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THE
LAWS OF ENGLAND.

VOLUME I.

THE

LAWS OF ENGLAND

BEING

A COMPLETE STATEMENT OF THE WHOLE LAW OF ENGLAND.

BY

THE RIGHT HONOURABLE THE

EARL OF HALSBURY

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

AND OTHER LAWYERS.

VOLUME I.

INTRODUCTION.

ACTION.
ADMIRALTY.
AGENCY.
AGRICULTURE.
ALIENS.
ALLOTMENTS.
ANIMALS.
ARBITRATION.
AUCTION AND AUCTIONEERS
BAILMENT.
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The Tables of Abbreviations Statutes and Cases have been compiled by Mr. H. I. Whitaker, Assistant Librarian of the Honourable Society of Lincoln's Inn.

The Law is stated as at September 1st, 1907.

PUBLISHERS' ANNOUNCEMENT.

In this work an attempt is made to supply a consolidation or complete statement of the law of England as it exists at the present time.

With this object in view the whole law has been under review and has been arranged under comprehensive titles; the titles selected being those which it is thought would most probably be looked for. Under each title the whole living law relating to the subject dealt with is stated.

The work is believed to be unique in aim and form. It is neither an encyclopædia, a digest of cases, nor a dictionary. It rather takes the form of a series of treatises on every branch of the law by experts in each particular branch, but by means of cross-references each treatise is made to fit in with the others, and so, it is hoped, a complete and harmonious whole is produced.

The aim throughout has been to present a full and complete statement of the law as it now exists in a practical and readily accessible form. Historical and theoretical matter has been excluded except so far as it is essential to the right understanding of the present law; though in one or two instances, as, for example, in the description of the old forms of action, this principle has for special reasons been departed from (see p. 31, note (*l*)).

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Fish and Fishing - - - - ,, GAME AND SPORT.
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Hire of Animals - - - - ,, BAILMENT.
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Nuisances from Keeping Animals - ,, NUISANCE; PUBLIC HEALTH.
Sale of Animals - - - - ,, AUCTION AND AUCTIONEERS; SALE OF GOODS.
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Compulsory Purchase of Land	,,	COMPULSORY PURCHASE AND COMPENSATION.
Electric Lighting etc.	,,	ELECTRIC LIGHTING, TRACTION AND POWER.
Factories and Workshops	,,	FACTORIES AND WORKSHOPS.
Friendly Societies	,,	FRIENDLY SOCIETIES.
Gasworks	,,	GAS AND WATER.
Housing of Working Classes	,,	PUBLIC HEALTH.
Industrial and Provident Societies	,,	INDUSTRIAL, PROVIDENT, AND SIMILAR SOCIETIES.
Local Government	,,	LOCAL GOVERNMENT.
Lunatic Asylums	,,	PUBLIC HEALTH.
Public Health	,,	PUBLIC HEALTH.
Railways	,,	RAILWAYS AND CANALS.
Telegraphs and Telephones	,,	TELEGRAPHS AND TELEPHONES.
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ATTORNEY-GENERAL.

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Appraisers - - - ,, VALUERS AND APPRAISERS.
Contracts, generally - - ,, CONTRACT.
Hawkers - - - - ,, MARKETS AND FAIRS.
House Agents - - - ,, AGENCY; SALE OF LAND; VALUERS AND APPRAISERS.
Licences, generally - - ,, REVENUE.
Necessity of Sale by Auction in certain cases - - ,, TRUST AND TRUSTEES; WILLS; and other titles *passim*.
Sales by Order of Court - ,, ADMIRALTY; COUNTY COURTS; PRACTICE AND PROCEDURE; SALE OF LAND.
Sales in general - - - ,, SALE OF GOODS; SALE OF LAND.
Valuers - - - - ,, VALUERS AND APPRAISERS.

AUTREFOIS ACQUIT AND AUTREFOIS CONVICT.

See CRIMINAL LAW AND PROCEDURE.

AVERAGE.

See INSURANCE; SHIPPING AND NAVIGATION.

BAIL.

See ADMIRALTY; CRIMINAL LAW AND PROCEDURE; MAGISTRATES.

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Larceny by Bailee	- - - - -	,,	CRIMINAL LAW AND PROCEDURE.
Limitation of Actions	- - - -	,,	LIMITATION OF ACTIONS.
Negligence, generally	- - - -	,,	NEGLIGENCE.
Position, as Bailees, of	*Agisters of Cattle* -	,,	ANIMALS.
	Auctioneers - -	,,	AUCTION AND AUCTIONEERS.
	Bankers - - -	,,	BANKERS AND BANKING.
	Carriers - - -	,,	CARRIERS.
	Factors - - -	,,	AGENCY.
	Innkeepers - -	,,	INNS AND INNKEEPERS.
	Pawnbrokers - -	,,	PAWNBROKERS AND PLEDGES.
	Printers and Publishers - - -	,,	PRESS AND PRINTING.
	Railway Companies	,,	CARRIERS.
	Receivers of Goods on Approval - -	,,	SALE OF GOODS.
	Servants intrusted with Master's Goods	,,	MASTER AND SERVANT.
	Sheriffs - - -	,,	SHERIFFS AND BAILIFFS.
	Solicitors - -	,,	SOLICITORS.

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For Bills of Exchange and Negotiable Instruments generally, see title BILLS OF EXCHANGE, PROMISSORY NOTES AND NEGOTIABLE INSTRUMENTS.

ABBREVIATIONS

USED IN THIS WORK.

A. C.	Law Reports, Appeal Cases, since 1891
A.-G.	Attorney-General
Act.	Acton's Reports, 2 vols., 1809—1811
Act of Sed.	Act of Sederunt, Court of Session
Act. Reg.	Acta Regia
Add.	Addams' Ecclesiastical Reports, 2 vols., and Part I., Vol. III., 1822—1826
Ad. & El.	Adolphus and Ellis's Reports, 12 vols., 1834—1840
Alc. & N.	Alcock and Napier's Reports (Ireland)
Alc. Reg. Cas.	Alcock's Registry Cases (Ireland)
Aleyn	Aleyn's Reports, fol., 1 vol.. 1664—1649
Amb.	Ambler's Reports, 2 vols., 1737—1783
And.	Anderson's Reports, fol., 1 vol., 1534—1605
Andr.	Andrew's Reports, fol., 1 vol., 1738—1740
Annaly	Annaly's Edition of Lee's Reports *temp.* Hardwicke, fol., 1733—1738
Anon.	Anonymous
Anst.	Anstruther's Reports, 3 vols., 1792—1797
App. Cas.	Law Reports, Appeal Cases, 1875—1890
Arkley	Arkley's Justiciary Reports (Scotch), 1 vol., 1846—1848
Arm. M. & O.	Armstrong, Macartney, and Oglo's Reports (Irish), 1840—1842
Arn.	Arnold's Reports, C. P., 2 vols., 1838—1839
Arn. & H.	Arnold and Hodges, Q. B., 1 vol., 1840—1841
Asp. M. L. C.	Aspinall's Maritime Law Cases (current)
Atk.	Atkyn's Reports, 3 vols., 1736—1755
Ayl. Pan.	Ayliffe's new Pandect of Roman Civil Law
Ayl. Par.	Ayliffe's Parergon Juris
B. & Ad.	Barnewall and Adolphus' Reports, 5 vols., 1830—1834
B. & Ald.	Barnewall and Alderson's Reports, 5 vols., 1817—1822
B. & C.	Barnewall and Cresswell's Reports, 10 vols., 1822—1830
B. & S.	Best and Smith's Reports, 10 vols., 1861—1869
Bac. Abr.	Bacon's Abridgment
Ball & B.	Ball & Beatty's Reports (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, 1 vol., 1740—1741
Barn. (K. B.)	Barnardiston's Reports, K. B., 2 vols., 1726—1735
Barnes	Barnes' Notes of Cases, C. P., 1732—1756
Batt.	Batty's Reports (Ireland), 1 vol., 1825—1826
Beat.	Beatty's Reports (Ireland), 1 vol., 1813—1830

Beav.	Beavan's Reports, 36 vols., 1838—1866
Beaw.	Beawes's Lex Mercatoria
Bell's C. C.	Bell's Crown Cases, 1 vol., 1858—1860
Bell, Ct. of Sess. ..	Bell (R.), Cases, Court of Session, 1 vol., 1790—1792
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Part I.—Definitions.

SECT. 1.—*Action.*

"Action." **1.** An "action," according to the legal meaning of the term, is a proceeding by which one party seeks in a court of justice to enforce some right against, or to restrain the commission of some wrong by, another party. More concisely it may be said to be "the legal demand of a right," or "the mode of pursuing a right to judgment" (*a*). It implies the existence of parties, of an alleged right, of an alleged infringement thereof (either actual or threatened), and of a Court having power to enforce such a right.

In its wider meaning the term includes both civil and criminal proceedings; it was frequently so used by old writers (*b*), and in a modern case (*c*) the House of Lords recognised that it is "a generic term, inclusive, in its proper legal sense, of suits by the Crown,"

(*a*) "Action nest autre chose que loyall demand de son droit" (*Horne's Mirroir des Justices* (1642), cap. 2, s. 1). "Actio nihil aliud est quam jus prosequendi in juditio quod alicui debetur" (Co. Litt. 284 b, 285 a, quoting Bracton, iii. fol. 98). See also *Altham's Case* (1610), 8 Co. Rep. 150 b; *Bradlaugh* v. *Clarke* (1881), 7 Q. B. D. 38.

(*b*) Co. Litt. 284 b, 285 a; Com. Dig. Action, D; Bac. Abr. Actions in General, A.

(*c*) *Clarke* v. *Bradlaugh* (1881), 7 Q. B. D. 38, *per* LUSH, L.J.; *sub nom. Bradlaugh* v. *Clarke* (1883), 8 App. Cas. 354, *per* Lords SELBORNE, L.C., and BLACKBURN.

SECT. 1. Action.

and comprehending, in legal phraseology, every suit, "whether by a subject, or in the name of the Sovereign, or by an information by the Attorney-General on behalf of the Crown." It is, however, generally used in a more restricted or "popular" sense as denoting a civil action brought by a subject and commenced by writ or plaint (*d*).

Statutory definitions.

2. At the present date there are several statutory definitions (*e*), which for certain purposes give to the word "action" meanings different from those indicated above. Thus for the purposes of the Judicature Act, 1873, and the Rules of the Supreme Court, it means a civil proceeding commenced by writ, or in such other manner as may be prescribed by rules of Court, and does not include a criminal proceeding by the Crown (*f*). For the same purposes the word "suit" is to include "action," the old technical distinction (*g*) between actions at law and suits in equity being thus rendered obsolete, and both "action" and "suit" are to be included in the still wider term "cause" (*h*). For the purposes of the County Courts Act, 1888 (*i*), the term "action" is to include every proceeding in the Court which may be commenced as prescribed by plaint, the term "matter" being appropriated to proceedings commenced in any other way.

Judicial interpretations.

Upon the word "action" as defined above and as used in other statutes there have been a number of judicial decisions.

Rules of Court.

The term "action" as used in the Rules of the Supreme Court includes a proceeding by the Attorney-General formerly known as an "information" (*j*).

Matrimonial cause or suit.

A matrimonial cause or suit, commenced by petition, is not generally known as an "action," and an order for payment of costs, forming part of a decree therein, is not a "final judgment" in respect of which a bankruptcy notice can be served (*k*).

(*d*) See note (*c*), p. 2.

(*e*) In addition to those referred to in the text, reference may be made to the Common Law Procedure Acts, 1852 (15 & 16 Vict. c. 76), 1854 (17 & 18 Vict. c. 125), and 1860 (23 & 24 Vict. c. 126), the Inferior Courts Judgments Extension Act, 1882 (45 & 46 Vict. c. 31), the British Law Ascertainment Act, 1859 (22 & 23 Vict. c. 63), and the Foreign Law Ascertainment Act, 1861 (24 & 25 Vict. c. 11). The latter Acts contain an extremely wide definition, viz., "every judicial proceeding instituted in any Court, civil, criminal, or ecclesiastical." See also the Railway Companies Act, 1867 (30 & 31 Vict. c. 127), s. 3, "Action includes suit or other proceeding."

(*f*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 100. See R. S. C., Ord. 71, r. 1.

(*g*) See, *e.g.*, *Sutton* v. *Sutton* (1882), 22 Ch. D. 511. In one old case, even before the Judicature Act, a statutory provision as to the Court's power to give special relief in "actions" of a certain character was held applicable to "suits" (*Pennell* v. *Smith* (1855), 5 De G. M. & G. 167, 187).

(*h*) As to the origin of the word "cause," see *Green* v. *Lord Penzance* (1881), 6 App. Cas. 657. The Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 100, defines it as including any action, suit, "or other original proceeding" between a plaintiff and a defendant, and any criminal proceeding by the Crown. A "suit," therefore (*Re Wallis's Trusts, Ex parte Wallis* (1888), L. R. 23 Ir. 7), is "an original proceeding between a plaintiff and defendant," and the term is a wider one than "action."

(*i*) 51 & 52 Vict. c. 43, s. 186.

(*j*) *A.-G.* v. *Shrewsbury Bridge Co.* (1880), 42 L. T. 79.

(*k*) *Re Binstead, Ex parte Dale*, [1893] 1 Q. B. 199.

SECT. 1. **Action.**

Admiralty cause.

An Admiralty cause or suit is not an "action" within the meaning of the provision of the County Courts Act, 1888 (*l*), which gives to either party in an action, where the amount claimed exceeds £5, a right to require a jury (*m*); nor is an Admiralty cause or suit *in rem* an "action" against the owners of the vessel within the meaning of a statute requiring notice of action (*n*).

Counterclaim.

A counterclaim is for most purposes of procedure, except execution, treated as if it were a cross-action to be tried together with the original action (*o*), but it is not an "action" within the meaning of the Judicature Act (*p*), or within the meaning of the provision of the County Courts Act, 1888, which deals with the remission of actions of tort to a county court (*q*). For the purposes of the Bills of Exchange Act, 1882 (*r*), and of the Sale of Goods Act, 1893 (*s*), a counterclaim is specifically included in the word "action."

Set-off.

A "set-off" is treated as an "action" for the purposes of the Limitation Act, 1623 (*t*), but not for those of the Solicitors Act, 1843 (*u*).

Interpleader issue.

An interpleader issue ordered in an action is technically a "proceeding" in that action, and not itself an "action" (*a*). It is, however, sufficiently distinct from the original action to be regarded for many purposes (*e.g.*, a solicitor's retainer) as a separate litigation (*b*).

Proceeding by originating summons.

A proceeding commenced by originating summons falls within the definition of an "action" in the Judicature Act, 1873 (*c*); but, as it is not an action in which a defence is put in, the rules as to third party procedure do not apply to it (*d*). Further, it is not an "action" within the meaning of the provision of the Conveyancing and Law of Property Act, 1881 (*e*), which enables a lessee under

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(*l*) 51 & 52 Vict. c. 43, s. 101.

(*m*) *The Tynwald*, [1895] P. 142; *The Theodora*, [1897] P. 279. See also *The Longford* (1888), 14 P. D. 34.

(*n*) *The Longford*, *supra*, decided under 6 & 7 Will. 4, cap. c., s. 8, a local or personal Act; and see *The Burns*, [1907] P. 137.

(*o*) *Sykes* v. *Sacerdoti* (1885), 15 Q. B. D. 423 (security for costs of counterclaim); *Re Milan Tramways Co., Ex parte Theys* (1882), 22 Ch. D. 122, 126, affirmed (1884), 25 Ch. D. 587; *Beddall* v. *Maitland* (1881), 17 Ch. D. 174; *Stumore* v. *Campbell & Co.*, [1892] 1 Q. B. 314; *Levi* v. *Anglo-Continental Gold Reefs etc.*, [1902] 2 K. B. 481 (third party procedure). A counterclaim is not a part of the plaintiff's action, and is not affected by his discontinuing such action (*McGowan* v. *Middleton* (1883), 11 Q. B. D. 464).

(*p*) And the counterclaiming defendant is not a "plaintiff" entitled as of right to require issues of fact to be tried by a jury under R. S. C., Ord. 36, r. 2 (*Kinnaird (Lord)* v. *Field*, [1905] 2 Ch. 361).

(*q*) 51 & 52 Vict. c. 43, s. 66; *Delobbel-Flipo* v. *Varty*, [1893] 1 Q. B. 663. See also *R.* v. *Judge of City of London Court*, [1891] 2 Q. B. 71, decided under s. 65 of the same statute.

(*r*) 45 & 46 Vict. c. 61, s. 2.

(*s*) 56 & 57 Vict. c. 71, s. 62.

(*t*) 21 Jac. 1, c. 16; *Remington* v. *Stevens* (1747), 2 Str. 1271; *Rawley* v. *Rawley* (1876), 1 Q. B. D. 460.

(*u*) 6 & 7 Vict. c. 73, s. 37; see *Brown* v. *Tibbits* (1862), 11 C. B. (N. S.) 855.

(*a*) *Hamlyn* v. *Betteley* (1880), 6 Q. B. D. 63; *Collis* v. *Lewis* (1887), 20 Q. B. D. 202 (as to appeal from a county court on an interpleader issue).

(*b*) *James* v. *Ricknell* (1887), 20 Q. B. D. 164.

(*c*) *Re Fawsitt* (1885), 30 Ch. D. 231; *Re Vardon* (1885), 55 L. J. (CH.) 259; *Gee* v. *Bell* (1887), 35 Ch. D. 160; *Re Robinson* (1885), 31 Ch. D. 247.

(*d*) *Re Wilson* (1890), 45 Ch. D. 266.

(*e*) 44 & 45 Vict. c. 41, s. 14 (2).

SECT. 1. Action.

certain circumstances to apply for relief against forfeiture in the lessor's "action," if any, or in any "action" brought by himself (*f*).

Garnishee order.

A garnishee order, made in collateral proceedings between a plaintiff and a third party, was held not to be "a decision in the action" for the purposes of an appeal under the earlier County Court Acts (*g*).

Petition.

A petition is a "pleading" for the purposes of the Judicature Act and Rules of the Supreme Court (*h*). It has been said that for such purposes the word "action" does not (though "suit" does) include proceedings upon petition (*i*); but a petition for payment out of Court of funds lodged there is clearly not in all cases an "action or suit" within the meaning of sect. 42 of the Real Property Limitation Act, 1833 (*k*). It is doubtful, indeed, whether it is so in any case (*l*).

Motion by trustee in bankruptcy.

A motion by a trustee in bankruptcy for delivery up of goods taken in execution by a high bailiff was held not to be an "action" within the meaning of the provisions of the County Courts Act, 1888 (*m*), which require notice of action to be given in certain cases (*n*).

Public Authorities Protection Act.

For the purposes of the Public Authorities Protection Act, 1893 (*o*), the term "action" includes actions in the Chancery Division and actions for injunctions and declarations as well as actions in the King's Bench Division, or actions for damages, but not an action *in rem* (*p*).

"Proceeding."

The term "proceeding" is frequently used to denote a step in an action, and obviously it has that meaning in such phrases as "proceeding in any cause or matter." When used alone, however, it is in certain statutes to be construed as synonymous with, or including, "action" (*q*).

Termination of an action.

An action, in the strict sense of the term, ends at judgment (*r*). Thus a provision as to the costs of an "action" does not affect the costs of an appeal against the judgment therein (*s*); so it was

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(*f*) *Lock* v. *Pearce*, [1893] 2 Ch. 271.

(*g*) *Mason* v. *Wirral Highway Board* (1879), 4 Q. B. D. 459.

(*h*) 36 & 37 Vict. c. 66, s. 100.

(*i*) *Re Wallis's Trusts, Ex parte Wallis* (1888), L. R. 23 Ir. 7.

(*k*) 3 & 4 Will. 4, c. 27.

(*l*) *Edmunds* v. *Waugh* (1866), L. R. 1 Eq. 418; *Re Stead* (1876), 2 Ch. D. 713, distinguished in *Re Lloyd*, [1903] 1 Ch. 385. See further on this subject the title LIMITATION OF ACTIONS.

(*m*) 51 & 52 Vict. c. 43, ss. 53, 54.

(*n*) *Re Lock, Ex parte Poppleton* (1890), 63 L. T. 320.

(*o*) 56 & 57 Vict. c. 61, s. 1.

(*p*) *Fielden* v. *Morley Corporation*, [1899] 1 Ch. 1; *Harrop* v. *Ossett Corporation*, [1898] 1 Ch. 525; *Grand Junction Waterworks Co.* v. *Hampton Urban District Council* (1899), 63 J. P. 503; *The Burns*, [1907] P. 137.

(*q*) *E.g.*, Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 89; *Pryor* v. *City Offices Co.* (1883), 10 Q. B. D. 504; Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), s. 6; *Manchester, Sheffield and Lincolnshire Rail. Co.* v. *Denaby Main Colliery Co.* (1884), 14 Q. B. D. 209, 225. See also sect. 85 of the Companies Act, 1862 (25 & 26 Vict. c. 89), and *Re Briton Medical and General Life Association* (1886), 55 L. J. (CH.) 416.

(*r*) Bac. Abr. Execution, A.

(*s*) *Fielden* v. *Morley Corporation, supra.* And costs of execution are not costs of action (*Armitage* v. *Jessop* (1866), L. R. 2 C. P. 12, 15).

SECT. 1. Action.

ruled that a release of "all actions" would not bar execution upon a judgment already obtained; *secus* a release of "all suits," for without "suit or prayer" none could have execution (*t*).

SECT. 2.—*Cause of Action.*

Meaning of term.

3. The "popular" meaning of the expression "cause of action" is that particular act on the part of the defendant which gives the plaintiff his cause of complaint (*a*). Strictly speaking, however, "every fact which is material to be proved to entitle the plaintiff to succeed, every fact which the defendant would have a right to traverse" (*b*), forms an essential part of "*the* cause of action," which "accrues" upon the happening of the latest of such facts (*c*). Consequently, in any particular case, "the cause of action," strictly so called, can only be said to arise within a certain local area, when all such material facts arise within that area, when (as it is often stated somewhat tautologically) the "whole" cause of action so arises. Thus it was held (*d*) that the purely common law jurisdiction of the Mayor's Court in London and the county court jurisdiction under sect. 60 of the repealed statute of 1846 (*e*), being in each case limited to causes of action arising within a particular area, did not attach unless the whole cause of action arose within that area. It may, however, be that, upon the true construction of a given statute, the expression "*a* cause of action" ought to bear a narrower interpretation and be restricted to the popular meaning indicated above. Thus after several conflicting decisions (*f*) upon sect. 18 of the Common Law Procedure Act, 1852 (*g*), the Courts of Queen's Bench and Common Pleas differing upon the point, it was finally held (*h*) by a majority of all the judges that the expression in that section must be treated as bearing such narrower interpretation. With reference to the cases cited above as to the jurisdiction of the Mayor's Court and county courts, it should be noted that sect. 12 of the Mayor's Court Procedure Act, 1857 (*i*),

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(*t*) *Altham's Case* (1610), 8 Co. Rep. 150 b.

(*a*) *Jackson* v. *Spittall* (1870), L. R. 5 C. P. 542.

(*b*) *Cooke* v. *Gill* (1873), L. R. 8 C. P. 107; *Read* v. *Brown* (1888), 22 Q. B. D. 128.

(*c*) *Coburn* v. *Colledge*, [1897] 1 Q. B. 702.

(*d*) As to the Mayor's Court, see *Cooke* v. *Gill*, *Read* v. *Brown*, *supra*; *Gold* v. *Turner* (1874), L. R. 10 C. P. 149; *Bowler* v. *Barberton Development Syndicate*, [1897] 1 Q. B. 164; as to the county court, *Wilde* v. *Sheridan* (1852), 21 L. J. (Q. B.) 260; *Borthwick* v. *Walton* (1855), 24 L. J. (C. P.) 83; *Hernaman* v. *Smith* (1855), 24 L. J. (EX.) 175. See also *Whitehead* v. *Butt* (1891), 7 T. L. R. 609, and *Payne* v. *Hogg*, [1900] 2 Q. B. 43, similar decisions upon the words of sect. 6 of the Salford Hundred Court of Record Act, 1868 (31 & 32 Vict. c. cxxx.).

(*e*) 9 & 10 Vict. c. 95.

(*f*) In favour of the wider interpretation, *Sichel* v. *Borch* (1864), 33 L. J. (EX.) 179; *Allhusen* v. *Malgarejo* (1868), L. R. 3 Q. B. 340; *Cherry* v. *Thompson* (1872), L. R. 7 Q. B. 573; in favour of the narrower interpretation, *Fife* v. *Round* (1858), 6 W. R. 282; *Jackson* v. *Spittall* (1870), L. R. 5 C. P. 542, and cases there referred to. In *Durham* v. *Spence* (1870), L. R. 6 Ex. 46, the Court were divided in opinion.

(*g*) 15 & 16 Vict. c. 76.

(*h*) *Vaughan* v. *Weldon* (1874), L. R. 10 C. P. 47, approving *Jackson* v. *Spittall*, *supra*.

(*i*) 20 & 21 Vict. c. clvii., s. 12. See thereon *Hawes* v. *Paveley* (1876), 1 C. P. D. 418.

and sect. 74 of the present County Courts Act, 1888 (*j*), make use of the expression "cause of action" arising "wholly or in part" within the jurisdiction; these words are satisfied if any fact material for the plaintiff to prove, *e.g.*, non-payment (*k*) of the debt sued for, or its assignment (*l*) to him, or receipt of an order by post or telegraph (*m*), took place within the jurisdiction.

The question whether some act gives rise to only one cause of action, or to a number of recurring causes of action in respect of recurring damage, is often of importance in determining the application of the Statutes of Limitation (*n*).

Part II.—In respect of what Acts and Omissions an Action will lie.

SECT. 1.—*Ubi jus, ibi remedium.*

Nature of *injuria*.

4. The general rule is that wherever there exists a "right" recognised by the law, there exists also a remedy for any infringement of such right; in the words of the old maxim, *ubi jus, ibi remedium* (*o*). Such an infringement of a legal right is known to the law as an *injuria*.

Where private right infringed, proof of damage unnecessary.

Wherever a person has a private (*p*) "right" (*i.e.*, not merely a right enjoyed by him in common with the community at large) he may in general maintain an action against any other person who infringes it, and that without proving actual damage. Every *injuria*, it is said, imports a damage in the nature of it, though there be no pecuniary loss or damage (*q*); and, consequently, where a private right and its infringement are proved, it is unnecessary to show actual damage in order to maintain an action (*r*). Thus

(*j*) 51 & 52 Vict. c. 43, s. 74.

(*k*) *Northey Stone Co.* v. *Gidney*, [1894] 1 Q. B. 99.

(*l*) *Read* v. *Brown* (1888), 22 Q. B. D. 128.

(*m*) *Cowan* v. *O'Connor* (1888), 20 Q. B. D. 640. Compare also *Alderton* v. *Archer* (1884), 14 Q. B. D. 1.

(*n*) See title LIMITATION OF ACTIONS.

(*o*) See *Ashby* v. *White* (1703), 1 Smith, L. C. (11th ed.), p. 240; 3 Ld. Raym. 320. "Indeed, it is a vain thing to imagine a right without a remedy, for want of right and want of remedy are reciprocal" (*ibid.*, 1 Smith, L. C., at p. 260, *per* HOLT, C.J.).

For a consideration of the different kinds of rights recognised by the law, see the particular titles dealing with various branches of the law of contracts and torts.

(*p*) See note (*b*), p. 9, *post*.

(*q*) "A damage is not merely pecuniary; but an injury imports a damage when a man is thereby hindered of his right. . . . So if a man gives another a cuff on the ear, though it cost him nothing, no not so much as a little diachylon, yet he shall have his action, for it is a personal injury" (*Ashby* v. *White*, *supra*, *per* HOLT, C.J., at pp. 260, 261. But see the maxim, "De minimis non curat lex," p. 16, *post*).

(*r*) The novelty of the complaint is no objection, "for if men will multiply injuries, actions must be multiplied too" (*Ashby* v. *White*, *per* HOLT, C.J., at p. 262). Cases new *in their principle* require legislation to remedy the grievance, but not cases new only *in the instance* (*Pasley* v. *Freeman* (1789), 3 Term Rep. 51, 63, *per* ASHHURST, J.; *Chapman* v. *Pickersgill* (1762), 2 Wils.

SECT. 1. **Ubi jus, ibi remedium.**

where a plaintiff's right to vote at a parliamentary election was denied by the polling officers it was held that they were liable to him in damages, although the candidates for whom he wished to vote were nevertheless elected (*s*). So a banker who had funds wherewith to honour a customer's cheque, but, in breach of his duty, dishonoured it, was held liable in damages without any proof of pecuniary loss to the customer (*t*). Similarly a person who trespasses on another's land without injuring it (*u*), or who wrongfully diverts water from another's stream, though leaving a sufficient flow for his present use, is liable to an action (*x*).

Statutory remedy alone available in certain cases.

5. Although it is true that a person who suffers an infringement of some private right may in general maintain an action in respect thereof, yet in the case of rights which depend upon some statute it may be that there is some statutory remedy which alone he can pursue. Upon this point the general rule has been stated in the following words (*y*): "There are three classes of cases in which a liability may be established founded upon a statute. One is where there was a liability existing at common law, and that liability is affirmed by a statute, which gives a special and peculiar form of remedy different from the remedy which existed at common law. There, unless the statute contains words which expressly or by necessary implication exclude the common law remedy, the party suing has his election to pursue either that or the statutory remedy. The second class of cases is where the statute gives the right to sue merely, but provides no particular form of remedy. There the party can only proceed by action at common law. But there is a third class, viz., where a liability not existing at common law is created by a statute which, at the same time, gives a special and particular remedy for enforcing it. . . . The remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class." In each case, however, in deciding whether a statutory remedy is, or is not, intended to be the only remedy for breach of the statutory duty, the particular statute must be examined (*z*). And even where the ordinary remedy by action for damages is excluded, there may also be a concurrent remedy by injunction (*a*).

(*s*) *Ashby* v. *White*, *supra*; but where a person, not in law entitled to vote, was on the register, it was held that the rejection of his profferred vote was not an *injuria*, for he had no "right" to vote (*Pryce* v. *Belcher* (1847), 4 C. B. 866).

(*t*) *Marzetti* v. *Williams* (1830), 1 B. & Ad. 415.

(*u*) *Ibid.*, *per* TAUNTON, J., at p. 426; *Clifford* v. *Hoare* (1874), 22 W. R. 828; *Williams* v. *Morland* (1824), 2 B. & C. 910.

(*x*) *Harrop* v. *Hirst* (1868), L. R. 4 Ex. 43.

(*y*) *Per* WILLES, J., in *Wolverhampton Waterworks Co.* v. *Hawkesford* (1859), 6 C. B. (N. S.) 336, at p. 356. See also *Great Northern Fishing Co.* v. *Edgehill* (1883), 11 Q. B. D. 225; *Pasmore* v. *Oswaldtwistle Urban District Council*, [1898] A. C. 387; *Stevens* v. *Chown*, [1901] 1 Ch. 894; *Harrington* (*Earl*) v. *Derby Corporation*, [1905] 1 Ch. 205, 222.

(*z*) *Atkinson* v. *Newcastle Waterworks Co.* (1877), 2 Ex. D. 441, 448, *per* Lord CAIRNS, L.C.; *Groves* v. *Wimborne* (*Lord*), [1898] 2 Q. B. 402, *per* VAUGHAN WILLIAMS, L.J., at p. 416.

(*a*) *Cooper* v. *Whittingham* (1880), 15 Ch. D. 501; *Stevens* v. *Chown*, *supra*; *A.-G.* v. *Ashborne Recreation Ground Co.*, [1903] 1 Ch. 101.

SECT. 1. **Ubi jus, ibi remedium.**

6. Where the right infringed is a public right, and where the grievance is a grievance to the whole community equally, there is similarly a *remedium*; but in this case the appropriate remedy is by proceedings of a public nature, *i.e.*, indictment or an action by the Attorney-General, as the guardian of the public's rights (*b*). Even in this case an individual who has suffered particular damage beyond that sustained by his fellows, *e.g.*, who has been injured by an obstruction to a highway, may maintain an action in his own name (*c*).

Infringement of public right.

SECT. 2.—*Injuria absque damno.*

7. It is apparent from what has been said above that there cannot in law be an *injuria* (strictly so called) *absque damno*. There are, however, numerous cases in which, unless there be actual damage, there can be no *injuria* and no cause of action. The distinction depends upon a distinction in the nature of "rights." Some rights are absolute, *e.g.*, a man may have a right to claim that some act shall be done or omitted (*simpliciter*); others are only qualified, *e.g.*, he may have a right to claim that some act shall not be done or omitted to his damage; in the latter class of case damage is an essential part of the action, and unless there is actual damage there is no *injuria* (*d*). Numerous instances may be cited of rights thus qualified. Thus a landowner has a right to demand that his land (in its natural state) shall not be "let down" by excavations on his neighbour's land; if it be so let down, he may maintain an action in respect of the damage; but unless subsidence follows no "right" is infringed by the most extensive excavations of his neighbour (*e*). So if a landlord ostensibly distrain for more rent than is due to him, the tenant's right is not infringed unless goods are in fact seized of a greater value than the amount of rent actually due from him, for otherwise he suffers no *damnum* (*f*). Again, unless an execution creditor is actually damnified by a sheriff's mistake in making a false return to a writ of execution, he has no cause of action in respect thereof (*g*).

Where actual damage essential.

For a consideration of the different types of "rights" recognised

(*b*) "Suppose the defendant had beat forty or fifty men, the damage to each one is peculiar to himself, and he shall have his action. . . . Indeed, where many men are offended by one particular act, there they must proceed by way of indictment, and not of action, for in that case the law will not multiply actions" (*Ashby* v. *White*, 1 Smith, L. C. (11th ed.), at p. 262, *per* HOLT, C.J.).

(*c*) In the absence, of course, of contributory negligence (*Lyon* v. *Fishmongers' Co.* (1876), 1 App. Cas. 662; *Fritz* v. *Hobson* (1880), 14 Ch. D. 542). "A man shall have his action for a public nuisance if he is more incommoded than others" (*per* FITZHERBERT, J., Y. B. 27 Hen. 8, fol. 27, pl. 10); see *Bedford (Duke of)* v. *Ellis*, [1901] A. C. 1, 11, 12. See also *Ricket* v. *Metropolitan Rail. Co.* (1867), L. R. 2 H. L. 175; *Winterbottom* v. *Lord Derby* (1867), L. R. 2 Ex. 316; *Tottenham Urban District Council* v. *Williamson & Sons*, [1896] 2 Q. B. 353; *Watson* v. *Hythe Corporation* (1906), 22 T. L. R. 245.

(*d*) See *per* Lord BLACKBURN in *Darley Main Colliery Co.* v. *Mitchell* (1886), 11 App. Cas. 127, at pp. 141, 142.

(*e*) *Backhouse* v. *Bonomi* (1861), 9 H. L. C. 503; *Darley Main Colliery Co.* v. *Mitchell, supra*; *Att.-Gen.* v. *Conduit Colliery Co.*, [1895] 1 Q. B. 301.

(*f*) *Tancred* v. *Leyland* (1850), 16 Q. B. 669; *Glynn* v. *Thomas* (1856), 11 Exch. 870; *French* v. *Phillips* (1856), 1 H. & N. 564.

(*g*) *Wylie* v. *Birch* (1843), 4 Q. B. 566; *Stimson* v. *Farnham* (1871), L. R. 7 Q. B. 175.

SECT. 2. Injuria absque damno.

by the law the reader is referred to the particular titles dealing with various branches of the law of contracts and torts.

SECT. 3.—*Damnum absque injuriâ.*

Damage without infringement of legal right.

8. Although an *injuria* imports, as we have seen, a *damnum*, there are many cases in which a person may sustain serious damage and yet have no cause of action, because no right of his recognised by the law has been infringed, and he has, therefore, suffered no *injuria* (*h*); and, in general, the fact that an act has been done "maliciously," and with intent to inflict *damnum*, is immaterial in considering whether such act does, or does not, amount to a legal *injuria* (*i*).

User of land.

Thus an owner or occupier of land may use it for any purpose "for which it might in the ordinary course of the enjoyment of land be used," and even though in so doing he inflicts injury upon his neighbour, the latter has no actionable cause of complaint (*j*); he may without incurring liability win the underlying minerals in the ordinary way, although water is thereby allowed to percolate into an adjoining mine (*k*); he may abstract underground water flowing in no defined channel, and so stop the flow of his neighbour's spring (*l*); he may grow poisonous yew trees on his land (*m*) so long as they do not overhang the fences (*n*), though animals which stray in may be poisoned, or though third persons may remove clippings therefrom and deposit them elsewhere (*o*); and he may allow the natural growth of weeds (*p*), or the natural stock of rabbits (*q*), to increase unchecked to the injury of his neighbour's crops. So he may erect a high wall or disfiguring buildings, and thus deprive his neighbour's house of its

(*h*) "You must have in our law injury as well as damage. The act of the defendant, if lawful, may still cause a great deal of damage to the plaintiff. If a man erects a wall on his own property and thereby destroys the view from the house of the plaintiff, he may damage him to an enormous extent. He may destroy three-fourths of the value of the house; but still, if he has the right to erect the wall, the mere fact of thereby causing damage to the plaintiff does not give the plaintiff a right of action" (*Day* v. *Brownrigg* (1878), 10 Ch. D. 294, *per* JESSEL, M.R., at p. 304; *Mogul Steamship Co.* v. *McGregor, Gow & Co.* (1889), 23 Q. B. D. 598, 613; *Allen* v. *Flood*, [1898] A. C. 1; *Clark* v. *London General Omnibus Co.*, [1906] 2 K. B. 648, *per* GORELL BARNES, P., at p. 663; *Sweeney* v. *Coote* (1907), 23 T. L. R. 448).

(*i*) *Allen* v. *Flood*, *supra*, at pp. 123, 124; *Bradford Corporation* v. *Pickles*, [1895] A. C. 587, 594. As to the effect of malice in cases of groundless legal proceedings, and of defamation, see pp. 12, 13, *post*.

(*j*) *Rylands* v. *Fletcher* (1868), L. R. 3 H. L. 330, *per* Lord CAIRNS; *Wilson* v. *Waddell* (1876) 2 App. Cas. 95, 99; *Attorney-General* v. *Tomline* (1879) 12 Ch. D. 214, 229, 230; *West Cumberland Iron and Steel Co.* v. *Kenyon* (1879), 11 Ch. D. 782, 786, 787; *Whalley* v. *Lancashire and Yorkshire Rail. Co.* (1884), 13 Q. B. D. 131, 135.

(*k*) *Smith* v. *Kenrick* (1849), 7 C. B. 515; *Wilson* v. *Waddell* (1876), 2 App. Cas. 95, 99; *Baird* v. *Williamson* (1863), 15 C. B. (N. S.) 376, 391, 392; *Corporation of Birmingham* v. *Allen* (1877), 6 Ch. D. 284.

(*l*) *Chasemore* v. *Richards* (1859), 7 H. L. C. 349; *Bradford Corporation* v. *Pickles*, [1895] A. C. 587; *Dudden* v. *Clutton Union* (1857), 1 H. & N. 627, 630; *Popplewell* v. *Hodgkinson* (1869), L. R. 4 Ex. 248.

(*m*) *Ponting* v. *Noakes*, [1897] 2 Q. B. 281.

(*n*) *Crowhurst* v. *Amersham Burial Board* (1878), 4 Ex. D. 5.

(*o*) *Wilson* v. *Newberry* (1871), L. R. 7 Q. B. 31.

(*p*) *Giles* v. *Walker* (1890), 24 Q. B. D. 656.

(*q*) *Boulston's Case* (1597), 5 Co. Rep. 104 b. See *Farrar* v. *Nelson* (1885), 15 Q. B. D. 258.

outlook or amenities (*r*); he may cut off light (*s*) or air (*t*) from an adjoining house and even "let it down" (*u*) by excavations on his own land, if no legal right to light or support has been acquired.

Trade rivalry.

9. Again, injury or loss occasioned to a man's trade, calling, or profession by the interference of others is not actionable, even though such interference be concerted, if the means used to inflict the loss are not unlawful. Thus damage resulting from the setting up of a rival shop or school to entice away the customers or scholars of the plaintiff (*x*), the underselling of a rival trader to get a monopoly of a trade (*a*), the offering of lower terms to such merchants as deal exclusively with one, whereby one draws away the customers of rival shipping companies (*b*), are all cases of *damnum absque injuriâ*. So is loss of trade caused to the owner of a ferry by the construction of a new bridge close at hand (*c*). And a workman has no cause of action against a fellow-workman who informs their common master that if the other's contract of service be not determined in due course, he himself will seek new employment (*d*), thus procuring the other's dismissal (*d*). It is not in all cases that the procuring a breach of contract is actionable; there must be interference of an active nature causing more than nominal damage (*e*).

Use of name

10. The annoyance or inconvenience resulting from the assumption of another's name (*f*) or that of his residence (*g*), if not done for a fraudulent purpose, is *damnum absque injuriâ*, for no one has a right to the exclusive use of any name.

Seduction.

11. The basis of an action for seduction is the right (whether of a parent or a master) to enjoy the services rendered by the woman seduced (*h*); and unless this right is infringed (*i*) a parent or master

(*r*) *Day* v. *Brownrigg* (1878), 10 Ch. D. 294; *Aldred's Case* (1610), 9 Co. Rep. 57 b; *Salvin* v. *North Brancepeth Coal Co.* (1874), L. R. 9 Ch. 705, *per* JAMES, L.J.

(*s*) *Tapling* v. *Jones* (1865), 11 H. L. C. 290; *Broomfield* v. *Williams*, [1897] 1 Ch. 602.

(*t*) *Webb* v. *Bird* (1863), 13 C. B. (N. S.) 841; and see *Chastey* v. *Ackland*, [1895] 2 Ch. 389, and the same case in the House of Lords, [1897] A. C. 155.

(*u*) *Partridge* v. *Scott* (1838), 3 M. & W. 220; though possibly in this case he must not dig negligently. See *Dodd* v. *Holme* (1834), 1 A. & E. 493; *Bradbee* v. *Christ's Hospital* (1842), 4 M. & G. 714.

(*x*) *Gloucester Grammar School Case* (1410), Y. B. 11 Hen. 4, fol. 47, pl. 21; *Keeble* v. *Hickeringill* (1706), 11 East, 574 (note), 576.

(*a*) *Ajello* v. *Worsley*, [1898] 1 Ch. 274.

(*b*) *Mogul Steamship Co.* v. *McGregor, Gow & Co.* (1889), 23 Q. B. D. 598.

(*c*) *Hopkins* v. *Great Northern Rail. Co.* (1877), 2 Q. B. D. 224; *Dibden* v. *Skirrow*, [1907] 1 Ch. 437.

(*d*) *Allen* v. *Flood*, [1898] A. C. 1.

(*e*) *National Phonograph Co.* v. *Edison-Bell Consolidated Phonograph Co.* (1906), 76 L. J. (CH.) 194.

(*f*) *Du Boulay* v. *Du Boulay* (1869), L. R. 2 P. C. 430; *Burgess* v. *Burgess* (1853), 3 De G. M. & G. 896; *Cowley* v. *Cowley*, [1901] A. C. 450. As to wrongful use of a trade name or description, see title TRADE AND TRADE UNIONS.

(*g*) *Street* v. *Union Bank of Spain* (1885), 30 Ch. D. 156; *Day* v. *Brownrigg* (1878), 10 Ch. D. 294.

(*h*) *Maunder* v. *Venn* (1829), Mood. & M. 323, *per* LITTLEDALE, J.; *Terry* v. *Hutchinson* (1868), L. R. 3 Q. B. 599; *Hedges* v. *Tagg* (1872), L. R. 7 Ex. 283; *Whitbourne* v. *Williams*, [1901] 2 K. B. 722. The services need not be rendered to a father under any legal obligation (*Bennett* v. *Alcott* (1787), 2 Term Rep. 166).

(*i*) There must be service both at the date of the seduction and of the succeeding incapacity to serve, see *Grinnell* v. *Wells* (1844), 7 M. & G. 1033;

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can recover no damages for the seduction, though he may have incurred expense in maintaining the woman seduced, the injury to his feelings not being in the eye of the law an *injuria* (*k*).

Fatal injuries.

12. A man's wife or child may suffer the greatest pecuniary loss by his death; yet at common law they had no remedy against a person who by an act of negligence caused such man's death, even though the victim, had he been merely incapacitated for life, could have recovered substantial damages (*l*). At the present day, however, this grievance has to some extent been removed by statute (*m*).

Defence against a common peril.

13. Acts done in self-defence against a common enemy, *e.g.*, the erection of banks to prevent inroads of the sea or of floods, do not amount to an *injuria*, though they may cause *damnum* to neighbours by diverting the water on to their lands (*n*). Conversely at common law a man may, apart from any prescriptive liability to repair it, allow his wall or bank to fall to pieces, although floods are thereby allowed to reach his neighbour's field (*o*); but there is a distinction between keeping out a flood—the common enemy—and getting rid of flood water already upon a man's own land; such water he must not deliberately drain on to another's land to its damage (*p*).

Defamation.

14. Another instance of *damna absque injuriâ* is supplied by that branch of the law which deals with libel and slander. Speaking generally, a man has a right to claim that he shall not be damnified by defamatory statements made about his character. If such a defamatory statement be made in writing, the law, indeed, presumes that he is damaged (*q*). Soo too if it be made orally, and is a statement of a particular character (*r*); and in other cases of oral defamation he can maintain an action upon proof of actual damage (*s*).

Privileged defamatory statements.

On the ground of public policy, however, it has been considered desirable that no action shall lie in respect of statements, however defamatory and damaging, made under certain particular circumstances.

Davies v. *Williams* (1847), 10 Q. B. 725; *Harris* v. *Butler* (1837), 2 M. & W. 539; *Whitbourne* v. *Williams*, *supra*; *Hamilton* v. *Long*, [1903] L. R. 2. Ir. 407, affirmed [1905] L. R. 2 Ir. 552.

(*k*) Yet if he can prove loss of service, it is a recognised principle that he may have damages not only for that, but also for injury to his feelings (*Irwin* v. *Dearman* (1809), 11 East, at p. 24; *Terry* v. *Hutchinson* (1868), L. R. 3 Q. B. 599).

(*l*) *Osborn* v. *Gillett* (1873), L. R. 8 Ex. 88.

(*m*) Fatal Accidents Act. 1846 (9 & 10 Vict. c. 93), commonly called Lord Campbell's Act; see title NEGLIGENCE.

(*n*) *R.* v. *Pagham Commissioners* (1828), 8 B. & C. 355; *Nield* v. *London and North Western Rail. Co.* (1874), L. R. 10 Ex. 4. As to damage caused by pulling down a burning house, see *Maleverer* v. *Spinke* (1537), Dyer, 35 b, 36 b; *Dewey* v. *White* (1827), Moo. & M. 56.

(*o*) *Hudson* v. *Tabor* (1876), 2 Q. B. D. 290. See *Nitro-phosphate Co.* v. *London and St. Katherine's Docks* (1878), 9 Ch. D. 503, as to liability for actively interfering with a river wall.

(*p*) *Whalley* v. *Lancashire and Yorkshire Rail. Co.* (1884), 13 Q. B. D. 131.

(*q*) *Ratcliffe* v. *Evans*, [1892] 2 Q. B. 524, *per* BOWEN, L.J., at p. 529; *South Helton Coal Co.* v. *North Eastern News Association*, [1894] 1 Q. B. 133, at p. 144. The presumption is apparently based on the principle that *littera scripta manet*. See generally, on the subject of defamation, title LIBEL AND SLANDER.

(*r*) *I.e.*, imputing a criminal offence, imputing unchastity to a female, imputing certain contagious diseases, or relating to a man's office, profession, or trade.

(*s*) *Stanhope* v. *Blith* (1585), 4 Co. Rep. 15; *Hopwood* v. *Thorn* (1849), 8 C. B. 293; *Savile* v. *Jardine* (1795), 2 H. Bl. 531; *Davies* v. *Solomon* (1871), L. R. 7 Q. B. 112.

Statements so made are said to be "privileged," and fall into two classes according as the privilege is "absolute" or "qualified"; in the former case no action can under any circumstances be maintained; in the latter it can only be maintained upon proof of express malice.

Nature of privilege.

Words spoken by a judge acting in his judicial capacity (*t*), by a magistrate while sitting as such (*u*), by a member of Parliament in Parliament (*a*), by a witness in a trial (*b*), or before a parliamentary committee (*c*), or before a military Court of inquiry (*d*), or when giving a proof of his evidence to a litigant's solicitor (*e*), or at an inquiry under a bishop's commission (*f*), by counsel (*g*) or advocate (*h*) in the conduct of a case, are absolutely privileged, and no action will lie for the damage ensuing therefrom even if they are irrelevant or are uttered maliciously. All documents properly used in a judicial proceeding are also absolutely privileged (*i*).

Absolute privilege.

A qualified privilege attaches to statements made in the discharge of a duty, or reasonably made in order to protect some interest of the maker. So reports of legal proceedings and of public meetings (*k*) and fair and *bonâ fide* comment on, or criticism (*l*) of, matters of public interest are not in general actionable without proof of malice.

Qualified privilege.

15. A person may be seriously damnified by having legal proceedings brought against him; but it has been found necessary to excuse from legal liability a person who brings such proceedings against another, but does so with reasonable and probable cause and without malice. If there be malice (*m*), and a want of reasonable and probable cause, then indeed an action may lie, but damage is an essential part of the *injuria*. In the case of an unsubstantiated criminal charge the presumed damage done to the defendant's position is sufficient (*n*), and it would seem that damage may be

Unfounded legal proceedings.

(*t*) *Anderson* v. *Gorrie*, [1895] 1 Q. B. 668; *Scott* v. *Stansfield* (1868), L. R. 3 Ex. 220; *Thomas* v. *Churton* (1862), 2 B. & S. 475 (coroner).

(*u*) *Law* v. *Llewellyn*, [1906] 1 K. B. 487.

(*a*) *Dillon* v. *Balfour* (1887), 20 L. R. Ir. 600; *R.* v. *Abingdon* (1794), 1 Esp. 226.

(*b*) *Seaman* v. *Netherclift* (1876), 1 C. P. D. 540, affirmed 2 C. P. D. 53; *Henderson* v. *Broomhead* (1859), 4 H. & N. 569; *Revis* v. *Smith* (1856), 18 C. B. 126.

(*c*) *Goffin* v. *Donnelly* (1881), 6 Q. B. D. 307.

(*d*) *Dawkins* v. *Lord Rokeby* (1875), L. R. 7 H. L. 744.

(*e*) *Watson* v. *McEwan*, [1905] A. C. 480.

(*f*) *Barratt* v. *Kearns*, [1905] 1 K. B. 504.

(*g*) *Munster* v. *Lamb* (1883), 11 Q. B. D. 588.

(*h*) *Mackay* v. *Ford* (1860), 5 H. & N. 792; *Pedley and May* v. *Morris* (1891), 61 L. J. (Q. B.) 21; *Lilley* v. *Roney* (1892), *ibid.* 727.

(*i*) *Revis* v. *Smith*, *supra*; *Henderson* v. *Broomhead*, *supra*.

(*k*) *Lewis* v. *Levy* (1858), E. B. & E. 537; *Kimber* v. *Press Association*, [1893] 1 Q. B. 65; *Stevens* v. *Sampson* (1879), 5 Ex. D. 53; *Macdougall* v. *Knight* (1890), 25 Q. B. D. 1; Law of Libel Amendment Act, 1888 (51 & 52 Vict. c. 64).

(*l*) *Thomas* v. *Bradbury, Agnew & Co., Ltd.*, [1906] 2 K. B. 627; *Campbell* v. *Spottiswoode* (1863), 3 B. & S. 769; *Merivale* v. *Carson* (1887), 20 Q. B. D. 275; *Joynt* v. *Cycle Trade Publishing Co.*, [1904] 2 K. B. 292.

(*m*) As to the burden of proof and respective functions of judge and jury, see *Abrath* v. *North Eastern Rail. Co.* (1883), 11 Q. B. D. 440, affirmed (1886), 11 App. Cas. 247; *Brown* v. *Hawkes*, [1891] 2 Q. B. 718; *Watson* v. *Smith* (1899), 15 T. L. R. 473.

(*n*) *Rayson* v. *South London Tramways Co.*, [1893] 2 Q. B. 304.

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similarly presumed when a bankruptcy petition is presented against a person (*o*); but in the case of ordinary civil proceedings, however maliciously and unreasonably instituted, the successful defendant has no remedy, for though he is doubtless put to expense, the law does not recognise his "extra costs" as the natural and legal consequence of the proceedings, and he has no damage to complete his cause of action (*p*).

The publisher of a libel has no right of action against a person who merely brings the libel to the notice of the person libelled (*q*).

Acts authorised by Act of Parliament.

16. There are also a number of cases in which the Legislature in authorising the construction and carrying on of works (especially works of public utility) necessarily interferes with the existing rights of individuals. Where an Act of Parliament authorises the use or the doing of a particular thing (*r*), and the thing is used or done for the authorised purpose, any damage resulting therefrom and not due to negligence or unreasonable conduct (*s*) is *damnum absque injuriâ*, and no action will lie therefor (*t*). No Court can treat as an *injuria* that which the Legislature authorises, and, except in so far as the Legislature has thought it proper to provide for compensation to the person damaged by the authorised acts, he has no remedy. Where the statute does give compensation, the only remedy is to apply for it in the manner provided by the statute (*u*). But for the negligent, unreasonable, or oppressive user or execution of authorised works an action will lie (*a*). Moreover, where no compensation is given, and the terms of the statute are not imperative, but permissive, and no particular place or locality is prescribed for the authorised work, it may be inferred that the Legislature intended that the discretion as to the use of the powers conferred should not be exercised so as to interfere with private rights (*b*).

Acts of state.

17. Again, an "act of state" may cause *damnum absque injuriâ*. Since such an act is essentially an exercise of sovereign power, its

(*o*) *Quartz Hill Co.* v. *Eyre* (1883), 11 Q. B. D. 674; *The Walter D. Wallet*, [1893] P. 202; *Wyatt* v. *Palmer*, [1899] 2 Q. B. 106.

(*p*) *Quartz Hill Co.* v. *Eyre*, *supra*; *Cotterell* v. *Jones* (1851), 11 C. B. 713; *The Walter D. Wallet*, *supra*.

(*q*) *Saunders* v. *Seyd and Kelly's Credit Index Co.* (1896), 75 L. T. 193.

(*r*) *E.g.*, the construction of a railway, with necessary excavations, and the use of locomotives. See *Vaughan* v. *Taff Vale Rail. Co.* (1860), 5 H. & N. 679; *London and Brighton Rail. Co.* v. *Truman* (1885), 11 App. Cas. 45; *Hammersmith Rail. Co.* v. *Brand* (1869), L. R. 4 H. L. 171; *Att.-Gen.* v. *Metropolitan Railway*, [1894] 1 Q. B. 384.

(*s*) *Mersey Docks Trustees* v. *Gibbs* (1866), L. R. 1 H. L. 93; *Clothier* v. *Webster* (1862), 12 C. B. (N. S.) 790; *Simkin* v. *London and North Western Rail. Co.* (1888), 21 Q. B. D. 453; *Geddis* v. *Proprietors of Bann Reservoir* (1878), 3 App. Cas. 430; *Fleming* v. *Mayor of Manchester* (1881), 44 L. T. 517.

(*t*) *Vaughan* v. *Taff Vale Rail. Co.*, *supra*; *Mersey Docks Trustees* v. *Gibbs*, *supra*, at p. 112; *Hammersmith Rail. Co.* v. *Brand*, *supra*, at p. 196; *London and Brighton Rail. Co.* v. *Truman*, *supra*; *East Fremantle Corporation* v. *Annois*, [1902] A. C. 213.

(*u*) *Hammersmith Rail. Co.* v. *Brand*, *supra*; *Mersey Docks Trustees* v. *Gibbs*, *supra*; *Cracknell* v. *Mayor of Thetford* (1869), L. R. 4 C. P. 629; *Metropolitan Asylum District* v. *Hill* (1881), 6 App. Cas. 193, 203.

(*a*) *Brine* v. *Great Western Rail. Co.* (1862), 31 L. J. (Q. B.) 101; *Roberts* v. *Charing Cross etc. Rail. Co.* (1903), 87 L. T. 732.

(*b*) *Metropolitan Asylum District* v. *Hill*, *supra*; *Reg.* v *Bradford Navigation Co.* (1865), 6 B. & S. 631.

consequences are governed by laws other than those which municipal Courts administer (*c*). Accordingly, whether the transaction constituting an act of state be one between two independent States or between a State and an individual foreigner, no cause of action arises by reason of it, and redress must be sought by other means (*d*).

Volenti non fit injuria.

18. In some cases a person who has suffered damage by another's wrongful or negligent act may be precluded from recovering by the rule expressed in the maxim *Volenti* (*e*) *non fit injuria*. One who invites or consents to the doing of an act which occasions him a wrong cannot be heard to complain of it (*f*). Thus at common law no cause of action arises in respect of personal injuries sustained by a person who, with full knowledge of a source of danger, voluntarily undertakes to incur the risk of exposing himself to it (*g*). So a person who contracts to do work which is intrinsically dangerous, such as the manufacture of chemicals which produce noxious fumes or of articles liable to sudden explosions, must be taken to voluntarily subject himself to the risks which inevitably accompany such work, and cannot complain of any harm he may suffer (*h*); and a person who trespassed in a wood with knowledge that there were spring guns there, was held to have no cause of action for personal injuries suffered by him, for, having voluntarily exposed himself to the mischief, he must take the consequences of his own act (*i*).

The maxim, however, does not apply where a person, having a right to expect to find a place free from danger, voluntarily goes there knowing it to be in some degree unsafe, provided the danger is not so great that no reasonable person would have incurred it (*j*). In such a case it does not lie in the mouth of the person through

(*c*) *Cook* v. *Sprigg*, [1899] A. C. 572; *Salaman* v. *Secretary of State for India*, [1906] 1 K. B. 613.

(*d*) See cases cited in note (*c*), *supra*; *Buron* v. *Denman* (1848), 2 Ex. 167; *East India Co.* v. *Syed Ally* (1827), cited 7 Moo. Ind. App. 531; *Nabob of the Carnatic* v. *East India Co.* (1793), 2 Ves. Jun. 56; *West Rand Central Gold Mining Co.* v. *The King*, [1905] 2 K. B. 391, 409; *Doss* v. *Secretary of State for India* (1875), L. R. 19 Eq. 509; *Secretary of State for India* v. *Kamachee Boye Sahaba* (1859), 7 Moo. Ind. App. 476; *Sirdar Bhagwan Singh* v. *Secretary of State for India* (1874), L. R. 2 Ind. App. 38.

(*e*) Note that the rule is *volenti*, not *scienti*, *non fit injuria*.

(*f*) *Gould* v. *Oliver* (1837), 4 Bing. N. C. 134; *Smith* v. *Baker*, [1891] A. C. 325.

(*g*) *Smith* v. *Baker*, *supra*; *Membery* v. *Great Western Rail. Co.* (1889), 14 App. Cas. 179, 186; *Yarmouth* v. *France* (1888), 19 Q. B. D. 647, 657; *Thomas* v. *Quartermaine* (1887), 18 Q. B. D. 685, 696; *Williams* v. *Birmingham Battery Co.*, [1899] 2 Q. B. 338.

(*h*) *Smith* v. *Baker*, *supra*; *Thomas* v. *Quartermaine*, *supra*. See further the title MASTER AND SERVANT, *post*.

(*i*) *Ilott* v. *Wilkes* (1820), 3 B. & Ald. 304, 311, 314; compare *Bird* v. *Holbrook* (1828), 4 Bing. 628.

(*j*) *Clayards* v. *Dethick* (1848), 12 Q. B. 439; *Osborne* v. *London and North Western Rail. Co.* (1888), 21 Q. B. D. 220; *Baddeley* v. *Earl Granville* (1887), 19 Q. B. D. 423; *Lax* v. *Corporation of Darlington* (1879), 5 Ex. D. 28; *Thompson* v. *North Eastern Rail. Co.* (1860), 2 B. & S. 106; *Parnaby* v. *Lancaster Canal Co.* (1839), 11 A. & E. 223; *Winch* v. *Conservators of River Thames* (1875), L. R. 9 C. P. 378; *Holmes* v. *Clarke* (1861), 6 H. & N. 349; *Wyatt* v. *Great Western Rail. Co.* (1865), 34 L. J. (Q. B.) 204.

SECT. 3. Damnum absque injuriâ.

whose breach of duty the danger arises to say that the injured person had a knowledge of the danger and risked it (*k*).

Remoteness of damage.

19. Lastly, there are numerous cases in which one man sustains a damage in consequence of the act of another, but is unable to maintain an action because the damage is too "remote," *i.e.*, is not the legal and natural consequences of the act complained of (*l*).

SECT. 4.—*De minimis non curat lex.*

Maxim does not apply where consequential damage might ensue, or character is involved.

20. As above stated, where a person's right is infringed he can maintain an action, although he has suffered no appreciable damage. It is reasonable that he should be able to do so where the act in question, if unchallenged, might enable adverse claims to be substantiated against his property, or where his character is involved (*m*).

Where maxim applies.

Where, however, a plaintiff has no good reason for wishing to vindicate his right, it is not the policy of the Courts to encourage the bringing of actions unless actual appreciable damage has been suffered; and in such cases they may apply the maxim *De minimis non curat lex* (*n*). Thus the plaintiff's injury may be of so small and little consideration in the law that no action will lie for it (*o*).

A trifling departure from the terms of a contract will not necessarily preclude a Court from holding that it has been substantially performed (*p*). So too in construing revenue statutes it has been said that the Court is not bound to a strictness at once harsh and pedantic in the application of statutes; if the deviation were a mere trifle, which, if continued in practice, would weigh little or nothing in the public interest, it might properly be overlooked (*q*). Similarly the law takes no notice of gradual accretion to land not appreciable except after the lapse of considerable time (*r*); and where power was conferred by statute to fix boundaries it was said that the Court would not interfere if the errors complained of were only trivial (*s*). It has been suggested too that in considering whether a councillor is disqualified by reason of his interest in a contract with his council, the maxim might apply to trifling purchases over the counter, *e.g.*, of "a paint-brush or a few nails" (*a*). Again, where a testator leaves to a legatee such articles of plate as he may choose, the legatee, being entitled (in strictness) to choose all but a valueless trifle, may take the whole (*b*).

(*k*) *Thomas* v. *Quartermaine* (1887), 18 Q. B. D. 685, 697.

(*l*) See title DAMAGES.

(*m*) See *Joyce* v. *Metropolitan Board of Works* (1881), 44 L. T. 811.

(*n*) See, *e.g.*, *Taverner* v. *Cromwell* (1594), Cro. Eliz. 353; *Smith* v. *Targett* (1795), 2 Anstr. 533; *Brace* v. *Taylor* (1741), 2 Atk. 253.

(*o*) *Ashby* v. *White* (1703), 2 Ld. Raym. 938, *per* POWYS, J., at p. 944.

(*p*) *Whitcher* v. *Hall* (1826), 5 B. & C. 269, *per* LITTLEDALE, J., at p. 277.

(*q*) *The Reward* (1818), 2 Dods. 265, *per* Sir W. SCOTT. See also *French Guiana* (1817), 2 Dods. 151 (a prize case).

(*r*) *New River Co.* v. *Land Tax Commissioners* (1857), 2 H. & N. 129, 138; see also *Ford* v. *Lacy* (1861), 7 H. & N. 151, 155.

(*s*) *Graham* v. *Berry* (1865), 3 Moo. P. C. C. (N. S.) 207, 223.

(*a*) *Nutton* v. *Wilson* (1889), 22 Q. B. D. 744, *per* LOPES, L.J., at p. 749; but see *R.* v. *Rowlands*, [1906] 2 K. B. 292.

(*b*) *Arthur* v. *Mackinnon* (1879), 11 Ch. D. 385.

Part III.—Who may sue and be sued.

SECT. 1.—*In General.*

SECT. 1. In General.

21. The general rule of law is that any person, natural or artificial, may sue and be sued in the English Courts (*c*). Thus individual foreigners and foreign corporations (*d*) (not being alien enemies (*e*)) may sue and be sued; so too infants (*f*), lunatics (*f*), and married women (*g*), and persons of so exalted a position as a Queen Consort or Prince of Wales (*h*). It must be understood, however, that this right to sue and liability to be sued are subject to the rules of procedure framed by our Courts, and may in particular cases prove to be restricted by such rules, especially those relating to service of process outside the jurisdiction (*i*). Further, it is necessary to mention specifically certain persons or classes of persons who are excepted from the general rule enunciated above, or whose rights and liabilities are restricted by special provisions.

Any person may sue or be sued.

Rules of procedure may affect right and liability.

SECT. 2.—*The Crown.*

22. Though the Sovereign may, if he see fit, sue a subject in his own Courts, no suit can be maintained against him in such Courts by a subject, for it is a maxim of our law that "the King can do no wrong" (*k*).

No action against Crown.

If the act complained of by a subject be in the nature of a personal tort, his remedy is against that servant of the Crown who actually committed or authorised it (*l*), for as such act, even if

Tort committed by servant of Crown.

(*c*) Com. Dig. tit. "Action."

A trade union occupies an anomalous position and cannot now be sued for any tort (Trade Disputes Act, 1907 (6 Edw. 7, c. 47), s. 4). See title TRADE AND TRADE UNIONS.

(*d*) *Dutch West India Co.* v. *Van Moses* (1724), 1 Str. 612; *Newby* v. *Van Oppen and Colt's Patent Firearms Co.* (1872), L. R. 7 Q. B. 293; *La Bourgogne*, [1899] A. C. 431; *Logan* v. *Bank of Scotland* (No. 2), [1906] 1 K. B. 141. See these cases and the title PRACTICE AND PROCEDURE as to the service of writs upon foreign corporations and the powers of the Court to stay proceedings against them where a foreign tribunal would be more convenient.

(*e*) As to alien enemies, see p. 20, *post*. An alien friend may sue in our Courts, though under a disability in his own country, if such disability be not recognised here. Thus a French *prodigal* may sue, and his *conseil judiciaire* cannot intervene (*Re Selot*, [1902] 1 Ch. 488; *Worms* v. *De Valdor* (1880), 49 L. J. (CH.) 261). See generally title ALIENS.

(*f*) As to infants and lunatics, see pp. 21, 22, *post*.

(*g*) A married woman may now sue and be sued in all respects as if she were *feme sole* (Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 1 (2)). As to the joint liability of a husband and wife for the wife's torts, and as to their alternative liability in the case of her contracts, see title HUSBAND AND WIFE.

(*h*) Com. Dig. tit. "Action." A Queen Consort was always regarded as a *feme sole*.

(*i*) See title PRACTICE AND PROCEDURE.

(*k*) *Canterbury* v. *The Queen* (1843), 12 L. J. (CH.) 281; *Tobin* v. *The Queen* (1864), 33 L. J. (C. P.) 199; *Feather* v. *The Queen* (1865), 6 B. & S. 257, 295. According to Comyns (Dig. tit. "Action"), "until the reign of Edward I. the King might have been sued in all actions as a common person." An action for salvage does not lie against the Crown (*Young* v. *SS. Scotia*, [1903] A. C. 501; see also *The Cybele* (1878), 3 P. D. 8).

(*l*) *Musgrave* v. *Pulido* (1879), 5 App. Cas. 102; *Nireaha Tamaki* v. *Baker*, [1901] A. C. 561; *Tobin* v. *The Queen*, *supra*.

SECT. 2. The Crown.

committed by the King personally, could not in law be attributed to him, so it must be assumed that he did not authorise its commission by one of his servants.

Petition of right.

If, however, the subject's cause of complaint be an injury to, or deprivation of, property, or the breach of a contract made by, or on behalf of, the Crown, redress may be sought by means of the statutory remedy known as a petition of right against the King himself or the particular Government department concerned (*m*).

There are, however, certain colonial statutes which expressly give a right of action against the Crown (*n*).

Where the Crown sues, a subject may apparently plead a cross-claim or set-off (*o*).

SECT. 3.—*Crown Servants.*

Crown servants.

23. Crown servants and officers of public departments may sue and be sued like any other persons; but their liability in tort and contract is governed by different rules. A Government official or servant is liable for torts committed or expressly authorised by him as such official or servant, but not for torts resulting from the negligence or unauthorised acts of his subordinates, for such subordinates are not his servants, but those of the Crown (*p*). Again, a public servant cannot be made personally liable on a contract made by him on behalf of the Crown (*q*), nor can the public revenue be reached by means of a suit against him. This subject is treated further elsewhere (*r*).

SECT. 4.—*Foreign Sovereigns and Governments.*

Not liable to be sued.

24. A foreign Sovereign or State may enforce their private rights by action in our Courts (*s*); but they cannot be sued therein against

(*m*) See title CROWN PRACTICE; *Thomas* v. *The Queen* (1874), L. R. 10 Q. B. 31; *Windsor etc. Rail. Co.* v. *The Queen and the Western Counties Rail. Co.* (1886), 11 App. Cas. 607; *Kinloch* v. *Secretary of State for India* (1882), 7 App. Cas. 619.

(*n*) See New South Wales Act (39 Vict. No. 38) and *Farnell* v. *Bowman* (1887), 12 App. Cas. 643; Straits Settlements Crown Suits Ordinance, 1876, s. 18 (2), and *Attorney-General of Straits Settlements* v. *Wemyss* (1888), 13 App. Cas. 192. See also *Hettihewage Siman Appu* v. *Queen's Advocate* (1884), 9 App. Cas. 571.

(*o*) See *Hettihewage Siman Appu* v. *Queen's Advocate*, *supra*.

(*p*) *Lane* v. *Cotton* (1701), 1 Ld. Raym 646; *Whitfield* v. *Lord Le Despencer* (1778), 2 Cowp. 754; *Raleigh* v. *Goschen*, [1898] 1 Ch. 73; *Bainbridge* v. *Postmaster-General*, [1906] 1 K. B. 178. But the ordinary rule as to the liability of a principal for his agent's negligence applies to public bodies which are not Government departments: see *Gilbert* v. *Corporation of Trinity House* (1886), 17 Q. B. D. 795; *Wheeler* v. *Commissioners of Public Works*, [1903] 2 I. R. 202. See sect. 460 of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), as to actions against the Board of Trade for wrongfully detaining ships; and see also *Tozeland* v. *West Ham Union*, [1907] 1 K B. 920, as to the liability of guardians to paupers under their care.

(*q*) *Dunn* v. *Macdonald*, [1897] 1 Q. B. 555; *Macbeath* v. *Haldimand* (1786), 1 Term Rep. 172; *Gidley* v. *Lord Palmerston* (1822), 3 B. & B. 275; *Palmer* v. *Hutchinson* (1881), 6 App. Cas. 619. The remedy is by petition of right against the department in question (*Churchward* v. *The Queen* (1865), L. R. 1 Q. B. 173). As to certain officials and public bodies, who, though acting as agents of the Crown, have power to contract as principals, and may therefore be sued on a contract, at any rate to obtain a declaratory judgment, even if execution cannot issue against them, see *Graham* v. *Commissioners of Works*, [1901] 2 K. B. 781; *Dixon* v. *Farrer* (1886), 18 Q. B. D. 43.

(*r*) See titles CONSTITUTIONAL LAW; PUBLIC AUTHORITIES AND PUBLIC OFFICERS.

(*s*) *United States of America* v. *Wagner* (1867), 2 Ch. App. 582; *Emperor of*

SECT. 4. Foreign Sovereigns and Governments.

their will. As a consequence of that principle of international law which regards every sovereign State as absolutely independent, and of the international comity which induces every sovereign State to respect the independence and dignity of every other sovereign State, it is a well-settled rule of our law that our Courts will not exercise by their process jurisdiction over the person of any independent ruler of even the smallest State or country (*t*). This is so even if he is within their territorial jurisdiction perfectly *incognito* (*u*). The public property of a sovereign State (*a*) and the private property of a sovereign ruler (*b*) are protected by the same principle from arrest in an action *in rem*.

May sue and be counter-claimed against.

It would seem, however, that where a foreign Sovereign is the plaintiff a defendant may file a cross-claim of a character consistent with our practice (*c*); and a foreign Sovereign may be named as defendant in order to give him notice of a claim which the plaintiff makes to funds in the hands of a third party or trustee over whom the Court has jurisdiction (*d*).

Waiver of right.

The privilege may be waived (*e*), but only by an intentional submission to the jurisdiction, as, for example, by entering an appearance with knowledge of the facts (*f*); and it has been said that, even though there has been a submission, a foreign Power does not waive the right of removing its property (*g*).

SECT. 5.—*Diplomatic Officers.*

Diplomatic privilege.

25. Diplomatic and consular officers may sue in our Courts as private individuals (*h*). An ambassador cannot, however, be sued

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Austria v. *Day* (1861), 30 L. J. (CH.) 690; *Hullett* v. *King of Spain* (1828), 2 Bli. (N.S.) 31, affirmed (1833), 1 Cl. & F. 333; *King of the Two Sicilies* v. *Willcox* (1851), 1 Sim. (N. S.) 301; *The Colombian Government* v. *Rothschild* (1826), 1 Sim. 94.

(*t*) *The Parlement Belge* (1880), 5 P. D. 197. A certificate from the Foreign or Colonial Secretary as to the independence of the foreign ruler is conclusive with respect thereto (*Mighell* v. *Sultan of Johore*, [1894] 1 Q. B. 149, disapproving *The Charkieh* (1873), L. R. 4 A. & E. 59).

(*u*) *Mighell* v. *Sultan of Johore*, *supra*.

Though a king be in a foreign country, yet he is judged in law to be a king there (*Calvin's Case* (1609), 7 Co. Rep. 15 b).

(*a*) Public property, *e.g.*, public ships of war, whether armed (*The Prins Frederik* (1820), 2 Dods. 451) or unarmed (*The Thomas A. Scott* (1864), 10 L. T. 726), shells (*Vavasseur* v. *Krupp* (1878), 9 Ch. D. 351), mail ships (*The Parlement Belge*, *supra*), and all public vessels belonging to foreign rulers in their public capacity (*The Constitution* (1879), 4 P. D. 39; *The Jassy*, [1906] P. 270), even if partly used for trading purposes (*The Parlement Belge*, *supra*).

(*b*) *The Parlement Belge*, *supra*; *Vavasseur* v. *Krupp*, *supra*.

(*c*) *South African Republic* v. *La Compagnie Franco-Belge du Chemin de Fer du Nord*, [1897] 2 Ch. 487; *Strousberg* v. *Republic of Costa Rica* (1881), 44 L. T. 199; *Prioleau* v. *United States of America* (1867), 36 L. J. (CH.) 36; *Rothschild* v. *Queen of Portugal* (1839), 3 Y. & C. Eq. 594; *Wadsworth* v. *Queen of Spain* (18 1) 17 Q. B. 171; *Duke of Brunswick* v. *King of Hanover* (1844), 6 Beav. 1; *Hettihewage Siman Appu* v. *Queen's Advocate* (1884), 9 App. Cas. 571.

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

(*e*) *Mighell* v. *Sultan of Johore*, *supra*. See also *Gladstone* v. *Musurus Bey* (1862), 32 L. J. (CH.) 155.

(*f*) *Mighell* v. *Sultan of Johore*, *supra*. An unauthorised appearance by an agent is not sufficient (*The Jassy*, *supra*).

(*g*) *Vavasseur* v. *Krupp*, *supra*.

(*h*) *Penedo* v. *Johnson* (1873), 29 L. T. 452; *Schneider* v. *Lizardi* (1845), 9 Beav. 461.

SECT. 5. Diplomatic Officers.

against his will even in respect of private commercial transactions (*i*); and the privilege extends (*k*) to his family and suite, attachés (*l*), secretaries of legation (*m*) and other secretaries, his domestic servants, if *bonâ fide* employed as such (*n*), his goods, and his house.

Limits of privilege.

No privilege was held to exist where a servant lived away from the embassy, and his goods were not necessary for the convenience of the ambassador (*o*), nor where a chaplain did no buty (*p*); and an interpreter (*q*) and a land waiter at the customs have been held unprivileged (*r*).

Consuls.

A consul does not enjoy the same exemption (*s*).

Waiver.

The privilege may be waived as in the case of a foreign Sovereign (*t*).

SECT. 6.—*Alien Enemies.*

Right to sue and be sued suspended during hostilities.

26. On grounds of public policy an alien enemy (*u*) is not permitted to maintain an action in our Courts during the progress of hostilities (*a*) unless resident in the country by licence, or under protection of the Crown (*b*). An action commenced by him before the outbreak of war cannot be continued after its outbreak (*c*), nor can any other person maintain an action on his behalf while hostilities last (*d*).

(*i*) See the Diplomatic Privileges Act, 1708 (7 Anne, c. 12); *De Haber* v. *Queen of Portugal* (1851), 17 Q. B. 196; *Magdalena Steam Navigation Co.* v. *Martin* (1859), 28 L. J. (Q. B.) 310. An English subject accredited is privileged unless an opposite condition is imposed at the time of his appointment (*Macartney* v. *Garbutt* (1890), 24 Q. B. D. 368).

(*k*) As to the limits of the privilege generally, see *Magdalena Steam Navigation Co.* v. *Martin*, *supra*, and cases cited below.

(*l*) *Parkinson* v. *De Potter* (1885), 16 Q. B. D. 152, 157.

(*m*) *Taylor* v. *Best* (1854), 14 C. B. 487, 523; *Hopkins* v. *De Robeck* (1789), 3 Term Rep. 79.

(*n*) *Ex parte Cloete* (1891), 65 L. T. 102; *Fisher* v. *Begrez* (1832), 2 L. J. (EX.) 13; *Delvalle* v. *Plomer* (1811), 3 Camp. 47; *Darling* v. *Aikins* (1769), 3 Wils. 33; *Lockwood* v. *Caysgarne* (1765), 3 Burr. 1676; *Triquet* v. *Bath* (1764), 3 Burr. 1478; *Heathfield* v. *Chilton* (1767), 4 Burr. 2016.

Compare also Binkershuck de Foro Legatorum, where it is said that "a person in debt cannot be taken into the service of a foreign minister in order to protect him."

(*o*) *Novello* v. *Toogood* (1823), 1 B. & C. 554.

(*p*) *Seacomb* v. *Bowlney* (1743), 1 Wils. 20.

(*q*) *Malachi Carolino's Case* (1744), 1 Wils. 78.

(*r*) *Masters* v. *Manby* (1757), 1 Burr. 401.

(*s*) *Viveash* v. *Becker* (1814), 3 M. & S. 284, 298.

(*t*) See p. 19, *ante*.

(*u*) As to who is an alien enemy, see title ALIENS, and *Janson* v. *Driefontein Consolidated Mines, Ltd.*, [1902] A. C. 484; *Sorensen* v. *Reg.*, *The Baltica* (1857), 11 Moo. P. C. 141; *Albrecht* v. *Sussmann* (1813), 2 V. & B. 323; *O'Mealey* v. *Wilson* (1808), 1 Camp. 482; *McConnell* v. *Hector* (1802), 3 Bos. & P. 113.

(*a*) *De Wahl* v. *Braune* (1856), 1 H. & N. 178; *Brandon* v. *Nesbit* (1794), 6 Term Rep. 82; *Bristow* v. *Towers* (1794), 6 Term Rep. 35; *Ricord* v. *Bettenham* (1765), 3 Burr. 1734; *Anthon* v. *Fisher* (1783), 2 Dougl. 649, n.

(*b*) *Alcinous* v. *Nigreu* (1854), 4 E. & B. 217; *Casseres* v. *Bell* (1799), 8 Term Rep. 166; *Daubigny* v. *Davallon* (1794), 2 Anstr. 462; *Wells* v. *Williams* (1697), 1 Salk. 46; *Sylvester's Case* (1703), 7 Mod. Rep. 150; *Boulton* v. *Dobree* (1808), 2 Camp. 163.

(*c*) *Le Bret* v. *Papillon* (1804), 4 East, 502.

As to staying execution where an alien friend becomes an alien enemy after verdict but before execution, see *Vanbrynen* v. *Wilson* (1808), 9 East, 321.

(*d*) *Brandon* v. *Nesbitt* (1794), 6 Term Rep. 23; *Bristow* v. *Towers* (1794), 6

His right of action is, however, merely suspended, and revives on the restoration of peace (*e*); and a prisoner of war whilst still in confinement may sue upon a contract entered into by him whilst such a prisoner (*f*).

Right revives when hostilities at an end.

The Court may apparently take notice of the fact that a plaintiff is an alien enemy, even though it be not pleaded (*g*).

SECT. 7.—*Bankrupts.*

Right to sue.

27. A bankrupt's right to maintain an action depends upon whether or not the cause of action is one which vests in his trustee; if it does so vest, the trustee is the proper person to sue; if it does not so vest, the bankrupt may himself sue, subject to the right of the trustee to intervene and take the proceeds of the action, except so far as they are necessary for the bankrupt's maintenance (*h*).

Liability to be sued.

Bankruptcy is a defence to any action brought (or continued) without leave of the Court in respect of any debt for which the plaintiff could prove in the bankruptcy (*i*).

SECT. 8.—*Infants.*

Infants.

28. An infant can sue and be sued; but specific performance cannot be decreed against him (*k*), and, therefore, the Court will not as a rule grant specific performance at his suit (*l*). An injunction may in a proper case be granted against him (*m*). An infant litigant is, however, subject to special rules of procedure: he should sue by his "next friend" (*n*); if he sues in his own name alone, the writ may be set aside with costs against the solicitor issuing it (*o*); but, in the absence of any objection by the defendant, the action could

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Term Rep. 35. See, however, *Daubuz* v. *Morshead* (1815), 6 Taunt. 332; *Kensington* v. *Inglis* (1807), 8 East, 273, two exceptional cases as to bills negotiated by prisoners of war and insurance policies on alien vessels.

(*e*) *Janson* v. *Driefontein Consolidated Mines, Ltd.*, [1902] A. C. 484, citing *The Jan Frederick* (1804), 5 Ch. Rob. 128, *The Boedes Lust* (1804), 5 Ch. Rob. 233, *Flindt* v. *Waters* (1812), 15 East, 260; see also *Antoine* v. *Morshead* (1815), 1 Marsh, 558; *Ex parte Boussmaker* (1806), 13 Ves. 71.

(*f*) *Maria* v. *Hall* (1807), 1 Taunt. 33, n.; *Sparenburgh* v. *Bannatyne* (1797), 1 B. & P. 163.

(*g*) *Janson* v. *Driefontein Consolidated Mines, Ltd.*, *supra*, *per* Lord DAVEY; and as to pleading generally in an action by an alien enemy, see *Wells* v. *Williams* (1697), 1 Salk. 46; *Le Bret* v. *Papillon* (1804), 4 East, 502; *Sylvester's Case* (1703), 7 Mod. Rep. 150; *Boulton* v. *Dobree* (1808), 2 Camp. 163. See generally, as to status of aliens, title ALIENS.

(*h*) *Beckham* v. *Drake* (1847), 2 H. L. C. 579; *Bailey* v. *Thurston & Co., Ltd.*, [1903] 1 K. B. 137.

(*i*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 9 (1). See title BANKRUPTCY AND INSOLVENCY.

(*k*) *Lumley* v. *Ravenscroft*, [1895] 1 Q. B. 683.

(*l*) *Flight* v. *Bolland* (1828), 4 Russ. 298.

(*m*) *Lemprière* v. *Lange* (1879), 12 Ch. D. 675; *Evans* v. *Ware*, [1892] 3 Ch. 502; but not where he could not be sued for damages, *De Francesco* v. *Barnum* (1889), 43 Ch. D. 165. He may be ordered to pay the costs of the action for an injunction, *Woolf* v. *Woolf*, [1899] 1 Ch. 343.

(*n*) R. S. C., Ord. 16, r. 16. The next friend is liable for the costs of the action.

(*o*) *Geilinger* v. *Gibbs*, [1897] 1 Ch. 479, unless leave were given to amend by adding a next friend.

SECT. 8. Infants.

proceed without a next friend (*p*). An action against an infant is commenced against him in the ordinary way, but he must enter appearance and defend by a guardian *ad litem* (*q*).

SECT. 9.—*Lunatics.*

Lunatic so found.

29. A lunatic may sue and be sued, subject (like an infant) to special rules of procedure. A lunatic so found by inquisition sues and is sued together with his committee (*r*), who should, before commencing or defending any action, obtain leave from the Court in lunacy (*a*).

Lunatic not so found.

A person of unsound mind, not so found by inquisition, should sue by his next friend; he may be sued in his own name as an ordinary defendant, and should enter appearance; but a guardian *ad litem* should be appointed to carry on the defence (*b*).

Part IV.—Conditions Precedent to Action.

SECT. 1.—*Award of an Arbitrator* (*c*).

Arbitration as to validity and amount of claim.

30. An agreement to refer a dispute to arbitration couched in such language as to entirely oust the jurisdiction of the Courts is invalid (*d*); but there is no legal objection to an agreement which makes it a condition precedent to the enforcement of a claim that the liability and amount shall first be determined by arbitration (*e*). An agreement of the last-mentioned nature can be pleaded as a defence to any action brought in respect of the matters to be referred.

SECT. 2.—*Consent.*

Under Public Health Act, 1875.

31. In certain cases it is necessary for a plaintiff to obtain the consent of a public officer or body before he can maintain his

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(*p*) *Ex parte Brocklebank* (1877), 6 Ch. D. 358.

(*q*) R. S. C., Ord. 16, r. 18. As to the procedure if no appearance is entered, see Ord. 13, r. 1. See generally titles INFANTS and PRACTICE AND PROCEDURE.

(*r*) *Jones* v. *Lloyd* (1874), L. R. 18 Eq. 265; *Farnham* v. *Milward & Co.*, [1895] 2 Ch. 730; *Fuller* v. *Lance* (1663), 1 Ch. Ca. 18. If the committee has adverse interests, a next friend or guardian *ad litem* respectively may be appointed to sue or defend.

(*a*) See *Re Hinchcliffe* (1895), 73 L. T. 522.

(*b*) *Didisheim* v. *London and Westminster Bank*, [1900] 2 Ch. 15; R. S. C., Ord. 16, r. 17. If no appearance is entered, see Ord. 13, r. 1. As to an inquiry into a party's state of mind, see *Howell* v. *Lewis* (1891), 65 L. T. 672. See generally titles LUNATICS AND PERSONS OF UNSOUND MIND and PRACTICE AND PROCEDURE.

(*c*) See generally title ARBITRATION.

(*d*) *Scott* v. *Avery* (1855), 5 H. L. C. 811; unless, indeed, it be a statutory agreement, as to which see *Crosfield* v. *Manchester Ship Canal Co.*, [1905] A. C. 421.

(*e*) *Scott* v. *Avery*, *supra*; *Trainor* v. *Phœnix Fire Assurance Co.* (1891), 65 L. T. 825.

action. Thus under the Public Health Act, 1875 (*f*), a plaintiff not being either a "party aggrieved" or the local authority of the district, or (in certain cases) of an adjoining district, must obtain the consent of the Attorney-General before commencing proceedings for the recovery of any penalty under that Act. Under such circumstances it has been held that a plaintiff must allege in his pleading that he has obtained the necessary consent, since upon it depends his title to sue (*g*).

Under Charitable Trusts Act, 1853.

Again, in proceedings falling within s. 17 of the Charitable Trusts Act, 1853 (*h*), the leave of the Charity Commissioners must be obtained. In this case, however, the Court may allow the consent to be applied for even after the action has been commenced (*i*). The section applies to any suit, petition, or other proceeding for obtaining any relief, order, or direction concerning or relating to any charity, or the funds, property, or income thereof (*k*).

SECT. 3.—*Demand or Request.*

Amount of solicitor's costs.

32. In certain cases before a plaintiff can maintain an action for money or for goods, he must deliver a bill or make a demand. Thus a solicitor must have delivered his bill of costs one month at least before he commences an action for the amount (*l*).

Negotiable instruments.

In an action on a promissory note payable "on demand," a demand (other than that implied in the issuing of the writ) need not be alleged or proved (*m*); but presentment (*n*) of a bill of exchange is ordinarily (*o*) necessary in order to charge the drawer or an indorsee, and also in order to charge the acceptor, where the bill is made payable only at a particular place "and not elsewhere."

Money paid under mistake.

A previous demand is necessary where a plaintiff seeks to recover money paid by him under a mistake of fact (*p*).

Goods detained or converted.

A demand and refusal of goods is evidence of their conversion (*q*), and is the ordinary evidence of their detention. Indeed, a demand would appear to be necessary before commencing an action of detinue (*r*), although, of course, if the plaintiff, without proving an actual demand and refusal, show that the defendant has, by his mode of originally obtaining the goods or by his conduct in respect

(*f*) 38 & 39 Vict. c. 55, s. 253.

(*g*) *Hollis* v. *Marshall* (1858), 2 H. & N. 755; and it is still advisable to plead it, though possibly R. S. C., Ord. 19, r. 14, has rendered it unnecessary to do so.

(*h*) 16 & 17 Vict. c. 137.

(*i*) *Rendall* v. *Blair* (1890), 45 Ch. D. 139.

(*k*) As to what actions fall within these words, see *Fisher* v. *Jackson*, [1891] 2 Ch. 84.

(*l*) Solicitors Act, 1843 (6 & 7 Vict. c. 73), s. 37. See title SOLICITORS.

(*m*) *Rumball* v. *Ball* (1714), 10 Mod. Rep. 38.

(*n*) *Rowe* v. *Young* (1820), 2 B. & B. 165; Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), ss. 19 (2), 52 (1).

(*o*) As to circumstances excusing presentment, see Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 46. See title BILLS OF EXCHANGE ETC.

(*p*) *Freeman* v. *Jeffries* (1869), L. R. 4 Ex. 189.

(*q*) *Hollins* v. *Fowler* (1875), L. R. 7 H. L. 757; *Philpott* v. *Kelley* (1835), 3 A. & E. 106; *France* v. *Gaudet* (1871), L. R. 6 Q. B. 199.

(*r*) "How could there be a wrongful detention until some claim was made?" (*Freeman* v. *Jeffries*, *supra*, *per* BRAMWELL, B., at p. 201). See also *Wilkinson* v. *Verity* (1871), L. R. 6 C. P. 206; *Wilkinson* v. *Godefroy* (1839), 9 A. & E. 536 (case of a stakeholder).

SECT. 3. Demand or Request.

of them, so dealt with them as to have "converted" them to his own use, then the plaintiff may sue him for the conversion without proof of any demand (*s*).

Agreement requiring formal demand.

Apart also from these statutory or common law requirements, parties may by agreement provide for a formal demand; in such a case an action brought without a previous demand will be premature (*t*).

The necessity for a demand in actions for the recovery of land and double value is discussed in a later volume of this work (*a*).

As to the necessity for demanding inspection of the warrant under which a constable has acted before commencing an action against him in respect of his acts thereunder, see p. 26, *post*.

SECT. 4.—*Notice of Action.*

Notice required by statute.

33. In numerous statutes, both public general and local and personal, there are provisions requiring a plaintiff, before commencing his action, to give notice thereof to persons whom he intends to sue in respect of any act, neglect, or default committed by them in execution or purported execution of the particular statute. At the present date, in considering how far provisions of this nature are still applicable, it is necessary to bear in mind two statutes of a general character, viz. "Pollock's" Act, 1842 (*b*), and the Public Authorities Protection Act, 1893 (*c*).

Length of notice.

The Act of 1842 provides that in all cases where notice of action is required such notice shall be given one calendar month at least before any action shall be commenced; and such notice shall be sufficient, any Act or Acts to the contrary notwithstanding (*d*).

Public Authorities Protection Act, 1893.

The Act of 1893 applies to any action, prosecution, or other proceeding against any person for any act done in pursuance or execution or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such act, duty, or authority (*e*); and it repeals so much of any public general Act as requires notice of action to be given in any proceeding to which it (the Act of 1893) applies (*f*). It follows, therefore, that for the purpose of determining whether any (and if so what) notice is now required by any particular statute proceedings must be divided into the following classes:—

(1) Proceedings arising out of a statute not being a public general statute. In this case reference must be made to the statute itself;

(*s*) See cases cited in note (*r*), p. 23, *supra*, and *Bristol and West of England Bank* v. *Midland Rail. Co.*, [1891] 2 Q. B. 653. See title TROVER AND CONVERSION.

(*t*) *Birks* v. *Trippet* (1666), 1 Saund. 32; *Sicklemore* v. *Thistleton* (1817), 6 M. & S. 9.

(*a*) See title LANDLORD AND TENANT.

(*b*) Limitations of Actions and Costs Act, 1842 (5 & 6 Vict. c. 97), as amended by the Statute Law Revision Act, 1890 (No. 2) (53 & 54 Vict. c. 51), Schedule, Part II.

(*c*) 56 & 57 Vict. c. 61.

(*d*) Sect. 4.

(*e*) Sect. 1. For a full treatment of this subject, see title PUBLIC AUTHORITIES AND PUBLIC OFFICERS.

(*f*) Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), s. 2.

if it provides for notice, notice must be given; if it was passed before 1843, one month's notice will be sufficient; if it was passed since 1843 (*g*), the length of notice will be that prescribed by the statute, or if none be prescribed, then reasonable notice, as a rule presumably one month (*h*).

(2) Proceedings arising out of a public general statute, and being proceedings to which the Public Authorities Protection Act, 1893, applies. In this case no notice is now required.

(3) Proceedings arising out of a public general statute, but not being proceedings to which the Act of 1893 applies; this class of cases is governed by the same rules as class (1), *supra*.

Defendants to whom Act applies.

34. It is necessary, therefore, to consider briefly to what proceedings the Act of 1893 does apply. First, as to the class of defendants to whom it applies. It only applies to defendants acting in pursuance or execution, or intended execution, of a statute, public duty, or authority; it is generally accepted that it does not apply to ordinary individuals or trading companies, though acting under statutory powers (*i*), but is confined to public officials and authorities. Thus it applies to local authorities acting as harbour authorities (*k*), as tramway authorities (*l*), as burial authorities (*m*), as education authorities (*n*), as purveyors of gas, water, and electricity (*o*), as highway or sanitary authorities etc. To all such bodies and their officials (*p*) carrying out their orders the statute applies if the act of commission or omission complained of was committed in pursuance or execution, or intended execution, of some statute or public duty. So it was held to apply where officials of a highway authority were sued in respect of an alleged trespass committed by them under express orders to assert a public right of way, for it was the authority's duty to protect rights of way (*q*), but not to proceedings against a borough councillor for voting in the council when disqualified (*r*). And it applies to the case of a county court bailiff acting under a warrant wrongly issued (*s*).

An act is to be regarded as done "in pursuance of" a statute, if the doer had a reasonable and *bonâ fide* belief that he was so acting (*t*).

(*g*) See *Boden* v. *Smith* (1849), 18 L. J. (C. P.) 121.

(*h*) See Pollock's Act, 1842 (5 & 6 Vict. c. 97), s. 4, note (*d*), *supra*.

(*i*) *Att.-Gen.* v. *Company of Proprietors of Margate Pier and Harbour Co.*, [1900] 1 Ch. 749; *Lyles* v. *Southend-on-Sea Corporation*, [1905] 2 K. B. 1; *Parker* v. *London County Council*, [1904] 2 K. B. 501.

(*k*) *The Ydun*, [1899] P. 236.

(*l*) *Parker* v. *London County Council*, [1904] 2 K. B. 501; *Lyles* v. *Southend-on-Sea Corporation*, [1905] 2 K. B. 1.

(*m*) *Toms* v. *Clacton Urban District Council* (1898), 62 J. P. 505.

(*n*) *Reid* v. *Blisland School Board* (1901), 17 T. L. R. 626.

(*o*) *Ambler* v. *Bradford Corporation*, [1902] 2 Ch. 585.

(*p*) But not independent contractors. See *Tilling, Ltd.* v. *Dick Kerr & Co., Ltd.*, [1905] 1 K. B. 562; *Kent County Council* v. *Folkestone Corporation*, [1905] 1 K. B. 620.

(*q*) *Greenwell* v. *Howell*, [1900] 1 Q. B. 535; *Salisbury* v. *Gould* (1904), 68 J. P. 158 (medical officer of health).

(*r*) *Humphries* v. *Worwood* (1895), 64 L. J. (Q. B.) 437.

(*s*) *Turley* v. *Daw* (1906), 94 L. T. 216.

(*t*) *Hazeldine* v. *Grove* (1842), 3 Q. B. 997; *Lea* v. *Facey* (1887), 19 Q. B. D. 352, 356; *Agnew* v. *Jobson* (1877), 47 L. J. (M. C.) 67, 68; *Heath* v. *Brewer*

SECT. 4. **Notice of Action.**

Actions to which Act applies.

Secondly, as to the class of actions to which it applies. It applies only to actions in respect of a tort or wrong (*u*), whether actions for damages only, or actions for injunctions (*a*) or declarations (*b*); but it does not apply to actions for breaches of contract (*c*), or for the price of goods or of work and labour, although bargained for in order to carry out a statutory duty, nor to actions *in rem* (*d*).

Form of notice.

The notice, when required, should give the name and address of the plaintiff or his solicitor (*e*), and should state the cause of complaint, with full particulars, and the intention to sue (*f*); but an error or omission, which cannot mislead the defendants, is immaterial (*g*).

Pleading the Act.

A defendant who intends to rely on the absence of notice must raise the point in his defence (*h*).

Demand for inspection of constable's warrant.

35. Closely akin to provisions requiring notice of action is the enactment (*i*) which provides that no action shall be brought against any constable (*k*), head borough, or other officer, or against any person or persons acting by his order and in his aid, for anything done in obedience to a justice's warrant until demand has been made in the prescribed mode for inspection of the warrant, and until six days have elapsed without inspection being given. The object of the provision is, of course, to enable the plaintiff to see whether the constable has merely executed a warrant which was a valid authority to him, or whether he has exceeded his authority (*l*).

(1864), 9 L. T. 653; *Burling* v. *Harley* (1858), 3 H. & N. 271, 274; *Booth* v. *Clive* (1851), 20 L. J. (C. P.) 151; *Spooner* v. *Juddow* (1850), 6 Moo. P. C. 257, 283; *Smith* v. *Hopper* (1847), 9 Q. B. 1005, 1014.

(*u*) *Milford Docks Co.* v. *Milford Haven Urban District Council* (1901), 65 J. P. 483, *per* ROMER, L.J.; but see *Cree* v. *St. Pancras Vestry*, [1899] 1 Q. B. 693; *Midland Rail. Co.* v. *Withington Local Board* (1883), 11 Q. B. D. 788.

(*a*) *Fielding* v. *Morley Corporation*, [1899] 1 Ch. 1.

(*b*) *Grand Junction Waterworks Co.* v. *Hampton Urban District Council* (1899), 63 J. P. 503; *Offin* v. *Rochford Rural District Council*, [1906] 1 Ch. 342, 357.

(*c*) *Clarke* v. *Lewisham Borough Council* (1903), 67 J. P. 195.

(*d*) *Milford Docks Co.* v. *Milford Haven Urban District Council*, *supra*; *The Burns*, [1907] P. 137.

(*e*) *Morgan* v. *Leach* (1842), 10 M. & W. 558; *Roberts* v. *Williams* (1835), 5 Tyr. 583; *James* v. *Swift* (1825), 4 B. & C. 681; *Mayhew* v. *Locke* (1816), 7 Taunt. 63; *Osborn* v. *Gough* (1803), 3 Bos. & P. 550.

(*f*) *Taylor* v. *Newfield* (1854), 2 W. R. 474; *Prickett* v. *Gratrex* (1846), 8 Q. B. 1020; *Gimbert* v. *Coyney* (1825), McL. & Y. 469; *Green* v. *Hutt* (1882), 51 L. J. (Q. B.) 640; *Forbes* v. *Lloyd* (1876), 10 Ir. R. C. L. 552; *Leary* v. *Patrick* (1850), 15 Q. B. 266; *Jacklin* v. *Fytche* (1845), 14 M. & W. 381; *Jones* v. *Nicholls* (1844), 13 M. & W. 361; *Breese* v. *Jerdein* (1843), 4 Q. B. 585; *Martins* v. *Upcher* (1842), 3 Q. B. 662; *Norris* v. *Smith* (1839), 10 A. & E. 188; *Mason* v. *Birkenhead Improvement Commissioners* (1860), 6 H. & N. 72.

(*g*) *Green* v. *Broad and Hutt* (1882), 46 L. T. 888; *Madden* v. *Kensington Vestry*, [1892] 1 Q. B. 614; *Hollingsworth* v. *Palmer* (1849), 18 L. J. (EX.) 409; *Jones* v. *Bird* (1822), 5 B. & Ald. 837; *Smith* v. *West Derby Local Board* (1878), 3 C. P. D. 423; *Jones* v. *Nicholls*, *supra*; *Howard* v. *Remer* (1853), 2 E. & B. 915.

(*h*) *Arnold* v. *Hamel* (1854), 23 L. J. (EX.) 137.

(*i*) Constables Protection Act, 1751 (24 Geo. 2, c. 44), s. 6.

(*k*) The section applies to metropolitan police (10 Geo. 4, c. 44, s. 4; 2 & 3 Vict. c. 47, s. 5), county police (2 & 3 Vict. c. 93, s. 8), borough police (45 & 46 Vict. c. 50, s. 191), parish constables (5 & 6 Vict. c. 109, s. 15; 35 & 36 Vict. c. 92, s. 7), and special constables (1 & 2 Will. 4, c. 41, s. 5).

(*l*) See *Parton* v. *Williams* (1820), 3 B. & Ald. 330; *Cotton* v. *Kadwell* (1833), 2 Nev. & M. (K. B.) 399; *Hoye* v. *Bush* (1840), 1 M. & G. 775; *Peppercorn* v. *Hoffman* (1842), 9 M. & W. 618; *Kay* v. *Grover* (1831), 7 Bing. 312.

Part V.—Suspension of Right of Action.

SECT. 1.—*By Agreement to refer to Arbitration.*

SECT. 1. **Agreement to refer to Arbitration.**

36. A simple agreement to refer a dispute to arbitration, as distinct from one which makes an arbitrator's award a condition precedent to an action, could not at common law be pleaded as a defence, and did not bar a plaintiff from bringing his action, if he chose to disregard the agreement (*m*). The Legislature has, however, interfered (*n*) in order to give effect to such agreements; and now an action brought in defiance of such an agreement will be stayed unless there exists sufficient reason to the contrary (*o*).

Agreement to refer.

SECT. 2.—*By Receipt of Negotiable Instrument.*

37. Where a negotiable instrument is taken by a creditor, not in full satisfaction (*p*), but merely on account of a simple contract debt, it operates as a conditional payment thereof. His right of action is suspended during the currency of the instrument, and the instrument affords a good defence to an action brought before it matures (*q*). If the instrument is honoured in its entirety or in part, the debt is paid and satisfied wholly or *pro tanto* (*r*). If, however, it is dishonoured on maturity or only partly paid, the debt or the balance may then be recovered by action (*s*).

Effect of acceptance.

SECT. 3.—*Actions in respect of Felonious Torts.*

38. Although it has been said that the "suspension" of a cause of action is a thing nearly unknown to our law (*t*), it has long (*a*) been recognised that in theory, where an injury amounts to an infringement of the civil rights of an individual, and at the same time to a felony, the right of redress by action (or by proof in bankruptcy) is suspended until the party inflicting the injury has been prosecuted, and public justice thus vindicated (*b*).

Effect of rule.

(*m*) *Thompson* v. *Charnock* (1799), 8 Term Rep. 139.

(*n*) First by the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), s. 11, and now by the Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 4.

(*o*) Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 4. See titles ARBITRATION and PRACTICE AND PROCEDURE.

(*p*) Whether it is so taken is a question of fact as to the parties' intention. See *Re Romer and Haslam*, [1893] 2 Q. B. 286.

(*q*) *Re Romer and Haslam, supra*; *Felix Hadley & Co.* v. *Hadley*, [1898] 2 Ch. 680.

(*r*) *Ibid.*; *Thorne* v. *Smith* (1851), 10 C. B. 659.

(*s*) Cases cited above; and *Gunn* v. *Bolckow, Vaughan & Co.* (1875), 10 Ch. App. 491. See generally title BILLS OF EXCHANGE ETC.

(*t*) *Ex parte Ball, In re Shepherd* (1879), 10 Ch. D. 667, *per* Lord BRAMWELL.

(*a*) "For three hundred years it has been said in various ways by judges, many of the greatest eminence, without intimating a doubt, except in one instance, that there is some impediment to the maintenance of an action" to recover an indebtedness caused by the felonious act of the defendant (*ibid.*, *per* Lord BRAMWELL, at p. 671).

(*b*) *Ibid.*; *Appleby* v. *Franklin* (1885), 17 Q. B. D. 93; *Wells* v. *Abrahams* (1872), L. R. 7 Q. B. 554; *Midland Insurance Co.* v. *Smith* (1881), 6 Q. B. D. 561; *Osborn* v. *Gillett* (1873), L. R. 8 Ex. 88; *Wellock* v. *Constantine* (1863), 2 H. & C. 146; *White* v. *Spettigue* (1845), 13 M. & W. 603; and cases cited in the

SECT. 3. Felonious Torts.

This rule is based on the grounds of public policy (*c*); and at one time it appears to have been thought that the right of action was (as was said) actually "merged," or "drowned," in the felony (*d*). It seems clear, however, that the true view is that it is merely suspended (*e*).

Application of rule.

39. The rule was acted upon in a case where a servant, suing her master for assault, pleaded and proved a rape, for which he had not been prosecuted, the judge nonsuiting the plaintiff, and the Court, with hesitation, upholding his decision (*f*); but in a later case, where the conversion alleged appeared upon the evidence to amount to a felony, it was held that the judge was right in declining to nonsuit (*g*), and subsequently it was also held that a statement of claim, showing the cause of action to be a felony, was not demurrable on that ground (*h*). At the present date, therefore, it is doubtful whether the rule is of any practical importance, since it seems clear that the defendant cannot raise the point in his pleadings (*i*). Nevertheless it would appear to be unsafe to ignore the existence of the rule; and it is submitted that, if in any particular case the evidence disclosed a felony in respect of which the plaintiff clearly ought to institute a prosecution, the judge might properly postpone the trial until this had been done. It must be remembered in this connection that a judge's duty is no longer confined to the bare trial of issues (*k*).

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succeeding notes. But the prosecution need not result in a conviction (*Crosby* v. *Leng* (1810), 12 East, 409; *Dudley Banking Co.* v. *Spittle* (1860), 1 Jo. & H. 14).

(*c*) So it was said in an action for trover arising out of a theft that if such an action could be maintained before the felon had been prosecuted, ". . . we should have no more criminal prosecutions; you must do your duty to the public before you seek a benefit to yourself" (*Gimson* v. *Woodfull* (1825), 2 C. & P. 41, *per* BEST, C.J.).

(*d*) See, *e.g.*, *dicta* in *Markham* v. *Cobb* (1626), W. Jones, 147; *Higgins* v. *Butcher* (1606), Yelv. 89; *Dawkes* v. *Coveneigh* (1652), Sty. 346.

(*e*) See *per* WATKIN WILLIAMS, J., in *Midland Insurance Co.* v. *Smith* (1881), 6 Q. B. D. 561, at p. 568: "The history of the question shows that it has at different times and by different authorities been resolved in three distinct ways. First, it has been considered that the private wrong and injury has been entirely merged and drowned in the public wrong, and therefore no cause of action ever arose or could arise. Secondly, it was thought that, although there was no actual merger, it was a condition precedent to the accruing of the cause of action that the public right should have been vindicated by the prosecution of the felon. Thirdly, it has been said that the true principle of the common law is that there is neither a merger of the civil right, nor is it a strict condition precedent to such right that there shall have been a prosecution of the felon, but that there is a duty imposed upon the injured person not to resort to the prosecution of his private suit to the neglect and exclusion of the vindication of the public law. In my opinion this last view is the correct one."

(*f*) *Wellock* v. *Constantine* (1863), 2 H. & C. 146.

(*g*) *Wells* v. *Abrahams* (1872), L. R. 7 Q. B. 554.

(*h*) *Roope* v. *D'Avigdor* (1883), 10 Q. B. D. 412, cited with approval in *Appleby* v. *Franklin* (1885), 17 Q. B. D. 93.

(*i*) For "nemo allegans suam turpitudinem est audiendus." See *Lutterell* v. *Reynell* (1670), 1 Mod. Rep. 282, cited with approval in *Wells* v. *Abrahams*, *supra*.

(*k*) As it was at the date of *Wells* v. *Abrahams*. See *Wightwick* v. *Pope*, [1902] 2 K. B. 100.

In any event the rule applies only to the party injured by the felonious act, who owes a duty to the public to prosecute the offender (*l*), and then only if his claim arises directly out of the felonious act (*m*); it does not apply to one who has sustained consequential damages (*n*). Thus it does not suspend the right of a trustee in bankruptcy to recover an indebtedness caused by the commission of a felony, for the trustee represents the creditors generally, and not the person who directly suffered by the felonious act, and upon whom personally is thrown the duty of prosecution (*o*); nor is the right of the party actually injured affected where his action is brought against an innocent third party, *e.g.*, a purchaser from the thief (*p*).

Limits of application of rule.

Again, it has no application in cases where the offender has been brought to justice at the instance of one or more injured by a similar offence (*q*), or where prosecution is impossible by reason of the death of the offender (*r*), or by reason of his escape from the jurisdiction before prosecution could have been commenced by the use of reasonable diligence (*s*).

Where prosecution impossible.

It is specially provided that an action under the Fatal Accidents Act, 1846 (*t*), shall be maintainable although the death of the person in question shall have been caused under circumstances amounting in law to a felony.

There is no similar rule in the case of misdemeanours (*u*).

SECT. 4.—*Conviction for Treason or Felony.*

40. At common law a person attainted of treason or felony was considered *civiliter mortuus*, and could not maintain an action (*v*).

At common law.

Attainder and forfeiture for treason or felony were abolished by statute in 1870 (*w*); but after defining a "convict" as a person

Forfeiture Act, 1870.

(*l*) *Appleby* v. *Franklin* (1885), 17 Q. B. D. 93; *Osborn* v. *Gillett* (1873), L. R. 8 Ex. 88.

(*m*) *Ex parte Leslie, Re Guerrier* (1882), 20 Ch. D. 131.

(*n*) *Appleby* v. *Franklin*, *supra*, in which case a parent sued for the seduction of a child, and the statement of claim alleged that subsequently to the seduction the defendant administered to the girl noxious drugs for the purpose of procuring abortion. See also *Osborn* v. *Gillett*, *supra*.

(*o*) *Ex parte Ball, Re Shepherd* (1879), 10 Ch. D. 667. See also *Ex parte Elliott* (1837), 3 Mont. & A. 110.

(*p*) *Stone* v. *Marsh* (1827), 6 B. & C. 551; *White* v. *Spettigue* (1845), 13 M. & W. 603, overruling *Gimson* v. *Woodfull* (1825), 2 C. & P. 41; *Marsh* v. *Keating* (1834), 1 Bing. (N. C.) 198; *Lee* v. *Bayes and Robinson* (1856), 18 C. B. 599.

(*q*) *Ex parte Ball, Re Shepherd*, *supra*; *Ex parte Jones* (1833), 2 Mont. & A. 193; *Ex parte Elliott*, *supra*; *Marsh* v. *Keating*, *supra*; *Wellock* v. *Constantine* (1863), 2 H. & C. 146; *Chowne* v. *Baylis* (1862), 31 Beav. 351.

(*r*) *Ex parte Ball, Re Shepherd*, *supra*; *Wickham* v. *Gatrill* (1854), 2 Sm. & G. 353; *Stone* v. *Marsh*, *supra*; *Ex parte Bolland* (1828), Mont. & M. 315; *Ex parte Jones*, *supra*.

(*s*) *Ex parte Ball, Re Shepherd*, *supra*; *Ex parte Elliott*, *supra*; *Marsh* v. *Keating*, *supra*; *Wellock* v. *Constantine*, *supra*.

(*t*) 9 & 10 Vict. c. 93, s. 1.

(*u*) *The Hercules* (1819), 2 Dods. 353; *Fissington* v. *Hutchinson* (1866), 15 L. T. 390.

(*v*) See Co. Litt. 128, 130 a; *Fleming* v. *Smith* (1861), 12 Ir. C. L. R. 404; *Bullock* v. *Dodds* (1819), 2 B. & Ald. 258. Apart from the fact of his personal disability, many of his causes of action had passed by forfeiture to the Crown.

(*w*) Forfeiture Act, 1870 (33 & 34 Vict. c. 23).

SECT. 4. Conviction for Treason or Felony.

sentenced to death or penal servitude in England, Wales, or Ireland upon a charge of treason or felony (*x*), the Act provides (*y*) that no action shall be brought by any convict for the recovery of any property, debt, or damage, while he is subject to the operation of the Act. The Act applies until the convict dies, or is made a bankrupt, or is pardoned, or has undergone his punishment, or some punishment lawfully substituted for that originally ordered (*z*). While he is subject to the operation of the statute an administrator or a curator may be appointed, in whom will vest the convict's property, including choses in action, and by or against whom proceedings in respect of such property may be instituted and defended (*a*).

SECT. 5.—*Under Vexatious Actions Act*, 1896.

Power of Court to prohibit commencement of action without leave.

41. If the Attorney-General satisfies the High Court that any person has habitually and persistently instituted vexatious legal proceedings without any reasonable ground in the High Court or inferior Courts against the same or different persons, the Court may order (*b*) that no legal proceedings shall be instituted by that person in any Court unless he first obtains the leave of the High Court or of some judge thereof after showing that there is *primâ facie* ground for such proceeding, and that it is not an abuse of the process of the Court (*c*).

Exercise of power.

The Court made such an order (*d*) where a person had commenced forty-eight actions against various public officials, and had only succeeded in one where the Treasury solicitor paid the sum claimed (£1) into Court in order to avoid expense in disputing the claim, which, however, the Crown regarded as unfounded; in no case had any costs been recovered from him. The Court will consider in such cases the general character and result of the actions, and not merely whether in any one or more there may have been a possible cause of action (*d*). So too an order (*e*) was made where a plaintiff had brought five actions against the committee of an allotments association, all of which were stayed, and the last dismissed as frivolous and vexatious. Although the number of the actions brought was comparatively small, the Court considered that there were exceptional circumstances justifying the making of an order.

(*x*) Forfeiture Act, 1870 (33 & 34 Vict. c. 23), s. 6.

(*y*) *Ibid.*, s. 8.

(*z*) *Ibid.*, s. 7. It would seem that a convict at liberty only on ticket of leave cannot be said to have undergone his punishment (*Bullock* v. *Dodds* (1819), 2 B. & Ald 258), but by s. 30 such a person may himself sue in respect of property acquired by him whilst so at liberty.

(*a*) *Ibid.*, ss. 9, 10. See also *Re Gaskell and Walter*, [1906] 2 Ch. 1.

(*b*) The person in question is to be heard, and counsel may be assigned to him for the purpose on the ground of poverty.

(*c*) Vexatious Actions Act, 1896 (59 & 60 Vict. c. 51), s. 1. As to the Court's inherent power to prevent abuse of process by frivolous proceedings, see title PRACTICE AND PROCEDURE.

(*d*) *Re Chaffers* (1897), 76 L. T. 351.

(*e*) *Re Jones* (1902), 18 T. L. R. 476.

Part VI.—Extinction of Right of Action.

PART VI. Extinction of Right of Action.

42. There are various ways in which a right of action may be extinguished.

An agreement by one party to accept satisfaction for a breach of contract or a tort, followed by performance of such agreement by the other party, extinguishes the first party's right of action in respect of such breach or tort (*f*). Accord and satisfaction.

A creditor who assigns to a third party any right capable in law of being effectually assigned, thereby precludes himself from maintaining an action in respect of such right (*g*). Assignment.

A discussion as to those causes of action which pass to a trustee in bankruptcy, and those which remain in the bankrupt, and as to those liabilities of a bankrupt which do or do not become merged in a creditor's right of "proof," will be found in a later volume (*h*). Bankruptcy.

Rights of action may also be extinguished where the common law maxim *Actio personalis moritur cum personâ* applies (*i*), or by lapse of time (*j*). Death. Lapse of time.

A person who takes a security of a higher legal character than he already possesses extinguishes his legal remedies upon his existing security or cause of action. Thus, if he takes a bond for a simple contract debt, he can sue only on the bond (*f*); or if he recovers a judgment, his cause of action *transit in rem judicatam*, and he cannot again sue on the same cause of action (*k*). Merger.

A right of action may be discharged by payment (*f*), and a right of action may be released by deed or by an unsealed agreement supported by consideration (*f*). Payment. Release.

Part VII.—Forms of Action.

SECT. 1.—*Old Forms of Action* (*l*).

43. The expression "form of action" has been defined as "the peculiar technical mode of framing the writ and pleadings appropriate to the particular injury which the action is intended to redress" (*m*). In early times all actions at law (as distinguished Old writs and forms of action.

(*f*) See title CONTRACT.
(*g*) See title CHOSES IN ACTION.
(*h*) See title BANKRUPTCY AND INSOLVENCY.
(*i*) See title EXECUTORS AND ADMINISTRATORS.
(*j*) See title LIMITATION OF ACTIONS.
(*k*) See title JUDGMENT.
(*l*) The description of old forms of action contained in this section may possibly be regarded as superfluous in a work intended to state the law of England as it now stands. It was, however, thought better to depart in this instance from the principle of excluding purely historical matter, since some acquaintance with the outlines of ancient procedure is necessary for an intelligent perusal of old reports.
(*m*) First Report of Common Law Commissioners (1851), p. 32.

SECT. 1. Old Forms of Action.

from suits in the Court of Chancery) were begun by purchasing (*n*) an original writ out of Chancery; and each form of action was founded on a particular original writ (*o*) appropriate to it. These writs, which were mandatory letters under the Great Seal (*p*), had by the reign of Henry III. become limited in number and crystallised in form, as the clerks in Chancery then considered that they had no authority to issue an original writ for which they could not find a precedent; consequently the number of forms of action was also limited.

Magistral writs.

The Statute of Westminster the Second (*q*) provided a partial remedy for the difficulty thus thrown in the way of litigants by directing the clerks in Chancery to agree in making a writ where a case, for which no writ was to be found, fell under the "like law" and required a like remedy as another case for which a writ was to be found; such writs were called *magistral*, to distinguish them from the writs *de cursu*, which were the earlier established forms.

De cursu writs.

The legal fictions (*r*) by which actions came to be commenced in the King's Bench and Exchequer upon imaginary original writs affected merely the procedure in, and not the form of, an action.

Classes of actions.

44. Actions were of three classes: real, personal, or mixed. In personal actions the plaintiff claimed a debt, or sought to recover a chattel or damages in lieu thereof, or claimed satisfaction in damages for some injury done to his person or property. In real actions the plaintiff claimed the right to recover lands, tenements, and hereditaments. Mixed actions were suits partaking of the nature of both personal and real actions, some real property being demanded therein, and also personal damages for a wrong sustained (*s*).

Appeals were brought by means of actions of error or false judgment (*t*).

SUB-SECT. 1.—*Real Actions.*

Kinds of real actions.

45. When a person (technically called the "demandant") claimed as against another (called the "tenant") a right to the possession of, or an interest in, land, or in incorporeal hereditaments, he had, until the passing of the Real Property Limitation Act, 1833 (*u*), various real actions which he could institute to enforce his claim. It is beyond the scope of the present work to give a detailed account of these actions, each of which was generally named after the most important words of the appropriate writ; but the chief of them

(*n*) In days when the granting of a writ was not a matter "of course," there was an actual bargain for the royal writ.

(*o*) See Registrum Brevium (1531), and articles by Prof. Maitland in 3 Harvard Law Review, pp. 97, 167, 212.

(*p*) *I.e.*, the King in Chancery.

(*q*) 13 Edw. 1, c. 24 ("in consimili casu").

(*r*) *E.g.*, bills of Middlesex and *latitat*, and writ of *quominus*, representing that the defendant was already in the custody of the King's Marshal, or that, by reason of his default, the plaintiff could not pay a debt to the King, whereby the Courts of King's Bench or Exchequer had seisin of the case.

(*s*) See Com. Dig. tit. "Actions."

(*t*) See *post*, p. 45.

(*u*) 3 & 4 Will. 4, c. 27.

may be classified (*v*) as being either actions of right proper, of right in their nature, of entry, or as to interests in land.

Actions of right proper.

46. An action "of right proper" (*w*) was the highest remedy known for the recovery of land. The demandant had to show a title to the fee-simple and actual seisin, either by himself, or by the ancestor under whom he claimed (*x*). Such an action might be (*inter alia*) one *de rationabili parte* (*y*), the remedy, between privies in blood, for one co-parcener against another, who had entered on the land and kept the demandant out; or it might be for an advowson (*z*), but this action was superseded by *quare impedit*, which was a more convenient form, as under it the intruding clerk could be put out of the benefice; or it might be for dower (*a*), the action of right for dower, though not brought in respect of the fee simple, being generally treated as one of right proper. This last action was not often used, as the action of dower *unde nihil habet* was more convenient; but where a widow had received a part of her dower in the particular vill or township in which she claimed to be entitled, it was her proper remedy. It was one of the four real actions saved by the Real Property Limitation Act, 1833 (*b*).

Actions in the nature of right.

47. Actions "of right in their nature" were akin to actions of right proper. The most important was Formedon (*c*), so called from *forma donationis*, the form of the gift on which the action was founded being set out in the writ. Another was the action of *de dote unde nihil habet* (*d*), by which a widow could recover dower against the heir of her husband in a case where she had not received any part of her dower in the same vill or township. This was another of the four real actions saved by the Real Property Limitation Act, 1833 (*b*).

Actions of entry.

48. Actions "of entry" were usually resorted to when the "tenant" had come into possession of the land without force or fraud. An action of entry, brought against the original disseisor or his heir, was called an action of entry "in the *per*"; if against one who claimed under the disseisor, entry "in the *per* and *cui*" (*f*); and

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(*v*) They have also been classified according to the person last seised of the property in question, viz., (1) Possessory actions, brought by a demandant who had himself been seised, as, for instance, novel disseisin; and (2) actions ancestrel, brought by a demandant to whom a right had descended from an ancestor who had himself been seised, as, for instance, Aiel, Cosinage, Mort-d'ancestor etc. Actions ancestrel were again divided into actions ancestrel possessory, and actions ancestrel droiturel (see Termes de la Ley, "Actions Real"; Co. Inst., Pt. 2, 1, 241).

(*w*) "Actio quidem super recto ultimum locum sibi vendicat in ordine placitorum a summo remedio ad inferiorem actionem non habetur ingressus neque auxilium" (Fleta, lib. 6, c. 1). See Roscoe, "Actions relating to Real Property," 9.

(*x*) *Dally* v. *King* (1788), 1 H. Bla. 1.
(*y*) Fitz. Nat. Brev. 9; Roscoe, 25.
(*z*) Fitz. Nat. Brev. 30; Roscoe, 26.
(*a*) Fitz. Nat. Brev. 7; Roscoe, 29.
(*b*) 3 & 4 Will. 4, c. 27, s. 36.
(*c*) Fitz. Nat. Brev. 211; Roscoe, 43.
(*d*) Fitz. Nat. Brev. 148; Roscoe, 39.
(*f*) Co. Litt. 238 b.

SECT. 1. Old Forms of Action.

if against anyone still more removed from the disseisor, entry "in the *post*." Actions of entry in the *post* were given by the Statute of Marlborough (*g*). If the demandant himself had been disseised it was entry *sur disseisin*.

The action of entry in the nature of an assize (*h*), also called entry *in de quibus*, was founded on a disseisin done to the demandant himself. It could be brought in the *per*, in the *per* and *cui*, and in the *post*.

Actions as to interests in land.

49. Actions "as to interests in land" were to recover incorporeal hereditaments and *profits à prendre*. The only one which survived the Real Property Limitation Act, 1833 (*i*), was the action of *quare impedit* (*k*). This was the remedy when a usurper had wrongfully presented a clerk to a benefice of which the demandant was the patron.

Nuisance.

The action of nuisance was either an assize, or an action in the King's Bench (*l*), or in the sheriff's Court (*m*), according to the subject of the action. It was superseded by the personal action on the case for nuisance.

Waste.

The action of waste (*n*) originally only lay against a guardian in chivalry, a tenant in dower, and probably a tenant by the curtesy; but by the Statute of Gloucester (*o*) it was extended to all tenants for life. It was superseded by the action on the case for waste.

SUB-SECT. 2.—*Mixed Actions.*

Development of mixed actions.

50. Most of the actions in this category were originally real actions to which by statute the incident of damages had been appended, as in the case of the action of waste. The action of ejectment, however, underwent the opposite process, being originally a personal action for trespass, which developed into a mixed action.

Ejectment.

51. In early times there were two forms of action by which a lessee for years who was ousted from his possession might have a remedy, viz., *quare ejecit infra terminum* (*p*), which was a real action, and which came to be regarded as applicable only against purchasers from the lessor; and *ejectione firmæ*, which was a personal action of the nature of trespass, and which was applicable to all cases where the termor was dispossessed. In the latter damages only could at one time be recovered (*q*), but by the time of Henry VII.

(*g*) 52 Hen. 3, c. 29.

(*h*) Fitz Nat. Brev. 191; Roscoe, 61.

(*i*) 3 & 4 Will. 4, c. 27, s. 36.

(*k*) Fitz. Nat. Brev. 32; Roscoe, 100; Brit. lib. 4, c. 6.

(*l*) Fitz. Nat. Brev. 183, 184. "Fos (-satum), stag (-num), sepe (-s), vi (-a), diversi cursus aquarum, poscunt assisam; mercatum, feria bancum. I terminari coram justic (-iariis) assisar (-um). I placitari in banco."

(*m*) "Fab (-rica), fur (-ca), porta, domus, vir (-gultum), gur (-ges), mo (-lendinum), murus, ovile et pons, tradantur hæc vicecomitibus." (Fitz. Nat. Brev. 184.)

(*n*) Fitz. Nat. Brev. 55.

(*o*) 6 Edw. 1, c. 5.

(*p*) Fitz. Nat. Brev. 197, 198. See Pollock and Maitland, Hist. of Eng. Law, vol. ii., pp. 105 *et seq.* The earliest recorded instance of the writ of *ejectione firmæ* is in 1370 (Y. B. Trin. 44 Edw. 3, fos. 22, 26), while *quare ejecit infra terminum* dates back to about 1235 (Pollock and Maitland, Hist. of Eng. Law, vol. ii. (2nd ed.), p. 107).

(*q*) In 1455 it was held by CHOKE, J., that damages only could be recovered in

(at latest) the action had become a mixed action, so that the tenant recovered his term.

Ejectment as a mode of trying title.

"Ejectment" developed subsequently into a mode of trying the title to land. The person claiming a right of entry came on to the land and sealed a lease to a tenant, who brought an action against the person in possession, or in later times against a fictitious person, called the casual ejector (*r*). After a time the practice of actually sealing a lease on the land fell into disuse, and a wholly fictitious procedure was invented by Chief Justice Rolle. Lease, entry, and ouster were imagined, and a copy of the declaration in an action based on a non-existent original writ was served on the person in possession, bearing a notice signed by his "loving friend Richard Roe" (the casual ejector), stating that he was being sued by one "John Doe" in an action of ejectment, and advising the person in possession to have himself made defendant by rule of Court in the place of his "friend." This form of "ejectment" gradually usurped the place of all the other real and mixed actions for the recovery of corporeal hereditaments; and by the beginning of the eighteenth century such other actions, with the exception of *quare impedit* and *de dote unde nihil habet*, had become almost entirely obsolete (*s*).

At common law, "ejectment" lay only in respect of things "in render," or, in other words, of corporeal hereditaments; thus it would not lie in respect of an advowson, a right of common in gross, or any *profit à prendre;* but the right to maintain an action in this form in respect of tithes was given by statute (*t*). It was necessary for the plaintiff to recover by the strength of his own title, and not by the weakness of the defendant's (*a*). Before the Real Property Limitation Act, 1833 (*b*), it was necessary that the plaintiff should have a right of entry into the land, but that Act, which preserved this form of action, abolished the distinction between a right of entry and a right of action to recover land.

SUB-SECT. 3.—*Personal Actions.*

Division of personal actions.

52. Personal actions may for present purposes be divided into actions arising out of contract (*ex contractu*) and actions arising out of torts (*ex delicto*).

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ejectione firmæ, but in 1467 FAIRFAX, J., held that "*si home port* ejectione firmæ *le plaintiff recouvera son terme qui est arrere, sibien come in* quare ejecit infra terminum; *et, si nul soit arrere, donques tout en damages*" (Y. B. 7 Edw. 4, 6; Bro. Abr. tit. "Quare ejecit infra terminum," 6).

(*r*) 1 Littleton's Practical Register, 673.

(*s*) In *Goodtitle* d. *Chester* v. *Alker* (1757), 1 Burr. 133, Lord MANSFIELD described an action of ejectment as "an ingenious fiction for the trial of titles to the possession of lands; and, in form, it appears as a trick between two to dispossess a third by a sham suit and judgment, an artifice which would be highly criminal, unless the Court converted it into a fair trial between the proper parties"; see *Fairclaim* d. *Fowler* v. *Shamtitle* (1762), 3 Burr. 1294. An entertaining account of the proceedings in such an action will be found in Samuel Warren's "Ten Thousand a Year."

(*t*) 32 Hen. 8, c. 7.

(*a*) *Roe* v. *Harvey* (1769), 4 Burr. 2484; *Doe* d. *Crisp* v. *Barber* (1788), 2 Term Rep. 749.

(*b*) 3 & 4 Will. 4, c. 27.

SECT. 1. **Old Forms of Action.**

(1) Actions *ex contractu*.

Account.

53. An action of account (*c*) lay at common law against a guardian in socage, a bailiff, and a receiver (*d*), to compel them to render an account of what they had received and expended in their office. It could also be maintained by one joint tenant (*e*) or one tenant in common or partner (*f*) against another, and it would lie against the administrator or executor of the person to be charged.

The proceedings were lengthy, complicated, and expensive; and therefore it was a form of action seldom resorted to, an action of debt (*g*), or assumpsit for money had and received, or (in complicated matters) a suit in equity being commonly preferred (*h*).

Annuity.

54. The grantee in fee of an annuity and his heirs could bring an action of annuity (*i*) against the grantor and his heirs. It was superseded at a very early period by the more convenient form of action in debt, or in covenant.

Assumpsit.

55. "Assumpsit" (*k*) lay for the recovery of damages for the breach of a promise, express or implied, not made by deed. It was a special development of the action on the case, the non-fulfilment of a promise being in the nature of deceit and similar in results to the person injured (*l*).

Originally a consideration passing at the time was necessary to support assumpsit (*m*), but gradually mutual promises came to be regarded as sufficient consideration to support each other, and in 1602 (*n*) it was held that the creation of a debt implied a promise to pay it, on which an action of assumpsit would lie.

Common assumpsits.

"Common assumpsits" included *indebitatus assumpsit*, which was a promise founded on a precedent debt, *e.g.*, goods sold; *quantum meruit*, or *quantum valebant*, where, in the absence of an agreed price, the amount payable for work done, services rendered, or materials supplied, had to be assessed; and *insimul computassent*, an action on an account stated and agreed between the parties.

Another class included actions founded on a promise to pay a sum in consideration of a legal liability to pay it (*o*), as, for instance, in the case of a bill of exchange or promissory note, a foreign judgment,

(*c*) Fitz. Nat. Brev. 116; Reg. Brev. 135.
(*d*) Y. B. 2 Hen. 4, 12 b; Co. Inst. 379.
(*e*) 4 Anne, c. 16, s. 27.
(*f*) *Godfrey* v. *Saunders* (1770), 3 Wils. 73.
(*g*) A plaintiff could sue in debt or in account at his option (*Core's Case* (1536), 1 Dyer, 20), or in assumpsit. See *Arnold* v. *Webb* (1814), 5 Taunt. 432 n; *Tomkins* v. *Willshear* (1814), 5 Taunt. 431.
(*h*) "The action is so inconvenient that it has long been discontinued" (*per* ALDERSON, B., in *Sturton* v. *Richardson* (1844), 13 M. & W. 17). It had been revived for a time in consequence of delays in Chancery, as to which see *Godfrey* v. *Saunders*, *supra*.
(*i*) Fitz. Nat. Brev. 152.
(*k*) Com. Dig. tit. "Action upon the Case upon Assumpsit."
(*l*) Bac. Abr. "Actions on the Case." For action on the case, see p. 39, *post*.
(*m*) Fitz. Nat. Brev. 94.
(*n*) *Slade's Case* (1602), 4 Co. Rep. 92 a.
(*o*) The assumpsit on the liability to pay differed from the *indebitatus assumpsit*, as in the latter case the promise was founded on a pre-existing *debt*, which was pleaded generally, while in the latter the circumstances under which the defendant became liable had to be pleaded specially.

a fine or admission to copyhold land, or a contribution to the expense of party walls.

A third class of common assumpsits covered the case of mutual promises, as promises of marriage, or undertakings to perform special agreements, such as awards, charterparties, or policies of assurance.

Special assumpsits.

"Special assumpsits" lay on ten kinds of undertakings or promises: (1) to marry or to do some personal service; (2) to provide necessaries for the plaintiff or for some third person; (3) on a retainer to serve or employ; (4) to perform work, as promises made by surgeons, attorneys etc.; (5) to forbear to sue, or to give time for payment of a debt; (6) on a sale or exchange of goods to accept, deliver, take back, or return the goods, also on a warranty as to their quality or value, or the vendor's title to them; (7) on bailment of goods, or against carriers, warehousemen etc.; (8) to sell, assign, or exchange lands; (9) as to real or personal securities; (10) to account for profits of lands, or for money and goods.

Assumpsit was frequently an alternative form of action. Thus "debt" always lay where *indebitatus assumpsit* might be brought (*p*).

Covenant.

56. Covenant (*q*) was the remedy for the breach of a covenant, other than one to pay a sum of money, contained in a deed, whether indented or poll (*r*). The claim was for damages for the non-fulfilment of the covenant.

The covenants which gave rise to this form of action were at first only such as related to realty, *e.g.*, to levy a fine, but personal covenants, *e.g.*, to build a house, were sued on as early as the reign of Edward I. (*s*).

Debt.

57. Debt (*t*) lay to recover definite sums due (a) on records, as judgments (*a*), recognisances of bail, or recognisances in the nature of a statute merchant (*b*); (b) on specialties (*c*), as bills or bonds, agreements to pay money, leases, mortgages etc.; (c) on simple contracts (*d*), as for work done, services rendered, and, generally, wherever *indebitatus assumpsit* would be appropriate (*e*); (d) *in maleficio*, as against a sheriff for escape (*f*), or by common informers and persons aggrieved under penal statutes, even

(*p*) See also *Longchamp* v. *Kenny* (1779), 1 Doug. 137; *Lamine* v. *Dorrell* (1705), 2 Ld. Raym. 1216; *Slade's Case* (1602), 4 Co. Rep. 92 b; *Reade* v. *Johnson* (1591), Cro. Eliz. 242; *Trever* v. *Roberts* (1664), Hard. 366; *Johnson* v. *May* (1683), 3 Lev. 150.

(*q*) Fitz. Nat. Brev. 145. The earliest recorded writ is dated 1201. See Select Civil Pleas (1201), 89, Selden Society, vol. iii., fol. 39.

(*r*) *Benushe* v. *Hildersley* (1618), Roll. Abr. 33, pl. 21. By the customs of London and Bristol, the action of covenant lay on agreements not under seal (Fitz. Nat. Brev. 146 a).

(*s*) Fitz. Nat. Brev. 145; Y. B. 21—22 Edw. 1, 111 (Rolls edition).

(*t*) Fitz. Nat. Brev. 119.

(*a*) Com. Dig. Dett, A. 2.

(*b*) Com. Dig. Dett, A. 3.

(*c*) Com. Dig. Dett, A. 4.

(*d*) Com. Dig. Dett, A. 8, 9.

(*e*) *Walker* v. *Witter* (1778), 1 Doug. 1, at p. 6.

(*f*) 1 Fitz. Nat. Brev. 93.

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though the statute did not expressly give a right of action for the penalty (*g*).

Common counts.

Amongst actions of debt on simple contract were what were called the "common counts": *i.e.*, (1) money lent; (2) money paid by the plaintiff at the defendant's request; (3) money received by the defendant to the use of the plaintiff; (4) money due on account stated (the foregoing were called the "money counts"); (5) goods sold and delivered; (6) goods bargained and sold; (7) interest on money due and forborne at interest at the defendant's request; (8) work done and materials used.

In early days the complaint ran that the debtor unjustly "deforced" (*h*) his creditor of his money or chattels; but in course of time the formula changed to *Debet et detinet*. The latter word was omitted in vicontiel writs (*i*); whilst, when the action was brought against an executor for his testator's debt, the writ ran "*quod detinet*" only (*k*).

Scire facias.

58. The writ of *scire facias* (*l*) was used when it was desired to obtain execution on a judgment, statute merchant, recognisance etc., for the sum recovered or acknowledged to be due. It also lay where a demandant who had recovered hereditaments in a real action did not obtain possession of the land within a year and a day.

Scire facias on a judgment was a continuation of the former action, but on a recognisance etc. it was an original proceeding; at common law it did not lie in respect of personal actions, so that, if a plaintiff did not succeed in getting execution on his judgment within a year and a day, he had to commence a new action on a new original writ. The Statute of Westminster the Second (*m*), however, gave *scire facias* to the plaintiff in a personal action to revive the judgment.

The writ was a judicial writ; but, as the defendant was allowed to plead to it, it was regarded in law as an action (*n*). An original writ of *scire facias* might issue out of the Chancery at the suit of the King on behalf of a subject to repeal letters patent.

(2) Actions *ex delicto*.

Attaint.

59. The action of attaint (*o*) lay when a false verdict was given. At common law the jury who had given the false verdict were imprisoned, their lands forfeited, their wives and children turned out of their possessions, and their goods forfeited to the King, and themselves outlawed. The penalty was mitigated in the reign of Henry VIII. (*p*), and the form of action abolished in the reign of George IV. (*q*).

(*g*) 1 Roll. Abr. 598, pl. 18.
(*h*) Glanvill, lib. x. c. 2, "deforceat."
(*i*) Reg. Brev. Dig. 139.
(*k*) Fitz. Nat. Brev. 119 M.
(*l*) Bac. Abr. tit. "Execution," H. As to the modern use of the writ, see title CROWN PRACTICE.
(*m*) 13 Edw. 1, stat. 1, c. 45.
(*n*) Co. Lit. 290 b, 291 a; *Grey* v. *Jones* (1764), 2 Wils. (K. B.) 251; *Pulteney* v. *Townson* (1779), 2 Wm. Bl. 1227; *Winter* v. *Kretchman* (1787), 2 Term Rep. 45.
(*o*) Fitz. Nat. Brev. 105.
(*p*) 23 Hen. 8, c. 3.
(*q*) 6 Geo. 4, c. 50, s. 60

The action of attaint left a permanent trace on procedure, for by the Statute of Westminster the Second (*r*) jurors were permitted to protect themselves by finding the facts and praying the aid of the Court, whether it be disseisin, or not; if they said of their own accord that it was disseisin, "their verdict shall be admitted at their own peril." From this the custom of finding special verdicts in actions of all forms grew up.

Audita querela.

60. The action of *audita querela* (*s*) was an action of an equitable nature akin to trespass, and was a remedy provided for the benefit of a person who had been, or was in danger of being, taken in execution upon a judgment, a statute merchant, a statute staple, or a recognisance, when he had good cause to show against the justice of such execution. It could thus be used to prevent an oppressive exercise of the powers of the law where the threatened person had a good defence in fact or law, but could not set it up otherwise (*t*); so if A. acknowledged to a statute in the name of B., and then B. was taken in execution, B. could have a writ; and, since the action lay *quia timet*, the proper applicant could have his writ before execution was actually sued out against him (*a*).

Case.

61. The action on the case (*b*) owed its origin to the Statute of Westminster the Second, which authorised the clerks in Chancery to issue writs similar to those of which there were precedents to be found (*c*). The formal part of the writ was worded similarly to that in trespass, omitting the words *vi et armis*. It was the remedy of plaintiffs who sought to recover damages in cases arising either *quasi ex contractu* or *quasi ex delicto*. The former class included actions where there was a contractual relation between the parties but where the real ground of action was some breach of duty collateral to the actual contract, *e.g.*, *mala praxis* on the part of a surgeon (*d*), deceit on the sale of goods (*e*), waste etc., or (to take a modern instance) an injury to a railway passenger by reason of the negligence of the company's servants. The second class included actions in respect of such wrongs as public nuisances, the keeping of dangerous animals, libel, *scandalum magnatum* (*f*), slander, wrongful refusal of bail by justices, malicious prosecution, conspiracy, negligence, infringements of patents or of copyrights, disturbance of rights of common, private nuisances, seduction, pound-breach, rescue, playing with false dice (*g*) etc.

In all cases where a man had a temporal loss or damage by the wrong of another, he might have an action on the case to be

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(*r*) 13 Edw. 1, stat. 1, c. 30, s. 2.
(*s*) See *Turner* v. *Davies* (1670), 2 Saund. 148 (1).
(*t*) Com. Dig. tit. "Audita Querela."
(*a*) 1 Roll. Abr. 306 c, pl. 6.
(*b*) Fitz. Nat. Brev. 92 E.
(*c*) 13 Edw. 1, c. 24. The first instance of a writ in this form is said to be found in the year-books of Edward II.
(*d*) *Pippin* v. *Sheppard* (1822), 11 Price, 400.
(*e*) Fitz. Nat. Brev. 94 C.
(*f*) *I.e.*, slander of certain exalted personages, *e.g.*, peers, judges, and other great officers.
(*g*) Fitz. Nat. Brev. 95 D.

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repaired in damages (*h*). It was adapted to every wrong and grievance a man could suffer by a special invasion of his right for which there was no other remedy, and it was no objection that the case was only new in the instance, if it was not new in principle (*i*).

The writs in actions on the case were framed to meet the special circumstances of each plaintiff; but two of the more common, viz., trover and assumpsit, became so important as to constitute in effect separate forms of action.

Actions on the case were either actions of trespass on the case, *i.e.*, actions in respect of wrongs similar to those the subject of trespass, but unaccompanied by immediate violence; or general actions on the case, which provided a remedy for all wrongs which would otherwise have been remediless. Of these latter the most important were actions on the case for waste, deceit, or nuisance.

Difference between trespass and case.

The chief distinction between trespass and action on the case was that the former was brought in respect of violence either actual or implied where the matter affected was tangible and the plaintiff's interest was immediate, while the latter was brought where the element of violence was absent, or the matter affected was intangible, or the injury was consequential, or the interest was only in reversion. In actions on the case the wrong complained of was called a tort, and not a trespass (*k*).

Case for deceit.

62. An action on the case for deceit (*l*) was both real and personal. It would lie if one person, A., pretended to be another, B. (the defendant in an action for trespass), and came into Court and alleged that C. was his attorney, and then C. let judgment by default go against B. Again, where A., having undertaken to purchase a manor for the plaintiff, by collusion with C. contriving to defraud the plaintiff, fraudulently bought the manor for C. instead of for the plaintiff, it was held that the plaintiff might have an action on the case for deceit (*m*).

Case for nuisance.

63. The action on the case for nuisance, which lay for nuisance (*n*), or for disturbance in the enjoyment of corporeal or incorporeal hereditaments, to a great extent superseded the real action on a writ of nuisance, or one of *quod permittat* (*o*). Although in the action on the case a judgment to have the nuisance abated could not be obtained, the plaintiff could bring a second action on the case, if it were not abated, and obtain larger damages. In case of disturbance to corporeal hereditaments, when the injury was immediate and forcible, the proper remedy was by action of trespass; but where the injury was not immediate and forcible, and also in case of disturbance in the enjoyment of incorporeal

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(*h*) *Millar* v. *Taylor* (1769), 4 Burr. 2345.
(*i*) *Pasley* v. *Freeman* (1789), 3 Term Rep. 63, *per* ASHHURST, J.
(*k*) *Bird* v. *Randal* (1762), 3 Burr. 1353. See, further, note (*h*), p. 43, *post.*
(*l*) Fitz. Nat. Brev. 95.
(*m*) Y. B. 11 Hen. 6, 18, pl. 10; 24, pl. 1; 55, pl. 26, *per* COTTESMORE, J.
(*n*) Roscoe, 353.
(*o*) *Penruddock's Case* (1598), 5 Co. Rep. 101 a, note.

hereditaments, such as rights of way (*p*), franchises, commons, pews in churches (*q*) etc., action on the case lay.

Case for waste.

64. An action on the case for waste (*r*) was found more convenient than the real action founded on the writ of waste. It had the disadvantage that the plaintiff could not recover the place wasted; but this was remedied, in the case of demises by deed, by reserving a power of re-entry on the lessee committing waste; and it had the advantage of being maintainable by the remainderman for life, or for years, as well as by a tenant in fee or tail. Also the plaintiff could recover his costs, which he could not do in an action of waste.

Where a lease contained a covenant against waste the lessor had an option either to bring an action on the covenant or on the case (*s*); but it is doubtful whether an action on the case lay against a tenant for permissive waste (*a*).

Champerty.

65. An action of champerty (*b*) lay if, when goods, chattels, land, or debt were in suit, a man by covenant or agreement in writing, or by word of mouth, bargained to take part of so much as the plaintiff should recover, and in return agreed to maintain and aid him in his action. The suit was said to be the King's suit, yet the party himself might sue the writ out of Chancery.

Conspiracy

66. An action for conspiracy (*c*) lay at the suit of a person acquitted of a charge of felony against two or more persons who had fraudulently and covinously conspired and devised to indict him therefor. If one person only devised the wrongful indictment, the remedy was an action on the case. If the conspirators procured a person to sue an appeal of felony or murder against another without indicting him, the action of conspiracy would not lie, but the remedy was by writ of *scire facias*.

Decies tantum.

67. An action of *decies tantum* (*d*) was the remedy against embracery, and lay against jurors who had allowed themselves to be bribed, and that whether their verdict was true or false, and also against the embracer, if he had received money. Its name was derived from the plaintiff demanding ten times the amount of the bribe. It was abolished in the reign of George IV. (*e*).

Detinue.

68. Detinue (*f*) grew out of the contractual action of debt (*g*), and was brought to recover specific goods of the plaintiff and

(*p*) 1 Roll. Abr. (1668 ed.), fols. 104—106; 1 Com. Dig. tit. "Action upon the Case for a Disturbance," A 2.

(*q*) *Stocks* v. *Booth* (1786), 1 Term Rep. 428. A lay rector, however, could not grant a pew in the chancel of a church so as to give the grantee a right to bring an action on the case for disturbance (*Clifford* v. *Wicks* (1818), 1 B. & Ald. 498).

(*r*) Roscoe, 383; *Greene* v. *Cole* (1670), 2 Saund. 252.

(*s*) *Kinlyside* v. *Thornton* (1776), 2 Wm. Bl. 1111.

(*a*) *Herne* v. *Bembow* (1813), 4 Taunt. 764, citing *The Countess of Shrewsbury's Case* (1600), 5 Co. Rep. 13 b (which, however, was a case of a tenant at will).

(*b*) Fitz. Nat. Brev. 172. See p. 53, *post*. Champerty was forbidden by 3 Edw. 1, c. 25, 13 Edw. 1, c. 49, and by "Articula supra Chartis."

(*c*) Fitz. Nat. Brev. 114. See titles CRIMINAL LAW, TORTS.

(*d*) Fitz. Nat. Brev. 171.

(*e*) 6 Geo. 4, c. 50, s. 62, repealing 38 Edw. 3, c. 12.

(*f*) Fitz. Nat. Brev. 138.

(*g*) See p. 37, *ante*.

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damages for their detention, and may therefore be regarded as founded both on contract and tort.

Originally detinue only lay against a bailee of goods himself, but the rule was soon relaxed so as to enable the bailor to sue the executors of the bailee under the allegation of *devenerunt ad manus*. The liability was again extended so as to include third parties who had obtained the goods from the original bailee; and, by the time of Henry VI., it had become unnecessary to show that there was any bailment at all. By a legal fiction the action was thus extended to purchases and other cases where the defendant refused to give up to the plaintiff goods which, though in the possession of the defendant, were the property of the plaintiff, a bailment by the plaintiff to the defendant being alleged, which the plaintiff was not required to prove, and the defendant was not allowed to traverse (*h*).

Forcible entry.

69. An action for forcible entry (*i*) could be maintained under the Statute of Northampton (*k*), by which, if a man entered with force and detained with force any land or tenements, the aggrieved party might have his action. The statute prohibited entry on land except where both lawful and effected without force; and, though it did not expressly give a right of action, actions for forcible entry against the terms of the statute are said to have been frequent (*l*).

Under a statute of Henry VI. (*m*) the forcible detaining of lands on which the entry had been peaceable was prohibited where the person who had entered had been less than three years in possession, and a right of action to a person disseised in this manner was given either by assize of novel disseisin or by writ of trespass; further, if it was found at the trial that there had been forcible entry, or forcible detention after peaceable entry, the person aggrieved could recover treble damages.

Injunction.

70. An action of injunction (*n*) was introduced by the Common Law Procedure Act, 1854 (*o*), which empowered a plaintiff to claim an injunction in his writ and declaration. Injunctions are now regulated by the provisions of the Judicature Acts and the Rules of the Supreme Court (*p*).

Mandamus.

71. An action of mandamus was also introduced by the Common Law Procedure Act, 1854 (*q*), which enacted that the plaintiff in any action, except one founded on replevin or ejectment, might indorse on his writ of summons his intention to claim a writ of mandamus, and might in his declaration claim a mandamus, with or without

(*h*) *Whitehead v. Harrison* (1844), 6 Q. B. 423; *Gledstane* v. *Hewitt* (1831), 1 Cro. & J. 565; *Walker* v. *Jones* (1834), 2 Cr. & M. 672; *Armory* v. *Delamirie* (1722), 1 Str. 504. In other words, the defendant was not permitted to set up a *jus tertii*.

(*i*) Fitz. Nat. Brev. 248, 249.

(*k*) 2 Edw. 3, c. 3. See also statute 15 Rich. 2, c. 2.

(*l*) Fitz. Nat. Brev. 248. 10 Co. Rep. 75 b (note (f)).

(*m*) 8 Hen. 6, c. 9.

(*n*) Injunction had previously been an exclusively equitable remedy.

(*o*) 17 & 18 Vict. c. 125, ss. 79—82.

(*p*) See title INJUNCTION.

(*q*) 17 & 18 Vict. c. 125, ss. 68—77.

any other demand. These provisions have been replaced by the Judicature Acts and the Rules of the Supreme Court (*r*).

Replevin.

72. Replevin (*s*) lay to recover specific goods (*t*) which had either been wrongfully distrained from the plaintiff, or had been wrongfully taken out of his possession (*a*). It did not lie to recover goods in which the plaintiff alleged merely that he had a right of property or which had been delivered under a contract (*b*). At common law also a human being could be replevied, as, for instance, where the defendant had abducted a child (*c*).

Writ *in withernam*.

If the sheriff, to whom the writ was directed, made a return that the cattle or goods, which he was directed to replevy, were *esloigned* (or taken far away), or were dead, or that no one showed him where the cattle or goods were, the plaintiff could have a *capias in withernam* to have so many of the defendant's cattle etc. delivered to him (*d*). The cattle or goods so taken *in withernam* could not be replevied so long as the original cattle or goods were not restored (*e*), nor, if the defendant in a writ of *de homine replegiando* had been arrested *in withernam*, could he be bailed (*f*).

The peculiarity of the action of replevin was that if the defendant put in an avowry whereby he acknowledged the taking, but denied the injustice of the caption, and set forth a good cause for taking the distress, both parties became in a sense plaintiffs, the one to have damages for the taking and detaining of his goods and the other to have return of the goods replevied.

Trespass.

73. Trespass (*g*) was the remedy for injuries accompanied by immediate violence (*h*), whether to real or personal property or to the person. The writ alleged that the trespass was done "*vi et armis*" and "*contra pacem nostram.*" Actions of trespass could

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(*r*) See title CROWN PRACTICE.

(*s*) Fitz. Nat. Brev. 68; Gilbert on "Distress and Replevin."

(*t*) Com. Dig. Pleader (3 K. 1); *Designy's Case* (1682), Sir T. Raym. 475.

(*a*) See Com. Dig. Replevin, A; Buller, Nisi Prius, 52; *Dore* v. *Wilkinson* (1817), 2 Stark. 287; *George* v. *Chambers* (1843), 11 M. & W. 149; *Shannon* v. *Shannon* (1804), 1 Sch. & Lef. 324.

(*b*) *Galloway* v. *Bird* (1827), 4 Bing. 299; *Mennie* v. *Blake* (1856), 6 El. & Bl. 842, 849; *Ex parte Chamberlain* (1804), 1 Sch. & Lef. 320; *Re Wilsons* (1804), 1 Sch. & Lef. 320 a.

(*c*) By writ of *de homine replegiando*.

(*d*) Com. Dig. Pleader, (3 K. 1); Fitz. Nat. Brev. 68; Dyer, 189 a; Reg. Brev. 82 b. If it was a writ *de homine replegiando*, the defendant was himself arrested under the *capias*, even though he were a peer of the realm (Fitz. Nat. Brev. 68).

(*e*) Y. B. 7 Hen. 4, 27; *Designy's Case*, *supra*. See also "Tho. Mori Vita et Exitus," by J. H. (1652), p. 26.

(*f*) Lord Grey of Werk was arrested in consequence of a writ of *de homine replegiando* in 1682, and was bailed on Lady H. Berkeley being produced in Court (State Trials, vol. ix., p. 186).

(*g*) Fitz. Nat. Brev. 85.

(*h*) The Common Law Commissioners (1851) give the following as an instance of the difference between an action of trespass and an action on the case: "Suppose a person throws a log of wood on the highway, and, by the act of throwing, another person is injured, the remedy in such a case is trespass. But if the log reaches the ground and remains there, and a person falls over it and is injured, the remedy is case, as the injury is not immediately consequent on the act" (First Report, p. 21).

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also be tried by justices in the sheriffs' county courts, in which case the words "*vi et armis*" and "*contra pacem nostram*" were omitted from the writ. The action of trespass was the earliest form of action for wrongs, and was the source from which were developed the action on the case, trover, and assumpsit.

Originally the King's Courts did not take cognisance of trespass, and the remedy was either by a criminal appeal and wager of battle or by plaint in an inferior Court. By the time of King John, however, writs of trespass began to appear in the records, and by the end of the reign of Henry III. had become of frequent occurrence (*i*), while in the reign of Edward I. the writ was introduced into the Registrum Brevium.

Writ *quare clausum fregit.*

In later times, a practice grew up of commencing actions by what was called a common original writ of trespass *quare clausum fregit*, and then continuing *ac etiam* to set out the real cause of action. The fictitious trespass was subsequently abandoned or ignored, and the action proceeded on the true cause. It was not necessary to set out the *ac etiam* in the præcipe for the writ (*k*).

Trespass to real property.

Ejectment was originally a personal action of trespass to real property, but (as we have seen (*l*)) became a mixed action, and the customary mode of trying the title to real property. All other violent wrongs to real property might be made the subject of an action of this form, the formula being "*quare clausum fregit.*" An action of trespass also lay for voluntary waste against a tenant at will (*m*) for cutting trees, fishing in ponds, or taking young hawks, for hunting in a warren, digging the soil and taking away sea coal etc. (*n*).

Trespass to personal property.

The subject-matter of actions of trespass to personal property was the violent taking away of goods (*o*) etc. (*quare bona et catalla asportavit*). Where goods were wrongfully taken and detained the plaintiff could bring his action either in trespass, detinue, replevin, or trover, and if they had been converted into money he could waive the tort and bring his action in assumpsit for money had and received to his use (*p*).

Trespass to the person.

Menaces, assaults, battery, wounding, mayhem, and false imprisonment were the principal wrongs for which redress was sought by trespass to the person.

Trover.

74. The action of trover (*q*), which was a form of action on the case, but which developed into a separate form of action, was orginally the remedy of a person who had lost personal property against the finder of it. By a legal fiction it became in time the appropriate form of action wherever a plaintiff sought to recover

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(*i*) Pollock and Maitland, Hist. of England, vol. ii. (2nd ed.), p. 525, note 2.
(*k*) *Boyd* v. *Durand* (1809), 2 Taunt. 161.
(*l*) See p. 35, *ante*.
(*m*) *Countess of Shrewsbury's Case* (1600), 5 Co. Rep. 13 b.
(*n*) Fitz. Nat. Brev. 86, 87.
(*o*) After 6 Edw. 1, c. 8, the plaintiff had to swear that the goods were worth 40*s*.
(*p*) *Dickon* v. *Clifton* (1766), 2 Wils. 319; *Brown* v. *Dixon* (1786), 1 Term Rep. 274.
(*q*) Com. Dig. tit. "Action upon the Case upon Trover."

damages from a defendant who had converted (*r*) the plaintiff's goods to his own use; a finding of the goods by the defendant was alleged, and he was not permitted to dispute the allegation. The circumstances in which actions of trover and trespass to goods lay were very similar, but trover was founded on the property in the goods, trespass on the possession of them (*s*); in trover damages only could be recovered (*t*).

In order to maintain trover the plaintiff had to prove either an absolute or a special property in the goods in question (*a*), and also a right to the possession of them; thus a man who let a furnished house could not maintain trover during the term, if the furniture was wrongfully taken away (*b*). As an instance of special property, the finder of an article was held to have such a property in it as would enable him to keep it against all but the rightful owner, and to maintain trover in respect of its conversion (*c*).

Appeal by actions of error and false judgment.

75. The actions of error (*d*) and false judgment (*e*) were the ancient methods of prosecuting appeals from judgments of superior and inferior Courts respectively. The proceedings on a writ of error (which was an original writ) were analogous to those on an action, and the person appealing against the judgment was called the plaintiff in error. A writ of error was considered to be the commencement of a new action (*f*).

SECT. 2.—*Abolition of Old Forms of Action.*

Royal Commission of 1828.

76. The principle of conducting litigation in accordance with rules of procedure, which varied with the different forms of action founded on particular original writs, formed the basis of English common law for seven centuries. In 1828, however, a Royal Commission (*g*) was appointed to inquire into the "course of proceeding in actions and other civil proceeding established or used in the superior Courts of common law."

Uniformity of Process Act, 1832.

The first result of the inquiries of this Commission was the Uniformity of Process Act, 1832 (*h*). This statute abolished the original writ in personal actions, and all the other substituted methods of commencing actions, and substituted therefor, in cases where it was not intended to hold the defendant to special bail, a

(*r*) "Conversion by a long course of practice has acquired a technical meaning. It means detaining goods so as to deprive the person entitled to the possession of them of his dominion over them" (*Burroughes* v. *Bayne* (1860), 5 H. & N. 296, *per* MARTIN, B., at p. 302. See also *Tinkler* v. *Poole* (1770), 5 Burr. 2657; *Ross* v. *Johnson* (1772), 5 Burr. 2825; *Owen* v. *Lewyn* (1673), 1 Vent. 223; *Youl* v. *Harbottle* (1791), Peake, N. P. 68; *Shipwick* v. *Blanchard* (1795), 6 Term Rep. 298).

(*s*) *Ward* v. *Macaulay* (1791), 4 Term Rep. 489.

(*t*) *Bishop* v. *Montague* (*Viscountess*) (1601), Cro. Eliz. 824.

(*a*) *Webb* v. *Fox* (1797), 7 Term Rep. 391, 398.

(*b*) *Gordon* v. *Harper* (1796), 7 Term Rep. 9.

(*c*) *Armory* v. *Delamirie* (1722), 1 Smith, L. C. (11th ed.), p. 356.

(*d*) Fitz. Nat. Brev. 20.

(*e*) *Ibid.*, 18; Co. Litt. 60 a, 288 b.

(*f*) *Batchelor* v. *Ellis* (1797), 7 Term Rep. 337; but see *Laidler* v. *Foster* (1825), 4 B. & C. 116.

(*g*) The Commissioners presented three reports.

(*h*) 2 Will. 4, c. 39.

SECT. 2. Abolition of Old Forms of Action.

writ of summons, and, in cases in which it was intended to hold the defendant to special bail, a writ of *capias*. Both of these writs set out the form of action in which the defendant was sued, otherwise they were the same in each form of action.

Real Property Limitation Act, 1833.

The following year saw another step taken towards the simplification of procedure. By this time nearly all the varied forms of real and mixed actions had either become obsolete or had been superseded by the action of ejectment; and the Real Property Limitation Act, 1833 (*i*), now abolished all except four of the original writs and forms of action in real and mixed actions. The four forms of real and mixed action which remained were those founded on the writs of right for dower, *de dote unde nihil habet*, *quare impedit*, and ejectment.

Common Law Procedure Act, 1852.

In 1850 another Royal Commission was appointed to examine into and report on the condition of the common law of England. This Commission reported in favour of abolishing all forms of action, although they admitted that the feeling of the profession was very much divided on the question. The Common Law Procedure Act, 1852 (*k*), which was the first result of the investigations of the Commissioners, did not go to the length of abolishing forms of action altogether; but it enacted that no form of action need be mentioned in the writ of summons (*l*), and that all forms of action (except ejectment and replevin) might be joined in one action (*m*). The practical effect of this was to leave as the only incident affecting forms of action the various periods of limitation of time in respect of them (*n*).

Common Law Procedure Act, 1860.

In 1860, however, a second Common Law Procedure Act (*o*) abolished the forms of original writs in the three remaining real actions, viz., right of dower, *de dote unde nihil habet*, and *quare impedit*, and substituted for them a writ of summons.

Judicature Acts.

The procedure introduced by the various Common Law Procedure Acts lasted over twenty years, until the Judicature Acts put a final end to forms of action by enacting that, in the writ of summons or the indorsement thereof, it should not be necessary to state the precise ground of complaint, or the precise relief the plaintiff claimed (*p*).

The effect of this legislation, abolishing forms of action, has been to obviate the inconvenience and expense to plaintiffs who were nonsuited by reason of having selected the wrong form of action,

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(*i*) 3 & 4 Will 4, c. 27, s. 36. In introducing the Bill into the House of Lords, Lord LYNDHURST said that the old forms were "antiquated, technical, obsolete, and little understood" (Hansard, 3rd ser., xviii. 793).

(*k*) 15 & 16 Vict. c. 76.

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

(*m*) *Ibid.*, s. 41.

(*n*) The Common Law Procedure Acts "did not abolish forms of action in words. The Common Law Commissioners recommended that, but it was supposed that, if adopted, the law would be shaken to its foundations, so that all that could be done was to provide as far as possible that, though forms of action remained, there never should be a question what was the form" (*per* BRAMWELL, L.J., *Bryant* v. *Herbert* (1878), 3 C. P. D. 389, at p. 390).

(*o*) 23 & 24 Vict. c. 126. s. 26.

(*p*) Judicature Act, 1875 (38 & 39 Vict. c. 77), Sched. I.; R. S. C., Ord. 1, r. 1; Ord. 2, r. 1; Ord. 3, r. 2.

and consequently had to pay the defendant's costs (*q*). But it is still often of importance, in considering the question whether a plaintiff has a cause of action under particular circumstances and in determining the period of limitation (*r*) prescribed for the particular ground of complaint in question, to inquire what would have been the form of action under the old practice.

SECT. 3.—*Modern Actions.*

Modern actions.

77. A modern action, in the popular sense of that word, is commenced by a writ of summons, which states simply the general nature of the plaintiff's complaint. Neither in the indorsement upon such writ, nor in the subsequent pleadings, is it necessary to state in any particular or stereotyped form the facts upon which he relies. Pleadings are no longer technical in the sense that they must show the precise legal form which the plaintiff's demand must take; they now show the facts, and then it is for the Court from the facts to decide upon the legal result of those facts (*s*). Even at the present date, however, there are certain distinctions between classes of actions which cannot be altogether disregarded.

SUB-SECT. 1.—*Actions in rem and in personam.*

Action *in rem*.

78. An action or suit *in rem* is an action brought in the Admiralty Division of the High Court, or in some inferior Court having Admiralty jurisdiction (*t*), in which the plaintiff seeks to make good a claim to or against certain property—*e.g.*, a ship or cargo—in respect of which, or in respect of damage done by which, he alleges that he has an actionable demand. Thus in collision actions and other cases where a plaintiff claims a maritime lien (*a*) he can, if the *res* be within the Court's jurisdiction, by process served upon its corpus, procure its arrest and detention by the Court until either

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(*q*) "It has been suggested that . . . the law . . . has been altered by the Judicature Acts, and by the abolition of the plea in abatement. I am unable to agree to this suggestion. I cannot think that the Judicature Acts have changed what was formerly a joint right of action into a right of bringing several and separate actions" (*per* Earl CAIRNS, L.C., *Kendall* v. *Hamilton* (1879), 4 App. Cas., at p. 516. See also *Gibbs* v. *Guild* (1882), 9 Q. B. D. 59, 67; *Britain* v. *Rossiter* (1879), 11 Q. B. D. 123, 129; *Macdonald* v. *Tacquah Gold Mines Co.* (1884), 13 Q. B. D. 535, 539).

(*r*) "It was said that inasmuch as the names of actions are altered, and there is no longer an action on the case, or an action of trespass, the Statute of Limitations did no longer apply; but I am of opinion that the Judicature Act, 1873, did not alter or touch the Statute of Limitations at all, and that the statute still applies to the circumstances which constituted the actions named in it, that is to say that if the circumstances would have constituted an action on the case, or an action of trespass, although the action which involves the remedy sought would not now be called an action on the case or an action of trespass, yet notwithstanding the Statute of Limitations applies to it, if the facts are such as would have supported an action on the case or an action of trespass" (*Gibbs* v. *Guild* (1882), 9 Q. B. D. at p. 67, *per* BRETT, L.J.). See generally the title LIMITATION OF ACTIONS, *post*.

(*s*) *Hanmer* (*Lord*) v. *Flight* (1876), 35 L. T. 127.

(*t*) Or in time of war in a prize court. See title PRIZE LAW AND JURISDICTION.

(*a*) *E.g.*, for salvage, wages, towage or pilotage, or in respect of a bottomry bond. There may also be a statutory right to proceed *in rem*, *e.g.*, for necessaries or repairs, though no maritime lien is conferred. See title ADMIRALTY.

SECT. 3. Modern Actions.

the owners bail it out by giving security for the amount claimed by him, or until the Court gives judgment upon his claim, when, if he be successful, effect may be given to such judgment by sale of the property in order to satisfy it. The effect of such a judgment or sale is that the order of the Court operates directly upon the status of the property, and transfers an absolute title to a purchaser (*b*).

Action *in personam*.

In the case, however, of an ordinary action *in personam* (*c*), the judgment of the Court is a personal one (in the nature of a command or prohibition) against the unsuccessful party; it may, it is true, be enforced against his goods by subsequent proceedings; but even if the sheriff sells them in execution under the judgment he does not thereby transfer to a purchaser an absolute title, but only such title as the owner may in fact have had (*d*).

It must be noted, however, that it is not only in actions ostensibly directed against a *res* that a "judgment *in rem*," as distinct from a "judgment *in personam*" or "*inter partes*," can be obtained (*e*). Thus a decision of the Court condemning goods in a revenue case (*f*), a grant of probate or administration (*g*), and a decree in a matrimonial suit (*h*) are judgments *in rem*, directly determining the status of property or persons, though the proceedings in which they are given are in form proceedings *in personam*.

SUB-SECT. 2.—*Actions of Contract and of Tort.*

Importance of distinction.

79. The distinction between actions of, or founded on, contract, and actions of, or founded on, tort is still of importance in determining whether a claim involving only a small amount should be brought in the High Court or the county court. A judge or master must upon application by either party, and in the absence of good cause to the contrary, remit for trial in a county court any "action of contract" brought in the High Court where any part of the plaintiff's claim is contested, and where the claim indorsed on the writ does not exceed £100, or where such claim, though it originally exceeded £100, has been reduced by payment, admitted set-off, or otherwise to a sum not exceeding £100 (*i*); and where any "action of tort" is brought in the High Court a judge or master may, upon affidavit showing that the plaintiff has no visible means of paying, if unsuccessful, the defendant's costs, make an order for the action to be stayed or remitted to a county court unless the plaintiff gives security for costs or satisfies a judge of the High

(*b*) See *Castrique* v. *Imrie* (1870), L. R. 4 H. L. 414; *Minna Craig Steamship Co.* v. *Chartered Mercantile Bank of India*, [1897] 1 Q. B. 55, and, on appeal, *ibid.*, 460. See, further, title ADMIRALTY.

(*c*) An action *in personam* must be distinguished from the old "personal action" and also from a *personalis actio*, which, in the words of the maxim, "moritur cum personâ."

(*d*) *Castrique* v. *Imrie*, *supra*.

(*e*) See, *e.g.*, *Fracis Times & Co.* v. *Carr* (1900), 82 L. T. 698, *per* VAUGHAN WILLIAMS, L.J. See also title JUDGMENT.

(*f*) *Geyer* v. *Aguilar* (1798), 7 Term Rep. 681, 696, *per* Lord KENYON.

(*g*) *Noell* v. *Wells* (1667), 1 Lev. 235.

(*h*) *Dacosta* v. *Villa Real* (1734), 2 Str. 961. See also *Bater* v. *Bater*, [1906] P. 209.

(*i*) County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 65.

Court that he has a cause of action fit to be prosecuted therein (*j*). Lastly, where any action which could have been commenced in the county court (*k*) is brought in the High Court, then the plaintiff's right to costs, or to costs upon any particular scale, will depend primarily upon the amount recovered by him, the crucial amount varying according as the action is one "founded on contract" or "founded on tort" (*l*).

Actions held to be founded on contract.

An action against a livery stable keeper for negligence in the care of a horse standing in his stable for reward to him was held to be an action founded on contract (*m*). So too were an action against a hackney carriage proprietor for not carrying securely certain luggage belonging to the hirer of the carriage (*n*), an action against an innkeeper for not keeping securely a traveller's property (*o*), an action against a railway company as common carriers for losing goods intrusted to them for carriage (*p*), and an action against an architect for not exercising due skill and care in supervising a builder's work (*q*).

Actions held to be founded on tort.

On the other hand, an action for the wrongful detention of goods is founded on tort (*r*). So too are an action by a passenger against a railway company through the negligence of whose servants he has been injured (*s*), an action against carriers for delivering goods to the original consignees after receiving notice to "stop" such goods *in transitu* (*t*), an action in respect of injuries received by a horse intrusted to the defendant for agistment (*a*), an action against a house-owner for removing before the commencement of a lease granted to a tenant fixtures which by the agreement for such lease were to remain on the premises during the term (*b*), and an action against an auctioneer for reselling in error to a third person goods bought at an auction by the plaintiff (*c*).

Mode of distinction.

Each case must, it has been said (*d*), be decided as it arises, and it is difficult to lay down any definite principle; but the substance

(*j*) County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 66.

(*k*) The following actions cannot be commenced in the county court: actions for libel, slander, seduction, breach of promise of marriage; actions concerning the title to any toll, fair, market, or franchise, or to any corporeal or incorporeal hereditament (except those within sect. 60 of the County Courts Act, 1888).

(*l*) *Ibid.*, s. 116, as amended by County Courts Act, 1903 (3 Edw. 7, c. 42), s. 3.

(*m*) *Legge* v. *Tucker* (1856), 1 H. & N. 500; but see now *Turner* v. *Stallibrass*, [1898] 1 Q. B. 56.

(*n*) *Baylis* v. *Lintott* (1873), L. R. 8 C. P. 345.

(*o*) *Morgan* v. *Ravey* (1861), 6 H. & N. 265.

(*p*) *Fleming* v. *Manchester, Sheffield, and Lincolnshire Rail. Co.* (1878), 4 Q. B. D. 81. Having regard to this decision and *Baylis* v. *Lintott*, *supra*, *Tattan* v. *Great Western Rail. Co.* (1860), 2 E. & E. 844, can apparently be no longer relied on.

(*q*) *Steljes* v. *Ingram* (1903), 19 T. L. R. 534.

(*r*) *Bryant* v. *Herbert* (1878), 3 C. P. D. 389; but see pp. 41, 44, *ante*, and p. 50, *post*.

(*s*) *Taylor* v. *Manchester, Sheffield, and Lincolnshire Rail. Co.*, [1895] 1 Q. B. 134; *Kelly* v. *Metropolitan Rail. Co.*, *ibid.* 944. See also *Bretherton* v. *Wood* (1821), 3 Brod. & B. 54; *Lyles* v. *Southend-on-Sea Corporation*, [1905] 2 K. B. 1.

(*t*) *Pontifex* v. *Midland Rail. Co.* (1877), 3 Q. B. D. 23.

(*a*) *Turner* v. *Stallibrass*, *supra*.

(*b*) *Sachs* v. *Henderson*, [1902] 1 K. B. 612.

(*c*) *Cohen* v. *Foster* (1892), 66 L. T. 616.

(*d*) *Per* ROMER, L.J., in *Sachs* v. *Henderson*, *supra*, at p. 616.

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of the action must be looked at, and the form of it, as stated in the pleadings, is immaterial (*e*); and the rule appears to be that, if the relationship between the parties is such that the plaintiff can maintain an action by showing the breach of a duty arising at common law out of that relationship, his action must be regarded as founded on tort. On the other hand, if his cause of action is that the defendant ought to have done something, or taken some precaution, not embraced by the common law liability arising out of their relationship, then he is obliged to rely on contract, and his action is founded on contract (*f*).

It must be noticed, however, that it is not every "action founded on tort" which falls within the above-mentioned provision as to costs. The provision does not apply to an action, *e.g.*, for trespass to land, where pecuniary damages for the tort are indeed claimed, but where an injunction is the substantial relief asked for and granted (*g*), nor to an action of detinue, where the plaintiff claims and recovers not only damages, but the actual goods *in specie* (*h*).

SUB-SECT. 3.—*Actions Transitory or Local.*

Transitory and local actions.

80. The old distinction between "local" and "transitory" actions, though of far less importance than it was before the passing of the Judicature Acts, must still be borne in mind in connection with actions relating to land situate outside the local jurisdiction of our Courts. "Transitory" actions were those in which the facts in issue between the parties had no necessary connection with a particular locality, *e.g.*, actions in respect of trespass to goods, assault, breach of contract etc.; whilst "local" actions were those in which there was such a connection, *e.g.*, disputes as to the title to, or trespasses to, land (*i*).

Venue.

One importance of this distinction lay in the fact that in the case of local actions the plaintiff was bound to lay the *venue* truly, *i.e.*, in the county (originally in the actual hundred) in which the land in question lay (*j*). In the case, however, of a transitory action, he might lay it wherever he pleased, subject to the power of the Court to alter it in a proper case (*k*). Local *venues* have now been abolished (*l*), and, therefore, so far as actions relating to land in England are concerned, the distinction may be disregarded.

Foreign land.

It is, however, important from another point of view, viz., that of jurisdiction as distinct from procedure. In the case of real

(*e*) *Bryant* v. *Herbert* (1878), 3 C. P. D. 389, and *per* A. L. SMITH, L.J., in *Turner* v. *Stallibrass*, [1898] 1 Q. B. 56, at p. 58.

(*f*) *Per* COLLINS, L.J., in *Turner* v. *Stallibrass*, *supra*, at p. 59. See also *Govett* v. *Radnidge* (1802), 3 East, 62.

(*g*) *Keates* v. *Woodward*, [1902] 1 K. B. 532, approving *Bradley* v. *Archibald*, [1899] 2 I. R. 108, and overruling *St. John's College, Cambridge* v. *Pierrepont* (1891), 61 L. J. (Q. B.) 19.

(*h*) *Du Pasquier* v. *Cadbury, Jones & Co., Ltd.*, [1903] 1 K. B. 104.

(*i*) See generally as to this subject *British South Africa Co.* v. *Companhia de Moçambique*, [1893] A. C. 602, 618.

(*j*) See the notes to *Mostyn* v. *Fabrigas* (1775), 1 Smith, L. C. (11th ed.) 618.

(*k*) The practice of altering the *venue* apparently originated about 1600 A.D.: see *Knight* v. *Farnaby* (1706), 2 Salk. 670, *per* HOLT, C.J., and 3 & 4 Will. 4, c. 42, s. 22.

(*l*) See R. S. C., Ord. 36, r. 1, and *Buckley* v. *Hull Docks Co.*, [1893] 2 Q. B. 93.

actions relating to land in the colonies or foreign countries the English Courts had, even before the Judicature Acts, no jurisdiction; and, therefore, the removal by those Acts of a difficulty of procedure —viz., the rule as to local *venue*—which might have stood in the way, if they had had and wished to exercise jurisdiction, did not in any way confer jurisdiction in such cases (*m*). The lack of jurisdiction still exists, and our Courts refuse to adjudicate upon claims of title to foreign land in proceedings founded on an alleged invasion of the proprietary rights attached thereto, and to award damages founded on that adjudication (*m*); in other words, an action for trespass to, or for recovery of, foreign land cannot be maintained in England, at any rate if the defendant chooses to put in issue the ownership of such land.

At the same time it should be noted that, in exercise of their equitable jurisdiction *in personam*, our Courts will entertain suits for specific performance of contracts for the sale of land, or respecting mortgages or equitable charges of foreign land, where the contract or agreement relied on has been made within the jurisdiction (*n*).

Jurisdiction over transitory actions.

On the other hand, our Courts have jurisdiction (subject to rules of procedure as to service of writs etc.) to entertain all "transitory" actions, though the cause of action arose abroad (*o*) and between aliens (*p*), subject only to one possible exception, viz., actions arising out of contracts made abroad by aliens with regard to a foreign subject-matter (*q*).

Part VIII.—Maintenance and Champerty.

Maintenance

81. "Maintenance" (*r*) may be defined as the giving of assistance or encouragement to one of the parties to an action by a person who has neither an interest in the action nor any other motive recognised by the law as justifying his interference.

(*m*) See *British South Africa Co.* v. *Companhia de Moçambique*, [1893] A. C. 602.

(*n*) *Penn* v. *Baltimore* (1750), 1 Ves. Sen. 444; *Paget* v. *Ede* (1874), L. R. 18 Eq. 118; *Duder* v. *Amsterdamsch Trustees Kantoor*, [1902] 2 Ch. 132; *British South Africa Co.* v. *Companhia de Moçambique*, *supra*, at p. 626, *per* Lord HERSCHELL.

(*o*) *Mostyn* v. *Fabrigas* (1775), 1 Smith, L. C. (11th ed.) 591.

(*p*) *Jackson* v. *Spittall* (1870), L. R. 5 C. P. at p. 549, *per* BRETT, J.

(*q*) See *Mathari* v. *Galizia* (1874), L. R. 18 Eq. 340; *Doss* v. *Secretary of State for India* (1875), L. R. 19 Eq. 509, 535.

(*r*) "Maintenance, *manutenentia*, is derived from the verb *manutenere*, and signifieth in law a taking in hand, bearing up, or upholding of quarrels and sides, to the disturbance or hindrance of common right" (Co. Litt. 368 b). It is "when one maintaineth the one side without having any part of the thing in plea or suit" (*ibid.* 369 a). See also 1 Hawk. P. C. (8th ed.) 454; 2 Co. Inst. 212; 4 Bl. Com. c. 10, s. 12, and other definitions referred to in *Bradlaugh* v. *Newdegate* (1883), 11 Q. B. D. 1; *Grant* v. *Thompson* (1895), 72 L. T. 264; and the various cases cited *infra*. According to Coke (2 Inst. 212), maintenance might be by word, writing, countenance, or deed; and merely to volunteer evidence might have been regarded as maintenance (*Master* v. *Miller* (1791), 4 Term Rep. at p. 340). At the present date, however, it is unlikely that anything short of pecuniary assistance would be considered illegal.

PART VIII. Maintenance and Champerty.

Barratry.

A person who was a common mover, exciter or maintainer of suits or quarrels was called a common barrator, and was guilty of the offence of barratry (*s*). This was an indictable offence (*t*) and punishable by fine and imprisonment (*u*); it is now practically obsolete.

Liability for maintenance.

Maintenance is a misdemeanour punishable by fine and imprisonment at common law, and is forbidden by various statutes (*v*); it is also an actionable tort rendering the maintainer liable in damages to the other party to the action (*w*). Such liability in no way depends upon the result of the action (*x*), nor upon the honesty of the maintainer's motives (*a*). But the fact that a plaintiff is being "maintained" by a third person is no answer to his action.

What amounts to maintenance.

The doctrine of maintenance is based upon considerations of public policy (*b*). It has no application to criminal proceedings (*c*), and in the case of civil proceedings there cannot be "maintenance" in the strict sense of the term until the action is commenced (*d*); but a person who, without reasonable and probable cause, instigates another to bring an action, incurs a civil liability to the defendant similar to that incurred by a maintainer (*e*).

In recent years actions for maintenance have been successfully instituted against a person who gave a bond of indemnity to a common informer who was suing the plaintiff for penalties (*f*), against a trade union which brought an action in the name of a member against his employer in respect of an alleged libel on the member contained in a letter to the union's secretary (*g*), and against a director who provided money to bring a libel action in respect of adverse criticisms upon a report made by an expert as to certain appliances sold by the director's company (*h*).

Exceptions to rule that maintenance is illegal.

82. There are, however, certain specific exceptions to the general rule of law against maintenance, which have at various times

(*s*) Co. Litt. 368b; 4 Bl. Com. 133. As to barratry by the master of a ship or the sailors, see titles CRIMINAL LAW AND PROCEDURE; SHIPPING AND NAVIGATION.

(*t*) Com. Dig. Barretry (C); Vin. Abr. Barretors (B).

(*u*) Bac. Abr. Barratry (C).

(*v*) 3 Edw. 1, c. 25; 13 Edw. 1, c. 49; 28 Edw. 1, stat. 3, c. 11; 1 Edw. 3, stat. 2, c. 14; 20 Edw. 3, c. 4; 1 Rich. 2, c. 4; 7 Rich. 2, c. 15; 32 Hen. 8, c. 9. It has, however, been said that these statutes are merely declaratory of the common law, with additional penalties (*Pechell* v. *Watson* (1841), 8 M. & W. 691; *Partridge* v. *Strange* (1552), Plowden, 77, 88).

(*w*) See, *e.g.*, *Pechell* v. *Watson*, *supra*; *Bradlaugh* v. *Newdegate* (1883), 11 Q. B. D. 1; *Alabaster* v. *Harness*, [1894] 2 Q. B. 897, [1895] 1 Q. B. 339; *Harris* v. *Brisco* (1886), 17 Q. B. D. 504.

(*x*) *Bradlaugh* v. *Newdegate*, *supra*.

(*a*) *Alabaster* v. *Harness*, *supra*.

(*b*) *Per* Lord ESHER, M.R., in *Alabaster* v. *Harness*, [1895] 1 Q. B. 339, at p. 342; *Wallis* v. *Portland* (*Duke of*) (1797), 3 Ves. 494.

(*c*) *Grant* v. *Thompson* (1895), 72 L. T. 264, disagreeing with a *dictum* of Lord COLERIDGE, C.J., in *Bradlaugh* v. *Newdegate*, *supra*. Therefore a solicitor can sue upon an indemnity given by a third party to cover the solicitor's costs of conducting a certain prosecution in the name of a client (*ibid.*).

(*d*) *Flight* v. *Leman* (1843), 4 Q. B. 883.

(*e*) *Pechell* v. *Watson*, *supra*; *Flight* v. *Leman*, *supra*; *Cotterell* v. *Jones* (1851), 11 C. B. 713; *Greig* v. *National Amalgamated Union of Shop Assistants* (1906), 22 T. L. R. 274.

(*f*) *Bradlaugh* v. *Newdegate*, *supra*.

(*g*) *Greig* v. *National Amalgamated Union of Shop Assistants*, *supra*.

(*h*) *Alabaster* v. *Harness*, *supra*.

been recognised by the Courts. In the first place, charity may excuse or justify what would otherwise be maintenance; a man may maintain the suit of his near kinsman, servant, poor neighbour, or poor co-religionist, out of charity, with impunity (*i*). Where a person thus assists a poor stranger, his action is justified if he has a *bonâ fide* belief in the justice of his cause, and it is not necessary that he should have made full inquiry into the matter, so as to have reasonable grounds for such belief (*k*). Where there is no question of poverty, it is doubtful how far the exemption in respect of kinship can be extended. It has been said to be confined to a father, a son, an heir apparent, or the husband of an heiress (*l*); but in a more recent case brothers, sons-in-law, and brothers-in-law were apparently regarded as within the exception (*m*); cousins are apparently without it (*n*).

Charity.

Secondly, the law permits persons to encourage litigants where they themselves have, or reasonably believe (*o*) that they have, a common interest in the result of the action. Thus a remainderman or reversioner may lawfully maintain the tenant in tail or life tenant. So too a landlord may maintain his lessee, if his own title may be prejudiced (*p*). An equitable interest, or a mere contingency of an interest, is sufficient to justify the maintenance of another in an action concerning the property in question (*p*); so too is a common interest in a way, churchyard, or common (*q*), or a common liability to pay tithes either in kind, or subject to a *modus*, according as the depending suit may result (*r*).

Common interest.

But the interest must not be merely a sentimental one (*s*), and it must be an interest in the matters actually in issue in the action, and not merely in matters incidentally connected therewith (*t*).

83. "Champerty" (*a*) is a particular kind of maintenance, namely, maintenance of an action in consideration of a promise to

Champerty.

(*i*) 4 Bl. Com. 134. See also 1 Hawk. P. C. (8th ed.) 460; Vin. Abr. and Bac. Abr. "Maintenance"; *Rothewel* v. *Pewer* (1431), Y. B. 9 Hen. 6, p. 64; *Pomer* (or *Pomeroy*) v. *Abbot of Buckfast* (1442), Y. B 21 Hen. 6, p. 15; *Harris* v. *Brisco* (1886), 17 Q. B. D. 504; *Findon* v. *Parker* (1843), 11 M. & W. 675. Charity induced by religious sympathy is none the less charity (*Holden* v. *Thompson* (1907), 23 T. L. R. 529). As to master and servant, see *Elborough* v. *Ayres* (1870), L. R. 10 Eq. 367.

(*k*) *Harris* v. *Brisco*, *supra*.

(*l*) 1 Hawk. P. C. (8th ed.) 458. See, however, 2 Roll. Abr. 115 h, "A man may maintain his blood."

(*m*) *Bradlaugh* v. *Newdegate* (1883), 11 Q. B. D. 1, *per* Lord COLERIDGE, C.J., at p. 11.

(*n*) *Burke* v. *Greene* (1814), 2 Ball & B. 517.

(*o*) *Findon* v. *Parker*, *supra*; *Hunter* v. *Daniel* (1845), 4 Hare, 420.

(*p*) 1 Hawk. P. C. (8th ed.) 456, 457; 2 Roll. Abr. 115 g; *Alabaster* v. *Harness*, [1894] 2 Q. B. 897; *Payne* v. *Rogers* (1794), 2 Hy. Bl. 349, 350.

(*q*) 1 Hawk. P. C., *supra*; *Alabaster* v. *Harness*, *supra*. But it must be the interest felt by a member of a limited class, and not merely by one of the general public (*Wallis* v. *Portland* (1797), 3 Ves. 494, 502).

(*r*) *Findon* v. *Parker*, *supra*.

(*s*) *Bradlaugh* v. *Newdegate*, *supra*. As to common trade interests, see *Plating Co.* v. *Farquharson* (1881), 17 Ch. D. 49.

(*t*) *Alabaster* v. *Harness*, *supra*. See also *Hutley* v. *Hutley* (1873), L. R. 8 Q. B. 112, as to "collateral interest."

(*a*) So called from *campi partitio*, but the doctrine is not confined to actions relating to realty (1 Hawk. P. C. (8th ed.) 463). See p. 41, *ante*.

PART VIII. Maintenance and Champerty.

give to the maintainer a share in the subject-matter or proceeds thereof (*b*). Unlike other kinds of maintenance, champerty is not excused by blood relationship (*c*).

Effect of champertous agreement.

The Courts will not enforce, or act upon, an agreement or other instrument which amounts to maintenance or champerty; and this rule extends to agreements or instruments which so "savour of" such offences as to be "mischievous," "against good policy and justice," and "tending to promote unnecessary litigation" (*d*). Instances of this rule fall under two main heads: agreements to assist litigation and purchases of interests in litigation.

Agreements to assist litigation.

84. As to the first class, an agreement merely to give information to a person on terms of getting a share of any property to be recovered by that person is legal (*e*); but if it be a term of the agreement that the giver of the information is himself to recover, or actively assist in recovering, the property, the agreement is unenforceable (*f*). *A fortiori* an agreement to supply funds or legal assistance for litigation in return for a share in the proceeds is invalid (*g*). So too an agreement to indemnify a person, willing to publish a libel, against the costs of an action in respect thereof, is unenforceable (*h*). An agreement by a solicitor to charge nothing for costs in a particular action has been held to be unobjectionable (*i*).

Purchase of interest in litigation.

85. As to the second class, there is nothing unlawful in the purchase of property which the purchaser can only enjoy by defeating existing adverse claims (*k*). In every case it is a question whether the purchaser's real object was to acquire an interest in the property, or merely to acquire a right to bring an action, either alone or jointly with the vendor; in the latter case his title is unenforceable (*l*). Thus the acquisition from a vendor of real property of the mere right to file a bill to set aside his conveyance

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(*b*) "Every champerty is maintenance" (2 Roll. Abr. 119 r).

(*c*) *Hutley* v. *Hutley* (1873), L. R. 8 Q. B. 112. But persons having common interests may agree to prosecute their claim, and to divide the proceeds in a manner not in accordance with their strict legal rights (*Guy* v. *Churchill* (1888), 40 Ch. D. 481). See, however, as to cases within 32 Hen. 8, c. 9, *Cholmondeley* v. *Clinton* (1821), 4 Bli. 1.

(*d*) *Reynell* v. *Sprye* (1852), 1 De G. M. & G. 660; *Rees* v. *De Bernardy*, [1896] 2 Ch. 437; *Fischer* v. *Kamala Naicker* (1860), 8 Moo. Ind. App. 170. See also *Ram Coomar Coondoo* v. *Chunder Canto Mookerjee* (1876), 2 App. Cas. 186.

(*e*) *Sprye* v. *Porter* (1856), 7 E. & B. 58.

(*f*) *Sprye* v. *Porter*, *supra*; *Stanley* v. *Jones* (1831), 7 Bing. 369; *Hutley* v. *Hutley*, *supra*. And the Court may go behind a written agreement, and draw its own conclusions as to the parties' intentions (*Rees* v. *De Bernardy*, *supra*).

(*g*) *James* v. *Kerr* (1889), 40 Ch. D. 449, and cases there cited; *Earle* v. *Hopwood* (1861), 30 L. J. (C. P.) 217; *Strange* v. *Brennan* (1846), 15 Sim. 346; *Wood* v. *Downes* (1811), 18 Ves. 120; *Hilton* v. *Woods* (1867), L. R. 4 Eq. 432.

(*h*) *Shackell* v. *Rosier* (1836), 2 Bing. (N. C.) 634.

(*i*) *Jennings* v. *Johnson* (1873), L. R. 8 C. P. 425.

(*k*) 2 Roll. Abr. 113; Y. B. 21 Edw. 3, 10, pl. 33; *Dickinson* v. *Burrell* (1866), L. R. 1 Eq. 337.

(*l*) *Dickinson* v. *Burrell*, *supra*; *Prosser* v. *Edmonds* (1835), 1 Y. & C. Ex. 481; *Harrington* v. *Long* (1833), 2 My. & K. 590; *Knight* v. *Bowyer* (1858), 2 De G. & J. 421.

on the ground of fraud was held to be bad (*m*). So too is the sale of a right to sue trustees for a breach of trust (*n*). But a creditor may assign his debt so as to enable another to sue for it, though such other's wish to enforce the debt arises from ill-feeling towards the debtor (*o*). It would seem, however, that he cannot transfer with his debt the right to proceed with a winding-up petition already presented by him (*p*). A bankrupt's right of action vesting in his trustee in bankruptcy, may properly be sold by such trustee, at any rate to one of the creditors (*q*). A person may buy shares in a company merely for the purpose of challenging, by legal proceedings, *ultra vires* acts of the directors (*r*).

The statute 32 Hen. 8, c. 9, expressly forbade, under penalty of forfeiture, the sale of "pretended rights or titles" by persons not in possession (*s*).

Solicitors.

It must be remembered in this connection that solicitors purchasing from their clients the subject-matter of a suit are in a different position from other purchasers. After his employment as such in the suit (*t*) a solicitor cannot purchase the subject-matter thereof from his client (*u*), although he may lawfully take a mortgage upon it to secure costs and expenses already incurred (*x*).

(*m*) *Prosser* v. *Edmonds* (1835), 1 Y. & C. Ex. 481. See also *De Hoghton* v. *Money* (1866), L. R. 2 Ch. 164.

(*n*) *Hill* v. *Boyle* (1867), L. R. 4 Eq. 260.

(*o*) *Fitzroy* v. *Cave*, [1905] 2 K. B. 364.

(*p*) *Re Paris Skating Rink Co.* (1877), 5 Ch. D. 959.

(*q*) *Seear* v. *Lawson* (1880), 15 Ch. D. 426; *Guy* v. *Churchill* (1888), 40 Ch. D. 481.

(*r*) *Bloxam* v. *Metropolitan Rail. Co.* (1868), 3 Ch. App. 337, 353.

(*s*) As to the limited application of this statute at the present date, see *Jenkins* v. *Jones* (1882), 9 Q. B. D. 128; *Kennedy* v. *Lyell* (1885), 15 Q. B. D. 491. For earlier decisions under it, see *Cholmondeley* v. *Clinton* (1821), 4 Bli. 1; *Doe* d. *Williams* v. *Evans* (1845), 1 C. B. 717. It did not forbid the sale of a mere expectancy (*Cook* v. *Field* (1850), 15 Q. B. 460).

(*t*) *Knight* v. *Bowyer* (1858), 2 De G. & J. 421; *Davis* v. *Freethy* (1890), 24 Q. B. D. 519

(*u*) *Wood* v. *Downes* (1811), 18 Ves. 120; *Simpson* v. *Lamb* (1857), 7 E. & B. 84; *Davis* v. *Freethy*, *supra*.

(*x*) *Anderson* v. *Radcliffe* (1858), E. B. & E. 806. See further, title SOLICITORS.

ADEMPTION.

See WILLS.

ADJOINING OWNERS.

See BOUNDARIES AND FENCES; EASEMENTS AND PROFITS PRENDRE; HIGHWAYS, STREETS, FOOTPATHS AND BRIDGES MINES, MINERALS AND QUARRIES; WATERS AND WATERCOURSES

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ADMIRALTY.

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Part I.—Introduction.

SECT. 1.—*History of Admiralty Jurisdiction Generally.*

SECT. 1. History of Admiralty Jurisdiction.

86. The seal of the Judicial Committee of the Privy Council, with which, until the coming into operation of the Judicature Act, 1873 (*a*), every order in Admiralty appeals was sealed, bears on its face the words, "Ab Edgare Vindico," thus picturesquely suggesting a very ancient origin of the jurisdiction of the Admiralty Court. Whether, however, Admiralty jurisdiction in England, as we now understand it, took its origin from Saxon times (*b*), or from the times of Henry I. (*c*), when the record of an ordinance at Ipswich (*d*) clearly refers to the Admiral's Court, at all events, in the reign of Edward III. the authority of the Crown (*e*) to administer justice in respect of piracy or spoil and other offences committed on the sea was undisputed.

Origin.

As a not unnatural consequence of possessing this criminal jurisdiction (*f*), the Court of the Lord High Admiral began to hear disputes in all civil matters connected with the sea, gradually usurping also a jurisdiction over cases arising in inland tidal waters. In consequence of this encroachment on the province of the Courts of Common Law, two statutes (*g*) were passed in the reign of Richard II. confining the admirals and their deputies to things done upon the sea, and in the main streams of great rivers beneath the bridges. The criminal jurisdiction of the Admiralty as adjusted by these statutes continued until the twenty-eighth year of Henry VIII., when it was to a great extent transferred to commissioners of oyer and terminer under the Great Seal, of whom one was the Judge of the High Court of Admiralty (*h*).

Civil matters.

87. The civil jurisdiction of the Admiralty continued within the limits laid down by the statutes of Richard II., but its exercise from the reign of Elizabeth to the reign of Charles II. involved the Admiralty Court in a long struggle with the superior courts of Common Law. The Common Law Courts issued prohibitions to their rival whenever any matter arose of which the Common Law

Conflict with common law courts.

(*a*) 36 & 37 Vict. c. 66. The Act came into operation on November 1, 1875.

(*b*) See 2 Co. Litt. 260 b; Prynne, Animadversions on the 4th Institute, p. 123.

(*c*) See *The Zeta*, [1892] P. 285, 300.

(*d*) Ordinance of Ipswich, Rolls Series, Monumenta Juridica—The Black Book of the Admiralty, Vol. I., edited by Sir Travers Twiss. See Prynne, Animadversions on the 4th Institute, p. 106.

(*e*) *R.* v. *Keyn* (1876), 2 Ex D. 63, at p. 167, *per* COCKBURN, C.J.

(*f*) See Select Pleas of the Court of Admiralty, A.D. 1390—1602 (Selden Society's Publications), by R. G. Marsden (1892—1897).

(*g*) 13 Rich. 2, st. 1, c. 5 (repealed by the Civil Procedure Acts Repeal Act, 1879 (42 & 43 Vict. c. 59), but with a saving of its effect so far as jurisdiction is concerned), and 15 Rich. 2, c. 3 (repealed in part by 42 & 43 Vict. c. 59).

(*h*) 28 Hen. 8, c. 15. The jurisdiction of the Admiralty over criminal offences committed at sea was ultimately regulated by 4 & 5 Will. 4, c. 36, s. 22, and the Admiralty Offences Act, 1844 (7 & 8 Vict. c. 2). See also *R.* v. *Keyn*, *supra*, at pp. 66, 67; *The Hercules* (1819), 2 Dods. at p. 371.

SECT. 2. Exercise of Jurisdiction.

on a bottomry or respondentia bond or to the possession of the ship, might take proceedings *in personam* against the owners of the property which would have been arrested if the proceedings had been *in rem* (*c*). Subsequently, in 1854, the High Court of Admiralty was empowered by statute to institute proceedings by personal service of a monition upon the owners of the property the subject-matter of the dispute, without the necessity of issuing a warrant to arrest the property (*d*).

Amount recoverable.

91. The question whether the amount of the judgment recoverable in an Admiralty action *in personam* can extend beyond the value of the *res* does not seem to have been decided, though there is some authority for holding that, although the Court of Admiralty did exercise a jurisdiction *in personam*, whenever there was a proceeding *in rem* it limited the damages recoverable to the value of the *res* (*e*).

Law administered in Admiralty.

92. The law administered in Admiralty actions is not the ordinary municipal law of England, but is the law which the High Court of Admiralty, by Act of Parliament or reiterated decisions, traditions, and principles, has adopted as the English maritime law (*f*).

(*c*) *The Volant* (1842), 1 W. Rob. 383.

See *R.* v. *Judge of the City of London Court*, [1892] 1 Q. B. 273, at pp. 307—310, and cases there cited. It was assumed where the proceedings were by monition that an action *in rem* was depending, so that all rights were tacitly reserved (see *The Trelawney* (1801), 3 C. Rob. 216 n.; *Five Steel Barges* (1890), 15 P. D. 142, 146; *The Cargo ex Port Victor*, [1901] P. 243, at pp. 254, 256).

(*d*) The Admiralty Court Act, 1854 (17 & 18 Vict. c. 78), s. 13. This section is repealed with numerous savings by the Statute Law Revision Act, 1892 (55 & 56 Vict. c. 19).

As to the present practice, see p. 105, *post*.

(*e*) See *R.* v. *Judge of the City of London Court*, *supra*, at p. 310, *per* KAY, L.J.

If this is so, the argument assented to by the court in *The Dictator*, [1892] P. 304, that where in an action *in rem* the defendant had appeared the action became an action *in personam* and consequently the liability of the defendant might extend beyond the value of the *res*, would fall to the ground, as of course the liability of the defendant *in personam* could only be the liability of the defendant in an Admiralty action *in personam*.

(*f*) *The Gaetano and Maria* (1882), 7 P. D. 137, 143. Accordingly the original and common law jurisdiction of that court must be ascertained from the continuous practice and the judgments of its judges and from the judgments of the courts at Westminster. The former, in moulding and crystallising the principles and practice of their court, used the laws of the Rhodians, of Wisbey, the Hanse towns, of Oleron, the Digest, and French and other ordinances, which, though they are no part of the law of England, contain many valuable principles and statements of marine practice. See *The Gas Float Whitton*, No. 2, [1896] P. 42, at p. 48, *per* Lord ESHER, M.R., quoting Abbott, Law of Merchant Ships and Seamen, 5th ed., Preface to the 1st ed., p. xi.

Part II.—Jurisdiction of the Supreme Court.

Probate, Divorce, and Admiralty Division.

93. The present jurisdiction of the Probate, Divorce, and Admiralty Division of the High Court of Justice, for brevity called the Admiralty Division, is derived partly from statute and partly from the inherent and statutory jurisdiction of the High Court of Admiralty, which, by the Judicature Acts (*g*), was transferred to the Admiralty Division.

Appeals.

Appeals lie from the Admiralty Division to the Court of Appeal, and thence to the House of Lords (*h*).

SECT. 1.—*Possession.*

Disputes as to possession.

94. The jurisdiction of the Admiralty Division to entertain suits of possession is derived from the inherent jurisdiction of the Admiralty Court to take ships or vessels out of the hands of wrong-doers and restore them to the true owners (*i*), to dispossess masters who ought to be removed (*j*), and to give possession to the majority of the part-owners wishing to send the ship proceeded against to sea, and on what is called an action of restraint being instituted by a dissentient minority of part-owners (*k*) to compel the majority of the part-owners sending the ship to sea to give bail in the amount of the value of the shares of the plaintiffs (*l*) for the safe return of the ship to a specified port (*m*). Bail for safe return may be given for more than a single voyage, but a bail bond may be cancelled when the ship is safe within the jurisdiction (*n*).

Questions of title.

95. This jurisdiction was limited to disputes as to possession alone, for the Common Law Courts declared that where any *bonâ fide* claim of ownership was set up as a defence, the Admiralty Court had no jurisdiction to deal with the question of title (*o*). To remedy

(*g*) 36 & 37 Vict. c. 66; 38 & 39 Vict. c. 77.

(*h*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 18 (5); Appellate Jurisdiction Act, 1876 (39 & 40 Vict. c. 59), s. 3.

(*i*) *Re Blanshard* (1824), 2 B. & C. 244.

(*j*) *The New Draper* (1802), 4 C. Rob. 287. See also the powers given by The Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 472. As to ownership and control of ships generally, see title SHIPPING AND NAVIGATION.

(*k*) *The Innisfallen* (1866), L. R. 1 A. & E. 72.

(*l*) If the value is not agreed on between the parties the shares will have to be appraised (*The Robert Dickinson* (1884), 10 P. D. 15, at p. 18).

(*m*) *The Apollo* (1824), 1 Hag. Adm. 306, 312; *The Talca* (1880), 5 P. D. 169; *The Keroula* (1886), 11 P. D. 92; *The Robert Dickinson*, *supra*. After the bail has been given the ship sails entirely for the profit of the majority of the part-owners who have sent her out, and the minority bear no share of the expenses of the voyage (Abbott, Law of Merchant Ships and Seamen (14th ed.) Part I., Chap. III.).

(*n*) *The Vivienne* (1887), 12 P. D. 185, in which case the bond had been in force for three years. Where the bail bond had been given in the usual form conditioned for the safe return of the vessel to the port to which she belonged, and it was proved that the ship though not lost had been taken to a port outside the territorial jurisdiction of the Court, the Court held that it had jurisdiction to order the amount of the bail to be brought into Court (*The Cawdor*, [1900] P. 47).

(*o*) *The Warrior* (1818), 2 Dods. 289.

SECT. 1. Possession.

this limitation, a statutory jurisdiction (*p*) was conferred in 1840 upon the Admiralty Court to decide any question of title to the subject-matter of any action of possession.

Foreign ships.

96. The Admiralty Division has jurisdiction in suits of possession against foreign ships, but will generally decline in its discretion to exercise the jurisdiction unless with the consent of the representative of the foreign state to which the ship belongs, or on the invitation of a competent Court of such foreign state (*q*). The Court has also power in a suit of possession to grant a decree declaring that the plaintiff is entitled to the possession of the ship proceeded against, and to have the register of British ships rectified accordingly where it appears that by mistake a wrong entry inconsistent with the plaintiff's title has been made in the register book (*r*).

Rectification of mistakes in register.

SECT. 2.—*Co-ownership and Restraint.*

Disputes between co-owners

97. The Admiralty Division has jurisdiction to determine all disputes incident to the employment of a ship registered in England or Wales, and to decide all questions arising between co-owners as to the ownership, possession and earnings of the ship, and may order the ship to be sold, and an account to be taken of all transactions outstanding and unsettled between the parties (*s*). The jurisdiction thus conferred may be exercised *in rem* or *in personam* (*t*), and in an action for an account between part-owners where one of the parties had before action parted with all his interest in the ship the Court held that it had jurisdiction to entertain the suit, and ordered him to give security to the amount of the shares he formerly possessed in the ship (*u*).

Sale at instance of minority of co-owners.

98. The sale of a ship or shares in a ship registered in England or Wales can, in the discretion of the Court, be ordered at the instance of a minority of co-owners against the consent of the majority of the co-owners (*a*); but a part-owner who can sell his own shares in the ship must make out a very strong case to induce the Court to make an order for the sale of the whole ship, by which his co-owners are forced to part with their property whether they like it or not (*b*).

Restraint.

99. In consequence of this power the Admiralty Court was enabled in a co-ownership suit to restrain the defendant from dealing with the share or shares of a ship registered in England

(*p*) Admiralty Court Act, 1840 (3 & 4 Vict. c. 65), s. 4.

(*q*) *The Evangelistria* (1876), 46 L. J. (ADM.) 1; *The Agincourt* (1876), 2 P. D. 239. See also R. S. C., Ord. 5, r. 16 (b).

(*r*) *The Rose* (1873), L. R. 4 A. & E. 6; and see *Brond* v. *Broomhall*, [1903] 1 K. B. 571.

(*s*) Admiralty Court Act, 1861 (24 Vict. c. 10), s. 8. For sale and transfer of of ships generally, see title SHIPPING AND NAVIGATION.

(*t*) *Ibid.*, s. 35.

(*u*) *The Lady of the Lake* (1870), L. R. 3 A. & E. 29.

(*a*) *The Hereward*, [1895] P. 284, in which case the majority of co-owners had formed themselves into a limited company and had rendered it impossible for the ship to be profitably employed in the general interests of all the owners unless the minority co-owners joined the company, and there appeared to be no way of preventing the sacrifice of the property but by a sale.

(*b*) See *The Marion* (1884), 10 P. D. 4.

SECT. 2. Co-ownership and Restraint.

or Wales the subject-matter of the suit, and the Admiralty Division, in common with the other Divisions of the High Court, has now power to prohibit for a specified time any dealing with a ship or any share therein on the application of any interested person (*c*).

Removal of master.

The Admiralty Division has also power to remove the master of any ship within the jurisdiction of the Court after satisfactory proof of the necessity for his removal, and to appoint a new master in his place (*d*).

Delivery up of certificate of registry.

100. The Court may in a fit case make an order for the delivery up to the persons entitled of the certificate of registry of a British ship (*e*).

SECT. 3.—*Mortgage.*

Disputes as to mortgages.

101. All disputes concerning duly registered (*f*) mortgages of British ships are within the jurisdiction of the Admiralty Division, whether the ship or the proceeds of her sale are under the arrest of the Court or not (*g*). The Admiralty Division has also jurisdiction to determine suits concerning unregistered or equitable mortgages on foreign (*h*) or British ships where the ship or the proceeds thereof are under arrest.

SECT. 4.—*Bottomry.*

Actions of bottomry and respondentia.

102. The Admiralty Division exercises the same jurisdiction in actions of bottomry and respondentia (*i*) as the Court of Admiralty possessed as part of its inherent jurisdiction. Actions of bottomry or respondentia are brought for the purpose of enforcing bottomry bonds on the ship or freight or cargo proceeded against in the action, or, in case the cargo alone is hypothecated, for the purpose of enforcing the respondentia bond on the cargo proceeded against. Bottomry bonds are contracts in the nature of mortgage of a ship on which the owner or the master acting for the owner (*j*) borrows money in circumstances of unforeseen necessity in a port of distress to enable him to repair the ship or to pay for the repairs and despatch of the vessel for the completion of her voyage (*k*), and pledges the keel or bottom of the ship *pars pro tota* for repayment. If the ship is lost in the course of the voyage by any of the perils enumerated in the

(*c*) *The Horlock* (1877), 2 P. D. 243; Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 30; and see also sect. 28 of the same Act as to the powers of the Court to order a sale where there has been a transmission of a registered ship or share or shares therein to unqualified persons.

(*d*) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 472.

(*e*) *The St. Olaf* (1877), 2 P. D. 113; *The Celtic King*, [1894] P. 175; and see the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 15.

(*f*) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 31. See generally, as to mortgages of ships, title SHIPPING AND NAVIGATION.

(*g*) Admiralty Court Act, 1840 (3 & 4 Vict. c. 65); Admiralty Court Act, 1861 (24 Vict. c. 10), s. 11; Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 34.

(*h*) *The Tagus*, [1903] P. 44.

(*i*) Respondentia is the proper technical term where the cargo alone is hypothecated. For bottomry and respondentia generally, see title SHIPPING AND NAVIGATION.

(*j*) See *The Gratitudine* (1801), 3 Ch. Rob. 240.

(*k*) See *Soares* v. *Rahn* (1838), 3 Moo. P. C. C. 1,

SECT. 4. Bottomry.

contract, the lender on the bottomry bond loses his money; but if the ship arrives safe, then he recovers the loan, with interest, which is called maritime interest and may be in proportion to the risks of the voyage (*l*).

Evidence of necessity for loan.

103. In order to enable the Court to pronounce for the validity of a bottomry bond or bill (*m*) or a respondentia bond put in suit before it, and to condemn the ship or freight and cargo or cargo alone, as the case may be, in the amount found due on the bond or bill, the Court must be satisfied by sufficient evidence that necessity existed for the loan on bottomry (*n*). This is ordinarily established by proof that the master or owner of the ship was in want of supplies (*o*) and was without credit at the port where the bond was executed, and was unable to obtain the necessaries for the continuance of the voyage without resort to a bottomry bond (*p*). If the cargo is hypothecated it must be shown that the necessity of the cargo required its hypothecation, or at least that some prospect of benefit accrued to the cargo by the hypothecation (*q*).

Bond on personal credit invalid.

104. The Court has no jurisdiction to pronounce for the validity of a bond if the bulk of the money lent on it has not been advanced on the security of the ship or cargo, but on the personal credit of the owners or master (*r*); a bond may, however, be good in part and bad in part (*s*), and upheld so far as it covers money advanced on the credit of the ship though void as to any money advanced on personal security.

Where collateral security taken.

Where a bottomry bond has been given, bills of exchange for the amount lent, drawn by the master, may be, and frequently are, taken as a collateral security for the payment of the bond, and the validity of the bond is not thereby affected (*t*).

Where no maritime risks.

105. Where there is no maritime risk, that is, where the repayment of the money advanced is not made dependent upon the safe arrival of the ship (*u*), a bond cannot be enforced in the Admiralty Division as a bottomry bond, though a bond covering in part property not exposed to maritime risk, and bad as to that part, may be valid as to the residue in respect of which maritime risk exists (*w*).

Where maritime interest not stipulated for.

A bottomry bond may be pronounced valid and within the

(*l*) See *The Atlas* (1827), 2 Hag. Adm. 48, 53.

(*m*) These are to the same effect as bottomry bonds. See *The Elpis* (1872), L. R. 4 A. & E. 1; *The D. H. Bills* (1878), 4 P. D. 32, n.

(*n*) *The Karnak*, (1868), L. R. 3 A. & E. 289, and, on appeal, (1869) L. R. 2 P. C. 505; *The Panama* (1870), L. R. 3 P. C. 199.

(*o*) See *The Lizzie* (1868), L. R. 2 A. & E. 254.

(*p*) *Kleinwort* v. *The Cassa Marittima of Genoa* (1877), 2 App. Cas. 156; *The Onward* (1873), L. R. 4 A. & E. 38.

(*q*) See *The Onward*, *supra*.

(*r*) *The Rhadamanthe* (1813), 1 Dods. 201. The Court of Admiralty was not prohibited where it entertained a cause of bottomry against the ship, but a prohibition was granted where the owners were sued to compel repayment of the bond (*Johnson* v. *Shippin* (1703), 1 Salk. 35).

(*s*) See *Cargo ex Sultan* (1859), Swa. 504; *The Augusta* (1813), 1 Dods. 283.

(*t*) *Stainbank* v. *Shepard* (1853), 13 C. B. 418; *The Staffordshire* (1872), L. R. 4 P. C. 194; *The Onward*, *supra*; *The Haabet*, [1899] P. 295.

(*u*) *The Indomitable* (1859), Swa. 446.

(*w*) *Cargo ex Sultan*, *supra*.

jurisdiction of the Court though it does not stipulate for the payment of maritime interest (*a*).

Questions of ownership.

If any question should arise in any action of bottomry as to the title to or ownership of any ship or vessel proceeded against, or the proceeds thereof remaining in the registry, the Admiralty Division has jurisdiction to determine it (*b*).

In some cases bottomry bond holders who have by the leave of the Court paid charges which take priority over the maritime lien for bottomry are allowed, without bringing a separate suit, to stand in the place of the original claimants (*c*).

SECT. 5.—*Necessaries.*

Claims for necessaries.

106. The Admiralty Division possesses a statutory jurisdiction *in rem* and *in personam* over claims for necessaries (*d*) supplied in certain places to certain ships. This jurisdiction extends (*e*) over claims for necessaries supplied to any foreign ship (*f*) at a time when such ship was in a British or Colonial (*g*) port, or on the high seas, or in a foreign port on the high seas (*h*). Further, where it is proved to the Court that at the time of the institution of the suit, no owner or part-owner of the ship was domiciled in England or Wales, the Admiralty Division has jurisdiction *in rem* or *in personam* over claims against any British or foreign ship (*i*) for necessaries supplied elsewhere than in the port (*j*) to which the ship belongs. A mere temporary absence, however, from England or Wales of a shipowner domiciled therein will not enable an action *in rem* for necessaries to be brought against the ship (*k*), but in order to deprive the Court of jurisdiction it must be shown to the Court before judgment that the owner or part-owner was domiciled in England or Wales (*l*). Claimants for necessaries do not possess maritime liens in respect of their claims (*m*), but the proceedings *in rem* which they are entitled to

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(*a*) *The Cecilie* (1879), 4 P. D. 210; *The Haabet*, [1899] P. 295.

(*b*) Admiralty Court Act, 1840 (3 & 4 Vict. c. 65), s. 4.

(*c*) *The Fair Haven* (1866), L. R. 1 A. & E. 67; *The Cornelia Henrietta* (1866), L. R. 1 A. & E. 51. See also *The St. Lawrence* (1880), 5 P. D. 250, where a plaintiff in a necessaries suit had by the leave of the Court paid amounts due for towage, pilotage, and dock dues, and was given priority over a bond holder; *The William F. Safford* (1860), Lush. 69

(*d*) As to what are necessaries, see title SHIPPING AND NAVIGATION.

(*e*) Admiralty Court Act, 1840 (3 & 4 Vict. c. 65), s. 6, and Admiralty Court Act, 1861 (24 Vict. c. 10), s. 5.

(*f*) This includes a sea-going vessel, see Admiralty Court Act, 1840 (3 & 4 Vict. c. 65), s. 6; *The Ocean Queen* (1842), 1 W. R. 457.

(*g*) *The Anna* (1876), 1 P. D. 253; *The Wataga* (1856), Swa. 165.

(*h*) See *The Mecca*, [1895] P. 95, at pp. 108, 112; *The India* (1863), 32 L. J. (ADM.) 185; *The Ocean* (1845), 2 W. Rob. 368.

(*i*) *The Mecca*, *supra*, overruling *The India*, *supra*, so far as it construed the Act of 1861.

(*j*) In the case of British ships, the port of registry is the port to which she belongs (Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 13).

(*k*) See *The Pacific* (1864), Br. & L. 243.

(*l*) *Ex parte Michael* (1872), L. R. 7 Q. B. 658.

(*m*) *The Two Ellens* (1872), L. R. 4 P. C. 161; *The Henrich Björn* (1886), 11 App. Cas. 270.

SECT. 5. Necessaries.

institute merely give them a right to arrest the ship proceeded against and thus obtain a statutory lien for their claims, charging the ship from the date of her arrest in the suit (*n*).

Claims for building, repairing etc.

107. The Admiralty Division has also jurisdiction *in rem* over any claim for the building, equipping or repairing of any ship if at the time of the institution of the cause the ship or the proceeds arising from its sale are under the arrest of the Court (*o*). A claim of this nature does not confer a maritime lien upon the claimant (*p*).

SECT. 6.—*Towage.*

Claims in the nature of towage.

108. The Court of Admiralty had since 1840 (*q*) jurisdiction to decide all claims and demands whatsoever in the nature of towage and to enforce the payment thereof; and this jurisdiction, together with whatever inherent jurisdiction the Court of Admiralty possessed over towage on the high seas, is now vested in the Admiralty Division. Claims and demands "in the nature of towage" mean claims and demands in the nature of ordinary towage, *i.e.*, towage which is only required for expediting the progress of a vessel not in distress (*r*), and not claims and demands for what has been called "extraordinary towage," which are in reality salvage claims in respect of towage services to a vessel in distress and are remunerated on a different basis (*s*).

Towage within the body of a county.

109. The jurisdiction extends over claims or demands for towage in respect of towage in tidal waters or otherwise within the body of a county (*t*), but it has been held that the claimant in respect of towage within the body of a county has not a maritime lien, but only a statutory lien giving him priority from the date of the institution of the suit or the arrest of the ship proceeded against (*u*).

SECT. 7.—*Wages, Masters' Wages and Disbursements.*

Seamen's wages and masters' wages and disbursements.

110. The present jurisdiction of the Admiralty Division over claims for seamen's wages and masters' wages and disbursements comprises a wider jurisdiction than the inherent jurisdiction in suits for seamen's wages possessed by the Court of Admiralty before 1840 (*a*). This jurisdiction of the Admiralty Division, which may

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(*n*) See *The Cella* (1888), 13 P. D. 82.
(*o*) Admiralty Court Act, 1861 (24 Vict. c. 10), s. 4.
(*p*) *The Two Ellens* (1872), L. R. 4 P. C. 161.
(*q*) Admiralty Court Act, 1840 (3 & 4 Vict. c. 65), s. 6.
(*r*) See *The Princess Alice* (1849), 3 W. Rob. 138.
(*s*) See p. 75, *post*.
(*t*) *The Hjemmett* (1880), 5 P. D. 227.
(*u*) *Westrup* v. *Great Yarmouth Steam Carrying Co.* (1889), 43 Ch. D. 241; see *The Henrich Björn* (1886), 11 App. Cas. 270, at p. 283; but see also *The Constancia* (1846), 4 Notes of Cases, 512, 521; *The Benares* (1850), 7 Notes of Cases Suppl. l., liii.; *The St. Lawrence* (1880), 5 P. D. 250.
(*a*) Admiralty Court Act, 1840 (3 & 4 Vict. c. 65), s. 4; Admiralty Court Act, 1861 (24 Vict. c. 10), ss. 10, 35; Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), ss. 165, 167—168; Merchant Shipping Act, 1906 (6 Edw. 7, c. 48), s. 57.

be exercised either *in rem* or *in personam* (*b*), extends over any claim by a master or seaman of any ship for wages earned by him on board the ship, and over any claim by the master of any ship for disbursements made by him on account of the ship (*b*). Masters (*c*) and seamen (*d*) have maritime liens for their wages, and both masters and persons acting for masters on their decease or incapacity from illness, have also now a maritime lien for disbursements or liabilities incurred by them on account of the ship (*e*).

These maritime liens may be lost by negligence or delay if the rights of third parties may be thereby compromised, but where reasonable diligence is used and the proceedings are taken in good faith the lien travels with the *res* into whosesoever possession it may come (*f*).

Claims for wages etc. by other persons.

111. A pilot has a maritime lien for his pilotage charges, and can sue for them in an Admiralty action *in rem* (*g*). The following have also been held entitled to bring Admiralty actions *in rem* for their wages: an apprentice (*h*), a purser (*i*), the ship's surgeon (*k*), a woman employed as a ship's stewardess (*l*), a ship's carpenter (*m*), and seamen and officers employed on board a ship after the discharge of the rest of the crew (*n*); but the Court has no jurisdiction to entertain in an Admiralty action *in rem*, or as a claim within either its inherent or statutory jurisdiction, a claim by a ship's husband for his salary or emoluments (*o*).

Suits for wages in the Admiralty Division must be brought within six years (*p*).

Conditional remuneration promised to a master by his owners if he stands by the ship and brings her safely into port is included in the term wages (*q*).

Damages for wrongful dismissal.

112. A claim by a seaman for damages for wrongful dismissal can be prosecuted by him in an action of wages within the jurisdiction of the Admiralty Court (*r*).

(*b*) Admiralty Court Act, 1861 (24 Vict. c. 10), ss. 10, 35.

(*c*) See *The Elmville No.* 2, [1904] P. 422; 57 & 58 Vict. c. 60, s. 167.

(*d*) *The Sydney Cove* (1815), 2 Dods. 11; *The Nymph* (1856), Swa. 86. The maritime lien in respect of seamen's wages due under a special contract may either be considered to have been conferred by the operation of the 10th section of the Admiralty Act, 1860, or to have always existed, although the Court of Admiralty until recent times might have been restrained by prohibition from enforcing it.

(*e*) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 167; *The Tagus*, [1903] P. 44; *The Ripon City*, [1897] P. 226.

(*f*) See *The Fairport* (1882), 8 P. D. 48, 55.

(*g*) See *The Servia and Carinthia*, [1898] P. 36; *The Adah* (1830), 4 Hag. Adm. 326.

(*h*) *The Albert Crosby* (1860), Lush, 44.

(*i*) *The Prince George* (1837), 3 Hag. Adm. 376.

(*k*) *The Lord Hobart* (1815), 2 Dods. 100.

(*l*) *Jane and Matilda* (1823), 1 Hag. Adm. 187.

(*m*) *The Lord Hobart* (1815), 2 Dods. 100, 104.

(*n*) See *R.* v. *Judge of the City of London Court and Owners of the SS. Michigan* (1890), 25 Q. B. D. 339.

(*o*) *The Ruby No.* 2, [1898] P. 59.

(*p*) 4 & 5 Anne, c. 3 (sometimes printed as c. 16), s. 17

(*q*) *The Elmville No.* 2, *supra*.

(*r*) *The Great Eastern* (1867), L. R. 1 A. & E. 384.

SECT. 7. Wages etc.

The Court has jurisdiction in an action of seamen's or masters' wages to decree that all or any part of the wages claimed have been forfeited for desertion, misconduct, or other offences (*s*).

Forfeiture of wages.

Other payments recoverable as wages.

Certain payments, though not strictly "wages," are recoverable as wages; for example, the allowance which has to be made by way of compensation for short or bad provisions is recoverable as wages (*t*).

Meaning of "disbursements."

"*Disbursements*" include all proper expenditure by the master for which he makes himself liable in respect of necessary things for the ship for the purposes of navigation which he, as master of the ship, is there to carry out—necessary in the sense that they must be had immediately—and when the owner is neither able to give the order, nor so near to the master that the master can obtain his authority, and the master is therefore obliged to render himself liable in order to carry out his duty as master (*a*).

Foreign ships.

The Court has jurisdiction to entertain both actions of wages and actions of disbursements (*b*) against foreign ships, but may in its discretion refuse to exercise the jurisdiction where the representative of the State to which the ship belongs objects on reasonable grounds to the Court proceeding to adjudicate (*c*).

Claims under £50.

113. A claim for wages under £50 cannot be brought in the Admiralty Division, but must be dealt with summarily, unless the owner of the ship is adjudged bankrupt, or the ship is under arrest or is sold by the authority of the Court, or the claim is referred by a Court of summary jurisdiction, or unless neither the owner nor the master of the ship is or resides within twenty miles of the place where the seaman is discharged (*d*).

SECT. 8.—*Damage by Collision.*

Claims for damage.

114. The Admiralty Division acquired (*e*) from the High Court of Admiralty jurisdiction over all wrongs committed by or to British subjects on the high seas (*f*). It has also statutory jurisdiction *in rem* and *in personam* over claims for damage received by any ship or sea-going vessel in the body of a county as well as on the high seas (*g*), and over claims for damage done by any ship in the body of a county or on the high seas (*h*). It is not

(*s*) See *The Macleod* (1880), 5 P. D. 254; *The Fairport* (1884), 10 P. D. 13; and see Williams and Bruce, 3rd ed. p. 206, note (u).

(*t*) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 199. See also ss. 135, 171, 186, 196, 207, 208 of the same Act.

(*a*) See *The Orienta*, [1895] P. 49, at p. 55; *The Elmville No.* 2, [1904] P. 422, at p. 426.

(*b*) See *The Tagus*, [1903] P. 44.

(*c*) *The Nina* (1867), L. R. 2 A. & E. 44; *The Leon XIII.* (1883), 8 P. D. 121.

(*d*) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 165.

(*e*) Under the Judicature Acts, 1873 and 1875 (36 & 37 Vict. c. 66, and 38 & 39 Vict. c. 77).

(*f*) See title SHIPPING AND NAVIGATION; *The Zeta*, [1893] A. C. 468. For definition of the high seas, see *The Mecca*, [1895] P. at p. 107.

(*g*) Admiralty Court Act, 1840 (3 & 4 Vict. c. 65), s. 6.

(*h*) Admiralty Court Act, 1861 (24 Vict. c. 10), s. 7. For definition of ship, see s. 2.

necessary that there should be actual contact causing the damage to found a claim for damage done by a ship (*i*).

Extent of jurisdiction.

The statutory jurisdiction *in rem* over claims for damage arising within the body of a county is limited to cases where a ship or a sea-going vessel is concerned, and will not include a case of collision between two dumb barges (*k*). Damage done in a collision to the cargo carried on a ship cannot be recovered in an action of damage against that ship (*l*), but damage "done by a ship" may include a claim for personal injuries done by a ship (*m*), though not a claim under the Fatal Accidents Act, 1846 (*n*), for damages for the death of a person (*o*). It is probable, however, that such a claim as last mentioned in respect of a foreign ship may now be entertained in the Admiralty Division by virtue of the statutory jurisdiction which it possesses in common with the other Divisions of the High Court (*p*).

Foreign ships.

115. The Court has jurisdiction in the case of foreign vessels sustaining damage, and of a collision between foreign vessels other than foreign national vessels (*q*). A foreign national vessel cannot be proceeded against or arrested (*r*), though where a foreign Government seeks to recover damages in respect of a collision in which a vessel belonging to it has been damaged, a counterclaim against it may be entertained (*s*).

King's ships.

116. King's ships cannot be arrested or proceeded against *in rem*, and where damage has been done by any such ship the usual course is to bring an action of damage *in personam* against the officer in charge of the ship at the time of the collision, which action the Court has jurisdiction to entertain, and in most cases an appearance is entered for the defendant by the Treasury Solicitor, who has succeeded to the duties of the Admiralty Proctor and defends the suit under the authority of the Commissioners of the Admiralty or other Government Department concerned (*t*). Certain mail ships are also exempt from arrest (*u*).

Collisions in foreign waters.

The Admiralty Division has jurisdiction *in rem* in respect of collisions between British ships in foreign inland waters (*w*), and between foreign ships other than foreign national ships in foreign waters (*a*).

Power to detain foreign ships.

117. A foreign ship which has caused an injury to any property

(*i*) *The Industrie* (1871), L. R. 3 A. & E. 303.
(*k*) *Everard* v. *Kendall* (1870), L. R. 5 C. P. 428.
(*l*) *The Victoria* (1887), 12 P. D. 105.
(*m*) *The Sylph* (1867), L. R. 2 A. & E. 24.
(*n*) 9 & 10 Vict. c. 93; see title NEGLIGENCE.
(*o*) *Seward* v. *"Vera Cr* " (1884), 10 App. Cas. 59.
(*p*) See The Shipowners Negligence (Remedies) Act, 1905 (5 Edw. 7, c. 10), s. 1; Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 11.
(*q*) This is so even in a case where proceedings in the same matter are pending before a foreign tribunal. See *The Charlotte* (1907), 23 T. L. R. 750.
(*r*) *The Parlement Belge* (1880), 5 P. D. 197; *The Jassy*, [1906] P. 270. See also title ACTION, *ante*, p. 19.
(*s*) *The Newbattle* (1885), 10 P. D. 33.
(*t*) See *H.M.S. Sans Pareil*, [1900] P. 267.
(*u*) Mail Ships Act, 1891 (54 & 55 Vict. c. 31), s. 5.
(*w*) *The Diana* (1862), Lush. 539.
(*a*) *The Courier* (1862), Lush. 541.

SECT. 8. **Damage by Collision.**

belonging to His Majesty or to any of His Majesty's subjects may be detained if found within three miles of the coast of the United Kingdom (*b*). This is a statutory power in respect of certain claims *in personam* which do not include claims for personal injuries (*c*).

Damage caused by wrongful act of individual.

118. An action *in rem* cannot be brought to recover damages for injury caused to a ship by the malicious act of the master of the defendant's ship (*d*) or the act of any agent done outside the scope of his authority (*e*); but in several cases ships allowed by their owners to be in the control of third parties have been successfully proceeded against to enforce maritime liens which sprang into being whilst they were under the control of such third parties (*f*).

Maritime lien.

119. The claimant in an action of damage has, as before stated, a maritime lien for the damage he has sustained in consequence of a collision on the high seas, and such claimant has also been held to have had conferred on him by statute a maritime lien in respect of any damage sustained by him in consequence of a collision within the body of a county (*g*). The maritime lien for damage may, like other maritime liens, be considered to be practically indelible in the absence of laches, and has been enforced eleven years after the collision in respect of which it attached occurred (*h*).

Collision with foreign ship in tow of British tug.

120. The jurisdiction of the Admiralty Division in actions of damage *in personam* has been in effect increased by the provisions allowing service of writs *in personam* out of the jurisdiction in certain cases (*i*). Thus, where a collision occurred out of the territorial jurisdiction of the Court between a British vessel and a foreign vessel at the time of the collision in tow of a British steam-tug, and the owners of the British vessel, to recover for the damages sustained in the collision, brought their action of damage *in personam* against the owners of the steam-tug and the owners of the foreign vessel, and duly served the writ of summons in the action on the owners of the steam-tug and obtained leave to serve, and duly served, notice of a concurrent writ of summons on the owners of the foreign vessel out of the jurisdiction, the Court of Appeal affirmed the refusal of the judge of the Admiralty Division to set aside the service abroad of the notice of the concurrent writ (*k*).

(*b*) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 688.
(*c*) *Harris* v. *Owners of Franconia* (1877), 2 C. P. D. 173.
(*d*) *The Ida* (1860), Lush. 6; *The Druid* (1842), 1 W. Rob. 391. See *Currie* v. *M'Knight*, [1897] A. C. 97.
(*e*) *The Orient* (1871), L. R. 3 P. C. 696.
(*f*) *The Lemington* (1874), 2 Asp. M. L. C. 475; *The Ruby Queen* (1861), Lush. 266. See also *The Ripon City*, [1897] P. 226
(*g*) *The Bold Buccleugh* (1851), 7 Moo. P. C. C. 267. See *The Veritas*, [1901] P. at p. 309.
(*h*) *The Kong Magnus*, [1891] P. 223.
(*i*) R. S. C., Ord. 11, r. 1 (g).
(*k*) *The Duc d'Aumale*, [1903] P. 18.

SECT. 9.—*Damage to Cargo.*

SECT. 9. Damage to Cargo.

121. The Admiralty Division has a statutory (*l*) jurisdiction *in rem* and *in personam* (*l*) over British and foreign (*m*) ships in respect of claims for damage to cargo, including short delivery (*n*). The claim must be made by the owner or consignee or an assignee of the bill of lading (being the person to whom the property has passed) (*o*) in respect of goods carried (*p*) or to be carried (*m*) into a port in England or Wales; and the damage must be caused by negligence, misconduct or breach of contract on the part of the owner, master or crew of the ship. This jurisdiction, however, does not exist if it is proved to the satisfaction of the Court that at the time of the institution of the suit the owner or a part owner of the ship is domiciled in England or Wales (*l*). The remedy *in rem* in respect of damage to cargo does not confer a maritime lien (*p*) and cannot be enforced against any ship other than that in which the goods were carried into England or Wales (*m*).

Damage to cargo.

SECT. 10.—*Limitation of Liability.*

122. The jurisdiction in actions of limitation of liability possessed by the Admiralty Division in common with the other Divisions of the High Court, is conferred by statute (*q*). In these actions the liability of the owner of a British or foreign ship or a charterer to whom the ship has been demised where loss of life, personal injury, or damage to vessels, goods, or other property or rights has been incurred without his fault or privity may be limited in respect of claims for loss of vessels or goods to £8, and in respect of claims for loss of life or personal injury to £15, per ton of the tonnage of the wrong-doing vessel; such tonnage being ascertained as directed by statute (*r*).

Statutory jurisdiction.

SECT. 11.—*Salvage.*

123. The Admiralty Division has acquired its jurisdiction in actions of salvage (*s*) from the inherent jurisdiction of the Admiralty Court and from statutes (*t*). Actions of salvage may be *in rem* or *in personam*. But, as in other actions *in rem*, a foreign national vessel cannot be arrested for salvage (*u*).

Salvage.

(*l*) Admiralty Court Act, 1861 (24 Vict. c. 10), s. 6. As to the remedy *in personam*, see *ibid.*, s. 35.

(*m*) *The Ironsides* (1862), Lush. 458.

(*n*) *The Danzig* (1863), Br. & L. 102.

(*o*) *The St. Cloud* (1863), Br. & L. 4.

(*p*) See *The Pieve Superiore* (1874), L. R. 5 P. C. 482.

(*q*) See Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), ss. 502—504; Merchant Shipping Act, 1906 (6 Edw. 7, c. 48), ss. 69—71, and title SHIPPING AND NAVIGATION.

(*r*) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 503; Merchant Shipping (Liability of Shipowners) Act, 1898 (61 & 62 Vict. c. 14), s. 3; Merchant Shipping (Liability of Shipowners and Others) Act, 1900 (63 & 64 Vict. c. 32), s. 2; Merchant Shipping Act, 1906 (6 Edw. 7, c. 48), s. 69.

(*s*) See title SHIPPING AND NAVIGATION.

(*t*) As to the principles on which salvage remuneration is awarded, and the law on the subject of salvage generally, see title SHIPPING AND NAVIGATION.

(*u*) *The Constitution* (1879), 4 P. D. 39.

SECT. 11. Salvage.

Salvage, whether of life or of property, confers a maritime lien whether the services of the salvors have been rendered on the high seas or within the body of a county (*a*), and such lien is only lost by laches.

SUB-SECT. 1.—*Life Salvage.*

Property must have been saved.

124. In order that life salvage may be awarded some property must have been saved (*b*), though not necessarily on the same occasion or by the same salvors (*c*).

Extent of jurisdiction.

The jurisdiction of the Admiralty Court to award salvage for services in the preservation of life is entirely statutory (*d*). In regard to British vessels salvage may be awarded for the preservation of life wherever the services were rendered, but (except as mentioned below in the case of Prussian vessels) to give the Court power to grant salvage for services to the lives of persons belonging to a foreign vessel the services must be rendered wholly or in part in British waters. But with the concurrence of a foreign Government, the Crown may, by Order in Council, give the Court jurisdiction over claims for life services rendered to persons belonging to ships owned by subjects of that foreign Government whilst beyond the limits of British jurisdiction. An Order in Council relating to Prussian ships (*e*) has been made and is still in force, but with that exception there are no provisions existing with respect to the salving of life from foreign vessels on the high seas beyond British waters, and in any case of salvage of life from foreign vessels other than Prussian vessels on the high seas beyond British waters coming before the Admiralty Division the practice of giving an enhanced award if life and property were salved together would probably be followed.

125. The Court has no jurisdiction to award life salvage for saving the lives of persons belonging to a foreign vessel not a Prussian ship where the services to life were rendered outside British waters, though the persons whose lives were saved were transferred from the salving vessel on to another vessel which brought them into an English port (*f*). On the other hand, the Court has jurisdiction to award life salvage where the lives from the foreign ship were saved by being taken on board the salving ship outside British waters and carried on board that ship into an English port (*g*).

"British waters" mean waters within the territorial limits of the United Kingdom, *i.e.*, in ordinary cases waters within the distance of three miles from the coast (*h*).

(*a*) *The Veritas*, [1901] P. 304, at p. 311.
(*b*) *The Renpor* (1883), 8 P. D. 115.
(*c*) See *The Cargo ex Schiller* (1877), 2 P. D. 145, where the property saved was recovered by divers long after the life services were rendered.
(*d*) See Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), ss. 544 *et seq.*
(*e*) The date of the Order is April 7, 1864.
(*f*) *The Willem III.* (1871), L. R. 3 A. & E. 487.
(*g*) *The Pacific*, [1898] P. 170; *The Fulham*, [1898] P. 206, at p. 213; *The Cairo* (1874), L. R. 4 A. & E. 184.
(*h*) See *The Johannes* (1860), Lush. 182; *The Leda* (1856), Swa. 40.

126. Salvage in respect of the preservation of life is payable in priority to all other claims for salvage (*i*). Priority of life salvage.

SUB-SECT. 2.—*Salvage of Property.*

127. Originally the Admiralty Court had no jurisdiction over claims for salvage of property unless the services were rendered on the high seas (*k*), but the jurisdiction has been extended by statute to include all claims for salvage of property within the body of a county (*l*). Salvage wherever services rendered.

128. Neither under the inherent jurisdiction derived from the Court of Admiralty nor under the statutory additions to its jurisdiction has the Admiralty Division jurisdiction in an action of salvage to enforce payment of salvage remuneration for services rendered to any property other than a ship, her cargo or apparel or any other things belonging to her or to her lading, including freight. Thus salvage remuneration cannot be recovered for services rendered to a raft of timber which has not formed part of the cargo of a ship (*m*), or to a structure afloat on the water, not used in navigation but for storing gas to be used in a lamp erected on the structure for the purpose of lighting a tidal river (*n*). Services must be rendered to ship, or cargo etc.

129. Not only the owners of salved property, but other persons directly interested in the preservation of the salved property, may, under the above provisions as to jurisdiction, be liable to an action of salvage *in personam* for the purpose of enforcing payment of the salvage remuneration due; as, for example, where stores belonging to the Crown in the possession of charterers under bills of lading not exempting the charterers from liability for negligence were salved, and the charterers were held liable to pay salvage remuneration (*o*). Persons liable to claim for salvage.

130. No claim can be allowed in any salvage suit for any loss, damage or risk caused to any of His Majesty's ships, or to the stores, tackle or furniture of any such ship, or for the use of any stores or Claim on behalf of King's ships or crews.

(*i*) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 544 (2).
(*k*) *Raft of Timber* (1844), 2 W. Rob. 251.
(*l*) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 565.
(*m*) *Raft of Timber, supra.*
(*n*) *Wells* v. *Owners of Gas Float Whitton No. 2*, [1897] A. C. 337. Whether, however, this decision would be applicable to cases where, no owner appearing within a year and a day, similar structures to the *Gas Float Whitton No. 2* would be the subject of condemnation as Admiralty droits to the Crown, may be doubted; and probably in such cases the persons who rendered the salvage services would be held entitled to be rewarded on salvage principles out of the proceeds of the structures salved. Otherwise, would the Crown be entitled to the droit of Admiralty without any payment to the finders at all? On this point see *Stacpoole* v. *R.* (1875), L. R. 9 Eq. Ir. 619, where it was held that logs of timber found floating in the sea were droits of Admiralty and not wreck. See also Williams and Bruce, 3rd ed. p. 127 n., where many instances of property, other than the property which the House of Lords has declared to be the subject of salvage, are referred to as being salved and condemned as droits of Admiralty after salvage had been paid to the salvors. See also an article entitled "Admiralty Droits and Salvage," by R. G. Marsden, Law Quarterly Review, Vol. XL., pp. 353—366.
(*o*) *The Cargo ex Port Victor*, [1901] P. 243. See *Five Steel Barges* (1890), 15 P. D. 142.

SECT. 11. Salvage.

other articles belonging to His Majesty supplied in order to effect salvage services, or for any other expense or loss sustained by His Majesty by reason of such services, and no claim for salvage services by the commander or crew or part of the crew of any of His Majesty's ships will be finally adjudicated upon unless the consent of the Lords Commissioners of the Admiralty to the prosecution of that claim is proved. If a claim is prosecuted and the consent is not proved, the claim will stand dismissed with costs (*p*).

Distribution of salvage remuneration.

131. A power of distributing amongst the salvors the amount of the salvage remuneration awarded in salvage suits was always incident to the jurisdiction of the Admiralty Court in actions of salvage, and is now provided for by statute (*q*).

Royal fish.

132. Remuneration in the nature of salvage is payable to the captors of royal fish (whales and sturgeons), and is recoverable in the Admiralty Division in an action of salvage (*r*).

Disputes as to wreck etc.

133. Disputes as to unclaimed wreck, jetsam, flotsam, ligan (*s*), and derelict found in or on the shores of the sea or any tidal water (*t*), may be brought before the Admiralty Division and there determined (*u*).

SECT. 12.—*Droits of Admiralty.*

Unclaimed wreck etc.

134. The jurisdiction of the High Court of Admiralty to condemn as droits of Admiralty unclaimed wreck, flotsam, jetsam, ligan and derelict found in or on the shores of the sea or any tidal water, as well as derelict found on the high seas beyond the limits of the United Kingdom, is vested in the Admiralty Division (*a*), but no necessity for the exercise of the jurisdiction can ordinarily arise, as droits of Admiralty in time of peace are dealt with by the receiver of wreck of the district (*b*), or by the Board of Trade as Receiver-General of Admiralty droits (*c*).

Piracy cases.

The High Court of Admiralty possessed an inherent jurisdiction to adjudicate in a case of piracy as to the restitution of goods taken piratically on the high seas and to condemn the goods belonging to pirates to the Crown as droits of Admiralty; and such jurisdiction is now exercised by the Admiralty Division (*d*).

(*p*) The Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 557.

(*q*) *Ibid.*, s. 556.

(*r*) *The Lord Warden of the Cinque Ports* v. *The King in His Office of Admiralty* (1831), 2 Hag. Adm. 438, 441.

(*s*) As to the meaning of these terms, see *Sir Henry Constable's Case* (1601), 5 Co. Rep. 106 a; *The Gas Float Whitton No.* 2, [1896] P. 42, at p. 51.

(*t*) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 510.

(*u*) *Ibid.*, s. 526.

(*a*) See *The King* v. *Property Derelict* (1825), 1 Hag. Adm. 383; *The King* v. *Forty-nine Casks of Brandy* (1836), 3 Hag. Adm. 257. As to wreck found or taken possession of outside the limits of the United Kingdom, and brought within those limits, see Merchant Shipping Act, 1906 (6 Edw. 7, c. 48), s. 72.

(*b*) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), ss. 524, 525.

(*c*) See Merchant Shipping Repeal Act, 1854 (17 & 18 Vict. c. 120), s. 10.

(*d*) See Co. Litt. 391 a; *The Hercules* (1819), 2 Dods. 353; *Radly* v. *Eglesfield* (1671), 1 Ventr. 173; *Prinston* v. *The Admiralty* (1615), 3 Buls. 147; *The Panda* (1842), 1 W. Rob. 423. See also *The Telegrafo or Restauracion* (1871), L. R. 3 P. C. 673.

SECT. 12. Droits of Admiralty.

The Admiralty Division has also a statutory jurisdiction (*e*), transferred from the High Court of Admiralty, over maritime property recaptured from pirates (*f*) by His Majesty's vessels, and may condemn such property as droits of Admiralty or restore it to its owner, if a British subject, on payment by him of one-eighth of the value of the property by way of salvage remuneration.

SECT. 13.—*Forfeiture.*

Illegal colours.

135. The Admiralty Court always exercised jurisdiction over persons who had infringed the ordinances or proclamations issued by royal authority with regard to the colours to be worn by merchant ships (*g*), and this jurisdiction is now exercised by the Admiralty Division, which also has certain statutory powers with reference to the same subject.

Improper use of national flag.

136. The Admiralty Division has under these powers a statutory jurisdiction to impose fines for the improper use of the British national colours on board a ship belonging to a British subject (*h*). The fines are recoverable from the master or owner, if on board, and from every other person hoisting the colours (*h*).

Concealment of national character.

137. The Admiralty Division also possesses a statutory jurisdiction to condemn as forfeited to His Majesty any ship or interest therein the owners of which have incurred forfeiture by the infringement of certain provisions (*i*) relating to the improper use of the British flag on board a ship owned in whole or in part by a person not qualified (*j*) to own a British ship, or to an improper concealment by the master or owner of a British ship of her national character. Any interest, legal or equitable, in a British ship acquired by a person unqualified to own a British ship is also subject to forfeiture under the Act (*k*).

Position of *bonâ fide* purchaser on forfeiture.

138. The corresponding provision contained in the repealed Merchant Shipping Act, 1854 (*l*), provided that if the offences specified therein were committed the ship *should be forfeited*; and the Court of Appeal decided (*m*) that under this language the forfeiture accrued immediately upon the commission of the offence, so that no sale of the ship or other dealing with it would be of any avail against the title of the Crown. The sections in the Act of 1894, which take the place of sect. 103 of the Act of 1854, enact that on commission of the offences specified therein the ships concerned are *subject to forfeiture under the Act*. It is doubtful, in the face of the decision above-mentioned (*m*), whether the result of introducing the words *subject to*

(*e*) Judicature Act, 1873, and The Piracy Act, 1850 (13 & 14 Vict. c. 26).

(*f*) For the jurisdiction of the Admiralty Division to ascertain whether persons are pirates, see The Piracy Act, 1850 (13 & 14 Vict. c. 26), s. 2.

(*g*) See *Reg.* v. *Ewen* (1856), 2 Jur. (N. S.) 454; *The Minerva* (1800), 3 Ch. Rob. 34; see also 3 Ch. Rob. Appendix No. ii., p. 13.

(*h*) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 73.

(*i*) *Ibid.*, ss. 69, 70, 71. See also, as to forfeiture of ship improperly registered as a British ship, Merchant Shipping Act, 1906 (6 Edw. 7, c. 48), s. 51.

(*j*) For such qualification, see Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 1.

(*k*) *Ibid.*, s. 71.

(*l*) 17 & 18 Vict. c. 104, s. 103.

(*m*) *The Annandale* (1877), 2 P. D. 218.

SECT. 13. Forfeiture.

forfeiture, will not be that the Court will have to uphold the title of a *bonâ fide* purchaser against the Crown, if the sale took place before proceedings to condemn for the forfeiture had been commenced.

Dangerous goods.

139. The Admiralty Division can, in common with other Courts having Admiralty jurisdiction, condemn as forfeited any dangerous goods sent or carried, or attempted to be sent or carried, on board any vessel, British or foreign, without being properly marked, or without a written notice having been given of the description of the goods, or under a false description or with a false description of the sender or carrier (*n*).

Cases under Foreign Enlistment Act.

140. All proceedings for the condemnation and forfeiture of ships, or of arms and munitions of war, in pursuance of the Foreign Enlistment Act, 1870, are directed to be taken in the Court of Admiralty, now the Admiralty Division, and not in any other Court. In such cases the Admiralty Division has, in addition to any power granted by the Foreign Enlistment Act, all powers over a ship or any other matter brought before it which the Division has in the case of a ship or matter brought before it in the exercise of its ordinary jurisdiction (*o*).

SECT. 14.—*Booty of War and Petitions of Right.*

Matters referred by Order in Council.

141. The Admiralty Division has jurisdiction to decide all matters and questions concerning booty of war and the distribution thereof which may be referred to the Court by Order in Council (*p*); and in all matters so referred the Court proceeds as in cases of prize of war, and its judgment is binding upon all parties concerned (*q*).

Petitions of right.

142. A petition of right arising out of the exercise of any belligerent right on the part of the Crown, or which would be cognizable in a Prize Court within His Majesty's dominions, and also any other petition of right, whether instituted in the Court of Admiralty or not, if the Lord Chancellor so directs, may be prosecuted in the Admiralty Division (*r*).

SECT. 15.—*Slave Trade etc.*

Special statutory jurisdiction.

143. The Admiralty Division possesses the jurisdiction conferred on the Court of Admiralty in regard to the condemnation or restoration of vessels, slaves, goods, and effects alleged to be seized, detained, or forfeited under The Slave Trade Act, 1873 (*s*), and the enactments incorporated with it, and in regard to bounties etc., and it also has jurisdiction under the Pacific Islanders' Protection Acts, 1872 and 1875 (*t*), to enforce by the condemnation of the vessels engaged the provisions of those Acts prohibiting the undue importing and removal of natives of any of the islands of the Pacific Ocean.

(*n*) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), ss. 446—449.

(*o*) Foreign Enlistment Act, 1870 (33 & 34 Vict. c. 90), s. 19. And see title CRIMINAL LAW AND PROCEDURE.

(*p*) Admiralty Court Act, 1840 (3 & 4 Vict. c. 65), s. 22.

(*q*) *The Banda and Kirwee Booty* (1866), L. R. 1 A. & E. 109; (1875), L. R. 4 A. & E. 436. See title PRIZE LAW AND JURISDICTION.

(*r*) Naval Prize Act, 1864 (27 & 28 Vict. c. 25), s. 52. As to petitions of right generally, see title CROWN PRACTICE.

(*s*) 36 & 37 Vict. c. 88.

(*t*) 35 & 36 Vict. c. 19; 38 & 39 Vict. c. 51.

SECT. 16.—*Special Jurisdiction of Admiralty Registrar* (*u*).

SECT. 16. Jurisdiction of Admiralty Registrar.

SUB-SECT. 1.—*Substitutes for Seamen Volunteering into the Navy.*

Repayment of excess of wages payable.

144. Merchant seamen belonging to British ships are allowed to leave their ships in order to enter the naval service of His Majesty, and where in consequence of a seaman leaving his ship and entering His Majesty's service it becomes necessary for the safety and proper navigation of the ship to engage any substitute, and the wages or other remuneration paid to the substitute for subsequent service exceed the wages or remuneration which would have been payable to the seaman under his agreement for similar service, the master or owner of the ship may apply in the Admiralty Registry for a certificate authorising the repayment of the excess (*x*).

How application made.

145. Any such application may be made by summons or otherwise, and either *ex parte* or upon service of motion on any person, as the Court may direct (*a*). It is made to the Admiralty Registrar, who, on receiving the application, gives written notice thereof, and of the sum claimed, to the Lords Commissioners of the Admiralty, and proceeds to examine the application, and, if he considers that the whole of the claim is just, gives a certificate accordingly; if, however, he considers that the claim, or any part thereof, is not just, he gives notice of his opinion in writing under his hand to the person making the application, or his solicitor or agent, who may within sixteen days from the giving of the notice leave at the Admiralty Registry a written notice demanding that the application be referred to the Judge; otherwise the Registrar decides finally (*b*).

Costs of proceedings.

146. The Judge or Registrar (as the case may be) may, if he thinks fit, allow for the costs of any such proceeding any sum not exceeding five pounds for each seaman in respect of whom application is made, and that sum is then added to the sum authorised to be repaid (*c*).

SUB-SECT 2.—*Costs in Vice-Admiralty Courts.*

Taxation.

147. Any person aggrieved by the charge of any of the practitioners in any Vice-Admiralty Courts or by the taxation thereof, may apply to the High Court of Admiralty of England, and therefore now to the Admiralty Division, to have the charges taxed and the taxation revised (*d*). The taxation or revised taxation on an application made under these provisions would be referred to the Admiralty Registrar (*e*).

(*u*) For the general jurisdiction of the Admiralty Registrar in matters within the jurisdiction of the Admiralty Division, see pp. 117 *et seq.*, *post*.

(*x*) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), ss. 195, 197.

(*a*) R. S. C. (Merchant Shipping), 1894, rule 2.

(*b*) *Ibid.*, rule 3 (1)—(4).

(*c*) *Ibid.*, rule 3 (6).

(*d*) Vice-Admiralty Courts Act, 1863 (26 & 27 Vict. c. 24), s. 19.

(*e*) See the Slave Trades Act, 1873 (36 & 37 Vict. c. 88), s. 20, which confers on the Registrar of the High Court of Admiralty a similar power of taxation and revising taxation of costs, charges, and expenses incurred in any proceeding taken in any British Slave Court or any Mixed Commission or Court in His Majesty's dominions.

Part III.—Practice of the Supreme Court.

SECT. 1. Actions in rem.

SECT. 1.—*Actions in Rem.*

SUB-SECT. 1.—*Writ of Summons in Rem.*

Issue of writ.

148. An Admiralty action *in rem* is commenced by a writ of summons *in rem*, prepared, as in other actions, by the plaintiff or his solicitor (*a*) on the paper in use for printing the proceedings in the Supreme Court of Judicature (*b*). The writ may be either written or printed or partly printed (*c*), and must be issued (*d*) out of the Central Office, Royal Courts of Justice, London, if it is intended that the action should proceed in London (*e*), or in other cases out of that one of the district registries of the High Court of Justice in which it is desired to institute the action (*f*). There are two forms of the writ, one for issue out of the Central Office, and the other for issue out of a district registry, and these must be followed with such variations as circumstances may require (*g*).

Form of writ.

149. The form of the writ to be issued in London is headed "Writ of Summons, Admiralty action *in rem*," and is directed, not to any defendants by name, but, except in cases where the circumstances require a variation (*h*), to "the owners and parties interested in" the property proceeded against (*i*). As a writ must specify the division of the High Court to which it is intended that the action should be assigned, and as Admiralty actions *in rem* are invariably in practice assigned to the Admiralty Division, the writ should be entitled "In the High Court of Justice, Probate, Divorce, and Admiralty Division (Admiralty)," and should state that an appearance is to be entered in that Division to the suit of the plaintiff. In other respects than those above noted the body of the writ is the same as the body of a writ of summons in an action in any other Division of the High Court (*j*). The form of the writ in an Admiralty action *in rem* for issue out of a district registry is similar to that issued out of the Central Office, with the exception that it is headed "Writ in Admiralty action for issue from district registry" (*k*).

Endorsement.

Before being issued the writ must be endorsed, as in other actions, with a statement of the nature of the claim made, and of the relief

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(*a*) R. S. C., Ord. 5, r. 10.
(*b*) R. S. C., Ord. 66, r. 3.
(*c*) R. S. C., Ord. 5, r. 10.
(*d*) R. S. C., Ord. 5, r. 11.
(*e*) R. S. C., Ord. 5, r. 1.
(*f*) R. S. C., Ord. 5, r. 2. As to the Central Office, Royal Courts of Justice, and the district registries, here referred to, see title PRACTICE AND PROCEDURE.
(*g*) R. S. C., Ord. 2, r. 7; and see R. S. C., Appendix A, forms 11, 12.
(*h*) As in co-ownership actions where the writ is directed to particular persons.
(*i*) The provision of the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), requiring any action against certain persons acting in execution of public duties to be brought within six months of the act or default complained of, does not apply to an action *in rem* (*The Burns*, [1907] P. 137); see title ACTION, p. 26, *ante*.
(*j*) See title PRACTICE AND PROCEDURE.
(*k*) It would, however, seem to be convenient that the heading of the writ should state that it is a writ *in rem*.

or remedy required in the action (*l*), and the endorsement so made should be to the effect of such one or more of the official forms as is or are applicable, or, if none be found applicable, then of such other similar concise form as the nature of the case may require (*m*).

Sealing, stamping and filing.

150. The writ must be sealed by the proper officer of the writ department in the Central Office, or of the district registry where the action is pending, and a signed and completed copy stamped with a stamp of 10*s.* be left with the officer and filed (*n*). If the writ has issued out of the Central Office, the plaintiff or his solicitor must, before taking any further step in the action, leave a copy of the writ in the Principal Admiralty Registry (*o*).

Owners of ship or cargo may sue as such.

151. By the practice of the Admiralty Division the owners of a ship or cargo may sue as such, and this practice is in no way affected by the enabling provisions in the Rules of the Supreme Court (*p*) relating to parties to suits (*q*), or to the joinder of causes of action (*r*). But the Court may on the application of the defendant at any period of the action call upon the solicitor whose name is endorsed on the writ to state specifically by name the whole of the parties for whom he is authorised to appear (*s*).

SUB-SECT. 2.—*Warrants of Arrest and Caveat Warrants.*

Application for warrant.

152. Having duly procured the issue of the writ, the plaintiff or a defendant who counterclaims, or their respective solicitors, may, even before service of the writ, apply at the Admiralty Registry if the action is proceeding in London, or in the district registry where the action has been commenced, for a warrant for the arrest of the property against which the action has been brought (*t*).

Præcipe for warrant.

The application for the warrant is made by filing a præcipe (*a*) for a warrant signed by the solicitor, or his clerk, of the party applying, stamped with a 15*s.* stamp (*b*), and bearing date on the day on which the warrant issues (*c*).

Affidavit to lead warrant.

The warrant will not be issued until an affidavit by the party applying or his agent has been filed (*d*), stating in all cases, unless

(*l*) R. S. C., Ord. 2, r. 1; Ord. 3, r. 1; R. S. C., Appendix A, Part III. (Sect. VI., Admiralty). It would seem that the claims should be claims over which the Court has jurisdiction *in rem*, and in an action of damage *in rem*, where it was sought to join a claim *in personam* against the pilot of one of the ships which came into collision, the Court, assuming it had jurisdiction to join the pilot in an action *in rem*, refused to make an order for the pilot to be joined, being of opinion that such an order would cause great inconvenience (*The Germanic*, [1896] P. 84).

(*m*) R. S. C., Ord. 3, r. 3.

(*n*) R. S. C., Ord. 5, rr. 11, 12, 13; Ord. 61, r. 1. Order as to Supreme Court Fees, 1884, Schedule, No. 1.

(*o*) See R. S. C., Ord. 5, r. 14.

(*p*) R. S. C., Ord. 16, r. 1; Ord. 18, r. 1; Ord. 48A, r. 1.

(*q*) *The Assunta*, [1902] P. 150.

(*r*) *The Maréchal Suchet*, [1896] P. 233.

(*s*) *The Whilelmine* (1842), 1 W. Rob. 335, 337; *The Euxine* (1871), L. R. 4 P. C. 8; see also R. S. C., Ord. 7, r. 1.

(*t*) R. S. C., Ord. 5, r. 16. For form see R. S. C., Appendix A, Part I., No. 17.

(*a*) For form, see R. S. C., Appendix A, Part I., No. 15.

(*b*) Order as to Supreme Court Fees, 1884, Schedule, No. 13.

(*c*) R. S. C., Ord. 67, r. 10.

(*d*) The nature and date of filing of this affidavit, and every other affidavit or

SECT. 1. Actions in rem.

otherwise ordered, the name and description of the party at whose instance the warrant is to be issued, the nature of the claim, the name and nature of the property to be arrested, and that the claim has not been satisfied; further, if the action be one of wages or possession, the affidavit must state the national character of the vessel proceeded against, and, if it be against a foreign vessel, that notice of the commencement of the action has been given to the consul of the state to which the vessel belongs, if there be one resident in London (*e*), a copy of the notice being required to be annexed to the affidavit. Moreover, before the issue of the warrant in an action of bottomry, the bottomry bond and also, if it be in a foreign language, a notarial translation thereof, must be produced for the inspection and perusal of the registrar, and a copy of the bond or of the translation thereof certified to be correct should be annexed to the affidavit (*f*). The Court or a judge (*g*) may, however, if it is thought fit, allow the warrant to issue, although the affidavit (*h*) may not contain all the required particulars, and may waive in an action of wages the service of the notice, and in an action of bottomry the production of the bottomry bond (*i*).

Exempted mail ships.

153. Ships engaged in postal service and subsidised for the execution of that service within the meaning of a convention with a foreign state to which the Mail Ships Act, 1891, applies, by reason of receiving from the foreign state or from the Government of the United Kingdom or of a British possession a *bonâ fide* subsidy for a specified postal service are, if their owners have given and maintain in the Admiralty Registry sufficient security (*j*), and proper

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document filed in Admiralty actions, must be stated on a printed form called a minute to be obtained in the Admiralty Registry. This is retained in the registry, and is used to enter up a book called the minute book kept there and containing a record of all such minutes, of all actions commenced and appearances entered, and of all orders of the Court (R. S. C., Ord. 66, rr. 8 and 9). A stamp of 5*s*. is to be paid on every "minute" in Admiralty actions, for every instrument or document to which the minute relates (other than an exhibit or any instrument or document previously issued from the registry or the marshal's office) unless otherwise provided (Order as to Supreme Court Fees, 1884, No. 35).

(*e*) See *The Golubchick* (1840), 1 W. Rob. 143, at p. 154; *The Herzogin Marie* (1861), Lush. 292; *The Nina* (1867), L. R. 2 A. & E. 44, at p. 52.

(*f*) R. S. C., Ord. 5, r. 16. The rule also makes provision for an affidavit to lead warrant in an action of distribution of salvage, but the rule only applies to actions *in rem*, and no such affidavit is ever filed in an action of distribution of salvage, which is an action *in personam*.

(*g*) R. S. C., Ord. 5, r. 17. Jurisdiction is given by these words both to the judge in Court and in chambers, and with certain exceptions specified in R. S. C., Ord. 54, r. 12, to the registrar in chambers. See also the Judicature Act, 1873, s. 39; *Baker* v. *Oates* (1877), 2 Q. B. D. 171, at p. 175.

(*h*) *Re B.*, [1892] 1 Ch. 463.

(*i*) R. S. C., Ord. 5, r. 17. Forms of affidavits to lead warrants in a cause of restraint and a cause of possession are to be found in the Supreme Court Rules of 1883, Appendix A, Part I., Nos. 13 and 14. The strict practice of the Admiralty Court, whereby in a bottomry suit the bond had to be brought in before its validity would be pronounced for (*The Rowena* (1877), 26 W. R. 82), may have been affected by the discretion given by this rule.

(*j*) Mail Ships Act, 1891 (54 & 55 Vict. c. 31), s. 3, amended by Mail Ships Act, 1902 (2 Edw. 7, c. 36), s. 1.

notice has been given by the Board of Trade (*k*), exempted from arrest and entitled to the privileges of exempted mail ships (*l*).

Caveat against arrest.

154. The warrant is ordinarily issued as of course, unless a caveat against an arrest is entered. A party, by filing a notice called a præcipe for a caveat warrant signed by himself or his solicitor undertaking to enter an appearance in any action which may be commenced against the property the arrest of which it may be desired to prevent, and undertaking to give bail in such action in a sum not exceeding an amount stated in the notice or to pay such sum into the Admiralty Registry, may cause a caveat against the issue of a warrant for the arrest of such property to be entered in the Principal Admiralty Registry in a book kept there and called the Caveat Warrant Book (*m*). The due entry of a caveat warrant in the Caveat Warrant Book does not prevent a warrant being taken out for the arrest of the property mentioned in the notice, but the party at whose instance any property in respect of which a caveat is entered is arrested is liable to have the warrant discharged and to be condemned in costs and damages unless he shows to the satisfaction of the judge good and sufficient reason for having taken out the warrant (*n*). It is therefore advisable before taking out the warrant to make a search for six months back (*o*) in the Caveat Warrant Book at the Principal Admiralty Registry, or, if the action is proceeding in a district registry, the district registrar should be requested to ascertain from the Principal Admiralty Registry whether or not any caveat has been entered against the issue of a warrant for the arrest of the property proceeded against (*p*). These precautions are the more necessary because a plaintiff who, after the entry of a caveat warrant and before bail has been put in, takes out a warrant of arrest, may be condemned in costs and damages notwithstanding that the property before it was arrested was not under the control of the Court and was free to leave the jurisdiction at any time (*q*).

(*k*) The Mail Ships Rules, 1892 (Feb. 27, 1892), printed in Statutory Rules and Orders for 1892, pp. 741—751.

(*l*) See Mail Ships Act, 1891 (54 & 55 Vict. c. 31), s. 5.

(*m*) R. S. C., Ord. 29, rr. 11, 12. The form of the notice or præcipe is to be found in R. S. C., Appendix A, Part II., No. 18. See also R. S. C., Appendix A, Part II., No. 19, for the form of the præcipe to withdraw the caveat.

(*n*) R. S. C., Ord. 29, r. 18.

(*o*) See R. S. C., Ord. 64, r. 15, whereby in Admiralty actions a caveat, whether against the issue of a warrant, the release of property, or the payment of money out of the Admiralty Registry, shall not remain in force for more than six months from the date thereof.

(*p*) The district registrar is bound to make the inquiry, unless the party insists on the warrant being issued notwithstanding a caveat (R. S. C., Ord. 29, r. 13).

(*q*) *The Crimdon*, [1900] P. 171. The attention of the court does not seem to have been drawn to the point that, as no bail had been given, the plaintiff in arresting the property was only exercising the ordinary right given him by the inherent jurisdiction of the Court of preventing the property being removed out of the jurisdiction before bail had been given, and that by construing Ord. 29, r. 18, as enabling the Court to condemn the plaintiff in costs and damages in these circumstances, the rights of the plaintiff were affected under the authority of what is only a rule of procedure. See *British South Africa Company* v. *Companhia de Moçambique*, [1893] A. C. 602, *per* Lord HERSCHELL, at p. 628. The scope of the rule, as a rule of procedure, in altering the older practice of

SECT. 1. Actions in rem.

Undertaking in the præcipe for caveat warrant.

155. It would seem that by signing a præcipe for a caveat warrant in the form given in the Rules of the Supreme Court without qualification, a solicitor renders himself personally liable to perform the undertaking contained in the præcipe, and that where such an undertaking has been given the plaintiff is entitled to have a reasonable opportunity of seeing whether he ought to accept it or not; if it is not a satisfactory undertaking, and for good and sufficient reason he does not accept it, he will not be condemned in costs and damages for taking out a warrant for arrest (*r*).

Service of writ where caveat warrant entered.

156. If the solicitor for the plaintiff ascertains that a caveat warrant has been entered in the Caveat Warrant Book against the arrest of the property against which the plaintiff is proceeding, he must forthwith serve a copy of the writ of summons (verifying the service by affidavit) upon the party on whose behalf the caveat has been entered, or upon his solicitor (*s*).

Bail in pursuance of undertaking.

157. Within three days from the service of the writ or copy thereof the party on whose behalf the caveat has been entered must, if the sum in respect of which the action is commenced does not exceed the amount for which he has undertaken, give bail in such sum or pay the same into the Admiralty Registry or into the district registry where the action is proceeding (*t*); and after the expiration of twelve days from the service of the writ or copy thereof, if such bail has not been given or such sum not paid into the registry, the plaintiff's solicitor may proceed with the action by default, and on filing his proofs in the registry may have the action placed on the list for hearing (*a*).

Judgment against party where undertaking not performed.

158. If when the action comes before the judge in Court he is satisfied that the claim is well founded, he may pronounce for the amount appearing to be due and may enforce the payment thereof by attachment against the party on whose behalf the caveat was entered, and by the arrest of the property if it then be or thereafter come within the jurisdiction of the Court (*b*).

Service of warrant.

159. If no caveat warrant has been entered or if it is desired to have the property arrested notwithstanding the entry of a caveat warrant, the plaintiff or his solicitor must after the warrant has been issued if the action is proceeding in London leave it, together with a notice or præcipe (*c*) stamped with an impressed stamp of

the Admiralty Court and preventing parties from using the process of the Court to *rearrest unnecessarily* property which was already under arrest in other actions, is shown by *The Europa* (1849), 13 Jur. 856.

(*r*) *The Crimdon*, [1900] P. 171.

(*s*) R. S. C., Ord. 29, r. 14.

(*t*) R. S. C., Ord. 29, r. 15. As to bail, see p. 90, *post*.

(*a*) R. S. C., Ord. 29, r. 16; and see p. 100, *post*.

(*b*) R. S. C., Ord. 29, r. 17. It is to be observed that the attachment is to be against the party on whose behalf the caveat had been entered, and that nothing is to be found in the rule as to the attachment of a solicitor who may have signed the undertaking to put in bail.

(*c*) R. S. C., Ord. 67, r. 13.

£2 (*d*) for the execution of the warrant, in the Admiralty Marshal's office for service by him or his substitutes, whether the property to be arrested be situate within the port of London or elsewhere within the jurisdiction of the Court (*e*). If the action is in a district registry the warrant has also to be served by the Admiralty Marshal or his substitutes, but in practice no delay takes place, as the collector of customs at the port where the vessel or other property to be arrested is situated acts as a substitute of the Admiralty Marshal, and will on the application of the solicitor taking out the warrant effect the service and arrest required.

Detainer by telegram.

160. The detainer of a vessel or other property in consequence of directions sent by telegram is not unusual, and the disregard of a notice by telegram from the Admiralty Marshal that a warrant has been issued against property and that the property is not to be removed is a contempt of Court (*f*).

Undertaking to appear etc.

161. Where the solicitor of the defendant agrees to accept service and to put in bail or to pay money into Court in lieu of bail no service of the writ or warrant is required (*g*), and where a solicitor has given such a written undertaking and neglects to enter an appearance or put in bail or pay money into Court in lieu of bail, he is liable to attachment unless his authority to act as solicitor has been withdrawn (*h*).

Mode of effecting service.

162. Service of the warrant, if required, may be effected within twelve months of its date (*i*), either in the day-time or night-time, and, if necessary, on a Sunday, Good Friday, or Christmas Day (*k*), and if the property to be arrested is a ship, freight, or cargo on board, must be effected by nailing or affixing the original warrant for a short time on the mainmast or on the single mast of the vessel, and on taking off the process leaving a true copy of it nailed or fixed in its place (*l*). If the cargo has been landed or transhipped, service of the warrant to arrest the cargo and freight is to be effected by placing it for a short time on the cargo, and on taking off the process by leaving a true copy upon it; if the cargo be in the custody of a person who will not permit access to it, the service may be made upon the custodian (*m*). After the service of the warrant has been effected, the property arrested, whatever be its value, remains in the custody of the Court until the action is determined or the property is released by a release duly issued from the registry either on the warrant being withdrawn by the plaintiff's solicitor, which may be done before

(*d*) Order as to Supreme Court Fees, 1884, Schedule, No. 92. Order as to Fees and Percentages, July 4, 1884, Schedule, "In the Admiralty Marshal's Office."
(*e*) R. S. C., Ord. 9, r. 11.
(*f*) *The Seraglio* (1885), 10 P. D. 120.
(*g*) R. S. C., Ord. 9, r. 10.
(*h*) R. S. C., Ord. 12, r. 18; *The Anna and Bertha* (1891), 64 L. T. 332; and compare *Re Kerly*, [1901] 1 Ch. 467. As to practice on attachment, see title CONTEMPT AND ATTACHMENT, *post*.
(*i*) R. S. C., Ord. 67, r. 11.
(*k*) R. S. C., Ord. 67, r. 12.
(*l*) R. S. C., Ord. 9, r. 12.
(*m*) R. S. C., Ord. 9, rr. 13, 14.

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appearance (*n*), or on bail being put in or money paid into Court in lieu of bail. A ship-keeper is put in possession under the authority of the Admiralty Marshal during the time a ship is under arrest (*o*), and any person breaking the arrest or interfering with the property whilst under arrest is guilty of a contempt of Court and liable to attachment (*p*).

Verification of service of warrant.

163. The service of the warrant is verified by the certificate of the Admiralty Marshal, or his substitute who effected the service, indorsed on the warrant (*q*); and within six days of the service the original warrant bearing the indorsement must be returned to the Admiralty Registry or the district registry out of which it issued, and be filed there with the usual minute by the solicitor who took it out (*r*).

Removal of property under arrest.

164. If during the time the property remains under arrest it has to be removed to another place than that where it was arrested, or if cargo has to be unladen from a ship under arrest, a summons must be taken out before the Judge in chambers or the Registrar, who will issue a commission of removal or a commission of unlivery, as the case may be. In some cases the issue of a formal commission will be dispensed with, the Admiralty Marshal acting on a copy of the order made on the summons (*s*).

Service of writ.

165. The time for judgment in actions where there has been default in appearance is counted from the date of the service of the writ (*t*), and accordingly the writ, which may be served by the plaintiff's solicitor or any person on his behalf (*a*), should be served as soon as possible after it has issued, unless the defendant's solicitor agrees to accept service (*b*). In practice a convenient opportunity for service occurs as soon as the Admiralty Marshal or substitute has entered into possession under a warrant. The writ is served on ship, freight, or cargo in the same manner as above mentioned in the case of the service of a warrant (*c*); but where the action is against proceeds in Court it is served on the Registrar or district registrar (*d*).

Verification of service.

Service on the Registrar need not be verified (*e*); but in all other

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(*n*) R. S. C., Ord. 29, r. 2.

(*o*) By the Order as to Supreme Court Fees, 1884, No. 98, a Court fee of 5*s*. per day is to be paid in the Admiralty Marshal's office "on retaining possession of a ship with or without a cargo, or of a ship's cargo without a ship, to include the cost of a ship keeper if required."

(*p*) *The Seraglio* (1885), 10 P. D. 120; *The Armenian*, Admiralty Court, March 20, 1874 (unreported); *The Harmonie* (1841), 1 W. Rob. 179; *The Bure* (1850), 14 Jur. 1123; *The Mathesis* (1844), 2 W. Rob. 286, at p. 288.

(*q*) R. S. C., Ord. 67, r. 14; *The Solis* (1885), 10 P. D. 62, 64.

(*r*) R. S. C., Ord. 9, r. 11.

(*s*) See "Admiralty Procedure against Merchant Ships and Cargoes etc.," by R. G. M. Browne (Admiralty Marshal), 1887 edn., pp. 187—189. Where the issue of a commission is not required, the only Court fees payable would be those for the summons and order.

(*t*) R. S. C., Ord. 13, r. 12A.

(*a*) *The Solis* (1885), 10 P. D. 62.

(*b*) R. S. C., Ord. 9, r. 10.

(*c*) See p. 85, *ante*.

(*d*) *The Cassiopeia* (1879), 4 P. D. 188.

(*e*) *Proceeds of The Berengere*, [1905] W. N. 18.

cases where the service has to be proved an affidavit of service must be made by the person who served the writ (*f*). The service must be made within twelve months of the date of the writ (*g*), and if the writ is amended, which in a fit case may be done even after judgment (*h*), the amended writ must be served in the same way as an original writ (*i*).

The writ, like writs of summons in other actions, must within three days of service be indorsed with a proper memorandum of service (*k*).

SUB-SECT. 3.—*Appearance by Defendants.*

Entry of appearance.

166. Appearances by defendants in Admiralty actions may be either absolute or, where it is intended to object to the jurisdiction of the Court, under protest (*l*), and are entered in the Central Office if the action is proceeding in London (*m*), or in the district registry whence the writ issued if the defendant resides or carries on business in that district or chooses to appear there. Notice of an appearance entered in the Central Office must be sent to the Admiralty Registry (*n*).

Who may appear.

The owners of the property proceeded against and all persons directly interested therein may appear and defend, without filing an affidavit and showing their interest, at any time before judgment (*o*). Further, any person not named in the writ may intervene in an Admiralty action *in rem* and appear on filing an affidavit showing that he is interested in the *res* under arrest or in the fund in the registry (*p*). Such persons are mortgagees (*q*), trustees in bankruptcy (*r*), underwriters who have accepted abandonment (*s*), persons who have possessory liens (*t*), or competing maritime liens (*a*), and generally persons who are plaintiffs in other actions *in rem* against the same property (*b*).

Appearance more than eight days after service of writ.

If a defendant appear at any time after the time limited by the writ for appearance, *i.e.*, eight days from the date of the service of the writ, he is not, unless the Court or a judge otherwise orders,

(*f*) R. S. C., Ord. 13, r. 12; Ord. 67, r. 14.
(*g*) R. S. C., Ord. 67, r. 11.
(*h*) *The Dictator*, [1894] P. 304.
(*i*) *The Cassiopeia* (1879), 4 P. D. 188.
(*k*) R. S. C., Ord. 9, r. 15; *The Cassiopeia*, *supra*, at p. 190.
(*l*) *The Vivar* (1876), 2 P. D. 29; *Seward* v. "*Vera Cruz*" (1884), 10 App. Cas. 59.
(*m*) R. S. C., Ord. 12, r. 2.
(*n*) R. S. C., Ord. 12, r. 3. Unless the protest is disposed of on motion the proper course after the appearance under protest has been entered is for the parties to enter into pleadings on protest.
(*o*) See R. S. C., Ord. 12, r. 22.
(*p*) R. S. C., Ord. 13, r. 24.
(*q*) *The Regina del Mare* (1864), Br. & L. 315, at p. 316; *The Tagus*, [1903] P. 44; *The Orienta*, [1894] P. 271.
(*r*) See *The Riga* (1872), L. R. 3 A. & E. 516.
(*s*) Underwriters who have not accepted an abandonment have been allowed to intervene on giving security for costs, see *The Regina del Mare*, *supra*.
(*t*) *The Immacolata Concezione* (1883), 8 P. D. 34, at p. 36.
(*a*) *The Linda Flor* (1857), Swa. 309; *The Veritas*, [1901] P. 304, at p. 308.
(*b*) *The Chioggia*, [1898] P. 1, at p. 3; *The Two Ellens* (1871), L. R. 3 A. & E. 345, at p. 355.

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Marshal or his substitute appoints valuers (*c*), whose appraisement is conclusive, unless the judge in Court directs a further appraisement to issue (*d*).

The costs of the appraisement are in the discretion of the Court, but where the appraised value is considerably more than the value given in the affidavit of value, the costs of the appraisement are usually ordered to be borne by the defendants (*e*).

If, owing to the property being out of the jurisdiction, valuers cannot value the property, the Court may itself determine the question of value at the hearing (*f*).

Bail.

172. Bail may be taken either before the Admiralty Registrar or a district registrar, or before any commissioner to administer oaths in the Supreme Court (*g*) who or whose partner is not acting as solicitor or agent for the party on whose behalf the bail is to be taken (*h*); but in practice bail is always taken before a commissioner for oaths, the Admiralty Registrar not interfering in matters as to taking bail, unless, either on a summons or by order of the judge, a report is made on the sufficiency of the bail, or the sureties are cross-examined before him on their affidavits of justification (*i*). The solicitor desiring to put in bail has, after filing a præcipe as to the persons tendered as bail (*k*), to attend with the proposed sureties before a commissioner for oaths, who will swear the sureties to the truth of their affidavits of justification (*l*), and they then sign the bail bond, which, except in an action of restraint (in which action a special form is in use) (*m*), is in the same form in all Admiralty actions *in rem*. By the bail bond the sureties submit themselves to the judgment of the Court, and consent that execution shall issue against them and their heirs executors and administrators if the party for whom they are bail does not pay what may be adjudged against him in the action with costs (*n*). The sureties to the bail bond may not be partners (*o*).

Amount of bail.

173. The amount entered in the bail bond as the amount for which the sureties make themselves liable should include an amount sufficient to cover the costs of the action over and above the amount claimed by the plaintiff. The amount, however, ought not to be too

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(*c*) See R. S. C., Ord. 51, r. 14. Order as to Supreme Court Fees, Schedule, Nos. 13, 15, 94, 95, 100.

(*d*) *The Georg*, [1894] P. 330; *The Cargo ex Venus* (1866), L. R. 1 A. & E. 50; *The Hohenzollern*, [1906] P. 339.

(*e*) *The Paul* (1866), L. R. 1 A. & E. 57.

(*f*) *The Werra* (1886), 12 P. D. 52.

(*g*) R. S. C., Ord. 12, r. 19.

(*h*) R. S. C., Ord. 12, r. 21.

(*i*) For the form of report by the Admiralty Marshal as to the sufficiency of bail, see R. S. C., Appendix A, Part II., No. 11, and as to the cross-examination of the sureties on questions arisen as to their solvency, see *The Don Ricardo* (1880), 5 P. D. 121; *The Fairport* (1882), 8 P. D. 48, at p. 55.

(*k*) R. S. C., Appendix A, Part II., No. 9.

(*l*) R. S. C., Ord. 12, r. 19. For form of affidavit, see R. S. C., Appendix A, Part II., No. 14.

(*m*) See *The Robert Dickenson* (1884), 10 P. D. 15.

(*n*) See form of bail bond R. S. C., Appendix A, Part II., No. 13.

(*o*) *The Corner* (1863), Br. & L. 161.

large, as, if the Court thinks that the amount of bail is excessive, the party who has required the excessive bail may be ordered at the hearing to bear the costs incurred by such demand over and above the costs of the lesser amount of bail which ought to have been put in (*p*). The bail represents the *res* (*q*), and if necessary the party putting in bail may take out a commission of appraisement to ascertain the value of the *res*. A commission or fee not exceeding £1 per cent. on the amount in which bail is given is payable to each surety, and may be recovered as taxed costs in the action (*r*).

Objections to sureties to bail bond.

174. After the bail bond has been signed in the manner above described, it must, together with the usual minute and a copy of the notice of bail containing the names and addresses of the sureties and the name of the commissioner before whom the bail was taken, verified by affidavit, be filed in the Admiralty Registry or in the district registry where the action is proceeding (*s*). But this cannot be done, in the absence of consent by the adverse solicitor, until twenty-four hours have expired from the time when such notice was served on the adverse solicitor (*t*). From these provisions it follows that where bail is put in the adverse solicitor has twenty-four hours before the release can issue to take any objections to the sufficiency of the sureties, and if necessary enter a caveat release. When a caveat release is entered a motion before the judge in Court to overrule the caveat enables the validity of the objections to the bail to be determined (*a*). These delays with respect to the taking of bail may be dispensed with by the consent of the solicitors in the action (*b*).

Amount of bail in collision actions.

175. The amount of bail put in in an action for damage by collision where the owners are not privy to the collision may, whether the vessel be British or foreign, be reduced to the statutory amount for which the owners are liable under the provisions as to limited liability contained in the Merchant Shipping Act, 1894, together with interest and costs (*c*).

Money paid into Court.

176. Money paid into Court in lieu of bail must, in actions proceeding in London, be paid into the Law Courts branch of the Bank of England (*d*), and will not be paid out of Court without the order of a Court or a judge (*e*).

Caveat payment.

If a solicitor desires to prevent the payment of money out of Court in an Admiralty action he may file a notice or præcipe for

(*p*) *The George Gordon* (1884), 9 P. D. 46; *The Chieftain* (1863), 32 L. J. (ADM.) 106.
(*q*) *The Kalamazoo* (1851), 15 Jur. 885, 886.
(*r*) R. S. C., Ord. 12, r. 21A.
(*s*) R. S. C., Ord. 12, r. 20.
(*t*) R. S. C., Ord. 12, r. 20. For form of notice of bail, see R. S. C., Appendix A, Part II., No. 9.
(*a*) See *The Don Ricardo* (1880), 5 P. D. 121; *The Corner* (1863), Br. & L. 161.
(*b*) R. S. C., Ord. 64, r. 10.
(*c*) 57 & 58 Vict. c. 60, s. 504; *The Duchesse de Brabant* (1857), Swa. 264; *The Sisters* (1876), 1 P. D. 281.
(*d*) See Supreme Court Funds Rules, 1905, rr. 28, 29, 46.
(*e*) R. S. C., Ord. 22, r. 20.

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a caveat against the payment of the money (*f*), and thereupon a caveat against the payment of the money, called a caveat payment (*g*), which remains in force for six months, must be entered in a book to be kept in the Admiralty Registry called a Caveat Payment Book (*h*). Where a caveat payment has been entered, notice will be given to the person at whose instance it has been entered before an order is made for payment of the money out of Court, and a motion may then be made in Court on behalf of such person to overrule the caveat (*i*). If the question with regard to the payment out has been settled by consent, the solicitor at whose instance the caveat payment has been entered may withdraw it by filing in the Registry with the usual minute a præcipe to withdraw the caveat (*k*).

Arrests at instance of defendants.

177. The provisions with regard to caveat warrants, caveat releases, releases, bail and payment into Court in lieu of bail apply equally to arrests at the instance of defendants as to arrests at the instance of plaintiffs.

SUB-SECT. 5.—*Sale of Property under Arrest before Judgment.*

Appraisement and sale.

178. Where property under the arrest of the Court is deteriorating or for good reason should be sold before judgment, the judge may on motion (*l*), supported by affidavit, after notice to the parties interested if they have appeared, or, if no appearance has been entered, on proof of that fact by affidavit, and on a report of the Admiralty Marshal as to the desirability of the sale, order the property to be forthwith appraised and sold, and the proceeds brought into Court (*m*). On such order being obtained the solicitor having the conduct of the sale must take out from the registry where the action is proceeding a commission of appraisement and sale (*n*), which will be executed by the Admiralty Marshal or his substitute, as in the case of the sale of property after judgment (*o*).

SUB-SECT. 6.—*Consolidation.*

Consolidation of salvage and damage actions.

179. It is usual, in accordance with the practice of the High Court of Admiralty (*p*), to consolidate pending actions of salvage against

(*f*) A Court fee of 5*s*. is paid on the minute filing the notice; Order as to Supreme Court Fees, 1884, Schedule, No. 35.

(*g*) R. S. C., Ord. 64, r. 15.

(*h*) R. S. C., Ord. 22, r. 21.

(*i*) *The Markland* (1871), L. R. 3 A. & E. 340, at p. 341.

(*k*) See R. S. C., Appendix A, Part II., No. 19, for form of præcipe.

(*l*) The notice of motion must, where the action is proceeding in London, be filed in the Admiralty Registry three days before the hearing, and a copy of the notice and affidavits must be served on the adverse solicitor before the originals are filed (R. S. C., Ord. 52, r. 10).

(*m*) *The Hercules* (1885), 11 P. D. 10; *The Kathleen* (1874), L. R. 4 A. & E. 269, at p. 271.

(*n*) For form of præcipe for commission, see R. S. C., Appendix G, Part I., No. 9, Form of Commission. See R. S. C., Appendix H, No. 16. For Court fees, see Order as to Supreme Court Fees, 1884, Schedule, Nos. 13, 15.

(*o*) See p. 99, *post*.

(*p*) See *The Demetrius* (1872), L. R. 3 A. & E. 523; *The William Hutt* (1860), Lush. 25.

the same property (*q*), and cross actions of damage and wages and other actions are also frequently consolidated. The application in either case should be made as soon as possible after the writs are issued. The conduct of the consolidated salvage actions is usually given to the principal salvor. Where cross actions of damage are consolidated the conduct is usually given to that party whose writ is first issued.

Consolidation without consent of parties and severing consolidation.

180. Consolidation may be ordered by the Court in its discretion without the consent and notwithstanding the objection of the parties (*r*); and if it becomes expedient after judgment has been delivered to sever the consolidation, the Court will make an order to that effect, and thereupon the actions will proceed separately as originally instituted (*s*).

Order for parties to appear by separate counsel.

181. If an order for consolidation of salvage actions contains a direction that a party may be represented at the hearing by separate counsel, this does not preclude the Court from directing at the hearing how the costs of and incident to the attendance of separate counsel shall be borne (*t*).

SUB-SECT. 7.—*Preliminary Acts in Damage Actions.*

Filing preliminary acts.

182. In any action of damage by collision between vessels, unless the Court or a judge otherwise orders, the solicitor for the plaintiff must within seven days after the commencement of the action, and the solicitor for the defendant must within seven days after appearance and before any pleading is delivered, file in the Admiralty Registry or the district registry where the action is proceeding a Preliminary Act, which must be sealed up and not opened until (*a*) the pleadings are completed and a consent that the Preliminary Acts shall be opened, signed by the respective solicitors, is filed in the Admiralty Registry.

Contents.

Each preliminary act must contain a statement of the following particulars:—

(a) The names of the vessels which came into collision and the names of their masters.

(b) The time of the collision.

(c) The place of the collision.

(d) The direction and force of the wind.

(e) The state of the weather.

(f) The state and force of the tide.

(g) The course and speed of the vessel when the other was first seen.

(h) The lights (if any) carried by her.

(i) The distance and bearing of the other vessel when first seen.

(k) The lights, if any, of the other vessel which were first seen.

(*q*) *The Strathgarry*, [1895] P. 264.
(*r*) *Ibid.*
(*s*) *The Helen R. Cooper* (1871), L. R. 3 A. & E. 339.
(*t*) *The Longford* (1881), 6 P. D. 60, 67.
(*a*) For Court fees, see R. S. C., Ord. 66, r. 8; Order as to Supreme Court Fees, 1884, Schedule, No. 35.

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(l) Whether any lights of the other vessel other than first seen came into view before the collision.

(m) What measures were taken, and when, to avoid collision.

(n) The parts of each vessel which first came into contact.

(o) What sound signals (if any), and when, were given.

(p) What sound signals (if any), and when, were heard from the other vessel (*b*).

Opening of preliminary acts.

183. The preliminary acts may by order of the Court be opened, and the evidence taken thereon, without its being necessary to deliver pleadings, and in such case if either party intends to rely upon the defence of compulsory pilotage, he should give notice in writing to the opposite party within two days from the opening of the preliminary act (*c*).

In actions of damage otherwise than by collision.

184. Although the rule of Court as to preliminary acts applies only to "actions of damage by collision between vessels" (*d*), the practice of the Court of Admiralty required preliminary acts to be delivered in all actions of damage, and accordingly this practice may still have to be followed and preliminary acts filed in all actions of damage, whether by collision between vessels or otherwise, as for instance in actions of damage by owners of cargo against vessels, or actions of damage arising out of collisions between vessels and piers or telegraph cables (*e*).

Amendment.

185. Alterations or amendments will not be allowed in the preliminary acts at the instance of the parties who have filed them, but where a question in a preliminary act is insufficiently answered the Court, on the application of the opposite party, may direct the question to be properly answered and the preliminary act to be amended accordingly (*f*).

SUB-SECT. 8.—*Pleadings.*

Statement of claim.

186. A statement of claim should be headed in the same way as a writ of summons with the title of the action, and should also state the date on which the writ was issued (*g*). More ample and detailed forms are used in practice than those contained in Appendix C, sects. 3 and 4, of the Rules of the Supreme Court. The material facts of the case should be clearly set out in numbered paragraphs, in as succinct a form as possible (*h*). No particulars of the amount

(*b*) See R. S. C., Ord. 19, r. 28 (R. S. C., 1883; R. S. C., August, 1898; R. S. C., November, 1900).

(*c*) R. S. C., Ord. 19, r. 28.

(*d*) *Armstrong* v. *Gaselee* (1889), 22 Q. B. D. 250.

(*e*) See Admiralty Court Rules, 1859, r. 62; R. S. C., Ord. 72, r. 2; *The Secretary of State for India* v. *Hewitt & Co., Ltd.* (1888), 6 Asp. M. L. C. 384; *The Alexandra, ibid.*, note.

(*f*) *The Miranda* (1881), 7 P. D. 185; *The Godiva* (1886), 11 P. D. 20.

(*g*) See R. S. C., Appendix C, sect. 1.

(*h*) See title PLEADING, *post*, and *The Isis* (1883), 8 P. D. 227; and, as to the delivery of a further statement of claim, see *The Rory* (1882), 7 P. D. 117. It is, however, customary for pleaders to embody as part of the statements of claim in collision and salvage actions the statements as to the nature of the plaintiff's claim contained in R. S. C., Appendix C, sect. VI., No. 5, and sect. III., No 6, respectively.

of damages claimed should be inserted, as all questions of damages are ordinarily assessed by the Registrar, assisted by merchants (*i*). The statement of claim should, where bail has been put in, claim judgment not only against the defendants but also against their bail, and in cases where the property is under arrest or the action is against proceeds in Court, it should ask that the Court pronounce for the damages and condemn the defendants and the property, or the proceeds, as the case may be, in damages and in the costs.

Time for delivery.

A statement of claim should be delivered within twelve days from the appearance of the defendant (*k*) unless the time is abridged by order (*l*).

In default actions.

In default actions a statement of claim has to be filed in the registry; this may be done at any time before the hearing (*m*).

Defence.

187. The principles of pleading applicable to a statement of claim apply equally to a defence (*n*).

Reply.

188. The plaintiff may, within six days of the delivery of the defence—which should be done within ten days of the delivery of the statement of claim, unless the time has been abridged or extended—or of the delivery of the last of the defences, deliver a reply without, as in actions other than Admiralty actions, obtaining an order (*o*), and the time for delivery of the reply may, as in the case of other pleadings, be extended or abridged by an order of the Court or a judge, or by consent (*p*).

SUB-SECT. 9.—*Cross Actions and Counterclaims.*

Cross actions.

189. Special provisions apply as to making arrests and giving security where cross actions of damage have been instituted (*q*). Thus, if in the principal cause the ship of the defendant has been arrested, or security has been given by him to answer judgment, and in the cross cause the ship of the plaintiff (defendant in such cross cause) cannot be arrested, and security has not been given to answer judgment therein, the proceedings in the principal cause may be suspended until security has been given to answer judgment in the cross cause (*r*). These provisions have been held to apply in favour of defendants setting up a counterclaim (*s*).

Counterclaim *in personam* to action *in rem*.

190. A defendant in an action *in rem* may set up a counterclaim *in personam* (*t*); and the Court has even refused to strike out a

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See p. 117, *post*.

(*i*) R. S. C., Ord. 20, r. 3.

(*k*) R. S. C. Ord. 64, r. 9.

(*l*) R. S. C., Ord. 13, r. 12 A.

(*m*) The precedents of defence in Admiralty actions in the First Schedule to the Judicature Act, 1875 (38 & 39 Vict. c. 77), are seldom of use. For the general heading of defences, see R. S. C., Appendix D, sect. 1.

(*n*) R. S. C., Ord. 23, rr. 1, 2.

(*o*) R. S. C., Ord. 64, rr. 7, 8, 9.

(*p*) As to the consolidation of cross actions of damage, see p. 92, *ante*.

(*q*) Admiralty Court Act, 1861 (24 Vict. c. 10), s. 34.

(*r*) *The Newbattle* (1885), 10 P. D. 33; see also *The Rougemont*, [1893] P. 275. But the provision of course does not apply if the plaintiff is suing *in personam*.

(*s*) *The Newbattle, supra*; *The Clutha* (1876), 45 L. J. (ADM.) 108.

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counterclaim as embarrassing, although the plaintiffs were foreigners who could not have been served with a writ of summons, and the counterclaim could, if the plaintiffs had so chosen, have been tried by a jury (*u*).

SUB-SECT. 10.—*Payment into Court and Tender.*

Payment into Court by way of satisfaction or with denial of liability.

191. The ordinary rules as to payment into Court applicable in other divisions of the High Court apply in the Admiralty Division. Thus a defendant may before or at the time of delivering his defence, or at any later time by leave of the Court or a judge, pay into Court a sum of money by way of satisfaction (*a*), which shall be taken to admit the claim or cause of action in respect of which the payment is made, or he may, with a defence denying liability, pay money into Court (*b*) which may be accepted in satisfaction of the claim or refused, as the case may be (*c*). Further, in accordance with the practice formerly prevailing in the Admiralty Court, a defendant may, and in salvage actions frequently does, tender a sum of money by act in Court, paying the amount of the tender into Court and pleading the tender in his defence. When such a defence, coupled with payment into Court, has been raised, and the tender is not accepted, the plaintiff will only be entitled to receive out of Court such an amount as the Court may find to be due, which may be a smaller amount than the sum tendered (*d*).

Tender by act in Court.

Costs where tender accepted.

192. Where a tender by act in Court is accepted or is pronounced for by the Court after its refusal by the plaintiff, the plaintiff is generally given the costs of the action up to the time of tender, and condemned in the costs subsequent to the date of tender (*e*). There may be exceptions to this rule, as where the Court pronounces for the tender as adequate, but does not consider it to be liberal, and orders each party to bear his own costs (*f*).

Notice of tender.

193. The defendant, in order to obtain the advantage of these rules of discretion as to costs, must, after paying the amount of the tender into Court (*g*), give formal written notice to the plaintiff, separately from any pleading, that the amount tendered has been so paid into Court, is tendered to him, and is enough to satisfy his claim, whilst if the plaintiff rejects the tender he must on his side give formal written notice to the defendant of his rejection. The defendant then in his defence pleads that the tender has been made, and the plaintiff may state in his reply the facts as to its rejection.

(*u*) *The Cheapside*, [1904] P. 339.
(*a*) R. S. C., Ord. 22, rr. 1, 2.
(*b*) R. S. C., Ord. 64, rr. 7, 8, 9; Ord. 67, r. 8.
(*c*) R. S. C., Ord. 22, r. 1; Ord. 22, r. 6.
Payment into Court with a denial of liability was not admissible in salvage suits until July, 1901, when the above rules were expressly made applicable to Admiralty actions. See *The Chiltonford*, [1901] W. N. 48.
(*d*) *The Mona*, [1894] P. 265.
(*e*) See *The William Symington* (1884), 10 P. D. 1.
(*f*) *The Lotus* (1882), 7 P. D. 199.
(*g*) *The Nasmyth* (1885), 10 P. D. 41.

SUB-SECT. 11.—*Other Interlocutory Proceedings.*

Discovery.

194. Discovery may be obtained either by means of the discovery of documents (*h*), or by means of interrogatories. The application for an affidavit of documents is generally made by the plaintiff after the statement of claim has been delivered, by the defendant after the defence has been delivered. In fit cases, however, discovery may be obtained before the above steps have been taken (*i*). Security for the costs of discovery is not ordered except on special application (*k*).

Interrogatories.

195. As to interrogatories, they are seldom allowed in actions of damage (*l*) or of salvage, or in actions generally other than those for damage to cargo. The rules of practice in the other divisions of the High Court (*m*) as to interrogatories apply in the Admiralty Division.

Motions.

196. With regard to all motions which may be required in the course of the proceedings in Admiralty actions, notice thereof, together with the affidavits (if any) in support, must be filed in the Admiralty Registry three days at least before the hearing of the motion, unless the time is shortened by leave. A copy of the notice of motion and the affidavits (if any) should be served on the adverse solicitor before the originals are filed (*n*).

Summonses.

197. Summonses are usually heard before the Judge or Registrar or Assistant Registrar. Every summons must be served two clear days before its return (*o*), but this time is frequently abridged. Amongst summonses heard by the Judge are those for payment of money out of Court (*p*), for review of a taxation of costs, for postponement of an action in the list for hearing, for transfer of an action from a county court, for removal of an action from or to another Division of the High Court, and for leave to serve a writ out of the jurisdiction (*q*).

Sealing and filing.

All summonses are sealed in the Admiralty Registry if the action is a London action, and a filed copy stamped with a stamp of 3*s.* must be left there (*r*).

Examination of witnesses.

198. The examination of one or more witnesses before the hearing of an action is frequently necessary owing to the exigencies

(*h*) R. S. C., Ord. 31, r. 12.

(*i*) See *The Loch Maree*, cited in Roscoe, Admiralty Practice (3rd ed.), p. 340; *Union Bank of London* v. *Manby* (1879), 13 Ch. D. 239.

(*k*) R. S. C., Ord. 31, r. 26.

(*l*) This is so especially in actions of damage by reason that the preliminary acts in many cases afford the information which would otherwise be furnished by interrogatories. See *The Radnorshire* (1880), 5 P. D. 172; *The Isle of Cyprus* (1890), 15 P. D. 134.

(*m*) See title DISCOVERY, INSPECTION, AND INTERROGATORIES.

(*n*) R. S. C., Ord. 52, r. 10. For stamps, see Order as to Supreme Court Fees, 1884, Schedule, No. 52 and No. 35.

(*o*) R. S. C., Ord. 54, r. 4 E.

(*p*) R. S. C., Ord. 22, r. 20.

(*q*) R. S. C., Ord. 54, r. 12. As to the hearing of summonses on appeal from the judge by a Divisional Court of the Admiralty Division, see *The Collingrove*, *The Numida* (1885), 10 P. D. 158.

(*r*) Order as to Supreme Court Fees, 1884, Schedule, No. 11.

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the action is proceeding a commission of appraisement and sale, and have it executed by the Admiralty Marshal or his substitute (*q*).

Effect of service of writ *in rem*.

204. The service of a writ *in rem* upon property within the jurisdiction of the Court is notice to all the world of the claim endorsed upon the writ; where, therefore, after the service of the writ *in rem*, but before a warrant of arrest issued in the action had been served, a foreign vessel proceeded against had left the jurisdiction without the owners appearing, the Court, on the action coming on for hearing as a default cause, pronounced for the plaintiff's claim with costs (*r*).

Judgment in default of pleading.

If the defendant in an action *in rem* makes default in delivering a defence, the plaintiff may on the expiration of ten days from the delivery of the statement of claim, and on filing an affidavit of non-delivery of a defence, set down the action for judgment by default, and on the action coming on for hearing accordingly, the above-mentioned procedure will be applicable (*s*).

Where default in giving bail after caveat warrant issued.

205. Similarly, where a caveat warrant has been entered, if the party on whose behalf the caveat warrant has been entered does not give bail in the sum mentioned in the præcipe for the caveat, or pay the same into the Registry, the plaintiff's solicitor may, after the expiration of twelve days from the service of the writ of summons in the suit, or a copy thereof (*t*), proceed with the action by default, and on filing his proofs in the Registry may have the action placed on the list for hearing (*w*). If the judge is satisfied at the hearing that the claim is well founded, he may pronounce for the amount which appears to him to be due, and enforce payment thereof by attachment against the party on whose behalf the caveat has been entered, and by arrest of the property if it then be or thereafter come within the jurisdiction of the Court (*a*).

Contested actions.

206. The hearing of contested actions where bail has been put in, money paid into Court in lieu of bail, or the property proceeded against left under arrest by the defendant, takes place before one of the two judges of the Admiralty Division in the Royal Courts in London (*b*). The day for the hearing is fixed by the Registrar on summons on the application of the plaintiff or the defendant, and is arranged, so far as possible, to suit the convenience of the parties and the movements of seafaring witnesses.

Trinity Masters.

207. Where the action is an action of damage or an action of salvage, two of the Elder Brethren of the London Trinity House are summoned, as of course, except when vessels belonging to the Trinity House are concerned, to attend the hearing and give the Court advice on questions of nautical skill and knowledge.

In actions other than actions of damage or salvage, or damage to

(*q*) See pp. 89, 92, *ante*.
(*r*) *The Nautik*, [1895] P. 121.
(*s*) R. S. C., Ord. 27, r. 11 A; Ord. 13, r. 11.
(*t*) See R. S. C., Ord. 29, r. 14.
(*w*) R. S. C., Ord. 29, r. 16.
(*a*) R. S. C., Ord. 29, r. 17.
(*b*) A Divisional Court of the Admiralty Division may sit to settle important points of law arising in Admiralty actions, see *The Arina* (1887), 12 P. D. 118; *The Collingrove*, *The Numida* (1885), 10 P. D. 158.

cargo, where nautical questions are involved, the Trinity Masters will only be summoned at the request of the parties, or by order of the Court or a judge made on summons.

Duty of Trinity Masters.

Trinity Masters only advise the judge on matters of nautical skill on which he desires information, and it is the duty of the judge, having received that information, to exercise his own judgment, and decide the case before him on his own responsibility (*c*). Witnesses therefore may not be called to give evidence on questions of general nautical skill in actions where the judge is assisted by the Trinity Masters (*d*).

Notice of trial.

208. Notice of trial must be given as in other actions, though in practice a special day, as above stated, is always fixed. The notice must be filed in London actions in the Admiralty Registry, and in other actions in the district registry where the action is proceeding. It must be stamped with a stamp of £2 in London actions, that being the amount of the Court fee for hearing (*e*). In the district registries, other than those of Manchester and Liverpool, the same fee is payable in money. In

(*c*) *The Magna Charta* (1871), 1 Asp. M. L. C. 153; *The Beryl* (1884), 9 P. D. 137, 141.

(*d*) *The Kirby Hall* (1883), 8 P. D. 71, 75; *The Sir Robert Peel* (1880), 4 Asp. M. L. C. 321; R. S. C., Ord. 36, r. 43.

The fees payable to the Trinity Masters are as follows:—

(1) For hearing, in any action other than one in which salvage only is claimed, £4 4*s*. per diem.

(2) For hearing, in any action in which salvage only is claimed, (i.) where there is one set of pleadings, £2 2*s*. per diem; (2) where there is more than one set of pleadings, £4 4*s*. per diem.

(3) If the part hearing of an action shall on any day end before the midday adjournment, or shall commence after such adjournment, the Trinity Master having in the latter case been engaged in a previous case, or not having been in attendance before such adjournment, half the day fee shall be payable in respect of such part hearing, provided that such half fee shall not be less than £2 2*s*.

(4) For hearing of any appeal, whether there be a cross appeal or not, to the Divisional Court, in each case £3 3*s*.

(5) For attending to hear judgment when reserved, including consultation with the judge or judges on the day on which judgment is given, £2 2*s*. For consultation with the judge or judges on any day other than one on which the action is heard or reserved judgment delivered, £2 2*s*.

(6) For attendance on any day when not called upon to sit in any action, half the day fee shall be payable, provided that such half fee shall not be less than £2 2*s*.

(7) If notice of attendance in any case has been given, and shall less than three days before the day of hearing have been countermanded, half the day fee shall be payable, provided that such half fee shall not be less than £2 2*s*.

(8) Actions in which there are counterclaims, consolidated actions, and all actions tried together, shall, for the purposes of these rules, be considered single actions, the total fees being payable in equal parts on each action, unless the judge shall otherwise order.

(9) In any case not falling within these rules, the fees to be paid shall be fixed by the judge (Order, January, 1893).

These fees are recoverable as taxed costs between party and party, and are in practice paid in the first place by the party recovering judgment on the action or other proceeding, except in actions of damage where both vessels are held to blame, or in actions where each party is directed to bear his own costs, in which cases a moiety of the fees is paid by each party.

(*e*) R. S. C., Ord. 36, rr. 11—14. Order as to Supreme Court Fees, 1884, Schedule, No. 52.

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all cases where the hearing is attended by the Trinity Masters a Court fee of 10*s.* is also payable in the registry in respect of the registrar writing for the attendance of the Trinity Masters (*f*).

Shorthand note of evidence.

209. The evidence of every witness examined orally in Court is taken down in shorthand by the official shorthand writer appointed by the Court or by one of his assistants, and a transcript of the evidence so taken down is always available for the purposes of an appeal (*g*).

Copies of pleadings.

210. Ten printed copies of the pleadings in the suit and of any evidence taken on commission or before an examiner or commissioner are brought into the Admiralty Registry for the use of the Court, the Trinity Masters, the Registry and the shorthand writers.

Inspection by Trinity Masters.

211. Where Trinity Masters are present at the hearing of an action, and the judge considers it expedient that before the case is decided there should be an inspection of any vessel or property, the Trinity Masters usually undertake the inspection and report the result to the judge (*h*).

An application for an order for inspection by the Trinity Masters ought not to be made where the condition of the vessel can be proved by the evidence of witnesses (*i*).

Amount of damages not generally decided in Court.

212. Questions as to the amount of damages to be recovered in the action are not generally entertained by the judge at the hearing, and the evidence of the witnesses examined before him is accordingly generally confined to questions of liability, it being the usual practice both in actions *in rem* and actions *in personam* to refer all

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(*f*) Order as to Supreme Court Fees, 1884, Schedule, No. 54.

(*g*) As to the correction of a mistake in the shorthand writer's transcript, see *The Knutsford*, [1891] P. 219. The fees payable to the official shorthand writer are as follows:—

	£	*s.*	*d.*
For the hearing of any collision case when witnesses are examined, such cases including cross actions or claims and counterclaims	2	2	0
For the second and following days	1	1	0
For the hearing of a salvage action where witnesses are called, first day	2	2	0
For any subsequent day or where witnesses are not called	1	1	0
For hearing of two or more consolidated salvage actions where witnesses are called for the claim having conduct, first day...	2	2	0
For each other claim	1	1	0
For each other claim if more than two	0	10	6
For any subsequent day for the claim having conduct	1	1	0
For each other claim	0	10	6
For attending to take a reserved judgment	1	1	0
For attending reference room, for each reference	1	1	0
Except where two ships have been held to blame, and the opposing claims are examined on the same day, for each claim	1	1	0
For a case called on in Court and settled before witnesses are called	1	1	0
For attending to take a judgment in Court of Appeal	1	1	0
For attending to take judgment on appeal to a Divisional Court, or on a hearing in objection to the Registrar's report	0	10	6

The amount per folio payable in respect of a transcript of the shorthand writer's notes is 8*d.* a folio.

(*h*) Admiralty Court Act, 1861 (24 Vict. c. 10), s. 18.

(*i*) *The Victor Covacevich* (1885), 10 P. D. 40.

questions as to the assessment of damages to the Registrar, or to the Registrar assisted by merchants, to report upon (*k*).

Where, however, a question arises whether after a collision a vessel has been wrongfully abandoned, the Court will sometimes decide this point, though one affecting the assessment of damages, at the hearing.

SUB-SECT. 13.—*Decree.*

Minute of decree.

213. A minute of the decree or judgment of the Court is entered in the minute book (*l*), a Court fee of £1 being paid by the solicitor of the party in whose favour the decree or judgment was pronounced (*m*).

The minutes of decrees in all Admiralty actions are drawn up in the Registry.

Rehearing.

214. It is well settled that the Admiralty Division possesses a power of rehearing Admiralty actions, which will be exercised in a fit case, where a mistake is proved to have been made on the first hearing; but this power will only be exercised rarely and with great caution (*n*).

Agreements between parties.

215. In Admiralty actions certain agreements between the parties may be made which are equivalent to decrees of the Court. For instance, where it is agreed that the liability of the defendants or the plaintiffs under a counterclaim shall be admitted, subject to the question of the amount of damage or of a certain percentage of the amount of damage sustained being ascertained at a reference before the Registrar and merchants, such an agreement, if in writing dated and signed by the solicitors of both parties, and such as the Admiralty Registrar thinks reasonable and as the judge would, under the circumstances, allow, may be filed, and thereupon will become an order of Court and have the same effect as if such an order had been made by the judge in person (*o*).

A stamp or Court fee of 5*s.* is payable on filing such an agreement (*p*).

SUB-SECT. 14.—*Costs.*

Rules for exercise of Court's discretion as to costs.

216. The costs of Admiralty actions are in the discretion of the Court (*q*), but this discretion is in most cases exercised in accordance with certain special rules. Thus where an action of damage is dismissed, the plaintiff is condemned in the whole costs of the action; the issues in the action, as a rule, not being divided and no order being made awarding to the opposite party the costs of any separate issue on which he may have succeeded (*r*). So where the

(*k*) See pp. 117 *et seq.*, *post*. The Court will sometimes, however, if such a course is expedient, decide at the hearing questions as to damage which ordinarily would be sent to a reference (*The Maid of Kent* (1881), 6 P. D. 178).

(*l*) R. S. C., Ord. 66, r. 9.

(*m*) Order as to Supreme Court Fees, 1884, Schedule, No. 57.

(*n*) *The Monarch* (1839), 1 W. Rob. 21; *The James Armstrong* (1875), L. R. 4 A. & E. 380; *The Georg*, [1894] P. 330, 333.

(*o*) See *The Buenos Ayres* (1868), 17 W. R. 627.

(*p*) Order as to Supreme Court Fees, 1884, Schedule, No. 66.

(*q*) R. S. C., Ord. 65, r. 1.

(*r*) *The Schwan. The Robert Morrison* (1874), L. R. 4 A. & E. 187.

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defendant's vessel is pronounced alone to blame in an action of damage, the defendant and his bail or his vessel left under arrest, as the case may be, is condemned in the whole costs. Similarly, where there is a counterclaim in an action of damage and the plaintiff's vessel is found to be alone to blame, the plaintiffs and their bail have to bear the whole costs of the action. In actions of damage where neither the plaintiffs nor the defendants admit negligence and both vessels are found to blame, no order as to costs is made, each party being left to bear his own costs (*s*); but where in an action of damage one party admits in pleading that his vessel is to blame, and the other party, notwithstanding this admission, seeks to obtain a decree that his opponent's vessel is solely to blame, the Court, if it finds both vessels to blame, does not follow the above rule of "no costs," but holds that the party so admitting liability is entitled to his costs (*t*).

Case of inevitable accident.

217. Where the defendant sets up the defence of inevitable accident and succeeds upon it, the action may be dismissed with costs against the plaintiff (*a*).

Compulsory pilotage.

218. In actions of damage, if the defendants raise a defence both on the merits and on the ground of compulsory pilotage without setting up a counterclaim (*b*), and the suit is dismissed by reason of the defence of compulsory pilotage having succeeded, no costs are given on either side (*c*); but where the sole issue to be decided is compulsory pilotage, the party succeeding on that issue is usually held entitled to the costs of the action (*d*).

Where a collision took place between a barge towed by a steam-tug and a steamship, and the owners of the barge, for the purpose of recovering the damages they had sustained in the collision, brought an action of damage *in rem* against the steamship, and an action *in personam* against the owners of the steam-tug, and the Court, on the actions coming on to be tried together, found the steamship alone to blame for the collision, the owners of the steamship, who had intervened as defendants in the action *in rem*, and sought to throw the blame of the collision on the owners of the steam-tug, were condemned not only in the costs of the plaintiffs, but also in the costs of the steam-tug (*e*).

Salvage cases.

219. The rules as to the usual incidence of costs where a tender by act in Court is made in an action of salvage have already been

(*s*) *The Hector* (1883), 8 P. D. 218; *The Beryl* (1884), 9 P. D. 137, at p. 144; *The Harvest Home*, [1905] P. 177.

(*t*) *The General Gordon* (1890), 6 Asp. M. L. C. 533. See also *The London*, [1905] P. 152.

(*a*) *The Monkseaton* (1889), 14 P. D. 51.

(*b*) If a counterclaim is set up and fails, the defendant may be condemned in the costs of the counterclaim, see *The Mercedes de Larrinaga*, [1904] P. 215, at p. 235.

(*c*) *The Daoiz* (1877), 3 Asp. M. L. C. 477; *The Mercedes de Larrinaga*, *supra*, at p. 235; *The Winestead*, [1895] P. 170, at p. 175.

(*d*) *The Oakfield* (1888), 11 P. D. 34, 37.

(*e*) *The River Lagan* (1888), 57 L. J. (ADM.) 28; and see *The Mystery*, [1902] P. 115, where a similar order was made by the Divisional Court in a county court appeal.

referred to (*f*). In other actions of salvage where an award of salvage is made the usual practice where the salvors have not been guilty of any misconduct is for the plaintiffs to have all the costs of the action (*g*). And even where no salvage has been awarded the Court may merely condemn the plaintiffs in a sum *nomine expensarum* (*h*), or leave each party to bear his own costs (*i*). When, however, salvors have been guilty of misconduct and for that reason there has been a forfeiture of salvage, they may be condemned in costs (*k*).

Where ship and cargo saved.

When salvage services have been rendered to ship and cargo and salvage has been awarded against both, the owners of the salved ship and of the cargo contribute to the costs in proportion to the values on which the award is made, but this has been said to be without prejudice to the salvor's right to recover the whole from either (*l*).

Where less than £300 recovered.

Where an action of salvage is instituted in the Admiralty Division, and the plaintiff does not recover more than £300, he cannot recover any costs unless the Court certifies that the case was a fit one to be tried otherwise than summarily, that is to say, otherwise than in a county court having Admiralty jurisdiction (*m*).

SECT. 2.—*Actions in Personam.*

Generally.

220. In actions *in personam* the procedure and practice mentioned above as prevailing in actions *in rem*, in other matters than those relating to arrests, caveat warrants, caveat releases and bail, are equally in force, except so far as they differ in a few particulars to be mentioned below.

Issue and service of writ.

221. The first difference to be noticed between the practice in actions *in personam* and actions *in rem* is as to the issue and service of the writs of summons. The forms of the writ of summons to be used in actions *in personam* are the same as the forms used in other personal actions in the High Court, the necessary change being made in the heading thereof, and the action being described on the face of the writ as an action between the plaintiffs and the defendants by name, except in the case of actions of limitation of liability (*n*), instead of between the plaintiffs and the owners of the property proceeded against, as in the case of writs of summons *in rem* (*o*).

Writ for service out of jurisdiction.

222. A writ in an Admiralty action *in personam* for service out of the jurisdiction, or of which notice may be given out of the jurisdiction, may be issued out of the Central Office or out of a district registry,

(*f*) See p. 96, *ante*.
(*g*) See *The Dwina*, [1892] P. 58, at p. 64; *The Rialto*, [1891] P. 175, at p. 179.
(*h*) See *The Henrietta* (1837), 3 Hag. Adm. 345, n.
(*i*) See *The Little Joe* (1860), Lush. 88.
(*k*) See *The Capella*, [1891] P. 70; *The Yan-Yean* (1883), 8 P. D. 147, 150.
(*l*) *The Elton*, [1892] P. 265, 271.
(*m*) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 547 (2), (4). See pp. 127 *et seq.*, *post*.
(*n*) See p. 108, *post*.
(*o*) Ord. 1, r. 1; Ord. 2, rr. 1, 2, 3. For forms, see R. S. C., Appendix A, Part I., Nos. 1 to 8. The Court fees for writs for service within the jurisdiction in actions *in personam* are the same as for writs in actions *in rem*.

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as in actions in other branches of the High Court, after leave for its issue has been obtained from a judge of the Admiralty Division (*p*).

Where person out of the jurisdiction a necessary and proper party.

Service out of the jurisdiction of a writ of summons or notice of a writ of summons may be allowed on the grounds prescribed by the Rules of the Supreme Court (*q*). The only provision which needs to be referred to here in relation to the procedure and practice in Admiralty actions is that which in terms allows of the issue of writs for service out of the jurisdiction, or notice of which is to be given out of the jurisdiction, whenever any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction (*r*). Thus where salvage services had been rendered to a British ship, laden with cargo belonging to foreign owners resident abroad, and the salvors instituted an action of salvage *in personam* against the owners of the salved ship and her freight and the owners of her cargo, the Court refused to set aside the notice of the service of the writ on the foreign cargo owners, on the ground that the foreign cargo owners were proper parties to the action properly brought against the shipowners for the recovery of the salvage due for salving the ship and freight (*s*). And where a collision occurred out of the territorial jurisdiction of the Court between a British vessel and a foreign vessel at the time of the collision in tow of a British steam-tug, and the owners of the British vessel brought an action of damage *in personam* against the owners of the steam-tug and the owners of the foreign vessel, and duly served the writ of summons in the action on the owners of the steam-tug and obtained leave to serve and duly served notice of a concurrent writ of summons on the owners of the foreign vessel out of the jurisdiction, the service abroad of the notice of the concurrent writ was not set aside (*t*).

Pleadings.

223. There is no special rule as to the time for the delivery of the statement of claim in an Admiralty action *in personam*, and, subject to the power of the Court to abridge the time for the delivery of pleadings, the time for the delivery of statements of claim and

(*p*) R. S. C., Ord. 2, r. 5; Ord. 11, rr. 1, 3, 4.
(*q*) R. S. C., Ord. 11, r. 1; see title PRACTICE AND PROCEDURE.
(*r*) R. S. C., Ord 11, r. 1 (g).
(*s*) *The Elton*, [1891] P. 265. It is somewhat difficult to understand the reasoning of this decision. The owners of the cargo were in noways concerned with the liability of the shipowners for salvage or the amount of salvage to be awarded for the services rendered to the ship and freight (*The Pyrénnée* (1863), Br. & L. 189), and as before the passing of the Judicature Acts no action of salvage *in personam* could have been entertained against the cargo owners, and as the Rules of the Supreme Court are mere procedure rules, no fresh jurisdiction could be conferred by the sub-section. If this decision had been appealed the Court of Appeal might have decided, in conformity with its decision in the case (*The Duc d'Aumale*, [1903] P. 18) cited in the next note, that the action referred to in the sub-section as "an action properly brought within the jurisdiction" must be an action brought to recover a claim or claims which or all of which both sets of defendants, if served within the jurisdiction, would be entitled to oppose, and not an action in which (as is frequently the case in Admiralty actions) there are two or more different and independent claims in one suit, no single one of which all the defendants are jointly interested to defeat.
(*t*) *The Duc d'Aumale*, [1903] P. 18. But see *Harris* v. *Owners of Franconia* (1877), 2 C. P. D. 173, 177, and *The British South Africa Company* v. *Companhia de Moçambique*, [1893] A. C. 602, 628.

defences in Admiralty actions not within the exclusive jurisdiction of the Admiralty Court before the Judicature Acts (*u*) is regulated by the same rules as are applicable to actions in the King's Bench and Chancery Divisions (*a*).

As in actions *in rem*, so in actions *in personam*, the plaintiff may, without obtaining leave, deliver his reply within six days after the defence or the last of the defences has been delivered, unless the time is extended by the Court or a judge (*b*).

Judgment in default of appearance.

224. If in an Admiralty action *in personam* carried on in default of appearance the writ of summons is endorsed for a liquidated demand, whether specially or otherwise, judgment may be entered in the Admiralty Registry in default of appearance for the amount of the liquidated amount with interest, without motion or hearing in Court (*c*). Where there has been default of appearance and there is endorsed on the writ a claim for pecuniary damage which is not liquidated, interlocutory judgment may be entered in the Registry, and the Court or a judge is at liberty to order a statement of claim or particulars to be filed before the assessment of the damages, and that the value and amount of damages or either of them be ascertained in any way which may be directed (*d*). Where there is default of appearance in an action of salvage *in personam* or an action of co-ownership or any similar action, the procedure is the same as in an action *in rem* (*e*).

Default of pleading.

225. Where there has been default of pleading by defendants in Admiralty actions *in personam* substantially the same procedure for obtaining judgment must be followed as is required in similar cases where there has been default of appearance (*f*).

SECT. 3.—*Transfer of Actions.*

Transfer from another division of the High Court.

226. Actions are sometimes transferred to the Admiralty Division from the other divisions of the High Court by reason of being actions connected with ships or in which questions are involved which it is convenient to have decided with the assistance of the Trinity Masters, or by a reference as to damages to the Registrar and merchants (*g*). If a transfer is desired it must be made by order, the consent of the President of the division being obtained (*h*).

Where question to be tried by jury.

An order for transfer of an action to the Admiralty Division was

(*u*) See the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 34, and R. S. C., Ord. 30, r. 1 (d).

(*a*) See title PRACTICE AND PROCEDURE.

(*b*) R. S. C., Ord. 23, rr. 1, 2.

(*c*) R. S. C., Ord. 13, rr. 3, 4; *The Madelaine and The André Théodore* (1904), 93 L. T. 184.

(*d*) Thus enabling the damages where so ordered to be referred in actions of damage *in personam* to the Registrar, or the Registrar and one merchant. See R. S. C., Ord. 13, rr. 5, 6, 7. As to references to the Registrar and merchants, see p. 117, *post*.

(*e*) See p. 99, *ante*.

(*f*) See R. S. C., Ord. 27, rr. 2, 3, 4, 5, 6, 9, 11.

(*g*) See *The Medina* (1876), 1 P. D. 272.

(*h*) See the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 35, and title PRACTICE AND PROCEDURE, *post*.

SECT. 3. Transfer of Actions.

refused, although a question as to salvage was involved, when it appeared that there were other questions in the action which ought to be tried by a jury (*i*). So an order for the transfer to the Admiralty Division of an action for loss of life where a decree had been obtained in an Admiralty action for the limitation of the plaintiff's liability, was refused on the ground that the plaintiff was entitled to have his damages assessed by a jury (*k*).

Transfer from county court. In what cases such transfer ordered.

227. An Admiralty action proceeding in a county court having Admiralty jurisdiction may be transferred to the Admiralty Division on the application of any party thereto. The application is made by summons before the judge in chambers (*l*).

Such transfer may be ordered if the subject-matter of the action exceeds the county court limit of jurisdiction (*m*), or for the purpose of effecting the sale of a ship in the High Court (*n*). An order is also usually made if it is desired to obtain evidence on commission (*o*), and frequently when another action arising out of the same cause of action is pending in the High Court (*p*), or on the ground that the hearing in the High Court would be more convenient.

Effect of transfer.

Where an action is transferred under the above-mentioned provisions the Admiralty Division acquires by virtue of the transfer full jurisdiction over the action, notwithstanding that if commenced as an action *in rem* in the Admiralty Division it would have been dismissed for want of jurisdiction (*q*).

Where simultaneous proceedings in High Court and county court.

228. Where proceedings in respect of the same collision are pending in the Admiralty Division and in a county court having Admiralty jurisdiction, and these proceedings were commenced practically simultaneously, the practice when the county court proceedings are transferred is to give the plaintiff in the action in the Admiralty Division the conduct of the proceedings, and, if the actions are consolidated, to make his action the principal cause, whilst if the county court action was clearly commenced first it will be the principal cause.

SECT. 4.—*Limitation of Liability.*

Nature of action.

229. The owners of a British or foreign ship, or the charterers to whom the ship has been demised, or the owners of docks or canals, or harbour authorities, who allege that they have incurred liability in respect of loss of life, personal injury, or loss of or damage to vessels, goods, merchandise, or property or rights of any kind, and that several claims are made or apprehended in respect of that liability, may apply to the Admiralty Division or any other division of the High Court to determine the amount of their liability

(*i*) *The Ocean Steamship Co.* v. *Anderson, Tritton & Co.* (1883), 33 W. R. 536.
(*k*) *Roche* v. *The London and South Western Rail. Co.*, [1899] 2 Q. B. 502.
(*l*) County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71), s. 6; *The Indra* (1905), 10 Asp. M. L. C. 196. As to the Admiralty jurisdiction of county courts, see p. 182, *post*.
(*m*) County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71), s. 7.
(*n*) *Ibid.*, ss. 8, 23; and see s. 32.
(*o*) *The Swan* (1870), L. R. 3 A. & E. 314.
(*p*) *The Never Despair* (1884), 9 P. D. 34; *The Mersey*, [1901] P. 369.
(*q*) *The Swan, supra; The Cargo ex Argos* (1872), L. R. 5 P. C. 134; *The Alina* (1880), 5 Ex. D. 227.

SECT. 4. Limitation of Liability.

and to distribute that amount rateably among the several claimants, and any proceedings pending in any other Court in relation to the same matter may be stayed. The Court may proceed in such manner and subject to such regulations as to making parties interested parties to the proceedings, and as to the exclusion of any claimants who do not come in within a certain time, and as to requiring security from the owners or other persons applying, and as to payment of any costs, as the Court thinks just (*r*).

Writ.

230. The first step is to issue a writ of summons. The writ must contain the actual names of the plaintiffs (*s*), but it is not directed to any person by name, but "to the owners of the ——" (the vessel with which the collision occurred) "and of the cargo lately laden on board the ——, and to all or every person claiming in respect of loss of life or personal injury occasioned by the improper navigation of the ——," or bears such similar directions as the case may require (*t*).

Service of writ and appearance.

The writ is in practice served only on the owners of the adverse vessel, or on any known cargo owner who may be conveniently served. The persons so served usually appear within the time limited by the writ and act in a sense as representative defendants, since it would in many cases be practically impossible to serve the writ on all the persons who might have a claim to share in the amount of the plaintiffs' liability. Any other persons, however, who answer the description of those to whom the writ is directed may also appear before the hearing and raise any defence open to them, though the Court may not grant all the defendants so appearing their costs; the usual practice being not to allow costs of the hearing to more than one or two sets of defendants.

Pleadings.

231. Statements of claim, defences, and replies are delivered in these actions as in other Admiralty actions *in personam*, but in most cases the defences merely put the plaintiffs to proof of those allegations contained in the statements of claim which, if proved, will entitle the plaintiffs to the relief claimed; such allegations usually are the occurrence of the collision or stranding, and any legal proceedings following thereon, and that claims beyond the amount of the plaintiffs' limited liability are apprehended. The plaintiffs submit in the case of there having been loss or damage to goods or merchandise to pay into Court the limited amount calculated on the appropriate tonnage of their vessel, with interest at 4 per cent. (*a*). In the case of loss of life or personal injury the claimants submit in addition to give bail for such claims in the Admiralty Registry or to give an undertaking to pay the amount of their liability into Court (*b*).

(*r*) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 504; Merchant Shipping (Liability of Shipowners and others) Act, 1900 (63 & 64 Vict. c. 32), ss. 1, 2; Merchant Shipping Act, 1906 (6 Edw. 7, c. 48), s. 71.

(*s*) *The Inventor* (1905), 10 Asp. M. L. C. 99.

(*t*) As to whether the names of the plaintiffs should be set out in the writ under the present practice, see *The Blanche* (1904), 21 T. L. R. 145; *The Inventor*, *supra*.

(*a*) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 503.

(*b*) See *The Northumbria* (1869), L. R. 3 A. & E. 6; *The Crathie*, [1897] P. 178; *The Inventor*, *supra*.

SECT. 4 Limitation of Liability.

Evidence.

232. Except in cases where there is likelihood of there being a conflict of testimony, as where it is alleged that the plaintiffs were privy to the collision and therefore disentitled to relief (*c*), the evidence is usually given on affidavit. The affidavit of the owner verifying the allegations in the statement of claim and having annexed to it, in the case of a British ship, a certified copy of the register in force at the time of collision, and some similar official evidence of tonnage in the case of a foreign ship, is generally required (*d*); and an affidavit is also required from the master or some other person on board that there has been no loss of life, if the limitation of £8 per ton only is sought. The affidavits need not be printed unless the Court or a judge so orders (*e*).

Decree.

233. On the case for the plaintiffs being sufficiently proved at the hearing the Court pronounces that the plaintiffs are entitled to limited liability according to the Merchant Shipping Act, 1894, and, if limitation of liability is claimed in consequence of a collision, that in respect of loss of life or personal injury either alone or together with damage to vessels, goods, merchandise, or other things occasioned by the improper navigation of their vessel on the occasion of the collision in question in the suit, that the plaintiffs are answerable in damages to an amount not exceeding £——, such sum being at the rate of £15 per ton of the —— tonnage of the —— (*f*), and that in respect of claims for damage to vessels, goods, merchandise, or other things alone (*g*), the plaintiffs are answerable in damages to an amount not exceeding £ —— of the said sum of £ ——, being at the rate of £8 for each ton etc. The decree also orders that upon payment into Court of the amount to which liability is limited, or upon giving the necessary bail (*h*), with interest at 4 per cent. from the date of the collision until payment into Court, and upon payment of the costs (if any) of actions pending in respect of the collision in the Admiralty Division, all proceedings in such actions shall be stayed. It is also ordered that advertisements be inserted at intervals in certain specified newspapers intimating that if persons having claims under the decree do not come in and enter their claims in the Admiralty Registry within a specified time, they will be excluded from sharing in the limited amount.

Time for bringing in claims.

The time for bringing in such claims is three months from the date of the decree, unless, for special reasons, a shorter period is limited. All claims brought in or thereafter to be brought in are by the

(*c*) See *The Cricket* (1882), 5 Asp. M. L. C. 33.

(*d*) See *The Roselyn* (1904), 10 Asp. M. L. C. 24; *The Cordilleras*, [1904] P. 90.

(*e*) R. S. C., Ord. 38, r. 30.

(*f*) As to the tonnage on which the limited amount is calculated, which is different in the case of steamers and sailing vessels, see the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 503; Merchant Shipping Act, 1906 (6 Edw. 7, c. 48), s. 69; *The Brunel*, [1906] P. 24; *The Cathay* (1900), 69 L. J. (P.) 89.

(*g*) For instance, passengers' luggage (*The Stella* (1899), 8 Asp. M. L. C. 605).

(*h*) If it is clear that the claims for loss of life before the Court at the hearing do not reach the limit of liability, the Court will sometimes grant a decree on the plaintiffs giving bail for an amount fixed by the Court and undertaking to give bail if required for the balance of their statutory liability. See *The* (1905), 10 Asp. M. L. C. 99.

decree referred to the Registrar and merchants for assessment, and the plaintiffs are as a general rule condemned in the costs of the action unless the defendants have raised unfounded issues on which they have failed, or costs have been incurred between claimants in respect of questions with which the plaintiffs have had nothing to do (*i*).

Damage or loss of Crown property and mails.

234. If any property of the Crown is damaged or lost in a collision, the Crown may claim to share in the limited amount paid into Court by the owner of the vessel to blame (*k*), and where mails have been lost in a collision the Postmaster-General is entitled, assuming him to be a bailee in possession of the mails, to share in the fund paid into Court by the owners of the wrong-doing vessel (*l*).

Where loss of life claims not entered in time.

235. Where there are loss of life claims, and the statutory amount of £15 per ton has all been paid into Court, but some of the loss of life claimants fail to come in and enter their claims until after the time appointed for claims to be filed, the Court may, although the year has not elapsed within which, under the Fatal Accidents Act, 1846 (*m*), an action in respect of such a claim could be commenced, order that the balance of the fund which remains in Court after all the loss of life claimants who have entered claims in due time have been paid shall be paid back to the plaintiffs, the claimants who have not entered their claims in time being thus excluded from all share in the limited amount (*n*).

Where claims both as to

And where there are both loss of life and personal injury claimants and claimants in respect of loss or damage to goods, and the sum of £7 per ton primarily applicable to the loss of life claims and personal injury claims is not enough to pay such loss of life and personal injury claims in full, it may be held that the balance of the claims for loss of life and personal injury which the amount of £7 per ton is insufficient to cover is entitled to rank *pari passu* with the claims for loss and damage to goods against the further amount of £8 per ton (*o*).

SECT. 5.—*Appeals from Inferior Courts.*

Right of appeal to Divisional Court.

No further appeal without leave.

236. All Admiralty appeals from inferior Courts are heard before a Divisional Court of the Admiralty Division (*p*), usually consisting of the President and the Judge of that Division sitting together, and assisted, where thought necessary or desirable, by two of the Elder Brethren of the London Trinity House (*q*); and unless leave to appeal to the Court of Appeal be given by the Divisional Court hearing the appeal, or by the Court of Appeal, the determination of such Divisional Court is, under the Supreme Court of Judicature (Procedure) Act, 1894, declared to be final (*r*).

(*i*) See *The Empusa* (1879), 5 P. D. 6; *The Winkfield*, [1902] P. 42, at p. 61.
(*k*) *The Zoe* (1886), 11 P. D. 72.
(*l*) *The Winkfield*, [1902] P. 42.
(*m*) 9 & 10 Vict. c. 93; see title NEGLIGENCE, *post*.
(*n*) *The Alma*, [1903] P. 55.
(*o*) *The Victoria* (1888), 13 P. D. 125.
(*p*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 45; R. S. C., Ord. 59, r. 4.
(*q*) The County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 125. For their fees, see note (*d*), p. 101, *ante*.
(*r*) The Supreme Court of Judicature (Procedure) Act, 1894 (57 & 58 Vict. c.

SECT. 8.

Appeals from Inferior Courts.

SUB-SECT. 1.—*From County Courts and the City of London Court.*

County court appeals.

237. Of these appeals from inferior Courts the most numerous are from county courts having Admiralty jurisdiction, including the City of London Court. Such appeals are brought either under the County Courts Admiralty Jurisdiction Act, 1868 (*s*), or under the County Courts Act, 1888 (*t*).

Under the Act of 1868.

In order to be entitled to appeal under the Act of 1868, the appellant must have given security for costs, and, if the appeal be from an interlocutory order or decree, have obtained leave to appeal (*u*); but the Court cannot entertain an appeal if the parties have agreed that the decision of the Court below shall be final (*w*). Notice of the institution of the appeal, called the instrument of appeal, must be lodged within ten days from the making of the decree appealed against, unless the time be extended (*x*). No appeal under this Act will be allowed, unless the amount decreed or ordered to be due exceeds £50 (*y*).

An appeal may be brought either on a question of law or a question of fact (*z*). The time for appealing may be extended by a Divisional Court of the Admiralty Division in its discretion on application by notice of motion supported by affidavit (*a*), and no appeal lies from the decision come to by that Court as to whether the time should be extended (*b*).

Security for costs.

Security for costs must be given in cases where an appeal on fact is asserted, whether with or without leave (*c*), but where the appeal is on a question of law the appellants usually exercise the right of appeal under the Act of 1888 and consequently do not give security (*d*).

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16), s. 1 (5). Possibly, however, certain particular provisions under which an ulterior appeal without leave lay to the Court of Appeal where the Divisional Court has altered the judgment of the county court may still be in force (see *The Dart*, [1893] P. 33; *The Cambrian Monarch*, March 7, 1907 (unreported), where such an appeal brought without leave to the Court of Appeal was recently allowed). See also *Cox* v. *Hakes* (1890), 15 App. Cas. 506, 517; *The Tynwald*, [1895] P. 142, 147. As to the cases in which before the Judicature Acts the Court of Admiralty usually granted leave for a further appeal in county court appeals, see *The Samuel Laing* (1870), L. R. 3 A. & E. 284.

(*s*) 31 & 32 Vict. c. 71.

(*t*) 51 & 52 Vict. c. 43.

(*u*) County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71), s. 26. As to this security not being required under the County Courts Act, 1888 (51 & 52 Vict. c. 43), when the appeal is on a question of law, see *The Delano*, [1895] P. 40 (note (*d*), *infra*).

(*w*) County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71), s. 28.

(*x*) *Ibid.*, s. 27.

(*y*) *Ibid.*, s. 31.

(*z*) See *The Delano*, *supra*, at p. 47.

(*a*) *The Humber* (1883), 9 P. D. 12. See County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71), s. 27.

(*b*) *The Amstel* (1878), 2 P. D. 186; the Supreme Court of Judicature (Procedure) Act, 1894 (57 & 58 Vict. c. 16), s. 1.

(*c*) County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71), s. 26. An order refusing plaintiffs, who have taken out of Court a sum paid into Court with denial of liability, their taxed costs has been held to be a final order within this section (*The Vulcan*, [1898] P. 222); see also *The Fyenoord* (1876), 3 Asp. M. L. C. 218, where it was held that the sum tendered was "the sum decreed or ordered to be due" under sect. 31 of the Act of 1868.

(*d*) See p. 114, *post*; *The Delano*, *supra*, at p. 47. The actual decision in this case was, that an appeal on a question of law brought from a county

The security must be given in the Court below (*e*), before the instrument of appeal is lodged in the Admiralty Registry, and the amount of the security, usually £50, is fixed by the county court registrar (*f*).

No appeal where less than £50 involved.

The condition that £50 must be decreed or ordered to be due in order to render an appeal valid does not apply to plaintiffs who have claimed over £50 and obtained nothing, or to appeals by leave from interlocutory orders (*g*). But no appeal is allowed to a plaintiff whose claim is less than £50, as in such a case in no circumstances could more than £50 be decreed or ordered to be due (*h*); so also in a damage suit leave to appeal on a question of fact will be refused to a plaintiff who, though claiming over £50, has only sustained less than £50 damages (*i*).

Where an appeal properly brought by a plaintiff is dismissed, the defendant cannot set up a cross appeal against the decision of the Court below when it appears that the only ground on which he can question that decision depends on a question of fact, and the amount claimed was under £50 (*k*).

Instrument of appeal.

238. The instrument of appeal is, as above mentioned, a notice of the institution of the appeal, and has to be filed in the Admiralty Registry, together with the usual minute, and a folio number obtained. The stamp or Court fee to be paid is 10*s.* on the instrument of appeal (*l*). As soon as it has been filed a copy should be served on the adverse parties in the Court below. A Divisional Court generally sits on the first Tuesday of each month during the sittings, and if the appeal is entered for hearing, and a Court fee of £1 paid for the entry of the appeal (*l*), and notice of hearing (unless dispensed with by consent) duly given, it will come on in regular course.

Evidence etc. printed.

239. If the evidence in the Court below has been taken by a shorthand writer, the transcript of the evidence so taken, together with copies of the orders made and other material documents in the cause, are transmitted to the Admiralty Registry (*m*), and, together with the judge's notes of the hearing in the Court below and a copy of the reasons for his judgment, form the record, and are printed for the purposes of the appeal, the directions of the Admiralty Registrar being taken on summons if the parties do

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court having Admiralty jurisdiction under the provisions of s. 120 of the County Courts Act, 1888 (51 & 52 Vict. c. 43), could be heard by the Court of Appeal without any security for costs having been given, and did not really determine that at the same time there was not an alternative method of appealing on a question of law under the Act of 1868 on security being first given, if it ever became necessary for any reason to appeal under the Act of 1868.

(*e*) *The Forest Queen* (1870), L. R. 3 A. & E. 299; *The Ganges* (1880), 5 P. D. 247.

(*f*) *The Humber* (1883), 9 P. D. 12.

(*g*) *The Alexandria* (1872), L. R. 3 A. & E. 574; *The Alert* (1894), 72 L. T. 124.

(*h*) *The Falcon* (1878), 3 P. D. 100.

(*i*) *The Burma (No. 2)* (1899), 8 Asp. M. L. C. 549.

(*k*) *The Alne Holme*, [1893] P. 173.

(*l*) See Order as to Supreme Court Fees, 1884.

(*m*) See *The Cynthia* (1876), 2 P. D. 52, 53.

SECT. 5. Appeals from Inferior Courts.

not agree as to what is to be printed. If the parties agree a special case may be printed and filed instead of the proceedings in the Court below (*n*).

Fresh evidence at hearing of appeal.

By the leave of the Divisional Court fresh evidence may be adduced by either the appellant or the respondent at the hearing of the appeal (*o*), and in one case where none of the evidence taken in the Court below could be brought before the appellate court the appeal was decided entirely on the evidence of witnesses called and examined at the hearing of the appeal (*p*).

Warrant of arrest pending hearing of appeal.

240. Where the appeal is from a decree or order in an action *in rem* in which the property proceeded against has been kept under arrest until the decision of the Court below has been given, the appellant, in order to keep the property under arrest pending the appeal, may obtain in the Admiralty Registry, and duly serve, a warrant of arrest on the property, which will then remain in the custody of the Admiralty Marshal to abide the order of the Divisional Court (*q*).

Costs of appeal.

When the appellant is unsuccessful he must pay the costs of the appeal, unless the Court otherwise directs (*r*).

Remission of cause.

241. The Divisional Court, after giving its decision, may either retain the cause or remit it to the Court below.

Appeals under the County Courts Act, 1888.

242. Further, a party in an Admiralty or maritime cause in a county court or the City of London Court who is aggrieved by any judgment, decision, direction or order of such Court on any point of law, or on the admission or rejection of any evidence, may appeal from the same to a Divisional Court of the Admiralty Division under the County Courts Act, 1888 (*s*). But there is no appeal on such points in any action of contract or tort where the debt or damage claimed does not exceed £20 unless the judge thinks it reasonable and proper that such appeal should be allowed, and grants leave to appeal (*s*).

Agreement not to appeal.

No appeal lies from the decision of the judge if before such decision be pronounced the parties agree in writing, signed by themselves or their solicitors or agents, that his decision shall be final, and such an agreement does not require a stamp (*t*).

Procedure on appeal.

With the exception that no security for costs is given and that the appeal is by way of motion, the notice for which is in practice an eight days' notice served on the respondent and filed in the registry in conformity with the practice established for county court appeals to the King's Bench Division (*w*), the procedure and practice on an appeal under the Act of 1888 are the same as the procedure and practice where the appeal is made under the County Courts

(*n*) *The Zeta* (1875), L. R. 4 A. & E. 460.
(*o*) *The Busy Bee* (1872), L. R. 3 A. & E. 527.
(*p*) *The C. S. Butler* (1874), L. R. 4 A. & E. 238.
(*q*) *The Miriam* (1874), 43 L. J. (ADM.) 35; *The Freir, The Albert* (1875), 44 L. J. (ADM.) 49.
(*r*) County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71), s. 30.
(*s*) 51 & 52 Vict. c. 43, s. 120.
(*t*) *Ibid.*, s. 123.
(*w*) See R. S. C., Ord. 59, r. 10.

Admiralty Jurisdiction Act, 1868 (*a*). For instance, the appeal is asserted by the notice of motion being filed in the registry within ten days of the decision appealed from, but this time may be extended by the order of a Divisional Court (*b*).

SUB-SECT. 2.—*Shipping Casualty Appeals and Rehearings and Appeals from Naval Courts.*

Shipping casualty appeals by masters, mates or engineers.

243. Appeals from a formal investigation into a shipping casualty, or from an inquiry under the Merchant Shipping Act, 1894, into the conduct of a master, mate or engineer, lie to a Divisional Court of the Admiralty Division if the decision has been given in England or by a naval court (*c*), in cases where there has been no application for a rehearing at the instance of the Board of Trade, or where such rehearing has been refused, and on the investigation or inquiry a decision has been given with respect to the cancellation or suspension of the certificate of a master, mate or engineer (*d*). Similar proceedings may take place in certain cases when the investigation has been held by a colonial Court or tribunal (*e*).

Appeals by shipowners.

Where on any investigation or inquiry into a shipping casualty the Court finds that the casualty has been caused or contributed to by the wrongful act or default of any person, and an application for a rehearing has not been made under the above provisions or has been made and refused, the owner of the ship, or any other person having an interest in the investigation or inquiry who has appeared at the hearing and is affected by the decision of the Court, has now the same right of appeal against the decision as a master has under the above provisions against a decision with respect to the cancellation or suspension of his certificate (*f*).

Notice of appeal and of grounds of appeal.

244. The appellant must serve notice of intention to appeal on such of the other parties to the proceedings as he may consider to be directly affected by the appeal, and within two days after setting down the appeal must give to those parties notice of the general grounds of the appeal (*g*).

The notice of appeal must be served (*h*) either within twenty-eight days from the date on which the decision was pronounced, or within twenty-one days of the date on which the report was issued in London by the Board of Trade (*i*).

(*a*) 31 & 32 Vict. c. 71. See p. 112, *ante*.

(*b*) *The Emmy* (1905), *Times* (12 August, 1905).

(*c*) See as to naval courts, the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), ss. 470, 480—486.

(*d*) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 475 (3).

(*e*) *Ibid.*, s. 478.

(*f*) Merchant Shipping Act, 1906 (6 Edw. 7, c. 48), s. 66.

(*g*) Shipping Casualty Rules, 1895, r. 20, printed in the Statutory Rules and Orders for 1895 at pp. 460, 463—469.

(*h*) *Ibid.* Any notice, summons, or other document issued under these rules may be served by sending the same by registered letter to the address of the person to be served (Shipping Casualty Rules, 1895, r. 28). The service of any notice, summons, or other document may be proved by the oath or affidavit of the person by whom it was served (*ibid.*, r. 29).

(*i*) *Ibid.*, r. 20. In computing the number of days within which any act is to be done they shall be reckoned exclusive of the first and inclusive of the last

SECT. 5. Appeals from Inferior Courts.

The appellant must, before the expiration of the time within which notice of appeal may be given, leave with the officer for the time being appointed by the Court a copy of the notice of appeal, and the officer will thereupon set down the appeal by entering it on the proper list (*j*).

Security for costs.

245. If the appeal is brought by any party other than the Board of Trade, the appellant must before the appeal is heard give security for the costs to be occasioned by the appeal in the manner directed by the judge from whose decision the appeal is brought (*k*).

Evidence given at former hearing.

246. The Divisional Court is assisted by two assessors, who in practice are always Elder Brethren of the London Trinity House. The evidence taken before the judge (*k*) from whose decision the appeal is brought is proved before the Court by a copy of the notes of the judge or of the shorthand writer, clerk, secretary, or other person authorised by him to take down the evidence, or by such other materials as the Court thinks expedient; and a copy of the evidence, and of the report to the Board of Trade containing the decision from which the appeal is brought, and of the notice of the general grounds of the appeal, must be left in the Admiralty Registry before the appeal comes on for hearing. Copies of the notes of the evidence and of the report must be supplied to the appellant on request by the judge or other person having charge thereof on payment of the usual charge for copying (*l*).

Fresh evidence.

The Court has full power to receive further evidence on questions of fact, either by oral examination in Court or by affidavit or deposition taken before an examiner or commissioner. Evidence may also be given by special leave as to matters which have occurred since the date of the decision from which the appeal is brought (*m*).

Any application to the Divisional Court for leave to adduce further evidence should be made in ordinary circumstances by means of a substantive application prior to the hearing of the appeal (*n*), and the Court will not grant leave for expert evidence to be called on matters as to which the Trinity Masters are present to advise the Court (*o*).

Report to Board of Trade.

247. On the conclusion of an appeal the Court sends to the Board of Trade a report of the case signed by the members of the Court.

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day unless the last day shall happen to fall on a Sunday, Christmas Day, or Good Friday, or on a day appointed for a public fast or thanksgiving or holiday, in which case the time shall be reckoned exclusive of that day also (Shipping Casualty Rules, 1895, r. 27).

(*j*) Shipping Casualty Rules, 1895, r. 20 d.

(*k*) *Ibid.*, r. 20 e. In these rules, unless the context or subject-matter otherwise requires, "judge" means the wreck commissioner, sheriff, sheriff substitute, stipendiary magistrate, justices, or other authority empowered to hold an investigation into a shipping casualty (*Ibid.*, r. 2).

(*l*) *Ibid.*, r. 20 e. As to the last portion of this rule, see *The Kestrel* (1881), 6 P. D. 182, 188.

(*m*) Shipping Casualty Rules, 1895, r. 20 h.

(*n*) *The Famenoth* (1882), 7 P. D. 207.

(*o*) *The Kestrel, supra.*

SECT. 5. Appeals from Inferior Courts.

248. The Court has power to make such order as to the whole or any part of the costs of and occasioned by the appeal as the Court may think just (*p*). Costs.

Appeals under the Shipping Casualties Act, 1879 (*q*), were, as also were appeals under the Merchant Shipping Act, 1894 (*r*), before the Act of 1906 came into force, generally made by certificated officers whose certificates have been dealt with, and not by the Board of Trade, and in such cases where the appeals are dismissed the usual course is to condemn the appellants in costs (*s*). Where the Board of Trade appears as respondent in the appeal and the decision appealed from is reversed, the Board of Trade may be ordered to pay the costs (*t*), and in a case where the decision was affirmed, but the Divisional Court considered that the time for which the certificate of the appellant had been suspended should be shortened, no order was made as to costs (*u*).

Rehearing at instance of Board of Trade.

249. A rehearing of a shipping investigation or inquiry may be ordered by the Board of Trade to be heard by a Divisional Court of the Admiralty Division; when this is the case, the Board must cause such reasonable notice to be given to the parties whom they consider to be affected by the rehearing as the circumstances of the case may, in their opinion, permit (*v*).

The rest of the procedure on such rehearings is the same as that already mentioned in regard to shipping casualty appeals (*w*).

Appeals from naval courts.

250. Any person aggrieved by the order of a naval court ordering the forfeiture of wages, or by the decision of a naval court on a question as to wages, fines or forfeiture, may appeal to the High Court; and on any such appeal the High Court may confirm, quash or vary the decision appealed against (*x*).

SECT. 6.—*References to the Registrar and Merchants and other Proceedings before the Registrar.*

SUB-SECT. 1.—*References to the Registrar and Merchants.*

251. Amongst the more important of the powers and authorities possessed by the Admiralty Registrar and assistant Admiralty Registrar are the holding of references to assess damages in actions *in rem* or *in personam*, and to report on other questions and matters in wages, co-ownership, mortgage or bottomry suits.

In what cases references usually made.

The Registrar is assisted by one (*a*) or more merchants selected

(*p*) Shipping Casualty Rules, 1895, r. 20 i.
(*q*) 42 & 43 Vict. c. 72.
(*r*) 57 & 58 Vict. c. 60, s. 473.
(*s*) *The Golden Sea* (1882), 7 P. D. 194.
(*t*) *The Famenoth* (1882), 7 P. D. 207; *The Arizona* (1880), 5 P. D. 123; *The Carlisle*, [1906] P. 301.
(*u*) *The Kestrel*, (1881) 6 P. D. 182.
(*v*) See *The Ida* (1886), 11 P. D. 37.
(*w*) See p. 115, *ante*, and Shipping Casualty Rules, 1895, r. 21 a, b.
(*x*) Merchant Shipping Act, 1906 (6 Edw. 7, c. 48) s. 68. The procedure and conditions of the appeal are to be provided for by rules of Court. The jurisdiction will probably be exercised by a Divisional Court of the Admiralty Division.
(*a*) In default actions *in rem*, the reference is usually to the Registrar alone or to the Registrar assisted by one merchant.

SECT. 6. References to Registrar etc.

by him from a list approved by the President. The judge in Court may, if he thinks there is cause for so doing, besides deciding the question of liability at the hearing, also determine in Court any question as to damages or any other matter usually referred to the Registrar or the Registrar and merchants (*b*); but in the following cases the ordinary course is to order a reference sometimes before, and sometimes after, the judge in Court has decided the question of liability: in actions of damage where either the plaintiff's or the defendant's vessel is to blame for the collision and has suffered damage, or where the two vessels involved are both damaged, and found to blame (in which latter case two references, *i.e.* one in respect of the claim of the plaintiffs and the other in respect of the claim of the defendants, may be necessary); in actions of damage where after the collision there has been subsequent damage or an abandonment of either or both of the vessels requiring the question of consequential damage to be decided; in actions of limitation of liability, in which, after the decree limiting the amount of the plaintiff's liability has been made in Court, the right of the claimants to share in the limited amount and the amounts respectively due to each of them is determined at a reference and reported upon to the Court; and in actions of salvage where the salving vessel has been damaged in rendering the services, and the details of the damage have to be accurately ascertained (*c*).

References are also frequently ordered in actions of co-ownership, mortgage, wages, disbursements, damage to cargo, bottomry and necessaries, or whenever there are accounts to investigate, and also in King's Bench actions brought in the Admiralty Division where damages have to be assessed (*d*).

Filing of claim and affidavits.

252. Within twelve days from the day when the order for the reference is made, the solicitor for the claimant must file the claim and any affidavits, and within twelve days from the day when the claim and affidavits are filed the adverse solicitor must file his counter affidavits (*e*). "The claim" here referred to is headed in the action, and consists of a statement of the particulars of the claim proposed to be made at the reference, arranged in numbered items, so that the Registrar in the schedule to his report may conveniently place in a tabular form the items allowed.

Other evidence.

253. Any other documentary evidence required to prove the items of the claim, such as vouchers or receipts not made exhibits to the affidavits, should be numbered to correspond with the items of claim and should be filed within the twelve days. It is not necessary to bring in any affidavits if it is intended that the claimant's case at the reference should be proved by oral evidence without affidavits.

Copies for other side.

In all actions other than actions of limitation of liability (where the number of the claimants prevent such a course being taken) a

(*b*) See *The Maid of Kent* (1881), 6 P. D. 178.
(*c*) See *Bird* v. *Gibb*, *The De Bay* (1883), 8 App. Cas. 559; *The City of Chester* (1884), 9 P. D. 182, at p. 190.
(*d*) See *The Gertrude*, *The Baron Aberdare* (1888), 13 P. D. 105.
(*e*) R. S. C., Ord. 56, r. 2.

copy of the claim and of the documentary evidence and of any affidavits intended to be filed should be supplied to the adverse solicitors, and similarly copies of any counter affidavits should be supplied to the claimants' solicitors.

The usual minute must be filed when any affidavits or other documents are filed, and the requisite Court fee paid (*f*).

Evidence on affidavit.

Although evidence on affidavit is admissible, it is within the discretion of the Registrar to determine whether he will give any, and what, weight to affidavits made by persons who have not been cross-examined on their affidavits; and where the deponent is the plaintiff in the action, he may, though resident abroad, be required to attend in this country for cross-examination (*g*).

Placing reference in list for hearing.

254. The hearing of the reference is appointed for a day fixed by the Registrar, who will consult the convenience of the parties as far as possible; and thereupon a notice to have the reference placed in the list for hearing is filed with a 10*s.* stamp (*h*).

Assessors.

255. If any question of seamanship or nautical skill is likely to arise at the reference, one of the Elder Brethren of the Trinity House will, if summoned, attend at the hearing of the reference (*h*).

Discovery.

256. Where discovery is necessary it may be ordered by the Registrar; but as the vouchers contain the particulars of the claim, discovery is seldom required. It is a frequent practice, however, for a defendant to apply for inspection of the voyage accounts of the plaintiffs' ship immediately before and after a collision in order to ascertain the grounds of the claim in respect of damages for detention arising from the collision.

Hearing of reference.

257. At the time appointed the reference may be proceeded with, if either solicitor be present, but the Registrar may adjourn the reference from time to time (*i*).

Witnesses may be examined at the reference, and on the application of either solicitor, but at the expense in the first instance of the party on whose behalf the application is made, the evidence may be taken down by a shorthand writer or reporter appointed by the Court, sworn faithfully to report the evidence, and a transcript of the shorthand writer's or reporter's notes, certified by him to be correct, is admitted to prove the oral evidence of the witnesses on an objection to the Registrar's report (*j*).

(*f*) R. S. C., Ord. 66, r. 8. The Court fee or stamp to be paid is 5*s.* for every instrument or document to which the minute relates, other than an exhibit or any instrument or document previously carried from the Registry or the marshal's office; see Order as to Supreme Court Fees, 1884, Schedule, No. 35.

(*g*) *The Parisian* (1887), 13 P. D. 16.

(*h*) Order as to Supreme Court Fees, 1884, Schedule, No. 12; Order as to Fees and Percentages, 1884, Schedule.

(*i*) R. S. C., Ord. 56, r. 5. As to the payment of the costs occasioned by the adjournment, see *The Kepler* (1861), Lush. 201; *The Mellona* (1848), 3 W. Rob. 16.

(*j*) R. S. C., Ord. 56, r. 6. The fees to be paid to the official shorthand writer are as follows: For attending reference room, for each reference, £1 1*s.*; except where two ships having been held to blame and the opposing claims are examined on the same day, for each claim, £1 1*s.*

SECT. 6. References to Registrar etc.

Counsel may attend the hearing of any reference; and though at one time the allowance of counsel's fees on taxation was regarded as exceptional it is now the general rule (*k*).

Costs.

258. The Registrar may report whether any and what part of the costs of the reference should be allowed, and to whom (*l*). The allowance or disallowance of costs is wholly discretionary. They do not depend in any way on how the costs of the action are to be borne, but are in the discretion of the Court, as the costs of a new litigation (*m*).

Tender.

259. If a tender is made in a reference and is not accepted, the defendant, if the amount found due is less than such tender, is entitled to have the balance paid out to him (*n*).

SUB-SECT. 2.—*Registrar's Report and Objections thereto.*

Registrar's report.

260. As soon as possible after the hearing of the reference has been concluded the Registrar makes his report to the Court, stating his decision on the questions referred to him; and where the report is as to damages, it shows in a schedule in parallel columns the items claimed, and those allowed, and from what period interest at 4 per cent. until payment, allowed as part of the damages proceeded for, will run (*o*).

Where the case is important, or a point of law is raised, or there is likely to be an appeal to the Court, the Registrar, in addition to his formal report, will attach thereto a statement in writing of his reasons for his decision (*o*).

Case stated by Registrar.

The Registrar may state a special case for the opinion of the Court, either on any special point arising in the course of the proceeding at the reference, or as to the questions involved in the reference generally (*p*).

Filing report.

Notice is sent from the Registry to the parties when the report has been drawn up, and the solicitor for the claimant must, within six days from the time when he has received notice that the report is ready, take up and file the same in the Registry (*q*). If the solicitor for the claimant fails to take up and file the report, the adverse solicitor may take it up and file it, or may apply to the Court or a judge to have the claim dismissed with costs (*r*).

Confirmation by Court.

The Registrar's report should, strictly, be confirmed by the Court; but in practice this procedure is seldom required in ordinary cases, the parties agreeing to treat the report as a final decision.

(*k*) R. S. C., Ord. 56, r. 7.
(*l*) *Ibid.*, r. 8.
(*m*) *The Consett* (1880), 5 P. D. 77; *The Friedeberg* (1885), 10 P. D. 112.
(*n*) *The Mona*, [1894] P. 265.
(*o*) As to the payment of interest, see *Stoomvaart Maatschappy Nederland* v. *Peninsular and Oriental Steam Navigation Co.*, *The Khedive* (1882), 7 App. Cas. 795, at p. 803; *The Kong Magnus*, [1891] P. 223, in which last case interest would, in strictness, have run for eleven years.
(*p*) *The Parisian* (1887), 13 P. D. 16; *The John Bellamy* (1870), L. R. 3 A. & E. 129; *The Immacolata Concezione* (1883), 9 P. D. 37.
(*q*) R. S. C., Ord. 56, r. 9.
(*r*) *Ibid.*, r. 10.

The fees for a reference vary from £1 1*s.* to £15 15*s.* for each merchant and the Registry, according to the amount at stake and the time occupied. They are payable in advance from day to day as the reference proceeds, by the claimant in the first instance, a moiety being repayable to him if no order is made as to the costs of the reference (*s*). Fees.

261. Any party who objects to the report and desires to appeal therefrom must file in the Registry, within six days of the filing of the report, a notice of objection to the report (*t*). Objections may by consent be heard on motion (*a*). If the objecting party cannot obtain the consent of the adverse party to the objections being so heard, he must within a further period of twelve days file a petition in objection to the report (*t*). Notice of objection to report.

Where a petition in objection is filed, it is headed like the statement of claim in the action, and sets out in detail the matters in the report objected to and the grounds of objections, and prays the Court to reject the report so far as it is objected to or to modify and alter it. It must be delivered to the opposite party like any other pleading. The case of the adverse party in answer to the petition in objection is contained in his "answer," which must be filed and delivered within ten days of the filing and delivery of the petition in objection. Further pleadings in objection may, if the case requires, be filed and delivered. Petition in objection.

All the rules applicable to ordinary pleadings apply to pleadings in objection to a report (*b*).

262. Within ten days of the filing and delivering of the last of the pleadings in objection, the petitioner must bring in to the Registry printed copies of the "record" containing the pleadings, the evidence taken at the reference material to the objections, and the Registrar's report; and the same documents are required where the objections are heard on motion. A notice to have the appeal in objection to the report placed on the list for hearing has then to be filed in the Registry, and a Court fee of £2 paid (*c*). The petition will be heard by the judge in Court in ordinary course with other business on such day as may be appointed for it. Hearing of objection.

Where questions are involved in the petition on which it would be desirable to have the assistance of the Elder Brethren of the Trinity House, they may be summoned to attend on the hearing of the appeal (*d*). Trinity Masters.

Additional evidence may by the leave of the Court be given at the hearing of the petition, and that evidence may be either the Additional evidence.

(*s*) See Order as to Supreme Court Fees, 1884, Schedule, Nos. 84—87; *The Consett* (1880), 5 P. D. 77.

(*t*) R. S. C., Ord. 56, r. 11. A copy of the notice of objection must, before it is filed, be served on the adverse solicitor (*ibid.*). The time for filing the notice of objection under this rule may be extended (*The Thyatira* (1883), 32 W. R. 276, 279).

(*a*) See *The Edmond* (1861), Lush. 211.

(*b*) R. S. C., Ord. 56, r. 12; see pp. 94, *et seq.*, *ante*.

(*c*) Order as to Supreme Court Fees, 1884, Schedule, No. 52.

(*d*) See *The Pensher* (1857), Swa. 211, 213.

SECT. 6. References to Registrar etc.

evidence of witnesses examined orally in Court (*e*), or evidence on affidavit (*f*). Such additional evidence will not, however, be admitted unless the Court is satisfied that such evidence could not by proper diligence have been produced before the Registrar and merchants (*g*).

The Court attaches great weight to the experience of the Registrar and merchants, especially in mercantile matters, and will not interfere with their report unless fully convinced that they are in error (*h*).

Order on appeal.

263. Instead of merely allowing the appeal or varying the report, the Court may refer the report back to the Registrar and direct him to make a further report, either on the case generally, or on any special point (*i*).

District Registries.

264. The practice and procedure as above stated in regard to references to the Registrar and merchants in London actions, and appeals in objection thereto, are applicable to references heard in District Registries.

SECT. 7.—*Judgment in Contested Actions.*

Payment of money found due.

265. Where the amount of the liability of the defendants, or of plaintiffs against whom a counterclaim has been substantiated, is ascertained either by the report of the Registrar and merchants, or by the amount of the principal sum due being specified in the decree of the Court, the person entitled to receive the amount can, if the proceeds of a ship or cargo are in Court or their value has been paid into Court, on application in the Registry, obtain an order directing the amount found due to him to be paid to him, or on his written authority to his solicitor. In actions *in rem*, where bail has been put in, the person so entitled to receive the amount due may similarly obtain an order ordering the sureties to pay that amount on a day named if the defendants have not paid the amount due from them.

If there have been cross actions of damage in which both vessels have been held to blame, or actions where both claim and counterclaim have been pronounced for, the amount due will be the amount of the balance (if any) which is found due after the amounts due to the plaintiffs in the cross actions, or to the plaintiffs and defendants in cases where there are counterclaims, have been set off against each other (*k*).

Caveat payment.

266. It has already been stated that where for any reason a party wishes, by reason of any question of priority or otherwise, to prevent the Court ordering the payment out of money to any person, the person objecting may file in the Admiralty Registry a præcipe for

(*e*) See *The Newport* (1858), Swa. 317; *The Flying Fish* (1865), Br. & L. 436.
(*f*) *The Harmonides*, [1903] P. 1, at pp. 3, 5.
(*g*) *The Thuringia* (1871), 41 L. J. (ADM.) 20.
(*h*) See *The Clyde* (1856), Swa. 23.
(*i*) See *The Minnetonka*, [1904] P. 202, at p. 210
(*k*) See *Stoomvaart Maatschappy Nederland* v. *Peninsular and Oriental Steam Navigation Co., The Khedive* (1882), 7 App. Cas. 795.

a caveat payment, and thereupon a caveat against the payment of the money will be entered in a book kept in the Admiralty Registry, and whenever this has been done no order for payment of the money will be made either by the Court or a judge until notice has been given to the party on whose behalf the caveat has been entered (*l*). Moreover, when in any action before the Court questions of priority are likely to arise, and in all cases of judgment being pronounced in default actions, the practice is for the judgment to be without prejudice to other claims against the property and reserving all questions as to the priority of such claims (*m*).

Decree of possession.

267. Where in an action of possession the plaintiff's claim is pronounced for, possession of the vessel proceeded against will, if it has not been bailed, be decreed to the plaintiff, and on a præcipe for a decree of possession being filed (*n*) in the Admiralty Registry if the action is proceeding in London, or in the district registry where the action is proceeding, a decree of possession directed to the Admiralty Marshal or his substitute commanding the release of the vessel and her delivery to the plaintiff, or his attorney for him, will be issued out of the Registry. The decree must be left in the Admiralty Marshal's office in London actions, or with his substitute where the action is proceeding in a district registry, and after payment of the proper Court fee with the Marshal's charges for possession fees and other expenses (*o*), it will be executed by the delivery of the ship to the plaintiff or his attorney.

Sale where property proceeded against is under arrest.

268. Where in an action *in rem* the property is left under arrest until the decree is made, the defendant will of course, if the suit is dismissed, be entitled to have the property released from arrest, on taking the necessary steps (*p*). If, however, the plaintiff's claim is pronounced for it will be necessary to have the property sold by the Court in order that the claim may be paid off out of the proceeds.

Commission of appraisement and sale.

The order for sale will usually be made a part of the decree at the hearing, and in order to carry it out the solicitor for the plaintiffs must file in the registry where the action is proceeding a præcipe for a commission of appraisement and sale, and have it executed when issued, unless the Court or a judge shall otherwise order, by the Admiralty Marshal or his substitutes (*q*).

Conduct of sale.

Unless the Court otherwise orders, after the appraised value has been fixed, the property will be sold by auction by the broker of the Court at not less than such value. For good cause on application being made by the parties, the Court will sometimes direct the property to be put up for sale privately. After the property has been sold the Marshal or his substitute returns the commission of

(*l*) See pp. 91, 92, *ante*.
(*m*) See *The Africano*, [1894] P. 141, at p. 150.
(*n*) This must be stamped with a stamp of 15*s*. (Order as to Supreme Court Fees, 1884, Schedule, No. 13).
(*o*) See Order as to Supreme Court Fees, 1884, Schedule, Nos. 94, 98.
(*p*) See p. 88, *ante*.
(*q*) See R. S. C., Ord. 51, r. 14. See also p. 89, *ante*, where the practice in relation to a commission of appraisement is set out.

SECT. 7. Judgment in Contested Actions.

sale and appraisement into the Registry, together with a statement of the result of the sale, and an "account of sale" showing what items of expenditure have to be charged against the proceeds of the property. The Marshal also pays the gross proceeds of the sale into the Law Courts branch of the Bank of England in London actions (*r*), and any fees or expenses payable to the Marshal in respect of the sale are deducted from the gross proceeds of the sale and transferred to the Marshal's account in the Paymaster-General's books (*s*).

Taxation of Marshal's account of sale.

The account of sale brought into the Registry by the Marshal may be taxed by the Admiralty Registrar, if any party so desires, and any person interested in the proceeds may be heard before the Admiralty Registrar on the taxation. An objection to the taxation is heard in the same manner as an objection to the taxation of a solicitor's bill of costs (*t*).

Execution by *fi. fa.*

269. The ordinary remedies for enforcing a judgment in the High Court are applicable to Admiralty actions. Thus writs of *fieri facias* are issued when necessary both to recover the amount, including costs, due under the judgment in an action *in personam*, and the amount due in respect of costs under the judgment in an action *in rem* (*a*). It has also been held in an action of damage *in rem*, where an amount of bail was put in up to the full value of the *res*, but the defendants were condemned in damages greater than the amount of bail, that the plaintiffs were entitled to a writ of *fieri facias* to levy on the ship released on bail the balance of the damages unpaid over and above the amount of bail (*b*).

SECT. 8.—*Taxation of Costs.*

Taxation in the Registry.

270. The taxation of costs is, generally speaking, conducted in the same manner as in the Central Office (*c*). The bill for taxation

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(*r*) See R. S. C., Ord. 51, r. 15; Supreme Court Fund Rules (1905), r. 29.

(*s*) Order as to Fees, Dec. 19, 1896 (Statutory Rules and Orders for 1896, p. 585). The ordinary fees, which are for the most part paid by stamps impressed by the Marshal on the account of the sale, are:—

	£	s.	d.
On attending, appointing, and swearing appraisers	1	0	0
On delivering up a ship or goods to a purchaser agreeably to the inventory	1	0	0
On attending the delivery of cargo, or sale, or removal of a ship or goods, per day	2	0	0
On retaining posession of a ship, with or without cargo, or a ship's cargo without a ship, to include the cost of a ship-keeper, if required, per day	0	5	0

If the Marshal of any of his substitutes is required to go more than five miles from his office to perform any of these duties he is entitled to his reasonable travelling expenses, board and maintenance, in addition.

On the sale of any vessel or goods sold pursuant to a decree or order of the Court, for every £50 or fraction of £50 realised, 10*s*. (Order as to Supreme Court Fees, 1884, Schedule, Nos. 95—98, 100, 101.)

(*t*) R. S. C., Ord. 51, rr. 15, 16. See title PRACTICE AND PROCEDURE.

(*a*) The Court fees payable on the issue of writ of *fieri facias* out of the Registry are 5*s*. for the writ, and 15*s*. for the præcipe (Order as to Supreme Court Fees, 1884, Schedule, Nos. 6, 13).

(*b*) See *The Gemma*, [1899] P. 285.

(*c*) See generally, as to taxation of costs, title SOLICITORS.

must be filed in the Registry, and notice of taxation is then sent out by the assistant registrar, who is generally the taxing officer. A certificate is not usually required, unless a difficulty in obtaining payment of the costs is anticipated. In default actions notice is usually sent to the several claimants on the fund in Court, so that each party may have an opportunity of criticising the several bills.

SECT. 8. **Taxation of Costs.**

SECT. 9.—*Appeals to the Court of Appeal.*

271. Appeals from the decision of the judge sitting in Admiralty or from a Divisional Court of the Admiralty Division are to the Court of Appeal (*d*).

Where a party has either a right to appeal without leave, or has obtained leave to appeal, he, or his solicitor for him, must, after serving the adverse party or parties with notice of appeal (*e*), file a copy of such notice in the Admiralty Registry in London; the Admiralty Registrar, the assistant Admiralty registrar, and the clerks there, acting, in respect of all applications in relation to Admiralty appeals, as officers attached to the Court of Appeal (*f*). The copy of the notice of appeal so filed must be stamped with a stamp of £2 (*g*).

Filing of notice of appeal.

272. Where the action in which the appeal is made is an action *in rem*, it is not the usual practice for an appellant who has put in bail in the Court below, and so obtained there the release of the property proceeded against, to be required to give security for the costs of the appeal (*h*). Security for costs may, however, be ordered under special circumstances, and where the right to such security is plain it ought to be furnished without any application to the Court being required (*i*).

Security for costs.

273. In accordance with the practice which prevailed in Admiralty appeals before the Judicial Committee of the Privy Council, the oral evidence taken in the Admiralty Division in an Admiralty action is proved before the Court of Appeal by a transcript of the shorthand notes taken by the official shorthand writer, and the judgment of the Court below is proved by a copy of such judgment certified by the reporter of the Court below to be correct (*k*).

Evidence.

The transcript of the evidence and the certified judgment, together with copies of the pleadings in the action, of the minute of the decree appealed from and of the notice of appeal, as well as copies of any material affidavits or documents, are printed by the appellant under an order obtained on summons in the Admiralty Registry (*l*).

274. At the hearing of final appeals in Admiralty actions in which questions of nautical skill or knowledge are involved, the Court of

Nautical assessors.

(*d*) Supreme Court of Judicature Act, 1873 (36 & 37 Vict. c. 66), ss. 18, 19.
(*e*) R. S. C., Ord. 58, rr. 2, 3.
(*f*) See R. S. C., Ord. 60, r. 2.
(*g*) Order as to Supreme Court Fees, 1884, Schedule, No. 52.
(*h*) *The Victoria* (1876), 1 P. D. 280.
(*i*) R. S. C., Ord. 58, r. 15; *The Constantine* (1878), 4 P. D. 156.
(*k*) A fee of two guineas is payable to the reporter.
(*l*) R. S. C., Ord. 58, rr. 11, 12.

SECT. 9. Appeals to Court of Appeal.

Appeal is assisted by two nautical assessors (*m*). The hearing of appeals in which nautical assessors so attend takes place on days specially appointed for the purpose.

Interlocutory appeals from the Admiralty Division are usually heard or put down for hearing in order with the other business of that division of the Court of Appeal which has been appointed to hear Admiralty appeals.

Additional evidence.

275. The power of receiving additional evidence in its discretion in Admiralty appeals was transferred to the Court of Appeal together with the rest of the jurisdiction over such appeals formerly possessed by the Judicial Committee of the Privy Council (*n*).

When the Court of Appeal is assisted by nautical assessors it will not allow additional evidence to be called on matters of nautical knowledge and skill (*o*).

Where there has been a conflict of evidence in the Court below, the Court of Appeal must decide, as in other cases, whether the conclusion come to by the judge appealed from is the proper one, but will attach great weight to his view of the evidence owing to the fact that the witnesses were examined before him, and he saw their demeanour and manner of giving evidence (*p*).

Costs.

276. The costs of an appeal follow the event as a general rule; but there are certain rules of practice which are followed in cases to which they apply. Thus where both vessels are to blame each party usually bears his own costs of the action (*q*). Where, however, the plaintiffs in an action of damage in which their vessel has been found alone to blame appeal to the Court of Appeal, and, admitting that their vessel was to blame, seek only to have the decision of the Court below varied by both vessels being held to blame, the Court of Appeal, if it allows the appeal and pronounces both vessels to blame for the collision, will give the appellants the costs of the appeal, but direct that each party is to bear his own costs in the Court below (*r*).

The rule of practice that where the appellants succeed on the ground of compulsory pilotage no costs will be given, has been followed in the Court of Appeal (*s*).

Application for stay.

277. In the event of an appeal being contemplated to the House of Lords any application made for a stay of proceedings pending such appeal must be made in the Court of Appeal (*t*).

(*m*) A fee of £3 3*s*. per day is payable to each assessor for each appeal (see note (*d*), p. 101, *ante*).

(*n*) See *The Scindia* (1866), L. R. 1 P. C. 241; 3 & 4 Will. 4, c. 41; 6 & 7 Vict. c. 38; and see R. S. C., Ord. 58, r. 4.

(*o*) *The Assyrian* (1890), 6 Asp. M. L. C. 525.

(*p*) See *The Glannibanta* (1876), 1 P. D. 283; *The Sisters* (1876), 1 P. D. 117; *The Singapore and The Hebe* (1866), L. R. 1 P. C. 378.

(*q*) See *The Hector* (1883), 8 P. D., 218; *The Beryl* (1884), 9 P. D. 137, at p. 144.

(*r*) *The London*, [1905] P. 152.

(*s*) See *The Daoiz* (1877), 3 Asp. M. L. C. 177. As to the costs in inevitable accident cases, see *The Monkseaton* (1889), 14 P. D. 51; *The Batavier* (1889), 15 P. D. 37; *The Chaucer* (March 8, 1907), where no order was made as to the costs in the Court below.

(*t*) See *The Ratata*, [1897] P. 118, 131.

278. The Court of Appeal has power to refer any question arising in an appeal to the Admiralty Registrar or the Admiralty Registrar assisted by merchants (*u*), and may, if it allows the appeal, either retain the cause (*v*) or remit it, with or without directions, to the Court below (*w*). SECT. 9. Appeals to Court of Appeal. Reference to Registrar.

Part IV.—Jurisdiction and Practice of other Courts having Admiralty Jurisdiction.

SECT. 1.—*County Courts having Admiralty Jurisdiction.*

SUB-SECT. 1.—*Jurisdiction.*

279. An Admiralty jurisdiction of a limited character, conferred by statute and Orders in Council made thereunder, is exercised by certain county courts, including the City of London Court. Such Courts have jurisdiction over all cases of salvage of life or property where the value of the property saved, when first brought into safety by the salvors (*a*), does not exceed £1,000 (*b*), or the amount claimed does not exceed £300 (*b*), and over all cases of salvage, irrespective of value or amount, where the parties to the dispute agree to the jurisdiction (*b*). A county court having Admiralty jurisdiction may also determine a dispute as to the title to wreck as if it were a dispute as to salvage (*c*). In salvage cases. Wreck.

A county court having Admiralty jurisdiction may determine claims not exceeding £150 for towage or necessaries (*d*), and claims not exceeding £300 for damage to cargo or damage to a ship by collision or otherwise or for damage done by a ship in collision with another ship or a barge (*e*). Other cases

In respect of wages a county court having Admiralty jurisdiction can determine claims not exceeding £150, but claims for wages below £50 must be dealt with by a Court of summary jurisdiction except under special circumstances (*f*). Wages.

In any of the above classes of claims a county court having Admiralty jurisdiction has jurisdiction, irrespective of the amount claimed, where the parties so agree. By agreement.

(*u*) See Judicial Committee Act, 1833 (3 & 4 Will. 4, c. 41); Supreme Court of Judicature Acts, 1873 (36 & 37 Vict. c. 66), ss. 16, 18, and 1875 (38 & 39 Vict. c. 77), s. 21.

(*v*) See *The Flying Fish* (1865), Br. & L. 436.

(*w*) *Ibid.*, at p. 445; and see the special provision as to sale contained in s. 32 of the County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71).

(*a*) *The Stella* (1867), L. R. 1 A. & E. 340.

(*b*) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 547.

(*c*) *Ibid.*, s. 526.

(*d*) County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71), s. 3.

(*e*) *Ibid.*, s. 3, and County Courts Admiralty Jurisdiction Amendment Act, 1869 (32 & 33 Vict. c. 51), s. 4.

(*f*) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 165; as to what such circumstances are, see p. 70. *ante*.

SECT. 1. County Courts in Admiralty.

Nature of claims.

280. Claims for salvage, necessaries, towage, wages, and damage to cargo, must be of such a nature (within the statutory limits) that the Admiralty Court would have had jurisdiction to entertain them at the time when such powers were conferred on the county courts having Admiralty jurisdiction (*g*). The jurisdiction in damage causes exists when a ship has been damaged, whether the object causing the damage is a ship or not (*h*); but claims for damage done by a ship in collision with an object situate on land outside the ebb and flow of the tide or with a pier are not included (*i*). The Admiralty jurisdiction conferred upon the county court may be exercised either *in rem* or *in personam* (*k*).

Maritime jurisdiction over claims on charter-parties etc.

281. A county court having Admiralty jurisdiction has also jurisdiction over claims arising out of any agreement made in relation to the use or hire of any ship or the carriage of goods therein, and also as to any claim in tort in respect of goods carried in any ship, provided the amount claimed does not exceed £300 (*l*). This jurisdiction, which may be exercised *in rem* as well as *in personam*, was not possessed by the High Court of Admiralty, and is not now possessed as an original jurisdiction by the Admiralty Division (*m*).

As already mentioned, an appeal lies to a Divisional Court of the Admiralty Division (*n*).

County courts appointed to have Admiralty jurisdiction within certain districts (*o*) (among which the City of London Court is included) have thus a statutory jurisdiction in certain maritime causes in regard to charterparties and bills of lading (*p*). They have also the same jurisdiction with regard to the forfeiture of dangerous goods as is possessed by the Admiralty Division (*q*).

(*g*) *Everard* v. *Kendall* (1870), L. R. 5 C. P. 428; *Purkis* v. *Flower* (1873), L. R. 9 Q. B. 114; *The Hyemmett* (1880), 5 P. D. 227 (towage); *Allen* v. *Garbutt* (1880), 6 Q. B. D. 165 (necessaries); *Wells* v. *Gas Float Whitton No. 2*, [1897] A. C. 337 (salvage). Consequently a claim *in personam* against a pilot for negligence causing a collision is not within the jurisdiction of a county court having Admiralty jurisdiction. See *R.* v. *Judge of City of London Court*, [1892] 1 Q. B. 273.

(*h*) *Mersey Docks and Harbour Board* v. *Turner, The Zeta*, [1893] A. C. 468; and see *The Warwick* (1890), 15 P. D. 189.

(*i*) County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71), s. 3, and County Courts Admiralty Jurisdiction Act, 1869 (32 & 33 Vict. c. 51), s. 4. *Robson* v. *The Owner of the Kate* (1888), 21 Q. B. D. 13 (damage to a pile-driving machine on bank of river); *The Normandy*, [1904] P. 187 (damage to a pier).

(*k*) County Courts Admiralty Jurisdiction Act, 1869 (32 & 33 Vict. c. 51), s. 3.

(*l*) *Ibid.*, s. 2. An action for commission on a charterparty is not within the jurisdiction conferred by this section (*The Nuova Raffaelina* (1871), L. R. 3 A. & E. 483). For illustrations of other matters not within this jurisdiction, see *The Zeus* (1888), 13 P. D. 188 (demurrage on shipping of coal); *R.* v. *Judge of City of London Court* (1883), 12 Q. B. D. 115 (loss of passenger's luggage).

(*m*) *The Alina* (1880), 5 Ex. D. 227. See also *The Cheapside*, [1904] P. 339, 343.

(*n*) County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71), s. 26. See p. 112, *ante*.

(*o*) *Ibid.*, s. 2. The County Courts Admiralty Jurisdiction Order in Council, 1899, enumerates the county courts upon which an Admiralty jurisdiction has been conferred, and defines the limits of their districts for Admiralty purposes.

(*p*) County Courts Admiralty Jurisdiction Amendment Act, 1869 (32 & 33 Vict. c. 51), s. 2.

(*q*) See p. 78, *ante*.

SECT. 1. County Courts in Admiralty.

Actions *in personam* for damage sustained in a collision between vessels and for claims under £300 in respect of the use or hire of ships or the carriage of goods (*r*) may be brought on the common law side of any county court, whether having Admiralty jurisdiction or not (*s*), provided the claims are within the amounts to which the jurisdiction of the court is limited (*t*).

SUB-SECT. 2.—*Practice and Procedure* (*u*).

Court in which action is commenced.

282. Proceedings are commenced in the county court having Admiralty jurisdiction within the district in which the vessel or property to which the cause relates is at the commencement of the proceedings (*a*). Failing the possibility of applying this rule, that Court has jurisdiction in the district of which the owner of the vessel or property to which the cause relates or his agent in England resides, or, in the alternative, that Court the district of which is nearest to such place of residence (*b*). The extension of the county court jurisdiction to entertain actions in regard to charterparties and bills of lading (*c*) does not affect the application of these principles as to the Courts in which actions are to be commenced (*d*). Where the vessel or property in question is at sea, the second of the above-mentioned provisions is applicable, notwithstanding the fact that the owners thereof are plaintiffs in the action (*e*).

The general provision enabling a plaintiff to commence an action in the district where the defendant dwells or carries on business is applicable to Admiralty actions (*f*). In any case the parties

(*r*) County Courts Admiralty Jurisdiction Amendment Act, 1869 (32 & 33 Vict. c. 51), s. 2.

(*s*) Notwithstanding sect. 5 of the County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71).

(*t*) *R.* v. *Judge of Southend County Court* (1884), 13 Q. B. D. 142; *Scovell* v. *Bevan* (1887), 19 Q. B. D. 428. The county courts have jurisdiction on their common law side in respect of the arrest of foreign ships causing damage to property, claims for wages etc., and the arrest of a ship for personal injuries caused by the owner's negligence (see p. 71, *ante*). Moreover the judge of a county court may be summoned to preside over a court of survey (Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 487; see title SHIPPING AND NAVIGATION, as to courts of survey); and he, and not his court, has jurisdiction in appeals against pilotage bye-laws (see title SHIPPING AND NAVIGATION).

(*u*) The practice and procedure is regulated by general orders made under the County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71), s. 35. The references throughout this section to rules and forms are to the County Court Rules and Forms, 1903—1906, except where otherwise indicated.

(*a*) County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71), s. 21 (1).

(*b*) 31 & 32 Vict. c. 71, s. 21 (2). "Agent in England" means a person acting for another person in relation to the vessel or property proceeded against at the time of service of process (*The City of Agra*, [1896] P. 198).

(*c*) County Courts Admiralty Jurisdiction Amendment Act, 1869 (32 & 33 Vict. c. 51), s. 2.

(*d*) *The County of Durham*, [1891] P. 1.

(*e*) *Pugsley* v. *Ropkins*, [1892] 2 Q. B. 184; *The County of Durham*, *supra*.

(*f*) County Courts Act, 1888 (51 & 52 Vict. c. 43) s. 74; *The Hero*, [1891] P. 294.

SECT. 1. County Courts in Admiralty.

may consent in writing that any county court having Admiralty jurisdiction shall have jurisdiction in that case (*g*).

Præcipe.

283. To institute an Admiralty action the plaintiff must file a præcipe stating the nature of the action, and, where practicable, his name, address, and description and the name of the defendant or vessel or property against whom or which he proceeds. With the præcipe he must file particulars of his claim, with necessary copies. Where a solicitor is employed his name and address for service are necessary in the præcipe, and he must sign the particulars (*h*). When it is not practicable at the time of filing to state the name of the plaintiff he may be described as "owner of the ship or vessel" (*i*). In an Admiralty action for wages against the owners of a foreign vessel notice of action must be given to the consul or vice-consul of the state to which the ship belongs, if there is one resident within the district of the Court, and a copy of the notice must be annexed to the præcipe (*j*).

Summons.

284. The præcipe and particulars being duly filed, the Registrar at once enters a plaint and issues a summons, the particulars forming part of the summons (*k*).

Warrant of arrest.

285. Where it is shown by evidence on affidavit (*l*) to the satisfaction of the judge, or, in his absence, the Registrar (*m*), that it is probable that any vessel or property to which the cause relates will be removed out of the jurisdiction of the Court before the plaintiff's claim (or the defendant's counterclaim) is satisfied, the judge, or the Registrar, may issue a warrant for the arrest and detention of the vessel or property unless or until bail sufficient to satisfy the claim and costs be entered into and perfected, according to general orders, by the owner, his agent, or other person defendant in the cause (*n*).

Service of summons and warrant.

286. The service of the summons and warrant is effected by the bailiff of the Court where a solicitor is not employed, but otherwise in the same manner as a warrant of arrest is served in the High Court, and if necessary on a Sunday or at nighttime (*o*). Personal service is necessary upon an agent in England (*p*) of the owner unless substituted service is allowed upon affidavit (*q*). A warrant of arrest directed to the high bailiff of a county court and others the bailiffs thereof cannot be served

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(*g*) County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71), s. 21 (4).
(*h*) County Court Rules, 1903—1906, Ord. 39, rr. 4, 9, form 368.
(*i*) Ord. 39, r. 5.
(*j*) Ord. 39, r. 8.
(*k*) Ord. 39, r. 10. For forms of summons, see County Court Forms, Nos. 370, 371.
(*l*) Ord. 39, r. 11.
(*m*) See Ord. 55, as to interpretation of the term "Court."
(*n*) County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c 71), s. 22; Ord. 39, rr. 11—14, form 372.
(*o*) See p. 85, *ante*; Ord. 39, rr. 15—17.
(*p*) See p. 137, *post*.
(*q*) Ord. 39, r. 18.

by a clerk in the high bailiff's office not authorised by the Court to execute warrants (*r*).

Where a solicitor is employed and agrees to accept service and appear and put in bail, delivery to him of the summons or warrant is sufficient (*s*).

Vessel already under arrest.

Where a vessel is already under the arrest of the High Court, it is unnecessary, so long as the vessel remains under such arrest, for the county court officer to incur possession fees by placing a person in possession, and a double set of such fees will not be allowed (*t*).

Appearance.

287. A defendant desiring to enter an appearance must file a præcipe containing where practicable the name, address, and description of the party, or parties where there are several defendants, appearing, or where not practicable a statement that the "owners" or the "defendant" are appearing, and where a solicitor is employed, an address for service must be given (*u*).

Intervening.

Any person not named in a summons may intervene in an action *in rem* on filing an affidavit of interest, and if necessary the intervener may apply for a transfer to the High Court (*w*). A defendant may appear at any time before final judgment (*x*).

Notice of appearance.

Notice of appearance must be given by the defendant to the plaintiff, and in the case of an intervener to all other parties who have appeared (*a*). The same rules apply to appearance upon the arrest of any vessel or property (*b*).

Proceedings in default of appearance.

288. Where no appearance has been entered within the time limited by the summons, if the claim is for salvage or towage and is not for damages or a liquidated sum, the plaintiff may on affidavit of service set down the action for hearing in the ordinary course, or, on application, upon a special day appointed (*c*). In any other case, the plaintiff may sign final judgment for a liquidated claim or interlocutory judgment for damages to be assessed by the Registrar, with costs to be taxed in either case (*d*).

Bail.

289. Bail may be taken before the Registrar or before a commissioner for oaths who or whose partner is not acting as solicitor for the party on whose behalf the bail is to be taken; in every case the sureties must justify, unless the adverse party by notice in writing dispenses with affidavits of justification (*e*). The bail

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(*r*) *The Palomares* (1885), 10 P. D. 36.
(*s*) County Court Rules, 1903—1906, Ord. 39, r. 6; Ord. 7, r. 12.
(*t*) *The Rio Lima* (1873), L. R. 4 A. & E. 157; and see *The Turliani* (1874), 32 L. T. 841, 843.
(*u*) Ord. 39, rr. 19—21, 25. For form of præcipe, see County Court Forms, No. 374.
(*w*) Ord. 39, r. 22.
(*x*) Ord. 39, r. 26.
(*a*) Ord. 39, r. 24; form 374A; Ord. 54, rr. 2—4.
(*b*) Ord. 39, r. 23.
(*c*) Ord. 39, r. 36.
(*d*) Ord. 39, r. 36; forms 375, 395, 397.
(*e*) Ord. 39, rr. 37, 38; form 377. As to affidavits of justification, see p. 90, *ante*.

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bond and affidavits of justification in proper form (*f*) must be prepared by the party giving bail (*g*).

Procedure on taking bail.

290. If bail is to be taken before the Registrar, the party giving bail must serve before six o'clock on the day before the day appointed for giving bail on the party requiring bail a notice on a form sent to the party giving bail by the Registrar, containing the names and addresses of the sureties and the time appointed (*h*). If bail is taken before a commissioner, notice of such bail must be given and an affidavit of service in proper form filed; but the property cannot be released without consent until the expiration of twenty-four hours from such service (*i*), nor can the property be released after that time if within that time the party requiring bail has given notice to the other party and the Registrar that he requires to cross-examine the sureties as to their means (*k*). On receipt of this notice the Registrar appoints a time for cross-examination on forty-eight hours' notice to all parties, and decides as to the sufficiency of the bail; the costs of an attendance at an appointment for cross-examination made without sufficient cause, and the expense of detaining the property kept under arrest in consequence of the notice, may in the discretion of the Registrar fall on the party requiring the attendance (*l*).

Release of property.

291. Payment into Court of the amount claimed with costs, or completion of the bail, and payment of the bailiff's charges, entitles the defendant to an order for release (*m*). In an action for salvage, however, the property cannot be released except by consent of the plaintiff until the value thereof has been agreed or stated in an affidavit of value by the party seeking the release (*n*). A plaintiff wishing to dispute the affidavit of value may apply by præcipe for an appraisement, the costs of which are in the discretion of the judge, but unless he applies for an appraisement he may not dispute the value sworn to, except by leave of the judge for good cause (*o*).

Cargo arrested for freight only may be released on an affidavit of value as to the value of the freight being filed and payment into Court of the amount of the freight being made or proof given that such amount has already been paid (*p*).

Costs and commission.

292. Costs properly incurred by any party in respect of instructions for bail, preparation and execution of the bail bond and affidavits of justification, and any notices, perusals and attendances in relation to bail, may be allowed on taxation, not exceeding the

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(*f*) County Court Rules and Forms, 1903—1906, forms 377, 378.
(*g*) Ord. 39, r. 39.
(*h*) Ord. 39, r. 40.
(*i*) Ord. 39, r. 41; forms 379, 380.
(*k*) Ord. 39, r. 42; form 381.
(*l*) Ord. 39, rr. 43, 44.
(*m*) Ord. 39, r. 45; form 384.
(*n*) Ord. 39, r. 46.
(*o*) Ord. 39, r. 47; *The Argo*, [1895] P. 33; form 383.
(*p*) Ord. 39, r. 48.

amounts allowed under the scale of costs in proceedings of a like nature (*q*). A commission or fee paid to a surety to a bail bond, or to a person otherwise giving security not exceeding in the aggregate one per cent. on the amount of the bail, is also recoverable on taxation (*r*).

Statement of claim.

293. At the time of entering appearance or within seven days thereafter, the defendant may give written notice requiring a statement of claim, and the plaintiff must within ten days after such notice, or within such further time as the Court allows, deliver a statement of claim (*s*).

Defence.

294. A defendant not requiring a statement of claim may either within ten days after appearance file and deliver his defence or give notice that he does not intend to do so, and thereupon either party may set down the action for hearing (*t*). In the ordinary course, the defence and set-off or counterclaim (if any) follow ten days after the statement of claim, and the reply six days after the defence (*u*).

Subject to these rules, the Rules of the Supreme Court as to pleadings and amendments of pleadings apply with necessary modifications to pleadings in the county court (*x*).

Preliminary act.

295. In actions for damage by collision between vessels where the amount claimed exceeds £20, a preliminary act, unless otherwise ordered, is filed by each party (*a*). The contents of the preliminary act and the rules applicable thereto are the same in the High Court and the county court (*b*), with the exception that in the county court the plaintiff must in addition allege what acts of negligence or breaches of navigation rules were committed by the defendant, and the defendant must allege the name of any vessel other than the plaintiff's which he alleges caused the collision or damage or with reference to which the persons in charge of the defendant's vessel acted (*c*). Where preliminary acts are required, the action is tried without pleadings unless the Court otherwise orders (*d*). In such case, where the defence of compulsory pilotage is raised by either party, the defendant must give notice of the same within the time allowed for delivery of his set-off or counterclaim, and the plaintiff within six days from such delivery (*e*).

Interrogatories.

296. Leave to administer interrogatories will not be granted where the information required is substantially covered by the pleadings or preliminary acts unless the Court considers the same necessary (*f*).

(*q*) County Court Rules, 1903—1906, Ord. 39, r. 48A.
(*r*) Ord. 39, r. 49.
(*s*) Ord. 39, r. 27.
(*t*) Ord. 39, r. 28.
(*u*) Ord. 39, rr. 29, 30.
(*x*) Ord. 39, r. 31; and see *ante*, p. 94
(*a*) Ord. 39, r. 32. As to obtaining copies of the preliminary acts after the pleadings are closed, see Ord. 39, r. 32 (2).
(*b*) See *ante*, p. 93; R. S. C., Ord. 19, r. 28.
(*c*) Ord. 39, r. 32 (1).
(*d*) Ord. 39 r. 32 (3).
(*e*) *Ibid.*
(*f*) Ord. 39, r. 33.

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Setting down.

297. The action is set down for hearing on the close of the pleadings, on the application of either party, to come on upon an ordinary day of sitting or on a special day appointed, and the Registrar gives notice of such day to both parties (*g*).

Default of pleading.

298. In case of default of pleading (including default of filing a preliminary act), the action may be dismissed for want of prosecution (*h*).

Consolidation.

299. The Court may on application by any party on notice to all other parties make an order to consolidate actions and give all necessary directions (*i*).

Admission of liability.

300. The defendant may at any time after appearance, and the plaintiff may at any time after the filing of a counterclaim, admit liability in any action except an action for salvage (*k*). The admission must be in proper form and signed by the solicitor for the party, or signed by the party in person, attested by a solicitor, and notice must be given of the admission to all parties (*l*).

Tender and payment into Court.

301. A party relying upon a tender must give notice of tender to the adverse party in proper form and deliver a præcipe with a copy thereof for the opposite party, and pay the amount tendered into Court. The præcipe should state whether the tender is made in respect of the whole or what part of the claim, the amount paid for costs (if any), the fact that liability is denied, and notice of defence on the ground of tender made before action, if either of these is alleged (*m*). Within twenty-four hours the Registrar must send notice of the payment into Court to the adverse party, and within forty-eight hours after the receipt of the notice the adverse party must serve notice accepting or rejecting the tender, failure to do so implying rejection (*n*).

Acceptance of tender.

302. Where a party accepts a tender (*o*) of the whole amount claimed he can take the same out of Court, unless the tender was accompanied by a notice of defence on the ground of tender before action brought, and he is entitled to his costs to be taxed and enforced where the tender is made without costs. Where the payment into Court is made with costs he may accept the sum so paid or tax his costs at his option, but in the latter case, should the amount paid prove less than the amount of the taxed costs, he is

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(*g*) County Court Rules, 1903—1906, Ord. 39, r. 35.
(*h*) Ord. 39, r. 34.
(*i*) See p. 92, *ante;* Ord. 39, r. 53A.
(*k*) Ord. 39, r. 93.
(*l*) Ord. 39, rr. 93, 94; form 390.
(*m*) Ord. 39, r. 74; form 387. A tender in the High Court of Admiralty never imported a denial of liability; see *The Chiltonford*, [1901] W. N. 48. The provisions of the rules (73—80) of Ord. 39 as to a denial of liability would seem to refer, not to a tender by act in Court, but to a payment into Court in salvage actions such as can now be made under R. S. C., Ord. 22, r. 1 (see p. 96, *ante*).
(*n*) Ord. 39, rr. 75, 76; forms 388, 389.
(*o*) *I.e.*, a payment into Court; see note (*m*), *supra*.

entitled to an order for the balance, and where the amount is more than the taxed costs the balance must be paid to the party making the tender (*p*).

A party may accept a tender of part of the claim, and is entitled, unless the tender is coupled with a notice of defence on the ground of tender before action brought, to costs in respect of the amount up to the date of notice and acceptance, but the amount cannot be paid out nor the costs taxed until after the disposal of the action, and is subject to a set-off for any costs awarded to the party making the tender (*q*).

Defence on ground of tender before action.

303. Where notice of defence on the ground of tender before action brought accompanies the tender and the tender is accepted, an order of the Court is necessary for payment out, which will also deal with any costs or set-off for costs allowed to the party making the tender (*r*).

Payment into Court with denial of liability.

304. Where a tender (*s*) is made with a denial of liability the adverse party may accept the same at any time before the action is called on, subject to a liability for reasonable costs incurred by his delay (*t*). In any other case the usual rules of the Supreme Court as to costs on payment into Court with denial of liability apply (*u*).

Offer to pay costs.

A defendant on making a tender should state in his notice on what scale he is prepared to pay costs, as otherwise he may be liable, in the event of acceptance and in the absence of a special order by the judge, to pay costs on a scale higher than that which would have been applicable if the suit had been tried out (*a*).

Payment out of Court.

305. Money in Court may be paid out to the solicitor on the record without the production of a power of attorney from the party entitled to receive the money, unless the judge otherwise orders (*b*). The proceeds of the sale of a vessel, where there are several actions pending against the proceeds, must be retained in Court to abide the decision of all the actions, unless the judge otherwise orders (*c*).

Hearing.

306. The action is heard in the ordinary course at one of the usual sittings of the Court, but it may be heard at some other place upon the application of either party on an undertaking to provide for the expenses of such hearing (*d*). In cases of urgency a special

(*p*) County Court Rules, 1903—1906, Ord. 39, r. 77.
(*q*) Ord. 39, r. 78.
(*r*) Ord. 39, r. 79.
(*s*) *I.e.*, a payment into Court; see note (*m*), p. 134, *ante*.
(*t*) Ord. 39, r. 80.
(*u*) See title PRACTICE AND PROCEDURE.
(*a*) See *The Skudenaes* (1901), 70 L. J. (P.) 64.
(*b*) Ord. 39, r. 81.
(*c*) Ord. 39, r. 82.
(*d*) County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71), s. 10, Ord. 39, rr. 1—3. For forms of undertaking, see County Court Forms, No. 373.

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day for trial may be appointed (*e*). The action will be heard by the judge alone or by the judge assisted by assessors, and there is no power to summon a jury to try the action (*f*). The case is heard and determined according to the ordinary rules of procedure of the county court (*g*).

Nautical assessors.

In actions of salvage, towage, or damage, the judge may in his discretion, or at the request of either party, be assisted by two nautical assessors, as in the High Court (*h*). A list of suitable persons to act as assessors is framed by the Registrar after the persons included have been approved by the President of the Admiralty Division. The assessors are summoned by the Registrar (*i*). Attendance is by rotation, subject to a penalty of five pounds for wilful non-attendance (*k*).

Summoning of assessors.

The party requiring the presence of assessors must deliver a præcipe to that effect and at the same time pay to the Registrar as remuneration for each assessor the sum of one guinea or two guineas, according as the amount claimed in the action does not or does exceed £100, and the same fees are payable for each day's attendance. Where assessors are summoned by the Court or in case of adjournment the assessors' fees are payable by the plaintiff (*l*).

Mercantile assessors.

307. In any Admiralty or maritime cause the judge may in his discretion, or on the request of either party, be assisted by two mercantile assessors; and all the provisions set out above apply to such assessors (*m*).

Assessment of damages.

308. In all cases except salvage the judge may decide the rights of the parties and refer the question of damages to the Registrar, or to the Registrar and assessors, upon a day appointed by the Registrar on four days' notice to all parties (*n*), subject to a right of adjournment by him (*o*). Evidence may be oral or by affidavit, where necessary, subject to a right of cross-examination upon the affidavits (*p*).

Registrar's report.

309. The Registrar on conclusion of the reference makes a report with an order as to costs, which within seven days after notice of the same may be objected to by either party, and the Registrar within seven days of notice of objection may file a statement of

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(*e*) County Court Rules, 1903—1906, Ord. 39, r. 3.

(*f*) County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71), s. 10; *The Theodora*, [1897] P. 279; *The Tynwald*, [1895] P. 142.

(*g*) County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71), s. 10; County Court Rules, Ord. 22. It appears that the order of speeches will follow this rule. Evidence will follow the practice of the Admiralty Division. See p. 102, *ante*.

(*h*) County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71), ss. 10, 11.

(*i*) Ord. 39, rr. 89—91, Form of Summons No. 393.

(*k*) County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71), ss. 14, 15.

(*l*) Ord. 39, rr. 88, 92.

(*m*) County Courts Admiralty Jurisdiction Act, 1869 (32 & 33 Vict. c. 51), s. 5.

(*n*) Ord. 39, rr. 96, 98; form 398.

(*o*) Ord. 39, r. 99.

(*p*) Ord. 39, r. 100.

his reasons in support, the whole matter coming before the judge by way of appeal. The judge may refer the matter back to the Registrar or finally decide the same, and has a discretion as to the costs (*q*). Before the hearing the parties in any action, except an action of salvage, may agree to an assessment of damages in the manner stated above (*r*).

Enforcement of judgment.

310. Generally speaking, decrees of the county court in an Admiralty cause are enforceable by the ordinary methods of execution in use in the county court (*s*), except in the case of a judgment *in rem*, where, if the vessel has been released, judgment may be enforced against the parties giving bail or their sureties or against the amount paid into Court (*t*). A note of every judgment must be registered with the Registrar of County Court Judgments in London in accordance with the usual practice (*a*).

Sale of property under arrest.

311. Where the vessel or property is under arrest the Court may by judgment or order, subject to conditions hereinafter set out, order a sale of the same (*b*). The owner may on security for costs in £10 apply for a transfer of the sale to the High Court of Admiralty, in which case the high bailiff shall retain possession of the vessel or property until possession is transferred to the Admiralty Marshal by order of the High Court; all powers and authorities with regard to the same will thereafter vest in the High Court (*c*).

Sale where owners known.

Where at the time of judgment the owners of the vessel or property are known, the vessel or property may be arrested or kept under arrest (*d*), and may be sold with or without notice; provided that in the case of a British-owned vessel any persons on the ship's register having an interest in the vessel, who are not before the Court, are entitled to service of notice of the judgment by præcipe and to appear within seven days of such notice in order to contest the sale by applying for a rehearing (*e*).

Where owners unknown.

Where at the time of the judgment the owners are unknown, the vessel or property may not be sold, but it may be arrested or kept under arrest (*d*). Where they can be ascertained subsequently, personal service of notice of the judgment, or substituted service on affidavit that it is necessary, must be effected on the owners, and in the case of a British-owned ship on any persons

(*q*) County Court Rules, 1903—1906, Ord. 39, rr. 101—104; forms 399, 400.

(*r*) Ord. 39, r. 95.

(*s*) County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71), ss. 12, 23; Ord. 39, r. 54. For form of judgment *in personam*, see form 395; for form of judgment *in rem*, see form 396. Ordinarily execution is levied under and in the manner described by the County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 146, and Ord. 25, rr. 1—25, of the County Court Rules, 1903—1906.

(*t*) Ord. 39, r. 55. See forms 402, 403.

(*a*) County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71), s. 24; County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 183; Ord. 36, r. 2, of the County Court Rules.

(*b*) Ord. 39, r. 56.

(*c*) County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71), s. 23; Ord. 39, rr. 70—72.

(*d*) County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71), s. 22; Ord. 39, rr. 57, 58.

(*e*) Ord. 39, rr. 57, 62; forms 404, 405, 410.

SECT. 1. County Courts in Admiralty.

on the ship's register having an interest in the vessel, on the same conditions as those stated above (*f*).

Where the owners cannot be ascertained a notice must be given by advertisement, or otherwise as ordered by the Court, and within not less than ten clear days from receiving the notice the owners or persons interested may appear and apply for a rehearing (*g*).

In all the above cases, in default of appearance within the time limited by the notice, a sale may be ordered by the Court (*h*).

Appraisement.

312. On an order of sale being made a warrant of execution is issued (*i*), and under such warrant the high bailiff must employ an appraiser to make an inventory and valuation of the vessel, which may not be sold, except by order of the Court, at less than the appraised value (*k*). The appraiser is paid by prescribed fees, or, in default of any remuneration being so prescribed, is allowed 10*s*. per cent. of the appraised value and a reasonable sum for travelling expenses and maintenance (*l*).

Conduct of sale.

313. The high bailiff must pay the proceeds into Court with an account of the sale and a certificate of the appraiser, and any person interested in the proceeds may object to the account or the fees paid in the same manner as an objection is heard on taxation of costs (*m*). The property is delivered to the purchaser, and any costs incurred by the plaintiff in the execution are recoverable on taxation against the vessel or property (*n*).

Costs

314. Costs are generally in the discretion of the Court (*o*), which is exercised in Admiralty actions in accordance with the same principles as are applied in Admiralty actions in the Admiralty Division (*p*). The costs of all necessary correspondence (*q*), and also of a solicitor necessarily acting as agent out of the district to obtain evidence, are to be allowed (*r*). An adjournment due to the neglect of a party to set up a defence of which notice should have been given before trial must be considered by the judge in his discretion as to costs (*s*). Where the amount recovered, or in the case of the defendant the amount claimed, does not exceed twenty pounds, costs, in the absence of a special order, are allowed under column B of the scale of costs (*t*). Where the amount in dispute exceeds £100, and the judge certifies that the action involved some novel or difficult

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(*f*) County Court Rules, 1903—1906, Ord. 39, rr. 59, 60.
(*g*) Ord. 39, r. 61; forms 408, 409.
(*h*) Ord. 39, r. 63.
(*i*) Ord. 39, r. 64.
(*k*) Ord. 39, r. 65.
(*l*) Treasury Order, December 30, 1903, Schedule B, Part III., 46, printed in Statutory Rules and Orders for 1903, at pp. 1409—1412.
(*m*) Ord. 39, rr. 66, 67.
(*n*) Ord. 39, rr. 68, 69.
(*o*) County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 113. As to costs where a tender by act in Court has been accepted or pronounced for, see p. 96, *ante*.
(*p*) See p. 103, *ante*.
(*q*) Ord. 39, r. 109.
(*r*) Ord. 39, r. 110.
(*s*) Ord. 39, r. 111, *e.g.*, the defence of compulsory pilotage.
(*t*) Ord. 39, r. 112; and see County Court Scales of Costs.

point of law or was of importance to some class or body of persons, increased costs may be allowed by the Registrar subject to review by the judge (*u*). Costs incident to procuring bail properly incurred may, as stated above, be allowed on taxation on the scale applicable to proceedings of a like nature (*a*). After a notice of admission of liability no costs shall be allowed to any party served with notice thereof who further contests the question of liability (*b*).

SECT. 2.—*The Court of Admiralty of the Cinque Ports.*

Jurisdiction.

315. The Court of Admiralty of the Cinque Ports can exercise within the boundaries of the Cinque Ports (*c*) the same inherent jurisdiction as the High Court of Admiralty possessed before the recent statutes enlarging its jurisdiction (*d*). The Court has also an additional statutory jurisdiction as to salvage disputes within the same boundaries on appeal (*e*), concurrently with the Admiralty Division of the High Court of Justice, from the Salvage Commissioners of the Cinque Ports (*f*); and it may also in all cases which arise within the jurisdiction of the Cinque Ports (*g*) entertain appeals from county courts having Admiralty jurisdiction, concurrently with the Admiralty Division of the High Court of Justice.

Appellate jurisdiction.

Procedure.

316. The Court, in the absence of the consent of the parties, sits in St. James's Church, at Dover (*h*), and rules and orders for regulating its procedure and practice were made in 1891, and are now in force, and are in substance very similar in many respects to the Rules of the Supreme Court especially applicable to the Admiralty Division (*i*).

Appeal.

317. From the Court of Admiralty of the Cinque Ports an appeal lies to the King in Council, and any such appeal would be referred to the Judicial Committee of the Privy Council (*k*).

SECT. 3.—*The Cinque Ports Salvage Commissioners.*

318. The Cinque Ports Salvage Commissioners are appointed by the Lord Warden of the Cinque Ports (*l*), or by the Deputy Warden of the Cinque Ports and the Lieutenant of Dover Castle (*m*), and

(*u*) County Court Rules, 1903—1906, Ord. 39, r. 113; and see County Court Scales of Costs.
(*a*) Ord. 39, rr. 48A, 49; see p. 132, *ante*.
(*b*) Ord. 39, r. 94.
(*c*) Cinque Ports Act, 1821 (1 & 2 Geo. 4, c. 76), s. 18.
(*d*) County Courts Admiralty Jurisdiction Act, 1869 (32 & 33 Vict. c. 51), s. 1; Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 571; *The Lord Warden and Admiral of the Cinque Ports* v. *The King in his Office of Admiralty* (1831), 2 Hag. Adm. 438.
(*e*) Cinque Ports Act, 1821 (1 & 2 Geo. 4, c. 76), s. 4.
(*f*) See sect. 3, on this page.
(*g*) County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71), s. 33.
(*h*) See Hasted, "History of Kent," Vol. IV., p. 118.
(*i*) They are to be found printed, Statutory Rules and Orders, 1896, p. 609.
(*k*) See, for an instance of such an appeal, *Gann* v. *Brun, The Clarisse* (1856), 12 Moo. P. C. C. 340.
(*l*) Cinque Ports Act, 1821 (1 & 2 Geo. 4, c. 76).
(*m*) 9 Geo. 4, c. 37, s. 1.

SECT. 3. The Cinque Ports Salvage Commissioners.

perform similar duties with respect to disputes as to salvage occurring within the boundaries of the Cinque Ports as were performed with respect to such disputes elsewhere in England by magistrates under the eighth part of the repealed Merchant Shipping Act, 1854 (*n*).

Jurisdiction.

319. The principal statute under which these commissioners are appointed defines the boundaries of the Cinque Ports to seawards and on the coast (*o*), and enables the commissioners to determine questions arising as to the salvage of anchors and chain cables found at sea or supplied to ships, and as to salvage services rendered generally to ships within the jurisdiction of the Cinque Ports, and to goods which have been wrecked or stranded within that jurisdiction, provided the master or owner of the salved ship or the owners of the goods salved, or his or their agents, are present (*p*).

Appeal.

320. An appeal from the determination by the commissioners of any salvage disputes may within eight days after the award of salvage is made be brought either to the Court of Admiralty of the Cinque Ports or to the Admiralty Division of the High Court of Justice (*q*). The appeal is to be proceeded with within twenty days, and the property in respect of the salving of which the award was made may be released on security being given in double the amount of the award (*r*).

SECT. 4.—*The Court of Passage of the Borough of Liverpool.*

Jurisdiction.

321. The Liverpool Court of Passage has an Admiralty jurisdiction similar to and coterminous with that of the County Court of Lancashire at Liverpool (*s*). An appeal lies from its decisions in Admiralty and maritime causes to a Divisional Court of the Admiralty Division (*t*).

SECT. 5.—*Colonial Courts of Admiralty.*

Constitution.

322. The Colonial Courts of Admiralty have in most instances taken the place of the Vice-Admiralty Courts abroad (*u*). Subject to the power of the King in Council to prevent the vesting of any

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(*n*) 17 & 18 Vict. c. 104; see ss. 460—465; and see the Merchant Shipping Act Amendment Act, 1862 (25 & 26 Vict. c. 63), s. 49.

(*o*) Cinque Ports Act, 1821 (1 & 2 Geo. 4, c. 76), s. 18.

(*p*) *Ibid.*, ss. 1, 2.

(*q*) *Ibid.*, s. 4; the Judicature Act, 1873 (36 & 37 Vict. c. 66), ss. 34, 76.

(*r*) Cinque Ports Act, 1821 (1 & 2 Geo. 4, c. 76), s. 4. For the further proceedings in appeals from these commissioners, see *The Caledonia* (1869), L. R. 4 A. & E. 11, note; *The Annette* (1873), L. R. 4 A. & E. 9.

(*s*) County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71), s. 25.

(*t*) *Ibid.*, s. 26; County Courts Admiralty Jurisdiction Amendment Act, 1869 (32 & 33 Vict c. 51), ss. 2, 6; *The Dowse* (1870), L. R. 3 A. & E. 135; *The Ganges* (1880), 5 P. D. 247. In *The Emilie Marron*, [1905] 2 K. B. 817, it would seem that the appeal was treated as coming from the common law side of the Court of Passage and taken direct to the Court of Appeal, the question of the jurisdiction not having been raised or argued.

(*u*) Colonial Courts of Admiralty Act, 1890 (53 & 54 Vict. c. 27), s. 17. The Act is not to come into force in regard to certain British possessions, namely, New South Wales, Victoria, St. Helena and British Honduras, until so directed

particular jurisdiction in the Courts of any British possession not having a representative Legislature (*a*), they consist of every Court of law (*b*) in a British possession of original unlimited civil jurisdiction declared by the Legislature of that British possession to be a Colonial Court of Admiralty, and any inferior Court upon which a partial or limited jurisdiction in Admiralty has been conferred by the Legislature of that possession (*c*).

Jurisdiction.

323. Within the limitations, if any, laid down by the colonial Legislatures, the Colonial Courts of Admiralty have similar jurisdiction and powers to those exercised in Admiralty by the High Court in England (*d*). And any enactment contained in any statute of the Imperial Parliament which refers to a Vice-Admiralty Court applies to a Colonial Court of Admiralty, as if the expression Colonial Court of Admiralty were used instead of Vice-Admiralty Court, and the Colonial Court of Admiralty has jurisdiction accordingly (*e*).

Appeal.

324. The judgments of a Colonial Court of Admiralty are subject to the same local rights of appeal as they would have been if pronounced by the Court in the exercise of its ordinary civil jurisdiction (*f*). Moreover, there is an ultimate appeal as of right without special leave to His Majesty in Council (*g*) from a judgment of any Court in a British possession in the exercise of the jurisdiction conferred by the Colonial Courts of Admiralty Act, 1890 (*h*). Leave of the Privy Council to appeal is necessary if the petition of appeal has not been lodged within the time prescribed by the rules, or if no time is so prescribed within six months from the date of the judgment appealed against (*i*).

Establishment of Vice-Admiralty Courts.

325. The Lords Commissioners of the Admiralty may be empowered by commission under the Great Seal to establish in a British possession any Vice-Admiralty Court, and the jurisdiction of a Colonial Court of Admiralty in that possession may be suspended by the Admiralty and vested in the Vice-Admiralty Court so established (*k*).

Courts of Jersey and Guernsey and the Isle of Man.

326. The Courts of Jersey and Guernsey have an Admiralty jurisdiction (*l*); and the provisions of the Colonial Courts of

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by Order in Council (s. 16 (1)). No such Order in Council having yet been made, there are still Vice-Admiralty Courts in these possessions.

(*a*) Colonial Courts of Admiralty Act, 1890 (53 & 54 Vict. c. 27), s. 11 (2).

(*b*) This includes the governor if he is the sole judicial authority (*ibid.*, s. 2 (1)).

(*c*) *Ibid.*, s. 2 (1), (3).

(*d*) *Ibid.*, s. 2 (2).

(*e*) *Ibid.*, s. 2 (3).

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

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

(*h*) *Ibid.*, s. 6 (1); *Richelieu and Ontario Navigation Co. v. Owners of SS. Cape Breton*, [1907] A. C. 112.

(*i*) *Ibid*, s. 6 (2).

(*k*) *Ibid.*, s. 9. The existing jurisdiction possessed by the Vice-Admiralty Courts abroad is, for the most part, conferred by the Vice-Admiralty Courts Acts, 1863 (26 & 27 Vict. c. 24).

(*l*) See Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 561.

SECT. 5. Colonial Courts of Admiralty.

Admiralty Act, 1890, do not apply to the Channel Islands (*m*). A Court of Admiralty also exists in the Isle of Man, its jurisdiction being almost identical with that of the Admiralty Division (*n*).

(*m*) Colonial Courts of Admiralty Act, 1890 (53 & 54 Vict. c. 27), s. 11.
(*n*) See Roscoe and Mears' "Admiralty Practice" (2nd ed.), 420, 421; Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 561.

ADMISSIONS.

See COPYHOLDS; CRIMINAL LAW AND PROCEDURE; EVIDENCE; PRACTICE AND PROCEDURE.

ADOPTION.

See INFANTS.

ADULTERATION.

See FOOD AND DRUGS.

ADULTERY.

See HUSBAND AND WIFE.

ADVANCEMENT.

See INFANTS; DESCENT AND DISTRIBUTION; TRUSTS AND TRUSTEES; WILLS

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AGENCY.

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Master and Servant	,,	MASTER AND SERVANT.
Parent and Infant	,,	INFANTS.
Partner and Firm	,,	PARTNERSHIP.
Shipmaster and Owner	,,	SHIPPING AND NAVIGATION.
Solicitor and Client	,,	SOLICITORS.
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Wife and Husband	,,	HUSBAND AND WIFE.
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Part I.—The Relation of Agency.

Definition.

327. The relation of agency arises whenever one person, called "the agent," has authority, express or implied, to act on behalf of another, called "the principal" (*a*), and consents so to act.

Agent distinguished from servant and independent contractor.

An agent is to be distinguished on the one hand from a servant, and on the other from an independent contractor. A servant acts under the direct control and supervision of his master, and is bound to conform to all reasonable orders given him in the course of his work (*b*); an independent contractor, on the other hand, is entirely independent of any control or interference, and merely

(*a*) *Wolff* v. *Horncastle* (1798), 1 Bos. & P. 316; *The Halley* (1868), L. R. 2 P. C. 193, 201. Authority may be implied from the subsequent assent of the principal. See pp. 173 *et seq.*, *post.*

(*b*) *Spain* v. *Arnott* (1817), 2 Stark. 256; *Barnett* v. *South London Tramways Co.* (1887), 18 Q. B. D. 815; *Owen & Co.* v. *Cronk*, [1895] 1 Q. B. 265; *Yewens* v. *Noakes* (1880), 6 Q. B. D. 530. See title MASTER AND SERVANT.

PART I. The Relation of Agency.

undertakes to produce a specified result, employing his own means to produce that result (*c*). An agent, though bound to exercise his authority in accordance with all lawful instructions which may be given to him from time to time by his principal, is not subject in its exercise to the direct control or supervision of the principal (*d*).

Existence of agency depends on true nature of agreement.

In order to ascertain whether the relation of agency exists, the true nature of the agreement between the alleged principal and agent will be regarded, and if it be found that such agreement in substance contemplates the alleged agent acting on his own behalf, and not on behalf of a principal, then, though the alleged agent may be described as an agent in the agreement, the relation of agency will not have arisen (*e*).

Existence of third party essential.

An agent is employed for the purpose of placing the principal in contractual or other relations with a third party, and it is therefore essential to the relation of agency that a third party should be in existence or contemplation (*f*). The essence of the agent's position is that he shall be but a conduit pipe connecting two other parties. Thus an agent for sale or purchase is debarred from being himself either buyer or seller without full disclosure to the principal. If a person who holds himself out to be an agent is in fact seeking to sell his own property or buy that of his principal, he violates the first condition of his employment (*g*).

Part II.—Competency of Parties.

SECT. 1.—*Principals.*

General rule.

328. It may be stated as a general proposition that whatever a person has power to do himself he may do by means of an agent (*h*).

(*c*) *Quarman* v. *Burnett* (1840), 6 M. & W. 499; *Reedie* v. *London and North Western Rail. Co.* (1849), 4 Exch. 244; *Hughes* v. *Percival* (1883), 8 App. Cas. 443; *Dalton* v. *Angus* (1881), 6 App. Cas. 740; *Jolliffe* v. *Woodhouse* (1894), 10 T. L. R. 553; *Lemaitre* v. *Davis* (1881), 19 Ch. D. 281; *Black* v. *Christchurch Finance Co.*, [1894] A. C. 48; *Holliday* v. *National Telephone Co.*, [1899] 2 Q. B. 392; *Hall* v. *Lees*, [1904] 2 K. B. 602.

(*d*) *Wolff* v. *Horncastle* (1798), 1 Bos. & P. 316; *Barnett* v. *South London Tramways Co.* (1887), 18 Q. B. D. 815.

(*e*) *Ex parte White, Re Nevill* (1871), 6 Ch. App. 397; *Bennett* v. *Smith* (1852), 16 Jur. 421; *De Bussche* v. *Alt* (1878), 8 Ch. D. 286. Conversely an agent may remain an agent while purporting to act as principal.

(*f*) *Ex parte Dyster, Re Moline* (1816), 2 Rose, 349; *Wilson* v. *Short* (1847), 6 Hare, 366.

(*g*) *Robinson* v. *Mollett* (1875), L. R. 7 H. L. 802; *De Bussche* v. *Alt, supra*; *Ex parte Dyster, Re Moline, supra.*

(*h*) *Re Whitley Partners, Ltd.* (1886), 32 Ch. D. 337 (memorandum of association of a company may be subscribed by an agent); *Compagnie Générale Transatlantique* v. *Thomas Law & Co.*, "*La Bourgogne*," [1899] A. C. 431; *Tharsis Sulphur and Copper Co.* v. *La Société des Métaux* (1889), 58 L. J. (Q. B.) 435 (a foreign corporation may appoint agent to accept service of writ); *Montgomery, Jones & Co.* v. *Liebenthal & Co.*, [1898] 1 Q. B. 487; *Furnivall* v. *Hudson*, [1893] 1 Ch. 335 (an agent may be appointed to execute a bill of sale); *R.* v. *Inhabitants of Longnor* (1833), 1 N. & M. 576; *Foreman* v. *Great Western Rail. Co.* (1878), 38 L. T. 851 (a principal who can read may appoint an agent who cannot read to sign

SECT. 1. Principals.

The converse proposition similarly holds good that what a person cannot do himself he cannot do by means of an agent (*i*). It is only necessary, speaking generally, to ascertain who is legally competent to act or contract (*j*), in order to learn who is competent to be a principal.

Exceptions.

There are, however, three exceptions to the general rule that a person may do by means of an agent whatever he has power to do himself:—

(1) Where the capacity to do the act arises by virtue of a special custom which requires it to be done in person (*k*);

(2) Where the transaction is required by statute to be evidenced by the signature of the principal himself (*l*);

(3) Where the competency to do the act arises by virtue of the holding of some public office or by virtue of some power, authority, or duty of a personal nature and requiring skill or discretion for its exercise (*m*).

Persons incompetent.

The following classes of persons are incompetent to contract or act as principals:—

(1) An alien enemy during the period of hostilities with the country of which he is a subject (*n*);

Persons with limited capacity.

(2) A convict during the period that he is serving his sentence (*o*).

The following classes of persons have only a limited capacity to contract or act as principals:—

Infants.

329. Subject to certain exceptions, an infant cannot be a principal, and the agent cannot bind him in respect of contracts made on his behalf, nor can the infant himself ratify them after

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a document); *Foster* v. *Fyfe*, [1896] 2 Q. B. 104; *Bevan* v. *Webb*, [1901] 2 Ch. 59. A partner may employ an agent (to whom no reasonable objection can be taken, and on the agent undertaking not to use information) to examine partnership books under the Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 24 (9); compare the Limited Partnerships Act, 1907 (7 Edw. 7, c. 24), s. 6 (1).

(*i*) *Bateman* v. *Mid-Wales Rail. Co.* (1866), L. R. 1 C. P. 499; *Poulton* v. *London and South Western Rail. Co.* (1867), L. R. 2 Q. B. 534; *Ashbury Railway Carriage and Iron Co.* v. *Riche* (1875), L. R. 7 H. L. 653; *The Montreal Assurance Co.* v. *McGillivray* (1859), 13 Moo. P. C. C. 87.

(*j*) See title CONTRACT.

(*k*) *Combe's Case* (1614), 9 Co. Rep. 75 a. An infant's power to convey by feoffment under custom of gavelkind could not be devolved on an attorney.

(*l*) *E.g.*, Lord Tenterden's Act (9 Geo. 4, c. 14), s. 6; *Williams* v. *Mason* (1873), 28 L. T. 232; *Hirst* v. *West Riding Union Banking Co.*, [1901] 2 K. B. 560. Compare *Re Whitley Partners, Ltd.* (1886), 32 Ch. D. 337; *Swift* v. *Jewsbury* (1874), L. R. 9 Q. B. 301. An agent cannot sign consent for a party to be added under Ord. 16, r. 11, of the Rules of the Supreme Court, which requires the party's "own consent in writing" (*Fricker* v. *Van Grutten*, [1896] 2 Ch. 649). But particulars of costs signed by a solicitor's clerk are "signed by the solicitor" within the County Court Rules, 1889 (*France* v. *Dutton*, [1891] 2 Q. B. 208), and in general an agent may sign where the statute does not expressly or impliedly require personal signature of the principal (see, *e.g.*, *Dennison* v. *Jeffs*, [1896] 1 Ch. 611).

(*m*) *Re Great Southern Mysore Gold Mining Co.* (1883), 48 L. T. 11 (the nomination of an official liquidator by a judge cannot be performed by an agent).

(*n*) *O'Mealey* v. *Wilson* (1808), 1 Camp. 482. The position of aliens is now governed by the Naturalisation Act, 1870 (33 Vict. c. 14), see title ALIENS.

(*o*) During this period he cannot enforce any of his existing rights, or employ an agent. But the Crown may appoint an administrator of his property with wide powers of managing his estate, who is answerable for loss arising to the convict's estate through want of care on his part, see Forfeiture Act, 1870 (33 & 34 Vict. c. 23); *Carr* v. *Anderson*, [1903] 2 Ch. 279.

SECT. 1. Principals.

majority (*p*). But an infant cannot recover back money actually paid in pursuance of such a contract (*q*); and an agent can bind a minor in respect of necessaries (*r*), and also in respect of those contracts which at common law have to be expressly renounced by the minor on attaining majority in order to be rendered void (*s*). A power of attorney given by an infant, other than a married woman, is void (*a*). An infant principal is not liable for a tort committed by his agent, unless committed by his direct command (*b*), but an infant principal can authorise an agent to expel a trespasser, and the agent may plead such authority by way of defence in an action by the trespasser (*c*).

Lunatics.

330. A lunatic cannot be a principal except by virtue of an estoppel (*d*). He cannot authorise an agent to alter the provisions of a settlement (*e*), or to apply for shares in a limited company (*f*). But a lunatic may be treated as a principal where the third party has no knowledge of, and takes no advantage of, his lunacy (*g*).

Drunkards.

331. A drunkard may avoid a contract entered into by him while he was in such a state of intoxication as not to know what he was doing, but a person contracting with him may enforce the contract if he can prove that he had no knowledge of, and took no advantage of, the drunkenness (*h*). A person who contracted when drunk may ratify his contract on becoming sober (*i*).

Married women.

332. The competency of a married woman to contract is limited to the extent of her separate property held at the date of the contract or subsequently acquired (*k*). She also has special power, whether an infant or not, to appoint by deed an attorney for the purpose of

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(*p*) Infants' Relief Act, 1874 (37 & 38 Vict. c. 62), ss. 1, 2; *Smith* v. *King*, [1892] 2 Q. B. 543; and see title INFANTS.

(*q*) *Valentini* v. *Canali* (1889), 24 Q. B. D. 166.

(*r*) See title INFANTS.

(*s*) *Whittingham* v. *Murdy* (1889), 60 L. T. 956.

(*a*) *Zouch* v. *Parsons* (1765), 3 Burr. 1794.

(*b*) *Burnard* v. *Haggis* (1863), 14 C. B. (N. S.) 45.

(*c*) *Ewer* v. *Jones* (1846), 9 Q. B. 623.

(*d*) See pp. 153 *et seq.*, *post*. He may act during a lucid interval (*Drew* v. *Nunn* (1879), 4 Q. B. D. 661; *Elliot* v. *Ince* (1857), 7 De G. M. & G. 475; *Hall* v. *Warren* (1804), 9 Ves. 605; *Jenkins* v. *Morris* (1880), 14 Ch. D. 674). A mere delusion does not necessarily render a man incapable of contracting. See, generally, title LUNATICS ETC.

(*e*) *Elliot* v. *Ince*, *supra*, at p. 487 (alteration for his benefit); but see as to contracts for his benefit *Ex parte Bradbury*, *Re Walden* (1839), Mont. & Ch. 625, 633.

(*f*) "*Daily Telegraph*" *Newspaper Co.* v. *McLaughlin*, [1904] A. C. 776.

(*g*) *The Imperial Loan Co.* v. *Stone*, [1892] 1 Q. B. 599; *Beavan* v. *M'Donnell* (1854), 9 Exch. 309; *Campbell* v. *Hooper* (1855), 3 Sm. & G. 153; *Elliot* v. *Ince*, *supra*; *Molton* v. *Camroux* (1849), 4 Exch. 17. Lord CRANWORTH, L.C., suggests in *Elliot* v. *Ince*, *supra*, at p. 487, that this doctrine is limited to executed contracts of sale. A lunatic may enter into an implied contract for necessaries (*Re Rhodes* (1890), 44 Ch. D. 94).

(*h*) *Gore* v. *Gibson* (1845), 13 M. & W. 623.

(*i*) *Matthews* v. *Baxter* (1873), L. R. 8 Exch. 132.

(*k*) Married Women's Property Acts, 1882 and 1893 (45 & 46 Vict. c. 75 and 56 & 57 Vict. c. 63). See title HUSBAND AND WIFE.

executing any deed or doing any other act which she might herself execute or do (*l*).

SECT. 1. Principals.

333. The capacity of a corporation or incorporated company to contract or do any other act is limited by its objects, to be ascertained from the terms of the instrument of incorporation (*m*). So far as it can act or contract at all, it can necessarily only do so through an agent (*n*).

Corporations.

SECT. 2.—*Agents.*

334. On the other hand, an agent's competency to act or contract for his principal is not limited to his competency to contract for himself (*o*). Thus a married woman (independently of the Married Women's Property Acts), or a minor, may be an agent, and act and contract so as to bind the principal, although not personally liable on the contract of agency or on contracts with third parties, in cases where an agent of full contractual capacity would have been personally liable (*p*). So an infant partner can bind the firm and partnership assets in respect of acts done in furtherance of the objects of the partnership (*q*).

Capacity to act as agent.

335. In the case of certain classes of agents the law requires a qualification before they can act (*r*).

Special qualification in certain cases.

Solicitors must be duly qualified, and an unqualified person acting as a solicitor is subject to penalties. Solicitors must also take out an annual practising certificate. A principal, who is successful in a suit, cannot recover costs from the other party if the solicitor employed by him is uncertificated, nor can the solicitor in such a case recover his costs from his client (*s*). A solicitor may act as a notary public when appointed by the Master of Faculties (*t*).

Solicitors.

Auctioneers and valuers must take out an annual licence (*a*).

Auctioneers.

(*l*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 40. The point has not been decided, but it seems probable that this power does not enable a married woman to appoint an attorney to execute a deed which would require to be acknowledged if executed by her.

(*m*) See cases cited in note (*i*), p. 149, *ante*. In *Ashbury Railway Carriage and Iron Co.* v. *Riche* (1875), L. R. 7 H. L. 653, the question is discussed whether its general competency at common law is limited by the terms of its incorporation, or whether its competency is given it by the terms of its instrument of incorporation, and in *A.-G.* v. *London County Council*, [1901] 1 Ch. 781, at p. 797, whether a corporation by royal charter has wider powers than one created by Act of Parliament.

(*n*) *Ferguson* v. *Wilson* (1866), 2 Ch. App. 77, at p. 89.

(*o*) *Kirby* v. *Great Western Rail. Co.* (1868), 18 L. T. 658. An agent who cannot read may bind by his signature a principal who can read (*Foreman* v. *Great Western Rail. Co.* (1878), 38 L. T. 851).

(*p*) *Smally* v. *Smally* (1700), 1 Eq. Ab. 6. But a married woman is not capable of filling the office of next friend or guardian *ad litem* (*Re Duke of Somerset, Thynne* v. *St. Maur* (1887), 34 Ch. D. 465).

(*q*) *Goode* v. *Harrison* (1821), 5 B. & Ald. 147.

(*r*) Solicitors Acts, 1843 (6 & 7 Vict. c. 73), and 1860 (23 & 24 Vict. c. 127).

(*s*) Attorneys and Solicitors Act, 1874 (37 & 38 Vict. c. 68); s. 12; and Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 43; *Re Sweeting*, [1898] 1 Ch. 268.

(*t*) Public Notaries Act, 1833 (3 & 4 Will. 4, c. 70). See generally title SOLICITORS.

(*a*) See titles AUCTION AND AUCTIONEERS; VALUERS AND APPRAISERS.

SECT. 2. Agents.

Bailiffs.

A county court bailiff must be authorised in writing by the judge to act as broker on an execution, and can then act without any other licence (*b*), and a bailiff to levy a distress must also be certificated by a county court judge (*c*).

Agent to sign contract.

Apart from these special conditions and qualifications required before persons can act in the capacity of particular classes of agents, no person who is contracting as a principal can act as agent to the other party to the contract for the purpose of signing a note or memorandum thereof so as to satisfy the provisions of the Statute of Frauds (*d*). But the same person may act as agent of both parties for that purpose (*e*).

Part III.—Classes of Agents.

336. An agent may be either a special agent or a general agent.

Special agents.

A special agent is one who has authority to act for some special occasion or purpose which is not within the ordinary course of his business or profession (*f*).

General agents.

A general agent is one who has authority, arising out of and in the ordinary course of his business or profession, to do some act or acts on behalf of his principal in relation thereto; or one who is authorised to act on behalf of the principal generally in transactions of a particular kind, or incidental to a particular business (*g*). The authority of a general agent may extend to all acts which the principal may do by means of an agent, in which case he is sometimes called a "universal agent."

Mercantile agents.

337. A mercantile agent is one having in the customary course of his business as such agent authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods (*h*).

Factors.

A factor is a mercantile agent who in the ordinary course of business is intrusted with possession of the goods or of the documents of title thereto (*i*).

(*b*) County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 159. See title COUNTY COURTS.

(*c*) Law of Distress Amendment Act, 1888 (51 & 52 Vict. c. 21), s. 7. See title DISTRESS.

(*d*) 29 Car. 2, c. 3, s. 4. It is apprehended that the same rule applies to the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 4, see *Sharman* v. *Brandt* (1871), L. R. 6 Q. B. 720; *Wright* v. *Dannah* (1809), 2 Camp. 203; *Farebrother* v. *Simmons* (1822), 5 B. & Ald. 333.

(*e*) *Hinde* v. *Whitehouse* (1806), 7 East, 558 (auctioneer); *Bird* v. *Boulter* (1833), 1 N. & M. 313 (auctioneer's clerk); *Durrell* v. *Evans* (1862), 1 H. & C. 174 (a factor); *Thompson* v. *Gardiner* (1876), 1 C. P. D. 777.

(*f*) *Brady* v. *Todd* (1861), 9 C. B. (N. S.) 592.

(*g*) *Smith* v. *McGuire* (1858), 3 H. & N. 554; *Brady* v. *Todd*, *supra*. A factor, broker, auctioneer, or house agent who is authorised to do any act in the ordinary course of his business is a general agent in relation to that employment. So a steward or manager of a business on an estate is a general agent.

(*h*) The Factors Act, 1889 (52 & 53 Vict. c. 45), s. 1; *Inglis* v. *Robertson*, [1898] A. C. 616.

(*i*) *Baring* v. *Corrie* (1818), 2 B. & Ald. 137; *Stevens* v. *Biller* (1883), 25 Ch. D. 31. For form of appointment, see Encyclopædia of Forms, Vol. I., p. 290.

PART III. Classes of Agents.

A broker is a mercantile agent who in the ordinary course of his business is employed to make contracts for the purchase or sale of property or goods of which he is not intrusted with the possession or documents of title (*k*). Brokers.

An insurance agent or insurance broker is employed to negotiate and effect policies of insurance (*l*). Insurance agents.

A *del credere* agent is one who, usually for extra remuneration, undertakes to indemnify his employer against loss arising from the failure of persons with whom he contracts to carry out their contracts (*m*). A *del credere* agency may be implied from facts showing that the agent was charging an additional commission for risk (*n*). Such an agent need not be appointed in writing (*o*), the agreement not being an agreement to answer for the debt, default, or miscarriage of another within the meaning of the Statute of Frauds (*p*). *Del credere* agent.

An auctioneer is an agent who is employed to sell at a public auction. He may be agent for both seller and buyer, and may or may not be intrusted with possession of the goods or property to be sold or of the documents of title thereto (*q*). Auctioneers.

In addition to the classes already mentioned, there are numerous other classes of agents, which are treated of in other parts of this work (*r*).

Part IV.—Formation of the Contract of Agency.

SECT. 1.—*In General.*

338. The contract of agency is created by the express or implied assent of principal and agent (*s*), or by ratification by the principal of the agent's acts done on his behalf (*t*). How created.

Express agency is created where the principal, or some person

(*k*) *Janssen* v. *Green* (1767), 4 Burr. 2103; *Milford* v. *Hughes* (1846), 16 M. & W. 174; *Foster* v. *Pearson* (1835), 1 C. M. & R. 849; *Baring* v. *Corrie* (1818), 2 B. & Ald. 137; *Stevens* v. *Biller* (1883), 25 Ch. D. 31.

(*l*) See title INSURANCE. For form of appointment, see Encyclopædia of Forms, Vol. I., p. 340.

(*m*) *Morris* v. *Cleasby* (1816), 4 M. & S. 566; *Grove* v. *Dubois* (1786), 1 Term Rep. 112; *Hornby* v. *Lacy* (1817), 6 M. & S. 166. For form of appointment, see Encyclopædia of Forms, Vol. I., p. 297.

(*n*) *Shaw* v. *Woodcock* (1827), 7 B. & C. 73.

(*o*) *Couturier* v. *Hastie* (1852), 8 Exch. 40; *Sutton & Co.* v. *Grey*, [1894] 1 Q. B. 285; *Wickham* v. *Wickham* (1855), 2 K. & J. 478, 487.

(*p*) 29 Car. 2, c. 3, s. 4.

(*q*) See title AUCTION AND AUCTIONEERS.

(*r*) See the titles BANKERS AND BANKING; HUSBAND AND WIFE; INFANTS; MASTER AND SERVANT; PARTNERSHIP; PATENTS AND INVENTIONS; PUBLIC AUTHORITIES AND PUBLIC OFFICERS and CONSTITUTIONAL LAW (for public agents); SHIPPING AND NAVIGATION (for shipmasters etc.); SOLICITORS; STOCK EXCHANGE (for stockbrokers).

(*s*) *Pole* v. *Leask* (1863), 33 L. J. (CH.) 155; *Love* v. *Mack* (1905), 93 L. T. 352; *Re Consort Deep Level Gold Mines, Ltd.*, [1897] 1 Ch. 575.

(*t*) *Markwick* v. *Hardingham* (1880), 15 Ch. D. 339. See pp. 173 *et seq.*, *post.*

SECT. 1. In General.

authorised by him, expressly appoints the agent, either by deed, by writing under hand, or by parol (*a*).

Implied agency arises from the conduct or situation of the parties (*b*), or from necessity (*c*).

SECT. 2.—*Appointment by Deed.*

Agent to execute deed.

339. An agent who has to execute a deed, as, for example, a conveyance or deed of partnership, must be appointed by deed (*d*). Such an authority is called a power of attorney (*e*).

Certain acts have no legal force unless effected by deed. In such cases, therefore, it is essential that the agent's authority should be conferred by an instrument under seal. The following are the principal instances:—

(1) Conveyances on sale and legal mortgages of land, and interests in land other than copyhold (*f*).

(2) Leases of lands, tenements, and hereditaments for more than three years, or reserving a rent less than two-thirds of the improved value (*g*).

(3) Transfers of shares in companies under the Companies Clauses Act (*h*).

(4) Transfer of a British ship or share therein (*i*).

(5) Bills of sale (*k*).

(6) Sale of sculpture, with copyright (*l*).

(7) Under the common law, a contract of a corporation.

(8) Under the common law, a contract without consideration.

The necessity for appointment by deed of an agent for the purpose of executing an instrument under seal does not, however, exist where the execution of the instrument is in the presence of the principal, when, at his request, someone signs on his behalf and in his name (*m*). And an agent who executes a deed, though

(*a*) *Gosling* v. *Gaskell*, [1897] A. C. 575; *Re Vimbos, Ltd.*, [1900] 1 Ch. 470; *Re Hale*, [1899] 2 Ch. 107.

(*b*) *Trent* v. *Hunt* (1853), 9 Exch. 14 (mortgagor implied agent of mortgagee); *Watson* v. *Threlkeld* (1794), 2 Esp. 637; *Ryan* v. *Sams* (1848), 12 Q. B. 460 (cohabitation as man and wife). And see titles AUCTION AND AUCTIONEERS; HUSBAND AND WIFE; SHIPPING AND NAVIGATION. See also as to agency by estoppel, p. 158, *post*.

(*c*) As to agency of necessity, see p. 157, *post*.

(*d*) *Steiglitz* v. *Egginton* (1815), Holt (N. P.) 141; *Berkeley* v. *Hardy* (1826), 5 B. & C. 355.

(*e*) Powers of attorney may be registered in the Central Office of the Supreme Court under the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 48. See also p. 161, *post*.

(*f*) Real Property Act, 1845 (8 & 9 Vict. c. 106), s. 3.

For forms of appointment, see Encyclopædia of Forms, Vol. I., pp. 380, 382.

(*g*) Statute of Frauds (29 Car. 2, c. 3), ss. 1, 2, 3; Real Property Act, 1845 (8 & 9 Vict. c. 106), s. 3.

For form of appointment, see Encyclopædia of Forms, Vol. I., p. 383.

(*h*) Companies Clauses Act, 1845 (8 & 9 Vict. c. 16), s. 14.

For form of appointment, see Encyclopædia of Forms, Vol. I., p. 354

(*i*) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 24.

(*k*) Bills of Sale Act, 1882 (45 & 46 Vict. c. 43), s. 9, schedule.

(*l*) Sculpture Copyright Act, 1814 (54 Geo. 3, c. 56), s. 4.

(*m*) *Ball* v. *Dunsterville* (1791), 4 Term Rep. 313, a deed executed for a partner in his presence; *R.* v. *Inhabitants of Longnor* (1833), 4 B. & Ad. 647, where the parties, who were unable to write, requested someone to execute the deed in their presence.

not authorised under seal, may bind his principal if a deed was not required by law in such a case (*n*). The authority to contract for, but not to execute, a lease of lands for a term exceeding three years may be given by parol (*o*).

Agents of corporations.

340. That a municipal or other non-trading corporation must contract by a seal, or some substitute for a seal, which by law shall be taken as conclusively evidencing the sense of the whole body corporate, is a necessity inherent in the very nature of a corporation (*p*). Their agents must therefore be appointed under seal (*q*), with certain exceptions which the necessity of everyday life has admitted. In matters of trifling importance, of necessary recurrence, and which admit of little delay, and, lastly, in matters for the doing of which the corporation was created, these corporations may appoint and contract by agents not appointed by deed on the ground that to hold to the contrary would occasion inconvenience and tend to defeat the very object for which the corporation had been created (*r*).

Part performance.

It has also been sought to show that the doctrine of part performance will relieve against the necessity of execution under seal. Where a corporation has on its side done all that it contracted to do, and the contract is of a mercantile character (*s*), the corporation may sue the other party for non-performance (*t*); but a partial performance will not avail it (*u*) unless the contract is one of which specific performance may be decreed. Nor can the other party sue the corporation on a contract not under seal, which he has performed, unless it be of the trifling or necessary nature before

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(*n*) *Hunter* v. *Parker* (1841), 7 M. & W. 322, 344, where the addition of a seal to the agent's contract of sale of a ship was not required for its validity.

(*o*) *Callaghan* v. *Pepper* (1840), 2 Ir. Eq. R. 399; *Mortlock* v. *Buller* (1804), 10 Ves. at p. 310.

(*p*) *Mayor of Ludlow* v. *Charlton* (1840), 6 M. & W. 815; *Mayor of Kidderminster* v. *Hardwick* (1873), L. R. 9 Exch. 13. See title CORPORATIONS.

(*q*) *Phelps* v. *Upton Snodsbury Highway Board* (1885), 1 T. L. R. 425; *Arnold* v. *Mayor of Poole* (1842), 5 Scott, N. R. 741 (solicitor and town clerk must be appointed by seal, and cannot recover otherwise, even for work done, although where payment had been appropriated it was not disturbed). But a corporation which has appointed an attorney not under seal may be estopped from denying the validity of his appointment as against other parties (*Faviell* v. *Eastern Counties Rail. Co.* (1848), 2 Exch. 344; *Sutton* v. *The Spectacle-makers' Co.* (1864), 10 L. T. 411; *Austin* v. *Guardians of Bethnal Green* (1874), L. R. 9 C. P. 91; *Smith* v. *Cartwright* (1851), 6 Exch. 927; *R.* v. *Mayor of Stamford* (1844), 6 Q. B. 433; *Mayor of Ludlow* v. *Charlton* (1840), 6 M. & W. 815; *Dyte* v. *St. Pancras Board of Guardians* (1872), 27 L. T. 342; *Cope* v. *Thames Haven Dock and Rail. Co.* (1849), 3 Exch. 841).

(*r*) *Lawford* v. *Billericay Rural Council*, [1903] 1 K. B. 772; *Clarke* v. *Cuckfield Union* (1852), 21 L. J. (Q. B.) 349; *Nicholson* v. *Bradfield Union* (1866), L. R. 1 Q. B. 620; *Diggle* v. *London and Blackwall Rail. Co.* (1850), 5 Exch. 442; *Beverley* v. *Lincoln Gas Light and Coke Co.* (1837), 6 A. & E. 829; *Wells* v. *Mayor of Kingston-upon-Hull* (1875), L. R. 10 C. P. 402. Compare *Haigh* v. *North Bierley Union* (1858), E. B. & E. 873; *Sanders* v. *St. Neots Union* (1846), 8 Q. B. 810. "Wherever to hold the rule applicable would occasion very great inconvenience, or tend to defeat the very object for which the corporation was created, the exception has prevailed" (*Church* v. *Imperial Gas Light and Coke Co.* (1838), 6 A. & E. 846, *per* Lord DENMAN, at p. 861).

(*s*) *London Dock Co.* v. *Sinnott* (1857), 8 E. & B. 347.

(*t*) *Fishmongers' Co.* v. *Robertson* (1843), 5 Man. & G. 131.

(*u*) *Mayor of Kidderminster* v. *Hardwick* (1873), L. R. 9 Exch. 13.

SECT. 2. Appointment by Deed.

mentioned (*b*). Nevertheless a corporation is liable to a third party induced to enter into a contract with one whom the corporation has allowed to hold himself out as their agent (*c*).

Urban authorities.

341. Every appointment of an agent by a local board or urban sanitary authority involving a contract of the value of £50 must be in writing and sealed with the common seal (*d*). As regards these corporations, therefore, this settles the question as to what are to be considered contracts of trifling importance or of necessity (*e*). This is a mandatory enactment designed to protect the interests of the ratepayers, and cannot be overcome by any consideration of the contract being executed on one side (*f*).

Trading corporations.

342. The cases of trading corporations (*g*) and joint-stock companies (*h*) afford important exceptions to the general rule that corporations must contract under their common seal, in that they may by agents enter informally into all contracts which are in furtherance of the objects of their incorporation. They may, therefore, appoint agents by parol to enter into all such contracts. Special exceptions may also exist under freedom granted by general or private Acts of Parliament; as in the case of industrial and provident societies (*i*).

SECT. 3.—*Informal Appointment.*

Appointment by parol.

343. The foregoing are the only legal requirements for the formal appointment of an agent. However desirable it may be that the appointment of certain kinds of agents, *e.g.*, solicitors, should be in writing, so that the fact of agency and extent of the authority should be thus clearly ascertainable, the law does not require formal evidence (*k*).

Agent to buy land.

Nor is writing necessary in the case of an appointment of an agent to purchase land, although contracts relating to land are not enforceable unless evidenced by writing (*l*).

An agreement relating to land may be signed either by the party

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(*b*) *Hunt* v. *Wimbledon Local Board* (1878), 4 C. P. D. 48.

(*c*) *Faviell* v. *Eastern Counties Rail. Co.* (1848), 2 Exch. 344, where a submission to arbitration by an attorney not appointed under seal was held binding on the defendants.

(*d*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 174.

(*e*) *Hunt* v. *Wimbledon Local Board, supra*, where a surveyor was unable to recover for plans ordered by the Board not under seal.

(*f*) *Young* v. *Mayor of Royal Leamington Spa* (1883), 8 App. Cas. 517.

(*g*) *South of Ireland Colliery Co.* v. *Waddle* (1868), L. R. 3 C. P. 463; affirmed (1869), L. R. 4 C. P. 617; *Henderson* v. *Australian Royal Mail Steam Navigation Co.* (1855), 5 E. & B. 409.

(*h*) Companies Acts, 1862—1907. See Companies Clauses Act, 1845 (8 & 9 Vict. c. 16), s. 97; title COMPANIES.

(*i*) Industrial Societies Act, 1876 (39 & 40 Vict. c. 45), s. 11 (12); *R.* v. *Justices of Cumberland* (1848), 5 D. & L. 431; see title INDUSTRIAL, PROVIDENT AND SIMILAR SOCIETIES.

(*k*) *Owen* v. *Ord* (1828), 3 C. & P. 349; *Lord* v. *Kellett* (1833), 2 My. & K. 1; *Wiggins* v. *Peppin* (1837), 2 Beav. 403. But the onus lies upon a solicitor of proving his appointment (*Maries* v. *Maries* (1853), 23 L. J. (CH.) 154; *Re Manby* (1857), 26 L. J. (CH.) 313; *John Griffiths Cycle Corporation, Ltd.* v. *Humber & Co., Ltd.*, [1899] 2 Q. B. 414).

(*l*) Statute of Frauds (29 Car. 2, c. 3), s. 4.

For forms of appointment, see Encyclopædia of Forms, Vol. I., pp. 380 *et seq.*

SECT. 3. Informal Appointment.

to be charged, *i.e.*, the principal, or by his agent thereunto lawfully authorised, whether the authority is given by parol or otherwise (*m*); and the principal may prove the agency by parol and enforce the contract against both agent and vendor (*n*). Nor is the parol appointment of an agent to purchase land invalid on the ground that creations of trust in land must be proved by writing (*o*), for, in the first place, such an agent is not a trustee unless and until the land has been conveyed to him, but a mere conduit pipe, whose contract vests the equitable estate in the principal (*p*), and, secondly, since the Court will not allow the Statute of Frauds to be made an instrument of fraud, an agent to whom land, purchased on behalf of his principal, has been conveyed, will not be permitted to plead the statute against the principal, for whom he is a trustee, and who may give parol evidence of the trust (*q*).

Agent to sign written contract.

344. Even in cases where the signature of a principal is required by statute, an agent may be appointed by word of mouth or in any other informal manner to sign for him, unless the statute expressly requires the agent, if any, to be authorised by writing (*r*), or expressly or impliedly requires a personal signature, and so renders an agent incompetent to sign at all (*s*). Thus an agent informally appointed may sign a memorandum of association (*t*), or a consent to a dissolution under the Building Societies Act, 1874 (*a*).

Subject, therefore, to the requirements already mentioned, an agent may be appointed by mere word of mouth or by signs, though he may have to execute a written instrument, and even in cases where he is appointed to enter into contracts which are not enforceable unless evidenced by writing (*b*).

SECT. 4.—*Agency of Necessity.*

Agency of necessity.

345. Agency of necessity arises wherever a duty is imposed upon a person to act on behalf of another apart from contract, and in circumstances of emergency, in order to prevent irreparable injury.

(*m*) *Clinan* v. *Cooke* (1802), 1 Sch. & Lef. 22; 29 Car. 2, c. 3, s. 4.

(*n*) *Heard* v. *Pilley* (1869), 4 Ch. App. 548; *Cave* v. *Mackenzie* (1877), 46 L. J. (CH.) 564.

(*o*) Statute of Frauds (29 Car. 2, c. 3), s. 7.

(*p*) *Cave* v. *Mackenzie*, *supra*.

(*q*) The contrary view was once held (*Bartlett* v. *Pickersgill* (1759), 1 Cox, Eq. 15), and was recognised as still law in *James* v. *Smith*, [1891] 1 Ch. 384, but must now be taken to be overruled. See *Booth* v. *Turle* (1873), L. R. 16 Eq. 182; *Davies* v. *Otty*, No. 2 (1865), 35 Beav. 208; *Haigh* v. *Kaye* (1872), 7 Ch. App. 469; *Willis* v. *Willis* (1740), 2 Atk. 71; and, finally, *Rochefoucauld* v. *Boustead*, [1897] 1 Ch. 196, in which *James* v. *Smith* (*supra*) was adversely criticised by the Court of Appeal.

(*r*) *E.g.*, Statute of Frauds (29 Car. 2, c. 3), s. 1.

(*s*) *Fricker* v. *Van Grutten*, [1896] 2 Ch. 649.

(*t*) *Re Whitley Partners, Ltd.* (1886), 32 Ch. D. 337.

(*a*) 37 & 38 Vict. c. 42, s. 32; *Dennison* v. *Jeffs*, [1896] 1 Ch. 611.

(*b*) *Deverell* v. *Lord Bolton* (1812), 18 Ves. at p. 509; *Mortlock* v. *Buller* (1804), 10 Ves. at p. 311; *Coles* v. *Trecothick* (1804), 9 Ves. 234; the common law rule, *Qui facit per alium facit per se*, will not be restricted except where a statute requires personal signature. An instance of the latter is the Statute of Frauds Amendment Act, 1828 (Lord Tenterden's Act, 9 Geo. 4, c. 14), s. 6. See *Williams* v. *Mason* (1873), 28 L. T. 232.

SECT. 4. **Agency of Necessity.**

It may also arise where a person carries out the legal (*c*) or moral (*d*) duties of another in the absence or default of that other, or acts in his interest to preserve his property from destruction. Most of the cases have reference to sea or land carriage, when, to prevent destruction of the ship, cargo or goods, the shipmaster or carrier has to take prompt action in excess of his instructions; and none of them establish that a mere stranger can under any circumstances become an agent.

Application of doctrine.

The doctrine of agency of necessity has a limited application, probably confined to cases in which there is a contractual relationship of some kind, express or implied, in existence already (*e*). The occurrence of exceptional circumstances during the carrying out of the act of agency, from the nature of the contract itself, necessitates its extension in the interests both of principal and agent—of the principal because otherwise his property or interests would be sacrificed; of the agent so that he shall have the necessary authority to preserve them and acquire rights against third parties for his principal and against the principal in respect of his own remuneration, indemnity etc. The authority arises only under urgent necessity; and, if questioned, it will lie upon the party contracting with the agent to show that such was the nature of the circumstances (*f*). At the same time, though a strong case is required, it is not essential that any other course should be an impossibility; the course that a prudent man would take under all the circumstances is that which will be upheld (*g*).

SECT. 5.—*Agency by Estoppel.*

Holding out.

346. Agency by estoppel arises where one person has so acted as to lead another to believe that he has authorised a third person to act on his behalf, and that other in such belief enters into transactions with the third person within the scope of such ostensible authority (*h*).

(*c*) On the ground that a husband is legally bound to maintain his wife, a person who supplies a deserted wife with necessaries may recover their price from the husband, and on the ground that the wife's necessaries include necessaries for her children in her custody he may likewise recover the price of necessaries supplied for such children (*Bazeley* v. *Forder* (1868), L. R. 3 Q. B. 559). And see title HUSBAND AND WIFE.

(*d*) *Langan* v. *Great Western Rail. Co.* (1873), 30 L. T. 173 (a police inspector held to have sufficient authority to bind a railway company for board and lodging of injured passengers); *Great Northern Rail. Co.* v. *Swaffield* (1874), L. R. 9 Exch. 132 (carriers of a horse, finding no one to receive it at the destination, maintained it from "common humanity").

(*e*) *Gwilliam* v. *Twist*, [1895] 2 Q. B. 84; *Hawtayne* v. *Bourne* (1841), 7 M. & W. 595, *per* PARKE, B., at p. 599.

(*f*) *The Bonita* (1861), 5 L. T. 141 (sale of ship by master); *The Gratitudine* (1801), 3 Ch. Rob. 240; *Benson* v. *Duncan* (1849), 3 Exch. 644; *Gibbs* v. *Grey* (1857), 2 H. & N. 22 (payment of freight by master on reshipment of cargo); and see title SHIPPING AND NAVIGATION.

(*g*) *The Australia* (1859), 13 Moo. P. C. 132. It is not necessary that the ship should be absolutely unrepairable to entitle a master to sell, the question being whether it was prudent to incur so large an expense, compare *The Mariposa*, [1896] P. 273 (as to whether the shipmaster was acting as agent for the ship or the passengers).

(*h*) *Summers* v. *Solomon* (1857), 26 L. J. (Q. B.) 301; and see *Biggs* v. *Evans*, [1894] 1 Q. B. 88; *Dickinson* v. *Valpy* (1829), 10 B. & C. 128. 140; *Farquharson Brothers & Co.* v. *King*, [1902] A. C. 325.

SECT. 5. Agency by Estoppel.

In this case the first-mentioned person is estopped from denying the fact of the third person's agency under the general law of estoppel, and it is immaterial whether the ostensible agent had no authority whatever in fact (*i*), or merely acted in excess of his actual authority (*k*). The principal cannot set up a private limitation upon the agent's ostensible authority (*l*), for, so far as third persons are concerned, the ostensible authority is the sole test of his liability (*m*). But the onus lies upon the person dealing with the agent to prove either real or ostensible authority (*n*), and it is a matter of fact in each case whether ostensible authority existed for the particular act for which it is sought to make the principal liable (*o*).

A person who assumes to act as an agent is estopped from denying the agency as between himself and the person on whose behalf he professed to act (*p*).

SECT. 6.—*Co-principals and Co-agents.*

Co-principals.

347. Co-principals may jointly appoint an agent to act for them, and in such case become jointly liable to him (*q*), and may jointly sue him (*r*). The agent is not bound to account separately to one of several co-principals (*s*), and if he has done so is not thereby discharged from liability to the other or others (*t*) unless the co-principals are also partners (*a*).

Co-agents.

348. A principal may give authority to co-agents to act for him, either jointly, or jointly and severally. A mere authority to act, without further specification, is a joint authority (*b*), and can be acted upon only by the co-agents jointly (*c*), but an authority given jointly and severally may be acted upon by all or any of the co-agents so as to bind the principal (*d*).

(*i*) *Pickard* v. *Sears* (1837), 6 A. & E. 469; *Freeman* v. *Cooke* (1848), 2 Exch 654.

(*k*) *Union Credit Bank* v. *Mersey Docks and Harbour Board*, [1899] 2 Q. B. 205; *King* v. *Smith*, [1900] 2 Ch. 425.

(*l*) *Hawken* v. *Bourne* (1841), 8 M. & W. 703; and see *Maddick* v. *Marshall* (1864), 17 C. B. (N. S.) 829; *Riley* v. *Packington* (1867), L. R. 2 C. P. 536; *Robinson* v. *Mollett* (1875), L. R. 7 H. L. 802.

(*m*) *Pickering* v. *Busk* (1812), 15 East, 38. See further on this subject p. 201, *post*.

(*n*) *Pole* v. *Leask* (1862), 33 L. J. (CH.) 155.

(*o*) *Brazier* v. *Camp* (1894), 63 L. J. (Q. B.) 257; *Dyer* v. *Pearson* (1824), 4 D. & R. 648; *Young* v. *Cole* (1837), 3 Bing. (N. C.) 724.

(*p*) *Moore* v. *Peachey* (1891), 7 T. L. R. 748; *Roberts* v. *Ogilby* (1821), 9 Price, 269.

(*q*) *Keay* v. *Fenwick* (1876), 1 C. P. D. 745.

(*r*) *Skinner* v. *Stocks* (1821), 4 B. & Ald. 437; *Cothay* v. *Fennell* (1830), 10 B. & C. 671; *Jones* v. *Cuthbertson* (1873), L. R. 8 Q. B. 504.

(*s*) *Hatsall* v. *Griffith* (1834), 2 Cr. & M. 679.

(*t*) *Innes* v. *Stephenson* (1831), 1 Mood. & R. 145; *Lee* v. *Sankey* (1872), L. R. 15 Eq. 204.

(*a*) *Innes* v. *Stephenson*, *supra*; and see *Heath* v. *Chilton* (1844), 12 M. & W. 632.

(*b*) *Brown* v. *Andrew* (1849), 18 L. J. (Q. B.) 153.

(*c*) *Boyd* v. *Durand* (1809), 2 Taunt. 161; *Brown* v. *Andrew*, *supra*; and see *Bell* v. *Nixon* (1832), 9 Bing. 393.

(*d*) *Guthrie* v. *Armstrong* (1822), 5 B. & Ald. 628.

SECT. 6. **Co-principals and Co-agents**

Quorum of co-agents.

A principal, again, may appoint co-agents, and give power to a quorum to act on his behalf, as is commonly done in the case of a joint stock company appointing directors (*e*). In such case the principal will not be bound by the act of any number less than the appointed quorum (*f*).

Where a power of a public nature is committed to several persons, the act of the majority is binding upon the minority (*g*).

Liability of co-agents for each other's acts.

One co-agent is not liable for the act of another unless he has expressly authorised or tacitly permitted it (*h*), or the co-agents are partners.

SECT. 7.—*Stamp Duties.*

Stamps.

349. The appointment, if by deed, and not otherwise provided for, must bear a revenue stamp of 10*s.*; if otherwise, in writing, a sixpenny stamp will probably suffice (*i*). This applies to all documents to be proved in the Courts of this country. If to be proved abroad, the document must also comply with the revenue laws of the foreign country (*k*).

Exemptions from duty in this country are provided under the Copyholds Act, 1894 (*l*); and, under the Friendly Societies Act, 1896 (*m*), on transfers by trustees of moneys in a friendly society.

Part V.—Authority of the Agent.

SECT. 1.—*In General.*

How derived.

350. The authority of the agent—as has been seen in Part IV.—may be derived expressly from an instrument, either under seal or simply in writing, or may be conferred by word of mouth or even signs. Authority may also be implied from the conduct of the parties or from the nature of the employment; may in certain cases be due to the necessity of circumstances, and in others be conferred by a valid ratification subsequent to the actual performance. In extent the authority may be confined to a particular

(*e*) *Ridley* v. *Plymouth Grinding and Baking Co.* (1848), 2 Exch. 711.

(*f*) *Kirk* v. *Bell* (1851), 16 Q. B. 290; *D'Arcy* v. *Tamar, Kit Hill, and Callington Rail. Co.* (1867), L. R. 2 Exch. 158; and see *Re Liverpool Household Stores Association* (1890), 59 L. J. (CH.) 616, and *Brown* v. *Andrew* (1849), 18 L. J. (Q. B.) 153.

(*g*) *Grindley* v. *Barker* (1798), 1 Bos. & P. 229.

(*h*) This rule is chiefly exemplified in the case of the acts of one or more directors of a company without the knowledge of the others, and extends to fraudulent acts (*Cargill* v. *Bower* (1878), 10 Ch. D. 502; *Re Denham & Co.* (1883), 25 Ch. D. 752; *Re Montrotier Asphalte Co.* (*Perry's Case*) (1876), 34 L. T. 716; *Lucas* v. *Fitzgerald* (1903), 20 T. L. R. 16; *Bear* v. *Stevenson* (1874), 30 L. T. 177; *Land Credit Co. of Ireland* v. *Lord Fermoy* (1870), 5 Ch. App. 763; *Weir* v. *Bell* (1878), L. R. 3 Ex. D. 238; *Cullerne* v. *London and Suburban General Permanent Building Society* (1890), 25 Q. B. D. 485).

(*i*) The Stamp Act, 1891 (54 & 55 Vict. c. 39), schedule, tit. "Letter or Power of Attorney"; *Mounsey* v. *Stephenson* (1827), 7 B. & C. 403. For stamp duties generally, see title REVENUE.

(*k*) *Bristow* v. *Secqueville* (1850), 19 L. J. (EX.) 289; *Stonelake* v. *Babb* (1770), 5 Burr. 2674.

(*l*) 57 & 58 Vict. c. 46, s. 58.

(*m*) 59 & 60 Vict. c. 25, s. 33 (b).

act, or be general (*a*) in its character. In no case, however, can the authority of the agent exceed the power of the principal to act on his own behalf (*b*). SECT. 1. In General.

The authority, whether the agency be created expressly by writing or be implied from conduct, is governed by rules which define its scope in accordance with the nature of the agent's employment and duties. As between the agent and his principal, the authority may be limited by agreement or special instructions, but as regards third persons the authority which the agent has is that which he is reasonably believed to have, having regard to all the circumstances, but only that authority which is reasonably to be gathered from the nature of his employment and duties (*c*). Extent of authority.

The scope of the authority is therefore largely governed by the class of agent employed (*d*), provided that he is acting within the limit of his ordinary avocation (*e*); or by the relation of the agent to the principal (*f*); or by the customs of particular trades and professions (*g*).

SECT. 2.—*Construction of Authority.*

SUB-SECT. 1.—*Powers of Attorney.*

351. The instrument conferring authority by deed is termed a power of attorney—a document which is construed strictly by the Courts, according to well-recognised rules (*h*). Powers of attorney construed strictly.

Regard is first had to the recitals which, showing the general object, control the general terms in the operative part of the deed (*i*). Recitals.

General words are construed as having reference only to the special powers (*k*), but include incidental powers necessary for General words.

(*a*) See p. 152, *ante*.

(*b*) *Shrewsbury and Birmingham Rail. Co.* v. *North Western Rail. Co.* (1857), 6 H. L. Cas. at p. 133; *Montreal Assurance Co.* v. *McGillivray* (1859), 13 Moo. P. C. C. 87; *Ashbury Railway Carriage and Iron Co.* v. *Riche* (1875), L. R. 7 H. L. 653. Corporations and incorporated companies can only enter into contracts within the powers of their charter, memorandum of association, or Act of Parliament (see p. 151, *ante*).

(*c*) *Brady* v. *Todd* (1861), 9 C. B. (N. S.) 592 (a servant sent to deliver a horse has no implied authority to warrant it, and the person to whom it is delivered takes it at the risk that the servant had no authority in fact); *Cox* v. *Midland Counties Rail. Co.* (1849), 3 Exch. 268 (a stationmaster has no implied authority to pledge the credit of a railway company for medical attendance to injured passenger), a case of doubtful authority in these days; and see *Langan* v. *Great Western Rail. Co.* (1873), 30 L. T. 173. See also pp. 201 *et seq.*, *post*.

(*d*) See, *e.g.*, titles AUCTION AND AUCTIONEERS and STOCK EXCHANGE.

(*e*) *Daun* v. *Simmins* (1880), 41 L. T. 783. A broker who by a friend pledged diamonds of which he had the custody was not acting in the ordinary course of duty, and the pawnbroker was not protected by the Factors Act (*De Gorter* v. *Attenborough & Son* (1904), 21 T. L. R. 19).

(*f*) See, *e.g.*, title HUSBAND AND WIFE.

(*g*) *Sutton* v. *Tatham* (1839), 10 A. & E. 27; *Bowring* v. *Shepherd* (1871), L. R. 6 Q. B. 309. See title STOCK EXCHANGE.

(*h*) *Bryant, Powis and Bryant, Ltd.* v. *La Banque du Peuple*, [1893] A. C. 170, 177; *Howard* v. *Baillie* (1796), 2 Hy. Bl. 618; *Withington* v. *Herring* (1829), 5 Bing. 442. For forms of power of attorney for various purposes, see Encyclopædia of Forms, Vol. I., pp. 275 *et seq.*

(*i*) *Rooke* v. *Lord Kensington* (1856), 2 K. & J. 753, 769; *Danby* v. *Coutts & Co.* (1885), 29 Ch. D. 500.

(*k*) *Attwood* v. *Munnings* (1827), 7 B. & C. 278; *Perry* v. *Holl* (1860), 2 De G. F. & J. 38, 48; *Lewis* v. *Ramsdale* (1886), 55 L. T. 179.

SECT. 2. Construction of Authority.

carrying out the authority (*l*). Thus a power granted to the donee to manage certain property, followed by general words giving him full power to do all lawful acts relating to the donor's business and affairs, of what nature or kind soever, does not necessarily include authority to indorse bills, for the general words are construed as having reference to managing the donor's property, for which indorsing bills may not be incidental or necessary (*m*). But a power to complete all contracts which the donee may deem necessary for a specific object, includes authority to obtain money for payment in respect of such contracts, where the payment is necessary and incidental to the completion (*n*).

Limits of authority must be observed.

352. The authority conferred by power of attorney must be adhered to strictly. If the authority is exercised in excess of and outside the reasonable scope of its special powers, the third party will be unable to make the principal liable (*o*); as where a power gave authority to sign contracts, acceptances, and other documents, and it was held that, while it gave power to sell or purchase negotiable instruments, it did not give power to pledge them (*p*).

When incidental powers implied.

353. The construction of authorities given by power of attorney has given rise to a multiplicity of cases, which serve to indicate the extent to which the Court, in its strict rules of construction, will allow actual expressions to imply incidental powers.

A power to deal with land gives authority to sell, the conditions of sale depending on the wording of the authority (*q*), but not to sell that portion included in a voluntary settlement (*r*). A general power gives authority to instruct a solicitor (*s*), to sue (*t*), and to submit to arbitration (*a*); but when given to act in partnership matters it does not give authority to dissolve the partnership (*b*). A power to sell land belonging to the donor does not give authority to exercise a power of sale vested in the donor as a mortgagee (*c*); nor does a general power to mortgage, sell, or otherwise deal with

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(*l*) *Re Wallace* (1884), 14 Q. B. D. 22, where, a solicitor being authorised to conduct legal proceedings, it was held that he was justified in presenting a bankruptcy petition.

(*m*) *Esdaile* v. *La Nauze* (1835), 1 Y. & C. Ex. 394; compare *Harper* v. *Godsell* (1870), L. R. 5 Q. B. 422 (general words limited to exercise of privileges under a partnership); and see *Lewis* v. *Ramsdale* (1886), 55 L. T. 179.

(*n*) *Withington* v. *Herring* (1829), 5 Bing., *per* PARK, J., at p. 459; and see *Henley* v. *Soper* (1828), 8 B. & C. 16 (authority to dissolve partnership and appoint any other person the donee might see fit includes authority to submit the accounts to arbitration).

(*o*) *Jacobs* v. *Morris*, [1902] 1 Ch. 816, where a loan to the agent was made without inquiry, and, as he had no general borrowing powers, it was held not within his authority to bind his principal.

(*p*) *Jonmenjoy Coondoo* v. *Watson* (1884), 9 App. Cas. 561; *De Bouchout* v. *Goldsmid* (1800), 5 Ves. 210.

(*q*) *Hawksley* v. *Outram*, [1892] 3 Ch. 359.

(*r*) *General Meat Supply Association, Ltd.* v. *Bouffler* (1879), 41 L. T. 719.

(*s*) *Ex parte Frampton* (1859), 1 De G. F. & J. 263.

(*t*) *Gray* v. *Pearson* (1870), L. R. 5 C. P. 568.

(*a*) *Henley* v. *Soper* (1828), 8 B. & C. 16; and see *Goodson* v. *Brooke* (1815), 4 Camp. 163.

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

(*c*) *Re Dowson and Jenkins*, [1904] 2 Ch. 219.

an estate authorise the donee to execute a deed as a voluntary gift (*d*); but a power to borrow money on mortgage, though deficient in formalities necessary to authorise a valid mortgage, may be sufficient authority to borrow money (*e*). A joint power given by husband and wife was not sufficient to authorise a dealing with separate estate coming to the wife (*f*); a power to act as executrix did not authorise the donee to bind the donor by accepting bills of exchange on her account (*g*); a power to sue for debts and conduct the business of the principal did not give authority to indorse bills of exchange in his name (*h*), nor did a power to demand, sue for, recover, and receive moneys, by all lawful ways and means whatsoever, give such an authority (*i*). What would give such an authority—viz., the words "to sell, indorse, and assign"—was decided in another case (*k*). A shipmaster's authority was held sufficient to empower him to assign the passage money of the ship (*l*), or to enter into a charter-party (*m*); and the ship agent's authority was held to enable him to dismiss the captain (*n*). An authority to discount a bill includes authority to warrant it (*o*).

SUB-SECT. 2.—*Written Authority.*

Liberal interpretation of authority under hand.

354. A written authority is capable of extension either verbally or by conduct. Such an authority is not so strictly construed as one under seal, and regard is had to all the circumstances of the agency business (*p*). The ordinary full authority given in one part of the instrument will not be cut down because there are ambiguous and uncertain expressions elsewhere (*q*); but the document will be considered as a whole for the interpretation of particular words or directions (*r*). When once an authority has been reduced into writing, the interpretation of the written document is a matter of law for the Court and not a question of fact for the jury (*s*).

Interpretation a question of law, not fact.

Agent's discretion.

In the absence of express directions, the agent may exercise his discretion so as to act in the best manner possible for his principal (*t*). Authority to act generally (whether conferred by writing or verbally) includes authority to instruct a solicitor (*u*).

Agents authorised by letter of credit to draw up to a certain amount will bind the principal for bills in the hands of third parties

(*d*) *Re Bowles* (1874), 31 L. T. 365, 366.
(*e*) *Denyssen* v. *Botha* (1860), 8 W. R. 710.
(*f*) *Kenrick* v. *Wood* (1869), L. R. 9 Eq. 333.
(*g*) *Gardner* v. *Baillie* (1795), 6 Term Rep. 591.
(*h*) *Esdaile* v. *La Nauze* (1835), 1 Y. & C. Ex. 394; *Murray* v. *East India Co.* (1821), 5 B. & Ald. 204; *Hogg* v. *Snaith* (1808), 1 Taunt. 347.
(*i*) *Murray* v. *East India Co.* (1821), 5 B. & Ald. 204.
(*k*) *Bank of Bengal* v. *Macleod* (1849), 5 Moo. Ind. App. 1; *Bank of Bengal* v. *Fagan* (1849), 5 Moo. Ind. App. 27.
(*l*) *Willis* v. *Palmer* (1859), 7 C. B. (N. S.) 340.
(*m*) *Routh* v. *Macmillan* (1863), 2 H. & C. 750.
(*n*) *Berwick* v. *Horsfall* (1858), 4 C. B. (N. S.) 450, 460, 462.
(*o*) *Fenn* v. *Harrison* (1791), 4 Term Rep. 177.
(*p*) *Pole* v. *Leask* (1860), 28 Beav. 562.
(*q*) *Pariente* v. *Lubbock* (1855) 8 De G. M. & G. 5.
(*r*) "May" will, if the context so warrant, be interpreted as "must" (*Entwisle* v. *Dent* (1848), 1 Exch. 812).
(*s*) See title DEEDS AND DOCUMENTS.
(*t*) *Pariente* v. *Lubbock, supra.* See *Tallentire* v. *Ayre* (1884), 1 T. L. R. 143.
(*u*) *Ex parte Frampton* (1859), 1 De G. F. & J. 263.

SECT. 2. Construction of Authority.

for value, although the agents were indebted to the principal to a larger amount (*a*).

SUB-SECT. 3.—*Verbal Authority.*

Construction a question of fact.

355. When authority is given by word of mouth, its construction and extent are questions of fact for the jury, depending on the circumstances of the particular case and the usages of trade or business.

Effect of authority in general terms.

An authority conferred in general terms gives an agent power to act in the ordinary way in reference to the particular business, and to do subordinate acts (*b*), and all reasonable acts in relation to the business (*c*), but does not, in the absence of special conditions, give authority to take more than the usual risks or employ extraordinary means (*d*).

Ambiguous authority.

356. An agent whose instructions are in ambiguous terms is justified if he acts in good faith and places a reasonable construction on his authority (*e*), but where the limits imposed are definite, he has no right to exercise a discretion (*f*).

SECT. 3.—*Implied Authority.*

Necessary and incidental acts.

357. The implied authority of an agent extends to all subordinate acts which are necessary or ordinarily incidental to the exercise of his express authority (*g*). It does not, however, extend to acts which are outside the ordinary course of his business, or which are neither necessary nor incidental to his express authority (*h*).

Authority to pledge credit.

The manager of a business has authority to do all acts necessary to the regular conduct of the business (*i*), but he has no implied

(*a*) *Re Agra and Masterman's Bank* (1867), 2 Ch. App. 391; *Maitland* v. *The Chartered Mercantile Bank of India, London and China* (1869), 38 L. J. (CH.) 363.

(*b*) *Collen* v. *Gardner* (1856), 21 Beav. 540.

(*c*) *Wiltshire* v. *Sims* (1808), 1 Camp. 258; *East India Co.* v. *Hensley* (1794), 1 Esp. 112; *Howard* v. *Braithwaite* (1812), 1 Ves. & B. 202, 208, 209.

(*d*) *Seymour* v. *Bridge* (1885), 14 Q. B. D. 460; *Papè* v. *Westacott*, [1894] 1 Q. B. 272; *Hine Brothers* v. *Steamship Insurance Syndicate, Ltd.* (1895), 72 L. T. 79; *Underwood* v. *Nicholls* (1855), 17 C. B. 239; *Ex parte Howell* (1865), 12 L. T. 785; *Blumberg* v. *Life Interests and Reversionary Securities Corporation*, [1897] 1 Ch. 171. The authority to receive money is to receive in cash, and not by a set-off, nor, in the absence of special custom, by bill of exchange or cheque (see p. 165, *post*).

(*e*) *Ireland* v. *Livingston* (1872), L. R. 5 H. L. 395; *Boden* v. *French* (1851), 10 C. B. 886; *Johnston* v. *Kershaw* (1867), L. R. 2 Exch. 82.

(*f*) *Bertram* v. *Godfray* (1830), 1 Knapp, 381.

(*g*) *Bayley* v. *Wilkins* (1849), 7 C. B. 886.

(*h*) An agent authorised to deliver a horse has no authority to give a warranty (*Woodin* v. *Burford* (1834), 2 Cr. & M. 391); nor has an agent authorised to sell a horse privately (*Brady* v. *Todd* (1861), 9 C. B. (N. S.) 592), unless he is the agent of a horse dealer (*Howard* v. *Sheward* (1866), L. R. 2 C. P. 148; *Bank of Scotland* v. *Watson* (1813), 1 Dow, 40, 45; *Baldry* v. *Bates* (1885), 52 L. T. 620); but an agent authorised to sell at a fair may give such a warranty (*Brooks* v. *Hassall* (1883), 49 L. T. 569). So an agent authorised to get a bill discounted may warrant it good, but not indorse it in the principal's name (*Fenn* v. *Harrison* (1790), 3 Term Rep. 757; and see *Dingle* v. *Hare* (1859), 7 C. B. (N. S.) 145). The depositary of a policy of insurance on a ship at sea has no implied authority to give notice to the underwriter of abandonment as for a total loss (*Jardine* v. *Leathley* (1863), 3 B. & S. 700).

(*i*) *Hawken* v. *Bourne* (1841), 8 M. & W. 703, including the accepting of a bill in the name in which the business is carried on where drawing and accepting bills is incident to the ordinary course of the business (*Edmunds* v. *Bushell* (1865),

authority to borrow money (*k*); nor has a servant, merely from the fact of service, authority to pledge his master's credit (*l*). In certain cases, however, an agent has implied authority to pledge his principal's credit, *e.g.*, the general manager of a railway company for medical attendance to a servant of the company (*m*), or the matron of a hospital, as agent of the managing committee, for meat supplied to the hospital (*n*).

Receiving payment.

358. Where it is in the ordinary course of business for the agent to receive payment for his principal, such payment should, generally speaking, be received in cash (*o*). In general the agent has no implied authority to receive payment by cheque (*p*), by bill (*q*), by other goods (*r*), or before it becomes due (*s*), nor may he give credit (*t*). But a reasonable custom to receive payment in any particular mode may be proved (*a*).

Authority to give into custody.

359. Whether an agent or servant has implied authority to give persons into custody has been considered in many cases; the test is whether in so doing he is acting within the scope of his ordinary duties, and also within the scope of the employer's powers. If he is, he has implied authority (*b*); if not, it is otherwise (*c*); and it is for the person asserting the existence of the authority to prove it (*d*).

L. R. 1 Q. B. 97. For the authority of the manager of a public-house, see *Daun* v. *Simmins* (1880), 41 L. T. 783.

(*k*) *Hawtayne* v. *Bourne* (1841), 7 M. & W. 595; and see *Dickinson* v. *Valpy* (1829), 5 Man. & R. 126; *Burmester* v. *Norris* (1851), 6 Exch. 796. But the directors of a banking or trading company may borrow for the business of the company (*Re Hamilton's Windsor Ironworks* (1879), 12 Ch. D. 707; *Maclae* v. *Sutherland* (1854), 3 E. & B. 1; and *Royal British Bank* v. *Turquand* (1855), 5 E. & B. 248).

(*l*) *Wright* v. *Glyn*, [1902] 1 K. B. 745 (a coachman is not an agent to pledge his master's credit for forage).

(*m*) *Walker* v. *Great Western Rail. Co.* (1867), L. R. 2 Exch. 228, but not so a stationmaster for medical attendance to an injured passenger (*Cox* v. *Midland Counties Rail. Co.* (1849), 3 Exch. 268); see p. 161, note (*c*), *ante*.

(*n*) *Real and Personal Advance Co.* v. *Phalempin* (1893), 9 T. L. R. 569.

(*o*) *Legge* v. *Byas, Mosley & Co.* (1901), 7 Com. Cas. 16, 19; *Williams* v. *Evans* (1866), L. R. 1 Q. B. 352; *Sykes* v. *Giles* (1839), 5 M. & W. 645.

(*p*) *Blumberg* v. *Life Interests and Reversionary Securities Corporation*, [1897] 1 Ch. 171.

(*q*) *Hine Brothers* v. *Steamship Insurance Syndicate, Ltd.* (1895), 72 L. T. 79.

(*r*) *Howard* v. *Chapman* (1831), 4 C. & P. 508.

(*s*) *Breming* v. *Mackie* (1862), 3 F. & F. 197.

(*t*) *Wiltshire* v. *Sims* (1808), 1 Camp. 258.

(*a*) See p. 168, *post*, and *Bridges* v. *Garrett* (1870), L. R. 5 C. P. 451 (payment by cheque); *Hine Brothers* v. *Steamship Insurance Syndicate, Ltd.*, *supra* (by bill); *Pelham* v. *Hilder* (1841), 1 Y. & C. Ch. 3 (giving credit). And where the principal authorises the agent to receive payment, intending that he shall thereout pay himself a debt due from his principal, the agent may receive payment in any manner (*Barker* v. *Greenwood* (1837), 2 Y. & C. Ex. 414). An agent appointed, on the dissolution of a partnership, by a retiring partner to liquidate the partnership affairs, has no authority to accept bills in the name of his principal (*Odell* v. *Cormack Brothers* (1887), 19 Q. B. D. 223).

(*b*) *Lowe* v. *Great Northern Rail. Co.* (1893), 62 L. J. (Q. B.) 524.

(*c*) *Walker* v. *South Eastern Rail. Co.* (1870), L. R. 5 C. P. 640; *Moore* v. *Metropolitan Rail. Co.* (1872), L. R. 8 Q. B. 36; but see, as to actions for false imprisonment arising out of this class of offence, *Knight* v. *North Metropolitan Tramways Co.* (1898), 14 T. L. R. 286; *Charleston* v. *London Tramways Co., Ltd.* (1888), 4 T. L. R. 629.

(*d*) *Goff* v. *Great Northern Rail. Co.* (1861), 30 L. J. (Q. B.) 148.

SECT. 3. Implied Authority.

An act, to be within the scope of an agent's implied authority, must be an apparently necessary one, arising out of the ordinary discharge of his duties (*e*), or to protect the principal's property (*f*). Giving a man into custody in order actually to protect the principal's property is within the implied authority, but so acting on mere suspicion is not (*g*); and mere belief in the danger is probably not sufficient (*h*).

A distinction must be observed between the acts of an agent of a reasonable nature and those of an excessive or improper character, which latter would not fall within such authority (*i*). The manager of a restaurant has no implied authority to give a customer into custody on a dispute over the bill (*k*), but a person in a similar capacity is justified in giving persons into custody on a charge of creating disorder on the premises (*l*).

Illegal acts.

360. There can of course, owing to general rules of the common law, be no authority given to do an illegal act so as to justify the agent, and no agent can recover remuneration or indemnity against a principal for the performance of an act known by him to be illegal (*m*). Powers of attorney given for illegal purposes, as in general restraint of trade (*n*), or to prevent penal legal proceedings (*o*), are void.

Estate and house agents.

361. An estate or house agent authorised to procure a purchaser has no implied authority to enter into a contract of sale (*p*); nor has an agent who is authorised to treat with people, and to permit them to view property (*a*). An agent authorised to act "in and about" a purchase has no implied authority to purchase (*b*); but an agent authorised to sell may sign an agreement for sale so as to bind his principal (*c*). Authority to find a purchaser and enter

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(*e*) *Lord Bolingbroke* v. *Local Board of Swindon New Town* (1874), L. R. 9 C. P. 575. There is no implied authority in a servant to do unlawful acts, nor in a solicitor to exceed his necessary duties, *e.g.*, where issuing *fi. fa.*, to direct the sheriff to seize certain goods (*Smith* v. *Keal* (1882), 9 Q. B. D. 340).

(*f*) *Hanson* v. *Waller*, [1901] 1 K. B. 390; *Allen* v. *London and South Western Rail. Co.* (1870), L. R. 6 Q. B. 65; *Abrahams* v. *Deakin*, [1891] 1 Q. B. 516 (a railway clerk or manager of a business has no implied authority to give into custody except for the purpose of protecting the property of his employer).

(*g*) *Edwards* v. *London and North Western Rail. Co.* (1870), L. R. 5 C. P. 445.

(*h*) *Knight* v. *North Metropolitan Tramways Co.* (1898), 14 T. L. R. 286.

(*i*) *Bank of New South Wales* v. *Owston* (1879), 4 App. Cas. 270.

(*k*) *Stedman* v. *Baker* (1896), 12 T. L. R. 451.

(*l*) *Ashton* v. *Spiers and Pond* (1893), 9 T. L. R. 606.

(*m*) *Collins* v. *Blantern* (1767), 2 Wils. (K. B.) 341; *Holman* v. *Johnson* (1775), 1 Cowp., *per* Lord MANSFIELD at p. 343. See further, pp. 196, 197, *post*.

(*n*) *Mitchel* v. *Reynolds* (1711), 1 Smith, L. C. (4th ed.), 406.

(*o*) *Kirwan* v. *Goodman* (1841), 9 Dowl. 330.

(*p*) *Hamer* v. *Sharp* (1874), L. R. 19 Eq. 108; *Chadburn* v. *Moore* (1892), 61 L. J. (CH.) 674; *Prior* v. *Moore* (1887), 3 T. L. R. 624. But he has authority to describe the property and state facts affecting its value (*Mullens* v. *Miller* (1882), 22 Ch. D. 194).

(*a*) *Godwin* v. *Brind* (1868), 17 W. R. 29.

(*b*) *The Vale of Neath Colliery Co.* v. *Furness* (1876), 45 L. J. (CH.) 276.

(*c*) *Rosenbaum* v. *Belson*, [1900] 2 Ch. 267. There is a substantial difference between "to sell" and "to find a purchaser."

into a contract for the sale of property does not imply an authority to receive the purchase-money (*d*). SECT. 3. Implied Authority.

A bailiff authorised to distrain has implied authority to receive the rent (*e*). Bailiff.

362. A steward has implied authority to give or receive notices to quit (*f*), but a mere rent collector has not (*g*); nor has a steward implied authority to bind his principal by signing bills of exchange (*h*), or by a contract to grant a lease for a term of years (*i*). A steward appointed for a particular occasion has a more limited implied authority than one appointed to act generally, and when appointed only for the purpose of maintaining order on a special occasion, has no authority to commit an assault (*k*). Steward.

363. The implied authority of a factor includes authority, subject to special instructions,— Factor.

(1) To sell in his own name (*l*);

(2) To sell on reasonable credit (*m*), and at such time and price as he may think best for his principal (*n*);

(3) To warrant (*o*);

(4) To receive payment when he has sold in his own name (*p*).

It does not include authority to barter (*q*) or pledge (*r*) the principal's goods, or the bill of lading therefor (*s*), or to delegate his authority (*t*).

364. An agent also has implied authority to act in accordance with the customs and usages of the place where (*u*), or the business Custom.

(*d*) *Mynn* v. *Joliffe* (1834), 1 Mood. & R. 326.

(*e*) *Hatch* v. *Hale* (1850), 15 Q. B. 10; *Boulton* v. *Reynolds* (1859), 2 E. & E. 369, but a man left in possession by the bailiff has no such implied authority (*ibid.*). And an agent authorised to receive rents for his own benefit has no authority to distrain therefor (*Ward* v. *Shew* (1833), 9 Bing. 608).

(*f*) *Roe* v. *Pierce* (1809), 2 Camp. 96; *Papillon* v. *Brunton* (1860), 5 H. & N. 518; *Jones* v. *Phipps* (1868), L. R. 3 Q. B. 567.

(*g*) *Pearse* v. *Boulter* (1860), 2 F. & F. 133.

(*h*) *Davidson* v. *Stanley* (1841), 3 Scott, N. R. 49.

(*i*) *Collen* v. *Gardner* (1856), 21 Beav. 540, 542, on the ground that a steward is employed to manage property, which does not involve a right to contract with tenants, nor is any such custom established. But he may contract for the usual and customary leases (*Peers* v. *Sneyd* (1853), 17 Beav. 151).

(*k*) *Lucas* v. *Mason* (1875), L. R. 10 Exch. 251.

(*l*) *Baring* v. *Corrie* (1818), 2 B. & Ald. 137, 143; *Ex parte Dixon, Re Henley* (1876), 4 Ch. D. 133.

(*m*) *Houghton* v. *Matthews* (1803), 3 Bos. & P. 485, 489; *Scott* v. *Surman* (1742), Willes, 400, 406.

(*n*) *Smart* v. *Sandars* (1846), 3 C. B. 380.

(*o*) *Pickering* v. *Busk* (1812), 15 East, 38, 45, but apparently only where there exists a custom to warrant the class of article sold (*Dingle* v. *Hare* (1859), 7 C. B. (N. S.) 145).

(*p*) *Drinkwater* v. *Goodwin* (1775), 1 Cowp. 251, 255, but only by the usual mode of payment (*Underwood* v. *Nicholls* (1855), 17 C. B. 239, and p. 165, *ante*).

(*q*) *Guerreiro* v. *Peile* (1820), 3 B. & Ald. 616.

(*r*) *Gill* v. *Kymer* (1821), 5 Moore, 503; *Fielding* v. *Kymer* (1821), 2 B. & B. 639; *Martini* v. *Coles* (1813), 1 M. & S. 140; *Paterson* v. *Tash* (1743), 2 Str. 1178; *Guichard* v. *Morgan* (1819), 4 Moore, 36.

(*s*) *Newsom* v. *Thornton* (1805), 6 East, 17.

(*t*) *Cockran* v. *Irlam* (1814), 2 M. & S. 301; *Solly* v. *Rathbone* (1814), 2 M. & S. 298.

(*u*) *Foster* v. *Pearson* (1835), 1 C. M. & R. 849; *Pollock* v. *Stables* (1848), 12 Q. B. 765.

SECT. 3. Implied Authority.

in respect of which (*x*), his express authority permits him to act, subject to the condition that such customs and usages must not be unreasonable, nor change the essential nature of the contract of agency (*y*).

Principal unaware of custom.

Provided the custom or usage is reasonable, the agent's implied authority to act in accordance therewith is not affected by the fact that the principal may have been unaware of its existence (*a*); and the agent is entitled to indemnity from his principal against losses caused by acting in accordance therewith (*b*).

Reasonableness of custom.

What is a reasonable custom or usage is a question of law (*c*). It must be a generally recognised custom or usage, and not merely a course of business between the agent and the third party (*d*). A custom to receive payment by cheque is reasonable (*e*), but a custom to receive payment by setting off a debt due from the agent personally is not (*f*).

To act in accordance with an unreasonable custom or usage is not within the scope of an agent's implied authority unless the principal had notice of the custom or usage and agreed to be bound by it (*g*); and the burden of proving that the principal had notice of it lies on the person alleging the existence of the authority (*h*).

SECT. 4.—*Exercise of Authority.*

Execution of deed.

365. An agent acting under a power of attorney should, as a general rule, act in the name of the principal. If he is authorised to sue on the principal's behalf, the action should be brought in the principal's name. A deed executed in pursuance of such a power is properly executed in the name of the principal or with words to

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(*x*) *Lienard* v. *Dresslar* (1862), 3 F. & F. 212.

(*y*) *Robinson* v. *Mollett* (1874), L. R. 7 H. L. 802; *Bostock* v. *Jardine* (1865), 3 H. & C. 700.

(*a*) *Scott and Horton* v. *Godfrey*, [1901] 2 K. B. 726; and see *Beckhuson and Gibbs* v. *Hamblet*, [1901] 2 K. B. 73; *Cropper* v. *Cook* (1868), L. R. 3 C. P. 194; *Sutton* v. *Tatham* (1839), 10 A. & E. 27; and see title STOCK EXCHANGE.

(*b*) *Harker* v. *Edwards* (1887), 57 L. J. (Q. B.) 147; *Russell* v. *Hankey* (1794), 6 Term Rep. 12 (custom of bankers).

(*c*) *Coles* v. *Bristowe* (1868), 4 Ch. App. 3.

(*d*) *Ex parte Howell, Re Williams* (1865), 12 L. T. 785.

(*e*) *Bridges* v. *Garrett* (1870), L. R. 5 C. P. 451; *Walker* v. *Barker* (1900), 16 T. L. R. 393.

(*f*) *Todd* v. *Reid* (1821), 4 B. & Ald. 210; *Sweeting* v. *Pearce* (1859), 7 C. B. (N. S.) 449; *Bartlett* v. *Pentland* (1830), 10 B. & C. 760; *Scott* v. *Irving* (1830), 1 B. & Ad. 605; compare *Stewart* v. *Aberdein* (1838), 4 M. & W. 211; *Blackburn* v. *Mason* (1893), 68 L. T. 510. For the authority of a stockbroker, and customs which have been held reasonable and unreasonable, see title STOCK EXCHANGE.

(*g*) *Blackburn* v. *Mason, supra; Hamilton* v. *Young* (1881), L. R. 7 Ir. 289; *Stewart* v. *Aberdein, supra; Sweeting* v. *Pearce, supra; Bartlett* v. *Pentland, supra; Perry* v. *Barnett* (1885), 15 Q. B. D. 388; *Robinson* v. *Mollett, supra* (in which the opinions of the judges were taken); *Bostock* v. *Jardine, supra; Scott* v. *Irving, supra*, at p. 612.

(*h*) *Matveieff & Co.* v. *Crossfield* (1903), 51 W. R. 365. For the authority implied by reason of custom and usages in the case of other special classes of agent, see titles AUCTION AND AUCTIONEERS, BANKERS AND BANKING, INSURANCE, SHIPPING AND NAVIGATION, and SOLICITORS.

SECT. 4. Exercise of Authority.

show that the agent is signing for him (*i*). An execution of such a deed in the agent's own name and with his own seal, by the authority of the principal, is now, however, as effectual in law as if he had executed it in the name and with the seal of the principal (*k*).

Effect of not disclosing principal.

An agent having authority to sign a bill of exchange cannot by signing in his own name render his principal liable thereon (*l*). Subject to this rule and to any personal liability which the agent may incur by reason of acting in his own name (*m*), an agent may exercise his authority, whether verbally or by writing, without disclosing the name or existence of his principal (*n*).

Part VI.—Delegation.

SECT. 1.—*In General.*

Meaning of term.

366. By delegation is here meant the devolution from an agent upon another person of a power or duty intrusted to the agent by his principal.

General rule against delegation.

Delegatus non potest delegare is the maxim which lays down the general rule that an agent cannot delegate his powers or duties to another, in whole or in part, without the express authority of the principal (*a*).

Generally speaking, where there is personal confidence reposed or skill required (*b*) there can be no delegation, however general the nature of the duties (*c*), unless urgent necessity compels the handing over of the responsibility to someone else (*d*).

Directors of companies.

The powers of directors under the Companies Acts cannot be delegated except in accordance with the articles of association of the company (*e*).

(*i*) *White* v. *Cuyler* (1795), 6 Term Rep. 176; *Wilks* v. *Back* (1802), 2 East, 142; *Berkeley* v. *Hardy* (1826), 8 D. & R. 102; *M'Ardle* v. *Irish Iodine and Marine Salts Manufacturing Co.* (1864), 15 Ir. C. L. R. 146.

(*k*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 46.

(*l*) *Leadbitter* v. *Farrow* (1816), 5 M. & S. 345, *per* Lord ELLENBOROUGH and HOLROYD, J.; and see *Bult* v. *Morrell* (1840), 12 A. & E. 745, 750. But see *Lindus* v. *Bradwell* (1848), 5 C. B. 583 (where, however, the agent was a married woman, who, as such, could only sign as agent).

(*m*) See p. 219, *post*.

(*n*) *Calder* v. *Dobell* (1871), L. R. 6 C. P. 486; *Wilson* v. *Hart* (1817), 1 Moore, 45; *Weidner* v. *Hoggett* (1876), 1 C. P. D. 533.

(*a*) *Sims* v. *Britten* (1832), 1 Nev. & M. (K. B.) 594.

(*b*) *Cockran* v. *Irlam* (1814), 2 M. & S. 301; *Catlin* v. *Bell* (1815), 4 Camp. 183; *Henderson* v. *Barnewall* (1827), 1 Y. & J. 387; *Re County Palatine Loan and Discount Co.* (1874), 9 Ch. App. 691; *Tarry* v. *Ashton* (1876), 1 Q. B. D. 314; *Doe* d. *Rhodes* v. *Robinson* (1837), 3 Bing. (N. C.) 677.

(*c*) *Burial Board of St. Margaret, Rochester* v. *Thompson* (1871), L. R. 6 C. P. 445, 457.

(*d*) *De Bussche* v. *Alt* (1878), 8 Ch. D. 286, 310; *Gwilliam* v. *Twist* (1895) 11 T. L. R. 415.

(*e*) *Re County Palatine Loan and Discount Co., supra; Re Leeds Banking Co.* (1866), 1 Ch. App. 561; *Totterdell* v. *Fareham Blue Brick and Tile Co., Ltd.* (1866), L. R. 1 C. P. 674.

SECT. 2.

SECT. 2.—*Implied Authority to delegate.*

Implied Authority to delegate.

When delegation allowed.

367. To the maxim *Delegatus non potest delegare* there are certain well-recognised exceptions, where an authority to delegate will be implied; generally on the ground that there is no personal confidence reposed or skill required, and that the duties are capable of being equally well discharged by any person (*f*).

Ministerial acts.

368. Such exceptions exist in the case of purely ministerial acts, where no special discretion or skill is required (*g*), and of acts subsidiary to the main purpose (*h*); thus authority to sign may in general be delegated (*i*); but in cases where an agent has implied authority to sign a contract for both parties (*e.g.*, an auctioneer or broker) the signature of his clerk or traveller will not suffice (*k*).

Custom or usage.

369. Delegation is also permissible if it is in accordance with a reasonable custom or usage of trade, if not expressly forbidden (*l*).

A master of a foreign ship has been held justified in delegating the signing of a charter-party to a shipbroker (*m*).

A country solicitor may employ his town agent, who will bind the client (*n*).

An agent cannot, however, depute his clerk to sign for his principal so as to satisfy the Statute of Frauds (*o*), though, without delegation, he may do through others necessary and subordinate acts, himself retaining the control (*p*).

Acquiescence of principal.

370. Where the principal knows of the agent's intended delegation at the time of his employment, or subsequently acquiesces in it, or where the very nature of the employment necessitates a partial or total delegation, the rule can have no application (*q*). Thus an English contractor for a railway in Canada, who was known not to be personally undertaking the work, was held entitled to engage an agent (*q*). And where there is a ratification by the

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(*f*) See note (*b*), p. 169, *ante*.

(*g*) *Burial Board of St. Margaret, Rochester* v. *Thompson* (1871), L. R. 6 C. P. 445, 457 (delegation by sexton); *Parker* v. *Kett* (1701), 1 Ld. Raym. 658 (delegation by steward of manor).

(*h*) *Re London and Mediterranean Bank* (1868), 3 Ch. App. 651; *Ex parte Sutton* (1788), 2 Cox, 84, where an agent was authorised to draw bills in the common course of business, and it was held that he could do this by means of his clerk; see *Henderson* v. *Barnewall* (1827), 1 Y. & J. 387; *Murphy* v. *Boese* (1875), L. R. 10 Exch. 126; *London County Council* v. *Hobbis* (1896), 75 L. T. 687; *Coles* v. *Trecothick* (1804), 9 Ves. 234; *Hemming* v. *Hale* (1859), 7 C. B. (N. S.) 487; *Rossiter* v. *Trafalgar Life Assurance Association* (1859), 27 Beav. 377.

(*i*) *Mason* v. *Joseph* (1804), 1 Smith, 406; *Lord* v. *Hall* (1848), 2 C. & K. 698; *Brown* v. *Tombs*, [1891] 1 Q. B. 253.

(*k*) *Peirce* v. *Corf* (1874), L. R. 9 Q. B. 210, 215; *Bell* v. *Balls*, [1897] 1 Ch. 663.

(*l*) *De Bussche* v. *Alt* (1878), 8 Ch. D. 286.

(*m*) *The Fanny* (1883), 5 Asp. M. L. C. 75. See also *Moon* v. *Guardians of Witney Union* (1837), 3 Bing. (N. C.) 814.

(*n*) *Griffiths* v. *Williams* (1787), 1 Term Rep. 710; *Solley* v. *Wood* (1852), 16 Beav. 370; *Re Newen*, [1903] 1 Ch. 812.

(*o*) *Blore* v. *Sutton* (1816), 3 Mer. 237. See *Doe* d. *Rhodes* v. *Robinson* (1837), 3 Bing. (N. C.) 677, and cases cited note (*k*), *supra*.

(*p*) *Rossiter* v. *Trafalgar Life Assurance Association* (1859), 27 Beav. 377.

(*q*) *Quebec and Richmond Rail. Co.* v. *Quinn* (1858), 12 Moo. P. C. C. 232.

principal of the acts of the sub-agent, the latter becomes jointly liable with the agent to the principal (*r*).

SECT. 2. Implied Authority to delegate.

The sanction of the delegation may be evident from the conduct of the parties, as where on the sale of a ship in Japan through a sub-agent it was shown that the principal had acquiesced in his employment (*s*).

Cases of emergency.

371. Where unforeseen circumstances arise, the necessity of the case may make delegation imperative (*s*). The necessity must be urgent (*t*), or the delegation be absolutely essential from the requirements of the case, and the employment of the sub-agent must be with discretion. The agent will be liable even in cases of necessity if he acts with indiscretion in the use of a sub-agent, or intrusts the sub-agent, when employed, with unnecessary power or opportunity (*u*).

Trustees.

372. The employment by trustees of bankers and solicitors for the receipt of moneys and the giving of a discharge is now permitted by statute; but the liability of the trustee for the acts of these and other subordinate agents will not be escaped if he leaves trust funds longer in their hands than is reasonably necessary, or does not take all reasonable precautions (*a*).

SECT. 3.—*Position of Sub-agent.*

Privity between principal and sub-agent.

373. There is as a general rule no privity of contract between the principal and a sub-agent, the sub-agent being liable only to his employer, the agent (*b*). The exception is where the principal was a party to the appointment of the sub-agent, or has subsequently adopted his acts, and it was the intention of the parties that privity of contract should be established between them (*c*).

Classes of sub-agents.

There may, therefore, be said to be three classes of sub-agents: (1) those employed without the authority, express or implied, of the principal, by whose acts the principal is not bound (*d*); (2) those employed with the express or implied authority of the principal, but between whom and the principal there is no privity of contract; (3) those employed with the principal's authority, between whom and the principal there is privity of contract.

(*r*) *Keay* v. *Fenwick* (1876), 1 C. P. D. 745; *Dew* v. *Metropolitan Rail. Co.* (1885), 1 T. L. R. 358.

(*s*) *De Bussche* v. *Alt* (1878), 8 Ch. D. 286.

(*t*) *Gwilliam* v. *Twist* (1895), 11 T. L. R. 415. The driver and conductor of an omnibus have no implied authority to hand over the driving to another person. And see *Harris* v. *Fiat Motors, Ltd.* (1906), 22 T. L. R. 556.

(*u*) *Speight* v. *Gaunt* (1883), 9 App. Cas. 1; *Jobson* v. *Palmer*, [1893] 1 Ch. 71.

(*a*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 17, and see *Rowland* v. *Witherden* (1851), 3 Mac. & G. 568; *Bostock* v. *Floyer* (1865), 35 Beav. 603; *Speight* v. *Gaunt* (1883), 9 App. Cas. 1.

(*b*) *Mackersy* v. *Ramsays, Bonars & Co.* (1843), 9 Cl. & F. 818; *Schmaling* v. *Thomlinson* (1815), 6 Taunt. 147; *A.-G.* v. *Earl of Chesterfield* (1854), 18 Beav. 596; *New Zealand and Australian Land Co.* v. *Watson* (1881), 7 Q. B. D. 374; *Dunlop* v. *De Murrieta & Co.* (1886), 3 T. L. R. 166; *Lockwood* v. *Abdy* (1845), 14 Sim. 437; *Montagu* v. *Forwood*, [1893] 2 Q. B. 350; *Pinto* v. *Santos* (1814), 1 Marsh. 132.

(*c*) *De Bussche* v. *Alt*, *supra*.

(*d*) *Blore* v. *Sutton* (1817), 3 Mer. 237; *Wray* v. *Kemp* (1884), 26 Ch. D. 169; *Dunlop* v. *De Murrieta & Co.*, *supra*.

SECT. 3. Position of Sub-agent.

For the acts and defaults of the first two classes the agent is responsible to the principal (*e*). Where an agent, employed to obtain payment, employed a sub-agent in India, and payment was actually made to the sub-agent, but not credited to the agent, the agent was held liable for the sub-agent's failure, on the ground that the principal could not be called upon to suffer loss through a sub-agent with whom he had no privity (*f*).

Remuneration of sub-agent.

374. The sub-agent, not as a rule being brought into contractual relationship with the principal, must look to the agent for his remuneration and indemnity (*g*). Thus, where an agent for the transport of goods, without authority delegated his entire duties, it was held that the person performing them was not entitled to recover for his services against the principal (*h*).

Sub-agent accountable to agent who employs him.

375. Similarly a sub-agent is, as a general rule, accountable only to the agent who employs him, and that agent in turn to his principal (*i*), so that a sub-agent taking over the conduct of the principal's business is not liable to render an account to him (*k*), and cannot even be sued by the principal (except in the cases stated already (*l*)) for money had and received to the principal's use (*m*).

This rule applies as between a principal and the town agent of his country solicitor (*n*); but though there is no privity of contract between them, yet in a case where the town agent holds money to which the principal is entitled, even though such holding be not fraudulent, the Court may, in the exercise of its jurisdiction over its own officers, order such money to be paid to the principal (*o*).

No delegation by body acting through committee.

376. The distinction between a delegation of authority and the exercise of the authority by a body through a committee of its own

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(*e*) *Mackersy* v. *Ramsays, Bonars & Co.* (1843), 9 Cl. & F. 818; *Swire* v. *Francis* (1877), 3 App. Cas. 106; *Skinner & Co.* v. *Weguelin, Eddowes & Co.* (1882), 1 Cab. & El. 12; *Ecossaise Steamship Co.* v. *Lloyd, Low & Co.* (1890), 7 T. L. R. 76; *Meyerstein* v. *Eastern Agency Co.* (1885), 1 T. L. R. 595.

(*f*) *Mackersy* v. *Ramsays, Bonars & Co., supra*, at p. 845; *Re Mitchell* (1884), 54 L. J. (CH.) 342, where the agent was held liable for loss arising through his negligently leaving funds in a sub-agent's hands for a longer time than was necessary and without seeing vouchers.

(*g*) *Solly* v. *Rathbone* (1814), 2 M. & S. 298; *Mason* v. *Clifton* (1863), 3 F. & F. 899.

(*h*) *Schmaling* v. *Thomlinson* (1815), 6 Taunt. 147.

(*i*) *Stephens* v. *Badcock* (1832), 3 B. & Ad. 354; *Sims* v. *Britten* (1832), 1 Nev. & M. (K. B.) 594.

(*k*) *Lockwood* v. *Abdy* (1845), 14 Sim. 437; *Cartwright* v. *Hateley* (1791), 1 Ves. 292.

(*l*) See p. 171, *ante*.

(*m*) *Cobb* v. *Becke* (1845), 6 Q. B. 930. But see *Blackburn* v. *Mason* (1893), 68 L. T. 510 (money had and received recovered by principal from London agent of stockbroker).

(*n*) *Cobb* v. *Becke, supra*; *Robbins* v. *Fennell* (1847), 11 Q. B. 248; *Wray* v. *Kemp* (1884), 26 Ch. D. 169.

(*o*) *Robbins* v. *Heath* (1848), 11 Q. B. 257; *Hanley* v. *Cassan* (1847), 11 Jur. 1088; *Ex parte Edwards* (1881), 7 Q. B. D. 155, affirmed 8 Q. B. D. 262. See title SOLICITORS, and, as to the lien of the town agent, *Farewell* v. *Coker* (1728), 2 P. Wms., 460; *Waller* v. *Holmes* (1860), 1 John. & H. 239 (no lien if nothing due to country solicitor when lien claimed).

members is examined in a leading case (*p*). This is only an exercise of the authority in a mode prescribed, and there is no delegation of the duty.

SECT. 3. Position of Sub-agent.

Part VII.—Ratification.

SECT. 1.—*In General.*

377. Under certain conditions a contract or other act which at the time it was entered into or done by an agent lacked the authority, express or implied, of a principal, may by his subsequent conduct become ratified by him and made as effectively his own as if he had previously authorised it. Effect of ratification.

Where the act has been done by a person not assuming to act on his own behalf, but for another, though without his precedent authority (*q*) or knowledge (*r*), and is subsequently ratified by that other person, the relation of principal and agent is constituted retrospectively. In such a case the principal is bound by the act whether it be to his advantage or detriment, whether it be founded in contract or in tort, to the same extent and with all the same consequences as if the same act had been done by his previous authority (*s*).

SECT. 2.—*Acts capable of Ratification.*

378. A ratification may be of one act or a series of acts; and as a general rule every act may be ratified, whether legal or illegal, if it be not void in its inception, provided that it was capable of being done by the principal himself (*t*). Where the validity of an act depends on the confirmation of one or more persons, it is voidable only and not void, and is therefore capable of ratification (*a*). General rule.

The act of a public officer, such as a sheriff's officer, performed in his public capacity, is not capable of ratification by a private person (*b*), but where a sheriff professes and intends to act on behalf of a private individual, or a corporation, the private individual or corporation can ratify his act (*c*). Act of public officer.

A contract may be ratified even though the circumstances have altered, as by a loss occurring under an unauthorised insurance policy (*d*), or even when the third party has given notice of Contract.

(*p*) *Osgood* v. *Nelson* (1872), L. R. 5 H. L. 636.
(*q*) *Simpson* v. *Eggington* (1855), 10 Exch. 845.
(*r*) *Ancona* v. *Marks* (1862), 7 H. & N. 686.
(*s*) *Wilson* v. *Tumman* (1848), 6 Man. & G. 236 (*per* TINDAL, C.J., at p. 242); *Maclean* v. *Dunn* (1828), 1 Moo. & P. 761; *Foster* v. *Bates* (1843), 12 M. & W. 226.
(*t*) *Mason* v. *Clifton* (1863), 3 F. & F. 899.
(*a*) *Spackman* v. *Evans* (1868), L. R. 3 H. L. 171, at p. 244.
(*b*) *Wilson* v. *Tumman, supra*; *Woollen* v. *Wright* (1862), 1 H. & C. 554.
(*c*) *Walker* v. *Hunter* (1845), 2 C. B. 324; *Carter* v. *Vestry of St. Mary Abbot's, Kensington* (1900), 64 J. P. 548.
(*d*) *Hagedorn* v. *Oliverson* (1814), 2 M. & S. 485; *Williams* v. *North China Insurance Co.* (1876), 1 C. P. D. 757.

SECT. 2. Acts capable of Ratification.

repudiation (*e*), provided it be ratified within a reasonable time (*f*), and it is immaterial that the contract was made by the agent in fraud of the principal (*g*). But where the agent and third party are able to rescind their transaction (as in the case of a payment by the agent to the third party, followed by repayment to the agent by mutual agreement), so that there remains nothing to ratify, ratification by the principal is inoperative (*h*).

Forgery.

379. A forgery is probably, as being void in its inception, incapable of ratification by the person whose name is forged, though he may incur a liability on the instrument on the principle of estoppel (*i*).

Act *ultra vires* the principal.

An act may be void in its inception, and therefore not capable of ratification, because it is one which the intended principal had not the power to do. Many cases illustrate this rule, largely connected with acts done on behalf of corporations or companies which are not within the scope of their powers as limited by the special Act, charter, or memorandum of association under which they are incorporated. However desirous the members of the corporation or company may be of ratifying such an act, they cannot do so (*k*). For instance, if directors pay dividends out of capital on a balance-sheet inflated by known bad debts, such a payment cannot be ratified by the shareholders, because the powers of the company do not authorise the payment of dividends out of capital (*l*). But an act which is beyond the powers of the directors or other agents, but within the general powers of the company, may be adopted and validly ratified by resolution of the shareholders (*m*), though such a ratification will not be implied merely from the fact that the shareholders have seen and passed without comment the balance-sheet or formal documents (*n*). Shareholders may, however,

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(*e*) *Bolton Partners* v. *Lambert* (1889), 41 Ch. D. 295. But this decision has been much criticised, and Lord LINDLEY in *Fleming* v. *Bank of New Zealand*, [1900] A. C. 577, at p. 587, expressly reserved the right of the Privy Council to consider the point; and see pp. 177, 178, *post*. Ratification does not relate back when parties other than the co-contracting party have acquired rights before ratification (*Re Gloucester Municipal Election Petition*, [1901] 1 K. B. 683).

(*f*) *Re Portuguese Consolidated Copper Mines, Ltd.* (1890), 45 Ch. D. 16; *Re Tiedemann and Ledermann Frères*, [1899] 2 Q. B. 66.

(*g*) *Re Tiedemann and Ledermann Frères, supra.*

(*h*) *Walter* v. *James* (1871), L. R. 6 Exch. 124; but see also *Hooper* v. *Kerr, Stuart & Co.* (1901), 83 L. T. 729.

(*i*) *Brook* v. *Hook* (1871), L. R. 6 Exch. 89 (MARTIN, B., dissenting), and see Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 24; but see *contra*, *McKenzie* v. *British Linen Co.* (1881), 6 App. Cas. 82, BLACKBURN, J., at p. 99.

(*k*) *Ashbury Railway Carriage and Iron Co.* v. *Riché* (1875), L. R. 7 H. L. 653; *Athy Guardians* v. *Murphy*, [1896] 1 Ir. R. 65; *Re Empress Engineering Co.* (1880), 16 Ch. D. 125; *Re Dale and Plant* (1889), 61 L. T. 206; *Mann* v. *Edinburgh Northern Tramways Co.*, [1893] A. C. 69.

(*l*) *Flitcroft's Case* (1882), 21 Ch. D. 519.

(*m*) *Irvine* v. *Union Bank of Australia* (1877), 2 App. Cas. 366; *Grant* v. *United Kingdom Switchback Railways Co.* (1888), 40 Ch. D. 135. See, however, *Boschoek Proprietary Co.* v. *Fuke*, [1906] 1 Ch. 148. The directors themselves may ratify an act done on behalf of the company if the act was within their own powers (*Wilson* v. *West Hartlepool Rail. Co.* (1866), 2 De G. J. & S. 475).

(*n*) *Blackburn and District Benefit Building Society* v. *Cunliffe, Brooks & Co.* (1883), 29 Ch. D. 902.

by acquiescence ratify such an act if they have a full knowledge of the circumstances (*o*).

SECT. 2. Acts capable of Ratification.

380. The illegality of an act will not of itself prevent its ratification (*p*). A trespass or assault committed by a servant is capable of being ratified by the employer (*q*), but a principal or employer is, in such a case, only liable to the extent of the acts he has ratified (*r*). An act tortious *ab initio* may be ratified, as where agents wrongfully seized possession of a stranded ship, and the principals wrote in terms of approval (*s*); but the receipt of money, the proceeds of an illegal distress, is not a sufficient ratification of the illegal acts of the agent levying the distress, unless the principal has knowledge of the illegality (*t*).

Unlawful acts.

The holder of a bill of exchange may avail himself of notice of dishonour by ratification of the act of another person (*a*); and the unauthorised institution of legal proceedings may be ratified (*b*).

Notice of dishonour.

Legal proceedings.

SECT. 3.—*Conditions of Ratification.*

381. The first essential to an agency by ratification is that the agent shall not be acting for himself, but shall intend to bind a named or ascertainable principal, and one who is actually in existence at the time when the act is done (*c*). If A. wrongfully seizes a chattel *for his own use*, B. cannot ratify the act (*d*).

Act must be done on behalf of principal.

A contract made by one professing to act on his own behalf, though at the time he has the intention of giving the benefit of the contract to an undisclosed principal, cannot be ratified by that person so as to give him the status of principal and the right to sue on the contract (*e*), unless in some way the principal's name was used in the first instance (*f*). So a contract made professedly on behalf of a volunteer corps cannot be ratified by individual members or officers of the corps (*g*).

Act done by agent professing to act on his own behalf.

(*o*) *London Financial Association* v. *Kelk* (1884), 26 Ch. D. 107; *Evans* v. *Smallcombe* (1868), L. R. 3 H. L. 249. See *Maclae* v. *Sutherland* (1854), 3 E. & B. 1; *Re the Magdalena Steam Navigation Co.* (1860), 29 L. J. (CH.) 667; *Phosphate of Lime Co.* v. *Green* (1871), L. R. 7 C. P. 43; *Reuter* v. *Electric Telegraph Co.* (1856), 6 E. & B. 341.

(*p*) *Hull* v. *Pickersgill* (1819), 1 B. & B. 282.

(*q*) *Eastern Counties Rail. Co.* v. *Broom* (1851), 6 Exch. 314.

(*r*) *Haseler* v. *Lemoyne* (1858), 5 C. B. (N. S.) 530; *Lewis* v. *Read* (1845), 13 M. & W. 834; *Knight* v. *North Metropolitan Tramways Co.* (1898), 14 T. L. R. 286.

(*s*) *Hilbery* v. *Hatton* (1864), 2 H. & C. 822.

(*t*) *Freeman* v. *Rosher* (1849), 13 Q. B. 780.

(*a*) *Chapman* v. *Keane* (1835), 3 A. & E. 193; and Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 49.

(*b*) *Ancona* v. *Marks* (1862), 7 H. & N. 686.

(*c*) *Wilson* v. *Tumman* (1843), 12 L. J. (C. P.) 306; *Royal Albert Hall Corporation* v. *Winchelsea* (1891), 7 T. L. R. 362; *Marsh* v. *Joseph*, [1897] 1 Ch. 213.

(*d*) *Wilson* v. *Barker* (1833), 4 B. & Ad. 614.

(*e*) *Keighley Maxsted & Co.* v. *Durant*, [1901] A. C. 240; *Heath* v. *Chilton* (1844), 12 M. & W. 632 (an executor cannot ratify a contract made by his two co-executors on their own behalf).

(*f*) *Re Tiedemann and Ledermann Frères*, [1899] 2 Q. B. 66.

(*g*) *Jones* v. *Hope* (1880), 3 T. L. R. 247; and see *Saunderson* v. *Griffiths* (1826), 5 B. & C. 909.

SECT. 3. Conditions of Ratification.

382. The intended principal must, in order that he may be able effectively to ratify a contract, be in existence and ascertainable at the time when the contract is entered into, and be himself capable of entering into it (*h*). If there is no such principal there can be no agency, and the so-called agent will himself be liable on the contract. This may happen in two cases.

Principal must be *in esse* and capable.

Infants.

A contract entered into on behalf of an infant, other than for necessaries, will not bind the infant (*i*), nor can an infant after coming of full age ratify any contract made on his behalf during infancy, even if there is a new consideration for it (*k*).

Contracts made before incorporation of company.

Secondly, contracts made in furtherance of the projects of an intended company, not actually formed, cannot be ratified by the company when it comes into existence. There is in such a case no agency, and the contract is that of the parties making it (*l*). But there may be evidence that the company after formation has entered into a new contract (*m*).

Claims have often been made against companies after formation on contracts entered into by promoters for services rendered, or to be rendered. In cases where the company has been incorporated by private Act of Parliament, and the Act has provided for the payment of the formation expenses, these actions have generally been successful (*n*), even in cases where the plaintiff had given an undertaking to an individual promoter that there should be no claim if the company did not proceed with its undertaking (*o*), or where there had been a novation of the contract (*p*). But where the articles of association of a company incorporated under the Companies Acts provided for such payment, this was held to give no right to persons not members of the company (*q*); and certain cases show clearly that the claimants must look to the promoters and not to the company for payment (*r*).

Position of agent.

When a contract is made by one who professes to be making it as agent, but who has no principal existing at the time, and the contract would therefore be wholly inoperative unless binding upon the professed agent, he must be presumed to have

(*h*) *Watson* v. *Swann* (1862), 11 C. B. (N. S.) 756; *Foster* v. *Bates* (1843), 12 M. & W. 226.

(*i*) But see pp. 149, 150, *ante*.

(*k*) Infants' Relief Act, 1874 (37 & 38 Vict. c. 62), s. 2.

(*l*) *Kelner* v. *Baxter* (1866), L. R. 2 C. P. 174; *Re Empress Engineering Co.* (1880), 16 Ch. D. 125; *Natal Land and Colonization Co.* v. *Pauline Colliery Syndicate*, [1904] A. C. 120; *Star Corn Millers' Society* v. *W. Moore & Co.* (1886), 2 T. L. R. 751; *North Sydney Investment and Tramway Co.* v. *Higgins*, [1899] A. C. 263. For the liability, apart from ratification, of a company which has benefited under the contract of its promoters, see *Touche* v. *Metropolitan Railway Warehousing Co.* (1871), 6 Ch. App. 671; *Preston* v. *Proprietors of Liverpool, Manchester etc. Railway* (1856), 5 H. L. Cas. 605; *Re English and Colonial Produce Co.*, [1906] 2 Ch. 435; *Earl of Shrewsbury* v. *North Staffordshire Rail. Co.* (1865), L. R. 1 Eq. 593.

(*m*) *Howard* v. *Patent Ivory Manufacturing Co.* (1888), 38 Ch. D. 156.

(*n*) *Re Tilleard* (1863), 3 De G. J. & S. 519.

(*o*) *Re Brampton and Longtown Rail. Co.* (1875), 10 Ch. App. 177.

(*p*) See *Re Rotherham Alum and Chemical Co.* (1883), 25 Ch. D. 103.

(*q*) *Eley* v. *Positive Government Security Life Assurance Co.* (1875), L. R. 1 Ex. D. 20, affirmed *ibid.* 88.

(*r*) *Re Kent Tramways Co.* (1879), 12 Ch. D. 312; *Re Skegness and St. Leonard's Tramways Co., Ex parte Hanly* (1888), 41 Ch. D. 215.

intended to bind himself, unless a contrary intention clearly appears from the terms of the contract; and a stranger, as a projected company subsequently incorporated is in fact, cannot by a subsequent ratification relieve him from personal liability (*s*). Even a secretary who has paid for his qualification, under an agreement with promoters, on the basis of a term appointment and salary, can only in such a case recover against the company on equitable grounds for work actually done (*t*).

Principal must have been ascertainable.

383. A ratification, to be effective, must be by the person for whom the act was professedly done or his personal representative (*u*), and not by a stranger. The person ratifying need not necessarily have been a named individual at the time when the act was done, but must have been ascertainable (*v*). A person entitled to the reversion of an estate may ratify the agency of one who has been professedly receiving the rents for the right owner (*v*).

Time for ratification.

384. As to the time within which ratification may take place, the rule is that it must be either within a time fixed by the nature of the particular case, or within a reasonable time, after which an act cannot be ratified to the prejudice of a third person. Thus an unauthorised notice to quit can only be ratified by the landlord within the time for giving notice (*w*); the payment of a debt to a creditor of another cannot be ratified after the money has been returned to the unauthorised agent (*x*); the entry of an unauthorised agent upon lands barred by fine and proclamation, could not be ratified after the time for entry had elapsed (*y*); an unauthorised stoppage *in transitu* cannot be ratified after the transit is ended (*z*); and the exercise of an option must be ratified within the time for which the option was open (*a*).

An unauthorised demand of a debt by the creditor's agent cannot, after tender by the debtor, be ratified so as to defeat the plea of tender, unless the agent had implied authority to receive the debt and give a discharge (*b*). An unauthorised demand of goods cannot be ratified by the owner so as to enable him to sue (*c*). Nor can the pledgee of a policy on a ship acquire through ratification by the owner a right to give notice of abandonment to the underwriters so

(*s*) *Kelner* v. *Baxter* (1866), L. R. 2 C. P. 174, *per* ERLE, C.J., at p. 183. See also *Scott* v. *Lord Ebury* (1867), L. R. 2 C. P. 255; *Re Empress Engineering Co.* (1880), 16 Ch. D. 125; *Re Northumberland Avenue Hotel Co.* (1886), 33 Ch. D. 16; *Melhado* v. *Porto Alegre Rail. Co.* (1874), L. R. 9 C. P. 503.

(*t*) *Re Dale and Plant, Ltd.* (1889), 61 L. T. 206.

(*u*) *Whitehead* v. *Taylor* (1839), 10 A. & E. 210; *Foster* v. *Bates* (1843), 12 M. & W. 226.

(*v*) *Lyell* v. *Kennedy* (1889), 14 App. Cas. 437; *Hagedorn* v. *Oliverson* (1814), 2 M. & S. 485; see *Purcell* v. *Henderson* (1885), L. R. 16 Ir. 213, 466.

(*w*) *Doe* v. *Walters* (1830), 10 B. & C. 626; and see *Right* v. *Cuthell* (1804) 5 East, 491; *Doe* v. *Goldwin* (1841), 2 Q. B. 143.

(*x*) *Walter* v. *James* (1871), L. R. 6 Exch. 124; *Jones* v. *Broadhurst* (1850), 9 C. B. 173; *Lucas* v. *Wilkinson* (1856), 1 H. & N. 420.

(*y*) *Lord Audley* v. *Pollard* (1597), Cro. (Eliz.) 561.

(*z*) *Bird* v. *Brown* (1850), 4 Exch. 786.

(*a*) *Dibbins* v. *Dibbins*, [1896] 2 Ch. 348. See also *Holland* v. *King* (1848), 6 C. B. 727; *Metropolitan Asylums Board* v. *Kingham* (1890), 6 T. L. R. 217.

(*b*) *Coles* v. *Bell* (1808), 1 Camp. 478; *Coore* v. *Callaway* (1794), 1 Esp. 115

(*c*) *Solomons* v. *Dawes* (1794), 1 Esp. 83.

SECT. 3. Conditions of Ratification.

as to render them liable (*d*). But a contract of insurance made by an agent on the principal's property may be ratified by the principal after notice of loss (*e*).

Ratification must not be partial.

A contract cannot be ratified in part and repudiated in part. If ratified, the whole contract must be ratified, and the agency accepted *cum onere* (*f*). Ratification of one of a series of acts constituting one transaction operates as a ratification of the entire transaction (*g*).

SECT. 4.—*Manner of Ratification.*

Deed.

385. The execution of a deed can only be ratified by deed or by matter of record (*h*). Subject to this, a ratification may be by parol, or be implied from conduct (*i*). Even in the case of a written contract which is unenforceable unless evidenced by a note or memorandum in writing, it is not necessary that the ratification should be in writing (*j*). An action on a voidable contract (*k*) or a pleading relying on an unauthorised act (*l*) is an adoption of the agency.

Contract in writing.

Essentials of ratification.

Ratification must be evidenced either by clear adoptive acts (*m*), or by acquiescence equivalent thereto. The act or acts of adoption or acquiescence must be accompanied by full knowledge of all the essential facts (*n*), and must relate to a transaction to which effect can be given (*o*), unless the principal shows an intention to take all risks (*p*). But it is not necessary that he should know the legal effect of the act ratified (*q*). A mere act of repudiation by the principal does not in itself, and apart from any conduct which it may have induced in any third person, estop the principal from subsequently adopting or ratifying the agent's act (*r*).

(*d*) *Jardine* v. *Leathley* (1863), 3 B. & S. 700, per CROMPTON, J., at p. 708.

(*e*) *Cory* v. *Patton* (1874), L. R. 9 Q. B. 577; *Williams* v. *North China Insurance Co.* (1876), 1 C. P. D. 757.

(*f*) *Hovil* v. *Pack* (1806), 7 East, 166, *per* Lord ELLENBOROUGH; *Wilson* v. *Poulter* (1730), 2 Str. 859.

(*g*) *Rodwell* v. *Eden* (1859), 1 F. & F. 542.

(*h*) *Hunter* v. *Parker* (1840), 7 M. & W. 322; *Tupper* v. *Foulkes* (1861), 9 C. B. (N. S.) 797; *Mayor, Aldermen and Citizens of Oxford* v. *Crow*, [1893] 3 Ch. 535.

(*i*) *Maclean* v. *Dunn* (1828), 1 M. & P. 761; *Fitzmaurice* v. *Bayley* (1856), 6 E. & B. 868; *Soames* v. *Spencer* (1822), 1 D. & R. 32.

(*k*) *Lucy* v. *Walrond* (1837), 3 Bing. (N. C.) 848, *per* COLTMAN, J.

(*l*) *Belshaw* v. *Bush* (1851), 11 C. B. 191.

(*m*) *Lythgoe* v. *Vernon* (1860), 29 L. J. (EX.) 164; *Smith* v. *Baker* (1873), L. R. 8 C. P. 350; *Brewer* v. *Sparrow* (1827), 7 B. & C. 310; *Valpy* v. *Sanders* (1848), 5 C. B. 886 (what constitutes such a clear adoptive act); *Moon* v. *Towers* (1860), 8 C. B. (N. S.) 611.

(*n*) *Savery* v. *King* (1856), 5 H. L. Cas. 627; *Haseler* v. *Lemoyne* (1858), 5 C. B. (N. S.) 530; *Gunn* v. *Roberts* (1874), L. R. 9 C. P., *per* BRETT, J., at p. 335; and see *Marsh* v. *Joseph*, [1897] 1 Ch. 213.

(*o*) *La Banque Jacques-Cartier* v. *La Banque d'Epargne de la Cité et du District de Montreal* (1887), 13 App. Cas. 111; *Foligno* v. *Martin* (1852), 22 L. J. (CH.) 502; *Jackson* v. *Jacob* (1837), 3 Bing. (N. C.) 869; *Munnings* v. *Bury* (1829), 1 Tam. 147.

(*p*) *Brewer* v. *Sparrow*, *supra* (where the assignees of a bankrupt affirmed the acts of a person wrongfully selling property, they could not afterwards treat him as a wrong-doer); *Haseler* v. *Lemoyne*, *supra*. But see *Valpy* v. *Sanders*, *supra*.

(*q*) *Powell* v. *Smith* (1872), L. R. 14 Eq. 85; *Lewis* v. *Read* (1845), 13 M. & W. 834; *Fitzmaurice* v. *Bayley* (1856), 6 E. & B. 868; *Hilbery* v. *Hatton* (1864), 2 H. & C. 822.

(*r*) *Simpson* v. *Eggington* (1855), 10 Exch. 845; *Soames* v. *Spencer* (1822), 1 D. [illegible]

SECT. 4. Manner of Ratification.

Evidence of ratification.

386. The receipt of purchase-money is generally sufficient evidence of ratification of a sale, but not if it is received in ignorance of the true facts (*s*). Where a solicitor, whose name had been used by another on a bill without authority, received a nominal sum, and was told it was a formality, whereas it was to assist a fraud, this was held not to be a ratification of the act, and he was liable only to the extent of the amount received by him (*t*). In the case of an assault by a railway company's servant in taking the plaintiff, a passenger, into custody, it was held that the fact of the company's solicitor appearing to conduct the charge was no evidence of a ratification by the company (*u*).

While a ratification must be clear and must bear distinct reference to the facts of the particular case, it need not necessarily be proved by positive acts of adoption. In certain cases it is sufficient evidence of ratification that the intended principal, having all material facts brought to his knowledge and knowing that he is being regarded as having accepted the position of principal, takes no steps to disown that character within reasonable time, or adopts no means of asserting his rights at the earliest period possible (*a*).

Ratification by acquiescence.

387. Acquiescence may take place before or at the time of or after the act acquiesced in. If before, it may be said to operate by way of estoppel, as where a person having a right, and seeing another person about to infringe it, stands by in such a way as to induce the person committing the act of infringement to believe that he assents to it. In such a case he is estopped from afterwards complaining of the act (*b*).

Acquiescence after the act, as evidence of its ratification, requires more consideration. Acquiescence, like acts of adoption, cannot avail when the contract or act is *ultra vires* the alleged principal (*c*), or is made or done before the alleged principal came into existence (*d*), even where such principal has derived advantage from the services rendered (*e*).

The acquiescence must be acquiescence in the particular facts and be incapable of referring to another set of facts. Thus where an agent in China for the sale of a ship employed, with the principal's knowledge, a sub-agent in Japan, who, unable to sell at the time,

(*s*) *The Bonita* (1861), 5 L. T. 141; *Freeman* v. *Rosher* (1849), 13 Q. B. 780. See also *Cornwal* v. *Wilson* (1750), 1 Ves. Sen. 509.

(*t*) *Marsh* v. *Joseph*, [1897] 1 Ch. 213 (to constitute a ratification there must be full knowledge and unequivocal adoption after knowledge, *per* Lord RUSSELL, C.J., at p. 246).

(*u*) *Eastern Counties Rail. Co.* v. *Broom* (1851), 6 Exch. 314. But see *Carter* v. *Vestry of St. Mary Abbots* (1900), 64 J. P. 548.

(*a*) *The Australia* (1859), 13 Moo. P. C. C. 132; *Jackson* v. *Jacob* (1837), 3 Bing. (N. C.) 869; *La Banque Jacques-Cartier* v. *La Banque d'Epargne de la Cité et du District de Montreal* (1887), 13 App. Cas. 111; *Robinson* v. *Gleadow* (1835), 2 Bing. (N. C.) 156; *Hall* v. *Laver* (1842), 1 Hare, 571. The burden of proving such ratification rests on the person alleging it, who must also prove full knowledge of facts (*Wall* v. *Cockerell* (1863), 10 H. L. Cas. 229, 243).

(*b*) *De Bussche* v. *Alt* (1878), 8 Ch. D. 286, *per* THESIGER, L.J., at p. 314; *Duke of Leeds* v. *Earl of Amherst* (1846), 2 Ph. 117, 123.

(*c*) See p. 174, *ante*.

(*d*) See p. 176, *ante*.

(*e*) *Re Rotherham Alum and Chemical Co.* (1883), 25 Ch. D. 103.

SECT. 4. **Manner of Ratification.**

himself became the buyer and subsequently resold at a large profit, it was held that there had been no such acquiescence by the principal in the sale as to extinguish the relation of principal and agent which had been created between the principal and sub-agent, and that the principal was entitled to recover from the sub-agent the profit made on the resale (*f*).

Where agency previously existing between parties.

Acquiescence is stronger evidence of ratification where the relationship of principal and agent previously existed between the parties, and the act to be ratified was rather one in excess of the agent's authority than one which was totally unauthorised (*g*). Thus, where a shipmaster who was intrusted with the sale of goods, the proceeds to be devoted to particular purchases, devoted the proceeds to other purchases and advised his employer thereof, it was held that the fact that there was no repudiation by the employer within a reasonable time was evidence that he assented to and ratified the shipmaster's conduct (*h*).

SECT. 5.—*Effect of Ratification.*

General effect.

388. An effective ratification places all the parties in exactly the same position as they would have occupied in the case of a precedent agency by formal constitution. *Omnis ratihabitio retrotrahitur et mandato priori æquiparatur* (*i*).

In case of contract.

Where a contract is ratified the agent is relieved from personal liability to his principal for acting in excess of his authority (*k*), and may recover his commission and expenses (*l*). The principal must perform the contract made by the agent in its entirety (*m*); and the agent is relieved from personal liability to the other contracting party for breach of warranty of authority, the only remedy of such party being against the principal, unless the agent contracted in his own name (*n*).

In case of tort.

In the case of a tort the agent remains liable, and the principal

(*f*) *De Bussche* v. *Alt* (1878), 8 Ch. D. 286; *Powell* v. *Evan Jones & Co.*, [1905] 1 K. B. 11; and where the agent of a shipowner contracts for repairs in excess of his authority, the fact that the owner accepts his own ship as repaired and sells it is not acquiescence (*Forman & Co. Proprietary, Ltd.* v. *The Liddesdale*, [1900] A. C. 190).

(*g*) *Sentance* v. *Hawley* (1863), 13 C. B. (N. S.) 458; *Benham* v. *Batty* (1865), 12 L. T. 266; *Waithman* v. *Wakefield* (1807), 1 Camp. 120; *Lapraik* v. *Burrows* (1859), 13 Moo. P. C. C. 132; *Allard* v. *Bourne* (1863), 15 C. B. (N. S.) 468; *Smith* v. *Hull Glass Co.* (1852), 11 C. B. 897; *Pott* v. *Bevan* (1844), 1 C. & K. 335.

(*h*) *Prince* v. *Clark* (1823), 1 B. & C. 186; *Sentance* v. *Hawley*, *supra* (principal found to have acquiesced in a reasonable custom of brokers); *Fothergill* v. *Phillips* (1871), 6 Ch. App. 770 (where one tenant in common entered into negotiations for sale, and the other, who allowed them to go on for three years without dissenting, knowing that the mortgagee was threatening to foreclose unless the sale took place, was held too late to allege absence of authority). See also *Bigg* v. *Strong* (1857), 3 Sm. & G. 592.

(*i*) *Maclean* v. *Dunn* (1828), 4 Bing. 722.

(*k*) *Smith* v. *Cologan* (1788), 2 Term Rep. 188 a; *Risbourg* v. *Bruckner* (1858), 3 C. B. (N. S.) 812, where a foreign principal distinctly ratified; *Hartas* v. *Ribbons* (1889), 22 Q. B. D. 254; *Clarke* v. *Perrier* (1679), 2 Freem. 48.

(*l*) *Keay* v. *Fenwick* (1876), 1 C. P. D. 745; *Mason* v. *Clifton* (1863), 3 F. & F. 899; *Cornwal* v. *Wilson* (1750), 1 Ves. Sen. 509; *Frixione* v. *Tagliaferro* (1856), 10 Moo. P. C. C. 175; *Gleadow* v. *Hull Glass Co.* (1850), 19 L. J. (CH.) 44 (directors of a company entitled to indemnity).

(*m*) *Bristow* v. *Whitmore* (1861), 9 H. L. Cas. 391.

(*n*) *Spittle* v. *Lavender* (1821), 2 Brod. & Bing. 452.

becomes liable as well, unless the wrong is justified by the ratification; it being no justification for the commission of a tortious act that the wrong-doer is acting under another's authority, unless that other can justify the wrong (*o*). SECT. 5. Effect of Ratification.

The person ratifying a contract has no right of action for any breach thereof committed before the time of ratification (*p*), and a ratification confers no new authority on the agent (*q*).

389. A ratification cannot operate to divest rights *in rem* which have become vested in third persons in the meantime (*r*), and does not relate back when persons other than the co-contracting party have acquired interests prior to ratification (*s*). Vested rights not affected.

The ratification by the Crown of an act against a foreigner by a public official in excess of his authority makes the act of the official an act of state in respect of which there is no legal remedy either against the official or the Crown (*t*). Ratification by Crown.

Part VIII.—Relations between Principal and Agent.

SECT. 1.—*In General.*

390. The rights and duties arising out of the relation of principal and agent are to be ascertained by reference to the contract, express or implied, which subsists between them (*a*). Rights and duties depend on contract.

The mere existence of the relation raises the implication of a contract involving certain rights and duties, the nature and extent of which depend upon the circumstances of the particular case (*b*), and the parties, in entering upon the relation, may leave the incidents arising out of it to be determined wholly by reference to the rights and duties so implied (*c*).

Where, however, the parties have defined their position by an express contract, the incidents of their relation depend upon their contract, as legally construed (*d*), subject nevertheless to such of

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(*o*) *Stephens* v. *Elwall* (1815), 4 M. & S. 259; *Hilbery* v. *Hatton* (1864), 2 H. & C. 822; *Perkins* v. *Smith* (1752), 1 Wils. (K. B.) 328; *Whitehead* v. *Taylor* (1839), 10 A. & E. 210; *Heugh* v. *Earl of Aberyavenny* (1874), 23 W. R. 40.

(*p*) *Mayor of Kidderminster* v. *Hardwick* (1873), L. R. 9 Exch. 13.

(*q*) *Irvine* v. *Union Bank of Australia* (1877), 2 App. Cas. 366.

(*r*) *Donelly* v. *Popham* (1807), 1 Taunt. 1; *Bird* v. *Brown* (1850), 4 Exch. 786.

(*s*) *Re Gloucester Municipal Election Petition*, [1901] 1 K. B. 683.

(*t*) *Buron* v. *Denman* (1848), 2 Exch. 167; *Secretary of State in Council of India* v. *Kamachee Boye Sahaba* (1859), 7 Moo. Ind. App. 476. See title ACTION, pp. 17, 18, *ante*.

(*a*) *Love* v. *Mack* (1905), 93 L. T. 352; *Pole* v. *Leask* (1863), 33 L. J. (CH.) 155.

(*b*) See pp. 183 *et seq.*, 193 *et seq.*, *post*; *Shaw* v. *Woodcock* (1827), 7 B. & C. 73, where the facts raised an inference of a *del credere* agency.

(*c*) For agency by necessity, see p. 157, *ante*.

(*d*) *Bull* v. *Price* (1831), 7 Bing. 237.

SECT. 1. In General.

the rights and duties implied by law as are not clearly excluded by express words or by necessary implication (*e*).

Effect of usage or custom.

391. Wherever a principal employs an agent belonging to a class of professional agents, or instructs him to deal at a particular place, a question arises how far the usages of the class or place in question are incorporated with the contract between them. Where the contract is an implied one only, such usages are deemed to be incorporated (*f*), provided that they are reasonable (*g*), even though the principal be in fact unacquainted with them (*h*). But no usage, which the Courts hold to be unreasonable (*i*), is binding upon the principal (*k*), unless he is shown to have known of it at the time when he employed the agent, and to have assented to it (*l*), or unless the circumstances of the particular case preclude him from denying his knowledge and assent (*m*).

The same rules apply to the case of an express contract (*n*), except that no usage can be incorporated which is inconsistent with the expressed intentions of the parties (*o*).

Fiduciary nature of relation.

392. The relation is of a fiduciary nature (*p*), whenever the principal reposes trust and confidence in the person whom he selects as his agent. This is so in all cases of general agency (*q*), but where the agency is not a general one, its fiduciary nature depends upon the circumstances of the particular case (*r*).

Remedy for breach of contract of agency.

A contract of agency, being in the nature of a contract for personal services, will not be specifically enforced at the suit of either party (*s*). But an injunction may be granted to restrain a breach of such a contract (*t*).

(*e*) *Graham* v. *Ackroyd* (1852), 10 Hare, 192, where a *del credere* agent was held not to be entitled to reimbursement in respect of matters covered by his agency; and compare *Hooper* v. *Treffry* (1847), 1 Exch. 17, where the reimbursement claimed and upheld was outside the *del credere* agency.

(*f*) *Bayliffe* v. *Butterworth* (1847), 1 Exch. 425.

(*g*) For examples of reasonable usages see *Bridges* v. *Garrett* (1870), L. R. 5 C. P. 451 (receipt of payment by cheque); *Walker* v. *Barker* (1900), 16 T. L. R. 393 (*id.*); *Cropper* v. *Cook* (1868), L. R. 3 C. P. 194 (agent incurring personal liability on the contract); *Pelham* v. *Hilder* (1841), 1 Y. & C. Ch. 3 (sale on credit); *Scott* v. *Godfrey*, [1901] 2 K. B. 726 (consolidation of orders).

(*h*) *Cropper* v. *Cook*, *supra*.

(*i*) For examples of unreasonable usages see *Robinson* v. *Mollett* (1875), L. R. 7 H. L. 802 (agent makes himself principal); *De Bussche* v. *Alt* (1878), 8 Ch. D. 286; *Sweeting* v. *Pearce* (1859), 7 C. B. (N. S.) 449 (payment by set-off); *Marsh* v. *Jelf* (1862), 3 F. & F. 234 (auctioneer selling by private contract).

(*k*) *Neilson* v. *James* (1882), 9 Q. B. D. 546; *Perry* v. *Barnett* (1885), 15 Q. B. D. 388.

(*l*) See *Sweeting* v. *Pearce*, *supra*, *per* COCKBURN, C.J., at p. 481; *Mateieff* v. *Crossfield* (1903), 51 W. R. 365.

(*m*) *Seymour* v. *Bridge* (1885), 14 Q. B. D. 460.

(*n*) *Scott and Horton* v. *Godfrey*, [1901] 2 K. B. 726.

(*o*) *Bower* v. *Jones* (1831), 8 Bing. 65. As to the admissibility of parol evidence of usage when there is a written contract, see title CONTRACT.

(*p*) For examples see pp. 184, 188, *post*.

(*q*) *Makepeace* v. *Rogers* (1865), 4 De G. J. & Sm. 649.

(*r*) *Foley* v. *Hill* (1848), 2 H. L. Cas. 28; *Fluker* v. *Taylor* (1855), 3 Drew, 183; *Mackenzie* v. *Johnston* (1819), 4 Madd. 373.

(*s*) *White* v. *Boby* (1877), 37 L. T. 652.

(*t*) *Mutual Reserve Fund Life Association* v. *New York Life Insurance Co.* (1896), 75 L. T. 528.

SECT. 2.—*Rights of Principal against Agent* (*u*).

SECT. 2. Rights of Principal against Agent.

SUB-SECT. 1.—*General Rights.*

393. The first duty of an agent is to carry out the business he has undertaken (*a*), or to inform his principal promptly if it be impossible to do so (*b*). Agent to perform business undertaken.

If he has received definite instructions from his principal as to the manner in which the business is to be carried out, he must follow them strictly (*c*), provided that they be lawful (*d*); and if he does so, he is not liable to his principal, because the consequences differ from those which the principal had anticipated (*e*). But he has no discretion to disregard them, even though he acts in good faith in the interests of his principal (*f*). Obedience to instructions.

Where no definite instructions have been given to the agent, or where his instructions leave him a discretion, the agent must be guided by the honest exercise of his own judgment and the interests of his principal (*g*). If his instructions leave two alternative courses open to him, he incurs no liability merely because he chooses that course which proves in the event less favourable to his principal (*h*). Where he is a professional agent, he must follow the ordinary course of business (*i*), and any special usages applicable to the particular case (*k*). Exercise of agent's discretion.

394. As a general rule, an agent must himself carry out the business intrusted to him, and is liable for a breach of duty if he delegates the performance of this duty to another (*l*). But delegation Delegation.

(*u*) This section deals only with the general principles governing the duties and liabilities of agents. For the special features of the agency of auctioneers, bankers, insurance brokers, married women, shipmasters, solicitors, and stockbrokers, see titles AUCTION AND AUCTIONEERS, BANKERS AND BANKING, HUSBAND AND WIFE, INSURANCE, SHIPPING AND NAVIGATION, SOLICITORS, and STOCK EXCHANGE.

(*a*) *Turpin* v. *Bilton* (1843), 5 Man. & G. 455. If the business is unlawful the agent incurs no liability through his failure to carry it out (*Webster* v. *De Tastet* (1797), 7 Term Rep. 157); and, similarly, where the agency is gratuitous (*Balfe* v. *West* (1853), 13 C. B. 466).

(*b*) *Cassaboglou* v. *Gibb* (1883), 11 Q. B. D. 797; *Callander* v. *Oelrichs* (1838), 5 Bing. (N. C.) 58.

(*c*) *Lilley* v. *Doubleday* (1881), 7 Q. B. D. 510; *Smith* v. *Lascelles* (1788), 2 Term Rep. 187; *Catlin* v. *Bell* (1815), 4 Camp. 183; *Barber* v. *Taylor* (1839), 5 M. & W. 527; *Dufresne* v. *Hutchinson* (1810), 3 Taunt. 117.

(*d*) *Bexwell* v. *Christie* (1776), Cowp. 395.

(*e*) *Overend and Gurney Co.* v. *Gibb* (1872), L. R. 5 H. L. 480; and see *Commonwealth Portland Cement Co.* v. *Weber*, [1905] A. C. 66.

(*f*) *Bertram* v. *Godfray* (1830), 1 Knapp, 381; *Fray* v. *Voules* (1859), 1 E. & E. 839, where a solicitor compromised an action on the advice of counsel against the express instructions of his client; and contrast *Chown* v. *Parrott* (1863), 14 C. B. (N. S.) 74, where the client had given no express instructions.

(*g*) *Cullerne* v. *London and Suburban General Permanent Building Society* (1890), 25 Q. B. D. 485, *per* LINDLEY, L.J., at p. 487; *Chown* v. *Parrott*, *supra*. And see *Lagunas Nitrate Co.* v. *Lagunas Syndicate*, [1899] 2 Ch. 392.

(*h*) *Comber* v. *Anderson* (1808), 1 Camp. 523; *Moore* v. *Mourgue* (1776), Cowp. 479; *Ireland* v. *Livingston* (1872), L. R. 5 H. L. 395, 416.

(*i*) *Russell* v. *Hankey* (1794), 6 Term Rep. 12; *Mallough* v. *Barber* (1815), 4 Camp. 150; *Papé* v. *Westacott*, [1894] 1 Q. B. 272, 279.

(*k*) *Farrer* v. *Lacy* (1885), 31 Ch. D. 42; *Solomon* v. *Barker* (1862), 2 F. & F. 726.

(*l*) *Catlin* v. *Bell*, (1815) 4 Camp. 183; *Cook* v. *Ward* (1877), 2 C. P. D. 255; *Henderson* v. *Barnewall* (1827), 1 Y. & J. 387.

is permissible in immaterial matters (*m*), or where the agent has received authority from his principal to delegate (*n*).

Use of information etc. acquired in agency.

395. It is the duty of an agent to employ the means of obtaining materials and information afforded him by his agency solely for the purposes of the agency (*o*), and not to use any materials or information so acquired, whether his agency has come to an end or not, in any manner inconsistent with good faith, as by divulging them to third parties (*p*), or by using them himself in unfair competition with his principal (*q*). But he may use them for any purpose which is not a breach of good faith (*r*).

Contracts.

396. An agent must not, in the absence of authority, purport to bind his principal by contract (*s*). Where he possesses authority so to do, he must contract in his principal's name and not in his own, unless the terms of his employment permit it (*t*). If he purchases property in his own name on behalf of his principal, and has the legal estate transferred to himself, he is a trustee for his principal in respect of the property (*a*).

No agent, however, is under any personal liability to his principal upon any contracts made by him on the latter's behalf (*b*), unless he is made personally liable by usage (*c*), or unless he is acting as a *del credere* agent (*d*).

Principal's remedy.

Upon an agent's breach of duty the principal's remedy is, as a rule, to bring an action for damages (*e*), and the Statute of Limitations runs in the agent's favour from the date of the breach (*f*).

(*m*) *Ex parte Sutton* (1788), 2 Cox, Eq. 84; *Brown* v. *Tombs*, [1891] 1 Q. B. 253.

(*n*) See pp. 169 *et seq.*, *ante*.

(*o*) *Lamb* v. *Evans*, [1893] 1 Ch. 218, *per* BOWEN, L.J., at p. 230; *Merryweather* v. *Moore*, [1892] 2 Ch. 518, *per* KEKEWICH, J., at p. 524; *Louis* v. *Smellie* (1895), 73 L. T. 226.

(*p*) *Merryweather* v. *Moore*, *supra*; *Lamb* v. *Evans*, *supra*, where BOWEN, L.J., disapproved of *Reuter's Telegram Co.* v. *Byron* (1874), 43 L. J. (CH.) 661; *Taylor* v. *Blacklow* (1836), 3 Scott, 614; *Davies* v. *Clough* (1837), 8 Sim. 262.

(*q*) *Robb* v. *Green*, [1895] 2 Q. B. 315; *Yovatt* v. *Winyard* (1820), 1 Jac. & W. 394.

(*r*) *Louis* v. *Smellie*, *supra*, *per* LINDLEY, L.J., at p. 228; and see *Aas* v. *Benham*, [1891] 2 Ch. 244.

(*s*) Compare *Chadburn* v. *Moore* (1892), 61 L. J. (CH.) 674, with *Rosenbaum* v. *Belson*, [1900] 2 Ch. 267; and see *Hamer* v. *Sharp* (1874), L. R. 19 Eq. 108. But the principal may, notwithstanding, be liable on such contracts to the third party. See pp. 201, 204, 207, *post*.

(*t*) A factor has implied authority to contract in his own name; a broker has not, in the absence of usage (*Baring* v. *Corrie* (1818), 2 B. & Ald. 137; *Cropper* v. *Cook* (1868), L. R. 3 C. P. 194). See also Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 46.

(*a*) *Lees* v. *Nuttall* (1834), 2 My. & K. 819; but see *James* v. *Smith*, [1891] 1 Ch. 384.

(*b*) *Gill* v. *Shepherd* (1902), 8 Com. Cas. 48. As to his liability to his principal as holder of a bill of exchange signed by the agent without qualification, see title BILLS OF EXCHANGE ETC.

(*c*) *E.g.*, insurance brokers, see title INSURANCE.

(*d*) See p. 153, *ante*.

(*e*) For the measure of damages, see p. 191, *post*; and for the appropriate remedies in special cases, see pp. 185—193, *post*.

(*f*) *Wood* v. *Jones* (1889), 61 L. T. 551; *Metropolitan Bank* v. *Heiron* (1880), 5 Ex. D. 319. Even when he acted in a fiduciary capacity (Trustee Act, 1888 (51 & 52 Vict. c. 59), s. 8), unless he has been guilty of fraud, or unless the

SUB-SECT. 2.—*As to Care, Skill and Diligence.*

SECT. 2. Rights of Principal against Agent.

Ordinary duty to use care and skill.

397. Every agent (*g*) is responsible to his principal for any loss occasioned by his want of proper care, skill, or diligence, in the carrying out of his undertaking (*h*), even though the principal has himself been negligent (*i*). No absolute standard can be laid down as to what constitutes proper care, skill, or diligence, and each particular case must be judged by its own circumstances (*k*). But the relation of principal and agent must be clearly established in respect of the matter complained of (*l*), before any responsibility arises (*m*).

Gratuitous agent.

Where an agent acts without reward he is only bound to use such skill as he has (*n*), except where he has represented himself as possessing skill, in which case the amount of skill requisite is such as may reasonably be expected under the circumstances (*o*). The care and diligence required are such as persons ordinarily use in their own affairs (*p*).

Agent for reward.

398. Where an agent acts for reward, a higher standard is exacted (*q*). The care, skill, or diligence required is not merely that which he in fact possesses, but such as is reasonably necessary for the due performance of his undertaking (*r*). If he is an agent following a particular trade or profession, and holding himself out to the world for employment as such, he represents himself as reasonably competent to carry out any business which he undertakes in the course of such trade or profession (*s*). He must then show such care and diligence as are exercised in the ordinary and proper course, and such skill as is usual and requisite, in the business for which he receives payment (*t*). In considering the question regard must be had to the nature of the business (*a*), and

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claim is for property intrusted to him, or for the proceeds or value of such property (*North American Land and Timber Co.* v. *Watkins*, [1904] 1 Ch. 242, affirmed [1904] 2 Ch. 233; *Re Lands Allotment Co.*, [1894] 1 Ch. 616).

(*g*) Except counsel, *Fell* v. *Brown* (1791), 1 Peake, 131; *Mulligan* v. *McDonagh* (1860), 2 L. T. 136; and see *Perring* v. *Hebutter* (1842), 2 Mood. & R. 429. See title BARRISTERS.

(*h*) *Beal* v. *South Devon Rail. Co.* (1864), 3 H. & C., *per* CROMPTON J., at p. 341.

(*i*) *Becker* v. *Medd* (1897), 13 T. L. R. 313.

(*k*) The question is one for the jury; *Beauchamp* v. *Powley* (1831), 1 Mood. & R. 38; *Doorman* v. *Jenkins* (1834), 2 A. & E. 256.

(*l*) *Chambers* v. *Goldthorpe*, [1901] 1 K. B. 624.

(*m*) *McManus* v. *Fortescue*, [1907] 2 K.B. 1; *Le Lievre* v. *Gould*, [1893] 1 Q. B. 491.

(*n*) *Beal* v. *South Devon Rail. Co.*, *supra*, at p. 342; *Wilson* v. *Brett* (1843), 11 M. & W. 113; *Moffatt* v. *Bateman* (1869), L. R. 3 P. C. 115.

(*o*) Such representation may be express (*Whitehead* v. *Greetham* (1825), 2 Bing. 464); or implied (*Donaldson* v. *Haldane* (1840), 7 Cl. & F. 762).

(*p*) *Beal* v. *South Devon Rail. Co.*, *supra*, at p. 342; *Shiells* v. *Blackburne* (1789), 1 Hy. Bl. 159; *Doorman* v. *Jenkins*, *supra*; *Giblin* v. *McMullen* (1868), L. R. 2 P. C. 317.

(*q*) *Grill* v. *General Iron Screw Collier Co.* (1866), L. R. 1 C. P., *per* SMITH, J., at p. 614.

(*r*) *Beal* v. *South Devon Rail. Co.*, *supra*, at p. 341.

(*s*) *Harmer* v. *Cornelius* (1858), 5 C. B. (N. S.) 236; *Jenkins* v. *Betham* (1855), 15 C. B. 168.

(*t*) *Beal* v. *South Devon Rail. Co.*, *supra*, at p. 342; *Smith* v. *Barton* (1866), 15 L. T. 294; *Lee* v. *Walker* (1872), L. R. 7 C. P. 121; *Solomon* v. *Barker* (1862), 2 F. & F. 726.

(*a*) *Heys* v. *Tindall* (1861), 1 B. & S. 296.

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such special usages as may be binding on the principal (*b*). But the agent is not responsible for failure to go beyond his reasonable duty, even though a loss is occasioned thereby, which might have been avoided by extra care, skill, or diligence (*c*). Nor does he incur liability in respect of matters which are not fairly within the scope of his employment (*d*).

Negotiation of contract.

In the negotiation of a contract he must take all reasonable precautions that may be requisite for the protection of his principal (*e*). Any contract made by him must be in accordance with his instructions (*f*) or with usage (*g*), and must truly represent the agreement of the parties (*h*). Its form must be such that it is capable of being enforced by the principal (*i*). If the contract be once completed, the agent cannot rescind it (*k*) nor vary its terms (*l*) unless he is expressly authorised to do so.

Dilatoriness.

The agent must not be guilty of unreasonable delay in carrying out his instructions (*m*), or in communicating to his principal any material information (*n*).

SUB-SECT. 3.—*As to Accounts and Moneys received by the Agent on the Principal's behalf.*

Duty to keep accounts.

399. It is the duty of an agent (*o*) to keep accurate accounts of all his transactions (*p*), and to be prepared at all times to produce them to his principal (*q*). Further, all books and documents relating to the principal's business must on demand be produced to the principal, or to some person named by him (*r*), provided that such person is not one against whom the agent may have reasonable grounds of objection (*s*).

(*b*) *Russell* v. *Hankey* (1794), 6 Term Rep. 12; *Mallough* v. *Barber* (1815), 4 Camp. 150; *Papé* v. *Westacott*, [1894] 1 Q. B. 272, 279; *Farrer* v. *Lacy* (1885), 31 Ch. D. 42; *Wilts and Dorset Bank* v. *Cook* (1889), 5 T. L. R. 703; *Pelham* v. *Hilder* (1841), 1 Y. & C. Ch. 3.

(*c*) *Commonwealth Portland Cement Co.* v. *Weber*, [1905] A. C. 66.

(*d*) *Zwilchenbart* v. *Alexander* (1860), 1 B. & S. 234; *Jenkins* v. *Betham* (1855), 15 C. B. 168; and see *Lee* v. *Walker* (1872), L. R. 7 C. P. 121; *Lamert* v. *Heath* (1846), 15 M. & W. 486; *Pappa* v. *Rose* (1872), L. R. 7 C. P. 32, affirmed, *ibid.* 525.

(*e*) *Heys* v. *Tindall* (1861), 1 B. & S. 296; *Smith* v. *Barton* (1866), 15 L. T. 294; *Solomon* v. *Barker* (1862), 2 F. & F. 726.

(*f*) *Park* v. *Hammond* (1816), 6 Taunt. 495.

(*g*) *Mallough* v. *Barber*, *supra*.

(*h*) *Stumore* v. *Breen* (1886), 12 App. Cas. 698.

(*i*) *McManus* v. *Fortescue*, [1907] 2 K. B. 1; *Rainbow* v. *Howkins*, [1904] 2 K. B. 322; *Scott* v. *Godfrey*, [1901] 2 K. B. 726; *May* v. *Angeli* (1898), 14 T. L. R. 551; *Neilson* v. *James* (1882), 9 Q. B. D. 546. A broker must make the contract binding on both parties, *Grant* v. *Fletcher* (1826), 5 B. & C. 436.

(*k*) *Xenos* v. *Wickham* (1866), L. R. 2 H. L. 296; *Thomas* v. *Lewis* (1878), 4 Ex. D. 18; *Nelson* v. *Aldridge* (1818), 2 Stark, 435.

(*l*) *Hibbert* v. *Bayley* (1860), 2 F. & F. 48.

(*m*) *Turpin* v. *Bilton* (1843), 5 Man. & G. 455.

(*n*) *Proudfoot* v. *Montefiore* (1867), L. R. 2 Q. B. 511.

(*o*) The rule does not apply where the agency is only to receive moneys in respect of separate transactions known to the principal in detail at the time (*Re Lee, Ex parte Neville* (1868), 4 Ch. App. 43).

(*p*) *Gray* v. *Haig* (1855), 20 Beav. 219; *Chedworth* v. *Edwards* (1802), 8 Ves. 47; *White* v. *Lady Lincoln* (1803), 8 Ves. 363.

(*q*) *Pearse* v. *Green* (1819), 1 Jac. & W. 135.

(*r*) *Bevan* v. *Webb*, [1901] 2 Ch. 59.

(*s*) *Dadswell* v. *Jacobs* (1887), 34 Ch. D. 278.

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400. Any money or other property intrusted to an agent by his principal or received by him on his principal's behalf must be kept separate, and not mixed with his own (*t*). Otherwise, all which he cannot show to be his own will be presumed to belong to the principal (*a*).

Principal's property to be kept separate.

When an agent is employed to carry out any transaction which involves a payment to him on his principal's behalf, he must not compromise his principal's rights (*b*) or part with his property (*c*), until he has received payment, unless authorised by his instructions or by usage to do so (*d*). Payment, in the absence of instructions or usage, must be received in cash, and not otherwise (*e*).

Payments made to agent for principal.

401. All moneys received on the principal's behalf (*f*) must be paid over, or accounted for (*g*), to the principal upon request (*h*), unless the agent has for some lawful reason repaid them to the person from whom he received them (*i*). It is immaterial that the transaction in respect of which the moneys are received is void (*k*) or illegal (*l*), provided that the agency itself is not illegal (*m*). Nor can the agent retain such moneys against the principal in respect of a debt due to himself from the person paying them (*n*), or because of some claim made to them by some third person (*o*).

Payment over of moneys received.

Where the moneys are received on behalf of joint principals, the agent is liable to account to them jointly, and is not discharged by payment to one or more of them only, unless by authority of all (*p*).

Payment to joint principals.

(*t*) *Gray* v. *Haig* (1855), 20 Beav. 218; *Clarke* v. *Tipping* (1846), 9 Beav. 284.

(*a*) *Lupton* v. *White* (1808), 15 Ves. 432.

(*b*) As in *Papé* v. *Westacott*, [1894] 1 Q. B. 272.

(*c*) As in *Brown* v. *Boorman* (1844), 11 Cl. & F. 1; *Kidd* v. *Horne* (1885), 2 T. L. R. 141.

(*d*) *Wiltshire* v. *Sims* (1808), 1 Camp. 258; *Earl of Ferrers* v. *Robins* (1835), 2 Cr. M. & R. 152. A factor (*Houghton* v. *Matthews* (1803), 3 Bos. & P. 485) and a broker (*Brown* v. *Boorman*, *supra*) have an implied authority to sell on credit.

(*e*) As by a negotiable instrument (*Papé* v. *Westacott*, *supra*; *Wiltshire* v. *Sims*, *supra*; *Earl of Ferrers* v. *Robins*, *supra*; *Hine* v. *Steamship Insurance Syndicate* (1895), 72 L. T. 79), unless authorised by usage (*Farrer* v. *Lacy* (1885), 31 Ch. D. 42); or by set-off or settlement of accounts (*Sweeting* v. *Pearce* (1859), 7 C. B. (N. S.) 449; *Legge* v. *Byas Mosley & Co.* (1901), 7 Com. Cas. 16), any usage to that effect being unreasonable (*Matveieff & Co.* v. *Crossfield* (1903), 51 W. R. 365, and cases last cited), or by taking other goods (*Howard* v. *Chapman* (1831), 4 C. & P. 508. And see *Catterall* v. *Hindle* (1866), L. R. 1 C. P. 187, and, on appeal (1867), L. R. 2 C. P. 368.

(*f*) As to what may be equivalent to a receipt, see *Gillard* v. *Wise* (1826), 5 B. & C. 134.

(*g*) For the duty to account, see p. 188, *post*.

(*h*) *Harsant* v. *Blaine* (1887), 56 L. J. (Q. B.) 511.

(*i*) *Murray* v. *Mann* (1848), 2 Exch. 538.

(*k*) *Bridger* v. *Savage* (1885), 15 Q. B. D. 363; *De Mattos* v. *Benjamin* (1894), 63 L. J. (Q. B.) 248.

(*l*) *Bousfield* v. *Wilson* (1846), 16 M. & W. 185; *Tenant* v. *Elliott* (1797), 1 Bos. & P. 3; *Farmer* v. *Russell* (1798), 1 Bos. & P. 296; *Sharp* v. *Taylor* (1849), 2 Ph. 801; and see *Sykes* v. *Beadon* (1879), 11 Ch. D. 170.

(*m*) *Booth* v. *Hodgson* (1795), 6 Term Rep. 405; *Catlin* v. *Bell* (1815), 4 Camp. 183; *Knowles* v. *Haughton* (1805), 11 Ves. 168; *Battersby* v. *Smyth* (1818), 3 Madd. 110, with which compare *Davenport* v. *Whitmore* (1836), 2 My. & Cr. 177.

(*n*) *Heath* v. *Chilton* (1844), 12 M. & W. 632.

(*o*) *Roberts* v. *Ogilby* (1821), 9 Price, 269; *Dixon* v. *Hamond* (1819), 2 B. & Ald. 310. As to the cases in which he may interplead, see p. 200, *post*.

(*p*) *Lee* v. *Sankey* (1873), L. R. 15 Eq. 204; *Heath* v. *Chilton*, *supra*.

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Action for account.

402. Where an agent fails to pay over to his principal on demand moneys received by him, the principal may bring an action for money had and received (*q*). He may also claim an account (*r*).

Where the agent is not in a fiduciary position, or the accounts are of a simple nature, the account will be taken in an ordinary action in the King's Bench Division (*s*). But if the agency is fiduciary (*t*), or the accounts are complicated (*a*), it is more correct to bring the action in the Chancery Division.

Settled accounts cannot, as a rule, be reopened (*b*), but the principal may obtain leave to surcharge and falsify them (*c*). On proof of fraud (*d*), however, or of undue influence (*e*), the principal is entitled to have them reopened from the beginning of the agency (*f*).

Taking of account.

On taking an account, the agent is entitled to deduct expenses authorised by the principal, and all proper expenses (*g*), even though expended for unlawful purposes (*h*). Except where he has been guilty of fraud (*i*), an action for an account is barred after six years from the time when the right of action accrued (*j*).

Interest.

403. No interest is payable by an agent in respect of money received by him on his principal's behalf, except under some contract express or implied (*k*), or where there has been some default on his part (*l*), such as a dealing with the money in breach of duty (*m*), or a failure to pay it over at the principal's request (*n*), in which cases interest is payable from the date of default (*o*). The agent must also pay interest in all cases of fraud (*p*), and on

(*q*) See the cases cited under this sub-section generally.

(*r*) But the account must not include damages for breach of duty (*Great Western Insurance Co.* v. *Cunliffe* (1874), 9 Ch. App. 525).

(*s*) *Foley* v. *Hill* (1848), 2 H. L. Cas. 28; *Barry* v. *Stevens* (1862), 31 Beav. 258; *Blyth* v. *Whiffin* (1872), 27 L. T. 330; *York* v. *Stowers*, [1883] W. N. 174.

(*t*) *Makepeace* v. *Rogers* (1865), 4 De G. J. & S. 649; *Padwick* v. *Stanley* (1852), 9 Hare, 627.

(*a*) *Foley* v. *Hill*, *supra*; *Leslie* v. *Clifford* (1884), 50 L. T. 590.

(*b*) *Parkinson* v. *Hanbury* (1867), L. R. 2 H. L. 1.

(*c*) *Mozeley* v. *Cowie* (1877), 47 L. J. (CH.) 271.

(*d*) *Clarke* v. *Tipping* (1846), 9 Beav. 284; *Walsham* v. *Stainton* (1863), 12 W. R. 63.

(*e*) *Watson* v. *Rodwell* (1879), 11 Ch. D. 150.

(*f*) *Stainton* v. *Carron Co.* (1857), 24 Beav. 346; *Williamson* v. *Barbour* (1877), 9 Ch. D. 529.

(*g*) *Dale* v. *Sollet* (1767), 4 Burr. 2133, *per* Lord MANSFIELD, at p. 2134.

(*h*) *Raynham* v. *Cattle* (1833), 1 Mood. & R. 265.

(*i*) *North American Land and Timber Co.* v. *Watkins*, [1904] 2 Ch. 233; *Re Lands Allotment Co.*, [1894] 1 Ch. 616.

(*j*) *Knox* v. *Gye* (1872), L. R. 5 H. L. 656.

(*k*) As to when interest is payable under a contract, see title MONEY AND MONEY LENDING.

(*l*) *Webster* v. *British Empire Mutual Life Assurance Co.* (1880), 15 Ch. D. 169.

(*m*) As by employing it in his own business (*Rogers* v. *Boehm* (1799), 2 Esp. 702; *Burdick* v. *Garrick* (1870), 5 Ch. App. 233), but contrast *Lord Chedworth* v. *Edwards* (1802), 8 Ves. 46.

(*n*) *Edgell* v. *Day* (1865), L. R. 1 C. P. 80; *Harsant* v. *Blaine* (1887), 56 L. J. (Q. B.) 511. But a mere retaining of money which he ought to pay over, but which he has never been required to pay, is not sufficient, in the absence of fraud (*Turner* v. *Burkinshaw* (1867), 2 Ch. App. 488). A stakeholder is not liable to pay interest (*Harington* v. *Hoggart* (1830), 1 B. & Ad. 577).

(*o*) *Edgell* v. *Day*, *supra*.

(*p*) *Earl of Hardwicke* v. *Vernon* (1808), 14 Ves. 504.

all bribes (*q*) and secret profits (*r*) received by him during his agency.

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SUB-SECT. 4.—*Disclosure by Agent.*

Agent's own interest in conflict with that of principal.

404. An agent will not be allowed to put his duty in conflict with his interest (*s*), and therefore he must not enter into any transaction likely to produce that result (*a*), unless he has first made to his principal the fullest disclosure of the exact nature of his interest, and the principal has assented (*b*). An agent does not discharge his duty in this behalf merely by disclosing that he has an interest (*c*), or by making statements which might put the principal on inquiry (*d*). In particular, notwithstanding any usage to the contrary (*e*), he must not sell his own property to the principal (*f*), nor buy the principal's property (*g*), without the knowledge of the principal.

Application of rule.

And in these and all other transactions (*h*) with the principal, he must disclose every material fact which is or ought to be known by him, if it would be likely to operate upon the principal's judgment (*i*). If this is not done, the fairness of the transaction is immaterial (*j*), and it is voidable at the principal's option (*k*).

SUB-SECT. 5.—*Receipt by Agent of Secret Profits and Bribes* (*l*).

General rule.

405. An agent must not, without the knowledge of his principal (*m*), acquire any profit (*n*) or benefit (*o*) from his agency (*p*) other than

(*q*) *Boston Deep Sea Fishing and Ice Co.* v. *Ansell* (1888), 39 Ch. D. 339, 371.

(*r*) *Nantyglo and Blaina Ironworks Co.* v. *Grave* (1878), 12 Ch. D. 738.

(*s*) *Bank of Upper Canada* v. *Bradshaw* (1867), L. R. 1 P. C. 479, *per* Lord CAIRNS, at p. 489; *Parker* v. *McKenna* (1874), 10 Ch. App. 96, *per* Lord CAIRNS, at p. 118.

(*a*) For the cases where the transaction is entered into with a person with whom he is dealing on his principal's behalf, see p. 190, *post*.

(*b*) *Gwatkin* v. *Campbell* (1854), 1 Jur. (N. S.) 131.

(*c*) *Imperial Mercantile and Credit Association* v. *Coleman* (1873), L. R. 6 H. L. 189; *Gluckstein* v. *Barnes*, [1900] A. C. 240; *Costa Rica Rail. Co.* v. *Forwood*, [1901] 1 Ch. 746.

(*d*) *Dunne* v. *English* (1874), L. R. 18 Eq. 524; and see *Swale* v. *Ipswich Tannery* (1906), 11 Com. Cas. 88, *per* KENNEDY, J., at p. 96.

(*e*) *Robinson* v. *Mollett* (1875), L. R. 7 H. L. 802; *Hamilton* v. *Young* (1881), L. R. 7 Ir. 289.

(*f*) *Gillett* v. *Peppercorne* (1840), 3 Beav. 78; *Rothschild* v. *Brookman* (1831), 2 Dow & Cl. 188; *Skelton* v. *Wood* (1894), 71 L. T. 616.

(*g*) *McPherson* v. *Watt* (1877), 3 App. Cas. 254; *Ex parte Huth, Re Pemberton* (1840), 4 Dea. 294; *Lowther* v. *Lowther* (1806), 13 Ves. 95.

(*h*) *Selsey* v. *Rhoades* (1824), 2 Sim. & St. 41, including gifts; *Hunter* v. *Atkins* (1834), 3 My. & K. 113. As to gifts between solicitor and client, see title SOLICITORS.

(*i*) *Dunne* v. *English, supra*; *Charter* v. *Trevelyan* (1844), 11 Cl. & F. 714; *King* v. *Anderson* (1874), 8 Ir. Eq. 147; *Savery* v. *King* (1856), 5 H. L. Cas. 627; *Luddy's Trustee* v. *Peard* (1886), 33 Ch. D. 500.

(*j*) *Gillett* v. *Peppercorne, supra*; *Aberdeen Rail. Co.* v. *Blaikie* (1854), 2 Eq. Rep. 1281.

(*k*) *Houldsworth* v. *City of Glasgow Bank* (1880), 5 App. Cas. 317, *per* Lord CAIRNS, at p. 323; *Re Cape Breton Co.* (1884), 26 Ch. D. 221; *Gillett* v. *Peppercorne, supra*; *Oliver* v. *Court* (1820), Dan. 301; *Great Luxembourg Rail.* v. *Magnay* (1858), 25 Beav. 586.

(*l*) As to the principal's rights against the person offering the bribe, see pp. 216 *et seq.*, *post*.

(*m*) *Re Haslam*, [1902] 1 Ch. 765; *Ritchie* v. *Couper* (1860), 28 Beav. 344.

(*n*) *Thompson* v. *Meade* (1891), 7 T. L. R. 698.

(*o*) *Fawcett* v. *Whitehouse* (1829), 1 Russ. & M. 132; *Tarkwa Main Reef, Ltd.* v. *Merton* (1903), 19 T. L. R. 367.

(*p*) *Erskine* v. *Sachs*, [1901] 2 K. B. 504; with which compare *Kirkham* v. *Peel* (1881), 44 L. T. 195; and see *Williamson* v. *Hine*, [1891] 1 Ch. 390.

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that contemplated by the principal at the time of making the contract of agency (*q*). And this rule may apply even though at the time of the transaction itself the agency has ceased (*r*). The rule applies in spite of the fact that the agent has done his best under the circumstances (*s*) or incurred a possibility of loss (*t*), or that the principal has in fact received the benefit he himself contemplated from the transaction (*a*). All such profits and the value of such benefits must be paid over to the principal (*b*).

Agent to purchase.

Where an agent who is employed to buy property on his principal's behalf sells his own to the principal, and thereby makes a profit, the principal, in lieu of rescinding the sale, may (*c*), and, if rescission be no longer possible, must (*d*), affirm it. He may then recover from the agent the full amount of the profit received by the latter, together with interest (*e*). Where the agent is employed to buy a particular property (*f*) in which he in fact has an interest before accepting the agency, and sells it to his principal during the agency without disclosing his interest, the principal may affirm or rescind the contract, but if he affirms it, he cannot also claim the profits (*g*) in the absence of any underhand dealing (*h*).

Bribe.

406. Where the secret profit is received from a third person with whom the agent is dealing on his principal's behalf, it is called a secret commission or bribe. The receipt of a bribe, whether in money (*i*) or otherwise (*k*), is a breach of duty, and it is immaterial whether or not the agent is influenced by such bribe in a way prejudicial to his principal's interest (*l*).

Usual commissions.

Where, however, the principal leaves the agent to look to the third party for his remuneration (*m*), or knows that he will receive

(*q*) See cases cited in notes (*n*), (*o*), (*p*), p. 189, *ante*. Even though the agency be gratuitous (*Turnbull* v. *Garden* (1869), 20 L. T. 218). The same principle applies to sub-agents where a fiduciary relation is established (*Powell* v. *Evan Jones & Co.*, [1905] 1 K. B. 11).

(*r*) *Carter* v. *Palmer* (1842), 8 Cl. & F. 657.

(*s*) *Shallcross* v. *Oldham* (1862), 2 Johns. & H. 609.

(*t*) *Williams* v. *Stevens* (1866), L. R. 1 P. C. 352.

(*a*) *De Bussche* v. *Alt* (1878), 8 Ch. D. 286

(*b*) *Thompson* v. *Meade* (1891), 7 T. L. R. 698; and cases in preceding notes.

(*c*) The onus of maintaining that the sale has been affirmed lies on the agent (*Cavendish-Bentinck* v. *Fenn* (1887), 12 App. Cas. 652, *per* Lord WATSON, at p. 666).

(*d*) As in *Re Leeds and Hanley Theatres of Varieties, Ltd.*, [1902] 2 Ch. 809; and see *Re Cape Breton Co.* (1884), 26 Ch. D. 221.

(*e*) *Bentley* v. *Craven* (1853), 18 Beav. 75; *Tyrrell* v. *Bank of London* (1862), 10 H. L. Cas. 26; *Benson* v. *Heathorn* (1842), 1 Y. & C. Ch. 326; *Massey* v. *Davies* (1794), 2 Ves. 317.

(*f*) *Quære* whether the same rule applies where no particular property is indicated. See *Re Cape Breton Co.*, *supra*.

(*g*) *Re Cape Breton Co.*, *supra* (affirmed on another ground *sub nom. Cavendish-Bentinck* v. *Fenn*, *supra*), approved in *Burland* v. *Earle*, [1902] A. C. 83.

(*h*) *Kimber* v. *Barber* (1872), 8 Ch. App. 56.

(*i*) *Hay's Case* (1875), 10 Ch. App. 593; *Boston Deep Sea Fishing and Ice Co.* v. *Ansell* (1888), 39 Ch. D. 339.

(*k*) *Nantyglo and Blaina Ironworks Co.* v. *Grave* (1878), 12 Ch. D. 738; *Mc Kay's Case* (1875), 2 Ch. D. 1.

(*l*) *Harrington* v. *Victoria Graving Dock Co.* (1878), 3 Q. B. D. 549.

(*m*) *Great Western Insurance Co.* v. *Cunliffe* (1874), 9 Ch. App. 525.

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something from the third party (*n*), the agent is entitled to receive and retain such commissions as are usual and customary, and the principal cannot object merely on the ground that he was unaware of the actual amount thereof.

Effect of receipt of bribe by agent.

On discovering the receipt of a bribe the principal may instantly dismiss the agent (*o*), and, if he has already been dismissed, may justify the dismissal on that ground, even though the bribery was not discovered till after the dismissal (*p*). The agent forfeits any commission in respect of the transaction (*q*) and becomes liable (*r*) to his principal for the amount of the bribe, if in money (*s*), or for the value of the property so received by him (*t*), such value being measured by the highest value which the property might have fetched whilst in his possession (*a*). Interest also is payable at the rate of 5 per cent. per annum from the date when the bribe was received (*b*). In addition, the agent is liable, jointly and severally with the briber, for any loss actually sustained by the principal in consequence of any breach of duty on the agent's part (*c*); and both he and the briber may be dealt with criminally (*d*).

SUB-SECT. 6.—*Measure of Damages for Breach of Duty.*

Measure of damages for breach of duty by agent.

407. Where an agent is sued by his principal for breach of duty, the measure of damages is the full amount of the loss actually sustained (*e*), and no more (*f*), provided that such loss is the natural and probable consequence (*g*) of the breach of duty, or such as was

(*n*) *Baring* v. *Stanton* (1876), 3 Ch. D. 502; *Lord Norreys* v. *Hodgson* (1897), 13 T. L. R. 421.

(*o*) See *Swale* v. *Ipswich Tannery* (1906), 11 Com. Cas. 88, *per* KENNEDY, J., at pp. 95, 98.

(*p*) *Boston Deep Sea Fishing and Ice Co.* v. *Ansell* (1888), 39 Ch. D. 339; *Swale* v. *Ipswich Tannery Co.*, *supra*.

(*q*) *Andrews* v. *Ramsay & Co.*, [1903] 2 K. B. 635; *Price* v. *Metropolitan House Investment and Agency Co., Ltd.* (1907), 23 T. L. R. 630; but not in respect of other transactions with which the receipt of the bribe was unconnected (*Hippisley* v. *Knee*, [1905] 1 K. B. 1; *Nitedals Taendstikfabrik* v. *Bruster* (1906), 75 L. J. (CH.) 798).

(*r*) The relation, however, is that of debtor and creditor, and not of trustee and *cestui que trust* (*Lister & Co.* v. *Stubbs* (1890), 45 Ch. D. 1; *Powell* v. *Evan Jones & Co.*, [1905] 1 K. B. 11).

(*s*) *Mayor etc. of Salford* v. *Lever*, [1891] 1 Q. B. 168; *Hay's Case* (1875), 10 Ch. App. 593.

(*t*) *McKay's Case* (1875), 2 Ch. D. 1; *Nantyglo and Blaina Ironworks Co.* v. *Grave* (1878), 12 Ch. D. 738; *Re Caerphilly Colliery Co., Pearson's Case* (1877), 5 Ch. D. 336).

(*a*) *Ibid.*

(*b*) *Boston Deep Sea Fishing and Ice Co.* v. *Ansell*, *supra*. Interest at the rate of 4 per cent. was given in *Nantyglo and Blaina Ironworks Co.* v. *Grave*, *supra*.

(*c*) *Mayor etc. of Salford* v. *Lever*, *supra*; *Morgan* v. *Elford* (1876), 4 Ch. D. 352.

(*d*) For conspiracy to defraud (*R.* v. *Barber* (1887), 3 T. L. R. 491), or under the Prevention of Corruption Act, 1906 (6 Edw. 7, c. 34), and, if a servant of a public body, under the Public Bodies Corrupt Practices Act, 1889 (52 & 53 Vict. c. 69). See title CRIMINAL LAW AND PROCEDURE.

(*e*) *Smith* v. *Price* (1862), 2 F. & F. 748; *Maydew* v. *Forrester* (1814), 5 Taunt. 615; *Neilson* v. *James* (1882), 9 Q. B. D. 546. Unless the loss is not a legal loss (*Webster* v. *De Tastet* (1797), 7 Term Rep. 157; *Cohen* v. *Kittell* (1889), 22 Q. B. D. 680). If there has been no actual loss, the principal is entitled to nominal damages (*Van Wart* v. *Woolley* (1830), Mood. & M. 520).

(*f*) *Waddell* v. *Blockey* (1879), 4 Q. B. D. 678; *Cassaboglou* v. *Gibb* (1883), 11 Q. B. D. 797; and see *Michael* v. *Hart & Co.*, [1902] 1 K. B. 482.

(*g*) Compare *Mainwaring* v. *Brandon* (1818), 2 Moo. 125, with *Re United Service Co., Johnston's Claim* (1871), 6 Ch. App. 212.

SECT. 2. Rights of Principal against Agent.

within the contemplation of the parties (*h*). This may include profit which has actually been lost, but not merely anticipated profits which might have been made if the agent had performed his duty (*i*).

SUB-SECT. 7.—*Estoppel of Person purporting to act as Agent.*

Denial of principal's rights.

408. Where in any transaction a person has admittedly acted as agent on a principal's behalf (*k*), he is estopped from denying the rights which have accrued to his principal in consequence, and from setting up any claims adverse thereto, whether in himself (*l*) or third parties (*m*).

Goods intrusted to agent.

This rule applies more especially in the case of goods which have been intrusted to him (*n*), or in respect of which he has acknowledged the title of his principal, whether in actual possession of them or not (*o*). But where the adverse claim is made by a third person, the agent may set up the latter's title, if he has actually handed over the goods to him or is acting by his authority and on his behalf (*p*), provided that he had no knowledge of the claim when he received the goods or attorned to his principal (*q*). If he is acting as agent for both parties, he may elect between them (*r*).

Agent cannot acquire title as against principal.

An agent in possession of property as agent (*s*) will not be permitted to deny that his possession is that of his principal. He is therefore estopped from setting up a statutory title against the principal (*t*), or maintaining his own title as true owner against the statutory title acquired by his principal through him (*a*). If he purchases land, and has the legal estate conveyed to him, he will not be permitted to plead the absence of a written declaration of trust (*b*). Nor, if money is paid to him by a third person, can he set up the illegality or nullity of the contract under which he received it (*c*).

SUB-SECT. 8.—*Attachment of Defaulting Agent.*

Attachment.

409. Whenever an agent who has received money on behalf of his principal in a fiduciary capacity fails to comply with an order of a

(*h*) *Boyd* v. *Fitt* (1864), 11 L. T. 280.

(*i*) *Salvesen & Co* v. *Rederi Aktieboluget Nordstjernan*, [1905] A. C. 302; *Cassaboglou* v. *Gibb* (1883), 11 Q. B. D. 797.

(*k*) *Sheridan* v. *New Quay Co.* (1858), 4 C. B. (N. S.) 618; *A.-G.* v. *Corporation of London* (1849), 2 Mac. & G. 247.

(*l*) *Heath* v. *Chilton* (1844), 12 M. & W. 632; *Lyell* v. *Kennedy* (1889), 14 App. Cas. 437; *Williams* v. *Pott* (1871), L. R. 12 Eq. 149.

(*m*) *Eames* v. *Hacon* (1881), 18 Ch. D. 347; *Dixon* v. *Hamond* (1819), 2 B. & Ald. 310.

(*n*) *Zulueta* v. *Vinent* (1852), 1 De G. M. & G. 315. For his right to interplead, see p. 200, *post*.

(*o*) *Henderson & Co.* v. *Williams*, [1895] 1 Q. B. 521; *Evans* v. *Nichol* (1841), 4 Scott, N. R. 43.

(*p*) *Biddle* v. *Bond* (1865), 6 B. & S. 225; *Rogers Sons & Co.* v. *Lambert & Co.*, [1891] 1 Q. B. 318.

(*q*) *Biddle* v. *Bond*, *supra*; *Ex parte Davies*, *Re Sadler* (1881), 19 Ch. D. 86.

(*r*) *Shee* v. *Clarkson* (1810), 12 East, 507.

(*s*) But the possession must be as agent (*White* v. *Bayley* (1861), 10 C. B. (N. S.) 227, and contrast *Bell* v. *Marsh*, [1903] 1 Ch. 528; *Markwick* v. *Hardingham* (1880), 15 Ch. D. 339).

(*t*) *Lyell* v. *Kennedy*, *supra*, and compare *Ward* v. *Carttar* (1865), L. R. 1 Eq. 29.

(*a*) *Williams* v. *Pott*, *supra*.

(*b*) As required by the Statute of Frauds (29 Car 2, c 3), s. 7. See *Rochefoucauld* v. *Boustead*, [1897] 1 Ch. 196.

(*c*) See p. 187, *ante*.

Court of equity to pay over the money, he becomes liable to attachment, even though he has parted with the money or become bankrupt or insolvent (*d*).

SECT. 2. Rights of Principal against Agent.

SUB-SECT. 9.—*As to the Acts and Defaults of Co-agents and Sub-agents.*

Co-agents.

410. An agent is under no responsibility to his principal for the acts or defaults (*e*) of his co-agents, except where they are his partners (*f*), unless he expressly or tacitly authorised such acts or defaults (*g*).

Sub-agents.

But he is liable for the acts (*h*) and defaults (*i*) of his sub-agents even though their employment was authorised by his principal (*k*), and he must account to his principal for all moneys received by them (*l*).

SECT. 3.—*Rights of Agent against Principal.*

SUB-SECT. 1.—*In General.*

Indemnity against liabilities not contemplated.

411. Most of the rights of an agent against his principal depend upon the principle that the agent, being a mere representative of his principal, and acting wholly on the latter's behalf, is not expected to incur any liabilities or suffer any losses other than those contemplated by him when he undertook the agency, or prescribed by the contract between them (*m*).

SUB-SECT. 2.—*Remuneration.*

No right apart from contract.

Where contract express.

412. An agent has no right to receive remuneration from his principal unless there be a contract, express or implied, to that effect (*n*). Where the parties have made an express contract for remuneration, the amount of remuneration and the conditions under which it will become payable must be ascertained by reference to the terms of that contract; no implied contract can be set up to add to or vary such terms (*o*).

(*d*) Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 4 (3); *Crowther* v. *Elgood* (1887), 34 Ch. D. 691; and see title CONTEMPT AND ATTACHMENT. For the criminal liability of an agent who misappropriates his principal's money or property, see the Larceny Act, 1861 (24 & 25 Vict. c. 96), ss. 77—79, and the Larceny Act, 1901 (1 Edw. 7, c. 10), title CRIMINAL LAW AND PROCEDURE.

(*e*) *Lucas* v. *Fitzgerald* (1903), 20 T. L. R. 16; *Land Credit Co. of Ireland* v. *Lord Fermoy* (1870), 5 Ch. App. 763; *Cullerne* v. *London and Suburban General Permanent Building Society* (1890), 25 Q. B. D. 485.

(*f*) See *Hamlyn* v. *Houston & Co.*, [1903] 1 K. B. 81.

(*g*) *Cargill* v. *Bower* (1878), 10 Ch. D. 502.

(*h*) *Re Mutual Aid Permanent Benefit Building Society, Ex parte James* (1883), 49 L. T. 530; *Swire* v. *Francis* (1877), 3 App. Cas. 106.

(*i*) *Collins* v. *Griffin* (1734), Barnes, 37; *Mackersy* v. *Ramsays, Bonars & Co.*, (1843), 9 Cl. & F. 818.

(*k*) *Skinner & Co.* v. *Weguelin Eddowes & Co.* (1882), 1 Cab. & El. 12.

(*l*) *Matthews* v. *Haydon* (1796), 2 Esp. 509; *Mackersy* v. *Ramsays, Bonars & Co.*, *supra*; *Re Mitchell* (1884), 54 L. J. (CH.) 342.

(*m*) See the following sub-sections, and in particular sub-sects. 2 and 3.

(*n*) *Reeve* v. *Reeve* (1858), 1 F. & F. 280; and compare *Taylor* v. *Brewer* (1813), 1 M. & S. 290, with *Bryant* v. *Flight* (1839), 5 M. & W. 114. No barrister can make a binding contract for remuneration in respect of professional services (*Kennedy* v. *Brown* (1863), 13 C. B. (N. S.) 677); see title BARRISTERS.

(*o*) *Barnett* v. *Isaacson* (1888), 4 T. L. R. 645; *Green* v. *Mules* (1861), 30 L. J. (C. P.) 343; *Alder* v. *Boyle* (1847), 4 C. B. 635; *Lott* v. *Outhwaite* (1893), 10 T. L. R. 76. But the contract may be interpreted by reference to usages which are not inconsistent with it. See p. 182, *ante*.

SECT. 3. Rights of Agent against Principal.

Implied contract.

In the absence of an express contract on the subject, a contract to pay remuneration may be implied from the circumstances of the case (*p*). The mere fact of employment of a professional agent itself raises the presumption of a contract to remunerate him (*q*), the amount of the remuneration and the conditions of its payment being ascertainable from the usages of his profession (*r*). But he is not entitled to any further or other remuneration than the usages of the profession justify, unless he does work not strictly ancillary to the agency, in which case, and also in the case of a non-professional agent, the implied contract is to pay reasonable remuneration, having regard to the circumstances of the particular case (*s*).

Remuneration must be earned.

413. In order to entitle the agent to receive his remuneration, he must have carried out that which he bargained to do (*t*), or at any rate must have substantially done so (*a*), and all conditions imposed by the contract must have been fulfilled (*b*). He is not, however, deprived of his right to remuneration, where he has done all he undertook to do, by the fact that the transaction is not beneficial to the principal (*c*), or that it has subsequently fallen through (*d*), whether by some act (*e*) or default (*f*) of the principal, or otherwise (*g*), unless there is a provision of the contract, express (*h*) or implied (*i*), to that effect, or unless the agent was himself the cause of his services being abortive (*k*).

Transaction in regard to which remuneration claimed must be direct consequence of agency;

414. Remuneration can be claimed only in transactions which are the direct consequence of the agency (*l*). It is not necessary that the

(*p*) *Bryant* v. *Flight* (1839), 5 M. & W. 114.

(*q*) *Miller* v. *Beal* (1879), 27 W. R. 403; *Manson* v. *Baillie* (1855), 2 Macq. 80; *Turner* v. *Reeve* (1901), 17 T. L. R. 592.

(*r*) *Broad* v. *Thomas* (1830), 7 Bing. 99; *Read* v. *Rann* (1830), 10 B. & C. 438; and see cases in preceding note.

(*s*) *Williamson* v. *Hine*, [1891] 1 Ch. 390; *Marshall* v. *Parsons* (1841), 9 C. & P. 656.

(*t*) *Bull* v. *Price* (1831), 7 Bing. 237; *Peacock* v. *Freeman* (1888), 4 T. L. R. 541.

(*a*) *Rimmer* v. *Knowles* (1874), 30 L. T. 496; *Johnston* v. *Kershaw* (1867), L. R. 2 Exch. 82.

(*b*) *Chapman* v. *Winson* (1904), 91 L. T. 17; *Kirk* v. *Evans* (1889), 6 T. L. R. 9 (conditions imposed by usage of trade).

(*c*) *Green* v. *Lucas* (1875), 33 L. T. 584; *Moir* v. *Marten* (1891), 7 T. L. R. 330.

(*d*) *Fuller* v. *Eames* (1892), 8 T. L. R. 278; *Harris* v. *Petherick* (1878), 39 L. T. 543.

(*e*) *Horford* v. *Wilson* (1807), 1 Taunt. 12; *Platt* v. *Depree* (1893), 9 T. L. R. 194; *Passingham* v. *King* (1897), 14 T. L. R. 39.

(*f*) *Fisher* v. *Drewett* (1878), 48 L. J. (EX.) 32; *Roberts* v. *Barnard* (1884), 1 Cab. & El. 336; *Lockwood* v. *Levick* (1860), 8 C. B. (N. S.) 603.

(*g*) *Fuller* v. *Eames*, *supra*; compare *Re Sovereign Life Assurance Co.*, *Salter's Claim* (1891), 7 T. L. R. 602.

(*h*) *Alder* v. *Boyle* (1847), 4 C. B. 635; *Bull* v. *Price*, *supra*; *Clack* v. *Wood* (1882), 9 Q. B. D. 276; and compare *Lara* v. *Hill* (1863), 15 C. B. (N. S.) 45.

(*i*) *Read* v. *Rann* (1830), 10 B. & C. 438.

(*k*) *Dalton* v. *Irvin* (1830), 4 C. & P. 289; *Hill* v. *Featherstonhaugh* (1831), 7 Bing. 569.

(*l*) *Tribe* v. *Taylor* (1876), 1 C. P. D. 505; *Gibson* v. *Crick* (1862), 1 H. & C. 142; *Toulmin* v. *Millar* (1887), 58 L. T. 96; *Curtis* v. *Nixon* (1871), 24 L. T. 706.

SECT. 3. Rights of Agent against Principal.

agent should actually complete the transaction (*m*), but he must show that it was brought about as the direct result of his intervention (*n*). It is not sufficient to show that it would not have been entered into but for his services, if it resulted therefrom only as a casual or remote consequence (*o*). It therefore follows that where several agents are concerned in negotiating a transaction between the principal and a particular third party the agent entitled to remuneration is not necessarily the agent who first introduces the business to him, but the agent who is the effective cause of the transaction being completed (*p*).

And must not be beyond scope of employment;

An agent is not entitled to receive any remuneration in respect of a transaction resulting from the agency which differs substantially from that which he was employed to procure (*q*).

Nor after termination of employment.

No remuneration is, as a rule, payable upon transactions between the principal and third persons introduced to him by the agent arising after the termination of the employment (*r*), whether such transactions are due to the agent's introduction (*s*) or not (*t*). But remuneration may be payable in respect of such further transactions if they are in fact part of a transaction in which the agent was employed (*a*), or if there was an express contract to that effect; and in the latter case it will be payable even though the agent was dismissed (*b*), and may be so though he was not the effective cause of the transaction (*c*).

Agent wrongfully prevented by principal from earning remuneration.

415. If an agent is prevented from earning his remuneration by some wrongful act or default on the part of the principal, he is entitled to recover from the latter as damages the actual loss sustained by him (*d*). Where the agent has done everything to entitle him to receive his remuneration, the measure of damages is the full amount of remuneration which he would have received, if the transaction in respect of which it was to be payable had been

(*m*) *Mansell* v. *Clements* (1874), L. R. 9 C. P. 139; *Green* v. *Bartlett* (1863), 14 C. B. (N. S.) 681.

(*n*) *Wilkinson* v. *Martin* (1837), 8 C. & P. 1; *Burton* v. *Hughes* (1885), 1 T. L. R. 207; and cases in preceding note.

(*o*) *Tribe* v. *Taylor* (1876), 1 C. P. D. 505, *Lumley* v. *Nicholson* (1886), 34 W. R. 716; *Antrobus* v. *Wickens* (1865), 4 F. & F. 291; *Millar Son & Co.* v. *Radford* (1903), 19 T. L. R. 575.

(*p*) *Taplin* v. *Barrett* (1889), 6 T. L. R. 30; *Barnett* v. *Brown & Co.* (1890), 6 T. L. R. 463; *Millar Son & Co.* v. *Radford*, *supra*. But the principal cannot interplead if several agents claim commission upon the same transaction (*Greatorex* v. *Shackle*, [1895] 2 Q. B. 249).

(*q*) *Toulmin* v. *Millar* (1887), 58 L. T. 96; *Barnett* v. *Isaacson* (1888), 4 T. L. R. 645.

(*r*) *Tribe* v. *Taylor*, *supra*.

(*s*) *Barrett* v. *Gilmour & Co.* (1901), 6 Com. Cas. 72; *Hilton* v. *Helliwell*, [1894] 2 Ir. R. 94; *Nayler* v. *Yearsley* (1860), 2 F. & F. 41.

(*t*) *Boyd* v. *Tovil Paper Co., Ltd.* (1888), 4 T. L. R. 332.

(*a*) *Wilkinson* v. *Martin*, *supra*.

(*b*) *Salomon* v. *Brownfield* (1896), 12 T. L. R. 239; *Bilbee* v. *Hasse & Co.* (1889), 5 T. L. R. 677.

(*c*) *Robey* v. *Arnold* (1897), 14 T. L. R. 39.

(*d*) *Prickett* v. *Badger* (1856), 1 C. B. (N. S.) 296. Where the agent has only done part of the work he was employed to do, he recovers on a *quantum meruit* (*Inchbald* v. *Western Neilgherry Coffee Co.* (1864), 17 C. B. (N. S.) 733), unless there is an express contract to meet the case (*Re London and Scottish Bank, Ex parte Logan* (1870), L. R. 9 Eq. 149).

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completed (*e*). The question whether an act or omission of a principal which prevents remuneration from being earned by an agent is wrongful or not, so as to entitle the agent to damages, depends upon the terms of the contract between them (*f*) and the usages of the particular trade or business (*g*).

Loss of right to remuneration.

416. An agent who is by law required to possess a particular qualification to enable him to act as such, is not entitled to any remuneration if at the time when he rendered the services in respect of which the remuneration is claimed he was not so qualified (*h*); nor is an agent entitled to any remuneration in respect of transactions in the course of which he has been guilty of wilful misconduct (*i*) or breach of faith, whether his principal has been damnified thereby or not (*k*), nor in respect of gaming or wagering transactions (*l*), or transactions which were unauthorised by his principal and not subsequently ratified (*m*), or which were known by the agent to be unlawful (*n*), nor in respect of any services which were rendered abortive by reason of his negligence or other breach of duty (*o*)

SUB-SECT. 3.—*Reimbursement and Indemnity by Principal.*

Extent of right.

417. The relation of principal and agent raises by implication a contract on the part of the principal to reimburse the agent in respect of all expenses, and to indemnify him against all liabilities, incurred in the reasonable performance of the agency (*p*), provided that such implication is not excluded by the express terms of the contract between them (*q*), and provided that such expenses and liabilities are in fact occasioned by his employment (*r*).

(*e*) *Prickett* v. *Badger* (1856), 1 C. B. (N. S.) 296; *Roberts* v. *Barnard* (1884), 1 Cab. & El. 336.

(*f*) *Simpson* v. *Lamb* (1856), 17 C. B. 603; and contrast *Turner* v. *Goldsmith*, [1891] 1 Q. B. 544, and *Brace* v. *Calder*, [1895] 2 Q. B. 253, with *Rhodes* v. *Forwood* (1876), 1 App. Cas. 256, and *Phillips* v. *Alhambra Palace Co.*, [1901] 1 K. B. 59. See also *Chinnock* v. *Sainsbury* (1860), 30 L. J. (CH.) 409; *Green* v. *Lucas* (1875), 33 L. T. 584.

(*g*) *Read* v. *Rann* (1830), 10 B. & C. 438; *Broad* v. *Thomas* (1830), 7 Bing. 99.

(*h*) *Falk* v. *Force* (1848), 12 Q. B. 666; *Cope* v. *Rowlands* (1836), 2 M. & W. 149.

(*i*) *Andrews* v. *Ramsay & Co.*, [1903] 2 K. B. 635; *Price* v. *Metropolitan House Investment and Agency Co., Ltd.* (1907), 23 T. L. R. 630; compare *The Macleod* (1880), 5 P. D. 254. But he is entitled to his remuneration in other transactions where he has acted properly (*Hippisley* v. *Knee Brothers*, [1905] 1 K. B. 1; *Nitedals Taendstikfabrick* v. *Bruster* (1906), 75 L. J. (CH.) 798).

(*k*) *Salomans* v. *Pender* (1865), 3 H. & C. 639.

(*l*) Gaming Act, 1892 (55 Vict. c. 9), s. 1; see title GAMING AND WAGERING.

(*m*) *Marsh* v. *Jelf* (1862), 3 F. & F. 234; *Campanari* v. *Woodburn* (1854), 15 C. B. 400.

(*n*) *Stackpole* v. *Earle* (1761), 2 Wils. (K. B.) 133; *Josephs* v. *Pebrer* (1825), 3 B. & C. 639; and see the Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 53 (3), which requires the broker to stamp the contract note before he can claim his commission. Otherwise, if the agent was unaware of the illegality (*Haines* v. *Busk* (1814), 5 Taunt. 521).

(*o*) *Denew* v. *Daverell* (1813), 3 Camp. 451; *Bracey* v. *Carter* (1840), 12 A. & E. 373; *Dalton* v. *Irwin* (1830), 4 C. & P. 289; *Hamond* v. *Holiday* (1824), 1 C. & P. 384.

(*p*) *Adamson* v. *Jarvis* (1827), 4 Bing. 66; *Frixione* v. *Tagliaferro* (1856), 10 Moo. P. C. C. 175; including those arising out of a premature revocation of his authority (*Warlow* v. *Harrison* (1858), 1 E. & E. 295, *per* MARTIN, B., at p. 317).

(*q*) As in the case of a *del credere* agent (*Morris* v. *Cleasby* (1816), 4 M. & S. 566). But a *del credere* agent is entitled to indemnity against losses outside the scope of the *del credere* commission (*Hooper* v. *Treffrey* (1847), 1 Exch. 17).

(*r*) Compare *Halbronn* v. *International Horse Agency and Exchange, Ltd.*, [1903] K. B. 270.

SECT. 3. Rights of Agent against Principal.

The right of indemnity covers not merely the losses actually sustained by the agent, but also the full amount of the liabilities incurred by him, even though they may never in fact be enforced (*s*), and extends to cases where they were incurred under an honest mistake of judgment (*t*). It is immaterial whether or not the agent professed to be acting on his principal's behalf, if he was so in fact (*a*).

Extent of indemnity.

Where an agent is employed to deal in a particular market or at a particular place, he may acquire wider rights of reimbursement and indemnity than he would otherwise have, in consequence of the usages of the particular market or place (*b*). Such usages are binding on the principal, even though unknown to him, if they are reasonable (*c*), but not if they are unreasonable (*d*), unless his knowledge of them be proved (*e*).

Where liabilities increased by local usages.

The agent may enforce his rights of reimbursement and indemnity by action (*f*), or by the exercise of his lien (*g*), and, if he is sued by the principal (*h*), he may assert them by way of set-off (*i*).

How right enforced.

418. An agent is not entitled to reimbursement or indemnity in respect of expenses or liabilities incurred in consequence of his own default (*k*) or breach of duty (*l*), or arising out of gaming or wagering transactions (*m*), or transactions which are known to be unlawful (*n*), or which are outside the scope of his authority and have not been ratified by his principal (*o*).

Liabilities to which right does not extend.

SUB-SECT. 4.—*Agent's Lien.*

419. Every agent has a lien on the goods and chattels of his principal in respect of all claims against the principal (*p*) arising

For what claims agent has lien.

(*s*) *Lacey* v. *Hill, Crowley's Claim* (1874), L. R. 18 Eq. 182.

(*t*) *Broom* v. *Hall* (1859), 7 C. B. (N. S.) 503; *Pettman* v. *Keble* (1850), 9 C. B. 701.

(*a*) *Ex parte Bishop, Re Fox* (1880), 15 Ch. D. 400; *Ex parte Rogers, Re Rogers* (1880), 15 Ch. D. 207.

(*b*) *Bayliffe* v. *Butterworth* (1847), 1 Exch. 425. See also p. 182, *ante*, and for the usages of the Stock Exchange, see title STOCK EXCHANGE.

(*c*) *Reynolds* v. *Smith* (1893), 9 T. L. R. 494; *Chapman* v. *Shepherd* (1867), L. R. 2 C. P. 228, *per* WILLES, J., at p. 239.

(*d*) *Perry* v. *Barnett* (1885), 15 Q. B. D. 388.

(*e*) *Seymour* v. *Bridge* (1885), 14 Q. B. D. 460.

(*f*) See the various cases cited in notes to this sub-section.

(*g*) See pp. 198, 199, *post*.

(*h*) Or by anyone claiming through the principal (*Cropper* v. *Crook* (1868), L. R. 3 C. P. 194).

(*i*) *Curtis* v. *Barclay* (1826), 5 B. & C. 141.

(*k*) *Lewis* v. *Samuel* (1846), 8 Q. B. 685; *Duncan* v. *Hill* (1873), L. R. 8 Exch. 242.

(*l*) *Ellis* v. *Pond*, [1898] 1 Q. B. 426; *Thomas* v. *Atherton* (1878), 10 Ch. D. 185.

(*m*) Gaming Act, 1892 (55 Vict. c. 9), s. 1; *Tatam* v. *Reeve*, [1893] 1 Q. B. 44.

(*n*) *Josephs* v. *Pebrer* (1825), 3 B. & C. 639; *Ex parte Mather* (1797), 3 Ves. 373; *Warwick* v. *Slade* (1811), 3 Camp. 127. But otherwise where the agent is unaware that the transaction is unlawful (*Adamson* v. *Jarvis* (1827), 4 Bing. 66), or where the transaction in respect of which the indemnity is claimed is distinct from the unlawful one (*Smith* v. *Lindo* (1858), 5 C. B. (N. S.) 587).

(*o*) *Bowlby* v. *Bell* (1846), 3 C. B. 284; and contrast *Hartas* v. *Ribbons* (1889), 22 Q. B. D. 254; *Colonial Bank of Australasia* v. *Marshall*, [1906] A. C. 559.

(*p*) Including those that are statute-barred (*Spears* v. *Hartly* (1800), 3 Esp. 81).

SECT. 3. Rights of Agent against Principal.

out of his employment, whether for remuneration earned, or for expenses or liabilities incurred, except where the right of lien is inconsistent with the contract between the parties (*q*), or with the special purpose for which the goods or chattels were intrusted to him (*r*).

Lien generally a particular lien.

The lien of an agent is, as a rule, a particular lien, confined to such claims as arise in connection with the goods and chattels in respect of which the right is claimed (*s*). But he may be given a general lien, extending to all claims arising out of the agency, either by express contract or by usage (*t*).

Possession necessary.

420. To enable an agent to exercise his lien, the goods must be in his possession, actual (*a*) or constructive (*b*).

The possession must have been acquired without breach of duty (*c*), and the agent must hold the goods by virtue of the same agency as that under which he claims the lien (*d*). The lien, even if created by an express contract, is subject to the reputed ownership clause of the Bankruptcy Act, if the goods are in the order and disposition of the principal, though in the custody of the agent (*e*).

Lien affecting third parties.

421. As against third persons, the agent cannot, by the exercise of his lien, deprive them of their existing rights in respect of the goods, except in so far as the principal could have done so (*f*). But an agent's lien on negotiable instruments and money intrusted to him is absolute, notwithstanding any defects in the title of the

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(*q*) *Re Bowes* (1886), 33 Ch. D. 586; *Wolstenholm* v. *Sheffield Union Banking Co.* (1886), 54 L. T. 746; but the inconsistency must be clear (*Fisher* v. *Smith* (1878), 4 App. Cas. 1).

(*r*) *Brandao* v. *Barnett* (1846), 12 Cl. & F. 787; *Burn* v. *Brown* (1817), 2 Stark. 272.

(*s*) *Bock* v. *Gorrissen* (1861), 30 L. J. (CH.) 39; and see *Williams* v. *Millington* (1788), 1 Hy. Bl. 81.

(*t*) But there is no lien in respect of claims accruing before the agency began (*Houghton* v. *Matthews* (1803), 3 Bos. & P. 485). A general lien is possessed by factors (*Baring* v. *Corrie* (1818), 2 B. & Ald. 137, *per* HOLROYD, J., at p. 148; *Hammonds* v. *Barclay* (1802), 2 East, 227); and by bankers (*London Chartered Bank of Australia* v. *White* (1879), 4 App. Cas. 413), insurance brokers (*Mann* v. *Forrester* (1814), 4 Camp. 60), solicitors (*Re Broomhead* (1847), 5 Dow. & L. 52), and stockbrokers (*Re London and Globe Finance Corporation*, [1902] 2 Ch. 416), for which see titles BANKERS AND BANKING, INSURANCE, SOLICITORS, and STOCK EXCHANGE respectively.

(*a*) *Ridgway* v. *Lees* (1856), 25 L. J. (CH.) 584; *Kinloch* v. *Craig* (1790), 3 Term Rep. 783.

(*b*) *Bryans* v. *Nix* (1839), 4 M. & W. 775.

(*c*) *Walsh* v. *Provan* (1853), 8 Exch. 843; *Madden* v. *Kempster* (1807), 1 Camp. 12.

(*d*) *Misa* v. *Currie* (1876), 1 App. Cas. 554; *Dixon* v. *Stansfeld* (1850), 10 C. B. 398.

(*e*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 44 (iii.); *Hoggard* v. *Mackenzie* (1858), 25 Beav. 493. See title BANKRUPTCY AND INSOLVENCY.

(*f*) Compare *Brunton* v. *Electrical Engineering Corporation*, [1892] 1 Ch. 434, with *Re Capital Fire Insurance Association, Ex parte Beall* (1883), 24 Ch. D. 408; and see *Turner* v. *Letts* (1855), 20 Beav. 185. But where the principal's disability to do so depends not upon the nature, but upon the circumstances, of the particular case, the agent can exercise his lien, unless he has notice of the circumstances; see *London and County Banking Co., Ltd.* v. *Ratcliffe* (1881), 6 App. Cas. 722; *Barry* v. *Longmore* (1840), 12 A. & E. 639; *Copland* v. *Stein* (1799), 8 Term Rep. 199; and the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 49.

principal (*g*), provided that, when the lien attached, the agent had no notice of any such defects (*h*).

SECT. 3. Rights of Agent against Principal.

Loss of lien.

422. An agent loses his lien by parting with the possession of the goods (*i*), unless at the time of parting with them he reserves expressly or by implication his right of lien (*k*), or they are obtained from him by fraud or other unlawful means (*l*). He may also, whilst remaining in possession of the goods, lose his lien by dealing with them in any way which is inconsistent with its continuance (*m*), or by entering into any agreement (*n*), or doing any act (*o*) which necessarily implies its abandonment. But it is not lost by any act of the principal after it has attached (*p*).

Lien of sub-agent.

423. A sub-agent has, in general, no right of lien against the principal as such (*q*). But if he is employed with the authority of the principal, and at the time when the right attaches he is unaware of the existence of a principal, he has the same right of lien against him as he would have had if the agent employing him had been the principal (*r*); and though aware of the principal's existence, he has a similar right of lien against him in respect of claims arising out of the transaction in which he was employed as sub-agent, notwithstanding any settlement between principal and agent (*s*); but his general lien (if any) is co-extensive with the actual rights of the agent in that behalf, and no wider (*a*).

SUB-SECT. 5.—*Agent's Right of Stoppage in Transit.*

Stoppage in transit.

424. If an agent has bought goods on behalf of his principal, either with his own money (*b*), or under such circumstances as to incur a personal liability towards the seller for the price (*c*), he

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(*g*) *Brandao* v. *Barnett* (1846), 12 Cl. & F. 787; *Bank of New South Wales* v. *Goulburn Valley Butter Co. Proprietary*, [1902] A. C. 543; *Jones* v. *Peppercorne* (1858), John. 430; and compare *London Joint Stock Bank* v. *Simmons*, [1892] A. C. 201; *Bechuanaland Exploration Co.* v. *London Trading Bank*, [1898] 2 Q. B. 658.

(*h*) *Solomons* v. *Bank of England* (1791), 13 East, 135; *Jeffryes* v. *Agra and Masterman's Bank (1866)*, L. R. 2 Eq. 674.

(*i*) *Sweet* v. *Pym* (1800), 1 East, 4.

(*k*) *Watson* v. *Lyon* (1855), 7 De G. M. & G. 288; *North Western Bank* v. *Poynter*, [1895] A. C. 56.

(*l*) *Dicas* v. *Stockley* (1836), 7 C. & P. 587; *Wallace* v. *Woodgate* (1824), Ry. & M. 193.

(*m*) *Weeks* v. *Goode* (1859), 6 C. B. (N. S.) 367; *Jacobs* v. *Latour* (1828), 5 Bing. 130.

(*n*) *The Rainbow* (1885), 53 L. T. 91.

(*o*) *Re Taylor, Stileman and Underwood*, [1891] 1 Ch. 590. But the mere taking of security is not by itself sufficient (*Angus* v. *McLachlan* (1883), 23 Ch. D. 330).

(*p*) *Godin* v. *London Assurance Co.* (1758), 1 Wm. Bl. 103; *West of England Bank* v. *Batchelor* (1882), 51 L. J. (CH.) 199. Nor is it affected by the subsequent bankruptcy of the principal (*Robson* v. *Kemp* (1802), 4 Esp. 233; *Re Capital Fire Insurance Association, Ex parte Beall* (1883), 24 Ch. D. 408).

(*q*) *Solly* v. *Rathbone* (1814), 2 M. & S. 298.

(*r*) *Taylor* v. *Kymer* (1832), 3 B. & Ad. 320; *Mann* v. *Forrester* (1814), 4 Camp. 60; *New Zealand and Australian Land Co.* v. *Watson* (1881), 7 Q. B. D. 374.

(*s*) *Fisher* v. *Smith* (1878), 4 App. Cas. 1.

(*a*) *Mildred* v. *Maspons* (1883), 8 App. Cas. 874; *Ex parte Edwards, Re Johnson* (1881), 8 Q. B. D. 262.

(*b*) *Jenkyns* v. *Brown* (1849), 14 Q. B. 496.

(*c*) As to this, see p. 219, *post*.

Sect. 3. Rights of Agent against Principal.

stands towards his principal in the position of an unpaid seller (*d*), and on delivery to a carrier for transmission to the principal, possesses the same rights of stoppage in transit (*e*).

SUB-SECT. 6.—*Interpleader by Agent.*

Right to interplead.

425. Where an agent is, by virtue of his agency, in possession of any money, goods or chattels (*f*), to which conflicting claims are made by his principal and a third person, he may, notwithstanding his agency (*g*), interplead (*h*), even though he has expressly attorned to his principal (*i*), provided that, at the time of so attorning, he had no notice of the third party's claim (*k*).

Where right exists.

But he must stand in a position of real impartiality between the claimants (*l*), and therefore he must not collude with either (*m*), nor claim any interest in the subject-matter except for his costs and charges (*n*). A claim of lien in respect of the latter does not oust him from his right (*o*). But he cannot interplead, if he claim any further lien or interest (*p*), nor can he interplead where one of the claimants claims unliquidated damages (*q*).

SUB-SECT. 7.—*As to an Account.*

Agent's right to account.

426. An agent has a right to have an account taken, and unless the accounts are of a complicated nature they will be taken in an ordinary action in the King's Bench Division (*r*).

(*d*) *Feise* v. *Wray* (1802), 3 East, 93; *Falk* v. *Fletcher* (1865), 18 C. B. (N. S.) 403; and see *Cassaboglou* v. *Gibb* (1883), 11 Q. B. D. 797, *per* BRETT, M.R., at pp. 803, 804.

(*e*) *Ireland* v. *Livingston* (1872), L. R. 5 H. L. 395, *per* BLACKBURN, J., at p. 408; *Imperial Bank* v. *London and St. Katharine Docks Co.* (1877), 5 Ch. D. 195. See, further, title SALE OF GOODS.

(*f*) Including things in action (*Robinson* v. *Jenkins* (1890), 24 Q. B. D. 275).

(*g*) *Ex parte Mersey Docks and Harbour Board*, [1899] 1 Q. B. 546; *Attenborough* v. *London and St. Katharine's Dock Co.* (1878), 3 C. P. D. 450; *Tanner* v. *European Bank* (1866), L. R. 1 Exch. 261.

(*h*) Under R. S. C., Ord. 57; and see title INTERPLEADER.

(*i*) *Ex parte Mersey Docks and Harbour Board, supra.*

(*k*) Compare *Ex parte Davies, Re Sadler* (1881), 19 Ch. D. 86.

(*l*) *Murietta* v. *South American etc. Co.* (1893), 62 L. J. (Q. B.) 396.

(*m*) R. S. C., Ord. 57, r. 2 (b). It is collusion to agree with one claimant to do what the agent legally can to defeat the other (*Murietta* v. *South American etc. Co., supra*), or to take an indemnity from one of them (*Tucker* v. *Morris* (1832), 1 Cr. & M. 73), though the party giving the indemnity cannot raise this objection (*Thompson* v. *Wright* (1884), 13 Q. B. D. 632).

(*n*) R. S. C., Ord. 57, r. 2 (a); *Best* v. *Heyes* (1862), 3 F. & F. 113.

(*o*) *Cotter* v. *Bank of England* (1833), 3 Moo. & S. 180; *Attenborough* v. *London and St. Katharine's Dock Co., supra, per* BRAMWELL, L.J., at p. 454.

(*p*) *Mitchell* v. *Hayne* (1824), 2 Sim. & St. 63.

(*q*) *Ingham* v. *Walker* (1887), 3 T. L. R. 448.

(*r*) *Padwick* v. *Hurst* (1854), 18 Beav. 575; *Harrington* v. *Churchward* (1860), 29 L. J. (CH.) 521.

Part IX.—Relations between Principal and Third Persons.

SECT. 1.—*In General.*

SECT. 1. In General.

SUB-SECT. 1.—*Extent of Principal's Liability.*

Acts within express authority.

427. Where a principal gives an agent express authority to do a particular act (*t*) or class of acts (*a*) on his behalf, the principal is bound, as regards third persons, by every act done by the agent which is so expressly authorised, or which is necessary for the proper execution of the express authority (*b*), even though the existence of such express authority is unknown to the third person (*c*).

General authority.

428. Where a principal gives an agent general authority to conduct any business on his behalf, he is bound, as regards third persons, by every act done by the agent which is incidental to the ordinary course of such business (*d*), or which falls within the apparent scope of the agent's authority (*e*).

Authority by estoppel.

429. Where a person has by words or conduct held out (*f*) another person, or enabled another person to hold himself out (*g*), as having authority to act on his behalf, he is bound, as regards third parties, by the acts of such other person to the same extent as he would have been bound if such other person had in fact had the authority which he was held out as having.

Fraudulent motive of agent immaterial.

430. A principal is not exempt from liability, where he would otherwise be bound by an act done by his agent, by reason of the fact that the agent in doing it was acting in fraud of the principal (*h*), or otherwise to his detriment (*i*).

SUB-SECT. 2.—*Limitation of Principal's Liability.*

Effect of limitation of authority.

431. Where a principal, in conferring authority upon his agent to act on his behalf, imposes conditions (*k*) or limitations (*l*) on its exercise,

(*t*) *Parkes* v. *Prescott* (1869), L. R. 4 Exch. 169; *Montague* v. *Perkins* (1853), 22 L. J. (C. P.) 187.

(*a*) *Hambro* v *Burnand*, [1904] 2 K. B. 10; *Montaignac* v. *Shitta* (1890), 15 App. Cas. 357.

(*b*) *Jacobs* v. *Morris*, [1902] 1 Ch. 816.

(*c*) *Hambro* v. *Burnand*, *supra*.

(*d*) *Edmunds* v. *Bushell* (1865), L. R. 1 Q. B. 97; *Watteau* v. *Fenwick*, [1893] 1 Q. B. 346; *Hawken* v. *Bourne* (1841), 8 M. & W. 703.

(*e*) *Howard* v. *Sheward* (1866), L. R. 2 C. P. 148; *Howard* v. *Tucker* (1831), 1 B. & Ad. 712; *Townsend* v. *Inglis* (1816), Holt (N. P.), 278; *Wing* v. *Harvey* (1854), 5 De G. M. & G. 265.

(*f*) *Hazard* v. *Treadwell* (1722), 1 Str. 506; *Summers* v. *Solomon* (1857), 26 L. J. (Q. B.) 301; *Jetley* v. *Hill* (1884), 1 Cab. & El. 239; *Filmer* v. *Lynn* (1835), 4 Nev. & M. (K. B.) 559; *Mahony* v. *East Holyford Mining Co.* (1875), L. R. 7 H. L. 869; *Barrett* v. *Deere* (1828), Mood. & M. 200.

(*g*) *Ex parte Harrison, Re Bentley & Co.* (1893), 69 L. T. 204; *Levita's Case* (1870), 5 Ch. App. 489; *London Freehold and Leasehold Property Co.* v. *Baron Suffield*, [1897] 2 Ch. 608.

(*h*) *Hambro* v. *Burnand*, *supra*; *Montague* v. *Perkins*, *supra*; *Summers* v. *Solomon*, *supra*.

(*i*) *Hawken* v. *Bourne*, *supra*; *Howard* v. *Sheward*, *supra*; *Wing* v. *Harvey*, *supra*.

(*k*) *Jordan* v. *Norton* (1838), 4 M. & W. 155.

(*l*) *Jacobs* v. *Morris*, *supra*; *Balfour* v. *Ernest* (1859), 5 C. B. (N. S.) 601.

SECT. 1. In General.

no act done by the agent in excess of the conditional or limited authority is binding on the principal as regards such persons as have (*m*) or ought to have (*n*) notice of such excess of authority.

Limitation of apparent scope of authority must be clear.

But, in the absence of notice, the principal cannot, by any instructions to his agent, escape liability for acts done by the agent which fall within the apparent scope of his authority (*o*).

No liability for act beyond apparent scope of authority.

432. Where, however, an act done by an agent is not done in the ordinary course of business (*p*) or falls outside the apparent scope of his authority (*q*), the principal is not bound by such act (*r*), even if the opportunity to do it arose out of the agency (*s*), and it was purported to be done on his behalf (*t*), unless he expressly authorised it (*a*), or adopted it by taking the benefit of it (*b*) or otherwise (*c*).

Exception where principal accepts benefit of unauthorised act.

And in particular, where the agent obtains the money or property of a third person by means of any such act, the principal is not responsible, unless the money (*d*) or property (*e*) or the proceeds thereof (*f*) have been received by him (*g*), or have been applied for

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(*m*) *Evans* v. *Kymer* (1830), 1 B. & Ad. 528; *Bodenham* v. *Hoskyns* (1852), 2 De G. M. & G. 903.

(*n*) *Hatch* v. *Searles* (1854), 24 L. J. (CH.) 22; as where a limitation is usual in the particular business (*Baines* v. *Ewing* (1866), L. R. 1 Exch. 320; *Daun* v. *Simmins* (1879), 41 L. T. 783). For limitations on the powers of directors imposed by articles of association, compare *Balfour* v. *Ernest* (1859), 5 C. B. (N. S.) 601, with *Royal British Bank* v. *Turquand* (1856), 6 E. & B. 327; and see, further, title COMPANIES. For the effect of signatures by procuration and analogous signatures on bills of exchange etc., see Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 25, title BILLS OF EXCHANGE ETC.

(*o*) *National Bolivian Navigation Co.* v. *Wilson* (1880), 5 App. Cas. 176, *per* Lord BLACKBURN at p. 209; *Trickett* v. *Tomlinson* (1863), 13 C. B. (N. S.) 663; *Duke of Beaufort* v. *Neeld* (1845), 12 Cl. & F. 248; *Davy* v. *Waller* (1899), 81 L. T. 107; *Edmunds* v. *Bushell* (1865), L. R. 1 Q. B. 97; *Limpus* v. *London General Omnibus Co.* (1862), 1 H. & C. 526. *Quære* whether it falls within an agent's apparent authority to represent the extent of his authority so as to bind his principal; see *London Joint Stock Bank* v. *Simmons*, [1892] A. C. 201, *per* Lord HERSCHELL at p. 220 and Lord MACNAGHTEN at p. 226.

(*p*) *McGowan & Co.* v. *Dyer* (1873), L. R. 8 Q. B. 141; *Re Cunningham & Co., Simpson's Claim* (1887), 36 Ch. D. 532; *Watkin* v. *Lamb* (1901), 85 L. T. 483; *Biggar* v. *Rock Life Assurance Co.*, [1902] 1 K. B. 516; *Barnett* v. *South London Tramways Co.* (1887), 18 Q. B. D. 815; *George Whitechurch, Ltd.* v. *Cavanagh*, [1902] A. C. 117.

(*q*) *Linford* v. *Provincial Horse and Cattle Insurance Co.* (1864), 34 Beav. 291; *Newlands* v. *National Employers' Accident Association* (1885), 54 L. J. (Q. B.) 428; *Re Southport and West Lancashire Banking Co.* (1885), 1 T. L. R. 204; *Xenos* v. *Wickham* (1866), L. R. 2 H. L. 296.

(*r*) Nor can it amount to an act of bankruptcy (*Ex parte Blain, Re Sawers* (1879), 12 Ch. D. 522, *per* BRETT, L.J., at p. 529).

(*s*) *Ruben* v. *Great Fingall Consolidated*, [1906] A. C. 439.

(*t*) See the cases cited in notes (*p*) and (*s*) *supra*.

(*a*) *Chadburn* v. *Moore* (1892), 61 L. J. (CH.) 674; *Kilgour* v. *Finlyson* (1789), 1 Hy. Bl. 156.

(*b*) *Jacobs* v. *Morris*, [1902] 1 Ch. 816, *per* VAUGHAN WILLIAMS, L.J., at p. 832.

(*c*) See pp. 173 *et seq.*, *ante*.

(*d*) *Bannatyne* v. *McIver*, [1906] 1 K. B. 103; *Reid* v. *Rigby & Co.*, [1894] 2 Q. B. 40.

(*e*) *Glyn* v. *Baker* (1811), 13 East, 509.

(*f*) *Marsh* v. *Keating* (1834), 1 Bing. (N. C.) 198.

(*g*) *Glyn* v. *Baker*, *supra*; *Marsh* v. *Keating*, *supra*. See also *Kettlewell* v. *Refuge Assurance Co.*, [1907] 2 K. B. 242; *Holdsworth* v. *Lancashire and Yorkshire Insurance Co.* (1907), 23 T. L. R. 521.

his benefit (*h*), in which case he becomes liable to the extent of the benefit received (*i*).

No liability for acts of unauthorised agent.

433. Further, no act done by a person purporting to be an agent acting on his principal's behalf, but having in fact no authority from the principal so to act, is binding on the principal (*k*), unless the latter is precluded by his conduct from denying the existence of the authority (*l*).

SECT. 2.—*As to Goods etc. intrusted to an Agent.*

SUB-SECT. 1.—*In General.*

Unauthorised dispositions not binding on principal.

434. Where an agent is intrusted with any money, goods, or other property belonging to his principal, no disposition of such property made by the agent without the authority of the principal is, as a general rule (*m*), binding upon the principal (*n*); and, notwithstanding any such disposition, the principal is entitled to follow the property into the hands of third persons and recover it (*o*) or its value (*p*).

Principal's right to follow property unaffected by agent's bankruptcy.

Where the agent becomes bankrupt (*q*), the rule applies in favour of the principal against the agent's trustee in bankruptcy and creditors, and entitles the principal to follow and recover any goods of his in the possession of the agent (*r*), together with any debts which may be due to him in his capacity as agent of the principal (*s*). But this right of the principal is subject to any lien which the agent may have in respect of the goods or debts (*t*), and it does not attach at all where at the commencement of the bankruptcy the goods or debts were in the order and disposition of the agent under such circumstances as to make him their reputed owner (*a*).

(*h*) *Bannatyne* v. *MacIver*, [1906] 1 K. B. 103; *Reid* v. *Rigby & Co.*, [1894] 2 Q. B. 40; *Re Japanese Curtains and Patent Fabric Co., Ex parte Shoolbred* (1880), 28 W. R. 339.

(*i*) Unless the third person was indebted to the principal, and the unauthorised act relates to the mode of enforcing payment, in which case the principal is entitled to keep the benefit without being liable for the agent's act (*Freeman* v. *Rosher* (1849), 13 Q. B. 780; *Lewis* v. *Read* (1845), 13 M. & W. 834); but contrast *Haseler* v. *Lemoyne* (1858), 5 C. B. (N. S.) 530, where there was in fact a ratification (all cases of distress for rent).

(*k*) *Spooner* v. *Browning*, [1898] 1 Q. B. 528; *Wright* v. *Glyn*, [1902] 1 K. B. 745; *Todd* v. *Emly* (1841), 7 M. & W. 427; and see *Wise* v. *Perpetual Trustee Co.*, [1903] A. C. 139.

(*l*) See p. 201, *ante*.

(*m*) For the exceptions to the rule, see pp. 204—206, *post*.

(*n*) *Farquharson Brothers & Co.* v. *King & Co.*, [1902] A. C. 325; *Cole* v. *North Western Bank* (1875), L. R. 10 C. P. 354, *per* BLACKBURN, J., at p. 363.

(*o*) *Fox* v. *Martin* (1895), 64 L. J. (CH.) 473; *Bodenham* v. *Hoskyns* (1852), 2 De G. M. & G. 903; *M'Combie* v. *Davies* (1805), 7 East, 5; *Solomons* v. *Bank of England* (1791), 13 East, 135.

(*p*) *Farquharson Brothers & Co.* v. *King & Co.*, *supra*.

(*q*) For the principal's rights on the bankruptcy of his agent, see, further, title BANKRUPTCY AND INSOLVENCY.

(*r*) *Ex parte Sayers* (1800), 5 Ves. 169; *Whitfield* v. *Brand* (1847), 16 M. & W. 282; *Ex parte Greenwood, Re Thickbroom* (1862), 6 L. T. 558; *Giles* v. *Perkins* (1807), 9 East, 12.

(*s*) *Scott* v. *Surman* (1743), Willes, 400; *Ex parte Pauli, Re Trye* (1838), 3 Deg. 169; *Ex parte Bright, Re Smith* (1879), 10 Ch. D. 566.

(*t*) See *Giles* v. *Perkins*, *supra*, *per* Lord ELLENBOROUGH, C.J., at p. 14.

(*a*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 44; in such case the principal has a right to prove in the bankruptcy for their value (*Re Button, Ex parte Haviside*, [1907] 1 K. B. 397).

SECT. 2. Goods etc. intrusted to Agent.

Where the agent has mixed his principal's money or property with his own, the principal has a first charge, as against the agent's trustee in bankruptcy and creditors, on the mixed fund (*b*) or property (*c*), if still *in specie*, or on their proceeds (*d*), as the case may be, provided that the money, property, or proceeds can be clearly identified.

Principal's property mixed with agent's.

Misappropriation by agent.

435. Where the agent has misappropriated his principal's money or property, the principal is entitled, as against the agent's trustee in bankruptcy and creditors, to follow the proceeds of such money or property, and take them in their existing form, provided that it is possible to trace them (*e*).

SUB-SECT. 2.—*Unauthorised Dispositions binding on the Principal.*

Dispositions by apparent owner.

436. Where a principal by any conduct on his part allows or enables his agent to appear as owner of any property belonging to the principal, the principal is bound by any sale (*f*), pledge (*g*), or other disposition of such property by the agent to the extent of such disposition, as regards all persons dealing for valuable consideration with the agent, provided that at the time of the disposition they had no notice of the principal's title and believed the agent to be the owner (*h*). But it is not sufficient for the principal merely to have been guilty of negligence, however gross (*i*), in the care of his property, whereby the agent obtained the opportunity of making the unauthorised disposition. The principal must himself have committed some indiscretion, that is to say, he must have done some act which was calculated to mislead, and did in fact mislead, the person dealing with the agent, or omitted some precaution which it was his duty towards such person to take (*j*).

Negotiable instruments or money.

In the case of money (*k*) or negotiable instruments (*l*), the rule applies even though the persons dealing with the agent knew him to be an agent, unless they knew him to be acting without authority (*m*) or in breach of faith (*n*).

(*b*) *Hancock* v. *Smith* (1889), 41 Ch. D. 456; *Re Hallett & Co., Ex parte Blane*, [1894] 2 Q. B. 237; *Re Hallett's Estate* (1880), 13 Ch. D. 696; but see *Wilsons and Furness-Leyland Line, Ltd.* v. *British and Continental Shipping Co., Ltd.* (1907), 23 T. L. R. 397.

(*c*) *Harris* v. *Truman* (1882), 9 Q. B. D. 264.

(*d*) *Frith* v. *Cartland* (1865), 34 L. J. (CH.) 301.

(*e*) *Taylor* v. *Plumer* (1815), 3 M. & S. 562.

(*f*) See *Farquharson Brothers & Co.* v. *King & Co.*, [1902] A. C. 325, *per* Lord HALSBURY, at p. 332.

(*g*) *Marshall* v. *National Provincial Bank of England* (1892), 61 L. J. (CH.) 465; *Pickering* v. *Busk* (1812), 15 East, 38; Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), ss. 21 (1) (estoppel), 22 (1) (sale in market overt).

(*h*) *Callow* v. *Kelson* (1862), 10 W. R. 193; *McCombie* v. *Davies* (1805), 7 East, 5; and see Factors Act, 1889 (52 & 53 Vict. c. 45), s. 7.

(*i*) But see *Fox* v. *Martin* (1895), 64 L. J. (CH.) 473; *Cooke* v. *Eshelby* (1887), 12 App. Cas. 271.

(*j*) *Bank of Ireland* v. *Trustees of Evans' Charities in Ireland* (1855), 5 H. L. Cas. 389; *Scholfield* v. *Lord Londesborough*, [1896] A. C. 514.

(*k*) *Marten* v. *Rocke, Eyton & Co.* (1885), 53 L. T. 946; *Union Bank of Australia* v. *Murray-Aynsley*, [1898] A. C. 693.

(*l*) *London Joint Stock Bank* v. *Simmons*, [1892] A. C. 201; *Goodwin* v. *Robarts* (1876), 1 App. Cas. 476; *Rumball* v. *Metropolitan Bank* (1877), 2 Q. B. D. 194; and see, further, title BILLS OF EXCHANGE ETC.

(*m*) *Earl of Sheffield* v. *London Joint Stock Bank* (1888), 13 App. Cas. 333.

(*n*) *Bodenham* v. *Hoskyns* (1852), 2 De G. M. & G. 903; and compare *Shields* v. *Bank of Ireland*, [1901] 1 Ir. R. 222; *Bank of New South Wales* v. *Goulburn Valley Butter Co. Proprietary, Ltd.*, [1902] A. C. 543.

SECT. 2. Goods etc. intrusted to Agent.

Where a principal (*o*) intrusts his agent with the title-deeds of any property, and gives him authority to raise a loan by means of them upon the security of the property, he is bound, as regards any person who has dealt with the agent in good faith, by any security given by the agent to the full amount advanced by such person to the agent on the faith of the security, notwithstanding the fact that the agent exceeded his authority in borrowing such amount (*p*).

Title deeds.

No disposition, however, which depends for its validity upon a forged instrument, is binding upon the principal (*q*).

Forged instrument.

SUB-SECT. 3.—*Dispositions under the Factors Act*, 1889 (*r*).

Dispositions under Factors Act.

437. Where a mercantile agent (*s*) is, with the consent of his principal, in the possession (*t*) of goods or of the documents of title (*u*) to goods belonging to the principal, the principal is bound by any sale, pledge (*x*), or other disposition of the goods made by the agent (*a*) for valuable consideration while acting in the ordinary course of business of a mercantile agent (*b*), as regards any person taking under the disposition, provided that such person acts in good faith, and has no notice at the time of the disposition that the agent has no authority to make it (*c*). Where the agent obtains possession without his principal's consent, no disposition by him is binding on the principal (*d*). But if the agent has been in possession with his principal's consent, the revocation of the

(*o*) For the position of a mortgagee who allows the mortgagor to retain or receive the title-deeds of the mortgaged property, see title MORTGAGE.

(*p*) *Brocklesby* v. *Temperance Building Society*, [1895] A. C. 173; *Robinson* v. *Montgomeryshire Brewery Co.*, [1896] 2 Ch. 841; *Gordon* v. *James* (1885), 30 Ch. D. 249; *Rimmer* v. *Webster*, [1902] 2 Ch. 163. See also *Lloyd's Bank, Ltd.* v. *Cooke*, [1907] 1 K. B. 794.

(*q*) *Mayor etc. of Merchants of the Staple of England* v. *Bank of England* (1887), 21 Q. B. D. 160; *Bank of Ireland* v. *Trustees of Evans' Charities in Ireland* (1855), 5 H. L. Cas. 389; *Painter* v. *Abil* (1863), 2 H. & C. 113.

(*r*) 52 & 53 Vict. c. 45. The provision of this Act is in amplification and not in derogation of the common law powers of an agent (*ibid.*, s. 13).

(*s*) For the definition of a mercantile agent, see p. 152, *ante*.

(*t*) The agent is in possession when the goods or documents are in his actual custody or are held by any other person subject to his control, or for him, or on his behalf (*ibid.*, s. 1 (2)).

(*u*) "Documents of title" include any bill of lading, dock warrant, warehouse-keeper's certificate, and warrant or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by indorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented (*ibid.*, s. 1 (4)). If the agent obtains possession of any documents of title by reason of being or having been, with the consent of his principal, in possession of goods or other documents of title, his possession of the first-mentioned documents of title is deemed to be with the consent of the principal (*ibid.*, s. 2 (3)).

(*x*) "Pledge" includes any contract pledging, or giving a lien or security on, goods, whether in consideration of an original advance, or of any further or continuing advance, or of any pecuniary liability (*ibid.*, s. 1 (5)). A pledge of the documents of title to goods is deemed to be a pledge of the goods (*ibid.*, s. 3). See *Waddington & Sons* v. *Neale & Sons* (1907), 23 T. L. R. 464.

(*a*) Or by his clerk or other person authorised in the ordinary course of business (Factors Act, 1889 (52 & 53 Vict. c. 45), s. 6). But the Act does not protect dispositions by persons who are not mercantile agents within its meaning (*Lamb* v. *Attenborough* (1862), 1 B. & S. 831; *Wood* v. *Rowcliffe* (1846), 6 Hare, 183 at p. 191).

(*b*) But not when the disposition is outside the ordinary course of business, see *Hastings* v. *Pearson*, [1893] 1 Q. B. 62; *Waddington & Sons* v. *Neale & Sons*, *supra*; and compare *Oppenheimer* v. *Attenborough & Son*, [1907] 1 K. B. 510.

(*c*) Factors Act, 1889 (52 & 53 Vict. c. 45), s. 2 (1).

(*d*) *Vaughan* v. *Moffat* (1868), 38 L. J. (CH.) 144. So also when possession is

SECT. 2. Goods etc. intrusted to Agent.

consent is immaterial unless the third person had notice of the revocation at the time of the disposition (*e*), and the consent of the principal is presumed in the absence of evidence to the contrary (*f*). The consideration may be either a payment in cash, or the delivery or transfer of other goods, or of a document of title to goods, or of a negotiable security, or any other valuable consideration (*g*).

Pledge

In the case of a pledge of goods, however, by a mercantile agent, the pledgee only acquires a right to hold the goods against the principal for the full value of the condition, if the advance has been made in cash (*g*). If the goods are pledged to secure a debt due from the agent to the pledgee before the time of the pledge, the pledgee acquires no right to the goods beyond that which could have been enforced by the agent at the time of the pledge (*i*). And where the goods are pledged in exchange for other goods, documents of title, or negotiable securities, the pledgee acquires no right or interest in the goods so pledged in excess of the value of the goods, documents of title, or negotiable securities at the time of the exchange (*k*).

SUB-SECT. 4.—*Privilege from Distress.*

No privilege as a rule.

438. Where a principal intrusts goods to an agent, the goods are not, as a general rule, privileged from distress for rent in respect of the premises on which they are at the time of the distress (*l*).

Exceptions.

But if the agent exercises a public trade or business (*m*), and the goods are delivered to him to be dealt with by him in the ordinary course of such trade or business (*n*), they are absolutely privileged from distress (*o*), provided that at the time of the distress they are upon premises occupied by him (*p*). The privilege, however, does not attach to the goods upon any other premises, even though they are there for the express purpose of being dealt with by the agent in the ordinary course of his trade or business (*q*).

SECT. 3.—*Contracts made by Agent.*

SUB-SECT. 1.—*In General.*

Principal may generally sue or be sued.

439. Any contract made by an agent with the authority of his principal may be enforced, as a general rule (*r*), by (*s*) or

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obtained by larceny by a trick (*Oppenheimer* v. *Frazer*, [1907] 2 K. B. 50, approving the *dictum* of COLLINS, L.J., in *Cahn* v. *Pockett's Bristol Channel Steam Packet Co.*, [1899] 1 Q. B. 643, at p. 659).

(*e*) Factors Act, 1889 (52 & 53 Vict. c. 45), s. 2 (2).

(*f*) *Ibid.*, s. 2 (4).

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

(*i*) *Ibid.* s. 4.

(*k*) *Ibid.* s. 5.

(*l*) *Tapling & Co.* v. *Weston* (1883), 1 Cab. & El. 99.

(*m*) As that of an auctioneer (*Adams* v. *Grane* (1833), 1 C. & M. 380; *Williams* v. *Holmes* (1853), 8 Exch. 861), or factor (*Gilman* v. *Elton* (1821), 3 Brod. & Bing. 75), or wharfinger (*Thompson* v. *Mashiter* (1823), 1 Bing. 283).

(*n*) But not for some other purpose (*Ex parte Russell* (1870), 18 W. R. 753).

(*o*) See the cases cited in notes (*m*) and (*n*), *supra*. For the meaning of absolute privilege, see title DISTRESS.

(*p*) The premises may only be hired by him (*Matthias* v. *Mesnard* (1826), 2 C. & P. 353), but there must be a *de facto* occupation, though it may be temporary only or even by way of trespass (*Brown* v. *Arundell* (1850), 10 C. B. 54).

(*q*) *Lyons* v. *Elliott* (1876), 1 Q. B. D. 210.

(*r*) For the exceptions to this rule, see pp. 208 *et seq.*

(*s*) And if the agent has begun an action against the other contracting party, the principal may intervene (*Sadler* v. *Leigh* (1815), 4 Camp. 195).

against (*t*) the principal whether or not his name or existence was disclosed to the other contracting party at the time when such contract was made (*a*).

But not when contract unauthorised.

Where, however, the contract is made without such authority, it cannot be enforced by the principal, unless it is a contract made ostensibly on behalf of a principal and capable of being ratified by the principal in question (*b*), or unless it is a contract relating to the principal's goods (*c*). Nor can it be enforced against the principal, unless he is estopped from denying the existence of the agent's authority (*d*).

Where signed memorandum necessary.

440. Where the enforcement of the contract depends upon the existence of a signed memorandum (*e*), a memorandum signed by the agent is sufficient (*f*), provided that the agent has authority, express or implied, to sign it (*g*).

Usages of professions etc.

441. Where the agent is a professional agent, and the contract made by him on his principal's behalf is made in the ordinary course of his business as such agent, all reasonable usages, rules, and regulations in force in such business are deemed to be incorporated with the contract (*h*), and the contract can only be enforced by (*i*) or against (*k*) the principal in accordance therewith. The usages, rules, or regulations, however, must not be inconsistent with the express terms of the contract (*l*).

(*t*) Including the Crown (*Thomas* v. *The Queen* (1874), L. R. 10 Q. B. 31; and see, further, title CONSTITUTIONAL LAW).

(*a*) *Skinner* v. *Stocks* (1821), 4 B. & Ald. 437; *Hornby* v. *Lacy* (1817), 6 M. & S. 166; *Sadler* v. *Leigh* (1815), 4 Camp. 195; *Duke of Norfolk* v. *Worthy* (1808), 1 Camp. 337; *Petty* v. *Anderson* (1825), 3 Bing. 170; *Bateman* v. *Phillips* (1812), 15 East, 272; *Higgins* v. *Senior* (1841), 8 M. & W. 834.

(*b*) *Keighley Maxsted & Co.* v. *Durant*, [1901] A. C. 240; *Kelner* v. *Baxter* (1866), L. R. 2 C. P. 174; and see further pp. 173 *et seq.*, *ante*.

(*c*) *Ramazotti* v. *Bowring* (1859), 7 C. B. (N. S.) 851; Factors Act, 1889 (52 & 53 Vict. c. 45), s. 12 (2), (3). See further p. 210, *post*.

(*d*) See p. 201, *ante*.

(*e*) As under the Statute of Frauds (29 Car. 2, c. 3); *Rosenbaum* v. *Belson*, [1900] 2 Ch. 267; the Companies Act, 1862 (25 & 26 Vict. c. 89), s. 6; *Re Whitley Partners, Ltd.* (1886), 32 Ch. D. 337; the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 4; *Durrell* v. *Evans* (1862), 1 H. & C. 174. See further pp. 160 *et seq.*, *ante*.

(*f*) Except where the signature of the party himself is essential, as in representations as to credit under Lord Tenterden's Act, 1829 (9 Geo. 4, c. 14), s 6 (*Williams* v. *Mason* (1873), 28 L. T. 232). See p. 214, *post*. But the signature of the agent is sufficient to revive a statute-barred debt under Lord Tenterden's Act, s. 1, and the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), s. 13 (*Palethorp* v. *Furnish* (1783), 2 Esp. 511, n.).

(*g*) *Sims* v. *Landray*, [1894] 2 Ch. 318, compare *Bell* v. *Balls*, [1897] 1 Ch. 663; and see further p. 157, *ante*. For brokers' bought and sold notes, see title SALE OF GOODS.

(*h*) *Graves* v. *Legg* (1857), 2 H. & N. 210; *Stray* v. *Russell* (1859), 1 E. & E. 888; *London Founders' Association* v. *Clarke* (1888), 20 Q. B. D. 576; and see in particular for the usages of the Stock Exchange, title STOCK EXCHANGE. Compare also p. 182, *ante*.

(*i*) *Coles* v. *Bristowe* (1868), 4 Ch. App. 3; *Hawkins* v. *Maltby* (1869), 4 Ch. App. 200; *Beckhuson and Gibbs* v. *Hamblet*, [1901] 2 K. B. 73.

(*k*) *Bowring* v. *Shepherd* (1871), L. R. 6 Q. B. [illegible]

(*l*) *Cruse* v. *Paine* (1869), 4 Ch. App. 441; and contrast *Grissell* v. *Bristowe* (1868), L. R. 4 C. P. 36.

SECT. 3. **Contracts made by Agent.**

No usage, rule, or regulation which is unreasonable is binding on the principal, unless he gave the agent express or implied authority to contract with reference to it (*m*). And in no case can the principal be deprived of his right to enforce the contract in his own name, or be exempted from his liability thereunder, notwithstanding that a usage, rule, or regulation purporting to have that effect was known to him at the time when the contract was made (*n*).

Unreasonable usages.

SUB-SECT. 2.—*Limitations on Principal's Rights and Liabilities.*

Deed executed in name of agent.

442. A contract under seal executed by an agent in his own name cannot be enforced by (*o*) or against (*p*) the principal, even though it is expressly stated that the agent is contracting on behalf of the principal (*q*).

Bills of exchange etc.

443. A principal is not liable upon any bill of exchange, cheque, or promissory note, unless his name appears thereon (*r*). But his signature may be written by the hand of an agent (*s*), and in determining whether any signature is that of the principal, or of the agent in his personal capacity, the construction most favourable to the validity of the instrument is adopted (*t*).

Where the agent signs the instrument in his principal's name, the principal is liable (*a*), except in the case of a bill drawn upon the agent, in which case the principal cannot be liable as acceptor (*b*), even if the agent accepts it in the principal's name and by his authority (*c*).

Instrument signed in agent's name.

Where the agent signs the instrument in his own name, the principal is not liable (*d*), unless the agent's signature purports to be made on the principal's behalf (*e*). But in the case of a bill drawn upon the principal, the principal is liable, though the agent accepts in his own name (*f*).

Business carried on in agent's name.

Where the principal carries on a trade or business in the agent's

(*m*) *Sweeting* v. *Pearce* (1859), 7 C. B. (N. S.) 449.
(*n*) *Langton* v. *Waite* (1868), L. R. 6 Eq. 165.
(*o*) *Schack* v. *Anthony* (1813), 1 M. & S. 573.
(*p*) *Re International Contract Co., Pickering's Claim* (1871), 6 Ch. App. 525; *Torrington* v. *Lowe* (1868), L. R. 4 C. P. 26.
(*q*) *Berkeley* v. *Hardy* (1826), 8 D. & R. (K. B.) 102. The Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 46, provides that any instrument executed in pursuance of a power of attorney by the donee of such power of attorney in his own name shall be as effectual in law to all intents as if it had been executed in the name of the donor. But this only applies where the donee has authority to contract in his own name, and *quære* whether this excludes the operation of the general rule stated above.
(*r*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 23. See, further, title BILLS OF EXCHANGE ETC.
(*s*) *Ibid.* ss. 25, 26.
(*t*) *Ibid.* s. 26 (2).
(*a*) *Ibid.* ss. 25, 26.
(*b*) *Ibid.* s. 17.
(*c*) Compare *Polhill* v. *Walter* (1832), 3 B. & Ad. 114; *Steele* v. *M'Kinlay* (1880), 5 App. Cas. 754.
(*d*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 26 (1); *Ducarrey* v. *Gill* (1830), Mood. & M. 450.
(*e*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 26 (1); *Alexander* v. *Sizer* (1869), L. R. 4 Exch. 102.
(*f*) *Lindus* v. *Bradwell* (1848), 5 C. B. 583; *Jenkins* v. *Morris* (1847), 16 M. & W. 877; *Okell* v. *Charles* (1876), 34 L T. 822.

name, he is liable as acceptor (*g*) or otherwise (*h*), as the case may be, on all instruments signed by the agent in his own name in the course of such trade or business.

Contract on behalf of foreign principal.

444. A contract made by an agent on behalf of a foreign principal cannot be enforced by (*i*), or against (*k*), such principal, even though his existence was known to the other contracting party, unless it is affirmatively shown that at the time when the contract was made the agent had authority to establish privity of contract between such principal and the other party, and that privity of contract was in fact established between them (*l*).

Exclusion of principal's rights and liabilities.

445. The rights and liabilities of a principal under his agent's contracts may be excluded by the express terms of the contract (*m*), but not by usage (*n*). The mere fact that the agent is himself liable on the contract, and that credit has been given him (*o*), is not sufficient to exclude the principal's liability.

Election to treat agent as principal.

Where, however, the other contracting party, whether in ignorance of the principal's existence or not, obtains a judgment against the agent (*p*), or, though he knows (*q*) at the time when the contract is made (*r*), or discovers afterwards (*s*), who the real principal is, elects to look to the agent to the exclusion of the principal, the principal is discharged from liability, and his liability cannot be revived (*t*). Such election is conclusively proved by obtaining judgment against the agent (*a*), even for part of the claim (*b*). Otherwise the question of election is one of fact (*c*), and depends on the circumstances of the particular case (*d*).

(*g*) *Edmunds* v. *Bushell* (1865), L. R. 1 Q. B. 97.

(*h*) *Furze* v. *Sharwood* (1841), 2 Q. B. 388.

(*i*) *Elbinger Actien-Gesellschaft* v. *Claye* (1873), L. R. 8 Q. B. 313.

(*k*) *Hutton* v. *Bullock* (1874), L. R. 9 Q. B. 572; *Paterson* v. *Gandasequi* (1812), 15 East, 62.

(*l*) *Armstrong* v. *Stokes* (1872), L. R. 7 Q. B. 598; *Elbinger Actien-Gesellschaft* v. *Claye*, *supra*, *per* BLACKBURN, J., at p. 317; *Malcolm* v. *Hoyle* (1893), 63 L. J. (Q. B.) 1.

(*m*) *Montgomerie* v. *United Kingdom etc. Association*, [1891] 1 Q. B. 370; *United Kingdom etc. Association* v. *Nevill* (1887), 19 Q. B. D. 110; and contrast *Great Britain etc. Association* v. *Wyllie* (1889), 22 Q. B. D. 710. See also *Humble* v. *Hunter* (1848), 12 Q. B. 310.

(*n*) *Langton* v. *Waite* (1868), L. R. 6 Eq. 165; *Levitt* v. *Hamblet*, [1901] 2 K. B. 53.

(*o*) *Paterson* v. *Gandasequi*, *supra*; *Thompson* v. *Davenport* (1829), 9 B. & C. 78.

(*p*) Even though unsatisfied (*Kendall* v. *Hamilton* (1879), 4 App. Cas. 504); but the principal's liability revives if the judgment is set aside on the merits (*Partington* v. *Hawthorne* (1888), 52 J. P. 807; but not where it is merely with the agent's consent (*Cross* v. *Matthews* (1904), 91 L. T. 500; *Hammond* v. *Schofield*, [1891] 1 Q. B. 453).

(*q*) Actual knowledge must be proved (*Dunn* v. *Newton* (1884), 1 C. & E. 278).

(*r*) *Paterson* v. *Gandasequi*, *supra*, *per* BAYLEY, J., at p. 70; *Addison* v. *Gandassequi* (1812), 4 Taunt. 574.

(*s*) *Priestley* v. *Fernie* (1865), 3 H. & C. 977.

(*t*) *Paterson* v. *Gandasequi*, *supra*, at p. 70.

(*a*) *Morel* v. *Earl of Westmoreland*, [1904] A. C. 11; *Priestley* v. *Fernie*, *supra*.

(*b*) *French* v. *Howie*, [1906] 2 K. B. 674.

(*c*) *Calder* v. *Dobell* (1871), L. R. 6 C. P. 486.

(*d*) *Calder* v. *Dobell*, *supra*; *Curtis* v. *Williamson* (1874), L. R. 10 Q. B. 57; v. *Read* (1829), 9 B. & C. 449; *Stoneham* v. *Wyman* (1901), 6 Com. Cas. 174.

SECT. 3. Contracts made by Agent.

SUB-SECT 3.—*Settlement with Agent.*

When principal discharged.

446. Where a principal is indebted to a third person on a contract made by his agent, he is not discharged from his liability to pay the debt by any payment to or settlement with the agent (*e*), unless such payment or settlement takes place before the existence of the principal is discovered (*f*), or unless the third person by his conduct leads the principal reasonably to believe that the debt has been paid by the agent (*g*) or that the third person has elected (*h*) to look to the agent alone for payment (*i*), and the principal in consequence alters his position as regards the agent to his prejudice (*k*). Mere delay, without something more (*l*), on the part of the creditor, is not sufficient to discharge the principal.

Third person not discharged in ordinary cases.

447. Nor is the third person discharged from his liability to the principal by any payment to or settlement with the agent (*m*), unless such payment or settlement is made in the ordinary course of business, and in accordance with the agent's authority (*n*), express or implied (*o*); or unless the principal has allowed the agent to appear as principal in the transaction in respect of which the payment or settlement is made, in which case the third person is discharged by any payment to or settlement with the agent which would have discharged him if the agent had been in fact the principal (*p*), and is also entitled to set off (*q*) any debts due

(*e*) *Irvine* v. *Watson* (1880), 5 Q. B. D. 414; *Davison* v. *Donaldson* (1882), 9 Q. B. D. 623; *Heald* v. *Kenworthy* (1855), 10 Exch. 739; *Smyth* v. *Anderson* (1849), 7 C. B. 21, *per* MAULE, J., at p. 42.

(*f*) *Armstrong* v. *Stokes* (1872), L. R. 7 Q. B. 598, doubted in *Irvine* v. *Watson*, *supra*.

(*g*) *Wyatt* v. *Hertford* (1802), 3 East, 147; *MacClure* v. *Schemeil* (1871), 20 W. R. 168.

(*h*) See p. 209, *ante*.

(*i*) *Priestley* v. *Fernie* (1865), 3 H. & C. 977; and compare *Harvey* v. *Norton* (1810), 4 Jur. 42.

(*k*) *Hopkins* v. *Ware* (1869), L. R. 4 Exch. 268; *Smith* v. *Ferrand* (1827), 7 B. & C. 19.

(*l*) *Davison* v. *Donaldson*, *supra*; *Irvine* v. *Watson*, *supra*; and contrast *Hopkins* v. *Ware*, *supra*.

(*m*) *Crossley* v. *Magniac*, [1893] 1 Ch. 594; *Linck* v. *Jameson* (1886), 2 T. L. R. 206; *Catterall* v. *Hindle* (1867), L. R. 2 C. P. 368.

(*n*) *Hogarth* v. *Wherley* (1875), L. R. 10 C. P. 630; *Catterall* v. *Hindle*, *supra*; *Legge* v. *Byas*, *Mosley & Co.* (1902), 7 Com. Cas. 16.

(*o*) The third person is not discharged by payment, in the absence of express authority, by a negotiable instrument (*Williams* v. *Evans* (1866), L. R. 1 Q. B. 352; *Hine* v. *Steamship Insurance Syndicate* (1895), 72 L. T. 79), unless justified by usage (*Bridges* v. *Garrett* (1870), L. R. 5 C. P. 451). Such usage is a reasonable one and binding on the principal without notice (*ibid.*). But a settlement of accounts with the agent does not bind the principal (*Pearson* v. *Scott* (1878), 9 Ch. D. 198), notwithstanding any usage to that effect, unless the principal has notice of it (*Sweeting* v. *Pearce* (1861), 9 C. B. (N. S.) 534). See further, on the effect of usage, p. 207, *ante*.

(*p*) *Ramazotti* v. *Bowring* (1859), 7 C. B. (N. S.) 851; *Borries* v. *Imperial Ottoman Bank* (1873), L. R. 9 C. P. 38; *George* v. *Clagett* (1797), 7 Term Rep. 359; and see p. 204, *ante*. Similarly, where an agent is authorised to retain part of a debt paid to him for his own account, he may settle with the third person as he pleases in respect of such part (*Barker* v. *Greenwood* (1836), 2 Y. & C. Ex. 414).

(*q*) *Borries* v. *Imperial Ottoman Bank*, *supra*; *Montagu* v. *Forwood*, [1893] 2 Q. B. 350.

to him from the agent personally, provided that the payment or settlement was made or the debt incurred before the third person knew of the existence of the principal (*r*).

Purchaser from agent having lien.

448. But where an agent sells in his own name goods belonging to his principal over which he has a lien against the principal, the purchaser is discharged, to the extent of the lien, by any payment to, or settlement with, or set-off against the agent (*s*), even though the purchaser knew of the existence of the principal at the time of the contract (*a*), or has had a demand for payment from the principal (*b*).

SUB-SECT. 4.—*Fraud, Misrepresentation, or Concealment.*

Fraud etc. of principal or agent.

449. Where, in the negotiation of any contract (*c*) by an agent, the agent does any act, whether or not the principal is privy thereto (*d*), which by reason of the agent's knowledge amounts to fraud, misrepresentation, or concealment (*e*), or where, though the agent himself acts honestly, his act, by reason of the principal's knowledge, would, if done by the principal himself, amount to fraud, misrepresentation, or concealment (*f*), the third party may treat such act as the fraud, misrepresentation, or concealment of the principal, and may in consequence rescind the contract (*g*) or resist any action brought upon it, whether for specific performance (*h*) or otherwise (*i*). Where, however, the third party elects to affirm the contract, or has lost the right to rescind it, he may bring an action for deceit, if the circumstances of the case permit, but otherwise he has no remedy (*k*).

SECT. 4.—*Principal's Liability for Torts committed by Agent.*

SUB-SECT. 1.—*In General.*

Wrongful act expressly authorised.

450. Where a principal gives his agent express authority to do a particular act which is wrongful in itself (*l*), or which necessarily

(*r*) *Kaltenbach* v. *Lewis* (1885), 10 App. Cas. 617; *Mildred* v. *Maspons* (1883), 8 App. Cas. 874; *Dresser* v. *Norwood* (1864), 17 C. B. (N. S.) 466; *Semenza* v. *Brinsley* (1865), 18 C. B. (N. S.) 467; and see *Cooke* v. *Eshelby* (1887), 12 App. Cas. 271.

(*s*) *Hudson* v. *Granger* (1821), 5 B. & Ald. 27.

(*a*) *Warner* v. *McKay* (1836), 1 M. & W. 591.

(*b*) Or from his trustee in bankruptcy (*Drinkwater* v. *Goodwin* (1775), Cowp. 251).

(*c*) But the fraud etc. of the agent is not imputable to the principal in reference to the negotiation of another contract through another agent. Contrast *Blackburn* v. *Haslam* (1888), 21 Q. B. D. 144, with *Blackburn* v. *Vigors* (1887), 12 App. Cas. 531.

(*d*) *Biggs* v. *Lawrence* (1789), 3 Term Rep. 454.

(*e*) *Archer* v. *Stone* (1898), 78 L. T. 34; *Mullens* v. *Miller* (1882), 22 Ch. D. 194; *Blackburn* v. *Haslam*, *supra*; *Morrison* v. *Universal Insurance Co.* (1873), L. R. 8 Exch. 197.

(*f*) *Ludgater* v. *Love* (1881), 44 L. T. 694. For the position generally when one of the contracting parties is guilty of fraud etc., see title CONTRACT.

(*g*) *Reese River Mining Co.* v. *Smith* (1869), L. R. 4 H. L. 64.

(*h*) *Mullens* v. *Miller*, *supra*.

(*i*) *Blackburn* v. *Haslam*, *supra*.

(*k*) *Brett* v. *Clowser* (1880), 5 C. P. D. 376; and see p. 214, *post*. But the principal must make good any misrepresentation from which he benefits (*Kettlewell* v. *Refuge Assurance Co.* (1907), 23 T. L. R. 506).

(*l*) *Schuster* v. *McKellar* (1857), 7 E. & B. 704; *Parkes* v. *Prescott* (1869), L. R. 4 Exch. 169.

SECT. 4. **Principal's Liability for Agent's Torts.**

results in a wrongful act (*m*), the principal is responsible to third persons for any loss or damage occasioned thereby.

Where the act complained of is not expressly authorised by the principal, the principal is responsible if such act is committed by the agent in the course of his employment and for the principal's benefit (*n*), but not otherwise (*o*).

Wrongful act not authorised expressly.

Wherever a principal has authorised an agent to do a particular class of acts on his behalf, he is responsible for any act (*p*) done by the agent which falls within the scope of his authority as measured by reference to his ordinary duties (*q*), however improper (*r*) or imperfect (*s*) the manner in which the authority is carried out, provided that the act is done for the principal's benefit (*t*) and not for that of the agent (*a*). It is immaterial that the act in question has been expressly prohibited by the principal (*b*).

Act within ordinary scope of authority, though expressly forbidden.

Act beyond scope of employment.

Where, however, the act done by the agent falls entirely outside the scope of his employment, the principal is not respon

Effect of judgment against agent.

A principal is discharged from liability for any tort committed

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(*m*) *Glynn* v. *Houston* (1841), 2 Man. & G. 337.

(*n*) *Barwick* v. *English Joint Stock Bank* (1867), L. R. 2 Exch. 259, *per* WILLES, J., at p. 265. For examples, see *Monaghan* v. *Taylor* (1886), 2 T. L. R. 685; *Betts* v. *De Vitre* (1868), 3 Ch. App. 429; *Ewbank* v. *Nutting* (1849), 7 C. B. 797; *Giles* v. *Taff Vale Rail. Co.* (1853), 2 E. & B. 822; *Bayley* v. *Manchester, Sheffield, and Lincolnshire Rail. Co.* (1873), L. R. 8 C. P. 148; *Page* v. *Defries* (1866), 7 B. & S. 137; *Ashton* v. *Spiers* (1893), 9 T. L. R. 606; *Whiteley* v. *Pepper* (1876), 2 Q. B. D. 276. But every act done in the course of the employment is deemed to be done for the principal's benefit until the contrary is proved; compare *Ward* v. *London General Omnibus Co.* (1873), 42 L. J. (C. P.) 265, with *Croft* v. *Alison* (1821), 4 B. & Ald. 590.

(*o*) *Bolingbroke* v. *Swindon Local Board* (1874), L. R. 9 C. P. 575; *Stevens* v. *Woodward* (1881), 6 Q. B. D. 318; *Croft* v. *Alison*, *supra*; *Whitechurch* v. *Cavanagh*, [1902] A. C. 117.

(*p*) Even though felonious (*Osborn* v. *Gillett* (1873), L. R. 8 Exch. 88).

(*q*) *Cheshire* v. *Bailey*, [1905] 1 K. B. 237, *per* MATHEW, L.J., at p. 245. The onus of proof is on the plaintiff (*Beard* v. *London General Omnibus Co.*, [1900] 2 Q. B. 530).

(*r*) Compare *Udell* v. *Atherton* (1861), 7 H. & N. 172, with *British Mutual Bank* v. *Charnwood Forest Rail. Co.* (1887), 18 Q. B. D. 714 (fraud); *Hatch* v. *Hale* (1850), 15 Q. B. 10, with *Richards* v. *West Middlesex Waterworks Co.* (1885), 15 Q. B. D. 660 (distress); *Morris* v. *Salberg* (1889), 22 Q. B. D. 614, with *Smith* v. *Kent* (1882), 9 Q. B. D. 340 (execution); *Moore* v. *Metropolitan Rail. Co.* (1872), L. R. 8 Q. B. 36, with *Poulton* v. *London and South Western Rail. Co.* (1867), L. R. 2 Q. B. 534 (false imprisonment).

(*s*) Compare *Whatman* v. *Pearson* (1868), L. R. 3 C. P. 422, with *Storey* v. *Ashton* (1869), L. R. 4 Q. B. 476; *Abraham* v. *Bullock* (1902), 86 L. T. 796, with *Cheshire* v. *Bailey*, *supra*; *Engelhart* v. *Farrant*, [1897] 1 Q. B. 240, with *Beard* v. *London General Omnibus Co.*, *supra*.

(*t*) Compare *Mackay* v. *Commercial Bank of New Brunswick* (1874), L. R. 5 P. C. 394, with *British Mutual Bank* v. *Charnwood Forest Rail. Co.*, *supra*.

(*a*) *Coleman* v. *Riches* (1855), 3 C. L. R. 795.

(*b*) *Limpus* v. *London General Omnibus Co.* (1862), 1 H. & C. 526; *Gregory* v. *Piper* (1829), 9 B. & C. 591.

(*c*) *Sanderson* v. *Collins*, [1904] 1 K. B. 628; *Poulton* v. *London and South Western Rail. Co.*, *supra*. In *Storey* v. *Ashton*, *supra*, and *Cormack* v. *Digby* (1876), 9 Ir. R. C. L. 557, the agent, though acting outside the scope of his employment, was to some extent acting in his principal's interest, yet the principal was not liable.

by his agent by a judgment (*d*) being obtained against the agent, although such judgment remains unsatisfied (*e*).

SUB-SECT. 2.—*Limitations on Principal's Responsibility.*

451. The Crown cannot in any way be made responsible for any wrongful act committed by any public agent (*f*). Crown.

Nor can a trade union, whether of workmen or masters, be in any way made responsible for any tortious act alleged to have been committed by or on behalf of such trade union (*g*). Trade union.

452. A corporation is responsible, like any other principal, for any wrongful act committed by its agent whilst acting within the scope of his employment (*h*), provided that the act done is not outside the power of the corporation (*i*). Corporation.

But where the corporation is a local authority and the agent an officer appointed by it, the responsibility of the authority for his wrongful acts depends upon whether the act done purports to be done by virtue of corporate authority or by virtue of something imposed as a public obligation to be done, not by the local authority, but by such officer (*k*). Where the corporation delegates to such officer duties which it has to perform, or powers which it is entitled to exercise, it is responsible for his wrongful acts (*l*), provided that they fall within the scope of his employment (*m*), and provided that proceedings are taken within the proper time (*n*). But if the sole duty of the authority is merely to appoint the officer, and the duties to be performed by him are of a public nature and have no peculiar local characteristics, the local authority is not responsible for acts of negligence or misfeasance on his part (*o*). Local authority.

(*d*) Or by the award of compensation in criminal proceedings (*Wright* v. *London General Omnibus Co.* (1877), 2 Q. B. D. 271), but not by the infliction of punishment (*Dyer* v. *Munday*, [1895] 1 Q. B. 742). See, further, title TORT.

(*e*) *Brinsmead* v. *Harrison* (1872), L. R. 7 C. P. 547.

(*f*) *Feather* v. *R.* (1865), 6 B. & S. 257; *Tobin* v. *R.* (1864), 16 C. B. (N. S.) 310; *Viscount Canterbury* v. *A.-G.* (1842), 1 Ph. 306; *Palmer* v. *Hutchinson* (1881), 6 App. Cas. 619. See, further, title CONSTITUTIONAL LAW, and see also note (*i*), p. 224, *post*.

(*g*) Trade Disputes Act, 1906 (6 Edw. 7, c. 47), s. 4. See title TRADE AND TRADE UNIONS.

(*h*) Even where the wrongful act involves fraud (*Barwick* v. *English Joint Stock Bank* (1867), L. R. 2 Exch. 259; *Houldsworth* v. *City of Glasgow Bank* (1880), 5 App. Cas. 317, *per* Lord SELBORNE at p. 326), or actual malice, as in libel where privilege is proved (*Citizens' Life Assurance Co.* v. *Brown*, [1904] A. C. 423, J. C.), or in malicious prosecution (*Bank of New South Wales* v. *Owston* (1879), 4 App. Cas. 270; *Cornford* v. *Carlton Bank*, [1900] 1 Q. B. 22; *Edwards* v. *Midland Rail. Co.* (1880), 6 Q. B. D. 287).

(*i*) *Poulton* v. *London and South Western Rail. Co.* (1867), L. R. 2 Q. B. 534; *Mill* v. *Hawker* (1874), L. R. 9 Exch. 309.

(*k*) *Stanbury* v. *Exeter Corporation*, [1905] 2 K. B. 838, *per* DARLING, J., at p. 843.

(*l*) *Ibid.*, *per* Lord ALVERSTONE, C.J., at p. 841.

(*m*) *Mersey Docks Trustees* v. *Gibbs* (1864), L. R. 1 H. L. 93; *The Rhosina* (1885), 10 P. D. 131; *Coe* v. *Wise* (1866), L. R. 1 Q. B. 711; *Scott* v. *Manchester Corporation* (1857), 2 H. & N. 204; *Garlick* v. *Knottingley Urban District Council* (1904), 68 J. P. 494.

(*n*) *I.e.*, within six months of the act complained of (Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), s. 1, and see *Parker* v. *London County Council*, [1904] 2 K. B. 501; *The Ydun*, [1899] P. 236). See title PUBLIC AUTHORITIES AND PUBLIC OFFICERS.

(*o*) *Stanbury* v. *Exeter Corporation*, *supra*, *per* WILLS, J., at p. 843,

SECT 4. **Principal's Liability for Agent's Torts.**

453. Where a ship is in charge of a duly qualified pilot, the shipowner's responsibility for any acts or defaults of such pilot depends upon the circumstances of his employment. If his employment is compulsory, and necessarily involves his taking sole charge of the ship, the owner is not responsible for his errors of navigation (*p*), unless the master or crew are guilty of contributory negligence (*q*). But the owner is responsible if the employment of the pilot is not compulsory (*r*), or if, though compulsory, it does not necessarily (*s*) involve taking the ship out of the charge of the master (*t*).

Compulsory pilotage.

SUB-SECT. 3.—*Misrepresentations.*

Where agent knows representation to be false.

454. Where an agent is personally guilty of fraudulent misrepresentation (*a*) in the course of his employment, the principal is responsible as for any other tort, and an action of deceit lies against him (*b*).

Where agent believes representation to be true.

Where the agent makes a representation which he honestly believes to be true, but which the principal knows to be false, the principal is responsible if he has intentionally concealed the truth from the agent in order that the representation in question might be made by the agent (*c*). But if the concealment on the part of the principal is not intentional, and the representation is made by the agent without his privity or authority, the principal's responsibility is not free from doubt (*d*).

Representations as to credit.

The principal is not responsible for any representation as to the character or credit (*e*) of another person made by his agent, unless such representation is in writing signed by the principal himself (*f*). A signature by the agent is not sufficient (*g*), even though expressly authorised or adopted by the principal (*h*).

Mersey Docks Trustees v. *Gibbs* (1864) L. R. 1 H. L. 93, *per* Lord WENSLEYDALE, at p. 124, and BLACKBURN, J., at p. 120; *Metcalfe* v. *Hetherington* (1855), 11 Exch. 257; *Tozeland* v. *West Ham Union*, [1907] 1 K. B. 920; *McKay* v. *Buffalo City* (1876), 9 Hun. (N. Y.) 401, 74 N. Y. 619.

(*p*) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 633; and see *The Halley* (1868), L. R. 2 P. C. 193; see title SHIPPING AND NAVIGATION.

(*q*) *The Velasquez* (1867), L. R. 1 P. C. 494; *The Guy Mannering* (1882), 7 P. D. 132, *per* BRETT, L.J., at p. 134.

(*r*) *The Maria* (1839), 1 W. Rob. 95.

(*s*) *The Dallington*, [1903] P. 77; *The Prins Hendrik*, [1899] P. 177; *The Guy Mannering*, *supra*.

(*t*) As in *The Dallington*, *supra*.

(*a*) For the effect of such misrepresentation upon contracts made by the agent, see p. 211, *ante*.

(*b*) *Barwick* v. *English Joint Stock Bank* (1867), L. R. 2 Exch. 259, *per* WILLES, J., at p. 265.

(*c*) *Ludgater* v. *Love* (1881), 44 L. T. 694.

(*d*) *Cornfoot* v. *Fowke* (1840), 6 M. & W. 358, decided against his responsibility. This case, however, was not followed in *Fuller* v. *Wilson* (1842), 3 Q. B. 58, reversed on another ground *Wilson* v. *Fuller* (1843), 3 Q. B. 68, 1009, and doubted in *Ludgater* v. *Love*, *supra*. See also *Barwick* v. *English Joint Stock Bank*, *supra*.

(*e*) For the meaning of a representation as to credit, see *Bishop* v. *Balkis Consolidated Co.* (1890), 25 Q. B. D. 512.

(*f*) Lord Tenterden's Act, 1828 (9 Geo. 4, c. 14), s. 6; *Swift* v. *Jewsbury* (1874), L. R. 9 Q. B. 301.

(*g*) Even though the principal be a corporation (*Hirst* v. *West Riding Banking Co.*, [1901] 2 K. B. 560).

(*h*) *Williams* v. *Mason* (1873), 28 L. T. 232.

SECT. 5.—*Admissions by Agent.*

SECT. 5. Admissions by Agent.

When principal bound.

455. Where a principal gives his agent authority to make admissions on his behalf, the principal is bound, as regards third persons, by any admission so made (*i*), provided that such admission is one which the agent has authority to make (*k*). Where, however, the agent makes any admission without, or in excess of, his authority, the principal is not bound by it (*l*), unless the agent, at the time when he made it (*m*), was acting on his principal's behalf (*n*) in the transaction to which the admission referred (*o*), and made it in the ordinary course of his duty as such agent (*p*).

How far principal bound.

In no case does any admission of the agent operate to bind his principal, except as regards the transaction in respect of which it was made (*q*), nor can any statement made by an agent to his principal be used as an admission against the principal by third persons (*r*).

Where the admission made by an agent binds the principal, it binds him to the same extent as it would have done if he had made it himself (*s*).

SECT. 6.—*Notice to Agent.*

When imputed to principal.

456. Where an agent, in the course of any transaction in which he is employed on his principal's behalf (*t*), receives notice (*a*) or acquires knowledge (*b*) of any fact material to such transaction (*c*), under such circumstances that it is his duty to communicate it to the

(*i*) *Welsbach etc. Co.* v. *New Sunlight Co.*, [1900] 2 Ch. 1; *Williams* v. *Innes* (1808), 1 Camp. 364.

(*k*) *Linsell* v. *Bonsor* (1835), 2 Bing. (N. C.) 241; *Meredith* v. *Footner* (1843), 11 M. & W. 202.

(*l*) *Barnett* v. *South London Tramways Co.* (1887), 18 Q. B. D. 815; *Pelch* v. *Lyon* (1846), 9 Q. B. 147; *Young* v. *Wright* (1807), 1 Camp. 139; *Blackstone* v. *Wilson* (1857), 26 L. J. (EX.) 229.

(*m*) *Great Western Rail. Co.* v. *Willis* (1865), 18 C. B. (N. S.) 748.

(*n*) *Pelch* v. *Lyon, supra; Young* v. *Wright, supra.*

(*o*) *Blackstone* v. *Wilson, supra.*

(*p*) *Kirkstall Brewery* v. *Furness Rail. Co.* (1874), L. R. 9 Q. B. 468; *Biggs* v. *Lawrence* (1789), 3 Term Rep. 454; *British Columbia etc. Co.* v. *Nettleship* (1868), L. R. 3 C. P. 499; *Richardson* v. *Peto* (1840), 1 Man. & G. 896.

(*q*) *Blackstone* v. *Wilson, supra.*

(*r*) *Re Devala etc. Co., Ex parte Abbott* (1883), 22 Ch. D. 593; *Langhorn* v. *Allnutt* (1812), 4 Taunt. 511; *Kahl* v. *Jansen* (1812), 4 Taunt. 565; *Reyner* v. *Pearson* (1812), 4 Taunt. 662. Otherwise if the statement is made to the principal by the agent in the course of his duty (*The Solway* (1885), 10 P. D. 137).

(*s*) As, for instance, if in writing, in preventing the operation of the Statute of Limitations (*Anderson* v. *Sanderson* (1817), 2 Stark. 204; *Burt* v. *Palmer* (1804), 5 Esp. 145; *Gregory* v. *Parker* (1808), 1 Camp. 394), and similarly in case of part payment (*Re Hale*, [1899] 2 Ch. 107, *per* LINDLEY, M.R., at p. 119).

(*t*) *Wilson* v. *Salamandra Assurance Co.* (1903), 88 L. T. 96; *Hiern* v. *Hill* (1806), 13 Ves. 114; and contrast *Bawden* v. *London, Edinburgh and Glasgow Assurance Co.*, [1892] 2 Q. B. 534, with *Biggar* v. *Rock Life Assurance Co.*, [1902] 1 K. B. 516. The rule applies to sub-agents employed with the principal's consent (*Re Ashton, Ex parte McGowan* (1891), 64 L. T. 28; *Truman's Case*, [1894] 3 Ch. 272).

(*a*) *Gladman* v. *Johnson* (1867), 36 L. J. (C. P.) 153; *Tanham* v. *Nicholson* (1872), L. R. 5 H. L. 561.

(*b*) *Baldwin* v. *Casella* (1872), L. R. 7 Exch. 325. The knowledge may have been acquired before the transaction, if it is in fact present in the agent's mind at the material time (*Fuller* v. *Benett* (1843), 2 Hare, 394; *Rolland* v. *Hart* (1871), 6 Ch. App. 678; *Bradley* v. *Riches* (1878), 9 Ch. D. 189. But see notes (*i*) and (*k*), p. 216, *post*).

(*c*) *Wyllie* v. *Pollen* (1863), 32 L. J. (CH.) 782.

SECT. 6. Notice to Agent.

principal (*d*), the principal is precluded, as regards the persons who are parties to such transaction (*e*), from relying upon his own ignorance of such fact (*f*), and is taken to have received notice of it from the agent (*g*) at the time when he should have received it, if the agent had performed his duty with due diligence (*h*).

When principal not bound by agent's notice.

But in the absence of such duty the principal is not bound by any notice given to, or any knowledge acquired by, the agent, if at the time when the agent received such notice or acquired such knowledge he was not acting as agent on the principal's behalf (*i*), or was not so acting in respect of the transaction in which the notice or knowledge is material (*k*).

When agent a party to fraud.

Moreover, where the agent, though acting on his principal's behalf in some transaction in which his knowledge would otherwise be imputed to his principal, takes part in any fraud (*l*) or misfeasance (*m*) against the principal, the principal is not bound by the agent's knowledge of such fraud or misfeasance (*n*).

SECT. 7.—*Corruption of Agent.*

Principal's remedies where agent bribed.

457. Where a principal has entered into any contract either through the mediation of an agent (*o*), or directly by himself on the faith of representations made by an agent (*p*), and it afterwards appears (*q*) that the other contracting party had made to the agent (*r*) a payment or promise of payment in the nature of a

(*d*) *Blackburn* v. *Vigors* (1887), 12 App. Cas. 531; *Bradley* v. *Riches* (1878), 9 Ch. D. 189.

(*e*) Unless they are aware of the agent's intention not to communicate it (*Sharpe* v. *Foy* (1868), 17 W. R. 65).

(*f*) *Bawden* v. *London, Edinburgh and Glasgow Assurance Co.*, [1892] 2 Q. B. 534; *Dresser* v. *Norwood* (1864), 17 C. B. (N. S.) 466.

(*g*) *Gladstone* v. *King* (1813), 1 M. & S. 35.

(*h*) As by telegram instead of by letter (*Proudfoot* v. *Montefiore* (1867), L. R. 2 Q. B. 511).

(*i*) *Société Générale de Paris* v. *Tramways Union Co.* (1884), 14 Q. B. D. 424; *Saffron Walden Building Society* v. *Rayner* (1880), 14 Ch. D. 406; unless it was part of his duty to communicate such knowledge, however acquired (*Re Payne & Co., Young* v. *Payne & Co.*, [1904] 2 Ch. 608, and see note (*b*), p. 215, *ante*). The same rule applies when the same person is agent for the two contracting parties, and acquires knowledge in his capacity as agent for the one party which he does not communicate to the other (*Re Hampshire Land Co.*, [1896] 2 Ch. 743; *Re Fenwick, Deep Sea Fishery Co.'s Claim*, [1902] 1 Ch. 507).

(*k*) *Wyllie* v. *Pollen*, (1863) 32 L. J. (CH.) 782; *Tute* v. *Hyslop* (1885), 15 Q. B. D. 368; *Ex parte Warren* (1885), 1 T. L. R. 430. See also Conveyancing Act, 1882 (45 & 46 Vict. c. 39) s. 3 (1), and *Molyneux* v. *Hawtrey*, [1903] 2 K. B. 487.

(*l*) *Cave* v. *Cave* (1880), 15 Ch. D. 639; *Williams* v. *Preston* (1882), 20 Ch. D. 672. Otherwise if the fraud is not against the principal (*Dixon* v. *Winch*, [1900] 1 Ch. 736; *Boursot* v. *Savage* (1866), L. R. 2 Eq. 134).

(*m*) *Re Fitzroy Bessemer Steel Co.* (1884), 50 L. T. 144.

(*n*) But it is not sufficient to show merely that it was to the agent's interest to withhold from his principal the knowledge which he should have communicated (*Bradley* v. *Riches*, *supra*).

(*o*) *Panama Telegraph Co.* v. *India Rubber Telegraph Works Co.* (1875), 10 Ch. App. 515; *Hough* v. *Bolton* (1886), 2 T. L. R. 788; *Salford Corporation* v. *Lever*, [1891] 1 Q. B. 168.

(*p*) *Shipway* v. *Broadwood*, [1899] 1 Q. B. 369.

(*q*) Even during the trial of an action on the contract (*Shipway* v. *Broadwood*, *supra*; *Hough* v. *Bolton* (1885), 1 T. L. R. 606).

(*r*) If the other contracting party discovers after his promise, but before payment, that the agent is in fact acting as agent for the principal, the payment

bribe (*s*), the principal has two courses open to him (*t*). He may repudiate the contract and get it set aside (*a*), or he may affirm it and obtain such relief as the Court may think right to give him (*b*).

It is immaterial to inquire whether or not the agent was in fact influenced by such payment or promise of payment to disregard his duty towards his principal (*c*).

The rule extends to cases where the payment or promise was not made directly with reference to the particular contract, but generally with a view of influencing the agent in his dealings with the other contracting party (*d*).

Where principal does not repudiate contract.

458. Where the principal elects to affirm the contract, or does not discover the corruption of his agent until it is too late to rescind it (*e*), he may recover from the person who has paid or promised the bribe, jointly or severally with the agent (*f*), damages for any loss which he has sustained by reason of entering into the contract (*g*). The measure of damages is *primâ facie* the amount of the bribe, without any deduction in respect of such portion of the bribe as may have already been recovered from the agent (*h*).

The person giving or promising any bribe to an agent is also liable to criminal proceedings (*i*).

SECT. 8.—*Criminal Liability of Principal for Acts or Defaults of Agent.*

General rule.

459. No act or default on the part of an agent imposes, as a general rule, any criminal liability on the principal in respect

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will apparently be a bribe (*Grant* v. *Gold Exploration Syndicate*, [1900] 1 Q. B. 233, *per* VAUGHAN WILLIAMS, L.J., at p. 254), but not if he does not discover it till after payment (*ibid.*, *per* COLLINS, L.J., at p. 247).

(*s*) See p. 189, *ante*.

(*t*) *Panama Telegraph Co.* v. *India Rubber Telegraph Works Co.* (1875), 10 Ch. App. 515, *per* JAMES, L.J., at p. 526.

(*a*) As in *Shipway* v. *Broadwood*, [1899] 1 Q. B. 369; *Panama Telegraph Co.* v. *India Rubber Telegraph Works Co.*, *supra*; *Smith* v. *Sorby* (1875), 3 Q. B. D. 552; *Bartram* v. *Lloyd* (1904), 90 L. T. 357.

(*b*) As in *Salford Corporation* v. *Lever*, [1891] 1 Q. B. 168; *Grant* v. *Gold Exploration Syndicate*, *supra*.

(*c*) *Shipway* v. *Broadwood*, *supra*; *Hovenden* v. *Millhoff* (1900), 83 L. T. 41; and see *Harrington* v. *Victoria Graving Dock Co.* (1878), 3 Q. B. D. 549, *per* FIELD, J., at p. 552. But see *Rowland* v. *Chapman* (1901), 17 T. L. R. 669, where the agent's duty and interest were not in conflict.

(*d*) *Smith* v. *Sorby*, *supra*.

(*e*) He may lose the right to rescind by acquiescing in the receipt of the bribe by his agent, provided that there is full disclosure (*Bartram* v. *Lloyd*, *supra*).

(*f*) As to the position of the agent, see p. 191, *ante*.

(*g*) The action may be framed either for money had and received (*Hovenden* v. *Millhoff*, *supra*), where the amount of damages is a liquidated sum, or for damages for deceit (*Grant* v. *Gold Exploration Syndicate*, *supra*, *per* A. L. SMITH, L.J., at p. 245; see also *Salford Corporation* v. *Lever*, *supra*). The giver of the bribe cannot escape liability on the ground that he thought the agent would disclose its receipt to his principal (*Panama Telegraph Co.* v. *India Rubber Telegraph Works Co.*, *supra*; *Grant* v. *Gold Exploration Syndicate*, *supra*).

(*h*) *Salford Corporation* v. *Lever*, *supra*. But an unconditional release of the agent operates as a release to the third person (*ibid.*, at p. 178).

(*i*) He may be indicted for conspiracy (*R.* v. *De Kromme* (1892), 66 L. T. 301), or may be proceeded against under the Prevention of Corruption Act, 1906 (6 Edw. 7, c. 34). See, further, title CRIMINAL LAW AND PROCEDURE.

SECT. 8. Criminal Liability of Principal.

thereof (*k*), unless the principal himself takes part in, authorises, or connives at, the commission of such act or default (*l*).

Nuisance.

460. This rule is, however, subject to two exceptions. In the first place, on an indictment for a public nuisance (*m*), committed by the principal through the instrumentality of his agent, the principal is liable to be convicted, although the nuisance was committed without his knowledge and against his express instructions (*n*).

Under special Acts.

461. Secondly, a particular statute may impose a criminal liability upon the principal in respect of the acts or defaults of his agent by its express terms or by implication (*o*). Where the statute prohibits the doing of something without reference to the state of mind of the party doing it, the principal may be responsible, having regard to the object of the statute, if the agent disobeys the prohibition, the principal's knowledge being immaterial (*p*). When the statute makes knowledge an essential ingredient of the offence, the principal, in spite of his absence of knowledge, and notwithstanding any prohibition given by him to the agent (*q*), is responsible for the agent's act (*r*), if he has delegated to such agent his authority in respect of the matter in connection with which the act is done, so as to make the act of the agent from its very nature obviously the act of the principal (*s*).

Where, however, there has been no delegation of authority, so that the act done by the agent is outside the scope of the agent's employment, the principal is not responsible without proof of knowledge or connivance (*t*).

(*k*) *Woodgate* v. *Knatchbull* (1787), 2 Term Rep. 148; *R.* v. *Stephens* (1866), L. R. 1 Q. B. 702, *per* BLACKBURN, J., at p. 710; *Hardcastle* v. *Bielby*, [1892] 1 Q. B. 709, *per* COLLINS, J., at p. 712.

(*l*) *Chisholm* v. *Doulton* (1889), 22 Q. B. D. 736; *Roberts* v. *Woodward* (1890), 25 Q. B. D. 412; *Massey* v. *Morriss*, [1894] 2 Q. B. 412; *Emary* v. *Nolloth*, [1903] 2 K. B. 264.

(*m*) Such proceedings, though criminal in form, being civil in substance (*R.* v. *Stephens*, *supra*, *per* MELLOR, J., at p. 708).

(*n*) *R.* v. *Stephens*, *supra*; but see on this case *Chisholm* v. *Doulton*, *supra*, *per* FIELD, J., at p. 740. Compare *Barnes* v. *Akroyd* (1872), L. R. 7 Q. B. 474.

(*o*) *Hardcastle* v. *Bielby*, *supra*, *per* COLLINS, J., at p. 712. But this rule does not apply to crimes, only to acts prohibited by a penalty enforceable by imprisonment in default of distress (*Newman* v. *Jones* (1886), 17 Q. B. D. 132, *per* A. L. SMITH, J., at p. 136).

(*p*) *Chisholm* v. *Doulton*, *supra*, *per* CAVE, J., at p. 742; *Emary* v. *Nolloth*, *supra*, *per* Lord ALVERSTONE, C.J., at p. 269. For examples see *Coppen* v. *Moore*, [1898] 2 Q. B. 306, decided on the Merchandise Marks Act, 1887 (50 & 51 Vict. c. 28), s. 2 (1); *Brown* v. *Foot* (1892), 66 L. T. 649, decided on Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 6; *Collman* v. *Mills*, [1897] 1 Q. B. 396, where the act was in contravention of a bye-law; *Dunning* v. *Owen*, [1907] 2 K. B. 237 (sale of intoxicating liquor by licensed agent for unlicensed principal).

(*q*) *Commissioners of Police* v. *Cartman*, [1896] 1 Q. B. 655.

(*r*) *Emary* v. *Nolloth*, *supra*, *per* Lord ALVERSTONE, C.J., at p. 269. For examples see *Bond* v. *Evans* (1888), 21 Q. B. D. 249; *Redgate* v. *Haynes* (1876), 1 Q. B. D. 89; *Bosley* v. *Davies* (1875), 1 Q. B. D. 84; *Mullins* v. *Collins* (1874), L. R. 9 Q. B. 292 (all cases on the Licensing Acts); *A.-G.* v. *Siddons* (1830), 1 C. & J. 220 (on the Smuggling Act, 1817 (57 Geo. 3, c. 87), s. 13). See *contra*, *Newman* v. *Jones*, *supra* (which, however, stands on its own circumstances, see *Bond* v. *Evans*, *supra*, *per* STEPHEN, J., at p. 257).

(*s*) *Roberts* v. *Woodward* (1890), 25 Q. B. D. 412, *per* POLLOCK, B., at p. 415.

(*t*) *Somerset* v. *Hart* (1884), 12 Q. B. D. 360; *Boyle* v. *Smith*, [1906] 1 K. B. 432; *Emary* v. *Nolloth*, *supra*; *Roberts* v. *Woodward*, *supra*.

These exceptions apply only to the case of knowledge. Where negligence is an essential ingredient in the offence, the principal is not responsible for the negligence of his agent (*a*).

SECT. 8. **Criminal Liability of Principal.**

Part X.—Relations between Agent and Third Persons.

SECT. 1.—*Liabilities of Agent.*

SUB-SECT. 1.—*On Contracts.*

462. Where a person makes a contract in his own name without disclosing either the name or the existence of a principal, he is personally liable on the contract to the other contracting party, though he may be in fact acting on a principal's behalf (*b*). Nor does he cease to be liable on the discovery of the principal by the other party, unless and until there has been an unequivocal election by the other contracting party to look to the principal alone (*c*).

Fact of agency not disclosed.

463. Every person who, in making a contract, discloses the existence, but not the name, of the principal on whose behalf he is acting, is personally liable on the contract to the other contracting party (*d*), unless a contrary intention appears (*e*). In the case of a verbal contract this is a question of fact (*f*). But if the contract is in writing, the question depends upon the construction placed by the Court upon the terms of such contract (*g*).

Identity of principal not disclosed.

Primâ facie a party is personally liable on a contract if he put his unqualified signature to it (*h*). In order, therefore, to exonerate the agent from liability, the contract must show, when construed as a whole, that he contracted as agent only, and did not undertake any personal liability (*i*). It is not sufficient that he should have described himself in the contract as an agent, whether as part of his signature (*j*) or otherwise (*k*). But if he states in the contract (*l*),

Agent liable unless contract shows contrary intention.

(*a*) *Chisholm* v. *Doulton* (1889), 22 Q. B. D. 736, *per* CAVE, J., at p. 742; but see *Nixon* v. *Geaves* (1890), 54 J. P. 548.

(*b*) *Saxon* v. *Blake* (1861), 29 Beav. 438; *Ex parte Bird* (1864), 4 De G. J. & S. 200; *Seaber* v. *Hawkes* (1831), 5 M. & P. 549.

(*c*) *Dramburg* v. *Pollitzer* (1873), 28 L. T. 470.

(*d*) *Hobhouse* v. *Hamilton* (1826), 1 Hog. 401; *Franklyn* v. *Lamond* (1847), 4 C. B. 637.

(*e*) *Southwell* v. *Bowditch* (1876), 1 C. P. D. 374.

(*f*) *Williamson* v. *Barton* (1862), 7 H. & N. 899; *Long* v. *Millar* (1879), 4 C. P. D. 450.

(*g*) *Southwell* v. *Bowditch, supra*; *Jones* v. *Littledale* (1837), 6 L. J. (K. B.) 169.

(*h*) See title CONTRACT.

(*i*) *Thompson* v. *Davenport* (1829), 9 B. & C. 78; *Hutcheson* v. *Eaton* (1884), 13 Q. B. D. 861. Or that he stipulated that his personal liability should cease in the events that have happened (*Oglesby* v. *Yglesias* (1858), E. B. & E. 930).

(*j*) *Hutcheson* v. *Eaton, supra, per* BRETT, M.R., at p. 865.

(*k*) *Magee* v. *Atkinson* (1837), 2 M. & W. 440.

(*l*) *Southwell* v. *Bowditch, supra*, and see *Gadd* v. *Houghton* (1876), 1 Ex. D. 357; *Ogden* v. *Hall* (1879), 40 L. T. 751.

SECT. 1. Liabilities of Agent.

or indicates by an addition to his signature (*m*), that he is contracting as agent only on behalf of a principal, he is not liable, unless the rest of the contract clearly involves his personal liability (*n*), or unless he is shown to be the real principal (*o*).

Usage.

When, on the construction of a written contract, the agent is held not to have contracted personally, evidence of usage is admissible to make him liable (*p*), unless the usage is inconsistent with the express contract (*q*).

Parol evidence.

But no parol evidence of intention is admissible to exonerate him from liability contrary to the terms of the contract (*r*), except that by way of equitable defence he may set up an express agreement between himself and the other contracting party to that effect (*s*).

Where identity of principal disclosed.

464. Where a person in making a contract discloses both the existence and the name of a principal on whose behalf he purports to make it, he is not, as a general rule, liable on the contract to the other contracting party (*t*), whether he had in fact authority to make it or not (*a*); but a personal liability may be imposed upon him by the express terms of the contract (*b*), by the ordinary course of business (*c*), or by usage (*d*). In particular an agent who makes a contract on behalf of a foreign principal is personally liable on the contract, although he discloses the name of the principal (*e*), unless the terms of the contract are inconsistent with his liability (*f*).

(*m*) *Hutcheson* v. *Eaton* (1884), 13 Q. B. D. 861, *per* BRETT, M.R., at p. 865; *Fleet* v. *Murton* (1871), L. R. 7 Q. B. 126, *per* BLACKBURN, J., at p. 131.

(*n*) *Weidner* v. *Hoggett* (1876), 1 C. P. D. 533; and see *Lennard* v. *Robinson* (1855), 5 E. & B. 125.

(*o*) *Carr* v. *Jackson* (1852), 7 Exch. 382.

(*p*) *Hutchinson* v. *Tatham* (1873), L. R. 8 C. P. 482; *Fleet* v. *Murton*, *supra*; *Pike* v. *Ongley* (1887), 18 Q. B. D. 708; *Humfrey* v. *Dale* (1857), 7 E. & B. 266; *Imperial Bank* v. *London and St. Katharine Docks Co.* (1877), 5 Ch. D. 195; *Bacmeister* v. *Fenton* (1883), 1 Cab. & El. 121.

(*q*) *Barrow* v. *Dyster* (1884), 13 Q. B. D. 635.

(*r*) *Higgins* v. *Senior* (1841), 8 M. & W. 834; *Jones* v. *Littledale* (1837), 6 L. J. (K. B.) 169.

(*s*) *Wake* v. *Harrop* (1862), 1 H. & C. 202.

(*t*) *Jenkins* v. *Hutchinson* (1849), 13 Q. B. 744; *Paquin* v. *Beauclerk*, [1906] A. C. 148. The same rule applies to public agents contracting on behalf of the Crown (*Macbeath* v. *Haldimand* (1786), 1 Term Rep. 172; *O'Grady* v. *Cardwell* (1873), 21 W. R. 340, Ir.).

(*a*) *Lewis* v. *Nicholson* (1852), 18 Q. B. 503.

(*b*) *Hall* v. *Ashurst* (1833), 1 C. & M. 714; *McCollin* v. *Gilpin* (1881), 6 Q. B. D. 516; *Woolfe* v. *Horne* (1877), 2 Q. B. D. 355; *Burrell* v. *Jones* (1819), 3 B. & Ald. 47; *Parker* v. *Winlow* (1857), 7 E. & B. 942; and contrast *Redpath* v. *Wigg* (1866), L. R. 1 Exch. 335. A public agent may bind himself personally (*Clutterbuck* v. *Coffin* (1842), 3 Man. & G. 842; *Graham* v. *Public Works Commissioners*, [1901] 2 K. B. 781). This is a question of fact (*Auty* v. *Hutchinson* (1848), 6 C. B. 266).

(*c*) *Warlow* v. *Harrison* (1859), 1 E. & E. 309; *Newton* v. *Chambers* (1844), 1 D. & L. 869.

(*d*) *Bayliffe* v. *Butterworth* (1847), 1 Exch. 425; *Hodgkinson* v. *Kelly* (1868), L. R. 6 Eq. 496; and see, further, title STOCK EXCHANGE.

(*e*) *Hutton* v. *Bulloch* (1874), L. R. 9 Q. B. 572, approving *Armstrong* v. *Stokes* (1872), L. R. 7 Q. B. 598, *per* BLACKBURN J., at p. 605; *Wilson* v. *Zulueta* (1849), 14 Q. B. 405.

(*f*) *Deslandes* v. *Gregory* (1860), 30 L. J. (Q. B.) 36; *Elbinger Actien-Gesellschaft* v. *Claye* (1873), L. R. 8 Q. B. 313, *per* BLACKBURN, J., at p. 317; *Gadd* v. *Houghton* (1876), 1 Ex. D. 357, disapproving *Paice* v. *Walker* (1870), L. R. 5 Exch. 173; *Ogden* v. *Hall* (1879), 40 L. T. 751; *Mahony* v. *Kekulé* (1854), 14 C. B. 390.

Further, the agent is personally liable on the contract if it is shown that he is the real principal (*g*), or that the principal named by him is non-existent (*h*) or incapable of making the contract in question (*i*).

Deeds executed by agent.

465. Moreover, an agent who executes a deed in his own name is personally liable upon it, whether he discloses the name and existence of his principal or not (*k*).

Bills of exchange etc.

In respect of bills of exchange, cheques, and promissory notes signed by an agent on his principal's behalf, the agent is not liable unless he signs his own name (*l*), in which case he is personally liable even though he adds to his signature words describing him as an agent (*m*), unless he makes it perfectly clear that he is signing only on his principal's behalf (*n*). He is not liable upon any acceptance in his own name, unless the bill was in fact drawn upon him (*o*), in which case he is liable though he purports to accept merely as agent (*p*).

Signed contracts generally.

In the case of any other written contract signed by the agent in his own name, but purporting to be made on behalf of a named principal, the agent is not personally liable, unless from the terms of the contract it appears that such was the intention of the parties (*q*).

Agent for limited company.

But where the principal is a limited company, any agent signing a contract on its behalf is personally liable, if he omits the name of the company or the word "limited" from the contract (*r*).

SUB-SECT. 2.—*On Warranty of Authority.*

Warranty implied.

466. Where any person purports to do any act or make any contract as agent on behalf of a principal, he is deemed to warrant (*s*)

(*g*) *Jenkins* v. *Hutchinson* (1849), 13 Q. B. 744, *per* Lord DENMAN, C.J., at p. 752

(*h*) *Kelner* v. *Baxter* (1866), L. R. 2 C. P. 174; *Scott* v. *Lord Ebury* (1867), L. R. 2 C. P. 255; *Wilson* v. *Baker* (1901), 17 T. L. R. 473, unless the other contracting party did not intend to accept the agent's liability (*Jones* v. *Hope* (1880), 3 T. L. R. 247; *Steele* v. *Gourley* (1887), 3 T. L. R. 772; and see *Bailey* v. *Macaulay* (1849), 13 Q. B. 815). Compare also cases cited in note (*i*), p. 219, *ante*.

(*i*) *Queensland Investment Co.* v. *O'Connell* (1896), 12 T. L. R. 502.

(*k*) *Appleton* v. *Binks* (1804), 5 East, 148; *Hancock* v. *Hodgson* (1827), 4 Bing. 269; *Case* v. *Rudele* (1692), 2 Vern. 280; *Chapman* v. *Smith*, [1907] 2 Ch. 97. But a public agent is not liable on a contract under seal made on behalf of the Crown (*Unwin* v. *Wolseley* (1787), 1 Term Rep. 674; see, however, *contra*, *Cunningham* v. *Collier* (1785), 4 Doug. 233).

(*l*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 23. See, further, title BILLS OF EXCHANGE ETC.

(*m*) *Ibid.*, s. 26 (1); *The Elmville*, [1904] P. 319.

(*n*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 26 (1); *Aggs* v. *Nicholson* (1856), 1 H. & N. 165; *Alexander* v. *Sizer* (1869), L. R. 4 Exch. 102.

(*o*) *Okell* v. *Charles* (1876), 34 L. T. 822; *Dermatine Co.* v. *Ashworth* (1905), 21 T. L. R. 510.

(*p*) *Jones* v. *Jackson* (1870), 22 L. T. 828; *Mare* v. *Charles* (1856), 25 L. J. (Q. B.) 119.

(*q*) *Norton* v. *Herron* (1825), 1 C. & P. 648; and compare *McCollin* v. *Gilpin*, (1881) 6 Q. B. D. 516, with *Downman* v. *Williams* (1845), 7 Q. B. 103, Ex. Ch.

(*r*) Companies Act, 1862 (25 & 26 Vict. c. 89), s. 42.

(*s*) Unless he is a public agent contracting on behalf of the Crown *Dunn* v *Macdonald*, [1897] 1 Q. B. 555).

SECT. 1. Liabilities of Agent.

that he has in fact authority from such principal to do the act (*t*) or make the contract (*a*) in question. If, therefore, he has no such authority (*b*), he is liable to be sued for breach of warranty of authority by any third person who was induced by his conduct in purporting to act as agent to believe that he had authority to do the act or make the contract, and who, by acting upon such belief, has suffered loss in consequence of the absence of authority (*c*).

Where no liability on warranty.

The agent's belief in the existence of his authority is immaterial (*d*). But he is not liable if at the time of doing the act or making the contract he expressly disclaims any present authority (*e*), or if the other party knows that he has no authority (*f*), or is fully acquainted with the facts from which the inference of authority is drawn (*g*).

Measure of damages for breach of warranty.

467. The measure of damages for a breach of warranty of authority is the loss actually sustained by the third person as the natural and probable consequence of the non-existence of the authority (*h*). In the case of a contract made without authority and repudiated by the principal, the loss will be the amount that could have been recovered from the principal in an action for breach of the contract if it had in fact been made with his authority (*i*), together

(*t*) *Starkie* v. *Bank of England*, [1903] A. C. 114; *Cherry* v. *Colonial Bank of Australasia* (1869), 38 L. J. (P. C.) 49; *Richardson* v. *Williamson* (1871), L. R. 6 Q. B. 276; *Weeks* v. *Propert* (1873), L. R. 8 C. P. 427.

(*a*) *Collen* v. *Wright* (1857), 8 E. & B. 647; *Simons* v. *Patchett* (1857), 7 E. & B. 568; *Re National Coffee Palace Co., Ex parte Panmure* (1883), 24 Ch. D. 367; *Anderson* v. *Croall* (1904), 6 F. (Ct. of Sess.) 153; *Hughes* v. *Graeme* (1864), 33 L. J. (Q. B.) 335.

(*b*) But he is not liable for exceeding his real authority, if his apparent authority would be sufficient to bind his principal (*Rainbow* v. *Howkins*, [1904] 2 K. B. 322). If the principal disputes the authority in an action brought by the third person, the agent may be joined as defendant, and relief claimed against him in the alternative (*Honduras Rail. Co.* v. *Lefevre* (1877), 2 Ex. D. 301; and see *Massey* v. *Heynes* (1888), 21 Q. B. D. 330; *Bennetts* v. *McIlwraith*, [1896] 2 Q. B. 464).

(*c*) See cases cited in the notes to this sub-section *passim* and the proposition stated by Lord HALSBURY, L.C., in *Salvesen* v. *Rederi Aktiebolaget Nordstjernan*, [1905] A. C. 302, at p. 309.

(*d*) *Starkie* v. *Bank of England*, *supra*; *Firbank* v. *Humphreys* (1886), 18 Q. B. D. 54; *Chapleo* v. *Brunswick Building Society* (1881), 6 Q. B. D. 696. If the agent is aware of the absence of authority, he may be sued either for breach of warranty of authority or for deceit (*Polhill* v. *Walter* (1832), 3 B. & Ad. 114).

(*e*) *Halbot* v. *Lens*, [1901] 1 Ch. 344.

(*f*) *Ibid.*

(*g*) *Smout* v. *Ilbery* (1842), 10 M. & W. 1; *Salton* v. *New Beeston Cycle Co.*, [1900] 1 Ch. 43; *McManus* v. *Fortescue* (1907), 23 T. L. R. 292; and contrast *Lilly* v. *Smales*, [1892] 1 Q. B. 456, with *Suart* v. *Haigh* (1893), 9 T. L. R. 488; and compare *West London Bank* v. *Kitson* (1884), 13 Q. B. D. 360. When the evidence of the agency is an inference of law, the agent is not liable, provided that the facts are equally within the knowledge of both (*Eaglesfield* v. *Londonderry* (1878), 38 L. T. 303; *Jones* v. *Hope* (1880), 3 T. L. R. 247; *Rashdall* v. *Ford* (1866), L. R. 2 Eq. 750).

(*h*) *Starkie* v. *Bank of England*, *supra*; *Firbank* v. *Humphreys*, *supra*; *Richardson* v. *Williamson*, *supra*; *Meek* v. *Wendt* (1888), 21 Q. B. D. 126; *Hubbart* v. *Phillips* (1845), 2 D. & L. 707; *Salvesen* v. *Rederi Aktiebolaget Nordstjernan*, *supra*; and see *Salton* v. *New Beeston Cycle Co.*, *supra*.

(*i*) *Simons* v. *Patchett*, *supra*; *Suart* v. *Haigh*, *supra*. But the contract must not have been one which would have been unenforceable against the principal owing to the absence of some formality (*Warr* v. *Jones* (1876), 24 W. R. 695; and see *Rainbow* v. *Howkins*, *supra*).

with the costs of any action upon the contract reasonably brought by the third person against him (*k*).

SUB-SECT. 3.—*For Moneys received by Agent.*

Liability of agent to repay to third person.

468. The receipt of money from a third person by an agent on his principal's behalf, does not in itself render the agent personally liable to repay it when the third person becomes entitled as against the principal to repayment, whether the money remains in the agent's hands or not (*l*). But if a third person pays money to an agent under a mistake of fact (*m*), or in consequence of some wrongful act (*n*), the agent is personally liable to repay it, unless, before the claim for repayment was made upon him, he has paid it to the principal or done something equivalent to payment to his principal (*o*). Where, however, the agent has been a party to the wrongful act (*p*), or has acted as a principal in the transaction (*q*), in consequence of which the money has been paid to him, he is not discharged from his liability to make repayment by any payment over to his principal (*r*).

Direction from principal to pay over to third person.

469. Where an agent is directed by his principal to pay to a third person any money which he has received or is about to receive on his principal's behalf, he is not in general responsible to the third person if he fails to do so (*r*), notwithstanding the fact that the money is received by him from the principal for the express purpose of paying it over to the third person (*s*), or that his failure to comply with the direction is a breach of duty towards his principal (*t*). But he renders himself personally liable if he assents

(*k*) *Hughes* v. *Graeme* (1864), 33 L. J. (Q. B.) 335; *Spedding* v. *Nevell* (1869), L. R. 4 C. P. 212; *Godwin* v. *Francis* (1870), L. R. 5 C. P. 295; and contrast *Pow* v. *Davis* (1861), 1 B. & S. 220.

(*l*) *Ellis* v. *Goulton*, [1893] 1 Q. B. 350, *per* BOWEN, L.J., at p. 353; *Bamford* v. *Shuttleworth* (1840), 11 A. & E. 926, *per* COLERIDGE, J., at p. 933.

(*m*) *Cox* v. *Prentice* (1815), 3 M. & S. 344; *Taylor* v. *Metropolitan Rail. Co.*, [1906] 2 K. B. 55.

(*n*) *Holland* v. *Russell* (1863), 4 B. & S. 14; *Galland* v. *Hall* (1888), 4 T. L. R. 761; *East India Co.* v. *Tritton* (1824), 5 D. & R. 214; *Ex parte Bird, Re Bourne* (1851), 4 De G. & S. 273.

(*o*) *Pollard* v. *Bank of England* (1871), L. R. 6 Q. B. 623, *per* BLACKBURN, J., at p. 630; *Cox* v. *Prentice, supra, per* Lord ELLENBOROUGH, C.J., at p. 348. A mere crediting the principal with the amount, without there being any change of circumstances affecting the agent is not sufficient (*Buller* v. *Harrison* (1777), Cowp. 565; *Cox* v. *Prentice, supra; Continental Caoutchouc Co.* v. *Kleinwort*, [1904] 90 L. T. 474).

(*p*) *Close* v. *Phipps* (1844), 7 Man. & G. 586; *Snowdon* v. *Davis*, (1808) 1 Taunt. 359; *Ex parte Edwards, Re Chapman* (1884), 13 Q. B. D. 747; *Wakefield* v. *Newbon* (1844), 6 Q. B. 276, unless both parties are *in pari delicto* (*Goodall* v. *Lowndes* (1844), 6 Q. B. 464).

(*q*) *Newall* v. *Tomlinson* (1871), L. R. 6 C. P. 405.

(*r*) *Citizens' Bank of Louisiana and the New Orleans Canal and Banking Co.* v. *First National Bank of New Orleans* (1873), L. R. 6 H. L. 352; *Stewart* v. *Fry* (1817), 7 Taunt. 339. The same rule applies to public agents, whether of the British Crown (*Gidley* v. *Palmerston* (1822), 3 B. & B. 275; *R.* v. *Secretary of State for War*, [1891] 2 Q. B. 326; *Kinloch* v. *Secretary of State for India* (1882), 7 App. Cas. 619; *Salaman* v. *Secretary of State for India*, [1906] 1 K. B. 613), or of foreign Governments (*Henderson* v. *Rothschild* (1887), 56 L. J. (CH.) 471; *Twycross* v. *Dreyfus* (1877), 5 Ch. D. 605).

(*s*) *Moore* v. *Bushell* (1857), 27 L. J. (EX.) 3.

(*t*) *Schroeder* v. *Central Bank* (1876), 34 L. T. 735.

SECT. 1. Liabilities of Agent.

to the direction, and the assent is communicated to the third person (*a*), or if he enters into an unconditional undertaking (*b*) to pay the money to the third person or to hold it on his behalf (*c*). In this case he is not discharged from liability by the subsequent bankruptcy of the principal (*d*), or the purported revocation of his authority to pay (*e*).

Direction amounting to assignment or charge.

If, however, the direction is not a mere authority to make the payment (*f*), but amounts to an assignment of a specific fund, or a charge upon it (*g*), the agent, upon receiving notice of the assignment or charge, becomes liable to the third person for the amount due to him thereunder. But the agent is not deprived thereby of any right of lien or set-off which accrued before he received such notice (*h*).

SUB-SECT. 4.—*For Torts.*

Liability generally.

470. Any agent, including a public agent (*i*), who commits a wrongful act (*k*) in the course of his employment, is personally liable (*l*) to any third person who suffers loss or damage thereby (*m*),

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(*a*) *Walker* v. *Rostron* (1842), 9 M & W. 411; *Noble* v. *National Discount Co* (1860), 5 H. & N. 225; *Lilly* v. *Hays* (1836), 5 A. & E. 548; *Griffin* v. *Weatherby* (1868), L. R. 3 Q. B. 753.

(*b*) *Brind* v. *Hampshire* (1836), 1 M. & W. 365, *per* PARKE, B., at p. 372; *Malcolm* v. *Scott* (1850), 5 Exch. 601.

(*c*) *Crowfoot* v. *Gurney* (1832), 9 Bing. 372; *Williams* v. *Everett* (1811), 14 East, 582; *Scott* v. *Porcher* (1817), 3 Mer. 652. But if the undertaking to pay was subject to a condition, the condition must have been accepted by the third person (*Baron* v. *Husband* (1833), 4 B. & Ad. 611), and must have been fulfilled (*Stevens* v. *Hill* (1805), 5 Esp. 247). If the condition is to pay when the money is received from the principal, the agent is only liable for the amount which he actually receives (*Langston* v. *Corney* (1815), 4 Camp. 176).

(*d*) *Crowfoot* v. *Gurney, supra; Walker* v. *Rostron, supra.*

(*e*) *Robertson* v. *Fauntleroy* (1823), 8 Moo. C. P. 10.

(*f*) *Ex parte Hall, Re Whitting* (1878), 10 Ch. D. 615.

(*g*) *Brandt* v. *Dunlop Rubber Co.*, [1905] A. C. 454; *Rodick* v. *Gandell* (1851), 1 De G. M. & G. 763.

(*h*) *Webb* v. *Smith* (1885), 30 Ch. D. 192; *Roxburghe* v. *Cox* (1881), 17 Ch. D. 520. See, further, title CHOSES IN ACTION.

(*i*) *Entick* v. *Carrington* (1765), 19 State Trials, 1030; *Sinclair* v. *Broughton* (1882), 47 L. T. 170, and see *Dixon* v. *London Small Arms Co.* (1876), 1 App. Cas. 632. But he must not be sued in his official capacity (*Bainbridge* v. *Postmaster-General*, [1906] 1 K. B. 178; *Raleigh* v. *Goschen*, [1898] 1 Ch. 73). No action can be brought in this country against the agent of a foreign Government, though a British subject, for any act done by him abroad under the authority of his Government, notwithstanding that such act is expressly prohibited by English law (*Dobree* v. *Napier* (1836), 2 Bing. (N. C.) 781; and see *Carr* v. *Fracis Times & Co.*, [1902] A. C. 176).

(*k*) As to what acts of the agent are sufficient to impose liability, contrast *Adair* v. *Young* (1879), 12 Ch. D. 13, with *Nobel's Explosive Co.* v. *Jones* (1882), 8 App. Cas. 5. But the act must be his personal act, and he is not liable for the acts of his co-agents (*Re Denham* (1883), 25 Ch. D. 752) or sub-agents (*Stone* v. *Cartwright* (1795), 6 Term Rep. 411), unless he is a partner (*Weir* v. *Bell* (1878), 3 Ex. D. 238, *per* BRAMWELL, L.J., at p 244), or has otherwise made himself a principal in the transaction (*Cargill* v. *Bower* (1878), 10 Ch. D. 502, *per* FRY, J., at p. 514; *Weir* v. *Bell, supra, per* COCKBURN, C.J., at p. 249), or unless he is made liable by statute, as under the Directors' Liability Act, 1890 (53 & 54 Vict. c. 64) (*Gerson* v. *Simpson*, [1903] 2 K. B. 197).

(*l*) But he cannot be sued if judgment has been obtained against the principal. See *Brinsmead* v. *Harrison* (1872), L. R. 7 C. P. 547.

(*m*) *Bennett* v. *Bayes* (1860), 5 H. & N. 391; *Arnot* v. *Biscoe* (1748), 1 Ves. Sen. 94; *Swift* v. *Jewsbury* (1874), L. R. 9 Q. B. 301; *Lowe* v. *Dorling*, [1906] 2

notwithstanding that the act was expressly authorised or ratified by the principal (*n*), unless it was thereby deprived of its wrongful character (*o*). It is immaterial that the agent did the act innocently and without knowledge that it was wrongful (*p*), except in cases where actual malice is essential to constitute the wrong (*q*).

Conversion.

471. Any agent who, while acting on his principal's behalf, acquires the actual or constructive (*r*) possession of goods (*s*) or securities (*t*) which are not in fact the property of his principal, and deals with them in any manner which is obviously wrongful if his principal is not their owner (*a*) or duly authorised by their owner—as by selling and delivering them to a stranger (*b*), or otherwise purporting to dispose of the property in them (*c*)—is guilty of a conversion (*d*), and is liable to their true owner for their value. His liability is not affected by the fact that he received them in good faith as the property of his principal, and dealt with them in accordance with his principal's instructions and in ignorance of the true owner's claim (*e*), unless the true owner is estopped from denying the principal's authority to dispose of them (*f*), or unless the agent is a banker receiving payment (*g*) of a crossed (*h*) cheque (*i*) on behalf of a customer (*k*).

K. B. 772; *Re National Funds Assurance Co.* (1878), 10 Ch. D. 118; *Cullen* v. *Thomson's Trustees* (1862), 4 Macq. 424, H. L.

(*n*) *Johnson* v. *Emerson* (1871), L. R. 6 Exch. 329.

(*o*) *Hull* v. *Pickersgill* (1819), 1 Brod. & Bing. 282; *Anderson* v. *Watson* (1827), 3 C. & P. 214; *Sykes* v. *Sykes* (1870), L. R. 5 C. P. 113; and contrast *Sharland* v. *Mildon* (1846), 5 Hare, 469; *Padget* v. *Priest* (1787), 2 Term Rep. 97. The Crown can ratify the wrongful act of a public agent as against a foreigner (*Buron* v. *Denman* (1848), 2 Exch. 167; *Salaman* v. *Secretary of State for India*, [1906] 1 K. B. 613), but not as against a British subject (*Entick* v. *Carrington* (1765), 19 State Trials, 1030).

(*p*) *Baschet* v. *London Illustrated Standard Co.*, [1900] 1 Ch. 73.

(*q*) *Eagleefield* v. *Londonderry* (1878), 38 L. T. 303.

(*r*) *Union Credit Bank* v. *Mersey Docks and Harbour Board*, [1899] 2 Q. B. 205.

(*s*) *Consolidated Co.* v. *Curtis*, [1892] 1 Q. B. 495; *Cochrane* v. *Rymill* (1879), 40 L. T. 744; *Hollins* v. *Fowler* (1874), L. R. 7 H. L. 757; *Stephens* v. *Elwall* (1815), 4 M. & S. 259.

(*t*) *Great Western Rail. Co.* v. *London and County Banking Co.*, [1901] A. C. 414; *Arnold* v. *Cheque Bank* (1876), 1 C. P. D. 578; *Fine Art Society* v. *Union Bank* (1886), 17 Q. B. D. 705.

(*a*) *McEntire* v. *Potter* (1889), 22 Q. B. D. 438, *per* CAVE, J., at p. 441.

(*b*) *Consolidated Co.* v. *Curtis*, *supra*; *Cochrane* v. *Rymill*, *supra*; *Hollins* v. *Fowler*, *supra*.

(*c*) *McEntire* v. *Potter*, *supra*; *Stephens* v. *Elwall*, *supra*; *Pearson* v. *Graham* (1837), 6 A. & E. 899.

(*d*) For the meaning of conversion, see title TROVER AND CONVERSION.

(*e*) See cases in notes (*r*)—(*d*), *supra*.

(*f*) As where the principal is a mercantile agent, or buyer or seller in possession of goods or the documents of title thereto with the consent of the true owner (Factors Act, 1889 (52 & 53 Vict. c. 45), ss. 2, 8, and 9; Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 25 (1) and (2); *Shenstone* v. *Hilton*, [1894] 2 Q. B. 452).

(*g*) For the meaning of receiving payment, see Bills of Exchange (Crossed Cheques) Act, 1906 (6 Edw. 7, c. 17), s. 1; title BANKERS AND BANKING.

(*h*) The cheque must be crossed before it reaches the banker (*Capital and Counties Bank* v. *Gordon*, [1903] A. C. 240).

(*i*) But not of any other instrument (*Bavins* v. *London and South Western Bank*, [1900] 1 Q. B. 270).

(*k*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 82; and see *Great Western Rail. Co.* v. *London and County Banking Co.*, *supra*. See further on this point title BANKERS AND BANKING.

SECT. 1. Liabilities of Agent.

Where agent not liable.

No agent, however, is guilty of a conversion who, not being in possession of the goods or securities, merely negotiates a contract of sale between his principal and a third person (*l*), or who, though being in possession of them, does not do any act which is obviously wrongful if the principal is not the true owner, but deals only with the possession of them as directed by his principal without purporting to dispose of the property in them (*m*). Nevertheless any dealings whatsoever with the goods or securities against the will of the true owner will amount to a conversion if done with notice of his claim (*n*).

Liability for breach of trust.

472. Moreover, no agent who, being in possession of property which his principal holds in trust for another, makes, on the instructions of his principal, any disposition thereof which is inconsistent with the trust, is guilty of a breach of trust (*o*), unless he had notice of the trust at the time (*p*), and was aware that the disposition made by him was in breach of trust (*q*).

SECT. 2.—*Rights of Agent.*

SUB-SECT. 1.—*Enforcement of Contracts.*

Right to enforce contract.

473. Any person who makes a contract in his own name without disclosing the existence of a principal (*r*), or who, though disclosing the fact that he is acting as an agent on behalf of a principal, renders himself personally liable on the contract (*s*), is entitled to enforce it against the other contracting party (*t*), notwithstanding that the principal has renounced the contract (*a*). And a similar right appears to exist where the agent, though contracting expressly as agent only, does not disclose the name of his principal (*b*).

(*l*) *Cochrane* v. *Rymill* (1879), 40 L. T. 744, *per* BRAMWELL, L.J., at p. 746; *Barker* v. *Furlong*, [1891] 2 Ch. 172.

(*m*) *National Mercantile Bank* v. *Rymill* (1881), 44 L. T. 767; *Union Credit Bank* v. *Mersey Docks and Harbour Board*, [1899] 2 Q. B. 205; *Barker* v. *Furlong*, *supra*.

(*n*) *Davis* v. *Artingstall* (1880), 49 L. J. (CH.) 609. But a refusal to deliver up the goods without an order from the principal, or a request for a reasonable time for inquiry, does not amount to conversion (*Alexander* v. *Southey* (1821), 5 B. & A. 247; *Pillott* v. *Wilkinson* (1864), 3 H. & C. 345).

(*o*) *Gray* v. *Johnston* (1868), L. R. 3 H. L. 1; *Bank of New South Wales* v. *Goulburn Valley Butter Company Proprietary, Ltd.*, [1902] A. C. 543; and see *Union Bank of Australia* v. *Murray-Aynsley*, [1898] A. C. 693.

(*p*) *Williams* v. *Williams* (1881), 17 Ch. D. 437; *Ex parte Kingston, Re Gross* (1871), 6 Ch. App. 632.

(*q*) *Magnus* v. *Queensland Bank* (1888), 37 Ch. D. 466; and contrast *Coleman* v. *Bucks etc. Union Bank*, [1897] 2 Ch. 243. The fact that a personal benefit to the agent is designed or stipulated for is strong evidence that the agent is privy to the breach of trust (*Gray* v. *Johnston*, *supra*, *per* Lord CAIRNS, L.C., at p. 11. See further, on this point, title TRUSTS AND TRUSTEES).

(*r*) *Drinkwater* v. *Goodwin* (1775), Cowp. 251.

(*s*) *Short* v. *Spackman* (1831), 2 B. & Ad. 962; *Cooke* v. *Wilson* (1856), 1 C. B. (N. S.) 153; *Agacio* v. *Forbes* (1861), 14 Moo. P. C. C. 160; *Sargent* v. *Morris* (1820), 3 B. & Ald. 277.

(*t*) *Fisher* v. *Marsh* (1865), 6 B. & S. 411, *per* BLACKBURN, J., at p. 416.

(*a*) *Short* v. *Spackman*, *supra*.

(*b*) *Schmalz* v. *Avery* (1851), 20 L. J. (Q. B.) 228. But see *Sharman* v. *Brandt* (1871), L. R. 6 Q. B. 720, *per* KELLY, C.B., at p. 722, and MARTIN, B., at p. 723. Compare *Chapman* v. *Smith*, [1907] 2 Ch. 97, 103, where the fact that the person making a lease was therein described "as agent, hereinafter called the landlord," was held not to prevent the lease operating as a demise of the estate vested in him as mortgagee.

But where he names his principal and makes the contract expressly as agent (*c*) on his behalf, he cannot enforce it (*d*), even though he is the real principal (*e*), unless the other party has affirmed the contract with knowledge of the fact (*f*).

No right to sue for promised bribe.

An agent cannot sue for a promised bribe, even though he was not influenced thereby in the discharge of his duty to his principal (*g*).

How right to enforce contract lost.

Where an agent is entitled to sue upon a contract made by him his right is lost by the intervention of his principal (*h*), and is subject to any settlement with either the principal (*i*) or the agent, even though in the latter case such defence would not be available against the principal (*k*). But an agent who has a special interest in the subject-matter of the contract (*l*) may enforce it (*m*), notwithstanding any settlement with the principal (*n*), unless the agent has not been prejudiced by the settlement (*o*), or unless he is estopped from setting up his interest against the other contracting party (*p*).

In any action brought by an agent, the defendant is entitled to discovery from the principal as fully as if he were the plaintiff on the record, even though he is a foreign principal (*q*).

SUB-SECT. 2.—*Recovery of Money paid by Agent.*

Money had and received.

474. An agent who has paid money on behalf of his principal to a third person under such circumstances (*r*) that the principal, if the payment had been made by him, would have been entitled to recover the money, may bring an action in his own name for money had and received against the third person (*s*).

(*c*) The rule applies to a *del credere* agent (*Bramwell* v. *Spiller* (1870), 21 L. T. 672).

(*d*) *Fairlie* v. *Fenton* (1870), L. R. 5 Exch. 169; *Bowen* v. *Morris* (1810), 2 Taunt. 374; *Evans* v. *Hooper* (1875), 1 Q. B. D. 45, except where he is an insurance broker (*Provincial Insurance Co. of Canada* v. *Leduc* (1874), L. R. 6 P. C. 224; and see title INSURANCE), or an agent with a special interest in the subject-matter of the contract (see note (*l*), *infra*).

(*e*) *Bickerton* v. *Burrell* (1816), 5 M. & S. 383.

(*f*) *Rayner* v. *Grote* (1846), 15 M. & W. 359.

(*g*) *Harrington* v. *Victoria Graving Dock Co.* (1878), 3 Q. B. D. 549.

(*h*) *Atkinson* v. *Cotesworth* (1825), 3 B. & C. 647; *Sadler* v. *Leigh* (1815), 4 Camp. 195.

(*i*) *Rogers* v. *Hadley* (1863), 2 H. & C. 227; *Thornton* v. *Maynard* (1875), L. R. 10 C. P. 695.

(*k*) *Gibson* v. *Winter* (1833), 5 B. & Ad. 96; *Bauerman* v. *Radenius* (1798), 7 Term Rep. 663.

(*l*) As a factor or auctioneer (*Gray* v. *Pearson* (1870), L. R. 5 C. P. 568, *per* WILLES, J., at p. 574), but not a broker (*Fairlie* v. *Fenton*, *supra*).

(*m*) *Williams* v. *Millington* (1788), 1 Hy. Bl. 81; *Drinkwater* v. *Goodwin* (1775), Cowp. 251.

(*n*) *Robinson* v. *Rutter* (1855), 4 E. & B. 954; *Atkyns* v. *Amber* (1796), 2 Esp. 493; *Isberg* v. *Bowden* (1853), 8 Exch. 852.

(*o*) *Grice* v. *Kenrick* (1870), L. R. 5 Q. B. 340; *Holmes* v. *Tutton* (1855), 5 E. & B. 65.

(*p*) *Coppin* v. *Walker* (1816), 2 Marsh. 497.

(*q*) *Willis* v. *Baddeley*, [1892] 2 Q. B. 324; *James Nelson & Sons, Ltd.* v. *Nelson Line (Liverpool), Ltd.*, [1906] 2 K. B. 217, at p. 223. But see *Queen of Portugal* v. *Glyn* (1840), 7 Cl. & F. 466.

(*r*) As mistake of fact (*Colonial Bank* v. *Exchange Bank* (1885), 11 App. Cas. 84), or fraud (*Holt* v. *Ely* (1853), 1 E. & B. 795), or extortion (*Stevenson* v. *Mortimer* (1778), 2 Cowp. 805). It is immaterial whether the principal authorised the payment or not (*Holt* v. *Ely*, *supra*, *per* ERLE, J., at p. 800).

(*s*) The action may be brought either by the principal or by the agent (*Holt* v. *Ely*, *supra*, *per* Lord CAMPBELL, C.J., at p. 799).

Part XI.—Duration and Termination of Agency.

SECT. 1. In General.

SECT. 1.—*In General.*

How terminated.

475. Agency may be terminated either (1) by the act of the parties, or (2) by operation of law.

The act of the parties may be either a revocation by the principal or a renunciation by the agent.

The law terminates the agency—(1) on the expiration of the time, if any, agreed upon; (2) on complete performance of the undertaking; (3) on destruction of the subject-matter or the happening of an event rendering the continuance of the agency unlawful; or (4) where either party becomes incapable of continuing the contract by reason of death, bankruptcy, or unsoundness of mind. But the termination of agency by these various events is subject to qualifications either defined by law, or due to the facts of the particular case.

SECT. 2.—*Irrevocable Authority.*

Authority coupled with interest irrevocable.

476. The authority of an agent is irrevocable under the following circumstances:—

(1) Where the agency is created by deed, or for valuable consideration, and the authority is given to effectuate a security or to secure the interest of the agent (*t*). Thus, if an agreement is entered into on a sufficient consideration whereby an authority is given for the purpose of securing some benefit to the donee of the authority, such an authority is irrevocable, on the ground that it is coupled with an interest (*a*). So an authority to sell in consideration of forbearance to sue for previous advances (*b*), an authority to apply for shares to be allotted on an underwriting agreement, a commission being paid for the underwriting (*c*), and an authority to receive rents until the principal and interest of a loan have been paid off (*d*) or to receive money from a third party in payment of a debt (*e*), have been held irrevocable. On the other hand, an authority is not irrevocable merely because the agent has a special property in or a lien upon goods to which the authority relates,

(*t*) What is an authority coupled with an interest so as to be irrevocable was discussed in *Smart* v. *Sandars* (1848), 5 C. B. 895.

(*a*) *Smart* v. *Sandars*, *supra*, *per* WILDE, C.J. See also *Walsh* v. *Whitcomb* (1797), 2 Esp. 565; *Gaussen* v. *Morton* (1830), 10 B. & C. 731; *De Comas* v. *Prost* (1865), 3 Moo. P. C. C. (N. S.) 158; *Kiddill* v. *Farnell* (1857), 3 Sm. & G. 428. But see *Watson* v. *King* (1815), 4 Camp. 272.

(*b*) *Raleigh* v. *Atkinson* (1840), 6 M. & W. 670.

(*c*) *Re Hannan's etc. Mining Co., Carmichael's Case*, [1896] 2 Ch. 343; but compare *Re Consort etc. Mines, Stark's Case* (1896), 66 L. J. (CH.) 122.

(*d*) *Abbott* v. *Stratton* (1846), 9 Ir. Eq. Rep. 233; *Whitworth* v. *Gaugain* (1844), 3 Hare, 416.

(*e*) *Alley* v. *Hotson* (1815), 4 Camp. 325. See also *Re Rose, Ex parte Hasluck and Garrard* (1894), 1 Mans. 218; *Gurnell* v. *Gardner* (1863), 4 Giff. 626; *Lepard* v. *Vernon* (1813), 2 V. & B. 51; and *Re Bultfontein Sun Diamond Mine, Ex parte Cox Hughes and Norman* (1897), 75 L. T. 669.

SECT. 2. Irrevocable Authority.

the authority not being given for the purpose of securing the claims of the agent (*f*).

477. (2) Where the agent, in pursuance of his authority, has contracted a personal liability. Agent becoming personally liable.

In such case, the principal cannot revoke the authority without the agent's consent, nor can the principal's trustee in bankruptcy do so (*g*). An agent who has authority to receive a debt due to his principal, and to pay the same to a creditor of the principal when received, and who promises such creditor to pay him accordingly, comes under this rule (*h*).

478. (3) Where liability to personal loss or suffering, though not amounting to a legal liability, has been incurred by the agent under the exercise of his authority, as, for example, by the operation of the rules of the Stock Exchange, which are binding upon the members (*i*). Agent liable to personal loss.

Illustrations of this rule are frequent in the case of betting transactions (*k*), and the principle of the agent's liability still affords a good example, although the Gaming Act, 1892 (*l*), which makes payments by the agent for bets irrecoverable from his principal (*m*), has limited the application of the rule.

479. (4) Where the agent is entitled to sue on a contract and to a lien on the subject-matter. Here the right to sue is not revocable by the act or bankruptcy of the principal until the claim secured by the lien is satisfied (*n*). Agent acquiring rights in subject-matter.

But a factor's authority to sell is not irrevocable merely because he has made advances on the goods to his principal. The making of advances may, however, be a good consideration for an irrevocable authority to sell, provided there is an agreement to that effect (*o*); and such an agreement may be inferred from the circumstances (*o*).

480. (5) In favour of purchasers for value, powers of attorney created since December 31st, 1882, which are given for valuable consideration and are expressed in the instrument creating them to be irrevocable, cannot be revoked by any act of the donor without the concurrence of the donee, or by the death, lunacy, unsoundness of mind, or bankruptcy of the donor; and any act done by the donee Powers of attorney.

(*f*) *Taplin* v. *Florence* (1851), 10 C. B. 744; *Chinnock* v. *Sainsbury* (1861), 30 L. J. (CH). 409; and see *Frith* v. *Frith*, [1906] A. C. 254.

(*g*) *Crowfoot* v. *Gurney* (1832), 9 Bing. 372; *Walker* v. *Rostron* (1842), 9 M. & W. 411; *Hutchinson* v. *Heyworth* (1838), 9 A. & E. 375; *Dickinson* v. *Marrow* (1845), 14 M. & W. 713; *Griffin* v. *Weatherby* (1868), L. R. 3 Q. B. 753.

(*h*) *Hodgson* v. *Anderson* (1825), 3 B. & C. 842; *Hamilton* v. *Spottiswoode* (1849), 4 Exch. 200; *Metcalf* v. *Clough* (1828), 6 L. J. (O. S.) (K. B.) 281; *Yates* v. *Hoppe* (1850), 9 C. B. 541.

(*i*) *Seymour* v. *Bridge* (1885), 14 Q. B. D. 460.

(*k*) *Read* v. *Anderson* (1884), 13 Q. B. D. 779.

(*l*) 55 Vict. c. 9.

(*m*) *Tatam* v. *Reeve*, [1893] 1 Q. B. 44.

(*n*) *Drinkwater* v. *Goodwin* (1775), Cowp. 251; *Robson* v. *Kemp* (1802), 4 Esp. 233.

(*o*) *De Comas* v. *Prost* (1865), 3 Moo. P. C. C. (N. S.) 158; *Smart* v. *Sandars* (1848), 5 C. B. 895.

SECT. 2. Irrevocable Authority.

in pursuance of the power will prevail over any act of the donor without the concurrence of the donee, and notwithstanding the donor's death, lunacy, unsoundness of mind, or bankruptcy; and neither the donee of the power nor the purchaser will be prejudicially affected by notice of any such act of the donor or occurrence to him.

And in favour of purchasers for value, powers of attorney, whether given for valuable consideration or not, expressed in the instrument creating them to be irrevocable for a fixed time, not exceeding one year from the date of the instrument, will similarly be valid and incapable of being affected by any act of or occurrence to the donor during the time expressed (*p*).

Agency for fixed term

481. Where an agency is created for a fixed time, the principal's right, as between himself and the agent, to terminate it before the expiration of the time agreed upon must be ascertained from the terms of the agreement and the facts of the particular case (*q*). The taking of a bribe has been held to be good ground for termination of the agency (*r*), and the common defences of incompetence or negligence would avail in an action for wrongful dismissal (*s*).

SECT. 3.—*Termination by Act of Parties.*

By agreement, revocation, or renunciation.

482. Subject to the cases of irrevocable authority already referred to, agency can be terminated either by agreement between principal and agent, or by the principal giving notice of revocation to the agent, or by the agent renouncing his authority.

Notice of revocation.

483. Notice of revocation may be given at any time before the authority is wholly exercised (*t*), subject to any right to damages on the part of the agent for breach of contract (*a*).

When authority is exercised so as to be irrevocable.

An authority is not deemed to be exercised, so as to prevent revocation, because a preliminary step has been taken which does not bind either principal or agent; for example, where an insurance broker had given instructions for a marine insurance policy and received the initialled slip, it was held, the slip not being a binding contract, that the authority to complete might be

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(*p*) Conveyancing Act, 1882 (45 & 46 Vict. c. 39), ss. 8, 9.

(*q*) *Burton* v. *Great Northern Rail. Co.* (1854), 9 Exch. 507; *Aspdin* v. *Austin* (1844), 5 Q. B. 671; *Dunn* v. *Sayles* (1844), 5 Q. B. 685; *Williamson* v. *Taylor* (1843), 5 Q. B. 175; *Emmens* v. *Elderton* (1853) 4 H. L. Cas. 624; *Eley* v. *Positive Assurance Co.* (1875), 1 Ex. D. 20 (where a solicitor was appointed by articles of association, and it was held that the articles were an agreement *inter socios* and not a contract with third parties).

(*r*) *Boston Deep Sea Fishing and Ice Co.* v. *Ansell* (1888), 39 Ch. D. 339; *Bulfield* v. *Fournier* (1894), 11 T. L. R. 62, affirmed (1895), *ibid.* 282.

(*s*) See title MASTER AND SERVANT.

(*t*) *Warlow* v. *Harrison* (1858), 1 E. & E. 295 (auctioneer's authority may be revoked at any time before the fall of the hammer); *Farmer* v. *Robinson* (1805), 2 Camp. 338, n.; *Manser* v. *Back* (1848), 6 Hare, 443; *Doward* v. *Williams* (1890), 6 T. L. R. 316; *Alexander* v. *Davis* (1885), 2 T. L. R. 142; *Bovine* v. *Dent* (1904), 21 T. L. R. 82; *Barrett* v. *Gilmour* (1901), 6 Com. Cas. 72; *Re Hare and O'More*, [1901] 1 Ch. 93; *Freeman* v. *Fairlie* (1838), 8 L. J. (CH.) 44.

(*a*) *Toppin* v. *Healey* (1863), 11 W. R. 466; *Turner* v. *Goldsmith*, [1891] 1 Q. B. 544; *Taylor* v. *Caldwell* (1863), 3 B. & S. 826.

revoked (*b*). But a revocation after partial exercise of the authority will be ineffective (*c*) unless the authority is severable into parts, so that the unexecuted parts may be countermanded (*d*).

Authority to pay money.

Money paid to an agent by his principal, under authority to devote it to a specific purpose, is recoverable at any time before that purpose has been carried out (*e*), even though paid to abide the event of a wager (*f*). But where the principal has given the agent authority to make a payment of money, and a sum has been appropriated under an agreement with the payee (*g*), or where the circumstances are such that the payee has obtained an equitable assignment of such sum (*h*), the principal cannot afterwards revoke the authority to make such payment.

Mode of revocation.

484. The revocation need not necessarily be by formal instrument. A deed may be revoked by word of mouth (*i*), or the principal may intervene in the course of negotiations (*k*); but until some such action of the principal is taken the agent is justified in assuming the continuance of the agency (*l*).

Termination by agreement.

485. As far as the principal and agent themselves are concerned, the agency, whether created by power of attorney (*m*) or in any other way, may *primâ facie* be terminated at will (*n*), and in any case may be so terminated subject to any claim for damages for breach of contract (*o*).

(*b*) *Warwick* v. *Slade* (1811), 3 Camp. 127; and see *The Vindobala* (1889), 6 Asp. M. L. C. 376. But see *Thompson* v. *Adams* (1889), 23 Q. B. D. 361, *per* MATHEW, J., at p. 365 (slip a binding contract in fire insurance, the Customs and Inland Revenue Act, 1867 (30 & 31 Vict. c. 23), not applying); *Campanari* v. *Woodburn* (1854), 15 C. B. 400; and compare *Read* v. *Anderson* (1884), 13 Q. B. D. 779.

(*c*) *Day* v. *Wells* (1861), 30 Beav. 220.

(*d*) *Bristow* v. *Taylor* (1817), 2 Stark. 50.

(*e*) *Taylor* v. *Lendey* (1807), 9 East, 49; *Brummell* v. *M'Pherson* (1828), 5 Russ. 263; *Gibson* v. *Minet* (1824), 9 Moo. C. P. 31; *Edgar* v. *Fowler* (1803), 3 East, 222; and see *Taylor* v. *Bowers* (1876), 1 Q. B. D. 291.

(*f*) *Smith* v. *Bickmore* (1812), 4 Taunt. 474; *Hastelow* v. *Jackson* (1828), 8 B. & C. 221; *Varney* v. *Hickman* (1847), 5 C. B. 271; *Diggle* v. *Higgs* (1877), 2 Ex. D. 422; *Trimble* v. *Hill* (1879), 5 App. Cas. 342; *Gatty* v. *Field* (1846), 9 Q. B. 431; *Hampden* v. *Walsh* (1876), 1 Q. B. D. 189. There is nothing in the Gaming Act, 1892 (55 Vict. c. 9), which alters this rule. See *O'Sullivan* v. *Thomas*, [1895] 1 Q. B. 698; *Burge* v. *Ashley and Smith*, [1900] 1 Q. B. 744; *Shoolbred* v. *Roberts*, [1900] 2 Q. B. 497.

(*g*) *Burn* v. *Carvalho* (1839), 4 My. & Cr. 690; *Dickinson* v. *Marrow* (1845), 14 M. & W. 713; *Crowfoot* v. *Gurney* (1832), 9 Bing. 372.

(*h*) *Robertson* v. *Fauntleroy* (1823), 8 Moo. C. P. 10; *Fisher* v. *Miller* (1823), 7 Moo. C. P. 527; *Walker* v. *Rostron* (1842), 9 M. & W. 411; *Hutchinson* v. *Heyworth* (1838), 9 A. & E. 375; *Chartered Bank of India* v. *Evans* (1869), 21 L. T. 407.

(*i*) *The Margaret Mitchell* (1858), 4 Jur. (N. S.) 1193; *R.* v. *Wait* (1823), 11 Price, 518.

(*k*) *Atkinson* v. *Cotesworth* (1825), 3 B. & C. 647; *Smith* v. *Plummer* (1818), 1 B. & A. 575.

(*l*) *Re Oriental Bank, Ex parte Guillemin* (1884), 28 Ch. D. 634. The authority is revoked by the winding up of a company of which its agent has no notice.

(*m*) *Bromley* v. *Holland* (1802), 7 Ves. 3, *per* ELDON, L.C., at p. 28; *Ex parte Smither* (1836), 1 Deac. 413.

(*n*) *Henry* v. *Lowson* (1885), 2 T. L. R. 199; *Motion* v. *Michaud* (1892), 8 T. L. R. 253, affirmed 447; *Joynson* v. *Hunt* (1905), 93 L. T. 470; *Barrett* v. *Gilmour* (1901), 6 Com. Cas. 72; *Clerk* v. *Laurie* (1857), 2 H. & N. 199 (as to what amounts to a revocation).

(*o*) As between the principal and third parties, see p. 235, *post*.

SECT. 3. **Termination by Act of Parties.**

486. An agent may at any time before completion of the agency renounce his authority, but subject to any claim of his principal for damages for breach of the contract of agency (*p*).

Renunciation of authority.

SECT. 4.—*Termination by Operation of Law.*

By effluxion of time.

487. Termination by operation of law may take place by effluxion of the time which may be fixed for the continuance of the agency by the parties or by custom or usage of the particular trade or business (*q*). It is not necessary that the time for the continuance of the agency should be expressly stated. It may be presumed from the nature of the authority, as when a power of attorney recited the fact that the donor was about to go abroad it was held to be impliedly revoked on his return home (*r*).

By performance or impossibility of continuance.

488. The agency may also be terminated by the conclusion of the agency by performance (*s*) or by destruction of the subject-matter or determination of the business where there is no express or implied undertaking to continue it (*t*), or by the happening of an event rendering its continuance unlawful (*a*).

Performance.

On completion of the agency by performance the agent is *functus officio*, and has no further authority to bind the principal (*b*).

Termination of principal's business.

With regard to the determination of the principal's business, where an agency has been created for a fixed time, the question whether the agent is entitled to claim damages as for wrongful revocation of the agency depends upon whether there was any obligation, express or implied, on the part of the principal to continue the employment to the end of the agreed period. This can only be determined from the circumstances of each particular case (*c*). If there was such an obligation, liability will not be escaped by the voluntary winding up of a company (*d*), or the dissolution of a partnership firm (*e*), constituting the principal; but

(*p*) *Hochster* v. *De la Tour* (1853), 2 E. & B. 678; *Bulfe* v. *West* (1853), 13 C. B. 466; *Elsee* v. *Gatward* (1793), 5 Term Rep. 143.

(*q*) *Dickinson* v. *Lilwall* (1815), 4 Camp. 279 (by custom a broker's authority expires with the day); *Seton* v. *Slade* (1802), 7 Ves. 265.

(*r*) *Danby* v. *Coutts* (1885), 29 Ch. D. 500; *Lawford* v. *Harris* (1896), 12 T. L. R. 275 (as to stockbroker's authority).

(*s*) *Bell* v. *Balls*, [1897] 1 Ch. 663 (the performance of the particular duty ends the authority, as where an auctioneer sold a week after the auction he was held to have no authority).

(*t*) *Rhodes* v. *Forwood* (1876), 1 App. Cas. 256; *Tasker* v. *Shepherd* (1861), 6 H. & N. 575; *Northey* v. *Trevillion* (1902), 18 T. L. R. 648.

(*a*) *Esposito* v. *Bowden* (1857), 7 E. & B. 763 (where the outbreak of war avoided a charterparty).

(*b*) *Blackburn* v. *Scholes* (1810), 2 Camp. 341, *per* Lord ELLENBOROUGH at p. 343; *Macbeath* v. *Ellis* (1828), 4 Bing. 578; *Gillow* v. *Aberdare* (1892), 9 T. L. R. 12; *Seton* v. *Slade*, *supra*, at p. 276; *Bell* v. *Balls*, *supra*; and see *Butler* v. *Knight* (1867), L. R. 2 Exch. 109, and *R.* v. *Justices of Leitrim*, [1900] 2 Ir. R. 397.

(*c*) *Hamlyn* v. *Wood*, [1891] 2 Q. B. 488; *McIntyre* v. *Belcher* (1863), 14 C. B. (N. S.) 654; *Turner* v. *Goldsmith*, [1891] 1 Q. B. 544.

(*d*) *Re Patent Floor Cloth Co., Dean and Gilbert's Claim* (1872), 26 L. T. 467; *Re Imperial Wine Co., Shirreff's Case* (1872), L. R. 14 Eq. 417; *Re London and Scottish Bank, Ex parte Logan* (1870), L. R. 9 Eq. 149; *Re English and Scottish Marine Insurance Co., Ex parte Maclure* (1870), 5 Ch. App. 737.

(*e*) *Rhodes* v. *Forwood*, *supra* (agreement as agent for sale of coals for fixed time implied no undertaking to pay damages on sale of the colliery); *Stirling*

if there was no such obligation, then the winding up of a company or dissolution of a partnership firm constituting the principal will put an end to the contract of agency (*f*), unless (in the case of a partnership) the contract was not of a personal character (*g*). An undertaking to continue the agent's employment will not, as a general rule, be presumed (*h*).

Where there is an agreement for a fixed period, it is not dissolved by the principal discontinuing the business on the ground of its unprofitable character (*i*), nor in consequence of the principal ceasing to carry on business under agreement with competitors (*j*).

Death, lunacy etc. of principal.

489. Except as stated above with regard to irrevocable authorities (*k*), a contract of agency is determined by the principal's death (*l*), lunacy or unsoundness of mind (*m*). The representatives of a deceased principal may, however, ratify a contract made by the agent subsequent to his death if they think fit, though, in the absence of a ratification, they are not bound by it (*n*). And as regards any power of attorney given after December 31st, 1881, under which any person makes any payment or does any act in good faith, such person is not liable by reason that, unknown to him, before the payment or act, the donor of the power had died, become lunatic, of unsound mind, or bankrupt, or revoked the power, but the same remedy is available against the payee of any money so paid as would have been available against the payer had the payment not been made by him (*o*).

The lunacy of a principal determines the agency as between the principal and agent, but is not *per se* a revocation (*p*) with regard to a third person dealing with the agent without knowledge of the lunacy (*q*).

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v. *Maitland* (1864), 5 B. & S. 840 (the dissolution of an insurance company dissolved the agency agreement); *Northey* v. *Trevillion* (1902), 7 Com. Cas. 201.

(*f*) *Tasker* v. *Shepherd* (1861), 6 H. & N. 575; *Salton* v. *New Beeston Cycle Co.*, [1900] 1 Ch. 43; *Friend* v. *Young*, [1897] 2 Ch. 421.

(*g*) *Phillips* v. *Alhambra Palace Co.*, [1901] 1 K. B. 59.

(*h*) See cases cited in note (*e*), p. 232, *ante*.

(*i*) *Nielans* v. *Cuthbertson* (1891), 7 T. L. R. 516.

(*j*) *Ogdens, Ltd.* v. *Nelson*, [1905] A. C. 109.

(*k*) See p. 228, *ante*.

(*l*) *Blades* v. *Free* (1829), 9 B. & C. 167 (death of husband determining the implied authority of wife to bind his estate for necessaries); *Lepard* v. *Vernon* (1813), 2 Ves. & B. 51; *Wallace* v. *Cook* (1804), 5 Esp. 118; *Whitehead* v. *Lord* (1852), 7 Exch. 691; *Pool* v. *Pool* (1889), 61 L. T. 401; *Farrow* v. *Wilson* (1869), L. R. 4 C. P. 744; *Campanari* v. *Woodburn* (1854), 15 C. B. 400; *Houstoun* v. *Robertson* (1816), 6 Taunt. 448; *Cottle* v. *Aldrich* (1815), 4 M. & S. 175; *Phillips* v. *Jones* (1888), 4 T. L. R. 401; *Re Overweg, Haas* v. *Durant*, [1900] 1 Ch. 209; *Graham* v. *Jackson* (1845), 6 Q. B. 811; *Bailey* v. *Collett* (1854), 18 Beav. 179; *Goodson* v. *Alexander* (1837), 1 Jur. 37; *Watson* v. *King* (1815), 1 Stark. 121 (even if the authority is coupled with an interest); but see *Spooner* v. *Sandilands* (1842), 1 Y. & C. Ch. 390; and see *Carter* v. *White* (1883), 25 Ch. D. 666 (distinction between authority and contract).

(*m*) *Drew* v. *Nunn* (1879), 4 Q. B. D. 661. But a lunatic's estate may be liable for necessaries. See *Re Weaver* (1882) 21 Ch. D. 615.

(*n*) *Foster* v. *Bates* (1843), 12 M. & W. 226; *Campanari* v. *Woodburn*, *supra*.

(*o*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 47.

(*p*) *Ex parte Bradbury, Re Walden* (1839), Mont. & C. 625; *Duke of Beaufort* v. *Glynn* (1855), 1 Jur. 888.

(*q*) *Drew* v. *Nunn*, *supra*; *Platt* v. *Depree* (1893), 9 T. L. R. 194. The principal excused the representatives of the purchaser, who had become insane; agent held entitled to commission.

SECT. 4. Termination by Operation of Law.

490. The death or, apparently, the insanity of an agent determines the agency, which rests on personal relationship (*r*). A joint agency is determined by the death of any one of the joint agents (*r*).

Death or insanity of agent.

Bankruptcy of principal.

491. Except as stated above (*s*) with regard to irrevocable authorities, the authority of an agent is, as a general rule, determined by the bankruptcy of the principal (*t*).

But mere formal acts in completion of a transaction already binding on the principal may be performed by the agent under his authority after the principal's bankruptcy (*u*), and any *bonâ fide* transaction of the agent under his authority before the date of the receiving order, and without notice of any available act of bankruptcy, is a valid transaction, and for that purpose the authority may be treated as still existing (*a*).

Solicitor acting for bankrupt principal.

Most of the cases arising under the latter exception relate to the authority of solicitors. Where a solicitor, even after an act of bankruptcy by his principal of which he has notice, receives authority from the principal to act for him, and payment therefor, for the express purpose of opposing bankruptcy proceedings, the authority is not terminated as from the act of bankruptcy (and payment is not recoverable by the principal's trustee in bankruptcy) upon the principal being adjudicated bankrupt within three months from the act of bankruptcy (*b*). But this rule will not be extended so as to prevent the termination, as from the act of bankruptcy, of the authority of a solicitor who has notice of an act of bankruptcy, where his authority relates to other acts than resisting bankruptcy proceedings (*c*). Where, however, authority is given before the act of bankruptcy, and a lump sum paid to include all services, then, though some of such services may be rendered after the act of bankruptcy, the authority is not terminated (*d*).

Where an act of the agent itself constitutes the act of bankruptcy, such act is not avoided by the bankruptcy, for the bankruptcy only relates back to the completion of the act, and the authority is therefore not determined until completion (*e*).

(*r*) *Friend* v. *Young*, [1897] 2 Ch. 421; *Pool* v. *Pool* (1889), 58 L. J. (P.) 67.

(*s*) See p. 228, *ante*.

(*t*) *Dawson* v. *Sexton* (1823), 1 L. J. (O. S.) (CH.) 185. See title BANKRUPTCY AND INSOLVENCY.

(*u*) *Dixon* v. *Ewart* (1817), Buck, 94; *Markwick* v. *Hardingham* (1880), 15 Ch. D. 339.

(*a*) *Ex parte M'Donnell* (1819), Buck, 399; *Ex parte Snowball, Re Douglas* (1872), 7 Ch. App. 534; Bankruptcy Act 1883 (46 & 47 Vict. c. 52), s. 49; *Re Oriental Bank Corporation, Ex parte Guillemin* (1884), 28 Ch. D. 634. The same rule applies in the winding up of a company where the company's agent has no notice of winding up proceedings.

(*b*) Apparently on the ground of public policy (*Re Sinclair, Ex parte Payne* (1885), 16 Q. B. D. 616).

(*c*) *Re Pollitt, Ex parte Minor*, [1893] 1 Q. B. 455; *Re Whitlock and Jackson, Ex parte the Official Receiver* (1893), 63 L. J. (Q. B.) 245; *Re Beyts and Craig, Ex parte the Trustee* (1894), 70 L. T. 561; *Re Mander, Ex parte the Official Receiver* (1892), 66 L. T. 234.

(*d*) *Re Charlwood, Ex parte Masters*, [1894] 1 Q. B. 643; and see *Re Whitlock and Jackson, supra*.

(*e*) *Ex parte Helder, Re Lewis* (1883), 24 Ch. D. 339.

SECT. 4. Termination by Operation of Law.

If the agent has a right of lien on goods of the principal or their proceeds, such right is not affected by the principal's bankruptcy (*f*).

Mutual credits.

If there have been mutual credits or dealings between the principal and agent, the agent is entitled to a right of set-off against all moneys of the principal received before the date of the receiving order and without notice of the act of bankruptcy (*g*).

Liability of agent acting after bankruptcy.

Subject to the above rules and to what is stated above as to irrevocable authorities (*h*), an agent who continues to act after he has had notice that his principal has committed an act of bankruptcy takes the risk of being held personally liable, if adjudication follows on a petition presented within three months of such act of bankruptcy (*i*).

So a trustee in bankruptcy has a right of action against an agent who, with notice of an act of bankruptcy by his principal, sells his principal's goods and pays the proceeds to the principal (*k*).

Bankruptcy of agent.

492. The bankruptcy of an agent determines the agency (*l*), except where the act which he is authorised to do is merely a formal one (*m*), or where the bankruptcy does not make him less fit and competent for the proper performance of his duties (*n*). Whether it does so or not depends on the nature of his duties and terms of his appointment (*n*).

Onus of proving notice of bankruptcy.

493. The onus of proving want of notice of an act of bankruptcy rests on the person relying thereon (*o*).

SECT. 5.—*Notice of Termination, when necessary.*

Where third person led to believe in authority.

494. The cases in which notice of termination has been held to be necessary are all cases in which a third person had been induced to believe through the act of the principal that the agent had authority, and therefore depend on the principle of estoppel (*p*). The belief may have been induced through the principal giving the agent express authority to do certain acts (*q*), or through his having

(*f*) *Drinkwater* v. *Goodwin* (1775), Cowp. 251.

(*g*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 38; *Elliott* v. *Turquand* (1881), 7 App. Cas. 79; and *Palmer* v. *Day*, [1895] 2 Q. B. 618 (as to what constitutes mutual credits). The rule does not apply to the case of a sum paid to an agent for a specific purpose (*Re Pollitt, Ex parte Minor*, [1893] 1 Q. B. 455). For meaning of mutual credits within sect. 171 of the Bankruptcy Act, 1849 (12 & 13 Vict. c. 106), see *Young* v. *Bank of Bengal* (1836), 1 Moo. P. C. C. 150; *Naoroji* v. *Chartered Bank of India* (1868), L. R. 3 C. P. 444; and *Astley* v. *Gurney* (1869), L. R. 4 C. P. 714.

(*h*) See p. 228, *ante*.

(*i*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 43; *Kynaston* v. *Crouch* (1845), 14 M. & W. 266; *Re Lamb, Ex parte Gibson* (1886), 55 L. T. 817.

(*k*) *King* v. *Leith* (1787), 2 Term Rep. 141.

(*l*) *Parker* v. *Smith* (1812), 16 East, 382.

(*m*) *Dixon* v. *Ewart* (1817), 3 Mer. 322.

(*n*) *McCall* v. *Australian Meat Co.* (1870), 19 W. R. 188; *Hudson* v. *Granger* (1821), 5 B. & A. 27; *Phelps* v. *Lyle* (1839), 10 A. & E. 113.

(*o*) *Pearson* v. *Graham* (1837), 6 A. & E.

(*p*) *Trueman* v. *Loder* (1840), 11 A. & E. 589; *Scarf* v. *Jardine* (1882), 7 App. Cas. 345, at p. 349.

(*q*) —— v. *Harrison* (1699), 12 Mod. Rep. 346; *Curlewis* v. *Birkbeck* (1863), 3 F. & F. 894; *Pole* v. *Leask* (1864), 33 L. J. (CH.) 155.

SECT. 5. **Notice of Termination, when necessary.**

ratified the agent's acts (*r*). In such cases, in the absence of actual notice, or of constructive notice by lapse of time or other indications (*s*), the principal will remain liable to those dealing in good faith with the agent on the assumption that his authority still continues (*a*).

Where notice unnecessary.

A mere implied agency, however, may be determined without the necessity of communicating such determination (*b*), and in the case of termination by the death (*c*) or bankruptcy of the principal it is not necessary that third persons should have notice of the termination, even where the agent has been held out as having authority (*d*).

(*r*) *Ryan* v. *Sams* (1848), 12 Q. B. 460.
(*s*) *Staveley* v. *Uzielli* (1860), 2 F. & F. 30; *Aste* v. *Montaque* (1858), 1 F. & F. 264; *Marsden* v. *City and County Assurance Co.* (1865), L. R. 1 C. P. 232.
(*a*) *Trueman* v. *Loder* (1840), 11 A. & E. 589.
(*b*) *Debenham* v. *Mellon* (1880), 6 App. Cas. 24.
(*c*) *Blades* v. *Free* (1829), 9 B. & C. 167. See, however, *Drew* v. *Nunn* (1879), 4 Q. B. D. 661.
(*d*) Notice of an available act of bankruptcy is, however, necessary, in order to terminate the principal's authority prior to the date of the receiving order (Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), ss. 43, 49).

AGISTMENT.

See ANIMALS.

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Part I.—Definitions.

495. An agricultural holding is, for the purposes of the Agricultural Holdings Acts, 1883 to 1906 (*a*), a holding which is either wholly agricultural or wholly pastoral, or in part agricultural and as to the residue pastoral, or in whole or in part cultivated as a market garden (*b*), and is let or agreed to be let for a term of years, or for lives, or for lives and years, or from year to year (*c*), and not let to a tenant during his continuance in any office, appointment, or employment held under the landlord (*b*). Meaning of "agricultural holding."

A market garden, for the purposes of the Acts, means a holding or that part of a holding (*d*) which is cultivated wholly or mainly for the purpose of the trade or business of market gardening (*e*). Meaning of "market garden."

Special incidents attach in several particulars to a holding to which the Agricultural Holdings Acts apply, and the expressions

(*a*) These Acts are the Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61); the Tenants' Compensation Act, 1890 (53 & 54 Vict. c. 57); the Market Gardeners' Compensation Act, 1895 (58 & 59 Vict. c. 27); the Agricultural Holdings Act, 1900 (63 & 64 Vict. c. 50); and the Agricultural Holdings Act, 1906 (6 Edw. 7, c. 56), which comes into operation on January 1, 1909.

(*b*) Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61), s. 54.

(*c*) *Ibid.*, s. 61.

(*d*) *Cullander* v. *Smith* (1900), 37 Sc. L. R. 890.

(*e*) Market Gardeners' Compensation Act, 1895 (58 & 59 Vict. c. 27), s. 6; there is no definition of market gardening in the Acts. A farmer growing peas and potatoes in an open field as a fallow crop was held not to be a market gardener under the bankruptcy law then in force (5 & 6 Vict. c. 122, s. 10; *Re Hammond* (1844), De G. 93). Land covered with glass-houses for the purpose of growing fruit and vegetables for sale has been held to be a market garden or nursery ground for the purposes of assessment under the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 211 (1), (b).

PART I. Definitions.

"agricultural holding" and "market garden" are accordingly used exclusively in the following pages as denoting a holding to which those Acts apply.

Part II.—The Tenancy.

SECT. 1.—*Commencement of the Tenancy.*

Commencement and time of entry.

496. The commencement of an agricultural tenancy and the time or times of entry upon the holding are usually provided for by the express terms of the agreement or lease, but, if not so provided for, the dates of entry upon the various parts may be regulated by the custom of the country; for it is usual in various parts of the country for an agricultural tenant to enter upon part of the holding for certain purposes of husbandry before entering into occupation of the whole. The custom of many counties would direct, without any special words for the purpose, in a taking from Old Lady Day (April 5), that the arable should be entered upon at Candlemas to prepare it for the Lent corn, and the meadows not till May-day, when they are mostly shut up for hay (*f*). This is the case even where the agreement of tenancy is in writing (*g*).

Record of condition of holding at commencement of tenancy.

497. If, at the commencement of any tenancy of an agricultural holding entered into after January 1, 1909, the landlord or the tenant so requires, a record of the condition of the buildings, fences, gates, roads, drains, ditches, and cultivation of the holding must be made within three months of such commencement by a person to be appointed, in default of agreement, by the Board of Agriculture and Fisheries. The cost of making the record will, in the absence of an agreement to the contrary, be borne by the landlord and the tenant in equal proportions (*h*).

SECT. 2.—*Determination of the Tenancy.*

Different parts entered on at different times.

498. When a tenant enters upon different parts of the holding at different dates, he must at the end of his tenancy quit the various parts upon dates corresponding to the dates of entry upon the same respectively. The notice to quit the holding must expire on the day corresponding to the day of entry upon the substantial part of the premises (*i*). It is for the jury to determine what is the substantial part, and what the accessorial (*j*).

Notice to quit.

499. The length of the notice to quit necessary to determine a tenancy of indefinite duration may be fixed by agreement (*k*), or by

(*f*) *Doe* v. *Snowdon* (1778), 2 Wm. Bl. 1224.
(*g*) *Ibid.*
(*h*) Agricultural Holdings Act, 1906 (6 Edw. 7, c. 56), s. 7.
(*i*) *Doe* v. *Spence* (1805), 6 East, 120; *Doe* v. *Watkins* (1806), 7 East, 551; *Doe* v. *Hughes* (1840), 7 M. & W. 139.
For forms of notice to quit, see Encyclopædia of Forms, Vol. VII., pp. 743, 744.
(*j*) *Doe* v. *Howard* (1809), 11 East, 498.
(*k*) *Doe* v. *Baker* (1818), 8 Taunt. 241.
For form of agreement, to be indorsed on tenancy agreement, see Encyclopædia of Forms, Vol. VII., p. 745.

custom of the country (*l*). In the absence of agreement or custom reasonable notice to quit must be given either by the landlord or by the tenant (*m*).

Tenancy from year to year.

500. In the case of a tenancy from year to year this reasonable notice has for a long time been fixed at a half-year's notice expiring at the end of a year of the tenancy (*n*).

Since January 1, 1884, however (*o*), a year's notice expiring with a year of the tenancy is, in the absence of express agreement in writing to the contrary, necessary and sufficient to determine a tenancy from year to year of an agricultural holding—(1) when a yearly tenancy has been created by express contract without any stipulation as to notice; (2) when such tenancy is not created by express contract but is *implied by law*, as where a tenant is let into possession under a void lease and pays or agrees to pay any part of the annual rent thereby reserved (*p*), or where a tenant holds over after the expiration of his lease and pays or agrees to pay any subsequent rent at the previous rate (*q*), or attorns and pays rent to a mortgagee whose mortgage was subsisting at the time when the tenant became lessee of the mortgagor (*r*), or where a remainderman accepts rent reserved by a lease granted by a previous tenant for life (which became void on the death of the tenant for life by reason of his having exceeded his leasing powers), but does not confirm or establish such lease (*s*).

The provision making a year's notice necessary and sufficient does not extend to a case where the tenant is adjudged bankrupt, or has filed a petition for a composition or arrangement with his creditors (*o*).

Express agreement as to notice.

When there is an express agreement as to the length of notice, as for instance that a six months' notice should be given, the notice must be given in accordance with the agreement (*t*).

Service of notice.

501. The notice need not be served on the tenant personally, but may be left with his wife or servant (*a*). The statutory year's notice may be served on the person to whom it is to be given either personally, or by leaving it for him at his last known place of abode in England, or by sending it through the post in a registered letter addressed to him there (*b*).

(*l*) *Tyley* v. *Seed* (1696), Skin. 649; *R.* v. *Charnock* (1790), 1 Peake, N. P. C. 6.

(*m*) *Doe* v. *Spence* (1805), 6 East, 120.

(*n*) *Right* v. *Darby* (1786), 1 Term Rep. 159; *Doe* v. *Porter* (1789), 3 Term Rep. 13; *Doe* v. *Watts* (1797), 7 Term Rep. 83.

(*o*) Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61), ss. 33, 53.

(*p*) *Doe* v. *Amey* (1840), 12 A. & E. 476; *Doe* v. *Bell* (1793), 5 Term Rep. 471.

(*q*) *Bishop* v. *Howard* (1823), 2 B. & C. 100; *Hyatt* v. *Griffiths* (1851), 17 Q. B. 505.

(*r*) *Doe* v. *Bucknell* (1838), 8 C. & P. 566; *Doe* v. *Ongley* (1850), 10 C. B. 25.

(*s*) *Doe* v. *Watts* (1797), 7 Term Rep. 83.

(*t*) *Barlow* v. *Teal* (1885), 15 Q. B. D. 501; *Wilkinson* v. *Calvert* (1878), 3 C. P. D. 360.

(*a*) *Jones* v. *Marsh* (1791), 4 Term Rep. 464; *Doe* v. *Dunbar* (1826), Mood. & M. 10.

(*b*) *Van Grutten* v. *Trevenen*, [1902] 2 K. B. 82; which decided that sect. 28 of the Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61), applies to notices to quit under sect. 33 of that Act (see note (*o*), *supra*).

SECT. 2. Determination of Tenancy.

502. Notwithstanding that a due notice to quit the premises has expired, the tenant may by the custom of the country be entitled to retain possession of part of the premises for certain purposes, as for taking a way-going crop, storing crops etc., after the tenancy has determined (*c*).

Retaining possession of part of holding.

Where a tenant of an agricultural holding is entitled, either by the express terms of his contract of tenancy, or by the custom of the country, to retain possession of portions of the holding after the expiration of the original term for purposes of husbandry, the determination of the tenancy takes place for all purposes relating to compensation under the Agricultural Holdings Acts (*d*) when the last portion of the arable or pastoral part of the holding is quitted by the tenant, although possession is still retained by him of the house, barns etc. (*e*).

Notice to quit part of holding.

503. A notice to quit part only of demised premises is bad at common law (*f*). But in the case of an agricultural holding, where on a tenancy from year to year a notice to quit is given by the landlord with a view, as stated in the notice, to the use of land for any of the following purposes: the erection of farm labourers' cottages or other houses with or without gardens; the provision of gardens for existing farm labourers' cottages or other houses; the allotment for labourers of land for gardens or other purposes; the planting of trees; the opening or working of any coal, ironstone, limestone, or other mineral, or of a stone quarry, clay, sand, or gravel pit, or the construction of any works or buildings to be used in connection therewith; the obtaining of brick-earth, gravel, or sand; the making of a watercourse or reservoir; the making of any road, railway, tramroad, siding, canal, or basin, or any wharf, pier, or other work connected therewith; or the provision of small holdings, it is no objection to the notice that it relates to part only of the holding (*g*).

In every such case the provisions of the Agricultural Holdings Acts respecting compensation (*h*) apply as on determination of a tenancy in respect of an entire holding; and the tenant is also entitled to a proportionate reduction of rent in respect of the land comprised in the notice to quit, and in respect of any depreciation of the value to him of the residue of the holding caused by the withdrawal of that land from the holding or by the use to be made thereof, the amount of that reduction being ascertained by agreement or settled by a reference under the Acts, as in a case of compensation (but without appeal) (*g*).

The tenant is further entitled at any time within twenty-eight days after service of the notice to quit to serve on the landlord a notice in writing to the effect that he (the tenant) accepts the same as a notice to quit the entire holding, to take effect at the expiration

(*c*) *Griffiths* v. *Puleston* (1844), 13 M. & W. 358.

(*d*) See pp. 258 *et seq.*, *post*.

(*e*) *Re Paul* (1889), 24 Q. B. D. 247; *Black* v. *Clay*, [1894] A. C. 368 (decided on the Agricultural Holdings (Scotland) Act, 1883); *Morley* v. *Carter*, [1898] 1 Q. B. 8.

(*f*) *Right* v. *Cuthell* (1804), 5 East, 491; *Doe* v. *Archer* (1811), 14 East, 245.

(*g*) Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61), s. 41, as extended, after 1907, by the Small Holdings and Allotments Act, 1907 (7 Edw. 7, c. 54), s. 38.

(*h*) See p. 258, *post*.

of the then current year of tenancy; and the notice to quit will have effect accordingly (*i*).

The landlord's notice to quit part of the premises must be in writing (*k*).

SECT. 2. Determination of Tenancy.

Part III.—Covenants and Custom of the Country.

SECT. 1.—*Implied Covenants.*

504. There is no implied covenant or warranty on the part of the landlord that the land leased or let is reasonably fit for cultivation (*l*), or that no noxious plants are growing on the demised premises (*m*).

No warranty as to fitness of land.

505. The law implies an undertaking or covenant on the part of an agricultural tenant to cultivate the land in a husbandlike manner, unless there is a particular agreement dispensing with that engagement (*n*); and the bare relation of landlord and tenant is a sufficient consideration for the tenant's promise to cultivate the land in a good and husbandlike manner according to the custom of the country (*o*).

Cultivation in husbandlike manner.

Such an undertaking is, however, implied only where the relation of landlord and tenant actually exists, and for that reason neglect by an incumbent to cultivate glebe land in a husbandlike manner does not render him or his executors liable in an action by a succeeding incumbent, though he or they may be liable for leaving the buildings, hedges, and fences in a state of decay (*p*).

Beyond this undertaking there is no implied obligation on the part of a yearly tenant of farming premises to do any particular acts (*q*), such as to consume on the premises the hay and straw grown thereon (*r*) or to repair generally (*q*); or to refrain from doing anything which does not amount to voluntary waste.

506. The landlord of an agricultural holding or any person authorised by him may at all reasonable times enter on the holding, or any part of it, for the purpose of viewing the state of the holding (*s*).

Right of landlord to enter and view.

SECT. 2.—*Custom of the Country.*

SUB-SECT. 1.—*Proof.*

507. The custom of the country (*t*) does not imply an immemorial or universal usage, but only the prevalent usage of the neighbourhood

What is custom of the country.

(*i*) Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61), s. 41.
(*k*) See *Moyle* v. *Jenkins* (1881), 8 Q. B. D. 116; *Reg.* v. *Shurmer* (1886), 17 Q. B. D. 323.
(*l*) *Hart* v. *Windsor* (1843), 12 M. & W. 68.
(*m*) *Erskine* v. *Adeane* (1873), 8 Ch. App. 756.
(*n*) *Brown* v. *Crump* (1815), 1 Marsh. 569.
(*o*) *Powley* v. *Walker* (1793), 5 Term Rep. 373.
(*p*) *Bird* v. *Relph* (1833), 4 B. & Ad. 826; and see title ECCLESIASTICAL LAW, *post*.
(*q*) *Horsefall* v. *Mather* (1815), Holt, N. P. C. 7.
(*r*) *Gough* v. *Howard* (1801), Peak. Add. C. 197.
(*s*) Agricultural Holdings Act, 1900 (63 & 64 Vict. c. 50), s. 5.
(*t*) The custom of the country varies not only in each county, but often in

SECT. 2. Custom of Country.

where the land lies which has subsisted for a reasonable length of time (*u*).

How proved.

508. The custom of the country is the custom prevalent throughout the district, and is not proved by showing that it is the usage of a particular estate or of the property of a particular individual, however large; and such usage will not be imported into the terms of a tenancy where it is not shown that the tenant was aware of it (*v*). The custom is to be collected, not from what witnesses say they think the custom is, but from what is publicly done throughout the district (*a*). It must be proved by the party alleging it; thus a custom to retain part of the holding or to take way-going crops etc., must be proved by the tenant; and in the absence of proof of such custom the tenant must give up possession of land and crops at the termination of the tenancy (*b*).

509. Evidence showing that a holding has been managed in accordance with the custom of the country is proof that it has been treated in a good and husbandlike manner (*c*).

SUB-SECT. 2.—*Applicability.*

510. A custom of the country, when once proved, is applicable to every agricultural tenancy in the district however created, whether by parol or by writing, unless excluded by the terms of the agreement itself (*d*). It is a contract which the law raises in the absence of any particular contract between the parties (*e*).

SUB-SECT. 3.—*Reasonableness.*

Reasonableness a question of law.

511. A custom of the country must be reasonable, otherwise it is void (*f*); and the reasonableness or unreasonableness of the custom is a question of law for the Court, and not of fact for the jury (*g*).

The following customs have been expressly held to be reasonable: that the tenant should have the way-going crop after the expiration

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different parts of the same county. Thus there is a great body of agricultural customs of which it is impossible to give an exhaustive or exact list, as no authority exists to determine generally what is the custom in each district, and new customs arise from time to time as the mode of agriculture changes. It is beyond the scope of this work to detail all the customs that have been ascertained to exist, but a comprehensive list of the more important customs prevailing in the different counties will be found in Brooke Little's Agricultural Holdings, pp. 210—231; Bund's Agricultural Holdings, 3rd ed. pp. 106—153; Dixon's Law of the Farm, 6th ed. pp. 710—747.

(*u*) *Legh* v. *Hewitt* (1803), 4 East, 154; *Dalby* v. *Hirst* (1819), 1 Br. & B. 224; *Tucker* v. *Linger* (1882), 21 Ch. D. 18; (1883) 8 App. Cas. 508; *Dashwood* v. *Magniac*, [1891] 3 Ch. at p. 324.

(*v*) *Womersley* v. *Dally* (1857), 26 L. J. (EX.) 219.

(*a*) *Tucker* v. *Linger*, *supra*, *per* JESSEL, M.R.

(*b*) *Caldecott* v. *Smythies* (1837), 7 C. & P. 808.

(*c*) *Legh* v. *Hewitt*, *supra*, *per* Lord ELLENBOROUGH.

(*d*) *Wilkins* v. *Wood* (1848), 17 L. J. (Q. B.) 319; *Wigglesworth* v. *Dallison* (1779), 1 Doug. 200; *Senior* v. *Armytage* (1816), Holt, N. P. C. 197, as explained in *Hutton* v. *Warren* (1836), 1 M. & W. 466.

(*e*) *Boraston* v. *Green* (1812), 16 East, 71.

(*f*) *Bradburn* v. *Foley* (1878), 3 C. P. D. 129.

(*g*) *Tyson* v. *Smith* (1838), 9 A. & E. 406, at p. 421,

of the term of tenancy (*h*), and crop one-third of the arable for that purpose (*i*); that on a taking from old Lady Day (April 5) the tenant should enter upon the arable at Candlemas to prepare for the Lent corn (*k*); that a tenant should be entitled to a portion of the expenses of draining the land, though the drainage be done without the landlord's consent or knowledge (*l*); that if there be no incoming tenant the landlord should pay to the outgoing tenant the valuation for fallows, dressings etc. (*m*); that a tenant should provide work and labour, tillage and sowing, and all materials for cultivation in his way-going year, and that the landlord should make him compensation for the same (*n*); that the tenant should collect flints turned up in the ordinary course of good husbandry and sell them for his own benefit, notwithstanding a reservation in the lease of minerals to the landlord (*o*); that the landlord should deduct rent in arrear from the valuation payable to the out-going tenant (*p*).

SUB-SECT. 4.—*Exclusion of Custom.*

Lease inconsistent with custom.

512. Where the terms of a lease as to quitting a holding are inconsistent with the custom of the country, the custom is excluded; thus a custom for an allowance from the incoming tenant for *foldage* (a mode of manuring) was excluded by the terms of a lease which provided for the tenant keeping a flock of sheep on the farm and in the last year of the term carrying out the manure on to the fallows, the landlord paying on the quitting of the farm for fallowing the land and the cartage of dung, but nothing for the dung itself (*q*); and a provision in a lease that the tenant shall leave the manure in the fold to be expended by the landlord or incoming tenant, without mentioning any payment for it, excludes a custom for the outgoing tenant to leave the manure and be paid for it (*r*).

Inconsistency must be complete.

513. Where, however, the lease contains no stipulations as to the mode of *quitting*, the outgoing tenant is entitled to his way-going crop according to the custom of the country, even though the terms of the *holding* may be inconsistent with such a custom (*s*).

A stipulation in a lease that the tenant will consume three-fourths of the hay and straw on the farm and spread the manure arising therefrom, and leave what is not spread for the use of the landlord on receiving a reasonable price for it, does not exclude a custom of the country by which the tenant is entitled on quitting to receive

(*h*) *Wigglesworth* v. *Dallison* (1779), 1 Doug. 200.
(*i*) *Griffiths* v. *Tombs* (1833), 7 C. & P. 810; *Caldecott* v. *Smythies* (1837), 7 C. & P. 808.
(*k*) *Doe* v. *Snowdon* (1778), 2 W. Bl. 1224.
(*l*) *Mousley* v. *Ludlam* (1851), 21 L. J. (Q. B.) 64.
(*m*) *Dalby* v. *Hirst* (1819), 1 Br. & B. 224; *Faviell* v. *Gaskoin* (1852), 7 Exch. 273.
(*n*) *Senior* v. *Armytage* (1816), Holt, N. P. C. 197.
(*o*) *Tucker* v. *Linger* (1883), 8 App. Cas. 508.
(*p*) *Re Wilson, Ex parte Lord Hastings* (1893), 62 L. J. (Q. B.) 628.
(*q*) *Webb* v. *Plummer* (1819), 2 B. & Ald. 746.
(*r*) *Roberts* v. *Barker* (1833), 1 C. & M. 808.
(*s*) *Holding* v. *Pigott* (1831), 7 Bing. 465; see also *Martin* v. *Coulman* (1834), 4 L. J. (K. B.) 37; *Constable* v. *Cranswick* (1899), 80 L. T. 164.

SECT. 2. Custom of Country.

from the landlord or incoming tenant a reasonable allowance for seeds and labour on the arable during the last year of tenancy, and is bound to leave the manure for the landlord if he will purchase it (*t*).

SUB-SECT. 5.—*Covenant to Cultivate according to Custom.*

What amounts to breach of the covenant.

514. Conversion of part of a farm, consisting of arable and pasture land, into a market garden, and the erection of glass-houses etc. thereon, is not a breach of a covenant to cultivate the farm "in a good, proper, and husbandlike manner according to the best rules of husbandry practised in the neighbourhood" (*a*). On the other hand, such a covenant, or the ordinary obligation to cultivate in a husbandlike manner according to the custom of the country, is broken by tilling half a farm, when it is proved that no other farmers in the neighbourhood till more than one-third, and some even less (*b*).

SECT. 3.—*Liability to Outgoing Tenant for Tillages etc.*

Devolution of liability.

515. Where there is a custom for the landlord to pay an outgoing tenant for tillages etc., the liability to make such payment attaches to the lessor's interest in the land, and devolves upon the person who, when the payment becomes due, is then in receipt, or entitled to receipt, of the rent. Thus the devisee of the original landlord being in possession is liable, notwithstanding that a long term of years has been created in the land and vested in trustees (*c*); also executors of a termor in the land who has sub-leased (*d*); and assignees of the reversion are liable, although the original landlord received the rent due to the end of the tenancy, and gave the notice to quit, which was merely renewed and confirmed by the assignees (*e*).

Vendor and purchaser.

516. A vendor who, after the contract for sale but before completion, pays the outgoing tenant's valuation is entitled, in the absence of a stipulation to the contrary, to be reimbursed by the purchaser (*f*).

Incoming tenant.

517. An alleged custom that the outgoing tenant should look to the incoming tenant, to the exclusion of the landlord's liability, for payment for seeds, tillages etc., is unreasonable, and cannot be supported (*g*); but the incoming tenant may become liable to the outgoing tenant by express or tacit contract (*h*).

An agreement between the outgoing and incoming tenants with respect to payment for tillages or crops does not, however, affect

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(*t*) *Hutton* v. *Warren* (1836), 1 M. & W. 466.
(*a*) *Meux* v. *Cobley*, [1892] 2 Ch. 253.
(*b*) *Legh* v. *Hewitt* (1803) 4 East, 154.
(*c*) *Mansel* v. *Norton* (1883), 22 Ch. D. 769.
(*d*) *Faviell* v. *Gaskoin* (1852), 7 Exch. 273.
(*e*) *Womersley* v. *Dally* (1857), 26 L. J. (EX.) 219.
(*f*) *Bennett* v. *Stone*, [1902] 1 Ch. 226.
(*g*) *Bradburn* v. *Foley* (1878), 3 C. P. D. 129.
(*h*) *Ibid.*; *Codd* v. *Brown* (1867), 15 L. T. 536; *Stafford* v. *Gardner* (1872), L. R. 7 Q. P. 242; and see *Sucksmith* v. *Wilson* (1866), 4 F. & F. 1083.

SECT. 3. Liability to Outgoing Tenant.

any existing rights of the landlord (*i*), or deprive him of his right to be paid rent due out of the valuation payable by the incoming tenant (*k*).

And there may be a custom of the country for the landlord to have a right to deduct the outgoing tenant's rent in arrear from the valuation due to him as outgoing tenant, which will be operative even when the outgoing tenant is bankrupt (*l*).

How right to payment lost.

518. A tenant is not liable to be paid for tillages etc., if he quits the holding before the due determination of the tenancy (*m*); but if a lease for a term of years is determinable by notice at the expiry of a lesser period, the tenant's rights are preserved on his quitting after due notice at the earlier date (*n*).

SECT. 4.—*Way-going Crops.*

Entry to take way-going crops.

519. A clause in a lease entitling the tenant to take a way-going crop does not entitle the tenant to retain possession of any part of the land against the landlord after the determination of the tenancy, but imports a licence to the tenant to enter the land for the purpose of taking the crop (*o*).

But where the tenant is entitled by custom to the way-going crop and is bound to repair fences, he may be entitled also to actual possession of the land on which the crop is growing until the crop is carried away (*p*).

Trover or trespass will not lie by the landlord or incoming tenant against the outgoing tenant for taking a way-going crop according to the custom of the country, even though the outgoing tenant has committed a breach of covenant in cropping too much of the land and not manuring it (*q*).

Exclusion of custom.

520. Where a Lady Day tenancy is prematurely determined by a judicial proceeding, such as the award of an arbitrator, the custom that the tenant should have a way-going crop has no operation (*r*).

SECT. 5.—*Hay and Straw Covenants.*

Covenant to consume.

521. A lease containing a covenant to consume all hay, straw and clover grown on the farm, and to use the manure on the farm, but silent as to hay etc. unconsumed on quitting, is not inconsistent with a custom that the tenant shall be paid for all hay etc. left unconsumed on his quitting. Such a covenant means only that

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(*i*) *Petrie* v. *Daniel* (1804), 1 Smith, 199.
(*k*) *Stafford* v. *Gardner* (1872), L. R. 7 C. P. 242.
(*l*) *Re Wilson, Ex parte Lord Hastings* (1893), 62 L. J. (Q. B.) 628.
(*m*) *Whittaker* v. *Barker* (1832), 1 C. & M. 113; *England* v. *Shearburn* (1884), 52 L. T. 22; see also *Breadalbane (Marquis)* v. *Stewart*, [1904] A. C. 217.
(*n*) *Bevan* v. *Chambers* (1896), 12 T. L. R. 417.
(*o*) *Strickland* v. *Maxwell* (1834), 2 C. & M. 539; *Wight* v. *Earl of Hopetoun* (1864), 4 Macq. 729.
(*p*) *Griffiths* v. *Puleston* (1844), 13 M. & W. 358.
(*q*) *Boraston* v. *Green* (1812), 16 East, 71; and see *Griffiths* v. *Tombs* (1833), 7 C. & P. 810, where, however, the over-cropping was on parol permission from the landlord.
(*r*) *Thorpe* v. *Eyre* (1834), 1 A. & E. 926.

SECT 5. **Hay and Straw Covenants.**

the tenant will not remove any hay etc. from the farm; it does not compel the tenant to cause it to be all consumed during the tenancy (*s*).

Covenant not to sell or remove.

522. A covenant by the tenant to pay an additional rent if hay straw, or other dry fodder should be sold and taken off the farm is enforceable by the landlord if hay, even though damaged and unfit for food, has been taken off by the tenant (*t*).

A covenant by the tenant not to sell or remove from the premises during the last year of the term any of the hay, straw, and fodder which shall arise and grow thereon, prohibits him from selling or removing during the last year any hay, straw etc. grown in previous years (*a*).

A covenant by a tenant not to sell any hay or straw etc. off the farm under penalty of additional rent is broken by a sale of straw off the farm by the tenant after the determination of the tenancy (*b*). An absolute covenant to consume hay and straw on the farm, being equivalent to a negative covenant not to remove it, may be enforced by injunction (*c*).

Where a tenant bound by covenant to consume the hay on the farm, or to bring in manure, has sold, on quitting, a rick of hay without informing the purchaser of the obligation to bring in manure, and the hay is injured owing to delay in performing the covenant to bring in manure, the purchaser is entitled to refuse to take it, and the vendor cannot recover the price of the hay (*d*).

Where a clause in a farming agreement provides that no hay or straw shall be sold off the holding, except the "value" of the hay etc. so sold off is returned in manure on the land, it is not clear whether the tenant, having sold the hay or straw, is bound only to return as much manure as the straw would have produced, or to return in manure the price or market value of the straw (*e*).

Where the tenant is entitled to be paid by the landlord or incoming tenant at "a fair price" for the hay, straw etc. left on the farm, but not for the manure, he is entitled only to a fodder or consuming price of the hay and straw, not to the market price (*f*). And where he is entitled to be paid for the hay, straw, and manure left on the farm "at a fair valuation," the valuer is not necessarily bound to value the same either at the market or the consuming price, it being a matter of evidence what is a "fair valuation" (*g*).

SECT. 6.—*Manuring and other Covenants.*

Covenant to leave manure on farm, and sell to incoming tenant.

523. A covenant by a tenant with his landlord to leave the manure made by him on the farm and to sell it to the incoming tenant at a valuation, gives the tenant a right of on-stand on the farm for the

(*s*) *Muncey* v. *Dennis* (1856), 1 H. & N. 216.
(*t*) *Fielden* v. *Tattersall* (1863), 7 L. T. 718.
(*a*) *Gale* v. *Bates* (1864), 3 H. & C. 84.
(*b*) *Massey* v. *Goodall* (1851), 17 Q. B. 310.
(*c*) *Crosse* v. *Duckers* (1873), 27 L. T. 816.
(*d*) *Smith* v. *Chance* (1819), 2 B. & Ald. 753.
(*e*) *Lowndes* v. *Fountain* (1855), 11 Exch. 487.
(*f*) *Clarke* v. *Westrope* (1856), 18 C. B. 765.
(*g*) *Cumberland* v. *Bowes* (1854), 15 C. B. 348.

manure until sold to an incoming tenant, and trespass lies against an incoming tenant if he remove and use the manure before the valuation (*h*).

A covenant by a tenant to manure with two sufficient sets of muck within the space of six of the last years of the term, the last set to be laid within three years of the expiration of the term, is satisfied by laying both sets within the last three years of the term (*i*).

Covenant to manure twice in last six years.

The condition of a bond that the tenant would not sell or convey away any dung, compost, or manure from the farm is broken by the removal of manure made by cattle purchased from the tenant and allowed to remain on the farm and fed by the purchaser with provender from his own farm (*k*). It is no answer to a breach of covenant not to remove manure unless on payment of an additional rent, that the tenant brought upon the premises a quantity of manure larger and better in quality than that carried away (*l*).

Covenant not to remove manure.

524. A covenant by a tenant that he will consume on the farm all the turnips etc., but that if he shall take or sell off any part thereof, which he is at liberty to do, then for every ton sold he shall bring back and spread a certain quantity of manure, is an alternative covenant, and in order to make the tenant liable for a breach of it, both failure to consume and failure to bring back manure must be proved (*m*).

Alternative covenant.

525. A covenant not to sow with more than two grain crops during four years applies to any four years of the term however taken, and not to each successive four years from the commencement (*n*). A covenant to cultivate on the four-course system according to the custom of the country means cultivating in that manner only so far as is obligatory by the custom (*o*).

Cropping covenants.

Under a covenant by the tenant to permit the landlord to enter on such part of the land as in the last year of the term shall be sown with barley or oats, and to sow clover therewith, the tenant is not bound to inform the landlord of an intention to sow barley or oats (*p*).

SECT. 7.—*Additional Rents, Penalties etc.*

526. It is common in agricultural leases for the tenant to covenant not to do certain acts, with a stipulation that if he do them he will pay an additional rent, or a sum of money. There are many decisions on the form of such covenants and stipulations, some turning upon matters of pleading, as whether the plaintiff should declare upon the breach of covenant not to do the particular act, or upon the breach of the stipulation to pay the additional rent (*q*); and some upon the question whether the additional rent or penal sum was

Enforcement of stipulation.

(*h*) *Beaty* v. *Gibbons* (1812), 16 East, 116.
(*i*) *Pownall* v. *Moores* (1822), 5 B. & Ald. 416.
(*k*) *Hindle* v. *Pollitt* (1840), 6 M. & W. 529.
(*l*) *Legh* v. *Lillie* (1860), 6 H. & N. 165.
(*m*) *Richards* v. *Bluck* (1848), 6 C. B. 437.
(*n*) *Fleming* v. *Snook* (1842), 5 Beav. 250.
(*o*) *Newson* v. *Smythies* (1859), 1 F. & F. 477.
(*p*) *Hughes* v. *Richman* (1774), 1 Cowp. 125.
(*q*) See *Hurst* v. *Hurst* (1849), 4 Exch. 571; *Legh* v. *Lillie*, *supra*.

SECT. 7. Additional Rents, Penalties etc.

payable by way of penalty or liquidated damages (*r*); the general rule in these last-mentioned cases being that when the tenant covenants not to do an act, such as ploughing pasture etc., and to pay an additional rent if he do it, the additional rent will be considered as liquidated damages (*r*); but that if, besides payment of the additional rent, the tenant's interest may be forfeited, the additional rent will be considered as a penalty (*s*), and only the damage actually suffered will be recoverable. Where the same sum is made payable on non-observance of two stipulations of varying degrees of importance, the sum will be treated as a penalty and not liquidated damages (*t*). Where a sum is proportionate to the extent of the non-observance of the stipulation, it is *primâ facie* liquidated damages and not a penalty (*u*). Where the negative covenant is absolute and distinct from the stipulation to pay the additional rent or penalty, the tenant will be restrained by injunction from committing the act on payment of such rent or penalty (*a*). The right to additional rent reserved in case of breaking up meadow or permanent pasture is not waived by the landlord accepting the ordinary rent with knowledge of the acts of breaking up (*b*).

Penal rents not to give more than actual damage.

527. In respect of an agricultural holding, however, notwithstanding any provision in a contract of tenancy making the tenant liable to pay a higher rent or other liquidated damages in the event of any breach or non-fulfilment of a covenant or condition, a landlord is not entitled to recover, by distress or otherwise, any sum in consequence of any breach or non-fulfilment of any such covenant or condition in excess of the damage actually suffered by him in consequence of the breach or non-fulfilment; but this provision does not apply to any covenant or condition against breaking up permanent pasture, grubbing underwoods, or felling, cutting, lopping, or injuring trees, or regulating the burning of heather (*c*). In these excepted cases the law is as stated above.

SECT. 8.—*Free Cropping and Disposal of Produce* (*d*).

Tenant's right of free cropping and disposal of produce.

528. Notwithstanding any custom of the country or the provisions of any contract of tenancy or agreement respecting the method of cropping arable land (*e*) or the disposal of crops, a tenant of an

(*r*) See *Woodward* v. *Gyles* (1690), 2 Vern. 119 (ploughing pasture); *Rolfe* v. *Peterson* (1772), 2 Bro. Parl. Cas. 436 (ploughing pasture); *Bowers* v. *Nixon* (1848), 12 Q. B. 546, 558 (ploughing pasture); *Farrant* v. *Olmius* (1820), 3 B. & Ald. 692 (ploughing pasture); *Jones* v. *Green* (1829), 3 Y. & J. 298 (sowing excess of clover); *Willson* v. *Love*, [1896] 1 Q. B. 626 (selling hay or straw).

(*s*) *Barret* v. *Blagrave* (1800), 5 Ves. 555; and see *Sloman* v. *Walter*, 2 White & Tudor, L. C. (7th ed.), p. 257.

(*t*) *Willson* v. *Love*, *supra*.

(*u*) *Clydebank Engineering and Shipbuilding Co.* v. *Yzquierdo*, [1905] A. C. 6.

(*a*) *French* v. *Macale* (1842), 2 Dr. & War. 269 (covenant not to burn land); *Weston* v. *Metropolitan Asylum District* (1882), 9 Q. B. D. 404.

(*b*) *Denton* v. *Richmond* (1833), 1 C. & M. 734.

(*c*) Agricultural Holdings Act, 1900 (63 & 64 Vict. c. 50), s. 6.

(*d*) The law stated in this section does not come into operation until January 1, 1909.

(*e*) Not including any land in grass which by the contract of tenancy is to be retained in the same condition throughout the tenancy (Agricultural Holdings Act, 1906 (6 Edw. 7, c. 56), s. 3 (4)).

SECT. 8. Free Cropping and Disposal of Produce.

agricultural holding may practise any system of cropping of the arable land on his holding, and may dispose of the produce of his holding without incurring any penalty, forfeiture or liability, provided that he has made, or as soon as may be makes, suitable and adequate provision to protect the holding from injury or deterioration. In the case of disposal of produce, such provision consists in the return to the holding of the full equivalent manurial value to the holding of all crops sold off or removed in contravention of the custom, contract or agreement.

Provision to be made against injury to holding.

These provisions have no application, in the case of a tenancy from year to year as respects the year before the tenant quits the holding, or any period after he has given or received notice to quit which results in his quitting the holding, nor, in any other case, as respects the year before the expiration of the contract of tenancy (*f*).

529. If the tenant exercises these rights of free cropping and disposal of produce in a manner that actually results, or is likely to result, in injury to or deterioration of the holding, the landlord is entitled, without prejudice to any other remedy which may be open to him, to recover damages in respect of such injury or deterioration at any time, and, should the case so require, to obtain an injunction restraining the tenant from so exercising his rights. In default of agreement the amount of damage may be determined by a single arbitrator (*h*).

Landlord's remedy where injury results.

SECT. 9.—*Injunctions.*

530. The general rule that affirmative covenants will not be enforced by injunction applies to agricultural leases, and no injunction will therefore be granted to restrain breaches by a tenant of a covenant to repair fences (*i*), or to cultivate generally in a husbandlike manner (*k*), or to keep the farm properly stocked (*l*). But if the proper observance of a covenant necessitates the abstention from doing a particular act, that act will be restrained by injunction; and a tenant will be restrained by injunction from committing any act of voluntary waste or from acting contrary to the custom of the country. Thus a tenant may be restrained from ploughing up ancient pasture or meadow land (*m*), from sowing pernicious crops (*n*), from carrying away manure (*o*), hay, straw and turnips (*p*), and from damaging hedgerows (*q*), contrary to the custom of the country. And the injunction in such cases may be granted although there is no express covenant, but merely an implied undertaking to cultivate in a husbandlike manner according

When an injunction can be obtained.

(*f*) Agricultural Holdings Act, 1906 (6 Edw. 7, c. 56), s. 3 (1).
(*h*) *Ibid.*, ss. 1 (2), 3 (2).
(*i*) *Rayner* v. *Stone* (1762), 2 Eden, 128.
(*k*) *Musgrave* v. *Horner* (1874), 31 L. T. 632.
(*l*) *Phipps* v. *Jackson* (1887), 56 L. J. (CH.) 550.
(*m*) *Drury* v. *Molins* (1801), 6 Ves. 328; *Lord Grey de Wilton* v. *Saxon* (1801), 6 Ves. 106; *Pratt* v. *Brett* (1817), 2 Madd. 62.
(*n*) *Pratt* v. *Brett*, *supra*.
(*o*) *Pulteney* v. *Shelton* (1799), 5 Ves. 260, n.
(*p*) *Walton* v. *Johnson* (1848), 15 Sim. 352.
(*q*) *Onslow* v. —— (1809), 16 Ves. 173.

SECT. 9. Injunctions.

to the custom of the country (*q*). An injunction will also be granted if the statutory right of the tenant after January 1, 1909, to crop the land and dispose of the produce thereof without regard to the covenants in the lease is exercised in such a manner as to injure or deteriorate, or be likely to injure or deteriorate, the holding (*r*).

Part IV.—Distress and Execution (*s*).

SECT. 1.—*Things Privileged from Distress.*

Things absolutely privileged from distress.

531. By the general law of distress the following things are absolutely privileged from distress:—fixtures (*t*); animals *feræ naturæ* (*u*); goods delivered to a person to be worked upon, carried, or managed in the way of his trade or calling (*a*); things in actual use (*b*); things in the custody of the law (*c*); and things which cannot be restored in the same plight (*d*). To this list other things have been added by various statutes, such as the goods of an ambassador (*e*); the goods of a lodger, if duly claimed (*f*); gas meters, if the property of a company incorporated by Act of Parliament (*g*); railway rolling stock in any works not belonging to the tenant of the works (*h*); goods of a tenant or his family which could be protected from seizure in execution under the County Court Acts (*i*).

Things provisionally privileged.

532. The following things are privileged from distress provided there is other sufficient distress on the premises:—beasts of the plough, sheep (*k*), and implements of trade (*l*).

Beasts.

No privilege attaches to cart colts and young steers not yet broken in or used for harness or the plough (*k*); and beasts of the plough may be distrained for poor rates although there are other distrainable goods sufficient to answer the demand (*m*).

So also beasts of the plough may be distrained, though there be growing crops on the land sufficient to satisfy the distress, for the

(*q*) See note (*n*), p. 243, *ante*.
(*r*) Agricultural Holdings Act, 1906 (6 Edw. 7, c. 56), s. 3 (2); see p. 251, *ante*.
(*s*) See, generally title DISTRESS.
(*t*) *Hellawell* v. *Eastwood* (1851), 6 Exch. 295.
(*u*) Co. Litt. 47.
(*a*) *Swire* v. *Leach* (1865), 34 L. J. (C. P.) 150, and cases there cited.
(*b*) *Simpson* v. *Hartopp* (1745), 1 Smith, L. C. 11th ed. 437, and cases there cited.
(*c*) Co. Litt. 47 a.
(*d*) *Wilson* v. *Ducke* (1675), 2 Mod. Rep. 61; *Morley* v. *Pincombe* (1848), 2 Exch. 101. And see p. 254, *post*, as to sheaves and ricks of corn and hay.
(*e*) Diplomatic Privileges Act, 1708 (7 Anne, c. 12), s. 3.
(*f*) Lodgers' Goods Protection Act, 1871 (34 & 35 Vict. c. 79).
(*g*) Gasworks Clauses Act, 1847 (10 & 11 Vict. c. 15), s. 14.
(*h*) Railway Rolling Stock Protection Act, 1872 (35 & 36 Vict. c. 50), s. 3.
(*i*) Law of Distress Amendment Act, 1888 (51 & 52 Vict. c. 21), s. 4.
(*k*) 51 Hen. 3, c. 4; *Keen* v. *Priest* (1859), 4 H. & N. 236.
(*l*) *Gorton* v. *Falkner* (1792), 4 Term Rep. 565; *Simpson* v. *Hartopp* (1745), 1 Smith, L. C. 11th ed. 437; *Lavell* v. *Richings*, [1906] 1 K. B. 480; the implements of trade need not be in actual use at the time (*Nargett* v. *Nias* (1859), 1 E. & E. 439).
(*m*) *Hutchins* v. *Chambers* (1758), 1 Burr. 579.

landlord has a right to those subjects of distress which are immediately available (*n*).

Escaping cattle.

Cattle of a stranger escaping into another's land by breaking down fences in good repair, or through defect of fences which the owner or occupier of the land is not bound to repair, are distrainable for rent (*o*); but if they escape into such land without their owner's knowledge through defect of fences which the owner or occupier of the land ought to repair, they are not distrainable until they have been on the land for a day and a night and actual notice has been given to their owner and he has neglected to remove them (*p*).

Special privilege on agricultural holdings.

533. In addition to the things mentioned above, the following things are absolutely privileged from distress for rent in arrear upon an agricultural holding:—(1) agricultural or other machinery which is the property of a person other than the tenant and is on the holding under a *bonâ fide* agreement with him for the hire or use thereof in the conduct of his business; (2) live stock of all kinds (which includes any animal capable of being distrained (*q*)) which is the *bonâ fide* property of a person other than the tenant and is on the holding solely for breeding purposes (*r*).

Live stock taken in to feed.

534. Live stock belonging to another person which has been taken in by the tenant of an agricultural holding to be fed at a fair price (*s*) is privileged from distress for rent when there is other sufficient distress to be found; if such live stock be distrained by reason of other sufficient distress not being found, there cannot be recovered by such distress a sum exceeding the price agreed to be paid for the feeding, or any part thereof which remains unpaid. The owner of the stock may, at any time before it is sold, redeem the stock by paying to the distrainer such unpaid price, which will be in full discharge as against the tenant of any sum of the like amount which would be otherwise due from the owner of the stock to the tenant in respect of the price of the feeding. Any portion of the stock, so long as it remains on the holding, continues liable to be distrained for the amount for which the whole of the stock is distrainable (*t*).

A landlord who is an assenting party to the sale by his tenant of (*inter alia*) the eatage on part of the farm on condition that the rent in arrear shall be paid out of the proceeds of the sale, is not entitled to distrain on the purchaser's cattle which are consuming it (*u*).

(*n*) *Piggott* v. *Birtles* (1836), 1 M. & W. 441.
(*o*) Co. Litt. 47 b.
(*p*) *Kempe* v. *Crews* (1684), 1 Ld. Raym. 167.
(*q*) Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61), s. 61.
(*r*) *Ibid.*, s. 45.
(*s*) This need not be money; it may be, *e.g.*, "milk for meat," see *London and Yorkshire Bank* v. *Belton* (1885), 15 Q. B. D. 457. Cattle on land under an agreement by which the tenant agrees to allow the owner of the stock "the exclusive right to feed the grass on land for four weeks" for a payment of £2 are not "taken in to be fed at a fair price" (*Masters* v. *Green* (1888), 20 Q. B. D. 807).
(*t*) Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61), s. 45.
(*u*) *Horsford* v. *Webster* (1835), 1 C. M. & R. 696.

Sect. 2. Sheaves and Ricks of Corn and Hay.

Sect. 2.—*Sheaves and Ricks of Corn and Hay.*

Sheaves and ricks of corn and hay.

535. Sheaves and cocks of corn were not distrainable at common law on the ground that they could not be restored in the same plight (*a*); but by statute (*b*) persons having rent in arrear (*c*) may seize and secure any sheaves or cocks of corn, or corn loose or in the straw, or hay in any barn or granary, or upon any hovel, stack, or rick, or elsewhere on the land, and lock up the same in the place where found until replevied. In default of replevy the same must be sold after appraisement at the expiration of five days, and until sale or replevy it must not be removed out of the place where it is found. But no appraisement need be made unless the tenant or owner of the goods by writing requires the same to be made (*d*).

Sect. 3.—*Growing Crops.*

Growing crops etc.

536. A lessor or landlord may distrain any cattle or stock of the tenant feeding upon any common appendant or appurtenant or any ways belonging to the premises, and may seize all sorts of corn, grass, hops, roots, fruits, pulse, or other product growing on the premises as a distress for arrears of rent, and cut, gather etc. and lay up the same when ripe in barns on the premises, or if there be no barns on the premises, then in barns as near thereto as may be; and in convenient time may appraise and sell (*e*) the same towards satisfaction of the rent and expenses, the appraisement thereof to be taken when cut, gathered, cured, and made, and not before (*f*). Notice of the place where the distress is lodged must be given to the tenant, and if the rent and expenses be paid or tendered after the taking of the distress, but before the crops etc. are ripe and cut, cured or gathered, the distress must be delivered up to the tenant (*g*).

The right does not extend to trees, shrubs, and plants growing in a nursery ground; these cannot be distrained (*h*); and the grantee of a rent-charge, not being a "lessor or landlord," cannot distrain upon growing crops unless a specific power to do so be inserted in the grant (*i*).

Growing crops can only be sold after appraisement, which is not to be made until the crops are ripe, and a sale before that time is wholly void, and no action by the tenant lies in respect of it if the crops are not removed (*k*). If they are taken away by the purchaser,

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(*a*) *Wilson* v. *Ducket* (1675), 2 Mod. Rep. 61.
(*b*) Statute 2 W. & M., sess. 1, c. 5, s. 2.
(*c*) Including grantees of rent-charges (Landlord and Tenant Act, 1730 (4 Geo. 2, c. 28), s. 5; *Johnson* v. *Faulkner* (1842), 2 Q. B. 925).
(*d*) Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61), s. 50; now repealed and replaced by s. 5 of the Law of Distress Amendment Act, 1888 (51 & 52 Vict. c. 21).
(*e*) The distress must in this case be sold, and cannot be retained as a pledge (*Piggott* v. *Birtles* (1836), 1 M. & W. at p. 448, *per* PARKE, B.).
(*f*) Distress for Rent Act, 1737 (11 Geo. 2, c. 19), s. 8.
(*g*) *Ibid.*, s. 9.
(*h*) *Clark* v. *Gaskarth* (1818), 8 Taunt. 431.
(*i*) *Miller* v. *Green* (1831), 8 Bing. 92.
(*k*) *Owen* v. *Legh* (1820), 3 B. & Ald. 470.

the tenant can only recover against the landlord nominal damages unless he can show actual damage (*l*).

Sale by sheriff subject to agreement.

537. When a sheriff has under an execution sold crops or produce on a farm subject to an agreement to expend the same on the land (*m*), the landlord of the farm may not distrain on any corn, hay, straw, or produce thereof which at the time of the sale was severed from the soil and sold subject to the agreement, nor on any turnips sold, whether drawn or not, nor on any horses, sheep, cattle, carts or implements of husbandry on the land employed or kept by any persons for the purpose of carrying or consuming such corn etc. or produce according to the agreement (*n*).

Growing crops sold and not removed.

538. As to growing crops, however, seized under an execution and sold by the sheriff or other officer, such crops, so long as they remain on the farm or lands, are liable in default of sufficient distress of the goods and chattels of the tenant to the rent which may accrue and become due to the landlord after any such seizure and sale, and to the remedies by distress for recovery of such rent, notwithstanding any sale and assignment of such crops by the sheriff (*o*).

Where tenant agrees not to sell crops, landlord distraining must sell at best price.

539. If a tenant be under a covenant not to sell hay, straw, or crops off the farm, a landlord distraining may not sell such hay, straw, or crops at a consuming price, but must sell them at the best market price obtainable, and is liable in damages if he do not (*p*).

SECT. 4.—*Amount which may be Distrained for.*

Six years' rent in ordinary cases.

540. The arrears of rent which may be distrained for may not in any case exceed six years' arrears (*q*).

One year's rent in case of agricultural holdings.

In the case of an agricultural holding, however, the landlord may not distrain for rent which became due more than one year before the making of the distress. But where, according to the ordinary course of dealing between the landlord and tenant of a holding, the payment of the rent has been allowed to be deferred until the expiration of a quarter of a year or half a year after the date at which such rent legally became due, then for the purpose of distress the rent of the holding is deemed to have become due at the expiration of such quarter or half year as the case may be, and not at the date at which it legally became due (*r*).

The reference to the expiration of a quarter or half year must be construed as referring only to the exact period of a quarter or half year, not to any indefinite period after a quarter or half year (*s*).

Where rent ordinarily payable after it is due.

Where rent is customarily payable a quarter or half year after it is legally due, the landlord is entitled to distrain for rent legally due

(*l*) *Proudlove* v. *Twemlow* (1833), 1 C. & M. 326.
(*m*) Under the Sale of Farming Stock Act, 1816 (56 Geo. 3, c. 50), s. 3, p. 258, *post*; as to which see also title DISTRESS.
(*n*) *Ibid.* s. 6.
(*o*) Landlord and Tenant Act, 1851 (14 & 15 Vict. c. 25), s. 2.
(*p*) *Ridgway* v. *Stafford* (1851), 6 Exch. 404.
(*q*) Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 42.
(*r*) Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61), s. 44.
(*s*) See *Garrard* v. *Meek* (1880), 50 L. J. (C. P.) 187.

SECT. 4. Amount Distrained for.

but not yet payable according to the course of dealing, and at the same time for rent which became legally due more than a year previously but became payable by the course of dealing less than a year previously, although the total amount thus distrained for exceeds a year's rent (*a*).

Where tenant becomes bankrupt.

541. Where the tenant becomes bankrupt, the landlord may, after the commencement of the bankruptcy, distrain only for six months' rent accrued due prior to the order of adjudication (*b*); and he will not be allowed to obtain a larger amount of rent by agreeing with the bankrupt to waive his right of distress in consideration of taking over the stock on the farm at a valuation in lieu of rent (*c*).

Compensation set off against rent.

542. When compensation due to a tenant under the Agricultural Holdings Acts, or under any custom or contract, has been ascertained before the landlord distrains for rent due, the amount of such compensation may be set off against the rent due, and the landlord is not entitled to distrain for more than the balance (*d*).

Fees for distraining.

543. Where a distress is levied for rent under the Agricultural Holdings Acts, the bailiff, not the landlord, is entitled to the authorised percentage for levying the distress (*e*).

SECT 5.—*When Distress may be made.*

Distress immediately after rent due.

544. Distress may be made when rent is in arrear, that is, on the day after it becomes due (*f*). And if by the custom of the country any rent is payable by the tenant upon entering his holding, it may be distrained for the next day (*g*).

Distress after determination of tenancy.

545. Rent accruing due before the determination of a tenancy by notice to quit by the landlord cannot be distrained for at common law after the tenancy has expired, although the tenant remains in occupation (*h*); but it is otherwise if the rent becomes due after the determination of the tenancy, and there is no evidence of a renewal of the tenancy (*i*)

By statute, however, any person having rent in arrear upon any lease for life, years, or at will, may distrain for such arrears within six months after the determination of the term, provided such distress be made during the continuance of the landlord's title and during the possession of the tenant (*k*). The right is not confined to cases

(*a*) *Ex parte Bull, Re Bew* (1887), 18 Q. B. D. 642; *Fairlamb* v. *Beaumont* (1887), 31 Sol. J. 272.

(*b*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 42, amended by Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 28. See title BANKRUPTCY AND INSOLVENCY.

(*c*) *Re Griffith* (1897), 66 L. J. (Q. B.) 763.

(*d*) Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61), s. 47.

(*e*) *Philipps* v. *Rees* (1889), 24 Q. B. D. 17; Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61), s. 49, sched. ii.

(*f*) *Duppa* v. *Mayo* (1671), 1 Saund. 287.

(*g*) *Buckley* v. *Taylor* (1788), 2 Term Rep. 600; where BULLER, J., stated that he found on inquiry that it was a common custom that the landlord might distrain the first day of the tenancy.

(*h*) *Williams* v. *Stiven* (1846), 9 Q. B. 14.

(*i*) *Jenner* v. *Clegg* (1832), 1 Moo. & Rob. 213; *Alford* v. *Vickery* (1842), Car. & M. 280.

(*k*) Landlord and Tenant Act, 1709 (8 Anne, c. 14), ss. 6, 7.

When Distress may be made.

where there is a holding over of the whole premises, but applies where by the custom of the country the tenant remains in possession of the barns only for the purpose of stowing his way-going crop (*l*). And where the tenant remains in possession of part of the farm by permission of the landlord, the landlord may distrain on that part within the six months (*m*).

But the landlord is not entitled to distrain if the tenant after holding over for a few days has quitted the premises after the entry of a new tenant, leaving some stock on the farm, but giving no intimation of a purpose to return or to continue the tenancy (*n*); nor where the landlord has agreed to let to the tenant part of the holding after the tenancy of the whole has determined, and the tenant remains in possession of that part (*o*).

SECT. 6.—*Remedy for Wrongful Distress.*

Remedy for wrongful distress on agricultural holding

546. In addition to the ordinary remedies by action of trespass or replevin in cases of unlawful distress, a special remedy exists where such distress is made upon an agricultural holding. In such cases any dispute arising (1) in respect of any distress levied contrary to the provisions of the Agricultural Holdings Acts, or (2) as to the ownership of any live stock distrained upon, or as to the price to be paid for the feeding of that stock, or (3) as to any other matter or thing relating to a distress on an agricultural holding, may be determined by a county court or a court of summary jurisdiction. Such court may make an order for the restoration of any live stock or other things unlawfully distrained, or declare the price to be paid for feeding any live stock distrained, or make any other order which justice requires. An appeal lies to quarter sessions from any decision of a court of summary jurisdiction respecting such dispute (*p*), and to the High Court from any such decision of a county court (*q*).

SECT. 7.—*Liability of Growing Crops etc. to Execution.*

At common law.

547. Growing fruit cannot be taken in execution under a *fi. fa.* (*r*). Farm produce and growing crops might at common law be taken in execution and sold under a *fi. fa.*, and were only subsequently liable to be distrained for rent if allowed to remain on the land an unreasonably long time.

By statute.

The rights of an execution creditor in this respect are now regulated by statute (*s*). No sheriff or other officer may carry off or sell from a farm any straw threshed or unthreshed, or straw of crops growing, chaff, colder, turnips, or manure in any case whatever; nor any hay, grass, tares, vetches, roots or vegetables, being produce of such farm, in any case where, according to any

(*l*) *Beavan* v. *Delahay* (1788), 1 H. Bl. 5.
(*m*) *Nuttall* v. *Staunton* (1825), 4 B. & C. 51.
(*n*) *Taylerson* v. *Peters* (1837), 7 A. & E. 110.
(*o*) *Wilkinson* v. *Peel*, [1895] 1 Q. B. 516.
(*p*) Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61), s. 46.
(*q*) *Hanmer* v. *King* (1887), 57 L. T. 367.
(*r*) *Rodwell* v. *Phillips* (1842), 9 M. & W. 501, 505, *per* Lord ABINGER, C.B.
(*s*) Sale of Farming Stock Act, 1816 (56 Geo. 3, c. 50).

SECT. 7. Liability of Produce and Growing Crops to Execution.

covenant or written agreement made for the benefit of the landlord, such hay etc. ought not to be removed, of which covenants or agreements the sheriff or other officer shall have received written notice before sale (*t*). The tenant against whom execution is issued must give notice to the sheriff of the existence of covenants etc. and the name and address of the landlord; and the sheriff is to give notice to the landlord of his taking possession of such produce (*a*). The sheriff may dispose of any of the crops or produce under a written agreement that the purchaser will expend the same on the land (*b*), and allow the landlord to bring an action in his name in case of breach of such agreement (*c*). The landlord may not distrain for rent on any produce severed from the soil and sold subject to such agreement, or on any beasts or carts or implements employed or kept for the purpose of threshing, carrying or consuming such produce (*d*). The sheriff may not sell any clover or grass crop growing under any crop or standing corn (*e*). These provisions do not apply to any straw, turnips or other articles which the tenant may remove from the farm consistently with some contract in writing (*f*).

Growing crops.

As above stated (*g*), where any growing crops are seized and sold under a *fi. fa.*, such crops, so long as they remain on the land, are liable, in default of other sufficient distress, to be distrained by the landlord for arrears of rent accruing due after the seizure and sale (*h*).

Part V.—Compensation.

SECT. 1.—*Compensation for Improvements to Agricultural Holdings.*

Generally.

548. In some districts a tenant is entitled on quitting his holding to compensation from his landlord by the custom of the country in respect of the unexhausted value of certain improvements, such as applied manure, marling, buildings etc., as well as for tillages, hauling materials, manure heaps etc. In some cases his lease or agreement provides for compensation for specific matters. Without prejudice to the right of the tenant to claim compensation to which he may be entitled under any custom, agreement, or otherwise, a statutory right to compensation for certain specified improvements is given to tenants of agricultural holdings (*i*), of allotments and cottage gardens, and small holdings (*k*).

(*t*) Sale of Farming Stock Act, 1816 (56 Geo. 3, c. 50), s. 1.
(*a*) *Ibid.*, s. 2.
(*b*) *Ibid.*, s. 3.
(*c*) *Ibid.*, s. 4.
(*d*) *Ibid.*, s. 6.
(*e*) *Ibid.*, s. 7.
(*f*) *Ibid.*, s. 8.
(*g*) *Ante*, p. 255.
(*h*) Landlord and Tenant Act, 1851 (14 & 15 Vict. c. 25), s. 2.
(*i*) By the Agricultural Holdings Acts, 1883 to 1906, see note (*a*), p. 239, *ante*.
(*k*) Allotments and Cottage Gardens Compensation for Crops Act, 1887 (50 & 51 Vict. c. 26), and Small Holdings and Allotments Act, 1907 (7 Edw. 7, c. 54), s. 35, for which see title ALLOTMENTS, pp. 347, 356, *post*, and title SMALL HOLDINGS.

With respect to the statutory rights of tenants of agricultural holdings to compensation, the following terms have the meanings here given (*l*):—

Definitions.

"Contract of tenancy" means a letting of or agreement for the letting of land for a term of years, or for lives, or for lives and years, or from year to year (*m*).

"Determination of tenancy" means the cesser of a contract of tenancy by reason of effluxion of time, or from any other cause (*n*).

"Landlord," in relation to a holding, means any person for the time being entitled to receive the rents and profits of any holding (*o*).

"Tenant" means a holder of land under a contract of tenancy as above defined, and includes his executors, administrators, assigns, or other persons deriving title from him (*p*); and the designations of landlord and tenant continue to apply to the parties until the conclusion of any proceedings taken under or in pursuance of the Agricultural Holdings Acts in respect of compensation for improvements, or under any agreement made in pursuance of those Acts.

"Holding" means any parcel of land held by a tenant which is either wholly agricultural or wholly pastoral, or in part agricultural and as to the residue pastoral, or in whole or in part cultivated as a market garden, and which is not let to the tenant during his continuance in any office, appointment, or employment held under the landlord.

"County court" in relation to a holding means the county court within the district whereof the holding, or the larger part thereof, is situate.

Right to compensation.

A tenant at the determination of his tenancy has a statutory

(*l*) See Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61), ss. 54, 61; Agricultural Holdings Act, 1900 (63 & 64 Vict. c. 50), s. 9; Market Gardeners' Compensation Act, 1895 (58 & 59 Vict. c. 27), s. 6.

(*m*) An agreement for letting land at a yearly rent, payable quarterly, with a stipulation that the tenancy may be determined by either party giving three months' notice to quit on any day of the year, creates a tenancy from year to year within this definition (*King* v. *Eversfield*, [1897] 2 Q. B. 475).

(*n*) Where the contract of tenancy is rescinded and occupation abandoned by reason of the failure of one of the parties to perform a necessary condition of the contract, there is no determination of tenancy within the meaning of this definition (*Todd* v. *Bowie* (1902), 4 F. 435, decided under the Scotch Agricultural Holdings Act, 1883).

If by the terms of the agreement, or by custom, a tenant is entitled or required to give up possession of different parts of his holding at different times, the determination of the tenancy takes place at the time for his giving up the last agricultural or pastoral part, whether he do or do not still retain some or all of the buildings (*Black* v. *Clay*, [1894] A. C. 368; *Morley* v. *Carter*, [1898] 1 Q. B. 8; *In re Paul* (1889), 24 Q. B. D. 247; see p. 242, *ante*).

(*o*) This definition of landlord excludes the executors of a landlord, unless they are parties to proceedings for compensation (*Gough* v. *Gough*, [1891] 2 Q. B. 665).

(*p*) The trustee in bankruptcy of a tenant is included in this definition, but in order to be entitled to compensation he must act in accordance with the provisions of the Act precisely as if he were the tenant. If he disclaim the lease, he loses the right to compensation (*Schofield* v. *Hincks* (1888), 58 L. J. (Q. B.) 147).

SECT. 1. **Improvements to Agricultural Holdings.**

right on quitting his holding (*q*) to obtain from the landlord (*r*) as compensation for any improvements of the kinds for which compensation is payable made by him on his holding such sum as fairly represents the value of the improvements to an incoming tenant (*s*).

Time for making claim.

549. A claim for such compensation cannot be made after the determination of the tenancy; but where the claim relates to an improvement executed after the determination of the tenancy, and while the tenant lawfully remains in occupation of part of the holding, the claim may be made at any time before the tenant quits that part (*t*).

How amount of compensation may be reduced.

550. In ascertaining the amount of compensation to be paid to a tenant there is to be taken into account (i.) any benefit which the landlord has given or allowed the tenant in consideration of the tenant executing the improvement (*u*), and (ii.) as respects manures (*a*), the value of the manure required by the contract of tenancy or by custom to be returned to the holding in respect of crops sold off or removed from the holding within the last two years of the tenancy, or other less time for which the tenancy has endured, not exceeding the value of the manure which would have been produced by the consumption on the holding of the crops so sold off or removed (*b*).

Compensation for permanent improvements

551. Compensation is not payable in respect of any improvement comprised in Part I. of the First Schedule to the Agricultural Holdings Act, 1900 (*c*), unless the landlord has previously to the

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(*q*) See note (*n*), p. 259, *ante*, for the case where a tenant quits parts of his holding at different times.

(*r*) A custom for the outgoing tenant to be paid compensation by the incoming tenant, though frequent in practice, is bad in law (*Bradburn* v. *Foley* (1878), 3 C. P. D. 129).

(*s*) Agricultural Holdings Act, 1906 (6 Edw. 7, c. 56), s. 1 (1). This section repeals the corresponding sect. 1 (1) of the Act of 1900, but does not come into operation until January 1, 1909. Until that date, therefore, the provision in the Act of 1900 that there shall not be taken into account as part of the improvement what is justly due to the inherent capabilities of the soil, remains in force.

For forms of notice claiming compensation, see Encyclopædia of Forms, Vol. VII., pp. 720, 721.

(*t*) Agricultural Holdings Act, 1900 (63 & 64 Vict. c. 50), s. 2 (2); see also cases decided before the Act, cited in note (*n*), p. 259, *ante*.

(*u*) *Ibid.*, s. 1 (3).

(*a*) *I.e.*, the improvements numbered (23), (24) and (25) in note (*k*), p. 261, *post*.

(*b*) *Ibid.*, s. 1 (4). When hay, straw etc. which the tenant is by his agreement bound to stack and consume on the holding is accidentally destroyed, as by fire, the landlord is not entitled at the determination of the tenancy to have deducted from the compensation due to the tenant the manurial value of the hay and straw so destroyed (*Re Hull and Lady Meux*, [1905] 1 K. B. 588).

(*c*) These are:—(1) erection, alteration, or enlargement of buildings; (2) formation of silos; (3) laying down of permanent pasture; (4) making and planting of osier beds; (5) making of water meadows or works of irrigation; (6) making of gardens; (7) making or improving of roads or bridges; (8) making or improving of watercourses, ponds, wells, reservoirs, or of works for the application of water power or for supply of water for agricultural or domestic purposes; (9) making or removal of permanent fences; (10) planting of hops; (11) planting of orchards or fruit bushes; (12) protecting young fruit trees; (13) reclaiming of waste land; (14) warping or weiring of land; (15) embankments and sluices against floods; (16) the erection of wirework in hop gardens.

execution of the improvement consented in writing (*d*) to the making of the improvement. Such consent may be unconditional, or upon such terms as to compensation or otherwise as may be agreed (*e*).

Compensation for drainage.

552. Compensation is payable for drainage (*f*) provided that the tenant has, not more than three nor less than two months before beginning the work, given to the landlord notice in writing of his intention to do so, and of the manner in which he proposes to do it. After such notice the landlord and tenant may agree on the terms as to compensation or otherwise on which the work is to be executed, and in default of such agreement the landlord may, unless the tenant's notice is withdrawn, execute the work, and recover from the tenant as rent a sum not exceeding £5 per cent. per annum on the outlay, or not exceeding such annual sum, payable for twenty-five years, as will repay the outlay in that period, with interest at £3 per cent. per annum. If the landlord fails to execute the work within a reasonable time, the tenant may do it, and will be entitled to compensation therefor (*g*).

The landlord and tenant may, however, dispense with any notice, and may, either in the lease or otherwise, make any agreement they please on the subject, and such agreement shall be as valid as though the statutory notice had been given (*h*).

Landlord's agent.

The landlord's consent and notices by the tenant to the landlord as to the execution of the improvements referred to above may be given by or to the authorised agent of the landlord (*i*).

Compensation for improvements for which landlord's consent is not required.

553. No notice to or consent by the landlord is required to enable compensation to be claimed for any of the improvements enumerated in Part III. of the First Schedule to the Agricultural Holdings Act, 1900 (*k*); but where any agreement in writing secures to the tenant

(*d*) The consent may be given in the lease. A lease providing that the tenant may at his own cost convert meadow into orchard is such a consent (*Mears* v. *Callender*, [1901] 2 Ch. 388).

For form of consent, see Encyclopædia of Forms, Vol. VII., p. 717.

(*e*) Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61), s. 3.

(*f*) Drainage is the only improvement comprised in Part II. of the Schedule.

For forms of notices as to drainage, see Encyclopædia of Forms, Vol. VII., pp. 718, 719.

(*g*) Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61), s. 4.

(*h*) *Ibid.* An agreement to dispense with notice need not be in writing (*Ogilvy* v. *Elliot* (1905), 7 F. (Ct. of Sess.) 1115).

(*i*) *Ibid.*, ss. 3, 4. The general manager of an estate is such an authorised agent (*Pearson* v. *I'Anson*, [1899] 2 Q. B. 618; *Ingham* v. *Fenton* (1893), 10 T. L. R. 113).

For form of appointment of agent, see Encyclopædia of Forms, Vol. VII., p. 718.

(*k*) 63 & 64 Vict. c. 50. These improvements are:—(18) chalking of land; (19) clay-burning; (20) claying; (21) liming; (22) marling of land; (23) application to land of purchased artificial or other purchased manure; (24) consumption on the holding by cattle, sheep, pigs, or by horses other than those regularly employed on the holding, of corn, cake, or other feeding-stuff not produced on the holding; (25) consumption in the same manner of corn proved to have been produced and consumed on the holding; (26) laying down temporary pasture with clover, grass, lucerne, sainfoin, or other seeds, sown more than two years prior to the determination of the tenancy; (27) matters special to market gardens, as to which, see p. 269, *post*.

The Agricultural Holdings Act, 1906 (6 Edw. 7, c. 56), s. 6, adds to this list of improvements, repairs to buildings, being buildings necessary for the proper

SECT. 1. Improvements to Agricultural Holdings.

fair and reasonable compensation for any such improvement, such compensation is payable as provided by the agreement, and is deemed to be substituted for compensation under the Acts (*l*).

Manures for prevention of deterioration of holding.

554. No compensation is payable in respect of manures which have been used by the tenant for the purpose of making provision against injury or deterioration of the holding caused or threatened by his exercise of his right after January 1, 1909, of freedom of cropping arable land and disposal of the produce of his holding (*m*).

Agreements as to compensation.

555. Any agreement, other than those already mentioned, by which the tenant is deprived of his right to claim compensation under the Acts for any improvement comprised in the First Schedule, is void so far as it deprives him of that right (*n*). But the tenant has the right to claim compensation under custom, agreement, or otherwise in lieu of compensation under the Acts (*o*).

Incoming tenant subrogated to rights of outgoing tenant.

556. If an incoming tenant, with the written consent of the landlord, pay to an outgoing tenant compensation for an improvement, he is entitled on quitting the holding to claim compensation for the improvement in like manner as the outgoing tenant would have been entitled if he had remained tenant of the holding and quitted it at the time at which the incoming tenant quits (*p*).

Change of tenancy during one occupation.

557. A tenant who has remained in his holding during two or more tenancies is not, on quitting the holding, deprived of his right to compensation for improvements by reason only that the improvements were not made during the tenancy on the determination of which he quits the holding (*q*).

Restriction on tenants about to quit.

558. Tenants about to quit a holding are discouraged from making or beginning improvements for the purpose of raising a claim to compensation by the provision that no tenant is entitled to compensation for improvements other than manures (*r*) begun by him within a year of the expiration of his contract of tenancy, or in the case of a yearly tenant within a year before he quits his holding, or at any time after giving or receiving notice to quit which results in

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cultivation or working of the holding, other than repairs which the tenant is himself under an obligation to execute, provided that the tenant, before beginning to execute such repairs, gives to the landlord notice in writing of his intention together with particulars of such repairs, and the landlord fails to execute such repairs himself within a reasonable time after receiving such notice. The Act does not come into operation until January 1, 1909.

(*l*) Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61), s. 5; and see *Newby* v. *Eckersley*, [1899] 1 Q. B. 465.

(*m*) Agricultural Holdings Act, 1906 (6 Edw. 7, c. 56), s. 3 (3); and see p. 250, *ante*.

(*n*) Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61), s. 55. This section does not apply to any agreement by which the tenant may deprive himself of his right to remove fixtures (*Mears* v. *Callender*, [1901] 2 Ch. 388).

(*o*) Agricultural Holdings Act, 1900 (63 & 64 Vict. c. 50), s. 1 (5).

(*p*) Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61), s. 56. In the case of a market garden, the consent of the landlord required by this section is dispensed with (Market Gardeners' Compensation Act, 1895 (58 & 59 Vict. c. 27), s. 3). For form of consent, see Encyclopædia of Forms, Vol. VII., p. 724.

(*q*) Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61), s. 58.

(*r*) "Manures," within this provision, mean the improvements numbered (23), (24), and (25) in note (*k*), p. 261, *ante*.

his quitting his holding. But this restriction does not apply in the case of an improvement begun by a yearly tenant during the last year of his tenancy if, in pursuance of a notice to quit thereafter given by the landlord, the tenant quits the holding at the expiration of the year, or where a tenant before beginning the improvement has served notice on his landlord of his intention to begin it, and the landlord has either assented, or failed for a month after receipt of the notice to object to the making of the improvement (*s*).

Compensation when possession taken by mortgagee.

559. Where a person occupies land under a contract of tenancy with a mortgagor which is not binding on the mortgagee (*t*) he is entitled, as against the mortgagee who takes possession, to any compensation which but for such taking possession would be due to him either by statute or custom from the mortgagor for crops, improvements, tillages, or other matters connected with the land. Any sum found due to the tenant under this provision may be set off against any rent or other sum due from him in respect of the land, but unless so set off may, as against the mortgagee, be charged and recovered only as compensation due from a landlord who is a trustee (*a*).

If the tenancy is from year to year or for a term not exceeding twenty-one years, the mortgagee, before evicting the occupier, must give him six months' notice, and if he then evict him, compensation must be given for crops and for any expenditure upon the land which the occupier has made in the expectation of holding the land for his full term, in so far as the improvement resulting therefrom is not exhausted at the time of eviction (*b*).

SUB-SECT. 1.—*Procedure for Recovery of Compensation.*

Arbitration failing agreement.

560. If the tenant of a holding (*c*) claim to be entitled to statutory compensation, or to compensation under any custom or agreement, in respect of any improvement comprised in the First Schedule to the Agricultural Holdings Act, 1900 (*d*), and he fail to agree with his landlord as to the amount and mode and time of payment of such

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(*s*) Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61), s. 59. For forms of notices under this provision, see Encyclopædia of Forms, Vol. VII., pp. 719, 720.

(*t*) A lease by a mortgagor alone made after the mortgage is not binding on the mortgagee unless it is made in pursuance of an express power in the mortgage deed, or satisfies the provisions of s. 18 of the Conveyancing Act, 1881 (44 & 45 Vict. c. 41): see *Keech* v. *Hall* (1778), 1 Doug. 21; *Thunder* v. *Belcher* (1803), 3 East, 449. If evicted by the mortgagee the tenant, but for the provision mentioned in the text, would lose all right to his growing crops, tillages etc. (*Walmsley* v. *Milne* (1859), 7 C. B. (N. S.) 115).

(*a*) Tenants Compensation Act, 1890 (53 & 54 Vict. c. 57), s. 2. As by s. 1 this Act is to be construed as one with the Agricultural Holdings Acts and Allotments and Cottage Gardens Compensation Act, 1887, these provisions apparently apply only to "holdings" under those Acts, notwithstanding the use of the larger word "land." The mode of charging and recovering compensation due from a trustee landlord is provided by s. 31 of the Agricultural Holdings Act, 1883 (see p. 268, *post*).

(*b*) Tenants Compensation Act, 1890 (53 & 54 Vict. c. 57), s. 2 (2).

(*c*) A landlord cannot initiate arbitration proceedings under the Agricultural Holdings Acts. If he has a claim against the tenant, and the tenant does not commence proceedings by arbitration, the landlord must proceed by action (*Re Holmes and Formby*, [1895] 1 Q. B. 174, *per* LAWRANCE, J., at p. 178).

(*d*) See notes (*c*), (*f*) and (*k*), pp. 260, 261, *ante*.

SECT. 1. Improvements to Agricultural Holdings.

compensation, the difference must be settled by arbitration (*e*), in accordance with the provisions, if any, of any agreement between the landlord and the tenant, and in default of and subject to any such provisions, in accordance with the following provisions (*f*).

Appointment of arbitrator.

561. In default of agreement between the parties (*g*) the arbitrator will be nominated by the Board of Agriculture and Fisheries (*h*). If the parties agree in writing (*i*) that there shall not be a single arbitrator, each of them must appoint an arbitrator (*k*). If for fourteen days after notice by one party to the other to appoint an arbitrator, or another arbitrator (*l*), the other party fails to do so, the appointment will be made by the Board of Agriculture and Fisheries on the application of the party giving the notice.

Two arbitrators and an umpire.

Where two arbitrators are appointed they must, before entering on the arbitration, appoint an umpire (*m*). If for seven days after request from either party (*n*) the arbitrators fail to appoint an umpire, he may be appointed by the Board.

All references after 1908 to a single arbitrator.

562. After January 1, 1909, all questions as to statutory compensation or arising under the contract of tenancy of an agricultural holding which are referred to arbitration must, at whatever date the question arose, and notwithstanding any agreement to the contrary, be determined by a single arbitrator in the manner above mentioned (*o*).

Removal of arbitrator.

563. If an arbitrator dies, or is incapable of acting, or for seven days after notice requiring him to act fails to act (*p*), a new arbitrator may be appointed (*q*). The appointment of an arbitrator cannot be revoked except by consent (*r*). Every such appointment, notice,

(*e*) A claim for such compensation cannot be made the subject of a set-off or counterclaim in an action brought by the landlord against the tenant for rent or breach of covenant (*Gaslight and Coke Co.* v. *Holloway* (1885), 52 L. T. 434; *Schofield* v. *Hincks* (1888), 60 L. T. 573).

(*f*) These provisions are contained in the Second Schedule to the Agricultural Holdings Act, 1900. For arbitration generally, see title ARBITRATION, *post*.

(*g*) For form of agreement, see Encyclopædia of Forms, Vol. VII., p. 722.

(*h*) For form of appointment by parties of a single arbitrator, see Encyclopædia of Forms, Vol. VII., pp. 724, 725.

(*i*) A clause in a lease referring certain questions of compensation under the lease to two arbitrators is not an agreement in writing that there shall not be a single arbitrator if questions arise as to compensation under the Agricultural Holdings Acts; and such questions must, therefore, be determined by a single arbitrator (*Ogilvy* v. *Elliot* (1905), 7 F. (Ct. of Sess.) 1115). See Encyclopædia of Forms, Vol. VII., p. 726, Form 200.

(*k*) See Encyclopædia of Forms, Vol. VII., pp. 727, 728, Forms 202, 204.

(*l*) *Ibid.*, p. 726, Form 201.

(*m*) *Ibid.*, p. 731, Form 209. Where an agreement for a tenancy provided that the rights of the parties thereunder should be adjusted on the determination of the tenancy by two arbitrators, and such arbitrators were appointed, but the landlord refused to allow his arbitrator to appoint an umpire, it was held that, as the arbitration was under the agreement and not under the Agricultural Holdings Acts, the Board of Agriculture and Fisheries had no power to appoint an umpire, and an award made by an umpire appointed by the Board was altogether void (*Re Cundall and Vavasour* (1906), 95 L. T. 483).

(*n*) See Encyclopædia of Forms, p. 730, Form 208.

(*o*) Agricultural Holdings Act, 1906 (6 Edw. 7, c. 56), s. 1 (2).

(*p*) See Encyclopædia of Forms, Vol. VII., p. 731, Form 210.

(*q*) *Ibid.*, p. 727, Form 203.

(*r*) *Ibid.*, pp. 729, 730, Forms 206, 207.

revocation, and consent must be in writing. The county court has power to remove an arbitrator for misconduct (*s*).

Evidence.

564. The evidence of the parties must, and that of witnesses may, be given on oath or by affirmation, which the arbitrator may administer or take; the arbitrator may also order production of samples and documents by the parties.

Case stated.

The arbitrator may on request, and must if so directed by the county court, state a case for the opinion of the county court on any question of law arising in the course of the arbitration; and an appeal lies from the county court to the Court of Appeal (*t*).

Time for making award.

565. A single arbitrator must make and sign his award within twenty-eight days of his appointment or such longer period as the Board of Agriculture and Fisheries may (whether the time for making the award has expired or not) direct (*a*). Two arbitrators must make and sign their award within twenty-eight days of the appointment of the last appointed of them or on or before any later day to which they may by writing signed by them (*b*) enlarge the time for making the award, not being more than forty-nine days from the appointment of the last appointed of them. If the arbitrators allow their time to elapse without making an award, or deliver to either party or the umpire a notice in writing that they cannot agree (*c*), the umpire may enter on the arbitration. He must make and sign his award within one month after the original or extended time for making the award of the arbitrators has expired, unless the time is extended by the Board of Agriculture and Fisheries.

Contents of award.

566. The award must be in the form prescribed by the Board (*d*), and must fix a day not sooner than one month or later than two months for payment of any money or costs awarded. If requested by either party the arbitrator must specify in the award the amount awarded for any particular improvement.

If a claim be made in respect of an improvement executed after the determination of the tenancy, but while the tenant lawfully occupies part of the holding, the arbitrator may, if he think fit, make a separate award in respect of such claim (*e*).

Award final.

567. The award is final, but may be corrected by the arbitrator in respect of any clerical error or accidental slip, or set aside by the county court for misconduct on the part of the arbitrator or if the arbitration or award has been improperly procured.

(*s*) For the rules of practice in the county court with regard to arbitrations and awards under the Agricultural Holdings Acts, see County Court Rules, Ord. 40, and title COUNTY COURTS, *post*.

(*t*) Agricultural Holdings Act, 1900 (63 & 64 Vict. c. 50), s. 2 (6). See Rules of the Supreme Court, Ord. 58, r. 20.

(*a*) For application to the Board to extend time, see Encyclopædia of Forms, Vol. VII., p. 742, Form 221.

(*b*) See Encyclopædia of Forms, p. 733, Form 212.

(*c*) *Ibid.*, p. 733, Form 213.

(*d*) *Ibid.*, p. 734, Form 214.

(*e*) Agricultural Holdings Act, 1900 (63 & 64 Vict. c. 50), s. 2 (2), (4). For form of notice of claim under such circumstances, see Encyclopædia of Forms, Vol. VII., p. 721.

SECT. 1. Improvements to Agricultural Holdings.

Costs.

568. Costs are in the discretion of the arbitrator, subject to taxation in the county court; and in awarding costs the arbitrator must take into consideration the reasonableness or unreasonableness of the conduct of the parties.

Official forms.

The Board of Agriculture and Fisheries has issued forms for use in arbitrations of this nature (*f*).

The Arbitration Act, 1889, does not apply to such an arbitration unless so provided in an agreement between the landlord and tenant (*g*). Witnesses giving false evidence before the arbitrator are guilty of perjury (*h*).

If any sum agreed or awarded to be paid to or by a landlord or tenant is not paid within fourteen days after payment becomes due, such sum may be recovered in the county court (*i*).

Claims for other matters than compensation included in the arbitration.

569. Where the tenant's claim for compensation is referred to arbitration, and any sum is claimed to be due to the tenant from the landlord for breach of contract or otherwise in respect of the holding (*k*), or to the landlord from the tenant in respect of waste or breach of covenant or otherwise in respect of the holding, the party claiming that sum may by notice given within seven days after the appointment of the arbitrator require that the arbitration shall extend to such claim, and any sum so awarded to be paid by a landlord or tenant will be recoverable in the same manner as compensation under the Agricultural Holdings Acts (*l*).

SUB-SECT. 2.—*Charge on Holding for Compensation.*

Landlord may obtain charge.

570. A landlord on paying to a tenant the amount due to him by statute, custom, agreement, or otherwise, for an improvement comprised in the First Schedule to the Agricultural Holdings Act, 1900 (*m*), or on expending money on drainage under s. 4 of the Agricultural Holdings Act, 1883, may obtain from the Board of Agriculture and Fisheries an order in favour of himself, his executors, administrators, and assigns, charging the holding with repayment of the amount expended, with such interest and by such instalments

(*f*) See Encyclopædia of Forms, Vol. VII., pp. 734—742.

(*g*) Agricultural Holdings Act, 1900 (63 & 64 Vict. c. 50), s. 2 (8). But if the parties agree to include in the reference matters outside the Agricultural Holdings Acts as well as matters within them, and one award is made dealing with the whole of such matters, the award may be enforced under s. 12 of the Arbitration Act, 1889 (*Re Lloyd and Tooth*, [1899] 1 Q. B. 559).

(*h*) *Ibid.*, s. 2 (7).

(*i*) Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61), s. 24; Agricultural Holdings Act, 1900 (63 & 64 Vict. c. 50), s. 2 (3).

(*k*) For form of notice of such claim, see Encyclopædia of Forms, Vol. VII., p. 722.

(*l*) Agricultural Holdings Act, 1900 (63 & 64 Vict. c. 50), s. 2 (3). Before this enactment a landlord could not enforce an award which awarded to him a larger sum than was awarded to the tenant (*Re Holmes and Formby*, [1895] 1 Q. B. 174; and see *Re Lloyd and Tooth*, *supra*). Where an agreement between a landlord and tenant provided that, in consideration of the tenant quitting his holding before the end of his tenancy, the landlord would pay him compensation in respect of certain matters included in the First Schedule, and also of other matters not mentioned in the Act, the amount to be ascertained by two valuers, it was held that the tenant could recover by action in the High Court the amount of the valuation (*Newby* v. *Eckersley*, [1899] 1 Q. B. 465).

(*m*) See notes (*c*), (*f*) and (*k*), pp. 260, 261, *ante*.

as the Board may direct (*n*). Where the landlord is not the absolute owner of the holding for his own benefit, no instalment or interest shall be made payable after the time when the improvement will in the opinion of the Board have become exhausted. No estate or interest of the landlord is or can be made subject to forfeiture by reason of his obtaining a charge on the holding from the Board (*o*).

Extent of charge.

The sum charged by an order of the Board is a charge on the holding for the landlord's interest therein and all interests therein subsequent to that of the landlord, but so that where the landlord's interest is leasehold the charge shall not extend beyond the interest of the landlord, his executors, administrators, and assigns (*p*).

Assignment of charge.

571. Any company incorporated by statute, and having power to advance money for the improvement of land, may take an assignment of any such charge made by the Board upon any terms that may be agreed upon, and may also assign any charge so acquired by them to any person (*q*).

Certificate as to charge.

572. Where a charge may be made for compensation, the person making the award shall, on the request and at the cost of the landlord, certify the amount to be charged and the term for which the charge may properly be made, having regard to the time when each improvement in respect of which compensation is awarded is to be deemed to be exhausted (*a*).

Registration of charge.

573. A charge made by the Board is a land charge within the meaning of the Land Charges Registration and Searches Act, 1888, and may be registered accordingly. If not so registered it will be void against a purchaser for value of the land charged (*b*).

SUB-SECT. 3.—*Capital Money Applicable for Compensation.*

Settled Land Acts.

574. Capital money arising under the Settled Land Acts, 1882 to 1890, may be applied (1) in payment of money expended or costs incurred by a landlord in the execution of an improvement comprised in Part I. or Part II. of the First Schedule to the Agricultural Holdings Act, 1900 (*c*), or paid by or due from him as compensation for any improvement comprised in that schedule, whether claimed under statute, custom, agreement, or otherwise; (2) in discharge of any charge created on the holding under the Agricultural Holdings Acts (*d*).

(*n*) If proceedings for compensation are brought against a tenant for life who dies before payment of the compensation, his executors, on making the payment, may obtain a charge on the holding for the amount so paid by them (*Gough* v. *Gough*, [1891] 2 Q. B. 665).

(*o*) Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61), s. 29; Agricultural Holdings Act, 1900 (63 & 64 Vict. c. 50), s. 3.

(*p*) Agricultural Holdings Act, 1883, s. 30; Agricultural Holdings Act, 1900, s. 3.

(*q*) Agricultural Holdings Act, 1883, s. 32; Agricultural Holdings Act, 1900, s. 3.

(*a*) Agricultural Holdings Act, 1900, s. 3 (2).

(*b*) Tenants' Compensation Act, 1890 (53 & 54 Vict. c. 57), s. 3; Agricultural Holdings Act, 1900, s. 3; Land Charges Registration and Searches Act, 1888 (51 & 52 Vict. c. 51), s. 12.

(*c*) See notes (*c*) and (*f*), pp. 260, 261, *ante*.

(*d*) Agricultural Holdings Act, 1883, s. 29; Agricultural Holdings Act, 1900, s. 3.

SECT. 1 — SUB-SECT. 4.—*Persons under Disability, Trustees etc.*

Improvements to Agricultural Holdings.

575. The county court may for the purposes of the Agricultural Holdings Acts appoint a guardian of any landlord or tenant who is an infant or of unsound mind and has no guardian (*e*).

Appointment of guardian.

Married women.

576. Where a woman married before 1883 was before her marriage entitled to land, then, if she is entitled to the land for her separate use and is not restrained from anticipation, she is, for the purposes of the Agricultural Holdings Acts, in the same position in respect to the land as if she were unmarried; but if she is not so entitled, her husband's concurrence is requisite in anything done by her under the Acts, and she must be examined apart from her husband by the judge of a county court as to her knowledge of the nature and effect of the intended act, and to ascertain that she is acting voluntarily (*f*).

Landlord a limited owner.

577. A landlord, whatever his estate or interest in the holding, may give any consent, make any agreement, and do or have done to him any act in relation to improvements for which compensation is payable under the Agricultural Holdings Acts which he might give, make, do, or have done to him if he were owner in fee simple, or, if his interest is an interest in a leasehold, were possessed of the whole estate in the leasehold (*g*).

Trustees etc.

578. Where any sum is due as compensation or under an award made under the Agricultural Holdings Acts from a landlord who is entitled to receive the rents and profits of the holding otherwise than for his own benefit, whether as trustee or otherwise, (1) the amount so due is not recoverable personally against the landlord, but is recoverable only as a charge on the holding; (2) the landlord may obtain from the Board of Agriculture and Fisheries a charge on the holding to the amount of the sum which he is required to pay or has paid to the tenant; and (3) the tenant, if he is not paid what is due to him within a month after quitting the holding, may obtain from the Board a charge for the amount due to him and costs. Charges in these cases are made in like manner as other charges under the Agricultural Holdings Acts (*h*).

Lease at best rent.

579. Where any Act or instrument authorising a lease to be made provides that the best rent shall be reserved, it is not necessary, in estimating the best rent, to take into account any increase in the value of a holding arising from any improvements made or paid for by the tenant (*i*).

SUB-SECT. 5.—*Crown, Duchy, Ecclesiastical and Charity Lands.*

Crown and Duchy lands.

580. The Agricultural Holdings Acts apply to land belonging to His Majesty in right of the Crown and of the Duchy of Lancaster, and to land belonging to the Duchy of Cornwall (*k*).

(*e*) Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61), s. 25.
(*f*) *Ibid.*, s. 26.
(*g*) *Ibid.*, s. 42.
(*h*) *Ibid.*, s. 31; Agricultural Holdings Act, 1900 (63 & 64 Vict. c. 50), ss. 2 (3), 3 (3).
(*i*) Agricultural Holdings Act, 1883, s. 43.
(*k*) *Ibid.*, ss. 35—37, which contain special provisions for the raising and payment of compensation in respect of Crown and Duchy holdings.

Where land forms the endowment of a see the powers conferred by the Agricultural Holdings Acts on a landlord (*l*) may not be exercised by the bishop except with the previous approval, in writing, of the Estates Committee of the Ecclesiastical Commissioners (*m*). SECT. 1. Improvements to Agricultural Holdings.

Where a landlord is incumbent of a benefice these powers may not be exercised by him in respect of the glebe except with the previous approval, in writing, of the patron of the benefice, or of the governors of Queen Anne's Bounty; and the latter may, on behalf of the incumbent, pay any compensation due, and obtain a charge on the holding in favour of themselves, which shall be effectual notwithstanding any change of incumbent (*n*). Ecclesiastical lands.

The power of charging land may not be exercised by trustees for ecclesiastical or charitable purposes without the approval of the Charity Commissioners (*o*). Charity lands.

SUB-SECT. 6.—*Supplemental Provisions.*

581. The costs of any proceedings in the county court under the Agricultural Holdings Acts are in the discretion of the court (*p*); and no order of the county court or of a court of summary jurisdiction under these Acts can be removed by *certiorari* or otherwise into the High Court (*q*). Costs in county court. *Certiorari.*

582. Any notice, request, demand, or other instrument under these Acts (*r*) may be served on the person to whom it is to be given either personally, or by leaving it at his last known place of abode in England, or by registered letter addressed to him there (*s*). Service on a landlord may be made on his agent duly authorised in that behalf (*t*). Service of notices etc.

583. Except as in the Agricultural Holdings Acts expressed, nothing in those Acts is to affect prejudicially any power, right, or remedy of any person under any other Act or law, or under any custom of the country or otherwise, in respect of any contract or thing (*a*). Saving of rights.

SECT. 2.—*Compensation for Improvements to Market Gardens.*

584. In the case of an agricultural holding in respect of which it is agreed in writing after January 1, 1896, that the holding shall be let or treated as a market garden (*b*), all statutory provisions as to compensation for improvements apply as if the following improvements were comprised in Part III. of the First Schedule to the Improvements for which compensation payable.

(*l*) These are, power to consent to the improvements mentioned in note (*c*), p. 260, *ante*; power as to drainage; power to make agreements as to the improvements mentioned in note (*k*), p. 261, *ante*, to purchase fixtures, and to charge the holding.

(*m*) Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61), s. 38.

(*n*) *Ibid.*, s. 39.

(*o*) *Ibid.*, s. 40.

(*p*) *Ibid.*, s. 27.

(*q*) *Ibid.*, s. 48.

(*r*) This includes a notice to quit (*Van Grutten* v. *Trevenen*, [1902] 2 K. B. 82).

(*s*) Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61), s. 28.

(*t*) An agent entrusted with the general management of an estate is *primâ facie* authorised to receive notices for the landlord (*Ingham* v. *Fenton* (1893), 10 T. L. R. 113).

(*a*) Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61), s. 60.

(*b*) See definition of this term, p. 239, *ante*.

SECT. 2. Improvements to Market Gardens.

Act of 1900 (*c*):—(1) planting of standard or other fruit trees permanently set out; (2) planting of fruit bushes permanently set out; (3) planting of strawberry plants; (4) planting of asparagus, rhubarb, and other vegetable crops which continue productive for two or more years; (5) erection or enlargement of buildings for the purpose of the trade or business of a market gardener (*d*). The right of an incoming tenant to claim compensation in respect of an improvement which he has purchased may be exercised although his landlord has not consented in writing to the purchase (*e*).

Crown and Duchy lands.

585. In the case of Duchy lands compensation for any of these improvements, and in the case of Crown lands compensation for improvements (1), (2), and (5), shall be paid in the same manner and from the same funds as if the improvement were comprised in Part I. of the First Schedule to the Act of 1900 (*f*).

Tenancies current in 1896.

586. Where a holding was, under a contract of tenancy current on January 1, 1896 (*g*), in use or cultivation as a market garden at that date with the knowledge of the landlord, and the tenant has executed thereon, without previous written notice of dissent by the landlord, any of the above-mentioned improvements, the tenant has the same right to compensation for the same as if it had been agreed in writing after that date that the holding should be let or treated as a market garden (*h*); and this right extends, after 1908, to compensation for such improvements even though they were executed before January 1, 1896 (*i*).

SECT. 3.—*Compensation for Unreasonable Disturbance.*

Nature of compensation payable.

587. If, after January 1, 1909, the landlord of an agricultural holding, without good and sufficient cause and for reasons

(*c*) See note (*k*), p. 261, *ante*.

(*d*) Market Gardeners' Compensation Act, 1895 (58 & 59 Vict. c. 27), s. 3; Agricultural Holdings Act, 1900 (63 & 64 Vict. c. 50), Schedule I., Part III.

(*e*) Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61), s. 56, as amended by the Market Gardeners' Compensation Act, 1895 (58 & 59 Vict. c. 27), s. 3 (4).

(*f*) Market Gardeners' Compensation Act, 1895, s. 5. See note (*k*), p. 268, *ante*.

(*g*) By s. 61 of the Agricultural Holdings Act, 1883, a tenancy from year to year under a contract of tenancy current at the commencement of the Act shall be deemed to continue to be a tenancy under a contract of tenancy current at the commencement of that Act until the first day on which either the landlord or tenant could, by giving notice to the other immediately after the commencement of the Act, cause such tenancy to determine, and on and after such day shall be deemed to be a tenancy under a contract beginning at the commencement of the Act.

(*h*) Market Gardeners' Compensation Act, 1895 (58 & 59 Vict. c. 27), s. 4.

(*i*) Agricultural Holdings Act, 1906 (6 Edw. 7, c. 56), s. 5; which, however, does not come into operation until January 1, 1909. This enactment overrides so much of the decisions in *Smith* v. *Callander*, [1901] A. C. 296, and *Mears* v. *Callender*, [1901] 2 Ch. 388, as decided that the right to compensation in such cases extended only to improvements executed after January 1, 1896.

As to the effect of terms in a lease substituting a specified allowance for compensation for fruit trees set out permanently in a market garden subsequently to January 1, 1896, see *Smith* v. *Devonshire* (*Duke of*) (1906), 22 T. L. R. 619.

As to compensation for improvements with respect to small holdings and allotments under the Small Holdings and Allotments Act, 1907 (7 Edw. 7, c. 54), which comes into force on January 1, 1908, see title ALLOTMENTS, pp. 347, 356, *post*, and title SMALL HOLDINGS.

inconsistent with good estate management, terminates a tenancy by notice to quit, or, after having been requested in writing at least one year before the expiration of a tenancy to do so, refuses to grant a renewal thereof, or if it is proved that an increase of rent has been demanded from the tenant and that such increase was demanded by reason of an increase in the value of the holding due to improvements executed by or at the cost of the tenant, and for which he has not received an equivalent from the landlord, and such demand results in the tenant quitting the holding, the tenant upon quitting the holding will, in addition to any compensation for improvements, and notwithstanding any agreement to the contrary, be entitled to compensation for the loss or expense directly attributable to his quitting the holding which he may unavoidably incur upon or in connection with the sale or removal of his household goods, or his implements of husbandry, produce, or farm stock on or used in connection with the holding.

SECT. 8. Unreasonable Disturbance.

588. No such compensation will, however, be payable (1) unless the tenant has given the landlord a reasonable opportunity of making a valuation of such goods, implements, produce and stock, or (2) unless the tenant has within two months after he received notice to quit, or a renewal of the tenancy was refused, as the case may be, given the landlord notice in writing of his intention to claim such compensation, or (3) where the tenant with whom a contract of tenancy was made has died within three months before the date of the notice to quit, or in the case of a lease for years, before the refusal to grant a renewal, or (4) unless the claim for compensation is made within three months after the time at which the tenant quits the holding (*k*).

Conditions of such compensation.

In the event of any difference arising as to any matter in respect of a claim for such compensation, the difference must be settled by arbitration before a single arbitrator (*l*).

Part VI.—Fixtures.

SECT. 1.—*Removal at Common Law.*

589. To the common law rule that whatever is affixed by the tenant to the freehold becomes the property of the owner of the freehold and cannot be severed by the tenant either during the continuance or after the determination of the term, exceptions were admitted by the Courts with respect to fixtures erected by a tenant (1) for the purposes of mere ornament or convenience; (2) for the purposes of trade (*m*).

Ornamental and trade fixtures alone removable at common law.

(*k*) Agricultural Holdings Act, 1906 (6 Edw. 7, c. 56), s. 4. This Act does not, however, come into operation until January 1, 1909. See sect. 9.

(*l*) *Ibid.*, ss. 1 (2), 4. The arbitration will be conducted in accordance with provisions set out on pp. 264—266, *ante*.

(*m*) See title LANDLORD AND TENANT, *post*.

SECT. 1. **Removal at Common Law.**

The exception in favour of trade fixtures was not, however, extended by the Courts to fixtures erected for agricultural purposes (*n*).

The right of an agricultural tenant to remove Dutch barns (*o*), and barns resting on the soil which have sunk into the soil by their own weight (*p*), or placed upon staddles (*q*), has been recognised on the ground that such structures are not fixtures, it being necessary to constitute a fixture that the soil should have been displaced for the purpose of receiving the article, or that the chattel should have been cemented or otherwise fastened to some fabric previously attached to the ground (*r*).

Erections and trees for business of market garden or nursery.

590. A market gardener or nurseryman was, however, entitled to remove greenhouses and hothouses erected for the purposes of his business (*s*), and shrubs, and trees, or such as are likely to become trees, planted with a view to sell (*a*), but not orchard trees (*b*).

SECT. 2.—*Statutory Right of Removal.*

Under Landlord and Tenant Act, 1851.

591. The harshness of the common law has been to some extent modified in favour of agricultural tenants by the enactment that if any tenant of a farm or lands shall with the consent in writing of the landlord at his own cost erect any farm building, either detached or otherwise, or put up any other building, engine or machinery, either for agricultural purposes or for the purposes of trade and agriculture (but not in pursuance of some obligation in that behalf), then all such buildings, engines and machinery remain the property of the tenant, and are removable by him provided that the same can be removed without injury to the land or buildings of the landlord, or that the tenant repair such injury, if any; and provided also that a month's notice of the tenant's intention to remove any such fixture be given to the landlord, who has the right to purchase the same at a price to be fixed by arbitration in case of difference (*c*).

The benefit of this enactment, it will be observed, enures to any tenant of a farm or land, and is enjoyed by a tenant of an agricultural holding, upon whom special further rights in respect of the removal of fixtures have been conferred (*d*).

Under Agricultural Holdings Act, 1883.

592. Where after January 1, 1884, a tenant of an agricultural holding affixes to his holding or acquires any engine, machinery, fencing or other fixture, or erects or acquires any building for which he is not under statute or otherwise entitled to compensation, and which is not so affixed or erected in pursuance of some obligation

(*n*) *Elwes* v. *Maw* (1802), 3 East, 38.
(*o*) *Dean* v. *Allaley* (1799), 3 Esp. 11.
(*p*) *Culling* v. *Tuffnal* (1694), Bull. N. P. 34; *Wansbrough* v. *Maton* (1836), 4 A. & E. 884.
(*q*) *Wiltshear* v. *Cottrell* (1853), 1 E. & B. 674.
(*r*) *Turner* v. *Cameron* (1870), L. R. 5 Q. B. 306, 311.
(*s*) *Penton* v. *Robart* (1801), 2 East, 88; *Mears* v. *Callender*, [1901] 2 Ch. 388.
(*a*) *Penton* v. *Robart*, *supra*; *Oakley* v. *Monck* (1866), L. R. 1 Ex. 159, 167.
(*b*) *Mears* v. *Callender*, *supra*.
(*c*) Landlord and Tenant Act, 1851 (14 & 15 Vict. c. 25), s. 3. For forms of notice by tenant of intention to remove and by landlord of election to purchase, see Encyclopædia of Forms, Vol. VII., pp. 742, 743.
(*d*) Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61), s. 60.

SECT. 2. Statutory Right of Removal.

in that behalf or instead of some fixture or building belonging to the landlord, then such fixture or building is the property of and is removable by the tenant before or within a reasonable time after termination of the tenancy. The right is, however, subject to the following conditions:—

Conditions of right of removal.

(1) Before the removal of any fixture or building the tenant must pay all rent owing by him, and perform and satisfy all other his obligations to the landlord in respect to the holding;

(2) In the removal of any fixture or building, the tenant must not do any avoidable damage to any other building or other part of the holding;

(3) Immediately after the removal of any fixture or building, the tenant must make good all damage occasioned to any other building or other part of the holding by the removal;

(4) The tenant must not remove any fixture or building without giving one month's previous notice in writing to the landlord of his intention to remove it;

(5) At any time before the expiration of the notice of removal the landlord, by notice in writing given by him to the tenant, may elect to purchase any fixture or building comprised in the notice of removal, and any fixture or building then elected to be purchased must be left by the tenant, and becomes the property of the landlord, who must pay the tenant the fair value thereof to an incoming tenant of the holding; any difference as to the value will be settled by a reference under the Agricultural Holdings Acts as in case of compensation (*e*), but without appeal (*f*).

Market gardens.

593. These provisions apply also to every fixture or building affixed or erected by the tenant to or upon a holding acquired by him for the purposes of the trade or business of a market-gardener, when it has been agreed in writing after the 1st January, 1896, that the holding shall be let or treated as a market garden (*g*). Such tenant may also remove all fruit trees and fruit bushes planted by him on the holding and not permanently set out; but if he does not remove such fruit trees and fruit bushes before the termination of his tenancy, such fruit trees and fruit bushes remain the property of the landlord, and the tenant is not entitled to any compensation in respect thereof (*h*).

Tenancies of market gardens current in 1896.

594. In the case of a tenancy current on January 1, 1896, if the holding was at that date in use or cultivation as a market garden with the knowledge of the landlord, and the tenant has executed thereon, without previous notice of dissent by the landlord, any of the improvements in respect of which the tenant would have a right of removal in the cases above mentioned, the tenant has the same right of removal of such improvements as he would have if it had been agreed in writing after January 1, 1896, that the holding should be let or treated as a market garden (*i*); and this

(*e*) For a reference in case of compensation, see p. 264, *ante*.

(*f*) Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61), s. 34, as amended by the Act of 1900 (63 & 64 Vict. c. 50), s. 4.

(*g*) Market Gardeners' Compensation Act, 1895 (58 & 59 Vict. c 27), s. 3 (1)

(*h*) *Ibid.*, sub-s. (5).

(*i*) *Ibid.*, s. 4.

Sect. 2. Statutory Right of Removal.

right extends, after 1908, to the removal of improvements which were executed before 1896 (*k*).

The above provisions as to fixtures and buildings may, however, be excluded by any agreement between the landlord and tenant (*l*).

If a tenant is entitled by the custom of the country to remove machinery or fixtures, such right is preserved to him, and may be exercised by him according to the custom without any of the statutory restrictions (*m*).

It would appear that fixtures or buildings which come within the provisions set forth above become forthwith the property of the tenant and remain his property should the lease be forfeited (*n*); but that observance of the conditions (1) and (4) is a condition precedent to their removal; and condition (1) must be fulfilled within a reasonable time.

Sect. 3.—*Time for Removal.*

Time for removal.

595. It is to be noticed that the statutory right to remove fixtures etc. may be exercised either before or within a reasonable time after the determination of the tenancy. Refusal by a landlord to allow removal of fixtures after the expiration of a tenancy gives the tenant a right of action against the landlord, but not against his mortgagees (*o*). The common law right to remove trade fixtures must be exercised by the tenant, if at all, during his original term and during such further period of possession by him as he holds the premises under a right still to consider himself a tenant (*p*). The right is lost on re-entry by the landlord for a forfeiture (*q*).

Waiver of right to remove.

596. A contract by an out-going tenant to leave on the premises fixtures which he is entitled to remove, to be taken by the landlord at a valuation, is not a sale of an interest in land within sect. 4 of the Statute of Frauds so as to require to be evidenced by writing, nor, it would seem, a sale of goods within sect. 4 of the Sale of Goods Act, 1893 (*r*); it is a sale of a waiver of the right to remove the fixtures (*s*).

(*k*) Agricultural Holdings Act, 1906 (6 Edw. 7, c. 56), s. 5, which, however, does not come into operation until January 1, 1909. This enactment overrides the decisions in *Smith* v. *Callander*, [1901] A. C. 297, and *Mears* v. *Callender*, [1901] 2 Ch. 388, that the right only extended to improvements executed after January 1, 1896.

(*l*) *Mears* v. *Callender*, *supra*. It was, however, held in that case that the tenant was not precluded from removing glasshouses erected by him, by a covenant to leave *gratis* for the landlord all improvements made by the tenant entered into in consideration of no claim being made by the landlord for "similar matters" on entry, on the ground that the words "similar matters" did not refer to improvements of such a nature as glasshouses.

(*m*) Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61), s. 60.

(*n*) *Ex parte Gould*, *Re Walker* (1884), 13 Q. B. D. 454.

(*o*) *Thomas* v. *Jennings* (1896), 66 L. J. (Q. B.) 5.

(*p*) *Weston* v. *Woodcock* (1840), 7 M. & W. 14.

(*q*) *Pugh* v. *Arton* (1869), L. R. 8 Eq. 626.

(*r*) 56 & 57 Vict. c. 71.

(*s*) *Hallen* v. *Runder* (1834), 1 C. M. & R. 266.

Part VII.—Bankruptcy of Tenant(t).

SECT. 1.—*Tenancy carried on by Trustee.*

SECT. 1. Tenancy carried on by Trustee.

597. Where the trustee in bankruptcy of a yearly tenant of a farm carries on the farm for the benefit of the creditors, and at the determination of the tenancy claims from the landlord the value of the tillages etc. under the terms of the contract of tenancy or the custom of the country, the landlord cannot set off against such value rent which was due from the tenant before the bankruptcy (*a*).

Rent accrued before bankruptcy.

If, however, a custom of the country be proved for the landlord to deduct from the tenant's valuation all arrears of rent, such custom will prevail notwithstanding the bankruptcy of the tenant (*b*).

598. The trustee of any bankrupt, or any assignee under any bill of sale, or any purchaser of the goods, stock or crop of any person engaged in husbandry on any lands let to farm, may not take, use or dispose of any hay, straw, grass or roots, or any other produce of such lands, or any manure etc. thereon, in any other manner and for any other purpose than such bankrupt or other person engaged in husbandry ought to have done if no such bankruptcy had occurred or no such assignment or sale had been made (*c*).

Disposal of produce by trustee.

This provision applies to a trustee in bankruptcy notwithstanding disclaimer by him of the lease (*d*); but does not extend to a purchaser from the landlord of goods distrained by him (*e*).

SECT. 2.—*Forfeiture by Bankruptcy.*

599. Where there is an absolute covenant by a tenant for a term of years not to sell or remove the hay and straw, but to consume the same on the farm, and also to leave on the farm all fodder grown in the last year of the term and unconsumed, on being paid for the same by valuation, then if the lease is forfeited on the bankruptcy of the tenant for condition broken, and the landlord re-enters, the landlord is not bound by the stipulations to pay for the unconsumed hay and straw (*f*).

Covenant to consume hay and straw.

SECT. 3.—*Disclaimer.*

600. If a trustee in bankruptcy of a tenant sell hay etc. off the farm without returning manure as required by the custom of the country or by the terms of the lease, and then disclaim the lease, he becomes personally liable to the landlord for his wrongful act (*g*).

Trustee selling hay etc. personally liable.

(*t*) See generally, title BANKRUPTCY AND INSOLVENCY, *post*.
(*a*) *Alloway* v. *Steere* (1882), 10 Q. B. D. 22.
(*b*) *Re Wilson, Ex parte Lord Hastings* (1893), 62 L. J. (Q. B.) 628.
(*c*) Sale of Farming Stock Act, 1816 (56 Geo. 3, c. 50), s. 11.
(*d*) *Lybbe* v. *Hart* (1885), 29 Ch. D. 8.
(*e*) *Hawkins* v. *Walrond* (1876), 1 C. P. D. 280.
(*f*) *Silcock* v. *Farmer* (1882), 46 L. T. 404; but see *Re Morrish, Ex parte Hart-Dyke* (1882), 22 Ch. D. 410.
(*g*) *Schofield* v. *Hincks* (1888), 60 L. T. 573. For form of disclaimer, see Encyclopædia of Forms, Vol. VII., pp. 707, 708, 711.

Sect. 3. Disclaimer.

Effect of disclaimer.

In the absence of any order of the Court dealing with such matter, when the trustee in bankruptcy of a tenant disclaims the lease he is not entitled to be paid for fallows etc. or to the benefit of any of the provisions in the lease which were to come into effect upon the expiration or sooner determination of the lease (*h*). Nor can he in such case claim compensation for improvements under the Agricultural Holdings Acts (*i*).

If a trustee in bankruptcy of a tenant disclaim the lease the Court may make such orders with respect to fixtures, tenant's improvements and other matters arising out of the tenancy, as the Court thinks just (*k*).

Sect. 4.—*Reputed Ownership.*

Reputed ownership.

601. Where a farmer becomes bankrupt, the doctrine of reputed ownership (*l*) does not apply to fixtures, tillages, grass and crops, included in a bill of sale given by him, of which he is in possession at the date of his bankruptcy (*m*).

The custom for purchasers of cattle and stock on a farm to leave the same with the vendor for their own convenience for a reasonable time is notorious, and the reputed ownership doctrine does not apply to such cattle or stock on the bankruptcy of the vendor within such time (*n*). The custom of agistment is also notorious, and no reputation of ownership arises in respect of agisted stock (*o*).

Part VIII.—Miscellaneous.

Sect. 1.—*Agricultural Gangs etc.*

Conditions of employment.

602. No child under such age as may be fixed by the Education Acts and bye-laws made thereunder for the employment of children (*p*), may be employed in an agricultural gang; no females may be employed in the same agricultural gang with males; and no female may be employed in any gang under a male gangmaster unless a female licensed (*q*) to act as a gangmaster is also present with that gang. The penalty for contravention of these provisions

Penalties.

(*h*) *Re Morrish, Ex parte Hart-Dyke* (1882), 22 Ch. D. 410.

(*i*) *Schofield* v. *Hincks* (1888), 60 L. T. 573.

(*k*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 55 (3).

(*l*) *Ibid.*, s. 44: see generally, title BANKRUPTCY AND INSOLVENCY.

(*m*) *Re Ginger, Ex parte London and Universal Bank*, [1897] 2 Q. B. 461.

(*n*) *Re Terry* (1862), 7 L. T. (N. S.) 370; *Priestley* v. *Pratt* (1867), L. R. 2 Ex. 101.

(*o*) *Re Woodward, Ex parte Huggins* (1886), 54 L. T. 683. See title ANIMALS, pp. 386-388, *post*.

(*p*) The Agricultural Gangs Act, 1867 (30 & 31 Vict. c. 130), s. 4 (1), fixed the age at eight years. The age of *eight* was altered to *ten* by the Agricultural Children Act, 1873 (36 & 37 Vict. c. 67), s. 16, which was repealed by the Elementary Education Act, 1876 (39 & 40 Vict. c. 79). The age at which children may be employed is now regulated by the Elementary Education Acts and the bye-laws made thereunder: see title EDUCATION.

(*q*) For form of licence, see Encyclopædia of Forms, Vol. XI., p. 119.

on the gangmaster, and also on the occupier of the land on which employment takes place, unless proved by him to have been without his knowledge, is 20*s.* for each person employed (*r*). A gangmaster, who may not be a person licensed to sell exciseable liquor (*s*), must not act without a licence (fee 1*s.* (*t*)) under penalty of 20*s.* for every day during which he so acts (*w*). Licences are granted by district councils (*x*), and remain in force for six months (*a*), but on the conviction of a gangmaster of an offence against the law in any of the above respects his licence may be suspended or rescinded (*b*). The penalties are recoverable summarily (*c*).

Licences.

In the above statement the following words have certain defined meanings. "Child" means a child under thirteen years; "young person" means a person between thirteen and eighteen years; "woman" means a female of eighteen years or upwards; "gangmaster" means any person, male or female, who hires children, young persons, or women with a view to their being employed in agricultural labour on lands not in his own occupation; and "agricultural gang" means a body of children, young persons, and women, or any of them under the control of a gangmaster.

Definitions.

603. A local authority may make bye-laws for securing the decent lodging and accommodation of persons engaged in hop-picking within the district of such authority (*d*); and also of persons engaged in fruit-picking (*e*).

Hop-pickers and fruit-pickers.

SECT 2.—*Damage by Game* (*f*).

604. An owner of land is not liable for injury done by rabbits bred on his land to the crops etc. on a neighbour's land (*g*), but the owner or lessee of a right of shooting is liable to the tenant of the land for injury caused to his crops by rabbits and game brought on to the land or by their progeny (*h*), though not for injury caused by the natural increase of rabbits etc. already on the land, or turned down in an adjoining cover not in the tenant's occupation (*i*).

Liability for damage.

An agreement by the landlord to keep down the game etc. on a farm in consideration of the tenant taking a lease of the farm

Agreement to keep down game.

(*r*) Agricultural Gangs Act, 1867 (30 & 31 Vict. c. 130), s. 4.
(*s*) *Ibid.*, s. 6.
(*t*) *Ibid.*, s. 9.
(*w*) *Ibid.*, s. 5.
(*x*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 27, which transfers certain powers of justices to district councils.
(*a*) Agricultural Gangs Act, 1867 (30 & 31 Vict. c. 130), s. 8.
(*b*) *Ibid.*, s. 10.
(*c*) *Ibid.*, s. 11.
(*d*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 314. Model bye-laws under this section have been issued by the Local Government Board. See title PUBLIC HEALTH, *post*.
(*e*) Public Health (Fruit Pickers' Lodging) Act, 1882 (45 & 46 Vict. c. 23).
(*f*) On the subject of game generally, poaching and trespass, and ground game, see title GAME AND SPORT, *post*.
(*g*) *Boulston's Case*, 5 Co. Rep. 104 b; *Brady* v. *Warren*, [1900] 2 Ir. 632.
(*h*) *Farrer* v. *Nelson* (1885), 15 Q. B. D. 258; *Hilton* v. *Green* (1862), 2 F. & F. 821; *Birkbeck* v. *Paget* (1862), 31 Beav. 403.
(*i*) *Hilton* v. *Green*, *supra*.

SECT. 2. Damage by Game.

may be made verbally, and its breach will entitle the tenant to damages (*k*).

Statutory compensation.

605. If, after 1908, the tenant of an agricultural holding sustain damage to his crops from game (which means deer, pheasants, partridges, grouse and black game), the right to kill and take which is vested neither in him nor in anyone claiming under him other than the landlord, and which the tenant has not permission in writing to kill, he is entitled to compensation from his landlord for such damage if it exceeds one shilling per acre of the area over which such damage extends, and any agreement to the contrary or in limitation of such compensation is void.

Amount and conditions.

The amount of compensation must, in default of agreement made after the damage has been suffered, be determined by arbitration before a single arbitrator, but no compensation will be recoverable (1) unless notice in writing of the damage is given to the landlord as soon as may be after the damage was first observed by the tenant, and a reasonable opportunity is given to the landlord to inspect the damage (a) in the case of damage to a growing crop, before the crop is begun to be reaped, raised or consumed, and (b) in the case of damage to a crop reaped or raised, before it is begun to be removed from the land; and (2) unless notice in writing of the claim, together with particulars thereof, is given to the landlord within one month after the expiration of the calendar year, or such other period of twelve months as by agreement between the landlord and tenant may be substituted therefor, in respect of which the claim is made (*l*).

Compensation by agreement.

606. If the landlord proves that under a contract of tenancy made before January 1, 1909, any compensation for damage by game is payable by him, or that in fixing the rent to be paid under such contract allowance in respect of such damage to an agreed amount was expressly made, the arbitrator must make such deduction from the compensation which would otherwise be payable as may appear just (*m*).

Landlord's indemnity by lessee of sporting rights.

607. Where the right to kill and take the game is vested in some person other than the landlord, the landlord is entitled to be indemnified by such other person against all claims by the tenant for compensation for damage by such game (*n*).

SECT. 3.—*Destruction of Crops etc. by Sparks from Locomotives.*

Extent of liability.

608. Crops, ricks and plantations are frequently set on fire by sparks from locomotive engines. Save as hereinafter mentioned, however, a railway company is not liable for the damage so caused, if it be shown that the engines are of the best construction and that

(*k*) *Erskine* v. *Adeane* (1873), 8 Ch. App. 756; *Barrow* v. *Ashburnham* (1835), 4 L. J. (K. B.) 146.

(*l*) Agricultural Holdings Act, 1906 (6 Edw. 7, c. 56), ss. 1 (2), 2 (1), (2). This Act does not, however, come into operation until January 1, 1909. See s. 9.

(*m*) *Ibid.*, s. 2 (3).

(*n*) *Ibid.*, s. 2 (4).

the best scientific means have been employed for preventing the escape of sparks, and the company or their servants have not otherwise been guilty of negligence in the matter (*o*).

The company will, however, be liable if negligence on their part or the part of their servants be proved (*p*).

Users of engines without legislative authority.

609. The comparative immunity of railway companies for such damage is established on the ground that the Legislature, by authorising the use of steam engines on railways, has impliedly indemnified railway companies against the consequences of the use of such engines. But a railway that has no legislative authority to use steam engines is not protected in the same manner (*q*); neither is the owner or user of a traction engine, who is liable if sparks issuing from the engine while travelling along the highway set fire to crops or ricks in the neighbourhood, without any negligence on the part of him or his servants (*r*).

Damage under £100 caused by railway engines.

610. After January 1, 1908, if damage is caused to agricultural land (which includes arable and meadow land and ground used for pastoral purposes or market or nursery gardens, as well as plantations, woods, orchards and fences on such land, but does not include moorland or buildings) or to agricultural crops (which include any crops on agricultural land, whether growing or severed, which are not led or stacked) by fire arising from sparks or cinders emitted from any locomotive engine used on a railway (which includes a light railway or steam tramway), the fact that the engine was used under statutory powers will not affect liability in an action for such damage if the claim for damage in the action does not exceed £100, and if written notice of claim shall have been given to the railway company within seven days, and particulars in writing of damage within fourteen days, after the occurrence of the damage. If the damage has been caused through the use of an engine by one company on a railway worked by another company, either company will be liable in such action, but the company using the locomotive must indemnify the company working the railway, if the action is brought against the latter (*s*).

Prevention and extinguishment of fires.

611. A railway company may, after January 1, 1908, enter on any land and do all things reasonably necessary for extinguishing or arresting the spread of any fire caused by sparks or cinders emitted from a locomotive engine; and may, for the purpose of preventing or diminishing the risk of any such fire in a plantation, wood, or orchard, enter upon any part thereof, or any land adjoining thereto, and cut down and clear away any undergrowth, and take any other precautions reasonably necessary for the purpose; but may not, without the consent of the owner, cut down or injure any trees,

(*o*) *Rex* v. *Pease* (1832), 4 B. & A. 30; *Vaughan* v. *Taff Rail. Co.* (1860), 5 H. & N. 679; *Port Glasgow and Newark Sailcloth Co.* v. *Caledonian Rail. Co.* (1893), H. L. 20 R. (Ct. of Sess.) 35; *Shaftesbury (Earl of)* v. *L. & S. W. Rail. Co.* (1895), 11 T. L. R. 269.

(*p*) *Smith* v. *L. & S. W. Rail. Co.* (1870), L. R. 6 C. P. 14, where railway servants left heaps of hedge trimmings and grass close to the line for a fortnight in very hot weather, and fire originating in the heaps spread to a stubble field and cottage.

(*q*) *Jones* v. *Festiniog Rail. Co.* (1868), L. R. 3 Q. B. 733.

(*r*) *Powell* v. *Fall* (1880), 5 Q. B. D. 597.

(*s*) Railway Fires Act, 1905 (5 Edw. 7, c. 11), ss. 1, 3, 5.

SECT. 3. Destruction by Railway Fires.

bushes, or shrubs. The railway company, however, exercising these powers must make full compensation to the person injuriously affected thereby for all damage, including loss of amenity. Such compensation will be determined, in case of difference, by two justices in the manner provided by s. 24 of the Lands Clauses Consolidation Act, 1845 (*t*).

SECT. 4.—*Destructive Insects, Fungi, and Pests.*

Prevention of importation of pests.

612. The Board of Agriculture and Fisheries may make such orders as they think expedient for preventing the introduction into Great Britain of any insect, fungus, or other pest destructive to agricultural or horticultural crops or to trees or bushes; and any such order may prohibit or regulate the landing in Great Britain of any vegetable substance, or other articles, the landing of which may appear likely to introduce such pests, and may direct or authorise the destruction of any such article, if landed. Any goods landed or attempted to be landed in contravention of such order may be forfeited, and the person offending is liable to such penalties as are imposed on persons importing goods prohibited by the Customs Acts (*a*).

Removal or destruction of tainted crops etc.

The Board may also make orders for preventing the spreading of destructive insects, fungi, or pests, and by any such order may direct or authorise the removal or destruction of any crops, trees, or bushes on which they are found in any stage of existence, or to or by which they may appear likely to spread; and may prohibit the keeping, selling, or exposing or offering for sale, or the distribution of any living specimens of such insects, fungi, or pests; and may impose penalties not exceeding £10 for any offence against such order, to be recovered summarily (*b*).

Compensation for crops etc. removed or destroyed.

613. When any order of the Board directs or authorises the removal or destruction of any crops, trees, or bushes, the Board may authorise, or, with the consent of the local authority, may direct, payment by the local authority of compensation for such crops, trees, or bushes, subject as follows: in the case of crops, trees, or bushes on which the destructive pests are found in any stage of existence, compensation is not to exceed one-half, and in other cases is not to exceed three-fourths of the value of the crops, trees, or bushes, which in each case is to be taken to be the value which in ordinary circumstances they would have had at the time of their removal or destruction. The local authority may require the value to be ascertained by their officers or by arbitration (*c*).

Local authorities.

614. The local authorities for executing these provisions, with their respective districts, local rates, clerks and committees, are

(*t*) Railway Fires Act, 1905 (5 Edw. 7, c. 11), ss. 2, 5. See title COMPULSORY PURCHASE AND COMPENSATION.

(*a*) Destructive Insects Act, 1877 (40 & 41 Vict. c. 68), s. 1, as extended and amended by the Destructive Insects and Pests Act, 1907 (7 Edw. 7, c. 4), s. 1 (1). The former Act applied only to the Colorado beetle (*Doryphora decemlineata*). The Board of Agriculture and Fisheries was substituted for the Privy Council in this Act by the operation of the Board of Agriculture Act, 1889 (52 & 53 Vict. c. 30), and the Board of Agriculture and Fisheries Act, 1903 (3 Edw. 7, c. 31). For the provisions of the Customs Acts, see title REVENUE.

(*b*) Destructive Insects Act, 1877 (40 & 41 Vict. c. 68), s. 2. See previous note.

(*c*) *Ibid.*, s. 3. See note (*a*), *supra*.

the same as the local authorities under the Diseases of Animals Act, 1894 (*d*), that is, in the City of London, the Common Council; in a borough having a population of not less than 10,000 in 1881, the Borough Council; and for the residue of each administrative county, the County Council (*e*). The Board may require a local authority to carry into effect any order of the Board; and expenses incurred and compensation paid by a local authority are to be paid out of the local rate (*f*).

Publication of orders.

All orders of the Board must be laid before Parliament within ten days after the making thereof, or after the next meeting of Parliament, and must be published in the *London Gazette* (*g*), and also by the local authority, in such manner as the Board may direct (*h*).

SECT. 5.—*Dogs.*

Liability for injury to cattle.

615. The owner of a dog is liable in damages for injury done by that dog to cattle (under which term are included horses, mules, asses, sheep, goats and swine), without proof of the mischievous disposition of the dog, or of *scienter* or negligence on the part of the owner. The occupier of the house or premises, or, if there are more occupiers than one in any house or premises let in separate apartments or lodgings or otherwise, the occupier of that particular part of the house or premises where the dog was kept or permitted to live or remain at the time of the injury, is presumed to be the owner of the dog, and is liable for the damages, unless proof is made to the contrary. If the damages claimed do not exceed £5, they may be recovered in a court of summary jurisdiction as a civil debt (*i*).

The owner of a dog that does injury to sheep is liable in damages even though the sheep were at the time trespassing on the property of the owner of the dog (*k*).

Prevention of injury by dogs.

616. Where a dog is proved to have injured cattle or chased sheep, an order may be made by a court of summary jurisdiction, directing the dog to be kept by the owner in proper control or destroyed, and any person failing to comply with such order is liable to a penalty not exceeding 20*s.* a day for every day during which he fails to comply with such order (*l*).

The Board of Agriculture and Fisheries may, *inter alia*, with a view to the prevention of worrying of cattle, make orders for preventing dogs, or any class of dogs, from straying during all or any of the hours between sunset and sunrise (*m*).

(*d*) Destructive Insects Act, 1877 (40 & 41 Vict. c. 68), s. 4 (see note (*a*), p. 280, *ante*); the Contagious Diseases (Animals) Act, 1869, referred to in that section, is now replaced by the Diseases of Animals Act, 1894 (57 & 58 Vict. c. 57), and amending Acts. See also title ANIMALS, p. 429, *post*.

(*e*) Diseases of Animals Act, 1894 (57 & 58 Vict. c. 57), s. 3.

(*f*) Destructive Insects Act, 1877 (40 & 41 Vict. c. 68), s. 4. See note (*a*), p. 280, *ante*.

(*g*) *Ibid*, s. 8.

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

(*i*) Dogs Act, 1906 (6 Edw. 7, c. 32), ss. 1 (1)—(3), 7, repealing the Dogs Act, 1865 (28 & 29 Vict. c. 60).

(*k*) *Grange* v. *Silcock* (1897), 77 L. T. 340; decided under the Dogs Act, 1865.

(*l*) Dogs Act, 1906 (6 Edw. 7, c. 32), s. 1 (4); Dogs Act, 1871 (34 & 35 Vict. c. 56), s. 2.

(*m*) Dogs Act, 1906 (6 Edw. 7, c. 32), s. 2; Diseases of Animals Act, 1894 (57 & 58 Vict. c. 57), s. 22.

SECT. 5. Dogs.

Any person who knowingly and without reasonable excuse permits the carcase of any head of cattle belonging to him to remain unburied in a field or other place to which dogs can gain access is liable on summary conviction to a penalty not exceeding 40*s.* (*n*).

Sheep dogs.

617. Where dogs are kept and used solely for tending sheep or cattle on a farm, or in the exercise of the calling or occupation of a shepherd, exemption from duty may be obtained by the owners of such dogs from the Commissioners of Inland Revenue by the certificate of such Commissioners issued with the previous sanction of a petty sessional court. Two dogs may be exempted in ordinary cases; but if the sheep are fed on common or uninclosed land so that more than two dogs are required to tend them, three dogs may be exempted where there are more than 400 sheep; four, where more than 1,000; and an extra dog for every 500 sheep above 1,000; but not more than eight dogs may be exempted on any one farm (*o*).

SECT. 6.—*Emblements.*

Definition.

618. The right to "emblements" is a right given to one who has an estate of uncertain duration, which is unexpectedly determined without any fault on his part, to take the crops growing upon the land when his estate determined.

Emblements extend only to such produce as grows by the industry and manurance of man, and to one crop only of that produce; and are confined to a crop of that species only which ordinarily repays the labour by which it is produced within the year in which that labour is bestowed (*p*). Hops, however, fall within the doctrine of emblements (*q*).

Right of entry.

619. A person entitled to emblements, or his grantee or assignee, is entitled to enter upon the land and to cut and carry them away after the estate has determined (*r*).

Contract to give up emblements.

A contract by a tenant to give up to the landlord or his successor his emblements or way-going crops at a valuation is not a sale of an interest in land (*s*).

No right to emblements on forfeiture etc.

If the estate of the tenant, although of uncertain duration, be determined by his own fault or his own act, as by forfeiture for waste or breach of covenant or condition, or by marriage of a female tenant holding during widowhood, or by resignation of a benefice, no right to emblements arises (*t*); nor where a tenancy at will is determined by the tenant (*u*).

(*n*) Dogs Act, 1906 (6 Edw. 7, c. 32), s. 6.

(*o*) *Ibid.*, s. 5 (1); Customs and Inland Revenue Act, 1878 (41 & 42 Vict. c. 15), s. 22. See also title ANIMALS, *post*, where the whole subject is dealt with (pp. 403—405).

(*p*) *Graves* v. *Weld* (1833), 5 B. & Ad. 105; Co. Litt. 55 b; *Haines* v. *Welch* (1868), L. R. 4 C. P. 91.

(*q*) *Latham* v. *Atwood* (1636), Cro. Car. 515.

(*r*) Shep. Touch. Vol. II. 244; 2 Bl. Com. 123; and see *Hayling* v. *Okey* (1853), 8 Ex. 531; *Kingsbury* v. *Collins* (1827), 4 Bing. 202.

(*s*) *Hallen* v. *Runder* (1834), 1 C. M. & R. 266, *per* PARKE, B., citing *Mayfield* v. *Wadsley* (1824), 3 B. & C. 357.

(*t*) Com. Dig. tit. "Biens," G. 2; *Bulwer* v. *Bulwer* (1819), 2 B. & Ald. 470; *Oland's Case* (1602), 5 Rep. 116 a; *Nicholas* v. *Simonds* (1625), 2 Roll. Rep. 468.

(*u*) Litt. s. 68, cited in *Kingsbury* v. *Collins*, *supra*, at p. 207.

SECT. 6. Emblements.

620. The right to emblements is now in most cases replaced by the right to hold the land until the end of the current year of tenancy. Where the lease or tenancy of any farm or lands, held by a tenant at rack rent, determines by the death or cesser of the estate of any landlord entitled for his life or for any other uncertain interest, instead of claims to emblements, the tenant may continue to hold and occupy such farm or lands until the expiration of the then current year of tenancy, and then quit upon the terms of his lease or holding. The succeeding landlord is entitled to a fair proportion of the rent for the period which has elapsed since the cesser of the estate of his predecessor, and he and the tenant are as between themselves entitled and subject to all the benefits, terms and conditions of the lease or tenancy; and no notice to quit is necessary by either party to determine such holding or occupation (*x*).

Right to hold over instead of taking emblements.

If there are no emblements which the tenant can claim he cannot hold over under this provision (*a*).

SECT. 7.—*Gleaning.*

621. No person has at common law a right to glean in the harvest field; neither have the poor of a parish legally settled (as such) any such right (*b*); and a custom for poor and indigent householders living in a certain township to cut and carry away rotten boughs and branches in a chase cannot be supported (*c*).

No common law right.

SECT. 8.—*Malicious Damage* (*d*).

622. Maliciously to destroy, or damage with intent to destroy or render useless (*e*), any machine or engine used for sowing, reaping, mowing, thrashing, ploughing or draining, or for performing any other agricultural operation (*f*), or to set fire to crops, woods, heath, stacks etc. (*g*), to destroy hopbinds (*h*), or to destroy or damage trees and shrubs (*i*), is a felony; and it is a misdemeanour maliciously to destroy or damage any vegetable production growing in a garden (*k*) or elsewhere (*l*), or to commit damage to real property exceeding £5 (*m*). Where damage is maliciously done to real property to an extent less than £5 (*n*), the offender may be

Damage to machinery or crops.

(*x*) Landlord and Tenant Act, 1851 (14 & 15 Vict. c. 25), s. 1.
(*a*) *Stradbrooke* v. *Mulcahy* (1852), 2 Ir. C. L. 406.
(*b*) *Steel* v. *Houghton* (1788), 1 Hy. Bl. 51.
(*c*) *Selby* v. *Robinson* (1788), 2 Term Rep. 758; and see *Gateward's Case* (1605), 6 Co. Rep. 59 b.
(*d*) For this subject generally, see title CRIMINAL LAW AND PROCEDURE.
(*e*) If the machine be taken to pieces by the owner, destruction or damage of any part is sufficient (*R.* v. *Mackerel* (1831), 4 C. & P. 448), unless the owner himself has destroyed some of the parts (*R.* v. *West* (1831), 2 Deac. Dig. Cr. Law, 1518); though both these cases were decided under 7 & 8 Geo. 4, c. 30, s. 4. The damage need not be complete or permanent (*R.* v. *Fisher* (1865), 1 C. C. R. 7).
(*f*) Malicious Damage Act, 1861 (24 & 25 Vict. c. 97), s. 15.
(*g*) *Ibid.*, ss. 16, 17.
(*h*) *Ibid.*, s. 19.
(*i*) *Ibid.*, ss. 20, 21.
(*k*) *Ibid.*, s. 23.
(*l*) *Ibid.*, s. 24.
(*m*) *Ibid.*, s. 51.
(*n*) *Ibid.*, s. 52.

SECT. 8. Malicious Damage.

imprisoned or fined any sum not exceeding £5. A "right of herbage" enjoyed by freemen of a borough over a moor is not "real property" within the meaning of the above provision (*o*).

Gathering mushrooms.

It is no offence to gather mushrooms growing spontaneously and uncultivated in a field, no damage being done to the grass or fences (*p*). But a trespasser upon a pasture field thereby doing injury to the grass to the extent only of a few pence may be guilty of an offence, and punishable by imprisonment or fine (*q*).

SECT. 9.—*Meadow and Ancient Pasture.*

Meadow land.

623. Ploughing up meadow-land is *primâ facie* waste and contrary to good husbandry, and will be restrained even though there be no express covenant in the lease against it (*r*): although if the ploughing be done for the purpose of ameliorating the meadow, and does ameliorate it, the act may be justified (*s*). The restriction on ploughing ancient pasture is the same as on meadow (*t*).

Pasture.

624. Sowing clover with the spring corn does not constitute laying down land in permanent pasture (*a*): nor does merely sowing common grass seed make land old meadow again (*s*).

It has been stated that continuance in pasture for twenty years impresses on the land the character of ancient meadow or pasture (*b*); and land that has formerly been ploughed may after a sufficient lapse of time become ancient pasture which a tenant will be restrained from ploughing (*c*).

The laying down of permanent pasture is an improvement to which the landlord's previous consent is necessary in order to entitle the tenant to compensation therefor under the Agricultural Holdings Acts (*d*).

SECT. 10.—*Poisoned Flesh and Grain.*

Poisoned flesh.

625. Every person wilfully placing on any land flesh or meat mixed or impregnated with poison, and calculated to destroy life, is liable on conviction to a penalty of £10 (*e*). This does not prevent the owner of a dwelling-house or any stack from laying poisonous preparations in his house, inclosed garden, drains (if protected with gratings) or stacks, for the destruction of small vermin (*f*); but laying poisoned flesh in an inclosed garden in order to destroy a

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(*o*) *Laws* v. *Eltringham* (1881), 8 Q. B. D. 283.
(*p*) *Gardner* v. *Mansbridge* (1887), 19 Q. B. D. 217.
(*q*) *Gayford* v. *Chouler*, [1898] 1 Q. B. 316.
(*r*) *Drury* v. *Molins* (1801), 6 Ves. 328; *Martin* v. *Coggan* (1824), 1 Hog. 120; *Simmons* v. *Norton* (1831), 9 L. J. (o. s.) (o. p.) 185.
(*s*) *Simmons* v. *Norton*, *supra*.
(*t*) *Atkins* v. *Temple* (1625), 1 Ch. Rep. 8.
(*a*) *Birch* v. *Stephenson* (1811), 3 Taunt. 469.
(*b*) *Morris* v. *Morris* (1825), 1 Hog. 238.
(*c*) *Fermier* v. *Maund* (1637), 1 Ch. Rep. 62.
(*d*) Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61), s. 3; Agricultural Holdings Act, 1900 (63 & 64 Vict. c. 50), s. 9, and Sch. I., Part I.; see p. 260, note (*c*), *ante*.
(*e*) Poisoned Flesh Prohibition Act, 1864 (27 & 28 Vict. c. 115), s. 2.
(*f*) *Ibid.*, s. 3.

troublesome dog that trespasses there is an offence under this provision (*g*). SECT. 10. Poisoned Flesh and Grain.

626. Every person selling or offering or exposing for sale (*h*) or knowingly sowing or putting on the ground or other exposed place, any grain, seed, or meal steeped in or mixed with poison so as to be dangerous to life, is liable on conviction to a penalty of £10 (*i*). But this does not apply to the sale of solution etc. for dressing grain or seed for *bonâ fide* use in agriculture, or to the sowing of such seed (*k*). Poisoned grain.

SECT. 11.—*Regulations as to Sale and Adulteration.*

SUB-SECT. 1.—*Fertilisers and Feeding Stuffs.*

627. Every person who sells, either wholesale or retail, for use as a fertiliser of the soil, any article (hereinafter referred to as a fertiliser) which has been subjected to any artificial process in the United Kingdom, or which has been imported from abroad, must give to the purchaser an invoice stating the name of the article and what are the respective percentages (if any) of nitrogen, soluble phosphates, insoluble phosphates, and potash contained in the article. Such invoice has effect as a warranty by the seller that the actual percentages do not differ from those stated in the invoice beyond the prescribed limits of error (*l*). Invoice on sale of fertiliser.

The prescribed limits of error representing percentages of the whole bulk of fertiliser sold vary, in the case of soluble phosphates from 1 to 4 per cent.; in the case of insoluble phosphates from 1 to 5 per cent.; in the case of nitrogen from ·3 to 1 per cent.; and in the case of potash from ·3 to ·5 per cent., except in the case of kainit and other potash salts and nitrate of potash, when either 1 or 2 per cent. is allowed (*m*). Limits of error on sale of fertiliser.

628. Every person who sells, either wholesale or retail, for use as food for cattle or poultry, any article (hereinafter referred to as a feeding stuff) which has been artificially prepared, must give to the purchaser an invoice stating the name of the article, and whether it has been prepared from one substance or seed or from more than one substance or seed, and in the case of any article artificially prepared otherwise than by being mixed, broken, ground, or chopped, what are the respective percentages (if any) of oil and albuminoids contained in the article. Such invoice has effect as a warranty by the seller as to the facts so stated, except that as respects percentages the Invoice on sale of feeding stuff.

(*g*) *Daniel* v. *Janes* (1877), 2 C. P. D. 351; but such an act is not an offence under the Malicious Damage Act, 1861 (24 & 25 Vict. c. 97), s. 41.

(*h*) Poisoned Grain Prohibition Act, 1863 (26 & 27 Vict. c. 113), s. 2.

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

(*k*) *Ibid.*, s. 4.

(*l*) Fertilisers and Feeding Stuffs Act, 1906 (6 Edw. 7, c. 27), ss. 1 (1), 10 (2). This Act repeals the Fertilisers and Feeding Stuffs Act, 1893 (56 & 57 Vict. c. 56).

(*m*) The limits are set out in detail in the Fertilisers and Feeding Stuffs (Limits of Error) Regulations, 1906, which give the following example of their application:—In the case of a bone compound, if the percentages stated in the invoice are—soluble phosphates, 20; insoluble phosphates, 8; nitrogen, 1; then the warranty implied under sect. 1 (1) of the Act will be that the fertiliser contains:—soluble phosphates, 19 to 21 per cent.; insoluble phosphates, 7 to 9 per cent.; nitrogen, ·7 to 1·3 per cent.

SECT. 11. Sale and Adulteration.

invoice has effect as a warranty only that the actual percentages do not differ from those stated in the invoice beyond the prescribed limits of error (*n*). "Cattle" here means bulls, cows, oxen, heifers, calves, sheep, goats, swine, and horses (*o*).

Feeding stuff prepared from two or more substances.

629. Where any feeding stuff is sold under a name or description implying that it is prepared from any particular substance or from any two or more particular substances, or is the product of any particular seed or of any two or more particular seeds, and without indication that it is mixed or compounded with any other substance or seed, there is implied a warranty by the seller that it is pure, that is to say, is prepared from that substance or those substances only, or is a product of that seed or those seeds only (*p*).

Implied warranty that feeding stuff is fit for use.

On the sale of any feeding stuff there is implied a warranty by the seller that the article is suitable to be used as such (*q*).

Statement by vendor as to percentages is a warranty.

630. Any statement by the seller of the percentages of the chemical and other ingredients contained in any article sold for use as a fertiliser, or of the nutritive and other ingredients contained

(*n*) Fertilisers and Feeding Stuffs Act, 1906 (6 Edw. 7, c. 27), ss. 1 (2), 10 (2). The prescribed limits of error with regard to feeding stuffs are as follows, the percentage of albuminoids being taken as the percentage of nitrogen multiplied by 6·25 :—

Description of Feeding Stuff.	Limits of Error.
Decorticated Cotton Cake or Meal Undecorticated Cotton Cake or Meal Earth Nut or Ground Nut Cake or Meal Palm Kernel or Palm Nut Cake or Meal Cocoanut Cake or Meal Niger Seed Cake or Meal Sesame Seed Cake or Meal Sunflower Seed Cake or Meal Hemp Seed Cake or Meal Kurdee or Safflower Cake or Meal Compound Cakes and Meals	One-tenth of the percentage of oil and one-tenth of the percentage of albuminoids stated in the invoice.
Linseed Cake or Meal. Rape Cake or Meal Maize Products	One-eighth of the percentage of oil and one-eighth of the percentage of albuminoids stated in the invoice.
All other feeding stuffs (as above defined) not otherwise specified in this schedule	One-fifth of the percentage of oil and one-fifth of the percentage of albuminoids stated in the invoice.

These limits are prescribed by the Fertilisers and Feeding Stuffs (Limits of Error) Regulations, 1906, the following example being given :—In the case of a linseed cake, if the percentages stated in the invoice are, oil 10, albuminoids 30, then the warranty implied under sect. 1 (2) of the Act will be that the linseed cake contains :—oil, 8·75 to 11·25 per cent. ; albuminoids, 26·25 to 33·75 per cent.

(*o*) Fertilisers and Feeding Stuffs Act, 1906 (6 Edw. 7, c. 27), s. 10 (1).
(*p*) *Ibid.*, s. 1 (3).
(*q*) *Ibid.*, s. 1 (4).

in any feeding stuff, made after the 1st January, 1907, in an invoice of such article, or in any circular or advertisement descriptive of such article, has effect as a warranty by the seller (*r*).

Where an article sold for use as a fertiliser or as a feeding stuff consists of two or more ingredients which have been mixed at the request of the purchaser, it is sufficient, with respect to percentages, if the invoice contains a statement of percentages with respect to the several ingredients before mixture, and a statement that they have been mixed at the request of the purchaser (*s*).

Feeding stuff consisting of mixed ingredients.

631. The Board of Agriculture and Fisheries must appoint a chief agricultural analyst (hereinafter referred to as the chief analyst), who may not while holding his office engage in private practice; and every county council must, and the council of any county borough may, appoint an official agricultural analyst (hereinafter referred to as an agricultural analyst) and one or more official samplers for their county or borough. The council of any county or county borough may also appoint a deputy agricultural analyst, who shall, in case of illness, incapacity, or absence of the agricultural analyst, have all the powers and duties of the agricultural analyst. The appointment of an agricultural analyst, deputy agricultural analyst, or official sampler is subject to the approval of the Board of Agriculture and Fisheries; and a person whilst holding the office of agricultural analyst may not engage or be interested in any trade, manufacture, or business connected with the sale or importation of fertilisers or feeding stuffs (*t*).

Appointment of analysts and samplers.

632. A purchaser of any fertiliser or feeding stuff who has taken a sample thereof within ten days after delivery of the article to or receipt of the invoice by him, whichever is later, is entitled, on payment of the required fee, to have the sample analysed by the agricultural analyst (*u*).

Right of purchaser to analysis by agricultural analyst.

An official sampler must at the request of the purchaser and on payment by him of the required fee, and may without any such request, take a sample for analysis by the agricultural analyst of any fertiliser or feeding stuff which has been sold or is exposed or kept for sale; but, in the case of an article which has been sold, the sample must be taken before the expiration of ten days after the delivery of the article to, or receipt of the invoice by, the purchaser, whichever is later (*x*).

Duty of official sampler.

Where a sample has been taken with a view to the institution of any civil or criminal proceeding, the person taking the sample must divide the sample into three parts as nearly as possible equal, and cause each part to be marked, sealed, and fastened up, and deliver or send by post two parts to the agricultural analyst and one part to the seller (*y*).

Division of sample into three parts.

(*r*) Fertilisers and Feeding Stuffs Act, 1906 (6 Edw. 7, c. 27), s. 1 (5).
(*s*) *Ibid.*, s. 1 (6).
(*t*) *Ibid.*, s. 2.
(*u*) *Ibid.*, s. 3 (1).
(*x*) *Ibid.*, s. 3 (2).
(*y*) *Ibid.*, s. 3 (3); Fertilisers and Feeding Stuffs (Sampling etc.) Regulations, 1906, para. 7.

SECT. 11. Sale and Adulteration.

633. If the sample submitted to an agricultural analyst is not divided into three parts marked, sealed, and fastened up, the agricultural analyst should send a copy of the certificate of his analysis to the person submitting the sample (*z*).

Duty of agricultural analyst as to certifying.

If, however, the sample has been so divided into parts, the agricultural analyst must analyse one of the parts of the sample delivered or sent to him and retain the other, and send a certificate of his analysis in the prescribed form, and containing the prescribed particulars, to the person who submitted the sample for analysis, and, where that person is not the purchaser of the article, also to the purchaser, and in every case to the seller; and he must report to the Board of Agriculture and Fisheries in the prescribed manner the result of any such analysis. If, however, the agricultural analyst does not know the name and address of the seller, he must send the certificate intended for the seller to the purchaser, to be forwarded by him to the seller (*a*).

Certificate of chief or agricultural analyst to be evidence of the facts therein stated.

634. At the hearing of any civil or criminal proceeding with respect to any article a sample whereof has been analysed as above provided, the production of a certificate of the agricultural analyst, or, if a sample has been submitted to the chief analyst, of the chief analyst, is sufficient evidence of the facts therein stated unless the defendant or person charged requires that the analyst or the person who made the analysis be called as a witness. This provision does not, however, apply—(a) where the sample has been taken otherwise than in the prescribed manner; or (b) where the sample has not been divided into parts and the parts marked, sealed, and fastened up as above mentioned (*b*).

Analysis by chief analyst.

If in any such legal proceeding (other than a proceeding which cannot be instituted until an analysis has been made and a certificate given by the chief analyst (*c*)) either party to the proceeding objects to the certificate of the agricultural analyst, the party objecting is entitled, on payment of such fee as may be fixed by the Treasury, to have submitted to the chief analyst the part of the sample retained by the agricultural analyst, and to have that part analysed by the chief analyst, and to receive from him a certificate of the result of his analysis (*d*).

Invoice to be sent to analyst with sample.

635. Where a sample or part of a sample is sent for analysis to the chief or an agricultural analyst, there must be sent therewith the invoice (if any) relating to the article from which the sample was taken, or a copy thereof; but there may be omitted from such copy the name and address of, and any other matter which would identify or disclose, the seller of the article to which the invoice relates (*e*).

Mode of taking sample.

The manner in which a sample must be taken is prescribed (*f*).

(*z*) Fertilisers and Feeding Stuffs Act, 1906 (6 Edw. 7, c. 27), s. 3 (4) (a).
(*a*) *Ibid.*, s. 3 (4) (b). For the prescribed form of certificate and prescribed particulars, see Fertilisers and Feeding Stuffs (General) Regulations, 1906.
(*b*) Fertilisers and Feeding Stuffs Act, 1906 (6 Edw. 7, c. 27), s. 3 (5).
(*c*) As to which see pp. 290, 291, *post*.
(*d*) Fertilisers and Feeding Stuffs Act, 1906 (6 Edw. 7, c. 27), s. 3 (6).
(*e*) *Ibid.*, s. 3 (7), as controlled by the Fertilisers and Feeding Stuffs (Sampling etc.) Regulations, 1906, paras. 4, 5.
(*f*) Fertilisers and Feeding Stuffs (Sampling etc.) Regulations, 1906, para. 6.

Power of Board of Agriculture and Fisheries to make regulations.

636. The Board of Agriculture and Fisheries may make regulations—(a) with respect to any matter requiring to be prescribed; (b) as to the qualifications to be possessed by agricultural analysts, deputy agricultural analysts, and official samplers; (c) as to the manner in which analyses are to be made; (d) as to the manner in which samples are to be taken and dealt with; and (e) generally; provided that nothing in any such regulations shall affect the right of the purchaser of a fertiliser or feeding stuff to have analysed by the agricultural analyst a sample of an article taken by him or at his request otherwise than in accordance with the regulations. All such regulations must be laid before both Houses of Parliament as soon as may be after they are made (*g*).

Provisions as to county and county borough councils.

637. The council of a county or county borough may (i.) concur with one or more other such councils in making any appointment of an agricultural analyst or deputy, or official sampler, and as to the apportionment in the case of such a joint appointment of the expenses amongst the several councils; (ii.) contribute towards any expenses incurred by any agricultural body or association in causing samples to be taken for analysis by the agricultural analyst; (iii.) fix the fees payable in respect of the making of any analysis and the taking of any sample at the request of a purchaser.

Expenses of county and county borough councils.

638. The expenses of any such council incurred in the execution of these provisions are to be defrayed in the case of a county council as part of their general expenses, and in the case of a county borough council out of the borough fund or borough rate (*h*).

Penalties for breach of duty by seller.

639. If any person who sells any article for use as a fertiliser or feeding stuff, (a) fails without reasonable excuse to give, on or before or as soon as possible after the delivery of the article, the requisite invoice, or (b) causes or permits any invoice or description of the article sold by him to be false in any material particular to the prejudice of the purchaser, or (c) sells for use as a feeding stuff any article which contains any ingredient deleterious to cattle or poultry, or to which has been added any ingredient worthless for feeding purposes and not disclosed at the time of the sale, he is, without prejudice to any civil liability, liable, on summary conviction, for a first offence to a fine not exceeding £20, and for any subsequent offence to a fine not exceeding £50; but no person may be convicted of the offence relating to a false invoice or description if he proves either (i.) that he did not know, and could not with reasonable care have ascertained, that the invoice or description was false, or (ii.) that he purchased the article sold with a written warranty or invoice from a person in the United Kingdom, and that that warranty or invoice contained the false statement in question, and that he had no reason to believe at the time when he sold the

(*g*) Fertilisers and Feeding Stuffs Act, 1906 (6 Edw. 7, c. 27), s. 4. Regulations have been made by orders of the Board dated December 27, 1906, under headings "General," "Sampling etc.," and "Limits of Error."

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

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article that the statement was false, and that he sold the article in the state in which it was when he purchased it (*i*).

Want of prejudice no defence.

640. In a proceeding for any of the above offences it is no defence to allege that the purchaser, having bought only for analysis, was not prejudiced by the sale (*k*).

Consent of Board of Agriculture to prosecution.

No prosecution for any of the above offences may be instituted except with the consent of the Board of Agriculture and Fisheries, which consent may not be given until the part of the sample retained by the agricultural analyst has been analysed, and a certificate of analysis given, by the chief analyst (*l*).

Requisites of summons.

In any such prosecution the summons must state particulars of the offences alleged, and also the name of the prosecutor, and will not be made returnable in less time than fourteen days from the day on which it is served; and there must be served therewith a copy of any analyst's certificate obtained on behalf of the prosecutor (*m*).

Penalties for tampering.

641. Any person fraudulently (a) tampering with any article so as to procure that any sample of it does not correctly represent the article, or (b) tampering with any sample taken as before mentioned, is liable on summary conviction to a fine not exceeding £20, or to imprisonment for a term not exceeding six months (*n*).

Obstructing official sampler

642. If the owner, or the person intrusted for the time being with the charge or custody of any article sold or intended to be sold for use as a fertiliser or feeding stuff, refuses to allow an official sampler to take a sample of the article for the purpose of analysis, or if the purchaser of any such article refuses to give to an official sampler the invoice of the article or a copy thereof or of any prescribed part thereof, the person so offending is liable on summary conviction to a fine not exceeding £10 (*o*).

Institution of prosecution.

643. Subject to the provisions as to the consent of the Board of Agriculture and Fisheries, a prosecution for any of the above-mentioned offences may be instituted either by the person aggrieved, or by the council of a county or borough, or by any body or association authorised in that behalf by the Board of Agriculture and Fisheries (*p*).

But a prosecution for an offence of causing or permitting an invoice or description to be false in any material particular may not be instituted after the expiration of three months from the date when the invoice was received by the purchaser, and not then unless a sample for analysis has been taken, and an analysis by the

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(*i*) Fertilisers and Feeding Stuffs Act, 1906 (6 Edw. 7, c. 27), s. 6 (1). Under the repealed Act of 1893, it was held that *mens rea* was not a constituent element of the offence of giving an invoice or description false in a material particular (*Laird* v. *Dobell*, [1906] 1 K. B. 131. See also *Korten* v. *West Sussex County Council* (1903), 72 L. J. (K. B.) 514).

(*k*) Fertilisers and Feeding Stuffs Act, 1906 (6 Edw. 7, c. 27), s. 6 (2).

(*l*) *Ibid.*, s. 6 (3).

(*m*) *Ibid.*, s. 6 (4).

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

(*o*) *Ibid.*, s. 8.

(*p*) *Ibid.*, s. 9 (1).

agricultural analyst has been made, and a certificate of analysis has been given, in accordance with the regulations made by the Board of Agriculture and Fisheries. The proceedings may be taken either before the Court having jurisdiction in the place where the purchaser of the article to which the invoice or description relates resides or carries on business, or before the Court having jurisdiction in the place where the invoice or description was given (*q*).

Appeal.

Any person aggrieved by a summary conviction in respect of any of the said offences may appeal to a Court of quarter sessions (*r*).

SUB-SECT. 2.—*Hay and Straw.*

Weight of trusses.

644. All hay or straw sold in London and Westminster or within thirty miles thereof must be sold in trusses; hay trusses to weigh fifty-six pounds, or if of new hay sold between June 1st and August 31st sixty pounds; straw trusses to weigh thirty-six pounds; all trusses to be of one quality throughout, and the bands not to exceed five pounds weight. Hay of the year sold between June 1st and December 31st must not be sold as hay of a former year. Buyers of hay and straw may cause it to be weighed on delivery, and no penalty for short weight or bad quality shall be incurred unless the hay etc. is weighed or complained of on delivery. Fraudulently increasing the weight, or delivering less than the number of trusses sold, renders the offender liable to a penalty (*s*).

Mixture of water etc.

645. Every person who mixes or puts or causes to be mixed or put any water, sand, earth, or other matter in any truss of hay or straw intended for sale within the said limits, or who sells, offers, or exposes for sale, or causes to be sold, offered, or exposed for sale any hay or straw into or with which any such matter has been put or mixed is liable on conviction to a penalty of £10. And every salesman must, at the time of the sale of any hay or straw on behalf of an owner, under a penalty of £10, deliver to the buyer a ticket or note showing the number of trusses sold and the name and address of the owner (*t*).

SUB-SECT. 3.—*Hops.*

Regulations as to adulteration and bags.

646. A penalty of £5 is imposed on every person who shall mix with or put into hops any drug or ingredient to alter the colour or scent thereof (*a*). Hops may not be bagged in bags of greater weight than in the proportion of 10 lbs. for every 112 lbs. of the gross weight of the bag and hops, under penalty of £20 (*b*). Growers of hops must put on every bag in large letters their names, and the name of the parish and county in which the hops were grown (*c*), the year of growth, and the consecutive number and true gross weight of the bag, under penalty of £20 for every bag (*d*).

(*q*) Fertilisers and Feeding Stuffs Act, 1906 (6 Edw. 7, c. 27), s. 9 (2).
(*r*) *Ibid.*, s. 9 (3).
(*s*) Hay and Straw Act, 1796 (36 Geo. 3, c. 88). For the other provisions of this Act, see title MARKETS AND FAIRS.
(*t*) Hay and Straw Act, 1856 (19 & 20 Vict. c. 114).
(*a*) Adulteration of Hops Act, 1733 (7 Geo. 2, c. 19), ss. 2, 3. See also title FOOD AND DRUGS.
(*b*) Hop Trade Act, 1800 (39 & 40 Geo. 3, c. 81), s. 3.
(*c*) Hop Trade Act, 1814 (54 Geo. 3, c. 123).
(*d*) Hop (Prevention of Frauds) Act, 1866 (29 & 30 Vict. c. 37), ss. 2 3.

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Penalties.

A penalty of £20 is imposed on any person marking on any bag a false description, symbol, or trade mark (*e*), or mixing hops of different qualities so that the bulk differs from sample, unless intent to defraud is disproved (*f*), or selling or exposing for sale hops in bags not marked or improperly marked, unless under a *bonâ fide* belief that the bags were duly marked (*g*), or wilfully altering or defacing marks on bags with intent to deceive (*h*). A penalty of £10 is imposed on any person rebagging foreign hops as British hops (*i*). A vendor of hops in marked bags is to be deemed to contract that the description etc. is genuine (*k*). No action or proceeding for a penalty may be taken but within three years after the offence, or one year after the discovery thereof, if not discovered within the three years (*l*).

Sub-Sect. 4.—*Seeds.*

Killing and dyeing seeds.

647. Every person who fraudulently kills or dyes or causes to be killed or dyed any seeds, or sells or causes to be sold any killed or dyed seeds, is liable on summary conviction for a first offence to a penalty of £5, and for any subsequent offence to a penalty of £50 and publication of the particulars of his offence at the offender's expense in any newspapers (*m*). To "kill" seeds is to destroy their germinating power by artificial means. "Dyeing" seeds means applying to seeds any process of colouring, dyeing, or sulphur smoking (*n*). A prosecution for selling or causing to be sold killed or dyed seeds must be commenced within twenty-one days after the offence; and it is not necessary to prove an intent to defraud any particular person (*o*).

Sect. 12.—*Sale of Cattle by Weight.*

Weighing in markets.

648. The market authority of every market or fair at which tolls are taken in respect of cattle, unless exempted by order of the Board of Agriculture and Fisheries, must provide and maintain suitable and sufficient accommodation for the weighing of cattle. "Cattle" includes rams, ewes, wethers, lambs, and swine. Every person selling, offering for sale, or buying any cattle in a market or fair where there is such weighing accommodation may require such cattle to be so weighed on payment of the toll therefor, and is entitled to have delivered to him a ticket specifying the true weight of the cattle weighed (*p*).

(*e*) Hop (Prevention of Frauds) Act, 1866 (29 & 30 Vict. c. 37), s. 4.
(*f*) *Ibid.*, s. 5.
(*g*) *Ibid.*, s. 6.
(*h*) *Ibid.*, s. 8.
(*i*) *Ibid.*, s. 7.
(*k*) *Ibid.*, s. 18.
(*l*) *Ibid.*, s. 17.
(*m*) Adulteration of Seeds Act, 1869 (32 & 33 Vict. c. 112), ss. 3, 4.
(*n*) Adulteration of Seeds Act, 1878 (41 & 42 Vict. c. 17).
(*o*) Adulteration of Seeds Act, 1869 (32 & 33 Vict. c. 112), ss. 5, 7.
(*p*) Markets and Fairs (Weighing of Cattle) Act, 1887 (50 & 51 Vict. c. 27), amended by Markets and Fairs (Weighing of Cattle) Act, 1891 (54 & 55 Vict. c. 70). For a complete account of these Acts, see title Markets and Fairs.

SECT. 13.—*Sale of Growing Crops etc.*

Sale of Growing Crops etc.

649. As a general rule, a sale of growing crops (*q*) or fruit is deemed a sale of chattels only, and does not confer an interest in land so as to come within the provisions of sect. 4 of the Statute of Frauds.

When not an interest in land.

With respect to *fructus industriales, i.e.*, corn and other growth of the earth which are not produced spontaneously but by labour and industry, a contract for the sale of them while growing, whether they are in a state of maturity or have still to derive nutriment from the land in order to bring them to that state, is not a contract for the sale of any interest in land, but merely for the sale of goods (*r*).

Sale of produce to be severed by vendor.

Also when the owner of the soil sells what is growing on the land, whether natural produce, as timber, grass, or apples, or *fructus industriales*, on the terms that he will cut or sever them from the land and deliver them to the purchaser, there is no sale of any interest in the land (*s*).

On these principles it has been held that the sale of a growing crop of wheat (*t*), of a crop of growing corn and the eatage of the stubble afterwards together with some growing potatoes and whatever lay grass was in the fields (*a*), of a crop of potatoes which had matured (*b*), and of a crop of growing potatoes (*c*) are all sales of chattels only.

When held to be an interest in land.

650. On the other hand, the following have been held to be sales of an interest in land: a sale of growing grass for the purpose of being mown and made into hay by the purchaser (*d*); a sale of hops not yet in bine (*e*); a sale of growing turnips, no time being stipulated for removing them (*f*); a contract with an incoming tenant to take and pay for growing crops and tillages in consideration of letting him a farm (*g*).

A sale of growing fruit is a sale of an interest in land (*h*).

Underwood and growing trees.

An unconditional sale of underwood or growing trees to be cut by the purchaser is a sale of an interest in land (*i*); but not so when it is stipulated that they shall be removed as soon as possible by

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(*q*) For the discussion of the questions affecting growing crops in connection with bills of sale, see title BILLS OF SALE.

(*r*) Note to Williams' Saunders on the case *Duppa* v. *Mayo*, p. 395, cited in *Marshall* v. *Green* (1875), 1 C. P. D. 35, 39.

(*s*) *Washbourn* v. *Burrows* (1847), 1 Exch. 107.

(*t*) *Mayfield* v. *Wadsley* (1824), 3 B. & C. 357.

(*a*) *Jones* v. *Flint* (1839), 10 A. & E. 753.

(*b*) *Parker* v. *Staniland* (1809), 11 East, 362; *Warwick* v. *Bruce* (1813), 2 M. & S. 205.

(*c*) *Evans* v. *Roberts* (1826), 5 B. & C. 829; *Sainsbury* v. *Matthews* (1838), 4 M. & W. 343.

(*d*) *Crosby* v. *Wadsworth* (1805), 6 East, 602; *Carrington* v. *Roots* (1837), 2 M. & W. 248.

(*e*) *Waddington* v. *Bristow* (1801), 2 Bos. & P. 452. But see *Rodwell* v. *Phillips* (1842), 9 M. & W. 501.

(*f*) *Emmerson* v. *Heelis* (1809), 2 Taunt. 38. It is doubtful if this case would now be considered to be correctly decided; see *Jones* v. *Flint*, *supra*.

(*g*) *Falmouth* (*Earl of*) v. *Thomas* (1832), 1 C. & M. 89.

(*h*) *Rodwell* v. *Phillips*, *supra*.

(*i*) *Scorell* v. *Boxall* (1827), 1 Y. & J. 396.

SECT. 13. Sale of Growing Crops etc.

the purchaser (*k*), or when sold by cubic measure with a view to immediate felling and removal (*l*).

Right to exclusive possession on sale of a crop of grass.

651. In the case of the sale of a crop of growing grass in a close for the purpose of being mown and made into hay by the purchaser, the purchaser acquires a right to the exclusive possession of the close for that purpose, and may maintain trespass against any person entering the close and taking the grass even with the assent of the vendor (*m*).

Fruit growing on tree.

The grant of fruit growing on a tree implies an undertaking by the grantor not to destroy the tree before the fruit is gathered (*n*).

SECT. 14.—*Sunday Trading.*

Farmer may do harvesting etc. on Sunday.

652. A farmer is not a "tradesman, artificer, workman or labourer" within the Sunday Observance Act, 1667 (*o*), and is not, therefore, liable to penalties under that Act for exercising the work or labour of his ordinary calling, such as hay-making, harvesting etc. on Sunday (*p*). It is doubtful also whether an agricultural labourer is a "labourer" within the enactment (*q*).

Contracts not within his ordinary calling.

Keeping a stallion for use on payment of a price is not part of the work or business of the ordinary calling of a farmer, and a contract by a farmer made and executed on Sunday for the covering of a mare is not therefore void within the statute (*r*).

SECT. 15.—*Tenant Right.*

Meaning of term.

653. "Tenant right" is a term used to express the right of the tenant to take or receive after the determination of his tenancy the benefit of the labour and capital expended by him in cleaning, tilling, and sowing the land during his tenancy, which he would otherwise lose by the determination of the tenancy. Before the Agricultural Holdings Acts, it also included the right to receive such payments from the landlord for unexhausted improvements on the holding as the custom of the country allowed. Since the Agricultural Holdings Acts, it is also sometimes used as including the tenant's right to receive the compensation for all unexhausted improvements which those Acts allow (*s*).

An assignment by an agricultural tenant of all his goods and effects on the farm, and "all his estate and interest thereon and therein," comprises the tenant right or tillages on the farm (*t*); and an assignment by a tenant of all his goods and effects etc. and "all his tenant right and interest yet to come and unexpired in

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(*k*) *Marshall* v. *Green* (1875), 1 C. P. D. 35.
(*l*) *Smith* v. *Surman* (1829), 9 B. & C. 561.
(*m*) *Crosby* v. *Wadsworth* (1805), 6 East, 602.
(*n*) See *M'Intyre* v. *Belcher* (1863), 14 C. B. (N. S.) at p. 664, *per* WILLES, J.
(*o*) 2 Car. 2, c. 7, s. 1. See title TIME.
(*p*) *R.* v. *Silvester* (1864), 33 L. J. (M. C.) 79.
(*q*) *Ibid.*, *per* MELLOR, J., at p. 80.
(*r*) *Scarfe* v. *Morgan* (1838), 4 M. & W. 270
(*s*) See pp. 258 *et seq.*, *ante*.
(*t*) *Cary* v. *Cary* (1862), 10 W. R. 669.

and to the farms and premises," passes the tenant's interest in crops grown in future years, including way-going crops (*a*). SECT. 15. Tenant Right.

SECT. 16.—*Thistles.*

654. An occupier of land is under no duty to an adjoining occupier to cut thistles naturally growing on his land, so as to prevent them seeding on the adjoining land (*b*). No duty to cut thistles.

SECT. 17.—*Threshing and Chaff-cutting Machines.*

655. The drum and feeding mouth of every threshing machine, worked by any motive power other than manual labour, must be sufficiently fenced; and any owner or person for whose service or benefit a threshing machine is used, or person in charge thereof, who permits the same to be used without being so fenced, or any person improperly removing the fencing during work, is liable on summary conviction to a penalty of £5. A constable may at all times enter on the premises to inspect any such machine in work. If the machine is shown to have been worked contrary to these provisions, the onus of showing that reasonable precautions to ensure compliance were taken is on the person charged with the offence (*c*). Threshing machines.

The feeding mouth or box, and the fly-wheel and knives, of every chaff-cutting machine worked by any motive power other than manual labour, must be sufficiently fenced, and the same persons are liable for the same offences to a similar penalty as in the case of threshing machines. The powers of a constable, and the onus of proof, are also the same as in the case of threshing machines (*d*). Chaff cutters.

SECT. 18.—*Trees.*

656. Timber trees are the property of the landlord, and even if included in the demise cannot be felled except for repairs and fuel (*e*). To cut or top timber trees, or to do any thing whereby they may decay, is waste (*f*). Property in trees.

If trees, being timber, are blown down, they belong to the landlord; but if they are dotards they belong to the tenant (*g*). In the absence of express agreement a landlord cannot, by cutting down dotards, acquire a right to the wood as against the tenant (*h*).

Where, however, trees are excepted from a demise, there is an implied right in the landlord to enter on the land at all reasonable Trees excepted from demise.

(*a*) *Petch* v. *Tutin* (1846), 15 M. & W. 110, following *Grantham* v. *Hawley* (1616), Hob. 132, on the point that goods to come into existence at a future time are assignable by deed.
(*b*) *Giles* v. *Walker* (1890), 24 Q. B. D. 656.
(*c*) Threshing Machines Act, 1878 (41 & 42 Vict. c. 12).
(*d*) Chaff Cutting Machines (Accidents) Act, 1897 (60 & 61 Vict. c. 60).
(*e*) *Doe* v. *Lock* (1835), 2 Ad. & E. 705; *Berriman* v. *Peacock* (1832), 9 Bing. 384.
(*f*) Co. Litt. 53 a.
(*g*) *Herlakenden's Case* (1589), 4 Co. Rep. 62 b; *Countess of Cumberland's Case* (1611), Moore, 812.
(*h*) *Channon* v. *Patch* (1826), 5 B. & C. 897.

SECT. 18. Trees.

times to show, and to cut and carry away the trees (*i*). The tenant is not liable for injury done to excepted trees by his cattle (*k*).

The destruction of germens, or young plants destined to become trees, is waste (*l*); but the tenant has a general property in hedges, bushes and trees which are not timber (*m*).

Apple trees in cider county.

In a lease of premises in a county where cider is made, an exception and reservation to the landlord of "all timber trees and other trees, but not the annual fruit thereof," does not except apple and similar fruit trees (*n*).

Timber trees.

Oak, ash, and elm are timber by the common law if over twenty years old, but not so old as to have no usable wood in them. Other trees may be timber by the custom of the country (*o*). Beech is timber by the custom of Buckinghamshire (*p*) and parts of Gloucestershire (*q*). Aspen and horse-chestnut are timber in some counties (*r*). Trees less than six inches in diameter have been said not to be timber (*s*).

Covenants.

A covenant not "to remove or grub up or destroy" trees is broken by removing trees from one part of the premises to another, or by substituting other trees for those growing on the premises (*t*); but a tenant may remove from an orchard trees that are decayed and past bearing, and plant others (*a*).

Cutting down pollard willows which are of no special service to the land, but leaving the stools or butts from which fresh shoots will grow, is not waste (*b*).

Nuisance.

657. Boughs and branches of trees which overhang another man's land so as to be a nuisance, may be cut by the owner or occupier of such land (*c*), without notice to the owner of the trees, and although they have so overhung for more than twenty years (*d*). And an action for damages lies for injury done to fruit and other crops by trees on a neighbour's land overhanging (*e*).

Poisonous trees.

A person who allows poisonous trees on his land to overhang a neighbour's land, is liable for the injury caused to the cattle of his neighbour by their eating the leaves of such trees (*f*). But if such trees do not project over the neighbour's land, although they may

(*i*) *Liford's Case* (1615), 11 Co. Rep. 52 a; *Hewitt* v. *Isham* (1851), 7 Exch. 77.
(*k*) *Glenham* v. *Hanby* (1700), 1 Ld. Raym. 739.
(*l*) *Phillips* v. *Smith* (1845), 14 M. & W. 589, 594.
(*m*) *Berriman* v. *Peacock* (1832), 9 Bing. 384.
(*n*) *Bullen* v. *Denning* (1826), 5 B. & C. 842; Com. Dig. tit. "Biens," H.
(*o*) *Honywood* v. *Honywood* (1874), L. R. 18 Eq. 306; *R.* v. *Minchin-Hampton* (1762), 3 Burr. 1309.
(*p*) *Dashwood* v. *Magniac*, [1891] 3 Ch. 306; *Aubrey* v. *Fisher* (1809), 10 East, 446.
(*q*) *R.* v. *Minchin-Hampton*, *supra*.
(*r*) See *R.* v. *Ferrybridge* (1823), 1 B. & C. 375, where many old authorities are epitomised.
(*s*) *Whitty* v. *Lord Dillon* (1860), 2 F. & F. 67.
(*t*) *Doe* v. *Bird* (1833), 6 C. & P. 195.
(*a*) *Doe* v. *Crouch* (1810), 2 Camp. 449.
(*b*) *Phillips* v. *Smith*, *supra*.
(*c*) *Lonsdale* (*E. of*) v. *Nelson* (1823), 2 B. & C. at p. 311.
(*d*) *Lemmon* v. *Webb*, [1895] A. C. 1.
(*e*) *Smith* v. *Giddy*, [1904] 2 K. B. 448.
(*f*) *Crowhurst* v. *Amersham Burial Board* (1878), 4 Ex. D. 5.

come close up to the boundary, and the neighbour's cattle reach and eat their leaves, and are thereby injured, the owner of the trees is under no liability for the injury, unless he is under an obligation to maintain the fence between the properties (*g*). Nor does the mere fact that clippings from trees have been placed on a neighbour's land, and have thereby injured the neighbour's cattle, constitute a cause of action against the owner of the trees as such, if the clippings were not placed there by himself or his servants (*h*). SECT. 18. Trees.

Part IX.—Board of Agriculture and Fisheries.

658. The Board of Agriculture was established in 1889 (*i*). Its title was changed to the Board of Agriculture and Fisheries in 1903 (*k*), when the powers and duties of the Board of Trade relating to fisheries were transferred to it. The Board consists of the Lord President of the Council, the principal Secretaries of State, the First Commissioner of the Treasury, the Chancellors of the Exchequer and the Duchy of Lancaster, the Secretary for Scotland, and such other persons as His Majesty may appoint. His Majesty may appoint any member of the Privy Council to be President of the Board (*l*); and the holder of that office is not rendered incapable of being elected to and sitting in Parliament (*m*). The Board may not act unless the President or one of the officers of State above mentioned is present (*n*). Constitution.

659. There are transferred to the Board (*o*) (1) the powers and duties of the Privy Council under the Contagious Diseases (Animals) Acts (*p*) and the Destructive Insects Act, 1877 (*q*); (2) the powers and duties of the Land Commissioners for England under all Acts relating to Allotments (*r*), Commons (*s*), Copyhold (*t*), Drainage and Improvement of Land (*a*), Inclosure (*b*), Metropolitan Commons (*c*), Tithe Rent-charge (*d*), Agricultural Holdings (*e*), Conveyancing (*f*), Powers.

(*g*) *Ponting* v. *Noakes*, [1894] 2 Q. B. 281.
(*h*) *Wilson* v. *Newberry* (1871), L. R. 7 Q. B. 31.
(*i*) Board of Agriculture Act, 1889 (52 & 53 Vict. c. 30), s. 1.
(*k*) Board of Agriculture and Fisheries Act, 1903 (3 Edw. 7, c. 31).
(*l*) Board of Agriculture Act, 1889 (52 & 53 Vict. c. 30), s. 1 (1), (2).
(*m*) *Ibid.*, s. 8.
(*n*) *Ibid.*, s. 1 (1).
(*o*) *Ibid.*, s. 2 (1), and First Schedule.
(*p*) Repealed and replaced by the Diseases of Animals Act, 1894 (57 & 58 Vict. c. 57), and amending Acts; see title ANIMALS, pp. 421 *et seq.*, *post*.
(*q*) See p. 280, *ante*.
(*r*) See titles ALLOTMENTS; SMALL HOLDINGS.
(*s*) See title COMMONS.
(*t*) See title COPYHOLDS.
(*a*) See title REAL PROPERTY AND CHATTELS REAL.
(*b*) See titles COMMONS; COPYHOLDS.
(*c*) See titles COMMONS; METROPOLIS.
(*d*) See title ECCLESIASTICAL LAW.
(*e*) See pp. 258 *et seq.*, *ante*.
(*f*) See title RENT-CHARGES AND ANNUITIES.

PART IX. Board of Agriculture and Fisheries.

Glebe Land (*g*), Settled Land (*h*), Universities and College Estates (*i*), Public Schools (*k*), and several private Acts, and the powers and duties of the Land Commissioners under every other Act whether general, local and personal or private; (3) all powers and duties of the Commissioner of Works, under the Survey Act, 1870 (*l*).

Promotion of agriculture.

660. The Board undertakes the collection and preparation of statistics relating to agriculture (which includes horticulture (*m*)) and forestry, and may undertake the inspection of and reporting on and aiding of any schools which are not public elementary schools, and in which instruction is given in any matter connected with agriculture and forestry; and the aiding of lectures or instruction connected with, and the inspection of and reporting on any examinations in agriculture or forestry; and may make or aid in making inquiries, experiments or research etc. for the purpose of promoting agriculture or forestry (*n*).

Animals.

The entire regulation of the movement, transit and slaughter of diseased animals, the prevention and mitigation of disease in animals, and all things incidental thereto, under the Diseases of Animals Acts (*o*), is vested in the Board; and also the power of making Orders for prescribing and regulating the wearing by dogs while in a highway or place of public resort of collars inscribed with the names and addresses of their owners, and, with a view to the prevention of worrying of cattle, for preventing dogs, or classes of dogs, from straying between sunset and sunrise (*p*).

Markets and fairs.

Certain powers in respect of markets and fairs formerly exercised by the Local Government Board, together with additional powers, are also vested in the Board of Agriculture and Fisheries (*q*).

Agricultural holdings.

The powers formerly vested in the County Court in respect of the granting of land charges to landlords who have paid compensation to any tenant of an agricultural holding, are now exercisable by the Board of Agriculture and Fisheries (*r*); who may also, in default of agreement between landlord and tenant, appoint a person to make a record of an agricultural holding at the commencement of a tenancy (*s*).

Merchandise Marks Acts.

The powers exercisable by the Board of Trade under the Merchandise Marks Act, 1891 (*t*), with respect to the prosecution

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(*g*) See title ECCLESIASTICAL LAW.
(*h*) See title REAL PROPERTY AND CHATTELS REAL.
(*i*) See title CHARITIES.
(*k*) See title EDUCATION.
(*l*) 33 & 34 Vict. c. 13. As to these powers, see title BOUNDARIES AND FENCES.
(*m*) Board of Agriculture Act, 1889 (52 & 53 Vict. c. 30), s. 12.
(*n*) *Ibid.*, s. 2.
(*o*) As to these Acts, see title ANIMALS, pp. 421 *et seq.*, *post*.
(*p*) Dogs Act, 1906 (6 Edw. 7, c. 32), s. 2; p. 281, *ante*; and see title ANIMALS, pp. 401 *et seq.*, *post*.
(*q*) Markets and Fairs (Weighing of Cattle) Act, 1891 (54 & 55 Vict. c. 70); see title MARKETS AND FAIRS.
(*r*) Agricultural Holdings Act, 1900 (63 & 64 Vict. c. 50), s. 3 (1). See p. 266, *ante*.
(*s*) Agricultural Holdings Act, 1906 (6 Edw. 7, c. 56), s. 7. See p. 240, *ante*.
(*t*) 54 & 55 Vict. c. 15.

of offences under the Merchandise Marks Act, 1887 (*a*), may in cases which appear to the Board of Agriculture and Fisheries to relate to agricultural or horticultural produce (or the produce of any fishing industry (*b*)) be exercised by that Board (*c*).

Powers to appoint analysts for, and to make regulations, and to consent to prosecutions in respect of fertilisers and feeding stuffs, are vested in the Board (*d*). Fertilisers and Feeding Stuffs Acts.

Powers of sanctioning and executing charges in favour of landowners who contribute towards the expenses of district councils in supplying water to the lands of such owners under the District Councils (Water Supply Facilities) Act, 1897 (*e*), are also vested in the Board. Charges in respect of water supply.

Such powers and duties of any Government department as are conferred by or in pursuance of any statute, and appear to His Majesty to relate to agriculture or forestry (or the industry of fishing (*f*)) may be transferred to the Board by Order in Council (*g*). Transfer of powers by Order in Council.

The Board of Agriculture and Fisheries may sue and be sued in that name, and have an official seal, which must be authenticated by the signature of the President or some member of the Board, or the secretary or person authorised to act on behalf of the secretary (*h*). Seal etc.

Every document purporting to be an order, licence, or other instrument issued by the Board, sealed and authenticated as above mentioned, or signed by a secretary or person authorised to act on behalf of the secretary, must be received in evidence, and be deemed to be such order, licence, or other instrument without further proof, unless the contrary is shown. A certificate signed by the President or any member of the Board that any order etc. purporting to be made or issued by the Board is so made or issued is conclusive evidence of the fact so certified (*i*). Evidence of orders etc.

Part X.—Royal Agricultural Society.

661. The Royal Agricultural Society was incorporated by charter in 1840 (*l*), and licence was granted to it to hold land in mortmain of the yearly value of £3,000. The objects of the Society are (1) to compile agricultural and scientific information; (2) to correspond with kindred societies; (3) to indemnify against loss persons making Incorporation and objects.

(*a*) 50 & 51 Vict. c. 28.
(*b*) Board of Agriculture and Fisheries Act, 1903 (3 Edw. 7, c. 31), s. 1 (8).
(*c*) Merchandise Marks (Prosecutions) Act, 1894 (57 & 58 Vict. c. 19), s. 1.
(*d*) Fertilisers and Feeding Stuffs Act, 1906 (6 Edw. 7, c. 27), ss. 2, 4, 8; see pp. 287 *et seq.*, *ante*.
(*e*) 60 & 61 Vict. c. 44. See title GAS AND WATER.
(*f*) Board of Agriculture and Fisheries Act, 1903 (3 Edw. 7, c. 31), s. 1 (3).
(*g*) Board of Agriculture Act, 1889 (52 & 53 Vict. c. 30), s. 4.
(*h*) *Ibid.*, s. 6, as amended by Board of Agriculture and Fisheries Act, 1903 (3 Edw. 7, c. 31), s. 1 (1).
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(*i*) *Ibid.*, s. 7.
(*l*) By supplemental charter of 1905, the method of holding general and other meetings, and of electing officers and members, was varied.

PART X. Royal Agricultural Society.

experiments in agriculture; (4) to encourage improvement in implements and buildings, the application of chemistry to agriculture, the destruction of insects, the eradication of weeds; (5) to promote discovery of new varieties of grain and vegetables; (6) to collect information on forestry and all subjects connected with rural improvement; (7) to advance education in agriculture; (8) to improve veterinary art; (9) to encourage, by holding meetings and giving prizes, farm cultivation and breeding of stock; (10) to promote the welfare of labourers and the good management of cottages and gardens.

Management etc.

The management of the Society is vested in a president and council; and the Society may sue and be sued in the name of the secretary appointed by the council.

AIR.

See EASEMENTS AND PROFITS À PRENDRE.

ALE AND BEER.

See INTOXICATING LIQUORS.

ALIENATION,

Restraint on.—*See* PERPETUITIES; PERSONAL PROPERTY; REAL PROPERTY AND CHATTELS REAL; TRUSTS AND TRUSTEES.

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Part I.—Definitions.

SECT. 1.—*Alien.*

Alien.

662. An alien is, at common law, a subject of a foreign state who has not been born within the allegiance (*x*) of the Crown (*a*).

The status of a person, as to whether he is an alien or not, is determined by the law of this country (*b*).

(*x*) "Ligeance is the mutual bond and obligation between the king and his subjects whereby subjects are called his liege subjects because they are bound to obey and serve him. . . . Therefore it is truly said *protectio trahit subjectionem et subjectio protectionem*" (*Calvin's Case* (1608), 7 Co. Rep. at p. 5 a).

(*a*) *Calvin's Case* (1608), 7 Co. Rep. 1; 1 Bl. Com. Ch. 10; *R.* v. *Burke and others* (1868), 11 Cox, C. C. 138. This definition does not, however, appear to be exhaustive, as in some cases, notably in that of Germany, if a subject is absent for ten years from his country, he loses his nationality. It would seem that such a person resident in England would, if he had not become naturalized here, have no nationality at all; for he would not be regarded as British merely because, by the law of Germany, he had ceased to be a German.

(*b*) *Re Adam* (1837), 1 Moo. P. C. C. 460, where it was held that the status of a man resident in the Mauritius, whether alien or not, is determined by the law of this country, but the rights and liabilities incidental to such status must be determined by the law of the colony.

Persons born within the allegiance of the Crown include—

(1) Everyone who is born within the dominions of the Crown whatever may be the nationality of either or both of his parents; unless he is either (a) a child of a foreign sovereign or any foreign state's ambassador, or, possibly, of any other foreign diplomatic agent (*c*); or (b) a child born in British territory of alien parents, if the territory was in the occupation of a foreign army at the time of his birth (*d*). Persons born within allegiance of the Crown.

The dominions of the Crown include—

(a) The United Kingdom and any colony, plantation, island, territory, or settlement within His Majesty's dominions and not within the United Kingdom (*e*). Dominions of the Crown.

(b) Places situated within the territory of a prince, who is subject to the Crown of England in respect of such territory (*f*).

(c) British ships of war and other public vessels (*g*).

(d) British merchantmen on the high seas (*h*), and probably even if in the territorial waters of a foreign country (*i*).

(2) The children of the King (*k*) or of a British ambassador (*l*), or, possibly, other diplomatic agent, even though such children are born abroad; but not the children born abroad of other persons in the service of the Crown (*m*). Children of Crown or diplomatic officers.

(3) Any person whose father or paternal grandfather was born within the dominions of the Crown, although he himself was born abroad, provided that at the time of his birth his father had not ceased to have the rights of a British subject (otherwise than by death (*n*)), and was not in the service of a foreign state at enmity with the Crown of England (*o*). Children and grandchildren of natural-born British subjects.

SECT. 2.—*Statutory Alien.*

663. A statutory alien is a natural-born British subject, who has become an alien in pursuance of the provisions of the Naturalization Act, 1870 (*p*). Statutory alien.

SECT. 3.—*Alien Friend.*

664. An alien friend is one whose sovereign or state is at peace with the sovereign of England (*q*). Alien friend.

(*c*) The point has never been judicially decided, but it is probable that the principle would apply at all events to a minister representing the personality of his sovereign. *See* Cockburn, Nationality, p. 7.

(*d*) *Calvin's Case* (1608), 7 Co. Rep. 1.

(*e*) Naturalization Act, 1870 (33 Vict. c. 14), s. 17.

(*f*) *Craw* v. *Ramsey* (1670), Vaugh. 281.

(*g*) *Parlement Belge* (1880), 5 P. D. 197.

(*h*) *Marshall* v. *Murgatroyd* (1870), L. R. 6 Q. B. 31.

(*i*) Compare *R.* v. *Carr and Wilson* (1882), 10 Q. B. D. 76.

(*k*) 25 Edw. 3, st. 1.

(*l*) *Calvin's Case*, *supra*, at p. 18 a.

(*m*) *De Geer* v. *Stone* (1882), 22 Ch. D. 243.

(*n*) *Doe* d. *Thomas* v. *Acklam* (1824), 2 B. & C. 779.

(*o*) The Foreign Protestants Naturalization Act, 1708 (7 Anne, c. 5), s. 53, as explained and enlarged by the British Nationality Act, 1731 (4 Geo. 2; c. 21), and the British Nationality Act, 1772 (13 Geo. 3, c. 21). Note, however, that the children of persons attainted of high treason, or liable to the penalties of high treason or felony, are expressly excepted (4 Geo. 2, c. 21, s. 2, and 13 Geo. 3, c. 21, s. 2).

(*p*) Naturalization Act, 1870 (33 Vict. c. 14), s. 8; and see p. 317, *post*.

(*q*) 1 Bl. Com. 360.

Sect. 4. Alien Enemy.

Alien enemy.

SECT. 4.—*Alien Enemy.*

665. An alien enemy is one whose sovereign or state is at war with the sovereign of England (*r*).

SECT. 5.—*Immigrant.*

Immigrant.

666. An immigrant for the purposes of the Aliens Act, 1905 (*s*), is an alien steerage passenger who is to be landed in the United Kingdom; but the term does not include—(a) any passenger who shows to the satisfaction of the immigration officer or board concerned with the case that he desires to land in the United Kingdom only for the purpose of proceeding within a reasonable time to some destination out of the United Kingdom; (b) any passenger holding a prepaid through ticket to some such destination, if the master or owner of the ship by which he is brought to the United Kingdom, or by which he is to be taken away from the United Kingdom, gives security to the satisfaction of the Secretary of State that, except for the purposes of transit or under other circumstances approved by the Secretary of State, he will not remain in the United Kingdom, or, having been rejected in another country, re-enter the United Kingdom, and that he will be properly maintained and controlled during his transit.

SECT. 6.—*Immigrant Ship.*

Immigrant ship.

667. An immigrant ship is a ship which brings to the United Kingdom more than twenty alien steerage passengers who are to be landed in the United Kingdom, whether at the same or different ports, or such number of those passengers as may be for the time being fixed by order of the Secretary of State (*t*).

SECT. 7.—*Immigration Port.*

Immigration port.

668. An immigration port is a port at which the Secretary of State has appointed immigration officers and medical inspectors for carrying the Aliens Act, 1905, into effect (*u*).

SECT. 8.—*Undesirable Immigrant.*

Undesirable immigrant.

669. An undesirable immigrant (*x*) is an immigrant—

(a) Who cannot show that he has in his possession (*y*) or is in a

(*r*) *Sylvester's Case* (1702), 7 Mod. Rep. 150.

(*s*) 5 Edw. 7, c. 13, s. 8 (1). This and the following definitions are contained in the Aliens Act, 1905 (5 Edw. 7, c. 13), and the Memorandum on the Aliens Act, 1905, issued by the Home Office (February, 1906); they apply only to the provisions of the Act and the memorandum.

(*t*) *Ibid.*, s. 8 (2). By an order made by the Home Secretary, dated December 19, 1905, the number was fixed at twelve, but by an amended order issued by the Secretary of State, and dated March 9, 1906, the number twenty was reverted to.

(*u*) Aliens Act, 1905 (5 Edw. 7, c. 13), s. 6 (1), and Memo. on Aliens Act, 1905, s. 7; see also note (*n*), p. 322, *post*.

(*x*) Aliens Act, 1905 (5 Edw. 7, c. 13), s. 1 (3).

(*y*) The test at present is, whether he is possessed of £5 and £2 for each dependant (Memo. on Aliens Act, 1905, s. 35).

position to obtain the means of decently supporting (*z*) himself and his dependants, if any; or

(b) Who is a lunatic or an idiot or owing to any disease (*a*) or infirmity appears likely to become a charge upon the rates, or otherwise a detriment to the public; or

(c) Who has been sentenced in a foreign country with which there is an extradition treaty, for a crime, not being an offence of a political character, which is as respects that country an extradition crime within the meaning of the Extradition Act, 1870 (*b*); or,

(d) Against whom an expulsion order under the Aliens Act, 1905 (*c*), has been made.

SECT. 8. Undesirable Immigrant.

SECT. 9.—*Transmigrant.*

670. A transmigrant is an alien passenger other than a first-class passenger, who holds a prepaid through ticket to some destination outside the United Kingdom and in respect of whom security has been given that he will proceed to a place outside the United Kingdom (*d*). Transmigrant.

SECT. 10.—*Passenger.*

671. A passenger is a person carried on a ship other than the master and persons employed in the working or service of the ship (*e*). Passenger.

SECT. 11.—*Steerage Passenger.*

672. A steerage passenger is any passenger except such persons as may be declared by the Secretary of State, by order made either generally or as regards any special ships or ports, to be cabin passengers (*f*). Steerage passenger.

SECT. 12.—*Cabin Passenger.*

673. A cabin passenger, as defined by the Secretary of State, is a passenger who is entitled to use the cabin, state room or saloons where the accommodation is superior to that provided in any other part of the ship devoted to the carrying of passengers (*g*). Cabin passenger.

(*z*) The fact that he has a definite trade, can speak English etc., must be taken into consideration (Memo. on Aliens Act, 1905, s. 36).

(*a*) Medical unfitness is left to the medical inspector; see Rules under the Aliens Act (December 19, 1905), r. 2.

(*b*) 33 & 34 Vict. c. 52; and see title EXTRADITION.

(*c*) See p. 323, *post.*

(*d*) Memo. on Aliens Act, 1905, s. 9.

(*e*) Aliens Act, 1905 (5 Edw. 7, c. 13), s. 8 (3).

(*f*) *Ibid.*, and Memo. on Aliens Act, 1905, s. 5. The result of the decision of the Secretary of State as to cabin passengers is that where there is more than one class of accommodation on board a ship, all alien passengers except first-class passengers are to be reckoned as alien steerage passengers, and where there is only one class of accommodation on board, all the alien passengers are to be so reckoned.

(*g*) *Ibid.*

Part II.—Rights and Duties of Aliens.

Sect. 1. Alien Friends.

Sect. 1.—*Alien Friends.*

Sub-Sect. 1.—*At Common Law.*

In general.

674. An alien friend has no legal right to enter British territory (*h*), but while in this country he owes a temporary and local allegiance to the Crown to the same extent as a British subject, which allegiance is founded on the protection he enjoys for his own person, his family and effects, during the time of that residence. Thus he may be convicted of treason (*i*), is subject to a writ of *ne exeat regno* (*j*), and is also amenable to all municipal laws. This applies equally to any alien, whether he be an alien friend or an alien enemy resident here under the protection of the King (*k*).

As to personal property.

675. At common law (*l*), and, since 1844, by statute (*m*), an alien can acquire, hold, and dispose of goods, money, and any other personal estate, other than chattels real such as leaseholds, with the single exception of a British ship (*n*), as freely as a natural-born British subject; but shares in a company owning a British ship may be held by an alien, and even if some, or even perhaps all, of the signatories of the memorandum of association are aliens, registration of the company cannot be refused (*o*).

As to real property.

Previously to 1870 an alien could hold no real estate, and this rule extended to leaseholds (*p*). He could, however, take until an inquisition was instituted by the Crown; but on a return to the inquisition being made, which was termed office found, the Crown was entitled to take (*q*). An alien could not, however, take by operation of law; thus an alien woman married to a British subject was not entitled to dower (*r*), and an alien could not be a tenant by the curtesy, but since 1844 every person then born or thereafter to be born out of the King's dominions of a mother being a natural-born subject is capable of taking real estate by devise, purchase, inheritance or succession (*s*).

(*h*) *Musgrove* v. *Chun Teeong Toy*, [1891] A. C. 272.

(*i*) See *De Jager* v. *A.-G. of Natal*, [1907] A. C. 326, where it was held that an alien resident in British territory owes allegiance to the Crown, and continues to do so although the country of which he is a subject declares war against this country and enters into military occupation of that part of British territory in which he resides; if, therefore, during the temporary evacuation of that territory by the British forces the alien takes up arms for the invaders, he is guilty of high treason.

(*j*) *De Carriere* v. *De Calonne* (1799), 4 Ves. 577.

(*k*) 1 East, P. C. p. 52; 1 Hale's History of the Pleas of the Crown, p. 59; Foster's Discourse on High Treason, p. 185, ss. 2, 3.

(*l*) 1 Bl. Com. 360. See title PERSONAL PROPERTY.

(*m*) Naturalization Act, 1844 (7 & 8 Vict. c. 66), s. 14.

(*n*) Under the old Navigation Acts, 1773 (13 Geo. 3, c. 26), and 1825 (6 Geo. 4, c. 110), s. 13, preserved by the Naturalization Act, 1870 (33 Vict. c. 14), and the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 1.

(*o*) *R.* v. *Arnaud* (1846), 9 Q. B. 806; see *Janson* v. *Driefontein Consolidated Mines, Ltd.*, [1902] A. C. 484, *per* Lord MACNAGHTEN, at p. 497.

(*p*) 1 Bl. Com. 360; Co. Litt. 2 b.

(*q*) *Ibid.*

(*r*) *Count de Wall's Case* (1848), 6 Moo. P. C. C. 216.

(*s*) Naturalization Act, 1844 (7 & 8 Vict. c. 66), s. 1. See title REAL PROPERTY AND CHATTELS REAL.

As regards leaseholds, an exception was early made by the law merchant in favour of alien merchants (*t*), who were allowed to hold leases of houses, but only for themselves and their families and for the purposes of their trade. In 1844 the right to hold leasehold lands was extended to all aliens, but it was still limited to lands held for the purpose of residence of the alien and his family or of his business and trade and to terms not exceeding twenty-one years (*u*). Leaseholds.

676. No descent could be traced through an alien ancestor (*x*); and the lands held by an alien pending the institution of an inquisition escheated to the Crown on his death intestate, because he could have no heirs (*y*). The son of an alien father and English mother, born out of the allegiance of the Crown, could not inherit to his mother in this country (*z*). But since 1700 all natural-born subjects may inherit as heirs and may trace their descent from any of their ancestors lineal or collateral, although such ancestors were born out of the allegiance of the Crown (*a*). The status of natural-born British subjects which is conferred by statute (*b*) on the children and grandchildren born abroad of a father who was a natural-born British subject at the time of their birth is purely personal, and is not made transmissible to the descendants of the persons to whom that status is given (*c*). Descent.

An alien can bequeath or receive as legatee every kind of personalty (*d*). He can also take the proceeds of land devised in trust for sale (*e*), but previously to 1870 a devise of lands to him was voidable (*f*), and lands so devised could be seized by the Crown after office found (*g*). Where a trust of freehold or copyhold lands was created in favour of an alien by will the beneficial interest passed to the Crown (*h*), and the Court of Chancery will enforce such a trust in the Crown's favour if made before 1870 (*i*). The will of an alien domiciled abroad must be made in accordance with the law of the country where he is domiciled, even though the property disposed of is personalty and his domicile of origin is British (*j*). Wills.

(*t*) 1 Bl. Com. 360; Co. Litt. 2 b.
(*u*) Naturalization Act, 1844 (7 & 8 Vict. c. 66), s. 5.
(*x*) Co. Litt. 8 a; *Rittson* v. *Stordy* (1856), 2 Jur. (N. S.) 410.
(*y*) Co. Litt. 2 b.
(*z*) *Doe* d. *Durour* v. *Jones* (1771), 4 Term Rep. 300.
(*a*) 11 & 12 Will. 3, c. 6, as explained by 25 Geo. 2, c. 39.
(*b*) 7 Anne, c. 5, 4 Geo. 2, c. 21, and 13 Geo. 3, c. 21.
(*c*) *De Geer* v. *Stone* (1882), 22 Ch. D. 243; see p. 303, *ante*.
(*d*) 1 Bl. Com. 360; *Wells* v. *Williams* (1697), 1 Lutw. 34.
(*e*) *Du Hourmelin* v. *Sheldon* (1839), 4 My. & Cr. 525.
(*f*) Shep. Touch. 404.
(*g*) *Duplessis* v. *A.-G.* (1753), 1 B. P. C. Toml. 415; *Fourdrin* v. *Gowdey* (1834), 3 My. & K. 408; *Sharp* v. *St. Sauveur* (1871), 7 Ch. App. 343. See p. 306, *ante*.
(*h*) *Barrow* v. *Wadkin* (1857), 24 Beav. 1.
(*i*) *Sharp* v. *St. Sauveur*, *supra*.
(*j*) *Bloxam* v. *Favre* (1884), 9 P. D. 130, where it was held that an alien could not by virtue of the Naturalization Act, 1870, make, if domiciled abroad, a valid will according to the provisions of English law, though an English subject domiciled abroad might do so under 24 & 25 Vict. c. 114, and it was also held that in determining what is a valid will of an alien the general principles of law prior to that year are still applicable. See also title WILLS.

SECT. 1. Alien Friends.

Bankruptcy.

677. An alien can commit an act of bankruptcy (*k*), and may be made a bankrupt if he is domiciled in England or if within a year before the date of the presentation of the petition he has ordinarily resided or had a dwelling-house or place of business in England (*l*) and has himself committed an act of bankruptcy in this country (*m*), and it would seem that an alien can be a petitioning creditor whenever he can sue for the debt (*n*).

Right to sue.

678. An alien can sue in our Courts for a personal demand (*o*). Thus he can maintain an action for debt (*p*), for slander (*q*) or libel (*r*), or sue for a fraud upon him by the use of his trade mark by a manufacturer in this country (*s*), and he can do so even though resident abroad (*t*). He is also entitled, if he is residing at the time of publication within the British dominions, to copyright in a work published by him in England (*u*), and the plea in an action that the plaintiff is an alien is invalid (*v*) unless it is also alleged that he is an alien enemy (*x*) residing here without the licence of the King (*y*). But previously to 1870 he had no right to bring a real or mixed action except in the capacity of a member of a corporation (*z*).

Offices.

679. Aliens are incapable of being members of the Privy Council or of either House of Parliament or of enjoying any office or place of trust (*a*), either civil or military, or of having any grant of lands or hereditaments from the Crown to themselves, or to any other or others in trust for them (*b*). They have, however, always been capable of becoming members of an English corporation (*c*).

Franchise.

They are debarred at common law (*d*) from exercising the Parliamentary franchise and by statute (*e*) from exercising the municipal

(*k*) *Re Pearson*, [1892] 2 Q. B. 263; *Re Clark, Ex parte Beyer, Peacock & Co.*, [1896] 2 Q. B. 476; *Ex parte Blain, Re Sawers* (1875), 12 Ch. D. 522, *per* BRETT, L.J., at p. 528.

(*l*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), ss. 4 (1) (g), 6 (1) (d).

(*m*) *Re Pearson, supra.*

(*n*) *Ex parte Pascal, Re Myer* (1876), 1 Ch. D. 509. See, generally, title BANKRUPTCY AND INSOLVENCY.

(*o*) 1 Bl. Com. 360. *Ramkissenseat* v. *Barker* (1737), 1 Atkins' Rep. p. 50.

(*p*) Dyer, 2 b (6 Hen. 8).

(*q*) *Tirlot* v. *Morris* (1611), 1 Buls. 134.

(*r*) *Pisani* v. *Lawson* (1839), 6 Bing. (N. C.) 90.

(*s*) *The Collins Co.* v. *Brown* (1857), 3 Kay & J. 423.

(*t*) *Pisani* v. *Lawson, supra.*

(*u*) *Routledge* v. *Low* (1868), 37 L. J. (CH.) 454.

(*v*) Co. Litt. 127—129; Salk. 46; *Brandon* v. *Nesbitt* (1794), 6 Term Rep. 23.

(*x*) *Openheimer* v. *Levy* (1737), 2 Stra. 1082; *Daubigny* v. *Davallon* (1793), 2 Anstr. 462.

(*y*) *Alcenius* v. *Nygren* (1854), 1 Jur. (N. S.) 16.

(*z*) 1 Co. Litt. 129 b. See title ACTION, p. 17, *ante*.

(*a*) *R.* v. *De Mierre* (1771), 5 Burr. 2788, where it was held that the office of constable of a ward of the City of London, being an office of trust, could not be held by an alien.

(*b*) Act of Settlement, 1700 (12 & 13 Will. 3, c. 2), s. 3.

(*c*) Co. Litt. 129 b.

(*d*) And see unanimous vote of House of Commons (1698), 12 Com. Jour. 367.

(*e*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 9; County Electors Act, 1888 (51 & 52 Vict. c. 10), s. 2 (2); and Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 2 (1); Naturalization Act, 1870 (33 Vict. c. 14), s. 2 (2).

franchise and from voting at any county council or parish council election or parish meeting.

Aliens who have been domiciled in England and Wales for ten years, if in other respects duly qualified, are qualified and liable to serve on juries or inquests (*f*).

Juries, civil.

An alien is triable criminally in the same manner as if he were a natural-born subject (*g*), though previously to 1870 he was entitled by statute (*h*), when indicted for a felony or misdemeanour, to be tried by a jury *de medietate linguæ*, which was constituted of equal numbers of British and alien jurors, his right to such a jury, in the case of treason, having been taken away from him in 1554 (*i*).

De medietate linguæ.

SUB-SECT. 2.—*Under the Naturalization Act*, 1870.

680. Real and personal property of every description may be taken, acquired, held, and disposed of by an alien in the same manner in all respects as by a natural-born British subject, and a title to real and personal property of every description may be derived through, from, or in succession to an alien in the same manner in all respects as through, from, or in succession to a natural-born British subject (*j*); but no right is conferred on aliens to hold real property situate out of the United Kingdom (*k*), nor is any other right or privilege as a British subject besides those expressly given (*l*).

The Act does not affect any estate or interest in real or personal property to which any person (*m*) has or may become entitled, either mediately or immediately, in possession or expectancy, in pursuance of any disposition made before the passing of the Act, or in pursuance of any devolution of law on the death of any person dying before it was passed (*n*).

SUB-SECT. 3.—*Military Service.*

681. The enlistment of aliens in the British army is regulated by statutory provisions (*o*) to the effect that an alien may, with the consent of the Crown signified through a Secretary of State, enlist in His Majesty's regular forces; but the number of aliens serving together at any one time in any corps of the regular forces must not exceed the proportion of one alien to every fifty British subjects; and an alien so enlisted is not capable of holding any higher rank than that of a warrant officer or non-commissioned officer (*p*).

Notwithstanding the above provisions any negro or person of colour, although an alien, may voluntarily enlist, and when so

(*f*) Juries Act, 1870 (33 & 34 Vict. c. 77), s. 8

(*g*) Naturalization Act, 1870 (33 Vict. c. 14), s. 5.

(*h*) (1354) 28 Edw. 3, c. 13, s. 2, and (1429) 8 Hen. 6, c. 29; see *R.* v. *Manning* (1849), 1 Den. C. C. 467; Juries Act, 1825 (6 Geo. 4, c. 50), s. 47.

(*i*) (1554) 1 & 2 Phil. & Mary, c. 10.

(*j*) Naturalization Act, 1870 (33 Vict. c. 14), s. 2.

(*k*) *Ibid.*, s. 2 (1).

(*l*) *Ibid.*, s. 2 (2); *Bloxam* v. *Favre* (1884), 9 P. D. 130.

(*m*) *Sharp* v. *St. Sauveur* (1871), 7 Ch. App. 343. Person is meant to apply generally, and it refers to all parties, whether they be aliens or otherwise.

(*n*) *Sharp* v. *St. Sauveur*, *supra*; Naturalization Act, 1870 (33 Vict. c. 14), s. 2 (3). The Act is not retrospective.

(*o*) Army Act, 1881 (44 & 45 Vict. c. 58).

(*p*) *Ibid.*, s. 95 (1).

SECT. 1. Alien Friends.

enlisted is, while serving in His Majesty's regular forces, deemed to be entitled to all the privileges of a natural-born British subject (*q*).

SECT. 2.—*Alien Enemies.*

SUB-SECT. 1.—*In General.*

In general.

682. An alien enemy had no rights at all at common law; he could be seized and imprisoned and could have no advantage of the law of England, nor obtain redress for any wrong done to him here (*r*). But it has for long been the custom to exonerate alien enemies who have been allowed to remain in this country and are of good behaviour from the disabilities of enemies (*s*).

There are, however, persons other than those whose Sovereign is at war with the Sovereign of England, who are in certain circumstances regarded as enemies. Thus, though an Englishman merely residing in a hostile country (*t*) is not regarded as an alien enemy, he is so regarded if trading there (*u*) without the licence of the Crown (*v*); and he is not freed from any liabilities imposed on him by his British nationality (*w*), unless he has by voluntary naturalization ceased to be a British subject before the commencement of the war (*x*). A neutral residing in an enemy's country as consul of a neutral state, and who also trades there as a merchant, must be regarded as an alien enemy (*y*). To prove a person is an alien enemy at the time of the commencement of an action, it is not enough to show that he was some time before domiciled in a territory which has become hostile (*z*).

SUB-SECT. 2.—*Contracts.*

Contracts.

683. A contract made after war has begun with an alien enemy who is not resident in this country and under the protection of the Crown (*a*) is void *ab initio*, and cannot be enforced even after the conclusion of peace (*b*); but a native of a foreign state in amity with this country captured on board an enemy's fleet and brought to England as a prisoner of war, is considered as being in the King's protection (*c*), and a contract with him is valid.

An action, however, was maintainable by an alien enemy on a ransom bill (*d*), but ransoming was made illegal, and all ransoming contracts were rendered void in 1782 (*e*).

(*q*) Army Act, 1881 (44 & 45 Vict. c. 58), s. 95 (2).
(*r*) *Sylvester's Case* (1702), 7 Mod. Rep. 150.
(*s*) Hall's International Law, 5th ed., p. 395.
(*t*) *Roberts* v. *Hardy* (1815), 1 Bos. & P., Lord ELLENBOROUGH's judgment at p. 536.
(*u*) *M'Connell* v. *Hector* (1802), 3 Bos. & P. at p. 114.
(*v*) *Baglehole, Ex parte* (1812), 18 Ves. 528.
(*w*) *R.* v. *Æneas Macdonald* (1747), Fost. 59.
(*x*) *R.* v. *Lynch*, [1903] 1 K. B. 444.
(*y*) *Sorensen* v. *Reg.* (1857), 11 Moo. P. C. C. 141.
(*z*) *Harman* v. *Kingston* (1811), 3 Camp. 152, 153.
(*a*) *Wells* v. *Williams* (1697), 1 Salk. 45; *Maria* v. *Hall* (1807), 1 Taunt. 33, n.; *M'Connell* v. *Hector* (1802), 3 Bos. & P. 114.
(*b*) *Willison* v. *Patteson* (1817), 7 Taunt. 439; *Brandon* v. *Nesbitt* (1794), 6 Term Rep. 23.
(*c*) *Sparenburgh* v. *Bannatyne* (1797), 1 Bos. & P. 163.
(*d*) *Ricord* v. *Bettenham* (1765), 3 Burr. 1734.
(*e*) 22 Geo. 3, c. 25.

Where a contract with an alien enemy is executory on the outbreak of war it is avoided, and both parties are at once absolved from any performance of it (*f*). Executory.

But where such a contract is executed (*g*) before the commencement of hostilities, the contract is not voided by the outbreak of war. The remedy only is suspended, and revives on the restoration of peace. Executed.

It is doubtful whether choses in action belonging to an alien enemy are forfeitable by the Crown and can be enforced for its benefit (*h*).

SUB-SECT. 3.—*Trading in War Time.*

684. Trading with alien enemies, whether individuals or corporations (*i*), is illegal (*j*), and any property employed in such trade may be confiscated by the Crown (*k*) and the subject guilty of such illegal action prosecuted for misdemeanour (*l*), and in some cases high treason (*m*). It is not a municipal offence for a neutral to carry on trade with a blockaded port (*n*), and a contract between subjects of a neutral state to export contraband of war to a belligerent is not illegal in the neutral state (*o*). Trading in time of war.

SUB-SECT. 4.—*Licences by the Crown.*

685. The Crown always has had the power to grant licences (*p*) to British subjects to reside in hostile countries and to trade with alien enemies, and to alien enemies to reside here and trade within the kingdom (*q*). But mere non-interference with an alien enemy does not imply a licence to reside or trade, and a previous licence to an alien friend is not sufficient unless his stay was sanctioned after hostilities had commenced (*r*). Licences.

Such licences may be general (*s*) or special (*t*), express (*u*) or Construction of licences.

(*f*) *Potts* v. *Bell* (1800), 8 Term Rep. 548; and *Esposito* v. *Bowden* (1857), 7 E. & B. 763.

(*g*) *The Hoop* (1799), 1 Ch. Rob. 196, 200; *Ex parte Boussmaker* (1806), 13 Ves. 71; *Alcenius* v. *Nygren* (1854), 1 Jur. (N. S.) 16; *Janson* v. *Driefontein Consolidated Mines, Ltd.*, [1902] A. C. 484.

(*h*) *A.-G.* v. *Weeden and Shales* (1699), Park. 267; *De Wahl* v. *Braune* (1856), 1 H. & N. 178; but see *contra Wolff* v. *Oxholm* (1817), 6 M. & S. 92, 102, and *Furtado* v. *Rodgers* (1802), 3 Bos. & P. 191, 200. For rights to sue, see title ACTION, p. 20, *ante*.

(*i*) *Janson* v. *Driefontein Consolidated Mines, Ltd.*, *supra*; and see *per* Lord LINDLEY, *ibid.*, at p. 505, as to what constitutes a foreign corporation.

(*j*) *The Hoop*, *supra*; *Bristow* v. *Towers* (1794), 6 Term Rep. 35; *Potts* v. *Bell*, *supra*; *Janson* v. *Driefontein Consolidated Mines, Ltd.*, *supra*, *per* Lord DAVEY, at p. 499; *M'Connell* v. *Hector* (1802), 3 Bos. & P. 114; see also notice of British Foreign Office (1899), British and Foreign State Papers, vol. 92, p. 383.

(*k*) *Land* v. *North* (*Lord*) (1785), 4 Dougl. 266.

(*l*) 1 Hawk. P. C. c. 22.

(*m*) Statute of Treason, 25 Edw. 3, st. 5, c. 2.

(*n*) *The Helen* (1865), 11 Jur. (N. S.) 1025.

(*o*) *Ex parte Chavasse, Re Grazebrook* (1865), 4 De G. J. & S. 655.

(*p*) *The Hoop*, *supra*.

(*q*) *Vandyck* v. *Whitmore* (1801), 1 East, 475.

(*r*) *Boulton* v. *Dobree* (1808), 2 Camp. 163.

(*s*) *E.g.*, the Order in Council allowing certain trades with the enemy at the outbreak of the Crimean War; and see *Clementson* v. *Blessig* (1855), 11 Exch. 135; *Busk* v. *Bell* (1812), 16 East, 3; *The Neptune* (1855), Spinks, 281.

(*t*) *Feize* v. *Thompson* (1808), 1 Taunt. 121.

(*u*) As in the case of the Order in Council, note (*s*), *supra*.

SECT. 2. Alien Enemies.

implied (*v*), and they are not assignable (*w*). A licence to trade implies an authority to insure (*x*). Licences must be construed liberally (*y*), and a mere misdescription of a party applying to the Crown for a licence to trade with an enemy, if made without fraud, does not vacate the licence (*z*), but any special condition attached to the licence must be strictly complied with (*a*). A licence to an alien enemy to reside within the realm imports a licence to trade (*b*); but a licence to a subject to trade with a hostile country does not imply a licence to reside there (*c*).

Absence of licence.

In the absence of any licence the property of an alien enemy may be seized for the use of the Crown (*d*), and the alien himself may be expelled (*e*) the country, or, if attempting to land, refused admission (*f*). At any time the Crown may revoke a licence granted (*g*).

Part III.—Acquisition of British Nationality.

SECT. 1.—*By Letters of Denization.*

In general.

686. An alien naturalized in this country becomes to all intents and purposes a British subject, and ceases to be an alien; for the character of an alien and British subject cannot be united in one person (*h*). Thus a naturalized alien is incapable of contracting a marriage which would have been void if contracted by a natural-born subject, though valid by the law of his domicil of origin (*i*).

Letters of denization.

687. The right to create denizens by letters patent is a prerogative of the Crown, which, though fallen into desuetude, is expressly preserved by the Naturalization Act, 1870 (*j*). Letters of denization, the grant of which is at the absolute discretion of the Crown, are obtainable upon petition to the Crown through the Home Office, and the petition must set out the circumstances which make it impossible or impracticable for the applicant to comply with the conditions of the Naturalization Act, 1870. The grant may be

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(*v*) *Sparenburgh* v. *Bannatyne* (1797), 1 Bos. & P. 163.
(*w*) See note (*t*), p. 311, *ante*.
(*x*) *Kensington* v. *Inglis* (1807), 8 East, 273. A licence to insure includes insurance of the ship, even if it be an enemy's, as well as of the goods put on board (*Morgan* v. *Oswald* (1812), 3 Taunt. 554; *Flindt* v. *Scott* (1814), 5 Taunt. 674).
(*y*) *Flindt* v. *Scott*, *supra*.
(*z*) *Lemcke* v. *Vaughan* (1824), 8 Moo. C. P. 646.
(*a*) *Camelo* v. *Britten* (1820), 4 B. & Ald. 184.
(*b*) *Wells* v. *Williams* (1697), 1 Salk. 45.
(*c*) *Ex parte Baglehole* (1812), 1 Rose, 271.
(*d*) *The Johanna Emilie* (1854), 2 Eng. Prize Cas. at p. 254.
(*e*) 1 Bl. Com. 259.
(*f*) *Musgrove* v. *Chun Teeong Toy*, [1891] A. C. 272; see also Hall's International Law, 5th ed., p. 390.
(*g*) *The Hoop* (1799), 1 Ch. Rob. 196, 199.
(*h*) *R.* v. *Manning* (1849), 1 Den. C. C. 467, *per* WILDE, C.J., at p. 478.
(*i*) *Metle* v. *Metle* (1859), 1 Sw. & Tr. 416.
(*j*) 33 Vict. c. 14, s. 13.

temporary or conditional, and may either express the privileges conferred or confer all the rights of a natural-born subject, except those specifically excluded by its provisions or withheld by law (*k*). SECT. 1. Letters of Denization.

Thus, a denizen is debarred from holding certain offices (*l*), and he is not qualified to own a British ship, unless he has taken the oath of allegiance and is during the time he is owner of the ship either resident in the King's dominions or partner in a firm actually carrying on business in those dominions (*m*). Disabilities of denizens.

The grant is not retrospective (*n*); consequently the children of a denizen born out of the King's dominions before the issuing of the letters patent, do not acquire British nationality unless expressly included in the terms of the grant. The taking of the oath of allegiance is a condition precedent to the grant (*o*).

SECT. 2.—*By Annexation or Cession to the British Crown.*

688. Inhabitants of conquered territory or of territory formally ceded by a foreign power become subjects when once received under the King's protection (*p*). Annexation or cession.

SECT. 3.—*Under the Naturalization Act*, 1870.

SUB-SECT. 1.—*By Certificate of Naturalization.*

689. An alien who, within such limited time before making the application hereinafter mentioned as may be allowed by one of His Majesty's principal Secretaries of State, either by general order or on any special occasion (*q*), has resided in the United Kingdom for a term of not less than five years, or has been in the service of the Crown for a similar period, and intends when naturalized either to reside in the United Kingdom or to serve under the Crown, may apply to one of His Majesty's principal Secretaries of State for a certificate of naturalization (*r*). Application for certificate of naturalization.

The applicant must adduce in support of his application such evidence of his residence or service and intention to reside or serve as the Secretary of State may require. The Secretary of State, if satisfied with the evidence adduced, must take the case of the Consideration of application.

(*k*) Act of Settlement, 1700 (12 & 13 Will. 3, c. 2), s. 3; and see p. 308, *ante*

(*l*) *Ibid.*

(*m*) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 1.

(*n*) *Fourdrin* v. *Gowdey* (1834), 3 My. & K. 383, where it was held that letters of denization conferring on a man not only the power of acquiring lands in the future, but of retaining and enjoying all lands he had heretofore acquired, gave him the power to devise the freehold and chattel interest which he had purchased previously to the letters of denization.

(*o*) For form of petition for letters patent of denization, see Encyclopædia of Forms, Vol. IX., p. 33; and for form of letters patent, see p. 34, *ibid.* The practice of the Home Office is to hand the patent to the denizen after he has taken the oath.

(*p*) *Hall* v. *Campbell* (1774), 1 Cowp. 204, *per* Lord MANSFIELD, at p. 208; see also *Mayor of Lyons* v. *East India Co.* (1836), 1 Moo. P. C. C. 175, at p. 286.

After the Boer war the Boers permitted to remain in the country were required to take the oath of allegiance.

(*q*) The period has been fixed by general order at eight years.

(*r*) The right of the Colonies to legislate as to naturalization, subject to the consent of the Crown, within the limits of such colony, is expressly preserved by the Naturalization Act, 1870 (33 Vict. c. 14), s. 16.

SECT. 3. Under Naturalization Act, 1870.

applicant into consideration, and may, with or without assigning any reason, give or withhold a certificate, as he thinks most conducive to the public good, and no appeal lies from his decision, but such certificate is not to take effect until the applicant has taken the oath of allegiance (*s*).

Effect of certificate.

690. An alien to whom a certificate of naturalization is granted is entitled in the United Kingdom to all political and other rights, powers and privileges, and is subject to all obligations, to which a natural-born British subject is entitled or subject in the United Kingdom, with this qualification, that he is not, when within the limits of the foreign state of which he was a subject previously to obtaining his certificate of naturalization, deemed to be a British subject unless he has ceased to be a subject of that state in pursuance of the laws thereof or in pursuance of a treaty to that effect (*s*).

Special certificate where doubt exists.

The Secretary of State may grant a special certificate of naturalization to any person with respect to whose nationality as a British subject a doubt exists, and he may specify in such certificate that the grant thereof is made for the purpose of quieting doubts as to the right of such person to be a British subject, and the grant of such special certificate will not be deemed to be any admission that the person to whom it was granted was not previously a British subject (*s*).

Grant to alien naturalized before 1870.

An alien who has been naturalized previous to the passing of the Act may apply to the Secretary of State for a certificate of naturalization under the Act, and the Secretary of State may grant such certificate to such naturalized alien upon the same terms and subject to the same conditions in and upon which such certificate might have been granted if such alien had not been previously naturalized in the United Kingdom (*s*).

Untrue declaration.

Any person wilfully and corruptly making or subscribing any declaration under the Act knowing the same to be untrue in any material particular is guilty of a misdemeanour, and is liable to imprisonment with or without hard labour for a term not exceeding twelve months (*t*).

Certificate irrevocable.

The certificate, when once granted, is irrevocable, and there is no provision in the Act for its withdrawal, even if it can be proved that it was obtained by fraudulent representations or upon false evidence (*u*). The certificate must be registered in the office of one of the principal Secretaries or Under-Secretaries of State (*v*).

Form of application.

691. The application takes the form of a memorial (*w*) stating (1) the foreign state of which the applicant is a subject, his place

(*s*) Naturalization Act, 1870 (33 Vict. c. 14), s. 7. For instructions generally and the various forms necessary for obtaining a certificate, see Encyclopædia of Forms, Vol. IX., pp. 9—29. The instructions and forms can also be obtained on application to the Under-Secretary of State at the Home Office.

(*t*) Naturalization Oath Act, 1870 (33 & 34 Vict. c. 102), s. 2.

(*u*) Upon this point reference may be made to the Report of the Inter-Departmental Committee on the Naturalization Laws, 1901 (Cd. 723), par. 24.

(*v*) Naturalization Act, 1870 (33 Vict. c. 14), s. 11; Regulations issued by the Home Office, December 28, 1886.

(*w*) See Encyclopædia of Forms, Vol. IX., p. 21.

of birth, and the names and nationality of his parents; (2) his name, address, age, and occupation; (3) whether he is married and has any children, under age, residing with him (with names and ages); and (4) details of his five years' residence in the United Kingdom during the prescribed period of eight years, and his intention to reside in the United Kingdom. The statements in the memorial must be verified by a general declaration made by the applicant (*x*), and the statements as to the five years' residence must be further verified, from personal knowledge, by a declaration made by one or more persons who are natural-born British subjects and none of whom is the agent or solicitor of the memorialist (*y*). The respectability and loyalty of the applicant must be vouched for by a declaration made by four householders, who must also fulfil the conditions just expressed (*z*). The fee payable on the grant of a certificate is £5.

SECT. 3. Under Naturalization Act, 1870.

Where the applicant is in the service of the Crown a very similar memorial is presented (*a*), and there is a special form (*b*) for alien seamen serving on British ships. Only those alien seamen who have for at least three years out of the qualifying period of five years been engaged in sea service on a British ship, and have been at sea within six months of their application, can avail themselves of this form. The £5 fee is not charged on the grant of certificates to alien seamen (*b*).

Alien seamen.

SUB-SECT. 2.—*Married Women.*

692. Since May 12th, 1870, an alien woman married to a British subject is deemed to be a British subject (*c*).

Married women.

SUB-SECT. 3.—*Alien Infants.*

693. Where the father, or the mother being a widow, has obtained a certificate of naturalization in the United Kingdom, every child of such father or mother who during infancy has become resident with such father or mother in any part of the United Kingdom, or with such father while in the service of the Crown out of the United Kingdom, is deemed to be a naturalized British subject (*d*).

Infants.

SECT. 4.—*By Private Act of Parliament.*

694. An alien is naturalized by private Act of Parliament only in exceptional cases. The political and other rights and privileges conferred on and the disabilities attaching to an alien so naturalized depend on the wording of the Acts (*e*). A Naturalization Bill must be first introduced in the House of Lords, the standing orders

Act of Parliament.

(*x*) See Encyclopædia of Forms, Vol. IX., p. 22.
(*y*) *Ibid.*, p. 23.
(*z*) *Ibid.*, p. 24.
(*a*) *Ibid.*, p. 21.
(*b*) *Ibid.*, p. 25.
(*c*) Naturalization Act, 1870 (33 Vict. c. 14), s. 10 (1).
(*d*) Naturalization Acts, 1870 (33 Vict. c. 14), s. 10 (5), and 1895 (58 & 59 Vict. c. 43), s. 1. As to the words "during infancy," it is suggested that this expression means such part of a child's infancy as is sufficient to constitute residence, and that what circumstances amount to residence of a child with a parent must in each case be a question of fact (Dicey, Conflict of Laws, p. 10).
(*e*) For precedents, see Encyclopædia of Forms, Vol. IX., pp. 31, 32.

SECT. 4. By Private Act of Parliament.

of which provide that it must be preceded by a petition, with a copy of the proposed Bill attached, for leave to bring in the Bill (*f*). The standing orders further provide that a Naturalization Bill shall not be read a second time until the petitioner has produced a certificate from the Secretary of State as to his conduct and has taken the oath of allegiance at the Bar of the House, and that such a Bill shall not be read a second time unless the consent of the Crown has been previously signified (*g*).

Part IV.—Loss of British Nationality.

SECT. 1.—*In General.*

At common law.

695. At common law a British subject could not by any voluntary act of his own divest himself of his British nationality (*h*). So the grandson of an Englishman by birth, who had emigrated to the United States of America after the recognition of their independence, and who had taken oaths of obedience to the American Government and of abjuration of all other allegiance, though born out of the King's dominions, was held capable of inheriting real estate as a British subject (*i*).

Loss of nationality by loss of territory.

696. A British subject could, however, lose his nationality by loss of territory by the British Crown; either by the severance of the Crown from the territory in which the British subject was born, by the laws of succession being different in the two countries, in which case he would cease to be a British subject and become that of the Prince who had succeeded to the territory in which he was born (*j*); or by cession to a foreign country by conquest, treaty, or Act of Parliament. It is doubtful whether the Crown, without the authority of Parliament, possesses the right of alienating British territory by treaty not following the close of a war (*k*), and when Heligoland was ceded to the German Empire in 1890, the provisions of the treaty whereby it was ceded were expressly assented to by Act of Parliament (*l*), and in the case of the Treaty made with the United States of America, which was signed on September 3rd, 1783, a statute (*m*) was previously passed authorising the Crown to treat of and conclude a peace with the American Colonies.

(*f*) Standing Orders, H. of L. 149—151.
(*g*) Standing Orders, H. of L. 179, 180.
(*h*) 1 Bl. Com. 370; *R.* v. *Æneas Macdonald* (1747), Fost. 59.
(*i*) *Fitch* v. *Weber* (1847), 6 Hare, 51.
(*j*) *Re The Stepney Election Petition, Isaacson* v. *Durant* (1886), 17 Q. B. D. 54, wherein it was held that persons born in Hanover before the accession of Queen Victoria to the throne of the United Kingdom and not naturalized are aliens, though resident in the United Kingdom; and the dicta in *Calvin's Case*, Co. Rep., Part vii., p. 46, 27 b, were dissented from.
(*k*) Forsyth's cases and opinions on Constitutional Law (1869), pp. 182, 336. See title CONSTITUTIONAL LAW.
(*l*) Anglo-German Agreement Act, 1890 (53 & 54 Vict. c. 32).
(*m*) 22 Geo. 3, c. 46.

SECT. 1. In General.

Effect of loss of territory by treaty.

Such treaties may specifically regulate the future nationality of the inhabitants of the ceded territory, but in the absence of an express provision, a relinquishment of the government of a territory is not only a relinquishment of the right to the soil or territory, but also of the rights over the inhabitants of the country (*n*).

Consequently children born in the United States of America since the recognition of their independence, of parents born there before that time and continuing to reside there afterwards, are aliens (*o*); but it was held that children born in the United States since such recognition, of parents who resided there before, but who were natural-born British subjects and at the time of the separation adhered to the British government, are not aliens (*p*).

SECT. 2.—*Under the Naturalization Act*, 1870.

SUB-SECT. 1.—*By Voluntary Naturalization in a Foreign State.*

Expatriation.

697. Any British subject who at any time, when in any foreign state and not under any disability, voluntarily becomes naturalized in such state, is from and after the time of his so having become naturalized in such foreign state deemed to have ceased to be a British subject and is regarded as an alien (*q*), but he is not thereby discharged from any liability in respect of any acts done before the date of his so becoming an alien (*r*).

A British subject voluntarily naturalized in a foreign state prior to May 12th, 1870, might within two years of that date have made a declaration that he was desirous of remaining a British subject, and have taken the oath of allegiance, in which case he was deemed to be, and to have been continually, a British subject, with the qualification that he should not, when within the limits of the foreign state in which he had been naturalized, be deemed to be a British subject unless he had ceased to be a subject of that state (*s*).

SUB-SECT. 2.—*By Declaration of Alienage.*

Persons who may make declaration of alienage.

698. The following persons may make a declaration of alienage, whereby they lose their status as British subjects, and are regarded as aliens (*t*):—

Naturalized aliens.

1. Where His Majesty has entered into a convention (*u*) with any foreign state for the purpose, and such convention has been declared to have been entered into by Order in Council, from and after the date of such order any person being originally a subject or citizen of the state referred to in such order who has been naturalized as a British subject;

(*n*) *Doe* d. *Thomas* v. *Acklam* (1824), 2 B. & C. 779.

(*o*) *Ibid.*

(*p*) *Doe* d. *Auchmuty* v. *Mulcaster* (1826), 5 B. & C. 771.

(*q*) Naturalization Act, 1870 (33 Vict. c. 14), s. 6; *Re Trufort* (1887), 36 Ch. D. 600; *R.* v. *Lynch*, [1903] 1 K. B. 444, unless the foreign state was at the time of such naturalization at war with the British Crown.

(*r*) Naturalization Act, 1870 (33 Vict. c. 14), s. 15; *Re Trufort*, *supra*.

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

(*t*) *Ibid.*, ss. 3, 4. For forms of declaration see Encyclopædia of Forms, Vol. IX., pp. 30, 31.

(*u*) Only one such convention has in fact been made, namely, with the United States of America in 1871. Owing to doubts being entertained whether

SECT. 2. Under Naturalization Act, 1870.

2. Any person who by reason of his having been born within the dominions of His Majesty is a natural-born subject, but who also at the time of his birth became under the law of any foreign state a subject of such state, and is still such subject, and who is of full age and not under any disability (*v*).

British-born subjects.

3. Any person who is born out of His Majesty's dominions (*w*) of a father being a British subject, if of full age and not under any disability (*v*).

Mode of making declaration.

A declaration of alienage or a declaration of British nationality may be made as follows:—

(i.) If the declarant is in the United Kingdom, before any justice of the peace;

(ii.) If elsewhere in the King's dominions, before a judge of any Court of civil or criminal jurisdiction, or any justice of the peace, or any other officer for the time being authorised by law in the place where the declarant is to administer an oath for any judicial or other legal purpose;

(iii.) If out of the King's dominions, before any officer in the diplomatic (*x*) or consular (*y*) service of His Majesty (*z*).

Registration.

Any declaration of alienage, or certificate of naturalization or of re-admission to British nationality must be registered in the office of one of the principal Secretaries of State, and may be proved in any legal proceeding by the production of the original declaration or duly certified copy thereof (*a*).

SUB-SECT. 3.—*By Marriage.*

Marriage.

699. Since May 12th, 1870, a female British subject becomes an alien by marrying an alien (*b*). But she is not deprived of any estate or interest in real or personal property to which she may have become entitled before that date, nor is such estate or interest affected to her prejudice (*c*).

SUB-SECT. 4.—*Infants.*

Infants.

700. Where a father being a British subject, or a mother being a British subject and a widow, becomes a statutory alien, every child of such father or mother who during infancy has become

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its provisions were in accordance with the Act, renunciations made under the convention were confirmed by the Naturalization Act, 1872 (35 & 36 Vict. c. 39), s. 2.

(*v*) Disability means the status of being an infant, lunatic, idiot, or married woman (Naturalization Act, 1870 (33 Vict. c. 14), s. 17).

(*w*) *Ibid.*, ss. 3, 4.

(*x*) "Officer in the diplomatic service of His Majesty" means any ambassador, minister, or *chargé d'affaires*, or secretary of legation, or any person appointed by such ambassador, minister, *chargé d'affaires*, or secretary of legation to execute any duties imposed by the Act on an officer in the diplomatic service of His Majesty (*ibid.*, s. 17).

(*y*) "Officer in the consular service of His Majesty" means and includes consul-general, consul, vice-consul, consular agent, and any person for the time being discharging their duties (*ibid.*, s. 17).

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

(*a*) *Ibid.*, s. 12 (1), (2), and (3). See also Regulations issued by the Home Office. For penalty on making a false declaration, see p. 314, *ante*.

(*b*) *Ibid.*, s. 10 (1).

(*c*) Naturalization Act, 1872 (35 & 36 Vict. c. 39), s. 3.

resident in the country where the father or mother is naturalized, and has, according to the laws of such country, become naturalized therein, is deemed a subject of the state of which the father or mother has become a subject, and not a British subject (*d*). SECT. 2. Under Naturalization Act, 1870.

Part V.—Re-admission to British Nationality.

SECT. 1.—*Statutory Aliens.*

701. Any statutory alien may, on performing the same conditions and adducing the same evidence as is required in the case of an ordinary alien applying for a certificate of naturalization, apply to the Secretary of State, or to the governor of any British possession in which he is residing, for a certificate of re-admission to British nationality (*d*). The Secretary of State, however, or governor, as the case may be, has an absolute discretion as to the granting or withholding of such certificate, and previous to its issue the alien must take the oath of allegiance (*e*). Application for certificate of re-admission.

A statutory alien thus re-admitted to British nationality resumes the status of a British subject from the date of the certificate of re-admission, but not in respect of any previous transaction; with this qualification, that he is not deemed a British subject in the foreign state of which he became a subject unless he has ceased to be a subject of that state in accordance with its laws or in pursuance of a treaty to that effect (*e*). Effect of grant of certificate.

702. The governor of any British possession is empowered to exercise the same jurisdiction in the case of statutory aliens residing in that possession as is conferred upon the Secretary of State in the United Kingdom, and residence in such possession shall in the case of such person be deemed equivalent to residence in the United Kingdom (*e*). British possessions abroad.

SECT. 2.—*Widows.*

703. A widow who was a natural-born British subject, and who has become an alien by marriage, is to be deemed a statutory alien, and may as such at any time during her widowhood obtain a certificate of re-admission to British nationality (*f*). Widows.

SECT. 3.—*Infants.*

704. Where a father, or a mother being a widow, has obtained a certificate of re-admission to British nationality, every child of such father or mother, who during infancy has become resident in the British dominions with such father or mother, is deemed to have resumed the position of a British subject to all intents (*g*). Infants.

(*d*) Naturalization Act, 1870 (33 Vict. c. 14), s. 10 (3). For penalty for making a false declaration, see p. 314, *ante*.
(*e*) *Ibid.*, s. 8.
(*f*) *Ibid.*, s. 10 (2).
(*g*) *Ibid.*, s. 10 (4).

Part VI.—Regulation of Alien Immigration.

SECT. 1. *In General.*

SECT. 1.—*In General.*

In General.

Powers of Crown.

705. At common law the King had power to reject or expel aliens (*h*), but an exception in favour of merchants was made by Magna Carta (*i*), except in time of war. On the reissue of the Charter in the reign of Henry III. the words "nisi publice antea prohibiti fuerint" were introduced into the clause (*j*). The Crown has, however, not exercised this right of expulsion since 1575 (*k*), but Parliament has from time to time passed Acts making regulations for the landing, registration, and expulsion of aliens (*l*).

Alien immigration is now regulated by the Aliens Act, 1905 (*m*). In carrying out the provisions of the Act due regard is to be had to any treaty, convention, arrangement, or engagement with any foreign country (*n*).

SECT. 2.—*Admission of Aliens.*

SUB-SECT. 1.—*Inspection and Leave to Land.*

Inspection and leave to land.

706. No immigrant (*o*) may be landed from an immigrant ship (*o*) except at a port where there is an immigration officer, whose leave (*p*) must be first obtained, after he has made an inspection (*q*) of the immigrants, in company with a medical inspector, and the immigration officer must withhold leave in the case of any immigrant who appears to him to be an undesirable immigrant (*r*).

When leave will not be refused.

Leave to land may not be withheld (1) in the case of an immigrant who proves (*s*) that he is seeking admission to this country solely to avoid persecution or punishment on religious or political grounds, or for an offence of a political character, or persecution, involving danger of imprisonment or danger to life or limb, on

(*h*) 1 Bl. Com. 252; *Musgrove* v. *Chun Teeong Toy*, [1891] A. C. 272.

(*i*) Mag. Cart. (1215), iv. 41.

(*j*) 9 Hen. 3, c. 30.

(*k*) Taswell-Langmead's Constitutional History (6th ed.), p. 523, n. 3.

(*l*) *E.g.*, Lord Grenville's Alien Act, 1793 (33 Geo. 3, c. 4); Registration of Aliens Act, 1826 (7 Geo. 4, c. 54); Registration of Aliens Act, 1836 (6 & 7 Will. 4, c. 11), repealed by the Aliens Act, 1905 (5 Edw. 7, c. 13), s. 10 (2).

(*m*) 5 Edw. 7, c. 13. For the various rules orders etc. made under the Act, see the Regulations etc. made by the Secretary of State for the Home Department with regard to the Administration of the Aliens Act, 1905 (Cd. 2879), which may be obtained from the King's Printers.

(*n*) Aliens Act, 1905 (5 Edw. 7, c. 13), s. 7 (6).

(*o*) For definitions, see p. 304, *ante*.

(*p*) The leave may be given verbally (Rules, dated December 19, 1905, No. 1).

(*q*) Aliens Act, 1905 (5 Edw. 7, c. 13), s. 1. Such inspection must be made as soon as practicable.

(*r*) For definition, see p. 304, *ante*, and see generally Aliens Act, 1905 (5 Edw. 7, c. 13), s. 1.

(*s*) Note, however, the Instruction to Immigration Officers, issued by the Home Secretary, dated March 9, 1906. "In all cases in which immigrants, coming from the parts of the continent which are at present in a disturbed condition, allege that they are flying from political or religious persecution, the benefit of the doubt, where any doubt exists, as to the truth of the allegation will be allowed and leave to land will be given."

account of religious belief, on the ground merely of want of means or the probability of his becoming a charge on the rates; nor (2) in the case of an immigrant who shows to the satisfaction of the immigration officer or board concerned with the case that, having taken his ticket in the United Kingdom, and embarked direct therefrom for some other country immediately after a period of residence in the United Kingdom of not less than six months, he has been refused admission in that country and returned direct therefrom to a port in the United Kingdom (*t*); nor (3) in the case of an immigrant who satisfies the immigration officer or board concerned with the case that he was born in the United Kingdom and that his father was a British subject, merely on the ground of want of means (*a*).

Alien seamen.

Alien seamen who prove (*b*) that they are under actual contract to join a ship in British waters are deemed not to be immigrants (*c*). In the case of distressed seamen returned to the United Kingdom from abroad under the orders of a British consul or other competent British authority, leave to land is given (*d*). Seamen landing with the object merely of making engagements are subject to inspection as ordinary immigrants (*e*).

Exemptions.

707. The Secretary of State may, subject to such conditions as he thinks fit to impose, by order exempt any immigrant ships from inspection if he is satisfied that a proper system is being maintained for preventing the embarkation of undesirable immigrants on those ships, or if security (*f*) is given to his satisfaction that undesirable immigrants will not be landed except for the purpose of transit. Such order may be withdrawn at any time at his discretion (*g*).

Conditional disembarkation.

708. Conditional disembarkation may be allowed—

(a) For the purposes of inspection (*h*).

(b) For the purpose of enabling aliens to prove they are transmigrants. In these cases the sanction of the Secretary

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(*t*) The effect of this particular provision is not clear, but apparently leave to land may not be withheld on any of the grounds contained in the section, in the case of immigrants coming within the terms of the provision.

(*a*) Aliens Act, 1905 (5 Edw. 7, c. 13), s. 1 (3). With regard to class (3), a person born in the United Kingdom is a British subject, and consequently not within the terms of the Act. It is clear, therefore, that class (3) must refer to a person born in the United Kingdom who has lost his British nationality by being naturalized abroad.

(*b*) Satisfactory evidence of such contract must be produced to the immigration officer, either by an individual seaman or by some responsible person in charge of or on behalf of a crew (Memo. on Aliens Act, 1905, s. 22).

(*c*) The presumption is that such seamen may be regarded as coming within the meaning of s. 8 (1) (a) of the Aliens Act, 1905 (*ibid.*).

(*d*) See Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60). A master of a British ship is bound to receive on board his ship, and afford a passage to the United Kingdom to, all distressed seamen under that Act (s. 192); consequently, if on their arrival they were refused leave to land, the provisions of the Act would be reduced to a nullity

(*e*) Memo on Aliens Act, 1905, s. 22.

(*f*) See pp. 322, 323, *post*.

(*g*) Aliens Act, 1905 (5 Edw. 7, c. 13), s. 1 (4).

(*h*) *Ibid.*, s. 1 (1).

SECT. 2. Admission of Aliens.

of State is necessary, and he must first be satisfied that proper provision has been made for their accommodation and safe custody (*i*).

(c) For the purpose of appeal from the decision of an immigration officer (*k*).

(d) For the purpose of treatment in a hospital if the medical inspector or port medical officer of health considers it advisable (*l*).

SUB-SECT. 2.—*Appointment of Officers and Boards.*

Appointment of officers.

709. The Secretary of State must appoint (*m*) at such ports in the United Kingdom as he thinks necessary for the time being (*n*) immigration officers and medical inspectors, and may appoint other additional officers for the purpose of carrying the Act into effect: the salaries and expenses are to be paid, up to an amount approved by the Treasury, out of moneys provided by Parliament. Such officers may be officers of customs (*o*).

Immigration Boards.

He must also approve a list of fit persons for service on the immigration boards, which are constituted by the Act to hear appeals against refusal of leave to land and are to consist in every case of three persons summoned from those comprised in the list, in accordance with the rules made by him (*p*).

SUB-SECT. 3.—*Rules of Secretary of State.*

Rules of Secretary of State

710. The Secretary of State may make rules generally with respect to immigration boards (*p*), their officers, appeals to such boards and conditional disembarkation, and may provide for the summoning and procedure of the board, its place of meeting, and for the security to be given by the master of the ship in the case of immigrants conditionally disembarked. . Such rules must provide for notice being given to masters of immigrant ships and immigrants informing them of their right of appeal, and for notice being given to the immigrant and to the master of the ship, where leave to land has been withheld, of the grounds on which leave has been refused (*q*).

SUB-SECT. 4.—*Bonds.*

Bonds.

711. Where security is required by the Secretary of State it must be by bond (*r*). Security may be required from the master of a ship

(*i*) Rules, dated December 19, 1905, made by the Secretary of State for the Home Department, under the Aliens Act, 1905 (5 Edw. 7, c. 13), r. 7.

(*k*) *Ibid.*, r. 10.

(*l*) *Ibid.*, r. 9.

(*m*) Aliens Act, 1905 (5 Edw. 7, c. 13), s. 6 (1).

(*n*) The ports at present established are Cardiff, Dover, Folkestone, Grangemouth, Grimsby, Harwich, Hull, Leith, Liverpool, London (including Queenborough), Newhaven, Southampton, and the Tyne ports (comprising Newcastle, North Shields, and South Shields, which are deemed to constitute one port). See Rules, dated December 19, 1905 (Preface). The Secretary of State must make known the ports appointed (Aliens Act, 1905 (5 Edw. 7, c. 13), s. 6 (3)).

(*o*) Aliens Act, 1905 (5 Edw. 7, c. 13), s. 6 (2).

(*p*) *Ibid.*, s. 2 (1). The immigration board of a port is to consist of three persons summoned, in accordance with the rules made by the Secretary of State, out of a list approved by him for the port comprising fit persons having magisterial, business, or administrative experience.

(*q*) *Ibid.*, s. 2 (2); Rules, dated December 19, 1905, rr. 4, 5, 11—25.

(*r*) Rules, dated December 19, 1905, r. 8.

for the conditional disembarkation of immigrants (*s*), unless a general bond has already been given by the owner; and also for exemption of immigrant ships from inspection (*t*); and for transmigrants (*a*).

SUB-SECT. 5.—*Appeals.*

Appeal to immigration board.

712. Where leave to land is withheld in the case of any immigrant, the master, owner, or agent of the ship or the immigrant himself may appeal to the immigration board of the port; and that board must, if they are satisfied that leave to land should not be withheld under the Act, give leave to land; and leave so given operates as the leave of the immigration officer (*b*).

Notice of appeal.

The notice of appeal by the immigrant may be verbal (*c*), but the master, owner or agent may, and if required by the immigrant must, within twenty-four hours after the refusal of leave to land, give written notice of appeal to the immigration officer, who must forthwith give notice to the clerk of the immigration board of the port (*d*).

Determination of questions by Secretary of State.

If any question arises on appeal to an immigration board whether any ship is an immigrant ship, or whether any person is an immigrant, a passenger, or a steerage passenger, or whether any offence is an offence of a political character, or whether a crime is an extradition crime (*e*), the question must be referred to the Secretary of State, and the board must act in accordance with his decision (*f*).

SECT. 3.—*Expulsion of Aliens.*

Expulsion order.

713. The Secretary of State may, if he thinks fit, as mentioned below, make an expulsion order, requiring an alien to leave the United Kingdom within a time fixed by the order, and thereafter to remain out of the United Kingdom (*g*). Any alien, in whose case an expulsion order has been made, found at any time within the United Kingdom in contravention of the order, is guilty of an offence under the Act (*h*).

SUB-SECT. 1.—*Convicted Aliens.*

Convicted aliens.

714. The Secretary of State may make an expulsion order (*i*) in respect of any alien if it is certified to him by any Court (including a Court of summary jurisdiction) that the alien has been convicted

(*s*) Aliens Act, 1905 (5 Edw. 7, c. 13), s. 2 (2); Rules, dated December 19, 1905, r. 8.
(*t*) Aliens Act, 1905 (5 Edw. 7, c. 13), s. 1 (4), which provides that the Secretary of State may by order exempt any immigrant ships from inspection on security being given that undesirable immigrants shall not be landed, and subject to such conditions as he thinks fit to impose. Under these powers the Secretary of State has granted exemptions in some cases so conditioned as to free from inspection only second class passengers on ships. See also Memo. on Aliens Act, 1905, s. 20.
(*a*) Aliens Act, 1905 (5 Edw. 7, c. 13), s. 8 (1) (b).
(*b*) *Ibid.*, s. 1 (2).
(*c*) Rules, dated December 19, 1905, rr. 4, 5.
(*d*) *Ibid.*
(*e*) See title EXTRADITION.
(*f*) Aliens Act, 1905 (5 Edw. 7, c. 13), s. 8 (4).
(*g*) *Ibid.*, s. (3).
(*h*) *Ibid.*, s. 3 (2).
(*i*) *Ibid.*, s. 3 (1).

SECT. 8. Expulsion of Aliens.

by that Court of any felony or misdemeanour, or other offence for which the Court has power to impose imprisonment without the option of a fine, or of an offence under par. 22 or 23 of s. 381 of the Burgh Police (Scotland) Act, 1892 (*k*), or of an offence as a prostitute under s. 72 of the Towns Improvement (Ireland) Act, 1854 (*l*), or par. 11 of s. 54 of the Metropolitan Police Act, 1839 (*m*), and that the Court recommend that an expulsion order should be made in his case either in addition to or in lieu of his sentence.

SUB-SECT. 2.—*Undesirable Aliens.*

Undesirable aliens.

715. The Secretary of State may also make an expulsion order (*n*) if it is certified to him by a Court of summary jurisdiction after proceedings taken for the purpose within twelve months after the alien has last entered the United Kingdom in accordance with the rules of Court made under sect. 29 of the Summary Jurisdiction Act, 1879 (*o*), that the alien—

Destitute.

(1) Has within three months from the time at which proceedings for the certificate are commenced been in receipt of any such parochial relief as disqualifies a person for the parliamentary franchise (*p*), or been found wandering without ostensible means of subsistence, or been living under insanitary conditions due to overcrowding; or,

Criminal.

(2) Has entered the United Kingdom after the passing of the Act and has been sentenced in a foreign country with which there is an extradition treaty for a crime not being an offence of a political character, which is as respects that country an extradition crime within the meaning of the Extradition Act, 1870 (*q*).

SUB-SECT. 3.—*Expenses of Expulsion.*

Expenses of expulsion.

716. Where an expulsion order is made the Secretary of State may, if he thinks fit, pay the whole or any part of the expenses incidental to the departure from the United Kingdom and maintenance until departure of the alien and his dependents if any (*r*).

(*k*) 55 & 56 Vict. c. 55, s. 381, imposes a fine not exceeding 40*s.* on any person who in any street being a common prostitute or street walker loiters about or importunes passengers for the purposes of prostitution (par. 22); or habitually or persistently importunes or solicits, or loiters about for the purpose of importuning or soliciting, women or children for immoral purposes (par. 23).

(*l*) 17 & 18 Vict. c. 103, s. 72, imposes a fine not exceeding 40*s.* on every common prostitute or night walker loitering and importuning passengers for the purposes of prostitution, or being otherwise offensive.

(*m*) 2 & 3 Vict. c. 47, s. 54, par. 11, imposes a fine not exceeding 40*s.* on every common prostitute or night walker loitering or being in any thoroughfare or public place (within the Metropolitan Police District) for the purpose of prostitution or solicitation to the annoyance of the inhabitants or passengers.

(*n*) Aliens Act, 1905 (5 Edw. 7, c. 13), s. 3 (1) (b).

(*o*) 42 & 43 Vict. c. 49, s. 29. These rules provide that the proceedings are to be commenced by complaint, and that the provisions of the Summary Jurisdiction Acts with reference to proceedings on complaint are in so far as applicable to apply accordingly (Summary Jurisdiction (Aliens) Rules, 1906). In Scotland the rules are made under s. 33 of the Summary Procedure (Scotland) Act, 1864 (27 & 28 Vict. c. 53), and in Ireland by the Lord Chancellor of Ireland.

(*p*) See Representation of the People Acts, 1832 (2 & 3 Will. 4, c. 45), s. 36, and 1867 (30 & 31 Vict. c. 102), s. 40. By the Medical Relief Disqualification Removal Act, 1885 (48 & 49 Vict. c. 46), the receipt of medical and surgical assistance no longer disqualifies for the parliamentary franchise.

(*q*) 33 & 34 Vict. c. 52. See title EXTRADITION.

(*r*) Aliens Act, 1905 (5 Edw. 7, c. 13), s. 4 (1).

If an expulsion order is made (except in the case of an alien who last entered the kingdom before January 1, 1906, or in whose case leave to land has been given under the Act) on a certificate given within six months after he last entered the United Kingdom, the master of the ship in which he was brought (*s*), and also the master of any ship belonging to the same owner, is liable to pay to the Secretary of State as a debt due to the Crown any sums paid by the Secretary of State in connection with the alien under the provision referred to, and must, if required by the Secretary of State, receive the alien and his dependents, if any, on board his ship and afford them free of charge a passage to the port of embarkation and proper accommodation and maintenance during the passage (*t*).

Liability of master of ship.

SECT. 4.—*Custody of Aliens.*

717. Any immigrant who is conditionally disembarked, and any alien in whose case an expulsion order has been made, while awaiting the departure of his ship and whilst being conveyed to the ship, and whilst on board the ship until the ship finally leaves the United Kingdom, and any alien in whose case a certificate has been given by a Court with a view to the making of an expulsion order, until the Secretary of State has decided upon his case, may be kept in custody as the Secretary of State directs, and whilst in that custody is deemed to be in legal custody (*u*).

Custody in general.

Any immigrant who is conditionally disembarked for the purpose of inspection, appeal or otherwise, is in the custody of the master of the ship until leave to land has been given, or, if leave is withheld, until he finally leaves the United Kingdom (*a*).

Immigrants conditionally disembarked.

718. Where a Court gives a certificate with a view to the expulsion of an alien, without imposing a sentence of imprisonment, the alien must, unless the Court otherwise directs and admits him to bail, be committed to prison until the orders of the Secretary of State with respect to his expulsion are received (*b*).

Where certificate of Court given.

Where the Court gives a certificate and imposes a term of imprisonment not exceeding one month, the alien must, if the Secretary of State has not sooner decided upon his case, be detained in prison until the orders of the Secretary of State with respect to his expulsion have been received (*b*).

Imprisonment pending decision of Secretary of State.

A copy of the certificate signed by the clerk or other proper officer of the Court giving the certificate is sufficient authority to the police to take the alien into custody and convey him to prison and to the governor of the prison to receive and detain him until such orders have been received. The certificate has to be forwarded to the Secretary of

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(*s*) Even though the alien was brought without the knowledge and consent of the master (*e.g.*, a stowaway); see *A.-G.* v. *Sutcliffe*, [1907] W. N. 191.

(*t*) Aliens Act, 1905 (5 Edw.7, c. 13), s. 4 (2).

(*u*) *Ibid.*, s. 7 (3).

(*a*) Orders and Directions of the Secretary of State for the Home Department, dated December 19, 1905, under the Aliens Act, 1905 (5 Edw. 7, c. 13).

(*b*) Directions, dated December 4, 1905, of the Secretary of State for the Home Department under the Aliens Act, 1905 (5 Edw. 7, c. 13, ss. 3 and 7 (3)), as to custody in connection with Expulsion Orders, s. 1 (1), (2).

SECT. 4. Custody of Aliens.

State, and a copy signed by the proper officer of the Court has to be given to the officer whose duty it is to convey the alien to prison (c).

SECT. 5.—*Returns as to Aliens.*

SUB-SECT. 1.—*In General.*

Returns required.

719. The master of any ship landing or embarking passengers (d) at any port in the United Kingdom must furnish, to such person and in such manner as the Secretary of State directs, a return giving such particulars with respect to any such passengers who are aliens as may be required for the time being by order of the Secretary of State; and any such alien must (e) furnish the master of the ship with any information required by him for the purpose of the return (f).

SUB-SECT. 2.—*Exemptions.*

Exemptions.

720. The Secretary of State may by order exempt from the provisions as to returns any special class of passengers, or voyages, or any special ships or ports, and may at any time withdraw such order at his discretion (g).

SUB-SECT. 3.—*Statutory Forms.*

(1) For inward traffic.

Forms for ships landing aliens at immigration ports.

721. The master of every ship (except a ship totally exempted from inspection) landing alien passengers at an immigration port must furnish a return showing the total number of—(1) alien cabin passengers; (2) exempted alien second-class passengers; (3) alien transmigrants; (4) alien immigrants (h).

Particulars of transmigrants and immigrants must appear on forms attached to the return.

Transmigrant form.

The transmigrant form (i) contains the following information as to each transmigrant: full name, sex, nationality, departure from United Kingdom (port and steamship line), and country or port of destination outside the United Kingdom.

Immigrant form.

The immigrant form must be signed by every immigrant (unless he or she comes under the category of dependent), and requires the following information to be given: name, age, sex and nationality of immigrant; names, ages and sex of dependents (if any); last permanent place of abode; proposed place of abode in the United Kingdom; occupation; means in immigrant's possession; what prospects the immigrant has of decently supporting himself (or herself) and dependents (if any); if the immigrant has been convicted of any crime, and if so its nature, date when committed, place of conviction, and sentence; and if the immigrant has ever been expelled from the United Kingdom.

(c) Directions, dated December 4, 1905, of the Secretary of State for the Home Department, under the Aliens Act, 1905 (5 Edw. 7, c. 13, ss. 3 and 7 (3)), as to custody in connection with Expulsion Orders, ss. 2, 3.

(d) For definition, see p. 305, *ante*.

(e) For penalty for failing to do so, see p. 328, *post*.

(f) Aliens Act, 1905 (5 Edw. 7, c. 13), s. 5 (1); Orders and Directions of the Secretary of State for the Home Department, dated December 19, 1905, under the Aliens Act, 1905 (5 Edw. 7, c. 13).

(g) Aliens Act, 1905 (5 Edw. 7, c. 13), s. 5 (3).

(h) Orders and Directions of the Secretary of State for the Home Department, dated December 19, 1905, under the Aliens Act, 1905 (5 Edw. 7, c. 13), par. (1) (a); and see Form A in the Appendix to those Orders.

(i) *Ibid.*, Form A.

SECT. 5. Returns as to Aliens.

An alien seaman under actual contract to join a ship in British waters need only give the following information, viz.: full name and nationality, name of ship he is about to join and of port at which she is lying, and occupation (*l*).

Cross-channel form.

In place of this form a modified form is required from immigrants arriving by any of the cross-channel routes (*m*), and this form requires the following information to be given: name, sex, nationality and occupation, whether proceeding to a destination outside the United Kingdom, and whether holding a return ticket between a foreign country and the United Kingdom.

Non-immigration ports.

The master of every ship (except a ship totally exempted from inspection) must furnish a return (*n*) showing the total number of alien passengers, together with the following information as to each of them: name, sex, nationality and occupation, and whether proceeding to a destination outside the United Kingdom.

Exempted ships.

722. The master of every ship totally exempted from inspection, landing alien passengers at any port in the United Kingdom, must furnish a return (*o*) of the total number of such alien passengers, divided into classes and giving the following information as to each of them: name, sex, nationality and destination as shown by ticket; and if any such alien passenger has been rejected at or deported from a port outside the United Kingdom further particulars must be shown (*o*) as to the place and cause of rejection or deportation, and whether the alien was originally a transmigrant, and how he (or she) is to be disposed of on arriving in the United Kingdom.

(2) For outward traffic.

Europe and Mediterranean Sea.

723. The master of every ship carrying alien passengers from the United Kingdom to places in Europe or within the Mediterranean Sea must furnish a return (*p*), showing—(1) the number of alien passengers, divided into classes and sexes, holding through tickets from one country outside the United Kingdom to another; and (2) the number of alien passengers not holding through tickets, divided into classes, sexes, and nationalities.

Cross-channel.

In the case of cross-channel traffic a modified form (*q*) is required, which merely shows the number of alien passengers, divided into classes.

Outside Europe and the Mediterranean Sea.

The master of every ship carrying alien transmigrants to places not in Europe or within the Mediterranean Sea must furnish a return (*r*) giving the total number of such transmigrants and particulars in the case of each alien as to name, sex, and arrival in the United Kingdom (port and steamship line).

The master of every ship carrying alien emigrants to such places must furnish a further return (*s*) showing with regard to each—

(*l*) Memo. on the Aliens Act, 1905, s. 22, see p. 321, *ante*; and see Form A (note) in the Appendix to Orders and Directions, dated December 19, 1905.
(*m*) *Ibid.*, Form A2.
(*n*) *Ibid.*, Form B.
(*o*) Forms of the return are obtainable at the Home Office; they are not included with other forms printed with the official regulations.
(*p*) *Ibid.*, Form E.
(*q*) *Ibid.*, Form E2.
(*r*) *Ibid.*, Form C.
(*s*) *Ibid.*, Form D.

SECT. 5. Returns as to Aliens.

name, sex, nationality, last permanent abode in the United Kingdom, length of residence and original port of arrival.

SECT. 6.—*Offences and Penalties.*

Persons guilty of offences.

724. The following persons are guilty of offences under the Aliens Act, 1905:—

(1) Any immigrant who lands from an immigrant ship either at a non-immigration port or at an immigration port without the leave of the immigration officer, or who, if allowed to be conditionally embarked, fails to comply with the conditions imposed (*t*).

(2) Any alien found in the kingdom after an expulsion order has been made against him (*u*).

(3) Any master of an immigrant ship who allows an immigrant to be illegally landed (*v*).

(4) Any master of a ship who fails to give a passage to an alien or his (or her) dependents when required to do so by the Secretary of State (*w*).

(5) Any master of a ship who fails to make a return or who makes a false return (*x*).

Penalties.

725. Any person guilty of such an offence is, if the offence is committed by him as the master of a ship, liable on summary conviction to a fine not exceeding £100 (*y*), and if the offence is committed by him as an immigrant or alien, is to be deemed a rogue and a vagabond within the meaning of the Vagrancy Act, 1824 (*z*), and be liable to be dealt with as if the offence were an offence under s. 4 of that Act (*a*); and any immigrant, master of a ship, or other person who for the purposes of the Act makes any false statement or false representation to an immigration officer, medical inspector, immigration board, or to the Secretary of State, and any alien who refuses to give the information required to the master of a ship for the purpose of the return (*b*), or who gives false information for that purpose, is liable on summary conviction to imprisonment for a term not exceeding three months with hard labour (*c*).

SECT. 7.—*Jurisdiction.*

Jurisdiction.

726. Courts and justices have the same extended jurisdiction (*d*)

(*t*) Aliens Act, 1905 (5 Edw. 7, c. 13), s. 1 (5).
(*u*) *Ibid.*, s. 3 (2); and see p. 323, *ante*.
(*v*) *Ibid.*, s. 1 (5).
(*w*) *Ibid.*, s. 4 (3).
(*x*) *Ibid.*, s. 5 (2).
(*y*) *Ibid.*, s. 5 (2). A master making a false return is held guilty of merely an offence under the Act carrying a penalty of £100; but compare s. 7 (4), where it is enacted that any master making a false statement to an immigration officer or board shall be liable to imprisonment for three months with hard labour.
(*z*) 5 Geo. 4, c. 83. By s. 4 of that Act persons convicted as rogues and vagabonds are liable to three months' imprisonment with hard labour, and on subsequent conviction to be indicted as incorrigible rogues, and on conviction and by special order of quarter sessions to be whipped.
(*a*) Aliens Act, 1905 (5 Edw. 7, c. 13), s. 7 (1).
(*b*) See p. 326, *ante*.
(*c*) Aliens Act, 1905 (5 Edw. 7, c. 13), ss. 5 (2), 7 (4).
(*d*) *Ibid.*, s. 7 (2).

SECT. 7. Jurisdiction.

over offences and complaints committed or arising, and over offenders, under the Aliens Act, 1905, which are beyond their original local jurisdiction, as under the Merchant Shipping Act, 1894 (*e*); and where a fine or other sum of money is ordered to be paid by the master or owner of a ship, the Court, justice or magistrate who made the order has power, if the order is not complied with, to levy the sum by distress on the ship (*f*).

The Act applies to Scotland and Ireland (*g*).

(*e*) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), ss. 684—686.

(*f*) *Ibid.*, s. 693; Aliens Act, 1905 (5 Edw. 7, c. 13), s. 7 (2).

(*g*) Aliens Act, 1905 (5 Edw. 7, c. 13), s. 9. In the application of the Act to Scotland and Ireland the words "be liable on summary conviction to imprisonment for a term not exceeding three months with hard labour" are to be substituted for the words "be deemed a rogue and vagabond within the meaning of the Vagrancy Act, 1824, and be liable to be dealt with accordingly as if the offence were an offence under sect. 4 of that Act"; and sect. 33 of the Summary Procedure (Scotland) Act, 1864, is to be substituted as respects Scotland for sect. 29 of the Summary Jurisdiction Act, 1879; and the Lord Chancellor of Ireland may as respects Ireland make rules for the purposes of this Act, for which rules may be made under sect. 29 of the Summary Jurisdiction Act; and all rules so made must be laid, as soon as possible, before both Houses of Parliament.

ALIMONY.

See HUSBAND AND WIFE.

ALLEGIANCE.

See ALIENS; CONSTITUTIONAL LAW.

ALLOTMENTS.

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For Small Dwellings, Advances by local authorities to enable occupiers to acquire - *See title* LOCAL GOVERNMENT.

Small Holdings - - - - - „ SMALL HOLDINGS.

SECT. 1.—*In General.*

727. There is no authoritative general definition of an "allotment," but the word is used here to refer exclusively to lands which are held by local authorities, or, in a few cases, by trustees or public bodies, for the purpose of providing the poorer classes with small plots of land for cultivation (*a*). Such lands may be classified as: Meaning of term "allotment."

(*a*) The following are the statutory interpretations of the meaning of the term:—

Allotments and Cottage Gardens Compensation for Crops Act, 1887 (50 & 51 Vict. c. 26), s. 4:—"In this Act 'allotment' means any parcel of land of not more than two acres in extent held by a tenant under a landlord and cultivated as a garden or as a farm, or partly as a garden and partly as a farm" (and see note (*e*), p. 357, *post*).

Allotments Act, 1887 (50 & 51 Vict. c. 48), s. 17:—"In this Act, unless

SECT. 1. In General.

(1) poor allotments; (2) fuel allotments; (3) field gardens; (4) parochial charity lands; and (5) lands acquired for allotments under the Allotments Acts, 1887 and 1890, the Local Government Act, 1894, and the Small Holdings and Allotments Act, 1907 (*b*).

Present authorities.

With the exception of a few allotments which have not been transferred to the local authority by the trustees in whom they are vested, all allotments, together with the powers and duties respecting them, are vested in district or parish councils (*c*).

SECT. 2.—*Poor Allotments.*

Description.

728. Poor allotments are those parish lands possessed or acquired by the poor law authorities (*d*) under the Poor Relief Act, 1819 (*e*), or by the inclosure of waste or common land in or near the parish under the Poor Relief Act, 1831 (*f*), or by the inclosure of any forest or waste Crown lands in or near the parish under the Crown Lands Allotment Act, 1831 (*g*).

Acquisition.

729. The powers under these statutes were made exercisable by the overseers of the poor or the poor law guardians under the control of the Local Government Board (*h*); though inclosures under the two statutes of 1831 are not now 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 (*i*). In giving or withholding their consent the last named Board must have regard to the same considerations and, if necessary, must hold the same inquiries as are directed by the Commons Act, 1876 (*l*), with reference to applications under the Inclosure Acts (*m*).

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the context otherwise requires, the expression 'allotment' includes a field garden."

Allotments Rating Exemption Act, 1891 (54 & 55 Vict. c. 33), s. 2:—"'Allotment' means any parcel of land of not more than two acres in extent and let as an allotment, and cultivated as a garden or a farm, or partly as a garden and partly as a farm."

Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 9 (16):—"In this section the expression 'allotment' includes common pasture where authorised to be acquired under the Allotments Act, 1887." This sub-section is repealed as from January 1st, 1908 (the Small Holdings and Allotments Act, 1907 (7 Edw. 7, c. 54), s. 47 (4) and Sched. II.).

(*b*) 50 & 51 Vict. c. 48; 53 & 54 Vict. c. 65; 56 & 57 Vict. c. 73; 7 Edw. 7, c. 54. See pp. 341 *et seq.*, *post*.

(*c*) This is effected for the most part by the Local Government Act, 1894 (56 & 57 Vict. c. 73), ss. 9, 10; the Allotments Act, 1887 (50 & 51 Vict. c. 48), s. 3; the Allotments Act, 1890 (53 & 54 Vict. c. 65), s. 4; and the Small Holdings and Allotments Act, 1907 (7 Edw. 7, c. 54).

See title LOCAL GOVERNMENT.

(*d*) For present authorities, see title POOR LAW.

(*e*) 59 Geo. 3, c. 12, ss. 12 and 13, extended by the Poor Relief Act, 1831 (1 & 2 Will. 4, c. 42), s. 1.

(*f*) 1 & 2 Will. 4, c. 42, s. 2.

(*g*) 1 & 2 Will. 4, c. 59.

(*h*) Union and Parish Property Act, 1835 (5 & 6 Will. 4, c. 69), s. 4; Local Government Board Act, 1871 (34 & 35 Vict. c. 70), s. 2.

(*i*) Commons Act, 1899 (62 & 63 Vict. c. 30), s. 22 (1) and Sched. I.; Board of Agriculture Act, 1889 (52 & 53 Vict. c. 30); Board of Agriculture and Fisheries Act, 1903 (3 Edw. 7, c. 31).

(*l*) 39 & 40 Vict. c. 56, ss. 10, 11, 12.

(*m*) Commons Act, 1899 (62 & 63 Vict. c. 30), s. 22 (2); see title COMMONS.

Inclosures under the two statutes of 1831 appear, therefore, to require in ordinary cases the consent of both the Local Government Board and the Board of Agriculture and Fisheries.

Letting.

730. Powers of letting poor lands to poor and industrious parishioners were given (*n*); whilst the provisions of the Allotments Act, 1832, were also made applicable to allotments appropriated to the benefit of the poor under the two statutes of 1831 above mentioned (*o*).

Application of rents.

Rents of lands acquired under the Poor Relief Act, 1819, and the Crown Lands Allotments Act, 1831, are to be applied in aid of the poor rate of the parish in which the lands are situate (*p*).

Disposal of unnecessary lands.

731. Where lands have been acquired under the Poor Relief Act, 1819, and the Crown Lands Allotments Act, 1831, for the purposes of those Acts, and such purposes cannot be carried into effect, the lands may be sold, exchanged, let, or otherwise disposed of subject to rules and regulations, if any, of the Local Government Board (*q*). No such rules and regulations have been made, and for all practical purposes the procedure under the above enactments has been rendered obsolete by more recent legislation on the subject (*r*).

SECT. 3.—*Fuel Allotments.*

Description.

732. Fuel allotments consist of those provided under local Inclosure Acts before 1845, and derive their name from the purpose for which the rent received in respect of them is applied. They were vested in trustees or in the churchwardens and overseers, either with or without the minister of the parish (*s*). Their main object was to provide poor parishioners with fuel (*t*).

Management.

733. Where the allotment trustees, or where the vestry empowered to make an order in respect of poor allotments under the Allotments Act, 1832, exceed twenty in number, such trustees or vestry are required to appoint annually during August a committee from their body to manage the allotments, and such committee have the powers of the trustees or vestry appointing them (*a*). Failing such appointment the Board of Agriculture and Fisheries may make the appointment on the application of any person interested (*b*). In other

(*n*) Poor Relief Act, 1819 (59 Geo. 3, c. 12), s. 13; extended to lands acquired under the Poor Relief Act, 1831 (1 & 2 Will. 4, c. 42), see s. 4.

(*o*) Allotments Act, 1832 (2 & 3 Will. 4, c. 42), s. 11; and see p. 334, *post*. For forms of agreement for letting these allotments, see Encyclopædia of Forms, Vol. I., p. 442.

(*p*) Poor Allotments Management Act, 1873 (36 & 37 Vict. c. 19), s. 14.

(*q*) *Ibid.*, s. 15.

(*r*) See pp. 349, 353, *post*.

(*s*) For the present authorities, see title LOCAL GOVERNMENT.

(*t*) Such allotments are governed chiefly by the Allotments Act, 1832 (2 & 3 Will. 4, c. 42), and by the Poor Allotments Management Act, 1873 (36 & 37 Vict. c. 19); the powers thereunder being exercised under the control of the Local Government Board, see the Union and Parish Property Act, 1835 (5 & 6 Will. 4, c. 69), s. 4, and Local Government Board Act, 1871 (34 & 35 Vict. c. 70), s. 2. The former of those two Acts substituted, for the churchwardens and overseers, the overseers of the poor or the guardians of poor law unions.

(*a*) Poor Allotments Management Act, 1873 (36 & 37 Vict. c. 19), ss. 3, 4.

(*b*) *Ibid.*, s. 9; Board of Agriculture Act, 1889 (52 & 53 Vict. c. 30), s. 2 (1) (b), and Board of Agriculture and Fisheries Act, 1903 (3 Edw. 7, c. 31).

SECT. 3 Fuel Allotments.

cases the powers and duties in respect of the allotments remain in the trustees acting together with the churchwardens and overseers in parish vestry assembled (*c*).

Provisions as to letting.

734. Industrious cottagers of good character, being day labourers or journeymen, legally settled in the parish, or dwelling within its bounds or those of the adjoining parishes, or being poor persons in any such parishes, are entitled to rent the allotments (*d*) in plots not exceeding one acre (*e*) as a yearly occupation from Michaelmas to Michaelmas and at such rent as land of the same quality is usually let for in the parish. Applications to rent are to be made in the first week in September (*f*). The allottee must cultivate the land properly (*g*) and no habitation must be erected thereon (*h*). The rent is payable at the end of the year and cannot be made payable in advance (*i*). A week's notice to quit may be given if rent is in arrear for four weeks or on failure to cultivate properly (*k*). Land illegally held over or unlawfully possessed, and rent in arrear, may be recovered summarily before the justices (*l*).

Rates, taxes, and the like are payable by the persons in whom the allotments are vested, and such persons are deemed the occupiers for this purpose (*m*).

Application of rents.

Rents from the allotments are to be applied in the purchase of fuel for distribution in the winter season among poor parishioners legally settled and resident in or near the parish (*n*).

Unlet allotments.

Allotments which cannot be let to industrious cottagers as mentioned above may be let to any person at the best rent obtainable for a term not exceeding twelve months (*p*).

or diversion to other purposes.

diversion of fuel allotments from their originally declared uses is forbidden, but the Charity Commissioners may, upon the application of the trustees of any fuel allotments, authorise the use of such allotments as a recreation ground or as field gardens, and may make an order for the establishment of a scheme for the administration of such fuel allotments accordingly (*q*).

(*c*) Allotments Act, 1832 (2 & 3 Will. 4, c. 42). The churchwardens and overseers were superseded by the overseers of the poor and the guardians of poor law unions (as the case might be). See Union and Parish Property Act, 1835 (5 & 6 Will. 4, c. 69), s. 4.

(*d*) Allotments Act, 1832 (2 & 3 Will. 4, c. 42), s. 1, as extended by the Allotments Extension Act, 1882 (45 & 46 Vict. c. 80), s. 6.

For forms of letting, see Encyclopædia of Forms, Vol. I., p. 442.

(*e*) Poor Allotments Management Act, 1873 (36 & 37 Vict. c. 19), s. 10, repealing the original provision as to the minimum of a quarter of an acre.

(*f*) Allotments Act, 1832 (2 & 3 Will. 4, c. 42), s. 3.

(*g*) *Ibid.*, s. 2.

(*h*) *Ibid.*, s. 10.

(*i*) *Ibid.*, s. 4, and Allotments Extension Act, 1882 (45 & 46 Vict. c. 80), s. 6

(*k*) Allotments Act, 1832 (2 & 3 Will. 4, c. 42), s. 5.

(*l*) *Ibid.*, ss. 6, 7.

(*m*) Poor Allotments Management Act, 1873 (36 & 37 Vict. c. 19), s. 13.

(*n*) Allotments Act, 1832 (2 & 3 Will. 4, c. 42), s. 8. Although the provisions of this Act are extended to poor allotments (see p. 333, and note (*o*), *ante*), the application of the surplus rents of those allotments is not affected, and they are to be applied in aid of the poor rate (Poor Allotments Management Act, 1873 (36 & 37 Vict. c. 19), s. 14).

(*p*) Commons Act, 1876 (39 & 40 Vict. c. 56), s. 26.

(*q*) *Ibid.*, s. 19.

Sect. 3. Fuel Allotments.

Exchange and disposal of land.

736. Allotments inconveniently situated for the cottagers may be let for the best rent obtainable, and other land of equal value, and more favourably situated, may be hired (*r*); and where the land has been acquired under the Allotments Act, 1832, for the purposes of that Act, and such purposes cannot be carried into effect, the land may be sold, exchanged, let, or otherwise disposed of in the same manner as surplus lands acquired for poor allotments (*s*).

Power to exchange inconvenient land is also given by the Inclosure Act, 1852 (*t*); and where application is made to the Charity Commissioners for authority to use fuel allotments as a recreation ground or as field gardens, they may, instead, authorise the exchange of such allotments for land of equal value situate within the parish or district and which is better suited for such allotment purposes (*a*).

Jurisdiction of Charity Commissioners.

The provisions above mentioned do not affect the ordinary jurisdiction of the Charity Commissioners to make a scheme in respect of any allotment being a charity within their jurisdiction (*b*).

SECT. 4.— *Field Gardens.*

Description and creation

737. The Board of Agriculture and Fisheries (*c*) is empowered, as a term and condition of inclosure, to appropriate land as allotments or field gardens for the labouring poor, and when this is not done the annual report of the Board must state the reason (*d*). The Board may, if they think fit, specify in any provisional order for the regulation of a common, as one of the terms and conditions of the regulation, the appropriation of allotments for the labouring poor, and thereupon the provisions of the Inclosure Acts, 1845 to 1876, with respect to allotments will apply.

Further, at the meeting for appointing a valuer of lands about to be inclosed the persons present may resolve upon instructions to the valuer, not inconsistent with the terms and conditions of the provisional order and of the Act of inclosure, for the appropriation of parts of the lands proposed to be inclosed for (*inter alia*) allotments or field gardens for the labouring poor (*e*). The land appropriated must be that which is best suited for the purpose (*f*); it must be rendered fit for immediate use and occupation, and the expenses thereof are part of the general expenses of inclosure (*g*); and it must be appropriated unto the churchwardens and overseers of the poor (*h*), who hold the allotments as if they were lands belonging to the parish, but in trust for the purposes for which they are allotted.

(*r*) Allotments Act, 1832 (2 & 3 Will. 4, c. 42), s. 9.
(*s*) Poor Allotments Management Act, 1873 (36 & 37 Vict. c. 19), s. 15; and see p. 333, *ante*.
(*t*) 15 & 16 Vict. c. 79, s. 21.
(*a*) Commons Act, 1876 (39 & 40 Vict. c. 56), s. 19.
(*b*) Poor Allotments Management Act, 1873 (36 & 37 Vict. c. 19), s. 16; see also Commons Act, 1876 (39 & 40 Vict. c. 56), s. 19; Commons Act, 1899 (62 & 63 Vict. c. 30), s. 18.
(*c*) Board of Agriculture Act, 1889 (52 & 53 Vict. c. 30), s. 2 (1) (b); Board of Agriculture and Fisheries Act, 1903 (3 Edw. 7, c. 31).
(*d*) Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 30.
(*e*) *Ibid.*, s. 34.
(*f*) Commons Act, 1876 (39 & 40 Vict. c. 56), s. 23.
(*g*) *Ibid.*, s. 21.
(*h*) Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 73.

SECT. 4. Field Gardens.

The Board of Agriculture and Fisheries may on the application of the valuer and before his award is made substitute other land for that originally allotted (*i*); and the Board also has power to order the allotment to be made out of common, being waste land of a manor, instead of out of common which is not waste land of a manor (*k*).

The appropriated allotment may not be used for any other purposes than those declared concerning it by the Act of Parliament and the award, or either of them, under which the same has been set out (*l*).

Management.

738. In any rural parish having a parish council the allotments are managed by the parish council (*m*), and in any parish that has no parish council are managed, until December 31st, 1907, by "allotment wardens," consisting of the incumbent of the parish or ecclesiastical district in which the allotment is situated, or the officiating minister nominated for the time being by the incumbent for that purpose, one of the churchwardens for the time being of the parish, and two ratepayers of the parish, any two of whom may exercise the statutory powers (*n*).

The allotment wardens may transfer their powers to sanitary authorities or to parish councils (*o*).

The term "parish council" is hereinafter used to include "allotment wardens" in cases where the latter still remain the managing body.

Reports at intervals fixed by the Board of Agriculture and Fisheries must be made by the parish council as to the field gardens under their management (*p*).

On and after January 1st, 1908, the powers of "allotment wardens" will cease, and, in the case of a parish not having a parish council, the powers and duties as to the management of the allotments will be exercised and performed by persons appointed by the parish meeting (*q*). And from that date the provisions of the Allotment Acts, 1887 to 1907 (*r*), will apply to such allotments as if they had been acquired by the parish council under the general powers of the Allotments Acts, 1887 and 1890 (*s*).

Provisions as to letting.

739. The parish council are required to let the allotments in gardens not exceeding a quarter of an acre each to poor inhabitants either for one year or from year to year as they think fit (*t*). Rents,

(*i*) Inclosure Act, 1846 (9 & 10 Vict. c. 70), s. 4, extended by the Commons Act, 1876 (39 & 40 Vict. c. 56), s. 22.

(*k*) Commons Act, 1876 (39 & 40 Vict. c. 56), s. 23.

(*l*) *Ibid.*, s. 19.

(*m*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 6 (4).

(*n*) Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 108.

(*o*) Allotments Act, 1887 (50 & 51 Vict. c. 48), s. 13 (1).

(*p*) Commons Act, 1876 (39 & 40 Vict. c. 56), s. 28.

(*q*) Small Holdings and Allotments Act, 1907 (7 Edw. 7, c. 54), s. 23 (1).

(*r*) These Acts are the Allotments Act, 1887 (50 & 51 Vict. c. 48), the Allotments Act, 1890 (53 & 54 Vict. c. 65), and the Small Holdings and Allotments Act, 1907 (7 Edw. 7, c. 54). For their provisions generally, see pp. 341 *et seq.*, *post*.

(*s*) Small Holdings and Allotments Act, 1907 (7 Edw. 7, c. 54), s. 23 (2). For the general powers referred to, see pp. 344 *et seq.*, *post*.

(*t*) Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 109.

For form of agreement for letting, see Encyclopædia of Forms, Vol. I., p. 444.

terms and conditions are in the discretion of the council, provided they are not inconsistent with statutory provisions, but the Board of Agriculture and Fisheries may frame regulations for this purpose. The gardens are to be let free of tithes, rates, taxes and the like, which are payable by the council, who for this purpose are regarded as the occupiers. Periodical valuations of the gardens must be made by valuers appointed by the council (*u*).

Buildings may not be erected on the allotments, and if they are the council must pull them down, sell the materials, and apply the proceeds in the same way as rents are to be applied (*a*).

Provision is made for the determination of tenancies by notice (*b*) when rent is in arrear or the conditions of tenancy violated, and also for the giving of compensation to outgoing tenants (*c*).

Possession may be recovered against an occupier holding over or unlawfully possessing by proceedings before justices (*d*).

Rents and their application.

740. Rents are payable to the parish council, who have all usual remedies for their recovery as if they were landlords (*e*). Surplus rents are applicable to improving the field gardens in the same parish or neighbourhood, or maintaining the drainage and fencing thereof, or to hiring or purchasing additional land for field gardens (*f*); towards the redemption of land tax or other like charges on the gardens (*g*); or for any of the purposes for which surplus rents arising from recreation grounds may be applied (*h*), which will include the improvement of recreation grounds in the same parish or neighbourhood, or the maintenance of the drainage and fencing thereof, or the hiring or purchasing of additional land for recreation grounds in the same parish or neighbourhood (*i*).

Surplus rents arising from recreation grounds may also be applied to the purpose of improving the field gardens in the same parish or neighbourhood, or maintaining the draining and fencing of the same, or in hiring or purchasing additional land for field gardens (*j*).

Compensation money received by the churchwardens and overseers of a parish in respect of any allotment for field gardens taken under statutory powers by a railway company or the like, is to be applied in the same manner as surplus rents arising from field gardens (*k*).

Unlet allotments.

741. If unable to let the allotments on the terms above mentioned, the parish council may let them, or any portion of them, in gardens

(*u*) Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 109.
(*a*) *Ibid.*
(*b*) For form of notice to quit, see Encyclopædia of Forms, Vol. I., p. 469.
(*c*) Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 110.
(*d*) *Ibid.*, s. 111. See also Small Tenements Recovery Act, 1838 (1 & 2 Vict. c. 74), ss. 1, 2. For form of notice of intention to apply to justices for recovery of possession, see Encyclopædia of Forms, Vol. I., p. 470. See title MAGISTRATES.
(*e*) Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 112.
(*f*) Commons Act, 1876 (39 & 40 Vict. c. 56), s. 27.
(*g*) Commons Act, 1899 (62 & 63 Vict. c. 30), s. 16 (2).
(*h*) *Ibid.*, s. 16 (1).
(*i*) Commons Act, 1876 (39 & 40 Vict. c. 56), s. 27.
(*j*) Commons Act, 1879 (42 & 43 Vict. c. 37), s. 2; Commons Act, 1876, s. 27.
(*k*) Commonable Rights Compensation Act, 1882 (45 & 46 Vict. c. 15), s. 3.

SECT. 4. Field Gardens.

not exceeding an acre each to poor inhabitants of the parish. Further, it is their duty to offer the gardens to the poor inhabitants of the parish at a fair agricultural rent sufficient to satisfy all rates, taxes etc., instead of at such rent as is required by the Inclosure Act, 1845 (*l*). If still unable to let the allotments to poor inhabitants, they may let them to any person whatever at the best annual rent obtainable, without any premium or fine, and on such terms as may enable the council to resume possession within a period not exceeding twelve months, should they be required for poor inhabitants. These powers and duties are extended to all persons whatever having management of lands allotted to the poor under any public or private Inclosure Act (*m*).

Exchange etc. of lands.

742. Lands unsuitable or inconveniently situated for field gardens may be exchanged for land more suitable or convenient by an order of the Board of Agriculture and Fisheries, on written application by the parish council or the overseers, as the case requires, or by the trustees of the allotment, and by the person willing to exchange the more suitable land (*n*).

Jurisdiction of Charity Commissioners.

743. The 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 respect to the management of such allotments contained in such Act, order, or award, may, on the application of any district or parish council interested in 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 (*o*).

SECT. 5.—*Parochial Charity Lands.*

Application of parochial charity lands for allotments.

744. Lands held by trustees for the benefit of the poor of any parish or places, and which are not otherwise used for the benefit of the parish as a recreation ground or otherwise for the enjoyment or general benefit of the inhabitants, are available for letting as allotments to cottagers labourers and others (*p*).

Further, the Charity Commissioners are required, where a scheme is made in relation to any charity and part of the endowment consists of lands (other than buildings or appurtenances thereto), to insert in the scheme a provision authorising the trustees of the charity to set apart portions of the lands for allotments, and these may be set apart and let as allotments in a similar manner (*q*).

These provisions do not extend to any lands with regard to which the Allotments Act, 1832, has been put into operation (*r*), and if the

(*l*) Commons Act, 1876 (39 & 40 Vict. c. 56), s. 26.
(*m*) *Ibid.*
(*n*) Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 149. Similar powers are given by the Inclosure Act, 1852 (15 & 16 Vict. c. 79), s. 21.
(*o*) Commons Act, 1899 (62 & 63 Vict. c. 30), s. 18.
(*p*) Allotments Extension Act, 1882 (45 & 46 Vict. c. 80), s. 4.
(*q*) *Ibid.*, s. 14.
(*r*) *Ibid.*, s. 6, and see pp. 333, 334, *ante*.

lands are held partly for the benefit of the poor and partly for other objects, they apply only to such proportion of the whole as the amount of the gross income of the former bears to the entire gross income. The Charity Commissioners settle differences as to computation (*s*).

Certificate of exemption.

745. Where the trustees for any reason think their lands unsuitable for the purpose of allotments they may apply to the Charity Commissioners for a certificate to that effect, and if such a certificate is granted they need not set apart any land for allotments (*t*). Public notice of such certificate must be given by fixing a notice on the doors of the parish church, or, if there is no church, on some public building or conspicuous place in the parish (*a*). The certificate may be revoked for any cause satisfactory to the Commissioners shown by any person entitled to make an application to them; but until revoked it is final and conclusive (*t*).

Transfer of powers.

746. The trustees may, with the approval of the Charity Commissioners, transfer their powers to parish councils or their appointees (*b*), or sell or let the land to sanitary authorities (*c*).

Duties of trustees.

747. The trustees must set apart such portions of the lands as may be most suitable for allotments, and give public notice specifying the situation, extent, and rent of the portions, and the times and places for making applications for allotments (*d*). On applications being received the trustees must forthwith obtain possession of the necessary amount of land, fence it, and let it, and continue to do so until the lands are exhausted or no further applications are made (*d*). This general rule is subject to the following limitations and directions: where the whole of the lands cannot conveniently be set apart, the trustees need not set apart any portion if the separation may make it impossible to let the remainder without substantial loss to the charity; if the lands are let on lease, the statutory duty does not arise until the expiration of the lease; if no application for any part be received within the time fixed, the public notice must be repeated once every year (*e*); lands lying at an inconvenient distance from the residences of cottagers and labourers may be let for the best rent procurable, and the trustees may hire more suitable land in lieu thereof (*f*); and if part only of the portion set apart is applied for, the remainder may be let in the same manner as unlet allotments (*g*).

Order in which applications to be granted.

The allotments are to be let to persons in the order in which they apply, or in accordance with such order as may be provided by the

(*s*) Allotments Extension Act, 1882 (45 & 46 Vict. c. 80), s. 8.
(*t*) *Ibid.*, s. 11.
(*a*) *Ibid.*, sched. (1).
(*b*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 14 (1).
(*c*) Under the Allotments Act, 1887 (50 & 51 Vict. c. 48), s. 13 (2), as to which see p. 349, *post*.
(*d*) Allotments Extension Act, 1882 (45 & 46 Vict. c. 80), s. 4. The schedule to the Act prescribes the method, time, and contents of such notice. If the notice is not given within the prescribed time, application must be made to the county court judge for the district or to the Charity Commissioners to extend the time.
(*e*) *Ibid.*, s. 4.
(*f*) *Ibid.*, s. 5.
(*g*) *Ibid.*, s. 4; and see p. 341, *post*.

SECT. 5. Parochial Charity Lands.

rules hereinafter mentioned, so that no undue preference shall be shown as regards the persons to whom they are let (*h*); but where the lands are situated in or adjoining to several parishes, preference is to be given to the cottagers and labourers being inhabitants of the parish or place for the benefit of the poor of which the lands are so held (*i*).

Management.

748. The trustees, or a majority of them, may make, revoke, and vary such rules as may be necessary for regulating the appointment and powers of local managers of the allotments, whether as tenants or agents of the trustees or otherwise, and for preventing the allotments being built upon or sublet, and for preventing any undue preference in letting, and generally for giving effect to these provisions. The rules may be disallowed by the Charity Commissioners, and public notice must be given of them and a copy supplied gratis to any cottager or labourer demanding the same. Any four cottagers or labourers, or any of the trustees, if aggrieved by such rules, or by the want of rules, or by any omission therefrom, may apply to the Charity Commissioners, who may make the necessary orders to remedy the complaint (*k*).

If the trustees neglect in any way to perform their duties, any four or more cottagers and labourers who would be entitled to rent allotments may, after due notice to the trustees of their neglect (to be specified in the notice), apply to the Charity Commissioners, who may thereupon issue their order for remedying the grievance, and such order is enforceable by attachment as for contempt of court (*l*).

Provisions as to letting.

749. Each allotment is to be let free of all charges and outgoings whatsoever, and for the purpose of rates, taxes, tithes and tithe rent-charges, the trustees are to be deemed the occupiers thereof. The rent is to be such as land of the same quality is usually let for in the parish, with such addition as will satisfy tithe, tithe rent-charge, rates, taxes and outgoings, including the expense of getting possession, and of allotting, dividing and fencing the portion set apart, and collecting the rents, and any sum payable for such draining of, and means of approach to, the allotments as may be necessary. The letting is limited to one acre to each person. Buildings may not be erected on the allotment, and if any are erected the trustees must pull them down, sell the materials, and apply the proceeds as if they were rents (*m*).

Recovery of rent and possession.

Any rent for an allotment, and the possession of an allotment after notice to quit (*n*) or other failure to deliver up possession as required by law, may be recovered by the trustees, or in the case of the appointment of local managers by such managers, in the same way as in the case of field gardens (*q*).

(*h*) Allotments Extension Act, 1882 (45 & 46 Vict. c. 80), sched. (6).
(*i*) *Ibid.*, s. 7.
(*k*) *Ibid.*, s. 9.
(*l*) *Ibid.*, s. 10. For the manner of enforcing such order, see title CHARITIES.
(*m*) *Ibid.*, s. 13.
For form of agreement for letting, see Encyclopædia of Forms, Vol. I., p. 445.
(*n*) For form of notice to quit, see Encyclopædia of Forms, Vol. I., p. 469.
(*q*) See p. 337, *ante*, and Allotments Extension Act, 1882 (45 & 46 Vict. c. 80), s. 12, which applies sects. 110 and 111 of the Inclosure Act, 1845 (8 & 9 Vict. c. 118).

Any allotment or portions thereof which cannot be let as an allotment, may be let to any person whatever at the best annual rent procurable, without any premium or fine, and on such terms as may enable the trustees to resume possession thereof within a period not exceeding twelve months if it should at any time be required to be let in allotments. Such letting does not exonerate the trustees from giving the public notices referred to above (*r*).

Unlet allotments.

SECT. 6.—*Allotments under the Allotments Acts.*

750. The Small Holdings and Allotments Act, 1907 (*s*), which comes into operation on the 1st of January, 1908, has very largely extended the powers of local authorities as to the provision and management of allotments. Until that date the more restricted provisions of the older Acts (*t*) remain effective, and must, therefore, be referred to; but, in view of the enlarged provisions which will shortly become available, it is anticipated that few, if any, steps will be taken in connection with allotments under the old law. The reader must be careful to distinguish between the powers now operative, and those which only come into effect on the 1st of January, 1908, and must also remember that references in this article to parish councils, in connection with allotments after that date, will, in the case of a rural parish not having a parish council, include references to the parish meeting (*a*).

Application of Acts.

751. On that date it will become the duty of a county council to ascertain the extent to which there is a demand for allotments in the several urban districts (other than boroughs) and rural parishes in the county, or to which there would be a demand if suitable land were available, and the extent to which it is reasonably practicable, having regard to statutory provisions (*b*) to satisfy any such demand (*c*), and for that purpose to co-operate with such authorities, associations, and persons, as they think best qualified to assist them, and to take such other steps as they think necessary (*d*).

Duty of county councils.

If the county council are satisfied that the circumstances in relation to any such urban district or rural parish are such that land for allotments should be acquired for such district or parish, the council must pass a resolution to that effect, and must proceed to acquire land and provide allotments, or cause allotments to be provided (*e*).

(*r*) Allotments Extension Act, 1882 (45 & 46 Vict. c. 80), s. 13 (6).

(*s*) 7 Edw. 7, c. 54.

(*t*) Namely, the Allotments Act, 1887 (50 & 51 Vict. c. 48), the Allotments Act, 1890 (53 & 54 Vict. c. 65), and the Local Government Act, 1894 (56 & 57 Vict. c. 73).

(*a*) See Small Holdings and Allotments Act, 1907 (7 Edw. 7, c. 54), s. 46 (4).

(*b*) *I.e.*, to the provisions of the Allotments Act, 1887, and of any subsequent amending statute.

(*c*) It may be noticed that if in the course of the inquiries of the Small Holdings Commissioners as to the demand for small holdings (see title SMALL HOLDINGS) they receive any information as to the existence of a demand for allotments, they must communicate the information to the councils of the county, and of the borough, urban district, or parish concerned (Small Holdings and Allotments Act, 1907 (7 Edw. 7, c. 54), s. 2 (4)).

(*d*) Small Holdings and Allotments Act, 1907 (7 Edw. 7, c. 54), s. 24 (1).

(*e*) Allotments Act, 1890 (53 & 54 Vict. c. 65), s. 2 (2), as amended and

SECT. 6. Under Allotments Acts.

Small Holdings and Allotments Committee.

For the performance of their duties under (*inter alia*) the Allotments Acts, every county council must establish a small holdings and allotments committee, consisting either wholly or partly of members of the council, but so that in the latter case the members of the council are in a majority; and all matters relating to the exercise and performance by the council of their powers and duties under the Allotments Acts, 1887 to 1907 (except the power of raising a rate or borrowing money), will stand referred to such committee (*f*); and the council before exercising any such powers must, unless in their opinion the matter is urgent, receive and consider the report of such committee with respect to the matter in question. A county council may also delegate to such committee, with or without restrictions or conditions, as they think fit, any of their powers under the Allotments Acts, except the power of raising a rate or borrowing money (*g*).

Accounts.

The committee may delegate any of their powers to sub-committees, consisting either wholly or partly of members of the committee (*h*). Where any receipts or payments of money under the Small Holdings and Allotments Act, 1907, are intrusted by the county council to the small holdings and allotments committee, or any sub-committee thereof, the accounts of those receipts and payments will be accounts of the county council, and must be made up and audited accordingly (*i*).

Duty of district and parish councils.

752. In addition to the duty imposed, as stated above, on a county council there is a duty upon urban district councils and parish councils, and until the 1st of January, 1908, upon rural district councils, to promote the provision of allotments (*k*). In the case

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inferentially affected by the Small Holdings and Allotments Act, 1907 (7 Edw. 7, c. 54), s. 47, sched. II. The exact effect of the amended procedure is not quite clear, but it would seem that an original duty is now cast upon county councils to initiate proceedings for the provision of allotments where there is a reasonable demand for them.

(*f*) References in the Allotments Acts to the standing committee of a county council are to be construed as references to the Small Holdings and Allotments Committee (Small Holdings and Allotments Act, 1907 (7 Edw. 7, c. 54), s. 36 (1)).

(*g*) *Ibid.*

(*h*) *Ibid.*, s. 36 (2). There is no instruction as to a majority of a sub-committee being members of either the committee or the council, and so long as at least one member of the committee, not necessarily a member of the council, is on the sub-committee, all the other members of the sub-committee may be chosen from outside those bodies. If, however, there is committed to a sub-committee the power of managing small holdings (as to which see title SMALL HOLDINGS), the committee in making appointments thereto must have regard to the advisability of including certain representative members (*ibid.*).

(*i*) *Ibid.*, s. 36 (3). And see p. 359, *post*, as to accounts of expenses under the Acts.

(*k*) The duty devolves upon district councils as successors to the "sanitary authority" mentioned in the earlier Allotments Acts. The expression has the same meaning as in the Public Health Act, 1875 (38 & 39 Vict. c. 55) (Allotments Act, 1887 (50 & 51 Vict. c. 48), s. 17). See title PUBLIC HEALTH. It includes the council of a borough. It also includes the parish council where, under the Allotments Acts, land is purchased by the county council and is assured to the parish council. On January 1st, 1908, the powers and duties of rural district councils under the Allotments Acts will be transferred to parish councils, and the Acts will have effect as if references therein to the sanitary authority and the district thereof included references to the parish council and

of a rural parish not having a parish council, the parish meeting has a like duty (*l*). The council or meeting, as the case may be, must consider any written representation (*m*) that allotments are required in the district or parish. The representation may be made by any six registered parliamentary electors or ratepayers resident in the district or parish (*n*). If the council or meeting think, after inquiry made, that there is a demand for allotments, and that they cannot be obtained at a reasonable rent or on reasonable conditions by voluntary arrangement, the council, if a district council, must purchase or hire any suitable land which may be available, within or without the district, adequate to provide sufficient allotments (*o*), and must let such land in allotments to the labouring population (*p*), resident in the district and desirous of taking the same (*q*). The land must not be acquired save at such price or rent as in the opinion of the council may, together with expenses, be recouped out of the allotment rents (*r*). Where the authority is a parish council or meeting they must, if they cannot acquire suitable land by voluntary arrangement, make a representation to the county council, who may thereupon proceed to acquire land on behalf of the parish council or parish meeting (*s*).

Area of allotments

The duty of a council to provide allotments does not include the duty of providing allotments exceeding one acre in extent, but they

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the parish, and subject to such other adaptations as may be necessary (Small Holdings and Allotments Act, 1907 (7 Edw. 7, c. 54), s. 20 (2)); and all property acquired and all liabilities incurred by any rural district council under the Allotments Acts will, as from an appointed day fixed by the Local Government Board, either generally or as respects any particular district, by virtue of the Act of 1907, be transferred to and vested in the parish council of the parish in respect of which the property was acquired or the liability incurred (*ibid.*, s. 20 (3)). Sects. 68, 70, 72, 85, 86, 87 and 88 of the Local Government Act, 1894 (56 & 57 Vict. c. 73) (which relate to adjustment of property and liabilities, the determination of questions, local inquiries, current rates, accounts and proceedings, existing securities, and the discharge of existing debts, existing regulations, and pending contracts), will apply in the case of any such transfer (Small Holdings and Allotments Act, 1907 (7 Edw. 7, c. 54), s. 20 (6)). And see title LOCAL GOVERNMENT.

(*l*) Small Holdings and Allotments Act, 1907 (7 Edw. 7, c. 54), s. 46 (4). Where any property is by the Act transferred to and vested in a parish council, the property will, in the case of a rural parish not having a parish council, be transferred to and vested in the chairman of the parish meeting and the overseers of the parish (*ibid.*). For parish councils and parish meetings generally, see title LOCAL GOVERNMENT.

(*m*) For a form of representation, see Encyclopædia of Forms, Vol. I., p. 448.

(*n*) Allotments Act, 1887 (50 & 51 Vict. c. 48), s. 2 (1). As to the right to use schoolrooms for the purpose of discussing questions relating to allotments, see Allotments Act, 1890 (53 & 54 Vict. c. 65), s. 5, and the Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 4, and title EDUCATION. For form of notice of intention to exercise the right, see Encyclopædia of Forms, Vol. I., p. 447.

(*o*) Allotments Act, 1887 (50 & 51 Vict. c. 48), s. 2 (1).

(*p*) This expression is not defined. The authority may make regulations defining the persons eligible to be tenants, but they must be persons within the description. See Allotments Act, 1887 (50 & 51 Vict. c. 48), s. 6 (1).

(*q*) *Ibid.*, s. 2 (1).

(*r*) *Ibid.*, s. 2 (2). This sub-section explains what is meant by "reasonable rent."

(*s*) Small Holdings and Allotments Act, 1907 (7 Edw. 7, c. 54), ss. 26 (7), 46 (4). As to the procedure, see p. 348, *post*.

SECT. 6. Under Allotments Acts.

may provide allotments up to five acres each in extent, and with the consent of the county council may adapt for letting and let as an allotment land exceeding five acres (*t*).

SUB-SECT. 1.—*Methods of Acquisition.*

Methods of acquisition.

753. The necessary land for allotments may be acquired by a council in several ways, namely:—(1) by hiring by agreement; (2) by purchase by agreement; (3) by compulsory hiring; (4) by compulsory purchase; (5) by obtaining a transfer of appropriated lands from allotment wardens and trustees; and (6) in the case of a council of a borough, urban district, or parish, by purchasing or hiring from the county council land acquired by the latter for small holdings (*a*).

(1) Hiring by agreement.

754. Under the Allotments Act, 1887, land may be hired, but only by agreement, and at such rent as, in the opinion of the council, will enable all expenses incurred to be recouped out of the rents to be obtained from the tenants of the allotments (*b*). A person who has power to lease land for agricultural purposes (*c*) may lease land to a council for the purposes of allotments for a term not exceeding thirty-five years, either with or without such right of renewal as is conferred in the case of land hired compulsorily (*d*).

Glebe land or other land belonging to an ecclesiastical benefice may be leased by the incumbent with the consent of the Ecclesiastical Commissioners (*e*).

(2) Purchase by agreement.

755. Land for allotments may be purchased by agreement, and for this purpose the Lands Clauses Consolidation Act, 1845 (*f*), and the amending Acts are incorporated with the Allotments Act, 1887, except the provisions with respect to the purchase and taking of land otherwise than by agreement, and with respect to the provisions

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(*t*) Small Holdings and Allotments Act, 1907 (7 Edw. 7, c. 54), s. 21 (1).

(*a*) For small holdings, see that title.

(*b*) See Allotments Act, 1887 (50 & 51 Vict. c. 48), s. 2 (1) and (2). For form of a lease of land to a parish council, see Encyclopædia of Forms, Vol. I., p. 453.

(*c*) *E.g.*, a mortgagor or mortgagee in possession, by virtue of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 18.

(*d*) Small Holdings and Allotments Act, 1907 (7 Edw. 7, c. 54), s. 28 (1). As to the right of renewal, see p. 346, *post*. Land belonging to the Crown, the Duchy of Lancaster, or the Duchy of Cornwall may be leased for allotments (*ibid.*, s. 28 (2)).

(*e*) *Ibid.*, s. 28 (3). Where glebe land or other land belonging to an ecclesiastical benefice is hired by a council, the provisions of the Ecclesiastical Dilapidations Act, 1871 (34 & 35 Vict. c. 43), will not during the continuance of the tenancy be applicable to buildings upon the land, and at the determination of the tenancy the incumbent may, under certain conditions, remove any buildings which have been erected for the purpose of adapting the land for allotments, and may dispose of the materials thereof (Small Holdings and Allotments Act, 1907 (7 Edw. 7, c. 54), s. 29). Sect. 10 of the Local Government Act, 1894 (56 & 57 Vict. c. 73), which enables a parish council to hire land for allotments by agreement, and, on the authorisation of the county council, compulsorily, will be repealed on January 1st, 1908, when the Small Holdings and Allotments Act, 1907, comes into operation (see s. 47, sched. II.). For the provisions of the latter Act as to compulsory hiring, see *post*, p. 345.

(*f*) 8 & 9 Vict. c. 18.

to be made for affording access to the special Act (*g*). Land in the Duchy of Lancaster may be sold for the purpose of allotments (*h*).

SECT. 6. Under Allotments Acts.

(3) Compulsory hiring.

756. Where a council are unable to obtain land on reasonable terms by agreement, they may acquire land by compulsory hiring or purchase (*i*). Under the Local Government Act, 1894, a parish council may be invested by the county council with power to hire land compulsorily (*j*), and the Local Government Board may confer a like power of hiring compulsorily on the council of a municipal borough, including a county borough, or other urban district (*k*), but these provisions will be superseded when the extended powers conferred by the Small Holdings and Allotments Act, 1907, come into operation. Under this Act where a council other than a parish council (*l*) propose to hire land compulsorily, they may submit to the Board of Agriculture and Fisheries an order providing for the compulsory hiring of the land specified in the order for a period not less than fourteen nor more than thirty-five years. The provisions as to the compulsory purchase of land by a council (*m*) will apply to the order with the substitution of the word "hiring" for "purchase," and the order must, further, determine the terms and conditions of the hiring other than the rent, and, in particular, must provide for the insertion in the lease of covenants by the council to cultivate the land in a proper manner, and to pay to the landlord at the determination of the tenancy compensation for depreciation, and, unless otherwise agreed, the usual lessee's covenants: the order must not, except with the consent of the landlord, confer on the council any right to fell or cut timber or trees, or any right to take, sell, or carry away any minerals, gravel, sand, or clay, except so far as may be necessary or convenient for the purpose of erecting buildings on the land or otherwise adapting the land for allotments, and except upon payment of compensation for minerals, gravel, sand, or clay so used. The amount of rent, compensation etc., will, in default of agreement, be determined by a single valuer appointed by the Board of Agriculture and Fisheries (*n*).

An order will not be effective unless and until it is confirmed by the Board, who may confirm it with or without modifications.

(*g*) Allotments Act, 1887 (50 & 51 Vict. c. 48), s. 3 (1). For a form of conveyance to a district council of land for allotments, see Encyclopædia of Forms, Vol. I., p. 451.

(*h*) *Ibid.*; Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 178.

(*i*) Small Holdings and Allotments Act, 1907 (7 Edw. 7, c. 54), s. 22.

(*j*) 56 & 57 Vict. c. 73, s. 10, which section will be repealed as from January 1, 1908.

(*k*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 33.

(*l*) Where a parish council proposes to hire land compulsorily they must act through the county council, as in the case of a compulsory purchase. See *post*, p. 348.

(*m*) See *post*, p. 347.

(*n*) Small Holdings and Allotments Act, 1907 (7 Edw. 7, c. 54), s. 26 (2), and Sched. I., Parts I. and II. Reference should be made to these schedules for full details as to the compulsory hiring of land. The expression "landlord" when used in relation to land compulsorily hired means the person for the time being entitled to receive the rent of the land from the council (*ibid.*, s. 46 (2)).

SECT. 6. Under Allotments Acts.

Confirmation will be conclusive evidence that the order has been duly made (*o*). It must incorporate any regulations made by the Board, and such provisions of the Lands Clauses Acts, and of sects. 77 to 85 of the Railways Clauses Consolidation Act, 1845 (*p*), as appear to the Board necessary (*q*). Where the land authorised to be compulsorily hired is subject to a mortgage, any lease made in pursuance of the order by the mortgagor or mortgagee in possession will have effect as if it were a lease authorised by sect. 18 of the Conveyancing and Law of Property Act, 1881 (*r*).

If land hired compulsorily is in the occupation of a tenant, he may, by notice in writing served on the council before the determination of his tenancy, require that any claim by him against the council which, under the Agricultural Holdings (England) Acts, 1883 to 1906 (*s*), might be referred to arbitration under those Acts shall be so referred, and such claim will then be determined by arbitration under those Acts, and not by valuation under the Act of 1907 (*t*).

Renewal of tenancy.

757. Where land has been hired compulsorily, the council may, by giving notice in writing to the landlord, not more than two years nor less than one year before the expiration of the tenancy, renew the tenancy for such term, not being less than fourteen nor more than thirty-five years as may be specified in the notice, and at such rent as, in default of agreement, may be determined by valuation by a valuer appointed by the Board, but otherwise on the same terms and conditions at the original lease, and so from time to time. If on any such notice being given the landlord proves to the satisfaction of the Board that any land included in the tenancy is required for the amenity or convenience of any dwelling-house, such land shall be excluded from the renewed tenancy (*u*).

In assessing the rent to be paid under a renewal the valuer must not take into account any increase in value due to improvements by the council, or to a possible user of the land as mentioned in sect. 33 of the Act of 1907, or to the establishment by the council of other allotments in the neighbourhood, or any depreciation in the value in respect of which the landlord would have been entitled to compensation if the council had quitted on the expiration of the original tenancy (*v*).

Resumption of possession by landlord.

758. Where land has been hired compulsorily under any of the Allotments Acts, 1887 to 1907, and the land or any part thereof at any time during the tenancy is shown to the satisfaction of the Board to be required by the landlord to be used for building,

(*o*) Small Holdings and Allotments Act, 1907 (7 Edw. 7, c. 54), s. 26 (3).
(*p*) 8 & 9 Vict. c. 20.
(*q*) Small Holdings and Allotments Act, 1907 (7 Edw. 7, c. 54), Sched. I., Part II (1).
(*r*) 44 & 45 Vict. c. 41. See Small Holdings and Allotments Act, 1907 (7 Edw. 7, c. 54), s. 26 (6).
(*s*) For these Acts, see title AGRICULTURE.
(*t*) Small Holdings and Allotments Act, 1907 (7 Edw. 7, c. 54), Sched. I., Part II. (3).
(*u*) *Ibid.*, s. 27 (1).
(*v*) *Ibid.*, s. 27 (2); for the provisions of s. 33, see next paragraph.

mining, or other industrial purposes, or for roads, necessary therefor, the landlord may resume possession of the land or part thereof upon giving to the council twelve months' previous notice in writing of his intention so to do; if a part only of the land is resumed the rent payable by the council for the remainder will, in default of agreement, be determined by valuation (*x*).

If, however, the land has been hired compulsorily by the Small Holdings Commissioners acting in default of a county council (*a*), any question as to resumption by the landlord must be determined by an arbitrator appointed by the Lord Chief Justice of England (*b*).

Compensation for improvements.

759. On the determination of a tenancy of land hired, whether compulsorily or by agreement, the council will, on quitting the land, be entitled (subject in the case of land hired by agreement to any agreement to the contrary) to compensation under the Agricultural Holdings (England) Acts, 1883 to 1906 (*c*), for any improvement in respect of the planting of standard or other fruit trees or fruit bushes permanently set out, or of the planting of strawberry plants; or of the planting of asparagus, rhubarb, and other vegetable crops which continue productive for two or more years; and in respect of any of the following improvements which were necessary and proper to adapt the land for allotments, namely, the erection, alteration or enlargement of buildings, the formation of silos, the laying down of permanent pasture, making and planting of osier beds, making of water meadows or works of irrigation, making gardens, making or improving roads or bridges, making or improving watercourses, ponds, wells, or reservoirs, or works for the application of water power or for supply of water for agricultural or domestic purposes, making or removal of permanent fences, planting hops, planting orchards or fruit bushes, protecting young fruit trees, reclaiming waste land, warping or weiring of land, embankments and sluices against floods, the erection of wirework in hop gardens, and drainage (*d*). In the case of land hired compulsorily the compensation will be such sum as fairly represents the increase (if any) in the value to the landlord and his successors in title of the land due to such improvements (*e*).

(4) Compulsory purchase

760. Though land can be purchased compulsorily under either the Allotments Act, 1887, or the Local Government Act, 1894, the powers under these statutes will cease to operate when the provisions

(*x*) Small Holdings and Allotments Act, 1907 (7 Edw. 7, c. 54), s. 33 (1). The valuer will be appointed by the Board of Agriculture and Fisheries, who will fix his remuneration (*ibid.*, ss. 33 (1), 43 (3)).

(*a*) See p. 350, *post*.

(*b*) Small Holdings and Allotments Act, 1907 (7 Edw. 7, c. 54), s. 33 (2). All questions referred to arbitration under the Act will, unless otherwise expressly provided, be determined by a single arbitrator in accordance with the Agricultural Holdings (England) Acts, 1883 to 1906 (*ibid.*, s. 43 (1)). For these Acts see title AGRICULTURE. The remuneration of the arbitrator will be fixed by the Board (*ibid.*, s. 43 (3)).

(*c*) See title AGRICULTURE.

(*d*) Agricultural Holdings Act, 1900 (63 & 64 Vict. c. 50), sched. I. (27); and Small Holdings and Allotments Act, 1907 (7 Edw. 7, c. 54), s. 35 (2).

(*e*) Small Holdings and Allotments Act, 1907 (7 Edw. 7, c. 54), s. 35 (2)).

SECT. 6. Under Allotments Acts.

of the Small Holdings and Allotments Act, 1907, become applicable on January 1, 1908 (*f*). By that Act when a council proposes to purchase land compulsorily they may submit to the Board of Agriculture and Fisheries an order putting in force as respects the land specified therein the provisions of the Lands Clauses Acts with respect to the purchase and taking of land otherwise than by agreement (*g*). The order must be in a form prescribed by regulations of the Board (*h*), and must incorporate, subject to the necessary adaptations, the Lands Clauses Acts and sects. 77 to 85 of the Railways Clauses Consolidation Act, 1845 (*i*). It must be published by the council, and notice thereof must be given to parties affected. If an objection to the order is lodged with the Board and persisted in, the Board must hold a public inquiry in the locality (*j*). The order has no force until confirmed by the Board, but when confirmed it is conclusive (*k*).

The order may provide for the continuance or creation of easements over the land authorised to be acquired, but so that no newly created easement over land hired by a council shall continue beyond the determination of the hiring (*l*).

Withdrawal of notice to treat.

If, during the course of proceedings for compulsory purchase or hiring, and within six weeks after the amount of compensation or rent to be paid has been determined, it appears to the council that the land cannot be let for allotments at a rent that will secure the council from loss, the council may withdraw the notice to treat, subject to being liable to pay compensation for loss or expenses caused by the notice to treat and the withdrawal. Where a notice of withdrawal is given by the Small Holdings Commissioners acting in default of the county council (*m*) compensation will be paid out of the Small Holdings Account (*n*).

Acquirement of land by parish council.

761. A parish council that proposes to acquire land compulsorily, whether by purchase or hiring must make a representation to the county council, who may, on behalf of the parish council, exercise the powers of compulsory purchase or hiring conferred by the Act of 1907. The order will be carried into effect by the county council, but the land acquired will be assured or demised to the

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(*f*) For the old powers, reference should be made to the Allotments Act, 1887 (50 & 51 Vict. c. 48), s. 3; Allotments Act, 1890 (53 & 54 Vict. c. 65), s. 4; and Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 9.

(*g*) Small Holdings and Allotments Act, 1907 (7 Edw. 7, c. 54), s. 26 (1).

(*h*) *Ibid.*, s. 26 (2), and Sched. I., Part I. (1).

(*i*) 8 & 9 Vict. c. 20. For these Acts see title COMPULSORY PURCHASE AND COMPENSATION.

(*j*) Small Holdings and Allotments Act, 1907 (7 Edw. 7, c. 54), Sched. I., Part I. (2), (3), (4). See also title COMPULSORY PURCHASE AND COMPENSATION, where the procedure on taking land compulsorily is fully treated. In determining the amount of any disputed compensation under an order no additional allowance can be made on account of the taking being compulsory (*ibid.*, s. 26 (5)).

(*k*) *Ibid.*, s. 26 (3).

(*l*) *Ibid.*, s. 26 (4).

(*m*) See p. 350, *post*.

(*n*) Small Holdings and Allotments Act, 1907 (7 Edw. 7, c. 54), ss. 26 (8), 19. And see title SMALL HOLDINGS.

parish council, who will pay all expenses (*o*). If the county council refuse to proceed on a representation being made to them, the parish council may petition the Board of Agriculture and Fisheries, who may, after inquiry, make such an order as the county council might have made (*p*).

General restrictions on the acquisition of land.

762. Land cannot be acquired compulsorily, either by purchase or hiring, which at the date of the order forms part of any park, garden, or pleasure ground or forms part of the home farm attached to and usually occupied with a mansion house, or is otherwise required for the amenity or convenience of any dwelling-house, or which is woodland not wholly surrounded by land acquired by a council, or which is the property of any local authority, or has been acquired by any corporation or company for the purposes of a railway, dock, canal, water, or other public undertaking, or is the site of an ancient monument, or other object of archæological interest (*q*).

A council in making, and the Board in confirming, an order must have regard to the extent of land held or occupied in the locality by any owner or tenant, and to the convenience of other property of such persons, and must, so far as practicable, avoid taking an undue or inconvenient quantity of land from any one owner or tenant, or displacing any considerable number of agricultural labourers or others employed on or about the land. No holding not exceeding fifty acres nor any part of such holding can be acquired compulsorily by an order under the Act of 1907 (*r*).

Land must not be acquired save at such price or rent that, in the opinion of the council, all expenses, except those of making public roads, incurred in acquiring the land or otherwise in relation to the allotments may reasonably be expected to be recouped out of the rents obtained in respect thereof (*s*).

Surplus land.

Superfluous or unsuitable land may be sold, let, or exchanged by the council, with the sanction of the county council (*t*).

(5) Transfer by allotment wardens and trustees.

763. Allotment wardens under the general Inclosure Acts, having the management of land appropriated under those Acts for allotments or field gardens, may by agreement with the district council transfer the management of such land to the council, upon such terms and conditions as may be agreed with the sanction (as regards the wardens) of the Board of Agriculture and Fisheries; and such land thereupon vests in the council (*a*).

Trustees under the Allotments Extension Act, 1882 (*b*), may, instead of letting their allotments to labourers, sell or let such land

(*o*) Small Holdings and Allotments Act, 1907 (7 Edw. 7, c. 54), s. 26 (7).
(*p*) *Ibid.*
(*q*) *Ibid.*, s. 30 (1).
(*r*) *Ibid.*, s. 30 (2), (3).
(*s*) Allotments Act, 1887 (50 & 51 Vict. c. 48), s. 2 (2). An explanation of the term "reasonable rent" is there given.
(*t*) *Ibid.*, s. 11.
(*a*) *Ibid.*, s. 13. See also Board of Agriculture Act, 1889 (52 & 53 Vict. c. 30), s. 2 (1) (b), and Board of Agriculture and Fisheries Act, 1903 (3 Edw. 7, c. 31).
(*b*) See pp. 333—338, *ante*.

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to a council, upon terms to be agreed upon with the sanction of the Charity Commissioners.

In both these cases the provisions of the Allotments Act, 1887, became applicable as if the land had been acquired under that Act (*c*).

(6) Interchange of land for small holdings and allotments.

764. A county council may sell or let to a borough, urban district, or parish council for the purpose of allotments any land acquired by them for small holdings, and a borough, urban district, or parish council may sell or let to the county council for the purpose of small holdings any land acquired by them for allotments. The provisions of the Lands Clauses Consolidation Act with respect to the sale of superfluous land will not apply on any such sale, and where land acquired for allotments is so sold the proceeds of sale must be applied to discharging the liabilities of the council in respect of such land or in acquiring other land for allotments; any surplus may be applied for any purpose for which capital money may be applied which is approved by the Local Government Board (*d*).

Common pasture and grazing rights.

765. The powers of a council to acquire land for allotments include power to provide common pasture (*e*), and to acquire land for the purpose of attaching grazing and other similar rights to allotments provided by them (*f*). Any rights so created or acquired by a council must be attached to the allotments in such manner and subject to such regulations as the council think expedient (*g*).

Enfranchisement and redemption of charges.

766. Expenses incurred by a council in the enfranchisement of land acquired for allotments or in the purchase or redemption of land tax, quit-rent, chief-rent, tithe or other rent-charge, or other perpetual annual sum issuing out of the land, are deemed to have been incurred in the purchase of the land (*h*).

SUB-SECT. 2.—*Procedure to Compel Defaulting Authorities.*

Default of county council.

767. Under the Small Holdings and Allotments Act, 1907, the Board of Agriculture and Fisheries is to appoint a body to be entitled the Small Holdings Commissioners (*i*), and if the Board are, in relation to any urban district (other than a borough) or rural parish, satisfied, after holding a local inquiry (*j*) at which the county council and the council of the district or parish, and such other

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(*c*) Allotments Act, 1887 (50 & 51 Vict. c. 48), s. 13.

(*d*) Small Holdings and Allotments Act, 1907 (7 Edw. 7, c. 54), s. 32; Allotments Act, 1887 (50 & 51 Vict. c. 48), s. 11.

(*e*) Allotments Act, 1887 (50 & 51 Vict. c. 48), s. 12. And see title COMMONS.

(*f*) Small Holdings and Allotments Act, 1907 (7 Edw. 7, c. 54), s. 31 (1).

, s. 46 (3).

(*i*) *Ibid.*, s. 1. For the constitution, powers, and proceedings of the Commissioners, see title SMALL HOLDINGS. Anything required to be done by or to the Commissioners may be done by or to any one Commissioner, and any document purporting to be signed by a Commissioner shall be received in evidence without proof of the appointment or handwriting of the Commissioner (*ibid.*, s. 41).

(*j*) For the purpose of an inquiry the Board and the Commissioners have the same powers as the Local Government Board have for an inquiry under the Public Health Acts (*ibid.*, s. 42). And see title PUBLIC HEALTH.

persons as the person holding the inquiry may, in his discretion, think fit to allow, shall be permitted to appear and be heard (*k*), that the county council have failed to fulfil their obligations under the Allotments Act, 1890, as amended by the Act of 1907 (*l*), the Board may by order transfer to the Commissioners all or any of the powers of the county council under the Allotments Act, 1890, as amended by the Act of 1907, in relation to the district or parish, and those Acts will then apply as if references to the Commissioners were substituted for references to the county council, and with such other adaptations as may be made by the order (*m*). Any land acquired by the Commissioners in pursuance of the order will be vested in the Board, but the Board may transfer the land to the council at whose expense the land was acquired, on payment of all sums due from the council in connection therewith, and on the Board being satisfied that the council are willing to exercise and perform their powers and duties in relation thereto (*n*).

Default of district or parish council.

768. When a representation has been made to an urban district council or to the council of a rural parish, by any six registered parliamentary electors or ratepayers resident in the district or parish, that allotments are required, and the council have failed to take steps to acquire land and provide allotments, the applicants may refer the matter to the county council, and that council, if satisfied that the circumstances are such that land for allotments should be acquired, may by resolution transfer to themselves the powers and duties of the defaulting council under the Allotments Acts, and may proceed to acquire the necessary land, or carry the Acts into operation in the district or parish (*o*), but without prejudice to the rights and powers of the defaulting council in respect of other land previously acquired by them (*p*).

Effect of transfer of powers.

769. Upon such transfer of powers the following provisions apply: the Allotments Act, 1887, applies with all necessary modifications; the county council have the powers of borrowing possessed by the defaulting authority, including power to charge the rates with the repayment of the loan, for which, however, the authority is liable; separate accounts are to be kept by the county council; the county council may delegate to the authority any powers of management, letting and use, and for the recovery of rent and possession, of the allotments, all expenses and receipts arising in the exercise of the delegated powers being (subject to the terms of

(*k*) Notices of the inquiry must be given and published in accordance with directions of the Board of Agriculture and Fisheries (Small Holdings and Allotments Act, 1907 (7 Edw. 7, c. 54), s. 42 (2)).

(*l*) See *ante*, p. 341, for these obligations and the amendment referred to.

(*m*) Small Holdings and Allotments Act, 1907 (7 Edw. 7, c. 54), s. 24 (2).

(*n*) *Ibid.*, s. 40.

(*o*) See Allotments Act, 1887 (50 & 51 Vict. c. 48), s. 2; Allotments Act, 1890 (53 & 54 Vict. c. 65), s. 2 (2); Small Holdings and Allotments Act, 1907 (7 Edw. 7, c. 54), ss 24, 47 (4), and sched. II. As to the right to use public schoolrooms for meetings etc. relating to the provision of allotments, see Allotments Act, 1890, s. 5, and Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 4. As to the expenses incurred by a county council in taking over powers of a defaulting council, see p. 359, *post*.

(*p*) Allotments Act, 1890 (53 & 54 Vict. c. 65), s. 2 (2).

SECT. 6. Under Allotments Acts.

the delegation) paid and dealt with as expenses and receipts of the defaulting authority under the Act of 1887 (*q*).

Re-transfer of powers and property.

770. On the request of the defaulting authority, the county council may, by order under their seal, transfer to that authority all the powers, duties, property, and liabilities vested in and imposed on the county council under the Act of 1890 as regards the district of the defaulting authority, and the property so transferred will be deemed to have been acquired by the defaulting authority under the Act of 1887, and that authority will act accordingly (*a*).

SUB-SECT. 3.—*Powers and Duties of Management.*

771. A council providing or acquiring lands for allotments have the following powers in respect thereof:

Improvement of land.

They may generally improve and adapt the land, and do all things necessary for the convenience and maintenance of the allotments, including (*inter alia*) draining, fencing, and road-making (*b*).

Regulations.

They may make, revoke, and vary regulations for controlling the letting of the allotments, for preventing undue preference in the letting thereof, and generally for giving effect to the provisions of the Allotments Acts (*c*).

Tenants.

They may define the persons eligible to be tenants, provided they belong to the labouring population, and be resident in or within one mile of the district or parish (*d*).

Managers.

An urban authority may appoint and remove allotment managers, being residents and ratepayers of the locality concerned, with such powers, including those of incurring expenses, as the authority may define (*e*).

In rural parishes the allotments will, on and after January 1, 1908, be managed by the parish council, or, where there is no parish council, by persons appointed by the parish meeting (*f*).

It must be noted that nothing contained in the Small Holdings and Allotments Act, 1907, will affect the rights and obligations under any tenancy created before January 1, 1908, under the Allotments Acts (*g*).

(*q*) Allotments Act, 1890 (53 & 54 Vict. c. 65), s. 4.

(*a*) *Ibid.*, s. 4 (f).

(*b*) Allotments Act, 1887 (50 & 51 Vict. c. 48), s. 5; and see p. 355, *post*, as to the erection of buildings on allotments.

(*c*) Allotments Act, 1887 (50 & 51 Vict. c. 48), s. 6. The regulations must be confirmed by the Board of Agriculture and Fisheries (*ibid.*, s. 6 (1)), as amended by sect. 20 (1) of the Small Holdings and Allotments Act, 1907 (7 Edw. 7, c. 54). Model regulations under the Act of 1887 were issued by the Local Government Board, dated May 30, 1888. See also Encyclopædia of Forms, Vol. I., pp. 456—469.

(*d*) Allotments Act, 1887 (50 & 51 Vict. c. 48), ss. 2 (2), 8 (2); subject to the power of the council to let to other persons when allotments cannot be let in accordance with the Act (*ibid.*, s. 7 (4)). And see p. 355, *post*, as to letting allotments to persons working on a co-operative system and to associations under the Act of 1907.

(*e*) *Ibid.*, s. 6 (3), (4)

(*f*) See Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 6 (4), and Small Holdings and Allotments Act, 1907 (7 Edw. 7, c. 54), ss. 20 (2), 23.

(*g*) Small Holdings and Allotments Act, 1907 (7 Edw. 7, c. 54), s. 45.

SECT. 6. Under Allotments Acts.

772. An urban council may borrow money for the purposes of the Allotments Acts, in like manner and subject to the like conditions as for the purpose of defraying general and special expenses under the Public Health Acts (*h*).

Borrowing powers.

A parish council may borrow money for the purposes of the powers and duties as to allotments transferred to or conferred on the council by the Small Holdings and Allotments Act, 1907; such borrowing will be under the provisions of the Local Government Act, 1894 (*i*).

Sects. 242 and 243 of the Public Health Act, 1875, relating to loans by the Public Works Loans Commissioners to a local authority, will, with the necessary adaptations, apply to a loan to a parish council under the Local Government Act, 1894, or to a county council lending money to a parish council under that Act, where the purpose for which the loan is required by the parish council is the acquisition, improvement, or adaptation of land under the Allotments Acts (*k*).

Dealing with allotments unlet.

773. Allotments which cannot be let in accordance with the provisions of the Allotments Act, 1887, and the regulations, may be let to any person whatever at the best annual rent which can be obtained, without premium or fine, and on such terms as may enable the authority to resume possession thereof within a period not exceeding twelve months (*l*).

Sale or exchange.

774. Land acquired under the Acts, but no longer needed or not suitable for allotments, may, with the sanction of the county council, be sold, let, or exchanged for more suitable land (*m*). The proceeds are to be applied in discharging the debts and liabilities of the authority in respect of land so acquired under the Act, or in acquiring, adapting, or improving other land for allotments. Any surplus may be applied for any purpose for which capital money may be applied which is approved by the Local Government Board. Interest and money received from the letting of the land may be applied in acquiring other land for allotments, or in like manner as receipts from the allotments are applicable (*n*). In the case of a rural district all such moneys must be credited to and applied for the benefit of the parish for which the land was purchased (*o*).

(*h*) Allotments Act, 1887 (50 & 51 Vict. c. 48), s. 10 (4). Sects. 233, 234, 236—239, 242, and 243 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), are made applicable to such loans (Allotments Act, 1887, s. 10 (5)).

(*i*) See s. 12 of the Act of 1887, with the proviso that money borrowed thereunder for the purposes of allotments will not be reckoned as part of the debt of the parish for the purpose of the limitation on borrowing contained in such section (Small Holdings and Allotments Act, 1907 (7 Edw. 7, c. 54), s. 20 (4)).

(*k*) Small Holdings and Allotments Act, 1907 (7 Edw. 7, c. 54), s. 20 (5). As to borrowing powers generally, see title LOCAL GOVERNMENT.

(*l*) Allotments Act, 1887 (50 & 51 Vict. c. 48), s. 7 (4).

(*m*) *Ibid.*, s. 11 (1).

(*n*) *Ibid.*, s. 11 (2).

For the above purposes ss. 128—132 of the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), under which the owner from whom the land was originally purchased has a right of pre-emption, are made applicable (Allotments Act, 1887 (50 & 51 Vict. c. 48), s. 11 (3)).

(*o*) Allotments Act, 1887 (50 & 51 Vict. c. 48), s. 11 (2). So much of the subsection as relates to this last requirement will be repealed as from January 1, 1908.

SECT. 6. Under Allotments Acts.

the delegation) paid and dealt with as expenses and receipts of the defaulting authority under the Act of 1887 (*q*).

Re-transfer of powers and property.

770. On the request of the defaulting authority, the county council may, by order under their seal, transfer to that authority all the powers, duties, property, and liabilities vested in and imposed on the county council under the Act of 1890 as regards the district of the defaulting authority, and the property so transferred will be deemed to have been acquired by the defaulting authority under the Act of 1887, and that authority will act accordingly (*a*).

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Regulations.

They may make, revoke, and vary regulations for controlling the letting of the allotments, for preventing undue preference in the letting thereof, and generally for giving effect to the provisions of the Allotments Acts (*c*).

Tenants.

They may define the persons eligible to be tenants, provided they belong to the labouring population, and be resident in or within one mile of the district or parish (*d*).

Managers.

An urban authority may appoint and remove allotment managers, being residents and ratepayers of the locality concerned, with such powers, including those of incurring expenses, as the authority may define (*e*).

In rural parishes the allotments will, on and after January 1, 1908, be managed by the parish council, or, where there is no parish council, by persons appointed by the parish meeting (*f*).

It must be noted that nothing contained in the Small Holdings and Allotments Act, 1907, will affect the rights and obligations under any tenancy created before January 1, 1908, under the Allotments Acts (*g*).

(*q*) Allotments Act, 1890 (53 & 54 Vict. c. 65), s. 4.

(*a*) *Ibid.*, s. 4 (f).

(*b*) Allotments Act, 1887 (50 & 51 Vict. c. 48), s. 5; and see p. 355, *post*, as to the erection of buildings on allotments.

(*c*) Allotments Act, 1887 (50 & 51 Vict. c. 48), s. 6. The regulations must be confirmed by the Board of Agriculture and Fisheries (*ibid.*, s. 6 (1)), as amended by sect. 20 (1) of the Small Holdings and Allotments Act, 1907 (7 Edw. 7, c. 54). Model regulations under the Act of 1887 were issued by the Local Government Board, dated May 30, 1888. See also Encyclopædia of Forms, Vol. I., pp. 456—469.

(*d*) Allotments Act, 1887 (50 & 51 Vict. c. 48), ss. 2 (2), 8 (2); subject to the power of the council to let to other persons when allotments cannot be let in accordance with the Act (*ibid.*, s. 7 (4)). And see p. 355, *post*, as to letting allotments to persons working on a co-operative system and to associations under the Act of 1907.

(*e*) *Ibid.*, s. 6 (3), (4)

(*f*) See Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 6 (4), and Small Holdings and Allotments Act, 1907 (7 Edw. 7, c. 54), ss. 20 (2), 23.

(*g*) Small Holdings and Allotments Act, 1907 (7 Edw. 7, c. 54), s. 45.

SECT. 6. Under Allotments Acts.

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Borrowing powers.

A parish council may borrow money for the purposes of the powers and duties as to allotments transferred to or conferred on the council by the Small Holdings and Allotments Act, 1907; such borrowing will be under the provisions of the Local Government Act, 1894 (*i*).

Sects. 242 and 243 of the Public Health Act, 1875, relating to loans by the Public Works Loans Commissioners to a local authority, will, with the necessary adaptations, apply to a loan to a parish council under the Local Government Act, 1894, or to a county council lending money to a parish council under that Act, where the purpose for which the loan is required by the parish council is the acquisition, improvement, or adaptation of land under the Allotments Acts (*k*).

Dealing with allotments unlet.

773. Allotments which cannot be let in accordance with the provisions of the Allotments Act, 1887, and the regulations, may be let to any person whatever at the best annual rent which can be obtained, without premium or fine, and on such terms as may enable the authority to resume possession thereof within a period not exceeding twelve months (*l*).

Sale or exchange.

774. Land acquired under the Acts, but no longer needed or not suitable for allotments, may, with the sanction of the county council, be sold, let, or exchanged for more suitable land (*m*). The proceeds are to be applied in discharging the debts and liabilities of the authority in respect of land so acquired under the Act, or in acquiring, adapting, or improving other land for allotments. Any surplus may be applied for any purpose for which capital money may be applied which is approved by the Local Government Board. Interest and money received from the letting of the land may be applied in acquiring other land for allotments, or in like manner as receipts from the allotments are applicable (*n*). In the case of a rural district all such moneys must be credited to and applied for the benefit of the parish for which the land was purchased (*o*).

(*h*) Allotments Act, 1887 (50 & 51 Vict. c. 48), s. 10 (4). Sects. 233, 234, 236—239, 242, and 243 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), are made applicable to such loans (Allotments Act, 1887, s. 10 (5)).

(*i*) See s. 12 of the Act of 1887, with the proviso that money borrowed thereunder for the purposes of allotments will not be reckoned as part of the debt of the parish for the purpose of the limitation on borrowing contained in such section (Small Holdings and Allotments Act, 1907 (7 Edw. 7, c. 54), s. 20 (4)).

(*k*) Small Holdings and Allotments Act, 1907 (7 Edw. 7, c. 54), s. 20 (5). As to borrowing powers generally, see title LOCAL GOVERNMENT.

(*l*) Allotments Act, 1887 (50 & 51 Vict. c. 48), s. 7 (4).

(*m*) *Ibid.*, s. 11 (1).

(*n*) *Ibid.*, s. 11 (2).

For the above purposes ss. 128—132 of the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), under which the owner from whom the land was originally purchased has a right of pre-emption, are made applicable (Allotments Act, 1887 (50 & 51 Vict. c. 48), s. 11 (3)).

(*o*) Allotments Act, 1887 (50 & 51 Vict. c. 48), s. 11 (2). So much of the subsection as relates to this last requirement will be repealed as from January 1, 1908.

SECT. 6. Under Allotments Acts.

775. A register must be kept by the council showing particulars of the tenancy, acreage, and rent of every allotment let, and of the unlet allotments (*p*).

Register and annual returns.

Within one month after March 25 in each year the council must cause a statement, showing receipts, expenditure, and outstanding liabilities in respect of the allotments up to that date, to be deposited at some convenient place in the district available to ratepayers (*q*).

Rating of allotments.

776. Allotments are liable, as "agricultural land," to pay only one-half of the rate in the pound payable in respect of buildings and other hereditaments, so far as public local rates are concerned (*r*), and, for the purposes of general district rates in urban districts and for special expenses in rural districts, allotments of not more than two acres in extent are assessed at one-fourth only of their rateable value (*s*).

SUB-SECT. 4.—*Terms and Conditions of Letting.*

Rents.

777. Rents are to be fixed so as to insure the council as far as can be reasonably expected against loss, but the expression "loss" does not include expenses incurred in an unsuccessful attempt to acquire land for allotments. Reasonable rents may be charged, having regard to the agricultural value of the land. Not more than one quarter's rent may be required to be paid in advance, where the authority deem payment in advance necessary (*t*).

Rates and taxes etc.

778. For the purpose of rates, taxes, and tithe rent-charges, the council are to be deemed the occupiers of the allotments and liable to pay; but the tenants are to be deemed occupiers thereof for the purpose of parliamentary, municipal, and other local franchises. Rates, taxes, and tithe rent-charges so paid are to be apportioned among the tenants, and the apportioned sum is to be certified to each tenant, and to be added to or deemed part of the tenant's rent, and to be recovered accordingly (*u*).

Area of an allotment.

779. Sub-letting of an allotment is forbidden (*b*). One person may not hold any allotment or allotments acquired under the Acts which exceeds or exceed five acres in extent (until the end of 1907 the limit is one acre) (*c*); but it is not compulsory upon a council to provide allotments exceeding one acre in extent (*d*). Further,

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(*p*) Allotments Act, 1887 (50 & 51 Vict. c. 48), s. 15. The register is to be open to the inspection of ratepayers of the district or parish it affects, who may take copies or extracts without fee (*ibid.*).

(*q*) *Ibid.*

(*r*) Agricultural Rates Act, 1896 (59 & 60 Vict. c. 16), as continued by the Agricultural Rates Act, 1896 etc. Continuance Acts of 1901 (1 Edw. 7, c. 13) and 1905 (5 Edw. 7, c. 8). As to payment of rates etc., see par. 778; and see, generally, title RATES AND RATING.

(*s*) Allotments Rating Exemption Act, 1891 (54 & 55 Vict. c. 33), s. 1, which directs that sects. 211 (1) and 230 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), shall be construed as if the word "allotments" was therein inserted.

(*t*) Allotments Act, 1887 (50 & 51 Vict. c. 48), s. 7 (1).

(*u*) *Ibid.*, s. 7 (2); see also title ELECTIONS.

(*b*) *Ibid.*, s. 7 (3).

(*c*) *Ibid.*, as extended by sect. 21 (1) of the Small Holdings and Allotments Act, 1907 (7 Edw. 7, c. 54).

(*d*) Small Holdings and Allotments Act, 1907 (7 Edw. 7, c. 54), s. 21 (1) (a).

SECT. 6. Under Allotments Acts.

after the year 1907, where a council has in hand land acquired under the Allotments Acts, any part which exceeds five acres may be adapted for letting and be let as an allotment if the council satisfies the county council that it is convenient and desirable that it should be so let, and the county council consent to such letting (*e*).

Co-operative working.

780. One or more allotments may, after 1907, with the consent of the Board of Agriculture and Fisheries, be let to persons working on a co-operative system, or to an association formed for the purpose of creating or promoting the creation of allotments when such association is so constituted that the division of profits among the members is prohibited or restricted (*f*).

Building on allotments.

781. Up to the end of the year 1907 no building other than a toolhouse, shed, greenhouse, fowlhouse, or pigstye may be erected on an allotment (*g*), but after that date the statutory restrictions against building by tenants cease to operate, save that a dwelling-house cannot be erected for occupation on an allotment of less than one acre (*h*). The powers conferred upon a council of improving and adapting land for allotments will then include power to erect buildings and make adaptations of existing buildings, but so that not more than one dwelling-house shall be erected for occupation with any one allotment (*i*).

Recovery of rent and possession.

782. Rent, and the possession of any allotment after notice to quit or failure to deliver up possession as required by law, may be recovered by the council as landlords (*k*).

If the rent is in arrear for forty days, or if it appears to the council that a tenant, not less than three months after the commencement of the tenancy, has not observed the regulations, or is resident more than a mile out of the district or parish, they may give him a month's notice to quit; but in all such cases the council must, in default of agreement between the outgoing and incoming tenant, pay on demand to the outgoing tenant any compensation due to him; and any Court or justice directing recovery of possession may stay delivery until payment of such compensation has been made or secured to the satisfaction of the Court or justice (*l*).

(*e*) Small Holdings and Allotments Act, 1907 (7 Edw. 7, c. 54), s. 21 (1) (b).

(*f*) *Ibid.*, ss. 9 and 21 (3); and see also title SMALL HOLDINGS.

(*g*) Allotments Act, 1887 (50 & 51 Vict. c. 48), s. 7 (5), which sub-section is repealed as from January 1, 1908 (Small Holdings and Allotments Act, 1907 (7 Edw. 7, c. 54), s. 35 (4)).

(*h*) Small Holdings and Allotments Act, 1907 (7 Edw. 7, c. 54), s. 21 (2).

(*i*) *Ibid.*

(*k*) Allotments Act, 1887 (50 & 51 Vict. c. 48), s. 8 (1). See also title LANDLORD AND TENANT.

For form of notice to quit, see Encyclopædia of Forms, Vol. I., p. 469, and for a form of notice to apply to the justices to recover possession, see *ibid.*, p. 470.

(*l*) Allotments Act, 1887 (50 & 51 Vict. c. 48), s. 8 (2), (3).

The compensation is to be assessed by an arbitrator appointed by the authority, unless the tenant elects to have it assessed under the Allotments and Cottage Gardens Compensation for Crops Act, 1887 (50 & 51 Vict. c. 26), or the Agricultural Holdings Acts, 1883 to 1906. See pp. 356 *et seq.*, *post.*

SECT. 6. **Under Allotments Acts.**

Compensation to tenants

783. On the expiration of his tenancy the tenant of an allotment may be entitled to compensation for improvements under either the custom of the country (*m*) or under statute.

Compensation by statute is regulated by (1) the Agricultural Holdings Acts, 1883 to 1906 (*n*), and (2) the Allotments and Cottage Gardens Compensation for Crops Act, 1887, and it may be claimed by the tenant under either, at his option; but no claim for compensation under the former Acts can be made in respect of anything for which a claim has been made under the Act of 1887 (*o*), and (3) by the Small Holdings and Allotments Act, 1907, which comes into operation on January 1, 1908.

(1) Under the Small Holdings and Allotments Act, 1907, and the Agricultural Holdings Acts.

Under the last-mentioned Act it is provided that where a council, which term will, as we have seen, include the persons appointed by a parish meeting to manage allotments, have let an allotment to any tenant the tenant shall as against the council have the same rights with respect to compensation for improvements effected by planting standard or other fruit trees permanently set out, planting fruit bushes permanently set out, planting strawberry plants, and planting asparagus, rhubarb, and other vegetable crops which continue productive for two or more years, as if it had been agreed in writing that the allotment should be let as a market garden. The tenant, however, will not be entitled to compensation in respect of any such improvement if executed contrary to an express prohibition in writing by the council affecting either the whole or any part of the allotment; but if the tenant feels aggrieved by any such prohibition, he may appeal to the Board of Agriculture and Fisheries, who may confirm, vary, or annul the prohibition, and the decision of the Board shall be final (*p*).

(2) Under the Allotments and Cottage Gardens Compensation for Crops Act, 1887.

784. Further, the tenant of an allotment to which the Allotments Acts apply may, if he so elects, claim compensation for improvements under the Allotments and Cottage Gardens Compensation for Crops Act, 1887, instead of under the Agricultural Holdings (England) Acts, 1883 to 1906, as amended by the Small Holdings and Allotments Act, 1907, notwithstanding that the allotment exceeds two acres in extent (*q*).

The law of compensation generally will be found under the title AGRICULTURE, p. 258, *ante*; reference is only made here to the special provisions which are applied to compensation for crops, fruit trees and bushes, labour, manure, drains, and structural improvements by the Allotments and Cottage Gardens Compensation for Crops Act, 1887; which Act, it must be remembered, does not extend to the metropolis (*r*).

(*m*) As to custom of the country and compensation thereunder, see title AGRICULTURE.

(*n*) For the provisions of these Acts and compensation thereunder, see title AGRICULTURE.

(*o*) Allotments and Cottage Gardens Compensation for Crops Act, 1887 (50 & 51 Vict. c. 26), s. 18. In case of conflict between the two codes, the provisions of this Act are to prevail.

(*p*) Small Holdings and Allotments Act, 1907 (7 Edw. 7, c. 54), s. 35 (1); Agricultural Holdings Act, 1900 (63 & 64 Vict. c. 50), Sched. I., 27 (i.), (ii.), (iii.), and (iv.).

(*q*) Small Holdings and Allotments Act, 1907 (7 Edw. 7, c. 54), s. 35 (3).

(*r*) 50 & 51 Vict. c. 26, s. 2. "Metropolis" means the City of London and

SECT. 6. Under Allotments Acts.

In that Act "allotment" means any parcel of land of not more than two acres in extent held by a tenant under a landlord and cultivated as a garden (*s*) or as a farm, or partly as a garden and partly as a farm; "cottage garden" means an allotment attached to a cottage; "holding" means an allotment or cottage garden; "tenant" means the holder of a holding under a landlord for any term, and includes the legal personal representative of a deceased tenant; "landlord" means the person for the time being entitled to receive the rents and profits of any holding; "contract of tenancy" means the letting of land for any term; "determination of tenancy" means the cesser of a contract of tenancy by effluxion of time or from any other cause (*t*). Definitions.

785. Upon the determination of the tenancy of a holding the tenant is entitled, notwithstanding any agreement to the contrary, to obtain from the landlord compensation (1) for crops, including fruit, growing upon the holding in the ordinary course of cultivation, and for fruit trees and fruit bushes planted by the tenant with the previous consent in writing of the landlord; (2) for labour and manure since the last crop in anticipation of a future crop; (3) for drains, outbuildings, pigstyes, fowlhouses, or other structural improvements made by the tenant on the holding with the written consent of the landlord (*u*). Right to compensation.

Deductions may be made from the amount of compensation in respect of rent due from the tenant, and in respect of any breach of contract or wilful or negligent damage by the tenant (*a*). Deductions.

Trees and bushes planted or acquired by a tenant, for which compensation is not payable, may be removed by the tenant before the expiration of the tenancy (*b*).

786. In default of agreement, the compensation is to be assessed by the arbitration (*c*) of a person who, unless agreed upon by the landlord and tenant, is to be appointed by the justices in petty sessions (*d*), if possible without remuneration (*e*). Such arbitrator has the ordinary powers as to taking evidence and calling for the production of necessary documents (*f*). He must begin the reference within Procedure.

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all parishes and places mentioned in Schedules A, B and C to the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120).

(*s*) A piece of land less than two acres in extent, occupied by a seedsman for the purposes of his business, and used to grow vegetables, fruit trees, and flowers for sale, is not "cultivated as a garden," and is not an allotment within this definition (*Cooper* v. *Pearse*, [1896] 1 Q. B. 562). An allotment is a piece of land cultivated for food or pleasure and not for business purposes (*per* COLLINS, J., *ibid.*, at p. 566).

(*t*) Allotments and Cottage Gardens Compensation for Crops Act, 1887 (50 & 51 Vict. c. 26), s. 4.

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

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

(*b*) Allotments Act, 1887 (50 & 51 Vict. c. 48), s. 7 (6).

(*c*) Allotments and Cottage Gardens Compensation for Crops Act, 1887 (50 & 51 Vict. c. 26), s. 7.

(*d*) *Ibid.*, s. 8. For appointment of arbitrator by agreement, see Encyclopædia of Forms, Vol. I., p. 471.

(*e*) *Ibid.*, s. 9.

(*f*) *Ibid.*, s. 11.

SECT. 6. Under Allotments Acts.

seven days (*g*) and make his award in writing within fourteen days from his appointment, though, by consent of the parties, this period may be extended to twenty-eight days (*h*). He may proceed in the absence of either party after notice given to both parties (*i*). The costs are in his discretion (*k*), and his award, which is final (*l*), must fix a day not sooner than fourteen days after delivery of the award for payment of the compensation and costs (*m*). If the amount awarded or agreed to be paid is not paid for fourteen days it may be recovered upon order made by the judge of the county court in the same way as money ordered by a county court under its ordinary jurisdiction to be paid (*n*).

SUB-SECT. 5.—*Finance.*

Expenses of district and parish councils.

787. All expenses incurred in respect of allotments by urban or parish councils will be defrayed as general expenses. Expenses incurred by rural district councils prior to January 1, 1908, will be defrayed as special expenses, chargeable to the parish on account of which the allotments were acquired (*o*); while expenses incurred before that date in respect of two or more parishes are to be apportioned among them as in the case of special expenses incurred for the common benefit of two or more contributory places under the Public Health Act, 1875 (*p*).

Apportionment of expenses.

The sums payable by a defaulting district council under the Allotments Act, 1890, are to be defrayed as expenses under the Act of 1887, except that in the case of a rural authority they must, with the exception of the principal and interest of any money borrowed, or the rent of any land hired, by the county council, be charged as general expenses (*q*).

Receipts.

Moneys received before January 1, 1908, in respect of any land acquired under the Allotments Act, 1887, otherwise than from sale or exchange, must be applied in aid of the expenses incurred in respect of such land, and any surplus must be applied in aid of the general or special expenses, and in the case of a rural authority

(*g*) Allotments and Cottage Gardens Compensation for Crops Act, 1887 (50 & 51 Vict. c. 26), s. 10.

(*h*) *Ibid.*, s. 13. For form extending time, see Encyclopædia of Forms, Vol. I., p. 472.

(*i*) *Ibid.*, s. 12.

(*k*) *Ibid.*, s. 14.

(*l*) *Ibid.*, s. 16. Although the award is final and conclusive both as to law and facts, it is subject to the general rule that any award may be invalidated by want of formality in the proceedings or misconduct or want of jurisdiction on the part of the arbitrator. Thus an award made out of time cannot be enforced. As to arbitration generally, see title ARBITRATION. For form of award, see Encyclopædia of Forms, Vol. I., p. 473.

(*m*) *Ibid.*, s. 15.

(*n*) *Ibid.*, s. 17. See County Court Rules, Ord. 40, rr. 7, 8, and see, generally, title COUNTY COURTS.

(*o*) Allotments Act, 1887 (50 & 51 Vict. c. 48), s. 10 (1). See, also, title PUBLIC HEALTH.

(*p*) Allotments Act, 1887 (50 & 51 Vict. c. 48), s. 14 (1), which is repealed by the Act of 1907. See also sect. 229 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), and title PUBLIC HEALTH.

(*q*) Allotments Act, 1890 (53 & 54 Vict. c. 65), s. 6 (2). The exception in the case of a rural authority is repealed by the Act of 1907.

must be credited to the parish on account of which the land was acquired (*r*).

SECT. 6. Under Allotments Acts.

788. As from January 1, 1908, separate accounts must be kept of the receipts and expenditure of a council under the Allotments Acts, and any receipts must, subject to the provisions of the Acts, be applied to the purpose of the Acts, and not for any other purpose except with the consent of the Local Government Board; and for the purpose of the provisions relating to the audit of accounts (*s*), any persons appointed by an urban sanitary authority under the Allotments Acts, or by a parish meeting under the Small Holdings and Allotments Act, 1907, to exercise and perform powers and duties as to the management of allotments (*t*), shall be deemed to be officers of the sanitary authority or parish meeting as the case may be (*u*).

Accounts.

789. Expenses incurred by a county council in executing the Allotments Acts or in connection with a local inquiry under the Acts, are to be paid in the first instance out of the county fund as for general county purposes, and, unless defrayed out of moneys received by the council in respect of any land acquired under the Allotments Acts, otherwise than by sale or exchange, or out of money borrowed under the Acts, they must, when the powers and duties of the district or parish council are transferred to the county council under the Allotments Act, 1890, be repaid to the county council as a debt by the district or parish council (*a*).

enses of county councils.

The expenses of a county council incurred in respect of the compulsory purchase of lands for allotments under the Local Government Act, 1894 (*b*), are to be defrayed in like manner as in the case of a local inquiry by a county council under that Act (*c*).

790. Sums received by a county council in respect of any land acquired under the Allotments Act, 1890, otherwise than from sale or exchange, in so far as they are not required for the payment of

Receipts by county councils.

(*r*) Allotments Act, 1887 (50 & 51 Vict. c. 48), s. 10 (3), which is repealed by the Act of 1907.

(*s*) For the provisions as to audit of accounts, see title LOCAL GOVERNMENT.

(*t*) See p. 352, *ante*.

(*u*) Small Holdings and Allotments Act, 1907 (7 Edw. 7, c. 54), s. 37. For the accounts of authorities and persons acting under earlier Acts, see Allotments Act, 1887 (50 & 51 Vict. c. 48), s. 10 (6); Allotments Act, 1890 (53 & 54 Vict. c. 65), s. 4 (c) (these provisions are repealed by the Act of 1907); and the Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 58 (2); also under title PUBLIC HEALTH.

(*a*) Allotments Act, 1890 (53 & 54 Vict. c. 65), s. 6 (1), as affected by the Small Holdings and Allotments Act, 1907 (7 Edw. 7, c. 54), s. 47, and Sched. II.

(*b*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 9, as amended by the Act of 1907.

(*c*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 9 (19).

By s. 72 (4) of the Act of 1894 the expenses incurred by the county council through the application of the council or inhabitants of a parish or district in relation to a local inquiry (including the expenses of any committee or person authorised by the county council) are to be paid by the council of that parish or district, or, in the case of a parish which has not a parish council, by the parish meeting; but, with this exception, the expenses of inquiries held under the Act are to be paid out of the county fund.

SECT. 6. Under Allotments Acts.

expenses incurred by them in respect of such land, are to be paid to the district council or parish council as the case may be (*d*).

SUB-SECT. 6.—*Miscellaneous.*

Transfer of powers etc. under Allotments Acts.

791. The powers of the Local Government Board under the Allotments Acts, except such of those powers as relate to the finance of local authorities, will be transferred to the Board of Agriculture and Fisheries as from January 1, 1908, and if any question arises as to whether any power is a power which is so transferred the question must be determined by the Local Government Board, whose decision will be final (*e*).

Annual report to Parliament.

792. The Board of Agriculture and Fisheries must make an annual report to Parliament of their proceedings, and of the proceedings of the Small Holdings Commissioners under the Small Holdings and Allotments Act, 1907, and also of the proceedings of the several county, borough, district, and parish councils under the Allotments Acts, 1887 to 1907, and for that purpose every council must, before such date in every year as the Board may fix, send to the Board a report of their proceedings under the Acts during the preceding year (*f*).

Application of Acts in London.

793. The powers conferred on sanitary authorities by the Allotments Acts, 1887 to 1907, may in London be exercised by the London County Council, and the Acts will apply accordingly, except that, subject to the provisions of the Act of 1907, the expenses must be defrayed, and money borrowed, under and in accordance with the provisions of the Local Government Act, 1888 (*g*).

Co-operative societies.

794. A county council may promote the formation or extension of, and may, under certain conditions, assist financially, societies on a co-operative basis, having for their object or one of their objects the provision or the profitable working of allotments, whether in relation to the purchase of requisites, the sale of produce, credit banking or insurance or otherwise, and may employ as their agents for the purpose any society having as its object or one of its objects the promotion of co-operation in connection with the cultivation of allotments (*h*).

Grants by county council.

With the consent of the Local Government Board, and subject to regulations to be made by that Board, a county council may, for the purpose of assisting a society, make grants or advances to the society, or guarantee advances made to the society, upon such terms and conditions as to rate of interest and repayment or otherwise, and on such security, as the county council think fit, and the making of such grants or advances will be a purpose for

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(*d*) Allotments Act, 1890 (53 & 54 Vict. c. 65), s. 6 (3), as amended by the Act of 1907.

(*e*) Small Holdings and Allotments Act, 1907 (7 Edw. 7, c. 54), s. 20 (1).

(*f*) *Ibid.*, s. 44. As the Act does not come into operation until January 1 1908, it follows that no report can be required before January, 1909.

(*g*) *Ibid.*, s. 25. As to these provisions, see titles LOCAL GOVERNMENT and METROPOLIS.

(*h*) Small Holdings and Allotments Act, 1907 (7 Edw. 7, c. 54), s. 39 (1), (4).

which a council may borrow under the Small Holdings Act, 1892 (*i*).

SECT. 6. Under Allotments Acts.

The Board of Agriculture and Fisheries, with the consent of the Treasury, may out of the Small Holdings Account (*k*) make grants upon such terms as the Board may determine, to any society having as its object or one of its objects the promotion of co-operation in connection with the cultivation of allotments (*l*).

Grants by Board of Agriculture and Fisheries.

(*i*) Small Holdings and Allotments Act, 1907 (7 Edw. 7, c. 54), s. 39 (2). A county council may borrow money for the purposes of providing small holdings; any borrowing must be in accordance with the Local Government Act, 1888 (51 & 52 Vict. c. 41), or, in the case of a county borough, with the Public Health Act, 1875 (38 & 39 Vict. c. 55). See Small Holdings Act, 1892 (55 & 56 Vict. c. 31), s. 19, and Small Holdings and Allotments Act, 1907 (7 Edw. 7, c. 54), s. 14, and title SMALL HOLDINGS.

(*k*) See title SMALL HOLDINGS.

(*l*) Small Holdings and Allotments Act, 1907 (7 Edw. 7, c. 54), s. 39 (4). The various powers referred to in sub-s. 6 do not become operative until January 1, 1908.

ALLUVION.

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ALTERATION OF DOCUMENTS.

See DEEDS AND DOCUMENTS; WILLS.

AMBASSADORS.

See ACTION; CONSTITUTIONAL LAW; CRIMINAL LAW AND PROCEDURE.

AMBIGUITY.

See DEEDS AND DOCUMENTS; WILLS.

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See CRIMINAL LAW AND PROCEDURE; PLEADING; PRACTICE AND PROCEDURE.

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Part I.—Classification of Animals.

PART I. Classification of Animals.

795. The term "animals" may be said to include all beasts, birds, reptiles, fishes, and insects, and is so used here, except where some specially restricted meaning is indicated or stated (*a*). Meaning of term "animals."

796. The common law follows the civil law in classifying animals in two divisions, as follows :— Domestic or tame animals.

(1) Domestic or tame (*domitæ*, or *mansuetæ*, *naturæ*). This class includes cattle, horses, sheep, goats, pigs, poultry, cats, dogs, and all other animals which by habit or training live in association with man (*b*).

(2) Wild (*feræ naturæ*), and not classed as domestic or tame. This class includes not only lions, tigers, eagles, and other animals of an undoubtedly savage nature, but also deer, foxes, hares, rabbits, game of all kinds, rooks, pigeons, wild fowl and the like, and all fishes, reptiles and insects (*c*). Wild animals.

Part II.—Property in Animals.

SECT. 1.—*Civil Rights.*

SUB-SECT. 1.—*Domestic Animals.*

797. Domestic animals, like other personal and movable chattels, are the subject of absolute property. The owner can maintain trover for them, and retains his property in them if they stray or are lost (*d*). The property in the young of domestic animals is in the owner of the mother (*e*), except in the case of cygnets (*f*). Absolute property in domestic animals.

SUB-SECT. 2.—*Wild Animals.*

798. There is no absolute property in wild animals while living, and they are not goods or chattels (*g*). There may, however, be what is known as a qualified property in them, either (1) *ratione* No absolute property in wild animals.

(*a*) The term "animals" is specially defined for the purposes of certain statutes, *e.g.*, the Cruelty to Animals Act, 1849 (12 & 13 Vict. c. 92), s. 29 (see p. 409, *post*); the Diseases of Animals Act, 1894 (57 & 58 Vict. c. 57), s. 59 (see p. 421, *post*); and the Wild Animals in Captivity Protection Act, 1900 (63 & 64 Vict. c. 33), s. 1 (see p. 410, *post*), which includes fish and reptiles.

(*b*) 3 Co. Inst. 109; 1 Hale, P. C. 512.

(*c*) As to animals which, though originally wild, or *ferœ naturæ*, have been tamed and are actually in a state of subjection, see p. 366, *post*. Domestic animals which have reverted to a wild state are *ferœ naturæ*, see *Falkland Islands Co.* v. *The Queen* (1863), 2 Moo. P. C. C. (N. S.) 266.

(*d*) *Putt* v. *Roster* (1682), 2 Mod. Rep. 318; *Binstead* v. *Buck* (1776), 2 Wm. Bl 1117.

(*e*) Brooke's Abridgment, tit. "Propertie," 29. The common law follows the maxim of the civil law, *Partus sequitur ventrem.*

(*f*) See note (*t*), p. 366, *post*; 2 Bl. Com., ch. 25.

(*g*) *Case of Swans* (1592), 7 Co. Rep. 16 a.

SECT. 1. Civil Rights.

impotentiæ et loci, (2) *ratione soli* and *ratione privilegii*, or (3) *per industriam*, which may be more properly described as an exclusive right to reduce them into possession (*h*).

(1) Qualified property *per industriam*.

799. A qualified property in living animals *feræ naturæ* obtained *per industriam*, arises by taking, taming or reclaiming them (*i*). Animals *feræ naturæ* become the property of any person who takes, tames or reclaims them, until they regain their natural liberty (*k*). Animals such as deer, swans, peacocks and doves are the subjects of this qualified property, which is lost if they attain their natural liberty, and have not the *animus revertendi* (*l*).

Thus trespass or trover will lie for taking a captive thrush, singing bird, muskrat, parrot or ape, because, although they are *feræ naturæ*, they have been held to be merchandise and valuable when in a state of captivity (*m*). Also for taking doves out of a dovehouse (*n*), hares, pheasants or partridges in a warren or inclosure (*o*), deer in a park (*p*), a hawk if tame (*q*), fish in a stew pond (*r*), rabbits in a warren (*s*), swans marked or in private waters (*t*), or bees from a hive.

Bees.

Bees are *feræ naturæ*, and there is no property in them except by reclamation. Thus, if a swarm settle on a man's tree, no property passes until the bees are hived; when hived, they become the property of the hiver; and if a swarm leaves the hive this property continues in the hiver so long as they can be seen and followed (*u*).

Deer.

Deer, though strictly speaking *feræ naturæ* (*x*), if reclaimed

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(*h*) See *Case of Swans* (1592), 7 Co. Rep. 17 b; *Blades* v. *Higgs* (1865), 11 H. L. Cas. 621, *per* Lord WESTBURY, L.C., at p. 631, and Lord CHELMSFORD, at p. 638; compare *Ewart* v. *Graham* (1859, 7 H. L. Cas. 331, *per* Lord CAMPBELL, L.C., at p. 344; *Keble* v. *Hickringill* (1706, 11 Mod. Rep. 74, 75.

(*i*) *Case of Swans, supra; Blades* v. *Higgs, supra, per* Lord CHELMSFORD, at p. 638.

(*k*) Bracton, lib. ii. cap. i.

(*l*) *Case of Swans, supra*; Bracton, *supra*.

(*m*) Brooke's Abridgment, tit. "Trespas," 407; *Grymes* v. *Shack* (1611), Cro. (Jac.) 262.

(*n*) Com. Dig. "Trespass," A 1; Fitzherbert, Nat. Brev. 88 I.

(*o*) Fitzherbert, Nat. Brev. 86 M, 87 A.

(*p*) *Mallocke* v. *Eastly* (1685), 3 Lev. 227.

(*q*) *Fines* v. *Spencer* (1571), 3 Dyer, 306 b.

(*r*) *Pollexfen* v. *Crispin* (1671), 1 Ventr. 122.

(*s*) Fitzherbert, Nat. Brev. 86 M, 87 A.

(*t*) *Case of Swans, supra*. There is much learning in this case relating to swans. The white swan, not marked, in open and common rivers is a royal fowl, and belongs to the King. A subject may, however, have property in white swans, not marked, in his manor or private waters, and if they escape he may bring them back again, but if they gain their natural liberty the King's officers may seize them. It is said, too, that by the custom of the realm, which is common law in such case, the cygnets belong equally between the owner of the cock and the owner of the hen swan, for the cock swan holdeth himself to one female and is the emblem of an affectionate and true husband to his wife above all other fowls. The swans on the Thames now belong to the King, the Dyers' Company, and the Vintners' Company, and are all marked; the cygnets are appropriated in the proportion of three to the owner of the cock to two to the owner of the hen.

(*u*) Bracton, lib. ii. cap. 1; 2 Bl. Com. 392; compare *Hannam* v. *Mockett* (1824), 2 B. & C. 934, at p. 944. See also p. 375, *post*.

(*x*) *Blades* v. *Higgs, supra, per* Lord WESTBURY at p. 631.

and kept in inclosed ground are the subject of property, pass to the executors (*y*), and are liable to be taken in distress (*z*).

(2) Qualified property *ratione impotentiæ et loci*.

800. The owner of land has a qualified property *ratione impotentiæ et loci* in the young of animals *feræ naturæ* born on the land until they can fly or run away (*a*), as where hawks, herons, or rabbits make their nests or burrows on the land and have young; and an action of trespass (*b*) will lie for taking young animals so born (*c*).

(3) Qualified property *ratione soli* and *ratione privilegii*.

801. The owner of land, who has retained the exclusive right to hunt, take and kill animals *feræ naturæ* on his own land, has a qualified property *ratione soli* in them for the time being while they are there (*d*). But if such an owner grants to another the right to hunt, take and kill animals *feræ naturæ* on his land, the grantee has a qualified property *ratione privilegii* (*e*), as in the case of a free warren on another man's soil (*f*), or a licence or grant of shooting or sporting rights (*g*). Such a grant is an incorporeal hereditament and an interest in realty, and amounts to a licence of a *profit à prendre* which can only be validly granted or demised by deed (*h*).

SUB-SECT. 3.—*Property in Wild Animals when Killed.*

Right of property in dead wild animals.

802. Although there is only a qualified property in animals *feræ naturæ* while they are alive, yet if they are killed, or die, there is an absolute property in the dead animal, which vests in the owner or occupier of the land, or the grantee or licensee of shooting or sporting rights as the case may be—the grantee or licensee of sporting rights has an absolute property in game killed, and may maintain an action against anyone infringing his rights therein (*i*).

Wild animals killed by trespasser.

803. The absolute property which the owner or occupier of land, or the grantee of the privilege, has in dead animals *feræ naturæ* is not confined to animals killed by him or his agents, and if the animals are killed by a trespasser, the trespasser has no property in them (*k*).

Poachers.

Thus in a case of trespass for breaking the plaintiff's close and hunting, killing, taking, and carrying away a hundred rabbits there found, it was moved in arrest of judgment that conies were *feræ*

(*y*) *Morgan* v. *Earl of Abergavenny* (1849), 8 C. B. 768; *Ford* v. *Tynte* (1861), 2 J. & H. 150.

(*z*) *Davies* v. *Powell* (1737), Willes, 46.

(*a*) *Case of Swans* (1592), 7 Co. Rep. 17 b.

(*b*) *Ibid.*; and Fitzherbert, Nat. Brev. 86 L, 89 K.

(*c*) *Blades* v. *Higgs* (1865), 11 H. L. Cas. 621; *per* Lord WESTBURY, L.C., at p. 631.

(*d*) *Ibid.*

(*e*) *Blades* v. *Higgs*, *supra*; and *per* POWELL, J., in *Keble* v. *Hickringill* (1706), 11 Mod. Rep. 74, 75.

(*f*) *Ibid.*

(*g*) For forms of such licences and grants, see Encyclopædia of Forms, Vol. VII., pp. 599—632.

(*h*) *Ewart* v. *Graham* (1859), 7 H. L. Cas. 331.

(*i*) *Fitzgerald* v. *Firbank*, [1897] 2 Ch. 96; compare *Lowe* v. *Adams*, [1901] 2 Ch. 598.

(*k*) *Sutton* v. *Moody* (1697), 1 Ld. Raym. 250; and see *per* WESTBURY, L.C., in *Blades* v. *Higgs*, *supra*.

Sect. 1. Civil Rights.

naturæ, and therefore there was no property in them in any one, and no damages ought to be given; but the plaintiff had judgment "because he had property by the possession" (*l*). If poachers take rabbits, sell them, and send them away by rail, the servants of the owner of the land are justified in following them up and taking possession of them from the purchaser (*m*), and if a customary tenant, who has a right of pasturing only, such as a cattle-gate, shoots grouse on his cattle-gate, the lord of the manor may maintain trover for the dead grouse so killed (*n*).

Huntsmen.

If a trespasser starts an animal *feræ naturæ* in the ground of one, and hunts it into the ground of another and there kills it, the property has been held to be in the killer (*o*); who, however, is liable to an action of trespass for hunting in either ground. This view of the law has been adversely criticised, but it has been received for so long that it is not now likely to be altered by judicial decision (*p*).

If a trespasser starts an animal *feræ naturæ* in a forest or warren and hunts it into the ground of another and there kills it, the property in the animal remains in the proprietor of the forest or warren, because his privilege continues (*q*).

Sect. 2.—*Criminal Law.*

Sub-Sect. 1.—*Domestic Animals.*

At common law.

804. Domestic and tame animals, such as horses, cattle, oxen, sheep, poultry, peacocks, and all animals which are fit for human food, and their young and eggs, are the subject of larceny at common law (*r*). Dogs of all kinds (*s*), cats, and animals of a base nature, are exceptions (*t*). The reason for this distinction has been variously given as the baseness of their nature, that they are not fit for food, and that they are kept merely for the whim or pleasure of man. No doubt the real reason is the severity of the ancient punishment for felony (*u*).

By statute. Stealing horses, cows, sheep etc.

805. To steal a horse, mare, gelding, colt, filly, bull, cow, ox, heifer, calf, ram, ewe, sheep or lamb, is felony, punishable with

(*l*) *Sutton* v. *Moody* (1697), 1 Ld. Raym. 250.

(*m*) *Blades* v. *Higgs* (1865), 11 H. L. Cas. 621.

(*n*) See *Lord Lonsdale* v. *Rigg* (1856), 11 Exch. 654, affirmed 1 H. & N. 923.

(*o*) *Churchward* v. *Studdy* (1811), 14 East, 249; where a huntsman maintained trespass for a dead hare against the owner of the land upon which the animal was killed by hounds.

(*p*) See *Blades* v. *Higgs*, *supra*, at p. 640; and compare *Gundry* v. *Feltham* (1786), 1 Term Rep. 334; *Paul* v. *Summerhayes* (1878), 4 Q. B. D. 9 (fox-hunting); and see title Game and Sport.

(*q*) *Per* Lord Holt in *Sutton* v. *Moody*, *supra*; and see *per* Lord Westbury, L.C., in *Blades* v. *Higgs*, *supra*, at p. 633.

(*r*) 1 Hawk. P. C., bk. 1, c. 19, s. 43; 1 Hale, P. C. 511.

(*s*) See p. 394, *post*.

(*t*) 3 Co. Inst. 109; 1 Hale, P. C. 512; nor are they the subject of the crime of obtaining by false pretences (*R.* v. *Robinson* (1859), 28 L. J. (M. C.) 58 (dog)).

(*u*) *Case of Swans* (1592), 7 Co. Rep. 18, citing 12 Hen. 8, 3, and 18 Hen. 8, 2, where it is said that bloodhounds or mastiffs are of "so base a nature that no felony can be committed of them and no man shall lose life or member for them." The skin of a dog when dead was always the subject of larceny, see *R.* v. *Halloway* (1823), 1 C. & P. 127, note (b).

penal servitude for a term not exceeding fourteen years, or two years' hard labour (*x*).

Killing animals with intent to steal the carcase.

Wilfully to kill any animal with intent to steal the carcase, skin, or any part of the animal so killed is felony (provided the offence of stealing the animal would have amounted to felony (*y*)), and is punishable as on a conviction for the stealing (*z*).

Stealing beasts or birds in confinement not the subject of larceny.

806. To steal any bird, beast, or other animal ordinarily kept in a state of confinement or for any domestic purpose, and not being the subject of larceny at common law, or to kill with intent to steal the same or any part thereof, is punishable on summary conviction with imprisonment with hard labour for a term not exceeding six months or a fine not exceeding £20 above the value of the animal, and on a subsequent conviction with imprisonment with hard labour for a term not exceeding twelve months (*a*); and to be found in possession of any such bird or the plumage thereof, or of any dog or any such beast or the skin thereof, knowing the same to be stolen, is punishable with forfeiture thereof, and, on a subsequent conviction, with the same penalties as if the offender were convicted of stealing such bird or beast; and a justice may make an order restoring the animal or its skin etc. to the owner (*b*).

Killing pigeons.

807. Unlawfully and wilfully to kill, wound, or take any house dove or pigeon under circumstances that do not amount to larceny at common law is punishable on summary conviction with a fine of £2 above the value of the bird (*c*). The right to prosecute is not limited to the owner of the bird (*d*).

Killing or maiming cattle.

Unlawfully and maliciously to kill, maim, or wound any cattle is a felony punishable with fourteen years' penal servitude (*e*).

Killing or maiming other animals.

Unlawfully and maliciously to kill, maim, or wound any dog, bird, beast, or other animal, not being cattle, but being either the subject of larceny at common law or being ordinarily kept in a state of confinement or for any domestic purpose, is punishable summarily with imprisonment for a term not exceeding six months or a fine not exceeding £20 above the amount of injury done; a subsequent offence is punishable with imprisonment with hard labour for a term not exceeding twelve months (*f*).

It is not necessary to prove that the wounding was done with an instrument (*g*); nor that there was an intention to kill, maim, or

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(*x*) Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 10.

(*y*) Killing a dog with intent to steal its carcase is not, therefore, a felony under this section, as stealing a dog is not a felony at common law or under the statute. As to larceny of dogs, see p. 405, *post*.

(*z*) Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 11.

(*a*) *Ibid.*, s. 21.

(*b*) *Ibid.*, s. 22.

(*c*) *Ibid.*, s. 23. A conviction under this section cannot be sustained where a farmer, in order to protect his crops, shoots pigeons plundering his seeds (*Taylor* v. *Newman* (1863), 32 L. J. (M. C.) 186).

(*d*) *Smith* v. *Dear* (1903), 88 L. T. 664.

(*e*) Malicious Damage Act, 1861 (24 & 25 Vict. c (97), s. 40.

(*f*) *Ibid.*, s. 41. When charged with a second offence, the accused has a right to trial by jury (Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49) s. 17).

(*g*) *R.* v. *Bullock* (1868), 11 Cox, C. C. 125.

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wound, if the accused acted with knowledge that what he was doing would so result, and did the act without caring whether the animal would be injured or not (*h*). Setting a rat-trap to catch trespassing cats and dogs has been held not to be within the provision (*i*).

SUB-SECT. 2.—*Wild Animals.*

At common law not generally the subject of larceny.

808. Living animals *feræ naturæ*, unless reclaimed and fit for human food, are not the subject of larceny at common law (*k*). They are not in the possession of the owner of the soil or privilege, he having at most a qualified property in them, or a right to reduce them into possession (*l*). They belong to the soil, savour of the realty, and until reduced into possession are *nullius in bonis*. Nor are animals *feræ naturæ* which are kept merely for the whim or pleasure of man the subject of larceny at common law—a rule no doubt made *in favorem vitæ* (*m*); therefore there can be no larceny of a captive lion, bear, monkey, fox, or ferret (*n*).

Exceptions. (1) Reclaimed animals.

809. Living animals *feræ naturæ* useful for the food of man and reclaimed—that is, actually tamed or in confinement—are the subject of larceny at common law, for a taking of them is a taking out of the owner's possession.

Examples are, tame deer; rabbits or peacocks domesticated though not actually in confinement; fish in a stew, net, or private pond, whence they can be taken at the will of the owner at any time; pheasants or partridges in an aviary or mew; deer in a house or even in a park if inclosed (*o*); swans marked and pinioned, or unmarked, if tame and kept in private waters (*p*); young pheasants and partridges hatched under a hen in a coop, though unconfined and able to fly a little, if they are unable to escape, for they are practically in the power and dominion of the owner (*q*); pigeons in a dovecot, though they can fly to and fro, which are tame (*r*), for they have the *animus revertendi*, and are constructively in the owner's possession and control; reclaimed hawks or falcons (*s*); and young hawks taken from the nest (though not the eggs (*t*)); but not hares or rabbits in a forest, chase

(*h*) *R.* v. *Welch* (1875), 1 Q. B. D. 23.
(*i*) *Bryan* v. *Eaton* (1875), 40 J. P. 213; see pp. 396, 397, *post.*
(*k*) 2 East, P. C. 607.
(*l*) See p. 366, *ante.*
(*m*) See note (*u*) p. 368, *ante.*
(*n*) 2 East, P. C. 614. As to ferrets, see *R.* v. *Searing* (1818), Russ. & Ry. C. C. 350.
(*o*) 1 Hawk. P. C., 8th ed. 149; 1 Hale, P. C. 511; 3 Co. Inst. 109; 2 East, P. C. 607.
(*p*) *Case of Swans* (1592), 7 Co. Rep. 18 a.
(*q*) *R.* v. *Cory* (1864), 10 Cox, C. C. 23; *R.* v. *Shickle* (1868), L. R. 1 C. C. R. 158.
(*r*) *R.* v. *Cheafor* (1851), 21 L. J. (M. C.) 43; *R.* v. *Brooks* (1829), 4 C. & P. 131.
(*s*) 1 Hawk. P. C., *supra*: "because of the very high value formerly set on the bird"; compare 2 Bl. Com. 394: "a relic of the tyranny of our ancient sportsmen."
(*t*) 1 Hale, P. C. 510; 1 Hawk. P. C., *supra.*

or warren, unless the warren is so inclosed that the owner can take them at his will (*x*).

Thief must know animal to be reclaimed.

It has been said (*x*) that to convict of larceny of a reclaimed wild animal, the animal must be known to the thief to be reclaimed. This only amounts to a strict proof of the *animus furandi*; if the thief takes it out of actual confinement, such as a pen or aviary, there can be no question that he knows it is reclaimed; if the animal is merely tamed and at large, he may not have known it was not wild: it is a question of evidence in each case. So if a man is indicted for receiving pheasants stolen out of a coop or aviary, it is a good defence to prove that there was nothing to show that they were not wild birds and that he took them as such.

(2) Dead wild animals.

810. The bodies of wild animals which have been killed are the subject of larceny (*y*), for when such animals are found and killed they become the absolute property of the owner of the soil, even if killed by a trespasser, unless the trespasser started an animal on the land of one person, and killed it on the land of another (*z*). If, however, the killing and carrying away are one continuous act, an indictment for larceny does not lie, owing to the peculiarity of the law of larceny; the ownership in the animals is considered as incident to the property in the land, and severing and immediately taking away things attached to the freehold is not a felonious taking so as to amount to larceny (*a*). If a wrong doer abandons possession after killing, and returns later with a "fresh intention of taking away," this is larceny, but merely hiding his spoil in a ditch for two or three hours is not sufficient (*b*).

Stealing deer.

811. Unlawfully and wilfully to course, hunt, snare, carry away, or kill or wound, or attempt to kill or wound, any deer kept or being in the uninclosed part of any forest, chase, or purlieu is punishable summarily before a justice with a fine not exceeding £50, and a subsequent offence is an indictable felony punishable with two years' imprisonment (*c*). The same offence committed where the deer are kept in the inclosed part of any forest, chase, or purlieu, or in any inclosed land where deer are usually kept, is a felony liable to the same punishment (*d*).

Other statutory offences.

812. Other statutory offences which render the accused liable on summary conviction to a fine not exceeding £20 are, being unlawfully in possession of deer or parts of them, or of engines or snares

(*x*) See note (*o*), p. 370, *ante*.
(*y*) 3 Co. Inst. 109.
(*z*) *Blades* v. *Higgs* (1865), 11 H. L. Cas. 631.
(*a*) *Ibid.*, at p. 634, *per* Lord WESTBURY, L.C.; *R.* v. *Townley* (1870), L. R. 1 C. C. R. 315. Nor does such a taking amount to embezzlement of the animals (*R.* v. *Read* (1878), 3 Q. B. D. 131).
(*b*) Compare *R.* v. *Roe* (1870), 11 Cox, C. C. 554; *R.* v. *Townley, supra*; *R.* v. *Petch* (1878), 14 Cox, C. C. 116; *R.* v. *Foley* (1889), L. R. 26 Ir. 299. The technical distinction in these cases does not affect the civil rights of property in the animals immediately they are killed.
(*c*) Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 12.
(*d*) *Ibid.*, s. 13.

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for taking them, and unlawfully setting such engines or snares in any part of a forest, whether inclosed or not, or in any inclosed land, or destroying fences where deer are kept (*e*); and the deer-keepers may demand and seize the guns, snares, or dogs of offenders, who, if they beat or wound the deer-keepers, are guilty of felony punishable with two years' imprisonment (*f*). Taking or killing hares or rabbits at night in any warren or ground lawfully used for breeding and keeping them is an indictable misdemeanour (*g*). The same offence in the day-time or setting snares is punishable summarily before a justice with a fine not exceeding £5 (*h*).

Part III.—Liability of Owners of Animals.

SECT. 1.—*Injuries caused by Animals.*

SUB-SECT. 1.—*Injuries by Domestic and Harmless Animals.*

Scienter.

813. The law assumes that animals which from their nature are harmless, or are rendered so by being domesticated for generations, are not of a dangerous disposition (*i*); and the owner of such an animal is not, in the absence of negligence, liable for an act of a vicious or mischievous kind which it is not the animal's nature usually to commit, unless he knows (*k*) that the animal has that particular vicious or mischievous propensity; proof of this knowledge, or *scienter*, is essential (*l*).

Under this rule it has been held that it is not in the ordinary nature of horses (*m*), bulls (*n*), or rams (*o*) to injure human beings, or of a boar to bite a mare (*p*), or of a dog to worry sheep, bite

(*e*) Larceny Act, 1861 (24 & 25 Vict. c. 96), ss. 14, 15. A person cannot be convicted under s. 14 of being in unlawful possession of deer which he has killed neither on the uninclosed nor the inclosed part of a forest, but on the land of a third person outside the limits of the forest (*Threlkeld* v. *Smith*, [1901] 2 K.B. 531).

(*f*) *Ibid.*, s. 16.

(*g*) *Ibid.*, s. 17. For punishment, see s. 117.

(*h*) *Ibid.*, s. 17.

(*i*) *Per* ESHER, M.R., in *Filburn* v. *People's Palace and Aquarium Co.* (1890), 25 Q. B. D. at p. 261.

(*k*) *May* v. *Burdett* (1846), 9 Q. B. 101, where a declaration that contained no allegation of negligence was held good; and the gist of the action was said to be keeping the animal (a monkey) after knowledge of its mischievous propensities.

(*l*) A very ancient rule; compare 1 Dyer, 25 b, pl. 162; 1 Vin. Abr. 234; Lord HOLT in *Mason* v. *Keeling* (1700), 1 Ld. Raym. 606, and the earlier authorities there cited; and *R.* v. *Huggins* (1730), 2 Ld. Raym. at p. 1583, for a statement of the law.

(*m*) *Cox* v. *Burbidge* (1863), 13 C. B. (N. S.) 430; *Hammack* v. *White* (1862), 11 C. B. (N. S.) 588.

(*n*) *Hudson* v. *Roberts* (1851), 6 Exch. 697; *Blackman* v. *Simmons* (1827), 3 C. & P. 138; *Buxendin* v. *Sharp* (1696), 2 Salk. 662. It has been decided in America that the owner of a bull is liable without proof of *scienter* if it attacks a horse (*Dolph* v. *Ferris* (1844), 7 W. & Serg. Pa. 367), and it seems often to be the disposition of horned cattle to attack horses (*per* BLACKBURN, J., in *Smith* v. *Cook* (1875), 1 Q. B. D. at p. 82), though this case is not a decision upon the point.

(*o*) *Jackson* v. *Smithson* (1846), 15 M. & W. 563.

(*p*) *Jenkins* v. *Turner* (1696), 1 Ld. Raym. 109.

cattle and horses, or attack human beings (*q*). The law as to proof of *scienter* in cases of dogs injuring cattle, sheep, horses, mares (*r*), and pigs (*s*) has been altered by statute (*t*).

Proof of *scienter*.

814. The evidence of the *scienter* must be directed to the particular mischievous propensity that caused the damage. In order to recover for the bite of a dog on a human being, it is necessary to show that the owner had notice of the disposition of the dog to bite mankind; that the dog had previously bitten a goat is not enough (*u*), though to prove a general savage or ferocious disposition towards mankind, and that it was in the habit of rushing at people and attempting to bite them, is sufficient without proof of any actual previous bite (*x*).

A caution not to go near a dog (*y*), and a statement that a particular bull would run at anything red (*z*), have been held to be evidence of *scienter*; it is doubtful whether an offer of compensation is evidence, and if left to the jury at all, it ought to have little or no weight with them (*a*).

Scienter of agent.

815. Knowledge of the animal's mischievous propensity need not always be the personal knowledge of the owner himself. If he delegates the care of his business or the care and control of his animal to others, notice to them is equivalent to notice to himself upon the ordinary principle of *respondeat superior*. Therefore the knowledge of a servant, such as a coachman, who ordinarily has control over a dog kept in the stable yard, is the knowledge of his master (*b*), and a complaint made on the premises to a wife who helped in her husband's business has been held to be evidence of *scienter* in an action against the husband (*c*); and so have complaints made to persons serving behind the bar of a public-house in an action against the publican (*d*), although there was no

(*q*) 1 Dyer, 25 b. pl. 162; *Mason* v. *Keeling* (1700), 1 Ld. Raym. 606. As to dogs hunting and killing game, compare *Read* v. *Edwards*, note (*l*), p. 377, *post*.

(*r*) *Wright* v. *Pearson* (1869), L. R. 4 Q. B. 582.

(*s*) *Child* v. *Hearn* (1874), L. R. 9 Exch. 176.

(*t*) See p. 397, *post*.

(*u*) *Osborne* v. *Chocqueel*, [1896] 2 Q. B. 109.

(*x*) *Worth* v. *Gilling* (1866), L. R. 2 C. P. 1, where the dog was chained up in a yard; the mere fact that the dog was a fierce one will not, however, suffice, *per* Lord ELLENBOROUGH in *Beck* v. *Dyson* (1815), 4 Camp. 198. In *Jones* v. *Perry* (1796), 2 Esp. 482, Lord KENYON said that precautions used to tie up a dog showed a knowledge that the animal was fierce and not safe to be permitted to go abroad; compare *Curtis* v. *Mills* (1833), 5 C. & P. 489; and see *Barnes* v. *Lucile, Ltd.* (1907), 23 T. L. R. 389 (bitch only fierce when with pups).

(*y*) *Judge* v. *Cox* (1816), 1 Stark. 285; compare *per* ABBOTT, J., in *Hartley* v. *Harriman* (1818), 1 B. & Ald. at p. 623. Compare also *Phillips* v. *Paterson* (1907), *Times*, January 16, 1907.

(*z*) *Hudson* v. *Roberts* (1851), 6 Exch. 697.

(*a*) *Thomas* v. *Morgan* (1835), 2 C. M. & R. 496. In *Beck* v. *Dyson*, *supra*, Lord ELLENBOROUGH refused to leave an offer of compensation to the jury as evidence of *scienter*.

(*b*) *Baldwin* v. *Casella* (1872), L. R. 7 Exch. 325.

(*c*) *Gladman* v. *Johnson* (1867), 36 L. J. (C. P.) 153. Compare *Miller* v. *Kimbray* (1867), 16 L. T. 360 (where notice to her deceased husband did not render a widow liable); *Elliott* v. *Longden* (1901), 17 T. L. R. 648 (notice to son aged eleven).

(*d*) *Applebee* v. *Percy* (1874), L. R. 9 C. P. 647, *per* COLERIDGE, C.J., and

SECT. 1. Injuries by Animals.

evidence that such complaints were ever communicated to the owner.

But the mere fact that some servant in the defendant's employment has knowledge is not sufficient. It must be a servant who has actual management or control over the premises or business or the animal (*e*).

Who is liable as owner.

It is not essential that the defendant should be the real owner of the animal. Anyone who keeps it on his premises or allows it to resort there may be liable (*f*), though if the animal has strayed there, and he has done nothing to encourage it or exercise control over it, he will not then be responsible (*g*).

Negligence.

816. The owner of a domestic and harmless animal may, however, be liable on the ground of negligence. Thus, where two dogs leashed together rushed against a passer-by and threw him down and broke his leg, the owner was held liable on the ground of negligence in having two big dogs coupled together on the highway at night and not keeping them in hand (*h*).

SUB-SECT. 2.—*Injuries by Wild and Dangerous Animals.*

Liability apart from *scienter* or negligence.

817. With regard to animals of a naturally savage and irreclaimable character, such as lions or tigers, though there is nothing unlawful in keeping them, a man does so at his peril, and is liable for any injury committed by them, irrespective of negligence or knowledge (*i*). This is part of the broad principle of law that a person who brings on to his land, or keeps, a dangerous thing is liable, independently of negligence, if it escape and cause damage (*k*). Therefore, if an animal is of a kind generally known to be dangerous or mischievous, the owner is liable for any damage caused by it, whether he have knowledge of its particular propensities or not (*l*).

It is difficult to enunciate an exact formula for the classification of dangerous animals. Whether they are *feræ naturæ* so far as

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KEATING, J. (BRETT, J., dissenting). Lord COLERIDGE suggested that it is a question for the jury in each case whether the persons to whom notice was given stood in such a relation to the defendant as to make it their duty to communicate it to him.

(*e*) *Stiles* v. *Cardiff Steam Navigation Co.* (1864), 33 L. J. (Q. B.) 310. The Court in this case said that there was no difference between a corporation and an individual in this respect (see also *Applebee* v. *Percy* (1874), L. R. 9 C. P. 647).

(*f*) *M'Kone* v. *Wood* (1831), 5 C. & P. 1. The effect of this decision as far as dogs are concerned was incorporated into the Dogs Act, 1865 (28 & 29 Vict. c. 60), s. 2, which is now repealed and re-enacted with a slight alteration in the Dogs Act, 1906 (6 Edw. 7, c. 32), s. 1. See note (*n*), p. 397, *post*.

(*g*) *Smith* v. *Great Eastern Rail. Co.* (1866), L. R. 2 C. P. 4.

(*h*) *Jones* v. *Owen* (1871), 24 L. T. 587 As to liability of the owner of such an animal to a trespasser, see p. 375, *post*.

(*i*) The duty of a person who owns a wild animal, as laid down in *May* v. *Burdett* (1846), 9 Q. B. 101, is to keep it secure at his peril. If he does keep the animal secure, *e.g.*, tied up in a stable, he is not liable to a man who goes in o the stable to stroke the animal and gets injured by it, see *Marlor* v. *Bull* (1900), 16 T. L. R. 239 (zebras).

(*k*) *Fletcher* v. *Rylands* (1866), L. R. 1 Exch. 265, and on appeal (1868), L. R. 3 H. L. 330; see *per* BOWEN, L.J., in *Filburn* v. *People's Palace and Aquarium Co.* (1890), 25 Q. B. D. at p. 261.

(*l*) 1 Hale, P. C. 430.

rights of property are concerned is not the question (*m*). Some are certainly included, in that they are of a dangerous nature, and to this class belong monkeys, lions, tigers, bears, wolves (*n*), and elephants (*o*), which still remain wild and untamed, though individuals are brought to a degree of tameness which amounts to domestication (*o*). It would seem that bees do not fall into this category (*p*).

SUB-SECT. 3.—*Injuries to a Trespasser.*

No liability to trespasser or person bringing injury upon himself.

818. There being nothing unlawful in keeping a dangerous animal, unless it escapes, the owner is not liable for any injury done to a person who is himself a trespasser, or who brings the injury upon himself (*q*). If a savage bull is kept in a properly fenced field, and a trespasser enters and is gored, he has no remedy; though if he is there under a claim of right, such as a right of way, or even a contested right of way, he can maintain his action (*r*). Where a dog was tied up in a yard in the day-time and let loose at night to protect the yard, a foreman who came into the yard after it had been shut for the night, and was bitten, was nonsuited (*r*).

Liability to person on lawful business.

Undoubtedly a man may keep a fierce dog to protect his property, but he must not put it in the way of access to his house, so that persons innocently coming to the house on lawful business may be injured (*s*). If he does so, the fact that he puts up a notice, "Beware of the dog," will not avail him if the person injured cannot read, nor will the fact that the dog is chained up, if the chain is so long that it can reach those who are passing (*t*).

SECT. 2.—*Trespass by Animals.*

SUB-SECT. 1.—*Domestic Animals.*

Liability of owner.

819. The owner of animals *domitæ naturæ* is bound to keep them under control, and is liable, if they escape, for such damage as

(*m*) *Per* ESHER, M.R., in *Filburn* v. *People's Palace and Aquarium Co.* (1890), 25 Q. B. D., at p. 259.

(*n*) *Besozzi* v. *Harris* (1858), 1 F. & F. 92; *May* v. *Burdett* (1846), 9 Q. B. 101; 1 Hale, P. C. 430.

(*o*) *Filburn* v. *People's Palace and Aquarium Co.*, *supra*, *per* BOWEN, L.J., at p. 261.

(*p*) *O'Gorman* v. *O'Gorman*, [1903] 2 Ir. R. 573, a case of injuries and subsequent death of a man through bees stinging his horse. The jury expressly found negligence in that the bees were kept in unreasonable numbers and in an unreasonable place, and were smoked out at an unreasonable time. Bees, unless disturbed, do not generally sting, and probably the keeping of a few ordinary hives in an ordinary place would not render the owner liable for damage caused by their stings, in the absence of negligence. If kept in unreasonable numbers, however, they may amount to a nuisance. See *Parker* v. *Reynolds*, Birmingham Assizes, *Times*, December 17, 1906; and compare *Lucas* v. *Pettit* (1907), 12 Ont. L. Rep. 448, a Canadian case noted in L. T. Journ., Vol. 123, p. 33.

(*q*) *Marlor* v. *Ball* (1900), 16 T. L. R. 239, see note (*i*), p. 374, *ante*.

(*r*) *Brock* v. *Copeland* (1794), 1 Esp. 203.

(*s*) *Per* TINDAL, C.J., in *Sarch* v. *Blackburn* (1830), 4 C. & P. 297, at p. 300.

(*t*) *Ibid.* Compare *Worth* v. *Gilling* and *Jones* v. *Perry*, note (*x*), p. 373, *ante*, and *Stiles* v. *Cardiff Steam Navigation Co.*, note (*e*), p. 374, *ante*.

SECT. 2. Trespass by Animals.

it is ordinarily in their nature to commit (*u*). The liability is an absolute liability independent of negligence, unless the escape or trespass was involuntary (*x*) or caused by an act of God (*y*), or was due to the act or default of the plaintiff (*z*), or of a third person for whom he is not responsible (*a*). In practice the question usually turns upon the question whose duty it is to maintain the fence between two properties. The liability is limited to the reasonable and natural consequences of the animal escaping (*b*).

Defences.

820. The owner of cattle, therefore, has a good defence if he can prove that the plaintiff was under some obligation to maintain the fence on his land and that the animals trespassed owing to the fault of the plaintiff (*z*) in not maintaining the fence; or that it was the duty of a third party, such as a railway company (*a*), under whom the plaintiff held, to fence; or indeed, as it is suggested, simply that it was not his duty to keep the fence in repair. It is naturally to be expected that when cattle, sheep, poultry, and the like, stray into a neighbour's land or garden, they will devour his grass, corn, or vegetable produce, and their owner is liable for the damage (*b*). It is in the ordinary course of nature that one horse should kick another, especially a strange one, when loose in a field, and the damages are not too remote; therefore the owners of a trespassing mare that injured a horse in this way (*c*), and of a stallion which bit and kicked a mare through a wire fence (*d*), were held liable for the damage; and it is apprehended that if two geldings or mares get together, and injury ensues, the damages are not too remote. It is a trespass if any part of the animal crosses the boundary of the properties, whether it gets through the fence (*e*) or stretches its neck over a ditch (*f*). It is not, however, in the ordinary course of

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(*u*) The modern decisions all agree in making the liability in trespass apart from negligence. See *per* BRETT, J., in *Ellis* v. *Loftus Iron Co.* (1874), L. R. 10 C. P. 10, at p. 13, citing Com. Dig. Trespass, C.; and *per* Lord COLERIDGE, C.J., in *Tillett* v. *Ward* (1882), 10 Q. B. D. 17, at p. 19. Sir William Blackstone (3 Bl. Com. c. xii.) says the liability is negligence. Perhaps the most accurate statement of the law is in an early case of trespass (*Star* v. *Rookesby* (1710), 1 Salk. 335), where the Court resolved that "either trespass or case lies: trespass because it was the plaintiff's ground and not the defendant's; and case because the first wrong was nonfeasance and neglect to repair, and that omission is the gist of the action, and trespass is only consequential damage." In an earlier case, *Anon.* (1675), 1 Ventr. 264, the declaration was in case *in defectu fensurarum*. The question is now settled, but it has something more than an academic interest, because in an action of *trespass* it would lie upon the defendant to plead and prove that he was excused by the fact that he was not liable to repair the fence, whereas in *case* the plaintiff would allege and prove the duty to repair, and this may have an important bearing on the burden of proof in an action at the present day.

(*x*) Y. B. 37 Hen. 6, 37 pl. 26; *Millen* v. *Fawdry* (1625), Poph. 161; *Beckwith* v. *Shordike* (1767), 4 Burr. 2092.

(*y*) See *Powell* v. *Salisbury* (1828), 2 Y. & J. 391.

(*z*) See *Singleton* v. *Williamson* (1861), 31 L. J. (EX.) 17.

(*a*) *Wiseman* v. *Booker* (1878), 3 C. P. D. 184.

(*b*) *Per* WILLIAMS, J., in *Cox* v. *Burbidge* (1863), 13 C. B. (N. S.) 430, at p. 438.

(*c*) *Lee* v. *Riley* (1865), 18 C. B. (N. S.) 722.

(*d*) *Ellis* v. *Loftus Iron Co.*, *supra*.

(*e*) Compare *Ellis* v. *Loftus Iron Co.*, *supra*; *Wiseman* v. *Booker*, *supra*.

(*f*) *Ponting* v. *Noakes*, [1894] 2 Q. B. 281.

nature for horses to kick human beings. Where a horse trespassed on to a highway and there kicked and injured a child, the owner was not liable in the absence of proof that he knew the horse was of a vicious nature (*g*), for without such knowledge the damages are too remote, there being nothing to connect the trespass with the act of the horse kicking (*h*).

Damage by reclaimed animals.

821. If a man reclaims wild animals and puts them on his land, he is liable, if they trespass, for any damage caused by them which it is their ordinary nature to commit. Thus where pigeons from a dovecot fly on to neighbouring land and eat the corn, their owner is liable in an action for the loss of the corn (*i*). Whether it is in the ordinary nature of hived bees to sting men or cattle (*k*), or of dogs to chase and kill game (*l*), seems doubtful on the authorities, though it is difficult to resist the fact that everyone knows that they often do so. And an interesting question still open is for how long the owner of a reclaimed animal is liable after its escape. It is presumably a question of fact as to whether the animal has reverted to the wild state or not (*m*).

SUB-SECT. 2.—*Trespass from Highway.*

Negligence essential.

822. An exception to the rule above stated exists in the case of cattle trespassing from a highway, while lawfully there for the purpose of passing and repassing and using it as a highway (*n*); in such cases it is necessary to prove negligence, and in the absence of negligence the owner of the cattle is not liable for the damage (*o*). It is a risk a man takes who has property adjoining the highway, and the loss falls upon him if he does not take precautions by

(*g*) *Cox* v. *Burbidge* (1863), 13 C. B. (N. S.) 430. See also *Hudwell* v. *Righton*, [1907] 2 K. B 345, where a cyclist who was upset by a fowl in the road was held not entitled to recover.

(*h*) Remoteness of damage, it is suggested, is the true distinction between this case and the other horse cases, such as *Lee* v. *Riley* and *Ellis* v. *Loftus Iron Co.*, notes (*u*) and (*c*), p. 376, *supra*; see *per* ERLE, C.J., in the former case. Whether the action is for trespass or negligence, proof of *scienter* is necessary to make the damages a reasonable consequence where it is a human being that is kicked.

(*i*) *Dewell* v. *Sanders* (1618), Cro. Jac. 490, where it was said that a dovecot is not a common nuisance, but that the judges of assize may take cognisance of it. "Three judges in this case argued that if pigeons come upon my land, I may kill them, and the owner hath not any remedy. But the fourth held the contrary, that the party hath *jus proprietatis* in them, for they are domestics, and have *animum revertendi*, and ought not to be killed, and for killing them an action lies; but the other opinion is the best," says the reporter. It is not a statutory offence. See note (*c*), p. 369, *ante*, and *Taylor* v. *Newman*, there cited.

(*k*) See note (*p*), p. 375, *ante*.

(*l*) See *Read* v. *Edwards* (1864), 17 C. B. (N. S.) 245, in which case *scienter* was alleged and proved; and as to the important question of trespass of dogs, see p. 395, *post*.

(*m*) See *Brady* v. *Warren*, [1900] L. R. 2 Ir. 632, where the defendant was held liable for damage done by park deer which had escaped some six years previously, and had wandered about uncontrolled ever since. Compare *Mitchil* v. *Alestree* (1677), 1 Ventr. 295, *per* TWISDEN, J.

(*n*) *Per* DARLING, J., in *Luscombe* v. *Great Western Rail. Co.*, [1899] 2 Q. B. 303, at p. 316, where it was held that a railway company is not bound to fence against straying and trespassing cattle, under s. 68 of the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20).

(*o*) *Per* Lord COLERIDGE, C.J., in *Tillett* v. *Ward* (1882), 10 Q. B. D. 17, at p. 20.

SECT. 2. Trespass by Animals.

fencing or otherwise to protect it (*p*). Where, therefore, an ox was being driven through the street of a town and went into a shop through an open door without any negligence on the part of the drover, and did damage before it could be driven out, the owner was not liable (*q*).

SUB-SECT. 3.—*Wild Animals.*

No trespass by wild animals.

823. No action for the trespass of animals *feræ naturæ* on the land of another will lie; for the owner has only a qualified property in them while they are alive, and they go with and belong to the soil; as soon as they have crossed from the land of one man to that of another they belong to the latter, or, more strictly, he has the right to kill them and reduce them into possession (*r*). An owner of land, therefore, is not liable for the damage done by rabbits or other wild animals that come from his land (for his neighbour may kill them as soon as they come on his land (*s*)) unless he brings on to his land a greater quantity of game or wild animals than can reasonably and properly be kept on it; in which case he is liable for damage done by them on the principle *Sic utere tuo ut alienum non laedas* (*t*).

Nuisance.

It is apprehended that an action will not lie unless the defendant has actually brought the animals on to the land; a mere failure to keep the existing stock within reasonable limits would not, apart from express agreement to do so, be sufficient; and the fact that rabbits have become a nuisance owing to their numbers does not justify entering upon the land of another and digging up the burrows to abate the nuisance (*x*).

SECT. 3.—*Distress Damage Feasant.*

SUB-SECT. 1.—*The Seizure.*

Nature of remedy.

824. By an old common law remedy similar to distress for rent, called distress damage feasant, trespassing animals may be seized and impounded to secure compensation for the damage done by them.

Who may distrain.

825. Any landowner or person having possession of land or a sufficient interest in land to maintain an action of trespass may

(*p*) *Per* POLLOCK, C.B., and MARTIN, B., in *Goodwyn* v. *Cheveley* (1859), 4 H. & N. 631; and compare BLACKBURN, J., in *Fletcher* v. *Rylands* (1866), L. R. 1 Exch. 265, at p. 286.

(*q*) *Tillett* v. *Ward* (1882), 10 Q. B. D. 17. It is hardly necessary to support this decision by reference to this exception; for there is no liability for an involuntary trespass, which seems a much shorter ground for the decision. Indeed it is the precise case mentioned in *Millen* v *Fawdry* (1625), Poph. 161 (see note (*t*), p. 395, *post*), of a man driving "goods" through a town, one of which goes into another man's house, as an instance of an involuntary trespass.

(*r*) See p. 367, *ante*.

(*s*) Compare *Boulston's Case* (1597), 5 Co. Rep. 104 b.

(*t*) *Farrer* v. *Nelson* (1885), 15 Q. B. D. 258, *per* POLLOCK, B., at p. 260, where a shooting tenant brought on to the land in coops four hundred and fifty pheasants which had been reared elsewhere and was held liable for damage. Compare *Boulston's Case* (*supra*), where the making of the coney burrows was an active interference with the existing state of things on the land. See, further, title GAME AND SPORT.

(*x*) *Cooper* v. *Marshall* (1757), 1 Burr. 259.

exercise this right; he need not have a demise of the soil itself provided he has such an interest in the land as to enable him to maintain an action of trespass for the protection of that interest (*y*). A demise of the milk of twenty-two cows to be depastured on certain stated fields, with a covenant not to depasture other cattle there, gives the grantee a right to the pasturage of those fields, and he may distrain any cows of the grantor which he finds there eating the herbage; for the remedy under the covenant does not oust the right in trespass or distress (*z*). A lord of a manor in which the custom is for the copyholders to have the sole right of pasture for the whole year may distrain damage feasant the beasts of a person not a copyholder, because they may damage the soil as well as the grass (*a*); a tenant in common may distrain the cattle of another tenant in common who has agreed not to exercise his rights for a term of years (*b*); a commoner may distrain the beasts of a stranger, but not of another commoner who exceeds his number, nor of the lord or any other person who puts cattle on the common under a colour of right (*c*). Where two persons have concurrent possession of land one cannot distrain the cattle of the other (*d*), nor can a tenant holding over after expiration of his term, and in defiance of a notice to quit, distrain cattle put on the premises by the landlord for the purpose of taking possession (*e*).

826. Any chattel not of a perishable nature that is trespassing and doing damage may be distrained damage feasant; the rule is not confined to animals (*f*), though they form the subject of this article and afford the chief illustrations of the rule, as they are more liable to trespass than other chattels. The only chattels exempt from distress are things in actual use. Thus a horse cannot be distrained if there is a rider upon it (*g*), though it is said a horse may be distrained if a person is leading it (*h*). At common law the beasts of the plough (*i*) could not be distrained for rent any more than the axe of a carpenter or the books of a scholar, but it is

What may be distrained.

(*y*) If a man has a grant of *vesturam* or *herbagium terræ*, the soil does not pass, but he has an action of trespass *quare clausum fregit* (Co. Litt. i. 1, 4 b).

(*z*) *Burt* v. *Moore* (1793), 5 Term Rep. 329.

(*a*) *Hoskins* v. *Robbins* (1672), 1 Ventr. 123, 163.

(*b*) *Whiteman* v. *King* (1791), 2 Hy. Bl. 4.

(*c*) See *Hall* v. *Harding* (1769), 4 Burr. 2426 (where there is much learning on the question of commoners distraining), and *Cape* v. *Scott* (1874), L. R. 9 Q. B. 269. But if the lord improperly put agisted cattle on the common, the commoners may distrain upon them.

(*d*) *Churchill* v. *Evans* (1809), 1 Taunt. 529.

(*e*) *Taunton* v. *Costar* (1797), 7 Term Rep. 431.

(*f*) *E.g.*, a railway engine (*Amhergate Rail. Co.* v. *Midland Rail. Co.* (1853), 2 E. & B. 793; see *per* CAVE, J., in *Boden* v. *Roscoe*, [1894] 1 Q. B. 608, 611); turves laid upon a common (*Bromhall* v. *Norton* (1683), T. Jones, 193).

(*g*) Co. Litt. 47 a; *Hoskins* v. *Robins* (1671), 2 Saund. 323; *Storey* v. *Robinson* (1795), 6 Term Rep. 138. Compare *Field* v. *Adames* (1840), 12 A. & E. 649, horse and harness in actual use; the object of this exception is to avoid a breach of the peace (*ibid.*, at p. 654).

(*h*) Gilbert on Distress, p. 49. It is obvious that a horse being merely led may not be in actual use.

(*i*) *Averia carucæ* as opposed to *animalia otiosa*, which might be always distrained. See Co. Litt. 47 a and 161 a.

submitted that this exemption does not exist for trespass damage feasant. It is also said that "distress must be of a thing whereof a valuable property is in somebody, and therefore dogs, bucks, does, conies, and the like, that are *feræ naturæ*, cannot be distrained" (*k*); but as regards dogs this is not now the law, for they may be distrained when trespassing and doing damage (*l*), and greyhounds, ferrets, nets, and gins may by very old authority be distrained damage feasant on the land, but not if they are held by a man (*m*).

Justification of the distress

827. In order to justify a distress damage feasant there must be a trespass without lawful excuse; the evidence will be the same as in an action of trespass *quare clausum fregit*. A right of common or a right of way, or some title by prescription (*n*), or an alleged defect in a fence, where the other party was under an obligation to repair, may be set up as a defence. Where cattle strayed into a close owing to a defect in the fence which the owner of the close was bound to repair, and then broke down another fence on the same owner's property and trespassed into a cornfield, it was held that the owner of the close and cornfield had no right to distrain the cattle, because the first wrongful act which caused the mischief was his own default in not maintaining his boundary fence in proper repair (*o*). Cattle lawfully upon the highway, that is to say, using it for the purpose of passing and repassing, which escape therefrom on to the adjoining land, cannot be distrained damage feasant until after the lapse of a reasonable time for them to be removed (*p*), but if they are trespassers on the highway, that is, are using it for grazing or any purpose other than that of a highway, they may be distrained immediately they stray on to the adjacent property (*q*).

Time for distress.

828. The distress must be made at the time of the trespass and on the land (*r*). There is no doctrine of fresh pursuit in distress damage feasant, and the animal cannot be followed if once it goes off the land (*s*).

(*k*) Co. Litt. 47 a. This is probably an error on Lord Coke's part, who was thinking only of what animals were valuable property. See note (*m*), *infra*.

(*l*) *Bunch* v. *Kennington* (1841), 1 Q. B. 679.

(*m*) Rolle, Abr. Distress, A., quoting year-books and Fitzherbert; and see *Boden* v. *Roscoe*, [1894] 1 Q. B. 608.

(*n*) Compare *Bailey* v. *Appleyard* (1838), 8 A. & E. 161.

(*o*) *Singleton* v. *Williamson* (1861), 7 H. & N. 410. Compare *Carruthers* v. *Hollis* (1838), 8 A. & E. 113, and compare p. 376, *ante*, and other cases there cited. As to fences generally, see title BOUNDARIES AND FENCES.

(*p*) *Goodwyn* v. *Cheveley* (1859), 4 H. & N. 631. Compare p. 377, *ante*.

(*q*) *Dovaston* v. *Payne* (1795), 2 Hy. Bl. 527. If cattle are being lawfully driven along the highway and crop the herbage at the side of the road the trespass may be justified as involuntary (Rolle, Abr. Trespass, K.); presumably this justification would not succeed if they were taken there for the purpose of grazing.

(*r*) Co. Litt. 161 a. "If a man come to distreyne for damage feasant, and see the beasts in his soyle, and the owner chase them out of purpose before the distresse is taken, the owner of the soyle cannot distreyne them, and if he doth, the owner of the cattle may rescue them, for the beasts must be damage feasant at the time of the distresse; and so note a diversitie."

(*s*) *Vaspor* v. *Edwards* (1701), 12 Mod. Rep. 661. Compare *Clement* v. *Milner* (1800), 3 Esp. 95, where, however, the first part of Lord Eldon's summing up is inconsistent with the older authorities.

829. Each animal is distrainable only for the damage which it does; if ten head of cattle are doing damage, one cannot be taken and kept as satisfaction for the whole damage, nor, if an animal trespasses twice, can it be detained the second time for the damage done the first time (*t*).

For what damage distress may be made.

To justify a distress damage feasant there must also be actual damage (*u*) at the time to the land or things on it, even if it only amounts to a treading down of the herbage. The older text-books suggest that the damage must be damage to the soil or its produce (*x*), but there is no authority for this; and it is now decided that damage to an animal on the land, such as a filly, is sufficient to justify a distress (*y*). It may still be an open question whether injuries to people or to chattels other than animals would justify the distress, as a filly may be regarded as part of the natural stock upon the land (*y*). In one case, where a horse ran away into a yard and injured a carriage there, the point was not specifically decided, as the decision turned upon the seizure being unnecessary to prevent the horse doing any further damage (*z*).

Actual damage necessary.

830. Generally speaking, distress damage feasant is very similar to distress for rent, but it is a simpler remedy, and there are very few statutory modifications of the common law right. Under the Statute of Marlborough (*a*) there can be no distress upon the highway (*b*); but, unlike distress for rent, it may be made at night, for otherwise the beasts might escape, and the remedy be lost (*c*).

Restrictions on exercise of right.

831. Distress at common law is merely a pledge for compensation for injury, therefore animals seized damage feasant cannot be sold or used by the distrainor (*d*). Any wrongful user of the distress makes the distrainor a trespasser *ab initio*, as where a man used for farmwork a horse which he had distrained, "for he hath it by law only for a gage" (*e*). Indeed, such a user entitles

Abuse of the distress.

(*t*) *Vaspor* v. *Edwards* (1701), 12 Mod. Rep. 661.

(*u*) Incumbering the land may be damage; see *Ambergate Rail. Co.* v. *Midland Rail. Co.* (1853), 2 E. & B. 793.

(*x*) Bullen on Distress (2nd ed.), p. 257; Gilbert on Distress, pp. 21 and 24. The rabbits mentioned in Rolle, Abr. Distress, A, may fairly be said to be the produce of land.

(*y*) *Boden* v. *Roscoe*, [1894] 1 Q. B. 608. The language of MATHEW, J., at p. 611, in this case, "all kinds of damage," is wide enough to cover injuries to other chattels besides animals on the land.

(*z*) *Wormer* v. *Biggs* (1845), 2 C. & K. 31.

(*a*) 52 Hen. 3, c. 15.

(*b*) Compare *Lyons* v. *Martin* (1838), 8 A. & E. 512; Co. Litt. 161 a. See, however, *Hodges* v. *Lawrance* (1854), 18 J. P. 347, from which it seems that distress may be made if the thing distrained is not using the highway as a highway. This was a case of a waggon stationary and within the middle of the highway, and presumed to be on the demised premises. If, therefore, cattle stray on to the highway and are found grazing on grass at the side thereof, the owner of the adjacent land can, on the authority of this case, distrain them damage feasant, if he can show that he is owner or occupier *ad medium filum viæ*, as in many cases he can.

(*c*) Co. Litt. 142 a.

(*d*) The statutes 11 Geo. 2, c. 19, and 2 W. & M., sess. 1, c. 5, s. 2, giving a power of sale, apply only to distress for rent.

(*e*) *Bagshawe* v. *Goward* (1606), Cro. (Jac.) 147.

SECT 3. Distress Damage Feasant.

835. An animal distrained damage feasant must be impounded where the owner can have access to supply it with food and water, or, if impounded in a pound covert, the distrainor must feed it (*z*).

Feeding impounded cattle.

Formerly there was a distinction between pound overt and pound covert, which had an important bearing upon the question as to whose duty it was to feed the impounded cattle (*a*). This has, however, been practically done away with by modern enactments. At the present time every person who shall impound or cause to be impounded any animal is required to provide a sufficient quantity of fit and wholesome food and water for such animal, under a penalty of twenty shillings (*b*); and may recover from the owner or owners not exceeding double the value of the food or water so supplied, in the same manner as penalties may be recovered (*c*). It is also lawful for any person whomsoever to supply with food and water any animal which is impounded and without food and water for twelve consecutive hours, and to recover from the owner of the animal not exceeding double the value of the food and water supplied, or, after seven clear days from the time of impounding, to sell the animal openly at any public market after giving three days' public printed notice thereof, in discharge of the cost of the food and water and expenses of sale, rendering the overplus, if any, to the owner (*d*).

Where several animals have been impounded, one or more may be sold to pay the expenses of supplying food and water to them all (*e*), but a sale must not be made within fifteen days of seizure.

Pound-keeper.

836. A pound-keeper is entitled to join in selling the cattle, if he has supplied the food (*f*), but he is not liable to the penalties imposed for not supplying food (*g*), for the Act is not intended to apply to him, but to the person taking the animal to the pound for the purpose of securing compensation (*h*); and at common law his duties were merely to receive the animals or goods and keep

several pounds one forfeiture satisfies this Act (*Partridge* v. *Naylor* (1596), Cro (Eliz.) 480; compare *R.* v. *Clarke* (1777), 2 Cowp. 610, *per* Lord MANSFIELD, at p. 612).

(*z*) 1 Co. Inst. 47; and see note (*a*), *infra*.

(*a*) A pound overt was either the common pound, or one which was well known and to which people had a right of access without trespassing; the owner would naturally seek his beasts there, so that the distrainor need not give him notice. A pound covert or close was private, "as to impownd the cattle in some part of his house, and then the cattle are to be sustained with meat and drink at the perill of him that distraineth, and he shall not have any satisfaction therefore" (Co. Litt. 47 b; compare note (*o*), p. 382, *ante*; Com. Dig. Distress, D; Vin. Abr. Distress, P).

(*b*) Cruelty to Animals Act, 1849 (12 & 13 Vict. c. 92), s. 5. This Act repealed a previous enactment (5 & 6 Will. 4, c. 59) to the same effect.

(*c*) Cruelty to Animals Act, 1854 (17 & 18 Vict. c. 60), s. 1.

(*d*) Cruelty to Animals Acts, 1849 (12 & 13 Vict. c. 92), s. 6, and 1854 (17 & 18 Vict. c. 60), s. 1. Any proceedings under these Acts must be commenced within six months (see the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), ss. 1, 2, repealing s. 27 of the Act of 1849).

(*e*) Cruelty to Animals Acts, 1849 (12 & 13 Vict. c. 92), ss. 5, 6, and 1854 (17 & 18 Vict. c. 60), s. 1; *Layton* v. *Hurry* (1846), 8 Q. B. 811 (decided under the similar provisions of 5 & 6 Will. 4, c. 59, s. 4).

(*f*) *Mason* v. *Newland* (1840), 9 C. & P. 575.

(*g*) *Durgan* v. *Davies* (1877), 2 Q. B. D. 118.

(*h*) *Ibid.*, *per* MELLOR, J., at p. 121.

them in custody: he is therefore not liable if the distress or detention were wrongful unless he has taken some active part in the distress outside his duties (*i*).

SUB-SECT. 3.—*Rescue and Pound-Breach.*

Definitions.

837. Rescue (*rescous*) has been defined as "a taking away and setting at liberty against law a distresse taken, or a person arrested by the proces or course of law" (*k*).

Pound-breach (*parco fracto*) is the taking of the thing distrained from a lawful pound (*l*). The difference is that rescue is the taking before the animals are impounded, and while in the custody of the distrainor; pound-breach is the taking after they are impounded and *in custodiâ legis*. In each case an action of trespass lies for it; and in early days there was a writ of *rescous* or *parco fracto* (*m*).

Justification

838. Rescue may be justified in any case where the distress is unlawful, as where the distress is made on the highway or after proper tender of amends (*n*), or where the beasts are not distrained at the time of the damage, or are distrained on the soil of another than the distrainor (*o*), or where the distress has been abandoned, or the beasts escape in such a way as to amount to an abandonment (*p*), or in any case where the distress amounts to a trespass *ab initio*, as where the animals distrained have been abused (*q*).

Pound-breach, however, cannot thus be justified, because, once impounded, the cattle are in the custody of the law; the breach of the pound is the gist of the action, and the party who distrained need not show his right to do so (*r*). If the distrainor himself take them out of the pound in order to use them, the owner may retake them and use sufficient force to do so, and is not liable in an action for either rescue or pound-breach (*s*), and it seems that if the owner makes "fresh pursuit" and finds the pound open or unlocked, they are not properly impounded, and he may justify (*t*). Lord Coke says there may be rescue in deed and rescue in law, the latter being where the cattle distrained go into the house of their owner as they are being driven to the pound, and he refuses to deliver them when demanded (*u*).

Civil remedies.

The remedies for rescue and pound-breach are either an action in trespass, or recaption, *i.e.*, the taking of the cattle again into the

(*i*) *Badken* v. *Powell* (1776), 2 Cowp. 476.
(*k*) Co. Litt. 160 b.
(*l*) Com. Dig. Distress (D 2).
(*m*) Fitzherbert, Nat. Brev. 100 E, 101 C.
(*n*) Co. Litt. 160 b.
(*o*) *Ibid.*, 161 a. See note (*r*), p. 380, *ante*.
(*p*) *Knowles* v. *Blake* (1829), 5 Bing. 499. Compare *Dod* v. *Monger* (1704), 6 Mod. Rep. 215. The distinction appears to be between a momentary escape, *e.g.*, for half an hour, as in *Knowles* v. *Blake*, and a real loss of them.
(*q*) See pp. 381, 382, *ante*.
(*r*) Co. Litt. 47 b; *Cotsworth* v. *Betison* (1696), 1 Ld. Raym. 104.
(*s*) *Smith* v. *Wright* (1861), 6 H. & N. 821.
(*t*) Co. Litt. 47 b.
(*u*) *Ibid.*, 161 a. As to the difference between this and abandonment, see note (*p*), *supra*.

SECT. 3. Distress Damage Feasant.

hands of the distrainor without a breach of the peace and upon "fresh pursuit" (*x*).

Remedy by indictment.

839. Rescue and pound-breach are indictable misdemeanours at common law, though they are not often heard of at the present day (*y*). The indictment will lie only where the goods have been taken out of the custody of the law. Thus where an official, such as a hayward, has distrained beasts on private land and is taking them to the pound, an indictment will not lie if they are rescued, because they are in his custody as servant of the owner of the land and not *in custodiâ legis* (*z*).

Summary remedy.

840. There is also a summary remedy before the justices; if any person releases or attempts to release from a pound any horse, ass, sheep, swine, or other beast or cattle (which includes cows and heifers (*a*)) lawfully seized for the purpose of being impounded in consequence of having been found wandering, straying, lying, or being depastured on any inclosed land without the consent of the owner or occupier, or damages or destroys any part of the pound, he commits an offence for which he may be subjected to a penalty not exceeding five pounds, together with reasonable expenses, and imprisonment in default of payment (*b*). This jurisdiction of the justices, however, is ousted if any question arises as to title to lands, bankruptcy, any execution under legal process, or any obligation to maintain walls or fences (*c*).

In places to which the Towns Police Clauses Act, 1847 (*d*), applies, there is a remedy on summary conviction by imprisonment for a term not exceeding three months.

The law as to rescue and pound-breach is here dealt with only so far as it is material to animals distrained damage feasant; it also applies to distress for rent, which is foreign to the present subject, and is now mostly governed by statutory enactments which do not apply to distress damage feasant (*e*).

Part IV.—The Contract of Agistment.

Nature of the contract.

841. Agistment (*f*) is in the nature of a contract of bailment, conferring no interest in the land and therefore not requiring to be in writing (*g*), and arises where one man (the agister) takes another

(*x*) *Per* TINDAL, C.J., in *Rich* v. *Woolley* (1831), 7 Bing. 651, at p. 661.
(*y*) See title CRIMINAL LAW AND PROCEDURE, and *R.* v. *Butterfield* (1892), 17 Cox, C. C. 598.
(*z*) *R.* v. *Bradshaw* (1835), 7 C. & P. 233.
(*a*) *R.* v. *Gee* (1885), 49 J. P. 212.
(*b*) Pound-breach Act, 1843 (6 & 7 Vict. c. 30), s. 1.
(*c*) *Ibid.*, s. 2.
(*d*) 10 & 11 Vict. c. 89, see s. 26.
(*e*) See title DISTRESS.
(*f*) The term agistment is said to be derived from the French "gyser," to lie, because the beasts are there levant and couchant; see Co. Inst. Pt. 4, c. 73, p. 293.
(*g*) Under sect. 4 of the Statute of Frauds (29 Car. 2, c. 3); *Jones* v. *Flint* (1839), 10 A. & E. 753.

man's cattle, horses, or other animals, to graze on his land for reward (usually at a certain rate per week) on the implied term that he will redeliver them to the owner on demand (*h*). If the latter wishes to have them redelivered to him he must make an express contract to that effect (*i*).

Negligence of agister.

842. The agister is not an insurer of the beasts taken in by him, but he must take reasonable and proper care of them, and is liable for injury caused to them by negligence or neglect of such reasonable and proper care (*j*). Thus he must make good the loss in case of injury if he puts a horse in a field with heifers, knowing that a bull is kept on adjoining land separated only by a shallow ditch, and has several times been found in the field, although he does not know it is vicious (*k*); or if he puts a horse in a field where there is a barbed wire fence concealed by long grass (*l*); or leaves a gate open so that the agisted animal strays out and is lost (*m*), or injured (*n*); or if he puts agisted animals on pasture that is dangerous by reason of the existence therein of wells, pits, or shafts (*o*).

Agister has no lien.

843. The agister has no lien, in the absence of special agreement (*p*), upon the beasts he agists, for he expends no skill upon them; he merely takes care of them and supplies them with food, and his remedy is to bring an action for the price of the grazing (*q*); he has, however, a sufficient possessory property in them to entitle him to sue in trespass or trover (*r*).

Custom is notorious.

The custom of agistment is notorious, and agisted animals are not in the order and disposition of the agister within the meaning of the Bankruptcy Acts (*s*).

Distress on agisted animals.

844. Agisted animals are not, at common law, privileged from distress for rent (*t*) any more than cattle that have escaped on to

(*h*) 2 Bl. Com. 452.

(*i*) *Corbett* v. *Packington* (1827), 6 B. & C. 268. Compare *Turner* v. *Stallibrass*, [1898] 1 Q. B. 56, 59.

(*j*) *Smith* v. *Cook* (1875), 1 Q. B. D. 79; *Broadwater* v. *Blot* (1817), Holt, N. P. C. 547.

(*k*) *Smith* v. *Cook*, *supra*.

(*l*) *Turner* v. *Stallibrass*, *supra*.

(*m*) *Broadwater* v. *Blot*, *supra*.

(*n*) *Halestrap* v. *Gregory*, [1895] 1 Q. B. 561. In this case an agisted horse had escaped from the field owing to the negligence of the defendant's servant in leaving a gate open. The occupiers of the adjoining land endeavoured to drive the horse back through the gate, when it fell over a fence and was injured, and it was held that the injury was the natural consequence of the gate having been left open.

(*o*) *Rooth* v. *Wilson* (1817), 1 B. & Ald. 59, *per* Lord ELLENBOROUGH, C.J., at p. 16.

(*p*) *Richards* v. *Symons* (1845), 8 Q. B. 90.

(*q*) *Chapman* v. *Allen* (1632), Cro. Car. 271; *Jackson* v. *Cummins* (1839), 5 M. & W. 342; *Judson* v. *Etheridge* (1833), 1 C. & M. 743; *Hobby* v. *Ruell* (1845), 1 C. & K. 716.

(*r*) Compare *Sutton* v. *Buck* (1810), 2 Taunt. 302, 309, and *Rooth* v. *Wilson*, *supra*. In an indictment concerning the agisted animals, the property therein may be laid in the agister (*R.* v. *Woodward* (1796), 2 East, P. C. 653).

(*s*) *Re Woodward*, *Ex parte Huggins* (1886), 54 L. T. 683. See title BANKRUPTCY AND INSOLVENCY.

(*t*) Bac. Abr. Distress B.; Rolle, Abr. 669. But it is perhaps open to argument that an exemption from liability to be distrained may be claimed on the ground

PART IV. Contract of Agistment.

the land (*u*), except in the case of a temporary agistment on the road to or at a fair or market (*x*); which is a consequence arising out of the necessity for their refreshment, and is an instance of a privilege arising as accessory to another privilege (*y*).

Animals agisted on agricultural holding.

In the case of an agricultural holding there is a statutory exemption; live stock taken in by a tenant of an agricultural holding (*z*) to be fed at a fair price, may not be distrained by the landlord for rent where there is other sufficient distress to be found; and if they are distrained by reason of there being no other sufficient distress, the landlord can only recover by such distress rent up to the price of the feeding which remains unpaid, subject to the right of the owner to redeem the stock by paying such price to the distrainor; so long as any portion of the live stock remains on the holding the right to distrain extends to the full extent of the unpaid price of feeding the whole of them (*a*). The "fair price" need not necessarily be money. Cows agisted on the terms of "milk for meat"—a very common form of contract by which the farmer takes the milk of the cows, instead of a money payment, in return for their feed—are "taken in to be fed at a fair price" within the meaning of this provision, and are entitled to the partial exemption (*b*); but live stock taken in under a contract for the letting of the herbage or grazing of land are not protected by the above provision (*c*).

Part. V.—Warranty on Sale of Animals.

No implied warranty of quality.

845. Domestic animals are goods and chattels, and the ordinary law as to the sale of goods (*d*) applies to them. The purchase of a horse is essentially a purchase of an unknown quantity, for no prudence can guard against all latent defects (*e*); and although upon a sale there is an implied warranty of the right of the vendor to sell, and although if a horse is sold for a particular purpose made known to the seller, there is an implied warranty that it is reasonably fit for that purpose (*f*), yet there is no implied warranty

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that agisted animals are delivered to the agister in the regular way of his trade (*per* MELLOR, J., in *Miles* v. *Furber* (1873), L. R. 8 Q. B. 77, at p. 83).

(*u*) Co. Litt. 47 a.

(*x*) 2 Saund. 290, n. 7; *Nugent* v. *Kirwan* (1838), 1 Jebb & Symes, 97.

(*y*) *Per* ALDERSON, B., in *Muspratt* v. *Gregory* (1836), 1 M. & W. 633, at p. 647.

(*z*) That is, a holding either wholly agricultural or wholly pastoral, or in part agricultural and as to the residue pastoral, or in whole or in part cultivated as a market garden (Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61), s. 54). But holdings let to a tenant during any office, appointment or employment held under the landlord are excluded (*ibid.*). See title AGRICULTURE, p. 239, *ante*.

(*a*) Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61), s. 45.

(*b*) *London and Yorkshire Bank* v. *Belton* (1885), 15 Q. B. D. 457.

(*c*) *Masters* v. *Green* (1888), 20 Q. B. D. 807. Compare *Burt* v. *Moore* (1793), 5 Term Rep. 329. For precedents of milk and meat contracts and for agistment and letting of herbage, see Encyclopædia of Forms and Precedents, Vol. I., pp. 425 *et seq.*

(*d*) *Edwards* v. *Pearson* (1890), 6 T. L. R. 220; see title SALE OF GOODS.

(*e*) Compare *per* BEST, C.J., in *Jones* v. *Bright* (1829), 5 Bing. 533, at p. 544.

(*f*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 14; *Chanter* v. *Hopkins* (1838), 8 L. J. (EX.) 14, *per* PARKE, B.

of the quality of the animal, and the rule *caveat emptor* applies; it is, therefore, usual, and certainly advisable, for the buyer to protect himself by requiring an express warranty with the animal of any quality or virtue he may require.

Patent defects.

846. A warranty is not intended to guard against defects which are obvious to the senses (*g*). It has been said that if a man guarantees that a horse has two eyes he is not liable if it has not, for the buyer could have an examination before he bought (*h*); but it is otherwise if the eye have some defect which is congenital, or which could not be ascertained by an ordinary man (*i*). It is a question of fact what is and what is not a patent defect. A "splint" may or may not cause lameness, and a warranty of soundness will be taken as meaning that a splint which was plainly visible and pointed out to the buyer was not at that time such a splint as would cause future lameness, and the warranty is broken if lameness arises from that splint (*j*). If the buyer is not present at the time of the treaty for sale, then the warranty will cover patent defects (*k*), or if the seller warrants the horse with the intention of preventing the buyer examining it and so discovering a patent defect, or uses any other artifice to conceal such a defect, then also the warranty will cover it (*l*).

Effect of warranty.

847. By a warranty the seller undertakes absolutely that the horse possesses the virtues attributed to it in the warranty, and is at the time of the sale free from the defects warranted against, whether they are known to him or not (*m*). Special words may, however, limit the warranty to defects within the seller's knowledge (*n*).

What will amount to a warranty.

It is not uncommon to insert the warranty given in the receipt for the price; and such insertion does not make the receipt liable to stamp duty as an agreement (*o*). No particular form of words is necessary to constitute a warranty (*p*). Any statement of fact made at the time of the sale, and before it is completed, and intended to be a warranty is a warranty in law (*q*). The question of the intention of the statement is one of fact for the jury, as also

(*g*) Compare Y. B. 11 Edw. 4, fol. 6 B., *per* FAIRFAX, J.

(*h*) *Ibid.*, *per* BRIAN, J.

(*i*) *Holyday* v. *Morgan* (1858), 28 L. J. (Q. B.) 9; *Southerne* v. *Howe* (1617), 2 Roll. Rep. 5.

(*j*) *Margetson* v. *Wright* (1831), 7 Bing. 603, and, on rehearing (1832), 8 Bing. 454; *Smith* v. *O'Bryan* (1864), 11 L. T. 346.

(*k*) Y. B. 13 Hen. 4, fol. 1 B., *per* THIRNING, J.

(*l*) *Dorrington* v. *Edwards* (1620), 2 Roll. Rep. 188; *Kenner* v. *Harding* (1877), 85 Ill. (U. S.) 264, also reported in 28 Amer. Rep. 615.

(*m*) Compare *Stuart* v. *Wilkins* (1778), 1 Dougl. 19; *Williamson* v. *Allison* (1802), 2 East, 446.

(*n*) *Wood* v. *Smith* (1829), 5 Man. & R. (K. B.) 124. Compare *Dunlop* v. *Waugh* (1792), 1 Peake, 167; *Pinder* v. *Button* (1862), 7 L. T. 269.

(*o*) *Skrine* v. *Elmore* (1810), 2 Camp. 407. As to what is a note or memorandum within s. 4 of the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71) applicable to a sale of a horse by auction, see *Peirce* v. *Corf* (1874), L. R. 9 Q. B. 210; *Rainbow* v. *Howkins*, [1904] 2 K. B. 322; and title SALE OF GOODS.

(*p*) *Gee* v. *Lucas* (1867), 16 L. T. 357.

(*q*) *Pasley* v. *Freeman* (1789), 3 Term Rep. 59. If made after the sale there must be a new consideration to support the warranty (*Roscorla* v. *Thomas* (1842), 3 Q. B. 234). Compare *per* BAYLEY, J., in *Cave* v. *Coleman* (1828), 3 Man. & R. (K. B.) 2, at p. 3.

PART V. Warranty on Sale of Animals.

whether the statement was part of the contract of sale (*r*). Thus, a statement "You may depend upon it that the horse is perfectly quiet and free from vice" is a sufficient warranty, although the word "warrant" is not used (*s*).

Extent of warranty.

If the word "warrant" is used, the warranty extends only to so much as is governed by that word. Thus, "a black horse rising five years, quiet to ride and drive and warranted sound" is not a warranty that the horse is quiet to ride and drive (*t*). If the word "warranted" is used alone, it is taken to refer to soundness only, and not to a preceding description, as where a horse was described as "a black gelding, five years old, has been constantly driven in the plough, warranted" (*u*). The warranty may be limited in any way (*v*), but if a horse is warranted "sound and quiet in all respects," that is general, and includes being quiet in harness (*w*).

A horse is most commonly warranted as to soundness and freedom from vice; but any quality may be warranted, such as its age (*x*), or that it has been hunted with a certain pack of hounds (*y*), or that a mare is in foal to a certain horse (*z*).

No warranty from price taken.

The fact that a sound price, *i.e.*, a good or fair price for a sound animal, is given for the animal does not amount to a warranty that the animal is sound (*a*).

What amounts to unsoundness.

848. If at the time of the sale the horse has any disease or defect which actually diminishes, or in its ordinary progress will diminish, the natural usefulness of the animal, it is not sound (*b*). A congenital defect, such as convexity of the cornea of the eye, which causes short-sightedness and induces the habit of shying, is unsoundness (*c*). The slightness of the disease, or the ease with which it is cured, may affect the amount of damages, but does not affect the principle, unless it is of so trifling a character as not to amount to unsoundness at all (*d*). A cough (*e*), and temporary lameness (*f*), have, therefore, both been held to be unsoundness. The question of soundness or unsoundness is one for the jury (*g*).

(*r*) *Salmon* v. *Ward* (1825), 2 C. & P. 211; *Hopkins* v. *Tanqueray* (1854), 23 L. J. (C. P.) 162; *Wood* v. *Smith* (1829), 5 Man. & R. (K. B.) 124; *Percival* v. *Oldacre* (1865), 18 C. B. (N. S.) 398.

(*s*) *Cave* v. *Coleman* (1828), 3 Man. & R. (K. B.) 2, *per* Lord TENTERDEN, C.J.

(*t*) *Anthony* v. *Halstead* (1877), 37 L. T. 433; *Budd* v. *Fairmaner* (1831), 8 Bing. 48.

(*u*) *Richardson* v. *Brown* (1823), 1 Bing. 344.

(*v*) *Jones* v. *Cowley* (1825), 4 B. & C. 445; *Hemming* v. *Parry* (1834), 6 C. & P. 580.

(*w*) *Smith* v. *Parsons* (1837), 8 C. & P. 199.

(*x*) *Buchanan* v. *Parnshaw* (1788), 2 Term Rep. 745.

(*y*) *Head* v. *Tattersall* (1871), L. R. 7 Exch. 7.

(*z*) *Gee* v. *Lucas* (1867), 16 L. T. 357.

(*a*) *Parkinson* v. *Lee* (1802), 2 East, 314, 322.

(*b*) See *per* PARKE, B., in *Coates* v. *Stephens* (1838), 2 Mood. & R. 157. Compare *Kiddell* v. *Burnard* (1842), 9 M. & W. 668.

(*c*) *Holyday* v. *Morgan* (1858), 28 L. J. (Q. B.) 9.

(*d*) Compare *per* PARKE, B., in *Kiddell* v. *Burnard*, *supra*.

(*e*) *Coates* v. *Stephens*, *supra*; *Shillitoe* v. *Claridge* (1816), 2 Chitty, 425.

(*f*) *Elton* v. *Brogden* (1815), 4 Camp. 281.

(*g*) *Lewis* v. *Peake* (1816), 7 Taunt. 153. For the various diseases, defects, and

Warranty relating to future.

849. Unless otherwise expressly stated, a warranty only relates to facts as they are at the time of sale (*h*). It may, however, expressly relate to the future, as where the seller undertakes to deliver horses sound at the end of a fortnight (*i*); but "warranted sound for one month" has been held to mean not that the horse was warranted to continue sound for a month, but that the duration of the warranty was limited to one month, and that complaint of unsoundness must be made within one month of sale (*j*).

Remedy for breach of warranty.

850. A warranty is an agreement collateral to the main purpose of a sale, and a breach of it gives rise to a claim for damages, but not to a right to reject the horse, the sale being a sale of a specific chattel and the property passing to the buyer on the sale (*k*).

In the absence of agreement, therefore, the buyer cannot, after the property has passed to him, return a horse to the seller for breach of warranty (*l*); his remedy is either to set up the breach of warranty in diminution or extinction of the price, or to counterclaim or bring an action against the seller for damages for the breach of warranty (*m*). But if a bill (which includes a cheque or promissory note) be given for the price, and the horse does not answer to the warranty, and has not been taken back by the buyer, the breach of warranty cannot be set off by way of diminution of the price; the damages being unliquidated and the failure of consideration partial (*n*). The measure of damages is *primâ facie* the difference between the value of the horse at the time of delivery and the value it would have had if it had answered to the warranty (*o*). The fact that the buyer has set up the breach of warranty in diminution or extinction of the price does not prevent him from counter-claiming or maintaining an action for damages in excess arising from the same breach of warranty (*p*).

Tender of horse to seller on breach of warranty.

851. Where there has been a breach of warranty and no agreement entitling the purchaser to return the horse, he should tender it to the seller, and, if the latter refuses to take it back, should then sell it; in which case the original seller is liable for its keep

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bad habits which have been held to amount to unsoundness or vice, see "Oliphant on Horses," 5th ed., pp. 66—102. "Vice" means either a defect in the temper of the horse which makes it dangerous or diminishes its usefulness, or a bad habit which is injurious to its health (*Scholefield* v. *Robb* (1839), 2 Mood. & R. 210).

(*h*) *Liddard* v. *Kain* (1824), 2 Bing. 183; and see Y. B. 11 Edw. 4, 10 B., *per* CHOKE, J.

(*i*) *Liddard* v. *Kain, supra*; *Eden* v. *Parkison* (1781), 2 Dougl. 732.

(*j*) *Chapman* v. *Gwyther* (1866), L. R. 1 Q. B. 463. Compare *Buchanan* v. *Parnshaw* (1788), 2 Term Rep. 745.

(*k*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 62 (1).

(*l*) *Ibid.*, s. 53 (1); *Street* v. *Blay* (1831), 2 B. & Ad. 456; *aliter* of a condition or where there is a fraud.

(*m*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 53 (1) (a), (b). By s. 62 (1) "action" includes counterclaim and set-off.

(*n*) *Warwick* v. *Nairn* (1855), 10 Exch. 762; *Solomon* v. *Turner* (1815), 1 Stark. 51.

(*o*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 53 (2), (3).

(*p*) *Ibid.*, s. 53 (4); *Street* v. *Blay, supra*; *Davis* v. *Hedges* (1871), L. R. 6 Q. B. 687.

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for a reasonable time (*q*); though he is not so liable if it is not tendered to him (*r*).

Notice to seller.

The buyer should give notice to the seller as soon as possible of any alleged breach of warranty, although this is not absolutely necessary (*s*). If there is no time limit in the contract within which complaint must be made, the buyer is not prejudiced by anything done by him before he discovers the defects (*t*).

Return of horse.

852. If the buyer has reserved a right to return the horse within a specified time, he may return it at any time within such period, and is not bound to do so the moment he discovers the defects; so that if injury happens to the horse while in his possession, and without his fault, he is not liable for this and may still return the horse within the period (*u*); and if the horse under such circumstances becomes injured so that it cannot be returned within the specified time, the non-return by the buyer within the period stipulated will not bar an action for breach of the warranty (*v*).

If the horse is sold upon a condition that it may be returned within a specified period in case of unsuitability or for any other reason, and the horse dies within the specified period without any default of the buyer, the loss falls on the seller; there being no completed sale in the proper sense until the buyer has given approval expressly, or by implication from his keeping the horse beyond the specified period (*w*).

Time limited for duration of warranty.

It is a usual condition in warranties, especially in those at sales by auction, that complaint be made or the horse returned within a specified time; if this condition is not complied with no action can be brought on the warranty (*x*). A condition that a warranty of soundness shall remain in force until noon of the day after the sale, when it will be deemed to have been performed and the responsibility of the seller will terminate, unless in the meantime a notice to the contrary and a certificate of any alleged unsoundness be given, is reasonable (*y*), and if painted up, or otherwise brought to the buyer's notice, is binding upon him (*z*).

Warranties at auctions.

Distinct statements of fact printed in an auctioneer's catalogue, if such as to confer additional value on the horse sold, amount to warranties (*a*). They do not generally involve much difficulty of

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(*q*) *Chesterman* v. *Lamb* (1834), 2 A. & E. 129; *McKenzie* v. *Hancock* (1826), Ry. & M. 436.

(*r*) *Caswell* v. *Coare* (1809), 1 Taunt. 566.

(*s*) See *Fielder* v. *Starkin* (1788), 1 Hy. Bl. 17.

(*t*) *Best* v. *Osborn* (1825), 2 C. & P. 74.

(*u*) *Head* v. *Tattersall* (1871), L. R. 7 Exch. 7.

(*v*) *Chapman* v. *Withers* (1888), 20 Q. B. D. 824; and see also *Taylor* v. *Caldwell* (1863), 3 B. & S. 826.

(*w*) *Elphick* v. *Barnes* (1880), 5 C. P. D. 321.

(*x*) *Hinchcliffe* v. *Barwick* (1880), 5 Ex. D. 177; *Smart* v. *Hyde* (1841), 8 M. & W. 723; *Mesnard* v. *Aldridge* (1801), 3 Esp. 271; *Head* v. *Tattersall*, *supra*.

(*y*) *Smart* v. *Hyde*, *supra*.

(*z*) *Bywater* v. *Richardson* (1834), 1 A. & E. 508.

(*a*) *Per* KELLY, C.B., *Gee* v. *Lucas* (1867), 16 L. T. 357, at p. 358. See generally as to sales by auction, titles AUCTION AND AUCTIONEERS; SALE OF GOODS.

interpretation, because such warranties are usually printed and explained in the conditions of sale (*b*).

In many parts of the country cows and other animals are sold with a warranty, *e.g.*, that a cow is in calf. What has been said above with regard to warranty of horses applies equally to the warranty of other animals.

Warranty of other animals

853. Fraud renders a contract voidable at the option of the party defrauded. On discovery of the fraud the buyer may either return the horse and bring an action for return of the price paid (*c*), or keep the horse and claim damages. This is so even where the fraud concerns something outside an express warranty; thus proof of fraud at the time of the sale, *e.g.*, as to a horse's age, would vitiate the sale though the warranty was only as to soundness and freedom from vice (*d*).

Fraud.

854. An agent to sell is not always an agent to warrant, but when a groom or servant is sent to sell a horse, slight evidence is sufficient to prove an agency to warrant (*e*). A distinction has generally been made between the servant of a private seller and that of a horse-dealer (*f*); if the servant or agent of a private individual takes upon himself to warrant, in the absence of authority to do so, the master is not bound, unless the sale be made at a fair or other public market, in which case the servant or agent is more in the position of the servant of a horse-dealer, and has an implied

Warranty given by agent.

(*b*) For precedents of special conditions on sale of horses by auction, see Encyclopædia of Forms, Vol. XI., p. 578. It is usually provided in such conditions that the following warranties are implied upon sales of horses with specific words of description:—

Horses described as—

"Good Hunters," as being sound in wind and eyes, as quiet to ride, as having been hunted, and as capable of being hunted;

"Good Hacks," as being sound in wind and eyes, quiet to ride, and not lame;

"Good Chargers" or "Good School Horses," as being sound in wind and eyes, quiet to ride, quiet with troops, and not lame;

"Good Brougham Horses," "Good Buggy Horses," "Good Wheelers," "Good Leaders," or "Good Harness Horses," as being sound in wind and eyes, quiet in the harness named, and not lame;

"Good Polo Ponies," as being sound in wind and eyes, quiet to ride, and capable of being played.

It is also usually provided in the conditions of sale that in the case of horses described as hunters, hacks, chargers, polo ponies, harness horses, brougham horses, buggy horses, leaders, or wheelers, without the use of the word "good," there shall only be an implied warranty that the horses have been so used; that horses described as "regularly" or "constantly" driven, or ridden, are only warranted as quiet to drive or ride, as the case may be; and that horses so sold are expected to be workably sound, and not to have any infirmity or disease that renders them unfit for reasonable work.

It has been held that the description "a clever hack" does not amount to a warranty of soundness (see Dixon's "Law of the Farm" (6th ed.), p. 352). A sale "with all faults" and without a warranty relieves the seller from all liability in respect of any disease or defect in the animal (*Ward* v. *Hobbs* (1878), 4 App. Cas. 13).

(*c*) Compare *Kennedy* v. *Panama etc. Mail Co.* (1867), L. R. 2 Q. B. 580, 587.

(*d*) *Steward* v. *Corsvelt* (1823), 1 C. & P. 23.

(*e*) *Miller* v. *Lawton* (1864), 15 C. B (N. S.) 834.

(*f*) *Brady* v. *Todd* (1861), 9 C. B. (N. S.) 592; *Bank of Scotland* v. *Watson* (1813), 1 Dow, 40, at p. 45; compare *Helyear* v. *Hawke* (1803), 5 Esp. 72.

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for a reasonable time (*q*); though he is not so liable if it is not tendered to him (*r*).

Notice to seller.

The buyer should give notice to the seller as soon as possible of any alleged breach of warranty, although this is not absolutely necessary (*s*). If there is no time limit in the contract within which complaint must be made, the buyer is not prejudiced by anything done by him before he discovers the defects (*t*).

Return of horse.

852. If the buyer has reserved a right to return the horse within a specified time, he may return it at any time within such period, and is not bound to do so the moment he discovers the defects; so that if injury happens to the horse while in his possession, and without his fault, he is not liable for this and may still return the horse within the period (*u*); and if the horse under such circumstances becomes injured so that it cannot be returned within the specified time, the non-return by the buyer within the period stipulated will not bar an action for breach of the warranty (*v*).

If the horse is sold upon a condition that it may be returned within a specified period in case of unsuitability or for any other reason, and the horse dies within the specified period without any default of the buyer, the loss falls on the seller; there being no completed sale in the proper sense until the buyer has given approval expressly, or by implication from his keeping the horse beyond the specified period (*w*).

Time limited for duration of warranty.

It is a usual condition in warranties, especially in those at sales by auction, that complaint be made or the horse returned within a specified time; if this condition is not complied with no action can be brought on the warranty (*x*). A condition that a warranty of soundness shall remain in force until noon of the day after the sale, when it will be deemed to have been performed and the responsibility of the seller will terminate, unless in the meantime a notice to the contrary and a certificate of any alleged unsoundness be given, is reasonable (*y*), and if painted up, or otherwise brought to the buyer's notice, is binding upon him (*z*).

Warranties at auctions.

Distinct statements of fact printed in an auctioneer's catalogue, if such as to confer additional value on the horse sold, amount to warranties (*a*). They do not generally involve much difficulty of

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(*q*) *Chesterman* v. *Lamb* (1834), 2 A. & E. 129; *McKenzie* v. *Hancock* (1826), Ry. & M. 436.

(*r*) *Caswell* v. *Coare* (1809), 1 Taunt. 566.

(*s*) See *Fielder* v. *Starkin* (1788), 1 Hy. Bl. 17.

(*t*) *Best* v. *Osborn* (1825), 2 C. & P. 74.

(*u*) *Head* v. *Tattersall* (1871), L. R. 7 Exch. 7.

(*v*) *Chapman* v. *Withers* (1888), 20 Q. B. D. 824; and see also *Taylor* v. *Caldwell* (1863), 3 B. & S. 826.

(*w*) *Elphick* v. *Barnes* (1880), 5 C. P. D. 321.

(*x*) *Hinchcliffe* v. *Barwick* (1880), 5 Ex. D. 177; *Smart* v. *Hyde* (1841), 8 M. & W. 723; *Mesnard* v. *Aldridge* (1801), 3 Esp. 271; *Head* v. *Tattersall*, *supra*.

(*y*) *Smart* v. *Hyde*, *supra*.

(*z*) *Bywater* v. *Richardson* (1834), 1 A. & E. 508.

(*a*) *Per* KELLY, C.B., *Gee* v. *Lucas* (1867), 16 L. T. 357, at p. 358. See generally as to sales by auction, titles AUCTION AND AUCTIONEERS; SALE OF GOODS.

interpretation, because such warranties are usually printed and explained in the conditions of sale (*b*).

In many parts of the country cows and other animals are sold with a warranty, *e.g.*, that a cow is in calf. What has been said above with regard to warranty of horses applies equally to the warranty of other animals.

Warranty of other animals

853. Fraud renders a contract voidable at the option of the party defrauded. On discovery of the fraud the buyer may either return the horse and bring an action for return of the price paid (*c*), or keep the horse and claim damages. This is so even where the fraud concerns something outside an express warranty; thus proof of fraud at the time of the sale, *e.g.*, as to a horse's age, would vitiate the sale though the warranty was only as to soundness and freedom from vice (*d*).

Fraud.

854. An agent to sell is not always an agent to warrant, but when a groom or servant is sent to sell a horse, slight evidence is sufficient to prove an agency to warrant (*e*). A distinction has generally been made between the servant of a private seller and that of a horse-dealer (*f*); if the servant or agent of a private individual takes upon himself to warrant, in the absence of authority to do so, the master is not bound, unless the sale be made at a fair or other public market, in which case the servant or agent is more in the position of the servant of a horse-dealer, and has an implied

Warranty given by agent.

(*b*) For precedents of special conditions on sale of horses by auction, see Encyclopædia of Forms, Vol. XI., p. 578. It is usually provided in such conditions that the following warranties are implied upon sales of horses with specific words of description:—

Horses described as—

"Good Hunters," as being sound in wind and eyes, as quiet to ride, as having been hunted, and as capable of being hunted;

"Good Hacks," as being sound in wind and eyes, quiet to ride, and not lame;

"Good Chargers" or "Good School Horses," as being sound in wind and eyes, quiet to ride, quiet with troops, and not lame;

"Good Brougham Horses," "Good Buggy Horses," "Good Wheelers," "Good Leaders," or "Good Harness Horses," as being sound in wind and eyes, quiet in the harness named, and not lame;

"Good Polo Ponies," as being sound in wind and eyes, quiet to ride, and capable of being played.

It is also usually provided in the conditions of sale that in the case of horses described as hunters, hacks, chargers, polo ponies, harness horses, brougham horses, buggy horses, leaders, or wheelers, without the use of the word "good," there shall only be an implied warranty that the horses have been so used; that horses described as "regularly" or "constantly" driven, or ridden, are only warranted as quiet to drive or ride, as the case may be; and that horses so sold are expected to be workably sound, and not to have any infirmity or disease that renders them unfit for reasonable work.

It has been held that the description "a clever hack" does not amount to a warranty of soundness (see Dixon's "Law of the Farm" (6th ed.), p. 352). A sale "with all faults" and without a warranty relieves the seller from all liability in respect of any disease or defect in the animal (*Ward* v. *Hobbs* (1878), 4 App. Cas. 13).

(*c*) Compare *Kennedy* v. *Panama etc. Mail Co.* (1867), L. R. 2 Q. B. 580, 587.

(*d*) *Steward* v. *Corsvelt* (1823), 1 C. & P. 23.

(*e*) *Miller* v. *Lawton* (1864), 15 C. B (N. S.) 834.

(*f*) *Brady* v. *Todd* (1861), 9 C. B. (N. S.) 592; *Bank of Scotland* v. *Watson* (1813), 1 Dow, 40, at p. 45; compare *Helyear* v. *Hawke* (1803), 5 Esp. 72.

PART V. Warranty on Sale of Animals.

authority to warrant (*g*); if the servant or assistant of a horse-dealer gives a warranty the principal is bound, even though such servant was expressly forbidden to warrant (*h*).

Servants and agents of horse-dealers.

Any person dealing with an agent or assistant of a horse-dealer has a right to assume an authority to warrant (*i*), and evidence of a custom amongst horse-dealers not to warrant is inadmissible (*j*). A horse-dealer is not bound by the action of his servant who is sent merely to deliver a horse already sold, and who signs a receipt containing a warranty (*k*), or who warrants such an incidental matter as that a horse may safely be placed with others in a stable, because the warranty is not given in the course of the transaction of sale (*l*).

On the other hand, a buyer who sends a servant to accept a horse with a warranty is not bound if the servant accepts it without a warranty, and may return the horse (*m*).

Warranty by partners.

A warranty by one of two partners who are horse-dealers binds the other, though as between the partners there is an agreement not to warrant (*n*).

Infants.

An infant, not being able to contract except for necessaries, is not liable for breach of warranty of a horse (*o*).

Part VI.—Dogs.

SECT. 1.—*At Common Law.*

SUB-SECT. 1.—*In General.*

Nature of property in dogs.

855. A dog, although a domestic animal (*p*), is not, on account of the baseness of its nature and the extremity of the ancient punishment for felony (*q*), the subject of larceny at common law.

(*g*) *Alexander* v. *Gibson* (1811), 2 Camp. 555; *Brooks* v. *Hassall* (1883), 49 L. T. 569.

(*h*) *Howard* v. *Sheward* (1866), L. R. 2 C. P. 148, *per* BYLES, J., at p. 152; *Pickering* v. *Busk* (1812), 15 East, 38, 45. Compare *Coleman* v. *Riches* (1855), 24 L. J. (C. P.) 125, at p. 128.

(*i*) *Howard* v. *Sheward*, *supra*, *per* WILLES, J., at p. 151.

(*j*) *Ibid.*

(*k*) *Woodin* v. *Burford* (1834), 2 Cr. & M. 391. Compare *Strode* v. *Dyson* (1804), 1 Smith, 400; and see *Cornefoot* v. *Fowke* (1839), 9 L. J. (EX.) 297.

(*l*) *Baldray* v. *Bates* (1885), 1 T. L. R. 558.

(*m*) *Jordan* v. *Norton* (1838), 4 M. & W. 155.

(*n*) *Sandilands* v. *Marsh* (1819), 2 B. & Ald. 673.

(*o*) See title INFANTS.

(*p*) See p. 368, *ante*. The owner of a lost dog may maintain trover, and the finder has no right to detain it until he is paid for its keep (*Binstead* v. *Buck* (1776), 2 Wm. Bl. 1117); merely keeping and feeding an animal does not, apart from contract, confer any lien. See title BAILMENT.

A dog is "goods" within the meaning of a statute (*R.* v. *Slade* (1888), 21 Q. B. D. 433). A dog is "property" within s. 102 of the Larceny Act, 1861, and it is therefore an offence to advertise a reward for the return of a lost dog and to state that "no questions will be asked" (*Mirams* v. *Our Dogs Publishing Co.*, [1901] 2 K. B. 564).

(*q*) See note (*u*), p. 368, *ante*.

SECT. 1. At Common Law.

It is not considered to be the ordinary nature of a dog to injure either mankind or cattle; therefore formerly the owner was not liable for any such injuries without proof being given of his knowledge of the dangerous and vicious propensity of his dog. The law has been altered by statute as regards injuries to cattle (*r*), but is unaltered as regards injuries to mankind. In the absence of proof of *scienter*, a dog may still have what is popularly called "his first bite" at a man; in this respect there is no difference between dogs and other domestic animals (*s*).

Injuries to mankind; proof of *scienter*.

SUB-SECT. 2.—*Trespass by Dogs.*

856. The owner of a dog is not answerable in trespass for its unauthorised entry into the land of another, often described as an unprovoked trespass (*t*).

No action for trespass of dog upon land.

But if a man wilfully send a dog on another man's land in pursuit of game he is liable in trespass, although he did not himself go on the land (*u*). So also if he allow a dog to roam at large, knowing it to be addicted to destroying game (*x*). The trespassing dog, if doing damage to the property of the owners of the land, may be seized as a distress damage feasant (*y*) although at the time it was in the possession and under the personal control of and being used by the owner (*z*).

857. To kill, shoot, or injure another man's dog without legal justification is an actionable wrong at common law. It is no legal justification that the dog was trespassing (*a*). In order legally to justify such an act it must be proved that it was done under

No right to kill a trespassing dog.

(*r*) See p. 397, *post*.

(*s*) The whole subject is dealt with fully, p. 372, *ante*.

(*t*) "Et est un difference inter un chein et auters avers: si un chein vaer en vostre terre naveres action" (*per* LITTLETON, J., in *Millen* v. *Fawdry* (1625), Latch, 119, where the defendant chased sheep off his land with a little dog, which continued chasing them when on the plaintiff's land. The defendant, it was said, was entitled to chase the sheep off his own land, and if a trespass at all, it would be an involuntary trespass, as he called the dog back. This case is distinguished in *Beckwith* v. *Shordike* (1767), 4 Burr. 2092, where a defendant was held liable in trespass for his dog killing a deer, on the ground that the owner took the dog with him and was really the trespasser. See also *Mason* v. *Keeling* (1700), 1 Ld. Raym. 606, at p. 608, where Lord HOLT is made to say: "The law does not oblige the owner to keep the dog in his house; for if a dog break a neighbour's close, the owner will not be subject to an action for it," quoting *Millen* v. *Fawdry*, *supra*. Compare *per* WILLES, J., in *Read* v. *Edwards* (1864), 17 C. B. (N. S.) 245, at p. 261, and in *Cox* v. *Burbidge* (1863), 13 C. B. (N.S) 430; though the point did not really arise in *Read* v. *Edwards*, *supra*, as it was there held that the chasing of game was a mischievous propensity, and *scienter* was proved. See also *Brown* v. *Giles* (1823), 1 C. & P. 118, and *Sanders* v. *Teape* (1884), 51 L. T. 263, where a big dog jumped over a garden wall and alighted upon the plaintiff, who was digging a well.

(*u*) *R.* v. *Pratt* (1855), 4 E. & B. 860; *Dimmock* v. *Allenby*, cited in *Deane* v. *Clayton* (1816), 2 Marsh. at p. 582.

(*x*) *Read* v. *Edwards*, *supra*.

(*y*) See pp. 378 *et seq.*; *ante*.

(*z*) *Bunch* v. *Kennington* (1841), 1 Q. B. 679; *Boden* v. *Roscoe*, [1894] 1 Q. B. 608.

(*a*) See cases cited in notes (*b*) and (*c*), p. 396, *post*, and *Moore* v. *Clarke* (1898), 62 J. P. 522.

SECT. 1. At Common Law.

necessity (*b*) for the purpose of protecting the person, or saving property in peril at the moment of the act (*c*).

Protection of person.

A dog attacking anyone may be shot in self-defence, whether it is of a mischievous disposition or not, but to justify shooting even a ferocious dog the animal must be actually attacking the person at the time (*d*).

Protection of land.

In practice no question ever arises as to land from the impossibility of proof of necessity.

Protection of property other than land.

The property other than land must be valuable property, and in the case of animals includes cattle, sheep, or poultry, and all animals the subject of absolute property, and such as are the subject of a qualified property only, but probably game and other animals *feræ naturæ*, which are not the subject of a qualified property, are not included (*e*).

Malicious injury to dog.

A similar rule exists in criminal cases. It is no defence to a charge of unlawfully and maliciously killing, wounding or maiming a dog (*f*), that it was trespassing at the time; but if the accused proves that he *bonâ fide* believed that the act was necessary, and that he could save his property in no other way, he is entitled to be acquitted (*g*).

Dog spears, traps and spring guns.

858. The limitation placed by the law on the shooting of dogs does not extend to prevent the occupier of land from taking measures to protect his game in his absence. He may set dog spears in his woods, and if a dog trespasses, and is injured thereby, he need not prove that his methods were necessary in order to protect his rights to the game, as he was acting within his rights on his own

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(*b*) *Wright* v. *Ramscott* (1665), 1 Saund. 83; *Vere* v. *Cawdor* (1809), 11 East, 568; *Protheroe* v. *Mathews* (1833), 5 C. & P. 581.

(*c*) *Janson* v. *Brown* (1807), 1 Camp. 41; *Wells* v. *Head* (1831), 4 C. & P. 568; *Morris* v. *Nugent* (1836), 7 C. & P. 572; *Hanway* v. *Boultbee* (1830), 4 C. & P. 350; *Clark* v. *Webster* (1823), 1 C. & P. 104. Putting up a notice that trespassing dogs will be shot does not justify the shooting (*Corner* v. *Champneys* (1814), 2 Marsh. 584).

(*d*) *Morris* v. *Nugent*, *supra*; *Hanway* v. *Boultbee*, *supra*.

(*e*) Compare *Barrington* v. *Turner* (1681), 3 Lev. 28 (deer in a park); *Wadhurst* v. *Damme* (1604), Cro. Jac. 44 (rabbits in a warren); *Protheroe* v. *Mathews*, *supra* (deer in a park), which are all cases of animals reclaimed, and therefore property. *Vere* v. *Cawdor*, *supra*, is not, perhaps, a very definite authority either way, except that LE BLANC, J., expresses an opinion in favour of the view taken here. There is an *obiter dictum* of BLACKBURN, J., to the contrary effect in *Taylor* v. *Newman* (1863), 4 B. & S. 89, at p. 91: "A person might shoot even a valuable greyhound which was chasing a hare if the hare was in peril," but the question of property in the hare was not there raised. The only definite decision on the point that the authors can find is a judgment of Judge INGHAM in Penrith County Court (1881), 45 J. P. 83, where, after considering the authorities and statements in text-books, his Honour held that a trespassing dog may be shot where necessary to preserve animals the subject of property, but not to preserve animals *feræ naturæ*, such as rabbits.

(*f*) *I.e.*, under s. 41 of the Malicious Damage Act, 1861 (24 & 25 Vict. c. 97), set out at length *ante*, pp. 369, 370. As to setting traps for vermin, cats and dogs, see *Bryan* v. *Eaton* (1875), 40 J. P. 213.

(*g*) *Miles* v. *Hutchings*, [1903] 2 K. B. 714, commenting on *Daniel* v. *Janes* (1877), 2 C. P. D. 351, and *Smith* v. *Williams* (1892), 9 T. L. R. 9, which are now of doubtful authority. See also *Taylor* v. *Newman*, *supra*. As to the shooting of a trespassing dog not being cruelty, see *Armstrong* v. *Mitchell* (1903), 19 T. L. R. 525.

soil (*h*). But he must not so use his land as to tempt the dogs of others to destruction; thus if he sets traps baited with strong-smelling meat so near his neighbour's yard, or so near a highway where dogs may lawfully pass, that dogs are irresistibly drawn to the traps, he is liable in damages (*i*). And nothing will justify the setting of spring guns, man-traps, or other engines dangerous to human life and limb, and likely to inflict grievous harm (*k*).

SECT. 1. At Common Law.

SECT. 2.—*By Statute.*

SUB-SECT. 1.—*Injuries to Cattle and Sheep.*

859. The necessity of proving *scienter* where injury is caused by dogs worrying sheep and cattle has been abolished by statute (*l*).

Proof of *scienter* unnecessary.

The owner of a dog is liable in damages for injury done to any cattle by the dog. It is not necessary for the plaintiff to show a previous mischievous propensity in the dog, or the owner's knowledge of such previous propensity, or that the injury was attributable to neglect on the part of the owner (*m*).

Owner's liability.

Where any such injury has been done by a dog, the occupier of any house or premises where the dog was kept or permitted to live or remain at the time of the injury is presumed to be the owner of the dog, and is liable for the injury unless he proves that he was not the owner at that time (*n*). Where there are more occupiers than one in any house or premises let in separate apartments or lodgings, or otherwise, the occupier of the particular part of the house or premises in which the dog has been kept or permitted to live or remain at the time of the injury is presumed to be the owner of the dog (*o*).

Who is liable as owner.

If the damages claimed do not exceed five pounds they may be recovered under the Summary Jurisdiction Acts as a civil debt (*p*).

Recovery of damages.

The expression "cattle" in the Act of 1906 includes horses, mules, asses, sheep, goats, and swine (*q*).

Definition of "cattle."

(*h*) *Deane* v. *Clayton* (1817), 7 Taunt. 489; *Jordin* v. *Crump* (1841), 8 M. & W. 782.

(*i*) *Townsend* v. *Wathen* (1808), 9 East, 277. He would probably now also be liable under the Malicious Damage Act, 1861 (24 & 25 Vict. c. 97), or the Cruelty to Animals Acts; see pp. 409 *et seq.*, *post*.

(*k*) *Bird* v. *Holbrook* (1828), 4 Bing. 628. See, however, the earlier case of *Ilott* v. *Wilkes* (1820), 3 B. & Ald. 304, where the plaintiff was a trespasser and knew of the guns. See now the Offences against the Person Act, 1861 (24 & 25 Vict. c. 100), s. 31, and title CRIMINAL LAW AND PROCEDURE.

(*l*) Dogs Act, 1906 (6 Edw. 7, c. 32), s. 6, which re-enacts a similar provision contained in s. 1 of the repealed Dogs Act, 1865 (28 & 29 Vict. c. 60).

(*m*) Dogs Act, 1906 (6 Edw. 7, c. 32), s. 1 (1). It is no defence to the claim that the cattle were trespassing on the defendant's land at the time (*Grange* v. *Silcock* (1897), 13 T. L. R. 565). As to what is sufficient evidence of a dog killing sheep, see *Lewis* v. *Jones* (1884), 49 J. P. 198.

(*n*) *Ibid.*, s. 1 (2). This provision does not go so far as the corresponding repealed s. 2 of the Act of 1865, the important words "and that such dog was kept or permitted to live or remain in the said house or premises without his sanction or knowledge" being omitted from the exception. Compare *Gardner* v. *Hart* (1896), 44 W. R. 527.

(*o*) *Ibid.*, s. 1 (2).

(*p*) *Ibid.*, s. 1 (3).

(*q*) *Ibid.*, s. 7. This is an extension. The Act of 1865 was confined to sheep

SECT. 2. By Statute.

Prevention of cattle worrying.

Where a dog is proved to have injured cattle or chased sheep, it may be dealt with as a "dangerous dog" (*r*). The power of the Board of Agriculture and Fisheries to make orders with a view to prevent the worrying of cattle is dealt with below (*s*).

SUB-SECT. 2.—*Stray Dogs.*

Seizure of stray dogs.

860. A police officer may seize and detain (till the owner has claimed it and paid all expenses incurred by its detention) any dog found in a highway or place of public resort which he has reason to believe is a stray dog. If the dog wears a collar with an address on it, or the owner of the dog is known, the police must serve a notice in writing stating that the dog has been seized, and is liable to be sold or destroyed if not claimed within seven clear days after the service of such notice (*t*). After seven clear days, if the owner has not claimed the dog and paid all expenses, the dog may be sold, or destroyed in a manner to cause as little pain as possible.

No dog so seized may be given or sold for the purposes of vivisection.

Register of dogs seized.

The police must keep a register of all dogs so seized which are not transferred to an establishment for the reception of stray dogs, and must not transfer dogs to such an establishment unless a similar register is kept there. The register is to contain a brief description of the dog, the date of seizure, and the manner in which the dog is disposed of, and is to be open to inspection at all reasonable times by the public on payment of one shilling (*u*).

Expenses incurred by police.

All expenses incurred by the police in connection with stray dogs are defrayed out of the police fund, and any money received by them on such account is to be paid to such fund (*v*). It is the duty of the police or other person having charge of any dog detained as above to feed and maintain it properly (*w*).

Duty of person finding stray dog.

861. Any person taking possession of a stray dog must forthwith return it to its owner, or give notice in writing to the police giving a description of the dog, and stating where it was found and where it is being detained, under a penalty not exceeding forty shillings (*x*).

Board of Agriculture and Fisheries.

The power of the Board of Agriculture and Fisheries to make orders for the seizure of stray dogs, and for keeping dogs under control, and regulating the wearing of collars, is dealt with below (*y*).

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and cattle, which was held to include horses, see *Wright* v. *Pearson* (1869), L. R. 4 Q. B. 582.

(*r*) Under s. 2 of the Dogs Act, 1871 (34 & 35 Vict. c. 56); Dogs Act, 1906 (6 Edw. 7, c. 32), s. 1 (4). See p. 399, *post*.

(*s*) See pp. 400 *et seq.*, *post*.

(*t*) Service of the notice may be made either personally, or by leaving it at the address of the person, or by sending it by prepaid postal letter (Dogs Act, 1906 (6 Edw. 7, c. 32), s. 3 (3)).

(*u*) Dogs Act, 1906 (6 Edw. 7, c. 32), s. 3 (1), (2), (4), (5), (6), (7).

(*v*) *Ibid.*, s. 3 (9).

(*w*) *Ibid.*, s. 3 (8).

(*x*) *Ibid.*, s. 4.

(*y*) See pp. 400 *et seq.*, *post*.

SUB-SECT. 3.—*Dangerous Dogs.* SECT. 2. By Statute.

862. Any court of summary jurisdiction may order that a dog which appears to be dangerous and not kept under proper control be kept by the owner under proper control or destroyed; the penalty for failing to comply with such order is a fine not exceeding twenty shillings for every day during which such non-compliance continues (*z*). The order for destroying the dog may be made without giving the owner the option of keeping it under proper control (*a*). Dangerous dog not kept under proper control.

In the metropolitan area, upon complaint that a dog has bitten or attempted to bite any person, when it appears to a magistrate that such dog ought to be destroyed, the magistrate may direct the dog to be destroyed, and any police constable may destroy the same accordingly (*b*). Destruction of dangerous dogs in metropolis.

And it is an offence to suffer to be at large any unmuzzled ferocious dog, or to set on or urge any dog or other animal to attack, worry, or put in fear, any person, horse or other animal in any thoroughfare or public place in the metropolis, or in any street in a town to which the Town Police Clauses Act, 1847, applies; and a constable may take into custody without warrant any person who commits this offence in his view (*c*). Ferocious dog at large.

SUB-SECT. 4.—*Mad Dogs.*

863. A local authority may, if a mad dog, or a dog suspected of being mad, is found within their jurisdiction, make and vary orders placing restrictions, during a prescribed period throughout the whole or part of their jurisdiction, on all dogs not being under the control (*d*) of any person. There is a penalty not exceeding twenty shillings for contravening the order, and dogs found at large in contravention of the order may be treated as stray dogs (*e*). Orders by local authorities.

It is an offence for the owner of any dog to suffer it to go at large knowing or having reasonable ground for believing it to be in a rabid state, or to have been bitten by any dog or other animal in a rabid state, or, after public notice given by any justice directing dogs to be confined on account of suspicion of canine madness, to suffer any dog to be at large, during the time specified, in any street of a town to which the Town Police Clauses Act, 1847 (*f*), applies. Offences under Town Police Clauses Act, 1847.

(*z*) Dogs Act, 1871 (34 & 35 Vict. c. 56), s. 2. Where a dog is proved to have injured cattle or chased sheep, it may be dealt with under this section as a dangerous dog (Dogs Act, 1906 (6 Edw. 7, c. 32), s. 1 (4)). Presumably the word "owner" in this section has not the extended meaning given to it under s. 1 of the Dogs Act, 1906, p. 397, *ante*. Whether a dog is under control or not is a question of fact, not of law (*Wren* v. *Pocock* (1876), 40 J. P. 646; *R.* v. *Huntingdon Justices* (1879), 4 Q. B. D. 522; compare *Ex parte Hay* (1886), 3 T. L. R. 24). It is not necessary to prove the owner's knowledge that the dog is dangerous before making an order under this section (*Parker* v. *Walsh* (1885), 1 T. L. R. 583). "Dangerous" includes dangerous to animals (*Williams* v. *Richards*, [1907] 2 K. B. 88).

(*a*) *Pickering* v. *Marsh* (1874), 43 L. J. (M. C.) 143; *R.* v. *Dymock* (1901), 17 T. L. R. 593.

(*b*) Metropolitan Streets Act, 1867 (30 & 31 Vict. c. 134), s. 18.

(*c*) Metropolitan Police Act, 1839 (2 & 3 Vict. c. 47), s. 54; Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), s. 28.

(*d*) It is a question of fact whether the dog is under control (see note (*z*), *supra*).

(*e*) Dogs Act, 1871 (34 & 35 Vict. c. 56), s. 3. See p. 398, *ante*.

(*f*) 10 & 11 Vict. c. 89, s. 28.

SECT. 2. By Statute. Metropolis.

Within the metropolitan area the police have power to destroy any dog (or other animal) reasonably suspected of being in a rabid state, or of having been bitten by any animal in a rabid state, and the owner who permits any such dog or animal to go at large after having information or reasonable ground for believing that it is in a rabid state or has been bitten by any dog (or other animal) in a rabid state, is liable to a penalty of not more than five pounds (*g*).

SUB-SECT. 5.—*Muzzling of Dogs.*

Muzzling orders in metropolis.

864. In the metropolis the Commissioner of Police may issue a notice requiring any dog while in the streets and not led by some person to be muzzled. The police may detain, and if not claimed within three clear days may sell or destroy, dogs found loose in the streets and unmuzzled during the currency of the notice; but if a dog has a collar and an address on it, they must send a letter to the address stating that the dog has been taken possession of (*h*).

SUB-SECT. 6.—*Burial of Carcases.*

Unburied carcases of cattle.

865. Any person who knowingly and without reasonable excuse permits the carcase of any head of cattle belonging to him to remain unburied in a field or other place to which dogs can gain access, is liable to a fine not exceeding forty shillings (*i*).

SUB-SECT. 7.—*Use of Dogs for Draught.*

Use of dogs for draught.

866. No dog may be used on any public highway in any part of the United Kingdom for the purpose of drawing or helping to draw any cart, carriage, truck or barrow, under a penalty not exceeding forty shillings, or five pounds for a subsequent offence (*j*).

SUB-SECT. 8.—*Dogs Orders.*

Powers of Board of Agriculture and Fisheries.

867. In addition to the statutory provisions as to the regulation and control of dogs, the Board of Agriculture and Fisheries is empowered to make Orders, which have all the force of statutory enactments, for the following purposes (*k*):—

(*g*) Metropolitan Police Act, 1839 (2 & 3 Vict. c. 47), s. 61. As to the Rabies Order, see p. 402, *post*.

(*h*) Metropolitan Streets Act, 1867 (30 & 31 Vict. c. 134), s. 18. As to the power of the Board of Agriculture and Fisheries to make Orders as to muzzling dogs, see p. 401, *post*.

(*i*) Dogs Act, 1906 (6 Edw. 7, c. 32), s. 6. The object of this provision is to prevent the owners of cattle, who are given a remedy for injury done to their cattle by dogs, from encouraging in dogs the propensity to trespass, by leaving carcases in places which are accessible to dogs.

(*j*) Cruelty to Animals Act, 1854 (17 & 18 Vict. c. 60), s. 2, extending to the whole kingdom a similar provision of the Metropolitan Police Act, 1839 (2 & 3 Vict. c. 47), s. 56.

(*k*) The empowering statutes are the Diseases of Animals Act, 1894 (57 & 58 Vict. c. 57), s. 22 (xxx.), (xxxi.), and the Dogs Act, 1906 (6 Edw. 7, c. 32), s. 2. The Orders now in force are the Rabies Order, 1897 (Ord. 5578, March 23, 1897), the Importation of Dogs Order, 1901 (Ord. 6396 of 1901), and the Dogs Order, 1906 (Ord. 7124, October 22, 1906), which came into operation on January 1, 1907. It is not possible in these pages to give more than a short summary of the main provisions of these Orders, copies of which may be obtained from the King's Printers.

(1) For prescribing and regulating the muzzling of dogs and the keeping of dogs under control (*l*);

(2) For prescribing and regulating the seizure, detention, and disposal (including slaughter) of stray dogs, and of dogs not muzzled, and of dogs not kept under control, and the recovery from the owners of dogs of the expenses incurred in respect of their detention (*m*);

(3) For prescribing and regulating the wearing by dogs, while in a highway or in a place of public resort, of a collar with the name and address of the owner inscribed on the collar or on a plate or badge attached thereto (*n*);

(4) With a view to the prevention of worrying of cattle, for preventing dogs or any class of dogs from straying during all or any of the hours between sunset and sunrise (*o*).

868. The effect of the Orders made under these powers, so far as they are now in force, is as follows:— Orders now in force.

A local authority (*p*) may make regulations for prescribing and regulating the wearing by dogs, while in a highway or place of public resort (*q*), of a collar with the name and address of the owner inscribed on it, or on a plate or badge attached thereto. Such regulations are not to apply to any pack of hounds (*r*), or to any dog while being used for sporting purposes, or for the capture or destruction of vermin, or for the driving or tending of cattle or sheep. Any local authority making such regulations must forthwith send two copies thereof to the Board of Agriculture and Fisheries, who may disallow any regulation which they are satisfied on inquiry is objectionable (*s*). Wearing collars in public places.

If a dog is found in a highway or place of public resort without the prescribed collar, it may be seized and treated as a stray dog (*t*), and the owner of the dog, and the person for the time being in charge thereof, and the person allowing it to be in the highway or in the place of public resort in contravention of the regulations, is, each in respect of his own acts and defaults, guilty of an offence under the Diseases of Animals Act, 1894, and is liable on summary conviction to a fine not exceeding twenty pounds, or, if the offence Penalty.

(*l*) Diseases of Animals Act, 1894 (57 & 58 Vict. c. 57), s. 22 (xxx.).

(*m*) *Ibid.*, s. 22 (xxxi.).

(*n*) Dogs Act, 1906 (6 Edw. 7, c. 32), s. 2 (1) (a).

(*o*) *Ibid.*, s. 2 (1) (b). For the meaning of "sunset" and "sunrise," see title TIME. Orders made in respect of the matters comprised in headings (3) and (4) may provide that an offending dog may be seized and treated as a stray dog, as to which see p. 398, *ante*. No order under heading (4) has yet been issued.

(*p*) The local authorities are those intrusted with the administration of the Diseases of Animals Acts, see p. 429, *post*.

(*q*) The expressions "highway" and "place of public resort" are defined to include any place to which the public have access whether on payment or otherwise.

(*r*) These words do not exempt a hound puppy out at walk, unless expressly so stated in the regulations.

(*s*) Dogs Order, 1906, s. 1; the provisions of the Order are to be executed and enforced by the local authority (s. 5). Up to March, 1907, over one hundred local authorities had made regulations under the order as to the wearing of collars by dogs.

(*t*) *Ibid.*, s. 2. And see p. 398, *ante*.

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is committed in relation to more than four dogs, not exceeding five pounds for each dog (*u*).

The power of seizing an offending dog and of prosecuting an offender is vested in the police and in the inspectors appointed under the Diseases of Animals Act, 1894 (*v*).

Rabies Order.

869. Every person having or having had in his possession a dog affected with or suspected of rabies, must with all practicable speed give notice thereof to a local police constable, who must forthwith telegraph the information to the Secretary of the Board of Agriculture and Fisheries (*x*), and must also inform the local inspector, who must at once report to the local authority (*y*).

Slaughter of diseased or suspected dog.

The local authority must cause to be slaughtered every dog within their district which is diseased or suspected, or which has been bitten by a diseased or suspected dog (*z*), and the owner or person in charge of the dog must give them all reasonable facilities for that purpose (*a*).

A veterinary inspector's certificate that an animal is or was affected with rabies is conclusive (*b*).

Preventive measures.

A local authority must make provision for securing the isolation of dogs which have been exposed to the infection of rabies, and may make regulations for the disinfection of places and things used by a diseased or suspected dog, and may also give public warning by advertisement or otherwise of the existence of rabies in any place (*c*). Every dog is deemed to have been exposed to infection which has been in the same shed, stable, building, kennel, field or other place as, or otherwise in contact with, any diseased or suspected dog (*d*).

Importation of dogs.

870. A licence from the Board of Agriculture and Fisheries is required before a dog can be brought into this country from abroad (*e*). Conditions may be attached to the grant of a licence; these principally relate to the movement of the dog when landed, its being placed in a proper hamper etc. during transit, and to muzzling (*f*). An imported dog must, for a period of six calendar

(*u*) Dogs Order, 1906, s. 3; Diseases of Animals Act, 1894 (57 & 58 Vict. c. 57), s. 51.

(*v*) Dogs Order, 1906, s. 4, which makes dogs "animals" for the purposes of the Diseases of Animals Act, 1894, ss. 43, 44 (powers of police and inspectors), see pp. 431, 432, *post*.

(*x*) The present address of the Board is 4, Whitehall Place, London, S.W.

(*y*) Rabies Order, 1897, s. 1. For the meaning of "local authority," see note (*p*), p. 401, *ante*.

(*z*) Rabies Order, 1897, s. 4.

(*a*) *Ibid.*, s. 5. The penalty for an offence against this section is the same as that for allowing a dog to be at large without a collar, see p. 401, *ante*.

(*b*) *Ibid.*, s. 6 (3).

(*c*) *Ibid.*, ss. 3, 8, 9, 14. Offences against the Rabies Order are to be treated as offences against the Diseases of Animals Act, 1894. They may be punished on summary conviction by the penalties indicated above (p. 401) in the case of a collarless dog. *Ibid.*, s. 22.

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

(*e*) A licence is not required in respect of a dog brought from Ireland, the Channel Islands, or the Isle of Man (Importation of Dogs Order, 1901, s. 1).

(*f*) Importation of Dogs Order, 1901, ss. 1, 3. This order is to be executed and enforced by the local authority.

months after its landing, be detained and isolated at its owner's expense upon the premises of a veterinary surgeon previously approved by the Board of Agriculture and Fisheries (*g*) (except in the case of a *bonâ fide* performing dog, or of a dog which is intended to be exported within forty-eight hours after its landing (*h*)), and if it is not so detained and isolated, it may be seized by an inspector of the Board, and detained and isolated for a similar period by the Board; and if the owner does not within ten days after the expiration of the period of detention claim the dog and pay the expenses incurred in respect thereof, the Board may destroy or dispose of the dog (*i*).

Penalties.

Contravention of these requirements is punishable on summary conviction by a fine not exceeding twenty pounds, or, if the offence is committed in respect of more than four dogs, not exceeding five pounds for each dog. Not only may the owner of the dog be made responsible, but also, each in respect of his own acts and defaults, the owner and the charterer and the master of the ship from which the dog is landed, the person for the time being in charge of the dog, the person causing, directing, or permitting the landing, the person landing the dog, and the consignee or other person receiving or keeping it with knowledge of the contravention (*k*).

A person who lands or attempts to land a dog unlawfully is also liable to be dealt with under the Customs Acts for importing or attempting to import goods the importation whereof is forbidden, and the dog may be forfeited (*l*).

SUB-SECT. 9.—*Dog Licences.*

The licence.

871. Every person who keeps a dog of whatever description or denomination above the age of six months, must take out an annual licence, which costs seven shillings and sixpence, and which commences on the day on which it is granted and terminates on the following 31st of December (*m*).

Penalty for not having or not producing licence.

Everyone who keeps a dog without a licence, or keeps a greater number of dogs than he is licensed to keep, or who does not produce his licence to an excise officer or constable within a reasonable time after request, is liable to a penalty of five pounds (*n*).

Persons requiring licence.

Every person in whose custody, charge, or possession, or in whose

(*g*) Importation of Dogs Order, 1901, s. 2 (1), (2).
(*h*) *Ibid.*, s. 2 (3).
(*i*) *Ibid.*, s. 7.
(*k*) *Ibid.*, s. 12; Diseases of Animals Act, 1894 (57 & 58 Vict. c. 57), s. 51.
(*l*) *Ibid.*, s. 8. See also Customs Consolidation Act, 1876 (39 & 40 Vict. c. 36), s. 42; the Diseases of Animals Act, 1894 (57 & 58 Vict. c. 57), s. 56; the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 53; and see title REVENUE.
(*m*) Dog Licences Act, 1867 (30 & 31 Vict. c. 5), ss. 3, 5, 10. The cost of the licence was increased from five shillings to seven shillings and sixpence by the Customs and Inland Revenue Act, 1878 (41 & 42 Vict. c. 15), s. 17. Although the licence commences on the day it is granted, a defendant cannot purge his offence of keeping a dog without a licence at 12.40 p.m. by taking out a licence at 1.10 p.m. (*Campbell* v. *Strangeways* (1877), 3 C. P. D. 105).
(*n*) Dog Licences Act, 1867 (30 & 31 Vict. c. 5), ss. 8, 9. The Court may award costs and mitigate the penalty to such an amount as it thinks fit (Customs and Inland Revenue Act, 1878 (41 & 42 Vict. c. 15), s. 23).

SECT. 2. By Statute.

house or premises any dog is found or seen is to be deemed to be the person who keeps such dog, unless the contrary be proved; and the owner or master of hounds is to be deemed to be the person keeping the same (*o*).

Burden of proof as to dog's age.

Upon the hearing of an information for a penalty for keeping a dog without a licence, the proof of the age of the dog lies upon the defendant (*p*).

The offence is not purged by taking out a licence after discovery of the fact that a dog is being kept without a licence (*q*).

Hound whelps.

872. No licence is required in respect of any hound under the age of twelve months which has never been entered in, or used with, any pack of hounds where the owner or master has taken out proper licences for all the hounds entered in any pack by him (*r*); nor for a dog kept and used solely by a blind person for his or her guidance (*s*); nor for dogs kept and used solely for the purpose of tending sheep or cattle on a farm or by a shepherd in the exercise of his calling. The occupier of a sheep farm on uninclosed land may, on filling up a declaration, with the previous consent of a petty sessional court (*t*), obtain a certificate of exemption for not more than two dogs if he owns four hundred sheep or less on uninclosed land, or for three dogs if he owns more than four hundred; and if his sheep number one thousand, then for a fourth dog; and for every five hundred sheep over one thousand for an additional dog. Provided that he cannot obtain exemption in respect of more than eight dogs kept on the farm (*u*).

Blind persons' dogs exempt.

Shepherds' dogs.

Game licence.

873. Every person, before he uses any dog, gun, or any other means whatever for taking, killing, or pursuing any game, or any woodcock, snipe, quail or landrail, or any coney or deer, must take

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(*o*) Dog Licences Act, 1867 (30 & 31 Vict. c. 5), s. 8.

(*p*) Customs and Inland Revenue Act, 1878 (41 & 42 Vict. c. 15), s. 19.

(*q*) *Campbell* v. *Strangeways* (1877), 3 C. P. D. 105.

(*r*) Customs and Inland Revenue Act, 1878 (41 & 42 Vict. c. 15), s. 20.

(*s*) *Ibid.*, s. 21.

(*t*) This is added by the Dogs Act, 1906, s. 5, and compare the Dogs Act Rules, 1906. The Court is to be the Court having jurisdiction where the dog is kept (r. 1).

(*u*) Customs and Inland Revenue Act, 1878 (41 & 42 Vict. c. 15), s. 22. It is an offence under this section to deliver an untrue declaration, and to refuse to produce a certificate. Upon a summons for keeping a dog without a licence, a certificate is a defence, even if wrongfully obtained, and the burden of proof is upon the prosecution to show that the dog kept is not a sheep or cattle dog (*James* v. *Nicholas* (1886), 50 J. P. 292), but a declaration is not a defence (*Graham* v. *Haig* (1894), 58 J. P. 835). The justices must convict even if they think the defendant entitled to a certificate (*Phillips* v. *Evans*, [1896] 1 Q. B. 305). As to a previous conviction and reduction of fine, see *Murray* v. *Thompson* (1888), 22 Q. B. D. 142.

The result of s. 22 and the Dogs Act Rules, 1906, is practically to transfer the power of exemption from the Inland Revenue authorities to the magistrates. In the absence of opposition, the duty of the magistrates to give their consent appears to be merely ministerial. They cannot require the attendance of the applicant unless the application is opposed *and* the Court considers his appearance necessary. The "and" in s. 5 (2) of the Act and r. 5 appears to be conjunctive; so that in the absence of opposition they cannot require appearance even if they consider it necessary. No fees are payable under the Act; but under r. 10 the Court may allow other just and reasonable costs in a contested case.

out a game licence, under a penalty of twenty pounds (*x*). No such licence is, however, necessary for pursuing and killing hares by coursing with greyhounds or by hunting with beagles or other hounds; or for pursuing and killing deer by hunting with hounds (*a*). SECT. 2. By Statute

SUB-SECT. 10.—*Dog Stealing.*

874. To steal a dog or obtain a dog by false pretences is not an offence at common law (*b*), nor is it to this day, in the case of a first offence, indictable. Dog stealing is, however, punishable upon summary conviction before two justices with six months' imprisonment or a fine not exceeding twenty pounds above the value of the dog. A subsequent offence is an indictable misdemeanour punishable with eighteen months' imprisonment (*c*). Theft of dog.

Unlawful possession of a stolen dog or its skin is punishable summarily before the justices with a fine not exceeding twenty pounds; a subsequent offence is an indictable misdemeanour punishable with eighteen months' imprisonment (*d*). Possession of stolen dog or its skin.

Corruptly to take any money or reward under pretence of aiding the recovery of any stolen dog is a misdemeanour punishable with eighteen months' imprisonment (*e*). Taking money to restore stolen dogs.

A justice of the peace may make an order restoring a dog found in the possession or on the premises of any person to the owner (*f*).

To advertise publicly a reward for the return of a dog, using words purporting that no questions will be asked, renders the advertiser liable to forfeit fifty pounds for every such offence to any person who will sue, *i.e.*, to a common informer (*g*).

Part VII.—Wild Birds.

SECT. 1.—*Offences.*

875. Wild birds are specially protected by a series of enactments known as the Wild Birds Protection Acts, 1880 to 1904 (*h*), the Close time for all wild birds.

(*x*) Game Licences Act, 1860 (23 & 24 Vict. c. 90), s. 4; and see title GAME AND SPORT.

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

(*b*) See p. 368, *ante*.

(*c*) The Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 18. An indictment for a second offence under this section must set out the previous conviction before the two justices.

(*d*) *Ibid.*, s. 19. See also s. 22.

(*e*) *Ibid.*, s. 20.

(*f*) [illegible], s. 102. The words "any property whatsoever" in the section have been held to include a dog (*Mirams* v. *Our Dogs Publishing Co.*, [1901] 2 K. B. 564). If the action is against a newspaper it must be brought within six months and with the assent of the Attorney-General or Solicitor-General (Larceny (Advertisements) Act, 1870 (33 & 34 Vict. c. 65), s. 3).

(*h*) These Acts are the following:—Wild Birds Protection Act, 1880 (43 & 44 Vict. c. 35); Wild Birds Protection Act, 1881 (44 & 45 Vict. c. 51); Wild Birds Protection Act, 1894 (57 & 58 Vict. c. 24); Wild Birds Protection Act, 1896 (59 & 60 Vict. c. 56); Wild Birds Protection Act, 1902 (2 Edw. 7, c. 6); Wild

SECT. 1. Offences.

principal effect of which is to establish a close time for all wild birds from March 1 to August 1 in every year. Any person who between those dates knowingly and wilfully shoots, or attempts to shoot, or uses any boat for the purpose of shooting or causing to be shot, any wild bird, or uses any lime, trap, snare, net, or other instrument for taking any wild bird, or exposes or offers for sale or has in his control or possession after March 15, any wild bird recently killed or taken, is guilty of an offence, and is liable to a penalty not exceeding one pound in respect of any wild bird included in the schedule (*i*) to the Act of 1880, and, in the case of any other wild bird, to a reprimand and payment of costs for the first offence, and to a penalty not exceeding five shillings for every bird, in addition to costs, for subsequent offences (*k*).

Exemption of owner or occupier of land.

There is an exemption in favour of the owner or occupier of land, or anyone authorised by him, who kills or takes on such land any wild bird not included in the schedule (*l*).

Birds Protection Act, 1904 (4 Edw. 7, c. 4); Wild Birds Protection (St. Kilda) Act, 1904 (4 Edw. 7, c. 10).

In addition, the Wild Animals in Captivity Protection Act, 1900 (63 & 64 Vict. c. 33) (see p. 410, *post*), applies to birds.

The principal Act (that of 1880) excluded St. Kilda, but the Wild Birds Protection (St. Kilda) Act, 1904 (4 Edw. 7, c. 10), applied it to that island with this variation: that the schedule to the principal Act is to be read as if the fork-tailed petrel and the St. Kilda's wren were inserted therein, and the fulmar, gannet, guillemot, puffin, and razorbill were deleted therefrom.

(*i*) The birds in the schedule are—

American quail.	Kittiwake.	Sealark.
Auk.	Lapwing.	Seamew.
Avocet.	Loon.	Sea parrot.
Bee-eater.	Mallard.	Sea swallow.
Bittern.	Marrot.	Shearwater.
Bonxie.	Merganser.	Shelldrake.
Colin.	Murre.	Shoveller.
Cornish chough.	Night-hawk.	Skua.
Coulterneb.	Night-jar.	Smew.
Cuckoo.	Nightingale.	Snipe.
Curlew.	Oriole.	Solan goose.
Diver.	Owl.	Spoonbill.
Dotterel.	Ox bird.	Stint.
Dunbird.	Oyster catcher.	Stone curlew.
Dunlin.	Peewit.	Stonehatch.
Eider duck.	Petrel.	Summer snipe.
Fern-owl.	Phalarope.	Tarrock.
Fulmar.	Plover.	Teal.
Gannet.	Ploverspage.	Tern.
Goatsucker.	Pochard.	Thick knee.
Godwit.	Puffin.	Tystey.
Goldfinch.	Purre.	Whaup.
Grebe.	Razorbill.	Whimbrel.
Greenshank.	Redshank.	Widgeon.
Guillemot.	Reeve or Ruff.	Wild duck.
Gull (except Black-backed gull).	Roller.	Willock.
	Sanderling.	Woodcock.
Hoopoe.	Sandpiper.	Woodpecker.
Kingfisher.	Scout.	

to which "Lark" is added by the Act of 1881 (44 & 45 Vict. c. 51), s. 2. As to the application of this schedule to the isle of St. Kilda, see last note.

(*k*) Act of 1880 (43 & 44 Vict. c. 35), s. 3.

(*l*) *Ibid.* Where the accused, with the authority of the occupier of land, shot thereon at a sparrow match, sparrows captured on other land without the authority

Defences.

It is a defence to a charge of exposing or offering for sale or having the control or possession of any wild bird recently killed, to prove that the killing of the bird, if in a place to which the Act extends, was lawful at the time when and by the person by whom it was killed, or that the bird was killed in some place to which the Act does not extend; and its importation from such a place is evidence of this until the contrary is proved (*m*).

Pole traps etc. prohibited.

It is an offence to fix or place, or knowingly allow to be fixed or placed, on a pole, tree, or cairn of stones or earth, any spring, trap, gin, or other similar instrument calculated to cause bodily injury to any wild bird coming in contact therewith; the penalty is not to exceed forty shillings for the first offence, and for a subsequent offence five pounds (*n*).

Sand-grouse.

The sand-grouse is an absolutely protected bird. It is illegal at any time, knowingly or with intent, to kill, wound, or take any sand-grouse, or to expose or offer for sale any sand-grouse killed or taken in the United Kingdom. The penalty, on summary conviction, is a sum not exceeding one pound for every bird so killed, wounded, or taken, or exposed or offered for sale, together with the costs of conviction (*o*).

Powers of Secretary of State.

876. The Secretary of State (*p*) upon the application of a county council (*q*), or of the council of a county borough (*r*), may by order—

Extension of close time.

(1) Extend or vary the time during which the killing and taking of any wild birds is prohibited, that is to say, extend or vary the close time as between March 1 and August 1 (*s*);

Absolute protection for certain birds.

(2) Prohibit (for special reasons mentioned in the application of the council) the taking and killing of any particular kind of wild bird during the whole or any part of the other months of the year, or the taking or killing of all wild birds in particular places during the whole or any part of such other months (*t*);

Exemption of certain districts.

(3) Exempt any county or parts of a county from the operation of the Acts as to all or any wild birds (*u*);

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of the owners or occupiers of the land on which they were captured, it was held that this exemption did not apply, and that they were rightly convicted (*R.* v. *Gilham* (1885), 52 L. T. 326).

(*m*) These defences are an amendment of s. 3 of the principal Act by s. 1 of the Act of 1881, as a result of *Taylor* v. *Rogers* (1881), 50 L. J. (M. C.) 132. The exception in the Act of 1880 applied to birds "killed or taken," but the amending section applies only to birds "killed." The result is that it is now no defence to a charge of exposing for sale birds recently taken to prove they were imported from abroad; see *Green* v. *Carstang* (1901), 66 J. P. 102 (live ravens).

(*n*) Wild Birds Protection Act, 1904 (4 Edw. 7, c. 4), s. 1. This section applies to any wild bird whatever, and is not confined to the wild birds scheduled to the principal Act. Nor is there a saving clause for owners and occupiers of land, as in s. 3 of the Act of 1880.

(*o*) Sand-grouse Protection Act, 1888 (51 & 52 Vict. c. 55), s. 1, continued by Expiring Laws Continuance Act, 1906 (6 Edw. 7, c. 51).

(*p*) *I.e.*, the Home Secretary.

(*q*) Originally the justices in quarter sessions. The duties passed to the county councils by the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 3.

(*r*) Wild Birds Protection Act, 1896 (59 & 60 Vict. c. 56), s. 3.

(*s*) Wild Birds Protection Act, 1880 (43 & 44 Vict. c. 35), s. 8.

(*t*) Wild Birds Protection Act, 1896 (59 & 60 Vict. c. 56), s. 1.

(*u*) Wild Birds Protection Act, 1880 (43 & 44 Vict. c. 35), s. 9. By the Wild

SECT. 1. Offences.

Protection of wild birds' eggs.

(4) Prohibit the taking or destroying of wild birds' eggs, or of any specified kind of wild birds' eggs, in any year or years, in any place or places in the county, and may extend the Act within the county to any wild birds not included in the schedule (*x*).

To take or destroy, or incite others to take or destroy, the eggs of any species of wild birds within the area specified in such order, or the eggs of any species of wild birds named in the order, is punishable with a penalty not to exceed one pound for every egg taken or destroyed (*y*).

Public notice of orders made by Secretary of State.

The council of every administrative county and of every county borough which has applied for and obtained an order must in every year give public notice of any order which is in force in any place within their county or borough during the three weeks preceding the commencement of the period of the year during which the order operates, by advertising it in two local newspapers circulating in or near that place, and by posting notices of the order in conspicuous spots within and near the place where it operates (*z*).

SECT. 2.—*Prosecution of Offenders.*

Name and address of offender.

877. Any person may demand the name and address of an offender. A refusal to give the information or the giving of incorrect information is in itself a distinct offence punishable by an additional penalty, not exceeding ten shillings (*a*).

Offences committed on high seas etc.

Offences committed on the high seas within the jurisdiction of the Admiralty are to be deemed to have been committed upon any land in the United Kingdom, and offences committed on boundary waters between counties may be the subject of proceedings in either county (*b*).

All offences are to be prosecuted summarily (*c*).

Forfeiture of birds, eggs and traps.

In addition to any penalty, the Court may order any wild bird or wild bird's egg in respect of which an offence has been committed to be forfeited and disposed of as the Court thinks fit (*d*); and

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Birds Protection Order, 1906 (January 30), those parts of the county of Devon comprised within the limits of the Axe, Exe, Dart, Teign, and Taw and Torridge fishery districts are exempted as regards the shag and cormorant.

(*x*) Wild Birds Protection Act, 1894 (57 & 58 Vict. c. 24), ss. 2, 3. Application under this Act must specify the limits of the places, the particular species of wild birds, and the reasons why the application is made. By s. 3 of the Act of 1896 the powers of a county council under this Act are exercisable by the council of a county borough.

(*y*) Act of 1894 (57 & 58 Vict. c. 24), s. 5. There have been many orders of local application made under this authority; they are enumerated in the annual volumes of Statutory Rules and Orders, and copies of most of them can be purchased from the King's Printers. But as they vary from time to time, the best course is to procure a copy of the order in force from the clerk of the particular county council.

(*z*) *Ibid.*, s. 4; Act of 1896 (59 & 60 Vict. c. 56), s. 3. But a prosecution can be instituted before such notice has been given (*Duncan* v. *Knill* (1907), 123 L. T. Jour., 13).

(*a*) Act of 1880 (43 & 44 Vict. c. 35), s. 4.

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

(*c*) *Ibid.*, s. 5; Act of 1904 (4 Edw. 7, c. 4), s. 2.

(*d*) Act of 1902 (2 Edw. 7, c. 6), s. 1.

further, upon a conviction under either the Act of 1880 or the Act of 1896, may order any trap, net, snare, or decoy bird used for taking any wild bird to be forfeited (*e*). SECT. 2. Prosecution of Offenders.

Part VIII.—Cruelty to Animals.

SECT. 1.—*General Offences.*

878. It is a statutory offence (*f*) cruelly to beat, ill-treat, overdrive (*g*), abuse, or torture any animal, or to cause or procure any of these acts to be done (*h*). "Animal" here means any horse, mare, gelding, bull, ox, cow, heifer, steer, calf, mule, ass, sheep, lamb, hog, pig, sow, goat, dog, cat, or any other domestic animal of any kind or species whatever, and whether a quadruped or not (*i*). A person may be charged and convicted on one summons with having cruelly ill-treated a number of animals, for instance five cows, on a certain date. It is not necessary to have a separate summons in respect of each animal (*k*). Ill-treating domestic animals.

It has been held that the above enactment does not apply to wild animals reclaimed or in captivity, and that, therefore, a conviction under it cannot be maintained for cruelty to parrots (*l*), a tame seagull (*m*), caged lions (*n*), or wild rabbits caught in nets and kept in boxes and fed for five or six days before being coursed (*o*); though a fighting cock (*p*), and linnets kept in captivity and trained to act as decoys (*q*), have been decided to be domestic animals for this purpose, and it has been suggested that trained elephants and leopards and otters kept and trained to hunt and fish are also domestic (*r*).

(*e*) Act of 1896 (59 & 60 Vict. c. 56), s. 4.

(*f*) The various Acts applicable to this subject are as follows:—Cruelty to Animals Act, 1849 (12 & 13 Vict. c. 92); Cruelty to Animals Act, 1854 (17 & 18 Vict. c. 60); Cruelty to Animals Act, 1876 (39 & 40 Vict. c. 77) (vivisection); Drugging of Animals Act, 1876 (39 Vict. c. 13); Injured Animals Act, 1907 (7 Edw. 7, c. 5); Wild Animals in Captivity Protection Act, 1900 (63 & 64 Vict. c. 33).

(*g*) The word "overdrive" also signifies "override"; see s. 29 of the Act of 1849 (the principal Act).

(*h*) Act of 1849 (12 & 13 Vict. c. 92), s. 2. Setting cocks to fight, if they are hurt, is an offence (*Budge* v. *Parsons* (1863), 3 B. & S. 382); so is cutting cocks' combs (*Murphy* v. *Manning* (1877), 2 Ex. D. 307); but leaving an injured horse to die in agony is not an offence (*Everitt* v. *Davies* (1878), 38 L. T. 360; *Powell* v. *Knight* (1878), 38 L. T. 607, a case of an injured dog).

(*i*) *Ibid.*, s. 29, as extended by s. 3 of the Act of 1854.

(*k*) *R.* v. *Cable*, [1906] 1 K. B. 719. See also *Rodgers* v. *Richards*, [1892] 1 Q. B. 555.

(*l*) *Swan* v. *Saunders* (1881), 44 L. T. 424.

(*m*) *Yates* v. *Higgins*, [1896] 1 Q. B. 166.

(*n*) *Harper* v. *Marcks*, [1894] 2 Q. B. 319.

(*o*) *Aplin* v. *Porritt*, [1893] 2 Q. B. 57.

(*p*) *Budge* v. *Parsons* (1863), 3 B. & S. 382; *Allen* v. *Small*, [1904] L. R. 2 Ir. 705.

(*q*) *Colam* v. *Pagett* (1884), 12 Q. B. D. 66.

(*r*) *Per* WRIGHT, J., in *Harper* v. *Marcks*, *supra*, at p. 323.

SECT. 1. General Offences.

Ill-treating captive wild animals.

879. The importance of this distinction has been greatly discounted by a modern amending statute (*s*), which makes any person guilty of an offence who, whilst an animal is in captivity or close confinement, or is maimed, pinioned, or subjected to any appliance or contrivance for the purpose of hindering or preventing its escape from such captivity or confinement, by wantonly or unreasonably doing or omitting any act, causes or permits to be caused any unnecessary suffering to such animal, or cruelly abuses, infuriates, teases, or terrifies it, or permits it to be so treated (*t*). The word "animal" in this statute means any bird, beast, fish, or reptile, not included in the definition above mentioned (*u*), *i.e.*, practically any living thing, except insects, that cannot be classed as a domestic animal. The amending Act does not apply to any act done or any omission in the course of destroying any animal, or of preparing any animal for destruction, as food for mankind, nor to lawful vivisection (*x*), nor to the hunting or coursing of any animal which has not been liberated in a mutilated or injured state in order to facilitate its capture or destruction (*y*).

Meaning of "cruelly abuse or torture."

880. It is important to ascertain as nearly as possible what is meant in the principal Act by the words "cruelly abuse or torture." The mere infliction of pain, even if extreme pain, is not by itself sufficient to constitute the offence. Pain is constantly inflicted upon the brute creation under various sanctions, such as surgery, or war, or where it is reasonably necessary. The mere whim or convenience or, as a rule, the profit of man will not constitute reasonable necessity; though an operation without which an animal does not attain its full development, or is not so serviceable, or is dangerous, may be justified as "necessary" if properly done. No doubt suffering is caused by the breaking in or the castration and docking of horses, but such acts may usually be justified on the principles above stated, if fairly and reasonably done (*z*).

The most terse and satisfactory definition of the cruelty aimed at by the statute is "the unnecessary abuse of the animal" (*a*). Branding lambs on the nose with a hot iron is not necessarily cruelly ill-treating them, since it may be reasonably necessary for their identification (*b*).

Dishorning cattle.

In accordance with the principles above stated, the very painful operation of dishorning cattle by sawing off their horns close to their heads for the purpose of slightly increasing their value, and for convenience in feeding and packing, was held to be unjustifiable and unnecessary, and to be cruelty within the meaning of the Act (*c*).

(*s*) Wild Animals in Captivity Protection Act, 1900 (63 & 64 Vict. c. 33).
(*t*) *Ibid.*, s. 2
(*u*) *Ibid.*, s. 1.
(*x*) *I.e.*, under the Prevention of Cruelty to Animals Act, 1876 (39 & 40 Vict. c. 77).
(*y*) Act of 1900 (63 & 64 Vict. c. 33), s. 4.
(*z*) *Ford* v. *Wiley* (1889), 23 Q. B. D. 203, *per* Lord COLERIDGE, C.J., and HAWKINS, J.
(*a*) *Budge* v. *Parsons* (1863), 3 B. & S. 382, *per* WIGHTMAN, J.
(*b*) *Bowyer* v. *Morgan* (1906), 95 L. T. 772.
(*c*) *Ford* v. *Wiley*, *supra*. The Court of Justiciary in Scotland and the Queen's Bench Division in Ireland refused to follow this case, holding that

Comb-cutting.

Nor can dubbing or cutting off the combs of cocks, which causes them pain, be justified for the purpose of exhibiting them or for cockfighting (*d*). On the other hand, the spaying of sows, which was said to make them more useful for food, was held not to be within the Act merely because it caused pain (*e*). An intention to commit cruelty is not an essential part of the offence; the question in each case being whether there was in fact cruelty to the animal (*f*).

Mens rea.

881. Guilty knowledge is an essential, and must be proved, otherwise the accused cannot be said to have caused or procured the cruelty (*g*). It is not sufficient to show that a defendant would have known of the suffering of the animal had he properly performed his duties. The mere fact that it is the duty of a man in the position of a manager to see that horses are fit to be worked does not render him liable to be convicted when they are worked in an unfit state, without proof of his knowledge of the actual cruelty (*h*). Where the defendant visited cattle and failed to loosen their head-ropes after disembarkation, and one was found suffering from a bad wound, the conviction was quashed in the absence of proof of his knowledge of the animal's suffering (*i*). Where a veterinary surgeon certified a mare as free from pain and fit for work, and the magistrate found that he knowingly counselled the owner to cause the act of cruelty, but that such advice was not the proximate cause of the cruelty, and acquitted him, the Court remitted the case for conviction on the ground that he was a principal offender (*k*) under the Summary Jurisdiction Act, 1848 (*l*).

Omission to alleviate suffering.

882. A mere omission to alleviate suffering is not an act of cruelty within the meaning of the statute (*m*); thus it is no offence merely not to kill an animal in pain (*n*); it is inhuman cruelty not to kill it, but passive cruelty of that kind is not an offence under the Act (*o*).

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dishorning cattle when performed with skill and in the usual manner for the purpose of preventing injury is not an offence. See *Renton* v. *Wilson* (1888), 15 Ct. Sess., 4th series, Just. Cas. 84, followed in *Todrick* v. *Wilson* (1891), 2 White, Just. Cas. 636, and *R.* v. *McDonagh* (1891), 28 L. R. Ir. 204. *Ford* v. *Wiley* is, however, binding on justices in England and Wales.

(*d*) *Murphy* v. *Manning* (1877), 2 Ex. D. 307.

(*e*) *Lewis* v. *Fermor* (1887), 18 Q. B. D. 532; dissented from in *Ford* v. *Wiley* (1889), 23 Q. B. D. 203, see note (*c*), *supra*.

(*f*) *Duncan* v. *Pope* (1899), 63 J. P. 217 (killing a dog).

(*g*) A lion tamer was convicted where a pony was attacked by one of the performing lions, but the Court was careful not to lay down a general rule that it is an offence to put a domestic animal with a tamed beast. There must be some evidence of *mens rea* (*Thielbar* v. *Craigen* (1905), 69 J. P. 421).

(*h*) *Small* v. *Warr* (1883), 47 J. P. 20. Compare *Greenwood* v. *Backhouse* (1902), 86 L. T. 566.

(*i*) *Elliott* v. *Osborn* (1891), 65 L. T. 378.

(*k*) *Benford* v. *Sims*, [1898] 2 Q. B. 641. This decision proceeded upon the very special findings in the case, and is not an authority for holding that every veterinary surgeon who gives a wrong opinion is liable to be convicted if cruelty in fact results (*per* CHANNELL, J., at p. 646).

(*l*) 11 & 12 Vict. c. 43 (Jervis's Act), s. 5.

(*m*) *Westbrook* v. *Field* (1887), 51 J. P. 726; compare *Elliott* v. *Osborn*, *supra*.

(*n*) *Everitt* v. *Davies* (1878), 38 L. T. 361.

(*o*) *Per* COCKBURN, C.J., *Powell* v. *Knight* (1878), 38 L. T. 607, at p. 608;

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Turning a mare into a field where its grazing must involve torture, instead of tending it in a stable, has been held to be torture within the Act (*p*). Causing cows to be overstocked with milk (*q*) and, in Scotland, allowing a horse to remain in a cab exposed and hungry (*r*) have been held to be offences under this Act. If a man begins to kill an animal he must kill it outright; to allow it to linger in pain is cruelty (*s*).

It may be observed that the language of the more recent Wild Animals in Captivity Act, 1900, is in many of its phrases wider than in the principal Act, and is designed to meet some of the points mentioned above in the case of captive wild animals. Moreover, not only acts, but omissions, which cause cruelty are made offences under the later Act.

SECT. 2.—*Special Offences.*

Special offences.

883. In addition to the main offence created by sect. 2 of the Act of 1849 (*t*), several other specific offences of cruelty are provided for, and penalties imposed in each case.

Bull-baiting, cock-fighting etc.

884. To keep, use, or act in the management of any place for the purpose of fighting or baiting (*u*) any bull, bear, badger, dog, cock, or other kind of animal, whether of domestic or wild nature, is an offence rendering the offender liable to a penalty not exceeding five pounds for every day on which the offence is committed; and any person encouraging, aiding, or assisting (*w*) at such fighting or baiting is liable to a penalty not exceeding five pounds for each offence.

Every person who receives money for admission to any such place is to be deemed to be the keeper thereof (*x*).

Neglecting impounded cattle.

885. As to the offence of not feeding and watering impounded cattle, and the power of others to do so and to recover the expenses by sale of the cattle or otherwise, see above, (*y*).

Slaughterer's licence.

886. The provision and regulation of places for the slaughter of cattle and horses are the subject of various statutory enactments, and of bye-laws made by local authorities (*z*). So far as the subject

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approved in *Hooker* v. *Gray* (1907), 23 T. L. R. 472. As to wounding a trespassing dog, see also *Armstrong* v. *Mitchell* (1903), 19 T. L. R. 525. See p. 395, *ante*.

(*p*) *Everitt* v. *Davies* (1878), 38 L. T. 361.

(*q*) *R.* v. *Cable*, [1906] 1 K. B. 719.

(*r*) *Anderson* v. *Wood* (1881), 9 Ct. Sess., 4th series, Just. Cas. 6.

(*s*) *Adcock* v. *Murrell* (1890), 54 J. P. 776.

(*t*) See p. 409, *ante*.

(*u*) Cruelty to Animals Act, 1849 (12 & 13 Vict. c. 92), s. 3. Turning out rabbits before dogs in a place where they cannot escape is not "baiting" (*Pitts* v. *Millar* (1874), L. R. 9 Q. B. 380).

(*w*) The offence of encouraging, aiding, and assisting under this part of the section can only occur at a "place" mentioned in the former part of it. See *Clarke* v. *Hague* (1860), 29 L. J. (M. C.) 105; *Morley* v. *Greenhalgh* (1863), 3 B. & S. 374.

(*x*) Cruelty to Animals Act, 1849 (12 & 13 Vict. c. 92), s. 3.

(*y*) See p. 384, *ante*.

(*z*) See the Knackers Act, 1786 (26 Geo. 3, c. 71), which does not now apply to London (Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 142);

of cruelty to animals is concerned, it is only necessary to point out that any person who is licensed (*a*) to slaughter horses and cattle must have affixed or painted over the door of the house or place where he carries on his business of a slaughterer, in large and legible characters, the name of the licensed person and the words "Licensed for slaughtering horses, pursuant to an Act passed in the twenty-sixth year of His Majesty King George the Third." For an infraction of this provision he may on summary conviction be fined five pounds for every day on which the offence has been committed (*b*).

Conduct of business.

Every person keeping, using, or acting in the management of any place (*c*) for the purpose of slaughtering horses or other cattle, not intended for butchers' meat, must immediately cut off the hair from the neck of such animal brought or delivered there, and kill it within three days, and properly feed it until it is killed, under a penalty of five pounds (*d*), and must not use or permit or cause it to be used, or permit it to leave the place to be employed in any manner of work under a penalty of forty shillings for every day on which the offence continues, to which penalty the person actually working the animal is also liable (*e*); he must also enter in a book a full and complete description of the colour, marks, and gender of the animal, and must produce such book or allow extracts to be made therefrom whenever required under a penalty of forty shillings (*f*). All these penalties may be recovered summarily.

No person licensed to slaughter horses may, while the licence is in force, exercise the business of a horse-dealer (*g*).

Improperly conveying animals.

887. Any person who conveys or causes to be conveyed in or upon any vehicle any animal in such a manner as to subject it to unnecessary pain or suffering is liable to a penalty of three pounds for a first offence, and five pounds for subsequent offences (*h*).

Administering poisonous drugs.

888. It is an offence for any person, not being the owner of the animal or acting by the authority of such owner, wilfully and

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Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), ss. 125—131; Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 169, 170; Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), ss. 29, 30, 31; Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), ss. 19, 20; Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 27 (2); and London Government Act, 1899 (62 & 63 Vict. c. 14), s. 6 (4). The subject is further dealt with under title PUBLIC HEALTH.

(*a*) To keep a slaughterhouse without a licence is a felony punishable by fine and imprisonment (26 Geo. 3, c. 71, s. 8). Both the person keeping the slaughterhouse and the slaughterhouse itself must be licensed. See the Acts mentioned in note (*z*), *supra*.

(*b*) 26 Geo. 3, c. 71; Cruelty to Animals Act, 1849 (12 & 13 Vict. c. 92), s. 7.

(*c*) The place need not be a licensed slaughterhouse. Where the huntsman of a pack of hounds, who had the sole management of a place at the kennels used solely as a slaughterhouse, permitted a horse sent to him for slaughter to leave the place to be employed in work, the Court held that he ought to have been convicted under s. 9 (*Colam* v. *Hall* (1871), L. R. 6 Q. B. 206).

(*d*) Cruelty to Animals Act, 1849 (12 & 13 Vict. c. 92), s. 8. A horse purchased by a slaughterer without any directions from the seller as to slaughtering, is "brought" to the premises within the meaning of this section (*Edgar* v. *Spain* (1901), 84 L. T. 631).

(*e*) Cruelty to Animals Act, 1849 (12 & 13 Vict. c. 92), s. 9.

(*f*) *Ibid.*, s. 10.

(*g*) *Ibid.*, s. 11.

(*h*) *Ibid.*, s. 12. As to the carriage of animals generally, see title CARRIERS.

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unlawfully to administer to or cause to be administered to or taken by any horse, cattle, or domestic animal, any poisonous or injurious drug or substance, unless he can show some reasonable cause or excuse for so doing (*i*).

Punishment.

The offender is liable on summary conviction before two justices (*k*) to a penalty not exceeding five pounds, or to a month's imprisonment, with or without hard labour, for a first offence, and to three months' imprisonment for a second or subsequent offence (*l*). These provisions do not affect any other liability of an offender in respect of the same acts, but he cannot be punished more than once for the same offence (*m*).

Sect. 3.—*Penalties and Procedure.*

Punishment.

889. Except where otherwise stated, the penalty for any of the above offences under the Act of 1849 is "a fine not exceeding five pounds for every offence," to which is added a provision that if the conviction takes place before two justices or before a metropolitan police magistrate, they or he may, instead of imposing a pecuniary penalty, commit the offender for any term not exceeding three months with or without hard labour (*n*).

An offender against the provisions relating to wild animals in captivity may be proceeded against under the Summary Jurisdiction Acts, and the penalty is three months' imprisonment with or without hard labour, or a fine not exceeding five pounds or imprisonment in default of payment (*o*).

Compensation.

890. Where an offender is convicted of cruelty (within the meaning of sect. 2 of the Act of 1849) which causes damage or injury to any animal, or damage or injury to any person or property, he may be ordered to pay compensation up to the sum of ten pounds. The payment of such compensation, or imprisonment for the non-payment thereof, is not to affect the punishment for the offence itself, nor to prevent a civil action being brought where the amount of damage is not sought to be recovered under the Act (*p*).

Imprisonment in default.

Where an offender is convicted, and does not pay the penalty or the amount awarded as compensation, together with the costs, within such time as the magistrate appoints, the magistrate is required to commit him to prison with or without hard labour for any time not exceeding two calendar months, unless payment be sooner made (*q*).

Apprehension of offenders.

891. Any constable, upon any of the offences against the principal Act being committed within his view, or upon complaint and information of any person who declares his or her name and place of abode,

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(*i*) Drugging of Animals Act, 1876 (39 & 40 Vict. c. 13), ss. 1, 2.
(*k*) *Ibid.*, s. 4.
(*l*) *Ibid.*, s. 1.
(*m*) *Ibid.*, s. 3.
(*n*) Cruelty to Animals Act, 1849 (12 & 13 Vict. c. 92), s. 18.
(*o*) Wild Animals in Captivity Protection Act, 1900 (63 & 64 Vict. c. 33), s. 3.
(*p*) Cruelty to Animals Act, 1849 (12 & 13 Vict. c. 92), s. 4. See as to such offences, p. 409, *ante*.
(*q*) *Ibid.*, s. 18.

may seize the offender and without other authority convey him before a justice of the peace to be dealt with (*r*).

If the constable takes an offender having charge of any vehicle or animal into custody, he may take charge of the vehicle or animal and deposit it in a safe place as security for any penalty to which the offender or the owner may be liable, and for payment of expenses necessarily incurred for keeping it. The justice may order it to be sold to satisfy the penalty and expenses (*s*).

Detention of vehicles and animals.

It is also made a special offence, under a penalty of five pounds, at any time or in any manner unlawfully to obstruct, hinder, molest, or assault any constable or keeper of a pound while in the exercise of any power or authority under the Act (*t*).

Penalty for obstructing constables etc.

892. Where a complaint is made against the driver or conductor of any hackney carriage or stage carriage or the driver of any other vehicle, the justice may summon the proprietor to produce the servant to answer the complaint. If the proprietor fail to do so, the justice may proceed to determine the case in the absence of the defendant, and may order the proprietor to pay any penalty money or costs in which the servant may be convicted. The proprietor may recover this sum in a summary way from the servant through whose default such sum shall have been paid, upon proof of payment and of such servant's refusing or neglecting to be produced. Alternatively, if the proprietor fail, without satisfactory excuse, to produce his servant, the justice may fine him forty shillings as often as he shall be summoned until he produce the servant (*u*).

Liability of proprietors in case of offences committed by drivers of public vehicles etc.

893. The money recovered by way of penalties is distributed as follows: one half to the overseer of the parish in which the offence is committed, to be applied in aid of the rates; the other half to the complainant or such other person as to the justice shall seem fit and proper (*v*).

Distribution of penalties.

894. Most of the special procedure provided in the principal Act has been repealed, and the procedure is now governed by the Summary Jurisdiction Acts (*x*).

Procedure.

However, the following special provisions remain in force:—

(1) Every complaint must be made within one calendar month (*y*), and may be heard by any justice of the peace within whose jurisdiction the offence is committed in a summary way (*z*).

Time of complaint.

(2) In all cases where the sum adjudged to be paid on conviction exceeds two pounds (*a*), or where imprisonment is adjudged, any person who thinks himself aggrieved by such conviction may appeal to the next Court of general or quarter sessions (*b*).

Appeals.

(*r*) Cruelty to Animals Act, 1849 (12 & 13 Vict. c. 92), s. 13.
(*s*) *Ibid.*, s. 19.
(*t*) *Ibid.*, s. 20.
(*u*) *Ibid.*, s. 22.
(*v*) *Ibid.*, s. 21.
(*x*) See title MAGISTRATES.
(*y*) Exclusive of the day upon which the offence is committed (*Radcliffe* v. *Bartholomew*, [1892] 1 Q. B. 161).
(*z*) Cruelty to Animals Act, 1849 (12 & 13 Vict. c. 92), s. 14.
(*a*) Exclusive of costs (*R.* v. *Warwickshire Justices* (1856), 6 E. & B. 837).
(*b*) Cruelty to Animals Act, 1849 (12 & 13 Vict. c. 92), s. 25.

SECT. 3. Penalties and Procedure.

(3) No conviction, order, judgment, or proceeding under the Act may be quashed for want of form, or removed by certiorari (*c*) into the superior Courts (*d*).

A conviction for cruelty to a number of different animals at one time, such as five cows or sixteen heifers, discloses only one offence, and is not bad on the face of it as a conviction for separate and distinct offences (*e*).

SECT. 4.—*Vivisection.*

SUB-SECT. 1.—*Offences.*

Painful experiments on living animals.

895. No unlicensed person may perform upon a living vertebrate (*f*) animal any experiment calculated to give pain. Any person performing, or taking part in performing, any such experiment is liable on summary conviction to a penalty of fifty pounds for a first offence, and to a penalty of one hundred pounds or three months' imprisonment for a second or subsequent offence (*g*).

General restrictions.

896. Experiments calculated to give pain may be performed by a duly licensed (*h*) person on any living vertebrate animal subject to the following restrictive regulations (*i*):—

Object of experiment and licence for person performing it.

The experiment must be performed with a view to the advancement by new discovery of physiological knowledge or of knowledge which will be useful for saving or prolonging life or alleviating suffering, and by a person holding a licence from the Secretary of State; and where the licence is a conditional one, or where the experiment is for the purpose of instruction, it must be performed in a registered place.

Use of anæsthetics:

During the whole of the experiment the animal must be under an anæsthetic (other than urari or curare (*j*)) of sufficient power to prevent its feeling pain. If pain is likely to continue after the effect of the anæsthetic has ceased, or if any serious injury has been inflicted, the animal must be killed before it recovers from the influence of the anæsthetic.

Experiments in medical schools etc.

The experiment must not be performed for the purpose of attaining manual skill, nor as an illustration of lectures in medical schools, hospitals, colleges, or elsewhere, unless a certificate (*k*) has been given that the proposed experiments are absolutely necessary for instruction with a view to the hearers acquiring physiological knowledge,

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(*c*) See *R.* v. *Chantrell* (1875), L. R. 10 Q. B. 587. The point seems not to have been taken in *R.* v. *Cable* (note (*e*), *infra*). Writ of certiorari for a special case now lies from quarter sessions under the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 40 (see title MAGISTRATES), so that the effect of this section is minimised.

(*d*) Act of 1849 (12 & 13 Vict. c. 92), s. 26.

(*e*) *R.* v. *Cable*, [1906] 1 K. B. 719. See also p. 409, *ante*.

(*f*) Cruelty to Animals Act, 1876 (39 & 40 Vict. c. 77), s. 22.

(*g*) *Ibid.*, s. 2.

(*h*) *I.e.*, by the Home Secretary (s. 8); see p 417, *post*. As to applications for licences, see p. 418, *post*.

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

(*j*) *Ibid.*, s. 4.

(*k*) See ss. 10, 11, p. 418, *post*.

or knowledge useful to them for saving or prolonging life, or alleviating suffering.

Experiments without anæsthetics, or without killing the animal.

Experiments may be performed without anæsthetics, on a certificate being given that insensibility cannot be produced without necessarily frustrating the object of such experiments; and without the necessity of killing the animal before it recovers from the anæsthetic, on a certificate being given that so killing the animal would necessarily frustrate the object of the experiment, provided that the animal is killed as soon as the object is attained.

Experiments to test former discovery.

Experiments not directly for the advancement by new discovery of physiological knowledge or of knowledge useful for saving or prolonging life or alleviating suffering, but for testing such previous discoveries, may be performed on a certificate being given that such testing is absolutely necessary for the effectual advancement of such knowledge.

Special restrictions on experiments on dogs, cats etc.

897. Dogs, cats, horses, asses, and mules are further specially protected. No experiment may be performed upon a dog or cat without anæsthetics, except on a certificate being given stating, in addition to the statements already mentioned, that the object of the experiment will be necessarily frustrated unless it is performed on an animal similar in constitution and habits to a cat or dog, and that no other animal is available; and an experiment calculated to give pain may not be performed on any horse, ass or mule, except on a similar certificate stating that the object of the experiment will be necessarily frustrated unless it is performed upon a horse, ass or mule, and that no other animal is available (*l*).

Public exhibition of experiments illegal.

Exhibitions to the general public (whether admitted on payment or gratuitously) of experiments on living animals which are calculated to give pain are illegal. Any person performing or aiding in performing such experiments is guilty of an offence and liable on a first offence to a penalty of fifty pounds, and on a subsequent offence to a penalty of one hundred pounds or three months' imprisonment. Any person publishing any notice of any such intended exhibition is liable to a penalty of one pound. A person punished under this section cannot be punished under any other section for the same offence (*m*).

SUB-SECT. 2.—*Procedure.*

Licences.

898. The power to grant licences is vested in the Secretary of State (*i.e.*, the Home Secretary), who may insert a provision in any licence granted that the place where any experiment is to be performed by the licensee must be registered as directed by order and approved by him (*n*).

The Secretary of State may also license any person whom he may think qualified, and for so long as he thinks fit, and may revoke the licence if satisfied that it ought to be revoked. He may annex to the licence any conditions which he thinks expedient, and which are not inconsistent with the provisions of the Act (*o*).

(*l*) Cruelty to Animals Act, 1876 (39 & 40 Vict. c. 77), s. 5.
(*m*) *Ibid.*, s. 6.
(*n*) *Ibid.*, s. 7. No general or special orders have yet been issued under this section.
(*o*) *Ibid.*, s. 8.

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The Secretary of State may also direct a person performing experiments to report to him the result in such form and with such details as he may require (*p*).

Reports to Secretary of State.

Inspection of registered places.

All registered places must be visited from time to time by inspectors appointed by the Secretary of State for the purpose of securing compliance with these provisions (*q*).

Authentication of certificates and applications for licences.

899. Any application for a licence and any certificate given must be signed by the President of one or more certain specified learned societies in England, Scotland, or Ireland, namely:—The Royal Society; The Royal Society of Edinburgh; The Royal Irish Academy; Royal Colleges of Surgeons in London, Edinburgh, and Dublin; Royal Colleges of Physicians in London, Edinburgh, and Dublin; General Medical Council; Faculty of Physicians and Surgeons of Glasgow; Royal College of Veterinary Surgeons; Royal Veterinary College, and also by a professor of medical subjects in a university or college in Great Britain or Ireland incorporated by royal charter, unless the applicant is himself such a professor.

Where the applicant for a certificate is himself authorised to sign such a certificate the signature of another authorised person must be substituted for the signature of the applicant.

The certificate may be given for such time and for such series of experiments as the person signing thinks expedient; and a copy thereof must be forwarded by the applicant to the Secretary of State, and is not available until one week afterwards, and the Secretary of State may disallow or suspend it at any time (*r*).

Power of Judges to grant licences in criminal cases.

900. Judges of the High Court in England, Scotland, and Ireland may grant a licence or give a certificate where they are satisfied that it is essential for the purposes of justice in a criminal case to make an experiment on living animals (*s*).

Search warrant.

901. A justice of the peace may, upon sworn information that there is reasonable ground to believe that experiments are being performed by an unlicensed person in an unregistered place, issue a search warrant, and the officers may enter and take the names and addresses of persons found. To refuse admission to or to obstruct any officer, or to refuse to disclose his name or address, or to give a false name or address, renders the offender liable to a penalty of five pounds (*t*).

Right to trial on indictment and appeal.

902. A person summarily accused in England of an offence for which the penalty is more than five pounds may elect to be tried on indictment; and if any party thinks himself aggrieved by a summary conviction, he may appeal under the Summary Jurisdiction Acts (*u*).

Prosecution only by leave of Secretary of State.

A prosecution under this Act against a licensed person may not

(*p*) Cruelty to Animals Act, 1876 (39 & 40 Vict. c. 77), s. 9.
(*q*) *Ibid.*, s. 10.
(*r*) *Ibid.*, s. 11. Forms of application for licences and certificates are on sale as Stationery Office publications.
(*s*) *Ibid.*, s. 12.
(*t*) *Ibid.*, s. 13.
(*u*) *Ibid.*, ss. 15, 16.

be instituted except with the assent in writing of the Secretary of State (*v*). SECT. 4. Vivisection.

SECT. 5.—*Destruction of Injured Animals.*

903. If a police constable finds any horse, mule, ass, bull, cow, ox, heifer, calf, sheep, goat, or swine, so diseased or so severely injured or in such a physical condition that it cannot without cruelty be removed, he must, if the owner is absent or refuses to consent to the destruction of the animal, at once summon a duly registered veterinary surgeon, if any such surgeon resides within a reasonable distance; and if it appears by the certificate of such veterinary surgeon that the animal is mortally injured or so severely injured or so diseased or in such a physical condition that it is cruel to keep it alive, the police constable may, without the consent of the owner, slaughter the animal or cause it to be slaughtered with such instruments or appliances, and with such precautions and in such manner as to inflict as little pain and suffering as practicable, and if in a street or public place may remove the carcase or cause it to be removed (*w*). Powers of police to destroy animals seriously injured.

Reasonable expenses of slaughtering or removing the carcase from any street or public place may be recovered from the owner summarily as a civil debt, *i.e.*, under the Summary Jurisdiction Acts. Subject to this, the expenses incurred are defrayed out of the police fund of the area in which the animal was found (*x*). Expenses.

Part IX.—Diseases of Animals.

SECT. 1.—*At Common Law.*

904. The owner or possessor of animals having an infectious or contagious disease is liable for the damage caused by their infected state in the following cases:— Liability for damage caused by infected cattle.

(1) If, knowing them to be suffering from an infectious or contagious disease, he does not keep them on his own premises (*z*);

(2) If, knowing of their diseased state, he gratuitously bails them (and *à fortiori* if the bailment be for reward), knowing that the bailee probably will or may place them with other animals which are healthy, without warning the bailee of their diseased state (*a*);

(3) If he sells them with a warranty that they are free from

(*v*) Cruelty to Animals Act, 1876 (39 & 40 Vict. c. 77), s. 21.
(*w*) Injured Animals Act, 1907 (7 Edw. 7, c. 5), s. 1 (1).
(*x*) *Ibid.*, s. 1 (2). See, as to procedure under the Summary Jurisdiction Acts, title MAGISTRATES. Under the Injured Animals Act, 1894 (57 & 58 Vict. c. 22), this power existed only in the case of injury, see *London Road Car Co. v. Harrison* (1900), 44 Sol. J. 424, and was limited to horses, mules or asses.
(*z*) *Cooke v. Waring* (1863), 2 H. & C. 332.
(*a*) *Penton v. Murdock* (1870), 22 L. T. 371.

SECT. 1. At Common Law.

infectious or contagious disease, and in this case, whether he knows of their diseased state or not is immaterial (*b*);

(4) If he is guilty of fraud or actual concealment in the sale (*c*);

(5) If, knowing them to be diseased, and that they may be put in with healthy animals, he sells them at a public market or fair, or at a public auction; and possibly even if he sells them privately (*d*).

Liability for selling diseased animals.

905. On the sale of an animal, whether suffering from an infectious or contagious disease or not, the maxim *caveat emptor* applies; thus where a person sent diseased pigs to market and refused to give any warranty, but stated that the animals must be taken "with all faults," the House of Lords decided that he was not liable for the damage caused thereby, even if he knew that the pigs were diseased, unless he was guilty of fraud (*e*). A declaration stating that the defendant knowingly caused a glandered horse to be sold by auction, whereby another horse of the purchaser was affected and died, was held to disclose no cause of action (*f*).

Delivery.

On the other hand, a declaration stating that the defendant knowingly delivered a glandered horse to the plaintiff to be put with his horse, without telling him it was glandered, was held good without an averment of concealment, fraud, or breach of warranty (*g*).

Misdemeanour at common law.

906. It is a nuisance, and therefore a misdemeanour at common law, to bring a horse infected with glanders into a fair or other public place, such as a highway, to the danger of infecting the King's subjects (*h*).

(*b*) *Ward* v. *Hobbs* (1878), 4 App. Cas. 13.

(*c*) *Mullett* v. *Mason* (1866), L. R. 1 C. P. 559; *Clarke* v. *Army and Navy Co-operative Society, Ltd.*, [1903] 1 K. B. 155.

(*d*) *Bodger* v. *Nicholls* (1873), 28 L. T. 441.

(*e*) *Ward* v. *Hobbs* (1878), 4 App. Cas. 13. Lord CAIRNS, L.C., in this case refrained from criticising the proposition of BLACKBURN, J., in *Bodger* v. *Nicholls* (1873), 28 L. T. 441, at p. 445, that "the defendant by taking the cow to a public market to be sold, though he does not warrant her to be sound, yet thereby furnishes evidence of a representation that, so far as his knowledge goes, the animal is not suffering from any infectious disease," beyond saying that no such representation could be implied where there was a clear statement that the buyer must take his purchase with all faults (*Ward* v. *Hobbs*, *supra*, at p. 23). The question is not affected by the fact that taking diseased animals to market is a breach of a statutory duty (*ibid.*, and see reports of same case in Courts below, 2 Q. B. D. 331; 3 Q. B. D. 150). As to the remedy for breach of such statutory duty, see *Gorris* v. *Scott* (1874), L. R. 9 Exch. 125.

(*f*) *Hill* v. *Balls* (1857), 2 H. & C. 299. It may be noted that this case was decided before the development of a somewhat modern doctrine that even in the case of a sale there is a duty cast upon the seller who knows of the dangerous nature of the goods he is supplying, and that the purchaser is not or may not be aware of it, to give the purchaser warning. Compare *Clarke* v. *Army and Navy Co-operative Society, Ltd.*, *supra*; also the leading American case of *Thomas* v. *Winchester* (1852), 6 N. Y. (2 Selden) 397, also reported in Radcliffe and Miles, Cases on the Law of Torts, p. 408. It must be taken that the doctrine does not apply where the seller expressly guards himself, as was done in *Ward* v. *Hobbs*, *supra*.

(*g*) *Penton* v. *Murduck* (1870), 22 L. T. 371. This case is distinguished from *Hill* v. *Balls*, *supra*, on the ground that the latter was a case of buyer and seller.

(*h*) *R.* v. *Henson* (1852), Dears. 24.

SECT. 2.—*By Statute.*

SUB-SECT. 1.—*In General.*

Object of enactments.

907. A series of statutory provisions (*i*) have been made dealing with (1) isolation; (2) disinfection; (3) regulating the importation of animals; (4) the declaration of infected "places," "areas," and "circles"; and (5) the slaughter of diseased or suspected animals, with the object of preventing the introduction and spread of contagious diseases amongst animals.

Extensive powers for these purposes are conferred on the Board of Agriculture and Fisheries (*k*), and upon local authorities, upon whom, too, further powers may be conferred by the Board.

Speaking generally, administrative machinery is set up by these Acts, and the carrying out of the objects of the legislation is effected by means of Orders of the Board of Agriculture and Fisheries (*l*).

Diseases included.

908. The diseases dealt with by the Board under these powers are cattle plague or rinderpest, contagious pleuro-pneumonia of cattle, foot and mouth disease, swine fever (*m*), sheep pox, and sheep scab (*n*). Other diseases may be included by order of the Board (*o*), and glanders (including farcy), rabies, anthrax, and epizootic lymphangitis have been added for certain purposes, including in the case of glanders and rabies those of slaughter and compensation (*p*).

Animals included.

909. The animals dealt with are cattle (which expression means bulls, cows, oxen, heifers and calves) (*q*), sheep, and goats, and all other ruminating animals, and swine, and there is power for the Board by Order to extend the scope so as to comprise any other kind of four-footed beasts (*r*).

(*i*) These Acts are:—Diseases of Animals Act, 1894 (57 & 58 Vict. c. 57), the principal and consolidating Act; Diseases of Animals Act, 1896 (59 & 60 Vict. c. 15), as to the slaughter of foreign animals; and Diseases of Animals Act, 1903 (3 Edw. 7, c. 43), as to sheep scab.

(*k*) As to which see title AGRICULTURE, pp. 297—299, *ante*. Returns are made to the Board regularly of all markets and fairs, under the Markets and Fairs (Weighing of Cattle) Acts, 1887 and 1891 (50 & 51 Vict. c. 27, and 54 & 55 Vict. c. 70), and the Markets and Fairs (Weighing of Cattle) Returns Order, 1905; see title MARKETS AND FAIRS.

(*l*) See Diseases of Animals Act, 1894 (57 & 58 Vict. c. 57), s. 22; Diseases of Animals Act, 1903 (3 Edw. 7, c. 43), s. 1; and Dogs Act, 1906 (6 Edw. 7, c. 32), s. 2, pp. 400, 401, *ante*, as to Dogs Orders. These Orders are liable to be revoked at any time. Copies of any particular Order can be obtained from the Board of Agriculture and Fisheries, 4, Whitehall Place, London, S.W.

(*m*) Known also as typhoid fever of swine, soldier purples, red disease, hog cholera, or swine plague.

(*n*) Diseases of Animals Act, 1894 (57 & 58 Vict. c. 57), s. 59.

(*o*) *Ibid.*, s. 22 (xxxv.).

(*p*) Glanders or Farcy Order, 1894 (5235), s. 2; Rabies Order, 1897 (5578), s. 21; Anthrax Order, 1899 (5905), s. 16; Epizootic Lymphangitis Order, 1905 (6962), s. 17.

(*q*) Diseases of Animals Act, 1894 (57 & 58 Vict. c. 57), s. 59 (1).

(*r*) *Ibid.*, s. 22 (xxxvi.). By various Orders, horses, asses, mules, and dogs have been added for certain purposes: Glanders or Farcy Order, 1894, s. 2 (horses, asses, and mules); Rabies Order, 1897, s. 21 (horses, asses, mules, and dogs); Anthrax Order, 1899, s. 16 (horses, asses, and mules); Importation of Dogs Order, 1901, s. 10 (dogs); Epizootic Lymphangitis Order, 1905, s. 17 (horses).

By Statute.

Isolation and notice by owners.

910. Every person having in his possession or under his charge an animal affected with disease, must as far as practicable keep it separate from animals not so affected, and must give notice of the animal being affected to a local police constable (*s*), who must forthwith give information thereof to such person or authority as the Board by general order direct (*t*). In cases of cattle plague, pleuro-pneumonia, foot and mouth disease, sheep pox, swine fever and rabies the constable must immediately communicate with the Board by telegraph (*u*).

Notice to local authority in certain cases.

In cases of pleuro-pneumonia and foot and mouth disease the constable must also give information of the receipt of the notice to an inspector of the local authority (*x*), who is forthwith to report the same to the local authority.

In a case of anthrax the inspector must also forthwith report to the Medical Officer of Health of the sanitary district in which the diseased or suspected animal is or was (*y*).

Orders as to animals with pleuro-pneumonia or foot and mouth disease.

911. The Board is given power to make orders respecting animals affected with pleuro-pneumonia or foot and mouth disease, while in a market, fair, sale yard, place of exhibition, or slaughter-house, or upon common or uninclosed land, or in transit, or generally while in a place not in the possession or control of the owner of the animals, as well as respecting animals being or having been in contact with animals so affected (*z*).

All diseases.

912. As regards all diseases, the Board may make orders for isolating animals being in an infected area (*a*); and for prohibiting and regulating the exposure of diseased or suspected animals in markets, fairs, or other public or private places where animals are commonly exposed for sale (*b*); or the sending of such animals, or of dung or other thing likely to spread disease, on railways, canals, rivers or inland navigable waters, or in coasting vessels or otherwise (*c*); or the carrying, leading, or driving of such animals on

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(*s*) The burden of proof is on the accused to show that he gave the notice, not on the prosecution to show that he did not (*Huggins* v. *Ward* (1873), L. R. 8 Q. B. 521). But the accused cannot be convicted of not giving notice unless it is proved that he knew the animal was diseased (*Nichols* v. *Hall* (1873), L. R. 8 C. P. 322; and compare *Carroll* v. *Eivers* (1873), Ir. R. 7 C. L. 226).

(*t*) Diseases of Animals Act, 1894 (57 & 58 Vict. c. 57), s. 4. The Board have directed such notice to be given to their secretary, 4, Whitehall Place, London, S.W. See Swine Fever Order, 1894 (5193), s. 1; Pleuro-pneumonia Order, 1895 (5289), s. 1; Cattle Plague Order, 1895 (5288), s. 1; Foot and Mouth Disease Order, 1895 (5290), s. 1; Sheep Pox Order, 1895 (5291), s. 1; Rabies Order, 1897 (5578), s. 1; Epizootic Lymphangitis Order, 1905 (6962), s. 1.

(*u*) See the respective Orders relating to these diseases.

(*x*) See p. 432, *post*.

(*y*) Anthrax Order, 1899 (5905).

(*z*) Diseases of Animals Act, 1894 (57 & 58 Vict. c. 57), s. 21.

(*a*) *Ibid.*, s. 22 (iii.).

(*b*) *Ibid.*, sub-s. (ix). See Cattle Plague Order, 1895, s. 12; Pleuro-pneumonia Order, 1895, s. 16; Foot and Mouth Disease Order, 1895, s. 19; Sheep Pox Order, 1895, s. 15; Swine Fever Order, 1894, s. 17; Anthrax Order, 1899, s. 11; Sheep Scab Order, 1905, s. 11. As to proof that the accused was aware of the disease, see *Carroll* v. *Eivers*, *supra*.

(*c*) Diseases of Animals Act, 1894 (57 & 58 Vict. c. 57), s. 22 (x.). See Swine

highways, etc. (*d*); or the placing or keeping them on commons or uninclosed lands or in insufficiently fenced fields or on the sides of highways (*e*). SECT. 2. By Statute.

The Board may, moreover, make orders for seizing diseased or suspected animals which are being dealt with in contravention of their orders (*f*). Seizure of suspected animals.

913. Further, the Board may prohibit and regulate the movement of animals, and the removal of carcases, fodder, litter, and dung, and prescribe and regulate the isolation of animals newly purchased (*g*); and also prescribe and regulate the issue and production of licences respecting movement (*h*). Movement of animals etc.

A railway company may be convicted of moving animals, or causing, directing, or permitting animals to be moved, in contravention of the regulations of the local authority, although no party to the contract of consignment, if they actually convey them into a prohibited district (*i*), but they are entitled to refuse to carry animals at all where the regulations of the local authority are not strictly complied with (*k*). Liability of railway company.

SUB-SECT. 3.—*Disinfection.*

914. Besides prohibiting and regulating the holding of markets, fairs, exhibitions and sales of animals (*l*), the Board may also by order prescribe and regulate the cleansing and disinfection (*m*) of Disinfection.

Fever Order, 1894, s. 5; Cattle Plague Order, 1895, s. 6; Pleuro-pneumonia Order, 1895, s. 4; Foot and Mouth Disease Order, 1895, s. 5; Sheep Pox Order, 1895, s. 6; Epizootic Lymphangitis Order, 1905, s. 6. Compare *Youngman* v. *Morris* (1866), 15 L. T. 276.

(*d*) Diseases of Animals Act, 1894 (57 & 58 Vict. c. 57), s. 22 (xi.).

(*e*) *Ibid.*, s. 22 (xii.). Swine Fever Order, 1894, s. 16; Cattle Plague Order, 1895, s. 11; Pleuro-pneumonia Order, 1895, s. 15; Sheep Pox Order, 1895, s. 14.

(*f*) Diseases of Animals Act, 1894 (57 & 58 Vict. c. 57), s. 22 (xiii.).

(*g*) *Ibid.*, s. 22 (xvii.); Swine Fever Order, 1894, s. 6; Swine Fever (Infected Areas) Order, 1902; Swine Fever (Regulation of Movement) Order, 1903; Swine Fever (Regulation of Movement) Order, 1906; Sheep Scab Order, 1905, ss. 2, 5, 9, 11; Sheep Scab (Regulation of Movement) Order, 1906; Cattle Plague Order, 1895, ss. 5 (rr. 1—3), 7; Pleuro-pneumonia Order, 1895, ss. 5, 11; Foot and Mouth Disease Order, 1895, ss. 6, 12, 13; Sheep Pox Order, 1895, s. 7.

(*h*) Diseases of Animals Act, 1894 (57 & 58 Vict. c. 57), s. 22 (xviii.)); Swine Fever Order, 1894, ss. 20, 21; Cattle Plague Order, 1895, s. 17; Pleuro-pneumonia Order, 1895, ss. 21, 22, 24; Foot and Mouth Disease Order, 1895, ss. 28, 29, 31; Sheep Pox Order, 1895, s. 26; Importation of Dogs Order, 1901, ss. 1, 3. If a licence is produced the justices have no power to inquire into the sufficiency of the evidence upon which it was granted (*Stanhope* v. *Thorsby* (1866), L. R. 1 C. P. 423).

(*i*) *Midland Rail. Co.* v. *Freeman* (1884), 12 Q. B. D. 629.

(*k*) *Williams* v. *Great Western Rail. Co.* (1885), 52 L. T. 250.

(*l*) Diseases of Animals Act, 1894 (57 & 58 Vict. c. 57), s. 22 (xix.). Cattle Plague Order, 1895, s. 11 (vi.); Sheep Pox Order, 1895, s. 14 (vi.); Pleuro-pneumonia Order, 1895, s. 14; Swine Fever (Markets and Fairs) Order, 1896. Hawking pigs is not "holding a sale" under the last-mentioned order; see *McLean* v. *Monks* (1898), 77 L. T. 663. See, generally, title MARKETS AND FAIRS.

(*m*) Diseases of Animals Act, 1894 (57 & 58 Vict. c. 57), s. 22 (xx.). This power is exercised in nearly all the orders of the Board. As to disinfection by inspectors of the Board, see Swine Fever Order, 1894, s. 9, and Pleuro-pneumonia Order, 1895, s. 9. As to the owner being required to disinfect, see Swine Fever Order, 1894, s. 10; Foot and Mouth Disease Order, 1895, s. 10; Sheep Pox Order, 1895, s. 11; Sheep Scab Order, 1905, s. 8. In every

SECT. 2. By Statute.

many places, such as fairs, markets, yards, and sheds used for animals, also of vessels, vehicles, and pens (*n*), and the modes of cleansing and disinfection (*o*).

They may also prohibit the conveyance of any animal by any specified vessel to or from any port in the United Kingdom.

They may secure the periodical dipping of sheep, or the use of some other remedy for sheep scab (*p*).

SUB-SECT. 4.—*Importation of Animals.*

Regulation of ports.

915. The Board may make such orders as they think fit (*q*) for prescribing the ports at which alone foreign animals may be landed; for regulating the movement and inspection and slaughter of animals in a port or defined part of a port, and the removal of carcases and other things likely to spread disease into, within, or out of a port (*r*); for cleansing and disinfecting ports (*s*); for disinfecting or destroying things therein (*t*); for regulating the movement of persons there (*u*), and the disinfecting of their clothes; for the use of precautions against introducing or spreading disease (*x*); and for the seizure and detention of any foreign animal or carcase likely to introduce or spread disease (*y*).

Restrictions on importation.

They may prohibit the importation and landing of animals, or specified animals or carcases, fodder, dung, or other thing, from any specified country out of the United Kingdom or from any part of such country. This power is to be exercised whenever they are not satisfied that reasonable security is provided against the importation from such country of animals affected with foot and mouth disease, having regard to the condition of the animals, the laws in such country relating to diseases of animals, and the administration of such laws (*z*).

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case the owner must give facilities for disinfection, but he is not liable for the disobedience of his servants (*Searle* v. *Reynolds* (1866), 7 B. & S. 704).

(*n*) Diseases of Animals Act, 1894 (57 & 58 Vict. c. 57), s. 22 (xxi.). Compare *Ismay* v. *Blake* (1892), 66 L. T. 530.

(*o*) *Ibid.*, s. 22 (xxii.); and see Anthrax Order, 1899, s. 9; Swine Fever Order, 1901 (6339); Swine Fever (Regulation of Movement) Order, 1903 (6734), s. 6; Swine Fever (Movement from Ireland) Order, 1904 (6866), s. 3; Sheep Scab Order, 1905, 2nd Schedule; Epizootic Lymphangitis Order, 1905, s. 9; Diseases of Animals (Disinfection) Order, 1906 (7047).

(*p*) Diseases of Animals Act, 1903 (3 Edw. 7, c. 43), s. 1, which inserts sub-s. (xiiiA.) in s. 22 of the principal Act. The Act of 1903 also gives power to inspectors to enter premises to examine sheep (s. 2), and power to local authorities to provide sheep-dipping tanks (s. 3); see Sheep Scab Order, 1905, s. 7; Sheep Scab (Compulsory Dipping Areas) Order, 1906.

(*q*) See Channel Islands Animals Order, 1896 (5511); Isle of Man Animals Order, 1896 (5512); Importation of Dogs Order, 1901; Foreign Animals Order, 1903 (6719); Foreign Animals (Amendment) Order, 1903 (6744); Swine Fever (Movement from Ireland) Order, 1904.

(*r*) Diseases of Animals Act, 1894 (57 & 58 Vict. c. 57), s. 30 (1), sub-ss. (i.)—(vii.).

(*s*) *Ibid.*, sub-s. (viii.).

(*t*) *Ibid.*, sub-s. (ix.).

(*u*) *Ibid.*, sub-s. (x.).

(*x*) *Ibid.*, sub-s. (xi.).

(*y*) *Ibid.*, sub-s. (xii.).

(*z*) *Ibid.*, s. 25. See Foreign Animals Order, 1903 (6719), 1st Schedule; Foreign Animals (Amendment) Order, 1903 (6744).

916. A "place" is the actual spot, the shed, field, or group of buildings where the disease exists or has existed; an "area" is a district containing such a place; and a "circle" is the space lying within half a mile of any part of such place (*a*). Meaning of "place," "area," and "circle."

917. A place is provisionally declared to be infected where an inspector (*b*) makes and signs a declaration of the existence of disease in that place at the time, or within the last ten days in the case of cattle plague, fifty-six days in the case of pleuro-pneumonia, and ten days in the case of foot and mouth disease (*c*). Provisional declaration as to cattle plague, pleuro-pneumonia, or foot and mouth disease.

This provisional declaration is subject to confirmation by the Board in the case of cattle plague, or by the local authority in the case of pleuro-pneumonia and foot and mouth disease, on being satisfied that it is correct; if not so satisfied, they must declare accordingly, and the provisional declaration will cease (*d*). The local authority must have the assistance of a veterinary inspector in the case of pleuro-pneumonia and foot and mouth disease (*e*). Confirming declaration by Board or local authority.

918. In the case of pleuro-pneumonia and foot and mouth disease, a local authority may, upon the advice of a veterinary inspector, declare an infected place free from infection, but only after the lapse of fifty-six days in the case of pleuro-pneumonia, or fourteen days (or such longer period, not exceeding twenty-eight days, as the Board directs) in the case of foot and mouth disease (*f*). Declaration by local authority that place is free from infection.

A local authority cannot declare an area infected, but they may recommend the Board to do so. When they report to the Board and declare a place to be infected with pleuro-pneumonia or foot and mouth disease, they must report whether in their opinion an infected area should be declared, and, if so, the proposed limits thereof, and whether there is a market within it, and whether they think that the holding of the market ought to be prohibited (*g*); and the Board must consider the expediency of prohibiting the holding of such a market whenever they declare an area so infected (*h*). Such places as markets can be declared infected places by the Board only (*i*). Report by local authority as to area.

(*a*) Diseases of Animals Act, 1894 (57 & 58 Vict. c. 57), ss. 5, 8, 12.
(*b*) Defined, s. 59, *ibid.* The expression "inspector of the Board of Agriculture" or "inspector of a local authority" means a person appointed to be an inspector for purposes of this Act by the Privy Council and the Board of Agriculture, or by a local authority, as the case may be; and the expression "inspector," used alone, means such a person, by whichever authority appointed.
(*c*) *Ibid.*, ss. 5 (1), 8 (1).
(*d*) *Ibid.*, ss. 5 (6)—(9), 8 (6)—(8).
(*e*) *Ibid.*, s. 8 (5), and Foot and Mouth Disease Order, 1895, s. 3.
(*f*) *Ibid.*, s. 8 (11).
(*g*) *Ibid.*, s. 8 (9).
(*h*) *Ibid.*, s. 9 (2).
(*i*) See Swine Fever Order, 1894, s. 16; Cattle Plague Order, 1895, ss. 11, 14;

SECT. 2. By Statute.

Independent declaration by Board.

919. The Board is unrestricted, and may at any time if they think fit on any evidence satisfactory to them by order declare any place or area to be infected with cattle plague, pleuro-pneumonia, or foot and mouth disease, or extend, contract, or alter the limits of such infected place or area, or declare them or any part of them free from infection (*k*).

Other diseases.

920. In the case of diseases other than cattle plague, pleuro-pneumonia, or foot and mouth disease, the Board can make orders prescribing the cases in which places and areas are to be declared infected, and the authority by which they may be declared, and the duration and discontinuance of the declarations (*l*).

Notice of declaration.

When a place or area is declared infected, notice of the fact may be published in the neighbourhood, and the Board may by order prescribe and regulate this (*m*).

Regulations as to removal, isolation, destruction, and disinfection.

921. The Board may prohibit and regulate the movement of animals and persons as well as of carcases and other things (*n*), whether into, or within, or out of an infected place or area (*o*); may prescribe and regulate the isolation and separation of animals there (*p*), the destruction, treatment, or removal of carcases and other things (*q*), and the cleansing and disinfection of infected places and areas or parts thereof (*r*) as well as the clothes of persons coming in contact with diseased or suspected animals or being in an infected place, and the use of precautions against the spreading of disease by such persons (*s*).

Power to exclude unauthorised persons.

The owner or person in charge of animals in an infected place or area may forbid by notice the entrance of persons therein without permission (*t*).

Movement into, within, and out of infected areas and places.

When a place is infected with pleuro-pneumonia, only cattle which have the disease may be moved into it, and no cattle may be moved out of it, except on such conditions as may be prescribed by the Board. A local authority, however, may give licences (on conditions prescribed by the Board) for the movement

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Pleuro-pneumonia Order, 1895, ss. 15, 18; Foot and Mouth Disease Order, 1895, s. 21; Sheep Pox Order, 1895, ss. 14, 17.

(*k*) Diseases of Animals Act, 1894 (57 & 58 Vict. c. 57), ss. 5 (10), 6, 8 (12), 9 (1).

(*l*) *Ibid.*, s. 10 (1), and see Swine Fever Order, 1894, s. 3; Sheep Pox Order, 1895, ss. 3, 5.

(*m*) Act of 1894, s. 22 (i.).

(*n*) *Ibid.*, s. 22 (iv.); Cattle Plague Order, 1895, s. 3; Pleuro-pneumonia Order, 1895, s. 3.

(*o*) Act of 1894, s. 22 (ii.). Compare *Eustace* v. *Sargent* (1866), 14 L. T. 552. The justices of the county from which the animals are moved also have jurisdiction (*R.* v. *Williams* (1866), 15 L. T. 290).

(*p*) Act of 1894, s. 22 (iii.).

(*q*) *Ibid.*, s. 22 (v.).

(*r*) *Ibid.*, s. 22 (vi.); Cattle Plague Order, 1895, s. 5, r. 4; Foot and Mouth Disease Order, 1895, s. 4, r. 5; Sheep Pox Order, 1895, s. 4, r. 5; Swine Fever Order, 1894, s. 4, r. 5.

(*s*) Act of 1894, s. 22 (vii.); Cattle Plague Order, 1895, s. 2 (3); Foot and Mouth Disease Order, 1895, s. 3 (2); Sheep Pox Order, 1895, s. 2 (3).

(*t*) Act of 1894, s. 13.

of cattle either into or out of such parts of an infected area as are not comprised within an infected place (*u*).

The same restriction holds good with regard to the movement of animals in the case of places or areas infected with foot and mouth disease (*x*).

Infected circles.

922. Where the Board declare that the provisions of s. 12 of the Act of 1894 shall apply in the case of any disease, then, upon any place becoming a place infected with that disease in pursuance of a declaration of an inspector of a local authority, the whole space lying within a distance of half a mile from any part of a place declared infected becomes an infected circle; when the place in respect of which an infected circle has been constituted ceases to be an infected place, the infected circle ceases to exist (*y*).

Effect of declaration of infected circle.

When an infected circle is declared, public notice may be given of it, for which the Board may make regulations; the Board may also make regulations for contracting and dissolving infected circles, may prohibit and regulate the movement of animals into, within, or out of the circle, and may authorise local authorities to do the same (*z*).

SUB-SECT. 6.—*Slaughter of Animals and Compensation.*

Foreign animals.

923. Foreign animals must be landed at a special wharf and killed before they are removed (*a*), and this regulation applies to all animals except such as may not be landed at all owing to prohibition (*b*), and such as are intended for exhibition or other exceptional purposes and allowed by the Board to land subject to quarantine (*c*). In such exceptional cases, they must be landed at a specified part of the port, and kept in particular sheds, and must not be moved except on conditions prescribed by the Board (*d*). With regard to animals from the Channel Islands and the Isle of Man, the Board may make alterations in the above regulations (*e*).

Cattle plague.

924. The Board must slaughter all animals affected with cattle plague, or which have been in contact with animals so affected, and may, if they think fit, slaughter animals suspected of cattle plague, or in a place infected with cattle plague, and (subject to Treasury Regulations) animals in a place in an infected area (*f*).

(*u*) Diseases of Animals Act, 1894 (57 & 58 Vict. c. 57), s. 11, and Schedule I., Part I.

(*x*) *Ibid.*, s. 11, and Schedule I., Part II.

(*y*) *Ibid.*, s. 12 (1), (2).

(*z*) *Ibid.*, s. 12. It may be noted that a conviction for moving infected animals in a county is no bar to proceedings in a borough for a like offence, although the movement was one continuous movement (*R.* v. *Coulman* (1883), 48 J. P. 8, a case decided at Doncaster Quarter Sessions).

(*a*) Schedule III., Part I., para. (1).

(*b*) See p. 424, *ante*.

(*c*) Diseases of Animals Act, 1896 (59 & 60 Vict. c. 15), s. 1. See the Foreign Animals (Quarantine) Order, 1896 (5513).

(*d*) Diseases of Animals Act, 1894 (57 & 58 Vict. c. 57), s. 27, and Schedule III., Part II.

(*e*) *Ibid.*, s. 28; and see Channel Islands Animals Order, 1896 (5511), and Isle of Man Animals Order, 1896 (5512).

(*f*) Diseases of Animals Act, 1894 (57 & 58 Vict. c. 57), s. 7.

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In the case of diseases other than cattle plague, the Board may direct and authorise slaughter by local authorities (*g*).

Slaughter by local authorities.

The Board must slaughter cattle affected with pleuro-pneumonia, and may, if they think fit, slaughter cattle suspected of, or exposed to, such infection (*h*). When slaughter is decided upon, it must, if the owner by notice in writing so requires, be done within twenty-one days (*i*).

Pleuro-pneumonia.

Foot and mouth disease.

The Board may, if they think fit, slaughter any animals, and a local authority may slaughter any cattle, sheep, or swine (*k*) affected with, or suspected of, or exposed to the infection of, foot and mouth disease (*l*).

Swine fever.

The Board may also slaughter any swine affected with, or suspected of, or exposed to the infection of, swine fever (*m*).

Glanders.

A local authority may slaughter horses, asses, or mules affected with glanders, but, if the owner objects, only with the authority of the Board; if the owner consents they may slaughter such animals when suspected of glanders (*n*).

Sheep pox.

A local authority must slaughter, within two days of their hearing of the disease, all sheep affected with sheep pox, and may, if they think fit, slaughter sheep suspected of, or exposed to, the infection of it (*o*).

General provisions as to slaughter and disposal of carcases.

925. The Board may reserve for observation and treatment an animal liable to be slaughtered. When an animal has been slaughtered the carcase belongs to the Board or local authority (whichever ordered the slaughter), and must be disposed of as they direct. A record of slaughter must be kept (*p*).

The Board or the local authority may use the land of the owner of a slaughtered animal for the burial of the carcase, or common or uninclosed land if the Board approves (*q*), and the Board may make orders prescribing and regulating the burial and destruction of carcases of slaughtered animals, or of animals dying while diseased or suspected (*r*).

Compensation.

926. Compensation is to be paid to persons whose animals are slaughtered for the common good. The rate varies according to the disease for the prevention of which the animal was slaughtered, and according to whether the animal was actually affected with disease or not (*s*).

When insurance is payable upon animals thus slaughtered, the

(*g*) Diseases of Animals Act, 1894 (57 & 58 Vict. c. 57), s. 19.
(*h*) *Ibid.*, s. 14 (1), (2).
(*i*) *Ibid.*, s. 14 (4).
(*k*) Foot and Mouth Disease Order, 1895, s. 22.
(*l*) Diseases of Animals Act, 1894 (57 & 58 Vict. c. 57), s. 15 (1).
(*m*) *Ibid.*, s. 16 (1).
(*n*) Glanders or Farcy Order, 1894, s. 13.
(*o*) Sheep Pox Order, 1895, s. 18.
(*p*) Diseases of Animals Act, 1894 (57 & 58 Vict. c. 57), s. 20.
(*q*) *Ibid.*, s. 20 (4).
(*r*) *Ibid.*, s. 22 (xvi.); Swine Fever Order, 1894, s. 7; Cattle Plague Order, 1895, s. 8; Sheep Pox Order, 1895, s. 8; Pleuro-pneumonia Order, 1895, s. 7; Foot and Mouth Disease Order, 1895, s. 7; Epizootic Lymphangitis Order, 1905, s. 10.
(*s*) See Diseases of Animals Act, 1894 (57 & 58 Vict. c. 57), ss. 7, 14, 15, 16;

insurers may deduct the amount of compensation received by the owner before they make the payment (*t*).

When compensation may be withheld.

Persons are liable to lose the whole or part of the compensation if, in the opinion of the Board or the local authority, they have been guilty of an offence against the Act, or the animal in question, being a foreign animal, was diseased at the time of its landing (*u*).

The Board may prescribe the mode of ascertaining the value of animals, and may regulate applications for and payment of compensation (*x*).

Funds from which compensation payable.

927. Compensation for animals slaughtered by the Board, and also the expenses of additional inspectors and valuers employed for the purposes of compensation, are paid out of an account kept at the Bank of England called "The Cattle Pleuro-pneumonia Account for Great Britain" (*y*). It is fed by money annually provided by Parliament (which is not to exceed £140,000 in any one year), and by the proceeds of sale of carcases of slaughtered animals.

When, however, animals are slaughtered by the local authority, the compensation is to be paid out of the local rate (*z*).

SUB-SECT. 7.—*Local Authorities.*

Who are local authorities.

928. The local authorities responsible for carrying out most of the provisions contained in the orders of the Board are the

Sheep Pox Order, 1895, s. 18; Glanders or Farcy Order, 1894, s. 13 (3) (a); Foot and Mouth Disease Order, 1895, s. 22.

The following table shows shortly the legal rate:—

Disease.	When the Animal is actually affected.	In other Cases.
Cattle plague . . .	Half the value immediately before it became affected: not to exceed £20	Full value before it was slaughtered: not to exceed £40.
Pleuro-pneumonia . .	Three-fourths the value immediately before it became affected: not to exceed £30.	Ditto.
Swine fever . . .	Half value before it became affected.	Full value before it was slaughtered.
Sheep pox . . .	Ditto, not exceeding 40s.	Ditto, not exceeding £4.
Glanders . . .	As the local authority thinks expedient; maximum, one-fourth of value before the animal became diseased, minimum, £2 for a horse, 10s. for an ass or mule.	Ditto.
Foot and mouth disease	Full value before it became affected .	Ditto

(*t*) Diseases of Animals Act, 1894 (57 & 58 Vict. c. 57), s. 20 (5).

(*u*) *Ibid.*, s. 20 (7); Foot and Mouth Disease Order, 1895, s. 25; Sheep Pox Order, 1895, s. 12.

(*x*) Act of 1894, s. 22 (xiv.), (xv.). See Cattle Plague Order, 1895, s. 15 (England), s. 16 (Scotland); Pleuro-pneumonia Order, 1895, s. 19 (England), s. 20 (Scotland); Foot and Mouth Disease Order, 1895, s. 23 (England), s. 24 (Scotland); Sheep Pox Order, 1895, s. 19 (England), s. 20 (Scotland); Animals (Transit and General) Amendment Order, 1904, s. 13 (England), s. 14 (Scotland).

(*y*) Act of 1894, s. 17. The account opened under s. 2 of the repealed Contagious Diseases (Animals) Pleuro-pneumonia Act, 1890 (53 & 54 Vict. c. 14), is continued; see s. 18 and the regulations contained in the Second Schedule to the Act of 1894.

(*z*) *Ibid.*, s. 19.

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borough councils in boroughs with a population in 1881 of not less than 10,000, and elsewhere the county councils, except in the city of London, where the city corporation is the local authority. Moreover, the city corporation is the local authority so far as foreign animals are concerned for the whole county of London (*a*). Many important functions which the principal Act authorises the local authorities to perform have already been noted.

Provision of wharves etc.

They are further empowered to provide wharves and sheds for landing and keeping (or slaughtering) foreign and other animals, or carcases, fodder, and dung. Such wharves are "markets" within the Markets and Fairs Clauses Act, 1847, the provisions of which relating to building, maintaining and holding markets, erecting and managing slaughter-houses, weighing goods, levying tolls, and making bye-laws are incorporated with the principal Act (*b*).

Periodical returns of tolls levied must be made to the Board (*c*).

Compulsory powers are given to them to buy or rent land within or without their district on which to build wharves and sheds, and also for the burial of carcases (*d*).

Sheep-dipping tanks.

They may also provide, fit up, and maintain portable dipping tanks or, with the sanction of the Board, dipping places for sheep, and charge for the use of them. No dipping place may be used so as to injure the water in any stream or pond for drinking or other purposes (*e*).

Reports to Board.

Local authorities and their inspectors and officers must give the Board such notices and returns as the Board require (*f*).

In case of their defaulting in their duties, the Board may exercise their functions at their expense (*g*).

Expenses.

929. The expenses of local authorities are defrayed out of their respective local rates (*h*); and as the boroughs in England, which have authority themselves to incur expenses, also contribute (except in the case of county boroughs) to the county rate, the expenses chargeable to the county rate must be fairly adjusted (*i*).

Borrowing powers.

When the amount of the local rate levied or required for the purpose of defraying such expenses exceeds or would exceed in any financial year sixpence in the pound, a local authority may borrow any money necessary for that purpose; such borrowing is subject to the Local Loans Act, 1875, and the Public Works Loan Commissioners may, on the recommendation of the Local Government

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(*a*) Diseases of Animals Act, 1894 (57 & 58 Vict. c. 57), s. 3.
(*b*) *Ibid.*, s. 32. See title MARKETS AND FAIRS.
(*c*) *Ibid.*, s. 32 (6). All such sums are to be carried to a separate account, and applied in payment of interest on money borrowed under the repealed Contagious Diseases (Animals) Acts, 1869—1893, or the Act of 1894 (see s. 32 (5)).
(*d*) Act of 1894, s. 33 (1), (3), which applies s. 176 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), which itself incorporates the Lands Clauses Consolidation Acts. See title COMPULSORY PURCHASE AND COMPENSATION.
(*e*) Diseases of Animals Act, 1903 (3 Edw. 7, c. 43), s. 3.
(*f*) Diseases of Animals Act, 1894 (57 & 58 Vict. c. 57), s. 36.
(*g*) *Ibid.*, s. 34.
(*h*) *Ibid.*, s. 40. See title RATES AND RATING.
(*i*) *Ibid.*, s. 41.

Board, lend them money (*k*). To secure these loans the local authorities may mortgage their rates for any term not exceeding seven years (*l*), or the tolls levied upon their wharves (*m*), in which case the above restrictions as to amount of rate and term of years do not operate.

Burial of carcases washed ashore.

930. Local authorities must pay the expenses of the burial or destruction of carcases washed ashore, when such burial or destruction is done under the direction of a receiver of wreck with authority from the Board of Trade, but may recover such expenses from the owner of the vessel from which the carcases were thrown or washed, in the same manner as salvage is recoverable (*n*).

Committee of county council.

931. A local authority being a county council may delegate any of their powers or duties to a committee, or to a district council, or to the justices of the county sitting in petty sessions, excepting only the power to raise money by rate or loan (*o*).

Transfer of powers by local authorities.

Local authorities may by agreement, to be approved by the Board, transfer their powers to one another, and form united districts (*p*).

Regulations by local authorities.

932. Further, the Board may make orders authorising local authorities to make regulations for any of the purposes of the principal Act (*q*), and it has exercised this power in nearly every order issued.

Publication of orders.

Every local authority must at their own expense publish every order etc. of the Board sent to them by the Board for publication (*r*).

SUB-SECT. 8.—*Enforcement of Statutory Provisions.*

Powers of police.

933. For the purpose of enforcing the Act the police (*s*) are empowered (*inter alia*) to stop and detain without warrant a person who is seen or found committing, or is reasonably suspected of being engaged in committing, an offence against the Act, and under certain circumstances to arrest him (*t*). An offence against the Act includes a contravention of an order of the Board or of a regulation of a local authority (*u*).

(*k*) Diseases of Animals Act, 1894 (57 & 58 Vict. c. 57), s. 42. Any loan by the Public Works Loan Commissioners is to be made in the manner provided by the Public Works Loans (Money) Act, 1875 (38 & 39 Vict. c. 58). See title LOCAL GOVERNMENT.

(*l*) Diseases of Animals Act, 1894 (57 & 58 Vict. c. 57), s. 42 (1), (2), (5).

(*m*) *Ibid.*, s. 42 (5).

(*n*) *Ibid.*, s. 46. See title ADMIRALTY.

(*o*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 28 (2), (3), and Diseases of Animals Act, 1894 (57 & 58 Vict. c. 57), s. 31, Sched. IV.

(*p*) Diseases of Animals Act, 1894 (57 & 58 Vict. c. 57), s. 39.

(*q*) *Ibid.*, s. 22 (XXXIV.). As to the validity of bye-laws so made, see *Scott* v. *Glasgow Corporation*, [1899] A. C. 470; and see title LOCAL GOVERNMENT.

(*r*) Act of 1894, s. 49 (4).

(*s*) The police were not entitled to notice in writing before being sued, nor to have the action tried in the county where an alleged grievance was committed, under the statute 1 & 2 Will. 4, c. 41, s. 19 (repealed by the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61)). See *Bryson* v. *Russell* (1884), 14 Q. B. D. 720. No doubt they are entitled to the protection given by the latter Act.

(*t*) Diseases of Animals Act, 1894 (57 & 58 Vict. c. 57), s. 43 (2).

(*u*) *Ibid.*, s. 52 (1).

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Powers of inspectors.

934. Inspectors (*x*), both of the Board and of local authorities, have all the powers of constables, and in addition, on reasonable suspicion of disease, or of neglect of the provisions of, or regulations made under, the principal Act, may enter any place or vessel. An inspector must, if required by the owner or occupier, state in writing his reasons for entering (*y*). An inspector of the Board and, if authorised by the Board, an inspector of a local authority, may enter premises and examine sheep (*z*). An inspector of the Board may detain ships (*a*). The certificate of a veterinary inspector is conclusive evidence in all Courts of justice that an animal is or was affected with the disease specified therein (*b*).

Appointment of inspectors by local authorities.

935. Local authorities appoint their own inspectors (*c*), but their inspectors are directly responsible to the Board for notification of disease (*d*) and other reports (*e*); the inspectors must also execute the orders of the Board, and if they act negligently in doing so the local authority is not answerable (*f*). Nor if a local authority fails to appoint inspectors and disease breaks out is it liable for damages or for a mandamus (*g*).

SUB-SECT. 9.—*Offences.*

Unlawful landing of animals.

936. The most serious offence against the Act is that of landing or attempting to land animals and other things in contravention of orders made under it; this may be dealt with as an offence under the Customs Acts (*h*).

Punishment of offences.

937. Other offences may be prosecuted summarily, with a right of appeal to quarter sessions (*i*).

Acting without a licence, or with a false or stale licence, where a licence is required, fraudulently obtaining compensation, digging up carcases, and using vessels or vehicles for carrying animals when such use is prohibited, may be punished with imprisonment for two months with or without hard labour, or by a fine (*k*).

The fine is not to exceed twenty pounds; or if the offence is committed with respect to more than four animals, is not to exceed five pounds for each animal; or if in respect of carcases, dung, and other things, is not to exceed ten pounds for every half-ton after the first half-ton, in addition to twenty pounds (*l*).

(*x*) See definition in Diseases of Animals Act, 1894 (57 & 58 Vict. c. 57), s. 59; note (*l*), p. 425, *ante*.
(*y*) Act of 1894, s. 44.
(*z*) Diseases of Animals Act, 1903 (3 Edw. 7, c. 43), s. 2.
(*a*) Diseases of Animals Act, 1894 (57 & 58 Vict. c. 57), s. 45.
(*b*) *Ibid.*, s. 44 (5). See *Harris* v. *Smith* (1880), 44 J. P. 361; *Jamieson* v. *Dow*, (1900) 2 F. (Just. Cas.) 24; and Sheep Scab Order, 1905, s. 3.
(*c*) Diseases of Animals Act, 1894 (57 & 58 Vict. c. 57), s. 35.
(*d*) *Ibid.*, s. 8 (4).
(*e*) *Ibid.*, s. 36.
(*f*) *Stanbury* v. *Exeter Corporation*, [1905] 2 K. B. 838.
(*g*) *Mulcahy* v. *Kilmacthomas Guardians* (1885), 18 L. R. Ir. 200.
(*h*) Diseases of Animals Act, 1894 (57 & 58 Vict. c. 57), s. 56. The Customs Consolidation Act, 1876 (39 & 40 Vict. c. 36), s. 42, enables customs authorities to destroy infected animals etc.; see title REVENUE.
(*i*) Diseases of Animals Act, 1894 (57 & 58 Vict. c. 57), ss. 54, 55.
(*k*) *Ibid.*, s. 53.
(*l*) *Ibid.*, s. 51

General contravention of the Act or of orders or regulations under it, failing to keep an animal separate, or to give notice of disease, failing to produce a licence, refusing to an inspector admission to premises, and throwing a diseased or suspected carcase into a river, may be punished by a similar fine, and on a further conviction within twelve months by imprisonment with or without hard labour for one month in lieu of a fine (*m*).

In addition to these, every order of the Board specifies particular offences against its provisions.

The right to lay information for offences under these Acts is not restricted to local authorities, but prosecutions may be instituted by a common informer (*n*).

SUB-SECT. 10.—*Carriage of Animals.*

Provision of food and water.

938. Railway companies must see that animals are properly supplied with food and water on journeys, and they may charge the consignor and consignee for their expenses (*o*). The Board may make orders for insuring such supply both by land and sea (*p*), and also for protecting animals from unnecessary suffering while travelling by land and sea (*q*).

Regulation of use of vehicles etc.

The Board may also make orders prohibiting the use of any vessel, vehicle, or pen etc. for the carrying of animals, in respect of the use of which a penalty has been previously recovered (*r*), and for regulating the marking of animals (*s*).

SUB-SECT. 11.—*Cows and Dairies.*

Cows and dairies.

939. The Local Government Board (*t*) may make orders for the registration of cowkeepers and dairymen (*u*), the inspection of cattle in dairies, the lighting, ventilating (*x*), and cleansing of the water supplies thereof, and for other matters, including the use of

(*m*) Diseases of Animals Act, 1894 (57 & 58 Vict. c. 57), s. 52.

(*n*) *R.* v. *Stewart*, [1896] 1 Q. B. 300.

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

(*p*) *Ibid.*, s. 22 (xxiv.), (xxvii.). See Cattle Plague Order, 1895, s. 13; Pleuro-pneumonia Order, 1895, s. 17; Foot and Mouth Disease Order, 1895, s. 20; Sheep Pox Order, 1895, s. 16; Water Supply on Railways Order, 1895 (5306), Schedule I. (this is a list of the stations where a water supply must be kept); Exportation of Horses Order, 1898 (5886); Animals (Transit and General) Order, 1895; Animals (Transit and General) (Amendment) Order, 1904; Sheep Scab Order, 1905, s. 13.

(*q*) Diseases of Animals Act, 1894 (57 & 58 Vict. c. 57), s. 22 (xxv.), (xxvi.). See the provisions in Foreign Animals Order, 1903; Channel Islands Animals Order, 1896; Isle of Man Animals Order, 1896.

(*r*) Act of 1894, s. 22 (xxix.).

(*s*) *Ibid.*, s. 22 (xxviii.).

(*t*) Under s. 34 of the Contagious Diseases Act, 1878 (41 & 42 Vict. c. 74), the only section of that Act still in force. The power was transferred from the Privy Council to the Local Government Board by s. 9 of the Contagious Diseases (Animals) Act, 1886 (49 & 50 Vict. c. 32), and was transferred again to the Board of Agriculture and Fisheries by the Board of Agriculture Act, 1889 (52 & 53 Vict. c. 30). As to London the power is now derived from s. 28 of the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76).

(*u*) For definition of cowkeepers and dairymen, see *Umfreville* v. *London County Council* (1897), 66 L. J. (Q. B.) 177; *Southwell* v. *Lewis* (1880), 44 J. P. 796.

(*x*) This includes air-space (*Baker* v. *Williams*, [1898] 1 Q. B. 23).

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precautions against contamination, and the authorising of local authorities (*y*) to make bye-laws.

Regulation of dairies.

Orders (*z*) have been made by which the registration (*a*) of dairymen and the notification of disease (*b*) are prescribed, and the construction of water supplies to new dairies and their sanitary condition are regulated (*c*). Local authorities have power to make regulations relating to the inspection, lighting, and ventilating of dairies (*d*).

Milk.

The contamination of milk is prohibited (*e*), and special rules have been made as to the milk of diseased cows (*f*), in the interests of consumers. Disease in this case includes a tubercular condition of the udder of a cow so certified by a veterinary surgeon (*g*). The milk of a cow affected with anthrax may not be moved from the shed or other place in which the cow is or has been kept (*h*).

(*y*) In London, the London County Council; elsewhere, see pp. 429, 430, *ante*.
(*z*) Dairies, Cow-sheds and Milk-shops Orders, 1885, 1886 (amending), and 1899. For precedents for use under these orders see Encyclopædia of Forms, Vol X., pp. 336 *et seq.*
(*a*) Dairies, Cow-sheds and Milk-shops Order, 1885, s. 6.
(*b*) See *London County Council* v. *Edwards*, [1898] 2 Q. B. 75.
(*c*) Dairies, Cow-sheds and Milk-shops Order, 1885, ss. 7, 8.
(*d*) *Ibid.*, s. 13.
(*e*) *Ibid.*, ss. 9—12.
(*f*) *Ibid.*, s. 15.
(*g*) Dairies, Cow-sheds and Milk-shops Order, 1899, s. 2.
(*h*) Anthrax Order, 1899, s. 4. See, further, titles FOOD AND DRUGS; PUBLIC HEALTH.

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ANTICIPATION,

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For Arbitration in Relation to—

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Compulsory Purchase of Land - -	,,	COMPULSORY PURCHASE AND COMPENSATION.
Electric Lighting etc. - - -	,,	ELECTRIC LIGHTING, TRACTION AND POWER.
Factories and Workshops - -	,,	FACTORIES AND WORKSHOPS.
Friendly Societies - - - -	,,	FRIENDLY SOCIETIES.
Gasworks - - - - -	,,	GAS AND WATER.
Housing of Working Classes - -	,,	PUBLIC HEALTH.
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Waterworks - - - - -	,,	GAS AND WATER.
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Classification.

940. References to arbitration are divisible into three classes, namely, (1) references by consent out of Court, (2) references under order of Court, and (3) references under an Act of Parliament.

References by consent out of Court.

In references by consent out of Court the matter referred is some difference or dispute between the parties, and the authority of the arbitrator is derived from and is limited by their submission to arbitration. Where, as is almost always the case, the submission is in writing, the provisions of the Arbitration Act, 1889, with

Introduction.

regard to references by consent out of Court are applicable, and constitute a code regulating the reference throughout (*a*).

References under order of Court.

In references under order of Court the matter referred may be either the whole action pending before the Court or some particular question or issue arising therein, and the authority of the referee or arbitrator is derived from the order of the Court directing the reference. The provisions of the Arbitration Act, 1889, with regard to references under order of Court, supplemented by the Rules of the Supreme Court, govern references of this description (*b*).

References under Act of Parliament.

In references under an Act of Parliament, the subject-matter of the reference is prescribed by, and the authority of the arbitrator is derived from, the particular statute in question. In some cases the statute either expressly excludes the application of the Arbitration Act, 1889, or renders its application dependent on the agreement of the parties, but in all other cases of what for convenience may be termed statutory arbitrations, the provisions of the Arbitration Act, 1889, except in so far as they may be inconsistent with the particular statute which regulates the arbitration in question or with any rules or procedure authorised or recognised by that statute, are applicable (*c*).

Part I.—References by Consent out of Court.

SECT. 1.—*The Submission.*

941. Every reference by consent out of Court must originate in a submission (*d*).

SUB-SECT 1.—*Definition.*

(1) At common law.

At common law a submission to arbitration is an agreement (*e*) made by two or more parties between whom some difference has arisen or may thereafter arise (*f*), whereby they appoint another person to adjudicate upon such difference, and agree to be bound by his decision thereon. The person appointed to adjudicate upon the difference is called an arbitrator. Where two arbitrators are appointed, and the submission provides that, in the event of their disagreement, the matter in dispute shall be referred to the decision of a third person, such third person is called an umpire.

(*a*) Arbitration Act, 1889 (52 & 53 Vict. c. 49), ss. 1—12, 18—23, 25—29.

(*b*) *Ibid.*, ss. 13—17, 18—23, 25—29; R. S. C., Ord. 36, rr. 45—55 c.

(*c*) *Ibid.*, s. 24. "This Act shall apply to every arbitration under any Act passed before or after the commencement of this Act as if the arbitration were pursuant to a submission, except in so far as this Act is inconsistent with the Act regulating the arbitration or with any rules or procedure authorised or recognised by that Act." See, as to such references, p. 492, *post*.

(*d*) Bac. Abr. tit. Arbitrament and Award (B), (D).

(*e*) The agreement between the parties may incorporate the provisions for arbitration which are set out in some other document (*Temperley Steam Shipping Co.* v. *Smyth & Co.*, [1905] 2 K. B. 791).

(*f*) *Willcox* v. *Storkey* (1866), L. R. 1 C. P. 671. For forms of submission of future differences, see Encyclopædia of Forms, Vol. II., pp. 90 *et seq.*

SECT. 1. The Submission.

The submission may be by mutual bonds or by deed (*g*), or by writing under hand only, or merely by word of mouth (*h*).

Arbitration distinguished from valuation.

In order to constitute a submission to arbitration there must be some difference or dispute, either existing or prospective, between the parties, and they must intend that it should be determined in a quasi-judicial manner (*i*). Therein lies the distinction between

(*g*) The submission may be sealed by one party and signed by the other (*Tomlin* v. *Mayor of Fordwich* (1836), 6 Nev. & M. (K. B.) 594).

(*h*) An oral submission could not be made a rule of Court under any of the statutes which were repealed by the Arbitration Act, 1889 (*Ansell* v. *Evans* (1796), 7 Term Rep. 1; *Ex parte Glaysher* (1864), 3 H. & C. 442; *Newton* v. *Hetherington* (1865), 19 C. B. (N. S.) 342; and see *Willcox* v. *Storkey* (1866), L. R. 1 C. P. 671). The provisions of the Arbitration Act, 1889, are for the most part inapplicable where the submission is oral; see s. 27, which defines a submission for the purposes of the Act as a "written agreement." Consequently, where the submission is oral, the arbitration is governed by the common law, under which (1) either party to the submission may at any time before the award is made revoke the authority of the arbitrator and so render the reference abortive (see p. 448, *post*); and (2) the award when made cannot be enforced except by action. Moreover, an award made pursuant to an oral submission would fail to satisfy the requirements of the Statute of Frauds in cases where that statute is applicable (*Walters* v. *Morgan* (1792), 2 Cox, 369; and compare *Rainforth* v. *Hamer* (1855), 25 L. T. (O. S.) 247). At common law an arbitrator had no power to administer an oath; by statute 3 & 4 Will. 4, c. 42, s. 41 (now repealed), an arbitrator under a rule of Court was empowered to administer an oath, and by the Evidence Act, 1851 (14 & 15 Vict. c. 99), s. 16, every arbitrator or other person having by law or by consent of parties authority to hear, receive and examine evidence is empowered to administer an oath to any witness who may be legally called before him.

(*i*) See *Re Carus-Wilson and Greene* (1886), 18 Q. B. D. 7 (agreement for the valuation of timber as between vendor and purchaser on the sale of an estate); *Re Hammond and Waterton* (1890), 62 L. T. 808 (agreement for the valuation of plants etc. in a market garden as between purchaser and tenant). In the following cases it was held that the agreement between the parties amounted to a submission to arbitration: *Jebb* v. *M'Kiernan* (1829), Mood. & M. 340 (agreement that due discharge of duties by clerk be ascertained by inspection of accounts); *Parkes* v. *Smith* (1850), 15 Q. B. 297, 309 (agreement for ascertaining the amount due by outgoing partner on dissolution of partnership); *Re Hopper* (1867), L. R. 2 Q. B. 367 (agreement to refer questions between landlord and tenant on termination of tenancy, with power to hear witnesses); *Re Evans* (1870), 18 W. R. 723 (where the agreement referred to the appointees as "valuers"); *Re Hohenzollern Actien-Gesellschaft and The City of London Contract Corporation* (1886), 54 L. T. 596 (refusal of engineer to give certificate under agreement for sale and purchase of locomotives).

Compare the following cases, in which it was held that the agreement between the parties did *not* constitute a submission to arbitration: *Leeds* v. *Burrows* (1810), 12 East, 1 (agreement for valuation between incoming and outgoing tenants); *Goodyear* v. *Simpson* (1845), 15 M. & W. 16 (agreement that a clerk should adjust the share of profits between the partners in a stage-coach); *Jenkins* v. *Betham* (1855), 15 C. B. 168 (where the agreement was for valuation of ecclesiastical property between incoming and outgoing incumbent); *Northampton Gaslight Co.* v. *Parnell* (1855), 15 C. B. 630 (agreement for ascertainment of amount due by sureties for a contractor); *Collins* v. *Collins* (1858), 26 Beav. 306 (agreement as to purchase price of a brewery); *Bos* v. *Helsham* (1866), L. R. 2 Exch. 72 (agreement in conditions of sale as to settlement of disputes); *Re Dawdy* (1885), 15 Q. B. D. 426 (agreement as to compensation payable by landlord to outgoing tenant, where witnesses were called and there was in fact an arbitration).

See also *Boyd* v. *Emmerson* (1834), 2 A. & E. 184 (case submitted for counsel's opinion); *Lee* v. *Hemingway* (1834), 3 Nev. & M. (K. B.) 860 (where an agreement to purchase land at a price to be named by a third person was held not to be a submission); *Wadsworth* v. *Smith* (1871), L. R. 6 Q. B. 332 (a similar decision as to the certificate of an architect as to delay under a building contract);

an agreement for a valuation and a submission to arbitration, for in the case of a valuation there is not, as a rule, any difference or dispute between the parties, and they intend that the valuer shall, without taking evidence or hearing argument, make his valuation according to his own skill, knowledge, and experience.

Submission incomplete at common law until arbitrator appointed.

A submission to arbitration is not complete at common law unless and until an arbitrator is appointed. An agreement to refer a dispute to arbitration without naming the arbitrator is valid and to this extent enforceable, that an action for damages for breach of the agreement can be maintained (*k*), but it does not by itself constitute a submission at common law (*l*).

(2) Under the Arbitration Act, 1889.

942. A written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not, constitutes a submission under the Arbitration Act, 1889 (*m*).

Writing essential.

The agreement must, it seems, be signed by or on behalf of the parties thereto (*n*).

Existing or prospective dispute.

In the case of a submission under the Arbitration Act, 1889, as in that of a submission at common law, it is essential that there should be some difference or dispute, either existing or prospective, between the parties, and that they should intend their difference to be decided in a quasi-judicial manner (*o*).

Submission valid though no provision for appointment of arbitrator.

Where no arbitrator is named in the submission, it usually contains some provision as to how he should be nominated, and in certain cases the Arbitration Act, 1889, provides for the nomination of an arbitrator or umpire (*p*); but even where the agreement for reference to arbitration is in such a form that in the event of either party refusing to nominate an arbitrator there is no means of

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Turner v. *Goulden* (1873), L. R. 9 C. P. 57 (agreement for the valuation of the goodwill of a business); *Bottomley* v. *Ambler* (1877), 38 L. T. 545 (where the matter referred was the amount of rent due under a lease).

The stewards of a horse-race are not in the position of arbitrators, though called upon to decide some dispute (*Ellis* v. *Hopper* (1858), 3 H. & N. 766; *Parr* v. *Winteringham* (1859), 1 E. & E. 394; and see *Brown* v. *Overbury* (1856), 11 Exch. 715; and compare *Sadler* v. *Smith* (1869), L. R. 5 Q. B. 40, as to the decision of a referee in a professional sculling race).

(*k*) *Livingston* v. *Ralli* (1855), 5 El. & Bl. 132.

(*l*) See *Ex parte Glaysher* (1864), 3 H. & C. 442.

(*m*) Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 27. "In this Act 'submission' means a written agreement to submit present or future differences to arbitration whether an arbitrator is named therein or not." The definition of a submission contained in this section includes submissions made before the Act came into force; see s. 25, and *Re Williams and Stepney*, [1891] 2 Q. B. 257; *Re Wilson and Eastern Counties Navigation etc. Co.*, [1892] 1 Q. B. 81.

(*n*) In *Caerleon Tinplate Co.* v. *Hughes* (1891), 60 L. J. (Q. B.) 640, the Court expressed the view that the signature of the parties is necessary in order to constitute a valid submission within the meaning of the Arbitration Act, 1889. This view, which was not necessary for the decision of that case, was repudiated in *Baker* v. *Yorkshire Fire and Life Assurance etc. Co.*, [1892] 1 Q. B. 144; but in *Forder* v. *Whittle* (April 18th, 1907, unreported) BRAY, J., decided that the signature of the parties or their agent is necessary. See also *Aitken* v. *Batchelor* (1893), 62 L. J. (Q. B.) 193, where it was held that the indorsements on counsel's briefs constituted a submission within the meaning of the Act; and *Antram* v. *Chace* (1812), 15 East, 209. For forms of submission of existing differences, see Encyclopædia of Forms, Vol. II., pp. 106—132.

(*o*) See cases cited note (*i*), *supra*.

(*p*) Arbitration Act, 1889 (52 & 53 Vict. c. 49), ss. 5, 6, Schedule I. (a), (b).

SECT. 1. The Submission.

compelling him to do so or of otherwise supplying the vacancy, so that it is impossible to proceed with the reference, nevertheless the agreement constitutes a valid submission within the meaning of the Arbitration Act, 1889 (*q*).

Agreement to be bound by judicial decision does not make judge an arbitrator.

When in proceedings pending before the Court the parties agree to accept the judge's decision as final, it is said that they thereby constitute the judge a quasi-arbitrator (*r*). The effect of such an agreement is that the decision of the judge is unappealable and cannot be questioned in any way; but the judge is not thereby really placed in the position of an arbitrator: and his decision is not, and does not in any way resemble, an award.

SUB-SECT 2.—*Parties.*

Capacity to make submission.

943. Capacity to make a submission is co-extensive with capacity to contract. Every person capable of entering into a contract may be a party to a submission (*s*): conversely he who cannot contract cannot make a submission (*t*); and, in the case of persons whose capacity to contract is restricted, the power of making a submission is, in the same manner and to the same extent, limited.

Married women.

Thus married women, who were with few exceptions incapable at common law of making a contract, were also incapable of making a submission to arbitration; but by virtue of the Married Women's Property Act, 1882, which enables every married woman to contract in respect of her separate estate, a married woman can now enter into a submission binding on her separate estate (*u*).

Infants.

With regard to infants, it would seem that a submission made by an infant could not be enforced against him during his infancy, and would be voidable by him on attaining his majority; but submissions by infants out of Court are very rare, the cases reported (*x*) being cases in which the reference was held pursuant to an order of the Court.

Bankrupts.

There is no objection to a bankrupt making a submission any more than there is to his making any other agreement (*y*).

Agents.

An agent, who is authorised so to do, may enter into a submission on behalf of his principal (*z*).

Partners.

In the case of partners the cases decided before the Partnership Act, 1890, seem to show that one partner had no authority to bind the firm by entering into a submission (*a*). The matter is now

(*q*) *Manchester Ship Canal Co.* v. *S. Pearson & Son, Ltd.*, [1900] 2 Q. B. 606.

(*r*) *Burgess* v. *Morton*, [1896] A. C. 136; *Re Durham County Permanent Benefit Building Society, Ex parte Wilson* (1871), 7 Ch. App. 45; *Harrison* v. *Wright* (1845), 13 M. & W. 816. Compare *Elvin* v. *Drummond* (1827), 4 Bing. 415; and *Bustros* v. *White* (1876), 1 Q. B. D. 423.

(*s*) Com. Dig. Arbitration D 2.

(*t*) Bac. Abr. tit. Arbitrament and Award C.

(*u*) *Conolan* v. *Leyland* (1884), 27 Ch. D. 632.

(*x*) See *Godfrey* v. *Wade* (1822), 6 Moo. C. P. 488; *Dowse* v. *Coxe* (1825), 3 Bing. 20; *Biddell* v. *Dowse* (1827), 6 B. & C. 255; *Jones* v. *Powell* (1838), 6 Dowl. 483; *Proudfoot* v. *Boyle* (1846), 15 M. & W. 198. See also title INFANTS.

(*y*) *Re Milnes and Robertson* (1854), 15 C. B. 451. See title BANKRUPTCY AND INSOLVENCY.

(*z*) *Goodson* v. *Brooke* (1815), 4 Camp. 163; and compare *The City of Calcutta* (1898), 79 L. T. 517, and *The Margery*, [1902] P. 157. See title AGENCY, *ante*.

(*a*) See *Strangford* v. *Green* (1678), 2 Mod. Rep. 228: *Stead* v. *Salt* (1825), 3

governed by the Act, and depends in each case on the question whether referring to arbitration is the usual way of carrying on the business of the particular partnership (*b*); and this of course varies with different businesses. It is incumbent on the person seeking to hold a firm bound by a submission made by one of its members to prove that referring to arbitration was the usual way of carrying on the firm's business, or that the other partners had authorised or ratified (*c*) the submission.

Capacity conferred by statute.

In certain cases, such as trustees, executors and administrators (*d*), trustees in bankruptcy (*e*), companies registered under the Companies Acts, 1862 to 1900 (*f*), Parliament has expressly conferred power to refer disputes to arbitration.

SUB-SECT. 3.—*Persons bound.*

Parties and their assignees.

944. The submission is binding on the parties thereto; and where the subject-matter of the reference is capable of assignment the assignee of a party to the submission would be likewise bound (*g*).

Personal representatives of a party.

Where a party to a reference dies pending the reference (*h*), and the subject-matter of the reference is some claim or cause of action which survives his death (*i*), the question whether his legal personal representatives are bound by the submission depends on its terms. If the submission provides either in express terms or by necessary implication that it shall bind the legal personal representatives of the parties thereto, then they are bound (*k*); but if it contains no such provision the ordinary rule of law that the death

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Bing. 101; *Adams* v. *Bankhart* (1835), 1 C. M. & R. 681; *Antram* v. *Chace* (1812), 15 East, 209. See also *Hatton* v. *Royle* (1858), 3 H. & N. 500.

(*b*) The Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 5, provides that the acts of every partner in carrying on in the usual way business of the kind carried on by the firm bind the other partners. See title PARTNERSHIP.

(*c*) See *Thomas* v. *Atherton* (1878), 10 Ch. D. 185.

(*d*) The Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 21, confers upon executors, administrators, and trustees power to submit disputes to arbitration. As to how far a submission to arbitration by an executor or administrator operates as an admission of assets, see *Re Wansborough* (1815), 2 Chitty, 40, where it is stated in the note that a submission to arbitration by an executor or administrator is in general considered as a reference not only of the cause of action, but also of the question whether or not he has assets, and when the arbitrator has awarded the executor or administrator to pay a certain sum of money it is equivalent to determining that assets existed. See also *Pearson* v. *Henry* (1792), 5 Term Rep. 6; *Barry* v. *Rush* (1787), 1 Term Rep. 691; *Riddell* v. *Sutton* (1828), 5 Bing. 200; *Worthington* v. *Barlow* (1797), 7 Term Rep. 453; *Love* v. *Honeybourne* (1824), 4 D. & R. 814; *Re Joseph and Webster* (1830), 1 Russ. & M. 496. Compare *Davies* v. *Ridge* (1800), 3 Esp. 101.

(*e*) The Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 57, authorises a trustee in bankruptcy, with the permission of the committee of inspection, to refer any dispute to arbitration. See *Ex parte Wyld* (1860), 2 De G. F. & J. 642, in which case the committee of inspection had not given the permission required of them by the Bankruptcy Act then in force.

(*f*) Companies Act, 1862 (25 & 26 Vict. c. 89), ss. 72, 73.

(*g*) *Smith* v. *Jones* (1842), 1 Dowl. (N. S.) 526.

(*h*) An award made before the death of the party is of course binding on his legal personal representatives. See *Brooke* v. *Mitchell* (1840), 6 M. & W. 473.

(*i*) See *Bowker* v. *Evans* (1885), 15 Q. B. D. 565.

(*k*) *McDougal* v. *Robertson* (1827), 4 Bing. 435; *Dowes* v. *Coxe* (1825), 3 Bing. 20; *Clarke* v. *Crofts* (1827), 4 Bing. 143.

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of a principal revokes the authority of his agent takes effect, and the legal personal representatives of the deceased party are not bound (*l*).

Trustee in bankruptcy.

Where a party to a submission becomes bankrupt pending the reference, his trustee in bankruptcy is not as a general rule bound by the submission (*m*); but if the submission forms one of the terms of a contract, as, for example, an ordinary building contract, it would seem that the trustee could not make a claim under the contract, and at the same time repudiate the arbitration clause in it; he could not both approbate and reprobate the contract (*n*).

SUB-SECT. 4.—*Subject-matter.*

Difference or dispute between parties.

945. The subject-matter of every reference to arbitration by consent out of Court must be some difference or dispute arising between the parties (*o*).

Nature of disputes that may be referred.

Any difference or dispute which the parties might, if they were minded so to do, settle between themselves without recourse to arbitration, may be referred to arbitration by their submission. Thus a husband and wife may refer to arbitration the terms on which they shall separate, because they can make a valid agreement between themselves on that matter; but they cannot refer to arbitration the question whether or no their marriage was a nullity or should be dissolved, because on those matters they cannot make any agreement between themselves (*p*).

Illegal transaction.

On the same principle a dispute arising from and founded on some illegal or *ultra vires* transaction cannot be referred to arbitration. In such cases an agreement for the settlement of the dispute made by the parties themselves would not be enforceable, and the award of an arbitrator on such a dispute would likewise be invalid and unenforceable (*q*).

Criminal matter.

All civil matters may be referred to arbitration, but matters which are purely criminal and give rise to no civil remedy cannot

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(*l*) *Toussaint* v. *Hartop* (1817), 7 Taunt. 571; *Cooper* v. *Johnson* (1819), 2 B. & Ald. 394. See also *Tyler* v. *Jones* (1824), 3 B. & C. 144; *Clarke* v. *Crofts* (1827), 4 Bing. 143; *M'Dougal* v. *Robertson* (1827), 4 Bing. 435; *Re Hare, Milne, and Haswell* (1839), 8 Dowl. 71. See title AGENCY, p. 233, *ante*.

(*m*) *Re Smith, Ex parte Edwards* (1886), 3 Mor. 179; *Dod* v. *Herring* (1829), 3 Sim. 143; *Marsh* v. *Wood* (1829), 9 B. & C. 659; and see *Pennell* v. *Walker* (1856), 18 C. B. 651; *Sturges* v. *Curzon* (1851), 7 Exch. 17. See title BANKRUPTCY AND INSOLVENCY.

(*n*) See *Piercy* v. *Young* (1879), 14 Ch. D. 200, at pp. 202, 203, and note (*t*), p. 451, *post*.

(*o*) *Re Carus-Wilson and Greene* (1886), 18 Q. B. D. 7. Where the submission is with respect to future differences, a difference must arise before the authority of the arbitrator can be invoked. See *London and North Western Rail. Co.* v. *J. H. Billington, Ltd.*, [1899] A. C. 79; and compare *Field* v. *Longden & Sons*, [1902] 1 K. B. 47.

(*p*) *Soilleux* v. *Herbst* (1801), 2 Bos. & P. 444; *Bateman* v. *Ross* (1813), 1 Dowl. 235; *Hooper* v. *Hooper* (1860), 1 Sw. & Tr. 602; and see *Wilson* v. *Wilson* (1848), 1 H. L. Cas. 538; *Besant* v. *Wood* (1879), 12 Ch. D. 605; *Hart* v. *Hart* (1881), 18 Ch. D. 670; *Cahill* v. *Cahill* (1883), 8 App. Cas. 420.

(*q*) *Maunsell* v. *Midland Great Western of Ireland Rail. Co.* (1863), 1 H. & M. 130; *Aubert* v. *Maze* (1801), 2 Bos. & P. 371; *Steers* v. *Lashley* (1794), 6 Term Rep. 61.

be referred (*r*); where, however, some act has been done which renders the person who did it liable to a criminal prosecution, and also to a civil action for damages at the suit of the injured party, the adjustment of the reparation to be made to the injured party may be referred to arbitration (*s*).

Ousting the jurisdiction of the Court.

An agreement which purports to oust the jurisdiction of the Court is on grounds of public policy illegal and void (*t*), but an agreement that no right of action shall arise unless and until an award has been made is valid and enforceable. In policies of insurance, building agreements, and grain and other produce contracts it is commonly stipulated that in case of any dispute arising thereunder, such dispute shall be referred to arbitration, and that the obtaining of an award shall be a condition precedent to the right to sue (*u*).

SUB-SECT. 5.—*Effect.*

Right to commence legal proceedings.

946. A submission authorises the arbitrator thereby appointed to hear and determine the matter in dispute between the parties (*x*), but it does not oust the jurisdiction of the Court. Any party to a submission may, therefore, before the award is made commence legal proceedings in respect of any claim or cause of action included in the submission (*y*). At common law the Court had no jurisdiction to stay such proceedings; but where the submission is contained in a written agreement, the Court has jurisdiction under the Arbitration Act, 1889, to stay proceedings commenced in respect of any matter agreed to be referred to arbitration (*z*).

Where the submission is contained in a written agreement it has the same effect as if it had been made an order of Court (*a*).

(*r*) *Edgcombe* v. *Rodd* (1804), 5 East, 294; *R.* v. *Hardey* (1850), 14 Q. B. 529; *R.* v. *Blakemore* (1850), 14 Q. B. 544; and see *R.* v. *Bardell* (1836), 5 A. & E. 619, and *R.* v. *Shillibeer* (1836), 5 Dowl. 238.

(*s*) *Baker* v. *Townshend* (1817), 7 Taunt. 422; *Keir* v. *Leeman* (1844), 6 Q. B. 308; and see also *Beeley* v. *Wingfield* (1809), 11 East, 46.

(*t*) *Horton* v. *Sayer* (1859), 4 H. & N. 643; *Lee* v. *Page* (1861), 30 L. J. (CH.) 857; *Edwards* v. *Aberayron Mutual Ship Insurance Society* (1875), 1 Q. B. D. 563; and see *Ripley* v. *Great Northern Rail. Co.* (1875), 31 L. T. 869.

(*u*) *Scott* v. *Avery* (1856), 5 H. L. Cas. 811; *Tredwen* v. *Holman* (1862), 1 H. & C. 72; *Braunstein* v. *Accidental Death Insurance Co.* (1861), 1 B. & S. 782; *Elliott* v. *Royal Exchange Assurance Co.* (1867), L. R. 2 Exch. 237; *Viney* v. *Bignold* (1887), 20 Q. B. D. 172; *Trainor* v. *Phœnix Fire Assurance Co.* (1892), 65 L. T. 825; *Scott* v. *Mercantile Accident and Guarantee Insurance Co.* (1892), 66 L. T. 811; *Caledonian Insurance Co.* v. *Gilmour*, [1893] A. C. 85; *Hamlyn & Co.* v. *Talisker Distillery*, [1894] A. C. 202; *Spurrier* v. *La Cloche*, [1902] A. C. 446; *Sharpington* v. *Fulham Guardians*, [1904] 2 Ch. 449. Compare *Collins* v. *Locke* (1879), 4 App. Cas. 674, and *Dawson* v. *Fitzgerald* (1876), 1 Ex. D. 257, in which cases it was held that an action was maintainable although there had been no reference to arbitration, and *Roper* v. *Lendon* (1859), 1 E. & E. 825. See also title ACTION, p. 22, *ante*.

(*x*) *Vynior's Case* (1610), 8 Co. Rep. 81 b.

(*y*) *Harris* v. *Reynolds* (1845), 7 Q. B. 71; and see *Wood* v. *Copper Miners Co.* (1856), 17 C. B. 561; *Cooke* v. *Cooke* (1867), L. R. 4 Eq. 77. Where the obtaining of an award is a condition precedent to any right of action, neither party can sue the other until after the arbitration has been held and the award has been made, because until that happens he has no cause of action. See the cases cited, note (*u*), *supra*.

(*z*) Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 4. See p. 451, *post*.

(*a*) *Ibid.*, s. 1. This provision of the Act does not appear to have much

SECT. 1. The Submission.

When arbitrator will be restrained

The Court will not, as a rule, restrain an arbitrator from proceeding with a reference on the ground that the award will be inoperative (*b*); but where the submission itself is impeached, an injunction may be granted to restrain the arbitrator from proceeding until the question of the validity of the submission has been determined (*c*).

SUB-SECT. 6.—*Clauses.*

Clauses in submissions.

947. The parties may insert in their submission such clauses as they think fit (*d*).

Where the submission is contained in a written agreement and does not express a contrary intention (*e*), the following provisions, so far as they are applicable, are implied:—

(i.) The reference is to a single arbitrator unless some other mode of reference is provided (*f*).

(ii.) If the reference is to two arbitrators, the two arbitrators may appoint an umpire (*g*); if the arbitrators fail to make an award within the time (*h*) allowed to them for that purpose or give written notice to any party to the submission or to the umpire that they are unable to agree upon an award, the umpire may forthwith enter upon the reference in lieu of the arbitrators (*i*).

(iii.) The parties to the submission, and all other persons who are bound thereby, must, subject to any legal objection, submit themselves for examination on oath or affirmation in relation to the matters in dispute (*k*).

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practical effect; it does not constitute the arbitration a "proceeding in the Court" within the meaning of the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 100, and it therefore does not enable the Court to direct the issue of a commission for the examination of witnesses out of the jurisdiction (*Re Shaw and Ronaldson*, [1892] 1 Q. B. 91); nor does it make the refusal of either party to appoint an arbitrator a contempt of Court (*Re Smith and Service and Nelson & Sons* (1890), 25 Q. B. D. 545); but it does make disobedience to the award a contempt of Court punishable in certain cases by attachment. See pp. 473 *et seq.*, *post*.

(*b*) *North London Rail. Co.* v. *Great Northern Rail. Co.* (1883), 11 Q. B. D. 30; *London and Blackwall Rail. Co.* v. *Cross* (1886), 31 Ch. D. 354, at p. 368. And see *Farrar* v. *Cooper* (1890), 44 Ch. D. 323; *Great Western Rail. Co.* v. *Waterford and Limerick etc. Rail. Co.* (1881), 17 Ch. D. 493.

(*c*) *Kitts* v. *Moore*, [1895] 1 Q. B. 253; *Sissons* v. *Oates* (1894), 10 T. L. R. 392; *Maunsell* v. *Midland and Great Western of Ireland Rail. Co.* (1863), 1 H. & M. 130; and compare *M'Harg* v. *Universal Stock Exchange* (1895), 11 T. L. R. 409.

(*d*) For forms of clauses usually inserted in submissions, see Encyclopædia of Forms, Vol. II., pp. 126—132; and compare Form 24 in Appendix K to the Rules of the Supreme Court.

A clause stipulating that neither party shall apply to the Court to direct the arbitrator to state a special case under s. 19 of the Arbitration Act, 1889 (52 & 53 Vict. c. 49), would seem to be invalid (*Re Hansloh and Reinhold* (1895), 1 Com. Cas. 215).

(*e*) Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 2.

(*g*) *Ibid.*, s. 2, Sched. I. (b).

(*h*) As to the time within which the award is to be made and the mode of extending the time, see p. 462, *post*.

(*i*) Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 2, Sched. I. (d).

(*k*) *Ibid.*, s. 2, Sched. I. (f), which provides that "the parties to the reference, and all persons claiming through them respectively," shall submit themselves for examination. It is conceived that the words "all persons claiming through

(iv.) The parties to the reference, and all persons claiming through them respectively, must, subject to any legal objection, produce all relevant documents in their possession or power, and do all other things during the proceedings on the reference which the arbitrators or umpire may require (*l*).

(v.) The witnesses on the reference must, if the arbitrators or umpire think fit, be examined on oath or affirmation (*m*).

(vi.) The award is final and binding on the parties (*n*) to the submission and the persons claiming under them respectively (*o*).

(vii.) The costs of the arbitration and award are in the discretion of the arbitrator (*p*).

SUB-SECT. 7.—*Alteration and Amendment.*

May be made by consent of parties.

948. Save by consent of the parties thereto, a submission to arbitration cannot be altered or amended (*q*).

At any time before the award is made the parties may by mutual agreement alter or amend the terms of the submission, but the arbitrator or umpire has no power so to do (*r*).

Alteration or amendment operates as new submission.

Any alteration or amendment of a submission constitutes a fresh submission incorporating such of the terms of the original submission as remain unaltered (*s*). Therefore, if it is intended that the provisions of the Arbitration Act, 1889, should apply to the reference, the alteration or amendment must be made in writing and signed on behalf of the parties thereto; if the alteration or amendment be made orally, the submission becomes an oral submission, and the Arbitration Act, 1889, has no application.

SUB-SECT. 8.—*Stamps.*

Submission under seal.

949. A submission to arbitration made under seal must be stamped with a deed stamp of ten shillings (*t*).

Submission under hand only.

A submission to arbitration made under hand only must be

them respectively" must be restricted to such persons as are bound by the submission.

(*l*) Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 2, Sched. I. (*f*).

(*m*) *Ibid.*, s. 2, Sched. I. (g).

(*n*) *Ibid.*, s. 2, Sched. I. (h), which provides that the award is to be final and binding "on the parties and the persons claiming under them respectively"; but it is conceived that the words "persons claiming under them" must be restricted to persons who are bound by the submission.

(*o*) *Ibid.*, s. 2, Sched. I. (h).

(*p*) *Ibid.*, s. 2, Sched. I. (i).

(*q*) *Smurthwaite* v. *Richardson* (1863), 15 C. B. (N. S.) 463; *Morgan* v. *Tarte* (1855), 11 Exch. 82; *Houghton* v. *Bankart* (1861), 3 De G. F. & J. 16. See also *Vanderbyl* v. *McKenna* (1868), L. R. 3 C. P. 252.

(*r*) For example, the arbitrators cannot restrict the time allowed for making the award (*Re Morphett* (1845), 2 Dow. & L. 967).

(*s*) *Greig* v. *Talbot* (1823), 2 B. & C. 179; *Evans* v. *Thomson* (1804), 5 East, 189. And see *Stephens* v. *Lowe* (1832), 9 Bing. 32; *Brown* v. *Goodman* (1789), 3 Term Rep. 592, n. (b); *R.* v. *Bingham* (1829), 3 Y. & J. 101.

(*t*) Stamp Act, 1891 (54 & 55 Vict. c. 39), ss. 1, 2; Sched. I., "Deed." The duty must be denoted by an impressed stamp.

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stamped with an agreement stamp of sixpence, unless the subject-matter of the submission is not of the value of five pounds, in which case no stamp is necessary (*x*).

One stamp only required.

Only one stamp is required, although the submission may comprise a number of separate causes of action by or against a number of different persons (*y*).

Alterations.

Any alteration or amendment of a submission, whether indorsed on the original submission or written on a separate document, must be stamped (*z*).

SUB-SECT. 9.—*Revocation.*

Either party may revoke oral submission.

950. At common law a party to a submission might, at any time before the award was made, revoke the authority of the arbitrator (*a*), and so render the proceedings on the reference abortive; for an award made by an arbitrator after revocation of his authority is a mere nullity (*b*). The power of revocation existed notwithstanding that the authority of the arbitrator was expressed to be irrevocable, because an arbitrator is in contemplation of law merely an agent appointed by the parties to decide the matter in dispute between them, and his authority is therefore revocable by either of his principals (*c*).

Liability of party revoking.

The party who revoked thereby rendered himself liable to an action for damages for breach of his agreement to refer (*d*); or where, as was in former times commonly the case, the submission to arbitration was by mutual bonds in a certain sum conditioned to be void on performance of the arbitrator's award, he was liable to an action in debt on the bond (*e*). Where the submission had been made a rule of Court, the party who revoked was guilty of contempt of court, and was liable to attachment (*f*).

(*x*) Stamp Act, 1891 (54 & 55 Vict. c. 39), ss. 1, 22; Sched. I., "Agreement." An adhesive stamp may be used.

As to stamp where the value of the subject-matter of the reference is uncertain, see *Lloyd* v. *Mansel* (1850), 19 L. J. (Q. B.) 192.

(*y*) *Goodson* v. *Forbes* (1815), 6 Taunt. 171.

(*z*) *Stephens* v. *Lowe* (1832), 9 Bing. 32.

(*a*) *Vynior's Case* (1610), 8 Co. Rep. 81 b; *Hide* v. *Petit* (1671), 1 Ch. Cas. 185; *Green* v. *Pole* (1830), 6 Bing. 443; *Mills* v. *Bayley* (1863), 2 H. & C. 36; *Thomson* v. *Anderson* (1870), L. R. 9 Eq. 523; *Re Rouse and Meier* (1871), L. R. 6 C. P. 212, at p. 217; *Re Mitchell and Governor of Ceylon* (1888), 21 Q. B. D. 408. See also *Clapham* v. *Higham* (1822), 1 Bing. 87.

(*b*) *Milne* v. *Gratrix* (1806), 7 East, 608; *Fraser* v. *Ehrensperger* (1883), 12 Q. B. D. 310. And see *King* v. *Joseph* (1814), 5 Taunt. 452; *Aston* v. *George* (1819), 2 B. & Ald. 395; *Randell* v. *Thompson* (1876), 1 Q. B. D. 748; *Deutsche Springstoff Actien-Gesellschaft* v. *Briscoe* (1887), 20 Q. B. D. 177. For forms of revocation, see Encyclopædia of Forms, Vol. II., pp. 133, 134.

(*c*) See *Vynior's Case* and the other cases cited above. The authority given to an agent is, generally speaking, revocable (*Venning* v. *Bray* (1862), 2 B. & S. 502). As to the cases in which such an authority is irrevocable, see *Clerk* v. *Laurie* (1857), 2 H. & N. 199, at p. 203; *Carmichael's Case*, [1896] 2 Ch. at p. 648. See also *Tayler* v. *Marling* (1840), 2 Man. & G. 55, where it was held that in the peculiar circumstances the arbitrator's authority was coupled with an interest, and was therefore irrevocable. See, generally, title AGENCY, p. 230, *ante*.

(*d*) *Newgate* v. *Degelder* (1667), 2 Keb. 10, 20, 24; *Charnley* v. *Winstanley* (1804), 5 East, 266; *Skee* v. *Coxon* (1830), 10 B. & C. 483.

(*e*) *Hill* v. *Langley* (1670), 1 Vent. 50; *Warburton* v. *Storr* (1825), 4 B. & C. 103.

(*f*) *Re Rouse and Meier*, *supra*, at pp. 217, 218; *Green* v. *Pole*, *supra*; *Milne* v. *Gratrix*, *supra*.

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Submission in writing irrevocable except by leave of Court.

When leave granted.

951. Where the submission is contained in a written agreement and does not express a contrary intention, the common law power of revocation has been abrogated by statute, and the authority of the arbitrator is irrevocable except by leave of a Court or judge (*g*).

The power to grant leave to revoke a submission is exercised by the Court in a sparing and cautious manner (*h*), and unless the applicant can establish that there will be failure of justice if the reference is allowed to proceed, he will not be allowed to revoke (*i*).

Although bankruptcy does not operate as a revocation of a submission (*k*), the fact that one of the parties has become bankrupt may be a sufficient ground for granting the other party leave to revoke (*l*).

(*g*) Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 1: "A submission, unless a contrary intention is expressed therein, shall be irrevocable, except by leave of the Court or a judge"; *Re Smith and Service and Nelson & Sons* (1890), 25 Q. B. D. 545. Applications for leave to revoke a submission may be made in the Chancery Division of the Court, but are more usually made in the King's Bench Division. In the King's Bench Division the application is made by originating summons returnable before a Master (R. S. C., Ord. 54, r. 12A); from the Master's decision an appeal lies in the ordinary course (R. S. C., Ord. 54, r. 21) to the judge in chambers; and from the judge in chambers to the Divisional Court; see *Re Frere and Staveley Taylor & Co. and North Shore Mill Co.*, [1905] 1 K. B. 366, which must be taken to have overruled *Re Portland Urban District Council and Tilley & Co.*, [1896] 2 Q. B. 98.

If the application be made in the Chancery Division, it may be made either by originating summons or by motion; and an appeal lies from the decision of the judge to the Court of Appeal.

Leave to revoke a submission cannot be granted *ex parte* (*Clarke* v. *Stocken* (1836), 2 Bing. (N. C.) 651); nor can it be granted after the arbitrator has made his award (*Phipps* v. *Ingram* (1835), 3 Dowl. 669).

(*h*) *Scott* v. *Van Sandau* (1841), 1 Q. B. 102; *Re Woodcroft and Jones* (1841), 9 Dowl. 538.

(*i*) See *James* v. *Attwood* (1839), 5 Bing. (N. C.) 628 (where the arbitrator was charged with prejudice, having taken no note of the evidence of several witnesses); *Re Donkin and Leeds Canal Co.* (1893), 9 T. L. R. 192 (where he was charged with negligence and incompetence); *Jackson* v. *Barry Rail. Co.*, [1893] 1 Ch. 238 (where he was charged with bias and prejudice); *Belcher* v. *Roedean School Site and Buildings, Ltd.* (1901), 85 L. T. 468 (where he was accused of fraud). The Court held in each of those cases that there were no sufficient grounds for granting leave to revoke the submission.

The reluctance of the Court to grant leave for the revocation of a submission is well illustrated by *Re Dreyfus and Paul* (1893), 9 T. L. R. 358. In that case one of the parties desired to obtain evidence from abroad; but the arbitrator could not issue a commission to take such evidence except with the consent of the other party, who, however, refused his consent. Application was then made to the Court for leave to revoke the submission, in order that the matter in dispute might be litigated in the Courts, in which case a commission to take evidence abroad could have been issued. Nevertheless the Court refused the application.

On the other hand, in *Re Baring Brothers and Doulton* (1892), 61 L. J. (Q. B.) 704, the Court was satisfied that the arbitrator could not, by reason of some controversy pending between him and one of the parties unconnected with the arbitration, bring an impartial and unbiassed mind to the consideration of the matter referred, and granted leave to revoke the submission. See also *Frankenberg* v. *The Security Co.* (1894), 10 T. L. R. 393; and compare *Eckersley* v *Mersey Docks and Harbour Board*, [1894] 2 Q. B. 667, where leave to revoke on the ground that the arbitrator might be biassed was refused, *Jackson* v. *Barry Rail. Co.*, *supra*, being approved and *Nuttall* v. *Mayor of Manchester* (1892), 8 T. L. R. 513, being distinguished.

(*k*) *Andrews* v. *Palmer* (1821), 4 B. & Ald. 250.

(*l*) *Marsh* v. *Wood* (1829), 9 B. & C. 659.

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But the fact that a third person who was expected to join in the submission has refused to do so has been held insufficient (*m*).

Where the arbitrator has been guilty of gross misconduct or unfairness, leave to revoke may be granted (*n*); or the alternative course of removing the arbitrator may be adopted (*o*).

Where arbitrator about to make mistake of law.

Formerly, where it could be shown that the arbitrator was going to make some mistake in matter of law, the Court would in certain cases grant leave to revoke the submission, unless he undertook to state his award in the form of a special case for the opinion of the Court (*p*); but in such a case the proper application to be made now is not for leave to revoke the submission, but for an order directing the arbitrator to state a special case (*q*).

Revocation by death of party.

952. At common law the death of a party to a reference by consent out of Court operated as a revocation of the authority of the arbitrator, unless the submission contained either expressly or by necessary implication a provision to the contrary; and the common law rule seems to be applicable in the case of a submission under the Arbitration Act, 1889 (*r*).

By marriage.

Formerly the marriage of a female party to a submission operated as a revocation of the arbitrator's authority; but since the 1st of January, 1883, this is no longer the case (*s*).

By bankruptcy.

The bankruptcy of a party to a submission does not operate as a revocation of the arbitrator's authority—that is to say, the bankrupt is bound by the arbitrator's award—but the submission is as a general rule not binding on his trustee in bankruptcy; but where the submission forms one of the terms of a contract, it is conceived

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(*m*) *Wilson* v. *Morrell* (1855), 15 C. B. 720.

(*n*) See *Drew* v. *Drew* (1855), 2 Macq. 1; *Re European and American Steamship Co. and Crosskey* (1860), 8 C. B. (N. S.) 397. And see *Cooper* v. *Shuttleworth* (1856), 25 L. J. (EX.) 114, where the arbitrator appointed by the other party failed to act.

(*o*) See p. 459, *post*.

(*p*) *Faviell* v. *Eastern Counties Rail. Co.* (1848), 2 Exch. 344, at p. 350; *Hart* v. *Duke* (1862), 32 L. J. (Q. B.) 55; *Robinson* v. *Davies* (1879), 5 Q. B. D. 26; *East and West India Dock Co.* v. *Kirk and Randall* (1887), 12 App. Cas. 738. It was within the discretion of the Court whether leave to revoke should be given on this ground or not. See *James* v. *James* (1889), 23 Q. B. D. 12; see also *Re Lord Gerard and London and North-Western Rail. Co.*, [1894] 2 Q. B. 915; and, on appeal, [1895] 1 Q. B. 459.

(*q*) Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 19; *Re Palmer & Co. and Hosken & Co.*, [1898] 1 Q. B. 131, at p. 139.

(*r*) *Blundell* v. *Brettargh* (1810), 17 Ves. 232; *Toussaint* v. *Hartop* (1817), 7 Taunt. 571; *Cooper* v. *Johnson* (1819), 2 B. & Ald. 394. And see *Tyler* v. *Jones* (1824), 3 B. & C. 144; *Clarke* v. *Crofts* (1827), 4 Bing. 143; *M'Dougal* v. *Robertson* (1827), 4 Bing. 435; *Smith* v. *Fielder* (1833), 10 Bing. 306; *Re Hare, Milne and Haswell* (1839), 8 Dowl. 71; *Prior* v. *Hembrow* (1841), 8 M. & W. 873; *Lewin* v. *Holbrook* (1843), 11 M. & W. 110. In *Bowker* v. *Evans* (1885), 15 Q. B. D. 565, the matter referred to arbitration was a claim for damages for a tort; the death of the wrong-doer before the award was made extinguished the other party's claim for damages, and it was therefore held that the award did not bind the executors of the deceased party, though the submission contained a provision that it should be binding on them. See also *Brooke* v. *Mitchell* (1840), 6 M. & W. 473.

(*s*) See the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 13, which provides that a married woman shall be bound by her ante-nuptial contracts. And see *Conolan* v. *Leyland* (1884), 27 Ch. D. 632.

that the trustee cannot take advantage of the contract and at the same time repudiate the arbitration clause (*t*).

SECT. 2.—*Stay of Legal Proceedings.*

Power of Court to stay proceedings.

953. If a person who is a party to or bound by a submission contained in a written agreement commences legal proceedings in respect of any matter agreed to be referred, the Court has power, subject to the conditions mentioned below, to stay such proceedings (*u*).

A defendant in an action, who delivers a counterclaim, thereby commences legal proceedings against the plaintiff. If, therefore, the counterclaim is in respect of some matter which is comprised in a written submission to arbitration, the plaintiff can apply for a stay of the counterclaim (*x*).

The power to stay legal proceedings commenced in respect of a matter agreed to be referred to arbitration can, it would seem, be exercised by any Court in which such proceedings are commenced (*y*).

Conditions of obtaining stay.

954. In order that a stay may be granted, the following conditions must be fulfilled.

(*t*) *Andrews* v. *Palmer* (1821), 4 B. & Ald. 250; *Dod* v. *Herring* (1829), 3 Sim. 143; *Marsh* v. *Wood* (1829), 9 B. & C. 659; *Taylor* v. *Shuttleworth* (1840), 8 Dowl. 281; *Tayler* v. *Marling* (1840), 2 Man. & G. 55; *Pennell* v. *Walker* (1856), 18 C. B. 651; *Hemsworth* v. *Brian* (1845), 1 C. B. 131. See title BANKRUPTCY AND INSOLVENCY.

(*u*) Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 4: "If any party to a submission, or any person claiming through or under him, commences any legal proceedings in any Court against any other party to the submission, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to such legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to that Court to stay the proceedings, and that Court or a judge thereof, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings."

Where the proceedings have been commenced in the King's Bench Division, the application is made by summons returnable before a Master (R. S. C., Ord. 54, r. 12A). An appeal from his decision lies in the ordinary course to the judge in chambers. From the judge in chambers an appeal lies direct to the Court of Appeal, because the application is a matter of practice and procedure within the meaning of the Judicature Act, 1894 (57 & 58 Vict. c. 16), s. 1 (4); see the rule laid down in *Watson* v. *Petts*, [1899] 1 Q. B. 54, and *Long* v. *Great Northern and City Rail. Co.*, [1902] 1 K. B. 863, and followed in *Re Frere and Staveley Taylor & Co. and North Shore Mill Co.*, [1905] 1 K. B. 366. An order granting or refusing a stay of proceedings is an interlocutory order within the meaning of s. 1 (1) of that Act. Leave to appeal from the decision of the judge in chambers must, therefore, be obtained, either from him or from the Court of Appeal.

In the Chancery Division the application may be made either by summons or motion. For form of notice of application to stay, see Encyclopædia of Forms, Vol. II., p. 103.

(*x*) *Chappell* v. *North*, [1891] 2 Q. B. 252. See also *Spurtali* v. *Van Hoorn*, [1884] W. N. 32; *Russell* v. *Pellegrini* (1856), 6 E. & B 1020; *Seligmann* v. *Le Boutillier* (1866), L. R. 1 C. P. 681.

(*y*) Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 4; see, however, *Runciman* v. *Smyth & Co.* (1904), 20 T. L. R. 625.

SECT. 2. Stay of Legal Proceedings.

The matter in question in the legal proceedings which it is sought to stay must be within the scope of the submission (*z*).

The submission must be contained in a written agreement and must be valid and subsisting (*a*), but the fact that the plaintiff has refused to nominate an arbitrator, and that until he nominates one the reference cannot proceed, would not be any ground for refusing a stay (*b*).

The submission must be in writing and subsisting.

955. The application must be made by a party to the submission or by some person claiming through or under such a party.

Where there are several persons against whom the proceedings have been commenced any one of them may apply for a stay; and the fact that some of them concur with the party who commenced the proceedings in wishing that the matter should be litigated in Court instead of being referred to arbitration is not of itself sufficient to induce the Court to abstain from ordering a stay (*c*).

Application must be by a party to the submission or someone claiming under a party.

It is conceived that where the interest of a party to a submission in the subject-matter in question has devolved on some other person, either by death or bankruptcy or voluntary assignment or in any other way, the latter would be a person "claiming through or under a party to the submission," if he chose so to claim (*d*).

956. The applicant must have taken no step in the proceedings.

No step must have been taken in the proceedings.

A party who makes any application whatsoever to the Court, even though it be merely an application for time, takes a step in the proceedings.

What amounts to a step in the proceedings.

Delivery of a defence (*e*), application to the Court for leave to interrogate (*f*), or for a stay pending the giving of security for costs (*g*), or for extension of time for delivery of defence (*h*), are "steps" in the proceedings. Even attendance on an ordinary summons for directions issued by the plaintiff and permitting an order to be made thereon without objection amounts to taking a step in the action (*i*).

On the other hand, neither a notice requiring a statement of claim (*k*), nor a request by letter for extension of time for pleading (*l*), nor the filing of affidavits in answer to an application by the plaintiff

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(*z*) *Piercy* v. *Young* (1879), 14 Ch. D. 200. See *Lury* v. *Pearson* (1857), 1 C. B. (N. S.) 639; *Dennehy* v. *Jolly* (1874), 22 W. R. 449.

(*a*) *Moffat* v. *Cornelius* (1878), 39 L. T. 102; *Deutsche etc. Gesellschaft* v. *Briscoe* (1887), 20 Q. B. D. 177; *Randell* v. *Thompson* (1875), 1 Q. B. D. 748; *Gillett* v. *Thornton* (1875), L. R. 19 Eq. 599. The agreement between the parties may by reference incorporate provisions for arbitration which are set out in some other document (*Temperley Steamship Co.* v. *Smyth & Co.*, [1905] 2 K. B. 791).

(*b*) *Manchester Ship Canal Co.* v. *S. Pearson & Son, Ltd.*, [1900] 2 Q. B. 606.

(*c*) *Willesford* v. *Watson* (1873), 8 Ch. App. 473.

(*d*) *Piercy* v. *Young* (1879), 14 Ch. D. at pp. 202, 203; but see *Pennell* v. *Walker* (1856), 18 C. B. 651.

(*e*) *West London Dairy Society, Ltd.* v. *Abbott* (1881), 44 L. T. 376.

(*f*) *Chappell* v. *North*, [1891] 2 Q. B. 252.

(*g*) *Adams* v. *Catley* (1892), 66 L. T. 687.

(*h*) *Ford's Hotel Co.* v. *Bartlett*, [1896] A. C. 1; see also *Smith & Co.* v. *British Marine Mutual Insurance Association*, [1883] W. N. 176.

(*i*) *County Theatres and Hotels, Ltd.* v. *Knowles*, [1902] 1 K. B. 480; *Richardson* v. *Le Maitre*, [1903] 2 Ch. 222; *Steven* v. *Buncle*, [1902] W. N. 44.

(*k*) *Ives and Barker* v. *Willans*, [1894] 2 Ch. 478.

(*l*) *Brighton Marine Palace and Pier, Ltd.* v. *Woodhouse*, [1893] 2 Ch. 486.

for the appointment of a receiver (*m*), amount to taking a step in the proceedings.

Applicant must be ready to do everything necessary for proper conduct of arbitration.

957. The applicant must satisfy the Court not only that he is, but also that he was at the commencement of the proceedings, ready and willing to do everything necessary for the proper conduct of the arbitration (*n*). He must also file an affidavit to this effect in support of his application for a stay (*o*), and unless the Court is satisfied on the point the application to stay must be dismissed.

Court must be satisfied that there is no sufficient reason why the matter should not be referred.

958. Finally, the Court must be satisfied that there is no sufficient reason why the matter should not be referred to arbitration in accordance with the submission (*p*).

If the above conditions are fulfilled, then it is for the party who wishes the matter to be litigated in Court instead of being referred to arbitration to show that the matter is one which ought not to be referred (*q*), and unless he can show that, an order to stay will be made (*r*).

Grounds for refusal of stay.

959. Where the circumstances are such that the Court would have granted leave to revoke the submission, if an application for that purpose had been made, an application to stay would no doubt be refused (*s*).

Impropriety of arbitrator acting.

An order to stay will not be granted if it can be shown that there is good ground for apprehending that the arbitrator will not act fairly in the matter (*t*), or that it is for some reason improper that he should arbitrate on the dispute (*u*).

Persons expected to join not doing so.

Where all persons expected to join in the submission had not done so, a stay was refused (*x*).

Party charged with fraud.

The fact that the matter in dispute involves a charge of fraud against one of the parties, and that the party charged with fraud desires the matter to be litigated in open Court, may, in certain

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(*m*) *Zulinoff* v. *Hammond*, [1898] 2 Ch. 92.

(*n*) Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 4; *Hodson* v. *Railway Passengers' Assurance Co.*, [1904] 2 K. B. at p. 841.

(*o*) *Piercy* v. *Young* (1879), 14 Ch. D. at p. 209. And see *Davis* v. *Starr* (1889), 41 Ch. D. 242; *Renshaw* v. *Queen Anne Mansions Co.*, [1897] 1 Q. B. 662; *Parry* v. *Liverpool Malt Co.*, [1900] 1 Q. B. 339; *Fox* v. *Railway Passengers' Assurance Co.* (1885), 52 L. T. 672.

(*p*) See *Vawdrey* v. *Simpson*, [1896] 1 Ch. at p. 169; *Hodyson* v. *Railway Passengers' Assurance Co.* (1882), 9 Q. B. D. 188; *Walmsley* v. *White* (1892), 40 W. R. 675; *Joplin* v. *Postlethwaite* (1889), 61 L. T. 629.

(*q*) *Willesford* v. *Watson* (1873), 8 Ch. App. 473, at p. 479; *Lyon* v. *Johnson* (1889), 40 Ch. D. 579; *Temperley Steamship Co.* v. *Smyth & Co.*, [1905] 2 K. B. 791, at pp. 803, 804.

(*r*) See *Wallis* v. *Hirsch* (1856), 1 C. B. (N. S.) 316; *Russell* v. *Russell* (1880), 14 Ch. D. 471; *Denton* v. *Legge* (1895), 72 L. T. 626.

(*s*) See p. 449, *ante*.

(*t*) *Ives and Barker* v. *Willans*, [1894] 2 Ch. 478, 488.

(*u*) *Nuttall* v. *Mayor etc. of Manchester* (1892), 8 T. L. R. 513; *Eckersley* v. *Mersey Docks and Harbour Board*, [1894] 2 Q. B. 667. And compare *Beddow* v. *Beddow* (1878), 9 Ch. D. 89; *Malmesbury Rail. Co.* v. *Budd* (1876), 2 Ch. D. 113; *Jackson* v. *Barry Rail. Co.*, [1893] 1 Ch. 238; *Re Haigh and London and North-Western Rail. Co.*, [1896] 1 Q. B. 649; *Pickthall* v. *Merthyr Tydvil Local Board* (1886), 2 T. L. R. 805; *The City of Calcutta* (1899), 79 L. T. 517, at p. 519; *Wickham* v. *Harding* (1859), 28 L. J. (EX.) 215.

(*x*) *Mason* v. *Haddan* (1859), 6 C. B. (N. S.) 526.

SECT. 2. **Stay of Legal Proceedings.**

cases, be sufficient to induce the Court to refuse to stay the proceedings (*y*).

Only question in dispute one of law.

Before the Arbitration Act, 1889, came into force, it was laid down in a number of cases that the fact that the matter at issue between the parties was merely a question of law was not a sufficient reason for refusing a stay (*z*), because, if the parties, instead of resorting to the ordinary Courts, agree to submit their dispute to a domestic tribunal of their own choosing, it is the *primâ facie* duty of the Court to give effect to their agreement (*a*); but since an arbitrator can now be compelled to state in the form of a special case for the opinion of the Court any question of law arising in the course of the reference, it would seem that, where the only question in dispute is a question of law, the Court would be disposed to refuse a stay, since it would be idle to remit to the arbitrator a question which the arbitrator in his turn would have to submit to the Court (*b*).

When submission includes only part of matters in dispute.

In some cases the fact that the submission includes but a small part of the matters which are the subject of the legal proceedings may be a sufficient reason for refusing a stay; since the order to stay must of course be confined to those matters only which are within the submission, and therefore the effect of an order to stay would be that part of the dispute between the parties would be litigated in Court and part would be referred to arbitration (*c*).

Stay will not be arbitrarily refused.

The Court may be said to have a discretion in the matter of granting or refusing a stay (*d*), but if the conditions necessary for granting a stay are fulfilled, and the Court is not satisfied that there is any sufficient reason why the matter should not be referred to arbitration, the Court, it is submitted, could not refuse a stay.

Other relief unobtainable before arbitrator.

960. The Court when making an order to stay, or at any time thereafter (*e*), may grant any relief which would not be obtainable in the arbitration, such as the appointment of a receiver (*f*), or an injunction (*g*).

The Court may, it would seem, at any time discharge or vary an order to stay (*h*).

(*y*) *Wallis* v. *Hirsch* (1856), 1 C. B. (N. S.) 316; *Kitchen* v. *Turnbull* (1872), 20 W. R. 253, 254; *Russell* v. *Russell* (1880), 14 Ch. D. 471. See also *Barnes* v. *Youngs*, [1898] 1 Ch. 414, at p. 419.

(*z*) *Randegger* v. *Holmes* (1866), L. R. 1 C. P. 679; *Forwood & Co.* v. *Watney* (1880), 49 L. J. (Q. B.) 447; *Plews* v. *Baker* (1873), L. R. 16 Eq. 564; *Cope* v. *Cope* (1885), 52 L. T. 607.

(*a*) *Willesford* v. *Watson* (1873), 8 Ch. App. 473, at p. 480.

(*b*) See Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 19; *Re Carlisle* (1890), 44 Ch. D. 200; *Barnes* v. *Youngs*, [1898] 1 Ch. 414.

(*c*) *Turnock* v. *Sartoris* (1889), 43 Ch. D. 150; *Young* v. *Buckett* (1882), 46 L. T. 266; but compare *Ives and Barker* v. *Willans*, [1894] 2 Ch. 478.

(*d*) *Lyon* v. *Johnson* (1889), 40 Ch. D. 579; *Wickham* v. *Harding* (1859), 28 L. J. (EX.) 215; *Barnes* v. *Youngs*, [1898] 1 Ch. 414.

(*e*) *Zalinoff* v. *Hammond*, [1896] 2 Ch. 92.

(*f*) *Law* v. *Garrett* (1878), 8 Ch. D. 26; *Pini* v. *Roncoroni*, [1892] 1 Ch. 633; *Compagnie du Sénégal* v. *Smith & Co.* (1883), 49 L. T. 527.

(*g*) *Brighton Marine Palace and Pier, Ltd.* v. *Woodhouse*, [1893] 2 Ch. 486; *Willesford* v. *Watson* (1873), 8 Ch. App. 473.

(*h*) *Bustros* v. *Lenders* (1871), L. R. 6 C. P. 259, a case decided under the repealed s. 11 of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125),

It is for the Court to direct how the costs of an application to stay should be borne. It is a common practice when an order staying proceedings is made to direct that the costs of the application to stay shall be in the discretion of the arbitrator, but it may be doubted whether such a direction would be valid if either party were to object to it.

Costs of application for stay.

SECT. 3.—*Appointment of Arbitrator or Umpire.*

Mode of appointment.

961. The parties may appoint whomsoever they please to arbitrate on their dispute; they may appoint a single arbitrator (*i*), or two arbitrators and an umpire, or two or more arbitrators without any umpire, or a number of persons such as the committee of a trade association (*k*) or even a foreign Court (*l*). They may also choose an arbitrator by lot or in any other way. If they choose an incompetent or unfit person, that is their own affair (*m*).

A person who is appointed arbitrator or umpire does not by acceptance of the office become bound to make an award (*n*), but he may bind himself to do so (*o*).

Where no provisions in written submission.

962. The submission itself may name the arbitrator or arbitrators, or it may without naming them direct how they are to be selected, or it may simply provide for a reference to arbitration without either naming the arbitrators or directing how they are to be selected.

In the last-mentioned case, if the submission is contained in a written agreement and does not express a contrary intention, the following rules apply:—

(1) The reference is to a single arbitrator (*p*).

(2) If the parties do not concur in the appointment of the arbitrator, any party may serve the other parties with a written notice to appoint an arbitrator; and if the appointment is not made within seven clear days after service of the notice, the Court may, on the application of the party who gave such notice, appoint an arbitrator (*q*).

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which, however, expressly enacted that an order to stay made thereunder might be discharged or varied as the parties might require. The Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 4, contains no such provisions, and the power to vary or discharge an order made under that section must therefore depend on the general jurisdiction of the Court, which is, it is submitted, sufficient to enable it to remove or vary the terms of any stay which it has placed on its own proceedings.

(*i*) The parties may appoint an official referee as their arbitrator (Arbitration Act, 1889 (52 & 53 Vict c. 49), s. 3). For forms of appointment, see Encyclopædia of Forms, Vol. II., pp. 95, 98—102.

(*k*) *Re Keighley, Maxsted & Co. and Durant & Co.*, [1893] 1 Q. B. 405.

(*l*) *Law* v. *Garrett* (1878), 8 Ch. D. 26; *Austrian Lloyd Steamship Co.* v. *Gresham Life Assurance Society, Ltd.*, [1903] 1 K. B. 249.

(*m*) *Re Shaw and Sims* (1851), 17 L. T. Jour. 160.

(*n*) *Lewin* v. *Holbrook* (1843), 11 M. & W. 110; *Crawshay* v. *Collins* (1818), 1 Swan. 40, 3 Swan. 90.

(*o*) *Pappa* v. *Rose* (1871), L. R. 7 C. P. 525, 527.

(*p*) Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 2, Schedule I. (a); *Re Eyre and Corporation of Leicester*, [1892] 1 Q. B. 136.

(*q*) Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 5. The application to the Court is made by originating summons. The appointment can be and usually

SECT. 3. Appointment of Arbitrator or Umpire.

(3) The arbitrator appointed by the Court has the same powers and is in the same position as if he had been appointed by the parties (*r*).

Where sole arbitrator appointed refuses to act.

Where the submission provides that the reference shall be to a single arbitrator, and the arbitrator, whether named in the submission or subsequently appointed either by the parties or the Court, refuses to act (*s*) or is incapable of acting, or dies, and the submission does not show that it was intended that the vacancy should not be supplied, and the parties themselves do not concur in an appointment, the Court has power to supply the vacancy (*t*).

Where two arbitrators appointed.

963. Where a submission contained in a written agreement provides that the reference shall be to two arbitrators, one to be appointed by each party, and does not express any contrary intention, the following rules apply:—

(1) It is the duty of each party to appoint an arbitrator (*u*).

(2) If either of the arbitrators so appointed refuses to act or is incapable of acting, or dies, the party who appointed him may appoint a new arbitrator in his place (*v*).

(3) If either party makes default in appointing his arbitrator, either originally or by way of substitution, the other party may, after serving the prescribed notice, appoint his own arbitrator to act as sole arbitrator in the reference, and his award is binding on both parties as if he had been appointed by consent (*w*).

(4) The Court can set aside any appointment made in accordance with either of the two preceding rules, though it has no power to supply the vacancy caused by setting such appointment aside (*w*).

Appointment of umpire.

(5) The two arbitrators may, unless the submission provides otherwise, appoint an umpire at any time within which they can make an award (*x*). The appointment of an umpire by the arbitrators is a judicial act; they must therefore meet and exercise the power together (*y*). They owe a duty to the parties to select a fit and

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is made by a Master] (R. S. C., Ord. 54, r. 12A). The Court is bound to make an appointment (*Re Eyre and Corporation of Leicester*, [1892] 1 Q. B. 136).

(*r*) Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 5.

(*s*) As to what amounts to a refusal to act, see *Re Wilson and Eastern Counties etc. Co.*, [1892] 1 Q. B. 81. The refusal of the arbitrator appointed by one of the parties to act in the reference does not render the party appointing him liable to an action at the suit of the other party (*Cooper* v. *Shuttleworth* (1856), 25 L. J. (EX.) 114).

(*t*) Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 5.

(*u*) The appointment made by each party should be notified to the other (*Tew* v. *Harris* (1847), 11 Q. B. 7; and see *Thomas* v. *Fredricks* (1847), 10 Q. B. 775).

(*v*) Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 6 (a). See Encyclopædia of Forms, Vol. II., pp. 102, 137, 138.

(*w*) *Ibid.*, s. 6 (b); *Re Frankenberg and The Security Co.* (1894), 10 T. L. R. 393. The Court has no inherent jurisdiction to appoint an arbitrator or umpire or to compel any party to a submission so to do. It is, therefore, only in the cases specified in the Arbitration Act, 1889, s. 5, that the Court can make an appointment (*Re Smith and Service and Nelson & Sons* (1890), 25 Q. B. D. 545; and see *Re Wilson and Eastern Counties etc. Co.*, *supra*, and, on appeal, 8 T. L. R. 264; and *Re Percival* (1885), 2 T. L. R. 150).

(*x*) Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 2, Schedule I. (b).

(*y*) *Re Hopper's Arbitration* (1867), L. R. 2 Q. B. 367, at p. 376; *Re*

proper person as umpire; they must not, therefore, leave the selection to chance, but as between several persons whom they both consider fit and proper persons to discharge the duty of umpire they may select by lot whom they will appoint (*z*).

(6) If the two arbitrators or, in cases where the submission reserves to the parties themselves the appointment of an umpire, the parties, fail to appoint an umpire, the Court can, after the prescribed notice has been given, supply the vacancy (*a*).

(7) If the umpire, whether appointed by the parties or the arbitrators or the Court, refuses to act or is incapable of acting, or dies, and the submission does not show that it was intended that the vacancy should not be supplied, and the parties or the arbitrators, as the case may be, do not concur in making an appointment, the Court can, after the prescribed notice has been given, supply the vacancy (*b*).

Three arbitrators

964. Where the submission is in writing and provides that the reference shall be to three arbitrators, one to be appointed by each party and the third either by the arbitrators so appointed or by the parties themselves (*c*), the Court cannot either directly or indirectly compel either party to appoint his arbitrator or supply the vacancy, so that if either party persists in his refusal to appoint an arbitrator, the reference cannot be held; but if the party who refuses to appoint commences legal proceedings against the other party in respect of any matter agreed to be referred, the Court has power on the application of the other party to stay such proceedings (*d*). If the two parties have appointed their respective arbitrators, but they or their arbitrators, as the case may be, do not appoint the third arbitrator, the Court can, after the prescribed notice has been given, make the appointment (*e*).

Where the reference is to three arbitrators, all three must concur in making the award, unless the submission provides that the decision of the majority shall be binding (*f*).

SECT. 4.—*The Powers of an Arbitrator or Umpire.*

General powers.

965. In every reference to arbitration the arbitrator is empowered to make an award on the difference or dispute comprised in the submission, and the parties may by their submission confer such other powers incidental to the power of making the award as they may in their discretion think fit.

Lord and Lord (1855), 5 E. & B. 404. See Encyclopædia of Forms, Vol. II., pp. 134, 135.

(*z*) *European and American Steamship Co.* v. *Crosskey* (1860), 8 C. B. (N. S.) 397; *Pescod* v. *Pescod* (1887), 58 L. T. 76. See also *Neale* v. *Ledger* (1812), 16 East, 51, and *Re Cassell* (1829), 9 B. & C. 624. As to acceptance of the appointment by the umpire, see *Ringland* v. *Lowndes* (1863), 15 C. B. (N. S.) 173, at p. 196.

(*a*) Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 5. See Encyclopædia of Forms, Vol. II., p. 136.

(*b*) *Ibid.*

(*c*) *Re Smith and Service and Nelson & Sons* (1890), 25 Q. B. D. 545; *United Kingdom etc. Association* v. *Houston & Co.*, [1896] 1 Q. B. 567; and see *Winteringham* v. *Robertson* (1858), 27 L. J. (EX.) 301.

(*d*) *Manchester Ship Canal Co.* v. *S. Pearson & Son, Ltd.*, [1900] 2 Q. B. 606.

(*e*) Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 5.

(*f*) *United Kingdom etc. Association* v. *Houston & Co.*, *supra.*

SECT. 4.

Powers of Arbitrator or Umpire.

Where the reference is to two arbitrators or an umpire, the umpire is, in the event of the arbitrators failing to agree, substituted for them, and has the same powers as they had (*g*).

Statutory powers.

966. Where the submission is contained in a written agreement and does not express a contrary intention, the arbitrators or umpire have the following powers:—

(1) To examine the parties and their witnesses on oath or affirmation (*h*);

(2) To enlarge the time for making the award (*i*);

(3) To direct to whom and by whom and in what manner the costs of the reference and award shall be paid (*k*);

(4) To state the award as to the whole or part thereof in the form of a special case for the opinion of the Court (*l*);

(5) To correct any clerical mistake or error in the award arising from any accidental slip or omission (*m*).

Expert advice.

967. It has been said that an arbitrator may for his own guidance consult persons of expert knowledge or skill on questions arising in the course of the reference (*n*); but it is not advisable that he should do so except with the knowledge and consent of the parties (*o*).

Delegation of powers.

An arbitrator or umpire may not delegate to another the powers

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(*g*) See *Taylor* v. *Dutton* (1823), 1 L. J. (o. s.) (K. B.) 158.

(*h*) Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 7 (a), and Schedule I. (f) and (g).

Any party to a submission can obtain a writ of *subpœna ad testificandum* or *subpœna duces tecum* (s. 8), but where the reference is a reference by consent out of Court a commission for the examination of witnesses abroad cannot be issued either by the arbitrators or umpire (*Re Dreyfus and Paul* (1893), 9 T. L. R. 358), or by the Court (*Re Shaw and Ronaldson*, [1892] 1 Q. B. 91).

(*i*) Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 2, Schedule I. (c), (e); and see p. 462, *post*.

(*k*) *Ibid.*, s. 2, Schedule I. (i); and see p. 470, *post*.

(*l*) *Ibid.*, s. 7 (b); and see p. 466, *post*.

(*m*) *Ibid.*, s. 7 (c). At common law an arbitrator or umpire after he had made his award was *functus officio*, and had no power to correct even a mere clerical mistake (*Mordue* v. *Palmer* (1870), 6 Ch. App. 22, and see *Henfree* v. *Bromley* (1805), 6 East, 309; *Irvine* v. *Elnon* (1806), 8 East, 54; *Ward* v. *Dean* (1832), 3 B. & Ad. 234; *Trew* v. *Burton* (1833), 1 Cr. & M. 533; *Brook* v. *Mitchell* (1840), 6 M. & W. 473, at p. 477; *Davies* v. *Pratt* (1855), 16 C. B. 586; *Re Calvert and Wyler* (1899), 106 L. T. Jour. 288; *Re Stringer and Riley*, [1901] 1 K. B. 105, and compare *Mountain* v. *Parr*, [1899] 1 Q. B. 805). The power conferred by the statute is rigidly limited to mere clerical mistakes or errors arising from an accidental slip or omission; see *Pedler* v. *Hardy* (1902), 18 T. L. R. 591; *Re Great Western Rail. Co. and the Postmaster-General* (1903), 19 T. L. R. 636, and compare *Re Stringer and Riley*, *supra*.

(*n*) See *Emery* v. *Wase* (1801), 5 Ves. 846, (1803), 8 Ves. 504, 517; *Hopcraft* v. *Hickman* (1824), 2 Sim. & St. 130; *Anderson* v. *Wallace* (1835), 3 Cl. & F. 26; *Caledonian Rail. Co.* v. *Lockhart* (1860), 3 Macq. 808; *Gray* v. *Wilson* (1865), L. R. 1 C. P. 50; and see *Rolland* v. *Cassidy* (1888), 13 App. Cas. 770. The arbitrator or umpire must in any case form his own judgment on the question before him (*Re Hare* (1839), 6 Bing. (N. C.) 158, 162).

(*o*) See *Sharp* v. *Nowell* (1848), 6 C. B. 253, where the parties agreed to a portion of the accounts between them being adjusted by a person whom they selected in lieu of the arbitrator, and *Whitmore* v. *Smith* (1861), 7 H. & N. 509.

which the parties have by their submission conferred on him (*p*). Where the reference is to several arbitrators they may not even delegate their powers to one another (*q*).

An arbitrator or umpire may, and frequently does, obtain legal assistance in the framing of his award (*r*).

Legal assistance.

SECT. 5.—*Liability of an Arbitrator or Umpire.*

968. An arbitrator or umpire is not liable for want of skill or care (*s*). It has been said that an arbitrator or umpire guilty of fraud would be liable to an action for damages at the suit of the party who had by reason of his fraud suffered loss (*t*), but there is not any reported case in which such an action was brought successfully. No misconduct falling short of fraud would, it seems, render an arbitrator or umpire liable to an action.

No liability for negligence not amounting to fraud.

Where an award is set aside by the Court on the ground of misconduct, the arbitrator or umpire would, it is conceived, be liable to an action for the return of the fees which had been paid to him, as money paid for a consideration which had failed (*u*).

Misconduct.

SECT. 6.—*Removal of an Arbitrator or Umpire.*

969. At common law the Court had no jurisdiction to remove an arbitrator or umpire (*x*); but where an arbitrator or umpire has misconducted himself power to remove him has been conferred upon the Court by statute (*y*).

Removal for misconduct.

An arbitrator or umpire who has made his award is *functus officio*, and cannot be removed. Where, therefore, an arbitrator or umpire who has made his award is found to have misconducted himself, the proper remedy is to apply to the Court to set the award aside (*z*).

Remedy of the award made.

Applications (*a*) for removal of an arbitrator or umpire are

(*p*) *Lingood* v. *Eade* (1742), 2 Atk. 501, 504; and compare *Emery* v. *Wase* (1801), 5 Ves. at p. 848.

(*q*) *Little* v. *Newton* (1841), 9 Dowl. 437; and see *Whitmore* v. *Smith* (1861), 7 H. & N. 509, and *Eads* v. *Williams* (1854), 4 De G. M. & G. 674.

(*r*) *Fetherstone* v. *Cooper* (1803), 9 Ves. 67; *Baker* v. *Cotterill* (1849), 18 L. J. (Q. B.) 345; *Threlfall* v. *Fanshawe* (1850), 19 L. J. (Q. B.) 334; *Galloway* v. *Keyworth* (1854), 15 C. B. 228; *Re Underwood and Bedford etc. Rail. Co.* (1861), 11 C. B. (N. S.) 442; and see *Dobson and Sutton* v. *Groves* (1844), 6 Q. B. 637, 647, and *Re Collyer-Bristow & Co.*, [1901] 2 K. B. 839.

(*s*) See *Pappa* v. *Rose* (1871), L. R. 7 C. P. 32, and, on appeal, 525; *Tharsis Sulphur etc. Co.* v. *Loftus* (1872), L. R. 8 C. P. 1; *Stevenson* v. *Watson* (1879), 4 C. P. D. 148; *Chambers* v. *Goldthorpe*, [1901] 1 K. B. 624.

(*t*) See *Stevenson* v. *Watson* (1879), 4 C. P. D. 148, 161; *Ludbrook* v. *Barrett* (1877), 46 L. J. (C. P.) 798; *Wills* v. *Maccarmick* (1762), 2 Wils. 148; and compare *Tullis* v. *Jacson*, [1892] 3 Ch. 441.

(*u*) *Re Hall and Hinds* (1841), 2 Man. & G. 847, 853. As to the cases in which an arbitrator or umpire is liable to an action for the return of excessive fees, see p. 472, *post*.

(*x*) At common law the authority of an arbitrator or umpire was revocable by any party to the submission at any time before the award was made (see p. 448, *ante*); and therefore there was no need for any such jurisdiction.

(*y*) Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 11 (1).

(*z*) *Ibid.*, s. 11 (2).

(*a*) An application for removal of an arbitrator or umpire under a submission by consent out of Court is made by an originating notice of motion. It cannot

SECT. 6. Removal of Arbitrator or Umpire.

rare, partly no doubt because the "misconduct" of the arbitrator or umpire does not in most cases appear until the award has been made, and partly also because, where the circumstances are such that it is possible to establish misconduct before the award has been made, the aggrieved party has the alternative remedy of applying for leave to revoke his submission (*b*).

Appointment set aside by Court.

Where the submission is contained in a written agreement and provides that the reference shall be to two arbitrators, one to be appointed by each party, and one of the appointed arbitrators refuses to act or is incapable of acting, or dies, and the party who appointed him appoints another arbitrator in his place, the Court can set aside such appointment; and where on such a reference one party makes default in appointing an arbitrator either originally or by way of substitution, and the other party appoints his arbitrator to act as sole arbitrator in the reference, the Court can likewise set aside such appointment (*c*).

SECT. 7.—*Conduct of an Arbitration.*

Appointment of time and place of meeting.

970. It is, in the first place, the duty of an arbitrator, when called upon to act pursuant to the submission, to appoint a time and place of meeting and to give due notice thereof to the parties.

Where the reference is to more than one arbitrator, they should all concur in appointing the time and place of meeting and in doing all other acts in the course of the reference, unless the submission provides that the decision of the majority is to be binding (*d*).

Absence of one party.

The arbitrator cannot hear one party in the absence of and without notice to the other parties (*e*); but where nothing was done at a meeting notice whereof had not been given to the other side, the award was not thereby invalidated (*f*).

In fixing the times and places of meetings it is usual for the arbitrator to consult the convenience of the parties and to comply, so far as possible, with their wishes; but it is within his discretion to fix such times and places as he may think proper (*g*).

Failure of party to attend appointment.

Where the time and place of meeting appointed by the arbitrator are reasonable, and due notice thereof has been given to the parties, but one of the parties refuses to attend, the arbitrator may proceed with the reference in his absence. Where the arbitrator proposes to proceed with the reference notwithstanding the absence of one of

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be made by summons. In the King's Bench Division such an application would be heard by a Divisional Court, and in the Chancery Division by the judge to whom the motion happened to be assigned by the ballot.

(*b*) See p. 449, *ante*.

(*c*) Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 6.

(*d*) *Goodman* v. *Sayers* (1820), 2 Jac. & W. 249, at p. 261; and see *Dalling* v. *Matchett* (1741), Barnes, 57. For form of notice of appointment, see Encyclopædia of Forms, Vol. II., p. 141.

(*e*) *Oswald* v. *Earl Grey* (1855), 24 L. J. (Q. B.) 69.

(*f*) *Re Morphett* (1845), 2 D. & L. 967.

As to waiver of irregularities, see *Bignall* v. *Gale* (1841), 9 Dowl. 631; *Hamilton* v. *Bankin* (1850), 3 De G. & Sm. 782.

(*g*) See *Re Whitwham and Wrexham etc. Rail. Co*, (1895), 39 Sol. Jour. 692.

the parties, it is advisable that he should give that party distinct notice of his intention to do so (*h*).

If a reasonable excuse for not attending the appointment can be shown, the Court will set aside an award made by an arbitrator who has proceeded *ex parte* (*i*).

Powers of umpire.

Where the reference is to two arbitrators or an umpire, the powers of the umpire do not arise unless and until the arbitrators are unable to agree or allow their time for making an award to expire; but in practice the umpire usually sits with the arbitrators from the commencement of the reference, since, unless he did so, he would have to hear all the evidence repeated before him (*k*). The umpire, if and when required to make an award, is substituted for and has the same powers with regard to the conduct of the arbitration as the arbitrator possessed.

Conduct of proceedings.

971. In the conduct of the proceedings the arbitrator or umpire must conform to any directions which may be contained in the submission itself (*l*). Subject to any such directions, he should observe, so far as may be practicable, the rules which prevail at the trial of an action in Court; but he may deviate from those rules (*m*) provided that in so doing he does not disregard the substance of justice (*n*).

Subpœna.

972. If the submission is contained in a written agreement, any party thereto can obtain as of course from the Central Office writs of *subpœna ad testificandum* and *subpœna duces tecum* to compel the attendance before the arbitrator of any witness who is in England (*o*); and the Court or a judge may order that such writs

(*h*) *Waller* v. *King* (1724), 9 Mod. Rep. 63; *Fetherstone* v. *Cooper* (1803), 9 Ves. 67; *Wood* v. *Leake* (1806), 12 Ves. 412; *Harcourt* v. *Ramsbottom* (1820), 1 Jac. & W. 505, at p. 512; *Hobbs* v. *Ferrars* (1840), 8 Dowl. 779; *Scott* v. *Van Sandau* (1844), 6 Q. B. 237; *Tryer* v. *Shaw* (1858), 27 L. J. (EX.) 320; *Angus* v. *Smythies* (1861), 2 F. & F. 381; *Re Hewitt and Portsmouth etc. Co.* (1862), 10 W. R. 780.

For form of notice, see Encyclopædia of Forms, Vol. II., p. 141.

(*i*) *Gladwin* v. *Chilcote* (1841), 9 Dowl. 550.

(*k*) *Re Salkeld and Slater* (1840), 12 A. & E. 767.

(*l*) If, for instance, the submission requires that the witnesses be examined on oath or that the arbitrator should have a view, such requirements must be observed (*Smith* v. *Goff* (1845), 14 M. & W. 264, 266); but an arbitrator need not hold a view unless required so to do by the submission (*Munday* v. *Bluck* (1861), 9 C. B. (N. S.) 557).

(*m*) *Knox* v. *Symmonds* (1791), 1 Ves. 369; *Re Badger* (1819), 2 B. & Ald. 691; *Tillam* v. *Copp* (1847), 5 C. B. 211.

(*n*) *Harvey* v. *Shelton* (1844), 7 Beav. 455, 462; and see *Andrews* v. *Mitchell*, [1905] A. C. 78.

If one party be represented by counsel, the other party must be given an opportunity of being similarly represented (*Whatley* v. *Morland* (1833), 2 Dowl. 249). As to whether an arbitrator could refuse to hear counsel on either side, see *Re Macqueen and Nottingham Caledonian Society* (1861), 9 C. B. (N. S.) 793.

The arbitrator or umpire cannot, except for some sufficient reason, exclude from the meeting any person whom either of the parties desires to be present to assist in the reference (*Re Haigh* (1861), 3 De G. F. & J. 157).

Each party must be permitted to adduce all his evidence, and must be fully heard. The arbitrator or umpire should not close the hearing and proceed to make his award without notifying the parties thereof (*Re Maunder* (1883), 49 L. T. 535; *Peterson* v. *Ayre* (1854), 14 C. B. 665, 677; *Pepper* v. *Gorham* (1820), 4 Moo. C. P. 148).

(*o*) Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 8; R. S. C., Ord. 37, rr. 26—34.

SECT. 6. Removal of Arbitrator or Umpire.

rare, partly no doubt because the "misconduct" of the arbitrator or umpire does not in most cases appear until the award has been made, and partly also because, where the circumstances are such that it is possible to establish misconduct before the award has been made, the aggrieved party has the alternative remedy of applying for leave to revoke his submission (*b*).

Appointment set aside by Court.

Where the submission is contained in a written agreement and provides that the reference shall be to two arbitrators, one to be appointed by each party, and one of the appointed arbitrators refuses to act or is incapable of acting, or dies, and the party who appointed him appoints another arbitrator in his place, the Court can set aside such appointment; and where on such a reference one party makes default in appointing an arbitrator either originally or by way of substitution, and the other party appoints his arbitrator to act as sole arbitrator in the reference, the Court can likewise set aside such appointment (*c*).

SECT. 7.—*Conduct of an Arbitration.*

Appointment of time and place of meeting.

970. It is, in the first place, the duty of an arbitrator, when called upon to act pursuant to the submission, to appoint a time and place of meeting and to give due notice thereof to the parties.

Where the reference is to more than one arbitrator, they should all concur in appointing the time and place of meeting and in doing all other acts in the course of the reference, unless the submission provides that the decision of the majority is to be binding (*d*).

Absence of one party.

The arbitrator cannot hear one party in the absence of and without notice to the other parties (*e*); but where nothing was done at a meeting notice whereof had not been given to the other side, the award was not thereby invalidated (*f*).

In fixing the times and places of meetings it is usual for the arbitrator to consult the convenience of the parties and to comply, so far as possible, with their wishes; but it is within his discretion to fix such times and places as he may think proper (*g*).

Failure of party to attend appointment.

Where the time and place of meeting appointed by the arbitrator are reasonable, and due notice thereof has been given to the parties, but one of the parties refuses to attend, the arbitrator may proceed with the reference in his absence. Where the arbitrator proposes to proceed with the reference notwithstanding the absence of one of

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be made by summons. In the King's Bench Division such an application would be heard by a Divisional Court, and in the Chancery Division by the judge to whom the motion happened to be assigned by the ballot.

(*b*) See p. 449, *ante*.

(*c*) Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 6.

(*d*) *Goodman* v. *Sayers* (1820), 2 Jac. & W. 249, at p. 261; and see *Dalling* v. *Matchett* (1741), Barnes, 57. For form of notice of appointment, see Encyclopædia of Forms, Vol. II., p. 141.

(*e*) *Oswald* v. *Earl Grey* (1855), 24 L. J. (Q. B.) 69.

(*f*) *Re Morphett* (1845), 2 D. & L. 967.

As to waiver of irregularities, see *Bignall* v. *Gale* (1841), 9 Dowl. 631; *Hamilton* v. *Bankin* (1850), 3 De G. & Sm. 782.

(*g*) See *Re Whitwham and Wrexham etc. Rail. Co*, (1895), 39 Sol. Jour. 692.

the parties, it is advisable that he should give that party distinct notice of his intention to do so (*h*).

If a reasonable excuse for not attending the appointment can be shown, the Court will set aside an award made by an arbitrator who has proceeded *ex parte* (*i*).

Powers of umpire.

Where the reference is to two arbitrators or an umpire, the powers of the umpire do not arise unless and until the arbitrators are unable to agree or allow their time for making an award to expire; but in practice the umpire usually sits with the arbitrators from the commencement of the reference, since, unless he did so, he would have to hear all the evidence repeated before him (*k*). The umpire, if and when required to make an award, is substituted for and has the same powers with regard to the conduct of the arbitration as the arbitrator possessed.

Conduct of proceedings.

971. In the conduct of the proceedings the arbitrator or umpire must conform to any directions which may be contained in the submission itself (*l*). Subject to any such directions, he should observe, so far as may be practicable, the rules which prevail at the trial of an action in Court; but he may deviate from those rules (*m*) provided that in so doing he does not disregard the substance of justice (*n*).

Subpœna.

972. If the submission is contained in a written agreement, any party thereto can obtain as of course from the Central Office writs of *subpœna ad testificandum* and *subpœna duces tecum* to compel the attendance before the arbitrator of any witness who is in England (*o*); and the Court or a judge may order that such writs

(*h*) *Waller* v. *King* (1724), 9 Mod. Rep. 63; *Fetherstone* v. *Cooper* (1803), 9 Ves. 67; *Wood* v. *Leake* (1806), 12 Ves. 412; *Harcourt* v. *Ramsbottom* (1820), 1 Jac. & W. 505, at p. 512; *Hobbs* v. *Ferrars* (1840), 8 Dowl. 779; *Scott* v. *Van Sandau* (1844), 6 Q. B. 237; *Tryer* v. *Shaw* (1858), 27 L. J. (EX.) 320; *Angus* v. *Smythies* (1861), 2 F. & F. 381; *Re Hewitt and Portsmouth etc. Co.* (1862), 10 W. R. 780.

For form of notice, see Encyclopædia of Forms, Vol. II., p. 141.

(*i*) *Gladwin* v. *Chilcote* (1841), 9 Dowl. 550.

(*k*) *Re Salkeld and Slater* (1840), 12 A. & E. 767.

(*l*) If, for instance, the submission requires that the witnesses be examined on oath or that the arbitrator should have a view, such requirements must be observed (*Smith* v. *Goff* (1845), 14 M. & W. 264, 266); but an arbitrator need not hold a view unless required so to do by the submission (*Munday* v. *Bluck* (1861), 9 C. B. (N. S.) 557).

(*m*) *Knox* v. *Symmonds* (1791), 1 Ves. 369; *Re Badger* (1819), 2 B. & Ald. 691; *Tillam* v. *Copp* (1847), 5 C. B. 211.

(*n*) *Harvey* v. *Shelton* (1844), 7 Beav. 455, 462; and see *Andrews* v. *Mitchell*, [1905] A. C. 78.

If one party be represented by counsel, the other party must be given an opportunity of being similarly represented (*Whatley* v. *Morland* (1833), 2 Dowl. 249). As to whether an arbitrator could refuse to hear counsel on either side, see *Re Macqueen and Nottingham Caledonian Society* (1861), 9 C. B. (N. S.) 793.

The arbitrator or umpire cannot, except for some sufficient reason, exclude from the meeting any person whom either of the parties desires to be present to assist in the reference (*Re Haigh* (1861), 3 De G. F. & J. 157).

Each party must be permitted to adduce all his evidence, and must be fully heard. The arbitrator or umpire should not close the hearing and proceed to make his award without notifying the parties thereof (*Re Maunder* (1883), 49 L. T. 535; *Peterson* v. *Ayre* (1854), 14 C. B. 665, 677; *Pepper* v. *Gorham* (1820), 4 Moo. C. P. 148).

(*o*) Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 8; R. S. C., Ord. 37, rr. 26—34.

SECT. 7. Conduct of Arbitration.

be issued to compel the attendance of a witness who may be in some other part of the United Kingdom, and may also order that a writ of *habeas corpus ad testificandum* be issued to bring up a prisoner for examination before an arbitrator (*p*).

Evidence.

Where the submission is contained in a written agreement and does not express a contrary intention, the arbitrator or umpire may require the parties to produce before him all books and documents in their possession or power which relate to the matters in question in the reference (*q*), and may examine the parties and their witnesses on oath or affirmation (*r*).

If the submission requires that the evidence should be taken on oath or affirmation (*s*), the arbitrator or umpire has no option but so to take it; and even where the submission is silent as to whether the evidence shall be given on oath, since it is the ordinary practice that it should be so given, the arbitrator or umpire should not take it otherwise than on oath unless with the consent of the parties (*t*).

Any person who wilfully and corruptly gives false evidence before an arbitrator is guilty of perjury as if the evidence had been given in open Court, and may be prosecuted and punished accordingly (*u*).

Party protesting that arbitrator is exceeding his authority.

973. A party who protests that the arbitrator is acting either without authority or beyond the scope of the submission, but nevertheless attends the reference, does not thereby waive his protest (*w*).

SECT. 8.—*Time for making Award and Mode of enlarging Time.*

Time for making award.

974. The time within which the award is to be made may be prescribed by the submission itself, but this is not usually the case.

Where the submission is contained in a written agreement and does not prescribe the time within which the award is to be made, the following rules are applicable unless a contrary intention is expressed in the submission.

Where award made by arbitrators.

The arbitrator (*x*) or arbitrators, as the case may be, must make the award within three (*y*) calendar (*z*) months after entering

(*p*) Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 18; but the Court cannot order a commission to issue for the examination of witnesses who are outside the United Kingdom (*Re Shaw and Ronaldson*, [1892] 1 Q. B. 91).

(*q*) Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 2, Schedule I. (f); *Penrice* v. *Williams* (1883), 23 Ch. D. 353.

(*r*) Arbitration Act, 1889, s. 7 (a) and s. 2, Schedule I. (f) and (g).

(*s*) *Smith* v. *Goff* (1845), 14 M. & W. 264, 266; *Banks* v. *Banks* (1835), 1 Gale, 46; and see *Ridoat* v. *Pye* (1797), 1 Bos. & P. 91.

(*t*) *Wakefield* v. *Llanelly etc. Co.* (1864), 34 Beav. 245; *Biggs* v. *Hansell* (1855), 16 C. B. 562.

(*u*) Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 22.

(*w*) *Hamlyn* v. *Betteley* (1880), 6 Q. B. D. 63, *per* Lord SELBORNE, at p. 65.

(*x*) Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 2, Schedule I. (c), which provides that "the arbitrators" shall make their award etc.; but the clause no doubt applies also where the reference is to a single arbitrator. See the Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 1 (1) (b).

(*y*) In calculating the period of three months the day from which the period begins to run should, it seems, be excluded (*Re Higham and Jessop* (1840), 9 Dowl. 203; *Kerr* v. *Jeston* (1842), 1 Dowl. (N. S.) 538. And compare *Knox* v. *Simmonds* (1791), 3 Bro. C. C. 358, and *Pugh* v. *Duke of Leeds* (1777), 2 Cowp. 714, at p. 723).

(*z*) See Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 3; but apart from that

SECT. 8. Time for making Award etc.

on (*a*) the reference, or after having been called on to act (*b*) by notice in writing from any party to the submission; or on or before any later day to which he or they may from time to time enlarge the time for making the award (*c*). The enlargement of the time must be in writing, and must be signed by the arbitrator or arbitrators; after the time for making the award has expired, there is no longer any power in the arbitrator or arbitrators to enlarge the time (*d*).

Where award made by umpire.

Where the reference is to two arbitrators and an umpire, and the power of making the award has devolved on the umpire, he (*e*) must make his award within one calendar month after the original or extended time for making the award of the arbitrators has expired, or on or before any later day to which he may from time to time enlarge the time for making his award. The enlargement of the time must be in writing, and must be signed by the umpire. After the time for making his award has expired, the umpire has no longer any power to enlarge it (*e*).

Consent in writing to enlargement of time.

Where the submission itself provides how the time for making the award may be enlarged, such provisions should be strictly observed (*f*).

The parties to a submission may expressly consent to the time for making the award being enlarged, but the consent should be given in writing, because it has been held that an enlargement of the time by consent of the parties amounts in law to a fresh submission; and therefore, unless the consent be in writing, the submission becomes an oral submission, and the provisions of the Arbitration Act would cease to be applicable thereto (*g*).

Estoppel from objecting to award out of time.

The parties to a submission may by their conduct be precluded from objecting to the award on the ground that it was made out of time, although they had given no express consent to the time for making the award being enlarged (*h*).

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statute "month" means a lunar month, unless it appears that a calendar month was intended (*Re Swinford and Horn* (1817), 6 M. & S. 226; *Simpson* v. *Margitson* (1847), 11 Q. B. 23). See title TIME.

(*a*) An arbitrator "enters on" the reference when he hears the case; neither acceptance of the office of arbitrator nor giving notice of his intention to proceed amount to entering on the reference (*Baker* v. *Stephens* (1867), L. R. 2 Q. B. 523; and see *Cudliff* v. *Walters* (1839), 2 Mood. & R. 232).

(*b*) See *Baring Gould* v. *Sharpington etc. Syndicate*, [1899] 2 Ch. 80.

(*c*) *Oswald* v. *Earl Grey* (1855), 24 L. J. (Q. B.) 69, 72. See Encyclopædia of Forms, Vol. II., p. 140.

(*d*) Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 2, Schedule I. (c).

(*e*) *Ibid.*, s. 2, Schedule I. (e).

(*f*) *Reade* v. *Dutton* (1836), 2 M. & W. 69.

(*g*) *Ibid.*; and compare *Halden* v. *Glasscock* (1826), 5 B. & C. 390, and *Leggett* v. *Finlay* (1829), 6 Bing. 255. As to enlargement of time constituting a fresh submission, see *Stephens* v. *Lowe* (1832), 9 Bing. 32, *per* TINDAL, C.J.

(*h*) *R.* v. *Hill* (1819), 7 Price, 636; *Re Hick* (1819), 8 Taunt. 694; *Lawrence* v. *Hodgson* (1826), 1 Y. & J. 16; *Benwell* v. *Hinxman* (1835), 3 Dowl. 500; *Burley* v. *Stephens* (1836), 1 M. & W. 156; *Hallett* v. *Hallett* (1839), 7 Dowl. 389; *Hawksworth* v. *Brammall* (1840), 5 My. & Cr. 281; *Tyerman* v. *Smith* (1856), 6 E. & B. 719; *Watson* v. *Bennett* (1860), 5 H. & N. 831; *Palmer* v. *Metropolitan Rail. Co.* (1862), 31 L. J. (Q. B.) 259; and compare *Ringland* v. *Lowndes* (1864), 17 C. B. (N. S.) 514. It was held in *Darnley* v. *London, Chatham and Dover Rail. Co.* (1867), L. R. 2 H. L. 43, 57, that taking up an award made out of time did not preclude the party taking it up from objecting that it was made out of time.

SECT. 8. Time for making Award etc.

975. In every case the Court can enlarge the time for making the award (*i*).

Enlargement of time by Court.

This power can be exercised not only after the time for making the award has already expired (*j*), but even after the award has been made; and thus an award which was at the time that it was made bad on the ground that the authority of the arbitrator had expired can be made valid and enforceable (*k*).

An application to the Court for an order enlarging the time for making an award is made by originating summons returnable before a Master (*l*), and unless the order otherwise directs the enlargement is for a period of one calendar month (*m*).

Time for making award remitted to arbitrator by Court.

Where an award is remitted by the Court to the arbitrator or umpire for reconsideration, the award is to be made within three calendar months from the date of the order, unless the order otherwise directs (*n*).

SECT. 9.—*Special Case for the Opinion of the Court.*

SUB-SECT. 1.—*Statement of Special Case during Reference.*

Statement of special case on question of law.

976. If any question of law arises in the course of a reference, the arbitrator or umpire before making his award may, and if so directed by the Court must, state such question in the form of a special case for the opinion of the Court (*o*).

No appeal from decision on special case.

The jurisdiction of the Court in the matter is merely consultative. No appeal lies from its decision (*p*).

Hearing of special case

The case may be stated for the opinion of the Chancery or the King's Bench Division of the High Court. If stated for the opinion of the Chancery Division, the case is assigned by ballot in the usual way to one of the judges of that division and comes on for argument in the non-witness list; if, as is usually the case, it is stated for the opinion of the King's Bench Division, it is entered at the Crown Office, and comes on for argument before a Divisional Court, consisting of either two or three judges (*q*).

Mode of stating special case.

The arbitrator or umpire may state a special case for the opinion of the Court either at the request of a party to the reference or, it would seem, of his own motion, without any such request. He

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(*i*) Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 9. And see *Re Denton and Strong* (1874), L. R. 9 Q. B. 117; *Knowles* v. *Bolton Corporation*, [1900] 2 Q. B. 253.

(*j*) See *Parkes* v. *Smith* (1850), 15 Q. B. 297.

(*k*) See *Lord* v. *Lee* (1868), L. R. 3 Q. B. 404; *Re May and Harcourt* (1884), 13 Q. B. D. 688; *Re Warner and Powell* (1866), L. R. 3 Eq. 261; *Browne* v. *Collyer* (1851), 20 L. J. (Q. B.) 426.

(*l*) R. S. C., Ord. 54, r. 12A; Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 9.

(*m*) R. S. C., Ord. 64, r. 14A.

(*n*) Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 10 (2).

(*o*) *Ibid.*, s. 19. The power to state a special case pending the reference is conferred by the statute; it does not depend on, and cannot be restricted by, the terms of the submission (*Re Hansloh and Reinhold* (1895), 1 Com. Cas. 215). For form of special case see Encyclopædia of Forms, Vol. II., p. 142.

(*p*) *Re Knight and Tabernacle Permanent Building Society*, [1892] 2 Q. B. 613.

(*q*) A direction has been given by the Lord Chief Justice that all special cases stated by arbitrators pending the reference shall be heard by at least two judges because there is no appeal from their decision.

should in the special case set out the facts as found by him affirmatively, and not in the alternative, and then submit the questions of law on which the opinion of the Court is sought (*r*).

Application to compel statement of special case.

977. If the arbitrator or umpire be requested by a party to the reference to state a special case for the opinion of the Court and refuses to do so, application can be made to the Court for an order directing him to state in the form of a special case the question or questions of law on which the opinion of the Court is desired. The application, which is usually brought in the King's Bench Division, is made by an originating summons returnable before a Master, from whom there is the ordinary right of appeal to the judge in chambers. The application is not a "matter of practice and procedure" within the meaning of the Judicature Act, 1894, s. 1 (4), and an appeal from the decision of the judge in chambers lies in the first instance, therefore, to the Divisional Court and not to the Court of Appeal. From the Divisional Court an appeal lies to the Court of Appeal (*s*). An order made on such an application is an "interlocutory order" (*t*); the appeal must therefore be brought within fourteen days from the date of the decision of the Divisional Court, and the notice of appeal should be a four days' notice (*u*). The costs of an application for an order directing the statement of a special case are in the discretion of the Court (*x*).

Mode of obtaining statement of special case where submission is oral.

The power of compelling the arbitrator or umpire to state a special case was conferred by the Arbitration Act, 1889, s. 19. Before that Act the Court could, however, in certain cases, indirectly compel the statement of a special case. A party to a reference who feared that the arbitrator was going to give an erroneous decision in matter of law could apply to the Court for leave to revoke his submission, and on such an application being made the Court would in a proper case give leave to revoke the submission unless an undertaking was given that the arbitrator would state his award in the form of a special case for the opinion of the Court, setting out the questions of law which the applicant desired to submit to the decision of the Court (*y*).

Principles on which order for special case granted.

978. The Court will not direct the arbitrator or umpire to state a special case unless (1) the applicant has in the first instance requested him to state a case and the request has been refused, and (2) the question of law on which the opinion of the Court is desired is material to the issues between the parties, and, having regard to all the circumstances of the case, is such as should be determined

(*r*) *North and South Western Junction Rail. Co.* v. *Assessment Committee of Brentford Union* (1888), 13 App. Cas. 592. The Court will not give directions to an arbitrator as to how he should find the facts. See also *Ferguson* v. *Norman* (1837), 4 Bing. (N. C.) 52, and *Jephson* v. *Howkins* (1841), 2 Man. & G. 366.

(*s*) *Re Frere and North Shore Mill Co.*, [1905] 1 K. B. 366.

(*t*) See *Re Croasdell and Cammell, Laird & Co.*, [1906] 2 K. B. 569.

(*u*) R. S. C., Ord. 58, rr. 3, 15.

(*x*) Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 20.

(*y*) *East and West India Dock Co.* v. *Kirk and Randall* (1887), 12 App. Cas. 738. See also *Tabernacle Permanent Building Society* v. *Knight*, [1892] A. C. 298, at p. 301; and compare *James* v. *James* (1889), 23 Q. B. D. 12.

SECT. 9. Special Case for Opinion of Court.

by the Court (*z*). The fact that the arbitrator or umpire has expressed no opinion on the question of law which the applicant desires to submit to the Court is immaterial (*a*).

A submission sometimes provides that neither party shall apply to the Court for an order directing the statement of a special case; but such a provision does not prevent the Court from making an order for the statement of a special case (*b*).

Award notwithstanding request for special case.

979. An order directing the statement of a special case cannot be made after the award has been made (*c*); it is therefore advisable, if the arbitrator refuses to state a special case, to request him to defer making his award until an application has been made to the Court for an order directing the statement of a special case. If the arbitrator or umpire, notwithstanding such request, proceeds to make his award, he is, assuming the application for a special case was such as ought to have been granted, guilty of "misconduct," and the Court can thereupon set the award aside or, if it think fit so to do, remit the matter to him with a direction to state a special case for the opinion of the Court (*d*).

Costs of special case.

980. The Court has no jurisdiction to deal with the costs of the argument of a special case stated pending the reference (*e*). Such costs form part of the "costs of the reference and award" within the meaning of the Arbitration Act, 1889, Schedule I. (i), and are, where the provisions of that schedule apply, in the discretion of the arbitrator or umpire (*f*).

SUB-SECT. 2.—*Award stated in Form of Special Case.*

Cases where award may be so stated.

981. Unless the submission expresses a contrary intention, the arbitrator or umpire may state his award in the form of a special case (*g*).

The exercise of this power is in the discretion of the arbitrator or umpire; the Court cannot order him to state his award in the form of a special case. But where an application is made pending the reference for an order directing the arbitrator or

(*z*) *Re Grey and Boustead* (1892), 8 T. L. R. 703, where the application was refused.

(*a*) *Re Spillers & Baker, Ltd. and H. Leetham & Sons*, [1897] 1 Q. B. 312.

(*b*) *Re Hansloh and Reinhold* (1895), 1 Com. Cas. 215; and compare *Re Nuttall and Lynton etc. Rail. Co.* (1899), 82 L. T. 17.

(*c*) *Tabernacle Permanent Building Society* v. *Knight*, [1892] A. C. 298, at pp. 302, 304; *Re Montgomery, Jones & Co. and Liebenthal & Co.* (1898), 78 L. T. 406; *Re Palmer & Co. and Hosken & Co.*, [1898] 1 Q. B. 131, at p. 138. See also *Re London Dock Co. and Trustees of Poor of Parish of Shadwell* (1862), 32 L. J. (Q. B.) 30.

(*d*) Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 11 (2); *Re Palmer & Co. and Hosken & Co., supra.*

(*e*) *Re Knight and Tabernacle Permanent Building Society*, [1892] 2 Q. B. 613. If, however, the case be stated pursuant to an order made under the Arbitration Act, 1889, s. 19, and the order directing the statement of the case expressly reserve to the Court the power of dealing with the costs of the argument, the Court has apparently jurisdiction to decide how such costs should be borne.

(*f*) The submission sometimes provides that the costs of the argument of a special case shall be paid by the party who applies for the special case, and it would seem that such a provision is valid and effective.

(*g*) Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 7 (b), re-enacting in substance the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), s. 5.

umpire to state in the form of a special case a question of law that has arisen in the course of the reference, it not infrequently happens that the parties agree that in lieu of such an order being made the arbitrator or umpire shall state his award in the form of a special case; and where an application is made to set aside an award, the Court sometimes remits the matter to the arbitrator or umpire with a direction to him to state a special case (*h*); and sometimes the submission itself provides that the award shall be stated in the form of a special case. Where the submission contains such a provision, the arbitrator or umpire is bound to state his award in the form of a special case (*i*), and should he fail to do so, the Court would no doubt set his award aside.

Form of statement of award as special case.

982. In stating his award in the form of a special case, it is the duty of the arbitrator or umpire to state the facts as found by him (*k*) and then formulate the questions of law for the opinion of the Court (*l*); and he should so state the facts and formulate the questions of law that when the Court has given its decision on those questions, the final result and effect of his award can be ascertained. If the award is in such a form that, after the decision of the Court on the questions submitted for its opinion has been given, the matter has to go back to the arbitrator in order that he may make his final decision, it is really no more than a special case stated by the arbitrator *pending* the reference, and will be so regarded by the Court (*m*).

It is no part of the arbitrator's duty to express his own opinion on the questions which by his award he submits to the opinion of the Court.

Costs and appeal.

983. An award in the form of a special case differs from a special case stated pending the reference in that the Court can direct how the costs of the argument (*n*) are to be borne, and the decision of the Court is appealable (*o*).

Hearing.

An award in the form of a special case is set down for hearing in the same way as a special case stated pending the reference (*p*).

(*h*) *Re Montgomery, Jones & Co. and Liebenthal & Co.* (1898), 78 L. T. 406; *Re Keighley, Maxsted & Co. and Durant & Co.*, [1893] 1 Q. B. 405; *Re Gough and Mayor etc. of Liverpool* (1890), 6 T. L. R. 453; *Re Kirkleatham Local Board and Stockton etc. Water Board*, [1893] 1 Q. B. 375; *Staniforth* v. *Lyall* (1830), 4 Moo. & P. 829; *Hocken* v. *Grenfell* (1837), 4 Bing. (N. C.) 103.

(*i*) *Bradbee* v. *Christ's Hospital* (1842), 4 Man. & G. 714.

(*k*) *North and South Western Junction Rail. Co.* v. *Assessment Committee of Brentford Union* (1888), 13 App. Cas. 592; *Ferguson* v. *Norman* (1837), 4 Bing. (N. C.) 52.

(*l*) *Bradbee* v. *Christ's Hospital, supra; Waller* v. *Lacy* (1840), 1 Man. & G. 54; *Arnold* v. *Mayor etc. of Poole* (1842), 4 Man. & G. 860.

For forms of award by special case, see Encyclopædia of Forms, Vol. II., pp. 196—204.

(*m*) *Re Holland Steamship Co.* (1906), 23 T. L. R. 59.

(*n*) *Re Gonty and Manchester, Sheffield and Lincolnshire Rail. Co.*, [1896] 2 Q. B. 439, at p. 450; and *Portishead etc. Co.* v. *Bristol etc. Co.*, [1887] W. N. 75.

(*o*) *Re Kirkleatham Local Board and Stockton etc. Water Board, supra;* and compare *Rhodes* v. *Airedale Commissioners* (1876), 1 C. P. D. 402, and *Re Bidder and North Staffordshire Rail. Co.* (1878), 4 Q. B. D. 412.

(*p*) In the King's Bench Division the argument of an award in the form of a special case is heard by a single judge, whereas a special case stated pending the reference is argued before a Divisional Court consisting of two or three judges.

SECT. 9. Special Case for Opinion of Court.

On the hearing of the argument of an award in the form of a special case, it is not the practice to make an order enforcing the award; the Court merely decides the questions stated in the case, and an order for the enforcement of the award is made on a separate application.

Enforcement of award.

SECT. 10.—*The Award* (*q*).

Form of award.

984. Where the submission is contained in a written agreement and does not express a contrary intention, the award must be made in writing (*r*).

Unless the submission prescribes in what form the award is to be made (*s*), it may be made in such form as the arbitrator or umpire thinks fit.

The arbitrator or umpire, as the case may be, can make but one award, unless the submission expressly authorises him to make more (*t*). Collateral writings not attached or referred to in the award cannot form part of it (*u*).

Recitals.

It is usual to insert recitals in an award, but it is not necessary to do so (*x*). Inaccurate recitals do not affect the validity of the award (*y*).

Ambiguity.

No particular form of words is requisite for the validity of an award; it may be expressed in such language as the arbitrator or umpire thinks fit (*z*), provided its meaning be clear (*a*).

An ambiguous or uncertain award is bad and cannot be enforced (*b*).

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the reason for this difference in procedure being that in the one case the decision of the Court is, and in the other it is not, appealable.

(*q*) For forms of award, see Encyclopædia of Forms, Vol. II., pp. 145 *et seq.*

(*r*) Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 2, Schedule I. (c).

(*s*) *Everard* v. *Paterson* (1816), 6 Taunt. 625; *Henderson* v. *Williamson* (1719), 1 Str. 116; *Anon.* (1826), 5 L. J. (O. S.) (K. B.) 16; and see *Gatliffe* v. *Dunn* (1738), Barnes. 55; *Eardley* v. *Steer* (1835), 4 Dowl. 423.

(*t*) *Gould* v. *Staffordshire Potteries Waterworks Co.* (1850), 5 Exch. 214, at p. 223; and see *Stephens* v. *Lowe* (1832), 9 Bing. 32; *Winter* v. *Munton* (1818), 2 Moo. C. P. 723; and *Re Smith and Reece* (1849), 6 D. & L. 520. Compare *Wrightson* v. *Bywater* (1838), 3 M. & W. 199, where the arbitrator was empowered to make one or more awards at his discretion, and *Wood* v. *Copper Miners etc.* (1854), 15 C. B. 464.

(*u*) *Leggo* v. *Young* (1855), 16 C. B. 626; *Holgate* v. *Killick* (1861), 7 H. & N. 418; *Kent* v. *Elstob* (1802), 3 East, 18.

(*x*) *Spence* v. *Eastern Counties Rail. Co.* (1839), 7 Dowl. 697; *Davies* v. *Prat* (1855), 17 C. B. 183; *Baker* v. *Hunter* (1847), 16 M. & W. 672.

(*y*) *Thames Ironworks Co.* v. *R.* (1869), 10 B. & S. 33; *Watkins* v. *Phillpotts* (1825), M'Cl. & Y. 393, 397; *Trew* v. *Burton* (1833), 1 Cr. & M. 533; *Paull* v. *Paull* (1833), 2 Cr. & M. 235; *White* v. *Sharp* (1844), 12 M. & W. 712; *Harlow* v. *Read* (1845), 3 D. & L. 203; *Baker* v. *Hunter* (1847), 16 M. & W. 672; *Re Lloyd and Spittle* (1849), 6 D. & L. 531, 536; and see also *Price* v. *Popkin* (1839), 10 A. & E. 139.

(*z*) *Lock* v. *Vulliamy* (1833), 5 B. & Ad. 600, at p. 602; *Matson* v. *Trower* (1824), Ry. & M. 17; *Whitehead* v. *Tattersall* (1834), 1 A. & E. 491; *Eardley* v. *Steer* (1835), 4 Dowl. 423; *Smith* v. *Hartley* (1851), 10 C. B. 800. See *Harding* v. *Forshaw* (1836), 1 M. & W. 415.

(*a*) *Samon's Case* (1594), 3 Co. Rep. 156; *Re Tribe and Upperton* (1835), 3 A. & E. 295; *Mortin* v. *Burge* (1836), 4 A. & E. 973; *Baily* v. *Curling* (1851), 20 L. J. (Q. B.) 235; *Wohlenberg* v. *Lageman* (1815), 6 Taunt. 251, 254; *Plummer* v. *Lee* (1837), 2 M. & W. 495, at p. 499; *Waddle* v. *Downman* (1844), 12 M. & W. 562; and see *Freeman* v. *Bernard* (1697), 1 Salk. 69, n. (a); *Armitt* v. *Breame* (1705), 2 Ld. Raym. 1076; and see *Re Manchester etc. Co. and Swinton Urban District Council* (1905), 22 T. L. R. 154.

(*b*) *Lawrence* v. *Hodgson* (1826), 1 Y. & J. 16; *Rainforth* v. *Hamer* (1855),

Scope of award.

985. The award must determine all the differences which the parties by their submission referred to arbitration; and, on the other hand, it must not purport to determine matters which were not comprised in the submission.

An award which does not decide the differences referred to arbitration is bad and unenforceable (*c*). So also is an award which purports to determine matters not comprised in the submission (*d*), unless the part of the award which was beyond the scope of the arbitration can be severed from that which deals with the matters comprised in the submission, in which case the latter part will be held good and valid (*e*).

Burden of proof as to scope of award.

The Court presumes, unless and until the contrary be shown, that the arbitrator or umpire has by his award determined those matters, and those matters only, which were referred to him. The burden of proving that he has awarded on matters not within the submission, or that he has failed or omitted to award on matters which were within the submission, lies on the party who seeks to impeach the award (*f*). Where by the submission all matters in difference between the parties are referred to arbitration, the award is valid if it deals with all the differences which were placed before the arbitrator, though there may be other differences which they did not bring to his notice (*g*).

Conditional awards.

The award must be final, and therefore a conditional award is bad unless it provide an alternative in case the condition be not

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25 L. T. (o. s.) 247; *Re Tidswell* (1863), 33 Beav. 213; *Hopcraft* v. *Hickman* (1824), 2 Sim. & St. 130; *Watson* v. *Watson* (1648), Styles, 28, 56 ("a vicars' award"); *Massey* v. *Aubry* (1652), Styles, 365.

Compare *Love* v. *Honeybourne* (1824), 4 D. & R. 814; and see *Johnson* v. *Wilson* (1741), Willes, 248, where the arbitrator awarded that there should be a partition between the parties, but did not give the directions necessary to make the partition effectual, and it was held that the award was invalid.

(*c*) *Bradford* v. *Bryan* (1741), Willes, 268; *Randall* v. *Randall* (1805), 7 East, 81; *Turner* v. *Turner* (1827), 3 Russ. 494; *Samuel* v. *Cooper* (1835), 2 A. & E. 752; *Wilkinson* v. *Page* (1841), 1 Hare, 276; *Hewitt* v. *Hewitt* (1841), 1 Q. B. 110; *Re Marshall and Dresser* (1842), 3 Q. B. 878; *Richardson* v. *Worsley* (1850), 5 Exch. 613; *Ross* v. *Boards* (1838), 8 A. & E. 290, where the award was held bad in that it did not decide the matter referred and gave directions which were beyond the power of the arbitrator.

The award need not, unless the submission so directs, deal with each matter of difference separately (*Whitworth* v. *Hulse* (1866), L. R. 1 Exch. 251; and see *Re Brown and Croydon Canal Co.* (1839), 9 A. & E. 522, 528, 530).

(*d*) *Duke of Buccleuch* v. *Metropolitan Board of Works* (1870), L. R. 5 Exch. 221, (1872) L. R. 5 H. L. 418; *Bowes* v. *Fernie* (1838), 4 My. & Cr. 150.

(*e*) *Re Wright and Cromford Canal Co.* (1841), 1 Q. B. 98. See *Aitcheson* v. *Cargey* (1824), 2 Bing. 199; *Leadbetter* v. *Marylebone Corporation*, [1904] 2 K. B. 893.

(*f*) *Bland & Co., Ltd.* v. *Russian Bank for Foreign Trade* (1906), 11 Com. Cas. 71; *Jewell* v. *Christie* (1867), L. R. 2 C. P. 296; *Harrison* v. *Creswick* (1853), 13 C. B. 399; *Ingram* v. *Milnes* (1807), 8 East, 445; *Cargey* v. *Aitcheson* (1823), 2 B. & C. 170; *Wyatt* v. *Curnell* (1841), 1 Dowl. (N. S.) 327; *Day* v. *Bonnin* (1836), 3 Bing. (N. C.) 219; *Wynne* v. *Edwards* (1844), 12 M. & W. 708; *Perry* v. *Mitchell* (1844), 12 M. & W. 792; *Smith* v. *Hartley* (1851), 10 C. B. 800; and see *Wood* v. *Griffith* (1818), 1 Swan. 43, and *Hawkins* v. *Colclough* (1757), 1 Burr. 275.

(*g*) *Hawksworth* v. *Brammall* (1840), 5 My. & Cr. 281; and see *Rees* v. *Waters* (1847), 16 M. & W. 263.

SECT. 10. The Award.

fulfilled (*h*), nor can power be reserved to deal with any difference which may arise on the award (*i*).

Effect of award.

986. An award has such effect as the submission may prescribe. Where the submission is contained in a written agreement and does not express a contrary intention, the award is final and binding on the parties and all other persons who are bound by the submission (*k*).

Stamps.

987. A duty of 10*s.* is payable on an award (*l*).

Execution.

Where the award is made by more than one arbitrator they should all execute the award together at the same time and place and in the presence of each other (*m*). If the only objections to an award are that all the arbitrators did not execute it at the same time and place in the presence of each other, the Court will, of course, remit the award to the arbitrators in order that the defect may be cured by its re-execution.

Unless the contrary be shown, the Court will presume that the date stated in the award is the date on which it was in fact made (*n*).

Publication.

An award is published when the arbitrator or umpire, as the case may be, gives notice to the parties that it is ready (*o*).

Alteration.

An arbitrator or umpire who has made his award is *functus officio*, and could not by common law alter it in any way whatsoever; he could not even correct an obvious clerical mistake (*p*). But where the submission is contained in a written agreement, the Arbitration Act, 1889, enables an arbitrator or umpire to correct any clerical mistake or error arising from any accidental slip or omission (*q*).

SECT. 11.—*The Costs of the Arbitration.*

Arbitrator's powers as to costs and taxation.

988. The parties may by their submission make such agreement with regard to the costs of the arbitration as they may think fit (*r*).

(*h*) *Sherrey* v. *Richardson* (1595), Poph. 15; *Furser* v. *Prowd* (1618), Cro. (Jac.) 423; *Kinge* v. *Fines* (1662), Sid. 59; *Crofts* v. *Harris* (1692), Carth. 187; *Baillie* v. *Edinburgh Oil Gas Light Co.* (1835), 3 Cl. & F. 639, 655; compare, however, *Turner* v. *Swainson* (1836), 1 M. & W. 572; *Nickels* v. *Hancock* (1855), 7 De G. M. & G. 300. See also *Collet* v. *Podwell* (1671), 2 Keb. 670.

(*i*) *Manser* v. *Heaver* (1832), 3 B. & Ad. 295; *Re Tandy and Tandy* (1841), 9 Dowl. 1044.

(*k*) See p. 443, *ante*.

(*l*) Revenue Act, 1906 (6 Edw. 7, c. 20), s. 9; *Goodson* v. *Forbes* (1815), 6 Taunt. 171.

(*m*) *Stalworth* v. *Inns* (1844), 13 M. & W. 466; *Wade* v. *Dowling* (1854), 4 E. & B. 44; *Eads* v. *Williams* (1854), 4 De G. M. & G. 674, 689; *Peterson* v. *Ayre* (1855), 15 C. B. 724; *Anning* v. *Hartley* (1858), 27 L. J. (EX.) 145; and see *Little* v. *Newton* (1841), 9 Dowl. 437; *Re Lord and Lord* (1855), 5 E. & B. 404.

(*n*) *Doe* d. *Clarke* v. *Stillwell* (1838), 8 A. & E. 645.

(*o*) *Musselbrook* v. *Dunkin* (1833), 9 Bing. 605; *Macarthur* v. *Campbell* (1833), 5 B. & Ad. 518; *Brooke* v. *Mitchell* (1840), 6 M. & W. 473; and see *Blundell* v. *Brettargh* (1810), 17 Ves. 232, at p. 236.

(*p*) *Mordue* v. *Palmer* (1870), 6 Ch. App. 22; and see *Henfree* v. *Bromley* (1805), 6 East, 309; *Brooke* v. *Mitchell*, *supra*, at p. 476. An alteration made by a stranger is, of course, nugatory (*Trew* v. *Burton* (1833), 1 Cr. & M. 533).

(*q*) 52 & 53 Vict. c. 49, s. 7 (c). See p. 458, *ante*.

(*r*) See *Fitzsimmons* v. *Lord Mostyn*, [1904] A. C. 46. Power to deal with the

SECT. 11. Costs of the Arbitration.

Where the submission is contained in a written agreement and does not express a contrary intention, the costs are in the discretion of the arbitrator or umpire (*s*), and he may in his award give such directions on the subject as he thinks proper (*t*). He may himself tax or settle the amount of the costs (*u*), or he may direct that they shall be taxed in the High Court (*x*); he may himself tax them, or may direct that they be taxed, on the solicitor and client scale (*y*); and he may direct by and to whom and in what manner such costs, whether fixed by himself or taxed by an officer of the Court, as the case may be, shall be paid and borne (*z*).

What costs included.

The costs of an arbitration include not only the costs of the preparation of the submission (*a*) and of the proceedings before the arbitrator or umpire and the award, but also the costs of the argument of a special case stated for the opinion of the Court pending the reference (*b*).

SECT. 12.—*Remuneration of Arbitrator or Umpire.*

How fixed.

989. Where the submission does not express a contrary intention, the arbitrator or umpire may himself fix the amount of his remuneration, and may include it in his award (*c*). If he includes it in his award, there is no means of taxing or otherwise disputing the amount so fixed by him (*d*), unless the amount is so unreasonable and excessive that the Court would hold him guilty of misconduct, and on that ground set the award aside (*e*).

Where the reference is to two arbitrators and an umpire, and the

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costs of the reference includes power to deal with the costs of the award (*Re Walker and Brown* (1882), 9 Q. B. D. 434).

(*s*) Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 2, Schedule I. (i). Before the Arbitration Act, 1889, an arbitrator had no power to deal with the costs of the arbitration unless such power was expressly conferred by the submission, see *Re Williams and Stepney*, [1891] 2 Q. B. 257.

(*t*) See *Re Fearon and Flinn* (1869), L. R. 5 C. P. 34, in which case the submission conferred on the arbitrator power to deal with the costs and he directed the successful party to pay the costs.

(*u*) The submission may direct the arbitrator to fix the costs; and in that case he must do so, and cannot direct that they shall be taxed in Court. See *Morgan* v. *Smith* (1842), 9 M. & W. 427.

(*x*) An arbitrator cannot direct the costs to be taxed by some person not an officer of the Court (*Knott* v. *Long* (1736), 2 Str. 1025).

(*y*) Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 2, Schedule I. (i). See *Malvern Urban District Council* v. *Malvern Link Gas Co.* (1900), 83 L. T. 326.

(*z*) Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 2, Schedule I. (i).

(*a*) *Re Autothreptic Steam Boiler Co., Ltd.* v. *Townsend, Hook & Co.* (1888), 21 Q. B. D. 182.

(*b*) *I.e.*, under sect. 19 of the Act (p. 464, *ante*); see *Re Knight and Tabernacle Permanent Building Society*, [1892] 2 Q. B. 613.

(*c*) As to enforcement of the arbitrator's direction with regard to the payment of his remuneration, see *Hicks* v. *Richardson* (1797), 1 Bos. & P. 93; *Stokes* v. *Lewis* (1804), 2 Smith, 12.

Sect. 15 (2) of the Arbitration Act, 1889, does not apply to a submission by consent out of Court (*Warburg & Co.* v. *McKerrow* (1904), 90 L. T. 644).

(*d*) *Re Stephens, Smith & Co. and Liverpool and London and Globe Insurance Co.* (1892), 36 Sol. Jour. 464.

(*e*) See *Re Prebble and Robinson*, [1892] 2 Q. B. 602, at p. 604; *Fernley* v. *Branson* (1851), 20 L. J. (Q. B.) 178; *Rose* v. *Redfern* (1861), 10 W. R. 91.

SECT. 12. Remuneration of Arbitrator or Umpire.

arbitrators fail to agree, so that the duty of making the award devolves on the umpire, the umpire may include the fees of the arbitrators with his own charges as part of the costs of the award (*f*).

Where the umpire had included his own and the arbitrators' remuneration in the award without specifying how much was in respect of his own charges and how much in respect of those of the arbitrators, the Court remitted the award with a direction that he should state those amounts (*g*).

If the arbitrator or umpire does not include his remuneration in the award, the party liable to pay his charges can, as between himself and the other party to the submission, have the charges taxed (*h*).

Lien on award.

An arbitrator or umpire has a lien on the submission and award for the amount of his charges (*i*); and the ordinary practice is to notify to the parties the amount of his charges as soon as the award is ready, and to retain possession of the award until such charges have been paid.

The lien does not extend to documents handed to the arbitrator in the course of the reference (*j*).

Remedy of party paying excessive remuneration.

If the arbitrator or umpire fixes his remuneration at an unreasonable and excessive amount, the party who has had to pay such amount in order to take up the award can bring an action to recover back the sum whereby such charges exceed what is fair and reasonable (*k*), unless the amount is included in the award itself, in which case his only remedy is to move to set aside the award or so much of it as relates to the arbitrator's remuneration (*l*).

Action to recover remuneration.

Where there is an express agreement by the parties that they will pay him, the arbitrator or umpire can maintain an action to recover reasonable remuneration (*m*). It was formerly held that

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(*f*) *Re Ellison and Ackroyd* (1850), 1 Lo. M. & P. 806; Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 2, Schedule I. (i); and see *Threlfall* v. *Fanshawe* (1850), 1 Lo. M. & P. 340, where the reference was under an order of Court.

(*g*) *Gilbert* v. *Wright* (1904), 20 T. L. R. 164.

(*h*) *Re Prebble and Robinson*, [1892] 2 Q. B. 602; *Re James & Sons*, [1903] W. N. 99, where the umpire had fixed a scale fee depending on the amount of the award and this was disallowed on taxation; and see *Roberts* v. *Eberhardt* (1857), 3 C. B. (N. S.) 482. Where the charges fixed by the arbitrator or umpire include a sum paid by him to his solicitors for preparing his award, the party liable to pay those charges is entitled to tax the solicitor's bill under sect. 38 of the Solicitors Act, 1843 (6 & 7 Vict. c. 73) (*Re Collyer-Bristow & Co.*, [1901] 2 K. B. 839; and compare *Galloway* v. *Keyworth* (1854), 15 C. B. 228, where the arbitrator was not allowed to add his solicitor's bill to his own fees).

(*i*) *Poneford* v. *Swaine* (1861), 1 Jo. & H. 433.

(*j*) *R.* v. *South Devon Rail. Co.* (1850), 15 Q. B. 1043.

(*k*) *Llandrindod Wells Water Co.* v. *Hawksley* (1904), 20 T. L. R. 241; *Fernley* v. *Branson* (1851), 20 L. J. (Q. B.) 178; *Barnes* v. *Braithwaite* (1857), 2 H. & N. 569; *Barnes* v. *Hayward* (1857), 1 H. & N. 742; *Re Coombs and Fernley* (1850), 4 Exch. 839, at p. 841; and compare *Dossett* v. *Gingell* (1841), 2 Man. & G. 870.

(*l*) See note (*e*), p. 471, *ante*.

(*m*) *Hoggins* v. *Gordon* (1842), 3 Q. B. 466.

there was no implied promise by the parties to a submission that they would pay the arbitrator or umpire for his services (*n*); but this appears to be no longer the law where the reference is to lay arbitrators (*o*); and if a lay arbitrator may bring an action on an implied promise by the parties that they would pay him reasonable remuneration for his services, there would seem to be no sound reason why a legal arbitrator should not also be entitled to maintain such an action (*p*).

SECT. 12. Remuneration of Arbitrator or Umpire.

SECT. 13.—*Enforcement of Award.*

SUB-SECT. 1.—*By Originating Summons.*

990. Where the submission is contained in a written agreement the award may, by leave of the High Court, be enforced in the same manner as a judgment or order to the same effect (*q*). There is no power to order judgment to be issued on the award, but only power to order that the award may be enforced as a judgment (*r*); but a person who has obtained leave to enforce an award may subsequently bring an action on the award, and in that manner obtain a final judgment (*s*).

Leave of High Court necessary.

In the King's Bench Division application for leave to enforce an award is made by originating summons returnable before a Master (*t*); from the decision of the Master there is an appeal to the judge in chambers (*u*), from the judge in chambers to the Divisional Court (*v*).

How application made.

Applications for leave to enforce an award are rarely brought in the Chancery Division; but if brought in that division the application may be by originating summons or by originating motion.

(*n*) *Virany* v. *Warne* (1801), 4 Esp. 47; *Burroughes* v. *Clarke* (1831), 1 Dowl. 48.

(*o*) *Willis* v. *Wakeley* (1891), 7 T. L. R. 604; *Crampton* v. *Ridley & Co.* (1887), 20 Q. B. D. 48; *Re Coombs and Fernley* (1850), 4 Exch. 839, 841; *Tuckett* v. *Isle of Thanet etc. Co.* (1902), 46 Sol. Jour. 158; *Swinford* v. *Burn* (1818), Gow, 5, 8. See also *Marsack* v. *Webber* (1860), 6 H. & N. 1, where it was held that where one party pays the arbitrator's fees in order to take up the award and neither party is entitled to costs, the party who has paid the arbitrator's fees can recover a moiety thereof from the other party; and compare *Bates* v. *Townley* (1848), 2 Exch. 152.

(*p*) See *Crampton* v. *Ridley & Co.*, *supra*, *per* A. L. SMITH, J., at p. 54.

(*q*) "An award on a submission may by leave of the Court or a judge be enforced in the same manner as a judgment or order to the same effect" (Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 12). See *Baker* v. *Cotterill* (1849), 7 D. & L. 20; *Bowen* v. *Bowen* (1862), 31 L. J. (Q. B.) 193. As to the manner in which judgments or orders of the High Court may be enforced, see R. S. C., Ords. 42, 43, 44, 45, 46, 47, 48; title EXECUTION.

(*r*) *Re a Bankruptcy Notice*, [1907] 1 K. B. 478.

(*s*) *China Steam Navigation Co.* v. *Van Laun* (1906), 22 T. L. R. 26.

(*t*) R. S. C., Ord. 54, r. 12A; *Ex parte Caucasian Trading Corporation, Ltd., Re a Bankruptcy Petition*, [1896] 1 Q. B. 368. The summons must be served two clear days before the return thereof (R. S. C., Ord. 54, r. 4E). The respondent is not required to enter an appearance (R. S. C., Ord. 54, r. 4F (3)).

(*u*) R. S. C., Ord. 54, r. 21.

(*v*) R. S. C., Ord. 54, r. 23; *Re Frere and Staveley, Taylor & Co. and North Shore Mill Co., Ltd.*, [1905] 1 K. B. 366.

SECT. 18. Enforcement of Award.

The application must be supported by an affidavit verifying the award (*w*).

Party out of jurisdiction.

The Court has no power to allow an originating summons or notice of motion for leave to enforce an award to be served out of the jurisdiction. Where the party against whom it is sought to enforce the award is out of the jurisdiction, it is therefore necessary to bring an action for the purpose (*x*).

Grounds of opposing application.

In answer to an application for leave to enforce an award, the respondent may set up that the award is a nullity, or is wholly or in part *ultra vires*, or is bad on the face of it (*y*); but if his objection to the award is that the arbitrator misconducted himself, or that the award was improperly procured, his proper course is to move to set the award aside (*z*), and, if necessary, to get the application to enforce the award adjourned in the meantime. In doubtful cases the party is generally left to pursue his remedy by action.

SUB-SECT. 2.—*By Attachment.*

Refusal to comply with award may be contempt of Court.

991. A submission in writing, unless a contrary intention is expressed therein, has the same effect in all respects as if it had been made a rule of Court (*a*); and consequently a refusal to comply with an award made on a submission in writing is a contempt of Court, and in certain cases may be punished by attachment. Formerly a motion for attachment was the most usual method of enforcing an award where the submission had been made a rule or order of Court, but at the present time the enforcement of an award by attachment is very rare; partly because an originating summons or motion for leave to enforce the award as a judgment or order of the Court is a more direct and simple and, as a rule, a more effective means of compelling compliance with the award, but mainly by reason of the statutory provision that, with certain exceptions, no person may be arrested or imprisoned for making default in payment of a sum of money (*b*); where, therefore, the award, as is usually the case, merely directs that one party shall pay a sum of money to the other, the Court is no longer able to order an attachment against the party making default in payment thereof.

Where, however, the award directs one of the parties to do some act other than the payment of money, and he refuses or neglects to comply with such direction, the Court has power to order his attachment.

(*w*) See *Lund* v. *Hudson* (1843), 1 D. & L. 236; *Hayward* v. *Phillips* (1837), 6 A. & E. 119; *England* v. *Davison* (1841), 9 Dowl. 1052; and compare *Hawkyard* v. *Stocks* (1845), 2 Dow. & L. 936.

(*x*) *Rasch & Co.* v. *Wulfert*, [1904] 1 K. B. 118.

(*y*) *Re Stone and Hastie*, [1903] 2 K. B. 463; *Pedley* v. *Goddard* (1796), 7 Term Rep. 73; *Randall* v. *Randall* (1805), 7 East, 81; *Lambe* v. *Jones* (1860), 9 C. B. (N. S.) 478; *Swayne* v. *White* (1862), 31 L. J. (Q. B.) 260; and see *Wright* v. *Graham* (1848), 3 Exch. 131, and *Dunn* v. *West* (1850), 10 C. B. 420.

(*z*) *Davies* v. *Pratt* (1855), 17 C. B. 183, 187; *Woollen* v. *Bradford* (1864), 33 L. J. (Q. B.) 129; *Brazier* v. *Bryant* (1825), 3 Bing. 167; *Holland* v. *Brooks* (1795), 6 Term Rep. 161; *Macarthur* v. *Campbell* (1834), 2 A. & E. 52.

(*a*) Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 1.

(*b*) Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 4.

Application for writ of attachment.

Application for the issue of a writ of attachment for contempt in refusing to obey an award should be made by originating notice of motion (*c*); and, in addition to the usual formalities which must always be strictly observed on every application for attachment (*d*), it is necessary that the applicant should, before serving the notice of motion, formally demand compliance with the award (*e*). In no case will the Court issue a writ of attachment where the validity of the award is doubtful (*f*). Delay in applying for an attachment is a good ground for refusing the application (*g*).

The issue of a writ of attachment does not preclude the applicant from also bringing an action on the award (*h*).

SUB-SECT. 3.—*By Action.*

Action to enforce award.

992. Every award is enforceable by action in every Court of competent jurisdiction (*i*).

Where the submission is oral or the party against whom the award is sought to be enforced is out of the jurisdiction, an action is the only available method of enforcing the award (*j*).

In such an action, if the defendant desires to set up that the award is bad because the arbitrator misconducted himself or the award was improperly procured, his proper course is to move to set the award aside (*k*). Such a motion must be made within the proper time (*l*); it is usually made on an originating notice of motion; but there seems to be no good reason why it should not be made on a notice of motion in the action.

(*c*) *Davis* v. *Gulmoye* (1888), 39 Ch. D. 322; and see same case (1889), 40 Ch. D. 355.

(*d*) See R. S. C., Ords. 44, 52, r. 4.

(*e*) See R. S. C., Ord. 41, r. 5; *Brandon* v. *Brandon* (1799), 1 Bos. & P. 394; *Strutt* v. *Rogers* (1816), 7 Taunt. 213, 215; *Standley* v. *Hemmington* (1816), 6 Taunt. 561; *Ex parte Fortescue* (1834), 2 Dowl. 448; *Sykes* v. *Haigh* (1835), 4 Dowl. 114 (but see *Baily* v. *Curling* (1851), 20 L. J. (Q. B.) 235); *Laugher* v. *Laugher* (1831), 1 Dowl. 284; and compare *Hemsworth* v. *Brian* (1845), 1 C. B. 131, 139; *Lloyd* v. *Harris* (1849), 8 C. B. 63, 74; *Doe* d. *Williams* v. *Howell* (1850), 5 Exch. 299; *Tattersall* v. *Parkinson* (1848), 2 Exch. 342; and see *Smith* v. *Troup* (1849), 7 C. B. 757, and *Hawkins* v. *Benton* (1844), 2 D. & L. 465, where attachment was allowed to issue though there had been no personal demand.

(*f*) *Hetherington* v. *Robinson* (1839), 4 M. & W. 608; *Creswick* v. *Harrison* (1850), 20 L. J. (C. P.) 56.

(*g*) *Storey* v. *Garry* (1840), 8 Dowl. 299.

(*h*) *R.* v. *Hemsworth* (1846), 3 C. B. 745.

(*i*) See *King* v. *Bowen* (1841), 8 M. & W. 625; *Metropolitan District Rail. Co.* v. *Sharpe* (1880), 5 App. Cas. 425; *China Steam Navigation Co.* v. *Van Laun* (1906), 22 T. L. R. 26. The plaintiff can in appropriate cases claim specific performance of the award (*Eads* v. *Williams* (1854), 4 De G. M. & G. 674; *Nickels* v. *Honcock* (1855), 7 De G. M. & G. 300; *Blackett* v. *Bates* (1865), 1 Ch. App. 117; and see *Hall* v. *Hardy* (1733), 3 P. Wms. 187, 190; *Wood* v. *Griffith* (1818), 1 Swan. 43, 54).

(*j*) *Rasch & Co.* v. *Wulfert*, [1904] 1 K. B. 118.

(*k*) *Bache* v. *Billingham*, [1894] 1 Q. B. 107, 112; and see *Pedler* v. *Hardy* (1902), 18 T. L. R. 591; *Smith* v. *Whitmore* (1864), 2 De G. J. & Sm. 297.

(*l*) R. S. C., Ord. 64, r. 14.

SECT. 14. **Remission or setting aside of Award.**

SECT. 14.—*Power of the Court to remit or set aside Award.*

SUB-SECT. 1.—*Application to Court to remit or set aside Award.*

Remitting or setting aside award.

993. The Court has power to remit the award to the reconsideration of the arbitrator or umpire (*m*), or to set it aside altogether (*n*).

Application by motion.

An application to the Court to set aside, or to set aside or remit, an award, is made by motion (*o*). In the King's Bench Division the motion is heard by a Divisional Court, and in the Chancery Division by the judge to whom the motion may be assigned in the usual manner by ballot (*p*). An application to remit an award may be made in chambers by originating summons, but should generally be made to the Court (*o*).

Time for application.

A notice of motion to set aside an award must be given before the last day of the sittings next after the award has been made and published (*q*).

No time is prescribed within which an application to remit an award must be made; but it must be made within what, having regard to all the circumstances of the case, is a reasonable time. Where there has been unreasonable delay in making the application the Court would on that ground refuse it (*r*).

The notice of motion, whether it be to remit or set aside the award, must state in general terms the grounds of the application (*s*).

(*m*) Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 10 (1): "In all cases of reference to arbitration the Court or a judge may from time to time remit the matters referred, or any part of them, to the reconsideration of the arbitrators or umpire." It is to be observed that whereas the statutory power of enforcing an award is confined to the cases where the award is an "award on a submission," *i.e.*, on a submission contained in a written agreement (see note (*q*), p. 473, *ante*), the power to remit or set aside an award is given in all cases of reference to arbitration (*per* BRAY, J., in *Forder* v. *Whittle*, 18th April, 1907, unreported).

(*n*) *Ibid.*, s. 11 (2): "Where an arbitrator or umpire has misconducted himself, or an arbitration or award has been improperly procured, the Court may set the award aside."

(*o*) The power to set aside an award is conferred by the Act on "the Court" (*ibid.*, s. 11 (2)), whereas the power to remit an award is conferred on "the Court or a judge" (*ibid.*, s. 10 (1)). An order to remit an award might therefore be made by a Master on an originating summons (see R. S. C., Ord. 54, r. 12A), but where the application to remit is opposed, it is usually more convenient to proceed by motion in Court than by summons at chambers.

(*p*) R. S. C., Ord. 5, r. 9 (c).

(*q*) R. S. C., Ord. 64, r. 14, and compare 9 & 10 Will. 3, c. 15, s. 2, which was repealed by the Arbitration Act, 1889 (52 & 53 Vict. c. 49); *Re Gallop and Central Queensland Meat Export Co., Ltd.* (1890), 25 Q. B. D. 230. The Court has power under R. S. C., Ord. 64, r. 7, to extend the time for moving to set aside an award (*Re Oliver and Scott* (1889), 43 Ch. D. 310).

(*r*) *Warburton* v. *Haslingden Local Board* (1879), 48 L. J. (C. P.) 451; *Leicester* v. *Grazebrook* (1879), 40 L. T. 883. Generally speaking, an application to remit an award should be made within the same limit of time as is prescribed in the case of an application to set the award aside (*Doe* v. *Holmes* (1848), 12 Q. B. 951); but see *Mordue* v. *Palmer* (1870), 6 Ch. App. 22, where the award was remitted for the purpose of correcting a mistake eighteen months after it had been published.

(*s*) R. S. C., Ord. 52, r. 4. See *Dunn* v. *Warlters* (1842), 9 M. & W. 293; *Staples* v. *Hay* (1843), 13 L. J. (Q. B.) 60; *Mercier* v. *Pepperell* (1881), 19 Ch. D. 58.

SECT. 14. Remission or setting aside of Award.

Copies of the affidavits intended to be used on the hearing of the motion should be served together with the notice, but the Court has power to dispense with the observance of this requirement (*t*).

Affidavits by the arbitrator or umpire may be used (*u*), for the evidence of an arbitrator or umpire is admissible upon every point which may be considered to be a matter of fact with reference to the making of the award; he may state what course the proceedings took before him, what claims were made by either party, and what claims were admitted; but his evidence is not admissible to explain, or to aid, or to contradict his award (*x*).

Evidence on motion.

The costs of an application to remit or set aside an award are in the discretion of the Court (*y*).

Costs.

From the decision of the Court on any such application an appeal lies to the Court of Appeal without leave (*z*).

Appeal.

SUB-SECT. 2.—*Remission to Arbitrator for Reconsideration.*

994. There are four grounds on which an award may be remitted to the reconsideration of the arbitrator or umpire (*a*). They are the following:—

Grounds for remission.

(1) That there is some defect patent on the face of the award, as, for example, where the award is ambiguous or uncertain (*b*);

(1) Patent defect on award.

(2) That the arbitrator or umpire has admittedly made some mistake, and desires the award to be remitted in order that he may correct it, as, for example, where the arbitrator made his award without having seen the submission, and the award therefore did not deal with the matters referred (*c*), or where the arbitrator omitted by mistake to give credit for a payment which had been duly proved (*d*), or made some mistake as to the principle on which he based his award (*e*);

(2) Mistake by arbitrator.

(3) That material evidence, which could not with reasonable

(3) Fresh evidence obtained.

(*t*) R. S. C., Ord. 52, r. 4. See *Hampden* v. *Wallis* (1884), 26 Ch. D. 746, and *Rendell* v. *Grundy*, [1895] 1 Q. B. 16. The Court has power to make an order under R. S. C., Ord. 31, r. 18, for inspection of documents referred to in any affidavit a copy whereof has been served with the notice of motion, notwithstanding the fact that the original affidavit is not on the file (*Re Fenner and Lord*, [1897] 1 Q. B. 667).

(*u*) *Mills* v. *The Master etc. of Society of Bowyers* (1856), 3 K. & J. 66.

(*x*) *Duke of Buccleuch* v. *Metropolitan Board of Works* (1872), L. R. 5 H. L. 418, 462; *Re Dare Valley Rail. Co.* (1868), L. R. 6 Eq. 429.

(*y*) Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 20: "Any order made under this Act may be made on such terms as to costs or otherwise as the authority making the order thinks just."

(*z*) The appeal is an interlocutory, and not a final, appeal (*Re Delagoa Bay Rail. Co. and Sir T. Tancred* (1889), 61 L. T. 343).

(*a*) *Re Montgomery Jones & Co. and Liebenthal & Co.* (1898), 78 L. T. 406, *per* CHITTY, L.J., at p. 409.

(*b*) *Ellis* v. *Desilva* (1881), 6 Q. B. D. 521; *Re Fearon and Flinn* (1889), L. R. 5 C. P. 34.

(*c*) *Re Stringer and Riley Brothers*, [1901] 1 K. B. 105.

(*d*) *Flynn* v. *Robertson* (1869), L. R. 4 C. P. 324; and see *Re Hall and Hinds* (1841), 2 Man. & G. 847.

(*e*) *Mills* v. *The Master etc. of Society of Bowyers, supra*; and see *Dinn* v. *Blake* (1875), L. R. 10 C. P. 388; and compare *Allen* v. *Grenslade* (1875), 33 L. T. 567; *Greenwood & Co.* v. *Brownhill & Co.* (1881), 44 L. T. 47.

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diligence have been discovered before the award was made, has since been obtained (*f*);

(4) That there has been misconduct on the part of the arbitrator or umpire. In such a case the Court has also power to set the award aside, and the question whether, in any particular case where the arbitrator or umpire has been guilty of misconduct, the Court will remit the award to his reconsideration or will set it aside depends on the nature of the misconduct.

(4) Misconduct.

Partial remission.

The whole award or only a part thereof may be remitted; in the former case the award so remitted is of no effect (*g*), in the latter only that portion of the award which is remitted is avoided, and the remainder is valid and enforceable (*h*).

Further evidence on reconsideration by arbitrator.

Where an award is remitted to the reconsideration of the arbitrator or umpire, his original powers are thereby revived (*i*), and it is his duty to hear such further evidence as the parties may wish to present (*k*), unless the remission is merely for the purpose of correcting some formal defect or making some alteration in the award which would not involve the hearing of further evidence (*l*).

Time for second award.

Where an award is remitted, the arbitrator or umpire, as the case may be, must, unless the order remitting the award otherwise directs, make his second award within three months after the date of the order (*m*).

SUB-SECT. 3.—*Setting aside Award.*

Grounds for setting aside award.

995. The grounds on which an award may be set aside are the following (*n*):—

(1) Arbitration or award improperly procured.

(1) That the arbitration or award has been improperly procured, as, for example, where the arbitrator is deceived (*o*), or material evidence is fraudulently concealed (*p*);

(2) Misconduct of arbitrator.

(2) That the arbitrator or umpire has misconducted himself.

What is "misconduct."

996. It is difficult to give an exhaustive definition of what amounts to misconduct on the part of an arbitrator or umpire. The expression is of wide import, including on the one hand bribery and corruption and on the other a mere mistake as to the scope of the authority conferred by the submission.

Thus misconduct occurs if the arbitrator or umpire, as the case may be, fails to decide all the matters which were by the submission

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(*f*) *Re Keighley, Maxsted & Co. and Durant & Co.*, [1893] 1 Q. B. 405; *Burnard* v. *Wainwright* (1850), 19 L. J. (Q. B.) 423; *Sprague* v. *Allen* (1899), 15 T. L. R. 150; and see *Solomon* v. *Solomon* (1859), 28 L. J. (EX.) 129; *Eardley* v. *Otley* (1818), 2 Chitt 42.

(*g*) *Re Dare Valley Rail. Co.* (1869), 4 Ch. App. 554.

(*h*) *Johnson* v. *Latham* (1851), 20 L. J. (Q. B.) 238.

(*i*) *M'Rae* v. *M'Lean* (1853), 2 E. & B. 946.

(*k*) *Nickalls* v. *Warren* (1844), 6 Q. B. 615; and see *Baker* v. *Hunter* (1847), 16 M. & W. 672.

(*l*) *Anning* v. *Hartley* (1858), 27 L. J. (EX.) 145; *Howett* v. *Clements* (1845), 1 C. B. 128; *Bird* v. *Penrice* (1840), 6 M. & W. 754; *Re Morris and Morris* (1856), 6 E. & B. 383.

(*m*) Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 10 (2).

(*n*) *Ibid.*, s. 11 (2).

(*o*) *Ives* v. *Medcalfe* (1737), 1 Atk. 63, 64.

(*p*) *South Sea Co.* v. *Bumstead* (1734), 2 Eq. Cas. Abr. 80.

referred to him (*q*); if by his award he purports to decide matters which were not in fact included in the submission (*r*); if the award is inconsistent (*s*), or is uncertain or ambiguous (*t*), or is on its face erroneous in matter of law (*u*); or even if there is some mistake of fact—but in such case the mistake must be either admitted or at least clear beyond any reasonable doubt (*x*); if there has been irregularity in the proceedings, as, for example, where the arbitrator failed to give notice to the parties of the time and place of meeting (*y*), or where the submission required the evidence to be taken *vivâ voce*, and the arbitrator received affidavits (*z*), or where the arbitrator refused to hear the evidence of a material witness (*a*), or where, the reference being to two or more arbitrators, they did not act together (*b*);

(*q*) *Samuel* v. *Cooper* (1835), 2 A. & E. 752; *Bowes* v. *Fernie* (1838), 4 My. & Cr. 150; *Wilkinson* v. *Page* (1842), 1 Hare, 276; *Ross* v. *Boards* (1838), 8 A. & E. 290 (where a question of title was referred, and the arbitrator awarded that the property should be taken with all its faults). See *Turner* v. *Turner* (1827), 3 Russ. 494. The award will not be set aside for excluding one of the matters referred to if such matter was not in dispute between the parties at the date of the submission (*Cockburn* v. *Newton* (1841), 2 Man. & G. 899), nor if the matter excluded was not specifically brought before the arbitrator (*Rees* v. *Waters* (1847), 16 M. & W. 263; and see *Hawksworth* v. *Brammall* (1840), 5 My. & Cr. 281). Unless required by the submission, the award will not be set aside because the arbitrator has not found separately on each matter referred (*Re Whitworth and Hulse* (1866), L. R. 1 Exch. 251).

(*r*) As where the award contains unauthorised directions to the parties (*Price* v. *Popkin* (1839), 10 A. & E. 139; *Re Green & Co. and Balfour, Williamson & Co.* (1890), 63 L. T. 97, and on appeal, 325; and see *Faviell* v. *Eastern Counties Rail. Co.* (1848), 2 Exch. 344, 349, and *Bowes* v. *Fernie* (1838), 4 My. & Cr. 150), or where the arbitrator has the power to direct what shall be done but his directions affect the interests of third persons (*Turner* v. *Swainson* (1836), 1 M. & W. 572). Excess of jurisdiction over costs alone is not sufficient to invalidate the award, see *Cockburn* v. *Newton* (1841), 2 Man. & G. 899.

(*s*) *Ames* v. *Milward* (1818), 8 Taunt. 637.

(*t*) An award is uncertain if it is difficult to say whether the matter in dispute is determined or not (*Re Tribe and Upperton* (1835), 3 A. & E. 295; *Mortin* v. *Burge* (1836), 4 A. & E. 973). The award will be set aside for uncertainty if it does not show to whom and in what proportions the amount found due should be paid (*Re Tidswell* (1863), 33 Beav. 213), or if it does not show who is liable to pay (*Lawrence* v. *Hodgson* (1826), 1 Y. & J. 16). Uncertainty as to the manner of payment is not a sufficient objection (*Love* v. *Honeybourne* (1824), 4 D. & R. 814). The arbitrator need not ascertain the exact amount to be paid if he gives the rule by which the amount is to be ascertained (*Higgins* v. *Willes* (1828), 3 Man. & R. 382; and see *Wohlenberg* v. *Lageman* (1815), 6 Taunt. 251). The award will be set aside if it is uncertain as to costs (*Re Smith and Wilson* (1848), 2 Exch. 327).

(*u*) *Hogge* v. *Burgess* (1858), 3 H. & N. 293, 298; *Hodgkinson* v. *Fernie* (1857), 3 C. B. (N. S.) 189; *Kent* v. *Elstob* (1802), 3 East, 18; *Landauer* v. *Asser*, [1905] 2 K. B. 184.

(*x*) *Re Hall and Hinds* (1841), 2 Man. & G. 847; *Hutchinson* v. *Shepperton* (1849), 13 Q. B. 955. But the admission must be proved by the affidavit of the arbitrator himself. See *Phillips* v. *Evans* (1843), 12 M. & W. 309. See also *Holgate* v. *Killick* (1861), 7 H. & N. 418; *Lancaster* v. *Hemington* (1835), 4 A. & E. 345; *Fuller* v. *Fenwick* (1846), 3 C. B. 705.

(*y*) *Oswald* v. *Grey* (1855), 24 L. J. (Q. B.) 69. The award will not be set aside on this ground if nothing is done at the meeting (*Re Morphett* (1845), 2 Dow. & L. 967).

(*z*) *Banks* v. *Banks* (1835), 1 Gale, 46.

(*a*) *Phipps* v. *Ingram* (1835), 3 Dowl. 669. In such a case the affidavit in support should state the arbitrator's reasons for refusal (*Bradley* v. *Ibbetson* (1851), 2 Lo. M. & P. 583; and see *Re Maunder* (1883), 49 L. T. 535).

(*b*) *Wade* v. *Dowling* (1854), 4 E. & B. 44. See *Stalworth* v. *Inns* (1844), 13

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if the arbitrator or umpire has failed to act fairly towards both parties (*c*), as, for example, where the arbitrator heard one party and refused to hear the other (*d*), or where he took instructions from or talked with one party in the absence of the other (*e*), or where he has taken evidence in the absence of one party (*f*) or both parties (*g*), or promised to hear certain witnesses and then made his award without hearing them (*h*); if the arbitrator or umpire refuses to state a special case himself or to allow an opportunity for an application to the Court to order a special case (*i*); if the arbitrator or umpire delegates any part of his authority (*j*), whether it be to a stranger (*k*) or to one of the parties (*l*), or even to a co-arbitrator (*m*); if the arbitrator or umpire accepts the hospitality of one of the parties, such hospitality being offered with the intention of influencing his decision (*n*); if he acquires an interest in the subject-matter of the reference (*o*); or if he takes a bribe from either party (*p*).

M. & W. 466; *Lord* v. *Lord* (1855), 5 E. & B. 404; *Eads* v. *Williams* (1854), 4 De G. M. & G. 674; *Anning* v. *Hartley* (1858), 27 L. J. (EX.) 145; and *Peterson* v. *Ayre* (1855), 15 C. B. 724. Where there are three arbitrators all three must concur (*United Kingdom Mutual Steamship Assurance Assoc.* v. *Houston & Co.*, [1896] 1 Q. B. 567). Even where the award is to be made by two out of three arbitrators, it will be set aside if all three have not met and discussed it (*Re Templeman and Reed* (1841), 9 Dowl. 962).

(*c*) *Cooper* v. *Shuttleworth* (1856), 25 L. J. (EX.) 114.

(*d*) *Oswald* v. *Grey* (1855), 24 L. J. (Q. B.) 69.

(*e*) *Re Gregson and Armstrong* (1894), 70 L. T. 106; *Re Hick* (1819), 8 Taunt. 694; *Harvey* v. *Shelton* (1844), 7 Beav. 455. But where each party was examined separately, and neither party expressed a desire to be present at the examination of the other, the award was upheld (*Matson* v. *Trower* (1824), Ry. & M. 17).

(*f*) *Walker* v. *Frobisher* (1801), 6 Ves. 70; *Dobson* v. *Groves* (1844), 6 Q. B. 637; *Re Tidswell* (1863), 33 Beav. 213; *Re Brook and Delcomyn* (1864), 16 C. B. (N. S.) 403; and see *Bache* v. *Billingham*, [1894] 1 Q. B. 107, 112. But see *Atkinson* v. *Abraham* (1797), 1 Bos. & P. 175.

(*g*) *Re Plews and Middleton* (1845), 6 Q. B. 845.

(*h*) *Pitt* v. *Dawkra*, cited in *Earl* v. *Stocker* (1691), 2 Vern. 251. As to when the arbitrator may proceed *ex parte*, see *Gladwin* v. *Chilcote* (1841), 9 Dowl. 550; *Scott* v. *Van Sandau* (1844), 6 Q. B. 237; *Tryer* v. *Shaw* (1858), 27 L. J. (EX.) 320; *Re Hewitt and Portsmouth Waterworks Co.* (1862), 10 W. R. 780.

(*i*) See p. 465, *ante*.

(*j*) The arbitrator may delegate a purely ministerial duty, such as the ascertainment of the amount of costs (*Holdsworth* v. *Wilson* (1863), 4 B. & S. 18). But see *Knott* v. *Long* (1736), 2 Str. 1025, and *Cargey* v. *Aitcheson* (1823), 2 B. & C. 170.

(*k*) *Johnson* v. *Latham* (1850), 1 Lo. M. & P. 348; *Tomlin* v. *Mayor of Fordwick* (1836), 5 A. & E. 147.

(*l*) *Pedley* v. *Goddard* (1796), 7 Term Rep. 73, 77.

(*m*) *Little* v. *Newton* (1841), 2 Man. & G. 351. The arbitrator cannot reserve to himself the right to deal with future differences arising on the award (*Manser* v. *Heaver* (1832), 3 B. & Ad. 295; *Re Tandy and Tandy* (1841), 9 Dowl. 1044).

(*n*) *Re Hopper* (1867), L. R. 2 Q. B. 367; *Moseley* v. *Simpson* (1873), L. R. 16 Eq. 226; *Re Maunder* (1883), 49 L. T. 535. To induce the Court to interfere on such a ground there must be something more than mere suspicion (*Crossley* v. *Clay* (1848), 5 C. B. 581).

(*o*) *Blanchard* v. *Sun Fire Office* (1890), 6 T. L. R. 365. See *Parker* v. *Burroughs* (1702), Colles, 257 (where Titus Oates was the arbitrator); and compare *Kemp* v. *Rose* (1858), 1 Giff. 258, and *Kimberley* v. *Dick* (1871), L. R. 13 Eq. 1. The award will not be set aside if the interest of the arbitrator was known to the parties at the time of his appointment (*Ranger* v. *Great Western Rail. Co.* (1854), 5 H. L. Cas. 72; *Jackson* v. *Barry Rail. Co.*, [1893] 1 Ch. 238; and see *Eckersley* v. *Mersey Docks and Harbour Board*, [1894] 2 Q. B. 667; *Ives* v. *Willans*, [1894] 2 Ch. 478; *Bright* v. *River Plate Construction Co.*, [1900] 2 Ch. 835).

(*p*) See *Re Whiteley and Roberts*, [1891] 1 Ch. 558. The amount of costs

SECT 14. Remission or setting aside of Award.

In each of the above cases he is guilty of misconduct, and the Court has power to set aside his award.

The parties may if they please waive any objection as to the misconduct of the arbitrator or umpire (*q*); but the waiver must be made with full knowledge of the circumstances (*r*); and it would seem that the parties may by their submission agree that neither of them will attempt to set aside the award on the ground of misconduct by the arbitrator (*s*).

Waiver of objection.

SECT. 15.—*Appeals.*

997. The Court of Appeal has no jurisdiction to entertain an appeal from the decision of the High Court on a special case stated by an arbitrator pending the reference; but, with that exception, every order made by the High Court on any application in the matter of an arbitration by consent out of Court is appealable (*t*), but no such appeal can be brought after the expiration of fourteen days except by special leave of the Court of Appeal (*u*).

Appeals from High Court.

From any order made by the Court of Appeal an appeal lies to the House of Lords (*x*).

Part II.—References under Order of Court.

SECT. 1.—*In General.*

998. The High Court of Justice has power to make orders for the reference of a cause or matter (other than a criminal proceeding by the Crown) pending in the Court, or of a question or issue of fact arising in such cause or matter (*y*); and the Court

Power to order reference.

awarded may be so excessive as to amount to evidence of partiality (*Turner* v. *Rose* (1756), 1 Ld. Ken. 393).

(*q*) *Bignall* v. *Gale* (1841), 2 Man. & G. 830; *Re Salkeld and Slater* (1840), 12 A. & E. 767; *Thomas* v. *Morris* (1867), 16 L. T. 398; *Moseley* v. *Simpson* (1873), L. R. 16 Eq. 226; *Drew* v. *Drew* (1855), 2 Macq. 1, at pp. 8, 9; *Mills* v. *Master etc. of Society of Bowyers* (1856), 3 K. & J. 66.

(*r*) *Earl of Darnley* v. *Proprietors etc. of London, Chatham and Dover Railway* (1867), L. R. 2 H. L. 43.

(*s*) *Tullis* v. *Jacson*, [1892] 3 Ch. 441; and see *Moseley* v. *Simpson* (1873), L. R. 16 Eq. 226.

(*t*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 19. Leave to appeal from a decision of a Divisional Court is not required. See *Wynne-Finch* v. *Chaytor*, [1903] 2 Ch. 475, at p. 485, overruling *Daglish* v. *Barton*, [1900] 1 Q. B. 284.

(*u*) R. S. C., Ord. 58, r. 15; and see *Austin Friars Steamship Co.* v. *Strack*, [1906] 2 K. B. 499. If the order appealed from is a final order, the notice of appeal is a fourteen days' notice; if interlocutory, a four days' notice (R. S. C., Ord. 58, r. 3). As to what is an interlocutory order, see *Re Croasdell and Cammell, Laird & Co.*, [1906] 2 K. B. 569. Whether in the case of an appeal from an interlocutory order made by a Divisional Court leave to appeal is requisite seems open to doubt. See Judicature Act, 1894 (57 & 58 Vict. c. 16), s. 1. The mistake of counsel as to the time within which an appeal should be brought is not sufficient ground for granting special leave to appeal (*Re Coles and Ravenshear*, [1907] 1 K. B. 1).

As to appeals from an order made on an application to stay an action pursuant to sect. 4 of the Arbitration Act, 1889, see note (*u*), p. 451, *ante*.

(*x*) Appellate Jurisdiction Act, 1876 (39 & 40 Vict. c. 59), s. 3.

(*y*) See Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 13 (1): "Subject to

SECT. 1. In General.

of Appeal has a similar power with respect to appeals pending before it (*z*).

References under order of Court made under these powers are of two kinds, namely (1) references for inquiry or report (*a*), and (2) references for trial (*b*).

References by consent.

999. Apart from the above statutory jurisdiction to make orders for reference, the Court has, and always has had, power to direct a reference to arbitration in all cases where the parties desire that the cause or matter should be referred instead of being litigated in Court (*c*); but an order for reference made under this inherent jurisdiction of the Court must be carefully distinguished from an order of reference for trial made under the jurisdiction conferred by the Arbitration Act, 1889.

References under Arbitration Act, 1889.

Where the order for reference is made under the Arbitration Act, 1889, the subject-matter of the reference must be limited to the cause or matter pending before the Court (*d*). The referee or arbitrator is deemed to be an officer of the Court, and has such authority, and must conduct the reference in such manner, as is prescribed by the rules of Court, and subject to those rules as the Court or a judge may direct (*e*). Moreover, his decision is, unless set aside by the Court or a judge, equivalent to the verdict of a jury (*f*).

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rules of Court and to any right to have particular cases tried by a jury, the Court or a judge may refer any question arising in any cause or matter (other than a criminal proceeding by the Crown) for inquiry or report to any official or special referee." And by sect. 14, "In any cause or matter (other than a criminal proceeding by the Crown),—

"(a) If all the parties interested who are not under disability consent, or

"(b) If the cause or matter requires any prolonged examination of documents or any scientific or local investigation which cannot in the opinion of the Court or a judge conveniently be made before a jury or conducted by the Court through its other ordinary officers, or

"(c) If the question in dispute consists wholly or in part of matters of account,

the Court or a judge may at any time order the whole cause or matter, or any question or issue of fact arising therein, to be tried before a special referee or arbitrator respectively agreed on by the parties, or before an official referee or officer of the Court."

(*z*) Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 17: "Her Majesty's Court of Appeal shall have all the powers conferred by this Act on the Court or a judge thereof under the provisions relating to references under order of the Court."

(*a*) *Ibid.*, s. 13 (1), *supra*.

(*b*) *Ibid.*, s. 14, *supra*.

(*c*) Formerly, when the parties to an action pending before the Court agreed that the matter in difference between them should be referred to arbitration, the Court gave effect to their agreement by making a rule of Court for the reference of such matter to arbitration; see *Hide* v. *Petit* (1671), Ch. Cas. 185. The practice of referring matters to arbitration by rule of Court gave rise to the earliest statute with regard to arbitrations by submission out of Court (9 & 10 Will. 3, c. 15), which begins by reciting that "it hath been found by experience that references made by rule of Court have contributed much to the ease of the subject in the determining of controversies because the parties become thereby obliged to submit to the award of the arbitrators under the penalty of imprisonment for their contempt" should they refuse to do so, and goes on to provide that certain submissions might be made rules of Court.

(*d*) *Darlington Wagon Co., Ltd.* v. *Harding and the Trouville Pier and Steamboat Co., Ltd.*, [1891] 1 Q. B. 245.

(*e*) Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 15 (1).

(*f*) *Ibid.*, s. 15 (2). See p. 490, *post*.

References under Court's inherent jurisdiction.

But where the order for reference is made under the inherent jurisdiction of the Court, the subject-matter of the reference is not necessarily limited to the cause or matter in which such order is made, for it may, and not infrequently does, include all matters in difference between the parties (*g*). The referee or arbitrator is not in any sense an officer of the Court. He has such authority and powers as the parties may agree by the order of reference to confer upon him, and his award is in most respects similar in its nature and effect to an award made in an arbitration pursuant to a submission out of Court. Moreover, whereas in certain cases the Court can make a compulsory order of reference for trial under the Arbitration Act, 1889, against the will of either or even both of the parties (*h*), an order for reference under the inherent jurisdiction of the Court can in no case be made save with the consent of all the parties.

Effect of order of reference.

The real nature and effect of an order for reference made under the inherent jurisdiction of the Court is this: that, the parties having agreed that the cause or matter, or that all matters in difference between them (as the case may be), should be referred to arbitration, instead of being litigated in Court, the action is stayed, and an arbitration similar to an arbitration pursuant to a submission out of Court takes place. The distinction between an arbitration pursuant to a submission out of Court and an arbitration pursuant to an order made by the Court under its inherent jurisdiction and not under the Arbitration Act, 1889, is that in the former case the submission is made by parties out of Court, and in the latter case the submission is contained in the order of the Court; and the arbitrator is usually empowered to direct how judgment should be entered in the action (*i*).

References under Arbitration Act, 1889.

References pursuant to an order made by the Court under the Arbitration Act, 1889, may be either for inquiry or report or for trial; they are entirely different from arbitrations held pursuant to a submission out of Court. Moreover, references for inquiry or report differ in many important respects from references for trial (*k*).

Official referees.

There are three official referees, who are barristers of ten years standing, and are appointed by the Lord Chancellor (*l*). When an order for reference to an official referee is made, the nomination is determined by the method of rotation prescribed by the rules of Court (*m*), or one of the three may be nominated by the order for reference (*n*).

(*g*) *Darlington Wagon Co., Ltd.* v. *Harding and the Trouville Pier and Steamboat Co., Ltd.*, [1891] 1 Q. B. 245.

(*h*) Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 14.

(*i*) See Part I., pp. 439 *et seq.*, *ante*.

(*k*) Where an action is pending in a county court the judge may, with the consent of both parties, order the action, with or without other matters, which are within the jurisdiction of the Court, in dispute between the parties, to be referred to arbitration to such person or persons, and in such manner, and on such terms as he may think reasonable and just. The award of the arbitrator or arbitrators is entered as the judgment in the action, and, subject to the power of the judge to set it aside, is as binding and effectual as if given by the judge. See County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 104.

(*l*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 83.

(*m*) R. S. C., Ord. 36, rr. 45, 46.

(*n*) *Ibid.*, rr. 45, 47.

SECT. 2. **References for Inquiry or Report.**

SECT. 2.—*References for Inquiry or Report.*

When order made.

1000. Subject to the right of any party to a trial by jury (*o*), any question arising in a cause or matter (other than a criminal proceeding by the Crown) may be referred for inquiry or report; but the power to order such a reference is only exercised in cases where the question cannot conveniently be decided in the usual way by the Court, as, for instance, where a prolonged examination of documents or of accounts (*p*), or some scientific or local investigation (*q*), is necessary, or where, as may be the case when damages have to be assessed, the inquiry involves questions of detail which would occupy too much time in Court (*r*). The Court will only refer for inquiry such questions as must necessarily arise, and not such as are dependent upon the determination of other issues (*s*).

An order of reference for inquiry or report may be made by a Master (*t*).

To whom reference made.

1001. The reference may be made either to an official referee or to a special referee, who may be any person approved by the Court or judge ordering the reference, and may be appointed without the consent of the parties (*u*).

Powers of referee.

The referee, whether he be an official or a special referee, is deemed to be an officer of the Court (*x*), and has such authority as is prescribed by the rules of Court (*y*), and, subject thereto, as the Court or judge directs. In the absence of direction to the contrary, he may fix the place for holding the inquiry (*z*), and may make a peremptory appointment for the hearing (*a*). He may have any inspection or view which he may deem expedient (*b*), and may make an order for the inspection of property (*c*). He has the same authority as a judge of the High Court with respect to the discovery and production of documents (*d*).

(*o*) See R. S. C., Ord. 36; title PRACTICE AND PROCEDURE.

(*p*) *Re Taylor* (1890), 44 Ch. D. 128; *Rochefoucauld* v. *Boustead*, [1897] 1 Ch. 196, at p. 213.

(*q*) *Broder* v. *Saillard* (1876), 2 Ch. D. 692, at p. 694; *Badische Anilin und Soda Fabrik* v. *Levinstein* (1883), 24 Ch. D. 156, 167.

(*r*) *Rust* v. *Victoria Graving Dock Co.* (1887), 36 Ch. D. 113, at p. 114; *Wallis* v. *Sayers* (1890), 6 T. L. R. 356.

(*s*) *Weed* v. *Ward* (1889), 40 Ch. D. 555.

(*t*) Arbitration Act, 1889 (52 & 53 Vict. c. 49), ss. 13, 21; R. S. C., Ord. 54, r. 12A.

(*u*) *Per* PEARSON, J., *Badische Anilin und Soda Fabrik* v. *Levinstein*, *supra*, at p. 167.

(*x*) Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 15 (1). In *Re Palmer* (1890), 63 L. T. 302, it was apparently assumed by the judge that this section applies to a reference for inquiry.

(*y*) See R. S. C., Ord. 36, rr. 48—55D.

(*z*) *Ibid.*, r. 48.

(*a*) *Baroness Wenlock* v. *River Dee Co.* (1883), 53 L. J. (Q. B.) 208.

(*b*) R. S. C., Ord. 36, r. 48.

(*c*) R. S. C., Ord. 36, r. 50; *Macalpine & Co.* v. *Calder & Co.*, [1893] 1 Q. B. 545.

(*d*) *Barnett* v. *Aldridge Colliery Co.* (1887), 4 T. L. R. 16; *Macalpine & Co.* v. *Calder & Co.*, *supra*.

SECT 2. References for Inquiry or Report.

1002. Unless otherwise directed by the Court or judge, he is to sit *de die in diem* (*e*), but this rule is not imperative, and disregard of it will not invalidate the proceedings (*f*).

Conduct of reference.

The inquiry which the referee is to make is a judicial inquiry by examination of witnesses (*g*). Evidence is to be taken, and the attendance of witnesses may be enforced by subpœna; and the inquiry is to be conducted in the same manner, as nearly as circumstances will admit, as trials are conducted before a judge (*h*); but a referee is not bound to take accounts in the exact manner which obtains before Masters in the chambers of the judges of the Chancery Division (*i*).

The order for reference does not usually fix any time within which the referee is to make his report. If a time is fixed and necessity arises for enlarging it, the Court or a judge has power to make an order for the enlargement (*k*).

When the referee makes his report, he should on the same day give notice thereof to each party by letter directed to his address for service, and the notice is deemed to have been received in due course of post (*l*).

Statement of special case.

1003. The referee may at any stage of the proceedings, and must if so directed by the Court or a judge, state in the form of a special case for the opinion of the Court any question of law arising in the course of the reference (*m*); and any such question may be submitted for the decision of the Court, or any facts may be specially stated, with power to the Court to draw inferences therefrom, by the report of the referee (*n*).

Referee's report.

It is not the duty of a referee to whom a question has been referred for inquiry and report to dispose of the matter; his duty is to find the materials upon which the Court is to act, and his report should be so framed that the Court will be able to determine the matter in question (*o*). Thus a report by a referee as to damages should state the mode in which the amount has been calculated and the facts on which the calculation is based (*p*); but it is not necessary that the referee should give the reasons for his conclusions, though he may state facts or figures that will assist the Court to revise the report, or to come to a different conclusion (*q*).

(*e*) R. S. C., Ord. 36, r. 48.
(*f*) *Robinson* v. *Robinson* (1876), 35 L. T. 337.
(*g*) *Baroness Wenlock* v. *River Dee Co.* (1887), 19 Q. B. D. 155.
(*h*) R. S. C., Ord. 36, rr. 49, 55*a*.
(*i*) *Re Taylor* (1890), 44 Ch. D. 128.
(*k*) Arbitration Act, 1889 (52 & 53 Vict. c. 49), ss. 9, 16.
(*l*) R. S. C., Ord. 36, r. 53.
(*m*) Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 19. See as to special case p. 489, *post*.
(*n*) R. S. C., Ord. 36, r. 52.
(*o*) *Mellin* v. *Monico* (1877), 3 C. P. D. *per* BRAMWELL, L.J., at p. 149; *Badische Anilin und Soda Fabrik* v. *Levinstein* (1883), 24 Ch. D. 156, at p. 167.
(*p*) *Mayor of Birmingham* v. *Allen*, [1877] W. N. 190.
(*q*) *Dunkirk Colliery Co.* v. *Lever* (1878), 9 Ch. D. 20, *per* BRAMWELL, L.J., at p. 28

SECT. 2. References for Inquiry or Report.

In taking accounts, it is sometimes advisable that the report should set out the items respectively allowed or disallowed (*r*), but in complicated cases this is not necessary (*s*). The report should, however, provide the materials to enable the parties to question it, and for this purpose the notes of the evidence taken may be considered with the report (*t*).

Costs of reference.

The referee has no power to make any order as to the costs of the inquiry unless such power is expressly given by the order appointing him. The costs of the inquiry are part of the costs in the cause or matter, and must be dealt with according to the order of the Court or judge by whom it is referred. The remuneration to be paid to any special referee to whom any matter is referred under order of the Court or a judge is to be determined by the Court or judge (*u*), and after such determination the referee can sue the parties for the amount allowed (*x*).

Adoption of report.

1004. The Court or judge may adopt the report of the referee wholly or partially. If and so far as the report be adopted, it may be enforced as a judgment or order to the same effect (*y*); but until it has been adopted no effect can be given to it (*z*). The Court or judge may decide the question referred on the evidence taken before the referee, either with or without additional evidence (*a*), but will not go into the evidence with a view to varying the report at the instance of a party who has not given notice of motion to vary (*b*).

Variation or remission of report.

The Court may also require any explanation or reasons from the referee, or may remit the question for further consideration to the same or any other referee (*c*). If the further consideration of the cause or matter has been adjourned, while the inquiry is pending, any party after the report has been made may apply to the Court or judge to adopt it without notice of motion or summons, but if the party desires to have the report varied or remitted, four days' notice of motion must be given to come on with the further consideration (*d*). If the further consideration has not been adjourned, any party may apply to the Court by an eight days' notice of motion to adopt or vary or remit the report (*e*). The time within which the application is to be made is not limited by the rules or otherwise (*f*).

(*r*) *Burrard* v. *Calisher* (1882), 19 Ch. D. 644.
(*s*) *Re Taylor* (1890), 44 Ch. D. 128.
(*t*) *Ibid.*
(*u*) Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 15 (3).
(*x*) *Willis* v. *Wakeley Brothers* (1891), 7 T. L. R. 604. In this case the reference was under an order made by the consent of the parties, but the right to recover would seem to be independent of such consent.
(*y*) Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 13 (2).
(*z*) *Guardians of Mansfield Union* v. *Wright* (1882), 9 Q. B. D. at p. 686 (decided under the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 56).
(*a*) R. S. C., Ord. 36, r. 52.
(*b*) *Re Fitton* (1893), 70 L. T. 397.
(*c*) R. S. C., Ord. 36, r. 52.
(*d*) R. S. C., Ord. 36, r. 54; *Burrard* v. *Calisher* (1882), 19 Ch. D. 644.
(*e*) R. S. C., Ord. 36, r. 55. In *Larkin* v. *Lloyd* (1891), 64 L. T. 507, an action for an injunction to restrain a nuisance, the referee found that there was no nuisance. On a motion to dismiss the action under Ord. 40, r. 7, it was held that Ord. 36, r. 55, did not apply.
(*f*) *Walker* v. *Bunkell* (1882), 31 W. R. 138.

SECT. 3.—*References for Trial.*

SUB-SECT. 1.—*What may be referred.*

When order of reference will be made.

1005. Any cause or matter pending in the High Court of Justice (other than a criminal proceeding by the Crown), or any question or issue of fact arising therein, may be referred for trial (*g*) if all the parties interested who are not under disability consent; and if the cause or matter requires any prolonged examination of documents (*h*) or any scientific or local investigation (*i*), which cannot in the opinion of the Court or a judge conveniently be made before a jury, or conducted by the Court through its other ordinary officers, or if the question in dispute consists wholly or in part of matters of account (*k*), the cause (*l*) or matter or question may be referred for trial without the consent of the parties. Where fraud is alleged, the Court will, as a general rule, be disposed to direct that the matter be tried in the ordinary way and to refuse an order for reference, unless the allegations of fraud are so mixed up with the merits of the case that they cannot be tried separately (*m*).

Limit of Jurisdiction

The Court has no jurisdiction under the Arbitration Act, 1889, to make an order for reference of questions which do not arise in the cause or matter. Any such order, as, for instance, an order for reference of "all matters in dispute between the parties," can only be made with the consent of the parties and under the

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(*g*) Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 14; see note (*y*), p. 482, *ante*. A consent under this section does not amount to a submission to arbitration. See *Zelma Gold Mining Co., Ltd.* v. *Hoskins*, [1895] A. C. 100 (in Privy Council).

(*h*) For the ascertainment of facts, not for the determination of a question of law, see *Ormerod* v. *Todmorden Mill Co.* (1882), 8 Q. B. D. at p. 677, *per* BRETT, L.J. The prolonged investigation does not mean merely reading a large number of letters (*Green's Trustee* v. *Barrett*, [1875] W. N. 204), or a mass of printed evidence taken on commission (*Hamilton* v. *Merchants' Marine Insurance Co.* (1889), 58 L. J. (Q. B.) 544). But a reference was ordered when it was necessary to examine a large number of invoices in order to prove systematic overcharges (*Hoch* v. *Boor* (1880), 49 L. J. (C. P.) 665).

(*i*) An order of reference was upheld in a case relating to the infringement of a patent for improvements in a railway signal, as involving a scientific investigation (*Saxby* v. *Gloucester Wagon Co.*, [1880] W. N. 28), and in an action to restrain interference with ancient lights, as requiring local investigation (*Bannister* v. *McDonald*, [1890] W. N. 50). An order for reference was set aside where the question was whether a coal-mine had been fairly worked under a lease (*Case* v. *Willis* (1892), 8 T. L. R. 610), also in a case as to the genuineness of a large number of pictures (*Leigh* v. *Brooks* (1877), 5 Ch. D. 592), but in that case there were allegations of fraud.

(*k*) The words "matters of account" should be construed in a wide sense (*Re Leigh* (1876), 3 Ch. D. 292). For orders made in such matters, see *Goodwin* v. *Budden* (1880), 42 L. T. 536 (partnership accounts), and *Ward* v. *Pilley* (1880), 5 Q. B. D. 427 (action on a builder's bill). In *Clow* v. *Harper* (1878), 3 Ex. D. 198, an action for breaches of covenant to repair where the breaches were denied, an order for reference was refused.

(*l*) The whole case may be referred if a substantial part of the dispute between the parties is matter of account (*Hurlbatt* v. *Barnett & Co.*, [1893] 1 Q. B. 77).

(*m*) *Russell & Co.* v. *Harris* (1891), 65 L. T. 752; and see *Leigh* v. *Brooks*, *supra*.

SECT. 3. References for Trial.

inherent jurisdiction of the Court, and amounts to a submission to arbitration (*n*).

Who may make order.

The order for reference may be made by a judge or Master in chambers upon an application by summons (*o*), or by a judge at any stage of a trial before him. An appeal lies to the Court of Appeal from an order of reference for trial made by a judge at the trial (*p*) or in chambers (*q*).

SUB-SECT. 2.—*To whom the Reference may be made.*

To whom reference made.

1006. The reference may be made to an official referee or Master (*r*) or other officer of the Court (*s*), or to a special referee or arbitrator agreed on by the parties (*t*).

In cases where application is made under the Rules of Court for summary judgment, if the parties consent, an order may be made referring the action to a Master of the Supreme Court (*u*).

SUB-SECT. 3.—*Powers of the Referee or Arbitrator.*

Referee an officer of Court.

1007. The referee or arbitrator is deemed to be an officer of the Court, and has such powers as are prescribed by the Rules of Court, and subject thereto as the Court or a judge may direct (*x*).

Authority.

Subject to any order made by the Court or judge, he has the same authority in the conduct of the reference as a judge of the High Court (*a*). He may order discovery and production of documents, and may grant a commission to examine witnesses abroad (*b*); he may make an order for the inspection of property (*c*), and for the addition of parties who ought to have been joined (*d*); and may direct judgment to be entered for any party (*e*).

No power to commit.

A referee or arbitrator to whom a reference for trial is ordered has no power to commit any person to prison, or to enforce any order by attachment or otherwise (*f*).

(*n*) See p. 482, *ante*; *Darlington Wagon Co., Ltd.* v. *Harding and the Trouville Pier and Steamboat Co., Ltd.*, [1891] 1 Q. B. 245.

(*o*) R. S. C., Ord. 54, r. 12A.

(*p*) *Hoch* v. *Boor* (1880), 43 L. T. 425. The Court of Appeal will not interfere with the judge's discretion unless it is clear that it has been wrongly exercised (*Ormerod* v. *Todmorden Mill Co.* (1882), 8 Q. B. D. 664; *Case* v. *Willis* (1892), 8 T. L. R. 610).

(*q*) Judicature Act, 1894 (57 & 58 Vict. c. 16), s. 1 (4).

(*r*) As to appeal on a reference to a Master, see p. 492, *post*.

(*s*) Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 14.

(*t*) The Court cannot refer a cause or matter to a special referee without such consent (*London and Lancashire Fire Insurance Co.* v. *The British America Assurance Co.* (1885), 52 L. T. 385, decided on R. S. C., Ord. 36, r. 7).

(*u*) R. S. C., Ord. 14, r. 7.

(*x*) Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 15 (1); R. S. C., Ord. 36, rr. 48, 49, 50.

(*a*) See p. 484, *ante*.

(*b*) *Hayward* v. *Mutual Reserve Association*, [1891] 2 Q. B. 236. There is an appeal to the judge against an interlocutory order of the official referee.

(*c*) *Macalpine & Co.* v. *Calder & Co.*, [1893] 1 Q. B. 545.

(*d*) *Byrne* v. *Brown* (1889), 22 Q. B. D. 657.

(*e*) R. S. C., Ord. 36, rr. 50, 55B, 55C.

(*f*) R. S. C., Ord. 36, r. 51.

SUB-SECT. 4.—*Conduct of the Reference.*

Appointment for hearing.

1008. In the absence of direction to the contrary, the referee or arbitrator may fix the place for holding the reference (*g*), and may make a peremptory appointment for the hearing (*h*).

The Rules of Court provide that, unless otherwise directed, he shall proceed with the trial *de die in diem* in a similar manner as in actions tried with a jury (*i*); but this rule is not imperative, and disregard of it will not in any case invalidate the proceedings (*k*). Moreover, it would seem that the rule is only intended to apply where the reference is to an official referee or some other officer of the Court (*l*).

Procedure at hearing.

At the hearing the evidence is taken and the proceedings are conducted in the same manner, as nearly as circumstances will admit, as trials are conducted before a judge (*m*).

SUB-SECT. 5.—*Time for making Award.*

No time usually fixed for decision.

1009. It is not usual for any time to be fixed for a referee, on a reference for trial, to give his decision. If the cause or matter is sent to an official referee it would take its place with other causes in his list, and, in the absence of any special order, come on for hearing in its turn. If for any reason a time should be fixed by the order of reference, and occasion should arise for enlarging the time, it would be necessary to apply to the Court to enlarge the time (*n*).

SUB-SECT. 6.—*Statement of Special Case.*

Special case on question of law.

1010. The referee may at any stage of the proceedings, and must if so directed by the Court or a judge, state in the form of a special case for the opinion of the Court any question of law arising in the course of the reference (*o*). The power and duty of a referee on a reference for trial are in this respect the same as those of an arbitrator under an ordinary submission to arbitration (*p*); but since it is open to any party to a reference for trial held pursuant to an order made under the Arbitration Act, 1889, to appeal against

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(*g*) R. S. C., Ord. 36, r. 48.

(*h*) *Baroness Wenlock* v. *River Dee Co.* (1883), 53 L. J. (Q. B.) 208.

(*i*) R. S. C., Ord. 36, r. 48.

(*k*) *Robinson* v. *Robinson* (1876), 35 L. T. 337.

(*l*) R. S. C., Ord. 36, r. 55c, provides that rule 48 shall apply where any cause or matter or any question or issue of fact therein is referred to an officer of the Court or to a special referee or arbitrator, subject to the proviso that "where the arbitrator is appointed otherwise than by an order of the Court" the provisions as to sitting *de die in diem* shall not apply. In every reference for trial under the Arbitration Act, 1889, the order of reference appoints the referee or arbitrator; but no special referee or arbitrator, that is, a referee or arbitrator who is not an official referee or officer of the Court, can be appointed unless the parties agree to his nomination; and in that sense it may be said that any such special referee or arbitrator is appointed "otherwise than by an order of the Court."

(*m*) R. S. C., Ord. 36, r. 49.

(*n*) Arbitration Act, 1889 (52 & 53 Vict. c. 49), ss. 9, 16. A Master has jurisdiction to enlarge the time (s. 21). See R. S. C., Ord. 54, r. 12A.

(*o*) Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 19.

(*p*) See p. 464, *ante*.

SECT. 8. References for Trial.

the decision of the referee or arbitrator (*q*), and such decision may be questioned on the same grounds as the verdict of a jury, it is not usual on such a reference to invoke the power of stating a special case for the opinion of the Court.

SUB-SECT. 7.—*The Decision of the Referee or Arbitrator.*

Decision of official referee.

1011. Where the referee is an official referee or some other officer of the Court, he usually announces his decision orally in the presence of the parties, stating, so far as he thinks fit so to do (*r*), the findings of fact on the evidence placed before him and the principles of law which he considers applicable to the facts so found. He directs how judgment is to be entered, and judgment is then entered in accordance with the direction so given by him (*s*).

Decision of special referee or arbitrator.

Where the reference is to a special referee or arbitrator, a different procedure is usually adopted. The special referee or arbitrator does not as a rule announce his decision in the presence of the parties, but formulates it in an award, resembling in all respects an award made by an arbitrator or umpire on a submission to arbitration out of Court, except that it directs how the judgment in the cause or matter wherein the order of reference was made should be entered.

Effect of decision.

The decision of the referee, whether he be an official referee, or some other officer of the Court, or a special referee or arbitrator, and whether it be announced orally to the parties or be expressed in the form of an award, is equivalent to the verdict of a jury (*t*); that is to say, it has the same legal effect, and may be enforced in the same way (*u*) or set aside on the same grounds, as a verdict of a jury (*v*). It is the duty of the referee to direct how judgment should be entered (*x*).

Where costs are to abide event, separate findings on each issue.

If the order of reference directs that the costs shall abide the event, the referee should decide each issue and give separate findings thereon; because the word "event" must, where there are separate issues, be construed distributively (*y*).

SUB-SECT. 8.—*Costs of the Reference, including the Remuneration of the Referee or Arbitrator.*

Costs.

1012. The order of the Court or judge directing the reference may deal with the costs (*z*); when no directions are given as to costs, or subject to such directions, if any, the referee has the same discretion as to the costs of the reference as the Court or judge

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(*q*) See p. 481, *ante*.

(*r*) *Miller* v. *Pilling* (1882), 9 Q. B. D. 736. A Master gives a certificate of the effect of the finding and directs judgment to be entered.

(*s*) R. S. C., Ord. 40, r. 2.

(*t*) Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 15 (2); *Carr Brothers* v. *Dougherty* (1898), 67 L. J. (Q. B.) 371. For forms of award on a reference, see Encyclopædia of Forms, Vol. II., pp. 180—189.

(*u*) *Glasbrook* v. *Owen* (1890), 7 T. L. R. 62.

(*v*) *Longman* v. *East* (1877), 3 C. P. D. 142, *per* BRETT, L.J., at p. 155.

(*x*) R. S. C., Ord. 40, r. 2.

(*y*) *Ellis* v. *Desilva* (1881), 6 Q. B. D. 521; *Lund* v. *Campbell* (1885), 14 Q. B. D. 821.

(*z*) Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 20.

could have exercised (*a*). If no order as to the costs is made by the referee it has been held that they follow the event, by reason of the statutory provision which makes the report or award equivalent to the verdict of a jury (*b*). Where the whole of an action has been referred, the order of the referee as to costs cannot be appealed against except by leave (*c*).

Remuneration.

Official referees are paid by salary, but on proceedings before them certain fees have to be paid according to regulations made by the Lord Chancellor with the consent of the Treasury (*d*).

As regards the remuneration of a special referee, provision is made by the Arbitration Act for its determination by the Court or a judge (*e*). The amount is usually fixed by agreement between the referee and the parties, and paid in the first instance, as in arbitrations under a submission out of Court, by the party who takes up the report or award. If there has been no agreement, the referee can apply by summons to have the amount determined, and sue the parties to the reference for the amount fixed by the Court or judge (*f*).

SUB-SECT. 9.—*Appeals from the Decision of a Referee or Arbitrator.*

Grounds of appeal.

1013. The decision of a referee or arbitrator on a reference held pursuant to an order made under the Arbitration Act, 1889, being equivalent to the verdict of a jury (*g*), can be set aside on the same grounds as the verdict of a jury may be set aside (*h*).

The Court may set aside the judgment directed by the referee or arbitrator if it has been wrongly entered, and enter judgment as it ought to have been entered (*i*).

Application.

An application to set aside findings of the referee or arbitrator and the judgment entered thereon, and to enter some other judgment or to remit the cause or matter to the same or some other referee, is made in the King's Bench Division to a Divisional Court (*k*), and in the Chancery Division to the judge to whom the action was assigned (*l*). The application is made by notice of motion. A motion to set aside the findings of the referee or arbitrator may be made at any time before judgment is entered (*m*). After judgment

(*a*) R. S. C., Ord. 36, rr. 55B, 55C. A Master to whom a cause is referred by consent under Ord. 14, r. 7, has the same jurisdiction as to costs (*Haycocks, Ltd.* v. *Mulholland*, [1904] 1 K. B. 145).

(*b*) Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 15 (2); *Carr Brothers* v. *Dougherty* (1898), 67 L. J. (Q. B.) 371.

(*c*) *Minister & Co.* v. *Apperley*, [1902] 1 K. B. 643.

(*d*) See Order as to Supreme Court Fees, 1884, Schedule, Nos. 88—91, as amended by order of February 10, 1903.

(*e*) Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 15 (3). See *Mason, Ltd.* v. *Lovatt* (1907), 23 T. L. R. 486.

(*f*) *Willis* v. *Wakeley Brothers* (1891), 7 T. L. R. 604.

(*g*) Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 15 (2).

(*h*) *E.g.*, that the finding was against the weight of the evidence (*Miller* v. *Pilling* (1882), 9 Q. B. D. at p. 739), or that evidence was improperly admitted or rejected (*Re The Maplin Sands* (1894), 71 L. T. 594).

(*i*) *Clark* v. *Sonnenschein* (1890), 25 Q. B. D. 226.

(*k*) R. S. C., Ord. 40, r. 6; *Gower* v. *Tobitt* (1891), 39 W. R. 193. The Divisional Court may in a proper case order an appellant to give security for costs (*J. H. Billington, Ltd.* v. *Billington*, [1907] 2 K. B. 106).

(*l*) *Wynne-Finch* v. *Chaytor*, [1903] 2 Ch. D. 475.

(*m*) *Bedborough* v. *Army and Navy Hotel Co.* (1884), 50 L. T. 173. The party moving should give two clear days' notice of the motion (Ord. 52, rr. 1, 5).

SECT. 3. References for Trial.

has been entered (*n*), it would seem necessary to move within the same time as after a trial with a jury (*o*). An affidavit should be produced as to what took place at the trial (*p*).

A reference for trial to a Master pursuant to Ord. 14, r. 7, is a reference under sect. 14 of the Arbitration Act, and an appeal lies from the decision of the Master to the Divisional Court (*q*).

From the decision of the Divisional Court or a judge of the Chancery Division an appeal lies as of right to the Court of Appeal (*r*), and thence to the House of Lords.

Part III.—References under Act of Parliament.

Arbitration compulsory.

1014. There are many statutes which provide for the settlement of disputed questions by arbitration. In some cases arbitration is the only method of procedure, in others it is an optional method.

Arbitration is compulsory for the settlement of certain disputes in connection with the following matters:—agricultural holdings (*a*), factories and workshops (*b*), housing of the working classes (*c*), light railways (*d*), local government (*e*), tramways (*d*), and workmen's compensation (*f*).

Arbitration optional.

Provisions for arbitration at the option of the parties or one of them exist with regard to certain disputes arising in connection with the following matters:—building societies (*g*), companies (*h*), electric lighting etc. (*i*), friendly societies (*k*), gasworks (*l*), industrial and provident societies (*m*), local government (*e*), lunatic asylums (*c*), the compulsory purchase of land (*p*), public health (*c*), railways (*q*), telegraphs and telephones (*r*), tramways (*d*), and waterworks (*l*).

(*n*) *Proudfoot* v. *Hart* (1890), 25 Q. B. D. 42, 43.

(*o*) *Forrest* v. *Todd* (1897), 76 L. T. 500. There the motion was for a new trial, but it is submitted that the decision applies generally to a motion to set aside or vary or remit a report. If not, there appears to be no limit of time for such a motion.

(*p*) *Stubbs* v. *Boyle* (1876), 2 Q. B. D. 124.

(*q*) *Fraser* v. *Fraser*, [1905] 1 K. B. 368. See generally as to such references, Yearly Practice, 1907, p. 385; title PRACTICE AND PROCEDURE.

(*r*) *Munday* v. *Norton*, [1892] 1 Q. B. 403; *Wynne-Finch* v. *Chaytor*, [1903] 2 Ch. 475.

(*a*) See title AGRICULTURE, p. 264, *ante*.

(*b*) See title FACTORIES AND WORKSHOPS.

(*c*) See title PUBLIC HEALTH.

(*d*) See title TRAMWAYS AND LIGHT RAILWAYS.

(*e*) See title LOCAL GOVERNMENT.

(*f*) See title MASTER AND SERVANT.

(*g*) See title BUILDING SOCIETIES.

(*h*) See title COMPANIES.

(*i*) See title ELECTRIC LIGHTING, TRACTION AND POWER.

(*k*) See title FRIENDLY SOCIETIES.

(*l*) See title GAS AND WATER.

(*m*) See title INDUSTRIAL, PROVIDENT AND SIMILAR SOCIETIES.

(*p*) See title COMPULSORY PURCHASE AND COMPENSATION.

(*q*) See title RAILWAYS AND CANALS.

(*r*) See title TELEGRAPHS AND TELEPHONES.

The provisions of the Arbitration Act, 1889, apply to every statutory arbitration, as if it were a reference by consent out of Court, except in so far as that Act is inconsistent with the special Act regulating the arbitration, or with any rules or procedure authorised or recognised by such Act (*s*). Sometimes the Act which regulates the arbitration expressly provides that the Arbitration Act, 1889, shall not be applicable (*t*).

Where special Act is inconsistent with Act of 1889.

Sometimes only a part of the Arbitration Act, 1889, is expressly excluded (*u*). And frequently the Act which regulates the arbitration, although it does not expressly exclude any of the provisions of the Arbitration Act, 1889, contains provisions which are inconsistent with, and override, those of that Act; for example, provisions with regard to the appointment of the arbitrator.

Arbitration Act, 1889, only partly excluded.

But the provisions of the Arbitration Act, 1889, are not inconsistent with provisions as to the same subject-matter contained in the Act regulating the arbitration if they can be read together without any conflict (*x*).

Where the Act regulating the arbitration neither excludes nor is inconsistent with the Arbitration Act, 1889, a statutory arbitration resembles a reference by consent out of Court. The arbitrator has power to administer oaths, to state a case for the opinion of the High Court (*y*), to call for the production of documents, to obtain professional assistance in drawing his award (*z*), and to correct any clerical mistake or error arising from an accidental slip or omission in an award; and the Court has power to secure the attendance of witnesses by subpœna or *habeas corpus*, to order the statement of a special case, to set aside the award or remit it to the arbitrator for reconsideration, to enlarge the time for making an award, and to remove an arbitrator for misconduct.

Where no inconsistency exists.

(*s*) Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 24: "This Act shall apply to every arbitration under any Act passed before or after the commencement of this Act as if the arbitration were pursuant to a submission, except in so far as this Act is inconsistent with the Act regulating the arbitration or with any rules or procedure authorised or recognised by that Act." It has been held that the Act applies to arbitrations under previous statutes unless the inconsistency is such as to render the earlier statute unworkable; see *Re Knight and Tabernacle Permanent Building Society*, [1891] 2 Q. B. 63; *Baxter* v. *Midland Railway* (1905), 93 L. T. 538; *Re Gollings and Tradesmen's Friendly Society, Peterborough* (1891), 64 L. T. 775; *Howlett* v. *Mayor etc. of Maidstone*, [1891] 2 Q. B. 110; *Re Sowerby Urban District Council and Mytholmroyd Urban District Council* (1896), 74 L. T. 313; *Hodson* v. *Railway Passengers' Assurance Co.*, [1904] 2 K. B. 833.

(*t*) The Conciliation Act, 1896 (59 & 60 Vict. c. 30), and the Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), contain provisions to that effect.

(*u*) Thus the Building Societies Act, 1894 (57 & 58 Vict. c. 47), and the Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), expressly exclude the provisions of the Arbitration Act, 1889, which empower the Court to order the statement of a special case.

(*x*) *Re Knight and Tabernacle Permanent Building Society, supra*, and, on appeal, [1892] A. C. 298. In that case the special statute gave the arbitrator a discretionary power to state a case, and it was held by the House of Lords that the Court could exercise the power given by sect. 19 of the Arbitration Act, 1889, to order a case to be stated.

(*y*) See *Re Gonty and Manchester, Sheffield, and Lincolnshire Rail. Co.*, [1896] 2 Q. B. 439.

(*z*) See *Re Collyer-Bristow & Co.*, [1901] 2 K. B. 839.

ARCHES,

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ARCHITECT.

See BUILDERS, BUILDING CONTRACTS, ENGINEERS AND ARCHITECTS.

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Of Association.—*See* COMPANIES.

Thirty-Nine.—*See* ECCLESIASTICAL LAW.

ARTISANS' DWELLINGS.

See PUBLIC HEALTH.

ASSAULT.

See CRIMINAL LAW AND PROCEDURE; TRESPASS.

ASSEMBLY.

See CONSTITUTIONAL LAW; CRIMINAL LAW AND PROCEDURE.

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For Benefit of Creditors.—*See* BANKRUPTCY AND INSOLVENCY.

ASSIZES.

See CRIMINAL LAW AND PROCEDURE; COURTS.

ASSOCIATIONS

See BUILDING SOCIETIES; CLUBS; FRIENDLY SOCIETIES; INDUSTRIAL PROVIDENT AND SIMILAR SOCIETIES; LOAN SOCIETIES; TRADE AND TRADE UNIONS.

ASYLUMS.

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ATTACHMENT,

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ATTAINDER.

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ATTEMPTS TO COMMIT CRIME.

See CRIMINAL LAW AND PROCEDURE.

ATTESTATION.

See DEEDS AND DOCUMENTS; WILLS.

ATTORNEY.

See SOLICITORS.

Power of.—*See* AGENCY.

ATTORNEY-GENERAL.

See CHARITIES; CONSTITUTIONAL LAW; CRIMINAL LAW AND PROCEDURE: PUBLIC AUTHORITIES AND PUBLIC OFFICERS.

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AUCTION AND AUCTIONEERS.

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Part I.—Definitions.

Auction.

1015. An auction is a manner of selling or letting property by bids, and usually to the highest bidder by public competition.

Auctioneer.

An auctioneer is one who sells goods or other property by auction.

Part II.—Auctioneer's Licence.

Who must take out licence.

1016. A licence (*a*), upon which a duty of £10 is charged, must, subject to certain exceptions (*b*), be taken out by every person who carries on the business of an auctioneer, or who acts in such capacity at any sale, or who sells or offers for sale any real or personal property at any sale conducted by means of bids, whether increasing or decreasing, or by any other mode of sale by competition (*c*).

(*a*) For form of licence, see Encyclopædia of Forms, Vol. II., p. 457.

(*b*) See p. 501, *post*.

(*c*) Auctioneers Act, 1845 (8 & 9 Vict. c. 15), s. 4. As to what sales are within the Act, see *A.-G.* v. *Taylor* (1824), 13 Price, 636 (decided under the earlier statute, 19 Geo. 3, c. 56, ss. 3, 4).

The licence is an excise licence (*d*) and is an annual one (*e*). It runs from the 5th of July in each year, and must be renewed (*f*) at least ten days before that day (*e*).

Any person acting as an auctioneer without taking out a licence as prescribed is liable to a fine of £100 (*e*).

Nature of licence.

The licence can be obtained by application in writing, at Somerset House or at the Inland Revenue Office for the district in which the applicant resides (*g*).

A person of either sex may obtain a licence (*h*).

The licence is personal, and therefore every member of a firm of auctioneers must take out an individual licence if he himself sells.

In addition to the right to act as auctioneer, an auctioneer's licence entitles the licensee to act as an appraiser (*i*) or as a house-agent without any further licence (*k*).

Effect of licence.

1017. A licence is not required by the auctioneer on a sale under a warrant of distress for non-payment of rent or tithes for less than £20 (*l*), or by the officer of any Court selling under process of the Court for less than £20 if exempted by any Act in force at the date of the passing of the Auctioneers Act, 1845 (*m*), or on a sale under an order of the Chancery Division (*n*), or on a sale of fish at the place where it is first landed (*o*), or on a sale by the bailiff under the authority of a county court (*p*).

When licence not required.

(*d*) Auctioneers Act, 1845 (8 & 9 Vict. c. 15), s. 3. Therefore under the Excise Licences Act, 1825 (6 Geo. 4, c. 81), s. 25, the holder must put up over his premises his name and the word "licensed," under a penalty of £20.

(*e*) Auctioneers Act, 1845 (8 & 9 Vict. c. 15), s. 4.

(*f*) For form of notice of intention to renew, see Encyclopædia of Forms, Vol. II., p. 458.

(*g*) For form of application, see Encyclopædia of Forms, Vol. II., p. 457.

(*h*) *Walker* v. *Advocate-General* (1813), 1 Dow, 111 (decided on the earlier Acts, 17 Geo. 3, c. 50, and 19 Geo. 3, c. 56).

(*i*) Revenue Act, 1845 (8 & 9 Vict. c. 76), s. 1. For appraisers, see titles REVENUE; VALUERS AND APPRAISERS.

(*k*) Revenue Act, 1861 (24 & 25 Vict. c. 21), s. 13. For the licence required by house agents, see title REVENUE. An auctioneer who advances money on bills of sale with the view of obtaining business, and not with the primary object of lending money, does not require registration as a moneylender under the Moneylenders Act, 1900 (63 & 64 Vict. c. 51); see *Furber* v. *Fieldings, Ltd.* (1907), 23 T. L. R. 362; and see title MONEY AND MONEY LENDING.

(*l*) Auctioneers Act, 1845 (8 & 9 Vict. c. 15), s. 5.

(*m*) 8 & 9 Vict. c. 15, passed on May 8th, 1845.

(*n*) Court of Chancery Act, 1852 (15 & 16 Vict. c. 87), s. 42.

(*o*) Customs and Inland Revenue Act, 1870 (33 & 34 Vict. c. 32), s. 5.

(*p*) County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 159. Under the instructions relative to licences issued by the Board of Inland Revenue in 1893, the following persons are declared exempt from the necessity of taking out licences: (1) Officers of Inland Revenue selling seizures; (2) Customs officers conducting sales under the direction of the Board of Customs; (3) Officers of ordnance conducting sales under the authority of the Surveyor-General; (4) Clerks authorized by the Admiralty to sell public stores; (5) the trustees of any tolls or their clerk letting such tolls to farm; (6) any person holding an auction for letting lands or any interest therein; (7) any person conducting a sale "by ticket" of mineral ore; (8) receivers of wreck or deputy receivers appointed under the Merchant Shipping Act, whether officers of customs or not when employed in their official capacities in selling public property for the benefit of the Crown; (9) non-commissioned officers and soldiers selling under the directions of the Secretary for War the effects of officers and soldiers dying in

PART II. Auctioneer's Licence.

A person hawking (*q*) goods from place to place for sale by auction must take out a hawker's licence in addition to an auctioneer's licence (*r*).

Hawker's licence.

Excisable articles.

1018. The licence granted to an auctioneer will not authorise him to sell, either on his own or any other person's behalf, any commodities for which an excise licence is required except (a) upon premises in respect of which the owner of the commodities has a proper and subsisting licence or (b) in the case of sales by sample (*s*) in the same town or place (*t*) in which the owner has a licence or (c) at sales authorised by the Commissioners of Inland Revenue where they are satisfied that the commodities are the property of a private person and are not sold for profit or by way of trade (*t*).

Part III.—Authority of Auctioneer.

SECT. 1.—*As Agent for the Vendor.*

Agency of auctioneer.

1019. An auctioneer may sell property of his own as principal, and need not disclose the fact that he is so selling (*a*); but, when selling as agent, he is the agent of the vendor only, except for the purpose of signing the contract or a memorandum of the contract, for which purpose he is also the agent of the purchaser (*b*).

Contract between vendor and auctioneer.

There are no special rules affecting the form of contract between the vendor and the auctioneer, and, subject to the ordinary exceptions common to all forms of agency, the contract may be either verbal or in writing (*c*).

Extent of authority.

The implied authority of the auctioneer, apart from express instructions narrowing or amplifying it, is a general authority to sell (*d*), and extends to selling and dealing with the subject-matter of the sale in the way usual and customary amongst auctioneers (*e*).

Delegation.

The agency of the auctioneer is personal and cannot be delegated (*f*).

Sale below reserve price.

1020. Where a reserve has been fixed by the vendor, there is no implied authority to sell without reserve even though the auctioneer

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service or the effects of deserters, when the proceeds are to be accounted for to the public. But a person declaring the purchase on a sale by tender must be licensed.

(*q*) See titles MARKETS AND FAIRS; REVENUE. For definition of "hawker," see the Hawkers Act, 1888 (51 & 52 Vict. c. 33), s. 2.

(*r*) Hawkers Act, 1888 (51 & 52 Vict. c. 33), s. 3; *Dean qui tam* v. *King* (1821), 4 B. & Ald. 517; *R.* v. *Turner* (1821), 4 B. & Ald. 510; *Manson* v. *Hope* (1862), 2 B. & S. 498; *Hudson* v. *Shooter* (1891), 55 J. P. 325. And contrast *R.* v. *Faraday* (1830), 1 B. & Ad. 275.

(*s*) As to what constitutes a sale "in the same town or place," see *Casey* v. *Rose* (1900), 82 L. T. 616.

(*t*) The Revenue (No. 2) Act, 1864 (27 & 28 Vict. c. 56), s. 14.

(*a*) *Flint* v. *Woodin* (1852), 9 Hare, 618.

(*b*) See p. 504, *post*.

(*c*) See title AGENCY, pp. 153 *et seq.*, *ante*; *Coles* v. *Trecothick* (1804), 9 Ves. 234. For forms of auctioneer's appointment, see Encyclopædia of Forms, Vol. II., pp. 458—460.

(*d*) *Howard* v. *Braithwaite* (1812), 1 Ves. & B. at p. 210

(*e*) *Collen* v. *Gardner* (1856), 21 Beav. 540.

(*f*) *Coles* v. *Trecothick*, *supra*.

SECT. 1. As Agent for the Vendor.

has ostensibly so sold; and if, in breach of his instructions, the auctioneer sells without reserve, a sale below the reserve price will not give the purchaser any right to enforce the contract against the vendor (*g*).

Authority to receive payment.

1021. The implied agency of the auctioneer extends to receiving the deposit on sales both of land and goods (*h*), and to receiving the purchase-money on sales of goods (*i*), but not on sales of land (*k*); but this implied agency may be excluded by the express terms of the conditions of sale (*l*).

Mode of payment.

The auctioneer has authority to receive payment of the deposit by cheque (*m*), but is not compellable so to do (*n*).

This authority is confined to cheques presently payable, and does not extend to receiving payment of the deposit by bill of exchange or post dated cheque (*o*).

The auctioneer has, however, no right in the absence of express instructions to take payment of the purchase-money otherwise than in cash (*p*).

In cases where the auctioneer has received payment by cheque or bill of exchange without or in excess of any authority, express or implied, the vendor is not bound by such payment. The purchaser still remains liable (*q*), and the auctioneer may be sued by the vendor for any damages sustained by him (*r*).

Authority to warrant.

1022. An auctioneer has no authority, except by express instructions, to give a warranty at the auction; and an unauthorised warranty will not bind the vendor, although it may render the auctioneer personally liable to the purchaser for breach of warranty of authority (*s*).

Termination of authority.

1023. The agency of the auctioneer is an agency for sale by auction only (*t*), and therefore when the property has been knocked down the auctioneer's authority is at an end except for the purpose of carrying out the contract made at the auction. He cannot rescind that contract (*a*), nor can he introduce into it any stipulations as to title (*b*).

(*g*) *McManus* v. *Fortescue*, [1907] 2 K. B. 1, disapproving on this point *Rainbow* v. *Howkins*, [1904] 2 K. B. 322. If, however, the vendor's instructions are to carry out a sale subject to a secret reserve and so to act as agent in effecting a fraud, the auctioneer will not be liable to the vendor for disregarding such instructions (*Bexwell* v. *Christie* (1776), 1 Cowp. 395).

(*h*) *Sykes* v. *Giles* (1839), 5 M. & W. 645.

(*i*) *Williams* v. *Millington* (1788), 1 Hy. Bl. 81.

(*k*) *Mynn* v. *Joliffe* (1834), 1 Mood. & R. 326.

(*l*) *Sykes* v. *Giles*, *supra*.

(*m*) *Farrer* v. *Lacy, Hartland & Co.* (1885), 31 Ch. D. 42.

(*n*) *Johnston* v. *Boyes*, [1899] 2 Ch. 73.

(*o*) *Williams* v. *Evans* (1866), L. R. 1 Q. B. 352; *Papè* v. *Westacott*, [1894] 1 Q. B. 272.

(*p*) *Earl of Ferrers* v. *Robins* (1835), 2 Cr. M. & R. 152; *Sykes* v. *Giles*, *supra*.

(*q*) *Sykes* v. *Giles*, *supra*.

(*r*) *Earl of Ferrers* v. *Robins*, *supra*.

(*s*) *Payne* v. *Lord Leconfield* (1882), 51 L. J. (Q. B.) 642.

(*t*) *Seton* v. *Slade* (1802), 7 Ves. 265, *per* Lord ELDON, L.C., at p. 276. And see *Blackburn* v. *Scholes* (1810), 2 Camp. 341.

(*a*) *Nelson* v. *Aldridge* (1818), 2 Stark. 435; and contrast *Stevens* v. *Legh* (1853), 2 C. L. R. 251.

(*b*) *Seton* v. *Slade*, *supra*.

SECT. 1. As Agent for the Vendor.

1024. He cannot conclude a sale by private contract (*c*), although if the vendor accept a purchaser introduced by the auctioneer, and himself conclude a sale to such purchaser by private treaty, the auctioneer has a right to claim remuneration (*d*).

Sale by private contract.

In some cases, where property has not reached its reserve and has been bought in, and immediately afterwards the auctioneer has sold the property at the reserve price to a person present at the biddings, this sale has been held good as in effect a sale by auction (*e*).

Revocation of authority.

1025. Up to the time of the conclusion of the sale, and until the property is finally knocked down, the auctioneer's authority is revocable either expressly or in any of the events which ordinarily determine agencies (*f*), unless the contract is such as to give the auctioneer an authority coupled with an interest (*g*).

The authority can be withdrawn even though the auctioneer has advertised the property for sale (*h*) and incurred expenses (*i*). The auctioneer will be liable in trespass if, after the determination of his authority, he insists on entering the vendor's premises for the purpose of effecting a sale (*i*).

If the authority has in fact been revoked, the auctioneer can give the highest bidder no right to the property, even though the bidder is unaware of the revocation (*k*).

SECT. 2.—*Authority to sign Contract or Note or Memorandum thereof.*

Authority implied and irrevocable.

1026. The auctioneer, in the absence of special circumstances, is, by virtue of his employment, impliedly the agent of both the vendor and the purchaser (*l*) to sign the contract (*m*) or a note or memorandum thereof to satisfy the requirements of the Statute of Frauds in the case of land, and of the Sale of Goods Act, 1893, in the case of goods (*n*), both of which statutes apply to sales by auction (*o*).

(*c*) *Marsh* v. *Jelf* (1862), 3 F. & F. 234.

(*d*) *Green* v. *Bartlett* (1863), 14 C. B. (N. S.) 681. See p. 516, *post*.

(*e*) *Else* v. *Barnard, Ex parte Courtauld* (1860), 29 L. J. (CH.) 729; *Bousfield* v. *Hodges* (1863), 33 Beav. 90.

(*f*) *Warlow* v. *Harrison* (1859), 1 E. & E. 295, 309. See title AGENCY, pp. 228—236, *ante*.

(*g*) For example, if an auctioneer is intrusted with goods for sale to repay previous advances, the authority is irrevocable. See *Charlesworth* v. *Mills*, [1892] A. C. 231, at p. 243. See title AGENCY, p. 228, *ante*.

(*h*) *Warlow* v. *Harrison, supra*; *Taplin* v. *Florence* (1851), 10 C. B. 744.

(*i*) *Taplin* v. *Florence, supra*. But the auctioneer does not lose his right to be indemnified against expenses incurred; see p. 516, *post*.

(*k*) *Manser* v. *Back* (1848), 6 Hare, 443.

(*l*) If the purchaser bids through an agent, the auctioneer may sign the name either of the principal (*Emmerson* v. *Heelis* (1809), 2 Taunt. 38), or of the agent, at least if the principal is present and acquiesces (*White* v. *Proctor* (1811), 4 Taunt. 209).

(*m*) For form of contract, see Encyclopædia of Forms, Vol. II., p. 462.

(*n*) Statute of Frauds (29 Car. 2, c. 3), s. 4; Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 4; *Simon* v. *Metivier or Motivos* (1766), 1 Wm. Bl. 599; *Kemeys* v. *Proctor* (1813), 3 Ves. & B. 57; *Emmerson* v. *Heelis, supra*; *White* v. *Proctor, supra*; *Shelton* v. *Livius* (1832), 2 Cr. & J. 411; *Beer* v. *London and Paris Hotel Co.* (1875), L. R. 20 Eq. 412.

(*o*) *Walker* v. *Constable* (1798), 1 Bos. & P. 306; *Blagden* v. *Bradbear* (1806), 12 Ves. 466; *Kenworthy* v. *Schofield* (1824), 2 B. & C. 945.

This implied authority cannot be revoked after the conclusion of the bidding either by the vendor (*p*) or by the purchaser (*q*).

It must, however, be exercised at the time of the sale, and the auctioneer has no authority to sign on a subsequent day or on a sale otherwise than by auction (*r*). Time for exercise of authority.

The authority to bind the purchaser is personal to the auctioneer, and does not extend to his clerk (*s*), unless the purchaser has specially, either by words or conduct, authorised the clerk to act as his agent for this purpose (*t*). Auctioneer's clerk.

If the auctioneer is himself the vendor, he cannot sign as the agent of the purchaser (*u*). Auctioneer vendor.

1027. The sufficiency of the note or memorandum is subject to the ordinary rules (*a*) affecting notes or memoranda under the statutes mentioned. It must therefore contain (1) the names of the parties or a description sufficient to identify them (*b*); (2) a statement of the subject-matter (*c*); (3) a full and complete statement of the terms of the contract (*d*), (4) the signature of the person against whom the contract is to be enforced (*e*); but the auctioneer's signature is sufficient to bind even an undisclosed principal (*f*). Similarly the necessity for a memorandum may be obviated by acts of part performance in accordance with the ordinary rules (*g*). Note or memorandum required.

On a sale in lots the agreement to purchase each lot is in law, in the absence of special circumstances, a separate contract, and therefore a note or memorandum will not be necessary to prove the sale of goods in a lot under the value of £10, even though the purchaser has bought goods in various lots of a larger aggregate value than £10 (*h*). Sale in lots.

(*p*) *Day* v. *Wells* (1861), 7 Jur. (N. S.) 1004; *Bell* v. *Balls*, [1897] 1 Ch. 663.

(*q*) *Van Praagh* v. *Everidge*, [1902] 2 Ch. 266.

(*r*) *Mews* v. *Carr* (1856), 1 H. & N. 484.

(*s*) *Bell* v. *Balls*, *supra*.

(*t*) *Bird* v. *Boulter* (1833), 4 B. & Ad. 443; *Sims* v. *Landray*, [1894] 2 Ch. 318.

(*u*) *Buckmaster* v. *Harrop* (1802), 7 Ves. 341, (1807) 13 Ves. 456; *Wright* v. *Dannah* (1809), 2 Camp. 203.

(*a*) See title CONTRACT.

(*b*) *Sale* v. *Lambert* (1874), L. R. 18 Eq. 1; *Hood* v. *Lord Barrington* (1868), L. R. 6 Eq. 218; *Commins* v. *Scott* (1875), L. R. 20 Eq. 11; *Catling* v. *King* (1877), 5 Ch. D. 660. But a term like "vendor" is not sufficient (*Jarrett* v. *Hunter* (1886), 34 Ch. D. 182; *Potter* v. *Duffield* (1874), L. R. 18 Eq. 4; see also *Pattle* v. *Anstruther* (1893), 69 L. T. 175).

(*c*) *Plant* v. *Bourne*, [1897] 2 Ch. 281; *Rose* v. *Cunynghame* (1805), 11 Ves. 550; *Owen* v. *Thomas* (1834), 3 My. & K. 353; *Bleakley* v. *Smith* (1840), 11 Sim. 150. As to when the statement may be supplemented by parol evidence, see title CONTRACT.

(*d*) *Reshton* v. *Whatmore* (1878), 8 Ch. D. 467; *Peirce* v. *Corf* (1874), L. R. 9 Q. B. 210; *Kenworthy* v. *Schofield* (1824), 2 B. & C. 945; *Hinde* v. *Whitehouse* (1806), 7 East, 558. As to the connection of separate documents to form a complete statement, see *M'Mullen* v. *Helberg* (1879), 6 L. R. Ir. 463; *Blagden* v. *Bradbear* (1806), 12 Ves. 466, 471.

(*e*) *Phillimore* v. *Barry* (1808), 1 Camp. 513; *Wood* v. *Midgley* (1854), 2 Sm. & Giff. 115; *Dobell* v. *Hutchinson* (1835), 3 A. & E. 355.

(*f*) *Beer* v. *London and Paris Hotel Co.* (1875), L. R. 20 Eq. 412.

(*g*) See titles CONTRACT; SALE OF GOODS; SALE OF LAND; and compare *Phillips* v. *Bistolli* (1824), 2 B. & C. 511; *Hinde* v. *Whitehouse*, *supra*.

(*h*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 58 (1). *Emmerson* v. *Heelis* (1809), 2 Taunt. 38; *Roots* v. *Lord Dormer* (1832), 4 B. & Ad. 77.

SECT. 2. Authority to sign Contract etc.

1028. The contracts signed by auctioneers are subject to the ordinary law as to stamps (*i*); and for stamp purposes also the sale of each lot must be treated as a separate contract (*j*).

Stamps.

Memorandum of contract a bill of sale.

1029. Where possession of goods is not given under the contract or memorandum signed by the auctioneer, the document may amount to a bill of sale and require registration (*k*).

Part IV.—Conduct of the Sale.

SECT. 1.—*Time and Place.*

1030. There are no special restrictions affecting the time and place when and where a sale by auction may be held (*l*).

A sale by auction should not be held on a Sunday (*m*), or at any place in contravention of the legal rights of another, *e.g.*, in a house in respect of which restrictive covenants against sales by auction exist (*n*), or under such circumstances as to constitute an infringement of market rights (*o*).

Any place at which a public auction is held, even though a private house, is for the time being a "place of public resort" for the purposes of the criminal law (*p*).

SECT. 2.—*Statutory Regulations* (*q*).

Exposure of name and address.

1031. Before an auction is commenced a ticket or board bearing the auctioneer's full christian and surname and his residence painted, written, or printed thereon in letters large enough to be publicly visible must be placed in some conspicuous part of the auction rooms and kept there during the continuance of the auction (*r*).

The penalty for a contravention of this provision is a fine of £20 (*s*).

(*i*) See title REVENUE.

(*j*) *Roots* v. *Lord Dormer* (1832), 4 B. & Ad. 77; *Watling* v. *Horwood* (1847), 12 Jur. 48.

(*k*) *Re Roberts* (1887), 36 Ch. D. 196. See *Charlesworth* v. *Mills*, [1892] A. C. 231, where an authority given to an auctioneer to sell for repayment of advances was unsuccessfully alleged to be a bill of sale. See, generally, title BILLS OF SALE.

(*l*) *Keith* v. *Reid* (1870), L. R. 2 Sc. App. 39.

(*m*) *Fennell* v. *Ridler* (1826), 5 B. & C. 406. See title TIME.

(*n*) *Toleman* v. *Portbury* (1872), L. R. 7 Q. B. 344.

(*o*) *Elwes* v. *Payne* (1879), 12 Ch. D. 468. See also *Abergavenny Improvement Commissioners* v. *Straker* (1889), 60 L. T. 756.

(*p*) *Sewell* v. *Taylor* (1859), 7 C. B. (N. S.) 160. See, further, title CRIMINAL LAW AND PROCEDURE.

(*q*) In addition to the regulations dealt with in this title, see other titles: SALE OF LAND for sales by the Chancery Division; BANKRUPTCY AND INSOLVENCY for sales under the Bankruptcy Court; DISTRESS for sales under a distress; COMPANIES for sales in the winding up of companies; EXECUTION for sales by the sheriff; MORTGAGE and REAL PROPERTY AND CHATTELS REAL for sales by mortgagees; TRUSTS AND TRUSTEES for sales of trust property; EXECUTORS AND ADMINISTRATORS for sales by personal representatives.

(*r*) Auctioneers Act, 1845 (8 & 9 Vict. c. 15), s. 7.

(*s*) *Ibid.*

SECT. 2. Statutory Regulations.

1032. Every person who acts as auctioneer at a sale for which a licence is required, must, on a demand made at the time of the sale by any officer of excise or customs or of stamps and taxes, produce and show a valid and current licence to such officer, or deposit with him the sum of £10 (*t*). Production of licence.

In default of so doing, any officer of the peace may arrest the auctioneer before or after the termination of the sale and bring him before a justice of the peace for the county or place where the sale was held, and on proof of the offence the offender may be committed to prison for a period not exceeding one month (*u*).

The liability to imprisonment is in addition to the liability to the £10 penalty for acting as auctioneer without a licence (*w*).

If a deposit has been made on demand, the auctioneer can recover it from the officer receiving it on production to such officer, within seven days, of a valid licence current at the date of the sale, otherwise the officer must account for the deposit to the excise authorities or their agents (*x*).

1033. Before selling unredeemed pledges above the value of 10*s.* on behalf of a pawnbroker, the auctioneer must publish catalogues of the pledges stating the pawnbroker's name and place of business, the month in which each pledge was pawned, and the number of each pledge as entered at the time of pawning in the pledge-book, and the pledges of each pawnbroker in the catalogue must be separate from those of any other pawnbroker (*y*). Catalogue of sale of unredeemed pledges.

The auctioneer must also insert in some public newspaper an advertisement giving notice of the sale, and stating the pawnbroker's name and place of business and the months in which the pledges were pawned (*a*). This advertisement must be inserted in the same newspaper on two days, the last day to be at least three clear days before the first day of the sale (*b*). Advertisement.

Certain unredeemed pledges, viz., pictures, prints, books, bronzes, statues, busts, carvings in wood and marble, cameos, intaglios, and musical, mathematical, and philosophical instruments, must not be sold at a sale when other unredeemed pledges are sold, and can only be sold on the first Monday in January, April, July, and October, or on the following day or days if the sale exceeds one day (*c*). Works of art etc.

At the sale the auctioneer must expose all pledges to public view (*d*). If the pawnbroker bids at the sale, as he is entitled to do (*e*), the auctioneer must not take his bidding otherwise than he takes biddings from other persons at the sale, and if a lot is knocked Purchase by pawnbroker.

(*t*) Auctioneers Act, 1845 (8 & 9 Vict. c. 15), s. 8.
(*u*) *Ibid.*
(*w*) *Ibid.*
(*x*) *Ibid.*
(*y*) Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93), Sched. V. (2) and (3). As to pledges generally, see title PAWNBROKERS AND PLEDGES.
(*a*) *Ibid.*, Sched. V. (4).
(*b*) *Ibid.*, Sched. V. (5).
(*c*) *Ibid.*, Sched. V. (6).
(*d*) *Ibid.*, Sched. V. (1).
(*e*) *Ibid.*, s. 20.

SECT. 2. Statutory Regulations.

down to a pawnbroker, the auctioneer must audibly declare the name of the pawnbroker as the purchaser (*f*).

After the sale the auctioneer must within fourteen days deliver to the pawnbroker a signed copy of the catalogue, or of as much as relates to any individual pawnbroker's pledges, showing the amount realised for each pledge, and the pawnbroker must preserve this for three years at least after the auction (*g*).

Signed catalogue showing amounts realised.

If the auctioneer fails to comply with these regulations, he is liable to a fine of £10 (*h*).

Sale of cattle in mart.

1034. Unless exempted by order of the Board of Agriculture and Fisheries, an auctioneer must not sell cattle (*i*) at any mart where cattle are habitually or periodically sold, unless such facilities for weighing cattle are provided at the mart as are required in the case of a sale of cattle at a market or fair to which the Markets and Fairs (Weighing of Cattle) Act, 1887 (*k*), or the Markets and Fairs (Weighing of Cattle) Act, 1891 (*l*), applies (*m*).

Returns of cattle sold.

When an auctioneer sells cattle at any mart in a place from which by these Acts returns must be made by a market authority, he must, unless exempted by the Board of Agriculture and Fisheries, make the like returns with respect to the cattle entered, weighed, and sold at the mart, and is subject to the like penalties for false or fraudulent returns (*n*).

Penalty.

Default in complying with these requirements renders the auctioneer or his employer, if he is employed by any person, liable on summary conviction to a fine of £20, or, if the offence is continuing, of £10 a day (*o*).

SECT. 3.—*Sales subject to a Reserve and Vendor's Right to Bid.*

Notification of reserve and of right of vendor to bid.

1035. When the sale of land or goods is subject to a reserve price, or when the vendor reserves a right to bid or to employ persons to bid on his behalf, the fact must be notified before the sale, and in a sale of land it must be expressly notified in the particulars and conditions of sale whether the sale is with or without reserve, or whether such right to bid is reserved (*p*).

Unless such notification is made (*q*), it is illegal for the vendor

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(*f*) Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93), Sched. V. (7).
(*g*) *Ibid.*, Sched. V. (8) and (9).
(*h*) *Ibid*, ss. 19, 20, 45.
(*i*) For definition of cattle, see Markets and Fairs (Weighing of Cattle) Act, 1887 (50 & 51 Vict. c. 27), s. 3. As to cattle generally, see title ANIMALS, and as to markets and fairs, see title MARKETS AND FAIRS.
(*k*) 50 & 51 Vict. c. 27.
(*l*) 54 & 55 Vict. c. 70.
(*m*) *Ibid.*, s. 4.
(*n*) *Ibid.* See sect. 3 as to returns and the schedule as to places from which returns must be made.
(*o*) *Ibid.*, s. 3 (3).
(*p*) Sale of Land by Auction Act, 1867 (30 & 31 Vict. c. 48), s. 5; Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 58.
(*q*) Notification of a reserve price is not in itself a reservation of the right to bid (*Gilliat* v. *Gilliat* (1869), L. R. 9 Eq. 60; Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 58).

SECT. 3. Sales subject to a Reserve etc.

or anyone on his behalf (*r*) to make a bid, or for the auctioneer knowingly to take such a bid, and as against a purchaser the sale will be treated as fraudulent and invalid (*s*).

Extent of right to bid.

Where the vendor reserves a right to bid, he or any one person, and no more, may bid at the auction (*t*); and the conditions announced as governing his right must be strictly complied with (*u*).

Fictitious bids made by a third person without the privity of the vendor or the auctioneer do not invalidate the sale, nor do they affect the vendor's right to specific performance (*x*).

Mock auctions.

If two or more persons take part in a mock auction, by means of sham bidders and bidding, to induce persons to buy at excessive prices, they are guilty of a criminal conspiracy (*a*).

SECT. 4.—*Advertisement of Auction.*

Property withdrawn.

1036. The advertisement of an auction is merely an intimation of an intention to sell, and therefore, in the absence of fraud, intending purchasers who attend an auction have no right of action if the property is not put up for sale (*b*).

Misrepresentation as to authority.

When, however, the advertisement amounts to a representation of fact that the auctioneer is authorised to sell, and this representation is fraudulent, persons incurring expense on the faith of it can sue the auctioneer in tort (*c*).

SECT. 5.—*Particulars and Conditions of Sale.*

When settled by auctioneer.

1037. It is customary for an auctioneer to settle the particulars and conditions of sale (*d*) on sales of goods, but not on sales of real property (*e*).

Omission of usual conditions.

When he undertakes to settle the conditions, he must do so with the skill and knowledge of a properly qualified auctioneer; and if he sells without imposing conditions which are usual and prudent for the protection of the vendor, he may, even in the case of the sale of real property, be held liable for negligence by the vendor (*f*).

Communication to bidders.

The conditions of sale will generally be held to have been sufficiently communicated to bidders if they are exhibited legibly in the auction room (*g*).

(*r*) See *Parnell* v. *Tyler* (1833), 2 L. J. (CH.) 195, where it was held that even the employment by a third person of the clerk to the vendor's solicitor invalidated the sale.

(*s*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 58 (3).

(*t*) Sale of Land by Auction Act, 1867 (30 & 31 Vict. c. 48), s. 2; Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 58. For form of appointment of person to bid on vendor's behalf, see Encyclopædia of Forms, Vol. II., p. 460.

(*u*) *Parfitt* v. *Jepson* (1877), 46 L. J. (C. P.) 529, where the vendor reserved a right to bid once, and the sale was set aside because the vendor bid three times.

(*x*) *Union Bank* v. *Munster* (1887), 37 Ch. D. 51.

(*a*) *R.* v. *Lewis* (1869), 11 Cox, C. C. 404; see title CRIMINAL LAW AND PROCEDURE.

(*b*) *Harris* v. *Nickerson* (1873), L. R. 8 Q. B. 286.

(*c*) *Richardson* v. *Silvester* (1873), L. R. 9 Q. B. 34.

(*d*) See titles SALE OF LAND; SALE OF GOODS. For forms of conditions on a sale of goods by auction, see Encyclopædia of Forms, Vol. XI., pp. 575 *et seq.*; for forms on sale of land, see *ibid.*, Vol. XII.

(*e*) *Pike* v. *Wilson* (1854), 1 Jur. (N. S.) 59.

(*f*) *Denew* v. *Daverell* (1813), 3 Camp. 451.

(*g*) *Mesnard* v. *Aldridge* (1801), 3 Esp. 271; *Bywater* v. *Richardson* (1834), 1 Ad. & E. 508; *Freme* v. *Wright* (1819), 4 Madd. 364; and compare *Torrance* v. *Bolton* (1872), 8 Ch. App. 118.

SECT. 6. **Verbal Statements by Auctioneer.**

SECT. 6.—*Verbal Statements by Auctioneer.*

1038. The verbal statements made by the auctioneer may or may not be part of the contract of sale.

When they are not part of the contract, they will, if material misrepresentations of fact, avoid the contract on the ground of misrepresentation, and, in case of fraud, give the purchaser a cause of action for damages against the auctioneer, or against the vendor if a party to the fraud (*h*).

When not part of contract.

When part of contract.

If such statements do in fact form part of the real contract of sale, their effect varies according to the nature of the property sold.

Verbal contract.

When the property is of a kind—*e.g.*, goods under the value of £10—the sale of which can be proved without written evidence, and there is no written contract excluding the verbal terms introduced at the auction, the auctioneer can verbally depart from the catalogue or conditions of sale and make a valid parol contract (*i*).

Written contract.

In general, however, the contract is such as to necessitate evidence in writing and purports to be contained in the particulars and conditions of sale. In such cases, if the real contract made by the auctioneer at the time of the sale contained terms at variance with the written contract, verbal evidence of such variance is inadmissible for the purpose of enforcing these terms (*j*). They may, however, be relied on for purposes of defence as showing that the true terms of the contract are not those set out in writing, and that the provisions of the Statute of Frauds have not been complied with (*k*), or that the contract is void for mistake (*l*).

Corrections of misdescriptions.

Verbal corrections at the time of the sale of misdescriptions in the particulars may defeat the purchaser's right to enforce specific performance with compensation (*m*).

Misstatements.

Misstatements by the auctioneer may render him liable to an action for negligence by the vendor for any loss sustained (*n*), or to an action by the purchaser for breach of warranty of authority (*o*).

SECT. 7.—*Bidding.*

Regulation.

1039. The method of bidding and the amount of the bids are usually regulated by the conditions of sale.

Bid may be retracted.

Until the property is actually knocked down there is no complete

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(*h*) If the representations are made in good faith, no action lies against the auctioneer after the completion of the purchase (*Brett* v. *Clowser* (1880), 5 C. P. D. 376) As to what statements are and are not part of the contract, see titles CONTRACT; SALE OF GOODS; SALE OF LAND.

(*i*) *Eden* v. *Blake* (1845), 13 M. & W. 614.

(*j*) *Gunnis* v. *Erhart* (1789), 1 Hy. Bl. 289; *Shelton* v. *Livius* (1832), 2 Cr. & J. 411; *Ogilvie* v. *Foljambe* (1817), 3 Mer. 53; *Higginson* v. *Clowes* (1808), 15 Ves. 516; *Clowes* v. *Higginson* (1813), 1 Ves. & B. 524; *Winch* v. *Winchester* (1812), 1 Ves. & B. 375; *Anson* v. *Towgood* (1820), 1 Jac. & W. 637.

(*k*) *Hussey* v. *Horne-Payne* (1879), 4 App. Cas. 311.

(*l*) *Swaisland* v. *Dearsley* (1861), 30 L. J. (CH.) 652; *Winch* v. *Winchester*, *supra*; *Manser* v. *Back* (1848), 6 Hare, 443; *Re Hare and O'More*, [1901] 1 Ch. 93.

(*m*) *Re Hare and O'More*, *supra*.

(*n*) *Parker* v. *Farebrother* (1853), 1 C. L. R. 323.

(*o*) *Anderson* v. *Croall & Sons* (1903), 41 Sc. L. R. 95; *Catton* v. *Bennett* (1884), 26 Ch. D. 161.

contract of sale (*p*). A bid is a mere offer, and can be retracted by the bidder at any time before the auctioneer announces the completion of the sale; until that time the vendor may also withdraw the property from the auction provided that the sale is subject to a reserve which has not been reached (*q*). Where the sale is not subject to a reserve price and the property has been withdrawn during the auction, it has been suggested that the vendor or the auctioneer, if the latter has not disclosed his principal, is liable to an action for damages by the highest bidder on an implied undertaking that the sale shall be without reserve, but the point is not free from doubt (*r*).

Withdrawal of property.

1040. If a sale has been actually completed the purchaser has a right of action against the vendor for preventing the auctioneer from signing a contract of sale, and this is a right of action independent of an action on the contract. It can therefore be maintained against the vendor without any written contract or memorandum of the sale (*s*).

Vendor preventing signature of contract by auctioneer.

1041. Where a sale is by its conditions a sale subject to a reserve price, no contract is concluded, even when the property is knocked down to the highest bidder, if the highest bid is lower than the reserve price, and the highest bidder has no right of action in such a case (*t*).

Bids under reserve price

(*p*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 58 (2).

(*q*) *McManus* v. *Fortescue*, [1907] 2 K. B. 1.

(*r*) The view that an action will lie for breach of such implied undertaking is supported by the judgment of the majority of the Exchequer Chamber in *Warlow* v. *Harrison* (1859), 1 E. & E. 309. See also, for *dicta* somewhat in favour of this view, *Harris* v. *Nickerson* (1873), L. R. 8 Q. B. at p. 288; *Spencer* v. *Harding* (1870), L. R. 5 C. P. at p. 563; *Re Agra and Masterman's Bank, Ex parte Asiatic Banking Corporation* (1867), 2 Ch. App. 391, at p. 397; and *Johnston* v. *Boyes*, [1899] 2 Ch. 73, at p. 77. Notwithstanding these opinions it seems difficult to answer the *ratio decidendi* of the Court in *Fenwick* v. *Macdonald, Fraser & Co., Ltd.* (1904), 6 F. (Ct. of Sess.), 850, viz., that, since the bidder has a right to retract his bid until the completion of the sale, there can be no complete contract, and therefore neither the vendor nor the purchaser is bound until that time. The opposite view is founded on the assumption that the case is indistinguishable from such cases as *Denton* v. *Great Northern Rail. Co.* (1856), 5 E. & B. 860 see judgment in *Warlow* v. *Harrison*, *supra*), *Williams* v. *Carwardine* (1833), 4 B. & Ad. 621 (see *Re Agra and Masterman's Bank, Ex parte Asiatic Banking Corporation*, *supra*), and *Carlill* v. *Carbolic Smoke Ball Co.*, [1893] 1 Q. B. 256 (see *Johnston* v. *Boyes*, *supra*), where an offer addressed to a number of persons has been held to give contractual rights to any one of those persons complying with the conditions of the offer. The analogy would appear to be questionable. In those cases there was a complete contract on the conditions being complied with. In the case of the highest bidder there is none until the sale is completed. The judgment of the minority of the Court in *Warlow* v. *Harrison* (*supra*) confines the liability of the vendor or auctioneer to cases where an action for false representation can be brought, and negatives the existence of any implied undertaking or right of action in contract; see also *dicta* in *Mainprice* v. *Westley* (1865), 6 B. & S. 420. In most cases the withdrawal by the vendor or the auctioneer would probably amount to an attempt to sell by reserve, and the distinction would merely affect the form of action; but there are certainly conceivable cases where property might be withdrawn *bonâ fide* from a sale after the auction had begun for reasons irrespective of the amount of the bidding, and the difference might also be important in determining the personal liability of the auctioneer.

(*s*) *Johnston* v. *Boyes*, *supra*.

(*t*) *McManus* v. *Fortescue*, *supra*.

SECT. 8. SECT. 8.—*Damping the Sale.*

Damping the Sale.

"Damping."

1042. Improper or fraudulent acts, which are likely to prevent the property put up from realising its fair value and to "damp" the sale, will invalidate any purchase by persons guilty of or privy to such acts, and will justify the auctioneer in withdrawing the property (*u*).

Knock-out.

An agreement between two or more persons not to bid against each other at an auction, even if amounting to what is popularly known as a "knock-out," would not seem to be illegal or to invalidate the sale (*a*).

Part V.—Deposit.

Auctioneer as stakeholder.

1043. In the absence of special agreement, the auctioneer receives the deposit as stakeholder for the vendor and the purchaser (*b*); and it is his duty to hold it until the completion or rescission of the contract, and to pay it to the party ultimately entitled (*c*).

Premature payment to wrong party.

If the auctioneer pays the money prematurely to either vendor (*d*) or purchaser, and it turns out that the person paid was not entitled to it, the auctioneer is liable to make good the money to the party to the contract eventually held to be entitled (*e*).

Purchaser entitled.

Where the purchaser is entitled to the return of the deposit, the auctioneer can set up the purchaser's right to the money in answer to any claim to it made by the vendor (*f*).

Loss of deposit falls upon vendor.

1044. Although the auctioneer is a stakeholder, he is so far the vendor's agent that the loss of the deposit sustained by

(*u*) *Twining* v. *Morrice* (1788), 2 Bro. Ch. Cas. 326; *Mason* v. *Armitage* (1806), 13 Ves. 25; *Fuller* v. *Abrahams* (1821), 6 Moo. C. P. 316.

(*a*) The *dictum* in *Levi* v. *Levi* (1833), 6 C. & P. 239, suggesting that such an agreement is an unlawful conspiracy, does not seem to be based on any sound principle or to be good law, though it has been adopted in a number of text-books. See *Doolubdass* v. *Ramloll* (1850), 15 Jur. 257; *Galton* v. *Emuss* (1844), 13 L. J. (CH.) 388; *Re Carew's Estate Act* (1858), 28 L. J. (CH.) 218; *Heffer* v. *Martyn* (1867), 36 L. J. (CH.) 372.

(*b*) *Harington* v. *Hoggart* (1830), 1 B. & Ad. 577. See *Edwards* v. *Hodding* (1814), 5 Taunt. 815, where it was held that a solicitor who was also auctioneer received the purchase-money as auctioneer and not as solicitor and agent for the vendor. As to receipt of a cheque by the auctioneer in payment of deposit, see p. 503, *ante*.

(*c*) *Gray* v. *Gutteridge* (1827), 3 C. & P. 40; *Yates* v. *Farebrother* (1819), 4 Madd. 239; *Edwards* v. *Hodding*, *supra*; *Burrough* v. *Skinner* (1770), 5 Burr. 2639; *Furtado* v. *Lumley* (1890), 54 J. P. 407; *Spurrier* v. *Elderton* (1803), 5 Esp. 1; *Spittle* v. *Lavender* (1821), 2 Brod. & Bing. 452; *Berry* v. *Young* (1788), 2 Esp. 640 (n.); *Stevens* v. *Legh* (1853), 2 C. L. R. 251. The auctioneer may pay over to the vendor even when the latter is in insolvent circumstances (*White* v. *Bartlett* (1832), 9 Bing. 378).

(*d*) For form of indemnity in such a case, see Encyclopædia of Forms, Vol. II., p. 462.

(*e*) *Burrough* v. *Skinner*, *supra*; *Furtado* v. *Lumley*, *supra*; *Edwards* v *Hodding*, *supra*.

(*f*) *Stevens* v. *Legh*, *supra*; *Murray* v. *Mann* (1848), 2 Exch. 538.

the auctioneer's insolvency or misconduct will fall on the vendor (*g*).

Where a sale is effected by a mortgagor and the sale is adopted by the mortgagee, the mortgagee is liable as between himself and the purchaser for the loss of the deposit whilst in the hands of the auctioneer (*h*); but as between mortgagor and mortgagee the loss will fall on the mortgagor if the auctioneer was the agent of the mortgagor (*i*).

1045. The auctioneer should be ready at any time to account for the deposit (*k*), but he is not liable to pay interest on it for the period during which he rightfully holds it as stakeholder, nor until demand for repayment has been made by some person entitled to receive it (*l*).

Auctioneer liable to pay deposit at any time without interest.

Part VI.—Interpleader and Payment into Court.

1046. Where adverse claims are made to goods or money in the hands of an auctioneer, he may interplead (*m*), subject to the ordinary rules governing interpleader (*n*).

Interpleader by auctioneer.

In the application for, and on, the interpleader proceedings the Court has power to provide for the costs and charges of the auctioneer, and the claim for such costs and charges does not bar the auctioneer of his right to interplead as being interested in the subject-matter, even when he is entitled to them against one of the claimants only (*o*).

Auctioneer's costs and charges.

The Court has also a discretionary power to allow the auctioneer to deduct from the deposit his costs of obtaining the interpleader order (*p*).

Auctioneer's costs of interpleader.

(*g*) *Smith* v. *Jackson and Lloyd* (1816), 1 Madd. 618; *Rowe* v. *May* (1854), 18 Beav. 613; *Annesley* v. *Muggridge* (1816), 1 Madd. 593. As to the right to follow the deposit money which has been paid into the auctioneer's banking account, see *Marten* v. *Rocke, Eyton & Co.* (1885), 53 L. T. 946.

(*h*) *Rowe* v. *May* (1854), 18 Beav. 613.

(*i*) *Barrow* v. *White* (1862), 2 Jo. & H. 580.

(*k*) *Brown* v. *Staton* (1816), 2 Chitt. 353; *Crosskey* v. *Mills* (1834), 1 C. M. & R. 298.

(*l*) *Lee* v. *Munn* (1817), 8 Taunt. 45; *Harington* v. *Hoggart* (1830), 1 B. & Ad. 577; *Gaby* v. *Driver* (1828), 2 Y. & J. 549.

(*m*) R. S. C., Ord. 57, r. 1.

(*n*) See title INTERPLEADER. See, for application to auctioneers of the ordinary rules as to identity of the property claimed, *Wright* v. *Freeman* (1879), 48 L. J. (C. P.) 276; *Hoggart* v. *Cutts* (1841), 1 Cr. & Ph. 197; and see, as to collusion, *Thompson* v. *Wright* (1884), 13 Q. B. D. 632.

(*o*) *Best* v. *Hayes* (1863), 1 H. & C. 718, followed in *Tanner* v. *European Bank* (1866), L. R. 1 Exch. 261; see also *Attenborough* v. *St. Katharine's Dock Co.* (1878), L. R. 3 C. P. D. 373, and, on appeal, 450; *De Rothschild* v. *Morrison, Kekewich & Co.* (1890), 24 Q. B. D. 750; *Ex parte Mersey Docks and Harbour Board*, [1899] 1 Q. B. 546; *Martinius* v. *Helmuth and Schmidt* (1815), Coop. 245.

(*p*) *Pitchers* v. *Edney* (1838), 4 Bing. (N. C.) 721; *Deller* v. *Prickett* (1850), 15 Q. B. 1081.

PART VI. Interpleader and Payment into Court.

Auctioneer defendant to action on contract.

1047. If the auctioneer is made a defendant to an action for specific performance or rescission (*q*), he will in general be dismissed from the action on paying the balance of the deposit into Court after deducting his charges (*r*); but he will not be so dismissed if relief be claimed against him personally on some ground other than the mere fact that he holds the deposit, *e.g.*, on the ground of his misconduct at the auction (*s*).

No interpleader by purchaser where two auctioneers claim commission.

1048. If two auctioneers claim commission in respect of the sale of the same property, the purchaser cannot, as a rule, interplead (*t*).

Part VII.—Auctioneer's Rights and Duties in Relation to the Vendor.

SECT. 1.—*Duty Generally.*

Skill and knowledge.

1049. An auctioneer, being a person who professes to carry on a business requiring skill and knowledge, must display such skill and knowledge in acting for his vendor as is reasonably to be expected from competent auctioneers, and must follow the course of business ordinarily recognised by custom (*a*) or prescribed by statute (*b*). He will be liable for a breach of any duty in damages, either nominal where no material injury results (*c*), or substantial and of an amount to compensate the vendor for any actual loss sustained through the negligence of the auctioneer (*d*), or of persons employed by him (*e*).

SECT. 2.—*Duties in respect of Goods.*

SUB-SECT. 1.—*Custody of Goods.*

Duty as bailee for reward.

1050. Since the auctioneer is a bailee for reward, he must exercise ordinary care and diligence in keeping the goods intrusted to him (*f*).

SUB-SECT. 2.—*Parting with Goods.*

Duty to retain till price paid.

1051. In the absence of authority from the vendor, it is the duty of the auctioneer not to part with possession of the goods until the

(*q*) See as to joining auctioneers as defendants in such cases, *Earl of Egmont* v. *Smith* (1877), 6 Ch. D. 469.

(*r*) *Annesley* v. *Muggridge* (1816), 1 Madd. 593; *Yates* v. *Farebrother* (1819), 4 Madd. 239.

(*s*) *Heatley* v. *Newton* (1881), 19 Ch. D. 326.

(*t*) *Greatorex* v. *Shackle*, [1895] 2 Q. B. 249.

(*a*) *Russell* v. *Hankey* (1794), 6 Term Rep. 12.

(*b*) *Coppen* v. *Moore* (No. 2), [1898] 2 Q. B. 306; *Christie, Manson and Woods* v. *Cooper*, [1900] 2 Q. B. 522.

(*c*) *Hibbert* v. *Bayley* (1860), 2 F. & F. 48.

(*d*) *Parker* v. *Farebrother* (1853), 1 C. L. R. 323.

(*e*) *Lord North's Case* (1558), 2 Dyer, 161 a.

(*f*) See title BAILMENT, p. 560, *post*. The *dictum* in *Maltby* v. *Christie* (1795), 1 Esp. 340, to the effect that an auctioneer is only liable for such care as he would take in the case of his own goods, would not seem on principle to be good law. See *Coggs* v. *Bernard* (1704), 2 Ld. Raym. 909, *per* Lord HOLT, at p. 917.

purchaser has paid the price. If the auctioneer does so and the purchaser fails to pay, the auctioneer will be liable to the vendor for the price (*g*).

SECT. 2. Duties in respect of Goods.

SUB-SECT. 3.—*Redelivery of Goods.*

Redelivery to vendor.

1052. An auctioneer must redeliver goods to the vendor on demand, except where his right of lien exists, either before sale if the authority to sell is revoked, or after sale if the goods are unsold. Like other bailees, he is estopped from setting up the title of a third person against the bailor, unless the bailment is determined by what is equivalent to an eviction by title paramount, and the auctioneer defends upon the right and title and by the authority of such third person (*h*). Even with such authority he cannot set up the *jus tertii* if he was aware of the adverse claim at the time when he accepted his employment (*i*).

Jus tertii.

SECT. 3.—*Duty to make a Binding Contract.*

1053. It is the duty of the auctioneer to sign a proper contract (*j*) binding the purchaser; and, if he omits to do so, he is liable to the vendor for any damages sustained in consequence of his neglect (*k*).

SECT. 4.—*Purchase by Auctioneer.*

1054. A purchase by the auctioneer himself without the vendor's consent is voidable, and will be set aside at the instance of the vendor, even after a long lapse of time, unless there is evidence of acquiescence (*l*).

SECT. 5.—*Duty to Account.*

Trustee of money received for vendor.

1055. An auctioneer must account for any moneys received by him on the vendor's behalf, and be ready to pay them over to him. He is in a fiduciary position in respect of such moneys, and an order to pay can be made against him as trustee, which, if disobeyed, renders him liable to attachment (*m*).

Payment to vendor personally.

Payment should in general be made to the vendor, and not to his solicitors except by his express directions (*n*).

SECT. 6.—*Remuneration.*

By agreement.

1056. The remuneration payable to an auctioneer by a private vendor may be fixed by express agreement as to both its amount and the events on which it is to be paid (*o*).

(*g*) *Brown* v. *Staton* (1816), 2 Chitt. 353.

(*h*) *Biddle* v. *Bond* (1865), 6 B. & S. 225; *Thorne* v. *Tilbury* (1858), 3 H. & N. 534, 537.

(*i*) *Ex parte Davies, Re Sadler* (1881), 19 Ch. D. 86.

(*j*) For form of contract, see Encyclopædia of Forms, Vol. II., p. 462.

(*k*) *Peirce* v. *Corf* (1874), L. R. 9 Q. B. 210.

(*l*) *Oliver* v. *Court* (1820), 8 Price, 127; *Salomons* v. *Pender* (1865), 3 H. & C. 639; and see *Ex parte Lacey* (1802), 6 Ves. 625; *Sanderson* v. *Walker* (1807), 13 Ves. 601; *Downes* v. *Grazebrook* (1817), 3 Mer. 200.

(*m*) *Crowther* v. *Elgood* (1887), 34 Ch. D. 691. See title CONTEMPT AND ATTACHMENT.

(*n*) *Brown* v. *Farebrother* (1888), 59 L. T. 822. See, as to payment in sales by the Court, title SALE OF LAND.

(*o*) *Re Page* (No. 3) (1863), 32 Beav. 487; *Beningfield* v. *Kynaston* (1887), 3 T. L. R. 279; *Peacock* v. *Freeman* (1888), 4 T. L. R. 541. See title AGENCY, pp. 193—196, *ante*, for general rules and construction of contracts as to payment of commission.

SECT. 6. **Remuneration.**

In the absence of express agreement, the remuneration is determined by custom, or, failing custom applicable to the particular circumstances, the auctioneer will be entitled to a fair and reasonable amount.

By custom.

In most instances, where the services of the auctioneer have been fully performed, a customary rate of payment calculated by percentage will be adopted as the measure of such amount (*p*).

Commission where no sale by auction.

The auctioneer may be entitled to commission on a sale to a purchaser introduced by the auctioneer even where no sale by auction has been actually effected (*q*).

Scale fixed by law.

The scale of payments to auctioneers is fixed by law in the case of a sale under a distress (*r*), sales under the Bankruptcy Acts (*s*), sales in the winding up of companies (*t*), and sales by the sheriff under a writ of *fieri facias* (*a*).

Auctioneer trustee.

An auctioneer who is also a trustee cannot make a profit out of the execution of the trust, unless authorised by the terms of the trust so to do, and therefore, in the absence of such authorisation, cannot in general claim remuneration for the sale of trust property of which either he or his partner is trustee (*b*).

Loss of right to commission.

The right to claim commission may be lost by the auctioneer's negligence (*c*) or misconduct (*d*).

Where authority revoked.

1057. If an auctioneer's authority is revoked before the sale, or the vendor, after the expenses of the sale have been incurred, insists on a prohibitive reserve, the auctioneer has, except under a special agreement, a claim against the vendor for expenses and for reasonable remuneration for the services already rendered (*e*).

In addition he would seem to be entitled to damages where the

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(*p*) The scale of fees of the Institute of Estate and House Agents (see Encyclopædia of Forms, Vol. II., p. 454) is that usually followed, but this scale may be varied by proof of special local custom.

(*q*) *Green* v. *Bartlett* (1863), 14 C. B. (N. S.) 681. See also *Bayley* v. *Chadwick* (1878), 39 L. T. 429; *Clark* v. *Smythies* (1860), 2 F. & F. 83. The question whether the sale is the result of the auctioneer's intervention is in each case a question of fact. See *Lumley* v. *Nicholson* (1886), 34 W. R. 716.

(*r*) Distress for Rent Rules (Law of Distress Amendment Act, 1888 (51 & 52 Vict. c. 21), s. 8), rr. 15—17, Appendix II. See Encyclopædia of Forms, Vol. II., p. 456.

(*s*) Rules under the Bankruptcy Acts, 1883 (46 & 47 Vict. c. 52), and 1890 (53 & 54 Vict. c. 71), r. 112 and Appendix. See Encyclopædia of Forms, Vol. II., p. 455.

(*t*) Companies (Winding-up) Act, 1890 (53 & 54 Vict. c. 63), and Companies (Winding-up) Rules, 1903, rr. 159, 166, 170 (2).

(*a*) Sheriffs Act, 1887 (50 & 51 Vict. c. 55), Order as to Fees of August 31, 1888. See Encyclopædia of Forms, Vol. II., pp. 455, 456.

(*b*) *Matthison* v. *Clarke* (1854), 3 Drew. 3, in which case the auctioneer was merely a mortgagee with a power of sale. See also *Salomons* v. *Pender* (1865), 3 H. & C. 639; *Broad* v. *Selfe* (1863), 9 Jur. (N. S.) 885; *Kirkman* v. *Booth* (1848), 11 Beav. 273. See, further, title TRUSTS AND TRUSTEES.

(*c*) *Denew* v. *Daverell* (1813), 3 Camp. 451; *Duncan* v. *Blundell* (1820), 3 Stark. 6; *Jones* v. *Nanney* (1824), 13 Price, 76.

(*d*) *White* v. *Chapman* (1815), 1 Stark. 113; see, further, title AGENCY, p. 196, *ante*.

(*e*) *Chinnock* v. *Sainsbury* (1860), 30 L. J. (CH.) 409. The remuneration may even be based on a percentage if a binding custom to that effect can be proved. See *Rainy* v. *Vernon* (1840), 9 C. & P. 559.

right of revocation is not expressly given by the terms of his employment (*f*).

SECT. 7.—*Lien.*

Extent of lien.

1058. Auctioneers have a lien, by the custom of their business, on goods intrusted to them for sale and on the deposit and purchase-money, for their charges and remuneration (*g*).

This lien attaches to goods whether they are sold at the auctioneer's premises or at those of the vendor (*h*). It is a charge on the proceeds of sale in priority to any assignment by the vendor, and the auctioneer cannot be compelled to marshal the proceeds of several sales in order to give effect to the rights of an assignee of the purchase-money of certain of the sales (*i*).

SECT. 8.—*Indemnity.*

Extent of right to indemnity.

1059. The vendor is bound to indemnify the auctioneer (*j*) for any expenses incurred or damages sustained by the auctioneer in the ordinary course of his employment, and as the natural consequence of the contract of agency (*k*).

Claim of third person to property.

This duty extends to a case where property for sale has been received by an auctioneer in good faith from a principal who was not the true owner, and the auctioneer has been held liable for conversion (*l*), but it does not extend to cases where the auctioneer has been sued and damages recovered from him for some act which is not a wrongful act done in pursuance of his employment, unless the auctioneer defends with the express or implied authority of the principal (*m*). The judgment against the auctioneer creates no estoppel against the principal unless he had such authority (*n*).

(*f*) There is no express authority for this proposition; but it is submitted that the employment of an auctioneer is a contract to allow the auctioneer to carry out the sale, and differs from such agencies as those of house agents, in which the principal may revoke the authority at any time without giving the agent any right to compensation. See *Simpson* v. *Lamb* (1856), 17 C. B. 603, where the two classes of agency are differentiated as general and qualified employment.

(*g*) *Williams* v. *Millington* (1788), 1 Hy. Bl. 81. See title AGENCY, pp. 197—199, *ante*.

(*h*) *Ibid.*

(*i*) *Webb* v. *Smith* (1885), 30 Ch. D. 192.

(*j*) For an agent's right of indemnity in general, see title AGENCY, pp. 196, 197, *ante*. For the form of an express indemnity, see Encyclopædia of Forms, Vol. II., p. 462.

(*k*) Amongst the expenses properly incurred are moneys paid to protect the goods from a distress as long as the goods remain the property of the vendor; but moneys paid after the sale, and when the property has passed, are not chargeable against the vendor (*Sweeting* v. *Turner* (1872), L. R. 7 Q. B. 310).

(*l*) *Spurrier* v. *Elderton* (1803), 5 Esp. 1; *Adamson* v. *Jarvis* (1827) 4 Bing. 66. On a sale on behalf of the sheriff an auctioneer is not entitled to indemnity against the sheriff (*Farebrother* v. *Ansley* (1808), 1 Camp. 343).

(*m*) *Halbronn* v. *International Horse Agency and Exchange, Ltd.*, [1903] 1 K. B. 270; *Frixione* v. *Tagliaferro* (1856), 10 Moo. P. C. C. 175, 200.

(*n*) *Ibid.*

SECT. 1. Action by Purchaser against Auctioneer.

Part VIII.—Auctioneer's Rights and Liabilities in Relation to Purchasers.

SECT. 1.—*Action by Purchaser against Auctioneer.*

Principal undisclosed.

1060. Where an auctioneer sells for an undisclosed principal, he is personally liable on the contract (*o*).

The extent of his liability and the nature of his obligations, *e.g.*, as to warranty of title or delivery of the property sold, must in each case depend on the contract of sale and the circumstances of the case (*p*).

Principal disclosed.

An auctioneer selling on behalf of a disclosed principal is in general not liable on the contract unless by its terms he contracts personally; but in the case of the sale of goods, when he is in possession, he may be liable for non-delivery under some circumstances (*q*).

When sued personally the auctioneer may avail himself of the defence that there is no written evidence of the contract under the Statute of Frauds or the Sale of Goods Act, 1893 (*r*).

Action for failing to sign binding contract.

1061. If the property has been knocked down, the purchaser may perhaps have a right of action against the auctioneer for failing to sign a binding contract (*s*) in cases where, but for such failure, the purchaser might have had an enforceable contract with the vendor; but no such right exists where there is no real contract between the vendor and purchaser, *e.g.*, where the property is advertised to be sold with a reserve, and the bid of the highest bidder, to whom the property is knocked down, does not reach the reserve price (*t*).

(*o*) *Hanson* v. *Roberdeau* (1792), Peake, 163; *Franklyn* v. *Lamond* (1847), 4 C. B. 637; *Evans* v. *Evans* (1835), 3 A. & E. 132. There are *dicta* in *Mainprice* v. *Westley* (1865), 6 B. & S. 420, suggesting that the auctioneer may escape liability by contracting merely as agent without disclosing his principal's name; but there is no express decision going to this length.

(*p*) *Wood* v. *Baxter* (1883), 49 L. T. 45; *Payne* v. *Elsden* (1900), 17 T. L. R. 161; *Salter* v. *Woollams* (1841), 2 Man. & G. 650.

(*q*) See the judgment in *Rainbow* v. *Howkins*, [1904] 2 K. B. 322, at p. 325, preferring *Woolfe* v. *Horne* (1877), 2 Q. B. D. 355, to *Mainprice* v. *Westley*, *supra*. "We are of opinion on the authority of *Woolfe* v. *Horne*, which is a more recent decision than *Mainprice* v. *Westley*, that an action for wrongful refusal to deliver a chattel sold at public auction may in some circumstances successfully be brought against the auctioneer, although the principal's name is disclosed to the buyer at the time of the sale." The Court did not define the circumstances, and it is only possible to state the proposition in the form in the text.

(*r*) *Rainbow* v. *Howkins*, *supra*.

(*s*) The point was left open in *Rainbow* v. *Howkins*, *supra*, but on principle the purchaser's right of action would seem to follow from the fact that the auctioneer becomes the purchaser's agent to sign after the contract is concluded. This would not be so, however, where the purchaser had signed the contract and the auctioneer refused to sign on the vendor's behalf, for, apart from fraud, an agreement to put into writing and sign a contract for the sale of land or of goods exceeding £10 in value cannot be enforced; see *Wood* v. *Midgley* (1854), 5 De G. M. & G. 41, 45; *Johnston* v. *Boyes* (1898), 42 Sol. Jour. 610, and, on further proceedings, [1899] 2 Ch. 73.

(*t*) *McManus* v. *Fortescue*, [1907] 2 K. B. 1.

SECT. 1. Action by Purchaser against Auctioneer.

1062. Where an auctioneer sells property without or in excess of his authority, he is, like other agents, liable to the purchaser for breach of warranty of authority (*a*).

Breach of warranty of authority.

The purchaser is entitled to sue the auctioneer personally for any fraud to which the auctioneer is privy (*b*).

Fraud.

SECT. 2.—*Action by Auctioneer for Price.*

1063. An auctioneer may, by reason of his lien on or special property in goods, maintain an action in his own name for the price of goods sold and delivered by him even where he sells and delivers as agent for a disclosed principal (*c*), but this right does not extend, in the absence of special contract, to suing for the purchase-money of land if he sells as agent for a disclosed principal (*d*), or for the use and occupation of land let by him by auction (*e*).

When auctioneer may sue in own name.

This right to sue continues as long as the auctioneer's lien on the proceeds of the sale exists, and cannot be affected by any settlement or set-off between the vendor and purchaser (*f*), unless the auctioneer has expressly or impliedly assented to such settlement (*g*), or unless it was a term of the original contract that the price should be paid or satisfied in some way other than by payment to the auctioneer (*h*).

When right affected by settlement between vendor and purchaser

If, however, the auctioneer's charges have been satisfied, his claim can be met by any set-off which would be valid against the vendor (*i*).

1064. Where the goods sold are not the property of the vendor, and are claimed by the true owner before payment by the purchaser, the auctioneer cannot maintain an action for the price even though the purchaser has taken away the goods under an express promise to pay (*j*).

No right where goods claimed by true owner.

1065. The auctioneer's power of suing is further subject to the limitation that though he is the agent of the purchaser to sign a written contract or memorandum of the contract as between vendor and purchaser, yet when he sues personally he cannot rely on such contract or memorandum if signed by himself, and cannot enforce

Where contract signed by auctioneer on purchaser's behalf.

(*a*) *Anderson* v. *Croall & Sons, Ltd.* (1904), 6 F. (Ct. of Sess.) 153.

(*b*) *Heatley* v. *Newton* (1881), 19 Ch. D. 326.

(*c*) *Williams* v. *Millington* (1788), 1 Hy. Bl. 81. See *Freeman* v. *Farrow* (1886), 2 T. L. R. 547, where an auctioneer was held entitled to sue even where the sale was effected by the owner himself on the auctioneer's premises. See also *Cleave* v. *Moore* (1857), 3 Jur. (N. S.) 48; *Hodgens* v. *Keon*, [1894] 2 Ir. R. 657, where an auctioneer who had taken an I.O.U. in respect of a deposit on the sale of land was allowed to sue the purchaser; but the *ratio decidendi* was that by so doing the auctioneer had in fact advanced the money to the purchaser.

(*d*) *Cherry* v. *Anderson* (1876), 10 Ir. R. C. L. 204.

(*e*) *Evans* v. *Evans* (1835), 3 A. & E. 132; *Fisher* v. *Marsh* (1865), 6 B. & S. 411.

(*f*) *Robinson* v. *Rutter* (1855), 4 E. & B. 954.

(*g*) *Coppin* v. *Walker* (1816), 7 Taunt. 237; *Coppin* v. *Craig* (1816), 7 Taunt. 243.

(*h*) *Bartlett* v. *Purnell* (1836), 4 A. & E. 792; *Grice* v. *Kenrick* (1870), L. R. 5 Q. B. 340.

(*i*) *Holmes* v. *Tutton* (1855), 5 E. & B. 65.

(*j*) *Dickenson* v. *Naul* (1833), 4 B. & Ad. 638.

SECT. 2. Action by Auctioneer for Price.

the contract unless other evidence satisfying the statutory requirements can be given (*k*).

Part IX.—Auctioneer's Rights and Liabilities in Relation to Third Persons.

SECT. 1.—*Right to Possession of Goods.*

Auctioneer may sue in trespass or trover.

1066. An auctioneer by virtue of his lien and special property can maintain an action of trespass or trover against persons wrongfully interfering with or converting goods (*l*). He has, however, no such property in, or right of action in respect of, unsevered fixtures (*m*).

SECT. 2.—*Privilege from Distress.*

Goods delivered to auctioneer.

1067. Goods delivered to an auctioneer for sale are privileged from distress whilst on the auctioneer's premises, as being chattels delivered to a person exercising a public trade to be dealt with in the way of his trade or employ (*n*). The privilege attaches to the goods either at the auctioneer's ordinary place of business or on premises temporarily hired for the auction, and even though the auctioneer's occupation of the premises is not lawful (*o*). It also extends to goods in the yard of a house (*p*). It does not, however, cover goods which are on the owner's premises, and such goods will remain liable to distraint although the subject-matter of a sale by auction (*q*).

SECT. 3.—*Conversion.*

Auctioneer liable.

1068. An action for conversion lies against an auctioneer who with or without knowledge of the true ownership has, in cases not covered by the Factors Act, 1889 (*r*), dealt with the property in and possession of goods without the consent or authority of the true owner (*s*).

What amounts to conversion.

A mere advertisement for sale without an actual sale, or even a contract of sale which affects neither the possession nor the property, does not constitute a conversion (*t*). To render an auctioneer liable who has no notice of the true ownership, and who

(*k*) *Farebrother* v. *Simmons* (1822), 5 B. & Ald.

(*l*) *Williams* v. *Millington* (1788), 1 Hy. Bl. 81, *per* HEATH, J., at p. 85; *Robinson* v. *Rutter* (1855), 4 E. & B. 954.

(*m*) *Davis* v. *Danks* (1849), 3 Exch. 435.

(*n*) See title DISTRESS; *Adams* v. *Grane* (1833), 1 Cr. & M. 380.

(*o*) *Brown* v. *Arundell* (1850), 10 C. B. 54.

(*p*) *Williams* v. *Holmes* (1853), 8 Exch. 861.

v. *Elliott* (1876), 1 Q. B. D. 210.

(*q*) 52 & 53 Vict. c. 45. See title AGENCY, p. 205, *ante*.

(*r*) *Barker* v. *Furlong*, [1891] 2 Ch. 172; *Consolidated Co.* v. *Curtis & Son*, [1892] 1 Q. B. 495; *Brown* v. *Hickinbotham* (1881), 50 L. J. (Q. B.) 426; *Featherstonhaugh* v. *Johnston* (1818), 8 Taunt. 237; *Adamson* v. *Jarvis* (1827), 4 Bing. 66; *Cochrane* v. *Rymill* (1879), 40 L. T. 744; *Hardacre* v. *Stewart* (1804), 5 Esp. 103. See, further, title TROVER AND CONVERSION.

(*s*) *Lancashire Waggon Co.* v. *FitzHugh* (1861), 6 H. & N. 502.

merely acts in the ordinary course of his business, he must deal or purport to deal both with the possession and with the property. Thus if the auctioneer has the goods in his possession for sale, but the contract of sale is in fact arranged privately by the vendor, and the goods are delivered to the purchaser by the auctioneer in pursuance of this contract, this is not a dealing with the property, but a mere ministerial act, and does not amount to a conversion (*u*). Nor is it a conversion when, without any physical interference with the goods, the auctioneer merely arranges the price, and the goods are delivered by the vendor (*a*).

SECT. 3. Conversion.

When goods are delivered to an auctioneer by a mercantile agent acting in the course of his ordinary business, or by a buyer or seller, if such agent or buyer or seller is in possession of such goods with the consent of the true owner, the auctioneer is not liable for dealing with the goods, provided such dealing is in good faith and without notice of the claim of the true owner (*b*).

Goods delivered to auctioneer by factor or buyer or seller.

If the auctioneer has notice of the adverse claim of the true owner, he is thereafter liable for the value, not only of goods sold by him, but of those unsold by him and returned to his principal (*c*).

The measure of damages, when the auctioneer's liability is established, is the true value of the goods, and not merely the sum realised at the auction (*d*).

Measure of damages.

A place where public auctions are habitually held, and to which the public are admitted, is not thereby made a market overt, and does not give the auctioneer the protection of such market (*e*).

Auction mart is not necessarily market overt.

SECT. 4.—*Executorship de son tort.*

1069. If an auctioneer intermeddles with the estate of a deceased person without the authority of a properly constituted executor, he may render himself liable as an executor *de son tort* (*f*).

When auctioneer liable.

SECT. 5.—*Partnership Bills.*

1070. It has been held that a firm of auctioneers is not a trading partnership, and therefore a member of the firm has no implied authority to bind his partners by giving a bill of exchange in the firm name (*g*).

Firm of auctioneers.

(*u*) *National Mercantile Bank* v. *Rymill* (1881), 44 L. T. 767. Probably *Turner* v. *Hockey* (1887), 56 L. J. (Q. B.) 301, is to be explained on this ground. See observations in *Consolidated Co.* v. *Curtis & Son*, [1892] 1 Q. B. 495, at pp. 502, 503.

(*a*) *Cochrane* v. *Rymill* (1879), 40 L. T. 744, at p. 746; *Barker* v. *Furlong*, [1891] 2 Ch. 172.

(*b*) See title AGENCY; Factors Act, 1889 (52 & 53 Vict. c. 45); *Shenstone & Co.* v. *Hilton*, [1894] 2 Q. B. 452.

(*c*) *Davis* v. *Artingstall* (1880), 49 L. J. (CH.) 609

(*d*) *Ibid.*, at p. 610.

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

(*f*) See title EXECUTORS AND ADMINISTRATORS; *Nulty* v. *Fagan* (1888), 22 L. R. Ir. Q. B. 604.

(*g*) See title PARTNERSHIP; *Wheatley* v. *Smithers*, [1906] 2 K. B. 321. The decision in this case was reversed on appeal on the facts ((1907), 23 T. L. R. 585), but the Court of Appeal declined to decide the question of principle which is stated in the text, and on which the judgments of the Divisional Court were based.

AUTREFOIS ACQUIT AND AUTREFOIS CONVICT.

See CRIMINAL LAW AND PROCEDURE.

AVERAGE.

See INSURANCE; SHIPPING AND NAVIGATION.

BAIL.

See ADMIRALTY; CRIMINAL LAW AND PROCEDURE; MAGISTRATES.

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See COPYHOLDS; SHERIFFS AND BAILIFFS.

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Part I.—Definition and Classification.

Definition.

1071. A bailment, properly so called, is a delivery of personal chattels in trust, on a contract, express or implied, that the trust shall be duly executed, and the chattels redelivered in either their original or an altered form, as soon as the time or use for which they were bailed shall have elapsed or been performed (*a*). A bailment is thus distinguishable from a sale (*b*), the latter being effected wherever chattels are delivered on a contract for an equivalent in money or money's worth, and not for the return of the identical chattels in their original or an altered form (*c*). To constitute, therefore, a

(*a*) Bac. Abr. tit. "Bailment." See also 2 Bl. Com. c. 30, s. 2; Jones on Bailments, 4th ed. pp. 1, 117; Redfield on Railways, 3rd ed. Vol. I., p. 2, note (7); Story on Bailments, c. 1, s. 2; 2 Kent's Com., Part V., s. 559; 1 Bell's Com. lib. 2, Part 3, c. 2, art. 2. As to contracts, see title CONTRACT.

(*b*) See title SALE OF GOODS.

(*c*) *South Australian Insurance Co.* v. *Randell* (1869), L. R. 3 P. C. 101, at pp. 108, 113, approving 2 Kent's Com. s. 589, p. 781 [11th ed.].

contract of bailment (which derives its name from the old French word *bailler*, to deliver or put into the hands of), the actual or constructive possession of a specific chattel must be transferred by its owner or possessor (the bailor), or his agent duly authorised for that purpose, to another person (the bailee) in order that the latter may perform some act in connection therewith, for which such actual or constructive possession of the chattel is necessary (*d*). No branch of our jurisprudence is more largely founded on the Roman law than that which relates to bailment, and for this reason the works of great foreign jurists belonging to countries whose laws are based on those of Rome, and especially of Pothier and Domat, are often cited as more or less authoritative.

Classification.

1072. At one period in the juridical history of this country, the exact nature of this contract and the law relating thereto were alike indeterminate, but in the year 1704 the judgment of Lord Holt in the case of *Coggs* v. *Bernard* (*e*) was so clear and authoritative a pronouncement of the general principles governing it, that all subsequent inquiries have related rather to the application of particular rules to particular cases, than to any fresh declaration of the law respecting the actual nature of the contract or the character of the obligation resulting therefrom. Lord Holt in his judgment stated the law of England very much as it is to be found in the Digest and Institutes of Justinian (*f*), using, with slight variations, the terminology there given to describe the different kinds of bailments. These he divided into six classes, which were reduced to five by Sir William Jones (*g*). Story considered that they might be reduced to three (*h*), while Chancellor Kent adhered to the system of Sir William Jones (*i*).

Lord Holt.

Sir W. Jones.

Five classes of bailment.

The five classes are as follows: (1) *depositum*, or the deposit of a chattel with the bailee, who is simply to keep it for the bailor without reward; (2) *mandatum*, where the bailee has, without reward, to do something for the bailor to or with the chattel bailed; (3) *commodatum*, where the bailor, without recompense, lends a chattel to the bailee for him to use; (4) *pignus*, sometimes called *vadium*, or pawn, where the bailee holds the chattel confided to him as a security for a loan or debt, or the fulfilment of an obligation; and (5) *locatio conductio*, where chattels or services are hired for reward. Some of these five classes are generally subdivided, especially *locatio* or hiring, of which there are four sorts: (1) *locatio rei*, the hiring of a chattel for use; (2) *locatio operis faciendi*, the hiring of a man's work or labour on or with regard to a chattel; (3) *locatio custodiæ*, the hiring of services in and about the

(*d*) *South Australian Insurance Co.* v. *Randell* (1869), L. R. 3 P. C. 101.

(*e*) 2 Ld. Raym. 909, 1 Sm. L. C., 11th ed., 173.

(*f*) Inst. lib. 3, tit. 14, 24.

(*g*) Jones on Bailments, 1st ed. p. 36.

(*h*) Story on Bailments, c. 1, s. 3, where he divides bailments into the following classes:—(1) those in which the trust is exclusively for the benefit of the bailor or of a third person; (2) those in which the trust is exclusively for the benefit of the bailee; and (3) those in which the trust is for the benefit of both parties or of both or one of them and a third party. Story in his treatise never heless adheres to Sir William Jones's classification.

(*i*) 2 Kent's Com., Part V., s. 559.

PART I. Definition and Classification.

keeping of a chattel; and (4) *locatio operis mercium vehendarum*, the hire of the carriage of chattels.

Bailments may also be classified as being (1) gratuitous, or (2) for reward; thus the first three classes above mentioned, being without recompense, are designated gratuitous bailments; the others are bailments for reward, or for valuable consideration. Of the three kinds of gratuitous bailments, it will be noticed that the first two are wholly for the benefit of the bailor, and the third wholly for the benefit of the bailee.

Gratuitous and for reward.

Classification followed herein.

This classification is the one adopted herein; the general law of bailment being alone dealt with, and not particular forms of bailment, for which reference should be made to other titles (*j*).

Care and diligence.

1073. Of the various rights and duties of bailors and bailees, that most discussed is the degree of care and diligence required of the bailee in each kind of bailment, and that degree has, from the time of the Roman empire till now, been held to vary according to the benefits derived from the bailment by the bailor and the bailee respectively, and corresponds with the degree of negligence for which the bailee is responsible (*k*). An ordinary degree of care and skill usually is required where both benefit from the transaction, slight diligence where the benefit is wholly that of the bailor (as in *depositum* and *mandatum*), and great diligence where the benefit accrues only to the bailee (as in *commodatum*). It may perhaps be stated with equal truth and brevity that the bailee is required in every case to take that degree of care which may reasonably be looked for, having regard to all the circumstances, *e.g.*, if you confide a casket of jewels to the custody of a yokel, you cannot expect him to take the same care of it that a banker would (*l*).

Part II.—Gratuitous Bailment.

SECT. 1.—*Deposit.*

SUB-SECT. 1.—*In General.*

Definition of deposit.

1074. The contract of deposit (*depositum*) may be defined as a bailment of a chattel, to be kept for the bailor, and returned upon demand without a recompense (*m*). This definition is sufficient for most purposes, and is complete, if it be understood that a return to the bailor covers delivery over to his nominee, for in some cases

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(*j*) See list of cross references on p. 524, *ante*.

(*k*) *Giblin* v. *McMullen* (1868), L. R. 2 P. C. 317.

(*l*) Sir William Jones cites as an example of this proposition the following illustration from Mahomedan law (Jones on Bailments, 4th ed. p. 100): "A man who had a disorder in his eyes called on a farrier for a remedy, and he applied to them a medicine commonly used for his patients; the man lost his sight, and brought an action for damages, but the judge said, 'No action lies, for, if the complainant had not himself been an *ass*, he would never have employed a *farrier*.'"

(*m*) 2 Bl. Com. 451.

the primary object of the bailment may be, that the bailee deliver over the chattel upon demand to a third party, and not to the actual bailor himself. This kind of bailment must always relate to a specific chattel (*n*).

Not binding till executed.

As the bailee is to receive no reward for his services, there can never be an executory contract of deposit, for the maxim *Ex nudo pacto non oritur actio* applies, and until there is actual delivery and acceptance of the subject-matter of the trust, there is no obligation on the part of the bailee to carry out his promise (*o*). As soon, however, as the bailee actually accepts the chattel, he becomes in some degree responsible for it whilst it remains in his possession or under his control, and is also bound, upon demand, to redeliver it to the true owner or his nominee, unless he has good excuse legally for not doing so (*p*).

SUB-SECT. 2.—*Special Kinds of Deposit.*

Necessary deposit.

1075. A necessary deposit is one which is made under peculiar stress of circumstances, such as fire, flood, shipwreck, civil riot, or other unforeseen disaster. If, under such conditions, an owner of a chattel intrusts it to the care of a bystander or neighbour, and that person accepts it, it has been suggested that the confidence of the owner in the recipient, and the acceptance by him, constitute an obligation which can only be satisfied by a very strict measure of care on the part of the bailee; but it is conceived that according to our law his duties are merely those of an ordinary depositary (*q*). Consequently the owner would probably recover damages only in the event of the depositary being guilty of negligence or bad faith whilst the chattel was in his custody (*r*).

Deposit by mistake.

1076. So again if a man who is mentally incapable of appreciating what he is doing, or is under a mistake as to the identity of the person with whom he is dealing, intrusts another with a chattel, the recipient becomes a bailee (*s*).

Accidental deposit.

1077. Another kind of deposit is that in which a chattel, through circumstances over which neither owner nor recipient has any

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(*n*) Pothier, Vol. IV., Contrat de Dépôt, c. 1, s. 2.

(*o*) Pothier, Vol. IV., Contrat de Dépôt, c. 1, s. 7.

(*p*) *Coggs* v. *Bernard* (1704), 2 Ld. Raym. 909; *Phipps* v. *New Claridge's Hotel, Ltd.* (1905), 22 T. L. R. 49, where the plaintiff handed over to one of the defendants' servants his dog, which could not be found when wanted, and the defendants were held liable. See also the similar decision in *Ultzen* v. *Nicols*, [1894] 1 Q. B. 92, where a diner at a restaurant handed his coat to a waiter, and it was gone when sought for. The same rule appears to apply to all kinds of bailment. If the chattels bailed are not forthcoming, the onus is in the first place upon the bailee to show circumstances negativing negligence on his part; see note (*s*), p. 545, *post*. But he need not account for the loss or prove that he knows how it happened (*Bullen* v. *Swan Electric Engraving Co.* (1907), 23 T. L. R. 258; *Phipps* v. *New Claridge's Hotel, Ltd.*, *supra*).

(*q*) Jones on Bailments, 4th ed. p. 48; Story on Bailments, s. 83.

(*r*) *Ibid.*

(*s*) *R.* v. *Reeves* (1859), 5 Jur. (N. S.) 716, where a man who was lying on the ground partially tipsy, permitted a person with whom he was acquainted, to take his watch out of his pocket without any effort on his part to prevent him, upon the supposition that his acquaintance was actuated by a friendly motive, and

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immediate control, is deposited upon the land or the premises of another. For example, timber carried by the tide in a navigable river and left at low water on the towing path (*t*), fruit dropped on a neighbour's garden, or a tree which has fallen on the field of an adjacent proprietor. In such cases, so long as the involuntary depositary does no overt act to the chattel thus deposited on his land, he incurs no responsibility to the true owner in respect thereof. But, if he interferes with it, an implied contract of bailment is created, with all its obligations and responsibilities, and if he not only interferes with it, but uses it for his own purposes, such user amounts to a conversion, and *à fortiori* this is the case, if he intentionally misuses it (*u*).

Involuntary deposit.

1078. Where a chattel is sent, without request or arrangement, by one person to another, who does not hold himself out to receive it, the person to whom it is sent is under no liability to the sender for its safe custody or protection (*v*); but he must, of course, not use it or otherwise convert it to his own use (*w*). Conversely, it has been suggested that where a man without previous request from the owner offers to take charge of a chattel, such an offer constitutes an inducement to the bailor to part with the possession of the chattel, and binds the bailee to exercise special care in its custody (*x*).

SUB-SECT. 3.—*Finding of Chattels.*

When finder of a chattel is a bailee.

1079. In the case of a casual finding of a lost chattel in a public place, there is no obligation on the finder to take charge of it

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it was held that the evidence was sufficient to convict the person of the statutory offence of larceny as a bailee.

(*t*) *Nicholson* v. *Chapman* (1793), 2 Hy. Bl. 254, *per* EYRE, C.J., at p. 257, where timber moored in a navigable river, within the flux and reflux of the tide, floated from the place where it was deposited, till the tide fell and left it again upon the banks of the river, and it was thence voluntarily conveyed by a person to a place of safety; it was held that such person had no lien on the timber for any expense he incurred in so removing it, but was liable to an action of trover unless he delivered it up to the owner on demand; compare *Binstead* v. *Buck* (1777), 2 Wm. Bl. 1117. *Quære* whether he could have maintained an action against the owner for compensation; *semble* he could not.

(*u*) *Mulgrave* v. *Ogden* (1591), Cro. (Eliz.) 219; *Isaack* v. *Clark* (1613), 2 Bulst. 306.

(*v*) *Howard* v. *Harris* (1884), 1 Cab. & El. 253, where the plaintiff, an author, being asked by the defendant, the lessee of a theatre, to send him a sketch or synopsis of his play, sent the whole manuscript, which the defendant lost, and it was held that no duty of any kind was cast on the defendant by sending him something he had not asked for (see *per* WILLIAMS, J., at p. 254). This decision accords with that in *Lethbridge* v. *Phillips* (1819), 2 Stark. 544, where a picture was without defendant's knowledge or request sent to defendant's house, and was there injured.

(*w*) This seems to follow on principle; compare the cases cited in note (*t*), *supra*, and the analogous principles governing the buyer's acceptance of goods not in accordance with the contract, for which see *Grimoldby* v. *Wells* (1875), L. R. 10 C. P. 391; *Harnor* v. *Groves* (1855), 15 C. B. 667; *Chapman* v. *Morton* (1843), 11 M. & W. 534, now embodied in Sale of Goods Act, 1893, (56 & 57 Vict. c. 71), s. 35.

(*x*) Jones on Bailments, 4th ed. pp. 47, 121, following Pothier and the Roman lawyers. *Contra*, Story on Bailments, s. 82.

at all. If, however, the finder actually takes it into his custody, he is regarded as a depositary, unless he can show that he had good ground for believing that the owner intended to divest himself of his property in the lost chattel (*y*).

When owner.

If, however, when he finds the chattel, he really believes that the true owner cannot be ascertained, or has intentionally parted with the property in it, his duties as bailee towards the true owner become merged in his own possessory rights as finder (*z*).

When thief.

The finder of a chattel is guilty of larceny if he takes it meaning to appropriate it to himself, knowing or having reasonable grounds for believing that the owner can be found. But if, when he takes it, he has reason to believe that the owner has abandoned it or that he cannot be found, a subsequent conversion of it after discovery of the owner is not larceny (*a*).

Finding by bailee.

If a bailee intrusted with a chattel for a specific purpose, such as its reparation or alteration, finds concealed therein some property the presence of which therein was unknown to the true owner at the time when he delivered the chattel over, such property belongs to the owner of the chattel and not to the bailee (*b*). And if the bailee commits some act in regard to the concealed property not warranted by the purpose for which the chattel was delivered to him, such unwarranted act amounts to a conversion (*b*).

By purchaser.

So, if a person purchase a chattel, such as a writing desk or bureau, and subsequently to the purchase find concealed therein property the existence of which was unknown to both buyer and seller at the time of the purchase, such property as a rule belongs to the seller of the chattel and not to the buyer, who is merely a bailee of it (*c*). But in each case the actual rights of the parties to the property are questions of fact to be deduced from the conditions or circumstances attendant on the sale; and an important factor in determining the question is the honest belief of the purchaser as to what was to be conveyed to him at the time he made the bargain (*c*).

(*y*) *Isaack* v. *Clark* (1609), 2 Bulst. 306, *per* Lord COKE, at p. 312. Compare Story on Bailments, ss. 85—87.

(*z*) "If one is possessed of a jewel, and casts it into the sea or a public highway, this is such an express dereliction, that a property will be vested in the first fortunate finder that will seize it to his own use. But if he loses or drops it by accident, it cannot be collected from thence that he designed to quit the possession, and therefore in such a case the property still remains in the loser, who may claim it again of the finder" (2 Bl. Com. 9).

(*a*) *R.* v. *Thurborn* (1849), 1 Den. C. C. 387, 396; *R.* v. *Glyde* (1868), L. R. 1 C. C. R. 139, *per* COCKBURN, C.J., at p. 144; *R.* v. *Deaves* (1869), 3 Ir. R. C. L. 306, and cases referred to therein. See also title CRIMINAL LAW AND PROCEDURE.

(*b*) *Cartwright* v. *Green* (1803), 8 Ves. 405, *per* Lord ELDON, at p. 409: "If a pocket-book containing bank notes was left in the pocket of a coat sent to be mended, and the tailor took the pocket-book out of the pocket, and the notes out of the pocket-book, there is not the least doubt that is a felony. So if the pocket-book were left in a hackney coach, if ten people were in the coach in the course of the day, and the coachman did not know to which of them it belonged, he acquires it by finding it, certainly, but not being intrusted with it for the purpose of opening it, that is a felony according to the modern cases."

(*c*) *Merry* v. *Green* (1841), 7 M. & W. 623, where a person purchased, at a

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A fortiori the general rule stated above applies if at the time of the purchase the existence of the concealed property was known to the buyer, but not to the seller, whilst, on the other hand, if its existence was known to the seller, but not to the buyer, the property belongs to the buyer and not to the seller, the knowledge of the seller raising a presumption in law that he intended to pass to the buyer his entire interest in the property, and not merely his interest in that portion of it which the buyer supposed he was purchasing (*d*).

Rights of finder against third parties.

1080. As against everyone save the true owner, the property in a chattel found in a public or *quasi*-public place vests in the finder (*e*). And the finder can successfully maintain an action against any person, except the true owner, who may dispossess him of it. A person possessed of a chattel has a good title as against every stranger, and anyone who takes it from the possessor, having no title in himself, is a wrongdoer, and cannot defend himself by showing that the real title was in some third person (*f*). Consequently a finder in actual possession of a chattel, the property of another, can recover its value in an action of trover against a wrongdoer who takes it from him (*g*). Moreover, as against the wrongdoer who dispossesses the actual finder, a jury may make every possible inference (*h*) not only as to the property in the chattel, but also as to its value; therefore, the presumption being, in the absence of the production of the chattel by the tort-feasor, that the property converted was of the finest quality, the damages may be assessed by the jury on that basis (*i*).

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public auction, a secretary in which he afterwards discovered, in a secret drawer, a purse containing money, which he appropriated to his own use. At the time of the sale neither the buyer nor the seller knew that the bureau contained anything whatever, and it was held by PARKE, B., at p. 631, that, "though there was a delivery of the secretary, and a lawful property in it thereby vested in the plaintiff, there was no delivery so as to give a lawful possession of the purse and money."

(*d*) *Merry* v. *Green* (1841), 7 M. & W. 623.

(*e*) *Bridges* v. *Hawkesworth* (1851), 21 L. J. (Q. B.) 75, where it was held that a person who found on the floor of a shop a packet of banknotes which had been accidentally dropped there by a stranger, who could not be found, was entitled to them as against everyone except the true owner, on the ground that the shop was a *quasi*-public place. But chattels found in the sea, whether *jetsam*, that is, sunk under water; *flotsam*, afloat on the surface of the water; or *ligan*, sunk under water, but tied to a buoy; or chattels cast ashore by shipwreck, belong to the Crown if the true owner fails to appear, unless the right to them has been granted to a subject. The same principle applies to the finding of whales or sturgeon, whether in the sea or cast ashore (1 Bl. Com. 290). See, further, titles ADMIRALTY; SHIPPING AND NAVIGATION.

(*f*) *Jeffries* v. *Great Western Rail. Co.* (1856), 5 E. & B. 802, *per* Lord CAMPBELL, C.J., at p. 805.

(*g*) *Ibid.*, *per* CROMPTON, J., at p. 807; *Armory* v. *Delamirie* (1722), 1 Str. 505, and 1 Sm. L. C. (11th ed.) 356. As to the right to sue in trover, see title TROVER AND CONVERSION.

(*h*) *Mortimer* v. *Cradock* (1843), 12 L. J. (C. P.) 166, *per* TINDAL, C.J., at p. 167.

(*i*) See *Mortimer* v. *Cradock*, *supra*, and *Armory* v. *Delamirie*, *supra*. As to cases where the maxim "Omnia præsumuntur contra spoliatorem" shifts the onus of proof, see *Williamson* v. *Rover Cycle Co.*, [1901] 2 Ir. R. 189, at p. 202, affirmed, [1901] 2 Ir. R. 615.

Chattels found on private property.

1081. Where chattels, other than treasure-trove (*j*), waifs (*k*), and estrays (*l*), are found on private property, the owner of the property, and not the finder, whether he is the servant of such owner or a stranger, is entitled to them and can maintain an action in detinue for their possession (*m*).

SUB-SECT. 4.—*Obligations of the Bailee.*

Measure of diligence.

1082. The measure of diligence demanded of a gratuitous depositary is as a rule that degree of diligence which men of common prudence generally exercise about their own affairs (*n*). In order, therefore, to maintain an action, in the case of a gratuitous deposit, the plaintiff must show that the defendant has been guilty of either a breach of orders, gross negligence, or fraud (*o*). As a general rule, the fact that he keeps chattels deposited with him in the same manner as he keeps his own is not sufficient to exempt a gratuitous bailee from liability, though this degree of care may be sufficient to repel the presumption of gross negligence (*p*). If, however, the subject-matter of the bailment is injured or destroyed

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(*j*) "Treasure-trove, is where any gold or silver in coin, plate, or bullion is found concealed in a house, or in the earth or other private place, the owner thereof being unknown, in which case the treasure belongs to the King or his grantee, having the franchise of treasure-trove. . . . If the owner, instead of hiding the treasure, casually lost it, or purposely parted with it in such a manner that it is evident he intended to abandon the property altogether, and did not purpose to resume it on another occasion, or if he threw it on the ground, or other public place, or in the sea, the first finder is entitled to the property as against every one but the owner, and the King's prerogative does not in this respect obtain. So that it is the hiding, and not the abandonment of the property that entitles the King to it." Chitty on Prerogatives, p. 152, cited by FARWELL, J., in *A.-G.* v. *Trustees of British Museum*, [1903] 2 Ch. 598, at p. 608. The right only passes to a subject by express grant, *ibid.* See also *A.-G.* v. *Moore*, [1893] 1 Ch. 676. See titles CONSTITUTIONAL LAW; CORONERS.

(*k*) That is, goods stolen and thrown away by the thief in his flight. They belong to the owner, unless he is guilty of default in pursuing the thief, when they belong to the Crown. But if they are not thrown away by the thief in his flight, but are hidden or left anywhere by him, they are not waifs, and belong in any case to the owner, 1 Bl. Com. 297.

(*l*) That is, animals found wandering in any manor or lordship, their owner being unknown. They belong to the Crown, or to the lord by special grant, unless claimed by their owner within a year and a day, 1 Bl. Com. 297; see title ANIMALS.

(*m*) *South Staffordshire Water Co.* v. *Sharman*, [1896] 2 Q. B. 44. Where the property on which the chattels are found is in the occupation of a lessee, they belong to the lessor, and not to the lessee, if they were there at the time the lease was granted, unless the terms of the lease are wide enough to cover them (*Elwes* v. *Brigg Gas Co.* (1886), 33 Ch. D. 562). But if they were not on the property at the time of the lease, they would seem to belong to the lessee on the principle laid down in *South Staffordshire Water Co.* v. *Sharman*, *supra*.

(*n*) *Giblin* v. *McMullen* (1869), L. R. 2 P. C. 317, *per* Lord CHELMSFORD, at p. 337; *Bullen* v. *Swan Electric Engraving Co.* (1907), 23 T. L. R. 258.

(*o*) *Moore* v. *Mourgue* (1776), 2 Cowp. 479; see *per* Lord MANSFIELD, at p. 480.

(*p*) *Giblin* v. *McMullen*, *supra*, *per* Lord CHELMSFORD, at p. 339. Compare *Doorman* v. *Jenkins* (1834), 2 A. & E. 256, in which case defendant, a coffee-house keeper, accepted from plaintiff the deposit of a sum of £32 10*s.* wherewith to take up a bill which would be presented there for payment, and placed it with money of his own to a much larger amount in a cash-box, which box he kept in the taproom, whence it was stolen on a Sunday, a day on which the room was open to the public while the rest of the house was closed; the jury were told by Lord DENMAN "that it did not follow from the defendant's having lost his own

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whilst in the custody of the bailee, although similar chattels belonging to him sustain no damage, it is conceived that the onus of proof lies on the bailee to show that he has not unduly favoured his own chattels (*q*).

Modified by locality.

The amount of diligence which is required may also be affected by the particular locality in which the bailment is effected. Thus in agricultural districts it is usual to leave barns, in which horses and other cattle are kept, unlocked at night; but in cities it would be deemed a great want of caution to act in the same manner (*r*).

Or by character of bailee.

If the bailee be notoriously either a dissipated, negligent, or imprudent man (*s*), and the bailor was aware of the fact, a presumption might be raised that the bailor only expected of him such lax amount of care as the bailee was in the habit of bestowing on his own chattels of a similar nature (*s*).

Or by nature of chattels.

In every case it is for the Court to decide whether there is any evidence of breach of duty on the part of the bailee, and if there is evidence of such breach of duty, the jury, after considering all the circumstances of the case, the nature, portability, value and character of the chattel, must decide whether such evidence is sufficient to justify the charge of negligence (*t*). The fact that the chattel was lost or injured whilst in the possession of the bailee raises a *primâ facie* presumption against him, but he may rebut it by proving that he was not to blame for the loss or injury, even if unable to show how it happened (*u*).

Acts of third parties.

Except by special agreement, a gratuitous depositary is not liable to his bailor for the misfeasances of third parties, whereby the chattel bailed is damaged or stolen, unless it can be shown that he was guilty of such negligence in its conduct or custody as to amount to gross negligence or fraud (*v*).

Effect of special contract.

1083. As in every other contract, a gratuitous bailee may, by special agreement, either limit or enlarge his legal liability for loss

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money at the same time as the plaintiff's that he had taken such care of the plaintiff's money as a reasonable man would ordinarily take of his own," and that the fact relied upon was no answer to the action if they believed that the loss had occurred from gross negligence, at the same time expressing his own opinion that it had *not*. The jury found for the plaintiff, and the verdict was upheld by the Court in banc. Lord DENMAN'S direction was expressly approved by the Privy Council in *Giblin* v. *McMullen* (1869), L. R. 2 P. C. 317, at p. 339, in which case, however, the Court said the plaintiff (Giblin) should have been nonsuited. See also *Nelson* v. *Macintosh* (1816), 1 Stark. 237; *Dartnall* v. *Howard* (1825), 4 B. & C. 345.

(*q*) Pothier, Prêt à Usage, s. 56.

(*r*) Story on Bailments, s. 13.

(*s*) *The William* (1806), 6 Ch. Rob. 316. See also *Coggs* v. *Bernard* (1703), 2 Ld. Raym. 909, *per* Lord HOLT, at p. 914, who says, "Suppose the bailee is an idle, careless, drunken fellow, and comes home drunk and leaves all his doors open, and by reason thereof the goods happen to be stolen with his own; yet he shall not be charged, because it is the bailor's own folly to trust such an idle fellow"—a *dictum* requiring the qualification given in the text.

(*t*) *Giblin* v. *McMullen*, *supra*. See also *Ryder* v. *Wombwell* (1868), L. R. 4 Exch. 32, at pp. 38 and 39.

(*u*) See note (*p*), p. 527, *ante*.

(*v*) *Coggs* v. *Bernard*, *supra*, at p. 913; *Nelson* v. *Macintosh*, *supra*, at p. 238; *Giblin* v. *McMullen*, *supra*; Jones on Bailments, pp. 46, 47; *Scott* v. *National Bank of Chester Valley* (1874), 10 Canada L. J. (N. S.) 182.

or damage to the chattel with which he has been intrusted by its owner. His liability then depends upon the terms of the contract (*x*). Consequently, if the bailee, in assuming possession of the chattel, expressly undertakes to keep it safely, he enlarges the measure of his responsibility, and by virtue of his express agreement may even make himself an insurer of it (*a*). Yet such a bailee's responsibility is limited in some respects. For though his undertaking to keep the chattel intrusted to him safely binds him to keep it safely against all perils and answer for accidents or theft (*b*), yet he will not be liable in the case of casualties happening by an act of God, such as fire or tempest, or by the King's enemies (*c*), and it is immaterial whether the contract is verbal or in writing (*d*).

Return of chattel to bailor.

1084. The bailee must return the chattel bailed to the bailor on demand, otherwise he may be sued in detinue or trover, and he is further liable for damages occasioned by loss of use during the period for which it is detained (*e*). He is equally responsible for it, notwithstanding it is no longer in his possession or custody, or in that of anyone over whom he can exercise control, if he parted with it without just cause (*f*). But he is excused if his failure to return it arises from its loss or destruction without any default on his part (*g*).

Deposits with bankers etc.

1085. Where a customer leaves valuables with his bankers (*h*) for safe custody, or allows a printer or any other trader to retain his plates or chattels, upon which the trader may have worked, it is not always easy to say whether the bailment is gratuitous (*depositum*) or one for reward to the bailee (*locatio custodiæ*). Although no specific charge for keeping is made, it may well be that the custodian gets indirectly some consideration for the service, either in being allowed to continue to keep the customer's account, or in the prospect of future work (*i*). As a general rule,

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(*x*) *Trefftz* v. *Canelli* (1872), L. R. 4 P. C. 277, 281 ; *Kettle* v. *Bromsall* (1738), Willes, 118, 121.

(*a*) Jones on Bailments, p. 43, where *Southcote's Case* (1601), 4 Co. Rep. 83 *b*, is discussed.

(*b*) *Kettle* v. *Bromsall*, *supra*.

(*c*) *Coggs* v. *Bernard* (1703), 2 Ld. Raym. 909, at p. 918.

(*d*) *Ibid*, at p. 915.

(*e*) *Nyberg* v. *Handelaar*, [1892] 2 Q. B. 202 ; *Cranch* v. *White* (1835), 1 Bing. (N. C.) 414, 420 ; *Cullen* v. *Barclay* (1881), 10 L. R. Ir. 224.

(*f*) *Jones* v. *Dowle* (1841), 9 M. & W. 19, *per* PARKE, B., at p. 20; *Wilkinson* v. *Verity* (1871), L. R. 6 C. P. 206.

(*g*) *Taylor* v. *Caldwell* (1863), 3 B. & S. 826, *per* BLACKBURN, J., at p. 838.

(*h*) *Giblin* v. *McMullen* (1869), L. R. 2 P. C. 317, where bankers with whom the plaintiff's testator had deposited for safe custody a box (of which he kept the key) containing railway debentures, which were stolen by the bankers' cashier, who had the keys of the strong room, were found to be gratuitous bailees, as were the bankers in *Scott* v. *National Bank of Chester Valley* (1874), 10 Canada L. J. (N. S.) 182 ; while those in *Re United Service Co., Johnston's Claim* (1871), 6 Ch. App. 212, were held to be bailees for reward. See also title BANKERS AND BANKING, pp. 627 *et seq.*, *post*. For forms applicable to deposit of valuables with bankers, see Encyclopædia of Forms, Vol. II., p. 471.

(*i*) *Bullen* v. *Swan Electric Engraving Co.* (1906), 22 T. L. R. 275, *per* WALTON, J. at p. 277, affirmed (1907), 23 T. L. R. 258. See also title PRESS AND PRINTING.

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however, it appears that such persons are to be considered as gratuitous bailees, on whom the duty lies of taking such care as a reasonable owner would take of his own property of a similar kind (*j*).

SUB-SECT. 5.—*User of Chattel.*

Effect of using chattel.

1086. The bailee is precluded from using the chattel bailed for his own personal advantage in any manner whatsoever without the consent of the bailor, express or implied, unless such use is needful for its preservation (*k*). Apart from such necessary use, if the bailee apply the chattel to any purpose other than that of bare custody he becomes responsible for any loss or damage resulting from his breach of good faith (*l*), except where the cause of the loss or damage is independent of his acts and is inherent in the chattel itself (*m*). The act of the bailee in doing something inconsistent with the terms of the contract terminates the bailment, causing the possessory title to revert to the bailor, and entitling him to maintain an action of trover (*n*).

A fortiori this rule applies when the unwarranted action of the bailee results either in the destruction or permanent alteration in character of the thing bailed (*o*).

Opening of receptacle.

If the chattel deposited is contained in a sealed or locked receptacle, the depository has no right to open it, and it is a breach of the confidential relation on which this contract is based if he does so unnecessarily (*p*).

Consequence of breach of duty.

1087. If a bailee deals with the chattels intrusted to him in a way not authorised by the bailor, he takes upon himself the risk of so doing.

Place of deposit.

If, therefore, the bailee without necessity, and without the permission of the bailor, fails to keep the chattel intrusted to him in the place where he has undertaken to keep it, that is, apart from express agreement, in the place where he himself usually keeps his own chattels of a similar description, he becomes by reason of his breach of duty an insurer of the chattel, and is liable to the bailor for any loss or damage caused thereby (*q*), unless he can show that such loss or damage did not arise out of his breach of duty, but must have taken place as inevitably at the one place as at the other (*r*).

(*j*) *Bullen* v. *Swan Electric Engraving Co.* (1906), 22 T. L. R. 275, affirmed (1907), 23 T. L. R. 258.

(*k*) *Re Tidd*, [1893] 3 Ch. 154, where money was handed to be taken care of, but with the intention that the bailee might use it. NORTH, J., held (p. 156) that it "was received, not as a loan, but as a trust for safe custody."

(*l*) Pothier, Contrat de Dépôt, ss. 34, 35.

(*m*) *Lilley* v. *Doubleday* (1881), 7 Q. B. D. 510, *per* GROVE, J., at p. 511.

(*n*) *Fenn* v. *Bittleston* (1851), 21 L. J. (EX.) 41.

(*o*) *Wilkinson* v. *Verity* (1871), L. R. 6 C. P. 206.

(*p*) Pothier, Contrat de Dépôt, s. 38. See also *R.* v. *Robson* (1861), 31 L. J. (M. C.) 22.

(*q*) *Ibid.*; *Mytton* v. *Cock* (1738), 2 Str. 1099.

(*r*) *Lilley* v. *Doubleday*, *supra*, at p. 511; *Davis* v. *Garrett* (1830), 6 Bing. 716, *per* TINDAL, C.J., at p. 724.

SECT. 2.—*Mandate.*

SUB-SECT. 1.—*In General.*

1088. Mandate, or *mandatum*, is another species of gratuitous bailment. It may be defined as a bailment of a specific chattel in regard to which the bailee engages to do some act without reward (*s*). Here the safe custody of the chattel deposited is ancillary to an undertaking by the bailee to do some act to it, or to perform some service in connection with it (*t*). Thus the great distinction between mandate and deposit is that the former lies in feasance and the latter in custody (*u*). Definition of mandate.

In this form of bailment confidence in the capacity, skill, and honour of the bailee duly to perform the act or employment undertaken by him, and not merely or chiefly his promise to safeguard the chattels while in his charge, constitutes the consideration moving the owner to deliver it over into his custody (*x*). Consideration.

An executory contract of mandate is not enforceable by law, for a person undertaking to perform a voluntary act is not liable if he neglects to perform it at all (*a*).

1089. If the contract of mandate is contained in a written instrument which is expressed in ambiguous terms, and the bailee is in fact misled and adopts one interpretation when the bailor intended him to follow the other, then the bailor will be bound, and the bailee will be exonerated (*b*). Ambiguous contract.

In the case of impossible undertakings the bailee is not liable. The impossibility must be absolute and not relative, mere difficulty in execution or the violation of trade custom not being sufficient ground for excusing non-performance when once the employment is entered upon (*c*). Impossibility or difficulty of contract.

A contract of mandate for the performance of an immoral or illegal act cannot be enforced, as no Court will enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal. And it is immaterial whether or not the defendant has pleaded the illegality (*d*). Illegality.

SUB-SECT. 2.—*Obligations of the Mandatary.*

1090. The mandatary, equally with the depositary, is responsible to the bailor for any loss or damage to the chattel intrusted to Obligations.

(*s*) Story on Bailments, s. 137. And see Heinec., Pand., par. 3, lib. 17, s. 230, where Heineccius thus defines the contract: "Mandatum (a manûs datione dictum), quod est contractus consensualis, bonæ fidei quo alteri negotium gratis gerendum, committitur, et ab altero suscipitur."

(*t*) *Coggs* v. *Bernard* (1703), 2 Ld. Raym. 909, 918.

(*u*) Jones on Bailments, p. 53.

(*x*) *Coggs* v. *Bernard*, *supra*, at p. 919, and see Story on Bailments, s. 140; Pothier, Contrat de Mandat, c. 1.

(*a*) *Skelton* v. *London and North Western Rail. Co.* (1867), L. R. 2 C. P. 631, *per* WILLES, J., at p. 636; *Elsee* v. *Gatward* (1793), 5 Term Rep. 143, *per* Lord KENYON, C.J., at p. 148; and see *Coggs* v. *Bernard*, *supra*, at p. 919.

(*b*) Story on Agency, s. 74.

(*c*) *Tufnell* v. *Constable* (1838), 7 A. & E. 798.

(*d*) *Scott* v. *Brown, Doering, McNab & Co.*, [1892] 2 Q. B. 724, *per* LINDLEY, L.J., at p. 728, citing *Holman* v. *Johnson* (1775), Cowp. 341.

SECT. 2. Mandate.

him arising out of any breach of duty on his part in respect of its safe custody (*e*). Further, apart from special contract, he must act prudently and honourably, and exercise reasonable care and diligence in the conduct of the employment which he has undertaken; he must use such care and diligence as persons ordinarily use in their own affairs, and such skill as he possesses (*f*).

Representation of skill.

If a mandatary holds himself out as possessing exceptional skill by reason of his profession or occupation, and is in consequence trusted by the mandator for a particular task, he is liable for negligence if he fail to use such skill (*g*).

The public profession of an art is a representation that the professor possesses the requisite skill and ability. When, therefore, a skilled labourer, artisan, or artist is employed, he warrants impliedly that he is possessed of sufficient skill to perform the task that he undertakes, even if the undertaking be without reward (*h*).

Duty to account.

1091. A mandatary who receives moneys or chattels on account of his principal is bound to account for them (*i*); and if he deposits them in his own name, with other chattels of his own of a like nature, in the hands of a third party, he is liable to his principal for any loss or damage to them during the existence of such deposit, even if his principal was aware of his course of procedure, but did not assent to it (*i*).

When the return of the chattel bailed constitutes part of the obligation of the mandatary, he is bound to restore not only the chattel itself, but also all increments profits and earnings immediately derived from it (*k*). If, however, the mandate be to put out money at interest, the specific coins delivered to the mandatary are not to be returned, but he is bound to return their equivalent in value and interest thereon (*l*).

No secret profits.

The mandatary is also liable to account to the bailor for any secret profits which he may have received in respect of the conduct or management of the business which he has undertaken gratuitously to perform (*m*).

Misuse of chattel bailed.

1092. When a mandatary does some act to the chattel bailed unauthorised by the agreement made between himself and the

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(*e*) See p. 531, *ante*.

(*f*) *Beauchamp* v. *Powley* (1831), 1 Mood. & R. 38; *Beal* v. *South Devon Rail. Co.* (1864), 3 H. & C. 337, *per* CROMPTON, J., at p. 342; *Shiells* v. *Blackburne* (1789), 1 Hy. Bl. 159.

(*g*) *Shiells* v. *Blackburne*, *supra*, *per* HEATH, J., at p. 162. See *Bourne* v. *Diggles* (1814), 2 Chitt. 311; *O'Hanlon* v. *Murray* (1860), 12 Ir. C. L. R. 161; and *Wilson* v. *Brett* (1843), 11 M. & W. 113, where a skilled horseman riding gratuitously a horse to show it to a purchaser on behalf of the owner was held liable for injuring it by riding it on improper ground.

(*h*) *Harmer* v. *Cornelius* (1858), 5 C. B. (N. S.) 236; *Shiells* v. *Blackburne*, *supra*.

(*i*) *Massey* v. *Banner* (1820), 4 Madd. 413.

(*k*) Pothier, Contrat de Mandat, ss. 58—60: "Thus if animals are to be restored, their young also belong to the bailor. . . . If a vehicle has been delivered to be let for hire, the mandatary must account for the hire earned, as well as for the vehicle" (Story on Bailments, s. 194).

(*l*) Pothier, Contrat de Mandat, s. 59. Compare the case of *mutuum*, p. 540, *post*

(*m*) See *Kimber* v. *Barber* (1872), 8 Ch. App. 56, and title AGENCY, p. 189, *ante*

bailor, he becomes responsible for any subsequent loss or damage which may be caused to such chattel by his unwarranted act (*n*).

Duty to return.

1093. As a general rule, a mandatary is bound to redeliver to his principal the chattel intrusted to him upon the fulfilment of the purpose for which he received it; but if it has been destroyed or damaged without any default on his part, he will in the absence of special contract or some positive rule of law be exempt from any claim for damage or non-delivery (*o*).

SUB-SECT. 3.—*Delegation by Mandatary.*

Delegation.

1094. There is, as a general rule, no power of delegation in the contract of mandate, the legal presumption being that the undertaking is personal to the mandatary and cannot be by him handed over to another (*p*). But where in the ordinary course of business the custody would naturally devolve upon, or the acts be performed by, some servant or agent of the mandatary, delegation is permissible (*q*). And in such a case the bailee is not liable if any loss or damage happens to the chattel during the period of delegation, without any negligence on the part of his substitute (*r*).

SUB-SECT. 4.—*Obligations of the Mandator.*

Reimbursement.

1095. A mandatary is entitled to his actual disbursements and out-of-pocket expenses in connection with the service, as otherwise a gratuitous act would become a burden (*s*).

SECT. 3.—*Gratuitous Loan for Use.*

SUB-SECT. 1.—*In General.*

Commodatum.

1096. In *depositum* and *mandatum* the bailor has all the advantage of the bailment. In *commodatum*, however, the reverse is the case. *Commodatum* is a bailment where a chattel is lent by its owner to the bailee for the express purpose of conferring a benefit upon the latter, without any corresponding advantage to its owner.

Contract confined to personal chattels.

By our law this contract is confined to goods, chattels, or personal property, and does not, as under the civil law, extend to real estate (*t*). The loan of the use of real estate or chattels real is no more than a licence beneficially to occupy a tenement or other hereditament belonging to the licensor for a particular or indeterminate period (*u*). Consequently there can be no bailment of a structure affixed to real property (*x*).

(*n*) *Nelson* v. *Macintosh* (1816), 1 Stark. 237; *Miles* v. *Cattle* (1830), 4 Moo. & P. 630.

(*o*) Story on Bailments, s. 25.

(*p*) *Bringloe* v. *Morrice* (1676), 1 Mod. Rep. 210.

(*q*) *Lord Camoys* v. *Scurr* (1840), 9 C. & P. 383, where defendant, having received a mare to try, was held, *per* COLERIDGE, J., at p. 386, entitled to put a competent person on the mare to try her. See also title AGENCY, p. 170, *ante*.

(*r*) *Ibid.*

(*s*) Story on Bailments, s. 154.

(*t*) *Ibid.*, s. 223.

(*u*) *Williams* v. *Jones* (1865), 11 Jur. (N. S.) 483.

(*x*) *Quarman* v. *Burnett* (1840), 6 M. & W. 499 *per* PARKE, B., p. 511.

Gratuitous Loan for Use.

Obligations of borrower

1097. The lender must be taken to lend for the purpose of a beneficial use by the borrower. The borrower, therefore, is not responsible for reasonable wear and tear (*y*). But as he alone receives benefit from the contract, he is liable for negligence, however slight; and he is bound to exercise the utmost degree of care in regard to the chattel bailed (*z*) and anything that is accessory thereto (*a*).

Modified by circumstances.

What is proper diligence, and what constitutes neglect, in a borrower, in his custody of the chattel lent, depends upon the circumstances of each particular case, the nature of the chattel lent, and the character and occupation of the borrower (*b*).

Exceptions.

As a general rule, however, he is not liable if, without any default on his part, the performance of his contract becomes an absolute impossibility, or for loss or injury arising from the wrongful act of a third person which could not be reasonably foreseen or prevented, or from the results of external and irresistible violence (*c*). Consequently, if the borrower's house be destroyed by fire, and, owing to his exertions in saving his own chattels, he be unable to save the chattel borrowed by him, it is extremely doubtful whether he must compensate the owner for its destruction merely because he preferred his own property to that which had been lent to him for his benefit (*d*). A borrower, however, is usually liable

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(*y*) *Blakemore* v. *Bristol and Exeter Rail. Co.* (1858), 8 E. & B. 1035, *per* COLERIDGE, J., at p. 1051; *Pomfret* v. *Ricroft* (1669), 1 Saund. 321, 323.

(*z*) *Coggs* v. *Bernard* (1703), 2 Ld. Raym. 909, at p. 915, *per* HOLT. C.J.: "The borrower is bound to the strictest care and diligence to keep the goods so as to restore them to the lender, because the bailee has a benefit by the use of them, so if the bailee be guilty of the least neglect he will be answerable. . . . If the bailee [of a horse] put the horse in his stable, and he were stolen from thence, the bailee shall not be answerable for him; but if he or his servant leave the house or stable doors open, and the thieves take the opportunity of that and steal the horse, he will be chargeable because the neglect gave the thieves the occasion to steal the horse, . . . but yet he shall not be chargeable where there is such a force as he cannot resist"; see also *Vaughan* v. *Menlove* (1837), 3 Bing. (N. C.) 468, *per* TINDAL, C.J., at p. 475; Jones on Bailments, p. 64. This view of the measure of the responsibility of the borrower is also taken by Pothier, who says that it is not sufficient for the borrower to exert the same ordinary care which fathers of families are accustomed to use about their own affairs, but that he ought to exert all possible care, such as the most careful persons apply to their own affairs, and that he is liable, not only for a slight fault, but also for the slightest fault; that is, he is bound to bring to the custody all possible care (Pothier, Prêt à Usage, s. 48).

This superlative degree of carefulness (the *exactissima diligentia* of the Roman law) has, however, been doubted by some jurists, one of whom states, "The commodatory, or person to whom the thing is lent, is not obliged to answer for any uncontrollable force, or for the loss or damage of the thing which happens by any fortuitous cause, provided such accident does not intervene through his fault or neglect, though it is necessary that he should take the same care of the thing as every prudent man would take of his own goods, since this contract is entered into for his sake" (Ayliffe, Pand., book 4, tit. 16, p. 517).

(*a*) Jones on Bailments, 4th ed., p. 66.

(*b*) Wherever a hirer is responsible (as to which see *post*, p. 552), *à fortiori* a borrower is, and he may be responsible where a hirer is not, seeing that greater diligence is required of him.

(*c*) Pothier, Prêt à Usage, ss. 38—55, 56, and see note (*z*), *supra*.

(*d*) Pothier, Prêt à Usage, s. 56; Pothier, basing himself upon the Roman law, takes the view that he must compensate the owner, and Sir William Jones

to the lender for any loss or damage, if he borrowed the chattel from its owner merely for the purpose of saving his own chattels from risk of damage or destruction. But he may be exempt if he can prove that he had previously disclosed to its owner that his object in borrowing it was to enable him to avoid hazarding his own property (*e*).

Where loan has been offered.

1098. The borrower's liability, however, is qualified where a special contract is substituted for that imposed by the common law, and possibly also where there has been an offer of the chattel by the lender to the borrower, though the diminution of liability in this latter case has been denied (*f*).

Detention.

The borrower is liable if he detains the chattel from its owner after demand, or after the time agreed upon between them for its return has expired (*g*).

Expenses.

1099. If in his use of what is lent the borrower is put to any ordinary expense, such as feeding or shoeing a horse, inasmuch as it is he who derives advantage from the user, such expenditure must in the absence of agreement be borne by him (*h*).

As regards extraordinary expenses incurred by the borrower in the preservation of the chattel lent, whether arising from inherent defect, or viciousness peculiar to the chattel itself, or from circumstances altogether beyond his control, such as the tortious acts of third parties, it is doubtful whether they are to be paid by the lender and whether the borrower has a lien on the chattel for the amount of such charges if paid by him (*i*).

SUB-SECT. 3.—*Obligations of the Lender.*

Obligations of lender.

1100. If the lender is aware of any defect in the chattel which renders it unfit for the purpose for which it is lent, and fails to communicate the fact to the borrower, who in consequence is injured thereby, the borrower can recover against the lender damages for any injuries so caused (*j*). So if the chattel lent has been put on one side and not used for years, and is then lent without any intimation to the borrower of this fact, and in consequence of its being out of repair, injury is caused to the borrower, he can recover in an action against the lender (*k*). In order to fix the lender with liability, the use must be of a kind contemplated by

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accedes to this doctrine (Jones on Bailments, p. 69), but it is very doubtful if it is law in England. Compare Story on Bailments, ss. 245 *et seq.*

(*e*) Jones on Bailments, p. 70.

(*f*) Pothier, Prêt à Usage, s. 52. Compare note (*x*), p. 528, *ante*.

(*g*) Jones on Bailments, p. 70.

(*h*) *Handford* v. *Palmer* (1820), 2 Brod. & Bing. 359 ; 1 Domat, book 1, tit. 5, s. 3, art. 4.

(*i*) The French jurists (Pothier, Prêt à Usage, ss. 81—83 ; 1 Domat, book 1, tit. 5, s. 3, art. 4) and Sir William Jones say that the lender must pay such expenses (Jones on Bailments, p. 65). But it is thought that this is not the law of England. Compare Story on Bailments, ss. 273, 274.

(*j*) *Blakemore* v. *Bristol and Exeter Rail. Co.* (1858), 8 E. & B. 1035, *per* COLERIDGE, J., at p. 1051 ; *Coughlin* v. *Gillison*, [1899] 1 Q. B. 145, *per* A. L. SMITH, L.J., at p. 147 ; *MacCarthy* v. *Young* (1861), 6 H. & N. 329.

(*k*) *Coughlin* v. *Gillison*, *supra*, *per* RIGBY, L.J., at p. 148.

SECT. 3. Gratuitous Loan for Use.

him at the time of lending, or subsequently authorised by him (*l*). Further, he is not liable for injuries occasioned by defects of which he was unaware (*m*).

SUB-SECT. 4.—*User of Chattel lent.*

Use of chattel.

1101. The borrower must use the chattel only for the particular purpose for which it was lent to him, and if he uses it for any materially different purpose he becomes liable as an insurer (*n*).

Use must be personal.

Generally speaking, the permission accorded by the owner of a chattel to a borrower to use it is purely personal, and cannot, except by the express consent of the owner, be extended to a third party (*o*). The reason for this limitation is obvious. The chattel is lent by the owner to a person with whose capacity and honesty he is presumably familiar. Should the borrower therefore license a third party to use it, the bailment is thereby determined, and the borrower becomes responsible for any accident that may happen (*p*).

Exceptions.

When, however, the actual user by a third party is necessary for the reasonable enjoyment of the chattel lent, the mere fact of its being lent for use implies a limited power of delegation in the borrower (*q*). Thus the loan of a traction engine, a threshing machine, or some other piece of machinery, must, in the majority of cases, of necessity imply both superintendence and use by some person other than the actual and responsible borrower (*r*).

SECT. 4.—*Gratuitous Quasi-bailment.*

SUB-SECT. 1.—*Mutuum.*

Mutuum distinguished from *commodatum.*

1102. *Mutuum* is the loan of something which is not to be returned in specie, but which is to be replaced by something similar and equivalent (*s*). The contract of *mutuum* differs from that of *commodatum*, in that in the latter a bare possession of the chattel lent, as distinguished from the property in it, vests in the

(*l*) *Blakemore* v. *Bristol and Exeter Rail. Co.* (1858), 8 E. & B. 1035, *per* COLERIDGE, J., at p. 1051.

(*m*) *MacCarthy* v. *Young* (1861), 6 H. & N. 329; *Coughlin* v. *Gillison*, [1899] 1 Q. B. 145.

(*n*) Bac. Abr. Bailment, C; Pothier, Prêt à Usage, s. 21. See also *Coggs* v. *Bernard* (1703), 2 Ld. Raym. 909, *per* HOLT, C.J., at p. 915, "if a man should lend another a horse to go westward or for a month, if the bailee go northward or keep the horse above a month, if any accident happen to the horse in the northern journey, or after the expiration of the month, the bailee will be chargeable."

The French rule is the same (Code Civil, art. 1881).

(*o*) Story on Bailments, s. 234.

(*p*) *Bringloe* v. *Morrice* (1676), 1 Mod. Rep. 219; and see *Gwilliam* v. *Twist*, [1895] 2 Q. B. 84.

(*q*) Story on Bailments, s. 234. Story says that if A. lends his horse to B. to make a certain ride, B. alone may ride him, but that if he lends his horses and carriage to B. for a month the user of them by B.'s family may be fairly presumed to be contemplated by A., and without doubt B.'s servants could ride or drive the horses for properly exercising them.

(*r*) See *Lord Camoys* v. *Scurr* (1840), 9 C. & P. 383, where the defendant was held entitled to put up a groom to ride a mare lent to defendant for trial.

(*s*) Justin. Inst. lib. 3, tit. 14.

borrower, the true ownership in it still remaining in the lender; whereas in *mutuum* the absolute property in the chattel passes from the lender to the borrower.

Mutuum is confined to such chattels as are intended to be consumed in the using and are capable of being estimated by number, weight, or measure, such as corn, wine, or money (*t*). Consumable chattels.

The essence of the contract in the case of such loans is, not that the borrower should return to the lender the identical chattels lent —for such specific return would ordinarily render the loan valueless —but that upon demand or at a fixed date the lender should receive from the borrower an equivalent quantity of the chattels lent. Thus, if money be advanced, its value in money must be returned, if corn or wine be lent, then similar corn or wine of an equivalent amount; nor will an enhancement in the commercial value of the commodity lent justify the borrower in tendering a less quantity than he actually received (*u*).

It is not, however, a contract of *mutuum* if a bargain is made by which an equivalent value of wine is to be returned for oil, or flesh for corn, such an exchange constituting a contract of barter, and therefore coming within a different category altogether (*v*). Barter.

1103. As a necessary consequence of the absolute transfer of the property in, as well as the custody of, the chattel lent, the borrower is not, by reason of its accidental loss or destruction, released from his obligation to return to the owner its equivalent in kind upon demand, for it is the borrower's property, and the rule is *Ejus est periculum, cujus est dominium* (*w*). Obligations of borrower.

An actual demand is, however, a condition precedent to an action for the non-delivery of the equivalent; just as where a man deposits money in the hands of another, to be kept for his use, the possession of the bailee is deemed the possession of the owner until an application and refusal, or other denial of the right. The Statute of Limitations runs from the date of such demand only (*x*). Demand for equivalent.

SUB-SECT. 2.—*Pro-mutuum.*

1104. Whenever a person, acting under a misapprehension as to an existing fact or state of facts, delivers to another a chattel which cannot be restored in specie, there arises the *quasi*-contract of *pro-mutuum*, which imposes upon the recipient the obligation to restore its equivalent. *Pro-mutuum* differs from *mutuum* in that this obligation is imposed by law, whereas in *mutuum* it arises out of the voluntary agreement between the lender and the borrower; it resembles *mutuum* in that the subject-matter to which it relates *Pro-mutuum.*

(*t*) 1 Domat, book 1, tit. 6, s. 1; Story on Bailments, s. 283.

(*u*) 1 Domat, book 1, tit. 6, s. 1, art. 9.

(*v*) 1 Domat, book 1, tit. 6, s. 1, art. 10; Jones on Bailments, pp. 64, 102. As to barter, see titles PERSONAL PROPERTY; SALE OF GOODS.

(*w*) Story on Bailments, s. 283; Doctor and Student, ed. by Murchall, edition 1815, 2nd dial. chap. xxxviii.

(*x*) *Re Tidd*, [1893] 3 Ch. 154, *per* NORTH, J., at p. 156, approving Pothier on the Law of Obligations, ed. by Evans, Vol. II., p. 126; and see *South Australian Insurance Co.* v. *Randell* (1869), L. R. 3 P. C. 101, and, generally, title LIMITATION OF ACTIONS.

SECT. 4. Gratuitous Quasi-bailment.

must always consist of money or fungibles, *i.e.*, chattels which, owing to their being consumed in the using, cannot be restored in specie.

The liability only arises out of an actual delivery of such chattels by one person to another, and the repayment of the obligation in chattels answering to the generic description of those advanced will always satisfy it. Thus if one man owe another twenty bushels of wheat, and by a mistake as to the amount of his indebtedness, pay to his creditor thirty bushels in satisfaction of the supposed liability, the recipient is a bailee to his quondam debtor of the ten bushels so overpaid, and, as such, is bound to account to him for the surplus. And a similar liability arises if a man discharge a debt twice over, or pay the debt of another under a mistaken assumption in point of fact as to his liability (*y*); the general rule in such cases being that where money is paid to another under a mistake of fact, an action will lie to recover it back (*z*). As, however, the original cause of the obligation is the mistake of the payer, the recipient is, as a rule, bound only to repay to him the actual amount overpaid, without interest (*a*).

A demand, moreover, is a condition precedent to an action (*b*).

SUB-SECT. 3.—*Intermixture of Chattels.*

Intermixture by agreement.

1105. Where the chattels of two persons are intermixed by consent or agreement (*c*), so that the several portions can be no longer distinguished, the proprietors have an interest in common in proportion to their respective shares (*d*).

By fraud.

But if one man wilfully intermixes his chattels with those of another without the approbation or knowledge of the latter, the law, to guard against fraud, refuses to allow him any interest in the result of the intermixture and gives the whole to the latter (*e*).

By accident.

Where, however, a bailee, by accident or inadvertence, mixes the chattels confided to him by the bailor with his own, or where the accidental intermixture results from the act of God or of an unknown third party (*f*), the mixture, if it is composed of substances similar in kind and quality, belongs to the bailor and bailee as tenants in common, in proportion as each contributed to the

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(*y*) Pothier, Contrat de Prêt de Consomption, ss. 132—134, and see *Cox* v. *Prentice* (1815), 3 M. & S. 344; *Newall* v. *Tomlison* (1871), L. R. 6 C. P. 405; *Milnes* v. *Duncan* (1827), 6 B. & C. 671.

(*z*) *Kelly* v. *Solari* (1841), 9 M. & W. 54, *per* PARKE, B., at p. 58.

(*a*) Pothier, Contrat de Prêt de Consomption, s. 138.

(*b*) *Kelly* v. *Solari*, *supra*.

(*c*) Justin. Inst., lib. 2, tit. 1, s. 28.

(*d*) 2 Bl. Com. 405.

(*e*) *Lupton* v. *White* (1808), 15 Ves. 432, *per* Lord ELDON, at p. 440; 2 Bl. Com., *supra*; *Colwill* v. *Reeves* (1811), 2 Camp. 575, *per* Lord ELLENBOROUGH, at p. 576: "If a man puts corn into my bag, in which there is before some corn, the whole is mine, because it is impossible to distinguish what was mine from what was his; but it is impossible that articles of furniture can be blended together so as to create the same difficulty."

(*f*) *Smurthwaite* v. *Hannay*, [1894] A. C. 494, *per* Lord RUSSELL OF KILLOWEN, C.J., at p. 505, approving *Spence* v. *Union Marine Insurance Co.* (1868), L. R. 3 C. P. 427. See also Mackeldey's Modern Civil Law (special part), book 1, s. 270.

combination, any cost attendant on its separation into shares being borne by the bailee (*g*).

But if there be a diversity in quality in the substances so intermixed, the whole heap should be divided and a greater allowance made to the owner whose substance is better or finer than that of the other (*h*).

Part III.—Bailment for Valuable Consideration.

SECT. 1.—*Hire of Custody.*

SUB-SECT. 1.—*Nature of the Contract.*

Hire of custody distinguished from deposit

1106. The hire of custody (*locatio custodiæ*) is a contract analogous to that of deposit (*i*).

The two contracts, however, materially differ in that whilst in deposit there is no reciprocity of advantage, all the benefit being conferred on the bailor, in the contract of hire of custody there is a mutual advantage to both the owner of the chattel and the person who undertakes to keep it safely for reward (*j*).

Its features.

The contract of custody for reward, which is consensual and need not be evidenced by writing, necessitates for its inception the concurrence of the four following conditions:—

(1) The subject-matter must be a chattel;

(2) The possession of the chattel must be capable of transference from one party to the other;

(3) The custody of the chattel must be the object of the transference of possession;

(4) The transference of the custody must be temporary and not permanent (*k*).

Given these conditions, the obligation of the custodian for hire commences as soon as he by any overt act evidences an intention of exercising responsibility over the chattel intrusted to him. Such, for instance, would be the act of applying a crane to raise goods into a warehouse (*l*).

(*g*) *Buckley* v. *Gross* (1863), 3 B. & S. 566, *per* BLACKBURN, J., at p. 575; *Jones* v. *Moore* (1841), 4 Y. & C. (EX.) 351.

(*h*) Ayliffe, Pand., book 3, tit. 3, p. 291.

(*i*) Innkeepers stand on a different footing from ordinary bailees, and their responsibility amounts to an insurance of safety. See title INNS AND INNKEEPERS.

(*j*) Story on Bailments, s. 442. The reward need not be money, it may be money's worth, and there need not be a specific reward for the custody if there is a reward for services which in fact cover the custody.

(*k*) Pothier, Contrat de Louage, s. 6 (*mutatis mutandis*).

(*l*) *Chapman* v. *Great Western Rail. Co.* (1880), 5 Q. B. D. 278; *Cailiff* v. *Danvers* (1792), Peake, 155; *Mitchell* v. *Lancashire and Yorkshire Rail. Co.* (1875), L. R. 10 Q. B. 256; *Thomas* v. *Day* (1803), 4 Esp. 262.

Obligations of bailee.

1107. The contract implies, in the absence of a special agreement, that the custodian will use due care and diligence in keeping the chattel, in return for a reasonable compensation to be paid by the owner (*m*).

But the common law liability of the custodian may be enlarged or diminished by the conditions contained in a special contract entered into by the parties. Such conditions will be construed strictly, and the bailee will be liable for any substantial deviation therefrom resulting in injury to the chattel (*n*).

If the custodian in either case deals with the chattel intrusted to him in a way not authorised by the bailor, he takes upon himself the risk of so doing, and is liable for any loss or damage except such as arises from causes independent of his acts and inherent in the chattel itself (*o*).

The effect of the payment for the accommodation afforded imposes upon the bailee obligations more stringent in their character than those raised where the custody is a purely gratuitous one (*p*).

Apart from special contract, a custodian for reward (*q*) is not an insurer of the chattel confided to him. Consequently the care to be exercised by such a person in its custody is no more than that which a careful and vigilant man would exercise in the custody of his own chattels of a similar description and character (*r*).

A custodian is therefore bound to see that the chattel intrusted to him is in proper custody (*s*) and properly kept (*t*), and if it

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(*m*) *Buxton* v. *Baughan* (1834), 6 C. & P. 674.

(*n*) *Harris* v. *Great Western Rail. Co.* (1876), 1 Q. B. D. 515, *per* BLACKBURN, J., at p. 530; *Van Toll* v. *South Eastern Rail. Co.* (1862), 12 C. B. (N. S.) 75, *per* ERLE, C.J., at p. 84.

(*o*) *Lilley* v. *Doubleday* (1881), 7 Q. B. D. 510, *per* GROVE, J., at p. 511; *Streeter* v. *Horlock* (1822), 1 Bing. 34. In *Lilley* v. *Doubleday* the defendant contracted to warehouse certain goods for the plaintiff at a particular place, but, contrary to the terms of his agreement, he warehoused a part of them at another place, where, without any negligence on his part, they were destroyed. The Court held the defendant liable, and the damage not too remote.

(*p*) See *Brabant & Co.* v. *King*, [1895] A. C. 632; *Searle* v. *Laverick* (1874), L. R. 9 Q. B. 122.

(*q*) Amongst such custodians are included agisters of cattle, warehousemen, forwarding merchants and wharfingers (Story on Bailments, s. 442).

(*r*) *Garside* v. *Proprietors of Trent and Mersey Navigation* (1792), 4 Term Rep. 581; *Finucane* v. *Small* (1795), 1 Esp. 315; *Smith* v. *Cook* (1875), 1 Q. B. D. 79; *Coggs* v. *Bernard* (1703), 2 Ld. Raym. 909, *per* Lord HOLT at p. 918, "He is only to do the best he can. And if he be robbed it is a good account. If he receives money and keeps it locked up with reasonable care he shall not be answerable for it though it be stolen"; *Searle* v. *Laverick*, *supra*.

(*s*) *Quiggan* v. *Duff* (1836), 1 M. & W. 174, *per* Lord ABINGER, C.B., at p. 180. Compare *Re United Service Co.*, *Johnston's Claim* (1871), 6 Ch. App. 212.

(*t*) *Brabant & Co.* v. *King*, *supra*, where custodians of chattels for reward stored them at such a level that on a flood coming they were destroyed. See *per* Lord WATSON at p. 640: the bailees "were under a legal obligation to exercise the same degree of care towards the preservation of the goods

is injured through his negligence, he will not be excused on the ground that it has subsequently been destroyed by inevitable mischance (*u*).

Acts of servants.

1108. He is further responsible to the owner of the chattel intrusted to him not only for the negligence of his agents or servants (*v*), but also for their acts of fraud or intentional malice (*w*), provided that such acts were committed by them within the apparent scope of their authority, either in the supposed interest of their principal or master or in the course of their employment (*x*). But such a custodian incurs no responsibility where an act of fraud or negligence is committed by a servant or agent not in the course of his employment or outside the scope of his authority (*y*).

Onus of proof.

1109. When a chattel intrusted to a custodian is lost, injured, or destroyed, the onus of proof is on the custodian to show that the injury did not happen in consequence of his neglect to use such care and diligence as a prudent or careful man would exercise in relation to his own property (*z*). If he succeeds in showing this, he is not bound to show how or when the loss or damage occurred (*a*). But where a custodian declines either to produce the chattel intrusted to him, when required to do so by the owner, or to explain how it has disappeared, such refusal amounts *primâ facie* to evidence of breach of duty on his part, and throws on him the onus of showing that he exercised due care in the custody of the chattel and in the selection of the servants employed by him in the warehousing (*m*).

Fire and insurance.

Apart from special contract, a custodian is not responsible to the owner of the chattel intrusted to him in case of its destruction by fire (*b*), although if he insures it he has such an insurable

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intrusted to them from injury which might reasonably be expected from a skilled storekeeper acquainted with the risks to be apprehended either from the character of the storehouse itself or of its locality, and that obligation included not only the duty of taking all reasonable precautions to obviate these risks, but the duty of taking all proper measures for the protection of the chattels when such risks were imminent or had actually occurred." But if the bailee provide a reasonably fit place for storing the chattels he is not responsible for such place proving defective, under exceptional and unlooked-for stress (*Searle* v. *Laverick* (1874), L. R. 9 Q. B. 122; *Broadwater* v. *Blot* (1817), Holt, N. P. 547).

(*u*) Story on Bailments, s. 450 a.

(*v*) *Randleson* v. *Murray* (1838), 8 A. & E. 109.

(*w*) *Barwick* v. *English Joint Stock Bank* (1867), L. R. 2 Exch. 259, 265; *Mackay* v. *Commercial Bank of New Brunswick* (1874), L. R. 5 P. C. 394; *Dyer* v. *Munday*, [1895] 1 Q. B. 742; *Coppen* v. *Moore* (No. 2), [1898] 2 Q. B. 306.

(*x*) *Ibid.*; *Beard* v. *London General Omnibus Co.*, [1900] 2 Q. B. 530.

(*y*) *Ibid.*; *Sanderson* v. *Collins*, [1904] 1 K. B. 628 (plaintiff while repairing defendant's carriage lent him another to use, and defendant's coachman took the carriage out for his own purposes and without his master's knowledge, and through his negligence it was injured, and it was held that defendant was not responsible). See also titles AGENCY, pp. 211, 212, *ante*, and MASTER AND SERVANT.

(*z*) *Mackenzie* v. *Cox* (1840), 9 C. & P. 632; *Reeve* v. *Palmer* (1858), 5 C. B. (N. S.) 84; *Phipps* v. *New Claridge's Hotel, Ltd.* (1905), 22 T. L. R. 49.

(*a*) *Bullen* v. *Swan Electric Engraving Co.* (1907), 23 T. L. R. 258.

(*m*) *Platt* v. *Hibbard* (1827), 7 Cowen, 497, *per* WALWORTH, J., at p. 500 (an American case). See also note (*p*), p. 527, *ante*.

(*b*) *Sidaways* v. *Todd* (1818), 2 Stark. 400, *per* ABBOTT, J., at p. 401; *Maving* v. *Todd* (1815), 4 Camp. 225.

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interest in it that, as against the insurers, he is entitled to recover its full value (*c*). A custodian who recovers insurance money occupies the position of a trustee to the owner of the chattel covered by the insurance for its value, less his agreed or reasonable charges for warehousing; and after demand by the owner and refusal by the custodian to account for the proceeds, an action will lie against him at the suit of the owner for money had and received (*d*).

Work to be done in addition to custody.

1110. Frequently the obligations of the custodian in the ordinary course of business are varied and enhanced by the addition of a contract on his part to perform some act in connection with the chattel whereby its character is altered or improved (*e*). This additional undertaking raises a series of obligations between the owner of the chattel and the bailee which are collateral to the bare obligation of safe custody. In such cases a further undertaking on the part of the bailee will be implied to exercise capacity and fidelity in the conduct of the particular employment for which it was intrusted to him. For when a person undertakes for reward to perform any work, he must be considered as bound to use a degree of diligence adequate to the performance of it (*f*).

Measure of damages.

1111. In an action against a custodian for negligence (*g*) a plaintiff cannot, apart from special contract, recover damages beyond the actual value of the chattel lost. There is no implied undertaking on the part of a mere custodian to be answerable for consequential damages; and the simple deposit of chattels with him in the ordinary course of business raises no such notice by implication as will render him liable to their owner for damages for loss of market or other similar contingencies (*h*).

SUB-SECT. 3.—*Liability to Distress.*

Liability to distress.

1112. Chattels received for custody by a person who does not carry on a business in which receiving such chattels is usual, are liable to be distrained for the rent of the premises on which they are stored, but chattels received in the course of a particular trade to be dealt with, wrought, or managed, in accordance with that trade by a tenant of premises, are exempted from distress (*i*); the

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(*c*) *Waters* v. *Monarch Life Assurance Co.* (1856), 5 El. & Bl. 870. See also *Ex parte Bateman, Re Routledge* (1856), 8 De G. M. & G. 263. But the chattels destroyed must be covered by the terms of the policy (*North British and Mercantile Insurance Co.* v. *Moffatt* (1871), L. R. 7 C. P. 25). See, further, title INSURANCE.

(*d*) *Sidaways* v. *Todd* (1818), 2 Stark. 400.

(*e*) As in *Bevan* v. *Waters* (1828), 3 C. & P. 520; *Forth* v. *Simpson* (1849), 13 Q. B. 680.

(*f*) Jones on Bailments, 4th ed. pp. 98, 99.

(*g*) Such action is an action founded on tort within the meaning of the County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 116 (*Turner* v. *Stallibrass*, [1898] 1 Q. B. 56).

(*h*) *Anderson* v. *North Eastern Rail. Co.* (1861), 4 L. T. 216. Compare the liability of a common carrier who may be liable for loss of market or other consequential damage (*Simpson* v. *London and North Western Rail. Co.* (1876), 1 Q. B. D. 274); see title CARRIERS.

(*i*) *Swire* v. *Leach* (1865), 18 C. B. (N. S.) 479. See also title DISTRESS.

general principle being that when the trade or business could not be carried on unless the chattels were privileged from distress, then they are exempt (*j*).

SUB-SECT. 4.—*Lien of the Bailee*

Lien.

1113. As a general rule, a custodian for reward has, in the absence of some special agreement, no lien (*k*) for his charges upon the chattel intrusted to him for safe custody alone (*l*), though he acquires a lien if he agrees, in addition, to expend labour and skill upon it (*m*), unless the terms of the contract exclude such lien (*n*). But by implication of law wharfingers (*o*), and possibly warehousemen (*p*), have a general lien (*k*) for their charges upon the chattels of their bailors, but in the case of wharfingers, in any particular district this implication may be rebutted by local usage (*q*). This general lien takes precedence of claims by the Crown (*r*), and the costs of defending it may be added to the security (*s*).

General lien.

In the case of factors, bankers and stockbrokers, in the absence of a special contract (*t*), which is always construed strictly against the claimant (*u*), a general lien is presumed; consequently such bailees may retain chattels or securities deposited with them, not

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(*j*) *Miles* v. *Furber* (1873), L. R. 8 Q. B. 77, *per* ARCHIBALD, J., at p. 83. Chattels of bailors have been held privileged from distress when held in the course of business by warehousemen and wharfingers (*Miles* v. *Furber*, *supra*; *Thompson* v. *Mashiter* (1823), 1 Bing. 283); factors or agents for sale (*Gilman* v. *Elton* (1821), 3 Brod. & Bing. 75; *Findon* v. *M'Laren* (1845), 6 Q. B. 891); auctioneers, if on their own premises (*Williams* v. *Holmes* (1853), 8 Exch. 861), otherwise not (*Lyons* v. *Elliott* (1876), 1 Q. B. D. 210); and tradesmen who have to do work on the [illegible] (*Simpson* v. *Hartopp* (1744), Willes, 512, 1 Smith, L. C. (11th ed.), p. 437; *Muspratt* v. *Gregory* (1838), 3 M. & W. 677). Agisters and livery stable-keepers are probably on the same footing as warehousemen (*Parsons* v. *Gingell* (1847), 4 C. B. 545, deciding against the privilege, being disapproved in *Miles* v. *Furber*, *supra*). Live stock taken in to be agisted by a tenant are privileged from distress beyond the amount of the agreed price remaining due to the tenant (Agricultural Holdings (England) Act, 1883 (46 & 47 Vict. c. 61), s. 45, and compare *London and Yorkshire Bank* v. *Belton* (1885), 15 Q. B. D. 457, with *Masters* v. *Green* (1888), 20 Q. B. D. 807; see title ANIMALS, p. 384, *ante*).

(*k*) See also p. 561, *post*.

(*l*) *Jackson* v. *Cummins* (1839), 5 M. & W. 342; *Smith* v. *Dearlove* (1848), 6 C. B. 132.

(*m*) *Bevan* v. *Waters* (1828), 3 C. & P. 520; *Scarfe* v. *Morgan* (1838), 4 M. & W. 270.

(*n*) *Forth* v. *Simpson* (1849), 13 Q. B. 680.

(*o*) *Jones* v. *Peppercorne* (1858), 1 John. 430, approved in *Re London and Globe Finance Corporation*, [1902] 2 Ch. 416. See also *Rushforth* v. *Hadfield* (1806), 7 East, 224; *Bock* v. *Gorrissen* (1860), 2 De G. F. & J. 434, *per* Lord CAMPBELL, L.C., at p. 443.

(*p*) *R.* v. *Humphery* (1825), McL. & Y. 173; but see *Leuckhart* v. *Cooper* (1836), 3 Bing. (N. C.) 99. There are statutory definitions of the expressions warehouseman, wharfinger, warehouse, and wharf, which will be found under titles REVENUE; SALE OF GOODS; SHIPPING AND NAVIGATION.

(*q*) *Holderness* v. *Collinson* (1827), 7 B. & C. 212. See also title SALE OF GOODS, and, for proof of usages, see title EVIDENCE.

(*r*) *R.* v. *Humphery*, *supra*.

(*s*) *Moet* v. *Pickering* (1878), 8 Ch. D. 372, *per* COTTON, L.J., at p. 376.

(*t*) *Bock* v. *Gorrissen*, *supra*. See titles AGENCY; BANKERS AND BANKING; STOCK EXCHANGE.

(*u*) *Kinnear* v. *Midland Rail. Co.* (1868), 19 L. T. 387.

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only as security for the particular loan in respect of which they were so deposited, but also for a general balance of account (*v*). A similar rule to the above also prevails, as part of the law merchant, in certain other trades, although in all such cases, the custom establishing the existence of a general lien must be strictly proved (*w*).

Particular lien.

In the absence of a particular trade custom (*x*), a specific lien on a particular chattel cannot be enlarged so as to include a general balance of account (*y*). And if in such a case after demand by the bailor for the particular chattel, coupled with tender of the specific amount due thereon, the bailee refuse to re-deliver, not only is his lien gone (*z*), but he is also liable to the true owner in an action of trover (*a*). The mere demand by the bailee of a sum in excess of that which is really due to him does not usually dispense with the necessity of a tender by the bailor of the amount actually due, especially if the bailee particularises his demand, and claims to hold the chattel for the correct sum to which he is entitled as well as for the excessive one (*b*).

Expense of keeping.

A bailee who keeps a chattel to enforce his lien on it cannot charge for keeping it (*c*).

Railway company.

A railway company has a lien on all chattels deposited with it for safe custody (*d*) for the amount of its reasonable charges. This lien applies not only against the person who actually deposited the chattel, but also against the true owner of the chattel, or a third party, even although they may not have had any privity with the original contracting parties (*e*).

Loss of lien.

1114. The lien is irretrievably gone if possession of the chattel be lost to the bailee (*f*), or if he do anything amounting to a waiver (*g*), or if the identity of the chattel be lost by intermixture or confusion with other chattels of a like nature belonging to a different owner (*h*). And the assertion by the bailee of a right to retain the chattel

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(*v*) *Re London and Globe Finance Corporation*, [1902] 2 Ch. 416; *Jones* v. *Peppercorne* (1858), 1 John. 430.

(*w*) *Re Spotten & Co., Ex parte The Provincial Bank* (1877), Ir. R. 11 Eq. 412. For cases where bankruptcy avoids a general lien by contract, see *Ex parte Great Western Rail. Co., Re Bushell* (1882), 22 Ch. D. 470; *Wiltshire Iron Co.* v. *Great Western Rail. Co.* (1871), L. R. 6 Q. B. 776; and see generally title BANKRUPTCY AND INSOLVENCY.

(*x*) *Re Spotten & Co., Ex parte The Provincial Bank, supra*; *Bock* v. *Gorrissen* (1860), 2 De G. F. & J. 434; *Leuckhart* v. *Cooper* (1836), 3 Bing. (N. C.) 99.

(*y*) *Jones* v. *Tarleton* (1842), 9 M. & W. 675.

(*z*) *Dirks* v. *Richards* (1842), 4 Man. & G. 574; but see *Scarfe* v. *Morgan* (1838), 4 M. & W. 270.

(*a*) *The Norway* (1865), 3 Moo. P. C. C. (N. S.) 245.

(*b*) *Scarfe* v. *Morgan, supra*, a very instructive case on liens.

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

(*d*) See p. 549, *post*.

(*e*) *Singer Manufacturing Co.* v. *London and South Western Rail. Co.*, [1894] 1 Q. B. 833, *per* COLLINS, J., at p. 837.

(*f*) *Hutton* v. *Bragg* (1816), 7 Taunt. 14. Compare *Dicas* v. *Stockley* (1836), 7 C. & P. 587.

(*g*) *Mulliner* v. *Florence* (1878), 3 Q. B. D. 484, where the bailee sold the goods and thereby lost his lien.

(*h*) *Grant* v. *Humphery* (1862), 3 F. & F. 162.

otherwise than by way of lien may operate as a waiver of the lien (*i*).

As a general rule, a right of lien confers no right to sell the chattel (*j*) unless such right is expressly conferred by statute, and sale without right causes loss of the lien (*k*).

Right of sale.

SUB-SECT. 5.—*Railway Cloak-rooms.*

Railway cloak-rooms.

1115. Railway companies receiving passengers' luggage or other chattels in the cloak-rooms of railway stations become responsible to the owners of the chattels deposited as warehousemen only, and not as carriers (*l*). Consequently they are not insurers, and, apart from special contract, they undertake no further obligation by such receipt than to take proper care that the chattels are safely kept from loss or injury (*m*). In the absence of any conditions limiting liability or of contributory negligence on the part of the bailor, the bailees are responsible for the entire value of the chattels (*n*), but not for consequential damages resulting from the loss (*o*).

Special contracts.

If the bailor and bailee agree that the chattels shall be deposited on terms other than those implied by law, the duty of the bailee is determined by the terms on which both parties have agreed (*p*).

Conditions limiting liability may be contained in the ticket given as a receipt to a bailor when depositing a chattel for safe custody, or may be otherwise agreed. In order, however, that a railway company may thus limit its liability, it is necessary for it to show not only that when the bailor entered into the contract he was aware that the ticket was not given to him merely as a receipt for the chattel, but also that it was intended to convey to him the knowledge of the terms of the special contract upon which the company agreed to receive it (*q*). And the onus of proof is on the company to show that the bailor was aware of such intention on its part at the time when he accepted the ticket, and that he accepted it as notice of such terms (*r*).

(*i*) *White* v. *Gainer* (1824), 2 Bing. 23, *per* BEST, C.J., at p. 24 ; *Weeks* v. *Goode* (1859), 6 C. B. (N. S.) 367 ; *Boardman* v. *Gill* (1808), Camp. 410, n. ; *Dubs* v. *Richards* (1842), 4 Man. & G. 574.

(*j*) *Pothonier* v. *Dawson* (1816), Holt (N. P.), 383, *per* GIBBS, C.J., at p. 385.

(*k*) Compare *Mulliner* v. *Florence* (1878), 3 Q. B. D. 484, where an innkeeper was held not to have a right to sell his guest's horses over which he had a lien. The law on this point is now altered by the Innkeepers Act, 1878 (41 & 42 Vict. c. 38), as to which see title INNS AND INNKEEPERS. Some liens can be enforced by sale by means of an action asking for such relief (Story, Commentaries on Equity Jurisprudence, 13th ed., s. 1217).

(*l*) *Van Toll* v. *South Eastern Rail. Co.* (1862), 12 C. B. (N. S.) 75 ; *Pratt* v. *South Eastern Rail. Co.*, [1897] 1 Q. B. 718. For the position of railway companies as carriers, see title CARRIERS.

(*m*) *Van Toll* v. *South Eastern Rail. Co.*, *supra*, *per* ERLE, C.J., at pp. 82, 83.

(*n*) *Roche* v. *Cork, Blackrock and Passage Rail. Co.* (1889), 24 L. R. Ir. 250.

(*o*) *Anderson* v. *North Eastern Rail. Co.* (1861), 4 L. T. 216.

(*p*) *Harris* v. *Great Western Rail. Co.* (1876), 1 Q. B. D. 515, *per* BLACKBURN, J., at pp. 529, 530.

(*q*) *Richardson, Spence & Co.* v. *Rountree*, [1894] A. C. 217, and cases cited note (*r*), *infra*.

(*r*) *Parker* v. *South Eastern Rail. Co.* (1877), 2 C. P. D. 416 ; see especially the

SECT. 2. Hire of Chattels.

SECT. 2.—*Hire of Chattels.*

SUB-SECT. 1.—*In General.*

Hire of chattels.

1116. This class of bailment (*locatio conductio rei*) is a contract by which the hirer obtains a right to use the chattel hired, in return for the payment of the price of the hiring to the owner (*s*). The proprietary interest in the chattel is not changed, but remains in the owner (*t*). But, upon delivery, the hirer becomes legally possessed of the chattel hired, so that if it be lent for a time certain, even the true owner is debarred during that time from resuming possession against the will of the hirer, and, should he do so, becomes liable in damages for the wrongful seizure (*u*).

The contract must not be based on an immoral or illegal consideration, nor must it conduce to immorality or illegality, the maxim *Ex turpi causâ non oritur actio* applying in this as in any other contract (*w*).

SUB-SECT. 2.—*Obligations of the Owner.*

Obligations of owner.

1117. The owner of a chattel which he lets out for hire is under an obligation to ascertain that the chattel so let out by him is reasonably fit and suitable for the purpose for which it is expressly let out or for which, from its character, he must be aware it is intended to be used; his delivery of it to the hirer amounts to an implied warranty that the chattel is in fact as fit and suitable for that purpose as reasonable care and skill can make it (*a*). Therefore if damage or loss is caused to the hirer by reason of some defect of which the owner was or ought to have been aware in the fitness or adaptability of the chattel, the owner is liable not only for the immediate results of his lack of care, but also for any other consequences which may reasonably be supposed to have been within the contemplation of the parties (*b*).

Fitness.

The owner of a chattel is not relieved from liability under his implied warranty that the chattel is reasonably fit for the

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judgment of BAGGALLAY, L.J., at pp. 424—426. Compare *Richardson, Spence & Co.* v. *Rowntree*, [1894] A. C. 217; *Acton* v. *Castle Mail Packets Co.* (1895), 73 L. T. 158; *Stephen* v. *International Sleeping-Car Co.* (1903), 19 T. L. R. 621.

(*s*) Jones on Bailments, 4th ed. p. 86; Pothier, Contrat de Louage, Part I., Chap. I., s. 1: "Louage . . . est un contrat par lequel l'un donne à l'autre la jouissance ou l'usage d'une chose . . . pendant quelque temps pour un certain prix" (Domat, book 1, tit. 4, s. 1, art. 1). For forms of agreement to hire goods, see Encyclopædia of Forms, Vol. VI., pp. 440 *et seq.*

(*t*) Story on Bailments, s. 370 a.

(*u*) Bac. Abr. Bailment, C; *Lee* v. *Atkinson and Brook* (1610), Yelv. 172.

(*w*) *Pearce* v. *Brooks* (1866), L. R. 1 Exch. 213, *per* POLLOCK, C.B., at p. 217.

(*a*) "The nature of the contract is such, that an obligation is imposed on the party letting for hire to furnish that which is proper for the hirer's accommodation" (*Sutton* v. *Temple* (1843), 12 M. & W. 52, *per* Lord ABINGER, at p. 60; *MacCarthy* v. *Young* (1861), 6 H. & N. 329; *Mowbray* v. *Merryweather*, [1895] 2 Q. B. 640; *Vogan & Co.* v. *Oulton* (1899), 81 L. T. 435).

(*b*) *Mowbray* v. *Merryweather*, *supra*, *per* Lord ESHER, at p. 643; *Vogan & Co.* v. *Oulton*, *supra*. In both these cases the defendant hired out tackle to the plaintiffs, whose workmen were injured by the unfitness thereof, and the plaintiffs had to compensate them for their injuries, and they recovered from the defendant what they had had to pay. Compare *The Moorcock* (1889), 14 P. D. 64.

particular purpose for which it was hired, merely by the fact that he has allowed the hirer a preliminary inspection of the chattel (*c*).

It is negligence in anyone to let out to hire a carriage to convey a number of people or a quantity of merchandise without previously taking care that the carriage is reasonably safe (*d*). And where a horse jobber lets out a horse, there is an implied warranty on his part that the animal is of sufficient capacity and docility for the particular purpose for which it was hired (*e*). A similar warranty of fitness extends to a servant of the bailor who accompanies a chattel, and whose services are necessary for the proper use and enjoyment of the chattel by the hirer (*f*), though in this case the warranty of the bailor extends only to those acts of his servant which are within the scope of his employment (*g*).

Hidden defects.

The implied warranty will not extend to a case where the immediate cause of an accident is a hidden defect in the chattel let out on hire which no reasonable amount of care on the part of the bailor could have discovered (*h*). In such cases the *primâ facie* evidence of negligence is rebutted, and it is for the aggrieved party to show that the resultant injury is one for which the bailor is legally liable in damages (*i*).

Quiet enjoyment.

1118. The mere fact of an owner entering into an engagement to let a chattel implies a promise or condition on his part to put the hirer into peaceable possession of the chattel hired by him, and to permit him to remain in custody thereof for the purpose of the particular service in respect of which the contract was entered into (*k*). But where the hirer so conducts himself as to hinder the performance of the contract by the owner, or to subject the owner, if he duly perform the contract, to an action at the suit of some third party, no action will lie against the owner for the non-performance of his agreement (*l*).

Repair of hired chattel.

Where the owner has agreed with the hirer to keep the chattel lent in proper repair (*m*), the owner is entitled to resume possession

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(*c*) *Jones* v. *Page* (1867), 15 L. T. 619.

(*d*) *Jones* v. *Page*, *supra*, *per* KELLY, C.B., at p. 620. A jobmaster who lets out a carriage for hire impliedly warrants that it is as fit for use as care and skill can make it (*Hyman* v. *Nye* (1881), 6 Q. B. D. 685).

(*e*) *Fowler* v. *Lock* (1872), L. R. 7 C. P. 272, *per* BYLES, J., at p. 282; *Chew* v. *Jones* (1847), 10 L. T. (o. s.) 231.

(*f*) *Abraham* v. *Bullock* (1902), 86 L. T. 796.

(*g*) Compare *Sanderson* v. *Collins*, [1904] 1 K. B. 628; *Cheshire* v. *Bailey*, [1905] 1 K. B. 237; in the latter case the servant supplied (a coachman) aided and abetted a theft of the bailee's goods, and the bailor was held not liable therefor.

(*h*) *Readhead* v. *Midland Rail. Co.* (1867), L. R. 2 Q. B. 412, *per* MELLOR, J., at p. 428; *Christie* v. *Griggs* (1809), 2 Camp. 79.

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

(*k*) Story on Bailments, s. 385.

(*l*) *European and Australian Royal Mail Co.* v. *Royal Mail Steam Packet Co.* (1861), 30 L. J. (C. P.) 247. See also Pothier, Contrat de Dépôt, s. 55; see also Civil Code of France, art. 1726.

(*m*) This is often to be implied from the nature of the contract (*Sutton* v. *Temple* (1843), 12 M. & W. 52, *per* Lord ABINGER, at p. 60. "If a carriage be let for hire, and it break down on the journey, the letter of it is liable, and not the party who

SECT. 2. Hire of Chattels.

of the chattel for the limited purpose of executing such repairs (*n*). But it is said that the hirer, if actually inconvenienced thereby, is entitled to an allowance or reduction from the rent for the period during which he has been deprived of the use of the chattel hired (*o*), though this probably depends on the nature of the thing itself and the inferences to be drawn from the terms of the contract and the surrounding circumstances.

SUB-SECT. 3.—*Obligations of the Hirer.*

To pay rent.

1119. The hirer must pay the rent agreed upon for the use of the chattel hired; and if the hiring be for a definite period, he is not discharged from his obligation to pay the price for the full period, by returning the chattel to its owner before the expiration of that period (*p*). But if the owner on receiving the chattels back acquiesces in their return as ending the contract, he cannot afterwards maintain an action against the hirer upon the agreement; the voluntary reception amounting to rescission of the contract, unless a fresh agreement to pay for such use as has been enjoyed by the hirer can be implied (*p*).

To take reasonable care.

1120. The hirer is, as a general rule, under an obligation to take reasonable care only of the chattel hired, and is not liable for loss or injury happening to it, unless caused by his negligence, or that of his servants (*q*). His liability, however, may be extended or diminished by the terms of a special contract, which, however, will be construed with reference to the age and condition of the particular chattel at the time of the hiring (*r*).

Apart from special contract, the hirer is not responsible for fair wear and tear (*s*), nor is he under any obligation to do any repairs (*t*) except such as are naturally incidental to the due performance of his obligation to take reasonable care (*a*). If he should exceed his duty, and execute repairs for which he is not responsible, it is doubtful whether he has any right to claim to be reimbursed by

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hired it." But the cost of feeding a hired horse usually falls on the hirer (Story on Bailments, s. 393).

(*n*) Story on Bailments, s. 385.

(*o*) Pothier, Contrat de Louage, s. 77; Domat, book 1, tit. 4, s. 3, art. 7.

(*p*) *Wright* v. *Melville* (1828), 3 C. & P. 542.

(*q*) *Sanderson* v. *Collins*, [1904] 1 K. B. 628; *Bray* v. *Mayne* (1818), Gow, 1; *Handford* v. *Palmer* (1820), 2 Brod. & Bing. 359; *Dean* v. *Keate* (1811), 3 Camp. 4, where the hirer of a horse prescribed for it himself when it fell sick instead of calling in a veterinary surgeon. The fact that the chattel is injured whilst in the hirer's possession raises a *primâ facie* presumption against him. See *Dollar* v. *Greenfield*, Times, May 19, 1905, *per* Lord HALSBURY, L.C., and the cases cited in note (*z*), p. 545, *ante*, the principle of which would seem to apply here. *Contra*, *Cooper* v. *Barton* (1810), 3 Camp. 5, n.

(*r*) *Schroder* v. *Ward* (1863), 13 C. B. (N. S.) 410.

(*s*) See *Pomfret* v. *Ricroft* (1770), 1 Saund. 321; *Blakemore* v. *Bristol and Exeter Rail. Co.* (1858), 8 E. & B. 1035, cases of gratuitous loan, but the principle seems to apply here.

(*t*) *Sutton* v. *Temple* (1843), 12 M. & W. 52, *per* Lord ABINGER, C.B., at p. 60; *Hyman* v. *Nye* (1881), 6 Q. B. D. 685. For a case of special contract excluding such repairs, see *Reading* v. *Menham* (1832), 1 Mood. & R. 234.

(*a*) *E.g.*, feeding a hired horse; see Story on Bailments, s. 393.

the owner, even though the repairs are necessary and the expenditure reasonable, and therefore it is advisable for him not to execute them without first consulting the owner (*b*).

If, however, it is a term of the contract between the parties that the hirer shall keep the chattel from injury, such a condition amounts, by implication, to an authority from the owner to the hirer to do all acts necessary for preserving the thing hired, and, as against the owner, a third party can acquire a lien on the chattel for the cost of repairing it at the request of the hirer (*c*).

Use of chattel for purpose not contemplated.

1121. The hirer must not use the chattel hired for any purpose other than that for which it was hired—thus, a horse hired as a hack and not for hunting or driving, must be used as a hack only, and the hirer will be responsible in case of damage arising from its use for any other purpose (*d*).

Return of chattel hired.

He must also return the chattel hired at the expiration of the agreed term (*e*). But if the performance of his contract to return the chattel becomes impossible because it has perished, this impossibility (if not arising from the fault of the hirer or from some risk which he has taken upon himself) excuses him (*f*).

SUB-SECT. 4.—*Responsibility for Negligence of Servant.*

Negligence of servant.

1122. The negligence of the servant of a hirer, acting within the scope of his employment, is the negligence of the master, even though the servant be doing something he has been told not to do, if he does it in the ordinary course of service and for the apparent benefit of his master (*g*). But if a servant use the hired chattel for his own purposes outside the scope of his employment, or if he wilfully injure it, the hirer is not responsible (*h*).

SUB-SECT. 5.—*Measure of Damages.*

Measure of damages.

1123. If the chattel is injured by the negligence of the hirer, the owner can recover against the hirer, not only the actual loss sustained by reason of the permanent depreciation in value of the chattel injured, but also all reasonable sums paid by him for its reparation. Thus, in the case of an animal which is injured, the amount of damages recoverable will include not only the farrier's bill for keep and treatment, but also the difference between the animal's original and subsequent value (*a*).

(*b*) See Story on Bailments, s. 392.

(*c*) *Keene* v. *Thomas*, [1905] 1 K. B. 136.

(*d*) *Burnard* v. *Haggis* (1863), 14 C. B. (N. S.) 45.

(*e*) *Mills* v. *Graham* (1804), 1 Bos. & P. (N. R.) 140, *per* MANSFIELD, C.J., at p. 145. This and the last cited case are cases of infant hirers, who cannot be sued upon the contract of bailment (unless the thing hired is a necessary), but may be sued upon torts arising out of it. See title INFANTS.

(*f*) *Taylor* v. *Caldwell* (1863), 3 B. & S. 826, *per* BLACKBURN, J., at p. 838.

(*g*) *Limpus* v. *London General Omnibus Co.* (1862), 1 H. & C. 526; *Ward* v. *General Omnibus Co.* (1873), 42 L. J. (C. P.) 265. See also titles AGENCY, p. 212, *ante*, and MASTER AND SERVANT.

(*h*) *Sanderson* v. *Collins*, [1904] 1 K. B. 628, distinguishing *Coupé Co.* v. *Maddick*, [1891] 2 Q. B. 413; *Cheshire* v. *Bailey*, [1905] 1 K. B. 237, *per* COLLINS, M.R., at p. 240; *Ward* v. *General Omnibus Co.*, *supra*.

(*a*) *Hughes* v. *Quentin* (1838), 8 C. & P. 703.

SECT. 2. Hire of Chattels.

The owner is also entitled to compensation for the loss caused to him by deprivation of the use of a chattel during the period necessary for its reparation or recovery; and the fact that he has not been compelled temporarily to hire or substitute another chattel for that under repair will not necessarily disentitle him to consequential damages (*b*).

Sect. 3.—Hire-Purchase.

SUB-SECT 1.—*In General.*

Hire-purchase.

1124. The contract of hire-purchase, or, more accurately, the contract of hire with an option of purchase, is one under which an owner of a chattel lets it out on hire and undertakes to sell it to, or that it shall become the property of, the hirer, conditionally on his making a certain number of payments (*c*). Until the making, however, of the last payment, no property in the chattel passes (*d*).

Distinguished from sale.

Where the contract between the parties amounts to an absolute agreement to sell and buy, whether the instrument be called a hire-purchase agreement or not (*e*), the property in the chattel passes upon delivery, provided that such was the intention of the parties (*f*). And even where the property has not passed, the so-called hirer, being really a purchaser, can give a good title to a purchaser or pledgee dealing with him in good faith and without notice of the rights of the original owner (*g*).

Registration unnecessary.

A written contract for the hire of a chattel with an option of purchase does not require registration as a bill of sale, because no property is conveyed thereby to the person in possession of the chattel during its effective existence (*h*).

The difference between a contract of sale at a price payable by instalments and a contract of hire-purchase is that in the former the purchaser has no option of terminating the contract and

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(*b*) See *Owners of Steamship Mediana* v. *Owners, Master and Crew of Lightship Comet, The Mediana*, [1900] A. C. 113, where, a harbour board's lightship being damaged by collision, the board put in its place a reserve lightship, and were nevertheless held entitled to substantial damages.

(*c*) *Helby* v. *Matthews*, [1895] A. C. 471; *Re Davis & Co., Ex parte Rawlings* (1888), 22 Q. B. D. 193.

(*d*) *Cramer* v. *Giles* (1883), 1 Cab. & El. 151. For forms of Hire-Purchase Agreements, see Encyclopædia of Forms, Vol. VI., pp. 453 *et seq.*

(*e*) It is for the Court to determine the effect of the agreement (*McEntire* v. *Crossley Brothers*, [1895] A. C. 457, *per* Lord WATSON, at p. 467; *Helby* v. *Matthews*, *supra*, *per* Lord HERSCHELL, at p. 475). For the general principles of construction, see title CONTRACT.

(*f*) *McEntire* v. *Crossley Brothers*, *supra*, *per* Lord HERSCHELL, at pp. 462, 463.

(*g*) The contract between the original purchaser (by instalments) and the person to whom he disposes of the chattel being a valid one within the meaning of the Factors Act, 1889 (52 & 53 Vict. c. 45), s. 9 (*Lee* v. *Butler*, [1893] 2 Q. B. 318; *Wylde* v. *Legge* (1901), 84 L. T. 121; *Hull Ropes Co., Ltd.* v. *Adams* (1895), 65 L. J. (Q. B.) 114; *Thompson and Shackell, Ltd.* v. *Veale* (1896), 74 L. T. 130).

(*h*) *Horsley* v. *Style* (1893), 69 L. T. 222; and see *McEntire* v. *Crossley Brothers*, *supra*. Yet what in form seems a sale and subsequent letting may be held to be a borrowing on mortgage and within the Bills of Sale Acts (*Maas* v. *Pepper*, [1905] A. C. 102). See title BILLS OF SALE.

returning the chattel, whereas in the latter the hirer has (*i*). In the former there is an agreement to purchase, whereas in the latter there is none (*i*). In each case the substance of the transaction or the agreement must be looked at and not the mere words (*i*).

SECT. 3. Hire-Purchase.

SUB-SECT. 2.—*Rights of Owner.*

1125. The agreement usually provides that if default is made in payment of any instalment the owner may resume possession. This provision is enforceable if the agreement be in fact as well as in form a true agreement for hire (*j*). But if the agreement, though in form a contract for hire, is really a sale, the provision is not enforceable unless the agreement is registered as a bill of sale, and, in the absence of registration, any seizure may subject the owner and his agents to an action of trespass (*k*). Equity will not relieve the hirer against a forfeiture occasioned by default in the punctual payments of the instalments as they accrue (*l*), the proviso not being in the nature of a penalty (*m*).

Possession on default in payment of instalment.

1126. The owner's right to seize is subordinate to that of the landlord of the premises in which the chattel is housed, should he distrain for rent (*n*) upon it, and it would seem that a sheriff who seizes chattels let on a hire-purchase agreement under an execution against the hirer may sell to a third person the qualified interest of the hirer therein (*o*); and therefore all well-drawn hire-purchase agreements give power to the owner to resume possession if the chattel is seized by a sheriff or is distrained.

Distress and execution.

There is no legal presumption that a chattel hired under a hire-purchase agreement, for private purposes, is in the order or disposition of the hirer so as to pass the property in it to his trustee in bankruptcy (*p*). The contrary is the case where the chattel let on such an agreement is in the possession of a trader in the way of his trade (*q*), although the presumption may be rebutted by proof of a custom of a particular trade or calling for the trader to have in his possession, or apparently under his control, chattels which are not in fact his own property (*r*).

Bankruptcy.

(*i*) *Helby* v. *Matthews*, [1895] A. C. 471; *Lee* v. *Butler*, [1893] 2 Q. B. 318; *Maas* v. *Pepper*, [1905] A. C. 102.

(*j*) *Ex parte Whittaker, Re Gelder*, [1880] W. N. 171, affirmed *sub nom. Ex parte Sergeant, Re Gelder*, [1881] W. N. 37; *Leman* v. *Yorkshire Railway Waggon Co.* (1881), 50 L. J. (CH.) 293.

(*k*) *Beckett* v. *Tower Assets Co.*, [1891] 1 Q. B. 638.

(*l*) *Cramer* v. *Giles* (1883), 1 Cab. & El. 151.

(*m*) *Sterne* v. *Beck* (1863), 1 De G. J. & Sm. 595.

(*n*) See *Lyons* v. *Elliott* (1876), 1 Q. B. D. 210, *per* LUSH, J., at p. 215, and cases cited, note (*j*), p. 547, *ante*.

(*o*) *Dean* v. *Whittaker* (1824), 1 C. & P. 347; *Lancashire Waggon Co.* v. *Fitzhugh* (1861), 30 L. J. (EX.) 231.

(*p*) *Ex parte Emerson, Re Hawkins* (1871), 41 L. J. (BCY.) 20. See title BANKRUPTCY AND INSOLVENCY.

(*q*) Sect. 44 (3) of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), provides that all goods being at the commencement of the bankruptcy, in the possession, order, or disposition of the bankrupt, in his trade or business, by the consent and permission of the true owner, under such circumstances that he is the reputed owner thereof, shall pass to his trustee in bankruptcy.

(*r*) *Ex parte Watkins, Re Couston* (1873), 8 Ch. App. 520; see also *Re William Watson & Co., Ex parte Atkin Brothers*, [1904] 2 K. B. 753. See title BANKRUPTCY

SECT. 3. Hire-Purchase.

Assignment.

1127. The owner of a chattel let out on a hire-purchase agreement may assign all his interest in it, and all rights and liabilities connected therewith, to a third party. The transferee, upon notice in writing of the assignment being given to the hirer, will become entitled to receive the instalments of rent from the hirer as they accrue, and the hirer cannot set up such transfer as an excuse for refusing to pay further instalments under the agreement (*s*). Such an assignment does not operate as a bill of sale within the meaning of sect. 4 of the Bills of Sale Act, 1878 (*t*).

A licence by the hirer to the original letter to enter and take possession of the chattel upon default of payment of any instalment, is not capable of assignment to a third party (*u*).

In order to perfect an assignment of an owner's interest in a hire-purchase agreement to a third party, it is necessary that the transfer should be accompanied by the same formalities as are essential to making the original security effective (*a*).

Conversion by hirer.

1128. If the hirer of a chattel under a hire-purchase agreement delivers it over to an auctioneer for the purpose of sale, and so determines the bailment and converts it to his own use, the true owner is entitled to recover damages for the conversion from the auctioneer if he refuses to deliver it up or sells it (*b*). He is similarly entitled as against a purchaser (*c*), a pledgee (*d*), or an equitable mortgagee (*e*) from the hirer, even though the chattel may have been received in good faith and without notice.

SECT. 4.—*Hire of Work and Labour.*

SUB-SECT. 1.—*In General.*

Hire of work and labour.

1129. This class of bailment (*locatio operis faciendi*) is a contract in which one of the two contracting parties undertakes to do something to a chattel, *e.g.*, to carry it or to repair it, in consideration of a price to be paid to him (*f*).

It is essential to constitute a valid contract of this description that there should be some work to be performed in connection with a specified chattel, and that money should be agreed to be paid as the price of the labour (*g*).

AND INSOLVENCY; *Re Thackrah, Ex parte Hughes and Kimber* (1888), 5 Morr. 235.

(*s*) *British Waggon Co.* v. *Lea & Co.* (1880), 5 Q. B. D. 149.

(*t*) *Re Davis & Co., Ex parte Rawlings* (1888), 22 Q. B. D. 193; *Re Isaacson, Ex parte Mason*, [1895] 1 Q. B. 333; *Newlove* v. *Shrewsbury* (1888), 21 Q. B. D. 41.

(*u*) *Re Davis & Co., Ex parte Rawlings, supra.*

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

(*b*) *Consolidated Co.* v. *Curtis & Son*, [1892] 1 Q. B. 495; *Cochrane* v. *Rymill* (1879), 40 L. T. 744; *Loeschman* v. *Machin* (1818), 2 Stark. 311.

(*c*) *Cooper* v. *Willomatt* (1845), 14 L. J. (C. P.) 219; *Marner* v. *Bankes* (1867), 16 W. R. 62.

(*d*) *Singer Manufacturing Co.* v. *Clark* (1879), 5 Ex. D. 37.

(*e*) *Re Samuel Allen & Sons, Ltd.*, [1907] 1 Ch. 575.

(*f*) Jones on Bailments, 4th ed. pp. 90, 91. As to work and labour in general, see title WORK AND LABOUR; as to carriers, see title CARRIERS.

(*g*) Pothier, Contrat du Louage d'Ouvrage, ss. 397—402; *Keys* v. *Harwood* (1846), 2 C. B. 905.

SECT. 4. Hire of Work and Labour.

The distinction between this contract and that of sale lies in the fact that the work and labour results in nothing which can properly be deemed the subject of a sale, inasmuch as the chattel upon which the work is performed, or the materials out of which the chattel delivered to the hirer is made, are already the property of the hirer, and do not, as in the case of sale, become his property by virtue of the contract (*h*). The contract is none the less one of work and labour, where, though the principal materials belong to the hirer, the workman furnishes accessories or ornaments, as in the case of a tailor, who is employed to make up the hirer's cloth, and who supplies his own buttons and thread (*i*).

Distinguished from sale.

SUB-SECT. 2.—*Obligations of the Hirer.*

1130. The hirer of labour must, at the time or times and in the manner appointed, pay the workman the agreed price, or, if no price has been agreed upon, a reasonable remuneration for his expenditure of time, labour and skill (*k*).

Obligations of hirer.

The acceptance of services does not in all cases necessarily imply that such services are to be remunerated. Remuneration cannot be successfully claimed for services voluntarily performed without request (*k*). But employment of a man, whose trade it is to do the work in question, *primâ facie* implies a contract by the employer to pay him a fair and reasonable price for his work. A person called in to do work of a class which he holds himself out as qualified to do, and which will be useful only if effective, and which he is left to do in his own way, can recover nothing if it proves ineffective, and the employer gets no benefit from it (*l*).

The hirer must also pay for all materials employed by the workman in the manufacture, alteration, or reparation of the chattel which is the subject of the contract, provided they are necessary for the completion of the work, and were either specifically or impliedly ordered (*m*). And where the work is not completed, whether through the fault of the workman (*n*) or

To pay for work and materials.

(*h*) *Lee* v. *Griffin* (1861), 1 B. & S. 272, *per* BLACKBURN, J., at p. 277. See also *Clay* v. *Yates* (1856), 1 H. & N. 73; *Grafton* v. *Armitage* (1845), 2 C. B. 336; *Atkinson* v. *Bell* (1828), 8 B. & C. 277; *Appleby* v. *Myers* (1867), L. R. 2 C. P. 651; *Adlard* v. *Booth* (1835), 7 C. & P. 108; *Gillett* v. *Mawman* (1808), 1 Taunt. 137, as to the effect of usage of trade. See also p. 524, *ante*, and title SALE OF GOODS.

(*i*) Story on Bailments, s. 423.

(*k*) *Sumpter* v. *Hedges*, [1898] 1 Q. B. 673. Compare *Taylor* v. *Laird* (1856), 25 L. J. (EX.) 329, *per* POLLOCK, C.B., at p. 332: "Suppose I clean your property without your knowledge, have I then a claim on you for payment? One cleans another's shoes; what can the other do but put them on? Is that evidence of a contract to pay for the cleaning?"

(*l*) *Farnsworth* v. *Garrard* (1807), 1 Camp. 38, *per* Lord ELLENBOROUGH, at p. 39, who says: "If there has been no beneficial service there shall be no pay, but if some benefit has been derived, though not to the extent expected, this shall go to the amount of the plaintiff's demand; . . . the claim shall be co-extensive with the benefit." Compare *Duncan* v. *Blundell* (1820), 3 Stark. 6, *per* BAYLEY, J., at p. 7.

(*m*) Story on Bailments, s. 425; *Wilmot* v. *Smith* (1828), 3 C. & P. 453.

(*n*) *Roberts* v. *Havelock* (1832), 3 B. & Ad. 404.

SECT. 4. Hire of Work and Labour.

otherwise (*o*), in the absence of a contract to complete it the hirer may nevertheless have to pay for the work actually done and for the materials supplied (*p*).

But a workman who engages to do specified work in connection with a chattel for an agreed sum to be paid on completion, and fails to complete the work in accordance with the specification, is not entitled to recover the price agreed upon, nor even the actual value of the work he has done on a *quantum meruit* (*q*), unless the failure to complete is due to the hirer's default (*r*).

Yet if a new contract is made to pay for the work actually done (*s*), the workman is entitled to recover the price agreed upon less a deduction, and the measure of that deduction is generally the sum which it would take to alter or complete the work so as to make it correspond with the specification (*t*).

Where the hirer is under no obligation to pay for the work done, he incurs no additional obligation by reason of the fact that the workman has incorporated his own materials with those of the hirer (*u*).

Extras.

1131. If the workman without any order or request does more work than was originally stipulated for in the contract, and there is on the part of the hirer no acquiescence in the change, although the extra work is essential to the proper performance of the contract, the hirer, in the absence of bad faith or concealment (*v*), is not bound to pay more than the sum originally agreed upon by him (*w*). So, a workman, employed to do specified work on a chattel for an agreed sum, who instead of doing the specified work does different or better work, can recover from the hirer neither the agreed sum under the special contract, nor the value of the work done on a *quantum meruit*, unless the hirer has sanctioned or acquiesced in the change. The mere fact that the hirer has received the chattel on which the work has been done and has sold it at an enhanced price does not amount to acquiescence (*x*).

But where during the course of the work the extras have been ordered or assented to by the hirer, such extra work must be paid for on a *quantum meruit*. In such cases, the contract is

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(*o*) *Menetone* v. *Athawes* (1764), 3 Burr. 1592.

(*p*) *Appleby* v. *Myers* (1867), L. R. 2 C. P. 651, *per* BLACKBURN, J., at p. 660.

(*q*) *Sinclair* v. *Bowles* (1829), 9 B. & C. 92. Compare *Roberts* v. *Havelock* (1832), 3 B. & Ad. 404. See also *Sumpter* v. *Hedges*, [1898] 1 Q. B. 673, *Munro* v. *Butt* (1858), 8 E. & B. 738; *Ellis* v. *Hamlen* (1810), 3 Taunt. 52.

(*r*) *Appleby* v. *Myers*, *supra*, *per* BLACKBURN, J., at p. 658.

(*s*) *Appleby* v. *Myers*, *supra*, *per* BLACKBURN, J., at p. 661.

(*t*) *Thornton* v. *Place* (1832), 1 Mood. & R., *per* PARKE, J., at p. 219; *Ranger* v. *Great Western Rail. Co.* (1854), 5 H. L. Cas. 72.

(*u*) *Sinclair* v. *Bowles*, *supra*.

(*v*) Story on Bailments, s. 425.

(*w*) *Brown* v. *Rollo* (1832), 10 Sh., Ct. of Sess. 667; *Wilmot* v. *Smith* (1828), 3 C. & P. 453.

(*x*) *Forman & Co. Proprietary* v. *The Liddesdale*, [1900] A. C. 190. Compare *Munro* v. *Butt*, *supra*.

binding so far as it can be traced, and the *quantum meruit* applies to the remainder (*y*).

1132. A further obligation on the part of the hirer is to afford the workman every reasonable facility for entering upon and completing the contract which he has undertaken to perform (*z*). If the hirer, after the contract has once been entered upon, wilfully obstruct the workman, and thereby retard him in his employment, or intervene without just cause so as to prevent its completion, he is liable to the workman for the loss actually caused by his interference (*m*). A similar duty and liability in case of default is imposed upon the hirer, if it be one of the terms of the bargain that he will supply the workman with the requisite materials for the employment undertaken (*a*).

Hirer must not obstruct workman.

SUB-SECT. 3.—*Obligations of the Workman.*

1133. The first obligation of the workman is to perform his undertaking (*b*), unless the performance is rendered impossible by circumstances beyond his control, as where the chattel upon which the work is to be performed is destroyed by an accidental fire (*c*). But he is responsible if the impossibility should have been foreseen by him, and the hirer has acted in good faith (*d*).

To do the work.

1134. The general rule as to all workmen is *Spondet peritiam artis*. The acceptance by a person of work of a class which he holds himself out as qualified to do amounts to a warranty on his part that he possesses the requisite skill and ability to do that work (*e*). But where there is neither a general nor a particular representation of skill and ability, a workman undertakes no responsibility in respect of his want of either. If, for instance, one man should employ another who is known to have never done anything but sweep a crossing to clean or mend his watch, the employer probably would be held to have incurred all risks himself (*f*). Moreover, the public profession of an art or craft amounts only to a representation that the artificer or craftsman is reasonably competent to carry out any work of the class he professes to

To exercise skill.

(*y*) *Napier* v. *Lang* (1834), 12 Sh., Ct. of Sess. 523; *Shipton* v. *Casson* (1826), 5 B. & C. 378.

(*z*) *Wells* v. *Army and Navy Co-operative Society, Ltd.* (1902), 86 L. T. 764; *Prickett* v. *Badger* (1856), 1 C. B. (N. S.) 296; *Green* v. *Lucas* (1876), 33 L. T. 584; *Russell* v. *da Bandeira* (1862), 13 C. B. (N. S.) 149; *Courtnay* v. *Waterford and Central Ireland Rail. Co.* (1878), 4 L. R. Ir. 11.

(*m*) *Mackay* v. *Dick* (1881), 6 App. Cas. 251. And see *Lilley* v. *Barnsley* (1844), 2 Mood. & R. 548.

(*a*) Pothier, Contrat de Louage d'Ouvrage, s. 410.

(*b*) Story on Bailments, s. 428.

(*c*) *Menetone* v. *Athawes* (1764), 3 Burr. 1592. And see *Appleby* v. *Myers* (1867), L. R. 2 C. P. 651.

(*d*) *Combe* v. *Simmonds* (1853), 1 W. R. 289; *Pearce* v. *Tucker* (1862), 3 F. & F. 136.

(*e*) *Duncan* v. *Blundell* (1820), 3 Stark. 6; *Harmer* v. *Cornelius* (1858), 5 C. B. (N. S.), *per* WILLES, J., at p. 246; 1 Bell's Com., book 3, part 1, c. 3, tit. "Skill."

(*f*) Jones on Bailments, p. 100; *Harmer* v. *Cornelius*, *supra*, *per* WILLES, J., at p. 246.

SECT. 4. Hire of Work and Labour.

do, and does not make him an insurer; he contracts only to display sufficient skill and knowledge of his calling to perform all ordinary duties connected therewith (*g*). When through negligence or lack of skill the workman fails to perform the work he has undertaken in a workmanlike manner, he forfeits all claim to remuneration (*h*), and, in addition, becomes liable to the hirer for the loss sustained in consequence of his breach of duty (*i*). But acceptance by the hirer of the labour after a slight and unimportant breach of the contract may amount to a waiver of such a breach (*j*).

Exercise of care.

1135. As the workman is entitled to a reward, either by express agreement or by implication, he is also obliged not only to perform his work in a workmanlike manner, but also to take ordinary care of the chattel intrusted to him (*k*), and to restore it to the hirer at the expiration of the period for which it was intrusted to him. If, therefore, he detains it beyond the proper period, he is guilty of a breach of duty, the measure of damages for which is *primâ facie* the sum which would have been earned in the ordinary course of employment of the chattel during the period of its detention (*l*). Where, however, it is lost or injured whilst in the workman's custody, he will be responsible for the full amount of the damage sustained, unless he can show (*m*) that the loss or injury is attributable to inevitable accident, inherent vice, or some other extraneous cause (*n*), and not to any want of care on his part (*o*).

SUB-SECT. 4.—*Delegation.*

Delegation.

1136. Where it is a condition of the contract that the work is to be done personally by a particular workman, that workman cannot delegate the work to another (*p*). But in many cases the nature of the work is such that delegation or sub-contracting is permissible (*p*). Where without the sanction of the hirer there is a transference of the contract from the original workman to a third party, there being no privity between the hirer and the actual workman, the latter cannot recover from the former any compensation for his services (*q*).

But if the hirer, after receiving notice that the contract has been transferred to a third party, allow the assignee to proceed

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(*g*) *Lanphier* v. *Phipos* (1838), 8 C. & P. 475, *per* TINDAL, C.J., at p. 479.
(*h*) *Cousins* v. *Paddon* (1835), 2 Cr. M. & R. 547.
(*i*) Story on Bailments, s. 431.
(*j*) *Lucas* v. *Godwin* (1837), 3 Bing. (N. C.) 737.
(*k*) Jones on Bailments, p. 91; *Leck* v. *Maestaer* (1807), 1 Camp. 138; *Clarke* v. *Earnshaw* (1818), Gow, 30.
(*l*) *Re Trent and Humber Co., Ex parte Cambrian Steam Packet Co.* (1868), 4 Ch. App. 112, *per* Lord CAIRNS, L.C., at p. 117.
(*m*) See note (*q*), p. 552, *ante*.
(*n*) Story on Bailments, s. 437.
(*o*) *Leck* v. *Maestaer, supra; Clarke* v. *Earnshaw, supra.* Compare *Wilson* v. *Powis* (1826), 11 Moo. C. P. 543; *Jobson* v. *Palmer*, [1893] 1 Ch. 71; *Bullen* v. *Swan Electric Engraving Co.* (1907), 23 T. L. R. 258.
(*p*) See title AGENCY, pp. 169, 170, *ante*.
(*q*) *Schmaling* v. *Thomlinson* (1815), 6 Taunt. 147; and see *Cull* v. *Backhouse* (1793), 6 Taunt. 148, note (a).

with the work, there is a novation, and the assignee is entitled to sue the employer for the value of the work done by him (*r*).

SUB-SECT. 5.—*Lien of Workman.*

Lien.

1137. Everyone to whom a chattel is delivered in order that he may, for reward, do work upon it, and who does work upon it, has by the common law a lien on the chattel for the amount of the remuneration due to him for the work done, and therefore is not bound to restore it until his remuneration is paid (*s*), unless such lien is excluded by express agreement or is otherwise inconsistent with the express or implied terms of the contract (*t*). But if a chattel is bailed to a workman for the sole purpose of his working with it, and not upon it, no lien attaches (*u*).

This lien applies, apart from agreement, only to the sum actually due to the workman for materials and labour expended by him in connection with the reparation or alteration of the chattel, and does not extend to charges for warehousing (*v*). Nor will the fact that the owner of the chattel is aware that an additional charge will be made for each day during which his property is detained in the valid exercise of the lien suffice to render him liable for such charges. Thus the owner of a ship, who knew that he must pay for dock room while the vessel was being repaired, was held to have made no implied promise to pay any additional charge for the period during which his vessel was detained as security for the shipwright's charges, although he had received notice that such charges would be made (*w*).

Should the owner of the chattel bailed sell it, the workman's lien attaches only for the amount of the debt due to him at the time when he has notice of the sale, and not for any after-accruing debt (*x*).

When a bailee of goods expressly agrees with his bailor to keep the chattel bailed from injury, and this term in the agreement necessarily implies its repair by a third party, the third party who actually executes the repairs has an effective lien on the chattel against the owner, although there may have been no privity of contract between the owner and himself (*y*).

(*r*) *Aspinall* v. *London and North Western Rail. Co.* (1853), 11 Hare, 325; *Oldfield* v. *Lowe* (1829), 9 B. & C. 73. As to the rights of the assignor against the assignee, see *Humphreys* v. *Jones* (1850), 5 Exch. 952.

(*s*) *Ex parte Ockenden, Re Matthews* (1754), 1 Atk. 235; *Franklin* v. *Hosier* (1821), 4 B. & Ald. 341; *Hollis* v. *Claridge* (1813), 4 Taunt. 807; *Scarfe* v. *Morgan* (1838), 4 M. & W. 270; *Blake* v. *Nicholson* (1814), 3 M. & S. 167; *Chase* v. *Westmore* (1816), 5 M. & S. 180; Story on Bailments, s. 440. See also, for equitable liens, title LIEN.

(*t*) *Raitt* v. *Mitchell* (1815), 4 Camp. 146; *Chase* v. *Westmore, supra, per* Lord ELLENBOROUGH, C.J., at p. 186; *Scarfe* v. *Morgan, supra, per* PARKE, B., at p. 283; *Forth* v. *Simpson* (1849), 13 Q. B. 680; and contrast *Ex parte Willoughby, Re Westlake* (1881), 16 Ch. D. 604.

(*u*) *Steadman* v. *Hockley* (1846), 15 M. & W. 553, *per* POLLOCK, C.B., at p. 556; *Bleaden* v. *Hancock* (1829), 4 C. & P. 152.

(*v*) *Somes* v. *British Empire Shipping Co.* (1860), 8 H. L. Cas. 338; *Bruce* v. *Everson* (1883), 1 Cab. & El. 18; *Hartley* v. *Hitchcock* (1816), 1 Stark. 408.

(*w*) *Somes* v. *British Empire Shipping Co., supra.*

(*x*) *Barry* v. *Longmore* (1840), 4 P. & D. 344.

(*y*) *Keene* v. *Thomas*, [1905] 1 K. B. 136; *Singer Manufacturing Co.* v. *London and South Western Rail. Co.*, [1894] 1 Q. B. 833.

SECT. 4. Hire of Work and Labour.

The lien is lost by a relinquishment of possession on the part of the workman (*z*), or by any act or agreement amounting to waiver (*a*).

SECT. 5.—*Pledge.*

Pledge.

1138. The remaining class of bailment for valuable consideration is pledge (*pignus*), whereby a chattel is delivered to a bailee to be held by him as security for money advanced to the bailor (*b*). The subject of pledge will be separately treated at length in another part of this work (*c*).

Part IV.—Considerations Common to All Classes of Bailment.

SECT. 1.—*Estoppel of Bailee.*

Estoppel of bailee.

1139. As a rule a bailee is estopped from setting up against his bailor's demand for a redelivery of the chattel bailed the right or title of a third person to the property in it (*d*).

Jus tertii.

But this estoppel ceases when the bailment on which it is founded is determined by what is equivalent to an eviction by title paramount (*e*); and the bailee is thereby discharged from all liability to the bailor (*f*), unless there be a special contract, or the bailee be in some way to blame for the eviction (*g*). But it is not enough that the bailee has become aware of the title of a third person, or that an adverse claim has been made upon him (*h*). Unless he has been actually evicted he can only set up the title of a third person where he does so on behalf and on the express authority of such third person (*i*).

Interrogatories may not be administered by a bailee to his bailor for the purpose of showing that the latter has parted with his title in the chattel to a third person, unless the bailee justifies his detention of it by setting up the title of such third person with his consent (*k*).

(*z*) *Jacobs* v. *Latour* (1828), 5 Bing. 130; *Hartley* v. *Hitchcock* (1816), 1 Stark. 408; *Legg* v. *Evans* (1840), 6 M. & W. 36, *per* PARKE, B., at p. 42.

(*a*) *White* v. *Gainer* (1824), 2 Bing. 23.

(*b*) *Coggs* v. *Bernard* (1703), 2 Ld. Raym. 909, *per* Lord HOLT, C.J., at p. 913; Jones on Bailments, 4th ed. p. 36; Story on Bailments, s. 286.

(*c*) See title PAWNBROKERS AND PLEDGES.

(*d*) *Biddle* v. *Bond* (1865), 6 B. & S. 225; *Betteley* v. *Reed* (1843), 4 Q. B. 511; *Ex parte Davies, Re Sadler* (1881), 19 Ch. D. 86; *Leese* v. *Martin* (1873), L. R. 17 Eq. 224.

(*e*) *Biddle* v. *Bond, supra, per* BLACKBURN, J., at p. 234.

(*f*) *Ross* v. *Edwards & Co.* (1895), 73 L. T. 100, *per* Lord MACNAGHTEN, at p. 101.

(*g*) *Ross* v. *Edwards & Co., supra.*

(*h*) *Betteley* v. *Reed, supra, per* Lord DENMAN, C.J., at p. 517; *Leese* v. *Martin, supra.*

(*i*) *Rogers & Co.* v. *Lambert & Co.*, [1891] 1 Q. B. 318, *per* Lord ESHER, M.R., at p. 325. See also *Thorne* v. *Tilbury* (1858), 3 H. & N. 534.

(*k*) *Rogers & Co.* v. *Lambert & Co., supra.*

SECT. 1. Estoppel of Bailee.

1140. If a third person claim the chattel and threaten the bailee with proceedings, and the bailor nevertheless insist on his title, the bailee may interplead (*l*).

Interpleader.

A bailee who forbears to interplead makes himself a party to a possibly wrongful detention by retaining the chattel for the bailor, and he must then stand or fall by the bailor's title (*m*).

Attornment.

1141. Where a bailee in possession of a chattel attorns to a third person, he is estopped from subsequently denying the title of such third person, even though the person to whom he has attorned obtained a transfer of the property from the original bailor by fraudulent misrepresentation (*n*).

And this rule applies even if the chattel reaches the hands of the bailee subsequently to his agreement to attorn; for though an attornment made by a person out of possession has no immediate application, yet it applies when he obtains possession (*o*).

As a general rule, in order to perfect his attornment to a third person, the chattel must be specific, or there must be a specific appropriation so as to make the chattel specific (*p*). On a sale of goods, when the seller has once recognised the right of the buyer to dispose of goods remaining in the seller's possession, he cannot subsequently defeat the right of a third person claiming under the purchase, upon the ground that no property passed to the latter by reason of the want of a specific appropriation of the goods (*q*). In the event of a conversion of a chattel by the bailee after his attornment, the parties injured thereby are entitled to damages, which in such a case would be estimated at the market value of the chattel at the time of its conversion (*r*).

SECT. 2.—*Rights and Obligations as regards Third Persons.*

Rights of bailor.

1142. The owner of a chattel bailed, although formerly not entitled to sue in trover for its conversion (*s*), has sufficient property in it to maintain an action against a third person for its loss or permanent injury whilst in the bailee's hands, because he has a reversionary interest in the chattel upon the termination of the bailment (*t*).

Further, where the bailee, by a wrongful dealing with the chattel, has determined the bailment, all third persons, however innocent,

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(*l*) Interpleader proceedings are now taken under R. S. C., Ord. 57, or the corresponding provisions under the County Courts Act, 1883. See title INTERPLEADER.

(*m*) *Wilson* v. *Anderton* (1830), 1 B. & Ad. 450, *per* Lord TENTERDEN, C.J., at p. 456.

(*n*) *Henderson & Co.* v. *Williams*, [1895] 1 Q. B. 521, *per* Lord HALSBURY, at p. 529.

(*o*) *Holl* v. *Griffin* (1833), 10 Bing. 246, *per* TINDAL, C.J., at p. 248.

(*p*) *Unwin* v. *Adams* (1858), 1 F. & F. 312; *Tanner* v. *Scovell* (1845), 14 M. & W. 28.

(*q*) *Woodley* v. *Coventry* (1863), 32 L. J. (EX.) 185.

(*r*) *Henderson & Co.* v. *Williams*, *supra*, *per* Lord HALSBURY, at p. 530.

(*s*) *Gordon* v. *Harper* (1796), 7 Term Rep. 9.

(*t*) *Meare* v. *London and South Western Rail. Co.* (1862), 11 C. B. (N. S.) 850; *Hall* v. *Pickard* (1812), 3 Camp. 187; *Meux* v. *Great Eastern Rail. Co.*, [1895] 2 Q. B. 387.

SECT. 2. Rights and Obligations as regards Third Persons.

who purport in any way to deal with the property in the chattel (*a*), are guilty of conversion and liable to the bailor (*b*).

Rights of bailee.

The bailee of a chattel is also entitled, while it continues in his possession, to maintain trover in his own name against any person who may dispossess him of it (*c*), or to sue for damages if the chattel be injured. The fact that he is under no responsibility to his bailor for the damage resulting from the negligence of a third person, will not avoid his right of action against the tort-feasor (*d*). He can recover not only the full value of the chattel bailed, for which amount he is a trustee to the true owner (*e*), but also any further damages which he may personally sustain through deprivation of the use of the chattel owing to its damaged condition (*f*).

Rights of third persons.

1143. Where the bailee personally assumes the conduct and custody of the chattel bailed, he is solely responsible to a third person for any injury which the latter may sustain by reason of the negligent handling of the chattel (*g*). But if the chattel is in charge of his servant at the time of the injury, the bailee is only responsible if the tortious act was committed while the servant was acting within the scope of his employment (*h*).

Where the bailor not only lets out a chattel, but also provides servants to manage it during the term of the hiring, the bailee is not responsible to a third person for injuries which may be caused by the negligence of such servants, provided that there is no interference by the bailee with such management. In that case the bailor is responsible, provided that the servants are acting in the course of their employment or within the scope of the authority delegated to them (*i*).

But the bailor will not be responsible merely because his name is inscribed upon the chattel (*j*). He will be exempt if he can prove that at the time of the accident he had let out the chattel to a hirer, and that such hirer, or his agent, had control over it to the exclusion

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(*a*) *Barker* v. *Furlong*, [1891] 2 Ch. 172.

(*b*) *Cooper* v. *Willomatt* (1845), 1 C. B. 672; *Loeschman* v. *Machin* (1818), 2 Stark. 311; unless the transaction is protected by the Factors Act, 1889 (52 & 53 Vict. c. 45), s. 2, see *Oppenheimer* v. *Attenborough & Son*, [1907] 1 K. B. 510; *Oppenheimer* v. *Frazer and Wyatt*, [1907] 2 K. B. 50; and see title AGENCY.

(*c*) *Burton* v. *Hughes* (1824), 2 Bing. 173, *per* BEST, C.J., at p. 175; *Rooth* v. *Wilson* (1817), 1 B. & Ald. 59; *Croft* v. *Alison* (1821), 4 B. & Ald. 590; *Raynor* v. *Childs* (1862), 2 F. & F. 775; *Sutton* v. *Buck* (1810), 2 Taunt. 302.

(*d*) *The Winkfield*, [1902] P. 42 (overruling *Claridge* v. *South Staffordshire Tramway Co.*, [1892] 1 Q. B. 422).

(*e*) *Ibid.*

(*f*) As to the measure of damages recoverable, see *The Greta Holme*, [1897] A. C. 596.

(*g*) *Jones* v. *Scullard*, [1898] 2 Q. B. 565.

(*h*) As to "scope of employment," see *Beard* v. *London General Omnibus Co.*, [1900] 2 Q. B. 530; *Gracey* v. *Belfast Tramway Co.*, [1901] 2 Ir. 322; *Limpus* v. *London General Omnibus Co.* (1862), 1 H. & C. 526. See titles AGENCY; MASTER AND SERVANT.

(*i*) *Jones* v. *Corporation of Liverpool* (1885), 14 Q. B. D. 890; *Quarman* v. *Burnett* (1840), 6 M. & W. 499; *Dalyell* v. *Tyrer* (1858), E. B. & E. 899; *Rourke* v. *White Moss Colliery Co.* (1877), 2 C. P. D. 205; *Waldock* v. *Winfield*, [1901] 2 K. B. 596; *Union Steamship Co.* v. *Claridge*, [1894] A. C. 185.

(*j*) *Smith* v. *Bailey*, [1891] 2 Q. B. 403.

of all interference with the working or management either by the bailor or his agents (*k*).

SECT. 2. Rights and Obligations as regards Third Persons.

SECT. 3.—*Statute of Limitations.*

Statute of Limitations.

1144. No action will lie against a bailee for a refusal to redeliver the chattel bailed to the bailor (*l*) until after a demand has been made by the bailor for its return (*m*). In order to succeed in such an action the bailor must prove that he is entitled to the delivery of the chattel, and that the bailee is wrongfully detaining it (*n*). In such cases the Statute of Limitations runs against the bailor from the date of the demand and refusal to redeliver, and not from the date of the conversion, even though the bailment was determined and a complete cause of action raised by a wrongful sale or other tortious act of the bailee committed more than six years before the date of the demand (*o*).

SECT. 4.—*Joint Bailors and Joint Bailees.*

Joint bailors.

1145. Where chattels belonging to co-owners are delivered to a bailee, he is bound to redeliver them to any of the co-owners on demand (*p*), unless it is a term in the contract that he shall deliver up possession only upon the demand of all the co-owners. In the latter case he is justified in refusing to redeliver the chattels on the demand of one or some of them only, and detinue will not lie against him for such a refusal (*q*). But, in such a case, if he delivers up the chattels to one of the co-owners upon his sole request, no action will lie against him for so doing, unless all the bailors join for that purpose; and as the person to whom they were actually redelivered cannot join with his co-owners in maintaining an action for a breach occasioned by his own act, no action for detinue will lie against the bailee (*r*). As, however, the bailee would be a trustee of the chattels for all the co-owners, he would be held liable in equity to those who were injured by his breach of trust (*s*).

Joint bailees.

1146. Where a chattel is bailed to two or more bailees, each is responsible for the acts and defaults of his co-bailees done or made within the scope of their authority (*t*). Probably, however, he is not responsible if the act or default is not negligence in the performance of the contract, but something wholly outside it (*u*).

(*k*) *Smith* v. *Bailey*, [1891] 2 Q. B. 403; *Nicholson* v. *Harrison* (1856), 4 W. R. 459.

(*l*) Or, in the case of *mutuum*, their equivalent (*Re Tidd*, [1893] 3 Ch. 154).

(*m*) *Cullen* v. *Barclay* (1881), L. R. 10 Ir. 224.

(*n*) *Gledstane* v. *Hewitt* (1831), 1 Cr. & J. 565, *per* BAYLEY, B., at p. 570.

(*o*) *Wilkinson* v. *Verity* (1871), L. R. 6 C. P. 206; *Philpott* v. *Kelley* (1835), 3 A. & E. 106. See title LIMITATION OF ACTIONS.

(*p*) *Broadbent* v. *Ledward* (1839), 11 A. & E. 209.

(*q*) *Atwood* v. *Ernest* (1853), 13 C. B. 881; *May* v. *Harvey* (1811), 13 East, 197.

(*r*) *Brandon* v. *Scott* (1857), 7 E. & B. 234.

(*s*) *Brandon* v. *Scott*, *supra*, *per* Lord CAMPBELL, C.J., at p. 237. See also *Harper* v. *Godsell* (1870), L. R. 5 Q. B. 422.

(*t*) *Davey* v. *Chamberlain* (1803), 4 Esp. 229; *Coupé Co.* v. *Maddick*, [1891] 2 Q. B. 413, *per* CAVE, J., at p. 415; Story on Bailments, s. 116.

(*u*) Story on Bailments, s. 116. This would seem to follow upon principle from the analogous cases of a bailee's responsibility for his servants. See pp. 553, 564, *ante*.

BAKEHOUSES.

See FACTORIES AND WORKSHOPS.

BALLOT.

See ELECTIONS.

BANKERS AND BANKING.

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For Bills of Exchange and Negotiable Instruments generally, see title BILLS OF EXCHANGE, PROMISSORY NOTES AND NEGOTIABLE INSTRUMENTS.

Part I.—Definitions.

Bank.

1147. A bank is a corporation, partnership or individual carrying on the business of banking.

Banker.

A banker is such individual or a member of such partnership; but for some purposes the term "banker" includes corporations or partnerships carrying on the business of banking (*a*).

Clearing bank.

Clearing banks are such as are entitled to the privileges of the London Clearing House (*b*).

Banking business.

1148. The business of banking, strictly speaking, is the receipt of money from or on account of a customer (*c*), to be repaid on demand or when drawn on by cheque (*d*). In the case of banks lawfully issuing bank notes such issue is a part of banking business.

(*a*) See Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 2.

(*b*) As to the practice of the London Clearing House, see *Boddington* v. *Schlenker* (1833), 4 B. & Ad. 752, and the Clearing House Rules, 1902. What is known as the country clearing is the department of the London Clearing House which deals with country cheques. There are local clearing houses at many provincial centres.

(*c*) As to what constitutes a customer, see pp. 595, 596, *post.*

(*d*) *Foley* v. *Hill* (1848), 2 H. L. Cas. 28, at p. 43. The collection of crossed cheques, being a statutory necessity, is part of the business of banking, but is included in the above definition. The numerous other functions undertaken by modern bankers, such as payment of domiciled bills, custody of valuables, and discounting bills, do not come within the strict definition of banking business.

The judicial recognition of the banker's lien (*e*) implies the inclusion in banking business of the making of advances or the granting of overdrafts to customers.

Cheque.

1149. A cheque is a bill of exchange drawn on a banker, payable on demand (*f*).

A bearer cheque is one expressed to be payable to a particular person or bearer (*g*), or to bearer (*h*).

An order cheque is one which is expressed to be so payable, or which is expressed to be payable to a particular person or body and does not contain words prohibiting transfer or indicating an intention that it should not be transferable (*i*). A cheque payable to the order of a particular person, and not to him or his order, is nevertheless payable to him or his order at his option (*j*).

Crossed cheque.

A crossed cheque is a cheque which bears across the face of it (a) two parallel transverse lines, with or without the words "and company" or any abbreviation thereof between them, and either with or without the words "not negotiable," such a cheque is crossed generally; (b) an addition of the name of a banker, either with or without the words "not negotiable," such a cheque is crossed specially to that banker (*k*).

Bank note.

A bank note is a bill or note for the payment of money to the bearer on demand issued by a bank (*l*).

(*e*) *Brandao* v. *Barnett* (1846), 12 Cl. & F. 787. See p. 620, *post*.

(*f*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 73. It is not necessarily drawn by a customer (*Capital and Counties Bank* v. *Gordon*, [1903] A. C. 240, at p. 250, where drafts drawn by a branch on the head office of the same bank were accorded the protection of the Stamp Act, 1853 (16 & 17 Vict. c. 59), s. 19, which uses the words "draft or order drawn upon a banker"). For form of cheque, see Encyclopædia of Forms, Vol. II., p. 515.

(*g*) For cheques made payable to a particular object, *e.g.*, "wages," see p. 608, *post*.

(*h*) An order cheque on which the only or last indorsement is an indorsement in blank is equally payable to bearer (Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 8 (3)).

(*i*) *Ibid.*, s. 8 (4). The addition of the words "account payee" does not prohibit transfer or indicate such intention (*National Bank* v. *Silke*, [1891] 1 Q. B. 435). It is a question whether a cheque made payable to "order" can be made non-transferable (*ibid.*). The judgments in this case have been read as implying that the "not negotiable" crossing prohibited transfer. Such is clearly not the case; compare Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 81, which limits negotiability, not transferability; *Great Western Rail. Co.* v. *London and County Bank*, [1901] A. C. 414.

(*j*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 8 (5).

(*k*) *Ibid.*, s. 76. Transverse parallel lines are not necessary in a specially crossed cheque. The words "not negotiable" by themselves do not constitute a crossing (see p. 611, *post*). For forms of crossing, see Encyclopædia of Forms, Vol. II., pp. 515, 516.

(*l*) See Bank Charter Act, 1844 (7 & 8 Vict. c. 32), s. 28; Stamp Act, 1854 (17 & 18 Vict. c. 83), s. 11, *quære*, however, as to the meaning of "holder" in that section. The payee of an order cheque or draft is a "holder," though not bearer (see Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 2; *Day* v. *Longhurst*, [1893] W. N. 3; *Lloyd's Bank, Ltd.* v. *Cooke*, [1907] 1 K. B. 794, *per* FLETCHER MOULTON, L.J., at p. 807). See note (*r*), p. 572, *post*.

Part II.—Constitution of Banks.

SECT. 1. **The Bank of England.**

SECT. 1.—*The Bank of England.*

SUB-SECT. 1.—*Constitution.*

Governor and Company of the Bank of England.

1150. In 1694, by Act of Parliament (*m*) and letters patent authorised thereby (*n*), the subscribers and contributors to a Government loan of £1,200,000, their heirs, successors, and assigns, were constituted a body corporate and politic by the name of the Governor and Company of the Bank of England, with perpetual succession and a common seal.

Capital etc.

The annual sum of £100,000 charged on Government revenues was appropriated to the benefit of such corporation, being 8 per cent. on the amount subscribed and £4,000 a year for management (*o*). Additional capital has from time to time been authorised, and the total now amounts to £14,553,000, the proprietors of which constitute the corporation. The internal affairs of the corporation are now governed by charter granted under parliamentary powers (*p*).

Transfers in books of the Bank.

Consols and most Government stocks are transferred by means of the books of the Bank of England (*q*).

Branches.

1151. The Bank of England has statutory power to establish branches in any part of England, provided notes issued at such branch are made payable there as well as in London (*r*).

SUB-SECT. 2.—*Note Issue.*

Circulation of notes.

1152. The notes of the Bank of England are legal tender in England and Wales for sums over £5, except when tendered by the Bank itself or a branch thereof, so long as the Bank continues to pay its notes in legal issue on demand (*s*). They are not legal tender in Scotland (*t*) or Ireland (*a*), but their circulation is not forbidden in either case. A Bank of England note is part of the currency of the country (*b*). The liability of the Bank on its notes is not affected by any lapse of time (*c*). All notes, whether issued by the Bank of England itself or by a branch bank, are payable at the Bank of England in London, but not at any of its branches

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(*m*) Bank of England Act, 1694 (5 W. & M. c. 20), s. 19.
(*n*) Dated July 27, 1694.
(*o*) Bank of England Act, 1694 (5 W. & M. c. 20), s. 17, and charter.
(*p*) Bank Act, 1892 (55 & 56 Vict. c. 48).
(*q*) As to liability to the Bank by presentation of forged power of attorney, see *Starkey* v. *Bank of England*, [1903] A. C. 114; by stockbroker identifying the wrong person as transferor, *Bank of England* v. *Cuiler*, [1907] 1 K. B. 889.
(*r*) Country Bankers Act, 1826 (7 Geo. 4, c. 46), s. 15.
(*s*) Bank of England Act, 1833 (3 & 4 Will. 4, c. 98), s. 6.
(*t*) Bank Notes Issue Regulation (Scotland) Act, 1845 (8 & 9 Vict. c. 38), s. 15.
(*a*) Bankers (Ireland) Act, 1845 (8 & 9 Vict. c. 37), s. 6.
(*b*) *Suffell* v. *Bank of England* (1882), 9 Q. B. D. 555, at p. 563.
(*c*) See Bank Act, 1892 (55 & 56 Vict. c. 48), s. 6, the reason assigned being that they are part of the actual currency of the country.

unless specially made payable there (*d*). Any person is entitled to demand from the Bank notes in exchange for bullion at the rate of £3 17*s.* 9*d.* per ounce, but the melting and assaying are at the expense of the person tendering the gold (*e*).

Amount of issue.

The amount of notes which the Bank of England may issue is governed by the amount of securities and gold and silver bullion appropriated to the issue department (*f*). The securities and issue may, under Order in Council, be increased by two-thirds of the authorised issue of any bank ceasing to issue its own notes (*g*). Where notes have not been presented for payment within forty years after issue, the amount may be written off the authorised issue, but this does not affect the liability of the Bank on such notes if subsequently presented (*h*).

Rights of holder.

1153. A holder with no title or a defective title cannot compel payment of a note by the Bank (*i*), but any person taking such note honestly and for value acquires a good independent title thereto and can enforce payment (*k*).

Alteration in note.

A material alteration in a bank note invalidates it, even in the hands of a holder in due course. An alteration of the number is a material alteration (*l*).

Periodical statement.

1154. The Bank of England has periodically to publish a statement of the amount of notes issued and of the gold and silver bullion and securities in the issue department (*m*).

Exemption from stamp duty.

1155. The notes of the Bank of England are exempt from all stamp duty (*n*).

SUB-SECT. 3.—*Restriction on Note Issue.*

Banks issuing notes.

1156. The Bank of England has exclusive and restrictive rights as to note issue in England and Wales.

Within the city of London and a three-mile radius, measured from the Royal Exchange, it has the monopoly (*o*).

Outside that radius and within a radius of sixty-five miles from London the right is shared with banks of six or less persons

(*d*) Bank of England Act, 1833 (3 & 4 Will. 4, c. 98), s. 6.

(*e*) Bank Charter Act, 1844 (7 & 8 Vict. c. 32), s. 4.

(*f*) *Ibid.*, s. 2.

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

(*h*) Bank Act, 1892 (55 & 56 Vict. c. 48), s. 6.

(*i*) *Raphael* v. *Bank of England* (1855), 17 C. B. 161, is not really an exception to the proposition that bank notes are currency. Honest acquisition is a condition of right, even to coin.

(*k*) *De la Chaumette* v. *Bank of England* (1829), 9 B. & C. 208. Compare *Suffell* v. *Bank of England* (1882), 9 Q. B. D. 555, at p. 567; *Ransted* v. *Bank of England* (1900), Journal of Institute of Bankers, Vol. XXI., p. 157.

(*l*) *Suffell* v. *Bank of England*, *supra*, which is not affected by the proviso to sect. 64 of the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61). See *Leeds Bank* v. *Walker* (1883), 11 Q. B. D. 84, 90.

(*m*) Bank Charter Act, 1844 (7 & 8 Vict. c. 32), s. 6, and Sched. A.

(*n*) *Ibid.*, s. 7; Stamp Act, 1891 (54 & 55 Vict. c. 39), Sched. I., Bills of Exchange, Exemption 1. See title REVENUE.

(*o*) Bank Notes Act, 1828 (9 Geo. 4, c. 23), s. 1; *Capital and Counties Bank* v. *Bank of England* (1889), 61 L. T. 516, *per* BOWEN, L.J., at p. 517; Bank Charter Act, 1844 (7 & 8 Vict. c. 32), ss. 10, 11. It is theoretically lawful for a bank of not more than six partners lawfully issuing notes within these limits on May 6, 1844, to continue doing so, but apparently there was none such at that date.

SECT. 1. The Bank of England.

established before May 6, 1844, and lawfully issuing their own notes at that date (*p*).

Outside the sixty-five mile radius the right of the Bank of England to issue notes is shared with all banks established before May 6, 1844, and then lawfully issuing their own notes, which have not since lost the privilege (*q*).

Prohibition upon note issue.

A bank not entitled to issue notes is prohibited from attaining the same end by drawing, accepting, making, or issuing any bill of exchange or promissory note payable to bearer on demand, or by borrowing, owing, or taking up money on such bills or notes (*r*).

Loss of right to issue notes.

1157. A bank loses its right to issue notes by bankruptcy, giving up business, or ceasing to issue bank notes (*s*); and it may relinquish the right in return for an annual compensation payable by the Bank of England (*t*). Where the individual existence of a note-issuing bank is lost through its absorption by a non-issuing bank, no manipulation will continue the right of issue to the absorbing bank (*a*). But where two or more banks, each consisting of not more than six persons, and each possessing the privilege of issuing notes, unite, they may apply to the Commissioners of Inland Revenue to certify the aggregate of the amounts of bank notes each was previously authorised to issue, and the united bank may issue notes up to that amount so long as the number of partners in such united bank shall not exceed six (*b*). Moreover, where a bank has the right to issue independent of numbers, its absorption of other banks, issuing or not issuing, will not affect its right (*c*).

(*p*) Bank of England Act, 1833 (3 & 4 Will. 4, c. 98), s. 2 (*Capital and Counties Bank* v. *Bank of England* (1889), 61 L. T. 516); Bank Charter Act, 1844 (7 & 8 Vict. c. 32), s. 11. It has been laid down by some writers that this limit of six has been enlarged to ten by the Joint Stock Banking Companies Act, 1857 (20 & 21 Vict. c. 49), s. 12, repealed and re-enacted by the Companies Act, 1862 (25 & 26 Vict. c. 89), s. 205, Third Schedule, Part II. This is not so. These Acts and the Joint Stock Banks Act, 1844 (7 & 8 Vict. c. 113), which fixed the limit at six, apart from letters patent, are simply Acts regulating the formation of new companies for banking business, a term which, after the Bank Charter Act, 1844 (7 & 8 Vict. c. 32), acquired the meaning of deposit apart from issue business. Sect. 19 of the Joint Stock Banking Companies Act, 1857 (20 & 21 Vict. c. 49), expressly enacted that nothing therein contained should affect the provisions of the Bank Charter Act, 1844 (7 & 8 Vict. c. 32), which enacted by sect. 11 that it should not be lawful for any company or partnership then consisting of six or less persons to issue bank notes at any time after the number of partners therein should exceed six in the whole.

(*q*) Country Bankers Act, 1826 (7 Geo. 4, c. 46); Bank Notes Act, 1828 (9 Geo. 4, c. 23); Bank of England Act, 1833 (3 & 4 Will. 4, c. 98); Bank Charter Act, 1844 (7 & 8 Vict. c. 32), ss. 10, 11 (*Capital and Counties Bank* v. *Bank of England, supra*).

(*r*) Bank Charter Act, 1844 (7 & 8 Vict. c. 32), s. 11. See also definition of bank note, Stamp Act, 1854 (17 & 18 Vict. c. 83), s. 11, where "holder" must, however, be read as equivalent to "bearer." Compare Bank Charter Act, 1844 (7 & 8 Vict. c. 32), s. 26, which gives special power to draw, accept, or indorse bills not being payable to bearer on demand. See note (*l*), p. 569, *ante*.

(*s*) Bank Charter Act, 1844 (7 & 8 Vict. c. 32), s. 12.

(*t*) *Ibid.*, s. 24; Bankers' Compositions Act, 1856 (19 & 20 Vict. c. 20).

(*a*) *A.-G.* v. *Birkbeck* (1884), 12 Q. B. D. 605.

(*b*) Bank Charter Act, 1844 (7 & 8 Vict. c. 32), s. 16.

(*c*) Compare *Capital and Counties Bank* v. *Bank of England, supra*, a case of recovering compensation for ceasing to issue, but the principle is the same, the identity of the bank not being lost.

Similarly the right to the annual compensation which the Bank of England has to pay to banks which have voluntarily surrendered their right to issue notes is lost by the absorption of the compensated bank, but not by its absorption of others (*d*).

Statement of note issue.

1158. Banks issuing notes have to render weekly statements showing the notes in circulation each day and the average circulation in the week. Every four weeks the statement must further show the average in circulation during that period, and the authorised issue (*e*). The average circulation on the four weeks must not exceed the certified amount of the authorised issue, under a penalty equal to the excess (*f*).

Licence for issue of notes.

1159. Bankers, other than the Bank of England, issuing notes must, on or before October the 10th in every year, take out a licence, costing £30. The licence may be for the issue of stamped notes only for sums not exceeding £100 (*g*) or for the issue of unstamped notes (*h*), the stamp duty being compounded for at 3*s.* 6*d.* the £100 of note value, but the banker must give security by bond for the due performance of certain conditions (*i*). If a banker holding a licence of the former class obtains one of the latter class, his right to issue stamped notes is not extinguished (*k*), but is covered by the one licence. The licence is issued by the Commissioners of Inland Revenue (*l*). A separate licence must be taken out in respect of each town or place where notes are issued, but bankers who on May 6, 1844, held four licences, need not take out more than four in respect of the number of places at which they were at that date issuing notes (*m*). Names and addresses of the partners, or the proper name and description of the corporation to which a licence is granted, with other particulars, are to be set out in the licence (*n*), but where a partnership consists of more than six persons, particulars need only be specified as to six (*o*).

Stamps.

A bank note issued duly stamped or issued unstamped by a banker duly licensed to issue unstamped notes may be from time to time re-issued without being liable to fresh stamp duty (*p*). The licence is not affected by a change during its currency in the composition of the partnership (*q*), but a new bond must be entered into for payment of the composition, unless the co-partnership exceeds six in number (*r*).

(*d*) *Capital and Counties Bank* v. *Bank of England* (1889), 61 L. T. 516 (absorption by compensated bank); *Prescott, Dimsdale & Co.* v. *Bank of England*, [1894] 1 Q. B. 351 (absorption of compensated bank).
(*e*) Bank Charter Act, 1844 (7 & 8 Vict. c. 32), s. 18.
(*f*) *Ibid.*, s. 17
(*g*) Stamp Act, 1815 (55 Geo. 3, c. 184), s. 24.
(*h*) Bank Notes Act, 1828 (9 Geo. 4, c. 23), s. 1.
(*i*) *Ibid.*, s. 7.
(*k*) *Ibid.*, s. 5.
(*l*) *Ibid.*, s. 2; Inland Revenue Board Act, 1849 (12 & 13 Vict. c. 1), s. 3.
(*m*) Bank Notes Act, 1828 (9 Geo. 4, c. 23), s. 3; Bank Charter Act, 1844 (7 & 8 Vict. c. 32), s. 22.
(*n*) Bank Notes Act, 1828 (9 Geo. 4, c. 23). The particulars are to be those required by the Country Bankers Act, 1826 (7 Geo. 4, c. 46), s. 4.
(*o*) Revenue (No. 2) Act, 1861 (24 & 25 Vict. c. 91), s. 35.
(*p*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 30.
(*q*) Bank Notes Act, 1828 (9 Geo. 4, c. 23), s. 4.
(*r*) *Ibid.*, s. 10.

SECT. 2. Bank Notes generally.

SECT. 2.—*Bank Notes generally.*

Restriction on amount of note.

1160. Bank notes (*s*) cannot be issued for sums less than £5 in England (*t*), or for sums less than £1 in Scotland (*a*) or Ireland (*b*). Bank notes may be re-issued after payment (*c*), but in practice the Bank of England never re-issues any notes. The circulation of Scotch or Irish notes for sums under £5 in England is prohibited (*d*).

Tender of country note in payment.

1161. Apart from Bank of England notes, which are legal tender (*e*), the notes of an English bank are good tender for money, if not objected to at the time (*f*). They may be so objected to even by the banker who issued them, if tendered to him in payment (*g*).

Half notes.

1162. Bank notes are frequently cut in halves for purposes of transmission or otherwise, and the practice is recognised as legitimate (*h*). In case of loss of one half, the Bank of England pays the other half on indemnity (*i*). It has been held, however, that a half bank note may be sued on without indemnity (*k*). Whether a Court has power to treat the matter as loss of a bill or negotiable instrument on indemnity being given would seem doubtful (*l*). But when the whole note is lost, the Court can allow the action to proceed on indemnity being given (*m*).

Effect of payment by country note.

1163. If a bank note be given in payment for value received at the time, the payment is complete, and in the event of dishonour of the note, no recourse can be had against the transferor either on the note or the consideration for it (*n*). But a note given for a pre-existing debt has been held to be only payment conditional on its being paid when presented (*o*). A note, however, must be presented or circulated within a reasonable time, otherwise, in the event of the bank failing, the loss will fall on the transferee (*p*). And in the

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(*s*) For definition of a bank note, see p. 569, *ante*.

(*t*) Bank Notes Act, 1826 (7 Geo. 4, c. 6), s. 3; and by terms of licence, Bank Notes Act, 1828 (9 Geo. 4, c. 23), s. 1.

(*a*) Bank Notes (Scotland) Act, 1845 (8 & 9 Vict. c. 38), s. 16.

(*b*) Bankers (Ireland) Act, 1845 (8 & 9 Vict. c. 37), s. 15.

(*c*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 30.

(*d*) Bank Notes (No. 2) Act, 1828 (9 Geo. 4, c. 65), s. 1.

(*e*) See p. 570, *ante*.

(*f*) *Wright* v. *Reed* (1790), 3 Term Rep. 554, *per* BULLER, J., in which case Bank of England notes prior to their being made legal tender were objected to.

(*g*) *Forster* v. *Wilson* (1843), 12 M. & W. 191.

(*h*) *Williams* v. *Smith* (1819), 2 B. & Ald. 496; *Redmayne* v. *Burton* (1860), 2 L. T. 324.

(*i*) *Redmayne* v. *Burton*, *supra*. For a form of indemnity, see Encyclopædia of Forms, Vol. II., p. 502.

(*k*) *Ibid.* See, however, *Mayor* v. *Johnson* (1813), 3 Camp. 324.

(*l*) Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), s. 87, as amended by Statute Law Revision Act, 1892 (55 & 56 Vict. c. 19), s. 1, sched.; Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 70. The question is whether half a note is a "negotiable instrument" or a "bill." As to indemnity, see title GUARANTEE.

(*m*) See statutes cited in last note.

(*n*) *Camidge* v. *Allenby* (1827), 6 B. & C. 373.

(*o*) *Ibid.*, *per* BAYLEY, J., at p. 382. But the doctrine is not fully established.

(*p*) *Guardians of Lichfield* v. *Greene* (1857), 26 L. J. (EX.) 140.

event of the bank failing, or the note being dishonoured, the transferee, in order to preserve his right as against the transferor, must give him notice and offer to return the note (*q*).

Payment in forged or materially altered notes is in any case of no effect whatever, and the amount may be recovered (*r*). And notes of a bank which, unknown to either party, had actually stopped payment, would stand on the same footing (*s*).

Interest.

1164. Interest is payable on a bank note, if payment is refused, from the date of demand, and in the case of a joint stock bank, which is being wound up, having stopped payment, a claim on the liquidator is a sufficient demand (*t*).

SECT. 3.—*Banks of Issue in Scotland.*

Note issue in Scotland.

1165. There is no individual bank in Scotland possessing exclusive rights of issuing bank notes like the Bank of England and Bank of Ireland. In 1845 all bankers claiming to issue notes in Scotland were required to give notice to the Commissioners of Stamps and Taxes in London of such claim. The Commissioners instituted inquiries whether such banker was lawfully issuing his own notes during the period from May 6, 1844, to May 1, 1845. If so, the Commissioners ascertained the average amount of notes of such bank in circulation during that period and certified that amount, and such banker was authorised to continue issuing to that amount plus the amount of gold and silver coin held at the head office or principal place of issue, subject to certain regulations (*u*). It was further enacted that after December 6, 1845, no banker should make or issue bank notes in Scotland except bankers who had obtained such certificate of their right to issue (*a*).

Points of difference.

1166. There is no statutory provision making Scotch bank notes legal tender in that country, nor would a bank of issue appear to lose its right to issue notes by ceasing to exercise it for a time. The law as to licences is the same in Scotland as in England (*b*).

SECT. 4.—*Bank of Ireland.*

Note issue in Ireland.

1167. The Bank of Ireland was established in 1781. The Act incorporating it prohibited the issue in Ireland of bank notes by any other company or partnership of more than six persons (*c*). In 1821 banking partnerships of any number of persons carrying on business not less than fifty miles from Dublin were authorised to issue bills or notes payable to bearer on demand (*d*). In 1825 the

(*q*) *Guardians of Lichfield* v. *Greene* (1857), 26 L. J. (EX.) 140.
(*r*) *Jones* v. *Ryde* (1814), 5 Taunt. 488, at p. 494. Compare *Leeds and County Bank* v. *Walker* (1883), 11 Q. B. D. 84, at p. 88. The Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 58, probably constitutes transfer a warranty that the note is genuine.
(*s*) Compare *Timmins* v. *Gibbins* (1852), 18 Q. B. 722.
(*t*) *Re East of England Banking Co.* (1868), 4 Ch. App. 14.
(*u*) Bank Notes (Scotland) Act, 1845 (8 & 9 Vict. c. 38).
(*a*) *Ibid.*
(*b*) 55 Geo. 3, c. 184, s. 24; 24 & 25 Vict. c. 91, s. 35.
(*c*) Statute 21 & 22 Geo. 3, c. 16 (Irish), s. 14.
(*d*) Bank of Ireland Act, 1821 (1 & 2 Geo. 4, c. 72), s. 6.

SECT. 4. Bank of Ireland.

number of partners was increased indefinitely so long as they had no establishment or place of business less than fifty miles from Dublin (*e*). In 1845 it was enacted that no person, other than a banker who on May 6, 1844, was lawfully issuing his own notes, should issue bank notes in Ireland (*f*). Means were prescribed for ascertaining what banks were so entitled and certifying the same, and for fixing the amount of their authorised issue.

Points of difference.

1168. There appear to be no statutory provisions making notes of the Bank of Ireland legal tender, nor would Irish banks of issue appear to be subject to the rule affecting similar English banks that they lose the right by merely ceasing to issue (*g*). Bankers, other than the Bank of Ireland, issuing notes, must take out an annual £30 licence (*h*).

SECT. 5.—*Trustee Savings Banks.*

Trustee savings banks.

1169. These are institutions established for the receipt of moneys from depositors without any benefit accruing to the trustees or organisers (*i*). No bank formed after July 28, 1863, can obtain the benefits of the system unless its formation be sanctioned and approved by the Commissioners for the Reduction of the National Debt, or by the Comptroller-General or assistant Comptroller acting on their behalf (*j*).

Rules and regulations.

All rules and regulations and any alteration thereof have to be submitted to the central office of the Registrar of Friendly Societies, who certifies that they are in conformity with law, and they then become binding on the trustees, managers and depositors (*k*).

Restriction on number of accounts.

1170. Depositors can only use one bank at a time, and may not have two accounts at the same bank (*l*). Any breach of this rule involves forfeiture of any amount illegally deposited, or of so much thereof as the National Debt Commissioners may think fit (*m*). Exception is made in case of deposits by friendly societies (*n*).

Restrictions on amount deposited.

With regard to ordinary deposits, not more than £50 can be deposited by any depositor within any one savings bank year, whether any sum has been previously withdrawn or not (*o*), nor can any deposit be received which would bring the aggregate amount over £200 (*p*). Apparently, however, interest or dividends on money standing to a depositor's credit or on Government stock or special investments standing to his credit in the bank may be

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(*e*) Bankers (Ireland) Act, 1825 (6 Geo. 4, c. 42), s. 2.
(*f*) Bankers (Ireland) Act, 1845 (8 & 9 Vict. c. 37), s. 8.
(*g*) There are no sections in the above Act corresponding to those in the Bank Charter Act, 1844 (7 & 8 Vict. c. 32).
(*h*) Bankers' Composition (Ireland) Act, 1828 (9 Geo. 4, c. 80), ss. 1, 2.
(*i*) Trustee Savings Banks Act, 1863 (26 & 27 Vict. c. 87), s. 2.
(*j*) *Ibid.*
(*k*) *Ibid.*, s. 4; Savings Banks (Barrister) Act, 1876 (39 & 40 Vict. c. 52), s. 2.
(*l*) Trustee Savings Banks Act, 1863 (26 & 27 Vict. c. 87), s. 38.
(*m*) Savings Banks Act, 1891 (54 & 55 Vict. c. 21), s. 12.
(*n*) *Ibid.*
(*o*) Savings Banks Act, 1893 (56 & 57 Vict. c. 69), s. 1.
(*p*) Savings Banks Act, 1891 (54 & 55 Vict. c. 21), s. 11.

added to his deposit notwithstanding that such addition raises the amount above £200 (*q*).

Deposits may be received from and repaid to infants (*r*) or married women (*s*).

Infants and married women.

1171. The trustees must invest all money deposited, except that actually required for necessary expenses, in the Bank of England in the names of the Commissioners (*t*), who invest it in authorised Government stocks and securities. The sums invested by the trustees with the Commissioners carry interest at $2\frac{3}{4}$ per cent. per annum, and the interest payable to depositors is not to exceed $2\frac{1}{2}$ per cent. per annum (*a*). Increased stock and property may be ordered by the Commissioners to be ascertained, certified, and paid over (*b*), and any sums so paid over carry interest and are credited to a separate surplus fund for such bank. This fund may be drawn on by the trustees for necessary purposes upon a certificate authorised by the Commissioners (*c*), and if the application for such payment be sanctioned by the inspection committee (*d*).

Application of deposits by trustees.

Dealing by trustees with land or buildings.

The trustees have power, with the consent of the Commissioners, to purchase land or to erect buildings for the purposes of the bank, and for such purposes to apply money from their separate surplus fund, and, with the like consent, to sell, exchange, or lease lands or buildings acquired by them for the purposes of the bank, but must account for the money thereby received and pay over the balance, after deducting the necessary expenses, to the Commissioners to be carried to the credit of the separate surplus fund (*e*).

Investment of deposits.

1172. Depositors can through the bank invest their deposits or any part thereof in Government stock (*f*). The amount of Government stock credited to a depositor in any savings bank year is not to exceed £200, whether any stock has been previously sold or not, and the whole amount credited is not to exceed £500 at any one time (*g*).

Special investments.

"Special investments" may be made by depositors through the trustees of the savings bank (*h*), as distinguished from investments out of the deposit at request of the depositor. "Special investments" cannot be made unless the person requiring them is a depositor for not less than £50. Such special investments must

(*q*) Savings Banks Act, 1893 (56 & 57 Vict. c. 68), s. 4; Savings Banks Act, 1904 (4 Edw. 7, c. 8), s. 8. Compare Trustee Savings Banks Act, 1863 (26 & 27 Vict. c. 87), s. 39.

(*r*) Trustee Savings Banks Act, 1863 (26 & 27 Vict. c. 87), s. 30.

(*s*) *Ibid.*, s. 31; Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 6.

(*t*) Trustee Savings Banks Act, 1863 (26 & 27 Vict. c. 87), s. 15.

(*a*) National Debt (Supplemental) Act, 1888 (51 & 52 Vict. c. 15), s. 5.

(*b*) Savings Banks Act, 1880 (43 & 44 Vict. c. 36), s. 6. Compare Trustee Savings Banks Act, 1863 (26 & 27 Vict. c. 87), s. 29.

(*c*) Trustee Savings Banks Act, 1863 (26 & 27 Vict. c. 87), s. 29.

(*d*) Savings Banks Act, 1891 (54 & 55 Vict. c. 21), s. 5 (2). The inspection committee of trustee savings banks is appointed under the scheme established by s. 2 of this Act.

(*e*) Savings Banks Act, 1904 (4 Edw. 7, c. 8), s. 4.

(*f*) Savings Banks Act, 1880 (43 & 44 Vict. c. 36), s. 3. Government stock is defined in the Savings Banks Act, 1893 (56 & 57 Vict. c. 69), s. 5 (2) and Sched. I.

(*g*) Savings Banks Act, 1893 (56 & 57 Vict. c. 69), s. 2.

(*h*) Trustee Savings Banks Act, 1863 (26 & 27 Vict. c. 87), s. 16; Savings Banks Act, 1891 (54 & 55 Vict. c. 21), s. 10.

SECT. 5. Trustee Savings Banks.

not exceed £500 in the aggregate. The money must be invested in securities authorised by law for the time being as trustees' securities, and not on mortgage of land or any interest in land (*i*). It may, however, be invested in securities issued under the Local Loans Act, 1875 (*k*), or in loans secured on any local rate levied under authority of Parliament by a local authority authorised to borrow money on that security (*l*). Special investments cannot be made by a bank which was not exercising the power before June 1, 1891, except on the recommendation of the committee of inspection and on the authority of the National Debt Commissioners, who must be satisfied on certain points as to the standing of the bank (*m*). Any bank making special investments must insert in all pass-books used for special investments a printed notice that the security of any special investment is not guaranteed by Government (*n*).

Death of depositor.

1173. Where the deposit of a deceased depositor is below £50, no stamp duty is chargeable on probate or letters of administration in respect thereof (*o*). Regulations may be made and altered by the Treasury for, among other things, the nomination by a depositor over sixteen years of age of a person or persons to whom any sum not exceeding £100 payable to such depositor on his decease shall be paid, and for the revocation of such nomination (*p*).

Returns and accounts by trustees.

1174. Weekly returns have to be transmitted by the trustees and manager to the Commissioners showing the week's transactions and the cash balances in hand, and yearly accounts of all moneys invested by them in the Bank of England, and moneys due to the depositors (*q*). Such yearly accounts are to be in the prescribed form, and must also be sent to the inspection committee (*r*).

Auditor.

1175. An auditor is to be appointed for a term not exceeding one year, but is eligible for re-appointment (*s*).

Settlement of disputes.

1176. No action can be brought by any depositor against the bank, its trustees or officers, all disputes being settled by the arbitration of the central office of the Registrar of Friendly Societies, whose award is final and conclusive (*t*).

SECT. 6.—*Seamen's and Naval and Military Savings Banks.*

Seamen's savings banks.

1177. The Board of Trade have power to establish and maintain a central seamen's savings bank in London, and branches in such ports and places in the United Kingdom as they think fit, and to receive there deposits from or on account of seamen of the

(*i*) Savings Banks Act, 1891 (54 & 55 Vict. c. 21), s. 10.
(*k*) 38 & 39 Vict. c. 83.
(*l*) Savings Banks Act, 1904 (4 Edw. 7, c. 8), s. 6 (2).
(*m*) *Ibid.*, s. 6 (1).
(*n*) *Ibid.*, s. 6 (4).
(*o*) Trustee Savings Banks Act, 1863 (26 & 27 Vict. c. 87), ss. 41, 42.
(*p*) Savings Banks Act, 1887 (50 & 51 Vict. c. 40), s. 3.
(*q*) Trustee Savings Banks Act, 1863 (26 & 27 Vict. c. 87), ss. 7, 55.
(*r*) Savings Banks Act, 1891 (54 & 55 Vict. c. 21), s. 8.
(*s*) Savings Banks Act, 1904 (4 Edw. 7, c. 8), s. 1.
(*t*) Trustee Savings Banks Act, 1863 (26 & 27 Vict. c. 87), ss. 48, 49; Savings Banks (Barrister) Act, 1876 (39 & 40 Vict. c. 52), s. 2. As to such arbitrations, see title FRIENDLY SOCIETIES.

SECT. 6. Seamen's and Naval and Military Savings Banks.

Royal Navy (*a*) and merchant or other sea service, their wives, widows, or children (*b*). The amount of such deposits must not at any one time exceed £200. The National Debt Commissioners, on the request of the Board of Trade, may receive from and repay to the account of the Board money paid as deposit in such banks (*c*). The money is invested in the same manner as that received from trustee savings banks, and interest paid thereon in the same way (*d*). Sums due from the Board of Trade to the estate of any deceased person on account of any such deposit are paid and applied by the Board of Trade as if they were the property of a deceased seaman received by the Board (*e*).

An annual account of all deposits received and repaid and the interest thereon is laid before both Houses of Parliament (*f*).

Naval savings banks.

1178. The Admiralty has power to establish savings banks (*g*), for the receipt of deposits from petty officers and seamen on the books of His Majesty's vessels, and from non-commissioned officers and privates of the royal marines; and regulations for the management of such banks may be made by Order in Council. Subject to any regulations, deposits may be transferred to other savings banks, and any deposits may be invested in the names of the National Debt Commissioners in certain approved stocks and securities; and the interest so obtained, which is not subject to any tax or deductions, may also be similarly invested (*h*).

Military savings banks.

1179. Military or regimental savings banks may be established under regulations made by the Secretary of State for War, with the concurrence of the Treasury, for the purpose of receiving deposits from non-commissioned officers and soldiers employed at home or abroad (except in India), or deposits of funds raised or paid for purposes connected with non-commissioned officers and soldiers (*i*).

SECT. 7.—*Post Office Savings Banks.*

Post Office savings banks.

1180. The Postmaster-General, with the consent of the Treasury, may authorise and direct any of his officers to receive deposits for remittance to the principal office, and to repay the same, subject to such regulations as he, with the concurrence of the Treasury, may prescribe (*j*).

Amount of deposit.

Deposits, which cannot be of less than a shilling, are duly entered in the depositor's book, and if of more than £1 are acknowledged by the Postmaster-General through an officer appointed by him (*k*).

(*a*) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 148.
(*b*) *Ibid.*
(*c*) *Ibid.*, s. 149 (1).
(*d*) *Ibid.*, s. 149 (2). See p. 577, *ante*.
(*e*) *Ibid.*, s. 150.
(*f*) *Ibid.*, s. 152.
(*g*) These banks are not savings banks within the Trustee Savings Banks Act, 1863 (26 & 27 Vict. c. 87), s. 38, or any Act relating to savings banks prior to June 28, 1866; see Naval Savings Bank Act, 1866 (29 & 30 Vict. c. 43), s. 7.
(*h*) Naval Savings Bank Act, 1866 (29 & 30 Vict. c. 43), ss. 8, 9.
(*i*) Military Savings Bank Act, 1859 (22 & 23 Vict. c. 20). Apparently no fresh account has been opened, and no new bank established, since 1897.
(*j*) Post Office Savings Banks Act, 1861 (24 & 25 Vict. c. 14), s. 1. A Post Office savings bank is now available in every town and in many villages.
(*k*) *Ibid.*, s. 2. The limit of £1 was fixed by the Savings Banks Act, 1904 (4 Edw. 7, c. 8), s. 11.

SECT. 7. Post Office Savings Banks.

1181. Moneys received by the Postmaster-General are paid over to the National Debt Commissioners and invested. Deficiencies in the investments are to be reported to the Treasury, and are met out of the Consolidated Fund (*l*).

Application of deposits. Regulations.

1182. Regulations for the conduct of business have been made by the Postmaster-General with the consent of the Treasury, and have statutory authority (*m*).

Restrictions on amount of deposit.

By such regulations (*n*) a depositor may not deposit more than £50 in one year (December 31 to December 31), but may pay in one or more sums to replace one previous withdrawal in the same year. The aggregate limit for deposit is £200, but if reduced by investment, transfer, or withdrawal, a further ordinary deposit may be made, bringing it up to £200, subject to the rule as to not more than £50 being deposited in one year. The depositor's book should be sent in yearly on the anniversary of the first deposit.

Interest.

The interest paid to depositors is 2½ per cent. per annum.

Infants and married women.

Deposits may be made and withdrawn by anyone over seven years old, including married women (*o*).

Withdrawal of deposit.

A depositor may make or withdraw deposits at any Post Office transacting savings bank business, without change of deposit book.

Death of depositor.

Special facilities are afforded for repayment of sums not exceeding £100 on death, and for the nomination by depositors over sixteen of a person or persons to receive not more than £100 out of the deposit on the depositor's death.

Investment of deposit.

Investments may be made out of the deposit at the depositor's request in Government stock up to a total of £500 stock. If such stock is reduced by sale, it may be made up to the same amount. Not more than £200 stock is to be bought in one year, but additional stock may be bought to replace any sold in the same year. The minimum limit of stock is one shilling.

Annuities and insurance.

There is no system of "special investment" in Post Office savings banks, but annuities can be purchased and life insurance effected by depositors through them.

Restriction on number of accounts.

1183. Money cannot be deposited in two Post Office savings banks, or in a Post Office savings bank and a trustee savings bank. A declaration has to be made on opening the account that such is not the case, and breach of the rule renders the depositor liable to forfeiture of all sums illegally deposited (*p*).

Protection against attachment.

1184. Deposits in Post Office savings banks are not liable to attachment for judgment debts of the depositor (*q*).

Settlement of disputes.

1185. Claims by depositors are settled in the same way as in the case of trustee savings banks (*r*).

(*l*) Post Office Savings Banks Act, 1861 (24 & 25 Vict. c. 14), ss. 5, 6.
(*m*) *Ibid.*, s. 11; Savings Banks Act, 1887 (50 & 51 Vict. c. 40), s. 1.
(*n*) See Post Office Guide.
(*o*) See also Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 6.
(*p*) Savings Banks Act, 1887 (50 & 51 Vict. c. 40), s. 1 (2), and regulations printed in Post Office Guide.
(*q*) So stated in regulations, presumably because the deposits are debts due from the Government. As to attachment of other deposits, see p. 588, *post*; and as to attachment of debts generally, see title EXECUTION.
(*r*) See p. 578, *ante*.

SECT. 8.—*Joint Stock Banks.*

SECT. 8. Joint Stock Banks.

1186. The earliest development of joint stock banks (*s*) was in 1826, when corporate bodies or co-partnerships, unlimited in number, were authorised to carry on banking business, both deposit and issue, outside the sixty-five-mile radius from London (*t*). In 1833 banking other than issue business was recognised as permissible within London and the sixty-five-mile radius by corporations, companies, or partnerships, irrespective of the number of members (*u*).

Joint stock banks in country.

In London.

In 1837 powers were given to the Crown to grant charters of incorporation to trading companies, including banking companies (*x*), and such charters may now be renewed or extended (*a*).

In 1844 a system of constituting banks of more than six persons by letters patent was instituted. Pre-existing banks under the legislation of 1826 and 1833 were given the option of coming under the new system by petitioning for letters patent, but if in operation prior to May 6, 1844, were not compelled to do so (*b*).

Effect of legislation of 1844.

The powers and privileges of banks formed within the sixty-five-mile radius in 1833 were assimilated to those formed outside it under the legislation of 1826, except with regard to the right to issue notes (*c*).

In 1857 the limit of ten members was imposed on all unregistered partnerships for banking business (*d*), but partnerships of not more than ten were authorised to carry on banking business in all respects as any partnership of not more than six could then do (*e*).

Limit on numbers imposed in 1857.

By the same Act all banks formed under the 1844 legislation were compelled to register with unlimited liability (*f*), but those of the earlier joint stock banks or companies which had merely availed themselves of the privileges of the 1844 scheme were not affected,

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(*s*) For the general law as to joint stock companies, see title COMPANIES. For the powers and duties of directors and managers, and the company's liability for their acts, see title COMPANIES. As to statutory requirements in a contract for the sale of shares, stock, or interest in a joint stock banking company, see title STOCK EXCHANGE.

(*t*) Country Bankers Act, 1826 (7 Geo. 4, c. 46).

(*u*) Bank of England Act, 1833 (3 & 4 Will. 4, c. 98).

(*x*) Chartered Companies Act, 1837 (7 Will. 4 & 1 Vict. c. 73).

(*a*) Chartered Companies Act, 1884 (47 & 48 Vict. c. 56).

(*b*) Joint Stock Banks Act, 1844 (7 & 8 Vict. c. 113), ss. 1—45.

(*c*) *Ibid.*, s. 47.

(*d*) It is not clear whether the restriction applies only to combinations formed for the exclusive purpose of banking, or whether it would include combinations carrying on banking business as part of their undertaking, or what precisely constitutes banking business. See *Ex parte Coe* (1861), 3 De G. F. & J. 335, where a society formed to receive deposits and conduct emigration operations was held not a banking company within the Joint Stock Banking Companies Acts; and contrast *O'Connor* v. *Bradshaw* (1850), 5 Exch. 882, where a company formed for the purpose of buying land and receiving deposits to be so utilised was held illegal under the Bank Charter Act, 1844 (7 & 8 Vict. c. 32). Probably the real test is the receiving money to be withdrawn by cheque.

(*e*) Joint Stock Companies Act, 1857 (20 & 21 Vict. c. 49). This does not, as before stated, appear to permit a partnership of not more than six, issuing notes at that date by virtue of not being more than six, to increase its number of members to ten without prejudice to the right of issuing notes. See p. 572, note (*p*), *ante*.

(*f*) Joint Stock Companies Act, 1857 (20 & 21 Vict. c. 49), s. 4.

SECT. 8. **Joint Stock Banks.**

nor were any of the banks existing prior to 1844 which had merely stood on their rights. Any of such banks, however, if consisting of more than seven members, or any new coalition of more than seven persons, was entitled to register as a banking company with unlimited liability (*g*).

In 1858 banking companies, whether registered under the last-mentioned provisions or newly formed, were permitted to register with limited liability, save as to note issue, if any (*h*).

Effect of company legislation of 1862.

All banks formed or registered under the above-mentioned legislation of 1857 and 1858 were made subject to the company legislation of 1862, as though registered thereunder. This legislation, with the subsequent amending enactments, governs their constitution and that of all banks of more than ten persons founded since 1862, otherwise than by royal charter or special Act of Parliament.

Restrictions on limitation of liability.

Banks came into the new system as limited or unlimited according to their previous constitution (*i*), but no existing or new bank could by registering with limited liability preclude the liability of its shareholders being unlimited with regard to note issue, if any (*k*). In 1879 banking companies registered as unlimited were afforded the opportunity of registering as limited, and the liability of shareholders in a limited company issuing notes was reformed by providing that in case of winding up they are liable to the note-holders and are further to pay, if required, towards the general debts of the company, a sum equal to that received by the note-holders out of the general assets (*l*).

Annual returns.

1187. Banks other than those affected by the legislation of 1862 and subsequent legislation have to make yearly returns to the Commissioners of Inland Revenue of the names and residences of the members, and of the name of the firm and the places at which business is carried on (*m*), but the Commissioners are not obliged to publish them (*n*).

The companies within the 1862 and subsequent legislation have only to furnish to the Registrar of Joint Stock Companies the annual list and summary required of all joint stock companies, with the addition of the names of the places where business is carried on (*o*).

Audit of accounts.

1188. The accounts of every joint stock banking company registered since August 15, 1879, as a limited company, must be examined at least once a year by an auditor or auditors, annually appointed by the company in general meeting. Such auditors are to have access to the books and accounts, and may examine the directors or any other officer of the company in relation

(*g*) Joint Stock Companies Act, 1857 (20 & 21 Vict. c. 49), ss. 6, 13.
(*h*) Joint Stock Companies Act, 1858 (21 & 22 Vict. c. 91), s. 1.
(*i*) Companies Act, 1862 (25 & 26 Vict. c. 89), ss. 175, 176.
(*k*) *Ibid.*, s. 182. It is believed, however, that certain companies, although registered as limited, have obtained special powers relieving shareholders of liability for notes.
(*l*) Companies Act, 1879 (42 & 43 Vict. c. 76), s. 6.
(*m*) Bank Charter Act, 1844 (7 & 8 Vict. c. 32), s. 21.
(*n*) Inland Revenue Act, 1880 (43 & 44 Vict. c. 20), s. 57.
(*o*) Revenue, Friendly Societies, and National Debt Act, 1882 (45 & 46 Vict. c. 72), s. 11.

thereto. They have to report to the members on the accounts and on every balance-sheet laid before the company, stating particularly whether, in their opinion, the balance-sheet is a full and fair one, exhibiting the then state of the company's accounts, as shown by the books (*p*).

Half-yearly statement.

1189. On the first Monday in February and the first Monday in August in each year a statement, showing the capital of the company, the amount of the shares, the number issued, the amount of the calls thereon and the receipts under such calls, and the liabilities and assets of the company on January 1 (or July 1) preceding, must be made, and a copy put up in a conspicuous place in the registered office of the company and in every branch, under a penalty of £5 a day during default (*q*).

SECT. 9.—*Private Banks.*

Private banks.

1190. Apart from issue business, any number of persons not exceeding ten may, without incorporation, carry on banking business in any part of England or Wales (*r*).

Annual returns.

Yearly returns have to be made to the Commissioners of Inland Revenue of the names of the partners and places where business is carried on (*s*).

SECT. 10.—*Foreign and Colonial Banks.*

Foreign and Colonial banks.

1191. Banks may be registered under the Companies Acts for the purpose of carrying on business abroad or in the Colonies. But a banking corporation legally established in a recognised foreign state cannot be registered here (*t*). It may, however, carry on business here without preliminary formalities (*u*), and the liabilities of its members will be regulated by the law of its domicile (*x*).

Part III.—Business of Banking.

SECT. 1.—*Receipt of Money on Current Account.*

Effect of receipt.

1192. Save as regards the following of trust funds into his hands,

(*p*) Companies Act, 1879 (42 & 43 Vict. c. 76), s. 7. The Companies Act, 1900 (63 & 64 Vict. c. 48), contains similar provisions with regard to all joint stock companies (ss. 21—23). It is presumed that both apply to a joint stock limited banking company registered since 1879. After July 1st, 1908, such audits will be governed by the Companies Act, 1907 (7 Edw. 7, c. 50), s. 19, replacing Companies Act, 1879 (42 & 43 Vict. c. 76), s. 7, and Companies Act, 1900 (63 & 64 Vict. c. 48), s. 23. See further, on this point, title COMPANIES.

(*q*) Companies Act, 1862 (25 & 26 Vict. c. 89), s. 44, and Sched. I., Form D.

(*r*) *Ibid.*, s. 4, and Sched. III., Part 2. It is not clear that a partnership of more than ten, if carrying on business prior to the Country Bankers Act, 1826 (7 Geo. 4, c. 46), might not continue to do deposit business with numbers over that figure, but it is probable that no such partnership exists. Private banks established before that time would keep their numbers down to six, so as to be able to issue notes. The number was raised from six to ten by the Companies Act, 1862 (25 & 26 Vict. c. 89), s. 4.

(*s*) Bank Charter Act, 1844 (7 & 8 Vict. c. 32), s. 21.

(*t*) *Bulkeley* v. *Schutz* (1871), L. R. 3 P. C. 764; *Bateman* v. *Service* (1881), 6 App. Cas. 385, 392.

(*u*) Until July 1st, 1908, when such a company will have to comply with the requirements of the Companies Act, 1907 (7 Edw. 7, c. 50), s. 35. See further, as to foreign corporations carrying on business in England, title COMPANIES.

(*x*) *Bateman* v. *Service*, *supra*, at p. 389.

SECT. 1. Receipt of Money on Current Account.

the receipt of money (*a*) by a banker from or on account of his customer constitutes him merely the debtor of the customer (*b*). He is not a trustee for the customer, and the latter has no right to inquire into or question the use made of the money by the banker (*c*).

Customer's title to money paid in.

1193. In the absence of notice, express or implied, the banker is not concerned to question the customer's title to money paid in by him (*d*).

If the money afterwards prove to be that of another person, it cannot be recovered as a general rule by such person from the banker, if he be under a binding contract to repay it to the person who paid it in (*e*). *Bonâ fide* transactions on the part of the banker prior to the intervention of the real owner will not be disturbed to the prejudice of the former (*f*).

Notice of trust.

But the banker is not at liberty to disregard intimations conveyed to him by the title or character in which the account is opened, or otherwise (*g*). He cannot retain any benefit to himself from wrongful dealing with any fund he knows to be affected with a trust where such benefit has been designed or stipulated for by him (*h*). A banker cannot assert his lien over an account known to be a trust account, whether so described or not (*i*). But a banker may refuse to accept an account in any form which implies that it is affected by a trust (*k*). Apart from benefit to himself, the banker is not, as a rule, entitled to question operations on a trust

(*a*) In so far as the receipt of money on current account consists in the collection of cheques and similar instruments, see pp. 590 *et seq.*, *post*.

(*b*) *Foley* v. *Hill* (1848), 2 H. L. Cas. 28.

(*c*) *Ibid.*; *Re Agra and Masterman's Bank, Ex parte Waring* (1866), 36 L. J. (CH.) 151.

(*d*) *Bodenham* v. *Hoskins* (1852), 21 L. J. (CH.) 864; *Thomson* v. *Clydesdale Bank*, [1893] A. C. 282; *Tassell* v. *Cooper* (1850), 9 C. B. 509. *Quære* whether a banker should accept payments in by or on behalf of an undischarged bankrupt, the moneys so paid in being *primâ facie* the property of the trustee.

(*e*) Compare *Calland* v. *Loyd* (1840), 6 M. & W. 26; *Tassell* v. *Cooper*, *supra*; and compare *Pinto* v. *Santos* (1814), 5 Taunt. 447.

In the case of *Healey* v. *Bank of New South Wales*, November 28, 1900, not reported, the Judicial Committee rejected the claim of the depositor to moneys he had paid into the bank, such moneys being the proceeds of fraud on the Government, for which he had been convicted and punished, treating such moneys as payable to the Government.

(*f*) *Re Montague* (1897), 76 L. T. 203, which does not appear to have been decided with reference to the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), but on general principles.

(*g*) *Bodenham* v. *Hoskins*, *supra*; *Ex parte Adair, Re Gross* (1871), 24 L. T. 198; *Bridgman* v. *Gill* (1857), 24 Beav. 302. Compare *Bank of New South Wales* v. *Goulburn Valley Butter Co. Proprietary, Ltd.*, [1902] A. C. 543.

(*h*) *Gray* v. *Johnston* (1868), L. R. 3 H. L. 1. In one case, *Foxton* v. *Manchester and Liverpool District Banking Co.* (1881), 44 L. T. 406, FRY, J. appears to have held that the fact that the bank indirectly derived benefit from such dealing invalidated the transaction. In *Coleman* v. *Bucks and Oxon Union Bank*, [1897] 2 Ch. 243, BYRNE, J. shows that, to come within *Gray* v. *Johnston*, there must at least be an ascertained debt due to the bank, which on pressure by the bank is satisfied or reduced by payment from the trust account. Compare *Shields* v. *Bank of Ireland*, [1901] 1 Ir. R. 222.

(*i*) *Union Bank of Australia* v. *Murray-Aynsley*, [1898] A. C. 693; *Bank of New South Wales* v. *Goulburn Valley Butter Co. Proprietary, Ltd.*, *supra*.

(*k*) *Ex parte Kingston, Re Gross* (1871), 6 Ch. App. 632, *per* MELLISH, L.J., at p. 640.

account, or to set up the right of any person other than his customer (*l*). But where moneys obviously in the hands of a Government official in that capacity are paid into a private account and drawn out by him, it seems possible that the banker might be called upon by the Crown, not only to hand over any existing balance, but also to make good any wrongful drawings out (*m*).

Payment in by third persons.

1194. Money may be paid into a customer's current account by a third person, and, in ordinary cases, the banker is bound to accept it. But where a cheque for an amount larger than the available balance is presented, the banker should not allow the holder to pay in the deficit, and then pay the cheque (*n*).

Lien.

1195. The banker's lien applies to money paid in on current account (*o*).

Dispositions by customer

1196. Money on current account is subject to the legal incidents of a debt. It passes under a bequest by the customer of "moneys owing to me at the time of my decease" (*p*), though it equally falls within a bequest of "ready money" (*q*). It is payable to the legal representatives of a deceased customer on production of probate or letters of administration (*r*). It is repayable on demand, the drawing of a cheque not being a condition precedent (*s*). It may be legally assigned (*a*), but probably only as a whole, by a single assignment (*b*). In England a cheque is not an assignment (*c*). On the bankruptcy of the customer any balance to his credit passes to his trustee in bankruptcy, and the banker may be summarily compelled to pay it over (*d*).

Garnishee order.

On the service of a garnishee order *nisi*, made on a judgment against the customer, the whole credit balance on current account is impounded, irrespective of the relative amounts of such balance and the judgment debt, and the banker cannot diminish the balance

(*l*) *Gray* v. *Johnston* (1868), L. R. 3 H. L. 1; *Backhouse* v. *Charlton* (1878), 8 Ch. D. 444.

(*m*) *Re West London Commercial Bank* (1888), 38 Ch. D. 364.

(*n*) *Foster* v. *Bank of London* (1862), 3 F. & F. 214. Apart from its being a disclosure of a customer's account, such a proceeding is regarded by bankers as improper.

(*o*) *Misa* v. *Currie* (1876), 1 App. Cas. 554. In *Roxburghe* v. *Cox* (1881), 17 Ch. D. 520, the Court of Appeal, while not disputing this, preferred to base their judgment on the ground of set-off.

(*p*) *Re Derbyshire*, [1906] 1 Ch. 135.

(*q*) *Stein* v. *Ritherdon* (1868), 37 L. J. (CH.) 369.

(*r*) *Tarn* v. *Commercial Bank of Sydney* (1884), 12 Q. B. D. 294.

(*s*) *Foley* v. *Hill* (1848), 2 H. L. Cas. 28, at pp. 36, 43; *Pott* v. *Clegg* (1847), 16 M. & W. 321; *Walker* v. *Bradford Old Bank* (1884), 12 Q. B. D. 511; *Re Tidd*, [1893] 3 Ch. 154.

(*a*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (6); *Walker* v. *Bradford Old Bank*, *supra*. See, further, title CHOSES IN ACTION.

(*b*) *Durham Brothers* v. *Robertson*, [1898] 1 Q. B. 765; *Jones* v. *Humphreys*, [1902] 1 K. B. 10; *Hughes* v. *Pump House Hotel Co.*, [1902] 2 K. B. 190, *per* MATHEW, L.J., at p. 195.

(*c*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 53 (1).

(*d*) Bankruptcy Act 1883 (46 & 47 Vict. c. 52), s. 50 (6).

SECT. 1. Receipt of Money on Current Account.

1202. Current accounts may be opened with corporations, whether trading or non-trading, and they have inherent power to draw valid cheques apart from special authority (*m*).

Corporations.

SECT. 2.—*Receipt of Money on Deposit Account.*

Deposit account.

1203. The receipt of money on deposit account constitutes the banker a debtor to the depositor, but not a trustee thereof for him (*n*). The debt is repayable either on demand or on conditions usually expressed on the receipt. Specified notice may be stipulated for, and the return of the receipt made a condition of repayment, or the deposit may be for a fixed period. If the return of the deposit receipt be a condition precedent, no actual debt arises until its return (*o*). In case of the loss of the receipt, however, a Court would exercise its equitable jurisdiction, and not allow the absence of the receipt to stand in the way of the depositor reclaiming his money (*p*). Nor would the Court require the depositor to give an indemnity, a deposit receipt not being a negotiable instrument (*q*).

Garnishee order.

1204. Whether a particular deposit account is attached by a garnishee order *nisi* depends on the terms on which it is held at the time of service of the order. To be affected by the order, it must be a debt "due or accruing due," that is, due or accruing due at a definite and certain approaching date (*r*). The following seem not attachable: (1) a deposit account repayable only on production of the receipt; (2) a deposit account repayable on fixed notice, which has not been given. The following are attachable: (1) a deposit account repayable on demand; (2) a deposit account repayable on fixed notice, which has been given; (3) a deposit account repayable at a fixed future date, or after the lapse of a specified time. When the account is attached, the whole amount is impounded irrespective of the sum recovered by the judgment (*s*).

Drawing against deposit account.

1205. It is doubtful whether valid cheques can be drawn against a deposit account at call (*t*). Bankers usually honour such cheques,

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(*m*) *Serrell* v. *Derbyshire Rail. Co.* (1850), 9 C. B. 811; *Bateman* v. *Mid-Wales Rail. Co.* (1866), L. R. 1 C. P. 499, at p. 506 (distinguishing cheques from bills); see generally title CORPORATIONS.

(*n*) *Pearce* v. *Creswick* (1843), 2 Hare, 286; *Re Head* (No. 1), [1893] 3 Ch. 426; *Re Head* (No. 2), [1894] 2 Ch. 236.

(*o*) Compare *Atkinson* v. *Bradford Third Equitable Benefit Building Society* (1890), 25 Q. B. D. 377; *Re Tidd*, [1893] 3 Ch. 154; *Re Dillon* (1890), 44 Ch. D. 76, at p. 81.

(*p*) *Re Dillon*, *supra*, *per* COTTON, L.J., at p. 81.

(*q*) Even if the deposit receipt had combined with it a form of cheque, and this were filled up and signed by the depositor before the loss, it is apprehended that, as the banker could not be sued on the cheque, he would not be entitled to an indemnity.

(*r*) *Jones* v. *Thompson* (1858), 27 L. J. (Q. B.) 234; *Webb* v. *Stenton* (1883), 11 Q. B. D. 518.

(*s*) *Rogers* v. *Whiteley*, [1892] A. C. 118.

(*t*) The view expressed by MALINS, V.-C., in favour of their validity in *Hopkins* v. *Abbott* (1875), L. R. 19 Eq. 222, at p. 228, and *Stein* v. *Rotherdon* (1868),

SECT. 2. Receipt of Money on Deposit Account.

relying on lien or set-off, either of which applies to a deposit account (*a*).

1206. A deposit account, being a chose in action, may be assigned as a whole under the Judicature Act, 1873 (*b*), but the mere transfer of a deposit receipt does not constitute such an assignment (*c*).

Assignment.

A deposit receipt, even if in terms it is expressed to be transferable, has never been recognised as a negotiable instrument, or as giving the transferee a right to sue in his own name (*d*). Possibly a bank, having issued the document in a transferable form, might be estopped from disputing its character as such. A form of cheque is sometimes indorsed on a deposit receipt. In such case, if any conditions imposed, such as previous notice, have been fulfilled, the bank cannot, as between itself and the depositor, refuse to pay the holder (*e*). Payment to a person wrongfully dealing with even a signed deposit receipt is no discharge to the bank, unless the depositor is estopped by his conduct from disputing such payment (*f*).

Transfer of deposit receipt.

A deposit receipt may be the subject of a *donatio mortis causâ*, and the Court will compel the legal representatives of the deceased to facilitate the receipt of the money by the donee (*g*). Where a document combining the features of a deposit receipt and a cheque is so given, the validity of the gift will depend on which is the predominant characteristic (*h*).

Donatio mortis causâ.

1207. A deposit receipt is exempt from stamp duty (*i*) as an agreement or otherwise (*k*). The exemption holds good though a time be fixed for repayment (*l*), nor does provision for payment of interest affect the question (*m*).

Stamp duty.

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37 L. J. (CH.) 369, seems inconsistent with the reasoning in *Re Head* (No. 2), [1894] 2 Ch. 236. Compare also *Re Tidd*, [1893] 3 Ch. 154, *per* NORTH, J., at p. 156.

(*a*) See p. 622, *post*.

(*b*) 36 & 37 Vict. c. 66, s. 25 (6).

(*c*) *Moore* v. *Ulster Bank* (1877), 11 Ir. R. C. L. 512, though it may be a good equitable assignment (*Re Griffin*, [1899] 1 Ch. 408).

(*d*) *Re Dillon* (1890), 44 Ch. D. 76; *Moore* v. *Ulster Bank*, *supra*.

(*e*) *Re Mead* (1880), 15 Ch. D. 651; *Re Dillon*, *supra*.

(*f*) *Evans* v. *National Provincial Bank of England* (1897), 13 T. L. R. 429; and see *Pearce* v. *Creswick* (1843), 2 Hare, 286.

(*g*) *Re Mead*, *supra*; *Re Dillon*, *supra*.

(*h*) See *Re Dillon*, *supra*.

(*i*) Stamp Act, 1891 (54 & 55 Vict. c. 39), Sched. I., Receipt, Exemption (1).

(*k*) *Horne* v. *Redfearn* (1838), 4 Bing. (N. C.) 433, where the Court stated that the document, which they held to be an agreement, would have been exempt as a deposit receipt if given by a banker.

(*l*) *Thomson* v. *Bell* (1894), 22 Ct. Sess. Cas., 4th series, 16, at p. 18. Compare *Horne* v. *Redfearn*, *supra*; *Mortgage Insurance Corporation* v. *Commissioners of Inland Revenue* (1888), 21 Q. B. D. 352. It is not a promise to pay within sect. 33 of the Stamp Act, 1891, but merely a recognition of legal obligation resulting from the loan of which it is evidence.

(*m*) In *Bank of Scotland* v. *Watson* (1813), 1 Dow, 40, the House of Lords declined to express an opinion on the point. The Stamp Act, 1815 (55 Geo. 3, c. 184), made bankers' receipts containing any agreement or memorandum that interest should be paid for the money deposited chargeable with stamp duty as promissory notes, but that statute is repealed, and there is no such provision in the Stamp Act, 1891 (54 & 55 Vict. c. 39).

SECT. 2. Receipt of Money on Deposit Account.

1208. A deposit account may be opened with a married woman (*n*) or with an infant (*o*). A person having a deposit account is a "customer" within sect. 82 of the Bills of Exchange Act, 1882 (*p*).

Married women and infants.

SECT. 3.—*Collection of Cheques.*

SUB-SECT. 1.—*Generally.*

Collection of cheques.

1209. Collection, strictly speaking, is the conduct of a banker who acts as a mere agent or conduit pipe to receive payment of the cheque from the banker on whom it is drawn and hold the proceeds at the disposal of his customer.

Presentment for payment.

As such agent, he is bound to exercise diligence in the presentation of the cheque for payment. He fulfils his duty if, when the cheque is drawn on a bank in the same place, he presents it the day after receipt (*q*), or, when on a bank in another place, if he either presents it or forwards it on the day following receipt (*r*). The forwarding may be to another branch or to an agent of the bank (*s*), who has the same time after receipt in which to present. A non-clearing bank may so utilise a clearing bank. But in any case the bank which has received the cheque from its customer remains liable to him for default of its agent (*t*). Presentment through a recognised clearing house is equivalent to presentment to the bank on which the cheque is drawn (*a*). Presentment by post is sufficient (*b*), and it would appear that when a bank forwards by post a cheque to the bank on which it is drawn the latter receives it as agent for presentment to itself (*c*), and in that capacity can hold it till the day after receipt.

Where a cheque drawn by one customer of a bank is received from another customer, it is a question of fact whether it was presented for payment or paid in for collection. If the latter, the bank has

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(*n*) Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), ss. 6, 7. See title HUSBAND AND WIFE.

(*o*) "The disability of infancy goes no further than is necessary for the protection of the infant" (*Burnaby* v. *Equitable Reversionary Interest Society* (1885), 28 Ch. D. 416, *per* PEARSON, J., at p. 424). The contract is beneficial to the infant, and so binding on the banker. The infant could never recover moneys withdrawn by him. Compare *Valentini* v. *Canali* (1889), 24 Q. B. D. 166. See title INFANTS.

(*p*) 45 & 46 Vict. c. 61; *Great Western Rail. Co.* v. *London and County Bank*, [1901] A. C. 414, *per* Lord DAVEY, at p. 421.

(*q*) *Alexander* v. *Burchfield* (1842), 7 Man. & G. 1061; *Rickford* v. *Ridge* (1810), 2 Camp. 537; *Forman* v. *Bank of England* (1902), 18 T. L. R. 339; and compare *Boddington* v. *Schlencker* (1833), 4 B. & Ad. 752.

(*r*) *Hare* v. *Henty* (1861), 10 C. B. (N. S.) 65; *Prideaux* v. *Criddle* (1869), L. R. 4 Q. B. 455; *Heywood* v. *Pickering* (1874), L. R. 9 Q. B. 428; and contrast *Moule* v. *Brown* (1838), 4 Bing. (N. C.) 266; *Bailey* v. *Bodenham* (1864), 16 C. B. (N. S.) 288.

(*s*) *Prideaux* v. *Criddle*, *supra*.

(*t*) *Mackersy* v. *Ramsays* (1843), 9 Cl. & F. 818.

(*a*) *Reynolds* v. *Chettle* (1811), 2 Camp. 596.

(*b*) *Prideaux* v. *Criddle*, *supra*, at p. 461; compare Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 45 (8). It is the usage to treat presentment by post by one bank to another as sufficient, but not presentment by letter by an ostensible payee requesting remittance by post.

(*c*) *Bailey* v. *Bodenham*, *supra*, *per* ERLE, C.J., at p. 296.

the usual time of an agent for giving notice of dishonour (*d*), but must pay it in preference to a debt due to itself from the drawing customer (*e*).

Failure to present.

If the banker fail to present the cheque within the allotted time after it reaches him, he is liable to his customer for loss arising from the delay (*f*). The indorsers, if any, are discharged (*g*), and the drawer is discharged to the extent of any actual damage he may have suffered by the failure of the bank on which the cheque was drawn subsequent to the time when the cheque should have been presented (*h*).

Notice of dishonour.

1210. If a cheque be dishonoured on presentment, the banker can debit the customer's account with the amount (*i*). He must give due notice of dishonour (*k*) either to the parties liable on the cheque, or to his customer (*l*). The latter is the usual course. Return of the cheque to the customer is deemed sufficient notice of dishonour, if the customer have indorsed it (*m*). Branches of the same bank are held to be separate persons for the transmission of notice of dishonour (*n*). A bank may apparently give notice of dishonour by telegram (*o*).

Where a cheque drawn by one customer of a bank is paid in for collection by another customer, and there are not sufficient funds to meet it, the banker still has till the next day in which to return it (*p*).

Where a cheque is sent by post to a bank in the dual capacity of agent for collection and paying bank, it is bound to return it the next day after receipt, if unpaid (*q*).

When cheque can be drawn against.

1211. Where cheques are collected, the banker has a reasonable time, consistent with ordinary book-keeping, in which to pass the proceeds to current account before they are available for drawing against (*r*). Where uncrossed cheques are credited as cash prior to

(*d*) *Boyd* v. *Emmerson* (1834), 2 A. & E. 184.

(*e*) *Kilsby* v. *Williams* (1822), 5 B. & Ald. 815.

(*f*) *Lubbock* v. *Tribe* (1838), 3 M. & W. 607, *per* Lord ABINGER, C.B., at p. 612.

(*g*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 45.

(*h*) *Ibid.*, s. 74, differentiating drawer of cheque from drawer of an ordinary bill under sect. 45.

(*i*) The universal custom of bankers, apparently recognised by Lord LINDLEY in *Capital and Counties Bank* v. *Gordon*, [1903] A. C. 240, at p. 248; *Re Mills, Bawtree & Co., Ex parte Stannard* (1892), 10 Morr. 193.

(*k*) For the general rules relating to notice of dishonour, see title BILLS OF EXCHANGE ETC.

(*l*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 49 (13).

(*m*) *Ibid.*, s. 49 (6). The section does not appear to cover the case of a bearer cheque.

(*n*) *Clode* v. *Bayley* (1843), 12 M. & W. 51; *Prince* v. *Oriental Bank Corporation* (1878), 3 App. Cas. 325; *Fielding* v. *Corry*, [1898] 1 Q. B. 268.

(*o*) *Fielding* v. *Corry*, *supra*, *per* A. L. SMITH, L.J., at p. 271.

(*p*) See *Boyd* v. *Emmerson* (1834), 2 A. & E. 184.

(*q*) There is no direct legal authority for this proposition, but it represents the accepted practice of bankers. The case of a cheque sent for payment through the country clearing, which must be returned direct, if unpaid, by the next post, must be distinguished. Compare *Parr's Bank, Ltd.* v. *Ashby* (1898), 14 T. L. R. 563.

(*r*) *Marzetti* v. *Williams* (1830), 1 B. & Ad. 415.

SECT. 3. Collection of Cheques.

receipt of payment, it would appear that the customer is at once entitled to draw on them (*s*). But if the cheque is dishonoured, the banker is still entitled to debit the customer's account (*t*).

Defective title of customer.

1212. There is no protection for the banker collecting uncrossed cheques (*u*); and therefore, if the customer have no title, or a defective title, the banker is liable to the true owner for conversion or for money had and received to the face value of the cheque (*x*). But where conversion will not lie, as where the collection has been for a customer having a revocable title unrevoked at the time the money was received and handed over, the banker will be protected as an innocent agent who has parted with the money to his principal before notice (*a*).

Bank holding in its own right.

Where no question of forged indorsement precludes him, the banker may, in the case of both crossed and uncrossed cheques, escape liability if he can establish an independent title as holder in due course, except where the cheque is crossed "not negotiable" (*b*). The position of holder for value can be set up by the bank where cash has been given for the cheque over the counter; where the cheque is paid in in reduction of an overdraft (*c*); where the cheque is paid in on express condition of being at once drawn against, and is so drawn against (*d*); where the cheque is subject to a lien (*e*), or, in the case of an uncrossed cheque, if it is credited as cash at once (*f*).

Where the banker, by any of the above-mentioned methods, becomes holder in due course of a cheque paid in, he has all the rights of such holder, including that of suing the parties to it in his own name (*g*).

(*s*) *Capital and Counties Bank* v. *Gordon*, [1903] A. C. 240, *per* Lord LINDLEY, at p. 249; and compare *Eyles* v. *Ellis* (1827), 4 Bing. 112. CHANNELL, J., in *Bevan* v. *The National Bank* (1906), 23 T. L. R. 65, doubts this. As to this right being precluded by previous agreement, see *Akrokerri (Atlantic) Mines, Ltd.* v. *Economic Bank*, [1904] 2 K. B. 465.

(*t*) *Capital and Counties Bank* v. *Gordon*, *supra*, *per* Lord LINDLEY at p. 248; and see *Bavins, junr. and Sims* v. *London and South Western Bank*, [1900] 1 Q. B. 270.

(*u*) For the protection of the banker collecting crossed cheques, see p. 593, *post*.

(*x*) *Fine Art Society* v. *Union Bank of London* (1886), 17 Q. B. D. 705; *Great Western Rail. Co.* v. *London and County Banking Co.*, [1899] 2 Q. B. 172, [1901] A. C. 414; *Capital and Counties Bank* v. *Gordon*, *supra*. As to recovering the face value, see *Bavins, junr. and Sims* v. *London and South Western Bank*, *supra*.

(*a*) *Holland* v. *Russell* (1863), 4 B. & S. 14; *Tate* v. *Wilts. and Dorset Bank* (1890), Journal of the Institute of Bankers, Vol. XX., p. 376; *Bavins, junr. and Sims* v. *London and South Western Bank*, *supra*.

(*b*) *Capital and Counties Bank* v. *Gordon*, *supra* (bearer cheques, bank protected); *Great Western Rail. Co.* v. *London and County Banking Co*, *supra* (cheques crossed "not negotiable," bank not protected).

(*c*) *London and County Bank* v. *Groome* (1881), 8 Q. B. D. 288.

(*d*) *National Bank* v. *Silke*, [1891] 1 Q. B. 435, *per* BOWEN, L.J., at p. 439.

(*e*) See pp. 620 *et seq.*, *post*.

(*f*) *Capital and Counties Bank* v. *Gordon*, *supra*. But see the doubts expressed as to the result of that case by BIGHAM, J., in *Akrokerri (Atlantic) Mines, Ltd.* v. *Economic Bank*, *supra*, and by CHANNELL, J., in *Bevan* v. *The National Bank*, *supra*. As to whether this course is available in the case of crossed cheques since the Bills of Exchange (Crossed Cheques) Act, 1906 (6 Edw. 7, c. 17), see p. 597, *post*.

(*g*) *London and County Bank* v. *Groome*, *supra* (paid in in reduction of overdraft); *Ex parte Richdale, Re Palmer* (1882), 19 Ch. D. 409; *Royal Bank of Scotland* v. *Tottenham*, [1894] 2 Q. B. 715 (placing at once to credit).

The banker may perhaps also escape liability, if he can show that the proceeds of the cheque have in fact reached the hands of the true owner, or been applied for his benefit (*h*).

Right to cross.

1213. The banker to whom an uncrossed cheque is paid in for collection is a holder, and may cross it generally or specially (*i*). He may cross it specially to himself (*k*), but does not thereby obtain any protection under sect. 82 of the Bills of Exchange Act, 1882 (*l*).

Lien.

1214. A banker has a lien over cheques paid in for collection (*m*).

SUB-SECT. 2.—*Crossed Cheques.*

Collection of crossed cheques.

1215. The fact that a cheque is crossed in no way affects the banker's duties as to presentation and notice of dishonour. Besides the usual rights of a holder with regard to crossing, a banker to whom a cheque is crossed specially may again cross it specially to another banker for collection (*n*). Where a cheque crossed generally is sent to a banker for collection he may cross it specially to himself (*o*).

Protection to banker.

1216. Subject to certain conditions, the banker is protected in the collection of crossed cheques against liability to the true owner (*p*). The cheque must be crossed when he receives it, for a banker crossing an uncrossed cheque specially to himself (*q*) acquires no protection (*r*).

Where an uncrossed cheque is crossed by a person having no power to do so, *e.g.*, one innocently in possession of it under a forged indorsement, who is not a holder, it is doubtful whether such crossing protects the collecting banker (*s*).

Extent of protection.

Where the protection attaches, it covers the receipt of the cheque and every step taken in the ordinary course of business and intended to lead up to the receipt of payment (*a*), such, for instance,

(*h*) *Reid* v. *Rigby*, [1894] 2 Q. B. 40; *Bevan* v. *The National Bank* (1906), 23 T. L. R. 65.

(*i*) *Akrokerri (Atlantic) Mines, Ltd.* v. *Economic Bank*, [1904] 2 K. B. 465; Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 77 (2).

(*k*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 77 (6). The words "sent to a banker" presumably include "brought," *i.e.* by the customer himself.

(*l*) *Bissell* v. *Fox* (1884), 51 L. T. 663; *Capital and Counties Bank* v. *Gordon*, [1903] A. C. 240. See note (*p*), *infra*.

(*m*) *Thompson* v. *Giles* (1824), 2 B. & C. 422; *Misa* v. *Currie* (1876), 1 App. Cas. 554, at pp. 565, 569, 573. Compare *Great Western Rail. Co.* v. *London and County Banking Co.* in C. A., [1900] 2 Q. B. 464. In *Akrokerri (Atlantic) Mines, Ltd.* v. *Economic Bank*, *supra*, BIGHAM, J., treats collection as a special purpose excluding lien, but the above authorities, it is submitted, must prevail.

(*n*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 77 (5). For forms of crossings, see Encyclopædia of Forms, Vol. II., pp. 515, 516.

(*o*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 77 (6).

(*p*) *Ibid.*, s. 82.

(*q*) Under s. 77 (6), *ibid.*

(*r*) *Bissell* v. *Fox* (1885), 53 L. T. 193; *Gordon* v. *London City and Midland Bank*, [1902] 1 K. B. 242, affirmed *sub nom. Capital and Counties Bank* v. *Gordon*, *supra*.

(*s*) If so held, it would have to be on a wide construction of the words "bears across its face" in sect. 76 of the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61). Compare *Simmons* v. *Taylor* (1858), 4 C. B. (N. S.) 463, 467 (case of paying banker).

(*a*) *Capital and Counties Bank* v. *Gordon*, *supra*, *per* Lord MACNAGHTEN, at p. 244.

SECT. 3. Collection of Cheques.

as stamping the bank identification stamp on the cheque (*b*). It has been suggested (*c*) that the protection does not extend to cheques obtained by larceny or analogous felony, but it is submitted this is not the case (*d*).

Conditions of protection.

1217. The banker's dealings throughout must be in good faith and without negligence (*e*). The alternative liability arising from negligence renders the question of good faith practically superfluous; and it is seldom, if ever, raised. Negligence in this connection is breach of a statutory duty to the possible true owner, not the customer, the duty being not to disregard the interests of such true owner (*f*). It binds the banker to inquiry when there is anything to raise suspicion that the cheque is being wrongfully dealt with in being paid into the customer's account.

Per pro. indorsement.

A *per pro.* indorsement puts the banker on inquiry as to the authority of the person so indorsing, and disregard of this intimation constitutes negligence (*g*). And the inquiry must include not only the authority to indorse, but the authority to deal with the indorsed cheque in the manner proposed (*h*). The words "*per pro.*" are not essential. Any cheque purporting to be indorsed in a representative capacity stands on the same footing (*i*). Where the indorsement is authorised, the banker is not affected by the existence of unfulfilled conditions (*k*); and where the indorsement and application are authorised, he is not liable for misapplication of the proceeds in the absence of any ground of suspicion (*l*).

Cheques payable to officials.

Apart from a procuration signature, any indication that the customer is using for his own benefit a document *primâ facie* created for the benefit of, and being the property of, another person should put the banker on inquiry (*m*). Under this head would come cheques payable to rate-collectors, secretaries of companies or charitable institutions, and the like, under their official denominations, cheques payable to a partnership and indorsed by one partner paying in to his private account (*n*). Apart from the fact that the

(*b*) *Capital and Counties Bank* v. *Gordon*, [1903] A. C. 240.

(*c*) *Dicta* of Lord HALSBURY and Lord BRAMPTON in *Great Western Rail. Co.* v. *London and County Banking Co.*, [1901] A. C. 414, have been taken to imply this.

(*d*) The customer cannot have less than no title, the contingency against which the banker is protected under sect. 82.

(*e*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 82. The section only specifically mentions the receipt of the money, but negligence in taking the cheque has always been held to preclude protection as necessarily involving the subsequent receipt.

(*f*) *Bissell* v. *Fox* (1885), 53 L. T. 193.

(*g*) *Bissell* v. *Fox, supra*; *Alexander* v. *Mackenzie* (1848), 6 C. B. 766; Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 25.

(*h*) *Gompertz* v. *Cook* (1903), 20 T. L. R. 106.

(*i*) *Balfour* v. *Ernest* (1859), 5 C. B. (N. S.) 601.

(*k*) *Re Land Credit Co.* (1869), 4 Ch. App. 460.

(*l*) *Bank of Bengal* v. *Macleod* (1849), 7 Moo. P. C. C. 35; *Bryant & Co.* v. *Quebec Bank*, [1893] A. C. 170; *Hambro* v. *Burnand*, [1904] 2 K. B. 10.

(*m*) *Hannan's Lake View Central, Ltd.* v. *Armstrong & Co.* (1900), 16 T. L. R. 236, where the secretary of a company indorsed a cheque payable to the company and paid it into a private account.

(*n*) *Bevan* v. *The National Bank* (1906), 23 T. L. R. 65. The position would seem to differ from that of a partner drawing on a partnership account and paying into a private account, as to which see *Backhouse* v. *Charlton* (1878), 8 Ch. D. 445.

Crown is not bound by the Bills of Exchange Act, 1882, since it is not specially named therein (*o*), it would be negligence for a banker to take for private account cheques payable to tax-collectors, excise officials, and the like under their official denominations. So perhaps it would be negligence to take for the private account of one executor a cheque payable to executors as such (*p*). The fact that cheques paid in by a stockbroker may possibly represent money of his clients in his hands has no effect on the collecting banker (*q*).

The omission to detect an irregularity in the indorsement or to notice that it does not ostensibly conform to what would be the proper indorsement would constitute negligence (*r*).

It has been suggested that the fact that a cheque is crossed "not negotiable" of itself puts the banker on inquiry (*s*); but it is submitted that such is not the case (*t*).

Crossing "account payee."

1218. The crossing to a particular account, as "account payee" or "account of A. B.," has no warrant or recognition in the Bills of Exchange Act, 1882 (*a*). It does not affect the transferability of the cheque (*b*). Nor, it is submitted, does it affect its negotiability (*c*). This particular crossing has been in use too long for it to be disregarded, and it must be taken to convey an intimation to the collecting banker that the proceeds of the cheque are only to be placed to the specified account (*d*). It is therefore the custom of most banks to decline to take the cheque for any other account, and a disregard of the intimation would probably be deemed negligence.

Receipt for customer.

1219. To entitle the banker to protection he must only receive payment for a customer (*e*). A customer is a person having

(*o*) As to the extent to which the Crown is bound by statute, see title STATUTES.

(*p*) Compare, however, *Shields* v. *Bank of Ireland*, [1901] L. R 1 Ir. 222, where the Court appears to have seen nothing irregular in an executor paying executorship money into his private account.

(*q*) *Thomson* v. *Clydesdale Bank*, [1893] A. C. 282.

(*r*) *Bavins, junr. and Sims* v. *London and South Western Bank*, [1900] 1 Q. B. 270.

(*s*) *Great Western Rail. Co.* v. *London and County Banking Co.*, [1901] A. C. 414, *per* Lord BRAMPTON, at p. 422. Compare *Bevan* v. *The National Bank* (1906), 23 T. L. R. 65, *per* CHANNELL, J., at p. 67.

(*t*) These words being merely part of the crossing, negligence in respect of a crossed cheque must be something outside the crossing. This particular crossing being for the protection of the public, the banker is entitled to correlative protection. In *Capital and Counties Bank* v. *Gordon*, [1903] A. C. 240, Lord BRAMPTON'S view (note (*s*), *supra*) was either not pressed or not adopted. Compare that case in the Court of Appeal, [1902] 1 K. B. 242, at p. 275.

(*a*) 45 & 46 Vict. c. 61.

(*b*) *National Bank* v. *Silke*, [1891] 1 Q. B. 435.

(*c*) If it did, it would have the effect of "not negotiable" without statutory sanction; compare *National Bank* v. *Silke*, *supra*. The word "account" points to the banker, not a transferee.

(*d*) *Akrokerri (Atlantic) Mines, Ltd.* v. *Economic Bank*, [1904] 2 K. B. 465; *Bevan* v. *The National Bank*, *supra*.

(*e*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 82. "The protection conferred by sect. 82 is conferred only on a banker who receives payment for a customer, that is, who receives payment as a mere agent for collection." The bank should be "a mere conduit pipe for conveying the cheque to the bank on which it is drawn and receiving the money from that bank for their customer" (*Capital and Counties Bank* v. *Gordon*, *supra*, *per* Lord MACNAGHTEN, at pp. 245, 246).

SECT. 8. Collection of Cheques.

habitual dealings with the banker in the nature of ordinary banking business. There must be use and habit (*f*). A single isolated transaction does not constitute a customer (*g*), nor does the continued cashing of crossed cheques over the counter from which the bank derived no direct benefit (*h*).

Having a current account constitutes a person a customer (*i*), so also having a deposit account (*k*). Habitual discounting of bills with a bank would probably constitute a customer. A first transaction, *e.g.*, paying in a cheque to open an account, even though followed by other transactions, would probably not be protected (*l*). If a man is not a customer, his drawing a counter-cheque for the amount, or the entry of the transaction in the banker's books under such a heading as "Sundry Customers," is of no avail (*m*). A man may be a customer although his account is overdrawn (*n*).

Where a crossed cheque drawn on a head office or a branch is paid in by a customer at another branch, and paid or allowed in account, the bank is protected either as a collecting or as a paying bank (*o*).

When bank becomes transferee.

1220. As above mentioned, the receipt of payment must be exclusively for the customer (*p*). Save in the case of crediting crossed cheques as cash before receipt of payment (*q*), a banker who becomes the transferee of a crossed cheque, or so acts with regard to it that but for a forged indorsement he would become the transferee of it, does not subsequently receive the proceeds for the customer, but for himself (*r*). The banker becomes a transferee, if he gives cash for it over the counter, or if the cheque is paid in on

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(*f*) *Matthews* v. *Brown & Co.* (1894), 10 T. L. R. 386; *Lacave & Co.* v. *Crédit Lyonnais*, [1897] 1 Q. B. 148; *Great Western Rail. Co.* v. *London and County Banking Co.*, [1901] A. C. 414.

(*g*) *Kleinwort* v. *Comptoir d'Escompte*, [1894] 2 Q. B. 157; *Matthews* v. *Brown & Co.*, *supra*; *Lacave & Co.* v. *Crédit Lyonnais*, *supra*.

(*h*) *Great Western Rail. Co.* v. *London and County Banking Co.*, *supra*.

(*i*) *Lacave & Co.* v. *Crédit Lyonnais*, *supra*.

(*k*) *Great Western Rail. Co.* v. *London and County Banking Co.*, *supra*, *per* Lord DAVEY, at p. 421.

(*l*) "He was not a customer at the moment, but he was going to become a customer if the cheque was collected" (*Tate* v. *Wilts and Dorset Bank* (1899), Journal of Institute of Bankers, Vol. XX., p. 376, *per* DARLING, J.).

(*m*) *Matthews* v. *Brown & Co.*, *supra*; *Great Western Rail. Co.* v. *London and County Banking Co.*, *supra*.

(*n*) *Clarke* v. *London and County Bank*, [1897] 1 Q. B. 552, criticised by Lord LINDLEY in *Great Western Rail. Co.* v. *London and County Banking Co.*, *supra*; but the doubt was whether the bank received only for the customer, not whether he was one. Compare *Hardy* v. *Veasey* (1868), L. R. 3 Exch. 107.

(*o*) *Gordon* v. *Capital and Counties Bank*, [1902] 1 K. B. at p. 274, where the cheque was to order and bore a forged indorsement (not included in appeal to House of Lords). But the protection would also apply in the case of a bearer cheque; see p. 608, *post*.

(*p*) See note (*e*), p. 595, *ante*.

(*q*) Provided for by the Bills of Exchange (Crossed Cheques) Act, 1906 (6 Edw. 7, c. 17). See note (*e*), p. 597, *post*.

(*r*) *Capital and Counties Bank* v. *Gordon*, [1903] A. C. 240, *per* Lord MACNAGHTEN, at p. 245: "It is impossible, I think, to say that a banker is merely receiving payment for his customer and a mere agent for collection when he receives payment of a cheque of which he is the holder for value." The person in possession of an order cheque under a forged indorsement could never be a holder for value, so that these words must be read in the extended sense given in the text.

the express understanding that it may be drawn against at once, and it is so drawn against (*s*). So probably if the cheque is received on that footing, whether it is in fact drawn against or not (*a*), or is paid in in express reduction of an overdraft (*b*). But the mere existence of an overdraft, though the banker's lien in respect thereof constitutes him for certain purposes a holder for value to the extent of that lien (*c*), would not appear to preclude the protection (*d*).

Crediting as cash.

1221. The mere fact that the banker has credited the cheque as cash before receiving the proceeds does not prevent his subsequently receiving them for the customer, or deprive him of protection (*e*).

But it would appear that the other incidents of crediting as cash still apply in the case of crossed cheques (*f*).

If so credited the customer can therefore draw against the cheque at once (*g*), unless by special agreement or course of business he is precluded from so doing (*h*). The banker can, in the absence of a forged indorsement, sue upon a crossed cheque in his own name as a holder in due course, unless the cheque is crossed "not negotiable" (*i*), and may debit the customer if the cheque is dishonoured (*j*). He may apparently set up the position of holder for value as against the person claiming as true owner, except where the indorsement is forged or the cheque is marked "not negotiable."

"Not negotiable" crossing.

1222. Where a cheque is crossed "not negotiable" the banker cannot avail himself of the defence that he dealt with the cheque pending revocation of a voidable title in the customer (*k*).

(*s*) *National Bank* v. *Silke*, [1891] 1 Q. B. 435, *per* BOWEN, L.J., at p. 439.

(*a*) *Royal Bank of Scotland* v. *Tottenham*, [1894] 2 Q. B. 715.

(*b*) Compare *London and County Bank* v. *Groome* (1881), 8 Q. B. D. 288.

(*c*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 27 (3).

(*d*) *Clarke* v. *London and County Bank*, [1897] 1 Q. B. 552. The banker might be said to have waived his lien on the cheque, presented it on behalf of the customer, and retained the proceeds by virtue of his right of set-off. Compare *Great Western Rail. Co.* v. *London and County Banking Co.*, [1900] 2 Q. B. 464, *per* ROMER, L.J., at p. 476; the same case, [1901] A. C. 414, *per* Lord LINDLEY, at p. 424. Where Lord MACNAGHTEN, as previously quoted (note (*r*), p. 596, *ante*), spoke of "holder for value," it is suggested that he meant "transferee for value."

(*e*) Bills of Exchange (Crossed Cheques) Act, 1906 (6 Edw. 7, c. 17). Doubts have been expressed whether this was not the case even apart from the Act by BIGHAM, J., in *Akrokerri (Atlantic) Mines, Ltd.* v. *Economic Bank*, [1904] 2 K. B. 465, and CHANNELL, J., in *Bevan* v. *The National Bank* (1906), 23 T. L. R. 65. But see *Capital and Counties Bank* v. *Gordon*, [1903] A. C. 240, in consequence of which the Act was passed. The Act is not retrospective, and does not affect transactions prior to its coming into operation. See *Bevan* v. *The National Bank*, *supra*.

(*f*) The Bills of Exchange (Crossed Cheques) Act, 1906 (6 Edw. 7, c. 17), is by its terms confined to the protection of the banker against the true owner.

(*g*) *Capital and Counties Bank* v. *Gordon*, *supra*, *per* Lord LINDLEY, at p. 249.

(*h*) Compare *Akrokerri (Atlantic) Mines, Ltd.* v. *Economic Bank*, *supra*.

(*i*) *Royal Bank of Scotland* v. *Tottenham*, *supra*.

(*j*) *Capital and Counties Bank* v. *Gordon*, *supra*, *per* Lord LINDLEY, at p. 248.

(*k*) As to this defence in the case of other cheques, see *Tate* v. *Wilts and Dorset Bank* (1899), Journal of Institute of Bankers, Vol. XX., p. 376. As to its exclusion by non-negotiable crossing, compare *Great Western Rail. Co.* v. *London and County Banking Co.*, [1901] A. C. 414.

SECT. 4. Collection of Bills of Exchange.

SECT. 4.—*Collection of Bills of Exchange.*

Collection of bills of exchange.

1223. If a banker undertakes the collection of bills (*l*) for a customer he is bound to present them for acceptance and payment in accordance with the provisions of the Bills of Exchange Act, 1882 (*m*), and must give notice of dishonour to his customer if they are dishonoured (*n*).

Sub-agents.

If he employs a sub-agent, he is responsible to the customer for negligence on the part of such sub-agent (*o*), but has a remedy over against the sub-agent.

Money received on a bill by a sub-agent is in law received by the banker, apart from any question of account between him and the sub-agent (*p*). A banker receiving bills for collection from another banker is agent for the remitting banker, not for that banker's customer; unless, therefore, the banker has distinct notice that the bills are the property of the customer, they may be treated as the property of the remitting banker (*q*), and are subject to a lien for any balance due from the latter (*r*).

Lien.

A banker has a lien on a bill handed to him by a customer for collection, if the customer be or become indebted to him (*s*). If the customer has indorsed the bill, the banker has a remedy on it against the customer to the extent of such indebtedness (*t*). Mere indorsement for collection, without indebtedness, gives no such right (*a*), nor does indorsement necessarily imply parting with the entire property in the bill (*b*). Whether the customer parts with the entire property depends on the nature of the dealing between him and the banker. Entering as cash before receipt of the money has been held evidence only of the banker's having taken the bill in his own right (*c*). Whether it has greater effect

(*l*) For forms of bill of exchange, see Encyclopædia of Forms, Vol. II., pp. 510, 511.

(*m*) 45 & 46 Vict. c. 61. See, further, title BILLS OF EXCHANGE ETC.

(*n*) Compare *Bank of Van Diemen's Land* v. *Bank of Victoria* (1871), L. R. 3 P. C. 526; *Bank of Scotland* v. *Dominion Bank* (*Toronto*), [1891] A. C. 592.

(*o*) *Mackersy* v. *Ramsays* (1843), 9 Cl. & F. 818; *Prince* v. *Oriental Bank Corporation* (1878), 3 App. Cas. 325. And see, further, title AGENCY, p. 193, *ante*. For form of acknowledgment excluding this liability, see Encyclopædia of Forms, Vol. II., p. 472.

(*p*) *Mackersy* v. *Ramsays*, *supra*.

(*q*) *Johnson* v. *Robarts* (1875), 10 Ch. App. 505. Compare *Ex parte Armitstead*, *Re Dilworth* (1828), 2 Gl. & J. 371.

(*r*) *Ex parte Froggatt*, *Re Parker* (1843), 3 Mont. D. & De G. 322. Compare *Prince* v. *Oriental Bank Corporation*, *supra*, at p. 335; *Ex parte Sargeant*, *Re Burrough* (1810), 1 Rose, 153.

(*s*) *Giles* v. *Perkins* (1807), 9 East, 12; *Ex parte Schofield*, *Re Firth* (1879), 12 Ch. D. 337; *Dawson* v. *Isle*, [1906] 1 Ch. 633; *Ex parte Barkworth*, *Re Harrison* (1858), 2 De G. & J. 194.

(*t*) Compare *Giles* v. *Perkins*, *supra*, at p. 14.

(*a*) There being no consideration (*Ex parte Schofield*, *Re Firth*, *supra*, *per* BRETT, L.J., at p. 343).

(*b*) *Ex parte Schofield*, *Re Firth*, *supra*; *Ex parte Barkworth*, *Re Harrison*, *supra*. It may be merely by way of additional security.

(*c*) *Giles* v. *Perkins*, *supra*; *Ex parte Barkworth*, *Re Harrison*, *supra* (bills not due); *Thompson* v. *Giles* (1824), 2 B. & C. 422. Compare *Gaden* v. *New-* *Savings Bank*, [1899] A. C. 281, at p. 286; *Dawson* v. *Isle*, *supra*.

now is doubtful (*d*). It would seem to constitute an undertaking by the banker to honour cheques to the amount of the bills (*e*).

Negotiation by banker.

A banker is not justified in negotiating bills, whether indorsed by the customer or not, which have been paid in for collection (*f*), at any rate unless the state of the customer's account renders it a reasonable thing to do so (*g*).

No protection when customer has no title.

A banker who collects a bill to which his customer has no title is liable to the true owner in trover or for money had and received to the face value of the bill, and has no statutory protection whatever (*h*).

SECT. 5.—*Collection of other Documents.*

SUB-SECT. 1.—*Orders for Payment.*

Orders for payment.

1224. An order for payment drawn by a customer on his banker payable conditionally on the payee's signing a specified attached receipt is not a cheque (*i*).

Such documents are not negotiable, and if the collecting banker has received the amount payable under any of such documents in circumstances constituting conversion of the document he is liable to the true owner for the face value (*k*).

Crossing.

The crossing on such documents has generally been regarded as affording both collecting and paying bankers the same protection as the crossing on cheques, and as imposing the same duties on the latter. This would appear to be the case (*l*) except that a collecting

(*d*) The doctrine that crediting cheques as cash makes the banker holder for value *ipso facto*, applied to cheques in *Capital and Counties Bank* v. *Gordon*, [1903] A. C. 240, has never yet been applied to bills not due.

(*e*) *Thompson* v. *Giles* (1824), 2 B. & C. 422, at pp. 429, 431.

(*f*) *Thompson* v. *Giles*, *supra*; *Collins* v. *Martin* (1797), 1 Bos. & P. 648, at p. 649; *Ex parte Barkworth*, *Re Harrison* (1858), 2 De G. & J. 194.

(*g*) Negotiation in some such circumstances is clearly contemplated in *Thompson* v. *Giles*, *supra*, see *per* BAYLEY, J., at p. 429: "The banker could only be justified in negotiating them when that was rendered a reasonable course by the state of the customer's account." See also *per* HOLROYD, J., at p. 432; and compare *Ex parte Barkworth*, *Re Harrison*, *supra*. But it is submitted that the right only arises when there has been agreement, express or implied, that the bills may be so dealt with on contingencies which have arisen. The proper course is to hold and collect the bills when due and retain the proceeds by virtue of set-off.

(*h*) *Arnold* v. *Cheque Bank* (1876), 1 C. P. D. 578, at p. 585. The suggestion there of handing over the money to the customer cannot be supported in view of the later cases, *e.g.*, *Fine Art Society* v. *Union Bank of London* (1886), 17 Q. B. D. 705; *Capital and Counties Bank* v. *Gordon*, [1903] A. C. 240.

(*i*) *Capital and Counties Bank* v. *Gordon*, *supra*, at p. 252 (instruments in class 8); *Bavins, junr. and Sims* v. *London and South Western Bank*, [1900] 1 Q. B. 270.

(*k*) *Bavins, junr. and Sims* v. *London and South Western Bank*, *supra*; *Capital and Counties Bank* v. *Gordon*, *supra*. Compare Revenue Act, 1883 (46 & 47 Vict. c. 55), s. 17: "Provided that nothing in this Act shall be deemed to render any such document a negotiable instrument." See also *Gordon* v. *London City and Midland Bank*, [1902] 1 K. B. 242, *per* COLLINS, M.R., at p. 275.

(*l*) Revenue Act, 1883 (46 & 47 Vict. c. 55), s. 17. See *Bavins, junr. and Sims* v. *London and South Western Bank*, *supra*; *Gordon* v. *London City and Midland Bank*, *supra*, at pp. 275, 282. Certain expressions used by Lord LINDLEY in the latter case, [1903] A. C. at p. 252, and concurred in by the other law lords, might seem to imply that the Revenue Act, 1883, s. 17, does not apply to these documents

SECT. 5. Collection of other Documents.

banker would not be protected if the documents were credited as cash before receipt of the money (*m*).

It would seem not to be regarded as negligence in a banker to take these documents for collection for a party other than the named payee (*n*). Beyond this, their transferability would seem doubtful.

SUB-SECT. 2.—*Dividend Warrants.*

Dividend warrants.

1225. With regard to dividend warrants which are strictly in cheque form, the banker's duties, liabilities, and protection are the same as with regard to other cheques.

But dividend warrants payment of which is made conditional, *e.g.*, on signature and production of an annexed receipt (*o*) or on presentation within a specified period, are not cheques.

As to such dividend warrants, the rules as to presentation and notice of dishonour applicable to cheques are not binding. It is, however, the duty of the banker to present them in reasonable time and return them to the customer if not paid on presentation. The usage of bankers to require only one indorsement on a dividend warrant payable to several holders is preserved by the Bills of Exchange Act, 1882 (*p*).

Crossing.

The crossed cheque sections of that Act (*q*) apply to dividend

by reason of their not being drawn on the bank which collects them. It is submitted that, as the form of such documents is clearly within the section, Lord LINDLEY meant that, though the documents were effectively crossed by virtue of the Revenue Act, 1883, s. 17, and the crossed cheque sections incorporated thereby, the protection was lost by reason of the documents having been credited as cash and not being negotiable, or that by reason of a forged indorsement no independent title was possible.

(*m*) Sect. 17 of the Revenue Act, 1883 (46 & 47 Vict. c. 55), merely enacts that sects. 76 to 82 inclusive of the Bills of Exchange Act, 1882, shall extend to any such document, and shall so extend in like manner as if the said document were a cheque. It does not make such documents cheques, and the amending Bills of Exchange (Crossed Cheques) Act, 1906 (6 Edw. 7, c. 17), refers only to "cheques," and does not state that it is to be read as one Act with the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61).

(*n*) Both in *Bavins, junr. and Sims* v. *London and South Western Bank*, [1900] 1 Q. B. 270, and *Gordon* v. *London City and Midland Bank*, [1902] 1 K. B. 242, the documents were taken from a third party, and no objection on this ground appears in the arguments or judgments. The words of the Revenue Act, 1883 (46 & 47 Vict. c. 55), s. 17, "intended to enable any person or body corporate to obtain payment from such banker of the sum mentioned in such document," might well be read as confining the operation of the section to dealings with the immediate payee. The exaction of the payee's receipt points in the same direction, though such receipt was not regarded as incompatible with a third party subsequently obtaining payment of a dividend warrant in *Partridge* v. *Bank of England* (1846), 9 Q. B. 396. The proviso to sect. 17 of the Revenue Act, 1883, that nothing therein contained is to be deemed to make such document a negotiable instrument, appears to use "negotiable" in the sense of transferable, as in sect. 8 of the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61). It is difficult to conceive a transferable but not negotiable document other than a cheque crossed "not negotiable," which is purely a statutory creation.

(*o*) Compare *Capital and Counties Bank* v. *Gordon*, [1903] A. C. 240. A bill or cheque must be unconditional (Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 3).

(*p*) 45 & 46 Vict. c. 61, s. 97 (3) (d).

(*q*) *Ibid.*, ss. 76—82.

warrants (*r*). But it would appear that the Bills of Exchange (Crossed Cheques) Amendment Act, 1906 (*s*), does not apply to dividend warrants, which are not cheques (*a*).

Negotiability.

A forged indorsement or the "not negotiable" crossing precludes the banker from setting up an independent title. Whether he can do so in other cases, or is justified in taking them for collection from anyone other than the payee, depends on the negotiability of a dividend warrant, which has never been judicially recognised (*b*). Where the amount of a dividend warrant has been received in circumstances constituting conversion of the document, the damages recoverable by the true owner would be the face value, independent of any question of negotiability (*c*).

Interest warrants.

A warrant for interest as distinguished from dividend (*d*), if susceptible of effective crossing, can be so only either as a cheque or as an order on a banker issued by the customer (*e*).

SUB-SECT. 3.—*Post Office Money Orders.*

Post Office money orders.

1226. These are not cheques, being drawn by one branch or agency of the Post Office on another. They are outside the ordinary crossed cheques legislation. They may, however, be crossed generally or specially, and will only be paid in accordance with such crossing (*f*). But a banker collecting postal money orders for his customer is absolutely protected whether they be crossed or not, and even if he has been negligent (*g*). The collection must be for the customer, so that the banker would lose protection by taking them for value or crediting them as cash. And as they are not negotiable (*h*), he could not set up an independent title.

(*r*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 95. Interest warrants, if distinguishable from cheques or dividend warrants, would not seem to come within the provisions of this section.

(*s*) 6 Edw. 7, c. 17.

(*a*) The Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 95, does not make dividend warrants cheques; it merely applies to them specific sections of the Act itself. The amending Act of 1906 (6 Edw. 7, c. 17) does not enact that it is to be read as one Act with the Bills of Exchange Act, 1882. In its terms it applies only to cheques.

(*b*) Compare *Partridge* v. *Bank of England* (1846), 9 Q. B. 396, *per* TINDAL, C.J., at p. 424, doubted in *Goodwin* v. *Roberts* (1875), L. R. 10 Exch. 337, at p. 354. Possibly a custom of merchants could be proved at the present day making dividend warrants negotiable if payable to bearer or order. The Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 97 (3) (d), is not sufficient to confer negotiability.

(*c*) Compare *Bavins, junr. and Sims* v. *London and South Western Bank*, [1900] 1 Q. B. 270.

(*d*) The Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 95, specifies a warrant for the payment of "dividend."

(*e*) See Revenue Act, 1883 (46 & 47 Vict. c. 55), s. 17.

(*f*) Post Office (Money Orders) Act, 1883 (46 & 47 Vict. c. 58), s. 1 and Sched. I.; Post Office (Money Orders) Act, 1880 (43 & 44 Vict. c. 33), s. 3.

(*g*) Post Office (Money Orders) Act, 1880, *supra*, proviso to sect. 3. The proviso, which has the force of a substantive enactment (see *Matthiessen* v. *London and County Bank* (1879), 5 C. P. D. 7, and see title STATUTES), is not in its terms confined to crossed postal money orders, and makes no reference to negligence or good faith, as does sect. 82 of the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61). This proviso was not set up in *Fine Art Society* v. *Union Bank of London* (1886), 17 Q. B. D. 705, but a defence based upon it appears sound.

(*h*) *Fine Art Society* v. *Union Bank of London*, *supra*.

SECT. 5. Collection of other Documents.

SUB-SECT. 4.—*Bankers' Drafts.*

Bankers' drafts.

1227. Drafts payable on demand drawn by a branch office on the head office of the same bank, or *vice versâ*, are not cheques (*i*). They are, however, presumably negotiable (*k*). A banker receiving payment in circumstances amounting to conversion is liable to the true owner for the face value. They are not susceptible of effective crossing (*l*), and ostensible crossing affords no protection to the collecting banker. If, however, collected by the bank on which they are drawn, the bank as a whole is protected if it has paid them on a forged indorsement (*m*), whether the draft be inland or foreign (*n*).

A draft drawn by one bank on another is a cheque, and may be crossed and dealt with as such.

SECT. 6.—*Payment of Cheques.*

Payment of cheques

1228. A banker is bound to pay cheques drawn on him by a customer in legal form provided he has in his hands at the time sufficient and available funds for the purpose (*o*). He must either pay them or refuse payment at once; a request to re-present amounts to dishonour (*p*).

Post-dated cheques.

Post-dated cheques are not invalid (*q*), but the banker should not pay such a cheque if presented before its ostensible date (*r*). So

(*i*) *Capital and Counties Bank* v. *Gordon*, [1903] A. C. 240; Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), ss. 3, 73.

(*k*) Bills of Exchange Act, 1882, s. 5 (2). So that, in the absence of a forged indorsement, an independent title may be set up where circumstances admit.

(*l*) *Quære* whether this is implied by Lord LINDLEY in *Capital and Counties Bank* v. *Gordon*, *supra*, at p. 250. Only "cheques" can be crossed under the Bills of Exchange Act, 1882, and "cheque" is defined as a bill in sect. 73, differing from previous crossed cheques legislation, which applied to "draft or order drawn on a banker." There is no statutory provision for applying to them the crossed cheques sections.

(*m*) Stamp Act, 1853 (16 & 17 Vict. c. 59), s. 19; *Capital and Counties Bank* v. *Gordon*, *supra*, at p. 250.

(*n*) It has been contended that the section, occurring in a Stamp Act, can only apply to inland drafts, but the enactment, though in the form of a proviso, is perfectly general in its terms. The fact that it is a proviso does not prevent its being a substantive enactment (*Matthiessen* v. *London and County Bank* (1879), 5 C. P. D. 7). The Court of Chancery (Funds) Act, 1872 (35 & 36 Vict. c. 44), s. 11, refers to this enactment as relating to "the indorsement of drafts or orders drawn upon bankers for the payment of money," without specifying inland drafts. In *Brown, Brough & Co.* v. *National Bank of India* (1902), 18 T. L. R. 669, BIGHAM, J., clearly thought it applied to foreign drafts, and his ruling was not dissented from by the House of Lords in *Capital and Counties Bank* v. *Gordon*, *supra*, see p. 251.

(*o*) *Foley* v. *Hill* (1848), 2 H. L. Cas. 28; *Whitaker* v. *Bank of England* (1835), 1 Cr. M. & R. at p. 750; *Marzetti* v. *Williams* (1830), 1 B. & Ad. 415). As to funds available, see p. 605, *post*.

(*p*) *Bank of England* v. *Vagliano*, [1891] A. C. 107, see *per* Lord BRAMWELL at p. 141, *per* Lord MACNAGHTEN at p. 157, dissenting from *dictum* of MAULE, J., in *Robarts* v. *Tucker* (1851), 16 Q. B. 560, at p. 578.

(*q*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 13 (2), even in the hands of a holder who has taken a post-dated cheque before the ostensible date (*Carpenter* v. *Street* (1890), 6 T. L. R. 410). Nor can an objection to the sufficiency of the stamp prevail if action is brought after the ostensible date (*Royal Bank of Scotland* v. *Tottenham*, [1894] 2 Q. B. 715).

(*r*) *Da Silva* v. *Fuller* (1776), unreported, see Sel. Cas. MS. 238; *Morley* v. *Culverwell* (1840), 7 M. & W. 174, *per* PARKE, B., at p. 178.

if a cheque dated on a Sunday is presented on the previous Saturday, it should be returned with the answer "Post-dated" (*s*). A post-dated cheque, however, if presented at or after its ostensible date, should be paid though the banker knows it to be post-dated, and even if it has been presented before date and refused payment (*t*).

Unstamped cheque.

A banker must not pay an unstamped cheque, but he may affix and cancel an adhesive penny stamp and pay the cheque, deducting the penny from the amount or charging it against the drawer (*u*). If a cheque is presented for payment with an adhesive stamp affixed, but not cancelled, the banker must refuse payment and return the cheque, unless satisfied and prepared to prove that the stamp was affixed by the drawer (*a*).

Irregular cheque.

A banker is justified in refusing payment of a cheque which is ambiguous in form or irregular in execution (*b*).

Payee bankrupt or infant.

It is submitted that a banker should not pay a cheque to a payee he knows to be an undischarged bankrupt (*c*). The validity of payment to an infant payee has never been questioned (*d*).

"Stale" cheques.

Bankers habitually refuse payment of "stale" cheques, *i.e.*, cheques which have been outstanding for a period varying from six months in some banks to twelve in others; but the practice has never received judicial sanction (*e*).

(*s*) A cheque dated on Sunday is not invalid (Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 13 (2)). Sect. 14 of the Act only applies to bills not payable on demand.

(*t*) In *Emanuel* v. *Robarts* (1868), 9 B. & S. 121, the bankers were held justified under a custom of London bankers in refusing payment of a post-dated cheque so re-presented. The ground of decision was the then existing doubt as to the legality of post-dated cheques. That legality is now established, as shown above, and the custom could not obtain at the present day. Possibly the person drawing and issuing a post-dated cheque is liable to a penalty under sect. 5 of the Stamp Act, 1891 (54 & 55 Vict. c. 39).

(*u*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 38 (2).

(*a*) Sect. 38 (2), *ibid.*, only empowers the banker to "affix and cancel" the stamp where the cheque is presented "unstamped." Where a cheque is drawn in the United Kingdom, and an adhesive stamp is used, the drawer must cancel it before he delivers it out of his hands (*ibid.*, s. 34), under a penalty of £10 (*ibid.*, s. 8 (3)). No intermediate holder can affix or cancel the stamp (*Hobbs* v. *Cathie* (1890), 6 T. L. R. 292). A cheque with an adhesive stamp is not "duly stamped" unless the stamp is cancelled by the drawer, or unless it is otherwise proved that the stamp was affixed at the proper time (*ibid.*, s. 8 (1)). Any person paying a bill not duly stamped incurs a fine of £10 (*ibid.*, s. 38). Sect. 35 only applies to bills drawn out of the United Kingdom.

(*b*) His only responsibility is to his customer. He is not bound to decide legal questions, or to run unusual risks. Compare *Emanuel* v. *Robarts*, *supra*; *Bank of England* v. *Vagliano*, [1891] A. C. 107.

(*c*) This question has been much discussed, and there is no direct authority on the point. It is the banker's duty, as far as possible, to obtain a good discharge for his customer. This *primâ facie* the bankrupt cannot give. The banker cannot possibly know whether or not the cheque represents after-acquired property, and, even if it does, payment of it is not a privileged transaction or dealing with the bankrupt. See *Cohen* v. *Mitchell* (1890), 25 Q. B. D. 262; *Re Clark, Ex parte Beardmore*, [1894] 2 Q. B. 393; *Re Bennett, Ex parte the Official Receiver*, [1907] 1 K. B. 149. See, further, title BANKRUPTCY AND INSOLVENCY.

(*d*) See, as to the extent of disability of infancy, p. 587, *ante*.

(*e*) Save in case of damage by non-presentation within a reasonable time, the drawer remains liable until discharged by the Statute of Limitations (*Robinson* v. *Hawksford* (1846), 15 L. J. (Q. B.) 377; *Laws* v. *Rand* (1857), 3 C. B. (N. S.) 442). See title LIMITATION OF ACTIONS. In the notes to *Serle* v. *Norton* (1841), 2

SECT. 6. **Payment of Cheques.**

Undated cheques.

Bankers usually refuse payment of an undated cheque, or one or which the date is incomplete, *e.g.*, December 1, 190–. The practice is of doubtful validity (*f*), but any alteration of the date of a cheque appears to be a material alteration (*g*), and a banker should therefore refuse to pay a cheque on which the date appears to have been altered.

Authority to draw.

1229. The cheque must be drawn by a person having authority express or implied (*h*). And a *per pro.* signature, or one of like import, puts the banker on inquiry as to the authority of the person so signing (*i*). Where the account is not a simply individual one, the parties to draw and form of drawing are generally arranged on opening the account, and such arrangement must be strictly observed.

Joint accounts.

Apart from agreement (*k*), cheques on ordinary joint accounts should be drawn by all the parties in whose name the account stands (*l*). But the banker is justified, in case of death, in allowing the survivor to draw any balance standing to the joint account, even as between husband and wife, whether both or either one is entitled to draw,

Partnership accounts.

During a partnership, and in the absence of instructions to the contrary (*m*), any partner has the right to draw on the partnership account in the firm name (*n*). The death of one or more partners does not preclude the surviving partner or partners from drawing on the firm account (*o*), but the modern and preferable method is that, where to the knowledge of the banker a partner dies, the old

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Mood. & R. 401, it is suggested that the practice is justified by the custom of bankers. In any event, the customer's credit would not be damaged by the cheque being returned marked with this ground of refusal.

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(*g*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 64 (2), not confined to bills payable after date.

(*h*) Theoretically a cheque need not be drawn by a customer. Compare *Capital and Counties Bank* v. *Gordon*, [1903] A. C. 240. Protection was there awarded under the Stamp Act, 1853 (16 & 17 Vict. c. 59), s. 19, to bankers' drafts, as being "drawn upon a banker," which words occur in the definition of a cheque contained in the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 73. But a cheque drawn otherwise than by a customer would not come within any practical rules of banking law. There can be no obligation to pay where there are no funds out of which to pay.

(*i*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 25. *E.g.*, an executor cannot as a rule delegate his powers, and a cheque signed *per pro.* an executor ought not to be paid without inquiry and satisfactory explanation.

(*k*) For an example, see *Marshal* v. *Cruttwell* (1875), L. R. 20 Eq. 328.

(*l*) *Husband* v. *Davis* (1851), 10 C. B. 645, *per* MAULE, J., at p. 650, and compare *Brandon* v. *Scott* (1857), 7 E. & B. 234.

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

account should be operated on only for the purpose of winding up the partnership, and arrangements should be made for a new account, carrying over to it any balance remaining (*p*). The bankruptcy of one partner does not interfere with the other partners or partner drawing on the firm account.

Administration and trust accounts.

In the absence of special arrangement, one of several executors or administrators can draw on an account opened with the deceased, or with them as executors or administrators (*q*); but one trustee cannot draw on a trust account in which others than he are named as trustees (*r*).

Payment without authority.

1230. Subject to questions of statutory protection, estoppel, or adoption, a banker who has paid a cheque drawn without authority or has paid one in contravention of his customer's orders (*s*), or, probably, negligently (*t*), cannot debit the customer's account with the amount.

Funds available.

1231. There must be sufficient funds to cover the whole amount of the cheque presented. For there is in England no obligation on the banker to pay any part of a cheque for an amount exceeding the available balance (*u*), save under instructions. Cheques must be paid in the order in which they are presented, whether by post or otherwise (*b*). If two cheques are presented simultaneously, *e.g.*, by the same mail or through the same clearing, and there are only funds sufficient to pay one, it is doubtful whether both may be returned (*c*).

Time when available.

The funds must not only be sufficient, but available. Even in the case of notes or gold, the banker is entitled to reasonable time between the paying in and drawing against in which to carry out the necessary book-keeping entries (*d*). In the case of cheques and other documents, he is entitled to a reasonable time for clearing or collection according to their respective nature (*e*).

(*p*) See the Partnership Act, 1890 (53 & 54 Vict. c. 39); *Re Bourne*, [1906] 2 Ch. 427. The rights *inter se* of partners and the representatives of a deceased partner do not seem directly to affect the banker, but it is questionable whether he is entitled to ignore them.

(*q*) For administration of a deceased's estate generally, see title EXECUTORS AND ADMINISTRATORS.

(*r*) See, further, title TRUSTS AND TRUSTEES.

(*s*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 75; *Twibell* v. *London Suburban Bank*, [1869] W. N. 127.

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(*u*) A cheque is not an assignment of funds in the banker's hands (Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 53 (1)). The banker only contracts with the customer to honour cheques when he has "sufficient" funds in hand. See *Carew* v. *Duckworth* (1869), L. R. 4 Exch. 313.

(*b*) *Kilsby* v. *Williams* (1822), 5 B. & Ald. 815.

(*c*) Unnecessary damage would be caused to the customer's credit.

(*d*) *Marzetti* v. *Williams* (1830), 1 B. & Ad. 415; *Whitaker* v. *Bank of England* (1835), 1 Cr. M. & R. 744, at pp. 749, 750; *Bransby* v. *East London Bank* (1866), 14 L. T. 403.

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SECT. 6. Payment of Cheques.

If, however, the amount is credited as cash, whether received or not, the customer is at once entitled to draw against it (*f*), unless precluded from doing so by agreement or course of business (*g*).

Funds not available.

1232. A balance at one branch of a bank does not entitle a customer to draw on another branch where he has no account or is overdrawn (*h*). If the customer has, in the same capacity, accounts at two or more branches, the bank is entitled to combine them in the absence of agreement or course of business, and treat the ultimate credit balance, if any, as alone available for drawing purposes (*i*).

A garnishee order *nisi* founded on a judgment against the customer and served on the banker prevents any credit balance being available irrespective of the relative amounts of the judgment and the balance (*k*).

Bills discounted for the customer not yet due do not render a credit balance on current account not available (*l*).

If a banker has marked cheques (*m*) at the instance of the customer, he is entitled to retain funds to meet them.

Lien, set-off, or the Statute of Limitations may render moneys not available.

A receiving order against, or notice of an available act of bankruptcy on the part of, the customer renders moneys standing to his credit at the time not available (*n*).

Breach of trust.

1233. It is not the banker's business or right to set up the title of persons other than his customer, and mere suspicion that a breach of trust is involved or intended in the drawing of a cheque on trust funds is not sufficient (*o*). But it is hardly conceivable that a Court would award damages against the banker to a customer

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(*f*) *Capital and Counties Bank* v. *Gordon*, [1903] A. C. 240, *per* Lord LINDLEY, at p. 249, is apparently not affected by the Bills of Exchange (Crossed Cheques) Act, 1906 (6 Edw. 7, c. 17), even in the case of crossed cheques. That Act only touches relations between the banker and the true owner.

(*g*) *Akrokerri (Atlantic) Mines, Ltd.* v. *Economic Bank*, [1904] 2 K. B. 465; compare *Bevan* v. *The National Bank* (1906), 23 T. L. R. 65.

(*h*) *Woodland* v. *Fear* (1857), 7 E. & B. 519; compare *Garnett* v. *M'Kewan* (1872), L. R. 8 Exch. 10; *Union Bank of Australia* v. *Murray-Aynsley*, [1898] A. C. 693.

(*i*) *Garnett* v. *M'Kewan*, *supra*; *Buckingham & Co.* v. *London and Midland Bank* (1895), 12 T. L. R. 70 (course of business precluding combination).

(*k*) *Rogers* v. *Whiteley*, [1892] A. C. 118; *Yates* v. *Terry*, [1901] 1 K. B. 102 (county court order). See p. 585, *ante*.

(*l*) *Bower* v. *Foreign and Colonial Gas Co.* (1874), 22 W. R. 740, distinguishing *Bolland* v. *Bygrave* (1825), 1 Rv. & M. 271, which had previously been doubted in *Barnett* v. *Brandao* (1843), 6 Man. & G. at p. 654; *Jeffryes* v. *Agra and Masterman's Bank* (1866), L. R. 2 Eq. 674. In the event of a customer's bankruptcy, apart from any determination of the authority to pay cheques, the banker could probably hold a credit balance as against such bills. See Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 38; *Alsager* v. *Currie* (1844), 12 M. & W. 751.

(*m*) Cheques are sometimes marked by bankers as a warrant to persons taking them that the bankers hold sufficient funds on the drawer's account to meet the cheques. See note (*u*), p. 607, *post*.

(*n*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), ss. 9, 49.

(*o*) *Gray* v. *Johnston* (1868), L. R. 3 H. L. 1, *per* Lord WESTBURY, at p. 14; *Bank of New South Wales* v. *Goulburn Valley Butter Co. Proprietary, Ltd.*, [1902] A. C. 543; *Coleman* v. *Bucks and Oxon Union Bank*, [1897] 2 Ch. 243.

who had to admit, or against whom it was proved, that he drew the cheque for the purpose of defrauding the trust (*p*). A banker should not pay a cheque drawn on trust funds in his own favour in circumstances which would in law render him accessory to a fraud, *e.g.*, where there has been a balance struck against a trustee on his private account and pressure for payment, followed by the drawing of a cheque on the trust account for the amount due (*q*).

1234. The duty and authority to pay a cheque drawn by a customer are determined— Determination of authority to pay.

(1) By countermand of payment (*r*), commonly known as stopping a cheque. Stopping by telegram is sufficient (*s*). One partner has power to stop a cheque issued in the firm name; one executor has power to stop a cheque signed by another (*t*). Where a banker has marked a cheque at the instance of the customer, the customer cannot countermand payment of the cheque after issue (*u*). Countermand.

(2) By notice of the customer's death (*x*).

Where one of two or more partners or customers on joint account dies, the survivors or survivor can still draw on the account (*a*). But on the death of one of several trustees the banker must not honour cheques on the trust account drawn by the survivor or survivors unless satisfied of his or their power so to draw under terms of the trust. Death.

(3) By a receiving order made against the customer or notice of an available act of bankruptcy on his part (*b*). Bankruptcy.

Notice of intention to commit an act of bankruptcy has not the same effect (*c*). If a banker chooses to open a new account with the bankrupt after adjudication, he cannot refuse to honour cheques drawn on it, unless the trustee intervene (*d*).

If the banker were served with an injunction not to pay, he Injunction.

(*p*) *Gray* v. *Johnston* (1868), L. R. 3 H. L. 1, *per* Lord CAIRNS, at p. 11; *Hunt* v. *Maniere* (1864), 34 Beav. 157.

(*q*) *Gray* v. *Johnston*, *supra*, and cases cited, note (*h*), p. 584, *ante*.

(*r*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 75. As to payment contrary to instructions, see *Twibell* v. *London Suburban Bank*, [1869] W. N. 127.

(*s*) *Curtice* v. *London City and Midland Bank* (1907), 23 T. L. R. 594, where the Court agreed that there might be a countermand by telegram, but differed as to whether there had been a sufficient communication of the countermand.

(*t*) *Gaunt* v. *Taylor* (1843), 2 Hare, 413.

(*u*) By so marking (see note (*m*), p. 606, *ante*), the banker becomes bound to pay to any other banker presenting it. Compare *Goodwin* v. *Robarts* (1876), L. R. 10 Exch. at p. 351; *Gaden* v. *Newfoundland Savings Bank*, [1899] A. C. 281; *Imperial Bank of Canada* v. *Bank of Hamilton*, [1903] A. C. 49. Sect. 75 of the Act does not include the case as an exception, but the banker is in the position of an agent with interest, for which see, further, title AGENCY, p. 228, *ante*. Even if the cheque is not crossed, it might be presented through a banker, or be subsequently crossed.

(*x*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 75.

(*a*) See p. 604, *ante*.

(*b*) The right and duty to refuse payment in such case arises, not so much from the actual determination of the customer's authority as from the fact of the relation back of the trustee's title in the event of adjudication, which renders the funds not available. See p. 585, *ante*.

(*c*) *Re Wright, Ex parte Arnold* (1876), 3 Ch. D. 70; *Trustee of Lord Hill* v. *Rowlands*, [1896] 2 Q. B. 124.

(*d*) See, as to after-acquired property, note (*d*), p. 584, *ante*.

SECT. 6. Payment of Cheques.

would have to obey it, but such an injunction ought not to be granted (*e*).

Wrongful dishonour.

1235. If a banker without justification dishonour his customer's cheque, he is liable to the customer in damages for injury to credit (*f*). Actual proof of injury is not necessary to warrant substantial damages (*g*).

The holder has no remedy against the banker, unless the banker has admitted to him that he holds money specially to meet the particular cheque (*h*).

SECT. 7.—*Protection to Bankers paying Cheques.*

SUB-SECT. 1.—*Bearer Cheques.*

Bearer cheques. Fictitious payee.

1236. A cheque of which the payee is a fictitious or non-existing person may be treated by the banker as payable to bearer (*i*), though ostensibly payable to such payee or order (*k*). It would appear that documents made payable to an impersonal payee or order, *e.g.*, "Wages or order," "Petty cash or order," are not within the above rule (*l*). Nor is a person fictitious or non-existing within the rule where he is a real person known to the drawer and intended by him to have the benefit of the cheque, although the drawer is induced to insert the name and draw by fraudulent representations of a third party, and the ostensible payee could never have enforced payment of the cheque (*m*). But in such case the paying banker would usually be protected as having paid on a forged indorsement (*n*).

Absence of negligence.

A banker who in good faith and without negligence (*o*) pays a bearer cheque on presentation is free from all liability (*p*), and can debit his customer (*q*) though the holder had no title or a

(*e*) *Fontaine-Besson* v. *Parr's Banking Co. and Alliance Bank* (1895), 12 T. L. R. 121. As to garnishee order against customer, see p. 585, *ante*.

(*f*) *Marzetti* v. *Williams* (1830), 1 B. & Ad. 415.

(*g*) *Rolin* v. *Steward* (1854), 14 C. B. 595; *Summers* v. *City Bank* (1874), L. R. 9 C. P. 580.

(*h*) *Boyd* v. *Emmerson* (1834), 2 A. & E. 184.

(*i*) For definition of a bearer cheque, see p. 569, *ante*. Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 8 (3).

(*k*) *Ibid.*, s. 7 (3); *Bank of England* v. *Vagliano*, [1891] A. C. 107.

(*l*) *Grant* v. *Vaughan* (1764), 3 Burr. 1516, *per* Lord MANSFIELD, at p. 1523, "There was no person originally named as the payee. It runs, 'Pay to ship *Fortune* or bearer'"; *ibid.*, *per* WILMOT, J., at p. 1528, "No person at all is named. It is, 'Pay to ship *Fortune* or bearer.'" Compare Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 2 (definition of "person"); *Bank of England* v. *Vagliano*, *supra*, *per* Lord SELBORNE, at p. 129. Compare, however, Lord HERSCHELL, at p. 153. The Council of the Institute of Bankers have decided that such cheques cannot safely be treated as payable to bearer, see "Questions on Banking Practice," No. 1938, Journal of Institute of Bankers, March, 1904.

(*m*) *Vinden* v. *Hughes*, [1905] 1 K. B. 795, distinguishing *Bank of England* v. *Vagliano*, *supra*, and *Clutton* v. *Attenborough*, [1897] A. C. 90; *Macbeth* v. *North and South Wales Bank*, [1906] 2 K. B. 718.

(*n*) See p. 609, *post*.

(*o*) *Bellamy* v. *Marjoribanks* (1852), 7 Exch. 389; *Carlon* v. *Ireland* (1856), 5 E. & B. 765. See Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 80, as to crossed cheques paid in good faith and without negligence.

(*p*) *Charles* v. *Blackwell* (1877), 2 C. P. D. 151, at p. 163 (not liable to true owner).

(*q*) *Charles* v. *Blackwell*, *supra*, at p. 158.

defective title to the cheque (*r*). If the cheque had reached the payee actually or constructively, the customer is discharged both on the cheque and consideration (*s*).

SECT. 7. **Protection to Bankers paying Cheques.**

SUB-SECT. 2.—*Order Cheques.*

Order cheques.

1237. A banker who in good faith and in the ordinary course of business pays a cheque payable to order (*t*) drawn on him, to which the person in possession has no title, by reason of the indorsement being forged, is protected from liability, and can debit his customer with the amount so paid (*a*). A thing is done in good faith if it is done honestly, whether it is done negligently or not (*b*).

Forged indorsement.

Ordinary course of business.

Apart from the crossed cheques sections, payment contrary to the crossing would not be in the ordinary course of business (*c*). Omission to ascertain that the ostensible indorsement was in proper form, *e.g.*, where one indorsement is "Placed to account of payee," would be a departure from the ordinary course of business. Payment over the counter of a cheque for a large amount to a suspicious-looking person might be such a departure (*d*).

To send notes by post in response to a request by letter inclosing an order cheque ostensibly indorsed by the payee would probably be held not in the ordinary course of business (*e*); but absence of the collecting banker's stamp would not seem to prevent payment being in the ordinary course of business (*f*).

Payment need not be in actual cash to the person presenting (*g*).

Cheque not drawn by customer.

1238. It would appear that the cheque need not necessarily be drawn by a customer (*h*). But whether payment of a cheque

(*r*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 59. "Holder" includes "bearer" (*ibid.*, s. 2). "Bearer" is the person in possession, without reference to title (*ibid.*).

(*s*) *Charles* v. *Blackwell* (1877), 2 C. P. D. 151, at p. 158.

(*t*) For definition of order cheque, see p. 569, *ante*.

(*a*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 60. This section does not apply to drafts between branch and head banks, for which see p. 612, *post*, or to documents payment of which is made conditional on the signature of an annexed receipt, or presentation within a limited time, for which see p. 613, *post* (*Capital and Counties Bank* v. *Gordon*, [1903] A. C. 240).

(*b*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 90.

(*c*) *Smith* v. *Union Bank of London* (1875), 1 Q. B. D. 31, at p. 35.

(*d*) Compare *Bank of England* v. *Vagliano*, [1891] A. C. 107, *per* Lord HALSBURY, at p. 117. But the banker must pay or dishonour at once, and refusal, if it proves unfounded, will subject him to liability to his customer.

(*e*) "Where authorised by agreement or usage a presentment through the post office is sufficient" (Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 45 (8)); but the practice of most bankers is to return such cheques unless they come from another banker; and it may be assumed that presentment by post by a private person is not authorised by usage. The banker might possibly consider himself agent for presentment (see *ante*, p. 590), and hold the cheque for a day, during which he could communicate with his customer for instructions.

(*f*) See Questions on Banking Practice, 5th ed., No. 410.

(*g*) "Payment" within the meaning of the Act is broadly interpreted (see *Glasscock* v. *Balls* (1889), 24 Q. B. D. 13, *per* Lord ESHER, at p. 16). A cheque drawn on one branch of a bank, paid in at another, and appearing as an item in balancing accounts between the branches, has been held to be paid (*Bissell & Co.* v. *Fox Brothers & Co.* (1885), 53 L. T. 193; *Capital and Counties Bank* v. *Gordon*, [1903] A. C. 240).

(*h*) See *Capital and Counties Bank* v. *Gordon*, *supra*, where protection was accorded to bankers' drafts (see p. 612, *post*) under the Stamp Act, 1853

SECT. 7. Protection to Bankers paying Cheques.

otherwise drawn would be in the ordinary course of business appears more than doubtful. But the protection extends to a *per pro.* indorsement (*i*).

Indorsement at request of banker.

Where a person claims payment of an open order cheque over the counter, alleging that he is the payee thereof, and only signs his name on the back at the insistent request of the banker, it is submitted that the banker does not obtain protection (*k*).

SUB-SECT. 3.—*Crossed Cheques.*

Payment in contravention of the crossing.

1239. The Bills of Exchange Act, 1882 (*l*), does not, as the earlier crossed cheques legislation did, directly prohibit a banker's paying in contravention of the crossing, except in the case of a cheque crossed to more than one banker, none of whom is an agent for collection. But a banker so doing is liable to the true owner for any loss the latter may sustain thereby (*m*). In the case of a forged indorsement he would also lose the protection of sect. 60, such payment not being in the ordinary course of business (*n*).

Notwithstanding the absence of the direct prohibition, a banker cannot charge his customer with the amount of a crossed cheque paid in contravention of the crossing (*o*), even, it would seem, though payment were made to the true owner (*p*).

(16 & 17 Vict. c. 59), s. 19, in which the words "drawn on a banker" are the same as in s. 60 of the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61). Consider, however, the history of the legislation given in *Charles* v. *Blackwell* (1877), 2 C. P. D. 151, at p. 156, and in *Capital and Counties Bank* v. *Gordon*, [1903] A. C. 240, *per* Lord LINDLEY, at p. 250. There is nothing about "ordinary course of business" in s. 19 of the Stamp Act, 1853.

(*i*) *Charles* v. *Blackwell*, *supra*, decided on the Stamp Act, 1853 (16 & 17 Vict. c. 59), s. 19, but applicable to the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 60.

(*k*) "Indorsement" means an indorsement completed by delivery (Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 2). There can be no delivery to the drawee. The terms of sect. 60 as to "indorsement of the payee or any subsequent indorsement" point to the indorsement being for negotiation, or at least collection; and those as to the banker being deemed to have paid the bill in due course, notwithstanding the forged indorsement, imply payment made to an ostensible holder under the indorsement (*Keene* v. *Beard* (1860), 8 C. B. (N. S.) 372, at p. 382, where BYLES, J., held such signature a receipt, not an indorsement. Compare the Finance Act, 1895 (58 Vict. c. 16), s. 9, treating such signature as a receipt. The words of COCKBURN, C.J., in *Charles* v. *Blackwell*, *supra*, at p. 157, may be read to the contrary effect). *Quære*, whether payment in such circumstances is "in good faith and in the ordinary course of business" for the purposes of the section.

(*l*) 45 & 46 Vict. c. 61.

(*m*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 79 (2).

(*n*) *Smith* v. *Union Bank of London* (1875), 1 Q. B. D. 31, 35.

(*o*) *Smith* v. *Union Bank of London*, *supra*, in which case there was a direct prohibition; but the disability to debit the customer was apparently based on disobedience to mandate (*Bobbett* v. *Pinkett* (1876), 1 Ex. D. 369). Such payment would clearly be made negligently, as to which see p. 608, *ante*. See also proviso to Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 79. "Shall not be questioned" implies that the customer may repudiate payment contrary to the crossing.

(*p*) Payment had been made to the true owner, the *bonâ fide* holder, in *Smith* v. *Union Bank of London*, *supra*. Possibly, however, the Court would apply the doctrine laid down in *Reid* v. *Rigby & Co.*, [1894] 2 Q. B. 40; *Bevan* v. *The National*

The fact that a crossed cheque has been refused payment does not make it an open cheque for the purpose of re-presentation (q).

SECT. 7. **Protection to Bankers paying Cheques.**

1240. A banker is protected if he pay a cheque in accordance with its ostensible crossing, if any, notwithstanding the same may have been obliterated, added to, or altered otherwise than as authorised by the Bills of Exchange Act, 1882 (r). "Addition" must mean a material addition, effective under the crossed cheques sections; the addition of a memorandum such as "Account payee" would not justify the banker in refusing to pay the cheque, or in itself deprive him of protection in paying (s); nor does such addition have any direct effect on the paying banker (a). The "opening" a crossing, *i.e.*, writing "Pay cash" and initialling, is a patent alteration not authorised by the Act, and a banker pays such a cheque over the counter at his own risk should the opening prove unauthorised. No right accrues to the true owner by the use of such words under sect. 79 of the Bills of Exchange Act, 1882 (b).

Payment in accordance with the crossing.

A banker paying a crossed cheque in good faith, without negligence, and in accordance with the crossing, is protected, and can debit his customer, notwithstanding any defect of title in the collecting banker or the person from whom he received it (c). If the cheque had come to the hands of the payee (d), the drawer is discharged both on the cheque and on the consideration (e).

Extent of protection.

Protection under the crossed cheques sections might be doubtful in the case of an open cheque crossed by a person having no authority to cross, *e.g.*, an innocent person in possession under a forged indorsement, but the banker would be otherwise protected (f).

The addition of "not negotiable" to the crossing has no effect whatever on the paying banker. "Not negotiable" by itself, however, does not constitute a crossing (g).

The banker's identification stamp may or may not be a crossing. If impressed on an open cheque by the collecting banker, it probably

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Bank (1906), 23 T. L. R. 65, as to adoption of a payment by taking the benefit thereof.

(q) It remains a crossed cheque; compare Questions on Banking Practice, No. 432.

(r) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 79, proviso. The proviso is defectively drawn. "To have been added to or altered" etc., grammatically refers to the cheque, not the crossing, but the words are intended to apply to the latter.

(s) See *Akrokerri (Atlantic) Mines, Ltd.* v. *Economic Bank*, [1904] 2 K. B. 465, *per* BIGHAM, J., at p. 472.

(a) *Ibid.*; and see p. 595, *ante*. The paying banker could, as a rule, have no knowledge for whose account the cheque was being collected. The only doubtful case would be where the cheque bore several indorsements after that of the payee, and one was forged. *Quære*, whether payment in such case would be "in the ordinary course of business" or "without negligence."

(b) The section only mentions definite recognised crossings.

(c) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 80.

(d) It is presumed that "constructive" coming to payee's hands would be sufficient.

(e) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 80.

(f) Compare *Simmons* v. *Taylor* (1857), 2 C. B. (N. S.) 528, *per* CRESSWELL, J., at p. 539; affirmed, 4 C. B. (N. S.) 463. But if the cheque is an order cheque, the banker is protected under sect. 60, if a bearer cheque, by having paid to bearer.

(g) See definitions in Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 76.

SECT. 7. Protection to Bankers paying Cheques.

is (*h*). So, again, the collecting banker's stamp on a cheque crossed generally would probably constitute it a cheque crossed specially to that banker.

A banker paying a document ostensibly a crossed cheque to which his customer's name is forged as drawer is not protected (*i*).

Forged cheques.

SUB-SECT. 4.—*Drafts on a Banker.*

Drafts on a banker.

1241. A draft drawn by a branch on another branch or head office of the same bank, or *vice versâ*, is not a bill, since the drawer and the drawee are in law the same person, and so not a cheque (*k*).

Extent of protection.

But it is "a draft or order drawn on a banker," and if payable to order on demand the banker is protected if he pay it in good faith, notwithstanding there may be a forged indorsement (*l*) or an unauthorised *per pro.* indorsement (*m*). The protection seems to apply to foreign as well as inland drafts (*n*). Payment, when within the protection, operates as a discharge of the draft or order (*o*).

Drafts between offices of same bank.

1242. Drafts between two branches or a branch and head office of the same bank cannot be issued payable to bearer on demand, except by banks having power to issue their own bank notes (*p*).

Drafts of the above nature payable to order on demand cannot be crossed (*q*). The protection against forged indorsements would, however, generally be sufficient for the bank in paying (*r*).

If such a draft bearing an ostensible crossing, but otherwise in order, be presented for payment across the counter, the banker

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(*h*) A collecting banker may specially cross to himself (Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 77 (6)). Transverse lines are not necessary to constitute crossing where a banker's name is put across the face of the cheque (*ibid.*, s. 76 (2)). Bankers habitually stamp all cheques collected by them, whether crossed or not, and the stamp is frequently horizontal, not transverse or "across" the face of the cheque. The latter point would probably not be considered material.

(*i*) It is not a cheque, but a mere piece of paper (*Imperial Bank of Canada* v. *Bank of Hamilton*, [1903] A. C. 49).

(*k*) Hence it is not within the protection of the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 60 (*Capital and Counties Bank* v. *Gordon*, [1903] A. C. 240).

(*l*) *Capital and Counties Bank* v. *Gordon*, *supra*; Stamp Act, 1853 (16 & 17 Vict. c. 39), s. 19. The section does not state that the payment must be in good faith, or in the ordinary course of business, but good faith is clearly a condition of protection. See *Smith* v. *Union Bank of London* (1875), L. R. 10 Q. B. 291, *per* BLACKBURN, J., at p. 296.

(*m*) *Charles* v. *Blackwell* (1877), 2 C. P. D. 151.

(*n*) See note (*n*), p. 602, *ante*.

(*o*) *Halifax Union* v. *Wheelwright* (1875), L. R. 10 Exch. 183, at p. 194.

(*p*) Bank Charter Act, 1844 (7 & 8 Vict. c. 32), ss. 10 and 11; Stamp Act, 1854 (17 & 18 Vict. c. 83), s. 11. The words "bearer or holder" in the latter section must be read as synonymous with "bearer." See note (*l*), p. 569, *ante*.

(*q*) They could have been crossed under the Crossed Cheques Act, 1876 (39 & 40 Vict. c. 81), where a cheque is defined as "draft or order drawn on a banker payable to bearer or to order on demand," but the definition was altered in the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 73, to "bill of exchange drawn on a banker payable on demand." Compare *Capital and Counties Bank* v. *Gordon*, *supra*, *per* Lord LINDLEY, at p. 250. They are not within the Revenue Act, 1883 (46 & 47 Vict. c. 55), s. 17, not being issued by a customer of the banker, but by the bank itself (*Capital and Counties Bank* v. *Gordon*, *supra*).

(*r*) See note (*l*), *supra*.

appears to have no alternative but to pay it. If payment be refused on the ground of the crossing or otherwise, the holder could sue the bank either as drawer of a bill or maker of a promissory note (*s*).

1243. Drafts drawn by one bank on another are merely cheques, and may in all respects be dealt with as such.

Drafts by one bank on another

SUB-SECT. 5.—*Payment of Orders with Receipt attached.*

1244. Documents made payable conditionally on a specific attached receipt being signed by the payee are not cheques (*t*). In paying them the banker is not protected by any of the legislation directly affecting cheques, nor, unless they are crossed, does the banker appear to be otherwise protected in case the signature of the receipt is a forgery (*u*). If the receipt is not signed by the payee the banker has paid away his customer's money without authority, and cannot debit him.

Orders with receipt attached.

Similarly, where documents are made payable conditionally on presentation within a limited time, the banker is not protected if he pays them on a forged indorsement (*x*).

Subject to the slight doubt alrealy expressed (*a*), these documents are, however, capable of being effectively crossed (*b*), and the banker paying in good faith and without negligence, and in accordance with the crossing, would be protected.

(*s*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 5 (2); *Capital and Counties Bank* v. *Gordon*, [1903] A. C. 240, *per* Lord LINDLEY, at p. 250. Apparently no stamp objection could be raised, though a promissory note on demand requires an *ad valorem* stamp. The provisions of any Stamp Act in force for the time being are recognised by sect. 97 (3) of the Bills of Exchange Act, 1882, but that cannot take away the express right to sue as on a promissory note given by sect. 5 (2). Possibly the explanation is that stamp objections only apply to the document as it appears on its face (see *Royal Bank of Scotland* v. *Tottenham*, [1894] 2 Q. B. 715), and the document purports to be a bill. In any case, the holder could sue the bank as drawer of a bill.

(*t*) *Bavins, junr. and Sims* v. *London and South Western Bank*, [1900] 1 Q. B. 270; *Capital and Counties Bank* v. *Gordon, supra, per* Lord LINDLEY, at p. 252. For forms of such documents see Encyclopædia of Forms, Vol. II., pp. 517, 518.

(*u*) They are not within the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 60, because they are not bills, nor are they apparently within the Stamp Act, 1853 (16 & 17 Vict. c. 59), s. 19, even if ostensibly payable to order and indorsed, since they are not payable "on demand"; a further condition being attached, viz., the signing of a specific receipt. Further, the last cited section would appear from its terms to apply only to negotiable instruments, which these are not. See Revenue Act, 1883 (46 & 47 Vict. c. 55), s. 17; *Gordon* v. *Capital and Counties Bank*, [1902] 1 K. B. 242, *per* COLLINS, M.R., at p. 275. In that case, on appeal, Lord LINDLEY says ([1903] A. C. at pp. 250, 251) that sect. 19 of the Stamp Act, 1853 (16 & 17 Vict. c. 59), applies to documents which are not bills or cheques, and (at p. 252), "Nor do they (*i.e.*, orders with receipts attached) come within sect. 19 of the Stamp Act of 1853, which, as I have already observed, applies only to banks which are drawees." It is submitted that this does not amount to a decision that such documents entitle the banker on whom they are drawn to the protection of this section.

(*x*) They are not payable on demand because of the limitation attached, and for the same reason are not negotiable. Hence the reasoning in note (*u*), *supra*, applies.

(*a*) See pp. 599, 600, *ante*.

(*b*) Revenue Act, 1883 (46 & 47 Vict. c. 55), s. 17.

SECT. 7. Protection to Bankers paying Cheques.

It is not unusual for bankers to take indemnities (*c*) from customers with regard to paying these documents, which, not being cheques, they are under no primary obligation to honour.

SECT. 8.—*Payment of Bills accepted payable at a Banker's.*

Bills accepted payable at a banker's.

1245. Where a customer accepts a bill payable at his banker's (*d*), it constitutes an authority to the banker to pay it at maturity (*e*), and if no funds are available, amounts to a request for an overdraft to the amount, but in the absence of previous arrangement, the banker is under no obligation to pay the bill, even though he have sufficient funds in hand (*f*).

Bearer bills.

A banker who in good faith and without negligence pays a bill payable to bearer so accepted to the bearer thereof can charge his customer with the amount (*g*).

Forged acceptance.

A banker who has paid a bill on a forged acceptance cannot charge his customer with the amount unless the customer is precluded from disputing his signature by estoppel or adoption (*h*).

Forged indorsement.

A banker who has paid a bill on a forged indorsement cannot charge his customer unless the customer is estopped from disputing the payment (*i*). Negligence on the part of the customer directly leading to or enabling the loss, or a representation made to the banker by the customer on a material point on which the banker acted by paying money which he would not otherwise have paid, might constitute such estoppel (*k*). But acceptance of a bill on which the payee's indorsement has been forged does not estop the customer from refusing to be debited (*l*).

If, however, the payee is a fictitious or non-existing person, the banker may treat the bill as payable to bearer (*m*), and so charge his customer, notwithstanding the forged indorsement.

Liability to true owner.

Where a banker has paid a bill on a forged indorsement, he is

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(*c*) For form of indemnity, see Encyclopædia of Forms, Vol. II., p. 501.

(*d*) For form of such acceptance, see Encyclopædia of Forms, Vol. II., p. 502.

(*e*) *Kymer* v. *Laurie* (1849), 18 L. J. (Q. B.) 218.

(*f*) *Robarts* v. *Tucker* (1851), 16 Q. B. 560, at p. 579; *Bank of England* v. *Vagliano*, [1891] A. C. 107, *per* Lord MACNAGHTEN, at p. 157.

(*g*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), ss. 2, 8 (3), 59.

(*h*) *Bank of England* v. *Vagliano*, *supra*, *per* Lord SELBORNE, at p. 124.

(*i*) *Robarts* v. *Tucker*, *supra*; *Bank of England* v. *Vagliano*, *supra*. There is no protection in such case for the banker similar to that given by sect. 60 of the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), with regard to cheques, or by sect. 19 of the Stamp Act, 1853 (16 & 17 Vict. c. 59), with regard to drafts or orders payable to order or demand drawn on a banker. See also Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 24. As to what may constitute such estoppel, see *Bank of England* v. *Vagliano*, *supra*, particularly at pp. 114—124.

(*k*) See *Bank of England* v. *Vagliano*, *supra*. The banker acts as agent for the customer in paying domiciled bills, and as such is entitled to the protection and consideration usually accorded to an agent.

(*l*) *Robarts* v. *Tucker*, *supra*.

(*m*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 7 (3). "The bill may be treated etc.," i.e., by anyone to whose interest it is so to treat it, which includes the paying banker (*Bank of England* v. *Vagliano*, *supra*). As to when the payee comes within this definition, see, further, *Vinden* v. *Hughes*, [1905] 1 K. B. 795; *Macbeth* v. *North and South Wales Bank*, [1906] 2 K. B. 718, and note (*m*), p. 608, *ante*.

liable for the amount to the true owner in conversion or for money had and received (*n*).

SECT. 8. Payment of Bills accepted payable at a Banker's.

The banker must, if the bill be ostensibly in order, pay or refuse to pay at once. He is not entitled to time in which to verify the indorsements (*o*). Where, however, presentment is made through the clearing house, the banker is entitled to the time allowed by the rules of that establishment for deciding whether to pay or not, *i.e.*, up to three minutes to 5 p.m. of the same day.

Time of payment.

SECT. 9.—*Forged or Altered Cheques.*

1246. A document in cheque form to which the customer's name as drawer is forged is not a cheque, but a mere nullity (*p*). Unless the banker can establish adoption or estoppel, he cannot debit the customer with any payment made on such document (*q*).

Forgery of drawer's signature.

Whether a material alteration of a cheque precludes the banker from debiting his customer with the whole or part of the cheque appears to depend on the character and effect of the alteration (*r*). If, despite the alteration, the customer's mandate has been substantially complied with, it is submitted that the banker can charge the customer (*s*). If the alteration is in the amount, it

Forgery by fraudulent alteration.

(*n*) *Smith* v. *Union Bank of London* (1875), L. R. 10 Q. B. at p. 295; affirmed, 1 Q. B. D. 31, at p. 35 (a case of a cheque, but the same principle applies, only there is no protection). *Quære*, however, whether the banker could not escape this liability by returning the bill, if still in his possession, to the true owner, the cancellation of the acceptance being treated as made under a mistake (Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 63 (3)). See *Castrique* v. *Imrie* (1870), L. R. 4 H. L. 414, at p. 435, *per* BLACKBURN, J., referring to *Novelli* v. *Rossi* (1831), 2 B. & Ad. 757. This course seems suggested by *Charles* v. *Blackwell* (1877), 2 C. P. D. 151. The acceptor would still be liable to the true owner, the bill not being discharged by the payment to the person wrongfully in possession of it.

(*o*) *Bank of England* v. *Vagliano*, [1891] A. C. 107, *per* Lord MACNAGHTEN, at p. 157, dissenting from *dictum* of MAULE, J., in *Robarts* v. *Tucker* (1851), 16 Q. B. 560, at pp. 577, 578.

(*p*) *Imperial Bank of Canada* v. *Bank of Hamilton*, [1903] A. C. 49.

(*q*) The disability is frequently referred to a supposed obligation on the part of the banker to know his customer's signature and detect an imitation (*e.g.*, *Smith* v. *Mercer* (1815), 6 Taunt. 76). The real ground, however, is that of having paid away money without the authority of the customer. See *London and River Plate Bank* v. *Bank of Liverpool*, [1896] 1 Q. B. 7.

(*r*) The cases are somewhat contradictory. *Simmons* v. *Taylor* (1857), 2 C. B. (N. S.) 528, at pp. 539, 541; affirmed (1858), 4 C. B. (N. S.) 463, implies that any material alteration would absolutely debar the banker from debiting, for the cheque must be the customer's cheque in all respects. *Hall* v. *Fuller* (1826), 5 B. & C. 750 (date and amount altered); *Young* v. *Grote* (1827), 4 Bing. 253 (amount altered); *Halifax Union* v. *Wheelwright* (1875), L. R. 10 Exch. 183; *Imperial Bank of Canada* v. *Bank of Hamilton*, *supra* (amount altered), point the other way, as only the excess amount seems to have been treated as disputable. In the last-mentioned case the cheque is referred to as good for the original amount.

(*s*) The banker, not being a holder, cannot avail himself of the proviso to sect. 64 of the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61). It is submitted that that section only avoids the bill as between the parties. Compare the limitation of the common law rule by BRETT, J., in *Suffell* v. *Bank of England* (1882), 9 Q. B. D. 555, at p. 568, to a party suing on the bill or setting it up as a direct defence. This is not the banker's position. He sets it up as an authority, not a bill. The ground alleged for the rule, viz., that the bill must have been altered with the privity or by the neglect of the holder (see *Davidson* v. *Cooper* (1843), 11 M. & W. 778, at p. 799), is inapplicable to the banker. Alteration of the date of a cheque is a material alteration (Bills of Exchange Act, 1882 (45 & 46 Vict.

SECT. 9. **Forged or Altered Cheques.**

would seem that the banker is entitled to debit the customer with the amount originally inserted (*t*).

There is a duty owing by the customer to the banker with regard to the filling up of cheques, but it has never been defined (*u*).

Customer's duty.

Leaving blank spaces which can be, and are, fraudulently utilised to raise the amount of the cheque is no breach of this duty; and the banker cannot debit his customer with, at any rate, the excess (*a*).

Estoppel.

1247. The doctrine that a forgery cannot be ratified probably only applies to criminal law (*b*). A man may by conduct be estopped from denying his signature or held to have adopted the forged instrument. If he consciously pays a cheque to which his name has been forged, he is not estopped from disputing a subsequent forgery by the same hand unless the repetition of such payment establishes a course of business authorising the use of his name (*c*).

Any conduct on the part of the customer directly leading the banker to pay a cheque on which the customer's name had been forged, or which had been fraudulently altered, would estop the customer from subsequently questioning the payment (*d*).

Adoption.

If a man knows, or has reasonable ground for believing, that his signature has been forged to a cheque, and that it is about to be presented to his banker for payment, he is bound to warn the banker of the fact. If he fails to do so within reasonable time, and the banker's position is thereby altered, he is held to have adopted the cheque (*e*).

The duty does not indeed seem confined to a customer of the banker, but to extend to any person who knows that a document bearing a forged signature purporting to be his is about to be presented to a banker for payment (*f*).

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c. 61), s. 64 (2); *Vance* v. *Lowther* (1876), 1 Ex. D. 176), but it would be unreasonable if the alteration to an earlier date debarred the banker from debiting the customer, if paid after the original date.

(*t*) See cases cited note (*r*), p. 615, *ante*.

(*u*) *Colonial Bank of Australasia* v. *Marshall*, [1906] A. C. 559, at p. 567; *Scholfield* v. *Earl of Londesborough*, [1896] A. C. 514 (where there was not the relation of mandator and mandatary); *Lewes Sanitary Steam Laundry Co.* v. *Barclay & Co.* (1906), 11 Com. Cas. 255; and compare *Young* v. *Grote* (1827), 4 Bing. 253, which, however, cannot now be treated as authority.

(*a*) *Colonial Bank of Australasia* v. *Marshall*, *supra*; *Scholfield* v. *Earl of Londesborough*, *supra*; *Société Générale* v. *Metropolitan Bank* (1873), 27 L. T. 849. "People are not supposed to commit forgery, and the protection against forgery is not the vigilance of parties excluding the possibility of committing forgery, but the law of the land" (*per* BOVILL, C.J., at p. 856). *Young* v. *Grote*, *supra*, and *Marcussen* v. *Birkbeck Bank* (1889), 5 T. L. R. 179, 463 (Divisional Court), 646 (Court of Appeal) (see also Journal of Institute of Bankers, Vol. XI., p. 403), are overruled.

(*b*) See *M'Kenzie* v. *British Linen Co.* (1881), 6 App. Cas. 82, *per* Lord BLACKBURN, at p. 99. Compare, however, *Brook* v. *Hook* (1871), L. R. 6 Exch. 89.

(*c*) *Morris* v. *Bethell* (1869), L. R. 5 C. P. 47.

(*d*) See further on this point, title ESTOPPEL.

(*e*) *M'Kenzie* v. *British Linen Co.*, *supra*, specially at pp. 91, 109, "reasonable ground for believing," *per* Lord SELBORNE, at pp. 92, 95; *Ogilvie* v. *West Australian Mortgage and Agency Corporation*, [1896] A. C. 257, specially at p. 270. In *Cairncross* v. *Lorimer* (1860), 3 Macq. H. L. 827, at p. 830, Lord CAMPBELL appears to consider actual knowledge necessary for adoption.

(*f*) *M'Kenzie* v. *British Linen Co.*, *supra*, was not in fact the case of a customer, but of a stranger, as appears from the report. It is, however, treated as the case of a customer and explained on that ground in *Ogilvie* v. *West Australian Mortgage and Agency Corporation*, *supra*. In *Ewing* v. *Dominion Bank* (1904),

Mere silence, without resulting injury to the banker, does not work estoppel or constitute adoption (*g*).

The alteration in the position of the banker necessary to support adoption is not confined to payment of the cheque. Loss of opportunity of protecting himself against subsequent forgeries, if any, by the same person, loss of the chance of taking proceedings, civil or criminal, against the forger, as by his escaping out of the jurisdiction, constitute sufficient alteration in the position of and prejudice to the banker (*h*). It appears immaterial whether civil proceedings against the forger would have resulted in recovering any money or not (*i*).

Where this principle of adoption applies, it covers all previous forgeries by the same person (*k*).

SECT. 10.—*Recovery of Money paid on Forged Documents.*

Recovery of money paid on a forgery.

1248. Where the money has been received *malâ fide*, it may be recovered by the payer (*m*). Where the payment is to a person who, though without title, receives the money *bonâ fide* (*e.g.*, an innocent person in possession under a forged indorsement), the case is complicated, and depends on the nature of the documents and of the forgery. The payment is made under a mistake of fact in the transaction common to both parties, and consequently the money is *primâ facie* recoverable.

Forged signatures.

Where the forgery is that of the customer's name, it has been held that a banker being bound to know his customer's signature and to detect an imitation of it, his not doing so is negligence, and that in such a case the banker cannot recover from an innocent person the money he has once paid him (*n*). This doctrine, however, has been questioned, and the basis of the cases above referred to has been stated to be the necessity of upholding negotiability (*o*).

Supreme Court of Canada Reports, Vol. XXXV., p. 133, the Supreme Court of Canada by a majority expressly extended the doctrine to the case of a business man, not a customer, on the ground of moral and commercial obligation. Special leave to appeal was refused by the Judicial Committee on the ground that no important question of law was involved, and that the question was one essentially for the colonial Courts (S.C., [1904] A. C. 806). The judgment of the Supreme Court of the United States of America in *Leather Manufacturers' Bank* v. *Morgan* (1886), 117 U. S. 96, may be consulted on this question.

(*g*) *M'Kenzie* v. *British Linen Co.* (1881), 6 App. Cas. 82.

(*h*) *Ogilvie* v. *West Australian Mortgage and Agency Corporation*, [1906] A. C. 257, at p. 270, and the Scotch cases quoted in *M'Kenzie* v. *British Linen Co.*, *supra*, at p. 110.

(*i*) Cases cited in note (*h*), *supra*. Compare *Knights* v. *Wiffen* (1870), L. R. 5 Q. B. 660. See, however, *Imperial Bank of Canada* v. *Bank of Hamilton*, [1903] A. C. 49, at p. 57 (apparently only a *dictum*).

(*k*) If notified on the last occasion when the customer or other person had knowledge of the forgery, the bank might have taken steps to recover from the forger all moneys previously obtained by him.

(*m*) *Kendal* v. *Wood* (1871), L. R. 6 Exch. 243.

(*n*) *Smith* v. *Mercer* (1816), 6 Taunt. 76; *Cocks* v. *Masterman* (1829), 9 B. & C. 902; *Hart* v. *Frontino Gold Mining Co.* (1870), L. R. 5 Exch. 111, *per* BRAMWELL, B., at p. 115; *Simm* v. *Anglo-American Telegraph Co.* (1879), 5 Q. B. D. 188, *per* LINDLEY, J., at p. 196; *Sheffield Corporation* v. *Barclay*, [1903] 2 K. B. 580, *per* VAUGHAN WILLIAMS, L.J., at p. 590.

(*o*) *London and River Plate Bank* v. *Bank of Liverpool*, [1896] 1 Q. B. 7. The forgery might be so adroit that detection might be impossible, and in that

SECT. 10. **Recovery of Money paid on Forged Documents.**

If the preservation of negotiability be the *ratio decidendi*, the banker might recover the money where the document was a mere counterfeit throughout, *e.g.*, a bearer cheque with drawer's name forged (*p*).

Where the document is a real bill or cheque, it has been held that the fact that the person who was paid was not really a holder, and would have had no remedy on the bill or cheque if dishonoured, was immaterial, and that if he had had the money in his possession for such a period that his position might have been altered, it would not be recovered from him by the payer (*q*). This view has been characterised as too sweeping by the Judicial Committee of the Privy Council, who would confine the right to retain the money to payees of negotiable instruments on the dishonour of which notice has to be given to someone who would be discharged from liability unless such notice were given in proper time (*r*). Even this latter view would include bills or cheques held under genuine indorsements following forged ones, since the holder's remedy against the indorsers subsequent to the forgery is on the instrument by estoppel and dependent on giving notice of dishonour in due time (*s*). Where a person holds immediately under a forged indorsement, the view taken by the Judicial Committee would entitle the banker to recover the money from him if demanded within a reasonable time after payment.

Forged indorsement and alteration.

It is somewhat difficult to see how, when the instrument has in the first instance been paid, the right to give notice of dishonour could accrue until repayment was at any rate demanded (*t*), or why delay in not giving it prior to that date is not, in the circumstances, excused (*a*).

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case there would be no negligence. *Lex non cogit ad impossibilia.* It is suggested that the real ground why the banker cannot charge the customer is the payment without authority. In any case the supposed duty could only extend to the customer, not to third parties, and where there is no duty there can be no negligence.

(*p*) Compare *Imperial Bank of Canada* v. *Bank of Hamilton*, [1903] A. C. 49. An instrument which is a mere forgery has none of the attributes of negotiability.

(*q*) *London and River Plate Bank* v. *Bank of Liverpool*, [1896] 1 Q. B. 7, where the bill was held under a forged indorsement succeeded by genuine indorsements.

(*r*) *Imperial Bank of Canada* v. *Bank of Hamilton*, *supra*, at p. 58.

(*s*) Not on warranty, which only applies to a transferor by delivery (Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 58). See *ibid.*, s. 55 (2) (b), for the estoppel of the indorser from denying the genuineness of previous indorsements; s. 55 (2) (a), for his liability to compensate the holder, subject to notice of dishonour being duly given. Although the person in possession is not strictly a holder in due course or even a holder, he is so by estoppel against indorsers subsequent to the forgery.

(*t*) "The defendants, while the bill continued paid, could not have given notice to the indorser, for the bill was not dishonoured" (*Smith* v. *Mercer* (1816), 6 Taunt. 76, *per* GIBBS, C.J., at p. 87).

(*a*) See Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 50 (1). It may be noticed that in the leading case *Cocks* v. *Masterman* (1829), 9 B. & C. 902, on which the cases referred to above professed to be based, the prejudice to the holder was defined as being the loss of his right to take steps against other parties to the bill the same day as it is dishonoured. This must refer to his immediate right of recourse on dishonour (Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 47 (2)), or the equally immediate right to give notice (*ibid.*, s. 49 (12)). There is no right of action until the next day (*Kennedy* v. *Thomas*, [1894] 2 Q. B. 759), and the right to give notice would hardly ever be lost until the next day

1249. A collecting banker is not precluded from debiting his customer with money he has paid him as the proceeds of a negotiable instrument should the banker have to account for them to the true owner (*b*).

Collecting bankers.

1250. A payment is made under a mistake of fact if so made honestly, notwithstanding the payer had means of knowing the true facts of which he did not avail himself (*c*). A misapprehension of fact confined to the party paying, but for which he would not have paid the money, is not sufficient (*d*). The property in the money given in payment of a cheque passes, and the payment is complete, as soon as the money is placed on the bank counter (*e*).

Mistake of fact.

SECT. 11.—*The Pass-book.*

The pass-book as evidence.

1251. Entries in the pass-book to the credit of the customer are, when the book is delivered to him, *primâ facie* evidence against the banker; when the book is returned by the customer without objection, entries to his debit are *primâ facie* evidence against him (*f*).

Erroneous entries.

Where credits appear by mistake in the pass-book for money not really received, and the customer alters his position in reliance thereon, the bank cannot afterwards debit the account with the amount (*g*); but, in the absence of any change of position, credits mistakenly entered may be rectified within reasonable time (*h*). A bank, however, would not be permitted to retain moneys paid in, but omitted to be credited, even if the customer had not noticed their omission in the pass-book.

Effect of balance being struck.

1252. Where a periodical or other balance has been struck in the pass-book, and the pass-book is returned by the customer without comment, this has been treated as constituting evidence of a stated and settled account (*i*). Elsewhere the matter has been regarded as one still requiring evidence of implied contract between banker and customer (*k*).

Assuming the return of the pass-book without comment to constitute a stated and settled account, it appears doubtful whether the customer is estopped from subsequently disputing debits shown therein to the prejudice of the bank, *i.e.*, from reopening the

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(Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 49 (12)). This would seem to point to deprivation of the immediate right, not loss of the power to give notice, as the test.

(*b*) *Bavins, junr. and Sims* v. *London and South Western Bank*, [1900] 1 Q. B. 270, where the instrument was treated as negotiable.

(*c*) *Kelly* v. *Solari* (1841), 9 M. & W. 54; *Imperial Bank of Canada* v. *Bank of Hamilton*, [1903] A. C. 49, at p. 56.

(*d*) *Chambers* v. *Miller* (1862), 13 C. B. (N. S.) 125, in which case the banker had mistaken the condition of the customer's account and paid the cheque.

(*e*) *Chambers* v. *Miller*, *supra*.

(*f*) As to the history of the pass-book, see *Devaynes* v. *Noble (Clayton's Case)* (1816), 1 Mer. 530, 535; *Commercial Bank of Scotland* v. *Rhind* (1860), 3 Macq. 643.

(*g*) *Skyring* v. *Greenwood* (1825), 4 B. & C. 281.

(*h*) *Commercial Bank of Scotland* v. *Rhind*, *supra*, at p. 653.

(*i*) *Blackburn Building Society* v. *Cunliffe Brooks & Co.* (1882), 22 Ch. D. 61, at pp. 71, 72.

(*k*) *Vagliano* v. *Bank of England* (1889), 23 Q. B. D. 243, at p. 263.

SECT. 11. The Pass-book.

account on proof of error. The question usually arises with reference to cheques to which the customer's signature has been forged, or the amount of which has been fraudulently raised. The estoppel depends mainly on whether there is or is not a duty on the part of the customer to examine the pass-book and paid cheques, if returned with it, and to communicate to the banker within reasonable time all debits which he does not admit, on which point the authorities are conflicting (*l*). It might further be contended that means of knowledge was equivalent to knowledge or reasonable grounds of belief, so as to fix the customer with adoption or ratification of the cheques (*m*), or that, the customer's claim not to be debited being in effect one for money had and received, it is not *ex æquo et bono* that he should not bear a loss occasioned by his neglect of ordinary business precautions (*n*).

SECT. 12.—*The Banker's Lien.*

Banker's lien.

1253. The general lien of bankers is part of the law merchant as judicially recognised (*o*), and attaches to all securities deposited with them as bankers by a customer, or by a third person on a customer's account, and to money paid in by, or to the account of, a customer (*p*), unless there be a contract, express or implied,

(*l*) The existence of the duty is recognised in *Spencer* v. *Wakefield* (1887), 4 T. L. R. 194 (where the customer's acquiescence in charges and commission was deduced from the return of the pass-book without comment); *Bank of England* v. *Vagliano*, [1891] A. C. 107, *per* Lord HALSBURY, at p. 116: "Was not the customer bound to know the contents of his own pass-book?" See also pp. 115, 128; and on appeal (1889), 23 Q. B. D. 243, at p. 263, where it was treated as a question of evidence. "There was no evidence to show . . . that, having regard to the ordinary course of dealing between a banker and his customers, the plaintiff had done anything which can be considered a neglect of his duty to the bank or negligence on his part." The highest American Court has fully recognised the duty (*Leather Manufacturers' Bank* v. *Morgan* (1886), 117 U. S. 96 (Supreme Court of United States); *Critten* v. *Chemical National Bank* (1902), N. Y. Reports, 171 (Supreme Court of New York). For the contrary view, see *Chatterton* v. *London and County Bank*, reported only in the *Miller* newspaper November 3, 1890, p. 394, where Lord ESHER distinctly denied the existence of any obligation on the customer to look at the pass-book, though he had sent for it weekly. "He is not bound to look at it. You must not put a burden on people the law never placed on them; you are putting on them the burden of saying, 'Look through the pass-book.'" No formal judgment was delivered, the appeal of the bank being dismissed. At the new trial, reported in the *Times* newspaper January 1, 1891, the *Miller* February 2, 1891, MATHEW, J., in summing up, said that there was no contract between the bank and its customer with regard to the pass-book. Plaintiff was entitled to conduct his business his own way, and might have deputed the examination of the pass-book and comparison with returned cheques to the clerk who was supposed to have forged the cheques. Verdict and judgment for plaintiff.

(*m*) See *M'Kenzie* v. *British Linen Co.* (1881), 6 App. Cas. 82 (particularly at p. 92), and p. 616, *ante*; *Jacobs* v. *Morris*, [1902] 1 Ch. 816, at pp. 830, 831.

(*n*) See *Jacobs* v. *Morris*, *supra*, *per* VAUGHAN WILLIAMS, L.J., at p. 831; *per* STIRLING, L.J., at p. 833. *Quære*, however, whether the omission is sufficiently the primary cause.

(*o*) *Brandao* v. *Barnett* (1846), 12 Cl. & F. 787; *Misa* v. *Currie* (1876), 1 App. Cas. 554, *per* Lord HATHERLEY, at p. 569.

(*p*) *Roxburghe* v. *Cox* (1880), 17 Ch. D. 52; *Misa* v. *Currie*, *supra*. Money is, however, not usually the subject of lien, not being capable of being earmarked, and the banker's claim in such cases is probably more rightly referred to set-off. See *Roxburghe* v. *Cox*, *supra*.

inconsistent with the lien (*q*). The lien is not limited to fully negotiable securities (*r*), but has been held to cover share certificates (*s*), an order to pay a particular person a sum of money (*t*), a policy of insurance (*a*), and a lease (*b*).

When lien attaches.

1254. Whatever the nature of the securities, the lien only attaches when they have come to the banker's hands, *quâ* banker, in the way of his business (*c*).

Safe custody.

Either because the receipt of securities or valuables for safe custody is not part of the ordinary business of banking, or because receipt for such purposes involves an implied contract inconsistent with the assertion of lien, the lien never attaches to securities or articles in the banker's hands for safe custody (*d*). Nor does the lien attach to any money or security known to the banker to be affected by a trust or not to be the actual property of the customer (*e*). Where securities are deposited which involve the collection of coupons or interest, the question is which component part is received for safe custody, which for the exercise thereon of the banker's business (*f*).

Specific purpose.

Bills or money paid in to meet specific cheques or bills accepted payable at the banker's are not subject to the lien (*g*). Whether securities deposited to cover a specific advance, and, after repayment of that advance, remaining in the banker's hands, are subject to a general lien for a balance due to the banker, seems somewhat doubtful (*h*).

Where, however, the security has been realised and produces

(*q*) *Brandao* v. *Barnett* (1846), 12 Cl. & F. 787, *per* Lord CAMPBELL, at p. 806; *Bock* v. *Gorrissen* (1860), 30 L. J. (CH.) 39.

(*r*) *Wylde* v. *Radford* (1863), 33 L. J. (CH.) 51, *per* KINDERSLEY, V.-C., at p. 53.

(*s*) *Re United Service Co., Johnston's Claim* (1871), 6 Ch. App. 212, *per* JAMES, L.J., at p. 217.

(*t*) *Misa* v. *Currie* (1876), 1 App. Cas. 564.

(*a*) *Re Bowes* (1886), 33 Ch. D. 586.

(*b*) *Mutton* v. *Peat*, [1900] 2 Ch. 79.

(*c*) *Brandao* v. *Barnett*, *supra*, *per* Lord CAMPBELL, at p. 803; *Lucas* v. *Dorrien* (1817), 7 Taunt. 279.

(*d*) *Brandao* v. *Barnett*, *supra*; *Leese* v. *Martin* (1873), L. R. 17 Eq. 225. For forms relating to custody by bank of valuables or documents, see Encyclopædia of Forms, Vol. II., p. 471.

(*e*) *Ex parte Kingston*, *Re Gross* (1871), 6 Ch. App. 632.

(*f*) See Questions on Banking Practice, 5th ed., Question and Answer 999. Where bonds are deposited with a banker for him to cut off the coupons and collect them, the lien probably attaches to the bonds and coupons. But if the bonds and coupons are deposited merely for safe keeping and the customer cuts off the coupons and hands them to the banker to collect, the lien attaches to the coupons when handed to the banker, but not to the bonds.

(*g*) See note (*n*), p. 586, *ante*.

(*h*) Doubted in *Jones* v. *Peppercorne* (1858), 28 L. J. (CH.) 158; in *Wilkinson* v. *London and County Banking Co.* (1884), 1 T. L. R. 63, the House of Lords assumed that the customer was entitled to have back the securities in such a case independent of the state of account. In *Re Bowes*, *supra*, NORTH, J., held an agreement that a policy of insurance was to be security for £2,000 inconsistent with a general lien for a further balance of £1,000. But in *Re London and Globe Finance Corporation*, [1902] 2 Ch. 416, BUCKLEY, J., held that securities deposited as cover for specified advances after discharge remaining in a banker's hands were liable to general lien. Compare *Wolstenholme* v. *Sheffield Union Banking Co.* (1886), 54 L. T. 746.

SECT. 12. The Banker's Lien.

more than enough to cover the specific advance, the banker's lien attaches on the surplus proceeds (*i*).

The banker's lien extends to bills and cheques paid in for collection, and even to bills of a customer of another bank transmitted by that bank for collection, unless the receiving banker has notice that the bills are the property of such customer (*j*).

Bills and cheques received for collection.

Where bills, notes, or cheques pass from a customer to a banker, a question of fact arises whether the banker takes them for collection subject to the lien, or as transferee, so as to become absolute holder for value (*k*). Where he takes them for collection the banker is, however, holder for value to the extent of the lien (*l*), and has full beneficial interest to that extent (*m*), and can sue for the full amount, holding any surplus over the customer's indebtedness as trustee for him. Where he holds as transferee, lien is excluded, but he has the ordinary rights of a holder for value, and can sue for the full amount irrespective of the customer's indebtedness, and without having to account for any balance received by him in excess of such indebtedness (*n*).

Whether banker holds for collection or as transferee.

Duty in respect of bills etc.

1255. The fact that the banker holds bills, notes, or cheques under a lien does not affect his duty to present them for acceptance where necessary, and for payment in due course, and to give notice of dishonour (*o*). Although, as before stated (*p*), there is some authority for saying that a banker who holds indorsed bills under a lien is entitled to negotiate them when the state of the customer's account renders such a course reasonable, it would be very unusual to do so (*q*).

Combination of accounts.

1256. Unless precluded by agreement or course of business, a banker is entitled to combine all accounts kept in the same right by the customer, whether deposit or current, and whether at the same branch or different branches, and to exercise his lien for the resulting balance (*r*). He may, in the absence of agreement or course of business, and either by right of lien or set-off, retain enough of an account in credit to satisfy a debit on another kept in the same right.

Sale by virtue of lien.

1257. The banker's lien is something more than an ordinary lien; it is an implied pledge (*s*). The distinction is not material in

(*i*) *Jones* v. *Peppercorne* (1858), 28 L. J. (CH.) 158; *Re Bowes* (1886), 33 Ch. D. 586, where the right is attributed to set-off. Compare *Inman* v. *Clare* (1858), John. 769.

(*j*) See p. 598, *ante*.

(*k*) See pp. 596—598, *ante*, and cases there cited.

(*l*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 27 (3).

(*m*) See judgment of Court of Appeal in *Great Western Rail. Co.* v. *London and County Banking Co.*, [1900] 2 Q. B. 464 (not affected on this point by its reversal in the House of Lords).

(*n*) See *Great Western Rail. Co.* v. *London and County Banking Co.*, *supra*, *per* VAUGHAN WILLIAMS, L.J., at p. 473.

(*o*) This course is equally obligatory on him either as agent or holder for value.

(*p*) See note (*g*), p. 599, *ante*.

(*q*) But if he holds them as transferee, he can of course deal with them in any way he likes.

(*r*) See p. 587, *ante*.

(*s*) See *Brandao* v. *Barnett* (1846), 12 Cl. & F. 787, *per* Lord CAMPBELL, at p. 806. As to pledge, see title PAWNBROKERS AND PLEDGES.

the case of bills, notes, and cheques, the position of holder for value enabling the banker to realise these when due; but in the case of other negotiable instruments, *e.g.*, bearer bonds, coming into the banker's hands in circumstances rendering them liable to the lien, the character of pledgee enables the banker to sell on default if a fixed time is appointed for repayment of the advance, or, where no time is fixed, after request for repayment and reasonable notice of intention to sell (*t*).

When lien accrues.

1258. No lien arises in respect of an advance of a specified amount made for a definite period until the arrival of the due date, as there is no debt owing till then; nor can the banker retain moneys of the customer against bills discounted by him for the customer, but not yet due, except perhaps in the case of the customer's bankruptcy (*a*).

SECT. 13.—*Letters of Credit and Documentary Bills.*

Letters of credit.

1259. Apart from previous arrangement, a banker is of course not bound to accept bills drawn on him by or for his customer. When he does so, it is usually in pursuance of a letter of credit (*b*). A letter of credit may be either general (or open), *i.e.*, addressed to anybody to whom it may be presented, or special, *i.e.*, addressed to a specified person, requesting him to make payments or advances or extend credit to the person to whom the letter is granted (*c*). Where the banker grants to a customer a letter of credit, it usually authorises the customer to draw on the banker to a specified amount against shipments of goods, bills of lading, or other documents of title, undertaking to accept such bills, provided the documents are transmitted with them (*d*). Such letters are given for the purpose of being shown to third parties, and create a binding contract to accept the bills on the specified conditions, enforceable against the banker by any person to whom the letter has been shown by the grantee, and who has acted on the faith of it (*e*). Similarly when the letter requests payments to be made or money advanced apart from acceptance of bills, and such payments or advances are made to the grantee on production of the letter, the banker becomes liable to the party making them (*f*).

(*t*) *Burdick* v. *Sewell* (1884), 13 Q. B. D. 159, *per* BOWEN, L.J., at p. 174; *Ex parte Official Receiver, Re Morritt* (1886), 18 Q. B. D. 222, at p. 232; *Re Richardson* (1885), 30 Ch. D. 396, *per* FRY, L.J., at p. 403; *Deverges* v. *Sandeman, Clark & Co.*, [1902] 1 Ch. 579. It is desirable to give notice of intention to sell, even when a time is fixed for repayment. The expression used by Lord HERSCHELL in *North Western Bank* v. *Poynter, Son and Macdonalds*, [1895] A. C. 56, at p. 69, must either have reference to Scotch law, or to the absolute and immediate right of sale given in that case.

(*a*) See note (*l*), p. 606, *ante*.

(*b*) For forms of letter of credit and notice of letter of credit, see Encyclopædia of Forms, Vol. II., p. 473.

(*c*) See *Union Bank of Canada* v. *Cole* (1877), 47 L. J. (C. P.) 100, at p. 109.

(*d*) See *Re Barned's Banking Co.* (1871), L. R. 5 H. L. 157.

(*e*) *Maitland* v. *Chartered Mercantile Bank of India, London, and China* (1869), 38 L. J. (CH.) 363; *Union Bank of Canada* v. *Cole, supra; Re Agra and Masterman's Bank, Ex parte Asiatic Banking Corporation* (1867), 2 Ch. App. 391.

(*f*) See *Morgan* v. *Larivière* (1875), L. R. 7 H. L. 423.

SECT. 18. **Letters of Credit and Documentary Bills.**

In every case the party claiming must act strictly within the terms and limitations of the letter (*g*), and possession of the letter is not sufficient evidence that the person presenting is the grantee (*h*).

In wrong hands.

1260. Letters of credit are not negotiable. If a person, on the faith of the letter of credit, pays or advances money to a person other than the grantee, the banker who granted the letter of credit will not be liable to the person who advanced or paid such money.

If the grantee of a letter of credit has paid or deposited money in respect thereof, and the letter, having got into wrong hands, is utilised, and money obtained, in fraud of the grantee, he will be entitled to recover the amount against the banker, and the return of the letter of credit is not a condition precedent to such claim (*h*).

Mode of using.

1261. The sums agreed to be advanced or paid to the grantee on a letter of credit may be obtained from the banker granting it by means of a cheque or by a demand of cash according as provided by the letter (*i*), but the drawing of documentary bills is the more usual course. To ensure acceptance the prescribed documents must accompany the bill or reach the bankers before or at the time they are called upon to accept the bill.

Documentary bills.

A letter of credit which prescribes the forwarding of documents as a condition of acceptance, shown to a person and acted on by him, does not confer on such person or other holder of the bill any right to the goods. The provision as to documents is for the protection of the banker or acceptor (*k*).

Non-acceptance.

If the banker do not accept the bill of exchange, he has no right to retain any documents (*e.g.*, bills of lading) sent in respect thereof, and no property in the goods represented thereby passes to him (*l*).

Acceptance.

If he accept the bill on the undertaking to forward bills of lading without actually having received them, the banker acquires an equitable claim to the bills of lading, valid against the customer's trustee in bankruptcy (*m*); but not against a third person who took them *bonâ fide*, and for value (*n*).

Effect of acceptance.

On the banker's accepting the bill and the documents coming to his hands he acquires a lien over and qualified property in the goods they represent (*o*). If he has to pay the acceptance, he can realise the goods, but it is advisable to apply to the customer for

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(*g*) *Brazilian and Portuguese Bank* v. *British and American Exchange Banking Corporation* (1868), 18 L. T. 823; *Union Bank of Canada* v. *Cole* (1877), 47 L. J. (C. P.) 100; and compare *Chartered Bank of India, Australia and China* v. *Macfadyen & Co.* (1895), 1 Com. Cas. 1.

(*h*) *Orr* v. *Union Bank of Scotland* (1854), 1 Macq. 513; *British Linen Co.* v. *Caledonian Insurance Co.* (1861), 4 Macq. 107.

(*i*) *Morgan* v. *Larivière* (1875), L. R. 7 H. L. 423, at p. 432.

(*k*) *Re Barned's Banking Co.* (1871), L. R. 5 H. L. 157, at p. 167; and see *Ex parte Dever, Re Suse* (1884), 13 Q. B. D. 766.

(*l*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 19 (3). Compare *Cahn* v. *Pockett's Bristol Channel Steam Packet Co.*, [1899] 1 Q. B. 643.

(*m*) *Lutscher* v. *Comptoir d'Escompte de Paris* (1876), 1 Q. B. D. 709.

(*n*) See further on this point title SALE OF GOODS.

(*o*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 19. He does not acquire absolute property in them, but a sufficient interest and right of disposition to constitute them sufficient security for his acceptance. See *Re Barned's Banking Co.*, *supra*; *Ex parte Brett, Re Howe* (1871), 6 Ch. App. 838, at p. 841.

reimbursement and give him notice of intention to sell if the application is not complied with (*p*). But, in the absence of special agreement, he is not entitled to sell before the due date in order to put himself in funds to meet the bill (*q*). The statement on the face of a bill that it is drawn against specific cargo, goods, or credit, however minutely the same may be described, does not, without the documents of title, create any charge over or claim to the goods in favour of a holder in the event of the dishonour of the bill (*r*). Nor would it appear that such a statement on the bill conveys any right to the acceptor over the goods apart from the documents of title (*s*).

A banker who has accepted bills in this form is in no sense a trustee for the holder of the bill with respect to the goods or documents of title, and the bill holders have no right to question the bank's dealings with such goods or securities (*t*).

Rights of drawer.

1262. The drawer may by formal agreement, apart from the bill, transfer his residuary rights in the goods to a third person, whether holder of the bill or not, so long as by so doing he does not interfere with the rights of the acceptor who holds the documents of title (*a*).

Rights of holder.

The holder may acquire rights to the goods if they are in the hands of one of two insolvent parties to the bill, both of whom are liable to the holder, and whose estates are being judicially administered (*b*).

Though the holder of the bill of exchange may have the documents of title with it he will not be able to claim appropriation of the goods to it, if he took the bill and documents with notice of the acceptor's right to have the documents on acceptance. Such notice may be conveyed by the letter of credit, the terms of the bill, or otherwise (*c*).

Stipulation for tender of documents.

1263. If a bill is accepted conditionally payable on delivery of documents, the acceptor is not liable unless the documents are

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(*p*) See *Re Barned's Banking Co.* (1871), L. R. 5 H. L. 157.

(*q*) *Re Barned's Banking Co., supra*, is not an authority to the contrary. There was in that case an undertaking by the drawers that the bankers should be kept out of cash advances. See *per* Lord HATHERLEY, at p. 167.

(*r*) *Inman* v. *Clare* (1858), John. 769, at p. 776; *Robey & Co.'s Perseverance Ironworks* v. *Ollier* (1872), 7 Ch. App. 695, 698; *Ex parte Dever, Re Suse* (1884), 13 Q. B. D. 766, *per* LINDLEY, L.J., at p. 777. Compare *Brown, Shipley & Co.* v. *Kough* (1885), 29 Ch. D. 848.

(*s*) See *Phelps, Stokes & Co.* v. *Comber* (1885), 29 Ch. D. 813, *per* COTTON, L.J., at p. 819.

(*t*) *Re Barned's Banking Co., supra, per* Lord HATHERLEY, at p. 168.

(*a*) *Ranken* v. *Alfaro* (1877), 5 Ch. D. 786. Such an agreement is really only a transfer of the drawer's right to have the goods specifically applied to the payment of the bill, and an assignment of his right to any surplus proceeds which the acceptor is not entitled to retain.

(*b*) *Ex parte Waring* (1815), 19 Ves. 345. See title BANKRUPTCY AND INSOLVENCY.

(*c*) See *Ex parte Dever, Re Suse, supra*, where a letter of credit which provided that bills of lading were to accompany bills of exchange, and to be surrendered to the acceptor on acceptance, was referred to on the bills of exchange

SECT. 13. Letters of Credit and Documentary Bills.

tendered him before or on presentment for payment (*d*). Such acceptance is, however, a qualified one (*e*), and a banker would only be warranted in so accepting where he was fully empowered to do so by the letter of credit.

Unless strictly stipulated in the acceptance, the acceptor is not discharged by the documents not being tendered to him before or on the due date of the bill (*f*), though payment cannot be demanded without such tender.

SECT. 14.—*Circular Notes.*

Circular notes.

1264. Where circular notes (*g*), accompanied by a letter of indication, are issued by a bank to a customer or other person, it is not incumbent on that person to cash all or any of such notes. He may return them or any of them unused to the banker provided he at the same time returns the letter of indication, and may claim to be reimbursed or credited the amount of the unused notes (*h*). But the return of the letter of indication alone, without the notes, will not entitle the customer or other person who took them out to any return of the money unless a satisfactory indemnity be given to the bank (*i*).

The conditions or terms on which circular notes are issued constitute a contract between the bank and the person receiving the notes, though he may not be a regular customer, and breach of such conditions or terms may preclude him from claiming return of any of the money from the bank, where he might otherwise have done so (*k*).

Letter of indication.

1265. The production of the letter of indication to the correspondent bank is not in ordinary cases a condition precedent to payment of the circular note, or to the right of the correspondent

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(*d*) *Ex parte Brett, Re Howe* (1871), 6 Ch. App. 838, 841. The acceptor thus gets security on the goods for his acceptance, while the bill is more readily negotiated by being accompanied by the documents, and the holder has security in case of dishonour.

(*e*) *Smith* v. *Vertue* (1860), 30 L. J. (C. P.) 56.

(*f*) *Ibid.*

(*g*) For form of circular notes and notices of circular notes, see Encyclopædia of Forms, Vol. II., pp. 474—476.

(*h*) *Conflans Quarry Co.* v. *Parker* (1867), L. R. 3 C. P. 1.

(*i*) *Conflans Quarry Co.* v. *Parker, supra.* In that case the name inserted in the circular notes as the person to present was that of a third party, but it is submitted that this can make no difference. The party taking out the notes might equally present them, if fraudulent.

(*k*) *Rhodes* v. *London and County Bank* (1880), Journal of Institute of Bankers, Vol. I., p. 779, where the circular notes were payable to order of "the bearer named in the letter of indication." A notice was printed on the letter as to the necessity of keeping letter and notes apart, but the plaintiff did not do so, and lost the letter and notes by theft or accident. The notes were cashed by a person who forged the plaintiff's name, and it was held by POLLOCK, B., that the condition of keeping letter and notes separate was a reasonable one, and a material part of the contract, and that, the breach of it having led to the loss, the plaintiff could not recover. The plaintiff was not a customer, but had deposited the amount of the notes. See also *Hume-Dick* v. *Herries, Farquhar & Co.* (1888), 4 T. L. R. 541, which, on a similar condition and similar facts, POLLOCK, B., held not distinguishable from *Rhodes* v. *London and County Bank, supra*, and gave judgment for defendants.

to recover the amount paid from the banker who issued the note (*l*). The liability of the issuing bank to reimburse the correspondent must rest on the request to cash the draft of the bearer. As drawer or payee of such draft, the bearer of the circular note could not sue the issuing bank on it, or convey the right to do so.

If the holder's name has been forged to a circular note, the correspondent cannot recover from the issuing bank any money paid thereon, notwithstanding that the letter of indication, genuinely signed by the holder, was produced to him (*m*).

1266. Circular notes are not negotiable in themselves. When the draft on the back is filled in and signed, the whole document then becomes a bill or cheque (*n*). Negotiability.

SECT. 15.—*Safe Custody of Valuables.*

1267. Unless undertaking the care of valuable property (*o*), when required, be made a condition of opening an account or offered as an inducement to do so, the position of the banker as regards any property deposited with him for custody is that of a gratuitous bailee (*p*). As such he is bound to take the same care of the property intrusted to him as a reasonably prudent and careful man may fairly be expected to take of his own property of the like description (*q*). It is submitted that this involves the employment of all the facilities at the banker's command (*r*); and in view of the facilities usually existing, the question whether the banker is a gratuitous bailee or a bailee for value does not seem material (*s*). The banker's knowledge or ignorance of the nature of the goods intrusted to him does not appear to affect the question of his liability (*t*). If, however, the customer mislead the banker as to the nature or value of the goods, he would presumably not be entitled to hold the banker to a greater degree of care or to a

Banker's position.

Degree of care.

(*l*) *Conflans Quarry Co.* v. *Parker* (1867), L. R. 3 C. P. 1, at p. 12.

(*m*) *Ibid.*

(*n*) *Ibid.*, at p. 13.

(*o*) For form of request to bank to take charge of valuables and of banker's acknowledgment of deposit, see Encyclopædia of Forms, Vol. II., p. 471.

(*p*) *Giblin* v. *McMullen* (1868), L. R. 2 P. C. 317; *Re United Services Co., Johnston's Claim* (1871), 6 Ch. App. 212; *Leese* v. *Martin* (1873), L. R. 17 Eq. 222, 235. The *dictum* of Lord CAMPBELL in *Brandao* v. *Barnett* (1846), 12 Cl. & F. 787, at p. 809, "A charge might be made by the bankers, if they were not otherwise remunerated for their trouble," is somewhat to the contrary, but too indirect. The view expressed above in the text is that adopted by the Central Association of Bankers (Journal of Institute of Bankers, Vol. XVII., p. 455). For a full discussion of the position of a gratuitous bailee, see title BAILMENT.

(*q*) *Giblin* v. *McMullen*, *supra*, at p. 339.

(*r*) The utilisation of available means of securing safety must be part of the care a reasonable man would take.

(*s*) A bailee for value is bound to adopt at his own expense all reasonable safeguards. A gratuitous bailee is bound to do his best with what he has got, using the best facilities at his command, but not more. A banker invariably has safes, strong-rooms etc. See title BAILMENT.

(*t*) The rule as above stated was laid down in *Giblin* v. *McMullen*, *supra*, without qualification as to knowledge. The facts in that case appear to point to ignorance on the part of the banker as to the nature of the goods. The presumption is that they are valuable.

SECT. 15. **Safe Custody of Valuables.**

larger compensation than was consistent with his own representations. An acknowledgment that the goods are received "for safe custody" does not increase the liability of the banker (*a*).

Felony of servant.

The bank is not liable for loss by the felonious act of members of its own staff which there was no ground for anticipating (*b*).

Delivery to wrong person.

1268. Where the bank delivers the goods to the wrong person, whereby they are lost to the owner, the liability of the bank is absolute, though there be no element of negligence, as where delivery is obtained by means of an artfully forged order (*c*). It is, however, theoretically practicable for the banker to contract himself out of this liability.

If the banker has suspicions as to the identity or authority of the person requiring delivery of the valuables or the genuineness of any written order produced by such person, the banker may retain the goods for a reasonable time in order to satisfy himself on these points, or, it is submitted, may decline to deliver them to the applicant, stating that he would himself send them to the owner, and doing so within a reasonable time (*d*).

(*a*) *Ross* v. *Hill* (1846), 2 C. B. 877. An undertaking in such terms must be interpreted in the light of the legal consequences resulting from the relation between the parties.

(*b*) Such an act would not be within the scope of the employment. Compare *Cheshire* v. *Bailey*, [1905] 1 K. B. 237, and see, further, title AGENCY, p. 202, *ante*.

(*c*) Delivery was obtained by such means in *Langtry* v. *Union Bank* (1896), Journal of Institute of Bankers, Vol. XVII., p. 338, but the case was settled by judgment by consent for the plaintiff for £10,000, counsel for the bank stating that they did not admit negligence. It was in consequence of this case that the memorandum of the Central Association of Bankers, referred to in note (*p*), p. 627, *ante*, was issued. It is there stated, "It is necessary to distinguish between cases in which valuables are by mistake delivered to the wrong person, as in Mrs. Langtry's case, and cases in which they are destroyed, lost, stolen, or fraudulently abstracted, whether by an officer of the bank or by some other person. The best legal opinion appears to be that, in the former case, the question of the negligence of a bailee does not arise; that the case is one of wrongful conversion of the goods, and that the bank is liable for this wrongful conversion, apart from any question of negligence." This view is supported by the following authorities: *Youl* v. *Harbottle* (1791), Peake, 68; *Stephenson* v. *Hart* (1828), 4 Bing. 476, "from the cases which have been cited it is clear that trover lies against a carrier for misfeasance in delivering a parcel to a wrong person," *per* PARK, J., at p. 482; "for delivery to a wrong person a carrier is no doubt responsible in trover," *per* GASELEE, J., at p. 488; *M'Kean* v. *M'Ivor* (1870), L. R. 6 Exch. 36, "I assume that a misdelivery would have been a conversion," *per* BRAMWELL, B., at p. 41; *Hiort* v. *London and North Western Rail. Co.* (1879), 4 Ex. D., *per* BRAMWELL, L.J., at p. 194; *Glyn* v. *East and West India Dock Co.* (1880), 6 Q. B. D., *per* BRAMWELL, L.J., at p. 493; *Bristol and West of England Bank* v. *Midland Rail. Co.*, [1891] 2 Q. B. 653, "delivery to a wrong person would be conversion," *per* LOPES, L.J., at p. 657. The cases of *Stephenson* v. *Hart*, *supra*, *Duff* v. *Budd* (1822), 3 Brod. & Bing. 177, and *Heugh* v. *London and North Western Rail. Co.* (1870), L. R. 5 Exch. 51, which have been supposed to support the contrary contention, are distinguishable on the ground that in each of them there had been a refusal to accept the goods or a failure to discover the consignee. The bailee was therefore in the position of an involuntary bailee, who has the implied authority of the real owner to deal with the goods in any reasonable manner, and is therefore only liable for negligence. See those cases explained and distinguished on this ground by BRAMWELL, L.J., in *Hiort* v. *Bott* (1874), L. R. 9 Exch. 86, at p. 90.

(*d*) Such retention would not be conversion, as it involves no disregard of or interference with the owner's title. Compare *Hollins* v. *Fowler* (1875), L. R. 7 H. L. 757, *per* BLACKBURN, J., at p. 766.

SECT. 15. Safe Custody of Valuables.

1269. A banker who receives goods for custody at his bank is not justified in removing them elsewhere for safe keeping, and would be liable for any loss occurring while deposited elsewhere (*e*).

Removal.

SECT. 16.—*Discounting Bills.*

Discounting bills.

1270. A banker discounts a bill, as opposed to taking it for collection or as security for advances, when he takes it definitely and at once as transferee for value. It does not matter that the amount of the bill, less discount, is carried to current account. In the case of a customer that is the usual course. Whether the bill is taken from a customer for collection or as security, or discounted for him, is a question of fact (*f*).

The presumption in favour of a negotiated bill being taken by way of absolute transfer rather than of pledge or security is not so appropriate in the case of banker and customer as in other cases. Indorsement of a specially indorsed bill is as necessary for collection as for absolute transfer. Even indorsement by the customer of a bill indorsed generally is consistent with his merely putting his name on it as extra security (*g*).

Subject to doubts raised by a recent decision (*h*), the entry of the amount of such bills, less discount, as cash in the banker's books would only be evidence of the banker having taken them as transferee. Possibly inferences might be drawn from whether the bank held itself out as a discounting bank or not (*i*). Where the transaction is really one of discounting, the banker is of course at liberty to deal with the bill as he pleases, rediscounting or transferring it.

Remedies of banker against customer.

1271. Where the banker has the customer's indorsement on the bill, he has the remedies of an indorsee against him; where he has not got the customer's indorsement on the bill, he only has against him the remedies of a transferee by delivery (*k*). Mere dishonour of a bill not indorsed by the customer gives no right to debit the customer's account or to proceed against him on the bill (*l*).

Instead of indorsing each bill for discount separately, the customer sometimes gives to the banker a general guarantee of all bills discounted for him, which has the same operation as specific indorsement in each case (*m*).

Remedies against customer's account.

The fact that bills have been discounted by the banker for a customer, which bills are still running, gives the banker no right to retain moneys due to the customer as a provision against such bills (*n*), except perhaps in the event of the customer's

(*e*) See *Lilley* v. *Doubleday* (1881), 7 Q. B. D. 510.
(*f*) See p. 622, *ante*.
(*g*) See *Ex parte Schofield, Re Firth* (1879), 12 Ch. D. 337.
(*h*) *Capital and Counties Bank* v. *Gordon*, [1903] A. C. 240; compare *Dawson* v. *Isle*, [1906] 1 Ch. 636.
(*i*) See *Gaden* v. *Newfoundland Savings Bank*, [1899] A. C. 281.
(*k*) See title BILLS OF EXCHANGE ETC.
(*l*) The *dicta* as to debiting a dishonoured cheque, though credited as cash, in *Capital and Counties Bank* v. *Gordon*, *supra*, at p. 248, could not be applied to a discounted bill.
(*m*) *Ex parte Bishop, Re Fox, Walker & Co.* (1880), 15 Ch. D. 400.
(*n*) *Bowen* v. *Foreign and Colonial Gas Co.* (1874), 22 W. R. 740. For form of

SECT. 16. Discounting Bills.

bankruptcy (*o*). Where the bill is dishonoured, the banker, if he has the customer's indorsement on it, can, after giving due notice of dishonour, debit the account (*p*).

SECT. 17.—*Advances by Bankers.*

SUB-SECT. 1.—*Loan.*

Advances by banker.

1272. Where a banker makes a definite advance to his customer, though the amount be carried to current account, the loan (*q*) is a matter of contract and arrangement, and presents no special feature by reason of the lender being a banker, except that, when and so long as money is actually due and payable to the banker in respect thereof, his lien attaches for the amount.

SUB-SECT. 2.—*Overdraft.*

Overdraft.

1273. In the absence of agreement, express or implied from course of business, a banker is not bound to let his customer overdraw (*r*). Such agreement must be supported by good consideration (*s*).

Drawing a cheque or accepting a bill payable at the banker's where there are not funds sufficient to meet it amounts to a request for an overdraft (*t*).

Corporations.

Overdraft is a loan (*a*), and cannot be recovered against a corporation which has no borrowing powers, or where the overdraft is in excess of those powers (*b*). But the banker who has permitted such an overdraft is entitled to be subrogated to those creditors of the corporation who have been paid out of the overdraft, and to recover the amounts so paid against the corporation (*c*).

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undertaking giving the banker this right, see Encyclopædia of Forms, Vol. II., p. 487.

(*o*) As a mutual dealing on credit (Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 38).

(*p*) The banker, as holder, being entitled to set off his liquidated claim. As to his remedies on unindorsed bills, see p. 629, *ante*.

(*q*) For forms relating to equitable mortgages to a bank, see Encyclopædia of Forms, Vol. II., pp. 478—486. For loans generally, see title MORTGAGE.

(*r*) *Cunliffe Brooks & Co.* v. *Blackburn and District Benefit Building Society* (1884), 9 App. Cas. 857, *per* Lord BLACKBURN, at p. 864; *Cumming* v. *Shand* (1860), 29 L. J. (EX.) 129 (course of business entitling to overdraw). Circumstances may justify a bank in withdrawing the right to overdraw (*Parkinson* v. *Wakefield & Co.* (1889), 5 T. L. R. 646 (security disturbed by customer)).

(*s*) *Fleming* v. *Bank of New Zealand*, [1900] A. C. 577. Implied contract to pay interest would be sufficient consideration.

(*t*) *Eaton* v. *Bell* (1821), 5 B. & Ald. 34; *Forster* v. *Clements* (1809), 2 Camp. 17; *Cunliffe Brooks & Co.* v. *Blackburn and District Benefit Building Society*, *supra*, at p. 864. *London Chartered Bank of Australia* v. *McMillan*, [1892] A. C. 292, is distinguishable, as the overdraft arose from the unauthorised act of an agent, and the circumstances should have put the bank on inquiry.

(*a*) *Cunliffe Brooks & Co.* v. *Blackburn and District Benefit Building Society*, *supra*.

(*b*) *Ibid.*, and see *A.-G.* v. *De Winton*, [1906] 2 Ch. 106. As to borrowing powers of corporations, see titles CORPORATIONS; LOCAL GOVERNMENT.

(*c*) *Ibid.*; *Baroness Wenlock* v. *River Dee Company* (1887), 19 Q. B. D. 155, 165. It is not confined to debts existing at the time of the overdraft. The test is whether the liabilities of the corporation are increased by the borrowing.

Power to overdraw being commensurate with power to borrow, the banker's remedy in each case depends on the existence and extent of the authority to borrow, express or implied; *e.g.*, an overdraft could not be recovered against an infant. As against a married woman, recourse could only be had to her separate estate not subject to restraint on anticipation (*d*).

Infants and married women.

If accounts are opened in the name of a fund, an unincorporated charitable or scientific institution, or the like, they should never be allowed to be overdrawn without the personal liability of substantial persons (*e*).

Unincorporated societies.

Where a banker has the security of substantial customers, strong evidence is required to establish, as against the banker, a novation or transfer of the liability for existing or future advances to a newly formed corporation (*f*).

Novation.

1274. By the universal custom of bankers, a banker has the right to charge simple interest at a reasonable rate on all overdrafts (*g*). An unusual rate of interest, interest with periodical rests, or compound interest can only be justified, in the absence of express agreement, where the customer is shown or must be taken to have acquiesced in the account being kept on that basis (*h*). Whether such acquiescence can be assumed from the return without comment of the pass-book showing interest so charged is doubtful (*i*).

Interest.

Acquiescence in such charges only justifies them so long as the relation of banker and customer exists with respect to the advance. If the relation is altered into that of mortgagee and mortgagor by the taking of a mortgage (*j*), interest must be calculated according to the terms of the mortgage, or according to the new relation (*k*).

The taking a mortgage to secure a fluctuating, as opposed to the ascertained, balance of an overdrawn account, is not, however, inconsistent with the relation of banker and customer, so as to displace a previously accrued right to charge compound interest (*l*).

(*d*) See further on this point titles INFANTS; HUSBAND AND WIFE. As to partnerships, see title PARTNERSHIP. As to companies, see title COMPANIES.

(*e*) *Eaton* v. *Bell* (1821), 5 B. & Ald. 34. If cheques were drawn in a form precluding personal liability, it might be contended that the banker looked merely to funds of the undertaking. The doctrine of *Kelner* v. *Baxter* (1866), L. R. 2 C. P. 174, or of *West London Commercial Bank* v. *Kitson* (1884), 13 Q. B. D. 360, as to the personal liability of the person contracting on behalf of a non-existent principal, is hardly applicable.

(*f*) *Coutts & Co.* v. *The Irish Exhibition in London* (1891), 7 T. L. R. 313.

(*g*) *Crosskill* v. *Bower* (1863), 32 L. J. (CH.) 540, at p. 544; *Gwyn* v. *Godby* (1812), 4 Taunt. 346.

(*h*) *Fergusson* v. *Fyffe* (1840), 8 Cl. & F. 121; *Spencer* v. *Wakefield* (1887), 4 T. L. R. 194; *London Chartered Bank of Australia* v. *White* (1879), 4 App. Cas. 413.

(*i*) See pp. 619, 620, *ante*.

(*j*) For form of mortgage to secure overdraft, see Encyclopædia of Forms Vol. VIII., p. 608A.

(*k*) *Fergusson* v. *Fyffe*, *supra*; *Williamson* v. *Williamson* (1869), L. R. 7 Eq. 542; *London Chartered Bank of Australia* v. *White*, *supra*.

(*l*) *National Bank of Australasia* v. *United Hand in Hand and Band of Hope Co.* (1879), 4 App. Cas. at p. 409.

SECT. 18. Securities for Advances.

SECT. 18.—*Securities for Advances.*

SUB-SECT. 1.—*Legal Mortgages.*

Effect of mortgage.

1275. In the case of a banker taking a legal mortgage (*m*) there is nothing in his position differing from that of any other mortgagee. The taking, however, of a legal mortgage for a definite amount terminates the relation of banker and customer as to that amount. The banker's lien would not operate by virtue of it, as the effect is to constitute a loan account to be kept distinct from current account, and any incidents arising from previous acquiescence in a system of dealing with it, such as charging interest thereon with periodical rests, would come to an end. Where a mortgage, however, is taken to secure a floating balance, this is not the case, as the relation of banker and customer still continues (*n*).

Subsequent advances.

A banker holding a mortgage of any sort must not advance further moneys upon it after notice of assignment of or further charge on the equity of redemption (*o*), even where the banker's assignment, though in fact by way of security only, purports to be absolute (*p*). Any such subsequent advances will be postponed to the later charge of which the banker had notice.

Nor does the fact that the banker had agreed to make advances on the security up to a limit which was not reached at the time he had notice of the subsequent charge or assignment affect this rule. The agreement being to make the further advances on the security of the property as it then stood, the mortgagor, having by his own act deprived himself of the power to give the stipulated security, could not proceed against the banker for damages (*q*). Specific performance will not be decreed of an agreement for a loan (*r*). If the banker makes the further advances, he acts voluntarily, and cannot claim priority over the subsequent charge or assignment (*r*).

SUB-SECT. 2.—*Equitable Mortgages.*

Change of parties.

1276. If securities are deposited with an unincorporated organisation, *e.g.*, a private bank, for advances made by them, any change in the constitution of that organisation, *e.g.*, the retirement of one partner and admission of another, would render the securities useless as cover for future advances (*s*).

So a security may cease to be effectual as cover for future advances by reason of a change in the personality of the borrower, *e.g.*, change in the constitution of the firm originally depositing (*t*).

(*m*) For the general law of legal mortgage, see title MORTGAGE. As to registration under the Land Transfer Acts, see title REAL PROPERTY AND CHATTELS REAL. As to remedy by foreclosure or sale, see title MORTGAGE. For forms of legal mortgage, see Encyclopædia of Forms, Vol. VIII., pp. 443, 661 *et seq.*

(*n*) See p. 631, *ante*, and note (*l*), *ibid.*

(*o*) *Hopkinson* v. *Rolt* (1861), 9 H. L. Cas. 514; *Union Bank of Scotland* v. *National Bank of Scotland* (1886), 12 App. Cas. 53.

(*p*) *Union Bank of Scotland* v. *National Bank of Scotland*, *supra.*

(*q*) *West* v. *Williams*, [1899] 1 Ch. 132, particularly *per* LINDLEY, M.R., at p. 143, and CHITTY, L.J., at p. 146.

(*r*) *South African Territories, Ltd.* v. *Wallington*, [1898] A. C. 309; *Larios* v. *Gurety* (1873), L. R. 5 P. C. 346.

(*s*) *Ex parte Kensington* (1813), 2 Ves. & B. 79, 83; and see title PARTNERSHIP.

(*t*) *Bank of Scotland* v. *Christie* (1840), 8 Cl. & F. 214; *Ex parte MacKenna*

But an equitable mortgage by deposit may be readily extended, even by parol, so as to be an effectual security on the happening of such contingencies, or they may be provided for by a memorandum of deposit in anticipation (*a*).

Mode of mortgaging.

1277. Land, freehold or leasehold, may be equitably mortgaged (*b*) by deposit of the title-deeds, with or without a memorandum. A memorandum is usually taken (*c*). The possession of the title-deeds would, in ordinary cases, preclude a subsequent legal mortgagee from obtaining priority for an advance (*d*).

Where registration necessary.

In registry counties (*e*), however, if a memorandum be taken it is a "conveyance," and registration is necessary to secure priority (*f*). Letters from an intending mortgagor, if they amount to an undertaking to deposit deeds as security, may constitute a "conveyance" and so require registration (*g*); but deposit of deeds without memorandum or anything equivalent is not a "conveyance" (*h*). In the Yorkshire Registry district, however, an equitable mortgage by mere deposit is inoperative as against a subsequent registered assurance, unless a specified memorandum is signed by the mortgagor and registered (*i*).

Title-deeds of land not being negotiable securities, the banker can, as a rule, acquire no better title to them than the person who deposits them had. Title may in some cases, however, be gained by estoppel (*k*). The existence of an equitable mortgage by deposit gives the right to call for a legal mortgage, or can be enforced by application to the Court for foreclosure or sale (*l*), or a power to sell may be given by an accompanying memorandum.

(1861), 3 De G. F. & J. 629, where a person deposited title-deeds for advances to be made to him, and it was held that the security did not cover advances made to him and others whom he took into partnership.

(*a*) As to changes in the constitution of joint stock or other corporations in this relation, see title GUARANTEE.

(*b*) For the general law as to equitable mortgages of land, see title MORTGAGE. For forms of memorandum of deposit, see Encyclopædia of Forms, Vol. II., pp. 478—486.

(*c*) If the title-deeds are not actually deposited, a memorandum is essential (*Ex parte Hall, Re Whitting* (1878), 10 Ch. D. 615; *Ex parte Broderick, Re Beetham* (1887), 18 Q. B. D. 766).

(*d*) *Oliver* v. *Hinton*, [1899] 2 Ch. 264; *Jared* v. *Clements*, [1903] 1 Ch. 428.

(*e*) For these see title REAL PROPERTY AND CHATTELS REAL.

(*f*) *Credland* v. *Potter* (1874), 10 Ch. App. 8. Compare *Re Calcott and Elvin*, [1898] 2 Ch. 460.

(*g*) *Fullerton* v. *Provincial Bank of Ireland*, [1903] A. C. 309.

(*h*) *Sumpter* v. *Cooper* (1831), 2 B. & Ad. 223; *Re Burke* (1881), L. R. 9 Ir. 24. Recognised as law in *Fullerton* v. *Provincial Bank of Ireland, supra*; see *per* Lord DAVEY, at p. 314.

(*i*) *Battison* v. *Hobson*, [1896] 2 Ch. 403; Yorkshire Registries Act, 1884 (47 & 48 Vict. c. 54).

(*k*) *Brocklesby* v. *Temperance Permanent Building Society*, [1895] A. C. 173; *Rimmer* v. *Webster*, [1902] 2 Ch. 163. *E.g.*, a person intrusts another with title-deeds for the purpose of raising money on them for the principal's benefit. He is estopped from disputing the title of anyone who honestly lends on the security, though the agent borrows money on the deeds on his own account and exceeds a limit imposed by the principal; compare *Lloyd's Bank v. Cooke*, [1907] 1 K B. 794. For full treatment of this subject, see title AGENCY, pp. 201 *et seq.*, *ante*.

(*l*) *York Union Banking Co.* v. *Artley* (1879), 11 Ch. D. 205; *Wade* v. *Wilson* (1882), 22 Ch. D. 235.

SECT. 18. Securities for Advances.

Deposit by partner.

1278. A partner has implied authority to deposit title-deeds of property, whether real or personal, belonging to the firm, as security for advances to the firm; and when the partnership is terminated by the death of the last surviving partner but one, the banker is entitled to treat a subsequent deposit of such deeds as being in the course of winding up the partnership affairs and so legitimate (*m*).

SUB-SECT. 3.—*Bills and Notes.*

Banker's remedies on bills or notes.

1279. Where bills or notes are deposited (*n*) as security, and not absolutely transferred in consideration of the advance, the banker's position is that of pledgee, analogous to that which he holds by virtue of his lien (*o*). If he took the bill or note without notice of any defect in the customer's title, he can in any event sue all parties to it to the extent of his advance (*p*). If the customer had a good title, the banker can sue all parties for the full amount, holding the balance, if any, beyond the advance as trustee for the customer (*q*).

Right to negotiate.

If the banker hold the customer's indorsement on the bill or note, he can sue the customer thereon to the extent of the advance; but the property in the bills or notes remains in the borrower.

Though, as before stated (*r*), there are *dicta* to the effect that, in certain states of the account, a banker may negotiate bills or notes of a customer in his hands, it would certainly not be a reasonable course to adopt where the instruments are security for an advance repayable at a definite period which has not arrived, or where the security is for existing or future overdrafts, without previous request for payment. The usual and proper course is to keep the documents and present them for payment at maturity, and set off the proceeds against the advance. If instruments at a fixed date are not duly presented, the banker will have to bear any loss incurred by the omission (*s*).

Collateral security.

Where a bill or note is given strictly as collateral security, it does not, even while current, suspend the remedy on the debt, and in theory the banker might sue for the advance pending the currency of the bill or note (*t*), but it would be very unusual to do so. And where a bill or note is strictly collateral security, satisfaction of the debt does not necessarily discharge the bill or note (*a*).

(*m*) *Re Bourne*, [1906] 2 Ch. 427, and see generally title PARTNERSHIP.

(*n*) For form of memorandum of deposit, see Encyclopædia of Forms, Vol. II., p. 489.

(*o*) Banker's lien being an implied pledge. See p. 622, *ante*.

(*p*) Compare Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 27 (3).

(*q*) See *Great Western Rail. Co.* v. *London and County Banking Co.*, [1900] 2 Q. B. 464. It would appear, however, that the banker could retain such surplus to meet any further existing indebtedness of the customer (see *Jones* v. *Peppercorne* (1858), John. 430; *Inman* v. *Clare*, *ibid.* 769; *Re London and Globe Finance Corporation*, [1902] 2 Ch. 416), also by right of set-off (*Re Bowes* (1886), 33 Ch. D. 586).

(*r*) See note (*g*), p. 599, *ante*.

(*s*) *Peacock* v. *Purssell* (1863), 32 L. J. (C. P.) 266.

(*t*) *Ibid.*

(*a*) *Jenkins* v. *Tongue* (1860), 29 L. J. (EX.) 147; *Glasscock* v. *Balls* (1889), 24 Q. B. D. 13. In both cases discharge of the debt was obtained by the holder of

SUB-SECT. 4.—*Other Negotiable Securities.*

SECT. 18. Securities for Advances.

Deposit of negotiable securities.

1280. Where a banker *bonâ fide* takes fully negotiable securities (*b*) as cover for an advance or overdraft, he is entitled to retain them until his debt is satisfied, notwithstanding that the borrower had no property in and was wrongfully dealing with the securities (*c*). Knowledge that the customer is a stockbroker or occupies a fiduciary position, and that so the securities may possibly not be his own, does not put the banker on inquiry, if he have no reason to doubt the honesty of the person tendering them as security, and the latter purport to deal with them as his own property (*d*).

Where the banker takes fully negotiable securities in the above circumstances, he is entitled either to have them redeemed by the true owner, or to satisfy his advances by means of them on default, or, where no time is fixed for repayment, on giving reasonable notice to the depositor (*e*).

Dispositions by agent.

1281. If a principal intrust his agent with securities which, though not fully negotiable, purport on the face of them to convey all rights by mere transfer, especially if he hold out the agent as clothed with authority to transfer them as negotiable, such principal will be estopped from disputing the title of a banker who has taken the securities *bonâ fide* and for value from such agent, though the agent be acting for his own ends and in fraud of his principal (*f*). In each case the test is whether the possession by the agent and the terms of the document combined amount to a representation that the agent is invested with disposing power of a professedly negotiable instrument (*g*).

SUB-SECT. 5.—*Stock and Shares.*

Advances on stock and shares.

1282. Stock and shares may be utilised as security by being transferred to the banker (*h*). The method of transfer depends on the

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the security. There was no direct payment by the borrower, but this does not seem to affect the principle. In *Jenkins* v. *Tongue* (1860), 29 L. J. (EX.) 147, the note was being enforced by the payee, but it is doubtful whether the effect is not confined to a *bonâ fide* holder from the payee; see *Glasscock* v. *Balls* (1889), 24 Q. B. D. 13. It would be inequitable that the payee, having satisfied himself, should still be able to sue on the security.

(*b*) As to what securities other than bills, notes, and cheques are fully negotiable, so as to come within this doctrine, see title BILLS OF EXCHANGE ETC.

(*c*) *London Joint Stock Bank* v. *Simmons*, [1892] A. C. 201; *Bentinck* v. *London Joint Stock Bank*, [1893] 2 Ch. 120; *Sheffield* v. *London Joint Stock Bank* (1888), 13 App. Cas. 333, explained and distinguished in *London Joint Stock Bank* v. *Simmons*, *supra*.

(*d*) *London Joint Stock Bank* v. *Simmons*, *supra*.

(*e*) *Deverges* v. *Sandeman, Clark & Co.*, [1902] 1 Ch. 579.

(*f*) *Goodwin* v. *Robarts* (1876), 1 App. Cas. 476, 489; *Easton* v. *London Joint Stock Bank* (1886), 34 Ch. D. 95, *per* BOWEN, L.J., at pp. 113, 114; *Colonial Bank* v. *Cady* (1890), 15 App. Cas. 267, *per* Lord HERSCHELL, at p. 285: "If the owner of a chose in action clothes a third party with the apparent ownership and right of disposition of it, he is estopped from asserting his title as against a person to whom such third party has disposed of it, and who has received it in good faith and for value." See also *Lloyd's Bank, Ltd.* v. *Cooke*, [1907] 1 K. B. 794.

(*g*) *Colonial Bank* v. *Cady*, *supra*, *per* Lord HALSBURY, at p. 273; *Farquharson* v. *King*, [1902] A. C. 325, *per* Lord HALSBURY, at p. 330. For full treatment of this matter, see title AGENCY, pp. 201 *et seq.*, *ante*.

(*h*) For forms of memorandum of deposit, see Encyclopædia of Forms, Vol. II., pp. 484—487.

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nature of the stock or shares. In order to avoid the danger of the person transferring being in a fiduciary position and not beneficial owner, it is essential that the banker should not only take the stock or shares *bonâ fide* and for value, but also acquire the legal estate (*i*).

Blank transfers.

Where stock or shares can only be transferred by deed (*k*), a blank transfer will not carry the legal estate (*l*). Such a blank transfer may be validated by redelivery after the blanks are filled up, but an agent cannot effect such redelivery unless himself authorised by deed (*m*). Where the transfer is not necessarily by deed, a blank transfer operates as an authority to the transferee to fill up all necessary blanks, and, when so filled up, operates as an effective transfer without redelivery (*n*). But, to preclude the rights of third parties, the transfer must in its then condition purport to carry to any person taking it in good faith and for value a full immediate and absolute title to the subject-matter (*o*).

Deposit of certificates.

The mere deposit of stock certificates or share certificates only constitutes an equitable mortgage of the stock or shares which the Court will enforce by order for transfer and foreclosure (*p*). Such remedy is not barred by reason of the debt not being recoverable by virtue of the Statute of Limitations (*q*).

Power of sale.

Where stock or shares have been effectually transferred to a banker as security, even though not by deed, he has an implied power of sale on default. If no time is fixed for repayment, he must give the borrower reasonable notice of his intention to sell unless repaid. A month's notice would be sufficient (*r*).

Registration.

1283. In addition to actual transfer, registration is necessary to render the banker's title indefeasible or good against parties other

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(*i*) For the effect of notice on the legal estate, see *Bank of Montreal* v. *Sweeny* (1887), 56 L. T. 897 ; and contrast *Bentinck* v. *London Joint Stock Bank*, [1893] 2 Ch. 120. See, further, title MORTGAGE.

(*k*) The Companies Act, 1862 (25 & 26 Vict. c. 89), s. 22, provides that transfer shall be in the manner provided by the regulations of the company. These may or may not provide that transfer shall be by deed (*Re Tahiti Cotton Co.* (1873), L. R. 17 Eq. 273). The stock or shares of corporations governed by the Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), are only transferable by deed (s. 14).

(*l*) *Hibblewhite* v. *McMorine* (1840), 6 M. & W. 200 ; *Swan* v. *North British Australasian Co.* (1863), 32 L. J. (EX.) 273 ; "We all know that both at common law and under these statutes, if you execute a transfer in blank, that instrument with the blanks is not a deed" (*Powell* v. *London and Provincial Bank*, [1893] 2 Ch. 555, *per* LINDLEY, L.J., at p. 560). See titles COMPANIES ; DEEDS AND DOCUMENTS.

(*m*) *Powell* v. *London and Provincial Bank*, *supra*, at p. 565 ; *Société Générale de Paris* v. *Walker* (1885), 11 App. Cas. 20.

(*n*) *Ireland* v. *Hart*, [1902] 1 Ch. 522, 527.

(*o*) *Colonial Bank* v. *Cady* (1890), 15 App. Cas. 267.

(*p*) Such certificates are not negotiable, and are merely evidence of the title as against the company of the specified person to whom they are issued. Their object is to facilitate dealings with the stock or shares, not to effectuate them. As to the remedy, see *Harrold* v. *Plenty*, [1901] 2 Ch. 314. The equitable mortgagee may obtain an injunction against transfer in fraud of his rights (*Société Générale de Paris* v. *Tramways Union Co., Ltd.* (1884), 14 Q. B. D. 424, *per* LINDLEY, L.J., at p. 453). This decision was affirmed in *Société Générale de Paris* v. *Walker* *supra*, but this particular point was not mentioned.

(*q*) *London and Midland Bank* v. *Mitchell*, [1899] 2 Ch. 161.

(*r*) *Deverges* v. *Sandeman, Clark & Co.*, [1902] 1 Ch. 579.

than the pledgor who have beneficial interests therein (*s*), or, failing registration, the transferee must have acquired a present absolute and unconditional right to be registered before he is affected with notice of the prior equitable title (*t*).

Registration does not perfect a transfer which is in itself inoperative (*a*).

Forged transfers.

1284. If a transfer to a banker prove to have been forged, the banker has no title to the stock or shares, his name will be removed from the register and that of the original holder restored, and he will be liable to refund to the company all dividends received.

Banker's liability.

If the banker has parted with the stock or shares, and his transferee has been registered and had certificates issued to him, the banker is liable to indemnify the company, who are estopped from disputing the title of such transferee. The company would be obliged to restore the original holders to the register and their rights, possibly having to buy stock or shares in order to do so. In the latter case the price of the stock purchased, if higher than at the date of the original holder's name being removed from the register, together with back dividends since that date, would be the measure of the banker's liability (*b*).

Statute of limitations.

The liability being based on indemnity, though the sending in the transfer for registration by the company may also import warranty, the cause of action against the banker does not arise until the company is compelled to reinstate the original holder; and the banker may accordingly be sued any time within six years of that date (*c*). His having retransferred the shares is of course immaterial. Neither is it any defence that the company on registration of the transfer issued certificates to him (*d*).

SUB-SECT. 6.—*Policies of Life Assurance.*

Banker's insurable interest in debtor's life.

1285. A banker may take out a policy of assurance (*e*) on the life of a person indebted to him.

Advances on life policies.

1286. A policy on his own life effected by the debtor may be deposited as security for advances. Notice of the assignment should be given to the company. If no notice is given,

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(*s*) *Shropshire Union Railways and Canal Co.* v. *The Queen* (1875), L. R. 7 H. L. 496.

(*t*) *Société Générale de Paris* v. *Walker* (1885), 11 App. Cas. 20, at pp. 29—41; *Moore* v. *North Western Bank*, [1891] 2 Ch. 599; *Ireland* v. *Hart*, [1902] 1 Ch. 522, at p. 529. No Court has ever defined what constitutes such right, and it would not be safe to rely on its existence apart from registration.

(*a*) *Powell* v. *London and Provincial Bank*, [1893] 2 Ch. 555, at p. 566.

(*b*) *Corporation of Sheffield* v. *Barclay & Co.*, [1905] A. C. 392. Compare *Bank of England* v. *Cutler*, [1907] 1 K. B. 889.

(*c*) *Corporation of Sheffield* v. *Barclay & Co.*, *supra*.

(*d*) Certificates had been issued to the banker in *Corporation of Sheffield* v. *Barclay & Co*, *supra*. Compare *A.-G.* v. *Odell*, [1906] 2 Ch. 47. The banker cannot claim an estoppel produced by his own misrepresentation. As to whether the same liabilities would attach to a banker sending in a forged transfer on behalf of a customer, see *Starkey* v. *Bank of England*, [1903] A. C. 114.

(*e*) For the general law of life assurance, see title INSURANCE.

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payment by the company before notice is good as against the assignee (*f*).

The mere deposit of a policy as cover gives the banker the rights of an equitable mortgagee (*g*).

Where a policy has been so deposited, even without a memorandum, and the depositor becomes bankrupt, his trustee cannot claim it without satisfying the debt to the banker (*h*).

SUB-SECT. 7.—*Documents of Title to Goods.*

Advances on documents of title.

1287. A banker may advance money on the security of documents of title to goods (*i*) otherwise than by the acceptance of documentary bills (*k*).

Pledge.

If his customer be the real owner of the goods and entitled to the documents he pledges, the transaction amounts to hypothecation of the goods, with the resulting rights of a pledgee (*l*). Neither goods nor documents of title thereto (*m*) being negotiable, the banker's title at common law must depend on that of the pledgor.

Where title defective.

In cases, however, of defective title in the borrower, a large measure of statutory protection is accorded to the banker, subject to certain conditions (*n*).

Protection to banker.

In order to entitle the banker to such protection the goods or documents of title thereto must be in the possession of an unpaid vendor, a vendee who has not paid for them, or a "mercantile agent" within the broad definition affixed to that term by the legislation in question (*o*). Moreover, the goods or the documents of title must have originally remained in or come into the possession of the person with whom the banker is dealing with the consent of the real owner (*p*). The fact that such possession and consent have been obtained by fraud is immaterial (*q*). But where the fraud amounts to larceny by a trick, different considerations would seem to apply (*r*). In the case of a mercantile agent a pledge of

(*f*) Policies of Assurance Act, 1867 (30 & 31 Vict. c. 144), s. 3. For forms of mortgage of such policies, see Encyclopædia of Forms, Vol. VIII. pp. 681 *et seq.*

(*g*) *Spencer* v. *Clark* (1878), 9 Ch. D. 127. See title MORTGAGE.

(*h*) *Re Wallis*, [1902] 1 K. B. 719.

(*i*) For forms of memorandum of deposit, see Encyclopædia of Forms, Vol. II., pp. 479—484.

(*k*) See p. 624, *ante*.

(*l*) See title PAWNBROKERS AND PLEDGES.

(*m*) With the possible exception of bills of lading, see *Lickbarrow* v. *Mason* (1794), 5 Term Rep. 683. "The words of the special verdict in *Lickbarrow* v. *Mason* admittedly overstate the law" (*Burdick* v. *Sewell* (1884), 13 Q. B. D. 159, *per* BOWEN, L.J., at p. 173). See *Sewell* v. *Burdick* (1884), 10 App. Cas., *per* Lord BLACKBURN, at p. 98. If fully negotiable there would have been no reason for including bills of lading with other documents of title in the Factors Act, 1889, and the Sale of Goods Act, 1893, whereas they are so included. See further on this point title SHIPPING AND NAVIGATION.

(*n*) Factors Act, 1889 (52 & 53 Vict. c. 45); Sale of Goods Act, 1893 (56 & 57 Vict. c. 71).

(*o*) Factors Act, 1889 (52 & 53 Vict. c. 45), s. 1.

(*p*) *Ibid.*; *Cahn* v. *Pockett's Bristol Channel Steam Packet Co.*, [1899] 1 Q. B. 643, 658.

(*q*) *Ibid.*

(*r*) *Ibid.*, *per* COLLINS, L.J., at p. 659; *Oppenheimer* v. *Frazer and Wyatt*, [1907] 2 K. B. 50, *per* FLETCHER MOULTON and KENNEDY, L.JJ., at pp. 70, 77, though

the documents for an antecedent debt would entitle the pledgee to acquire such rights only as the pledgor could have enforced at the time of the pledge (*s*). The same rule applies probably to vendees or persons who have agreed to purchase (*t*). In such case the security would not be effective (*a*).

SECT. 19.—*Guarantees.*

Banker's rights.

1288. The position and rights of a banker under a guarantee obviously must depend on the character and form of such guarantee and the parties thereto (*b*).

Certain general principles may, however, be laid down.

Appropriation of payments.

Where there is an unbroken account, and the guarantee is not strictly a continuing one, payments in must be attributed to the earlier items of the account in relief of the surety, unless there are exceptional circumstances indicating an intention that the guarantee should not be exhausted by such process (*c*).

Where the guarantee is a really continuing one, the surety has no right to control the appropriation of payments in (*d*) so long as the banker deals with the accounts in the ordinary way of business (*e*).

Payments in may be appropriated to a pre-existing debt of which the surety had no notice or knowledge (*f*); but it would be contrary to ordinary business and good faith to open a new account during the currency of the guaranteed one, and carry all payments in to the new account (*g*). But on the determination of the guarantee the banker may close the account and open a new one, to which he may carry all payments in, leaving any debit on the old one to be covered by the guarantee (*h*).

Consideration.

1289. A pre-existing debt is not a good consideration for a guarantee. Where in a guarantee no stipulation for future advances is made, the consideration must be supplied by forbearance to sue

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the Court of Appeal, in reversing the judgment of CHANNELL, J., reported [1907] 1 K. B. 519, held that the facts did not show larceny by a trick.

(*s*) The Factors Act, 1889 (52 & 53 Vict. c. 45), s. 3, makes a pledge of the documents equivalent to a pledge of the goods themselves.

(*t*) See *Cahn* v. *Pockett's Bristol Channel Steam Packet Co.*, [1899] 1 Q. B. 643, *per* A. L. SMITH, L.J., at p. 654.

(*a*) As to the Factors Acts generally, see titles AGENCY; SALE OF GOODS. As to the Sale of Goods Act, 1893, see title SALE OF GOODS.

(*b*) For the general law of guarantees, see title GUARANTEE. For forms of guarantees to a bank, see Encyclopædia of Forms, Vol. II., pp. 491—501.

(*c*) *Cory Brothers* v. *Owners of Steamship Mecca*, [1897] A. C. 286, 295; *City Discount Co.* v. *McLean* (1874), L. R. 9 C. P. 692. It is practically necessary to show that ordinary appropriation would nullify the guarantee. Compare *Commercial Bank of Australia* v. *Official Assignee of Wilson & Co.*, [1893] A. C. 181, where money on suspense account in lieu of guarantor's liability was held not equivalent to payment.

(*d*) *Williams* v. *Rawlinson* (1825), 3 Bing. 71; *Re Sherry* (1884), 25 Ch. D. 692.

(*e*) *Re Sherry*, *supra*.

(*f*) *Williams* v. *Rawlinson*, *supra*; compare *Hamilton* v. *Watson* (1845), 12 Cl. & F. 109.

(*g*) *Re Sherry*, *supra*, *per* COTTON, L.J., at p. 706; compare *Mutton* v. *Peat*, [1900] 2 Ch. 79, 85, where it was said that the method of book-keeping was not to prejudice the real rights of the surety.

(*h*) *Re Sherry*, *supra*.

SECT. 19. Guarantees.

for the existing debt at the request of the guarantor. This may be implied from the nature of the transaction as between business men and the fact of forbearance (*i*). Forbearance for a definite period is not essential (*k*). If one only of several accounts is to be covered by a particular guarantee, this must be clearly expressed. The term "ultimate balance" by itself signifies the ultimate balance owing, combining all existing accounts (*l*).

Disclosure.

A banker is not bound to volunteer to an intending guarantor information as to the state of the account or whether the customer was or was not in the habit of overdrawing. If asked by the intending guarantor, however, he must give the information, this being sufficient reason for disclosing the customer's account (*m*). During the continuance of a guarantee for an overdraft the banker is bound, on request, at any time to acquaint the guarantor with the amount of his then liability, but not to give further information as to the account or to allow inspection of it (*n*).

Guarantee limited in amount.

1290. Where the guarantor's liability is limited to a specified sum, it depends on the wording of the guarantee whether the surety is surety for the whole debt with the specified limitation to his total liability, or whether he is surety only for part of the debt. The difference becomes material in case of the bankruptcy of the principal debtor (*o*), but is generally neutralised by special terms.

Determination of guarantee.

1291. A guarantor is, in general, entitled to determine the guarantee as to future advances by giving notice and paying what is then due (*p*). Where the guarantee is under seal this right appears to exist in equity (*q*), and would possibly be recognised even though the guarantee were expressed to be for a definite period, if the banker were not under contract with the principal debtor to make further advances to him (*r*).

Continuing guarantee.

But it would appear that a continuing guarantee could not be revoked so as to exclude outstanding liabilities properly undertaken

(*i*) *Fullerton* v. *Provincial Bank of Ireland*, [1903] A. C. 309, 316. Compare *Miles* v. *New Zealand Alford Estate Co.* (1886), 32 Ch. D. 266, *per* BOWEN, L.J., at p. 290.

(*k*) *Ibid.* It is, however, advisable to have such consideration expressed in the guarantee.

(*l*) *Mutton* v. *Peat*, [1900] 2 Ch. 79.

(*m*) *Hamilton* v. *Watson* (1845), 12 Cl. & F. 109; *Welton* v. *Somes* (1889), 5 T. L. R. 184; and contrast *Stone* v. *Compton* (1838), 5 Bing. (N.C.) 142. See also *Seaton* v. *Burnand*, [1900] A. C. 135, and p. 643, *post*.

(*n*) This view is adopted by the Institute of Bankers, see Questions on Banking Practice, 5th ed., Nos. 938, 939. See *Hardy* v. *Veasey* (1868), L. R. 3 Exch. 107.

(*o*) *Midland Banking Co.* v. *Chambers* (1869), 4 Ch. App. 398; *Ex parte National Provincial Bank of England* (1881), 17 Ch. D. 98; and see *Ex parte Hope* (1844), 3 Mont. D. & De G. 720. These cases recognise the principle as to a surety for part of the debt, but in each case the surety had by the guarantee contracted himself out of his rights. See also *Re Sass*, [1896] 2 Q. B. 12, where the security was for the whole debt, but the surety had also contracted out.

(*p*) *Beckett & Co.* v. *Addyman* (1882), 9 Q. B. D. 783, 791; *Lloyd's* v. *Harper* (1880), 16 Ch. D. 290, *per* LUSH, L.J., at p. 319.

(*q*) *Re Crace*, [1902] 1 Ch. 733,738; and see *Lloyd's* v. *Harper*, *supra*.

(*r*) No direct authority; but see *Lloyd's* v. *Harper*, *supra*, *per* JAMES, L.J., at p. 314. It would not be equitable to determine the guarantee if the banker was bound to make further advances to the principal debtor. He is not released from such obligation by the withdrawal of the guarantee by the third party.

by the banker on the faith of it, *e.g.*, bills accepted by him current at the time of notice of revocation (*s*); but without special words, where the guarantee is for a specified period, it would not cover obligations undertaken, but not dischargeable, within that period (*t*).

Death of guarantor.

Whether a continuing guarantee is determined as to subsequent advances by the mere fact of the death of the guarantor has never been finally decided (*a*). Probably it is not. Where there is no provision for giving notice of termination by representatives in the event of death, it may be taken that actual notice of the death given by a responsible person, such as an executor or administrator, terminates the guarantee so far as subsequent advances are concerned (*b*). Whether constructive notice of death is equivalent to actual notice is doubtful (*c*).

Where there is specific provision for notice of revocation by the guarantor or his representatives, notice of his death by executors or administrators will not terminate the guarantee. The notice must be one of revocation (*d*).

Whether the death of one joint surety terminates the liability of the other for subsequent advances is also doubtful (*e*). But where the guarantee is joint and several, the death of one guarantor does not affect the liability of the survivor for subsequent advances (*f*).

Joint guarantors.

If a guarantee is joint only, judgment against one guarantor, even though unsatisfied (*g*), operates as a bar to any action against the other or others (*h*), but not where the guarantee is several, or joint and several (*i*).

(*s*) See *Hollond* v. *Teed* (1848), 7 Hare, 50, where a guarantee given to a bank for advances and bills honoured, though terminated by the death of a partner in the bank, was held to apply to bills accepted by the bank, and current at his death.

(*t*) *Hollond* v. *Teed*, *supra*, at p. 54.

(*a*) *Bradbury* v. *Morgan* (1862), 31 L. J. (EX.) 462, where the guarantee was held not determined by death; *Harriss* v. *Fawcett* (1873), 8 Ch. App. 860, *per* MELLISH, L.J., at p. 869: "As mere matter of law, . . . I am of opinion that this guarantee was not determined by the death. If one were to suppose a case, which might very easily happen, where a bank holding such a guarantee was not aware of the death, I should think it very hard upon the bank that a guarantee worded like this was terminated by the death of the guarantor"; *Re Sherry*, (1884), 25 Ch. D. 692 (where the question was treated as undecided). Compare *Coulthart* v. *Clementson* (1879), 5 Q. B. D. 42; *Re Silvester*, [1895] 1 Ch. 573; *Re Crace*, [1902] 1 Ch. 733 (all cases dealing with questions as to notice of death, but not deciding the effect of death by itself).

(*b*) See *Coulthart* v. *Clementson*, *supra*; *Re Silvester*, *supra*; *Re Crace*, *supra*, discussing the effect of constructive notice, but assuming that actual notice would be sufficient. It would be hard if death involved unlimited liability on the estate.

(*c*) *Coulthart* v. *Clementson*, *supra* (Yes, *per* BOWEN, J.); *Re Silvester*, *supra* (No, *per* ROMER, J.); *Re Crace*, *supra* (No, *per* JOYCE, J.).

(*d*) *Re Silvester*, *supra*.

(*e*) *Re Sherry*, *supra*, at pp. 703—705.

(*f*) *Beckett & Co.* v. *Addyman* (1882), 9 Q. B. D. 783.

(*g*) Except under R. S. C., Ord. 14, r. 5, or Ord. 13, r. 4, in default of appearance, or under Ord. 27, r. 3, in default of defence.

(*h*) *Kendall* v. *Hamilton* (1879), 4 App. Cas. 504; *McLeod* v. *Power*, [1898] 2 Ch. 295.

(*i*) *King* v. *Hoare* (1844), 13 M. & W. 494; *Blyth* v. *Fladgate*, [1891] 1 Ch. 337. *Morel Brothers* v. *Earl of Westmorland*, [1904] A. C. 11, is not an authority against this; there the liability was alternative, and judgment against one operated as an election.

SECT. 19. Guarantees.

Change in firm.

1292. In the absence of agreement to the contrary, any change in the constitution of the firm for which a guarantee is given puts an end to the guarantee (*k*). So in the case of a private bank any change in the partners of the bank would nullify the guarantee as to future advances (*l*). Where either the bank or the guaranteed party is a corporate body, joint stock or otherwise, internal change by transfer of shares, issue of new capital, change of directors, or the like has no effect (*m*).

Absorption or amalgamation.

Where guarantees are given to a corporate bank, its absorbing another bank would not affect the guarantees (*n*). But guarantees given to the absorbed bank would not enure for the benefit of the absorbing one (*o*). In the case of amalgamation as distinguished from absorption, guarantees given to either bank would probably be determined (*p*).

Interest on bankruptcy.

1293. Where a guarantee provides for payment of interest on "money remaining due" from the principal debtor, no claim can be maintained for interest accruing after the bankruptcy of the principal debtor (*q*). But it is otherwise where the words are "until repayment" (*r*).

Remedies of banker.

1294. The banker is not obliged to resort to securities in his hands before proceeding against the surety (*s*).

Where a continuing guarantee is given for a running account, it is doubtful at what time a cause of action accrues. In one case it has been held that a cause of action arises as soon as any

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(*k*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 18, "absence of agreement to the contrary," stronger words than sect. 4 of the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), repealed by Partnership Act, 1890, "necessary implication from the nature of the firm or otherwise."

(*l*) *Ibid.*

(*m*) The Partnership Act, 1890 (53 & 54 Vict. c. 39), only applies to "firms," *i.e.*, partnerships. Corporations remain the same entity notwithstanding any change in their component parts.

(*n*) See *Capital and Counties Bank* v. *Bank of England* (1889), 61 L. T. 516.

(*o*) *Prescott, Dimsdale & Co.* v. *Bank of England*, [1894] 1 Q. B. 351.

(*p*) *Ibid.* "An amalgamation between two banks need not necessarily cause the business thereafter carried on to be the same as was theretofore carried on by either," *per* A. L. SMITH, L.J., at pp. 364, 365; *London, Brighton, and South Coast Rail. Co.* v. *Goodwin* (1849), 3 Exch. 320; *Eastern Union Rail. Co.* v. *Cochrane* (1853), 9 Exch. 197. Guarantees are not discharged by the amalgamation, but only by virtue of the provisions of the Partnership Act, 1890 (53 & 54 Vict. c. 39).

(*q*) *Re Moss*, [1905] 2 K. B. 307. Bankruptcy prevents the debt being recoverable against the bankrupt, so that it is not due and owing. *Quære* whether the result would not be the same if the same words were used with regard to the principal sum.

(*r*) *Re FitzGeorge*, [1905] 1 K. B. 462.

(*s*) *Ex parte Brett* (1871), 6 Ch. App. 838, 841 (laying down the rule that the surety has no right or interest in the securities until he has paid the debt); *Ewart* v. *Latta* (1865), 4 Macq. 983, *per* Lord WESTBURY, at pp. 987, 989; *Duncan Fox & Co.* v. *North and South Wales Bank* (1880), 6 App. Cas. 1, *per* Lord SELBORNE, at pp. 10, 14; *per* Lord BLACKBURN, at pp. 18, 20. The remarks of Lord WATSON at p. 22 (*ibid.*) are explainable, inasmuch as the contest was not between the holder of the securities and the surety. As to the discharge of the surety by dealings with the principal, and as to the right of the surety to securities on payment of the debt, see title GUARANTEE.

advance has been made, and that each item would be barred when six years had elapsed (*t*); but in another the mere existence of a debt, without balance struck or demand made on the guarantor, was held not to make the Statute of Limitations run from that

SECT. 20.—*Charges and Commissions.*

Right to charges and commissions.

1295. The right of a banker to charges and commissions would seem, in the absence of an express agreement by the customer to pay them, to depend on the universal custom of bankers, as in the case of his right to charge interest on overdrafts (*a*). For it is doubtful whether the right can be based on acquiescence in the charges and commissions as disclosed in the pass-book, in view of the doubts cast on the existence of any obligation on the part of the customer to examine his pass-book (*b*).

SECT. 21.—*Banker's Obligation to Secrecy.*

Obligation to secrecy.

1296. A banker is bound not to disclose the state of a customer's account, whether the same be in credit or overdrawn, except on reasonable and proper occasion, as when answering inquiries by a proposing guarantor (*c*), or under compulsion of law (*d*). Where an overdraft is guaranteed, it would seem that the guarantor has a right to be informed of the extent of his liability, and that the banker is justified in disclosing to him the condition of the customer's account so far as is necessary for this purpose (*e*).

Production, supplying copies, or affording inspection of books under the Bankers' Books Evidence Act is either done on reasonable and proper occasion or under compulsion of law (*f*).

Inquiries.

A banker is justified in answering inquiries regarding his customer's general position and character put to him by a person contemplating business relations with that customer (*g*).

But, even where the answers are intentionally false, the banker cannot be held responsible for any loss or damage sustained in

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(*t*) *Parr's Banking Co., Ltd.* v. *Yates*, [1898] 2 Q. B. 460.

(*u*) *Hartland* v. *Jukes* (1863), 32 L. J. (EX.) 162. See *Rouse* v. *Bradford Banking Co., Ltd.*, [1894] A. C. 586, *per* Lord HERSCHELL, at p. 596, as to the unreasonableness of a bank granting an overdraft and immediately proceeding to sue for it. The difficulty may be avoided by taking a new guarantee before the end of the six years, or by specifying in the guarantee the liability of the surety to be to pay a certain time after demand. See generally title LIMITATION OF ACTIONS.

(*a*) See p. 631, *ante*.

(*b*) See pp. 619, 620, *ante*.

(*c*) See p. 640, *ante*.

(*d*) *Hardy* v. *Veasey* (1868), L. R. 3 Exch. 107; *Clarke* v. *London and County Banking Co.*, [1897] 1 Q. B. 552, holding a person a customer though overdrawn; *Loyd* v. *Freshfield* (1826), 2 C. & P. 325 (compulsion of law); *Foster* v. *Bank of London* (1862), 3 F. & F. 214. It is not clear whether the obligation is a strictly legal one, see *Tassell* v. *Cooper* (1850), 9 C. B. 509.

(*e*) See p. 640, *ante*.

(*f*) See pp. 644—647, *post*.

(*g*) *Robshaw* v. *Smith* (1878), 38 L. T. 423, where the exhibition of a libellous anonymous letter was held privileged. For form of letter of inquiry as to financial position of customer and banker's reply thereto, see Encyclopædia of Forms, Vol. II., pp. 467, 468.

SECT. 21. **Banker's Obligation to Secrecy.**

consequence, unless such answers were put into writing, and signed by the banker himself, signature by an agent not being sufficient (*h*). Where the banker can be held responsible, it is immaterial whether he gave the information direct to the person acting on it, or to another banker in order that it might be communicated to him (*i*).

SECT. 22.—*Production, Inspection etc. of Bankers' Books.*

Copies of entries are evidence.

1297. In all legal proceedings, a copy of any entry in a banker's books (*k*), that is to say, in the ledgers, day-books, cash-books, account books, and all other books used in the ordinary business of a bank (*l*), is received as *primâ facie* evidence (*m*) not only of such entry, but of the matters, transactions, and accounts therein recorded (*n*), provided that it is first proved by a partner or officer of the bank either orally or by affidavit that the book was at the time of making the entry one of the ordinary books of the bank, that the entry was made in the usual and ordinary course of business, and that the book is in the custody or control of the bank (*o*) or of the successors to the bank in whose custody or control it was when the entry was made (*p*). It must also be proved in the same manner that the copy has been examined with the original and is correct (*q*).

Conditions of admissibility.

Company in compulsory liquidation.

1298. A banker may be ordered to produce any books and documents in his possession relating to the account of a person known or suspected to have in his possession any of the estate or effects of a company which is being wound up under an order of the Court, or who is supposed to be indebted to such a company: and the fact that such person's account has been closed is immaterial (*r*).

Production of originals.

1299. Where the bank is a party to the litigation, the bank can still be made to produce the books under the ordinary *subpœna duces tecum;* but no banker or officer of a bank, in any legal proceedings to which the bank is not a party, is compellable to produce any book the contents of which can be proved as above, or to appear

(*h*) Statute of Frauds Amendment Act, 1829 (9 Geo. 4, c. 14), s. 6; *Swift* v. *Jewsbury* (1874), L. R. 9 Q. B. 301; *Williams* v. *Mason* (1873) 28 L. T. 232. A banking company cannot be held responsible, as a company cannot sign (*Hirst* v. *West Riding Union Banking Co.*, [1901] 2 K. B. 560), but the agent signing is personally responsible (*Swift* v. *Jewsbury, supra*).

(*i*) *Hosegood* v. *Bull* (1876), 36 L. T. 617.

(*k*) Bankers' Books Evidence Act, 1879 (42 Vict. c. 11, s. 3).

(*l*) *Ibid.*, s. 9. The expression "used in the ordinary business" does not mean that the books must be in use every day; it is sufficient if the banker keeps a book to refer to if necessary (*Asylum for Idiots* v. *Handysides* (1906), 22 T. L. R. 573).

(*m*) The Act makes copies of such entries evidence against any one; thus the entries in a defendant's bankers' books are made evidence against the plaintiff (*Harding* v. *Williams* (1880) 14 Ch. D. 197).

(*n*) Bankers' Books Evidence Act, 1879 (42 Vict. c. 11), s. 3.

(*o*) *Ibid.*, s. 4.

(*p*) *Asylum for Idiots* v. *Handysides, supra.*

(*q*) Bankers' Books Evidence Act, 1879 (42 Vict. c. 11), s. 5.

(*r*) Companies Act, 1862 (25 & 26 Vict. c. 89), s. 115; *Re Contract Corporation, Druitt's Case* (1872), L. R. 14 Eq. 6.

as a witness to prove the matters and transactions and accounts recorded, unless by order of a judge made for special cause (*s*).

SECT. 22. Production, Inspection etc. of Bankers' Books.

To obtain, however, the benefit of this relief from attendance and production, the banker or officer must have furnished, or have been willing to furnish, verified copies of the required entries (*t*).

Right to apply for order of inspection etc.

1300. Any party to a legal proceeding (*a*) who, prior to the passing of the Act, could have sued out a *subpœna duces tecum* in such proceeding (*b*), may apply for an order that the applicant be at liberty to inspect and take copies of any entries in a banker's book for the purposes of such proceeding (*c*).

Procedure on application.

The application for leave to inspect and take copies should be made to a master at chambers. It may be made *ex parte* (*d*); but as a rule it should be made by a summons or a notice under the summons for directions (*e*), and if made *ex parte* the master will generally order a summons to issue. In ordinary cases the application, at all events if made *ex parte*, should be supported by an affidavit showing what entries it is desired to inspect and the materiality of the inspection, and that the application is made *bonâ fide*. But an affidavit is not essential (*f*), and where the application is made by summons or on notice and the materiality of the inspection appears from the pleadings, or otherwise, it is not necessary (*g*). The party whose account is sought to be inspected may oppose the application on any ground on which inspection of ordinary documents could be resisted (*h*).

Object of legislation.

1301. The main object of these provisions is to enable evidence to be procured and given (*i*), and to relieve bankers from the necessity for attending and producing their books (*k*). They enable a party who formerly had the right to issue a *subpœna duces tecum* to compel bankers to produce their books and to attend and be examined on them, to obtain an order for leave to inspect and take copies of the books (*l*). They do not give any new power of discovery (*m*), or alter the principles of law or the practice with regard to discovery (*n*), or take away any previously existing ground

(*s*) Bankers' Books Evidence Act, 1879 (42 Vict. c. 11), s. 6.
(*t*) *Emmott* v. *Star Newspaper* (1892), 62 L. J. (Q. B.) 77.
(*a*) This includes an arbitration (Bankers' Books Evidence Act, 1879 (42 Vict. c. 11), s. 10).
(*b*) *Re Marshfield* (1886), 32 Ch. D. 499.
(*c*) Bankers' Books Evidence Act, 1879 (42 Vict. c. 11), ss. 7, 10. The order may be made on a bank in Scotland or Ireland (*Kissam* v. *Link*, [1896] 1 Q. B. 574).
(*d*) *Arnott* v. *Hayes* (1887), 36 Ch. D. 731.
(*e*) *Ibid.*; *Davies* v. *White* (1884), 53 L. J. (Q. B.) 275.
(*f*) *Arnott* v. *Hayes*, *supra*.
(*g*) *Ibid.*, at p. 736.
(*h*) See notes (*m*)—(*r*), *infra*. As to inspection generally, see title DISCOVERY, INSPECTION AND INTERROGATORIES.
(*i*) *Arnott* v. *Hayes*, *supra*, at p. 737; *Emmott* v. *Star Newspaper Co.*, *supra*.
(*k*) *Parnell* v. *Wood*, [1892] P. 137; *Emmott* v. *Star Newspaper Co.*, *supra*; *Pollock* v. *Garle*, [1898] 1 Ch. 1, at p. 4.
(*l*) *Re Marshfield*, *supra*.
(*m*) *Arnott* v. *Hayes*, *supra*, *per* COTTON, L.J., at p. 737; but consider *Perry* v. *Phosphor Bronze Co.* (1894), 71 L. T. 854.
(*n*) *Pollock* v. *Garle*, *supra*, *per* LINDLEY, M.R., at p. 4.

SECT. 22. Production, Inspection etc. of Bankers' Books.

of privilege (*o*). Nor do they enable a party to get discovery, before the trial, of entries which would be privileged or protected from production (*o*), or which are, or are sworn to be, irrelevant (*p*), or which are not the subject of discovery apart from the Act (*q*). Where, therefore, a party swears that the entries sought to be inspected are irrelevant, his affidavit is conclusive, and no order for inspection should be made before the trial (*r*).

When application granted.

The power to order inspection is a discretionary power (*s*), and will be exercised with great caution (*a*), and on sufficient grounds only (*b*); and the order, if made, should be limited to relevant entries (*c*). The order will only be made where the entries of which inspection is sought will be admissible in evidence at the trial (*d*).

Accounts of third persons.

It would appear that there is jurisdiction to order inspection of the accounts of persons who are not parties to the litigation (*e*); but this power will seldom, if ever, be exercised (*f*), except where the account sought to be inspected is in form or substance really the account of a party to the litigation or is kept on his behalf, so that the entries in it would be evidence against him at the trial (*g*), and then only on notice to the third party (*h*) and to the bank (*i*). Where, therefore, the plaintiff brought an action to rescind a contract for the purchase from the defendant of shares in a company, on the ground of misrepresentation by the defendant as to the company's finances, leave to inspect the company's banking account was refused (*j*).

Pass-book exhibited.

The fact that the plaintiff has scheduled his pass-book in his affidavit of documents does not necessarily debar the defendant from getting an order to inspect the banker's book, and in a fit case an order will be made (*k*).

Service of order.

The order must be served on the bank three clear days before it is to be obeyed unless otherwise directed (*l*).

Costs.

The costs of the application and of anything done or to be done under the order are in the discretion of the Court, and the whole or any part of such costs may be ordered to be paid to any party by

(*o*) *South Staffordshire Co.* v. *Ebbsmith*, [1895] 2 Q. B. 669, *per* KAY, L.J., at p. 676; *Parnell* v. *Wood*, [1892] P. 137, *per* LINDLEY, L.J., at p. 139.
(*p*) *Parnell* v. *Wood*, *supra*.
(*q*) *Pollock* v. *Garle*, [1898] 1 Ch. 1.
(*r*) *South Staffordshire Co.* v. *Ebbsmith*, *supra*.
(*s*) *Emmott* v. *Star Newspaper Co.* (1892), 62 L. J. (Q. B.) 77.
(*a*) *Arnott* v. *Hayes* (1887), 36 Ch. D. 731, *per* BOWEN, L.J., at p. 738; *South Staffordshire Co.* v. *Ebbsmith*, *supra*, *per* Lord ESHER, M.R., at p. 674.
(*b*) *Perry* v. *Phosphor Bronze Co.* (1894), 71 L. T. 854.
(*c*) *Arnott* v. *Hayes*, *supra*. Where a defendant applied for inspection to assist him to justify a libel imputing pecuniary embarrassment inspection was refused (*Emmott* v. *Star Newspaper Co.*, *supra*).
(*d*) *Howard* v. *Beall* (1889), 23 Q. B. D. 1, *per* MATHEW, J., at p. 2.
(*e*) *Howard* v. *Beall*, *supra*.
(*f*) *Pollock* v. *Garle*, *supra*, *per* LINDLEY, M.R., at p. 5.
(*g*) *South Staffordshire Co.* v. *Ebbsmith*, *supra*; *Pollock* v. *Garle*, *supra*.
(*h*) *South Staffordshire Co.* v. *Ebbsmith*, *supra*, *per* KAY, L.J., at p. 677.
(*i*) *L'Amie* v. *Wilson*, [1907] 2 Ir. R. 130.
(*j*) *Pollock* v. *Garle*, *supra*.
(*k*) *Perry* v. *Phosphor Bronze Co.*, *supra*.
(*l*) Bankers' Books Evidence Act, 1879 (42 Vict. c. 11), s. 7.

the bank, where the same have been occasioned by any default or delay on the part of the bank. Any such order against a bank may be enforced as if the bank was a party to the proceeding (*m*).

SECT. 22. **Production, Inspection etc. of Bankers' Books.**

1302. The privileges of the Act extend to all banks having duly made a return to the Commissioners of Inland Revenue, to savings banks duly certified, and to Post Office savings banks (*n*); but if the bank is a company registered under the Companies Acts, it must have duly furnished to the Registrar of Joint Stock Companies the prescribed list and summary, with the addition of a statement of the name of the several places where it carries on business, and produce his certificate that such is the case (*o*).

Banks included.

(*m*) Bankers' Books Evidence Act, 1879 (42 Vict. c. 11), s. 8.
(*n*) *Ibid.*, s. 9.
(*o*) Revenue Act, 1882 (45 & 46 Vict. c. 72), s. 11. See p. 582, *ante*.

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