rights of all persons interested as he shall think necessary (*t*). The decision must be in writing under the hand and seal of the assistant commissioner, and the description of the boundary is to be published within a month after the decision, by serving it upon the parochial authorities and the lords or stewards of the manors affected and by giving notice by advertisement that the boundary has been set out and that the description has been served as above stated (*a*). Originally the description had to be delivered to, or left at the place of abode of, one of the

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(*o*) Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 128.

(*p*) *Ibid.*, s. 129.

(*q*) In dealing with the powers and duties of the valuer and of the Board during the progress of an inclosure, it has to be borne in mind that the establishment of the Inclosure Commissioners as a central body to deal with inclosures brought to light many things which it was desirable to provide for on an inclosure, but for which provision had not been made in the Inclosure Act, 1845 (8 & 9 Vict. c. 118). That Act may be said to have represented the general scope of private Acts without the experience which could only be gained by their administration. As deficiencies and ambiguities were discovered they were gradually remedied by the series of amending Acts (see p. 541, *ante*); and this accounts for the somewhat chaotic state in which the legislation relating to inclosure and regulation of commons remains, and must remain until all the Acts are consolidated; see note (*x*), p. 541, *ante*.

In these pages the practice as at present existing will be stated, with references to the Acts under which the powers and duties of the valuer, of the assistant commissioner, and of the Board are conferred or imposed; but in considering the value of cases which have arisen on the Acts it will always be necessary to bear in mind what Acts were in force when the cases were decided. Where there has been legislation to supply deficiencies which particular decisions have brought to light, the decisions cease to be of value, and will not be referred to. It frequently happens, however, that the wording of a section of an old Act, such as the Inclosure (Consolidation) Act, 1801 (41 Geo. 3, c. 109), has been adopted in the Inclosure Act, 1845 (8 & 9 Vict. c. 118), or its amending Acts, and in such cases a decision under the early Act remains of value.

(*r*) "Parish" or "parishes" includes a district or districts having a separate surveyor of highways (Inclosure Act, 1852 (15 & 16 Vict. c. 79), s. 28).

(*s*) Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 29; Inclosure Act, 1849 (12 & 13 Vict. c. 83), s. 9.

(*t*) Inclosure Act, 1845 (8 & 9 Vict c. 118), s. 29.

(*a*) *Ibid.*, s. 39.

churchwardens and overseers of each parish, but now service on the parish council will be sufficient so far as the parishes are concerned (*b*). Unless appealed against, the determination is final and conclusive.

SECT. 4. Powers and Duties of Valuer etc.

1178. Any person interested in the determination who is dissatisfied with the decision may within one month after the publication of the boundaries appeal against it by notice in writing to the Board stating the particulars in respect of which he is dissatisfied. The appeal is either to an assistant commissioner specially appointed by the Board for the purpose and a jury (*c*), or to the High Court by *certiorari* (*d*).

Appeal by person interested.

The first alternative is to be adopted unless the Board receive notice within the month from some person dissatisfied of his intention to apply to the King's Bench Division of the High Court to remove the decision into that court by *certiorari*. The Board issue a warrant to the sheriff to summon a jury of eighteen from which a panel is to be drawn (*e*), and the assistant commissioner is empowered to administer the oath to the jury, summon witnesses, order a view, and reduce the verdict of the jury to writing, and certify the same to the Board under his hand and seal (*f*). He is also empowered to impose penalties on non-attending or recalcitrant jurymen, and to settle and determine the cost of summoning the jury and the expenses of witnesses (*g*).

Appeal to assistant commissioner and jury.

Provision is also made for the payment of costs by the Board or by the person who requested the summoning of the jury according to the result of the appeal, and the Board are empowered to require security for the costs likely to be incurred before issuing their warrant for a jury (*h*). If the person who requested the jury to be summoned did so in pursuance of a resolution of the parish council, the costs and expenses paid by him are to be refunded to him (*i*). From the finding of the jury there is to be no further appeal (*j*).

Costs.

1179. But if any person dissatisfied with a decision of the assistant commissioner (*k*) on a question of boundary elects to appeal to the High Court, he may do so on giving notice in writing to the Board within one month after the publication of the boundaries of his intention to apply to the court to remove the determination of the assistant commissioner by *certiorari* into the High Court (*l*).

Appeal to High Court by *certiorari*.

(*b*) See Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 6 (1) (c); and p. 593, *post*.
(*c*) Inclosure Act, 1845 (8 & 9 Vict. c. 118), ss. 39—43.
(*d*) *Ibid.*
(*e*) *Ibid.*, s. 39.
(*f*) *Ibid.*
(*g*) *Ibid.*, ss. 40, 42.
(*h*) *Ibid.*, ss. 42, 43. As to the power of the assistant commissioner to order production of maps and the costs of such production etc., see s. 23 of the Inclosure Act, 1852 (15 & 16 Vict. c. 79); and as to what costs of supporting the decision are to be allowed if the decision is confirmed, *ibid.*, s. 24.
(*i*) Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 42.
(*j*) *Ibid.*
(*k*) Inclosure Act, 1849 (12 & 13 Vict. c. 83), s. 1.
(*l*) Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 44.

SECT. 4. Powers and Duties of Valuer etc.

Having given such notice of his intention, he may move the court at any time within six months from the date of the publication of the boundaries, but must give eight days' notice to the Board of his application (*m*). When the preliminary steps have been duly taken, the rule for a *certiorari* will be absolute in the first instance (*n*), but will not be made after the expiration of the six months nor unless the party prosecuting the *certiorari* shall before allowance thereof enter into a recognisance before one of the judges in the sum of £50 with condition to prosecute the same without delay and to pay the taxed costs of the Board within one month after the determination shall have been confirmed. The court may either direct the trial of one or more feigned issues and direct who shall be plaintiff and defendant on the trial, or may determine the same in a summary manner, or otherwise dispose of the questions in dispute, and may make such other rules and orders therein as to costs and all other matters as may appear just and reasonable. The decision of the court is final and conclusive as to the boundaries of the parish or manor (*o*).

Conclusiveness of award.

1180. A determination of boundaries in an award is not conclusive evidence of what the boundary was before the award (*p*).

Where a special limited authority, such as the settlement of boundaries, is given by Act of Parliament, it must be pursued strictly through all its conditions and qualifications, and is not to be considered merely as directory (*q*).

After an award as to boundaries and the expiry of the time for appeal, evidence as to the proceedings of the commissioner and the steps which he took to arrive at his decision ought not to be

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(*m*) Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 44.

(*n*) *R.* v. *Kelsey* (1850), 1 L. M. & P. 499. As to the form of issue to be directed, directions as to who should be plaintiff etc., see *ibid.* It would seem that the court will not grant a rule unless the person making the application is substantially interested in the matter, and sufficient ground is stated for his belief that the decision is erroneous (*R.* v. *Merson* (1842), 3 Q. B. 895).

(*o*) Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 44. The court may make orders for the payment and recovery of costs exceeding the amount of the recognisance; see Inclosure Act, 1852 (15 & 16 Vict. c. 79), s. 25. Any costs incurred by the Board in supporting the determination or payable by them to any other party pursuant to a decision of the court are to be deemed expenses of the inclosure or regulation (*ibid.*, s. 26). As to the practice of making the Board a party to the proceedings and on the procedure of appeals generally, see the note to this section in Cooke, Inclosure Acts, p. 417. The powers of settling disputed boundaries above mentioned are, with the substitution of the Inclosure Commissioners for England and Wales and the assistant commissioner in the Inclosure Act, 1845 (8 & 9 Vict. c. 118), and its amending Acts for the commissioners or commissioner appointed under private Inclosure Acts, identical with those conferred by the Inclosure (Consolidation) Act, 1801 (41 Geo. 3, c. 109), s. 33, so that cases decided under the last-mentioned Act are authorities on points arising on the Inclosure Acts, 1845 to 1899.

(*p*) *R.* v. *St. Mary's, Bury St. Edmunds* (*Inhabitants*) (1821), 4 B. & Ald. 462.

(*q*) *R.* v. *Washbrooke* (*Inhabitants*) (1825), 7 Dow. & Ry. (K. B.) 221, *per* HOLROYD, J., at p. 229. Therefore where commissioners were directed to ascertain the boundaries of a parish, and when ascertained to advertise them and to embody them in their award, it was held that the award was not conclusive as to the parochiality of a certain cottage where there was a discrepancy between the advertisement and the award, though the question was raised twenty-four years after the award (*ibid.*).

received (*r*); but continued usage contrary to the award after its execution may rebut the presumption that proper notices of the determination were given and necessitate proof that proper notices were given (*s*).

Parish and county boundaries.

1181. The valuer is also empowered to declare in his award in what parish or parishes any lands to be divided or allotted are situate where there is no dispute; but the award is not to be confirmed by the Board if it is represented to the Board that there is any dispute; and in such a case they direct an inquiry as above before confirming the award; and if it appears that any county boundaries will be affected by the declaration, the award is not confirmed until the valuer has served notice in writing on the respective clerks of the peace of the counties affected of his intention to insert the declaration in his award; and if objection is made at the next general quarter sessions by either of the counties, and a requisition requiring the omission of the declaration is sent to the Board within fourteen days thereafter, such declaration is not inserted in the award (*t*).

Modification of private boundaries.

1182. The valuer in inclosure or regulation proceedings is empowered, with the consent of the owner of any adjoining lands, to straighten fences or define a new line of boundary of the lands to be inclosed or regulated, and to give directions as to the fencing of the new boundary (*a*).

SUB-SECT 2.—*Claims and Objections.*

Meetings for receipt of claims.

1183. One of the early duties of the valuer is the ascertainment of the respective rights in and over the common. He issues notices (*b*) of meetings to be held in the parish where the land to be

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(*r*) *R.* v. *Marsh* (1836), 5 Ad. & El. 468, where a question was raised as to the sufficiency of notice given to the churchwardens of a parish, there being separate churchwardens for each tithing, and notice having only been given to one.

(*s*) See *R.* v. *Haslingfield* (*Inhabitants*) (1814), 2 M. & S. 558 (a case under an Inclosure Act before 1801).

Where the boundaries of a parish were settled on an inclosure, and the lord of manor A. had exercised rights of ownership over a waste which was determined to be in parish B., the owner of manor B. having also exercised rights of ownership over the waste, and the lord of manor A. had in the inclosure proceedings claimed to be owner of lands in A., but had not claimed any lands in B., it was held that the jury were rightly directed to say whether the property in the waste was in the lord of manor A. or the lord of manor B., and, a verdict being found for the latter, the court refused to disturb it (*Lester* v. *Kemp* (1824), 9 Moore (C. P.), 85); and compare *Warren* v. *Shuttleworth* (1823), 1 L. J. (O. S.) (K. B.) 214. For a summary of the evidence which may be received on questions of boundary, see *ibid.*; and Cooke, Inclosure Acts, p. 159. As to delimitation of boundaries generally, see title BOUNDARIES AND FENCES, Vol. III., pp. 108 *et seq.*

(*t*) Inclosure Act, 1849 (12 & 13 Vict. c. 83), s. 1.

(*a*) Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 45.

(*b*) Fourteen days' notice of any meeting to be held by the valuer during the progress of the inclosure or regulation is given by advertisement in a local paper, and by affixing the notice on the principal outer door of the church of every parish and ecclesiastical district in which the land or any part thereof is situate on Sunday morning before divine service (Inclosure Act, 1845 (8 & 9 Vict.

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dealt with is situate for the receipt of claims from all persons claiming any common or other right or interest in the land to be inclosed or regulated. Three meetings are usually held, and after the last meeting, of which special notice is given by stating that it is the last, no further claims can be received, except for some special cause, to be allowed by the Board (*c*).

Although the requirements as to claims have been simplified (*d*), the wording of the claim is a matter of importance where the rights included in the claim are valuable and there is any possibility of an appeal against the valuer's decision.

To frame correctly the particulars of a claim requires considerable care and technical knowledge, and as, in the event of an appeal, the action will be decided upon the claim as made to the valuer, the importance of having it framed correctly in the first instance is obvious (*e*).

Deposit of claims; delivery of objections.

1184. After the last meeting for the receipt of claims the valuer deposits for examination a statement of all claims received by him at some public place in the parish, and gives notice (*f*) of the deposit, limiting a time, not less in any case than twenty-one days, for the delivery of objections. Any objection must be delivered in writing to the valuer, and a copy must also be delivered at the place of abode of the claimant or his agent (*g*).

After the expiration of the time limited for the delivery of objections no objection to any claim is to be received unless for some special cause to be allowed by the Board.

Determination of claims.

1185. The valuer then gives notice of (*f*) and holds a meeting to examine into and determine the claims, which he may allow or

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c. 118), ss. 46, 162). In cases where the Crown is interested notice must also be given to the office of the Commissioners of Woods and Forests or to the office of the Duchy of Lancaster, as the case may be, and where the Duke of Cornwall is interested to the Lord Warden of the Stannaries (*ibid.*, ss. 17, 18). An old Board order of the Inclosure Commissioners provided that unless these notices were sent the Commissioners would not recognise the meeting as valid. The same rules apply to other notices required to be given by the valuer.

(*c*) Under *ibid.*, s. 47, the claim had to state the several particulars in respect of which it was made, distinguish the claims in respect of freehold, copyhold, customary, and leasehold property from each other, and mention the place of abode of the claimant or his agent, at which notices in respect of the claims might be delivered. The Inclosure Act, 1848 (11 & 12 Vict. c. 99), s 9, authorises the valuer to receive claims which do not contain these particulars, but the address for service must either appear on the claim or be indorsed upon it. Claims may also be sent to the valuer by post in a registered letter or left at his office (Inclosure Act, 1857 (20 & 21 Vict. c. 31), s. 3). As to the importance of putting in a claim for occupation roads or ways, see p. 564, *post*.

(*d*) See note (*c*), *supra*. The simplification of the requirements was introduced to give relief to very small claimants, whose claims were often found to be informal. At the meetings held by the valuer to receive claims he generally examines them, and is often able to afford advice and assistance to claimants; and where a claim is manifestly not in accordance with the requirements of the Acts he may and should require it to be amended (Inclosure Act, 1848 (11 & 12 Vict. c. 99), s. 9).

(*e*) Upon the trial of an issue proof of a portion only of the right claimed will not justify a verdict for so much of the right claimed as the claimant has proved (*Ivatt* v. *Mann* (1842), 4 Scott (N. R.), 342).

(*f*) See note (*b*), p. 553.

(*g*) Inclosure Act, 1845 (8 & 9 Vict c. 118), s. 48.

disallow in whole or in part and make such order thereon as shall appear to him just (*h*). In the determination of contested claims he is as a rule assisted by an assistant commissioner, nominated by the Board, as assessor, in accordance with whose advice as to the determination of a claim and as to costs he is bound to decide (*i*).

Tofts.

Claims are allowed in respect of tofts or the sites of old commonable messuages or cottages as if the messuages or cottages were still standing (*k*), and claims may be allowed on proof of sixty years' user of the right claimed although in the judgment of the valuer or assistant commissioner such a claim could not be sustained in law (*l*).

(*h*) Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 48.

(*i*) *Ibid.*, s. 35. The section provides that upon the hearing and determining of any contested claim or objection, or upon awarding any costs, the valuer shall, if he thinks proper or if he is so directed in the valuer's instructions, be assisted by an assistant commissioner specially appointed as an assessor, who is to be a practising barrister of five years' standing at the least. There may be some doubt, having regard to s. 4 of the Inclosure Act, 1845 (8 & 9 Vict. c. 118), which empowered the Inclosure Commissioners to appoint assistant commissioners without the legal qualification, and to s. 13 of the Inclosure Act, 1846 (9 & 10 Vict. c. 70), under which any assistant commissioner might be so specially appointed as assessor, whether the legal qualification is still required; but the point is not of practical importance, as the assistant commissioners appointed by the Inclosure Commissioners and the Board have for the last fifty years been invariably barristers, and the assessors have always been nominated from among them. See Cooke, Inclosure Acts, p. 192, as to the early practice. Although the determination is in fact that of the assistant commissioner, in form it is the valuer's determination.

In many cases throughout inclosure or regulation proceedings acts are authorised to be done by the Commissioners or an assistant commissioner. As such acts have been almost invariably intrusted by the Commissioners and the Board to an assistant commissioner where the work to be done was outside the office, the assistant commissioner will alone be referred to in these pages, but it must be remembered that the Commissioners had the power, and that the Board have now the same power themselves, to deal with any matter directly.

From the wording of the Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 48, it seems clear that the valuer has power to disallow a claim whether objected to or not; but in *Musgrave* v. *Inclosure Commissioners for England and Wales* (1874), L. R. 9 Q. B. 156, it was held that neither the valuer nor the assistant commissioner has such power, but that a claim not objected to must be allowed, and that the valuer must consider subsequently whether any, and what, value is to be attached to the claim when he comes to make the allotments. The decision has been regarded by the Board as of doubtful authority, and binding upon them only in cases where the claim is on the face of it good in law, as in that particular case it was. In a recent case of regulation where numerous claims to a right of common of pasture were made in respect of messuages with no land attached, which were manifestly bad, the Board decided that the assistant commissioner might advise the valuer to disallow the claims although they had not been objected to.

(*k*) Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 53.

(*l*) *Ibid.*, s. 54. The exact legal meaning of this section has not yet been judicially determined, and it has been the subject of some speculation; see Cooke, Inclosure Acts, p. 214; Elton, Commons, p. 6. The draftsman of the Bill was of opinion that it only extended to those rights which could not be sustained in law either under or independently of the Prescription Act, 1832 (2 & 3 Will. 4, c. 71), *e.g.*, rights of common claimed by inhabitant householders, burgesses, and some others not as annexed to lands and tenements, nor as common of inheritance in gross. The user is not legalised, and the courts

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Questions of title.

Neither the Board nor the valuer can determine any questions of title or, except in cases of encroachment as hereinafter mentioned, any rights contrary to the actual possession of any party; but if their opinion is adverse to the rights of the party in possession, they may hold their hands until possession has been given up by him or recovered in a court of law; or, where the circumstances admit, the valuer or assistant commissioner may declare what rights are appendant or appurtenant to the land or hereditament in question, or may declare by any sufficient description the rights of the owner for the time being of any land or hereditament (*m*) without declaring by name who is the actual owner of such land or hereditament.

Encroachments.

1186. All encroachments and inclosures other than inclosures authorised by the custom of the manor or otherwise according to law made within twenty years before the first meeting for the examination of claims are deemed parcel of the common, and any dispute or difference is to be determined by the valuer (*n*); but lands taken for the erection of a schoolhouse or other charitable or parochial purposes are not treated as encroachments (*o*). Lands inclosed more than twenty years before the date of the first meeting for the examination of claims are for the purposes of the Acts deemed ancient inclosures, but not so as to carry any right of common or compensation or allotment for or in respect of right of common which might be claimed in respect of ancient inclosures (*p*). The title to the soil of and minerals in and under these encroachments is not affected by the Acts (*q*).

Questions as to land being common or an encroachment.

1187. Where questions arise as to whether land included in a provisional order and Act is or is not land subject to be inclosed within the meaning of the Inclosure Acts, or is or is not an encroachment, the valuer, assistant commissioner, and Board are the persons to determine the question in the first instance, although their decisions may be controlled on appeal in manner provided by the Acts (*a*).

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may not be bound by the section. In practice the assistant commissioners have always held that a right claimed under it must not be an unlimited right.

(*m*) Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 49. Upon the construction of the words of this section (occurring in another Act identical in terms), see *Ivatt* v. *Mann* (1842), 4 Scott (N. R.), 342, 361.

(*n*) Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 50, which empowers the Board to direct the valuer to make allowances to encroachers if they consider it just or reasonable, and also allows the encroacher to remove building materials etc. Possession of encroachments may be obtained by the valuer under s. 13 of the Inclosure Act, 1852, which adopts the procedure of the Small Tenements Recovery Act, 1838 (1 & 2 Vict. c. 74).

(*o*) Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 51.

(*p*) *Ibid.*, s. 52.

(*q*) Inclosure Act, 1847 (10 & 11 Vict. c. 111), s. 3.

(*a*) See *Turner* v. *Blamire* (1853), 1 Drew. 402, where KINDERSLEY, V.-C., refused to interfere with the determination of an assistant commissioner that certain lands formed part of the lands to be dealt with under an Inclosure Act, and held that any appeal against his determination ought not to be made to the Court of Chancery, but in manner provided by the Inclosure Acts. See p. 557, *post*. The case was dismissed on appeal on the merits, without going

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Appeals.

Appeals, however, from the decisions of a valuer or assistant commissioner made under ss. 48 and 50 of the Inclosure Act, 1845, are only given (*b*) to persons claiming to be interested in the land to be inclosed; and it has been held that they do not apply to cases where land not subject to be inclosed has been included in the provisional order and shown on the map annexed thereto. If a valuer, therefore, proceeds to recover possession of land included in a provisional order in manner directed by the Acts (*c*), the justices have jurisdiction to inquire whether the land was properly deemed to be parcel of the land subject to be inclosed, and the occupier is not precluded from objecting before the justices that the land was not subject to be inclosed by reason either of its having been included in the map annexed to the provisional order or of his not having made a claim to it before the valuer (*d*).

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into the question of jurisdiction (*Turner* v. *Blamire* (1853), 22 L. J. (CH.) 766). See also *Ivatt* v. *Mann* (1842), 4 Scott (N. R.), 361, where a motion was made in Chancery after an action at law to restrain the valuer from making his award, and it was held by SHADWELL, V.-C., that, if a person in possession objected to the jurisdiction of the valuer, his duty was to state his claim and to state that he was in possession and claim that the matter should not be determined until he gave up possession or until it was recovered from him. An injunction was granted in that case on the ground of a mistake on the part of those concerned, and an issue was directed to be tried in a court of law, but the matter was ultimately compromised. In *Re Portsmouth (Earl)* (1861), 9 W. R. 336, application for inclosure of a common had been made by Lord Portsmouth. At the inquiry before the assistant commissioner one Partridge claimed to be lord or owner of the soil of a large portion of the common. Both parties agreed in writing that the inquiry should be adjourned to enable evidence to be obtained. At the adjourned inquiry the assistant commissioner decided in favour of Lord Portsmouth, and the Inclosure Commissioners on his report issued a provisional order stating Lord Portsmouth to be lord of the manor and making an allotment to him in respect of the soil. Partridge gave written notice of dissatisfaction and brought an action in the Court of Common Pleas against the Inclosure Commissioners upon a feigned issue, and the action was at issue. A bill filed by Lord Portsmouth and a motion to restrain Partridge from proceeding with his action was refused with costs (*Portsmouth (Earl)* v. *Partridge* (1860), 8 W. R. 658) after an application in the first-mentioned action with the same object to a judge in chambers had been refused. A subsequent rule obtained by Lord Portsmouth calling upon Partridge and the Inclosure Commissioners to show cause why prohibition of the inclosure proceedings should not issue, or why the feigned issue should not be set aside or reformed, was refused. The objection of Lord Portsmouth was apparently to the form of the issue and to the fact that the action had been brought against the Inclosure Commissioners, and not against himself, but, as was pointed out by WILLIAMS, J., he might have avoided all difficulty by becoming a joint defendant, which he had refused to do.

(*b*) Inclosure Act, 1845 (8 & 9 Vict. c. 118), ss. 55, 56.

(*c*) See note (*n*), p. 556, *ante*.

(*d*) *Chilcote* v. *Youlden* (1860), 3 E. & E. 7, where the justices found that the land in question, which was admittedly an encroachment from the common, had been made more than twenty years before the inclosure, though a question was raised at the hearing whether it had been sufficiently fenced off to constitute an inclosure, and accordingly decided that the land was an ancient inclosure, and refused to make an order for delivery of possession. Neither the owner nor the occupier of the land had apparently taken any part in the inclosure proceedings, or made any claim before the valuer that the land was not subject to be inclosed. The Court of Queen's Bench upheld the decision of the magistrates that the land was not subject to be inclosed, on the ground

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Deposit of schedule of determination on claims etc.

1188. Having heard and determined all claims and objections, the valuer prepares a schedule of them with his determinations thereon, which he deposits in some public place in the parish for the inspection of persons interested, and gives notice of the deposit by advertisement and otherwise (*e*). He also sends to the Board a copy of the schedule, and furnishes any explanation or information they may require in relation thereto. The schedule remains deposited for thirty days, and within that time any person dissatisfied with any determination may give notice in writing to the Board of his desire to have the claim or matter reheard; and in such case, or if the Board from the information supplied by the valuer are of opinion that any of his determinations have been made without due consideration of the legal rights of the parties interested or are erroneous, the Board give notice of a rehearing before themselves or an assistant commissioner appointed for the purpose (*f*), and the Board or assistant commissioner may award costs of the rehearing (*g*).

If no notice of dissatisfaction with the valuer's determinations is given within the time limited, and if the Board see no reason to have a rehearing of any of his determinations, they are final (*h*).

Appeal to court of law.

1189. A further right of appeal by notice in writing to the Board within thirty days (*i*) after notice of the determination of the Board or the assistant commissioner has been given to the persons interested is given by means of an action to be brought in the High Court of Justice either against the person in whose favour the determination has been given or against the Board upon a feigned issue, which

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that the Acts gave the valuer and the Commissioners no power to determine conclusively whether the land was or was not an encroachment within the meaning of the Acts, though it might reasonably have been expected that such a power would have been found. The point that the land was included in the provisional order map as land subject to be inclosed, and that the provisional order was confirmed by a public general Act (see Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 32), does not appear to have been taken. As to this, see *Cook* v. *Mitcham Common Conservators*, [1901] 1 Ch. 387; *Chislehurst Common Conservators* v. *Newton* (1887), reported [1901] 1 Ch. 389, n., both of which cases decided that a scheme under the Metropolitan Commons Act, 1866 (29 & 30 Vict. c. 112), when confirmed by Act of Parliament, is conclusive as to the limits and extent of the common, and that an owner of land included therein cannot successfully assert his title thereto.

(*e*) See note (*b*), p. 553, *ante*.

(*f*) Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 55; see next note.

(*g*) *Ibid.*, s. 59. The valuer is also empowered to award costs of a claim or objection if he sees fit (*ibid.*, s. 48), though in practice this is rarely, if ever, done; and he may also pay the expenses of any witnesses or of the production of any surveys, maps, or plans which he may require for his information and guidance, and not for the benefit of any person interested, and these expenses are to be deemed part of the expenses of the inclosure (*ibid.*). If the rehearing before the Board or an assistant commissioner is a substantial rehearing, the Board usually direct another assistant commissioner to hold it; but if the parties intend to carry the case to the courts and so inform the Board, there can be a formal rehearing before the same assistant commissioner, at which no evidence is called in support of the appeal, and the determination of the valuer is affirmed. The parties are then in a position to proceed to the next stage.

(*h*) *Ibid.*, s. 48.

(*i*) It is essential that notice of dissatisfaction be given within the time named (*Homfray* v. *Scroope* (1849), 13 Q. B. 509).

is to be tried at the assizes for the county in which the land is situate, the issue or issues to be settled by the proper officer of the court in the event of dispute between the parties (*k*).

The costs of the action abide the event of the trial (*l*). If the parties prefer, they may submit the appeal to arbitration. The submission is irrevocable and binding upon both parties, and the Board may require each party to give security for the costs of the arbitration (*m*).

If there is no notice of appeal or if the appeal is not prosecuted, the determination of the Board or of the assistant commissioner is final and conclusive (*n*).

Actions are not to abate by reason of the death of parties (*o*).

SUB-SECT. 3.—*Sale of Small Commons under Fifty Acres* (*p*).

When sale may be made.

1190. After the claims have been finally determined written application may be made to the Board by persons representing at least two-thirds in value of interest and two-thirds in number of the persons whose claims have been allowed to authorise a sale instead of a division of the whole of the land included in the provisional order if it does not exceed fifty acres, or of any portion thereof not exceeding fifty acres, and thereupon the Board may, if they consider the sale would be expedient, make an order accordingly (*q*); and the land may be sold in the same way as land sold to raise the expenses of an inclosure (*r*), but with this exception, that before a sale is made it must be approved by a majority of the persons whose claims have been allowed present at a meeting called by the Board for the purpose (*s*).

Application of proceeds.

1191. When the sale has been effected the Board call a meeting of all persons whose claims have been allowed to determine how any surplus of the purchase-money after payment of the expenses of the inclosure and the sale is to be appropriated. Resolutions passed by a majority in respect of interest of the persons present at the meeting may decide that the surplus may be appropriated to the endowment of schools, the construction or maintenance of

(*k*) For a form of feigned issue, see *Lloyd* v. *Powis* (*Earl*) (1855). 4 E. & B. 485. If the action is brought against the Board, the person in whose favour the determination has been given may, if he desires, be made a joint defendant (*Re Portsmouth* (*Earl*) (1861), 9 W. R. 336).

(*l*) Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 57. If the plaintiff delays proceeding to trial beyond the time limited in the Act, the defendant is entitled to judgment as in case of a nonsuit (*Hancock* v. *Carlisle* (*Earl*) (1850), 4 Exch. 447).

(*m*) Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 60.

(*n*) *Ibid.*, s. 57.

(*o*) *Ibid.*, s. 58.

(*p*) This is a power which can now rarely be exercised, and it will be only necessary to deal briefly with the provisions relating to it.

(*q*) Inclosure Act, 1852 (15 & 16 Vict. c. 79), s. 4. The consent of persons whose consent would be required to the sale of an allotment or part of an allotment to raise inclosure expenses is also required; see Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 134; and p. 583, *post*.

(*r*) See p. 583, *post*.

(*s*) Inclosure Act, 1852 (15 & 16 Vict. c. 79), s. 4.

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bridges, highways, schoolhouses, drains, watercourses, or any other works or objects of public utility (*t*), or that it should be apportioned among the persons interested (*a*); but any resolutions have to be confirmed by order of the Board (*b*), and if the Board vary or disallow any resolutions, they call a second meeting, presided over by an assistant commissioner, at which the resolutions may be revised or rescinded and new resolutions passed subject to the same conditions as before. If the Board disallow the resolutions passed at the second meeting, or if no effectual resolution is passed at either meeting, the surplus must be expended in aid of the highway rate for the parish or parishes in which the land is situate (*c*).

Award.

1192. The inclosure proceedings are then completed by an award, framed by the Board or assistant commissioner in the manner and with the formalities required for a final inclosure award (*d*), in which, after reciting the sums allowed and paid for expenses incurred in and of and incident to the inclosure proceedings or the sale of the land or the improvement thereof for the purposes of sale or otherwise, the appropriation of the surplus in one or more of the modes above mentioned is awarded and directed (*e*). The award when confirmed is unimpeachable (*f*).

SUB-SECT. 4.—*Drainage, Roads, Fences etc.*

Works of improvement.

1193. Where the intention of the parties who obtain an inclosure order for a small common is to enable a sale thereof to be carried out under the procedure stated in the preceding subsection, no works of drainage, road-making etc., are as a rule required; but in most cases of inclosure there is a considerable amount of work of this description, which may or may not have been decided on at the meeting called to appoint the valuer and embodied in his instructions (*g*).

When the persons who will be entitled to have the common divided among them have been ascertained, and the extent of their respective rights has been determined, the valuer proceeds to execute such works of drainage, road-making, exchange, and general improvement, as the circumstances of the case may require, to enable him to make convenient allotments when the land is divided among the persons interested to be held in severalty. His powers under the Acts are extensive, and it is not possible within the limits of this article to give more than a short reference to each of them. He is of course bound by the instructions which he receives on his appointment, or which are passed and confirmed during the progress of the inclosure (*h*).

(*t*) Inclosure Act, 1852 (15 & 16 Vict. c. 79), s. 4.

(*a*) Inclosure Act, 1859 (22 & 23 Vict. c. 43), s. 9. The procedure is similar to that relating to compensation moneys; see p. 497, *ante*.

(*b*) Inclosure Act, 1852 (15 & 16 Vict. c. 79), s. 6.

(*c*) *Ibid.*, ss. 7, 8.

(*d*) See pp. 585, 586, *post*.

(*e*) *Ibid.*, s. 9.

(*f*) *Ibid.*, s. 10.

(*g*) See p. 548, *ante*.

(*h*) A committee is often appointed by the persons interested to consult with the valuer as to matters arising during the progress of the inclosure, examine

Watercourses, bridges etc.

1194. The valuer may consistently with his instructions set out and make, enlarge, cleanse, or alter the course of, and improve common ponds, ditches, or watercourses, embankments, tunnels, or bridges, both in, through, and over the land to be inclosed and old inclosed lands in the parish or neighbouring parishes, as he may find necessary, making compensation for any damage done and obtaining the consent of persons interested in any land interfered with which is not part of the land to be inclosed (*i*). Except to obtain or improve an outfall, such consent is essential before diverting a watercourse. For the purposes of obtaining or improving an outfall he is during the progress of the inclosure deemed the person interested in the land to be inclosed under the Land Drainage Act, 1847 (*k*). Expenses incurred by him are expenses of the inclosure, and the expenses of subsequent maintenance and repair are borne as the valuer directs in his award (*i*). They may be directed to be raised by rate (*l*).

Land Drainage Acts.

1195. The Land Drainage Acts, which are also under the administration of the Board of Agriculture and Fisheries, provide means for the establishment, after local inquiries held by direction of the Board and an order of the Board made thereon authorising the execution of the necessary works, of a scheme of drainage over a district with provision for the compulsory purchase of land required for a pumping station etc. and for compensation to persons affected by the working of the scheme (*m*).

Apart from the powers conferred by such a scheme, a valuer is not empowered to overload an ancient drain flowing through common lands from another township and thereby to obstruct the drainage of lands in that other township to the damage of the owners (*n*).

the claims deposited, make objections where necessary, and generally act in the interests of the whole body. Where the land to be dealt with is of large extent, and the various interests are valuable, the progress of the inclosure may be much facilitated by such a course.

(*i*) Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 61.

(*k*) 10 & 11 Vict. c. 38. See Inclosure Act, 1852 (15 & 16 Vict. c. 79), s. 2.

(*l*) Inclosure Act, 1848 (11 & 12 Vict. c. 99), s. 5. As to the rate, see p. 567, 582, *post*.

(*m*) This subject is dealt with under the title SEWERS AND DRAINS.

(*n*) *Dawson* v. *Paver* (1847), 5 Hare, 415, where the powers under Inclosure Acts, as contrasted with powers under public general Acts, are illustrated, and may be stated as follows: (1) Where an Act of Parliament empowers certain persons to deal with their own property or with property in a certain place or district or defined by a certain description, and does not by express words or by necessary implication import that the Legislature intended to affect the rights of other persons in other property, courts of law do not construe more general words in the Act as affecting the rights of strangers in property not within the description of that with which the Act expressly purports to deal. (2) Whether an Act is to be a public Act, binding on all the King's subjects, or merely a private Act depends upon the nature and substance of the case, and not upon the technical consideration whether the Act does or does not contain a clause declaring that it shall be a public Act. As to the subject of the construction of Inclosure Acts, compare *Galloway* v. *London Corporation* (1866), L. R. 1 H. L. 34; *A.-G.* v. *Lunesdale Rural District Council* (1901), 86 L. T. 822.

An award made under an early Inclosure Act (1773) directed that certain public drains set out under the award were to be kept in repair by the owners of

SECT. 4. **Powers and Duties of Valuer etc.**

Public roads and ways.

Stopping and alteration of roads.

1196. The valuer is also, consistently with his instructions, to set out, make, and widen public roads and ways over the land to be inclosed and to stop up, divert, or alter roads or ways passing through the land or through old inclosures (*o*) in the parish (*p*). The consent of the county council or other highway authority will be required in the case of main roads (*q*).

Before any public road or way can be discontinued, diverted, stopped up, or altered, the valuer is required to affix a notice at each end of the road in question stating the date from which he intends to close or divert the road, and to give the same notice by advertisement for four successive weeks, and on the church door for four Sundays; and from the day named the road is to be deemed closed or diverted, as the case may be, unless any person gives notice of appeal to quarter sessions within four months after the first Sunday on which the notice is posted. Fourteen days' notice of the appeal must be given in writing to the valuer, stating the grounds of the appeal, and the appellant is confined to the grounds stated in the notice. The appeal is heard before a jury, who are to determine, first, whether the road is unnecessary, and, secondly, whether the proposed alteration would be beneficial to the public and without injury to the appellant. If either question is answered in the affirmative, the court dismisses the appeal and awards costs to the valuer; if both are answered in the negative, the appeal is allowed, and costs, at the expense of the inclosure, awarded to

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the lands inclosed according to an acreage rate, and that direction had been acted on for eighty years; but in 1854 there was a presentment that the drains ought to be widened and an increased acreage rate made. There being no evidence of liability to repair *ratione tenuræ* or by reason of benefit accruing to the inclosed lands, and the Inclosure Act directing that public drains etc. set out under the award were to be repaired in the same manner as other drains in the township, it was held that a presentment imposing the increased liability solely on the owners of lands inclosed under the Act was bad (*Biglin* v. *Wylie* (1867), 36 L. J. (Q. B.) 307).

A landowner who is directed by an award to keep a public drain running through his land clean and of sufficient depth and breadth to carry off the water intended to run through it is not responsible to an owner above who throws an increased burden on the drain by an additional drain from his own land (*Sharpe* v. *Hancock* (1844), 8 Scott (N. R.), 46).

(*o*) These do not necessarily mean old inclosures from the common or waste, so that the power of the valuer extends to stopping up or diverting any road or path through any inclosed lands in the parish, and not merely through old inclosures or intakes from the common (*Hornby* v. *Silvester* (1888), 20 Q. B. D. 797, C. A.). To make a new road through an old inclosure the valuer must make arrangements with the owner. This may be done by giving the owner other land out of the waste of equivalent value if he is a person interested; but s. 66 of the Inclosure Act, 1845 (8 & 9 Vict. c. 118), which provides for the expenses attending the purchasing of the soil of public roads and ways being part of the expenses of the inclosure, would authorise a purchase of land for the purpose.

(*p*) *Ibid.*, s. 62. The formation of new roads is frequently referred to in the provisional order as one of the statutory provisions for the benefit of the neighbourhood (see p. 545, *ante*); and occasionally the formation of a particular road is expressly referred to as a condition on which the inclosure is granted. The practice is for the valuer when he has examined or surveyed the lands to prepare a scheme of new roads, roads to be stopped or diverted, footways etc., and submit it to a meeting of the persons interested.

(*q*) *Ibid.* See title HIGHWAYS.

the appellant. If the appeal is made by the surveyor of highways by direction of the parish council or of inhabitant ratepayers at a meeting for the purpose, his costs and any costs awarded against him are paid out of the highway rate (*r*).

Effect of award declaring road stopped.

1197. Non-compliance with the requirements of the statute in force at the time of making the award will render ineffectual an award purporting to stop up a road or path (*s*), unless it is merely a private road or path (*a*); but where time has elapsed from the execution of an award, and the subsequent user is not inconsistent with the terms of the award, the requirements will be presumed to have been complied with (*b*).

Where a road is stopped up by an award a claim to have acquired title by user under the Prescription Act, 1832 (*c*), cannot go behind the date of the award, though there has been user of the same nature both before and after the award, and such user will not rebut the legal presumption that the award was properly made (*d*).

If a road or footpath is properly stopped up in one parish, the fact that a continuation of the road or footpath in the adjoining parish is thereby made a *cul de sac* does not invalidate the award or justify a trespass (*e*); and the remedy of persons aggrieved is by appeal to quarter sessions (*f*). Such a case is different from one

(*r*) Inclosure Act, 1845 (8 & 9 Vict. c. 118), ss. 62—64. The parish council takes the place of the old vestry (Local Government Act, 1894 (56 & 57 Vict. c. 73, ss. 6 (1) (a), 13 (1)). Under the Inclosure (Consolidation) Act, 1801 (41 Geo. 3, c. 109), s. 8, and Acts incorporating that Act, an order of two justices was required before a road passing through old inclosures could be closed. As to the consent of the two justices and stopping up ways under that Act, see *Logan* v. *Burton* (1826), 5 B. & C. 513; *R.* v. *Downshire* (*Marquis*) (1836), 4 Ad. & El. 698; *Thackrah* v. *Seymour* (1832), 1 Cr. & M. 18, which cases are now of value mainly to show that, if a road or footpath through an old inclosure is not validly stopped up, a continuation of the road or footpath which might have been stopped up and is not set out as a road or footpath in the award will remain open also.

In the case of straightening an existing road and so making a small diversion, the consent of the justices is not requisite, and the parish is liable for the repair of the road (*R.* v. *Cricklade* (*Inhabitants*) (1850), 14 Q. B. 735; *R.* v. *East Haybourne* (*Inhabitants*) (1859), Bell, C. C. 135).

(*s*) *Harber* v. *Rand* (1821), 9 Price, 58, where a right of way over an old footpath omitted from an award map under the Inclosure (Consolidation) Act, 1801 (41 Geo. 3, c. 109), was pleaded as a defence to an action for trespass, and it was held that nothing short of an order by two justices would extinguish a right of way.

(*a*) *White* v. *Reeves* (1818), 2 Moore (C. P.), 23.

(*b*) *Manning* v. *Eastern Counties Rail. Co.* (1843), 12 M. & W. 237, where an award, purporting to be made by the order and with the consent of two justices, stopped up a public footpath; no order was found with the award, but the subsequent enjoyment of the land was not inconsistent with the award, and it was held that the award and statements in it were *primâ facie* evidence of compliance with the requirements of the Act. So in *Williams* v. *Eyton* (1859), 4 H. & N. 357, Ex. Ch., no order of the justices was recited, and there was no proof of its having been made; but for twenty-eight years after the date of the award a gate had been placed across the road and locked, and the road had not been used by carriages, and this was held to amount to a presumption that the order had been obtained.

(*c*) 2 & 3 Will. 4, c. 71.

(*d*) *Holden* v. *Tilley* (1859), 1 F. & F. 650.

(*e*) *Gwyn* v. *Hardwicke* (1856), 1 H. & N. 49.

(*f*) *Ibid.*; Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 63.

All private or occupation roads or ways over, through, or upon the lands to be inclosed which are not set out in the valuer's award are for ever stopped up and extinguished (*i*).

The setting out of an occupation road by the valuer raises no presumption as to the ownership of the soil (*j*).

Fencing of new roads.

1198. The public carriage roads set out by the valuer are to be fenced on both sides by such of the persons interested and within such time as he shall direct, and the valuer is to make and complete the new public roads and ways in conformity with the provisions of the Highway Act, 1835 (*k*), as to width.

The Board have power by order to certify that it is not for the public convenience that public roads or driftways set out by the valuer should be fenced or made of hard materials and certified by justices, and in such case any liability to repair imposed by the valuer does not involve a liability to convert the road into a fenced road or into one made of hard materials (*l*).

Taking over as public highways.

Before a public road set out by the valuer can become a highway repairable by the parish or highway authority a certificate must be obtained from two justices for the county or other jurisdiction in which the lands are situate that the road has been sufficiently formed and completed, and such certificate is at the following quarter sessions filed as of record by the clerk of the

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(*g*) As where a road was stopped through inclosed lands and through a waste, there being no jurisdiction to stop the road through the inclosed lands, and it was held that the road through the waste remained open (*Thackrah* v. *Seymour* (1832), 1 Cr. & M. 18).

(*h*) *R.* v. *Huntingdonshire Justices* (1865), L. R. 1 Q. B. 36, where the question whether the fact of allowing such an appeal may or may not result in the whole road being kept open is also dealt with.

(*i*) Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 68. This section is conclusive, and the award of the valuer, which does not set out such a road over the common, stops it up although it may have been enjoyed for forty years (*Turner* v. *Crush* (1879), 4 App. Cas. 221; *Holden* v. *Tilley* (1859), 1 F. & F. 650). Hence it is important, where any occupation road or right of way over land to be inclosed has been enjoyed, that a claim for it should be made to the valuer.

(*j*) *R.* v. *Hatfield* (*Inhabitants*) (1835), 4 Ad. & El. 156. Formerly a right of way could not be gained by prescription against the Crown; see *Harper* v. *Charlesworth* (1825), 6 Dow. & Ry. (K. B.) 572, where twenty subsequent years' user of a public footpath which had been stopped up under an Inclosure Act was held not to show dedication to the public in the absence of any consent on the part of the Crown, there being also the objection to a presumption of dedication that the land had been leased for sporting purposes, and that a lessee cannot dedicate (*Wood* v. *Veal* (1822), 1 Dow. & Ry. (K. B.) 20). But now as regards rights of way which can be gained under the Prescription Act, 1832 (2 & 3 Will. 4, c. 71), the Crown and a subject are on the same footing (*ibid.*, s. 2).

(*k*) 5 & 6 Will. 4, c. 50.

(*l*) Inclosure Act, 1854 (17 & 18 Vict. c. 97), s. 9. The provision was intended to apply to mountainous and other districts where the land would probably continue to be used as sheepwalks.

peace (*m*). When this certificate has been given the parish is liable to keep the road in repair (*n*). If the road is not completed and taken to by the public, it may cease to be a public road after a lapse of years (*o*).

Extent of dedication.

1199. Where a road is inclosed between fences, the whole of the space between the fences is as a rule, and in the absence of rebutting evidence, deemed to have been dedicated to the public (*p*).

But if the road passes over a village green or open common where there are no fences, the right of the public is as a rule restricted to the made road (*q*).

Ownership of soil in roads.

1200. The soil of the roads set out under an inclosure award remains in the lord of the manor where the soil of the common before the inclosure belonged to him, unless his right and interest in the soil has been compensated by an allotment (*r*); but where such an allotment has been made to the lord, the ownership of the soil of the roads is in the allottees of the lands on either side (*s*). The fact that rights of pasturage over a road are given by an Inclosure Act to the adjoining owners does not transfer the ownership of the soil from the lord of the manor to them (*a*).

(*m*) Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 67. This requirement is always attended to by the Board, who require the production of the certificate with reference to any roads or footways set out in the award before it is confirmed. As to raising the question of a direction in an award being *ultra vires* when it has been acted on for many years, see *A.-G.* v. *Tamworth Rural District Council* (1901), 85 L. T. 190.

(*n*) Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 67. See *R.* v. *French* (1879), 4 Q. B. D. 507, C. A., and *Sheringham Urban District Council* v. *Halsey* (1904), 68 J. P. 395.

(*o*) See *Cubitt* v. *Maxse* (*Lady Caroline*) (1873), L. R. 8 C. P. 704, where a road forty feet wide had been set out as a public road under an Inclosure Act, but, the evidence proving that for forty years it had never been completed or used as a public road, a plea of a public right of way in defence to an action of trespass was not sustained.

(*p*) *Turner* v. *Ringwood Highway Board* (1870), L. R. 9 Eq. 418, where a public road had been set out in the award of the width of fifty feet, but the actual roadway was only twenty-five feet wide, and the spaces on each side were overgrown with gorse, and it was held that the right of the public was to have the whole kept open and free from obstruction. So in *R.* v. *Wright* (1832), 3 B. & Ad. 681, where a private road and public footpath were described in an award under an Inclosure Act as twenty-four feet wide, but were, in fact, set out of a width of sixty feet, though only the middle was used for carriages, the jury were directed to decide whether the whole road had been dedicated to the public, and Lord TENTERDEN, C.J., approved of the direction to the jury and of an affirmative verdict found by them. Compare *Neeld* v. *Hendon Urban District Council* (1899), 81 L. T. 405, C. A., for a case of rebutting evidence; and for the circumstances to be taken into account, see *Belmore* (*Countess*) v. *Kent County Council*, [1901] 1 Ch. 873, and other cases therein referred to.

(*q*) *Easton* v. *Richmond Highway Board* (1871), L. R. 7 Q. B. 69. As to the presumption where there is an open common on one side of the road and a narrow strip, bounded by a hedge, on the other, see *Evelyn* v. *Mirrielees* (1900), 17 T. L. R. 152, C. A.

(*r*) *Poole* v. *Huskisson* (1843), 11 M. & W. 827. See *R.* v. *East Mark Tithing* (*Inhabitants*) (1848), 12 Jur. 332, and compare *R.* v. *Edmonton* (*Inhabitants*) (1831), 1 Mood. & R. 24; *R.* v. *Wright* (1832), 3 B. & Ad. 681.

(*s*) *Neaverson* v. *Peterborough Rural District Council*, [1901] 1 Ch. 22, following *Haigh* v. *West*, [1893] 2 Q. B. 19, 29, C. A.

(*a*) *Hooper* v. *Bourne* (1877), 3 Q. B. D. 258, C. A.; *R.* v. *Hatfield* (*Inhabitants*) (1835), 4 Ad & El. 156.

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Where an allotment under an Inclosure Act abuts on a road with a roadside strip the presumption that the strip belongs to the adjoining owner is rebutted (*b*).

Private roads and ways.

1201. The valuer also sets out private or occupation roads and ways for the use of the persons interested and such private roads or ways for the use of persons interested in other lands as may become necessary in consequence of the alteration of public roads and ways; and the expenses of setting out, forming, and completing such private roads and ways may be treated by the valuer as expenses of the inclosure, or he may direct them to be borne by such of the persons interested and such of the persons for whose use they have been set out, and in such shares and proportions, as he thinks fit. The maintenance and repair of private roads and ways is provided for in the same way. The owners of the allotments or lands who will be benefited by or use the roads are generally the persons on whom the burden is thrown. The valuer may also direct to whom the grass and herbage on such roads and ways is to belong, but in the absence of any direction the grass or herbage belongs to the owners of the soil of the adjoining lands on either side as far as the crown of the road (*c*).

Where private roads or rights of way are set out under an inclosure for the benefit of certain persons or the owners of particular lands without any qualification, such persons are not confined to access to the lands in respect of which the right is given for the purposes only for which the right was required at the time of the award, although the use to which the right of way is subsequently put may increase the burden on the land over which it passes (*d*). In the absence, however, of such an express grant, the burden on land over which there is a right of way may not be increased (*e*).

A provision in an Inclosure Act that certain specified lands are to be allotted to an individual in lieu of his rights in the land to be inclosed, *e.g.*, as in the case of a lord of the manor, does not preclude the valuer from setting out a private road over such lands for the use of persons interested in other allotments if he finds it desirable, or preclude the Board from directing the valuer to set it out after objection has been made (*f*).

(*b*) *Gery* v. *Redman* (1875), 1 Q. B. D. 161.

(*c*) Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 68; Inclosure Act, 1848 (11 & 12 Vict. c. 99), s. 4. It would seem that the valuer has no power to order a parish or township to repair private roads (*R.* v. *Cottingham* (*Inhabitants*) (1794), 6 Term Rep. 20; *R.* v. *Richards* (1800), 8 Term Rep. 634, cases under early Inclosure Acts); but it may appear from the terms of the award that as against a township a road is made a public road, though not expressly so described (*R.* v. *Gate Fulford* (*Inhabitants*) (1856), Dears. & B. 74). If a road is partly set out through land over which the Commissioners had no power to make a road, the award is bad as to the whole road (*ibid.*).

(*d*) *Newcomen* v. *Coulson* (1877), 5 Ch. D. 133, C. A., where land which was agricultural land at the time of the award became building land; *Finch* v. *Great Western Rail. Co.* (1879), 5 Ex. D. 254, where a railway company acquired land to which a right of way over other lands had been given and built a cattle pen for the use of cattle to be conveyed over their line.

(*e*) See *Wimbledon and Putney Commons Conservators* v. *Dixon* (1875), 1 Ch. D. 362, C. A.; *Harris* v. *Flower* (1904), 74 L. J. (CH.) 127, C. A.

(*f*) *Grubb* v. *Inclosure Commissioners* (1863), 13 C. B. (N. S.) 805, Ex. Ch.

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1202. For the protection of all fenced roads set out by the valuer while the hedges are growing grazing thereon for seven years after the date of the award is prohibited (*g*).

1203. The valuer may, and frequently does, provide that the expenses of maintaining and repairing private roads and ways, and also the expenses of repairing, cleansing, and maintaining common ponds, ditches, watercourses, embankments, tunnels, and bridges, are to be raised by a rate, the persons chargeable and the proportion in the pound which each is to pay being specified in the award. In such case a rating officer is appointed at a meeting called by the Board of the persons liable to the rate after the award is completed; and such officer is intrusted with the maintenance and repair of the roads, watercourses etc., and is empowered to make and recover the necessary rate. Provision is also made for an annual meeting to appoint the rating officer and give him instructions (*h*).

Raising expenses by rate.

Rating officer.

The rating officer makes a rate for such a sum as the majority in value of the owners of lands subject to such rate present at a meeting think fit, and the amount of the rate is apportioned among the owners in the proportions directed by the award and is payable to the rating officer on demand. If not paid within fourteen days after demand, it is recoverable by distress; and the demand or distress may be made of or on the occupier of any such land as if the occupier were the owner liable to the payment of the rate, and the rate may be paid by the occupier; and the amount so paid shall be deemed a payment on account of his rent, and shall be allowed by his landlord accordingly (*i*).

Fencing of allotments.

1204. Allotments are to be inclosed, fenced, and ditched, and the fences and ditches subsequently maintained and repaired, in accordance with the directions given by the valuer; and if he finds that any person has more than his fair share of fencing to do, he may order a sum of money to be contributed by any person having less than his fair share of the work, to be paid as directed by the valuer and to be recoverable as penalties under the Inclosure Act, 1845, are recoverable (*k*). If an owner of an allotment makes default in fencing etc., any other owner or occupier aggrieved may serve him with a notice of his intention to do the work if not completed within three months from the date of the notice, and in default may do the work and recover the expenses from the defaulter, but without prejudice to any other right or remedy he may have in respect of the neglect to make the fence or ditch or of any trespass or damage occasioned thereby (*l*).

The same question arose in *Grubb* v. *Brown* (1858), 1 F. & F. 352, which was an action for trespass against the valuer. As to the effect of the award on private roads, see p. 564, *ante*.

(*g*) Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 100.

(*h*) Inclosure Act, 1848 (11 & 12 Vict. c. 99), ss. 5—7.

(*i*) *Ibid.*, s. 7. The rating officer must follow the remedy prescribed by the Act and recover by distress only; he cannot bring an action (*Danby* v. *Watson* (1877), 46 L. J. (M. C.) 179); the powers of the valuer for recovery of rates made by him are wider; see p. 582, *post*.

(*k*) Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 83. Penalties under the Act are recoverable by distress after an order of justices (*ibid.*, s. 159).

(*l*) Inclosure Act, 1848 (11 & 12 Vict. c. 99), s. 12. If a question arises as to the sufficiency of a fence, the sufficiency is a matter of fact for a jury to decide

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When fencing dispensed with.

The Board may by order dispense with the erection of boundary fences and direct the allotments to be distinguished by metes and bounds; but any person interested in an allotment may at any time fence at his own expense (*m*). Such allotments while remaining unfenced are to be subject to the provisions of the Inclosure Act, 1845, relating to regulated pastures in such manner as the valuer, with the approbation of the Board, shall by his award direct, and the owners are to enjoy such rights of common by reason of vicinage as they were entitled to before the setting out of the allotments (*n*).

SUB-SECT. 5.—*Conversion of Land into Regulated Pasture.*

Regulated pasture under Inclosure Act, 1845.

1205. Besides the power of persons interested in a common for which an Inclosure Act had been obtained to have part or the whole (not exceeding fifty acres in either case) sold (*o*), provision was made for the whole or part of a common being converted into a regulated pasture, if, during the progress of the inclosure, persons whose interest exceeded one half of the total value of interests so desired (*p*).

Procedure.

1206. The Inclosure Commissioners were empowered at any time before the report of the valuer was received by them, on the application of persons representing more than one half of the value of interests in land of which an inclosure had been authorised, to direct that the land or part thereof should be converted into a regulated pasture to be stocked and depastured in common by the persons interested therein in proportion to their rights and interests as determined on the examination of claims. If part of the land only was to be so converted, the valuer was, subject to any instructions given to him, to ascertain and set out the part to be used as regulated pasture and to direct how and at whose expense it was to be fenced and divided from the residue of the land (*q*).

Apportionment of rights and of pasturage.

He was also to ascertain and allot the number of stints or rights

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(*Ellis* v. *Arnison* (1822), 1 B. & C. 70 (a case under the Inclosure (Consolidation) Act, 1801 (41 Geo. 3, c. 109)), where it was held that an old ditch or drain was sufficient).

A grant of copyhold land inclosed from the waste, coupled with evidence that the fences have been maintained by the grantee, affords a presumption that the grant was made subject to an obligation on the part of the grantee to make and maintain a fence to keep out the commoner's cattle, and consequently that he was bound to fence against the owners of adjoining allotments after inclosure (*Barber* v. *Whiteley* (1865), 34 L. J. (Q. B.) 212).

(*m*) Inclosure Act, 1857 (20 & 21 Vict. c. 31), s. 1. This provision was intended to meet the case of mountain inclosures, which would remain as pasturage, and in which the expenses of fencing would be out of proportion to the value of the land.

(*n*) Inclosure Act, 1857 (20 & 21 Vict. c. 31), s. 2; see the following sub-section.

(*o*) See p. 559, *ante*.

(*p*) Inclosure Act, 1845 (8 & 9 Vict. c. 118), ss. 113—122, of which ss. 121 and 122 have been repealed by the Commons Act, 1899 (62 & 63 Vict. c. 30). The repealed sections provided only for the application of this procedure to pastures which were already stinted.

This procedure is practically obsolete, as any regulation of a common would now be carried out under the provisions of the Commons Act, 1876 (39 & 40 Vict. c. 56); but the powers and duties of field reeves under the earlier Act have been applied to conservators appointed under the later one, and there are no doubt many commons so regulated throughout the country, so that it is necessary to state shortly the procedure relating to these regulated pastures.

(*q*) Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 113.

of pasturage to each person interested in proportion to the value of his interest and specify the respective kinds of stock to be admitted to the pasture and the respective numbers of animals of each kind in respect of each stint, with such option as to equivalent numbers of the respective kinds as he thought just, and also, if he thought proper, the time during which the animals might be kept on the pasture (*r*).

Where part of the land was to be used as a regulated pasture and part to be allotted in severalty, the valuer might, having regard to the convenience of persons interested, award either stints or allotments or both; or if the proportionate interest of any person entitled to an allotment was too small to be conveniently compensated by a stint or could not be wholly compensated by a stint, and circumstances would not, in the judgment of the valuer, admit of the compensation being adjusted by an allotment, he might direct the compensation to be made or adjusted by a money payment out of the moneys applicable to the expenses of the inclosure (*s*).

Provisions as to roads, claims, awards etc. applicable.

All the provisions of the Inclosure Act, 1845, in relation to roads, ways, and works, the examination and rehearing of claims, the valuer's report and award, and other matters applicable to an inclosure, were applicable where the land was directed to be used as a regulated pasture; and the word "inclosure" in every case in the Act (where the context was not repugnant) included conversion into regulated pasture (*t*).

Apportionment of rate.

The proportionate shares or aliquot parts of any rate which might be required to be raised on the owners of the stints were determined by the valuer, and such determination governed the rights of voting (*a*). The right of soil in a regulated pasture, subject to the right of the lord of the manor to minerals and other rights reserved to him, was to be vested in the owners of the stints in proportion to their respective shares of the rate (*b*).

Election of field reeves.

1207. After the confirmation of an award containing a direction for the conversion of any land into a regulated pasture a meeting of the owners of the stints was to be called by the Inclosure Commissioners by notice on the church door to elect one or more field reeves, and meetings for the like purpose were to be held yearly in the month of February (*c*).

Similar provisions to those contained in the Act with respect to the election, continuance in office, salary, removal, and evidence of election of rating officers and the voting at meetings of owners of lands liable to be rated (*d*), are made with reference to the election etc. of field reeves (*e*), the owners of stints taking the

(*r*) Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 113. The Inclosure Commissioners were empowered to frame such directions as they thought fit for the purpose of guiding the valuer in the correct specification of the rights or stints. As to a fraction of a stint, see *Nicholls* v. *Chapman* (1860), 5 H. & N. 643.

(*s*) Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 113.

(*t*) *Ibid.*, s. 114.

(*a*) *Ibid.*, s. 115.

(*b*) *Ibid.*, s. 116.

(*c*) *Ibid.*, s. 117.

(*d*) For these provisions, see Inclosure Act, 1848 (11 & 12 Vict. c. 99), ss. 5—7; and p. 567, *ante*.

(*e*) Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 117.

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place of the owners of lands in reference to those powers. In addition, the owners of stints might at their annual meetings appoint or authorise the field reeve to appoint herds and assistants.

Bye-laws.

1208. The owners of stints are also now empowered, with the consent of the lord of the manor, to make bye-laws and regulations for the prevention of and protection from nuisances or for keeping order on the regulated pasture, and for general management, occupation, and enjoyment of the regulated pasture; and by the bye-laws pecuniary penalties (not exceeding forty shillings for any offence) may be imposed on persons breaking the same, to be recovered before a court of summary jurisdiction (*f*).

Duties of field reeves.

1209. The field reeves for the time being are, subject to any orders and instructions in writing from time to time agreed upon at the annual meetings of the owners of stints, to regulate the times in each year during which stock or animals are to be admitted to or excluded from the pasture; to make, maintain, and keep in order any necessary fences, gates, ditches, drains, watercourses, embankments etc.; to distrain stock and animals found on the pasture contrary to the regulations, and do all other acts necessary for the maintenance, improvement, and convenient use of the pasture; to maintain and, if so directed, erect buildings for the shelter or stall feeding of stock, and let the same from year to year or, if so directed, for a term; and to apply the rents in the first place to the same purposes as the rates to be made on the owners of stints and to divide any residue among such owners in proportion to the respective liability of their stints to the rates (*g*).

Increase or diminution of stints.

1210. At any annual meeting of the owners of stints resolutions may be passed by a majority in value of the owners present increasing or diminishing rateably the number of animals to be admitted to the pasture in respect of the several rights. In the event of the right of any owner not being sufficient to admit of a rateable increase or diminution, the meeting is to award an annual sum of money to be paid to or charged on such owner in lieu of the increase or diminution of his right. Any difference of opinion as to the sufficiency of the sum awarded or the charge being excessive is to be settled in a summary way before two justices on the complaint of the owner of the stint against the field reeve (*h*).

Expenses of management and rates therefor.

1211. All salaries and allowances to field reeves and other persons, and all expenses of management, including repairs and erection of buildings under direction of the annual meetings, are paid and defrayed by the owners of stints; and the field reeve may, under

(*f*) Commons Act, 1876 (39 & 40 Vict. c. 56), ss. 15—17. Any bye-laws made in this way, or by conservators of a regulated common, are of no validity until confirmed by one of His Majesty's principal Secretaries of State. Notice of intention to apply for confirmation is to be published by the field reeves or conservators at least one month before the application, and during that month the person or body making any bye-law or altering or revoking a confirmed bye-law is to keep a copy at his or their office open to inspection by persons interested, and to furnish printed copies of the bye-laws and of the proposed alterations, if any, on application and payment of one shilling for each copy (*ibid.*, s. 17).

(*g*) Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 118.

(*h*) *Ibid.*, s. 119. Forms of the summons and of the order of the justices are given in the schedule to that Act.

direction of an annual meeting, make a rate on the respective owners for such sum as at the meeting may be found requisite. The apportioned amount of the rate payable by each owner is payable to the field reeve, and if not paid within fourteen days after notice is recoverable by distress; and the field reeve may exclude the stock of an owner or his tenant from the pasture until the rate is paid. A demand or distress may be made on the occupier of a stint, and money paid by the occupier in respect of the rate is to be deemed a payment on account of rent and allowed by the landlord accordingly (*i*).

Breach of regulations as to stock.

1212. Any person having any stock or animals on a regulated pasture contrary to the regulations thereof, on conviction before a court of summary jurisdiction is liable to pay for each head of stock or animal found such sum, not exceeding £5, as the court thinks proper to inflict by way of penalty. The penalty is paid to the field reeve and applied by him in aid of the rates on the owners of stints, but any other remedy of a field reeve under the Inclosure Act, 1845, or otherwise is not affected or prejudiced (*k*).

SUB-SECT. 6.—*Allotments for Special Purposes.*

Lands to be allotted for public purposes or sold.

1213. Having ascertained the persons to whom the allotments are to be made (*l*), and set out public roads and ways and stopped up or diverted such old roads and ways as have become unnecessary, the valuer proceeds to set out the allotments specified in the provisional order or in his instructions for public purposes (*m*) and the land to be sold to raise the expenses of the inclosure (*n*), unless those expenses are to be raised by a rate on the persons interested.

Allotment to lord of manor.

1214. Out of the residue of the land the valuer proceeds to set out such an allotment to the lord of the manor in lieu of his right or interest in the soil of the land to be inclosed as in his judgment is, quantity and value considered, proportionate to his interest therein according to the directions of the provisional order; but this allotment is to be exclusive of any other allotments which may be made to the lord in lieu of or in satisfaction for any other rights or interests in the land to which he may be entitled. If by the provisional order it is specified that the lord of the manor is to receive

(*i*) Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 120.

(*k*) Inclosure Act, 1852 (15 & 16 Vict. c. 79), s. 33; as to the court of summary jurisdiction, see Statute Law Revision (Substituted Enactments) Act, 1876 (39 & 40 Vict. c. 20), s. 1, which made an offence under this section punishable under the Summary Jurisdiction Acts.

(*l*) In cases where it has been agreed that the common, not exceeding fifty acres, shall be sold no allotment of course is made to any person; see p. 559, *ante*.

(*m*) The allotments for recreation and field gardens and other allotments referred to on pp. 591 *et seq.*, *post*. Although the valuer may have received no instructions to do so, he may, if he thinks it necessary, set out an allotment to provide materials for the repair of the roads, to be inclosed and fenced as he directs, and to be vested in the district council or other highway authority (as successor of the surveyor of highways), with power to let the herbage subject to the right of getting road materials, the rent to be applied towards the repair of the roads (Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 72). As to the highway authority, see Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 144; Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 11; and Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 26 (2).

(*n*) See p. 583, *post*.

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a rent charge in lieu of an allotment, the valuer awards such rent-charge and charges it on all or some of the lands to be allotted (*o*).

An allotment may be made to the lord of the manor, with his consent, by an order of the Board, in lieu of quit rents, chief rents, or heriots payable out of any old inclosure in respect of which an allotment is to be made or which would become payable out of any allotment on confirmation of the award (*p*).

Seigniories and manorial rights.

1215. All seigniories, royalties, franchises, and manorial jurisdictions in or upon land to be inclosed are to be saved and excepted out of the operation of the Inclosure Acts unless it is expressly declared in the award, with the consent of the lord interested, that they are to be extinguished; and the same rule applies to mines and minerals under the land to be inclosed where the right to them exists as property distinct and separate from the property in the surface and has not been compensated in the inclosure. The right of the owner and all rights and easements auxiliary to his ownership, and the rights of lessees, if the mines and minerals and the right of working have been leased, remain unaffected (*q*).

Working of reserved minerals.

If the minerals (*r*) under the land to be inclosed have been reserved to the lord of the manor, and under the provisional order he is to have rights of entry for opening and working mines, the necessary rights of entry, rights of way, and other easements are to be reserved to the lord subject to such provisions for compensation for surface damage as the valuer, with the approval of the Board, shall think reasonable, and shall not be inconsistent with the terms of the provisional order (*s*).

Where the right to the mines and minerals has by the provisional order been reserved to the lord of the manor or other owner of the soil, and powers of entry and of working the mines and minerals after the inclosure are also reserved, his powers, which are specified in the Inclosure Acts (*t*), together with any provisions for compensation

(*o*) This power was given by the Inclosure Act, 1846 (9 & 10 Vict. c. 70), s. 5, to meet the case of lords of manors who had no ancient land within the manor, or were only tenants for life, and consequently unwilling to incur expense in connection with an inclosure. The rent-charge or rent-charges may be charged on the lands of any person who shall consent thereto, he receiving an equivalent in land as an addition to his allotment, or, in default of any such arrangement, the rent-charge is divided and charged as separate rent-charges on the lands of all the allottees. The section directs that the rent-charge or rent-charges are to be recovered by the same means as are given by the Tithe Act, 1836 (6 & 7 Will. 4, c. 71), or any Act amending the same, for recovering tithe rent-charges, and presumably they are now recoverable in the county court under the procedure of the Tithe Act, 1891 (54 & 55 Vict. c. 8). The power of stipulating for a rent-charge in lieu of an allotment in land is not confined to the manorial allotment, but may extend, if the Board think fit, to any other allotments to the lord of the manor in respect of any other rights or interests in the land to be inclosed (Inclosure Act, 1846 (9 & 10 Vict. c. 79), s. 5).

(*p*) Inclosure Act, 1849 (12 & 13 Vict. c. 83), s. 5.

(*q*) Inclosure Act, 1845 (8 & 9 Vict. c. 118), ss. 96, 98.

(*r*) For the law relating to mines and minerals generally, see title MINES, MINERALS AND QUARRIES.

(*s*) Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 76; Inclosure Act, 1851 (14 & 15 Vict. c. 53), s. 9, which extends the powers to minerals under lands other than those the subject of the inclosure.

(*t*) Inclosure Act, 1859 (22 & 23 Vict. c. 43), s. 3. Ss. 4—7 contain provisions for assessing and raising compensation for surface damage where such compensation is payable by the owners of allotments collectively.

for surface damage payable either by the person working the mines or by the owners of other allotments, should be set out in the award.

SUB-SECT. 7.—*Mining Rights and Reservations after Inclosure.*

Reserved rights of lord.

1216. A fruitful subject of litigation has been the relative rights of the former owner of the soil of a waste and the owners of allotments after an inclosure where the mineral rights, in some cases, and the rights of shooting, fishing etc. in others, have been of considerable value, and the lord has stipulated for the reservation and exercise by himself or his lessees or assignees of those rights over the allotments after the common has been inclosed. As these rights, and especially the mineral rights, in many districts were of infinitely greater value than any rights over the surface, and as no scheme of inclosure could be carried out without the consent of the lord of the manor, the earlier Inclosure Acts, both public and private, contain numerous instances of attempts to reserve to the lord free and unrestricted rights of working the minerals under the allotments, entering upon them for that purpose, letting down the surface and using the surface for pit shafts, spoil-banks, and other mining and colliery purposes, with or without compensation, as he had previously done over the waste (*u*).

Principles applicable in case of subsidence.

1217. The following principles are applicable in cases arising between an owner of minerals and the surface owner where damage has been done or is anticipated by subsidence owing to mineral workings (*a*).

(*u*) The large estates of the see of Durham afford many instances of this, and the Inclosure Acts relating to them are unusually stringent, a common provision being that compensation for damage to an allotment is to be provided, not by the mine-owner, but by the owners of other allotments.

(*a*) See *Butterknowle Colliery Co., Ltd.* v. *Bishop Auckland Industrial Co-operative Society, Ltd.*, [1906] A. C. 305; *New Sharlston Collieries Co., Ltd.* v. *Westmorland (Earl)*, 1900 (reported [1904] 2 Ch. 443, n., H. L.). In these two cases nearly all the previous cases on the subject were referred to. The plaintiffs in *Butterknowle Colliery Co., Ltd.* v. *Bishop Auckland Industrial Co-operative Society, Ltd.*, *supra*, were owners of the surface of freehold lands allotted under the provisions of an Inclosure Act passed in 1757. The defendants were lessees from the Ecclesiastical Commissioners for England, successors of the Bishop of Durham, who in right of his see was lord of the manor and owner of the soil of the wastes which were the subject of the inclosure. As lord of the manor he was entitled to the mines and minerals under the lands inclosed, and by the custom of the manor was entitled to work them without leaving support for the surface, but subject to the usual restriction of leaving sufficient common of pasture for the commoners. The Act reserved the mines and minerals to the lord, with very wide powers of working and using the surface for the purposes of working etc. "as fully and freely as if the Act had not been passed, and that without making or paying any compensation for so doing." Then, after a recital that great inconveniences might happen and damage be done to particular persons by reason of the searching for and working the mines and quarries under the allotments by the Bishop, his successors or assigns, without making or paying any compensation for so doing, it was provided that, in the event of any allottee suffering damage from the workings or the exercise of the powers and liberties reserved (again in very wide terms), the damage was to be assessed by a justice or justices after inquiry and to be paid by the occupiers of the other allotments in the same township according to the value of their holdings. The owners of the allotments were to be entitled to get stone on their own lands and in certain common quarries to be set out for the use of the allottees. The short question to be determined was whether the defendants, working in the ordinary manner and without negligence, were entitled to let down and destroy the surface of the lands in question. The House of Lords, affirming the C. A. and FARWELL, J. ([1904] 2 Ch. 419), held that the Act construed as a whole did not take away from the allottees their

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Right of support displaced by express words only.

The surface owner has by common law the right to have sufficient support for his surface so as to prevent its subsidence (*b*), and the mere fact of giving a right to sink pits and to work or get coal does not of itself extinguish that right (*c*). If the mineral owner contests this common law right, the burden is on him to displace it (*d*). The right can only be displaced by express words used in the Act or other instrument, such as a conveyance or lease or by necessary implication from the language used (*e*). Words, however large, applicable to the right of working and privileges connected with it and compensation for the exercise of such rights and privileges, are not enough to displace the right, at any rate if the words used are fairly applicable to the ordinary mode of working, and nothing more (*f*). If the introduction of a clause to the effect that the mines must be worked so as not to let down the surface would not create an inconsistency with the actual clauses of the instrument, then it means that the surface cannot be let down (*g*).

Effect of a compensation clause.

The absence of any provision for compensation is strong evidence in favour of the continuance of the right to support (*h*). So, too, is a compensation clause limited to injury arising from ordinary surface user as distinct from injury by subsidence or obviously inadequate to any greater injury; but a compensation clause providing expressly for injury from subsidence to buildings or otherwise is in favour of the destruction of the right. Such a clause, however, does not necessarily authorise the mine-owner to let the surface down. It may be intended to provide a remedy for damage done in breach of the obligation to leave support, as no injunction can be obtained for a past injury (*i*). In any case the compensation clause will be strictly scrutinised (*j*).

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common law right to support, and that the plaintiffs were entitled to an injunction restraining the defendants from working the coal so as to let down the surface of the land or so as to injure any of the plaintiffs' buildings.

In *New Sharlston Collieries Co., Ltd.* v. *Westmorland (Earl)* (1900), [1904] 2 Ch. 443, n., H. L., the defendants were working the coal as lessees from A., who was owner of the minerals, under a conveyance which gave very wide powers of working, but also contained covenants not to work so as to cause damage to buildings and to make satisfaction on the footing of double rent and assessments for the use and occupation of the surface, and also to pay full compensation for all damage done to the surface or buildings which was not covered by such double rent. It was admitted that the system of working must cause, and had caused, some subsidence of the surface, but there was no proof of any substantial damage. An injunction similar to that in the previous case was granted, though no inquiry as to damages was directed.

(*b*) *Davis* v. *Treharne* (1881), 6 App. Cas. 460.

(*c*) *New Sharlston Collieries Co., Ltd.* v. *Westmorland (Earl)*, *supra*, *per* Lord HALSBURY, L.C., at p. 446.

(*d*) *Ibid.*

(*e*) *Ibid.*; and see *Butterknowle Colliery Co., Ltd.* v. *Bishop Auckland Industrial Co-operative Society, Ltd.*, [1906] A. C. 305, *per* Lord LOREBURN, L.C., at p. 309, and *per* Lord MACNAGHTEN, at p. 313.

(*f*) *Love* v. *Bell* (1884), 9 App. Cas. 286, *per* Lord SELBORNE, L.C., at p. 289.

(*g*) *Butterknowle Colliery Co., Ltd.* v. *Bishop Auckland Industrial Co-operative Society, Ltd. supra*, *per* Lord LOREBURN, L.C., at p. 309.

(*h*) *Buccleugh (Duke)* v. *Wakefield* (1870), L. R. 4 H. L. 377; *Love* v. *Bell*, *supra*.

(*i*) *New Sharlston Collieries Co., Ltd.* v. *Westmorland (Earl)*, *supra*, *per* Lord DAVEY, at p. 447, explained in *Butterknowle Colliery Co., Ltd.* v. *Bishop Auckland Industrial Co-operative Society, Ltd.*, [1906] A. C. 305, *per* Lord DAVEY, at p. 315.

(*j*) *Ibid.*, *per* Lord LOREBURN, L.C., at p. 307; "If the compensation clause

It is a question of the construction of the particular document in each case, and the same principles apply whether that document is a grant, a lease, or an Inclosure Act (*k*).

Reservation or new grant.

It is also important to ascertain whether the rights of the mineral owner under an Act are merely reserved or whether they are newly created by grant. In the latter case there is more ground for the argument that the common law right of support has been displaced (*l*).

The reservation of the lord's rights to be enjoyed in as full and ample a manner as if the Act had not been passed, though conferring on him all usual powers and surface privileges for working the mines (*m*), is not equivalent to a reservation of those rights free from the common law liability to leave support to the surface merely because the only

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is capable of being satisfied by reference to acts done on the surface, then, though it may be wide enough to cover also damage done to the surface by taking away the support, still it must be confined to damage done *on* the surface, and the inference that support may be taken away on payment of compensation will not be drawn."

When there is evidence that the working of the coal in a seam will be irresistibly followed by a corresponding sinking of the whole of the superjacent strata, and a lease of an upper seam makes it clear that it is the intention of the parties that subjacent seams shall be worked, it is a necessary implication that they intend that there shall be a subsidence of the superjacent strata, and clauses of the lease permitting the working of the lower seams will be read with the necessary implication (*Butterley Co., Ltd.* v. *New Hucknall Colliery Co., Ltd.*, [1908] W. N. 221, C. A.; reversing [1902] 2 Ch. 475).

(*k*) *Davis* v. *Treharne* (1881), 6 App. Cas. 460; *New Sharlston Collieries Co.* v. *Westmorland (Earl)* (1900), [1904] 2 Ch. 443, n.; *Love* v. *Bell* (1884), 9 App. Cas. 286. An Inclosure Act is a statutory agreement between the parties (*Bishop Auckland Industrial Co-operative Society, Ltd.* v. *Butterknowle Colliery Co., Ltd.*, [1904] 2 Ch. 419, *per* FARWELL, J., at p. 425), or, according to Lord SELBORNE in *Love* v. *Bell*, *supra*, a case of mutual considerations resulting in the apportionment of land to which the parties may be taken to have agreed or have had determined for them by the authority which made the award.

(*l*) *Buccleugh (Duke)* v. *Wakefield* (1869), L. R. 4 H. L. 377; *Love* v. *Bell*, *supra*; *Aspden* v. *Seddon* (1875), 10 Ch. App. 394. But the question of reservation or regrant was not referred to in *Butterknowle Colliery Co., Ltd.* v. *Bishop Auckland Industrial Co-operative Society, Ltd.*, *supra*, and does not seem to have been regarded as of much importance by the court below (*Bishop Auckland Industrial Co-operative Society, Ltd.* v. *Butterknowle Colliery Co., Ltd.*, *supra*, *per* VAUGHAN WILLIAMS and ROMER, L.JJ., at pp. 437, 441).

Stress has been laid in some of the cases on the absence of any direct reference to damage by subsidence in the provisions relating to damage arising from working the mines; but see *Bishop Auckland Industrial Co-operative Society, Ltd.* v. *Butterknowle Colliery Co., Ltd.*, *supra*, *per* LINDLEY, L.J., at p. 438: "As a practical question it is impossible to see what damage you could do to the surface in the course of working a mine under it except by letting it down."

A point which does not appear to have been taken in any of the cases on this subject, and which would appear to have some force in construing Acts in which very wide powers of working have been reserved to the lord and no compensation is to be made for damage, or the compensation is not to be paid by the mineral owner, but by the owners or occupiers of the other allotments, is that the consent of the lord of the manor was absolutely essential to any inclosure proceedings, and that where such wide powers were reserved, and he was to have the same powers of working the minerals as if the Act had not been passed, an intention to protect himself against being prevented from working the minerals by any contingency might be presumed, and that subsidence of the soil is almost a natural consequence of mineral workings.

(*m*) *Bell* v. *Love* (1884), 9 App. Cas. 286, *per* Lord SELBORNE, L.C., at p. 291; including the right of sinking a shaft upon any of the allotments (*Hayles* v. *Pease and Partners, Ltd.*, [1899] 1 Ch. 567).

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previous liability was to leave sufficient pasturage, but is to be read as subject to the ordinary maxim *Sic utere tuo, ut alienum non lædas*, so that, *mutatis mutandis*, it becomes subject to the substituted ownership right of support in lieu of the extinguished commoners' right of pasturage; and accordingly, if there were no such commonable rights, no substituted right of support can be maintained (*n*).

Even with the aid of the principles above laid down, it is difficult to reconcile the decisions in the various cases (*o*).

It appears clear, however, that the tendency of the later cases has been to construe more strictly against the mineral owner the powers of working the mines reserved or granted to him and to lay greater stress upon the common law right of the owner of land to right of support for the surface (*p*).

SUB-SECT. 8.—*Sporting Rights over Allotments.*

Sporting rights over allotments.

1218. The question whether an allotment made to the lord in respect of his rights as lord of the manor and owner of the soil with a reservation of some or all of those rights is intended to take away the rights of sporting which he formerly possessed over the wastes has also given rise to much litigation where the sporting rights are of value, and those rights are claimed over the other allotments.

Questions can only arise in the construction of Inclosure Acts passed before 1876, as after the passing of the Commons Act,

(*n*) See *Gill* v. *Dickinson* (1880), 5 Q. B. D. 159.

(*o*) This is shown by the fact that the Act which was the subject of discussion in *Butterknowle Colliery Co., Ltd.* v. *Bishop Auckland Industrial Co-operative Society, Ltd.*, [1906] A. C. 303, had been previously discussed in at least two reported cases in which opposite conclusions were arrived at (*Blackett* v. *Bradley* (1862), 31 L. J. (Q. B.) 65; *Gill* v. *Dickinson* (1880), 5 Q. B. D. 159).

(*p*) In the following cases power to let down the surface has been inferred:—*Bucclengh (Duke)* v. *Wakefield* (1870), L. R. 4 H. L. 377 (on this case Lord WATSON stated in *Love* v. *Bell* (1884), 9 App. Cas. 286, at p. 298, that he concurred in the opinion expressed by MELLISH, L.J., in *Hext* v. *Gill* (1872), 7 Ch. App. 699, that no one could read the judgment without coming to the conclusion that, if the provisions as to compensation had not been there, the House of Lords, notwithstanding the strength of the other words, would have come to a different conclusion); *Consett Waterworks Co.* v. *Ritson* (1889), 22 Q. B. D. 702, C. A., also reported 64 L. J. (CH.) 293, n., where the judgments are given at length (this case can no longer be regarded as an authority (*Butterknowle Colliery Co., Ltd.* v. *Bishop Auckland Industrial Co-operative Society, Ltd.*, *supra*, *per* Lord MACNAGHTEN, at p. 314)); *Bell* v. *Dudley* (*Earl*), [1895] 1 Ch. 182 (but it is doubtful whether this case can be regarded as an authority after *New Sharlston Collieries Co.* v. *Westmorland* (*Earl*) (1900), [1904] 2 Ch. 443, n., H. L.); *A.-G.* v. *Welsh Granite Co.* (1887), 35 W. R. 617, C. A.; *Gill* v. *Dickinson*, *supra*; *Thompson* v. *Mein*, [1893] W. N. 202; *Butterley Co., Ltd.* v. *New Hucknall Colliery Co., Ltd.*, [1908] W. N. 221, C. A.

The cases in which the right to let down the surface has been negatived are—*Love* v. *Bell*, *supra*; *Hext* v. *Gill*, *supra*; *Blackett* v. *Bradley*, *supra*; *Haines* v. *Roberts* (1857), 7 E. & B. 625, Ex. Ch.; *Smith* v. *Darley* (1872), L. R. 7 Q. B. 716; *New Sharlston Collieries Co.* v. *Westmorland* (*Earl*), *supra*; *Butterknowle Colliery, Co., Ltd.* v. *Bishop Auckland Industrial Co-operative Society*, *supra*; and compare the Scotch case of *Buchanan* v. *Andrew* (1873), L. R. 2 Sc. & Div. 286.

The right has also been negatived in cases where the allotment has been made for public purposes, as a public road, canal, or sewer (*Benfieldside Local Board* v. *Consett Iron Co.* (1877), 3 Ex. D. 54, where it was held that the reservation to the lord was made subject to the public right in the roads set out in the award); and the same principle was adopted in the case of a canal (*London and North Western Rail. Co.* v. *Evans*, [1893] 1 Ch. 16, C. A.); and of a sewer constructed for the benefit of the public (*Re Dudley Corporation* (1881), 8 Q. B. D. 86, C. A.).

1876(*q*), the Inclosure Commissioners refused to sanction provisional orders giving the lord an exclusive right of sporting over the allotments, though in some few cases it is believed that a concurrent right with the owners of the allotments was assented to. It may be doubted whether the Board of Agriculture and Fisheries would now issue a provisional order giving even a concurrent right.

Necessity for express or implied reservation.

1219. The principles upon which the cases have been decided are similar to those which have arisen with reference to the exercise of mineral rights and the rights of the surface owner to support. The language of the special Act must in each case be closely examined, but *primâ facie* the owner of land allotted as freehold has all the rights of ownership of land and is entitled to the free and uninterrupted enjoyment of it. If any rights are claimed over it, the onus of proof lies upon the person claiming those rights, and a lord who claims the rights of sporting over the allotments which he had before the inclosure over the waste of the manor must show clearly that the right was reserved to him by the Act in express terms or by necessary implication (*o*).

Nature of lord's sporting right.

The right of the lord of a manor to sport over an uninclosed waste or common within his manor is not a licence or liberty incident to him as lord, but is a mode of direct enjoyment of his own property, and consequently a reservation of a liberty of hunting, hawking, fishing, and fowling occurring in a reservation of rights which are manorial, and not territorial (especially where no right of free warren has been shown), will not imply a reservation of sporting rights over the allotments (*p*).

Consequently it is important to consider whether the saving clause or reservation of the rights of the lord in an Inclosure Act has the effect of preserving to the lord any rights which are merely territorial or incidental to his ownership of the soil or whether they merely preserve manorial or seigniorial rights independent of those which he had formerly as owner of the soil (*q*).

Free warren.

1220. An important factor for construction of the Act is whether before the inclosure the lord had a right of free warren or free chase within the manor (*r*).

(*q*) 39 & 40 Vict. c. 56.

(*o*) *Devonshire* (*Duke*) v. *O'Connor* (1890), 24 Q. B. D. 468, C. A., following and approving *Sowerby* v. *Smith* (1874), L. R. 9 C. P. 524, Ex. Ch., and *Greathead* v. *Morley* (1841), 3 Man. & G. 139.

(*p*) *Greathead* v. *Morley*, *supra*; *Bruce* v. *Helliwell* (1860), 5 H. & N. 609.

(*q*) *Ecroyd* v. *Coulthard*, [1898] 2 Ch. 358, *per* LINDLEY, L.J., at p. 369, C. A., following *Devonshire* (*Duke*) v. *O'Connor*, *supra*. For illustrations of such reservations, see *Bruce* v. *Helliwell*, *supra*; *Graham* v. *Ewart* (1859), 7 H. L. Cas. 331; *Sowerby* v. *Smith*, *supra*.

(*r*) *Bruce* v. *Helliwell*, *supra*; *Sowerby* v. *Smith*, *supra*; see also *Graham* v. *Ewart*, *supra*, followed in *Leconfield* (*Lord*) v. *Dixon* (1867), L. R. 3 Exch. 30, Ex. Ch., and in *Musgrave* v. *Forster* (1871), L. R. 6 Q. B. 590. In *Graham* v. *Ewart*, *supra*, the lord of the manor was owner in fee of a stinted pasture, and entitled to a right of shooting over it, and in the Inclosure Act in question there was a declaration that the manorial rights were not to be prejudiced, but that the lord was to hold and enjoy the same, and the minerals and all powers of working the same, and all rights of hunting, shooting, fishing etc., over the stinted pasture and every part and allotment thereof, and all seigniories etc., to the lord belonging (except those barred by the Act), as if the Act had not been passed; and it was held that the right of hunting and shooting is an interest in the realty and a grant of it a licence of a *profit à prendre*, and that

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If it can be shown that the lord of the manor had a right of free warren or free chase, the reservation of rights of hunting, shooting, fishing etc., which commonly appears among the manorial rights reserved in these Inclosure Acts, will have a definite meaning and cannot be regarded as merely representing the desire of the draftsman that all manorial rights which were seigniorial, and not territorial, should be preserved (*s*).

Reservation construed strictly against lord.

1221. The result of the cases appears to be that, while the reservation clause in each Act must be construed by itself, it must be construed most strictly against the lord of the manor, and that unless the rights claimed are reserved either by express words or by necessary implication the right of the owner of land allotted as freehold to have the uninterrupted enjoyment of that land will be maintained (*t*).

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the Act gave or reserved to the lord the exclusive right which he had previously enjoyed.

Sowerby v. *Smith*, (1874) L. R. 9 C. P. 524, Ex. Ch., is perhaps the leading case on the subject. The Inclosure Act in question, which was passed in 38 Geo. 3, provided for the allotment of a certain proportion in value of the lands to be inclosed to the lady of the manor as compensation for her right in the soil, and for the allotment of the residue among the other persons entitled to rights of common; and the several allotments were to be vested in the allottees in full satisfaction of all rights of common and other rights and interests whatsoever in, over, and upon the lands, except such manorial rights as were reserved to the lady of the manor; then followed a reservation clause, which is in the fullest form of manorial general words, and is quoted at length, *per* COCKBURN, C.J., at pp. 529, 530, to the effect that nothing in the Act should prejudice the right, title, or interest of the lady of the manor in or to the seigniory or royalties incident or belonging to the manor, but that she might hold and enjoy all rents and services, courts etc., rights of fishery and liberty of hawking, hunting, coursing, fishing, and fowling within the said manor, and all tolls, markets etc., goods of felons etc., royalties, franchises, matters, and things to the said manor or to the lord or lady thereof incident or belonging, or which had been theretofore held and enjoyed by the lady of the manor or her ancestors (other than such common right as could or might be claimed by the lady of the manor as owner of the soil of the commons or waste grounds). She had previously possessed the right of shooting over the lands allotted by virtue of her ownership of the soil, and it was held by the Exchequer Chamber (with two dissentients), affirming the decision of the court below (1873) L. R. 8 C. P. 514, where there was also a difference of opinion), that such right of shooting was not reserved to her by the Act.

One feature in the case was that about the year 1806 the then lord was in the habit of shooting over the freehold lands within the manor as well as over the wastes, and of giving permission to others to do so, but it was admitted that a claim to the right of free warren or to any right of sporting over the ancient inclosures could not be maintained. COCKBURN, C.J., in his judgment, at p. 532, referred to the common but erroneous idea which was prevalent at the time when the Act was passed that a lord of the manor had, as lord and quite independently of any right of free warren, the right of sporting over all lands, whether freehold or not, within the manor, and he arrived at the conclusion, independently of authority, that nothing short of a positive reservation to the lord of the right of sporting over the inclosed lands, if not in express terms, at all events in language necessarily leading to such a conclusion, will suffice to entail upon land allotted as freehold a burden of a feudal and onerous character inconsistent with the ownership in fee; see *Pickering* v. *Noyes* (1825), 4 B. & C. 639, *per* BAYLEY, J., at p. 648; *Bruce* v. *Helliwell* (1860), 5 H. & N. 609, *per* MARTIN, B., at p. 620. The notion, according to CHRISTIAN, J. (notes to 2 Bl. Com., c. 27, p. 418), probably arose from the powers conferred on lords of manors for the preservation of game by Acts of Parliament from 22 & 23 Car. 2, c. 25, downwards.

(*s*) As, for instance, the right of fishery reserved in *Sowerby* v. *Smith*, *supra*, in which it appeared during the trial that there was no fishing in the manor.

(*t*) See *Devonshire* (*Duke*) v. *O'Connor* (1890), 24 Q. B. D. 468, C. A., *per*

1222. The residue of the land is divided and allotted by the valuer among the several persons interested, including the lord of the manor in respect of demesne or old inclosed lands the tenants of which have exercised rights of common or *quasi*-rights of common, in shares proportionate to the value of their respective rights and interests which have been claimed and allowed (*a*). Separate allotments are made in respect of land held under different titles or for different estates, and for copyhold land held by separate quit rents (*b*).

To whom allotments made.

1223. If any persons so desire, their allotments may be laid together, and distinguished only by metes or bounds, without requiring any fencing except a ring fence to separate them from the other allotments (*c*).

Convenience of allottees to be considered.

The allotments are to be laid out with due regard to the situation of the houses or homesteads of the allottees, so far as can reasonably be done, and particular regard is to be paid to the convenience of the persons interested in the smallest estates (*d*).

Land cultivated as an orchard or garden, or on which any building has been erected, or which has been inclosed by virtue of any agreement between the proprietor and commoners, is to be allotted

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Lord ESHER, M.R., at p. 474, and FRY, L.J., at p. 484, followed in *Ecroyd* v. *Coulthard*, [1898] 2 Ch. 358, C. A. The last-mentioned case involved two questions, one the right of the owners of allotments to fish in a river abutting on land which was formerly waste of a manor, and of which the lord as owner of the soil was owner *usque ad medium filum*, the other the right of the lord to go upon the allotments in order to exercise his right of fishing in the river after the inclosure by reason of a reservation of all manorial rights; and it was held that both claims failed; the first because it was shown that the land to be inclosed did not include the river, and consequently that the presumption that the owners of the allotments abutting on the river were also owners of half the river failed, and such ownership remained in the lord of the manor (on this point compare *Hough* v. *Clark and Hall* (1907), 23 T. L. R. 682); and the second because such ownership was by reason of the ownership of the soil, and that, as all rights over the waste in respect of the ownership of the soil were compensated and taken away, the lord had no longer any rights over the allotments. There are some other cases which have only been mentioned, but when examined they will be found to come within the principles above laid down; see *Greathead* v. *Morley* (1841), 3 Man. & G. 139, commented on in *Graham* v. *Ewart* (1859), 7 H. L. Cas. 331, and *Sowerby* v. *Smith* (1874), L. R. 9 C. P. 524, Ex. Ch. *Musgrave* v. *Forster* (1871), L. R. 6 Q. B. 590, was a case in which it was held that the provisions of the Inclosure Act, 1848 (11 & 12 Vict. c. 99), s. 1, authorising the Inclosure Commissioners to embody in a provisional order any special agreement with reference to rights of the lord of the manor, authorised them to embody an agreement severing the sporting rights from the ownership of the soil, and that the terms of the provisional order and Act carried out such an agreement; see also *Robinson* v. *Wray* (1866), L. R. 1 C. P. 490; *Pannell* v. *Mill* (1846), 3 C. B. 625.

(*a*) Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 77. Reference is frequently made in Inclosure Acts to "rights of common of the lord of the manor." This expression, though not strictly accurate, has been accepted as a description of rights which have been enjoyed by the lord of the manor and his tenants, and which, if enjoyed by persons other than the owner of the soil, would be strictly rights of common (*Arundel* v. *Falmouth* (*Lord*) (1814), 2 M. & S. 440; *Lloyd* v. *Powis* (*Earl*) (1855), 4 E. & B. 485; *Musgrave* v. *Inclosure Commissioners* (1874), L. R. 9 Q. B. 162; *Askew* v. *Wilkinson* (1832), 3 B. & Ad. 152).

(*b*) Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 79.

(*c*) *Ibid.*, s. 80.

(*d*) *Ibid.*, s. 82,

SECT. 4. Powers and Duties of Valuer etc.

to the proprietor, unless he consents to a different arrangement, or unless the land is an encroachment or unauthorised inclosure (*e*).

1224. Allotments may be sold during the progress of the inclosure, and the allotment made direct to the purchaser; and the representatives of a deceased proprietor receive his allotment and undertake his liabilities (*f*).

Old inclosures may be declared allottable.

1225. Old inclosures within the parish or an adjoining parish may, with the consent of the owner, be declared allottable and parcel of the land to be inclosed, and the owner receives an equivalent allotment out of the land to be inclosed (*g*); but in the case of old inclosures or encroachments from the common of twenty years' standing which are not so declared allottable with the consent of the owner neither the inclosure award nor any consents or orders previous thereto are to divest, defeat or prejudice any property estate, right or title of the Crown or any other person in or to such encroachments or the minerals under the same, or in or to any rent or payment payable in respect thereof, rights of common which are intended to be extinguished being only excepted (*h*).

Partition and exchange of allotments.

1226. The valuer, on the request of persons interested in undivided shares, may make a partition of the land to be allotted to them, and give separate allotment to each, and may make exchanges either between private owners, or of land allotted for public purposes (*i*).

Trees and underwood.

1227. Trees and underwood on the land to be inclosed are to go with the allotments, the owner receiving compensation, except in the case of fruit trees, from the allottee, and in default of payment being entitled to enter and cut down and remove the trees and underwood within a year from the time fixed by the valuer for payment. In the case of fruit trees, the valuer is to take into account the increased value of the land in making the allotment (*k*).

Allotments under £5 in value.

1228. Where an allotment to any person interested would be less than £5 in value, the valuer may, with the consent of the person

(*e*) Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 81.

(*f*) *Ibid.*, ss. 84, 85.

(*g*) *Ibid.*, s. 86. This is a very useful provision, enabling the valuer to lay out the allotments conveniently in cases where there have been many old encroachments, or to acquire land for field gardens, or recreation ground, if it should be found that land more suitable for those purposes than the allotments specified in the provisional order can be obtained. A similar provision may be contained in the provisional order (see p. 545, *ante*), but the close examination of the land and its surroundings by the valuer often brings to light many material points which are not brought to the notice of the assistant commissioner when he holds the preliminary inquiries.

(*h*) Inclosure Act, 1847 (10 & 11 Vict. c. 111), s. 3. Such encroachments are not to be entitled to any right of common or allotment in lieu thereof (Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 52; and p. 556, *ante*; see *Mill* v. *New Forest Commissioner* (1856), 18 C. B. p. 60).

(*i*) Inclosure Act, 1845 (8 & 9 Vict. c. 118), ss. 90—92. The power of exchanging, during the progress of the inclosure, allotments for public purposes originally provided by the provisional order, is often found useful. Further powers of making such exchanges of public allotments set out under early Inclosure Acts, where representations are made to the Board that such allotments are inconvenient or ill suited, and that more convenient land may be acquired, are dealt with later; see p. 592, *post*.

(*k*) Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 99; Inclosure Act, 1852 (15 & 16 Vict. c. 79), s. 16.

interested, and with the approval of the Board, award him an equivalent money payment instead of an allotment (*l*).

Alterations by valuer in allotments etc.

1229. The valuer may, at any time before the confirmation of his award, with the approval of the Board make alteration in the allotments or fences which he has set out or ordered, or in the private roads he has set out, or in the orders or directions which he has given in relation thereto, and may provide compensation to any person injured by such alteration, either out of the money raised for expenses of the inclosure, or by ordering some person thereby benefited to pay it (*m*).

Allotment to trustees for benefit of class.

1230. Where the freemen or burgesses of a city or borough, or the householders or inhabitant householders of a town or place, or any class or description of such freemen or householders, or any other persons as a class, are entitled to rights of common or other rights over the land to be inclosed, the valuer is empowered to make an allotment or allotments to trustees for the benefit of such class; and when the claim of a class is allowed, the Board are to call a meeting of the class, by advertisement specifying the number which will form a quorum, for the purpose of appointing trustees of the allotment or allotments, and of passing resolutions for the management or letting thereof, or for the sale of the whole or parts thereof, and investment of the purchase-money, and for the division or application of the rent or income among or for the benefit of the members of the class; and the valuer must give effect to the resolutions passed by a majority of the persons present at such meeting when approved by the Board (*n*).

In default of resolutions, or if the Board deem the resolutions passed unreasonable, the Board may give instructions on the subject to the valuer, but no sale is to be made except in pursuance of a resolution passed at the meeting (*o*).

Persons having similar rights may be treated as a class.

If there are persons having similar rights of common, and it appears to the valuer that it would be for their benefit that they should be dealt with as a class, the Board, on the representation of the valuer, may call a meeting of the persons interested to decide whether they desire to be dealt with as a class, and may appoint an assistant commissioner to preside at such meeting. If the majority at the meeting are in favour of it, the Board may make an order that the persons so entitled are to be dealt with as a class, and thereupon the provisions above stated as to a class apply (*p*).

(*l*) Inclosure Act, 1848 (11 & 12 Vict. c. 99), s. 3.

(*m*) Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 101. This section gives the valuer an opportunity of correcting any injustice or unfairness in allotments, or the burden of making and maintaining roads or fences which may be brought to his notice. Unless arranged previously, any person who considers he has a grievance in any of these respects has an opportunity of bringing it forward at the appeal meeting when the report of the valuer is discussed; see p. 586, *post*.

(*n*) *Ibid.*, ss. 87—89.

(*o*) *Ibid.*, s. 89.

(*p*) Inclosure Act, 1849 (12 & 13 Vict. c. 83), s. 2. Where the sale of any land, not exceeding fifty acres, has been sanctioned by the Board, a resolution may be passed by a majority in number and interest that it should be apportioned among the persons interested, and it is then dealt with as money

SECT. 4. SUB-SECT. 10.—*Expenses of Inclosure, how raised.*

Powers and Duties of Valuer etc.

Estimates of expenses.

1231. The valuer from time to time makes estimates of the expenses of the inclosure, and submits them to a meeting of the persons interested called after seven days' notice, and also to the Board, who before approving them consider any representations on them made by a majority of the persons present at the meeting (*q*).

Modes of raising expenses.

1232. The mode in which the expenses of the inclosure are to be provided may be settled at the meeting of the persons interested held for the purpose of appointing the valuer and for resolving upon instructions to him (*r*), or at some other meeting called by the Board for the purpose; and the expenses may be raised either by sale of part of the land to be inclosed or by rate upon the persons interested as the meeting or the majority in number and in respect of interest of the persons present personally or by their agents at the meeting shall decide (*s*). Both modes have been used, but during the last thirty years the sale of part of the land has been more frequently adopted.

(1) By rate.

1233. If it has been decided that the expenses are to be raised by rate, the expenses when approved are apportioned by the valuer among the persons interested, other than the trustees of public allotments, as the valuer shall direct, and he gives notice requiring payment fourteen days before the time appointed for payment (*t*). In case of default in payment the valuer may recover the amount due, after further special notice, by action as for a liquidated debt, by distress, or by letting, or, with the approval of the Board, selling all or part of the allotment (*a*). If the rate made proves insufficient,

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arising from the compulsory purchase of common lands, as to which, see pp. 495, *et seq.*, *ante* (Inclosure Act, 1859 (22 & 23 Vict. c. 43), s. 9). Presumably the same course may be followed on the sale of an allotment or allotments made to a class.

(*q*) Inclosure Act, 1845 (8 & 9 Vict. c. 118), ss. 124, 125. These expenses necessarily vary according to the extent of the land dealt with, the roads and other works required, the necessity of a new survey and map, the expenses of putting into a proper state and fencing the allotments for field gardens and recreation etc. The expenses of the Board, including the remuneration and travelling expenses of assistant commissioners and other persons specially employed and paid by them, and the fees payable to the office may be charged by an order of the Board upon the persons interested in such shares as the Board think just; and are to be raised with and deemed part of the expenses of the inclosure (*ibid.*, s. 130), but in practice the amount of these expenses is supplied to the valuer and included in his estimates. Persons interested are to bear their own expenses and the expenses of their agents of attending meetings etc. (*ibid.*, s. 131). In practice the valuer is generally authorised by the persons interested to borrow money to meet expenses of wages etc. on inclosure works, and an estimate representing his total expenditure is submitted to the appeal meeting, presided over by an assistant commissioner.

(*r*) As to this meeting and the valuer's instructions, see p. 548, *ante*.

(*s*) Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 34.

(*t*) *Ibid.*, s. 124. Notice is to be given on the church door, and to persons not resident in the parish, where the valuer knows their addresses, by post. As every claim must give the address of the claimant or his agent, the addresses are always known.

(*a*) Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 126; Inclosure Act, 1852 (15 & 16 Vict. c. 79), s. 3.

the valuer has power to make a supplemental rate with the approval of the Board before or after the confirmation of award (*b*).

Powers of limited owners as to expenses.

1234. Tenants for life and other limited owners, trustees, guardians, and committees of persons under disability, attorneys of owners abroad, and parochial or charitable trustees, with the consent of the Board under seal, and incumbents, with the consent in writing of the bishop of the diocese and of the patron of the benefice, have power to charge their allotments with a sum not exceeding £5 per acre towards their proportion of the expenses and to mortgage the allotments for a term to secure repayment. A tenant for life must covenant to keep down the interest so that his successor shall not be liable for more than six months' interest, and an incumbent must keep down the interest and repay one-thirtieth of the principal each year. The money advanced on mortgage is paid to and applied by the Board, whose receipt is a discharge to the mortgagee (*c*).

A sale of part of the allotment may also, with the like consents required in the case of a mortgage, be sanctioned by the Board (*d*).

(2) By sale of land.

1235. Where under the provisional order or the valuer's instructions the expenses of the inclosure are to be raised by a sale of part of the land to be inclosed, and in any other case in which the

(*b*) Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 127. It will be observed that the valuer has wide and varied powers of compelling payment of the rate. In the early Inclosure Acts the commissioners appointed were usually more restricted in their powers, and difficulties sometimes arose from their adopting a method of recovery which was not authorised, *e.g.*, *Danby* v. *Watson* (1877), 46 L. J. (M. C.) 179, where under a local Act and award rates were directed to be recovered in the same way as poor rate, and it was held that an action would not lie for their recovery. Where an Act of Parliament creates an obligation and enforces its performance in a specified manner, the performance can only be enforced in the manner pointed out by the Act (*Handley* v. *Moffat* (1873), 21 W. R. 231; compare *Bonnell* v. *Beighton* (1793), 5 Term Rep. 182, where a similar objection was made to an appeal by action against a rate).

As to an action of ejectment to recover possession of an allotment made under a local Inclosure Act, where the owner refused to pay a rate made for expenses of the inclosure after the proceeds of land sold for that purpose had proved insufficient, see *Doe* d. *Harris* v. *Bodenham* (1829), 9 B. & C. 495.

(*c*) Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 133; Inclosure Act, 1848 (11 & 12 Vict. c. 99), s. 8. In *Vernon* v. *Manvers* (*Earl*) (1862), 32 L. J. (CH.), 244, it is assumed by Lord ROMILLY, M.R., that the consent of the Board is required to a mortgage by a tenant for life, though this is not quite clear from the wording of s. 133. In practice the Board's consent is given to a mortgage by an incumbent, though this is not required by the same section. A declaration can be made by the Chancery Division that so much as the tenant for life could have made a charge upon the allotments shall be charged thereon after his death, even though the money raised has not been paid to and applied by the Board (*Vernon* v. *Manvers* (*Earl*), *supra*).

(*d*) Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 134. The Chancery Division will authorise the payment out of compensation moneys paid in under the Lands Clauses Acts etc. for these purposes to avoid the necessity of a mortgage or sale (*Re Oxford, Worcester etc. Rail. Co., Ex parte Lockwood* (1851), 14 Beav. 158). Where a tenant for life impeachable for waste is empowered by an Inclosure Act to mortgage for payment of his share of the inclosure expenses he is not entitled to cut timber to raise those expenses (*Lee* v. *Alston* (1789), 1 Ves. 78).

SECT. 4. Powers and Duties of Valuer etc.

valuer is to sell land (*e*), the valuer sets out such part of the land as he judges sufficient to raise the money required and sells by public auction or private contract with the approval of the Board. The purchase-money is to be paid to the Board or as they direct, and their receipt is a sufficient discharge to the purchaser. On receipt of the whole of the purchase-money a conveyance is executed by the Board to the purchaser or as he directs, and is evidence of the regularity of the sale. Land sold to raise the expenses of the inclosure is conveyed as, and becomes freehold of inheritance (*f*), except where land set out as copyhold is sold; *e.g.*, where a limited owner of a copyhold allotment desires a sale to meet his proportion of the expenses (*g*) it is conveyed as copyhold and subject to the same rents, suits, and services as if the sale had not been made (*h*).

Surplus purchase-money, how dealt with.

1236. Surplus purchase-money in the hands of the Board where the land has been sold to raise the expenses of the inclosure is paid to the persons interested in such proportions and subject to such restrictions and conditions as the Board deem just (*i*); where it arises from the sale of an allotment, the money, if it amounts to £200 and is not paid to a proprietor who is absolutely entitled, is paid into court in manner similar to that provided for payment in the case of persons under disability under the Lands Clauses Acts, and may by order of the court be applied, (i.) in the redemption of land tax or the discharge of incumbrances affecting the land or other land settled therewith, or (ii.) in the purchase of other land to be settled in the same way as the land sold (*k*). Until so applied the money must be invested and the income paid to the tenant for life (*l*). If the money is less than £200 but exceeds £20, it may, at the option of the person entitled to the rents and profits of the land, or of his guardian or committee in case of persons under disability, be paid into court as before, or may be paid to two trustees to be nominated by the parties and approved by the Board, who are to deal with the money in the same way as money paid into court, but without the necessity of obtaining any order of the court for the purpose (*m*). Sums under £20 are to be paid to the tenant for life or other person entitled to the rents (*n*).

SUB-SECT. 11.—*Interim Proceedings pending Award.*

Powers of valuer before award.

1237. Pending the completion of his award, which frequently occupies a considerable time, the valuer has extensive powers of management. He may suspend rights of common and other

(*e*) *E.g.*, where a limited owner desires a sale of part of his allotment to meet his share of the expenses; see p. 583, *ante*.
(*f*) Inclosure Act, 1845 (8 & 9 Vict. c. 118), ss. 142, 143. A form of conveyance is given in the schedule to that Act.
(*g*) See p. 583, *ante*.
(*h*) Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 135.
(*i*) Inclosure Act, 1849 (12 & 13 Vict. c. 83), s. 6.
(*k*) Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 138.
(*l*) *Ibid.*, s. 139.
(*m*) *Ibid.*, s. 140. If the Board think fit they may direct sums exceeding £200 to be so paid to trustees (*ibid.*).
(*n*) *Ibid.*, s. 141.

rights over the land (*o*); let the herbage (*p*); direct that the allotments when marked and staked out shall be entered upon by the persons for whom they are intended (*q*); take proceedings against persons committing wilful damage to fences, ditches, or other inclosure works, or trespassing upon lands over which the rights of common have been suspended, or which have been put into possession of allottees, and recover penalties (*r*); give directions as to the determination of tenancies of the land to be inclosed, and, in case of difference, settle the compensation to be paid by the landlord to the tenant etc. (*s*); direct the course of husbandry (*t*) and order what, and by whom, compensation is to be paid for growing crops, manuring cultivations etc., to the former owner of an allotment (*a*).

SUB-SECT. 12.—*Valuer's Report and Final Award, and Correction of Award.*

Report and map.

1238. Within one month after the division of the land to be inclosed and staking out of the allotments, unless the time is extended by the Board, the valuer must send to the office of the Board a report in writing accompanied by a map, both of which are to be signed by him (*b*).

The report specifies all the claims allowed, the allotments, exchanges, and partitions, the roads, ways, works, and easements set out or directed to be made or reserved by the valuer, and any other directions or determinations which the valuer considers necessary.

The map shows the lands to be inclosed, the lands to be sold or exchanged, the lands in respect of which allotments are made, and such other particulars as are required by the Board (*c*).

(*o*) Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 69.

(*p*) Inclosure Act, 1859 (22 & 23 Vict. 3, 43), s. 8.

(*q*) Inclosure Act, 1845 (8 & 9 Vict. 118), s. 95; but now an Order of the Board is required before the valuer can give this direction (Inclosure Act, 1852 (15 & 16 Vict. c. 79), s. 15.

(*r*) Inclosure Act, 1848 (11 & 12 Vict. c. 99), s. 10; Inclosure Act, 1849 (12 & 13 Vict. c. 83), s. 10; amended as to procedure by the Statute Law Revision (Substituted Enactments) Act, 1876 (39 & 40 Vict. c. 20), s. 1, which brings offences of this nature within the Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), and the Acts amending the same. Fines and penalties are to go towards the expenses of the inclosure or to the person lawfully in possession of the allotment, as the court shall direct. The latter person may also take proceedings against trespassers (Inclosure Act, 1848 (11 & 12 Vict. c. 99), s. 11).

(*s*) Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 95; Inclosure Act, 1852 (15 & 16 Vict. c. 79), s. 15; Inclosure Act, 1859 (22 & 23 Vict. c. 43), s. 13.

(*t*) Inclosure Act, 1845 (8 & 9 Vict. 118), s. 70.

(*a*) *Ibid.*, ss. 70 & 71.

(*b*) Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 102; Inclosure Act, 1852 (15 & 16 Vict. c. 79), s. 15. The report is in effect the draft award of the valuer. A Form of the Report will be found in the Encyclopædia of Forms and Precedents, Vol. IV., p. 84. The report and map are carefully examined in the office, the quantities checked and corrections made where necessary before it is returned to be deposited for inspection.

(*c*) The Board have power if they think it desirable, and to save expense, to make an order dispensing with the necessity of showing on the map the old inclosed lands in respect of which the allotments are made (Inclosure Act, 1848

SECT. 4. Powers and Duties of Valuer etc.

Deposit for inspection.

1239. A copy of the report is then sent by the Board for deposit in some convenient place in the parish for inspection by persons interested; and notice is given stating where the report and map may be inspected and of a meeting to be held by an assistant commissioner, not less than twenty-one days after the first publication of the notice, to hear objections to any allotment, direction, determination or matter in the report (*d*).

Objections.

At the meeting any objections are considered and determined by the assistant commissioner, who has power to adjourn and fix further meetings and to direct any further valuation or survey of the land or any part thereof, and to take such other measures for ascertaining the justice and propriety of the determinations and directions of the valuer as he thinks proper. When all objections have been considered and determined the Board approve the report or cause it to be amended as they see occasion (*e*).

Valuer's award.

1240. The award is then prepared and engrossed on parchment by the valuer, under the direction of the Board, describing the boundaries (if any) ascertained and set out under the provisions of the Acts, the matters contained in the report and a declaration whether all or any and which of the mines, minerals, stone, and other substrata have or have not been included in the estimate of the right and interest of the lord of the manor in the soil in respect of which an allotment may have been made to him (*f*).

Confirmation by Board and deposit of award.

1241. The award and map annexed thereto (*g*), when signed by the valuer, are confirmed by the Board and sealed with the date of confirmation.

Two copies of every confirmed award and of the map, if separate, are made and sealed with the seal of the Board, one of which is to be deposited with the clerk of the peace of the county (*h*), and the other with the clerk to the parish council (*i*) of the parish in which the lands or the greater part thereof are situate, or with such other fit persons as the Board approve. They are to be kept with the county and parish records respectively, and persons interested are

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(11 & 12 Vict. c. 99), s. 2). In such a case the old inclosed lands will be described in the schedule to the award in which the allotments are set out by reference to the numbers on the Ordnance Map or Tithe Map of the parish.

(*d*) Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 103. The notice is given both on the outer door of the parish church and by advertisement.

(*e*) *Ibid.*, s. 103.

(*f*) *Ibid.*, s. 104. As to the importance of this declaration and a clear definition of the rights of the lord, see p. 573, *ante*.

(*g*) If the Board by reason of the size of the map or other circumstances deem it advisable, they may certify a separate map under their seal without its being annexed to the award (Inclosure Act, 1859 (22 & 23 Vict. c. 43), s. 14). The award and map are retained at the office of the Board (3, St. James Square, S.W.).

(*h*) The clerk of the peace is entitled to a fee of ten shillings on the deposit (Inclosure Act, 1852 (15 & 16 Vict. c. 79), s. 27).

(*i*) Originally the churchwardens or chapelwardens, many of whose powers and duties have been transferred to the parish council under the Local Government Act, 1894 (56 & 57 Vict. c. 73), ss. 5, 6.

to be entitled to inspection, and to be furnished with copies or extracts (*k*).

Effect of confirmation.

The confirmation of the award is conclusive evidence that the requirements of the Acts have been complied with; no award can be impeached by reason of any mistake or informality therein or in the inclosure proceedings; and all allotments, exchanges, partitions, directions, and matters specified and set forth in the award are binding and conclusive on all persons (*l*).

The confirmed award is to be received as satisfactory evidence of all matters therein recited and stated, and copies or extracts signed by the clerk of the peace are to be received as evidence without further proof (*m*).

Rectification of omissions etc. in award.

1242. If the award has omitted to distinguish any land in respect of tenure, estate or title, or has awarded an aggregate allotment where there should have been separate allotments (*n*), the Board may, at any time within two years after the confirmation of the award on the application of any person interested, rectify the omission or subdivide the allotment, upon investigation and at the expense of the applicant, by a separate instrument under their seal, which is deposited with and deemed part of the original award (*o*).

In case of any fraudulent or other error or omission in any award confirmed by the Board or their predecessors, the Board may at any time, by an order under their seal, correct the error or supply the omission at the expense of the applicant; and the order, if not indorsed, must be deposited with the award (*p*).

(*k*) Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 146. The fee for inspection is two shillings and six pence, and for furnishing copies or extracts at the rate of threepence for every seventy-two words (*ibid.*).

(*l*) Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 105.

(*m*) *Ibid.*, s. 146. A return of all the inclosure awards or copies thereof deposited with the clerks of the peace or of the county councils in England and Wales was made by the Board in 1904, pursuant to an order of the House of Commons, and has been printed as a Parliamentary paper ("Commons (Inclosure) Awards," 1904, 50).

(*n*) For an instance of difficulty occasioned by an aggregate allotment made in respect of land partly freehold and partly copyhold, see *King* v. *Moody* (1826), 2 Sim. & St. 579), where a lord of a manor, who was seised of the manor subject to an executory devise, purchased lands partly freehold and partly copyhold held of the manor; on an inclosure an allotment was made in respect of these lands, and the lord, considering that both the freeholds and copyholds purchased had become his own property, received one allotment in respect of both and devised the purchased estate; the executory devise took effect, and the executory devisee claimed as against the devisee under the will of the lord that portion of the allotment which was made in respect of the copyhold land on the ground that the purchased copyhold became extinguished to the manor, and it was held that he was entitled, and that the court would not interfere in favour of the lord's devisee.

(*o*) Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 107. The Board have also similar powers under s. 152 of remedying defects and omissions in awards under local Inclosure Acts, or under the Inclosure Act, 1836 (6 & 7 Will. 4, c. 115). In *Bateman* v. *Boynton* (1866), 1 Ch. App. 359, TURNER and KNIGHT BRUCE, L.JJ., expressed an opinion that in the absence of fraud the Court of Chancery had no power to correct an award made under an Inclosure Act.

(*p*) Inclosure Act, 1852 (15 & 16 Vict. c. 79), s. 29. The Board, as successors of the Inclosure Commissioners, are also empowered to revive the powers of commissioners under local Inclosure Acts or the Common Fields Inclosure Act, 1836, which had been lost by delay, and to appoint fresh persons to carry

SECT. 4. SUB-SECT. 13.—*Incidental Powers of the Board.*

Powers and Duties of Valuer etc.

Notice to reversioners.

1243. The Board may, if they see occasion before certifying the expediency of an inclosure or at any stage of the inclosure proceedings, require notice to be given to immediate reversioners or remaindermen, or any other person to whom they think notice should be given, and objections made by any such person may be heard and determined (*q*).

Delivery of valuations etc. to Board.

1244. The Board may at any time after the appointment of a valuer, if they see occasion, make an order requiring such valuer or any other person in possession of any schedule, valuation, plan, or other document relating to the inclosure to deliver such document to them at their office, and in default of compliance with the order may summon him before the county court of the district, the judge of which is to enforce the order (*r*).

Payment to valuer on removal.

In the event of such an order being made or of the removal of a valuer or surveyor (*s*), the Board, on the application of the valuer or surveyor or their representatives, are to ascertain what progress has been made in the work, and to award the sum to be paid to the valuer or surveyor for services rendered, and the sum so awarded with any costs incurred by the Board is to be a charge upon the landowners and form part of the expenses of the inclosure (*a*).

Fees of Board.

1245. The Board are by statute (*b*) required to prepare tables of fees to be taken by them under the various Acts administered by

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out the proceedings where necessary, and also to confirm awards made under the supposed authority of the last-mentioned Act, making such inquiries and taking such steps as upon an application for inclosure under the Inclosure Acts, 1845 to 1899; see Inclosure Act, 1845 (8 & 9 Vict. c. 118), ss. 153—157; Inclosure Act, 1849 (12 & 13 Vict. c. 83), s. 4. Owing to the lapse of time, however, these powers are now rarely exercised.

Where, under a local Inclosure Act or award, trustees having certain qualifications are to be elected for carrying out or maintaining works connected with the inclosure or other local duties, the Board may make an order reducing the number of trustees, if on inquiry it is found necessary or desirable (Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 158). They may also extend the time for enrolling awards under local Acts where they are satisfied that such awards have been acted on though not enrolled (Inclosure Act, 1854 (17 & 18 Vict. c. 97), s. 7). Such awards, if executed before 1833, are valid without enrolment (3 & 4 Will. 4, c. 87); see p. 538, *ante*.

(*q*) Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 145.

(*r*) Inclosure (Expenses) Act, 1868 (31 & 32 Vict. c. 89), s. 4.

(*s*) For the powers as to removing a valuer and appointing a new one where necessary, see p. 549, *ante*.

(*a*) Inclosure (Expenses) Act, 1868 (31 & 32 Vict. c. 89), s. 5.

(*b*) *Ibid.*, s. 6. The fees at present payable in respect of transactions under the Inclosure Acts (which for the sake of convenience are given together, although they do not all relate to inclosures), are as follows:—

On the confirmation of an award £10, and in addition the following acreage fees: for each acre inclosed up to 100, 2*s.*; for every additional acre exceeding 100 up to 500, 1*s.* 6*d.*; for every additional acre exceeding 500 up to 2,000, 1*s.*; and for every additional acre exceeding 2,000 up to 5,000, which is to be the maximum upon which a fee is to be charged, 6*d.*

On the confirmation of an award for the regulation of a common £10, and in addition half the above-mentioned acreage fees.

On an award setting out the boundaries of parishes, townships, manors etc., or declaring the boundaries of freehold, copyhold, or leasehold lands, £5.

On an order of exchange or partition or of division (of intermixed lands),

them, which are to be subject to the approval of the Treasury Commissioners, and may from time to time with the like approval be revised and altered. The tables are to be published in the *London Gazette* and laid before Parliament, and the fees payable are to be denoted by stamps affixed to or impressed on the documents.

SECT. 4. Powers and Duties of Valuer etc.

1246. At any time after application has been made to the Board to sanction an inclosure or regulation of a common or any land subject to be inclosed within the meaning of the Inclosure Act, 1845, the Board, or assistant commissioner, or valuer, or any person or persons appointed by the Board, assistant commissioner, or valuer, are empowered to enter with assistants and servants upon the land to be inclosed or regulated at any time or times until the inclosure or other proceedings are completed, for the purpose of making examination, surveys, and measurements of the land, and of doing all things necessary for putting the Acts into execution (*c*).

Power to enter on land.

SUB-SECT. 14.—*Town Greens and Village Greens.*

1247. Although town greens and village greens (*d*) are frequently referred to in Acts of Parliament, neither in the Acts nor in the reported cases is there any exact definition of a town green or a village green. It may or may not be subject to rights of common, but the essential characteristic of a town or village green is that by immemorial custom the inhabitants of the town, village, or parish should have acquired the right of playing lawful games thereon and enjoying it for purposes of recreation. The nature of the enjoyment is a matter for proof in each case, and the custom must be limited to the inhabitants of the district (whether parish, vill, or manor) for which it is claimed. The evidence must be

Essential features of town greens etc.

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where the aggregate value of the property does not exceed £100, £1; where it exceeds £100 and does not exceed £200, £2; for each additional £100 or fraction thereof up to £5,000, 5*s.*; and for every £100 or fraction thereof exceeding £5,000, 2*s.* 6*d.*; but the fee is not in any case to exceed £50.

On an award of apportionment or other application of money under the Lands Clauses Acts, for every £100 or part thereof, £1; on an order of apportionment of fee farm rents or other rents or certain payments, for every £100 or part thereof, £1; on the amendment or completion of any award under local Acts, £5; and on the amendment of any award or order confirmed under the Inclosure Acts, £2.

(*c*) Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 123.

(*d*) The leading cases on this subject are *Fitch* v. *Rawling* (1795), 2 Hy. Bl. 393; *Hammerton* v. *Honey* (1876), 24 W. R. 603; and *Edwards* v. *Jenkins*, [1896] 1 Ch. 308; but the following cases may also be referred to, namely, *Abbot* v. *Weekly* (1665), 1 Lev. 176, where a custom for the inhabitants of a certain vill to dance at all times of the year on a certain close, which may or may not have been a village green, was upheld; *Hall* v. *Nottinghum* (1875), 1 Ex. D. 1; and *Lancashire* v. *Hunt* (1894), 11 T. L. R. 49, C. A. (the Stockbridge Down case), where the right of the inhabitants of Stockbridge to ride and drive over the down and use it for all lawful games and recreation, including the right to erect tents and other lawful and necessary accessories, was upheld, but the right to carry on the business of a trainer and train racehorses on the down was rejected. See further on this subject, title OPEN SPACES AND RECREATION GROUNDS.

SECT. 4 Powers and Duties of Valuer etc.

consistent with the custom alleged, and must not be too wide. Evidence proving that all the world went over and played games on a piece of waste land or common will not establish the custom for a particular parish (*e*).

Allotment for recreation purposes only.

1248. Town greens and village greens are expressly excepted from inclosure (*f*); but the Board are empowered, if they think fit, to direct that any town green or village green in the parish in which an inclosure is being made shall be allotted and awarded for purposes of exercise and recreation, in the like manner and with the like provisions for making and maintaining the fences, preserving the surface, and draining and levelling the same, as are directed concerning allotments to be made for the purposes of exercise and recreation; and any such green may be so allotted in addition to other land which may be allotted for purposes of exercise and recreation, or, if the Board think it sufficient, in substitution for other land which might have been required to be allotted for such purposes.

Boundaries to be defined.

In every case in which a town green or village green adjoins land subject to be inclosed, and is not separated therefrom by fences or known bounds, the Board are required in the provisional order to set out a boundary line between such green and the adjoining land, and in their annual report to Parliament to mention and describe such boundary (*g*). The effect of allotting a town green or village green for the purposes of exercise and recreation is that any rights of common over it are extinguished, while the rights of recreation are preserved.

Vesting of village greens and recreation allotments.

1249. Village greens dealt with by Inclosure Acts and allotments set out for recreation were usually vested in the churchwardens and overseers of the parish (*h*); but the powers and duties of such officials with respect to village greens are now transferred to the parish council (*i*), which has power to protect and improve them (*j*).

In parishes where there is no parish council, village greens and recreation grounds which have been allotted to the churchwardens and overseers are now vested in the chairman of the parish meeting and overseers as a body corporate (*k*); and they may obtain from the county council the powers of management given by the Local Government Act, 1894, to a parish council (*l*).

Injury to village green.

Injury to a village green or interference with its use as a place of recreation may be punished on summary conviction by a fine not exceeding forty shillings and damages (*m*); and where it has a

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(*e*) See cases cited in note (*d*), p. 589, *ante*; and in particular *Hammerton* v. *Honey* (1876), 24 W. R. 603.

(*f*) Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 15.

(*g*) *Ibid.*

(*h*) *Ibid.*, s. 73.

(*i*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 6 (1) (c) (iii.).

(*j*) *Ibid.*, s. 8 (1) (d), which also empowers a parish council to make bye-laws, subject to confirmation by the Local Government Board, with penalties for their infringement, with reference to any village green or recreation ground under its control.

(*k*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 19 (7).

(*l*) *Ibid.*, s. 19 (10).

(*m*) Inclosure Act, 1857 (20 & 21 Vict. c. 31), s. 12.

known or defined boundary, any encroachment on or interference with it is a public nuisance and indictable accordingly (*n*).

Schemes relating to village greens.

1250. Unless a village green is subject to rights of common, it cannot be the subject of a scheme under the Metropolitan Commons Acts for regulation, since it is not subject to be inclosed under the Inclosure Acts; but it may be the subject of a similar scheme under the Commons Act, 1899 (*o*).

Any provisions with reference to recreation allotments, including village greens so allotted, or with respect to the management of such allotments, contained in any Inclosure Act or award, may, on the application of any district council or parish council interested therein, be dealt with by a scheme of the Charity Commissioners in the exercise of their ordinary jurisdiction and modified (*p*).

SUB-SECT. 15.—*Allotments for Recreation Grounds and Field Gardens.*

Vesting of recreation grounds.

1251. Allotments for recreation grounds made under the Inclosure Act, 1845, were until the year 1876 awarded to and vested in the churchwardens and overseers of the parish to be held in trust as places of exercise and recreation for the inhabitants of the parish and neighbourhood (*q*), unless the valuer, with the approbation of the Inclosure Commissioners, allotted the recreation allotment to some person entitled to an allotment, who consented to receive the same as part of his allotment charged with the obligation of keeping it in order and of permitting it to be used for purposes of recreation, the allottee receiving the benefit of the herbage (*r*).

The Commons Act, 1876 (*s*), however, repealed the power of so allotting a recreation allotment, and directed that all allotments for the purpose of a recreation ground made after the passing of that Act should be vested in the churchwardens and overseers of the parish, to be held by them as provided by the Inclosure Acts, 1845 to 1868.

The powers, duties, and liabilities of the overseers, or of the churchwardens and overseers, of a parish with respect to, among other things, the holding and management of village greens or of allotments, whether for recreation grounds or for gardens or otherwise, for the benefit of the inhabitants or any of them, have been transferred to the parish council, so that any allotments for recreation grounds heretofore made to the churchwardens and overseers are now vested in the parish council of the parish, and any such allotments made in future will be made to the parish council (*t*).

(*n*) Commons Act, 1876 (39 & 40 Vict. c. 56), s. 29.

(*o*) See the definition of "common" in the Metropolitan Commons Acts, p. 606, *post*; and in the Commons Act, 1899 (62 & 63 Vict. c. 30), ss. 14, 15.

(*p*) Commons Act, 1899 (62 & 63 Vict. c. 30), s. 18.

(*q*) Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 73.

(*r*) Under the powers conferred by *ibid.*, s. 74.

(*s*) 39 & 40 Vict. c. 56, s. 25. This section was repealed by the Statute Law Revision Act, 1894 (57 & 58 Vict. c. 56), as unnecessary in consequence of the transfer of the powers, duties, and liabilities of the churchwardens and overseers in reference to, among other things, recreation allotments to the parish council by the Local Government Act, 1894 (56 & 57 Vict. c. 73).

(*t*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 6 (1) (c).

SECT. 4.

Powers and Duties of Valuer etc.

1252. Recreation allotments are in the first instance to be fenced (*a*) and, if necessary, drained and levelled by the valuer at the expense of the inclosure (*b*). The parish council (*c*) are required to maintain and repair the fences and to keep the surface drained and level out of the rents to be reserved for the herbage or out of the poor rate or otherwise, and are empowered to let the grass and herbage (*d*). The rents are to be applied to meet the requirements above mentioned; and any surplus is now to be expended (1) in improving the recreation grounds in the parish or neighbourhood, or in maintaining the drainage and fencing thereof, or in hiring or purchasing additional land for recreation grounds in the parish or neighbourhood (*e*), or (2) in the improvement etc. of the field gardens in the parish or neighbourhood (*f*), or (3) towards the redemption of the land tax, tithe rent-charge, or other charge on the recreation grounds (*g*).

Fencing etc.

Surplus rents.

Exchange and sale.

1253. The Board have power, on the application of the parish council and of the person or persons interested in land more convenient or suitable for the purpose who may be willing to give such land in exchange, to authorise the exchange of a recreation allotment (*h*); and the trustees of any recreation ground may, with the approval of the Board, sell all or any part thereof, and out of the proceeds of sale purchase other suitable land for the same purpose; but no such sale can be sanctioned unless it is proved that such land can and will be forthwith purchased (*i*).

A recreation allotment may also be transferred to the sanitary authority of the district (*k*).

User

1254. Since 1876 it has been unlawful to authorise the use of or to use any recreation or field garden allotment for any purposes other than those declared by the Act and award, or either of them, under which the same was set out, notwithstanding anything contained in any other Act (*l*).

Periodical reports.

1255. The parish council are required to make to the Board reports at intervals of not less than three or more than five years

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(*a*) Unless the Board by order under seal authorise the fencing of the allotment to be dispensed with (Inclosure Act, 1852 (15 & 16 Vict. c. 79), s. 14).

(*b*) The valuer is required by the Board, when sending in his report (see p. 585, *ante*), to state whether the recreation and field garden allotments are properly fenced, drained, levelled, and in a fit state for occupation for their respective purposes.

(*c*) See note (*n*), p. 593, *post*.

(*d*) Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 73.

(*e*) Commons Act, 1876 (39 & 40 Vict. c. 56), s. 27. Before 1876 surplus rents were applicable in aid of the highway rates (Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 73).

(*f*) Commons Act, 1879 (42 & 43 Vict. c. 37), s. 2.

(*g*) Commons Act, 1899 (62 & 63 Vict. c. 30), s. 16.

(*h*) Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 149.

(*i*) Commons Act, 1876 (39 & 40 Vict. c. 56), s. 27.

(*k*) See pp. 594, 595, *post*.

(*l*) Commons Act, 1876 (39 & 40 Vict. c. 56), s. 19. This provision, however, is not in derogation of the powers of exchange and sale above mentioned, as the substituted lands will be used for the original purposes.

in respect of the recreation grounds and field gardens under their management, with such particulars of the rents received by them as the Board require (*m*).

Field gardens allotments.

1256. The allotment wardens of field gardens (*n*) are required to let the allotments (*o*) in gardens not exceeding a quarter of an acre to poor inhabitants of the parish for one year or from year to year at such rents and subject to such terms, not inconsistent with the provisions of the Act, as they think fit. The gardens are to be let free of tithe rent-charge and other rates etc. at rents not below the full yearly agricultural value of the land as ascertained by periodical valuation; and the erection of any building for, or to be used as, a dwelling-house is expressly prohibited (*o*).

If the allotment wardens are unable to let the allotments to the poor inhabitants of the parish in gardens not exceeding a quarter of an acre, they may let the same or any unlet portion in gardens not exceeding one acre, and must offer the gardens to the poor inhabitants at a fair agricultural rent, if sufficient to satisfy all rates, taxes, tithe rent-charge, and the special rent-charge mentioned below (in cases where it is payable) (*p*), but not otherwise, instead of at the full yearly agricultural value of the land. They are also empowered, if unable to let the allotment or any portion thereof to the poor inhabitants on the terms above mentioned, to let the same or any unlet portions to any person whatever at the best annual rent obtainable without any premium or fine, and so that

(*m*) Commons Act, 1876 (39 & 40 Vict. c. 56), s. 28. Parish property, other than church property, is now vested in the parish council, subject to all trusts and liabilities affecting the same (Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 5 (2) (c)). Apparently by inadvertence, no provision was made for enforcing obedience to the Board's demand for a report. The powers of a parish council to make bye-laws etc. with reference to a recreation ground have been dealt with on p. 590, *ante*.

(*n*) Under the Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 73, allotments for field gardens were to be set out to, and the legal estate vested in, the churchwardens and overseers of the parish, but were to be under the management of four allotment wardens, who were to be elected and to hold office in manner directed by the Act (*ibid.*, s. 108). But under the Small Holdings and Allotments Act, 1908 (8 Edw. 7, c. 36), s. 33 (3), which is practically a re-enactment of the Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 6 (4), where any Act constitutes any persons wardens for allotments or authorises or requires the appointment or election of any wardens, committee, or managers for the purposes of allotments in a rural parish, then the powers and duties of the wardens, committee, or managers shall be exercised and performed by the parish council, or in the case of a parish not having a parish council by persons appointed by the parish meeting, and it shall not be necessary to make the said appointment or to hold the said election, so that the powers and duties of the allotment wardens stated in the following pages will now apply to the parish council or to the persons appointed by the parish meeting, as the case may be.

(*o*) Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 109. In the event of such a building being erected, the allotment wardens are to pull it down, sell the materials, and apply the proceeds as rents of the gardens (*ibid.*).

(*p*) Under *ibid.*, s. 75, there was power to allot field gardens subject to a rent-charge. The power of so charging the field garden allotments was repealed by the Commons Act, 1876 (39 & 40 Vict. c. 56), s. 24, and since 1876 every such allotment has been awarded free of any such rent-charge. This rent-charge was to be allotted to someone interested in the inclosure in full or in part of his allotment or allotments, or it might be sold for the purpose of raising part of the expenses of the inclosure.

SECT. 4. Powers and Duties of Valuer etc.

they can obtain possession within a period not exceeding twelve months if the land shall be required for the poor inhabitants (*q*).

These powers of letting must, however, be read in conjunction with the powers conferred on parish councils with reference to allotments under their charge (*r*).

Application of rents of field gardens.

1257. The rents of the gardens are applicable in the payment of rates, taxes, tithe rent-charge, and any other outgoings and of any expenses incurred by the allotment wardens in the execution of their trusts and powers under the Acts. Any surplus must be applied to some of the following purposes, namely, in improving the field gardens or some of them in the parish or neighbourhood or maintaining the drainage or fencing thereof, or in hiring or purchasing additional land for field gardens in the same parish or neighbourhood (*s*), or for any of the purposes for which surplus rents from recreation grounds may be applied, including the redemption of any land tax, tithe rent-charge, or other charge on the field gardens (*t*).

Rent in arrear.

1258. In the event of the occupier of a garden allotment being in arrear with his rent for forty days, failing to observe the terms and conditions of his tenancy, or going to reside more than a mile outside the parish, the allotment wardens are required to serve notice upon such occupier, or to affix it on the church door if he has removed out of the parish, determining the tenancy at the expiration of one month from the service or affixing of the notice, and thereupon the tenancy is to be determined accordingly (*u*). If the occupier refuses to give up possession or any other person unlawfully takes possession of the allotment, the allotment wardens may recover possession by a warrant from justices as in proceedings under the Small Tenements Recovery Act, 1838 (*a*). They also have the same remedy for recovery of the rent due by distress and otherwise as if the legal estate were vested in them (*b*).

Provisions applicable to field gardens.

1259. The provisions as to the exchange or sale of recreation allotments to acquire land more suitable for the purpose, the restriction on the use of such allotments for purposes other than those for which they were set out, and the provisions as to furnishing periodical reports to the Board apply equally to allotments for field gardens and to allotment wardens (*c*).

Transfer of management.

1260. The allotment wardens are also empowered by agreement with any sanitary authority within whose district the place for which

(*q*) Commons Act, 1876 (39 & 40 Vict. c. 56), s. 26.

(*r*) See title ALLOTMENTS, Vol. I., pp. 336 *et seq.*; and as from 1st January, 1909, Small Holdings and Allotments Act, 1908 (8 Edw. 7, c. 36), ss. 27—30, 33 (4).

(*s*) Commons Act, 1876 (39 & 40 Vict. c. 56), s. 27.

(*t*) Commons Act, 1899 (62 & 63 Vict. c. 30), s. 16; and see p. 592, *ante*. Prior to 1876 surplus rents were paid over in aid of the poor rates of the parish (Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 112).

(*u*) Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 110. Compensation is to be made by the allotment wardens or their incoming tenant for crops (except prohibited ones) and manure or the benefit of manure, the amount, in case of difference, to be settled by the justices, to whom application may be made to give possession of the allotment (*ibid.*).

(*a*) *Ibid.*, s. 111; 1 & 2 Vict. c. 74.

(*b*) Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 112.

(*c*) See p. 592, *ante*.

SECT. 4. Powers and Duties of Valuer etc.

the allotments under their management were set out is situate, and with the sanction of the Board, to transfer the management of the allotments to the sanitary authority upon such terms and conditions as may be agreed upon, and upon any such transfer the land is to vest in the sanitary authority (*d*).

Scheme by Charity Commissioners.

1261. The Charity Commissioners have power, as in the case of a recreation allotment, to modify the provisions of an Inclosure Act or award with reference to a field garden allotment on the application of a district council or parish council interested (*e*).

SUB-SECT. 16.—*Allotments for Fuel and other Public Purposes.*

Allotments for other public purposes.

1262. Besides the allotments for recreation grounds and field gardens, allotments for other public purposes may be resolved upon by the persons interested at the meeting held for the appointment of the valuer or at some other meeting for the purpose, and may be embodied in his instructions (*f*). The principal matters for which allotments may be made and continued in use under parochial or other management are allotments for the supply of fuel for the labouring poor, quarries for the supply of road materials, and for public ponds or watering places.

Fuel allotments.

Fuel allotments were frequently set out both under private Inclosure Acts and in the early days of the Inclosure Commissioners in the north and other hilly districts where there were turbary rights, and peat or turf which could be used as fuel. They are often of considerable extent, and, coming as they do within the definition of land subject to be inclosed (*g*), when no longer suitable for the purpose for which they were set out or not required, have been and may be the subject of subsequent inclosure or regulation (*h*).

Vesting of allotments.

1263. Fuel allotments and other allotments for public purposes might be allotted to such persons and subject to such directions as the valuer with the approbation of the Inclosure Commissioners or the Board should direct, and in all cases where the valuer with such approbation as aforesaid should not think it necessary or proper to direct the same to be otherwise made, were to be made to the churchwardens and overseers of the parish (*i*). Where allotted originally to the churchwardens and overseers and in most other cases they will be now vested in the parish council, or where there is no parish council in the chairman and overseers of the parish,

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(*d*) Allotments Act, 1887 (50 & 51 Vict. c. 48), s. 13; but from 1st January, 1909, see Small Holdings and Allotments Act, 1908 (8 Edw. 7, c. 36), s. 33 (1).

(*e*) Commons Act, 1899 (62 & 63 Vict. c. 30), s. 18.

(*f*) See Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 34; and p. 548, *ante*. Some of these purposes involve a definite grant of the land and conveyance or allotment to the bodies or persons for whom they are intended; as land for a burying ground or enlarging a burying ground; sites for churches or chapels, parsonage houses, schools, workhouses, or for gardens to be attached thereto respectively.

(*g*) Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 11; and see p. 541, *ante*.

(*h*) *E.g.*, the fuel allotment which was the subject of dispute in *A.-G.* v. *Meyrick*, [1893] A. C. 1; and Harrow Weald Common, which was an old gravel allotment and has been the subject of a scheme under the Metropolitan Commons Acts.

(*i*) Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 73.

SECT. 4. Powers and Duties of Valuer etc.

like field garden allotments (*k*). And any future allotments will doubtless be so made.

They were frequently vested in the lord of the manor as a trustee for the labouring poor of the parish or other persons entitled, or they may have been set out for this purpose, but not allotted to any specific persons by name or office. In such cases questions have arisen as to the ownership of the soil. Where the allotment has not been made to any person or persons by name or office, the lord's interest in the soil remains, if there is nothing in the Act or award to transfer such interest; and he consequently has the power of refusing his consent to a subsequent inclosure and preventing it (*l*). If the allotment is made to the lord as trustee, and the trust as declared in the award does not exhaust the beneficial interest in the land, the lord is entitled to the unexhausted benefit (*m*).

Where, however, the allotment has been made to the churchwardens and overseers for the purposes of a fuel allotment, the legal estate in the land is vested in them (*n*); and presumably the lord would be excluded from any benefit if he received an allotment in respect of his right and interest in the soil, and there was no reservation of rights from which a reservation of the soil of the fuel allotment might be implied (*a*).

Sale and exchange.

1264. The powers of the Board to authorise the sale or exchange of recreation and field garden allotments apply also to other allotments for public purposes, whether made under early Inclosure Acts or under the Inclosure Acts administered by them (*b*).

Scheme by Charity Commissioners.

1265. Fuel allotments (with allotments for recreation grounds and field gardens) are not to be diverted from the uses declared in the Acts concerning the same; but the Charity Commissioners, in the exercise of their ordinary jurisdiction, may, upon the application of the trustees of any fuel allotment, authorise the use of such fuel allotment as a recreation ground or field garden or for either of those purposes, and order the establishment of a scheme for the administration of the fuel allotment accordingly; and may also, on the like application, authorise the exchange of a fuel allotment for land of equivalent value if in their opinion land better suited for the purpose can be so obtained (*c*).

Any provisions with respect to allotments for recreation grounds, field gardens, or other public or parochial purposes contained in any Act relating to inclosure or in any award or order made in pursuance thereof, and any provisions with reference to the management of any such allotments contained in any such Act, award, or

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(*k*) See note (*n*), p. 593, *ante*.
(*l*) *R.* v. *Inclosure Commissioners for England and Wales* (1871), 23 L. T. 778, where a large fuel allotment had been set out under an early inclosure on Chobham Common, Surrey.
(*m*) *A.-G.* v. *Meyrick*, [1893] A. C. 1.
(*n*) *Simcoe* v. *Pethick*, [1898] 2 Q. B. 555, C. A.
(*a*) See *A.-G.* v. *Meyrick*, *supra*.
(*b*) See p. 592, *ante*.
(*c*) Commons Act, 1876 (39 & 40 Vict. c. 56), s. 19.

order, may now, on the application of any district or parish council interested in any such allotment, be dealt with by a scheme of the Charity Commissioners in the exercise of their ordinary jurisdiction as if those provisions had been established by the founder, in the case of a charity having a founder (*d*).

SECT. 4. Powers and Duties of Valuer etc.

1266. Quarries and allotments for road repairs and for getting stone and gravel for the general use of the parish or of all the persons interested in an inclosure are subject to the same rules as other allotments for public purposes (*e*).

Quarries etc.

The terms of the Act and award as to the user of such quarries etc. must be adhered to (*f*).

Where land is set out as an allotment for the supply of road materials and the grass and herbage are awarded to other people, the surveyor of highways, or other highway authority, may, by ceasing to use the allotment and getting materials elsewhere, lose his right to get materials, and an adverse title may be acquired against him under the Real Property Limitation Act, 1833 (*g*), by exercise of acts of ownership over the allotment (*h*).

Adverse title.

SECT. 5.—*The Position and Powers with reference to Commons of Local Authorities.*

1267. Local authorities, *i.e.*, county councils, urban and rural district councils, and parish councils and parish meetings, under modern legislation bear an important part in all proceedings for inclosure or regulation. Notice of every application to the Board has to be served upon one or more of them, and their attitude with regard to the application naturally carries weight with the Board.

Local authorities concerned.

1268. For the purposes of this branch of the subject commons may be divided into two classes: suburban commons, *i.e.*, commons situate in or within six miles of any municipal borough or urban district with a population of 5,000 inhabitants (*i*); and non-

Classification of commons.

(*d*) Commons Act, 1899 (62 & 63 Vict. c. 30), s. 18.

(*e*) The rights of the surveyors of highways and of the highway authorities in whom their powers are now vested to get road materials from lands in the parish are dealt with later; see p. 604, *post*.

(*f*) *Rylatt* v. *Marfleet* (1845), 14 M. & W. 233, where an allotment of two acres was made under an early Inclosure Act for getting stone and gravel and other materials for the repair of the highways and the public and private roads set out by virtue of the Act, and for the use of the inhabitants of the parish of A., and it was held that the allotment was for the repair of roads only, and that a user of the allotment by inhabitants for private purposes was not authorised.

(*g*) 3 & 4 Will. 4, c. 27.

(*h*) *Thew* v. *Wingate* (1862), 10 B. & S. 741; *Smith* v. *Stocks* (1869), 10 B. & S. 701, 741.

(*i*) Commons Act, 1876 (39 & 40 Vict. c. 56), s. 8. The population is to be reckoned according to the last published census, and the distance is to be measured in a straight line from the town hall, or if there be no town hall, then from the cathedral or church, if there shall be only one church, or if there be more churches than one, then from the principal market place of such town to the nearest part of the common. When part only of a common is situate within the aforesaid distance from a town, such part is to be deemed for the

SECT. 5. Position and Powers etc. of Local Authorities.

suburban commons, including all land subject to be inclosed under the Inclosure Act, 1845 (*k*), other than metropolitan commons, which are the subject of special legislation (*l*), and town greens and village greens (*m*); but it must be borne in mind that notice of every application to the Board relating to any common must be served upon the parish council of every parish in which any part of the common is situate (*n*) and upon the district council, whether urban or rural, within whose district any part of the common is situate (*o*).

(1) Suburban commons.

1269. In regard to a suburban common, the town council or urban district council of any municipal borough or urban district with respect to which the common is suburban are invested with the following powers, in addition to the right of receiving notice of any application relating to the common :—

Powers of borough and urban district councils.

(1) Of appearing at any local inquiry held by order of the Board and making representations or proposals there or to the Board direct, regard being had to the health, comfort, and convenience of the inhabitants of their town (*p*).

(2) Of entering into undertakings, with the sanction of the Board, to contribute out of their funds towards the maintenance of recreation grounds, paths, or roads, or the doing of other things in relation to the common for the benefit of their town; or to pay compensation in respect of the rights of the commoners for the purpose of acquiring greater privileges for their town (*q*).

(3) Of making application for the regulation of the common with the consent of one-third in value of the interests in the common. If they are applicants for regulation, or if they undertake to make any contribution or other payment out of their funds, they may be invested with such powers of management and other powers as the Board consider expedient having regard to the benefit of the neighbourhood as well as to private interests (*r*).

Expenses.

Any expenses incurred by them may be defrayed out of any rate applicable to the payment of expenses incurred by them in the execution of the Public Health Act, 1875 (*s*), and not otherwise provided for (*t*).

Acquisition of common or rights of common.

They may acquire by gift and hold without licence in mortmain in trust for the benefit of their town the common and any rights in it (*a*). They may also purchase and hold in like manner, with

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purposes of the above-mentioned section to be a common separate and distinct from the part situated without and beyond such distance.

(*k*) 8 & 9 Vict. c. 118, s. 11; and see p. 541, *ante*.

(*l*) Metropolitan Commons Acts, 1866 to 1898; see p. 606, *post*.

(*m*) As to town greens and village greens, see p. 589, *ante*.

(*n*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 8 (4).

(*o*) *Ibid.*, s. 26 (2).

(*p*) Commons Act, 1876 (39 & 40 Vict. c. 56), s. 8, where they are referred to as the urban sanitary authority.

(*q*) *Ibid.*

(*r*) *Ibid.*

(*s*) 38 & 39 Vict. c. 55.

(*t*) Commons Act, 1876 (39 & 40 Vict. c. 56), s. 8.

(*a*) *Ibid.* Rights are probably equivalent to estates, such as the estate of a tenant for life or possibly an interest under a lease.

SECT. 5. Position and Powers etc. of Local Authorities.

a view to prevent the extinction of the rights of common, any saleable rights of common (by which rights of common in gross or stints must be intended) or any tenement of a commoner having annexed thereto rights of common (*b*).

A district council may purchase or take on lease lands for the purpose of their being used as public walks or pleasure grounds (*c*).

A district council has also the power, with the consent of the county council, of aiding persons to maintain rights of common the extinction of which would, in the opinion of the council, be prejudicial to the inhabitants of the district and of instituting or defending proceedings for that purpose (*d*).

County boroughs.

1270. The council of a county borough has all the above powers of a district council (*e*), but being itself a county council it does not require the consent of any other county council to any action which it may take. As the population of a county borough is at least 50,000, any common in which it is interested is necessarily a suburban common (*f*).

The council of a county borough or of an urban district may also make a scheme under the Commons Act, 1899 (*g*), for the improvement and management of a suburban common within their district and the management of the common will then be vested in the council (*h*).

Rural district councils.

1271. Rural district councils have the same powers of making a scheme and of undertaking the management of a common within their district and may delegate their powers of management to the council of any parish within which the common is situate, and thereupon the Public Health Acts apply as if the parish council were a parochial committee (*i*).

Parish councils.

1272. The powers of a parish council are necessarily limited by the small funds at their disposal. They receive notice of any application to the Board relating to a common any part of which is in their parish (*j*), and may make representations on the subject at any local inquiry and to the Board; they may provide or acquire land for a recreation ground and for public walks and may make bye-laws relating to it (*k*); they may apply to the Board for the regulation or inclosure of a common (*l*); they may accept and hold

(*b*) Commons Act, 1876 (39 & 40 Vict. c. 56), s. 8. "Rights in common," in the Act, is probably a misprint for "rights of common." This is a valuable power as a means of preventing the inclosure of a common, or a part thereof, by a lord of the manor, though of less importance since the passing of the Law of Commons Amendment Act, 1893 (56 & 57 Vict. c. 57), under which the consent of the Board is required to any inclosure or approvement under the Statute of Merton and the Statute of Westminster II., or either of them; see p. 509, *ante*.

(*c*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 164.

(*d*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 26 (2), (3).

(*e*) *Ibid.*, s. 26 (7).

(*f*) See p. 597, *ante*.

(*g*) 62 & 63 Vict. c. 30, s. 1.

(*h*) *Ibid.*, s. 3. As to this Act, see p. 611, *post*.

(*i*) *Ibid.*, ss. 1, 4; Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 202; and see p. 611, *post*.

(*j*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 8 (4).

(*k*) *Ibid.*, s. 8 (1) (b).

(*l*) *Ibid.*, s. 8 (1) (c). But, presumably, this section is to be read in conjunction

SECT. 5. Position and Powers etc. of Local Authorities.

any gifts of property, real or personal, for the benefit of the inhabitants of the parish or any part thereof (*m*) which would enable them to accept by gift a right of common or commonable tenement.

Public Improvements Act, 1860.

If the population of the parish is more than 500, and the Public Improvements Act, 1860 (*n*), is adopted by the parish meeting, they have power to purchase or lease lands for the purpose of public walks, and exercise or play grounds (*o*). They may contribute towards the expense of doing any of the things above mentioned, and may combine with any other parish council with that object (*p*). They may accept the powers of management delegated to them by a district council under a scheme made in pursuance of the Commons Act, 1899; and may agree to contribute the whole or part of the expenses of and incidental to the preparation and execution of such a scheme for the regulation and management of any common within their parish, such contribution being limited by their powers as to a general rate (*q*).

In parishes which are too small to have a parish council, the Public Improvements Act, 1860, cannot be adopted by the parish meeting, as the population is necessarily under 500, but the parish meeting may obtain from the county council any of the powers conferred by the Local Government Act, 1894, on a parish council (*r*).

(2) Non-suburban commons.

1273. In the case of non-suburban commons, notice of any application to the Board relating to a common is to be served upon the district council within whose district the common is situate, and also upon the parish council of the parish.

Powers of district council.

In relation to commons within their district a district council may, with the consent of the county council:—(1) Aid persons in maintaining rights of common, where, in the opinion of the council, the extinction of such rights would be prejudicial to the inhabitants of the district; (2) exercise the powers which, under s. 8 of the Commons Act, 1876, may be exercised by an urban sanitary authority in relation to a suburban common (*s*); and (3), for the purposes of carrying these powers into effect, institute or defend any legal proceedings and generally take such steps as they deem expedient (*t*).

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with s. 2 of the Commons Act, 1876 (39 & 40 Vict. c. 56), under which the Board are not to proceed to carry any application into effect without the consent of one-third in value of the interests in the common. The Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 8 (c), refers to the application as being made under s. 9 of the Commons Act, 1876 (39 & 40 Vict. c. 56); but possibly s. 9 was a misprint for s. 8 of the Commons Act, 1876, which would have been more appropriate, and would have given the parish council the same powers as an urban sanitary authority in this respect.

(*m*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 8 (1) (h).

(*n*) 23 & 24 Vict. c. 30.

(*o*) See Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 7, and the Public Improvements Act, 1860 (23 & 24 Vict. c. 30). The expenses incurred under the last-mentioned Act are to be defrayed by a special rate and not treated as part of the general expenses of the parish council (Local Government Act, 1894, s. 7 (6)).

(*p*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 8 (1) (k).

(*q*) Commons Act, 1899 (62 & 63 Vict. c. 30), ss. 4, 5; Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 11.

(*r*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 19 (10).

(*s*) See p. 598, *ante*.

(*t*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 26 (2), (3).

SECT. 5. Position and Powers etc. of Local Authorities.

Differences from cases of suburban commons.

1274. The principal difference between the powers exercisable by a district council with reference to a non-suburban common and with reference to a suburban common lies in the fact that in the former case the common must be within their own district, that the consent of the county council is required to any action on the part of the district council, and that their powers are derived under the Local Government Act, 1894, and not under the Commons Act, 1876.

Parish councils etc.

1275. Parish councils and parish meetings have none of the powers specified in s. 8 of the Commons Act, 1876. In other respects their powers in relation to a common which is not suburban are practically the same as those stated above in relation to a suburban common.

Miscellaneous powers.

1276. Besides the powers above mentioned which relate to commons generally, county councils and district councils have power to assert and protect the rights of the public over roadside strips (*u*). As from 1st January, 1909, borough councils, urban district councils, and parish councils may acquire land for common pasture for the labouring population (*a*).

Part XI.—Regulation of Commons.

SECT. 1.—*Regulation under the Inclosure Acts*, 1845—1882 (*b*).

Early stages of regulation.

1277. The preliminary steps towards a provisional order for regulation of a common under the above Acts, as regards the advertisements of the intention to make application to the Board (*c*); the service of notices on the council of every parish, and urban or rural district council in or within the district of which any part of the common is situate, and upon the local authority of any town or towns in respect of which the common may be suburban; and the supplying information to the Board to enable them to judge whether a *primâ facie* case is made out for holding a local inquiry, are the same as on an application for inclosure, which have been already explained (*d*), and it is therefore only necessary to draw attention to those provisions of the Acts which relate solely to regulation.

(*u*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 11 (i.); Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 26.

(*a*) Small Holdings and Allotments Act, 1908 (8 Edw. 7, c. 36), s. 34. For the procedure to be adopted for acquiring such common pastures, see *ibid.*; and title SMALL HOLDINGS.

(*b*) The Commons Act, 1899 (62 & 63 Vict. c. 30), though by s. 24 directed to be read with the Inclosure Acts, 1845 and 1882, is here omitted, as the procedure for regulation under that Act is distinct, see p. 611, *post*.

(*c*) See p. 543, *ante*.

(*d*) See pp. 543, 544, *ante*. "Common" in the Commons Act, 1876 (39 & 40 Vict. c. 56), s. 37, is defined to mean, unless the context otherwise requires, any land subject to be inclosed under the Inclosure Acts, 1845 and 1868; see p. 541, *ante*. The consent to the application of one-third in value of the interests to be affected by the provisional order, and the consent of two-thirds to the provisional order and of the lord of the manor, where the lord is entitled to the soil in right of his manor, are also required (Commons Act, 1876 (39 & 40 Vict. c. 56), s. 12); see note (*o*), p. 546, *ante*.

SECT. 1. **Regulation under the Inclosure Acts, 1845—1882.**

1278. A provisional order for regulation may provide, generally or otherwise, for the "adjustment of rights" and "improvement of the common," or for any of the things comprised under those two expressions, or may state that all or any of those subjects are to be provided for in the proceedings subsequent to the confirmation of the provisional order by Parliament (*e*).

Adjustment of rights.

1279. "Adjustment of rights" in respect of a common, for the purposes of the Act, comprises all or any of the following things:—

Where land waste of manor.

(1) As respects rights of common of pasture in a common being waste land of a manor (*f*)—the determination of the persons by whom, the stock by which, and the times at which such common of pasture may be exercised.

(2) As respects rights of common of turbary or taking of estovers, or taking gravel, stone, or otherwise interfering with the soil of the common, being waste land of a manor—the determination of the persons by whom, and the mode and place or places in which, and the times at which such rights are to be exercised, and also, on compensation made to any person aggrieved either by grant of a right of equal value, or with his consent in writing, in money (*g*), the restriction, modification, or abolition of all or any of such rights which may permanently injure the common.

Where land not waste of manor.

(3) As respects rights of common in land which is not waste land of a manor—the stinting or other determination of such rights, and the persons by whom, and the mode in which, and the times at which, such rights are to be exercised, with a similar provision for the restriction, modification, or abolition of any of such rights which may be injurious to the general body of the commoners or the proper cultivation of the land.

Whether land waste or not.

(4) As respects any common, whether or not waste of a manor—the determination of the rights and obligations of the lord of the manor, severalty owners or other person or persons entitled to the soil of such common, with similar provision for the restriction, modification or abolition of all or any of such rights, and in particular, in the case of severalty owners, of all or any of such rights which may be injurious to the general body of the severalty owners, or to the proper cultivation of the land; and

(5) Generally as respects any common, whether or not waste land of a manor—the determination of any rights and settlement of any disputes relating to boundaries, rights in the soil or in

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(*e*) Commons Act, 1876 (39 & 40 Vict. c. 56), s. 3.

(*f*) "Waste land of a manor" means and includes any land consisting of (1) waste land of any manor on which the tenants of such manor have rights of common, (2) any land subject to any rights of common which may be exercised at all times of the year for cattle levant and couchant, or (3) any land subject to any rights of common which may be exercised at all times of the year and are not limited by number or stints (*ibid.*, s. 37). It need not, therefore, be necessarily parcel of a manor at all.

(*g*) The raising of the money is provided for by s. 18 of the Commons Act, 1876 (39 & 40 Vict. c. 56), which enacts that, subject to the terms of the provisional order, the amount of any such compensation shall be deemed to be expenses of and incidental to the regulation of the common, and may be defrayed accordingly.

the produce of the soil, or otherwise, whether arising between the commoners themselves or between the commoners in relation to the lords of the manors, severalty owners, or other person or persons entitled to the soil of the common, which settlement may be conducive to the interests of all or any class of persons interested in the commons (*h*).

Improvement of common.

1280. "Improvement of a common" comprises for the purposes of the Act all or any of the following things:—(1) The draining, manuring, and levelling of the common; (2) the planting of trees on parts of such common, or in any other way improving or adding to the beauty of the common; (3) the making or causing to be made bye-laws and regulations for the prevention of or protecting from nuisances or for keeping order on the common; (4) the general management of such common; (5) the appointment from time to time of conservators of the common for the purposes aforesaid (*i*).

Field gardens and recreation grounds.

1281. Allotments for field gardens and recreation grounds may also be provided for in a provisional order for regulation. As, however, one of the main objects of regulation is to keep the common open, power is frequently given to the conservators to set apart a specified portion for games, with powers of temporarily inclosing it with posts and chains or other open fence, while a right of general recreation over the whole of the common is reserved to the public with or without restrictions (*j*). Where a power of temporarily inclosing a space for cricket or other games is given the inclosure must not unreasonably interfere with the rights of commoners, although such rights must be necessarily subject to the reasonable exercise of the rights of recreation and playing games conferred; and access for commonable beasts at suitable times and seasons must be allowed by the conservators (*k*).

For the same reason field garden allotments are not usually required by the Board to be made, unless there is special need for them in the locality, and the extent of the common admits of their being provided (*l*).

Advantages of appointment of conservators

1282. The appointment of conservators with powers of management and preventing encroachments, of making bye-laws for the protection of and prevention of nuisances on the common, and of obtaining convictions for offences against the bye-laws by summary

(*h*) Commons Act, 1876 (39 & 40 Vict. c. 56), s. 4.

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

(*j*) Whether such a right will be assented to by the lord of the manor and commoners depends to a great extent upon the nature and situation of the common. In a Yorkshire case where the common was a grouse moor, and a road was set out to give access to a recreation ground on the top of a hill near Ilkley, the road and ground were to be open to the public from one hour before sunrise till one hour after sunset, and no dogs were to be allowed; and in some Welsh inclosure cases the public were to have free access over the allotments until planted or cultivated.

(*k*) *Ratcliffe* v. *Jowers* (1891), 8 T. L. R. 6.

(*l*) The Commons (Expenses) Act, 1878 (41 & 42 Vict. c. 56), s. 4, gives power to set out allotments for this purpose. For the provisions as to the management of recreation and field garden allotments and the application of the rents arising therefrom, see pp. 591—595, *ante*.

SECT. 1. **Regulation under the Inclosure Acts, 1845—1882.**

proceedings before justices, is one of the most valuable features of regulation, as a responsible body is constituted with definite powers (*m*).

Inclosure provisions to be adopted where applicable.

1283. The Board may insert in any provisional order for regulation any provisions they may deem necessary for carrying the order into effect; but, subject as aforesaid, the proceedings for carrying into effect the regulation are the same so far as practicable as they would be if the common were to be inclosed instead of being regulated, and the provisions of the Inclosure Acts are to apply accordingly (*n*).

Metropolitan commons.

1284. Metropolitan commons may not be regulated under the Commons Act, 1876 (*o*).

Inclosure of regulated common.

1285. Where an Act has been passed confirming a provisional order for the regulation of a common, then, subject and without prejudice to the provisions of the order, no part of such common can be inclosed without the subsequent sanction of Parliament (*p*).

Provision as to road materials from regulated common.

1286. When a common has been regulated by a provisional order of the Board duly confirmed, or is the subject of a scheme, also confirmed, under the Metropolitan Commons Acts, or of a scheme under the Commons Act, 1899, or, being within the metropolitan police district, is the subject of any private or local Act having for its object the preservation of such common as an open space, no surveyor of highways or highway authority has power to search for or get gravel, sand, stone, or other materials for road repairs from any part of the common which has not been set apart for that purpose with the sanction of Parliament without the consent of the persons or body who have the regulation or management of the common, or, in default of such consent, without an order of justices in petty sessions for the petty sessional district in which the common is situate, who may in their order prescribe conditions as to the mode of working and the restitution of the surface as they deem expedient (*q*).

(*m*) Under the ordinary law the remedy of the lord of the manor and commoners would usually be the costly one of an action for trespass; see note (*b*), p. 608, *post*.

The number of conservators and the persons or bodies by whom they are to be appointed are specified in the provisional order. Usually the lord of the manor stipulates for the right of appointing one or more, a certain number are elected by the commoners, the parish council has of recent years been usually given one or more representatives, and if the district council or urban sanitary authority agree to contribute to the expenses of management, they may be given representation; where the common rights are of little or no value the management of the common may be, and sometimes is, vested in them; see pp. 598, 599, *ante*.

(*n*) Commons Act, 1876 (39 & 40 Vict. c. 56), s. 13.

(*o*) *Ibid.*, s. 35. For the provisions applicable see pp. 606 *et seq.*, *post*.

(*p*) *Ibid.*, s. 36.

(*q*) *Ibid.*, s. 20; Commons Act, 1899 (62 & 63 Vict. c. 30), s. 8. Under the above section the justices have an absolute discretion as to making or refusing to make an order (*Hayes Common Conservators* v. *Bromley Rural District Council*, [1897] 1 Q. B. 321). As mentioned above (see p 595, *ante*), the provision of an allotment for the supply of materials for the repair of the roads in the parish was usual in inclosures, and is not uncommon in cases of regulation.

Under the Highways Act of 1835 (5 & 6 Will. 4, c. 50), s. 51, surveyors of highways were empowered to search for and get road materials from any waste land or common ground, river, or brook within their parish, or within any other

SECT. 1. Regulation under the Inclosure Acts, 1845—1882.

1287. The expenses of and incidental to the regulation of a common (*r*) may, if the Board think fit, be provided for by the insertion in the provisional order of a clause authorising the raising and payment of such expenses by a sale of a portion of the common, in which case the situation and maximum quantity of the portion to be sold is to be specified in the provisional order (*s*). The expenses will then be raised and paid as in a case of inclosure (*t*).

Expenses of regulation.

The provisional order may also provide for the raising from time to time by such persons interested in the common, and for such amounts as the Board think fit, of money, to be applied towards the improvement or protection of the common (*a*), either (1) by means of rates to be levied on the persons and in respect of the property who and which will be benefited or principally benefited by such improvement or regulation (*b*), or (2) by means of the sale of any outlying or small portion of the common not exceeding in the whole one-fortieth of the total area (*c*). In the case of a sale

Expenses of improvements.

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parish if such materials could not be conveniently had within the parish for which they were to be used, and sufficient was left for the use of the roads in such other parish. No compensation for taking the materials from the common is paid, but s. 55 contains provisions for making good damage and fencing off pits and dangerous places and penalties for non-observance.

By the Highway Act, 1841 (4 & 5 Vict. c. 51), "lands and grounds in the exclusive occupation of one or more persons for agricultural purposes" are to be deemed inclosed lands in the provisions of the above Act relating to the taking of materials for roads although not separated from any adjoining lands or grounds of other persons or from the highway by any fence or other inclosure. Materials cannot therefore be taken from common fields without an order of justices, which is required when they are taken from inclosed land. "Inclosed" ordinarily means "*de facto* inclosed" (*Tongue* v. *Plumstead Board of Works*, *Times*, 5th Nov., 1866, p. 9, *per* WILLES, J.).

For the devolution of the powers of surveyors of highways under the Highway Acts and the highway authorities at the present time, see title HIGHWAYS.

(*r*) These expenses include the expenses of the Board and the parties in connection with the local inquiry and otherwise in obtaining the provisional order and carrying it out down to the confirmation of the valuer's award. They are frequently borne by local authorities or by subscription. If not so provided for or raised under the above provision, they would be raised by the valuer by rate on the persons interested in proportion to their interests, in the same way as similar expenses in case of inclosure; see p. 582, *ante*.

(*s*) Commons (Expenses) Act, 1878 (41 & 42 Vict. c. 56), s. 2.

(*t*) [illegible]

(*a*) These expenses are expenses connected with the regulation and improvement of the common after the regulation proceedings have been completed, and the conservators have come into office. Their powers will necessarily depend upon the funds at their disposal. Contributions from local authorities and voluntary subscriptions may suffice. If a rate is provided for, the provision that it is to be raised by persons interested in the common makes it necessary that some of the conservators at least should be persons interested, and the provision that it may be made on the persons and property benefited or principally benefited would imply that a charge may be made on commoners exercising rights of common. In a recent case of regulation (Sodbury Commons, Gloucestershire) where all the inhabitant householders of a town were entitled to rights of common, but the rights were exercised by a comparatively small number, it was contemplated that the rate, if required, would be levied upon the persons who exercised the right in each year. The same practice prevails in many manors, under the custom of the manor, to provide for the expenses of a "hayward," or person appointed to look after the stock on the common.

(*b*) Commons Act, 1876 (39 & 40 Vict. c. 56), s. 14.

(*c*) *Ibid.*

SECT. 1. Regulation under the Inclosure Acts, 1845–1882.

the situation and maximum quantity is to be specified in the provisional order, and the proceeds of sale may be invested and the income used, with power to resort to the capital from time to time (*d*).

SECT. 2.—*Regulation of Metropolitan Commons.*

Metropolitan commons regulated by scheme.

1288. The regulation of metropolitan commons, or commons the whole or any part of which is situate within the metropolitan police district as defined in 1866 (*e*), is carried out by the machinery of the Metropolitan Commons Acts, 1866 to 1898 (*f*); and no such common or any part thereof may be inclosed or regulated under the Inclosure Acts, 1845 to 1882 (*g*).

In the Metropolitan Commons Acts "common" means (1) land subject at the passing of the Metropolitan Commons Act, 1866, to any right of common (*h*), and (2) any land subject to be inclosed under the provisions of the Inclosure Act, 1845 (*i*).

The main object of proceedings under the Metropolitan Commons Acts is the establishment of local management by means of a scheme with a view to the expenditure of money on the drainage, levelling, and improvement of a metropolitan common and to the making of bye-laws and regulations for the prevention of nuisances and the preservation of order thereon by means of a scheme approved by the Board and subsequently confirmed by Parliament (*k*).

Procedure.

1289. A memorial for a scheme may be presented to the Board by (1) the lord of the manor, or (2) any commoners, or (3) the local authority (*l*), for a district into which any part of the common extends, or (4) any twelve or more ratepayers inhabitants of the parish or parishes in which the common is situate (*m*).

Draft scheme.

After consideration and such examination and inquiry as is thought advisable into the subject-matter of the memorial, the Board may prepare a draft scheme respecting the common or any

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(*d*) Commons (Expenses) Act, 1878 (41 & 42 Vict. c. 56), s. 3.

(*e*) For the definition of the metropolitan police district in 1866, see Metropolitan Police Act, 1829 (10 Geo. 4, c. 44), Schedule; Metropolitan Police Act, 1839 (2 & 3 Vict. c. 47), s. 2.

(*f*) Metropolitan Commons Act, 1866 (29 & 30 Vict. c. 122); Metropolitan Commons Act, 1869 (32 & 33 Vict. c. 107); Metropolitan Commons Act, 1878 (41 & 42 Vict. c. 71); Metropolitan Commons Act, 1898 (61 & 62 Vict. c. 43).

(*g*) Metropolitan Commons Act, 1866 (29 & 30 Vict. c. 122), s. 5.

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

(*i*) Metropolitan Commons Act, 1869 (32 & 33 Vict. c. 107), s. 2. In the Act, the term is "subject to be included"; but this is evidently a misprint for "subject to be inclosed." For a statement of what lands come under this definition, see p. 541, *ante*.

(*k*) Metropolitan Commons Act, 1866 (29 & 30 Vict. c. 122), s. 6.

(*l*) The "local authority" is as to a common the whole or any part whereof is within the county of London the London County Council; as to a common the whole or any part whereof is within an urban district, and no part whereof is within the county of London, the borough council or district council; and as to any other metropolitan common, the parish council (*ibid.*, Schedule, as amended by the Local Government Act, 1894 (56 & 57 Vict. c. 73), which constituted the borough councils and district councils in place of the old local boards and the parish council in place of the vestry).

(*m*) Metropolitan Commons Act, 1869 (32 & 33 Vict. c. 107), s. 3.

part of it. Prints of the draft are delivered to the memorialists, the lord of the manor, and the local authority, and the scheme or an abstract of it is published by deposit in the locality and advertisement in the local papers (*n*). The publication and circulation of the scheme is effected in such manner as the Board think sufficient for giving information to all parties interested.

Objections.

During two months from the first publication of the scheme objections and suggestions in writing may be made to the Board (*o*); and after the expiration of that period the Board may, and usually do, direct a local inquiry to be held by an assistant commissioner or other officer, who holds a sitting or sittings in the locality, receives evidence and information, inquires into any objections or suggestions made, and makes a written report to the Board setting forth the result of the inquiry and whether in his opinion the scheme should be approved without alteration, or with what alterations, if any, and his reasons for the same, and his opinion upon the objections and suggestions, if any, made at the inquiry (*p*).

Approval.

As soon as may be after the expiration of the said two months or the receipt by the Board of the report of the assistant commissioner, as the case may be, the Board proceed to consider any objections or suggestions made to them in writing respecting the scheme, and the report, if any, and thereupon, if they think fit, finally settle and approve of the scheme in such form as they think expedient (*q*).

Confirmation.

The scheme, after being certified and sealed by the Board, is printed and published in the same way as the draft scheme, and in their annual report to Parliament the Board are to state the grounds of their approval, the objections made and overruled, the proceedings in relation to such objections, and the grounds on which they were overruled. As the scheme must receive the sanction of Parliament, a confirmatory Bill is introduced by the President of the Board, as in the case of provisional orders; and if in its progress through Parliament a petition is presented against the Bill, it is referred to a Select Committee, and the petitioner or petitioners can appear and oppose (*r*).

Usual provisions of scheme.

1290. The leading provisions usually inserted in a scheme under these Acts are, as stated by the Board (*s*),—

"(1) That the common shall be regulated and managed by a body specified in the scheme, generally either the local authority or a body of elected conservators;

(*n*) See Metropolitan Commons Act, 1866 (29 & 30 Vict. c. 122), s. 9. A draft scheme is sometimes sent with the memorial, in which case it is settled by the Board.

(*o*) *Ibid.*, s. 10.

(*p*) *Ibid.*, ss. 11, 12. Fourteen days' notice must be published of any sitting by an assistant commissioner, except of an adjourned sitting. A sitting may now be adjourned without the personal attendance of the assistant commissioner, as in meetings under the Inclosure Acts (Commons Act, 1899 (62 & 63 Vict. c. 30), s. 20).

(*q*) Metropolitan Commons Act, 1866 (29 & 30 Vict. c. 122), s. 13.

(*r*) *Ibid.*, ss. 18, 19, 21, 23; Commons Act, 1899 (62 & 63 Vict. c. 30), s 21, as to the report of the Board.

(*s*) Annual Report of the Board of Agriculture for the Year 1902, which is published as a parliamentary paper (1903, Cd. 1519).

SECT. 2. Regulation of Metropolitan Commons.

"(2) That this managing body may execute works for the protection and improvement of the common, that they shall maintain it free from encroachments and shall not permit trespass on or inclosure of any part of it, and that they may set apart portions of it for games (*t*);

"(3) That the managing body shall make bye-laws and regulations, subject to confirmation by the Local Government Board, for the prevention of nuisances and the preservation of order on the common, which bye-laws may include various specified purposes (*a*), and may impose penalties recoverable on summary conviction (*b*).

"(4) A saving of all rights of a profitable or beneficial nature in, over, or affecting the common, except so far as such rights shall be purchased or acquired or otherwise compensated for by the managing body."

Map or plan.

1291. Although the Act makes no reference to a map or plan, every common which is the subject of a scheme is delineated on a map or plan therein referred to which is deposited with the Board.

Conclusiveness of maps and scheme.

The map and scheme are conclusive as to the limits and extent of the common; and the owner of land included in the scheme cannot, after the passing of the confirmatory Act, successfully assert his title thereto and contend that the land is not subject to the jurisdiction of the conservators (*c*).

(*t*) Temporary inclosures by posts and chains or other open fence are commonly authorised for the protection of a cricket pitch etc., and even the erection of such a fence which was intended to be permanently maintained has been held to be within the powers of conservators provided that access for the commonable cattle of a common at all suitable times and seasons was provided (*Ratcliffe* v. *Jowers* (1891), 8 T. L. R. 6).

(*a*) Bye-laws under a scheme prohibiting the delivery of any public speech, lecture, sermon, or address of any kind, except with the written permission of the authority in whom the management of the common was vested, and on such parts of the common and at such times as should be directed or sanctioned by the authority, were held valid. No right on the part of the general public to hold meetings on a common is known to the law (*De Morgan* v. *Metropolitan Board of Works* (1880), 5 Q. B. D. 155); but a bye-law cannot prejudicially affect a beneficial interest saved by a scheme (*Hoare* v. *Metropolitan Board of Works* (1874), L. R. 9 Q. B. 296).

(*b*) This power of summary conviction is one of the most beneficial features of regulation of a common either under this Act or the Inclosure Acts. In the absence of such a power, a civil action for damages against persons who are usually impecunious is practically the only remedy which even the lord of the manor has for offences on or damage to a common, and the power of bringing offenders before a magistrate is much more effectual. Under the Malicious Damage Act, 1861 (24 & 25 Vict. c. 97), s. 16, it is made a felony punishable with penal servitude to unlawfully and maliciously set fire to, among other things, any heath, gorse, furze, or fern wherever growing, but the severity of the penalty, independently of the difficulty of proof, made convictions hard to obtain, and by the Summary Jurisdiction Act, 1899 (62 & 63 Vict. c. 22), s. 1 and Schedule, minor penalties may in certain cases be imposed.

(*c*) *Cook* v. *Mitcham Common Conservators*, [1901] 1 Ch. 387, where the owner of land which was included in the memorial and subsequently in the scheme stood by and took no notice of the inquiry or proceedings; *Newton* v. *Chislehurst Common Conservators* (1887), [1901] 1 Ch. 389, n., where the land had been included in the map sent with the memorial to the Land Commissioners; and the assistant commissioner, who held the local inquiry, had decided, on the objection of the owner, that the land in question was not part of the common and ought not to be included, but, owing to representations subsequently made

SECT. 2. Regulation of Metropolitan Commons.

1292. There is an important difference between the procedure in the case of a scheme relating to a metropolitan common and that relating to the regulation or inclosure of a common under the Inclosure Acts in that no consent of the lord of the manor or of the commoners is required in the case of the former, the idea being that under a scheme private rights will be interfered with as little as possible and only so far as may be necessary for the proper management of the common and its preservation for the enjoyment and recreation of the neighbourhood (*d*).

No consents requisite.

Every scheme must state, however, what rights, if any, claimed by any person or class of persons are affected by the scheme and to what extent and whether or not such persons or any of them have consented to the scheme (*e*); and it is expressly enacted that no estate, interest, or right of a profitable or beneficial nature in, over, or affecting a common (*f*) shall, except with the consent of the person entitled thereto, be taken away or injuriously affected without compensation being made or provided for the same; and such compensation is to be ascertained and provided in case of difference under the provisions of the Lands Clauses Acts with reference to the compulsory taking or injuriously affecting of lands (*g*).

Private rights.

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to the office contrary to the facts, it was included in the map and scheme. An opportunity of rectifying the error was subsequently afforded, when the conservators applied for an amending scheme, and the owner of the land opposed the Bill and obtained restitution of the land.

(*d*) In nearly all the schemes which have been confirmed up to the present time the lords of the manors and the commoners have, however, either been consenting parties or have not opposed. The two exceptions related (1) to the Banstead commons, where the scheme was confirmed after strong opposition on the part of the owners of the soil in both Houses of Parliament; and (2) to Ham Common, where the opposition of the lord of the manor was mainly directed against some common fields being included in the scheme, and to that extent was successful.

(*e*) Metropolitan Commons Act, 1866 (29 & 30 Vict. c. 122), s. 14.

(*f*) The right to maintain and renew a signpost in front of a public-house is such a right (*Hoare* v. *Metropolitan Board of Works* (1874), L. R. 9 Q. B. 296).

(*g*) Metropolitan Commons Act, 1866 (29 & 30 Vict. c. 122), s. 15. This section and the general effect of the Metropolitan Commons Act were discussed at length by JESSEL, M.R., in *A.-G.* v. *Amhurst* (1879), 23 Sol. Jo. 443, relating to Hackney Downs and one of the early schemes under the Act. Later schemes have been framed in accordance with the judgment in that case. A full note of the judgment taken from the shorthand notes will be found in Sir Robert Hunter, Open Spaces, Footpaths, and Rights of Way, 2nd ed., p. 468. The scheme in question conferred upon the Metropolitan Board of Works over certain Hackney commons, including Hackney Downs, powers of management, improvement, and protection from encroachment with a view to good order, prevention of nuisances, and improving the commons; which, as the Master of the Rolls held, conferred upon them a sort of modified possession of the land to enable them to carry out the duties imposed upon them. The scheme contained a statement of the rights claimed over the common as required by s. 14 of the Act, and a further statement that the scheme affected the rights so claimed only so far as was absolutely necessary for the purposes contemplated by the scheme, but did not contain any provision for compensation being made or provided for in the event of any right of a profitable or beneficial nature being taken away or injuriously affected. There was also a saving clause as regards all estates, interests etc., of a profitable or beneficial nature as if the scheme had not been confirmed. The Master of the Rolls held that the lord of the manor had no longer a legal right to interfere with the

SECT. 2. **Regulation of Metropolitan Commons.**

Any person claiming any estate, interest, or right in, over, or affecting a common which is the subject of a scheme who is dissatisfied with any determination made or implied by the Board or by the scheme concerning such estate, interest, or right may obtain a decision thereon by an action at law in the manner provided by the Inclosure Act, 1845 (*h*).

Appeal to court of law.

Amendment of schemes.

1293. Schemes confirmed by Act of Parliament may be subsequently amended, and in such case the procedure is the same as in the case of an original scheme (*i*).

Expenses of scheme.

1294. The expenses of the Board in relation to any memorial or to a scheme consequent thereon are defrayed by the memorialists, or by ratepayers or inhabitants of the parish or district or of the metropolis, or by the local authority if respectively willing to defray those expenses, and payment on account or security for such expenses may be required by the Board (*k*).

The local authority for a metropolitan common may contribute towards the expenses of executing a scheme, including the payment of compensation, if any, to be paid in pursuance thereof, such amount as they think fit, in a gross sum or by annual payments or otherwise; and all expenditure incurred by a local authority is to be defrayed by them out of the local rate and raised by means thereof (*l*).

The London County Council, as successors of the Metropolitan Board of Works, may also make similar contributions in relation to any metropolitan common, although not one for which they are the local authority, out of the rate leviable under the Metropolis Management Acts (*m*).

Powers of London County Council.

1295. The London County Council has within the county of London the same powers of buying and holding rights of common and property having rights of common annexed thereto as a district council in the case of a suburban common (*n*).

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officers of the Metropolitan Board of Works in keeping order, keeping off bad characters, or in improving the grass, draining or levelling the common etc. (which before the confirmation of the scheme he could have done as owner of the soil), his rights in this respect not being profitable or beneficial rights; but that his right of taking gravel etc. was a different matter, and he refused to grant an injunction against the lord to prevent him from exercising this right, which was of a profitable or beneficial nature, in the absence of any evidence that such taking of gravel was not legal.

The schemes of the Board subsequent to that decision contain a provision that rights of a profitable or beneficial nature are not to be injuriously affected without compensation being made or provided for, and that until the compensation agreed upon or awarded is paid the rights may continue to be exercised. See the Banstead commons scheme set out in Appendix IV. to Sir Robert Hunter's book above referred to.

(*h*) 8 & 9 Vict. c. 118, s. 56; see p. 558, *ante*. This power must presumably be exercised before the confirmation of the scheme by Act of Parliament.

(*i*) Metropolitan Commons Act, 1866 (29 & 30 Vict. c. 122), s. 27.

(*k*) *Ibid.*, s. 24.

(*l*) *Ibid.*, ss. 25, 26, and Sched. I., which defines the local authority for each class of metropolitan commons; see p. 606, *ante*.

(*m*) *Ibid.*, s. 25, and Sched. I.

(*n*) Metropolitan Commons Act, 1878 (41 & 42 Vict. c. 71), s. 2; and see p. 598, *ante*.

SECT. 2. **Regulation of Metropolitan Commons.**

The Corporation of the City of London has powers of acquiring commons and estates and interests in them within twenty-five miles from the nearest boundary of the City, and not within the county of London, and also powers of acquiring common rights and of assisting in the preservation of commons as open spaces similar to those which the London County Council has within the county, and may exercise powers of management and make bye-laws for the regulation of commons so acquired (*o*).

Corporation of City of London.

1296. Provision is made with reference to the persons who are to act for lords of manors and other persons who may be under disability (*p*); consents in the case of Crown lands and of lands belonging to the Duchies of Lancaster and Cornwall (*q*); the appointment of agents by special power of attorney exempt from stamp duty (*r*); the removal of the requirements of the Charitable Uses Act, 1735 (*s*), with reference to land conveyed for charitable uses in the case of estates, interests, or rights in over, or affecting a common which may be conveyed by deed for the purposes of a scheme (*t*); and the Crown is enabled to grant in manner therein specified any wastes of the manor of East Greenwich and any rights of common in, over, or affecting any metropolitan common (*a*).

Miscellaneous provisions.

Every scheme is to contain a provision for the sale of printed copies thereof to persons desirous of purchasing them at a reasonable price to be fixed by the scheme (*b*).

SECT. 3.—*Regulation of Commons under the Commons Act*, 1899.

1297. The principles of regulation under the Metropolitan Commons Acts have been recently extended to commons outside the metropolitan area by the Commons Act, 1899 (*c*), under which the council of an urban or rural district (*d*) may make a scheme for the regulation and management of any common (*e*) within their district with a view to the expenditure of money on the drainage, levelling, and improvement of the common, and to the making of

Scheme under Commons Act, 1899.

(*o*) Corporation of London (Open Spaces) Act, 1878 (41 & 42 Vict. c. cxxvii.).
(*p*) Metropolitan Commons Act, 1866 (29 & 30 Vict. c. 122), s. 28.
(*q*) *Ibid.*, s. 29.
(*r*) *Ibid.*, s. 30 and Sched. II.
(*s*) 9 Geo. 2, c. 36; see title CHARITIES, pp. 124 *et seq.*, *ante*.
(*t*) Metropolitan Commons Act, 1866 (29 & 30 Vict. c. 122), s. 31.
(*a*) *Ibid.*, s. 32.
(*b*) *Ibid.*, s. 17.
(*c*) 62 & 63 Vict. c. 30.
(*d*) Or the council of a county borough (*ibid.*, s. 13).
(*e*) For the purposes of the Commons Act, 1899 (62 & 63 Vict. c. 30), "common" is by *ibid*, s. 15, to include any land subject to be inclosed under the Inclosure Acts, 1845 to 1882, and any town or village green; but it is provided by s. 14 of the Commons Act, 1899, that no scheme under the Act is to apply to a common which is or might be the subject of a scheme under the Metropolitan Commons Acts, or is regulated by a provisional order under the Inclosure Acts, 1845 to 1882, or has been acquired or managed as an open space under the powers of the Corporation of London (Open Spaces) Act, 1878 (40 & 41 Vict. c. cxxvii.) (see *supra*), or any Act therein referred to, or is the subject of any private or local and personal Act of Parliament having for its object the preservation of the common as an open space, or is subject to bye-laws made by a parish council under s. 8 of the Local Government Act, 1894 (56 & 57 Vict. c. 73) (see p. 599, *ante*).

SECT. 3. **Regulation of Commons under the Commons Act, 1899.**

bye-laws and regulations for the prevention of nuisances and the preservation of order on the common (*f*).

Confirmation by Parliament not required.

The scheme comes into operation when an order of the Board of Agriculture and Fisheries approving it has been made, and the sanction of Parliament is not required. The Act is merely intended to provide a simple and inexpensive method of enabling local authorities to manage and improve commons and open spaces where no question as to the rights over them is likely to arise, and where the exercise and recreation of the neighbourhood is the principal consideration. For complicated cases the more elaborate machinery of a provisional order under the Commons Act, 1876 (*g*), must be adopted.

Necessity of strict compliance in schemes with the terms of the Act.

As schemes under this Act are not confirmed by Parliament, they are valid only so far as their provisions are authorised by the Act itself, and the Board has no latitude in approving provisions which are not strictly authorised by the Act, though they may be beneficial and desirable in any particular case, and if inserted in a provisional order or in a scheme under the Metropolitan Commons Acts would probably obtain the approval of the Select Committee and become effectual by the sanction of the confirmatory Act of Parliament.

Private rights.

1298. The Act contains the same provision as the Metropolitan Commons Act, 1866, that no estate, right, or interest of a profitable or beneficial nature in, over, or affecting a common shall, except with the consent of the person entitled thereto, be taken away or injuriously affected by any scheme without compensation being made or provided for the same by the council making the scheme, such compensation in case of difference to be settled as on a compulsory purchase or injurious affecting of land under the Lands Clauses Acts (*h*).

Procedure.

1299. The procedure under the Act is to be in accordance with regulations prescribed by the Board (*i*). Three months at least before making a scheme the council must give the prescribed notice (*i*) of their intention to make it, stating where a draft of the

(*f*) The scheme may contain any of the statutory provisions for the benefit of the neighbourhood mentioned in s. 7 of the Commons Act, 1876 (39 & 40 Vict. c. 56), and is to be in a form prescribed by regulations of the Board of Agriculture and Fisheries and to identify the commons by means of a plan (Commons Act, 1899 (62 & 63 Vict. c. 30), ss. 1, 15).

(*g*) 39 & 40 Vict. c. 56 ; see p. 601, *ante*.

(*h*) Commons Act, 1899 (62 & 63 Vict. c. 30), s. 6. The prescribed scheme (see note (*i*), *infra*), contains the following clause: "Nothing in this scheme or any bye-laws made thereunder shall prejudice or affect any right of the lord of the manor [or the person entitled to the soil of the common] or of any person claiming under him which is lawfully exercisable in, over, under, or on the soil or surface of the common in connection with game or with mines, minerals, or other substrata or otherwise, or prejudice or affect the lawful use of any highway or thoroughfare on the common, or affect any power or obligation to repair any such highway or thoroughfare." No reference is made in the scheme to rights of common, but they would be equally protected under the above-mentioned section of the Act. See too *Ratcliff* v. *Jowers* (1891), 8 T. L. R. 6; *Hoare* v. *Metropolitan Board of Works* (1874), L. R. 9 Q. B. 296; and p. 609, *ante*.

(*i*) Commons Act, 1899 (62 & 63 Vict. c. 30), ss. 1, 2, 15 The regulations as

scheme and plan may be inspected; they are also to send as soon as possible to the Board a copy of the draft scheme and plan (*k*).

During the three months copies of the draft scheme may be obtained, the plan inspected, and objections or suggestions in writing made to the Board by any person; and after the expiration of the three months the Board take into consideration any objections or suggestions so made, and if they think fit direct a local inquiry by an officer of the Board (*l*).

The Board may then by order approve of the scheme subject to such modifications, if any, as they think fit; but if at any time before the scheme is approved they receive written notice of dissent either (1) from the person entitled as lord of the manor or otherwise to the soil of the common, or (2) from persons representing one-third in value of such interests in the common as are affected by the scheme, and such notice is not subsequently withdrawn, the Board cannot proceed further in the matter (*m*).

Management.

1300. The management of the common after the scheme is approved is vested in the district council, but any powers of management of a rural district council may be delegated by that council to the parish council of any parish in which the common is situate (*n*).

Miscellaneous.

1301. The powers of urban and district councils and parish councils to defray or contribute to the expenses of a scheme and of the management of a regulated common, to acquire property therein, and to make bye-laws have already been dealt with (*o*).

present in force came into operation on the 8th May, 1900, and may be cited as the Commons Regulations, 1900. They are obtainable at the office of the Board of Agriculture and Fisheries, 3, St. James' Square, London, S.W., and give in a schedule the prescribed form of scheme. Notice of the intention of a council to make a scheme is to be given (a) by advertisement in a local paper at least twice with an interval of at least a week between the advertisements, (b) by copies posted at two or more places on the common, (c) by service of a copy of the notice on the council of every parish in which any part of the common is situate, and (d) by registered letter sent to the usual or last known place of abode of every person entitled as lord of the manor or otherwise to the soil of the common, unless the Board where such parties are numerous dispense with such notice. In the case of Crown lands the notice is to be sent to the Commissioners of Woods and Forests or to the Chancellor of the Duchy of Lancaster, as the case may be; and where the Duke of Cornwall is entitled it is to be sent to the Lord Warden of the Stannaries. The office of the council making the scheme is to be the place where the draft scheme and plan may be inspected.

(*k*) Commons Act, 1899 (62 & 63 Vict. c. 30), s. 2 (1).

(*l*) *Ibid.*, s. 2 (1), (2), (3).

(*m*) *Ibid.*, s. 2 (4). In this respect this Act differs from the Metropolitan Commons Act, 1866 (29 & 30 Vict. c. 122), and the Commons Act, 1876 (39 & 40 Vict. c. 56). Under the former no consent of the lord of the manor or commoners is required (see p. 609, *ante*); under the latter the consent of the lord of the manor and of two-thirds in value of the interests in or over the common is requisite before a provisional order can be recommended by the Board (see p. 546, *ante*); but under both those Acts the decision of the Board is not final, whereas under the Commons Act, 1899 (62 & 63 Vict. c. 30), it is, as the sanction of Parliament to a scheme thereunder is not required.

(*n*) *Ibid.*, ss. 3, 4.

(*o*) See pp. 598, 599, *ante*.

SECT. 3. Regulation of Commons under the Commons Act, 1899.

The taking of gravel or other material for the repair of the roads from a regulated common by the highway authority is prohibited except with the consent of the district council (*p*).

The power to make a scheme includes power to amend or supplement a scheme (*q*).

(*p*) Commons Act, 1899 (62 & 63 Vict. c. 30), s. 8; Commons Act, 1876 (39 & 40 Vict. c. 56), s. 20; and see p. 604, *ante*.
(*q*) Commons Act, 1899 (62 & 63 Vict. c. 30), s. 9.

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