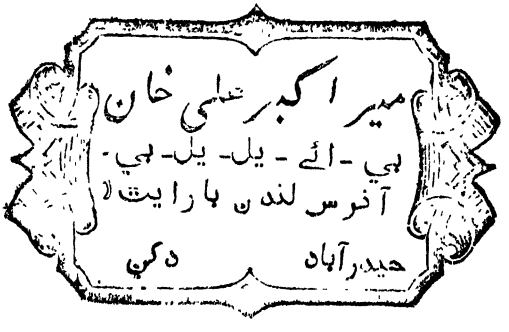
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BARRISTER-AT-LAW,

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AND

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PREFACE

PRACTICAL experience during many years of the use of Brett's Equity Cases with students has convinced us that for their purposes, in the course of successive editions, the book had become overloaded with detail. In preparing this edition, we have therefore taken full advantage of the permission kindly accorded to us by Messrs. Butterworth and Co. to modify the text wherever it seemed desirable to do so, and have, to a great extent, re-written the notes to the leading cases throughout the book with the view of making them as clear and simple as the nature of the subject permits. Our main purpose has been to make the work intelligible to students, and we have therefore contented ourselves with a reference to the decisions which seemed most useful to them without attempting to incorporate every case that has been decided on the subjects dealt with. The leading cases remain, for the most part, the same as those in the last edition, but in view of the aim of the late Mr. Brett we have, in a few instances, substituted later decisions where it seemed necessary to do so to illustrate the doctrines of "modern Equity." Thus, in lieu of *Steed* v. *Preece* (L. R. 18 Eq. 192) we have inserted *Burgess* v. *Booth* ([1908] 2 Ch. 648), since what was only an obiter dictum of Sir GEORGE JESSEL in the former was made the actual decision of the Court of Appeal in the latter. To this we have added two cases, *Haynes* v. *Haynes* (1 Dr. & Sm. 426) and *In re Lord Grimthorpe* ([1908] 2 Ch. 675), the judgments in which exhibit more plainly than any others the principles on which the doctrine of equitable conversion has been based in modern times.

Upon mortgages we have added the important House of Lords cases, *Noakes* v. *Rice* ([1902] A. C. 24) and *Pledge* v. *White* ([1896] A. C. 187) and the Court of Appeal decision in *West* v.

Williams ([1899] 1 Ch. 132), and in connection with restrictive covenants the decision of the Court of Appeal in *In re Nisbett and Potts Contract* ([1906] 1 Ch. 386). On the other hand, we have omitted several cases on the practice under the Judicature Acts and Rules which though no doubt of considerable importance when Mr. Brett first brought out his book in 1887 are now of diminished interest. We have also re-grouped the leading cases with a view to making the book a somewhat more connected statement of equitable principles, and also with a view to rendering it more serviceable as a companion volume to the treatises on equity which students usually read.

We cannot hope that in the effort to achieve our aims we have avoided all errors and omissions. For such as may be found we ask indulgence, and trust that this edition may receive the favourable consideration of students and the profession.

J. A. SHEARWOOD.
WALTER G. HART.

August, 1911.

EXTRACT FROM PREFACE TO FIRST EDITION

THE object which I have had in view in writing this book is to illustrate, by means of leading cases, the doctrines of "modern Equity." That great judge, Sir GEORGE JESSEL, in his celebrated judgment in *In re Hallett's Estate, Knatchbull* v. *Hallett* (13 Ch. D. 696, 710), . . . pointed out that the moment the fiduciary relation was established between the parties, that moment the "modern doctrines of equity" applied. "I intentionally," the judgment proceeds, "say modern rules, because it must not be forgotten that the rules of Equity are not, like the rules of the Common Law, supposed to have been established from time immemorial. No doubt they were invented for the purpose of securing the better administration of justice, but still they were invented. Take such things as these—the separate use of a married woman, the restraint on alienation. We can name the Chancellors who first invented them, and state the date when they were first introduced into Equity jurisprudence, and therefore in cases of this kind the older precedents in Equity are of very little value. The doctrines are progressive, refined, altered and improved; and if we want to know what the rules of Equity are, we must look, of course, rather to the more modern than the more ancient cases."

To this it may be added, that the great changes which have been introduced by recent statutes and orders into the principles and practice of Equity have still further diminished the value of the "older precedents," and in many cases have rendered them practically obsolete. Thus, to cite only two illustrations

from among several which might be mentioned. Even since 1879, when the late Master of the Rolls delivered his judgment in *In re Hallett's Estate*, the old principles of the law as to restraint on anticipation (see p. 230 *et seq.*; p. 172 in the present edition) have been greatly modified by the *Conveyancing Act*, 1881. Within the last few years the old practice as to administration (see p. 320 *et seq.*; p. 126 in the present edition) has been revolutionized by the Orders under the *Judicature Act*.

Reasons such as these would seem amply sufficient to justify the appearance of a new volume dealing professedly with "modern Equity." Thus far as to the substance of the work. A word now as to its form. The form of leading cases has been selected as best calculated to interest the reader, and impress the modern doctrines on the minds alike of students and practitioners.

I desire to express my warmest acknowledgments to Mr. James Pickup and Mr. John Marsh Dixon, of 6, Stone Buildings, Lincoln's Inn, for their most valuable assistance throughout the whole of this book, and also to Mr. William Tucker and Mr. J. W. Blagg, for friendly aid rendered in respect of portions of it, and to submit my work to the favourable consideration of the profession to which I have the honour to belong.

THOMAS BRETT.

LINCOLN'S INN,
July, 1887.

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LEADING CASES IN MODERN EQUITY

Equity acts in personam.

EWING *v.* ORR EWING.

(1883–1885, 22 Ch. D. 456; 9 App. Cas. 34; 10 App. Cas. 453.)

Equity acts in personam, that is to say, the Court has a personal jurisdiction to enforce contracts and trusts. But it will not exercise this jurisdiction of "inconvenient."

A testator domiciled in Scotland left over £400,000 personal estate in Scotland and about £25,000 in England, and heritable property in Scotland, and he made his will in Scotch form and appointed six Scotchmen (two or three of whom resided in Scotland) to be his executors and trustees. The executors obtained confirmation of the will in Scotland, which was sealed by the English Court.

An infant legatee resident in England brought an action for the administration of the estate against the executor-trustees: the Scotch trustees entered an appearance without protest; but before the trial all the English personalty was removed into Scotland. The House of Lords held that the English Court had jurisdiction as to the whole estate, and ordered administration.

A year later the House of Lords held that it would be inconvenient to exercise this jurisdiction, as a similar action had been

brought in Scotland, and proceedings in the English action were stayed.

The old Court of Chancery in its origin professed to be less a court of law than a court of morals proceeding against the defendant because he had acted unconscientiously towards the plaintiff. It enforced its decrees against the defendant personally by process of attachment and committal, and though in course of time a system of process against property was developed, attachment and committal are still in many cases the appropriate procedure for enforcing equitable rights and remedies.

This principle has largely influenced the development of equitable jurisdiction. It follows from it that the court is enabled to exercise jurisdiction in cases in which the subject-matter of the dispute between the parties is situate outside the local jurisdiction of the English Courts even if it be in a foreign country; for it is immaterial where the subject-matter is so long as the defendant is before the Court. This was established by the decision of Lord HARDWICKE in the great case of *Penn* v. *Lord Baltimore* (*a*) in 1750, when he granted specific performance of a contract for settling the boundaries between what are now the States of Pennsylvania and Maryland in America which had been come to between William Penn and Lord Baltimore, both parties being within the jurisdiction.

So in *Ewing* v. *Orr-Ewing*, Lord SELBORNE said: "The Courts of Equity in England are and always have been courts of conscience operating *in personam* and not *in rem*; and in the exercise of this personal jurisdiction they have always been accustomed to compel the performance of contracts and trusts as to subjects which were not either locally or *ratione domicilii* within the jurisdiction. They have done so as to land in Scotland, in Ireland, in the colonies, and in foreign countries. A jurisdiction against trustees which is not excluded *ratione legis rei sitæ* as to land cannot be excluded as to moveables because the author of the trust may have had a foreign domicil; and for this purpose it makes no difference whether the trust is constituted *inter vivos*, or by will, or *mortis causâ* deed."

More recent instances in which the jurisdiction has been exercised are to be found in *Rochefoucauld* v. *Boustead* (*b*), in which the Court enforced a trust of land in Ceylon, and *British South Africa Company* v. *De Beers Consolidated Mines* (*c*), in which the equitable rule

(*a*) 1 Ves. Sen. 444. (*b*) [1897] 1 Ch. 196. (*c*) [1910] 2 Ch. 502.

against clogging an equity of redemption was enforced in the case of a mortgage of land in South Africa.

On the other hand, where the title to land is in dispute, if the land is situate in a foreign country strictly so called, being no part of the British dominions or possessions, the Court has no jurisdiction merely because both parties are resident here (*d*). And so in the case of the *British South Africa Company* v. *Companhia di Moçambique* (*e*) it was decided by the House of Lords that the rules of procedure under the Judicature Acts, abolishing local venue (*f*), have given no new jurisdiction with respect to "local" actions relating to land abroad, and that apart from cases of contract or equity such as that of the leading case the English Courts have no jurisdiction to entertain any local action relating to land abroad, such as an action for damages for trespass.

And further, even though the Court has jurisdiction, it does not follow that it will exercise it, as the leading case itself shows. It inquires which is the *forum conveniens;* if it is the foreign tribunal the English Court will not entertain the suit. So in the leading case, when the Scotch jurisdiction was subsequently invoked by the majority in number and interest of the beneficiaries under the testator's will, and the Court of Session made a decree, the House of Lords held that it could not be maintained that the Scotch Court was bound to abstain from the exercise of its own "independent and unquestionable jurisdiction over the trustees and the trust property in Scotland on the mere ground that there had been a previous decree for administration in England." The trust was Scottish in form; the testator was a domiciled Scotchman; if any questions should arise under the terms of the trust Scottish law must be applied to their solution; the whole trust estate was *de facto* in Scotland; and neither the trustees nor the pursuers (as the plaintiffs are called in Scotland) desired it to be removed from there, and the House of Lords came to the conclusion that the balance of convenience was in favour of the administration of the estate in Scotland instead of England (*g*).

(*d*) *In re Hawthorne, Graham* v. *Massey,* 23 Ch. D. 743.

(*e*) [1893] A. C. 602.

(*f*) R. S. C., O. XXXVI. r. 1.

(*g*) More recent cases in which the Court has stayed proceedings on similar grounds are *Logan* v. *Bank of Scotland,* [1906] 1 K. B. 141; *Egbert* v. *Short,* [1907] 2 Ch. 205; and *In re Norton's Settlement,* [1908] 1 Ch. 471.

Declaration of Trust.

RICHARDS *v.* DELBRIDGE.

(1874, L. R. 18 Eq. 11.)

In order to render a voluntary gift or settlement valid, there must be what amounts to either (1) *a complete transfer of the property beneficially or in trust, or* (2) *a valid declaration of trust.*

John Delbridge was possessed of a mill and of plant, machinery, and stock-in-trade belonging to it, and shortly before his death he indorsed on the lease and signed the following memorandum :—

" 7th March, 1873.

" This deed and all thereto belonging I give to E. B. Richards from this time forth, with all the stock-in-trade.

" John Delbridge."

Richards was an infant at the time of the execution of the memorandum, and Delbridge delivered the lease to the infant's mother on his behalf.

The Court (Sir GEORGE JESSEL, M.R.) held that there was no valid declaration of trust of the property in favour of E. B. Richards.

Much the most important contribution made by equity to the law of England is the invention of the trust, that species of interest in property which involves the separation of the legal ownership or control from the beneficial interest in it, and imposes on the person having the legal ownership or control an obligation to deal with the property in a particular way.

No special form of words is necessary to create a trust. " Trusts can be imposed by any language which is clear enough to show an intention to impose them " (*a*). But there must be an intention to

(*a*) *Per* Lindley, L.J., *In re Williams*, [1897] 2 Ch. at p. 18 ; see also *Page* v. *Cox*, 10 Hare, at p. 10.

create a *trust* by the words used. It is of no avail to show an intention to confer a benefit in some other way; if the intention appears to have been not to create a trust but to make a *gift*, however clearly it may appear, the Court will not, in order to prevent this gift failing, aid the intended donee by construing the imperfect gift as a declaration of trust.

It is this lesson that the leading case so clearly enforces. "A man," said Sir GEORGE JESSEL, "may transfer his property without valuable consideration in one of two ways: he may either do such acts as amount in law to a conveyance or assignment of the property, and thus completely divest himself of the legal ownership, in which case the person who by those acts acquires the property takes it beneficially, or on trust as the case may be; or the legal owner of the property may by one or other of the modes recognized as amounting to a valid declaration of trust, constitute himself a trustee, and without an actual transfer of the legal title, may so deal with the property as to deprive himself of its beneficial ownership, and declare that he will hold it from that time forward in trust for the other person. It is true he need not use the words, "I declare myself a trustee," but he must do something which is equivalent to it, and use expressions which may have that meaning; for, however anxious the Court may be to carry out a man's intention, it is not at liberty to construe words otherwise than according to their proper meaning. . . . The true distinction appears to me to be plain, and beyond dispute; for a man to make himself a trustee there must be an intention to become a trustee, whereas words of present gift show an intention to give over property to another, and not to retain it in the donor's own hands for any purpose fiduciary or otherwise."

In the leading case the intention of John Delbridge plainly was to make a gift of the property, not to declare a trust, and that intention failing for want of the necessary formalities, the transaction being voluntary there was no equity in favour of the intended donee.

In the oft-quoted case of *Milroy* v. *Lord* (*b*), A had executed a voluntary deed purporting to assign bank shares to B upon trust for C. B at the same time was given a general power of attorney by A, authorizing him to transfer the shares, and a further power authorizing him to receive the dividends, but no transfer was in fact ever made. It was held that this was not a valid trust of the shares, since it was not A's intention to constitute himself a trustee,

(*b*) 4 De G. F. & J. 264.

but to vest the trust in B, and this had not been done, the bank shares being transferable only in the books of the bank, and no transfer having been made to B. Lord Justice TURNER, after referring to the two modes of making a voluntary settlement valid and effectual, proceeded as follows, in words which Sir GEORGE JESSEL in the leading case said contain the whole law upon the subject: "If a settlement is intended to be effectuated by one of the modes to which I have referred, the Court will not give effect to it by applying another of those modes. If it is intended to take effect by transfer, the Court will not hold the intended transfer to operate as a declaration of trust, for then every imperfect instrument would be made effectual by being converted into a perfect trust."

And so in a case before Sir GEORGE JESSEL in 1876 (*c*), where a Mrs. Caplen had lent a Mr. Stening £300 on his promissory note payable on demand, she directed him after her death to pay the interest on the £300 to her sister for her life, and afterwards to divide the principal sum among her sister's children. Mrs. Caplen received the interest during her life, and made no demand for payment of the note, and it was found by the executors among her papers uncancelled after her death. The question to be determined was whether a trust of the £300 was created. Sir GEORGE JESSEL held that it was not. "The evidence," he said, "does not satisfy me that Mrs. Caplen intended to create an irrevocable trust. Whether she did or not, it is clear that at law she remained the owner of the note, and did not therefore create a complete trust. . . . I think, however, that a mere agreement on the part of the debtor to apply the money according to the direction of the creditor will not do. There is no magic in words, and, as I explained in *Richards* v. *Delbridge*, a man may make himself a trustee without declaring that he is a trustee in so many words; but he must do something or other that is equivalent to declaring that he is a trustee. In *McFadden* v. *Jenkyns* (*d*) Lord COTTENHAM certainly said, 'The testator, in directing Jenkyns to hold the money in trust for the plaintiff, which was assented to and acted upon by Jenkyns, impressed, I think, a trust upon the money which was complete and irrevocable.' But I do not think that applicable to the present case, where there is nothing to show that the owner of the note intended to part with her legal title to the money" (*e*).

(*c*) *In re Caplen's Estate, Bulbeck* v. *Silvester*, 45 L. J. Ch. 280.

(*d*) 1 Ph. 153.

(*e*) Other cases to the like effect are *Antrobus* v. *Smith*, 12 Ves. 39; *Jones* v.

Not only must there be a clear indication of the settlor's intention to create a trust, but he must also indicate with reasonable certainty the property which is to be the subject of the trust, and the beneficiary who is to take the benefit of it (*f*). These three certainties, as they have been called, were originally all that was necessary, until the year 1677 trusts of every species of property being "averrable," *i.e.* capable of being created by word of mouth; but in addition to them the Statute of Frauds (*g*) requires writing for express trusts of land. The provisions of the statute in point are as follows:—

Sect. 7:—

"All declarations or creations of trusts or confidences of any lands, tenements, or hereditaments shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void and of none effect."

Sect. 8:—

"Provided always that where any conveyance shall be made of any lands or tenements by which a trust or confidence shall or may arise or result by the implication or construction of law, or be transferred or extinguished by an act or operation of law, then and in every such case such trust or confidence shall be of the like force and effect as the same would have been if this statute had not been made, anything herein contained to the contrary notwithstanding."

It is also provided by sect. 9 of the statute that:—

"All grants and assignments of any trust or confidence shall likewise be in writing, signed by the party granting or assigning the same, or by such last will or devise, or else shall likewise be utterly void and of none effect."

It may be observed that the statute only requires the trust to be "manifested and proved" by writing; it does not require it to be made in writing (*h*). Accordingly the statute is satisfied by any subsequent acknowledgment by the trustee, such as an express declaration, a memorandum, a letter, an affidavit, or a recital in

Lock, L. R. 1 Ch. App. 25; *Moore* v. *Moore*, L. R. 18 Eq. 474; *Heartley* v. *Nicholson*, L. R. 19 Eq. 233; and *Pethybridge* v. *Burrow*, 53 L. T. 5.

(*f*) *Knight* v. *Knight*, 3 Beav. 172; *Briggs* v. *Penney*, 3 Mac. & G. 554. See also *Wright* v. *Atkyns*, T. & R. 143.

(*g*) 29 Car. II. c. 3.

(*h*) See *per* Lord ALVANLEY, *Forster* v. *Hale*, 3 Ves. at p. 707.

a bond or deed, and the trust, however late the proof, operates retrospectively from the time of its creation (*i*).

The party "who is by law enabled to declare the trust" is the person in whom the absolute beneficial interest in the property is vested when the trust is created (*k*).

The statute, however, does not apply where it would operate to effectuate a fraud. "It is . . . established by a series of cases the propriety of which cannot now be questioned that the Statute of Frauds does not prevent proof of a fraud; and it is a fraud on the part of a person to whom land is conveyed as a trustee, and who knows it was so conveyed, to deny the trust and claim the land himself. Consequently notwithstanding the statute it is competent for a person claiming land conveyed to another to prove by parol evidence that it was so conveyed upon trust for the claimant, and that the grantee knowing the facts is denying the trust and relying upon the form of conveyance and the statute in order to keep the land himself. This doctrine was not established until some time after the statute was passed. In *Bartlett* v. *Pickersgill* (*l*) the trust was proved and the defendant who denied it was tried for perjury and convicted, and yet it was held that the statute prevented the Court from affording relief to the plaintiff. But this case cannot be regarded as law at the present day. The case . . . is inconsistent with all modern decisions on the subject" (*m*).

It seems settled that the statute applies to all express trusts of land whether freehold, copyhold, or leasehold (*n*), but it has no application to trusts of *pure personalty* which may still be made by word of mouth (*o*).

(*i*) Lewin, Trusts, 12th ed., 58.

(*k*) *Tierney* v. *Wood*, 19 Beav. 330; *Kronheim* v. *Johnson*, 7 Ch. D. 60.

(*l*) 1 Eden, 515, decided in 1759.

(*m*) *Per* LINDLEY, L.J., *Rochefoucauld* v. *Boustead*, [1897] 1 Ch. 196.

(*n*) See, however, Hart, Digest of the Law of Trusts, 32.

(*o*) *Benbow* v. *Townsend*, 1 M. & K. 506; *Kilpin* v. *Kilpin*, *ibid.* 520; *McFadden* v. *Jenkyns*, 1 Hare, 458.

Precatory Trusts.

In re ADAMS AND THE KENSINGTON VESTRY.

(1884, 27 Ch. D. 394.)

Precatory words will not raise a trust unless, on the consideration of all the words employed, it appears that it was the intention to create a trust.

A testator gave all his real and personal estate and effects wheresoever and whatsoever unto and to the absolute use of his wife, her heirs, executors, administrators, and assigns, "in full confidence that she will do what was right as to the disposal thereof between my children, either in her lifetime or by will after her decease." The Court of Appeal held, that the widow took an absolute interest in the property, "unfettered by any trust in favour of the children."

The preceding case shows that there can be no trust without an intention to create a trust; the present turns on the question, whether a presumption of such intention arises from the use of "precatory words."

The effect of the old cases was that when property was given absolutely to any person accompanied by words of recommendation, entreaty, request, hope, or wish (like the *peto, rogo, volo, mando, fidei tuæ committo,* by which *fidei-commissa* were created by the Roman Law (*a*)), such "precatory words" as they are called were held to create a trust if the words were apparently used in an imperative sense, and if the property to be affected and the person intended to be benefited were indicated with certainty (*b*).

In modern times, however, the leaning of the courts has been strongly against construing precatory words as creating trusts. The change in the "current of authority" dates from the case of *Lambe* v. *Eames* (*c*) decided in 1871, where the testator gave his

(*a*) Justinian, Inst. Lib. ii. 24, 3.

(*b*) The old cases will be found collected in Lewin on Trusts, 12th ed., 148, and Jarman on Wills, 6th ed., vol. i., 868 *et seq.*

(*c*) L. R. 6 Ch. App. 597.

property to his widow "to be at her disposal in any way she may think best for the benefit of herself and family," and the Court of Appeal held that the widow took the property for her own benefit, and not in trust. "In hearing case after case cited," said Lord Justice JAMES, "I could not help feeling that the officious kindness of the Court of Chancery in interposing trusts where in many cases the father of the family never meant to create trusts must have been a very cruel kindness indeed. I am satisfied that the testator in this case would have been shocked to think that any person calling himself a next friend could file a bill in this court, and, under pretence of benefiting the children, have taken the administration from the wife. I am satisfied that no such trust was intended, and that it would be a violation of the clearest and plainest wishes of the testator if we decide otherwise."

This view having been followed in a number of cases (*d*), the decision of the Court of Appeal in the leading case may be considered as finally settling the conflict between the older and the modern authorities. Lord Justice COTTON in the course of his judgment said, "I have no hesitation in saying myself that I think some of the older authorities went a great deal too far in holding that some particular words appearing in a will were sufficient to create a trust. Undoubtedly confidence, if the rest of the context shows that a trust is intended, may make a trust, but what we have to look at is the whole of the will which we have to construe. Having regard to the later decisions we must not extend the old cases in any way, or rely upon the mere use of any particular words, but considering all the words which are used, we have to see what is their true effect, and what was the intention of the testator as expressed in his will." "I am very glad to say that . . . Lord Justice James had the courage to stem the tide," said Lord Justice LINDLEY.

These opinions have been constantly approved, and the decisions frequently followed (*e*), the only note of dissent coming from Lord Justice RIGBY, who differed from the majority of the Court of Appeal in the case of *In re Williams* (*e*). That case is a good illustration of

(*d*) See *Mackett* v. *Mackett*, L. R. 14 Eq. 49; *In re Bond*, 4 Ch. D. 238; *Stead* v. *Mellor*, 5 Ch. D. 225; *In re Hutchinson and Tenant*, 8 Ch. D. 540; *Parnall* v. *Parnall*, 9 Ch. D. 96; *The Mussoorie Bank* v. *Raynor*, 7 App. Cas. 321.

(*e*) See *In re Moore*, 34 W. R. 343; *In re Diggles, Gregory* v. *Edmondson*, 39 Ch. D. 253; *Hill* v. *Hill*, [1897] 1 Q. B. 483; *In re Williams, Williams* v. *Williams*, [1897] 2 Ch. 12; *In re Oldfield, Oldfield* v. *Oldfield*, [1904] 1 Ch. 549; *In re Conolly, Conolly* v. *Conolly*, [1910] 1 Ch. 219.

the modern view, and perhaps goes a little further even than *In re Adams and the Kensington Vestry*. The testator gave his residuary estate to his wife, her heirs, executors, administrators, and assigns absolutely, "in fullest confidence that she will carry out my wishes in the following particulars," viz. to pay the premiums due during her life on a policy of insurance on her own life (which was her own property), and that she should by her will leave the moneys payable under the policy, and also the moneys payable at testator's death in respect of a policy on his life (which was testator's property), to his daughter. The Court held that this did not constitute a trust in favour of the daughter.

The only modern cases in which precatory words have been held to create a trust are two decisions of Courts of first instance in 1874 (*f*), which, being before the date of the leading case, may be deemed to belong to the transition period, and a decision of Mr. Justice JOYCE in 1910, in the case of *In re Burley* (*g*).

In this case it appeared that Mary Burley, by her will, gave to Colonel Russell a legacy of £2300, and declared that if he should die in her lifetime leaving issue, then she gave the legacy to his children or child who should survive her. On thinking over this gift after having executed her will, however, she appears to have felt dissatisfied with it, for on the same day she executed a codicil, in which she said: "I wish Colonel Russell to use £1000, part of the legacy given to him by my above will, for the endowment in his own name of a cot in the Ipswich and Suffolk Hospital, and to retain the balance of the said legacy for his own use and benefit." Two years later she made a second codicil, in which she said: "I wish Colonel Russell, after endowing a cot as provided by the first codicil, to use the balance of the legacy given to him by my will for such charitable purposes as he shall in his absolute discretion think fit." The question was whether these codicils created a trust of the legacy, or whether Colonel Russell might have put the legacy in his own pocket had he chosen. It should perhaps be mentioned that Colonel Russell had disclaimed the legacy, so that the question fell to be determined between the Attorney-General and the residuary legatee.

Mr. Justice JOYCE held that the will and codicils created a valid charitable trust: "I may be wrong," he said, "but the conclusion

(*f*) *Curnick* v. *Tucker*, L. R. 17 Eq. 320 (HALL, V.C.), and *Le Marchant* v. *Le Marchant*, L. R. 18 Eq. 414 (MALINS, V.C.). These cases were cited apparently with approval by LINDLEY, L.J., in *In re Williams*, *supra*.

(*g*) *In re Burley*, *Alexander* v. *Burley*, [1910] 1 Ch. 215.

at which I have arrived is this: That by the first codicil the testatrix intended that £1000, part of the £2300 legacy mentioned in the will, should be employed in endowing a cot in the hospital named, and she intended that to be done without Lieutenant-Colonel Russell having any choice as to whether it should be done or not. So, also, I think that on the whole her intention, which I infer or gather from the second codicil, was that £1300, the balance of the legacy, should be given, employed or expended in charitable purposes without Lieutenant-Colonel Russell having any choice as to whether that should be done or not, although he was to have a discretion as to the charitable purposes to which it was to be devoted."

Perhaps the case of *Comiskey* v. *Bowring-Hanbury* (*h*) ought to be mentioned because the decision of the Court of Appeal, which was reversed by the House of Lords, was based on the decisions relating to precatory trusts. The case turned on a home-made will by which the testator gave to his wife "the whole of my real and personal estate and property absolutely in full confidence that she will make such use of it as I should have made myself, and that at her death she will devise it to such one or more of my nieces as she may think fit, and in default of any disposition by her thereof by her will or testament I hereby direct that all my estate and property acquired by her under this my will shall at her death be equally divided among the surviving said nieces." There was a good deal of difference of judicial opinion, but the majority of the House of Lords held that the testator's intention was to make an absolute gift of his property to his wife subject to an executory gift of the same at her death to such of his nieces as should survive her, equally if more than one, so far as his wife should not dispose by will of the property in favour of the surviving nieces or any one or more of them. But the decision was not based on the precatory words. "The words 'in full confidence,'" said Lord DAVEY, "are in my opinion neutral. I think it would be impossible to regard them as technical words in any sense. They are words which may or may not create a trust, and whether they do so or not must be determined by the context of the particular will in which you find them. In the present case I do not think it necessary to determine any such question." The decision therefore has little bearing on the subject of precatory trusts.

(*h*) [1905] A. C. 84.

Trusts for Creditors.

JOHNS *v.* JAMES.

(1878, 8 Ch. D. 744.)

A trust deed by which property is conveyed for the benefit of creditors does not of itself create a trust for any of the creditors.

Meyrick, who owed Johns £3500, conveyed his property to James, and gave him a power of attorney to collect all his assets, upon trust to pay all debts due from Meyrick, including the £3500 due to Johns. Meyrick became bankrupt. James collected his assets, but did not pay Johns' debt. Johns then commenced an action against James claiming an account, and that the estate might be administered, and the debts of himself and other creditors satisfied. The Court of Appeal decided that the action was not maintainable.

In this case the Court confirmed and acted on the principle established by *Garrard* v. *Lord Lauderdale* in 1831 (*a*).

In that celebrated case there was an assignment of certain personal property to trustees in trust to sell, and after satisfying certain claims and charges in a prescribed order to divide the residue among the creditors named in the schedule. The creditors were named as parties to the deed, but did not execute it. The contents were, however, communicated to them by circular though the plaintiff did not admit the receipt of it, and had not refrained from suing, but had actually proved his debt against the estate. It was held that the assignment was a private arrangement for the convenience of the debtor, and that there was no trust for the benefit of the creditors.

In the leading case the Court said it was now too late to repeat the doubt which had been expressed as to the original propriety of the decision in *Garrard* v. *Lord Lauderdale* (*b*). That case, Lord

(*a*) 3 Sim. 1; affirmed on appeal, 2 Russ. & My. 451.

(*b*) Some observations had been made in 1845 by Knight-Bruce, V.C., and in 1849 by Wigram, V.C., indicating disapproval of that case, but "thirty years had elapsed since the last of those dicta was pronounced; and *Wallwyn* v.

Justice JAMES said, proceeded upon the plainest notions of common sense. "It is quite obvious," he said, "that a man in pecuniary difficulties having a great number of debts which he could not meet might put his property in the hands of certain persons to realize and pay the creditors in the best way they could. It was held in *Garrard* v. *Lord Lauderdale* that really after all that is only making those particular persons who are called trustees his agents or attorneys. There might be a power of attorney for them to realize all his property and relieve him from the difficulties he was in. If it were supposed that such a deed as that created an absolute irrevocable trust in favour of every one of the persons who happened at the time to be a creditor the result might have been very often monstrous. It would give him no opportunity of settling an action, no opportunity of getting any food for himself or his family next day, or redeeming property pledged." And the Lord Justice pointed out that the result of holding that such a deed created an absolute trust in favour of every creditor would be that the unfortunate trustee might be liable to a thousand actions, for he could not stop any of them till a judgment was made in favour of all the creditors.

The principle on which the decisions are based is that such a deed is to be treated as a mandate, just as when a man gives his servant money with directions to pay debts, that does not of itself create any right in favour of the creditors. The right to the direction of the money is the right of the person who has put the money in the hands of the agent. The deed on the face of it appears to create a trust for the creditors no doubt, but a little consideration shows that that was not the real intention of the debtor; it was his own benefit he had in mind, not theirs. The trust is illusory since he is the real beneficiary, and consequently he can revoke the deed whenever he pleases (*c*).

There are cases, however, in which such a deed creates a true trust for the creditors, and is, therefore, enforceable by them. These are:

First, *When any of the creditors is a party to and executes the deed.* This was recognized in the leading case. "If the creditor," said

Coutts (3 Mer. 707), *Garrard* v. *Lord Lauderdale*, and *Acton* v. *Woodgate* (2 My. & K. 492) have ever since been recognized and acted upon."

(*c*) The rule has been applied in *Wilding* v. *Richards*, 1 Coll. Ch. R. 655; *Cornthwaite* v. *Frith*, 4 De G. & Sm. 552; *Johns* v. *James*, 8 Ch. D. 744; *Kinlock* v. *Secretary of State for India*, 7 App. Cas. 619; *Henderson* v. *Rothschild*, 33 Ch. D. 459; and *In re Ashby*, [1892] 1 Q. B. 872.

Lord Justice JAMES, "has executed the deed himself, and been a party to it, and assented to it—if he has entered into obligations upon the faith of the deed, of course that gives him a right just as in the case where a man receives money from a person or a direction from his creditor to pay some other person instead of paying him, and he communicates it to this person. The person to whom he communicates it of course has a legal right to have the money so applied, but that does not enure for the benefit of any other person or persons to whom no such communication has been made" (*d*).

Secondly, *when it is communicated to any of the creditors who indicate their acquiescence in it*, even though they are not parties, it becomes enforceable by them. "I should be sorry," said Lord St. LEONARDS (when Sugden, L. C.), "to have it understood that a man may create a trust for the benefit of his creditors, communicate it to them, and obtain from them the benefit of their lying by until perhaps the legal right to sue was lost, and then to insist that the trust was wholly within his power" (*e*). The authorities are somewhat vague as to what must be the nature of the communication, but it does not seem to matter whether it is made by the debtor himself or by the trustee (*f*).

Thirdly, *when the debtor dies without having revoked the deed* it becomes irrevocable, since the right is personal to the debtor (*g*). Vice-Chancellor MALINS once held (*h*) that the debtor's executor was at liberty to revoke the deed after the debtor's death, but having regard to the weight of authority the decision must be regarded as erroneous.

Lastly, *when an intention to create a trust for the benefit of the creditors clearly appears*, the deed will be enforceable by them. It is always a question what is the real intent of the debtor. The form of the transaction raises a presumption that he only intended to promote his own convenience, but the presumption is rebuttable, and if on examination of the circumstances it appears that its true

(*d*) For cases in which a deed has been held irrevocable on this ground, see *Mackinnon* v. *Stewart*, 1 Sim. N. S. 76; *Montefiore* v. *Browne*, 7 H. L. C. 241; *Cosser* v. *Radford*, 1 De G. J. & S. 585.

(*e*) *Browne* v. *Cavendish*, 1 J. & Lat. 635.

(*f*) See *Harland* v. *Binks*, 15 Q. B. 713; *Synnot* v. *Simpson*, 5 H. L. C. 121; *Cornthwaite* v. *Frith*, 4 De G. & Sm. 552. For a fuller discussion of the authorities, see Hart, Digest of the Law of Trusts, 52.

(*g*) See *per* Lord CRANWORTH in *Synnot* v. *Simpson*, *supra*; see also *In re Fitzgerald's Settlement*, 37 Ch. D. 18; and *Priestley* v. *Ellis*, [1897] 1 Ch. 480.

(*h*) *In re Sanders' Trusts*, 47 L. J. Ch. 667.

purpose was to benefit the creditors it will be enforceable by them (*i*). A good illustration of this is to be found in the case of *New Prance and Garrard's Trustee* v. *Hunting* (*k*), where a trustee who had been guilty of misappropriation of trust funds conveyed an estate upon trust to raise thereout by sale or mortgage the sum of £4200, and therewith to make good the breaches of trust he had committed in respect of the estates specified in the schedule to the deed. The existence of the deed was not communicated to any of the beneficiaries, but it was held that the deed was not revocable either by the grantor or the trustee in his bankruptcy.

Executory Trusts.

SACKVILLE-WEST *v.* VISCOUNT HOLMESDALE.

(1870, L. R. 4 H. L. 543.)

In construing executory trusts the Court exercises a large authority in subordinating the language to the intent.

The Countess Amherst by a codicil to her will gave certain freeholds, leaseholds, copyholds, and chattels to trustees in trust to settle them in a course of settlement to correspond as nearly as might be practicable with the limitations of the barony of Buckhurst, in such manner and form as the trustees should think proper, or as their counsel should advise. The limitations of the letters patent of the barony of Buckhurst after the decease of the Countess de la Warr were to R. W. Sackville-West, and "the heirs male of his body," and in default of such issue to the third, fourth, and fifth sons of the Countess de la Warr successively, and the heirs male of their bodies, with a shifting clause by which in certain events the barony was to go over. The House of Lords decided that the estates ought to be limited in a course of strict settlement to the second and other

(*i*) See *Wilding* v. *Richards*, 1 Coll. Ch. 655; *Smith* v. *Hurst*, 10 Hare, 30; *Godfrey* v. *Poole*, 13 App. Cas. 497.

(*k*) [1897] 2 Q. B. 19.

younger sons of the Countess de la Warr for their respective lives without impeachment of waste, with remainder to their sons successively in tail male in the order mentioned in the letters patent creating the barony, and that the copyholds, leaseholds, and chattels were to go in a similar manner so far as the rules of law and equity would allow, and that the settlement ought to contain powers of jointuring and of charging portions.

For purposes of interpretation trusts are classified as either executed or executory—a distinction established, according to Lord HARDWICKE (*a*), by the case of *Lord Glenorchy* v. *Bosville* decided in 1733 (*b*).

A trust is said to be executed when the limitations of the equitable interest are complete and final. If those limitations are not complete but are only indicated in general terms with a view to a complete declaration in a subsequent instrument, the trust is said to be executory. Probably as good an explanation of the distinction as can be given is that of Lord ST. LEONARDS in the case of *Egerton* v. *Earl Brownlow* (*c*) in the House of Lords in 1853. "All trusts are in a sense executory," he said, "because a trust cannot be executed except by a conveyance, and therefore there is always something to be done. But this is not the sense which a Court of Equity puts upon the term 'executory trust.' A Court of Equity considers an executory trust as distinguished from a trust executing itself, and distinguishes the two in this manner: Has the testator been what is called, and very properly called, his own conveyancer? Has he left it to the Court to make out from general expressions what his intention is, or has he so defined that intention that you have nothing to do but to take the limitations he has given to you, and to convert them into legal estates?" "An executory trust," said Lord CAIRNS in the leading case (*d*), "is not a trust which remains to be executed, for in this sense all trusts are executory at their creation, but a trust which is to be executed by the preparation of a complete and formal settlement, carrying into effect through the operation of an apt and

(*a*) See *Bagshaw* v. *Spencer*, 2 Atkins, 582.
(*b*) Cas. t. Talbot, 3; Wh. & Jud. L. C. Eq. 7th ed., vol. ii., 763.
(*c*) 4 H. L. C. at p. 211.
(*d*) P. 571.

detailed legal phraseology, the general intention compendiously indicated by the testator" (*e*).

The reason for drawing the distinction is that an executed trust is construed according to the technical meaning of the words used by the settlor, while, as Lord WESTBURY said in the leading case (*f*), "in construing an executory trust a Court of Equity exercises a large authority in subordinating the language to the intent." The origin of the rule, Lord HATHERLEY tells us in the leading case (*g*), may be traced to the desire to obviate the consequence of the extremely technical doctrine of the rule in *Shelley's Case*.

Executory trusts are most usually to be found in marriage articles (which are the rough jottings or heads of the provisions intended to be formally embodied in a regular marriage settlement) and wills. In the case of marriage articles there is a presumption arising from the nature of the instrument that the intention of the settlor is to provide for the issue of the marriage. Consequently when in such an instrument an estate is limited to the husband for life with a subsequent remainder to his heirs or the heirs of his body, which limitation if literally introduced into the settlement would, under the rule in *Shelley's Case*, confer an estate of inheritance on the husband and so enable him to defeat the very object of the settlement, a Court of Equity, as Lord WESTBURY said in the leading case (*h*), discerns an intention that the issue shall take as purchasers, and it refuses, therefore, to give to the words "heirs of the body" their proper effect and meaning at common law, but directs a settlement on the first and other sons in tail (*i*).

No such presumption exists with regard to wills. Here the intention must appear on the face of the instrument in order to justify the Court in directing a settlement which does not follow the exact words implied in the instrument containing the executory trust, but by varying them effects the presumed intention of the parties (*k*). Though even here, if it is clearly to be ascertained from anything in the will that the testator did not mean to use the expressions which he has employed in their strict proper technical sense, the Court in

(*e*) See Lewin, Trusts, 12th ed. *et seq.*, and Hart, Digest of the Law of Trusts, 70, for a fuller discussion.

(*f*) P. 565.

(*g*) P. 554.

(*h*) P. 565.

(*i*) See, for example, *Trevor* v. *Trevor*, 1 P. Wms. 622; *Newcastle* v. *Lincoln*, Ves. 387, 12 Ves. 217.

(*k*) *Per* Lord HATHERLEY in the leading case, p. 554.

decreeing such settlement as he has directed will depart from his words in order to execute his intention (*l*).

The leading case is an illustration of this. The trust was executory, the gift being to the trustees "*to settle*" the property in a course of settlement to correspond as nearly as might be practicable with the limitations of the barony in such manner and form as the trustees should think proper, or as their counsel should advise. The object of the testatrix was to annex as far as she could "alienable" property to an "inalienable" barony, to attach the property by an apt and formal method of law to the new peerage so as to make it a provision for the peerage. "It is plain from the whole of the codicil," said Lord WESTBURY, "that the general and leading intent of the testatrix was to make provision for the support and maintenance of the dignity; and it would be mere mockery of this intent and purpose if the estates were settled so that they would at once become the absolute property of Reginald to the disherison of all subsequent possessors of the dignity under the letters patent (*m*).

On the other hand, there are cases to be found in the books in which for lack of evidence the technical words received their strict legal signification, notwithstanding that the trust was executory. For example, in the old case of *Sweetapple* v. *Bindon* (*n*), where the testatrix gave £300 to be laid out by her executrix in lands and settled to the only use of her daughter and her children; and if she died without issue the lands to be equally divided between her brothers and sisters then living; there being no evidence of a contrary intent, it was held that the daughter took an estate tail.

So again in *Blackburn* v. *Stables* (*o*), the testator gave the residue of his property to his executors in trust for X, adding, "my will is that he shall not be put into possession of any of my effects till he attains the age of twenty-four years, nor shall my executors give

(*l*) *Per* Sir W. GRANT in *Blackburn* v. *Stables*, 2 V. & B. 369.

(*m*) Other instances are to be found in *Papillon* v. *Voice*, 2 P. Wms. 470; *Meure* v. *Meure*, 2 Atk. 265; *Glenorchy* v. *Bosville*, Cas. t. Talbot, 3; *Roberts* v. *Dixwell*, 1 Atk. 606; *White* v. *Carter*, 2 Eden, 365; *Bastard* v. *Proby*, 2 Cox, 6 *Shelley* v. *Shelley*, L. R. 6 Eq. 540; *Thompson* v. *Fisher*, L. R. 10 Eq. 207; *Miles* v. *Harford*, 12 Ch. D. 691; *Cockerell* v. *Earl of Essex*, 26 Ch. D. 538.

(*n*) 2 Vernon, 356, decided in 1705.

(*o*) 2 V. & B. 367. See also *Marshall* v. *Bousfield*, 2 Maddock, 166; *Seal* v. *Seal*, appears to be another instance if the reports in 1 P. Wms. 290 and 2 Eq. 346, which state that there was a direction *to settle*, are correct, but the words are omitted in the report in Precedents in Chancery, and in their absence the trust appears to be an executed one.

up their trust till a proper entail be made to the heir male by him." It was held that the trust was executory, but there being nothing to show that the words were not used in their technical sense, that X took an estate tail.

Executory trusts are occasionally to be found in post-nuptial and other settlements as well as marriage articles and wills, and are then on the same footing as such trusts in wills, that is to say, the intention must appear on the face of the instrument, otherwise technical words and expressions will be given their strict legal signification (*p*).

Trusts in Fraud of Creditors.

FREEMAN *v.* POPE.

(1870, L. R. 5 CH. APP. 538.)

A voluntary settlement may be set aside under 13 *Eliz. c.* 5, *without proof of actual intention to defeat, hinder or delay creditors, if, under the circumstances, the instrument will necessarily have that effect.*

The settlor, who was under pressure from his creditors, made a voluntary settlement of such an amount of his property as to render the residue insufficient to pay his creditors at that date. At the suit of a person who subsequently became his creditor the Court of Appeal set the settlement aside.

A trust may be void if it be made for the purpose of defrauding the settlor's creditors. By the statute 13 Eliz. c. 5—an Act for avoiding gifts, grants and conveyances, as well of lands and tenements as of goods and chattels devised to the intent to delay, hinder or defraud creditors and others—it is declared by s. 1 that every gift, grant and conveyance of lands, tenements, hereditaments, goods and chattels, or any of them, by writing or otherwise to or for any intent or purpose before declared shall be deemed (only against that person hindered, delayed or defrauded) to be utterly void. By s. 5, however, the

(*p*) *Rochford* v. *Fitzmaurice*, 1 Conn. & Laws. 158; 2 Dr. & War. 1; *Mayn* v. *Mayn*, L. R. 5 Eq. 150; *Sackville West* v. *Viscount Holmesdale*, L. R. 4 H. L. at p. 554.

statute is not to extend to any estate or interest in lands, tenements or hereditaments, goods or chattels upon good consideration, and *bonâ fide* conveyed or assured to any person not having at the time any notice of such fraud.

The principle on which this statute proceeds was stated by Lord HATHERLEY in the leading case to be that people "must be just before they are generous, and that debts must be paid before gifts can be made." It will be observed that it makes no mention of voluntary conveyances, nevertheless in applying it the Courts have drawn an important distinction between settlements which are voluntary and those which are for valuable consideration.

Freeman v. *Pope* is the leading authority upon this distinction. The judge before whom the case originally came, and whose decision setting aside the settlement was upheld in the Court of Appeal, seems to have felt a difficulty whether if the case had come before him as a special juryman he could have arrived at the conclusion that the settlor had any intention to defeat or delay his creditors. On this point the Court of Appeal stated that were it necessary to decide it they would probably have concluded that the settlor's mind was so full of considerations of kindness and generosity for the lady whom he intended to benefit that he forgot the higher claims of his creditors.

The fact, however, being once established that the settlor had not left sufficient property outside the settlement to pay his debts, it was unnecessary " to speculate as to what was passing in his mind." " It is established," said Lord HATHERLEY, " by the authorities that in the absence of any such direct proof of intention, if a person owing debts makes a settlement which subtracts from the property which is the proper fund for the payment of those debts, an amount without which the debts cannot be paid, then since it is the necessary consequence of the settlement (supposing it effectual) that some creditors must remain unpaid, it would be the duty of the judge to direct the jury that they must infer the intent of the settlor to have been to defeat or delay his creditors, and that the case is within the statute."

" When the instrument is voluntary," said Lord Justice GIFFARD, " then the intent may be inferred in a variety of ways. For instance, if after deducting the property which is the subject of the voluntary settlement, sufficient available assets are not left for the payment of the settlor's debts, then the law infers intent, and it would be the duty of the judge, in leaving the case to the jury, to tell the jury that they must presume that that was the intent. Again, if at the date

of the settlement the person making the settlement was not in a position actually to pay his creditors, the law would infer that he intended by making the voluntary settlement to defeat and delay them" (*a*).

It would appear, however, that the presumption of intent to defeat creditors is not, as seems to have been thought at one time, an irrebuttable one. The Court is not bound to presume such an intention merely because creditors are defeated or delayed as a necessary consequence of the settlement. The settlement, though it has this effect, will yet be valid if the evidence shows that the settlor had no such intention.

This appears to be the result of the case of *Ex parte Mercer, In re Wise* (*b*), decided by the Court of Appeal in 1886. In this case the settlor, Wise, was married on May 31, 1881. In August of the same year a Miss Vyse, a young lady to whom he had previously engaged himself, commenced an action against him for damages for breach of promise of marriage, and the writ in this action was served on October 8, 1881. About the same time the settlor received news that he had become entitled to a legacy under the will of his step-father, and on October 17, 1881, he executed a voluntary settlement of this legacy on his wife for life with remainders over. The evidence showed that in doing this the settlor was not influenced by the action pending against him, which he then thought would come to nothing, and that he did not owe a shilling at that time. However, Miss Vyse proceeded with her action, and on July 20, 1882, obtained judgment against him for £500, and finding herself unable to execute the judgment made him a bankrupt. In the bankruptcy proceedings she applied to the Court to set aside the settlement on the ground that the necessary effect of it was to defeat her claim, of which the settlor was aware when he executed it, and that the settlement being voluntary the Court was bound as a consequence to presume that it was made with intent to defeat her. But the Court of Appeal refused to set the settlement aside.

This case was at first argued, said Lord ESHER, "upon the assumption that if the natural or necessary effect of what the settlor did was to defeat or delay his creditors, the Court must find that he actually had that intent. That proposition or doctrine I entirely abjure. . . . It was not the necessary consequence of what he did to defeat or

(*a*) *Ridler* v. *Ridler*, 22 Ch. D. 74 (where the previous authorities on the subject are collected) is to the same effect.

(*b*) 17 Q. B. D. 290.

delay the plaintiff in the action, for if the verdict had been for a small amount she would not necessarily have been delayed for a week."

"We have to deal," said Lord Justice LINDLEY, "with the case of an honest man, not in fact indebted at all, and the question is whether we are driven (not by the statute of Elizabeth, but by a series of decisions upon it) to say that the settlement cannot stand. I do not think we are. It is true that voluntary settlements have been set aside under the statute, as it has been construed for a great number of years, in cases in which there was no actual intention to defraud. It has been held to be sufficient if when the settlement is executed the circumstances are such that it must have that effect. But the language which has been used in a great many cases that a man must in point of law be held to have intended the necessary consequences of his own acts is apt to mislead, by confusing the boundary between law and fact, and by consequences which can be foreseen with those which cannot" (*c*).

It is not easy to reconcile the judgments in this case with those in *Freeman* v. *Pope*, but the result seems to be that if there is no evidence at all it must be inferred that the settlement was intended to delay, hinder or defraud creditors from the fact that this was its necessary result, but this inference is one of fact only and not of law, and is rebutted if the evidence shows that no such intention existed (*d*).

Trusts for valuable consideration may likewise be set aside under the statute if made with the intention of defrauding creditors, but in order to get a settlement for value set aside an actual intent to defraud must be proved, and it must be shown that the beneficiary had notice of it; there is no presumption of intent in these cases merely because creditors are necessarily defrauded. Such trusts are usually to be found in ante-nuptial settlements, such as that in *Columbine* v. *Penhall* (*e*), where the debtor who had been cohabiting with a woman for seven years got into insolvent circumstances, and for the purpose of securing his property from his creditors married the woman, having by an ante-nuptial settlement assigned the whole of his property to trustees upon trust for his wife with a joint power to them to appoint the property amongst their children. The

(*c*) *In re Holland, Gregg* v. *Holland*, [1902] 2 Ch. 360, accords with this, but the settlement the Court had to deal with there was not a voluntary settlement.

(*d*) See Hunt, Fraudulent Conveyances, 2nd ed., 54, 55.

(*e*) 1 Sm. & Giff. 228.

woman was aware of the fact, and it was accordingly held that the settlement was void as against the man's creditors (*f*).

A settlement is only avoided under the statute for the purpose of satisfying creditors (*g*), and although the statute says "void" it really means "voidable," so that dispositions of the settled property —whether legal or equitable—made in favour of persons who give valuable consideration are protected just as they would be in an action for rescission based on equitable grounds (*h*).

The provisions of the statute of Elizabeth are supplemented by those of the Bankruptcy Act, 1883, s. 47 of which provides that—

"(1) Any settlement of property, not being a settlement made before and in consideration of marriage, or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, or a settlement made on or for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife, shall, if the settlor becomes bankrupt within two years after the date of the settlement, be void against the trustee in the bankruptcy, and shall, if the settlor becomes bankrupt at any subsequent time within ten years after the date of the settlement, be void against the trustee in the bankruptcy, unless the parties claiming under the settlement can prove that the settlor was, at the time of making the settlement, able to pay all his debts without the aid of the property comprised in the settlement, and that the interest of the settlor in such property has passed to the trustee on the execution thereof.

"(2) Any covenant or contract made in consideration of marriage for the future settlement on or for the settlor's wife or children of any money or property wherein he had not, at the date of his marriage, any estate or interest, whether vested or contingent in possession or remainder, and not being money or property of or in right of his wife, shall, on his becoming bankrupt before the property or money has been actually transferred or paid pursuant to the contract or covenant, be void against the trustee in bankruptcy.

"(3) 'Settlement' shall, for the purposes of this section, include any conveyance or transfer of property."

(*f*) Similar cases are *Bulmer* v. *Hunter*, L. R. 8 Eq. 46; and *In re Pennington, Ex parte Cooper*, 59 L. T. 774. See also *In re Hirth*, [1899] 1 Q. B. 612.

(*g*) *Curtis* v. *Price*, 12 Ves. 89, at p. 103.

(*h*) *Halifax Banking Co.* v. *Gledhill*, [1891] 1 Ch. 31.

Here too the word " void " should be read as " voidable," so that a purchaser of the property comprised in the settlement who has taken a conveyance before the trustee's title has accrued cannot be disturbed (*i*).

Trusts for Charity—The Cy-près Doctrine.

In re CAMPDEN CHARITIES.

(1881, 18 Ch. D. 310.)

The cy-près doctrine is applied to charitable trusts when from lapse of time and change of circumstances it is no longer possible to carry out the intention of the donor in the exact mode which he has directed.

The Court will not interfere with a scheme settled by the Charity Commissioners unless the Commissioners have exceeded their jurisdiction or the scheme contains something wrong in principle or wrong in law.

The charitable gifts which came under the consideration of the Court in this case consisted of (1) £200 left by the will of Viscount Campden in the year 1629 for the benefit of the poor of Kensington, " as the trustees for the time being should think fit to establish for ever." (2) £200 left in 1643 by the will of Viscountess Campden to purchase lands of the clear annual value of £10, £5 of which should be " applied from time to time for ever for and towards the better relief of the most poor and needy people that be of good life and conversation that should be inhabiting within the said parish of Kensington," and the other £5 to be applied yearly " to put forth one poor boy or more being of the said parish to be apprenticed." " The

(*i*) *In re Vansittart*, [1893] 2 Q. B. 377; *In re Carter and Kenderdine's Contract*, [1897] 1 Ch. 776; *In re Tankard, Ex parte the Official Receiver*, [1899] 2 Q. B. 57. See on sub-sec. (1) *Sanguinetti* v. *Stuckeys Banking Co.*, [1895] 1 Ch. 176, and on sub-sec. (2) *Ex parte Bishop, In re Tonnies*, L. R. 8 Ch. App. 718; *In re Reis, Ex parte Clough*, [1904] 1 K. B. 451; *In re Magnus, Ex parte Salaman*, [1910] 2 K. B. 1049.

said £5 due to the poor to be paid to them half-yearly for ever at Lady Day and Michaelmas in the church or the porch thereof at Kensington." Both these sums of £200 were laid out in the purchase of land. The parish of Kensington had increased enormously, and the total rents of the charity estates were about £3600, of which £2200 belonged to Lady Campden's Charity. Apprenticeship had almost died out, and opinion had changed as to the expediency of doles.

Accordingly the trustees had for a considerable time been applying the charity funds in a manner which, though beneficial, was not in accordance with the directions in Lady Campden's will. The Charity Commissioners prepared a draft scheme for the administration of the charities, by which they appropriated the income to interim relief, hospitals, the promotion of thrift, old age pensions, education, apprenticeship, and outfits for poor boys, and the like. Some of the parishioners objected to the scheme, and produced evidence that there was no lack of deserving objects of the charity ready to take under the old mode of applying the income, but the Court of Appeal, reversing the decision of Vice-Chancellor Hall, refused to interfere with the decision of the Commissioners, and confirmed the scheme.

In some respects trusts for charitable purposes are treated by the law differently from trusts for private purposes, and a consideration of this difference in treatment makes it necessary to consider what constitutes a charity.

In the first place, all objects are regarded as charitable which are expressly enumerated in the old statute of charitable uses (*a*), the 43 Eliz. c. 4, the preamble of which specifies, "Relief of aged impotent and poor people; maintenance of sick and maimed soldiers and mariners, schools of learning, free schools and scholars in universities, repair of bridges, ports, havens, causeways, churches, sea-banks and highways, education and preferment of orphans, relief, stock or maintenance for houses of correction, marriages of poor maids, supportation aid and help of young tradesmen, handicraftsmen and persons decayed, relief or redemption of prisoners or captives; aid or ease of any poor inhabitants concerning payments of fifteens, setting out of soldiers, and other taxes."

Secondly, all objects which are deemed by analogy within its "spirit and intendment" are equally regarded as charitable (*a*).

The statute of Elizabeth has been repealed, but by s. 13 of the Mortmain and Charitable Uses Act, 1888, after reciting its preamble, and that in divers enactments and documents reference is made to charities within the meaning, purview and interpretation of the said Act, it is enacted that references to such charities shall be construed as references to charities within the meaning, purview and interpretation of the said preamble.

"Charity," said Lord MACNAGHTEN, "in its legal sense comprises four principal divisions: trusts for the relief of poverty, trusts for the advancement of education, trusts for the advancement of religion, and trusts for other purposes beneficial to the community not falling under any of the preceding heads" (*b*).

When the object of a trust is one of those specified in the statute no difficulty arises, but it is not always easy to determine whether a trust is within its "meaning, purview and interpretation."

Recent decisions show no disposition to narrow down the wide interpretation of the word "charity" in the older cases (*c*). Thus the Royal National Lifeboat Institution (*d*), the Salvation Army (*e*), a Volunteer Corps (*f*), the National Rifle Association (*g*), and an Officers' Regimental Mess (*h*) have all been decided to be charities; so have vegetarian societies (*i*), and Societies for the Prevention of Cruelty to Animals and the Suppression of Vivisection (*j*), and even a Conservative Club and Village Reading Room (*k*).

A trust for the repair of a churchyard is valid by the Gifts for Churches Act, 1803 (*l*), and even apart from that statute a trust for keeping a burial ground in good repair is a charitable trust (*m*), and so a trust for the erection and maintenance of headstones over

(*a*) *Per* Sir W. GRANT in *Morice* v. *Bishop of Durham*, 9 Ves. at p. 405.
(*b*) *Commissioners of Income Tax* v. *Pemsel*, [1891] A. C. at p. 583.
(*c*) See Jarman, Wills, 6th ed., 213 *et seq.*
(*d*) *In re Richardson, Shuldham* v. *R. N. L. I.*, 35 W. R. 710.
(*e*) *In re Lea, Lea* v. *Cooke*, 34 Ch. D. 528.
(*f*) *In re Lord Stratheden and Campbell*, [1894] 3 Ch. 265.
(*g*) *In re Stephens*, [1892] W. N. 140.
(*h*) *In re Good*, [1905] 2 Ch. 61.
(*i*) *In re Cranston*, [1898] 1 Ir. R. 431; *In re Slatter*, 25 T. L. R. 295.
(*j*) *In re Douglas*, 35 Ch. D. 472; *In re Foveaux*, [1895] 2 Ch. 501.
(*k*) *In re Scowcroft*, [1898] 2 Ch. 638—a special case.
(*l*) *In re Vaughan*, 33 Ch. D. 187; *In re Douglas*, [1905] 1 Ch. 279.
(*m*) *In re Manser*, [1905] 1 Ch. 68; *In re Pardoe*, [1906] 2 Ch. 184.

graves is charitable (*n*). But a trust for keeping in repair a tomb in a churchyard is not a charitable trust, and is therefore void as involving a perpetuity (*o*); yet a gift of a fund to a charity on condition that the trustees keep the testator's tomb in repair with a gift over to another charity on their failing to do so is valid, since the rule against perpetuities does not apply to such a gift, and it is therefore possible to frame a valid trust for the repair of a tomb in this way (*p*).

So a trust of a sum of money to be distributed annually to bell-ringers of a church who should ring a peal of bells on the anniversary of the restoration of the monarchy in commemoration of that happy event is charitable as tending to inspire happy thoughts and a feeling of gratitude to the Giver of all (*q*). But the encouragement of mere sport is not charity, so that a gift of a fund to provide annually for ever a cup to encourage the sport of yacht racing is not a valid gift (*r*).

The most important respect in which charitable trusts are treated differently from private trusts is that the *cy-près* doctrine is applied to the former. The *cy-près* doctrine is that when a testator manifests a general intention of charity, but the particular object of his bounty cannot be carried out literally, it must be carried into effect *as nearly as possible*. The principle upon which the Court proceeds in applying the doctrine was laid down by Lord ELDON to be that if the testator has manifested a general intention to give to charity, the failure of the particular mode in which the charity is to be effectuated shall not destroy the charity; but if the substantial intention is charity, the law will substitute another mode of devoting the property to charitable purposes, though the formal intention as to the mode cannot be accomplished (*s*).

This doctrine is applied for the protection of charitable trusts at their making, so as to prevent them from being void for uncertainty. For example, suppose a testator gives property to such charitable institutions as he shall by codicil appoint, and he makes no codicil, the trust is none the less valid; the Court will direct a scheme to be prepared for the application of the property *cy-près* (*t*).

(*n*) *In re Pardoe, supra.*
(*o*) *In re Vaughan, supra; In re Rogerson,* [1901] 1 Ch. 715.
(*p*) *In re Tyler,* [1891] 3 Ch. 252.
(*q*) *In re Pardoe, supra.*
(*r*) *In re Nottage,* [1895] 2 Ch. 649.
(*s*) *Moggridge* v. *Thackwell,* 7 Ves. 36.
(*t*) *Mills* v. *Farmer,* 1 Mer. 55.

Or suppose a testator directs the residue of his estate "to be given by my executors to such charitable institutions as I shall by any future codicil give the same, and in default of any such gift then to be distributed by my executors at their discretion." After the words "to be distributed by my executors" the Court will supply the words "in charity," and will execute the trust (*u*).

And the doctrine is not only applied to protect charitable trusts at their birth, but to save them from an untimely end, for though the charity specified by the testator ceases to exist after his death the trust will not fail, the Court will direct the fund to be applied *cy-près*. For example, in *Wilson* v. *Barnes* (*x*) it appeared that in the twelfth year of her reign Queen Elizabeth granted Wedholme Wood in the manor of Holme Cultram, which is situate near the sea-coast in Cumberland, "for and towards the reparation of the sea-dykes within the said lordship of Holme," and that the copyholders should "appoint four ancient tenants to oversee and deliver the said woods from time to time as need shall require." As years went by, however, the sea receded and the sea-dykes were no longer required, and between the years 1761 and 1765 the representatives of the ancient tenants cut Wedholme Wood down and invested the proceeds of sale. In 1886 the Court of Appeal, holding that the grant of the wood constituted a gift for charitable purposes, directed a scheme for the management and application of the property *cy-près*.

And so in *Smith* v. *Kerr* (*y*), it appeared that in the year 1618 a grant was made of Clifford's Inn to certain trustees to the intent that the same might "for ever after continue and be employed as an Inn of Chancery for the furtherance of the practisers and students of the common laws of this realm," and that in the time of Lord Coke, "the readings and other exercises of the laws therein continually used were most excellent and behoofful for attaining to the knowledge of those laws," but that as time had gone on the exercises

(*u*) *Pocock* v. *Att.-Gen.*, 3 Ch. D. 342. See also *In re Sutton*, 28 Ch. D. 464; *In re White*, [1893] 2 Ch. 41 (gift to "the following religious societies, viz." followed by a blank). But the purpose specified must be wholly charitable for the *cy-près* doctrine to be applied; a gift for such "charitable *or* philanthropic" purposes as the trustees may select, for instance, would be void for uncertainty: *In re Macduff*, [1896] 2 Ch. 451; *Blair* v. *Duncan*, [1902] A. C. 37. On the other hand, a gift "such charitable *and* benevolent institutions" as the trustees may determine is good: *In re Best*, [1904] 2 Ch. 354.

(*x*) 38 Ch. D. 507. Of a similar character is *Biscoe* v. *Jackson*, 35 Ch. D. 460.

(*y*) [1902] 1 Ch. 774, affirming [1900] 2 Ch. 511.

of the laws in the Inn had become gradually less excellent until they had finally ceased altogether, and that for very many years all that the Principal and Rules of the Inn had done for the students of the common laws was to give a prize known as the Clifford's Inn Prize for competition at the examinations of the Law Society. The Court of Appeal nevertheless held that the property was vested in the trustees for charitable purposes—"the maintenance of a school of learning"—and that the members of the society were not entitled to sell the Inn and divide the proceeds among themselves, but that a scheme should be prepared for their application *cy-près*.

A rather peculiar instance of the application of the doctrine to this class of cases occurred in the case of *In re Slevin* (*z*), where a testator gave "£200 to the Orphanage of St. Dominics, Newcastle-on-Tyne." This was an institution voluntarily maintained by a lady at her own expense which was in existence at the date of the testator's death, but was discontinued shortly afterwards, and before the legacy had been paid over. It was held by the Court of Appeal that since the legacy had become the property of the charity on the testator's death, when the orphanage ceased to exist it became applicable by the Crown for charitable purposes, resembling those which the testator intended to benefit (*z*).

In the leading case this principle was carried a little further, for it was applied even though it was possible to carry out the testator's directions literally.

The judge before whom the case first came considered that the scheme settled by the Charity Commissioners ought not to be sanctioned by the Court, principally on the ground that it did not conform to the sound construction of the founder's declared trusts; and this objection he held to be peculiarly fatal in the present case, where in his opinion the usage had been comformable to what the Court considered to be the correct construction of the trusts (*a*). The Court of Appeal in reversing this decision proceeded on the principle that the circumstances of the case had altered so much

(*z*) *In re Slevin, Slevin* v. *Hepburn*, [1891] 2 Ch. 236. This class of cases must be distinguished from that in which a testator shows an intention, not of general charity, but to give to some particular institution, and that institution ceases to exist before his death. There is then a lapse just as there would be in the case of a legacy to an individual who predeceased the testator, and the gift falls into the residue. *In re Rymer, Rymer* v. *Stanfield*, [1895] 1 Ch. 19.

(*a*) 18 Ch. D. at p. 321.

that anything like a rigid adherence to the words of the testatrix's will would altogether defeat "the principal object which she had in view as distinguished from the means by which she wished that object to be carried out." The increase in the value of the property had been enormous, but the change in the whole circumstances and condition "of the parish of Kensington" had been so infinitely greater that it required some exercise of the imagination to realize it adequately. The then village of Kensington was a small village about a mile and a half from Hyde Park Corner, and in old documents it is called a village. "Now it is what we know it, a suburb of London, very thickly inhabited with many thousands of people, and containing a large number of houses of great magnitude and value inhabited by wealthy people. The whole of the circumstances of the place have changed. That which was a provision for the poor inhabitants of a village is now a provision for the numerous inhabitants of this large town or part of a town."

"Again," the judgment continues, "circumstances have changed in another way. The habits of society have changed, and not only men's ideas have changed, but men's practices have changed, and in consequence of the change of ideas there has been a change of legislation; laws have become obsolete or have been absolutely repealed, and habits have become obsolete and have fallen into disuse, which were prevalent at the time these wills were made. The change indeed has become so great in the case that we are considering that it is eminently a case for the application of the *cy-près* doctrine, if there is nothing to prevent its application."

The Court of Appeal then proceeded to consider the mode in which the testatrix had directed the fund to be applied. One moiety was to be applied in "doles," but that which might have been reasonable enough more than 200 years ago, when 50 shillings were to be given half-yearly among a few poor people in a small parish, would be intolerable on a large scale in a large town like Kensington. "Was it," asked Sir GEORGE JESSEL, "the intention of the testatrix? Here again I should say emphatically, No. Could she have intended to distribute 500 sovereigns every half-year among the poor of a large town like Kensington? There was no such idea in her mind. It seems to me, when you consider the change in the amount of money and the change in the surrounding circumstances, you cannot impute to the testatrix an intention to distribute this large sum in the way I have mentioned."

The other moiety was to be used for the purposes of apprenticing

one or more boys of the parish. On this the Master of the Rolls observed :—

" Now it is said that as regards the apprenticing of the poor boys, we are to apply £1100 a year in exactly the same way that the testatrix directed £5 a year to be paid. The answer, I think, is very plain. In giving £5 a year to apprentice one poor boy or more, she evidently thought that there might occasionally be a chance of more than one boy ; . . . . but did she imagine, or can anybody suppose she imagined, she was going to provide £1100 a year to apprentice any number of boys that might be living in that parish ? Of course she was not dealing with anything of the kind. The amount has so increased that we have no knowledge, nor can we even guess what she would have done with it if she had anticipated any such increase." It was also pointed out that under the statute passed in the 5th year of Queen Elizabeth (cap. 4), it was then part of the law of the land that no one could exercise a trade without being apprenticed. " All that legislation has been repealed—so the case falls within the principle laid down by Lord WESTBURY in *Clephane* v. *Lord Provost of Edinburgh* (*b*), where the means to the end required a change, the end (that of educating the poor of the parish so as to enable them to obtain a living) being kept in view."

" To confine," says Lord Justice JAMES, " the application of that charity in the present state of things, in the present state of feeling, and the present state of the law to those persons only among the poor of Kensington whose children would be willing to become apprentices to tradesmen or otherwise, and to exclude from the charity all that other mass of poor people who have got the same claim, and who do not now find it beneficial for their children to be put out as apprentices, would be, in fact, to exclude from the charity the great majority of that class of poor whom, it is obvious to my mind, Lady Campden contemplated as recipients of the benefit of the charity, and in doing that we should be in truth defeating the spirit of Lady Campden's gift by following strictly the letter, when the letter has become inapplicable."

Finally, the trustees of Lord Campden's charity had used their discretion to submit to the Charity Commissioners ; and the Charity Commissioners had a discretion conferred on them by the legislature. Therefore it would not be sufficient " for a judge to say he thought some detail might well be different, or that if he himself had

(*b*) L. R. 1 H. L. Sc. 417.

originally settled the scheme he should have put in some others than those which are specified in the scheme. He must be satisfied that the Charity Commissioners have gone wrong, either by disobeying those rules of law which govern them, as well as they govern Courts of justice, or else that there has been some slip or gross miscarriage which calls for the intervention of the Court to set aside and remodel the scheme."

The *cy-près* doctrine cannot be applied, however, unless it is clearly established that the directions of the testator cannot be carried into effect in such a way as to accord with his real intention. The mere fact that his directions appear to be inexpedient, and that the fund might be more beneficially applied in some other way is not sufficient. This is illustrated by the important case of *In re Weir Hospital* (c), where a testator who died in 1902 devised to trustees two houses upon trust to use one as a dispensary, cottage hospital or convalescent home, or other medical charity, to be called the Weir Hospital, for the benefit of the inhabitants of the parish of Streatham and the neighbourhood, until a restrictive covenant which prevented the other house (in which he resided) from being so used had expired, and then to use that in conjunction or not with the first for the same purpose. The trustees established a dispensary at the first house, and maintained it until the covenant expired in 1907, when the fund applicable for the maintenance of the charity was about £100,000. The trustees being doubtful whether the second house could be made suitable for the establishment of a cottage hospital or convalescent home which would require the expenditure of so large a fund, eventually applied to the Charity Commissioners for a scheme. The Charity Commissioners approved a scheme whereby the dispensary was to be maintained, the second house was to be turned into a home for nurses, four of whom were to give their services gratuitously in the district, and the bulk of the fund was to be applied in enlarging and maintaining a general hospital called the Bolingbroke Hospital, which was situate outside the parish of Streatham. This was to be re-named the Weir and Bolingbroke Hospital, and a number of beds in it were to be reserved for the inhabitants of Streatham and the neighbourhood. The Court of Appeal held that the scheme was *ultra vires*, and that the order of the Commissioners must be discharged. The grounds of the decision are clearly stated in the judgment of Lord Justice FARWELL, who said, " By s. 2 of the Charitable

(c) [1910] 2 Ch. 124.

Trusts Act, 1860, the Charity Commissioners (subject as therein mentioned) are authorized 'to make such effectual orders as may now be made by any judge of the Court of Chancery . . . for the establishment of any scheme for the administration of any such charity.' Now the Court of Chancery adopted schemes as the convenient machinery in most cases of charitable trusts for carrying into execution such trusts, and giving effect to the intentions of the founder thereof. As charities are for the most part created in perpetuity it would obviously have created a block in chambers, and have put charity funds to continual heavy costs if all charitable trusts had been retained and dealt with by Masters and Chief Clerks in chambers as in the case of ordinary trusts. . . . But the scheme is mere machinery: the function and duty of the Court is to give effect to the testator's will; nor is there any jurisdiction to apply *cy-près* so long as any lawful charitable object of the testator's bounty is available, however inexpedient such object may appear to the Court as compared with other objects. . . . It is clearly impossible for the Commissioners or trustees to decline to carry out the trusts of a single named lawful charity because they disapprove of it. It is equally clear that if they have the choice of two or more charities they cannot apply a part of the trust funds towards one of such charities, and refuse to apply the balance to the others because they disapprove of them. A case for the *cy-près* application of trust funds cannot be manufactured, but must arise *ex necessitate rei*. I of course give the Commissioners and the trustees full credit for desiring to do their best; but it is of great importance that their conduct should be in accordance with the law. It is contrary to principle that a testator's wishes should be set aside and his bounty administered not according to his wishes, but according to the view of the Commissioners, and if it is wished that testators should continue to become 'pious founders' it is eminently desirable that no doubt should be cast on the security and permanency of their bequests. One of the strongest inducements to gifts of this nature is that desire for posthumous remembrance which has inspired similar gifts for centuries."

Resulting Trust and Presumption of Advancement.

FOWKES *v.* PASCOE.

(1875, L. R. 10 Ch. App. 343.)

Where in the case of a purchase in the name of another there is a presumption of resulting trust, and evidence against such presumption, the Court is in the position of a jury, and will take into consideration all the circumstances of the case.

Sarah Baker was a widow who had large sums of stock standing in her own name, and other considerable property. Her only child, a son, had died, leaving a childless widow, who married again and had a son, John Irving Pascoe, and a daughter. In March, 1843, Sarah Baker invested £500, viz. £250 in the names of herself and her companion, and £250 in the names of herself and John Irving Pascoe. Subsequently, in the same year, she made her will, and gave the residue of her estate to her daughter-in-law for life, and after her death among her children. She then made further purchases in the names of herself and John Irving Pascoe, and also transferred stock into the names of herself and him, so that at the time of her death there was standing in the joint names of herself and John Irving Pascoe the sum of £7000. Pascoe deposed that the £7000 was intended as a gift to him after Mrs. Baker's death, and his evidence was supported by that of his wife, and by circumstances which made it likely that a gift was intended, *e.g.* that Pascoe had resided with Mrs. Baker for some years before his marriage and that she gave him part of her property by her will and appointed him one of the trustees. Held, by the Court of Appeal, that John Irving Pascoe was entitled to the £7000 stock.

Trusts are divisible into two principal classes—those which are expressly created and those which arise by implication of law, the former being commonly denoted express trusts, and the latter

implied trusts, the latter being also distinguished further into resulting trusts and constructive trusts (*a*). This fundamental distinction is recognized in the Statute of Frauds, by s. 7 of which, as we have seen, all "declarations" of trusts of land must be proved by writing, while by s. 8 trusts which "arise or result by the implication or construction of law" are excepted from the operation of the statute. One of the principal classes of resulting trusts is that which arises upon the purchase by one person of property which is conveyed to another. In the old leading case of *Dyer* v. *Dyer* (*b*) decided by the Court of Exchequer in the year 1788, the rule was stated by Chief Baron EYRE as follows:—

"The clear result of all the cases, without a single exception, is that the trust of a legal estate, whether a freehold, copyhold, or leasehold; whether taken in the names of the purchaser and others jointly, or in the names of others without that of the purchaser; whether in one name or several; whether jointly or *successivè*, results to the man who advances the purchase-money."

This judgment goes only to real estate and leaseholds, but a resulting trust will arise in just the same way in favour of the purchaser of pure personal estate (*c*).

Chief Baron EYRE founded the rule on analogy to the common law that where a feoffment was made without consideration the use resulted to the feoffer, a rule which probably originated in the practice of making feoffments of land to the use of the feoffer's will, and of taking a purchase of land in the name of another in order to bar the dower of the purchaser's wife (*d*).

There are many examples of such resulting trusts to be found in the reports (*e*), but since the doctrine is based upon the presumed intention of the parties, evidence is always admissible to prove what their real intention was. This is admitted in *Dyer* v. *Dyer* itself. "It is the established doctrine of a court of equity," said Chief

(*a*) See *per* Lord NOTTINGHAM in *Cook* v. *Fountain*, 3 Swanst. at p. 591. See also Story, Equity Jurisprudence, 2nd Eng. ed., s. 980; White and Tudor, L. C. Eq., 7th ed., vol. ii., 694; Hart, Digest of the Law of Trusts, 13.

(*b*) 2 Cox, 92; White and Tudor, L. C. Eq., 7th ed., vol. ii., 803.

(*c*) See judgment of Joyce, J., in *In re a Policy*, [1902] 1 Ch. at p. 285, and *Soar* v. *Foster*, 4 K. & J. 152; *James* v. *Holmes*, 4 De G. F. & J. 470; and *The Venture*, [1908] P. 218.

(*d*) See Strahan and Kenrick, Digest of Equity, 177.

(*e*) *Anon.*, 2 Vent. 361; *Howe* v. *Howe*, 1 Vern. 415; *Wray* v. *Steele*, 2 V. & B. 388; *Soar* v. *Foster*, 4 K. & J. 152; *James* v. *Holmes*, 4 De G. F. & J. 470; *In re a Policy*, [1902] 1 Ch. 282.

Baron EYRE, " that this resulting trust may be rebutted by circumstances in evidence."

The importance of *Fowkes* v. *Pascoe* lies in the fact that it shows that even apart from the evidence adduced by the party who claims to take beneficially regard must be had to the circumstances of the case. The Master of the Rolls, Sir GEORGE JESSEL, had decided that there was a resulting trust. The Court of Appeal reversed this decision. " To my mind," Lord Justice JAMES said, " differing in this respect altogether from the Master of the Rolls, the evidence in favour of gift and against trust is absolutely conclusive. *There is, to begin with, in respect of the two first purchases, an inference from the facts themselves which is to my mind irresistible.* Whatever may be the presumption as to one purchase or one transfer standing by itself, the fact of the contemporaneous purchase of small distinct sums in different names—in the name of a *quasi* son or grandson, and of a companion, and the subsequent repetition of those purchases is not to be got over. The lady had £500 to invest; she had already large sums of stock standing in her own name, besides other considerable property. Is it possible to reconcile with mental sanity the theory that she put £250 into the names of herself and her companion, and £250 into the names of herself and the defendant as trustees upon trust for herself? What trust—what object is there conceivable in doing this? If the case were tried before a jury, no judge could withdraw the facts of the contemporaneous purchases and of their repetition from the consideration of a jury, and in my opinion no jury would or could be found who would hesitate to say that the thing was done by way of gift and not trust."

" When once there is evidence to rebut the presumption," said Lord Justice MELLISH, " the Court is put in the same position as a jury would be, and then we cannot give such influence to the presumption in point of law as to disregard the circumstances of the investment, and to say that neither the circumstances nor the evidence are sufficient to rebut the presumption."

" The presumption," the Court went on to say, " must beyond all question be of different weight in different cases. In some cases it would be very strong indeed. If, for instance, a man invested a sum of stock in the name of himself and his solicitor the inference would be very strong indeed that it was intended solely for the purpose of a trust, and the Court would require very strong evidence on the part of the solicitor to prove that it was intended as a gift; and certainly his own evidence would not be sufficient. On the other hand, a

man may make an investment of stock in the name of himself and some person, although not a child or wife, yet in such a position to him as to make it extremely probable that the investment was intended as a gift. In such a case, although the rule of law, if there was no evidence at all, would compel the Court to say that the presumption of trust must prevail, even if the Court might not believe that the fact was in accordance with the presumption, yet if there is evidence to rebut the presumption, then in my opinion the Court must go into the actual facts."

Presumption of Advancement.

In certain cases, however, where the purchase has been made in the name of another, there is a presumption that the purchase is by way of advancement or provision, which rebuts that of resulting trust. This is in the cases where the person in whose name the purchase has been made is the wife or child of the purchaser, or one to whom he stands *in loco parentis*. In these cases, as Sir George Jessel said (*f*), "the presumption of gift arises from the moral obligation to give" (*g*). Whether this presumption of advancement arises in the case of a mother as it does in the case of a father, is not clear.

In *Bennet* v. *Bennet* (*h*), Sir George Jessel held (dissenting from the statement of the law in *Sayre* v. *Hughes* (*i*)) that no presumption of advancement arises in the case of a mother: "In the case of a father you have only to prove the fact that he is the father, and when you have done that the obligation arises; but in the case of a person *in loco parentis* you must prove that he took upon himself the obligation. But in our law there is no moral legal obligation—I do not know how to express it more shortly—no obligation according to the rules of equity, on a mother to provide for her child; there is no such obligation as a court of equity recognizes as such."

"In the case of a mother," he went on to say—"this is the case of a

(*f*) *Bennet* v. *Bennet*, 10 Ch. D. at p. 477.

(*g*) See for examples *Ebrand* v. *Dancer*, 2 Ch. Ca. 26; *Kingdon* v. *Bridges*, 2 Vern. 67; *Beckford* v. *Beckford*, Lofft. 490; *Dyer* v. *Dyer*, 2 Cox, 92; *Drew* v. *Martin*, 2 H. & M. 130; *In re Eykin's Trusts*, 6 Ch. D. 115.

(*h*) 10 Ch. C. 474.

(*i*) L. R. 5 Eq. at p. 381; In *Bennet* v. *Bennet*, Jessel, M.R., followed *In re De Visme*, 2 D. J. & S. 17; but *Garrett* v. *Wilkinson*, L. R. 5 Eq. 376, and *Belstone* v. *Salter*, L. R. 10 Ch. App. 431, seem to support *Sayre* v. *Hughes*. See also *In re Orme*, 50 L. T. 51.

widowed mother—it is easier to prove a gift than in the case of a stranger. In the case of a mother, very little evidence beyond the relationship is wanted, there being very little additional motive required to induce a mother to make a gift to her child." This suggests that although a person is not *in loco parentis*, his relationship to the donee may be a very important link in the chain of evidence which rebuts the presumption of a resulting trust.

It must, however, be remembered that Sir GEORGE JESSEL'S judgment in *Bennet* v. *Bennet* was delivered in the year 1879, and that the law on this subject was subsequently very materially altered by s. 21 of the Married Women's Property Act, 1882, which provides that "a married woman having separate property shall be subject to all such liability for the maintenance of her children and grandchildren as the husband is now by law subject to for the maintenance of her children and grandchildren." Having regard to this enactment, it seems doubtful whether a married woman having separate property is not as much as the father under a "moral legal obligation" to provide for her children.

In any case where the presumption of advancement arises, just as where the presumption of resulting trust arises, the circumstances of the case must be taken into consideration. "The mere circumstance that the name of a child or wife is inserted on the occasion of a purchase of stock is not sufficient to rebut a resulting trust in favour of the purchaser, if the surrounding circumstances lead to the conclusion that a trust was intended. Although a purchase in the name of a wife or a child, if altogether unexplained, will be deemed a gift, yet you may take surrounding circumstances into consideration so as to say that it is a trust, not a gift" (*k*).

It should be added that there is no resulting trust, and the Court will not assist the purchaser if the purchase be made with a view to defeat the policy of the law, as for instance where property was purchased by A in the name of B in order to give B a vote for a parliamentary election (*l*), or to qualify him to act as justice of the peace (*m*). And if it appear that A paid the purchase money by way of loan to B, to whom the conveyance is made, there will be no resulting trust in favour of A (*n*).

(*k*) *Per* JESSEL, M.R., in *Marshall* v. *Crutwell*, L. R. 20 Eq. 328.

(*l*) *Groves* v. *Groves*, 3 Y. & J. 163; *May* v. *May*, 33 Beav. 81.

(*m*) *Crichton* v. *Crichton*, 13 R. 770. Compare *Ex parte Yallop*, 15 Ves. at p. 71.

(*n*) *Crop* v. *Norton*, 9 Mod. 235; *Bartlett* v. *Pickersgill*, 1 Eden, 516.

Constructive Trusts.

BARNES *v.* ADDY.

(1874, L. R. 9 Ch. App. 244.)

A stranger to a trust acting as agent of the trustees is liable as a constructive trustee, if he receives and knowingly deals with the trust property in a manner inconsistent with the trust, or if he acts with knowledge of a dishonest and fraudulent design on the part of the trustees.

Addy was the sole surviving trustee of a fund under a will which gave him a power of appointing new trustees, but no power of reducing their number. One moiety of the fund, spoken of as the "Addy" share, was held for the benefit of Mrs. Addy and her children; the other moiety, spoken of as the "Barnes" share, for the benefit of Mrs. Barnes and her children.

Family disputes having arisen, Addy desired to appoint Barnes in his place as sole trustee of the Barnes fund. His solicitor advised him not to do so, and pointed out the risk of the misapplication of the trust fund when it was in the power of a sole trustee; but Addy persisted in his intention. Addy's solicitor, on his instructions, drew up a deed of appointment and indemnity, but required that it should be approved by an independent solicitor on behalf of Mrs. Barnes and her children. Barnes' solicitor, acting on behalf of Mrs. Barnes and her children, warned her of the risk of the proposed transaction, but on her replying that she fully understood the matter and desired it to be carried through, approved the deed on her behalf. Addy's solicitor then introduced Barnes to a broker, and Addy transferred the "Barnes" share to Barnes. The next day Barnes misappropriated the whole of the "Barnes" share, and subsequently became bankrupt. The solicitors never had control of the trust fund, nor had they knowledge

of any fraudulent design on the part of Barnes. The Court of Appeal held that they were not liable.

Constructive trusts are a species of trust arising by implication or construction of law which are distinguished from resulting trusts such as that discussed in *Fowkes* v. *Pascoe* in that they are independent of any intention to create a trust on the part of the parties concerned.

Such a trust arises "when a stranger to a trust already constituted is held by the Court to be bound in good faith and in conscience by the trust in consequence of his conduct and behaviour," as Lord Justice BOWEN said in a case in 1893 (*a*). Lord Justice KAY in the same case stated the rule to be that "a stranger to the trust who receives the trust money with notice of the trust, or knowingly assists the actual trustee in a fraudulent and dishonest disposition of the trust property is a constructive trustee" (*b*). In such cases the person whom it is sought to affect with the trust is not really a trustee at all, though he is liable as if he were.

The case of *Barnes* v. *Addy* is important, because it shows the limitations of this doctrine. "In this case," Lord Selborne said, "we have to deal with certain persons who are trustees, and with certain other persons who are not trustees. That is a distinction to be borne in mind throughout the case. Those who create a trust clothe the trustee with a legal power and control over the trust property, imposing on him a corresponding responsibility. *That responsibility may no doubt be extended in equity to others who are not properly trustees, if they are found either making themselves trustees* de son tort *or actually participating in any fraudulent conduct of the trustee to the injury of the* cestuis que trust. But on the other hand, strangers are not to be made constructive trustees merely because they act as agents of trustees in transactions within their legal powers, transactions perhaps of which a Court of Equity may disapprove, unless those agents receive and become chargeable with some part of the trust property, or unless they assist with knowledge in a dishonest and fraudulent design on the part of the trustee. Those are the principles, as it seems to me, which we must bear in mind in dealing with the facts of this case. If those principles were disregarded I know not how any one could in transactions admitting of doubt as to the view which a Court of Equity might take of them, safely

(*a*) *Soar* v. *Ashwell*, [1893] 2 Q. B. at p. 396. (*b*) *Ibid.* at p. 405.

discharge the office of solicitor, of banker, or of agent of any sort to trustees." Thus to hold the one solicitor liable on account of his preparation and approval of the deed would, it was said, render it impossible for any person safely to act as a solicitor for any retiring or incoming trustee unless he took upon himself the office of a Court of Equity and satisfied himself that nothing in the transaction could possibly be called in question. The case against the other solicitor carried the point very little further. He knew that as a general rule it was not a safe thing to hand over a trust fund to a single trustee, he advised against it, and he prepared a deed of indemnity. To hold that a solicitor in such a case was a constructive trustee would be an alarming and novel doctrine. "I have long thought," said Lord Justice JAMES, "that this Court has in some cases gone to the very verge of justice in making good to *cestuis que trust* the consequences of the breaches of trust of their trustees at the expense of persons perfectly honest, but who have been in some more or less degree injudicious. I do not think it is for the good of *cestuis que trust* or the good of the world that those cases should be extended."

The same thing was expressed in a slightly different way by Mr. Justice STIRLING in a later case, when he said, "What is the general doctrine with reference to constructive trustees of that kind? It is that a stranger to the trust receiving money from the trustee which he knows to be part of the trust estate is not liable as a constructive trustee unless there are facts brought home to him which show that to his knowledge the money is being applied in a manner which is inconsistent with the trust; or (in other words) unless it be made out that he is either party to a fraud or to a breach of trust on the part of the trustee" (*c*).

It will be useful to compare with *Barnes* v. *Addy* a couple of cases in which an agent employed by a trustee has brought himself within the rule and become liable as a constructive trustee in consequence. In one a trustee kept two accounts with his bankers, one was his private account, and the other, as they knew, was a trust account. Having overdrawn his private account, with a view to discharging his liability to the bankers, he drew a cheque on the trust account and paid it in to the credit of his private account. Since they knew it was trust money that was being utilized for his private purposes

(*c*) *In re Blundell*, 40 Ch. D. at p. 381. Lord Selborne's judgment was also adopted by A. L. SMITH, L.J., in *Mara* v. *Browne*, [1896] 1 Ch. 209. See also *In re Barney*, [1892] 2 Ch. 265, and *Coleman* v. *Bucks and Oxon Union Bank*, [1897] 2 Ch. 243.

by the trustee, his bankers were held liable to the beneficiaries as constructive trustees (*d*).

In the other two trustees employed a solicitor to receive from the purchaser the proceeds of part of the trust estate which they were selling. On receipt of the money the solicitor paid it over to one only of the trustees without having any authority from the other or getting a discharge from him. Of course he ought to have seen that it was placed in the control of both. Unfortunately for him, the trustee misappropriated it and then died insolvent. It was held that the solicitor was a constructive trustee, and as such must make good the loss to the beneficiaries (*e*).

It will be seen that in both these cases the agent received money which he knew to be part of the trust estate, and knew that the money was being applied in a manner which was "inconsistent with the trust," to use Mr. Justice STIRLING'S words, and became a constructive trustee accordingly.

It may be added that a constructive trustee is in the same position as an express trustee for the purposes of the Statutes of Limitation (*f*).

Duty of Trustees to convert Wasting Securities.

MACDONALD *v.* IRVINE.

(1878, 8 CH. D. 101.)

The rule of Howe *v.* Earl of Dartmouth *must be applied unless there is a sufficient indication of intention against it. The burden of proof in every case rests upon the person who says it is not to be applied.*

A testator, after specifically bequeathing leaseholds, gave the residue of his estate, "including my furniture" and consisting, *inter alia*, of "Khedive Bonds" and a policy, to his nephew. Afterwards he married, and made a codicil, by which

(*d*) *Pannell* v. *Hurley*, 2 Coll. Ch. Ca. 241. Like cases are *Bridgman* v. *Gill*, 24 Beav. 302; *Foxton* v. *Manchester, &c., Banking Co.*, 44 L. T. 406. Distinguish *Coleman* v. *Bucks and Oxon Union Bank, supra*.

(*e*) *Lee* v. *Sankey*, L. R. 15 Eq. 204. Contrast *Mara* v. *Browne, supra*.

(*f*) *Soar* v. *Ashwell*, [1893] 2 Q. B. 390.

he gave to his wife for her life "all the income, dividends and annual proceeds of his entire estate, and postponed the payment of all legacies and the distribution of all estates vested in him, or over which he had any power of disposition or appointment until after her decease," and subject thereto revived and confirmed his will.

The Court of Appeal held that the residuary estate (including the furniture and bonds) must be converted, and that the premiums must be charged on the policy in accordance with the rule in *Howe* v. *Earl of Dartmouth*.

When trustees hold property in trust for more than one beneficiary they must be impartial, and must not favour one at the expense of another. They are bound to hold the scales evenly between all the beneficiaries (*a*).

The rule known as the rule in *Howe* v. *Earl of Dartmouth* (*b*), because it was definitely established by the decision of Lord ELDON in that case, is a corollary from this.

The rule was stated by Lord Justice BAGGALLAY in the leading case as follows (*c*): "where there is a residuary bequest of personal estate to be enjoyed by several persons in succession, a Court of Equity, in the absence of any evidence of a contrary intention, will assume that it was the intention of the testator that his legatees should enjoy the same thing in succession, and as the only means of giving effect to such intention will direct the conversion into permanent investments of a recognized character of all such parts of the estate as are of a wasting or reversionary character, and also all such other existing investments as are not of the recognized character, and are consequently deemed to be more or less hazardous."

The rule only applies to trusts in wills, and not to a settlement of personal property by deed (*d*), and it only applies to gifts of the residuary personalty; in the leading case, for example, it did not apply to the leaseholds, since they were given specifically. It applies to

(*a*) See *Ellis* v. *Barker*, L. R. 7 Ch. App. 104; *In re Lepine*, [1891] 1 Ch. at p. 219; *Knox* v. *Mackinnon*, 13 App. Cas. at p. 768.

(*b*) 7 Ves. 137; White and Tudor, L. C. Eq., 7th ed., vol. i., 68, decided in 1802.

(*c*) 8 Ch. D. at p. 112.

(*d*) See *In re Van Straubenzee, Boustead* v. *Cooper*, [1901] 2 Ch. 779.

three different kinds of personal property: (1) wasting property, (2) securities not authorized for the investment of trust funds either by law or by the terms of the trust, and (3) reversionary interests. The two former must be converted, since otherwise the tenant for life might be benefited at the expense of the remainderman; the last since otherwise the remainderman might be benefited at the expense of the tenant for life.

The rule only applies in the absence of evidence of a contrary intention on the part of the settlor. At one time the Courts seemed rather disposed to seize on any indication of a contrary intention however slight, but the leading case makes it now "quite clear that the rule must be applied unless upon the fair construction of the will you find a sufficient indication of intention that it is not to be applied; the burden in every case being upon the person who says the rule ought not to be applied in the particular case" (*e*). When conversion is necessary under the rule, it ought generally to be made within a year from the death of the testator (*f*).

The application of the rule is illustrated by the following cases:—

In *Howe* v. *Earl of Dartmouth* (*g*) the testator had given all his personal estate, with some specified exceptions, to two persons for successive life interests, with remainders over. The personal estate included terminable Government annuities. Lord ELDON decided that these must be sold and the proceeds re-invested in trustee's securities.

In *In re Shaw's Trusts* (*h*), a testatrix gave the residue of her estate to trustees in trust as to one-third to pay the income to a legatee for life, and after his death to his children, and the other two-thirds on similar trusts. Among her property was a house held under an underlease for an unexpired term of fifty-seven years. It was held that the trustees must convert this.

In *In re Game, Game* v. *Young* (*i*), the testator gave the "rents

(*e*) *Per* JAMES, L.J., at p. 124.

(*f*) See Hart, Digest of the Law of Trusts, 153; Strachan, Digest of the Law of Trust Accounts, 86, where the authorities are cited.

(*g*) *Supra Lichfield* v. *Baker*, 13 Beav. 447; *Sutherland* v. *Cooke*, 1 Coll. Ch. R. 498; *Tickner* v. *Old*, L. R. 18 Eq. 422, and *Porter* v. *Baddeley*, 5 Ch. D. 542, are similar cases. Contrast with the two last named *Lord* v. *Godfrey*, 4 Madd. 455.

(*h*) L. R. 12 Eq. 124; *Benn* v. *Dixon*, 10 Sim. 636; and *Craig* v. *Wheeler*, 29 L. J. Ch. 374, are similar.

(*i*) [1897] 1 Ch. 881. See also *Pickup* v. *Atkinson*, 4 Hare, 624. The decision

and profits" of his residuary estate to one for life, with remainder to another for life (subject to some annuities), with remainder to the latter's children, giving the annuitants a power of distress. It appeared that he was possessed of both freehold and leasehold property besides pure personalty. It was held that the leaseholds must be converted, the reference to "rents" and "distress" being applicable to the freehold property, and therefore not a sufficient indication of intention that the leaseholds were to be enjoyed in specie.

There are, however, a very large number of cases to be found in the reports, stretching from Lord Eldon's time to the present, in which evidence of an intention on the part of the testator that the rule should not be applied has been found, and it is not easy to reconcile some of these with the foregoing (*k*).

Adjustment of Accounts between Tenant for Life and Remainderman.

Difficult questions sometimes arise with reference to the respective rights of tenant for life and remainderman when property which ought to be converted under the rule in *Howe* v. *Earl of Dartmouth*, or, what comes to the same thing, under an express trust for conversion, has not been converted. Here again the decisions are very numerous and difficult to follow, and the subject is involved in a good deal of confusion as a consequence, but it would seem that the following rules are applicable:—

I. *The tenant for life is entitled to the whole of the income produced by the convertible property if the testator indicates an intention to that effect.* This intention may be expressed in so many words, and in fact often is, but it may also be implied (*l*).

in *Vachell* v. *Roberts*, 32 Beav. 140 was the other way. Contrast also *Goodenough* v. *Tremmamondo*, 20 Beav. 512, and *Marshall* v. *Bremner*, 2 Sm. & G. 237.

(*k*) See *Lord* v. *Godfrey*, *supra*; *Vincent* v. *Newcombe*, Young Ex. 599; *Alcock* v. *Sloper*, 2 My. & K. 699; *Collins* v. *Collins*, 2 My. & K. 703 (see note on this case at 1 Ph. 78); *Bethune* v. *Kennedy*, 1 My. & Cr. 114 (a doubtful case, see 1 Coll. C. C. at p. 501, and 8 Ch. D. at p. 122); *Goodenough* v. *Tremmamondo*, *supra*; *Vaughan* v. *Buck*, 1 Ph. 75; *Oakes* v. *Strachey*, 13 Sim. 414; *Blann* v. *Bell*, 5 De G. & Sm. 658; *In re Sewell's Estate*, L. R. 11 Eq. 80; *Thursby* v. *Thursby*, L. R. 19 Eq. 395; *Gray* v. *Siggers*, 15 Ch. D. 74; *In re Pitcairn*, [1896] 2 Ch. 199; *Stanier* v. *Hodgkinson*, 73 L. J. Ch. 179; *In re Bates*, [1907] 1 Ch. 22.

(*l*) See *Green* v. *Britten*, 1 De G. J. & S. 649; *In re Chancellor*, 26 Ch. D. 4;

II. If there is no such indication of intention, but the testator has given the trustees power to postpone the conversion or the trustees have found it impossible to sell the property, then the rule is that *a value must be put on the property as at the testator's death, and the tenant for life is entitled to* 3 *per cent. interest on that value from the day of the testator's death, and the residue of the income must be treated as capital* (*m*). In this case it should be observed that the trustees have not been guilty of any breach of trust in delaying to convert.

III. If, however, there is no power to postpone conversion, and there is nothing to show that it was impossible to convert, but the property has not been converted simply because the trustees were ignorant of or neglected their duty, the trustees will have been guilty, at any rate technically, of a breach of trust in not converting, and then the rule is that *the tenant for life is entitled as from the testator's death to the interest on so much* 2½ *per cent. consols as could have been purchased with the amount that would have been realized by a conversion at the end of a year after the testator's death* (*n*).

The application of the last two rules is clearly shown by the case of *Brown* v. *Gellatly* (*m*). The testator, who was a shipowner and merchant, directed his executor to realize his personal estate "when and in such manner as they shall think fit, without being personally responsible for such realization," and gave them power to sail his ships for the benefit of his estate until they could be satisfactorily sold. He then left his residuary estate to tenants for life with remainders over, and gave his executors the most ample discretionary powers to invest or to allow to remain as invested his funds in certain specified securities. Three questions arose :—

(1) As to the ships belonging to the deceased which had earned large profits ; (2) as to investments in securities which the testator had authorized his executors to retain ; (3) as to other investments not within the power of investment contained in the will. Lord CAIRNS, in the course of his judgment, said :—

I think that with regard to the ships the testator put them simply

In re Sheldon, 39 Ch. D. 50 ; *In re Thomas*, [1891] 3 Ch. 482 ; *In re Bates*, [1907] 1 Ch. 22 ; *In re Wilson, ibid.*, 397 ; *In re Nicholson*, [1909] 2 Ch. 111.

(*m*) See *Gibson* v. *Bott*, 7 Ves. 89 ; *Meyer* v. *Simonsen*, 5 De G. & Sm. 723 ; *In re Llewellyn's Trusts*, 29 Beav. 171 ; *Brown* v. *Gellatly*, L. R. 2 Ch. App. 751 ; *Cooper* v. *Laroche*, 38 L. J. Ch. 591 ; *Furley* v. *Hyder*, 42 L. J. Ch. 626 ; *In re Chaytor*, [1905] 1 Ch. 233.

(*n*) See *Dimes* v. *Scott*, 4 Russ. 195 ; *Taylor* v. *Clark*, 1 Hare, 161 ; *Morgan* v. *Morgan*, 14 Beav. 72 ; and *Brown* v. *Gellatly, supra.*

in the position of property which was to be converted cautiously and in proper time, and as to which there was no breach of trust in the executors delaying to convert it, but which when converted was to be invested, and when invested to be enjoyed as the residue of his estate. In that state of things it seems to me that the case falls exactly within the third division pointed out by Sir JAMES PARKER in the case of *Meyer* v. *Simonsen*, and that a value must be set upon the ships as at the death of the testator, and the tenant for life must have [3] per cent. on such value, and the residue of the profits must of course be invested and become part of the estate. Then, secondly, as to the authorized securities . . . the tenant for life is in my opinion entitled to the specific income of the securities just as if they had been [2½] per cent. consols. Then comes the third question in the case, the securities not ranging themselves under any of those mentioned in the last clause of the will. . . . I think the proper order to make is that which was made in *Dimes* v. *Scott*, followed by Vice-Chancellor WIGRAM in the case of *Taylor* v. *Clark*, namely, to treat the tenant for life as entitled during the year after the testator's death (*o*) to the dividends upon so much [2½] per cent. stock as would have been produced by the conversion and investment of the property at the end of the year."

IV. If the property which ought to be converted consists of a reversionary interest the above rules are not applicable, and if such property is not got in until more than a year after the testator's death, the rule is that *when the property is received it is apportionable between tenant for life and remainderman by ascertaining the sum which put out at* 3 *per cent. per annum on the day of the testator's death, and accumulating at compound interest calculated at that rate with yearly rests and deducting income tax, would with the accumulations of interest have produced at the date of receipt the amount actually received; and the sum so ascertained ought to be treated as capital and the residue as income* (*p*).

V. The foregoing rules only apply to personal property. Real property cannot be within the rule in *Howe* v. *Earl of Dartmouth* of course, and when real property is convertible under an express trust

(*o*) There appears to be a mistake in the report here. In the minutes of the order given at p. 760 of the report the words "as from the 6th March, 1862, the day of the testator's death" are substituted for these, and they are no doubt what the Court intended.

(*p*) *In re Earl of Chesterfield's Trusts*, 24 Ch. D. 643; *In re Goodenough*, [1895] 2 Ch. 537; and *Rowlls* v. *Bebb*, [1900] 2 Ch. 107.

for conversion it would seem that the tenant for life is always entitled to the whole actual income produced by it (*q*). The reason for this difference is nowhere explained.

The Court has a discretion to increase or diminish the rate of interest allowed under the foregoing rules. Formerly it allowed 4 per cent, but since 1900 it has allowed only 3 per cent. (*r*).

Employment of Agents by Trustees.

SPEIGHT *v.* GAUNT.

(1883, 22 CH. D. 727 ; 9 APP. CAS. 1.)

A trustee must not delegate his trust, but he may in the administration of the trust employ agents, in cases of moral necessity, or in the usual course of business, and in the absence of negligence or default he will not be liable for loss.

A trustee employed a broker whose honesty and solvency he had no reason to suspect to buy securities of certain municipal corporations authorized by his trust. The broker gave the trustee a bought note which purported to be subject to the rules of the London Stock Exchange, and obtained from him over £15,000 on a statement that the money would have to be paid next day, which was, in fact, the next settling-day. Although some of the securities were not bought and sold on the Stock Exchange, and the form of the bought note would have excited the suspicions of an expert, there was nothing to excite the suspicions of an ordinary prudent man of business.

(*q*) *Casamajor* v. *Strode*, 19 Ves. 390 n. ; *Hope* v. *D'Hédonville*, [1893] 2 Ch. 361 ; *In re Searle*, [1900] 2 Ch. 829 ; *In re Darnley*, [1907] 1 Ch. 159 ; *In re Oliver*, [1908] 2 Ch. 74. See, however, *Wentworth* v. *Wentworth*, [1900] A. C. 163, where the rule in *Meyer* v. *Simonson*, *supra*, was applied to real estate. And on the whole of this intricate subject see more fully Strachan, Digest of the Law of Trust Accounts, 83 *et seq.* ; and Hart, Digest of the Law of Trusts, 160 *et seq.*

(*r*) See *Rowlls* v. *Bebb*, [1900] 2 Ch. 107 ; *In re Woods*, [1904] 2 Ch. 4 ; and *In re Chaytor*, [1905] 1 Ch. 233.

The broker never obtained the securities, and shortly afterwards became insolvent and absconded, and the trust money was lost. In an action to compel the trustee to make good the loss with interest at four per cent. the House of Lords (affirming the Court of Appeal) decided that he was not liable.

A trustee must perform the trust himself; he is not entitled to hand over its administration to others. But the maxim *delegatus non potest delegare* only applies to trustees, subject to important exceptions. These exceptions have grown more numerous as the use of agents has been introduced more and more into business transactions, and the equitable principle which now prevails is summed up in *Speight* v. *Gaunt*, in which Sir GEORGE JESSEL, in an oft-quoted passage (*a*), expressed the principle thus :—

"My view has always been this, that where you have an honest trustee, fairly anxious to perform his duty, and to do as he thinks best for the estate, you are not to strain the law against him to make him liable for doing that which he has done, and which he believes is right, in the execution of his duty, without you have a plain case made against him. In other words, you are not to exercise your ingenuity, which it appears to me that the Vice-Chancellor has done, for the purpose of finding reasons for fixing a trustee with liability, but you are rather to avoid all such hypercriticism of documents and acts, and to give the trustee the benefit of any doubt or ambiguity which may appear in any document, so as to relieve him from the liability with which it is sought to fix him. I think it is the duty of the Court in these cases, where there is a question of nicety as to construction or otherwise, to lean to the side of the honest trustee, and not to be anxious to find fine and extraordinary reasons for fixing him with any liability upon the contract. You are to endeavour as far as possible, having regard to the whole transaction, to avoid making an honest man, who is not paid for the performance of an unthankful office, liable for the failure of other people from whom he receives no benefit;" and he added, "I think that this is the view which has been taken by modern judges, and some of the older cases in which a different view has been taken would now be repudiated with indignation."

The House of Lords by their decision approved the rule laid down

(*a*) 22 Ch. D. at p. 746.

by Lord Chancellor HARDWICKE, more than 130 years before, in *Ex parte Belchier* (*b*), which was stated by Lord BLACKBURN (*c*) to be, that "where there is a usual course of business, the trustee is justified in following it, though it may be such that there is some risk that the property may be lost by the dishonesty or insolvency of an agent employed. . . . It would be both unreasonable and inexpedient to make a trustee responsible for not being more prudent than ordinary men of business are;" and he added, "What was at one time the usual course may at another time be no longer usual," illustrating his point by the practice of crossing cheques, which had arisen within living memory. It is in conformity with this general rule that the Trustee Act, 1893, s. 24, exonerates a trustee from liability for the act, neglect or default of any banker, broker or other person with whom any trust moneys or securities may be deposited.

On the other hand, the rule to which *Speight* v. *Gaunt* is an exception still holds; and nothing in this case or in any statute "authorizes," in Lord SELBORNE'S words (*d*), "a trustee to delegate at his own mere will and pleasure the execution of his trust, and the care and custody of trust moneys to strangers in any case in which (to use Lord HARDWICKE'S words) there is no 'moral necessity from the usage of mankind' for the employment of such an agency."

The principles of *Speight* v. *Gaunt* and of the Trustee Act, 1893, apply equally whether the trustee is or is not remunerated for his services (*e*).

Since the leading case was decided it has been expressly enacted by the Trustee Act, 1893, s. 17 (*f*), that:—

(1) A trustee may appoint a solicitor to be his agent to receive and give a discharge for any money or valuable consideration or property receivable by the trustee under the trust by permitting the solicitor to have the custody of and to produce a deed containing any such receipt as is referred to in s. 56 of the Conveyancing and

(*b*) Amb. 218, decided in 1754. (*c*) 9 App. Cas. at p. 19.

(*d*) *Ibid.* at p. 5.

(*e*) *Wilkinson* v. *Wilkinson*, 2 S. & S. 237; *Jobson* v. *Palmer*, [1893] 1 Ch. 71; but compare *National Trustees Co. of Australia* v. *General Finance Co., &c.*, [1905] A. C. 381. For recent illustrations of the application of the rule in *Speight* v. *Gaunt*, see besides the last-mentioned cases, *Field* v. *Field*, [1894] 1 Ch. 425; *In re De Pothonier*, [1900] 2 Ch. 529; *Shepherd* v. *Harris*, [1905] 2 Ch. 310.

(*f*) This re-enacts s. 2 of the Trustee Act, 1888, which is repealed. The section was enacted to reverse the decision in *In re Bellamy and the Metropolitan Board of Works*, 24 Ch. D. 387.

Law of Property Act, 1881; and a trustee shall not be chargeable with breach of trust by reason only of his having made or concurred in making any such appointment; and the producing of any such deed by the solicitor shall have the same validity and effect under the said section as if the person appointing the solicitor had not been a trustee (*g*).

(2) A trustee may appoint a banker or solicitor to be his agent to receive and give a discharge for any money payable to the trustee under or by virtue of a policy of assurance by permitting the banker or solicitor to have the custody of and to produce the policy of assurance with a receipt signed by the trustee, and a trustee shall not be chargeable with a breach of trust by reason only of his having made or concurred in making any such appointment.

(3) Nothing in this section shall exempt a trustee from any liability which he would have incurred if this Act had not been passed in case he permits any such money, valuable consideration or property to remain in the hands or under the control of the banker or solicitor for a period longer than is reasonably necessary to enable the banker or solicitor (as the case may be) to pay or transfer the same to the trustee. . . ."

And by s. 8 (*h*) of the same statute a trustee is authorized to employ a surveyor or valuer to advise him upon the value of property on the security of which he is proposing to lend the trust funds. The section is as follows:—

"(1) A trustee lending money on the security of any property on which he can lawfully lend shall not be chargeable with breach of trust by reason only of the proportion borne by the amount of the loan to the value of the property at the time when the loan was made, provided that it appears to the Court that in making the loan the trustee was acting upon a report as to the value of the property made by a person whom he reasonably believed to be an able practical surveyor or valuer instructed and employed independently of any owner of the property, whether such surveyor or valuer carried on business in the locality where the property is situate or elsewhere, and that the amount of the loan does not exceed two equal third parts of the value of the property as stated in the report, and that the loan was made under the advice of the surveyor or valuer expressed in the report."

(*g*) See *King* v. *Smith*, [1900] 2 Ch. 425, and compare *Day* v. *Woolwich, &c., Society*, 40 Ch. D. 491, and *In re Hetling and Merton's Contract*, [1893] 3 Ch. 269.

(*h*) This re-enacts s. 4 of the Trustee Act, 1888, which is repealed.

But although it is settled by the decision in the leading case that a trustee may employ agents in any case in which an ordinary prudent man of business would do so, the agents must not be employed out of the ordinary scope of their own business. He may employ a solicitor to give him legal advice, for example, but not to choose a valuer (*i*), or act as banker (*k*) or rent collector (*l*).

"He may appoint a broker to make or realize investments, or a solicitor to do legal business," as it has been said (*l*), "and the power of employment involves that of remuneration at the cost of the trust estate. The limit of the power of employment is, as pointed out in the well-known case of *Speight* v. *Gaunt*, reasonableness, and whether there happens to be a standard to which appeal can be made by taxation or otherwise or not, reasonableness must also, I think, be the limit of the power of remuneration. A trustee is bound to exercise discretion in the choice of his agents, but so long as he selects persons properly qualified he cannot be made responsible for their intelligence or their honesty. He does not, in any sense, guarantee the performance of their duties. It does not, however, follow that he can entrust his agents with any duties which they are willing to undertake, or pay them or agree to pay them any remuneration which they see fit to demand. The trustee must consider these matters for himself."

And further, a trustee must only employ such an agent as would be employed by an ordinary prudent man of business in like circumstances, so though he may employ a broker to make investments, it is a very dangerous thing for him to make them through an "outside" broker (*m*).

Discretionary Powers of Trustees.

GISBORNE *v.* GISBORNE.

(1877, 2 App. Cas. 300.)

Where an absolute discretion is conferred on trustees as to the mode of executing a trust, the Court will not interfere

(*i*) *Fry* v. *Tapson*, 28 Ch. D. 268.

(*k*) *Wyman* v. *Paterson*, [1900] A. C. 271; and see *Field* v. *Field*, [1894] 1 Ch. 425; *In re De Pothonier*, [1900] 2 Ch. 529.

(*l*) *In re Weall*, 42 Ch. D. 674.

(*m*) *Robinson* v. *Harkin*, [1896] 2 Ch. 415.

with their discretion provided that they exercise it in good faith.

An Order in Lunacy had been made to pay £696 per annum for the maintenance of a lady who was absolutely entitled under her marriage settlement to a fund which produced about £600 per annum. A second fund had been given by her husband's will to trustees upon trust, "in their discretion and of their uncontrollable authority," to apply "the whole or such portion only of the annual income as they shall deem expedient" for her maintenance. The second fund, together with so much of the income as was not applied for her benefit, passed over to other persons on her decease. The question was on which fund the £696 per annum should be charged. Held, by the House of Lords, that the trustees were entitled to exercise an absolute discretion as to paying and applying the whole or any part of the income of the second fund for the benefit of the lunatic; and it was declared, with the consent of the trustees, that the income of the second fund was only liable to make good the deficiencies of the first fund.

The leading case has been described (*a*) as the turning point in the current of authority with regard to the control which the Court will exercise over trustees in whom discretionary powers have been reposed. It will be observed that the lady's interest in the fund under her husband's will was, as Lord CAIRNS expressed it, "evanescent," and that consequently it was obviously for her interest that their cost of her maintenance should be charged upon that fund. He then referred to the practice of the Court in such a case, which would have been to save the money which was her own property and to maintain her out of the other fund (*b*), and proceeded to say: "That may be the principle (and I make no objection to the principle; I highly approve of it) by which the Court of Chancery, where it has to exercise its discretion, deems it expedient to proceed in the exercise of that discretion. But am I entitled, in dealing with a will such as is now before your lordships, to set up against the discretion of the trustees,

(*a*) See the argument in *In re Lofthouse*, 29 Ch. D. at p. 921.
(*b*) See *In re Weaver*, 21 Ch. D. 615 below, p 56.

which is pronounced by this will to be uncontrolled and uncontrollable, the rule which the Court of Chancery adopts for the exercise of its own discretion in a similar or in an analogous case? To do so here would simply be to reverse the words used by the testator, and to say that the discretion which is given to the trustees by this will and which is stated to be uncontrollable, shall be controlled and be subjected to that rigid and unbending rule upon which the Court of Chancery acts (for reasons of which I entirely approve) upon those occasions when it has to perform the functions which in this instance the trustees, and not the Court, have to perform."

"It is settled law," said Sir GEORGE JESSEL in a later case (*c*), "that when a testator has given a pure discretion to trustees as to the exercise of a power the Court does not enforce the exercise of the power against the wish of the trustees, but it does prevent them from exercising it improperly."

The following cases illustrate the rule :—

In *Tabor* v. *Brooks* (*d*), the trustees of a marriage settlement had power to apply the income of the settled fund for the benefit of the husband and wife and their children as they should "in their uncontrolled and irresponsible discretion think proper." The husband was a hopeless drunkard, and in consequence of his intemperance and violence the wife could not live with him. The wife had no means of support, but notwithstanding this the trustees paid the whole of the income, amounting to about £360, to the husband, with the exception of £60 a year which they paid for the schooling of the only child. The Court declined to interfere with the trustees, though of opinion that they were exercising their discretion injudiciously, there being no proof of *mala fides* on their part.

In *In re Norrington* (*e*), a testator gave his residuary estate upon trust to sell and hold the proceeds on specified trusts, and declared that it should be lawful for the trustees to postpone the sale "for such period as they in their free discretion should think fit." The trustees accordingly retained some bonds which were subsequently sold at a considerable loss, and some shares in an unlimited bank which ultimately failed. The Court of Appeal held that they were not responsible for the loss.

(*c*) *Tempest* v. *Lord Camoys*, 21 Ch. D. at p. 578.

(*d*) 10 Ch. D. 273.

(*e*) 13 Ch. D. 654. See also *In re Brown*, 29 Ch. D. 889, where the power was to invest in such investments as the trustees in their uncontrolled discretion should think proper.

In *Tempest* v. *Lord Camoys* (*f*), a testator gave his trustees power to sell his real estate at their absolute discretion, and at the like discretion to lay out the money received from such sale in the purchase of other real estate; and he also gave them power at their absolute discretion to raise any money by mortgage for the purpose of effecting any such purchase. The real estate having been sold and some of the persons interested being desirous of purchasing an old family mansion which had formerly belonged to the testator's family, it was proposed by one of the trustees to apply part of the money for the purpose and to raise the remainder by mortgage of the purchased property. The other trustee refused to concur in the scheme. The Court refused to control the discretion of the dissentient trustee.

In *In re Bryant* (*g*), a testator declared that the trustees of his will should apply, "the whole or such part as they should think fit" of the income of the expectant share of any child of his for or towards the maintenance, education and benefit of such child. The testator's children resided with their mother, who maintained and educated them out of her separate estate. She was one of the three trustees of the will, and applied to her co-trustees to make her an allowance of £300 a year for the purpose. The co-trustees *bonâ fide* in the exercise of their discretion refused, and the Court declined to interfere.

By way of contrast the case of *In re Weaver* (*h*) may be cited. In that case a testator had left property to trustees upon trust to convert and invest it and then pay and apply the income of half of it "in such way, at such time, and in such manner as they at their authority and discretion should think fit" towards the maintenance of a lunatic during her life, with power to invest any surplus not required for the purpose as capital. The question which came before the Court of Appeal on a petition presented by the committee of the lunatic, was whether the allowance for the future maintenance of the lunatic should be paid primarily out of the life interest of the lunatic, or whether it should come out of her absolute property. It was urged by the petitioners that there was nothing in the present case to take it out of the ordinary rule which had been established as most beneficial to the lunatic, that the life income should be first applied. The trustees on the other hand submitted that the matter was left

(*f*) 21 Ch. D. 571. *Marquis Camden* v. *Murray*, 16 Ch. D. 161, is a similar case, but concerning a sale instead of a purchase. See also *In re Blake Jones* v. *Blake*, 20 Ch. D. 913.

(*g*) [1894] 1 Ch. 324.

(*h*) 21 Ch. D. 615.

to their discretion. The Court distinguished *Gisborne* v. *Gisborne* on the ground that in that case there was power to apply the whole or such portion of the income as the trustees might think fit, while in the present case on the contrary the trustees had only a discretion as to the time and manner of the application. "In this case," said Sir GEORGE JESSEL, "there is an absolute trust to apply the income in the lunatic's maintenance, and there is no discretion as to what part the trustees should apply. That being so, the rule is applicable that the lunatic's property must be applied as appears to be most for her benefit. It is clear that it is best for her that her maintenance should be provided out of her life interest, for if she should recover she will have the benefit of what belongs to her absolutely."

There is apparently no virtue in the use of the adjectives "free," "absolute," or "uncontrolled" with the word "discretion," cases where there is no adjective being treated in the same way as those where the adjective is present (*i*).

Suspension of Trustees' Powers.

MINORS *v.* BATTISON.

(1876, 1 APP. CAS. 428.)

Where judgment has been given in an action for the administration of a trust, the trustees cannot exercise any power conferred on them by the terms of the trust without the sanction of the Court.

A testator, who died in 1863, left his newspaper and other property to trustees upon trust after his widow's death, "at the sole discretion of my trustees," to sell the same, and divide the proceeds among his children. In 1866 a suit for administration was commenced, in which a decree was made, followed by an order in 1870, after the death of the widow, declaring that

(*i*) See *Wilson* v. *Turner*, 22 Ch. D. 521, and *In re Bryant*, *supra*. The opinion of MALINS, V.C., to the contrary in *In re Hodges*, 7 Ch. D. at p. 761, seems to be erroneous in view of these cases.

it was for the benefit of all parties that the newspaper should be carried on. The House of Lords, in giving judgment, declared that there was an absolute trust for sale after the death of the widow, and expressed an opinion that the trustees no longer had power to postpone or carry out the sale at their absolute discretion.

The rule applied in the last preceding case is subject to the qualification stated above, for which *Minors* v. *Battison* is the modern leading authority. Discussing the trust for sale in that case, Lord CHELMSFORD said: "In my opinion the true meaning of the clause is that it imposes upon the trustees an absolute trust to sell, but gives them a discretion as to the manner in which, and to a certain extent the time at which, the different properties may be sold to the best advantage." "I cannot help observing," he continued, "that even assuming that the trustees had an absolute discretion, this would not prevent the appellant from being entitled to her share of the testator's residuary estate, because during the life of William Hobson (her father and the testator's son) the trustees had retired from the trust and placed themselves in the hands of the Court by the bill filed by the trustees for administration of the trusts and the order founded thereon, after which the trustees could not exercise any discretion with which they were invested without the sanction of the Court."

Lewin thus sums up the effect of the cases (*a*): "The powers assigned in the preceding pages to trustees must be taken subject to the qualification that if a suit has been instituted for the execution of the trust and a decree made, the powers of the trustees are thenceforth so far paralyzed that the authority of the Court must sanction every subsequent proceeding. Thus the trustees cannot commence or defend any action or suit or interfere in any other legal proceeding without first consulting the Court as to the propriety of so doing: a trustee for sale cannot sell: the committee of a lunatic cannot make repairs: an executor cannot pay debts or deal with the assets for the purpose of investment."

This is well illustrated by the case of *Bethell* v. *Abraham* (*b*), in which a decree had been obtained for the administration of the trusts of Lord WESTBURY'S will. The will gave the trustees power to invest

(*a*) 12th ed., 747. (*b*) L. R. 17 Eq. 24.

at their discretion, and also to continue or change securities from time to time as to the majority of them should seem meet, and the trustees desired to sell certain securities and invest the proceeds in American funds, but the Court declined to sanction the proposed investment. "As long," said Sir GEORGE JESSEL, "as an estate remains to be administered in this Court, the Court does not allow a purchase to be made or a mortgage or any other investment to be made unless the Court is satisfied of its safety."

Subject to this sanction, however, they can exercise their discretion almost as before. A decree for administration does not deprive the trustees of appointing new trustees, for example, but the Court will see that they exercise it in a proper manner. "Where there is a power of appointment of new trustees," said Mr. Justice CHITTY, in *Tempest* v. *Lord Camoys* (*c*), "it is quite clear, according to the long-established course of decisions, that the donees of the power cannot exercise it after there is a decree for the execution of the trusts made by the Court without coming to the Court for its sanction. It is, however, equally clear according to the modern practice that where there is a power of this kind to appoint new trustees the right order is not the reference in a common case to appoint new trustees as if the jurisdiction were solely in the Court. The right form of order is that which keeps alive the power. The substance of the order properly is either that the trustees are at liberty to exercise the power subject to the sanction of the Court, or that there are new trustees to be appointed having regard to the power. The substance, therefore, is that the power is not taken away from the trustees. They have it, but the Court also has control over it." If, therefore, the trustee nominates a fit person he must be appointed. If he nominates an improper person the Court calls upon him to make a fresh nomination. If the trustee repeatedly nominates improper persons that amounts to a refusal to exercise the power, and the Court can then appoint, but the power is not destroyed by a single nomination of which the Court disapproves (*d*).

When there is an action for administration pending even if no judgment for administration has been given, though the plaintiff

(*c*) '58 L. T. at p. 224.

(*d*) See *In re Gadd*, 33 Ch. D. 134. *In re Norris*, 27 Ch. D. 333, is to the like effect. The proper course in such cases is to make an application in chambers, giving the name of the person nominated, and if it is found that there is no objection to his appointment it will be approved. See *In re Hall*, 51 L. T. 901.

may abandon the action at any moment, and though the trustees must not assume that a judgment will be given, but must proceed in all necessary matters in the due execution of the trust, it is nevertheless imprudent for them to act without first consulting the Court, since the costs and onus will lie on them of proving that what they did was right (*e*).

Trustees may make no profit from their Trust.

In re CORSELLIS: LAWTON *v.* ELWES.

(1887, 34 CH. D. 675.)

As a general rule a trustee is not entitled, in the absence of express authorization, to make any profit out of the trust.

Where, however, business is done in any action or other legal proceeding by a solicitor-trustee on behalf of himself and his co-trustee, the solicitor may receive the usual charges if there has been no greater cost than would have been incurred if the solicitor had acted for the co-trustee alone.

A solicitor, who was one of two trustees under a will which contained no power to charge for professional services, claimed against the trust estate :—

(1) Fees received by his partner for manorial business in respect of a manor belonging to the trust estate to which the partner had been appointed steward by the co-trustees. These fees had been brought into the partnership account.

(2) Profit costs in respect of an application for the maintenance of an infant on a summons by a next friend, in which he and his co-trustee were respondents, and in which his firm had acted through their London agents as solicitors for the respondents.

(*e*) *Cafe* v. *Bent*, 3 Ha. 245 ; *Att.-Gen.* v. *Clack*, 1 Beav. 467. In *In re Mansel*, 52 L. T. 806, PEARSON, J., upheld a sale by the trustees without an order of Court when an order on further consideration, reserving only liberty to apply, had been made.

(3) Profit costs in respect of business done by the same London agents for a receiver appointed in an administration action, commenced after the death of the co-trustee.

(4) Profit costs paid by the lessees for the preparation by the solicitor-trustee's firm of leases which he had granted as trustee of the estate.

Only the first and second claims were allowed by the Court of Appeal.

No rule of the law of trusts is better established than that a trustee cannot make any profit out of his trust. This was settled by the old leading case of *Robinson* v. *Pett* (*a*), decided by Lord Chancellor TALBOT in 1734.

And so it follows that in the absence of a special authority in the trust instrument a trustee or executor who is a solicitor, factor, broker, commission agent, auctioneer, or banker, cannot derive any profit in the way of business from the estate committed to his charge (*b*). Why not? it may be asked. Why should not a trustee be entitled to a reasonable remuneration for performing what is often enough a thankless task? It is because of the fear that if a man places himself in a position in which his interest and his duty are in conflict, he will be led to disregard his duty and consider only his interest. "If allowed, the trust estate might be loaded and rendered of little value," Lord Chancellor TALBOT said (*c*).

One of the principal exceptions to this rule was established by the decision of Lord COTTENHAM in the case of *Cradock* v. *Piper* (*d*) in 1850, where it was held not to apply to a case where several co-trustees were made defendants to a suit, this being a matter thrust upon them and beyond their own control, so that one of the trustees

(*a*) 3 P. W. 132; Hh. & Tud. L. C. Eq., 7th ed., vol. ii., 606.

(*b*) See *New* v. *Jones*, 1 Hall & Tw. 632; *Moore* v. *Frowd*, 3 My. & Cr. 45; *Fraser* v. *Palmer*, 4 Y. & C. Exch. Ca. 517; *Kirkman* v. *Booth*, 11 Beav. 273; *Lincoln* v. *Windsor*, 9 Hare, 158; *Pollard* v. *Doyle*, 1 Dr. & Sm. 319; *Crosskill* v. *Bower*, 32 Beav. 86; *In re Barber, Burgess* v. *Vinicome*, 34 Ch. D. 77. For other cases see Lewin, Trusts, 12th ed., 780; Hart, Digest of the Law of Trusts, 269 *et seq.* The disability extends to the trustees' firm: *New* v. *Jones, supra*; *Collins* v. *Carey*, 2 Beav. 128; *Lincoln* v. *Windsor, supra*; *Lyon* v. *Baker*, 5 De G. & Sm. 622.

(*c*) See also *In re Barber, supra*, at p. 81.

(*d*) 1 Mac. & G. 664; 1 Hall & Tw. 617.

who was a solicitor and acted first for himself, second for his co-trustees, and thirdly for the *cestuis que trust* was held entitled to receive full costs, it being admitted that the costs had not been increased by his conduct. In the leading case Lord Justice COTTON stated the exceptional rule in *Cradock* v. *Piper* thus: "Where there is work done in a suit, not on behalf of the trustee who is a solicitor alone (*e*), but on behalf of himself and a co-trustee, the rule will not prevent the solicitor or his firm from receiving the usual costs, if the costs of appearing for and acting for the two have not increased the expense; that is to say, if the trustee himself has not added to the expense which would have been incurred if he or his firm had appeared only for his co-trustee."

In dealing with the first item of the claim in the leading case, the "customary manorial fees," the Court considered that these were non-professional charges not payable by the estate, and that since they did not arise from any duty which the trustee ought to have discharged gratuitously he could not be compelled to refund them.

In regard to the second item, viz. the costs of the summons for maintenance, Lord Justice COTTON said, "It is said that the exception established by *Cradock* v. *Piper* would only apply to costs in a hostile action, and that this was not an action at all, but only a summons, and that therefore the exception ought not to apply. Undoubtedly the proceeding was not in any hostile action, but was commenced by a summons; but in my opinion it would be frittering away the decision, which we ought not to overrule by saying that it only applies to a hostile action, no such limitation being laid down by Lord COTTENHAM. Therefore I am of opinion that the rule by way of exception established in *Cradock* v. *Piper* does apply to the first part of the costs. Those costs the defendant the trustee ought not to be required to bring into account."

The third item—the costs for work done by the trustee's firm in respect of the passing of the receiver's accounts—was disallowed on the ground that the receiver and the trustee's firm acting for him were in a position not hostile but adverse to the interest of the estate. The two positions were inconsistent, as the duty of the trustee was to get all he could from the receiver, and to obtain the disallowance of any payments to which he was not legally entitled,

(*e*) It is to be observed that a sole trustee who is a solicitor cannot claim costs under the rule in *Cradock* v. *Piper*. See *Lyon* v. *Baker*, 5 De G. & Sm. 622.

while the receiver was seeking to avoid being charged with more than he admitted to be due from him, and to maintain all his payments.

The fourth item—the costs incurred with reference to the preparation of leases—was also disallowed on the ground that though they had been paid by the tenants by arrangement in the ordinary course of business, the business was done on the employment of the landlord, who in this case was the trustee himself.

Although the disability of the solicitor trustee extends to the firm of which he is a member (*f*), where a member of a firm of solicitors employs his partner to act as his solicitor in trust business under an agreement that the trustee shall not participate in any way in the profits the partner is entitled to his full costs (*g*); in this case it is obvious that the rule is not infringed. And so where a country firm (a member of which is a trustee) employs London agents, and under the usual agreement receives profit costs, although the country firm must account for the costs they receive, the London agents can keep their proportion of them (*h*).

It is also now quite common for the trust instrument to contain a clause expressly authorizing a trustee who is a solicitor or other professional man to charge for his services. But such a clause needs to be carefully framed. For example, a power to charge for "costs and expenses" only includes expenses out of pocket (*i*), and a power "to make the same professional charges, and to receive the same pecuniary emoluments and remuneration for all business done by him as if he, not being a trustee, was employed by the trustee" does not include non-professional charges (*k*); nor does a power to charge "all usual professional or other charges for business done, whether in the ordinary course of his profession or not" (*l*).

On the other hand, a power to transact business "whether such business be usually within the business of a solicitor or not," and to make the usual professional or other proper and reasonable charges for all business done and time expended in relation thereto, authorizes non-professional employment and charges (*m*). And so

(*f*) See above note (*b*), p. 61.
(*g*) *Clack* v. *Carlon*, 7 Jur. N. S. 441.
(*h*) *Burge* v. *Brutton*, 2 Ha. 373; see also *Vipont* v. *Butler*, [1893] W. N. 64.
(*i*) *Bainbrigge* v. *Blair*, 8 Beav. 588; *Moore* v. *Frowd*, 3 My. & Cr. 45.
(*k*) *In re Chapple*, 27 Ch. D. 584.
(*l*) *Clarkson* v. *Robinson*, [1900] 2 Ch. 722.
(*m*) *In re Ames*, 25 Ch. D. 72.

does a power to charge for business "including all business of whatever kind not strictly professional, but which might have been performed, or would necessarily have been performed in person by a trustee not being a solicitor" (*n*).

Such a power, however, if contained in a will, is a legacy of which the trustee loses the benefit if he attests the will (*o*), which abates if the testator's estate proves to be insolvent(*p*), and on which legacy duty is payable (*q*).

It may be added that a judicial trustee is entitled to remuneration for his services by the express provisions of the Judicial Trustees Act, 1896 (*r*), and the Public Trustee is, it is almost needless to say, entitled to charge such fees as the Treasury may fix (*s*).

Purchase of Trust Property by Trustee.

McPHERSON *v.* WATT.

(1877, 3 App. Cas. 254.)

Where a person stands in a fiduciary relation to another, any purchase by the fiduciary from that other in which the fact that he is purchasing for himself is concealed, will be set aside.

Two ladies, who were trustees and acted in the trust principally through their brother, Hugh McPherson, were desirous of selling four houses. John Watt, "an advocate of Aberdeen," who was employed as law agent by each of the vendors in collateral matters, advised McPherson to sell by private treaty, and was

(*n*) *In re Fish*, [1893] 2 Ch. 413. In *In re Chapple, supra*, Kay, J., said that a power to a solicitor to charge for non-professional expenses ought not to be put into a will drawn by himself unless he has been especially instructed to do so.

(*o*) *In re Pooley*, 40 Ch. D. 1, citing *In re Barber, Burgess* v. *Vinicombe*, 34 Ch. D. 77.

(*p*) *In re White*, [1898] 2 Ch. 217.

(*q*) *In re Thorley*, [1891] 2 Ch. 613.

(*r*) Judicial Trustees Act, 1896, s. 1 (5).

(*s*) See the Public Trustee Act, 1906, s. 9.

commissioned to obtain a purchaser. He had named £1900 as a fair price, and said that his brother, Dr. Thomas Watt, would probably buy at that price. The property was subsequently sold to Dr. Watt for £1900. The vendors believed that Dr. Watt was the sole purchaser, but there had been a previous arrangement between the brothers that John Watt should have two of the houses at half the price. The House of Lords set the entire sale aside.

It is a further application of the principle that a trustee must not place himself in a position in which his interest and his duty may be in conflict that he may not purchase the property which forms the subject of the trust (*a*).

In applying this rule, however, a distinction must be made between a purchase by a trustee from himself and a purchase from the *cestui que trust*. A trustee who is selling under a trust or power of sale is absolutely precluded from buying the trust property either from himself or a co-trustee, unless he is authorized to do so by the terms of the trust or he obtains the leave of the Court (*b*). On the other hand, though a purchase by the trustee from the *cestui que trust* is looked upon with suspicion, it is valid if the trustee can show that he gave a fair price, that he made a full disclosure of all he knew about the trust property and the circumstances of the case, and that the *cestui que trust* had competent and independent advice in respect of the transaction. "A trustee may buy from his *cestui que trust* provided there is a distinct and clear contract, ascertained to be such after a jealous and scrupulous examination of all the circumstances, proving that the *cestui que trust* intended the trustee should buy; and there is no fraud, no concealment, no advantage taken by the trustee of the information acquired by him in the

(*a*) See *per* Lord O'HAGAN in the leading case.

(*b*) See *Fox* v. *Mackreth*, 2 Cox, 320, White and Tudor, L. C. Eq., 7th ed., vol. ii., 709; *Whichcote* v. *Laurence*, 3 Ves. 739; *Campbell* v. *Walker*, 5 Ves. 678, 13 Ves. 601; *Ex parte Lacey*, 6 Ves. 625; *Lister* v. *Lister*, 6 Ves. 631*a*; *Ex parte Hughes*, 6 Ves. 616; *Randall* v. *Errington*, 10 Ves. 423; *Franks* v. *Bollans*, 17 L. T. 309; *In re Moore, Ex parte Moore*, 51 L. J. Ch. 72; *Williams* v. *Scott*, [1900] A. C. 499. The Court may allow the trustee to buy *Campbell* v. *Walker*, *supra*; *Tennant* v. *Trenchard*, L. R. 4 Ch. App. 537; *Boswell* v. *Coaks*, 23 Ch. D. 302; 11 App. Cas. 232.

character of trustee" (*c*). If he cannot prove these things the transaction is invalid (*d*).

Precisely the same rule applies wherever there is a fiduciary relation—whether it be that of trustee and *cestui que trust*, parent and child, guardian and ward, solicitor and client, or any other, as the leading case shows. The transaction in question in it had been held valid by the Scotch Court of Session; the House of Lords, however, came to the conclusion that since there was a fiduciary relationship between Watt and the vendors full disclosure ought to have been made, and as this had not been done the purchase could not stand.

Lord CAIRNS, paraphrasing the observations of Lord St. LEONARDS in an earlier case (*e*), said: "Take the case of a sale of any kind which is so fair, so reasonable as to price, so entirely free from anything else that is obnoxious as to be capable of being supported, yet if there has entered into that sale this ingredient that the client has not been made aware that the real purchaser is his law agent, if the purchase has been made in the name of some other person for that law agent, that is a sale that cannot be supported" (*f*).

"The law both in England and in Scotland," said Lord BLACKBURN, "is that in such cases we do not inquire whether it was a good bargain or a bad bargain before we set it aside. The mere fact that you being in circumstances which made it your duty to give your client advice have put yourself in such a position that being the purchaser yourself you cannot give disinterested advice, your own interests coming in conflict with his, that mere fact authorizes him to set aside the contract if he chooses to do so." "If," Lord BLACKBURN continued, "he purchases from his client in a matter totally unconnected with what he was employed in before, no doubt an attorney may purchase from one who has been his client just as any stranger may do, honestly telling the truth and without any fraudulent concealment, but being in no respect bound to do more than any other purchaser would do. But when he is purchasing from a person property with respect to which the confidential relation has existed or exists, it becomes wrong of him

(*c*) *Coles* v. *Trecothick*, 9 Ves. at p. 246; *Downes* v. *Grazebrook*, 3 Mer. at p. 208.

(*d*) *Fox* v. *Mackreth*, *supra*.

(*e*) *Lewis* v. *Hillman*, 3 H. L. C. at p. 630.

(*f*) 3 App. Cas. at p. 264.

to purchase without doing a great deal more than would be expected from a stranger " (*g*).

There is in all such cases a presumption that the transaction was brought about by undue influence; this presumption may be rebutted, but the onus is on the fiduciary, and unless he discharges it by proving the facts set out above, the transaction will be set aside.

The rule relating to gifts *inter vivos* is even more strict. " It is almost impossible," said Lord ELDON, in the case of *Hatch v. Hatch* (*h*) in 1804, " in the course of the connection of guardian and ward, attorney and client, trustee and *cestui que trust*, that a transaction shall stand purporting to be bounty for the execution of antecedent duty. There may not be a more moral act, one that would do more credit to a young man beginning the world, or afford a better omen for the future, than if a trustee, having done his duty, the *cestui que trust* taking it into his fair, serious and well-informed consideration, were to do an act of bounty like this. But the Court cannot permit it, except quite satisfied that the act is of that nature."

" Persons standing in a confidential relation towards others," said Lord Justice TURNER, " cannot entitle themselves to hold benefits which those others may have conferred upon them unless they can show to the satisfaction of the Court that the persons by whom the benefits have been conferred had competent and independent advice " (*i*).

Here also the Court, in dealing with such a transaction, starts with the presumption that undue influence exists on the part of the donee, and throws upon him the burden of satisfying the Court that the gift was uninfluenced by his position. This presumption is not entirely irrebuttable, though it is extremely difficult to rebut it. It must be shown that the donor had competent independent advice, but the introduction of a new solicitor, although a highly important element, does not conclude the matter, and the Court has still to be satisfied that the influence arising from the relationship can no longer be supposed to exist (*k*).

(*g*) See also *Wright* v. *Carter*, [1903] 1 Ch. 27. The same rule is applicable to counsel, *Carter* v. *Palmer*, 8 Cl. & Fi. 657.

(*h*) 9 Ves. 292. See also *Vaughton* v. *Noble*, 30 Beav. at p. 39.

(*i*) *Rhodes* v. *Bate*, L. R. 1 Ch. App. 252, where the confidential agent was a conveyancer.

(*k*) See *Wright* v. *Carter*, [1903] 1 Ch. 27. Other cases to the like effect are: *Morgan* v. *Minett*, 6 Ch. D. 645; *Liles* v. *Terry*, [1895] 2 Q. B. 679; *Willis* v.

On the other hand, a mere trifling gift to a person standing in a confidential relation or a mere trifling liability incurred in favour of such a person ought not to stand in the same position as a gift of a man's whole property or a liability involving it; *mala fides* must be shown in order to set aside such a benefit. To object to such gifts would be mere pedantry (*l*).

Gifts by will appear to be on a different footing. A person standing in a fiduciary relation to another may take a benefit under that person's will, although if he has prepared the will, or it has been prepared on his instructions, he may be called on to show that it was the testator's real will (*m*).

Trustees' Costs and Expenses.

STOTT *v.* MILNE.

(1884, 25 CH. D. 710.)

The costs and expenses properly incurred by trustees in the execution of a trust are a first charge on all the trust property, both corpus and income.

The fact that counsel have advised trustees to bring an action is not conclusive that the costs of the action were properly incurred.

Stott was beneficially entitled for life to a certain freehold estate of which Milne was trustee. Milne, without Stott's authority, but under the advice of counsel, brought two actions

Barron, [1902] A. C. 271 (all cases of solicitor and client); *Broun* v. *Kennedy*, 33 Beav. 133 (counsel and client); *Savery* v. *King*, 5 H. L. C. 627; *Wright* v. *Vanderplank*, 8 D. M. & G. 133; (both cases of parent and child); *Powell* v. *Powell*, [1900] 1 Ch. 243 (step-mother and child); *Maitland* v. *Irving*, 15 Sim. 437 (guardian and ward); *Huguenin* v. *Baseley*, 14 Ves. 273; *Allcard* v. *Skinner*, 36 Ch. D. 145; *Morley* v. *Loughnan*, [1893] 1 Ch. 736 (all cases of spiritual adviser and follower); *Akearne* v. *Hogan*, Dr. 310; and *Mitchell* v. *Homfray*, 8 Q. B. D. 587 (both cases of medical adviser and patient).

(*l*) See *Rhodes* v. *Bate*, *supra*; and per VAUGHAN-WILLIAMS, L.J., in *Wright* v. *Carter*, *supra*.

(*m*) See *Parfitt* v. *Lawless*, L. R. 2 P. & D. 462; *Walker* v. *Smith*, 29 Beav. 394; *Hindson* v. *Weatherill*, 5 D. M. & G. 301.

for the protection of the estate. Subsequently Stott sued Milne for an account of the rents, and the question arose whether the costs of the actions ought to be allowed to Milne, and if so, whether he was entitled to retain them out of the income of the estate. The Court of Appeal held that although the actions were not necessarily proper because advised by counsel, they were brought *bonâ fide* and were beneficial to the estate, and therefore the trustees were entitled to a charge upon the *corpus*, and to retain the income until provision could be made for raising the costs out of the *corpus*.

Though a trustee is allowed nothing for his trouble, he is entitled to be reimbursed every expense he has properly incurred in the execution of the trust. This has always been the rule. "The contract between the author of a trust and his trustees entitles the trustees as between themselves and their *cestuis que trust* to receive out of the trust estate all their proper costs incident to the execution of the trust," as Lord SELBORNE said (*a*). Now s. 24 of the Trustee Act, 1893, expressly enacts that a trustee may "reimburse himself or pay or discharge out of the trust premises all expenses incurred in or about the execution of his trusts or powers." But the phraseology of the section is rather clumsy and it would express the rule more accurately if it contained the word "properly" before the word "incurred," for unless the expenses are properly incurred the trustee will not be allowed them out of the trust property, as the leading case clearly shows.

The Vice-Chancellor of the Lancaster Palatine Court, before whom the case originally came, decided that as the actions were brought under the advice of counsel the costs must be raised and paid out of the *corpus* of the estate, but that as they were brought without the authority of Stott the costs were not chargeable against the income, and he accordingly ordered the trustees to pay the plaintiff his costs of the present action up to the hearing. From this decision there were cross appeals, one by the plaintiff with regard to the costs of the former actions, and the other by the trustee with regard to the costs of the present action. The Court of Appeal varied the decree on both points.

(*a*) See *Cotterell* v. *Stratton*, L. R. 8 Ch. App. at p. 302.

"I cannot say," said Lord SELBORNE, "that because an action is advised by counsel it is always and necessarily one which trustees may properly bring. The advice of counsel is not an absolute indemnity to trustees in bringing an action, though it may go a long way towards it."

The second point decided in the trustee's favour was that he was justified in retaining the costs out of the income, and that consequently he ought to be allowed his costs of the action which had been brought against him. The trust property, the Court said, was peculiarly circumstanced, as it was available for building purposes, and anything done by tenants or neighbours which would give any other persons rights over it might cause a material depreciation in its value. The trustees had an anxious duty to perform and it had to be borne in mind that the plaintiff, after giving the trustee an indemnity, had changed his mind and given him notice that he would hold him liable. Under these circumstances the Court would require to be clearly satisfied that the actions were improper to induce it to refuse costs out of the estate, and accordingly they not only allowed the trustee his costs out of the *corpus* of the estate, but also recognized his right of retainer as against the income and gave him his costs of the present action.

"The right of trustees," said Lord SELBORNE, "to indemnity against all costs and expenses properly incurred by them in the execution of the trust is a first charge on all the trust property, both income and *corpus*. The trustees therefore had a right to retain the costs out of the income until provision could be made for raising them out of the *corpus*."

In accordance with the rule entitling the trustee to his costs and expenses, the Court has allowed travelling expenses (*b*), costs of employing a solicitor or barrister (*c*), damages recovered against the trustee for a *tort* committed by his agent (*d*), payment of calls on shares (*e*), costs of defending a compromise made for the benefit of the trust, although the main question raised was his personal honesty (*f*), payment of insurance premiums (*g*), liabilities incurred

(*b*) See *Ex parte Lovegrove*, 3 D. & C. 763.

(*c*) *Macnamara* v. *Jones*, Dick. 587; *Poole* v. *Pass*, 1 Beav. 600.

(*d*) *Bennett* v. *Wyndham*, 4 D. F. & J. 259; *In re Raybould*, [1900] 1 Ch. 199.

(*e*) *Jervis* v. *Wolferstan*, L. R. 18 Eq. 18; *Todd* v. *Moorhouse*, L. R. 19 Eq. 69; *Hardoon* v. *Belilios*, [1901] A. C. 118.

(*f*) *Walters* v. *Woodbridge*, 7 Ch. D. 504.

(*g*) *In re Leslie*, *Leslie* v. *French*, 23 Ch. D. 552, *post*, p. 166.

in carrying on a business (*h*), and costs of unsuccessfully defending an action to rectify (*i*) and to set aside (*k*) the trust instrument.

Subject to the right of subrogation which is dealt with below, the lien only extends to property of which the person who makes the payment is the trustee (*l*). In the case of liabilities incurred in carrying on a testator's business, the lien extends to the assets at the date of the testator's death, as well as those coming into existence afterwards (*m*). The right is assignable and passes to the trustee's trustee in bankruptcy (*n*).

The lien is available to third parties who have made any of these payments at the request and on the behalf of the trustee, for example, to save part of the estate (*o*) or to pay a mortgage (*p*). This is called the right of subrogation. Further, a person who has a claim on the trustees as such has the same lien on the trust estate as the trustees would have had if they had paid his claim (*q*). But "the creditor cannot have anything higher than a right to be substituted to the right of the trustee to indemnity" (*r*), so that his right is valueless if the trustee to whom he is substituted is in default or a debtor to the estate (*s*), or has incurred the expenses improperly (*t*).

Where there is no trust property out of which the trustee can reimburse himself, as, for example, where the trust property consists of shares in a company which have become valueless, the trustee may have a right to sue the *cestui que trust* personally for any loss he may have sustained or expense he may have properly incurred (*u*). But the extent of this right is somewhat obscure; it seems not to

(*h*) *Dowse* v. *Gorton*, [1891] A. C. 190; *In re Brooke*, [1894] 2 Ch. 600; *In re Raybould, supra*; *In re Frith*, [1902] 1 Ch. 342.

(*i*) *James* v. *Couchman*, 29 Ch. D. at p. 217.

(*k*) *Merry* v. *Pownall*, [1898] 1 Ch. 306.

(*l*) *In re Earl of Winchelsea's Policy Trusts*, 39 Ch. D. 168.

(*m*) *Dowse* v. *Gorton, supra.*

(*n*) *Jennings* v. *Mather*, [1901] 1 Q. B. 108; [1902] 1 K. B. 1.

(*o*) *Hamilton* v. *Tighe*, [1898] 1 Ir. R. 123.

(*p*) *Patten* v. *Bond*, 60 L. T. 583; *Chetwynd* v. *Allen*, [1899] 1 Ch. 353.

(*q*) *In re Blundell*, 44 Ch. D. 1; *In re Raybould, supra.*

(*r*) *In re Evans*, 34 Ch. D. at p. 601.

(*s*) *Ex parte Harper*, 20 Ch. D. 685; *Ex parte Lloyd George*, [1898] 1 Q. B. 520; *In re Johnson*, 15 Ch. D. 548.

(*t*) *Strickland* v. *Symons*, 22 Ch. D. 666; 26 Ch. D. 245.

(*u*) *Balsh* v. *Hyam*, 2 P. W. 453; *Phené* v. *Gillan*, 5 Hare, 1; *In re Southampton Imperial Hotel Co.*, 22 L. T. 384; *Jervis* v. *Wolferstan*, L. R. 18 Eq. 18; *Hardoon* v. *Belilios*, [1901] A. C. 118.

be exercisable against a *cestui que trust* who is not *sui juris* (*x*), and the nature of the transaction out of which the trust arises may exclude it (*y*).

NOTE.—*Costs of Trustees and Mortgagees.*

Order LXV., r. 1, of the Rules of the Supreme Court, 1883, provides that nothing therein contained "shall deprive an executor, administrator, trustee or mortgagee who has not unreasonably instituted or carried on or resisted any proceedings, of any right to costs out of a particular estate or fund to which he would be entitled according to the rules hitherto acted upon in the Chancery Division." And the Judicature Act, 1890, which enacts that the costs of and incident to all proceedings in the Supreme Court, including the administration of estates and trusts shall be in the discretion of the court or judge, is expressly made subject to this rule.

The costs allowed to trustees are as between solicitor and client (*z*).

Trustees being a joint body are not entitled as a general rule to appear separately from each other or from their *cestuis que trust*, or, as it is technically termed, "to sever their defence," and in the absence of special circumstances only one set of costs will be allowed (*a*). If, however, there are special circumstances, *e.g.* where one of the trustees is charged with a breach of trust or there is a charge of fraud, or even in some cases when they reside at a distance from each other, severance is allowed (*b*).

(*x*) See *per* Lord LINDLEY, *Hardoon* v. *Belilios*, *supra*, at p. 127.

(*y*) *Wise* v. *Perpetual Trustee Co., Ld.*, [1903] A. C. 139.

(*z*) *Mortgage, &c., Corporation* v. *Canadian, &c., Co.*, [1901] 2 Ch. 377; see also *In re Love*, 29 Ch. D. 348; and *In re Maddock*, [1899] 2 Ch. 588, where two sets of costs and costs of two counsel were allowed.

(*a*) *Farr* v. *Sheriffe*, 4 Hare, 528; and see *In re Isaac*, [1897] 1 Ch. 251.

(*b*) *Course* v. *Humphrey*, 36 Beav. 402; *Prince* v. *Hine*, 27 Beav. 345; *Att.-Gen.* v. *Wyville*, 28 Beav. 464; *Walters* v. *Woodbridge*, 7 Ch. D. 504.

Following Trust Fund.

In re HALLETT'S ESTATE, KNATCHBULL *v.* HALLETT.

(1879, 13 Ch. D. 696.)

Property intrusted to a person in a fiduciary character may be followed as long as it can be traced.

When a person holding money as trustee or in a fiduciary character mixes it with his own, and draws out of the mixed fund for his own purposes, there is a presumption that his drawings are of his own money.

H., a solicitor, had bonds for £2145 belonging to C., and for £770 representing T.'s improperly converted trust funds, in his possession. He improperly sold first C.'s, then T.'s bonds, and paid the proceeds to his general balance at his bankers, and drew cheques for his own purposes. He afterwards paid in other moneys of his own, so that his balance at his bank was never less than £2915, and was at his death £3029. But for such payments in, his balance at his death would have been £1708. It was held by the Court of Appeal that T. and C. had a right "to follow the money," and were entitled to a charge on the £3029.

In his elaborate judgment in the above case Sir George Jessel stated "the modern doctrine of equity as regards property disposed of by persons in a fiduciary position." The right of the *cestui que trust* varies according to whether the property or its proceeds remains distinct or whether it has been mixed with other money belonging to the fiduciary.

First.—If he can identify the property or money received in exchange for the trust property or any subsequent proceeds of either, he has a choice either—

(*a*) To waive the breach of trust and take that property, money or proceeds; or

(*b*) To require the trustee or fiduciary to make good the breach of trust and to enforce a lien on that property, money or proceeds until it is made good (*a*).

"The modern doctrine of equity," said Sir GEORGE JESSEL, "as regards property disposed of by persons in a fiduciary position, is a very clear and well-established doctrine. You can, if the sale was rightful, take the proceeds of the sale if you can identify them. If the sale was wrongful you can still take the proceeds of the sale, in a sense adopting the sale for the purpose of taking the proceeds, if you can identify them. There is no distinction, therefore, between a rightful and a wrongful disposition of the property so far as regards the right of the beneficial owner to follow the proceeds . . . when the purchase is clearly made with . . . the trust money, . . . the beneficial owner has a right to elect either to take the property purchased or to hold it as a security for the amount of the trust money laid out in the purchase; or, as we generally express it, he is entitled at his election either to take the property or to have a charge on the property of the amount of the trust money" (*b*).

This may be illustrated by the case of Sir Thomas Plumer, the Master of the Rolls, which occurred in the year 1815 and was a *cause célèbre* of the time. Sir Thomas had handed to his stockbroker, one Walsh, a sum of £22,200, with instructions to lay it out in the purchase of Exchequer bills. The stockbroker, who was in financial difficulties at the time—though of course this was unknown to Sir Thomas—bought £6500 worth of Exchequer bills in accordance with his instructions, but converted the rest of the money to his own use, utilizing it in paying for fifty shares in an American bank, some funded stock of the United States, and certain bullion which he had previously bought for himself, but for which he had not any money of his own to pay. He then bolted with these securities, intending to take ship for America, but just as he was about to embark at Falmouth, was caught by Sir Thomas Plumer's solicitor, who had posted in hot haste after him, and who compelled him to surrender the American securities. Proceedings in bankruptcy were subsequently taken against the stockbroker, and the question then arose whether Sir Thomas was entitled to retain the securities which he had "followed" in so literal a fashion, or whether the trustee in

(*a*) See besides the leading case *Frith* v. *Cartland*, 34 L. J. Ch. 301; *In re Champion*, [1893] 1 Ch. 101; and *In re Oatway*, [1903] 2 Ch. 356.

(*b*) The beneficiary has an equitable interest or charge of the same description as that created by an equitable mortgage: *Cave* v. *Cave*, 15 Ch. D. at p. 649.

bankruptcy had the right to them as part of the bankrupt's estate, and the court held that Sir Thomas had the right to keep them since he could show that they had been bought with his money (*c*).

Secondly.—If the trust property or its proceeds has been converted into money and is mixed with the money of the trustee or fiduciary, then, whether it remains money or whether the mixed fund has been invested in the purchase of any property, the *cestui que trust* is entitled to a lien on the fund or property purchased therewith for the amount of the trust money.

When the trustee has mixed the trust money with his own "there is this distinction," as Sir GEORGE JESSEL said, "that the *cestui que trust* or beneficial owner can no longer elect to take the property, because it is no longer bought with the trust money, simply and purely, but with a mixed fund. He is, however, still entitled to a charge on the property purchased for the amount of the trust money laid out in the purchase; and that charge is quite independent of the fact of the amount laid out by the trustee" (*d*).

The importance of the leading case is that it decided that this applies equally where the proceeds of the trust property is money. The idea had previously prevailed that since "money has no ear-mark," the *cestui que trust* could not follow the fund if it had been converted into money and mixed with the fiduciary's own. Sir GEORGE JESSEL decided that this view was erroneous. "Supposing," he went on, "instead of being invested in the purchase of land or goods, the moneys were simply mixed with other moneys of the trustee, does it make any difference according to the modern doctrine of equity? I say none. It would be very remarkable if it were so. Supposing the trust money was 1000 sovereigns, and the trustee put them into a bag, and by mistake, or accident, or otherwise, dropped a sovereign of his own into the bag. Could anybody suppose that a judge in equity would find any difficulty in saying that the *cestui que trust* has a right to take 1000 sovereigns out of that bag? I do not like to call it a charge of 1000 sovereigns on the 1001 sovereigns, but that is the effect of it. I have no doubt of it. It would make no difference if, instead of one sovereign, it was another 1000 sovereigns; but if, instead of putting it into his bag or after putting it into his bag, he carries the bag to his bankers,

(*c*) *Taylor* v. *Plumer*, 3 M. & S. 562. Walsh's case led to the passing of the statute 52 Geo. III. c. 63, making a fraudulent breach of trust of this kind a criminal offence. See Stephen, History of the Criminal Law, vol. iii., 154.

(*d*) *In re Hallett's Estate*, *supra*, at p. 709.

what then ? According to law, the bankers are his debtors for the total amount. But if you lend the trust money to a third person you can follow it. If in the case supposed the trustee had lent the £1000 to a man without security, you could follow the debt and take it from the debtor. If he lent it on a promissory note you could take the promissory note ; or a bond, if it were a bond. If, instead of lending the whole amount in one sum simply, he had added a sovereign or had added £500 of his own to the £1000, the only difference is this, that instead of taking the bond or the promissory note, the *cestui que trust* would have a charge for the amount of the trust money on the bond or promissory note. So it would be on a simple contract debt ; that is, if the debt were of such a nature as that between the creditor and the debtor you could not sever the debt in two so as to show what part was trust money. Then the *cestui que trust* would have a right to a charge upon the whole " (*e*).

Lord Justice THESIGER also, in his judgment in the leading case, summed up the law in the proposition that whenever a specific chattel is intrusted by one man to another, either for the purpose of safe custody or for the purpose of being disposed of for the benefit of the person intrusting the chattel, then either the chattel itself or the proceeds of the chattel, whether the chattel has been rightfully or wrongfully disposed of, may be followed at any time, although either the chattel itself or the money constituting the proceeds of that chattel may have been mixed and confounded in a mass of the like material.

Now suppose that after mixing the trust funds with funds of his own at a bank, the trustee draws cheques on the mixed fund for his private expenses, what is the result ? The leading case shows that so long as there are funds of his own at the bank it must be presumed that the trustee drew them, not the trust moneys. This is an application of the maxim, " allegans suam turpitudinem non est audiendus," and is stated thus by Sir GEORGE JESSEL, " When we come to apply that principle to the case of a trustee who has blended trust moneys with his own, it seems to me perfectly plain that he cannot be heard to say that he took away the trust money when he had a right to take away his own money. The simplest case put is the mingling of trust moneys in a bag with moneys of the trustee's own. Suppose he has a hundred sovereigns in a bag, and he adds

(*e*) See also *Frith* v. *Cartland*, 34 L. J. Ch. 301 ; *Gibert* v. *Gonard*, 54 L. J. Ch. 439 ; *Hancock* v. *Smith*, 41 Ch. D. 456.

to them another hundred sovereigns of his own, so that they are commingled in such a way that they cannot be distinguished, and the next day he draws out for his own purposes £100, is it tolerable for anybody to allege that what he drew out was the first £100, the trust money, and that he misappropriated it and left his own £100 in the bag ? It is obvious that he must have taken away that which he had a right to take away, his own £100. What difference does it make if instead of being in a bag he deposits it with his banker, and then pays in other money of his own and draws out some money for his own purposes ? Could he say that he had actually drawn out anything but his own money ? His money was there and he had a right to draw it out, and why should the natural act of simply drawing out the money be attributed to anything except to his ownership of money which was at the bankers ? "

On the other hand, where the funds belonging to several different *cestuis que trust* have been mixed together and the fund has then been drawn on, as between the *cestuis que trust* the rules in *Clayton's Case* (*f*) must be applied, and in the absence of any other appropriation the sum first paid in is presumed to be that first drawn out.

A further question may have to be dealt with in such cases as these, although it did not arise in the leading case, namely, if Hallett's balance had at any time been less than £2915, ought subsequent payments in to be treated as made in order to replace the trust fund, or ought the rule in *Clayton's Case* to be applied ? The answer appears to be that the latter rule must be applied (*g*).

Finally, all the foregoing rules are equally applicable to the case of a trustee . . . and to the case of factors, bailees or other kinds of agents. " There is no distinction," said Lord Justice BAGGALLAY in a later case, " as regards this doctrine between an express trustee or an agent or bailee standing in a similar fiduciary position " (*h*).

The right to follow trust property may, however, be defeated by a transfer to a *bonâ fide* purchaser for value without notice. In the well-known case of *Thorndike v. Hunt* (*i*), Hunt was a trustee of two different trusts. He applied funds of the first to his own use, and then procuring a power of attorney from his co-trustee in the second trust, he replaced the deficiency in the first trust fund by a

(*f*) 1 Mer. 572.

(*g*) See *per* BAGGALLAY, L.J., at p. 731 of the report ; and see *Brown* v. *Adams*, L. R. 4 Ch. App. 764.

(*h*) *New Zealand, &c., Land Co.* v. *Watson*, 7 Q. B. D. 383.

(*i*) 3 De Gex & J. 563.

transfer into that fund of a part of the funds of the second trust. A suit was brought in respect of breaches of trust in the first trust, and the trustees of that trust transferred the sum thus replaced into court. It was held that the transfer into court was a transfer for valuable consideration without notice, and that consequently the *cestuis que trust* under the second trust could not follow their trust fund. "There was," said Lord Justice KNIGHT BRUCE, "a debt due from the trustees; they were called upon to pay it, and if it had not been paid they would have been liable to execution. If the fund had not been transferred into court the property might have been obtained from them by other means."

And so in the subsequent case of *Taylor v. Blakelock* (*k*), where one Carter was a co-trustee with Taylor of a will, and also co-trustee with Blakelock of a settlement. He misappropriated a considerable sum of the settlement fund, and then applied an equal portion of Metropolitan Stock belonging to the will fund in the purchase of Caledonian Stock in the joint names of himself and Blakelock. Carter died insolvent, and Taylor then commenced an action against Blakelock to have the Caledonian Stock transferred to him. There was no dispute of fact. Both parties were quite innocent of Carter's fraud, and neither Blakelock nor his *cestuis que trust* had any notice that the stock was purchased with part of the will fund. The Court of Appeal decided that Taylor had no right to follow the trust fund, as Blakelock must be treated as a purchaser for value without notice of the legal right to the stock. "The term 'purchaser for value,'" said Lord Justice BOWEN, "is a well-known expression to the law. By the common law of this country the payment of an existing debt is payment for valuable consideration. That was always the common law before the reign of Queen Elizabeth as well as since. Commercial transactions are based upon that very idea. It is one of the elementary legal principles, as it seems to me, which belong to every civilized country; and many of the commercial instruments which the law recognizes have no other consideration whatever than a pre-existing debt."

(*k*) 32 Ch. D. 560.

Trustees' Statutes of Limitations.

THORNE *v.* HEARD.

([1893] 3 Ch. 530; [1894] 1 Ch. 599; [1895] A. C. 495.)

Statutes of Limitations may be pleaded by a trustee as a bar to an action for breach of trust except where (1) *the claim is founded upon any fraud or fraudulent breach of trust to which the trustee was party or privy; or* (2) *is to recover the trust property or the proceeds thereof still retained by the trustee; or* (3) *previously received by the trustee and converted to his use.*

If fraud is relied on to take the case out of the statute it must be fraud imputable to the trustee; and property is neither retained nor converted by a trustee, if his agent fraudulently converts it to his own use, and the trustee is not benefited thereby.

Heard was entitled to a first mortgage for £1000; Thorne to a second mortgage for £333; Searle, a solicitor who had negotiated and prepared both mortgages for all parties, was entitled to a third mortgage for £375 3*s.* 6*d.* Heard exercised his power of sale in 1878 and sold the property for £1700. Searle conducted the sale and received the purchase-money, out of which he paid £1000 to Heard and retained the residue, putting among Heard's papers a receipt signed by himself for payment of the £333 to Thorne, and of the £375 3*s.* 6*d.* to himself. Searle converted the £700 to his own use, but paid interest on the £333 to Thorne until 1892, when he became bankrupt. Heard had no actual knowledge of the existence of Thorne's mortgage. It was held by the Court of First Instance, by the Court of Appeal, and the House of Lords (*nem. con.*) that Heard was entitled to plead the Statute of Limitations, and was not liable to Thorne for the £333 and interest.

A mortgagee who has exercised his power of sale is a trustee of the surplus proceeds of sale for the parties interested in the equity of redemption.

In the leading case Mr. Justice ROMER and the Court of Appeal held, and the House of Lords assumed, that Heard had either knowledge or notice of Thorne's mortgage (*a*). Mr. Justice ROMER also held that Heard was negligent in not inquiring into Searle's authority to act for Thorne; and the superior courts unanimously confirmed this view. A solicitor should produce "a separate direction or authority from the person entitled to the purchase-money," or else a deed "having in the body thereof or endorsed thereon a receipt." This being the inference from the facts, Heard had clearly committed a breach of trust against Thorne in 1878. The question was, when Thorne discovered this in 1892 was his claim barred or not by the statute of limitations?

Until 1888, as a general rule, a breach of trust was not barred by lapse of time. The Judicature Act of 1873, s. 25 (2), expressly enacts that "no claim of a *cestui que trust* as against his trustee for any property held on an express trust or in respect of any breach of such trust shall be held barred by any statute of limitations." It is not clear to what extent this rule was applicable to implied trusts generally; in some cases lapse of time would be a defence (*b*), though on the other hand some kinds of constructive trusts—those illustrated by the leading case of *Barnes* v. *Addy* (*c*), for example—were on the same footing as express trusts (*d*).

In 1888, however, a revolutionary change in the law was effected by the Trustee Act of that year, the 8th section (*e*) of which is as follows:—

"(1) In an action or other proceeding against a trustee or any person claiming through him, except where the claim is founded upon any fraud or fraudulent breach of trust to which the trustee was party or privy, or is to recover trust property or the proceeds

(*a*) Lord HERSCHELL questioned this view, and Lord DAVEY thought that the question of knowledge depended on whether Heard had read Searle's receipt.

(*b*) See *Townshend* v. *Townshend*, 1 Bro. Ch. Ca. at p. 554, and *Beckford* v. *Wade*, 17 Ves. at p. 97.

(*c*) L. R. 9 Ch. App. 244, *ante*, p. 40.

(*d*) See *Soar* v. *Ashwell*, [1893] 2 Q. B. 390, particularly the judgment of KAY, L.J., at p. 405. See also *Wassell* v. *Leggatt*, [1896] 1 Ch. 554.

(*e*) Sects. 1 and 8 are the only parts of the statute which have survived, the rest of the Act having been repealed and re-enacted in various sections of the Trustee Act, 1893.

thereof still retained by the trustee, or previously received by the trustee and converted to his use, the following provisions shall apply :—

"(*a*) All rights and privileges conferred by any statute of limitations shall be enjoyed in the like manner and to the like extent as they would have been enjoyed in such action or other proceeding if the trustee or person claiming through him had not been a trustee or person claiming through him.

"(*b*) If the action or other proceeding is brought to recover money or other property, and is one to which no existing statute of limitations applies, the trustee or person claiming through him shall be entitled to the benefit of and be at liberty to plead the lapse of time as a bar to such action or other proceeding in the like manner, and to the like extent as if the claim had been against him in an action of debt for money had and received, but so, nevertheless, that the statute shall run against a married woman entitled in possession for her separate use, whether with or without a restraint upon anticipation, but shall not begin to run against any beneficiary unless and until the interest of such beneficiary shall be an interest in possession.

"(2) No beneficiary as against whom there would be a good defence by virtue of this section shall derive any greater or other benefit from a judgment or order obtained by another beneficiary than he could have obtained if he had brought such action or other proceeding and this section had been pleaded.

"(3) The section shall apply only to actions or other proceedings commenced after the first day of January, one thousand eight hundred and ninety, and shall not deprive any executor or administrator of any right or defence to which he is entitled under any existing statute of limitations."

Sect. 1 makes the statute applicable not only to an express trustee but to an executor, administrator, an implied and constructive trustee.

It will be seen that the statute does not apply "where the claim is founded upon any fraud or fraudulent breach of trust to which the trustee was party or privy," and in the leading case, though Heard himself was not guilty of any fraud, the question was, was he implicated in the fraud of his agent Searle ?

It is clear that the fraud of an agent may affect his principal (*f*), but Lord HERSCHELL held that Searle ceased to be agent for Heard with regard to the surplus proceeds of sale at the moment at which Heard paid the surplus to him in the erroneous belief that he was agent for somebody else. Searle was not "acting within the scope of his authority" as agent, nor was he "doing something or purporting to do something on behalf of the principal," for the simple reason that the relationship had long since ceased (*g*). Further, for the fraud of an agent to implicate his principal the fraud must be committed in the interest of the principal, and Heard derived no benefit of any kind from Searle's action.

But another argument was based on the fact that fraud had been committed. Equity has engrafted on the old Statute of Limitations of 1623 the principle that where there is concealed fraud the statute does not begin to run until the date of the discovery of the fraud. It was accordingly urged that Thorne's right of action accrued at the date of his discovery of the fraud which had been committed upon him, which was in 1892. But it was held that "if fraud or a non-discovery of fraud is to be relied on to take a case out of the Statute of Limitations, it must be the fraud of or in some way imputable to the person who invokes the aid of the Statute of Limitations (*h*)." Therefore, since the Court had already held that the fraud was not imputable to Heard, this plea failed. Of course, if it had been imputable to him the statute would never have begun to run in his favour at all.

Again, the statute does not apply where the claim "is to recover trust property or the proceeds thereof still retained by the trustee," and no doubt the trustee "retains" it if he or any agent for him has it so that he can get it (*i*). But it is not "still" retained by him unless it is actually in his hands or under his control when the action is brought. Now, Searle had converted the surplus proceeds of sale to his own use, and that put an end to any constructive retention by Heard. It was as though "these moneys before action brought had been stolen from Heard, and the thief had remained unknown and the money unrecovered" (*k*).

The 8th section of the Trustee Act, 1888, has unquestionably been a great boon to trustees, but its draftsmanship leaves something

(*f*) See *Vane* v. *Vane*, L. R. 8 Ch. App. 383; *Moore* v. *Knight*, [1891] 1 Ch. 547; *Blair* v. *Bromley*, 2 Ph. 354, 5 Ha. 542.

(*g*) Page 502.

(*h*) *Per* Lord DAVEY, at p. 506.

(*i*) See [1894] 1 Ch. at p. 606.

(*k*) [1894] 1 Ch. at p. 614.

to be desired. Paragraph (*a*) of sub-sect. (1) is very obscure, and it seems doubtful whether it can ever have any practical application (*l*). However this may be in all the cases in which the trustee has been held to be entitled to relief under the statute hitherto, it has been under paragraph (*b*) that he has succeeded. It will be observed that this enables him to plead lapse of time as a bar, "as if the claim had been against him in an action of debt for money had and received," so that the period of limitation is six years from the time when the right of recovery accrued (*m*), or from an acknowledgment in writing or payment sufficient to take the case out of the statute. And except against a beneficiary whose interest is not in possession it begins to run, as the leading case shows, from the commission of the breach of trust whether the beneficiary knows of its commission or not. This sometimes has rather a curious result. Suppose, for example, a fund is held upon trust for one person for life, and after his death upon trust for others absolutely, and suppose the trustee invests part of the fund in an unauthorized security in the year 1900, and the investment on its subsequent realization involves a loss. Suppose that the beneficiaries first became aware of the breach of trust in the year 1911, and commence an action to have it made good to which the trustee pleads the statute of limitations. If there is nothing to take the case out of the statute his defence will be good against the tenant for life but not against the remaindermen. The result will be that the latter will be entitled to have the lost moneys replaced, but the trustee will be entitled to the income produced by them during the remainder of the life of the tenant for life (*n*), which may materially mitigate his loss.

Relief under the Judicial Trustees Act, 1896.

Notwithstanding the amelioration of the position of trustees effected by the Trustee Act, 1888, it was felt that there were still

(*l*) See the remarks of Fry, L.J., in *In re Bowden*, 45 Ch. D. at p. 450; but compare the criticism of Lindley, L.J., in *How* v. *Earl Winterton*, [1896] 2 Ch. at pp. 638, 639, and of Rigby, L.J., *ibid.* at p. 641. See also Champernowne and Johnston, Trustee Acts, 8.

(*m*) 21 Jac. I., c. 16, s. 3. *In re Somerset*, [1894] 1 Ch. 231.

(*n*) *In re Somerset, supra*; *In re Fountaine*, [1909] 2 Ch. 382. Other cases on the statute are *Moore* v. *Knight*, [1891] 1 Ch. 547; *In re Swain*, [1891] 3 Ch. 233; *In re Page*, [1893] 1 Ch. 304; *In re Gurney*, [1893] 1 Ch. 590; *In re Lands Allotment Co.*, [1894] 1 Ch. 616; *Wassell* v. *Leggatt*, [1896] 1 Ch. 554; *In re Timmis*, [1902] 1 Ch. 176.

many cases in which the law operated harshly, and that it was unfair that a trustee who had honestly intended to carry out the terms of his trust should be held liable for the consequences of what was technically a breach of trust though he had acted reasonably perhaps throughout. Accordingly, when the Judicial Trustees Act, 1896, was being considered by parliament, advantage was taken of the opportunity to accord to all trustees a still further measure of relief. The third section of the Act provides that " if it appears to the Court that a trustee, whether appointed under this Act or not, is or may be personally liable for any breach of trust, whether the transaction alleged to be a breach of trust occurred before or after the passing of this Act, but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the Court in the matter in which he committed such breach, then the Court may relieve the trustee either wholly or partly from personal liability for the same."

Many applications have been made for relief under this enactment. Each case must depend on its own circumstances, for it is a matter for the exercise of a judicial discretion (*o*). The onus is on the trustee to prove that he acted honestly and reasonably (*p*), and even though he succeeds in proving it he will not get relief if it does not appear that he ought fairly to be excused for his breach of trust (*q*).

Relief has been granted to an executor for paying to a legatee the income of an estate which he reasonably believed to be solvent, but which was in fact insolvent (*r*), to an executor and to trustees for omitting to get in assets (*s*), to trustees who sold the trust property reasonably, but erroneously, believing they had power to do so (*t*), and to trustees who reasonably entrusted money belonging to the trust to agents who misapplied part of it (*u*). It has been refused in many others (*x*).

(*o*) See *In re Turner, Barker* v. *Ivimey*, [1897] 1 Ch. at p. 542; *In re Kay*, [1897] 2 Ch. at p. 524.

(*p*) *In re Turner, supra*; *In re Stuart*, [1897] 2 Ch. at p. 583.

(*q*) *Waite* v. *Parkinson*, 85 L. T. 456; *National Trustees Co., &c.* v. *General Finance Co., &c.*, [1905] A. C. 373; *Davis* v. *Hutchings*, [1907] 1 Ch. 356.

(*r*) *In re Kay, supra.*

(*s*) *In re Roberts*, 76 L. T. 479; *In re Grindley*, [1898] 2 Ch. 593.

(*t*) *Perrins* v. *Bellamy*, [1899] 1 Ch. 797.

(*u*) *In re Lord de Clifford's Estate*, [1900] 2 Ch. 707.

(*x*) *In re Turner, supra*; *In re Stuart, supra*; *Chapman* v. *Browne*, [1902] 1 Ch. 785; *Davis* v. *Hutchings, supra*; *In re Dive*, [1909] 1 Ch. 328; and *Shaw* v. *Cates, ibid.*, 389.

Donatio mortis causâ.

In re MEAD, AUSTIN *v.* MEAD.

(1880, 15 CH. D. 651.)

A gift of a bill of exchange payable to self or order is valid as a donatio mortis causâ *though unindorsed and though it does not fall due until after the donor's death, but a gift of the donor's own cheque if not payable until after his death is not valid as a* donatio mortis causâ.

Mead had in his possession two bills of exchange payable to himself or order, and a banker's non-transferable deposit note for £2700, which required seven days' notice of withdrawal. Two days before his death, Mead, desiring to give £500 to his wife, signed the notice of withdrawal and sent it to the bank. He then signed a form of cheque which was on the back of the deposit note, "Pay self or bearer £500," and handed it to his wife. He had already handed the two bills of exchange unindorsed to a friend to cash and pay the proceeds to his wife.

The Court (FRY, J.) held that there had been a valid *donatio mortis causâ* of the bills of exchange, but not of the cheques.

The English law concerning *donationes mortis causâ* is derived from the Roman law. In the Institutes of Justinian the nature of the gift is explained as follows: "Mortis causa donatio est quæ propter mortis fit suspicionem; cum quis ita donat ut si quid humanitus ei contigisset, haberet is qui accepit; sin autem supervixisset is qui donavit, reciperet, vel si eum donationis pœnituisset, aut prior decesserit is cui donatum sit. Hæ mortis causa donationes ad exemplum legatorum redactæ sunt per omnia" (*a*). "A gift *mortis causâ* is one made in expectation of death; when a person gives a thing upon condition that if any fatality happen to him, the receiver shall keep it; but that if the donor should survive, or if he should

(*a*) Justinian, Inst. lib. 2, tit. 7, 1.

change his mind, or if the donee should die first, then the donor shall have it back again. These gifts *mortis causâ* are now in all respects upon the same footing as legacies." In this latter respect, as we shall presently see, the English law differs from the Roman (*b*). There are three conditions essential to the validity of a *donatio mortis causâ* :—

1. The gift must be made when the donor is ill and expecting to die as a consequence, and it must be made with a view to his death (*c*),

2. It must be made subject to the condition either express or implied that it is only to take effect if the donor dies of his existing disorder (*d*).

3. There must be delivery of the subject-matter of the gift by the donor himself to the donee or some one on behalf of the donee (*e*).

Having regard to the necessity for delivery, it might be supposed that only property capable of transfer by delivery—like chattels or negotiable instruments—could be made the subject of a *donatio mortis causâ*. But it has long since been settled that, though property is not capable of transfer in this way, if the evidence of the title to it is delivered *mortis causâ* the gift is effective. This is on the ground that though the delivery gives no legal title to the donee, yet the executors of the deceased donor are trustees for the donee, and must do what is necessary to perfect the transfer (*f*). This would not be so in the case of an incomplete voluntary gift *inter vivos*—the Court would not interfere to compel either the donor or his executors to perfect it (*g*), as we have seen in discussing the leading case of *Richards* v. *Delbridge*. " The doctrine is an anomalous one peculiar to the case of a *donatio mortis causâ* " (*h*).

It is on this principle that such securities as a bond (*i*), a banker's

(*b*) See Abdy and Walker, Institutes of Justinian, 119; Hunter, Roman Law, 2nd ed., 915.

(*c*) See *Duffield* v. *Elwes*, 1 Bli. N. S. 497; *Agnew* v. *Belfast & Co.*, [1896] 2 Ir. Rep. 204 (a healthy man contemplating suicide).

(*d*) *Edwards* v. *Jones*, 1 My. & Cr. 233; *Tate* v. *Hibbert*, 3 Ves. Jun. 120; *Gardner* v. *Parker*, 3 Madd. 184.

(*e*) *Ward* v. *Turner*, 2 Ves. 431; Wh. & Tud. L. C. Eq. 7th ed., vol. i., 390. The delivery may precede the *donatio* : *Cain* v. *Moon*, [1896] 2 Q. B. 283.

(*f*) *Duffield* v. *Elwes*, *supra* ; *In re Dillon*, 44 Ch. D. 76.

(*g*) See *In re Dillon*, *supra*.

(*h*) *Per* COTTON, L.J., 44 Ch. D. at p. 82.

(*i*) *Snellgrove* v. *Baily*, 3 Atk. 214; *Duffield* v. *Elwes*, *supra* ; *Gardner* v. *Parker*, 3 Mad. 184.

deposit note (*k*), a mortgage deed (*l*), a policy of insurance (*m*), a receipt for money (*n*), a post office savings' bank book (*o*), have all been held capable of being made the subject of a *donatio mortis causâ*.

It was on this principle also that the gift of the bills of exchange, though unindorsed, was held to be valid in the leading case, following the earlier decision in *Veal* v. *Veal* (*p*). With regard, however, to the cheque drawn by Mead upon the sum represented by the deposit note for £2700, Mr. Justice FRY said: "The authorities stand in this way. A gift of a banker's deposit note with a view of giving to the donee the whole sum secured by it has been held to be a good *donatio mortis causâ*. A gift of a cheque upon a banker, the cheque not being payable during the donor's life, has been held to be not a good *donatio mortis causâ*. To which of these two classes of decisions does the present case belong? In my judgment it belongs to the latter class. The effect of the notice of withdrawal given by the testator to the bank on May 23rd, was to set free a fund of £2700 upon May 30th, and upon that fund the testator drew a cheque of £500 which was not payable till that day, *i.e.* after his death. Looking at the whole of the circumstances of the case and at the practice of the bank, which was to give a fresh deposit note for the balance when a part of the money was withdrawn, it does not appear to me that the delivery of the note was made with the intention of giving either it or the money to the wife. The intention was to deliver the cheque, and according to the authorities that is not a good *donatio mortis causâ*."

The reason why a cheque drawn by the donor upon his own banker cannot be the subject-matter of a *donatio mortis causâ* is because the death of the drawer is a revocation of the banker's authority to pay (*q*). Its delivery to the donee is from the nature of the thing a nullity. The matter is clearly explained in the judgment of Mr. Justice BUCKLEY in the subsequent case of *In re Beaumont, Beaumont* v.

(*k*) *In re Dillon*, 44 Ch. D. 76; *In re Taylor*, 56 L. J. Ch. 587; *In re Farman*, 57 L. J. Ch. 637; *Dunne* v. *Boyd*, 8 I. R. Eq. 609; *Cassidy* v. *Belfast Banking Co.*, 22 L. R. Ir. 68; *Porter* v. *Walsh*, [1896] 1 Ir. R. 148.

(*l*) *Richards* v. *Syms*, Barnard. Ch. Ca. 90; *Duffield* v. *Elwes*, *supra*.

(*m*) *Witt* v. *Amis*, 1 Best & Sm. 109; *Amis* v. *Witt*, 33 Beav. 619.

(*n*) *Moore* v. *Darton*, 4 De G. & Sm. 517.

(*o*) *In re Weston, Bartholomew* v. *Menzies*, [1902] 1 Ch. 680.

(*p*) 27 Beav. 303 (unindorsed promissory note payable to order). See also *Clement* v. *Cheesman*, 27 Ch. D. 631 (unindorsed cheque payable to order).

(*q*) Bills of Exchange Act, 1882, s. 75. See *per* CHITTY, J. *Clement* v. *Cheesman*, 27 Ch. D. 631; *Hewitt* v. *Kaye*, L. R. 6 Eq. 198; *In re Beak's Estate*, L. R. 13 Eq. 489.

Ewbank (*r*). The facts in that case were that on the 19th of February, 1901, Beaumont being in expectation of death caused a cheque for £300 to be drawn in favour of his sister. He signed the cheque, and by his direction it was handed to her. The cheque was presented on the 23rd, on which date the donor's account was overdrawn. The cheque would, however, have been paid had not the bank manager doubted the signature. On the 25th the donor died, and the cheque was never cashed. Mr. Justice BUCKLEY held that this was not a valid *donatio mortis causâ*. "A man's cheque," he said, "in favour of another person is not an equitable assignment of any part of the donor's balance at his banker's (*s*). The cheque is only a revocable mandate which may be stopped in the donor's lifetime, and is revoked by his death. If before the donor's death the cheque is presented and paid, there is no question of *donatio mortis causâ* of the cheque, although there may be a question whether the money has been received on the terms that it shall only be retained in case of the donor's death. If the cheque is not presented in the donor's lifetime the gift is ineffectual; the cheque is a revocable order which is revoked by the donor's death. . . . It is true that in *In re Dillon*, LINDLEY, L.J., said: 'It is said that here there was no good *donatio mortis causâ* because a man cannot make such a gift of his own cheque. I will assume that to be correct, though I think it may some day require consideration; but assuming it to be correct, I think it does not dispose of the present case.' But if *Hewitt* v. *Kaye* and *In re Beak's Estate* are to be reconsidered it must be by some higher Court than this."

Among other things that cannot be made the subject of a *donatio mortis causâ* are a banker's pass book (*t*), an I.O.U. (*u*), a railway stock certificate (*x*), a certificate of Building Society shares (*y*), and a post-office stock investment certificate (*z*). A *donatio mortis causâ* resembles a legacy, and differs from a gift *inter vivos* in the following respects: (1) It is revocable, but is not revoked by a subsequent will; (2) it is liable to estate duty under the Finance Acts (*a*); (3) it is

(*r*) [1902] 1 Ch. 889.

(*s*) *Hopkinson* v. *Forster*, L. R. 19 Eq. 74. See also Bills of Exchange Act, 1882, s. 73.

(*t*) *In re Beak's Estate*, *supra*.

(*u*) *Duckworth* v. *Lee*, [1899] 1 Ir. R. 405.

(*x*) *Moore* v. *Moore*, L. R. 18 Eq. 474, 483.

(*y*) *In re Weston*, *Bartholomew* v. *Menzies*.

(*z*) *In re Andrews*, [1902] 2 Ch. 394.

(*a*) See Finance Act, 1894, s. 2 (1) (c).

liable to legacy duty; and (4) it is liable for payment of debts on a deficiency of assets. On the other hand, it differs from a legacy in that: (1) It takes effect conditionally in the lifetime of the donor; and (2) it requires no assent from the executor or administrator to perfect the donee's title.

Conversion by Contract for Sale.

HAYNES *v.* HAYNES.

(1861, 1 DREWRY & SMALE, 426.)

A contract for the sale and purchase of land effects an equitable conversion of the property the subject of the contract if the Court would decree specific performance of it, but not otherwise.

John Haynes, being possessed of freehold houses at Lower Mitcham in the countyof Surrey, specifically devised the same by his will dated the 6th of November, 1850, to his children individually, giving one house to one child and another house to another child, and so on, and gave his residuary estate to various persons. In September, 1853, the Wimbledon and Croydon Railway Company, in exercise of the powers conferred by their Act of 1853, with which the Lands Clauses Consolidation Act, 1845, was incorporated, served on John Haynes notice of their intention to take several of the houses so devised for the purposes of their railway, but nothing further was done with respect to the notice during his lifetime. After his death, which occurred in January, 1854, the company proceeded under the notice, and ultimately the amount of compensation to be paid for the land was assessed and the amount was paid into Court by the company. A suit for administration of the estate of the deceased having been instituted by two of the residuary legatees, the question arose whether the notice to treat which had been served on the testator in his lifetime had the effect of converting the freehold estates comprised in it into personalty,

so as to make the compensation money pass under the residuary gift.

The Court (KINDERSLEY, V.-C.) held that the mere notice to treat served by the company did not constitute a contract by the deceased for the sale of the property, and that even if it did an action for specific performance would not lie against him, and therefore that it did not effect a conversion.

The doctrine of equitable conversion is a consequence of the distinction made in English law between real and personal property as regards the devolution of title on the death of the owner. It was explained by Lord Justice BOWEN in a case in 1884 as follows: "It is an established principle in equity that when money is directed or agreed to be turned into land or land agreed or directed to be turned into money, equity will treat that which is agreed to be, or which ought to be, done as done already, and impresses upon the property that species of character for the purpose of devolution and title into which it is bound ultimately to be converted" (*a*).

There are three principal classes of transactions which give rise to the application of the doctrine: (*a*) a contract for the sale or purchase of land, (*b*) a trust for the sale or purchase of land, and (*c*) an order of the Court for the sale or purchase of land.

The case of *Haynes* v. *Haynes* illustrates its application in the case of a contract for the sale or purchase of land. "If," said Vice-Chancellor KINDERSLEY in the course of his judgment, "A and B have entered into a contract for the sale and purchase of land, the Court of Chancery which enforces the contract by decreeing specific performance regards the lands as having become in equity by virtue of the contract the property of the purchaser, and treats the vendor as trustee of the land for the purchaser so that the vendor's prior beneficial interest in the land has ceased to exist in him, and he has become only entitled to the purchase-money; in other words, there is a conversion. The first question, therefore, is how far the residuary legatees are justified in their contention that the notice by the company constitutes a contract." Having then considered the authorities on this point, and decided that they showed that the notice to treat did not constitute a contract by the landowner to sell his land, he continued: "Neither upon principle nor upon

(*a*) *Att.-Gen.* v. *Hubbuck*, 13 Q. B. D. at p. 289.

authority can the proposition be maintained that the mere service by the company on the landowner of the notice to treat constitutes a contract by the landowner to sell his land to the company; and if there be no contract to sell there is no conversion. But supposing that the view of the case which I have thus far taken could not be supported, and that the notice to treat does constitute a contract, there still remains another view which appears to me perfectly conclusive against conversion. The only reason why a contract by the owner of land for the sale of it to another operates to effect conversion is that a court of equity will compel him specifically to perform his contract. A court of equity considers that as done which ought to be done, and which it will compel to be done. There is no conversion at law. And why? Not because a court of law disregards the obligation of the contract, for it gives damages for the breach; but simply because a court of law does not enforce specific performance. Conversion as arising from a contract to sell is merely and exclusively the consequence of the application by a court of equity of the doctrine of specific performance. When there can be no specific performance there can be no conversion. If the owner of land has contracted to sell his land to another, and the case is such that for any reason whatever a court of equity would, if a bill were filed, refuse to decree specific performance, in that case there is no conversion. . . . Now, I hold that even if we are to assume that the notice to treat constitutes a contract, and a contract by the landowner to sell his land to the company, a court of equity will not decree specific performance of such a contract. . . . I am clearly of opinion, 1st that the notice to treat served by the company does not constitute a contract by the landowner for the sale of his land; and 2nd, that if it did a bill for specific performance will not lie against the landowner in respect thereof, and that therefore there is no conversion" (*b*).

Similarly, if A and B have entered into a contract for the sale and purchase of land, and B the purchaser dies before conveyance, B's heir, if he died intestate, is entitled to call on B's personal representative to pay the purchase-money to A, and obtain a conveyance of the property to him the heir if, but only if, there is a contract capable of being specifically enforced against B at the date of his death (*c*).

(*b*) See also *Edwards* v. *West*, 7 Ch. D. 858; *Lysaght* v. *Edwards*, 2 Ch. D. at p. 506; *Thomas* v. *Howell*, 34 Ch. D. at p. 169.

(*c*) See *Garnett* v. *Acton*, 28 Beav. at p. 337; *Buckmaster* v. *Harrop*, 7 Ves. at p. 343; *Broome* v. *Monck*, 10 Ves. at p. 606.

It is on this ground that real property belonging to a partnership is deemed to be personalty in equity. "If partners purchase land merely for the purpose of their trade, and pay for it out of the partnership property, that transaction makes the property personalty and effects a conversion out and out. What is the clear principle of this Court as to the law of partnership? It is that on the dissolution of the partnership all the property belonging to the partnership shall be sold, and the proceeds of the sale, after discharging all the partnership debts and liabilities, shall be divided among the partners according to their respective shares in the capital. That is the general rule, and it requires no special stipulation; it is inherent in the very contract of partnership (*d*). This rule is now embodied in s. 22 of the Partnership Act, 1890, which provides that "where land or any heritable interest therein has become partnership property it shall, unless the contrary intention appears, be treated as between the partners (including the representatives of a deceased partner) and also as between the heirs of a deceased partner, and his executors and administrators as personal or moveable and not real or heritable estate."

Unfortunately, however, this principle has not always been consistently applied. An anomalous rule has been laid down as applicable when freeholds are let to a tenant with an option to him to purchase the fee, which he exercises after the lessor's death. It was decided in the case of *Lawes* v. *Bennett* (*e*) in 1785 that when the option is exercised it operates as a conversion as from the date of the lease, so that as between the lessor's real and personal representatives it will be the latter, not the former, who will be entitled to the purchase-money, though of course there is no right to specific performance until the option is exercised. This rule applies whether the lessor dies testate or intestate (*f*). On the other hand, the intermediate rents belong to the real representative (*g*). The rule has often been disapproved, but seems now to be settled law, though it may be excluded by an indication of a contrary intention in the lessor's will (*h*).

On the other hand, if in such a case the lessee dies, and after his

(*d*) *Darby* v. *Darby*, 3 Drew. 495; *Steward* v. *Blakeway*, L. R. 4 Ch. 603.
(*e*) 1 Cox, 167.
(*f*) *In re Isaacs*, [1894] 3 Ch. 506.
(*g*) *Townley* v. *Bedwell*, 14 Ves. 591.
(*h*) *Drant* v. *Vause*, 1 Y. & Coll. 580; *Emuss* v. *Smith*, 2 De G. & Sm. 722; *In re Pyle*, [1895] 1 Ch. 724. Compare *Weeding* v. *Weeding*, 1 J. & H. 424.

death his executor or administrator exercises the option he does so for the next-of-kin or residuary legatee as the case may be, the property being actually personalty at the date of the lessee's death. The rule in *Lawes* v. *Bennett* has nothing to do with this case, so that even if the executor or administrator is also the heir-at-law, it would not be his property when he exercises the option (*i*).

Conversion by Trust for Sale.

In re LORD GRIMTHORPE, BECKETT *v.* LORD GRIMTHORPE.

([1908] 2 Ch. 675.)

A trust for the sale of real estate effects an equitable conversion of the real estate into personalty if the trust is enforceable, but not otherwise.

By his marriage settlement made in 1845 Lord Grimthorpe conveyed real estate to trustees, subject to the prior life interests of his parents therein, to the use of the settlor for life, and after his death to the use of the trustees upon trust to sell and invest as therein mentioned and to hold the investments upon trusts for the benefit of the settlor's wife and children, with an ultimate trust for the settlor, his executors, administrators, and assigns. The settlor's wife died in December, 1901. The settlor died in April, 1905, without having had any issue, and all the purposes for which the sale and conversion had been directed had at this date failed. By his will the settlor devised "his interest" in the estates the subject of the settlement to his successor Lord Grimthorpe in fee.

The Court of Appeal held, that since in the events which had happened there was no enforceable trust for sale there was no equitable conversion, but even if there had been, the property was reconverted by the devise in the settlor's will.

(*i*) *In re Adams and the Kensington Vestry*, 27 Ch. D. 394; *Edwards* v. *West*, 7 Ch. D. 858.

A trust for the sale or purchase of real estate causes an equitable conversion for the same reason as a contract, namely, that equity will enforce performance of the trust. It follows that if there is no enforceable trust there is no conversion.

This was the ground on which the leading case was decided. "At the very moment that the trustees came into possession," said Lord Justice COZENS-HARDY, "and when alone any duty or power was vested in the trustees, there was no enforceable trust; for I think it is well settled that as between the executors and the heir, or putting it more generally, between the real and personal representatives of a deceased person, there is no equity. Or, in other words, the executors could not have maintained an action on the settlor's death against the heir-at-law, requiring him to sell the property and to pay the proceeds over to the executors as part of the settlor's residuary estate. This seems to me to be reasonably plain in principle, and I think there is ample authority for it, the real test being this: aye or no, was there an enforceable trust for sale? If there was, then no doubt conversion would take place, and would take place with all its full consequences and effects; but if there was no enforceable trust for sale, then the property is, to use a phrase which is commonly found in some of the old authorities, 'at home.' It was real estate *de facto*, and the Court will not, in favour of the personal representative and as against the real representative, convert it into money. The case of *Davenport* v. *Coltman* (*a*), which I mentioned in the argument, seems to me to be, if necessary, a sufficient authority on that point. We have been pressed with the case of *Attorney-General* v. *Hubbuck* (*b*) and with the case of *Clarke* v. *Franklin* (*c*), and other cases, but they are broadly distinguished from the present by that which is a vital difference; in all those cases there was an enforceable trust; there were people who could require the property to be converted, and the trustees had both a power and a duty to discharge; and then the doctrine of notional conversion applied with all its full consequences. When once you get to this fact, that there was no human being who, from the first moment when the trust came into operation till the present day, could have enforced the trust for sale, it seems to me that the whole argument fails, and that this was, in the events which have happened, real estate of the settlor which passed under his will as such."

Unfortunately, here also the principle has not always been clearly

(*a*) 12 Sim. 610. (*b*) 13 Q. B. D. 275. (*c*) 4 K. & J. 257

brought out in the cases on the subject, many of which seem to make the equitable conversion depend on the intention of the settlor (*d*). But it is clear that however plainly the settlor has expressed an intention to make real property devolve as personal or *vice versâ*, there will be no equitable conversion unless there is an absolute trust for sale. For example, in *In re Walker* (*e*) the testator bequeathed to trustees all his residuary personal estate on trusts for sale and conversion, and to "hold and apply the said moneys upon the trusts and in the manner upon and in which the same would be held and applicable if they had arisen from a sale of the said premises hereinbefore devised in settlement under the Settled Land Act, 1882," *i.e.* as real estate. Mr. Justice PARKER, in deciding that the property was not converted, said, "Of course the legislature can, by a simple enactment to that effect, make personalty devolve and pass to a series of persons successively for the same interests as if it had been realty; but the only manner in which an individual can do this is by the creation of an imperative trust for its conversion into realty to uses which will secure the devolution or create the estates which he desires to create. A mere declaration that personalty shall devolve or pass to persons successively as realty is in itself inoperative, for the whole doctrine of conversion turns on the maxim that equity considers to have been done what ought to have been done pursuant to the trust; and a mere declaration such as I have mentioned creates no obligation as to dealing with the property in one way or another." That is to say, unless there is some person who has a right to come to a court of equity and compel an actual conversion there is no equitable conversion.

When a trust in a will for the conversion of realty into personalty partially fails, to the extent of the failure there is a resulting trust in favour of the heir-at-law. So that if the testator gives real estate to trustees upon trust to sell and divide the proceeds between A, B, C, and others, and A dies before the testator, his share of the proceeds of sale will belong to the testator's heir-at-law. This was decided in the case of *Ackroyd* v. *Smithson* (*f*), in which Lord ELDON, then JOHN SCOTT, made his celebrated argument for the heir-at-law. "Mr. Scott," said one of the judges when soon after he attempted

(*d*) See, *e.g.*, *Ackroyd* v. *Smithson*, 1 Bro. Ch. 503; *Smith* v. *Claxton*, 4 Madd. 484.

(*e*) [1908] 2 Ch. 705. See also *Hyett* v. *Mekin*, 25 Ch. D. 735; *per* STIRLING, J., in *Goodier* v. *Evans*, [1893] 3 Ch. at p. 462.

(*f*) 1 Bro. Ch. 503; White and Tudor, L. C. Eq. 7th ed., vol. i., 372.

to argue the reverse doctrine, "I have read your argument in that case of *Ackroyd* v. *Smithson*, and I defy you or any man in England to answer it. I won't hear you!" (*g*) Conversely, when a trust for the conversion of money into realty in a will partially fails, to the extent of the failure there is a resulting trust in favour of the next-of-kin (*h*).

It was held in *In re Richerson* (*i*) that where realty is devised upon trust to sell and hold the proceeds of sale upon trusts some of which fail, if part only of the realty has been sold, the rest remaining land, the heir takes both the land and the proceeds of sale as personalty, so that if the heir is dead his next-of-kin will be entitled to the whole. But as to the land, the decision appears contrary to principle. In the converse case where money is bequeathed upon trust to buy and hold freehold land upon trusts some of which fail, it has been held in a case in which the whole of the money had been laid out in the purchase of land that there was a resulting trust of the land bought in favour of the next-of-kin, who took it as realty, so that he being dead his heir took the whole (*k*).

Where a trust contained in a deed for the conversion of property partially fails the rule is different; to the extent of the failure the property results in the opposite way to what it would have done had it been contained in a will (*l*).

Conversion by Order of the Court.

BURGESS *v.* BOOTH.

([1908] 2 Ch. 648.)

An order of the Court rightfully made for the sale of real estate operates as an equitable conversion of the property as from the date of the order, whether it has been actually sold or not.

In this action an order was made declaring that the plaintiff, who was an infant, was (subject to certain prior interests)

(*g*) Campbell, Lives of the Chancellors, vol. vii., 56.
(*h*) *Cogan* v. *Stephens*, 5 L. J. Ch. 17. (*i*) [1892] 1 Ch. 379.
(*k*) *Curteis* v. *Wormald*, 10 Ch. D. 172.
(*l*) *Griffith* v. *Ricketts*, 7 Hare, 299; *Clarke* v. *Franklin*, 2 K. & J. 257.

entitled to an estate in fee simple in certain real property, the subject of the suit. Subsequently an order was made that for the purpose of paying the taxed costs of various parties such sums as the judge should direct should be raised by mortgage of the property, or that it should be sold and that the moneys to arise by such sale should be paid into court. Pursuant to this order the whole of the property was sold in 1876, and after payment of the costs in question there was left in Court a sum of £1569 3*s*. 2*d*. consols, and £83 17*s*. cash, representing accumulated income. The plaintiff attained twenty-one and died intestate on September 22nd, 1905, leaving a widow and five children surviving him. On a petition for payment out of the £1569 3*s*. 2*d*. consols the question arose whether these proceeds of sale descended to the plaintiff's heir-at-law, or whether they went as personalty to his next-of-kin.

The Court of Appeal (reversing the decision of EVE, J.) held, that since an order of the Court properly made for the sale of real estate operates to convert the property in equity as from the date of the order, the proceeds of sale devolved as personalty.

It will be observed that in this case there had been an actual conversion of the real property, and what the plaintiff's heir-at-law was asking the Court to say was, that since more of the property had been sold than was actually necessary to attain the purpose for which the sale was directed, there was an equitable or notional reconversion of the surplus proceeds of sale. And he was able to cite a decision of the Irish Court in his favour in a case of *Scott* v. *Scott* (*a*). But the Court of Appeal declined to follow that authority. The Master of the Rolls (COZENS-HARDY, L.J.) said: "EVE, J., in deciding this case, has preferred the decision of the Irish Vice-Chancellor in *Scott* v. *Scott* to a decision of Sir GEORGE JESSEL in *Steed* v. *Preece* (*b*). It may be, but I am not quite sure that it was, only a dictum of Sir GEORGE JESSEL; but it was a dictum which, so far as I am aware, has never been qualified or disapproved of by any judge of the English bench, and it is a dictum which has been followed by decisions in courts of first instance, and I think in this Court. As I read *Hyett*

(*a*) 9 L. R. Ir. 367. (*b*) L. R. 18 Eq. 192.

v. *Mekin* (*c*), KAY, J., really did decide the point where Sir GEORGE JESSEL had only expressed his opinion; and in the case which came before me when I was a judge of first instance, *Hartley* v. *Pendarves* (*d*), I undoubtedly gave a decision which covers this point. There timber on a certain estate had been sold under an order of the Court. I think both the tenant for life and the remainderman were lunatics, and the question was whether this was real estate of the tenant in tail in remainder or not. This being so, I said: 'I think that where timber has been rightfully sold under an order of the Court all the consequences of conversion must follow, and that there is no equity as between the heir and the legal personal representative of the owner in fee'; and I referred to Sir GEORGE JESSEL'S view. Reading 'land' for 'timber,' that is exactly the position in this case. But it is clear that this Court, in the case of *In re Grange* (*e*), arrived at a decision absolutely impossible to reconcile with the Irish decision of *Scott* v. *Scott*, and I think conclusive of the present case. There a mortgagee sold the property under a power of sale in the mortgage, the mortgagor becoming lunatic after the mortgage, but before the sale. He died intestate, and there, notwithstanding that the language of the mortgage deed said that the surplus of the proceeds was to be paid to the mortgagor, his heirs or assigns, this Court held without any hesitation, agreeing with PARKER, J., that 'There are no trusts for reconversion into real estate, and there is no equity between heir-at-law and next-of-kin, and there is no ground for holding that this is anything else than what it professes to be, and is, in fact, namely cash.' In my judgment every word in that judgment applies, and I think we ought now to lay it down in a manner which admits of no doubt that Sir GEORGE JESSEL'S decision in *Steed* v. *Preece* goes the full length of those passages which I have cited."

In other words, there can be no equitable conversion or equitable re-conversion unless some person has a right to come into a court of equity and have an actual conversion or re-conversion made. Such a right must be founded on something—a trust or a contract or an order of the Court, and the plaintiff's heir-at-law in *Burgess* v. *Booth* had none of these.

It has been pointed out above that an actual conversion had been made in the leading case, and that the property was actually personalty at the date of the plaintiff's death; but the position would have been

(*c*) 25 Ch. D. 735. (*d*) [1901] 2 Ch. 498. (*e*) [1907] 2 Ch. 20.

just the same if no sale had actually taken place. This is shown by the case of *In re Dodson* (*f*) decided in the same year, where it having been determined that one Edwin Yates was entitled to a share of some real estate, an order was made in 1901 for its sale. Edwin Yates died in 1903 intestate, at which date only a part of the real estate had been sold. Mr. Justice EVE held that the property remaining unsold passed on his death to his legal personal representative as personal estate.

This ruling has been approved in a subsequent case by the Court of Appeal (affirming a decision of WARRINGTON, J.), in which the Master of the Rolls said, "An order is made by a court within its jurisdiction ordering a sale of certain property in which A, B, and C are interested in equal shares. Before the sale takes place A dies intestate. Is A's one-third share real estate or personal estate? In my opinion it is personal estate. It is settled law that if a testator devised real estate to his trustees upon an absolute trust to sell and divide the proceeds between A, B, and C, it makes no matter that at the death of A the property was not sold. A's only right, in the view of a court of equity, is to have one-third of the monies produced by a sale. It makes no difference that there may be a power to postpone the sale, or whether A dies immediately after the death of the testator, or some years after but before the property is sold. In that case it cannot be disputed that A's personal representative takes his share. What difference is there in point of principle if you have, not a testator who imposes a trust, but a Court which in the presence of A, B, and C, makes an absolute order that the property be sold? Exactly the same result must follow: from that moment of time the interests of A, B, and C are interests only in the money to be produced by the sale ordered by the Court. I should, therefore, even if there had been no authority on this point, have come to the conclusion that the decision of WARRINGTON, J., was right; but this is not a case which we ought to decide on strict grounds of principle, for it is of the last importance in dealing with titles to land to have regard to long-standing decisions. In 1874, HALL, V.C., in *Arnold* v. *Dixon* (*g*), in terms decided this very point. That was thirty-six years ago. The matter came before KAY, J., in 1884 in *Hyett* v. *Mekin* (*h*), and he gave a long judgment in which this point was dealt with. In 1908 absolutely the same point was decided by EVE, J.,

(*f*) [1908] 2 Ch. 638. (*g*) L. R. 19 Eq. 113.
(*h*) 25 Ch. D. 735.

in *In re Dodson* (*i*). Even if I had any doubt, which I have not, as to the accuracy of these decisions, I should hesitate long before coming to a conclusion which would tend to impair the authority of decisions on which I have no doubt many people have acted during the last thirty years " (*k*).

The rule above stated does not apply if the sale is ordered or is made under the provisions of a statute the effect of which is to preserve the rights existing before sale. On a sale under the Lands Clauses Acts, for example, where the purchase-money is paid into Court under s. 69 of the Act of 1845, if the person entitled dies before the money can be claimed by him the right to it will devolve on the heir-at-law (*l*). But this is simply because the terms of s. 69 show that this was the intention of the legislature. The same thing applies to a sale under the Partition Acts (*m*).

Election.

COOPER *v.* COOPER.

(1874, L. R. 7 H. L. 53.)

CODRINGTON *v.* CODRINGTON.

(1875, L. R. 7 H. L. 854.)

When a gift is conferred by an instrument by which the property of the donee is disposed of without his authority, the donee is under an obligation either to conform to the instrument as a whole and confirm the disposition of his property or to repudiate the instrument as a whole.

Cooper v. *Cooper.*

The testatrix had power to appoint the proceeds of sale of Pain's Hill Estate, Cobham, among her three sons William, Rowland, and Frederick, before they attained the age of twenty-five.

(*i*) [1908] 2 Ch. 638. (*k*) *Fauntleroy* v. *Beebe*, [1911] 55 Sol. Jour. 497.
(*l*) *Kelland* v. *Fulford*, 6 Ch. D. 491.
(*m*) *Foster* v. *Foster*, 1 Ch. D. 588; *Mordaunt* v. *Benwell*, 19 Ch. D. 302; *In re Norton*, [1900] 1 Ch. 101.

She, by deed executed before either of them had attained twenty-five, appointed the property equally among them subject to a power of revocation. She then made a will by which she appointed Pain's Hill Estate to William. She then made a codicil by which she gave £1000 on trust for Rowland's two children, and later another codicil by which she gave them other property. She died long after all the sons had attained twenty-five, Rowland having predeceased her intestate. The result was, reading her will and codicils as one instrument, that by her will she had given Rowland's children's share of Pain's Hill Estate to her son William, and by the same will had given them part of her own property. The House of Lords, affirming the Court of Appeal, held that they were bound to elect.

Codrington v. *Codrington.*

By a post-nuptial settlement made in 1850 between a husband and wife of the first part, the wife's father of the second part, and the trustees of the third part, certain property of the husband and the father was settled on trusts for the husband for life, then to the wife for life and then to the children of the marriage, and certain property in which in the events which had happened the wife had a reversionary interest expectant on the death of her father was settled on the like trusts. This property of the wife, being a reversionary interest of a married woman, she could not, as the law then stood, be bound by the assignment of it. The result was that the deed gave her property to her husband and the children, and gave the husband's property to her for her life. The marriage was dissolved by decree of the Court, and she commenced an action against her husband, her children and the trustees, praying that the assignment by her in the settlement of her property might be declared inoperative. The House of Lords, affirming the Court of Appeal, held that she was put to her election either to accept or reject the settlement as a whole, and, she having elected against the settlement, that the interest to which she would have been entitled

under the settlement ought to be applied in making compensation to the persons disappointed by her election.

The principle on which the doctrine of election is based was said by Lord HATHERLEY in the first of the above cases to be that "there is an obligation on him who takes a benefit under a will or other instrument to give full effect to that instrument under which he takes a benefit; and if it be found that that instrument purports to deal with something which it was beyond the powers of the donor or settlor to dispose of, but to which effect can be given by the concurrence of him who receives a benefit under the same instrument, the law will impose on him who takes the benefit the obligation to carry the instrument into full and complete force and effect" (*a*).

In the second Lord CHELMSFORD gave a similar explanation. "The principle is that there is an implied condition that he who accepts a benefit under an instrument must adopt the whole of it, conforming to all its provisions and renouncing every right inconsistent with it" (*b*).

Mr. Justice CHITTY in a later case expressed the doctrine in slightly different language, though the meaning is the same. "The principle is that a man shall not be allowed to approbate and reprobate; that if he approbates he shall do all in his power to confirm the instrument which he approbates" (*c*).

That is to say, the effect of the doctrine is that a man is not allowed to say that an instrument is good so far as it makes a gift to or confers a benefit on him, and bad in so far as it imposes an obligation on him or disposes of his property. It is either wholly good or wholly bad, and he must make his election between the two.

The doctrine was definitely established by the cases of *Noys* v. *Mordaunt* (*d*), decided by Lord COWPER in 1706, and *Streatfield* v. *Streatfield* (*e*), decided by Lord TALBOT in 1735. It is said to have been borrowed from the Roman Law, but so far as the doctrine existed in the Roman Law it was confined in its application to gifts by

(*a*) *Cooper* v. *Cooper*, L. R. 7 H. L. at p. 70.

(*b*) *Codrington* v. *Codrington*, L. R. 7 H. L. at p. 866.

(*c*) *In re Lord Chesham*, 31 Ch. D. at p. 473. See also *per* NORTH, J., [1892] 1 Ch. at p. 399. The doctrine is known in Scots Law as the doctrine of approbate and reprobate. See for a recent example, *Douglas-Menzies* v. *Umphleby*, [1908] A. C. 224.

(*d*) 2 Vern. 581; White and Tudor, L. C. Eq., 7th ed., vol. i. 414.

(*e*) Cas. t. Talbot, 176; *ibid.*

will, whereas in English law, though it appears to have been thought at one time that it only applied to wills (*f*), it has long since been settled, as the leading cases show, that it is equally applicable to gifts by deed.

In order to raise a case of election, the intention of the donor to dispose of property not his own must appear on the face of the instrument (*g*). If this appears it is immaterial whether he knew the property to be another's or not. "An assumption of power to give what a testator knows not to belong to him is at least as much a ground of election as a disposition of what he has mistakenly conceived to be his own" (*h*).

There can likewise be no case for election unless two things concur—the property of the person subjected to the obligation to elect must be disposed of by the instrument under which the question arises, and by the same instrument that person must be given an interest in somebody else's property. For example, suppose A has power to appoint a fund of £6000 among his children, and in default of appointment the fund is given to them in equal shares. If A appoints £3000 among his children and the other £3000 to strangers, the children are not put to their election, since A has not given them any of his own property (*i*). If, however, in addition to the £3000 appointed to them A had given some of his own property to his children by the same deed or will as that by which he exercised the power, they would have been obliged to elect (*k*).

Further, there is no case for election unless the donee has such an interest in the property disposed of as to be able to make the assignment which the instrument purports to make. For example, in *In re Lord Chesham* (*l*) a testator who died in 1882 by his will made in 1878 gave certain chattels upon trust for sale for the benefit of his two younger sons, and all the residue of his real and personal estate to his eldest son. The chattels which were so bequeathed away from the eldest son were heirlooms which had been settled by a deed executed in 1877, upon trust to go and be held with a mansion of which the eldest son was tenant for life. Lord CHESHAM, the eldest son, claimed the property given him by the will, and the question was

(*f*) Ashburner, Equity, 662.

(*g*) See *per* Lord CAIRNS in *Codrington* v. *Codrington*, at p. 862; *per* PARKER, J., in *In re Harris*, [1909] 2 Ch. at p. 209.

(*h*) *Per* Sir W. GRANT, *Welby* v. *Welby*, 2 V. & B. at p. 199.

(*i*) *Bristowe* v. *Warde*, 2 Ves. Jr. 336.

(*k*) *Whistler* v. *Webster*, 2 Ves. Jr. 367.

(*l*) 31 Ch. D. 466.

raised whether he was not put to his election between the benefits given him by the will and the chattels which were bequeathed away from him by the same will. Mr. Justice CHITTY held that he was not. "Inasmuch as Lord CHESHAM has no interest in the chattels, which he can make over for the benefit of his younger brothers, it appears to me that no case for election really arises," he said. "Election means free choice. He cannot be compelled directly or indirectly to take under the settlement and against the will. But when he takes under the will there is nothing for him to give up, for there is nothing which he can give up."

It appears from what has been said that the doctrine is applicable to a void appointment under a power, and the question has been raised whether it is applicable when an appointment has been made which is void for remoteness as infringing the rule against perpetuities. Suppose, for example, A by his will gives property upon trust to B for life, and after his death upon trust for such of his children or other issue (such issue to be born within the limits allowed by law) as B shall appoint, and in default of appointment upon trust for B's children equally. In purported exercise of this power B appoints to one of his children, C, for life, and after his death upon trust for C's children then living, and by the same instrument B gives property of his own among all his children. The appointment in favour of C's children is void, since it has to be read into the will creating the power and consequently infringes the rule against perpetuities. Are B's children bound to elect? Mr. Justice KEKEWICH held that they were (*m*). "I do not myself see," he said, "what the difference in principle is between an appointment becoming void for that reason and an appointment . . . to persons who are not objects of the power. Whether the appointment fails because it offends the rule of law or whether it fails because it offends against the rule of construction of the will, which is that the donee may appoint to certain persons and no others, seems to me, with all deference to those who entertain a contrary opinion, not to matter one jot. In either case it fails, and on its failing the property goes to those who take in default of appointment." But this ignores the essential difference that if a gift of the former kind were upheld, indirect validity would be given to a disposition of property which the law declares void on grounds of public policy, whereas in the latter case the gift is innocent. ' ' In the one case the testator openly and avowedly breaks the general

(*m*) *In re Bradshaw*, [1902] 1 Ch. 436.

law and asks the Court of Equity to participate in his illegal act by giving effect to it; in the other he merely attempts to exceed the limits set to his power by the donor thereof in the one particular case, limits which the donor might have extended without any breach of the general law" (*n*). And after several expressions of dissent from other judges of first instance (*o*), Mr. Justice KEKEWICH'S view has been definitely overruled by the Court of Appeal, and it is now settled that the doctrine of election does not apply to such a case (*p*).

An election may be inferred from the conduct of the party subjected to the obligation; it need not be made by a formal instrument or even expressly. But "election by conduct must be by a person who has positive information as to his rights to the property, and with that knowledge really means to give that property up" (*q*).

It is now well settled that if the person put to his election decides to retain his own property—elects "against the instrument," as it is called—he does not necessarily forfeit the benefit coming to him from the author of the instrument. Equity requires that he shall compensate the persons disappointed by his election, but no more. So that if his own property which he retains is worth less than the benefit conferred on him he will not lose the whole of the latter. The Court will sequester or impound it to compensate those whom his election disappoints, and the surplus will be restored to him (*r*).

Where the person put to election is under disability a complication arises. In the case of an infant the usual practice is to direct an inquiry what would be the most beneficial to the infant (*s*). In other cases the Court has elected for the infant without a reference to chambers (*t*). In the old leading case, *Streatfield* v. *Streatfield* (*u*) the Court ordered the infant to elect on attaining twenty-one.

Where a married woman is entitled for her separate use under the Married Women's Property Act, 1882, she has the same capacity to

(*n*) *Per* FARWELL, J., *In re Oliver's Settlement*, [1905] 1 Ch. 191.

(*o*) *In re Oliver's Settlement, supra; In re Beale's Settlement*, [1905] 1 Ch. 256; *In re Wright*, [1906] 2 Ch. 288; *In re Nash*, [1909] 2 Ch. 450.

(*p*) *In re Nash*, [1910] 1 Ch. 1.

(*q*) *Per* JAMES, L.J., *Wilson* v. *Thornbury*, L. R. 10 Ch. App. 239.

(*r*) See Mr. Swanston's note to *Gretton* v. *Haward*, 1 Swanst, 441; the same view was taken in the House of Lords in *Ker* v. *Wauchope*, 1 Bli. at p. 25.

(*s*) *Brown* v. *Brown*, L. R. 2 Eq. 481.

(*t*) *Blunt* v. *Lack*, 26 L. J. Ch. 148; *In re Montagu*, [1896] 1 Ch. 549 (order); Seton, Decrees, 5th ed., p. 1343.

(*u*) Cas. t. Talbot, 176.

elect as a *feme sole* or a man. Where she is not so entitled generally the Court will direct an inquiry what is most beneficial for her, and she will be required to elect within a limited time (*x*); but the inquiry may be dispensed with (*y*). In the case of a lunatic the Court will make an election on his behalf (*z*).

Election excluded by Intention.

In re VARDON'S TRUSTS.

(1885, 31 CH. D. 275.)

The doctrine of election is founded on a presumed intention that effect shall be given to every part of an instrument, but this presumption is rebutted where the instrument indicates an intention inconsistent with it.

An ante-nuptial settlement was made in 1860 on the marriage of Mr. Walker and Miss Vardon, then an infant, by which £5000 was settled by her father, Mr. Vardon, upon trust that the income should be paid to her for her life for her separate use with restraint upon anticipation, and Mr. Walker and she covenanted to settle all her after-acquired property upon trusts the effect of which was to give the first life interest to him, then a life interest to her, with remainder to the issue of the marriage. The settlement was not made with the sanction of the Court under the Infant Settlements Act, 1855. The question was whether she could repudiate the settlement and take absolutely a legacy of over £8000 bequeathed to her in 1883 for her separate use without compensating out of her life estate in the £5000 the persons disappointed by her refusal to settle the £8000. The Court of Appeal decided that the lady was not put to her election, because the restraint upon anticipation indicated an intention to that effect.

(*x*) See *Cooper* v. *Cooper*, *supra*, at pp. 55, 67, 69; White and Tudor, L. C. Eq. 8th ed., vol. i. 466.

(*y*) See *Hamilton* v. *Hamilton*, [1892] 1 Ch. at p. 408.

(*z*) *Wilder* v. *Pigott*, 22 Ch. D. 263; *In re Earl of Sefton*, [1898] 2 Ch. 378.

It will be observed that the settlement had been executed by Mrs. Walker while she was an infant, that the sanction of the Court had not been obtained under the Infant Settlements Act, 1855, and that consequently she was entitled to repudiate it. At the same time she claimed she was entitled to retain the benefit conferred on her by it, because it was settled for her separate use without power of anticipation. The question was whether her claim was valid, or whether she was bound to elect which she would do.

The principle on which the Court of Appeal proceeded in deciding the case was this: "The doctrine of election rests, not on the particular provisions of the instrument which raises the election, but on the presumption of a general intention in the authors of an instrument that effect shall be given to every part of it, 'the ordinary intent,' to use the words of Lord HATHERLEY in *Cooper* v. *Cooper*, 'implied in every man who affects by a legal instrument to dispose of property that he intends all that he has expressed.' This general intention is not repelled by showing that the circumstances which in the event gave rise to the election were not in the contemplation of the author of the instrument. It may, however, be repelled by a declaration in the instrument itself of a particular intention inconsistent with the presumed and general intention" (*a*).

"What," said Lord Justice FRY, "is the force and effect of this restraint on anticipation? It provides that nothing done or omitted to be done by Mrs. Walker at any given time shall deprive her of the right to receive from the trustees the next and every succeeding payment of the income of the fund as it becomes due. But if she be put to her election, and if by her election she deprives herself of the right to receive subsequent payments of the income until her husband and children are compensated, it follows that she has by the act of election or by the default in performing her covenant deprived herself of the benefit of the income in the way of anticipation, which is the very thing which the settlement declares that she cannot do. This settlement, therefore, in our judgment contains a declaration of a particular intention inconsistent with the doctrine of election, and therefore excludes it. This conclusion appears to us consonant with the general understanding of men and women in England at the present day. A provision for a married woman who is restrained from anticipation is regarded

(*a*) See *Cooper* v. *Cooper*, *supra*, and p. 404 of Mr. Swanston's notes to the cases of *Dillon* v. *Parker* and *Gretton* v. *Haward*, 1 Swanst. 359 *et seq.*

as giving the highest security known to the law that the married woman shall, come what may to herself and her husband, have from half-year to half-year some moneys paid into her very hands to increase her comforts or supply her with maintenance. And this security would be seriously imperilled if by the doctrine of election she could be compelled to take in lieu of this inalienable provision a sum of money or other benefit which she might forthwith make over to her husband or squander at her choice." This is illustrated by supposing Mrs. Walker, put to her election, taking £8000 and losing her annual income of the £5000. In that case, if she lost the £8000 "she might pass the rest of her life in that very poverty and need against which the inalienable provision of the settlement was designed to protect her."

Had it not been for the indication of intention to exclude the application of the doctrine of election by imposing the restraint upon anticipation, however, Mrs. Walker would have been bound to elect. And this attracts attention to a development of the doctrine which the case illustrates. In the older cases there was always an attempt on the part of the author of the instrument to dispose of property which did not belong to him. But the doctrine is equally applicable to cases in which a person purports to dispose of property which is really his or her own, but of which he or she, owing to some personal disability such as coverture or infancy, cannot make a binding disposition. If by the same instrument a benefit is conferred on him or her, he or she must make an election either to confirm the voidable disposition and take the benefit, or to repudiate the instrument as a whole and to compensate the disappointed parties out of the benefit. Had it not been for the restraint upon anticipation in *In re Vardon's Trusts*, since Mrs. Walker got a life interest in the £5000, she would have been bound to confirm the settlement and bring in her £8000 according to her voidable covenant or to repudiate it as a whole, taking her £8000 and giving up the life interest in the £5000 by way of compensation to the husband and children of the marriage (*b*).

Though its application is somewhat different, the principle applied in these cases is the same; equity does not permit a person both to approbate and reprobate an instrument at the same time (*c*).

(*b*) *Hamilton* v. *Hamilton*, [1892] 1 Ch. 396.

(*c*) *In re Vardon's Trusts* was followed in *Hamilton* v. *Hamilton*, *supra*; and in *Haynes* v. *Foster*, [1901] 1 Ch. 361. See also *Greenhill* v. *North British Insurance Co.*, [1893] 2 Ch. 474; and *In re Hodson*, [1894] 2 Ch. 421.

Satisfaction and Ademption.

In re TUSSAUD'S ESTATE, TUSSAUD *v.* TUSSAUD.

(1878, 9 Ch. D. 363.)

The doctrine of satisfaction is founded on the presumed intention of the donor, but this presumption may be rebutted whether in a deed or a will by parol evidence of intention.

In 1867 F. Tussaud, on the marriage of his daughter, Mrs. White, covenanted with her trustees that his executors should, within six months after his or (if she survived him) his wife's death, transfer to the trustees the sum of £2000 consols to be held on the trusts of the settlement, which were (1) for Mrs. White's appointees, and in default of appointment (2) for her for life for her separate use, then (3) for her husband for life, and after the death of the survivor (4) for the children, sons at twenty-one, daughters at twenty-one or marriage, and in default of children (5) for Mrs. White absolutely.

In 1871 F. Tussaud paid the trustees £1000, thereby performing his covenant to the extent of a moiety. In 1873 F. Tussaud died, having by his will and codicil, both dated in 1873, bequeathed £2800 to the trustees of his will in trust for (1) Mrs. White for life for her separate use without power of anticipation, and after her decease (2) for such of her children as should attain twenty-one in equal shares, and in default of children (3) for testator's sons. The Court of Appeal, reversing Jessel, M.R., decided that parol evidence of the testator's intention was admissible to rebut the presumption of satisfaction, but independently of it, that the provision for Mrs. White under the will and codicil was not to be considered as a satisfaction of F. Tussaud's liability under the covenant in the settlement.

The following definition of satisfaction, given or rather adopted in White and Tudor's Leading Cases (*a*), was cited with approval by the House of Lords in the case of *Lord Chichester* v. *Coventry* (*b*). "Satisfaction is the donation of a thing with the intention that it is to be taken either wholly or in part in extinguishment of some prior claim of the donee."

The doctrine is applied in two principal classes of cases—first when a debtor confers by will a pecuniary benefit on his creditor; secondly when a father or person filling the place of a parent makes a double provision for a child standing towards him in a filial relation.

With regard to the first class of cases, it was established in the case of *Talbot* v. *Shrewsbury* (*c*), decided in 1714, that "if one, being indebted to another in a sum of money, does by his will give him a sum of money as great as or greater than the debt without taking any notice at all of the debt, this shall nevertheless be in satisfaction of the debt, so that he shall not have both the debt and the legacy." This was put on the ground that "a man shall be intended to be just before he is kind" (*d*); but, as has been pointed out from the earliest times, this is an obviously insufficient reason when the testator's estate is sufficient to pay both debts and legacies (*e*). Being based on such an unsatisfactory foundation, it is not surprising that the doctrine began to meet with disapproval almost as soon as it was laid down, and the Courts made use of almost any excuse to avoid the necessity for applying it. Thus within a very few years it was held that since the rule is based upon a presumed intention, if there is any indication of a contrary intention it will not apply; so that if there is a direction in the will to pay the testator's debts and legacies there will be no satisfaction (*f*), and this has in later times been extended to a direction to pay debts alone (*g*). For a similar reason the presumption does not arise where the debt is contracted after the date of the will. Moreover, it will not apply unless the legacy is of an amount equal to or greater than and as beneficial to the creditor as the payment of the debt; therefore a debt will not be satisfied by a legacy of uncertain value, such as a share of residue (*h*). For this reason, also, if

(*a*) 7th ed., vol. ii. 379.
(*b*) L. R. 2 H. L. 71, at p. 95.
(*c*) Pr. Ch. 394; White and Tudor, L. C. Eq., 7th ed., vol. ii. 375.
(*d*) See Salkeld, 155.
(*e*) *Per* Lord COWPER, Salkeld, *supra*; and L.C. KING, *Chancey's Case*, 1 P. Wms. 408; White and Tudor, L. C. Eq., 7th ed., vol. ii. 376.
(*f*) *Chancey's Case, supra*, decided in 1717.
(*g*) *Bradshaw* v. *Huish*, 43 Ch. D. 260.
(*h*) *Crichton* v. *Crichton*, [1896] 1 Ch. 870.

a creditor who would be payable immediately on the testator's death is left a legacy payable one month after the testator's death, there is no satisfaction (*i*); and similarly in 1895 Mr. Justice STIRLING decided that a debt of £300 payable within three months of the testator's death was not satisfied by a legacy of £400 as to which no time was expressed for payment; for in that case the legacy is not payable until one year after the testator's death (*k*). And if this decision be correct it seems to have almost abrogated the rule altogether. On the other hand, Mr. Justice SWINFEN EADY has since decided that a debt of £150 payable on demand with interest at 5 per cent. was satisfied by a legacy of £400, though no time was specified for payment of the legacy, and no mention was made of interest (*l*). This was on the ground that "a legacy to a creditor of an amount equal to or greater than the debt is *primâ facie* to be considered a satisfaction of the debt; that "where the legacy is in satisfaction of a debt, and no time is fixed for payment of the legacy, it carries interest from the death of the testator;" that though "a legacy that ought to be deemed a satisfaction must take place immediately after the death of the testator," yet a legacy is within this "if it is an immediate legacy, although of course only payable in due course of administration and after debts and funeral expenses have been provided for." But it seems impossible to reconcile this decision with that of Mr. Justice STIRLING.

As regards cases of the second class above referred to, there are several sub-classes: (1) where a father gives by his will a legacy to a child, and then makes a provision for that child in his lifetime; (2) where a father agrees to make a provision for a child, and subsequently before he has performed the agreement makes a gift to that child by his will; (3) where a father contracts a debt to a child, and the debt being unpaid subsequently makes a provision for the child in his lifetime; the doctrine being equally applicable in each case to a person who, though not a father, stands *in loco parentis*. The first of these three sub-classes, the satisfaction of a legacy by a portion, is often called ademption; the others are called satisfaction in the stricter sense. But they are all based on the same theory—that it cannot be presumed that a father intends to make a double provision for the same child—on the "leaning against double portions," as it is termed.

(*i*) *Clark* v. *Sewell*, 3 Atk. 96. (*k*) *In re Horlock* [1895] 1 Ch. 516.
(*l*) *In re Rattenberry*, [1906] 1 Ch. 667.

The satisfaction of a legacy by a portion is illustrated by a case in which a father by his will gives a legacy to each of his children, and then subsequently on the marriage of a daughter settles a sum of money in trust for her and her children. On his death her legacy will be deemed to have been satisfied or adeemed by the portion advanced on her marriage (*m*). It is now settled, however, that if the amount of the portion is less than the amount of the legacy the latter is only adeemed *pro tanto* (*n*).

In connection with this kind of satisfaction there is a distinction which must be noticed with regard to the persons who benefit by the application of the doctrine. If a legacy to a child is adeemed by an advance in the lifetime of the testator, all the residuary legatees, whether children of the testator or strangers, take the benefit of the ademption (*o*). But if a gift of a share of the residuary estate is adeemed by an advance, only children entitled to a share of the residuary estate are entitled to benefit thereby and not strangers. So where a testator directed his trustees to pay one moiety of the residuary estate to his widow during her life, and to divide the other moiety between his children in equal shares, and after making his will he made advances to some of his children, the Court of Appeal held that the advances could only be brought into account for the benefit of the children among themselves, and that the widow was not entitled to have her income increased by having them brought into account in estimating the residue (*p*).

The second of the sub-classes, the satisfaction of a portion (or rather a portion debt) by a legacy, is illustrated by the leading case of *In re Tussaud* (*q*). It is to be observed that it can only arise when a parent, on the marriage of his child or otherwise, has agreed to make a provision for that child, and dies without having performed the agreement, but leaving a sum of money to or in trust for the child by his will. If the agreement has been performed in the parent's lifetime there is nothing to satisfy, and no room, therefore, for the application of the doctrine.

(*m*) *Ex parte Pye*, 18 Vesey, 140; see also *Durham* v. *Wharton*, 3 Cl. & F. 146; *In re Furness*, [1901] 2 Ch. 346; and compare *In re Smythies*, [1903] 1 Ch. 259.

(*n*) *Pym* v. *Lockyer*, 5 My. & Cr. 29.

(*o*) *Kirk* v. *Eddowes*, 3 Hare, 509.

(*p*) *Meinertzagen* v. *Walters*, L. R. 7 Ch. App. 670, followed in *In re Heather, Pumfrey* v. *Fryer*, [1906] 2 Ch. 230.

(*q*) See also *Thynne* v. *Earl of Glengall*, 2 H. L. C. 131.

In both these classes of cases the Court leans strongly against double portions. But there is a difference between them. "In the case of ademption," said Lord Justice COTTON in the leading case, "where the will is first, that is a revocable instrument, and the testator has an absolute power of revoking or altering any gift thereby made. But where the obligation is earlier in date than the will, the testator when he makes his will is under a liability which he cannot revoke or avoid. He can only put an end to it by payment or by making a gift with the condition expressed or implied that the legatees shall take the gift made by the will in satisfaction of their claim under the previous obligation. It is, therefore, easier to assume an intention to adeem than an intention to give a legacy in lieu or in satisfaction of an existing obligation" (*r*).

Accordingly, if there are substantial differences between the provision made by the settlement and that made by the subsequent will there will be no satisfaction. It was upon this point that the Court of Appeal differed from Sir GEORGE JESSEL in the leading case. "The question," said the former, "must be, is there sufficient on the face of the will to show that the testator did not intend the provision thereby made to be in lieu of that made by the settlement, or, in other words, to satisfy his obligation under that instrument? In arriving at a conclusion on this question we must of course look at the settlement for the purpose of seeing what the obligations of the testator under that instrument, and the provisions thereby made for his daughter's family, were. What we have to consider is well expressed by Lord COLONSAY in the case of *Lord Chichester* v. *Coventry* (*s*), in these words: 'But I can conceive no consideration more important, upon a question of double portions, than the consideration of whether the parties to be benefited by the one are the same as the parties to be benefited by the other, or whether the nature of the benefit conferred in the one case is the same as the nature of the benefit conferred in the other.' It must be remembered that slight differences between the two provisions will not be sufficient to prevent the presumption from arising. Slight differences, however, in the words of Sir John Leach in *Weall* v. *Rice* (*t*), are such 'as in the opinion of the judge leave the two provisions substantially of the same nature'; and he adds, 'every judge must decide that question for himself.'" In the leading case under the settlement

(*r*) *In re Tussaud, supra*, at p. 390. (*s*) L. R. 2 H. L. at p. 98.
(*t*) 2 Russ. & My. 268.

Mrs. White, with the consent of the trustees, had an absolute power over the fund. She had no such power under the will. Under the settlement Mr. White took a life interest after his wife, and in certain events an absolute interest. Under the will he had no interest, and the fund, if no child of Mrs. White took a vested interest, went over to the testator's sons. These were held by the Court of Appeal to be such substantial differences between the two provisions as to rebut the presumption against double portions.

The third of the sub-classes of cases—the satisfaction of a debt by a portion, may be illustrated by the case of *In re Lawes* (*u*). In this case Lawes executed a bond on November 28, 1868, whereby he bound himself to pay to his illegitimate son the sum of £10,000 on April 30, 1872, if the latter should then be alive. On March 22, 1872, Lawes took the son into partnership, transferring to him £19,000, part of the capital employed by him therein. Lawes died intestate on May 20, 1876, without having paid the bond debt. The Court of Appeal decided that the bond debt was satisfied by the share of the partnership (*x*).

A question which was discussed by Sir GEORGE JESSEL in the course of his judgment in the leading case was "what is a portion?" No one, he said, would imagine that a gift of a necklace by a father to his daughter could be a portion. There must be a sum of such an amount as that it would reasonably be presumed to be an advancement. Nor will the Court add up small sums which a father has from time to time given his child: "nothing could be more productive of misery in families than if he were to hold that every member of a family must strictly account for every sum received from a parent." A portion is not restricted to money; it means "something given to establish a child in life" (*y*). Where a sum of money constitutes a portion, it is immaterial whether it be given to the child absolutely or for life with a power of appointment (*z*), or for life with remainder to her children (*a*), or for life with remainder to her husband for life with remainder to their children (*b*).

Finally, it should be observed that the presumptions of ademption and satisfaction are based upon a presumed intention on the part

(*u*) 20 Ch. D. 81.

(*x*) See also *Plunkett* v. *Lewis*, 3 Hare, 316; *Crichton* v. *Crichton*, [1896] 1 Ch. 870.

(*y*) See *Taylor* v. *Taylor*, L. R. 20 Eq. 155.

(*z*) *Lord Chichester* v. *Coventry*, L. R. 2 H. L. 71.

(*a*) *Thynne* v. *Earl of Glengall*, 2 H. L. C. 131.

(*b*) *Weall* v. *Rice*, 2 Russ. & My. 251.

of the donor, and therefore evidence is admissible to rebut them. In the leading case an affidavit was tendered in the Court of Appeal to prove declarations made by the testator that he did not intend the legacy in his will to be a satisfaction of his covenant in his daughter's settlement, and the Court held it to be admissible. It was, they said, established upon the authority of decided cases, and according to the opinion expressed in all the books as well as the uniform course of practice, that parol evidence was admissible to rebut a presumption, though not to raise a presumption. They held that there was no distinction for this purpose between the case of a deed and a will. If evidence is thus admitted to rebut the presumption, evidence will also be received on the other side in favour of the presumption; the Court tries to get at the real intention. On the other hand, if the case is one in which no presumption would be made in equity the Court will not permit evidence to be given to raise the presumption.

Right of Retainer by Executor or Administrator.

In re ROWNSON, FIELD *v.* WHITE.

(1885, 29 CH. D. 358.)

An executor or administrator cannot retain a debt in respect of which, if vested in another person, no action could be maintained.

An administratrix claimed to retain £500 and interest on the ground that her father, who had died intestate, had made a verbal promise to her husband in consideration of her marriage to give her £500 as her portion, and that he had never fulfilled his promise.

The Court of Appeal decided that the administratrix had no right of retainer.

In this case an attempt was made to extend the doctrine of Retainer. The rule is thus laid down in Williams on Executors (*a*):

(*a*) 9th ed., 884.

"As an executor or administrator, among creditors of equal degree, may pay one in preference to another, so it is another of his privileges that he has a right to retain for his own debt due to him from the deceased in preference to all other creditors of equal degree. This remedy arises from the mere operation of law on the ground that it was absurd and incongruous that he should sue himself, or that the same hand should at once pay and receive the same debt."

The rule, then, is that an executor or administrator (but *vide post*) among creditors of equal degree, has a right to retain for his own debt due to him from the deceased any funds in his hands.

It is a devastavit if he pays a debt which need not be paid, though he may prefer one creditor to another if of equal degree, and he may pay or retain a statute-barred debt. The right of retainer only exists in regard to legal assets, being based upon the fact that the executor could not sue himself to recover the debt, but he can retain a debt of which he is trustee or if it is an equitable or a joint debt.

As he can retain a statute-barred debt, an attempt was made in the present case to extend it to the case where a contract was not put into writing as required by the Statute of Frauds, sect. 4. But BOWEN, L.J., said that the Statute of Limitation does not destroy the debt, only the remedy, but the Statute of Frauds prevents parol contracts to which it applies from being enforced either directly or indirectly, and does not create a debt or liability against a testator's estate. Hence the attempted extension failed.

The right depends upon possession, and is therefore lost by the parting with possession, as by the appointment of a receiver as to subsequent assets, and as the right arises from possession of the assets, it is not lost by an administration order (*b*) or by payment into Court (*c*), but it is lost, as above stated, if the assets come into the hands of a receiver in an administration action (*d*), and also if the estate is administered in or transferred to the Bankruptcy Division, except as to assets actually received by the executor (*e*).

It extends to an executor who is one of several co-trustees, though the *cestui que trust*, being a partial beneficiary only, could not so retain (*f*). It includes not only a debt due at the death of the testator, but also a debt accrued due since, and only statute-barred debts provided they would have been recoverable

(*b*) *In re Belham*, [1901] 2 Ch. 52. (*c*) *Richmond* v. *White*, 10 Ch. D. 361.
(*d*) *Pulman* v. *Meadows*, [1901] 1 Ch. 233.
(*e*) *In re Rhoades* (1899), 2 Q. B. 347.
(*f*) *International Marine Co.* v. *Hawes*, 29 Ch. D. 934.

were there no Statutes of Limitation. Thus, before 1882, A, who became an executor after 1882, made a loan to a married woman, who gave him an acknowledgment after 1882. *Held*, no retainer because it was not a legal debt when made, and the acknowledgment could not make it so (*g*).

A *cestui que trust* cannot compel an executor who is trustee of a debt due by his testator to retain. Thus, where A, a sole executor and trustee, who was indebted to his testator's (C) estate through a breach of trust, died insolvent, appointing X his trustee and executor. X, declining the trust, could not be compelled to retain out of A's estate the debt due to him as administrator *de bonis non* of C (*h*). The right cannot be set up after a creditor has obtained judgment (*i*), but it need not be asserted until another claim is made. A widow, if her husband's executrix, can make it although his estate is insolvent (*j*), and even where the loan was made to him for the purposes of his business. If the executor has asserted the claim during his lifetime, his executor can recover the money after his death (*k*).

The right does not exist in regard to real property, nor in land which, under the Land Transfer Act, 1897 (*l*), vests in the personal representative (*m*).

It is only debts of equal degree which can be retained, and Hinde Palmer's Act, 1869, which has put simple contract and specialty debts on an equal footing, has not perhaps made any difference in this respect (*n*). The executor can retain a simple contract debt due to himself before paying a specialty debt of which at the time of retention he had no notice. In *In re Samson* (*o*), an executor, knowing of an unpaid specialty debt, paid a simple contract debt without reserving funds to pay the specialty, and the result was that the specialty creditor was not paid at all. The Court of Appeal *held* that the executor was not guilty of a devastavit, but it reserved for future decision the question whether he could have

(*g*) *In re Wheeler, Hankinson* v. *Hayter*, [1904] 1 Ch. 66.
(*h*) *In re Ridley, Ridley* v. *Ridley*, [1904] 1 Ch. 774.
(*i*) *In re Marvin*, [1905] 2 Ch. 490.
(*j*) *In re Ambler*, [1905] 1 Ch. 697.
(*k*) *Norton* v. *Compton*, 30 Ch. D. 15.
(*l*) 61 & 62 Vict. c. 65, s. 1.
(*m*) *In re Williams*, [1904] 1 Ch. 52.
(*n*) *Wilson* v. *Coxwell*, 23 Ch. D. 764. *In re Briggs*, [1894] W. N. 162.
(*o*) [1906] 2 Ch. 584.

retained a simple contract debt. And *In re Jennes* (*p*), Mr. Justice NEVILLE followed the previous decisions (that he could not retain), though saying it was contrary to his own view.

An heir or devisee has no right of retainer out of lands which are made assets by 3 & 4 Will. IV. c. 104, against specialty debts in which the heir was not bound, because the only remedy such creditors had under that Act was by an administration action in which all creditors were paid *pari passu;* hence they were called equitable assets under Romilly's Act (*q*).

As stated *supra*, an administrator is also entitled to retain, but now, where a creditor obtains a grant, the Court, not favouring the rule, puts him under an undertaking not to prefer his own debt (*r*).

Retainer extends to a debt which has arisen from the executor having been a surety for the testator, provided the debt has already accrued and is not a mere liability (*s*).

The executor may retain a legacy of pure personalty when the legatee is indebted to the testator's estate, provided the legatee was under a legal obligation. Where A lent B £200, B never acknowledging since 1880, A dying in 1882, leaving all his property to his widow for life and then to his seven children, equally, and B dying in 1903, leaving J, one of the children, her sole executor and legatee, and A's widow dying in 1906; in dividing A's estate between his children, A's executors must deduct from the share of J the £200, it being not a retainer or set-off, but a question of equities, as it is unjust that J should take his share of the residue without bringing into account the debt and interest (*t*).

In the recent case of *In re Jennes, Oetzes* v. *Jennes* (*u*), it was held, confirming previous law, that an executor can retain a simple contract debt due to a firm of which he is a partner, even though he knows the estate to be insolvent.

Also, in the very recent case of *Wilson* v. *Wilson*, it has been held, that an administrator, being an undischarged bankrupt, cannot retain a debt due to him from the deceased intestate (*v*).

(*p*) [1909] 53 S. J. 376.
(*q*) *Davidson* v. *Illidge*, 27 Ch. D. 478.
(*r*) *In re Belham*, [1901] 2 Ch. 52; W. N. (1899), p. 262.
(*s*) *Lee* v. *Binns*, [1896] 2 Ch. 584; *Turner* v. *Watson*, [1896] 1 Ch. 925.
(*t*) *In re Bruce, Lawford* v. *Bruce*, [1908] 1 Ch. 850; 2 Ch. 682.
(*u*) [1909] 53 S. J. 376. (*v*) [1911] 1 K. B. 327.

Order in Administration.

TROTT *v.* BUCHANAN.

(1884, 28 CH. D. 446.)

The general personal estate is the primary fund for payment of debts and funeral and testamentary expenses, unless the testator has either by express words or necessary implication exonerated it. This rule applies where the real estate is charged either by deed or will, but not where specific personal estate is so charged.

John Trott by deed conveyed certain real and personal estate to trustees on trust after his decease to sell and pay his debts and funeral expenses out of the proceeds of sale, and hold the balance on trust for his sons and their children. He subsequently by will, after reciting the deed, left all the residue of his property not comprised in the deed for the benefit of his wife and granddaughter. It was held that the estate must be resorted to for the payment of debts in the following order :—

(1) Personalty comprised in the deed.
(2) General personal estate.
(3) Realty comprised in the deed.

In this case the Court followed *French* v. *Chichester* (*a*), which was decided 200 years ago, and the records of which were found to correct the statement of facts given in Vernon, Brown, and the text-books.

It was contended that the gift for the benefit of the wife and granddaughter was a gift of residue, and taken together with the recital of the deed in the will, it exonerated the personal estate. But Mr. Justice PEARSON said : that the testator does not give his wife all the personal estate comprised in the trusts of the deed, but he gives her the residue. But as there is not a single previous gift in the will, the residue must mean what is left after making those

(*a*) 2 Vern. 568 ; 3 Bro. P. C., 2nd ed., 16.

deductions which by law ought to be made, which means that he did not intend to interfere with the rule that personalty is the primary fund for the payment of debts. Subsequently, as regards the realty, he held that in the will there was a positive recital of the trust deed, a declaration that the trusts of it were for the payment of the testator's debts, and an express gift to the widow of the residue not comprised in the deed. Therefore as against the realty his intention was, that the personalty comprised in the deed must be the primary fund, as it was specially appropriated for their payment, next the general personalty, and lastly the realty comprised in the deed. Personal estate must bear the debts first, unless there is an expression of intention of the strongest kind that it should be otherwise.

Subject to the provisions of Locke King's Acts, the order of the application of assets for the payment of debts is as follows :—

1. The general personal estate including lapsed legacies, unless expressly or impliedly exonerated.
2. Realty devised upon trust for the payment of debts.
3. Realty descended to the heir.
4. Realty devised charged with debts.
5. General pecuniary legacies and demonstrative legacies which have become general *pro rata*.
6. Specific legacies and legacies, which have remained demonstrative, specific and residuary devises, *pro rata*.
7. Personalty and realty over which the testator had a general power of appointment which he has exercised by his will, or by voluntary deed.
8. Land in a foreign country which, being governed by the *lex loci rei sitæ*, is not liable at all for debts which the law of the foreign country would not cast upon it (*b*).
9. *Donationes mortis causâ*.
10. Widow's *paraphernalia*.

Therefore, to exonerate the personalty from its primary liability it must be given to some legatee, thus showing an intention to make it (in effect) resemble a specific legacy (*c*). It is not sufficient to throw an express charge upon the realty or to charge it or to say it is to be taken first (*d*). But the costs of an administration action, in as far as they are increased by the administration of the real

(*b*) *Harrison* v. *Harrison*, L. R. 8 Ch. App. 342.
(*c*) *Broadbent* v. *Barrow*, 31 Ch. D. 113.
(*d*) *Banks* v. *Bushridge*, [1905] 1 Ch. 547.

estate, are to be borne by the real estate (*e*), and a charge of testamentary expenses upon personalty does not alter this rule, the Land Transfer Act, 1897, making no difference (*f*).

The cost of completing building contracts on land devised by the testator or passing to the heir are borne by the personalty (*g*).

Part 1 of the Land Transfer Act, 1897, by putting real estate on an equality with personal as regards administration has rendered it needless for a testator to charge his realty with payment of debts, but where such a direction has been given and the personalty exhausted, the Court will marshall for pecuniary legatees. Thus, where A directed his debts, etc., should be paid as soon as possible, and devised realty to S and bequeathed certain legacies. His debts were £200, his personalty £150, and his realty £750. *Held*, that the legatees could be indemnified out of the realty (*h*).

The law as to residuary devises being on the same footing as specific devises, was settled in *Tomkins* v. *Colthurst* (*i*).

Where a testator bequeathed pecuniary legacies *inter alia* and all his real and personal estate "not otherwise disposed of" to his executor, the legacies were chargeable on the residuary realty in aid of the residuary personalty (*k*). Where there is a direction to pay debts, followed by a gift of all the real estate to the executors, either beneficially or in trust, all the debts will be payable out of the estate so given to them, whether they take the whole beneficial interest or none. In all cases it has been held that the entire liability has been thrown on the entirety of the estate (*l*).

Locke King's Act, 1854.

In re NEWMARCH, NEWMARCH *v.* STORR.

(1878, 9 CH. D. 12.)

A charge of "debts" or "just debts" on part of a testator's real estate in aid of his personal estate and in exoneration of

(*e*) *In re Middleton*, 19 Ch. D. 552.
(*f*) *In re Jones, Elgood* v. *Kinderley*, [1901] W. N. 217.
(*g*) *In re Day*, [1898] 2 Ch. 510.
(*h*) *Kempster* v. *Kempster*, [1906] 1 Ch. 446.
(*i*) *Tomkins* v. *Colthurst*, 1 Ch. D. 626.
(*k*) *In re Bawden*, [1894] 1 Ch. 693.
(*l*) *In re Tanqueray-Willaume and Landau*, 20 Ch. D. 625.

his other real estate, is not a sufficient expression of intention within the meaning of Locke King's Acts to exonerate the mortgaged estates from the payment of the mortgage debt.

Newmarch died in 1875, having mortgaged the whole of his real estate except seven cottages for £1000. By his will, dated 1875, he devised his real estate in the following manner :—

(1) A close called " Bean Butts " and the seven cottages to trustees for his wife and children.

(2) A house, garden, and other hereditaments to his daughter and to her children.

(3) His mill and the residue of his real estate to his sons, " charged nevertheless in aid of my personal estate and in exoneration of my other real estate with the payment of my just debts," and his residuary personal estate to his trustees upon trust to sell and divide the net proceeds after payment of his debts between his sons. The Court of Appeal decided that all the real estates subject to the mortgage must contribute rateably (*i.e.* in proportion to their respective values) towards the payment of the £1000 mortgage debt.

The law with regard to the mode in which mortgage debts are to be borne has been completely changed by three Acts.

The primary liability of the personal estate of a deceased person used to include his mortgage debts. But the Act known as Locke King's Act or the Real Estate Charges Act, 1854 (17 & 18 Vict. c. 113) and its extensions have changed this.

17 & 18 Vict. c. 113 provides: that when any person shall, after the 31st December, 1854, die seized of or entitled to any estate or interest (not being an estate tail) in any lands or other hereditaments which shall at the time of his death be charged with the payment of any sum of money by way of mortgage, and such person shall not have signified any contrary or other intention, the heir or devisee to whom such lands or hereditaments shall descend or be devised shall not be entitled to have the mortgage debt discharged or satisfied out of the personal estate or of any other real estate, but the lands so charged shall, as between the different persons claiming through or

under the deceased person, be primarily liable—every part thereof according to its value, bearing a proportionate part of the mortgage debts charged on the whole thereof.

Under the previous law, which still applies to cases not within the statute, the mortgaged lands only bore the burden of the mortgage debt in the two following cases:

1. If the mortgage was created by a previous owner, being an ancestral mortgage; or

2. If the estate was devised *cum onere*.

It was held (*a*) that a direction to pay debts out of the personalty was a contrary intention within the Act; also it did not include a vendor's lien for unpaid purchase-money. But the Real Estate Charges Act, 1867, 30 & 31 Vict. c. 69, included the lien, and provided that a general direction to pay the debts out of the testator's personal estate should not be deemed a contrary or other intention.

Copyholds were within the Acts, but leaseholds were forgotten. Hence a third Act was necessary, called the Real Estate Charges Act, 1877 (40 & 41 Vict. c. 34), which applied to any testator or intestate dying after the 31st December, 1877, and to lands of *any* tenure, thus including leaseholds, but it was made subject to any contrary intention of a testator *only* (not of an intestate).

It was decided in the leading case: (1) That where there is a question of contribution between devisees of different portions of an estate subject to one mortgage debt, the different devisees had to bear proportionate parts of the mortgage debt according to their value; (2) That the words "just debts" and "in aid of my personal estate and in exoneration of my other real estate" were treated as merely amounting to a declaration that the real estate was to be exonerated only to the same extent as the personal estate was charged, and as by Locke King's Act the personal estate was not liable, the practical effect was nothing.

The contrary intention must be declared by words which refer to the mortgage debt, either directly or impliedly (*b*). If the testator, a partner, mortgages his own property for a partnership debt, that is not to be regarded as a mortgage debt of the testator's for the purposes of the Acts (*c*), provided the partnership assets are sufficient to answer all the partnership debts (*d*).

(*a*) *Eno* v. *Tatham*, 3 D. J. & S. 443.
(*b*) *Valpy* v. *Valpy*, [1906] 1 Ch. 531.
(*c*) *Ritson* v. *Ritson*, [1899] 1 Ch. 128.
(*d*) *Brettell* v. *Holland*, [1907] 2 Ch. 88.

Charges of fixed amount, arising directly or by equitable construction, fall within the Acts, as a charge on unsettled and settled estates which is thrown on the unsettled estates for the purpose of exonerating those settled (*e*).

Also it is sufficient if the personal estate is bequeathed subject to the payment of debts or on trust to pay debts, reference to the mortgage debt being made.

Estates tail are excluded from the Acts (*f*), but equitable mortgages (*g*) are included, and also lands delivered into execution (*h*).

Where a testator's will was dated in 1877, and he directed his executors to pay his just debts, funeral and testamentary expenses in exoneration of his real estate, the question arose how a debt due on the security of part of the realty was to be borne. Sir GEORGE JESSEL, M.R., in holding that the mortgaged estate was primarily liable, said the amendment Act was intended to meet such expressions as this. The testator thought his debts were primarily charged on his realty, but the Act said a direction was insufficient to exonerate it. Why should I make a difference because the testator did not know the law?" (*i*)

A testator's liability to build on devised or descended land is not a liability falling under Locke King's Acts (*k*). Also the liability of the estate must be absolute and not contingent merely, as a liability falling on the assignee of a lease of which the testator was the lessee (*l*).

Where a testator, after directing payment of his debts, devised a freehold house to his wife "absolutely to do with as she thought proper," and disposed of his residuary realty and personalty on trusts for sale, it was decided that a mortgage debt on all the realty must be borne rateably on all the properties comprised (*m*).

Where a testator directed that all his private debts should be paid out of one fund and his trade debts out of the residue, and devised his realty on certain trusts and then deposited the title deeds of his

(*e*) *Price* v. *John*, [1905] 1 Ch. 734.
(*f*) *In re Anthony*, [1893] 3 Ch. 498.
(*g*) *In re Sharland*, 74 L. T. 664.
(*h*) *In re Anthony*, [1892] 1 Ch. 450.
(*i*) *In re Rossiter*, 13 Ch. D. 355.
(*k*) *Sprake* v. *Day*, [1898] 2 Ch. 510.
(*k*) *Sprake* v. *Day*, [1898] 2 Ch. 510.
(*l*) *Mellor* v. *South Australia*, [1907] 1 Ch. 72.
(*m*) *In re Smith, Hannington* v. *True*, 33 Ch. D. 1965.

realty with his bankers, to secure an overdrawn account, the devisee of the real estate was entitled to have it exonerated from the banker's lien. NORTH, J., said: "I do not consider it necessary that the debts under that statute should be mortgage debts; such a debt should be particularly described to identify it as being the particular debt which happens to be secured by mortgage. And if a debt is described as the debt which the testator owes his banker, which is in fact secured by mortgage, there would not by that fact be the less an expression of a contrary intention. All that is required is that the debt should be specifically described and identified in some way (*n*).

In re Cockcroft (*o*), a testator having contracted to buy real estate and paid a deposit, specifically devised it. The personal estate was undisposed of. An action for specific performance against his executors was compromised on the terms that the contract should be rescinded, and that the vendor should retain the deposit and pay the costs. The devisees, alleging conversion, claimed the unpaid purchase-money. The Court allowing conversion, decided that the Acts applied, and that all the devisees were entitled to what was the real estate charged with the unpaid purchase-money—in other words, to nothing.

In the recent case of *In re Birch, Hunt* v. *Thorn* (*p*), real estate was specifically devised, and there was a mortgage on it. The testator directed that the mortgage should be paid out of the proceeds of sale of certain other realty. These proceeds not being sufficient, the question was whether the specifically devised property was subject to the deficiency, or whether such an intention to exonerate it had been shown as to make the deficiency payable out of the testator's general estate. *Held*, no general exoneration, and the specifically devised property must bear the deficiency.

In *Wilson* v. *Wilson* (*q*), a testator gave his real and personal estate in trust for sale and conversion, and directed his son should have an option to buy two specified houses for £450. The son elected to buy the houses, which had been mortgaged for £300. It was held by Mr. Justice WARRINGTON that the mortgage would be discharged out of the £450, and that he would not take the houses *cum onere* and have to pay the mortgage too, for he took as a purchaser and not as a devisee or heir, and the provisions of the above Acts did not apply.

(*n*) *In re Fleck*, 37 Ch. D. 677.
(*o*) 24 Ch. D. 94.
(*p*) [1909] 1 Ch. 787.
(*q*) [1908] W. N. 106.

Administration Judgments and Orders.

In re BLAKE, JONES *v.* BLAKE.

(1885, 29 Ch. D. 913.)

The former practice of the Court, that a person interested in the residue was entitled as of course to a full administration of the estate, is now completely altered, and all applications for administration judgments or orders are at the risk of the applicants.

A testatrix left the residue of her real and personal estate to trustees upon trust to sell with all convenient speed, with power to postpone the sale at their discretion and hold the proceeds in trust for her issue equally. The trustees advertised the residuary estate for sale by auction, and an application was made on behalf of two residuary legatees, one of whom was an infant, asking (*inter alia*) that the trustees might be restrained from selling the real estates out of Court, for certain accounts, and if and so far as should be necessary, general administration. The Court of Appeal refused to interfere with the trustees' discretion as to selling the estate, directed certain inquiries, and declined to make any general order for administration.

In no single department of modern equity has a greater revolution been introduced than in the practice which concerns the administration of estates. "Formerly, if any one interested in a residuary estate instituted a suit to administer the estate, he had a right to require and obtained a full administration decree; and the Court, even if it thought that, although there were really questions which required decision, those questions might be decided upon some only of the accounts and inquiries which formed part of the decree, found itself fettered and unable to restrict the accounts and inquiries to such only as were necessary to work out the questions."

Rs. 3–5 of R.S.C., 1883, O. 55, now allow applications to be made for the determination of questions relating to express trusts and administration of the estates of deceased persons by means of an

originating summons, without administration of the estate or trust. Also O. 55, r. 10, provides that when a person insists that there is a question to be determined, and for the purpose of determining that question asks for an administration order, the Court cannot refuse the order unless it sees there is no question which requires its decision, but it may restrict the order simply to those points which will enable the question to be determined. If it turns out that the question is not a substantial one, or that the applicant was entirely wrong in his contention, the Court will order him to pay the costs. It may refuse the order when it is not really wanted at the time of the application (*a*).

An administration summons is "every summons other than a summons in a pending cause or matter" (R.S.C., O. 71, r. 1*a*). It can be taken out by any executor, administrator or trustee, or by any creditor, beneficiary, next-of-kin or heir or his or their assigns (O. 55, r. 3). In order to be an action it must be (1) under the R.S.C.; (2) not *ex parte*; (3) not interlocutory. It cannot be served out of the jurisdiction, nor does it admit third party procedure (*b*).

Therefore a person can now take out an administration summons or institute an administration action as formerly. But for some matters an action is still necessary, as points arising on an intestacy between two claimants to real property (*c*), the setting aside of a release (*d*), questions involving breach of trust or wilful default (*e*); the Courts, however, show the greatest reluctance to make an administration decree when a more limited order will suffice (*f*).

When an action or summons is for the administration of the personal estate only, a creditor may sue on behalf of himself; in other cases he must do so on behalf of himself and all the other creditors (*g*).

When wilful default is alleged, but the judgment gives no relief on that footing, and the claim is not dismissed, the Court may, at any subsequent stage, if evidence of wilful default is brought forward, direct inquiries on that footing (*h*). Allegations of fraud and wilful default should be disposed of at the hearing (*i*). And after a common administration judgment, leave must be obtained to bring on an

(*a*) *Re Quetteville* v. *De Quetteville*, [1902] 19 L. T. R. 109; Yearly Pr., 1911, p. 820.
(*b*) *In re Wilson*, 5 Ch. D. 266.
(*c*) *Hope* v. *Hope*, [1892] 2 Ch. 336.
(*d*) *In re Ellis*, 59 L. T. 924.
(*e*) *In re Hengler*, [1893] W. N. 37.
(*f*) *Hunt* v. *Wenham*, [1892] 3 Ch. 59.
(*g*) *In re Royle*, 5 Ch. D. 540.
(*h*) *In re Symons*, 21 C. D. 757.
(*i*) *Smith* v. *Armitage*, 24 Ch. D. 727.

action on the footing of wilful default, the burden of proof being of course on the party making the charge, and one instance at least of wilful default must be proved (*k*).

The plaintiff in a legatee's administration action is entitled to his costs between solicitor and client where the estate pays the debts in full but not the legacies. Applications for orders for the further consideration of any matter where the order made is for the distribution of an insolvent estate or the estate of an intestate or the distribution of a fund amongst creditors or debenture holders, are made at chambers, but the plaintiff will have his costs in cases of difficulty (*l*).

Marshalling.

WEBB *v.* SMITH.

(1885, 30 CH. D. 192.)

Assets will not be marshalled in favour of a creditor to the prejudice of another man's rights.

Smith, an auctioneer, had in his hands the proceeds (*a*) of a brewery, £82, (*b*) of furniture, £207, sold by him for Canning. Canning, who owed Webb £503, wrote to Smith requesting him to pay Webb the £503 on the completion of the purchase of the brewery, and to charge the same to his account. Smith wrote to Webb that he would comply with these instructions; and then paid himself his expenses, £177, out of the £289, and paid the balance, £112, to Canning. Webb claimed that Smith ought to have marshalled the two funds and charged the brewery expenses upon the furniture fund, so as to leave the brewery money available for payment of his debt; but the Court of Appeal decided that the doctrine of marshalling did not apply.

Marshalling has been defined to be "such an arrangement of the different funds of the common debtor of two or more creditors as may satisfy every claim, so far as without injustice such assets

(*k*) *In re Youngs*, 30 Ch. D. 421. (*l*) *In re Barber*, 31 Ch. D. 665.

can be applied in satisfaction thereof, notwithstanding the claims of particular individuals to prior satisfaction out of one or more of the funds " (*a*).

There are two essentials :—

1. The creditor who has been paid out of one fund must have a right of resource to the other.

2. The person disappointed must have had a right to the fund out of which the other creditor has been paid.

There are two kinds of marshalling :—

1. Between creditors as to assets.

2. Between beneficiaries.

The Court of Equity has for long taken this subject under its exclusive supervision; it desires that all the creditors shall be satisfied, and that beneficiaries shall get their bequests if possible; and therefore, if a creditor has seized some fund which was the only resource of another creditor, the first creditor having the choice of two funds, equity allowed the second creditor to have resource to the fund which otherwise only the first creditor could have touched. This was called the marshalling of assets as between creditors. Thus, before 3 & 4 Will. IV. c. 104 (Romilly's Act) simple contract creditors could not come upon the debtor's land, but specialty creditors could if the heir was bound to pay them. Therefore, if the latter took the personalty, leaving none for the simple contract creditors, equity permitted them to satisfy themselves from the realty to as great an extent as the latter had exhausted the personalty. The great case upon this is *Aldrich* v. *Cooper* (*b*), decided by Lord ELDON. But the doctrine is strictly limited to apply between creditors of the same debtor (*c*), which the marshalling of securities is not; if one creditor has two liens and the other but one, the doctrine will apply. In *Webb* v. *Smith*, Smith had a lien on the furniture fund for furniture expenses and on the brewery fund for brewery expenses. Hence, if he had paid the brewery fund to Webb, there would have been no fund from which he could repay himself for the brewery expenses.

" There were not two funds to which the defendants could resort, that is, two funds standing on an equal footing. The defendants had a superior right to the brewery fund. I think, however, they

(*a*) Smith, Manual of Equity.

(*b*) White and Tudor, L. C. Eq., 7th ed., vol. i. 36.

(*c*) Thus the creditors of B could not compel one who was a creditor of A and B to seek payment from A.

could not have deprived the plaintiff of the benefit of his charge, if there had been two funds to which they could have resorted under equal circumstances," said Lord Justice LINDLEY. If they had retained the furniture fund they might have pleaded a set-off if sued by Canning (R.S.C., O. 19, r. 3). But marshalling has never been employed to compel a creditor to accept an insecure for a secure remedy. *Webb* v. *Smith* was characterized by the Court of Appeal as one " in which an experiment was tried for the first time with regard to the doctrine of marshalling," the difficulty arising from certain expressions of Lord ELDON in *Aldrich* v. *Cooper*. Hence its importance.

Marshalling between beneficiaries results from the disturbing action of creditors seizing a fund intended for a beneficiary, then equity allows the disappointed person to recoup himself by going against a fund intended for a beneficiary prior to himself. Thus, if a widow's paraphernalia is seized, she will be entitled to marshall against all other legatees, as she claims priority next to creditors.

The executor of a deceased person applies the various properties the latter leaves in a certain order (see p. 120), but a creditor who has obtained judgment against a personal representative can, of course, seize upon any part of the estate at his election, and then it remains for the executor to marshall—provided that the testator has not indicated any intention to the contrary, for if he has directed that certain legacies shall be paid first, precedence will be given to them (*d*).

Modern statutes making all property liable for debts and tending to put different creditors on a level have thinned the cases in which marshalling is necessary. Thus, equity used to marshall in favour of charities, throwing debts and legacies on impure personalty, provided there was a direction to marshall (*e*); but this is unnecessary as to deaths occurring since 5th August, 1894, the Mortmain and Charitable Uses Act, 1891 (54 & 55 Vict. c. 73), validating gifts by will to charities under certain conditions (*f*).

What is a direction to marshall is shown by *In re Arnold* (*g*), where there was a gift to charities of residue, coupled with a direction that the residue so given should consist of pure personalty only, or (*h*) that only such parts of his estate should be comprised in the residue

(*d*) *In re Hardy*, 17 Ch. D. 798.
(*e*) Otherwise the Court would not marshall assets in favour of a charity.
(*f*) *In re Bridger*, [1894] 1 Ch. 297.
(*g*) 37 Ch. D. 637. (*h*) *Miles* v. *Harrison*, L. R. 9 Ch. App. 316.

thereof as should be legally applicable to charities. These are directions to marshall. But a gift of residue, except as to such parts thereof as cannot by law be appropriated by will is not a direction to marshall (*i*).

Clogs on Redemption.

SALT *v.* MARQUESS OF NORTHAMPTON.

([1892] A. C. 1; AFFIRMING 45 CH. D. 190.)

If the substance of a transaction is a mortgage the Court disallows any conditions appropriate to a sale but inappropriate to a mortgage.

The trustees of an insurance company advanced to Earl Compton the sum of £10,000 on the security of a charge on certain Scotch real estates to which he was entitled in the event of his surviving his father, who was the plaintiff in the present action. In accordance with the contract between the parties the insurance company had already insured the life of Earl Compton against the life of his father in their own office for £34,500. Nothing was ever paid by Earl Compton in respect of interest, premiums, or principal. All premiums were provided by the office itself, and the reversion was charged with principal, premiums, and compound interest on the principal and premiums. A supplementary agreement was entered into on the same day as the original contract, which stipulated that in the event of Earl Compton predeceasing his father without having paid all the principal money, interest, and costs due to the trustees, the proceeds of the policy should belong to the society absolutely. Earl Compton died in the lifetime of his father, intestate. The father took out administration to his estate, and claimed the right to redeem the £34,500. The House of Lords decided that he was so entitled, as the subsequent agreement was an agreement limiting the mortgagor's right of redemption to his lifetime, and therefore invalid.

(*i*) *In re Somers-Cocks*, [1895] 2 Ch. 449.

The legal maxim, *modus et conventio vincunt legem*, that contracting parties can regulate their rights and liabilities themselves, and the law will only give effect to the intention as expressed by the contract (*a*) (*per* Mr. Justice EADY), does not apply when the parties attempt to violate legal or equitable principles, as to interfere with the attributes of mortgages, of which what is called the equity of redemption is one. An estate cannot at one time be a mortgage and at another time cease to be so. If it is a mortgage it must remain one while it exists.

Until the legal right to redeem is gone, that is, until the time fixed for redemption in the agreement of mortgage is passed, there is no right in equity to redeem (*b*). But when it does arise the right to redeem is inseparable from a mortgage, and the mortgagor cannot by contract deprive himself of it, the maxim being "once a mortgage always a mortgage;" therefore, if there is no equity of redemption, the transaction cannot be a mortgage at all from the beginning. Clogging the equity of redemption is different; it means fettering it, and it does not follow that because an equity of redemption is fettered in some way that the fetter is bad and uninforceable. It depends entirely what the fetter is.

Thus, if there is a stipulation in the mortgage of a public house that during its continuance the mortgagor shall sell only the beer of the mortgagee, thus "tying" the public house, this is perfectly good (*c*). So is giving to the mortgagee a right of pre-emption if the property is sold (*d*). So is a contract to postpone the right to redeem for five, and perhaps for seven years (*e*); but a covenant not to redeem at all is bad, so is a clause of forfeiture on redemption.

Clogs, then, are bad, (1) if they peril the character of the security, or are repugnant to its nature, as to sell to the mortgagee the right to redeem; (2) if undue benefits are retained, as "tying" a public house after redemption (next case) (*f*); (3) if imposed by undue influence or overbearing in their nature, as employing the mortgagee at an exorbitant commission, which might prevent the mortgagor being able to redeem; (4) if for charges disallowed by law, as a mortgagee in possession charging for personal services, which are

(*a*) *Williams* v. *Morgan*, [1906] 1 Ch. 804.
(*b*) *Gott* v. *Gaudy*, 23 L. J. Q. B. 1, 3.
(*c*) *Biggs* v. *Hoddinott*, [1898] 2 Ch. 307.
(*d*) *Orby* v. *Trigg*, 2 Mod. 2.
(*e*) *Teevan* v. *Smith*, 20 Ch. D. 729.
(*f*) *Rice* v. *Noakes*, [1900] 2 Ch. 445; [1902] A. C. 24.

not allowed, he being in the nature of a trustee; (5) as being in the nature of penalties, as to raise the rate of interest on irregular repayment (*g*), or the sum required to redeem, if in default.

Many covenants lie on the borderland between a sale and a mortgage. Thus, a sale accompanied (or it may be made at a subsequent period) by an agreement giving the vendor the right to re-purchase on a named day, is a sale with option of re-purchase, and no equity of redemption attaches (*h*). The tests to ascertain in this case which was intended are: (1) Was the price paid the full value of the property? for, as a rule, not more than two-thirds of the value is advanced on mortgage. (2) Did the purchaser take immediate possession? In mortgages he does not, as a rule. (3) Did the purchaser account for the rents and profits to the vendor? In a sale he does not.

Parol evidence is freely admitted to show the intention of the parties.

Clogs on Redemption by Proviso to defeat it.

NOAKES *v.* RICE.

([1902] A. C. 24; 71 L. J. Ch. 179.)

Any proviso inserted to prevent redemption on payment or performance of the debt for which the security is given, is what is meant by a clog or fetter on the equity of redemption.

A mortgaged his leasehold public house to B, with a proviso that A should not, during the continuance of lease, whether any money should or should not be owing on the security of the mortgage, purchase his liquors of any one but B. The House of Lords held that this proviso was not binding after the mortgage had been paid off.

"Equity will not permit any device or contrivance designed or calculated to prevent or impede redemption" (*a*), and when a mortgage has been paid off the land is as free as if it never had been mortgaged, and in the leading case it was held that the mortgagor

(*g*) *Thornhill* v. *Evans*, 2 Atk. 330.

(*h*) *Birmingham Canal Co.* v. *Cartwright*, 11 Ch. D. 421.

(*a*) *Per* Lord MacNaghten in *Bradley* v. *Carritt*, [1903] A C. 253.

was entitled to an assignment freed from the covenant. Neither can a fetter be imposed to operate indirectly.

So where the defendant, a shareholder holding a controlling number of shares in a tea company, mortgaged his shares to the plaintiff, agreeing to endeavour that the plaintiff should have the sale of the company's teas as a broker, or to pay him the amount of commission he otherwise would have earned. The plaintiff acted as broker, and when the advance was paid off, the shares were re-transferred to the defendant, who afterwards transferred them to another person as security for an advance, and the new transferee deprived the plaintiff of his position as broker. In an action by the plaintiff to recover damages, held by the House of Lords that the stipulations were a clog on the redemption, as otherwise the defendant would have to retain the shares after the advance was paid off, to secure the plaintiff continuing as broker to the company(*b*).

But where M owed T £1500, secured by mortgage, and subsequently, in consideration of a further advance of £300, gave his bond (registered as a judgment mortgaged against the said land), and executed a collateral agreement appointing T his agent over the land, authorizing him to charge agency fees, it was held that this was a new contract, not fettering the equity of redemption (*c*). For the Court interferes to protect the weaker party, that is, the mortgagor, for he is presumably in want of money and the mortgagee is not. But when he has got the money the position changes, and if by a new agreement he chooses to release his right of redemption or tamper with it, there arises no ground for relief (*d*).

If a stipulation in a mortgage gives the mortgagee during the mortgage a right to other advantages besides getting the interest, it is not, as has been stated (*e*), a clog; but it must not prevent the right to redeem from ever becoming complete. Where a company mortgaged some of its debenture stock to the plaintiff, the debt to be paid off at any time after thirty days' notice on either side, the agreement giving to the mortgagee the option to purchase the stock at 40 per cent. at any time within twelve months, which he exercised within twelve months, and before any notice to pay off had been given, the stipulation was ruled void (*f*), and the company entitled to redeem.

(*b*) *Bradley* v. *Carritt*, [1903] A. C. 253.
(*c*) *Maxwell* v. *Tipping*, [1903] 1 Ir. R. 499.
(*d*) *Reeve* v. *Lisle*, [1902] A. C. 461. (*e*) *Biggs* v. *Hoddinott*, [1898] 2 Ch. 307.
(*f*) *Samuel* v. *Jarrah Timber and Wood Paving Corp.*, [1904] A. C. 323.

Any stipulation to raise the rate of interest on non-punctual payment is bad, being in the nature of a penalty, but one to lower it on punctual payment is good (*g*).

Recent case. A chartered company granted defendants, whom it owed £112,000, in consideration of assistance rendered, an exclusive right to work mines in their territories, and in lieu of repayment and for a further advance, it was agreed that debentures should be issued as a floating charge on all the company's property. *Held*, the licence was a clog on the redemption (*h*).

Mortgage of Chattels.

Ex parte ODELL: *In re* WALDEN.

(1878, 10 Ch. D. 76.)

The Court regards the substance of a transaction, and if though in form a sale it is in reality a mortgage, it will be treated as a mortgage.

Cochrane advanced Walden £150 in order (*inter alia*) to pay out an execution, and upon the same day two documents were executed, one an inventory of the furniture in Walden's house, at the foot of which was a receipt for £150 for the "absolute" sale to Cochrane "of the above-mentioned articles;" the other an agreement in writing, by which Cochrane let Walden the same furniture for two months for £170, to be repaid on 18th of September, or such other time as might be agreed upon; and power was given to Cochrane in case the £170 was not repaid and in other certain specified events to determine the agreement and take possession of the goods, sell them, and pay the surplus (if any) to Walden, who on the other hand was to make good any deficiency. On payment of the £170, together with costs, charges, and expenses payable under the agreement, the goods were to become the property of Walden. Held, by the Court of Appeal, that the two documents constituted a mortgage and required registration as a bill of sale.

(*g*) *Tipton Green Colliery* v. *Tipton Moat Colliery*, 7 Ch. D. 53.

(*h*) *British South Africa Co.* v. *De Beers Consolidated Mines, Ltd.*, [1910] 2 Ch. 502.

If a person assigns chattels and retains the possession of them, having parted with the property, there is nothing to show that they are not still his own, and therefore it is possible for him to get credit on the strength of them and thus to defraud his creditors; and to prevent this, in modern times, statutes called Bills of Sale Acts have been passed. There are two now in force, one passed in 1878 (41 & 42 Vict. c. 31). This extends to absolute assignments for value, and also to mortgages of chattels. It defines chattels as being things capable of complete transfer by delivery at the time of the date of the bill of sale (*a*), and it gives a list, including "inventories of goods with receipt thereto attached," "receipts for purchase moneys," if intended to take effect as transfers of chattels (*b*), "declarations of trust without transfer," "licences to take possession as security for any debt," "agreements by which a right in equity to any personal chattel or any charge or security thereon shall be conferred"; but it excludes mercantile documents, debentures, trust deeds, ante-nuptial settlements, etc. The leading case was decided under a previous Act of 1854.

The other Act, 1882 (45 & 46 Vict. c. 43), applies to mortgages only, and is designed as much for the security of the borrower as for his creditors, for its provisions are very strict, and if they are not complied with the transaction is void, in some cases as against creditors, and in other cases *in toto*. A bill of sale must be registered within seven days of its execution and re-registered every five years. An affidavit, stating its execution and its date, the residences and occupations of the grantor and witnesses must accompany it, attested before a solicitor, if it is an absolute bill of sale, and also a schedule, if given by way of security, accurately describing the articles to which it relates; and also the consideration must be truly stated in the document. There have been numerous cases avoiding bills of sale for not complying with these requisites, for the Act is strictly interpreted, and not only is it void as a security, but any covenant it contains for the repayment of the money advanced (*c*) is also void; but it does not interfere with any collateral security (*d*) the lender may have. The law as to bills of sale is prolific with decisions, but as the subject lies on the borderland of equity, only a few of them are cited here.

(*a*) *Thomas* v. *Kelly*, 13 App. Cas. 506.
(*b*) *Charlesworth* v. *Mills*, [1892] A. C. 231, 241.
(*c*) *Davies* v. *Rees*, 17 Q. B. D. 408.
(*d*) *Monetary Advance Co.* v. *Cater*, 20 Q. B. D. 785.

This (the leading case) was a sale and a demise, not an ordinary mortgage, the mortgagee merely taking the property as a security without intending to keep it. The two pieces of paper are one transaction, and cannot be separated, and they constitute the real intention of the parties. "The real transaction which took place," said the Court of Appeal, "as evidenced by the two documents now before us, was a bill of sale for the purpose of securing a debt . . . the form adopted, a sale and a demise, seems to be wholly immaterial. You cannot defeat the operation of the Bills of Sale Act by putting part of the transaction in one document and part in another. Both should have been registered as a bill of sale. Together they constitute a bill of sale with a defeazance." This case was distinguished from the *North Central Waggon Co.* v. *Manchester, Sheffield Railway Co.* (*e*), where the plaintiffs paid £1000 to a colliery company, and took receipts and an invoice in which the £1000 was described as the purchase money for 100 waggons. Simultaneously the parties executed an agreement by which the plaintiffs let the 100 waggons to the colliery for three years at a rent with an authority, when the rent was in arrear, to seize the waggons and end the agreement, and the company had an option of purchase exercisable on all payments being made. The Court of Appeal held that there was a complete contract of sale and purchase, and the documents did not constitute a bill of sale. In deciding whether a transaction is a mortgage or a sale, the rule is that the inadequacy of the consideration, the value of the property, the taking of possession and the payment of the costs by the transaction, etc., by the grantee or grantor will be taken into consideration as favouring the conclusion that the transaction is intended to be a mortgage, but will not be conclusive. In *In re Alison* (*f*) a security for money lent was made in the form of a conveyance to the vendor in trust to sell, and it was held that such a conveyance was simply a mortgage, and nothing more. "It is not for a court of equity to make distinction between forms instead of attending to the real essence of the transaction," said Lord Justice JAMES.

An agreement may be severed so as to be void as to one part of it under the Bills of Sale Acts, and valid as to another, as an assignment of a piano and a hire-purchase agreement (*g*). An assignment of the benefit of a hire-purchase agreement (*h*) is not a bill of sale,

(*e*) 32 Ch. D. 437. (*f*) 11 Ch. D. 284
(*g*) *Ex parte Mason*, [1895] 1 Q. B. 333.
(*h*) *Ex parte Rawlings*, 22 Q. B. D. 193.

neither is an equitable deposit of a bill of sale (*i*), nor a hire-purchase agreement itself (*j*), nor are dock warrants (*k*), nor pawn tickets (*l*), because possession changes hands.

A bill of sale is void—

1. If the consideration is a pre-existing debt (*m*).
2. If the consideration is wrongly stated (*n*).
3. If it is given for liabilities which the mortgagee had agreed to discharge (*o*).
4. If the mortgagee retains interest (*p*).
5. Or pays expenses (*q*).
6. If the statement of it does not contain the whole transaction (*r*).
7. If the time of repayment is falsely stated (*s*).
8. If the grantor is expressed to convey "as beneficial owner" (*t*).
9. If it embraces after-acquired chattels, save chattels substituted (*u*).
10. If there is more than one grantor, not being entitled in joint tenancy, as if one is a surety (*x*).

If a bill of sale is void, a surety is released, but any collateral security which the grantor may have given is not affected (*y*), nor any assurance of freehold land (*z*). In *Swanley Coal Co.* v. *Denton* (*a*), a bill of sale assigned chattels specifically described of the L. Hotel to a moneylender, including in the schedule the deed which assigned to the defendant the lease of the hotel and the muniments of title relating thereto. The bill of sale was held valid, the intention of the parties not being to create a security on the land, but merely on the deeds themselves.

(*i*) *Ex parte Turquand*, 14 Q. B. D. 636.
(*j*) *McEntire* v. *Crossley*, [1895] A. C. 457.
(*k*) *Ex parte Close*, 14 Q. B. D. 391.
(*l*) *Attenbrough's case*, 28 C. D. 682.
(*m*) *Ex parte Berwick, re Young*, 29 W. R. 292.
(*n*) *Ex parte Ralph*, 19 Ch. D. 98.
(*o*) *Norman* v. *Hodges*, C. A. Trin. Sittings, 1883.
(*p*) *Ex parte Charing Cross Bank*, 16 Ch. D. 35.
(*q*) *Ex parte Firth*, 19 Ch. D. 419.
(*r*) *Roberts* v. *Roberts*, (1884) 13 Q. B. D. 794.
(*s*) *In re Barber*, 17 Q. B. D. 259.
(*t*) *Bishop* v. *Beale*, 1 T. L. R. 140.
(*u*) *Thomas* v. *Kelly*, 13 A. C. 506.
(*x*) *Saunders* v. *White*, [1902] 1 K. B. 472.
(*y*) *Monetary Advance Co.* v. *Cater*, 20 Q. B. D. 785.
(*z*) *Brooke* v. *Brooke*, [1984] 2 Ch. 600.
(*a*) [1906] 2 K. B. 873.

The most numerous decisions on the subject of the invalidity of bills of sale occurred shortly after the Acts were passed. Now their jeopardous nature is very well known, and conveyancers are careful not to deviate from the form.

Where a railway company let a piece of land to a coal merchant for stacking his coal unloaded from trucks on their sidings, as yearly tenant, with a provision that the company should have a continual lien on the coal for freight and charges, with liberty to sell it to satisfy the lien, the House of Lords, reversing the Court of Appeal, held that the agreement for the lien was not a bill of sale within the Acts (*b*).

Where the plaintiff gave a bill of sale to secure the repayment of £30 with interest at the rate of 10*d.* per month in the £, and agreed that he would pay the principal and interest by monthly payments of £2, and in default he would pay interest on such instalments at the same rate. *Held*, that the bill of sale was in accordance with the scheduled form and good (*c*).

Where freeholds were settled by deed on A for life, remainder to his son in tail, and later on a will bequeathed goods in trust to trustees for the person absolutely entitled to the freeholds, but not so as to vest in any tenant in tail of the freeholds unless he attained 21; A's eldest son attained 21, and mortgaged his interest in the goods to C. *Held*, that the deed was not within the Bills of Sale Acts, as B had only an equitable reversionary interest in the goods, and that is a *chose in action* within the exception to "personal chattels" in sec. 4 of the Act of 1878 (*d*).

Consolidation of Mortgages.

PLEDGE *v.* WHITE.

([1896] A. C. 187.)

The doctrine of consolidation of mortgages laid down in Vint *v.* Paget (2 De Gex. & Jo. 611) *and other cases has been too long established to be overthrown.*

(*b*) *Great Eastern Railway Co.* v. *Lord's Trustee*, [1910] W. N. 4.
(*c*) *Rosefield* v. *Provincial Bank*, [1910] 2 K. B. 781.
(*d*) *In re Thynne, Thynne* v. *Gray*, [1911] 1 Ch. 282.

Therefore when the owner of different properties mortgages them to different persons and the mortgages become afterwards united in title, the holder of the mortgages has a right to consolidate them and to refuse to be redeemed as to one without payment of what is due to him on all, not only as against the mortgagor, but also as against a person to whom the mortgagor has by one deed assigned the equity of redemption of all the properties, although the assignment is made before the mortgages become united in title.

A fee simple owner made separate mortgages of separate properties to A, B, C, and D respectively. In 1868 he made a second mortgage of all the properties to X, and transferred to Pledge in 1885. After 1885 all the first mortgages become vested in Carr, and Pledge now sued to redeem one of the properties only. The House of Lords held that Carr could consolidate, and the action must be dismissed.

Pledge v. *White* went a step further than *Jennings* v. *Jordan* (the next case) holding that the mortgages in the different properties must not merely be in existence, but vested in the same person, while *Jennings* v. *Jordan* laid down that in order that a mortgage of one property may be consolidated against the assignee (which includes a mortgagee) of the equity of redemption in another property, it must be in existence before the assignment of the equity of redemption.

JENNINGS *v.* JORDAN.

(1881, 6 App. Cas. 698.)

The Court leans against the extension of the doctrine of the consolidation of mortgages.

T. Tale mortgaged Blackacre to Merrit; then settled the equity of redemption of a part thereof on his daughter on her marriage. He then mortgaged Whiteacre to J. Tale. The two

mortgages became vested in Jennings. The House of Lords held that Jennings had no right to consolidate the two mortgages as against the persons entitled under the settlement.

But where a rule of a building society provided that in case the society should hold from a member more than one mortgage, such member should not redeem one property without the consent of the board, it was held that the society could consolidate against a second mortgage, although one of the mortgages was subsequent in date to the security of the second mortgage (with notice of the covenant to observe the rules (*a*).

At one time, according to the view of the late Joshua Williams, Q.C., the law unduly favoured a mortgagee in the matter of consolidation, which means that if A mortgaged lands to B, and then mortgaged other lands to B for a different sum of money, equity placed him (B) in the same favourable position as he would be if the whole of the lands had been mortgaged to him for the sum total of the money advanced.

The doctrine of consolidation was thus stated by Lord SELBORNE in the leading case: "A mortgagee who holds several distinct mortgages under the same mortgagor, redeemable, not by express contract, but only by virtue of the right which is called 'equity of redemption,' may, within certain limits and against certain persons (entitled to redeem all or any of them) consolidate them, that is, treat them as one, and decline to be redeemed as to any unless he is redeemed as to all."

The principle is that the Court will not assist a mortgagor in getting back one of his estates unless he has paid all that is due, though secured on different estates. He asks the assistance of the Court to get back an estate which at law belongs to the mortgagee, and it was held inequitable to allow him to get back a property of more value than the debt charged upon it, and to leave perhaps a debt due on another property of larger amount than the value of the estate. "He who seeks equity must do equity," is the maxim.

The principle applied equally to redemption and foreclosure suits (*b*), and to legal and equitable mortgages, and, at times, worked considerable hardship. Thus, if A mortgaged Blackacre (worth £1500) to B for £1000, and Whiteacre (worth £100) to B for £500, and then

(*a*) *Andrews* v. *Permanent Benefit Building Society*, 44 L. T. N. S. 641.
(*b*) *Neve* v. *Pennell*, 11 W. R. 986.

sold the equity of redemption of Blackacre to C, C was bound by B's right to consolidate, whether he knew of his mortgage or not (*c*), and this was the same if the mortgage of Whiteacre was subsequent to the sale to C (*d*). Therefore C's purchase is worth nothing to him at all, as he must pay both mortgages off. Also the principle applied although the first mortgages were originally made to different mortgagees, and fell into the hands of the same person (*e*).

But the tendency of recent decisions has been to curtail this widely extended doctrine. Thus, although the doctrine applied as equally to mortgages of personalty (*f*) as to mortgages of realty, it has been held that there can be no consolidation of a bill of sale and a mortgage of land so as to enable a grantee of a bill of sale to apply any surplus after sale to a prior mortgage of his, and thus defeat an execution creditor (*g*). Also there never was any right to consolidate where there had been no default in respect of all the mortgages, for until default the estate at law is not forfeited (*h*); nor where one of the estates was not existing (*i*) or has ceased to exist (*k*), as where a lease is forfeited on bankruptcy; nor where the transactions are not between the same parties or persons claiming through them, as where one mortgage is made by a firm and the other by one of the partners in it (*k*); nor where the mortgage on one estate was not made till after the *puisne* mortgage on the other (*l*) and both mortgagees had notice of the *puisne* mortgage before the transfer; neither has the doctrine of election any place in regard to it (*m*).

In *Harter* v. *Coleman* (*n*), X mortgaged Blackacre to A and Whiteacre to B, and then conveyed the equity of redemption in Blackacre to C, and then A and B assigned their mortgage to D. This case differed from *Jennings* v. *Jordan* in that the assignment of the equity of redemption here was subsequent to the mortgage on Whiteacre, but in both cases the assignment was previous to the

(*c*) *Beevor* v. *Luck*, 4 Eq. 537; *Pledge* v. *White*, [1896] A. C. 187.
(*d*) *Vint* v. *Padget*, 1 Giff. 446.
(*e*) *Tweedale* v. *Tweedale*, 23 Beav. 341.
(*f*) *Watts* v. *Symes*, 1 De G. M. & G. 240.
(*g*) *Chesworth* v. *Hunt*, 5 C. P. D. 266.
(*h*) *Cummins* v. *Fletcher*, 14 Ch. D. 699.
(*i*) *Baker* v. *Gray*, 1 Ch. D. 491, partially overruling *Beevor* v. *Luck*, *supra*.
(*k*) *Cummins* v. *Fletcher*, 14 Ch. D. 699
(*l*) *Baker* v. *Gray*, *ibid.*
(*m*) *Griffiths* v. *Pound*, 45 Ch. D. 553.
(*n*) 19 Ch. D. 630. Also see *Minter* v. *Carr*, [1894] 3 Ch. 498, and *Hughes* v. *Britannia Building Society*, [1906] 2 Ch. 607.

union of the mortgages in the same person. Mr. Justice FRY said that the purchaser of an equity of redemption takes it subject to all the equities which affected it in the hands of the assignor, but not to those subsequently accruing. The equity to consolidate arising from a subsequent union in the same person of that mortgage with another, is not an equity which was then subsisting, and therefore it is not one of the equities subject to which the equity of redemption was purchased.

Finally, the Conveyancing Act, 1881 (44 & 45 Vict. c. 41, s. 17), has provided that a mortgagor seeking to redeem any one mortgage shall be entitled to do so, without paying any money due under any separate mortgage made by him or by any person through whom he claims, on property other than that comprised in the mortgage which he seeks to redeem (thus abolishing the doctrine of consolidation unless contracted for). But the section only applies if there is no contrary intention expressed in the mortgage deeds or one of them (*o*), or if the deeds or one of them is dated after the Act, that is after the 1st January, 1882. Where a mortgagor mortgaged Blackacre to A and afterwards to B and afterwards with some other property to C, and the mortgage to A contained the clause permitting consolidation, and on the mortgagor's bankruptcy B took transfers of A's and C's mortgages. *Held*, that the mortgagor's trustee in bankruptcy could not redeem the C mortgage without redeeming mortgages A and B (*o*).

As stated above, the different mortgages must have been made by the same mortgagor for the doctrine of consolidation to exist (*p*).

Thus in 1898 A made four separate mortgages by demise of four leasehold houses to B, each mortgage excluding sec. 17, and, by separate deed, A covenanted that all the houses should be separately and collectively charged with all monies due under the four mortgages, and only redeemable on payment thereof. A sold his equities of redemption to C. One of the four houses was sold to H, and, on completing B's mortgage thereon, was paid off. Then C granted a building lease of a fifth house belonging to him to D (who was admittedly a nominal trustee for C himself), and B took a mortgage by demise in 1899 from D of this fifth house by deed excluding sec. 17, and providing that B could consolidate the mortgage "with any other security for money due from the mortgagor." C sold his freehold reversion in this fifth house, and then D assigned

(*o*) *In re Salmon, Ex parte the Trustee*, [1903] 1 K. B. 147.
(*p*) *Sharp* v. *Rickards*, [1909] 1 Ch. 109.

his equity of redemption therein to C. C claimed to pay off the mortgage on the fifth house, and B claimed to consolidate it with his three remaining mortgages created by A in 1898. Mr. Justice NEVILLE held that B could not consolidate—he could not have consolidated his three 1898 mortgages with the 1899 mortgage as against D, and the Court would not go behind D to find out that C was equitable owner, and no right to do so against C arose when D conveyed his equity of redemption to C. The doctrine of consolidation is not in any case to be extended, and the same person was not the original mortgagor of both the 1898 and 1899 mortgages (*q*). This is the last reported decision on the subject, and illustrates the tendency of the Courts not to widen the doctrine.

Judgment in Mortgage Actions.

DYMOND *v.* CROFT.

(1876, 3 CH. D. 512.)

A mortgagee may since the Judicature Act combine in one action the personal remedy on the covenant with the remedy by foreclosure.

A mortgagee brought an action for foreclosure and claimed by his writ an order directing personal payment of the mortgage debt as well as the usual judgment for foreclosure. The Registrar declined to insert the order for personal payment as being contrary to the practice of the Court of Chancery in foreclosure suits, but Sir George JESSEL, M.R., directed that the judgment should be drawn up as claimed by the writ.

Before the Judicature Acts a mortgagee had two rights, an action at law against the mortgagee personally, and a suit in equity against the mortgaged property, the former giving him his principal, interest and costs, and the latter foreclosing upon the estate. The Act has enabled these two rights to be enforced in one proceeding in the same Court.

(*q*) *Sharp* v. *Rickards*, [1909] 1 Ch. 109.

In *Farrer* v. *Lacy, Hartland & Co.* (*a*), it was decided that a plaintiff succeeding in his action on the covenant is entitled to immediate payment, and that the waiting six months from the signature of the certificate does not apply, as is the rule in foreclosure suits. It was contended that by sec. 25, sub-sec. 11 of the Judicature Act, 1873, the rules of equity are to prevail, and this applies when one action is brought for foreclosure and on the covenant to repay; but Lord Justice FRY said that he knew no rule of equity whereby a sum immediately payable should not be payable for six months, though he allowed that it was competent for the judge to postpone payment for such time as he deemed reasonable. In the case in question it was postponed for a month.

When a mortgagee seeks on motion for judgment, not only foreclosure, but a personal order for payment of the mortgage money against a mortgagor who has made default in delivering a defence, the statement of claim ought to contain an express statement of the covenant under which the order for payment is claimed (*b*).

Section 15 of the Conveyancing Act, 1881 (*c*), provides that in spite of contrary stipulation, where a mortgagor is entitled to redeem he may require the mortgagee, instead of reconveying, to assign the debt and convey the property to any third person as the mortgagor directs and on the same terms. The section does not apply to the case of a mortgagee being or having been in possession. A tenant for life of mortgaged premises who has failed to keep down the interest, and who has obtained the usual order permitting him to redeem, cannot of right take advantage of sec. 15 (*d*).

By sec. 12 of the Conveyancing Act, 1882 (*e*), the right *supra* shall belong to and be capable of being enforced by each incumbrancer or by the mortgagor, but a requisition of an incumbrancer shall prevail over a requisition by the mortgagor, and a requisition by a prior incumbrancer shall prevail over a requisition by a subsequent one.

By R.S.C., O. 55, r. 5*a*, any mortgagee or mortgagor, whether legal or equitable, or any person entitled to or having property subject to a legal or equitable charge, or any person having the right to redeem or foreclose any mortgage whether legal or equitable, may take out an originating summons returnable in the Chambers of a Judge of the Chancery Division for sale, foreclosure, delivery of possession

(*a*) 31 Ch. D. 42.
(*b*) *Law* v. *Philby*, 35 W. R. 401.
(*c*) 44 & 45 Vict. c. 41.
(*d*) *Alderson* v. *Elgey*, 26 Ch. D. 567.
(*e*) 45 & 46 Vict. c. 39.

by the mortgagor, redemption, reconveyance, or delivery of possession by the mortgagee.

A receiver can be appointed directly after the originating summons is issued (*f*).

In a foreclosure action, a mortgagee, if not claiming under a covenant to pay, can only recover six years' arrears of interest, but in a redemption action a mortgagor can only redeem on payment of all arrears of interest (*g*).

Where an action had been commenced by writ in the Chancery Division, a concurrent action on the covenant in King's Bench was staid (*h*). So also where a foreclosure action was followed by one claiming arrears of interest, as the form of judgment would include that (*i*).

A mortgagor may redeem a mortgage before the date for payment if the mortgagee proceeds to realize his security, *e.g.* by (1) entering into possession (*k*); or (2) by sale with the mortgagor's consent (*l*); (3) under O. 57, r. 12, under exceptional circumstances on a sale by the sheriff (*m*); (4) in company cases, on a winding up (*n*).

A mortgagee may exercise all his remedies concurrently, but if, after foreclosing, he sues on his covenant for any balance, by so doing he re-opens the foreclosure suit (*o*). Hence, if he has parted with the property he cannot do so, as he could not restore it (*o*). Also he must obtain the consent of the Court to sell under a power of sale after obtaining a *nisi* foreclosure decree (*p*). The power of sale which the Conveyancing Act, 1881, gives does not (sec. 20) interfere with the right to foreclose.

The mortgagor can never anticipate by premature payment the date fixed by the judgment for redemption (*q*).

(*f*) *In re Francke*, 58 L. T. 305.
(*g*) *Dingle* v. *Coppen*, [1899] 1 Ch. 726. *Re Hazeldine's Trusts*, [1908] 1 Ch. 34.
(*h*) *Williams* v. *Hunt*, [1905] 1 K. B. 512.
(*i*) *Poulett* v. *Hill*, [1893] 1 Ch. 277.
(*k*) *Ex parte Wickens*, [1898] 1 Q. B. 543.
(*l*) *West* v. *Diprose*, [1900] 1 Ch. 337.
(*m*) *Forster* v. *Clowser*, [1897] 2 Q. B. 79.
(*n*) *Wallace* v. *Automatic Machine Co.*, [1894] 2 Ch. 547.
(*o*) *Dyson* v. *Morris*, 1 Ha. 413.
(*p*) *Stevens* v. *Theatres, Ltd.*, [1903] 1 Ch. 857.
(*q*) *Hill* v. *Rowlands*, [1897] 2 Ch. 361.

Real Property Limitation Act, 1874—*Mortgage Debts.*

SUTTON *v.* SUTTON.

(1882, 22 Ch. D. 511.)

After twelve years from the last payment of interest or acknowledgment in writing of debt the personal remedy of the mortgagee upon the covenant is barred, as well as the remedy against the land.

The plaintiff brought an action in 1882 on a covenant contained in a certain indenture executed in May, 1868, for payment of £1850 with interest at 5 per cent., together with all the costs "relating to the said indenture and attending the execution of the trusts and powers contained therein."

The defence was that the indenture of May, 1868, was in fact a mortgage of certain lands, and that no part of the principal nor any interest thereon had been paid by the defendant since November, 1869, which was more than twelve years before the commencement of the action, and the defendant claimed the benefit of the *Real Property Limitation Act*, 1874.

The Court of Appeal decided against plaintiff.

The point in this case was whether a covenant to repay money borrowed on mortgage is barred by the Real Property Limitation Act, 1874, 37 & 38 Vict. c. 57 after twelve years, or whether there is still a remedy for twenty years under 3 & 4 Will. IV. c. 42, it being a specialty debt. Sect. 8 provides that "no action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment or lien or otherwise charged on or payable out of any land or rent at law or in equity or any legacy, but within twelve years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same," unless (1) some part of the principal or interest shall have been paid; or (2) some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable or his agent, to the person

entitled thereto or his agent. In these cases no suit shall be brought but within twelve years after the last payment or acknowledgment. Similar protection was extended to mortgagors and mortgagees against actions of foreclosure, ejectment and redemption (ss. 1–7, supplemented by 1 Vict. c. 28).

It was contended that the words "no action, suit or other proceedings" were not intended to prevent the recovery of any money by way of mortgage, but applied only to its recovery so far as it could be got out of the land. To this Sir George JESSEL, Master of the Rolls, said there were two objections—(1) that it put words into the section which were not found there; (2) that it gave no meaning to the words that were in the section, because you could not get the money as against the land at the time the Act was passed except by a suit in Chancery. A further reason was that it would be absurd to get rid of the liability upon the land (the greater one) and retain the less, the personal liability to pay. The fact that the money was secured by a collateral bond given by the mortgagor, made no difference, although the bond was in a separate deed (*a*).

By a mortgage dated 1872, A and a surety jointly and severally covenanted for repayment, and A paid interest till 1880. The surety died in 1886. The payment by A prevented the statute from running in favour of the surety (*b*). But if a collateral deed has been given by a surety to secure a mortgage debt conditioned to be void on payment by the mortgagor of the principal and interest, the principle as just stated does not apply, as the parties are not the same (*c*).

Sect. 9 of the Act of 1874 must be read in connection with the former Limitation Act, 3 & 4 Will. IV. c. 27, and 1 Vict. c. 28, and it has been decided by the Court of Appeal that the payment to take the case out of the Statute of Limitations must be a payment which is an acknowledgment by the person making it of his liability and an admission of the title of the person to whom it is made (*d*); thus a payment of rent by an occupying tenant required to do so by notice from the mortgagee without the authority of the mortgagor is not sufficient.

Actions to recover money or legacies charged on land or rent and

(*a*) *Fearnside* v. *Flint*, 22 Ch. D. 579.

(*b*) *In re Frisby*, 43 Ch. D. 106.

(*c*) *In re Powers, Lindsell* v. *Phillips*, 30 Ch. D. 291, though it is doubtful whether this distinction can be maintained, as the Lords Justices in that case referred to payment of interest by the mortgagor as an alternative ground of decision.

(*d*) *Horlock* v. *Ashberry*, 19 Ch. D. 539.

secured by an express trust, and for arrears of rent or interest in respect of such sum or legacy, and for damages in respect of such arrears, must be brought in the same time as if there was no express trust, that is, in twelve years (sect. 10).

If the tenant for life pays interest he keeps the debt alive against the remainderman (*e*) and against the convenanting settlor and (if bound to pay interest) against the original mortgagor's residuary estate (*f*). So will the payment of interest by a receiver (*g*), but payment by any other person will not do so without express or implied authority from the mortgagor (*h*), and no part-payment if compulsory will do so, as that would break the principle on which part payment is based.

After obtaining a judgment for foreclosure, a mortgagee has a further period for re-entry within twelve years, but possession is always asked for in practice in a foreclosure action (*i*).

If the mortgagee and the mortgagor are one person, time does not begin to run at all. Thus, where A was for twenty years tenant for life of the estate and the mortgage debt, the remainderman could still foreclose (*j*). Also where two estates were mortgaged and one devised to A for life, remainder to B; and the other to C for life, remainder to D, and A paid the mortgage; B cannot recover against D. Husband and wife, if they live together and are respective tenants for life of the debt and estate, are deemed one person (*k*).

If the mortgage is of an expectancy, as a remainder, the mortgagee's right of entry dates from the time of the remainder falling into possession, but a fee simple, reversionary on a term, is regarded as a fee in possession.

If the mortgage is not under seal, *e.g.* if it is a memorandum and deposit, the contract is barred in six years, but the lien is permanent.

When the Real Property Limitation Act, 1833, bars the right to sue, in twenty years the title to the property is totally gone, and now it is reduced to twelve years by the Act of 1874. The rule is the same if the mortgage is of a remainder not yet fallen into possession (*l*).

(*e*) *Howard* v. *Lightfoot*, [1907] 1 Ch. 330.
(*f*) *In re England*, [1895] 2 Ch. 820.
(*g*) *Berwick* v. *Price*, [1905] 2 Ch. 225.
(*h*) *Chinnery* v. *Evans*, 11 H. L. Cas. 115; *Bradshaw* v. *Widdrington*, [1902] 2 Ch. 430.
(*i*) *Pugh* v. *Heath*, 7 App. Cas. 235.
(*j*) *Topham* v. *Booth*, 35 Ch. D. 607.
(*k*) *Haynes* v. *Dixon*, [1899] 2 Ch. 561.
(*l*) *Kirkland* v. *Peatfield*, [1903] 1 K. B. 756.

Supposing a policy, as of life insurance, has been given as well as a mortgage of land, and the mortgagee has been in possession for twelve years and the mortgagor's right to recover the land is barred, his right to recover the policy is also barred (*m*). But if the mortgage is of pure personalty, such as shares, and the debt itself is barred by lapse of time, the mortgagee can still come into equity at any time to enforce his security by foreclosure or sale (*n*), for the Statute of Limitation does not extinguish the title to pure personalty as it does to land.

The receipt of the surrender value of a life policy which is included in the security by the mortgagee is not a part payment by the mortgagor so as to keep the mortgage debt alive (*o*).

In a case in 1911, *In re Metropolis and Counties Permanent Investment Building Society, Gatfield's Case* (*p*), Mr. Justice NEVILLE held that a building society's annual accounts, under sect. 40 of the Building Societies Act, 1874, cannot be taken as an acknowledgment of a mortgagor's title within sect. 7 of the Real Property Limitation Act, 1874.

Mortgagee's Costs and Expenses.

NATIONAL PROVINCIAL BANK OF ENGLAND *v.* GAMES.

(1886, 31 CH. D. 582.)

A mortgagee is entitled to be allowed all costs which he reasonably incurs in relation to the mortgage debt.

Games deposited with the Bank certain title deeds and writings, accompanied by a memorandum by which he charged the lands to which the deeds and writings related with debts due or to become due from him to the Bank, and agreed upon request to execute a legal mortgage.

A surety had given a promissory note for part of Games's debt to the Bank, and some correspondence took place with the

(*m*) *Charter* v. *Watson*, [1899] 1 Ch. 175.
(*n*) *London and Midlands Bank* v. *Mitchell*, [1899] 2 Ch. 161.
(*o*) *Annaly* v. *Agar-Ellis*, [1900] 1 Ch. 774.
(*p*) (1911), W. N. 67.

surety, from whom nothing could be recovered. The Bank called upon Games to execute legal mortgages, and after investigating Games's title prepared the deeds and corresponded with Games, who refused to execute the mortgages.

In an action for foreclosure by the Bank against Games's trustee in bankruptcy the trustee was ordered, by consent, to pay the debt and costs, "including therein any charges and expenses properly incurred by them as mortgagees," such costs to be taxed.

The Bank claimed: (1) Costs of correspondence with the surety: (2) costs of investigating Games's title; (3) costs of preparing the legal mortgage; (4) costs of correspondence with Games as to the legal mortgage; (5) costs of an action in the Q. B. D. to recover the debt. The Court of Appeal disallowed items (2) and (5), but allowed the rest.

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1. As to item (1), it was contended that the mortgagee could not charge against the mortgagor his costs incurred as a person holding security. But the Court of Appeal held that in that capacity he was merely trying to enforce his rights as a mortgagee, whether he gets them from the mortgaged property or from the surety. Seton on Decrees, 4th ed., 1059, was cited: "both in foreclosure and redemption actions the mortgagee is entitled to the costs of suit and all costs properly incurred in reference to the mortgaged property, for its recovery or preservation and recovery of the mortgage money." Also in *Smith* v. *Watt* (*a*), it was laid down that mortgagees cannot be deprived of their costs unless they misbehave themselves, and even if a mortgagee under an erroneous impression of the law had made a *bonâ fide* claim which could not be supported and had been disallowed, that was no reason for depriving him of his costs. As to item (5), in the leading case he was not allowed his costs of action in the Queen's Bench Division because they were excluded by the special terms of the taxation order, which only allowed charges incurred after a certain date, and the costs in question before that date had not been taxed till afterwards.

2. Item (3) was disallowed because Games had only agreed to mortgage his estate and interest, and it was unnecessary to look

(*a*) 22 Ch. D. pp. 12, 13.

to the title any further than to see in what form the mortgage ought to be drawn.

3. The Court of Appeal rejected the argument that the mortgagee's costs did not include the costs of proceedings between the mortgagor and mortgagee. The plaintiffs had an equitable mortgage, including an agreement to execute a legal one which they demanded, and their costs in relation to it ought to be allowed—as well as those incurred in the preparation of the drafts, which gives them all they are entitled to in respect to the inspection of such deeds as was necessary.

If a mortgagee is in possession, he is like a trustee as far as his powers and liabilities are concerned. He must keep the premises in repair, and is liable if through his neglect the property deteriorates. If he expends money judiciously upon the property, and the expenditure improves it, he will be allowed such expenditure; if he renews leases, he will be entitled to include any fine or premium he has paid in the price of redemption. But he must not so increase the price of redemption as to improve the mortgagor out of his redemption altogether" (*b*). He must account to a second mortgagee of whose mortgage he has notice, and, after receiving such notice, it is at his risk that he pays any surplus moneys over to the mortgagor (*c*). He is only accountable for what he actually receives, or might, but for wilful default, have received. He need not make the most of the property (*d*).

If a mortgagee has through a receiver expended on the property more than the surplus rents, he will not be allowed the excess of expenditure, because the receiver's possession is not his possession. Also the receiver cannot expend upon repairs any more than the surplus rents remaining after the payment of the prior charges (*e*). Nor can the costs incurred in negotiating the loan be added (*f*), but all costs incurred in protecting the security can be. If there is no clause in the mortgage deed allowing the mortgagee to add all arrears of interest to the capital of the mortgage debt so that they shall bear interest, on taking accounts, the Court cannot allow interest on arrears; but even if there is such a power in the mortgage deed and the mortgagee takes possession, assuming the profits are greater than the interest accruing on the mortgage, he will not be allowed to treat the interest as in arrear (*g*).

(*b*) *Shepherd* v. *Jones*, 21 Ch. D. 469.
(*c*) *Macleod* v. *Jones*, 24 Ch. D. 289.
(*d*) *Mayer* v. *Murray*, 8 Ch. D. 424.
(*e*) *White* v. *Metcalf*, [1903] 2 Ch. 567.
(*f*) *Wales* v. *Carr*, [1902] 1 Ch. 860.
(*g*) *Wrigley* v. *Gill*, [1906] 1 Ch. 165.

The rule that a mortgagee is entitled by contract to the costs properly incident to a redemption action was held in a recent case not to apply to an action for account against a mortgagee after he had realized his security by sale (*h*).

Mortgage—Sale by the Court.

UNION BANK OF LONDON *v.* INGRAM.

(1882, 20 Ch. D. 463.)

The Court has now, under the Conveyancing Act, 1881, *s.* 25, *jurisdiction to order a sale of mortgaged property at any time before the foreclosure has become absolute.*

The Union Bank of London, as second mortgagees, brought an action for redemption and foreclosure against the first mortgagee in possession, six subsequent incumbrancers, and the trustee in bankruptcy of the mortgagor. A complicated judgment was made, allowing successive rights of redemptions and foreclosures to the Bank, the six incumbrancers, and the trustee in bankruptcy. The Bank redeemed the first mortgagee, and then applied to the Court for an order for sale. Evidence was produced that the utmost value of the property was less than the amount due to the Bank. The Court of Appeal granted the order.

The question which arose in this case was whether the Court had jurisdiction to make the order. Sect. 25 of the Conveyancing Act, 1881, allows " any person entitled to redeem mortgaged property to have an order for sale instead of redemption in an action asking for redemption alone or sale alone or sale or redemption in the alternative. Also in any action for foreclosure or redemption or for sale or for the raising or payment of mortgage money, the Court, at the request of the mortgagee or any person interested, although other persons dissent and the mortgagee or any person interested does not appear, and without allowing any time for redemption or the payment of the mortgage money, may, if it thinks fit, *direct a sale* of the mortgaged property on such terms as it thinks fit."

(*h*) *Williams* v. *Jones*, [1911] 131 L. T. Notes, 33.

The Court considered in the leading case that the words "instead of a foreclosure," which were contained in the corresponding section of the Chancery Procedure Act, 1852, were designedly omitted after the words "direct a sale"; it was accordingly held that a sale could be ordered at any time before the judgment for foreclosure became absolute. The Act is an enabling statute giving the Court beneficial powers, and ought to be construed liberally.

The Court has power in a redemption action to make an order for sale on an interlocutory application before the trial of the action, security for costs being given (*a*).

Where an equitable mortgagee asked for a sale, the conduct of the sale was given to the mortgagor, as he was most interested in obtaining a good price (*b*).

The remedy of an equitable mortgagee by deposit of title deeds is that if the deposit is accompanied by an agreement to execute a legal mortgage, he can either foreclose or sell (*c*); but if not so accompanied, the Court can, at the request of the mortgagee, order a sale (*d*).

A mortgagee, exercising his power of sale, is not a trustee for the mortgagor, even if the mortgage is in the form of a trust for sale, and he exercises his power to get his money, and therefore the Court will not interfere, even though the price obtained is very disadvantageous, unless, indeed, so low as to be evidence of fraud (*e*); but he is a trustee for the mortgagor as to the surplus, and therefore is liable if he pays it to the wrong parties (*f*) or allows it to lie idle even for a few months (*g*).

In the *Merchant Banking Co.* v. *London and Hanseatic Bank* (*h*), the first mortgagee of a building estate at Manchester brought a foreclosure action. The estate was insufficient to cover the first mortgage, but the subsequent mortgagees and the mortgagor produced evidence to show that, owing to the passing of the Manchester Ship Canal Act, the value of the property would increase, and offered to pay into Court sufficient to cover the costs. Application

(*a*) *Woolley* v. *Coleman*, 21 Ch. D. 169.
(*b*) *Davies* v. *Wright*, 32 Ch. D. 220.
(*c*) *York Union Banking Co.* v. *Artley*, 11 Ch. D. 205.
(*d*) *Oldham* v. *Stringer*, 33 W. R. 251. See Conveyancing Act, 1881, s. 25, s. 6, subs. 2.
(*e*) *Warner* v. *Jacob*, 20 Ch. D. 220.
(*f*) *Magnus* v. *Queen's National Bank*, 37 Ch. D. 466.
(*g*) *Charles* v. *Jones*, 35 Ch. D. 544. (*h*) 55 L. J. Ch. 479.

refused on the ground that the rights of the mortgagee should not be postponed by a speculative sale.

Therefore the Court has jurisdiction to direct a sale, but the exercise of it is discretionary.

Mortgagees selling under an order of Court are in the same position as mortgagees exercising the powers of sale conferred by the Conveyancing Act, 1881, s. 19 (*i*). If a power of sale is inserted in a mortgage deed, giving the mortgagee power to sell, the concurrence of the mortgagor is not necessary to complete the title of the purchaser, unless by the terms of the power of sale notice is required to be given, when, if the mortgagee sells without giving notice he is liable in damages (*k*). If the net proceeds are insufficient to pay the principal, interest and costs, the whole may be applied towards repaying the principal, and the mortgagee will thus escape the income tax payable on arrears of interest (*l*). But a purchaser may take the objection that notice has not been given (*m*), and if he has express notice that it has not been given, he will not be safe (*n*). He is not precluded from inquiring into the mortgagee's capacity to sell (*m*).

Mortgage—Priorities.

WEST *v.* WILLIAMS.

(1899, 1 Ch. 132.)

The doctrine of Hopkinson *v.* Rolt (*a*) *that after notice of a subsequent incumbrance a first mortgagee cannot as against that incumbrancer, tack to his debt further advances made to him by the mortgagor, applies to further advances made in pursuance of an obligation or covenant on the part of the first mortgagee entered into at the time of the first mortgage.*

By a mortgage dated December 24, 1895, W. Williams assigned (*inter alia*) his life interest in certain property under

(*i*) *Union Bank* v. *Munster*, 37 Ch. D. 51.
(*k*) *Hoole* v. *Smith*, 17 Ch. D. 34; *Newman* v. *Selfe*, 33 Beav. 522.
(*l*) *Smith* v. *Law Guarantee*, [1904] 2 Ch. 569.
(*m*) *Life Interest, &c., Corp.* v. *Hand in Hand Ins. Soc.*, [1898] 2 Ch. 230.
(*n*) *Selwyn* v. *Garfitt*, 38 Ch. D. 273. (*a*) 9 H. L. C. 514.

his father's will to F. W. West to secure the payment of £600 and interest. West did not give notice of this mortgage to the trustees of the will until January 8, 1897.

By a mortgage dated April 2, 1896, after reciting the settlement hereafter mentioned, W. Williams assigned his life interest to his uncles, P. A. Williams and J. W. Williams, to secure the payment of £2297 and further advances to be made under the covenant in the settlement. By a settlement also dated April 2, 1896, and executed immediately after the last mortgage (*inter alia*), P. A. and J. W. Williams covenanted to pay to F. W. West, for a period of five years, the annual sum of £200 by quarterly payments. Notice of this mortgage and settlement was given to the trustees of the will on July 7, 1896.

The result was that the mortgage to P. A. and J. W. Williams was the first charge on the life interest, and the mortgage to F. W. West was a second charge.

P. A. and J. W. Williams received notice of the mortgage to F. W. West on February 15, 1897. They made payments of the annuity to W. Williams, pursuant to the covenant both before and after this date.

The Court of Appeal held that they were entitled to priority for the £2297 and the further advances made before February 15, 1897, but not for those made after that date.

NORTHERN COUNTIES OF ENGLAND FIRE INSURANCE CO. *v.* WHIPP.

(1884, 26 Ch. D. 482.)

A legal mortgagee may be postponed to a subsequent equitable mortgagee (1) *by gross carelessness;* (2) *when he has assisted in a fraud which has led to the creation of a subsequent equitable estate without notice of the prior legal estate;* (3) *when he has entrusted the title deeds to an agent to raise money, and the estate thus created has by the misconduct of the agent been represented as being the first estate.*

But the Court will not postpone the prior legal estate to

the subsequent equitable estate on the ground of mere carelessness.

Crabtree, who was manager of a company, executed a legal mortgage of his freehold for £4500 to the company, delivered the title deeds to them, and received the money. The deeds were placed in the company's safe, of which Crabtree had a duplicate key. Crabtree took the deeds out of the safe, mortgaged the property to Mrs. Whipp, who had no notice of the company's mortgage, and handed over the deeds. The Court of Appeal decided that the company was entitled to priority over Mrs. Whipp.

The principle in this case was one of common law and equity—namely, that whenever one of two innocent persons must suffer by the acts of a third person, he who has enabled such third person to occasion the loss must sustain it. The carelessness displayed by the company was mere carelessness and not negligence, for this term implies a duty which is neglected, and men have no duty to keep title deeds, like fierce dogs, in custody; besides, the *Agra Bank* v. *Berry* (c) decided that the duty of inquiring after deeds is not a duty which a purchaser or mortgagee owes to the possible holder of a latent title. If the prior legal mortgagee had undertaken any duty as to the custody of the deeds and had neglected it, the legal estate might possibly have been postponed in consequence. Also there was no proof that the company had constituted Crabtree their agent, with authority to raise money, but on the contrary, the evidence went to negative this. Therefore the case did not resemble those in which a legal mortgagee had been postponed to a subsequent equitable incumbrancer.

Those cases, according to the Court of Appeal, fell into two categories:—

1. Those which relate to the conduct of the legal mortgagee in not obtaining possession of the deeds, and this category is divided into five classes—(i) when showing such gross negligence as would render it unjust to deprive the prior incumbrancer of his priority, as if a mortgagee does not ask for an abstract; (ii) where a legal mortgagee has made no inquiry as to the deeds; (iii) where he has

(c) L. R. 7 H. L. 135.

left them in the hands of the mortgagor; (iv) where he has nquired and has received an excuse; then he does not lose his priority if the excuse is reasonable.

2. When the mortgagee has received the deeds but has parted with them or suffered them to fall into the hands of the mortgagor.

In the *National Provincial Bank of England* v. *Jackson* (*d*), the Court of Appeal held that the principle that a legal mortgagee will not be postponed by mere carelessness did not apply to equitable claims; but it is open to question whether the mere carelessness which has displaced equities has not been gross negligence under another name, according to Mr. Justice KAY (*dd*). In this case two ladies, whose freehold property was subject to a mortgage, were induced by their brother to convey their share to him for value, but no value passed, and the ladies never read the deed, placing full reliance on their brother, who next day deposited the deeds with the plaintiffs (a bank) as security for a loan, and the manager was told by the brother that the ladies were not to receive any consideration, although the deed recited it. The manager communicated with the bank's solicitor, but did not tell him that no consideration had passed, and the title was accepted. The Court of Appeal held that the conveyances were voidable, not void, as they passed the legal estate, and that the bank, owing to their manager's negligence, must have their equity postponed to that of the ladies.

Where a mortgagee of leasehold property lent the lease to the mortgagor to obtain a further advance, the mortgagor promising to inform the lender of the prior charge, which he did not do, it was held that the negligence of the mortgagee in putting it in the power of the mortgagor to commit the fraud, postponed him to the subsequent incumbrancer (*e*). But if a reasonable representation is made for the borrowing of the deeds, the legal mortgagee will retain his priority (*f*).

If a third or subsequent mortgagee buys in a first mortgage and thereby acquires the legal estate, he having had no notice of the mesne incumbrance when he advanced his money, he shall be allowed to tack his third mortgage on the first, and get paid before the *mesne* mortgagee, because he has an equal equity with him and the legal estate as well; and the result will be the same if he knows of the *mesne* mortgage when he buys in the first. This is called the *tabula*

(*d*) 33 Ch. D. 1. (*dd*) *Taylor* v. *Russell*, [1891] 1 Ch. 8, [1892] A. C. 244.
(*e*) *Briggs* v. *Jones*, L. R. 10 Eq. 2.
(*f*) *The Thatched House Case*, 1 Eq. Cas. Abr. 321.

in naufragio, meaning that by that process he saves his third advance from shipwreck (*g*). But it depends upon his getting in the legal estate; if it is outstanding there can be no tacking (*h*). If a first mortgagee lends a further sum, even on a judgment (*i*), he can tack what he has lent before receiving notice of the *mesne* advance, but a judgment creditor cannot tack his judgment on to a first mortgage he buys, for he did not lend his money on the faith of the land (*k*).

The principle in *Dearle* v. *Hall* (*l*) is that when a mortgagee takes a mortgage from an equitable owner and does not give notice of his mortgage to the trustees of the mortgaged property, he, by his abstention, enables the mortgagor to obtain a false and a delusive credit. He enables the mortgagor to represent to a mortgagee subsequent in time that he is the unincumbered owner of the property, when in fact it is already encumbered, and by reason of this conduct he must, though his mortgage is prior in date, be postponed to the mortgagee whose security is of a later date. It is necessary for him to do everything to perfect his title, and do everything towards obtaining possession which is possible; it is parcel of the right of action, and must be given even where no notice should (by the law of the place of the assignment) be given (*m*).

Merger of Charges.

ADAMS *v.* ANGELL.

(1876, 5 CH. D. 634.)

The question whether a charge which is paid off is merged depends on the intention of the payer whether expressed or implied from the circumstances attending the transaction; and the Court will presume that it is his intention to keep the charge alive if it is obviously for his benefit.

Angell mortgaged property first to Adams and then to Newsom. Adams obtained judgment for foreclosure against

(*g*) *Brace* v. *Duchess of Marlborough*, 2 P. W. 491.
(*h*) *Morrett* v. *Paske*, 2 Atk. 52.
(*i*) *Baker* v. *Harris*, 16 Ves. 397.
(*k*) *Yates* v. *Terry*, [1902] 1 K. B. 527.
(*l*) 3 Russ. 1.
(*m*) *Kelly* v. *Selwyn*, [1905] 2 Ch. 117.

Angell and Newsom. Then Angell's trustee in bankruptcy, in consideration of £1380 retained by Adams "in full satisfaction of his debt," and of £20 paid to the trustee, assigned the mortgaged property to Adams, "subject to the aforesaid claim" of Newsom. It appeared that the amount due to Adams was the full value of the property. The Court of Appeal decided that the surrounding circumstances showed an intention to keep Adams' mortgage alive as against Newsom, and that therefore it did not merge.

"An owner who has paid off a prior incumbrance can never set it up against his own mortgage," said Mr. Justice CHITTY. Further, if an owner creates and pays off a mortgage, the mortgage merges in the owner's estate; but if the mortgages are created by some one else, merger only occurs if the principle of non-merger stated in the leading case is inapplicable. Sir GEORGE JESSEL said in the leading case, "The fact of a charge having been paid off does not conclude that it is extinguished." He then pointed out two classes of cases which required to be considered.

If (1) the charge is paid off by a person having a limited interest, as a tenant for life (*a*), or (2) by a tenant in tail who is unable to bar the entail (*b*), or (3) by a tenant in fee subject to an executory devise over (*c*), the limited owner retains the benefit of the charge against the inheritance; he is presumed to have intended to keep it alive because it is manifestly for his benefit. But if it is paid off by a tenant in tail able to bar (*d*), or by a tenant in fee, the presumption is the other way, but in either case the person paying off the charge can, by absolutely declaring his intention, keep it alive or destroy it. A charge may be expressly preserved by being assigned to a trustee for the purchaser or by a declaration that it shall be treated as remaining on foot for the purpose of protecting the purchaser against incumbrances.

There are two alleged variations to these rules: (1) if the debt is paid off by an owner while his title is contingent, a presumption arises that he meant to keep it alive, therefore there is no presumption of merger after it vests in possession, as presumptions are never

(*a*) *Burrell* v. *Egremont*, 7 B. 205. (*b*) *Alsop* v. *Bell*, 24 B. 451.
(*c*) *Drinkwater* v. *Coombe*, 2 S. & S. 340. (*d*) *Grice* v. *Shaw*, 10 Ha. 76.

invoked to rebut presumptions (*e*). (2) A purchaser of an equity of redemption who pays off or owns earlier mortgages was once supposed to merge the mortgage in the fee and give the next *puisne* mortgagee the priority of the redeemed mortgagee, but this exception is swept away unless there is an intention of merger. Therefore the prior mortgage is kept alive if that is the intention.

Thus in *In re Pride* (*f*), "the owner of five-sixth shares of the estate was paying off a charge pending a suit to set aside the sale of one-sixth. The presumption in such a case must be that the person paying off the charge intended to keep it alive as regards that one-sixth, because that is for his benefit; he cannot be presumed to have meant to benefit the person who was seeking to impeach his title." "Therefore, as to the mortgage for £2000, the intention to keep it alive must be presumed," that is to say, this case was put into our first class of cases.

In *Thorne* v. *Cann* (*g*), A mortgaged freeholds to C, who transferred his mortgage to K. Then A mortgaged the freeholds to Thorne, and became bankrupt. Then P purchased the equity of redemption from the trustee in bankruptcy. Then P paid K with money borrowed from the bank, took a transfer of the mortgage, and deposited the deeds with the bank. Then P paid the bank with Cann's money, and assigned the mortgage to Cann. Thorne, a purchaser from Cann, objected to the title on the ground that C's mortgage was extinguished by the transfer to P, and also claimed priority for his own mortgage. The House of Lords decided (1) partly from the form of the instrument, but (2) mainly from the circumstances of the case, that it was the intention of the parties to keep the security alive. (1) "I cannot myself conceive," said Lord Chancellor HERSCHELL, "when the owner of the equity of redemption paid K, what was the object of his taking to himself the assignment of the mortgage debt and all benefits and rights in respect of it, if it was not to keep alive that security." (2) "Nothing, I think," said Lord MACNAGHTEN, "is better settled than this, that when the owner of an estate pays charges on the estate which he is not personally liable to pay, the question whether those charges are to be considered as extinguished or as kept alive for his benefit, is simply one of intention. You may find the intention in the deed or in the circumstances attending the transaction, or you

(*e*) *Horton* v. *Smith*, 4 K. & J. 624. (*f*) [1891] 2 Ch. 135.
(*g*) [1895] A. C. 11.

may presume an intention from considering whether it is or is not for his benefit that the charge should be kept on foot."

In *Liquidation Estates Co.* v. *Willoughby* (*h*), Lord Justice LINDLEY summed up the result of *Thorne* v. *Cann* as follows: "Having regard to this decision, it is perhaps now safe to go a little further, and to say that where a purchaser of a property pays off a charge on it without showing an intention to keep it alive, still if its continuance as an existing charge is beneficial to him it will be treated in equity as subsisting, unless an intention to the contrary can be inferred from the terms of the purchase deed or from other legitimate evidence." "I cannot understand," said Lord MACNAGHTEN, "a person entitled to several charges on a money fund which must rank in priority according to date of notice sweeping away the earlier charges and trusting to the last, though it might seem large enough to exhaust the fund, and though there might apparently be nothing behind it" (*i*).

The above-mentioned equitable doctrine of non-merger is, since the Judicature Act, 1873, s. 25 (4), binding upon every division of the Supreme Court. It is questionable, however, if the Judicature Act has extended its application.

The general law of merger is the same in every species of property, and was thus stated by Lord Justice LINDLEY (*k*): "The two estates which are supposed to coalesce must be vested (1) in the same person (2) at the same time (3) in the same right. This law applies to co-extensive legal and equitable interests, and to debts of inferior and superior degrees. The law with regard to merger in equity was considered in *Chambers* v. *Kingham* (*l*). C, acting as administrator for his father, granted an underlease of a term which belonged to him as administrator. Soon after the underlessee assigned all the residue of the term which had been granted to him to C. The Court, deciding there was no merger, stated the general rule to be that when one of the estates was held *en autre droit*, no merger takes place. The Court was bound to assume that the lease was well granted, and was for the benefit of the estate of which C, the son, was the administrator; and if so, the extinction of the term, and with it the extinction of the right to the rent and to the performance of the covenants which were incident to that term, would be an

(*h*) [1896] 1 Ch. 726; [1898] A. C. 321.
(*i*) Compare *Chetwynd* v. *Allen*, [1899] 1 Ch. 353.
(*k*) *In re Radcliffe*, [1892] 1 Ch. 227. (*l*) 10 Ch. D. 743.

injury to the estate, as it would deprive the estate of the benefit of these.

When the first mortgage debt is the personal debt of the mortgagor who redeems, the Court will assume that the mortgagor intended the next mortgagee to benefit by the redemption, unless the redeeming mortgagor has signified an express contrary intention (*m*).

The doctrine of equity as to merger has been elevated into peculiar importance by s. 25, subs. 4 of the Judicature Act, 1873, which provides that there shall not be any merger by operation of law only of any estate the beneficial interest in which would not be deemed to be merged or extinguished in equity, as well as by the general provision in subs. 11, that in case of conflict equity rules shall prevail.

Charge in Favour of Solicitor.

GREER *v.* YOUNG.

(1882, 24 Ch. D. 545.)

The 28th *section of the Solicitors Act,* 1860, *confers upon the Court a discretionary power to create a charge upon property recovered or preserved. Such charge is independent of contract and is in the nature of salvage.*

Mrs. Greer and her daughter had life interests, and certain infants had reversionary interests, under the will of W. J. Greer, of which Young and Pollock were trustees. Pollock lost a large portion of Greer's estate and died insolvent. In a suit instituted for the administration of his estate, Young carried in a claim in respect of the said loss.

Then Mrs. Greer and her daughter commenced the present action, to which the infants were not parties, and obtained the appointment of new trustees in place of Young and a declaration that Young and the estate of Pollock were liable, and that the proceeds of Young's proof were payable to the new trustees. The new trustees then obtained dividends from Pollock's estate

(*m*) *Hoare* v. *Tasker,* [1905] 1 Ch. 253.

and in Young's bankruptcy. The Court of Appeal held that the solicitors who had acted in the present action were entitled to a charge on the dividend recovered in Young's bankruptcy, but not on the dividend recovered from Pollock's estate.

A solicitor has two kinds of lien—

1. A lien on the papers of his client, other than a will, to the extent of his client's interest in them (*a*), and also on articles delivered to him to be exhibited to witnesses, and things on which he has bestowed his skill. This lien is a right arising by custom, not contract, and the subject-matter must have come into his hands as solicitor, and the right is confined to professional charges, not extending to debts (*b*).

2. By the Solicitors Act, 1860 (23 & 24 Vict. c. 127), when a solicitor is employed to prosecute or defend any suit, the Court may declare he is entitled to a charge on the property recovered by his instrumentality. The Act does not give a charge, but the Court has the power of creating one; it affects the whole of the property (even land) including infants' interests, the interests of married women restrained from anticipation (*c*), and of parties not represented in the action (*d*). It does not depend upon contract, but is based on the principle of salvage (*e*). It is immaterial whether the property belonged to an infant, or whether the person whose property is recovered employed the solicitor (*e*). It attaches to money paid to compromise an action (*f*), but will not extend to the costs of an arbitration, and is confined to the costs of the particular litigation, and hence does not cover costs incurred entirely out of Court (*a*).

A country solicitor has it against his country client, and in turn is liable for it to his town agent to the extent of his lien against his own client (*g*), but it is lost by his rightly discharging himself or by his client discharging him. It is postponed to the lien of the solicitor acting at the date of recovery, and, in the case of three

(*a*) *Ex parte Lloyd George*, [1898] 1 Q. B. 526.
(*b*) *In re Galland*, 13 Ch. D. 296.
(*c*) *In re Keane*, L. R. 12 Eq. 115.
(*d*) *Bailey* v. *Birchall*, 2 H. & M. 371.
(*e*) *Greer* v. *Young*, at p. 552.
(*f*) *Cole* v. *Eley*, [1894] 2 Q. B. 350.
(*g*) *Ex parte Edwards*, 8 Q. B. D. 262.

solicitors, the last ranks first, and the solicitor in the Court of Appeal has it before the solicitor in the court of first instance (*h*).

It overrides most other claims, *e.g.* that of a landlord threatening distraint (*i*) or of a client's trustee in bankruptcy (*k*) or of a mortgagee who takes the benefit of an action unless the solicitor has told him he will not enforce it (*l*), but is subject to the right of a trustee for his costs (*m*).

As the awarding it is discretionary in the Court, it may be lost by any laches of the solicitor, as when he stood by while the fund was being dealt with so unfairly as to prejudice the position of others.

The position of solicitors of trustees—a subject on which the Court considered it important that parties should know what their rights were—was discussed in and contrasted with that of trustees themselves in the case of *Staniar* v. *Evans* (*n*).

"The person employed by trustees to act as their solicitor with respect to a trust estate, is commonly enough said to be a solicitor to the trust estate. But that is an inaccurate way of describing his position. He is not a solicitor to the trust estate. He has no retainer from the trust estate, and he is not employed by the trust estate, but he is the person employed by the trustee for his own purposes as trustee. His retainer is by the trustee personally. The trustee personally is liable to pay his costs, and the trustee personally is the only person to whom the solicitor can look for those costs. The solicitor of the trustee has no lien whatever upon the trust estate for those costs. That is the general rule. There are certain exceptions to it by which a trustee-solicitor may in that character have a better claim. He may, for instance, have got a statutory charge by an order of Court in respect of his having recovered or preserved either the whole of the trust fund or some part of it. He may possibly have some lien on documents in his hands. He may have a right, as between himself and his client, to go against that client's share of the trust estate. But except in those cases, he has no claim on the trust estate."

(*h*) *In re Knight*, [1892] 2 Ch. 368.
(*i*) *Suffield* v. *Watts*, 20 Q. B. D. 693.
(*k*) *Emden* v. *Carte*, 19 Ch. D. 311.
(*l*) *Scholey* v. *Peck*, [1893] 1 Ch. 709.
(*m*) *In re Turner*, *Wood* v. *Turner*, [1907] 2 Ch. 126.
(*n*) 34 Ch. D. 470.

Life Insurance.

In re LESLIE, LESLIE *v.* FRENCH.

(1883, 23 Ch. D. 552.)

A stranger or a part owner of a policy of life insurance cannot acquire a lien on the proceeds of the policy for premiums paid by him except (1) *by contract,* (2) *as trustee,* (3) *as mortgagee,* (4) *by subrogation.*

A widow, after effecting a policy on her own life for £5000, married Mr. Leslie, and handed the policy to him. Subsequently, Mr. Leslie covenanted to pay £6000 on the death of his wife to trustees on the trusts of his daughter's marriage settlement, assigned the policy to the trustees as security, and covenanted with them to pay the premiums during the life of his wife. Mr. Leslie, and after his death his executors, paid the premiums. His estate was not entitled to a lien on the policy for the premiums so paid.

In this case Fry, L.J., reviewed the authorities where a lien may be created upon the moneys secured by a policy in favour of the person who pays the premiums to keep the policy on foot. He classed them into four groups.

1. By contract with the beneficial owner, as where the mortgagor had contracted with the mortgagee to pay the premiums, his sureties who paid them were entitled to a lien on the principle that by contract they were entitled to all the mortgagor's securities.

2. By reason of the right of trustees to indemnity out of their trust property for money expended by them in its preservation.

3. By reason of the right of the mortgagee to add to his charge any money paid by him to preserve his property.

4. By subrogation or substitution, as when a person who at the request of a trustee, has advanced money for the preservation of the property, is allowed to stand in his place and succeed to his right of indemnity.

In all other cases Lord Justice Fry considered that the person paying the money transferred it to the person with whose property he had mingled it. It was argued that Mr. Leslie was in the position

of a tenant for life who renews leaseholds and dies before the expiration of the renewal and who is entitled to a lien on the interests in remainder, but the answer was that this case is *sui generis*, and, as a rule, a tenant for life of an insurance policy will acquire no lien by paying premiums. It was further suggested that a lien had arisen through acquiescence on the part of the real owners, on the ground that when one person allows another to spend money on his property he engages to repay him. But a lien only arises in such cases, when the stranger expending the money believes he is owner, and the real owner knows of the mistake. Lastly, the ground of salvage was suggested, but it was decided in *Falke* v. *Scottish Imperial Insurance Co.* (*a*) that the salvage doctrine does not apply to policies of insurance.

When a creditor insures the life of a debtor, the policy being effected as security, if the debtor directly or indirectly pays the premiums, he is entitled to have the policy when he pays the debt, on the principle, *Qui sentit onus sentire debet et commodum* (*b*). If the transaction takes the form of an annuity with a right of repurchase and the grantee effects an insurance on the life of the debtor by way of security (*c*), that circumstance alone does not give to the person who pays the annuity an interest in the policy, but it belongs to the person who has chosen to effect it for his own protection.

As to companies paying money into Court under the Trustee Act, they are allowed by the Judicature Act, 1873, s. 25, sub-s. 6, to do so, but this only applies to assignments under the Act, not, *e.g.*, to assignments in equity or by operation of law.

The Policies of Assurance Act, 1867, anticipating the Judicature Act, allowed assignees of policies to sue in their own names at law to recover policy moneys on giving written notice to the company, the assignment to be either by indorsement or by a separate instrument. A policy expressed to be unassignable is still assignable in equity (*d*).

Life assurances were made the subject of special legislation by three Acts, passed 1870 to 1872 (*e*). Their gist was—that every company in the United Kingdom must deposit £20,000 on commencing business, to be returned when its fund attains £40,000. That on proof of insolvency the Court may order the winding up of the company, and in determining that fact shall take into account

(*a*) 34 Ch. D. 234. (*b*) *Courtenay* v. *Wright*, 2 Giff. 337.
(*c*) *Gottlieb* v. *Cranch*, 4 D. M. & G. 440. (*d*) *In re Turcan*, 40 Ch. D. 5.
(*e*) 33 & 34 Vict. c. 61; 34 & 35 Vict. c. 58; 35 & 36 Vict. c. 41. All three now repealed and re-enacted by Assurance Companies Act, 1909.

its contingent and prospective liabilities, and, in place of a winding up order, may reduce its contracts upon such terms as it may think just. And no policy holder of a company amalgamated with or transferred to another shall because of payment of any premium or other act, be deemed to have abandoned any claim against the original company, and to have accepted in lieu thereof the other company, unless signified by writing signed by him.

In a debenture holder's action for the maintenance of his security, a charge given by the receiver is in the nature of a salvage charge, and is valid, taking precedence of the debentures (*f*), and an officer of the Court or any one in that capacity receiving money earned through the exertions of another must repay that other what is right (*g*). Thus, in April, 1893, T assigned by deed of mortgage two policies on his own life to two persons to secure £400 and interest, and covenanted for payment of interest and premiums in the usual way. In December, 1895, T told his wife he could not continue the payments, and she did so out of her own money. In August, 1906, T was made bankrupt, and notice given to the Assurance Company. At that date the surrender value of the policies was less than the mortgage debt. Soon after T died, and the policy moneys were received by the mortgagees, and they paid over the balance to T's trustee in bankruptcy. Nearly all the payments made by T's wife were after the commencement of the bankruptcy, and T's trustee was not aware that she had been making the payments. *Held*, she had no legal right to be refunded, and probably no equitable right; but the trustee, as an officer of Court, must do what is right in the matter, and refund to her (*h*). But the holders of a mortgage for current account who advance money to a bankrupt with notice of an act of bankruptcy cannot repay themselves out of the surplus realised out of the mortgaged property after payment of the amount due to them at the date of the act of bankruptcy—their not understanding the notice of an act of bankruptcy not being held to make it a hard case (*i*).

A person, having the care of an infant, who has insured its life before the Children's Act, 1908, does not contravene s. 7 by continuing to pay the premiums (*j*).

(*f*) *Smith* v. *Lubbock*, [1901] 2 Ch. 357.
(*g*) *In re Tyler, Ex parte The Trustee*, [1907] 1 K. B. 865.
(*h*) *Ibid.*, Williams, Farwell and Buckley, L.JJ., affirming BIGHAM, J.
(*i*) *In re Hall, ex parte Official Receiver*, [1907] 1 K. B. 875.
(*j*) *Glasgow Parish Council* v. *Martin* (1910), S. C. (J.) 102.

Relief to Debtors, or Penalties and Forfeiture.

WALLIS *v.* SMITH.

(1882, 21 CH. D. 243.)

The Court in deciding whether a sum of money payable on breach of a condition is to be treated as a penalty or as liquidated damages, proceeds on the principle that the primary object is to ascertain the intention of the parties, but in ascertaining the intention the Court will have regard to the principles established by decided cases.

Wallis contracted to sell an estate to Smith for £70,000, which was to be expended by Smith in building on the estate. £5000 was to be deposited in their joint names in part payment of the £70,000, and after being so deposited was to be similarly expended by Smith. Part of the deposit (£500) was to be paid on the execution of the contract. Clause 25 of the agreement provided that if Smith should commit any substantial breach of the contract in not diligently carrying out the works, or in not performing any of its provisions, the deposit of £5000 or a sum of £5000 should be forfeited " as liquidated damages."

Smith neither paid the £500 nor performed any part of the contract. Held, by the Court of Appeal, that Wallis was entitled to £5000 as liquidated damages.

In this case Sir GEORGE JESSEL, Master of the Rolls, reviewed the authorities touching the point whether a sum stipulated to be paid on breach of a condition in a contract is to be considered as a penalty against which the Court will grant relief, or as liquidated damages which the Court will enforce. He divided the precedents into four groups :—

1. Where a sum of money is payable by way of liquidated damages or penalty for breach of stipulations, all or some or one of which are for payment of a lesser sum, as in the leading case of *Kemble* v. *Farren* (*a*), where A agreed to pay £1000 as liquidated damages in

(*a*) 6 Bing. 141.

case of a breach of a theatrical agreement, and one term was to pay £3 6*s.* a day. This sum was deemed penal, and only the actual damages sustained could be recovered.

2. Where the amount of damage is not ascertainable *per se*, but it must or probably will be trifling for breach of one or more of the stipulations; *e.g.* where a penal rent was payable on two conditions of very unequal value, it was held to be a penalty (*b*). The Master of the Rolls here said these cases lay on the borderland between Class 1, *supra*, and Class 3, *infra*.

3. Where the damages for each breach are not readily ascertainable even though the stipulations are of varying importance, the sum stipulated to be paid has always been treated as liquidated damages.

4. Where a deposit has to be forfeited for a breach of a number of stipulations, some of which may be trifling and some for the payment of money on a certain day, the bargain of the parties is to be carried out and the sum is to be treated as liquidated damages.

Applying these principles to *Wallis* v. *Smith*, the Master of the Rolls said that there was no definite sum of less amount than the sum named payable under it as a single condition, so it did not fall within Group 1, nor was it a case in which one or more of the stipulations could be deemed of trifling importance—hence it was excluded from Group 2. It was a case in which the stipulations varied in importance, but the amount of damage would be substantial and hence the sum should be treated as liquidated damages. "It is of the utmost importance in contracts between adults—persons not under disability and at arm's length—that the courts should maintain the performance of the contract according to the intention of the parties and not overrule any clearly expressed intention on the ground that judges know the business of the people better than they do themselves."

If 1, a man agrees to pay a larger amount if he does not pay a smaller, or

2. A man agrees to pay £1000 if he does not pay £500 with interest a year hence, or

3. A man agrees in a mortgage to pay 4 per cent. interest, and if unpunctual, it is to be raised to 5 per cent.; in all these cases the engagement to pay the larger amount is deemed a penalty and relief is given by the Courts.

In case of ambiguity, the Court will lean towards the construction

(*b*) *Willson* v. *Love*, [1896] 1 Q. B. 626.

which treats the sum as a penalty, in order to relieve against it (*c*). The use of the term "penalty" or "liquidated damages" is not conclusive (*d*).

Relief to Lessees and Others against Forfeiture.

This principle had been repeatedly recognized by the legislature. The Conveyancing Act, 1881 (*e*) (preserving the principle of the Common Law procedure Acts of 1852 and 1860), provides that a right of re-entry on breach of condition in a lease shall not be enforceable unless the lessor serves on the lessee a notice specifying the breach and requiring him to remedy it if possible, and he fails in a reasonable time to do so. Sub-s. 2 provides that where a lessor is proceeding to enforce such right of entry (*f*), the lessee (*f*) may apply to the Court for relief, which, before re-entry (*g*), the Court may grant or refuse on terms, such as raising the rent. Section 6 excepts (i) breach of covenant not to assign or underlet; (ii) the condition of forfeiture on bankruptcy or the taking in execution of the lessee's interest; (iii) the covenant in a mining lease for permitting inspection of the books, accounts, &c., and working of the mine, &c., by the lessor. By sub-s. 3 of sect. 14, lease includes underlease.

Section 51 of the Settled Land Act (*h*), 1882, provides that any clause of forfeiture forbidding the exercise of any powers under the Act shall be void, and sect. 52 provides that in spite of anything to the contrary in a settlement, the exercise of any of the powers under the Act shall not occasion a forfeiture. Where there was a "residence clause" by which not only a life estate, but a power of appointment amongst children was made conditional on residence for not less than three months in the year on some part of the testator's estate, and in default of compliance the estate was to go over, it was held the condition was void, and the tenant for life could exercise the power of sale (*i*).

(*c*) *Davies* v. *Penton*, 6 H. & C. 216, for penalties are odious in the law. Comyns, Dig. Cond. 1 (6).

(*d*) *Diestal* v. *Stevenson*, [1906] 2 K. B. 345.

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

(*f*) After an ejectment commenced, and including a sublessee, s. 212, C. L. P. A. 1852; *Moore* v. *Smee and Cornish*, [1907] 2 K. B. 8.

(*g*) *Humphreys* v. *Morton*, [1905] 1 Ch. 739.

(*h*) 45 & 46 Vict. c. 38.

(*i*) *In re Paget's Settled Estates*, 30 Ch. D. 161.

Removal of Restraint on Anticipation.

In re WARREN'S SETTLEMENT

(1883, 52 L. J. Ch. 928.)

The Court has not, under sect. 39 *of the Conveyancing Act,* 1881, *a general power of removing the restraint upon anticipation, but only a power to make binding a particular disposition of property by a married woman if it be for her benefit.*

Property had been settled upon trust to pay the income to the wife for life without power of anticipation, and then to the husband for life, then to their children, and in default of children for the husband absolutely. The parties had been married for twenty-eight years without having any children, the wife was fifty years old, and there was medical evidence that it was almost impossible for her to have children. Both husband and wife were badly off. The Court of Appeal declined to remove the restraint on anticipation.

A married woman could not hold property at the common law. Her husband was entitled to the rents and profits of her realty during the coverture and to an estate by the curtesy if there was issue born alive, and her personalty was his absolutely. But equity conceived the idea of giving property to trustees to hold for her for her separate use, her husband having no power over it. This was usually done by ante-nuptial settlement, but as the doctrine became more established there were other ways—as, by virtue of a separation deed; by including her acquisitions in separate trade; by absolute gift from her husband; by express limitation by a stranger specifying the gift was made to her separate use; by post-nuptial agreement with her husband; or by private Act of Parliament.

Over property thus given she had complete control, and the trust would not fail for want of a trustee, but equity would hold the

husband to be a trustee for her. But there was nothing to prevent her giving it to her husband, or to prevent him at times, by force or persuasion, inducing her to surrender it to him, or in vulgar parlance, prevent her from being kissed or kicked out of it. In 1785, the Court settled property on a Miss Vernon to protect it, just after her marriage, with all the anxious terms then known to the law. In a day or two afterwards, while the wax was yet warm on the deed, the creditors of her husband got a claim upon it, and Lord THURLOW, who directed the settlement, was obliged to decide in their favour, says Lord ELDON, telling the story in the case of *Jones* v. *Harris* (*a*). In a subsequent case in which Lord THURLOW became a trustee, he inserted the words, "and not by anticipation." From that time the doctrine has never been questioned, though it is now somewhat narrowed by Statute. In this way equity prevented her from being allowed to part with the property by force or persuasion to her own undoing. This idea of virtually breaking the common law and giving a married woman property to do as she pleased with was the origination of equity, and based on natural justice, and therefore equity could act upon its own creature. Having instituted a class of ownership known only to itself, it could impose conditions not formerly known; that is, not to allow the recipient to alienate it. Therefore, if the clause or words of similar effect are inserted, the woman cannot give the property to her husband or to anybody else, and can only dispose of the income when it is paid into her hands.

The rules for the existence of the restraint are :—

1. That it must be created by words clearly showing that she is not to anticipate or deal with the property under it.

2. That it is the creature of separate use, and if the separate use disappears, it disappears also.

Thus if the lady becomes discovert, as by widowhood, it fails, but it will re-attach on re-marriage (*b*), unless she has totally changed the nature of the property in the interval. Thus where Government stock was bequeathed in this manner without trustees, and the lady, while still a spinster, sold the stock and invested the money in a manner totally inconsistent with the investment of trust money, and subsequently married, Lord HATHERLEY held that, owing to her conversion, the separate use was at an end (*c*).

(*a*) 9 Ves. 493, discussing *Pybus* v. *Smith*, 1 Ves. Jun. 189.
(*b*) *Tullett* v. *Armstrong*, 1 Beav. 1.
(*c*) *Wright* v. *Wright*, 2 J. & H. 647.

3. Trustees are not imperative, as the above case shows, for a trust will not fail for want of a trustee.

She cannot bind either the *corpus* or the future income by her engagements, only the income as it falls due, and it cannot be taken in execution for a judgment founded on any contract or tort of hers during the coverture, even after the coverture has ceased (*d*).

If it consists of her own property so settled on marriage, it is liable for her ante-nuptial debts, for otherwise it would be a way of defrauding her ante-nuptial creditors (*e*).

Also by the Married Women's Property Act, 1893, s. 2 (*f*), costs incurred by her through her litigation may be ordered to be paid out of restrained property (but not the costs of defence, or of appealing). Under this Act the property is, of course, taken without her consent.

If a limitation to her breaks the rule against perpetuities, the whole limitation is void, and any anticipation clause falls with it.

The clause against anticipation and the rule against perpetuities are both inventions of the Chancellors, and so equity can deal with them in a way so as to meet the ends of public policy (*g*).

In the last case on the subject (*h*), a gift to the testator's daughter A for life and then for her children who should attain twenty-one, or, if daughters, marry, without power of disposition otherwise than by will, it was held that as to two daughters born in the testator's lifetime, the provision that they should take without power of disposition was valid, thus conflicting with a decision of JESSEL, M.R. (*i*).

Modern legislation has affected the restraint in this wise:

1. The Conveyancing Act, 1881, s. 39, provides that although a woman is restrained from anticipation, the Court may, if it thinks fit, where it appears to the Court to be for her benefit, by judgment or order, with her consent, bind her interest in her property. This

(*d*) *Brown* v. *Dimbleby*, [1904] 1 K. B. 28.

(*e*) *Sanger* v. *Sanger*, L. R. 11 Eq. 470; M. W. P. Act, 1882, s. 19.

(*f*) See *Moran* v. *Place*, [1896] P. 214; *Hood-Barrs* v. *Heriot*, [1897] A. C. 177.

(*g*) *Herbert* v. *Webster*, 15 Ch. D. 610.

(*h*) *In re Game, Game* v. *Tennent*, [1907] 1 Ch. 276.

(*i*) *In re Ridley, Buckton* v. *May*, 48 L. T. 563, Jessel, M.R., said his decision was against his own judgment and was open to a reversal on Appeal, but he followed earlier cases. See also *In re Fernely's Trusts*, [1902] 1 Ch. 543.

must be a personal benefit, though not necessarily a pecuniary one (*k*), and the benefit is a question of fact in each case (*l*). In the leading case, the Court of Appeal said :

"All that the Conveyancing Act authorizes the Court to do is, notwithstanding a restraint on anticipation, to bind by an order a disposition of a married woman—that is, if a married woman has made a disposition which the Court thinks for her benefit, the Court makes that particular disposition binding ; but the Act did not give the Court power generally to remove the restraint. The Court has, no doubt, in certain cases allowed funds to be parted with on the ground of a woman being past child-bearing, but in those cases security had been given for the property to be refunded, if necessary. Latterly, the Court has discouraged that sort of arrangement. The Court would be setting a bad example if, in a case like this, it were to sanction any disposition by a married woman which would defeat the interests of any children who might be born."

2. A married woman, if a life tenant, can avail herself of the powers given by the Settled Land Acts, although under the fetter, and if a tenant in tail she can disentail, as neither of these Statutes interfere with the fetter, which attaches to the substituted property.

3. If she carries on a trade apart from her husband, she can be made bankrupt under the Married Women's Property Act, 1882, s. 1, sub-s. 5, and then property of hers which is under the restraint vests in her trustee in bankruptcy subject to the restraint, and as long as she is covert she enjoys the income, but if she becomes discovert the trustee holds it free from the restraint (*m*).

4. The restraint may also be removed to indemnify her trustee in respect of liability for a breach of trust committed with her written consent or at her instigation or request by the Trustee Act, 1893, s. 45 (*n*).

Illustrations of when the Court uses its discretion as to what it considers to be for her benefit or otherwise may be seen from the following cases :—

The restraint was removed in *Sedgwick* v. *Thomas* (*o*), for the

(*k*) *Paget* v. *Paget*, [1898] 1 Ch. 47.

(*l*) *In re Blundell*, [1901] 2 Ch. 221.

(*m*) *In re Wheeler's Settlement Trusts*, [1899] 2 Ch. 717.

(*n*) See *Griffiths* v. *Hughes*, [1892] 3 Ch. 106; *In re Somerset*, [1899] 1 Ch. 231; *Bolton* v. *Curre*, [1895] 1 Ch. 544.

(*o*) 48 L. T. 100.

purposes of the costs of an action to rectify an instrument, she having undertaken to pay the costs; in *In re Milner's Settlement* (*p*), for the purpose of paying interest on a mortgage and premiums on a policy in which she was interested; in *Ex parte Thompson* (*q*), in order to enable her while living apart from her husband to carry on her business; in *Bates* v. *Kesterton* (*r*), to complete a contract for sale; in *In re Sawyer's Trusts* (*s*), to make an advancement; in *Hodges* v. *Hodges* (*t*), for payment of debts; and in *In re C.'s Settlement* (*u*), for payment of the husband's debts guaranteed by her. In *Paget* v. *Paget* (*x*), the Court allowed her to raise money and give it to her husband for payment of his debts.

It has been refused in the case of a married woman releasing a power for her own benefit and then applying for removal of the restraint (*y*). In *In re Jordan* (*z*) the Court refused to remove a restraint on the ground that such removal might forfeit her estate under one of the provisions of the will imposing the restraint. It was not removed where its removal would have caused her estate to indemnify a trustee against a wrong investment made at her request (*a*), nor where its removal would have increased the wife's income (*b*); a case in which the woman, being past child-bearing, was mistress of the fund but for the restraint. And the rule is that it will not be removed in order to pay debts arising through her extravagance or her husband's (*c*).

In the recent case of *Sprange* v. *Lee* (*d*), by separation deed in 1888, A paid £1000 to a trustee to pay the income to his wife without power of anticipation, and covenanted with the wife to make up the income to £100 a year, the extra payment to cease if the marriage was dissolved or if she broke any covenant in the deed. In 1896 she petitioned for a divorce, but there was a compromise, part of which included a deed by which the wife and the trustee released the husband from the covenant, and the wife covenanted that neither she nor any one on her behalf should sue A for any extra income or molest him. The wife died in 1901, and administration *cum testamento annexo* was granted to Sprange as guardian to the

(*p*) [1891] 3 Ch. 547.
(*q*) (1884), W. N. 28.
(*r*) [1896] 1 Ch. 165.
(*s*) [1896] 1 I. R. 40.
(*t*) 20 Ch. D. 749.
(*u*) 56 L. J. Ch. 556.
(*x*) [1898] 1 Ch. 470.
(*y*) *In re Little*, 40 Ch. D. 418.
(*z*) 34 W. R. 270.
(*a*) *Bolton* v. *Curre*, [1895] 1 Ch. 544.
(*b*) *In re Blundell*, [1901] 2 Ch. 221.
(*c*) *In re Pollard's Settlement*, [1896] 2 Ch. 552.
(*d*) [1908] 1 Ch. 424.

sole beneficiary under her will, an infant. He contended that the deed of release was void, as the additional yearly payments under the deed were restrained from anticipation and sued for £580 additional payments, and A counterclaimed for damages for the wife's breach of covenants in the release. *Held*, Sprange was entitled to recover the £580, and A was entitled to damages for breach of the covenants in the release, such damages to be payable only out of property which the wife had never been restrained from anticipating.

In the very recent case of *Bagley* v. *Maple & Co., Ltd.* (*f*), property of the plaintiff which was under the restraint, was by order of Court taken to pay her costs, she not appearing.

The Married Women's Property Act, 1882.

REID *v.* REID.

(1886, 31 CH. D. 402.)

Sect. 5 of the M. W. P. Act, 1882, *is limited to property the title to which accrues since the 1st January*, 1883, *and accordingly when a woman married before 1st January*, 1883, *has acquired a title to property whether vested or contingent, and whether in remainder or reversion before that date, such property does not become separate property by falling into possession after that date.*

A woman married in 1871 was entitled under a settlement made in 1874 to a reversionary interest in the proceeds of the sale of certain real estate, and on the death of the tenant for life in February, 1883, she brought an action asking for a declaration under the *M. W. P. Act*, 1882, that she was entitled for her separate use to her interest under the deed of 1874, or in the alternative that the whole of such share might be settled on her or her children.

The Court of Appeal decided that she was not entitled to the declaration that the property in question was her separate property, but remitted the question as to her equity to a settlement to be dealt with by the judge from whom the appeal was brought.

(*f*) 27 T. L. R. 284.

The first legislative recognition of the power of a married woman to hold property was given by the Married Women's Property Act, 1870 (*a*), which assigned questions touching her property declared by the Act to be separate to the Court of Chancery; that Act and the amending Act of 1874 are repealed by the Act of 1882 (*b*), s. 22 (subject to rights acquired under it), which now regulates the law, and any judge of the High Court can determine all questions between husband and wife as to the ownership of property.

Section 1 of the Act provides (i) that any married woman can hold and dispose of any property as her separate property, like a *feme sole*, given to her without the intervention of a trustee; (ii) that she can be sued in respect of such property either in contract or in tort, and her husband need not be made a party, and damages and costs recovered by or against her shall be or be payable out of her separate property; (iii) every contract entered into by her shall be deemed to concern and bind her separate property unless the contrary is shown; and (iv) this includes any separate property she may hereafter acquire; and (v) if trading apart from her husband she shall be subject to the bankruptcy laws in respect of her separate property like a *feme sole*. Since the amending Act of 1893 (*c*), s. 1, she need not have any separate estate at the time of the contract (*d*), and it binds any property to which she may become entitled after the coverture is ended (*e*). She cannot be made a bankrupt, unless carrying on a separate trade, upon a judgment against her and her husband, obtained on her contract, even when left a widow (*f*), *secus* on a judgment obtained against her for her tort (*g*). No personal decree could ever have been made against her, and she is not liable to a commitment order under sect. 5 of the Debtors Act (*h*), 1869, neither can a bankruptcy notice issue against her, except on a judgment for her tort (*g*).

Section 2 makes all property of women married after the Act which they have at the time of the marriage or subsequently acquire, separate property, and sect. 3 postpones loans to her husband as a sole trader (*secus*, to a firm of which he was a partner (*i*)) to other

(*a*) 33 & 34 Vict. c. 93. (*b*) 45 & 46 Vict. c. 75.
(*c*) 56 & 57 Vict. c. 63, s. 1.
(*d*) *Beck* v. *Pierce*, 23 Q. B. D. 316.
(*e*) *Brown* v. *Dimbleby*, [1904] 1 K. B. 28.
(*f*) *In re Hewett, Ex parte Levene*, [1895] 1 Q. B. 328.
(*g*) *In re Beauchamp, Ex parte Beauchamp*, [1904] 1 K. B. 572.
(*h*) *Robinson* v. *Lynes*, [1894] 2 Q. B. 577.
(*i*) *In re Tuff*, 19 Q. B. D. 88.

creditors on his bankruptcy or insolvency. Sect. 4 makes a devise of property under a general power of appointment by a married woman liable for her debts, and not only for her fraud, as formerly. Sect. 5, providing that every woman married before the Act, shall hold as her separate estate all property her title to which accrues after the Act, is the section which was discussed in the leading case. The Court of Appeal held that except in special cases the law ought to be construed so as to interfere as little as possible with vested rights, and that the construction which leads to the less inconvenience ought to be adopted, and that the object of the words is to make it clear that all property to which a married woman first acquires a title after the commencement of the Act comes within the operation of the section (*k*).

Sections 6, 7, 8, 9 make provision with regard to stock to which she is entitled, and sect. 10 makes provision against fraudulent investments with the money of her husband. Sect. 12 confers upon her the same civil remedies for the protection of her separate property as a *feme sole* would have. But she cannot prosecute her husband while they are living together unless he was on the point of deserting her. By sect. 16, he may prosecute her, being the offender, whenever she may prosecute him (*l*). By sect. 11, she may effect a policy of insurance on her own life or upon his and for his benefit with or without her child or children or any of them (*m*). By sect. 17, disputes between husband and wife regarding her separate property are to be settled on application by summons or otherwise on application to the High Court or County Court, and, if in the latter, they are removeable to the High Court if beyond the County Court jurisdiction. By sect. 18, if she is an executrix, administratrix, or trustee, she is to be regarded as a *feme sole*, so that her husband need not be a party to her administration bond (*n*). By sect. 20 she is liable to maintain her pauper husband if chargeable to the parish, and (21) her children and grandchildren, but not her father or mother (*o*). Sect. 22 repeals the Acts of 1870 and 1874, except so

(*k*) A *spes successionis* is not considered a title which has "accrued" for the purposes of the section. *In re Parsons*, 45 Ch. D. 51.

(*l*) The amending Act of 1884, 47 & 48 Vict. c. 14, makes husband and wife competent witnesses in criminal proceedings.

(*m*) A subsequent wife usually will be entitled to a share in the policy moneys. *In re Browne's policy*, [1903] 1 Ch. 1888, so will the children of both marriages.

(*n*) *In re Harriet Ayres*, 8 P. D. 168.

(*o*) *Pontypool Guardians* v. *Buck*, [1906] 2 K. B. 896, now altered by Married Woman's Property Act, 1908.

far as anything is done under them, and sect. 23 puts her personal representatives in the same position as herself as regards her separate property. By sect. 24 the word "contract" includes acceptance of any trust, &c., thus reversing the former law, and making her liable for breach of trust, &c., and exonerating her husband.

Under the exercise of a power of appointment, the title which accrues dates from its operation and not from the date of the instrument giving it (*p*). In the event of non exercise, it cannot be touched on her bankruptcy (*q*).

By the Act of 1893, s. 1, every contract made by her after the 5th December, 1893, binds her separate estate whether she has any or not at its date unless made as agent for another, and the liability continues on widowhood. By sect. 3 her will made during coverture speaks from her death without re-execution during widowhood.

Sects. 13 and 14 deal with her ante-nuptial liabilities, making her liable for them and also her husband in as far as he has acquired property through her. But he is still liable for her torts in cases where he was formerly liable for them (*r*), but the husband and wife cannot sue one another for torts (*s*), though third persons can sue them together, the husband being personally liable and the wife to the extent of her separate property.

By sect. 19, the Act does not interfere with settlements, *ante* or *post-* nuptial.

To sum up: The following are the most important but not the most obvious consequences produced by this Statute upon the rights of property and upon the status of women married after January 1st, 1883, or subject to the new law under sect. 5 :—

"The right of action is the same as against a man, but the relief is different" (*t*). Under sect. 4 property over which she has and executes a general power of appointment is subject to her debts, though such power is to appoint by will only (*u*). Cases before the Act went on the same lines, but were not quite consistent (*x*). She can release a power coupled with an interest to her separate use (*y*)

(*p*) *In re Vizard's Trusts*, L. R. 1 Ch. App. 588.

(*q*) *Lee* v. *Guedalla's Trustee*, [1905] 2 Ch. 331.

(*r*) *Seroka* v. *Kattenburg*, 17 Q. B. D. 177; *Earl* v. *Kingscote* (1900), 2 Ch. 585.

(*s*) *Beaumont* v. *Kaye*, [1904] 1 K. B. 292.

(*t*) *Per* Lord Justice FRY, *Whittaker* v. *Kershaw*, 45 Ch. D. 320, 329; *cited* [1891] 1 Q. B. 783).

(*u*) *In re Parkin*, [1892] 3 Ch. 510.

(*x*) See *The London Chartered Bank of Australia* v. *Lemprière*, L. R. 4 P. C. 572.

(*y*) *In re Davenport*, [1895] 1 Ch. 361.

although restrained from anticipation (*z*). She can enlarge a base fee without acknowledgment, and without her husband's consent (*a*). She can sign an administration bond alone (*b*). She can be attached for non-compliance with an order to pay into Court money in her possession belonging to an estate which she is administering (*c*). Her acceptance of the office of executrix, trustee, &c., is as free as are contracts by her, and involves the same liabilities (sect. 24). Separate examination is no longer necessary under sect. 59 of the Settled Estates Act, 1877, if the woman was married after 1882 (*d*), or became entitled after 1882 (*e*). As mortgagee she can convey realty acquired after the Act without acknowledgment and without her husband (*f*). Cases of fraud on marital rights and equities to a settlement are obsolete.

"The effect of marriage on particular property in which a woman has an interest as joint-tenant depends on whether the marriage divests the property from the wife and vests it in the husband:" therefore marriage will not now sever a joint tenancy (*g*), nor will a lease by the husband and the co-tenant (*g*). In *In re March* (*h*), a testatrix who died after 1883, by her will executed before 1883, gave her property to A and B, and his wife, "to and for their own use and benefit." The will was construed in accordance with the old law; A took half, B took a quarter, and his wife took the other quarter. "In my opinion," said Lord Justice COTTON, "the Act was not intended to alter any rights excepting those of the husband and wife *inter se*. What the effect will be when words similar to these occur in a will made after the Act came into operation, I do not say." A conveyance after 1883 to the use of her and her husband makes her and her husband joint-tenants (*i*). A gift by will to A, her husband, and her, will make three joint-tenants (*k*), and the whole will be divisible into thirds (*k*), or halves, if there is an "and" between A and her husband (*k*).

(*z*) *In re Chisholm's S.*, [1901] 2 Ch. 82.
(*a*) *In re Drummond and Davie's C.*, [1891] 1 Ch. 524.
(*b*) *In re Ayres*, 8 P. D. 168.
(*c*) *In re Turnbull*, [1900] 1 Ch. 180.
(*d*) *In re Harris S. E.*, 28 Ch. D. 171.
(*e*) *In re Batt's S. E.*, [1897] 2 Ch. 65.
(*f*) *In re Brooke & Fremlin's C.*, [1898] 1 Ch. 647.
(*g*) *In re Butler's T.*, 38 Ch. D. 286, 296.
(*h*) 27 Ch. D. 166.
(*i*) *Thornley* v. *T.*, [1893] 2 Ch. 229.
(*k*) *In re Dixon*, 42 Ch. D. 306.

She can be made bankrupt, and her property will vest in her trustee in bankruptcy (*l*), if she carries on a trade separately from her husband, or has debts incurred in such business (*m*). Property restrained from anticipation will also vest as soon as the restraint ceases (*n*). See sect. 1 (5).

If she lends money to her husband for his trade or business, she can prove only after other creditors are satisfied (sect. 3). The purpose of the loan must be proved by the trustee in bankruptcy (*o*).

She is liable on joint contracts like other joint contractors (*p*). Lord Justice LINDLEY, in *Beck* v. *Pierce* (*q*), thus summed up under four heads her husband's liability for her ante-nuptial debts: 1. He is only liable as far as the value of the property he has acquired with her extends. 2. They can be sued jointly; or 3. He can be sued alone, whether she is alive or dead. 4. He is entitled to indemnity out of her separate property.

As a judgment against her is against her separate property and not against her property over which she has a general power of appointment, which she has not exercised, it cannot be made subject to her debts in bankruptcy (*r*). Her husband is still entitled to an estate by the curtesy of her realty, and still takes her personalty if she dies intestate (*s*).

Infants' Control and Custody.

In re AGAR-ELLIS, AGAR-ELLIS *v.* LASCELLES.

(1878, 10 CH. D. 49.)

A father has a right to control the religious education of his infant children, but such right may be forfeited or abdicated. The Court requires a stronger case to induce it to interfere with the father than with a testamentary guardian.

(*l*) *Ex parte Boyd*, 21 Q. B. D. 264.
(*m*) *In re Worsley*, [1901] 1 Q. B. D. 309.
(*n*) *In re Wheeler's S. T.*, [1899] 2 Ch. 717. See sect. 1 (5).
(*o*) *Ex parte Cronmire*, [1894] 2 Q. B. 246.
(*p*) *Hoare* v. *Niblett*, [1891] 1 Q. B. 781.
(*q*) 23 Q. B. D. 716.
(*r*) *Ex parte Gilchrist*, 17 Q. B. D. 521.
(*s*) *Surman* v. *Wharton*, [1891] 2 Ch. 585.

A Protestant on his marriage with a Roman Catholic promised her that all the children should be brought up as Roman Catholics. After the birth of the first child he determined that all his children should be brought up as Protestants, and gave express directions to that effect, but the mother, without the father's knowledge, so indoctrinated the children (who were of ages varying from nine to twelve), that at last they refused to go to a Protestant Church. The father made them wards of Court. The Court of Appeal granted an injunction to restrain the mother from taking the children to confession, or to any other than a Church of England place of worship.

The rule that a father has the custody and control of his children means that he controls their education and religion; his religious control extends beyond his lifetime, for the guardian of his children must carry out the actual or presumed religious wishes of the father.

The Court in this case pointed out that the husband's antenuptial promise was absolutely void, the same as it would be if either of the conjugal associates had embraced a new faith after marriage, and that the right of the father to the custody and control of his children is one of the most sacred of rights. The law may take it away as it may take his property or liberty, but it must be for sufficient reason —misconduct, or profession of immoral or irreligious opinions. As the conduct of the mother was a wrong to the children, as well as to the father, the Court granted the injunction, otherwise it would have left the father, as ruler of his family, to enforce his authority in his own way. The Court declined to examine the children, because it deemed it had no right to sit in appeal from the father's decision, as the law made him the judge, and it could not interfere with the honest exercise of the jurisdiction it had confided to him. He was not, as a testamentary guardian was (*a*), a creature of the law and not of nature, and who, being in a position of trust, was essentially under the jurisdiction of the Court. Also the Court declined to interfere, on a petition by the mother and daughter (aged 16), that the mother might have free access to the daughter. (But *query* as to this since 1886.)

The *St. Tenures* (*b*) allows the father, even though a minor, to

(*a*) *Stourton* v. *Stourton*, 8 D. M. & G. 760, in which case they had been privately examined, and there was a testamentary guardian.

(*b*) 12 Car. II. c. 24, s. 8.

appoint a guardian to his legitimate (*c*) child by deed or will, but since the Wills Act, 1 Vict. c. 26, he cannot do so by will, if a minor.

The Infants' Custody Act, 1873, extending Talfourd's Act, 1839, is in its turn extended by the Guardianship of Infants Act, 1886 (*d*), which provides that (i) the mother, if surviving the father, shall be a guardian jointly with any guardian appointed by the father, or alone if none, unless the Court appoints one on his death or refusal to act; (ii) if not surviving the father she may appoint a guardian to act jointly with one appointed by him, and also may make a provisional appointment of a fit person to act jointly with him, which the Court may confirm if it deems him unfitted to be sole guardian; (iii) on her application it empowers the Court to make such order as regards the custody of and access to an infant by either parent as it may deem fitting, and to remove any guardian and to appoint another.

The Court has two kinds of jurisdiction over infants.

1. As delegate of the Sovereign, who is *parens patriæ*.

Under the Custody of Children Act, 1891 (*e*), the Court has power to refuse to order the production or delivery up of a child to the father if not for the benefit of the child.

If the child has no property the Court still has jurisdiction, but will not exercise it other than to appoint or remove a guardian (*f*), as it can only exercise it usefully when there is property to apply for maintenance (*g*), besides now, there is the Prevention of Cruelty of Children Act, 1904, and the Children's Act, 1908 (*h*).

2. As a ward of Court. Here a scheme for maintenance and education will be made and the jurisdiction is exercised by and according to the principles of the Chancery Division as assigned to it by the Judicature Act, 1873. If an order for custody has been made by the Divorce Court, equity will not interfere (*i*).

An infant becomes a ward of Court:

(i) If an action is commenced in his name.

(ii) If an order or petition or summons has been made for a guardian for him.

(iii) If an order is made in like manner for maintenance.

(*c*) *Sleeman* v. *Wilson*, L. R. 13 Eq. 36.
(*d*) 49 & 50 Vict. c. 27.
(*e*) 54 Vict. c. 3.
(*f*) *In re Scanlan*, 40 Ch. D. 200.
(*g*) *Wellesley* v. *Beaufort*, 2 Russ. 21.
(*h*) 4 Edw. 7, c. 15; 8 Edw. 7, c. 67.
(*i*) *Manders* v. *Manders*, 63 L. T. 627.

(iv) If a fund belonging to an infant is paid into Court under the Trustee Act, 1893, in as far as it replaces the previous Acts of 1847 and 1849.

The father controls the education and religion of his children, and this power extends after his death, as the guardian he appoints must carry out his wishes on the subject. But he can be deprived of this privilege by misconduct. Thus, in *Wellesley* v. *Wellesley* (*k*), the father lived an openly immoral life; in *In re Besant*, Mrs. Besant published what was called an obscene book (*l*); in *Shelley* v. *Westbrook* (*m*), the famous poet Shelley published what was stigmatized as an atheistical work, called Queen Mab, but one would fancy that for the Courts to dictate about matters of religion or morality would be dangerous, and it is satisfactory to know that this attempted assertion is on the wane.

A father can abdicate his right to require his children to be brought up in his own religion. Thus he may commend his children to the care of some person of alien creed (*n*), or have allowed the children to be baptized in an alien church (*o*), and they may in consequence have resided with persons and acquired convictions from them which it would be injudicious to disturb. The Court in these cases deems the interests of the children to be paramount. Desertion or inability to provide for a child may disentitle a father or widowed mother to the right of custody (*p*). Permission that the children should look for maintenance to other people, from which limited delegated custody must be distinguished (*q*), will add weight to this plea. The Court will not, however, prefer a child's pecuniary interest to what a father would have regarded as its spiritual interests (*r*). The welfare which the Court regards in its moral, religious and spiritual welfare, is welfare all round (*s*). Although matters concerning the custody and education of infants are assigned by the Judicature Act, 1873, to the Chancery Division and the rules of equity are to prevail, yet it was decided in *In re Goldsworthy* (*t*) that the common law has a concurrent jurisdiction.

(*k*) 2 Bl. N. S. 124.
(*l*) 11 Ch. D. 508.
(*m*) Jac. 266.
(*n*) *In re Violet Nevin*, [1891] 2 Ch. 299.
(*o*) *Hill* v. *Hill*, 2 W. R. 400.
(*p*) *Queen* v. *Gyngall*, [1893] 2 Q. B. 232.
(*q*) *Barnardo* v. *Ford*, [1892] A. C. 326.
(*r*) *Talbot* v. *Earl of Shrewsbury*, 4 M. & Cr. 627.
(*s*) *Per* LINDLEY, L.J. *Per* Lord ESHER, M.R. (1893), 2 Q. B. 242.
(*t*) 2 Q. B. D. 75.

Maintenance and Accumulation.

In re HOLFORD, HOLFORD *v.* HOLFORD.

([1894] 3 Ch. 30.)

(1) *Where a bequest is made to a class of children contingently on their attaining twenty-one, the capital representing the then share of the first child who attains twenty-one then vests in him, and if the class is not liable to be increased is then payable to him.*

(2) *If the bequest carries the right to intermediate income, the income of the then prospective share of each minor is payable towards his maintenance under sect.* 43 *of the Conveyancing Act,* 1881 ; *but the residue is accumulated, and if not applied as income under the same Act, follows the destination of the capital.*

(3) *The second rule applies after as well as before the first rule has been applied.*

H. Holford devised and bequeathed his real and personal estate to trustees upon trust to convert and stand possessed of his net residuary trust funds upon trust to divide the same equally among the children of his brother, T. Holford, who should be living at his decease and attain twenty-one. There was no express provision for maintenance and accumulation. There were six children of the class mentioned; and the trustees of the marriage settlement of the eldest child when she attained twenty-one claimed (1) the capital, *i.e.* one-sixth of the residuary trust funds, and (2) the accumulations thereon. This claim was conceded. But her trustees also claimed (3) the income of the entire "residuary trust funds" until the next child attained twenty-one, then of half thereof until the third child attained twenty-one, and so on. The Court of Appeal (affirming Mr. Justice Chitty) disallowed this claim, and declared that the income of the five-sixths was payable in the same way as before the eldest child attained twenty-one.

There is no broad principle of equity involved in the leading case, but it settles a point which meets every lawyer in practice, and as to which *In re Jeffery* (*a*) had made not clear.

It was said that if leaseholds were devised to children at twenty-one, the first who attained that age got a vested share in the whole, and therefore the whole income, of which he was divested *pro tanto* as his brothers and sisters attained twenty-one (*a*). Where the property is realty, this is still the rule (*b*).

The Conveyancing Act, 1881, s. 43, authorized trustees holding any property for an infant in trust either for life or for any greater estate and whether absolutely or contingently on his attaining twenty-one or on the occurrence of any event before his attaining that age, to apply the income of that property or any part thereof, for or towards the infant's maintenance, education, or benefit. The leading case set at rest a question in which, owing to the above rule, there had been considerable confusion, and in consequence of the construction now placed upon the section, it is sufficient to rely upon it.

In drafting instruments in which a gift of property is made to an infant or a class of infants contingently in such a way that upon the happening of the contingency they will receive the principal, the intermediate income from the date of the gift until the happening of the contingency will go to the donee or donees as well as the principal (*c*). Thus, where leaseholds were given to trustees to pay the income to the testator's daughter for life, and then in trust for her children in equal shares, the sons at twenty-one and the daughters at that age or marriage. There were other bequests, and the residue was in trust for the children. The daughter died, leaving children who were infants. It was held that the bequest separated the leaseholds from the general estate, and the intermediate income until one of the children attained a vested interest was applicable for the maintenance of the infants. But if the gift of the principal be so made as not to carry with it the intermediate income, such income cannot be applied under the Act for the infant's maintenance. Any unapplied accumulations of the income will go to the contingent legatee on the contingency happening (*d*), but only if it happens (*e*).

(*a*) [1891] 1 Ch. 671. *Furneaux* v. *Rucker* (1879), W. N. 135.
(*b*) *In re Averill*, [1898] 1 Ch. 523.
(*c*) *In re Woodin*, [1895] 2 Ch. 309.
(*d*) *Bective* v. *Hodgson*, 10 H. L. Cas 656.
(*e*) *In re Bowlby*, [1904] 2 Ch. 685.

Illegitimate children are not included in the expression "children" (*f*). These rules are applicable to a legacy payable out of a mixed fund of realty and personalty (*g*), and the expression "personalty" includes chattels real.

Testamentary gifts carry interest from the testator's death in the absence of directions to the contrary in the case of (*h*):

1. A present but not a future devise, and a present vested specific bequest but not a future contingent bequest, unless segregated by order of the testator, as an appointment.

2. Contingent residuary personalty and future residuary personalty and realty blended in one gift to the same beneficiaries.

3. An immediate legacy charged on land only.

4. Where the legatee is an infant and maintenance is given or the testator is *in loco parentis*.

5. Where the legacy is in satisfaction of a debt.

6. Any legacy payable on a contingency or at a certain date if the testator survives that date or contingency.

The rate of interest is 4 per cent.

The rules as to ascertaining who are members of a class are chiefly as follows (*i*):

1. As to personalty (*j*):

Where A gives to B's children:

(i) Those of B's children who are alive at A's death take, and in default of such, all B's children take; also in gifts of income.

(ii) After B's death; B's children living at A's and born before B's death, take.

2. As to realty:

(i) A gives to B's children; those living at A's death take, unless it is an executory devise, in which case all take.

(ii) A gives to E for life, then to B's children who attain twenty-one; the gift, if a contingent remainder, fails as to those who are not in existence when E dies; if an executory devise, all B's children will take (*k*).

Since the passing of 40 & 41 Vict. c. 33, 2nd August, 1877, a limitation which fails as a contingent remainder will take effect as an

(*f*) *In re Du Bocket*, [1901] 2 Ch. 441.
(*g*) *Smart* v. *Taylor*, [1901] 2 Ch. 134.
(*h*) Theobald on Wills.
(*i*) As to these rules in full, see Theobald on Wills.
(*j*) *In re Powell*, [1898] 1 Ch. 227.
(*k*) *Dean* v. *Dean*, [1891] 3 Ch. 150.

executory interest if it does not transgress the rule against perpetuities, which is, that every executory interest to take effect must arise within a life or lives in being and twenty-one years after, allowing for gestation if gestation exists or within twenty-one years independently of any life; and if by any possibility a limitation could transgress the rule, it is void *ab initio* (*l*).

Sect. 43 of the Conveyancing Act, 1881, does not apply, if the vesting is postponed beyond twenty-one years (*m*). A gift transgressing the rule may be upheld if severable. Thus: to A for life, then to his children for life, then to their children, is severable, and the grandchildren born in the settlor's lifetime take, but not the others, as the total gift splits into different shares, and the invalidity of the one does not affect the other (*n*); but such a gift to them as tenants in common with B wholly fails (*o*).

The Thelusson Act (*p*) forbids accumulations of income beyond (1) the life of the settlor; or (2) twenty-one years after his death; or (3) during the minority of a child in being at his death; or (4) of any child in being who would, if of full age, be entitled to the income. An Act of 1892 (*q*) has shortened the period to the minority of the person who would, if of full age, be entitled when the accumulation is to be invested wholly (not mainly) in (*r*) the purchase of land (*s*). The periods are alternative, and, if transgressed, the excess only is avoided. Accumulations for payment of debts, raising portions and of proceeds of woods and timber, or for repairs (*t*) or replacement wasting capital (*u*), are excepted from the prohibitions, which are less stringent than the perpetuities rule, not vitiating the entire limitation.

Sect. 43 (2) of the Conveyancing Act, 1881, provides that the trustees shall accumulate the residue of the income by way of compound interest for the benefit of the person who ultimately becomes entitled to the property. It was decided in *In re Bowlby*, in 1904, that where property was settled contingently on their attaining

(*l*) *Cadell* v. *Palmer*, Tud. Conv. Cas., 4th ed., 578.
(*m*) *In re Judkin's Trusts*, 25 Ch. D. 743.
(*n*) *In re Russell*, [1895] 2 Ch. 698.
(*o*) *In re Stephens* (1896), W. N. 24.
(*p*) 39 & 40 Geo. III. c. 98 (Accumulations Act, 1800).
(*q*) 55 & 56 Vict. c. 58 (Accumulations Act, 1892).
(*r*) *In re Danson* (1895), W. N. 102.
(*s*) *In re Clutterbuck*, [1901] 2 Ch. 285.
(*t*) *Vine* v. *Raleigh*, [1891] 2 Ch. 13.
(*u*) *In re Gardiner*, [1901] 1 Ch. 697.

twenty-one, on infants for life, and afterwards *aliunde* on other trusts, the infants on attaining twenty-one were entitled only to the accumulations of income during their minority (*x*). The same if a legacy is payable out of a mixed fund of realty and personalty (*y*).

Victims of Mistake—Mistake of Law.

ROGERS *v.* INGHAM.

(1876, 3 Ch. D. 351.)

The Court will only relieve against a payment of money under mistake of law if there be some equitable ground which renders it inequitable that the party who received the money should retain it.

An executor took the opinion of counsel with regard to the construction of a will, and was advised that a legatee was not entitled to certain interest which had been paid to her. The legatee also took the opinion of her counsel, which was to the same effect. The executor then divided the estate, and the legatee accepted her share in accordance with these opinions. Two years afterwards the legatee commenced an action submitting another construction of the will and claiming repayment on that basis, but it was held that such an action could not be maintained.

The Court of Appeal upheld the decision of Vice-Chancellor Hall, to the effect that it was too late in the day to consider the question whether a proper construction had been put upon the will, and that the plaintiff could not be relieved on the ground that there was a common mistake of law.

In deciding the leading case the Court of Appeal assumed that a mistake in the construction of an instrument was a mistake of law so far as the question of relief is concerned. Similarly, specific performance was decreed against defendant, who misconstrued a

(*x*) *In re Bowlby*, [1904] 2 Ch. 685.
(*y*) *Smart* v. *Taylor*, [1901] 2 Ch. 134.

document in *Powell* v. *Smith* (*a*); and *Hart* v. *H.* (*b*); and vendor's delay in completing a contract, being due to a misconstruction of it, was regarded as "wilful default" in *In re Pelly & Jacob's C.* (*c*).

Ignorance of law is no excuse, and generally money paid under it is irrecoverable. The rough exceptions are:

1. If paid under legal compulsion.

2. If the mistake of law is so gross as to amount to a mistake of fact as well, or if there is a fraud, or an agreement is absolutely ill-advised.

Thus where an eldest son was too ignorant to know that he was heir, and agreed to divide the estate with his younger brother, he was relieved (*d*).

3. If it occurs owing to an error of construction of a document.

4. Where a fiduciary relationship exists between the parties.

Sir GEORGE JESSEL, Master of the Rolls, in *Eaglesfield* v. *Marquis of Londonderry* (*e*), defines a misrepresentation of law as follows: "When you state the facts and state a conclusion of law, so as to distinguish between facts and law, the man who knows the facts is taken to know the law; but when you state that as a fact which no doubt involves, as most facts do, a conclusion of law, that is still a statement of fact and not a statement of law. Suppose a man is asked by a tradesman whether he can give credit to a lady, and the answer is, 'You may; she is a single woman of a large fortune.' It turns out that the man knew that the lady had gone through the ceremony of marriage with a man who was believed to be a married man, and she had been advised that the marriage ceremony was null and void. That is a statement of fact. If he had told the whole story and all the facts and said, 'Now, you see, the lady is single,' that would have been a misrepresentation of law."

Lord Justice JAMES said: "When a person has received money from another with perfect knowledge of the facts common to both, no authority has been cited that it can be recovered from him, there being no fiduciary relationship between them or ground which rendered it inequitable to retain it."

To allow this would open a fearful amount of litigation in the case of distribution of estates, and therefore the general principle is that though the Court has power to relieve (*f*), there is no relief

(*a*) L. R. 14 Eq. 85.
(*b*) 18 Ch. D. 690.
(*c*) 80 L. T. 45.
(*d*) *Pusey* v. *Desbouverie*, 3 P. Wms. 315.
(*e*) 4 Ch. D. 693.
(*f*) *Stone* v. *Godfrey*, 5 De G. M. & G. 76.

against mistakes of law, except when some fiduciary relationship or some equity renders it expedient, and the fact that the complainant was wrongly advised makes no difference. Thus in the old case of *Bingham* v. *Bingham* (*g*), a man got back money which he had paid by mistake for a conveyance of land which was really his own, and his mistake was owing to the defendant's advice, the latter being a scrivener and conveyancer.

The cases in which it is recoverable may be marshalled as follows:—

1. Where there are circumstances pointing to fraud (*h*), the Court will interfere, for fraud vitiates everything; for instance, a wilful misrepresentation of law.

2. Where a trustee under a mistake of law overpays, he can deduct from future payments the amount overpaid, as a consequence of his right to impound (*i*).

3. If B induces A's erroneous construction of a document, A may set it aside, not on the ground of common error, but of misrepresentation by B (*k*):

4. This is an important exception—if a company amalgamates with another company, and such amalgamation is *ultra vires*, a creditor who has renounced may resume his rights against the first company. He is to this extent relieved against his mistake in law (*l*).

5. Where A *knows* he is entitled to one estate adversely to B and to the same and another estate under B, he cannot claim both against and under B (*m*); but he must know that the doctrine of election is a practice of equity and not a rule of law, and remaining in possession of two estates under inconsistent titles is no proof of an election. He must have exercised an election knowing what he does.

6. Where by mistake of law money has been paid to an officer of the Court as a trustee in bankruptcy, Lord Justice JAMES, in delivering judgment, said: "I am of opinion that a trustee in bankruptcy is an officer of the Court. He has inquisitorial powers given him by the Court, and the Court regards him as its officer, and he is to hold money in his hands upon trust for its equitable distribution

(*g*) 1 Ves. Sen. 126.
(*h*) *Broughton* v. *Hutt*, 3 De G. & J. 501.
(*i*) *Livesay* v. *Livesay*, 3 Russ. 287.
(*k*) *Stewart* v. *Kennedy*, 15 App. Cas. 108.
(*l*) *In re Saxon Life Ass. Soc.*, 2 J. & H. 408.
(*m*) *Spread* v. *Morgan*, 11 H. L. C. 588, 602, 611.

among the creditors. The Court, then, finding that he has in his hands money which in equity belongs to some one else, ought to set an example to the world by paying it to the person really entitled to it. In my opinion the Court of Bankruptcy ought to be as honest as other people." And, further, the trustee in bankruptcy will be ordered to refund such payments, not only out of money in his hands, but out of other moneys afterwards coming to his hands (*n*).

"The Court," said Lord ESHER, "will direct its officer to do that which any high-minded man will do, not to take advantage of the mistake of the law. This rule is not confined to the Court of Bankruptcy. If money had by a mistake of law come into the hands of an officer of the Court of Common Law, the Court would order him to repay it as soon as the mistake was discovered. Of course, as between litigant parties, even a Court of Equity would not prevent a litigant from doing a shabby thing. But I cannot help thinking that if money had come into the hands of a receiver appointed by a Court of Equity through a mistake of law, the Court would, when the mistake was discovered, order him to repay it." This was done in *In re Rhoades*(*o*).

In *In re Brown* (*p*), where trust money in the hands of a trustee had been paid to his trustee in liquidation by a mistake of law, the Chancery Division ordered him to refund it. Mr. Justice KAY said: "A Court of the Chancery Division does not consider itself bound to act on principles less honest than the Court of Bankruptcy."

The leading case followed the earlier decision in *Stone* v. *Godfrey* (*q*), where the plaintiff had been advised that he was not tenant by the curtesy, and concurred with his daughter, then an infant, in a partition suit. *Held*, he was not entitled to relief, though Lord Justice TURNER expressed his view that it was in the power of the Court to relieve, an opinion followed by Lord HATHERLEY in *Re Saxon Life Assurance Society* (*r*).

Therefore on the whole doctrine it may be said that the Court has power to relieve, but will only do so in exceptional circumstances, and where it would not be consonant with the principles of equity to refuse.

(*n*) *Ex parte Simmonds*, 16 Q. B. D. 308.
(*o*) [1899] 2 Q. B. 347, 355.
(*p*) Ch. D. 597.
(*q*) 5 De G. M. & G. 76.
(*r*) 2 J. & H. 408.

Victims of Mistake—Mistake of Fact.

COOPER *v.* PHIBBS.

(1867, L. R. 2 H. L. 149.)

Where a contract is entered into bonâ fide *under a mutual mistake of fact, either party is entitled to be relieved from it.*

An owner in fee simple of Irish estates, including a salmon fishery, having become a lunatic, an application was made to Parliament for an Act to improve the fishery, and the Act was passed shortly after the lunatic's decease. The Act, after reciting that the fishery in question had descended to and was vested in E. J. Cooper as heir-at-law of the lunatic, and that the said E. J. Cooper was desirous of constructing certain works to improve the fishery, "on the terms that the exclusive right of fishery should in consideration thereof be vested in and confirmed to him, his heirs and assigns," proceeded to confer upon him the requisite powers. Under these powers E. J. Cooper spent large sums upon the improvement of the fishery, and always considered and stated that by the Act he was made owner in fee of the fishery. As a matter of fact, E. J. Cooper was only entitled to the fishery as trustee for the persons beneficially entitled under a prior settlement, *i.e.* for himself for life with remainder to E. Cooper. On E. J. Cooper's death all parties assumed, from statements made by E. J. Cooper, that he was owner in fee of the fishery, and that therefore, while the lands passed to E. Cooper under the settlement, the fishery passed direct from E. J. Cooper to his daughters. Phibbs, the daughters' trustee, then agreed to lease the fishery for a term of years to E. Cooper. Shortly afterwards E. Cooper read the Act of Parliament, and believing that, under the provisions thereof and of the settlement, the fishery really belonged to himself, applied to the Court to have the agreement set aside. The House of Lords decided that the agreement,

having been made in mutual mistake, must be set aside, and directions were given for ascertaining the amount expended by E. J. Cooper, the House holding that his estate was entitled to a lien upon the fishery for that amount.

For mistake of fact there is, as a rule, relief in equity if the mistake is material. The mistake may be on one side only or mutual. Usually there is relief for either if it is a case for relief, the remedy for mutual mistake being rectification, and that for unilateral mistake rescission. But there are considerable limits in the latter case. Thus it must be shown that the fact is one which could not by reasonable diligence have been known to the plaintiff, and generally also that it is one which the defendant should have been bound to communicate. If the means of information are equally open to both, there is no reason why the Court should interfere; though Lord Justice FRY laid down, in *Wilmott* v. *Barber* (*a*), that it was no less a ground of relief because the mistaken party had the means of knowledge, though there specific performance was refused because the agreement involved the breach of a prior contract.

In the leading case, the tenant for life had become a lunatic, and an Act was passed shortly after his decease to develop the salmon fishery. The facts were that E. J. C. had under a settlement a life estate in the fishery, remainder to his heirs male, but he died without heirs male, and E. C. and his heirs male succeeded. Therefore he took a lease of his own property, his daughters thinking he was the owner.

Lord WESTBURY said that the word "*Jus*," in the maxim *ignorantia juris non excusat*, applies to the general law, and not to private rights.

The House of Lords held that it is the duty of a Court of Equity to deal with the whole subject-matter; hence the ruling as to the lien upon the fishery given to the estate of E. J. C.

The subject of rectification, setting aside and cancellation of deeds and other written instruments, specially assigned by sect. 34 of the Judicature Act, 1873, to the Chancery Division, is a remedy for mutual mistake, as it gives the defendant an option of taking what the plaintiff intended to give him (*b*). In *Tucker* v. *Bennett* (*c*)

(*a*) 15 Ch. D. 96, 106.
(*b*) *Paget* v. *Marshall*, 28 Ch. D. 255.
(*c*) 34 Ch. D. 754.

there was a marriage settlement drawn up without any reference to the intended wife, who had not been informed of its terms, containing a covenant to settle after-acquired property on her for life, remainder to her issue, and, on default, on her next-of-kin, as if she had died intestate and without having been married. The rectification gave her a testamentary power of appointment, in the event of her predeceasing her husband, over the property, and an absolute property if she survived him.

The Court can rectify upon parol evidence of mistake, and order specific performance in the same action, provided the Stat. of Frauds is not a bar; nor does enrolment of the deed under the Fines and Recoveries Act exclude its jurisdiction (*d*). And the practice is to endorse the rectifying order on the instrument rectified.

A release was set aside on the ground of mistake in *Re Garnett, Gandy* v. *Macauley* (*e*), where two ladies entitled to quarter shares in a residuary estate released to the trustee their shares for a sum much less than their value at the time of the release, which was drawn up by the trustee's solicitor, they having no independent advice.

As to enforcing or declining specific performance on the ground of mistake, Lord Justice JAMES held, in *Tamplin* v. *James* (*f*), that the Court had gone too far in allowing a defendant to escape specific performance because of a mistake to which the plaintiff had not contributed (as in *Malins* v. *Freeman* (*g*), where the purchaser had mistaken the lot at an auction), and that a man should take reasonable care as to what he is buying; in fact, that the principle, whether relief should lie or not depends upon whether, in the description of the property, there is a matter in which a man might *bonâ fide* make a mistake or not (*h*). But in *Beauchamp* v. *Winn* (*i*) the House of Lords held that where there is a *mutual* mistake in the agreement as to the rights of the parties, relief will not be withheld because it is impossible to restore them to their original position.

In the recent case of *Hodson* v. *Thetard* (*k*), A offered to sell B land based on a valuation, forgetting the existence of a more recent valuation. Specific performance was refused, and the plaintiff awarded damages instead. Where two estates were sold by the same auction, and A by mistake had the wrong one knocked

(*d*) *Hall-Dare* v. *Hall-Dare*, 31 Ch. D. 251.
(*e*) 31 Ch. D. 1.
(*f*) 15 Ch. D. 217.
(*g*) 2 Keen, 25.
(*h*) *Swainsland* v. *Dearsley*, 29 Beav. 430.
(*i*) L. R. 6 H. L. 223
(*k*) [1907] 51 S. J. Notes, 482.

down to him, it was held there was a fundamental mistake as to the subject-matter, and that between A and the auctioneer there could be no agreement, as they were at cross purposes (*l*). This case does not tally with *Tamplin* v. *James*, save that the purchaser bought the wrong estate; while there he thought two pieces of garden were included.

In giving relief, the Court holds that in considering the question of laches, time runs from the date when the party seeking relief first became aware of the mistake. In *Beale* v. *Kyte* (*m*) a conveyance did not accord with the contract, and the vendor, who brought an action for rectification on the ground of mutual mistake six years after the conveyance, was granted relief.

Finally, no relief is given when some formality is wanting, the absence of which makes the instrument void by Statute (*n*). And if the Statute itself or any other Statute gives relief in order to abate the rigour of the Common Law, as in the case of breach of covenants, resort must be made to them, and not to a Court of Equity (*o*).

But declining to give relief because of implied Statutory prohibition is confined to cases which are absolutely and not merely apparently contravening a Statute, for the Court is anxious to do justice whenever expedient. Thus, if an assurance of resettlement has been enrolled under the Fines and Recoveries Act, 1833, and there is an error, the Court will relieve, because the Statute is only imperative as far as regards the destruction of the entail (*p*).

Fraud on a Power.

HENTY *v.* WREY.

(1882, 21 Ch. D. 332.)

There is no rule of law that every power for raising portions for children is subject to the qualification that the portions are not raisable under it unless the children live to want them.

(*l*) *Van Praagh* v. *Everidge*, [1903] 1 Ch. 434.
(*m*) [1907] 1 Ch. 564.
(*n*) *Dixon* v. *Ewart*, 3 Mer. 322.
(*o*) *Evans* v. *Chapman*, [1902] W. N. 78.
(*p*) *Hall-Dare* v. *Hall-Dare*, 31 Ch. D. 251.

The Court will not infer that an appointment is a fraud upon a power unless there are such cogent facts that it cannot reasonably come to any other conclusion.

Sir B. P. Wrey had a power to charge portions for younger children on real estate, and to fix the ages and times at which the portions should vest and be payable. In 1828 and 1832 he appointed £10,000 to his three daughters, aged nine, seven, and one, equally, the portions to vest at once and to be paid after his death. There were provisions for maintenance and advancement. Two of the daughters having died infants and spinsters, Sir B. P. Wrey in 1851 appointed that £5000 should be paid to his surviving daughter after his death. Then she and her husband reassigned to him their share in the remaining £5000, which the appointor then mortgaged to Henty. Held, by the Court of Appeal, that Henty was entitled to have the £5000 raised.

The old case of *Aleyn* v. *Belchier* (*a*), decided in 1758, proceeded upon the principle that "no point is better established than that a person having a power of appointment must execute it *bonâ fide* for the end designed, otherwise it is corrupt and void." Two questions, one of fact, the other of law, arose in the leading case. First, whether as a question not of law but of fact, the appointment made by Sir B. P. Wrey was a fraud on the power; and, secondly, whether there was a general rule established by the cases with regard to charges on land created under powers of appointment, under which the Court was bound, even in the absence of proof of fraudulent intent, to set aside the appointment which had been made. This alleged rule had been stated in the Court below to proceed on the principle that such a power being in the nature of a discretionary trust, the appointor must be taken to know that it is contrary to the nature of the trust to make an appointment so as to vest immediately portions in children of tender years, and such an appointment would therefore be so improper that the Court would control it by refusing to allow the portions to be raised if the children did not live to want them. Before approaching the consideration of the peculiar circumstances of the case before them

(*a*) 1 Eden, 132.

in connection with the exercise of the power, the Court of Appeal pointed out that plainer or more emphatic words as regarded the right of directing the portions to be vested at any time which the appointor should think fit, could not be imagined. It was not merely directed that the money should be vested at such age, day, or time, but that it should be an interest vested in and to be paid to the child or children at such age, day, or time as the donee of the power should think fit. It came therefore to this, that on the words there could be no question that the parties to this deed intended that the appointor (acting of course *bonâ fide*) should be the judge of the period at which the portions should vest. It was left to him to decide that question, and therefore, unless there was some rule of law which said that notwithstanding the plain meaning of the expressions used, effect could not be given to the intention expressed by them, effect must be so given. The rule contended for was opposed to principle, "the principle being that such contracts or settlements are to have effect given to them according to the intention," and opposed also to the modern rules of construction.

In dealing with the question of fact, the Court of Appeal wholly distinguished the facts of the present case from the facts of the celebrated case of *Lord Hinchinbroke* v. *Seymour* (*b*), discussed in Lord St. Leonards on Powers, p. 694, Chance on Powers, pp. 141, 463, and Farwell on Powers, p. 326. The facts of that case, as illustrating the principle that the Court will not permit a party to execute a power for his own benefit, were thus shortly summed up by Lord Eldon in *McQueen* v. *Farquhar* (*c*): "In Lord Sandwich's case" (Lord Hinchinbroke became Lord Sandwich), "a father having a power of appointment and thinking one of his children was in a consumption, appointed in favour of that child. And the Court was of opinion that the purpose was to take the chance of getting the money as administrator of that child." With regard to the present case the Court pointed out that here there was not one child, but there were three children in whose favour the appointment was made. "Did the father," said Sir GEORGE JESSEL, "expect the three children to die in his lifetime? Why should he? It has been laid down over and over again that even in a will the legatees are assumed by the testator to survive him. Does a father assume that his children will die? There is not a *scintilla* of evidence to show anything of the kind, that he assumed it or that he had

(*b*) 1 Bro. C. C. 395. (*c*) 11 Vesey, 467.

any ground for assuming it. The child, who was one year old, no doubt died afterwards, but not until fifteen years afterwards; and the other child, who was then four years old, died afterwards at eighteen years of age. Therefore the times of death do not afford any inference at all that they were likely to die at this early age, and why should the father have such a horrible intention imputed to him that he appointed to his three little daughters on the assumption that they would die in his lifetime and that he would thereby obtain the benefit? I am shocked at such an inference being drawn without any ground whatever." The judgment then went on to show that the appointment which really took effect was not the appointment of 1828, but the confirmatory appointment of 1832, and that there was this cogent reason for making the appointment, that otherwise the children would be left without provision, and there were these further advantages, that the Court could give maintenance and advancement out of the fund, and any surplus of the income would be available for future maintenance, when increased maintenance was required. These were reasons for making the appointment vest at once; it would be a benefit to the children and never could do them any harm. "When you see," said Sir GEORGE JESSEL, "that there was a reason for appointing portions, and making them vest immediately, with a view to the benefit of the children, you are not to impute to the father an intention to commit a fraud upon the power."

With regard to the general question of law involved in the case, Sir GEORGE JESSEL elaborately reviewed the authorities, and stated that no such principle existed as that laid down in the Court below, prohibiting the raising of a portion in the event of a child dying under twenty-one and unmarried. The whole law on the subject was summed up by Lord Justice LINDLEY, in the five following propositions:—

1. That powers to appoint portions charged on land ought, if their language is doubtful, to be construed so as not to authorize appointments vesting those portions in the appointees before they want them, that is, before they attain twenty-one or (if daughters) marry.

2. That where the language of the power is clear, effect must be given to it.

3. That where upon the true construction of the power and the appointment, the portion has not vested in the lifetime of the appointee, the portion is not raisable, but sinks into the inheritance.

4. That where, upon the true construction of both instruments

the portion has vested in the appointee, the portion is raisable even though the appointee dies under twenty-one or (if a daughter) unmarried.

5. That appointments vesting portions charged on land in children of tender years who die soon afterwards are looked at with suspicion; and very little additional evidence of improper motive or object will induce the Court to set aside the appointment or treat it as invalid, but that without some additional evidence the Court cannot do so.

Sir GEORGE JESSEL, in *In re D'Angibau, Andrews* v. *Andrews* (*d*), classified the different classes of powers thus:

1. Powers collateral—those given to a person who has no interest in the property, as an executor's power to sell.

2. Powers in gross—those exercised by a person who has an interest in the property over which the power extends, but which interest cannot be affected by its exercise, as a power given to a tenant for life to be exercised after his death.

3. Powers appendant or appurtenant, as a power exercised by a person who has an interest in the property, which interest is capable of being affected to some extent by its exercise, as a power given to a tenant for life to grant leases.

Formerly when a power of appointment was given amongst a class, an appointment of a very small share to any of the objects was invalid, but by the Illusory Appointments Act, 1 Will. IV. c. 46, this is no longer so, and by the Powers of Appointment Act, 1874, 37 & 38 Vict. c. 37, an exclusive appointment, that is, leaving out one or more of them altogether, is also valid unless it is stated in the instrument conferring the power that none of the objects shall be excluded.

The Conveyancing Act, 1881, 44 & 45 Vict. c. 41, s. 52, enables any person to whom a power, whether coupled with an interest or not shall be given, by deed to release or covenant not to exercise it, and by the Conveyancing Act, 1882, 45 & 46 Vict. c. 39, s. 6, similar powers of disclaimer are conferred on any person to whom a power, whether coupled with an interest or not, is given, and on such disclaimer the power may be exercised by the other or others or the survivor of the others to whom such power is given unless the contrary is expressed in the instrument creating the power. Both these provisions are retrospective.

(*d*) 15 Ch. D. 228.

In a recent case a husband and wife, under a marriage settlement of personalty in the usual form by deed appointed part of the settled funds to their eldest son upon a bargain that he should raise money to pay their debts. The son mortgaged the reversionary interest so appointed to him to S, and then sold the equity of redemption to C, and handed over the proceeds to the husband. After the husband's death a mortgagee of the wife's life interest brought an action to administer the trusts of the settlement, and an order of compromise directed the property appointed to the eldest son to be carried to a separate account called "share of C and his incumbrancers subject to the life interest of the wife and her mortgagee." The younger children of the marriage afterwards discovered the fraud on the power, and sued for a declaration that the appointment to the son and his mortgage to S and sale to C were all void.

The Court of Appeal, affirming Mr. Justice NEVILLE, held that the appointment to the son was not voidable, but void; that nothing passed by it to the son or to his mortgagees or to his purchaser C; that carrying the appointed share to a separate account could not give C and S what was equivalent to a legal estate in it so long as the wife was alive; and that the daughters were entitled to the declaration sued for.

If the Court had decided the appointment was only voidable, then the defence of *bonâ fide* purchaser without notice would have been available to C and S, and formed a good defence to the action (*e*).

Relief to "Expectant Heirs," and other Similar Cases.

EARL OF AYLESFORD *v.* MORRIS.

(1873, L. R. 8 CH. APP. 484.)

The Court will relieve "expectant heirs" against bad bargains relating to their reversionary or expectant interests if they have had no independent advice; and if some deceit has been practised or age or poverty has enfeebled their intelligence.

(*e*) *Cloutte* v. *Storey*, [1910] W. N. 163; affirmed (1911), 1 Ch. 18.

The Earl of Aylesford, who was entitled to large estates as tenant in tail expectant on the death of his sick father, had contracted debts during his minority, and shortly after attaining his majority borrowed from Morris, a money-lender, £6800 on his acceptance at three months for £8000, and a policy effected at his own cost. The money was borrowed partly in order to pay off an old debt, and Lord Aylesford had no independent advice. When the acceptance became due an arrangement was entered into under which Lord Aylesford received £207 and gave acceptances for £11,000. The Court of Appeal ordered all securities to be given up upon payment of the sums actually advanced, with interest at five per cent. per annum.

This protective equity originated with the infamous Jeffreys, and that its object was the protection of hereditary capitalism has been boldly stated by its author and some of his successors (*a*). Lord THURLOW and Sir WILLIAM GRANT justified it by a theory which attributed constructive infancy to those who have great expectations (*b*), but Lord SELBORNE describes the modern rule in terms which indicate that it is a species of constructive or equitable fraud. However, Courts of Equity have always been inclined to relieve against catching bargains with heirs and expectants, especially when they consider there has been any undue taking advantage of youth or inexperience. Lord SELBORNE, in the above case, said, "There is hardly any older head of equity than that described by Lord HARDWICK in *Earl of Chesterfield* v. *Janssen* (*c*), namely, relieving against the fraud which infects catching bargains with heirs and expectants in the life of the father. . . There is always fraud presumed from the condition of the contracting parties, weakness on the one side, usury on the other, or advantage taken of that weakness .. . . The victim comes into the snare excluded, by the very motives which attract him, from the advice of his natural guardians, and from that professional aid which would be accessible to him if he was not compelled to secrecy. Great judges have said there is public policy in restraining this; that this system of undermining the fortunes of families is a public as well

(*a*) *Berney* v. *Pitt*, 2 Vern. 14; *Nott* v. *Johnson*, 2 Vern. 27.
(*b*) *Gwynne* v. *Heaton*, 1 Br. 9; *Peacock* v. *Evans*, 16 Ves. 514.
(*c*) 2 Ves. Sen. 125.

as a private nuisance; that it is a sort of indirect fraud upon the heads of families from whom these transactions are concealed," etc. Also, where there is "an advancement of goods instead of money for the purpose of being resold to supply the necessities of the expectant heir or reversioner, Equity will treat the transaction as colourable, and grant relief" (*d*).

The modern Statutes dealing with this subject are:

1. 17 & 18 Vict. c. 90 (1854), which repeals the usury laws, allowing any amount of interest to be charged.

2. 31 Vict. c. 4 (1867), forbidding any *bonâ fide* purchase of a reversionary interest to be set aside merely on the ground of under value.

3. The Infants' Relief Act, 1874 (37 & 38 Vict. c. 62), providing that all contracts entered into by infants for the repayment of money lent or goods supplied, and all accounts stated with them, shall be absolutely void, and that no action shall be brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy or upon any ratification made after full age of any promise made during infancy, whether there shall be any new consideration or not. But a fresh promise is not a ratification (*e*).

4. The Money-lenders Act, 1900 (63 & 64 Vict. c. 51), whereby all money-lenders must now be registered, provides that where money-lenders proceed against borrowers for money lent after the 1st November, 1900, and the interest or costs are excessive, and the transaction is such that a Court of Equity would relieve, the Court may make any order it thinks just and reopen settled accounts and set aside or alter securities.

A court of law will also relieve, and relief under the Act is not confined to cases where the Court of Chancery would have relieved before the Act. For example, where a loan for £2000 was secured by the borrower's promissory note for £3300, which provided that the money was to be paid by twelve monthly instalments of £275 each, and in default of payment of one of them, the whole was at once to become due, the rate of interest was unconscionable, being more than 100 per cent., the borrower was a man of means and intemperate, and, the agent having received commissions from

(*d*) *Per* Lord THURLOW, in *Barker* v. *Vansommer*, 1 Bro. C. C. 149. It is known to be a favourite practice with money-lenders to get borrowers to take part of the loan in wine, cigars, or other goods.

(*e*) *Coxhead* v. *Mullis*, 3 C. P. D. 439.

both sides, it was held that the contract was fraudulent, apart from the Act (*f*). Also where the lender was not registered, and denied that he carried on the business of a money-lender, lending only to company promoters and in connection with his business as a speculator in mining shares, relief was granted against him, the transaction reopened, and it was held that he was a money-lender within sect. 6 of the Act (*g*).

The relief is given upon equitable terms, although the lender is not registered under the Act (*h*), and where the borrower is a man of business and experience and voluntarily agrees to pay the interest demanded without any pressure, the transaction cannot be considered as harsh, and no relief is obtainable (*i*).

These Acts occasionally vary the earlier decisions. Thus the leading case here would now fall under the Infants' Relief Act as far as the debts contracted during minority are concerned. But they do not alter the principles of equity. In *O'Rorke* v. *Bolingbroke* (*k*) the vendor of a reversion had just attained his majority, and he had no independent advice, but there being no evidence of fraud on the part of the purchaser, the House of Lords refused to set aside the sale. In *Western* v. *Cooke* (*l*), the borrower was entitled to the income of property subject to the payment of two jointure rent charges and the interest on mortgages, which reduced the income to a small amount. For an advance of £1000, to which £400 was afterwards tacked on at £5 per cent. a month, he assigned the income by way of security for £3300 repayable on the death of the first life annuitant, £1 per cent. per annum to be paid in the meanwhile and redeemable on payment of £1500 at the end of a year. Neither transaction was set aside, as the income was not a reversion.

Therefore, on the whole, we may say that the Courts are as keenly alive as ever they were to inquire into transactions with persons who wish to dispose of or raise money upon property which will some day be theirs, and, if there is inadequacy of price or secrecy, they are eager to grasp it as a sign of constructive fraud, and to set the transaction aside unless the other party can show it is all *bonâ fide* and the young person had independent advice. It is easy to understand that the judges of former days looked with an indulgent eye upon the reckless

(*f*) *Samuel* v. *Newbold*, [1906] A. C. 461.
(*g*) *Bonnard* v. *Dott*, [1906] 1 Ch. 740.
(*h*) *Lodge* v. *National Union Investment Co.*, [1907], 1 Ch. 300.
(*i*) *Carrington, Ltd.* v. *Smith*, [1906] 1 K. B. 79.
(*k*) 2 App. Cas. 814. (*l*) L. R. 2 Ch. App. 542.

transactions of young heirs in their anxiety to keep together family property and great estates; but at the present day, when so many think that great estates are undesirable, and their breaking up would be for the public advantage, and, in view of the fact that the competition amongst lenders is sufficiently keen to enable any borrower to get the value of his security, it may be contended that the attitude of the Courts on this question is one over-solicitous towards the interests of the prodigal classes. It must be remembered, however, that there is another class of persons who are ever anxious to obtain money at exorbitant interest, and this class is a deserving and meritorious one, namely, inventors and projectors—often necessitous persons, who have original ideas of benefits for the community, but not the capital adequate to their successful completion, and, confident in the value of their schemes, are willing to obtain it on any terms. These persons deserve the countenance of the Courts more than the other class (in regard to whom it is questionable whether it is not rather for the public weal that the sooner they lose their property the better), but even with them the same argument applies, namely, that there is keen competition amongst lenders, and there is nothing to prevent their getting the marketable value of what they have to sell (*m*).

Specific Performance and the Statute of Frauds.

ROSSITER *v.* MILLER.

(1878, 3 App. Cas. 1124.)

MADDISON *v.* ALDERSON.

(1883, 8 App. Cas. 467.)

Contracts to sell land are specifically enforceable if in writing or partly performed. If such a contract must be collected from letters, the letters must specify the parties, property, price, and promise; and a promise is specified although the letters refer to a future formal contract, SECUS *if they suspend assent until execution thereof. A parol contract followed by a positive act (other than part payment*

(*m*) See J. S. Mill, Political Economy, Book v. chap. x. s. 2.

or marriage) which is part of and exclusive referable to the contract is partly performed.

In the first case Rossiter and others owned certain land, and authorized White to dispose of it. The land was laid out in lots, and a plan made, with conditions of sale printed on it. One of these conditions set out the price of each lot, and another required that a purchaser should, on completion, execute a deed of covenant embodying the conditions. Miller verbally offered to purchase some of the lots. White informed him that he must purchase subject to the conditions stated on the plan, and promised to lay his offer before "the proprietors." Then White wrote to Miller stating that "the proprietors" had accepted his offer subject to the conditions printed on the plan, that "it was taken into consideration by them in reducing the published price that you intended building at once," and that he had requested their solicitors to forward an agreement. Miller wrote back that he would not be bound to build at any given time, and therefore "the offer had better be reconsidered, unless you are prepared to leave me at liberty to do as I think best." White wrote that his former letter was "not intended to convey a conditional acceptance of your offer therein defined. . . . In your own words, you are at liberty to do as you may think best." Then the vendor's solicitor forwarded the formal agreement, which Miller returned unsigned and refused to complete. Held, by the House of Lords, that there was a complete contract in writing, which Miller was bound specifically to perform.

In the second case a housekeeper had served her deceased master gratuitously during his life, on a verbal promise of a life interest in his realty if she survived. She was not entitled to specific performance of the promise.

The House of Lords, reversing the decision of the Court of Appeal, laid down in the first case that if the parties to the agreement, the

thing to be sold, the price to be paid, are clearly stated by correspondence, an acceptance by letter will not the less constitute an agreement because the letter says that it shall be put in due form by a solicitor; thus showing that there are four essentials for a complete contract, viz.: (1) persons; (2) property; (3) price; and (4) assent.

As to (1) it was held that "the proprietor" or "owner" sufficiently described the vendor, but not "the vendor" (*a*).

(2) So the expression "my property," sufficiently described the property, parol evidence being admissible to identify it (*b*).

(3) So if the price is to be settled by a valuer already appointed (*c*).

(4) Parties often "enter into a negotiation, meaning that each party is to reserve to himself the right to retire from the engagement if, on looking at the formal contract, he finds that though it may represent what he said, it does not represent what he meant to say:" said Lord BLACKBURN. This is the effect when the parties agree that the agreement shall not be binding until the formal contract is drawn. On the other hand, if the acceptance was "subject to the title being approved of by our solicitor," Lord CAIRNS pointed out that if the words were construed as a condition, they would leave the vendor free and the purchaser bound, which was a palpable absurdity (*d*). Besides, the words only cover the liberty which every purchaser impliedly reserves to himself of cancelling if the title is not good.

Agreements to buy and sell are often mere outlines, and the point is whether the complete offer has been accepted.

The cardinal principles for construing a contract by letters are:

1. To read them as a whole. Thus, in *Hussey* v. *Horne Payne* (*d*), the first two letters constituted a contract containing a proposal and acceptance, but the purchaser went on in subsequent letters to demand payment by instalments, and the vendor payment by deposit and the balance on completion. It was held that these letters threw a back-light on the previous letters, showing that the parties were not *ad idem* after the first two letters.

2. To adopt loose popular canons in construing the expressions used. "It very often happens that both parties use expressions in letters which, if read alone, would amount to a contract, if we did

(*a*) *Jarrett* v. *Hunter*, 34 Ch. D. 182.

(*b*) *Plant* v. *Bourne* (1897), 2 Ch. 281; *Shardlow* v. *Cotterill*, 20 Ch. D. 90.

(*c*) *Smith* v. *Peters*, L. R. 20 Eq. 511.

(*d*) *Hussey* v. *Horne Payne*, 4 App. Cas. 311. *Per* Lord CAIRNS: "He might appoint any solicitor he pleased. He might change his solicitor. . . . There is no appointment of an arbitrator in whom both sides had confidence."

not know that neither of the parties intended those general expressions to constitute a contract" (*e*).

In a contract for the sale of land, the plaintiff must show: (1) a concluded agreement; (2) a written memorandum sufficient to satisfy the Statute of Frauds, s. 4. The acceptance of the proposal must be unequivocal, without variation, and communicated without delay. It may be withdrawn before acceptance, and it is sufficient if it is brought to the purchaser's knowledge that the vendor has done something inconsistent with his proposal, as by selling to a third person (*f*).

The post-office is the agent of both parties, for posting the acceptance completes the contract (*g*).

In *May* v. *Thompson* (*h*) an offer and acceptance seemed to have been concluded. It was the sale of a doctor's practice, and the doctor, in accepting, wrote to the vendor's agent: "I will pay on receipt of corrected agreement"; and to the vendor, "I shall trust to you to give me the best introductions you can during the three months, and afterwards"; and subsequent letters showed that this matter was never settled. As "introductions" and "restrictive covenants" (which had not been mentioned) are all that a doctor has to sell, it was held that this language—vague though it was—clearly implied disagreement about the most vital terms, and that, therefore, there was no agreement. JESSEL, M.R., said: "I think the decisions of our Courts as to letters have gone quite far enough, that is, in the spelling out of a contract from letters when both parties intended a formal contract to be executed. I think it very often happens that both parties use expressions in letters which, read alone, would amount to a contract, if we did not know that in fact neither of the parties intended those general expressions to constitute a contract; and in that case, if the Court lays hold of the language of the letters to make a contract, it makes a contract for the parties which the parties never intended to enter into."

In *Bristol, etc., A. B. Co.* v. *Maggs* (*i*), a baker sold and the company bought a shop; the contract seemed complete in two letters. After which the company wrote a third letter, introducing a new and vital

(*e*) *Per* JESSEL, M.R., in *May* v. *Thompson*, 20 Ch. D. 705, which was a sale of a doctor's practice.

(*f*) *Dickenson* v. *Dodds*, 2 Ch. D. 463.

(*g*) *Dunlop* v. *Higgins*, 1 H. L. C. 381; *Household Fire Insurance Co.* v. *Grant*, 4 Ex. D. 216.

(*h*) 20 Ch. D. 705.

(*i*) 44 Ch. D. 616.

term, namely, a restriction upon the baker trading in the district. It was held that the three letters together negatived the idea that the two letters constituted a contract.

Chairman's minutes (*k*), instructions for a telegram (*l*), a letter to a third party, initials (*m*), pencil, print, an affidavit in another action, or a recital in a will, are sufficient notes in writing (*n*). The document must be signed, not subscribed, but the signature must govern the whole document (*o*). If two documents are necessary, they should be capable of being referred to one another. The writings need not be contemporaneous, but it cannot be merely enough to say in writing that there was a previous parol agreement; it must be proved that there was such an agreement, and to let in such proof is precisely what the Statute meant to forbid (*p*).

The Statute of Frauds, s. 4, merely provides that no action shall lie in the cases it details unless its provisions are followed. The Court of Chancery has long refused to be bound by the Statute when the consequence would entail injustice or want of equity (*q*); and one case is that it will grant specific performance of a verbal contract for the sale of land (only land (*r*)) whenever there has been what is styled part performance of the contract, as to allow the other to escape doing his part would be a fraud on the party who has performed his part. Once (till 1747) equitable relief extended to any such acts, even to part payment of the purchase-money; but that is not now deemed part performance, as the money can be repaid and the parties put *in statu quo* (*s*).

Lord SELBORNE laid down that to warrant equitable interference:

(*k*) *Jones* v. *Victoria Co.*, 2 Q. B. D. 314.

(*l*) *Goodwin* v. *Francis*, L. R. 5 C. P. 295

(*m*) Fry, S. P. ss. 555, 518.

(*n*) *In re Hoyle*, [1893] 1 Ch. 84.

(*o*) *Caton* v. *Caton*, L. R. 2 H. L. 147.

(*p*) *Per* Lord CRANWORTH, *Warden* v. *Jones*, 2 De G. & J. 65.

(*q*) This is what is vulgarly termed "driving a coach-and-four" through the Statute.

(*r*) Lord SELBORNE, in 8 App. Cas. 474, citing the decision as to "land only" in *Britain* v. *Rossiter*, 11 Q. B. D. 123, pointed out that this decision was not reconcilable with Lord COTTENHAM'S view, as expressed in *Hammersley* v. *De Biel*, 2 Cl. & F. 64 n, and KAY, J., in *McManus* v. *Cooke*, 35 Ch. D. 681, reviewing the authorities, ruled that the doctrine was not confined to land, and granted the enforcement of a parol contract for an easement. But the doctrine applies to actions for specific performance only.

(*s*) *Clinan* v. *Cooke*, 1 Sch. & Lef. 22.

1. The act must be unequivocal, one that could have been done with no other object than to perform the agreement.

2. The act must speak for itself so as to connect itself with the agreement.

3. It must change the relative position of the parties towards the subject-matter of the contract, and be such as to render non-performance a fraud.

Lord Selborne classed five cases of acts which were held not part performances.

1. Acts preparatory to the contract, as going to view the estate, preparing abstracts (*t*), &c.

2. Acts explainable on other grounds, as the mere holding over by a tenant or retaining possession of the land independent of the contract (*u*), but not if referable unequivocally to it (*x*), as by paying a higher rent (*y*) or expending money on improvements (*z*).

3. Desisting from the prosecution of a purchase, as where A, engaged to buy land, desisted in order that B might buy it in order to resell part to A (*a*).

4. When the act is a condition precedent (*b*).

5. Payment of the purchase-money (see *supra*).

6. To these marriage (alone) may be added (*c*). But in *Surcombe* v. *Pinniger* (*d*), where the bride's father before marriage stated that he meant to give certain property, and after the marriage handed the deeds and possession to the husband, it was held to be part performance; so was a written promise after in pursuance of a verbal one before marriage (*e*).

The doctrine of part performance applies to companies and corporations as well as to individuals (*f*).

Where the contract has not been put in writing owing to the fraud of one of the parties, the contract is taken out of the Statute as regards that party (*g*). It is well established that the remedy is mutual between vendor and purchaser.

(*t*) *Williams* v. *Walker*, 9 Q. B. D. 576.
(*u*) *Wells* v. *Stradling*, 3 Ves. 378.
(*x*) *Hodson* v. *Henland*, [1896] 2 Ch. 428.
(*y*) *Miller* v. *Sharpe*, [1899] 1 Ch. 622.
(*z*) *Gregory* v. *Michel*, 18 Ves. 328.
(*a*) *Lomas* v. *Bailey*, 2 Vern. 627. (*b*) *O'Reilly* v. *Thomas*, 2 Cox, 271.
(*c*) *Page* v. *Moulton*, Dy. 297. (*d*) 3 De G. M. & G. 571.
(*e*) *Gregg* v. *Holland*, [1902] 2 Ch. 360.
(*f*) *Wilson* v. *West Hartlepool Ry. Co.*, 34 Beav. 187.
(*g*) *Chattock* v. *Mutter*, 8 Ch. D. 177.

Agreement for a Lease.

WALSH *v.* LONSDALE.

(1882, 21 Ch. D. 9.)

Since the Judicature Acts a tenant holding under an agreement for a lease, of which specific performance would be decreed, stands in the same position as if the lease had been executed.

Lonsdale agreed to grant, and Walsh agreed to take, a lease of a mill called the Providence Mill for seven years at a rent of 30*s.* a year for each loom, the looms not to be less after the first year than 540. The lease was to contain a stipulation that there should always be payable in advance on demand one whole year's rent in addition to the rent, if any, due for the period down to the date of the demand. Walsh was let into possession of the premises, and in 1881 was running 560 looms for which he paid £840 rent, but not in advance. Lonsdale then served a notice demanding payment of £840 for one whole year's rent of the mill in advance, *plus* £165 14*s.* for rent which had accrued since the last quarter-day. Two days later Lonsdale put in a distress for the amount demanded. The Court of Appeal decided that Walsh, while holding under an agreement for a lease, was subject to the same right of distress as though a lease containing the same stipulations had been granted.

On the principle of the maxim that "Equity looks upon that done which ought to have been done," an agreement for a lease of which specific performance could be decreed, and more especially so where possession has been given (*a*), is looked upon as a lease. Formerly at law such a possessor was deemed but a tenant at will, or at the most a tenant from year to year on payment of rent. The Judicature

(*a*) *Zimbler* v. *Abrahams*, [1903] 1 K. B. 377.

Act, 1873, has provided that law and equity are to be administered in the same Court, and therefore every Court which can grant specific performance recognizes such a tenant now as a lessee. He holds under the same terms as if a lease had been granted, and Sir GEORGE JESSEL, Master of the Rolls, said: "He (the tenant) is protected in the same way as if a lease had been granted . . . That being so . . . being a lessee in Equity, he cannot complain of the exercise of the right of distress merely because the actual parchment has not been signed and sealed." "Since the Judicature Act, the possession is held under the agreement, and there are not two estates as formerly, one estate at Common Law by reason of the payment of rent from year to year, and one estate in Equity under the agreement. There is only one Court, and Equity rules prevail in it."

So, under an agreement for a lease, it was held that the landlord's right to the ground game was preserved by the saving clause of the Ground Game Act of 1880, s. 5, the word "lease" used there including an agreement for a lease (*b*).

By sect. 96 of the Stamp Act, 1870, an agreement for a lease for thirty-five years or less is charged the same duty as if it were a lease.

A Vendor and Purchaser's Summons, which is only available for purchasers of real or leasehold estates, includes estates agreed to be granted on lease (*c*).

The Conveyancing Act of 1882 (*d*), s. 4, provides that where a lease is made under a power, any preliminary contract for or relating to it shall not for the purposes of deduction of title, form part of the title or the evidence of the title to the lease.

Where a provisional draft lease for twenty-one years had been signed, containing a covenant to cultivate the land, the plaintiff entered into possession, but before any rent was due the landlord ejected him for breach of covenant. On his suing for trespass, the Court of Appeal held that he was a mere tenant at will, and no Court would decree specific performance in favour of a plaintiff who was himself in default for breach of covenant (*d*).

Covenants imposing a burden or conferring a benefit upon the tenant begin from the moment the agreement can be specifically enforced (*e*), but an agreement to assign does not make his assignee liable for breach of covenants running with the land within the

(*b*) *Allhusen* v. *Brooking*, 26 Ch. D. 559.
(*c*) *In re Lander and Bagley's Contract*, [1892] 3 Ch. 41.
(*d*) 45 & 46 Vict. c. 39. *Coatsworth* v. *Johnson*, 55 L. J. Q. B. 220.
(*e*) *Lowther* v. *Heaver*, 41 Ch. D. 248, 264.

meaning of Spencer's case (*f*), and covenants not to assign (*g*) or "for himself and his assignees" (*h*) refer only to legal assignments, as agreements for leases being loosely construed, "usual covenants" include provisoes for non-payment of rent only.

A solicitor's remuneration under the scale fee for preparing a lease includes the preparation of a prior agreement for a lease (*i*). Also the right of a trustee in bankruptcy to disclaim property of an onerous character (Bankruptcy Act, 1883, s. 55, Bankruptcy Act, 1890, s. 13) extends to an agreement for a lease, if one for which specific performance would be ordered (*k*).

The Vendor and Purchaser Act, 1874.

In re HARGREAVES and THOMPSON'S CONTRACT.

(1886, 32 CH. D. 454.)

The Court has jurisdiction on a summons under the Vendor and Purchaser Act, 1874, *not only to decide all questions arising out of the contract (except such as affect the existence or validity thereof), but also to make any order that would be just as the natural consequence of its decision.*

On a summons under this section, the Court was of opinion that the minerals under a part of the property agreed to be sold belonged to the lord of the manor, and made a declaration that the vendors had not shown a good title, and ordered the deposit to be returned. A further question arose whether the Court had jurisdiction on the summons to order the return of the deposit with interest thereon at 4 per cent., and the purchaser's costs of investigation of the title, and the Court of Appeal decided both these points in the purchaser's favour.

The process of buying land has always resembled a suit in Equity, and the parallel is rendered more complete by the Vendor and Purchaser

(*f*) *Friary, etc. Breweries* v. *Singleton*, [1899] 1 Ch. 86; 2 Ch. 261.
(*g*) *Gentle* v. *Faulkner*, [1900] 2 Q. B. 267.
(*h*) *Ramage* v. *Womack*, [1900] 1 Q. B. 116.
(*i*) *In re Emmanuel and Simmonds*, 33 Ch. D. 40
(*k*) *Ex parte Monkhouse*, 13 Q. B. D. 956.

Act, 1874, s. 9, which provides that "a vendor or purchaser of real or leasehold estate in England, or their representatives respectively, may at any time or times, and from time to time, apply in a summary way to a judge of the Court of Chancery in Chambers in respect of any requisitions or objections or any claim for compensation or any other question arising out of or connected with the contract (*not being a question affecting the existence or validity* (*a*) *of the contract*), and the judge shall make such order upon the application as to him shall appear just, and shall order how the costs incident to the application shall be paid—the object being to diminish frivolous suits (*b*).

The practice is to take out a summons (which cannot be served out of the jurisdiction (*c*)), intituled in the matter of the contract and of the Vendor and Purchaser Act of 1874, and (usually) to agree upon a short statement of facts, signed by the solicitors for the parties, and leave a copy at Chambers before the hearing. The hearing may be at Chambers, but is usually adjourned into Court.

Matters which cannot be decided on summons under sect. 9 are:—

1. Controverted facts (*d*).
2. Questions affecting the existence or validity of the contract.
3. Damages for breach of contract other than interest or expenses of investigating title (*e*).

Matters determinable under the section are:—

1. Whether conditions of sale are misleading (*f*).
2. As to vendor's right to rescind (*g*).
3. As to vendor's right to interest after delay, not due to default by him (*h*).
4. When powers of sale are exercisable by executors selling leaseholds (*i*), or realty for debts (*k*), or by trustees after a resettlement (*l*).
5. What consents are necessary to the sale (*m*).

(*a*) *In re Jackson and Woodburn's Contract*, 37 Ch. D. 44.

(*b*) *Per* BACON, V.C., in *Thompson* v. *Ringer*, 44 L. T. 507.

(*c*) *In re Busfield*, 32 Ch. D. 123.

(*d*) *In re Popple and Barrett*, 25 W. R. 248. But see *In re Burroughs, Lynn and Saxton*, 5 Ch. D. 601.

(*e*) *In re Wilson and Stevens*, [1894] 3 Ch. 546.

(*f*) *In re Marsh and Earl Granville*, 24 Ch. D. 11.

(*g*) *In re Walker and Oakshott*, [1901] 2 Ch. 583.

(*h*) *In re Young and Harston's Contract*, 31 Ch. D. 168; *Bennett* v. *Stone*, [1903] 1 Ch. 509.

(*i*) *In re Whistler*, 35 Ch. D. 561.

(*k*) *In re Tanqueray-Willaume and Landau*, 20 Ch. D. 465 (twenty years' delay allowed, after which the debts are presumed paid).

(*l*) *In re Wright's Trustees and Marshall*, 28 Ch. D. 93.

(*m*) *Finnis to Forbes*, 24 Ch. D. 587 (Charity Commissioners).

6. What are the usual covenants in a lease, and as to whether the agreement for a lease specifies a date for its commencement (*n*).

7. The appointment of a trustee under the Conveyancing Act, 1881, s. 31 (*o*), in the place of a trustee who had been abroad for more than twelve months (*p*).

8. Whether under the Land Transfer Act, 1897, all general executors must concur in conveying realty (*q*).

9. What documents must be abstracted in chief (*r*).

10. Whether recitals are receivable instead of evidence (*s*).

11. As to incidence of Succession Duty (*t*).

In the leading case a question arose as to the time from which interest ought to be paid on the deposit. On this point the judgment of the Court of Appeal was as follows: "I think interest ought to be given from the day when the deposit was paid, on this ground, that at that time the vendors tried to sell what they had no title to. Therefore from the very time when this deposit was made the vendors were in the wrong. It is different from a case where, in consequence of delay or otherwise, the purchaser may have had a right to say the contract is at an end and he will not complete. Then it may be that the deposit would only be wrongfully held from the time when the purchaser, having a right so to do, had declared that he would be no longer bound by the bargain. But here from the very first the vendors were wrong in purporting to sell that which they had not, namely, the minerals as well as the surface."

Time the Essence of the Contract.

TILLEY *v.* THOMAS.

(1867, L. R. 3 Ch. App. 61.)

Time is not of the essence of a contract unless it is made so either by the express stipulations between the parties, the nature of the property, or the surrounding circumstances.

(*n*) *In re Lander and Bagley's Contract*, [1892] 3 Ch. 41.
(*o*) Now the Trustee Act, 1893, s. 10.
(*p*) *In re Coates to Parsons*, 34 Ch. D. 370.
(*q*) *In re Pawley and London & P. Bank*, [1900] 1 Ch. 58.
(*r*) *In re Ebsworth and Tidy's Contract*, 42 Ch. D. 23.
(*s*) *In re Marsh and Earl Granville*, 24 Ch. D. 11.
(*t*) *In re Kidd and Gibbon's Contract*, [1893] 1 Ch. 695.

Thomas agreed to purchase a lease of a house from Tilley, "possession to be given" on a certain day. Tilley, who knew that Thomas required the house for immediate residence, tendered possession on the day named, which Thomas refused to accept, on the ground that Tilley had failed to show a good title. Tilley commenced a suit for specific performance, alleging that he had since deduced a good title. The Court of Appeal dismissed the suit with costs.

The general principle of time being or not being the essence of the contract is this: that when there is a term in a contract of sale that the transfer shall be completed by a certain day, and by that day one of the parties is not ready to complete, the contract at law is broken, and an action for damage lies by the observant party; but Equity, in granting specific performance, looks beyond this and considers whether the omission is really material and whether there cannot be compensation by payment of interest or otherwise, so as to do complete justice.

In *Tilley* v. *Thomas*, Lord CAIRNS applied the rule laid down by Lord Justice TURNER in *Roberts* v. *Berry* (*a*), saying that a Court of Equity will enforce specific performance and relieve, although the dates assigned by the contract are not kept, if there is nothing in (1) the express stipulation between the parties; (2) the nature of the property; or (3) the surrounding circumstances to make it inequitable to modify the legal right.

1. The "express stipulation" of the parties means that the clause as to time is not put in as a merely formal part of the contract and because some day must be named, but that it was inserted because the real intention of the parties was that time should be material.

2. Time is material "owing to the nature of the property" in several cases: (i) if it is of a wasting nature, as a leasehold, which becomes less valuable every day (*b*); (ii) where the purchaser requires possession for an immediate purpose, as in *Tilley* v. *Thomas*, *supra*; (iii) where it is a reversion, and thus becomes more valuable every day as it may fall in—here generally the sale is for pressing need of money (*c*); (iv) where the vendors are a fluctuating body,

(*a*) 3 D. M. & G. 284. (*b*) *Hudson* v. *Temple*, 29 Beav. 536.
(*c*) *Newman* v. *Rogers*, 4 Bro. C. C. 391.

as a dean and chapter, and delay might give the purchase-money to others (*d*); (v) where a patent was sold in order that the purchase-money might be applied in purchasing foreign patents (*e*); (vi) where the property consists of mines, or is purchased for trade or mercantile purposes (*f*), as the exercise of an option to purchase the share of a partner; (vi) in options to purchase or sales with options to repurchase (*g*).

3. "The surrounding circumstances," as used in the expression of Lord Justice TURNER, must depend upon the facts of each particular case. No. (v), *supra*, affords an illustration.

The doctrine is more frequently applied to contracts concerning land than to any other property (*h*). But time is not the essence of the contract in mortgages, or there would be no such thing as an equity of redemption.

Although time was not originally the essence of the contract, it may be made so by notice in the case of unreasonable delay, the one party acquainting the other that he will consider the contract at an end if not fulfilled by a certain day (*i*). But this notice must fix a reasonable time (*k*). If default is made after notice, damages are recoverable, and if by a vendor the purchaser's deposit will be returned with interest (*l*).

Lord ST. LEONARDS says, in his work on Vendors and Purchasers (*m*): "When time is not made the essence of a contract by the contract itself, although a day of performing it is named, of course neither party can strictly make it so after the contract; but if either party is guilty of delay, a distinct written notice by the other that he will consider the contract at an end if it be not completed in a reasonable time to be named, would be treated in Equity as binding on the party to whom it is given."

Sect. 25 of the Judicature Act, 1873, provides that stipulations in contracts as to time or otherwise which would not before the commencement of this Act have been deemed to be the essence of

(*d*) *Carter* v. *Dean of Ely*, 7 Sim. 211.

(*e*) *Payne* v. *Banner*, 15 L. J. Ch. 227.

(*f*) *Pollard* v. *Clayton*, 1 K. & J. 462; *Weston* v. *Savage*, 10 Ch. D. 736, a sale of a public house as a going concern.

(*g*) *Dibbins* v. *Dibbins*, [1896] 2 Ch. 348.

(*h*) *Reuter* v. *Sala*, 4 C. P. D. 239.

(*i*) Ld. St. Leonards' V. & P., 13th ed. 127.

(*k*) *Crawford* v. *Toogood*, 13 Ch. D. 153.

(*l*) *Compton* v. *Bagley*, [1892] 1 Ch. 313.

(*m*) 13th ed. 227.

such contract in a Court of Equity, shall receive in all Courts the same construction as they would formerly have received in Equity.

"The tendency of modern decisions has been to hold persons concerned in contracts relating to land bound, as in other contracts, to regard time as material, and this principle has been applied with greater strictness where the property was connected with trade" (*n*).

In the recent case of *Laughton* v. *Commissioners of Port Erin*, it was held that consents obtained two years after a contract to buy land for a public purpose, did not debar the vendor from getting specific performance (*o*).

Family Arrangements.

WILLIAMS *v.* WILLIAMS.

(1867, L. R. 2 CH. APP. 294.)

A family arrangement may be upheld although there were no rights in dispute at the time of making it, and the Court will not be disposed to scan with much nicety the quantum of the consideration.

A tanner who owned real estate of socage, gavelkind, borough English and leasehold tenure, and stock-in-trade, etc., died in 1831, leaving a wife and two sons, John and Samuel. After his death an unwitnessed will was found, by which he purported to give all his property (subject to provision for his widow) to his two sons equally. The intended will was refused probate. At an interview shortly after the refusal, John declared that the invalidity of the will should make no difference, but that the property should "be not mine nor thine, but ours." The widow stated that she did not claim her right to dower because her sons were carrying out their father's intentions, and for the rest of her life she was supported by her two sons out of the proceeds of the tannery, which the brothers carried on as partners until 1851, and out of the income of their father's

(*n*) Dart, V. and P., 7th ed. 497.
(*o*) [1910] A. C. 565.

estate. The two brothers treated the whole property as belonging to them equally. In 1858 Samuel died, and on a suit being instituted by his representatives, the Court of Appeal held that there was sufficient evidence of a family arrangement, and that John and Samuel were tenants in common of their father's property.

"There was here no doubtful right to be compromised, no dispute between the brothers which was to be set at rest, no honour of the family involved; the appellant was merely prompted by respect for his father's intentions and by his affection for his brother, both most excellent and praiseworthy motives, but scarcely sufficient to constitute such a consideration as would convert an act of kindness into a binding engagement" (*a*).

The principle of family arrangements as laid down by Lord HARDWICKE in the leading case of *Stapilton* v. *Stapilton* (*b*), was that an agreement entered into upon a supposition of right or of a doubtful right, though it subsequently eventuates that the right was on the other side, shall be binding, and therefore the compromise of a doubtful right is a sufficient foundation of an agreement; also that where agreements entered into to save the honour of a family are reasonable, a court of equity will, if possible, decree a performance of them.

In *Williams* v. *Williams*, the Court of Appeal extended this doctrine. Here there was (1) no agreement in writing; (2) there was no doubtful point, no dispute, no family honour involved, but the appellant was actuated by respect for his father's intentions and fraternal affection. The Court will not look into the quantum of consideration (*c*), but a family arrangement is not itself value, and there must be some consideration, otherwise it is void against creditors and specific performance will not be decreed (*d*). The *bonâ fide* compromise of a doubtful claim is valuable consideration (*e*), and in *Williams* v. *Williams* the bringing in of the borough English property was consideration, and also the widow was a party to the arrangement, and released her freebench and dower in order to carry it into effect. The doctrine is not confined to cases where the

(*a*) *Per* Lord CHELMSFORD.
(*b*) 1 Atk. 739; Wh. & Tud. L. C. Eq. 7th ed., vol. i. 223.
(*c*) *Per* TURNER, L.J.
(*d*) *Coles* v. *Trecothick*, 9 Ves. 246.
(*e*) *Callisher* v. *Bischoffheim*, L. R. 9 Q. B. 449.

compromise is made for the preservation of peace, but extends to where the object is to preserve the family property.

There must be full disclosure, the parties must be at arm's length, on equal terms, with equal knowledge, and sufficient advice and protection (*f*). A secret arrangement is sufficient to vitiate a compromise (*g*).

The Court can approve of a compromise on behalf of an infant, but cannot force it against the opinion of his legal adviser (*h*); also counsel and solicitors can compromise in Court unless forbidden (*i*).

The compromise may be set aside on grounds of mistake (*k*), and as just stated, "To make a compromise of any value the parties must be at arm's length, on equal terms, with equal knowledge, and with sufficient advice and protection" (*l*). One side must not know more about the matter than the other (*m*), unless what he knows could not possibly have affected the other party's decision (*n*). In *Gordon* v. *Gordon* (*o*) an agreement between two brothers for the division of the family property was set aside after nineteen years, on the ground that the younger brother knew that there had been a ceremony which was called a private marriage and concealed this knowledge, and Lord ELDON said that whether he did so designedly "or in an honest opinion of the invalidity of the ceremony and of a want of obligation on his part to make the communication, the Court could not sanction the arrangement." In *Fane* v. *Fane* (*p*) an innocent misrepresentation as to title by the father and his solicitor (who was also the son's solicitor) induced the son to make the family arrangement; on the misrepresentation being discovered by the son, the deed of settlement was at his instance set aside.

Apparent mortgages have been treated as really conditional sales in family arrangements, where but for the family arrangement a different construction might have been adopted.

The knowledge of the plaintiff's solicitor will be imputable to the plaintiff unless there is proof that the solicitor has misled him (*q*).

(*f*) *Moxon* v. *Payne*, L. R. 8 Ch. App. 881.
(*g*) *De Cordova* v. *De Cordova*, 4 App. Cas. 692.
(*h*) *In re Birchall*, *Wilson* v. *Birchall*, 16 Ch. D. 43.
(*i*) *Matthews* v. *Munster*, 20 Q. B. D. 141.
(*k*) *Hickman* v. *Berens*, [1895] 2 Ch. 688.
(*l*) *Per* JAMES, L.J., *Moxon* v. *Payne*, *supra*.
(*m*) *Gilbert* v. *Endean*, 9 Ch. D. 259.
(*n*) *Maynard* v. *Eaton*, L. R. 9 Ch. App. 414. (*o*) 3 Sw. 400.
(*p*) L. R. 20 Eq. 698. (*q*) *Roberts* v. *Roberts*, [1905] 1 Ch. 704.

Where the Court has gone into the merits of the case and consented to a deliberate compromise, a party who has instructed counsel will not be allowed to withdraw his consent, but a consent given by inadvertence may be withdrawn at any time before the order is drawn up (*r*).

Restrictive Covenants.

AUSTERBERRY *v.* CORPORATION OF OLDHAM.

(1885, 29 Ch. D. 750.)

The doctrine of Tulk *v.* Moxhay *is confined to restrictive covenants, and will not be extended to a covenant to lay out money or do any other act so as to bind a purchaser taking with notice of the covenant.*

Elliott conveyed a slip of land, bounded on both sides by other lands which belonged to him, to the trustees of a road company, who covenanted with Elliott, his heirs and assigns, that they, their heirs and assigns, would make and maintain the road, and allow the user by the public subject to tolls. Elliott sold his lands to Austerberry and the trustees sold the road to the Corporation of Oldham, both parties having notice of the covenant. The Court of Appeal decided that Austerberry could not enforce the covenant against the Corporation.

Sir George Jessel, Master of the Rolls, raised the question in the *L. and S.W. Railway Co.* v. *Gomm* (*a*), whether covenants not to use one's land in a certain way—and which are attached to the land—ought not to be regarded as easements instead of as covenants.

The old Common Law case known as *Spencer's Case* (*b*), laid down that a covenant by a lessee to do any act upon the demised premises, as to build a wall, is binding upon his assignee if the lessee has covenanted for himself and his assignees to do the act. Covenants relating directly to the demised premises bind assignees, although they are not mentioned in the lease, as long as they are in possession

(*r*) *Davis* v. *Davis*, 13 Ch. D. 861. And see *Neale* v. *Gordon-Lennox*, [1902] A. C. 465.

(*a*) 20 Ch. D. 562, 583.

(*b*) 5 Rep. 16*a*.

and have not assigned again (*c*), and covenants to do any acts upon premises not comprised in the lease do not bind assignees at all, as to ring a bell in an adjoining monastery.

Tulk v. *Moxhay* (*d*), the Leicester Square case, laid down that "a covenant between a vendor and a purchaser, on the sale of land, that the purchaser and his assigns shall use or abstain from using the land in a particular way, will be enforced in equity against all subsequent purchasers with notice, independently of the question whether it be one which runs with the land so as to be binding upon subsequent purchasers at law." Lord COTTENHAM said, "The question is not whether the covenant runs with the land, but whether the party shall be permitted to use the land in a manner inconsistent with the contract entered into by his vendor, with notice of which he purchased." "If there was a mere agreement and no covenant, this Court would enforce it against a party purchasing with notice of it, for if an equity is attached to the property by its owner, no one purchasing with notice of that equity can stand in a better position than the party from whom he purchased." Therefore the word "covenant" is in a way misleading, but restrictive covenants were the creature of equity, as before November, 1875, the common law did not recognize their existence—hence the name and why they were not styled negative easements. Vice-Chancellor HALL said, in *Renals* v. *Cowlishaw* (*e*), "This right exists whenever a mutual contract is established." But they differ from contracts in that (1) the Court will grant an injunction without showing damage; (2) the covenantee could sue the covenantor's assign's tenant, which he could not do in any of the cases falling under *Spencer's case*, the leading common law case dealing with covenants running with the land; and (3) no common law action has ever been used in cases of this kind.

They differ from easements, as they have got to be kept alive by notice, and die from want of notice directly the legal estate changes hands.

To enable the benefit of a covenant to enure to a purchaser from the covenantee, the conveyance containing the covenants must confer the benefit of the covenant on the owner of each portion of the estate in respect of which the plaintiff claims (*e*); thus, where A owned adjoining lands and sold part to B's predecessors in title subject to restrictive covenants in favour of himself and assigns, and then

(*c*) *Taylor* v. *Shaw*, 1 Bos. & Cal. 21. (*d*) 2 Ph. 774.

(*e*) 11 Ch. D. 1866. The doctrine in *Tulk* v. *Moxhay* does not apply to a case where the vendor sells his whole estate: *Formby* v. *Barker*, [1903] 2 Ch. 53.

sold the estate to P's predecessors in title without reference to the restrictive covenants and without contract that the purchasers were to benefit by them, it was held that P could not enforce them against A. So where S sold part of an estate to L, who entered into restrictive covenants for himself and assigns with S as to building on the estate, and S sold other parts of the retained estate to other purchasers without notice of L's covenants, and S then rebought from L; *held*, that the benefit of L's covenants did not pass to the other purchasers, and S could make a clear title to the repurchased land (*f*).

The line of cleavage between the old authorities which commenced with *Tulk* v. *Moxhay*, which has been characterized as the first case which brought this doctrine to a focus, and in which Lord COTTENHAM drew no line between covenants in which the purchaser and his assigns (1) should use and (2) should abstain from using the land in a particular way, and the latter class of decisions which culminate in the leading case, is marked by the case of *Haywood* v. *Brunswick Building Society* (*g*), where there was a covenant to build and repair, and it was held that the assignee of the grantee, who took with notice of the covenant, was not liable upon it, Lord Justice LINDLEY saying that only such a covenant as can be complied with without the expenditure of money will be enforced against a grantee on the ground of notice. Also in *London and South Western Railway Co.* v. *Gomm* (*h*), where land was conveyed to an adjoining owner who covenanted that he would at any time, on six months' notice, reconvey, and Gomm, who purchased with notice of this covenant, refused to reconvey, an action for specific performance against him failed. It was Sir GEORGE JESSEL, Master of the Rolls, who in this case raised the question whether covenants not to use the land in a certain way ought not to be regarded as easements rather than as covenants.

The land is freed from its burden—

1. When a purchaser buys without notice the legal estate to which the burden is attached (*i*).

2. If the covenantees have acquiesced in material breaches of the restrictive covenants (*k*), but not if the breaches are immaterial (*l*), and remaining passive is not acquiescence (*m*).

(*f*) *Keates* v. *Lyon*, L. R. 4 Ch. App. 218. (*g*) 8 Q. B. D. 403.
(*h*) 20 Ch. D. 562. (*i*) *Renals* v. *Colishaw*, 11 Ch. D. 866.
(*k*) *Hepworth* v. *Pickles*, [1900] 1 Ch. 108.
(*l*) *Knight* v. *Simmonds*, [1896] 2 Ch. 294.
(*m*) *L. C. & D. Railway Co.* v. *Bull*, 47 L. T. 413.

3. If the neighbourhood has changed and the covenants are hence unenforceable (*n*).

4. If the lands are purchased under the Lands Clauses Act, 1845, for the remedy is then under that Act (s. 68) (*o*).

A release to one covenantee does not release the others (*p*).

Therefore the whole doctrine may be summed up as follows :—

1. It is an equitable principle, quite apart from the law of covenants running with the land, which are governed by the common law rule in *Spencer's case*.

2. If a purchaser gets the legal estate without notice of the equitable burden of the covenant, he is not bound by it, having equal equity with the incumbrancer and the legal estate as well. This doctrine applies to all equitable incumbrances.

3. The rule laid down in *Tulk* v. *Moxhay* applies to restrictive covenants, but not to where the purchaser has to do some act which involves outlay.

It is questionable whether the expression " contract or easement " instead of " covenant " would not be more appropriate for undertakings of this nature, and less confusing.

In the recent case of *Ricketts* v. *Enfield Churchwardens* (*q*), a lessee covenanted with his lessor that he and his assigns would not erect a building in advance of a certain building on land adjoining the land demised. Mr. Justice NEVILLE said that he saw no distinction between this covenant which concerned the land, and was not a mere collateral covenant, and a covenant not to build on the demised land in a particular way, and therefore it ran with the land and bound assigns; and further that the word " assign " included any one in possession of the adjoining land, and that the lessor was liable under the covenant to a person who was not strictly an assignee, but merely a lessee or entitled to a demise as soon as he had completed the erection of a house thereon.

A covenant by one with himself and others jointly is void, although of a kind to run with the land (*r*).

(*n*) *Duke of Bedford* v. *Trustees of British Museum*, 2 My. & K. 552.
(*o*) *Kirby* v. *School Board for Harrogate*, [1896] 1 Ch. 437.
(*p*) *King* v. *Dickeson*, 40 Ch. D. 596.
(*q*) [1909] 1 Ch. 544.
(*r*) *Napier* v. *Williams* (1911), 1 Ch. 361.

Restrictive Covenants.

In re NISBET *v.* POTTS' CONTRACT.

(1906, 1 CH. 386.)

A purchaser of land, having only a title under the Real Property Limitation Act, which he could not be compelled to accept, and having waived his right to a full forty years' title, cannot be considered a bonâ fide *purchaser for value of the legal estate without notice, and takes subject to restrictive covenants, which are equitable burdens attaching to the land.*

A, having purchased land in 1901, agreed to sell it in 1903, the title to commence with a conveyance in August, 1890, in which it was stated that the vendor and his father had been in possession for thirteen years and upwards. It was admitted that in 1890 the then vendor had acquired a possessory title, and that there was then in existence a deed of 1872 containing a restrictive covenant which affected the land, and that neither A nor the purchaser in 1890 had made any inquiry into the title prior to 1878. Held, by the Court of Appeal, affirming the decision of Mr. Justice FARWELL, that the land was subject to the restrictive covenant.

The Court in the leading case said that a restrictive covenant was in the nature of a negative easement, and was really governed by *Tulk* v. *Moxhay* (*a*), *London and S. W. Railway* v. *Gomm* (*b*), and *Rogers* v. *Hosegood* (*c*). The burden was on the land, and binding on every one who could not show he was a purchaser for value without notice, and the onus was not discharged by either of the vendors, who must be treated as having constructive notice of that which they would have discovered had they insisted on their right to have the title

(*a*) 2 Ph. 774. (*b*) 20 Ch. D. 562.
(*c*) [1900] 2 Ch. 388, 405.

deduced for the full period. Restrictive covenants are not destroyed by subsequent statutory possession of the land by a squatter, who could not claim to be in a better position than an ordinary purchaser.

A more recent application of the principle is to be found in *Abbey* v. *Gatteres* (*d*). In this case L was a builder who had entered into an agreement with a landlord by which a lease of certain property was to be granted him on the completion of certain buildings thereon. L covenanted with B, the owner of adjoining land, that the windows in the said buildings facing B's land should be obscured and fixed. A block of flats was erected, and a lease granted to L, by whom it was subsequently mortgaged and the equity of redemption released. G became tenant of one of the flats, and opened one of the fixed windows.

Held, by Mr. Justice WARRINGTON, that the covenant was a restrictive one, binding on the leasehold interest, of which G had constructive notice, and could be enforced by injunction. G had made no investigation of title at all, and the result of that is well expressed in *Nisbet and Pott's Contract* (*e*), to the effect that a purchaser accepts a less than forty years' title at his own risk. In this case G could not investigate the title apart from special contract, and that G had omitted to make.

If a lessee covenants to use a house for private residential purposes only, and the lessee with the freeholder's consent grants an underlease for a boarding-house, and it turns out that the freeholder is subject to a restrictive covenant to use the house only for private residential purposes, and the underlessee is stopped from using it as a boarding-house, yet he cannot get damages from the lessee because the freeholder's consent only was discussed, and nobody inquired whether other consents might be needed (*f*).

Where A contracted to sell two freehold houses to B, and when the abstract was delivered it was seen that it was subject to covenants that no trade should be carried on, and that the property should not be used except for private dwellings, B not having had notice of these restrictive covenants when he signed the contract, and refused to complete. A sued for specific performance, and failed, the Court holding that a contract to sell freehold means unencumbered freehold,

(*d*) [1911] 55 S. J. Notes, 364.
(*e*) [1906] 1 Ch. 408.
(*f*) *Milch* v. *Coburn*, [1910] 45 L. J. Notes, 827.

and freehold free from restrictive covenants. The vendor should have disclosed them or have said in the contract that the sale is subject to restrictive covenants (*g*).

The effect of registration of restrictive conditions under the Land Transfer Acts is to make the entry on the register as effective as notice, but not to extend the rights of purchasers of different parts of the land *inter se*, where no building scheme is established and there are no contractual rights or otherwise between them. By the Land Transfer Act, 1875, s. 84, it is assumed that the restrictive conditions which may be entered upon the land register have been already annexed to the registered land in some known legal way, and all the section does is to authorize the registration of the conditions so annexed (*h*).

Notice.

PATMAN *v.* HARLAND.

(1881, 17 Ch. D. 353.)

Where a purchaser has notice of a deed forming part of a chain of title, he has notice of the contents of the deed.

A lessee has notice of his lessor's title.

Patman conveyed to Hervè two freehold plots of land, part of a building estate, subject to restrictive covenants, one of which was that private dwelling-houses only should be erected. Hervè subsequently conveyed the two plots, subject to the covenants, to Harland. Harland, who had erected a dwelling-house on one plot, granted a lease of the plot to B, and the lease provided that B might erect a studio and use the premises as a school of art, but not for carrying on any other business or employment. Neither B nor her solicitor knew of the restrictive covenants, and B had proceeded to erect and nearly completed a studio detached from the house. The Court declared that B was bound by the restrictive covenant;

(*g*) *Hone* v. *Gakstatter*, [1910] 53 S. J. 280.
(*h*) *Willé* v. *St. John*, [1910] 1 Ch. 325.

and restrained her from proceeding with the construction of the studio.

In this case, B, though ignorant of the restrictive covenant which affected the property, was bound by it on the principle established, as Sir GEORGE JESSEL, Master of the Rolls, said, for more than a century, and treated by Lord ELDON as settled law, that a lessee is bound to make reasonable inquiry into his lessor's title, to require "the usual title, whatever that title may be. If the lessor had a conveyance made to him the day before, that would not do; the lessee must ask for the conveyance to him and a fair reasonable deduction of title."

It had been contended that the effect of the Vendor and Purchaser Act, 1874, s. 2, and the Conveyancing Act, 1881, ss. 3 (1) and 13, preventing an intended lessee or assignee from calling for the lessor's title, was to alter this rule. This point was disposed of in the judgment as follows: "What the Vendor and Purchaser Act does is this, in order that a lessee may obtain his lessor's title, it makes an express stipulation to that effect necessary, whereas formerly the rule was the other way, that, without express stipulation, the lessee had a right to the title. Formerly, if the lessee had expressly stipulated not to look into his lessor's title, it would not have affected the doctrine of constructive notice. This is the meaning of the doctrine: you may bargain to shut your eyes, but if you wilfully shut your eyes, whether a bargain or not, you are liable to the consequences. If, therefore, the lessee had formerly bargained expressly to take a lease without looking into the lessor's title, the lessee would have been bound by constructive notice, and now, if the lessee says nothing, it is exactly the same as if formerly he had bargained expressly not to look at the lessor's title.

Notice is actual or constructive, the latter being evidence of notice, or, as Lord CHELMSFORD called it in *Espin* v. *Pemberton* (*a*), imputed notice.

The kinds of constructive notice are—

1. Where the defendant has had actual notice of some incumbrance on the property in dispute, the Court has bound him with constructive notice of matters to a knowledge of which he would have been led by an inquiry into the incumbrance of which he had actual notice.

2. Where the Court has been satisfied, from the evidence before

(*a*) 3 De G. & J. 547.

it, that the party charged has designedly abstained from inquiring, for the purpose of avoiding notice, which purpose would show that he had a suspicion of the truth and a wilful determination not to learn it (*b*), as where a purchaser had notice of a mortgage and the mortgage deed referred to other incumbrances which the purchaser did not inspect (*c*); but this is inapplicable to documents under the law merchant, save as to the limits prescribed under that law (*c*).

The absence of title deeds is *primâ facie* evidence of an equitable mortgage, but if a purchaser or incumbrancer inquires and a reasonable excuse is made for their non-production, he is not imputed with notice (*d*). But a statement by a lessor that there are no restrictive covenants affecting his title will not protect the lessee from liability to them (*e*).

When a person purchases property where a visible state of things exists which could not legally exist without the property being subject to some burden, as a sea wall (*f*), or an archway with plans which may be notice of a right of way (*g*), he is taken to have notice of the extent and nature of that burden. But it seems that the rule goes further, and that when a state of circumstances exists which is very unlikely to exist without a burden, he is affected with notice. In *Allen* v. *Seckham* (*h*), it was held that a window overlooking purchased property was not enough to put a purchaser on inquiry as to the existence of an easement. So in *Attorney-General* v. *Biphosphated Guano Co.* (*l*), with a road marked "private" in the plan.

In *Caballero* v. *Henty* (*m*), an action was brought by the vendor for specific performance of a contract to purchase a freehold public-house. The conditions of sale contained a statement that it was in the occupation of a tenant, and that it was to be sold subject to the tenancies then existing. The public-house was in fact in lease for a term of which eight years were unexpired, but the defendants stated that they had inferred that the tenancy was from year to year, and that the object of their purchase was to obtain a public-house

(*b*) *Jones* v. *Smith*, 1 Hare, 55.
(*c*) *Bisco* v. *Earl of Banbury*, 1 Ch. Ca. 287.
(*d*) *Birgh* v. *Ellames*, 2 Anstr. 427.
(*e*) *Oliver* v. *Hinton*, [1899] 2 Ch. 264.
(*f*) *Morland* v. *Cook*, L. R. 6 Eq. 262.
(*g*) *Davies* v. *Sear*, L. R. 7 Eq. 427.
(*h*) 11 Ch. D. 790, 795; and see *Morland* v. *Cook*, and *Davies* v. *Sear*, *supra*.
(*l*) 11 Ch. D. 327; Dart, V. & P. vol. i. p. 453.
(*m*) L. R. 9 Ch. App. 447.

for the purpose of extending their own business as brewers. The Court of Appeal held (affirming the decision of the Court below, and practically overruling *James* v. *Lichfield* (*n*) and *Phillips* v. *Miller* (*o*), that specific performance of the contract must be refused.

If there is anything in the nature of the tenancies which affects the property sold, the vendor is bound to tell the purchaser, and let him know what it is which is being sold; and the vendor cannot afterwards say to the purchaser, "If you had gone to the tenant and inquired, you would have found out all about it" (*p*).

3. Notice to an agent is notice to the principal—subject to the following exceptions. But this is rebuttable:—

(1) Where the act was not done in the character of agent, but as that of a party to an independent fraud on his principal (*q*).

(2) Where he violates no duty, but only serves his interest in concealing the flaw (*r*).

(3) If, being a common agent, it was not within his duty to receive notice from the vendor of the flaw and to give it to the purchaser, as where, being secretary for a borrowing and lending company, he knows of an irregularity which would be fatal to the loan, and does not tell the lending company (*s*).

A very great change in the law with regard to constructive notice has been introduced by the Conveyancing Act, 1882. Sect. 3 provides:—

(1) A purchaser shall not be prejudicially affected by notice of any interest, fact, or thing, unless:—

(i.) It is within his own knowledge, or would have come to his knowledge, if such inquiries and inspections had been made as ought reasonably to have been made by him; or

(ii.) In the same transaction, with respect to which a question of notice to the purchaser arises, it has come to the knowledge of his counsel, as such, or of his solicitor or other agent, as such, or would have come to the knowledge of his solicitor, or other agent, as such, if such inquiries and inspections had been made as ought reasonably to have been made by the solicitor or other agent (*t*).

(2) A purchaser is not exempted from any liability under or any

(*n*) L. R. 9 Eq. 51.
(*o*) 9 C. P. 190.
(*p*) *Caballero* v. *Henty*, *ubi supra*.
(*q*) *Cave* v. *Cave*, 15 Ch. D. 639.
(*r*) *Kettlewell* v. *Watson*, 21 Ch. D. 685.
(*s*) *In re Hampshire Land Co.*, [1896] 2 Ch. 743.
(*t*) This sub-section is a legislative reversal of *Hargraves* v. *Rothwell*, 1 Keen, 160.

obligation to perform any covenant, &c., contained in any instrument under which his title is derived, and he is not affected by notice in any case where he would not have been affected if the section had not been passed.

This section's effect was considered in *In re Cousins* (*u*), where C mortgaged his share in trust property to P, the deed not disclosing any previous charge. In 1881, P's executors gave notice of this mortgage to C's trustees. Prior to 1875, C's share had been mortgaged and a solicitor had acted for all parties. *Held*, no constructive notice of the prior charges to P, as the same solicitor had acted throughout, and as P's executors had been the first to give notice, his charge was entitled to priority. Mr. Justice CHITTY said, " The knowledge of the solicitor to be imputed to the client must be (1) in the same transaction; (2) it must come to his knowledge; and (3) as solicitor to the mortgagee.

X, who died in 1872, devised his realty to three trustees (Kempster was one) in trust to pay debts, legacies, &c., and subject thereto, to hold a house for Kempster in fee. Six months after X died, Kempster mortgaged his equitable interest in the freehold house to Pecham, who gave notice to the other two trustees. In 1879 Kempster became sole surviving trustee, and in 1890 he deposited the deeds of the house with a bank to secure an overdraft, and agreed to give a legal mortgage on demand, which he did in 1903. All the debts and legacies had been satisfied except a legacy of £100 to A. Pecham has priority, for when he gave notice of his equitable assignment, in 1872, to the trustees, they became express trustees for him, and if the bank had made proper inquiries in 1890, it would have had notice of his charge and the subsisting trusts of the will; the conveyance in 1903 was a breach of trust, and the property was subject in the bank's hands to all equities to which it was subject in Kempster's hands (*x*), and also to any prior title of beneficiaries (*y*).

A purchaser for value without notice can give a good title to a purchaser from him with notice. S had two shops; he sold to W the lease of one of them, covenanting not to carry on the same trade within three miles or at the other shop, and then he surrendered the other shop to the lessor, who had no notice of these covenants, and who gave to S's son a new lease of the shop. The son knew of the

(*u*) 31 Ch. D. 671.

(*x*) *Pecham* v. *Kempster*, [1907] 1 Ch. 373.

(*y*) *Capell* v. *Winter*, [1907] 2 Ch. 376. Other recent cases are *Hunt* v. *Luck* (1902), 1 Ch. 428, and *In re Greer* (1907), 1 Ir. 57.

covenants, and started the same trade. *Held*, by the Court of Appeal, that W had no remedy against the son (*b*). This case follows in principle *Harrison* v. *Forth* (*c*), where A purchased with notice of the plaintiff's equitable incumbrance, and sold to B without notice; B sold to C with notice. *Held*, that the plaintiff could not be relieved against C, not from any merit of C's, but because the property might possibly otherwise be unsaleable in B's hands. In *Barrow's case* (*d*), B resold to A himself, and as A had notice before, his notice still clung to him, but his son could not be considered the same person as himself or his agent so as to make the doctrine of privity apply.

Sale of Goodwill.

TREGO *v.* HUNT.

([1896] A. C. 7.)

On a sale of goodwill the vendor will be restrained from soliciting his former customers; and a retiring partner who agrees that his former partner shall retain the goodwill lies under the same obligations.

In 1889, A. Trego and Smith entered into a partnership for seven years with Hunt; the goodwill was to remain A. Trego's property. In December, 1894, Hunt employed a clerk of the firm out of office hours to copy the names and addresses of the firm's customers, in order that when the partnership expired he might canvass them on his own account. The House of Lords granted an injunction against Hunt from doing so.

"Goodwill," said Lord ELDON, in *Cruttwell* v. *Lye* (*a*), "is nothing more than the probability that the old customers will resort to the old place." Vice-Chancellor WOOD expanded the definition to include "every positive advantage that has been acquired by the old firm in carrying on its business, whether connected with the premises in which the business was previously carried on or with the name of

(*b*) *Wilkes* v. *Spooner*, [1911] 13 L. T. Notes, 33.
(*c*) 2 Prec. Ch. 51.
(*d*) 14 Ch. D. 432.
(*a*) 17 Ves. 335.

the late firm or with any other matter carrying with it the benefit of the business (*b*). Lord Justice COTTON said, "It is admitted that a person who has sold the goodwill of his business may set up a similar business next door and say that he is the person who carried on the old business, yet such proceedings manifestly tend to prevent the old customers going to the old place" (*c*). Goodwill is still valued on this assumption (*d*).

Lord ROMILLY decided in *Labouchere* v. *Dawson* (*e*), that after the sale of the goodwill the vendor might not privately, by letter or otherwise, apply to old customers, on the principle that a man may not derogate from his own grant. In *Ginesi* v. *Cooper* (*f*), Sir GEORGE JESSEL, M.R., stated that the command "thou shalt not steal" was a portion of the law of equity, and expressed his surprise that a vendor of a goodwill should still solicit old customers to deal with him.

In *Leggot* v. *Barrett* (*g*), the Court of Appeal reversed the decision of Sir GEORGE JESSEL, M.R., who had restrained the former partner from dealing with old customers; but there was no appeal from his decision restraining solicitation of old customers.

Pearson v. *Pearson*, however, overruled *Labouchere* v. *Dawson*, Lord Justice COTTON saying that it was admitted that a person who had sold the goodwill of his business might set up a similar business next door and say that he is the person who carried on the old business, and then by his acts invite customers to deal with him and not with the purchaser of the old business, and if he may do this, why not apply to them and ask them to come to him? Where could the line be drawn?

Pearson v. *Pearson*, however, is now in its turn overruled by the leading case, and *Labouchere* v. *Dawson* restored.

Lord DAVEY said that the idea of goodwill and what is comprised in the sale of a business had been silently developed since the days of Lord ELDON. Lord HERSCHELL approved of Sir GEORGE JESSEL'S definition in *Ginesi* v. *Cooper* as "the formation of that connection which has made value of the thing that the late firm sold;" and which often, as in *Ginesi* v. *Cooper*, is the only thing saleable. Lord MACNAGHTEN said the goodwill is often "the very sap and life of the business, without which the business would yield little or no fruit."

(*b*) *Churton* v. *Douglas*, Joh., at p. 188.
(*c*) *Pearson* v. *Pearson*, 27 Ch. D. 145.
(*d*) *In re David and Matthews*, [1899] 1 Ch. 355.
(*e*) L. R. 13 Eq. 322.
(*f*) 14 Ch. D. 596.
(*g*) 15 Ch. D. 306.

It is the advantage "of the reputation and connection of the firm which may have been built up by years of honest work or gained by lavish expenditure of money." And he defined the duties of the vendor or retiring partner thus: "He may not sell the custom and steal away the customers. It is not an honest thing to pocket the price and then to recapture the subject of sale, to decoy it away or call it back before the purchaser has had time to attach it to himself and make it his very own." But on the other hand, "he may do everything that a stranger to the business in an ordinary course would be in a position to do. He may set up where he will. He may push his wares as much as he pleases."

A purchase of goodwill confers (1) the right to the order in *Trego* v. *Hunt*; and (2) the right to use the old trade name (*h*). These rights also belong to the party entitled to the assets on a dissolution of partnership, goodwill not being mentioned (*i*).

"If there is one attribute common to all cases of goodwill it is the attribute of locality. For goodwill has no independent existence," said Lord MACNAGHTEN in *C. I. R.* v. *Muller* (*j*).

Thus, on the sale of a public-house, these rights will pass by implication (*k*), but a mortgage of a lease of a public-house will not carry the goodwill (unless so expressed) until the mortgagee takes possession (*l*), or if he is also mortgagee of the business, appoints a receiver (*m*).

Closely connected with goodwill are covenants in restraint of trade. Covenants in total restraint of trade are void on grounds of public policy, but in partial restraint, where there is a reasonable ground for the restriction, are good.

Chief Justice BEST, in *Homer* v. *Ashford* (*n*), said: "Any deed by which a person binds himself not to employ his talents, his industry, and his capital in any useful undertaking in the kingdom would be void, because no good reason can be imagined for a person imposing such a restraint upon himself."

A contract or covenant in restraint of competition is considered a contract or covenant in restraint of trade, and as such is watched with much jealousy.

Covenants in restraint of trade rest on public policy; in interpreting which Chancery judges have not quite seen eye to eye with judges

(*h*) *Levy* v. *Walker*, 10 Ch. D. 436. (*i*) *Jennings* v. *Jennings*, [1898] 1 Ch. 378.
(*j*) [1901] A. C. 24. (*k*) *Ex parte Pannett*, 16 Ch. D. 226.
(*l*) *In re Bennett*, [1899] 1 Ch. 316.
(*m*) *Whitley* v. *Challis*, [1892] 1 Ch. 64. (*n*) 3 Bing. 322.

trained in the King's Bench Division. The divergence of view came to a head in *Maxim Nordenfeldt Co.* v. *Nordenfeldt* (*o*).

In this case defendant covenanted for what was practically the rest of his life, not to make guns or ammunition anywhere except for plaintiffs, they covenanting to employ him for seven years only; he might, however, prosecute other branches of his industry and make torpedoes. This contract, after the seven years were over, was declared valid by most of the Law Lords and Lord Justices, on the double ground that it was not against public policy and not unreasonable. But Lord Justice BOWEN, who represented the views of the King's Bench Division, after reviewing all the authorities, based his decision on the first ground only. "Rules," he said, "which rest upon the foundation of public policy, not being rules which belong to the fixed or customary law, are capable on proper occasion of expansion and modification." It was the elasticity of rules of public policy which made Mr. Justice BURROUGH say in despair, "Public policy is a very unruly horse, and when once you get astride of it you never know where it will carry you. It may lead you from the sound law" (*p*); and which made Lord BRAMWELL adopt Mr. Justice CAVE's caution: it is "a branch of the law which certainly should not be extended, as judges are more to be trusted as interpreters of the law than as expounders of what is called public policy" (*q*). But in the group of cases discussed in the *Nordenfeldt case*, BOWEN, L.J., proved that elasticity was a symptom of adaptability, not caprice, and resulted from rational progress and not arbitrary change. Thus the precedents prove that these rules do not exist wherever the reason for their existence is absent—to take one instance, (1) wherever trade secrets are assigned, and, to take another instance, (2) wherever the business or goodwill of a business like Nordenfeldt's is sold; for "trade cannot suffer by the substitution of one possessor of a secret for another" (p. 666).

In *Whittaker* v. *Howe* (*r*) Lord LANGDALE enforced by injunction a covenant on the part of an attorney not to practise in Great Britain for twenty years.

A contract prohibiting a former clerk from starting the same business for a year after dismissal in the United Kingdom, France, or Canada is valid as to the United Kingdom, the contract being severable (*s*).

(*o*) [1893] 1 Ch. 630.
(*p*) *Richardson* v. *Mellish*, 2 Bing. 252.
(*q*) *Mogul Steamship Co.* v. *McGregor*, [1892] A. C. 25, 45.
(*r*) 3 Beav. 383.
(*s*) *Underwood* v. *Barker*, [1899] 1 Ch. 300.

A contract by a brewer's traveller not to sell beer or aerated waters in a certain area was upheld as to beer, but void as to aerated waters (*t*).

A covenant to retire as far as the law allows from the trade of the partnership and not to deal in any way so as to affect the other partners is valid (*u*).

Unlimited duration of time is no objection if the restraint is otherwise reasonable, and reasonableness is a question on which evidence is inadmissible (*x*).

In the latest case on the subject, it was held that a goodwill is not included in a valuation of partnership assets, nothing being charged for it (*y*).

Equitable Waste.

BAKER *v.* SEBRIGHT.

(1879, 13 Ch. D. 179.)

The principle upon which the Court interferes with a tenant for life, in respect of equitable waste, is that he is "using his powers unfairly," "making an unconscientious use of his powers."

Sir John G. Sebright, the equitable tenant for life, without impeachment of waste of the Beechwood Estate had cut down a large amount of timber, part of which was "ornamental" and part of which had been planted or left for ornament or shelter, and applied the proceeds to his own use. It appeared that all the trees so cut were injurious to or impeded the growth of other adjoining trees, so that their removal was "essential for the purposes of ornament and protection or shelter," and also "that no trees planted or left standing by any predecessor of the Beechwood Estate for protection or shelter had been cut by the defendant. It was held that Sir J. Sebright was entitled to retain the proceeds of the timber cut.

(*t*) *Rogers* v. *Maddocks*, [1892] 3 Ch. 346.
(*u*) *Davies* v. *Davies* (1887), W. N. p. 65.
(*x*) *Haynes* v. *Doman*, [1899] 2 Ch. 13.
(*y*) *Holdern* v. *Holdern* (1910), A. C. 465.

At law, if a tenant for life was not impeachable for waste, he could commit any kind of waste, even destroy the whole property. This necessitated the interference of Equity, and it was laid down in the great case of *Garth* v. *Cotton* (*a*), by Lord HARDWICKE, that such a tenant could not destroy the mansion house and the ornamental grounds. This was called equitable waste, and the reason for its creation was because it never could have been intended by the settlor, as it would destroy the subject of the settlement. Thus it was held unconscientious for the tenant for life to take the roof off Raby Castle to spite the remainderman, or to cut ornamental timber to destroy the beauty of the estate (*b*). But the trees may grow so thickly as to destroy one another; and in the leading case, Sir GEORGE JESSEL, Master of the Rolls, said that the tenant for life was only doing what the Court itself would have ordered had it been applied to.

Waste means an alteration in the nature of a thing. If it is for the better (*ameliorating waste*), as changing barns into houses (*c*), the Court will not now interfere, though formerly it did (*d*). Permissive waste is allowing property to go to decay, and a tenant for life is not responsible for it either to the remainderman or to the trustees unless the estate is subject to an obligation to repair; but an equitable tenant for life of leaseholds is liable to the settlor's estate for not keeping the leaseholds in repair (*e*).

Lord Justice TURNER in *Micklethwait* v. *Micklethwait* (*f*), described the doctrine of equitable waste as an incroachment on the rights of the tenant for life, but Sir GEORGE JESSEL disapproved of the term because all doctrines of equity were an interference with a legal right, and it was rather a term of opprobrium, whereas equitable interference with the law was for the furtherance of justice, and the term implied a censure upon the whole doctrine of equity. The Judicature Act, 1873, s. 25, sub-s. 3, expressly provides that an estate for life without impeachment of waste shall not confer on the tenant for life any legal right to commit equitable waste unless such an intention appears in the instrument creating such estate.

The same rule applies to a tenant in tail after possibility of issue

(*a*) Wh. & Tud, L. C. Eq., 7th ed., vol. ii., 970.
(*b*) *Vane* v. *Lord Barnard*, 2 Vern. 738.
(*c*) *Doherty* v. *Allman*, 3 App. Cas. 709.
(*d*) *Lord D'Arcy* v. *Askwith*, Hob. 234.
(*e*) *In re Betty*, [1899] 1 Ch. 821.
(*f*) 1 De G. & J. 504.

extinct and to a tenant in fee whose estate is defeasible (*g*), as by an executory devise over, they being on the same footing as a life without impeachment for waste.

Limited owners impeachable for waste may cut down and sell any trees which are not timber, that is oak, ash and elm, at least twenty years old, and such other trees as by local custom are regarded as timber (*h*). Infant timber may be cut, if necessary, to allow the growth of other timber on the same plantation, and the tenant for life can appropriate the proceeds. Decaying timber may be cut down by order of Court (*i*).

Trees to protect banks may not be cut down, but an exception occurs in regard to a *timber estate*, that is, an estate cultivated merely for the produce of saleable timber and where timber is cut periodically, it being then considered part of the annual fruits of the land (*j*). The opening of new mines and quarries is waste, but where they have been already opened the tenant for life may work them and take the profits (*k*). Timber cut down by the life tenant or blown down by a storm belongs to the owner of the first estate of inheritance as personalty (*l*), and the Statute of Limitation begins to run from the date of the severance (*m*).

The Court will interfere whether the titles of the parties are legal or equitable, and though the waste is apprehended only, and it will interfere at the instance of any person whose interest may be prejudiced by the waste, and a person may sue on behalf of himself and others having the same interest (*n*). An injunction may be granted at the instance of trustees to preserve contingent remainders to prevent waste by a tenant for life and a remote remainderman in collusion (*o*).

The Settled Land Act, 1882, s. 29, authorizes tenants for life to work freestone, limestone and clay, and to cut timber and other trees not left standing for shelter or ornament in order to execute and repair improvements authorized by the Act. Trial pits and planting are among the authorized improvements to which capital money may be applied under sect. 25 and sect. 28; sub-sect. 2 forbids

(*g*) *Turner* v. *Wright*, 2 De G. F. & J. 234.
(*h*) *Honeywood* v. *Honeywood*, L. R. 18 Eq. 306.
(*i*) *Phillips* v. *Barlow*, 14 Si. 263.
(*j*) *Dashwood* v. *Magniac* (1891), 3 Ch. 306.
(*k*) *Elias* v. *Snowden Slate Quarries Co.*, 4 App. Cas. 454.
(*l*) *In re Ainslie*, 30 Ch. D. 485.
(*m*) *Higginbotham* v. *Hawkins*, L. R. 6 Ch. App. 676.
(*n*) O. 16, r. 27.
(*o*) *Garth* v. *Cotton*, 3 Atk. 751.

the tenant for life to cut down, except for proper thinning, any trees planted as an improvement under the Act. Sect. 35 provides that where there is ripe timber fit for cutting, the tenant for life though impeachable for waste may, by consent of the trustees or an order of Court, cut and sell it or any part of it, three-fourths of the proceeds to be capital money, and the other fourth to go as rents and profits. Sect. 11 apportions the rent of mining leases on the same principle where the tenant for life is impeachable for waste.

If sums of money are recovered in respect of a breach of covenant and dilapidations from a tenant of a mansion house under a lease granted under the provisions of the Settled Land Acts by a tenant for life without impeachment of waste, the moneys belong to the tenant for life (*p*).

Jurisdiction to grant Injunction.

DAY *v.* BROWNRIGG.

(1878, 10 Ch. D. 294.)

GASKIN *v.* BALLS.

(1879, 13 Ch. D. 324.)

NORTH LONDON RAILWAY CO. *v.* GREAT NORTHERN RAILWAY CO.

(1883, 11 Q. B. D. 30.)

The effect of sect. 25, *sub-sect.* 8, *of the Judicature Act,* 1873, *with regard to injunctions has not been to give any new rights to parties who had previously no rights enforceable at law or in equity, but is simply to enable the High Court, without being hampered by its old rules, to grant an injunction whenever it is just or convenient so to do, for the purpose of protecting or asserting the legal rights of the parties.*

In the first case, plaintiffs alleged that their house had been called " Ashford Lodge " for sixty years, and that defendant,

(*p*) *In re Lacon's Settlement,* [1911] 2 Ch. 17.

whose adjoining house had been called "Ashford Villa" for forty years, had recently changed its name to "Ashford Lodge," and that this caused them expense, damage, and annoyance. The Court of Appeal decided that there was no case for an injunction.

In the second case, defendant purchased part of an estate which was subject to restrictive covenants against building beyond a certain line. Some buildings had been erected by his predecessor, but there had been acquiescence for five years, and defendant after his purchase erected further buildings beyond the line, and continued to build despite plaintiff's protest. Plaintiff then applied for a mandatory injunction to have all the buildings removed. The Court of Appeal granted a mandatory injunction as to buildings erected after the time when the defendant had acquired his title, but refused to interfere with the other buildings.

In the third case, the Court of Appeal refused to issue an injunction to restrain a party from going on with an arbitration which might be futile, vexatious, and cause delay.

An injunction was formerly a writ issuing under an order of Court restraining the commission or continuance of a wrongful act or the continuance of a wrongful omission, which was an infringement of a legal or equitable right. It is now an order simply, and usually preventive, though it may be mandatory or restorative.

Formerly injunctions lay chiefly (1) to prevent the wrongful institution of judicial proceedings or their continuance when inequitable, as to restrain an action on an instrument obtained by fraud; (2) to restrain wrongful acts.

They were also final and *interim* or interlocutory, the latter being to protect the plaintiff's rights pending judgment.

The Judicature Act, 1873 (s. 24, sub-s. 5), provided that no cause should be staid by injunction but that equitable matters should be pleaded as a defence and also an injunction (s. 25, sub-s. 8) might be granted by an interlocutory order in all cases in which it should appear to the Court to be just or convenient, and upon such terms and conditions as should appear to the Court to be just. In the

above leading cases it was argued that the effect of the Act was to extend the principles upon which the Court acted in granting injunctions, but the Court declined to extend its jurisdiction beyond the point to which it had been carried before the Act. In the first case, it said there was no authority for the proposition that a man had a legal right to the use of any name he chose to affix to any part of his landed property, and there was no damage alleged or legal right infringed. In the second, that it would be going beyond any decided case to enforce the covenant in respect of acts done before the defendant became owner and without any complaint at the time. In the third, the defendants were not interfering with any right of the plaintiff's which the Court could be called upon to protect. The only novelty introduced by the Act was, according to Lord ESHER, a novelty of procedure, not of jurisdiction, that being due to the extension of the procedure of one Court (the Court of Equity) to the High Court of Justice, which amalgamates in itself all the jurisdictions which had previously existed.

In *London* v. *Blackwall Railway Co.* v. *Cross* (*a*), it was held that the Court had no jurisdiction to restrain persons from acting without authority, and an injunction to restrain persons from taking proceedings out of Court in the name of a person who had no authority to give it was refused, Lord Justice LINDLEY saying, "the very first principle of injunction law is that *primâ facie* you do not obtain injunctions to restrain actionable wrongs for which damages are the proper remedy. Before the Act equity would not restrain proceedings at law where the case in equity rested upon a ground equally available at law (*b*).

The nature of an interlocutory injunction is well illustrated by *Preston* v. *Luck* (*c*), where there being a contract between the parties, the Court of Appeal thought it better to keep things *in statu quo*, so that if the plaintiff succeeded, the defendant would in the meanwhile have been prevented from dealing with the property so as to make the judgment ineffectual. The Court is not finally deciding the rights of the parties, but it must be satisfied that there is a serious question to be tried, and that the plaintiffs are probably entitled to relief. In doubtful cases, where damage may be occasioned to the defendant, in the event of an *interim* restraining order being proved to have been wrongly granted, the Court will require the plaintiff, as

(*a*) 31 Ch. D. 354. (*b*) *Harrison* v. *Nettleby*, 2 My. & K. 423.
(*c*) 27 Ch. D. 497.

a condition of its interfering in his favour, to enter into an undertaking to abide by any order it may make as to damages. If the plaintiff fails on the merits, an undertaking being given, the rule is to grant an inquiry as to damages, although the plaintiff has not made any misrepresentation by which he got the injunction (*d*).

An application for an injunction may be made *ex parte* or on notice if made by the plaintiff. If made by any other party, then on notice to the plaintiff, at any time after the appearance of the party making it (*e*). It need not be served if the respondent had notice *aliunde*, and knew that the plaintiff intended to enforce it (*f*). Notice may be given by telegram, and the Court decides whether under the circumstances the party had notice (*g*).

Since the Judicature Act the Court has power to award damages in lieu of granting an injunction. Thus, in *Rileys* v. *Halifax* (*h*), an injunction was sought to restrain a trespass, and the Court gave damages because the actual damage amounted to less than the cost of removal of the works complained of. But the giving is discretionary, and if the damage does not compensate for the injury it will not do so.

The Court is careful in awarding a mandatory injunction, and it used to take the form of disallowing the continuance of the matter complained of from going on, but now it requires the performance of some act as removal of a structure (*i*), and is not usually granted before the hearing or before the establishment of the plaintiff's right unless serious injury would otherwise result, or where the defendant will not cease pursuing the act after notice or after proceedings have been commenced, as where he hurried on building after an action for infringement of the plaintiff's right to light had been commenced with a view to anticipate the action of the Court; in that case he was ordered to demolish it (*k*).

Injunctions to enforce or restrain acts may be considered:—

1. As to their enforcing or forbidding breaches of contracts. The jurisdiction is akin to that of specific performance, but the remedy is sometimes available where specific performance does not lie,

(*d*) *Griffith* v. *Blake*, 27 Ch. D. 474, 477.
(*e*) R. S. C., O. 50, R. 6.
(*f*) *United Telephone Co.* v. *Dale*, 25 Ch. D. 778.
(*g*) *In re Bryant*, 4 Ch. D. 98.
(*h*) [1907] 97 L. T. 278.
(*i*) *Davies* v. *Gas Light and Coal Co.*, [1909] 1 Ch. 248.
(*k*) *Daniel* v. *Fergusson*, [1891] 2 Ch. 37.

as where the contract is of a negative nature. Thus, in *Lumley* v. *Wagner* (*l*), where the defendant engaged to sing at the plaintiff's theatre, and not to sing at any other theatre, the Court could not compel him to sing, but could forbid his singing at any other theatre. This case has been much commented upon, and the Courts are not inclined to extend it to cases where there are no express negative words or where the stipulation, though negative in form, is affirmative in substance (*m*). Where the plaintiff sold land to trustees who covenanted that he should have the exclusive right to supply beer to any public house to be erected on the land, and the defendant erected a public house on a part of the land which he acquired, knowing of the covenant, and supplied it with his own beer, an injunction lay, as the covenant was in substance negative, though apparently positive (*n*).

Therefore injunction is a mode of specifically performing negative agreements, but, of course, the Court will never grant one unless it can secure its performance.

2. As to torts, the Courts will generally interfere.

Voluntary waste may be restrained, if the tenant for life is impeachable for waste and equitable waste will be staid in any case against a tenant for life, but not permissive waste.

An injunction will generally lie to restrain an act causing material injury where damages would not give sufficient compensation, and where the infringement is of a proprietory right, as one relating to light, water, or support, even though there has been no damage, if an adverse right might be acquired by the continuance of the act. As a rule, a person can only restrain a public nuisance if he has sustained special damage, the remedy being a civil information at the suit of the Attorney-General.

The Court will not, as a rule, restrain a nuisance of a temporary character (*o*), unless it interferes with the enjoyment and comfort of life or property when it will, although no direct injury can be proved, but there is apprehension of it. Thus, the carrying on of noxious and dangerous trades (*p*), the noise caused by an electric generating machine station (*q*), the erection of a pumping station amounting to

(*l*) 1 De G. M. & G. 604.
(*m*) *Kirchner & Co.* v. *Gruban*, [1909] 1 Ch. 413.
(*n*) *Catt* v. *Thurle*, 4 App. Cas. 654. See the Rule in *Tulk* v. *Moxhay*, *ante*, p. 223.
(*o*) *Harrison* v. *Southwark and Vauxhall Water Co.*, [1891] 2 Ch. 409.
(*p*) *A.-G.* v. *Cole & Son*, [1904] 1 Ch. 205.
(*q*) *Colville* v. *St. Pancras Borough Council*, [1904] 1 Ch. 707.

a nuisance (*r*), have all been restrained. Noise made by printing machinery will only be restrained if, having regard to the locality and previous noises, it is just and convenient (*s*).

Where there is a claim of right, an injunction will lie to restrain a trespass pending the determination of the question of right. Also where the trespass is continuing or repetitive or of an increasing mischievous character, but not if it is neither continuing nor its repetition threatened, nor any loss to health is likely.

Injunctions also lie for the infringement of easements, of all descriptions; as where windows are darkened by adjacent buildings, where the access of air to a window or to a current of air passing through a defined channel is interfered with (*t*). Also for pollution of rivers by sewage (*u*), for disturbance of rights of support by excavation causing subsidence to land or buildings (*x*).

The utterance or repetition of libels, slanders and injurious trade notices are restrained by injunction, and the Court has power to restrain false and libellous statements at Parliamentary elections (*y*).

The Patents and Designs Act, 1907, regulates the law of patents. In an action for infringement, the Court may make such order on such terms as it thinks fit, but no such action can be instituted until a patent has been granted. An interlocutory injunction lies to protect the patent from infringement pending the trial of the real right. On the establishment of the validity of the patent, the patentee is entitled to a perpetual injunction restraining future infringements. Defamation of title may be restrained even when no damage has accrued to the patentee, but damage is imminent and likely to follow as the result of the defamation (*z*).

Copyright is the exclusive liberty of printing and multiplying copies of literary works, dramatic and musical compositions, works of art, photography, sculpture, and lectures, provided they are not obscene or irreligious, and any infringement of the right may be restrained by injunction (*a*). The right endures for various

(*r*) *Price's Patent Candle Co.*, [1908] 2 Ch. 526.

(*s*) *Heath* v. *Brighton Corporation*, [1908] 98 L. T. 718.

(*t*) *Chastey* v. *Acland*, [1897] A. C. 155.

(*u*) *Earl of Harrington* v. *Corporation of Derby*, [1905] 1 Ch. 205.

(*x*) *Angus* v. *Dalton*, 6 App. Cas. 740; *Butterley Co.* v. *New Hackney Colliery Co.*, [1908] 2 Ch. 475.

(*y*) *Craig's case*, [1908] W. N. 22.

(*z*) *Dunlop Pneumatic Tyre Co.* v. *Maison Talbot*, [1904] 52 W. R. 254.

(*a*) There is none in racing tips printed in a copyright newspaper. *Chiltern* v. *Progress Co.*, [1895] 2 Ch. 29.

terms according to the subject of the copyright. Registration is a condition precedent to the right to proceed for infringement, and an action for injunction is the proper remedy for a threatened infringement or for an actual infringement intended to be repeated. It is not an infringement to make quotations from a book, or extracts, or to abridge it or to use common materials. Living pictures are not (*b*), though pictures of living-pictures may be (*c*), and the backgrounds (*d*) are, within the Act. It is doubtful whether the copyright in a photograph belongs to the photographer (*e*) or to the person for whose use it is taken (*f*), but a photographer taking a person for payment may not sell or distribute copies broadcast (*g*). A reproduction of a copyrighted work of art may be enjoined, especially if it vulgarizes it (*h*).

The property in private letters lies in the author of them, and he may enjoin the party written to from publishing (*i*), and the latter may enjoin a stranger (*k*). The author of an unpublished manuscript may restrain the publication thereof (*l*), and also the publication of information obtained under confidential circumstances or under a promise not to divulge it, may be restrained; also the publication of lectures given by a professor to a class (*m*). Where a manager clandestinely copied the names of customers to solicit orders after he had set up a separate business of his own, he was enjoined from using the information obtained (*n*).

Since 1875 a trade mark may be acquired by registration; before the Trade Marks Registration Act of that date, it was acquired by user, and the system of registration is now regulated by the Trade Marks Act, 1905. The principle on which the Court acts in enjoining user in cases not within the Act is that it will not allow one man's goods to be passed off as those of another in order to mislead the public, and when the trade mark has been duly

(*b*) *Hansfstaengl* v. *Empire Palace*, [1894] 2 Ch. 1.
(*c*) *Hansfstaengl* v. *Baines*, [1895] A. C. 20.
(*d*) *Hansfstaengl* v. *Empire Palace*, [1895] W. N. 76.
(*e*) *Boucas* v. *Cooke*, [1903] 2 K. B. 227.
(*f*) *Stackeman* v. *Paton*, [1906] 1 Ch. 519.
(*g*) *Pollard* v. *Photographic Co.*, 40 Ch. D. 345.
(*h*) *Hansfstaengl* v. *Smith*, [1905] 1 Ch. 519.
(*i*) *Lytton* v. *Devey*, 52 L. T. 121.
(*k*) *Thompson* v. *Stanhope*, Amb. 737.
(*l*) *Queensbury* v. *Shebbeare*, 2 Eden. 329.
(*m*) *Caird* v *Sime*, 12 App. Cas. 326.
(*n*) *Robb* v. *Green*, [1895] 2 Q. B. 315.

registered under the Act, a property in it is acquired. Single or fancy words may be registered as trade marks if they have been in use before 1875 (*o*), since the Act the word must be an invented word, and not a geographical name (*p*), but a distinctive word is registerable (*q*). So is a flower, as the "magnolia flower" (*r*), and also the portrait of the maker was held as a distinctive device for cough lozenges.

A trader may be enjoined from using his own name where it has become identified with the business of another so as to be deceptive when used without qualification, as where J. & J. Cash had for years sold goods known as Cash's Frillings, one Joseph Cash was restrained from carrying on the same trade in the same name (*s*). But if there is no proof or probability of deception, an injunction will not lie. An injunction to restrain the Dunlop Motor Tyre Co. from carrying on business on the ground of the similarity of name to that of the plaintiff company was refused, there being no proof that anybody would be misled thereby, and the plaintiff company not being entitled to the exclusive use of the name "Dunlop" (*t*).

No injunction but only damages are given for expulsion from a proprietary club, and in the case of other clubs, expulsion is upheld if it has been according to rules and not malicious (*u*).

An executor who becomes bankrupt after the testator's death may be restrained from acting (*x*).

The husband may be restrained from going to the wife's house settled to her separate use, and where alimony is claimed from dealing with his property (*y*). So may the publication of valuable information, as tape prices communicated to a limited public for a limited purpose (*z*). So with a lecture delivered to a limited audience admitted by ticket, the publication of notes taken may be enjoined (*a*).

A peer may not enjoin his divorced wife from using his name (*b*).

(*o*) *In re Vaseline Trade Mark*, [1902] 2 Ch. 1.
(*p*) *Caledonia Springs Case*, [1904] A. C. 103.
(*q*) *In re Apollinaris Trade Mark*, [1907] 2 Ch. 178.
(*r*) *In re Magnolia's Metal Co. Trade Mark*, [1897] 2 Ch. 371.
(*s*) *J. J. Cash, Ltd.* v. *Cash*, [1901] 18 R. P. C. 213; *John Cash & Sons* v. *Harwood, Cash & Co.*, [1907] 2 Ch. 184.
(*t*) *Dunlop Pneumatic Tyre Co.* v. *Dunlop Motor Co.*, [1907] A. C. 430.
(*u*) *Baird* v. *Wells*, 44 Ch. D. 661.
(*x*) *Bowen* v. *Phillips*, [1897] 1 Ch. 194.
(*y*) *Newton* v. *Newton*, [1896] P. 35.
(*z*) *Exchange Telegraph Co.* v. *Gregory*, [1896] 1 Q. B. 147.
(*a*) *Nichols* v. *Pitman*, 26 Ch. D. 374.
(*b*) *Cowley* v. *Cowley*, [1901] A. C. 450.

In *Parker* v. *First Avenue Hotel Co.* (*c*), it was held that a building may obstruct the light coming to a window if it permits the light to fall upon the window at an angle of 45 degrees, but the question of obstruction is to be determined by the evidence in each case (*d*). During rebuilding, the site of ancient windows must not be blocked up (*e*). A greenhouse may acquire a right to light (*f*).

Diversion, even if malicious, of underground water gives no right to an injunction (*g*).

Therefore, on the whole as to injunctions it may be said—

1. That the exercise of the power is discretionary, not imperative, and the Court will be guided by the balance of convenience.
2. That it is only in actionable cases that it will interfere.
3. And only when the remedy in damages is not a satisfactory one.
4. And when the Court can enforce the order it makes.
5. And the plaintiff has used due diligence in his application for relief.
6. And the order cannot operate oppressively or unjustly.

It may be added that the Court may impose such terms as it elects as conditions for relief, and a usual term is that it will require the plaintiff to undertake to abide by any order the Court may subsequently make as to the payment of any damages the defendant may have sustained by the granting of the injunction.

Lord CAIRNS' Act (*h*) empowered Equity to give a plaintiff damages by way of alternative relief, and though this Statute is repealed by the Statute Law Revision Act, 1883, yet its principles are still followed; the High Court has full power, under the provisions of the Judicature Acts as above stated, to award damages instead of an injunction.

Recent cases on injunction are: *The Society of Architects* v. *Kendrick* (*i*), where a society of architects open to certain qualified persons were authorized to use the letters M.S.A. as a professional designation. The defendant, who was an architect but not a member, used those letters. It was argued that the continuous use of the letters had given a definite value to them in the minds of the public, and the use by unauthorized persons would damage the

(*c*) 24 Ch. D. 282; and see *Colls* v. *Home and Colonial Stores*, [1904] A. C. 179 —the leading case now.

(*d*) *Field* v. *Debenham*, 2 Ch. D. 165.

(*e*) *Smith* v. *Baxter*, [1900] 2 Ch. 138.

(*f*) *Clifford* v. *Holt*, [1899] 1 Ch. 698.

(*g*) *Chasemore* v. *Richards*, 7 H. L. Cas. 349.

(*h*) 21 & 22 Vict. c. 27, s. 2

(*i*) [1910] 102 L. T. 526.

society. The injunction was refused on the ground that the plaintiffs had not made out any legal claim.

In *A. G.* v. *Birmingham, etc., Drainage Board* (*k*), a perpetual injunction had been granted to restrain the defendants from polluting a stream by their drainage works. But before the hearing of the appeal they satisfied the Court that they had adopted a new system, doing away with the nuisance. The injunction was discharged, but the defendants were ordered to pay all costs, including those of the appeal. These cases hardly turn on principle, the first touching a professional matter and the latter being a reasonable decision on costs.

A mandatory injunction was also refused to enforce a contract to maintain a structure bearing an inscription likely to provoke a breach of the peace (*l*).

Contribution among Sureties.

STEEL *v.* DIXON.

(1881, 17 Ch. D. 825.)

The principle as between co-sureties is equality of burden and benefit.

Money was advanced to Robinson on the security of a promissory note for £800, which Dixon, Gurney, Steel, and Chater signed as sureties. Dixon and Gurney only consented to sign if security were given, and Robinson afterwards assigned property securing their share of money payable on the note. Steel and Chater had no knowledge of this arrangement, but it was held that they were entitled to share in the benefit of the security held by Dixon and Gurney.

There being no English authority bearing precisely upon the subject, the Court was guided by American precedents based on the rule in *Dering* v. *Earl of Winchilsea* (*a*), that "as between co-sureties there is to be equality of the burden and of the benefit." "Co-sureties" means co-sureties for one and the same debt (*b*). And

(*k*) [1910] 1 Ch. 48.
(*l*) *Woodward* v. *Mayor, etc. of Battersea* [1911], 104 L. T. 51.
(*a*) Wh. & Tud. L. C. Eq., 7th ed., vol. ii., 535.
(*b*) *Johnson* v. *Wild*, 44 Ch. D. 146.

"equality," said FRY, J., "does not mean necessarily equality in its simplest form, but what has been sometimes called proportionable equality. The result of the case of *Dering* v. *Earl of Winchilsea* was expressed by Baron ALDERSON in *Pendlebury* v. *Walker* (*c*) in these terms, that 'where the same default of the principal renders all the co-sureties responsible, all are to contribute; and then the law superadds that which is not only the principle but the equitable mode of applying the principle, that they should all contribute equally, if each is a surety to an equal amount; and if not equally, then proportionably to the amount for which each is a surety.' I hold, therefore, that the result of *Dering* v. *Earl of Winchilsea* is to require that the ultimate burden, whatever it may be, is, as between the co-sureties, to be borne by them in proportion to the shares of the debt for which they have made themselves responsible. If that be the case, it follows that each surety must bring into hotchpot every benefit which he has received in respect of the suretyship which he undertook."

He added, however, that the equity which raised the surety's right to have all benefits brought into hotchpot, may be varied or departed from. Thus—

1. The co-sureties may renounce or contract themselves out of the benefit. Merely taking other security is not such a contract (*d*).

2. "One co-surety, by reason of his default in performing his duty towards another co-surety, may estop himself from asserting the equity which he would otherwise have had against him." Misrepresentation of facts, but not of an intention to abandon the equity, would create estoppel (*e*).

In re Arcedeckne (*f*), one of the sureties jointly with his father paid the guaranteed debt; the son was only allowed to enforce contribution from his co-sureties on bringing into hotchpot a security which his father had received from the creditor. Mr. Justice PEARSON said, "I treat the father and son as one person."

Where two sureties are equally liable on a bond, and one dies and a new bond is given, so as to make the deceased's estate still liable, but making a new surety equally liable with the continuing surety, the liability as between the three will be in thirds (*g*).

(*c*) 4 Y. & C. Ex. p. 441.
(*d*) *Lake* v. *Brutton*, 8 D. M. & G. 440; *Brandon* v. *B.*, 3 D. & J. 524.
(*e*) *Chadwick* v. *Manning*, [1896] A. C. 231.
(*f*) 24 Ch. D. 709.
(*g*) *In re Sir J. Ennis*, [1893] 3 Ch. 238.

A surety's right to indemnity from a co-surety ranks with simple contract debts (*h*), though he be surety to a bond, unless there is a contract by deed to indemnify him (*i*); but having paid the bond he becomes entitled to it under the Mercantile Law Amendment Act, 1856, s. 5 (*k*), and is thus changed into a specialty creditor.

A surety is entitled to have all the securities preserved for him which were taken at the time of the suretyship or subsequently (*l*).

The principal of equal contribution between co-sureties was applied to successive indorsers of a bill of exchange in *Macdonald* v. *Whitfield* (*m*).

A surety is discharged if time is given to the principal debtor without the surety's assent. If the creditor binds himself not to sue the principal debtor for however short a time, he interferes with the surety's theoretical right to sue in his name during that period. But the creditor may reserve his rights against the surety, because when that right is so reserved the principal debtor cannot say it is inconsistent with giving him time that the creditor should be at liberty to proceed against the sureties and that they in their turn should proceed against him, the principal debtor.

If the creditor varies the contract with the principal debtor to the detriment of the surety without the consent of the latter, that will work a discharge. Thus, suppose the debt is a negotiable instrument having several indorsers, and time is given to one of them, all those who indorsed subsequently to him are discharged, but not the prior ones, as it cannot affect them (*n*).

If there are two or more sureties, and they are jointly or jointly and severally bound, the release of one of them operates as the release of all, even if made under a mistake, unless, indeed, it can be interpreted as a covenant not to sue (*o*).

An absolute release of the principal of course releases the surety, and the creditor cannot in that case reserve any remedy against the latter for the debt and its incidents, of which the suretyship is one, is gone, and because it would be a fraud to free the principal debtor and sue the surety, who in his turn could sue the principal debtor (*p*).

If the creditor loses any collateral securities he holds or permits

(*h*) *In re Illidge*, 27 Ch. D. 482.
(*i*) *In re Allen*, [1896] 2 Ch. 345.
(*k*) 19 & 20 Vict. c. 97.
(*l*) *In re Forbes and Jackson*, 47 L. J. Q. B. 146.
(*m*) 8 App. Cas. 733.
(*n*) *Macdonald* v. *Whitfield*, 8 App. Cas. 733.
(*o*) *Cheetham* v. *Ward*, 1 B. & P. 630.
(*p*) *Tasmania Bank* v. *Jones*, [1893] A. C. 313.

them to go back into the hands of the debtor or if by his laches they become ineffectual, as by want of registration or neglect to give the notices, if any, required by law or neglecting any statutory formalities, in all these cases the surety is discharged to the extent of the security (*q*).

If a surety pays the debt at a less sum than the one he was surety for, he can only charge his principal what he has actually paid; he cannot make money by the transaction (*r*).

The right to contribution can be varied by special circumstances, as where three sureties agreed amongst themselves that if the principal debtor failed to pay, they should only be liable for their *aliquot* parts, and one of them became insolvent and one of the others paid the whole debt, it was held, he could only recover one-third from the other solvent one (*s*).

The principle of contribution applies when co-sureties are bound by different instruments, provided they are sureties for the same debt and to the same debtor, and if bound in different sums, the contribution is proportional. Thus, where there are four sureties for £150, two limiting their liability to £50 and two to £25 and £60 is payable, the first two will each pay £20 and the second two £10 each, and if one of the former has to pay the whole £50 he can recover from the others proportionally (*t*).

For the purposes of the Statute of Limitations, no debt accrues between surety and co-surety until their reciprocal liability is ascertained by judgment and the Statute begins to run in favour of the creditor from the date of the advance, and if the debt is one payable on demand, it runs from the date of the demand (*u*).

(*q*) *Taylor* v. *Bank of New South Wales*, 11 App. Cas. 596.
(*r*) *Reed* v. *Norris*, 2 My. & Cr. 361.
(*s*) *Swain* v. *Wall*, 1 Ch. R. 149.
(*t*) *Ellesmere Brewery Co.* v. *Cooper*, [1896] 1 Q. B. 75.
(*u*) *In re Brown's Estate*, [1893] 2 Ch. 300.

Limited Owners—The Settled Land Act, and its Amendments, 1882-1890.

LORD R. BRUCE *v.* MARQUESS OF AILESBURY.

([1892] 1 Ch. 506 ; [1892] A. C. 356.)

In re JONES.

(1884, 26 Ch. D. 736.)

The object of these Acts is the well-being of settled land, and to make it always marketable. Therefore the person entitled to receive the income of settled land is tenant for life within the meaning of the Settled Land Act, 1882, *though he derives no income from the estate.*

In the first of these cases the Marquess of Ailesbury, aged twenty-eight, and a spendthrift, was tenant for life of Savernake estate. He had mortgaged his life estate to a money-lender named Samuel Lewis, who put a receiver into possession. Lord Iveagh offered to buy the whole estate on advantageous terms, if the tenant for life obtained the consent of the Court to the sale of that part of the estate which consisted of the mansion house and Savernake forest. All the remaindermen opposed the sale. The Court of Appeal and House of Lords held that the Court should consent to the sale in the interests of the tenantry.

In the second case Colonel Grey was entitled to the surplus income of settled land after payment of the interest on incumbrances and an annuity. The rents, after payment of the interest, were insufficient to pay the annuity, and there was no probability that there would be any income for Colonel Grey to receive for many years to come. Held, by the Court

of Appeal, that Colonel Grey was entitled to exercise the powers of a tenant for life.

Originally at the common law a limited owner could not deal with settled property beyond his own interest; he could not lease for a fixed term which might endure longer than his life or expend money except his own on necessary improvements on the property. Modern legislation has endeavoured to remedy this, notably the Improvement of Land Acts and the Settled Estates Acts; and lastly, the Settled Land Act, 1882 (with its amendments), which has practically superseded these. But they are not repealed by it. It gives large powers of disposition to the tenant for life, at the same time imposing such conditions as shall prevent his dealing with the land for his own benefit to the detriment of others entitled under the settlement. The subject of the Act may be divided into five heads—

1. The meaning of the expressions used in the Act.
2. Who may exercise the powers it gives.
3. What can be done in the exercise of those powers.
4. In what ways capital money arising from the exercise of those powers may be employed.
5. What securities are provided against reckless dealings by limited owners.

We proceed to discuss these in detail.

The object of the "Settled Land Act of 1882" was to confer upon the present generation of land owners the means of alienation which by the ingenuity of conveyancers and the process of time they had become deprived of (*a*). "The object of the legislature was the well-being of the settled land," thus contrasting with the Settled Estates Acts, where it did not look beyond the interests of the persons entitled under the settlement (*b*). "The object is to render land a marketable commodity" (*c*). Therefore this Act was passed for motives of public policy, and hence we see "the startling paradox that a man could be entitled to the income of land, although there was no income to receive, and no chance of any" (*d*). It was to grant a tenant for life very large powers for his own benefit, "to take

(*a*) As described in *Cardigan* v. *Curzon-Howe*, 30 Ch. D. 536.

(*b*) *Per* Lord MacNaghten, *Bruce* v. *Marquess of Ailesbury*, *supra*, at p. 364.

(*c*) *Per* C. A. in *In re Mundy and Roper's Contract*, [1899] 1 Ch. 288.

(*d*) *Per* Lord Justice Lindley, *In re Jones*, *supra*, at p. 743.

land out of settlement and substitute for it its value in pounds, shillings, and pence" (*e*), and at the same time to provide that the interests of those in expectancy were not jeopardized.

1. Artificial meanings are given to many expressions in the Act; thus—

"Settlement includes, besides deeds, wills, and agreements for settlement, any number of instruments by which interests in land may be limited to or in trust for any number of persons in succession (sect. 2, sub-sect. 7).

"Settled land" includes land or any interest therein which is the subject of a settlement, also remainders, reversions, leases for years, New River Shares (*f*), titles, shares in tolls in lighthouses, but most of the provisions apply to corporeal hereditaments (sect. 2, sub-sects. 2, 3).

"Tenant for life" embraces persons in possession (this is the essential point) of the income for life or until sale or forfeiture, tenants by the curtesy (but not a doweress or jointress) (*g*), infants absolutely entitled in possession, joint tenants or tenants in common, but not persons alternately entitled under a discretionary trust (*h*) (sect. 58).

"Trustees of the settlement" means those who are for the time being entrusted with a power of sale or to consent to the same, or if there are none, those who are declared to be trustees for the purposes of the Act (sect. 2, sub-sect. 8).

Sect. 46, sub-sect. 1, assigns all matters under the Act to the Chancery Division, and sub-sect. 3 declares that applications shall be made by petition or summons at chambers.

2. The powers of the tenant for life.

The object of the Act was to give the tenant for life power to deal with the property when beneficial for the estate; and he can sell, enfranchise, exchange, partition, lease for twenty-one years, or, in the case of mining and building leases, for sixty and ninety-nine years respectively (sects. 6–12 (S. L. A., 1890, ss. 7–9)), and even mortgage for the purposes of enfranchisement, exchange or partition or paying off incumbrances (s. 18, S. L. A., 1890, s. 11). Except to grant a twenty-one-year lease, he must give one month's notice of his intention to the trustees, who must be at least two (though they may waive

(*e*) *Per* Mr. Justice PEARSON, *Wheelwright* v. *Walker*, 23 Ch. D., at p. 761.
(*f*) *A.-G.* v. *Jones*, 1 M. & G. 574.
(*g*) *In re Marquis of Aylesbury and Lord Iveagh*, [1893] 2 Ch. 345.
(*h*) *In re Atkinson*, 31 Ch. D. 577.

notice (S. L. A., 1884, s. 5)), and also to their solicitor, if known (s. 45), but absence of notice does not affect a *bonâ fide* purchaser. Where the tenant for life is an infant the trustees exercise his powers. In *In re Llewellyn* (*i*), A devised land in settlement and directed his trustees to accumulate the rents and profits and pay an annuity to X, the first life tenant, till he should attain twenty-seven. A did not give the trustees any powers of letting. X at twenty-five can exercise the powers of a life tenant (s. 58, sub-s. 1, clause 6).

These statutory powers are incapable of assignment or release, and any contract not to exercise them is void (sects. 50–52). They are cumulative, that is, additional to any powers conferred by the settlement, and in case of conflict with such powers, the powers of the Act shall prevail (sects. 56 and 57). The powers do not pass to an assignee by operation of law or otherwise, though they cannot be exercised to his prejudice if he is an assignee for value. Assignments in consideration of marriage and by way of family settlement are excepted, not being for money advanced.

Every lease must be by deed, must take effect in possession in twelve months and must reserve the best rent—in fact, the interests of those in expectancy must be secured; there were similar provisions in leases under the Settled Estates Acts.

The consent of the trustees or of the Court is required—

(1) For the sale, exchange or lease of the principal mansion house and lands usually occupied therewith (S. L. A., 1890, sect. 10).

(2) For the approval of a scheme for an improvement and the expenditure of capital money thereon (sect. 26) (*k*).

(3) For the cutting and sale of timber (sect. 35).

(4) For the investment and application of capital money arising under the Act (sect. 22).

(5) For the application of purchase-money paid for a lease or reversion (sect. 34).

(*i*) [1911] 1 Ch. 451.

(*k*) The Improvement of Land Act, 1864 (27 & 28 Vict. c. 114, s. 25), gave facilities for borrowing money to be spent on improvements on settled land, by way of drainage, etc., to be repaid with interest by equal instalments, the tenant for life to maintain the improvements. Capital money may be applied at the instance of the tenant for life in payment of any such improvements, of which there is a long list, and this list is added to by the Settled Land Act, 1890, s. 13, to include: (1) bridges; (2) altering and adding to buildings to enable them to be let; (3) erecting buildings in substitution for buildings in an urban sanitary district, taken by a local authority; and (4) rebuilding the principal mansion house.

3. In several cases application to the Court is imperative.

(1) To authorize building or mining leases not authorized by the Act.

(2) To obtain directions as to enforcing, varying, or rescinding contracts (sect. 31 (3)).

(3) To approve of proceedings for protection or recovery of settled land (sect. 36).

(4) For purchase or sale of heirlooms (sect. 37).

(5) For appointment of trustees under the settlement for the purposes of the Act, where there are none (sect. 38).

(6) If differences arise between the tenant for life and trustees of the settlement as to the exercise of powers of the Act (sect. 44).

(7) If conflict occurs between the provisions of the Act and a settlement (sect. 56).

(8) For the appointment of persons to exercise the powers of the Act where the tenant for life is an infant (sect. 60).

(9) The powers given by sect. 63 are not to be exercised without leave of the Court (S. L. Act, 1884, s. 7).

The Court has a general power to make such order as it thinks fit, and to give directions for paying costs, &c. (sect. 46, sub-s. 6).

4. Capital money. What becomes of it?

The tenant for life cannot take it; it must be paid either to the trustees of the settlement or into Court (sect. 22), and if there are no trustees, nothing can be done in exercise of the powers given by the Act till they are appointed, as notice must be given to them (sect. 45). Capital money will be invested by the trustees according to the direction of the tenant for life or that of the Court in any of the authorized modes of employment of it when arising under the Act; sect. 21 details these. They are chiefly investments in authorized securities, payment for authorized improvements, discharge of incumbrances and purchase of other lands to be made the subject of the settlement. The investments are made in the names of the trustees. It devolves as the original land would have done, and the income is paid to those who would have had the income of the land.

5. The protection afforded to the tenants in expectancy against reckless dealings of the tenant for life are—

(1) Requiring him to give a month's notice to the trustees and to their solicitor, if known to him, before exercising any of the powers of the Act, sect. 45, sub-sect. 1.

(2) Enabling the Court to settle differences between the tenant

for life, and the trustees as to the exercise of the statutory powers (sect. 44).

(3) Compelling capital money to be paid to the trustees or into Court (sect. 22, sub-sect. 1).

(4) Placing restrictions on the execution of authorized improvements out of capital money, *e.g.* making a scheme necessary and an order of Court or a certificate of the Lands Commissioners or of an engineer or surveyor approved of by the Court or the Commissioners before the trustees part with the money (sect. 26, sub-sects. 2 and 3).

(5) Making the tenant for life and each of his successors responsible for maintaining improvements (sect. 28, sub-sect. 123).

(6) Putting the tenant for life in the position of a trustee for those in expectancy (sect. 53).

Joint Tenants and Tenants in Common—Partition or Sale—The Court's Discretion.

PEMBERTON *v.* BARNES.

(1871, L. R. 6 Ch. App. 685.)

Sect. 4 of the Partition Act, 1868, is imperative, and when the parties entitled to a moiety or upwards desire a sale, the Court must order it unless some good reason is shown to the contrary.

The Tring Park Estate consisted of a mansion-house of great historical interest, upwards of 3600 acres of land, of which about 300 formed a park, together with manorial rights extending over thirty square miles of country. The plaintiffs, who were entitled to one moiety of the estate, filed their bill against the trustees of the estate, and Dr. and Mrs. Barnes, who were entitled to the other moiety, claiming a sale of the property or, in the alternative, a partition. There was uncontradicted evidence that the Tring Park Estate if sold as a whole would realize a much larger price than if sold in moieties, and that it could not be satisfactorily partitioned; but the defendants objected to the estate being sold in order that the plaintiffs

might obtain a fancy price, and denied that a sale would be more beneficial than a partition.

Lord HATHERLEY, Lord Chancellor, being of opinion that no "real good plain cause" had been shown against a sale, ordered a sale, with liberty to the defendants to bid.

Tenants holding *indiviso* are either joint tenants, coparceners, or tenants in common. Coparceners could always compel partition, because their estates devolved upon them independently of their own will, but the others could not do so before 31 Hen. VIII. c. 1, and 32 Hen. VIII. c. 32, which Statutes allowed partition to be enforced by writ of partition. These Acts excluded copyholds and also castles, the latter being needed, it was said, for the defence of the realm, but included leaseholds, and incorporeal hereditaments, such as tithes and advowsons. Copyholds were included by 3 & 4 Vict. c. 35, s. 85 (1841). By 3 & 4 Will. IV. c. 27, the Court of Chancery obtained exclusive jurisdiction in partition matters. But the Courts had no power to decree a sale till the Partition Acts of 1868 and 1876, however great the inconvenience of the deprivation might be. Thus in *Turner* v. *Morgan* (*a*), the defendant objected on the ground that the Commissioners had allotted to the plaintiff the whole stack of chimneys, all the fireplaces, the only staircase, and all the conveniences in the yard; and a case was there mentioned where the partition of a house was carried into effect by building a wall through the middle. Lord ELDON, however, overruled the objection, saying he had no doubt what was to be done (*b*). The old Partition Acts are still in force, and in 1894 Mr. Justice NORTH partitioned a garden wall longitudinally (*c*).

The Partition Act of 1868 (*d*), s. 3, gives the Court power to direct a sale and distribution of the proceeds instead of a partition at the request of any party interested, though the others dissent, if the Court is satisfied that a sale would be more beneficial by reason of (1) the nature of the property to which the suit relates; (2) the number of the parties interested therein; (3) the absence or disability of some of them; (4) or any other circumstance.

(*a*) 8 Ves. 143.

(*b*) Nor had Solomon when he ordered the partition of the baby. In *Warner* v. *Baynes*, Amb. 589, Lord HARDWICKE partitioned a cold bath.

(*c*) *Mayfair Property* v. *Johnston*, [1894] 1 Ch. 508.

(*d*) 31 & 32 Vict. c. 40.

Sect. 4 provides that in a partition suit, where if the Act had not been passed, a partition decree might have been made, then if the parties interested to the extent of one moiety or upwards in the property, request the Court to direct a sale, the Court shall, unless it sees good reason to the contrary, direct a sale.

Therefore, if half wish a sale and half wish a partition, the Court shall be bound to order a sale unless it sees that there is some vindictive feeling, or that a sale is for other reasons undesirable. Sir GEORGE JESSEL, Master of the Rolls, suggested as good reasons "that the property might be temporarily depreciated in value," or "it might be of a peculiar description, so as not to be actually saleable, as an appanage to another property, as a room in a warehouse, manorial rights, &c."

Where trustees were directed to work a quarry during the lives of the tenants in common (*f*), and where the trustees were to sell realty at such time as they should think fit (*g*), but the beneficiaries were *sui juris* and might compel a sale at any time, a sale was refused, the Court not wishing to interfere with a discretionary trust; but where there was a mere power to sell, which the trustees were willing to exercise, and, in a partition action, one of the tenants in common contended that the Court had no power to interfere with the discretionary power of the trustees, the Court decreed a partition (*h*). The Court does not consider matters of affection or sentiment in concluding what is beneficial (as where a mansion house was part of the family property, and it was urged that the Court should not interfere), but its commercial value (*i*).

Sir GEORGE JESSEL said the meaning of the legislature is that if the property is of such a nature that it cannot reasonably be partitioned, a sale should be directed (*k*).

Sect. 5 provides that in every case of an action for partition, if any party, whether owning more or less than a moiety, requests a sale, the Court shall have discretion to order a sale, unless the parties opposing are willing to take his share at a valuation.

In *Pitt* v. *Jones* (*l*), where the owners of three-sixteenths wanted a sale, and the owners of thirteen-sixteenths objected and offered to purchase the shares of the others at a valuation, the House of Lords

(*f*) *Grange* v. *Taylor*, 15 Ch. D. 165.
(*g*) *Biggs* v. *Peacock*, 22 Ch. D. 284.
(*h*) *Boyd* v. *Allen*, 24 Ch. D. 622.
(*i*) *Drinkwater* v. *Ratcliffe*, L. R. 20 Eq. 533.
(*k*) *Gilbert* v. *Smith*, 11 Ch. D. 81.
(*l*) 5 App. Cas. 659.

ordered a sale. Lord BLACKBURN said sects. 3, 4, 5, though to be read together, are independent enactments, but it would have been clearer if sect. 5 and sect. 3 had changed places. Under sect. 5, if a party presses for a sale and the Court thinks that the others ought to buy him out or consent, it may order a sale unless the others will agree to take his share at a valuation, and he may accept that valuation or not. If he does not, he will have his common law right to a partition.

Sect. 6 enables the Court to allow parties interested to bid on terms. The parties and the right of bringing the action are the same in an action for partition and sale. A tenant in common in reversion cannot bring such an action (*m*). Where a sale is asked for, partition may be ordered, and *vice versâ*, under the Act of 1876, s. 7, and there may be partition of one part and sale of another part of the property (*n*). Where a sum is paid for equality of partition, "that is, not partition pure and simple, but partition *plus* sale," (*nn*) so that sale is not necessarily alternative to partition.

Sect. 3 of the Act of 1876 specifies the grounds upon which service of the notice of the judgment on the hearing could be dispensed with, viz. the impossibility of effecting services on all required to be served by the Act of 1868. And sect. 6 allows a request for sale to be made by a married woman, infant, or person under disability, an infant appearing by next friend (*o*) or guardian *ad litem*, and a lunatic by his committee; no order will be made unless for the benefit of the person under disability (*p*). The request by a married woman should be made by counsel instructed by a solicitor, formally authorised and requested to do so (*q*).

The Court cannot make an order for sale at the hearing unless all parties interested are parties to the action (*r*), and mortgagees and lessees are interested parties (*s*).

Costs are paid out of the proceeds of sale, and sect. 10 of the Act of 1868 enables the Court to make such order as it thinks fit as to the costs up to the time of sale.

(*m*) *Evans* v. *Bagshaw*, L. R. 5 Ch. App. 340.
(*n*) *Roebuck* v. *Chadebet*, L. R. 8 Eq. 127.
(*nn*) *Per* JESSEL, M.R., in *Porter* v. *Lopez*, 7 Ch. D. 358.
(*o*) *Rimington* v. *Hartley*, 14 Ch. D. 630.
(*p*) *Porter* v. *Porter*, 37 Ch. D. 420.
(*q*) *Grange* v. *White*, 18 Ch. D. 612.
(*r*) *Mildmay* v. *Quicke*, L. R. 20 Eq. 537
(*s*) *Mason* v. *Keays*, 78 L. T. 33.

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