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PRINCIPLES

OF

THE COMMON LAW.

PRINCIPLES

OF

THE COMMON LAW.

INTENDED FOR THE USE OF STUDENTS AND THE PROFESSION.

BY

JOHN INDERMAUR,

SOLICITOR,

AUTHOR OF "MANUAL OF PRACTICE," "EPITOMES OF LEADING CASES," "MANUAL OF THE PRINCIPLES OF EQUITY," "PRINCIPLES AND PRACTICE OF CONVEYANCING," ETC. ETC.

ELEVENTH EDITION

BY

THE AUTHOR

AND

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SOLICITOR,

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PREFACE.

Five years have elapsed since the last edition of this work was published, and during that period there has been considerable legislation, and a number of cases have been decided, in connection with various matters dealt with in it. The difficulty in preparing this edition—for which the author and Mr. Charles Thwaites are again jointly responsible—has been to embody all that was necessary without increasing the bulk of the work, a very material point with students, for whom it is, as originally, still primarily intended. The additions and emendations in the text are very numerous apart from those necessitated by cases and statutes. By a very careful revision, however, this edition has been made even a few pages less than the last one. Certain matter has been eliminated to make room for what was new or seemed more important, but it is believed that nothing really material has been omitted, and that this present edition will be found as comprehensive as any previous one and thoroughly brought down to the present date. The Editors call attention to the fact that they have in this edition given the date of every English case quoted, as they think this often proves of material assistance. This in itself has, of

course, occasioned considerable extra labour. They trust that this edition will meet with the same favourable reception that has been accorded to every prior edition issued during the thirty-two years that have elapsed since the work was originally published.

Since the text of this edition was printed, two statutes have been passed which in some respects affect the work. They will be found mentioned on the page of "Addenda et Corrigenda" which they made necessary, and one of them is set out in an appendix.

JOHN INDERMAUR.
CHARLES THWAITES.

22 CHANCERY LANE, LONDON,
January 1909.

PREFACE TO FIRST EDITION.

The chief object of the present work is to supply the student with a book upon the subject of Common Law (or, in other words, of the law as usually administered in the Queen's Bench, Common Pleas, and Exchequer Divisions of the High Court of Justice), which, while being elementary and readable on the one hand, yet also goes sufficiently into the subject to prepare the student for examination upon it. The present work is indeed written mainly with a view to the Examinations of the Incorporated Law Society, for which the author has had considerable experience in reading with students; but at the same time he trusts it may be found useful to those who are adopting the other branch of the profession. The author does not consider that any apology is necessary for presenting this work, it being new in its design, as offering to the student a comparatively short volume combining the plain and popular divisions of "Contracts" and "Torts," and keeping as much as possible from all matters of practice, and from Criminal Law, and also from all matters of an exceptional nature and likely neither to be useful in examination nor in practice. In addition to the two main divisions the author has added

another, in which the subjects of "Damages" and "Evidence" are discussed, as no work on the "Common Law" could be complete without.

Besides his chief object, the author has also had another in view, viz., to produce a book which may—if not always in itself, yet, at any rate, by aid of the extensive references to either text-books or cases—form a work useful to the practitioner. In many cases it may—from its very size—be useful for this purpose only as an index: and remembering this, the author has considered that in many places references to larger text-books would be preferable to cases, and has acted accordingly; and here he would acknowledge the obligations he is under to the learned authors and editors of the various works he has in the following pages referred to.

With these few words the author sends his work forth to speak for itself, and be judged on its merits, assuring his readers that no pains have been spared on his part to ensure accuracy, and trusting that his labours may meet with approbation.

J. I.

22 Chancery Lane, W.C.
August 1876.

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8 Ed. VII. c. 53 *See* Addenda and Appendix
8 Ed. VII. c. 69 . . *See* Addenda

EDITIONS OF TEXT-BOOKS REFERRED TO.

Of which more than one Edition has been published.

Addison on Torts	8th Edition
Anson's Contracts	11th Edition
Arnould on Marine Assurance	7th Edition
Baldwin's Bankruptcy	9th Edition
Benjamin on Sale	5th Edition
Broom's Commentaries	9th Edition
Broom's Legal Maxims	7th Edition
Brown's Law Dictionary	2nd Edition
Bunyon on Life Assurance	4th Edition
Byles on Bills	16th Edition
Chalmers' Sale of Goods Act	6th Edition
Chitty on Contracts	14th Edition
Clerk and Lindsell on Torts	4th Edition
Folkard on Slander and Libel (founded on Starkie's Slander and Libel)	6th Edition
Greenwood's Real Property Statutes	2nd Edition
Indermaur and Thwaites' Manual of Equity	6th Edition
Indermaur and Thwaites' Principles and Practice of Conveyancing	2nd Edition
Indermaur's Manual of Practice	9th Edition
Lindley on Partnership	7th Edition
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Phipson's Law of Evidence	4th Edition
Pollock's Contracts	7th Edition
Pollock's Torts	8th Edition
Pollock's Digest of the Law of Partnership	7th Edition
Powell's Principles and Practice of the Law of Evidence	8th Edition
Prideaux's Conveyancing	19th Edition
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Smith's Leading Cases	11th Edition
Smith's Mercantile Law	11th Edition
Snell's Principles of Equity	15th Edition
Story on Agency	9th Edition
Tudor's Conveyancing Cases	4th Edition
Tudor's Mercantile Cases	3rd Edition
Wharton's Law Lexicon	10th Edition
White and Tudor's Equity Cases	7th Edition
Williams and Bruce's Admiralty Practice	3rd Edition
Williams' Principles of the Law of Personal Property	16th Edition
Willis' Law of Negotiable Instruments	2nd Edition
Woodfall's Landlord and Tenant	18th Edition

ADDENDA ET CORRIGENDA.

Page 19, line 19. *for* "promise" *substitute* "promisee."

Pages 75 to 77. On these pages the Lodger's Goods Protection Act, 1871 (34 & 35 Vict. c. 79) is dealt with. Since this book was in print a new Act on the subject has received the royal assent, viz., the Law of Distress Amendment Act 1908 (8 Ed. VII. c. 53), which comes into operation on July 1, 1909, and materially extends the Act of 1871, and so far as the new Act applies repeals the Act of 1871. The 1908 Act protects the goods of undertenants and (in some cases) of strangers as well as those of lodgers, when its provisions apply, and it is so important that it has been printed as an Appendix to this work, and will be found at the end of the book on page 512. It should be studied in connection with pages 75 to 77 of the text.

Page 183, line 22, *for* "change" *read* "charge."

The following reference alterations are made necessary by the Companies Act 1908 (8 Ed. VII. c. 69) a consolidating Act, which comes into force on January 1, 1909. The Act makes no alterations in the law but is merely consolidating.

Page 144, note (*d*). The reference should now be to the Companies Act, 1908, sects. 76, 77.

Page 156, note (*a*). *Substitute* "Companies Act, 1908, sect. 1" *for* "25 & 26 Vict. c. 69 s. 4.

Page 164, note (*a*). *Substitute* "Companies Act, 1908, sect. 267" *for* "sect. 6."

Page 232, note (*p*). *Substitute* "Companies Act, 1908, sects. 1, 2" *for* the statutes mentioned in this note.

Page 233, note (*s*). *Substitute* "Companies Act, 1908, sect. 2."

Page 233, note (*t*). *Substitute* "Companies Act, 1908, sect. 267."

Page 233 notes (*y*) and (*z*). *Substitute* "Companies Act, 1908, sect. 87."

Page 233, note (*a*). *Substitute* "Companies Act, 1908, sects. 22, 37, and Table A regulation 18" *for* "30 & 31 Vict. c. 131, sects. 27–33."

Page 291 } *Substitute* "Companies Act, 1908, section 89," *for* "Directors
Page 326 } Liability Act, 1890."

Page 326. *Substitute* "Companies Act, 1908, sect. 89 (4)" *for* "7 Ed. VII., c. 50, s. 33."

Page 424, note (*a*). *Substitute* "Companies Act, 1908, sect. 89" *for* "Directors Liability Act, 1890."

Page 479, note (*h*). *Substitute* "Companies Act, 1908, sect. 243 (7)."

Page 493. In first footnote *for* "c. 716" *read* "c. 76."

PRINCIPLES OF THE COMMON LAW.

INTRODUCTION.

The origin of the common law.

THE origin of the Common Law of England—though it cannot be now certainly and surely found, being lost in antiquity—may probably be set down to the customs and usages in the first instance of the early Britons, afterwards amended and added to by those of the Romans and other nations who spread themselves over the country. The early Common Law was of a narrow and limited kind, but increased according to men's necessities, until, in the present highly artificial state in which we live, it has assumed such wide dimensions as to make it difficult to believe in its early foundations. The term "Common Law," would seem, according to Blackstone (*a*), to have originated in contradistinction to other laws, or (more reasonably) as a law common and general to the whole realm; and, used in a wide sense, comprehends now not only the general law of the realm, but also that contained in Acts of Parliament. Thus it may be divided into two kinds, viz.: (1) The *lex non scripta*, or unwritten law; and (2) the *lex scripta*, or written law. With regard to the former division, in very ancient times, in consequence of the utter ignorance of the mass of the people, the laws could not be reduced into writing, but were to a certain extent transmitted from age to age by word of mouth. But this is not all that is included in the *lex non scripta*—which term is indeed used in contradistinction to the statute law, which forms the actual *lex scripta*—for the monuments and

(*a*) 1 Bl. Com. 67.

records of our legal customs are now contained in the books of the reports of the decisions of judges from time to time, and in the treatises of the different writers, commencing at periods of high antiquity, and continued until the present time (*b*). With regard to the latter division, viz., the *lex scripta*, this comprises the statute law of the realm. In the earlier times but little attention was given to the laws, and indeed, from the essentially warlike nature of the people, improvements therein were not the greatest requirement; but gradually, as civilisation advanced, the *lex non scripta* was found insufficient, and also sometimes contrary to the benefit of the community, and the direct intervention of the legislature was required to amend, alter, and vary, or in some cases to simply declare, the law when doubts had arisen on it. As civilisation has progressed, and age after age has become more and more artificial, so the statute law has increased, as is evidenced by the multitude of Acts of Parliament necessary to be referred to by the student of our laws.

As to the advantages of a code.

It might be interesting, and perhaps useful, to here enter into a consideration of the relative advantages and disadvantages of a code of laws, but such a discussion would be beyond the scope of a work like the present, and the subject must be dismissed with a few remarks. True, there is in our present system of laws the disadvantage that it involves, to master it, deep and intricate study, and it requires to be traced back to the earliest times to understand various results. On the other hand, though a code would do away with this necessity for historical research, yet it would present law in a much more inflexible state than now; and as no code could be perfect, it is to be feared that doubts of construction, and other difficulties, would arise; and perhaps, therefore, to leave things on their present foundation would be well (*c*).

(*b*) 1 Bl. Com. 6.

(*c*) Codification of one branch of the law was made by the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), and has been continued by the Partnership Act, 1890 (53 & 54 Vict. c. 39), the Sale of Goods Act,

Common law as distinguished from equity.

The term "Common Law" has also been used in contradistinction to equity jurisprudence, which is of later growth, and comprehends matters of natural justice, other than matters of mere conscience, for which courts of law gave no relief, or no proper relief. Probably this distinction between Common Law and Equity must to some extent always practically exist, for although the Judicature Acts of 1873 and 1875, to a certain extent, fuse law and equity, and also lay down that the rules of equity are to govern where they have clashed with the rules of law (as will be frequently noticed in the course of the following pages), yet as formerly certain matters were strictly the subject of cognisance in the Common Law Courts, and others in the Court of Chancery, so the like matters respectively are commenced and carried on in the analogous divisions of the present High Court of Justice.

Of the nature of a person's right which will entitle him to maintain an action.

It is important to have a clear and correct idea of the nature of a person's rights which will entitle him to maintain an action for their infringement. The two main divisions of the present work are Contracts and Torts. Where there is an infringement of any person's legal rights, *i.e.*, if a valid contract be broken, or a tortious act committed, the other party to the contract, or the person against whom the tort was committed, has a right of action in respect of such breach of contract or tortious act; and even though he suffers no substantial damage, yet he nevertheless has his right of action. The rule upon this point is, that *Injuria sine damno* will entitle a person to maintain an action, which, plainly expressed, means that when a person has suffered *what in the eyes of the law is looked upon as a legal injury* (*d*), he must have a corresponding right of

Injuria sine damno.

1893 (56 & 57 Vict. c. 71), the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), the Trade Marks Act, 1905 (5 Edw. VII. c. 15), the Marine Insurance Act, 1906 (6 Edw. VII. c. 91), and the Patents and Designs Act, 1907 (7 Edw. VII. c. 29).

(*d*) The italicised words must be particularly observed, because there are many wrongful acts, *i.e.*, acts not merely morally wrong and indefensible, but even *contra legem*, which give no right of action unless productive of actual damage, such as the breach of a public duty, mere negligence, fraud, and ordinary cases of slander. In such cases it is

Ashby v. *White.*

action, even though he has suffered no harm. This is illustrated by the well-known case of *Ashby* v. *White* (*e*), which was an action against a returning officer for maliciously refusing to receive the plaintiff's vote on an election of burgesses to serve in Parliament, and it was held that the defendant having so maliciously refused to receive the plaintiff's vote, although the members for whom he wished to vote were actually elected, and therefore he suffered no damage, yet he had a good right of action, for he had a legal right to vote, and that right had been infringed.

Damnum sine injuriâ.

On the other hand, there are many cases in which a person, although he suffers damage by the act of another, yet has no right of action, *because there has been no infringement of what the law looks upon as a legal right*, and this is expressed by the maxim that *Damnum sine injuriâ* will not suffice to enable a person to maintain an action. Thus, in an action of seduction, unless loss of service is proved by the plaintiff, the action cannot be maintained, for though the plaintiff may have suffered damage without the loss of service, yet he has not sustained what in the eyes of the law is looked upon as an injury. The best instance, however, on this point is perhaps found in the principle that a person may deal with the soil of his own land as he thinks fit, so that if he digs down and thus deprives his neighbour of water that would otherwise percolate through the land, yet although this operates to the great detriment of such neighbour, it does not constitute the invasion of a legal right, and will not form any foundation for an action (*f*). And if a subsidence be caused by the withdrawal of such underground water, the same rule holds good—it is merely *Damnum sine*

Chasemore v. *Richards.*

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sometimes said that *injuria* and *damnum* must combine in order to constitute a right enforceable by action (Broom's Coms. 90).

(*e*) (1703) 1 S. L. C. 240; Lord Raymond, 938.

(*f*) *Acton* v. *Blundell* (1843), 12 M. & W. 324; *Chasemore* v. *Richards* (1859), 7 H. L. 349. This last case should be carefully distinguished from that of *Ballard* v. *Tomlinson* (1885), 29 Ch. D. 115; 54 L. J. Ch. 454; and see *post*, Part II. chap. 2. See also hereon *Bradford Corporation* v. *Pickles* (1895), A. C. 587; 64 L. J. Ch. 757; 73 L. T. 353.

injuriâ (*g*); though subsidence caused by the withdrawal of quicksand, running silt, or other semi-fluid substances is actionable (*h*). A further illustration of the rule we are considering is supplied by the decision of the House of Lords in the well-known case of *Allen* v. *Flood* (*i*). There a shipbuilding firm employed the plaintiffs and other workmen by the day, and the plaintiffs having incurred the displeasure of a trade union society, the defendant, who was an officer of the society, saw the firm and stated that, if the plaintiffs were not dismissed, their other workmen would be called out by the society. The shipbuilding firm, feeling that they would be placed in an awkward position if this threat were carried out, yielded to the pressure and lawfully terminated the employment of the plaintiffs, and refused to employ them again. The plaintiffs sued the defendant for damages. It was held that there was no cause of action, and that what had happened was entirely *damnum sine injuriâ* (*k*).

Allen v. *Flood.*

However, notwithstanding the rules that *injuria sine damno* will give a cause of action, but that *damnum sine injuriâ* will not, in the words of Mr. Broom, in his 'Commentaries on the Common Law,' "In the vast majority of cases which are brought into courts of justice, both *damnum* and *injuria* combine in support of the claim put forth, the object of the plaintiff usually being to recover by his action substantial damages" (*l*). When both *injuria* and *damnum* are combined, then,

Injuria and *damnum* usually found combined.

(*g*) *Popplewell* v. *Hodkinson* (1869), L. R. 4 Ex. 248.

(*h*) *Jordeson* v. *Sutton Gas Co.* (1899), 2 Ch. 217; 68 L. J. Ch. 457; 80 L. T. 815; *Trinidad Asphalt Co.* v. *Ambard* (1899), A. C. 594; 68 L. J. P. C. 114; 81 L. T. 132.

(*i*) (1898), A. C. 1; 67 L. J. Q. B. 119; 77 L. T. 717. See also *Boots* v. *Grundy* (1900), 82 L. T. 769; 48 W. R. 638.

(*k*) See also and compare *Lyons* v. *Wilkins* (1899), 1 Ch. 255; 68 L. J. Ch. 146; 79 L. T. 709; *Charnock* v. *Court* (1899), 2 Ch. 35; 68 L. J. Ch. 550; 80 L. T. 564; *Quinn* v. *Leathem* (1901), A. C. 495; 70 L. J. P. C. 76; 85 L. T. 289; *South Wales Miners' Federation* v. *Glamorgan Coal Co.* (1905), A. C. 239; 74 L. J. K. B. 525; 92 L. T. 710; and *Giblan* v. *National Amalgamated Labourers' Union* (1903), 2 K. B. 600; 72 L. J. K. B. 907; 89 L. T. 386; and the Trade Disputes Act, 1906, secs. 1, 3, 5. See also hereon, *post*, Part II. chap. v.

(*l*) Broom's Coms. 108; and see generally upon the subject discussed above Broom's Coms. 71–106.

as a general rule, there is always a good cause of action, except indeed where there is some special reason to the contrary, *e.g.*, some matter of public policy. The case of *Wilkinson* v. *Downton* (*m*) furnishes a novel instance of both *injuria* and *damnum*. It was there held that a false statement made wilfully, the direct and natural effect of which is to cause a mental shock resulting in the illness of the person to whom it is made, is an infringement of the right to personal safety and actionable. It is *injuria*, although no malicious purpose to cause the harm, nor motive of spite, be imputed, and the *damnum*—illness from mental shock—is not too remote to be in law regarded as a consequence for which the speaker is answerable. It has also been held that damages for harm resulting from a nervous shock caused by fright, may be recovered in an action for negligent driving, although there has been no actual physical impact upon the plaintiff's person (*n*).

Wilkinson v. *Downton.*

Dulieu v. *White.*

Although a person may have suffered an injury in the eyes of the law, whether combined with actual damage or not, there are many cases in which, if he dies before he has enforced his rights, the injury expires with him, the common law maxim being *Actio personalis moritur cum personâ*. And so also, on the same principle, there are many cases in which a person having injured another dies, and there is an end of the remedy that the injured party would otherwise have had (*o*). Taken generally, the maxim applies to actions *ex delicto*, but not to actions *ex contractu* when the breach of contract causes pecuniary damage(*oo*); though

Actio personalis moritur cum personâ.

(*m*) (1897), 2 Q. B. 57 ; 66 L. J. Q. B. 493 ; 76 L. T. 493.

(*n*) *Dulieu* v. *White* (1901), 2 K. B. 669 ; 70 L. J. K. B. 837 ; 85 L. T. 126. See also *Bell* v. *Great Northern Railway* (1890), 26 L. R. Ir. 928. The contrary decision in *Victorian Railway* v. *Coultas* (1888), 13 A. C. 222 ; 57 L. J. P. C. 69 ; 58 L. T. 390, cannot be regarded as law in England. It seems, however, that the shock must arise from a reasonable fear of immediate personal injury to oneself, and not to another person or to one's own or another's property (see judgment of Kennedy, J., in *Dulieu* v. *White*, *supra*).

(*o*) See *Phillips* v. *Homfray* (1883), 24 Ch. D. 439 ; 52 L. J. Ch. 833 ; 32 W. R. 6.

(*oo*) *Bradshaw* v. *Lancashire and Yorkshire Railway* (1875), L. R. 10 C. P. 189 ; 44 L. J. C. P. 148.

even a breach of contract will die with either party so far as it is merely a personal injury without direct or consequential pecuniary loss. Thus an action will not lie by personal representatives for breach of promise to marry the deceased unless direct damage to the deceased's personal estate can be shewn (*p*); nor can such an action be maintained against the personal representatives of a deceased person except under similar circumstances (*q*). The true distinction as to the cases in which the maxim does and does not apply, appears strictly to be not merely between actions *ex contractu* and actions *ex delicto*, but between rights affecting persons, and rights affecting property.

Chamberlain v. Williamson.

Finlay v. Chirney.

Various exceptions have, however, been introduced to the maxim, *Actio personalis moritur cum personâ*. It does not apply to a tort which involves the wrongful appropriation of another's property, and executors can sue and be sued for the value of such property (*r*). And executors or administrators have the same right of action for any injury done to the personal estate of the deceased as he had (*s*). By the Civil Procedure Act, 1833 (*t*), executors or administrators may sue for any injury to the real property of deceased provided the injury was done within six calendar months before the death, and the action is brought within one year after the death; and if the wrong is a continuing one, and did continue up to a time within such six months, the action lies (*u*). And by the same Act (*w*), executors or administrators may be sued (*x*) for all injuries done to the real or personal property of plaintiff within six months before the death of their

Exceptions to maxim.

(*p*) *Chamberlain* v. *Williamson* (1814), 2 M. & S. 408; 15 R. R. 295.
(*q*) *Finlay* v. *Chirney* (1888), 20 Q. B. D. 494; 57 L. J. Q. B. 247; 58 L. T. 664.
(*r*) *Phillips* v. *Homfray* (1883), 24 Ch. D. 439.
(*s*) 4 Edw. III. c. 7. See *Twycross* v. *Grant* (1878), 4 C. P. D. 40 (fraudulent prospectus inducing deceased to pay for shares in a company), *Hachard* v. *Meye* (1887), 18 Q. B. D. 771 (slander of title to trade-mark).
(*t*) 3 & 4 Wm. IV. c. 42, s. 2.
(*u*) *Jenks* v. *Clifden* (1897), 1 Ch. 694; 66 L. J. Ch. 338; 76 L. T. 382.
(*w*) 3 & 4 Wm. IV. c. 42, s. 2.
(*x*) *Woodhouse* v. *Walker* (1880), 5 Q. B. D. 202; 49 L. J. Q. B. 609; 42 L. T. 470.

deceased (*y*) provided the action is brought within six months after they enter on the administration. Also, damages for an injury causing death may be recovered under the Fatal Accidents Acts (*z*), the Employers Liability Act (*a*), and the Workmens Compensation Act (*b*).

Having, in these few remarks, endeavoured to introduce the student to the subject of common law, and the nature of the legal right in respect of which a person has a remedy, let us proceed to our first chief subject, viz., that of contracts.

(*y*) *Kirk* v. *Todd* (1882), 21 Ch. D. 484 ; 52 L. J. Ch. 224 ; 47 L. T. 676.
(*z*) 9 & 10 Vict. c. 93 ; 27 & 28 Vict. c. 95 ; 8 Ed. VII. c. 7.
(*a*) 43 & 44 Vict. c. 42.
(*b*) 6 Edw. VII. c. 58.

PART I.

OF CONTRACTS.

CHAPTER I.

OF THE DIFFERENT KINDS OF CONTRACTS, THEIR BREACH, AND THE RULES FOR THEIR CONSTRUCTION.

Definition of contract, and different divisions of contracts.

A CONTRACT may be defined as some obligation of a legal nature arising either by matter of record, deed, writing, or word of mouth, to do, or refrain from doing, some act. *Contracts* are usually divided as of three kinds, viz. :—

Records, specialties, and simple contracts.

1. *Contracts of record, i.e.*, obligations proceeding from some Court of record, such as judgments, recognisances, and cognovits.

2. *Specialties, i.e.*, contracts in writing, sealed and delivered.

3. *Simple contracts, i.e.*, those not included in the foregoing, and which may be either by writing not under seal, or by mere word of mouth.

Express and implied contracts.

Contracts may also be divided as to their nature into—

1. *Express contracts, i.e.*, those the effect of which is openly expressed by the parties ; and

2. *Implied contracts, i.e.*, those which are dictated by the law ; as, for instance, if a person goes into a shop and orders goods, his contract to pay their proper value is implied.

Executed and executory contracts.

Again, contracts are divided, with reference to the time of their performance, into—

1. Executed contracts, and

2. Executory contracts.

Contracts of record are only technically the most important.

Having, therefore, three different divisions of contracts, let us proceed to consider each of them separately. As to the first division, the most important kind of contracts, technically speaking, are contracts of record, as they proceed from some Court of record; but in a practical sense they may be set down as the least important, for, with the exception of judgments, they are not of constant occurrence; and even judgments, considered in the light of contracts simply, are not entitled to much discussion, although, considered in other ways, they are of great importance (*a*). As we have given as instances of contracts of record, judgments, recognisances, and cognovits, it will be well at the outset to have a clear understanding of each, and then consider the peculiarities of contracts of record generally, but yet mainly with reference to judgments, as being the most important kind of contracts of record that occur.

Definition of a judgment.

A judgment may be defined as the sentence of the law pronounced by the Court upon the matter appearing from the previous proceedings in the suit. It is obtained by issuing a writ of summons, on which the defendant either makes default, whereby judgment is awarded in consequence of such default, or the case is tried and ultimately judgment awarded.

Definition of recognisance.

A recognisance is an acknowledgment upon record of a former debt, made before a Judge or other authorised officer, and enrolled in a Court of record. He who so acknowledges such debt to be due is termed the recognisor, and he to whom, or for whose benefit, such acknowledgment is made, is termed the recognisee. It is very similar to a bond, but whereas a bond creates a new debt, a recognisance is merely an acknowledgment upon record of an antecedent debt (*b*).

(*a*) Sir W. R. Anson, in his work on Contracts (p. 8), writes of a judgment as being "unfortunately styled a contract of record in English law," and continues—"The phrase is unfortunate, because it suggests that an obligation springs from agreement which is really imposed upon the parties *ab extra*."

(*b*) Brown's Law Dict.

Definition of a cognovit.

A cognovit is an instrument signed by a defendant in an action already commenced, confessing the plaintiff's demand to be just, and empowering the plaintiff to sign judgment against him in default of his paying the plaintiff the sum due to him within the time mentioned in the cognovit (*c*). By the Judgments Act, 1838 (*d*), it was provided for the protection of ignorant persons, who might be persuaded into executing cognovits, that they must be attested by an attorney (*e*). But this enactment has been repealed, and it is now provided by the Debtors Act, 1869 (*f*), that "after the commencement of this Act (*g*) a warrant of attorney to confess judgment in any personal action, or *cognovit actionem*, given by any person, shall not be of any force unless there is present some attorney of one of the superior courts on behalf of such person, expressly named by him, and attending at his request, to inform him of the nature and effect of such warrant or cognovit before the same is executed, which attorney shall subscribe his name as a witness to the due execution thereof, and thereby declare himself to be attorney for the person executing the same, and state that he subscribes as such attorney"; and also (*h*), that "if not so executed it shall not be rendered valid by proof that the person executing the same did, in fact, understand the nature and effect thereof, or was fully informed of the same." In this enactment it will be noticed that a warrant of attorney is mentioned, being made subject to the same provisions as to execution as is a cognovit; and as the two are sometimes confused by students, it may be well to point out that there is this difference between them, viz., that a cognovit is a written confession of some existing action, whilst a warrant of attorney is simply a power given to an attorney, or attorneys, to appear in some action commenced, or to be commenced, and allow judgment to be entered up.

Essentials as to execution.

Difference between a warrant of attorney and a cognovit.

(*c*) Brown's Law Dict.
(*d*) 1 & 2 Vict. c. 110, s. 9, repealed by 32 & 33 Vict. c. 83.
(*e*) All attorneys are now styled solicitors; Jud. Act. 1873, sect. 87.
(*f*) 32 & 33 Vict. c. 62, s. 24. (*g*) 1st January 1870.
(*h*) Sect. 25.

Cognovits and warrants of attorney require to be filed in the Central Office of the High Court of Justice within twenty-one days after execution (*i*).

Judge's order by consent.

There is a like provision as to a judge's order made by the consent of any defendant in a personal action, whereby the plaintiff is authorised forthwith, or at any future time, to sign or enter up judgment, or to issue or to take out execution (*j*); and it has been held that if the order is not so filed, any judgment signed thereon is void against creditors, though it cannot be set aside on the application of the defendant (*k*).

Of the peculiarities of contracts of record.

Now, as to the peculiarities of contracts of record generally, but mainly with reference to judgments.

1. Merger.

1. *Being of the highest nature of all contracts, they have the effect of merging either a simple contract or a contract entered into by deed (a specialty).*—It is a principle not only with regard to contracts but also estates, that a larger interest swallows up or extinguishes a lesser one. If a person has an estate for years, and afterwards acquires an estate in fee-simple in the same land, and in the same right, the former estate for years is lost in the greater estate in fee (*l*). So if there be a contract by word of mouth, or in writing, or by deed, and judgment is recovered on it, the judgment merges the rights on the former contract, and the person's rights thenceforth are on the new and higher contract, the judgment. Thus, where a mortgage deed contained a covenant by the mortgagor to pay the principal sum with interest at 5 per cent. per annum, and the mortgagee sued for the mortgage money and obtained judgment, it was held that the covenant was merged in the judgment, and that the mortgagee was, as from the date of the judgment, entitled only to interest on

Ex parte Fewings, re Sneyd.

(*i*) 32 & 33 Vict. c. 62, s. 26.

(*j*) Ibid. s. 27.

(*k*) *Gowan* v. *Wright* (1887), 18 Q. B. D. 201; 56 L. J. Q. B. 131; 35 W. R. 297; *Ex parte Brown, re Smith* (1888), 20 Q. B. D. 321; 57 L. J. Q. B. 212; 36 W. R. 403.

(*l*) The Judicature Act, 1873, s. 25 (4), however, provides that there shall not now 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.

the judgment debt at 4 per cent., and not to the 5 per cent. under the covenant (*m*).

2. *They have the effect of estopping the parties to them.*— Estoppel has been defined as a rule of law (*n*) whereby a person is stopped or hindered from denying a matter already stated (*o*), and it is because of the high nature of contracts of record that whilst they remain in existence they are conclusive, for no one can aver against a record, and this has been stated by Lord Coke, as follows:—"The Rolls being the records or memorials of the judges of the Court of record, import in them such uncontrollable credit and verity as they admit of no averment, plea, or proof to the contrary" (*p*). 2. Estoppel.

The leading authority on the point of estoppel by matter of record is the *Duchess of Kingston's Case* (*q*), which shews that a judgment is only a conclusive estoppel where the same matter is directly involved in it, and not where it is only incidentally involved; and also that, even although it might be otherwise a conclusive estoppel, yet that may always be avoided by shewing fraud or collusion (*r*). *Duchess of Kingston's case.*

3. *They require no consideration.*—This peculiarity 3. As to consideration

(*m*) *Ex parte Fewings, re Sneyd* (1883), 25 Ch. D. 338; 53 L. J. Ch. 545; 50 L. T. 109; 32 W. R. 352. But where a mortgage reserves interest at a higher rate than 4 per cent., and the proviso for redemption is on payment of the principal and interest at such rate, then notwithstanding that judgment may have been recovered in an action for the debt, the mortgagor or any subsequent mortgagee can only redeem by paying the principal and the interest as reserved by the deed (*Economic Life Assurance Co.* v. *Usborne* (1902), A. C. 147; 71 L. J. P. C. 34).

(*n*) It is usually said to be a rule of evidence, as no action can be founded on it (per Bowen, L.J., in *Low* v. *Bouverie* (1891), 3 Ch. at p. 105; *Bateman* v. *Faber* (1898), 1 Ch. at p. 150); but as a defence, it has, in many cases, come to have the effect of a rule of substantive law (Ewart on Estoppel 187–195).

(*o*) Brown's Law Dict. 211. See also *post*, pp. 17–19.

(*p*) 1 Inst. 260.

(*q*) (1776) 2 S. L. C. 731; Bul. N. P. 244. See also *Peareth* v. *Marriott* (1883), 22 Ch. D. 182; 52 L. J. Ch. 221; 31 W. R. 68; *Cahill* v. *Fitzgibbon*, 16 L. R. Ir. 371.

(*r*) See also *Wildes* v. *Russell* (1866), L. R. 1 C. P. 722; *National Bolivian Navigation Company* v. *Wilson* (1880), L. R. 5 A. C. 176; 43 L. T. 60; *Concha* v. *Concha* (1886), 11 A. C. 541; 55 L. T. 522. As to the effect of a foreign judgment see *Re Trufort, Trafford* v. *Blanc* (1887), 36 Ch. D. 600; 57 L. J. Ch. 135; 57 L. T. 674.

results from the preceding one of estoppel; the want of consideration can be no defence or objection to proceedings on a judgment or other record, which, as we have seen, the party is estopped from denying. However, with regard to a proof in bankruptcy, the fact that the debt relied on is a judgment debt is by no means conclusive, for the Court has here full power to inquire into the consideration therefor (*s*).

4. As to priority of payment.

4. *A judgment may have priority in payment* (*t*).—This is so where the estate of a deceased person is being administered out of Court, or by the Court, and the estate is solvent. If, however, the estate is insolvent, and is being administered in the Chancery Division of the High Court of Justice, it is not so, for the Judicature Act, 1875 (*u*), provides that the same rules shall prevail as to the respective rights of secured and unsecured creditors, and debts and liabilities provable, as are in force in bankruptcy, and there is no such priority in bankruptcy (*v*). Insolvent estates of deceased persons may also be administered in bankruptcy under the provisions of the Bankruptcy Acts, 1883 and 1890 (*x*), and in that event also a judgment is not entitled to any priority, the rules of bankruptcy prevailing so far as they are possibly applicable (*y*).

Administration of insolvent estates in bankruptcy.

5. As to charging lands.

5. *A judgment constituted a charge on the lands of the*

(*s*) *Ex parte Bonham, re Tollemache* (1885), 14 Q. B. D. 604; 54 L. J. Q. B. 388; *Ex parte Anderson, re Tollemache* (1885), 14 Q. B. D. 606; 54 L. J. Q. B. 383; *Ex parte Kibble, re Onslow* (1875), 10 Ch. 373; 44 L. J. Bk. 63; 23 W. R. 423; *Ex parte Seaton, re Deerhurst* (1891), 60 L. J. Q. B. 411; 64 L. T. 273.

(*t*) And this advantage does not only apply to English judgments, but also to Irish judgments and Scotch decreets, if registered here, it being provided by the Judgments Extension Act, 1868, 31 & 32 Vict. c. 54, s. 1, that, if registered here, within twelve months, they shall have the same force and effect as if original judgments of this country.

(*u*) 38 & 39 Vict. c. 77, s. 10.

(*v*) See *Re Long, Turn* v. *Emmerson* (1895), 1 Ch. 652; 64 L. J. Ch. 468; 72 L. T. 407; *Re Whitaker, Whitaker* v. *Palmer* (1901), 1 Ch. 9; 70 L. J. Ch. 6; 83 L. T. 449; see further Indermaur and Thwaites' Manual of Equity, 146–149.

(*x*) 46 & 47 Vict. c. 52, s. 125; 53 & 54 Vict. c. 71, s. 21.

(*y*) See *Re Gould, ex parte Official Recr.* (1887), 19 Q. B. D. 92; 56 L. J. Q. B. 333; 35 W. R. 569; 56 L. T. 806; see further Indermaur and Thwaites' Manual of Equity, 150–152.

judgment debtor (*z*).—This is a peculiarity of the past, and the following is a short summary of the past and present laws upon the subject :—

By the Statute of Westminster the Second, half a judgment debtor's land could be taken in execution under a writ of elegit. 13 Ed. I. c. 18.

By the Statute of Frauds, execution could also be issued to the above extent on judgments entered up against a *cestui que trust* of freeholds, provided they were vested in a trustee in fee-simple, and he was duly seised of them. 29 Car. II. c. 3, s. 10.

By the Judgments Act, 1838, a judgment was made a charge upon all the lands of a judgment debtor, of whatever nature, but was not to affect purchasers until registered in the name of the debtor. 1 & 2 Vict. c. 110.

By the Judgments Act, 1839, all judgments, to so bind, were required to be re-registered every five years. 2 & 3 Vict. c. 11.

By the Law of Property Act, 1860, no judgment to be entered up after the passing of that Act (July 23, 1860) was to affect any lands, unless a writ of execution was issued and registered and put in force within three calendar months from the time of registration. 23 & 24 Vict. c. 38.

By the Judgments Act, 1864, it was provided that no judgment to be entered up after the passing thereof (July 29, 1864) should affect any lands until the same should have been actually delivered in execution by virtue of a writ of elegit, or other lawful authority—*i.e.*, equitable execution, which is obtained by getting an order appointing a receiver (*a*). 27 & 28 Vict. c. 112.

By the Land Charges Act, 1888, it was enacted that no such writ or order should bind the lands in the hands of a purchaser for value unless it had been duly registered at the Land Registry Office (*b*). It was also provided that the registration should only have effect for five years, but might be renewed from time to time, so as to have effect for a further five years. 51 & 52 Vict. c. 51.

(*z*) This was extended to Irish judgments and Scotch decrees, if registered under 31 & 32 Vict. c. 54.

(*a*) See Indermaur's Manual of Practice, 202–205.

(*b*) This provision reversed the decision in *Re Pope* (1886), 17 Q. B. D. 743 ; 57 L. J. Q. B. 522.

63 & 64 Vict. c. 26.

By the Land Charges Act, 1900, the above provision of the Judgments Act, 1864, is repealed, but it is provided that no judgment shall operate as a charge on land unless and until a writ or order for the purpose of enforcing it is registered as last mentioned. The issuing and registration of a writ of elegit, or order appointing a receiver, therefore, now binds land if duly registered at the Land Registry Office.

6. As to proof.

6. *They prove themselves*—which means that when necessary to prove a contract of record the mere production thereof is sufficient proof, and this is always their proper mode of proof, so that when there is an issue of *nul tiel record* (no such record), either the record itself must be produced, or it may be proved by exemplification under the great seal, or by an examined or sworn copy (*c*).

Specialty contracts.

The two remaining kinds of contracts under this division are specialties, and simple contracts, and these are of more practical importance than contracts of record. A specialty, or contract under seal, has been styled "the only 'formal contract,' because it derives its validity neither from the fact of agreement, nor from the consideration which may exist for the promise of either party, but from the form in which it is expressed" (*d*). It is termed a deed because of the peculiar solemnities attending its execution, it being not only signed (*e*), but also sealed and delivered, whilst a simple contract is either oral, or at most in writing not under seal; and it is from the additional solemnities attending the execution of deeds or specialties, that we may trace the numerous distinctions which exist between them on the one hand, and simple contracts on the other. These distinctions are mainly as follows:—

Distinctions between specialties and simple contracts.

1. As to execution.

1. *As to the execution.*—The essential formalities to be observed on the execution of a deed are sealing and

(*c*) Stephen's Digest, ch. 10; Powell's Evidence, 350.
(*d*) Anson's Contracts, 64.
(*e*) There is some doubt whether signing is actually necessary to the validity of a deed generally.

delivery, whilst a simple contract may be even by word of mouth, and if writing is used, signature only is necessary. One of the essentials, too, of a deed being delivery, a person may execute a deed as an escrow, *i.e.*, " so that it shall take effect or be his deed on certain conditions " (*f*), by delivering it to some third person, and then it will not take effect until the happening of the condition, though on the condition being performed it will relate back to the original date of execution. A deed cannot be delivered as an escrow to the other party to it, it must be to some third person, but it may be delivered to a solicitor acting for all parties (*g*); and it has been held that where there are several grantees, and one of them is a solicitor acting for himself and the other grantees, the deed may be delivered to him as an escrow (*h*). Escrow.

2. *As to merger.*—The principle of merger has already been explained (*i*), and it may be defined as an operation of law whereby a security or estate is swallowed up or lost in a greater. It has already been remarked that the effect of a record will be to merge any contract respecting the same matter not by record, because of its higher nature; and so here, a deed, though of a technically less important nature than the record, and liable to be merged in it, yet in its turn, being more important than a simple contract, it will cause a merger of that. 2. As to merger.

3. *As to estoppel.*—This doctrine has already been touched upon in its bearing on contracts of record (*k*); but, in addition to the definition given there of it, it may be well to note here Lord Coke's definition, which is perhaps a better one when the term is applied to estoppel otherwise than by matter of record. His definition of it is, " Where a man is concluded by his 3. As to estoppel.

(*f*) Chitty on Contracts, 3.
(*g*) *Millership* v. *Brooks* (1860), 5 H. & N. 797; *Watkins* v. *Nash* (1875), 20 Eq. 262.
(*h*) *London Freehold and Leasehold Property Co.* v. *Suffield* (1897), 2 Ch. 608; 66 L. J. Ch. 790; 77 L. T. 445.
(*i*) *Ante*, p. 12.
(*k*) *Ante*, p. 13.

own act or acceptance to say the truth" (*l*). It has been noticed that a record will estop the parties to it and those claiming under them; and so in a deed the doctrine of estoppel applies, though generally speaking it does not in a simple contract, for there statements made are merely strong evidence against the parties.

Estoppel by deed.

Thus, if a man executes a deed, stating or admitting in that deed a certain fact, he is precluded from denying it, the reason being the solemnity of the deed; whilst in a simple contract the person entering into it may shew the contrary of what he has admitted in it. But in discussing the doctrine of estoppel, what was decided in the leading case of *Collins* v. *Blantern* (*m*) must be noticed, viz., that though a person is estopped from denying what he has stated in a deed, yet he may set up the illegality or fraud of the instrument. In that case the plaintiff sued on a bond executed by certain parties, of whom the defendant was one, the obligation of which was £700, conditioned for payment of £350. The defendant pleaded the following facts: Certain parties were prosecuted by one John Rudge, and pleaded not guilty, and according to arrangement, the plaintiff gave his promissory note to the prosecutor, John Rudge, he to forbear further prosecuting, and as part of the arrangement, the bond on which the plaintiff sued was executed to indemnify him. Now the facts shewed illegality in the whole matter, for it was the stifling of a criminal prosecution; but had the doctrine of estoppel applied here, the defendant would have been precluded from setting it up. It may be noticed on this point of estoppel, that if a person in the body of a deed admitted having received the consideration money, at law he was estopped from setting up that he had not received it; but in equity he might always have done so, otherwise the doctrine of the vendor's lien for

Collins v. *Blantern.*

Receipt for consideration.

(*l*) Co. Litt. 352a. See also *Simm* v. *Anglo-American Telegraph Co.* (1880), 5 Q. B. D. 202; 49 L. J. Q. B. 392; 28 W. R. 290, where the doctrine was further explained by L. J. Bramwell, who remarked that an estoppel may be said to exist where a person is compelled to admit that as true which is not true, and to act upon a theory which is contrary to truth.

(*m*) (1767), 1 S. L. C. 369; 2 Wilson, 341.

unpaid purchase-money could not have existed. Now, as the Judicature Act, 1873 (*n*), provides, that, where the rules of law and equity clash, the latter shall prevail, the consequence is, that in such a case a person is always able to do what he could, as above stated, have only formerly done in equity.

Estoppel *in pais*.

Estoppel, however, beside being by record or deed, may also in some cases be *in pais*, *i.e.*, by the conduct of the parties; *e.g.*, where an infant, having made a lease, accepts rent after he comes of age, he will be estopped from denying its validity (*o*). Many circumstances may produce estoppel of this kind, and as a practical example of it may be noticed the fact that a bailee is ordinarily estopped from denying the title of his bailor (*p*).

4. As to consideration.

4. *As to consideration.*—The consideration is the price or motive of a contract, and is either good or valuable. A valuable consideration may be defined as some benefit to the person making the promise, or a third person by the act of the promisee, or some loss, trouble, inconvenience to, or charge imposed upon, the person to whom the promise is made (*q*). It is an essential and unflinching rule, that all simple contracts require a valuable consideration; if they have no consideration, or a merely good consideration, such as natural love and affection, they will not be binding, and no action will lie for their breach (*r*); whilst a deed will be perfectly valid and binding with a merely good consideration, or with no consideration at all (*s*). This distinction plainly

Definition of a valuable consideration.

Distinction between simple contracts and deeds as to consideration.

(*n*) Sect. 25 (11).

(*o*) See hereon as to the effect of 37 & 38 Vict. c. 62, *post*, p. 246.

(*p*) *Rogers* v. *Lambert* (1890), 24 Q. B. D. 573; 59 L. J. Q. B. 259; 62 L. T. 664. And see as further instances of estoppel *in pais*, *Roe* v. *Mutual Fund Loan Association, Limited* (1887), 19 Q. B. D. 347; 56 L. J. Q. B. 145; 35 W. R. 723; *Young* v. *Grote* (1827) 4 Bing. 253; *Pickard* v. *Sears* (1837), 6 A. & E. 469; *Coventry* v. *G. E. Ry. Co.* (1883), 11 Q. B. D. 776; 52 L. J. Q. B. 694; *Lloyds Bank* v. *Cook* (1907), 1 K. B. 797; 76 L. J. K. B. 666. See also hereon *Scholfield* v. *Lord Londesborough* (1896), A. C. 514; 65 L. J. Q. B. 593; 75 L. T. 254; *Lewis* v. *Clay* (1898), 67 L. J. Q. B. 224; 77 L. T. 653; 46 W. R. 319; and *post*, p. 187.

(*q*) This definition is gathered from what is stated as to the sufficiency of the consideration in Chitty on Contracts, 20 *et seq.*

(*r*) *Lampleigh* v. *Braithwaite* (1614), 1 S. L. C. 141; Hobart, 105.

(*s*) An important exception to this rule arises in the case of contracts in restraint of trade, which, even though by deed, must have a valuable consideration. See *post*, p. 301.

arises from the fact of the additional solemnity and importance of a deed.

A voluntary deed is not in every respect as good as a deed founded on valuable consideration.

It must not, however, from this be taken by the student for granted, that a voluntary deed is in every respect as good as a deed founded on valuable consideration. All that is meant is, that, as between the parties, it is no objection to the validity of a deed, and consequently no answer to an action brought upon it, that there was no consideration for the benefits conferred or the obligations entered into by it, as it would be in the case of a simple contract. But even a deed entered into without valuable consideration, may possibly be affected on account of its want of consideration.

13 Eliz. c. 5.

The statute 13 Eliz. c. 5 provides that all gifts and conveyances of either chattels or land, made for the purpose of defeating, hindering, or delaying creditors, are void against them unless made *bonâ fide* upon good (which means here valuable) consideration, and *bonâ fide* to some person without notice of the fraud. The mere fact of any conveyance or assignment being voluntary will not necessarily render it bad under this statute; but the fact of its voluntary nature will cause suspicion to attach to it, and every such voluntary instrument is therefore liable to be set aside under this statute (*t*).

27 Eliz. c. 4.

By 27 Eliz. c. 4, it was provided that all voluntary conveyances of land should be void against subsequent purchasers for valuable consideration taking from the donor; the effect of which was that although a person might make a perfectly good voluntary conveyance to another of his land, yet if he afterwards conveyed that land for value, even although the latter person knew of the prior voluntary conveyance, he would take in preference to the volunteer. This, however, is not so now by reason of the Voluntary Conveyances Act, 1893 (*u*).

Bankruptcy Act, 1883.

By the Bankruptcy Act, 1883 (*v*), any voluntary

(*t*) See further as to fraudulent dispositions under the statute 13 Eliz. c. 5. *post*, pp. 294, 295.

(*u*) 56 & 57 Vict. c. 21. (*v*) 46 & 47 Vict. c. 52, s. 47.

settlement is void if the settlor becomes a bankrupt within two years; and if he becomes bankrupt after that time, but within ten years, it is also void, unless the parties claiming under such settlement can prove that the settlor was at the time of making it able to pay all his debts without the aid of the property comprised in such settlement (*x*), and that the interest of the settlor in such property had passed to the trustee of such settlement on the execution thereof (*y*).

5. *As to limitation.*—A simple contract is barred after six years (*z*); a deed, after twenty years (*a*). 5. As to limitation.

6. *As to their extent.*—A deed, if the heirs were bound, and the heir had assets by descent, bound him, whilst a simple contract did not. This distinction between a specialty and a simple contract was formerly one of considerable importance, for a simple contract creditor had no right to come upon the real estate descended to the heir for payment of his debt. By the Administration of Estates Act, 1833, this anomaly was done away with, that statute providing that real estate should be liable for payment of simple contract as well as specialty debts, provided, however, that creditors by specialty in which the heirs were bound should be paid first. This distinction has also now been done away with by the Administration of Estates Act, 1869, which provides that all creditors, as well by specialty as by simple contract, shall be treated as standing in equal degree (*b*). 6. As to extent. 3 & 4 Will. IV c. 104. 32 & 33 Vict. c. 46.

7. *As to their discharge.*—Though a simple contract may be discharged in various ways—*e.g.*, by accord 7. As to discharge.

(*x*) As to the meaning of these last words see *Ex parte Russell*, *re Butterworth* (1882), 19 Ch. D. 588; 51 L. J. Ch. 621; 46 L. T. 113; *Re Lowndes* (1887), 18 Q. B. D. 677; 56 L. J. Q. B. 425.

(*y*) As to the effect of this enactment see *Sanguinetti* v. *Stuckey's Banking Co.* (1895), 1 Ch. 176; 64 L. J. Ch. 181; 71 L. T. 872; *Re Carter & Kenderdine's Contract* (1897), 1 Ch. 776; 66 L. J. Ch. 408; 76 L. T. 476; *Shrager* v. *March* (1908), A. C. 402; 99 L. T. 33.

(*z*) 21 Jac. I. c. 16.

(*a*) 3 & 4 Will. IV. c. 42. See as to limitation generally, *post*, pp. 277–284.

(*b*) *Re Samson, Robbins* v. *Alexander* (1906), 2 Ch. 584; 76 L. J. Ch. 21; 95 L. T. 633.

and satisfaction (*c*),—a deed, speaking generally, can at law only be discharged by an act of as high or of a higher nature (*d*). But in equity a deed might sometimes have been put an end to by a new parol agreement, and it must be remembered that the rules of equity now prevail in all cases (*e*). This last distinction, therefore, with the previous one, may be put down as of little practical importance, however valuable they both may be considered as points in the history of the law.

Express and implied contracts.

With regard to the division of contracts into those expressed and those implied, it is not necessary to say much, as the very names indicate what is meant; but it may be useful to enumerate, as instances, a few cases in which a contract will be implied. If in any trade or business there is some well-known and established usage or custom, and two persons enter into any contract which does not exclude such usage or custom, and contains nothing antagonistic to it, the usage or custom will be implied to be part of their contract: so if between two persons there has been a practice in past years for interest to be paid on balances between them, a contract will continue to be implied to that effect until something is said or done to the contrary (*f*). Again, if a landlord gives his tenant notice to quit or else pay an increased rent, and the tenant says nothing, but continues to hold on, his contract to pay such increased rent will be implied; and if any deed or other instrument contains a recital, or any words, shewing a clear intention to do some act, a contract to do it is implied (*g*). And it has been laid down in general terms, that whenever circumstances arise in the ordinary business of life, in which if two persons were ordinarily honest and careful, the one of them would make a promise to the other, it may properly be inferred that both of

Instances of implied contracts.

(*c*) As to which, see *post*, p. 276. (*d*) Anson's Contracts, 305.
(*e*) Jud. Act, 1873, sect. 25 (11).
(*f*) See Chitty on Contracts, chapter 3.
(*g*) See *Knight* v. *Gravesend Waterworks Co.* (1858), 2 H. & N. 6.

them understood that such a promise was given and accepted (*h*).

Expressum facit cessare tacitum.

An express contract is, however, naturally more certain and definite than an implied contract, which indeed can only exist in the absence of an express contract, the maxim being *Expressum facit cessare tacitum*.

Executed and executory contracts.

Again, on the third division of contracts, into those executed and those executory, it is necessary to say but little, the words almost explaining what is meant. An executed contract is one in which the act has been done, as if a contract is made for the sale and purchase of goods, and the price paid and the goods handed over; an executory contract is one in which the act contracted for is to be done at some future time, as if a person agrees to supply another with certain goods on the arrival of a ship in which they are. Contracts may be entirely executed or entirely executory, or in part executed and in part executory.

Breach of executory contracts.

On an executory contract one important point may be usefully noticed. It must be apparent that generally speaking, no action can be brought for the breach of such a contract until the day arrives for its performance; but it has been decided that where a person, before the day, declares that he will not perform his contract, or renders himself incapable of performing it, the action may be brought immediately without waiting for the future day (*i*).

Consequences flowing from the breach of a contract.

Where a valid contract has been entered into between the parties, and there is a breach of it, certain consequences flow from that breach. Looking at judgments as contracts of record, if a judgment is not complied with by the party against whom it is given, there are various means pointed out by law for obtaining satis-

(*h*) Per Lord Esher (M.R.) in *Ex parte Ford, re Chappell* (1886), 16 Q. B. D. 307; 55 L. J. Q. B. 406.

(*i*) *Hochster* v. *De la Tour* (1853), 2 Ell. & Bl. 678; *Frost* v. *Knight* (1872), L. R. 7 Ex. 111. See, however, *Johnstone* v. *Milling* (1886), 16 Q. B. D. 460; 55 L. J. Q. B. 162; 34 W. R. 238; 54 L. T. 629; and *post*, ch. viii. pp. 264, 265.

faction of it, the chief being by execution (*k*). In the case of a breach of a specialty, or a simple contract, a new obligation will in every case arise, a right of action being conferred upon the party injured by the breach, or, in other words, an action has to be brought against the person committing the breach, and damages are awarded in that action for the breach, such damages being estimated by a jury in accordance, as far as can be, with the settled principles of what is the proper measure of damage, a subject which will be discussed later on in the present work (*l*). In some cases, also, relief may be obtained beyond mere damages, *e.g.*, in an action for breach of a contract to deliver specific goods sold, the buyer may, under the provisions of the Sale of Goods Act, 1893 (*m*), obtain an order for the delivery to him of the specific goods themselves (*n*).

Forfeiture of right to compensation.

In some cases, also, the breach of a contract by one of the parties may cause him to forfeit his right to any compensation for what he has done before breach. Thus, if a servant hired by the month wrongfully leaves, or is discharged on account of his misconduct, in the middle of a month, he will lose the whole month's wages (*o*).

Rules for the construction of contracts.

The last subject to be considered in the present chapter is that of the rules for construction of contracts, a matter of considerable importance. In the first place, it must be observed, that while the jury decide on questions of fact, it is for the Court to put the correct construction on any instrument; and, to ensure uniformity in construction as far as possible, certain rules have been framed and handed down from time to time. These rules are very fully stated by Mr. Chitty in his work upon Contracts (*p*), and the most important of them are as follows :—

(*k*) As to the different modes of enforcing a judgment, see Indermaur's Manual of Practice, 196–217.

(*l*) As to the measure of damages, see *post*, Part III. ch. i.

(*m*) 56 & 57 Vict. c. 71, s. 52. (*n*) See *post*, Part III. ch. i.

(*o*) See hereon also *post*, ch. vi. p. 238.

(*p*) See Chitty on Contracts, 85–116, from which pages the following remarks on the construction of contracts are mainly gathered.

1. *Every agreement shall have a reasonable construction according to the intention of the parties; e.g.*, if a person borrows a horse, it will be considered a part of the agreement that he shall feed it during the time it remains in his possession. This is a great and important rule of construction, but upon it must be borne in mind: first, that it is not enough for a party to make out a possible intention favourable to his view, but he must shew a reasonable certainty that the intention was such as he suggests (*pp*); and, secondly, that all latitude of construction must submit to this restriction, viz., that the words and language of the instrument will bear the sense sought to be put upon them (*q*). 1. Agreements to be construed reasonably.

2. *Agreements shall be construed liberally, e.g.*, the word "men" used in a contract may often be held to include both men and women (*r*). 2. Agreements to be construed liberally.

3. *Agreements shall be construed favourably;* which means that such a construction shall be put that, if possible, they be supported. Thus, if on an instrument it is possible to put two constructions, one of which is contrary to law, and the other not, the latter shall be adopted. And it is upon this principle that words sometimes have different meanings given to them: thus the word "from" is *primâ facie* exclusive, but it always depends on the context; and the words "on" or "upon" may mean either before the act to which it relates, or simultaneously with the act done, or after the act done; and the word "to" may mean "towards" (*s*). 3. Agreements to be construed favourably.

4. *Words are to be understood in their plain ordinary, and popular sense.* But if words have by any usage of 4. Words are to be understood in their ordinary meaning.

(*pp*) *Per curiam*, *Pennell* v. *Mills* (1846), 3 C. B. 625.

(*q*) *Per curiam*, *Ford* v. *Beech* (1848), 11 Q. B. 852, 866.

(*r*) See, as to the liberal construction of certain words in statutes, the Interpretation Act, 1889 (52 & 53 Vict. c. 63); and see also the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), sect. 66, which provides that "in the construction of a covenant or proviso, or other provision implied in a deed, by virtue of this Act, words importing the singular or plural number, or the masculine gender, shall be read as also importing the plural or singular number, or as extending to females, as the case may require."

(*s*) Chitty on Contracts, 88.

trade or custom obtained a particular signification, then that meaning will generally be put upon them.

5. The construction shall be on the entire instrument.

5. *The construction shall be put upon the entire instrument, so that one part may assist another;* and it is upon this rule that, to further the evident intention of the parties, words used in a contract may be transposed; and again that where there are general words following after certain particular words, they will be construed as only *ejusdem generis* with the particular words. This rule also has to be taken subject to the maxim *Falsa demonstratio non nocet*, the meaning of which maxim has been well stated to be, "that if there be in the former part of an instrument an adequate and sufficient description shewing with convenient certainty the subject-matter to which it was intended to apply, a subsequent erroneous addition will not vitiate that description" (*t*). As regards differences between the operative words used in a deed and the recitals, the following rules have been laid down:—(1) If the recitals are clear, but the operative words ambiguous, the recitals govern. (2) If the recitals are ambiguous, but the operative words clear, the operative words govern. (3) If the recitals and the operative words are both clear, but are inconsistent, the operative words govern (*u*).

Falsa demonstratio non nocet.

Recitals.

6. The *lex loci contractus* is to prevail unless the parties made their contract with reference to another country.

6. *A contract is to be construed according to the law of the country where made, except when the parties at the time of making the contract had a view to a different country* (*v*). From this it follows that if a contract is made anywhere out of England, and an action is brought on it here, it will ordinarily be necessary to give evidence to shew what the law of the place where it was made is as to it; and with regard to the last part of this rule, what is meant is, that although the *lex loci contractus* generally applies, yet if the parties

(*t*) Chitty on Contracts, 94.

(*u*) *Ex parte Dawes, re Moon* (1886), 17 Q. B. D. 275; 34 W. R. 752; 55 L. T. 114.

(*v*) See *South African Breweries* v. *King* (1900), 1 Ch. 273; 69 L. J. Ch. 171; 82 L. T. 32.

have in contemplation, at the time, the performance of the contract in another country, then the law of that country will apply, *e.g.*, if a bill of exchange is executed here but made payable abroad (*x*). However, the rule altogether only primarily holds good, and the Court must look at the circumstances of each contract, and consider, having regard to the nature of the contract, and the other circumstances of the case, what law it is to be governed by (*y*). And as to a contract of affreightment, all questions as to sea damage arising under it are to be decided by the law of the country to which the carrying ship belongs, unless otherwise stipulated (*z*).

Affreightment.

Notwithstanding the rule that the *lex loci contractus* governs the interpretation of the contract, yet, although a contract is made abroad, as regards the proceedings to enforce it, the *lex loci fori* (*i.e.*, the law of the country where the action is brought) governs; so that, for instance, although a contract is made abroad in a country where the period of limitation for bringing the action is different from what it is here, yet, if the action is brought here, our Statute of Limitations will bind. Again, a contract may be made abroad, and by the law of the country where made may, perhaps, not be required to be in writing, although here it may be otherwise by reason of the provisions of the Statute of Frauds. Yet if such a contract is made abroad without writing, and an action is brought here upon it, such action cannot succeed, the Statute of Frauds dealing with matter of procedure only—that is, not invalidating the contract, but requiring the evidence of writing (*a*).

But in bringing an action the *lex loci fori* governs.

Leroux v. *Brown*.

7. *If there are two repugnant clauses in a contract, the first is the one to be received* (*b*). This rule is, however,

7. Of two repugnant clauses the first is to be received.

(*x*) See also hereon *Jacobs* v. *Credit Lyonnais* (1884), 12 Q. B. D. 589; 53 L. J. Q. B. 156; 50 L. T. 194; 32 W. R. 761.

(*y*) *Re Missouri Steamship Co.* (1889), 42 Ch. D. 321; 58 L. J. Ch. 721; 61 L. T. 316; *Hamlyn* v. *Talisker Distillery* (1894), A. C. 202; 72 L. T. 1.

(*z*) *Lloyd* v. *Guibert* (1865), L. R. 1 Q. B. 115.

(*a*) *Leroux* v. *Brown* (1852), 12 C. B. 801.

(*b*) It may be noted that the contrary is the rule in the case of a will;

subject to a different construction being possibly come to by reason of recitals (*c*).

8. The construction is to be taken against the grantor.

8. *The construction shall be taken most strongly against the grantor or contractor* (*d*). But this is a rule not to be resorted to until after all other rules of construction fail; and in some cases it will not apply at all—thus it does not apply against the crown.

9. Parol evidence not admissible to contradict a written contract.

9. *Parol evidence is not admissible to vary or contradict a written contract, but it is admissible to explain in the case of a latent, though not in the case of a patent, ambiguity.* A patent ambiguity is one appearing on the face of the instrument. A latent ambiguity is one not so appearing, but raised by extraneous evidence. And the distinction between these two cases as to the admissibility of parol evidence has been well stated by Lord Chief-Justice Tindal as follows:

The distinction as to the admissibility of parol evidence in the case of a patent and a latent ambiguity, as stated by Lord Chief-Justice Tindal.

"The general rule I take to be that where the words of any written instrument are free from ambiguity in themselves, and where external circumstances do not create any doubt or difficulty as to the proper application of those words to claimants under the instrument, or the subject-matter to which the instrument relates, such instrument is always to be construed according to the strict, plain, common meaning of the words themselves; and that, in such case, evidence *dehors* the instrument for the purpose of explaining it according to the surmised or alleged intention of the parties, is utterly inadmissible. The true interpretation, however, of every instrument being manifestly that which will make the instrument speak the intention of the party at the time it was made, it has always been considered an exception, or, perhaps to speak more precisely, not so much an exception from, as a corollary to, the general rule above stated, that where any doubt arises

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for, as a subsequent will revokes a former, so a later clause will have effect over an earlier.

(*c*) *Ante*, p. 26.

(*d*) See per Lord Selborne in *Neill* v. *Devonshire* (1882), 8 App. Ca. at 149 and in *Birrell* v. *Dyer* (1883), 9 App. Ca. at 350.

upon the true sense and meaning of the words themselves, or any difficulty as to their application under the surrounding circumstances, the sense and meaning of the language may be investigated and ascertained by evidence *dehors* the instrument itself; for both reason and common sense agree that by no other means can the language of the instrument be made to speak the real mind of the party. Such investigation does of necessity take place in the interpretation of instruments written in a foreign language; in the case of ancient instruments; in cases where terms of art or science occur; in mercantile contracts, which in many instances are in a peculiar language employed by those who are conversant in trade and commerce; and in other instances in which the words, besides their general common meaning, have acquired, by custom or otherwise, a well-known, peculiar, idiomatic meaning, in the particular county in which the party using them was dwelling, or in the particular society of which he formed a member, and in which he passed his life" (*e*).

Goss v. *Lord Nugent.*

When a contract has once been reduced into writing, evidence cannot be given to shew that the parties at the time agreed orally that some other term or stipulation should be part and parcel of the contract, for to admit any such evidence would be in effect to vary the written instrument (*f*). Where, however, a contract is in writing, but there are collateral terms or conditions entered into which are not contrary to the tenor of the written agreement, or supplementary terms are arranged, evidence of such terms may be given (*g*). And evidence may also be given to shew that, by reason of some condition or stipulation, a document purporting to be a contract is in fact no

(*e*) *Shore* v. *Wilson* (1844), 9 C. & F. 565.

(*f*) *Goss* v. *Lord Nugent* (1833), 5 B. & A. 58; *Stott* v. *Fairlamb* (1883), 52 L. J. Q. B. 420; 48 L. T. 574; *Leduc* v. *Ward* (1888), 20 Q. B. D. 475; 57 L. J. Q. B. 379; 58 L. T. 908.

(*g*) *Jarris* v. *Berridge* (1873), 8 Ch. 351; *Erskine* v. *Adeane* (1873), 42 L. J. Ch. 849; *De Lessalle* v. *Guilford* (1901), 2 K. B. 215; 70 L. J. K. B. 533.

contract at all (*h*). If parties have made an executory contract which is to be carried out by a deed, and such deed is afterwards executed, the real complete contract is to be found in the deed, and the parties have no right to look at the contract, although it is recited in the deed, except for the purpose of construing the deed itself; it must not be looked to for the purpose of enlarging, or diminishing, or modifying, the contract which is to be found in the deed itself (*i*).

Expressum facit cessare tacitum.

In mentioning the subject of implied contracts, it has been already stated that where there is some well-known and established usage or custom in a trade, persons may be taken in their contract to have had that in view at the time; and a contract may be construed on that footing, provided, of course, that the custom or usage does not clash with the contract; for it is an imperative principle of construction that whenever there is an implied contract, and the parties have also expressly agreed on the point, the maxim *Expressum facit cessare tacitum* will have effect (*k*).

Summary of cases of admission of parol evidence.

The exceptions to the rule that extraneous evidence is not admitted where there is a written contract are conveniently summarised as follows:—

(1) Cases where terms are proved supplementary or collateral to so much of the agreement as is in writing.

(2) Cases where explanation of the terms of the contract is required, *i.e.*, in cases of latent as opposed to patent ambiguities.

(3) To introduce usages into the contract.

(4) To shew fraud, duress, or mistake (*l*).

In addition, it is now necessary to observe the

(*h*) *Pym* v. *Campbell* (1856), 6 E. & B. 370; *Pattle* v. *Hornibrook* (1897), 1 Ch. 25; 66 L. J. Ch. 144; 75 L. T. 475.

(*i*) *Leggott* v. *Barrett* (1882), 15 Ch. D. 306; 51 L. J. Ch. 90; 43 L. T. 641; *Henderson* v. *Arthur* (1907), 1 K. B. 10; 76 L. J. K. B. 22; 95 L. T. 772.

(*k*) *Ante*, pp. 22, 23; and see *Wigglesworth* v. *Dallison* (1779), 1 S. L. C. 545; Dougl. 201; *Johnson* v. *Raylton* (1881), 7 Q. B. D. 438; 50 L. J. Q. B. 735; 45 L. T. 374.

(*l*) Anson's Contracts, 286.

provisions of the Money-Lenders Act, 1900 (*m*), as regards contracts entered into with money-lenders, as defined by the Act. It is provided that, as regards securities taken after November 1, 1900, if the interest, fines, bonuses, or other charges, are excessive, and if the transaction is harsh or unconscionable, or is otherwise such that a Court of Equity would give relief, the Court may re-open the transaction and relieve the borrower from payment of any sum in excess of what the Court considers under all the circumstances to be fairly due (*n*). In other words, notwithstanding the written contract, the Court can receive evidence and go completely behind it.

Money-Lenders Act, 1900.

When a contract is to be completed by a certain day, the rule at law formerly always was that time was of the essence of the contract; but in equity it was never so, unless expressly so stipulated, either at the time of the contract, or by notice given afterwards (*o*), or it appeared to be so intended from the nature of the property, *e.g.*, where a reversion was being sold, as it might at any moment, through the falling in of the life-estate, become an estate in possession. The Judicature Act, 1873 (*p*), however, now provides that stipulations as to time shall receive in all courts the same construction and effect as they would have theretofore received in equity. But, notwithstanding this enactment, in mercantile contracts stipulations as to time are still of the essence of the contract (*q*), subject

As to when time is of the essence of a contract.

Judicature Act, 1873.

Mercantile contracts.

(*m*) 63 & 64 Vict. c. 51.

(*n*) Sect. 1. See hereon *Re Debtor, Ex parte Debtor* (1903), 1 K. B. 705; 72 L. J. K. B. 232; 88 L. T. 401, overruling *Wilton* v. *Osborne* (1901), 2 K. B. 110; *Samuel* v. *Newbold* (1906) A. C. 461; 75 L. J. Ch. 705; 95 L. T. 209. A "money-lender" is defined by sect. 6. Sect. 2 provides for the registration of money-lenders, and that a money-lender shall carry on his business only in his registered name, and at his registered addresses; see hereon *Bonnard* v. *Dott* (1906), 1 Ch. 740; 75 L. J. Ch. 446; 94 L. T. 656; *Lodge* v. *National Union* (1907), 1 Ch. 300; 96 L. J. Ch. 187; *Dott* v. *Brickwell* (1907), 23 T. L. R. 61.

(*o*) However, a party to a contract is not entitled in every case by giving notice to make time of the essence of the contract; there must have been some unreasonable delay by the other party. *Green* v. *Serin* (1880), 13 Ch. D. 589; 49 L. J. Ch. 166.

(*p*) Jud. Act, 1873, s. 25 (7); Indermaur and Thwaites' Manual of Equity, 300.

(*q*) *Reuter* v. *Sala* (1879), 4 C. P. D. 249; 48 L. J. Q. B. 492.

Sale of Goods Act, 1893.

to this, that with regard to contracts for the sale of goods, it has now been provided that, unless a different intention appears from the terms of the contract, stipulations as to time of payment are not deemed to be of the essence of the contract; and whether any other stipulation as to time is of the essence of the contract or not, depends on its terms (*r*).

Meaning of the term "month."

The term "month" in a contract signifies a lunar month (*s*), except in the case of mercantile contracts, *e.g.*, bills of exchange, when it signifies a calendar month (*t*). In a statute passed before 1851, it means, *primâ facie*, a lunar month, but after that time a calendar month (*u*).

Quasi-contracts.

Besides contracts strictly so called, it may also be well, in concluding this chapter, to mention what are sometimes known as *Quasi contracts*. The expression is merely a general term intended to include many legal relations in which there is an obligation resting on a party although there is no contract in any direct way, *e.g.*, if A. has received the money of B. under circumstances which disentitle him to retain it, B. can recover it from him; or if one of several co-debtors pays the entire amount of the debt, he may recover from each of the others his proportionate share (*x*). So also where, in an action for trespass to, or conversion or wrongful detention of goods, the plaintiff recovers the full value of the goods or damages, and the defendant satisfies the judgment, the transaction operates as a sale of the goods from the plaintiff to the defendant, as from the time when the judgment is satisfied (*y*).

(*r*) 56 & 57 Vict. c. 71, s. 10.

(*s*) *Hutton* v. *Brown* (1881), 29 W. R. 928; 45 L. T. 343; *Simpson* v. *Margitson* (1847), 11 Q. B. 23; *Bruner* v. *Moore* (1904), 1 Ch. 305.

(*t*) *Hart* v. *Middleton* (1846), 2 C. & K. 10.

(*u*) 52 & 53 Vict. c. 63, s. 3.

(*x*) See Anson's Contracts, 390, 391.

(*y*) Chalmers, Sale of Goods Act, 1893, notes to sect. 1, p. 9.

CHAPTER II.

OF SIMPLE CONTRACTS, AND PARTICULARLY OF CASES IN WHICH WRITING IS REQUIRED FOR THEIR VALIDITY.

Definition of a simple contract.

A SIMPLE contract may be defined as an agreement between two or more parties, and either made by word of mouth, or by writing not under seal, by which, in consideration of something done or to be done by one party, the other party promises to do or omit some act. Such contracts have been said to be called simple because they subsist by reason simply of the agreement of the parties, or because their subject-matter is usually of a more simple or of a less complex nature (*a*).

Four essentials to simple contracts.

They have four great essentials, which are—(1) Parties able to contract; (2) Such parties' mutual assent to the contract; (3) A valuable consideration; and (4) Something to be done or omitted which forms the object of the contract, and which must be neither illegal nor immoral (*b*). There are in certain cases other requirements, and particularly writing is necessary in some cases, as will presently be shewn; but in these cases the form of writing is not generally required to give efficacy to the contract, as in the case of a deed, but as evidence of its existence.

Generally speaking, all persons are competent to contract.

Firstly, then, as to the parties to contract. As a general rule, all persons are competent to contract, for the law presumes this until the contrary is shewn; but inability to contract may often be shewn, and it will be found that in some cases the incompetency to contract is absolute, in others only limited, in some the contract is of no effect at all, in others only so with regard to the incompetent party.

(*a*) Brown's Law Dict. 493.
(*b*) Chitty on Contracts, 8.

Cases of incompetency to contract.

The chief cases of incompetency to contract, either entire or limited, may be stated to be in the case of infants, married women, persons of unsound mind, intoxicated persons, persons under duress, and aliens; and as contracts with all these persons are discussed in a subsequent chapter, nothing further need here be remarked as to them (*c*).

A person not a party to a contract cannot sue on it.

Only a party to a contract can sue thereon; and a person taking a benefit under it, but not a party to it, cannot sue (*d*), unless indeed there is a provision in an Act of Parliament enabling him to do so (*e*), or unless the circumstances are such that he is entitled to say that he is a *cestui que trust* of the benefit of the contract (*f*), or unless he is an assignee of a party to the contract, and thus entitled to stand in his shoes.

There must be mutual assent of the parties.

Secondly, as to the mutual assent it is essential that both the parties should agree to exactly the same thing; there must be mutuality in the contract, or there can be no contract at all (*g*). Thus if there is a direct offer on the one side, and direct and unequivocal acceptance on the other, of exactly the same thing, then there is a perfect contract; but if the acceptance is in any way conditional, or introduces any fresh term or stipulation, then there is no complete contract, unless that fresh term or stipulation is in its turn directly acceded to by the other contracting party (*h*). And there can be no contract where a party, though signing a document, did not in fact know what he was signing by reason of the fraud of the other party, unless, indeed, he was guilty of negligence in signing, when

Foster v. *Mackinnon*.

(*c*) See *post*, chap. vii.

(*d*) *Tweddle* v. *Atkinson* (1861), 1 B. & S. 393; *Gandy* v. *Gandy* (1884), 30 Ch. D. 57; 52 L. J. Ch. 1154.

(*e*) *Re Rotherham Alum and Chemical Co.* (1883), 25 Ch. D. 111; 53 L. J. Ch. 290; 32 W. R. 131; 50 L. T. 219.

(*f*) *Gandy* v. *Gandy* (1884), 30 Ch. D. 57; 54 L. J. Ch. 1154; 33 W. R. 803; 53 L. T. 306.

(*g*) *Jordan* v. *Norton* (1838), 4 M. & W. 155; *Hutchison* v. *Bowker* (1839), 5 M. & W. 535.

(*h*) *Fowle* v. *Freeman* (1804), 6 Ves. 351; *Winn* v. *Bull* (1878), 7 Ch. D. 29; 47 L. J. Ch. 139; *Hussey* v. *Horn-Payne* (1879), 4 App. Cas. 311; 48 L. J. Ch. 846; *Hawkesworth* v. *Chaffey* (1886), 55 L. J. Ch. 335; 54 L. T. 72; *Watson* v. *M'Allum* (1903) 87 L. T. 547.

he may—*e.g.*, in the case of bills or notes—incur a liability to third parties (*i*). Even although there is an offer and a direct acceptance, it sometimes happens that no contract is produced thereby, for evidence may be given of extraneous facts which shew that the parties did not in fact mean to be bound. Thus, where matters generally are under discussion, and then there is a bare offer to sell for so much, and an acceptance, and afterwards, on further discussion as to payment and other terms, the parties disagree, here the fact of other matters having been at the time under consideration, and there having been subsequent negotiations with regard thereto, shews that there was in fact no concluded contract (*j*). But if, in fact, no other terms were under consideration, and there was a simple offer and a direct acceptance, the circumstance that the parties afterwards entered into further negotiations. cannot alter the fact that a concluded contract had been actually made (*k*).

Hussey v. *Horn-Payne.*

Bellamy v. *Debenham.*

What is necessary to establish a contract from different instruments.

Where it is necessary, to satisfy the Statute of Frauds, that the contract should be in writing, there is also another point to be observed if it is desired to make out a contract from different instruments, and that is, that the different instruments, offered as constituting an entire contract, must be connected *inter se*—that is, by reference in themselves to each other—without the necessity of any parol evidence to connect them. This is well shewn by the case of *Boydell* v. *Drummond* (*l*), which was an action for alleged breach of contract to take and pay for a set of prints from some of the scenes in Shakespeare's plays, and which contract, as it was not to be performed within a year, was required to be in writing by section 4 of the Statute of Frauds. The agreement in writing on

Boydell v *Drummond.*

(*i*) *Foster* v. *Mackinnon* (1869), L. R. 4 C. P. 704 ; 38 L. J. C. P. 310; *Lewis* v. *Clay* (1898), 67 L. J. Q. B. 224 ; 77 L. T. 653 : 46 W. R. 319.

(*j*) *Hussey* v. *Horne-Payne* (1879), 4 App. Cas. 311 ; 48 L. J. Ch. 846 ; *Bristol and Swansea Aërated Bread Co. Limited* v. *Maggs* (1890), 44 Ch. D. 616 ; 59 L. J. Ch. 472 ; 62 L. T. 416.

(*k*) *Bellamy* v. *Debenham* (1890), 45 Ch. D. 481 ; 63 L. T. 220.

(*l*) (1809), 11 East, 142.

which it was sought to charge the defendant was this —that printed copies of the prospectus, containing the full particulars of the publication, lay on the counter of the plaintiff's shop for inspection, and that there was also a book lying there, headed "Shakespeare Subscribers: their signatures," and that the defendant had signed his name in this book; but it also appeared that there was nothing in the book which contained the signatures referring to the prospectus, nor was there anything in the prospectus referring to the book; and upon this it was held that there was no binding contract, the reason being shewn in the following passage from one of the judgments delivered: "If there had been anything in the book which had referred to the particular prospectus, that would have been sufficient; if the title to the book had been the same as the prospectus, it might perhaps have done; but as the signature now stands, without reference of any sort to the prospectus, there was nothing to prevent the plaintiff from substituting any prospectus, and saying that it was the prospectus exhibited in his shop at the time to which the signature related" (*m*).

Modern relaxation of the strict rule in *Boydell* v. *Drummond*.

But the rule as thus laid down must be taken to have been somewhat relaxed by modern cases, it having been held that parol evidence is admissible to connect two documents where one document obviously refers to another, and where the two when thus connected make a contract without further explanation (*n*). Thus in one case the defendant agreed to sell to the plaintiff a freehold estate for £2375, and signed a memorandum which contained all the essentials of the contract except that it omitted to mention or refer to the property agreed to be sold. Two days afterwards the plaintiff, pursuant to the contract, sent the defendant a cheque for the deposit and in part payment of the price, and the defendant replied by letter, "I beg to

Oliver v. *Hunting*.

(*m*) Per Le Blanc, J., 11 East, 158. See further *Ingram* v. *Little*, 1 C. & E. 186; *Studds* v. *Watson* (1884), 28 A. D. 305; 54 L. J. Ch. 626; 33 W. R. 118; *Potter* v. *Peters* (1895), 64 L. J. Ch. 357; 74 L. T 624.

(*n*) See Anson's Contracts, 80.

acknowledge receipt of cheque on account of the purchase-money for the F. estate." It was held that parol evidence was admissible to explain the circumstances under which the letter was written, and that as such evidence connected the letter and the memorandum, the two documents read together constituted a sufficient memorandum under the Statute of Frauds (*o*). It will be observed that in this case there was an obvious reference in the letter to another document, which was not the case in *Boydell* v. *Drummond*, the rule in which case must still be taken as holding good in its general terms, and which has indeed been since acted upon by the same Judge who decided the case just referred to (*p*).

It must, however, be remembered that where the contract is not required by law to be in writing, there is nothing to prevent the connection of several documents by oral evidence (*q*).

How offer may become a contract.

An offer made by one person to another is capable of being turned into a contract by acceptance, which must be communicated to the offeror (*r*), or made in the manner prescribed by the terms of the offer (*s*). But an offer lapses if either party dies before acceptance (*t*) or if a reasonable time elapses before

Lapse of offer.

(*o*) *Oliver* v. *Hunting* (1890), 44 Ch. D. 205 ; 59 L. J. Ch. 255 ; 62 L. T. 108. See also *McGuffie* v. *Burleigh* (1898), 78 L. T. 264 ; *Ridgway* v. *Wharton* (1857), 6 H. L. 238 ; *Long* v. *Millar* (1879), 4 C. P. D. 450 48 L. J. C. P. 596. In connection with the principle involved in *Boydell* v. *Drummond*, see also *Pearce* v. *Gardner* (1897), (1 Q. B. 688 ; 66 L. J. Q. B. 457 ; 76 L. T. 441), where it was held that an envelope addressed to a vendee, and received by him, enclosing a letter which set out the terms of the contract, but in which the name of the vendor only appeared, was sufficiently connected with the enclosure to be admitted in evidence, in order to prove a memorandum in writing of the contract, within the meaning either of sect. 4 of the Statute of Frauds, or of sect. 4 of the Sale of Goods Act, 1893.

(*p*) Mr. Justice Kekewich in *Potter* v. *Peters* (1895), 64 L. J. Ch. 357 ; 74 L. T. 624.

(*q*) *Edwards* v. *Aberayron Mutual Insurance Company* (1876), 1 Q. B. D. 587 ; 44 L. J. Q. B. 67.

(*r*) *Felthouse* v. *Bindley* (1862), 11 C. B. 689.

(*s*) *Carlill* v. *Carbolic Smoke Ball Co.* (1893), 1 Q. B. 256.

(*t*) Per Mellish, L.J., in *Dickinson* v. *Dodds* (1876), 2 Ch. D. 463 ; *Bagel* v. *Miller* (1903), 2 K. B. 212 ; 72 L. J. K. B. 495.

acceptance (*w*) or by revocation communicated before acceptance (*x*).

An offer is not binding till accepted.

Any offer that is made by a person does not bind him, and may be revoked by him, until it is accepted by the person to whom it is made, for until then he has a *locus pœnitentiæ* allowed him (*y*); and this is true, although the person making the offer expressly gives the person to whom it is made a certain time to accept or reject it. There is nothing binding between the parties until the offer is accepted; but when the unconditional acceptance is once made, there is a perfect and binding contract. When an offer is made by letter, which is to be accepted by a particular time, there is a presumption that the intention to contract continues until that time arrives, unless the offer is before then rescinded. Thus, where an offer was made by the defendant to sell at a certain price, "receiving an answer by return of post," and through the defendant's mistake the plaintiff did not get the letter at the time he should have done, but when he did receive it sent an answer by return of post, and the defendant had in the meantime considered the bargain off, and sold to some one else, it was held that there was a perfect contract (*z*). In another case, an offer was made which required an answer by return of post, and, by the fault of the post-office officials, the letter did not reach the plaintiff when it ought to have done, but directly he did receive it he accepted the offer; it was held that there was a complete contract (*a*). And it has been held that an offer by telegram is presumptive evidence that a prompt reply is expected, and an acceptance by letter may be evidence of such unreasonable delay as to justify a withdrawal of the offer (*b*).

Presumption of continuance of intention to contract.

Adams v. *Lindsell.*

Dunlop v. *Higgins.*

Quenerduaine v. *Cole.*

(*w*) *Ramsgate Hotel Co.* v. *Montefiore* (1866), L. R. 1 Ex. 109; 35 L. J. Ex. 90. (*x*) *Post*, p. 39.

(*y*) *Routledge* v. *Grant* (1828), 4 Bing. 653.

(*z*) *Adams* v. *Lindsell* (1818), 1 B. & Ald. 681. See also *Stevenson* v. *M'Lean* (1880), 5 Q. B. D. 356; 49 L. J. Q. B. 701; 28 W. R. 916.

(*a*) *Dunlop* v. *Higgins* (1848), 1 H. L. 381.

(*b*) *Quenerduaine* v. *Cole* (1883), 32 W. R. 185.

It is now definitely decided with regard to a contract taking place through the post—*i.e.*, where it is understood, either expressly or impliedly, between the parties that the acceptance is to be sent by post—that such a contract is complete directly the letter accepting the offer is posted, even although it may never reach its destination (*c*). In fact, where an offer is made under such circumstances that it must have been within the contemplation of the parties, that, according to the ordinary usages of mankind, the post might be used as a means of communicating the acceptance, the contract is complete as soon as the acceptance is posted (*d*). It had formerly been held that such a contract is not complete until the letter of acceptance is received by the party making the offer (*e*), but this decision is now clearly overruled, and the law is as just stated.

When a contract taking place through the post is complete.

Henthorn v. *Fraser*.

An offer made under seal cannot be withdrawn (*f*); but in other cases, as already stated, there is until acceptance a *locus pœnitentiæ*, and it may be withdrawn. But no withdrawal or revocation of an offer is effective until communicated, and though, as already stated, in the case of contracts taking place through the post, an acceptance is communicated when it is despatched, a revocation or withdrawal is not communicated until it is received (*g*). Therefore, where the defendant wrote and posted an offer (which naturally indicated that the acceptance might be communicated in the same way), and the plaintiff wrote accepting it, and posted such acceptance, and in the meantime the defendant had written withdrawing his offer, but such letter of withdrawal had not been received by the plaintiff at the time of posting his acceptance, it was held that there

Revocation or withdrawal of an offer.

Byrne v. *Van Tienhoven*.

(*c*) *Harris's Case* (1872), L. R. 7 Ch. Ap. 587 ; 41 L. J. Ch. 621 ; *Household Fire Insurance Co.* v. *Grant* (1879), 4 Ex. Div. 216 ; 48 L. J. Ex. 577.

(*d*) *Henthorn* v. *Fraser* (1892), 2 Ch. 27 ; 61 L. J. Ch. 373 ; 66 L. T. 439.

(*e*) *British American Telegraph Co.* v. *Colson* (1871), L. R. 6 Ex. 108 ; 40 L. J. Ex. 97.

(*f*) *Xenos* v. *Wickham* (1866), 2 H. L. 296 ; 36 L. J. C. P. 313.

(*g*) *Henthorn* v. *Fraser* (1892), 2 Ch. 27 ; 61 L. J. Ch. 373 ; 66 L. T. 439.

was a complete contract (*h*). As stated in the case just referred to below, both legal principles and practical convenience require that a person who has accepted an offer not known to him to have been revoked shall be in a position safely to act upon the footing that the offer and acceptance constitute a contract binding upon both parties. Although a person makes an offer which is to remain open for a certain time, he may retract or withdraw the offer, even during that time, before it has been accepted, and a sale to another person is sufficient retraction or withdrawal if it comes to the knowledge of the other party, either directly or indirectly, under circumstances sufficient to induce such other party to believe it (*i*).

Dickinson v. *Dodds.*

Recovery of reward offered by advertisement.

It has been held that where a person offers by advertisement a reward for the doing of some act, any person doing such act has a right to recover the advertised reward. The advertisement is at first only an offer to the whole world at large, but any particular person doing the act renders it the same as if the offer had been made to and accepted by him, and the doing of the act required amounts to a valuable consideration, so that all the essentials of a valid simple contract exist (*k*). It is submitted that this principle does not apply if the person doing the act did not at the time know of the reward offered (*l*).

Conditions on tickets, receipts, &c.

If a person offers to sell or carry goods, or do any other act, on certain terms and conditions, and the party to whom the offer is made buys the goods, or delivers the goods to be carried, or suffers the other act to be done, he is taken to have assented to the

(*h*) *Byrne* v. *Van Tienhoven* (1880), 5 C. P. D. 344 ; 49 L. J. C. P. 316 ; 42 L. T. 371. See hereon *Re London and Northern Bank, ex parte Jones* (1900), 1 Ch. 220 ; 69 L. J. Ch. 24 ; 81 L. T. 512.

(*i*) *Dickinson* v. *Dodds* (1876), 2 Ch. D. 463 ; 45 L. J. Ch. 777.

(*k*) Per Lord Campbell, in *Gerhard* v. *Bates* (1853), 2 E. & B. 476 ; *Carlill* v. *Carbolic Smoke Ball Co.* (1893), 1 Q. B. 256 ; 62 L. J. Q. B. 257 ; 67 L. T. 837.

(*l*) See this point and the case of *Williams* v. *Carwardine* (1833), 4 B. & Ad. 621, which is sometimes quoted as an authority to the contrary, dealt with in Anson's Contracts, p. 23. There appears to be no direct English authority on the point, but there are conflicting American authorities.

special terms and conditions. Thus if A. puts up in his shop a notice that he charges interest on the price of all goods sold and not paid for within a certain time, and a person having seen that notice buys goods, he has assented to the condition as to interest, and it forms part of the contract (*m*). Matters of this kind often arise in the case of railway companies who make offers to carry or receive goods on certain conditions, *e.g.*, by giving a receipt or ticket containing detailed terms and conditions. The question then arises whether the party is bound by such terms and conditions. If he read the conditions, then certainly he is bound by them; and this is also the case if he saw there were certain conditions but did not choose to read them, or if the conditions were so plainly stated on the face of the document that he must be taken to have seen them, or to be guilty of negligence in not having read them (*n*). But if the conditions are stated on the back of the document, or in very small type, so that a person cannot be presumed to have seen them, and is guilty of no negligence in not having done so, then he is not bound by them unless it is proved that he did in fact see them (*o*).

Henderson v. *Stevenson.*

Thirdly, as to consideration. A valuable consideration has already been defined (*p*), and upon it the first point to be noticed is, that though some valuable consideration is an essential to a simple contract (*q*), yet the question of whether or not the consideration is sufficient for what is agreed to be done will not be entered into.

The question of whether or not a consideration is sufficient for what is agreed to be done, cannot be considered.

(*m*) See *Watkins* v. *Rymill* (1883), 10 Q. B. D. 178; 52 L. J. Q. B. 121.

(*n*) *Harris* v. *Great Western Ry.* (1876), 1 Q. B. D. 515; 45 L. J. Q. B. 729; *Parker* v. *South-Eastern Ry.* (1877), 2 C. P. D. 416; 46 L. J. C. P. 768.

(*o*) *Henderson* v. *Stevenson* (1875), L. R. 2 Sc. App. 470; *Richardson* v. *Rowntree* (1894), A. C. 216; 63 L. J. Q. B. 283.

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

(*q*) For some remarks on how consideration came to be the important ingredient in simple contracts, the student is referred to Anson's Contracts, 55–60; and it may be useful to quote here the following passage from that work (p. 59): "It is a hard matter to say how consideration came to form the basis upon which the validity of informal promises might rest. Probably the '*quid pro quo*' which furnished the ground of the action of debt, and the detriment to the promisee on which was based the delictual action of assumpsit, were both merged in the same general conception of consideration as it was developed in Chancery."

Thus the forbearance of legal proceedings even for a very short time is a perfectly satisfactory valuable consideration for an agreement to pay a much larger sum (*r*); and a *bonâ fide* compromise of a real claim is a valuable consideration, whether the claim would have been successful or not, but the plaintiff must believe that he has a case, and must intend *bonâ fide* to maintain it (*s*). If the professed consideration is practically nothing at all, but simply a nullity, as, for instance, the surrender of a tenancy at will, which may be determined at any time, then it will not be sufficient. In other words, consideration need not be adequate (*t*), but must be real (*u*). It has also long been the rule in equity in cases of most utter and unconscionable inadequacy of consideration—such inadequacy, in fact, as to shock the conscience—to give relief on the ground of some imposition or fraud, and in the case of bargains with expectant heirs it is generally necessary to shew that a full consideration was paid (*x*); and this now applies to all divisions of the High Court of Justice. Further, the provision of the Money-Lenders Act, 1900, already referred to (*y*), must be borne in mind; but still there is nothing in all this to do away with the correctness of the general rule, that the question of adequacy or inadequacy of the consideration will not be entertained.

When writing is used, it must shew the consideration as well as the promise.

When writing is used, it is not sufficient for the writing to shew the promise, and then to shew by oral evidence that there was a consideration for that promise, but both the promise and the consideration must appear on the face of the written contract, or be capable of being implied therefrom (*z*), or it will not be binding; for

(*r*) See, for instance, *Smith* v. *Algar* (1831), 1 B. & Ad. 603.

(*s*) *Miles* v. *New Zealand Alford Estate Company* (1886), 32 Ch. D. 266; 55 L. J. Ch. 801; 34 W. R. 669; 54 L. T. 582.

(*t*) *Thornborow* v. *Whitacre* (1706), 2 Ld. Ray. 1164; *Bainbridge* v. *Firmstone* (1838), 1 Ad. & E. 743.

(*u*) Anson's Contracts, 88 *et seq.*

(*x*) See hereon Indermaur and Thwaites' Manual of Equity, 265-269.

(*y*) *Ante*, p. 31.

(*z*) Thus it is not necessary in a contract in writing for the sale of goods that the price of the goods should be actually named, if in fact no specific price has been agreed on, for it will be presumed that the contract is to pay a reasonable price. But if a specific price is agreed

the consideration is part of the agreement (*a*), and this is so even though writing was not necessary to the validity of the contract. To this rule there are exceptions in the case of bills of exchange and promissory notes, in which the consideration is presumed until the contrary is shewn, and also in the case of guarantees, by the Mercantile Law Amendment Act, 1856 (*b*). The reason for the alteration in the case of guarantees was because it was found in practice that the rule led to many unjust and technical defences to actions upon guarantees (*c*); but of course the statute does not dispense with the necessity of a consideration to a guarantee, but merely provides that it need not appear on the face of the instrument.

Wain v. *Warlters.*

Exceptions to the rule.

Considerations with reference to the time of their performance may be either *executed, i.e.*, something done before the making of the promise; *executory, i.e.*, something to be done at a future day; *concurrent, i.e.*, taking place simultaneously; or *continuing, i.e.*, partly performed, and partly yet to take place (*d*). A very important question to be asked on this subject is, Will an executed consideration support a promise? and the answer is mainly found in the leading case of *Lampleigh* v. *Braithwaite* (*e*), which decides that "a mere voluntary courtesy will not uphold assumpsit, but a courtesy moved by a previous request will." An executed or past consideration, therefore, to support a promise must be moved by a precedent request, *e.g.*, if the plaintiff in his statement of claim alleges that in consideration that he had done a certain act for the defendant, the defendant promised, this would be bad;

Considerations divided with reference to the time of their performance.

An executed consideration will only support a promise when moved by a precedent request.

Lampleigh v. *Braithwaite.*

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on, then that price must be mentioned in the contract, and oral evidence is inadmissible on the point (*Hoadley* v. *M'Laine* (1804), 10 Bing. 482).

(*a*) *Wain* v. *Warlters* (1832), 1 S. L. C. 323; 5 East, 10. See, however, the case of *Re Barnstaple Second Annuitant Society* (1882), 50 L. T. 424, where it was held that oral evidence might be admitted to show that there was another consideration besides the one mentioned in the contract.

(*b*) 19 & 20 Vict. c. 97, s. 3.

(*c*) 1 S. L. C. 309.

(*d*) Chitty on Contracts, 33.

(*e*) (1614), 1 S. L. C. 141; Hobart, 105; and see *Bradford* v. *Roulston* (1858), 8 Ir. R. C. L. 468.

but if he stated that in consideration that he had done a certain act for the defendant *at his request*, the defendant promised, this would be good. This previous request may be either express or implied, and it will be implied in the following cases:

Cases in which the previous request will be implied.

1. Where the plaintiff has been compelled to do that which the defendant was legally compellable to do and ought to have done, *e.g.*, where the plaintiff was a surety for the defendant, and has been called upon to pay, and has paid, the amount for which he was surety.

2. Where the plaintiff has voluntarily done what the defendant was compellable to do, and in consideration thereof the defendant has afterwards expressly promised to reimburse him. A person cannot recover for his spontaneous act unless there is such a subsequent promise (*f*), but the promise being made, then the prior request is implied.

3. Where the defendant has accepted the benefit of the consideration, *e.g.*, if a tradesman sends to a man goods which he never ordered, but he chooses to keep them (*g*) ; and

4. Where the plaintiff has voluntarily done some act for the defendant which is for the public good, *e.g.*, in paying the expenses of burying a person in the absence of the one legally liable to pay such expenses (*h*).

Counsel's services.

There is one case even at the present day in which, though there is actually an express previous request, no action can be maintained, viz., in the case of counsel's services, for any fee is here looked upon as an honorarium.

An executed consideration from which the law implies a promise will not support any other promise.

In discussing executed considerations there is another important point to be mentioned, and that is that where from the executed consideration the law implies a promise, the force and strength of the consideration is exhausted in producing the implied promise, and it will

(*f*) *Stokes* v. *Lewis* (1786), 1 T. R. 20.
(*g*) 1 S. L. C. 147 ; Chitty on Contracts, 34.
(*h*) Roscoe's Digest, 513.

support no express promise in addition to it. Thus it was held that where an account had been stated, and a sum found to be due thereon to the plaintiff, that this fact would not support an express promise to pay such sum *in futuro*, because the promise that the law implied from it was to pay *in præsenti* (*i*). So again, in the case of *Roscorla* v. *Thomas* (*j*), where, in consideration that the plaintiff had, at the defendant's request, bought a horse of the defendant, the defendant afterwards promised that the horse was free from vice, it was held that there was no consideration to support this promise, for it was an executed consideration from which the law had already implied a promise to deliver the horse, and therefore it would not serve to support any other promise.

Roscorla v. *Thomas.*

There are many matters of a past nature which throw upon a person a moral obligation, but though there have been cases to show that a merely moral consideration will support a promise (*k*), they may be put aside as undoubtedly not law at the present day, and it can be definitely stated that a consideration only moral in its nature will not be sufficient to support a contract (*l*). This is well illustrated by the case of *Beaumont* v. *Reeve* (*m*), in which it was decided that a promise by a man that, in consideration that he had seduced and cohabited with a woman, he would make her a certain payment, was a mere *nudum pactum*, and could not be enforced: the seduction gave forth no obligation towards the woman which, according to our laws, could be enforced, and therefore no promise could give a right of action on it. This must not be confused with a promise by a man to pay a sum to the mother of his illegitimate child towards its support, for this is perfectly valid, as a mother by undertaking the entire support of such child does more than by law she is

A merely moral consideration will not support a promise.

Beaumont v. *Reeve.*

(*i*) *Hopkins* v. *Logan* (1839), 5 M. & W. 247.
(*j*) (1842), 3 Q. B. 234; 6 Jur. 939.
(*k*) Chitty on Contracts, 28.
(*l*) *Eastwood* v. *Kenyon* (1840), 11 A. & E. 438.
(*m*) (1846), 8 Q. B. 483.

bound to do, and this forms a sufficient consideration for the promise (*n*).

But a moral obligation which was once a legal one will support a promise.

But though a merely moral obligation will not constitute a sufficient foundation to support a promise, yet, if it is not entirely of a moral nature, but was once a legal obligation, which has only become a moral one by reason of having become devoid of legal remedy, it may support a promise (*o*). The correct rule upon the point has been well stated to be that "an express promise can only revive a precedent good consideration which might have been enforced at law through the medium of an implied promise, had it not been suspended by some positive rule of law; but *can give no original right of action if the obligation on which it is founded could never have been enforced at law*, though not barred by any legal maxim or statute provision" (*p*). Thus in the case of an agreement to pay a sum in consideration of past seduction, this is an obligation which never could have been enforced at law; but in the case of a debt which has been barred by the Statute of Limitations, though, being so barred, the obligation to pay is merely a moral one, yet it is an obligation which could once have been enforced, and has been rendered simply moral only by reason of its having become devoid of legal remedy, and the promise to pay such a debt is binding (*q*). This principle does not, however, apply to a debt from which a bankrupt is released by his order of discharge, for no promise to pay such a debt can be enforced unless supported by a new and valuable consideration (*r*), the debt being, in fact, extinguished.

Statute-barred debt.

Jakeman v. *Cook*.

(*n*) *Smith* v. *Roche* (1859), 28 L. J. C. P. 237. (*o*) 1 S. L. C. 148.

(*p*) Note to *Wennall* v. *Adney* (1862), 3 B. & P. 252. The following quotation also puts the matter very plainly:—"Where the consideration was originally beneficial to the party promising, yet if he be protected from liability by some provision of the Statute or Common Law, meant for his advantage, he may renounce the benefit of that law; and if he promises to pay the debt, which is only what an honest man ought to do, he is then bound by the law to perform it." (Per Parke, B., in *Earle* v. *Oliver* (1848), 2 Ex. 90.)

(*q*) As to limitation generally, see *post*, pp. 277–284.

(*r*) *Jakeman* v. *Cook* (1878), 4 Ex. D. 26; 48 L. J. Ex. 165; 27 W. R. 171.

An executory consideration must have been performed before an action can be brought.

With regard to an executory consideration, as it consists of something to be done at a future day, naturally before an action can be maintained on the contract, the future act forming the consideration must have been done by the plaintiff, or he must at least have been always ready and willing to do it:

The doing of an act a person was bound to do is no consideration.

The doing by a person of an act which he was already under a legal obligation to do cannot form a consideration; thus a promise by a master of a ship to pay his seamen a sum in addition to their proper wages, as an incitement to extra exertion on sudden emergency, is not binding, for they are, as seamen, bound to do everything in their power (*s*). This is an instance of unreality of consideration (*t*). But it would be different if risks had arisen which were not contemplated by the contract, and the agreement was to make further payments by reason of this (*u*).

As to an impossible consideration.

If the consideration stated for a promise is of such a nature as to be either legally or morally impossible, no promise founded on it will be binding (*x*). By a consideration legally impossible, is meant where a person agrees to do an act which is contrary to the law, or not permitted by law to be done (*y*); and by a consideration morally impossible, is meant where a person agrees to do an act which is simply an absurdity as being naturally and physically impossible, "as if the consideration be a promise that A. shall go from Westminster to Rome in three hours" (*z*). Here this is manifestly an absurdity and an impossibility, and from such a promise no benefit or advantage can result to the other party, so that it in fact amounts to no consideration at all. And although a consideration did not originally appear impossible, yet if from

(*s*) *Stilk* v. *Myrick* (1809), 2 Camp. 317; *Harris* v. *Carter* (1854), 3 E. & B. 559.

(*t*) See Anson's Contracts, 101.

(*u*) *Hartley* v. *Ponsonby* (1857), 7 E. & B. 870.

(*x*) Chitty on Contracts, 31, 32.

(*y*) See *Haslam* v. *Sherwood* (1833), 10 Bing. 540; *Harvey* v. *Gibbons*, 2 Lev. 161; *Whitmore* v. *Farley* (1881), 29 W. R. 825; 45 L. T. 99.

(*z*) Chitty on Contracts, 31, 32.

circumstances it appears that it is so, the rule equally applies, or if it is made impossible by statute (*a*).

Articled clerk's or apprentice's premium.

If an apprentice or articled clerk pays a premium, and the master dies before completion of the period of the apprenticeship or articles, no portion of the premium can be recovered (*b*), unless there is a stipulation providing for it, or the master is a member of a firm (*c*). In the event of the bankruptcy of the master, however, provision is made by the Bankruptcy Act, 1883, for the return of a portion of the premium (*d*).

The object of a contract must not be illegal or immoral.

Fourthly, as to the object of the contract. This must be neither of an illegal nor immoral nature, either directly or indirectly. A contract, however, which is unlawful by English law but valid in the country where it is made and is to be performed, is not treated as invalid by English Courts (*e*) unless an English statute prohibits it or it is a gross violation of moral law (*f*); but if such contract was intended to be performed in England, then it will not be enforced by English Courts unless it would be enforced if made in England (*g*). If there are legal and illegal acts stipulated for in a contract, and they are clearly divisible, the whole contract will not be void but only the illegal part (*h*). Irrespective of illegality, a contract may sometimes be avoided on the ground of impossibility of performance. Where there is obvious physical or legal impossibility apparent on the face of the contract, there is, in fact, nothing binding between the parties. And where, though there is nothing impossible on the face of the contract, yet a subsequent impossibility arises, that may sometimes

Impossibility of performance.

(*a*) See *Chanter* v. *Lees* (1835), 4 M. & W. 295; Chitty on Contracts, 32.

(*b*) *Whincup* v. *Hughes* (1871), L. R. 6 C. P. 78; 40 L. J. C. P. 104; 24 L. T. 76; *Ferns* v. *Carr* (1885), 28 Ch. D. 400; 54 L. J. Ch. 478; 52 L. T. 348.

(*c*) *Ex parte Bayley* (1829), 9 B. & C. 691.

(*d*) 46 & 47 Vict. c. 52, s. 41.

(*e*) *Santos* v. *Illidge* (1860), 8 C. B. N. S. 861.

(*f*) *Kaufman* v. *Gerson* (1904), 1 K. B. 591; 73 L. J. K. B. 320; 90 L. T. 608.

(*g*) *Hope* v. *Hope* (1867), 1 D. G. & M. 731; *Grell* v. *Levy* (1864), 16 C. B. N. S. 73.

(*h*) See further as to illegal contracts, *post*, ch. ix.

avoid all future obligations on it, *e.g.*, if it has become impossible to perform the contract by reason of a change in the law (*i*); or if the continued existence of a specific thing was essential to performance, and it is destroyed without fault on either side (*j*). So also a contract which was for personal services is discharged by the death or incapacitating illness of the promisor (*k*).

Personal services.

To a deed, writing is, of course, an essential, for to constitute a deed there must be a writing actually sealed and delivered; but for simple contracts, at common law, no writing was necessary, nor is it at the present day, except in those cases in which it has been rendered necessary either by statute or custom. Those cases in which writing is necessary are mostly of great practical importance, and may be stated to be chiefly as follows:—

Cases in which writing is necessary.

1. In cases coming within the Statute of Frauds (*l*), Lord Tenterden's Act (*m*), or the Sale of Goods Act, 1893 (*n*).

2. Contracts relating to the sale or assignment of copyright.

3. Contracts relating to the sale or transfer of ships; and,

4. Bills of exchange, promissory notes, and other like negotiable instruments.

Of the above cases, by far the most extensive is that numbered 1, and here it must be remembered that the writing required by these statutes does not go to the existence of the contract; that the contract exists

(*i*) *Bailey* v. *De Crespigny* (1869), L. R. 4, Q. B. 180; 38 L. J. Q. B. 98.

(*j*) *Taylor* v. *Caldwell* (1863), 3 B. & S. 826; 32 L. J. Q. B. 164; *Appleby* v. *Myers* (1867), 36 L. J. C. P. 331; *Nickoll* v. *Ashton* (1901), 2 K. B. 126; 70 L. J. K. B. 600; 84 L. T. 804; *Blakeley* v. *Muller* (1903), 88 L. T. 90; 67 J. P. 51; *Krell* v. *Henry* (1903), 2 K. B. 740; 72 L. J. K. B. 794; 89 L. T. 328; *Chandler* v. *Webster* (1904), 1 K. B. 493; 73 L. J. K. B. 401; 90 L. T. 217. The three last-mentioned cases were in connection with the abortive Coronation procession on the accession of His Majesty King Edward VII.

(*k*) See Anson's Contracts, 349.

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

(*m*) 9 Geo. IV. c. 14.

(*n*) 56 & 57 Vict. c. 71.

though it may not be clothed with the necessary form, and the effect of non-compliance with the statutory provisions is simply that no action can be brought until the omission is made good (*o*).

Of the Statute of Frauds the most important sections are the 1st, 2nd, 3rd, 4th, and 7th. The 17th section has been repealed and replaced by section 4 of the Sale of Goods Act, 1893.

Provisions of the 1st, 2nd, and 3rd sections of the Statute of Frauds.

The effect of the 1st and 2nd sections of the Statute of Frauds taken together is, that an oral lease can be made only if it does not exceed three years from the making thereof, and the rent is at least two-thirds of the annual value (*p*). By the third section all assignments and surrenders of leases must be in writing, signed by the parties or their agents authorized in writing.

Provisions of the 7th section.

The 7th section should perhaps hardly be mentioned in the present work. It provides that trusts of land, or any interest in land, must be evidenced by signed writing; but it does not require any writing to create a trust of purely personal property, though under section 9 all grants and assignments of *any* trust must be in writing. There remain the 4th and 17th sections to be considered.

Provisions of the 4th section.

The 4th section provides that "no action shall be brought (1) to charge any executor or administrator upon any special promise to answer damages out of his own estate, or (2) to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person, or (3) to charge any person upon any agreement made upon consideration of marriage, or (4) upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, or (5) upon any agreement that is not to be performed within the space of one year from the making thereof, *unless* the agreement upon which

(*o*) Anson's Contracts, 78; and see *Bailey* v. *Sweeting* (1861), 9 C. B. N. S. 843; see also *ante*, p. 27.

(*p*) See further hereon, *post*, ch. iii. p. 63.

such action is brought, or some memorandum or note thereof, shall be in writing, signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

"Memorandum or note."

As to what is a sufficient "memorandum" or note to satisfy the statute, the case of *Re Hoyle, Hoyle* v. *Hoyle* (*q*), may usefully be referred to. A testator had in his lifetime verbally promised to guarantee payment of debts due from his son to a certain firm, and he recited this fact in his will and codicil. In the administration of the estate, the firm made a claim against the estate under the guarantee, and it was held that the reference in the will and codicil to the guarantee was a "note or memorandum in writing," within the meaning of section 4 of the Statute of Frauds, of a promise by the testator to answer for the debt of his son, and therefore the testator's estate was liable.

Hoyle v. *Hoyle.*

As to contracts by executors or administrators to answer damages out of their own estates.

With regard to a promise by an executor or administrator to answer damages out of his own estate, it need only here be said that, although the writing required by the statute exists, yet there must also be some valuable consideration for the promise; thus the mere fact of an executor or administrator stating in writing that he will see a certain debt paid, is not sufficient to render him personally liable in the absence of some consideration, *e.g.*, the giving of time or forbearing of proceedings by the creditor

As to guarantees.

But the next kind of contract mentioned in the 4th section, viz., a guarantee, or agreement to answer for the debt, default, or miscarriage of another person, demands a more lengthened consideration.

Birkmyr v. *Darnell.*

In the first place must be observed the decision in the leading case of *Birkmyr* v. *Darnell* (*r*), to the effect that a promise to answer for the debt, default, or miscarriage of another, for which that other person

(*q*) (1893) 1 Ch. 84; 62 L. J. Ch. 182; 67 L. T. 674; 41 W. R. 81.
(*r*) (1702) 1 S. L. C. 299; Salkeld, 27.

remains liable, is within the statute, and must be in writing; but if that other does not remain liable, then it is not within the statute, and need not be in writing. To illustrate this, the following example may be given:—A. goes into a shop with B., and says to the shopkeeper, "Supply goods to B., and if he does not pay you for them, then I will." This is within the statute, for it is a guarantee, and to render A. liable it must be reduced into writing. But if A. goes into a shop with B. and says, "Supply goods to B. and charge them to me," this is not within the statute, for it is no guarantee, but a direct sale to A., the goods being by his direction sent to B., and therefore, to render A. liable, there need be no writing (*s*).

Promise to the debtor himself.

Again, if the promise is made to the debtor himself, it is not within the statute, for the statute only applies to promises made to the person to whom another is answerable (*t*).

Formerly consideration must appear in the guarantee.

A guarantee formerly came within the common rule (*u*) that the consideration as well as the promise must appear on the face of the instrument, but in consequence of the difficulty of setting forth the consideration in a sufficient manner to satisfy the courts of law, this rule proved to be a grievance to the mercantile community (*x*), and in consequence the Mercantile Law Amendment Act, 1856 (*y*), provides that a guarantee shall be valid without the consideration appearing on its face. The same statute (*z*) provides that on a surety paying the principal's debt he shall be entitled to have assigned to him, or a

The consideration need not now appear on the face of a guarantee.

(*s*) Unless, indeed, it comes within section 4 of the Sale of Goods Act, 1893 (formerly section 17 of the Statute of Frauds), as to which see *post*, ch. iv. p. 99. The question as to whether words used do or do not amount to a guarantee, is one for the determination of the Court not the jury: *Bank of Montreal* v. *Munster Bank*, 11 Ir. Rep. C. L. 47.

(*t*) *Eastwood* v. *Kenyon* (1840), 11 A. & E. 446. See further as to what are and what are not guarantees within the 4th section of the Statute of Frauds, and the distinction between a contract of guarantee and a contract to indemnify, *post*, p. 152.

(*u*) Stated *ante*, p. 42.

(*x*) 1 S. L. C. 304; *ante*, p. 43.

(*y*) 19 & 20 Vict. c. 97, s. 3.

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

trustee for him, every judgment, or other security, held by the creditor, notwithstanding the same may be deemed at law satisfied by his payment or performance, and such a person shall be entitled to stand in the place of the creditor (*a*). Before this statute the surety only had a right to collateral securities, and not to the principal security itself. The rule as to a surety's right to securities equally applies, though he did not know of the existence of such securities when he became a surety, his right in no way depending on contract, but being the result of the equity to indemnification attendant on suretyship (*b*); and the right of a co-surety who has satisfied a judgment obtained by the creditor against the debtor and his sureties, to stand in the place of the judgment creditor, is not affected by the circumstance that such surety has not obtained an actual assignment of the judgment (*c*). If a person gives a continuing guarantee to a firm, or to a third person for a firm, it is, unless otherwise expressly or impliedly agreed, revoked as to future transactions, by any change in the firm (*d*).

Rights of a surety on paying his principal's debt.

Surety to or for a firm, &c.

The following acts will operate to discharge a surety :—

Acts which will operate to discharge a surety.

(1) Any fraudulent misrepresentation or concealment (*e*).

(2) The failure of an intended co-surety to execute (*f*).

(3) Alteration of the instrument of suretyship by an intended co-surety (*g*).

(4) The creditor's connivance at the principal's

(*a*) *Re Churchill, Manisty* v. *Churchill* (1888), 39 Ch. D. 174, 59 L. T. 597.

(*b*) *Duncan Fox & Co.* v. *North and South Wales Bank* (1881), L. R. 6 Ap. Cas. 1; 50 L. J. Ch. 335; 29 W. R. 763; *Forbes* v. *Jackson* (1882), 19 Ch. D. 615; 51 L. J. Ch. 690; 30 W. R. 652.

(*c*) *Re M'Myn, Lightbound* v. *M'Myn* (1886), 33 Ch. D. 575; 55 L. J. Ch. 845; 35 W. R. 179.

(*d*) 53 & 54 Vict. c. 39, s. 18.

(*e*) *Railton* v. *Matthews* (1844), 10 C. & F. 934; *Phillips* v. *Foxall* (1872), 7 L. R. Q. B. 666; 41 L. J. Q. B. 293; *Durham* v. *Fowler* (1889), 22 Q. B. D. 394; 58 L. J. Q. B. 246.

(*f*) *Evans* v. *Brembridge* (1856), 25 L. J. Ch. 334.

(*g*) *Ellesmere Brewery Co.* v. *Cooper* (1896), 1 Q. B. 75; 65 L. J. Q. B. 173.

default, or his laches, but a mere voluntary forbearance for a short period will not be sufficient laches (*h*).

(5) Non-performance of conditions by the creditor (*i*).

(6) The discharge (*j*) of the principal (except as mentioned in the next succeeding page).

(7) Any alteration of the terms of the contract between the creditor and the principal debtor, which may have the effect of interference for a time with the creditor's remedies against the principal debtor (*k*).

(8) A binding agreement by the creditor with the debtor to give him time, unless the creditor and the debtor also stipulate that it shall not discharge the surety, when (even although not by his consent) it will not discharge him (*l*); but a mere voluntary giving of time, without any obligation to do so, will not operate to discharge a surety (*m*).

(9) In the case of a continuing guarantee, it may always be revoked at will, and the surety discharged from further liability. A continuing guarantee is not *ipso facto* revoked by the death of the guarantor, but notice of the death of the guarantor given to the holder of the guarantee, is constructive revocation as to future advances (*n*), unless the contract of guarantee stipulates for a special notice (*o*). A continuous guarantee under seal, where the consideration is given once for all, is

Balfour v. *Crace.*

(*h*) *Strong* v. *Foster* (1856), 25 L. J. C. P. 106.

(*i*) *Lawrence* v. *Walmesley* (1862), 31 L. J. C. P. 143.

(*j*) A payment made by the debtor to the creditor which is afterwards set aside as a fraudulent preference in the debtor's bankruptcy does not discharge the surety. *Petty* v. *Cooke* (1871), L. R. 6, Q. B. 790; 40 L. J. Q. B. 281.

(*k*) *Bonser* v. *Cox* (1844), 6 Beav. 110; *Watts* v. *Shuttleworth* (1860), 10 W. R. 132; *Holme* v. *Brunskill* (1877), 3 Q. B. D. 495; 47 L. J. Q. B. 610.

(*l*) *Rees* v. *Berrington* (1795), 2 W. & T. 578; 2 Ves. Jur. 540; *Owen* v. *Homan* (1853), 4 H. L. 997; *Boaler* v. *Mayor* (1865), 19 C. B. (N. S.), 76; *Croydon Gas Co.* v. *Dickenson* (1876), 2 C. P. D. 46; 46 L. J. C. P. 157; *Norman* v. *Bolt* (1884), 1 C. & E. 77.

(*m*) *Bell* v. *Banks* (1831), 3 M. & G. 258; *Clarke* v. *Birley* (1889), 41 Ch. D. 422; 58 L. J. Ch. 616; 60 L. T. 948; *Rouse* v. *Bradford Banking Co.* (1894), Q. S. 586; 63 L. J. Ch. 890.

(*n*) *Coulthart* v. *Clementson* (1880), 5 Q. B. D. 42; 49 L. J. Q. B. 204; 28 W. R. 355.

(*o*) *Re Silvester, Mid. Ry. Co.* v. *Silvester* (1895), 64 L. J. Ch. 390; 72 L. T. 283.

not determinable by the death of the guarantor, nor by the fact that his death has come to the knowledge of the person to whom the guarantee is given; nor can such a guarantee be determined by notice from the guarantor or his executors, unless there be an express stipulation to that effect (*p*).

Position of parties to a bill.

On a bill of exchange the party primarily liable is the acceptor, and the other persons liable thereon stand in the position of sureties for him, as is hereafter explained (*q*), and the rule, therefore, as to what acts will operate to discharge a surety applies to the persons liable on a bill other than the acceptor. With regard to the release of any principal debtor, it is enacted by the Bankruptcy Act, 1890 (*r*), that the acceptance by a creditor of a composition or scheme of arrangement, shall not release any person who under that Act would not be released by an order of discharge if the debtor had been adjudged bankrupt (*s*).

Agreement for guarantee.

An agreement to give a guarantee is within the statute and must be in writing (*t*).

Meaning of an agreement made in consideration of marriage.

An agreement made in consideration of marriage does not mean the actual promise of marriage (for that would be contrary to the general usages of mankind), but means a contract for the doing of collateral acts in consideration of marriage (*u*). An action, therefore, for breach of promise of marriage, may be brought although the promise is not evidenced by writing, so only that it can be clearly proved, and the evidence of the plaintiff—as is hereafter mentioned (*x*)—is corroborated in some material respect. Contracts as to land are treated of in the next chapter (*y*).

(*p*) *Re Crace, Balfour* v. *Crace* (1902), 1 Ch. 733; 71 L. J. Ch. 358: 86 L. T. 144.
(*q*) See *post*, p. 174.
(*r*) 53 & 54 Vict. c. 71, sect. 3 (19).
(*s*) This had already been decided to be so before under the Bankruptcy Act, 1869. *Ex parte Jacobs* (1875), 10 Ch. App. 211; 44 L. J. Bk. 34.
(*t*) *Mallet* v. *Bateman* (1866), L. R. 1 C. P. 163.
(*u*) *Vincent* v. *Vincent* (1886), 35 W. R. 7; 55 L. T. 181.
(*x*) See *post*, Part III. ch. ii.
(*y*) See *post*, ch. iii. p. 60, *et seq.*

As to agreements not to be performed within a year.

The term, "an agreement not to be performed within a year from the making thereof," seems on the face of it clear enough, but a more careful consideration will shew the student that doubts may arise on its meaning. There may be some contracts as to which it is utterly impossible that they can be performed within the year, and others which may or may not, according to circumstances, be carried out within the year—is the statute to apply to all or which of these? It has been decided that this clause in the Statute of Frauds only means and includes agreements which from their terms are actually incapable of performance within the year, and does not include contracts which may or may not, according to circumstances, be performed within that period (*z*). Further, it has been held that an agreement is not within the statute if all that is to be done by one of the parties is to be done within a year, so that where the tenant under a twenty years' lease, of which fourteen years had still to run, verbally promised his landlord that, in consideration of £50 to be laid out in alterations by the landlord, he would pay an additional rent of £5 a year during the remainder of the lease, it was held that as the laying out of the £50 was to be within a year, the agreement was not within the statute, and need not be in writing (*a*). Where by the terms of a contract one party can perform his part of it within a year, a subsequent request by the other party that such performance should be postponed till after a year, does not bring the case within the statute, although such request be acceded to (*b*).

Peter v. *Compton.*

Donnellan v. *Read.*

A contract for a year's service from a subsequent day.

A contract made on one day for a year's service to commence on the next day is not an "agreement that is not to be performed within the space of a year from the making thereof"; but if it is to commence on some later day, then it is (*c*). If a contract appears

(*z*) *Peter* v. *Compton* (1694), 1 S. L. C. 316; Skinner, 353.

(*a*) *Donnellan* v. *Read* (1832), 3 B. & Ad. 899. See also *Lavalette* v. *Richards* (1908), 52 S. J. 279.

(*b*) *Beran* v. *Carr* (1885), 1 C. & E. 499.

(*c*) *Smith* v. *Gold Coast and Ashanti Explorers Ltd.* (1903), 1 K. B. 538; 72 L. J. K. B. 235; 88 L. T. 442; *Braceyirdle* v. *Heald* (1818),

on its face to be intended to extend over a year, although it may contain a condition by which it may be put an end to within the year, yet it is within the statute, and must be in writing (*d*). It is, however, sometimes very difficult to tell when a contract is or is not within the statute, and with regard to some of the cases it is, in the opinion of the editors, very difficult, if not impossible, to reconcile them with each other (*e*). Conflict of decisions.

The 17th section of the Statute of Frauds provided for contracts for the sale of goods either being in writing or as therein mentioned. This enactment has been repealed by the Sale of Goods Act, 1893, but is substantially re-enacted by section 4 of that statute, which section is dealt with fully in a subsequent chapter (*f*). 29 Car. II. c. 3, s. 17.

The Statute of Frauds by its provisions does not require any formal contract fully and technically precise; but anything is sufficient which contains, either expressly or by reference, the terms of the agreement, and any written memorandum must shew not only who is the person to be charged, but also who is the party in whose favour he is to be charged (*g*). The memorandum must be a memorandum of an agreement complete at the time the contract is made (*h*); What is sufficient to satisfy the Statute of Frauds.

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1 B. & A. 722; *Britain* v. *Rossiter* (1879), 11 Q. B. D. 123; 48 L. J. Ex. 362.

(*d*) *Birch* v. *Liverpool* (1859), 9 B. & C. 392; *Giraud* v. *Richmond* (1846), 2 C. B. 835.

(*e*) See particularly *Murphy* v. *Sullivan* (11 Ir. Jur. (N. S.) 111), where it was held that a contract to support a child during its life need not be in writing, although in *Sweet* v. *Lee* (1842), 3 M. & Gr. 452, it had been held that a contract for payment of an annuity must be in writing, though it might determine within the year by the death of the annuitant. See also hereon *Knowlman* v. *Bluett* (1874), L. R. 9 Ex. 1; 43 L. J. Ex. 151. See also *McGregor* v. *McGregor* (1888), 21 Q. B. D. 424; 57 L. J. Q. B. 591; 37 W. R. 45, where it was held that an oral agreement of separation between husband and wife, under which the husband agreed to pay his wife £1 a week during her life, was good.

(*f*) *Post*, ch. iv. pp. 99–102.

(*g*) Chitty on Contracts, 80; Benjamin's Sale of Personal Property, ch. 6.

(*h*) *Munday* v. *Asprey* (1880), L. R. 13 Ch. D. 855; 49 L. J. Ch. 216; 28 W. R. 347; *Cave* v. *Hastings* (1881), L. R. 7 Q. B. D. 125; 50 L. J. Q. B. 575; 45 L. T. 348.

and if there is any omission from it of a material term of the contract, it is not a sufficient memorandum to satisfy the statute (*i*). Thus an executory agreement in writing to grant a lease for a term of years which does not expressly or by reasonable inference state the date from which the term is to commence, is not sufficiently definite to satisfy the Statute of Frauds, and cannot be enforced (*k*). The statute does not require that the contract or memorandum should be actually signed by both the parties to it, for it will be sufficient if only signed by the person to be charged (*l*); and although the foot or end is the most proper place for the signature, yet it need not be there. Thus where a person drew up an agreement in his own handwriting commencing "I, A. B., agree," it was held that this was sufficient signature, although the name A. B. was not subscribed at the end (*m*). Again, it has been held that when a person usually prints his name—as, for instance, if there is a memorandum on a bill-head containing the party's name in print—this may be a sufficient signature (*n*). In all these cases it is a question of the intention of the party whether the name should operate as a signature (*o*). The 4th section does not require an agent who signs an agreement under it to be authorized by writing, neither did the 17th section, nor does the new enactment contained in section 4 of the Sale of Goods Act, 1893, but the 1st and 3rd sections of the Statute of Frauds do. An agent, to execute a deed, must receive his authority by deed, but it has been held that, in the case of two joint contractors by deed, one may execute for himself and the other in the presence of that other, without any authority from him in writing (*p*). One party to a

Humphreys v. *Conybeare.*

When an agent must be authorized in writing.

(*i*) *M'Mullen* v. *Helberg*, 6 L. R. Ir. 463; *Donnison* v. *People's Café Co.* (1882), 45 L. T. 187.

(*k*) *Humphreys* v. *Conybeare* (1899), 80 L. T. 40.

(*l*) *Reuss* v. *Picksley* (1866), 35 L. J. Ex. 218.

(*m*) *Knight* v. *Crockford*, 1 Esp. 190, referred to by Lord Eldon in *Saunderson* v. *Jackson* (1800), 2 B. & P. 138.

(*n*) *Saunderson* v. *Jackson* (1800), 2 B. & P. 138: *Schneider* v. *Norris* (1814), 2 Maule & S. 280.

(*o*) *Caton* v. *Caton* (1867), 2 H. L. 127; 36 L. J. Ch. 886.

(*p*) *Ball* v. *Dunsterville* (1791), 4 T. R. 313.

contract cannot be the agent of the other (*q*), but one agent may sign for both parties, as in the case of a broker or auctioneer.

By Lord Tenterden's Act (*r*) it is provided that no acknowledgment by a debtor to take a case out of the Statutes of Limitation shall be binding unless in writing, signed by the debtor, or—by the Mercantile Law Amendment Act, 1856 (*s*)—by his agent (*t*). Lord Tenterden's Act (*u*) also provides that no action shall be brought to charge any person by reason of any representation as to the character, conduct, credit, ability, trade, or dealing of any other person, made with the view that he may obtain money or goods upon credit, unless in writing, signed by the person to be charged therewith. 9 Geo. IV. c. 14. 19 & 20 Vict. c. 97. Representations.

Copyright is the sole and exclusive liberty of multiplying copies of an original work or composition (*v*), and by the Copyright Act, 1842 (*x*), writing is necessary to its transfer, it being assignable by an entry in the registry at Stationers' Hall in the manner prescribed by the Act. As to copyright.

By the Merchant Shipping Act, 1894 (*y*), a registered ship, or any share therein, must be transferred by bill of sale in the form given in the Act, and attested by a witness and registered at the ship's port of registry. As to ships.

Bills of exchange, promissory notes, and other like negotiable instruments, have always been required to be in writing and signed, by the custom of merchants, and they are required now to be so by statute (*z*). Bills and other negotiable instruments.

(*q*) *Sharman* v. *Brendt* (1874), 43 L. J. Q. B. 312.
(*r*) 9 Geo. IV. c. 14, s. 1.
(*s*) 19 & 20 Vict. c. 97, s. 13.
(*t*) See further hereon, and also as to what will be a sufficient acknowledgment, *post*, pp. 281, 282.
(*u*) 9 Geo. IV. c. 14, s. 6 ; see also *post*, pp. 293, 294.
(*v*) Brown's Law Dict. ; see further as to copyright, *post*, pp. 217–222.
(*x*) 5 & 6 Vict. c. 45.
(*y*) 57 & 58 Vict. c. 60, s. 24 ; see also as to ships, *post*, pp. 202–208.
(*z*) 45 & 46 Vict. c. 61. As to such instruments generally, see *post*, ch. v. pp. 170–201.

CHAPTER III.

OF CONTRACTS AS TO LAND, AND HEREIN OF LANDLORD AND TENANT.

Contracts for sale of land must always be in writing under 29 Car. II. c. 3.

It has been stated in the previous chapter that a contract for the sale of lands, tenements, or hereditaments, or any interest in or concerning them, must be in writing, this being one of the contracts specified by section 4 of the Statute of Frauds. Any sale of land, even though by auction, must therefore be in conformity with the provisions of this section, but sales under an order of the Chancery Division have been held not to be within the statute (*a*). Also Chancery has been in the habit of decreeing specific performance of an oral contract in three cases, viz.: (1) Where set out and admitted in the pleadings and the defendant does not set up the statute as a bar; (2) Where prevented from being reduced into writing by the fraud of the defendant; and (3) After certain acts of part performance (*b*); and now, in consequence of the Judicature Act, 1873 (*c*), in any of such cases effect will be given to the contract in all divisions of the High Court of Justice.

Chancery would carry out a parol contract, however, in three cases.

Effect of Judicature Act, 1873.

The statute extends to any interest in land.

But the statute does not mention merely contracts for the sale of lands, but also "any interest in or concerning them;" and it is frequently a point of some nicety to determine what is and what is not "an interest in land" within the statute. Good instances of what have been held to be, and what have been held not to be, an interest in land are found in the decisions that a contract for

(*a*) *Attorney-General* v. *Day* (1749), 1 Ves. Sen. 218.
(*b*) Indermaur and Thwaites' Manual of Equity, 282–288.
(*c*) 36 & 37 Vict. c. 66, s. 25 (11).

the sale of growing grass is an interest in land within the statute (*d*), but a contract for the sale of growing potatoes is not (*e*). The rule on this point is stated in Mr. Chitty's work on Contracts (*f*) as follows:—"With respect to emblements, or *fructus industriales*, a contract for the sale of them while growing, whether they have arrived at maturity or not, and whether they are to be taken off the ground by the buyer or seller, is *not* a contract for the sale of an interest in land; but a contract for the sale of a crop which is the natural produce of the land, if it be unripe at the time of the contract, and is to be taken off the land by the buyer, is a contract for the sale of an interest in land within the statute." To determine accurately what is an interest in land within this section and what is not, is, however, frequently a most difficult matter; indeed, a learned judge (*g*) once stated that there was no general rule laid down in any of the cases that was not contradicted by some other. It has been held that a contract for the sale of growing timber, to be cut by the vendor or vendee, if it is to be cut immediately, or as soon as possible, does not confer any interest in land, and therefore is not within the section now under discussion, though if the price exceeds £10 it is within the 17th section (*h*), as being a contract for the sale of goods (*i*). In the case of *Marshall* v. *Green*, Lord Coleridge, in deciding that timber to be cut and taken away immediately is not an interest in land within this section, said: "Planted trees cannot in strictness be said to be produced spontaneously, yet the labour employed in their planting bears so small a proportion to their natural growth that they cannot be considered as *fructus industriales*; but treating them as not being *fructus industriales*, the proposition is, that where the thing sold is to derive no benefit from the land, and is

What is an interest in land.

Marshall v. *Green*.

(*d*) *Crosby* v. *Wadsworth* (1805), 6 East, 602.
(*e*) *Evans* v. *Roberts* (1826), 5 B. & C. 829.
(*f*) Page 298.
(*g*) Lord Abinger in *Rodwell* v. *Phillips* (1842), 9 M. & K. 501.
(*h*) Now the 4th section of the Sale of Goods Act, 1893, as to which see *post*, ch. iv. pp. 99–102.
(*i*) *Smith* v. *Surman* (1829), 9 B. & C. 561; *Marshall* v. *Green* (1875), 1 C. P. D. 35; 45 L. J. C. P. 153.

to be taken away immediately, the contract is not for an interest in land. Here the contract was that the trees should be got away as soon as possible, and they were almost immediately cut down. Apart from any decision on the subject, and as a matter of common sense, it would seem obvious that a sale of twenty-two trees, to be taken away immediately, was not a sale of an interest in land, but merely of so much timber" (*k*). From these observations it appears that if the timber is not to be immediately taken away, but is to remain on the land and derive some benefit therefrom, it will be an interest in land. The following contracts may also be mentioned as having been decided *not* to be an interest in land within the statute :—

Particular cases upon the point.

A contract for the sale of railway shares.

A contract by a tenant in possession by which he agreed to pay an additional sum per annum in consideration of improvements by the landlord.

An agreement for lodging and boarding in a house (*l*).

An agreement by a landlord with a quitting tenant to take the tenant's fixtures (*m*).

(*k*) *Marshall* v. *Green* (1875), 1 C. P. D. 39, 40 ; 45 L. J. C. P. 153. In the case of *Scovell* v. *Boxall* (1827), 1 Y. & J. 396, it was held that a contract for the sale of growing underwood was a contract for sale of an interest in land within this section ; but in that case it did not appear when it was to be cut, and probably had it been that the underwood was to have been cut immediately, it would have been decided the other way. As a further instance of a contract held to relate to an interest in land, see *Whitmore* v. *Farley* (1881), 28 W. R. 908 ; 43 L. T. 192 ; also *Webber* v. *Lee* (1882), 9 Q. B. D. 315 ; 51 L. J. Q. B. 485 ; where it was held that a grant of a right to shoot over land, and to take away a part of the game killed, comprised an interest in land ; also *Lavery* v. *Pursell* (1888), 39 Ch. D. 508 ; 57 L. J. Ch. 570 ; 58 L. T. 846, where it was held that a contract for the sale of the materials of an old house to be pulled down and taken away within two months, was a contract for the sale of an interest in land ; also *Driver* v. *Broad* (1893), 1 Q. B. 744 ; 63 L. J. Q. B. 12 ; 69 L. T. 169, where it was held that a contract for the sale of a company's debentures that created a floating charge over its property, consisting in part of leaseholds, was a contract for the sale of an interest in land.

(*l*) As to an agreement for the letting of apartments, if the tenant actually enters, and it is not for more than three years, no writing is required, as it comes within the exception in section 2 of the Statute of Frauds ; but until actual entry, it is only a contract and is not actionable unless in writing : *Inman* v. *Stamp* (1815), 1 Stark, 12 ; *Edge* v. *Strafford* (1831), 1 Tyrw. 295.

(*m*) It has been held that an agreement requires just as much to be

A tenancy may exist in various different ways, as if one holds either for a fixed period, or simply from year to year, or at will, or sufferance. By section 1 of the Statute of Frauds, all leases, estates, interests of freehold, or terms of years, or any uncertain interest of, in, to, or out of land, must be in writing signed by the parties or their agents *authorized by writing*, or they have the force and effect of estates at will only. Section 2 excepts from this provision leases not exceeding three years from the making thereof, at two-thirds of the full improved value. Section 3 provides that all assignments of leases (not being copyhold or customary property) must in a like way, as is provided in section 1 as to leases, be in writing. By the Real Property Act, 1845 (*p*), every lease required by law to be in writing, and assignments of leases (not being copyhold), are declared void at law unless made by deed.

Different ways in which a tenancy may exist.

Statute of Fraud as to leases,

and assignments of leases.

The student will observe that though, under section 2, leases not exceeding three years may be made by word of mouth, yet, by reason of section 4, any agreement for a lease, for however short a time, must be in writing.

An agreement for a lease must always be in writing.

As before stated, the strict provision of the statute is, that leases which it requires to be by writing, and which are not, are to have the force and effect of estates at will only; but although this is so, to simply state that fact in answer to a question on the effect of such a lease would be useless. The well-known case of *Clayton* v. *Blakey* (*q*) decides that, notwithstanding the said enactment, yet if a tenant under such a lease enters and pays rent, it may serve as a tenancy from year to year. In the first instance, no doubt, all the tenant has is a tenancy at will in strict conformity

Statute provides that leases not in writing shall have only the effect of estates at will.

Clayton v. *Blakey*.

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in writing if the interest in the land moves *to* the plaintiff as it would if it moved *from* him (*Ronayne* v. *Sherrard* (11 Irish Reps. (C. L.) 146).

(*p*) 8 & 9 Vict. c. 106, sect. 3.

(*q*) (1799) 2 S. L. C. 127; 8 T. R. 3.

with the statute, but the court leans against such a tenancy, and in favour of a tenancy from year to year (*r*), and therefore it is afterwards converted into that. Further, if a person holds under a lease which is void under the Statute of Frauds, or from not being, as now required to be (*s*), by deed, or if a tenant holds over after the expiration of his lease, and continues to pay a yearly rent, he will hold under the terms of the lease in other respects so far as they are applicable to the new tenancy from year to year (*t*).

Doe d. *Rigge* v. *Bell.*

Notice on determining tenancy.

A yearly tenant is entitled to, and must give, a reasonable notice to quit, which has been held to mean half a year's notice (*u*), ending at the period at which his tenancy commenced. If, however, it is a tenancy under the Agricultural Holdings Act, 1908, a year's notice is necessary, expiring at the end of the current year of the tenancy, unless the parties agree in writing to the contrary (*v*). To determine a monthly or a weekly tenancy, a reasonable notice is required, and the safest plan is to give a month's or a week's notice, as the case may be, which will no doubt always be sufficient (*x*). A notice to quit need not be couched in technical language; it is sufficient if it clearly conveys to the mind of the other party that it is not desired that the relationship of landlord and tenant shall continue (*y*); and though a written notice to quit is always advisable, a parol tenancy may be determined by a verbal notice (*z*). Where several premises are let under one common rent, notice to

Notice to quit part of demised premises.

(*r*) *Richardson* v. *Langridge* (1811), Tudor's Con. Cases, 4; 4 Taunt. 128. (*s*) 8 & 9 Vict. c. 106, s. 3.

(*t*) *Doe* d. *Rigge* v. *Bell* (1794), 2 S. L. C. 119; 5 T. R. 471.

(*u*) As to the distinction between half a year's notice and six months' notice, see *Barlow* v. *Teal* (1885), 15 Q. B. D. 501; 54 L. J. Q. B. 564; 54 L. T. 63; 34 W. R. 54.

(*v*) 8 Edw. VII. c. 28, sec. 22, replacing 46 & 47 Vict. c. 61. s. 33; and see *Wilkinson* v. *Calvert* (1878), L. R. 3 C. P. Div. 360; 47 L. J. C. P. 679; *Barlow* v. *Teal*, supra.

(*x*) *Bowen* v. *Anderson* (1894), 1 Q. B. 164; 42 W. R. 236, explaining and partly overruling *Sandford* v. *Clark* (1888), 21 Q. B. D. 398; 57 L. J. Q. B. 507; 59 L. T. 226.

(*y*) *Bury* v. *Thompson* (1895), 64 L. J. Q. B. 257; 71 L. T. 846.

(*z*) Woodfall's Landlord and Tenant, 401.

quit part of them only cannot be given (*a*), except to a certain extent under the Agricultural Holdings Act, 1908, which provides (*b*) that a landlord may give notice to quit a part only of the demised premises in order to make certain improvements mentioned in the Act; but the tenant will be entitled to compensation, and may within twenty-eight days accept the notice for the entire holding. If a tenant holds under a lease made by two or more joint lessors, they should properly all join in giving notice to quit, but notice to quit by one on behalf of all, whether authorized by the others or not, will put an end to the tenancy (*c*). As stated, if a tenant holds over after the expiration of his lease, he may by payment of rent be converted into a yearly tenant, and until then he is a tenant at sufferance. But if a tenancy determines and the landlord has made a demand and given notice *in writing* for possession, and the tenant holds over, he is liable to pay double the yearly *value* of the premises, unless he had a *bonâ fide* belief that he had a right to so hold over (*d*). And if a tenant gives notice to quit to his landlord, and does not quit at the proper time, he is liable to pay double the yearly rent of the premises (*e*). If a landlord gives notice to his tenant to quit or pay an increased rent, and the tenant does not quit, his agreement to pay the increased rent will be implied (*f*).

Joint lessors.

Penalty for holding over.

A tenancy at will sometimes arises by construction of law. Thus in the case of a mortgage, the courts of law always considered the mortgagor as simply the tenant at will, or rather at sufferance, of the mortgagee, and liable to be ejected at any time, so that he could not bring any action in respect of the mortgaged lands, nor make a lease of them to bind the mortgagee, although he continued in possession of them. But

Tenancy at will arising by construction of law.

(*a*) Woodfall's Landlord and Tenant, 403.
(*b*) 8 Edw. VII. c 28, s. 23, replacing 46 & 47 Vict. c. 61, s. 41.
(*c*) Tudor's Con. Cases, 26; Woodfall's Landlord and Tenant, 399.
(*d*) 4 Geo. II. c. 28, s. 1. (*e*) 11 Geo. II. c. 19, s. 18.
(*f*) See *ante*, p. 22. See further, as to a contract being implied from silence and acquiescence, *Wilcox* v. *Redhead* (1880), 49 L. J. Ch. 529; 28 W. R. 795.

Provision of Judicature Act, 1873, as to position of mortgagors.

now the Judicature Act, 1873 (*g*), provides that "a mortgagor entitled for the time being to the possession or receipt of the rents and profits of any land as to which no notice of his intention to take possession or to enter into the receipts of the rents and profits thereof shall have been given by the mortgagee, may sue for such possession or for the recovery of such rents or profits, or to prevent or recover damages in respect of any trespass or other wrong relative thereto in his own name only, unless the cause of action arises upon a lease or other contract made by him jointly with any other person." In addition to this the Conveyancing Act, 1881 (*h*), now allows certain leases to be made by a mortgagor in possession, on specified terms (*i*).

A tenant is estopped from disputing his lessor's title.

A tenant is estopped from disputing the title of the landlord who let him in (*j*); therefore where a tenant acquires possession under a person who claims as devisee, it is not competent for him to set up any objection to the devise. Payment of rent impliedly admits a tenancy between the payer and the payee unless, indeed, the payment was procured by fraud, or was made in ignorance of circumstances which had the payer known of he would not have made the payment (*k*).

Liability of tenant from year to year for repairs.

A tenant from year to year, in the absence of agreement, is only bound to keep the premises wind and water tight, and is not bound to do any general repairs, *e.g.*, to make good defects arising from accidental fire, wear and tear of time, or the like; but an act arising from his own voluntary negligence he is liable for, *e.g.*, to repair broken windows. Where a tenant covenants generally

(*g*) 36 & 37 Vict. c. 66, s. 25 (5).

(*h*) 44 & 45 Vict. c. 41; see Indermaur and Thwaites' Conveyancing, 445.

(*i*) Sect. 18. See also hereon as to a tenant's right to compensation when holding under a lease from a mortgagor which is not binding on the mortgagee, 8 Edw. VII. c. 28, s. 12.

(*j*) *Cooke* v. *Loxley* (1792) 5 T. R. 4; *Carlton* v. *Bowcock* (1885), 51 L. T. 659.

(*k*) *Carlton* v. *Bowcock* (1885), 51 L. T. 659; *Underhay* v. *Reed* (1890), 20 Q. B. D. 209; 59 L. J. Q. B. 129; 58 L. T. 45.

to keep the premises in good repair, and to deliver them up in that state at the end of the term, it is not sufficient to keep them in the same state of repair as they were in at the commencement of the tenancy, if they were then in bad repair. The class and description of the house may, however, be taken into account, as whether it is an old or a new one, and it must be kept and delivered up in good repair with reference to the class to which it belongs (*l*). If the premises are burnt down, under such a covenant the tenant will have to reinstate them unless the contrary has been provided. If a fire is caused by any person's gross negligence, such person is liable for it to the person injured. In the absence of express agreement, a landlord is not under any obligation to repair the demised premises, and it seems that the fact of premises becoming uninhabitable from the want of proper repairs will not entitle the tenant to quit without notice, and is no answer to an action for the rent. With regard to farms, a promise is implied by the law on the part of a yearly tenant to use the farm in a husbandlike manner, and cultivate it according to the custom of the country (*m*). Where there is a covenant by the landlord to do repairs, the tenant must give him notice of any want of repair, so as to give him an opportunity of doing the same; and if the tenant executes the repairs without notice to the landlord that they needed doing, he cannot compel the landlord to pay for them (*n*).

Landlord not bound to repair.

As to the liability to pay rates and taxes, the general rule is that they fall upon the tenant in the absence of express agreement; but property-tax forms an exception to this rule, and must always be allowed by the landlord, even though the tenant has covenanted to pay it, the rule being that the tenant should in the first instance pay it, and is then entitled to have it

Liability to pay various rates, taxes, and assessments.

(*l*) Indermaur and Thwaites' Conveyancing, 403, 404.
(*m*) See generally hereon Woodfall's Landlord and Tenant, 693–695.
(*n*) *Huggall* v. *M'Lean* (1885), 33 W. R. 588; 53 L. T. 94.

allowed to him out of his rent (*o*). The landlord is ordinarily liable for the land-tax, and for sewers rate (unless indeed it is only for ordinary or annual repairs), and if the tenant pays them under compulsion, express or implied, he may deduct them from his rent, but any other rates or taxes he cannot generally deduct (*p*).

Tithe rent-charge.

Tithe rent-charge, however, was never a charge upon the person of the owner or occupier, but upon the land, and therefore, in the absence of agreement to the contrary, a tenant paying it might always deduct it from his rent; and it is now expressly provided that tithe rent-charge issuing out of any lands shall be payable by the owner of the lands, despite any contract between the owner and the occupier (*q*).

Tithe Act, 1891.

Ordinarily in a lease there is an express covenant that the tenant shall pay all rates, taxes, assessments, and outgoings, whether imposed on landlord or tenant, and when such words are used some matters may be included in the covenant which but for them the tenant would not be liable for, *e.g.*, land-tax, sewers rate, the expense of paving a road, or of reconstructing a drain (*r*).

Farlow v. *Stevenson.*

A tenant may sometimes have rights by custom.

Although there may be nothing in a lease to that effect, a tenant may sometimes by custom have certain rights, on the ground that the parties have contracted with reference to that custom, and an implied contract has been thus created (*s*). This often occurs in the case of farming tenants, with reference to the custom of the country as to their rights on giving up possession of their farms. If a lease contains any particular stipulations as to the manner in which a tenant is to

(*o*) 5 & 6 Vict. c. 35, ss. 60, 103.
(*p*) Woodfall's Landlord and Tenant, 631–640.
(*q*) 54 Vict. c. 8.
(*r*) *Budd* v. *Marshall* (1880), 5 C. P. D. 481; 50 L. J. Q. B. 24; 42 L. T. 793; 29 W. R. 148; *Allum* v. *Dickinson* (1882), 9 Q. B. D. 632; 52 L. J. Q. B. 190; 47 L. T. 493; 30 W. R. 930; *Farlow* v. *Stevenson* (1900), 1 Ch. 128; 69 L. J. Ch. 106; 81 L. T. 581; *Foulger* v. *Arding* (1902), 1 K. B. 700; 71 L. J. K. B. 499; 86 L. T. 488; Re *Warriner* (1903), 2 Ch. 367; *Stockdale* v. *Ascherberg* (1904). 1 K. B. 447; 73 L. J. K. B. 206; *Greeves* v. *Whitmarsh* (1906), 2 K. B. 346; 75 L. J. K. B. 633.
(*s*) See *ante*, p. 22.

quit, and what he is to be entitled to on quitting, then the rule *Expressum facit cessare tacitum* applies, and no custom can have any effect; but if, though there is a lease, it is silent on this point, then the tenant may take advantage of the custom (*t*). *Wigglesworth v. Dallison.*

Fixtures.

Questions frequently arise between landlord and tenant as to the right to fixtures. The term fixtures is used sometimes with different meanings; strictly speaking, it signifies things affixed to the freehold, but it may also be used as signifying chattels annexed to the freehold, but which are removable at the will of the person who annexed them. The rule at common law as to things affixed to the freehold is expressed by the maxim, *Quicquid plantatur solo, solo cedit;* but this rule, being found to operate in discouragement of trade, has been gradually much mitigated. It may be stated generally, that fixtures erected for the purposes of trade, ornament, or domestic use, and also agricultural fixtures (*u*), may be removed by a tenant as against his landlord, and it may in particular cases happen that custom gives a tenant a wider right than he would ordinarily have. When a tenant has the right to remove fixtures, other than agricultural fixtures, the removal by him must be during his tenancy, or such further period as he holds under a right to consider himself tenant (*v*), *i.e.*, whilst permitted by the landlord to remain in possession; and if he does not remove the fixtures during that time, he will lose his right to them, for they then become a gift in law to the landlord, unless indeed the landlord afterwards gives a licence to the tenant to enter and remove them (*x*). As to agricultural fixtures, they may be removed within a reasonable time of the expiration of the tenancy (*y*).

Meaning of the term.

Must be removed during tenancy.

(*t*) *Wigglesworth* v. *Dallison* (1779), 1 S. L. C. 545; Dougl. 201; *Tucker* v. *Linger* (1882), 8 App. Cas. 508; 52 L. J. Ch. 941; 32 W. R. 40; 49 L. T. 373.

(*u*) 8 Edw. VII. c. 28, s. 21.

(*v*) *Weeton* v. *Woodcock* (1840), 7 M. & W. 14; *Ex parte Gould, re Walker* (1884), 13 Q. B. D. 454; 51 L. T. 368.

(*x*) *Roffey* v. *Henderson* (1851), 17 Q. B. 574.

(*y*) *Post*, pp. 70, 71.

Originally no fixtures could be removed, but the old rule now mitigated.

As before stated, originally, under the maxim, *Quicquid plantatur solo, solo cedit*, nothing in the nature of a fixture could be removed, and the mitigations of the old rule have arisen gradually; the first was in favour of *trade* fixtures, and subsequently other cases extended it to *ornamental* and *domestic* fixtures. There have been a very great number of cases upon this subject, and amongst the articles that have been decided to be removable by the tenant may be mentioned as instances the following:—Chimney-glasses, blinds, ornamental chimney-pieces, tapestries affixed to the walls of a house (*z*), wainscots, shelves, counters, pumps, partitions, shrubs and trees planted for sale. The fixtures, if removable, must be taken away without material damage to the inheritance, and the right of removal is liable to be controlled by express contract; so that, for instance, if a tenant covenants to keep in repair all erections built, or thereafter to be built, and surrender them at the end of the term, this will prevent him removing things which, but for the covenant, he might have removed (*a*).

Elwes v. *Maw* as to agricultural fixtures.

Under the exception to the common law rule in favour of trade fixtures, it was decided in the well-known case of *Elwes* v. *Maw* (*b*), that this would not allow tenants in agriculture to remove things erected for the purpose of husbandry. But as the rule undoubtedly often worked hardship on tenants, it was provided by the Landlord and Tenant Act, 1851 (*c*), that all buildings, engines, or the like, erected by the tenant for agricultural purposes, with the consent in writing of the landlord, shall remain the property of, and be removable by the tenant, so that he do no injury in the removal thereof; provided that one month's notice in writing shall be given, before removal, to the landlord, who within that time is to have a right of

Provision of the Landlord and Tenant Act, 1851.

(*z*) *Leigh* v. *Taylor* (1902), A. C. 157; 71 L. J. Ch. 272; 86 L. T. 239; Re *Hulse* (1905), 1 Ch. 406; 74 L. J. Ch. 246.

(*a*) *West* v. *Blakeway* (1837), 2 M. & G. 729; *Penry* v. *Brown* (1820), 2 Stark, 403.

(*b*) (1802) 2 S. L. C. 189; 3 East, 38.

(*c*) 14 & 15 Vict. c. 25, s. 3.

purchasing at a value to be ascertained by two referees or an umpire. The Agricultural Holdings Act, 1908 (*d*), now enacts (*e*) that when, after 1 January, 1884, a tenant affixes (*f*) to his holding any engine, machinery, fencing, or other fixture, or erects any building for which he is not (under that Act or otherwise) entitled to compensation, and which is not so affixed or erected in pursuance of some obligation in that behalf, or instead of some fixture or building belonging to the landlord, then such fixture or building shall be the property of and removable by the tenant before or within a reasonable time after the termination of the tenancy. Provided, however, as follows :—1. Before the removal of any fixture or building the tenant shall pay all rent owing by him, and shall perform or satisfy all other his obligations to the landlord in respect of the holding. 2. In the removal of any fixture or building the tenant shall not do any avoidable damage to any other building or other part of the holding. 3. Immediately after the removal of any fixture or building the tenant shall make good all damage occasioned to any other building or other part of the holding. 4. The tenant shall not remove any fixture or building without giving one month's previous notice in writing to the landlord of his intention to remove it. 5. At any time before the expiration of the notice of removal, the landlord, by notice in writing given by him to the tenant, may elect to purchase any fixture or building comprised in the notice of removal, and any fixture or building thus elected to be purchased shall be left by the tenant, and shall become the property of the landlord, who shall pay the tenant the fair value thereof to an incoming tenant of the holding; and any dispute as to the value shall be settled by arbitration under that Act (*g*).

Provision of the Agricultural Holdings Act, 1908.

(*d*) 8 Edward VII. c. 28, which consolidates the law as to agricultural holdings in England and Wales as from 1 January, 1909.

(*e*) Section 21.

(*f*) This right to remove fixtures and buildings put up by the tenant is extended to those acquired by the tenant (*i.e.*, taken over from a former tenant) since 31 Decr. 1900, ibid.

(*g*) There was a similar provision in the now repealed Agricultural

Difference between the two foregoing provisions.

The most noticeable difference between this provision and the one contained in the Act of 1851, is that under the earlier statute only fixtures erected with the consent in writing of the landlord could be removed, whilst no such consent is necessary under the later Act. The Act applies to all tenancies of an agricultural or pastoral character, or partly one and partly the other, or wholly or partly cultivated as a market-garden; but it does not apply to any holding let to a tenant during his continuance in any office, appointment, or employment held under the landlord (*h*).

On the sale or mortgage of land, fixtures pass without any special words.

Upon a sale or mortgage (*i*) of land, fixtures will pass to the vendee, or mortgagee, in the absence of any contrary intention, and this is so although the things are only affixed by consent of another to whom they belong, and who has a right to remove them as against the mortgagor (*k*). With regard to the question of whether a mortgage of land with fixtures requires to be registered as a bill of sale, it was prior to the Bills of Sale Act, 1878 (*l*), decided that it did so require, if the mortgagee had power given him to deal with the fixtures separately and apart from the land, but not unless (*m*). Now, however, by that Act it is definitely provided (*n*) that "personal chattels" (which are the things as to which registration is required) shall include fixtures when separately assigned or charged by a distinct instrument, but not fixtures when assigned together with a freehold or leasehold interest in any land or building to which they are affixed, except trade

Hobson v. *Gorringe*.

Mortgage of premises with fixtures thereon.

Holdings Act (1883) (46 & 47 Vict. c. 61, sec. 34), which itself replaced a similar provision of 1875 (38 & 39 Vict. c. 92, s. 53).

(*h*) 8 Edw. VII. c. 28, sec. 48, replacing 46 & 47 Vict. c. 61, s. 62. See sec. 42 as to market gardens.

(*i*) Other than an equitable mortgage, Re *Allen* (1907) 1 Ch. 575; 76 L. J. Ch. 362, 96 L. T. 660.

(*k*) *Hobson* v. *Gorringe* (1897), 1 Ch. 182; 66 L. J. Ch. 114; 75 L. T. 610; *Reynolds* v. *Ashby* (1903), 1 K. B. 87; 72 L. J. K. B. 51; 87 L. T. 640. Compare, however, with these cases *Lyon* v. *London City and Mid. Bank* (1903), 2 K. B. 135; 72 L. J. K. B. 465; 88 L. T. 392.

(*l*) 41 & 42 Vict. c. 31.

(*m*) *Ex parte Barclay* (1874), L. R. 9 Ch. App. 576; 43 L. J. Bk. 137; *Ex parte Daglish* (1873), L. R. 8 Ch. App. 1072. On the law of fixtures generally, see Brown on Fixtures.

(*n*) Sects. 4, 7.

machinery (*o*). And even as to trade machinery, it has been decided that if it is not specially mentioned, but merely passes as incidental to the conveyance of the premises, no registration is necessary (*p*). If, however, it is specially mentioned, then it is otherwise (*q*). *Re Yates.*

The most apt and direct remedy of a landlord for the recovery from his tenant of the rent due is distress, which is a remedy by the act of the party, being the right of the landlord to enter and seize goods for the purpose of liquidating the amount due to him, the word being derived from the Latin, *distringo*. Besides a distress for rent, such a right also exists in the case of cattle taken *damage feasant*, and here the reason for the remedy is tolerably plain, because the distrainor may be said to be acting on the compulsion of the trespass; but in the case of the distress for rent the reason why it is allowed is by no means clear. Distress. What it is.

The following seem to be the requisites to the exercise of the power of distress for rent:— Requisites to enable a landlord to distrain.

1. There must be an actual demise, or an agreement for a lease. If a tenant goes into possession under an agreement for a lease, and holds thereunder without any lease being actually granted, for all practical purposes the tenant is in the same position as if the lease had been made (*r*). Strictly, however, when he first enters into possession he is—notwithstanding his right to specific performance of the agreement provided that he has observed the conditions thereof on his part—merely a tenant at will; but as soon as he pays an annual rent, or the proportionate part of an annual rent, he becomes then a tenant from year to year, on such of the terms of the agreement as are applicable to a yearly tenancy (*s*).

(*o*) See sect. 5, defining trade machinery.
(*p*) *Re Yates, Batchelor* v. *Yates* (1888), 38 Ch. D. 112; 57 L. J. Ch. 697; 59 L. T. 47.
(*q*) *Small* v. *National Provincial Bank of England* (1894), 1 Ch. 686; 63 L. J. Ch. 270; 70 L. T. 492; *Johns* v. *Ware* (1899), 1 Ch. 359; 68 L. J. Ch. 155; 80 L. T. 112.
(*r*) *Walsh* v. *Lonsdale* (1883), 21 Ch. D. 9; 52 L. J. Ch. 2; 46 L. T. 858.
(*s*) *Coatsworth* v. *Johnson* (1886), 55 L. J. Q. B. 220; 54 L. T. 520;

2. The rent must be certain, that is, the premises must be let at a fixed rent (*t*); for if the tenant holds premises at a rent to be agreed on, or simply at their fair value, the landlord has no right of distress, but must bring an action for use and occupation (*u*).

3. The rent must be in arrear; and rent does not become *due* until the very end of the day on which it is payable; but in the case of rent payable in advance, it has been decided to be in arrear directly the period for which it is payable commences (*v*).

4. The distrainor must have the reversion in him, either an actual reversion, or at least a reversion by estoppel (*x*).

All movable chattels can be distrained, subject to exceptions.

The general rule is that all movable chattels on the demised premises at the time of the distress are liable to be seized, whether they are the property of the tenant or of a stranger; but this rule is subject to many exceptions. The leading case on the point of the exemption of things from distress is *Simpson* v. *Hartopp* (*y*). This case is only a direct decision that implements of trade are privileged from distress for rent, if they be in actual use at the time, or if there be any other sufficient distress on the premises; but in the judgment is contained a summary of the authorities upon the matter generally. Instead of going into this case, it will be best to give a list of the principal things which at the present day are exempted from being taken in distress, and they are as follows :—

Simpson v. *Hartopp.*

Things exempted at the present day from being taken in distress.

1. Things in the personal use of a man.
2. Fixtures affixed to the freehold.
3. Goods of a stranger delivered to the tenant to be wrought on in the way of his ordinary trade.

Swain v. *Ayres* (1888), 21 Q. B. D. 289; 57 L. J. Q. B. 428; 36 W. R. 798.

(*t*) A distress may be made for the whole rent reserved on a letting of furnished apartments, because in contemplation of law the rent issues out of the premises only, and not out of the furniture (Woodfall's Landlord and Tenant, 403).

(*u*) Woodfall's Landlord and Tenant, 487.

(*v*) *Ex parte Hale, re Binns* (1873), 1 Ch. D. 285; 45 L. J. Bk. 21.

(*x*) Brown's Law Dict., tit. Distress.

(*y*) (1744) 1 S. L. C. 437; Willes, 512.

4. Perishable articles.

5. Animals *ferœ naturæ*.

6. Goods *in custodia legis* (*z*).

7. Instruments of a man's trade or profession (though not in actual use), *provided* other sufficient distress can be found.

8. Beasts of the plough, instruments of husbandry, and beasts which improve the land, *provided* other sufficient distress can be found.

9. In tenancies under the Agricultural Holdings Act, 1908 :—

(*a*) Live stock belonging to another person and taken in by the tenant to be fed at a price agreed on, may not be seized if other sufficient distress can be found; and even if there is not other sufficient distress can only be seized to the extent of any part of the price agreed on for their feed which remains unpaid, and the owner may redeem on paying this (*a*).

(*b*) Agricultural or other machinery the *bonâ fide* property of a person other than the tenant, and only hired by the tenant cannot be seized at all (*b*).

(*c*) Live-stock of all kinds the *bonâ fide* property of a person other than the tenant, and on the tenant's premises solely for breeding purposes cannot be seized at all (*c*).

10. Loose money.

11. Lodgers' goods (*d*).

12. Wearing apparel and bedding (*e*) of the tenant and his family, and the tools and implements of his trade, to the inclusive value of £5, unless the tenancy

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(*z*) See hereon *Ex parte Pollen's Trustees, Re Davies* (1886), 55 L. J. Q. B. 217 ; 34 W. R. 442 ; 54 L. T. 304.

(*a*) 8 Edw. VII. c. 28, s. 29, replacing 46 & 47 Vict. c. 61, s. 45.

(*b*) Ibid.

(*c*) Ibid.

(*d*) 34 & 35 Vict. c. 79.

(*e*) This includes the bedstead : *Davis* v. *Harris* (1900), 1 Q. B. 729 ; 69 L. J. Q. B. 232 ; 81 L. T. 780.

has ended and possession is not given for seven days after demand (*f*).

13. Goods of an ambassador (*g*).

14. Frames, looms, or machines used in the woollen, cotton, or silk manufactures (*h*).

15. Gas meters and fittings, and water meters and fittings, and electric lighting apparatus, if they are the property of statutory "undertakers" (*i*).

16. Railway rolling stock in any works, not belonging to the tenant of such works, if it has the owner's name on it (*j*).

Difference between distress and execution as to goods of a stranger.

On the above, attention is particularly called to the exception numbered 3, for the purpose of noticing the difference on that point between execution and distress. No goods of a stranger are liable to be taken in execution; but in distress they are so liable, unless they have been delivered to be wrought upon in the course of the tenant's ordinary employment (*k*). Thus, if a book is lent, and a distress or an execution is put into the lendee's house, the book is liable to be taken in the distress though not in the execution; but if the book is delivered to a bookbinder to be bound, it is not liable to be taken either in distress or execution, for here the

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(*f*) 51 & 52 Vict. c. 21, s. 4. This may include a sewing-machine, *Masters* v. *Fraser* (1901), 85 L. T. 611; and a cab, *Lavelle* v. *Richards* (1906), 1 K. B. 480; 76 L. J. K. B. 287. If the only article of wearing apparel or bedding or tool of trade is worth over £5, it cannot be seized, *Lavelle* v. *Richards*, *supra*. See as to power of a court of summary jurisdiction to order return of goods in this case, 58 & 59 Vict. c. 24. For the purpose of comparison note the following list of things exempt from being taken in execution:—1. Wearing apparel and bedding and implements of trade of any judgment debtor not exceeding £5. 2. Goods of a stranger. 3. Goods *in custodia legis*. 4. Fixtures affixed to the freehold. 5. (In the case of an elegit) advowsons in gross and glebe land. 6. Rolling stock of a railway company (30 & 31 Vict. c. 127, s. 4).

(*g*) 7 Anne, c. 12, sec. 3; *Macartney* v. *Garbutt* (1890), 24 Q. B. D. 368.

(*h*) 6 & 7 Vict. c. 40, secs. 18, 19.

(*i*) Gasworks Clauses Act, 1871 (34 & 35 Vict. c. 41) sec. 18; including a gas stove, *Gas Light and Coke Co.* v. *Hardy* (1886), 17 Q. B. D. 619; Waterworks Clauses Acts, 1847 (10 and 11 Vict. c. 17) sec. 44 and 1863 (26 & 27 Vict. c. 93) sec. 14; Electric Lighting Act 1882 (45 & 46 Vict. c. 56) sec. 25.

(*j*) 35 & 36 Vict. c. 50, sec. 3. See *Easton Estate Co.* v. *Western Waggon Co.* (1884), 50 L. T. 735.

(*k*) *Clark* v. *Millwall Dock Co.* (1885), 17 Q. B. D. 494; 55 L. J. Q. B. 378; 54 L. T. 814; *Challoner* v. *Robinson* (1908), 1 Ch. 49.

bookbinder has it to work upon in the way of his ordinary calling.

Lodgers' goods never could be taken in execution, but could in distress.

Again, upon this point, the student must particularly notice the exception numbered 11, being lodgers' goods. A lodger's goods, being goods of a stranger, were never liable to be taken in execution, but in the case of distress they were formerly so liable; and the exception in this latter case is contained in the Lodgers Goods Protection Act, 1871 (*l*). This statute provides that on any distress by a superior landlord upon a lodger's goods for rent due to the landlord from his immediate tenant, the lodger may serve the landlord or his bailiff with a declaration (*m*), to which must be annexed an inventory of the goods, that the immediate tenant has no property or beneficial interest in the goods, and that the same are the property of the lodger, and also setting forth whether any and what rent is due from the lodger to his immediate landlord. It also provides that the lodger may pay to the superior landlord, or his bailiff, the rent (if any) so due, or so much of it as may be sufficient to discharge the claim of such superior landlord; and if the landlord, or his bailiff or employée, proceeds with the distress after the lodger has complied with these provisions, he is to be guilty of an illegal distress, and can be sued at law for damages (*n*); and the lodger may apply to a justice of the peace for restoration of the goods. The question of whether the relationship of landlord and lodger actually exists is one of fact (*o*), the general rule being that to constitute a person a lodger there must be a possession or control retained over the premises by the landlord, *e.g.*, having a room in the house (*p*).

Provisions of Lodgers Goods Protection Act, 1871.

What constitutes a lodger.

(*l*) 34 & 35 Vict. c. 79.

(*m*) As to the sufficiency of this declaration see *Thwaites* v. *Wilding*, (1883), 12 Q. B. D. 4; 53 L. J. Q. B. 1; 32 W. R. 80; 49 L. T. 396; *Ex parte Harris* (1885), 16 Q. B. D. 130; 55 L. J. M. C. 24. As to the inventory see *Godlonton* v. *Fulham* (1905), 1 K. B. 431; 74 L. J. K. B. 242, 34 W. R. 132.

(*n*) The bailiff can be sued as well as the landlord, *Lowe* v. *Dorling* (1906), 2 K. B. 772; 75 L. J. K. B. 1019; 95 L. T. 243.

(*o*) *Ness* v. *Stevenson* (1882), 9 Q. B. D. 245; 47 J. P. 134.

(*p* *Phillips* v. *Henson* (1877), 3 C. P. D. 26; 47 L. J. C. P. 273;

Bill or note taken for rent does not extinguish the right of distress.

If a landlord takes a bill, note, or bond for his rent, there is no extinguishment of his original right to the rent, for the rent is of a higher nature than either of those securities (*q*). But if a landlord take a bill of exchange or promissory note for rent due, he cannot distrain during its currency, for the taking of the instrument is evidence from which a jury may infer an agreement by the landlord to suspend his right of distress during that period (*r*).

Semayne's Case. Maxim; "Every man's house is his castle."

It is said that "Every man's house is his castle" (*s*), and therefore to make a distress, the landlord or his bailiff must not break the house; and by breaking the house is meant not only the forcing open the door, but even the opening of an unbolted window, though, if the window is already partially open it is justifiable to open it further to effect an entrance (*t*). This principle applies not only to a dwelling-house, but to the outer door of any building (*u*). It also applies generally to a sheriff, but it may be observed that in the case of a sheriff executing a writ of *fieri facias*, though he must not break into a dwelling-house, he may break into a barn or outhouse (*x*), or a shop or warehouse not forming part of the dwelling-house (*y*). Where a bailiff, employed to distrain for rent, climbed over a wall surrounding the yard of the house, and entered the house by an open window, it was held that the climbing over the wall was not illegal, and that the distress was lawful (*z*). A landlord, in making a distress, is

Long v. *Clarke*.

Hodder v. *Williams*.

Martin v. *Palmer* (1881), 50 L. J. Q. B. 7; 30 W. R. 115; *Ness* v. *Stevenson*, supra; see also *Heawood* v. *Bone* (1884), 13 Q. B. D. 179; 32 W. R. 752; 51 L. T. 125.

(*q*) *Harris* v. *Shipway*, and *Ewer* v. *Lady Clifton*, Bul. N. P. 182.

(*r*) *Palmer* v. *Bramley* (1895), 2 Q. B. 405; 65 L. J. Q. B. 42; 73 L. T. 329.

(*s*) *Semayne's Case* (1605), 1 S. L. C. 104; 5 Coke, 91.

(*t*) *Crabtree* v. *Robinson* (1885), 15 Q. B. D. 312; 54 L. J. Q. B. 544; 33 W. R. 936.

(*u*) *Long* v. *Clarke* (1894), 1 Q. B. 119; 63 L. J. Q. B. 108; 69 L. T. 654.

(*x*) *Penton* v. *Brown* (1663), 1 Sid. 186.

(*y*) *Hodder* v. *Williams* (1895), 2 Q. B. 633; 65 L. J. Q. B. 70; 73 L. T. 394.

(*z*) *Long* v. *Clarke* (1894), 1 Q. B. 119; 63 L. J. Q. B. 108; 69 L. T. 654.

justified in opening an outer door in the way in which other persons are accustomed to use it; and when entry has once properly been obtained into a house, inner doors may be forced open. If a distrainor, having properly entered, is afterwards turned out of possession, he has a right to break the house to re-enter (*a*).

Provisions of statute of Richard II.

It was formerly considered that if a tenant gave his landlord special leave and licence to break and enter premises, this would justify the landlord in so doing. The law must now however be taken to be otherwise by reason of modern decisions on the effect of a statute of Richard II. (*b*), which enacts as follows: "As also the king enjoineth that none from henceforth make entry into any lands and tenements but in case where entry is given by law, and in such case not with strong hand nor with multitude of people, but only in lawful, peaceable, and easy manner. And if any man from henceforth do to the contrary, and thereof be duly convicted, he shall be punished by imprisonment of his body, and thereof be ransomed at the King's will." On this statute it has been held that any leave and licence to break and enter premises is void in its inception, and that any forcible entry under such a licence is an indictable misdemeanour; but that no action for damages lies against the rightful owner for forcibly entering (*c*), though for an independent wrong (*e.g.*, assault on the persons in possession or damages to furniture on the premises) an action can be maintained (*d*).

(*a*) See hereon notes to *Semayne's Case* (1603), 1 S. L. C. 104–118. The principle of Semayne's Case applies generally also to the levying of executions, but note that in executing a writ of attachment for contempt of court, the officer charged with the execution of the writ may break open even an outer door to execute it: *Harvey* v. *Harvey* (1884), 26 Ch. D. 644; 51 L. T. 508; 33 W. R. 76; 48 J. P. 468. See also *Penton* v. *Brown* and *Hodder* v. *Williams*, *ante*, p. 78.

(*b*) 5 Rich. II. st. 1, c. 8.

(*c*) *Pollen* v. *Brewer* (1859), 7 C. B. (N. S.) 371.

(*d*) *Newton* v. *Harland* (1840), 1 M. & G. 644; *Beddall* v. *Maitland* (1881), 17 Ch. D. 174; 50 L. J. Ch. 401; 44 L. T. 248; *Edwick* v. *Hawkes* (1882), 18 Ch. D. 199; 50 L. J. Ch. 577; 45 L. T. 168; 29 W. R. 913. See however the contrary opinions in *Harvey* v. *Brydges* (1845), 14 M. & W. 347 and *Blades* v. *Higgs* (1861), 10 C. B. N. S. 713.

A landlord may distrain after expiration of lease; and an executor or administrator may distrain.

A landlord can, if his title still continues, and the tenant is still in possession, distrain for rent after the expiration of the lease, provided he makes the distress within six months of such expiration (*e*). An executor or administrator of any landlord may distrain for rent due in the landlord's lifetime in like manner as his testator or intestate might have done, but such distress must be within six calendar months after the determination of the term or lease (*f*).

Landlord may follow goods clandestinely removed by tenant.

By the Distress for Rent Act, 1737 (*g*), it is provided that if a tenant fraudulently or clandestinely removes his goods after rent has become due, in order to avoid their being seized in a distress, the landlord may, if there is not a sufficient amount of other distrainable property left, within thirty days follow and distrain on the goods if they have not been sold *bonâ fide* for value and without notice in the meantime, and a penalty for such removal may be recovered of double the value of the goods. A landlord is not, under this provision, justified in following and seizing, after the expiration of the tenancy, and after the tenant has given up possession, goods which were fraudulently removed from the demised premises for the purpose of defeating the landlord's right to distrain for the rent, for this enactment applies only to a case where the landlord has a right to distrain either at common law or under the statute 8 Anne, c. 14, referred to in the last preceding paragraph, and it is a condition of that statute, in order to make it applicable, that the tenant must be in actual possession (*h*). If a tenant has given a bill of sale, and the holder thereof, being entitled to do so, seizes and removes the goods, although such removal is made with the view of preventing the landlord distraining on the goods, yet the landlord cannot

Gray v. *Stait.*

Tomlinson v. *Consolidated Credit Corporation.*

Where a tenant held over and the landlord from the outside removed the roof he was held not liable for damage caused to the tenant's furniture thereby, *Jones* v. *Foley* (1891), 1 Q. B. 730; 60 L. J. Q. B. 464.

(*e*) 8 Anne, c. 14, ss. 6, 7.

(*f*) 3 & 4 Wm. IV. c. 42, ss. 37, 38.

(*g*) 11 Geo. II. c. 19, ss. 1, 2. 3.

(*h*) *Gray* v. *Stait* (1883), 11 Q. B. D. 668; 52 L. J. Q. B. 412; 49 L. T. 288; 31 W. R. 662.

follow them under the above provision and this is so even although the only right on the part of the bill of sale holder to seize and remove, was the consent of the tenant to his so doing (*i*).

Manner of making a distress.

The manner of making a distress is as follows :— The landlord, either personally or by his duly certified (*j*) bailiff (who need not necessarily be authorised by writing), enters and makes a seizure at any time between sunrise and sunset. He then makes an inventory of the goods, and leaves the same, with a written notice of the amount of rent due and of the things distrained, on the premises. Having thus impounded the goods (*k*), he usually leaves a bailiff in possession, but this is not actually necessary as a point of law, though practically advisable (*l*). Then after five days from making the distress—which period is allowed for the tenant to have an opportunity of replevying—the chattels are usually appraised by two appraisers, and they are then sold, and any balance beyond the rent and expenses is afterwards paid to the owner (*ll*). All necessity for appraisement prior to selling is, however, now dispensed with, and the period for replevying is, if the tenant so requests, and gives security for any additional costs that may be thereby occasioned, extended to fifteen days (*m*).

The Six Carpenters Case.

The well-known case called *The Six Carpenters Case* (*n*) decides that where an authority or power is given to a person by the law, and that authority or power is abused by such person, he becomes a trespasser

(*i*) *Tomlinson* v. *Consolidated Credit Corporation* (1890), 24 Q. B. D. 135 ; 62 L. T. 162 ; 38 W. R. 118.

(*j*) 61 & 62 Vict. c. 21, s. 7.

(*k*) See 11 Geo. II. c. 19, s. 10.

(*l*) *Jones* v. *Beirnstein* (1900), 1 Q. B. 100 ; 69 L. J. Q. B. 1 ; 81 L. T. 553.

(*ll*) 2 Wm. & Mary, sess. 1, c. 5, s. 2 ; 35 & 36 Vict. c. 92, s. 13. A sale to the landlord himself of goods which have been properly distrained upon, but which are not the property of the tenant, is invalid (*Moore* v. *Singer Manufacturing Co.* (1904), 1 K. B. 820 ; 73 L. J. K. B. 457).

(*m*) 51 & 52 Vict. c. 21, ss. 5-7. See also as regards distress the Law of Distress Amendment Act, 1895 (58 & 59 Vict. c. 24).

(*n*) (1611) 1 S. L. C. 132 ; 8 Coke, 146 a.

ab initio; and a distress being such an authority or power, it followed from this decision, that if there was any irregularity in making the distress, the distrainor was from the moment of distraining a trespasser. This hardship has been remedied by the Distress for Rent Act, 1737 (*o*), which provides that if any rent is justly due, irregularity is *not* to make the distrainor a trespasser *ab initio.* But if a landlord is not merely guilty of some irregularity, but distrains in an unauthorized way, he is then a trespasser from the commencement; and if he makes an excessive distress, an action may be brought against him for so doing. If the tenant tenders (*p*) the amount of rent, this will make the distress tortious, and although a warrant has been delivered to a bailiff, a tender without expenses is good before the distress is put in. If a tender is made after seizure, but before the impounding (*q*) of the distress, it makes the detaining, and not the original taking, wrongful. Any person guilty of pound-breach, or rescue of goods distrained on, is by statute (*r*) liable for treble the damages suffered by the distrainor.

The effect of this case as to a distress now altered by 11 Geo. II, c. 19, s. 19.

Tender of rent makes a distress tortious.

Pound-breach.

Replevin.

The usual proceeding on a wrongful distress is by replevin, the first step in which is to enter into a replevin bond before the registrar of the local County Court, with two sureties; and on this being entered into, the goods are redelivered to the owner, who subsequently has to commence an action to try the validity of the distress, and if it goes against him, he has to return the goods to the distrainor (*s*).

Other remedies of a landlord besides distress.

Beyond his remedy to recover rent by the summary process of distress, the landlord has another remedy, viz., by bringing an action to recover it; and besides this, he may also, provided there is a condition of re-entry in the tenancy agreement, proceed to eject his

(*o*) 11 Geo. II. c. 19, s. 19.

(*p*) See as to a tender, *post*, ch. viii, pp. 274–276.

(*q*) As to what will amount to "impounding," see Woodfall's Landlord and Tenant, 548, 549. Seizing and making an inventory and giving notice to the tenant of the distress appears to be sufficient.

(*r*) 2 Wm. & Mary, sess. 1, c. 5, s. 4.

(*s*) See hereon Indermaur's Manual of Practice, 74.

tenant (*t*). At common law, before commencing an action of ejectment for non-payment of rent, it was necessary to make a demand for it, at some convenient time before sunset on the last day limited for payment of the rent. This being a great inconvenience, it was provided by the Common Law Procedure Act, 1852 (*u*), that if half a year's rent is in arrear, and there is no sufficient distress to be found upon the premises, the landlord may bring ejectment without the necessity of making any previous demand. If half a year's rent is not due, or there is a sufficient distress on the premises, it will be observed that this provision is inapplicable, and if ejectment is resorted to, it must be as at the common law, quite irrespective of the statute, with the formality of a demand, unless indeed the proviso for re-entry expressly dispenses with the necessity for it, which is usually the case.

Action of ejectment at common law, and under 15 & 16 Vict. c. 76, s. 210.

A landlord may distrain for six years' rent, except in the one case of a holding under the Agricultural Holdings Act, 1908, presently mentioned; and if the demise be under seal, though he cannot distrain beyond the six years, yet he has a right of action under the Civil Procedure Act, 1833, against the person for the full period of twenty years (*v*). And it is well established that so long as the relation of landlord

Amount of rent landlord entitled to sue and distrain for.

(*t*) This subject is unaffected by sect. 14 of the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), which provision should, however, be referred to on the general subject of forfeiture by tenants. See *post*, pp. 87, 88.

(*u*) 15 & 16 Vict. c. 76, s. 210.

(*v*) 3 & 4 Wm. IV. c. 27, s. 42; 3 & 4 Wm. IV. c. 42, s. 3; and see further generally as to limitation of action, *post*, pp. 277, 278. We have carefully considered the point of whether an action for arrears of rent on a covenant can still be brought within twenty years, and are of opinion that it can. We arrive at this result thus: Sect. 1 of 37 & 38 Vict. c. 57, is in place of sect. 2 of 3 & 4 Wm. IV. c. 27, now repealed, and it provides that an action for rent must be brought within twelve years; but on the authority of *Grant* v. *Ellis* (1842), 9 M. & W. 113, decided under the repealed provision, this does not extend to rent between landlord and tenant, and this case was followed in *Lewis* v. *Graham*, 80 L. T. Newspaper, 66; and in *Darley* v. *Tennant* (1886), 53 L. T. 257. By 3 & 4 Wm. IV. c. 27, s. 42, only six years' arrears of rent can be recovered, but under 3 & 4 Wm. IV. c. 42, s. 3, an action for debt upon a covenant to pay rent may be brought within twenty years. The confusion between these two enactments, passed within three weeks of each other, was, in *Hunter* v. *Nockolds* (1849), 1 Mac. & G. 640, explained in this way, that 3 & 4 Wm. IV. c. 27, must be considered as

and tenant exists as a legal relation, the nonpayment of rent for any length of time does not bar the landlord's right of action on the covenant to pay, although he cannot sue for more than twenty years arrears prior to the issue of the writ (*x*).

Landlord has a right against an execution creditor for one year's rent.

If a landlord distrains before the goods are taken in execution for a debt, he has a right to the full amount he is entitled to distrain for out of the goods, notwithstanding the subsequent execution; and in the case of the goods on the demised premises being taken in execution before he has distrained, he has even then a right to be paid one year's rent (if so much is due) before the goods are removed under the execution; and the sheriff is empowered to levy out of the goods and pay the execution creditor not only the amount of the execution, but also such one year's rent which he has had to pay the landlord (*y*). The landlord has no right as against an execution creditor to more than the one year's rent, although more may be due to him, if the execution has been levied before he has distrained (*z*).

Agricultural tenants.

With regard to a holding governed by the Agricultural Holdings Act, 1908 (*a*), a distress for rent is only allowed to the extent of one year before the

only determining what could be recovered against the land, and 3 & 4 Wm. IV. c.42, what could be recovered against the person. Therefore plainly, before 37 & 38 Vict. c. 57, the periods of limitation were as stated in the text. We find nothing in that Act which alters the law. Section 9, it is true, whilst expressly keeping on foot sec. 42 of 3 & 4 Wm. IV. c. 27, makes no mention of 3 & 4 Wm. IV. c. 42, s. 3; but surely that cannot produce any repeal by implication. Lastly, we do not recognise that *Sutton* v. *Sutton* (1883), 21 Ch. D. 511; 52 L. J. Ch. 333; 48 L. T. 95; 31 W. R. 369 affects the point, for that was distinctly decided on sect. 8 of 37 & 38 Vict. c. 57, which section has nothing whatever to do with an action to recover rent, though it has with money charged on rent. There really is so much confusion amongst writers on this subject, and so much apparent timidity in stating anything definite as to it, that we have thought it best to leave it as it is in the text, and give readers the reasons thus fully.

(*x*) *Archbald* v. *Scully* (1861), 9 H. L. Cas. 360.

(*y*) 8 Anne, c. 14, s. 1. If the premises are let at a weekly rent, the landlord's claim against an execution creditor is, however, limited to four weeks' arrears of rent, and if the premises are let for any other term less than a year, his claim is limited to arrears of rent accruing during four such terms or times of payment (7 & 8 Vict. c. 96, s. 67).

(*z*) 8 Anne, c. 14, s. 1.

(*a*) 8 Edw. VII. c. 28, s. 28.

making of the distress, except that where the ordinary custom between landlord and tenant has been to defer payment of rent until the expiration of a quarter or half a year after the same became due, then such rent is only deemed, for the purposes of distress, to have become due at the expiration of such quarter or half-year, and not at the date at which it legally became due (*b*).

Also in the case of bankruptcy.

In the case of bankruptcy also, a landlord has an advantage over other creditors, it being provided that the landlord or other person to whom any rent is due from the bankrupt, may at any time, either before or after the commencement of the bankruptcy, distrain upon the goods or effects of the bankrupt for the rent due to him from the bankrupt, with this limitation, that if such distress be levied after the commencement of the bankruptcy, it shall be available only for six months' rent accrued due prior to the date of the order of adjudication; but the landlord, or other person to whom the rent may be due from the bankrupt, may prove in the bankruptcy for the surplus due for which the distress may not have been available (*c*). It is, however, also provided that if a landlord distrains on the goods of a bankrupt, or of a company being wound up, within three months next before the date of the receiving order, or the winding-up order, certain debts to which priority is given in bankruptcy—viz., twelve months' rates and taxes, and wages of a clerk or servant during the previous four months and not exceeding £50, and wages of a labourer or workman during the previous two months and not exceeding £25—shall be a first charge on the goods so distrained or the proceeds thereof, but the landlord is then to have the same rights of priority as the person to whom such payment is made (*d*).

(*b*) 8 Edw. VII. c. 28, sec. 28, replacing 46 & 47 Vict. c. 61, s. 44. See *Ex parte Bull, re Bew* (1887), 18 Q. B. D. 642; 56 L. J. Q. B. 270; 56 L. T. 571; 35 W. R. 455.

(*c*) 46 & 47 Vict. c. 52, s. 42, as amended by 53 & 54 Vict. c. 71, s. 28. The Act 46 & 47 Vict. c. 52. s. 42, also goes on to provide that the term "order of adjudication" shall be deemed to include an ordor for the administration of the estate of the debtor whose debts do not exceed £50, or of a person who has died insolvent.

(*d*) 51 & 52 Vict. c. 62, s. 1 (4).

On bankruptcy trustee may disclaim lease as onerous property.

If, during the continuance of a lease, the lessee becomes bankrupt, the position of his landlord for the remainder of the term is, that the trustee in bankruptcy may take the lease and hold it, or deal with it generally for the benefit of the creditors, or may, by leave of the court (*e*), disclaim it, as being onerous property, in which case the lease will be deemed determined from the date of disclaimer, and the landlord may then prove against the bankrupt's estate for any injury or loss caused him by such disclaimer (*f*). This disclaimer must be made within twelve months from the trustee's appointment, unless the property shall not have come to the trustee's knowledge within one month after his appointment, when he may disclaim at any time within twelve months after he first became aware thereof; but it is provided that the landlord may make an application in writing to the trustee to decide whether or not he will disclaim, and if the trustee does not then disclaim within twenty-eight days, or such further time as may be allowed by the bankruptcy court having jurisdiction, he cannot afterwards do so (*g*).

Time for disclaimer.

Tenant is liable to be ejected on breach of covenants.

On the breach by a tenant of the covenants contained in his lease, he is liable to be ejected by his landlord under the ordinary condition of re-entry contained in the lease; but in the two cases of covenants to pay rent and to insure, the court has long had power to relieve on the payment of the rent and costs in the one case (*h*), and in the other case, if shewn that the omission to insure arose through accident or mistake, or otherwise than from fraud or gross neglect,

But relief long given in two cases.

(*e*) There are certain cases in which the trustee may disclaim without leave. See Bankruptcy Rules, 1886 and 1890, Rule 320.

(*f*) 46 & 47 Vict. c. 52, s. 55 (1, 7).

(*g*) 46 & 47 Vict. c. 52, s. 55 (1, 7); 53 & 54 Vict. c. 71, s. 13. These provisions as to disclaimer do not only apply to the relation of landlord and tenant, but to all cases of onerous property. As to the effect of disclaimer, and the power of the Court to make a vesting order, see 46 & 47 Vict, c. 52, s. 55 (2), and 53 & 54 Vict. c. 71, s. 13.

(*h*) This was always so in Equity, and as to the Courts of Law, was so provided by 15 & 16 Vict. c. 76, s. 211. It has been decided that a mortgagee of a lease has the same right to relief as the lessee (*Newbolt* v. *Bingham* (1895), 72 L. T. 852).

that no loss or damage by fire had happened, that there was at the time of the application an insurance on foot in conformity with the terms of the covenant, and also provided relief had not been previously given, or a previous breach waived by the landlord out of court. A memorandum of the fact of the relief had to be indorsed on the lease (*i*).

Provisions of Conveyancing Act, 1881, as to relief against forfeitures under leases.

The law as to relief on non-payment of rent remains as formerly. But the provisions just referred to as to relief against breach of a covenant to insure are repealed by the Conveyancing Act, 1881 (*j*), which contains a much wider enactment on the subject of relief against breaches of covenants in leases generally. This Act provides (*k*) that a right of re-entry or forfeiture under any proviso or stipulation in a lease for a breach of any covenant or condition therein, shall not be enforceable by action or otherwise, unless and until the lessor serves on the lessee a notice specifying the particular breach complained of, and, if the breach is capable of remedy, requiring the lessee to remedy the breach, and in any case requiring the lessee to make compensation in money for the breach, and the lessee fails within a reasonable time thereafter to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money to the satisfaction of the lessor for the breach (*l*). Also that where a lessor "is proceeding" by action, or otherwise, to enforce such a right of re-entry or forfeiture, the lessee may in the lessor's action, if any, or in any action brought by himself, apply to the Court for relief; and the Court may grant or refuse relief as it thinks fit, or grant it on any terms it thinks fit (*m*). It is, however, expressly enacted that this provision shall not extend to (1) a proviso for

Proviso.

(*i*) This power was given to Equity by 22 & 23 Vict. c. 35, ss. 4-6, and to Courts of Law by 23 & 24 Vict. c. 126, s. 2.

(*j*) 44 & 45 Vict. c. 41, s. 14 (7).

(*k*) Sect. 14.

(*l*) A notice is not invalid because it does not contain a claim for compensation in money for the breach, *Lock* v. *Pearce* (1893), 2 Ch. 271; 62 L. J. Ch. 582; 68 L. T. 569.

(*m*) See *Rogers* v. *Rice* (1892), 2 Ch. 170; 61 L. J. Ch. 573; 66 L. T. 640.

re-entry for breach of a covenant or condition against assigning, underletting, parting with the possession or disposing of the land leased, or (2) to a condition for forfeiture on the bankruptcy of the lessee (*n*), or on the taking in execution of the lessee's interest (*n*), or (3) to a condition for forfeiture of a mining lease on breach of a covenant allowing the lessor to have access to or inspect books, accounts, records, weighing-machines or other things, or to enter or inspect the mines or the workings thereof. This enactment is retrospective, and applies notwithstanding any stipulation in the lease to the contrary. If a tenant commits a breach of one of the excepted covenants, *e.g.*, a covenant not to assign without licence, he is absolutely liable to be ejected, and the court has no power to give him any relief (*o*).

Barrow v. *Isaacs.*

Apportionment Act, 1870.

If a tenant is evicted or his term is surrendered by operation of law during the continuance of a current year, half-year, or quarter, an apportionment of the rent is now made in all cases, under the provision of the Apportionment Act 1870 (*p*).

Tenant has a right to satisfy any burden on the land out of his rent.

The relation of landlord and tenant creates an implied consent by the landlord that the tenant may appropriate such part of his rent as shall be necessary to indemnify him against obligations to which the premises are subject, and which the tenant has been forced to pay but for which the landlord was primarily liable; and that the money so appropriated shall be considered as paid on account of the rent; so that if a tenant discharges some such burden, it is considered as an actual payment of so much rent, and need not be set up as a set-off, but as an actual payment (*q*).

(*n*) This is, however, to a certain extent, somewhat modified by the Conveyancing Act, 1892 (55 & 56 Vict. c. 13, sect. 2, sub-sect. 2).

(*o*) *Barrow* v. *Isaacs* (1891), 60 L. J. Q. B. 179; 64 L. T. 686. See further on the subject of relief under the Conveyancing Acts, 1881 and 1892, Indermaur and Thwaites' Conveyancing, 408–414.

(*p*) 33 & 34 Vict. c. 35.

(*q*) 1 S. L. C. 162, 167.

Implied condition on taking a furnished house or apartments.

It has been decided that there is no implied warranty on the letting of an unfurnished house as regards the state it is in (*r*), and that there is no duty cast upon the owner to see that the house is let to the tenant in a safe condition at the commencement of the term, so that if the tenant, or the customer or guest of the tenant, suffers injury during the term by reason of the unsafe condition of the house, no action for negligence will lie against the owner (*s*). But if a person agrees to take a furnished house or apartments for some short period, as the property is naturally intended for immediate occupation, there is an implied condition that it is fit for habitation; so that if, by reason of defective drains, or through the house or apartments being infected with some complaint, or otherwise, it is not so fit, the tenant is justified in repudiating the agreement, and is not liable upon it (*t*). This implied warranty, however, only exists as regards defects existing at the commencement of the tenancy (*u*), and only when the house is properly speaking a furnished house, so that where a house and land were let, and the house was partly furnished, it was held that there was no implied warranty (*x*).

Wilson v. *Finch-Hatton.*

Sarson v. *Roberts.*

The Housing of the Working Classes Act, 1890.

It is, however, provided by the Housing of the Working Classes Act, 1890, that in any contract made after 14th August, 1885, for letting for habitation by persons of the working classes a house or part of a house, there shall be implied a condition that the house is at the commencement of the holding in all respects reasonably fit for human habitation. This, however, only applies

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(*r*) *Keates* v. *Lord Cadogan* (1851), 10 C. B. 591; *Manchester Bonded Warehouse Co.* v. *Carr* (1880), 5 C. P. D. 507; 49 L. J. C. P. 809; 29 W. R. 354.

(*s*) *Robbins* v. *Jones* (1863), 33 L. J. C. P. 1; *Lane* v. *Cox* (1897), 1 Q. B. 415; 66 L. J. Q. B. 193; 76 L. T. 135; *Cavalier* v. *Pope* (1906), A. C. 428; 75 L. J. K. B. 609; 95 L. T. 65.

(*t*) *Wilson* v. *Finch-Hatton* (1877), 2 Ex. D. 337; 46 L. J. Ex. 489; *Smith* v. *Marrable* (1843), 11 M. & W. 5; *Bird* v. *Lord Greville* (1885), 1 C. & E. 317.

(*u*) *Maclean* v. *Currie* (1885), 1 C. & E. 361; *Sarson* v. *Roberts* (1895), 2 Q. B. 395; 65 L. J. Q. B. 37; 73 L. T. 174.

(*x*) *Chester* v. *Powell* (1886), 52 L. T. 722.

in England where the annual letting rent does not exceed the following amounts respectively, viz., £20 in London, £13 in Liverpool, £10 in Manchester or Birmingham, and £8 elsewhere (*y*). This implied condition cannot be excluded by an express contract (*z*).

(*y*) 53 & 54 Vict. c. 70, s. 75. (*z*) 3 Edward VII. c. 39, s. 12.

CHAPTER IV

OF CONTRACTS AS TO GOODS, AND HEREIN OF BAILMENTS, INCLUDING CARRIERS AND INNKEEPERS (*a*)

Sale and agreement to sell.

THE most usual, and therefore most important, kind of contracts as to goods are for their sale, the law on which subject has been codified by the Sale of Goods Act, 1893 (*b*). This Act defines "goods" as including all chattels personal other than things in action and money; and the term includes emblements, industrial growing crops, and things attached to or forming part of the land which was agreed to be severed before sale or under the contract of sale (*c*). A contract of sale of goods may be defined as a contract whereby the seller transfers, or agrees to transfer, the property in goods to the buyer for a money consideration, called the price. Where under a contract of sale the property in the goods is transferred from the seller to the buyer, the contract is called a sale. Where the transfer of the property in the goods is to take place at a future time, or subject to some condition thereafter to be fulfilled, the contract is called an agreement to sell; and an agreement to sell becomes a sale when the time elapses, or the conditions are fulfilled, subject to which the property in the goods is to be transferred (*d*).

Points as to delivery and acceptance of goods.

When a contract of sale of goods is entered into it is the duty of the seller to deliver them, and of the buyer to accept and pay for them, in accordance with the terms of the contract (*e*), and delivery of the goods and payment of the price are concurrent conditions (*f*).

(*a*) As to the title to goods, see *post*, Part II., "Torts," ch. iii.
(*b*) 56 & 57 Vict. c. 71.
(*c*) Sect. 62.
(*d*) Sect. 1.
(*e*) Sect 27.
(*f*) Sect. 28.

Place of delivery.

Whether it is for the buyer to take possession of the goods, or for the seller to send them to the buyer, is a question depending in each case on the contract; but apart from this, the place of delivery is the seller's place of business, if he has one, and if not his residence, except that if the contract is for the sale of specific goods, which to the knowledge of the parties when the contract is made are in some other place, then that place is the place for delivery (*g*).

Delivery to a carrier.

Where under the contract the seller is authorised or required to send the goods to the buyer, delivery to a carrier for transmission to the buyer is *primâ facie* a delivery to the buyer; but when goods are sent by the seller to the buyer by a route involving sea transit, under circumstances in which it is usual to insure, the seller must give such notice to the buyer as may enable him to insure them during their sea transit, and if the seller fails to do so, the goods are deemed to be at his risk during such sea transit (*h*).

Deterioration during transit.

Where the seller agrees to deliver goods at his own risk, the buyer nevertheless takes any risk of deterioration in the goods necessarily incident to the course of transit (*i*).

Examination of goods by buyer.

When goods are delivered, the buyer should examine them, and accept or reject them according to whether they are or are not in conformity with the contract, and he cannot be deemed to have accepted them until he has had a reasonable opportunity of examining them (*j*); and he will be deemed to have accepted them when he so intimates to the seller, or when he does any act in relation to the goods which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them (*k*).

Rejection of goods.

If the buyer, being entitled to do so, rejects the goods, he is not bound to return them to the seller, but it is sufficient if he intimates to the seller that he refuses to accept them (*l*).

Whether the property in

The majority of contracts for the sale of goods are

(*g*) 56 & 57 Vict. c. 71, s. 29.
(*h*) Sect. 32.
(*i*) Sect. 33.
(*j*) Sect. 34.
(*k*) Sect. 35.
(*l*) Sect. 36.

simple and plain in their nature, but in very many such contracts intricate and difficult points arise as to the passing of the property in the goods, and the relative rights of the seller and buyer in the subject-matter of the contract; and whether the property in goods has passed under a contract is frequently a question of intention, to be gathered from the expressions made use of in the contract, and the surrounding circumstances. If goods, on being sold, are actually delivered over to the buyer, or, being in the possession of a third person, he acknowledges to the buyer that he holds the goods for him, there can ordinarily be no doubt whatever of the property at once passing to him; but in many cases the goods may remain in the possession of the seller whilst the property in them has passed to and is vested in the buyer, so that any loss happening to them would have to be borne by the latter. It is necessary, therefore, to specially consider the question as to when the property passes in goods under a contract for their sale, bearing in mind that the goods are at the risk of the person in whom the property is vested (*m*).

goods has passed.

The Sale of Goods Act, 1893 (*n*), provides that, with regard to a contract for the sale of unascertained goods, no property in the goods is transferred to the buyer unless and until the goods are ascertained (*o*); but that with regard to specific (*p*) goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred; and to arrive at this intention, regard is to be had to the terms of the contract, the conduct of the parties, and the circumstances of the case (*q*). The Act then goes on to provide (*r*), that *unless a different intention appears* (*rr*), the following rules are to be observed for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer :—

As to property passing in unascertained, and specific goods, respectively.

(*m*) 56 & 57 Vict. c. 71, s. 20. (*n*) 56 & 57 Vict. c. 71.
(*o*) Sect. 16.
(*p*) *i.e.*, goods identified and agreed upon at the time a contract of sale is made, sec. 62.
(*q*) Sect. 17. (*r*) Sect. 18. (*rr*) *Weiner* v. *Gill* (1906), 2 K. B. 574.

Rules for ascertaining intention as regards property passing.

Rule 1. Where there is an unconditional contract for the sale of specific goods in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment, or the time of delivery, or both, be postponed (*s*).

Rule 2. Where there is a contract for the sale of specific goods, and the seller is bound to do something to the goods for the purpose of putting them into a deliverable state, the property does not pass until such thing be done and the buyer has notice thereof.

Rule 3. Where there is a contract for sale of specific goods in a deliverable state, but the seller is bound to weigh, measure, test, or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until such act or thing be done, and the buyer has notice thereof.

Rule 4. When goods are delivered to the buyer on approval, or "on sale or return," or other similar terms (*t*), the property therein passes to the buyer— (i) When he signifies his approval or acceptance to the seller, or does any other act adopting the transaction (*u*); (ii) If he does not signify his approval or acceptance to the seller, but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of such time, and, if no time has been fixed, on the expiration

(*s*) *e.g.*, *Tarling* v. *Baxter* (1827), 6 B. & C. 360, where B. agreed to sell A. a certain stack of hay to be paid for on ensuing 4th February and to be removed in May following.

(*t*) *e.g.*, on trial, *Ellis* v. *Mortimer* (1865), 1 B. & P. N. R. 257, or on approbation (*Blanckensee* v. *Bleiberg* (1885), 2 T. L. R. 36.

(*u*) Thus in *Kirkham* v. *Attenborough* (1897), (1 Q. B. 201 ; 66 L. J. Q. B. 149 ; 75 L. T. 543), the plaintiff was a jeweller, and sent goods to W. "on sale or return." W. pawned the goods with the defendant. It was held that W. by the act of pawning had adopted the transaction, and therefore the property had passed to W., and consequently the defendant had a good title. But where a retailer delivered goods to a person who was to pay cash or return them in a day or so, and he fraudulently pawned them, it was held that the property did not pass and that the retailer could recover the goods from the pawnbroker without compensation (*Weiner* v. *Gill*, 1906, 2 K. B. 574 ; 75 L. J. K. B. 916 ; 95 L. T. 438).

of a reasonable time. What is a reasonable time is a question of fact.

Rule 5. (i) Where there is a contract for sale of unascertained or future (*v*) goods by description, and goods of that description (*w*), and in a deliverable state, are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be express or implied, and may be given either before or after the appropriation is made. (ii) Where, in pursuance of the contract, the seller delivers the goods to the buyer, or to a carrier or other bailee (whether named by the buyer or not), for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract.

Instances of cases when the property in goods does not pass.

These rules, thus specifically formulated by the Sale of Goods Act, 1893, are in substance the result of a number of decisions to which it is now unnecessary to refer; but with regard to them it may be well to specially notice some instances of cases in which the transaction may be simply inchoate and incomplete, and not pass any property in the goods, by reason of the contract shewing that there is no present intention to pass the property. Thus, in one case, where, on a contract for the sale of goods, it was, according to the usage of trade, the duty of the seller to count them out, and before he did so the goods were destroyed by fire, it was held that the loss fell on the seller (*x*). In another case, turpentine was bought at an auction, which, according to the conditions of sale, was to be weighed, and before it was entirely weighed it was destroyed by fire; the Court held that the property had not passed in that portion of the goods which had

Zagury v. *Furnell.*

Rugg v. *Minett.*

(*v*) *i.e.*, goods to be manufactured or acquired by the seller after the making of the contract of sale, 56 & 57 Vict. c. 71, secs. 5, 62.

(*w*) *Vigers* v. *Sanderson* (1901), 1 Q. B. 608; 70 L. J. K. B. 383; 84 L. T. 464.

(*x*) *Zagury* v. *Furnell* (1809), 2 Camp. 240.

Acraman v. *Morrice.*

not been weighed (*y*). And where the defendant had contracted for the purchase of the trunks of certain trees, and the custom of the trade was that he should measure and mark the portions he wanted, and that the seller should then cut off the rejected parts, it was held that no property passed in the goods, although the buyer had so measured and marked them, until the rejected parts had been actually severed by the seller (*z*). And where the buyer of a horse on sale or return had eight days in which to return it, and it died within that time without his fault, it was held that the property had not passed and the seller could not sue for the price (*a*).

Elphick v. *Barnes.*

When property passes in goods part of an entire bulk.

Where goods, part of an entire bulk, are sold, no property passes in them until separated and set apart from the bulk and absolutely appropriated to the buyer (*b*). It is sometimes the seller, and sometimes the buyer, who has the right of selecting the particular goods from the entire bulk; and the rule is, that "the party who by the agreement is to do the first act which, from its nature, cannot be done until the election is determined, has authority to make the choice in order that he may be able to do that first act; and, when once he has done that act, the election has been irrevocably determined, but till then he may change his mind" (*c*). An instance of when the right of appropriation will be in the buyer may be found in the case of the sale of a certain number of bricks out of a stack of bricks, and it is provided that the buyer shall send his cart and fetch them away. Here the first act has to be done by the buyer, and he, therefore, has the right of appropriation. He may choose which of the bricks he likes, but as soon as he has once put them in his cart to be taken away, the appropriation is com-

(*y*) *Rugg* v. *Minett* (1809), 11 East, 210.
(*z*) *Acraman* v. *Morrice* (1849), 8 C. B. 449.
(*a*) *Elphick* v. *Barnes* (1880), 5 C. P. D. 321; 49 L. J. C. P. 698; 29 W. R. 139.
(*b*) See *Dixon* v. *Yates* (1833), 5 B. & Ad. 313.
(*c*) Benjamin on Sale, 342.

plete and the property has passed. But if in such a case the contract was that the seller should load the bricks into the buyer's cart, here the right of appropriation would be in the seller, for the first act is to be done by him; and in all cases of appropriation by the seller such appropriation must be assented to by the buyer before the property will pass; but if it is made in pursuance of and as a term of the contract, the assent is presumed, and it is conclusive (*d*). In the case also of a contract to make any article (though an action would of course lie for the breach of the contract), the property therein will not pass until there has been a subsequent appropriation thereof made by the seller, and such appropriation has been assented to by the buyer. And so also a grant of goods not in existence, or not belonging either actually or potentially to the grantor at the time, is of no effect unless the grant is afterwards in some way ratified by him after acquiring a property in them (*e*). The mere fact of the price not being mentioned in the contract does not prevent the property passing, for it may be either a price to be thereafter agreed on, or determined in the course of dealing between the parties, or what the things are reasonably worth (*f*). If, however, there is an agreement to sell goods at a price to be fixed by the valuation of a third party who cannot or does not make such valuation, then the agreement is avoided; but if the goods, or any part of them, have been delivered to and appropriated by the buyer, he must pay a reasonable price for them. And if such third party is prevented from making the valuation by the fault of the seller or buyer, the party not in fault may maintain an action for damages against the party in fault (*g*).

When the property passes in goods to be made.

Agreement to sell at valuation.

The Sale of Goods Act, 1893, also provides (*h*) that

Reservation of right of disposal.

(*d*) Benjamin on Sale, 342.
(*e*) *Robinson* v. *Macdonnel* (1816), 5 M. & S. 228.
(*f*) 56 & 57 Vict. c. 71, s. 8; *Acebal* v. *Levy* (1834), 10 Bing. 376; *Hoadly* v. *M'Laine* (1834), 10 Bing. 482; *Joyce* v. *Swann* (1864), 17 C. B. N. S. 84.
(*g*) 56 & 57 Vict. c. 71, s. 9.
(*h*) Ibid., s. 19 (1).

where there is a contract for the sale of specific goods, or where goods are subsequently appropriated to the contract, the seller may specially reserve the right of disposal of the goods until certain conditions are fulfilled; and in such a case, notwithstanding the delivery of the goods to the buyer, or to a carrier or other bailee for transmission to him, the property does not pass until the conditions are fulfilled. When goods are shipped, and by the bill of lading they are deliverable to the order of the seller or his agent, the seller is *primâ facie* deemed to reserve the right of disposal (*i*); and when the seller of goods draws on the buyer for the price, and transmits the bill of exchange and bill of lading to the buyer together, to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honour the bill of exchange, and if he wrongfully retains the bill of lading the property in the goods does not pass to him (*k*).

General answer to question of when property in goods passes.

Upon the question of when the property in goods passes, it will be found that it is a fairly correct answer to say that, as a general rule, *the property will pass where there is a valid and complete contract, provided that the goods are in existence, and no act remains to be done to them, or the buyer has acquired possession of the goods.*

The effect of goods perishing.

Where there is a contract for the sale of specific goods, and the goods, without the knowledge of the seller, have perished at the time when the contract is made, the contract is void (*l*); and where there is an agreement to sell specific goods, and subsequently the goods, without any fault of the buyer or seller, perish *before the risk passes to the buyer*, the agreement is thereby avoided (*m*).

(*i*) 56 & 57 Vict. s. 19 (2). (*k*) Ibid., s. 19 (3).
(*l*) 56 & 57 Vict. c. 71, s. 6; see *Couturier* v. *Hastie* (1850), 5 H. L. Ca. 673.
(*m*) Sect. 7; *Elphick* v. *Barnes* (1880), 5 C. P. D. 321; 49 L. J. C. P. 698.

Contracts as to goods are in many cases required by statute to be by writing.

4th section of Statute of Frauds as applying to contracts for sale of goods.

By section 4 of the Statute of Frauds (*n*) it is provided that no action shall be brought whereby to charge any defendant upon (*inter alia*) any contract not to be performed within one year from the making thereof. This section has already been discussed (*o*), and with regard to this portion of it, it is sufficient here to say that, applying to all contracts not to be performed within a year, it includes contracts as to goods. With regard, however, specially to contracts for the sale of goods, section 17 of the Statute of Frauds, and the amendment thereof contained in section 7 of Lord Tenterden's Act (*p*), were until lately the important enactments, but these provisions have been repealed and substantially re-enacted by section 4 of the Sale of Goods Act, 1893, which provides as follows :—

Sale of Goods Act, 1893, sect. 4, in substitution for 17th sect. of Statute of Frauds as amended by Lord Tenterden's Act.

"1. A contract for the sale of any goods of the value of £10 or upwards shall not be enforceable by action unless the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract be made, and signed by the party to be charged, or his agent in that behalf.

"2. The provisions of this section apply to every such contract, notwithstanding that the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery.

"3. There is an acceptance of the goods within the meaning of this section when the buyer does any act in relation to the goods which recognises a pre-existing contract of sale, whether there be an acceptance in performance of the contract or not."

(*n*) 29 Car. II. c. 3. (*o*) *Ante*, pp. 50–57. (*p*) 9 Geo. IV. c. 14, s. 7.

Writing not absolutely necessary.

The memorandum required as sufficient evidence of a contract has been before touched on in treating of the Statute of Frauds generally (*q*). What has been there remarked is equally applicable to section 4 of the Sale of Goods Act, 1893, and the student will note that writing is not, under the latter enactment, an absolute essential (as neither was it under section 17 of the Statute of Frauds), as there may be instead either part payment, or earnest, or acceptance and receipt.

Distinction between earnest and part payment.

Earnest is a matter quite distinct from part payment, being some gift or token given by a buyer to a seller, not on account, but quite irrespective of the price; part payment is simply an actual payment of money on account of the price. The giving of earnest is not a course adopted often now, though of course, part payment is frequently (*r*).

What will amount to earnest or part payment.

On the point of part payment, it may be noticed that an actual payment is necessary, so that what is called in the north of England "striking off" a bargain, *i.e.*, drawing the edge of a shilling over the hand of the seller and not paying him the money, is not sufficient (*s*); but delivery of a bill of exchange or promissory note is, because it amounts to payment until dishonoured (*t*). Retention of money owing by the seller to the buyer, is not "part payment" sufficient to satisfy the statute, if the agreement for retention or set off is one of the terms of the contract of sale (*u*).

Norton v. *Davison.*

As to acceptance and receipt.

The acceptance and receipt require a slightly more detailed explanation.

Recognition of the contract required.

The words of the statute are, "accept part of the goods so sold and actually receive the same;" and it

(*q*) *Ante*, pp. 57–59.

(*r*) See Benjamin on Sale, 225; *Howe* v. *Smith* (1884), 27 Ch. D. 89; 32 W. R. 302; 55 L. J. Ch. 1055; 50 L. T. 373.

(*s*) Neither is it giving something in earnest, *Blenkinsop* v. *Clayton* (1817), 7 Taunt. 597.

(*t*) *Chamberlyn* v. *Delarive* (1767), 2 Wils. 253; see Benjamin on Sale, 227.

(*u*) *Norton* v. *Davison* (1899), 1 Q. B. 401; 68 L. J. Q. B. 265; 80 L. T. 139; *Walker* v. *Nussey* (1847), 16 M. & W. 302.

is provided that there is to be a sufficient acceptance when the buyer does any act in relation to the goods which recognises a pre-existing contract of sale, whether there is an acceptance in performance of the contract or not. Thus there may be an acceptance and receipt as evidentiary matter to satisfy the statute, and make the contract one upon which an action can be brought, although the buyer may still have the right to reject the goods as not in accordance with sample. The enactment is well illustrated by the case of *Page* v. *Morgan* (*x*). There the plantiff had sold to the defendant certain wheat, which was put into a barge in sacks and sent to the defendant's mill, where it arrived in the evening, and on the following morning, a portion of it was by order of the defendant's foreman, hoisted up into the mill and there examined with the sample. The defendant then rejected the whole of the wheat on the ground that it was not equal to sample, and the portion examined was put back into the barge, and remained there for some weeks, when it was sold by order of the court. It was the custom at the defendant's mill not to examine wheat whilst it was in the barge. The plaintiff sued to recover damages from the defendant for not accepting the wheat, and the jury having found that it was in accordance with the sample, the defendant objected that section 17 of the Statute of Frauds had not been complied with. It was, however, held that the taking part of the wheat into the mill to see if it was equal to sample constituted "acceptance and receipt" to satisfy the statute, for that what is required is a recognition of the contract, and that though acceptance and receipt are two distinct things, yet receipt under such circumstances as to import a recognition of a contract, is also the acceptance contemplated by the statute (*y*). This case forms an exact illustration of what is meant by the enactment on the subject in the Sale of Goods Act, 1893; but notwith-

Page v. *Morgan*.

(*x*) (1885) 15 Q. B. D. 228; 54 L. J. Q. B. 434; 53 L. T. 126.
(*y*) See also *Abbott* v. *Wolsey* (1895), 2 Q. B. 97; 64 L. J. Q. B. 587; 72 L. T. 581; 43 W. R. 513.

Every delivery not sufficient.

standing this, the student must not think that every mere delivery is sufficient, for there may be many a delivery without there being in any way a recognition of the contract, and that is what is wanted (*z*). However clearly the principle may be put, it must ever in some cases be difficult of application.

Summary on this point.

To endeavour to sum up an answer to the question of what will amount to a sufficient "acceptance and actual receipt" within the statute, we shall be tolerably correct in stating that *there must be a delivery actual or constructive, and the buyer must by his acts, either prior to or contemporaneously with the receipt, have signified his acceptance in some way, but that what is or is not an acceptance is a question, principally of fact, depending on the different circumstances of each particular case, and that all that is really required is an admission or recognition of the contract.*

Sales by auction.

Where goods are sold, not by private contract, but by auction, the sale is complete when the auctioneer's hammer falls, and until then a bidder may retract his bid. A sale by auction may be notified to be subject to a reserved or upset price; and a right to bid may also be expressly reserved, in which last case, but not otherwise, the seller or any person for him may bid at the auction. Subject to this, it is not lawful for the seller to bid, or to employ any person to bid at the sale, and if the seller or some one on his behalf does so bid, the sale may be treated as fraudulent by the buyer (*a*).

Remedies of seller and buyer.

The seller of goods may maintain an action against the buyer for their price—(1) if the property has passed to the buyer, who wrongfully neglects or refuses to pay for the goods according to the contract; or (2) if under the contract of sale the price is payable on a day certain, irrespective of delivery, and the buyer wrongfully neglects or refuses to pay such price,

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(*z*) *Taylor* v. *Smith* (1893), 2 Q. B. 65; 61 L. J. Q. B. 331; 67 L.T. 39, where looking at goods after they arrived at the wharf of the buyer, without handling them, was held not a sufficient acceptance.

(*a*) 56 & 57 Vict. c. 71, s. 58.

although the property in the goods has not passed and the goods have not been appropriated to the contract (*b*). In other cases, where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages (*c*). Where the seller wrongfully neglects or refuses to deliver goods contracted to be sold, the buyer may maintain an action against the seller for damages for non-delivery (*d*); but the buyer before he can sue for non-delivery of the goods must have paid or tendered the price, unless some period of credit was agreed upon, for, subject to this, the seller has a lien upon them for the price until actual delivery to the buyer (*e*).

Unpaid seller's rights.

The seller of goods is deemed to be an unpaid seller, if the whole of the price has not been paid or tendered, or if a negociable instrument has been taken as conditional payment and the condition has not been fulfilled by reason of dishonour or otherwise (*f*). Such unpaid seller, although the property in the goods has passed to the buyer, has by implication of law—(1) a lien on the goods for the price while he has possession; (2) a right of stoppage *in transitu;* and (3) certain rights of re-sale; and if the property has not passed to the buyer, a right of withholding delivery (*g*).

Definition of a lien.

A lien may be defined as the right in one man to retain that which is in his possession belonging to another until certain demands of the possessor against the owner are satisfied (*h*). A lien may be either *general, i.e.*, in respect of a general balance of account due, *e.g.*, the right of a solicitor to retain his client's

(*b*) Sect. 49. (*c*) Sect. 50.
(*d*) Sect. 51. As to getting specific delivery of the goods themselves, see *post*, p. 108. As to the measure of damages, see *post*, Part III. ch. i.
(*e*) 56 & 57 Vict. c. 71, s. 39.
(*f*) Sect. 38. (*g*) Sect. 39.
(*h*) *Hammonds* v. *Barclay* (1801), 2 East at p. 235. The word "lien" also denotes rights given by equity and by maritime law to creditors to have certain specific property primarily applied to the satisfaction of their demands, as distinct from the possessory lien at common law.

papers for a general balance due to him (*i*); or *particular*, *e.g.*, the ordinary right of a seller to retain particular goods until payment of their price. The law leans in favour of a particular, but against a general lien, which will only be allowed when there is a custom or contract to justify it. The lien in both cases can only be commensurate with the interest of the person through whom it arises, and it may be lost by the seller taking a security for payment, *e.g.*, a bill of exchange or promissory note; but if such instrument is dishonoured, the right of lien will revive if the instrument is still in the hands of the seller, though not if outstanding in a third person's hand (*j*).

How lien lost.

Lien of seller.

The unpaid seller has a lien on the goods, if there was no stipulation for credit, or if the agreed term of credit has expired, or if the buyer becomes insolvent; and may exercise such lien although he is in possession of the goods as agent or bailee for the buyer (*k*). The lien is lost by waiver, or by delivery to a carrier for the buyer without reserving the right of disposal, or by delivery to the buyer or his agent (*l*); but the mere marking by the buyer of goods remaining in the vendor's possession, or putting his name upon them, or other like acts, will not constitute a delivery sufficient to deprive the seller of his right of lien (*m*). When an unpaid seller has made part delivery of the goods, he may exercise his right of lien on the remainder, unless such part delivery has been made under such circumstances as to shew an agreement to waive the lien (*n*).

A lien can only exist before delivery.

A lien is a right of a passive nature, and does not ordinarily confer on the person possessing such right

A lien is a passive right, except in the case of an innkeeper.

(*i*) Factors, wharfingers, dyers, bankers and stockbrokers have also a general lien, Re *London and Globe Finance Corporation* (1902), 2 Ch. 416.

(*j*) *Gunn* v. *Bolckow* (1875), L. R. 10 Ch. App. 491; 44 L. J. Ch. 732.

(*k*) 56 & 57 Vict. c. 71, s. 41.

(*l*) Sect. 43.

(*m*) *Dixon* v. *Yates* (1833), 5 B. & Ad. 313; *Marvin* v. *Wallace* (1856), 25 L. J. (Q. B.), 369.

(*n*) 56 & 57 Vict. c. 71, s. 42.

any power to sell the goods (*o*). But an unpaid seller of goods has a right of re-sale in certain cases, as presently mentioned (*p*); and the Innkeepers Act, 1878 (*q*), enacts that if a guest shall become indebted to an innkeeper, and shall deposit or leave any personal effects with him or in his inn or adjacent premises for the space of six weeks, such innkeeper, after having advertised a month previously in one London newspaper, and one country newspaper circulating in the district, a notice describing the goods, and giving (if known) the name of the owner or person who deposited the goods, and of his intention to sell, may duly sell the same by public auction. Any surplus after paying the debt and expenses is to be paid to the person who left or deposited such goods.

And in one case of solicitor.

To a certain extent also a solicitor has, under the provisions of the Solicitors Act, 1860 (*r*), a lien of an active kind, as mentioned hereafter (*s*).

Definition of stoppage *in transitu*.

Closely akin to the right of lien, is the further right of stoppage *in transitu*, which is the right of the seller to stop goods after they have left his possession, but are *in course of transit* to the buyer, on hearing of the latter's bankruptcy or insolvency (*t*). The doctrine of stoppage *in transitu* seems to have been borrowed from equity (*u*), and the right, as its name imports, only exists while the goods are in transit, a matter not always easy to determine, for there may be cases of constructive possession of the buyer. The subject is now dealt with by section 45 of the Sale of Goods Act, 1893, which enacts as follows:—

The doctrine comes from equity.

Duration of transit.

1. Goods are deemed to be in course of transit from the time when they are delivered to a carrier by

(*o*) Per Alderson, B., *White* v. *Spettigue* (1845), 13 M. & W. 608.
(*p*) See *post*, p. 107.
(*q*) 41 & 42 Vict. c. 38.
(*r*) 23 & 24 Vict. c. 127, s. 28.
(*s*) *Post*, p. 226.
(*t*) 56 & 57 Vict. c. 71, s. 44.
(*u*) *Wiseman* v. *Vandeput* (1690), 2 Vern, 203, seems to be the first case in which it was acted upon. The doctrine was clearly established by *Lickbarrow* v. *Mason* (1787), 1 S. L. C. 693; 2 T. R. 93.

land or water, or other bailee, for the purpose of transmission to the buyer, until the buyer, or his agent in that behalf, takes delivery of them from such carrier or other bailee.

2. If the buyer or his agent in that behalf obtains delivery of the goods before their arrival at the appointed destination, the transit is at an end.

3. If, after the arrival of the goods at the appointed destination, the carrier or other bailee acknowledges to the buyer or his agent that he holds the goods on his behalf, and continues in possession of them as bailee for the buyer or his agent, the transit is at an end (*x*), and it is immaterial that a further destination for the goods may have been indicated by the buyer.

4. If the goods are rejected by the buyer, and the carrier or other bailee continues in possession of them, the transit is not deemed to be at an end, even if the seller has refused to receive them back.

5. When goods are delivered to a ship chartered by the buyer, it is a question depending on the circumstances of the particular case whether they are in the possession of the master as a carrier, or as agent to the buyer.

6. Where the carrier, or other bailee, wrongfully refuses to deliver the goods to the buyer, or his agent in that behalf, the transit is deemed to be at an end.

7. Where part delivery of the goods has been made to the buyer, or his agent in that behalf, the remainder of the goods may be stopped *in transitu*, unless such part delivery has been made under such circumstances as to shew an agreement to give up possession of the whole of the goods (*y*).

How the stoppage *in transitu* may be exercised.

For the seller of goods to exercise the right of stoppage *in transitu*, it is not essential that he should actually seize the goods, but the stoppage may be effected by giving a notice to the carrier or other forwarding agent. If a servant of the carrier is conveying the goods, notice

(*x*) *Taylor* v. *G. E. Ry.* (1901), 1 K. B. 774; 70 L. J. K. B. 499; 84 L. T. 770.
(*y*) 56 & 57 Vict. c. 71, s. 45.

may be given to the servant or the principal; but if to the principal, it must be given in time to enable him to inform the servant before he delivers them (*z*). When notice of stoppage *in transitu* is given to a shipowner, it seems the Act imposes on him the duty to transmit the notice to the master of the ship with reasonable diligence; and if he fails to do so, and the goods are in consequence delivered to the insolvent buyer, the shipowner is liable to an action for wrongful conversion and also for breach of duty under section 57 (*a*).

Effect of exercise of right of lien or stoppage *in transitu*.

The mere exercise of a right of lien, or a right of stoppage *in transitu*, by an unpaid seller, does not rescind the contract of sale (*b*), although where an unpaid seller has exercised such a right and re-sells the goods, the buyer acquires a good title as against the original buyer (*c*). The unpaid seller can also re-sell the goods and recover from the original buyer damages for any loss caused by his breach of contract, where the goods are perishable, or where he gives notice to the buyer of his intention to re-sell, and the buyer does not within a reasonable time pay or tender the price (*d*). Also where the seller has expressly reserved a right of re-sale in case the buyer makes default, and on such a default he accordingly re-sells, the original contract is in that case rescinded, but without prejudice to any claim the seller may have for damages (*e*).

Right of re-sale.

Effect of sale of goods during course of transit.

If, whilst the goods are in course of transit, and not paid for, the buyer sells them to another without the seller's consent, the right of stoppage *in transitu* nevertheless remains in the seller. If however, a document of title to the goods, *e.g.*, a bill of lading (*f*),

(*z*) 56 & 57 Vict. c. 71, s. 46.
(*a*) See Benjamin on Sale, 910.
(*b*) 56 & 57 Vict. c. 71, s. 48 (1). This enactment is in accordance with the opinion expressed in *Wentworth* v. *Outhwaite*, 10 M. & W. 451.
(*c*) 56 & 57 Vict. c. 71, s. 48 (2).
(*d*) Sect. 48 (3).
(*e*) Sect. 48 (4).
(*f*) Any bill of lading, dock warrant, warehouse keeper's certificate, and warrant or order for the delivery of goods, and any other docu-

has been lawfully (*g*) transferred to the buyer, who then transfers such document to a person who takes the same in good faith and for valuable consideration, then, if such last-mentioned transfer was by way of sale, the unpaid seller's right is defeated, and if by way of pledge or other disposition for value, the unpaid seller's right can only be exercised subject to the rights of the transferee (*h*). It will be observed that in the case of a sale accompanied by a transfer of the bill of lading, or other document of title, the seller's right is absolutely defeated, and therefore, even if the sub-purchase-money has not been paid, it appears that the unpaid seller has no right to intercept that, or a sufficient part of it, to satisfy what is owing to him (*i*).

As to right against a sub-purchaser.

Specific performance of contract to sell goods.

The respective rights of the seller and buyer on breach of a contract for the sale of goods have already been noticed (*k*), but in addition it is provided by the Sale of Goods Act, 1893 (*l*), that in any action for breach of contract to deliver specific or ascertained goods, the Court may, if it thinks fit, on the application of the plaintiff, by its judgment or decree direct that the contract shall be performed specifically, without giving the defendant the option of retaining the goods on payment of damages. The judgment or decree

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ment used in the ordinary course of business as proof of the possession or control of goods, and authorising or purporting to authorise, either by indorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented, is a "document of title"—56 & 57 Vict. c. 71, s. 62; 52 & 53 Vict. c. 45, s. 1 (4).

(*g*) See *Cahn* v. *Pockett's Bristol Channel Steam Packet Co.* (1899), 1 Q. B. 643; 68 L. J. Q. B. 515; 80 L. T. 269.

(*h*) 56 & 57 Vict, c. 71, s. 47. This enactment embodies the effect of the case of *Lickbarrow* v. *Mason* (1789), 1 S. L. C. 693 and the Factors Act, 1889 (52 & 53 Vict. c. 45, s. 10).

(*i*) The contrary was decided before the Sale of Goods Act, 1893, in *Ex parte Golding* (1880), 13 Ch. D. 628; 42 L. T. 220; 48 W. R. 481; and *Ex parte Falk*, re *Kidl* (1880), 14 Ch. D. 446; 42 L. T. 780; 28 W. R. 485; but these decisions were dissented from by Lord Selborne in *Kemp* v. *Falk* (1882), 7 App. Cas. 573; 52 L. J. Ch. 167, and Lord Selborne's opinion has apparently been adopted by the Act (sect. 47), which, as above stated, speaks of the seller's right as being defeated (see Benjamin on Sale, 923).

(*k*) *Ante*, pp. 102, 103.

(*l*) 56 & 57 Vict. c. 71, s. 52. This is almost identical with the former provision of 19 & 20 Vict. c. 97, s. 2.

may be unconditional, or upon such terms and conditions as to damages, payment of price, and otherwise as to the Court may seem just, and the application by the plaintiff may be made at any time before judgment or decree.

Definition of a warranty.

A warranty is sometimes given by a vendor of goods on their sale. A warranty is defined as an agreement with reference to goods which are the subject of a contract of sale, but collateral to the main purpose of such contract, the breach of which gives rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated (*m*). A warranty must be carefully distinguished both from a condition and from misrepresentation. A warranty is made contemporaneously with the contract, and its breach does not vitiate the contract, but the buyer may set up against the seller the breach of warranty in diminution or extinction of the price, or may maintain an action against the seller for damages for the breach of warranty, and if necessary he has both such rights (*n*). A condition is, however, an essential term of a contract, a breach of which entitles the buyer to reject the goods and treat the contract as at an end. It is not always easy to determine whether a certain term in a contract is a warranty or a condition, and, as was stated in one case, "There is no way of deciding the question except by looking at the contract in the light of the surrounding circumstances, and then making up one's mind whether the intention of the parties will best be carried out by treating the promise as a warranty sounding only in damages, or as a condition precedent, by the failure to perform which the other party is relieved of his liability" (*o*).

Distinctions between warranty, condition, and misrepresentation.

Provisions of Sale of Goods Act, 1893, as to conditions and warranties.

This is substantially the effect also of the provisions upon the subject now contained in the Sale of Goods Act,

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

(*n*) 56 & 57 Vict. c. 71, s. 53.

(*o*) Per Bowen, L. J., in *Bentsen* v. *Taylor* (1893), 2 Q. B. 274; 63 L. J. Q. B. 15; 69 L. T. 487. See also on the distinction between warranty and condition, *Behn* v. *Burness* (1862), 3 B. & S. 751; 32 L. J. Q. B. 204; *Bettini* v. *Gye* (1876), 1 Q. B. D. 183; 45 L. J. Q. B. 209.

1893 (*p*), which enacts that the matter must depend in each case on the construction of the contract, and that a stipulation may be a condition, though called a warranty in the contract. It is also provided by this statute (*q*), that where a contract of sale is subject to any condition to be fulfilled by the seller, the buyer may waive the condition, or may elect to treat the breach of such condition as a breach of warranty, and not as a ground for its repudiation; and that where a contract of sale is not severable, and the buyer has accepted the goods or part thereof, or where the contract is for specific goods, the property in which has passed to the buyer, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty, and not as a ground for rejecting the goods and treating the contract as repudiated, unless there be a term of the contract, express or implied, to that effect (*r*). As regards misrepresentation, that is a matter that precedes and induces the contract, and gives the person to whom it is made the right to repudiate it.

Misrepresentation.

Warranty subsequent to sale bad.

On an express warranty, it must be noticed that if made subsequently to the contract, it will be void unless it is given for a new and valuable consideration (*s*).

What will amount to a warranty.

As to what will, and what will not, amount to a warranty, the rule at the present day has been well stated to be that "every affirmation at the time of sale of personal chattels is a warranty, provided it appears to have been so intended" (*t*). It would appear upon this rule, that the well-known case of *Chandelor* v. *Lopus* (*u*) would now be decided differently, for there, on the sale of a stone, it was affirmed that it was a bezoar stone, and yet it was held no action lay. However, if, on any contract for sale, the words used merely amount to a puffing of the articles, no action will lie;

Chandelor v. *Lopus.*

(*p*) 56 & 57 Vict. c. 71, s. 11.
(*q*) Ibid. (*r*) Sect. 11.
(*s*) *Roscorla* v. *Thomas* (1842), 3 Q. B. 234.
(*t*) Per Buller, J., in *Pasley* v. *Freeman* (1789), 3 T. R. 51.
(*u*) (1603), 2 S. L. C. 54; Cro. Jac. 4.

and though the above rule is plain, yet the most that can be said on it is that it must be a question of intention in each particular case. As an instance of implied warranty may be mentioned the fact that on the sale of certain defined goods there is an implied warranty that they exist and are capable of transfer; and again an implied warranty may arise sometimes by the mere custom or usage of some particular trade or business, or from the necessities of the case. Implied warranty is in all cases founded on the presumed intention of the parties, and on reason. The implication which the law draws from what must obviously have been the intention of the parties, is drawn with the object of giving efficacy to the transaction, and preventing such a failure of consideration as cannot have been within the contemplation of either side. Probably in all cases of implied warranties it will be found that the law is raising an implication from the presumed intention of the parties, with the object of giving to the transaction such efficacy as both parties must have intended that at all events it should have (*x*). Implied warranty.

Where a person sells goods, unless the circumstances of the case shew a contrary intention (*y*), the law implies (1) a condition that the seller has a right to sell the goods and (2) a warranty that the buyer shall have and enjoy quiet possession of the goods, free from any charge or incumbrance in favour of any third party, not declared or known to the buyer (*z*). Warranty of title.

On the sale of goods words may be used which will amount to a warranty of quantity, but many cases of statements as to quantity amount to nothing more than words of estimate or expectancy (*a*). If the seller delivers to the buyer goods of less quantity than he contracted to sell, the buyer may reject them, As to warranty of quantity.

(*x*) Per Bowen, L.J., in *The Moorcock* (1889), 14 P. D. 64; 58 L. J. P. 73; 60 L. T. 654.

(*y*) As for example, a sale by a sheriff, who is only bound by an implied warranty that he is not aware of any defect of title: *Peto* v. *Blades* (1814), 5 Taunt, 657.

(*z*) 56 & 57 Vict. c. 71, s. 12.

(*a*) See *M Lay* v. *Perry* (1881), 44 L. T. 152.

but if he accept the goods so delivered, he must pay for them at the contract rate (*b*). If the seller delivers goods larger in quantity than what he contracted to sell, the buyer may accept the goods included in the contract and reject the rest, or he may reject the whole, or he may accept the whole of the goods so delivered, in which case he must pay for them at the contract rate (*c*).

Condition, or warranty, as to quality or fitness of goods.

There is, generally, no implied condition or warranty as to the quality of goods, or of their fitness for any particular purpose, the maxim *caveat emptor* (let the buyer beware) applying (*d*). To this general rule there are, however, various exceptions, the chief of which are as follows:—

1. Where there is a contract for the sale of goods by description, there is an implied condition that the goods shall correspond with the description (*e*).

2. Where the buyer expressly or by implication makes known to the seller the particular purpose for which the goods are required, so as to shew that he relies on the seller's skill or judgment, and the goods are of a description which it is the course of the seller's business to supply, there is an implied condition that the goods shall be reasonably fit for such purpose (*f*). But if the contract is for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose (*g*).

3. Where goods are bought by description from a seller who deals in goods of that description, there is an implied condition that they shall be of merchantable quality; but if the buyer has examined the goods,

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(*b*) 56 & 57 Vict. c. 71, sec. 30.
(*c*) 56 & 57 Vict. c. 71, s. 30. (*d*) Sect. 14.
(*e*) Sect. 13. *Varley* v. *Whipp* (1900), 1 Q. B. 513; 69 L. J. Q. B. 333.
(*f*) Sect. 14. See *Randall* v. *Newson*, 2 Q. B. D. 102; 46 L. J. Q. B. 256; *Priest* v. *Last* (1903), 2 K. B. 148; 72 L. J. K. B. 657; 89 L. T. 33; *Wren* v. *Holt* (1903), 1 K. B. 610; 72 L. J. K. B. 370; *Frost* v. *Aylesbury Dairy Co.* (1905), 1 K. B. 608; 74 L. J. K. B. 386.
(*g*) Sect. 14. See *Chanter* v. *Hopkins* (1838), 4 M. & W. 399; *Paul* v. *Glasgow Corporation* (1901), 3 F. 119.

there is no implied condition as regards defects which such examination ought to have revealed (*h*).

4. Where goods are sold by sample, there are implied conditions that the bulk shall correspond with the sample in quality, that the buyer shall have a reasonable opportunity of comparing the bulk with the sample, and that the goods shall be free from any defect rendering them unmerchantable, which would not be apparent on reasonable examination of the sample (*i*).

5. Where any article is sold with a trade-mark, label, or ticket, &c., thereon, or any statement thereon of the weight, quantity, or quality thereof, a warranty is implied that the trade-mark, label, or ticket, &c., is genuine and true, and that any such statement is not in any material respect false, unless the contrary is expressed in writing, signed by or on behalf of the seller, and delivered to and accepted by the buyer (*k*).

6. By the Fertilisers and Feeding Stuffs Act, 1906 (*l*), a warranty is implied, on the sale of an article for use as food for cattle or poultry, that the article is suitable for feeding purposes, and the invoice which the seller of manufactured or artificially prepared fertilisers or feeding stuffs is bound to give to the buyer is a warranty of the statements contained in it.

7. An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade to a contract for sale of goods (*m*), unless negatived or varied by express contract or by the course of dealing or usage binding both parties (*n*).

(*h*) 56 & 57 Vict. c. 71, s. 14. See *Jones* v. *Just* (1860), L. R. 3 Q. B. 197; 37 L. J. Q. B. 89.

(*i*) 56 & 57 Vict. c. 71, s. 15. *Drummond* v. *Van Ingen* (1887), 12 App. Cas. 284; 56 L. J. Q. B. 563; 57 L. T. 1. It will be observed that in the four exceptions given above, the word "condition" is used, not "warranty." As to the right conferred by reason of the breach of such condition, viz., whether the other party is entitled to reject the goods, or only to sue for damages, see sect. 12 (c) *ante*, p. 109.

(*k*) 50 & 51 Vict. c. 28, s. 17. As to trade-marks generally, see *post*, pp. 222, 223.

(*l*) 6 Edward VII. c. 27.

(*m*) 56 & 57 Vict. c. 71, sect. 14 (3).

(*n*) Ibid., sect. 55.

A warranty does not extend to apparent defects.

If a fact is known to a purchaser at the time of the sale, or might have been so known to him (take for instance, the familiar example of a horse being warranted sound, and wanting an ear or a tail), a warranty will not protect the purchaser (*o*); and where an article is sold expressly "with all faults," the only case of defect for which the purchaser can sue the vendor is, where the vendor has used artifice to prevent the purchaser discovering it, and it is not sufficient to merely show that the vendor knew of the defect (*p*).

Bills of sale.

A very frequent and common mode of dealing with goods is by bill of sale, which is an instrument used for the purpose of effecting a transfer of personal chattels from one person to another. The principal Acts governing these instruments are the Bills of Sale Act, 1878 (*q*), which now only applies to bills of sale given otherwise than as security for money, and the Bills of Sale Amendment Act, 1882 (*r*), which applies to all bills of sale given by way of security for money, and which came into operation on 1st November, 1882. The Act of 1878 under the term "bill of sale" includes assignments, transfers, declarations of trust without transfer, and other assurances of personal chattels, and also powers of attorney, or authorities or licences to take possession of personal chattels as security for any debt, and also any agreement by which a right in equity to any personal chattels or to any charge or security thereon shall be conferred (*s*); but it does not include assignments for the benefit of creditors, ante-nuptial marriage settlements, or settlements made in pursuance of an ante-nuptial agreement (*t*), transfers of any ship or share therein, transfers of goods in the ordinary course of business of any trade or calling, bills of sale of goods in foreign

What included under expression "bill of sale."

(*o*) 2 Bl. Coms. 165, 166.
(*p*) Per Heath, J., *Pickering* v. *Dowson* (1813), 4 Taunt, 779.
(*q*) 41 & 42 Vict. c. 31.
(*r*) 45 & 46 Vict. c. 43.
(*s*) *Lord's Trustee* v. *G. E. Ry.* (1908), 2 K. B. 54; 77. L. J. K. B. 611.
(*t*) *Ashton* v. *Blackshaw* (1870), L. R. 9 Eq. 510; 39 L. J. Ch. 205; Re *Reis, Ex parte Clough* (1904), 2 K. B. 769; 73 L. J. K. B. 929; 91 L. T. 352.

parts or at sea, bills of lading, India warrants, warehouse keeper's certificates, delivery orders, or any other documents used in the ordinary course of business as proof of the possession or control of goods (*u*). Difficulty sometimes arises as to whether a document is or is not a bill of sale. An inventory and receipt for the purchase of goods may amount to a bill of sale if thereby the property passes, or the terms of agreement are therein contained; but if a title can be made out by the payment of the money quite apart from the inventory and receipt, then it is otherwise. Thus if a landlord distrains and then sells the goods to a purchaser who pays his money and takes a receipt on the inventory, here ordinarily the inventory and receipt do not constitute a bill of sale (*v*). Where goods are pledged as security for a loan and delivered to the pledgee, a document signed by the pledgor, recording the transaction and regulating the rights of the pledgee as to the sale of the goods, is not a bill of sale (*x*). But any inventory, or invoice and receipt, or other document really used as the means of conferring the title to, and passing the property in the goods, does constitute a bill of sale (*y*). An attornment clause in a mortgage is in effect a bill of sale, as it confers a power to seize personal chattels (*z*), and so also is a clause in any

Inventories and receipts.

Document recording a pledge.

Attornment clause.

(*u*) 41 & 42 Vict. c. 31, s. 4. See also 53 & 54 Vict. 53, and 54 & 55 Vict. c. 35.

(*v*) *Marsden* v. *Meadows* (1881), 7 Q. B. D. 80; 50 L. J. Q. B. 536; *Preece* v. *Gilling* (1885), 53 L. T. 763; *Haydon* v. *Brown* (1888), 59 L. T. 330; *Ramsay* v. *Margrett* (1894), 2 Q. B. 18; 63 L. J. Q. B. 513; 70 L. T. 788.

(*x*) *Ex parte Hubbard, re Hardwick* (1886), 17 Q. B. D. 690; 55 L. J. Q. B. 490; 35 W. R. 2. See also, as to certain instruments of hypothecation which are not to be deemed bills of sale, 53 & 54 Vict. c. 53 and 54 & 55 Vict. c. 35.

(*y*) *Ex parte Parsons, re Townsend* (1886), 16 Q. B. D. 532; 55 L. J. Q. B. 137; 53 L. T. 897; 34 W. R. 329; *Re Roberts, Evans* v. *Roberts*, (1887), 36 Ch. D. 196; 56 L. J. Ch. 952; 57 L. T. 79; 35 W. R. 684; *Re Hood, ex parte Burgess*, (1893), 42 W. R. 23.

(*z*) *Re Willis, ex parte Kennedy* (1888), 21 Q. B. D. 384; 57 L. J. Q. B. 634; 59 L. T. 749; 39 W. R. 793. But such an attornment clause may be of value as constituting the relationship of landlord and tenant, so as to enable a mortgagee, on suing his mortgagor in ejectment, to specially indorse his writ as against a tenant holding over after the expiration of his tenancy, and proceed by means of a summons under Order 14 (*Mumford* v. *Collier* (1890), 25 Q. B. D. 279; 59 L. J. Q. B. 552; 38 W. R. 716). See further, as to the exact effect of an attornment

instrument which practically gives a power of distress (*a*), unless it is in respect of a genuine rent (*b*).

Hiring agreement.

A hiring agreement is not a bill of sale (*c*), but it is a bill of sale if, though nominally a hiring agreement, it is really a device to secure money, and the Court in considering this point is not bound merely to look at the form of the document itself, but is entitled to go outside it, and inquire into the facts of the case to see what is the real transaction (*d*). A debenture issued by an incorporated company, and secured upon the capital, stock, or goods, chattels, and effects of such company, is not a bill of sale (*e*).

Debenture.

Attestation of bills of sale.

It was provided by the Act of 1878 that every bill of sale must be attested by a solicitor, and the attestation was required to state that before execution its effect had been explained to the grantor by the attesting witness (*f*); but it was held that if this provision was not observed, the instrument was not void as between the parties, but only as against execution creditors and trustees in bankruptcy and liquidation proceedings, and under assignments for the benefit of creditors (*g*). And now by the Act of 1882 (*h*), as regards bills of sale given by way of security for money, the above requirement of attestation by a solicitor is repealed, and it is simply provided that the instrument shall be attested by some credible witness, and that if not thus duly attested it shall be absolutely void as to the chattels comprised therein (*i*). The witness must

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clause, *Green* v. *Marsh* (1892), 2 Q. B. 330; 61 L. J. Q. B. 442; 66 L. T. 480.

(*a*) *Stevens* v. *Marston* (1890), 60 L. J. Q. B. 192; 69 L. T. 274.

(*b*) *Re Roundwood Colliery Co.* (1897), 1. Ch. 373; 66 L. J. Ch. 186; 75 L. T. 641.

(*c*) *M. S. & L. Ry. Co.* v. *North Central Waggon Co.* (1888), 13 App. Cas, 554; 58 L. J. Ch. 219; 59 L. T. 730.

(*d*) *Re Watson, ex parte Official Receiver* (1890), 25 Q. B. D. 27; 59 L. J. Q. B. 394; 63 L. T. 209; *Beckett* v. *Tower Assets Co.* (1891), 1 Q. B. 638; 60 L. J. Q. B. 493; 64 L. T. 497; *Mellor's Trustee* v. *Maas* (1903), 1 K. B. 226; 72 L. J. K. B. 82; 88 L. T. 50; *Maas* v. *Pepper* (1905), A. C. 102; 74 L. J. K. B. 452; 92 L. T. 371.

(*e*) 45 & 46 Vict. c. 43, s. 17. *Re Standard Manufacturing Co. Ltd. ex parte Lowe* (1891), 1 Ch. 627; 60 L. J. Ch. 292; 64 L. T. 487.

(*f*) 41 & 42 Vict. c. 31, s. 10.

(*g*) *Davis* v. *Goodman* (1880), L. R. 5 C. P. Div. 128; 49 L. J. C. P. 344.

(*h*) 45 & 46 Vict. c. 43, s. 10. (*i*) Sect. 8.

give his name, address, and description in the attestation clause (*k*).

Bills of sale governed by the Act of 1882 are required also to be in a certain form, and any substantial departure therefrom renders them void. The rule to be collected from all the cases is, that substantial departure from the form will vitiate the instrument, and this even though it may be practically impossible, from the nature of the transaction, to make the instrument in the prescribed form (*l*). Thus the form provides for the repayment of the money with interest at per cent. per annum, and it has been held that to provide for payment of a lump sum by way of interest or bonus is invalid, for the actual rate of interest must be stated (*m*). It has also been held that a bill of sale which is in its terms so complicated as to substantially differ from the form is void (*n*). The form gives no covenants for title, and therefore in a case where the grantor was expressed to assign "as beneficial owner," it was held this invalidated the instrument, as these words would under the Conveyancing Act, 1881 (*o*), imply covenants for title (*p*). So, again, a bill of sale providing for payment of the money secured "on demand," has been held void (*q*); as also has a bill of sale which omitted to give the grantee's address (*r*).

The form of a bill of sale.

Myers v. Elliott.

Ex parte Stanford, re Barber.

(*k*) *Parsons* v. *Brand* (1890), 25 Q. B. D. 110; 59 L. J. Q. B. 189; 62 L. T. 479; *Blankenstein* v. *Robertson* (1890) 24 Q. B. D. 543; 59 L. J. Q. B. 315; 62 L. T. 732; *Bird* v. *Davey* (1891), 60 L. J. Q. B. 8; 63 L. T. 741; 39 W. R. 40; *Simmons* v. *Woodward* (1892), A. C. 100; 61 L. J. Ch. 252; 66 L. T. 534.

(*l*) *Ex parte Parsons, re Townsend* (1886), 16 Q. B. D. 552; 55 L. J. Q. B. 137; 34 W. R. 329; 53 L. T. 897.

(*m*) *Myers* v. *Elliott* (1886), 16 Q. B. D. 526; 55 L. J. Q. B. 233; 54 L. T. 552; 34 W. R. 338; *Blankenstein* v. *Robertson* (1890), 24 Q. B. D. 543; 59 L. J. Q. B. 315; 62 L. T. 732.

(*n*) *Melville* v. *Stringer* (1884), 13 Q. B. D. 392; 53 L. J. Q. B. 482; 32 W. R. 890; 50 L. T. 774.

(*o*) 44 & 45 Vict. c. 41, s. 7.

(*p*) *Ex parte Stanford, re Barber* (1886), 17 Q. B. D. 259; 55 L. J. Q. B. 341; 34 W. R. 507; 54 L. T. 894.

(*q*) *Hetherington* v. *Groome* (1884), 13 Q. B. D. 789; 53 L. J. Q. B. 577; 33 W. R. 103. But a bill of sale containing an agreement to pay "on or before" a fixed date is good: *De Braam* v. *Ford* (1900), 4 Ch. 142; 69 L. J. Ch. 82; 81 L. T. 568.

(*r*) *Altree* v. *Altree* (1898), 2 Q. B. 267; 67 L. J. Q. B. 882; 78 L. T. 794.

Saunders v. *White.*

A bill of sale to secure a loan, given by two or more persons who are not joint-owners of the chattels comprised in the schedule to the bill of sale—each being owner of a portion only of the chattels, and the portion belonging to each not being distinguished in the schedule—is void as not being made in accordance with the prescribed form (*s*). Instances might indeed be multiplied in which a very slight departure from the prescribed form has been held fatal (*t*). On the other hand, provisions which are properly for the maintenance of the security are allowable, and do not vitiate the instrument, *e.g.*, provisions relating to the replacing of chattels by the grantor, and to the disposal by the grantee of the purchase-money (*u*), or empowering the grantee to sell privately or by auction (*x*). Where a bill of sale is void as not being in accordance with the prescribed form, it is void not merely as regards the right to the chattels comprised therein, but *in toto*, so that no action can be brought on a covenant contained therein for payment of principal and interest (*y*). If the document is a security not merely on personal chattels, but also on other property which is not personal chattels within the meaning of the Act (*z*), *e.g.*, tenant-right and goodwill, this will vitiate the instrument as a bill of sale (*a*), but still it is only void in so far as it deals with the personal chattels, and the residue of the security is good (*b*).

Davies v. *Rees.*

Cochrane v. *Entwistle.*

(*s*) *Saunders* v. *White* (1902), 1 K. B. 472; 71 L. J. K. B. 318; 86 L. T. 173.

(*t*) See *Furber* v. *Cobb* (1886), 17 Q. B. D. 459; 55 L. J. Q. B. 487; 55 L. T. 359; *Bianchi* v. *Offord* (1886), 17 Q. B. D. 484; 55 L. J. Q. B. 486; *Calvert* v. *Thomas* (1887), 19 Q. B. D. 204; 56 L. J. Q. B. 470; 57 L. T. 441; 35 W. R. 616; *Watson* v. *Strickland* (1887), 19 Q. B. D. 391; 56 L. J. Q. B. 594; 35 W. R. 769; *Real and Personal Advance Co.* v *Clears* (1888), 57 L. J. Q. B. 164; 58 L. T. 610; *Thomas* v. *Kelly* (1889), 13 App. Cas. 506; 58 L. J. Q. B. 66; 60 L. T. 114.

(*u*) *Consolidated Credit and Mortgage Co.* v. *Gosney* (1886), 16 Q. B. D. 24; 55 L. J. Q. B. 61; 34 W. R. 106.

(*x*) *Bourne* v. *Wall* (1891), 64 L. T. 530; 39 W. R. 510.

(*y*) *Davies* v. *Rees* (1886), 17 Q. B. D. 408; 55 L. J. Q. B. 363; 34 W. R. 573; 54 L. T. 813. As to the position when the bill of sale is bad for other reasons, see *Heseltine* v. *Simmons* (1892), 2 Q. B. 547; *post*, p. 121.

(*z*) As to which see 41 & 42 Vict. c. 31, ss. 4, 7.

(*a*) *Cochrane* v. *Entwistle* (1891), 25 Q. B. D. 116; 59 L. J. Q. B. 418; 62 L. T. 852.

(*b*) *Ex parte Byrne, re Burdett* (1888), 20 Q. B. D. 310; 57 L. J. Q. B. 263; 58 L. T. 708.

The Bills of Sale Act, 1882, also provides (*c*) that the amount for which a bill of sale is given must not be less than £30, and that it must have a schedule annexed to it, which schedule must be specific and not general in its character, so that a description in the schedule of "450 oil paintings in gilt frames" was held insufficient (*d*), as also was the description "21 milch cows" (*e*). It is also provided by this Act (*f*) that a bill of sale shall not, except as against the grantor, pass future acquired property, with two exceptions, viz., (1) growing crops which are actually growing at the time, and (2) fixtures, plant, or trade machinery, used in or attached to or brought upon any premises in substitution for others specifically described in the schedule (*g*). But although the Act does, therefore, to a certain extent, contemplate assignments of future acquired property, it has been held that as the form of bill of sale prescribed by the Act contains nothing with regard to it, to insert a clause in the body of the document dealing with future acquired property will be a departure from the form, and will therefore vitiate the instrument (*h*). The proper course, if it is desired to affect any future acquired property, is to deal with it in the inventory or schedule, and not in the body of the instrument. It is also provided (*i*) that the grantee of a bill of sale by way of security for the payment of money shall only seize the chattels for the five causes specified in section 7 of the Act, and that the grantee on seizing shall not at once remove, but must wait five days (*k*); and that within that period

Other points on the Act of 1882.

Specific description.

Future acquired property.

Seizure.

(*c*) 45 & 46 Vict. c. 43, s. 4.

(*d*) *Witt* v. *Banner* (1888), 20 Q. B. D. 114; 57 L. J. Q. B. 141; 58 L. T. 34.

(*e*) *Carpenter* v. *Deen* (1889), 23 Q. B. D. 566; 61 L. T. 860. See, however, and compare *Davidson* v. *Carlton Bank* (1893), 1 Q. B. 82; 62 L. J. Q. B. 111; 67 L. T. 641.

(*f*) 45 & 46 Vict. c. 43, ss. 5, 6.

(*g*) The horses of a cab proprietor used by him for the purpose of his business are not "plant" within the meaning of the above provision: *London and Eastern Counties Loan and Discount Co.* v. *Creasy* (1897), 1 Q. B. 768; 66 L. J. Q. B. 503; 76 L. T. 612.

(*h*) *Thomas* v. *Kelly* (1889), 13 App. Cas. 506; 58 L. J. Q. B. 66; 60 L. T. 114.

(*i*) 45 & 46 Vict. c. 43, s. 7.

(*k*) See hereon, *ante*, p. 80, and *Tomlinson* v. *Consolidated Credit Corporation* (1890), 24 Q. B. D. 135, there quoted.

the grantor may apply to a judge at chambers, who, if satisfied that the cause of seizure no longer exists, may restrain the grantee from removing or selling, or may make such other order as seems just (*l*). The Act does not give any special power of sale to the grantee of a bill of sale, but it has been held that after due seizure he has naturally a power of sale existing in him, on reasonable notice, in the same way that a pledgee of goods has (*m*).

Consideration for, and registration, &c., of bills of sale.

In order to make a bill of sale effectual, it must truly set forth the consideration for which it is given (*n*), and an affidavit of the time of the bill of sale having been given, of its due execution and attestation, of the residence and description (*o*) of the person giving it, and of the attesting witness, must be made; and the bill of sale, together with any defeasance or condition affecting the same (*p*), must be registered, and the affidavit filed, in the Central Office of the High Court of Justice within seven clear days after giving it (unless the seven days expire on a Sunday or other day on which the office is closed, when registration is good if made on the next following day on which the office is open), or if the instrument is executed abroad, then within seven clear days after the time at which it would in the ordinary course of post arrive in England if posted immediately after the execution thereof, and the registration must be renewed every five years (*q*). If these requirements

(*l*) See *Ex parte Wiekens* (1898), 1 Q. B. 543; 67 L. J. Q. B. 397; *Ex parte Ellis* (1898), 2 Q. B. 79; 67 L. J. Q. B. 734; 78 L. T. 733.

(*m*) *Ex parte Official Receiver, re Morritt* (1887), 18 Q. B. D. 222; 56 L. J. Q. B. 139; 33 W. R. 277; 56 L. T. 42.

(*n*) *Ex parte Firth, re Cowburn* (1882), 19 Ch. D. 419; 51 L. J. Ch. 473. See also *Ex parte Nelson, re Hockaday* (1887), 35 W. R. 264; 55 L. T. 819; *Cochrane* v. *Moore* (1890), 25 Q. B. D. 57; 59 L. J. Q. B. 377; 63 L. T. 153; *Darlow* v. *Bland* (1897), 1 Q. B. 125; 66 L. J. Q. B. 157; 75 L. T. 537; *Re Davies, ex parte Equitable Investment Co.* (1898), 77 L. T. 567.

(*o*) Strict accuracy must be observed here: *Cooper* v. *Davis* (1884), 32 W. R. 329; *Marks* v. *Derrick* (1899), 80 L. T. 60.

(*p*) See *Edwards* v. *Marcus* (1894), 1 Q. B. 587; 63 L. J. Q. B. 363; 70 L. T. 182. A defeasance or condition, if not in the body of the bill of sale, must be written on the same paper or parchment before registration, 41 & 42 Vict. c. 31, sect. 10 (3).

(*q*) 41 & 42 Vict. c. 31, s. 10; 45 & 46 Vict. c. 43, s. 8.

are not observed the bill of sale is absolutely void in respect of the personal chattels comprised therein, but an action may still be brought on a covenant contained in the instrument to pay the money (*r*). A transfer or assignment of a bill of sale does not require to be registered (*s*). *Heseltine* v. *Simmons.*

To prevent evasion of the Act by the execution of fresh bills of sale within seven days from time to time, it is provided that any such subsequent bill of sale executed within seven days of an unregistered bill of sale for the same debt, or any part thereof, is to be void unless it is proved that it was given *bonâ fide* for the purpose of correcting some material error in the prior bill of sale, and not for the purpose of evading the Act (*t*). Omissions to register and re-register within the proper time, or omissions or mis-statements of name, residence, or occupation of any person, may be rectified by any judge of the High Court, on his being satisfied that the omission or mis-statement was accidental, or due to inadvertence, on such terms or conditions (if any) as he may think fit (*u*). Upon evidence of the discharge of the debt for which any bill of sale has been given, a memorandum of satisfaction may be ordered to be written upon any registered copy of a bill of sale (*x*). Former evasion of registration. Omission to register, &c. Satisfaction.

It was enacted by the Act of 1878 that chattels comprised in a bill of sale duly registered under that Act should not be deemed to be in the order or disposition of the grantor of a bill of sale in the event of his bankruptcy (*y*); and this provision still applies to bills of sale governed by the 1878 Act (*z*). But it does not apply to any bill of sale by way of security Order and disposition clause of Bankruptcy Act, 1883.

(*r*) *Heseltine* v. *Simmons* (1892), 2 Q. B. 547; 62 L. J. Q. B. 5; 67 L. T. 611; *Fenton* v. *Blyth* (1890), 25 Q. B. D. 417; 59 L. J. Q. B. 589; 63 L. T. 453. As to the effect of the bill of sale not being in the statutory form, see *Davies* v. *Rees* (1886), 17 Q. B. D. 408; *ante*, p. 108.

(*s*) 41 & 42 Vict. c. 31, s. 10.

(*t*) 41 & 42 Vict. c. 31, s. 9. (*u*) Sect. 14.

(*x*) Sect. 15. (*y*) Sect. 20.

(*z*) 45 & 46 Vict. c. 43, s. 15; *Re Clinger, ex parte London and Universal Bank* (1897), 2 Q. B. 461; 66 L. J. Q. B. 777; 76 L. T. 808.

for the payment of money executed on or after 1st November 1882, as regards goods used by him in his trade or business (*a*).

Bailments.

Goods are frequently delivered to some person who is not their absolute owner, and a bailment thus constituted. A bailment has been defined as "a delivery of a thing in trust for some special object or purpose, and upon an undertaking express or implied to conform to the object or purpose of the trust" (*b*). Different classifications of bailments have been given, but perhaps the best is found in the judgment of Lord Holt in the leading case of *Coggs* v. *Bernard* (*c*), where they are divided as follows:—

Definition of a bailment.

Division of bailments by Lord Holt in *Coggs* v. *Bernard*.

1. *Depositum*—where goods are delivered to be kept by the depositee without reward for a bailor;

2. *Commodatum*—where goods are lent to some person to be used by him gratis;

3. *Locatio rei*—where goods are lent out to a person for hire;

4. *Vadium*—where goods are pawned or pledged;

5 *Locatio operis faciendi*—where something is to be done to goods, or they are to be carried for reward; and

6. *Mandatum*—where goods are to be carried gratis.

Depositum and *mandatum*.

Of the above, let us first deal with those bailments called respectively *depositum* and *mandatum*, they being exactly similar to each other in respect that each comprises the doing of some act by the bailee voluntarily and without reward. In any contract or bailment of a merely voluntary nature, a person cannot be compelled to do the act required, for a simple contract requires a valuable consideration (*d*); and therefore it is said that a voluntary bailee is not liable for *nonfeasance*, so that though, from his not doing what he has contracted to do, damage may have arisen to the other party, yet he is not liable (*e*). But if a bailee enters upon the bail-

(*a*) *Swift* v. *Pannell* (1883), 24 Ch. D. 210; 31 W. R. 543.
(*b*) Broom's Coms. 915.
(*c*) (1704), 1 S. L. C. 173; Lord Raymond, 909.
(*d*) *Ante*, p. 41. (*e*) *Elsee* v. *Gatward* (1793), 5 T. R. 143.

ment, as by accepting a deposit of goods, there is said to be sufficient consideration, by reason of the intrusting him with the goods, to create a duty in him to perform the matter properly, and if he does not do so, he is liable if he is guilty of such default as to amount to gross negligence; and the before-mentioned case of *Coggs* v. *Bernard* is a direct decision to this effect. The facts in that case were, that the defendant had promised the plaintiff to take up several hogsheads of brandy then in a certain cellar, and lay them down again in a certain other cellar safely and securely; and by the default of the defendant one of the casks was staved and a quantity of the brandy spilt. It was decided that the plaintiff was entitled to recover notwithstanding the defendant was not to be paid, but that a voluntary bailee was only liable for gross negligence. This, then, is the general principle of law governing the liability of voluntary bailees, but it has been in some slight degree altered, it being now decided that if a voluntary bailee is in such a situation as to imply skill in what he undertakes to do, an omission to use that skill is imputable to him as gross negligence. Thus in the case of *Wilson* v. *Brett* (*f*), it was held that a person who rode a horse for the purpose of exhibiting and offering it for sale, though he was to receive no reward for doing so, was yet bound to use such skill as he possessed, and that he being proved to be conversant with and skilled in horses, was equally liable with a borrower for any injury done to the horse on account of his omission to use such skill.

Coggs v. *Bernard.*

Wilson v. *Brett.*

In the above cases of *mandatum* and *depositum*, the reason of the bailee being only liable for his gross neglect is the fact of the bailment being practically altogether for the bailor's benefit. But in the case of the bailment called *commodatum*, as the whole benefit is received by the bailee, the liability is different, for here the bailee is strictly bound to use the utmost care, and will be liable for even slight neglect; so that if a

Commodatum.

(*f*) (1843), 11 M. & W. 113.

person lends a horse to another, who lets his servant ride it, and it is injured without his fault, or the fault of his servant, that will nevertheless be quite sufficient slight neglect on his part to render him liable, for the horse was lent to him, and he had no right to let his servant ride it (*g*).

Locatio rei.

In the bailment *locatio rei*, or hiring of goods, the bailee is bound to use ordinary diligence, and is liable for ordinary neglect, for here the bailment operates for the benefit of both parties; for that of the bailee in that he has the use of the goods, and for that of the bailor in that he has the amount agreed to be paid for the hire.

Vadium, or *pignori acceptum.*

So also the bailment *vadium*, otherwise known as *pignori acceptum*, or pawn, is for the benefit of both parties, the pawner getting a loan of money, and the pawnee getting the use of the chattel, or interest, or both, and so the liability of the pawnee is only to use ordinary diligence. To constitute a valid pledge there must be either an actual or constructive delivery of the article to the pawnee, and the bailee here looks not only to the property but to the person of the bailor: and if the subject of the bailment is lost and the bailee has used a proper amount of diligence, and the loss has occurred without any fault on his part, he may sue the bailor for the amount of the debt (*h*). It is not sufficient to exonerate a bailee from responsibility for the loss of the subject of the bailment to shew that it was stolen, but he must also shew that he used due care to protect it (*i*). It was stated by Lord Holt, in his judgment in *Coggs* v. *Bernard* (*j*), that if it will do the article no harm the pawnee may use it (as, for instance, the wearing of a jewel pawned), but such user will be at the peril of the bailee, and if the article will be worse for using, then it must not be used. The law, however, now seems to be that the pawnee is never

Whether the pawnee may use the chattel pawned.

(*g*) *Bringloe* v. *Morrice* (1676), 1 Mod. 210.
(*h*) 1 S. L. C. 198.
(*i*) Chitty on Contracts, 371, 372.
(*j*) 1 S. L. C. 183.

justified in so using the article pawned, except it be of such a nature that the bailee is at some expense to maintain it (as, for instance, a horse, which naturally requires to be fed), for in such a case as this the bailee may use it in a reasonable way, to recompense him for his expenditure (*k*).

Distinctions between a pawn, a lien, and a mortgage of personal property.

A pawn or pledge requires to be carefully distinguished from a lien, and from a mortgage of personal estate (*l*). A lien, generally speaking, gives but a right to retain property, and no active right in respect of it (*m*); a mortgage passes the actual property in the goods to the mortgagee; but a pawn or pledge simply gives a special or qualified property, and a limited right of possession. The proper remedy of a pawnee to recover his money is, on reasonable notice, to sell the subject of the pledge, or to sue, or if necessary he may adopt both remedies (*n*); and if he sells the subject of the pledge, and it does not produce sufficient to satisfy the debt, he may sue for the deficiency (*o*).

Pawnbrokers.

A certain, practically, very important kind of pawnees or pledgees are pawnbrokers, and at common law they stood on the same footing as other bailees of that class, and were liable, therefore, as before stated. But it is evident that the system of pawning is open to many abuses, both from the necessities persons may be under to induce them to pledge, the desire of others to part with things to which they have no right beyond that of possession, and the opportunities that pawnbrokers may have of advantaging themselves to the injury of the pawners, and accordingly the legislature has specially dealt with the subject. The present statute governing the matter is the Pawn-

(*k*) Chitty on Contracts, 372.

(*l*) See 1 S. L. C. 199.

(*m*) See *ante*, p. 103–105.

(*n*) 1 S. L. C. 198, 199. A pledgee of a chattel cannot foreclose (*Carter* v. *Wake* (1877), 4 Ch. D. 605; *Fraser* v. *Byas*, 13 Reps. 452). As to a pledge of title-deeds, which constitutes an equitable mortgage, and as to the remedies of an equitable mortgagee, see Indermaur and Thwaites' Manual of Equity, 194, 211.

(*o*) *Jones* v. *Marshall* (1889), 24 Q. B. D. 269; 59 L. J. Q. B. 123; 61 L. T. 721.

Pawnbrokers Act, 1872.

brokers Act, 1872 (*p*), which applies only to licensed pawnbrokers and fixes the terms of the contract if the loan does not exceed 40*s.*, and permits a special contract if the loan is over 40*s.* but does not exceed £10, but does not apply to a loan above £10 as to which the ordinary law of pawn applies (*q*). By this statute every pledge must be redeemed within twelve months from the day of pawning, with seven additional days of grace (*r*), and if not redeemed within that time, and the amount for which the article is pledged does not exceed 10*s.*, it becomes the pawnbroker's absolute property (*s*); but if for above 10*s.* then it is still redeemable until actual sale (*t*). Any such sale is only to be by public auction, at which the pawnbroker may, if he think fit, bid and purchase, and any surplus above the costs of the sale and the amount of the pledge, is to be accounted for (*u*). As to an injury to the subject of the pledge by fire, formerly the pawnbroker was not liable unless it was proved that the fire occurred through his default or neglect, but now he is liable for one quarter of the amount of the loan, and the loan and profit are cancelled, and to protect himself, he is empowered to insure to that amount (*x*). Formerly, also, as to goods which had been stolen, neither the pawnbroker, nor a purchaser from him, had a right to retain the goods as against the true owner; but now, upon conviction of the thief, the Court has a discretion to allow the pawnbroker to retain the goods as a security for the money advanced, or to order them to be returned to the true owner (*y*). If by the default or neglect of the pawnbroker the pledge suffers any injury or depreciation, the owner may recover summarily a reasonable satisfaction for the same (*z*). It is also provided (*a*),

Pawnbroker is now liable for loss by fire.

Pledge of stolen goods.

(*p*) 35 & 36 Vict. c. 93.
(*q*) On the old law, see *Pennell* v. *Attenborough* (1843), 4 Q. B. 868.
(*r*) 35 & 36 Vict. c. 93, s. 16. (*s*) Sect. 17. (*t*) Sect. 18.
(*u*) Sect. 19. A person purchasing a chattel which has been fraudulently pledged (including the pawnbroker himself) does not gain any property against the true owner of the pledge (*Burrows* v. *Barnes* (1900), 82 L. T. 751) except in so far as the law of *market overt* affects the matter see *post*, pp. 345, 346).
(*x*) 35 & 36 Vict. c. 93, s. 27. (*y*) Sect. 30.
(*z*) Sect. 28. (*a*) Sect. 25.

that the holder for the time being of a pawn-ticket shall be presumed to be the person entitled to redeem the pledge, and that the pawnbroker shall accordingly, on payment of the loan and profit, deliver the pledge to the person producing the pawn-ticket, and he is thereby indemnified for so doing. It has, however, been decided that this enactment only applies as between the pawnbroker and the pawner, or the owner who has authorised the pledge, and that it does not affect the common law rights of the owner of property which is pledged against his will (*b*).

Right to redeem on production of pawn-ticket.

There remains but to consider that kind of bailment classified by Lord Holt as *locatio operis faciendi*, and this is either a delivery to one exercising a public employment, *e.g.*, a carrier or an innkeeper, or a delivery to a private person, *e.g.*, a factor or wharfinger. As to this latter kind, they are only liable to do the best they can, or, in other words, are bound only to use ordinary diligence, so that such a bailee would not be liable for a robbery of goods happening without his fault, but in such a case it would have to be clearly shewn that no care on his part could have prevented the robbery. On the other hand, as to the former kind, such a bailee, at common law, stands in the position of an insurer, liable for all losses except those occurring by the act of God (*c*) or the King's enemies, and the reason on which this rule was founded has been stated with regard to carriers as follows: "This is a politic establishment contrived by the policy of the law for the safety of all persons the necessity of whose affairs oblige them to trust these sort

Locatio operis faciendi.

In the case of private persons, and those exercising a public employment.

Reason of common law liability of carriers.

(*b*) *Singer Manufacturing Co.* v. *Clark* (1877), 5 Ex D. 37; 49 L. J. Ex. 224; 28 W. R. 170.

(*c*) As to what will amount to an "act of God," see *Nugent* v. *Smith* (1875), 1 C. P. D. 413; 45 L. J. C. P. 697. In that case the defendant, a common carrier, received from the plaintiff a mare to be carried by sea. In the course of the voyage, the weather being rough and the mare being frightened, she struggled violently, and received injuries from which she died. It was held, by the Court of Appeal, that no facts being proved but these, the defendant was not liable, that this was in effect an "act of God"; and that it was not necessary to prove that it was absolutely impossible for the carrier to prevent the injury, but that it was enough to prove that by no reasonable precaution under the circumstances could it have been prevented.

of persons, that they may be safe in their ways of dealing; for else these carriers might have an opportunity of undoing all persons that had any dealing with them by combining with thieves, &c., and yet doing it in such a clandestine manner as would not be possible to be discovered" (*d*). But the above, though formerly the correct rule at common law, is not altogether so now, and it will be best to consider, firstly, the law of carriers, and then pass on to the law of innkeepers.

Definition of common carrier.

A common carrier has been defined as one who undertakes to transport from place to place for hire the goods of such persons as choose to employ him (*e*). The rule is that to constitute a person a common carrier he must hold himself out, expressly or by course of conduct, as ready to engage in the transportation of such goods as he publicly professes to carry, for hire, as a business, and not merely as a casual occupation *pro hac vice;* and that a person who merely undertakes chance jobs is not a common carrier (*f*). It is not finally settled whether a common carrier must be a person plying from one fixed terminus to another; but the better opinion seems to be that he need not do so (*g*). Thus, a barge-owner who carries for hire the goods of such persons as choose to employ him from place to place on a certain river is a common carrier, and liable as such, although he does not ply between any fixed termini, and the customer in each particular case fixes the point of arrival and departure (*h*). Railway companies, as to goods which they ordinarily carry, are common carriers (*i*).

Liability of carriers at common law.

The liability of a carrier at common law was for every loss, unless it arose by the act of God or the King's

(*d*) Per Lord Holt, in his judgment in *Coggs* v. *Bernard* (1704), 1 S. L. C. 185.

(*e*) *Palmer* v. *Grand Junction Ry. Co.* (1839), 4 M. & W. 247.

(*f*) *Johnson* v. *Midland Ry.* (1849), 4 Ex. 367; *Dickson* v. *G. N. Ry.* (1886), 18 Q. B. D. 176; 56 L. J. Q. B. 111.

(*g*) See 1 S. L. C. 206; Macnamara on Carriers, ch. iii.; *Liver Alkali Co.* v. *Johnson* (1874), L. R. 7 Ex. 267; 41 L. J. Ex. 110.

(*h*) *Liver Alkali Co.* v. *Johnson* (1876), L. R. 9 Ex. 338; 43 L. J. Ex. 216; 31 L. T. 95.

(*i*) See 1 S. L. C. 207.

enemies, and the reason of this extraordinary liability was as has been stated by Lord Holt in his remarks on the subject already set out (*j*). It may also be added that a carrier is not liable for an injury happening to goods through bad packing (*k*) or some inherent defect or vice in themselves (*l*), even though such defect or vice was quite unknown both to the sender and the carrier (*ll*). It has, however, always been in the power of carriers to make special contracts with their customers limiting their liability, and this they often did by putting notices up in their warehouses, when, if it could be proved that such a notice was brought to the knowledge of any particular customer, it was held to constitute a special contract with him; but if it could not be proved to have been brought to his knowledge it was utterly ineffectual. No such notice, however, exonerated the carrier from liability for gross negligence (*m*).

Inherent vice.

It was evident that this state of things could not continue, for it was constantly a difficult thing to determine whether in each particular case notice had been brought to the customer's knowledge. Accordingly the Carriers Act, 1830 (*n*), was passed. This enacts (*o*) that no carrier by land for hire shall be liable for any loss of, or injury to, any valuable articles therein named (*p*), contained in any parcel which shall have been delivered, either to be carried for hire or to accompany the person of any passenger, when the value of those articles contained in the parcel shall exceed

Difficulties at common law.

The Carriers Act, 1830.

(*j*) *Ante*, pp. 127, 128.

(*k*) *Richardson* v. *N. E. Ry.* (1872), L. R. 7, C. P. 75; 41 L. J. C. P. 60; *Barbour* v. *S. E. Ry.* (1876), 34 L. T. 67.

(*l*) *Blower* v. *G. W. Ry.* (1872), L. R. 7, C. P. 655; 41 L. J. C. P. 288.

(*ll*) *Lister* v. *Lancs. and Yorks. Ry.* (1902), 1 K. B. 878; 72 L. J. K. B. 385; 88 L. T. 561.

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

(*n*) 11 Geo. IV. & 1 Wm. IV. c. 68. This act only applies to carriers by land. As to carriers by sea, see *post*, pp. 207, 208.

(*o*) Sect. 1.

(*p*) *i.e.*, gold or silver coin, manufactured or unmanufactured gold or silver, precious stones, jewellery, watches, clocks or timepieces, bills, notes of any bank in Great Britain or Ireland, orders, notes or securities for payment of money (English or foreign), stamps, maps, writings, title-deeds, paintings, engravings, pictures, gold or silver plate or plated articles, glass, china, silks, furs, or lace, or any of them.

£10; unless, at the time of the delivery of such parcel to be carried, the value and nature of such articles therein contained shall have been declared, and an increased rate of charge paid, or agreed to be paid, which is legibly notified in a conspicuous part of the office or warehouse, and is then binding without proof of its having come to any customer's knowledge (*q*). Carriers who omit to exhibit such notification are excluded from the benefit of the Act so far as any right to extra charge is concerned, but it seems that in any event they are entitled to a declaration of the nature and value of the goods (*r*). The statute also provides (*s*) that no public notice or declaration limiting the common law liability of a carrier for goods to which the Act does not apply, shall be valid. Nothing in the Act is to be construed to annul, or in anywise effect, any special contract between the carrier and the customer (*t*) or to protect any carrier from any loss arising from the felonious acts of any person in his employ, or to protect any employee from any loss arising from his own personal misconduct or neglect (*u*). Although a customer may declare a package to be of some particular value, in the event of its loss the carrier is not bound by that declaration, but may demand proof of the actual value, which is all he is liable for (*v*), and, as alrealy stated, even although the carrier has omitted to put up any notification as to extra charge, it appears

Notice of increased charge to be exhibited by carrier.

No public notice limiting liability allowed.

Declaration of value of goods.

(*q*) 11 Geo. IV. & 1 Wm. IV. c. 68. This Act not only protects the carrier in respect of the loss of the articles themselves, but also from any damages consequential to such loss: *Millen* v. *Brasch* (1883), 10 Q. B. D. 142; 52 L. J. Q. B. 127; 31 W. R. 190; 47 L. T. 685. It applies quite as much to personal luggage taken with a passenger as to luggage sent unaccompanied by a passenger (*Dyke* v. *South-Eastern and Chatham Ry.*, 111 L. T. Newspaper 252; Law Students' Journal, Aug. 1901, p. 185).

(*r*) 11 Geo. IV. & 1 Wm. IV. c. 68, s. 3; see cases cited in note (*w*) on page 131.

(*s*) Sect. 4.

(*t*) Sect. 6. *Baxendale* v. *G. E. Ry* (1869), L. R. 4 Q. B. 244; 38 L. J. Q. B. 137 decides that a carrier is entitled to the benefit of section 1 unless the special contract necessarily excludes that benefit.

(*u*) Sect. 8. As to "felonious acts," see *Gogarty* v. *Great S. & W. Ry. Co.*, 9 Irish Reports (C. L.), 233; and *Shaw* v. *G. W. Ry.* (1894), 1 Q. B. 373; 70 L. T. 218; 42 W. R. 285.

(*v*) 11 Geo. IV. & 1 Wm. IV. c. 68, s. 9.

he is entitled to a declaration of the value and nature of the goods (*w*).

As regards goods not of the kind mentioned in the Act, or when the value is not above £10, then, in the absence of any special contract, and subject as to railway and canal companies to the Act next mentioned, the carrier's common law liability remains by the express provision of the statute, notwithstanding any public notice (*x*).

Where this Act does not apply carrier's common law liability remains.

Railway and canal companies frequently evaded the provisions of the Carriers Act, 1830, by putting notices on the receipts given to persons delivering goods to be carried, and these were held to constitute special contracts between the parties. The Railway and Canal Traffic Act, 1854 (*y*), therefore provides (*z*), that no such notice given by any railway or canal company shall have any effect, but that the company shall be liable for all loss or injury to goods which are being carried by them, occasioned by the neglect or default of the company or its servants. It is, however, also provided that nothing therein contained is to prevent a railway or canal company from making such conditions with respect to the forwarding and delivering of any goods as shall be adjudged by the court or judge, before whom any question relating thereto shall be tried, to be just and reasonable, and that no special contract with such a company as to the forwarding and delivering of any goods shall be binding upon any one unless signed by him or the person delivering the goods to be carried. Very great difficulty has arisen on the construction of this provision, as to whether the statute only requires that there should be some special contract, and requires nothing as to the conditions to be contained in it, and also whether, in addition to a

Evasion of the Act by railway companies.

Railway and Canal Traffic Act, 1854.

Difficulties in construing this Act.

(*w*) *Hart* v. *Baxendale* (1851), 6 Ex. 769; *Pinciani* v. *L. & S. W. Ry.* (1850), 18 C. B. 226; *Caswell* v. *Cheshires Lines* (1907), 2 K. B. 499; 76 L. J. K. B. 734; 97 L. T. 209.

(*x*) 11 Geo. IV. & 1 Wm. IV. c. 68, sec. 4.

(*y*) 17 & 18 Vict. c. 31.

(*z*) Sect. 7. See *Wilkinson* v. *L. & Y. Ry.* (1907), 2 K. B. 222; 76 L. J. K. B. 801.

special contract in writing signed, reasonable conditions may bind which are not made part of a contract, but only given notice of—or, to put the matter more directly in the shape of two questions: (1) When a condition is reasonable, does it require also to be reduced into writing and signed? and (2) When there is a special contract, can the question of its reasonableness be gone into? However, the weight of authority is certainly to answer both questions in the affirmative, and to treat the words "special contract" and "conditions," used in the Act, as synonymous terms (*a*), so that there must always, to comply with the Act, be a special contract in writing signed, and reasonable conditions contained therein (*b*). The burden of proving that a condition inserted in a special contract is a reasonable condition is on the company setting it up (*c*); and it has been decided that an ordinary contract exempting a company from liability for injuries to goods does not protect them from acts of wilful misconduct on the part of their servants, and that, even if it professed to, such a condition would be unreasonable and bad (*d*). It has, however, been held that the Act does not apply to contracts made by railway companies exempting themselves from liability by loss or detention beyond the limits of their own lines (*e*); and it has also been held that it does not include theft by the company's servants *without negligence*, and therefore that by any contract, or

Burden of proving condition reasonable.

Zunz v. *South-Eastern Ry. Co.*

(*a*) *Simons* v. *Great Western Ry. Co.* (1856), 18 C. B. 805; *McManus* v. *Lancashire Ry. Co.* (1859), 2 H. & N. 693; *Peck* v. *North Stafford Ry. Co.* (1863), 10 H. L. Ca. 443; 32 L. J. Q. B. 241.

(*b*) As to what is a reasonable condition, see *Corrigan* v. *Great Northern & Manchester, Sheffield & Lincolnshire Ry. Cos.*, 6 L. R. Ir. 90; *Ashenden* v. *L. B. & S. C. Ry. Co* (1880), 5 Ex. D. 190; 28 W. R. 511; 42 L. T. 586; *M'Nally* v. *Lancs. and Yorks. Ry.* (1880), 8 L. R. Ir. 81; *Brown* v. *M. S. & L. Ry.* (1883), 8 App. Cas. 703; 53 L. J. Q. B. 124; 50 L. T. 281; *Dickson* v. *G. N. Ry. Co.* (1886), 18 Q. B. D. 176; 56 L. J. Q. B. 111; 55 L. T. 868; *Williams* v. *Midland Ry.* (1908), 1 K. B. 252; 77 L. J. K. B. 157. See also hereon, 1 S. L. C. 223, 224.

(*c*) *Ruddy* v. *Midland Great Western Ry. Co.* (1880), 8 L. R. Ir. 224.

(*d*) *Ronan* v. *Midland Ry. Co.*, 14 L. R. Ir. 157.

(*e*) *Zunz* v. *South-Eastern Ry. Co.* (1869), L. R. 4 Q. B. 539; 38 L. J. Q. B. 209; *Doolan* v. *Midland Ry. Co.*, 10 Irish Reps. (C. L.) 47. See further as to the effect of a special contract, *Tattersall* v. *National Steamship Co. Limited* (1884), 12 Q. B. D. 297; 53 L. J. Q. B. 332; 32 W. R. 566; 50 L. T. 299.

notice brought home to the consignor, a company can exempt itself from liability for such loss (*f*). The same Act (*g*) also exempts railway and canal companies from liability for loss beyond—(1) for horses the sum of £50, (2) neat cattle £15, and (3) sheep and pigs £2 per head, unless a higher value is declared, and an increased rate paid or agreed to be paid, to be notified as under the Carriers Act; and if this is not done, the liability of the company is limited to the amount just specified without there being any written contract, or any special declaration of value (*h*).

Limit of liability for horses, cattle, and sheep.

The Railway Regulation Act, 1868 (*i*), also provides that where a company by through booking contracts to carry partly by rail and partly by sea, or partly by canal and partly by sea, a condition exempting such company from liability from any loss by danger of seas and navigation, published in a conspicuous manner in the office where the booking is effected, and printed in a legible manner on the receipt note, shall be perfectly valid (*j*). It is also provided (*k*) that where any railway company, under a contract for carrying persons, animals, or goods by sea, procures the same to be carried in a vessel not belonging to the railway company, their liability is to be the same as though the vessel had belonged to the company.

Liability when contract to carry partly by sea.

The carrier's duty is to carry all goods delivered to him of the kind that he usually carries, provided that he has room in his carriage, and the person delivering them is ready to pay his proper charge, such carrying to be by his ordinary route and with reasonable diligence (*l*). With regard to a carrier's charges for

The duty of a carrier.

(*f*) *Shaw* v. *Great Western Ry. Co.* (1894), 1 Q. B. 373; 70 L. T. 218.
(*g*) 17 & 18 Vict. c. 31, s. 7.
(*h*) *Hill* v. *London & North Western Ry. Co.* (1880), 42 L. T. 513.
(*i*) 31 & 32 Vict. c. 119, s. 14.
(*j*) This provision does not operate to prevent a railway company making conditions with a passenger travelling with a free pass, which exempt the company from liability for the loss of such passenger's luggage, although no notice has been posted in the company's office (*The Stella*, No. 2 (1900), P. 162; 69 L. J. P. 70; 82 L. T. 390).
(*k*) 34 & 35 Vict. c. 78, s. 12.
(*l*) *Jameson* v. *Midland Ry. Co.* (1884), 50 L. T. 426.

carrying, though he is entitled to be paid beforehand, yet he is not entitled to be paid before he has received the goods for carriage, so that in an action against him for not carrying, it is sufficient to allege readiness and willingness to pay the amount of the carriage, without proving actual tender of it (*m*). His liability as a carrier ceases at the termination of the carrying, and where goods delivered to a railway company to be carried are partly carried on that and partly on another line, the original company will generally be liable unless they restrict their liability by a condition to that effect, which they are entitled to do (*n*). As a general rule, the person to sue the carrier is the consignee, for the contract is really with him, the consignor being his agent to retain the carrier; but if the consignee has not acquired any property in the goods, then the consignor is the person to sue. It is the duty of any person delivering goods of a dangerous nature to be carried, to give notice of their dangerous character (*o*); and where goods which are specially dangerous are delivered to be warehoused or carried, the true name or description of such goods, with the word "specially dangerous," must be marked on them, and a notice thereof in writing given to the warehouseman or carrier, or the person so delivering them is subject to imprisonment or fine (*p*).

Carriage by a railway company over their own and another company's line.

The person to sue carrier is generally the consignee.

As to dangerous goods.

As to railway passengers' personal luggage.

Railway companies are bound to carry passengers' personal luggage to a certain weight, free of extra charge, and if duly labelled and put in the luggage van in the ordinary way, their liability as to it is that of common carriers; and it seems that a railway company accepting a passenger's personal luggage to be conveyed in the carriage with him, stands in the same position, subject only to this modification, that in respect of the passenger's interference with their exclusive control of his luggage the company are not liable for any loss or injury occurring during its transit, to which the act or

(*m*) *Pickford* v. *Grand Junction Ry. Co.* (1841), 8 M. & W. 371.
(*n*) *Zunz* v. *South Eastern Ry. Co.* (1869), L. R. 4 Q. B. 539; 38 L. J. Q. B. 209. (*o*) *Farrant* v. *Barnes* (1862), 31 L. J. (C. P.) 137.
(*p*) 29 & 30 Vict. c. 69, s. 3.

default of the passenger has been contributory (*q*). As to what will be comprehended under the term passengers' personal luggage, it may be stated to mean not only wearing apparel, but all things which under the particular circumstances of the case, for convenience, a passenger would ordinarily carry with him (*r*). Where luggage is left in the custody of a porter under such circumstances as to make the porter the agent of the passenger, the company are not liable at all for its loss; thus where a passenger, having missed his train, left his luggage on the platform in charge of a porter, saying he would travel by the next train, and went to a hotel during the interval, and the luggage was lost, it was held that the company were not liable (*s*). But if a passenger, having arrived at a station a reasonable time before the advertised hour for the departure of the train, merely goes to another part of the station for a purpose necessary or proper for travelling, leaving his personal luggage with a porter, the company are liable if it is lost (*t*). As to things carried by a passenger which are not properly personal luggage, the carrier's liability is simply that of a voluntary bailee. If articles are deposited in the cloak-room of a railway company, then the company's position is that of an ordinary bailee, subject to the terms of any notices they may have issued which may be held to constitute a contract and limit the liability which would otherwise exist (*u*). Where, how-

What is passengers' personal luggage?

Welch v. *L. & N. W. Ry.*

G. W. Ry. Co. v. *Bunch.*

Goods deposited in a cloak-room.

Chapman v. *G. W. Ry.*

(*q*) *Great Western Ry. Co.* v. *Bunch* (1888), 13 App. Cas. 31; 57 L. J. Q. B. 361; 58 L. T. 128.

(*r*) See on this point, *Phelps* v. *London & North-Western Ry. Co.* (1865), 34 L. J. (C. P.) 259; *Macrow* v. *Great Western Ry. Co.* (1871), L. R. 6 Q. B. 612; 40 L. J. Q. B. 300; *Hudston* v. *Midland Ry. Co.* (1869), L. R. 4 Q. B. 366; 38 L. J. Q. B. 213. A bicycle is not included (*Britten* v. *Great Northern Ry.* (1899), 1 Q. B. 243; 68 L. J. Q. B. 75; 79 L. T. 640).

(*s*) *Welch* v. *London & North-Western Ry. Co.* (1885), 34 W. R. 166; see also *Hodkinson* v. *London & North-Western Ry. Co.* (1885), 14 Q. B. D. 228; 33 W. R. 622.

(*t*) *Richards* v. *London, Brighton & South Coast Ry. Co.* (1849), 7 C. B. 839; *Talley* v. *Great Western Ry. Co.* (1871), L. R. 6 C. P. 44; 40 L. J. C. P. 9; *Great Western Ry. Co.* v. *Bunch* (1888), 13 App. Cas. 31; 57 L. J. Q. B. 361; 58 L. T. 128; 34 W. R. 574.

(*u*) *Chapman* v. *Great Western Ry. Co.* (1880), 5 Q. B. D. 278; 49 L. J. Q. B. 420; 28 W. R. 566; *Harris* v. *Great Western Ry. Co.* (1886),

ever, goods are delivered addressed to a consignee at a certain station "to be called for," the liability of the company as common carriers continues for a reasonable time after the goods arrive at the station, but after this their liability as common carriers ceases, and they are merely liable as bailees for hire, *i.e.*, some negligence on their part must be shewn; and this principle applies generally to all goods delivered to be carried, whether ordinary goods in respect of the carriage of which payment is made, or passengers' personal luggage, for the company are bound to keep them at their own risk as common carriers for a reasonable time (*v*). Directly the goods are delivered to the owner or his agent, however, all liability on the part of the company ceases, and a porter of the railway company may be such an agent. Thus, where a passenger on arriving at her destination had her luggage taken from the van by a porter, and said she would walk to her house and then send for her luggage, and the porter said he would put it aside and take care of it until then, and the luggage was lost, it was held that the company were not responsible (*w*). But if an entrustment to a porter is made for the ordinary purposes of transit, and not to be taken charge of an unreasonable time before the journey has commenced, or while the journey is suspended, or when it has actually ended, then the company are liable (*x*).

When the company's liability for passengers' luggage ceases.

Hodkinson v. *L. & N. W. Ry.*

Duty of railway companies as to equality.

By what are known as the "equality clauses" in the Railway Clauses Consolidation Act, 1845 (*y*), and in various special Acts relating to particular companies, railway companies are bound to charge equally to all persons in respect of the carriage of goods; and by the

1 Q. B. D. 515; 45 L. J. Q. B. 729. As to when a notice on a receipt or ticket binds, see *ante*, pp. 40, 41.

(*v*) *Chapman* v. *Great Western Ry. Co.* (1880), 5 Q. B. D. 278; 49 L. J. Q. B. 420; 28 W. R. 566; *Patscheider* v. *Great Western Ry. Co.* (1878), 3 Ex. D. 153.

(*w*) *Hodkinson* v. *L. & N. W. Ry. Co.* (1885), 14 Q. B. D. 228; 33 W. R. 662.

(*x*) *G. W. Ry. Co.* v. *Bunch* (1888), 13 App. Cas, 31; 57 L. J. Q. B. 361; 58 L. T. 128.

(*y*) 8 & 9 Vict. c. 20, s. 90.

Railway and Canal Traffic Act, 1854 (*z*), the Court of Common Pleas, or any judge of that Court, was empowered to restrain, by injunction, any railway or canal company from giving undue or unreasonable preference to any particular persons or description of traffic. By the Railway and Canal Traffic Act, 1888 (*a*), a new Court of record called "The Railway and Canal Commission" was established, consisting of two ordinary commissioners and one *ex officio* commissioner (being a judge of a Superior Court in the United Kingdom), and all matters of this kind, and various other matters mentioned in the Act, are now to be adjudicated upon by this Court (*b*). If a railway or canal company demands and receives payment in excess, in disregard of the "equality clauses," such excess can also be recovered back in an ordinary action for money had and received (*c*). It is the duty of a railway company to afford all reasonable facilities for the receiving, forwarding, and delivery of traffic upon its railway (*d*), and if this is not done, application may be made to the Railway and Canal Commission for an order to compel it; and generally as regards the power of this Court it may also give damages in addition to, or substitution for other relief, if proceedings are commenced within one year from the discovery of the matter complained of.

The Railway and Canal Commission.

With regard to the subject of the liability of carriers of passengers for injuries done to them, although it cannot be considered under the heading of the present

Liability of carriers of passengers for injury to passengers.

(*z*) 17 & 18 Vict. c. 31, s. 236. (*a*) 51 & 52 Vict. c. 25.

(*b*) 51 & 52 Vict. c. 25, ss. 8–13.

(*c*) *Sutton* v. *Great Western Ry. Co.* (1869), 4 H. L. Cas. 226; 38 L. J. Ex. 177. As to what constitutes an undue preference, see *Denaby Main Colliery Co.* v. *M. S. & L. Ry. Co.* (1886), 11 App. Cas. 97; 55 L. J. Q. B. 181; 54 L. T. 1; in which the House of Lords held that the provision of 8 & 9 Vict. c. 20, s. 90, requiring equality of rates, applies only to goods passing between the same points of departure and arrival, and passing over no other part of the line, so that although the railway company had carried coal from a group of collieries situated at different points along their line, and charged all the collieries one uniform set of rates in respect of such carriage, yet they had not infringed the provision.

(*d*) 17 & 18 Vict. c. 31, s. 2.

chapter, yet it may be here convenient to remind the student that it is very different from that of common carriers of goods, who, as we have seen, are, at common law, insurers. The contract of a carrier of passengers is only to carry safely and securely as far as reasonable care and forethought on his part can go, and if an accident which he could not possibly have prevented takes place, he is under no liability. There must be some negligence on his part shewn, and there must be no contributory negligence on the part of the passenger; a *primâ facie* case of neglect on the carrier's part will, however, be always made out by shewing that the vehicle was under his absolute control. This subject is considered hereafter under the division "Torts" (*e*).

Definition of an innkeeper.

His duty.

An innkeeper may be defined as one who keeps a house where travellers are supplied with everything that they have occasion for while on their way (*f*). He stands to a certain extent in a public capacity, and it is his duty to receive all guests who come to him, with their goods, provided the inn is not full (*g*) and they are not drunk or disorderly, or suffering from any infectious complaint, and they tender to him a proper and fair amount for his charge. If an innkeeper fail in this his duty, he is liable to be indicted, or to have an action for damages brought against him (*h*). By

His liability at common law.

the common law the liability of an inkeeper is very extensive, being for all losses except those arising by the act of God, the King's enemies, or the fault of the guest, for very much the same reason as has been before stated with regard to carriers (*i*). It is not

(*e*) *Post*, Part II. ch. vi.

(*f*) *Thompson* v. *Lacy* (1830), 2 B. & Ald. 283. A restaurant-keeper is not an innkeeper, but yet he may be liable to a customer on the ordinary prineiples applying to bailments (*Ultzen* v. *Nichols* (1894), 1 Q. B. 93; 63 L. J. Q. B. 289; 70 L. T. 140). If, however, the establishment is an inn or hotel, then the proprietor is liable as an innkeeper to a person although he is merely dining, and not actually staying there (*Orchard* v. *Bush* (1898), 2 Q. B. 284; 67 L. J. Q. B. 650; 78 L. T. 557).

(*g*) For the modern view of when an inn is deemed "full," see *Brown* v. *Brandt* (1902), 1 K. B. 696; 71 L. J. K. B. 367; 80 L. T 625.

(*h*) *Fell* v. *Knight* (1841), 10 L. J. Ex. 277.

(*i*) See *ante*, pp. 127, 128.

necessary, to make a man a guest within the meaning of the common or statute law as to innkeepers' liability, that he should have come to the inn for more than temporary refreshment (*j*). The length of time for which a person resides at an inn does not necessarily affect his position as a guest or traveller, provided he stays there in the transitory condition of a traveller; but a person who goes to an inn is not entitled to stay there as long as he chooses, against the will of the innkeeper, who has a right to terminate the relation of host and guest by reasonable notice. If the guest forms an intention of staying at the inn, and has no intention of going on to any other place, he then ceases to be a traveller; but when he has in fact ceased to be a traveller is a question of fact depending on the circumstances of each particular case (*k*). If a person comes to an inn on a special contract to board and lodge there, the law does not consider him as a guest, but as a boarder (*l*).

Who is a "guest" at an inn.

Lamond v. *Richard.*

The leading case on the liability of innkeepers is *Calye's Case* (*m*), in which it was laid down that to charge an innkeeper the following circumstances are necessary:—

Calye's Case.

1. The inn ought to be a common inn, so that in the case of lodging at some private person's house, and a robbery occurring there, the landlord would not necessarily be liable.

2. The party ought to be a traveller or passenger.

3. The goods must be in the inn, and for this reason the innkeeper is not bound to answer for a horse put out to pasture.

4. There must be default on the part of the innkeeper or his servants; and,

5. The loss must be to movables, and therefore, if a guest be beaten at an inn, the innkeeper shall not answer for it.

(*j*) *Bennett* v. *Mellor* (1793), 5 T. R. 273; *Orchard* v. *Bush* (1898), 2 Q. B. 284; 67 L. J. Q. B. 650; 78 L. T. 557.

(*k*) *Lamond* v. *Richard* (1897), 1 Q. B. 541; 66 L. J. Q. B. 315; 76 L. T. 141.

(*l*) 1 S. L. C. 128.

(*m*) (1584), 1 S. L. C. 119; 8 Coke, 32.

The Innkeepers Act, 1863.

The liability of innkeepers being, as above stated, so extensive, it was only natural that, in course of time, it should be restricted in like manner as has been shewn the liability of carriers was restricted. The Innkeepers Act, 1863 (*n*), enacts (*o*), that no innkeeper shall be liable to make good any loss or injury to goods or property brought to his inn (not being a horse or other live animal, or any gear appertaining thereto, or any carriage), to a greater amount than £30, except (1) where the goods are stolen, lost, or injured through the wilful act, neglect, or default of the innkeeper or any person in his employ; or (2) where the goods are deposited with him expressly (*p*) for safe custody, in which latter case he may demand that the goods shall be placed in a sealed box or other receptacle. If an innkeeper refuses to receive goods for safe custody, or if by his default the guest is unable to so deposit them, he is not to have the benefit of the Act (*q*); and he must cause at least one *printed* copy of sect. 1 to be exhibited in a conspicuous part of the hall or entrance to the inn, and will only be entitled to the benefit of the Act whilst it is so exhibited (*r*). The copy should be an exact one, and if there is any material omission the innkeeper is not protected (*s*).

Injuries to guests' persons.

We may gather from Calye's Case that an innkeeper does not warrant the safety of his guests, but nevertheless he is liable if an injury happens to them through his neglect, as if a guest falls and injures himself through a defective staircase, carpet, or the like; but some evidence of negligence on the part of the innkeeper must here be given (*t*).

Innkeeper may detain guest's property, but not his person.

An innkeeper has no right to detain his guest's person till his bill is paid, but he has a right of lien

(*n*) 26 & 27 Vict. c. 41. (*o*) Sect. 1.
(*p*) See *Whitehouse* v. *Pickett* (1908), A. C. 357; 77 L. J. P. C. 89.
(*q*) Sect. 2. (*r*) Sect. 3.
(*s*) *Spice* v. *Bacon* (1877), 2 Q. B. D. 463; 46 L. J. Q. B. 713; 25 W. R. 840.
(*t*) *Walker* v. *Midland Ry. Co.* (1887), 55 L. T. 489; 51 J. P. 116.

on property brought by the guest to the inn, or sent to him there, notwithstanding even that the property does not belong to the guest, and the innkeeper is aware of that fact, *e.g.*, if a commercial traveller brings with him, or has sent to him, samples of goods, the innkeeper has a right of lien thereon (*u*). And where a husband and wife came together to an inn (so that of course credit was given to the husband), yet the innkeeper's lien was held to exist on property brought with them, although it was the separate property of the wife (*v*). The lien also exists over property, though it may not be ordinary traveller's luggage (*w*); but there is no lien in respect of goods the property of a third person sent to the guest in the inn for a temporary purpose, *e.g.*, a piano or other article on hire (*x*). When an innkeeper is entitled to a lien over carriages and horses, such lien is not limited to the charge for the keep of the horses and the care of the carriages, but extends to the whole charges against the guest (*y*). An innkeeper who accepts security does not thereby waive his common law lien on the goods of his guest, unless the nature of the security, or the circumstances under which it is given, are inconsistent with the retention of the lien (*z*). The Innkeepers Act, 1878, as already noticed (*a*), now gives the innkeeper a right of actively enforcing his lien. As before observed on the decision in Calye's Case, a lodging-house or boarding-house keeper is not liable as an innkeeper. He is liable only in a less degree, his duty being to use an ordinary amount of care with regard both to his guest and his guest's goods (*b*); and to render such a person liable

Robins v. *Gray*.

Gordon v. *Silber*.

Broadwood v. *Granara*.

Liability of lodging-house or boarding-house keeper.

(*u*) *Robins* v. *Gray* (1895), 2 Q. B. 501; 65 L. J. Q. B. 44; 73 L. T. 252.

(*v*) *Gordon* v. *Silber* (1890), 25 Q. B. D. 491; 59 L. J. Q. B. 507; 63 L. T. 283.

(*w*) *Snead* v. *Watkins* (1857), 1 C. B. (N. S.) 267; *Threlfall* v. *Barwick* (1872), L. R. 10 Q. B. 210; 44 L. J. Q. B. 87.

(*x*) *Broadwood* v. *Granara* (1854), 10 Ex. 417.

(*y*) *Mulliner* v. *Florence* (1878), 3 Q. B. D. 484; 47 L. J. Q. B. 700; 26 W. R. 385; 38 L. T. 167.

(*z*) *Angus* v. *M'Lachlan* (1883), 23 Ch. D. 331; 52 L. J. Ch. 587; 31 W. R. 614; 48 L. T. 863.

(*a*) *Ante*, p. 105.

(*b*) *Dansey* v. *Richardson* (1854), 3 E. & B. 144; *Holder* v. *Soulby*

for the wrongful acts of a servant, he must have been guilty of such a misfeasance or gross misconduct as an ordinary person should not have been guilty of (*c*).

Another classification of bailments.

We have now gone through the different kind of bailments according to Lord Holt's division in *Coggs* v. *Bernard* (*d*), on which it is apparent that another classification (which has been stated in various text-books) may be given. It has the advantage of simplicity, and is as follows:

1. Bailments exclusively for the benefit of the bailor. (This will include those styled *depositum* and *mandatum*.)

2. Bailments exclusively for the benefit of the bailee. (This will include that styled *commodatum*.)

3. Bailments partly for the benefit of the bailor and partly for the benefit of the bailee. (This will include those styled *locatio rei*, *vadium* or *pignori acceptum*, and *locatio operis faciendi*.)

General position of bailor and bailee.

There being a property in the case of goods bailed, both in the bailor and bailee, generally speaking either may maintain an action in respect of the same (*e*). As between a bailor and bailee under an ordinary contract of bailment, if the bailor sues the bailee for delivery of the goods or their value, the bailee is estopped from disputing the title of the bailor (*f*). But notwithstanding this, the bailee cannot have a better title to the goods than his bailor, and therefore he can successfully resist the claim of the bailor to have them delivered up to him, by showing that in refusing to give them up he is acting at the request and by the authority of

Jus tertii.

(1860), 8 C. B. (N. S.) 254; *Scarborough* v. *Cosgrave* (1905), 2 K. B. 805; 74 L. J. K. B. 892.

(*c*) *Clench* v. *D'Arenberg* (1885), 1 C. & E. 42.

(*d*) See *ante*, p. 122.

(*e*) See also, *post*, Part II. ch. iii.

(*f*) *Rogers* v. *Lambert* (1891), 1 Q. B. 318; 60 L. J. Q. B. 187; 64 L. T. 106; 39 W. R. 114.

a person who has a better title than the bailor; or by showing that such a person has actually taken the goods from him contrary to his wish. But a bailee can never set up the title of another if he accepted the goods with knowledge of the adverse claim (*g*).

(*g*) See Goodeve's Personal Property, 25.

CHAPTER V.

OF MERCANTILE CONTRACTS, AND HEREIN OF BILLS OF EXCHANGE, PROMISSORY NOTES, AND CHEQUES.

Matters treated of in this chapter not exclusively mercantile.

ALTHOUGH for convenience the title given to this chapter is "Mercantile Contracts," &c., it must not be understood that the matters treated of in it are exclusively mercantile, but only more generally so; for instance, both agencies and partnerships may occur in matters not strictly mercantile.

It must be manifest that in many matters of ordinary business people may be unable to do personally all acts coming within the scope of their transactions, and for this reason they employ other persons to act for them, who are called agents for them the principals, and acts done by the agents are considered to be done by the principals by force of the maxim *Qui facit per alium facit per se*. Generally, what a person can do himself in his own right he may do by an agent, and, ordinarily speaking, an agent may be authorised by mere word of mouth; but to execute a deed an agent must be authorised by deed, and the agent who is to act under sections 1 and 3 of the Statute of Frauds (*a*) must be authorised by writing. An agent for a corporation aggregate must also be authorised under the seal of the corporation (*b*); but this does not apply at all in the case of a trading corporation (*c*) or joint stock companies (*d*), or industrial or provident

Who are agents.

Qui facit per alium facit per se.

(*a*) 29 Car. II. c. 3; *ante*, p. 50. All instruments comprised in these sections have now, under 8 & 9 Vict. c. 106, s. 3, to be by deed, and therefore such an agent must now be appointed by deed.

(*b*) *Kidderminster* v. *Hardwicke* (1873), L. R. 9 Ex. 13; 43 L. J. Ex. 9; 22 W. R. 160.

(*c*) *South of Ireland Colliery Co.* v. *Waddle* (1869), L. R. 4 C. P. 617; 38 L. J. C. P. 338.

(*d*) 30 & 31 Vict. c. 131, s. 37; 8 & 9 Vict. c. 16, s. 97.

societies (*e*), nor in any case where its application would cause very great inconvenience or tend to defeat the very purpose for which the corporation was created (*f*). The relation of principal and agent requires the consensus of both parties; there must be an express or implied assent to, or a subsequent ratification of, that relation (*g*). No person can authorise another to do for him what he cannot do himself, for naturally he cannot pass to another a power which he never possessed; but though this is so, persons who cannot do acts for themselves are, generally speaking, competent to act as agents, *e.g.*, infants, for they are exercising not their own but another person's powers (*h*).

Persons not *sui juris* may nevertheless act as agents.

An agent cannot delegate his authority to another, the maxim being *Delegatus non potest delegare*, except, indeed, in the ordinary way of business—as when a man in business is employed to do an act, and his clerk does it by his directions—and except by the principal's assent, express or implied, *e.g.*, on occasions arising from the conduct of the parties, the usage of a trade, the nature of a transaction, or an unforeseen emergency (*i*). An agent employing a sub-agent, even though with the knowledge of his principal, is always liable to the principal for money received by the sub-agent (*k*).

Delegatus non potest delegare.

De Bussche v. *Alt.*

The powers of an agent vary according to the authority he is invested with, and there are said to be three kinds of agencies:—

Three kinds of agencies.

1. *Universal agency*, which is the largest and widest kind, being a general authority to do any acts without reference to their character, and this is not of constant occurrence.

(*e*) 39 & 40 Vict. c. 45, s. 11 (12).

(*f*) *Church* v. *Imperial Gas Light Co.* (1838), 6 Ad. & E. 846; 7 L. J. Q. B. 118; *Ludlow* v. *Charlton* (1840), 6 M. & W. 815, 822.

(*g*) *Markwick* v. *Hardingham* (1880), 15 Ch. D. 349; 29 W. R. 361; 43 L. T. 647.

(*h*) See Story on Agency p. 6; Co. Litt. 52 a.

(*i*) *De Bussche* v. *Alt* (1877), 8 Ch. D. 286; 47 L. J. Ch. 381.

(*k*) *Stephens* v. *Badcock* (1832), 3 B. & Ad. 359; *Sims* v. *Brittain* 1832), 4 B. & Ad. 375; *Skinner* v. *Weguelin* (1882), 1 C. & E. 12; *Montagu* v. *Forwood* (1893), 2 Q. B. 350; 69 L. T. 371.

2. *General agency*, which is the next largest, signifying a power to do all acts in some particular trade, business, or employment, *e.g.*, the authority that is usually vested in a wife to bind her husband for necessaries without any particular sanction on each occasion from him.

3. *Special agency*, which is the most limited and usual case of agency, being where a person has simply an authority to do some particular act for the principal (*l*).

Differences between universal and general agencies on the one hand, and special agencies on the other.

There is a very important difference to be noticed between universal and general agencies on the one hand, and special agencies on the other, with regard to the power to bind the principal. In the former, even although the act exceeds the agent's authority in the particular instance and is contrary to the principal's instructions, yet *if it comes within the scope of his ordinary authority* the principal is liable (*m*) : thus, for instance, supposing a servant has a general authority to order goods for his master, and the master one day withdraws that authority, yet if the servant orders goods as theretofore, the tradesman not knowing of such withdrawal, the master will be liable, because the act comes within the scope of the agent's ordinary authority. In the case of special agency this will not be so, for it is the duty of the party contracting with such an agent to inquire and see as to the extent of his authority, and if he exceeds it the principal cannot be liable (*n*). But although an act may be done without any authority from the principal, and therefore not bind him, yet if at the time of doing the act the agent professed that he was acting for a principal (*o*) who was in existence

(*l*) See Story on Agency, p. 23, *et seq.*

(*m*) *Smethurst* v. *Taylor* (1844), 12 M. & W. 545 ; *National Bolivian Navigation Co.* v. *Wilson* (1880), 5 A. C. 290 ; 43 L. T. 70 ; *Chapleo* v. *Brunswick Building Society* (1881), 6 Q. B. D. 696 ; 50 L. J. Q. B. 372 ; 29 W. R. 529 ; *Brooks* v. *Hassell* (1883), 49 L. T. 568 ; *Stein* v. *Cope* (1883), 1 C. & E. 63.

(*n*) *East India Co.* v. *Hensley* (1794), 1 Esp. 111 ; *Graves* v. *Masters* (1883), 1 C. & E. 73.

(*o*) Per Parker, J., *Vere* v. *Ashby* (1830), 10 B. & C. 288.

at the time (*p*), it may be subsequently ratified by such principal, and become his act just as much as if he had authorised it beforehand; for the maxim is, *Omnis ratihabitio retrotrahitur et mandato priori æquiparatur* (*q*). And this is so even although the other party has before the ratification repudiated the contract (*r*).

Omnis ratihabitio retrotrahitur et mandato priori æquiparatur.

Principal's liability.

The principal is bound to persons who deal with his agent in good faith, by every act done by the agent as such within his actual authority, even though the agent did the act fraudulently in furtherance of his own interests (*s*). The principal is also bound by the acts of his agent done in the course of his employment and within the apparent scope of his authority, unless the agent was not in fact authorised to do the particular act and the other party knows that the agent is exceeding his authority (*t*).

As to the effect of giving credit to an agent.

An important point on the law of principal and agent is as to the effect of a person contracting with an agent giving credit to the agent. Generally speaking, an agent incurs no personal liability, and the person contracting with him will charge his principal; but it may be that (1) it is not known that he is an agent, or, (2) though known that he is an agent, it is not known who his principal is, or (3) though both the above facts are known, the agent not contracting as agent, it is preferred to charge him rather than his principal. The law is, that if the fact of the person being an agent is not known, or if the agency is known but the name of the principal is not, though credit is first given to the agent, the principal, on being discovered, may be sued (*u*); but that if the principal is known, and yet credit has been given to the agent, who has made himself personally

Thomson v. *Davenport.*

Paterson v. *Gandesequi*; *Addison* v. *Gandesequi.*

(*p*) *Kelner* v. *Baxter* (1866), L. R. 2 C. P. 174; 36 L. J. C. P. 94.
(*q*) *Maclean* v. *Dunn* (1828), 4 Bing. 722.
(*r*) *Bolton* v. *Lambert* (1888), 41 Ch. D. 295; 58 L. J. Ch. 425; 60 L. T. 687; *Re Portuguese Consolidated Copper Mines* (1890), 45 Ch. D. 16; 63 L. T. 423; 39 W. R. 25.
(*s*) *Hambro* v. *Burnand* (1904), 2 K. B. 10; 73 L. J. K. B. 669; 90 L. T. 803.
(*t*) *Wattean* v. *Fenwick* (1893), 1 Q. B. 346; 67 L. T. 831.
(*u*) *Thomson* v. *Davenport* (1829), 2 S. L. C. 379; 9 B. & C. 78.

liable, the principal cannot afterwards be charged, for the person has made his election (*v*).

Effect of payment to a broker or agent.

Where a broker or agent buys goods in that capacity for his principal, though he does not at the time disclose his principal, yet the principal is, on being discovered, liable for the price, and this although he has paid the broker or agent; unless indeed before payment to the broker or agent, the vendor has by his conduct led the principal to believe that he had been already paid by the broker (*w*).

Cases in which agent personally liable.

The cases in which, contrary to the general rule, the agent incurs personal liability may be stated to be as follows:—

1. Where the agent conceals or does not disclose his principal, and does not contract merely as agent (*x*). Here, though the agent is liable, it is in the option of the other contracting party, on discovering the principal, to sue either principal or agent.

2. Where he acts without authority, or after his authority has determined. If, however, he could not have known of the determination of his authority, this will not be so; thus, an action was brought for necessaries supplied to a woman after her husband's death, whilst on a foreign voyage, but before she knew of his decease, and it was decided that she was not liable (*y*). If an agent

(*v*) *Paterson* v. *Gandesequi* (1812), 2 S. L. C. 365; 15 East, 62; *Addison* v. *Gandesequi* (1812), 2 S. L. C. 372; 4 Taunt. 574.

(*w*) *Heald* v. *Kenworthy* (1855), L. R. 10 Ex. 739; 24 L. J. Ex. 76; *Irvine* v. *Watson* (1880), 5 Q. B. D. 414; 49 L. J. Q. B. 531; 42 L. T. 810.

(*x*) *Fleet* v. *Murton* (1871), L. R. 7 Q. B. 126; 41 L. J. Q. B. 49. But where a person contracts specially "as agent," his principal being undisclosed, evidence is admissible to shew a custom that he shall be personally liable if he does not disclose his principal's name within a reasonable time (*Hutchinson* v. *Tatham* (1873), L. R. 8 C. P. 482; 42 L. J. C. P. 260).

(*y*) *Smout* v. *Ilbery* (1842), 10 M. & W. 1, which case was followed in *Salton* v. *New Beeston Cycle Co.* (1900), 1 Ch. 43; 69 L. J. Ch. 20, and is submitted to be still good law notwithstanding the remarks of Kekewich, J., in *Halbot* v. *Lens* (1901), 1 Ch. 344; 70 L. J. Ch. 125; 49 W. R. 214. And it has been held that the husband's estate would not be liable in such a case (*Blades* v. *Free* (1829), 9 B. & C. 167). But see *Drew* v. *Nunn* (1879), 4 Q. B. D. 661; 48 L. J. Q. B. 591, where the defendant, having held out his wife to the plaintiff as having authority to pledge his credit, afterwards became insane. The plaintiff, being unaware of the insanity, continued to supply the wife with goods on

acts without authority, but yet honestly believing that he had authority, he may be sued *ex contractu* upon a warrant of authority (*z*). Thus, an innocent stock-broker who acted in transferring certain stock under a forged power of attorney, was held liable to indemnify the bank, on the ground that he impliedly warranted that he had a proper authority (*a*). If, however the professed agent knew that he had not the authority he assumed to possess, he may be sued *ex delicto* in an action for deceit (*b*).

Collen v. *Wright.*

Starkey v. *Bank of England.*

Polhill v. *Walter.*

3. Where, though having authority, he exceeds that authority, or fraudulently misrepresents its extent.

4. Where he specially pledges his own credit.

5. Where, though contracting as agent, he uses words to bind himself, *e.g.*, if he covenants personally for himself and his heirs (*c*).

It was formerly considered that where a British agent contracted for a foreign principal, the British agent was necessarily the person liable, and not the foreign principal, because it was said there was no responsible employer; but this, though still generally the case, cannot be taken to be now a perfectly correct statement of the law (*d*). It is really a question of fact in each particular case as to who is liable, and the circumstance of the principal being a foreign one may sometimes be considered as of great weight in the determination of that question. Thus in the case of an ordinary sale and purchase of goods in this country, it is perhaps not an unreasonable inference of fact that the parties residing here are looked to as principals where there is no stipulation to the contrary. The

British agent contracting for foreign principal.

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credit, and it was held that the defendant was liable to the plaintiff for the price of the goods so supplied.

(*z*) *Collen* v. *Wright* (1857), 8 E. & B. 647.

(*a*) *Starkey* v. *Bank of England* (1903), A. C. 114; 72 L. J. Ch. 402; 88 L. T. 244; 51 W. R. 513. *Sheffield Corporation* v. *Barclay* (1905), A. C. 114; 74 L. J. K. B. 747; 93 L. T. 83.

(*b*) *Polhill* v. *Walter* (1832), 3 B. & Ad. 114.

(*c*) See hereon *Thomas* v. *Edwards* (1837), 2 M. & W. 216, and cases there cited.

(*d*) See *Malcolm Flinn & Co.* v. *Hoyle* (1894), 63 L. J. Q. B. 1, where it was held that the circumstances excluded the application of the ordinary rule.

usage of trade, or the conduct of the parties, will probably in most cases furnish a guide to the decision of this question (*e*).

The different ways in which an agent's authority may be determined.

An agent's authority may be determined in any of the following ways, *i.e.* :—

1. By the principal's revocation of it, and death will operate as a revocation (*f*). If by the act of the principal the agency is revoked, in the case of a special agency nothing further done by the agent will bind the principal, but in the case of a general or universal agency the revocation will not bind third persons until made known to them (*g*); for, as we have seen, in these agencies the principal may be bound if the act comes within the scope of the agent's usual authority (*h*). In ordinary cases, special notice should be given by the principal to all persons who have been in the habit of dealing with the agent, and in addition he should give a general notice in the *London Gazette*.

2. By the agent's renunciation with the principal's consent.

3. By the principal's bankruptcy.

4. By the object of the agency being accomplished.

5. By the effluxion of time; and

6. Formerly by the marriage of a *femme sole* agent (*i*), but now, since the Married Women's Property Act, 1882 (*k*), this is no longer so.

An agent's authority includes all incidental acts.

Unless a contrary intention appears, the authority given to an agent must be taken to include all incidental acts necessary for accomplishing the principal

(*e*) *Green* v. *Kopke* (1856) 25 L. J. C. P. 297; *Armstrong* v. *Stokes* (1872), L. R. 7. Q. B. 598; 41 L. J. Q. B. 253; *Elbinger* v. *Clave* (1873), L. R. 8 Q. B. 313; 42 L. J. Q. B. 151; *Hutton* v. *Bullock* (1874), L. R. 9 Q. B. 572. See as to the rights of an undisclosed foreign principal, *Kaltenbach* v. *Lewis* (1885), 10 A. C. 617; 55 L. J. Ch. 58; 53 L. T. 787. *Malcolm Flinn & Co.* v. *Hoyle* (1894), 63 L. J. Q. B. 1.

(*f*) With regard, however, to powers of attorney, see the Conveyancing Act, 1881 (44 & 45 Vict. c. 41, s. 47), and the Conveyancing Act, 1882 (45 & 46 Vict. c. 39, ss. 8, 9).

(*g*) *Monk* v. *Clayton*, Moll. 270, cited in *Nickson* v. *Brohan* (1718), 10 Mod. 110.

(*h*) *Ante*, p. 146.

(*i*) See hereon Story on Agency, 481

(*k*) 45 & 46 Vict. c. 75.

object; for instance, a person sending another to a shop to buy goods without giving him the money to pay for them, gives to him the necessary incidental power of pledging his credit (*l*).

The principal, not the agent, should generally sue.

The proper person to sue on a contract is, generally speaking, the principal, and not the agent, unless indeed the agent has some special property or interest in the subject-matter of the contract by way of commission or otherwise, *e.g.*, a carrier or an auctioneer (*m*), and generally an undisclosed principal has an equal right to sue as if he had been disclosed (*n*). If an agent is remunerated, he is bound to use ordinary diligence; if unremunerated, then, by analogy to the case of a voluntary bailee (*o*), he is only liable for gross negligence, unless he is possessed of any special skill or knowledge, when an omission to use it will be imputable to him as gross negligence (*p*). It is the duty of an agent always to act fairly and honestly, and to keep proper accounts and vouchers, and be ready to account to his principal, and he may lose his right to any commission he might otherwise be entitled to by not doing so (*q*). If an agent takes a bribe, the principal may sue him to recover the amount of such bribe (*r*) and also to recover any remuneration he has paid the agent (*s*); and he may also sue the person who bribed the agent for any loss he has suffered, *e.g.*, excess of price which he has paid for goods (*t*), or he may abrogate the contract (*u*).

Agent's liability and duty.

Bribing agent.

(*l*) Story on Agency, p. 77. See as to the extent of the power vested in an auctioneer, *Saunders* v. *Dence* (1885), 52 L. T. 644; *Rosenbaum* v. *Belson* (1900), 2 Ch. 267; 69 L. J. Ch. 569; 82 L. T. 658.

(*m*) *Robinson* v. *Rutter* (1855), 4 E. & B. 954.

(*n*) *Mildred* v. *Maspons* (1883), 8 A. C. 874; 53 L. J. Q. B. 33; 49 L. T. 685; 32 W. R. 125.

(*o*) As to which see *ante*, p. 123.

(*p*) See *Coggs* v. *Bernard* (1704), 1 S. L. C. 173; Lord Ray, 909; *Wilson* v. *Brett* (1843), 11 M. & W. 113; *ante*, pp.

(*q*) See hereon *Stainton* v. *Carron Co.* (1857), 24 Beav. 353.

(*r*) *Turnbull* v. *Garden* (1869), 38 L. J. Ch. 331.

(*s*) *Andrews* v. *Ramsay* (1903), 2 K. B. 635; 72 L. J. K. B. 865; 89 L. T. 450.

(*t*) *Mayor of Salford* v. *Lever* (1891), 1 Q. B. 168; 63 L. T. 658; 60 L. J. Q. B. 39; 39 W. R. 85; *Grant* v. *Gold Exploration Syndicate* (1900), 1 Q. B. 233; 69 L. J. Q. B. 150; 82 L. T. 5.

(*u*) *Shipway* v. *Broadwood* (1899), 1 Q. B. 369; 68 L. J. Q. B. 360; 80 L. T. 11.

Del credere agent.

A *del credere* agent is one who agrees with his principal, in consideration of some additional compensation, to be responsible to the principal for due payment of the purchase-money of goods to be sold by him, the agent. It has been decided that this engagement need not be in writing (*x*), as is necessary, as we have seen, in the case of guarantees (*y*). The reason of this is that the contract of the *del credere* agent is not really to guarantee the solvency of those who purchase from him, but rather a promise of indemnity to his employer against his own inadvertence or ill fortune in making contracts for him with persons who cannot or will not perform them (*z*). A contract of indemnity must, in fact, be distinguished from a guarantee. Thus in one case the plaintiffs, a firm of stockbrokers, had orally agreed with the defendant to transact ordinary business, and be answerable upon the Stock Exchange, for customers whom the defendant should introduce, upon the terms that the defendant should receive half the commission earned upon, and be liable to the plaintiffs for half the losses arising from, such transactions. Owing to the default of a customer a loss was incurred by the plaintiffs, the half of which they sought to recover. It was held that the promise to answer for the losses was the ulterior consequence only of the above agreement, the main object of which was to regulate the terms of the employment, and that therefore the contract was one of indemnity, and not a promise to guarantee the debt of another person, and that sect. 4 of the Statute of Frauds did not apply (*a*). It may be shortly stated that indemnity only requires two parties, promisor and promisee, while guarantee requires three, debtor, creditor, and surety; in indemnity the promise is

His contract not one of guarantee.

Difference between indemnity and guarantee.

Sutton v. *Grey*.

Indemnity contrasted with guarantee.

(*x*) *Coutourier* v. *Hastie* (1852), 8 Ex. 40; *Wickham* v. *Wickham* (1855), 2 K. & J. 178.

(*y*) *Ante*, pp. 51–53.

(*z*) Anson's Contracts, 373.

(*a*) *Sutton* v. *Grey* (1894), 1 Q. B. 285; 63 L. J. Q. B. 633; 69 L. T. 673. See also *Guild* v. *Conrad* (1894), 2 Q. B. 885; 63 L. J. Q. B. 721; 71 L. T. 140.

absolutely to indemnify (in whole or in part) in consideration of a certain liability or risk being incurred by the promisee, while in guarantee the surety only promises collaterally to pay on the debtor's default; and indemnity may be oral, while guarantee must be in signed writing.

Difference between factors and brokers.

Factors and brokers are peculiarly mercantile agents, being employed constantly to effect sales, the difference between them being that the broker has not the possession of the goods he is selling for his principal, whilst the factor has (*b*). At common law, if goods were placed in a factor's hands for sale, he, having only a power to sell and not to pledge, could not give any title by way of pledge, that not being within the usual scope of his authority. This being, however, considered by the mercantile community as an undue restriction on the operations of commerce, certain Acts (*c*) were passed to effect an alteration of the law; but these Acts were repealed by the Factors Act, 1889 (*d*), which now deals with the entire subject. By this statute it is provided (*e*) that where a mercantile agent (*f*) is, with the owner's consent, in possession of goods or documents of title (*g*) thereto, any sale, pledge, or other disposition made by him when acting in the ordinary course of a mercantile agent's business, shall be as valid as if made with the owner's authority, and this notwithstanding the owner's consent may since have been determined, provided that the person taking does so in good faith and without notice of the agent's want of authority, or of the determination of such consent. Where, however, the mercantile agent pledges goods as security for an antecedent debt, then the pledgee

Sale or pledge by factor without authority.

Factors Act, 1889.

Pledge for antecedent debt.

(*b*) *Baring* v. *Corrie* (1818), 2 B. & A. 137; Campbell on the Law of Sale of Goods, 408, 424.

(*c*) 6 & 7 Geo. IV. c. 94; 5 & 6 Vict. c. 39; 40 & 21 Vict. c. 39.

(*d*) 52 & 53 Vict. c. 45.

(*e*) Sect. 2.

(*f*) *i.e.*, a person who in the customary course of his business as a mercantile agent has authority either to sell, or to buy, or to raise money on security of, goods, sect. 1. See *Hastings* v. *Pearson* (1893), 1 Q. B. 62; 62 L. J. Q. B. 75; 67 L. T. 553.

(*g*) As to the meaning of this expression see *ante* p. 107, note (*f*).

is to acquire no further right to the goods than the pledgor had at the time of the pledge (*h*); and if the pledge is made in consideration of the delivery or transfer of other goods, or of a negotiable security, the pledgee is to acquire no right to the goods pledged beyond the value of what has been so given (*i*).

Position of seller or buyer in possession of goods or documents of title.

It was formerly held that where a seller had been left by his buyer in possession of goods or the documents of title thereto, he could not confer a good title upon a *bonâ fide* purchaser or pledgee (*k*); but under the provisions of the Factors Act, 1889 (*l*), and the Sale of Goods Act, 1893 (*m*), he can now do so to any person taking in good faith and without notice. And with regard to the possession of a buyer, it is also provided (*n*), that where any goods have been sold or contracted to be sold, and the buyer or any person on his behalf obtains with the seller's consent the possession of the goods or the documents of title thereto, from the seller or his agent, any sale, pledge, or disposition of such goods, or documents, by such buyer or his agent, to a person taking in good faith and without notice of any lien or other right of the seller, shall be valid and effectual (*o*). The effect of this enactment on hire-purchase agreements is important. A person agrees to acquire furniture under this system, and is by the agreement to pay so much a month for a certain period, and the property is to vest in him only when he has paid so many monthly instalments as make up the full price. If he, being in possession of the furniture under the agreement, before he has made all the payments sells or pledges to a purchaser or pledgee, who takes *bonâ fide* without notice of

Hire-purchase agreements.

(*h*) 52 & 53 Vict. c. 45, s. 4.

(*i*) Sect. 5.

(*k*) *Johnson* v. *Credit Lyonnais Co.* (1878), 3 C. P. D. 32; 47 L. J. C. P. 241.

(*l*) 52 & 53 Vict. c. 45, s. 8.

(*m*) 56 & 57 Vict. c. 71, s. 25 (1). This provision is practically the same as that in the Factors Act, 1889, which is, however, not repealed.

(*n*) 52 & 53 Vict. c. 45, s. 9; 56 & 57 Vict. c. 71, s. 25 (2).

(*o*) See *Hugill* v. *Masker* (1889), 22 Q. B. D. 364; 58 L. J. Q. B. 171; 60 L. T. 774; *Cahn* v. *Pockett's Bristol Channel Steam Packet Co.* (1899), 1 Q. B. 643; 68 L. J. Q. B. 515; 80 L. T. 269.

the circumstances, is the title of such purchaser or pledgee good? The answer to this question depends upon the way in which the hire-purchase agreement is worded. If it is an absolute contract, under which the hirer is bound to carry out the transaction, then the question must be answered in the affirmative (*p*), and this notwithstanding the contract contains provisions under which the owner may put an end to the arrangement for sale on various contingencies (*q*); but if the hiring agreement contains a provision that the hirer may at any time determine the transaction by redelivering the furniture, then the question must be answered in the negative (*r*). Hire-purchase agreements, therefore, should be drawn in this way, so that the provisions of the Factors Act, 1889, and the Sale of Goods Act, 1893, shall not operate to protect a person to whom the hirer improperly sells the goods (*s*).

Lee v. *Butler*.

Helby v. *Matthews*.

Right of set-off when goods bought of a factor and principal sues.

If goods are bought of a factor, the buyer not knowing that he is only a factor, but believing that he is selling his own goods, and the principal then declares himself and sues, the buyer may set off against him any claim he might have set off against the factor had the action been brought by him; but if the buyer knew that the person selling was a factor, then he cannot (*t*). If, however, the buyer, though possessed of this knowledge, yet honestly believed that the factor was entitled to sell, and was in fact selling to repay himself advances made for his principal, then he may set off to the amount of the factor's claim against his principal (*u*). If the buyer had clearly the means of knowing that the person with whom he contracted was only a factor, and ought to

George v. *Clagett*.

Warner v. *M'Kay*.

(*p*) *Lee* v. *Butler* (1893), 2 Q. B. 318; 62 L. J. Q. B. 591; 69 L. T. 370.

(*q*) *Thompson* v. *Veale* (1897), 74 L. T. 130; *Hull Rope Co.* v. *Adams* (1896), 65 L. J. Q. B. 114; 73 L. T. 446; 44 W. R. 108.

(*r*) *Helby* v. *Matthews* (1895), A. C. 471; 64 L. J. Q. B. 465; 72 L. T. 841.

(*s*) A *bonâ fide* hire-purchase agreement is not a bill of sale; see *ante*, p. 116.

(*t*) *George* v. *Clagett* (1797), 2 S. L. C. 138; 7 T. R. 359; *Cook* v. *Eshelby* (1887), 12 A. C. 271; 56 L. J. Q. B. 505; 56 L. T. 673.

(*u*) *Warner* v. *M'Kay* (1836), 1 M. & W. 595.

have availed himself of his means of knowledge, he is considered in the same position as if he had actually known (*x*).

Partnership.

What is a partnership.

The subject of partnership is now specially dealt with by the Partnership Act, 1890 (*y*). Partnership is the relation which subsists between persons carrying on a business in common with a view of profit, but does not include a company or association which is (1) registered under the Companies Act, 1862, or (2) formed under any other statute, or under letters patent or royal charter, or (3) working mines within and subject to the jurisdiction of the Stannaries (*z*). The number of partners must not exceed ten for a banking business, and twenty for any other business (*a*).

Actual and nominal partners.

Holding out.

A partnership may be either actual or nominal, the former depending on the agreement and intention of the parties, and the latter occurring where a person allows his name to be held out to the world as a partner without having any real interest in the concern (*b*). Whoever by words, either spoken or written, or by conduct, represents himself, or knowingly suffers himself to be represented as a partner, is, on principles of estoppel, liable as a partner to any one who, on the faith of such representation, gives credit to the firm, whether the representation was or was not communicated to the person giving credit with the knowledge of the apparent partner (*c*). But where after a partner's death the business is continued in the old firm's name, the continued use of that name, or of the dead partner's name, does not of itself make his estate liable for debts contracted after his death (*c*).

What will constitute persons partners.

With regard to what will be sufficient to constitute persons partners, the general rule is that it is in every

(*x*) *Baring* v. *Corrie* (1818), 2 B. & A. 137; *Borries* v. *Imperial Ottoman Bank* (1874), L. R. 9 C. P. 38; 43 L. J. C. P. 3; see also 2 S. L. C. 141–143.

(*y*) 53 & 54 Vict. c. 39. (*z*) 53 & 54 Vict. c. 39, s. 1.

(*a*) 25 & 26 Vict. c. 89, sect. 4.

(*b*) *Waugh* v. *Carver* (1794), 2 H. Blackstone, 235.

(*c*) 53 & 54 Vict. c. 39, s. 14.

case a question of intention (*d*), and though when persons are found sharing both the profits and losses of a concern, it is generally true that they are partners, it is not necessarily so, for it is quite possible that the real intention may not have been that the parties should be partners (*e*). The Partnership Act, 1890 (*f*), now lays down the following rules on the subject to which special attention must be paid, but it must still be borne in mind that they only state the weight which is to be attached to the facts mentioned when such facts stand alone.

Provisions of Partnership Act, 1890, hereon.

1. Joint tenancy, tenancy in common, joint property, common property, or part ownership, does not of itself create a partnership, even though the owners share profits by using the property.

2. Sharing gross returns does not of itself create a partnership, whether the persons so sharing have or have not a common interest in the property from which the returns are derived.

3. Receipt of a share of profits is *primâ facie* evidence of partnership, but the receipt of such a share does not of itself constitute a partnership, and in particular this is so in the following five cases :—

(*a*) Where a debt or other liquidated sum is received, by instalments or otherwise, out of the accruing profits of a business.

(*b*) Where a servant or agent is remunerated by a share of the profits of the business.

(*c*) Where a widow or child of a deceased partner receives by way of an annuity a portion of the profits made in the business in which the deceased person was a partner.

(*d*) Where money is lent, under a contract *in writing* duly signed, to receive a rate of interest varying with the profits.

(*d*) *Cox* v. *Hickman* (1860), 8 H. L. Cas. 268 ; *Walker* v. *Hirsch* (1884), 27 Ch. D. 460 ; 54 L. J. Ch. 315 ; 51 L. T. 581 ; 33 W. R. 992 ; *Adams* v. *Newbigging* (1888), 13 App. Cas, 308 ; 57 L. J. Ch. 1066 ; 59 L. T. 267.

(*e*) *Walker* v. *Hirsch* (1884), 27 Ch. D. 460 ; 54 L. J. Ch. 315 ; 51 L. T. 581.

(*f*) 53 & 54 Vict. c. 39, s. 2.

(*c*) Where a person receives, by way of annuity or otherwise, a portion of the profits of a business in consideration of the sale by him of the goodwill (*g*).

Postponement in the event of bankruptcy in certain cases.

With regard, however, to paragraphs (*d*) and (*e*) it is provided that in the event of any such borrower of money, or purchaser of a goodwill, becoming bankrupt, or entering into an arrangement to pay less than 20*s*. in the pound, or dying insolvent, the lender of such money, or the vendor of such goodwill, shall not be entitled to recover anything in respect of his loan, or of the share of profits contracted for, until the claims of the other creditors for valuable consideration in money, or money's worth, have been satisfied (*h*).

Re Fort.

It has been held that this provision applies to the case of a contract for the loan of money at interest varying with the profits, notwithstanding that the contract is not in writing (*i*), and that therefore no

Re Gieve.

protection is gained under the Act. It has also been held that where a goodwill is sold in consideration of an annuity which is not expressly stated to be payable out of the profits of the business, the provisions of the Act do not apply (*k*). The section does not, however, deprive a lender of any security he may have taken for his loan, *e.g.*, a mortgage (*l*).

Quasi-partnership.

Where there is no actual partnership between the parties, but only a liability as partners, which may occur, as we have seen, by holding one's self out as a partner, this is styled a quasi-partnership.

Dormant partner.

A person, although an actual partner, may possibly not be an ordinary partner taking his active share in the business, but a dormant partner, who may be defined as one who, though an actual partner, does

(*g*) 53 & 54 Vict. c. 39, s. 2. This section is in place of Bovill's Act (28 & 29 Vict. c. 86), which is repealed (s. 48). It is practically identical, except that the case (*a*) is new.

(*h*) 53 & 54 Vict. c. 39, s. 3.

(*i*) *Re Fort, ex parte Schofield* (1897), 2 Q. B. 495; 66 L. J. Q. B. 824; 77 L. T. 274.

(*k*) Re *Gieve, ex parte Shaw* (1899), 80 L. T. 737; 47 W. R. 616.

(*l*) *Ex parte Sheil* (1877), 4 Ch. D. 789; 46 L. J. Bk. 62.

not take any active part in the firm's business, and may perhaps not appear to the world as a partner in the concern. A dormant partner, when discovered, is liable in the same way as any other actual partner.

Liability of partners *ex contractu*.

Each partner is an agent of the firm, and the other partners, for the purposes of the partnership business, and his acts done for carrying on such business in the usual way bind the firm and his partners, unless he had in fact no authority in the particular matter, and the party with whom he was dealing either knew that he had no authority, or did not know or believe him to be a partner (*m*). Thus a bill of exchange given in the firm's name by one partner in a trading concern, for a transaction of the firm, will ordinarily bind the firm (*n*); but it would not be so in a non-trading concern, *e.g.*, a firm of solicitors, unless there was direct authority, as the giving of bills is not within the scope of such a business (*o*). But a cheque given by one partner in the name of the firm, and not post-dated, will in all cases bind the firm (*p*). One partner cannot bind his firm by a submission to arbitration (*q*), nor by borrowing money, unless it is a trading firm and the money is properly borrowed for the purposes of the business (*r*), nor by giving a guarantee (*s*), nor by executing a deed unless authorised by deed (except as to releases); but it has been decided that if a partner executes a deed in the presence of and by the express consent of his co-partners in a matter in which they are commonly interested, it binds all (*t*). If a partner pledges the credit of the firm for a purpose apparently not connected with the firm's ordinary

Bill given by a partner in the firm's name.

Cheque.

Other cases.

(*m*) 53 & 54 Vict. c. 39, s. 5.
(*n*) *Kirk* v. *Blurton* (1842), 9 M. & W. 284.
(*o*) *Harman* v. *Johnson* (1853), 2 El. & Bl. 61. As to the power of a member of a firm of solicitors to bind his partners, see *Rhodes* v. *Moules* (1895), 1 Ch. 236; 64 L. J. Ch. 122; 71 L. T. 599.
(*p*) *Forster* v. *Mackreth* (1867), L. R. 2 Ex. 163; 36 L. J. Ex. 94.
(*q*) *Stead* v. *Salt* (1825), 3 Bing. 101.
(*r*) See Lindley on Partnership, 156–158.
(*s*) *Hasleham* v. *Young* (1844), L. R. 5 Q. B. 833; *Brettel* v. *Williams* (1849), 4 Ex. 623.
(*t*) *Ball* v. *Dunsterville* (1796), 4 T. R. 313.

course of business, the firm is not bound, unless he is, in fact, especially authorised by the other partners (*u*).

Effect of agreement restricting powers of partners.

If there is any agreement between partners restricting their ordinary power of binding the others, this agreement is valueless as regards persons not having notice of it; but no act done in contravention of the agreement is binding on the firm with regard to persons having notice thereof (*x*).

Partnership liability is joint.

Where debts or liabilities are incurred by or on behalf of a partnership firm, every partner is jointly liable with the other partners (*y*), and after his death his estate is also severally liable in a due course of administration, but subject to the prior payment of his separate debts (*z*). Where a judgment is obtained against two or more partners or other joint contractors in the individual names, such judgment is a bar to any subsequent action against another partner or joint contractor (*a*); and when joint contractors are sued together, and the plaintiff obtains judgment by consent against one of them, such judgment forms a bar to further proceedings against the others (*b*). But if one partner's bill, note, or cheque is taken in conditional payment of the joint debt and is dishonoured, judgment against him on the dishonoured instrument does not (unless paid) extinguish the joint liability on the original debt (*c*).

Liability of partners *ex delicto*.

Where a loss or injury is caused to a person by the wrongful act or omission of any partner acting in the

(*u*) 53 & 54 Vict. c. 39, s. 7.
(*x*) Ibid., s. 8.
(*y*) Sect. 9. This enactment is in accordance with the previous decision of the House of Lords in *Kendall* v. *Hamilton* (1879), 4 App. Cas. 504; 48 L. J. C. P. 705; 41 L. T. 418.
(*z*) 53 & 54 Vict. c. 39, s. 9.
(*a*) *Kendall* v. *Hamilton* (1879), 4 App. Cas. 504; 48 L. J. C. P. 705; 41 L. T. 418; *Hoare* v. *Niblett* (1891), 1 Q. B. 781; 60 L. J. Q. B. 565; 64 L. T. 659. As to the suing of partners in the name of their partnership firm, and the service of the writ, and execution on a judgment so obtained against a partnership firm, and generally, see Order xlviiia, and Indermaur's Manual of Practice, 62, 63, 214.
(*b*) *McLeod* v. *Power* (1898), 2 Ch. 295; 67 L. J. Ch. 551; 79 L. T. 67.
(*c*) *Drake* v. *Mitchell* (1803), 3 East 251; *Wegg Prosser* v. *Evans* (1895), 1 Q. B. 108; 64 L. J. Q. B. 1.

course of the firm's business, or with the authority of his co-partners, the firm and every partner are liable both jointly and severally (*d*). And if one partner, acting within the scope of his apparent authority, receives money or property of a third person and misapplies it, or if a firm in the course of its business receives money or property of a third person which is misapplied by one or more of the partners while in the custody of the firm—the firm and every partner are liable both jointly and severally (*e*).

Introduction of a new partner, and retirement of old partner.

No new member can, in the absence of stipulation in the partnership articles (*f*), be introduced into a partnership firm without the consent of all the members; and an incoming partner is not liable for anything done before he became a partner (*g*). Where no fixed term has been agreed upon, any partnership may be determined by notice (*h*), but a person dealing with a firm after a change in its constitution is entitled to treat all apparent members of the old firm as still being members until he has notice of the change. An advertisement in the *London Gazette* is notice to persons who had no dealings with the firm before the change occurred (*i*), but a particular notice must be given to persons who had been in the habit of dealing with the firm. And although when a partner retires, his liability, of course, continues in respect of debts incurred whilst he was a member of the firm, yet if any creditors expressly or impliedly accept the credit of the new instead of the old firm—that is to say, if there is a novation—this exonerates him from liability (*k*). As to a dormant partner, it will always be sufficient for him to give notice only to the persons who knew of his connection with the firm (*l*).

Novation.

(*d*) 53 & 54 Vict. c. 39, ss. 10, 12.
(*e*) Sects. 11, 12; *Rhodes* v. *Moules* (1895), 1 Ch. 236; 64 L. J. Ch. 122; 71 L. T. 599.
(*f*) *Cuffe* v. *Murtagh*, 7 L. R. Ir. 411.
(*g*) 53 & 54 Vict. c. 39, s. 17.
(*h*) Sect. 26.
(*i*) Sect. 36.
(*k*) Sect. 17.
(*l*) *Evans* v. *Drummond* (1802), 4 Esp. 89.

Dissolution of partnership.

A partnership may be dissolved in any of the following ways :—

1. By effluxion of time.

2. By mutual consent.

3. By notice, if the partnership is for an undefined time.

4. By death of a partner.

5. By bankruptcy of a partner.

6. By the happening of any event which makes the carrying on of the business by the partners unlawful.

7. By judgment of the High Court of Justice, which may be obtained on various grounds, *e.g.*, lunacy of a partner, permanent incapability of a partner to perform his duties, conduct of a partner calculated to prejudice the carrying on of the business, a partner wilfully committing a breach of the partnership articles, the business being only capable of being carried on at a loss, or that it is just and equitable to dissolve (*m*).

8. A partnership may also, at the option of the other partners, be dissolved if any partner's share of the partnership property is charged for his separate debt under an order of the Court obtained by a judgment creditor against the individual partner (*n*).

Partners' powers after dissolution.

After dissolution the authority of each partner to bind the firm, and the other rights and obligations of the partners, continue so far as may be necessary to wind up the partnership affairs and to complete transactions begun but not finished at the date of the dissolution, but not otherwise (*o*). So if one partner dies, the survivor may not only sell the assets but even give a legal or equitable mortgage over the partnership realty or personalty in the course of winding up the affairs (*p*). A firm is in no case bound by the act of a partner who has become bankrupt, but this does not effect the liability of any person who has, after the bankruptcy, represented himself, or knowingly suffered himself to be represented, as a partner of a bankrupt (*o*).

(*m*) 53 & 54 Vict. c. 39, ss. 32–35.
(*n*) Sects. 23, 33. See Indermaur's Manual of Practice, 210.
(*o*) 53 & 54 Vict. c. 39, s. 38.
(*p*) *Re Bourne* (1906), 2 Ch. 427 ; 75 L. J. Ch. 779 ; 95 L. T. 131.

As to infants and others being partners.

All partners must be competent to contract, so that an infant cannot properly be a partner. Still, if an infant does professedly become a partner, he may be entitled to benefits, though not liable for debts, arising during the partnership and whilst he was an infant; but in taking accounts the Court will not allow him to be credited with profits and not debited with losses. And if an infant who is professedly a partner does not on attainment of his majority expressly rescind and disclaim the partnership, he will be liable for losses accruing after he comes of age. An alien may now be a partner, unless the partnership embraces the holding of a British ship or any share therein (*q*), and a married woman may, since the Married Woman's Property Act, 1882 (*r*), be a partner. An executor of a deceased partner may be let in as a partner under a provision to that effect in the partnership articles; but even if there is such a provision, he cannot be compelled to become a partner (*s*), for if let in he becomes personally liable as any other partner, though he is simply acting in trust, and not himself taking any benefit (*t*).

Remedies between partners.

At common law, as a general rule, one partner could not sue another. This rule was, however, subject to these exceptions, viz., (1) Where an account had been gone through between the parties, and a balance struck and agreed on; (2) where money had been received by one partner for the private use of the other, and wrongfully carried to the partnership account; and (3) where one partner had improperly used the partnership name in giving a bill of exchange or a promissory note for his own private debt, and it had been paid by the other. The proper remedy between partners was formerly in the Court of Chancery for a dissolution and account, and now, where formerly a bill in Chancery would have been necessary, the plaintiff, by his writ in the High

(*q*) 33 Vict. c. 14, s. 14.
(*r*) 45 & 46 Vict. c. 75.
(*s*) *Lancaster* v. *Allsup* (1887), 57 L. T. 53.
(*t*) *Wightman* v. *Townroe* (1832), 1 M. & S. 412. He is, however, entitled to indemnity out of his testator's estate, if it is sufficient, provided he has acted properly.

Court of Justice, must claim an account, and the proper Division for such accounts is the Chancery Division, such matters being specially assigned to that Division (*u*).

Limited partnerships.

In ordinary partnerships, the rule is that each partner is liable, to his last shilling, for the liabilities of the firm, supposing the partnership assets do not prove sufficient to discharge them. But the Limited Partnership Act, 1907 (*x*) permits the formation of partnerships in which the liability of some of the partners is not so great. A limited partnership must be formed after 1907, and must consist of one or more "general partners" who are liable for all debts and obligations of the firm, and one or more "limited partners," each of whom is only liable for the stated amount he contributes on entering the firm (*y*). Every limited partnership must be registered with the registrar of companies by filing a statement signed by each partner (giving particulars of the firm's name, the nature and place of its business, the full name of each partner, commencement and duration of the partnership, and who are the limited partners and how much each contributes in cash or otherwise) and stamped with 5*s*. per cent. on the contributions of the limited partners (*z*). Any one can inspect the register, and demand certified copies of any entries therein. A limited partner may not take part in the management of the partnership business without becoming liable as a general partner, and has no power to bind the firm; but he may inspect the books and examine the affairs of the firm, and advise with the general partners thereon. The firm is not dissolved by death, bankruptcy, or lunacy of a limited partner. On dissolution, the general partners wind up the affairs. Application to the Court to wind up a limited partnership is to be by petition under the Companies Acts, general partners being substituted for directors therein (*a*). Differences are to

(*u*) Judicature Act, 1873, s. 34. See generally hereon Indermaur's and Thwaites' Manual of Equity, 168–179.
(*x*) 7 Edward VII. c. 24. (*y*) Sect. 4.
(*z*) Sects. 5, 8, 11–15. An untrue statement is a misdemeanour, sect. 12.
(*a*) See Sects. 6 and 16.

be decided by a majority of the general partners (*b*). Unless otherwise agreed, a limited partner can assign his share with consent of the general partners; and he may veto the introduction of new partners, but cannot dissolve the partnership by notice, and the general partners cannot dissolve if a charging order is made on his share (*b*). Changes in a limited partnership must be registered (*c*); and advertisements must be inserted in the *Gazette* when a general partner becomes a limited partner or a limited partner assigns his share (*d*).

Choses in action.

Bill of exchange, promissory notes, and cheques being all *choses in action*, it will be well to first devote a few lines to the explanation of that term. A *chose in action* may be defined as signifying some outstanding thing, and the right of action in respect of that thing(*e*), *e.g.*, where a debt is owing to a person. Originally the common law did not allow *choses in action* to be assigned or transferred, the policy of our laws being to prevent the springing up of litigation (*f*), and the only way of effecting such an object was by giving to an assignee a power of attorney to sue in the assignor's name. But such assignments were allowed in equity, and to the original common law rule there have grown up exceptions, of which the chief are as follows:—

Choses in action were not assignable at law.

Exceptions to that rule.

1. Liquidated choses in action could always be assigned by the Crown (*g*) or to the Crown (*h*).

2. Bills of exchange, promissory notes, and cheques, formerly by the custom of merchants and statute (*i*), and now by the Bills of Exchange Act. 1882 (*k*).

3. Bills of lading, by 18 & 19 Vict. c. 111.

4. Life policies, by 30 & 31 Vict. c. 144, provided notice in writing is given to the insurance office.

5. Marine policies, by 31 & 32 Vict. c. 86, and now by 6 Edward VII. c. 41 sect. 50.

(*b*) 7 Edw. VII. c. 24, s. 16. (*c*) Sect. 9. (*d*) Sect. 10.
(*e*) Brown's Law Dict. 90, title "Chose" (*f*) See Co. Litt. 214 *a*.
(*g*) Y. B. 39 Henry VI. 26; *Lambert* v. *Taylor* (1825), 4 B & C. 138.
(*h*) Per Parker, C. J. in *Myles* v. *Williams* (1715), Gilb. 321.
(*i*) Promissory notes were made negotiable by 3 & 4 Anne, c. 9.
(*k*) 45 & 46 Vict. c. 61.

Provision of Judicature Act, 1873, on the subject.

6. By the Judicature Act, 1873 (*l*) it is now provided that "any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only), of any debt or other legal *chose in action* (*m*), of which express notice in writing shall have been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or *chose in action*, shall be effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed), to transfer the legal right to such debt or *chose in action* from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor: provided always, that if the debtor, trustee, or other person liable in respect of such debt or *chose in action*, shall have had notice that such assignment is disputed by the assignor or any one claiming under him, or of any other opposing or conflicting claim to such debt or *chose in action*, he shall be entitled, if he thinks fit, to call upon the several persons making claims thereto to interplead, or he may, if he thinks fit, pay the same into the High Court of Justice under and in conformity with the provisions of the Acts for the relief of trustees."

Disputed assignment.

Remarks on this provision.

The effect of this provision is now to make it the general rule that *choses in action* are assignable so as to enable the assignee to sue in his own name, if notice in writing is given to the holder of the *chose*, and such notice is good though not given until after the assignor's death (*n*). It should be noticed that the enactment

(*l*) 36 & 37 Vict. c. 66, s. 25 (6).

(*m*) It appears that a right of action for damages for breach of contract is a legal *chose in action* capable of assignment (*Earle's Shipbuilding Co.* v. *Atlantic Transport Co.*, Solicitor's Journal, 1899, p. 691; Law Students' Journal, 1899, p. 190.) A trustee in bankruptcy cannot under the Bankruptcy Act, 1883, and rules, recognise the title of an assignee of a proof to a dividend declared in the bankruptcy, but it appears that the assignee's remedy is to prove, and get his proof substituted for that of the original creditor, his assignor (*Re Frost, ex parte Official Receiver* (1899), 2 Q. B. 50; 68 L. J. Q. B. 663; 80 L. T. 496).

(*n*) *Walker* v. *Bradford Old Bank* (1884), 12 Q. B. D. 511; 53 L. J. Q. B. 280; 32 W. R. 645.

does not extend to assignments merely by way of charge, but only to absolute assignments (*o*). It may here be observed, whilst on the subject of the assignment of *choses in action*, that future as well as present debts may be assigned; and it has been held that an assignment of future book debts, though not limited to book debts in any particular business, is sufficiently defined, and will pass the equitable interest in book debts incurred after the assignment, whether in the business carried on by the assignor at the time of the assignment, or in any other business (*p*).

Assignment of future debts good.

The student must carefully distinguish between assignability and negotiability. A negotiable instrument is one representing money, which is an exception to two common law rules. First, the holder can bring an action upon it, simply because he is the holder, and this is an exception to the common law rule that *choses in action* are not assignable. Secondly, a holder in due course—*i.e.*, an innocent holder for value—gets a perfect title even if he takes from a thief, and this is an exception to the general common law rule that *nemo dat quod non habet*. Thus, if A. steals a bank note from B., and pays it to a tradesman in exchange for goods and the latter takes in good faith and without notice of the defect in A.'s title, the tradesman gets a good title to that bank note as against all the world (*q*). If the instrument be negotiable, the holder in due course acquires a right of action independently of privity of contract with the obligor, is not prejudiced by any defects in the title of his immediate transferor or any prior holder, takes free from equities, and has no

Negotiable instrument.

(*o*) A deed by which debts were assigned to the plaintiff upon trust that he should receive them and thereout pay himself a sum due to him from the assignor, and pay the surplus to the assignor, was held to be an absolute assignment, and not by way of charge only, and therefore the plaintiff might sue in his own name for the debts: *Burlinson* v. *Hall* (1884), 12 Q. B. D. 347; 53 L. J. Q. B. 222; 50 L. T. 723; 32 W. R. 492. See also *Tancred* v. *Delagoa Bay Co., Limited* (1889), 23 Q. B. D. 239; 58 L. J. Q. B. 459; 61 L. T. 229.

(*p*) *Tailby* v. *Official Receiver* (1889), 13 App. Cas. 523; 58 L. J. Q. B. 75; 60 L. T. 162.

(*q*) *Miller* v. *Race* (1791), 1 S. L. C. 462; 1 Burr. 452; *Raphael* v. *Bank of England* (1856), 17 C. B. 161.

need to comply with the provisions of the Judicature Act as to assignment of choses in action.

What instruments are negotiable.

An instrument becomes negotiable either by the general usage of merchants, which may be modern usage (*r*), or by Act of Parliament. The following English instruments are recognised as negotiable—Bills of exchange, promissory notes, cheques, and bankers' circular notes (*s*), all duly indorsed if payable to order (*t*), and not overdue or restrictively indorsed (*u*), and not stating a contrary intention, or in the case of a cheque not marked "not negotiable" (*x*); exchequer bills in blank (*y*); East India bonds (*z*); bank notes (*a*); dividend warrants (*b*); share warrants (*c*); and debenture bonds under the seal of a company expressed to be payable to bearer (*d*). But bills of lading (*e*), post office orders (*f*), and share certificates with indorsement in blank (*g*), are not negotiable. Foreign instruments are only negotiable in England by English general mercantile usage, and it is not sufficient to prove they are negotiable by the foreign law; but the evidence must shew that the instrument is transferable by delivery and passes free from defects in the title of the transferor (*h*).

(*r*) *Edelstein* v. *Schuler* (1902), 2 K. B. 144; 71 L. J. K. B. 572; 87 L. T. 204; *Bechuanaland Exploration Co.* v. *London Trading Bank* (1898), 2 Q. B. 658; 67 L. J. Q. B. 986; 79 L. T. 270; *Rumball* v. *Metropolitan Bank* (1877), 2 Q. B. D. 194; 46 L. J. Q. B. 346; judgment in *Goodwin* v. *Robarts* (1875), L. R. 10 Ex. 337; 44 L. J. Ex. 157; all dissenting from *Crouch* v. *Credit Foncier* (1873), L. R. 8 Q. B. 374; 42 L. J. Q. B. 183.

(*s*) *Conflans* v. *Parker* (1867), L. R. 3 C. P. 1; 37 L. J. C. P. 51.

(*t*) 45 & 46 Vict. c. 61 s. 31; *Whistler* v. *Forster* (1863), 32 L. J. C. P. 161; *Good* v. *Walker* (1892), 61 L. J. Q. B. 736.

(*u*) 45 & 46 Vict. c. 61, s. 35, 36, 73, 89.

(*x*) Ibid, sect. 81.

(*y*) *Wookey* v. *Pole* (1820), 4 B. & Ald. 1; *Brandao* v. *Barnett* (1846), 12 Cl. & F. 787.

(*z*) 51 Geo. III. c. 64.

(*a*) *Miller* v. *Race*; *Raphael* v. *Bank of England*, *ante*, p. 167.

(*b*) See *Partridge* v. *Bank of England* (1846), 9 Q. B. 396, as altered by 45 & 46 Vict. s. 61, sect. 8 (4).

(*c*) 30 & 31 Vict. c. 631, secs. 27–31; *Webb* v. *Alexandria Water Co.* (1906), 93 L. T. 339.

(*d*) *Edelstein* v. *Schuler*; *Bechuanaland Exploring Co.* v. *London Trading Bank*; quoted *supra*.

(*e*) *Ogle* v. *Atkinson* (1814), 5 Taunt. 759.

(*f*) *Fine Art Society* v. *Union Bank of London* (1886), 17 Q. B. D. 705; 56 L. J. Q. B. 70.

(*g*) *Colonial Bank* v. *Cady* (1890), 15 A. C. 267.

(*h*) *Gorgiev* v. *Mieville* (1824), 3 B. & C. 45, bonds of foreign govern-

No title even to a negotiable instrument can be conferred by a forgery.

It must, however, be clearly borne in mind, that even though an instrument is negotiable, yet if it is payable to order, and not indorsed, the thief or finder cannot pass any title to it by forging the indorsement (*i*), except, indeed, as against himself; nor in the case of a cheque crossed "not negotiable" can a person pass any better title than he had himself (*k*). And for the principle that a negotiable instrument passes like cash to apply, it is absolutely necessary that the instrument should have been taken for valuable consideration and *boná fide*, for if there be any *mala fides*, then being in the nature of specific property, the true owner has a right to recover; but any *mala fides* must be alleged and clearly proved (*l*), and the mere fact of a person not having exercised the fullest caution in taking such an instrument will not be sufficient to deprive him of his rights as a transferee. To do this, actual *mala fides* must exist, and even gross negligence and want of caution in taking the instrument are not sufficient to deprive the transferee of his rights, and can simply operate as evidence of *mala fides*. If, however, a transferee of a bill, or note, or other negotiable security, wilfully shuts his eyes to manifest circumstances of suspicion in a case in which he must have concluded there was something wrong, and has purposely forborne from inquiry, then this is equivalent to *mala fides*. In other words, if there were circumstances sufficient to put a person upon inquiry which, if made, would probably have led to the discovery of a defect, neglect to make such inquiry is sufficient to constitute constructive notice of the defect (*m*). It is sometimes by no means easy to

Boná fides necessary.

ment: *Goodwin* v. *Robarts* (1876), 1 A. C. 476; 45 L. J. Ex. 740, scrip; *Symons* v. *Mulkern* (1882), 30 W. R. 875, bonds; *London and County Bank* v. *London and River Plate Bank* (1889), 21 Q. B. D. 535; 57 L. J. Q. B. 601, bonds; *Venables* v. *Baring* (1892), 3 Ch. 527; 61 L. J. Ch. 609, bonds; *Bentinck* v. *London Joint Stock Bank* (1893), 2 Ch. 120; 62 L. J. Ch. 358, bonds.

(*i*) Byles on Bills, 350.

(*k*) As to crossing a cheque "not negotiable," see *post*, p. 200.

(*l*) *Goodman* v. *Harvey* (1836), 4 A. & E. 870; *Usher* v. *Rich* (1841), 10 A. & E. 784.

(*m*) *Goodman* v. *Harvey* (1836), 4 A. & E. 870; *Raphael* v. *Bank of England* (1856), 17 C. B. 161; *Jones* v. *Gordon* (1878), 2 A. C. 616; 47 L. J. Bk. 1; *Sheffield* v. *London Joint Stock Bank* (1888), 13 App. Cas. 332;

London Joint Stock Bank v. *Simmons.*

determine when this principle applies. In one case, a broker, in fraud of the owners, pledged negotiable instruments belonging to other persons with his bankers, who did not know whether they belonged to the broker or to other persons, or whether the broker had any authority to deal with them, and they made no inquiries. The broker having absconded, the bankers realised the securities, and in an action brought by the real owner, who had merely, in the ordinary way of business, intrusted the securities to the broker, it was held that there being, as a matter of fact, no circumstances to create suspicion,—although the bankers knew their customer was a broker, and as such might very likely have securities of clients in his possession, —the bankers were entitled to realise the securities and retain the proceeds (*n*).

The origin of the system of exchange.

Bills of exchange, promissory notes, and cheques owe their origin to the law merchant. The system of exchange did not originate in England, but was anciently made use of in Athens, some provinces of France, and some few other places, and brought to perfection in Italy, whence it appears to have been introduced into our country. Bills, notes, and cheques have until recently been mainly governed by the custom of merchants, such custom forming the common law thereon ; but the subject is now governed by the Bills of Exchange Act, 1882 (*o*), which codifies the whole law with regard to such instruments. By that Act a bill of exchange is defined as "an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand, or at a fixed or determinable future time, a sum certain in money to, or to

Definitions of bills, notes, and cheques.

57 L. J. Ch. 986 ; 58 L. T. 735 ; *Colonial Bank* v. *Cady* (1891), 15 A. C. 267 ; 60 L. J. Ch. 131 ; 63 L. T. 27 ; 39 W. R. 17.

(*n*) *London Joint Stock Bank* v. *Simmons* (1892), A. C. 201 ; 61 L. J. Ch. 723 ; 66 L. T. 625. It is no doubt somewhat difficult to reconcile this case with *Sheffield* v. *London Joint Stock Bank* (1888), 13 A. C. 332 ; 57 L. J. Ch. 986 ; 58 L. T. 735 ; but the principle is the same in each case, and the real difficulty is the application of the principle to the particular facts.

(*o*) 45 & 46 Vict. c. 61.

the order of, a specified person, or to bearer" (*p*). A promissory note is defined as "an unconditional promise in writing, made by one person to another, signed by the maker, engaging to pay on demand, or at a fixed or determinable future time, a sum certain in money to, or to the order of, a specified person, or to bearer" (*q*). A cheque is defined as "a bill of exchange drawn on a banker payable on demand" (*r*). The mere addition of other words to bills, notes, or cheques does not deprive them of their proper character, *e.g.*, adding to a promissory note the words "No time given to or security taken from, or compromise or arrangement entered into with any party, shall prejudice the rights of the holder to proceed against any other party" (*s*).

Kirkwood v. *Carrol.*

Explanation of advantages derived from the use of bills of exchange.

For those not conversant with such matters, to properly understand the subject, it seems necessary to first explain the advantages to be derived by the means of bills of exchange, and this is best shewn by an example. Suppose B. to owe money to A., but it has been arranged that payment shall not be made for, say, three months; in the ordinary course of things A. would simply have to wait that time for his money, which he would be deprived of using for that period. But A. may draw a bill of exchange, directed to B., requesting him to pay to A. or his order the amount due three months after date; and A. would here be called the drawer and also the payee, as it is payable to him, and B. would be called the drawee. At first this would not have full effect, but B., the drawee, then signifies his acquiescence in it by—as it is called—accepting it, and it is then handed back to the drawer and payee, A. (*t*). The advantage to A. is that he can then transfer the bill to any one to whom he in his turn may owe money, who will at the proper time

(*p*) 45 & 46 Vict. c. 61, s. 3.

(*q*) Sect. 83. A bank-note is in effect a promissory note payable to bearer on demand. (*r*) Sect. 73.

(*s*) *Kirkwood* v. *Carrol* (1903), 1 K. B. 531; 72 L. J. K. B. 208; 88 L. T. 52; 51 W. R. 374.

(*t*) As to acceptance, see now 45 & 46 Vict. c. 61, s. 17, *post*, pp. 174, 175.

get payment from the acceptor, and thus the original drawer quickly turns his money over. If the bill is payable to him or bearer, the transfer is effected by simply handing it over; if to him simply, or to him or order, by his indorsing his name on the back, when he, in addition to being the drawer, becomes an indorser, and the person to whom he indorses it an indorsee, who in his turn may indorse it over to some one else, and so it may be passed on to any extent. When the time mentioned in the bill is up, and the bill therefore becomes due, the holder of it presents it to the original debtor, *i.e.*, the acceptor; and if he pays it, the bill has operated and been used as money, and served as such between the different parties, though actually no money passed until the bill became due. The bill might even have a still more extended operation, for it need not necessarily be made payable to the drawer. Say B. in India owes money to A. here, who in his turn owes money to C. in India; A. can draw a bill on B. payable to C. and send it to India to C., who presents it for acceptance to B., and B. duly accepting, then when it is due C., or any person into whose hands it has come, presents it for payment and obtains payment from B., and A.'s debt to C. is thus liquidated without the actual transmission of money from England to India.

Promissory notes.

A promissory note is not quite so practically useful as a bill of exchange, but nearly so, and remarks as to the one will generally apply to the other. To take an example of one: If B. owes money to A., he can sign a promissory note, of which he will be called the maker, in which he engages to pay the money at a certain time to A. (who will be called the payee), or order, or bearer, and A. can then transfer it over to any one to whom he owes money, becoming if he indorses it an indorser, and the person to whom he indorses it an indorsee, and, when due, it will be presented to the maker, and payment obtained. On both a bill of exchange and a promissory note, the ultimate holder's claim is not only against the original debtor under the bill or note, but if he acts properly (as is hereafter detailed) he has a claim

against every other party. The following are forms of a bill of exchange and of a promissory note, respectively :— Forms of bill of exchange, and promissory note.

FORM OF A BILL OF EXCHANGE.

£500. *Jan.* 1, 1909. Stamp varying according to amount.

—— months after date [*or* on demand, *or* at sight, *or* —— months after sight, *or* at some other period] pay to my order [*or* pay to E F. or order, *or* pay to E. F *or* bearer] Five hundred pounds for value received

A. B.

To Mr. C. D., of &c

FORM OF A PROMISSORY NOTE.

£500. *Jan.* 1, 1909. Stamp varying according to amount.

—— months after date [*or* on demand, *or* at sight, or —— months after sight, *or* at some other period] I promise to pay to C. D. or order [*or* to C. D. or bearer] Five hundred pounds for value received.

A. B.

On these forms it should be remarked that there is no virtue in the words at the end of each, "for value received," and that the instruments would be just as valid if those words were omitted. If the words "or order" or "or bearer" are not inserted, the instrument formerly would not have been negotiable as a bill of exchange or promissory note (*u*); but now if such words are omitted or struck out, the instrument will be deemed payable to order and negotiable by indorsement, unless it contains, in the body, words prohibiting transfer, or indicating an intention that it shall not be transferable (*x*). And even if the negotiability of the instrument is thus restricted, the amount for which it is given may be assigned in the ordinary way in which *choses in action* may be assigned under the provisions of the Judicature Act, 1873 (*y*). Where a bill is made payable to —— or order, the blank never having been filled in, the instrument is not void, but must be construed as being payable to the order of the drawer,

(*u*) Byles on Bills, 96.

(*x*) 45 & 46 Vict. c. 61, s. 8; *Decroix* v. *Meyer* (1890), 25 Q. B. D. 343; 59 L. J. Q. B. 538; 63 L. T. 414.

(*y*) See *ante*, p. 166.

and the instrument having been indorsed by him is perfectly valid (*z*).

Two classes of persons liable on bills and notes.

From the foregoing remarks the student will have observed—as indeed has been expressly pointed out—that there are two classes of persons liable on bills of exchange and promissory notes, viz., (1) those primarily liable, who on a bill are the acceptor or acceptors, and on a note the maker or makers; and (2) those not so primarily liable, who are the drawer and the indorser or indorsers. Therefore the positions of the parties are similar to those of creditor, principal debtor, and surety, the holder for the time being the creditor, the acceptor of a bill or maker of a note the principal debtor, and all other parties the sureties.

Acceptance of a bill.

The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer. It must be written on the bill and be signed by the drawee, and it must not express that the drawee will perform his promise by any other means than the payment of money (*a*).

Acceptance.

It was formerly held that the mere writing by the drawee of his name across the instrument without adding the word "accepted" was not a sufficient acceptance to satisfy the law (*b*), but it is now provided that the simple signature of the drawee across the bill is sufficient (*c*). A bill may be accepted before it has been signed by the drawer, or while otherwise incomplete, or when it is overdue, or after it has been dishonoured (*d*). The acceptance precludes the acceptor from denying to a holder in due course (*e*), the existence of the drawer and the genuineness of his signature and

(*z*) *Chamberlain* v. *Young* (1893), 2 Q. B. 206; 63 L. J. Q. B. 28; 69 L. T. 332.

(*a*) 45 & 46 Vict. c. 61, s. 17. Sect. 96 of this Act repeals the former provisions on this point which were contained in 1 & 2 Geo. IV. c. 78, ss. 2, 19, and 19 & 20 Vict. c. 97, s. 6.

(*b*) *Hindehaugh* v. *Blakey* (1878), 3 C. P. D. 136; 47 L. J. C. P. 345; 26 W. R. 480.

(*c*) 45 & 46 Vict. c. 61, s. 17. Sect. 96 of this Act repeals the former provision to the same effect contained in 41 Vict. c. 13.

(*d*) Sect. 18.

(*e*) See *post*, p. 179,

his capacity and authority to draw the bill and the existence of the payee and his capacity to indorse (*f*).

The engagement of the acceptor is to pay the bill according to the tenor of his acceptance (*g*). And as a general rule, only he can accept a bill to whom it is addressed; but to this rule there is an exception, for suppose the person to whom the bill is directed cannot be found, or through infancy or any other cause cannot accept, or he refuses to accept, some other person may accept for him to prevent his being sued, and such an acceptance is called an acceptance for honour (*h*), and such an acceptor an acceptor for honour (*i*). An acceptance for honour is not of constant occurrence. In addition to this, the drawer of a bill, or any indorser, may insert therein the name of a person to whom the holder may resort in case of need, that is to say, in case the bill is dishonoured by non-acceptance or non-payment, and such person is called the referee in case of need. It is in the option of the holder to resort to the referee in case of need, or not, as he may think fit (*k*). The benefit of this course is well shewn by reference to the practical instance already given of a bill sent out to India (*l*), for to meet the possible event of B. not accepting, some correspondent or agent can, by arrangement, be made the referee in case of need, to whom on B.'s default the holder would apply either for acceptance, or payment as the case might be.

The engagement of the acceptor is to pay the bill according to the tenor of his acceptance.

Acceptance for honour or *supra* protest.

Referee in case of need.

The person to whom the bill is directed, and who becomes the acceptor, may be either an ordinary acceptor, who owes money to the drawer, or an accommodation acceptor, *i.e.*, one who accepts without con-

Different kinds of acceptors.

(*f*) 45 & 46 Vict. c. 61, s. 54.

(*g*) Sect. 54. In certain cases presentment of a bill for acceptance is necessary, viz: (1) Where it is payable after sight, so as to fix the maturity of the instrument; (2) where it is expressly stipulated that it shall be presented for acceptance; (3) where it is drawn payable elsewhere than at the residence or place of business of the drawee (sect. 40).

(*h*) It is sometimes also called an acceptance *supra* protest, because it can only be so accepted after the bill has been protested, 45 & 46 Vict. c. 61, ss. 65-68.

(*i*) 45 & 46 Vict. c. 61, ss. 65-68.

(*k*) 45 & 46 Vict. c. 61, s. 15. (*l*) *Ante*, p. 172.

sideration for the convenience of the drawer, and with a view to his raising money upon it, or otherwise using it. An accommodation acceptor is equally liable as any ordinary acceptor to pay the bill to any holder except the drawer, and it is no defence to an action by an indorsee for value against an accommodation acceptor who has received no consideration, that at the time the plaintiff took the bill he knew the defendant had received no value (*m*); unless, indeed, the plaintiff took it of a person who held it for a particular purpose, and was therefore guilty of a breach of trust in transferring it to him, and the plaintiff at the time of taking it was cognisant of the circumstances (*n*). The drawer of a bill for whose accommodation it has been accepted, is bound to indemnify the accommodation acceptor (*o*), against whom he can have no claim (*p*); but if an accommodation acceptor in an action brought against him on the bill to which he evidently has no defence yet does defend it, he cannot recover the costs of the action against the person accommodated (*q*). Evidence may always be given to shew that as between the original parties to a bill there was no consideration, or that the consideration has failed, or that a fraud has been practised on the defendant. Following, however, the general rule that oral evidence may not be given to contradict or vary a written contract (*r*), evidence of some contemporaneous oral agreement entered into between the parties cannot be admitted to contradict or vary the contract which appears on the face of the bill (*s*).

Liability of an accommodation acceptor.

Drawer must indemnify him.

General and qualified acceptances.

The acceptance of a bill may be made in two different ways: it may be either a general or absolute acceptance, and the party presenting the instrument for acceptance is not bound to receive any accept-

(*m*) 45 & 46 Vict. c. 61, s. 28. (*n*) Byles on Bills, 154, 155.
(*o*) Byles on Bills, 155.
(*p*) *Solomon* v. *Davis* (1885), 1 C. & E. 83.
(*q*) *Beech* v. *Jones* (1848), 5 C. B. 696.
(*r*) See *ante*, p. 28.
(*s*) *Young* v. *Austen* (1869), L. R. 4 C. P. 553; *Aubrey* v. *Crux* (1870), L. R. 5 C. P. 37.

ance other than this (*t*), or it may be a qualified acceptance. A general acceptance assents, without qualification, to the order of the drawer. A qualified acceptance in express terms varies the effect of the bill as drawn. In particular, an acceptance is qualified which is:— When an acceptance is qualified.

1. Conditional, *i.e.*, which makes payment by the acceptor dependent on the fulfilment of a condition therein stated.

2. Partial, *i.e.*, an acceptance to pay part only of the amount for which the bill is drawn.

3. Local, *i.e.*, an acceptance to pay only at a particular specified place. An acceptance to pay at a particular place (*e.g.*, if it is accepted with the words added "Payable at the London & County Bank") is a general acceptance, but if it is expressly stated in the acceptance that the bill is to be paid there only and not elsewhere, then it is otherwise.

4. Qualified as to time, *e.g.*, drawn at one month and accepted at three months; or

5. The acceptance of some or one of the drawees but not of all (*u*).

The maker of a note promises absolutely to pay according to its tenor; and if he has made the note without consideration, he will stand in the same position as an accommodation acceptor. Generally speaking, the rules as to bills of exchange apply equally to promissory notes; but the rules as to the presentment for acceptance, acceptance, acceptance supra protest, and bills in a set, do not apply to notes, and no protest is necessary on dishonour of a foreign note (*x*). The rules as to bills apply also generally to promissory notes.

A bill or note is negotiated by delivery if payable to bearer, or by indorsement and delivery if payable to How bill negotiated.

(*t*) 45 & 46 Vict. c. 61, s. 44. Thus refer again to the instance of a bill sent out to India, given on p. 172, C. has a right on presenting the instrument to B. to expect from him an absolute and unqualified acceptance.

(*u*) 45 & 46 Vict. c. 61, s. 19, which is in substitution for the provisions of the repealed statute of 1 & 2 Geo. IV. c. 78.

(*x*) 45 & 46 Vict. c. 61, s. 89; see also ss. 83–88.

order (*y*). The indorsement must be on the bill, and must be of the whole bill (*z*). A person indorsing a bill or note may either make his indorsement specially, or, as it is sometimes called, in full, *i.e.*, to some particular person, or in blank, by simply signing his name; and when this latter course is taken, the bill or note becomes at once transferable by mere delivery, although originally payable to order (*a*). The holder of a bill payable to his order must indorse it, but if he hands it over for value without indorsing it, the transferee gets the same title which the transferor had, and also the right to call for his indorsement (*b*), but not the right to indorse it for him (*c*). When a bill has been indorsed in blank, any holder may convert the blank indorsement into a special indorsement by writing above the indorser's signature a direction to pay the bill to, or to the order of, himself or some other person (*d*). Any indorsement may be made restrictive, that is, the indorsement may prohibit the further negotiation of the bill (*e*). A conditional indorsement may be disregarded by the payer, who is discharged by paying even if the condition has not been fulfilled (*f*). Although, as has been said, parties other than the acceptor of a bill and maker of a note stand but in the position of sureties for those persons respectively, yet as between each other they stand in the relation of principals, every indorser being looked upon in the light of a new drawer (*g*). Ordinarily every prior indorser must indemnify a subsequent one, but this is not always so, for the whole circumstances attendant on the transaction may be referred to for the purpose of ascertaining the true relation to each other of the parties who indorse, or indeed are parties in any way. Therefore, where the directors of a company mutually agreed with each other to become sureties for the

An indorsement of a bill or note may be special or in blank.

Position of indorsers.

Macdonald v. *Whitfield.*

(*y*) 45 & 46 Vict. c. 61, s. 31. (*z*) Sect. 32.
(*a*) Sects. 31, 34.
(*b*) Sect. 31 (4). See *Whistler* v. *Forster* (1863), 32 L. J. C. P. 161; *Day* v. *Longhurst*, W. N. 1893, p. 3.
(*c*) *Harrop* v. *Fisher* (1861), 10 C. B. N. S. 196.
(*d*) Sect. 34 (4). (*e*) Sect. 35. (*f*) Sect. 33.
(*g*) Byles on Bills, 180.

company's debt, and indorsed a note accordingly, it was held that they were entitled and liable to equal contribution *inter se*, and were not liable to indemnify each other successively according to the priority of their respective indorsements (*h*). Any indorser may so indorse a bill as to be under no liability on it, by putting after his name the words "*sans recours*," or "without recourse to me," or words to the like effect (*i*); *e.g.*, if A. has a bill payable to his order and accepted by B., and C. is willing to purchase it of A. and to look only to B. to pay it, the transaction might be effected safely in this way. If the holder of a bill or note, payable to bearer, transfers it—as he may do—without indorsement, he is called a transferor by delivery, and is not liable on the instrument but he warrants to his immediate transferee for value that the bill is what it purports to be and that he has a right to transfer it and is not aware of any fact which renders it valueless (*k*).

Indorsement *sans recours*.

Transferor by delivery.

Any person into whose hands a bill or note comes is styled the holder, and under certain circumstances a "holder in due course." A "holder in due course" is defined by the Bills of Exchange Act, 1882, to be a holder who has taken a bill complete and regular on the face of it, before it was overdue, and without notice of any prior dishonour, in good faith, for value, without notice of any defect in title (*l*). The title of a person who negotiates a bill is defective when he obtained the bill, or the acceptance thereof, by fraud, duress, or unlawful means, or for illegal consideration, or when he negotiates it in breach of faith or under

Holder in due course.

(*h*) *Macdonald* v. *Whitfield* (1883), 8 A. C. 733; 52 L. J. C. P. 70; 49 L. T. 446; 32 W. R. 730.

(*i*) 45 & 46 Vict. c. 61, sect. 16, 31 (5).

(*k*) Sect. 58.

(*l*) 45 & 46 Vict. c. 61, s. 29. As to whether the payee of a promissory note can be a "holder in due course" within the meaning of this provision, consider the criticisms of Alverstone, L.C.J., and Darling and Channell, J.J., in *Herdman* v. *Wheeler* (1902), 1 K. B. 361; 71 L. J. K. B. 270; 86 L. T. 48, upon the dictum that he cannot, of Russell, L.C.J., in *Lewis* v. *Clay* (1898) 67 L. J. Q. B. 224; 77 L. T. 653; 46 W. R. 319. See also *Lloyd's Bank* v. *Cooke* (1907), 1 K. B. 794; 76 L. J. K. B. 666; 96 L. T. 715.

circumstances amounting to a fraud (*m*). But any holder who derives his title to a bill through a holder in due course, and who is not himself a party to any fraud or illegality affecting it, has all the rights of that holder in due course as regards the acceptor, and all parties to the bill prior to that holder (*n*).

Accepting, making, or indorsing, *per procuration.*

A bill may be accepted, or a note made, or either may be indorsed, by an agent "*per procuration*," and as these words shew that he is acting under some particular authority, it is the duty of the taker of any such instrument to inquire into the extent of it, and if the agent has no authority, or has exceeded it, the principal will not be liable (*o*). On the other hand, when a person, being duly authorised, either draws, accepts, or indorses in this manner, he is not himself liable, but the mere addition to his signature of words describing himself as an agent, executor, or trustee, without saying for whom, does not exempt him from personal liability (*p*). If a person knowing that he has no authority to do so, thus draws, accepts, or indorses, he may be sued *ex delicto* in an action for deceit, even although he had no fraudulent intention in thus drawing, accepting, or indorsing (*q*); and if he believed that he had authority to so draw, accept, or indorse, but in fact he had not, he may be sued *ex contractu* upon a warranty of authority (*r*). But he cannot himself be charged as the drawer, acceptor, or indorser of the bill, and, in fact, no one can be liable as acceptor but the person to whom the bill is addressed, except an acceptor for honour, or a referee in case of need.

Result of doing so without authority.

Liability of executor or administrator.

If an executor or administrator, or any other person in a like capacity, draws, accepts, or indorses a bill (which includes a cheque), without restricting his liability, he will incur personal responsibility on it; if

(*m*) 45 & 46 Vict. c. 61, s. 29. (*n*) Ibid.
(*o*) Sect. 25. (*p*) Sect. 26 (1).
(*q*) *Polhill* v. *Walter* (1832), 3 B. & A. 614.
(*r*) *Collen* v. *Wright* (1857), 8 E. & B. 647; *Starkey* v. *Bank of England* (1903), A. C. 114; and *Sheffield Corporation* v. *Barclay* (1905), A. C. 14; *ante*, p. 149.

he does not desire to do this, he should indorse "*sans recours*," or expressly sign in his representative capacity. The mere addition to the signature of words describing him as filling a representative capacity will not exempt him from personal liability; thus if an executor signs, adding after his signature the word "executor," this is not sufficient; he should add "executor of A. B., deceased (*s*).

The ways in which bills and notes may be made payable.

Bills and notes may be made payable at different times, *i.e.*, on demand, at sight, on presentation, or so many days, weeks, or months after a certain time, the most usual kind being those payable a certain fixed time after date, and it should be noticed that the term "month" here signifies a calendar month (*t*). These instruments are not payable at the exact end of the time named in them, but in addition to that time, there are allowed (originally by the custom of merchants) three further days which are called "days of grace," so that a bill dated the 1st of January, and payable three months after date, is not actually due and payable until the 4th of April (*u*). These "days of grace" do not, however, exist in bills or notes payable on demand (*x*); and a bill is payable on demand, which is expressed to be payable on demand, or at sight, or on presentation, or in which no time for payment is expressed (*y*).

Days of grace.

What is a bill payable on demand.

Where no time named, bill or note deemed payable on demand.

As just stated, all bills or notes in which no time for payment is specified are deemed payable on demand; and with regard to instruments on demand, or at sight, or on presentation, it should be noticed that it is not necessary before bringing an action thereon that any demand should actually be made, and the Statute of Limitations will run from the date of making the

Limitation.

(*s*) 45 & 46 Vict. c. 61, s. 26 (1). (*t*) Sect. 14 (4).

(*u*) Sect. 14 (1). Days of grace were so called because they were formerly only allowed as a favour; but the laws of commercial countries long since recognised them as a right, and see now the above statutory provision.

(*x*) 45 & 46 Vict. c. 61, s. 14.

(*y*) Sect. 10. Sect. 96 of this Act repeals the former provisions to the same effect contained in 34 & 35 Vict. c. 74, s. 2.

instrument, and not from the time of demand (*z*); but if an instrument is made payable a certain time after demand, *e.g.*, one month after demand, then the statute does not commence to run until a demand has been made, and the period named after it has expired (*a*).

Usance.

Foreign bills are sometimes drawn payable at an "usance," or two or more "usances," which signifies the period or periods customary for payment between the two countries where the bills are drawn and payable respectively (*b*).

Non-dating or wrong dating a bill.

Where a bill, expressed to be payable at a fixed period after date, is issued undated, or where the acceptance of a bill payable at a fixed period after sight is undated, any holder may insert therein the true date of issue or acceptance, and the bill will be payable accordingly (*c*), and evidence will be admissible to account for the omission of date. Where the holder by mistake, but in good faith, inserts a wrong date, or in fact in every case where a wrong date is inserted, if the bill subsequently comes into the hands of a holder in due course, the bill is not avoided, but operates and is payable as if the date so inserted had been the true date (*c*). Where a bill or an acceptance, or an indorsement on a bill is dated, the date is, unless the contrary is proved, deemed to be the true date of the drawing, acceptance, or indorsement, as the case may be (*d*). A bill is not invalid by reason only that it is ante-dated, or post-dated, or that it bears date on a Sunday (*d*).

(*z*) Byles on Bills, 358. This is the rule as regards all principal debts payable on demand, but where a sum is payable by a collateral debtor on demand, such demand is a condition precedent, and the statute will not commence to run against the collateral debtor until demand (*Re Brown, Brown* v. *Brown* (1893), 2 Ch. 300; 63 L. J. Ch. 695; 69 L. T. 12). As regards payment of interest on a bill or note payable on demand, that does not run until demand (45 & 46 Vict. c. 61, s. 57).

(*a*) *Thorpe* v. *Booth* (1827), R. & M. 388; 45 & 46 Vict. c. 61, s. 14 (3).

(*b*) The practice of drawing bills in this way is almost, if not quite, obsolete. Byles on Bills, 282.

(*c*) 45 & 46 Vict. c. 61, s. 12. (*d*) Sect. 13.

As to presentment and notice of dishonour.

A person who without qualification accepts a bill of exchange, or makes a promissory note, payable on a given day, is liable to pay it when that day arrives though no demand is made. He must be aware of the contract he has entered into, and he has no right to say that he is taken by surprise, for he is bound to provide for payment on the day when the instrument becomes due (*e*). But this does not apply to a bill or note payable at a certain time after sight or on presentation, for in such cases it cannot become payable, unless and until it is presented and the time named has expired; nor does it apply in the case of a qualified acceptance of a local kind, which has been already dealt with (*f*). As to a promissory note, if in the body of it it is made payable at a particular place, it must be presented for payment at that place in order to render the maker liable; but in other cases, presentment for payment is not necessary to render the maker liable, though it is always necessary to render an indorser liable (*g*). The law on this point, therefore, is, that to change an acceptor, presentment is not necessary unless accepted payable *only* at a particular place; but to charge the maker of a note, if in its body it is expressed to be payable at a certain place, though not only at that place, yet presentment is necessary; but in both cases it may be observed that it is not essential that presentment should be made on the exact day.

To charge the drawer or indorsers there must always be presentment and notice of dishonour.

But what has just been stated applies only to the parties primarily liable, *i.e.*, the acceptor of a bill and the maker of a note. As to the parties not so primarily liable, *i.e.*, the drawer or indorsers of a bill, or the indorsers of a note, it has no application, for they are only liable on the default of the party primarily responsible; it is necessary, with regard to them, that the holder should present the instrument to the person primarily liable on the very day it becomes due, and if dishonoured

(*e*) Per Channell, B., in *Maltby* v. *Murrell* (1860), 5 H. & N. 823.
(*f*) *Ante*, p. 177. (*g*) 45 & 46 Vict. c. 61, s. 87.

give notice of its dishonour, unless the notice of dishonour is waived, or in some way excused (*h*). As to the presentment, even when necessary to charge the acceptor or maker, we have seen that it need not be on the actual day of the instrument becoming due, but to charge the other parties the presentment must be on the exact day (*i*). When, however, a bill or note becomes due on a Sunday, Christmas Day, Good Friday, or public fast or thanksgiving day, the instrument is presentable and payable on the day preceding such day; but if it becomes due on a bank holiday, it is presentable and payable on the day following such day (*k*).

Instrument falling due on a Sunday, &c., or a bank holiday.

Reason why notice of dishonour is required.

As to notice of dishonour, the law requires it to be given "because it is presumed that the bill is drawn on account of the drawee having effects of the drawer in his hands; and if the latter has notice that the bill is not paid, he may withdraw them immediately" (*l*). Upon this point of notice of dishonour three matters require attention :—

What will be sufficient notice of dishonour.

Firstly, What will be sufficient notice of dishonour? The answer to this question is, that though no formal notice is required, yet mere knowledge of the probability that a bill or note will be dishonoured, or even actual knowledge of the dishonour, will not be sufficient, but there must be some intimation given by or on behalf of the holder or an indorsee, either verbally or in writing, which sufficiently identifies the bill or note, and clearly intimates that it has been dishonoured (*m*).

To whom notice of dishonour must be given.

Secondly, To whom must the notice of dishonour be given? The answer to which question is, that notice must be given to all persons the holder intends to charge; but if he gives notice to the one preceding

(*h*) 45 & 46 Vict. c. 61, s. 48. As to when notice of dishonour is excused see *post*, p. 186.
(*i*) Byles on Bills, 281.
(*k*) 45 & 46 Vict. c. 61, s. 14.
(*l*) Per Buller, J., in *Bickerdike* v. *Bollman* (1786), 2 S. L. C. 102.
(*m*) 45 & 46 Vict. c. 61, s. 49.

him, who in his turn gives notice to the one preceding him, and so on throughout, these notices will all operate for the benefit of the holder, each person having his day to give notice; but if this link of notices is once broken, then the liability of the other persons to whom notice has not been given is gone. The proper course is, therefore, for the holder to always give notice to every prior party he intends to charge (*n*). In case of death, notice may be given to the personal representative, and if the party be a bankrupt, either to him personally or to his trustee (*n*). Where there are two or more drawers or indorsers not partners, notice must be given to each, unless one has authority to receive it on behalf of all (*n*). The drawer of a dishonoured cheque is entitled to notice of dishonour (*o*).

Within what time notice of dishonour must be given.

Thirdly, Within what time is notice of dishonour to be given? The answer to which question is that the notice may be given as soon as the bill is dishonoured (*p*), and that it must be given within a reasonable time thereafter (*q*). As to this reasonable time, the rule is that where the person to give and the person to receive notice reside in the same place, the notice must be given or sent off in time to reach the latter on the day after the dishonour of the instrument; and when the person giving and the person to receive notice reside in different places, the notice must be sent off on the day after the dishonour of the instrument, if there be a post at a convenient hour on that day, and if there be no such post on that day, then by the next post thereafter (*q*). Where an instrument when dishonoured is in the hands of an agent, he may either himself give notice to the parties liable on the bill, or he may give notice to his principal;

(*n*) 45 & 46 Vict. c. 61, s. 49.

(*o*) *May* v. *Chidley* (1894), 1 Q. B. 451; 63 L. J. Q. B. 355.

(*p*) Even on the very day, although there is a possibility of its yet being taken up; but the bill cannot be sued on until the next day, and a writ issued on the due day, although after dishonour, is premature. (*Kennedy* v. *Thomas* (1894), 2 Q. B. 759; 63 L. J. Q. B. 801; 71 L. T. 144).

(*q*) 45 & 46 Vict. c. 61, s. 49 (12, 13).

and if he gives notice to his principal, he must do so within the same time as if he were a holder, and the principal, upon the receipt of such notice, has himself the same time for giving notice as if the agent had been an independent holder (*q*). If the notice is received on a "non-business day" (*r*), it is deemed as received on the day following (*s*). Delay in giving notice of dishonour is excused when the delay is caused by circumstances beyond the control of the party giving notice, and not imputable to his default, misconduct, or negligence; but when the cause of delay ceases to operate, the notice must be given with reasonable diligence (*t*).

Delay in giving notice.

When notice of dishonour dispensed with.

However, under the Bills of Exchange Act, 1882 (*u*), certain cases are expressly enumerated in which notice of dishonour is to be dispensed with, viz.:

1. Where the notice cannot be given, or does not reach the party.

2. Where notice is expressly or impliedly waived.

3. As regards the drawer, where the drawer and drawee are the same person, or the drawee is a fictitious person or a person not having capacity to contract, or where the drawer is the person to whom the bill is presented for payment, or where the drawee or acceptor is, as between himself and the drawer, under no obligation to accept or pay the bill (*x*), or where the drawer has countermanded payment.

4. As regards the indorser, where the drawee is a fictitious person, or a person not having capacity to contract, and the indorser was aware of the fact when he indorsed, or where the indorser is the person to whom the bill is presented for payment, or where the bill was accepted or made for his accommodation.

(*q*) 45 & 46 Vict. c. 61, s. 49 (12, 13).

(*r*) That is, a Sunday, Good Friday, Christmas Day, bank holiday, or a day appointed by royal proclamation as a public fast or thanksgiving day (45 & 46 Vict. c. 61, s. 92).

(*s*) 45 & 46 Vict. c. 61, s. 92.

(*t*) Sect. 50. *Studdy* v. *Beesty* (1889), 60 L. T. 647. (*u*) Sect. 50.

(*x*) This would comprise an accommodation acceptance, and is as was formerly decided in *Bickerdike* v. *Bollman* (1786), 2 S. L. C. 102; 1 T. R. 406.

Effect of alterations in bills and other instruments.

It has long been a rule not only as to bills and notes, but as to all instruments, that any material alteration after execution will vitiate them, except as to persons consenting to such alteration (*y*). This is particularly shewn in the leading case of *Master* v. *Miller* (*z*), where it was held that an unauthorised alteration of the date of a bill of exchange after acceptance, whereby the payment would be accelerated, avoids the instrument, and no action can afterwards be brought upon it, even by an innocent holder for valuable consideration. To a certain extent, however, the law on this subject has been altered by the Bills of Exchange Act, 1882, which provides that where a bill or note is materially altered without the assent of all parties liable thereon, it is avoided, except as against a party who has himself made, authorised, or assented to the alteration, and subsequent indorsers; provided, however, that where a bill has been materially altered, but the alteration is not apparent, and the bill is in the hands of a "holder in due course," such holder may avail himself of the bill as if it had not been altered, and may enforce payment of it according to its original tenor (*a*). This provision therefore considerably mitigates the rigour of the common law, and with regard to a non-apparent alteration the position has been held to be the same even although a party has, by the way in which he has drawn or accepted the bill, placed it in the power of a holder to make the alteration. Thus in one case (*b*) a bill of exchange was drawn for £500 on a bill stamp sufficient to cover £4000, and blanks were left before the amount of the bill both in the words and figures, and it was accepted in this state, and then the drawer

Master v. *Miller*.

Provision of Bills of Exchange Act, 1882, hereon.

Scholfield v. *Lord Londesborough*.

(*y*) *Pigot's Case* (1615), 11 Rep. 27a; *Master* v. *Miller* (1791), 1 S. L. C. 747; 4 T. R. 320; *Vance* v. *Lowther* (1876), 1 Ex. D. 176; 45 L. J. Ex. 200.

(*z*) 1 S. L. C. 767. See also *Suffell* v. *The Bank of England* (1884), 9 Q. B. D. 555; 51 L. J. Q. B. 401; 47 L. T. 146, where it was held that the altering of the number on a Bank of England note invalidated it.

(*a*) 45 & 46 Vict. c. 61, ss. 64 (1), 89 (1). This provision is not retrospective, and has been held not to apply to Bank of England notes (*Leeds Bank* v. *Walker* (1883), 11 Q. B. D. 84; 52 L. J. Q. B. 590).

(*b*) *Scholfield* v. *Lord Londesborough* (1896), A. C. 514; 65 L. J. Q. B. 593; 75 L. T. 254.

fraudulently altered the bill into one for £3500, and circulated it as a bill for that amount. It was held that a holder in due course could only recover the £500 for which the bill was originally drawn, there being no duty on an acceptor to take reasonable care that a bill is so framed as to offer no obvious opportunities for committing a crime, and that he could not be held liable on the principle of estoppel (*c*). And the law as to cheques is the same—thus where three executors had a banking account and the acting executor drew a cheque for £10 carelessly, so as to leave room for additions, and after the other executors had signed it, he fraudulently altered that amount to £110 and got the money and spent it, the bank was only allowed to debit the account with the original £10 and had to make good the loss to the innocent executors (*d*).

Colonial Bank of Australasia v. *Marshall.*

Immaterial alterations.

If an alteration is made in an instrument which is not material, such alteration will have no effect; thus where a promissory note expressed no time for payment (and therefore, as we have seen (*e*), was payable on demand), and the holder inserted the words "on demand," it was held such alteration did not affect the validity of the instrument, for it, in fact, made it nothing more than it was before (*f*). As to what are material alterations, the following in particular are deemed so, viz.. Any alteration of the date, the sum payable, the time of payment, the place of payment, and, where a bill has been accepted generally, the addition of a place of payment without the acceptor's assent (*g*).

What are material alterations.

(*c*) As to which see *ante*, pp. 17–19.

(*d*) *Colonial Bank of Australasia* v. *Marshall* (1906), A. C. 559; 75 L. J. P. C. 76. See also *Bank of Montreal* v. *Exhibit and Trading Co.* (1906), 11 Com. Ca. 250; 22 T. L. R. 722, where the name of the payee of a promissory note was altered. *Young* v. *Grote* (1827), 4 Bing. 253 does not conflict with the statement above, it only deciding that where a person hands a blank signed cheque to an agent with authority to use it at discretion, he is liable on it to an innocent holder although there may be fraud.

(*e*) *Ante*, p. 181. (*f*) *Aldous* v. *Cornwell* (1868), L. R. 3 Q. B. 575.

(*g*) 45 & 46 Vict. c. 61, s. 64 (2).

Difference in transfer of a bill or note before and after it becomes due.

A person who takes a bill or note when it is overdue is not a holder in due course, but takes it subject to any defect of title affecting it at its maturity, and thenceforward no person who takes it can acquire or give a better title than that which the person from whom he took it had (*h*); but such an instrument transferred before it is overdue has, in common with other negotiable securities, certain advantages annexed to it, from the principles of the law merchant, so as to give the fullest currency and effect to it (*i*). One of the chief of these advantages is that, although a person has found such an instrument, or acquired it by means of fraud, or even stolen it, yet, provided it is payable to bearer, or to order and has been indorsed in blank, it will pass like cash by mere delivery, so that the holder, though his own title to it is bad, may yet confer a good title to it on a person taking *bonâ fide* for value (*k*). This, indeed, is the true test of whether an instrument is negotiable (*l*).

Miller v. *Race*.

What constitutes valuable consideration for a bill or note.

Valuable consideration for a bill may be constituted by (1) any consideration sufficient to support a simple contract, or (2) an antecedent debt or liability, and such a debt or liability is deemed valuable consideration whether the bill is payable on demand or at a future time (*m*). Where value has at any time been given for a bill, the holder is deemed to be a holder for value as regards the acceptor and all parties to the bill who became parties prior to such time (*n*). Where the holder of a bill has a lien on it arising either from contract or by implication of law, he is deemed to be a holder for value to the extent of the sum for which he has a lien (*o*).

(*h*) 45 & 46 Vict. c. 61, s. 36 (2).

(*i*) It may be noticed that if a bill or note is transferred to another on the day it becomes due, it is considered as transferred before it became due. See Byles on Bills, 197.

(*k*) *Miller* v. *Race* (1791), 1 S. L. C. 462 ; 1 Burr. 452.

(*l*) See *ante*, p. 167. (*m*) 45 & 46 Vict. c. 61, s. 27.

(*n*) Ibid. Thus suppose a holder for value indorses a bill to an agent for collection, the agent can sue the acceptor, but could not sue his own principal.

(*o*) Ibid. As to sufficiency of consideration, see also *Stoll* v. *Fairlamb* (1884), 53 L.J.Q.B. 47 ; 32 W.R. 354 ; 49 L.T. 525.

Forgery.

As has been already stated, the general rule has always been that no title can be obtained through a forgery, and this is also expressly provided by the Bills of Exchange Act, 1882 (*p*). A forged signature cannot be ratified (*q*); but if a person whose signature has been forged, so conducts himself as to induce the holder to take it to be genuine, he is estopped from afterwards setting up the forgery (*r*). If a bill or note bearing a forged indorsement is paid by a banker, the loss will fall on him, and not on the customer (*s*), in which respect it is now different from a cheque, as is hereafter noticed (*t*). Where the acceptance, making, or indorsement of a bill or note is obtained by fraud, so that the party sought to be made liable on it has had in fact no contracting mind, he is not, in the absence of negligence on his part, liable upon it (*u*).

Estoppel.

Fraud.

Bank of England v. *Vagliano.*

The important case of *Bank of England* v. *Vagliano* (*x*) may here be conveniently noticed. Vagliano had a large banking account with the bank of England. One of Vagliano's clerks from time to time drew out bills, to which he forged the name of a well-known customer, put them amongst Vagliano's ordinary bills, and thus got his acceptances to a number of such forged bills, amounting in all to about £70,000. To further deceive his master, the clerk had taken care to draw these bills in favour of a person the customer was in the habit of drawing in favour of. The clerk forged the payee's indorsement, and also took care that the bank was from time to time advised of these bills, and they were duly paid, and debited in Vagliano's pass-book. The fraud was ultimately discovered, and Vagliano sought to recover from

(*p*) 45 & 46 Vict. c. 61, s. 24.

(*q*) *Leach* v. *Buchanan* (1806), 4 Esp. 226; *Brook* v. *Hook* (1871), L. R. 6 Ex. 89; 40 L. J. Ex. 50.

(*r*) Byles on Bills, 272.

(*s*) *Robarts* v. *Tucker* (1851), 16 Q. B. 560.

(*t*) See *post*, p. 198.

(*u*) *Foster* v. *Mackinnon* (1869), L. R. 4 C. P. 704; 38 L. J. C. P. 310; *Lewis* v. *Clay* (1898), 67 L. J. Q. B. 224; 77 L. T. 653; 46 W.R. 310.

(*x*) (1891) A. C. 107; 60 L. J. Q. B. 145; 64 L. T. 353; 39 W. R. 657.

the bank the total amount of these fraudulent bills, with which his account had been debited, but in this he failed. It will be observed that there was here a forgery of the indorsement of the payee, and therefore, having reference to what has been stated in the last paragraph, primarily the loss would have had to be borne by the banker; but amongst other provisions in the Bills of Exchange Act, 1882, is the following:—"Where the payee is a fictitious or non-existent person, the bill may be treated as payable to bearer" (*y*). The House of Lords held that the payee is a fictitious person within the meaning of this section if the person who draws the bill does not in fact intend that the person named as payee shall receive the money; and it makes no difference whether the name inserted as that of the payee is the name of a real existing person, or of a person who did once exist, or of a person who never existed. This is sufficient in itself to explain the decision to the student. But further, it was held that Vagliano had been guilty of negligence, and that he must be the person to bear the loss, and not the bank; for where one of two innocent parties must suffer by the fraud of the third, he who by his conduct, however innocently, enables the fraud to be committed must be the sufferer.

Grounds of the decision in the House of Lords.

Again, if a person is induced to draw a cheque payable to the order of a person whom he believes to be real and to be his creditor, but who does not in fact exist, the cheque will be treated by virtue of the above cited section as payable to bearer (*z*). But if a tradesman is induced to draw cheques to the order of actual customers, in payment of sums which his clerk falsely tells him are owing to those customers, these cheques will not be treated as payable to bearer; so that, where the clerk who had made such representation then stole the cheques which had accordingly been drawn and

Clutton v. *Attenborough.*

Vinden v. *Hughes.*

(*y*) 45 & 46 Vict. c. 61, s. 7 (3).

(*z*) *Clutton* v. *Attenborough* (1897), A. C. 90; 66 L. J. Q. B. 221; 75 L. T. 556.

forged the indorsements and got an innocent tradesman to cash them, the drawer of the cheques was held entitled to recover their value from the tradesman (*a*).

How the liability on a bill or note may be discharged.

The liability on bills and notes may be discharged in different ways, and especially as to different parties to them. If the person primarily liable on such an instrument pays the amount, that necessarily discharges all the other parties; but if a person not so primarily liable pays it, then only he and parties subsequent to him are discharged, and the liability of prior parties remains (*b*). Irrespective of payment, the obligation on such an instrument may be discharged by the acceptor becoming the holder of it in his own right (*c*); or by the holder absolutely and unconditionally renouncing his right against the acceptor, either by writing, or by delivering up the bill to the acceptor (*d*); or by intentional cancellation of the instrument apparent on its face (*e*); or by any material alteration (*f*); also, as to parties not primarily liable, by omission to present and give due notice of dishonour (*g*). And —as has been pointed out (*h*)—the position of the parties is similar to that of creditor, principal debtor, and surety, any act that will operate to discharge sureties will operate to discharge parties not primarily liable on bills and notes (*i*). Noting or protesting is not necessary to entitle a person to sue on an inland bill or note, although even as to them noting is very usual; but in the case of a foreign bill both noting and protesting are generally necessary (*k*). By the noting is meant a minute made by a notary public, or consul, of the fact of the presentment and dishonour of the instrument; and by the protesting is meant a solemn declaration by the same official that the instrument

Acts which will operate to discharge drawer or indorsers.

Noting and protesting necessary for a foreign, but not for an inland bill.

(*a*) *Vinden* v. *Hughes* (1905), 1 K. B. 735; 74 L. J. K. B. 410; *North and South Wales Bank* v *Macbeth* (1908), A. C. 137; 77 L. J. K. B. 464.
(*b*) 45 & 46 Vict. c. 61, s. 59. (*c*) Sect. 61.
(*d*) Sect. 62. *Re George, Francis* v. *Bruce* (1890), 44 Ch. D. 627; 59 L. J. Ch. 709; 69 L. T. 49; *Edwards* v. *Walters* (1896), 2 Ch. 157; 65 L. J. Ch. 557; 74 L. T. 396.
(*e*) 45 & 46 Vict. c. 61, s. 63. (*f*) Sect. 64. See *ante*, p. 187.
(*g*) See *ante*, pp. 183–186. (*h*) *Ante*, p. 174.
(*i*) For the acts that will operate to discharge sureties, see *ante*, pp. 53, 54.
(*k*) 45 & 46 Vict. c. 61, s. 51.

has been presented for payment and dishonoured. An inland bill is one which on its face purports to be both drawn and payable in the United Kingdom, or the Islands of Man, Guernsey, Jersey, Alderney, or Sark, or the islands adjacent to any of them, being part of the dominions of His Majesty, or drawn within those limits on some person resident therein, and any other bill is a foreign bill (*l*). The chief peculiarities of a foreign bill in which it differs from an inland one are, that it may be stamped after execution; it requires noting and protesting; it is most usually drawn in parts; and it is occasionally drawn at one or more "usance" (*m*).

What is an inland and what is a foreign bill.

Peculiarities of foreign bills.

When a bill drawn in one country is negotiated, accepted, or payable, in another—the validity of the bill as regards requisites in form is determined by the law of the place of issue; and the validity, as regards requisites in form of the supervening contracts, such as acceptance, or indorsement, or acceptance *supra protest*, is determined by the law of the place where such contract was made. But where a bill is issued abroad, it is not invalid by reason only that it is not stamped in accordance with the law of the place of issue; and where a bill issued abroad conforms, as regards requisites in form, to the law here, it may, for the purpose of enforcing payment thereof, be treated as valid as regards every one here. The interpretation of the drawing, indorsement, or acceptance, is determined by the law of the place where made; but when an inland bill is indorsed in a foreign country, the indorsement as regards the payer is interpreted according to the law here. The duties of the holder with regard to presentment, protest, and notice of dishonour, are determined by the law of the place where the act is done or the bill is dishonoured; and where the bill is drawn abroad and payable here, the amount of the bill, in the absence of express stipulation, is calculated according

Rules of construction as regards foreign bills where laws conflict.

(*l*) 45 & 46 Vict. c. 61, s. 4.
(*m*) As to meaning of "usance," see *ante*, p. 182.

to the rate of exchange for sight drafts at the place of payment on the day the bill is payable. Where a bill is drawn in one country and payable in another, the date when it is due is determined by the law of the place where it is payable (*n*).

Receipt on back of a bill or note requires stamp.

A receipt for the money given on the back of a bill or note did not formerly require a receipt stamp, but it does now (*o*). A person paying a negotiable instrument has a right to the possession of it (*p*).

Position if negotiable instrument lost.

The effect of losing a negotiable instrument formerly was, that no action could be brought at law in respect of the amount payable thereon, because there was always the possibility that it might have got into the hands of a *bonâ fide* holder for value; but equity would give relief on a proper indemnity being given, on the principle of an accident; and by the Common Law Procedure Act, 1854 (*q*), power was given at law for the court or a judge to order that the loss should not be set up on an indemnity being given. It is now

Demanding another bill.

provided by the Bills of Exchange Act, 1882, that where a bill has been lost before it is overdue, the person who was the holder of it may apply to the drawer to give him another bill of the same tenor, giving security to the drawer, if required, to indemnify him against all persons whatever, in case the bill alleged to have been lost shall be found again, and that if the drawer on such request refuses to give such duplicate bill, he may be compelled to do so (*r*). This

Ordering loss not to be set up.

Act also provides that in any action or proceeding upon a bill, the court or judge may order that the loss of the instrument shall not be set up, provided that an indemnity be given, to the satisfaction of the court or judge, against the claim of any other person upon the instrument in question (*s*).

(*n*) 45 & 46 Vict. c. 61, s. 72.

(*o*) Formerly see 54 & 55 Vict. c. 39, schedule 1, title "Receipt Exemptions"; but now see Finance Act, 1895 (58 Vict. c. 16, s. 9).

(*p*) Byles on Bills, 307.

(*q*) 17 & 18 Vict. c. 125, s. 87.

(*r*) 45 & 46 Vict. c. 61, s. 69. (*s*) Sect. 70.

Bill or note carries interest.

A bill or note carries interest from the time of dishonour as regards the acceptor or maker thereof; and as regards any other party liable thereon, from the time of notice of dishonour having been given to such other party. And it has been decided that when a person guarantees payment of a bill or note, he is liable not only for the principal amount of it, but also for interest (*t*).

Tender after bill due.

It is not technically, though it must nearly always be practically, a defence to an action brought on a bill or note that after the day for payment the defendant tendered the amount to the plaintiff, for he has committed a breach in not paying on the day and the plaintiff's claim may possibly, under special circumstances, be for damages beyond the mere amount of the bill (*u*).

Summary of differences between bills and notes and other simple contracts.

To sum up as to bills and notes, the following are the chief points in which they differ from other simple contracts:—

1. They must always be in writing.
2. They must always be stamped, and as to inland bills, before execution (*x*).
3. They import a consideration, so that it need not appear on the face of the instrument (*y*).
4. They carry interest.
5. They are negotiable.

Relation existing between banker and customer.

The relation existing between a banker and his customer is not that of trustee and *cestui que trust*, but of debtor and creditor. "The customer lends money to the banker, and the banker promises to repay that money, and, whilst indebted, to pay the whole or any part of the debt to any person to whom his creditor, the customer, in the ordinary way requires him to pay

(*t*) *Ackerman* v. *Ehrensperger* (1847), 16 M. & W. 99. See also 45 & 46 Vict. c. 61, s. 57.

(*u*) *Hume* v. *Peploe* (1808), 8 East, 168.

(*x*) A bill or note not properly stamped cannot be admitted even as evidence of the receipt of the money alleged to have been lent: *Ashling* v. *Boon* (1891), 1 Ch. 601; 64 L. T. 193.

(*y*) A guarantee is the same on this point; see 19 & 20 Vict. c. 97, s. 3, *ante*, p. 43,

it" (*z*), and this debt is paid by the banker duly honouring his customer's bills, notes, and cheques.

Cheques.

A cheque has already been defined as a bill of exchange drawn on a banker, payable on demand (*a*). The drawer of the cheque is the person primarily liable, and it is the duty of a banker to cash his customer's cheques if he has sufficient assets of that customer, and if he fails in this duty an action will lie against him, even although the customer has sustained no actual loss or damage by his act (*b*). But the banker's duty and authority to pay his customer's cheques are terminated by countermand of payment (*c*), or by notice of the customer's death (*d*), or by notice that the customer has committed an available act of bankruptcy, or by a receiving order being made against the customer (*e*). Cheques are not intended, like bills and notes, for circulation, but, generally speaking, the rules as to bills and notes apply to them, and in particular they are negotiable (*f*). A person receiving a cheque should present it for payment within a reasonable time (*g*); and in determining what is a reasonable time, regard must be had to the nature of the instrument, the usage of trade and of bankers, and the facts of the particular case (*h*). Ordinarily, however, if the banker is in the same place, it should be presented during the next day, and if in a different place, forwarded for presentment within that time, and presented by the person to whom so forwarded within the day after he receives it (*i*). Where a cheque is not presented for payment within such reasonable time, and the drawer, or person on whose account it is

Duty of bank to pay.

How duty terminated.

The rules as to bills and notes apply generally to cheques.

Time within which a cheque should be presented.

Consequence of non-presentment within the proper time.

(*z*) *Per* Alderson, B., in *Robarts* v. *Tucker* (1851), 16 Q. B. 575; *Foley* v. *Hill* (1848), 2 H. L. 28. (*a*) *Ante*, p. 171.

(*b*) *Marzetti* v. *Williams* (1830), 1 B. & A. 415. This furnishes an instance of the truth of the rule that *injuria sine damno* will entitle a person to maintain an action, as to which see *ante*, pp. 3, 4.

(*c*) Even by telegram, see *Curtice* v. *London Bank* (1908), 1 K. B. 293.

(*d*) 45 & 46 Vict. c. 61, s. 75. (*e*) Ibid, sect. 97 (1).

(*f*) *M'Lean* v. *Clydesdale Banking Co.* (1884), 9 App. Cas. 95; 50 L. T. 457.

(*g*) 45 & 46 Vict. c. 61, s. 45. (*h*) Sect. 74 (2).

(*i*) Byles on Bills, 20-23.

drawn, had the right at the time when it should have been presented, as between himself and the banker, to have the cheque paid, and suffers actual damage through the delay, he is discharged to the extent of such damage, that is to say, to the extent to which such drawer or person is a creditor of the banker to a larger amount than he would have been had such cheque been paid (*k*). The holder of a cheque as to which such drawer or person is discharged, is, however, a creditor of the banker in lieu of such drawer or person to the extent of such discharge, and is entitled to recover the amount from him (*k*). Thus, suppose A. draws a cheque on his bankers for £50, and pays it to B., who neglects to present it within a reasonable time, and meanwhile the banker fails, A. having at the time of such failure sufficient money to his credit to meet the cheque, here A. is discharged, but B. can prove for £50 against the banker's estate.

Overdue cheque.

It has been already stated that a person taking a bill or note after it becomes due takes it subject to all faults it was subject to in the transferor's hands (*l*). It has, however, been decided that this rule does not primarily apply to cheques (*m*), but that if a cheque has been overdue for an unreasonable length of time, then it does (*n*). A person, therefore, who takes a stale cheque, takes it at his peril; if it is in all respects a good cheque, he can enforce it against the drawer, but if it is affected by fraud or illegality, he cannot recover on it.

Post-dated cheque.

A post-dated cheque bearing merely an ordinary penny stamp is a valid and negotiable instrument, and is complete and regular upon the face of it, so that a person taking such a cheque before its date has nevertheless a good title (*o*).

(*k*) 45 & 46 Vict. c. 61, s. 74 (1, 3).

(*l*) *Ante*, p. 174.

(*m*) *London & County Banking Co.* v. *Groome* (1882), 8 Q. B. D. 278; 51 L. J. Q. B. 224; 30 W. R. 382.

(*n*) 45 & 46 Vict. c. 61, s. 36 (3), and s. 73. "What is an unreasonable length of time for this purpose is a question of fact."

(*o*) *Hitchcock* v. *Edwards* (1889), 60 L. T. 636; *Royal Bank of Scotland* v. *Tottenham* (1894), 2 Q. B. 715; 64 L. J. Q. B. 99; 71 L. T. 168.

A banker paying a forged cheque bears the loss.

If a banker pays a cheque to which the drawer's signature has been forged, he (the banker) must bear the loss incurred thereby, unless it has been caused by the customer's negligence (*p*). The liability of a banker in the case of his paying a cheque bearing a forged indorsement was formerly the same; but this being considered a hardship on bankers—who, whilst they may reasonably be supposed to know their customers' signatures, cannot possibly be expected to know the signatures of payees—it has been provided that the banker shall be discharged if the cheque purports to be duly indorsed, so that in the case of a forged indorsement of a cheque the loss now falls on the customer (*q*). But though a banker is thus protected, yet a third person who cashes a cheque bearing a forged indorsement is not, and in such an event will be liable to refund to the rightful owner of the cheque, the money which he received when it was honoured by the banker on whom it was drawn (*r*). However, bankers who receive and collect cheques for their customers are specially protected by the Bills of Exchange Act, 1882, which provides that "where a banker in good "faith, and without negligence, receives payment for a "customer of a cheque crossed (generally, or specially "to himself) and the customer has no title, or a defective "title thereto, the banker shall not incur any liability "to the true owner of the cheque by reason only of "having received such payment" (*s*).

But not so if it is a forged indorsement.

Ogden v. *Benas.*

Protection of bankers.

Importance of enactment protecting bankers.

The enactment just mentioned is manifestly one of great importance to bankers. It has been held that a banker thus collecting a cheque for a customer is relieved from liability although the customer's account is overdrawn, and the effect of the collection is to benefit the banker by enabling him thus to get payment

(*p*) *Robarts* v. *Tucker* (1851), 16 Q. B. 560; *Young* v. *Grote* (1827), 4 Bing. 253; *Baxendale* v. *Bennet* (1878), 3 Q. B. D. 525; 47 L. J. Q. B. 624.

(*q*) 16 & 17 Vict. c. 59; amended and re-enacted by 45 & 46 Vict. c. 61, s. 60.

(*r*) *Ogden* v. *Benas* (1874), L. R. 9 C. P. 513; 43 L. J. C. P. 259; 22 W. R. 805.

(*s*) 45 & 46 Vict. c. 61, s. 82.

of the overdraft (*t*). A person may be a customer within the meaning of the statute although he has not actually got an account at the bank; but the mere fact that he has long been in the habit, for his own convenience, of getting a banker to cash cheques for him, does not make him a customer so as to protect the banker (*u*), though if the banker made some charge for cashing them it would no doubt be otherwise. The protection afforded by the enactment is restricted to the process of collecting the cheque for the customer, and does not extend to a case in which the banker makes himself a holder for value (*x*). So that, if a banker takes for collection a cheque payable to some one other than his customer for whom he is collecting it, but gets his customer to indorse it, he gains no protection from the enactment in question (*x*). It was also held that a banker gained no protection if he placed the amount of a cheque to his customer's credit before it was collected, and allowed him to draw against the amount (*x*); but this point has been expressly altered by the Bills of Exchange Act, 1906 (*y*). A banker gains no protection by himself crossing the cheque, for to give him protection it must be crossed before being paid in (*x*).

Great Western Ry. v. *London & County Bank.*

London City & Midland Bank v. *Gordon.*

If a banker pays money on a customer's cheque to some third person, he cannot, on discovering that such customer has overdrawn his account, recover back the sum he has paid (*z*).

Customer overdrawing.

Cheques are frequently crossed, that is, they have the name of some banker written across them, or simply two transverse lines with or without the words "& Co.," leaving the name of the particular banker to be filled

Crossing cheques.

(*t*) *Clarke* v. *London & County Banking Co.* (1897), 1 Q. B. 552; 66 L. J. Q. B. 354; 76 L. T. 293.

(*u*) *Great Western Ry.* v. *London & County Banking Co.* (1901), A. C. 414; 70 L. J. Q. B. 915; 85 L. T. 152; 50 W. R. 50.

(*x*) *London City & Mid. Bank* v. *Gordon, Capital & Counties Bank* v. *Gordon* (1903), A. C. 240; 72 L. J. K. B. 451; 88 L. T. 574; *Akrokerri* v. *Economic Bank* (1904), 2 K. B. 465; 73 L. J. K. B. 742; 91 L. T. 175.

(*y*) 6 Edw. VII. c. 17.

(*z*) *Chambers* v. *Miller* (1865), 13 C. B. N. S. 125.

in or not, but at any rate rendering it necessary that it should be paid through some banker.

Provisions of the Bills of Exchange Act, 1882, as to crossed cheques.

The law on the subject of crossed cheques is now contained in the Bills of Exchange Act, 1882 (*a*). By this Act, a cheque may be crossed *generally* by putting across it two transverse lines, with or without the words "and Company," or any abbreviation thereof, or it may be crossed *specially* by writing across it the name of a banker, and it may in either case be so crossed with the addition of the words "not negotiable" (*b*). Any lawful holder may cross a cheque, but may not alter it, though he may add to it the words "not negotiable," and a banker to whom a cheque is crossed may again cross it specially to another banker for collection (*c*). When a cheque is crossed generally, the banker on whom it is drawn must only pay it to a banker, and when crossed specially, then only to the particular banker or his agent; and if so paid, then the banker is protected by the payment, as also is the drawer if the cheque came to the hands of the payee; but if the banker pays the cheque otherwise than according to the crossing, then he is liable to the true owner for any loss sustained owing to the cheque having been so paid (*d*). In the case of any alteration or obliteration in the crossing, the banker is not liable if the alteration or obliteration is not apparent (*e*).

Crossing cheque "not negotiable."

With regard to the crossing of a cheque "not negotiable," this does not restrain its transfer, but it is provided (*f*) that a person taking a cheque so crossed shall not have, and shall not be capable of giving, a better title to the cheque than that which the person from whom he took it had. Thus, if A. steals a crossed cheque payable to bearer, or to order and indorsed, and

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(*a*) 45 & 46 Vict. c. 61.
(*b*) Sect. 76. (*c*) Sects. 77, 78.
(*d*) Sect. 79. And if the drawer of the cheque chooses to waive his banker's mistake, he can follow the money, *Bobbett* v. *Pinkett* (1876) L. R. 1 Ex. D. 373.
(*e*) Sects. 79, 80. (*f*) Sect. 81.

which cheque is crossed "not negotiable," and gets it cashed by B., who takes it honestly, yet B. has no title because of the crossing "not negotiable," and cannot retain the cheque, or the amount thereof if he has received payment, as against the true owner (*g*).

(*g*) With regard to the subject of crossed cheques, the first statutory provision on the subject was contained in 21 & 22 Vict. c. 79. The insufficiency of this statute was shewn by the case of *Smith* v. *Union Bank of London* (1876), 1 Q. B. D. 31 ; 45 L. J. Q. B. 149, and it was repealed by 39 & 40 Vict. c. 81, which contained new and more precise provisions on the subject. This Act has now, in its turn, been repealed by 45 & 46 Vict. c. 61, s. 96, except as to anything done or suffered before 18th August 1882, and the law is—as stated in the text—now governed by that statute.

CHAPTER VI.

OF SOME PARTICULAR CONTRACTS IRRESPECTIVE OF ANY DISABILITY OF THE CONTRACTING PARTIES.

Matters considered in this chapter.

UNDER this heading it is proposed to consider shortly contracts as to ships, insurance, patents, copyrights, and trade-marks; contracts with legal practitioners, medical men, dentists, witnesses, corporations, companies, and institutions; and contracts in the relation of master and servant.

I. Ships.

The principal statute now in force containing provisions as to the registration and ownership of ships, and generally as to merchant shipping, is the Merchant Shipping Act, 1894 (*a*). One important provision in that statute has been already incidentally noticed (*b*), viz., that a registered ship, or any share therein, must be transferred by bill of sale, in the form given therein, and attested by a witness, and registered by the registrar of the port at which the ship is registered (*c*); and this registration is of great importance, for in the case of several mortgages, they will have priority, not according to the date of execution, but according to the date of registration (*d*). On the discharge of a mortgage, satisfaction thereof has to be entered on the register (*e*).

Merchant Shipping Act, 1894.

How a ship or share therein transferred

As to ownership.

As to ownership in a British ship, it is considered as being divided into sixty-four equal parts, and persons may hold one or more shares, so only that the total number of registered holders does not exceed sixty-

(*a*) 57 & 58 Vict. c. 60, amended by 61 & 62 Vict. c. 114; 63 & 64 Vict. c. 32; 6 Edw. VII. c. 48; and 7 Edw. VII. c. 52.

(*b*) *Ante*, p. 59.

(*c*) 57 & 58 Vict. c. 60, ss. 24, 26. This transfer is exempted from stamp duty, as also are all agreements between masters of ships and seamen, if made in the proper form (sect. 721).

(*d*) 57 & 58 Vict. c. 60, s. 33. (*e*) Sect. 32.

four; but five or less persons may register as joint-owners of one or more shares, and as such be considered as one person (*f*). Ships, to have the privileges of British vessels, must be duly registered, and a certificate of the registry is given; and certificates may also be given by the registrar of ships authorising the same to be disposed of, or mortgaged, out of the United Kingdom (*g*).

Power of master of ship during voyage.

The conduct of a ship during its voyage is intrusted to a person called the master, and he is invested with a power to do everything necessary to bring the voyage to the best termination he can; and in determining what he shall do, he must consider the interests of all parties concerned (*h*). If it becomes necessary to sell (*i*) or hypothecate the ship, the master should, if he has the opportunity, obtain the owner's consent thereto; but if he is at a distant English port, or at a foreign port where the owner has no agent, and immediate payments are required, he has power to borrow money on the owner's credit, or even to sell or hypothecate the ship and cargo. If the cargo is dealt with, the owner must indemnify the merchant, who will have a right either to take what his goods actually fetched, or what they would have fetched had they been brought to their destination (*j*). The master has also power to pledge the shipowner's credit for stores or other necessaries for the ship, under like circumstances as above mentioned with regard to borrowing money on it (*k*). The master is in fact an agent of necessity, and the general power he possesses cannot be restricted.

Agent of necessity.

Master has unlimited discretion.

It must necessarily be that the master of a ship has an unlimited discretion how to act in times of peril during the voyage, and it may be sometimes necessary for the safety of all to incur some loss, *e.g.*, by jettison, which is the throwing of goods overboard to lighten

Jettison.

(*f*) 57 & 58 Vict. c. 60, s. 5. (*g*) Sects. 2, 14, 39.
(*h*) *The Rona* (1885), 51 L. T. 28.
(*i*) Smith's Mercantile Law, 213.
(*j*) Smith's Mercantile Law, 158; *Gunn* v. *Roberts* (1874), L. R. 9 C. P. 331; 43 L. J. C. P. 223; *The Fanny, The Mathilda* (1883), 48 L. T. 771; 5 Asp. M. C. 75.
(*k*) *Gunn* v. *Roberts*, supra.

the ship, so that they are lost. In such cases it would be manifestly unfair that the particular owner should bear the whole burthen of what has been done as much for others' benefit as his own, and the loss is therefore rateably adjusted between all owners, which adjustment is called "general average," and appears to be founded not upon contract, or the relation created by a contract, but upon a rule of the common law, and upon the principles of the ancient maritime law (*l*). As distinguished from this, "particular average" is sometimes spoken of, which simply arises when some particular injury is done, by accident or otherwise, not voluntarily for the benefit of all; and here no contribution to the loss is made, but it has wholly to be borne by the person to whom the injured property belongs (*m*).

General and particular average.

Salvage.

When some special and extraordinary assistance is rendered, whereby a ship, the persons on it, or its cargo are saved, the persons rendering such successful assistance, who are called salvors, are entitled to a compensation, which is called salvage. As to the persons who may become entitled to salvage, it may be particularly noticed that neither the passengers nor the crew of a rescued ship can so claim unless circumstances have put an end to the common duty of both to do their best to save the ship, *e.g.*, the *bonâ fide* abandonment of the ship at sea (*n*). With reference to the salvage itself, it is only allowed in the case of success, and the practice is rarely to allow more than a moiety for salvage (*o*). A pilot who simply performs ordinary pilot

(*l*) *Pirie* v. *Middle Dock Co.* (1881), 44 L. T. 426. See further on the subject of general average the definition given in *Birkley* v. *Presgrave* (1801), 1 East 220, approved in *Svendsen* v. *Wallace* (1884), 13 Q. B. D. 69; 53 L. J. Q. B. 385; and *Attwood* v. *Sellar* (1870), 5 Q. B. D. 286; 49 L. J. Q. B. 515; 28 W. R. 604; *Gordon* v. *Marwood* (1881), 7 Q. B. D. 62; 50 L. J. Q. B. 634; 29 W. R. 673.

(*m*) See the distinction between general and particular average well stated by Lord Kenyon in *Birkley* v. *Presgrave* (1801), 1 East. 226, 227.

(*n*) *The Vrede* (1861), 30 L. J. Ad. 209; *The Florence* (1852), 16 Jur. 572. The chief statutory provisions as to salvage are contained in 57 & 58 Vict. c. 60, Part ix.

(*o*) *The Inca* (1860), Sw. 370; *The Killeena*, (1882) 6 P. D. 193; 45 L. T. 621; *The Craigs* (1880), 5 P. D. 186; 29 W. R. 446; *The Erato* (1888), 13 P. D. 163.

services is not entitled to anything for salvage, or even for extraordinary pilot services; but he is entitled to something extra in this respect if he performs extraordinary services, more than a pilot for his ordinary fees could be expected to do (*p*). In the case of a collision between two ships, the rule in the Court of Admiralty has always been that where both ships are in fault the loss sustained by the two vessels is added together and divided between them (*q*), and the Judicature Act, 1873 (*r*), specially provides that this rule is still to continue. Where, however, one ship has by wrong manœuvres placed another ship in a position of extreme danger, the latter will not be held to blame in the event of her doing something wrong, and not having been manœuvred with perfect skill and presence of mind (*s*).

Rule as to damages in the case of collision between two ships.

A bottomry bond is a contract in writing hypothecating a ship, given at a foreign port, by the owner or agent, to secure the repayment of money lent for the use of the ship, where the loan is actually necessary for the purposes of the ship or cargo and cannot be got on personal credit; and the conditions of it are, that if the ship is lost the lender loses his money; but if it arrives, then not only the ship itself is liable, but also the person of the borrower. A security given on the cargo, and not on the ship, is also now generally called a bottomry bond indiscriminately with the above, though properly distinguished as a *respondentia* bond. Because of the risk the lender runs in losing his money entirely by the loss of the ship or cargo, it has always been legal, even when the usury laws were in force, to reserve any amount of interest on such a loan; and if there are several of these securities given during a voyage, the last will generally be paid first, because,

Bottomry bond.

Respondentia bond.

(*p*) *Akerblom* v. *Price* (1881), 7 Q. B. D. 129; 50 L. J. Q. B. 629; 29 W. R. 797; 44 L. T. 837.

(*q*) See Williams and Bruce's Admiralty Practice, 93–98.

(*r*) 36 & 37 Vict. c. 66, s. 25 (9). See hereon *Chartered Mercantile Bank of India* v. *Netherlands India Steam Navigation Co.* (1883), 10 Q. B. D. 521; 52 L. J. Q. B. 220; 48 L. T. 546; 31 W. R. 445.

(*s*) *The Bywell Castle* (1879), 4 P. D. 219; 28 W. R. 293; 41 L. T. 747

without the last, possibly the vessel might have been lost altogether (*t*). It has been held that a person who has advanced money for the purpose of discharging dock dues, stands in the same position as the dock company, and his claim ranks with pilotage and towage claims, and has priority over the claim of a holder of a bottomry bond of a previous date (*u*).

Difference between a charter-party and a bill of lading.

The owner of a ship sometimes lets it, or some part of it, for a particular voyage, which is done by means of an agreement called a charter-party (*v*); and sometimes he simply agrees to carry any one's goods therein without letting any particular part of the ship, which agreement is carried out by means of a bill of lading, which is in form a receipt for the goods to which it relates, given by the owner or master of the ship, and a contract for the carriage and delivery of those goods upon the terms and conditions therein stated, and an assignable document of title to those goods (*x*). A bill of lading may be transferred by indorsement and delivery, and this will pass the property in the goods, and all liabilities and all rights of action in respect thereof, and the indorsee may sue thereon in his own name (*y*); and such an indorsement for value *bonâ fide* without notice, deprives the vendor of any right of stoppage *in transitu* (*z*), unless the person through whom the bill of lading comes had no authority to put it in circulation (*a*). A bill of lading is not, however, a negotiable instrument, as it must be borne in mind that, beyond what has just been stated, the indorsement of

Bill of lading is not negotiable.

(*t*) See hereon Smith's Mercantile Law, 573–580.

(*u*) *The St. Lawrence* (1880), 5 P. D. 250; 49 L. J. P. 82.

(*v*) For a form of a charter-party, see Appendix to Anson's Contracts.

(*x*) For a form of a bill of lading, see Appendix to Anson's Contracts. The ordinary principles of contract apply to a bill of lading, so that, for instance, parol evidence cannot be admitted to vary its terms (*Leduc* v. *Ward* (1888), 20 Q. B. D. 475; 57 L. J. Q. B. 379; 58 L. T. 908).

(*y*) 18 & 19 Vict. c. 111, s. 1. A transfer by way of pledge does not enable the pledgee to sue or be sued, unless he claims delivery of the goods, *Sewell* v. *Burdick* (1885), 10 A. C. 74; 54 L. J. Q. B. 156.

(*z*) As to stoppage *in transitu*, see *ante*, pp. 105–108; 56 & 57 Vict. c. 71, s. 47.

(*a*) *Gurney* v. *Behrend* (1856), 3 E. & B. 622. See *Lickbarrow* v. *Mason* (1787), 1 S. L. C. 710.

such an instrument cannot confer a better title than was possessed by the indorser (*b*). In respect of the carriage of goods, either by means of a charter-party or a bill of lading, a certain reward is payable, which is called the freight, and for which the shipowner can sue, and for which he has a lien on the goods, provided they are in his possession; if, however, he has actually let out the whole ship, he has thus parted with possession of her and her cargo, and has no lien (*c*). The owner of goods does not by simply indorsing the bill of lading, and delivering it to the indorsee by way of security for money advanced by him, pass the property in the goods to such indorsee so as to make him directly liable to the shipowner for freight, unless he claims and takes delivery (*d*). Freight.

In the case of loss of goods during a voyage, the question arises, What is the liability of the shipowner or person carrying the goods? At common law such persons were, like carriers by land (*e*), liable for all losses except those arising from act of God or the King's enemies, or the inherent fault or vice of the things themselves. The charter-party, or bill of lading, always contains a stipulation exonerating them from such losses, and from those occasioned by perils or accident of the seas (*f*) and navigation, and by fire. And now, by statute (*g*), the shipowner (including Liability of shipowners for loss of goods during a voyage.

(*b*) *Ogle* v. *Atkinson* (1814), 5 Taunt, 759. As to negotiable instruments, see *ante*, pp. 167–170.

(*c*) Brown's Law Dict. 245, title "Freight."

(*d*) *Sewell* v. *Burdick* (1885), 10 App. Cas. 74; 54 L. J. Q. B. 156; 52 L. T. 445.

(*e*) As to whose liability, see *ante*, pp. 128–138.

(*f*) As to what is a "peril of the sea," see *Wilson* v. *The Xantho* (1887), 12 App. Cas. 503; 56 L. J. P. 116, where it was held that foundering caused by collision with another vessel is within the exception "dangers and accidents of the sea" in a bill of lading, and excuses the shipowner for non-delivery of the goods if it occurs without fault on the part of the carrying ship. See also *Hamilton* v. *Pandorf* (1888), 12 App. Cas. 518; 57 L. J. Q. B. 24; 57 L. T. 726, where rice was shipped under a charter-party which excepted "dangers and accidents of the sea," and during the voyage rats gnawed a hole in a pipe on board the ship, whereby sea-water escaped and damaged the rice, without neglect or default on the part of the shipowners or their servants, and it was held that the damage was within the exception, and the shipowners were not liable.

(*g*) 57 & 58 Vict. c. 60, s. 502.

any charterer to whom the ship is demised (*h*)) is not
Fire. liable at all for a loss caused (without his actual fault or privity) by fire; nor is he liable for a loss or damage (without his actual fault or privity) by reason of
Robbery, robbery, embezzlement, making away with, or secreting of any gold, silver, diamonds, jewels, or precious stones, taken in or put on board his ship (*i*) unless the true nature and value thereof are at the time of shipment declared by their owner or shipper to the owner or master of the ship in the bill of lading or otherwise in writing. Shipowners are in addition exempted from
Pilot. liability for any loss or damage occasioned by the fault or incapacity of any qualified pilot where the employment of such pilot is compulsory by law, and the vessel is under the control of such pilot (*j*). Also,
Limit of liability where the loss or damage arises without his actual fault or privity, the shipowner, including any charterers to whom the ship is demised (*h*), is not liable in respect of any personal injuries (either alone or with loss to ships or goods) to an aggregate amount beyond £15 per ton of his ship's tonnage, nor in respect of injuries to ships or goods either on land or on water (whether there be in addition personal injuries or not), to an aggregate amount beyond £8 per ton of the ship's tonnage (*k*). This provision may, however, be excluded by express contract in the bill of lading or charter-party (*l*), which, indeed, can in any respect limit and define the extent of liability (*m*).

(*h*) 6 Edw. VII. c. 48, s. 71.

(*i*) *e.g.*, a gold watch, cigar cutter and sovereign purse containing £5, stolen from a passenger's cabin, *Smitton* v. *Orient Co.* (1907), 12 Com. Ca. 270; 96 L. T. 848.

(*j*) 57 & 58 Vict. c. 60, s. 633; *The Rigborgs Minde* (1883), 8 P. D. 132; 52 L. J. P. 74; 49 L. T. 232; *The Guy Mannering* (1882), 7 P. D. 132; 51 L. J. P. 57; 46 L. T. 905; *The Oakfield* (1886), 11 P. D. 34; 55 L. J. P. 11; 34 W. R. 687; 54 L. T. 578. But see *The Tactician* (1907), P. 244; 76 L. J. P. 80.

(*k*) 57 & 58 Vict. c. 60, s. 503; 63 & 64 Vict. c. 32, s. 1. As to the construction of the above provision, see *The Victoria* (1890), 13 P. D. 125; 57 L. J. P. 103; 59 L. T. 728. See also as to the limitation of liability of the owners of any dock, or canal, or a harbour authority, or conservancy, 63 & 64 Vict. c. 32, s. 2. See also 61 & 62 Vict. c. 14; 63 & 64 Vict. c. 32; and 6 Edw. VII. c. 48, sects. 59, 69, 70.

(*l*) *The Satanita* (1895), 72 L. T. 316; 64 L. J. (P. D. & A.) 96; 43 W. R. 498.

(*m*) See *Westport Coal Co.* v. *M'Phail* (1898), 2 Q. B. 130; 67 L. J. Q. B. 674; 78 L. T. 490.

II. Insurance.

Insurance (or assurance) has been defined as a security or indemnification, given in consideration of a sum of money, against the risk or loss from the happening of certain events (*n*); but this definition, though explaining the primary object, cannot be considered as accurate when applied to life insurance, as will be presently explained. Insurance is mainly of three kinds, viz., life, fire, and marine; and as we have just considered the subject of ships, it will be convenient to consider marine insurance first, as relating thereto.

Three kinds.

Marine insurance.

Marine insurance is generally undertaken by certain persons who are called underwriters, who subscribe the policy, each indemnifying the insured to the amount set opposite his name. The law has recently been codified by the Marine Insurance Act, 1906 (*o*), which defines marine insurance as a contract whereby the insurer agrees to indemnify the assured, in manner and to the extent thereby agreed, against the losses incident to marine adventure (*p*) and (if so expressed) against losses on inland waters or on any land risk incidental to a sea voyage or in the building or launch of a ship (*q*). The policy may be in the form given in the Act, and certain rules are laid down for the construction of all policies unless excluded (*r*). The insurance may be either for a particular voyage, or for a certain period, in which latter case it is called a time policy (*s*). Certain things are generally expressly warranted in marine policies, *e.g.*, the date of sailing, and the safety of the ship at the time, and if there is any untruth in any of such warranties the insured cannot recover, even although the point warranted was not of any material importance. Warranties or conditions, a breach of which discharges the insurer, are dealt with in sections 33 to 49; and in particular, it is

Time policy.

Things impliedly warranted in a marine policy.

(*n*) Brown's Law Dict. 280.
(*o*) 6 Edw. VII. c. 41, which came into operation on January 1, 1907.
(*p*) Sect. 1.
(*q*) Sect. 2.
(*r*) Sect. 30 and schedule one.
(*s*) Sect. 25.

implied in a voyage policy (*t*) that at the commencement of the voyage the ship (but not cargo (*u*)) is seaworthy for the purposes of the particular adventure insured (*t*) and that the adventure is a lawful one (*v*), and that a change of voyage or direction shall not take place (*x*), and that all material facts were disclosed and no untrue representations made by the assured (*y*); and breach of any of their implied matters discharges the insurer from liability. On a total actual loss occurring, the underwriters are liable on a valued policy, for the sum fixed by the policy, and on an unvalued policy, for the insurable value of the thing insured (*z*); but if the ship or cargo is not totally destroyed, but may become so, then they are only liable for the above amounts if the owner gives them notice that he abandons it within a reasonable time, when there is said to be a total constructive loss (*a*).

Liability of underwriters.

Contracts of marine and fire insurance are entirely contracts of indemnity.

A contract of marine insurance is, therefore, simply and purely a contract of indemnity. So also is a contract of fire insurance; it is simply a contract, in consideration of certain annual sums paid by way of premium, to indemnify the insured against any loss that may happen from fire, and if no loss happens, there can be no claim under the policy (*b*). Where a person has insured property, and then contracts to sell it, and a fire occurs, the purchaser cannot claim the benefit of the insurance (*c*); nor, on the other hand, on the principle of its being a contract of indemnity, can the vendor recover from the insurance office. If in such a case the insurance company has unwittingly paid the vendor the amount of the insurance, the company can recover back the amount so paid. In other words, a case of subrogation or sub-

Subrogation.

(*t*) Sect. 39, though not in a time policy.
(*u*) Sect. 40. (*v*) Sect. 41. (*x*) Sects. 45–49.
(*y*) Sects. 17–21. (*z*) Sect. 68. (*a*) Sects. 60–63.
(*b*) *Darrell* v. *Tibbitts* (1881), 5 Q. B. D. 560; 50 L. J. Q. B. 33; 42 L. T. 797; 29 W. R. 66.
(*c*) *Rayner* v. *Preston* (1881), 18 Ch. D. 1; 50 L. J. Ch. 472; 44 L. T. 787; 29 W. R. 546.

stitution arises, by which is meant that the insurance company is entitled to be placed in the position of the insured (*d*).

Contracts of life insurance not contracts of indemnity merely.

But a contract of life insurance is in its nature very different from that of fire or marine insurance; for it is not a mere contract of indemnity, but is a contract to pay a certain sum of money on the death of a person in consideration of the due payment of a certain annuity for his life, so that if one person has properly insured another's life, although by that other's death he may not have sustained the slightest damage, he is yet entitled to recover on the policy (*e*). A mere wager policy, however, cannot be good, for it is necessary that every person insuring another's life should have a pecuniary interest therein at the time of effecting the insurance (*f*), and the name of the person interested therein must be inserted in it (*g*); but although that interest afterwards terminates, the policy may be kept up and recovered on. Thus if a creditor insures his debtor's life, though he is afterwards paid, yet he can, if he has kept up the policy, recover from the insurance office. No more than the insurable interest at the time of effecting a policy can be recovered, and if several policies are effected with different offices, the insured can recover no more from the insurers, whether on one policy or many, than the amount of his original insurable interest (*h*).

To enable a person to insure another's life he must have an interest in it.

A person may insure his own life.

The statute (*i*) which requires a person to have an insurable interest in the life he insures, does not, of course, prevent persons insuring their own lives to any amount; and though a husband, parent, or child

(*d*) *Castellain* v. *Preston* (1883), 11 Q. B. D. 380; 52 L. J. Q. B. 366; 49 L. T. 29; 31 W. R. 557. See further hereon Indermaur and Thwaites' Conveyancing, 280–283.

(*e*) *Dalby* v. *India & London Life Assurance Co.* (1856), 15 C. B. 365; overruling *Godsall* v. *Boldero* (1809), 9 East, 72.

(*f*) 14 Geo. III. c. 48, s. 1. A like provision is made as to marine insurance by 6 Edw. VII. c. 41, replacing 19 Geo. II., c. 37, which, however, does not apply to foreign ships. Premiums paid under a wager policy cannot be recovered back (*Howard* v. *Refuge Friendly Society* (1886), 54 L. T. 644).

(*g*) 14 Geo. III. c. 48, s. 2.

(*h*) *Hebdon* v. *West* (1862), 3 B. & S. 579.

(*i*) 14 Geo. III. c. 48.

has not (unless he or she has some interest in property dependent on his, her, or their life) an insurable interest in the lives of a wife, child, or parent, yet a wife has always an insurable interest in her husband's life (*k*).

Policy on husband's life for wife's benefit.

By the Married Women's Property Act, 1882 (*l*), a married woman may effect a policy of insurance upon her own life, or the life of her husband, for her separate use; and a policy of insurance by a married man on his own life, if so expressed on its face, may enure as a trust for the benefit of his wife and children or any of them, and as a trust is not subject to the control of the husband or his creditors (*m*); but if it has been effected for the purpose of defrauding creditors, they are entitled to receive out of the sum secured an amount equal to the premiums paid.

Creditors' rights.

Contracts of insurance are *uberrimæ fidei*.

In effecting any policy of marine, fire, or life insurance, it is material that there should be no concealment on the part of the person effecting the insurance, or through whose instrumentality the insurance is effected (*n*). Concealment in the law of insurance has been defined as "the suppression of a material fact within the knowledge of one of the parties, which the other has not the means of knowing, or is not presumed to know" (*o*). The maxim of *caveat emptor* (*p*) does not apply to contracts of insurance, which are *uberrimæ fidei*, and there seems to be no substantial difference with regard to this, whether the contract is for life, fire, or marine insurance (*q*). If, however, there are any false

(*k*) *Reed* v. *Royal Exchange Co.* (1812), 2 Peake, 70.

(*l*) 45 & 46 Vict. c. 75, s. 11. This Act (sect. 22) repeals the provision to a like effect contained in 33 & 34 Vict. c. 93, s. 10, except as to anything done thereunder prior to January 1, 1883.

(*m*) As to the position when a husband meets his death through the act of his wife, see *Cleaver* v. *Mutual Reserve Fund* (1892), 1 Q. B. 147; 61 L. J. Q. B. 128; 66 L. T. 220).

(*n*) *Blackburn* v. *Haslam* (1888), 21 Q. B. D. 144; 57 L. J. Q. B. 479; 59 L. T. 407; and see and distinguish *Blackburn* v. *Vigors* (1888), 12 App. Cas. 531; 57 L. J. Q. B. 114; 57 L. T. 730. As to marine policies see now 6 Edw. VII. c. 41, s. 17–21.

(*o*) Arnould on Marine Insurance, 548; *Rivaz* v. *Gerussi* (1881), 6 Q. B. D. 222; 50 L. J. Q. B. 176.

(*p*) As to which, see *ante*, p. 112.

(*q*) *London Assurance Co.* v. *Mansel* (1879), 11 Ch. D. 363; 48 L. J. Ch. 331; Anson's Contracts, 177.

representations made in effecting a policy, it is *à fortiori* vitiated (*r*). And when an insurance company on a certain state of facts offers to issue a policy of insurance, and any fresh material circumstances occur before the granting of the policy, they must be disclosed; and the insurance company has the right, by reason of such new circumstances, to refuse to grant a policy which they have previously offered to grant (*s*).

Disclosure of altered circumstances.

Irrespective of any condition in a policy of life insurance, on principles of public policy, if a person who has effected a policy of insurance on his own life afterwards dies by the hand of justice, or commits suicide—unless, in the latter case, he was insane and not accountable for his acts—the policy is vitiated, and no action can be brought to recover the amount thereof, and a stipulation to uphold a policy in any such case would, it is said, be contrary to sound policy and ineffectual. In addition to this, it is a very frequent practice of insurance companies to insert in their policies conditions vitiating them on such events, except to the extent of any *bonâ fide* interest which at the time of the death may be vested in any other person for valuable consideration, and sometimes only within a certain time (*t*). If this is done, it makes no difference, in the case of death by a person's own hand, whether he was sane or insane at the time. It is important, however, to note that, in the absence of any condition on the point, the rule of the common law is, that whether the amount of the policy can be recovered

Effect of suicide on a life policy.

(*r*) *Thomson* v. *Weems* (1884), 9 App. Cas. 671; *Hamborough* v. *Mutual Life Insurance Co. of New York* (1895), 72 L. T. 140.

(*s*) *Canning* v. *Farquhar* (1886), 16 Q. B. D. 727; 55 L. J. Q. B. 225; 54 L. T. 350; 34 W. R. 423.

(*t*) See *White* v. *British Empire Mutual Life Assurance Co.* (1869), L. R. 7 Eq. 394; *City Bank* v. *Sovereign Life Assurance Co.* (1884), 32 W. R. 658; 50 L. T. 565. The clause varies in different offices, and the following clause is quoted from a policy in a prominent office: "In case the said member shall die by his own act or deed whether committed in a state of mental derangement or not, during the term of five years from the date of effecting this insurance, the policy shall be void, and all claims to any benefit out of or any interest in the funds of the said Society in virtue of these presents shall cease and determine, except to the extent of the after value of the policy calculated as for a surrender thereof on the day preceding the decease."

depends on the question of whether or not the person was at the time responsible for his own acts (*u*).

That life and marine policies may now be assigned, has been previously noticed (*x*).

III. Patents.

A patent may be defined as a grant by the Crown to a subject, by letters-patent, of the exclusive privilege of making, using, exercising, and vending some new invention—in other words, it is the grant of a kind of trade monopoly. Anciently the prerogative that was vested in the Crown of granting such an exclusive right was much abused (*y*), and in consequence an Act was passed, known as the Statute of Monopolies (*z*). whereby the granting of such monopolies was declared illegal, with certain exceptions; and the law as to what invention can form the subject of a patent still depends upon section 6 of that Act as interpreted by judicial decision (*a*), although the general law of patents has been consolidated by the Patents and Designs Act, 1907 (*b*), which came into operation on 1st January, 1908 (*c*).

Statute of Monopolies.

What can be patented.

The subject of a patent must be (1) a manufacture, *i.e.*, a saleable thing, *e.g.*, a telescope, or some instrument or part thereof for making a saleable thing, or a new or improved process for producing a saleable thing which is new or is better or cheaper than before (*d*), and not a mere philosophical or abstract principle or a discovery of a natural law (*e*); (2) it must be new within this realm (*f*), *i.e.*, it must not have been published here by user in public (*g*) or by books or

(*u*) See hereon Bunyan on Life Assurance.
(*x*) See *ante*, p. 165; 30 & 31 Vict. c. 144; 6 Edw. VII. c. 41, s. 50.
(*y*) See Hallam's Constitutional History of England, vol. i. p. 262.
(*z*) 21 Jac. I. c. 3.
(*a*) 7 Edw. VII. c. 29, s. 93. (*b*) 7 Edw. VII. c. 29.
(*c*) Ibid., s. 99.
(*d*) Abbott, C.J. in *R.* v. *Wheeler* (1819), 2 B. & Ald. at 349; *Electric Telegraph Co.* v. *Brett* (1851), 10 C. B. 838; *Crome* v. *Price* (1842), 4 M. & Gr. 580; *Edison* v. *Woodhouse* (1887), 4 R. P. C. 79, 92; *Gould* v. *Manchester* (1892), 9 R. P. C. 516; *Consolidated Car Heating Co.* v. *Crane* (1903), A. C. 509; 72 L. J. P. C. 110.
(*e*) *Patterson* v. *Gas Light and Coke Co.* (1876), 2 Ch. D. 812.
(*f*) User in Natal is not fatal, *Rolls* v. *Isaacs* (1881), 19 Ch. D. 268, but user in Scotland is, *Brown* v. *Annandale* (1842), 1 Web. P. C. 433.
(*g*) *Carpenter* v. *Smith* (1841), 9 M. & W. 300; *Brereton* v. *Richardson* (1884), 1 R. P. C. 165.

documents which have in fact become a part of public knowledge (*h*) or by communication to persons not bound to secrecy (*i*); (3) it must be useful for the purpose indicated by the patentee, *i.e.*, in some respect better than previous public knowledge (*k*), though it need not be commercially successful (*l*). The grant must be to the true and first inventor (whether a British subject or not) or to the legal representative of a deceased inventor, either alone or jointly with any other person or persons (*m*). The application is by petition lodged at the Patent Office with a declaration that one of the applicants claims to be the true and first inventor (*n*); and the applicant has to file a provisional or complete specification describing accurately the nature of the invention (*o*). Then an examiner enquires if the papers fairly describe the nature of the invention and are in proper form, and if the title sufficiently indicates the invention, and if the invention has been claimed or described in a specification filed within the previous fifty years (*p*). If the examiner reports favourably, the application is accepted and advertised (*q*); and within two months any person may give notice of opposition on the grounds that—(1) the applicant obtained the invention from him or his testator, or (2) the invention was claimed or described in a specification filed within the last fifty years, or (3) the invention is not fairly or sufficiently described or (4) the complete specification differs from the provisional one and the opponent has claimed it before the former was filed (*r*). If there is no successful opposition, the patent is granted. A patent is granted for fourteen years (*s*);

To whom patent granted.

How patent obtained.

Grounds for opposing patent.

Term of patent.

(*h*) *Stead* v. *Williams* (1843), 2 Web. P. C. 143; *Plimpton* v. *Malcolmson* (1874), 3 Ch. D. 531; 43 L. J. Ch. 505. As to specifications over 50 years old, and publication at exhibitions, see sects. 41 and 45 of 7 Edw. VII. c. 29.

(*i*) *Blank* v. *Footman* (1888), 39 Ch. D. 678; *Winfield* v. *Snow* (1891), 8 R. P. C. 15; *Westley* v. *Perkes* (1893), 10 R. P. C. 181.

(*k*) *Lane Fox* v. *Kensington Co.* (1892), 3 Ch. 424; 67 L. T. 440; *Welsbach Co.* v. *Sunlight Co.* (1900), 1 Ch. 843; 69 L. J. Ch. 343.

(*l*) *Badische Anilin* v. *Levinstein* (1887), 12 A. C. 712.

(*m*) 7 Edw. VII. c. 29, ss. 6, 93.

(*n*) Ibid., sect. 1.

(*o*) Ibid., sects. 2–10.

(*p*) Ibid., sects. 3–8.

(*q*) *i.e.*, in the Illustrated Official Journal, published every Wednesday.

(*r*) 7 Edw. VII. c. 29, s. 11.

(*s*) Ibid., s. 17.

but may be extended by the High Court, for seven or fourteen years, if satisfied that the patentee has been inadequately remunerated (*t*). If a patent is granted to two or more persons jointly after 1907, they are joint tenants as regards the devolution of the legal estate; but each may (subject to any contract) use the invention for his own profit without accounting to the others, though he may not grant a licence without their consent; and when each dies, his beneficial interest passes to his legal personal representative as part of his personal estate (*u*). A register of patents is kept (*x*), and all assignments and licences must be entered there, but no trust can be entered (*y*) though notice of a mortgage or licence can (*z*); and the register is open to the public (*a*). By its terms a patent is assignable, but the assignment must be under seal to give the assignee the legal ownership and enable him to sue in his own name for infringements (*b*); though equities in respect of patents can be enforced as in respect of any other personal property (*c*). A patentee may license others to use the invention (*d*); and any interested person with leave of the Board of Trade may petition the court to grant compulsory licences to work the patent or to revoke the patent, on the ground that the reasonable requirements of the public have not been satisfied (*e*). The Court (*f*) may revoke a patent on petition by the Attorney-General or any one authorised by him, or by any person who alleges that the patent was obtained in fraud of him, or some person through whom he claims, or that he was the true and first inventor, or that he had publicly used the invention before the patent (*g*).

Rights of joint patentees.

A register of patents has to be kept.

Assignment of patents.

Licences.

Revocation of patent.

(*t*) 7 Edw. VII. c. 29. s. 18. (*u*) Ibid., s. 37. (*x*) Ibid., s. 28.
(*y*) Ibid., s. 66. (*z*) Ibid., s. 71. (*a*) Ibid., s. 67.
(*b*) See *Re Carey* (1902), 1 Ch. 104; 61 L. J. Ch. 61.
(*c*) 7 Edw. VII. c. 29, s. 71; *New Ixion Tyre Co.* v. *Spilsbury* (1898), 2 Ch. 484; 67 L. J. Ch. 557.
(*d*) See *Heap* v. *Hartley* (1888), 42 Ch. D. 461; *Guyot* v. *Thompson* (1894), 3 Ch. 388. Certain restrictive conditions in a licence against using or buying other articles are made void by sect. 38 of 7 Edw. VII. c. 29
(*e*) 7 Edw. VII. c. 29, s. 24.
(*f*) Or the comptroller within 2 years from the grant, 7 Edw. VII. c. 29, s. 26. (*g*) 7 Edw. VII. c. 29, s. 25.

Remedy for infringement of patent.

For the infringement of his patent, the patentee has a remedy both by an action for damages (*h*) and also for an injunction to restrain the further infringement; and in any action for an injunction the Court has power to award damages either in substitution for or in addition to the injunction (*i*). It has been held that the mere possession of articles which are an infringement of a patent, entitles the person to whom the patent belongs to obtain an injunction, though not to get an order for their destruction or delivery up (*j*).

IV. Copyright.

Copyright is the sole and exclusive liberty of multiplying copies of an original work or composition, which exists in its author or his assignee.

Copyright in a book.

By the Copyright Act, 1892 (*k*), copyright in a book (*l*) lasts for the life of the author and seven years longer or for forty-two years from first publication, whichever is the longer (*m*); and is the property of the author and his assigns, but if the book is first published after the author's death is the property of the owner of the manuscript from which it is first published (*n*). All periodicals are books so far as copyright is concerned; but the law is that if the proprietor of any encyclopædia, review, magazine, periodical work, serial work, or any book employs any one to compose any part thereof on the terms (*nn*) that the copyright shall belong to and be paid for by such proprietor, the copyright is in such proprietor; but in the case of a

(*h*) Or an account of profits made, *De Vitre* v. *Betts* (1873), 6 H. L. 319.

(*i*) See further as to patents generally, Williams' Personal Property, 300–316.

(*j*) *United Telephone Co.* v. *London & Globe Telephone and Maintenance Co.* (1884), 26 Ch. D. 766; 53 L. J. Ch. 1158; 51 L. T. 187; 32 W. R. 870.

(*k*) 5 & 6 Vict. c. 45.

(*l*) *i.e.* every volume, part or division of a volume, pamphlet, sheet of music, map, chart, or plan, separately published, 5 & 6 Vict. c. 45, sect. 2. See *Johnson* v. *Newnes* (1894), 3 Ch. 669.

(*m*) 5 & 6 Vict. c. 45, s. 3.

(*n*) Ibid.; *Macmillan* v. *Dent* (1907), 1 Ch. 107; 76 L. J. Ch. 136; 95 L. T. 730.

(*nn*) No express words, and no writing are necessary; it is a question of fact who has the copyright; and if there are no special circumstances and the only material facts are the employment and payment, it is a fair inference that the proprietor has the copyright, *Lawrence* v. *Aflalo* (1904), A. C. 17; 73 L. J. Ch. 85; 89 L. T. 609.

review, magazine, or like periodical work, after twenty-eight years the right of separate publication reverts to the author, and during such twenty-eight years there can be no separate publication without the author's consent, and by contract the author may have the right of separate publication during such twenty-eight years (*o*). Copyright in a book must be registered (*p*) at Stationers' Hall, but when registered entitles the owner to sue for infringements committed before registration; and assignments must also be registered (*q*).

Fine Arts Copyright Act, 1862.

By the Fine Arts Copyright Act, 1862 (*r*), the author of every original painting, drawing, or photograph has the sole right of copying, engraving, reproducing, and multiplying such painting or drawing and the design thereof, or such photograph and the negative thereof, by any means and for any size, for his natural life and seven years longer. If, however, the painting or drawing or the negative of the photograph is for the first time after the commencement of the Act (*s*) sold or disposed of, or made or executed for or on behalf of any other person for a good (*t*) or valuable consideration, then the person who so sells or disposes of or makes or executes the same does not retain the copyright unless it is expressly reserved to him by agreement signed at the time by the vendee or assignee or the person for or on whose behalf it is made or executed; but the copyright shall belong to the vendee or assignee of the painting or drawing or negative or to the person for or on whose behalf it was made or executed; nor shall the vendee or assignee be entitled to the copyright unless so agreed by writing signed at the time of such sale or disposition (*u*). The effect seems to be that

(*o*) 5 & 6 Vict. c. 45, s. 18.

(*p*) Registration of a copyright is bad if the name entered as that of the publisher is not that of the first publisher (*Coote* v. *Judd*, 23 Ch. D. 727; 53 L. J. Ch. 36; 48 L. T. 205; 31 W. R. 423). The entry on the register must state the precise title of the work, and the day, month, and year of first publication (*Collingridge* v. *Emmott*, 57 L. T. 804).

(*q*) 5 & 6 Vict. c. 45, s. 11, 24.

(*r*) 25 & 26 Vict. c. 68. (*s*) 29th July, 1862.

(*t*) See *Stackemann* v. *Paton* (1906), 1 Ch. 774; 75 L. J. Ch. 59.

(*u*) 25 & 26 Vict. c. 68, s. 1.

on a sale or assignment, neither assignor nor assignee can have the copyright unless there is a signed agreement about it; but that if a photograph is taken for good or valuable consideration, the copyright belongs to the person giving such consideration. A photographer who is paid to take a photograph of a customer may not sell or dispose of, or publicly exhibit, copies thereof without the customer's consent; and this is so by the general law apart from the above Act of 1862, although the property in the negative belongs to the photographer (*x*). *A fortiori* is this the case by the 1862 Act (*y*). But if a photograph is taken without good or valuable consideration, and on the terms that the taker shall keep the negative with a right of selling copies, the copyright is in the taker, even if his assistant under his direction poses the sitter and performs the other manual operations (*z*). No legal proceedings can be taken for any infringement of copyright in paintings, drawings, or photographs, which is committed before the copyright is registered at Stationer's Hall (*a*).

The copyright in engravings, prints, and lithographs lasts for twenty-eight years, if they are done in the United Kingdom and bear the name of the proprietor, and no Act requires such copyright to be registered (*b*).

The Sculpture Copyright Act, 1814 (*c*), gives the author of any new and original sculpture, model, copy, or cast, of any human figure or animal or part thereof, the copyright, without registration, for fourteen years, if he puts his name and the date thereon; and if the author is living at the end of that term, for a further fourteen years.

(*x*) *Pollard* v. *Photographic Co.* (1888), 40 Ch. D. 345; 58 L. J. Ch. 251; 60 L. T. 418.

(*y*) *Boucas* v. *Cooke* (1903), 2 K. B. 227; 72 L. J. K. B. 741; 88 L. T. 760.

(*z*) *Melville* v. *Mirror of Life* (1895), 2 Ch. 531; 65 L. J. Ch. 41; 73 L. T. 334.

(*a*) 25 & 26 Vict. c. 68, s. 4.

(*b*) 8 Geo. II. c. 13; 7 Geo. III. c. 38; 17 Geo. III. c. 57; 6 & 7 Wm. IV. c. 59, s. 2; 15 & 16 Vict. c. 12.

(*c*) 54 Geo. III. c. 56.

The sole right of publicly representing or performing any dramatic piece (*d*) or musical composition belongs to the author and his assigns for the same period as copyright in a book (*e*), and no registration is necessary as to a dramatic piece, though it may be as to a musical composition (*f*). The assignee of the copyright in the book of a dramatic piece or musical composition does not get the right of representation or performance unless an entry in the register expressly says that was the intention of the parties (*g*). The penalty for infringement is 40*s.* for each performance or the actual profits made or the actual loss suffered (*h*); but as to musical compositions, the penalty or damages may now be merely nominal (*i*). And as regards all music published on or since 10th August, 1882, the proprietor of the copyright who shall be entitled to, and shall be desirous of retaining in his own hands exclusively, the right of public representation or performance of the same, is obliged to print or cause to be printed upon the title-page of every published copy of such musical composition a notice to the effect that the right of public representation or performance is reserved (*k*).

Copyright (Musical Compositions) Act, 1882.

Copyright in lectures.

The deliverer of an original lecture has the copyright thereof in him, and the sole right of printing and publishing the lecture, provided he has first given notice in writing to two justices within five miles, at least two days before delivering the same (*l*). If this has not been done, any one may publish the lecture; and as regards this, and other cases in which the speaker claims no rights, every reporter is an "author" within the meaning of the Copyright Act, 1842, and has copyright in his own report (*m*). It has, however,

Walter v. *Lane*.

(*d*) 5 & 6 Vict. c. 45, s. 2. (*e*) 5 & 6 Vict. c. 45, s. 20. See *ante*, p, 217.
(*f*) Ibid., sect. 20; but see *Russell* v. *Smith* (1848), 12 Q. B. 237.
(*g*) Ibid., sect. 22.
(*h*) 3 & 4 Wm. IV. c. 15, sect. 2; 5 & 6 Vict. c. 45, s. 21.
(*i*) 51 & 52 Vict. c. 17.
(*k*) 45 & 46 Vict. c. 40, s. 1. See *Sarpy* v. *Holland* (1908), 2 Ch. 190.
(*l*) 5 & 6 Wm. IV. c. 65, s. 5.
(*m*) *Walter* v. *Lane* (1900), A C. 539; 69 L. J. Ch. 699; 83 L. T. 289.

been held that a professor of a university, who delivers orally in his class-room lectures which are his own literary composition, does not communicate such lectures to the world so as to entitle any one to publish them (*n*).

Dramatising a novel.

It is not an infringement of copyright merely to dramatise a novel, even though the drama may be called by the same name as the novel (*o*); but it is an infringement if the dramatiser extracts passages from the novel, and circulates any copies of his drama (*p*). There is no copyright in a name, *e.g.*, the name or style given to a novel, a drama, or a newspaper; but if by user the name has become known, a person making use of it may be restrained by injunction, on the ground that the public may be deceived thereby and the plaintiff injured (*q*).

No copyright in a name.

For the infringement of his copyright, the same remedies are open to the author as before mentioned in the case of a patentee (*r*).

Copyright in designs.

Copyright in any new and original design for the pattern, shape, configuration, or ornament of any article is now governed by the Patents and Designs Act, 1907 (*s*). It is obtained by registration, and lasts for five years, but can be extended for a second five years, and again for a third five years, by re-registration. Infringement gives rise to an action for a penalty not exceeding £100, or for damages and injunction.

Property in letters.

As somewhat connected with the subject of copyright, may be noticed the question of the property in letters written by one person to another. The law on

(*n*) *Caird* v. *Sime* (1888), 12 App. Cas. 326; 57 L. J. P. C. 2; 57 L. T. 634.

(*o*) *Reade* v. *Conquest* (1861), 30 L. J. P. C. 209.

(*p*) *Warne* v. *Seebohm* (1888), 39 Ch. D. 73; 57 L. J. Ch. 689; 56 L. T. 928.

(*q*) *Hogg* v. *Kirkby* (1827), 8 Ves. 215; *Borthwick* v. *Evening Post* (1888), 37 Ch. D. 449; 57 L. J. Ch. 406; 48 L. T. 252; *Licensed Victuallers' Newspaper* v. *Bingham* (1889), 38 Ch. D. 139; 58 L. J. Ch. 36; 58 L. T. 187.

(*r*) *Ante*, p. 217.

(*s*) 7 Edw. VII. c. 29, ss. 93, 48–61.

this point is that the ownership in such letters belongs to the person to whom they are addressed and sent, but the writer and sender still retains such an interest in them as entitles him to obtain an injunction restraining the publication of their contents, except where such publication is necessary in order to vindicate character (*t*).

V. Trade-marks.

Trade-marks are now governed by the Trade Marks Act, 1905 (*u*). A trade-mark is a mark used upon, or in connection with, goods, to indicate that they are the goods of the proprietor of such mark by virtue of manufacture, selection, certification, dealing with, or offering for sale (*v*). The right to the exclusive use of a trade-mark is obtained by registration (*w*). A registrable trade-mark must contain or consist of at least one of the following essential particulars (*x*):—

1. The name of a company, individual, or firm represented in a special or particular manner.

2. The signature of the applicant for registration or some predecessor in his business.

3. An invented word or words.

4. A word or words having no direct reference to the character or quality of the goods and not being, according to its ordinary signification, a geographical name or a surname.

5. Any other distinctive mark, but a name, signature, or word which does not come under the four previous heads is not to be deemed a distinctive mark without an order of the Board of Trade or the Court.

6. Any special or distinctive word or words, letter, numeral, or combination thereof, continuously used by the applicant or his predecessors in business since before August 13, 1875.

But nothing can be registered which would, because it is calculated to deceive or otherwise, be disentitled

(*t*) *Earl of Lytton* v. *Devey* (1885), 54 L. J. Ch. 293; 52 L. T. 121; *Labouchere* v. *Hess* (1898), 77 L. T. 599; Indermaur and Thwaites' Manual of Equity, 468.

(*u*) 5 Edw. VII. c. 15. (*v*) Ibid., s. 3.

(*w*) Ibid., s. 39.

(*x*) Ibid., s. 9. This section greatly expands the previous law under the repealed acts of 1883 and 1888.

to protection in a court of justice, or which would be contrary to law or morality, or would be a scandalous design (*y*). A trade-mark must be registered in respect of particular goods or classes of goods (*z*); and can only be assigned with the goodwill of the business in those goods, and ceases with such goodwill (*a*). The registration is for fourteen years, and is renewable from time to time (*b*). A valid registration gives the exclusive right to the use of the trade-mark for the goods for which it is registered (*c*). In all legal proceedings registration is *primâ facie* evidence of the validity of the original registration and of subsequent assignments (*d*) and after seven years from the first registration, the original registration shall be taken to be valid unless it was procured by fraud or the mark offends against Section 11 just quoted (*e*). No action lies for infringing an unregistered trade-mark unless it was in use before August 13, 1875, and has been refused registration under the present Act of 1905 (*f*).

Remedies.

For the infringement of a trade-mark the same remedies are open to the proprietor of it as are open to a patentee for infringement of his patent, or to an author for infringement of his copyright, *i.e.*, to maintain an action for damages, and also for an injunction to prevent the further infringement (*g*).

Warranty implied when goods sold with a trade-mark on them.

As has before been noticed (*h*), it is provided by statute (*i*) that if any article is sold with a trade-mark thereon, a warranty is implied that the same is genuine and true, unless the contrary is expressed in some

(*y*) 5 Edw. VII. c. 15, s. 11.
(*a*) Ibid., ss. 22, 23.
(*c*) Ibid., s. 39.
(*e*) Ibid., s. 41.
(*z*) Ibid., s. 8.
(*b*) Ibid., ss. 28–31.
(*d*) Ibid., s. 40.
(*f*) Ibid., s. 42.
(*g*) See Indermaur and Thwaites' Manual of Equity, 464–486. In an action for infringement the court may certify that the right to the exclusive use of the trade-mark came in question, when, in any subsequent action for infringement, the plaintiff, on obtaining a final judgment in his favour, will have his full costs as between solicitor and client, unless the court trying the subsequent action certifies otherwise, 5 Edw. VII. c. 15, s. 46. This rule also applies to actions for infringement of patents, 7 Edw. VII. c. 29, s. 35.
(*h*) See *ante*, p. 113.
(*i*) 50 & 51 Vict. c. 28, s. 17.

writing signed by or on behalf of the vendor, and delivered to and accepted by the vendee.

VI. Legal practitioners.

Legal practitioners may be either barristers, special pleaders not at the bar, certified conveyances, or solicitors. The three latter may recover their fees, but the first may not, their acting being deemed of a voluntary nature, and their fees merely in the light of honorary payments; and it follows from this that no action lies against them for negligence or unskilfulness (*k*). A barrister and his client are, in fact, mutually incapable of entering into a binding contract of hiring with respect to the services of the former as an advocate. This incapacity of contract is reciprocal, and is an answer to any action brought, whether by client or advocate, upon such an alleged agreement (*l*). This principle is of universal application in all cases where the relation of counsel and client exists; it extends to an alleged engagement by counsel to give exclusive attention to the defence of a prisoner standing his trial upon a criminal charge, and to a case in which the client has entered into an express agreement with the barrister to pay special fees named by the barrister for his exclusive attendance, in excess of the fee which would be ordinarily payable to counsel for the contemplated service (*m*).

Barristers cannot recover their fees, and are not liable for negligence.

Position of solicitor and client.

In the absence of an express contract, the agreement of a client with his solicitor is to pay him for his services the ordinary and usual charges, which are regulated chiefly by the time occupied in attendances and by the length of documents, and now generally in conveyancing matters by the amount of the purchase or mortgage money, or the rental of the property leased; and beyond this, in particular cases, any special skill or trouble may be taken into consideration (*n*). The

(*k*) *Kennedy* v. *Brown* (1862), 32 L. J. C. P. 137; *Brown* v. *Kennedy* (1863), 33 L. J. Ch. 342.

(*l*) *Fell* v. *Brown* (1792), Peake 96; *Swinfen* v. *Lord Chelmsford* (1860), 29 L. J. Ex. 382.

(*m*) *Robertson* v. *M'Donogh* (1880), 6 L. R. Ir. 433; *Kennedy* v. *Brown* (1862), 13 C. B. (N. S.), 677.

(*n*) See 33 & 34 Vict. c. 28, s. 18; 44 & 45 Vict. c. 44, s. 4, and General Order of 1882 under this Act.

client is entitled to the personal advice of the solicitor, though if a clerk sees the client, and has continual opportunities of conferring with his principal, that is sufficient (*o*). To entitle a solicitor to recover his bill of costs, he must have had a certificate to practise during the time the work was done, and it is also necessary for him to deliver a signed bill, or a bill with a letter signed, a calendar month before bringing the action (*p*), unless he obtained leave to commence the action before, which he may do on the ground that his client is about to leave England, become bankrupt, liquidate, compound with his creditors, or do any other act that may be prejudicial to him, the solicitor (*q*). It has been decided that though a solicitor cannot sue until after a month from delivery of his bill, the cause of action in respect of the work done by him arises upon its completion, and not at the expiration of the month, and therefore the Statute of Limitations runs from the time of the completion of the work (*r*). In any action brought by a client against his solicitor, the latter may set off the amount of his costs, though the month has not expired, and even though they have not been delivered, provided he delivers them before trial (*s*). A solicitor may now also enter into a contract with his client for remuneration in some way other than by his ordinary charges (*e.g.*, by commission), but such agreement must be in writing, and if in respect of any action, must be submitted to a taxing-master for approval before anything can be received under it. Any agreement for payment, however, only in the case of success

Solicitor must deliver a signed bill.

Time from which Statute of Limitations runs.

A solicitor may now enter into a contract for remuneration by commission or otherwise.

(*o*) *Hopkinson* v. *Smith* (1834), 1 Bing. 13.

(*p*) 6 & 7 Vict. c. 73, s. 37. And in this bill he must state the items; it is not sufficient to put a gross sum. When the solicitor had assigned his bill of costs, and the assignee gave notice of the assignment to the debtor, and delivered the bill to him enclosed in a letter signed by himself, and after a month sued on the bill, it was held he had sufficiently complied with the Act (*Ingle* v. *M'Cutchen* (1884), 12 Q. B. D. 518; 53 L. J. Q. B. 311). It has been held that if a third person agrees with a solicitor to pay his bill of costs against his clients, the solicitor can sue such third person without sending in a signed bill a month before action (*Greening* v. *Reeder* (1892), 66 L. T. 192).

(*q*) 38 & 39 Vict. c. 79.

(*r*) *Coburn* v. *Colledge* (1897), 1 Q. B. 702; 66 L. J. Q. B. 462; 76 L. T. 608.

(*s*) *Brown* v. *Tibbits* (1862), 31 L. J. C. P. 206.

is void, and any stipulation that the solicitor is not to be liable for negligence is also void (*t*). A solicitor could always take a security from his client for costs already incurred, and he can now also do so for costs to be incurred (*u*).

Solicitor's costs may be charged on property recovered.

The Court or a judge before whom any action, matter, or other civil proceeding has been heard, has power to order the solicitor's costs to be made a charge on property recovered or preserved by the solicitor's acts, and to make an order for raising and payment thereof out of such property; and this can be done not only as to the client's own interest in the property, but generally as regards the whole of the property recovered or preserved through the solicitor's instrumentality (*v*). If a solicitor has assigned his costs, the assignee has the same right to obtain such an order as the solicitor himself would have had, had he not made such assignment (*x*). Any such order has priority over everything except the claim of a *bonâ fide* purchaser for value without notice (*y*); and if a person takes an assignment of a judgment debt, he is always deemed to take with full notice of the solicitor's lien, even though such solicitor has not yet obtained a charging order (*z*). But if a fund recovered by the solicitor actually comes into his possession, he then has an active and special lien upon it to pay himself the costs of its recovery,

(*t*) 33 & 34 Vict. c. 28, ss. 4–15, which applies to litigious business and 44 & 45 Vict. c. 44, s. 8, which applies to conveyancing business.

(*u*) 33 & 34 Vict. c. 28, s. 16, as to litigious business, and 44 & 45 Vict. c. 44, s. 5, and General Order thereunder of 1882, as to conveyancing business.

(*v*) 23 & 24 Vict. c. 127, s. 28; *Charlton* v. *Charlton* (1883), 52 L. J. Ch. 971; 49 L. T. 267; 32 W. R. 90; *Rhodes* v. *Sugden* (1885), 29 Ch. D. 517; 54 L. J. Ch. 638; 52 L. T. 613; 33 W. R. 558; *Guy* v. *Churchill* (1887), 35 Ch. D. 489: 56 L. J. Ch. 670; 57 L. T. 510; 35 W. R. 706; *Moxon* v. *Sheppard* (1890), 24 Q. B. D. 627; 59 L. J. Q. B. 286; 62 L. T. 726. This provision only allows a solicitor to get a charging order for his costs on property recovered or preserved in a civil proceeding (*Re Humphreys, ex parte Lloyd-George* (1898), 1 Q. B. 520; 67 L. J. Q. B. 412; 78 L. T. 182.)

(*x*) *Briscoe* v. *Briscoe* (1892), 3 Ch. 543; 61 L. J. Ch. 665; 67 L. T. 116.

(*y*) *Re Suffield & Watts, ex parte Brown* (1888), 20 Q. B. D. 693; 58 L. T. 911; 36 W. R. 584.

(*z*) *Cole* v. *Eley* (1894), 3 Q. B. 350; 63 L. J. Q. B. 682; 70 L. T. 892.

apart from the Solicitor's Act, 1860, altogether (*a*). A solicitor has also a general lien on his client's papers (*b*). However, the solicitor for a party to an administration action will not, on a change of solicitors, be allowed to assert his lien for costs on papers in his possession in such a way as to embarrass the proceedings in the action, but must produce and hand over any papers when required for the carrying on of the proceedings (*c*). The London agent of a country solicitor has a general lien on the papers of, and a right to retain the moneys of a particular client of the country solicitor, in respect of the general account owing to him, the London agent, by the country solicitor, such lien or right of retention being, however, limited to the amount due to the country solicitor for costs from his client to whom the papers or moneys belong (*d*).

Solicitor's lien.

London agent's lien.

It is the duty of a solicitor to conduct his client's case with ordinary skill, and due expedition, to its conclusion (*e*); and if, having commenced any proceedings, he refuses to continue them, he will not be entitled to his costs, unless specially justified by circumstances in so doing, *e.g.*, if the client denies that he is liable to pay the costs already incurred (*f*), or if he omits to furnish the solicitor with money to meet costs out of pocket (*g*),—in either of which cases the solicitor may, after giving reasonable notice, discontinue, and bring an action for his costs already incurred. The solicitor is personally liable to pay court and jury fees, law stationers, printers, and shorthand writers (*h*); but not

The duty of a solicitor.

When he may discontinue acting.

(*a*) *Mackenzie* v. *Mackintosh* (1891), 64 L. T. 706.

(*b*) See *ante*, p. 103. See also, as to the nature and extent of the lien, *Re Llewellin* (1892), 3 Ch. 145; 65 L. T. 249; 60 L. J. Ch. 732; 39 W. R. 713.

(*c*) *Re Boughton*, *Boughton* v. *Boughton* (1883), 23 Ch. D. 169; 48 L. T. 413; 31 W. R. 517. See also *Re Hanbury*, *Whitting* v. *Nicholson* (1896), 75 L. T. 449.

(*d*) *Re Johnson*, *ex parte Edwards* (1881), 8 Q. B. D. 262; 50 L. J. Q. B. 541; *Lawrence* v. *Fletcher* (1879), 12 Ch. D. 858; *Re Mand*, 34 Solicitor's Journal, 709; Law Students' Journal, Sept. 1890, p. 208. *Re Jones* (1905), 2 Ch. 219; 74 L. J. Ch. 458.

(*e*) *Underwood* v. *Lewis* (1894), 2 Q. B. 306; 64 L. J. Q. B. 60; 70 L. T. 833.

(*f*) *Hawkes* v. *Cottrell* (1858), 3 H. & N. 243.

(*g*) *Wadsworth* v. *Marshall* (1832), 2 C. & J. 665.

(*h*) *Cocks* v. *Bruce* (1905), 21 T. L. R. 62.

witnesses, unless he specially pledges his own credit (*i*). The death of either client or solicitor during an action puts an end to the retainer, and costs incurred after the death are not recoverable (*k*). If a solicitor, in the course of his acting, does not conduct his client's business with ordinary diligence, but is guilty of some gross default, negligence, or ignorance, whereby his client is injured, he is liable to an action (*l*), but he is not liable for a mistake on some doubtful point of law (*m*). A solicitor may also under special circumstances be liable to a person, not his client, for injury caused by his improper conduct or neglect (*n*). A solicitor employing an agent is liable to his client for that agent's negligence or fraud (*o*).

When negligence of solicitor may be set up as a defence to an action for costs.

With regard to a solicitor's negligence, the old rule was, that if he brought an action to recover the amount of his bill, his negligence could not be set up as a defence to the action, unless it was of some such extreme kind that the client had obtained, and could obtain, no benefit whatever from his services; and that where the client had derived, or might derive, some benefit from what the solicitor had done, although a great part of the benefit he ought to have derived might have been lost to him, a cross-action must be brought by the client for the negligence complained of (*p*). This rule is, however, now no longer correct, for under the Judicature practice it is provided (*q*) that anything may be set off by way of counterclaim, even although sounding in damages (*r*).

Position of solicitor and

A solicitor acting in any cause or matter, has a

(*i*) *Robins* v. *Bridge* (1872), 7 Ex. 49; *Helkett* v. *Mears* (1811), 13 East, 15.

(*k*) *Whitehead* v. *Lord* (1872), 7 Ex. 691. See Poley, 241.

(*l*) See *Godfrey* v. *Dalton* (1840), 6 Bing. 460, 467

(*m*) *Kemp* v. *Burt* (1833), 4 B. & A. 424; *Pitman* v. *Francis* (1885), 1 C. & E. 355.

(*n*) *Re Dangar's Trusts* (1889), 41 Ch. D. 178; 58 L. J. Ch. 315; 60 L. T. 491.

(*o*) *Asquith* v. *Asquith*, W. N. (1895), 31.

(*p*) Chitty on Contracts, 512.

(*q*) Order xix, r. 3; Order xxi, rr. 15, 17.

(*r*) As to what will amount to negligence in a solicitor, see Chitty on Contracts, 513–515.

general authority from his client to act therein, so that his acts bind the client; and this principle applies also to another solicitor who is employed by the client's own solicitor as his agent, whether in London or elsewhere, so that not only the original solicitor, but also the agent, has vested in him all general authority in the conduct of the cause or matter, including the power to compromise in a *bonâ fide* and reasonable way (*s*). A solicitor is not absolutely incapable of buying from, selling to, or otherwise contracting with his client; but if he does so, it is incumbent on him, on the transaction being called in question, to shew either that the contract was perfectly fair and proper under the circumstances, or that the client had separate and independent advice; and if he cannot shew this, it will be set aside (*t*).

his client, and agent of solicitor.

Although a witness who is subpœnaed to attend a trial has a claim for his expenses, and when called to give an opinion and not to speak to a fact, for his loss of time (*u*), his claim is ordinarily not against the solicitor in the action, but against the party on whose behalf he is subpœnaed (*v*). The remedy also of a sheriff's bailiff who executes process in an action, is against the client, not against the solicitor (*x*).

Witness's claim for expenses is not against the solicitor.

Nor is a bailiff's.

Medical men may be either physicians, surgeons apothecaries, or chemists and druggists. As to the latter, they must be duly registered as chemists or druggists, and their duty is simply to prepare, dispense, and sell medicines, and they cannot recover for advice. As to the three former, they can recover their fees,

VII. Medical men and dentists, &c.

(*s*) *Re Newen, Carruthers* v. *Newen* (1903), 1 Ch. 812; 72 L. J. Ch. 356; 88 L. T. 264.

(*t*) See hereon *Cockburn* v. *Edwards* (1882), 18 Ch. D. 449; 51 L. J. Ch. 46; *Craddock* v. *Rogers* (1884), 53 L. J. Ch. 968; 51 L. T. 191; *Pooley's Trustee* v. *Whetham* (1885), 33 Ch. D. 111; 55 L. J. Ch. 654; 55 L. T. 333; 34 W. R. 689. See further on this subject, which belongs more especially to equity, Indermaur and Thwaites' Manual of Equity, 257–261.

(*u*) See *post*, p. 231,

(*v*) *Lee* v. *Everest* (1858), 2 H. & N. 285.

(*x*) *Royle* v. *Busby* (1881), 6 Q. B. D. 171; 50 L. J. Q. B. 196, overruling *Brewer* v. *Jones*, 10 Ex. 655.

21 & 22 Vict. c. 90.

provided they are duly registered under the Medical Act (*y*), and provided also, as to physicians, that they are not prohibited by the bylaws of any college of physicians from so doing (*z*). If a medical man is guilty of such a want of reasonable care or skill that his patient receives no benefit, he cannot recover his fees, and he is liable to an action by the patient for negligence, even though he was not called in by such patient, or was not to be remunerated by him (*a*), and any negligence may be set off against him by way of counter-claim in an action brought by him for his fees (*b*).

Dentists' Act, 1878.

With regard to dentists, it is now provided by the Dentists Act, 1878 (*c*), that from the 1st August, 1879, a person shall not be entitled to recover any fee or charge in respect of dentistry unless registered under that Act, or unless he is a duly qualified medical practitioner (*d*); and that no person shall be entitled to use the name or title of "dentist" or "dental practitioner," or any description implying that he is registered under this Act, or that he is a person specially entitled to practise dentistry, under a fine not exceeding £20, unless he is duly registered (*e*). Prior to this Act there was no provision of this character as to dentists, who are, by force of it, now placed in much the same position as medical men with regard to their right to sue to recover their fees. But the Act does not prevent an unregistered person recovering the price of false teeth supplied as distinguished from the fitting of them (*f*).

Veterinary Surgeons' Act, 1881.

With regard also to veterinary surgeons, it is now

(*y*) 21 & 22 Vict. c. 90, amended by 23 Vict. c. 7; 39 & 40 Vict. c. 40 and c. 41; and 49 & 50 Vict. c. 48.

(*z*) 49 & 50 Vict. c. 48, s. 6; 21 & 22 Vict. c. 90, s. 32. Before 21 & 22 Vict. c. 90, a physician could not sue for services rendered unless there had been an express contract to pay him.

(*a*) See generally as to torts arising peculiarly from negligence, *post*, Part. ii. ch. vi.

(*b*) Order xix, r. 3.

(*c*) 41 & 42 Vict. c. 33.

(*d*) Sect. 5.

(*e*) Sect. 3.

(*f*) *Hannan* v. *Duckworth* (1904), 90 L. T. 546; *Seymour* v. *Pickett* (1905), 1 K. B. 715; 74 L. J. K. B. 913; 92 L. T. 519.

provided by the Veterinary Surgeons Act, 1881 (*g*), that they must be duly registered; and any person practising as a veterinary surgeon after 31st December, 1883, without being on the register, is liable to a fine not exceeding £20, and is not entitled to recover any fee or charge for practising (*h*).

VIII. Witnesses.

Every person subpœnaed as a witness is entitled to be paid a reasonable sum for his expenses of going to, staying at, and returning from the trial, and this sum must be paid or tendered him at the time of his being served with his subpœna, otherwise he is not bound to attend. If a witness lives within the bills of mortality, it is sufficient to give him a nominal sum with his subpœna, usually one shilling. If a witness who is not paid a proper sum for his expenses yet chooses to attend, he is justified in refusing to be sworn until his expenses have been paid (*i*). But though a witness is always entitled to his expenses, yet he is not entitled to be paid for his loss of time, unless he is a professional witness called not to give evidence upon some matter of fact, but of opinion (*e.g.*, an expert), and then he is so entitled (*k*).

When a witness entitled to be paid for loss of time.

IX. Corporations, companies, and institutions.

A corporation is some legal body always known by the same name, and perpetually preserving its identity, and it may be either a corporation sole, that is, composed of one person (*e.g.*, a bishop), or a corporation aggregate, that is one composed of many persons, *e.g.*, some company incorporated by Act of Parliament. Corporations aggregate may be created either by Act of Parliament, charter, or letters-patent, and the great peculiarity as to their contracts is that, generally speaking, they must be under their common seal. To this rule there are, however, exceptions, which may chiefly be stated to be contracts comprising matters of every-day occurrence, or of such a nature as to be actually necessary, these being valid, though not under the

(*g*) 44 & 45 Vict. c. 62. (*h*) Sect. 17.

(*i*) As to the meaning of the expression "bills of mortality," see Wharton's Law Lexicon, title "Bills of Mortality."

(*k*) See *Webb* v. *Page* (1833), 1 C. & R. 23; *Lee* v. *Everest* (1858), 2 H. & N. 285.

Lawford v. *Billericay Rural Council.*

common seal (*l*). And it must now be taken also as settled, that a corporation is liable in respect of work actually done, or goods actually provided (that is to say, on executed contracts), where the work done, or things provided, were reasonable for the purposes for which the corporation was existing, notwithstanding that there was no contract under seal (*m*). And where the corporation has contracted without seal and has performed the whole of its part of the contract, it can sue upon such contract (*n*). Also a corporation created for trading purposes can make such contracts as are of ordinary occurrence in such trade without seal, irrespective of the magnitude of the particular transaction (*o*).

Differences between limited and unlimited companies.

Companies may be either unlimited or limited, and now any company consisting of seven or more persons may, and of more than twenty persons must be registered (*p*). Associations consisting of more than twenty persons, and not so registered, are illegal associations, and parties concerned therein are not entitled to the protection or assistance of the court (*q*). An unlimited company is simply a combination of several persons for some business, and the members stand in the position of ordinary partners, and are liable to an unlimited extent for all the debts of the partnership, and the ordinary partnership rules generally apply to them (*r*). A company may, however, be limited if duly registered

(*l*) *Ludlow* v. *Charlton* (1840), 6 M. & W. 815; *Clarke* v. *Cuckfield Union* (1852), 21 L. J. Q. B. 349; *Wells* v. *Mayor of Kingston upon Hull* (1875), L. R. 10 C. P. 402; 44 L. J. C. P. 257.

(*m*) *Lawford* v. *Billericay Rural Council* (1903), 1 K. B. 772; 72 L. J. K. B. 554; 88 L. T. 317.

(*n*) *Mayor of Stafford* v. *Still* (1827), 4 Bing. 75.

(*o*) *South of Ireland Colliery Co.* v. *Waddle* (1869), 38 L. J. C. P. 338.

(*p*) 25 & 26 Vict. c. 89, ss. 4, 6. By 7 Edw. VII. c. 50, s. 37, any two or more persons can now be registered as a private company, provided its articles restrict the right to transfer shares and limit the members to fifty and forbid the public being invited to take shares or debentures.

(*q*) *Sykes* v. *Beadon* (1879), 11 Ch. D. 170; 48 L. J. Ch. 822; *Smith* v. *Anderson* (1881), 15 Ch. D. 247; 50 L. J. Ch. 39; 29 W. R. 21; *Jennings* v. *Hammond* (1882), 9 Q. B. D. 225; 51 L. J. Q. B. 493; *Re Padstow Assurance Association* (1882), 20 Ch. D. 137; 45 L. T. 774; *Shaw* v. *Benson* (1883), 11 Q. B. D. 563; 52 L. J. Q. B. 575; *Crowther* v. *Thorley* (1883), 48 L. T. 644; 31 W. R. 564.

(*r*) As to which, see *ante*, pp. 156-165.

as such (*s*), and the members are then only liable to the extent of their respective shares or guarantees; so that any person contracting with such a company must only look for payment to the assets of the company. A limited partner's responsibility is stated *ante*, p. 164.

How contracts entered into by registered companies.

Any contract made by a registered company need only be under such company's seal when the same would, if made by a private person, require a seal; where, if made by a private person, writing would be necessary, signature by some person authorised by the company is sufficient; and where no writing would be necessary if made by a private person, the contract may be made by parol by some person authorised by the company (*t*), and such authority may be implied as regards matters in the ordinary course of the company's business, but not beyond that (*u*). A contract made by a person on behalf of an intended company cannot afterwards, on its formation, be ratified by the company, but a fresh contract with the company must be entered into (*x*). Under the Companies Act, 1900 (*y*), certain restrictions have now been made as to a company commencing business; and contracts made after incorporation, but before the company is entitled to commence business, are only provisionally binding until then, when they automatically become binding without any confirmation (*z*). Shares in a registered company may be transferred by deed duly registered at the company's office, or, in the case of such a company limited by shares, when shares are fully paid up, by simple delivery of share warrants (*a*).

Companies' Act, 1900.

(*s*) 25 & 26 Vict. c. 89.

(*t*) 30 & 31 Vict. c. 131, s. 37.

(*u*) *Re Cunningham & Co., Simpson's Claim* (1887), 36 Ch. D. 532.

(*x*) *Re Empress Engineering Co.* (1881), 16 Ch. D. 125; 29 W. R. 342; 43 L. T. 742; *Re Northumberland Avenue Hotel Co., Sully's Case* (1886), 33 Ch. D. 16; 54 L. T. 777; *Kelner* v. *Baxter* (1867), L. R. 2 P. C. 174; 36 L. J. C. P. 94.

(*y*) 63 & 64 Vict. c. 48.

(*z*) Sect. 6.

(*a*) 30 & 31 Vict. c. 131, ss. 27–33. The subject of companies is of such general importance that it is well worthy of some separate attention by every student, and particular attention should be given to the Companies Acts 1900 (63 & 64 Vict. c. 48) and 1907 (7 Edw. VII. c. 50). The student may gain a fair elementary knowledge of the subject of

Liability in respect of contracts on behalf of charities and institutions generally.

With regard to contracts made with persons acting on behalf of institutions and associations, such as charities, clubs, and the like, the rule is that the persons making or authorising the making of the contract are the persons liable, unless indeed the other party has specially agreed that he will look for payment only to the assets of the institution (*b*). And this rule applies to all miscellaneous undertakings, it being always a question, when a person disputes his liability, whether he in any way authorised what has been done, so as to make himself liable. Thus, if a person becomes one of a committee of direction of any such undertaking or institution, this will be evidence to shew that he has made himself liable for goods supplied for its purposes, even although he himself did not give, or assist in giving, the particular order in question. The mere fact, however, of a person being a member of a committee of management is only evidence of his having authorised the making of the contract. Thus, where wine for a club had been ordered by the house-steward, according to the directions of the committee of management, in an action brought against two members of that committee, it was held that it was a question for the jury whether the defendants had authorised the steward to order the wine in question (*c*).

Todd v. *Emly.*

X. Master and servant.

Contracts in the relation of master and servant may be conveniently considered under three heads, viz., (1) As to the hiring; (2) As to the power of the servant, and the relation between the parties during the service; and (3) As to the determination of the service.

As to the hiring.

Firstly, then, as to the hiring.—There may be an express contract for the hiring of a servant, and when there is, it may be either in writing or by word of

companies from a perusal of Eustace Smith's Summary of the Law of Companies.

(*b*) *Coutts* v. *Irish Exhibition*, Weekly Notes (1891), p. 41; 90 Law Times Newspaper, 336; Law Students' Journal, April 1891, p. 81.

(*c*) *Todd* v. *Emly* (1895), 8 M. & W. 505. As to the right of indemnity from members of a club, see *Wise* v. *Perpetual Trustee Co.* (1903), A. C. 139; 72 L. J. P C. 31.

mouth, unless it is a hiring for a period beyond a year, in which case writing is by the Statute of Frauds necessary (*d*). A contract to remain in the service of the employer during the life of either is valid, and not illegal as in restraint of trade, but such a contract must be by deed (*e*). In every express contract of hiring, its duration, and the wages in respect of the hiring should be stated; but if there is no express contract, but simply an entering into a service, it is called a general hiring, which has been decided to be for different terms according to the nature of the service (as will be next noticed), but in respect of which hiring it is always presumed, unless the contrary appears, that reasonable wages are to be paid (*f*).

Different kinds of servants.

Persons occupying the legal position of servants may be classified as clerks, domestic or menial servants, and servants who are neither in the position of clerks nor domestic or menial servants. A general hiring of a clerk is a yearly hiring determinable by three months' notice, or an equivalent three months' wages (*g*); and a general hiring of a domestic or menial servant is also a yearly hiring, but determinable by a month's notice, or an equivalent month's wages (*h*). As to the latter, it has been considered that by custom there is a right at the end of the first month to determine the service by notice given at or before the expiration of the first fortnight; but it has been held, that though, if such a custom does exist, it is not unreasonable, but good in the absence of special contract, yet its existence must in every case be proved, and that it is not a

Effect of general hiring.

Moult v. *Halliday.*

(*d*) 29 Car. II. c. 3, s. 4, *ante*, pp. 56, 57.

(*e*) *Wallis* v. *Day* (1837), 2 M. & W. 273.

(*f*) Chitty on Contracts, 501. Payment of wages to workmen in public-houses is illegal (46 & 47 Vict. c. 31; 50 & 51 Vict. c. 58, s. 11). Where there is an agreement entitling a master to retain a servant's wages on breach by him of certain regulations, the servant must have an opportunity of first being heard on the matter before his wages can lawfully be declared forfeited (*Armstrong* v. *South London Tramways Co.* (1891), 64 L. T. 96).

(*g*) *Fairman* v. *Oakford* (1860), 5 H. & N. 635.

(*h*) *Fawcet* v. *Cash* (1834), 5 B. & Ad. 904. The housekeeper of a large hotel is not a menial servant, and cannot be dismissed on a month's notice in the absence of express agreement (*Lawler* v. *Linden*, 10 Irish Rep. C. L. 188).

notorious custom of which the Court will take judicial notice (*i*). A general hiring of other kinds of servants, though it will be taken primarily as a hiring for a year (*k*), must depend more especially upon the circumstances of each particular case, as indeed it must to a certain extent in all cases, so that the fact of a servant's wages being payable at longer or shorter periods, as the case may be, may alter the presumption as to the hiring and the length of notice required, as also may a usage or custom in any particular trade or business if it is clearly proved. Although a general hiring of a servant may therefore be construed as a hiring for a year, and so on from year to year, yet as it need not necessarily extend beyond the year, it is valid though not in writing (*l*).

As to the power of the servant, and the relation between master and servant.

Secondly, as to the power of the servant, and the relation between the parties during the service.—It will be at once seen that a person by entering into another's service becomes that other's agent for certain purposes, and that therefore the ordinary principles of agency apply, and answer the question of his power to bind his master by his contracts. These principles of agency have already been considered, and the very great difference in the powers of a general and special agent pointed out (*m*); and it follows, from that difference, that the power of a servant to bind his master must depend on whether he is merely a special agent appointed simply to do some particular act, or whether he is a general agent, having a power given him by his master to do all acts of a certain nature. If he is of the former kind, then any contract which he makes can only bind his master when strictly in conformity with his master's orders; but if he is of the latter kind, then any contract he may make will bind his master, even though it goes beyond his master's orders

The ordinary principles of agency apply to these contracts.

(*i*) *Moult* v. *Halliday* (1898), 1 Q. B. 125; 77 L. T. 794; 46 W. R. 318.

(*k*) *Bayley* v. *Rimmel* (1836), 1 M. & W. 506.

(*l*) *Beeston* v. *Collyer* (1838), 4 Bing. 309. See as to contracts not to be performed within a year, *ante*, pp. 56, 57.

(*m*) See *ante*, p. 146.

in the particular case, if it is within the scope of his ordinary and usual authority, and the person with whom he contracts has no notice of the limitation of his authority (*n*).

As to torts committed by a servant.

A master is liable for his servant's torts when committed by the servant acting in the course of his ordinary employment and duty, but he is not liable criminally for his servant's unauthorised acts (*o*).

Servant entitled to be paid wages though disabled through temporary illness.

Master not bound to provide medical attendance.

A servant is entitled to be paid wages during a time he was disabled from service by illness (*p*); but the relation between an ordinary master and servant (it is otherwise as to an indoor apprentice) does not make it obligatory on a master to provide medical attendance or medicines for his servant. If, however, he sends for a medical practitioner for his servant whilst under his roof, he is liable, and he cannot deduct from the servant's wages any expenses incurred thereby, unless it was specially so agreed (*q*).

Master not bound at common law to indemnify servant against injuries.

There was at common law no implied contract by a master to indemnify his servant against any injury happening in the course of his employment, or even not to expose his servant to any extraordinary risks (*r*); but there was always a duty cast on him to make use of proper tackle and machinery in his business, and also to employ duly competent co-servants, and if any injury arose to the servant through the non-observance of such duties, the master was liable (*s*). This subject has been considerably affected by the Employers Liability Act, 1880 (*t*), and the Workmens Compensation Act, 1906 (*u*), which are hereafter dealt with (*x*).

(*n*) *Brady* v. *Todd* (1861), 9 C. B. N. S. 562; *Howard* v. *Sheward* (1867), L. R. 2 C. P. 148. (*o*) See hereon, *post*, Part II. chap. i.

(*p*) *Cuckson* v. *Stones* (1859), 1 E. & E. 248.

(*q*) See Chitty on Contracts, 509; and the principle that a master is not bound to provide medical attendance or medicines for his servant is the same even although the servant's illness has arisen through an accident which occurred in performing his duties as servant, unless, indeed, it arose in such a way that the master could be held liable for it.

(*r*) *Riley* v. *Baxendale* (1861), 6 H. & N. 445.

(*s*) *Wilson* v. *Merry* (1868), L. R. 1 H. L. Sc. 526.

(*t*) 43 & 44 Vict. c. 42. (*u*) 6 Edw. VII. c. 58.

(*x*) See *post*, Part II. chap. vi.

As to the determination of the service.

Thirdly, as to the determination of the service.—The general way in which this happens is by notice either by the master or the servant, the length of which notice varies according to the contract for hiring, or the nature of the service (*y*).

When master may discharge servant without notice.

In giving the notice, it is not necessary to allege any reason for it; and in the following cases the master will be justified in putting an end to the contract of service without any notice:—

1. When the servant unlawfully absents himself from his work.

2. If he proves to be incompetent to perform any particular service which he agreed to render.

3. If he refuses or neglects to obey his master's reasonable orders; and

4. If he is guilty of any gross moral misconduct, or of habitual neglect, or even of one extreme act of neglect (*z*), in the performance of his duties.

And in these cases the servant will only be entitled to wages already accrued due, so that if his wages are payable monthly, and he is discharged in the middle of a month, he forfeits his right to any part of such month's wages (*a*).

The death of either master or servant will operate to dissolve the contract of service (*b*).

Master's liability as to giving a character to his servant.

A master is not bound to give his servant a character, but if he does so, he must give what he believes to be a true one. If he wilfully gives a false character, he will be liable to an action for libel or slander; but if he believes the character to be true, and gives it honestly and fairly, without exaggeration, it comes within the

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(*y*) As to which see *ante*, p. 235.

(*z*) *Baster* v. *London and County Printing Works* (1899), 1 Q. B. 901; 68 L. J. Q. B. 622; 80 L. T. 757.

(*a*) Chitty on Contracts, 506, 507. As to the measure of damages in an action by a servant for wrongful dismissal, see *post*, Part III. chap. i.

(*b*) *Farrow* v. *Wilson* (1869), L. R. 4 C. P. 774; 38 L. J. C. P. 326.

designation of a privileged communication, and he is not liable (*c*).

Many important points in the relation of master and servant belong to the second division of this work, viz., "Torts," and are there considered (*d*).

(*c*) See *post*, Part II. chap. v.
(*d*) See *post*, Part II., particularly chap. vi., "Of Torts arising peculiarly from negligence."

CHAPTER VII.

OF CONTRACTS WITH PERSONS UNDER SOME DISABILITY.

1. Infants.

In this chapter will be considered the position of the following parties as to their contracts: Infants, married women, persons of unsound mind, intoxicated persons, persons under duress, and aliens.

An infant, in the eyes of the law, is a person under the age of twenty-one years, at which period he or she is said to attain majority (*a*). For his torts and crimes an infant may be liable, but for his contracts, as a general rule, he is not liable, unless the contract is for necessaries. The law as to infants' liability on their contracts was much altered by the Infants Relief Act, 1874 (*b*), but to properly understand the application of that statute it will be necessary to first notice the law as it stood before its passing.

Infant is always liable on his contracts for necessaries.

Other contracts could formerly be ratified.

On his contracts for necessaries an infant is now, and always has been, liable; and with regard to his other contracts, they were not formerly actually void, but only voidable, and accordingly, from the earliest times, capable of ratification after he came of age without any new consideration; and it was held that any act or declaration which recognised the original contract as binding was sufficient ratification. However, by Lord Tenterden's Act (*c*) it was provided that no action should be maintained whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification after full age of any promise or simple contract made during infancy, unless such promise or ratification was made by some writing

Lord Tenterden's Act.

(*a*) Majority is attained on the day before the anniversary of the 21st birthday, per Holt, L.C.J., 1 Lord Raym. 480.

(*b*) 37 & 38 Vict. c. 62.

(*c*) 9 Geo. IV. c. 14, s. 5.

signed by the party to be charged therewith (*d*). As to contracts not for necessaries, therefore, the law formerly was that they might be ratified by the infant after coming of age by writing duly signed by him.

Infants Relief Act, 1874.

This, however, is no longer so, for by the Infants Relief Act, 1874 (*e*), it is enacted that "all contracts, whether by specialty or by simple contract, henceforth entered into by infants (1) for the repayment of money lent, or to be lent, or (2) for goods supplied or to be supplied (other than contracts for necessaries), and (3) all accounts stated with infants, shall be absolutely void; provided always, that this enactment shall not invalidate any contract into which an infant may, by any existing or future statute, or by the rules of common law or equity, enter, except such as now by law are voidable" (*f*); 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 or contract made during infancy, *whether there shall or shall not be any new consideration for such promise or ratification after full age*" (*g*). It will be observed that, by sect. 1, certain specific contracts are made void, and by sect. 2, no contract of any kind is capable of ratification.

Promise to marry by infant.

In several cases since the Act the point has been raised of the position of a person who, having during infancy entered into a contract to marry, after attaining full age recognises the promise by continuing his position as before, or again promises to marry the party in question. It has been held that, with regard to ratification, the Infants Relief Act, 1874, applies to this in the

(*d*) Signature by an agent was not sufficient, and 19 & 20 Vict. c. 97, s. 13, made no difference on this point.

(*e*) 37 & 38 Vict. c. 62.

(*f*) Sect. 1. As to the latter part of this section, see note (*g*) *infra*.

(*g*) Sect. 2. This Act, in making infant's contracts void, does not affect the powers of infants in certain cases to convey lands, viz., By the custom of gavelkind at the age of fifteen by feoffment; on marriage by the sanction of the court under 18 & 19 Vict. c. 43; and by the sanction of the court for payment of debts under 1 Wm. IV. c. 47.

same way as to other cases, and that in the absence of some distinct evidence of a new promise no action can be maintained (*h*). It is, however, in such cases very difficult to determine whether what has taken place is in fact a new contract, or is only an attempted ratification. Thus, in one case, an infant made a promise of marriage to the plaintiff, and the day after he had attained his majority he said to her, "Now I may and will marry you as soon as possible;" and it was held that it was a question of fact for the jury whether this was a fresh promise, or a ratification of the promise made during infancy (*i*). In another case, the defendant, who had promised the plaintiff marriage when under age, continued in the same familiar position with her for four years after coming of age, and it was held that there was here evidence to go to the jury of a new promise having been made (*j*).

Northcote v. *Doughty.*

Ditcham v. *Worrall.*

Infant liable for necessaries.

The Infants Relief Act, 1874, whilst providing that an infant's contract to pay for goods supplied shall be void, expressly excepts a contract for necessaries; and in addition to this the Sale of Goods Act, 1893 (*k*), enacts, that where necessaries are sold and delivered to an infant, he must pay a reasonable price therefor. It is important, therefore, to properly understand the meaning of the term "necessaries." It may also be well to mention that in any action against an infant for the price of necessaries, it is for the judge to first consider whether the goods are of such a nature as could possibly come under that description, and if not, there is nothing to go to the jury, and the plaintiff will be non-suited; but if the judge is of opinion, on the evidence adduced, that the goods are of such a nature that they may be considered necessaries, he leaves it to the jury to say whether, under the particular circumstances of the case, they are in fact necessaries (*l*). As a matter of course,

Functions of judge and jury.

(*h*) *Coxhead* v. *Mullis* (1878), 3 C. P. D. 439; 47 L. J. C. P. 761.
(*i*) *Northcote* v. *Doughty* (1879), 4 C. P. D. 385.
(*j*) *Ditcham* v. *Worrall* (1880), 5 C. P. D. 410; 49 L. J. C. P. 688; 29 W. R. 59. See also *Holmes* v. *Bircly* (1888), 36 W. R. 795.
(*k*) 56 & 57 Vict. c. 71, s. 2.
(*l*) *Peters* v. *Fleming* (1840), 6 M. & W. 47; *Barnes* v. *Toye* (1884)

The meaning of the term "necessaries."

the term "necessaries" will include all things essential for existence and without which a person cannot reasonably be supposed to live, viz., ordinary lodging, food, and clothing; but it has a much wider application than this, and many things not actually essential to existence are included under it. The rule as to what will be deemed necessaries has been stated as follows: "All such articles as are purely ornamental are not necessary, and are to be rejected, because they cannot be requisite for any one; and for such matters, therefore, an infant cannot be held responsible. But if they are not strictly of this description, then the question arises whether they are bought for the necessary use of the party, *in order to maintain himself properly in the degree, state, and station of life in which he moved;* if they were, for such articles the infant may be responsible" (*m*). So that useful articles which are suitable to the age, rank, and condition in life of the particular infant may be necessaries for him. Also medical attendance and medicines, schooling, and instruction in a trade or calling suitable to the infant's position, come under the category of necessaries (*n*).

Instance.

To take an instance to exemplify this rule it has been held that an infant is liable for the price of horses bought by him if his position warranted his keeping horses, or if riding was recommended by his medical adviser (*o*). To enumerate a series of cases in which things have or have not been held to be necessaries would be useless, and the answer to the question of what are necessaries for which an infant will be liable

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13 Q. B. D. 410; 53 L. J. Q. B. 567; *Johnstone* v. *Marks* (1887), 19 Q. B. D. 509; 57 L. J. Q. B. 6; *Nash* v. *Inman* (1908), 77 L. J. K. B. 626.

(*m*) Per Parke, B., in *Peters* v. *Fleming* (1840), 6 M. & W. 47. See further as to meaning of term "necessaries," *Skrine* v. *Gordon*, 9 Irish Reps. C. L. 479; *Clyde Cycle Co.* v. *Hargreaves* (1898), 78 L. T. 296. The Sale of Goods Act, 1893 (56 & 57 Vict. c. 71, s. 2), also contains a definition of "necessaries," it enacting as follows: "Necessaries in this section mean goods suitable to the condition in life of such infant or minor, or other person, and to his actual requirements at the time of the sale and delivery."

(*n*) Co. Litt. 672, a; *Walter* v. *Everard* (1891), 2 Q. B. 369; 60 L. J. Q. B. 738.

(*o*) *Hart* v. *Prater* (1837), 1 Jur. 623.

may be shortly stated to be, that he will be liable not merely for the bare essentials of life, but also for education, and generally for anything suitable to his rank and condition in life, and it will always be a question for the jury whether an infant is liable or not in every particular case (*p*). Where an infant is sued for the price of goods supplied to him on credit, he may, for the purpose of shewing that they were not necessaries, give evidence that when they were ordered he was already sufficiently supplied with goods of a similar description, and it is immaterial whether the plaintiff did or did not know of the existing supply (*q*). If an infant has a wife and children, he will be equally liable for necessaries supplied to her, or them, as if supplied to himself (*r*).

Evidence to shew goods not necessaries.

Necessaries for wife or childen.

The statement that an infant is liable for necessaries must, however, be taken with the following restriction, viz., that if an infant is residing under the parental roof, he cannot generally be made responsible even for necessaries, for in such a case the presumption is that the credit is intended to be given to the parent, and not to the infant. It must not, however, from this be taken as law, that in such a case the parent is necessarily liable for such things supplied to his child living with him, for he is not so liable as a matter of course, it being always essential, to render the parent liable, to shew that he in some way—either by a precedent act or a subsequent ratification—authorised his child to contract and to bind him; for if he has in no way given any authority, he is no more liable to pay a debt contracted by his child, even for necessaries, than a stranger would be. But slight evidence of the parent's authority will usually be sufficient, so that if goods are delivered at the parent's residence, this will *primâ facie* raise a presumption of

An infant is not liable for necessaries if residing under the parental roof.

Nor is the parent necessarily liable.

(*p*) See hereon *Ryder* v. *Wombwell* (1868), L. R. 4 Ex. 32; 37 L. J. Ex. 48.

(*q*) *Barnes* v. *Toye* (1884), 13 Q. B. D. 410; 53 L. J. Q. B. 567; 51 L. T. 292; *Johnstone* v. *Marks* (1887), 19 Q. B. D. 509; 57 L. J. Q. B. 6; *Nash* v. *Inman* (1908), 2 K. B. 1; 77 L. J. K. B. 626.

(*r*) *Turner* v. *Frisby* (1794), 1 Str. 168.

his liability, though if, directly he heard of, or saw the goods, he objected to them, this would operate to rebut that liability.

Infant not liable for money lent, unless advanced to buy necessaries.

For money lent to an infant not for the purposes of buying necessaries he cannot be liable (*s*), but if money is advanced to him to procure necessaries, and is so expended by him, the Court will order repayment to the lender, on the ground that he stands in the place of the infant's creditor, who could have recovered against him had his claim not been satisfied (*t*). And where a person advances money to an infant to enable him to buy land, and the money is so applied, the lender is entitled to stand in the place of the vendor, and enforce the vendor's lien on the land (*u*). At common law, it was no answer to a plea of infancy that the defendant when making the contract had fraudulently represented himself to be of full age when in fact he was an infant (*x*). Thus, where an infant had obtained a lease of a furnished house on an implied representation that he was of full age, it was held that although the lease must be declared void, and possession ordered to be delivered up, yet the infant was not liable for use and occupation (*y*). But an infant who has represented himself to be of full age incurs an equitable obligation and is bound by payments made and acts done at his request on the faith of such representation and is liable to restore any advantage he has obtained by such representation to the person from whom he obtained it (*z*). Whether, since the Judicature Acts, a defence of infancy to a common law claim can be sustained when the defendant by his fraud

Nor is he liable merely because he has represented himself to be of age.

(*s*) *Nottingham Permanent Benefit Building Society* v. *Thurstan* (1903), A. C. 6; 72 L. J. Ch. 134; 87 L. T. 529; 51 W. R. 273.

(*t*) *Martin* v. *Gale* (1877), 4 Ch. D. 428; 46 L. J. Ch. 84; *Bateman* v. *Kingston*, 6 L. R. Ir. 328; *Lewis* v. *Alleyne*, 32 Solicitors' Journal, 486; Law Students' Journal, July 1888, p. 150.

(*u*) *Nottingham Permanent Benefit Building Society* v. *Thurstan*, *supra*.

(*x*) *Liverpool Adelphi Association* v. *Fairhurst* (1854), 9 Ex. 422; *Bartlett* v. *Wells* (1862), 1 B. & S. 836.

(*y*) *Lempriere* v. *Lange* (1879), 12 Ch. D. 675; see also *Bateman* v. *Kingston*, 6 L. R. Ir. 328.

(*z*) *Ex parte Unity Banking Association* (1858), 3 De G. & J. 63.

induced the plaintiff to enter into the contract has not come before the courts (*a*).

Infant not liable on a bill or note, though for necessaries.

An infant is not liable on a bill of exchange or promissory note to which he is a party, although it was given for necessaries (*b*); but although not liable on the bill or note, he may yet be sued on the original debt for necessaries. A bill or note given by an infant is, however, good as against the other parties thereto (*c*).

Betting and Loans Infants Act, 1882.

But if a bill or note is given after coming of age, in respect of a loan made to the giver during infancy, it is provided that the instrument shall be void as against all persons whomsoever (*d*).

Infancy is a personal privilege.

Infancy is a personal privilege, and does not affect the other contracting person's liability, so that though an infant is not liable, generally, to be sued on his contracts, he is capable of suing, subject to this, that he cannot sue for specific performance of a contract (*e*).

Continuous contract for which infant liable if he does not disaffirm on majority.

With regard to certain of an infant's contracts, embracing matter of a continuous nature, they stand in this different position from his other contracts, in that, if the infant does not disaffirm the contract within a reasonable time of attaining majority, he will be bound. This is so with regard to an infant's contract to buy land (*f*); also in the case of a lease made by an infant, who is bound thereby if he receives rent after he comes of age; also with regard to shares in a company, or a building society, taken by an infant; also in the case of his having entered into partnership (*g*). And if an infant makes a marriage settlement which is not binding on him, but he does not repudiate it within a reasonable time after attaining majority, he is bound

(*a*) Pollock on Contracts, 55, 77.

(*b*) *Re Soltykoff, ex parte Margrett* (1891), 1 Q. B. 413; 60 L. J. Q. B. 339; 39 W. R. 337.

(*c*) 45 & 46 Vict. c. 61, s. 22 (2).

(*d*) 55 & 56 Vict. c. 4, s. 5.

(*e*) *Bateman* v. *Kingston*, 6 L. R. Ir. 328. See Indermaur and Thwaites' Manual of Equity, 292.

(*f*) See Indermaur and Thwaites' Conveyancing, 248–251. See also *Nottingham Permanent Benefit Building Society* v. *Thurstan* (1903), A. C. 6; 72 L. J. Ch. 134; 87 L. T. 529; 51 W. R. 273.

(*g*) *Re Yeoland's Consols* (1888), 58 L. T. 922; *Whittingham* v. *Murdy* (1889), 60 L. T. 966; see also *ante*, p. 163.

thereby (*h*). Where an infant has contracted for things not necessaries, and has paid for them, he cannot afterwards recover back the amount if he has received any benefit from the contract (*i*), but if he has in fact received no benefit whatever, it is otherwise (*k*).

Infant not liable on a contract to marry.

But if marriage takes place, it is generally binding.

Although an infant's contract to marry stands on the same footing as an ordinary contract he enters into—*i.e.*, the infant is not liable on it, but can sue in respect of it—yet if the infant actually completes the contract by going through the marriage ceremony in the manner prescribed by law, then if a male, of the age of fourteen or upwards, or a female, of the age of twelve or upwards, it is absolutely binding; or if under those ages, but not under the age of seven, then he or she may avoid the marriage on arriving at such ages respectively: but if either party is under the age of seven, then the marriage is absolutely void.

Liability of infant apprentice.

An infant may bind himself as an apprentice, because that is for his benefit; and a covenant entered into in the apprenticeship deed by an infant to pay a premium, is capable of being enforced if the deed was a provident and proper arrangement for him, and necessary if he wished to learn the business, and provided that the amount of the premium is fair and reasonable, and that the instruction has duly been given under the deed (*l*). If an apprentice misbehaves himself in his service, the master may correct him, or complain to a justice of the peace to have him punished according to the statute (*m*); but the master cannot sue the infant for damages, or for an injunction in respect of breach of contract con-

(*h*) *Edwards* v. *Carter* (1893), A. C. 360; 63 L. J. Ch. 100; 69 L. T. 153; *Re Hodson's Settlement, Williams* v. *Knight* (1894), 2 Ch. 421; 63 L. J. Ch. 609; 71 L. T. 77.

(*i*) *Valentini* v. *Canali* (1890), 24 Q. B. D. 166; 59 L. J. Q. B. 74; 61 L. T. 731.

(*k*) *Hamilton* v. *Vaughan-Sherrin Electrical Engineering Co.* (1894), 3 Ch. 589; 63 L. J. Ch. 795; 71 L. T. 325.

(*l*) *Walter* v. *Everard* (1891), 2 Q. B. 369; 60 L. J. Q. B. 738; 65 L. T. 443.

(*m*) Unless indeed the apprentice is an infant, and the apprenticeship deed contains such conditions that it is manifestly not for his benefit, in which case it cannot be enforced at all against him: *Corn* v. *Matthews* (1893), 1 Q. B. 310; 62 L. J. M. C. 61; 68 L. T. 482.

tained in the apprenticeship deed, though, of course, he can sue the father or other person who may have joined in the deed and covenanted (*n*).

Infant's torts.

It has been already stated, incidentally, that an infant is liable in respect of his torts (*o*), so that, for instance, an action for assault, libel, or trespass may be brought against him. But if the tort is one arising out of contract, then the infant cannot be sued, so that where an infant, having hired a horse, drove negligently and injured the animal, it was held he could not be sued (*p*); but where a horse was hired by an infant for a ride on the road with an express stipulation that it was not to be jumped, and the animal was jumped at a fence and injured, the contrary was held, on the principle that the jumping of the horse was quite outside the hiring, and that it was not strictly a tort arising out of the contract (*q*). Though an infant cannot ordinarily be sued for money had and received, yet if he wrongfully embezzles money, he may be sued for that; and where, having embezzled money, an infant on coming of age gave a memorandum of charge on certain property to secure payment of the amount, it was held that, being liable to an action of tort, he gave the charge to avoid being sued, and that the charge was perfectly valid (*r*).

Jennings v. *Rundall.*

Burnard v. *Haggis.*

Re Seagar, Seeley v. *Briggs.*

II. Married women.

The position of married women as to their contracts may be conveniently considered in the following order:—

1. As to their contracts made before marriage.

2. As to their contracts made after marriage and during cohabitation; and

3. As to their contracts made after marriage and during separation.

(*n*) *Gilbert* v. *Fletcher* (1629), Cro. Car. 179; *De Francesco* v. *Barnum* (1890), 43 Ch. D. 165; 59 L. J. Ch. 151; 62 L. T. 40.
(*o*) *Ante*, p. 240.
(*p*) *Jennings* v. *Rundall* (1799), 8 T. R. 335.
(*q*) *Burnard* v. *Haggis* (1863), 14 C. B. (N. S.) 45; 32 L. J. C. P. 189.
(*r*) *Re Seager, Seeley* v. *Briggs* (1889), 60 L. T. 665.

Firstly, as to contracts made before marriage.—Here it is apparent that there may be a benefit or a liability in respect of the contract, and any such benefit, being an outstanding right, is a *chose in action*. The effect of marriage upon personal property in possession was, until comparatively lately, to operate as an absolute gift of it in law to the husband, so that from that time it was no longer the wife's property, but his in every way; but with regard to mere *choses in action* this was never so, for to entitle the husband to them he must have reduced them into possession, and if he did this, then they formed part of his estate in the same way as *choses in possession*. If, however, he did not reduce them into possession, and his wife died, he would not then be entitled to them *jure mariti* (that is, in his capacity of husband), but only by taking out letters of administration to his wife, and thus constituting himself her legal personal representative; but in whichever way he took he was bound to pay her debts which might possibly exist. If the wife survived the husband, then her *choses in action* not having been reduced into possession, survived and belonged to her. To constitute a sufficient reduction into possession by the husband, it was technically said that he must take some step shewing his disagreement to, and extinguishing, the interest of his wife, *e.g.*, of course the actually receiving the principal money would always so operate, though not the mere receipt of interest, and again, the recovery of judgment in an action brought by husband and wife would be sufficient (*s*).

1. As to their contracts made before marriage.

Rights of husband in wife's personal property.

What is a sufficient reduction into possession.

With regard, however, to all marriages on or after 1st January, 1883, it is now provided that all property which a woman is possessed of at the date of marriage, as well as property she shall thereafter acquire, shall be to her separate use (*t*). This is also to be the case

Married Women's Property Act, 1882.

(*s*) The subject of married women's property and the position of married women as to separate estate, &c., belongs more particularly to Equity, and the student is referred to Indermaur and Thwaites' Manual of Equity, Part III. ch. vi.

(*t*) 45 & 46 Vict. c. 75, s. 2.

as regards any property the title to which accrues to a woman on or after 1st January, 1883, although married before that date (*u*).

Liability of husband on wife's contracts made before marriage.

As to the liability of the husband, at common law, the rule was absolute that he was liable for all his wife's contracts and debts entered into and contracted by her before marriage, and also for her ante-nuptial torts, whether he had any property with her or not; but this liability ended with her death, unless he took out administration to her *choses in action*, when he would still be liable as administrator to the extent of her assets (*x*), but the rule has now been very materially altered, as is next stated.

Married Women's Property Act, 1870.

By the Married Women's Property Act, 1870 (*y*), it was provided that "a husband shall not, by reason of any marriage which shall take place after this Act has come into operation (*z*), be liable for the debts of his wife contracted before marriage, but the wife shall be liable to be sued for, and any property belonging to her for her separate use shall be liable to satisfy, such debts as if she had continued unmarried." This statute did not alter the husband's liability for his wife's ante-nuptial torts (*a*).

Injustice caused by this provision.

A very short trial of the provision in the Act of 1870 shewed that it was too extensive, for it created a possible manifest injustice. It provided that the husband should never be liable for his wife's ante-nuptial debts; but yet in many cases the husband might have property from his wife, and it not being to the wife's separate use, the creditor had no hold on it. To remove this injustice, therefore, the Married Women's Property Act Amendment Act, 1874 (*b*), was passed, which repealed so much of the Married Women's Property Act, 1870, as enacted that a husband should not

(*u*) 45 & 46 Vict. c. 75, s. 5. See hereon *Reid* v. *Reid* (1886), 31 Ch. D. 402; 54 L. T. 100; 55 L. J. Ch. 294; 34 W. R. 332.
(*x*) Macqueen's Law of Husband and Wife, 69.
(*y*) 33 & 34 Vict. c. 93, s. 12.
(*z*) August 9, 1870.
(*a*) Macqueen's Law of Husband and Wife, 72.
(*b*) 37 & 38 Vict. c. 50.

be liable for the debts of his wife contracted before marriage, as respects marriages taking place after the passing of that Act (*c*), and provided that a husband and wife married after the passing of that Act might be jointly sued for any such debt (*d*), but that the husband should in such action, and in any action brought for damages sustained by reason of any tort committed by the wife before marriage, or by reason of the breach of any contract made by the wife before marriage, be liable to the extent only of the assets acquired through his wife as therein specified. Married Women's Property Act, Amendment Act, 1874.

The Married Women's Property Acts of 1870 and 1874 have, however, now been repealed, except as regards the rights and liabilities of persons married before January 1, 1883 (*e*), as to whom the law remains as above stated. In substance the provisions of the Act of 1874 on this point, given in the last paragraph, are re-enacted, it being, however, specially provided that the husband and wife may be sued together or separately, so that a husband is liable even after his wife's death for her ante-nuptial debts or torts to the extent of any assets he had with her (*f*), which was not the case under the Act of 1874 (*g*). If a creditor sues the wife alone, and obtains judgment against her, such judgment is a personal one, and not one limited merely to the separate estate (*h*). If, having got such judgment, the creditor cannot succeed in enforcing payment, the judgment is no bar to a subsequent action against the husband, who has had assets with her, and who might therefore have been sued in the first instance (*i*). Married Women's Property Act, 1882. *Beck* v. *Pierce*.

Any question, therefore, as to the liability of a Summary as to liability of husband for

(*c*) July 30, 1874.
(*d*) Sect. 2.
(*e*) 45 & 46 Vict. c. 75, s. 22.
(*f*) Sects. 13–15. Macqueen's Law of Husband and Wife, 74.
(*g*) *Bell* v. *Stocker* (1883), 10 Q. B. D. 129; 52 L. J. Q. B. 49; 47 L. T. 624; 31 W. R. 183.
(*h*) *Robinson* v. *Lynes* (1894), 2 Q. B. 577; 63 L. J. Q. B. 759; 71 L. T. 249.
(*i*) *Beck* v. *Pierce* (1889). 23 Q. B. D. 316; 58 L. J. Q. B. 516; 61 L. T. 448.

wife's ante-nuptial debts and torts.

husband for his wife's ante-nuptial debts, or torts, must depend on the date of the marriage: if it took place before the 9th of August, 1870, he is liable for them all; if between that date and before the 30th of July, 1874, he is not under any liability in respect of ante-nuptial debts, but he still remains liable for ante-nuptial torts; if on or since this latter date and prior to 1st January, 1883, he is liable for either ante-nuptial debts or torts to the extent of the assets or property which he has or acquires with or through his wife, but they must be sued together; and if on or since 1st January, 1883, he is liable for them both to the extent of such assets or property, and may be sued together with or separately from his wife.

2. As to contracts made during cohabitation.

Secondly, as to contracts made after marriage, and during cohabitation.—Marriage produced a general disability on the part of the wife to contract, so that no contract that she might make would be binding on her, and any advantage she might acquire thereunder vested in her husband. But some contracts (*k*) of a married woman always bound her separate estate in equity; and besides this, there were and are, irrespective of the Married Women's Property Act, 1882, presently mentioned, several exceptions to the rule, which are chiefly as follows:—

1. Where the husband is banished, or, formerly, was transported, or is suffering sentence of penal servitude, the wife can contract, sue, or be sued as if she were a *feme sole*.

2. Where the husband has not been heard of for a period of seven years, she may also do so, as he is then presumed to be dead (*l*).

3. Where a judicial separation has been obtained under the Divorce Act, she may also do so (*m*), or where under the Summary Jurisdiction (Married Women) Act, 1895, a separation order has been obtained, which that

(*k*) See *Hulme* v. *Tenant*, 1 White and Tudor's Leading Cases in Equity, 654.

(*l*) See *Nepean* v. *Doe* (1837), 2 S. L. C. 558; 2 M. & W 894.

(*m*) 20 & 21 Vict. c. 85, s. 25.

Act provides shall have the same effect as a decree of judicial separation (*n*).

4. Under the Divorce Act (*o*) a married woman may obtain an order, called a protection order, when she has been deserted by her husband, protecting her earnings or property acquired since desertion, from her husband and persons claiming under him.

Position under the Married Women's Property Act, 1882.

And now by the Married Women's Property Act, 1882 (*p*), a married woman may generally contract in respect of all her separate property (*q*), and render herself liable thereupon as though she were a *feme sole*. This statute also enacted that every contract entered into by her should be deemed to bind her separate property which she then had, or might thereafter acquire, unless the contrary was shewn (*r*). But it was held under this enactment, that to render subsequently acquired separate estate liable, a married woman must have been possessed of some separate estate at the time of contracting the debt (*s*), and it was necessary in every action on contract against a married woman, that this should be alleged in the statement of claim, and duly proved (*t*). The Married Women's Property Act, 1893 (*u*), however, now provides that every contract thereafter (*x*) entered into by a married woman (otherwise than as agent) shall be deemed a contract entered into by her with respect to, and to bind, her separate property, whether she is or is not in fact possessed of or entitled to any separate property at the time when she enters into such contract, and shall bind all separate property which she may thereafter be possessed of or entitled to, and be enforceable also against all property which she may thereafter while discovert

Position under the Act of 1893.

(*n*) 58 & 59 Vict. c. 39, s. 5, in substitution for the repealed provision of 41 Vict. c. 19, s. 4.
(*o*) 20 & 21 Vict. c. 85, s. 21.
(*p*) 45 & 46 Vict. c. 75.
(*q*) Sect. 1 (2).
(*r*) Sect. 1 (3), (4).
(*s*) *Palliser* v. *Gurney* (1887), 19 Q. B. D. 519; 56 L. J. Q. B. 546; 35 W. R. 760.
(*t*) *Tetley* v. *Griffith* (1888), 57 L. T. 673; 36 W. R. 96.
(*u*) 56 & 57 Vict. c. 63, s. 1.
(*x*) December 5, 1893.

be possessed of or entitled to (*y*). It is, however, expressly provided (*z*) that this shall not render available to satisfy any liability or obligation arising out of any contract made during marriage, any separate property which at that time or thereafter she was restrained from anticipating. It has therefore been held that if a married woman is restrained from anticipating a life income at the date when she made a contract, or at any subsequent date during the marriage, income which accrues therefrom after she becomes discovert cannot be taken in execution to satisfy her liability on that contract (*a*).

Brown v. *Dimbleby.*

Married woman cannot be made bankrupt unless trading apart from husband.

Formerly, a married woman could not have been made a bankrupt in respect of a debt for which she was liable, even though she had separate estate (*b*). But now by the Married Women's Property Act, 1882, if a married woman is carrying on a trade separately from her husband, she shall, in respect of her separate property, be liable to the bankruptcy law (*c*). A married woman cannot be committed to prison under section 5 of the Debtors Act, 1869, for non-payment of a judgment debt contracted during coverture, for the liability created by the Married Women's Property Act, 1882, is not personal, but is merely in respect of her separate property (*d*). She may, however, be

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(*y*) Sub-sections (3) and (4) of sect. 1 of 45 & 46 Vict. c. 75 are repealed by this statute (sect. 4).

(*z*) 56 & 57 Vict. c. 63, s. 1.

(*a*) *Barnett* v. *Howard* (1900), 2 Q. B. 784; 69 L. J. Q. B. 955; 83 L. T. 301; *Brown* v. *Dimbleby* (1904), 1 K. B. 28; 73 L. J. K. B. 35; 89 L. T. 424.

(*b*) *Ex parte Holland, re Heneage* (1874), L. R. 9. Ch. App. 307; 43 L. J. Bk. 85; *Ex parte Jones, re Grissell* (1879), 12 Ch. D. 484; 48 L. J. Bk. 109.

(*c*) 45 & 46 Vict. c. 75, s. 1 (5); *Re Gardiner, ex parte Coulson* (1888), 20 Q. B. D. 249; 58 L. T. 119; 36 W. R. 142; *Re Debtor, ex parte Debtor* (1898), 2 Q. B. 576; 67 L. J. Q. B. 820; 78 L. T. 824. The expression "separate property" does not include a general power of appointment (*Ex parte Gilchrist, re Armstrong* (1886), 17 Q. B. D. 521; 55 L. J. Q. B. 578; 55 L. T. 538; 34 W. R. 709).

(*d*) *Scott* v. *Morley* (1888), 20 Q. B. D. 120; 57 L. J. Q. B. 43; 36 W. R. 97; 57 L. T. 919. But it is otherwise as regards a judgment obtained against a married woman in respect of an ante-nuptial debt (*Robinson* v. *Lynes* (1894), 2 Q. B. 577; 63 L. J. Q. B. 759; 71 L. T. 249. See *ante*, p. 251.)

attached for non-payment of money in her possession in a fiduciary capacity (*e*).

Married woman suing or defending.

A married woman formerly sued either together with her husband or by her next friend; but now, under the Married Women's Property Act, 1882 (*f*), she may in all cases sue or be sued as if she were a *feme sole*, and her husband need not be joined.

The wife's power of binding the husband.

The question of the power of a wife living with her husband to bind him is one of great importance. The earliest case constantly referred to upon the subject is *Manby* v. *Scott* (*g*), which lays down the broad principle that a wife's contract does not bind her husband, unless she acts by his authority. And if she does in fact contract with her husband's authority, it is immaterial whether the other party to the contract did or did not know that she was only acting as her husband's agent (*h*). The wife, therefore, may be said to stand in the position of an agent, but to some extent as an agent of a peculiar kind; for the general rule is that, apart from any special power or authority that may be given her, from her very position of living as a wife (*i*) she is *presumed* to be invested with an authority to bind him for necessaries suitable to his rank and condition (*k*); but this does not extend to anything beyond actual necessaries (*l*), for there, to bind the husband, some evidence of his assent must always be shewn (*m*).

Manby v. *Scott*.

Montague v. *Benedict*.

Husband not always liable even for necessaries.

But a husband is not in all cases absolutely liable for necessaries, for as the power of a wife to bind her

(*e*) *Re Turnbull, Turnbull* v. *Nicholas* (1900), 1 Ch. 180; 69 L. J. Ch. 187.

(*f*) 45 & 46 Vict. c. 75, s. 1 (2); Order xvi. r. 16.

(*g*) (1659), 2 S. L. C. 446; 1 Levintz, 4.

(*h*) *Paquin* v. *Beauclerk* (1906), A. C. 148; 75 L. J. K. B. 395.

(*i*) And this principle applies to a woman living with a man as his wife, though not actually married, and even although the tradesman knows she is not married, *Watson* v. *Threlkeld* (1794), 2 Esp. 637; *Ryan* v. *Sams* (1848), 12 Q. B. 460.

(*k*) *Etherington* v. *Parrott* (1704), Lord Raym. 1006.

(*l*) *Montague* v. *Benedict* (1825), 2 S. L. C. 476; 3 B. & C. 673.

(*m*) See *Jetley* v. *Hill* (1885), 1 C. & E. 239. As to the position when both husband and wife are sued, see *Morel* v. *Earl of Westmoreland* (1904), A. C. 11; 73 L. J. K. B. 93. There cannot ordinarily be any joint liability.

husband for them only arises from his *presumed* authority to her, such authority is liable to be rebutted by its being shewn that she was kept fully supplied by her husband with all necessary articles (*n*). So also modern cases have decided that this presumption of liability may be rebutted by shewing that the husband has forbidden his wife to pledge his credit, or that there was an agreement between them to that effect (*o*). This may at first sight seem somewhat to militate against what has been before explained with regard to general agency (*p*), namely, that a principal is liable for all acts of his general agent coming within the scope of his ordinary authority, although done contrary to the principal's directions, if they were not known to the contractee; but the reason of the decision is, that the wife does not, simply as wife, actually stand in the position of general agent for her husband, but is only presumed to do so, and that this presumption is always liable to be rebutted. If the position of agent is actually constituted by the husband allowing the wife to contract, then certainly to prevent his being further liable for necessaries, he must have given notice to the tradesman.

Seaton v. *Benedict.*

Jolly v. *Rees.*

Explanation.

Correct answer to the question of what contracts by a married woman living with her husband will bind him.

To summarise the foregoing remarks, the answer to the question, what contracts of a wife who is living with her husband will bind him, may be stated as follows: All her contracts entered into with his express or implied authority will bind him, and his authority will be *implied* for necessaries, but only for necessaries (*q*); and this implied authority is liable to be rebutted by shewing that she is already fully supplied with necessaries (*r*), or that the husband has forbidden her to pledge his credit, or that they have so agreed between themselves, even although unknown to the

(*n*) *Seaton* v. *Benedict* (1828), 2 S. L. C. 482; 5 Bing. 28.
(*o*) *Jolly* v. *Rees* (1874), 15 C. B. (N. S.) 628; 12 W. R. 473; 43 L. J. C. P. 177; *Debenham* v. *Mellon* (1881), 6 A. C. 24; 50 L. J. Q. B. 155; 43 L. T. 673; 29 W. R. 141.
(*p*) *Ante*, p 255.
(*q*) *Montague* v. *Benedict*, *ante*, p. 255.
(*r*) *Seaton* v. *Benedict*, *supra.*

tradesman, unless indeed the husband has previously actually constituted her his agent, when this must be communicated to the tradesman (*s*).

3. As to contracts made during separation.

Thirdly, as to contracts made after marriage, but whilst the parties are living separate and apart from each other.—The fact of there being a separation never made any difference in the wife's former incapacity to contract, so as to bind herself, and the observations previously made hereon, under the second division of this subject, apply equally here (*t*). The wife's power to bind her husband stands on a totally different footing, for in the case of husband and wife living together, we have seen that, from their so living together, the presumption is that the husband is liable for necessaries; but here there is no such presumption, and it is always incumbent on a creditor, seeking to charge the husband, to shew that the wife, from the circumstances of the separation, or from the conduct of the husband, has such an implied authority (*u*). The wife's power, therefore, to bind her husband by her contracts depends on the way in which the separation occurred, which may be either by the fault of the husband, by the fault of the wife, or by mutual consent and arrangement.

Where the separation is by a husband's fault, he is liable for necessaries.

Where the separation is by the fault of the husband, *e.g.*, if he deserts his wife, or actually turns his wife away, or refuses to receive her, or behaves in such a way, either by cruelty or otherwise, as to render it impossible for her to continue to live with him, then, unless she has an adequate allowance for maintenance paid to her, she goes forth to the world with full authority to bind him for necessaries, which authority the husband cannot deprive her of, even though he gives particular notice to the tradesman not to trust her (*v*). She is in such a case an agent of necessity. If the husband seeks in

Agent of necessity.

(*s*) *Jolly* v. *Rees*, *Debenham* v. *Mellon*, *ante*, p. 256.

(*t*) *Ante*, p. 252.

(*u*) See *Johnston* v. *Sumner* (1858), 3 H. & N. 261; *Mainwaring* v. *Leslie* (1826), M. & M. 18; *Eastland* v. *Burchell* (1878), 3 Q. B. D. 432; 47 L. J. Q. B. 500.

(*v*) *Johnston* v. *Sumner* (1858), 3 H. & N. 261; *Boulton* v. *Prentice* (1749), 2 Str. 1006; 2 S. L. C. 498.

such cases to exonerate himself by shewing a separate allowance, it is a question for the jury whether or not it is adequate (*w*).

But the reverse where the separation is by the wife's fault.

Where the separation is by the fault of the wife, as if she elopes and lives in adultery, or the husband turns her away for adultery, or she voluntarily, and without fault on his part, simply leaves him, she has no authority to bind him for necessaries in any degree (*x*). And even though she originally leaves him on account of his misconduct, but then she commits adultery, she has no further power to bind him (*y*).

Where separation by mutual consent, husband liable unless a contrary agreement.

Where the separation is by mutual consent, the rule is, that the wife has an implied authority to bind her husband for necessaries, unless there is some express agreement between the husband and wife on the subject of the separation and the rights of the wife. Although it was at one time considered that, in such a case as this, to exonerate the husband it was necessary to shew that the wife had from some source adequate separate maintenance, it appears to be now clear that it is not necessary to shew this, but that, when the parties separate by mutual consent, they make their own terms and conditions, and, so long as the separation exists, these terms are binding on them both (*z*). If, however, under the agreement of separation, a certain allowance is to be paid, if it is not kept up, the wife may bind the husband by contracting to the extent of it (*a*).

Effect of notice in newspapers by a husband that he will not be answerable for his wife's debts.

From the foregoing remarks it will be seen that to give a correct answer to any general question on the power of a wife to bind her husband during separation, the different ways in which the separation may have

(*w*) *Hodgkinson* v. *Fletcher* (1816), 4 Camp. 70; *Emmett* v. *Norton* (1839), 8 C. & P. 506.

(*x*) Macqueen, 115; 2 S. L. C. 496. And there is no liability on the husband even under the Poor Law Amendment Act, 1868 (31 & 32 Vict. c. 122, s. 33), to support a wife with whom he has ceased to cohabit in consequence of her adultery (*Culley* v. *Charman* (1881), 7 Q. B. D. 89; 50 L. J. M. C. 111).

(*y*) *Govier* v. *Hancock* (1817), 6 T. R. 603.

(*z*) *Biffen* v. *Bignell* (1862), 7 H. & N. 877; 31 L. J. Ex. 189; *Eastland* v. *Burchell* (1878), 3 Q. B. D. 432; 47 L. J. Q. B. 500.

(*a*) *Nurse* v. *Craig* (1806), 2 N. R. 148.

occurred must be stated (*b*). The student may perhaps have sometimes observed in the newspapers, notices by husbands that they decline to be answerable for the debts of their wives, and applying to that fact what has been stated in the previous pages on the subject of the husband's liability, he will see that any such notice can have no legal effect or object where the parties are actually separated ; for if the separation has taken place by the wife's fault, there is no need for any such notice, for the husband is not liable anyhow; if by the husband's fault, then he is liable, and any such notice cannot lessen his liability; and if by mutual consent, the husband is not liable if the arrangement between them is that he shall not be. However, such notice by advertisement may have some effect where the husband and wife are living together, and he has actually constituted her his agent, but has since withdrawn his authority to her to pledge his credit ; for in such a case, as has been pointed out, the principle of private notice or arrangement being sufficient does not apply (*c*).

Husband is liable for the costs of any proceeding rendered necessary by his conduct.

If a husband, by his conduct, renders it necessary for his wife to protect herself by applying for him to be bound over to keep the peace, the costs of such application will always fall on the husband, and he will be liable to an action by the solicitor who has incurred such costs ; and this is so even although he allow and pay her separate maintenance, for he has no right to diminish her means by his improper conduct (*d*). And the same rule will also, generally speaking, apply as to the costs of other proceedings rendered necessary by his conduct, *e.g.*, the costs of the institution of an action for divorce, or for judicial separation, or the costs of necessary advice taken by the wife (*e*).

(*b*) See hereon, generally, notes to *Manby* v. *Scott*, *Montague* v. *Benedict*, and *Seaton* v. *Benedict*, in 2 S. L. C. 446–505, and cases there quoted.

(*c*) *Ante* pp 256, 257.

(*d*) *Turner* v. *Rookes* (1839), 10 Ad. & E. 47.

(*e*) *Brown* v. *Acroyd* (1856), 5 E. & B. 819 ; *Wilson* v. *Ford* (1868), L. R. 3 Ex. 63 ; 37 L. J. Ex. 60 ; *Ottaway* v. *Hamilton* (1878), 3 C. P. D. 393 ; 47 L. J. C. P. 725. The case of *Re Hooper* (1864), 33 L. J. Ch. 300, does not clash with the general rule stated in the text, the

Money lent to wife to buy necessaries.

A husband although he may be liable under the circumstances for necessaries supplied to his wife, would not at law have been liable for money lent to his wife, even for the purpose of buying necessaries (*f*). It was, however, otherwise in equity if the money so lent was actually expended on necessaries (*g*), and the equity rule now prevails (*h*).

Effect of contract by wife for necessaries, her husband being dead, though not known to be by her.

It has before been pointed out, in considering the subject of agency, that if a married woman, having power to bind her husband for necessaries, contracts for such necessaries after his death, but before she could possibly have known thereof, no liability therefore attaches to her personally, and that in such a case it appears the husband's estate would not be liable either (*i*).

Liability of husband for wife's torts committed during marriage.

The subject of torts commited by a married woman may be here incidentally noticed. With regard to these, it makes no difference whether the husband and wife are living together or are separated. He had, by the old principles of common law, a control over her person—though it seems this is now no longer so, or at any rate to a very limited extent (*k*)—and therefore it was not unreasonable on this theory to make him liable jointly with his wife for her wrong-doings. One would have thought, however, that an alteration would have been made hereon by one of the Married Women's Property Acts, but such is not the case, and it has been held that the common law liability of the husband has

Reg. v. *Jackson.*

Seroka v. *Kattenburg.*

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reason of the husband being there held not liable being that there was no reasonable foundation for the wife's proceedings; but in so far as any observations in that case tend to decide that to render the husband liable for the costs of any proceedings they must have resulted in actual success, it is submitted that it is clearly not law, and that it is sufficient that there was a reasonable ground for such proceedings. And see hereon 2 S. L. C. 502.

(*f*) *Knox* v. *Bushell* (1857), 3 C. B. (N. S.) 334.

(*g*) *Deare* v. *Soutten* (1860), L. R. 9 Eq. 151.

(*h*) Jud. Act, 1873, s. 25 (11).

(*i*) See *ante*, p. 148, and note (*y*) on that page, and cases of *Smout* v. *Ilbery* (1842), 10 M. & W. 1; *Blades* v. *Free* (1829), 9 B. & C. 167; and *Drew* v. *Nunn* (1879), 4 Q. B. D. 661; 48 L. J. Q. B. 591, there referred to.

(*k*) *Reg.* v. *Jackson* (1891), 1 Q. B. (C. A.) 671; 60 L. J. Q. B. 346; 64 L. T. 679.

not been taken away, and that a person affected by the tortious act of a married woman is still entitled to sue her and her husband jointly, and obtain a judgment against them both, which he may enforce either against the husband, or against the wife's separate estate (*l*). This principle applies where a wife commits a fraud under or in connection with a contract, but not where the fraud is the means of effecting, or bringing into existence, the contract (*m*).

Earle v *Kingscote.*

III. Persons of unsound mind.

Persons of unsound mind may be either idiots or lunatics. By the designation idiot is meant a person who has never from his birth upwards had any glimmering of reason; whilst a lunatic "is one who hath had understanding, but by disease, grief, or other accident has lost the use of his reason" (*n*). However, with regard to these two classes of non-sane persons, this distinction is of no practical importance, as no person is now found an idiot, the inquiry as to the commencement of the insanity not being carried back to the birth (*o*).

To what extent unsoundness of mind is a defence.

It was formerly considered that a person could not set up as a defence to an action on a contract that he was of unsound mind when it was entered into, but this is no longer law. But although unsoundness of mind may be set up, yet it must not be thought that it will form an answer to every action that may possibly be brought; for, firstly, a person of unsound mind is liable to pay a reasonable price for all necessaries suitable to his state and condition in life (*p*); and, secondly, although the contract may not be for necessaries, and though it may be executory, yet, if the other party to it had no knowledge of the person's want of mental capacity, unsoundness of mind will be

Imperial Loan Co. v. *Stone.*

(*l*) *Seroka* v. *Kattenberg* (1888), 17 Q. B. D. 177; 55 L. J. Q. B. 375; 54 L. T. 649; 54 W. R. 542.

(*m*) *Earle* v. *Kingscote* (1900), 2 Ch. 585; 69 L. J. Ch. 725; 83 L. T. 377. See also *Liverpool Adelphi Loan Association* v. *Fairhurst* (1854), 9 Ex. 422.

(*n*) 1 Bl. Com. 304.

(*o*) See hereon Phillips on Lunacy, 224.

(*p*) 56 & 57 Vict. c. 71, s. 2.

no defence (*q*). The burden of proving both the insanity, and the knowledge of it by the other contracting party, lies upon the party seeking to avoid the contract.

Acts during a lucid interval.

Contracts entered into by a lunatic during a lucid interval are perfectly valid (*r*), except that a lunatic so found by inquisition is, until the inquisition has been superseded, absolutely incapable, even during a lucid interval, of making a valid deed disposing of his property (*s*). The mere existence of a delusion in the mind of a person making a disposition, or contract, is not sufficient to avoid it, even though the delusion is connected with the subject-matter of such disposition or contract; it is a question for the jury whether the delusion affected the particular transaction (*t*). And although a person may not be strictly of unsound mind, yet if he is of weak capacity, though this by itself would be, generally, no ground of defence to an action on his contract, yet it may afford evidence of undue influence, misplaced confidence, or imposition, so as to render the act a constructive fraud (*u*).

Mere existence of delusion.

IV. Intoxicated persons.

If a person is in such a state of intoxication as not to know what he is doing, so that, indeed, his reason is for the time being destroyed, he cannot be said to have any agreeing mind, and his contract, made whilst he is in such a state, cannot be enforced, unless he afterwards when sober ratifies it, which he may do, for it is only voidable and not absolutely void. But intoxication is never any defence to an action for things actually supplied for the person's preservation, or indeed for any necessaries suitable to his position in life, he being liable to pay a reasonable price for them (*x*).

(*q*) *Imperial Loan Co.* v. *Stone* (1892), 1 Q. B. 599; 61 L. J. Q. B. 449; 66 L. T. 556.

(*r*) *Selby* v. *Jackson* (1843), 6 Beav. 192.

(*s*) *Re Walker* (1905), 1 Ch. 160; 74 L. J. Ch. 86.

(*t*) *Jenkins* v. *Morris* (1880), 14 Ch. D. 972; 42 L. T. 817.

(*u*) As to Constructive Frauds, see Indermaur and Thwaites' Manual of Equity, 249–278.

(*x*) 56 & 57 Vict. c. 71, s. 2.

V. Persons under duress.

A person is said to be under duress when he is subjected to great terror or violence, *e.g.*, if his person is wrongfully detained, or even legally detained, and excessive and unnecessary violence is used, or if he is threatened with loss of life or serious injury. Any contract made by a person who is under duress is, as regards him, voidable, and cannot be enforced against him unless he subsequently ratifies it (*y*).

VI. Aliens.

An alien may be defined as a subject of a foreign state, and may be an *alien ami*, that is, a subject of a friendly state, or an *alien enemy*, that is, a subject of a state at enmity with ours.

The Common Law.

By the Common Law, though an *alien ami* might contract and sue, yet the contract of an *alien enemy* was absolutely void; and even with regard to the contract of an *alien ami*, if after the contract war broke out, so that he thus became an *alien enemy*, his remedy here was suspended until the war ceased, and he again became an *alien ami*. The Naturalisation Act, 1870 (*z*), however, now also provides that real and personal property of every description (*a*) may be taken, acquired, held, and disposed of by an alien, in the same manner in all respects as by a natural-born British subject; and that a title to real and personal property of every description may be derived through, from, or in succession to an alien, in the same manner in all respects as if a British subject (*b*), provided that this shall not qualify an alien for any office, or for any municipal, parliamentary, or other franchise (*c*), nor shall it qualify him to be the owner of a British ship, or any share therein (*d*). Possibly by reason of this comprehensive provision, the distinction, as to their contracts, between an *alien ami* and an *alien enemy*, is now done away with, and an *alien enemy* may contract, and sue, in the same way as an *alien ami*.

Naturalisation Act, 1870.

Distinction between *alien ami* and *alien enemy*.

(*y*) *Secars* v. *Cohen* (1882), 45 L. T. 589. (*z*) 33 Vict. c. 14.
(*a*) Formerly, as regards land, an alien could only hold a lease not exceeding twenty-one years (7 & 8 Vict. c. 66, s. 5).
(*b*) 33 Vict. c. 14, s. 2. (*c*) Ibid.
(*d*) Sect. 14; and see 57 & 58 Vict. c. 60, s. 1.

CHAPTER VIII.

OF THE LIABILITY ON CONTRACTS, THEIR PERFORMANCE, AND EXCUSES FOR THEIR NON-PERFORMANCE.

In this chapter it is proposed to consider the position of a person who has entered into a contract, and other points incidental thereto.

When any person enters into a valid contract, it follows as a matter of course that he thereby incurs a liability to perform such contract, and must either perform it or show some good excuse for not doing so.

When a liability on a contract arises.

This liability on a contract arises directly it is entered into, and if it is for the doing of some immediate act, the remedy of the other party to the contract may be taken immediately on breach thereof. But if the contract is for the doing of an act at some future day, then generally the remedy of the other party in respect of such liability cannot be taken until the future day.

When on an executory contract a liability arises before the day arrives for doing the act.

To this rule, there is, however, one important exception, viz., that where there is an executory contract, and the person liable to do the act, before the happening of the future day, expressly states that he will not do it when the future day arrives, or renders himself before the day incapable of doing it, the other party may sue him at once, though the time for performance has not actually arrived, for in the meantime he has a right to have the contract kept open as a valid and subsisting contract. Thus in *Hochster* v. *De la Tour* (*a*) there was an agreement to employ the plaintiff as a courier from a day subsequent to the date of the

Hochster v. *De la Tour.*

(*a*) (1853) 2 El. & Bl. 678 ; *Frost* v. *Knight* (1872), L. R. 7 Ex. 111 ; 41 L. J. Ex. 78. See also *British Waggon Co.* v. *Lees* (1880), 5 Q. B. D. 149 ; 49 L. J. Q. B. 321 ; 42 L. T. 437 ; 28 W. R. 349 ; *Société Générale de Paris* v. *Milders* (1884), 49 L. T. 55 ; *Synge* v. *Synge* (1894), 1 Q. B. 466 ; 63 L. J. Q. B. 202.

writ, and, before the time fixed for the employment to begin, the defendant refused to perform the agreement, and discharged the plaintiff from performing it, and he at once commenced an action for breach of this contract. It was objected that he could not sue until the future day arrived, but it was held that he might do so, and the principle before stated was laid down.

Exact effect of repudiation.

It should be noticed, in cases of this kind, that the repudiation of the contract, or the total refusal to perform it before the day of performance arrives, is not of itself a breach of the contract, but may be acted on by the other party, and adopted by him as a rescission of the contract if he so chooses. In other words, where one party refuses by anticipation to perform the contract, he declares that, so far as he can, he rescinds it, and by doing so wrongfully, he entitles the other party either to agree to the rescission and treat the contract as at an end, or to elect not to adopt the repudiation, and to continue to treat it as binding, and wait until the time for performance arrives. When the promisee thus does not accept the rescission, the contract remains in existence for the benefit, and at the risk, of both parties, and if anything occurs to discharge it from other causes, the promisor may take advantage of such discharge (*b*). But a party entitled to take advantage of a rescission cannot both act on the contract as existing for some purposes, and at the same time bring an action upon it on other points (*c*). Probably, also, the principle of rescission or renunciation giving an immediate right of action has no application at all to the case of a lease or other contract containing various stipulations, where the whole contract cannot be treated as put an end to upon the wrongful repudiation of one of the stipulations of the contract by the promisor (*d*).

Avery v. *Bowden.*

A question may sometimes arise whether, in the

Failure in delivery or

(*b*) *Avery* v. *Bowden* (1855), 5 El. & Bl. 714; *Johnstone* v. *Milling* (1886), 16 Q. B. D. 460; 55 L. J. Q. B. 162; 54 L. T. 629; 34 W. R. 238.
(*c*) Ibid.
(*d*) *Johnstone* v. *Milling* (1885), 16 Q. B. D. 460; 55 L. J. Q. B. 162; 54 L. T. 629; 34 W. R. 238.

payments by instalments.

case of an agreement to deliver goods by instalments, a failure to deliver one instalment operates as an entire discharge of the other party to the contract (*e*); and again, if, where goods are to be paid for by instalments, non-payment of one instalment entitles the vendor to treat the whole contract as at an end (*f*). The Sale of Goods Act, 1893, now enacts as follows: "Where there is a contract for the sale of goods to be delivered by stated instalments, which are to be separately paid for, and the seller makes defective deliveries in respect of one or more instalments, or the buyer neglects or refuses to take delivery of or pay for one or more instalments, it is a question in each case, depending on the terms of the contract, and the circumstances of the case, whether the breach of the contract is a repudiation of the whole contract, or whether it is a severable branch giving rise to a claim for compensation, but not a right to treat the whole contract as repudiated" (*g*). The effect of this enactment is that each case must be determined on its own particular facts, which are to be construed and dealt with on the general principles here laid down (*h*).

To entitle a person to sue on a contract, he must have performed his part of it.

Where a special (indivisible) contract is entered into by a person, to entitle him to his remedy against the other party to it, it is very necessary that he himself should strictly carry out on his part the stipulations of the contract; for it is always open to the parties to agree that the entire performance of a consideration in its nature divisible, shall be a condition precedent to the right to a fulfilment by the other party of his promise (*i*). Thus, where the agreement was to pay a man a certain sum provided he proceeded, continued,

(*e*) *Hoare* v. *Rennie* (1859), 5 H. & N. 19; *Honck* v. *Muller* (1884), 7 Q. B. D. 92; 45 L. T. 202; 50 L. J. Q. B. 529; *Simpson* v. *Crippin* (1874) L. R. 8 Q. B. 14.

(*f*) *Bloomer* v. *Bernstein* (1872), L. R. 9 C. P. 588.

(*g*) 56 & 57 Vict. c. 71, s. 31. This section substantially embodies the previous decision in *Mersey Steel and Iron Co.* v. *Naylor* (1884), 9 App. Cas. 434; 51 L. J. Q. B. 576; 47 L. T. 369.

(*h*) See *Rhymney Railway* v. *Brecon and Merthyr Tydfil Junction Ry.* (1900), 69 L. J. Ch. 813; 83 L. T. 111; 49 W. R. 116; *Braithwaite* v. *Foreign Hardwood Co.* (1905), 2 K. B. 543; 74 L. J. K. B. 688.

(*i*) Anson's Contracts, 325.

and did his duty as mate of a ship during the whole of a certain voyage, and he died before the voyage was completed, it was held that his representatives could not recover anything, for the contract had not been strictly carried out by the deceased, and therefore no right of action had accrued (*j*). But although, where there is a special contract, the remedy must be on that special contract, and therefore there can generally be no remedy when the person suing has not himself performed its stipulations, yet if the special contract has been abandoned or rescinded by the parties mutually, then an action will lie on a *quantum meruit* for what has been done by the person suing (*k*). And where there has been a special contract which has not been fully performed, but the other party has taken advantage of, and benefited by, the actual performance, in some cases a new contract will be implied to pay remuneration commensurate with the benefit derived from the partial performance. Thus, if A. agrees to build a house for B., and he brings materials on to the premises and partly builds the house but then abandons the contract and refuses to complete, and B. accordingly finishes the house, using the loose materials brought on to the premises by A., a contract to pay so much as those materials are worth will be implied, although no action would lie upon a *quantum meruit* in respect of the partial building (*l*). It may be stated, as a correct general rule, that where there is a special contract not under seal, and one of the parties refuses to perform his part of it, or renders himself absolutely unable to do so, it is open to the other party to at once rescind such special contract, and immediately sue on a *quantum meruit* for whatever he has done under the contract previously (*m*). But to entitle a

Cutter v. *Powell.*

Suing on a *quantum meruit.*

Sumpter v. *Hedges.*

(*j*) *Cutter* v. *Powell* (1795), 2 S. L. C. 1 ; 6 T. R. 320 ; see also *Hull* v. *Heightman* (1802), 2 East, 145 ; *Sinclair* v. *Bowles* (1829), 9 B. & C. 92.

(*k*) That is to say, for as much as it is worth ; see Brown's Law Dict.

(*l*) *Sumpter* v. *Hedges* (1898). 1 Q. B. 673 ; 67 L. J. Q. B. 545 ; 78 L. T. 378 ; *Munro* v. *Butt* (1858), 8 E. & B. 738.

(*m*) *Planché* v. *Colburn* (1831), 8 Bing. 14 ; *Withers* v. *Reynolds*

What refusal will justify a party to a contract in rescinding it.

person so to rescind a special contract on the ground of the refusal of the other party to perform it, such refusal must be absolute and unqualified, and a mere conditional refusal will not be sufficient (*n*).

How the liability on a contract may be put an end to.

The liability of a person upon a contract may be put an end to either—

1. By its performance; or
2. By showing some excuse for its non-performance.

I. Performance of contracts.

Firstly, as to the performance of contracts.—Contracts may be, and are, of the most varied nature, and they must be carried out according to the stipulations in each particular case, attention being paid always to the ordinary and well-known rules of construction, *e.g.*, that the intention of the parties shall be observed, that the construction shall be liberal, and, failing all other rules of construction, that the contract shall be taken most strongly against the grantor or contractor (*o*). The most practically useful points to considor under this head appear to be Payment, Tender, and Accord and Satisfaction.

1. Payment.

Payment has been defined as the normal mode of discharging an obligation (*p*), and payment by a person liable on a contract to the other party to it, of the amount which is actually agreed on between them to be payable in respect of the contract, naturally puts an end to it and furnishes a complete performance.

Payment by a third person voluntarily is not a performance unless afterwards ratified and accepted.

But a payment made under a contract, to amount to performance, must be actually made by the party, or some one on his behalf, and if made by some third person voluntarily, it amounts to no performance, and does not destroy the contracting party's liability, unless afterwards ratified and accepted by him as his act (*q*). This, however, is only where payment is made voluntarily; if made—as by a surety—in pursuance

(1831), 2 B. & Ad. 882; *O'Neil* v. *Armstrong* (1895), 2 Q. B. 418; 64 L. J. Q. B. 552.

(*n*) See *Lines* v. *Rees* (1837), cited 2 S. L. C. 33.

(*o*) For rules of construction, see *ante*, pp. 25–32.

(*p*) Brown's Law Dict.

(*q*) See *Simpson* v. *Eggington* (1856), 10 Ex. 845.

of a legal obligation, then the contract is performed so far as the original liability is concerned, and a new performance is necessary, viz., the repayment to the surety (*r*).

To whom payment must be made.

It is, of course, also necessary, to make the payment a performance of the contract, that it should be actually made to the creditor, or one having authority from him, either as a particular or a general agent, to receive it. Payment in an action to the plaintiff's solicitor is equivalent to payment to the plaintiff; but it seems payment to the agent of the plaintiff's solicitor does not necessarily so operate (*s*).

Rule in *Clayton's Case* as to appropriation of payments.

Where there are several sums of money due from one person to another at different times, and the party liable to pay makes a payment, but not sufficient to discharge his liability in respect of the whole of the debt, the question arises, In respect of which sum is it to operate as a performance or part performance? The answer to this question is known as the rule in *Clayton's Case* as to the appropriation of payments, and is, that the party liable to performance, *i.e.*, the debtor, when he makes the payment, has the right to declare in respect of which contract or debt the payment is made; and if he fails to do so, the party entitled to performance, *i.e.*, the creditor, has such right, and the creditor may make the appropriation down to the very last moment (*t*), which seems to mean usually at any time before judgment (*u*); and if both fail to do so, then the law considers the payment to be in respect of the contract or debt which is the earliest in point of date, commencing with the liquidation of any interest that may be due (*v*). This rule as to the appropria-

(*r*) As to sureties, see *ante*, pp. 51–55.

(*s*) *Yates* v. *Freckleton* (1781), 2 Doug. 625.

(*t*) *The Mecca* (1897), A. C. 286; 66 L. J. P. 86; 76 L. T. 579.

(*u*) *Seymour* v. *Pickett* (1905), 1 K. B. 715; 74 L. J. K. B. 413; *Smith* v. *Batty* (1903), 2 K. B. 317; 72 L. J. K. B. 853; *Re Friend* (1897), 2 Ch. 421; 66 L. J. Ch. 737.

(*v*) *Clayton's Case*, *Devaynes* v. *Noble* (1816), 1 Mer. 585; Tudor's Mercantile Cases, 1, and notes thereto; *Re Macnamara's Estate*, 13 L. R. Ir. 158. This ordinary rule does not apply as between trustee and *cestui que trust*; see *Re Hallett's Estate* (1880), 13 Ch. D. 696; 49

This rule not an invariable one.

tion of payments is not, however, an invariable rule of law, but the circumstances may be looked at to see if the proper inference is that the parties intended the transaction to fall within the rule (*w*). Where, under the rule, the creditor has the right of appropriating the money, he may appropriate it to a debt barred by the Statute of Limitations (*x*), but this will not revive the power to sue for the balance of such debt. The creditor can only appropriate money received from, or with the knowledge of, the debtor (*y*). Where a payment is made to a person to whom two or more debts are due, of a sum not sufficient to satisfy all, and the debts are owing in respect of contracts of the same date, the amount paid, unless expressly appropriated by one of the parties, will be apportioned between the different debts (*z*).

A smaller sum cannot be a satisfaction of a greater.

Where the performance that is required by a contract is the payment of a fixed sum of money, it is not sufficient performance for the debtor to pay a smaller sum, even though the parties expressly so agree, and the party to whom the payment is made gives a receipt expressly stating that it is received in full discharge (*a*). The reason is that there is no consideraton for the smaller sum being received in satisfaction of the greater; and as an ordinary simple contract requires a consideration to support it (*b*), so here there must be some consideration for the giving up of the balance.

But something different, though of less value, may be a satisfaction.

But if something is given in performance of an obligation of a different nature, there may be a complete satisfaction, though of less value; thus, a horse may be given in satisfaction of a debt, though of much less value than such debt. And it has been expressly

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L. J. Ch. 415; 28 W. R. 732; Indermaur and Thwaites' Manual of Equity, 182, 183.

(*w*) *The Mecca* (1897), A. C. 286; 66 L. J. P. 86; 76 L. T. 579.

(*x*) *Mills* v. *Fowkes* (1839), 5 Bing. (N. C.) 455.

(*y*) *Waller* v. *Lacy* (1840), 9 L. J. C. P. 219.

(*z*) *Favenc* v. *Bennett* (1809), 11 East, 36.

(*a*) *Pinel's Case* (1602), 5 Rep. 117a; *Cumber* v. *Wane* (1719), 1 S. L. C. 338; 1 Strange, 436; *Fitch* v. *Sutton* (1804), 5 East. 230; *Sibree* v. *Tripp* (1846), 15 M. & W. 23. A smaller sum paid by a third party at the debtor's request may satisfy a greater (*Lawder* v. *Peyton*, 11 Irish Reps. C. L. 41).

(*b*) See *ante*, p. 41.

decided that a negotiable security such as a bill, note, or cheque, may operate, if so given and taken, in satisfaction of a debt of greater amount, the circumstance of negotiability making it, in fact, a different thing, and theoretically more advantageous than the original debt, which was not negotiable (*c*), a decision which we can best reconcile with the general principle, and common sense, by saying that the general principle is to be taken very literally, and not to be extended. Where there is any doubt or disagreement about the amount of a debt, and in all cases of unliquidated demands, the rule that a smaller sum cannot satisfy a greater does not apply; nor does it if the time for payment is accelerated, or any other advantage given to the payee, for in such cases there is a consideration—in the one case the settlement of doubts, and in the other the obtaining the money before it would be otherwise paid (*d*). And where a less sum was tendered after the time for payment, and retained in discharge of a larger sum which was to become due in default of payment of the lesser sum, it was held that the receiver could not retain the sum paid otherwise than as a complete discharge (*e*). Although a debtor, who disputes the amount claimed from him, remits a smaller sum to his creditor in entire satisfaction of his demand, yet if the creditor retains it, giving a receipt simply on account, he may still sue for the balance (*f*).

Goddard v. *O'Brien.*

Smaller sum than penalty.

Remittance in full discharge of disputed claim.

Following out the principle dealt with in the last paragraph, it has been held that an agreement (not under seal) between a judgment debtor and his judgment creditor, that in consideration of the debtor paying down part of the judgment debt and costs, and on condition of his paying to the creditor the residue by instalments, the creditor would not take any proceedings

Foakes v. *Beer.*

(*c*) *Sibree* v. *Tripp* (1846), 15 M. & W. 23; *Goddard* v. *O'Brien* (1882), 9 Q. B. D. 37; 1 S. L. C. 373.
(*d*) See notes to *Cumber* v. *Wane*, 1 S. L. C. 338 *et seq.*
(*e*) *Johnson* v. *Colquhoun* (1883), 32 W. R. 124.
(*f*) *Ackroyd* v. *Smithies* (1885), 54 L. T. 130; 50 J. P. 358; *Day* v. *M'Lea* (1889), 22 Q. B. D. 610; 58 L. J. Q. B. 293; 60 L. T. 947.

on the judgment, was *nudum pactum*, being without consideration, and did not prevent the creditor, after payment of the whole debt and costs, from proceeding to enforce payment of the interest upon the judgment (*g*).

A smaller sum may satisfy a greater if a receipt under seal is given, or on a composition under the Bankruptcy Act, 1890.

The payment of a smaller sum may, however, operate in satisfaction of a greater if the receipt is under seal, for this would be a deed which, as we have seen, requires no consideration to support it, and operates also by way of estoppel (*h*). And under the Bankruptcy Act, 1890 (*i*), a statutory majority of creditors may, as therein provided, and subject to the Court's confirmation, agree to accept a composition in satisfaction of their debts, which will be binding on the other creditors, and the payment of which composition will discharge the debtor. Irrespective of this, a private composition with creditors, whereby each creditor agrees to take a smaller sum than what is due to him, has always been held to be good; but this is no real exception to the general rule that a smaller sum cannot satisfy a greater, for there is a consideration, viz., the forbearance by other creditors (*j*). It may be here mentioned that all private arrangements with creditors require now to be registered within seven days of their first execution, and are, generally, governed by the Deeds of Arrangement Act, 1887 (*k*).

Private arrangements with creditors.

Performance of a contract may may sometimes by presumed.

Performance of a contract will in some cases be presumed until the contrary is shewn, *e.g.*, from lapse of time; and where there is money coming due from time to time, *e.g.*, rent, the production of a receipt for a payment will be presumptive evidence that all rent that has become due before that date has been paid. But a receipt, even for any particular sum, is not conclusive evidence of payment of that sum, but, like

(*g*) *Foakes* v. *Beer* (1884), 9 App. Cas. 605; 54 L. J. Q. B. 130; 51 L. T. 833; and see also *Underwood* v. *Underwood* (1894), P. 204; 63 L. J. P. 109; 70 L. T. 390.

(*h*) *Ante*, pp. 16, 17.

(*i*) 53 & 54 Vict. c. 71, s. 3.

(*j*) *Good* v. *Cheesman* (1831), 2 B. & Ad. 335; *Fitch* v. *Sutton* (1804), 5 East, 230.

(*k*) 50 & 51 Vict. c. 57; and see also 51 & 52 Vict. c. 51, ss. 7, 8, requiring deeds of arrangement affecting land to be registered at the Land Registry Office.

other presumptions generally, the fact of the receipt may be controverted (*l*).

Effect of payment by cheque.

Payment should strictly be made in money or bank-notes, but if a cheque is given and received, that operates as payment unless and until dishonoured. If a cheque is given in payment, the payee is guilty of laches if he does not present it for payment within the proper time, so that if in the meantime the banker fails, having sufficient assets of the customer in his hands, the person to whom the cheque was paid has no further claim for payment against his debtor, and can only prove against the banker's estate (*m*). So, also, a bill of exchange or other negotiable security may operate as payment, and during its currency the remedy for recovering the debt is suspended (*n*); but, upon the dishonour of the instrument the original remedy revives, unless it be then outstanding in the hands of a third person for value, in which case it does not (*o*). On the dishonour of a bill, note, or cheque given in payment, the creditor may sue either for the original debt, or on the instrument itself.

Or by a negotiable security.

Payment by transmission through the post.

If a creditor expressly or impliedly requests his debtor to make payment by transmission through the post, the debtor is safe in adopting that course, provided he properly addresses and posts the letter; but unless there is such a request made, either expressly or impliedly, if the money is lost in transmission, the debtor will have to pay it over again, as posting the remittance, without authority to thus transmit it, cannot in itself constitute payment (*p*). However, if a creditor residing at a distance from his debtor writes a letter by post simply requesting the

(*l*) *Phillips* v. *Warren* (1845), 14 M. & W. 379.

(*m*) See hereon, *ante*, pp. 196, 197.

(*n*) *Per cur. Belshaw* v. *Bush* (1851), 11 C. B. 191; *Simon* v. *Lloyd* (1836), 2 Cr. M. & R. 187; Byles on Bills, 374; *Ex parte Matthew, re Matthew* (1884), 12 Q. B. D. 506; 32 W. R. 813; 51 L. T. 179.

(*o*) *Puckford* v. *Maxwell* (1794), 6 T. R. 52; *Price* v. *Price* (1847), 16 M. & W. 232; *Gunn* v. *Bolckow* (1877), 10 Ch. App 491; 44 L. J. Ch. 732.

(*p*) See Chitty on Contracts, 629.

debtor to send a cheque, this is an implied request or authority to send the cheque by post, and the debtor is safe in adopting that course, and not liable to be again called upon to pay, although the cheque never reaches the creditor, but is stolen in the course of transit through the post, and cashed by the thief (*q*).

Pennington v. *Crossley.*

But the mere fact that a debtor has for many years been in the habit of making remittances through the post, to which course the creditor has never raised any objection, does not in itself constitute a request or authority by the creditor to make payment in this way, and the transmission is at the debtor's risk (*r*).

2. Tender.

By tender is meant the act of offering a sum of money in satisfaction of some claim. If it is accepted, it of course is payment; but if refused, it is simply a tender, and amounts to a performance as far as the debtor is able of himself to effect performance. The advisable course to be taken by a person on whom a claim is made of a pecuniary character (reduced or reducible to a certainty), and who admits a liability but not to the full amount claimed, is to tender to the other person the amount which he admits. It is important to properly understand what will be a valid tender, and how a valid tender may be made.

What will constitute a valid tender.

A tender may be made either by the debtor or some one on his behalf, and either to the creditor personally, or some one who has been duly authorised by him to receive the money (*s*), *e.g.*, if a solicitor writes for payment of a debt, tender may be made to him. The tender must be made of the actual debt that is due, and nothing less than it, but tender of an amount in excess of the debt is a perfectly good tender provided change is not required, or, if required, provided that no

(*q*) *Norman* v. *Ricketts* (1886), 31 Solicitors' Journal, 124; Law Students' Journal, 1887, p. 6.

(*r*) *Pennington* v. *Crossley* (1897), 77 L. T. 43.

(*s*) *Moffat* v. *Parsons* (1814), 5 Taunt. 307; *Finch* v. *Boning* (1879), 4 C. P. D. 143. A tender to one of several joint creditors, or by one of several joint debtors is good, operating as tender to or by all (*Douglas* v. *Patrick* (1790), 3 T. R. 683).

objection is made to the tender on that ground (*t*). The tender must be made before any action has been commenced for recovery of the sum claimed.

In making a tender the money should be actually produced.

To constitute a valid tender it is not sufficient for the debtor to merely say he will pay the money, or even that he has it with him ; there must be an actual production of the money itself, unless, indeed, the creditor expressly dispenses with the production of it at the time (*u*).

Tender must be unconditional.

The tender must always be absolute and unconditional : for instance, in case a receipt is wanted, the proper course is for the debtor to bring a stamped receipt with him, and ask the creditor to sign it and pay the debtor the amount of the stamp (*v*). So also a sum offered, if the creditor will accept it, in full discharge of a larger sum claimed, has been held not to be a valid tender (*w*).

But a tender under protest is good.

It seems a tender under protest is good, if it does not impose any conditions on the creditor (*x*).

In what money a tender may be made.

A tender must (except as is presently mentioned) be made in money or bank-notes. It is provided that a tender of Bank of England notes payable to bearer on demand, is a valid tender for all sums above £5, except by the Bank itself or any branch thereof (*y*). It is also provided (*z*) that a tender of money in coins which have been issued by the Mint and have not been called in by proclamation and are of current weight shall be a legal tender—in the case of gold coins, for the payment of any amount ; in the case of silver coins, for the payment of any amount not exceeding 40*s.* ; and in the case of bronze coins, for the payment of any amount not exceeding 1*s.*

When country notes or cheques are a good tender.

Although a tender should usually be actually in money or Bank of England notes, yet a tender of

(*t*) *Dean* v. *James* (1833), 4 B. & A. 546.
(*u*) *Thomas* v. *Evans* (1808), 10 East, 101 ; *Douglas* v. *Patrick* (1790), 3 T. R. 683.
(*v*) *Laing* v. *Meader* (1834), 1 C. & P. 257.
(*w*) *Evans* v. *Judkins* (1815), 4 Camp. 156.
(*x*) *Scott* v. *Uxbridge Ry. Co.* (1866), L. R. 1 C. P. 596 ; *Greenwood* v. *Sutcliffe* (1892), 1 Ch. 1.
(*y*) 3 & 4 Wm. IV. c. 98, s. 6. (*z*) 33 Vict. c. 10, s. 3.

country notes, or of a draft or cheque on a banker, is valid if a creditor at the time raises no objection to the tender being made in that way (*a*).

Person tendering must remain ready to pay the money at any time afterwards.

If a creditor rejects a tender that is made to him by his debtor, yet he has afterwards a right to demand payment of the amount previously tendered, which if refused will make the position the same as if no tender had been made (*b*); for the very principle of tender is, that the person was then ready, and afterwards remained ready, to pay the amount tendered (*c*).

Effect of a tender.

The effect of a tender as a defence is, that if it is the fact that the amount tendered was the whole amount due, it bars any claim for subsequent interest, and the debtor will be entitled to his costs of any action that may subsequently be brought against him (*d*). On any action being brought, the proper course for the defendant to take is to set up the tender in his statement of defence, and pay the money into court; and payment into court must, in fact, always accompany a plea of tender. If a defendant sets up tender as a defence, he thereby, naturally, admits the contract, and a liability on it to the amount of the tender (*e*).

3. Accord and satisfaction.

Accord and satisfaction is a defence in law to a claim in contract or in tort (*f*) consisting of two parts, viz., (1) The accord, *i.e.*, a mutual agreement to accept and to pay or do something in satisfaction of the cause of action, and (2) The satisfaction, *i.e.*, the actual payment or doing of the sum or thing agreed on (*g*); it therefore amounts to a performance of a contract, though not in the way originally agreed on, and furnishes an answer to any action on it (*h*). The value of the satisfaction

(*a*) *Polglass* v. *Oliver* (1831), 2 A. & J. 15; *Jones* v. *Arthur* (1840), 8 Dowl. 442.

(*b*) The demand must be personal, and not by letter, *Edwards* v. *Yates* (1826), R. & M. 360.

(*c*) *Hayward* v. *Hayne* (1802), 4 Esp. 93.

(*d*) See *Dixon* v. *Clark* (1848), 5 C. B. 365.

(*e*) Indermaur's Manual of Practice, 129.

(*f*) See *Boosey* v. *Wood* (1865), 3 H. & C. 484, action for libel.

(*g*) See per Maule, J., in *Gabriel* v. *Dresser* (1855), 15 C. B. 628.

(*h*) See *Blake's Case* (1604), 6 Rep. 43b.

cannot be inquired into, provided it is shewn that it is of some value (*i*); but if an accord and satisfaction has been brought about by means of any fraud, it will be set aside on application to the Court, in the same way than any contract induced by fraud may be set aside (*j*).

II. Excuses for the non-performance of contracts.

Secondly, as to excuses for the non-performance of contracts; and these may be various, both from the different natures of contracts themselves, and from the circumstances that may arise in particular cases to justify a contracting party in not carrying out his contract. Of these excuses it is proposed in this chapter to consider the following, viz., Statutes of Limitation, Set-off, and Release. The subject of fraud or illegality in a contract, forming a valid excuse for its non-performance, is specially considered in the next chapter. The subject of bankruptcy and composition with creditors is beyond the scope of this work; and with regard to incompetency of a party to contract, this matter has already been sufficiently dealt with (*k*).

I. Statutes of Limitation.

The Statutes of Limitation are certain statutes which have been passed for the purpose of establishing fixed periods or limits after which actions cannot be brought, and claims, or the remedies whereby such claims might have been enforced, are extinguished and gone. There are several of these statutes, and different periods are fixed within which different actions must be brought (*l*). To take contracts by record and

(*i*) *Pinel's Case* (1602), 5 Rep. 117a; *Curlewis* v. *Clarke* (1849), 18 L. J. Ex. 144.

(*j*) *Stewart* v. *Great Western Ry. Co.* (1865), 2 De G. J. & S. 319.

(*k*) See *ante*, chap. vii. p. 240, *et seq.*

(*l*) The following are some of the chief periods of limitation :—

On a specialty contract . . . . . 20 years.

But with regard to a mortgage of land, although under seal, an action for the principal money secured by it must always be brought within twelve years (*Sutton* v. *Sutton* (1883), 22 Ch. D. 511; 52 L. J. Ch. 333; 48 L. T. 95); and this is the same even though there is besides the mortgage a collateral bond by the mortgagor (*Fearnside* v. *Flint* (1883), 22 Ch. D. 579; 52 L. J. Ch. 479; 48 L. T. 154). If, however, there is a collateral bond by a third person, the period is then twenty years as to him (*Re Powers, Lindsell* v. *Phillips* (1885), 30 Ch. D. 291); and this is so even though he is joined by the same instrument (*Re Frisby,*

As to records and specialties.

specialty first. It is provided that all such actions must be brought within twenty years after the cause of such action or suit accrued, and not after (*m*), but if any person shall be an infant, *feme covert*, or *non compos mentis* at the time when the cause of action accrues, then such person is at liberty to commence the action within the like time after becoming of full age, discovert, or of sound memory (*n*); and if any person or persons *against* whom there shall be any such cause of action is or are,

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Allison v. *Frisby* (1889), 61 L. T. 632; 38 W. R. 65). See further hereon Indermaur and Thwaites' Manual of Equity, 202, 203. Only six years' arrears of interest can be sued for on a mortgage of land, but a mortgagor will not be allowed to redeem without paying all arrears of interest (*Re Turner, Turner* v. *Spencer* (1894), 43 W. R. 155; and see *Re Lloyd, Lloyd* v. *Lloyd* (1903), 1 Ch. 385; 72 L. J. Ch. 78; 87 L. T. 541). As regards what arrears of rent can be recovered by a landlord against his tenant, the rule is six years, but if there is a covenant under seal to pay, then twenty years. See *ante*, p. 83, note (*v*).

For recovery of share of personality under an intestacy (23 & 24 Vict. c. 38, s. 13, and see hereon, *Re Johnson, Sly* v. *Blake* (1885), 29 Ch. D. 694; 52 L. T. 682; 33 W. R. 502)	20 years.
To recover a dividend declared by a company (*Re Severn and Wye and Severn Bridge Railway* (1896), 1 Ch. 559; 65 L. J. Ch. 400; 74 L. T. 219)	20 years.
For recovery of land and arrears of rent or mesne profits, against a wrongful owner	12 years.
For recovery of an annuity charged upon land (see hereon *Hughes* v. *Coles* (1884), 27 Ch. D. 231; 53 L. J. Ch. 1047; 51 L. T. 226; 32 W. R. 27)	12 years.
For recovery of a legacy	12 years.
On a simple contract	6 years.
For libel	6 years
For assault	4 years.
For false imprisonment	4 years.
For slander (dating in slander by words actionable *per se* from the utterance, and when not so actionable *per se* from the actual happening of the damage) . . .	2 years.
For penalty by common informer	2 years.
To recover an advowson three successive adverse incumbencies, or sixty years, whichever is the longer, but in no case after	100 years.

It has been held that the Statutes of Limitation apply so as to bar claims against the separate estate of a married woman (*Re Hastings Estate, Hallet* v. *Hastings* (1887), 35 Ch. D. 94; 56 L. J. Ch. 631; 57 L. T. 126; 35 W. R. 584).

(*m*) 3 & 4 Wm. IV. c. 42, s. 3. It has been held that judgments come within the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57, s. 8), and, in the absence of part payment or acknowledgment in writing, are barred by the lapse of twelve years (*Jay* v. *Johnstone* (1893), 1 Q. B. 189; 62 L. J. Q. B. 128; 68 L. T. 129).

(*n*) There was also by this statute a further period allowed in the case of the absence of the creditor beyond seas, but this is not so now (19 & 20 Vict. c. 97, s. 10).

at the time of such cause of action accruing, beyond the seas, then the person or persons entitled to any such cause of action may commence the action within the like time after the return of such person or persons from beyond the seas (*o*). It is also provided that if there shall have been any acknowledgment of the debt in writing signed by the party liable or his agent, or any part payment or part satisfaction, then there shall be a like period of twenty years from such acknowledgment, part payment, or part satisfaction (*p*).

As to simple contracts.

To next take simple contracts, it is provided that all actions thereon must be brought within six years of the cause of action arising, and not after (*q*). But if the person to whom any such cause of action accrues is at the time an infant, *feme covert*, or *non compos mentis*, then such person may commence the action within the like period after becoming of full age, discovert, or of sane memory (*r*) ; and if any person or persons *against* whom there shall be any such cause of action is or are at the time of its accrual beyond seas, then the person or persons entitled to any such cause of action may bring the same within the like period after his or their return from beyond seas (*s*). No part of the United Kingdom of Great Britain and Ireland, or the islands of Man, Guernsey, Jersey, Alderney, and Sark, or any island adjacent to any of them, being part of the dominions of His Majesty, is "beyond seas" within the meaning of this provision (*t*).

Meaning of "beyond seas."

The Statutes of Limitation as to contracts only bar the remedy, not the right.

Such, then, being the chief legislative enactments as to the limitation of actions on contracts, it follows that, if the periods allowed go by, generally speaking there is no further remedy on the contract ; it should how-

(*o*) 3 & 4 Wm. IV. c. 42, s. 4.

(*p*) Sect. 5. (*q*) 21 Jac. I. c. 16, s. 3.

(*r*) There was also by this statute a further period allowed in the case of the creditor being beyond seas, but this is not so now (19 & 20 Vict. c. 97, s. 10).

(*s*) 4 & 5 Anne, c. 16, s. 19. Where there are several persons jointly liable on a contract, some only of whom are beyond seas, time runs against those that are here, notwithstanding the absence of the other or others (19 & 20 Vict. c. 97, s. 11).

(*t*) 19 & 20 Vict. c. 97, s. 12.

ever, be observed that these statutes do not discharge the debt, but simply bar the remedy by action, so that a person having a lien will continue to have that lien, although his debt is statute-barred and therefore he cannot bring any action to recover it (*u*). With regard to the further periods allowed in the case of disabilities, it should be observed that the disability must be existing at the time of the accrual of the cause of action, and no disability commencing afterwards will be of any effect; for when once the time of limitation has begun to run nothing will stop it (*v*). Thus, if at the time of the accrual of a liability under a contract, the person who has incurred such liability is here, though he goes beyond seas the next day, yet the party having the right against him has no further time allowed him to enforce that right, though he would have had, if the other had been actually beyond seas at the time of the liability accruing. Nor will ignorance that a right of action existed, prevent the statute running, unless indeed the ignorance is produced by the defendant's fraud, and no reasonable diligence could have enabled the plaintiff to discover his rights, for here the statutory period only commences with the discovery of his rights. This is an equitable rule, which now, since the Judicature Acts, universally prevails (*w*).

When statute begins to run nothing can stop it.

Ignorance of right of action.

But, notwithstanding these provisions, the debt may be revived, or the Statutes of Limitation prevented from applying, by a signed acknowledgment of the debt being given, or by the payment of interest, or part payment of the debt by the debtor, or by the creditor issuing a writ of summons.

The ways in which the Statutes of Limitation may be prevented from applying.

(*u*) Per Lord Eldon in *Spears* v. *Hartley*, 3 Esp. 81; *Re Carter*, *Carter* v. *Carter* (1886), 34 W. R. 57; 53 L. T. 630. This is different to the Statutes of Limitation relating to land, which not only bar the remedy, but also the right. As resulting from what is stated in the text, it has been held that where a legacy is given by a testator to his debtor, and at the testator's death the debt is statute-barred, yet the executor is justified in setting off the statute-barred debt against the legacy (*Coates* v. *Coates* (1864), 33 L. J. Ch. 448).

(*v*) *Rhodes* v. *Smethurst* (1840), 6 M. & W. 351; *Gregory* v. *Hurrill* (1826), 5 B. & C. 341.

(*w*) *Gibbs* v. *Guild* (1882), 9 Q. B. D. 59; 46 L. T. 248; *Barber* v. *Houston*, 18 L. R. Ir. 475; *Armstrong* v. *Milburn* (1886), 54 L. T. 723.

What will be a sufficient acknowledgment to take a case out of the Statutes of Limitation.

An acknowledgment to take a case out of the statutes, as regards debts by record and specialty, was always required to be in writing (*x*), but as regards simple contracts, formerly a verbal admission of the debt was sufficient, provided it contained an express promise to pay, or was in such distinct and unequivocal terms that a promise to pay upon request might reasonably be inferred from it, which was an essential (*y*); so that where the acknowledgment set up was in the following words: "I know that I owe the money, but I will never pay it," it was held this was no sufficient acknowledgment, because the very words negatived a promise to pay (*z*). This is still what must be the nature of an acknowledgment to take the case out of the statutes, so that, in every case where it is disputed whether words used do or do not amount to an acknowledgment, the criterion is, Do they contain an actual promise to pay, or can such a promise be inferred? (*a*). It seems that an unqualified admission of an account being open, or one which either party is at liberty to examine, implies a promise to pay the debt found due (*b*). An acknowledgment may be conditional on a certain event happening, but in such a case the plaintiff, to entitle him to recover, must prove that the condition has been performed, or that the event has happened (*c*).

Conditional acknowledgment.

An acknowledgment must now always be in writing.

A mere oral acknowledgment will not, however, now be sufficient, for it has been provided by Lord Tenterden's Act (*d*), that no acknowledgment or promise by words only, shall be sufficient unless in writing signed by the party chargeable therewith (*e*); but by

(*x*) 3 & 4 Wm. IV. c. 42, s. 5.

(*y*) *Williams* v. *Griffiths* (1849), 3 Ex. 335; *Smith* v. *Thorne* (1852), 18 Q. B. 134.

(*z*) *A'Court* v. *Cross* (1825), 3 Bing. 328. See also *Green* v. *Humphreys* (1884), 26 Ch. D. 474; 53 L. J. Ch. 625; 51 L. T. 42; *Jupp* v. *Powell* (1885), 1 C. & E. 349; *Quincey* v. *Sharp* (1876), 45 L. J. (Ex.) 347.

(*a*) See *Pryke* v. *Hill* (1898), 79 L. T. 738.

(*b*) *Banner* v. *Berridge* (1881), 18 Ch. D. 254; 50 L. J. Ch. 630; 44 L. T. 680; 29 W. R. 844.

(*c*) *Tanner* v. *Smart* (1827), 6 B. & C. 638.

(*d*) 9 Geo. IV. c. 14, s. 1.

(*e*) It is, however, expressly provided in this section "that nothing

the Mercantile Law Amendment Act, 1856 (*f*), it is enacted that such an acknowledgment may be signed by an agent of the party duly authorised. In the case of several persons being liable jointly upon a contract, and one of them giving an acknowledgment, though without the consent or knowledge of the other, or others, it was formerly held that it took the case out of the Statutes of Limitation, not only as against that one, but against all (*g*). The contrary is, however, now the law, it having been provided by Lord Tenterden's Act (*h*), that an acknowledgment given by one shall only operate to revive or keep alive a debt against the particular person giving such acknowledgment. It has, however, been decided under this enactment that where one of several executors gives an acknowledgment of a debt of his testator, that is sufficient to revive the debt as against the testator's personal estate (*i*), but it is otherwise with regard to a claim against land (*j*).

Effect of an acknowledgment by one of several joint debtors.

An acknowledgment must be made before any action is brought (*k*). The person to whom the acknowledgment should properly be made is the creditor, and an acknowledgment of a simple contract debt is insufficient unless made to the creditor or his agent (*l*); but an acknowledgment of a specialty debt will, it seems, suffice though made to a stranger (*m*).

An acknowledgment must be before action.

As to payment of interest, or part payment of the debt, made by the debtor or his agent (*n*), this always

Payment of interest or part payment of principal.

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therein contained shall alter, or take away, or lessen the effect of any payment of any principal or interest made by any person."

(*f*) 19 & 20 Vict. c. 97, s. 13.

(*g*) *Whitcombe* v. *Whiting* (1781), 1 S. L. C. 579; Dougl. 652.

(*h*) 9 Geo. IV. c. 14, s. 1.

(*i*) *Re Macdonald, Dick* v. *Fraser* (1897), 2 Ch. 181; 66 L. J. Ch. 630; 76 L. T. 713.

(*j*) *Astbury* v. *Astbury* (1898), 2 Ch. 111; 67 L. J. Ch. 471; 78 L. T. 494.

(*k*) *Bateman* v. *Pinder* (1842), 3 Q. B. 574.

(*l*) *Stamford Banking Co.* v. *Smith* (1892), 1 Q. B. 765; 61 L. J. Q. B. 405; 66 L. T. 306.

(*m*) *Moodie* v. *Bannister* (1859), 4 Drew. 432. See also 1 S. L. C. 590.

(*n*) See as to the necessity of the payment being by the debtor or a person who is properly speaking his agent, *Newbold* v. *Smith* (1886), 33 Ch. D. 127; 55 L. J. Ch. 788; 55 L. T. 194; 34 W. R. 690.

has been, and is still, sufficient to take a case out of the Statutes of Limitation, and it matters not that the payment is made after the statute has barred the debt. The part payment, whether made to the creditor or his agent, is indeed evidence of a fresh promise to pay, and it must therefore be made under such circumstances that a promise to pay the balance may be inferred (*o*). Where there are accounts with items on both sides, the mere going through them and striking a balance does not take the case out of the statute ; but if it is expressly agreed that certain items on the one side shall be set off against and satisfy certain statute-barred items on the other side, and this then leaves a balance consisting of items not statute-barred, the full balance can be recovered (*p*). In the case of several persons liable jointly upon a contract, in the same way that it was formerly held that an acknowledgment by one would take the case out of the Statutes of Limitation as against all, so in the case of part payment of principal, or payment of interest, by one, it was also held that it extended to all (*q*). The contrary is, however, now the law, as the Mercantile Law Amendment Act, 1856 (*r*), enacts that part payment, or payment of interest, by one, shall only operate to keep the debt alive, or to revive it, as regards the particular person making such payment (*s*). But this provision does not govern cases coming within the Real Property Limitation Act, 1874, and as to all such cases, if there are joint debtors (*e.g.*, joint mortgagors of land), a part payment, or payment of interest, by one, will keep the debt alive against all, the reason being that there is not in the Real Property Limitation Act, 1874, any corresponding provision to that in

Effect of such payment by one of several joint debtors.

Differences as regards cases governed by Real Property Limitation Act, 1874.

(*o*) *Morgan* v. *Rowlands* (1872), L. R. 7 Q. B. 493 ; *Re Rainforth, Gwynne* v. *Gwynne* (1880), 49 L. J. Ch. 5 ; 41 L. T. 610.

(*p*) Chitty on Contracts, 688.

(*q*) *Whitcombe* v. *Whiting* (1781), 1 S. L. C. 579 ; Dougl. 652.

(*r*) 19 & 20 Vict. c. 97, s. 14.

(*s*) However, if one partner makes a part payment, or pays interest in respect of a debt of the firm, this would be presumed to be within the scope of his authority, and would revive the debt or keep it alive, not merely as against him, but against the whole firm, *Goodwin* v. *Parton* (1880), 42 L. T. 568).

the Mercantile Law Amendment Act, 1856, and therefore the common law principle with regard to the matter still prevails (*t*).

Issuing of process to prevent Statutes of Limitation applying.

A creditor cannot, by merely issuing a writ of summons to recover his debt, keep it alive for an indefinite space of time. The writ will primarily only remain in force for twelve months, but if not served it may by leave be renewed for six months, and so on from time to time, on its being shewn that reasonable efforts had been made to serve it, or for other good reason; and so long as the writ having originally been issued before the debt was statute-barred, is thus kept on foot, the debt will be kept alive (*u*).

2. Set-off.

Set-off is a demand which the defendant in an action sets up against the plaintiff's demand, so as to counterbalance that of the plaintiff, either altogether or in part. Thus, if the plaintiff sues for £50 due on a note of hand, the defendant may set off a sum due to himself from the plaintiff for merchandise sold to the plaintiff; and if he pleads such set-off in reduction of the plaintiff's claim, such plea is termed a plea of set-off. A set-off may therefore be defined as a claim which a defendant has upon a plaintiff, and which he sets up or places against the plaintiff's demand.

Former rules as to set-off.

Before any statute upon the subject, a defendant was not allowed to set-off any claim he had against the plaintiff, though he might claim a right to reduce or defeat the plaintiff's demand on account of some matter connected therewith, *e.g.*, in an action for money received by him he might claim to make certain deductions out of the money received by him, by way of commission or otherwise; but if he had simply some independent counter-debt against the plaintiff, he must have brought a cross-action to recover it (*x*). In equity the rule was somewhat different, being much more extensive, for there, whenever there was some mutual

(*t*) *Re Frisby, Allison* v. *Frisby* (1890), 61 L. T. 632; 38 W. R. 65.
(*u*) Indermaur's Manual of Practice, 67.
(*x*) Chitty on Contracts, 690.

credit between the parties, set-off was allowed. However, by the Statutes of Set-off (*y*) all mutual debts were allowed to be set-off, and this even although such debts were of a different nature. But under the Statutes of Set-off only *debts* were allowed to be set-off, and so the law remained until the coming into operation of the Judicature Acts, 1873 and 1875, when it received a great extension, the provision on the subject now being that a defendant in an action may set off, or set up by way of counter-claim against the claims of the plaintiff, any right or claim, *whether such set-off or counter-claim sound in damages or not*, and such set-off or counter-claim shall have the same effect as a statement of claim in a cross-action, so as to enable the court to pronounce a final judgment in the same action both on the original and on the cross-claim (*z*). But the court or a judge may, on the application of the plaintiff before trial, if in the opinion of the court or judge such set-off or counter-claim cannot be conveniently disposed of in the pending action, or ought not to be allowed, refuse permission to the defendant to avail himself thereof (*a*). The student will observe that the great alteration and extension of the principle of set-off that is made by the Judicature Acts is, that anything, even a mere claim for damages, may be set-off or counter-claimed for, whereas formerly it must have been liquidated, or of such a nature as might be rendered liquidated, without an actual verdict to liquidate it; and under such a counter-claim the defendant may now not merely reduce or nullify the plaintiff's claim, but may recover any balance due to him from the plaintiff (*b*).

Rule now.

(*y*) 2 Geo. II. c. 22; 8 Geo. II. c. 24, now repealed by the Statute Law Revision Acts, 1879 and 1883.

(*z*) The right of a defendant to set-off exists only where the debt or claim is enforceable by action, so that a debt arising from the unenforceable promise of an infant, or barred by the Statutes of Limitation, or arising from an oral contract which should have been in writing, by reason of the provisions of the Statute of Frauds (sect. 4) or the Sale of Goods Act, 1893 (sect. 4), cannot be set off (*Rawley* v. *Rawley* (1876), L. R. 1 Q. B. 460; 45 L. J. Q. B. 675; 35 L. T. 191).

(*a*) 36 & 37 Vict. c. 66, s. 24 (3); Order xix. r. 3.

(*b*) See *Re Milan Tramways Co., ex parte Theys* (1883), 22 Ch. D. 122;

3. Release.

By release, as applied to contracts, is meant some act which operates as an extinguishment of a person's liability on a contract, and it may occur either where the contractee expressly exonerates or discharges the contractor from his liability, or impliedly where the same effect takes place by the act of the law. An express release may be by an instrument under seal, in which case no consideration is necessary to its validity and effect; or provided there be a valuable consideration for the release, it need not be under seal, if it is made before breach, and also provided the original contract was not under seal, though if the original contract was under seal, then it can only be discharged by a release under seal. After breach, a release must be under seal, unless, being founded on a valuable consideration, it can operate, as it may possibly do, as an accord and satisfaction (*c*). A contract of record may be discharged by a release under seal (*d*).

A release given to one of several joint-contractors discharges all.

A release can only generally operate to discharge the liability of the person to whom the release is given. But in the case of several joint contractors a release given to one will operate to discharge all, and this even though the contract be several as well as joint, the reason of which is apparent, for if it did not so operate, the effect would be that any co-contractor from whom the amount was recovered would have a right over for contribution against the one released, so that the release would really be without effect (*e*).

Covenant not to sue given by one of two joint creditors.

Although one of two joint creditors can give a release, yet a covenant not to sue given by one of two joint creditors does not so operate, and cannot be set up as a defence to an action brought by both (*f*).

An instance of release by operation or implication of

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48 L. T. 213; 52 L. J. Ch. 29; 31 W. R. 107. As to the true distinction between set-off and counter-claim, see Indermaur's Manual of Practice 108.

(*c*) As to which see *ante*, p. 276.

(*d*) *Barker* v. *St. Quentin* (1844), 12 M. & W. 441.

(*e*) Chitty on Contracts, 649.

(*f*) *Walmesley* v. *Cooper* (1839), 11 A. & E. 221.

law occurred formerly where a creditor died having appointed his debtor executor of his will, for here, as the debtor, as executor, is the person entitled to receive the debts, and the debt is due from himself, and he cannot sue himself, the debt was at law gone. But in equity he would have been a trustee for the benefit of the persons entitled under the will or the next-of-kin, and it is now provided by the Judicature Act, 1873 (*g*), that where there is any variance between the rules of law and equity, the rules of equity shall prevail. Another instance of release by operation of law, which might until lately have occurred, was where a man married a woman to whom he was indebted; but in equity any such debt might always have been kept alive by the agreement of the parties prior to marriage by way of settlement, and the same provision in the Judicature Act applies here, and now in marriages on or since 1st January 1883, the debt will remain to her separate use (*h*).

Effect of a creditor appointing his debtor executor.

Or of a woman marrying her debtor.

If a person pays money in performance of some contract under compulsion of legal process, and afterwards he discovers that it was not due—*e.g.*, in the case of an action brought to recover money, and the defendant in such action, who has already paid the amount, being unable to find the receipt, or prove the payment without it, has to pay the amount over again, but subsequently finds the receipt—he cannot sue to recover back what he has thus paid (*i*).

Money paid under compulsion of legal process cannot afterwards be recovered back.

Money paid under mistake of fact can be recovered back again; thus, if A., owing B. money, pays him, and then A.'s agent, not knowing that the amount has been paid, also pays B., the amount can be recovered back by A. (*k*). But money paid under a mistake of law cannot be recovered back; thus, if A., against

Money paid under mistake.

(*g*) 36 & 37 Vict. c. 66, s. 25 (11).
(*h*) 45 & 46 Vict. c. 75, s. 2.
(*i*) *Marriott* v. *Hampton* (1797), 2 S. L. C. 409; 7 T. R. 269; *Cadaval* v. *Collins* (1836), 4 A. & E. 866; *Moore* v. *Fulham Vestry* (1895), 1 Q. B. 399; 71 L. T. 862; 43 W. R. 277; 64 L. J. Q. B. 226.
(*k*) See as an instance of the recovery of money paid under mistake, *King* v. *Stewart* (1892), 66 L. T. 339.

whom B. makes a claim, pays the amount under a mistaken impression that he is legally liable, and then finds out the law is the other way, he cannot recover the amount he has paid (*l*). But this rule, that money paid under mistake of law cannot be recovered, does not apply to a payment made under such a mistake to an officer of the court. Thus, a trustee in bankruptcy—who is an officer of the court—demanded payment of certain moneys from the trustee of the bankrupt's marriage settlement, which were paid under the mistaken belief that the trustee in bankruptcy was legally entitled thereto. It was held that the money could be recovered back, even though it had been distributed in the payment of dividends to the creditors, the trustee in bankruptcy being ordered to repay it out of other moneys coming to his hands belonging to the bankrupt's estate (*m*).

(*l*) Pollock's Contracts, 457.

(*m*) *Ex parte Simmons, re Carnac* (1886), 16 Q. B. D. 308; 55 L. J. Q. B. 74; 54 L. T. 339; 34 W. R. 421. See also *Re Brown, Dixon* v. *Brown* (1886), 32 Ch. D. 597; 55 L. J. Ch. 556; 54 L. T. 789; *Re Rhoades* (1899), 2 Q. B. 347; 68 L. J. Q. B. 804; 80 L. T. 742.

CHAPTER IX.

OF FRAUD AND ILLEGALITY.

In this chapter it is proposed to consider generally what will amount to fraud, and when a contract will be illegal; the effect of fraud and illegality on a contract; and also some particular cases.

Fraud defined.

Firstly, *As to Fraud.*—Fraud in law may be defined as an untrue representation, made knowingly or recklessly (*a*), with intent that the plaintiff should act upon it, and really inducing him so to act, to his detriment (*b*). It is not necessary to shew that the guilty party made any benefit by the fraud or colluded with any one who made a benefit (*c*). The representation may be by express words, or by conduct; by positive assertion or suggestion of that which is false, or by active concealment of something material to be known (*d*). Thus, it is fraud to hide defects in goods if that deceives the buyer when he is examining them (*e*). The omission to disclose a material fact is not fraud unless there was a legal duty to disclose it (*f*), though it is ground for setting aside contracts *uberrimæ fidei*—*i.e.*, contracts of insurance, for allotment

Pasley v. *Freeman.*

(*a*) Knowingly, or without belief in its truth, or recklessly careless whether it be true or false, per Lord Herschell in *Derry* v. *Peek* (1889). 14 A. C. 337.

(*b*) Numerous definitions of fraud have from time to time been given (see several in Brown's Law Dict. 236), and it is an undoubtedly difficult matter accurately to define. Courts of equity have refused to define fraud, considering that the ways of fraud are infinite, and that new modes of fraud may constantly arise; and the rules of equity now prevail in all divisions of the High Court of Justice: 36 & 37 Vict. c. 66, s. 25 (11).

(*c*) *Pasley* v. *Freeman* (1789); 2 S. L. C. 66; 3 T. R. 51.

(*d*) Pollock on Contracts, 554.

(*e*) *Schneider* v. *Heath* (1813), 3 Camp. 506; *Horsfall* v. *Thomas* (1862), 1 H. & C. 90.

(*f*) *Peck* v. *Gurney* (1873), 6 H. L. at p. 390; *Keates* v. *Cadogan* (1851), 10 C. B. 591; *Ward* v. *Hobbs* (1878), 4 A. C. 14; 48 L. J. Q. B. 281.

of shares in a company, for settlement of some family dispute, for sale of land, and (perhaps) suretyship and partnership (*g*). But a partial statement of the truth is fraud if that which is kept back makes that which is stated untrue—*e.g.*, disclosing two paragraphs in a surveyor's report, but keeping back a third which qualifies the others (*h*); and *suppressio veri* is deceit if withholding what is not stated makes what is stated absolutely false (*i*). A mere statement of opinion is not deceit (*j*) unless it can be proved that the opinion was wilfully false (*k*). But a false statement of intention (as distinct from an unfulfilled promise) to do a thing is deceit, as where directors who borrowed money for a company were held liable for fraud on a false statement of the purpose for which the loan was to be used (*l*). An untrue representation as to a man's private rights (*m*), or as to the effect of a deed (*n*), or the existence or text of a statute or reported case, is sufficient to constitute fraud; but it seems that a representation of general law is taken to be only an expression of opinion (*o*).

As to legal and moral fraud.

Fraud was formerly said to be of two kinds; (1) Legal fraud, consisting in some false representation, made without any knowledge of its falsity, and without any dishonest intention, or any intention to benefit the party making the representation; and (2) Moral fraud, consisting in a representation made with knowledge of its falsity, or without actual belief in its truth, and with dishonest intention, or made for the purpose of benefiting the party making the representation. A question very much discussed was, whether,

(*g*) See Anson on Contracts, 175–181; Pollock on Contracts, 530–552.
(*h*) *Arkwright* v. *Newbolt* (1881), 17 Ch. D. at p. 318.
(*i*) *Peek* v. *Gurney* (1873), 6 H. L. at p. 403 per Cairns, L.C.
(*j*) *Harvey* v. *Young* (1602), 1 Yelv. 20.
(*k*) *Anderson* v. *Pacific Insurance Co.* (1872), L. R. 7 C. P. p. 69.
(*l*) *Edgington* v. *Fitzmaurice* (1885), 29 Ch. D. 459; 55 L. J. 650; 53 L. T. 369. The state of a man's mind is as much a fact as the state of his digestion, per Bowen, L.J.
(*m*) Per Lord Westbury in *Cooper* v. *Phibbs* (1867), 2 H. L. 149; per Mellish, L.J. in *Rogers* v. *Ingham* (1876), 3 Ch. D. 350.
(*n*) *Hirschfield* v. *L. B. & S. C. Ry.* (1876), 2 Q. B. D. 1; *West London Commercial Bank* v. *Kitson* (1884), 13 Q. B. D. 360.
(*o*) *Rashdall* v. *Ford* (1866), L. R. 2 Eq. 750.

in order to vitiate a contract or to give a right of action for deceit, it was necessary to show moral as well as legal fraud, or whether mere legal fraud by itself was sufficient (*p*). Such distinction and question may, however, be now consigned to oblivion, the phrase Legal as distinguished from Moral fraud having been rejected as wholly inapplicable and inappropriate to legal discussion, and the question now always is simply, Do the facts shew fraud in the common meaning of the word? (*q*). It has been expressly decided by the House of Lords in *Derry* v. *Peek* that a false statement made carelessly and without reasonable ground for believing it to be true, is not in itself fraud, though it may be evidence of fraud; and that a false statement, if made in the honest belief that it is true, is not fraudulent, and does not render the person making it liable to an action for deceit (*r*). In consequence of this decision, a new right of action was created by the Directors Liability Act, 1890 (*s*), which provides that directors, promoters, and other persons responsible for the issue of any prospectus with regard to a company, shall be absolutely liable for untrue statements contained therein which induce persons, to their loss, to take shares or debentures unless they can satisfy the court that they not only believed in the statements, but had reasonable ground for such belief; or unless it was a correct statement of the report or valuation of an engineer, valuer, or other expert, and they had no reasonable ground for believing that such person was not competent to make such report or valuation; or unless the statement was a correct and fair representation of a statement made by an official person, or in a public official document.

No such distinction now.

A false statement honestly believed in is not fraudulent.

Directors Liability Act, 1890.

(*p*) *Cornfoot* v. *Fowke* (1840), 6 M. & W. 358; *Evans* v. *Collins* (Ex. Ch.) (1844), 5 Q. B. 820.

(*q*) *Weir* v. *Bell* (1877), 3 Ex. D. 238; 47 L. J. Ex. 704; *Hart* v. *Swaine* (1877), 7 Ch. D. 42; *Jolliffe* v. *Baker* (1883), 11 Q. B. D. 235; 52 L. J. Q. B. 609; 48 L. T. 966; 32 W. R. 69; *Smith* v. *Chadwick* (1884), 9 App. Cas. 187; 53 L. J. Ch. 873; 50 L. T. 697; 32 W. R. 687.

(*r*) *Derry* v. *Peek* (1889), 14 A. C. 337; 58 L. J. Ch. 864; 61 L. T. 265.

(*s*) 53 & 54 Vict. c. 64. See hereon *Thomson* v. *Lord Clanmorris* (1899), 2 Ch. 523; 68 L. J. Ch. 727; 81 L. T. 286.

The statement need not be actually made to the injured party (*t*). If it is a statement to the public generally, any member of the public who acts upon it can sue (*u*). A person who buys shares in the market (as distinct from a person who applies to the company for shares) in reliance on a fraudulent prospectus cannot sue the persons who issued that prospectus for fraud (*v*) unless he can prove the prospectus was issued to induce people to buy in the market (*w*). The plaintiff must have been misled by the false representation or he cannot rely on it (*x*).

A principal is liable for his agent's fraud.

If an agent in the course of his employment makes some false representation, which representation is unknown to the principal, or not known by him to be false, and not in any way sanctioned by him, but yet it comes within the scope of the agent's authority or employment, the principal is liable for the fraud (*y*), and this whether the principal has or has not derived any benefit from the fraud (*z*). The principal appears to be liable in all cases except where both he and the agent believed the false representation to be true. He is liable if he knew the representation to be false, and either authorised it to be made or the agent made it in the course of his employment without specific authorisation; and he is liable if he believed the representation to be true, but the agent knew it was false. The principal is liable for the fraud of his agent in abuse of his authority and for his own purposes to all persons dealing with the agent in good faith for valuable consideration, provided the act done by the agent

(*t*) *Langridge* v. *Levy* (1837), 4 M. & W. 337.
(*u*) *Andrews* v. *Mockford* (1896), 1 Q. B. 372; 65 L. J. Q. B. 302.
(*v*) *Peek* v. *Gurney* (1873), 6 H. L. 377; 43 L. J. Ch. 17.
(*w*) *Andrews* v. *Mockford*, *supra*.
(*x*) *Horsfall* v. *Thomas* (1862), 1 H. & C. 90; *Macleay* v. *Tait* (1906), A. C. 24; 75 L. J. Ch. 90.
(*y*) *Udell* v. *Atherton* (1861), 7 H. & N. 172; *Barwick* v. *English and Joint Stock Bank* (1867), L. R. 2 Ex. 259 (1887); 36 L. J. Ex. 147; *Houldsworth* v. *City of Glasgow Bank* (1880), 5 A. C. 317; 42 L. T. 194; *Shaw* v. *Port Philip Gold Mining Co.* (1884), 13 Q. B. D. 103; 53 L. J. Q. B. 369; 50 L. T. 685.
(*z*) *British Mutual Banking Co.* v. *Charnwood Forest Ry. Co.* (1887), 18 Q. B. D. 714; 56 L. J. Q. B. 449; 57 L. T. 833; 35 W. R. 590.

is authorised by the terms of the agent's authority (*a*). But a principal is not liable for the misrepresentation of his agent made without his authority, express or implied, but to serve the private ends of the agent (*b*). It has been held that the secretary of a company has no general authority to make representations to induce persons to take shares in a company, so that a person who is induced to take shares in a company by fraudulent misrepresentations of the secretary, not authorised by or known to the directors, is not entitled to take proceedings against the company for the removal of his name from the list of shareholders, or against the directors for damages (*c*). An agent acting within the scope of his authority is not personally liable for false representations made innocently by him (*d*).

As to agent's personal liability.

If a person interests himself to procure credit for another, or is applied to and inquired of as to a person's position, and makes some false representation in reply thereto, whereby the inquirer is induced to give credit to the third person, he is liable to an action in respect of the fraud contained in such false representation, and quite irrespective of guarantee; so that, the provision in the Statute of Frauds as to guarantees being in writing, was sometimes evaded by suing for the fraud frequently involved in such a representation. However, by Lord Tenterden's Act (*e*) it is provided "that no action shall be maintained whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade, or dealings of any other person, to the intent or purpose that such

Representations concerning the credit of another.

Writing necessary.

(*a*) *Hambro* v. *Burnand* (1904), 2 K. B. 10; 73 L. J. K. B. 669; 90 L. T. 803.

(*b*) *British Mutual Banking Co.* v. *Charnwood Forest Ry. Co.* (1887), *supra.*; *Thorne* v. *Heard* (1895), A. C. 495; 64 L. J. Ch. 652; *Whitechurch* v. *Cavanagh* (1902), A. C. 117; 71 L. J. K. B. 400; *Ruben* v. *Great Fingall* (1906), A. C. 439; 75 L. J. K. B. 843.

(*c*) *Newlands* v. *National Employers' Accident Association* (1885), 54 L. J. Q. B. 428; 53 L. T. 242.

(*d*) *Eaglesfield* v. *Marquis of Londonderry* (1876), 38 L. T. 303; 26 W. R. 540.

(*e*) 9 Geo. IV. c. 14, s. 6. As to the circumstances leading to this enactment, see 2 S. L. C. 57.

other person may obtain credit, money, or goods upon (*f*), unless such representation or assurance be made in writing signed by the party to be charged herewith." This Act includes a case where the representation is made in order that the party to be charged may obtain a benefit from the credit, money, or goods being obtained by such other person (*g*). A company incorporated under the Companies Acts is a "person" within the meaning of this enactment and entitled to its benefit. Consequently such a company is not liable for a fraudulent representation as to the credit of another person, not signed by it, but made by its agent acting within the scope of his authority, although the representation is in writing signed by the agent, and is made in the interests of the company (*h*).

Hirst v. *West Riding Union Banking Co.*

13 Eliz. c. 5.

By 13 Eliz. c. 5, "An Act against Fraudulent Deeds, Gifts, Alienations, &c.," it is provided that all gifts, grants, conveyances, &c., of every kind of property, by writing or otherwise, made for the purpose of delaying, hindering, or defrauding creditors and others of their just and lawful actions, suits, debts, &c., shall be void and of no effect as against such creditors and others, except made upon good (which means valuable) consideration to a person *bonâ fide* not having notice of the fraud. It will be observed that this statute applies to conveyances of all kinds of property, whether real or personal. The leading case on the construction of the statute is *Twynne's Case* (*i*), in which a gift of goods was held to be fraudulent on the following grounds:—

Twynne's Case.

1. The gift was perfectly general.
2. The donor continued in possession after the gift.
3. It was made in secret.
4. It was made pending the writ.

(*f*) This is as it is in the Act, but it is evidently a misprint, and should be read "money or goods upon credit."

(*g*) *Pearson* v. *Seligman* (1883), 31 W. R. 730; 48 L. T. 842.

(*h*) *Hirst* v. *West Riding Union Banking Co.* (1903), 2 K. B. 260; 70 L. J. K. B. 282; 85 L. T. 3; 49 W. R. 715; *Swift* v. *Jewsbury* (1874), L. R. 9 Q. B. 301; 43 L. J. Q. B. 56.

(*i*) (1585), 1 S. L. C. 1; 3 Coke, 80.

5. There was a trust between the parties, and fraud is always clothed with a trust.

6. The deed of gift stated that the gift was honestly and truly made, which was an unusual clause.

The above are therefore points to look to in any gift or conveyance of property to determine whether or not it is fraudulent within the above Act; not that because any of those circumstances exist the transaction is therefore necessarily void, but a presumption of fraud arises therefrom. And although it was at one time laid down that an absolute sale without delivery of possession must be in point of law fraudulent (*j*), this cannot be taken at the present day to be the law, for the rule now established is that under almost any circumstances the question whether the transaction is or is not fraudulent is one for the jury (*k*). And where the transaction is a mortgage, absence of change of possession is, certainly, no evidence of fraud (*l*).

When fraud presumed in a voluntary settlement.

If a person makes a voluntary settlement of his property, whereby his remaining assets are not sufficient for creditors existing at the time, the law presumes an intention to defeat and delay such creditors so as to bring the case within the statute (*m*), and in some cases the same principle applies to subsequent creditors (*n*). Although a conveyance may be fraudulent under the above statute as against creditors, yet as between the parties themselves it is good (*o*). A settlement may be set aside under this statute even after a considerable lapse of time; thus, in one case this was done after ten years had gone by (*p*).

(*j*) *Edwards* v. *Harben* (1780), 2 T. R. 587.

(*k*) *Martindale* v. *Booth* (1832), 3 B. & Ad. 498, and cases there cited See generally hereon 1 S. L. C. 13.

(*l*) See *Edwards* v. *Harben* (1780), 2 T. R. 587; 1 S. L. C. 11, 12.

(*m*) *Spirett* v. *Willows* (1865), 34 L. J. Ch. 367; *Re Lane Fox, ex parte Gimblett* (1900), 2 Q. B. 508; 69 L. J. Q. B. 722; 83 L. T. 176.

(*n*) *Freeman* v. *Pope* (1870), L. R. 5 Ch. 538; 39 L. J. Ch. 689; *ex parte Russell, re Butterworth* (1882), 19 Ch. D. 588; 51 L. J. Ch. 521. And see generally hereon Indermaur and Thwaites' Manual of Equity, 43-46.

(*o*) *Robinson* v. *M'Donnell* (1818), 2 B. & Ald. 134; *Marewood* v. *South Yorkshire Ry. Co.* (1859), 3 H. & N. 798.

(*p*) *Three Towns Banking Co.* v. *Maddever* (1884), 27 Ch. D. 523; 53 L. J. Ch. 998; 52 L. T. 35.

27 Eliz. c. 4.

By 27 Eliz. c. 4 all voluntary conveyances of land were rendered fraudulent and void against subsequent purchasers for value from the donor, and this even although the subsequent purchaser had notice of the prior voluntary conveyance; but this is now no longer so, since the Voluntary Conveyances Act, 1893 (*q*).

Voluntary Conveyances Act, 1893.

Ex dolo malo non oritur actio.

As to the effect of fraud on a contract, the maxim is, *Ex dolo malo non oritur actio* (*r*); but, notwithstanding this, fraud does not altogether vitiate a contract, but the person on whom the fraud is practised is entitled to insist on the fraud as preventing any right of action that would, but for it, exist, or he may, if he choose, ratify and confirm the contract; and generally he may also sue for such damages as the fraud has occasioned (*s*). And although as a contract originally stands, if induced by fraud, the party guilty of the fraud cannot enforce it, yet if third persons acquire a *bonâ fide* interest under it without any notice of the fraud, they will have a right to enforce it even against the party on whom the fraud has been practised (*t*).

But third persons may acquire an interest.

As to rescission of a contract on the ground of fraud.

But where there has been fraud, and a person has therefore a right to rescind the contract, he must exercise this right within a reasonable time, and if, knowing of the fraud, he does not rescind the contract, but continues to act in the matter as if there were no fraud, he will lose his right (*u*). If there is fraud, it is not necessary to shew that the fraud goes to the whole of the contract; it is quite sufficient to shew that there is a fraudulent misrepresentation as to any part of that which induced the person to enter into the contract (*v*).

(*q*) 56 & 57 Vict. c. 21.
(*r*) See Broom's Legal Maxims.
(*s*) *White* v. *Garden* (1851), 10 C. B. 919, 927; *Stevenson* v. *Newnham* (1853), 13 C. B. 285.
(*t*) *Oakes* v. *Turquand* (1867), L. R. 2 H. L. 325.
(*u*) Ibid.
(*v*) Per Blackburn, J., *Kennedy* v. *Panama Mail Co.* (1867), L. R. 2 Q. B. 587.

If a person comes to the court to set aside a contract on the ground of fraud, and it appears that he also on his part has been guilty of fraud, so that both parties are really and truly *in pari delicto*, the court will not give relief, for the maxim is, *In pari delicto potior est conditio defendentis et possidentis*, unless, indeed, public policy will be promoted by giving relief (*x*). Application of the maxim *In pari delicto*, &c.

Secondly, *As to illegality*.—Primarily speaking, parties are allowed to enter into any contracts that they think fit, and by their contracts to make laws for themselves to a certain extent, but there are many kinds of contracts which are not allowed because the interests of the public, or of morality, are affected thereby, and public injury might be done were they allowed. Where, then, there is illegality, the contract is void, and, in the words of Lord Chief Justice Wilmot, in the important case of *Collins* v. *Blantern* (*y*), "The reason why such contracts are void is for the public good. You shall not stipulate for iniquity; no polluted hand shall touch the pure fountain of justice. Whoever is a party to an unlawful contract, if he hath once paid the money stipulated to be paid in pursuance thereof, he shall not have the help of a court to fetch it back again; you shall not have a right of action when you come into a court of justice in this unclean manner to recover it back again." But if of two parties to an illegal contract one is not actually in *pari delicto* with the other, he may obtain relief, *e.g.*, money paid as a fraudulent preference by a debtor to his creditor to procure the latter's consent to a composition deed can be recovered (*z*); and further, if money is paid, or goods delivered, for an illegal purpose, the party may recover the same back before the illegal purpose (or any material part of it) is carried out or effected (*a*). Still all such transactions must be regarded closely, II. As to illegality. *Collins* v. *Blantern*. Money paid under an illegal contract cannot generally be recovered back. *Taylor* v. *Bowers*.

(*x*) Story's Equity, 298, 303; Broom's Legal Maxims, 546.
(*y*) (1767), 1 S. L. C. 369; 2 Wilson, 341.
(*z*) *Atkinson* v. *Denby* (1860), 7 H. & N. 934; 31 L. J. Ex. 362.
(*a*) *Taylor* v. *Bowers* (1876), 1 Q. B. D. 300; 46 L. J. Q. B. 39.

Herman v. *Zeuchner.*

and if the illegal purpose is in substance effected, the principle just stated applies. Thus, it has been held to be illegal for a defendant in a criminal case (*b*), who has been ordered to find bail for his good behaviour for a certain period, to deposit money with his surety to secure him, under an arrangement for repayment at the expiration of the period; and that therefore no action can be maintained by the depositor to recover it back either before or after such period, although the defendant in the criminal case has not committed any default, and the surety has therefore not been called upon for any payment, for the illegal purpose was in fact effected when the public lost the protection which the law affords for securing the party's good behaviour (*c*).

The doctrine of estoppel does not prevent the setting up of illegality.

Collins v. *Blantern.*

Although an instrument on its face may appear to be perfectly valid, yet parol evidence may be given to shew that it is actually an illegal contract, and this even although it be a contract under seal. This is well shewn by the case of *Collins* v. *Blantern* (*d*), which has already been referred to, and the facts in which have been set out at a previous page, to which the student is referred (*e*). In that case also Lord Chief Justice Wilmot in his judgment said: "What strange absurdity would it be for the law to say that this contract is wicked and void, and in the same breath for the law to say, You shall not be permitted to plead the facts which clearly shew it to be wicked and void!" (*f*).

The law never presumes illegality.

But it must be carefully remembered that the law never presumes illegality, but rather presumes every contract to be good until the contrary is shewn; for

(*b*) This principle has recently been held to extend to indemnification given even by a person other than the defendant (*Consolidated Exploration & Finance Co.* v. *Musgrave* (1900), 1 Ch. 37; 69 L. J. Ch. 11; 81 L. T. 747).

(*c*) *Herman* v. *Zeuchner* (1885), 15 Q. B. D. 561; 54 L. J. Q. B. 340; 53 L. T. 94; 33 W. R. 606; see also *Kearly* v. *Thomson* (1890), 24 Q. B. D. 742; 59 L. J. Q. B. 288; 63 L. T. 150.

(*d*) (1767), 1 S. L. C. 369; 2 Wilson, 341.

(*e*) See *ante*, p. 18.

(*f*) 1 S. L. C. 375.

one of the maxims for the construction of contracts is that the construction shall be favourable (*g*). If a contract be made on several considerations, one of which is illegal, the entire contract is void. And where the illegal part of a contract cannot be severed from the legal part, the whole is void. But if there is no illegality of consideration, and some only of the promises or covenants or conditions are illegal, and those can be separated from the rest, the remainder of the contract is good (*h*). Effect of illegality.

Illegality is usually said to be of two kinds, viz., (1) Where the illegality consists of some act which is illegal by the common law of the realm, as being against public policy or morality, and acts of this kind are also said to be *mala in se;* and (2) Where the illegality consists of some act which was not originally illegal, but has been rendered so by some statutory provision, and acts of this kind are also said to be *malâ quia prohibita* (*i*). Illegality is of two kinds.

A contract in general restraint of trade was formerly held to be absolutely void—that is to say, no person, for however valuable a consideration, could covenant absolutely never again to carry on his trade or calling anywhere, for any such agreement was considered to be contrary to public policy, as tending to cramp trade, and to discourage industry, enterprise, and competition (*j*). But it was held that it was perfectly legal for a person, for valuable consideration, to enter into a contract in limited restraint of trade, which might often be very necessary for another's proper protection; thus, if a person sells the goodwill of a business, and nothing is said restricting his carrying on a similar business in or near that place, he is at liberty forthwith to set up a like business even next door, to the great injury of the purchaser (*k*), though he must not Contracts in general restraint of trade.

(*g*) See *ante*, p. 25. (*h*) Chitty on Contracts, 549, 550.
(*i*) See this division in 1 S. L. C. 383.
(*j*) *Mitchell* v. *Reynolds* (1711), 1 S. L. C. 406; 1 P. Wms. 181.
(*k*) *Walker* v. *Mottram* (1882), 19 Ch. D. 355; 51 L. J. Ch. 108; 45 L. T. 639.

solicit the former customers of the business (*l*), nor in any way represent himself as carrying on the old business. But this power of setting up a fresh business may always be prevented by the vendor entering into a contract in reasonable restraint of trade. It is now laid down that a contract in restraint of trade which is even general in its nature is not necessarily invalid (though it usually is), but that *the true test of the validity of such contract is whether it is or is not reasonable*, and that a covenant of this kind may be unlimited, provided that it is not more than is reasonably necessary for the protection of the covenantee, and is in no way injurious to the interests of the public (*m*). The question depends to a great extent on the circumstances of each particular case, for naturally some trades or callings may require a wider limit than others, and it is impossible to lay down any fixed rules as to when a restraint will be reasonable and when not (*n*). Where a limit of space is fixed, *e.g.*, within two miles, the distance is to be measured on the map as the crow flies, and is not to be taken by the nearest road unless so stated (*o*).

Nordenfelt v. *Maxim-Nordenfelt Guns & Ammunition Co.*

Restraint may be good in part and bad in part.

It has been held that a contract in restraint of trade may sometimes be good in part, and bad in part; that is to say, where there are distinct stipulations, part may be accepted and held to be binding, and part may be rejected (*p*). A covenant not to carry on a trade at

(*l*) *Trego* v. *Hunt* (1897), A. C. 7; 65 L. J. Ch. 1; 73 L. T. 514.

(*m*) *Nordenfelt* v. *Maxim-Nordenfelt Guns & Ammunition Co.* (1894), A. C. 535; 63 L. J. Ch. 908; 71 L. T. 489; *Rousillon* v. *Rousillon* (1880), 14 Ch. D. 351; 49 L. J. Ch. 338; 42 L. T. 679; 28 W. R. 623; *Leather Cloth Co.* v. *Lorsent* (1869), L. R. 9 Eq. 345; 39 L. J. Ch. 86; *Mills* v. *Dunham* (1891), 1 Ch. 576; 60 L. J. Ch. 362; 64 L. T. 712; *Mumford* v. *Gething* (1859), 7 C. B. (N. S.) 317.

(*n*) See various instances of different limits in Pollock on Contracts, 363–365; Chitty on Contracts, 557–563. See also *Tallis* v. *Tallis* (1873), 2 E. & B. 391; *Leather Cloth Co.* v. *Lorsent* (1869), L. R. 9 Eq. 355; *Allsopp* v. *Wheatcroft* (1853), L. R. 15 Eq. 59; 42 L. J. Ch. 12; *Jacoby* v. *Whitmore* (1883), 32 W. R. 18; 49 L. T. 335; *Mineral Bottle Exchange Co.* v. *Booth* (1887), 36 Ch. D. 465; 57 L. T. 573; and see particularly the modern leading case of *Nordenfelt* v. *Maxim-Nordenfelt Gun & Ammunition Co.*, supra.

(*o*) *Mouflet* v. *Cole* (1873), 42 L. J. Ex. 8.

(*p*) *Mallam* v. *May* (1843), 11 M. & W. 643; *Price* v. *Green* (1847),

all "so far as the law allows," has been held to be bad, as being too vague and general, for the parties must fix the limit, and not leave it for the court to do so (*q*). *Davies* v. *Davies*.

It is actually necessary that a contract in restraint of trade, to be good, should be founded upon a valuable consideration even though under seal (*r*), and this forms an exception to the rule that a specialty contract requires no consideration. But the court will not enter into the question of whether the consideration is adequate; it will be sufficient if there is a consideration shewn to be of some *bonâ fide* legal value, but if the consideration is so small as to be merely colourable, then it is not sufficient (*s*). Such contracts must always be founded on a valuable consideration.

Although the restraint is a limited and reasonable one, yet it may, irrespective of that be illegal. Thus in one case the plaintiff, who was not a duly qualified medical practitioner, engaged the defendant to assist him in the profession of medicine, and bound the defendant not to practise that profession within ten miles of his place of business for five years after the engagement terminated. The defendant, nevertheless, commenced to practise, and the plaintiff applied for an injunction. It was held that, as the plaintiff was an unqualified practitioner, the agreement was not binding, and an injunction was refused (*t*). When a contract, though in limited restraint of trade, may be bad.

An agreement or combination of employers binding themselves only to employ workers at a certain rate of wages, or only to carry on their business in a certain specified way, is illegal, and no action lies on the breach of any such agreement (*u*); and so also an agreement Agreement or combination of employers.

16 M. & W. 346; *Baines* v. *Geary* (1887), 35 Ch. D. 154; 56 L. J. Ch. 935; 36 L. T. 567

(*q*) *Davies* v. *Davies* (1888), 36 Ch. D. 359; 57 L. J. Ch. 962; 36 W. R. 89; 58 L. T. 209.

(*r*) *Mitchell* v. *Reynolds* (1711), 1 S. L. C. 406; 1 P. Wms. 181.

(*s*) *Hitchcock* v. *Coker* (1837), 6 A. & E. 438; *Archer* v. *Marsh* (1837), 6 A. & E. 966; *Pilkington* v. *Scott* (1846), 15 M. & W. 657.

(*t*) *Davies* v. *Makuna* (1885), 29 Ch. D. 596; 54 L. J. Ch. 1148; 53 L. T. 314; 33 W. R. 668.

(*u*) *Hilton* v. *Eckersley* (1856), 6 E. & B. 47; but compare herewith *Mogul Steamship Co.* v. *Macgregor* (1892), A. C. 25; 61 L. J. Q. B. 295; 66 L. T. 1.

Trade Union Act, 1871.

by employés to combine to increase the rate of wages cannot be enforced (*x*). By the Trade Union Act, 1871 (*y*), it is, however, provided that trade unions (*z*) are not to be considered unlawful so as to render members thereof liable to be prosecuted, but agreements between members *inter se* are to be incapable of being enforced (*a*).

Contracts of an immoral nature.

As instances of contracts of an immoral nature, and as such illegal and void, may be mentioned agreements in consideration of future cohabitation (*b*), or future seduction (*c*); and any contract which is designed to promote an illegal transaction is bad, *e.g.*, the letting of lodgings, or supplying goods, for the direct purposes of prostitution (*d*), or the lending of money to further a known illegal enterprise (*e*).

Restraint of marriage.

Contracts which operate in general restraint of marriage are illegal and void (*f*).

Contracts involving maintenance, or champerty, are also illegal and void.

Maintenance.

Maintenance consists in officiously intermeddling in

(*x*) *Walsby* v. *Anley* (1861), 3 El. & El. 516.

(*y*) 34 & 35 Vict. c. 31, amended by 39 & 40 Vict. c. 22. See also the Trade Disputes Act, 1906, 6 Edw. VII. c. 47.

(*z*) *I.e.*, any combination (temporary or permanent) for regulating the relations between workmen and masters, or between workmen and workmen, or between masters and masters, or for reposing restriction conditions on the conduct of any trade or business, see 39 & 40 Vict. c. 22, s. 16.

(*a*) Sects. 2–4; *Rigby* v. *Connol* (1880), 14 Ch. D. 482; 49 L. J. Ch. 328; 42 L. T. 139; 28 W. R. 650; *Duke* v. *Littleboy* (1880), 49 L. J. Ch. 802; 28 W. R. 977; 43 L. T. 216; *Old* v. *Robson* (1890), 59 L. J. M. C. 41; 62 L. T. 282.

(*b*) But the mere fact that a man who is cohabiting with a woman gives her a bond for the payment of money, and afterwards continues to cohabit with her, will not necessarily raise the presumption that the bond was given in consideration of future cohabitation, and there being nothing to shew it on the face of the bond, and no evidence that it was given to secure the future cohabitation, the bond will be good (*Re Vallence*, *Vallence* v. *Blagden* (1884), 26 Ch. D. 353; 50 L. T. 574).

(*c*) A contract to pay a sum in consideration of *past* seduction is not illegal, but there would be no valuable consideration to support a simple contract (*Beaumont* v. *Reeve* (1846), 8 Q. B. 483, *ante*, p. 45).

(*d*) *Pearce* v. *Brooks* (1866), L. R. 1 Ex. 213; 35 L. J. Ex. 134.

(*e*) *M'Kinnell* v. *Robinson* (1838), 3 M. & W. 434.

(*f*) See as to conditions in restraint of marriage, Indermaur and Thwaites' Manual of Equity, 250–252.

a civil suit (*g*) that in no way belongs to one, as by maintaining or assisting either party with money or otherwise, although having nothing to do with it (*h*); and for maintenance a person may be prosecuted, and an action may be maintained against him for damages caused by his acts of maintenance (*i*). There are, however, many exceptions to maintenance, founded mainly upon the principle of a common interest in the maintaining party: *e.g.*, a master may assist his servant, any person may assist his close relative, or even his neighbour or friend, and it has even been held that a rich man may, out of charity, assist a poor man to maintain a right which he would otherwise lose (*j*). In such cases it is not necessary that there should in fact be a right existing, for it is sufficient if the party maintaining honestly believes there is a right, and this even though he may not have inquired into the circumstances (*k*).

Champerty consists in an agreement between a litigant and a third party, whereby, in consideration of that third party advancing him money, he agrees to share with him the proceeds of the litigation (*l*). A bargain by which one party is to assist another in the recovery of property and share in the proceeds is champerty, whether the litigation is in progress or only contemplated (*m*); but an agreement to give infor- Champerty.

(*g*) The maintenance of criminal suits is not illegal (*Grant* v. *Thompson* (1895), 72 L. T. 264).

(*h*) *Bradlaugh* v. *Newdegate* (1883), 11 Q. B. D. 1; 52 L. J. Q. B. 454; 31 W. R. 792.

(*i*) *Alabaster* v. *Harness* (1895), 1 Q. B. 339; 64 L. J. Q. B. 76; 71 L. T. 740.

(*j*) Per Lord Coleridge in *Bradlaugh* v. *Newdegate* (1883), 11 Q. B. D. 1; 52 L. J. Q. B. 454; 31 W. R. 792. See also *Plating Co.* v. *Farquharson* (1881), 17 Ch. D. 49; 50 L. J. Ch. 406; 44 L. T. 389.

(*k*) *Harris* v. *Briscoe* (1886), 17 Q. B. D. 504; 55 L. J. Q. B. 423; 55 L. T. 14; 34 W. R. 729.

(*l*) *Ball* v. *Warwick* (1881), 50 L. J. Q. B. 382; 29 W. R. 468; 44 L. T. 218. This case shows that in order to constitute champerty it is not essential that there should be an undertaking on the part of the litigant to proceed with the action. In order to render an agreement void on the ground that it is in the nature of champerty, it is not necessary that it should amount strictly to champerty as a punishable offence (*Rees* v. *De Bernardy* (1896), 2 Ch. 437; 65 L. J. Ch. 656; 74 L. T. 585).

(*m*) *Sprye* v. *Porter* (1856), 7 E. & B. 58; per Blackburn J. in *Hutley* v. *Hutley* (1873), 8 Q. B. 112.

mation enabling the person entitled to recover property in consideration of a share when recovered is not champerty on that account only (*n*). The Solicitors Act, 1870 (*o*), specially guards against champerty in the case of solicitors, by providing (*p*) that nothing therein contained shall be construed to give validity to any purchase by a solicitor of the interest of his client in any contentious proceedings, or to give validity to any agreement by which a solicitor stipulates for payment only in the event of success in an action.

Contract to compromise criminal offence.

All contracts for the compromise of criminal offences, or to interfere with the course of justice, are illegal and void (*q*). But in order to render illegal the receipt of securities by a creditor from his debtor, where the debt has been contracted under circumstances which render the debtor liable to criminal proceedings, it is not enough merely to shew that the creditor was thereby induced to abstain from prosecuting (*r*).

Future separation.

Contracts for *future* separation of husband and wife are contrary to public policy, and absolutely illegal. To render a separation deed valid, the separation must be actually existing at the time. The intervention of trustees, though usual, is not necessary, and though a separation arrangement is almost invariably by deed, it may be merely by word of mouth (*s*).

Gaming contracts.

Gaming and wagering contracts, though not actually illegal, are made void by statute. A gaming contract is one by which persons play at some game for a

Wager defined.

stake (*t*). A wager is a contract by which one party is to win and the other to lose a stake on the ascertainment of some uncertain event: *e.g.*, a bet on a

(*n*) *Rees* v. *De Bernardy* (1896), 2 Ch. 437.
(*o*) 33 & 34 Vict. c. 28; see *ante*, p. 224.
(*p*) 33 & 34 Vict. c. 28, s. 11.
(*q*) *Windhill Local Board* v. *Vint* (1890), 45 Ch. D. 351; 59 L. J. Ch. 608; 63 L. T. 366; *Jones* v. *Merionethshire Building Society* (1892), 1 Ch. 173; 61 L. J. Ch. 138; 65 L. T. 685.
(*r*) *Flower* v. *Sadler* (1882), 10 Q. B. D. 572.
(*s*) *M'Gregor* v. *M'Gregor* (1888), 21 Q. B. D. 424; 57 L. J. Q. B. 591; 37 W. R. 45.
(*t*) *R.* v. *Ashton* (1852), 1 E. & B. 286; *Dyson* v. *Mason* (1888), 22 Q. B. D. 351; *Lockwood* v. *Cooper* (1903), 2 K. B. 428; 72 L. J. K. B. 690.

horse race (*u*); the event may be past or future, but the parties must have no pecuniary interest under the contract other than the stake; and it is essential that each stands to win or lose on the event (*u*). At common law such contracts were not void unless of such a nature as to contravene public policy; as, for instance, if tending to the injury or annoyance of others, or to outrage decency. The Gaming Act, 1845 (*x*), however, provides that all contracts or agreements by way of gaming or wagering shall be null and void, and that no action shall be brought to recover any sum of money or valuable thing alleged to have been won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made; but this is not to be deemed to apply to any subscription, or contribution, or agreement to subscribe or contribute, for or towards any plate, prize, or sum of money to be awarded to the winner or winners of any lawful game, sport, pastime, or exercise. In addition, the Gaming Act, 1892 (*y*), also now provides that any promise, express or implied, to pay any person any sum of money paid by him under or in respect of any contract or agreement rendered null and void by the Gaming Act, 1845, or to pay any sum of money by way of commission, fee, reward, or otherwise, in respect of any such contract or of any services in relation thereto or in connection therewith, shall be null and void, and no action shall be brought or maintained to recover any such sum of money. These Acts do not make the contracts illegal, but only make them unenforceable in a court of justice if the statute is pleaded (*z*) or if the judge during the trial discovers the claim to fall within the statute (*a*).

Gaming Act, 1845.

Gaming Act, 1892.

(*u*) See per Hawkins, J., in *Carhill* v. *Carbolic Smoke Ball Co.* (1892), 2 Q. B. at p. 490.
(*x*) 8 & 9 Vict. c. 109, s. 18.
(*y*) 55 & 56 Vict. c. 9.
(*z*) Order xix. 219.
(*a*) *Scott* v. *Brown* (1892), 2 Q. B. 724; 61 L. J. Q. B. 738. But in a county court, the statute is no defence unless notice was given, *Willis* v. *Lovick* (1901), 2 K. B. 195; 70 L. J. K. B. 656.

Principal and agent in betting transactions.

It is not always easy to determine whether some particular contract is or is not prohibited by the above-mentioned provisions. Thus an agreement between a principal and an agent that the agent shall employ moneys of the principal in betting on horse-races, and pay over the winnings therefrom to his principal, is neither void nor illegal (*b*); and if an agent is employed to make bets, which are won and received by the agent, the principal can recover the same from the agent (*c*). But if a principal instructs his agent to make certain bets, and the agent neglects to do so, and had he done so money would have been won and received by the agent, and might have been recovered by the principal from him, yet here the principal cannot sue the agent for damages for having neglected to make the bets (*d*). If an agent, by the direction of his principal, incurs a liability in betting on horse-races, it was formerly held that he must be indemnified in respect thereof, and that if he paid the amount he could recover it back from the principal (*e*), but this is not so now since the Gaming Act, 1892. To illustrate the way in which this Act has extended the law, it may be observed that if A. makes a bet with B. and loses, B. cannot sue A. because of the Gaming Act, 1845; but if A. instructed X. to make a bet with B. and X. made the bet, and it being lost paid it, X. could formerly have recovered from A., but now he cannot do so by reason of the Gaming Act, 1892. This is a manifest result of the Act; but it has a wider effect than this, as will be seen by a close examination of its provisions. Thus if A. at the request of B. pays certain creditors of B. debts which A. at the time of making the payments knows are bets which B. has lost, A. cannot sue B. for the amounts so paid (*f*). The Act, however, does not apply to prevent

Bridger v. *Savage.*

Cohen v. *Kittell.*

Illustration of effect of Gaming Act, 1892.

(*b*) *Beeston* v. *Beeston* (1875), 1 Ex. D. 8; 45 L. J. Ex. 230.

(*c*) *Bridger* v. *Savage* (1885), 15 Q. B. D. 363; 54 L. J. Q. B. 464; 53 L. T. 129; 33 W. R. 891; *De Mattos* v. *Benjamin* (1894), 63 L. J. Q. B. 248; 70 L. T. 560; 42 W. R. 284.

(*d*) *Cohen* v. *Kittell* (1889), 22 Q. B. D. 680; 58 L. J. Q. B. 241; 60 L. T. 932.

(*e*) *Read* v. *Anderson* (1884), 13 Q. B. D. 779; 53 L. J. Q. B. 532; 51 L. T. 55; 32 W. R. 950.

(*f*) *Tatam* v. *Reeve* (1893), 1 Q. B. 44; 62 L. J. Q. B. 30; 67 L. T.

A. from recovering money lent to B. to pay betting losses. In one case the defendant, who had agreed to contest a boxing match with another person, for stakes to be deposited with a stakeholder by himself and the other combatant, requested the plaintiff to help him by advancing the money for his stake. This the plaintiff did by paying the amount to the stakeholder, and the arrangement was that the money was to be repaid to the plaintiff if the defendant won the match, but not if he lost it. The defendant won the match and received the whole stakes, and then refused to repay the plaintiff. It was held that the money was paid by the plaintiff in respect of a contract rendered null and void by the Gaming Act, 1892, and that the action could not be maintained (*g*). It should be observed that this was not a simple loan to the defendant, but the money was paid to the stakeholder, and there was the term of repayment only if the defendant won the match. Had it been a case of a simple loan to the defendant, the plaintiff could have recovered (*h*). It has recently been held that money lent in a country where gaming is not unlawful, to be used for the purpose of gaming there, can be recovered by action in England (*hh*).

Loan to pay bets.

Carney v. *Plimmer.*

By the Betting Act, 1853 (*i*), it is provided that it shall be illegal to keep any "place" for the purpose of betting, and therefore any contract in connection with such a matter would be void. But, notwithstanding this enactment, the business of a bookmaker on the turf is not illegal if carried on in a manner which

Betting Act, 1853.

683. Notwithstanding an opinion expressed in this case that the payee must at his own risk inquire into the nature of the debt he is paying, it is with all deference submitted that if a plaintiff in such a case does not know that the debts are for losses at betting, he can recover.

(*g*) *Carney* v. *Plimmer* (1897), 1 Q. B. 634; 66 L. J. Q. B. 415; 76 L. T. 354.

(*h*) Per Chitty, L.J., in his judgment in *Carney* v. *Plimmer*, supra.

(*hh*) *Saxby* v. *Fulton* (1908), 99 L. T. 92, following *Quarrier* v. *Colston* (1841), 1 Phillips, 147.

(*i*) 16 & 17 Vict. c. 119, s. 3. As to what is a "place" within the meaning of this Act, see *Powell* v. *Kempton Park Racecourse Co.* (1899), A. C. 143; 68 L. J. Q. B. 392; 80 L. T. 538; *Reg.* v. *Stoddart* (1901), 1 Q. B. 177; 70 L. J. Q. B. 189; 83 L. T. 538.

Thwaites v. *Coulthwaite.*

Saffery v. *Mayer.*

does not infringe the provisions of this statute, and in one case an account was ordered in a partnership suit between two bookmakers (*j*). Where, however, one partner in a betting business, on paying a loss, claimed contribution from his partner, it was held that the Gaming Act, 1892, rendered this irrecoverable (*k*).

Stock Exchange transactions.

Thacker v. *Hardy.*

Where a speculator employs a broker on the Stock Exchange to effect sales or purchases of stock according to the rules of the Stock Exchange for delivery on a future day, with the intention that he shall not be called upon actually to deliver or accept such stock as may be sold or purchased, but only to pay and receive, as the case may be, the difference between the price of the stock at the day of the sale and the price on the day named for delivery, the contract between the speculator and the broker is not void or illegal (*l*). But the transaction may be of a purely gaming nature in the intention of both the speculator and the broker, *e.g.*, where not for sale and purchase of stock, but merely to pay or receive differences, according to whether the stock goes up or down, and then, though not illegal, this is void (*m*), even although there is superadded to the contract a provision that, if required, the stock shall be actually delivered, or actually taken up (*n*).

Universal Stock Exchange v. *Strachan.*

It is not always easy to determine in respect of Stock Exchange transactions whether they are good or not, and it has been laid down that it is for the jury to say whether a contract relating to dealings in stocks and shares is intended by the parties to be a gambling transaction in differences, or a *bonâ fide* sale and purchase of shares; and if the jury take the former

(*j*) *Thwaites* v. *Coulthwaite* (1896), 1 Ch. 496; 65 L. J. Ch. 238; 74 L. T. 164.

(*k*) *Saffery* v. *Mayer* (1901), 1 Q. B. 11; 83 L. T. 394; 49 W. R. 54.

(*l*) *Thacker* v. *Hardy*, *Thacker* v. *Wheatley* (1879), 4 Q. B. D. 685; 48 L. J. Q. B. 289; *Ex parte Rogers*, *re Rogers* (1880), 15 Ch. D. 207; 29 W. R. 29; 43 L. T. 163; *Forget* v. *Ostigny* (1895), A. C. 318; 64 L. J. P. C. 62; 72 L. T. 399.

(*m*) Per Bramwell, L.J., in *Thacker* v. *Hardy* (1879), 48 L. J. Q. B. at p. 296.

(*n*) *Re Gieve*, *ex parte Trustee* (1899), 1 Q. B. D. 794; 68 L. J. Q. B. 509; 80 L. T. 438.

view the court will not interfere (*o*). If the transaction is held to be a contract by way of gaming and wagering, it has been decided that securities deposited by the client with the stockbroker by way of "cover" can be recovered back by the client (*p*). If, however, money is deposited in a similar way, and is actually appropriated in payment of losses, it cannot be recovered back (*q*); though where there are no losses, or the losses have not exhausted the deposit, it is otherwise (*r*).

Strachan v. *Universal Stock Exchange.*

If on a gaming contract a deposit is made with a person as stakeholder, here, before such deposit is actually paid over, the person so depositing it has a right to demand and recover it back again, for he has to this extent a *locus pœnitentiæ* (*s*), and this is still the law notwithstanding the Gaming Act, 1892 (*t*). Both this point and also what will be held to be a gaming and wagering contract are well shewn by *Hampden* v. *Walsh* (*u*), in which the facts were as follows:—The plaintiff and one Wallace each deposited £500 in the defendant's hands as stakeholder, upon an agreement that if Wallace proved the convexity or curvature to and fro of any canal, river, or lake by actual measurement and demonstration, to the satisfaction of certain referees, he should receive both sums, but that if he failed, then the plaintiff should receive both. The experiment was made, and decided by the referees in favour of Wallace, and the defendant paid the whole £1000 over to him accordingly. Before, however, he had done so the plaintiff objected to the decision, and he afterwards brought this action to recover his own £500 deposit, as money had and

Deposit with a stakeholder may be recovered before actually paid over.

Hampden v. *Walsh.*

(*o*) *Universal Stock Exchange* v. *Strachan* (No. 1), (1896), A. C. 166; 65 L. J. Q. B. 429; 74 L. T. 468. (*p*) Ibid.
(*q*) *Strachan* v. *Universal Stock Exchange* (No. 2), (1895), 2 Q. B. 697; 65 L. J. Q. B. 178; 73 L. T. 492.
(*r*) *Re Cronmirs, ex parte Waud* (1898), 2 Q. B. 383; 67 L. J. Q. B. 629.
(*s*) *Varney* v. *Hickman* (1848), 17 L. J. C. P. 102; *Martin* v. *Hewson* (1855), 24 L. J. (Ex.) 174; *Diggle* v. *Higgs* (1877), 2 Ex. D. 422; 46 L. J. Ex. 721.
(*t*) *O'Sullivan* v. *Thomas*, 64 L. J. Q. B. 308; 72 L. T. 285; *Burge* v. *Ashley* (1900), 1 Q. B. 744; 69 L. J. Q. B. 538; 82 L. T. 518.
(*u*) (1876), 1 Q. B. D. 189; 45 L. J. Q. B. 438.

received by the defendant to his use, and it was held: (1) That the agreement was a wager, and so null and void within the Gaming Act, 1845; and (2) That the plaintiff was entitled to recover on the ground that that statute does not apply to an action by a person to recover his own deposit, and he had here revoked the authority of the stakeholder before he had paid over the money.

As to the position of a stakeholder.

If, however, a stakeholder pays the money over to the winner with the express or implied assent of the loser, then he is discharged from any further liability (*x*). No action will lie by the winner against a stakeholder for the whole of the amount in his hands, for the stakeholder is not, by the fact of the winning, converted into an agent for the winner for anything beyond what he originally was, viz., the amount of the winner's own deposit (*y*). However, in a recent case the trustee in bankruptcy of the winner of one of two depositors with a stakeholder, was allowed to recover the whole amount from the stakeholder, neither he nor the other depositor raising any claim, and the stakeholder having interpleaded (*z*). And if a stakeholder pays over the whole amount to some third person for the use of the winner, then the winner can recover it from such third person (*a*).

Shoolbred v. *Roberts.*

What is a lawful game within the Gaming Act, 1845.

It will be noticed that the Gaming Act, 1845, contains a proviso that the enactment shall not extend to any subscription or contribution, or agreement for the same, towards any plate, prize, or sum of money to be awarded to the winner or winners of any lawful game, pastime, or exercise. It has, however, been held that an agreement between two persons to deposit money in the hands of a third, to abide the event of a lawful game between the two, is void within the statute, and is not a subscription or contribution for a sum of money to be awarded to the winner within the

(*x*) *Howson* v. *Hancock* (1800), 8 T. R. 575.
(*y*) *Allport* v. *Nutt* (1845), 1 C. B. 974.
(*z*) *Shoolbred* v. *Roberts* (1900), 2 Q. B. 497; 69 L. J. Q. B. 800; 3 L. T. 37.
(*a*) *Simpson* v. *Bloss* (1816), 7 Taunt. 246.

proviso ; but although the winner of the match cannot sue the loser or stakeholder to recover the stakes, yet he may repudiate the transaction, and bring an action to recover back the amount deposited by him with the stakeholder (*b*).

Horse-racing. Horse-racing is allowed on the principle that it tends to improve the breed of horses (*c*) ; but, of course, wagers on the result of such races are void.

Lotteries. Lotteries are rendered illegal by the provisions of the Lottery Acts (*d*). But a lottery constituted avowedly for the benefit of its members, making certain of them entitled to particular benefits by the process of periodical drawings, does not come within the scope of these enactments (*e*).

Leeman's Act. By a statute known as Leeman's Act (*f*), all contracts for the sale and purchase of shares and stock in joint-stock banking companies are void, if they do not specify the distinguishing numbers of such shares or stock, or, if there are no distinguishing numbers, the name of every registered proprietor. A custom exists on the Stock Exchange to disregard this Act, and there is, in fact, a rule on the Stock Exchange that if a member shelters himself behind its provisions he shall be liable to expulsion. If a client of a stockbroker, knowing of this custom, has permitted the stockbroker to enter into a contract in breach of this Act, he is bound to indemnify the stockbroker, so that any loss may be recovered from him by the stockbroker notwithstanding the provisions of the Act, on the principle that he has knowingly caused the stockbroker to incur a prac-

Seymour v. *Bridge.*

(*b*) *Diggle* v. *Higgs* (1877), 2 Ex. D. 422 ; 46 L. J. Ex. 721 ; *Shoolbred* v. *Roberts*, supra.

(*c*) The statute on the subject is 18 Geo. II. c. 34, the enactments of which, so far as they relate exclusively to horse-racing, appear not to be affected by 8 & 9 Vict. c. 109.

(*d*) 10 & 11 Wm. III. c. 17, and 42 Geo. III. c. 119. See *Barclay* v. *Pearson* (1893), 2 Ch. 154 ; 62 L. J. Ch. 636 ; 68 L. T. 709.

(*e*) *Wallingford* v. *Mutual Society* (1880), 5 A. C. 685 ; 50 L. J. Q. B. 49 ; 43 L. T. 258 ; 29 W. R. 81. See also on this subject, *Smith* v. *Anderson* (1880), 15 Ch. D. 269 ; 50 L. J. Ch. 47 ; 43 L. T. 429 ; 29 W. R. 22 ; *Jennings* v. *Hammond* (1881), 9 Q. B. D. 225 ; 51 L. J. Q. B. 493 ; and contrast *Sykes* v. *Readon* (1879), 11 Ch. D. 170.

(*f*) 30 & 31 Vict. c. 29.

tical, though not a legal liability, and is therefore bound to indemnify him therefrom (*g*). But if the client did not know of the custom existing on the Stock Exchange to disregard Leeman's Act, then it is otherwise, the custom having been held to be unreasonable (*h*), and it being a well-established rule that a person is only bound by an unreasonable custom if at the time of dealing he knew of it, and expressly or impliedly agreed to be bound by it (*i*).

Perry v. *Barnett.*

Bills, notes, or mortgages given for gaming debts.

By the Gaming Act, 1835 (*k*), it is provided that a bill of exchange, promissory note, or mortgage, given for some debt won by gaming, or by betting on games, or knowingly lent for gaming or betting thereon, shall not be absolutely void, but shall be deemed and taken to have been given or executed for an illegal consideration. The effect of this 1835 Act is, that if any such bill, note, or mortgage is transferred, before it becomes due, to a *bonâ fide* holder for value without notice of the illegality—now styled a holder in due course—he will have a right to recover thereon, although the person in whose hands the same originally was could not have done so (*l*). But the 1835 Act also, provides (*m*) that money paid to the holder of such a security shall be deemed to be paid on account of the person to whom the same was originally given, and shall be deemed to be a debt due and owing from such last-named person to the person who shall have paid such money, and shall accordingly be recoverable by action. Thus, if A. wins money of B. at gaming or betting on a game, and B. gives a promissory note for it to A., and A. discounts it with C., who takes *bonâ fide* for value without notice of the illegality of the consideration for which it was given, here C. can recover the amount from B., but B. can in his turn

Instance.

(*g*) *Seymour* v. *Bridge* (1885), 14 Q. B. D. 460; 54 L. J. Q. B. 347.
(*h*) *Perry* v. *Barnett* (1885), 15 Q. B. D. 388; 54 L. J. Q. B. 466; 53 L. T. 585.
(*i*) *Sweeting* v. *Pearce* (1861), 9 W. R. 343; *Blackburn* v. *Mason* (1893), 68 L. T. 510.
(*k*) 5 & 6 Wm. IV. c. 41, amending 9 Anne, c. 14.
(*l*) 45 & 46 Vict. c. 61, ss. 29, 30.
(*m*) 5 & 6 Wm. IV. c. 41, s. 2.

recover what he has to pay from A. A cheque on a London bank given in Algiers for losses at cards and for loans to continue play is within the Gaming Act, 1835 and the payee cannot recover on it (*n*). It must be borne in mind that the 1835 Act does not deal with all bills, notes, and mortgages given for wagering debts, but only with such as are given in respect of money won by gaming or betting on games, on which it may be noticed that a horse-race has been held to be a "game" (*o*). Therefore, as regards any instrument given in respect of a wager transaction not of this character, the 1835 Act has no application, *e.g.*, a promissory note given for a bet lost over the result of a contested election. The instrument in such cases is simply given in respect of a void transaction, and therefore, though it cannot be sued upon by the party to whom given, because there is no consideration, yet it can be sued upon by a holder for value, and this even though he had notice of what it was given for; nor is it necessary for such a holder to shew that he gave value for it, though if proved that he gave none he cannot recover (*p*).

Bills, &c. given for other wagers.

Woolf v. *Hamilton.*

It is not decided whether a bond given in payment of a wager is valid; but when A. had lost money in betting on horse-races and was warned by the Jockey Club that unless he satisfied these bets his horses would not be allowed to run on any course subject to the Club's rules, and A. gave a bond with sureties for £10,000, it was held that an action would lie on the bond, for it was not given to pay bets but to avoid the consequences of not having paid them, *i.e.*, for a new and valuable consideration (*q*). And where C. had paid £800 in lost bets as agent for D. and could not recover from

Securities given to avoid the consequences of not paying wagers are enforceable.

(*n*) *Moulis* v. *Owen* (1907), 1 K. B. 746; 76 L. J. K. B. 396; 96 L. T. 596.

(*o*) *Woolf* v. *Hamilton* (1898), 2 Q. B. 337; 67 L. J. Q. B. 917; 79 L. T. 49.

(*p*) *Fitch* v. *Jones* (1855), 5 E. & B. 245; *Lilley* v. *Rankin* (1887), 56 L. J Q. B. 248; 55 L. T. 814; *Hawker* v. *Halliwell* (1856), 25 L. J. Ch. 558.

(*q*) *Bubb* v. *Yelverton* (1870), 9 Eq. 471; 39 L. J. Ch. 428.

D. by reason of the Gaming Act, 1892, and C. reported the matter to D.'s sporting club, and D. was consequently not re-elected at the next annual election of members, and D. then accepted bills for £400 in consideration of C. withdrawing his complaint, C. was able to recover on these bills (*r*). And an action has been held to be maintainable on a cheque given in payment of lost bets, in consideration of not being reported to the debtor's club for non-payment (*s*); but if the creditor takes a bill and then a renewed bill on dishonour, as the best thing he can get and without any threat to post the debtor as a defaulter, no action lies (*t*).

Wager policies.

Any person insuring another's life must have an interest therein, or the policy will be illegal and void (*u*).

Simony.

Simony is an offence which consists in the buying and selling of holy orders, and any bond or contract involving simony is illegal and void (*x*).

Sunday Observance Act, 1677.

By the Sunday Observance Act, 1677 (*y*) it is provided that "no tradesman, artificer, workman, labourer, or other person whatsoever, shall do or exercise any worldly labour, business, or work of their ordinary callings upon the Lord's Day, or any part thereof (works of necessity and charity only excepted); and that every person being of the age of fourteen years or upwards offending in the premises shall for every such offence forfeit the sum of five shillings." This statute is still in force, and under it contracts so entered into are illegal and void, and no action can be maintained thereon; and it has been decided that if a person buys goods of a tradesman on a Sunday, although he keeps them after that day, yet that alone will not render

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(*r*) *Re Browne, ex parte Martingell* (1904), 2 K. B. 133; 73 L. J. Ch. 446.

(*s*) *Goodson* v. *Baker* (1908), 98 L. T. 514; *Goodson* v. *Grierson* (1908), 1 K. B. 761; *Hyams* v. *Stewart-King* (1908), 2 K. B. 696; 77 L. J. K. B. 794.

(*t*) *Re Comar, ex parte Ronald* (1908), 52 S. J. 642 (C. A.).

(*u*) 14 Geo. III. c. 48; *ante*, p. 211.

(*x*) See hereon 31 Eliz. c. 6; 12 Anne, st. 2, c. 12; *Fox* v. *Bishop of Chester* (1824), Tudor's Leading Conveyancing Cases, 810; 6 Bing. 1.

(*y*) 29 Car. II. c. 7, s. 1. This statute is more generally known as the "Lord's Day Act."

him liable for the price (*z*). Although this statute uses the words "or other person whatsoever," yet it does not extend to every person, but these general words must be taken to be limited by the particular words immediately preceding them, and it will only include persons coming within that class—that is, it will only include persons *ejusdem generis* (*a*). The provision also only applies to an act done in the way of one's ordinary calling, so that it will not apply to an act done by one of the persons within its provisions, but which act is not of the kind that he ordinarily does: thus, if a person who is a horse-dealer sells a horse on a Sunday and gives a warranty with it, no action lies against him on his warranty; but if he is not a person who usually deals in horses, but simply a private individual selling a horse, it will be different, for the sale and the warranty are not in the course of his ordinary calling (*b*). It has been decided under this statute that a person can commit but one offence on one Sunday by exercising his ordinary calling contrary to the statute; but this pertains to criminal law (*c*).

Rule of *ejusdem generis*.

Offences under the statute.

Where an instrument is illegal, either by the common law or by statute, it cannot be afterwards confirmed, the maxim being, *Quod ab initio non valet in tractu temporis non convalescit.*

The mere fact that an instrument which ought to have been stamped has not been stamped within the proper time does not render it illegal, but prevents it (except in criminal proceedings) being given in evidence or being available for any purpose whatever, until stamped; and it is the duty of the officer of the court to call the attention of the court to any want or insufficiency of the stamp (*d*). An unstamped instru-

Effect of not stamping an instrument within the proper time.

(*z*) *Simpson* v. *Nicholls* (1838), 3 M. & W. 240.
(*a*) *Sandiman* v. *Breach* (1827), 7 B. & C. 96; *Palmer* v. *Snow* (1900), 1 Q. B. 725; 69 L. J. Q. B. 356.
(*b*) *Drury* v. *De Fontaine* (1808), 1 Taunt. 131.
(*c*) *Crepps* v. *Durden* (1777), 1 S. L. C. 632; Cowp. 640.
(*d*) 54 & 55 Vict. c. 39, s. 14.

ment may, however, be put in evidence for collateral purposes: thus an unstamped promissory note may be handed to a witness in order to challenge his recollection (*e*). An ordinary agreement requires a stamp of *6d.*, and must be stamped within fourteen days of execution (*f*), or afterwards can only be stamped on payment of a penalty of £10, and if paid in court, a further penalty of £1 (*g*). The following agreements, however, are exempted from stamp duty:—

Stamp Act, 1891.

Exemptions from stamp duty.

1. An agreement or memorandum the matter whereof is not of the value of £5.

2. An agreement or memorandum for the hire of any labourer, artificer, manufacturer, or menial servant.

3. An agreement, letter, or memorandum made for or relating to the sale of any goods, wares, or merchandise.

4. An agreement or memorandum made between the master and mariners of any ship or vessel, for wages on any voyage coastwise from port to port in the United Kingdom (*h*).

A cognovit or I.O.U. does not require stamping unless it contains some special terms of agreement (*i*).

(*e*) *Birchall* v. *Bullough* (1896), 1 Q. B. 325; 65 L. J. Q. B. 252; 74 L. T. 27.

(*f*) This right to stamp within fourteen days of execution is only under a regulation of the Commissioners of Inland Revenue, which they have power to alter.

(*g*) 54 & 55 Vict. c 39, ss. 14, 15. The Commissioners have, however, power to remit the penalty or any part of it on application (54 & 55 Vict. c. 39, s. 15 (3); 58 Vict. c. 16, s. 15).

(*h*) 54 & 55 Vict. c. 39, tit. "Agreement."

(*i*) *Ames* v. *Hill* (1800), 2 B. & P. 150; *Fisher* v. *Leslie* (1795), 1 Esp 429.

PART II.

OF TORTS.

CHAPTER I.

OF TORTS GENERALLY.

A TORT may be defined as some wrongful act, consisting in the withholding or violating of some legal right (*a*), and the following are a few instances—under the divisions subsequently adopted—of torts in respect of which an action will lie:— Definition of a tort.

1. Torts affecting land (*b*), such as, Instances of torts.
   Trespass to land;
   Waste;
   Nuisances.
2. Torts affecting goods and other personal property (*c*), such as,
   Wrongful taking or detention of goods;
   Wrongful distress.
3. Torts affecting the person (*d*), such as,
   Assault and Battery;
   Libel and Slander;
   Seduction.
4. Torts arising peculiarly from negligence (*e*), such as,
   Injuries by carriers to goods or passengers;
   Injuries from negligent driving (*f*).

Now in all the above instances it must follow, that as a person has a right to the due protection of his

(*a*) See Broom's Coms. 746; Pollock's Torts, 19, 20.
(*b*) *Post*, chap. ii. (*c*) *Post*, chap. iii.
(*d*) *Post*, chaps. iv. and v. (*e*) *Post*, chap. vi.
(*f*) See hereon generally. Addison on Torts, chap. i.

Every tort produces a right of action.

person and his property, both real and personal, that these rights being infringed, he has a right of action in respect of the infringement, and all torts will be found to come in some way under one at least of the above heads.

But different torts might be enumerated almost without end, for they may be infinitely various in their nature, and it is impossible to lay down any fixed rule as to what will or what will not amount to a tort for which an action will lie (*g*). It is no good ground of objection to an action that injury of such a kind has never been made the subject of any prior action, for, provided it comes within any principle upon which the courts act, it is sufficient, although the instance may be new; but if it embraces some entirely new principle, and it is sought to make an act a tort which does not come within any former principle, then this can only be done by the interference of the legislature. This is expressed in *Pasley* v. *Freeman* (*h*), by Ashurst, J., who says: "Where the cases are new in their principle, there I admit that it is necessary to have recourse to legislative interposition in order to remedy the grievance; but where the case is only new in the instance, and the only question is upon the application of a principle recognised in the law to such new case, it will be just as competent to courts of justice to apply the principle to any case that may arise two centuries hence as it was two centuries ago." That this is so is well shewn by *Langridge* v. *Levy* (*i*), which presents a highly novel instance of a tort. In that case the father of the plaintiff had bought a gun of the defendant, stating at the time of buying it that it was required for the use of himself and his sons, of whom the plaintiff was one, and the defendant gave him a warranty that it was made by a particular maker, which was untrue. The plaintiff used the gun, and it burst and injured him, and this action was brought for

The newness of a tort is no objection to an action.

Remarks of Ashurt, J., in *Pasley* v. *Freeman*.

Langridge v. *Levy*.

(*g*) See *Ashby* v. *White* (1703), 1 S. L. C. 240; Lord Raymond, 738.
(*h*) (1789), 2 S. L. C. 66; 3 T. R. 51.
(*i*) (1837), 2 M. & W. 519; in error, 4 M. & W. 337.

damages in respect of the breach of duty on the part of the defendant; and it being proved that the defendant had wilfully, or at any rate recklessly, made the false warranty, and that the gun had been used by the plaintiff, who was one of the persons who it was contemplated should use it, it was held that the defendant was liable for his deceit, and that the plaintiff was entitled to recover (*k*).

Injuria sine damno, and *damnum sine injuriâ.*

A tort may be committed although no actual harm is done by the tortious act, for if a person has what in the eyes of the law is considered as a legal right, and that right is infringed, he has an action in respect of it, even though it has not hurt him, and this is said to be *injuria sine damno* (*l*). On the other hand, some substantial harm may be done to a person, but yet he may have no right of action in respect of it, because, although damage has been done to him, yet no legal right has been infringed, and therefore no injury done to him in the eyes of the law, and this is said to be *damnum sine injuriâ* (*m*). This subject has already been sufficiently considered at the pages referred to below.

Distinction between torts and crimes.

Some torts may amount to crimes, but many do not, and it is very important to properly understand the difference between mere torts and crimes. A tort has been already defined (*n*), and a crime may be described as some breach or violation of a public right. The real distinction between an act which is simply and purely a tort, and an act which is not only a tort but also an actual crime, is that, whilst the tort is simply a wrong affecting the civil right of some particular person

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(*k*) As a novel instance of a tort, see *Wilkinson* v. *Downton* (1897), 2 Q. B. 57; 66 L. J. Q. B. 493; 76 L. T. 493. See also *Dulieu* v. *White* (1901), 2 K. B. 669; 70 L. J. K. B. 837; 85 L. T. 126; *ante*, p. 6.

(*l*) See *ante*, pp. 3, 4, and case of *Ashby* v. *White*, there cited and referred to.

(*m*) See *ante*, p. 4, 5, and cases of *Acton* v. *Blundell* and *Allen* v. *Flood*, there cited and referred to. See also Addison on Torts, ch. i. s. 1.

(*n*) *Ante*, p. 317.

or persons, a crime affects a public right, injuring the whole, or a number, of the community.

As to torts which do not amount to crimes.

It must, therefore, be apparent to every reader that there are many wrongful acts which, though amounting to torts, yet do not come within the category of crimes. Thus particularly may be enumerated torts arising from the negligence of one's servants or agents. If a coachman is driving his master's carriage in the ordinary course of his duty, and by his negligence he runs over a person, this is a tort for which the master may be liable in a civil action, but it is nothing more; there is no crime on the master's part. Again a private nuisance—that is, a nuisance which does not affect the public at large, but simply some individual—is a tort, but not a crime.

As to torts amounting to crimes.

But, on the other hand, many acts may not only be torts, but may also amount to actual crimes punishable by the criminal law; thus, in our first instance given above, we have it that the master has committed a tort, but no crime, but with regard to the coachman the case may be very different, for he may possibly have been guilty of a criminal offence amounting to manslaughter. So, also, if a nuisance is not merely a private but a public one—that is, one affecting the public at large—this is an offence for which the person committing it is liable to be indicted.

Where a tort is also a crime the civil remedy is not necessarily suspended until after prosecution.

When a tortious act is also a crime, and a crime of such a high nature as to amount to felony (*o*), it was formerly considered that the civil right which a person had, to maintain an action in respect of the injury done to him, was suspended until the felony had been punished, for it was said "the policy of the law requires that before the party injured by any felonious act can

(*o*) A felony at common law was an offence which occasioned forfeiture of a man's property, and was generally applied to a higher class of offences than comprised under the term "misdemeanour." Now, however, by various statutes, numerous offences have been classed indiscriminately as felonies and misdemeanours, and forfeiture for felony having by 33 & 34 Vict. c. 23 been abolished, the original distinction between felonies and misdemeanours is now gone, though many other points of difference still exist.

seek civil redress for it, the matter should be heard and disposed of before the proper criminal tribunal, in order that the justice of the country may be first satisfied in respect of the public offence" (*p*). This, however, is not now the law, for it has been decided that if a person would have a right of action for another's wrongful act, it makes no difference that that wrongful act in fact amounts to a felony, unless the court considers that it was under the circumstances the plaintiff's duty to prosecute, and that he has neglected to do so (*q*). Such a duty would ordinarily be existing so as to prevent an action against the felon himself by the person against whom the felony was committed before prosecution, but this does not apply as regards claims by or against third persons arising out of the felony (*r*).

Appleby v. *Franklin.*

With respect, however, to some torts amounting to crimes, the injured party cannot take both civil and criminal proceedings; but these are cases in which, though the act does amount to a crime, yet it is to a certain extent a crime directly and particularly affecting the individual, and not the public at large. Thus, for an assault, where there is a criminal prosecution and there is also a civil action for damages pending, sentence will not be passed for the crime whilst such action is pending (*s*). It has also been enacted that if the justices, upon the hearing upon the merits, of any summary proceedings for assault or battery, shall deem the offence not proved, or to be justified, or to be so trifling as not to merit any punishment, and shall accordingly dismiss the complaint, they shall forthwith make out a certificate under their hands stating the fact of such dismissal, and shall deliver such certificate to the party against whom the complaint was pre-

When both criminal and civil proceedings cannot be taken.

24 & 25 Vict. c. 100, ss. 44, 45.

(*p*) Per Lord Ellenborough, C.J., in *Crosby* v. *Leng* (1810), 12 East, 413.
(*q*) *Midland Insurance Company* v. *Smith* (1881), 6 Q. B. D. 561; 50 L. J. Q. B. 329; 45 L. T. 411; 29 W. R. 850; *Re Shepherd, ex parte Ball* (1879), 10 Ch. D. 667; 48 L. J. Bk. 57; *Roope* v. *D'Avigdore* (1883), 10 Q. B. D. 412; 48 L. T. 761.
(*r*) *Appleby* v. *Franklin* (1886), 17 Q. B. D. 93; 55 L. J. Q. B. 129; 54 L. T. 135; 34 W. R. 231.
(*s*) *Reg.* v. *Mahon* (1836), 4 A. & E. 575.

ferred (*t*); and that if any person against whom any such complaint shall have been preferred shall have obtained such a certificate, or having been convicted shall have paid the whole amount adjudged to be paid, or shall have suffered the imprisonment awarded, in every such case he (*u*) shall be released from all further or other proceedings, civil or criminal, for the same cause (*x*).

The term "tort" is used in contradistinction to "contract."

The term "tort" is frequently used for the purpose of denoting a wrong or injury quite independent of contract; but in the definition at the commencement of the present chapter a wider application is given to it, viz., that it is some wrongful act which consists in the withholding or violating some legal right, and, as will be presently noticed, there are many torts in some way connected with contracts, and which are said to arise out of or flow from contracts. Before, however, proceeding to further notice this, it is important to have a correct appreciation of the difference between rights arising from breach of contract, and rights arising from tort, using the latter term as signifying an injury independent of contract, for these are the mere ordinary and usual kind of torts.

Quasi torts.

Difference between torts arising from contracts, and independently of contracts.

Where a person's right arises from a wrongful act independently of any contract, his action is styled an action *ex delicto*, but when arising strictly out of a contract it is called an action *ex contractu*, and in this latter kind it is necessary that there should be privity between the plaintiff and the defendant, for a person cannot sue upon a contract when there is no privity between himself and the party against whom he claims.

Mistake in telegraphic message.

Thus, if a person sends a message by a telegraphic company, and a mistake is made by the company in sending it, whereby he (the sender) is injured, here there is privity of contract between him and the company, and the sender has a right of action *ex contractu* against them. But if through the mistake an injury happens to the

(*t*) 24 & 25 Vict. c. 100, s. 44.

(*u*) *Dyer* v. *Munday* (1895), 1 Q. B. 742; 64 L. J. Q. B. 448; 72 L. T. 448.

(*x*) Sect. 45.

person to whom the message is sent, there being no privity of contract between him and the company—for he indeed made no contract with them—he can have no right of action against them *ex contractu*, or in tort for they owe him no duty, unless indeed the company wilfully alter the message, when he might sue them for deceit (*y*). To support an action *ex contractu*, therefore, it is essential that there should be privity between the parties; but with regard to a tort—again using that term as signifying an injury arising independently of contract—the right of action has nothing to do with any privity between the parties, but exists simply because of the withholding or violation of some right (*z*). That this is so is shewn by the case of *Langridge* v. *Levy*, the facts in which have been already stated (*a*). So also in another case the plaintiff had been employed by a shipowner to paint his ship, and the defendant had been employed by the shipowner to put up a staging round the ship for the purpose of the painting. The plaintiff, owing to a defect in the staging, fell and was injured. It was held that privity being in no way essential to an action of tort, the plaintiff could recover damages against the defendant, as the defendant was under an obligation, in erecting the staging, to see that it was in a fit and proper state for the use of persons who might naturally be expected to come upon it (*b*).

Heaven v. *Pender*.

But there are many kinds of torts arising out of contract,—being cases in which there has been a contract and a breach of that contract,—which, looked at in one way, furnish a right of action *ex contractu*, and looked at in another way furnish a right of action *ex delicto*. This is well explained by Mr. Broom in his Commentaries on the Common Law (*c*), and we cannot

There are many cases in which it may be in a person's election to sue for a tort or for a breach of contract.

(*y*) *Playford* v. *United Kingdom Telegraph Co.* (1869), L. R. 4 Q. B. 706; 38 L. J. Q. B. 249; *Dickson* v. *Reuter* (1877), 2 C. P. D. 62; 46 L. J. C. P. 197.

(*z*) *Gerhard* v. *Bates* (1853), 2 E. & B. 476; *Langridge* v. *Levy* (1837), 2 M. & W. 519.

(*a*) *Ante*, pp. 318, 319.

(*b*) *Heaven* v. *Pender* (1883), 11 Q. B. D. 503: 52 L. J. Q. B. 702; 49 L. T. 537.

(*c*) Page 773.

do better than quote the passage from that work: "Although tort in general differs essentially from contract as the foundation of an action, it not infrequently happens that a particular transaction admits of being regarded from two different points of view, so that when contemplated from one of these, it presents all the characteristics of a good cause of action *ex contractu*, and when regarded from the other it offers to the pleader's eyes sufficient materials whereupon to found an action *ex delicto*. Thus carriers warrant the transportation and delivery of goods intrusted to them. Attorneys, surgeons, and engineers undertake to discharge their duty with a reasonable amount of skill and with integrity; and for any neglect or unskilfulness by individuals belonging to one of these professions, a party who has been injured thereby may maintain an action, *either in tort for the wrong done, or in contract, at his election*" (*d*).

Privity is never necessary in torts.

But even in cases where the tort flows from contract, the rule that privity between the parties is not necessary still applies (*e*).

Certain cases in which no remedy for torts.

Having now considered the nature of torts, the distinctions between mere torts and acts actually amounting to crimes, and the differences between acts which are purely and simply torts in the more limited sense of the word, and breaches of contract, it remains but to notice in this chapter that there are certain acts for which, although they are torts, yet the law—principally upon public grounds—allows no redress.

Maxim that the king can do no wrong.

There is no remedy for a tort committed by the sovereign, because of the maxim or rule, "The king can do no wrong" (*f*).

(*d*) From the above the student will perceive that there are various matters before treated of under Part I., "Contracts," which might perhaps with equal propriety be considered in this part "Torts," particularly such subjects as Carriers, Innkeepers and Bailments generally.

(*e*) *Gerhard* v. *Bates* (1853), 2 E. & B. 476; *Langridge* v. *Levy* (1837), 2 M. & W. 519.

(*f*) Broom's Legal Maxims, 38. This maxim is explained thus in Broom's Legal Maxims, 38, 39: "Its meaning is, first, that the sovereign individually and fully in his natural capacity is independent

Acts done by a judge of a court of record.

For any act done by a judge of a court of record no action lies, provided such act is done in the course of his legal duties, for it is considered for the benefit of the community at large that the judges should have full scope, and not be fettered and impeded by any restraint and apprehensions, and this is so even although a judge's acts are shewn to have proceeded from malice (*g*). But if an act is done by a judge not acting judicially, or if an act is done by him in respect of some matter which was not within his jurisdiction, as he knew, or ought to have known, he is not protected then, but is liable in the same way as any other person (*h*). The same principle is applied also to a limited extent to arbitrators, who are not liable for mistakes or errors of judgment, or even for their acts of negligence, if they act honestly (*i*). Everything is presumed to be within the jurisdiction of the judge of a superior court until the contrary is shown, but the judge of an inferior court must prove the act complained of was within his jurisdiction (*k*).

Act done by a superior officer.

Again, a superior officer is justified in arresting and imprisoning an inferior for the purpose of bringing him to a court-martial in accordance with the rules of the service; and this is so even although the person so arrested is not ultimately brought to a court-martial, if

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of, and is not amenable to, any other earthly power or jurisdiction, and that whatever may be amiss in the condition of public affairs is not to be imputed to the king, so as to render him answerable for it personally to his people; secondly, the above maxim means that the prerogative of the Crown extends not to do any injury, because, being created for the benefit of the people, it cannot be exerted to their prejudice, and it is, therefore, a fundamental general rule that the king cannot sanction any act forbidden by law, so that in this point of view he is under and not above the laws, and he is bound by them equally as his subjects. If, then, the sovereign personally command an unlawful act to be done, the offence of the instrument is not thereby indemnified, for though the king is not himself under the coercive power of the law, yet in many cases his commands are under the directive power of the law, which makes the act itself invalid if unlawful, and so renders the instrument of execution hereof obnoxious to punishment."

(*g*) *Anderson* v. *Gorrie* (1895), 1 Q. B. 668; 71 L. T. 382.

(*h*) *Scott* v. *Stansfield* (1868), L. R. 3 Ex. 220; and see Broom's Coms. 103–107, and cases there cited and referred to.

(*i*) *Pappa* v. *Rose* (1872), L. R. 7 C. P. 725; *Chambers* v. *Goldthorpe* (1901), 1 Q. B. 624; 70 L. J. K. B. 482.

(*k*) *Houlden* v. *Smith* (1850), 14 Q. B. 841.

Dawkins v. *Lord Paulet.*

the arrest was in respect of some matter fairly cognisable by a military tribunal, and no action will lie against the superior officer (*l*). And this rule has been carried so far that it has been decided that it will apply even although the tortious act complained of is done maliciously, and without reasonable and probable cause (*m*).

Joint tort feasors.

If there are two or more joint tort feasors they may be sued together or individually (*n*), and satisfaction by one releases all (*o*), and a judgment obtained against one releases all even though not satisfied (*p*). If a plaintiff, having recovered judgment against several tort feasors, levies the whole damages on one, that one has no right to recover contribution from the other or others, for *Ex turpi causâ non oritur actio* (*q*). An exception to this rule was, however, created by the Directors Liability Act, 1890 (*r*), which provided that in case of representations made by directors of companies, whereby they became liable to pay damages under the Act, each director should be entitled to contribution, as in cases of contract, from any other person who, if sued separately, would have been liable. This statutory right to contribution was held to apply where directors are sued and held liable in a common law action of deceit, just as much as if they had been sued under this Act (*s*). The provision has now, however, been modified, it being provided that no such contribution can be obtained by a director guilty of fraudulent misrepresentation against any director not so guilty (*t*).

Ex turpi causâ non oritur actio.

Directors Liability Act, 1890.

7 Ed. VII. c. 50.

(*l*) *Dawkins* v. *Lord Rokeby* (1873), L. R. 8 Q. B. 255.
(*m*) *Dawkins* v. *Lord Paulet* (1869), L. R. 5 Q. B. 94; 39 L. J. Q. B. 53.
(*n*) *Hume* v. *Oldacre* (1815), 1 Stark 351.
(*o*) *Cocks* v. *Jenner* (1615), Hob. 66.
(*p*) *Howe* v. *Oliver* (1908), 52 S. J. 684; *Brinsmead* v. *Harrison* (1872), 44 L. J. C. P. 190; *King* v. *Hoare* (1844), 13 M. & W. 494.
(*q*) *Merryweather* v. *Nixan* (1799), 2 S. L. C. 398; 8 T. R. 186. It is otherwise in contract.
(*r*) 53 & 54 Vict. c. 64, s. 5. See *ante*, p. 291.
(*s*) *Gerson* v. *Simpson* (1903), 2 K. B. 197; 72 L. J. K. B. 603; 89 L. T. 117.
(*t*) 7 Edw. VII. c. 50, s. 33.

Indemnifying another from consequences of tort.

If a person is instructed to do some palpably tortious act, and the person so instructing him undertakes to indemnify him from the consequences of such act, no action will lie; yet if the act he is so instructed to do does not appear of itself manifestly unlawful, and he does not know it to be so, he can recover thereon (*u*). Thus, if A. instructs B. to drive certain cattle from a field, which B. does, thereby unwittingly committing a trespass, A. is bound to indemnify him; but if A. instructs B. to assault a person, which he does, this being an act manifestly illegal in its nature, B. cannot call upon A. to indemnify him. And where the proprietor of a newspaper agreed to indemnify the printer against all claims for any libel that might appear in the paper, and the printer had to pay damages and costs in respect of such a libel, and it appeared that such libel had been inserted with the knowledge of both the proprietor and the printer, it was recently held that the contract of indemnity was void (*v*). But if the libel had appeared by accident or inadvertence and both parties were anxious to avoid publishing libels, such a contract of indemnity would probably be upheld.

(*u*) Per Lord Kenyon in *Merryweather* v. *Nixan* (1799), 2 S. L. C. 398; 8 T. R. 186; *Betts* v. *Gibbon* (1834), 2 A. & E. 57; *Palmer* v. *Wick* (1894), A. C. 318; 71 L. T. 163; *Burrowes* v. *Rhodes* (1899), 1 Q. B. 816; 68 L. J. Q. B. 545.

(*v*) *Smith* v. *Clinton & Harris* (1908), 126 *Law Times* Newspaper, 8.

CHAPTER II.

OF TORTS AFFECTING LAND.

Different torts affecting land.

EVERY person possessed of land has necessarily a right to the peaceful possession and enjoyment of such land, and the infringement of this right is a tort in respect of which an action will lie. The infringement of this right may happen in various ways, but the most important infringements are by trespass, by commission of nuisances, and by waste.

I. Trespass. Meaning of the term "trespass."

A trespass, in its widest sense, signifies any transgression or offence against the laws of nature, of society, or of the country in which we live, whether relating to a man's person or to his property (*a*); but we have here only to consider trespass to land, which has been defined as a wrongful and unwarrantable entry upon the soil or land of another person (*b*), and is styled trespass *quare clausum fregit*.

Trespass to land:

In considering the subject of trespass to land, two main points present themselves for our consideration, viz.:—

1. The position of the party claiming that a trespass has been committed.
2. What will amount to a trespass.

1. The position of a person claiming that a trespass has been committed.

Firstly, then, as to the position of the party claiming that a trespass has been committed. It is necessary that he should have a valid title to the land, and that he should be actually in the exclusive possession of the land by himself, his servant, or agent (*c*). It is not, however, actually essential that the plaintiff should in

(*a*) Brown's Law Dict.
(*b*) Broom's Coms. 870.
(*c*) *Harrison* v. *Blackburn* (1865), 17 C. B. 678; 34 L. J. C. P. 109.

every action for trespass to his land prove his strict title thereto, for possession is the great requirement, and if the plaintiff proves that he is in possession, that makes out a sufficient *primâ facie* case on which he can recover (*d*); but if the defendant in any such action sets up in his statement of defence that the title to the land in respect of which the trespass is alleged to have been committed is not in the plaintiff, but in him the defendant, or in some third person by whose authority he has entered, then the actual title to the land is in question (*e*). An action of trespass, therefore, is frequently resorted to as a method of trying the title to land. An action for trespass to land must be brought within six years after the wrongful entry, except that in cases of infancy, or lunacy then existing, six years is allowed from the termination of the disability(*f*).

Possession the great essential.

An action for trespass is frequently resorted to, to try the title to land.

An action in respect of trespass to land situate abroad cannot be brought in this country, although both the plaintiff and the defendant are domiciled and resident here (*g*).

No action for trespass to land abroad.

Possession of the land in respect of which the trespass is committed is an essential to the plaintiff's case, but "very slight evidence of possession is sufficient to establish a *primâ facie* title to sue for an injury, such as the occupation of the soil with stones and rubbish which have been placed thereon by order of the plaintiff, and kept there for some short time without molestation, or the building of a wall, or a dam, mound, or fence, which goes on for some weeks without interruption and is then knocked down; or the enclosure or cultivation of a piece of waste ground, the mowing of the grass thereof, or the pasturing of a cow thereon; for mere occupancy of land, however recent, gives a good title to the occupier whereon he may recover against all

Very slight evidence of possession of land is sufficient to support an action for trespass.

(*d*) See Broom's Coms. 870.
(*e*) Addison on Torts, 404.
(*f*) 21 Jac. I. c. 16, ss. 3, 7.
(*g*) *British South Africa Co.* v. *Companhia di Moçambique* (1893), A. C. 602; 63 L. J. Q. B. 70; 69 L. T. 604.

who cannot prove an older and better title in themselves" (*h*). Possession by one's servant or agent is also sufficient; and there is one case in which a person may maintain an action for trespass committed to land although not in possession, and that is in the case of a reversioner, who, if some injury of a permanent kind is done to his reversion, may sue for the same (*i*), although in respect of the immediate injury to the land he would have no right of action, that being in the possessor, the actual tenant. Thus, if a person trespasses and cuts down trees, the tenant in possession may sue for the injury done to the residential value of the property, and the landlord for the diminished saleable value (*k*). And where a window was obstructed by the erection of a wall on the adjoining premises, it was held that the reversioner was entitled to recover damages in respect thereof, because of the permanent nature of the obstruction (*l*).

When a reversioner may sue in respect of a trespass.

When a mortgagor may maintain an action for trespass.

A mortgagor, by mortgaging, parts with the legal estate in the land mortgaged, and therefore could not formerly have maintained an action in respect of any trespass committed on the property; but by reason of the Judicature Act, 1873 (*m*), he may do so now if he remains in possession, and provided that the mortgagee has not given notice of his intention to take possession.

In an action for trespass to land it is not essential to prove any special damage.

It is not necessary in an action for trespass to land for the plaintiff to shew that he has sustained any special damage, the mere fact of the trespass entitling him, at any rate, to a nominal verdict (*n*). The fact of a person trespassing after notice or warning not to do so, will operate to aggravate the offence, and justify the jury in giving damages of a penal nature (*o*).

(*h*) Addison on Torts, 304.
(*i*) *Cox* v. *Glue* (1848), 5 C. B. 533.
(*k*) Addison on Torts, 354.
(*l*) *Jesser* v. *Gifford*, 4 Burr, 2141.
(*m*) 36 & 37 Vict. c. 66, s. 25 (5). See also *ante*, p. 66.
(*n*) Broom's Coms. 870.
(*o*) *Merest* v. *Harvey* (1814), 5 Taunt. 441.

In the case of trespass to land, and the owner of such land dying, the right of action survives to his executors or administrators, provided the injury was committed within six months of the owner's death, and that the action is brought within one year after his death; and this forms an exception to the maxim, *Actio personalis moritur cum personâ* (*p*). So also if injury is done to land, or, in fact, any property, real or personal, by a person who then dies, though the maxim primarily applies, yet there is a like exception, provided the injury was committed within six months before the death, and the action is brought within six months after the executors or administrators have taken upon themselves the administration of the estate of such deceased person (*q*). Thus an action may be brought against executors or administrators for obstruction by their testator of the ancient lights of a building belonging to the plaintiff, and as this is a continuing wrong, the action may be maintained although the obstruction was actually completed more than six months before the death (*r*). And, apart from these statutory provisions, it must be remembered that where a person by his wrongful act acquires the property of another—*e.g.*, if he wrongfully cuts and takes timber—the right of action does not die with the person, but may still be enforced (*s*).

Exceptions by 3 & 4 Wm. IV. c. 42, to the maxim *Actio personalis moritur cum personâ.*

Jenks v. *Clifden.*

Secondly, What will amount to a trespass to land? We have defined trespass to land as a wrongful and unwarrantable entry upon the soil or land of another person (*t*), and it therefore follows that entry is the essential to constitute a trespass. But this entry need not be actual; it may be constructive, as by a person

2. What will amount to a trespass to land?

Entry may be constructive.

(*p*) 3 & 4 Wm. IV. c. 42, s. 2. See as to this maxim, *ante*, pp. 6-8; and see other exceptions to the maxim, *post*, pp. 364, 426, 430, 434, 437.

(*q*) 3 & 4 Wm. IV. c. 42, s. 2. See hereon *Kirk* v. *Todd* (1883), 21 Ch. D. 484; 52 L. J. Ch. 224; 47 L. T. 676; *Jones* v. *Simes* (1890), 43 Ch. D. 607; 59 L. J. Ch. 351; 62 L. T. 447.

(*r*) *Jenks* v. *Clifden* (1897), 1 Ch. 694; 66 L. J. Ch. 338; 76 L. T. 382.

(*s*) *Phillips* v. *Homfray* (1883), 24 Ch. D. 439; 52 L. J. Ch. 833; 49 L. T. 5.

(*t*) *Ante*, p. 328.

throwing stones or rubbish on to his neighbour's land, or by letting a chimney or any other part of his house fall thereon, or by erecting a spout on his own lands or buildings, which discharges water on to his neighbour's (*u*). So also if a man's cattle stray from his own lands on to those of his neighbour, the latter not being under any legal obligation to fence them out, this amounts to trespass; but this rule as to cattle does not apply to dogs, for the owner of a dog is not liable for its straying and doing injury, unless it is of some peculiarly mischievous disposition (*v*). And if cattle are lawfully passing along a highway, and stray on to adjoining land through its not being properly fenced off, this does not amount to a trespass, though it is otherwise if they are not merely passing along, but staying there (*x*). Upon this principle, it was held that where an ox belonging to the defendant was being driven through the streets of a country town, and entered the plaintiff's shop and damaged his goods, the defendant was not liable, there being no negligence on his part (*y*). A person is not generally under any obligation to fence out his neighbour's cattle for his neighbour's protection, though the contrary may be the law either from express contract to that effect or by prescription. Railway companies are, however, under the provisions of the Railway Clauses Act, 1845 (*z*), bound to fence to keep out the cattle of adjoining proprietors (*a*). It has also been held that the owner of an open quarry is bound to fence it to protect his neighbour's cattle from falling therein (*b*).

Cattle straying.

Dogs straying.

Tillett v. *Ward*.

Obligation as to fencing out cattle.

(*u*) Addison on Torts, 308.

(*v*) Ibid., 310.

(*x*) See *Dovaston* v. *Payne* (1795), 2 S. L. C. 160; 2 H. Bl. 527.

(*y*) *Tillett* v. *Ward* (1883), 10 Q. B. D. 17; 52 L. J. Q. B. 61; 47 L. T. 546; 31 W. R. 197.

(*z*) 8 & 9 Vict. c. 20, s. 68.

(*a*) It has been decided that this duty of railway companies extends to keeping out swine, although swine require a stronger kind of hedge than cattle (*Child* v. *Hearn* (1874), L. R. 9 Ex. 176; 43 L. J. Ex. 100). The above provision does not apply where a highway intervenes between the lands where the cattle are, and the railway (*Luscombe* v. *Great Western Ry.* (1899), 2 Q. B. 313; 68 L. J. Q. B. 711; 81 L. T. 183).

(*b*) *Hawken* v. *Shearer* (1887), 56 L. J. Q. B. 284. There is also now

A lawful owner out of possession may peaceably enter.

The fact of a lawful owner of lands out of possession peaceably entering thereon is justifiable, and does not constitute a trespass; thus, if a tenant wrongfully holds over after the expiration of his tenancy, there is no doubt that the landlord may peaceably enter, and thus by his own act regain possession, but he must not use force. So also may a mortgagee entitled to possession thus peaceably enter. If such a person, however, enters forcibly, though technically he cannot be liable for a trespass on his own land (*c*), yet he may be liable for an assault (*d*), and generally his act would be contrary to the provisions of 5 Rich. II. s. 1, c. 8, and illegal (*e*).

But must not use force.

Licence to enter.

The fact that the owner of lands gave leave and licence to a person to come thereon, justifies and excuses what would otherwise be a trespass, but will not justify the remaining after rescission of such licence or permission; for if it be a mere permission or licence, and not a grant, it is always revocable, even though under seal (*f*). But although a licence is revocable, yet if it in fact forms part of a contract, and in revoking the licence the contract is broken, then an action for damages will lie in respect of that (*g*). A licence to break and enter premises with force is absolutely void.

A person is justified in removing a trespasser from his lands provided he first require him to leave, and in removing him he does not use a greater amount of force than is necessary under the circumstances.

A person is justified in removing a trespasser,

or in forcibly defending possession.

A person is justified in forcibly defending the possession of his land against any one who attempts to take it (*h*).

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a duty cast on the owner of a quarry within fifty yards of a highway to fence it in (50 & 51 Vict. c. 19). See further *post*, pp. 423, 424.

(*c*) *Newton* v. *Harland* (1840), 1 Mr. & Gr. 644; Per Parke, B., *Harvey* v. *Brydges* (1845), 14 M. & W. 442.

(*d*) *Beddall* v. *Maitland* (1881), 17 Ch. D. 174; 50 L. J. Ch. 401; 44 L. T. 248; 29 W. R. 484; *Edridge* v. *Hawkes* or *Edwick* v. *Hawkes* (1881), 18 Ch. D. 199; 50 L. J. Ch. 577; 45 L. T. 168; 29 W. R. 91.

(*e*) *Ante*, p. 79. (*f*) *Wood* v. *Leadbitter* (1855), 13 M. & W. 838.

(*g*) *Kerrison* v. *Smith* (1897), 2 Q. B. 445; 66 L. J. Q. B. 762; 77 L. T. 344.

(*h*) Per Fry, J., in *Edridge* v. *Hawkes*, *ante*, p. 79; *Tully* v. *Reid* (1846), 1 C. & P. 6.

Some special rights over the lands of others.

Persons sometimes have rights over the lands of others, entitling them to do acts which, if they had not such rights, would amount to trespasses; and of such rights the chief are Easements and Rights of Common. An easement has been well defined as "The right which the owner of one tenement, which is called the dominant, has over another, which is called the servient, to compel the owner thereof to permit something to be done, or to refrain from doing something, on such tenement, for the advantage of the former" (*i*). Rights of watercourse and rights of way may be mentioned as easements (*j*).

Easements.

Rights of common.

A right of common has been defined as "The right which one person has of taking some part of the produce of land, while the whole property in the land itself is vested in another" (*k*). Instances of rights of common are the right of pasturing cattle on another's lands, called common of pasture; the right of cutting turf on another's land, called common of turbary; and the right of fishing in water on another's lands, called common of piscary (*l*).

Riparian proprietors.

Where persons own land adjoining a river (*m*), the soil is vested in each owner up to the centre of the stream, and if either deals with it beyond that point, he is a trespasser. Each of such persons has a right to use the water for all proper purposes, provided he does not thereby interfere with his neighbour's enjoyment thereof, and to do so—*e.g.*, by preventing the water from flowing to some proprietor below—is a tort for which an action will lie (*n*). But this does not apply where water flows under the surface in no defined

(*i*) See notes to *Sury* v. *Pigot* (1626), in Tudor's Conveyancing Cases, p. 744.

(*j*) This is a subject belonging to Conveyancing. As to it, see *Sury* v. *Pigot* (*supra*), and notes thereon, and Indermaur and Thwaites' Conveyancing, 121–141.

(*k*) See notes to *Tyrringham's Case* (1584), in Tudor's Conveyancing Cases, p. 707 *et seq.*

(*l*) This subject pertains to Conveyancing, and reference may be made to the notes in *Tyrringham's Case* in Tudor's Conveyancing Cases, p. 707, *et seq.* See also Indermaur and Thwaites' Conveyancing, 117–121.

(*m*) Such persons are called riparian proprietors.

(*n*) See notes to *Sury* v. *Pigot*, Tudor's Conveyancing Cases, p. 154.

channel, for in such a case a landowner is justified in sinking a well and preventing the water from percolating through to, or in draining it from, his neighbour's lands, and this even though his design may be to injure his neighbour (*o*). He may, in fact, appropriate the under-ground water, in which at present, until appropriation, there is no property; but still he may not foul it, for whilst it percolates, every owner through whose land it passes has a right to receive it in its natural condition (*p*).

Chasemore v. *Richards.*

Ballard v. *Tomlinson.*

Where one person is possessed of the surface of land and another of the subsoil, or mines, each has an independent property in respect of which trespass may be committed. It is the duty of the owner of the subsoil, or mines, to leave sufficient support to maintain the ground above, and the owner of the ground above must not interfere with the soil or minerals beneath. The owner of the subsoil, or mines, is liable for every subsidence occurring through his not leaving sufficient support for the surface land (*q*); and this even although the minerals, with the right to get them; have been expressly granted to him by the owner of the surface (*r*). In one case the facts were that the lessees of coal under the plaintiff's land worked the coal so as to cause a subsidence of the land, and injury to houses thereon, in the year 1868. For the injury thus caused they made compensation and ceased working the coal, but in the year

Position when one party is possessed of the surface and the other of the subsoil of land.

Darley Main Colliery Co. v. *Mitchell.*

(*o*) *Chasemore* v. *Richards* (1859), 7 H. L. C. 349; *Grand Junction Canal Co.* v. *Shugar* (1871), L. R. 6 Ch. 483; *Bradford Corporation* v. *Pickles* (1895), A. C. 587; 54 L. J. Ch. 759; 73 L. T. 353; *Nichols* v. *Robertson* (1897), A. C. 129; 60 L. J. P. C. 27. This, it will be remembered, is an instance of a damage without what is considered an injury in the eyes of the law—that is, *damnum sine injuriâ*. See *ante* pp. 4, 5.

(*p*) *Ballard* v. *Tomlinson* (1885), 29 Ch. D. 115; 54 L. J. Ch. 454.

(*q*) Unless the instrument of severance provides to the contrary, *Butterknowle Colliery* v. *Bishop Auckland Co-operative Co.* (1906), A. C. 305; 75 L. J. Ch. 541. But the rule does not apply as between lessees of an upper seam of coal and lessees of a lower seam if the lease of the upper seam shews an intention that the lower seam shall be worked, and the lessee of the upper seam has no remedy for subsidence caused by working the lower seam except against his lessor under a covenant in his lease, *Butterley Co.* v. *New Hucknall Co.* (1908), Weekly Notes (C. A.) 221.

(*r*) *New Sharleston Colliery Co.* v. *Earl of Westmoreland* (1909), 82 L. T. 725.

1882 a further subsidence occurred, causing fresh injury. The defendants contended that the plaintiff's right of action accrued only at the time of the last working the coal, and that any claim was statute-barred, and that the case was therefore one of *damnum absque injuriâ*. The House of Lords, however, held that the cause of action in respect of the further subsidence did not arise until such subsidence occurred, and that the action could be maintained though more than six years had elapsed since the last working of the coal (*s*). But a person who has not himself been concerned with the workings which caused the subsidence is not liable, though he is in possession at the time of the subsidence, and though he might have taken measures to arrest it (*t*). If a fee simple owner demises minerals with power to let down the surface, and afterwards by signed writing "agrees to let" the surface on a yearly tenancy, and the mineral lessees let down the surface, the surface tenant can recover from the landlord consequential damages in an action on the implied covenant for quiet enjoyment (*u*).

Greenwell v. *Low Beechburn Col. Co.*

Every owner of land has a right to the lateral support of his neighbour's land to sustain his own land unweighted by buildings, but nothing more (*v*); unless, indeed, a title is gained by prescription, which will be the case after twenty years' enjoyment of the additional support (*x*); or where there is an express grant of the additional right, or such a grant can be implied, which would be the case when the adjoining land belongs to the same vendor, who sold for building purposes, for where there is a grant for building purposes, there is an implied grant of the right of support for the land

Right to lateral support.

(*s*) *Darley Main Colliery Co.* v. *Mitchell* (1885), 11 A. C. 127; 55 L. J. Q. B. 529; 54 L. T. 882.

(*t*) *Greenwell* v. *Low Beechburn Colliery Co.* (1897), 2 Q. B. 165; 60 L. J. Q. B. 643; 76 L. T. 759; *Hall* v. *Duke of Norfolk* (1900), 2 Ch. 493; 69 L. J. Ch. 571; 82 L. T. 836.

(*u*) *Markham* v. *Paget* (1908), 1 Ch. 697; 77 L. J. Ch. 451; 98 L. T. 605.

(*v*) *Brown* v. *Robbins* (1859), 4 H. & N. 186; *Smith* v. *Thackerah* (1865), 35 L. J. C. P. 276.

(*x*) *Dalton* v. *Angus* (1881), 6 A. C. 740; 50 L. J. Q. B. 689; 44 L. T. 844; 30 W. R. 191; *Bower* v. *Peate* (1876), 1 Q. B. D. 321; 45 L. J. Q. B. 446; 35 L. T. 321.

with the buildings to be erected, from adjoining land of the grantor (*y*).

II. Nuisances. Definition.

A nuisance (*z*) may be defined as some act which unlawfully and unwarrantably injures or prejudices the rights of another person; thus, the carrying on an offensive or noisy trade (*a*), the excessive ringing of a peal of bells (*b*), the improper emission of smoke from a chimney (*c*), and suffering drains to get into an offensive state (*d*), and many other acts, have been held to be nuisances (*e*). But it must not be understood from the foregoing that because a person simply carries on a trade which is somewhat objectionable to his neighbour, the carrying on of that trade must necessarily constitute a nuisance; to amount to a nuisance the matter must go further than that. Thus a person may possibly have a material objection to a butcher's shop being set up next door to him, and it may deteriorate from the value of his house, but the setting up of such a shop will not of itself be a nuisance; but if, by reason of the way in which the person conducts his business, offensive smells penetrate to the next house, then undoubtedly it will be. It is not every mere discomfort a person may experience that will constitute a nuisance (*f*), and the Court, in determining whether the user by a person of a building occupied by him constitutes an actionable nuisance to his neighbour, must have regard to the question whether he is using the building in a reasonable and usual manner for the

What acts are sufficient to constitute a nuisance.

(*y*) *Rigby* v. *Bennett* (1882), 21 Ch. D. 559; 48 L. T. 47; 31 W. R. 222.

(*z*) From *nuire*, to annoy. The subject of nuisances generally has been dealt with in this chapter, though many nuisances affect only the person, and do not therefore come under the head of "Torts affecting Land."

(*a*) *St. Helen's Smelting Co.* v. *Tipping* (1865), 11 H. L. C. 642; 35 L. J. Q. B. 66.

(*b*) *Soltau* v. *De Held* (1851), 2 Sim. (N. S.) 133.

(*c*) *Rich* v. *Basterfield* (1847), 4 C. B. 786.

(*d*) *Russell* v. *Shenton* (1842), 3 Q. B. 449.

(*e*) For numerous instances of acts that will amount to nuisances the student is referred to Addison on Torts, 486–495; Clerk and Lindsell on Torts, 380–400; Salmond on Torts, 181, 182.

(*f*) *St. Helen's Smelting Co.* v. *Tipping* (1865), 11 H. L. C. 650.

Polsue v. *Rushmer.*

ordinary purposes for which it was intended (*g*). If the alleged nuisance merely causes personal discomfort, it must be shewn that it seriously interferes with the comfort of human existence according to the ordinary standard of a reasonable person in that locality (*h*).

Party liable for probable consequence of his acts.

Landlord and tenant.

Where a nuisance arises not directly from the act of the defendant, but only incidentally from something he has done, he is nevertheless liable in respect of it, if it can be considered as the probable consequence of his act (*i*). If a man creates a nuisance on his property, and then conveys or demises it to another, they both are liable in respect of it. And if a nuisance arises on property in the possession of a tenant, from an omission on the part of the landlord to do repairs which he was bound to do, the landlord is liable; and so also a landlord will be liable if he by licence authorises the doing on his land of something whereby a nuisance is created (*j*). *Primâ facie*, however, in the case of a nuisance on premises in the occupation of a tenant, the tenant, and not the landlord, is the person liable, and in all such cases the remedy will be against the tenant if the landlord is not a party to it in any way, and the tenant has covenanted to repair (*k*). A landlord, who is not under a contract to repair, is not liable if the tenant's wife, or customer or guest, is injured by the defective state of the property, although he has voluntarily promised to repair that defect (*l*). But if a landlord lets out a building in flats or offices but retains possession of the common staircase, he is liable to persons calling on his tenants if they are injured owing to the staircase not being in a reasonably safe condition (*m*).

Todd v. *Flight.*

(*g*) *Sanders-Clerk* v. *Grosvenor Mansions* (1900), 2 Ch. 373; 69 L. J. Ch. 579; 82 L. T. 758; *A. G.* v. *Cole* (1901), 1 Ch. 205; 70 L. J. Ch. 148.

(*h*) *Polsue* v. *Rushmer* (1907), A. C. 121; 76 L. J. Ch. 365; 96 L. T. 519.

(*i*) *Chibnall* v. *Paul* (1881), 29 W. R. 536.

(*j*) *Todd* v. *Flight* (1860), 30 L. J. C. P. 21; *White* v. *Jameson* (1874), L. R. 18 Eq. 303.

(*k*) *Pretty* v. *Bickmore* (1873), L. R. 8 C. P. 401; 21 W. R. 733; *Nelson* v. *Liverpool Brewery Co.* (1877), 2 C. P. D. 311; 46 L. J. C. P. 675; 25 W. R. 877.

(*l*) *Cavalier* v. *Pope* (1906), A. C. 428; 75 L. J. K. B. 609; 95 L. T. 65.

(*m*) *Miller* v. *Hancock* (1893), 2 Q. B. 177; 69 L. T. 214.

Where an act is done which really does amount to a nuisance to some person or persons, it is no defence to say that the act is a benefit to other persons, or to the community at large, or that the place where it is carried on is very convenient for the public (*n*). Thus, there are many trades of an offensive character that necessarily must be carried on, and as to which it would be a detriment to the public were they not followed, but that fact does not justify a person in establishing such a trade where it prejudices another (*o*). He must seek out another place where he can carry it on without doing injury to any one. And if a person comes to a place where a nuisance is existing, he has an equal right to his legal remedies in respect of that nuisance as if he had been there first, and the nuisance had been afterwards established (*p*). Where an Act of Parliament authorises the doing of certain things, but does not by direct and imperative provisions order them to be done, if in doing them a nuisance or other injury is created, the Act does not afford any statutory protection (*q*). And even if the thing is imperatively required to be done, the onus rests on the person who has to do it, of shewing that it was impossible to do it without creating a nuisance (*r*).

It is no defence to an action for a nuisance that the act is a benefit to other persons or to the community at large.

Although a person comes to a nuisance, he still has a right to have it abated.

Metropolitan Asylum District v. *Hill.*

Nuisances are divided into two classes, viz. :—

1. Public nuisances, which are acts that affect the public at large, *e.g.*, the digging of a ditch in a public road, or the causing of a great smoke; and,

2. Private nuisances, which are acts that affect only some particular individual or individuals, and not the public at large, *e.g.*, an offensive smell which only

Nuisances may be either public or private.

(*n*) *Ogston* v. *Aberdeen District Tramways* (1897), A. C. 111; 66 L. J. P. C. 1; 75 L. T. 933.

(*o*) *Bamford* v. *Turnley* (1862), 31 L. J. (Q. B.) 286; *Stockport Waterworks Co.* v. *Potter* (1862), 31 L. J. Ex. 9.

(*p*) Per Byles, J., *Hole* v. *Barrow* (1858), 27 L. J. C. P. 208; *Sturges* v. *Bridgman* (1879), 11 Ch. D. 852; 48 L. J. Ch. 875; 28 W. R. 200.

(*q*) *Metropolitan Asylum District* v. *Hill* (1881), 6 A. C. 193; 50 L. J. Q. B. 353; 44 L. T. 653; 29 W. R. 617; *Jordeson* v. *Sutton, &c. Gas Co.* (1899), 2 Ch. 217; 68 L. J. Ch. 457; 80 L. T. 815.

(*r*) *Attorney-General* v. *Gas Light & Coke Co.* (1878), 7 Ch. D. 217; 47 L. J. Ch. 534.

penetrates to the next house, or a noise only affecting a neighbour.

Differences in the remedy in respect of each.

There are very material differences in the remedies in the case of a public and a private nuisance respectively. A public nuisance being a public wrong, affecting the community at large, a public remedy is applied to it, the proper course being to proceed either by indictment or information. An indictment is a written accusation laid against one or more persons of a felony or misdemeanour, preferred to and presented upon oath by the grand jury; and there are many cases of public nuisances in which an indictment is the strictly proper course, *e.g.*, the keeping of gunpowder in large quantities in close proximity to populous neighbourhoods, the blocking up of, or other injury to, a public road, the keeping of a disorderly house, indecent bathing, or the carrying of persons suffering from infectious disorders through the public streets in such a way as to endanger the health of the public (*s*). An information is a process preferred in the name of the Attorney-General or Solictor-General for the purpose of restraining, on behalf of the public, the commission or continuance of some public injury and is a remedy frequently resorted to in cases of ordinary public nuisances. However, although indictment and information are the proper remedies for a public nuisance, an action may be brought in respect of it by a private individual if he can shew that the nuisance affects him more than the community at large (*t*).

Indictment.

Information.

The remedy in respect of a private nuisance is an action.

A private nuisance is no offence against the public, but only against a private individual, and therefore there is no public remedy, but merely a private one, in respect of it. This private remedy is exercised by bringing an action, in which the plaintiff simply seeks damages for the injury that has been done to him by the commission of the nuisance, or an injunction to restrain the commission or continuance of the nuisance, or both; that is to say, damages for the injury already

(*s*) See Broom's Coms. 1030.
(*t*) *Soltau* v. *De Held* (1851), 2 Sim. (N. S.), 133.

done him, and an injunction to prevent the continuance of such injury. If, however, there have been leave and licence expressly given, or impliedly given by a person standing by for some time and acquiescing tacitly in the doing of some act which constitutes a nuisance—*e.g.*, if he stands by and sees a building completed which he knows is being erected for the purpose of carrying on an obnoxious trade amounting to a nuisance—he will lose his right to an injunction, though it would be otherwise were he not aware that the act would constitute a nuisance, or if the nuisance exceeded what he had reasonable grounds for believing it would amount to (*u*).

But a person may be barred by his laches.

Besides the before-mentioned remedies by legal process, there is yet another course that can sometimes be taken by a person affected by a nuisance, and that is the abatement of it, which may be defined as a remedy by the act of the party, consisting in the removal and doing away of the nuisance. Here again is another difference between a public and a private nuisance, for the former can only be abated where it does the person abating it some special and peculiar harm, but the latter the person prejudiced has always the right of abating (*v*). Thus, if an obstruction is placed on a public road, strictly speaking a private person has no right to remove it unless he requires to pass that way, and then, as it does him a special and peculiar injury, he may (*x*); but if A. erects a spout discharging water on to B.'s land, here, as this is a private nuisance only affecting B., he has a right to remove it. And if trees on one man's land overhang the adjoining land, the owner thereof is entitled to cut the overhanging branches, no matter how long they may have been overhanging, and it is not necessary first to give notice of the intention to so cut them (*y*).

Abatement of nuisances.

A public nuisance can only be abated where it particularly affects the abator.

Cutting trees.

The abatement of a nuisance must, however, be

The abatement of a nuisance must be peaceable.

(*u*) Addison on Torts, 504.
(*v*) *Mayor of Colchester* v. *Brook* (1845), 7 Q. B. 389; *Earl of Lonsdale* v. *Nelson* (1823), 2 B. & C. 302.
(*x*) *Webber* v. *Sparkes* (1842), 10 M. & W. 485.
(*y*) *Lemmon* v. *Webb* (1895), A. C. 1; 64 L. J. Ch. 205; 71 L. T. 647.

done peaceably and without danger to life or limb; so that although, if a house is wrongfully built on another's land (which will constitute both a trespass and a nuisance), the person affected is justified in pulling it down, yet he must not do so if individuals are actually in the house at the time (*z*) without reasonable notice beforehand (*a*). And if to abate a nuisance it is necessary to enter on another's land, notice must be given to the occupier of such land requiring him first to remove it (*b*), unless it is of such a kind as to render it positively unsafe to wait, when an immediate entry will be perfectly justifiable (*c*), provided it is made peaceably, or at the most with as little violence as is necessary under the circumstances. But although a person may be justified in entering on another's land to abate, he is not justified in so entering to prevent the commission of a nuisance (*d*).

Notice usually necessary before entering on another's land to abate a nuisance.

III. Waste. Definition.

Waste may be defined as some act committed by a limited owner of an estate, exceeding the right which he has therein. It does not appear to be strictly correct to say that it is some act which tends to the depreciation of the inheritance, nor to say that it is some havoc or devastation, for an act which does not really injure the property, but, on the contrary, improves it, may possibly yet amount to waste. As to who are liable for waste, tenants for life, for years, at will, or at sufferance are; but a tenant in tail is not, because he can at any time bar the entail and make himself absolute owner of the property, unless indeed he be a tenant in tail after possibility of issue extinct, and then, as he cannot bar the entail, he is liable for that kind of waste called equitable waste. A tenant in fee-simple is, of course, not at all liable for waste, unless, indeed, he be a tenant in fee-simple with an executory devise over (*e*).

Persons liable for waste.

(*z*) *Perry* v. *Fitzhowe* (1846), 8 Q. B. 757; *Jones* v. *Jones* (1862), 1 H. & C. 1.

(*a*) *Davies* v. *Williams* (1851), 16 Q. B. 546. (*b*) Ibid.

(*c*) Per Best, J., in *Earl of Lonsdale* v. *Nelson*, 2 B. & C. 311.

(*d*) Addison on Torts, 504.

(*e*) The subject of waste is most properly discussed in a work on real property law. It is not, therefore, dealt with further here. On the subject generally the reader is referred to *Lewis Bowles' Case*,

Slander of title.

Another tort indirectly affecting land may here be shortly referred to, viz., slander of title. If lands are about to be sold by auction, and a person declares in the auction-room, or elsewhere, that the vendor's title is defective, or makes other statements calculated to deter, and which do deter, people from buying, or from buying at as high a price as would otherwise have been the case, this is actionable unless the truth of the statements can be proved. In all such cases, however, the plaintiff must prove special damage caused by the defendant's act (*f*). The action for slander of title formerly only existed as regards land, but such an action may now be brought as regards chattels (*g*).

Injurious falsehood.

An action will lie for written or oral falsehoods, which are not actionable *per se* nor even defamatory, provided they are maliciously published, and are calculated in the ordinary course of things to produce, and do in fact produce, actual damage (*h*). Such injurious falsehood differs from deceit, for in the latter the untrue statement is made with intent that the party injured shall act upon it, while in the former the untrue statement is made to a third person; and it differs from libel and slander because it is not an attack on the reputation of the party injured (*i*). Thus a false and malicious depreciation of the quality of goods made and sold by a trader is actionable if it causes loss, but a mere puffing statement by A. that his goods are better than B.'s or are the best in the world is not actionable (*j*).

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and notes, in Tudor's Conveyancing Cases, 86 *et seq.*, and to *Garth* v. *Cotton*, and notes, in 2 White and Tudor's Equity Cases, 970. The student will also find a short statement of the liabilities of different owners in respect of waste in Indermaur's Epitome of Conveyancing and Equity Cases, 9th edit. 5–7. See also Indermaur and Thwaites' Conveyancing, 13–15.

(*f*) *Royal Baking Powder Co.* v. *Wright* (1901), 18 Pat. Cas. 95; *White* v. *Mellin* (1895), A. C. 154.

(*g*) *Wren* v. *Weild* (1869), 38 L. J. Q. B. 327.

(*h*) Per Bowen, L.J., in *Ratcliffe* v. *Evans* (1892), 2 Q. B. at p. 527 (untrue statement in a newspaper that plaintiff had ceased to carry on business).

(*i*) Salmond on Torts, 426–429.

(*j*) *White* v. *Mellin* (1895), A. C. 154; 64 L. J. Ch. 308, *Linotype Co.* v. *British Empire Typesetting Co.* (1899), 81 L. T. 331; *Alcott* v. *Millar's Karri Forests Ld.* (1905), 91 L. T. 722.

CHAPTER III.

OF TORTS AFFECTING GOODS AND OTHER PERSONAL PROPERTY, AND HEREIN OF THE TITLE TO THE SAME.

Torts to goods, &c., come under the head of trespass or conversion.

TORTS to goods and other personal property mainly come under one of two divisions, viz.: (1) Trespass, and (2) Conversion. The former may be described as the wrongful meddling by a person with the goods of another, and the latter as the taking of goods from the possession of another, and exercising some dominion or control over them.

Mode of considering torts to goods, &c., adopted in this chapter.

It is proposed to consider the subject of torts affecting goods and other personal property in the following manner :—

1. The title necessary to enable a person to sue in respect of such a tort.
2. The tortious acts themselves.
3. Justification of the tortious acts.
4. Some miscellaneous points connected with the subject.

I. Title.

Possession raises a presumption of title.

The mere fact of a person having goods in his possession, generally raises a presumption that they are his property, and that he has a perfect title to them, so that he can dispose of and deal with them to the fullest extent; but this is only a presumption, and the general rule is *Nemo dat quod non habet*. Exceptions to this rule, however, exist in the case of current coin (*a*), negotiable instruments (*b*), dispositions by a mercantile agent under the Factors Act 1889 (*c*), or by a seller or buyer under sec. 25 of the Sale

Exceptions to maxim.

(*a*) In circulation as such, and not kept simply as a curiosity, *Miller* v. *Hancock* (1899), 2 Q. B. 111; 68 L. J. Q. B. 657.
(*b*) See *ante*, p. 167.
(*c*) See *ante*, p. 153.

of Goods Act, 1893 (*d*), cases of estoppel (*e*), sales under a special common law or statutory power of sale or under the order of a competent court (*f*), sale of stolen goods in market overt (*g*), and sale of stolen horses according to the statutes (*h*). Generally speaking, the mere fact of bare possession constitutes a sufficient title to enable the party enjoying it to maintain an action against a mere wrongdoer (*i*); but this is not always so, for a person may have possession of goods and yet have no real title to them, or an imperfect one.

As to stolen goods.

As to stolen goods, the thief naturally has no good title to them, and the law is—except in the case of current coin and negotiable instruments (*j*),—that he can give no title to them, except by a sale in market overt when it is otherwise (*k*). By a sale in market overt is meant selling goods in an open public and legally constituted market (*l*), as opposed to selling them privately. In the country, the market-place or piece of ground set apart by custom for the sale of goods, is in general the only market overt there; but in the city of London, and in other towns, when so warranted by custom, a sale by the shopkeeper in an open shop (*m*) of such goods only as the shopkeeper professes to trade in (*n*) is equivalent to, and in fact amounts to a sale in market overt (*o*). This advan-

What is meant by market overt.

(*d*) See *ante*, p. 154.

(*e*) *Pickard* v. *Sears* (1837), 6 A. & E. 469; *Freeman* v. *Cooke* (1848), 2 Ex. 654; 56 & 57 Vict. c. 71, s. 21 (1). And contrast *Farquharson* v. *King* (1902), A. C. 325; 71 L. J. K. B. 667.

(*f*) 56 & 57 Vict. c. 71, s. 21 (2b).

(*g*) Ibid., s. 22.

(*h*) *Post*, pp. 346, 347.

(*i*) *Armory* v. *Delamirie*, 1 S. L. C. 356; 1 Strange, 504; Per Lord Campbell, C.J., in *Jeffries* v. *Great Western Ry. Co.*, 5 E. & B. 805.

(*j*) As to which, see *ante*, p. 167.

(*k*) 56 & 57 Vict. c. 71, s. 22. See *Farquharson* v. *King* (1902), A. C. 325; 71 L. J. K. B. 667; 86 L. T. 810.

(*l*) Per Jervis, C.J., in *Lee* v. *Bayes* (1856), 18 C. B. at p. 601. It includes a modern market established under statutory powers, *Ganly* v. *Ledwidge* (1876), 10 C. L. (Irish), 33.

(*m*) But not in a back room or upstairs show-room, *Hargreave* v. *Spink* (1892), 1 Q. B. 25; 61 L. J. Q. B. 318; 65 L. T. 650.

(*n*) Case of *Market Overt* (1596), 5 Rep. 83b.

(*o*) Benjamin on Sale, 15–18.

The advantage of a sale in market overt existed at common law.

tage of a sale in market overt, which is now expressly recognised by the Sale of Goods Act, 1893 (*p*), existed at common law (*q*), and is of material importance, enabling, as it does, a person to confer a title to goods where he could not have done so by a private sale of them. It must, however, be carefully borne in mind that there is one case in which even this kind of sale by a wrongful owner will not have this effect, it being provided by the Sale of Goods Act, 1893 (*r*), that where goods have been stolen, and the offender is prosecuted to conviction, the property in the goods so stolen revests in the person who was the owner of the goods, notwithstanding any intermediate dealing with them, whether by sale in market overt or otherwise, so that he can sue to recover them from any person into whose hands they may have got (*s*). The Act goes on, however, specially to provide that where goods have been obtained by fraud or other wrongful means not amounting to larceny, the property in such goods shall not revest in the person who was the owner of the goods by reason only of the conviction of the offender. This is a modification of the previous law, for it had formerly been held that, under the provisions contained in the Larceny Act, 1861 (*t*) (which formerly entirely governed the matter), there was no distinction between cases of false pretences and larceny (*u*).

Sale of Goods Act, 1891, s. 24.

Special provisions as to sale of a horse.

And as to one particular kind of property, viz., a horse, it is expressly provided that even although bought in market overt, a sale of it will confer no better title than the vendor had, unless it has been exposed there for sale for an hour between ten in the

(*p*) 56 & 57 Vict. c. 71, s. 22.

(*q*) See the case of *Market Overt* (1596), Tudor's L. C. Mer. Law, 274; and also see *Crane* v. *London Dock Co.* (1864), 33 L. J. (Q. B.) 224.

(*r*) 56 & 57 Vict. c. 71, s. 24, which is based upon the provision contained in the Larceny Act, 1861 (24 & 25 Vict. c. 96, s. 100).

(*s*) *Cundy* v. *Lindsay* (1878), 3 A. C. 459; 47 L. J. Q. B. 481.

(*t*) 24 & 25 Vict. c. 96, s. 100.

(*u*) *Bentley* v. *Vilmont* (1888), 12 A. C. 471; 57 L J. Q. B. 18. The case of *Moyce* v. *Newington* (1879), 4 Q. B. D. 32; 48 L. J. Q. B. 125 which was overruled by *Bentey* v. *Vilmont*, is, therefore, now good law under the new provision, and it furnishes an apt illustration of the modification now introduced.

morning and sunset, and also the price, colour, and marks of it, together with the names, descriptions, and abodes of the buyer and seller, have been taken down in a book by the toll-keeper; and even when these formalities are complied with, if the horse has been stolen, the rightful owner may at any time within six months after the sale recover it, on tendering to the person possessed of it the price he has *bonâ fide* paid for it (*x*).

Rights of a finder of goods.

A person who has found a chattel does not acquire any absolute title by such finding, but he does acquire a qualified title that will be good against all the world except the rightful owner or his representative (*y*), unless he has found the chattel on the private premises of another person, when the finding is on behalf of such person (*z*). Thus in *Armory* v. *Delamirie* the plaintiff, a chimney-sweeper's boy, had found a jewel, and taken it to the shop of the defendant, a goldsmith, to know what it was; he there delivered it to the defendant's apprentice, who, under a pretence of weighing it, took out the stone, and the master, the defendant, then offered the plaintiff three-halfpence for it. On the plaintiff refusing to accept this, and requiring to have the jewel back, the socket was returned to him without the stone, and this action was brought for damages in respect of the wrongful conversion. It was objected that the plaintiff had no title to enable him to sue in respect of the wrongful conversion, but the court decided that he might do so (*a*). So also where a person picked up a parcel of bank-notes in the defendant's shop, and temporarily deposited them with the defendant to restore to the true owner when he was ascertained, and no owner appeared to claim

Armory v. *Delamirie.*

Bridges v. *Hawkesworth.*

(*x*) 2 & 3 Phil. & M. c. 7; 31 Eliz. c. 12. It is extraordinary that the Sale of Goods Act, 1893, should have left these old statutes still existing; but it does, and it in fact expressly recognises them by enacting (s. 22), "Nothing in this section shall affect the law relating to the sale of horses."

(*y*) *Armory* v. *Delamirie* (1721), 1 S. L. C. 356; 1 Strange, 504.

(*z*) *South Staffordshire Waterworks* v. *Sharman* (1890), 2 Q. B. 44; 65 L. J. Q. B. 460; 74 L. T. 761.

(*a*) *Armory* v. *Delamirie*, supra.

South Staffordshire Waterworks v. *Sharman.*

them, it was held that the original finder might recover them from the defendant (*b*). But where a labourer was employed to clean out a reservoir, and found two rings embedded in the mud, it was held that he was not entitled to retain them against the owners of the reservoir, they having control over that place and its contents (*c*). It will be observed that in *Armory* v. *Delamirie* the plaintiff's claim was not against the owner of the premises where the jewel was found, whilst in *South Staffordshire Waterworks* v. *Sharman* it was ; in this latter case the finding was really on behalf of the employers, and their title was good against every one except the true owner. These cases illustrate the rule already stated, that bare possession is generally a sufficient title as against wrongdoers. If an honest finder sells to a person *bonâ fide* in market overt, he will give a perfect title as there is here no one liable to be prosecuted and convicted.

Treasure trove.

Any gold or silver in coin, or plate, or bullion found (*trouvé*) hidden in a building, or in the earth or in any other private place, the owner whereof is unknown, is called treasure trove. The property therein, and the title thereto, under different circumstances, vest either in the Crown, or the Crown's grantee of the franchise of treasure trove, *i.e.*, usually the lord of the manor within which it is found (*d*), but the Crown is *primâ facie* entitled (*e*).

A judgment does not affect the title to goods.

A person who buys goods from one against whom a judgment has been signed, gains a perfect title to such goods, unless they have been actually taken in execution, or he has, at the time of acquiring his title, notice that a writ of execution is lying unexecuted in the hands of the sheriff, under which the goods might be seized (*f*). A person who buys goods from one against

(*b*) *Bridges* v. *Hawkesworth* (1852), 21 L. J. (Q. B.) 75.
(*c*) *South Staffordshire Waterworks* v. *Sharman* (1890), 2 Q. B. 44.
(*d*) Chitty on Prerogatives of Crown, 152.
(*e*) *Att.-General* v. *Moore* (1893), 1 Ch. 676 ; 62 L. J. Ch. 607 ; 68 L. T. 574.
(*f*) 56 & 57 Vict. c. 71, s. 26.

whom a receiving order has been actually made, can gain no title to them, unless they have been acquired after the bankruptcy, and before the trustee has intervened to claim them (*g*); nor can he after an act of bankruptcy and before the date of the receiving order, unless he has bought them *bonâ fide* without notice of the act of bankruptcy (*h*). Bankruptcy.

In animals of such a nature as horses, cows, sheep, &c., a person may, certainly, have an absolute property; but in animals of a wild nature and not ordinarily in man's dominion, called animals *feræ naturæ*, he can only gain a qualified property, as by taming them, or their being on his land, or their being so young as not to be able to get away, or by reason of his being possessed of a forest, chase, or rabbit-warren. Also in fish a person may gain a title by harpooning or hooking them (*i*). Property in animals and fish.

Where a person leased his lands to another without reserving the game, it belonged by the common law to the tenant. But by the Game Act, 1831 (*j*), it was provided that in all cases of tenancies made before 5 October, 1831, the landlord should have the right to the game, except such a right had been expressly granted or allowed to the tenant, or a fine had been taken upon the granting or renewal of the lease (*k*). Under this Act, in all other cases, the occupier for the time being of lands has the sole and exclusive right of killing and taking the game upon the land, unless such right is reserved to the landlord or any other person (*l*); and where any landlord has reserved Property in game as between landlord and tenant.

(*g*) *Cohen* v. *Mitchell* (1890), 25 Q. B. D. 262; 59 L. J. Q. B. 409; 63 L. T. 206. It is the same with regard to leaseholds (*Re Clayton & Barclay's Contract* (1895), 2 Ch. 212; 64 L. J. Ch. 615; 72 L. T. 764), but as to freeholds or copyholds, no title can be acquired to them from an undischarged bankrupt even though the trustee has not intervened (*Re New Land Development Association* (1892), 2 Ch. 138; 61 L. J. Ch. 495; 66 L. T. 694; *London & County Contracts, Ltd.* v. *Tallack* (1903), 51 W. R. 408; 19 T. L. R. 156.

(*h*) 46 & 47 Vict. c. 52, s. 49.

(*i*) Addison on Torts, 631.

(*j*) 1 & 2 Wm. IV. c. 32. (*k*) Sect. 7.

(*l*) See *Pochin* v. *Smith* (1888), 52 J. P. 5.

to himself the right of killing game upon any land, he may authorise any other person or persons, who shall have obtained an annual game certificate, to enter upon such land for the purpose of pursuing and killing game thereon (*m*). The subject of ground game is, however, now governed by the Ground Game Act, 1880 (*n*). Under this Act, every occupier has, as incident to and inseparable from his occupation, the right, either by himself or by persons duly authorised by him in writing (*o*), to kill, take, and sell ground game (*i.e.*, hares and rabbits), concurrently with any other person who may be entitled to kill and take the same, and every condition or agreement which purports to divest the occupier's right in this respect is void (*p*). This provision does not, however, apply to cases in which, at the time of the passing of the Act (*q*), the right of taking game was, for valuable consideration, vested in some person other than the occupier, until such person's rights determine (*r*). An occupier, of land who is entitled otherwise than by reason of the Ground Game Act, 1880, to kill and take the ground game thereon, may demise the sporting rights to any other person; but as to ground game, the lessee only gets concurrent rights with the occupier (*s*).

Ground Game Act, 1880.

II. The tortious acts themselves.

It has been stated that torts to personal property consist mainly of trespass or conversion. Trespass to goods (called trespass *de bonis asportatis*) takes place when any one wrongfully intermeddles with goods in the actual or constructive possession of another, *e.g.*, by

(*m*) 1 & 2 Wm. IV. c. 32, s. 11.

(*n*) 43 & 44 Vict. c. 47.

(*o*) The Act provides that the occupier himself, and one other person authorised in writing by such occupier, shall be the only persons entitled under its provisions to kill ground game with firearms; and that no person shall be authorised by the occupier in writing to kill or take ground game in any way, except members of his household resident on the land in his occupation, persons in his ordinary service on such land, and any one other person *bonâ fide* employed by him for reward in the taking and destruction of ground game (43 & 44 Vict. c. 47, s. 1).

(*p*) 43 & 44 Vict. c. 47, ss. 1, 3, 4, 8; *Sherrard* v. *Gascoigne* (1900), 2 Q. B. 279; 69 L. J. Q. B. 720; 82 L. T. 850.

(*q*) September 7, 1880. (*r*) 43 & 44 Vict. c. 47, s. 5.

(*s*) *Morgan* v. *Jackson* (1895), 1 Q. B. 885; 64 L. J. Q. B. 462; 72 L. T. 593.

laying hold of, or removing, or carrying away, or defacing any inanimate articles, or by striking or chasing domestic animals (*t*). Conversion of goods is an unauthorised act which deprives the owner of his property permanently or for an indefinite time (*u*). The grievance in conversion is the unauthorised assumption of the powers of the true owner (*x*), so that actually dealing with another's goods as owner for however short a time and however limited a purpose is conversion (*y*), and it makes no difference that the acts were done under the mistaken though honest and reasonable belief of being lawfully entitled (*y*), or with the intention of benefiting the real owner (*u*). To saw a log of timber in two is trespass, but to burn it or to make it up into articles of furniture is conversion. A carrier or other bailee who accidentally loses the goods is liable to be sued in contract; but if he wrongfully refuses to deliver to the right person, or delivers to the wrong person, he is liable for conversion. Wrongful distress is a trespass (*z*), but it is conversion if the goods are sold (*a*).

Duty as to dangerous things.

All acts of trespass or injury to goods are not of a direct nature, for they may arise in various ways. Thus, if one person lends out to another, or gives to another to carry, any article of a highly dangerous character, or which, though not naturally dangerous, has yet such defects as to make it so, of which fact he is or ought to be aware, he is liable for any injury done to property thereby (*b*). And any person who brings and keeps on his property for his own purposes animals

Rylands v. *Fletcher.*

(*t*) Addison on Torts, 579.
(*u*) Per Bramwell, B., in *Hiort* v. *Bott* (1874), 43 L. J. Ex. at p. 83.
(*x*) Pollock on Torts, 357.
(*y*) *Hollins* v. *Fowler* (1875), 7 H. L. 757; 44 L. J. Q. B. 169.
(*z*) As to which see *ante*, p. 78, and *Semayne's Case*, there referred to; also as to when a person will be a trespasser *ab initio*, see *ante*, p. 81; and the *Six Carpenters' Case*, there referred to.
(*a*) For further instances of acts constituting conversion see Clerk and Lindsell on Torts, 234–246.
(*b*) *Blackmore* v. *Bristol & Exeter Ry. Co.* (1858), 27 L. J. (Q. B) 167; *Farrant* v. *Barnes* (1862), 11 C. B. N. S. 553; *Coughlin* v. *Gallison* (1899), 1 Q. B. 145; *Earl* v. *Lubbock* (1905), 1 K. B. 253; 74 L. J. K. B. 121.

or any other things—*e g.*, water or sewage—which may escape and do injury to property, is liable for any injury occasioned thereby, for it is the duty of the owner to keep the same under due control, so that they may do or cause no injury (*c*). *Sic utere tuo ut alienum non lædas* (*d*) is, indeed, an established principle governing such cases as this, and if a person will bring into or collect on his property things of a manifestly dangerous nature, or which may become so, he does it at his own peril, and it is not necessary, if damage occurs by reason of their escape, to prove negligence. Thus, to further illustrate this, it may be mentioned that where the owner of land had thereon a yew-tree, the branches of which projected on to his neighbour's land, and the neighbour's horse ate some of the leaves and was poisoned thereby, the owner of the land on which the tree was growing was held liable (*e*); but where the same thing happened, except that the branches of the yew-tree did not project, but the plaintiff's horse trespassed and ate the leaves, it was held the defendant was not liable (*f*). To the general principle of liability above stated, there are, however, exceptions: Firstly, if the injury caused by a dangerous thing on a person's land is due to the act of God, as where the defendant had on his land stored-up water, and an overflow occurred from an extraordinary storm (*g*). Secondly, if the immediate cause of the escape which does the damage is the act of a stranger over whom and at a place where the person had no control (*h*).

(*c*) *Rylands* v. *Fletcher* (1868), L. R. 3 H. L. 330; 37 L. J. Ex. 161; *Anderson* v. *Oppenheimer* (1880), 5 Q. B. D. 602; 49 L. J. Q. B. 708; *Snow* v. *Whitehead* (1884), 27 Ch. D. 588; 53 L. J. Ch. 885; 51 L. T. 253; 33 W. R. 128; *Ballard* v. *Tomlinson* (1885), 29 Ch. D. 115; 54 L. J. Ch. 454; 52 L. T. 942.

(*d*) "Use your own rights so that you do not hurt those of another."

(*e*) *Crowhurst* v. *Amersham Burial Board* (1879), 4 Ex. D. 5; 48 L. J. Ex. 109. See also *Firth* v. *Bowling Iron Co.* (1878), 3 C. P. D. 254; 47 L. J. C. P. 358.

(*f*) *Ponting* v. *Noakes* (1894), 2 Q. B. 281; 63 L. J. Q. B. 549; 70 L. T. 842.

(*g*) *Nichols* v. *Marsland*, 2 Ex. D. 1; 46 L. J. Ex. 174; 25 W. R. 173.

(*h*) *Box* v. *Jubb* (1879), 4 Ex. D. 76; 48 L. J. Ex. 417; *Ely Brewery*

Thirdly, if the thing which escapes is brought by a landlord on the premises for the mutual benefit of all the occupiers and with their express or implied consent—*e.g.*, where rats gnawed through a leaden water cistern and the escaping water damaged the goods of a tenant on a lower floor (*i*). Fourthly, where the landowner did not bring the things which have escaped upon his land—thus a landowner has been held not bound to cut down or exterminate thistles (*j*); and a mineowner, who worked his coal, was held not liable for water previously held back by the worked-out coal escaping and flooding a lower mine (*k*).

Whalley v. Lancashire & Yorkshire Railway Company.

Although a person is not liable for the escape of something which he did not bring on his land, yet he is not justified in actively transferring the mischief on to his neighbour, and will be liable if he does that. Thus where, on account of excessive rainfall, a quantity of water accumulated against a railway embankment, which it threatened to destroy, and to protect it the railway company cut trenches which caused the water to be tranferred to the lower land of the plaintiff, it was held that the company was liable for the damage done (*l*). But a man can erect a wall to protect his land from the overflow of a stream in times of flood, although the effect is to send the flood-water on the land of other riparian owners (*m*), unless he thereby obstructs an established flood-channel (*n*).

Injuries by animals.

With regard to animals *feræ naturæ*, such as hares, rabbits, pigeons, pheasants, and the like, it seems that though a person breeds them on his land, as he only has property in them whilst on his land, he is not liable for any injury they may do if they escape, the only

Co. v. *Pontypridd Urban Council* (1904), 68 J. P. 3. It is submitted that if the escape is due to the act of any one lawfully on defendant's premises (member of his family, servant, visitor) defendant is liable.

(*i*) *Carstairs* v. *Taylor* (1871), L. R. 6 Ex. 217; 40 L. J. Ex. 129.

(*j*) *Giles* v. *Walker* (1890), 24 Q. B. D. 656; 59 L. J. Q. B. 416.

(*k*) *Smith* v. *Kenrick* (1849), 7 C. B. 515.

(*l*) *Whalley* v. *Lancashire & Yorkshire Ry. Co.* (1884), 13 Q. B. D. 131; 50 L. T. 472; 53 L. J. Q. B. 285; 32 W. R. 711.

(*m*) *Nield* v. *L. & N. W. Ry.* (1874), L. R. 10 Ex. 4; 44 L. J. Ex. 15.

(*n*) *Menzies* v. *Breadalbane* (1828), 3 Bligh (N.S.), 414.

Farrer v. *Nelson.*

remedy of the person injured being to capture or destroy them (*o*). If, however, a person brings on to his own land a great quantity of such animals, or birds, and really overstocks his land, and this overstocking causes damage to a neighbour—*e.g.*, to his crops—then such person is liable in respect thereof (*p*). Irrespective of this, in the case of creatures which are by their very nature likely to do injury, the person owning, keeping, or harbouring them is always liable for any damage done by them; but in the case of animals not of such a character, to make a person liable for injuries to property done by them, a previous *scienter* or knowledge of the creature's mischievous propensities must be proved (*q*). This is shewn more particularly with regard to injuries to the person (*r*), but it has also application to injuries to goods. On the above principle, therefore, that the *scienter* of the owner must be shewn, it was formerly held that if a man's dog strayed and trespassed on another's land, and by biting, worrying, or otherwise, injured that other's sheep or cattle, unless the owner could be proved to have known that his dog had previously so acted, he was not liable, because, it was said, the worrying and killing of sheep is not in accordance with the ordinary instinct and nature of the animal (*s*). The contrary is, however, now the law, it being enacted (*t*) that "the owner of a dog shall be liable in damages for injury done to any cattle (*u*) by that dog, and it shall not be necessary for the party seeking such damages to show a previous mischievous propensity in the dog, or the owner's knowledge of such previous propensity, or to shew that the injury was attributable to neglect on the part of the owner" (*x*).

Scienter.

Dogs Act, 1906.

(*o*) Addison on Torts, 311.

(*p*) *Farrer* v. *Nelson* (1885), 15 Q. B. D. 258; 54 L. J. Q. B. 385; 52 L. T. 766.

(*q*) *Saunders* v. *Teape* (1884), 51 L. T. 263; 48 J. P. 757; *Cox* v. *Burbridge* (1863), 16 C. B. N. S. 430.

(*r*) See *post*, pp. 421, 422. (*s*) Addison on Torts, 310.

(*t*) 6 Edw. VII. c. 32, s. 1, repealing the former statute 28 & 29 Vict. c. 60.

(*u*) Even although the cattle were trespassing at the time, *Grange* v. *Silcock* (1897), 77 L. T. 342; 61 J. P. 709.

(*x*) The occupier of any house or premises, where the dog was kept

Damages, where not exceeding £5, are under the provisions of this Act recoverable summarily before a justice, or justices, in petty sessions. The Act defines "cattle" as including horses, mules, asses, sheep, goats, and swine.

What will amount to *scienter*.

As to what will amount to a *scienter* of viciousness, it is enough to shew that the owner was in any way aware of the animal's savage disposition, and it is not actually necessary to prove that the animal has previously done some positive injury (*y*). If the owner of an animal appoints a servant to keep it, the servant's knowledge of the animal's disposition is equivalent to the knowledge of the master (*z*); but it is not necessarily so if the servant is not so specially appointed, or has no special control in the matter (*a*).

The doctrine of *scienter* does not apply when there is an obligation existing by contract.

The doctrine of *scienter* in relation to injuries to animals is not applicable to cases where there is an independent obligation by contract to take reasonable care; so that where the plaintiff intrusted the defendant with a colt to take care of, and the defendant put it in a field near to where he kept a bull, and the bull gored the colt, it was held that the defendant was liable, although he had no knowledge of the bull's viciousness, and in fact had always believed it to be a perfectly gentle animal (*b*).

If a dog of a mischievous propensity strays and does injury, the owner is liable.

Although a person is not liable as a trespasser for his dog straying on to his neighbour's land (*c*), yet if it be of a peculiarly mischievous propensity, which is known to him, he is liable for any injury it may do to his

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or permitted to remain at the time of the injury, is to be liable for the injury, unless he proves he was not the owner of the dog at the time of the injury; so that an innkeeper may be held responsible for an injury done by a guest's dog (*Gardner* v. *Hart* (1895), 44 W. R. 527).

(*y*) *Worth* v. *Gilling* (1866), L. R. 2 C. P. 685. As to what is sufficient proof of *scienter* in the case of a dog biting a person, see *Osborne* v. *Chocqueel* (1896), 2 Q. B. 109; 65 L. J. Q. B. 534; and *Barnes* v. *Lucille* (1907), 96 L. T. 680; *post*, p. 421, 422.

(*z*) *Baker* v. *Snell* (1908), Court of Appeal, Weekly Notes, 187.

(*a*) *Baldwin* v. *Casella* (1872), L. R. 7 Ex. 325; 41 L. J. Ex. 167; *Stiles* v. *Cardiff Steam Navigation Co.* (1864), 33 L. J. Q. B. 310.

(*b*) *Smith* v. *Cook* (1876), 1 Q. B. D. 79; 45 L. J. Q. B. 122.

(*c*) See *ante*, p. 332.

neighbour's property (*d*); and if a dog whose nature it is to destroy game, or who has been trained for that purpose, strays on to another's land and does injury in that way, the owner is liable in respect of all such injury (*e*).

It is a tortious act to kill or injure another man's dog or cat.

To kill or injure any creature the property of another is a tortious act, for which the person so killing or injuring will be liable, even although the creature be only a dog or a cat. And it is also a tortious act to kill the dog of another, although it is actually known to be of a ferocious disposition, and is found going at large; unless, indeed, it is actually attacking a person at the time when it is killed (*f*).

Straying animals.

A person is not justified in killing his neighbour's dog or cat which he finds on his land, unless the animal is in the act of doing some injury which can only be prevented by its slaughter (*g*). And it has been held that if a person sets on his land a trap for foxes, and baits it with such strong-smelling meat as to attract his neighbour's dog or cat on to his land to the trap, and such animal is thereby killed or injured, he is liable for the act, though he had no intention of doing it, and though the animal ought not to have been there (*h*).

Injury done by traps.

Conversion may be by an agent's act, and even by ratification.

A person can be guilty of an act of trespass or conversion by his agent; and the ratification of a prior act originally unauthorised, will amount to a conversion by the person so ratifying it, provided the person doing the act professed at the time to be doing it as his agent (*i*). Thus, if A. meddles with the goods of B. and takes them away, professing to act, in so doing, for C., who gave him no instructions or authority to do so, but C. afterwards acknowledges and ratifies the act, it amounts to conversion by C. But for a ratification to

(*d*) Addison on Torts, 310.
(*e*) *Read* v. *Edwards* (1865), 17 C. B. N. S. 245; 34 L. J. C. P. 32.
(*f*) Addison on Torts, 580, 581; see *post*, p. 360.
(*g*) *Miles* v. *Hutchings* (1903), 2 K. B. 714; 72 L. J. K. B. 775; 89 L. T. 420.
(*h*) *Townsend* v. *Watken* (1808), 9 East, 277.
(*i*) *Wilson* v. *Tunman* (1843), 6 M. & Gr. 236.

have this effect, it must be with the full knowledge of the nature of the act committed, or with an intention to adopt that act at all events, so that where a landlord gave a broker a warrant to distrain for rent, and the broker took away and sold a fixture and paid the proceeds to the landlord, who received the money without inquiry, but yet without any knowledge of the broker's irregularity, it was held that no such authority appeared as would sustain an action against the landlord (*j*).

Conversion by intermeddling and taking away goods.

If a person in any way unlawfully meddles with and exercises an act of ownership over the goods of another, an act of conversion is at once committed, and an action for such conversion may be maintained immediately against him (*k*). Thus, in the case of *Cochrane* v. *Rymill* (*l*), the plaintiff advanced money to one Peggs on a bill of sale of his effects. The defendant, an auctioneer, without notice of the plaintiff's rights, by the direction of Peggs, sold the effects, and after deducting money he had advanced to Peggs on account, paid the whole balance to him. The plaintiff sought to recover the value of the goods on the ground of their conversion by the defendant, and it was held that the plaintiff was entitled to recover, for the dealing with the property, and sale, by the defendant amounted to a conversion. But if in this case the goods had been sent to the defendant in the ordinary and usual course of the business of the person sending them (*m*), the decision would have been different (*n*). It may be noticed that the protection afforded to a purchaser of goods in market overt (*o*) does

Cochrane v. *Rymill*.

(*j*) *Freeman* v. *Rosher* (1849), 13 Q. B. 780.

(*k*) *Hollins* v. *Fowler* (1875), 7 H. L. 757; 44 L. J. Q. B. 169.

(*l*) (1881), 40 L. T. 744; 27 W. R. 776. This case is perfectly distinguishable from a subsequent case of *National Mercantile Bank* v. *Rymill*, 44 L. T. 767.

(*m*) It matters not that the auctioneer was acting in the way of his ordinary business: that will not protect him. The case of *Turner* v. *Hockey* (1887), 56 L. J. Q. B. 301, in so far as it decides anything to the contrary, cannot be maintained. See *Barker* v. *Furlong* (1891), 2 Ch. 172; 64 L. T. 411; *Consolidated Co.* v. *Curtis* (1892), 1 Q. B. 495; 61 L. J. Q. B. 325; 40 W. R. 426.

(*n*) *National Mercantile Bank* v. *Hampson* (1880), 5 Q. B. D. 177; 49 L. J. Q. B. 480; *Taylor* v. *M'Keand* (1880), 5 C. P. D. 358; 49 L. J. C. P. D. 563; 28 W. R. 528.

(*o*) See *ante*, p. 345.

not extend to an auctioneer selling in market overt, so as to save him from the consequences of an inadvertent conversion (*p*).

When demand necessary before suing for conversion.

If goods come to a person's hands lawfully in the first instance, and he then detains them, to enable the owner to maintain an action for conversion, he must first make a demand for such goods, and then, on refusal to deliver them, he may sue for their conversion (*q*). This demand for, and refusal of, the goods, furnishes evidence of a conversion of them either then or at some time previously (*r*).

When a person is justified in refusing to deliver goods to the owner.

There are, however, some cases in which a person is justified in refusing to deliver up goods in his possession though he is not the owner of them, and in which his refusal will not render him guilty of a conversion. Thus if goods are deposited in a person's hands for another, but subject to a certain charge in some third person's favour, here the depositee is justified in refusing to deliver the goods over to the owner of them unless he has ascertained whether such charge does or does not exist. And, with still greater force, if the depositee has himself some claim in the nature of a lien, he is justified in retaining the goods until such lien is satisfied. If, however, the lien is disputed, and the owner brings an action to recover the goods, he can at once obtain possession of them on paying into court the amount of the lien to abide the result of the action (*s*). And if a person has goods of another and leaves them with his servant, and demand of them from the servant is made by the owner, here the servant is justified in refusing to deliver them up until he has had an opportunity of receiving his master's instructions upon the subject; and such a refusal is a qualified, reasonable, and justifiable refusal, and is no

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(*p*) *Delaney* v. *Wallis* (1883), 14 Ir. Reps. 31.
(*q*) *Thorogood* v. *Robinson* (1845), 6 Q. B. 772.
(*r*) *Wilton* v. *Girdlestone* (1822), 5 B. & Ald. 847.
(*s*) Order l. rule 8; *Gebruder Naf.* v. *Ploton* (1890), 25 Q. B. D. 13; 63 L. T. 328. See also *ante*, p. 142.

evidence of conversion in an action brought by the owner against the master (*t*).

Right of owner to follow proceeds of goods wrongfully converted.

The owner of goods which have been wrongfully converted may follow the proceeds thereof so long as he can mark or distinguish them, and provided there is no countervailing and superior title, such as a purchase in market overt. Thus, where a person wrongfully obtained goods and sold them, and the proceeds of sale were paid into a colonial bank for the purpose of transmission to its London branch, it was held that the owners of the goods were entitled to follow the proceeds into the hands of the bank (*u*).

Interpleader, what it is, &c.

Where a person is in doubt which of two or more persons demanding goods of him is the true owner to whom he ought to deliver them, the course open to him is to interplead, that is, take certain steps to have it decided between those parties which of them is the one entitled (*x*).

III. Justification.

Instances of justification.

There may be many cases in which the commission of a trespass to goods is justifiable, as has incidentally appeared in some of the foregoing remarks. "If a man's goods obstruct me in the exercise of my right of way, I have a right to remove them. If he places a horse and cart in the way of the access to my house, or before my door, so that I cannot drive up to it, I have a right to lay hold of the horse and lead him away, and, if necessary, to whip him to make him move on. So, if a person's goods are placed on my ground, I may lawfully remove them; and if his cattle or sheep come upon my land, I may chase them and drive them out" (*y*). All these form instances of justification.

When justifiable to kill another's animal.

It is perfectly justifiable to kill a naturally ferocious animal which is found at large, *e.g.*, a lion or a tiger,

(*t*) Addison on Torts, 589.
(*u*) *Comité des Assureurs Maritimes* v. *Standard Bank of South Africa* (1885), 1 C. & E. 87.
(*x*) See Indermaur's Manual of Practice, 159-162.
(*y*) Addison on Torts, 580.

but this does not extend to justify a person killing a ferocious dog simply found at large (*z*). But it is perfectly justifiable for a person who is attacked by a dog to kill it in self-defence, or to kill it when it is chasing sheep or cattle, and they cannot be otherwise preserved (*a*). It is also justifiable for the police to detain any stray dog found in a highway or place of public resort, and if it is not claimed to sell or destroy it (*b*); and if any dog is dangerous and not kept under proper control, application may be made to justices, who may order it to be destroyed (*c*).

Dogs Act, 1906.

Acts not really amounting to trespass or conversion.

Cases in which a person is justified in refusing to give up goods, though belonging to the person making the application for delivery to him, have already been mentioned (*d*). These cases cannot be called the justification of a conversion, but rather cases in which acts, though apparently constituting a conversion, do not actually amount to it. So also with regard to the justification of a trespass, perhaps these cases would be more correctly described as cases in which acts, though apparently constituting a trespass, do not actually amount to it.

An act done accidentally may be excusable.

Although a person does what is apparently an unjustifiable injury to another's property, he may find an excuse for it by shewing that it was the result of unavoidable accident; as if a man is riding along the streets, and accidentally, and without any fault on his part, his horse runs away and does injury, he is not liable. So again, on the same principle, if a person is walking along the street, and accidentally slips, and falls against and breaks a window, he is not liable for the damage done. But if, in either of these cases, at the time of the accident the person was doing an unlawful act, *e.g.*, committing an assault, he would be liable (*e*).

(*z*) *Ante*, p. 356.
(*a*) Ibid.
(*b*) 6 Edw. VII. c. 32, ss. 3, 4.
(*c*) 34 & 35 Vict. c. 56, s. 2.
(*d*) *Ante*, p. 358.
(*e*) *Hammack* v. *White* (1862), 31 L. J. C. P. 129; *Holmes* v. *Mather* (1875), 44 L. J. Ex. 176; *Manzoni* v. *Douglas* (1881), 6 Q. B. D. 145; 50 L. J. Q. B. 289; 29 W. R. 425.

IV. Miscellaneous points.

Self-defence is a natural act open to every man, and if a person has actual possession of goods or other personal property, and another wrongfully attempts to take the same from him against his will, he is perfectly justified in using all force necessary for the purpose of defending his own possession and preventing the act of trespass or conversion; he must, however, use no more force than is, under the circumstances of the case, necessary (*f*).

Recaption.

How a person is justified in effecting a recaption.

And even if a person is wrongfully dispossessed of his goods, he has the right of recaption. Recaption may be defined as a remedy by the act of the party, consisting in the right of the true owner of goods to follow them into the hands of another, and actually retake them from that other, and repossess himself thereof. And a person to exercise this right of recaption, if the taker has removed the goods on to his own land, may enter thereon and take them, and will commit no trespass in so doing; but in exercising this right he must be careful not to do any act that may render him in his turn an aggressor—he must not use any undue force, must not effect the retaking in a riotous manner, and must not commit a breach of the peace (*g*).

Who can sue for trespass or conversion.

Bailments.

When trespass to goods is committed, or a conversion of them takes place, the person possessed of them at the time of the committing of the wrongful act is generally the person entitled to maintain an action in respect of it. But in the case of a bailment of goods, there being an interest in both the bailor and the bailee, the rule as regards many tortious acts is, that either or both of them may maintain an action in respect thereof (*h*). Thus, if goods are let out by A. to B., and by the wrongful act of a third person, C., they are destroyed, or permanently and materially damaged, B. may sue in respect of the direct loss to him, and the

(*f*) Judgment in *Reg.* v. *Wilson* (1835). 3 A. & E. 825.
(*g*) *Patrick* v. *Colerick* (1838), 3 M. & W. 483.
(*h*) Per Parke, B., *Reg.* v. *Vincent*, 21 L. J. (N. C.) 109; see also *ante*, p. 142.

bailor A., who is entitled after the determination of the bailment, may sue for the ultimate injury done to him. To entitle the bailor, however, in such a case to sue, the injury done must be of a permanent nature (*i*). But where a conversion takes place in respect of goods the subject of a bailment, and the bailee has a right to them for some fixed and specific period yet unexpired, here the bailor cannot sue in respect of the conversion, but the action must be by the bailee; unless, indeed, the very conversion occurs by a tortious act of the bailee which determines the bailment (*k*). As against a stranger, the bailee of goods in his possession can recover the full value of the goods if they are destroyed by the negligence or other wrongful act of such stranger; and it is no defence that the bailee is not liable to the bailor for the loss (*l*); though of course the bailee will have the duty of accounting to the bailor for the value.

The Winkfield.

Remedy for trespass to goods.

The legal remedy for a trespass was originally either by action of trespass for damages for any direct injury done, or an action of trespass on the case for any consequential injury, and this was, in fact, the only difference in the two forms of action. The present system of pleading under the Judicature practice, however, now entirely does away with all such distinctions (and, indeed, this distinction of forms of action had ceased long before), and in respect of a trespass committed to goods, the proper remedy is by an action to recover damages for the tortious act.

Remedy for wrongful conversion.

With regard, however, to cases in which the tortious act amounts not merely to trespass, but to a conversion of goods, that is, to the actual taking away and wrongful appropriation of them, or where goods are wrongfully detained by a person from the true

(*i*) *Hall* v. *Pickard* (1814), 3 Camp. 187; *Mears* v. *London & South Western Ry. Co* (1862), 11 C. B. (N. S.) 850.

(*k*) *Fenn* v. *Bittlestone* (1851), 7 Ex. 159.

(*l*) *The Winkfield* (1902), P. 42; 70 L. J. P. 21; 85 L. T. 668, overruling *Claridge* v. *South Staffordshire Tramways* (1892), Q. B. 422; 61 L. J. Q. B. 503.

owner, though all distinctions in the forms of action are now quite done away with, yet it will be useful to note the former remedies and the present position. In cases of conversion, the action brought was an action of trover—so called because founded on the supposition, generally a mere fiction, that the defendant had found the goods in question (*m*),—and the claim of the plaintiff was not for the return of the goods, but to recover the value of them. In the case of wrongful conversion now, though there is no such thing as an action of trover, yet the remedy may still well be called an action in the nature of an action of trover, being to recover the value of them as formerly.

Former action of trover.

But when goods were wrongfully detained from a person, there was another action that he might bring, called an action of detinue, being to recover the goods, or on failure thereof the value, and also damages for their detention (*n*). It was in the option of the defendant, on a verdict against him, either to return the goods or pay their value; but the Common Law Procedure Act, 1854 (*o*), enacted that on application of the plaintiff the court should have power to order execution to issue for the return of the particular goods without giving the defendant the option of retaining them on paying their value (*p*). And although this enactment was repealed by the Statute Law Revision Act, 1883 (*q*), the same provision is substantially contained in the present Rules of Court (*r*). So now, therefore, though, under the Judicature practice, all distinctions in forms of actions are done away with, yet an action may still be brought for the return of the goods detained, which may well be styled an action in the nature of an action of detinue.

Former action of detinue.

Where an injury has been committed to the goods

Exception to maxim *Actio personalis*, &c.

(*m*) Wharton's Law Lexicon, tit. "Trover."
(*n*) Ibid., tit. "Detinue."
(*o*) 17 & 18 Vict. c. 125.
(*p*) Sect. 78: see also *post*, Part III. chap. i.
(*q*) 46 & 47 Vict. c. 49.
(*r*) Order xlviii. rule 1.

and chattels of a person who then dies, the right of action survives to his executors or administrators, this forming an exception to the maxim, *Actio personalis moritur cum personâ* (*s*). Thus, where the plaintiff sued in respect of the infringement of his trade-mark, and died pending the action, it was held that the cause of action involved damage to the plaintiff's property, and consequently his personal representatives could continue the action (*t*). So also, as has been previously noticed, there is a further exception to the maxim in the case of injuries committed by a deceased person to any property, whether real or personal (*u*).

(*s*) 4 Edward III. c. 7; 25 Edward III. st. 5, c. 5. See other exceptions to the maxim, *ante*, p. 331, and *post*, pp. 426, 430, 434, 437. See also as to the maxim, *ante*, pp. 7, 8.

(*t*) *Oakey* v. *Dalton* (1887), 35 Ch. D. 700; 56 L. J. C. H. 823; L. T. 18.

(*u*) 3 & 4 Wm. IV. c. 42, s. 2, *ante*, p. 331.

CHAPTER IV.

OF TORTS AFFECTING THE PERSON (*a*).

Torts to the person are more important than torts to property.

We have in the two preceding chapters considered the subject of Torts to Property; in this and the next chapter we proceed to the subject of Torts to the Person, which may be said to be still more important than torts affecting property, because every one does not possess property for a tort to be committed in respect of, but torts affecting the person may equally be committed on any one. The different torts affecting the person are numerous, and those which may most usefully be considered appear to be the following:—

1. Assault and battery.
2. False imprisonment and malicious arrest.
3. Malicious prosecution.
4. Libel and slander; and
5. Seduction and loss of services.

I. Assault and battery.

Assault and battery are always classed together, because they are acts closely connected, and, in fact, depending on each other; for though an act may be an assault without amounting to a battery, yet a battery must comprise an assault, and so it is most usual to find an assault and battery taking place simultaneously. An assault may be defined as the unlawful laying of hands on another person, or an attempt or offer to do a corporeal hurt to another, coupled with a present ability and intention to do

Definition of an assault.

(*a*) Some of the Torts ranged under this head in the present chapter and the one next following, are sometimes styled Torts affecting the Reputation; but it does not appear necessary to introduce this further division in a work like the present, as torts particularly affecting the reputation necessarily more or less affect the person—for the reputation appertains to the person.

Definition of a battery.

the act (*b*). A battery may be defined as the actual striking of another person, or touching him in a rude, angry, revengeful, or insolent manner (*c*). We will now proceed to notice the essentials to constitute an assault, and some instances of assaults; and then the essentials to constitute a battery, and the distinction between the two torts, and their combination.

What acts will be sufficient to constitute an assault.

To constitute an assault by a mere attempting or offering to do an act, it is stated in the definition that there must be a present ability and intention to do the act attempted or offered to be done. This means that it is not sufficient for a person to offer to do the act, unless he apparently is both able to and intends to do it. Thus, "holding up a fist in a threatening attitude sufficiently near to be able to strike; presenting a gun or pistol, whether loaded or unloaded, in a hostile and threatening manner, within gun-shot or pistol-shot range, and near enough to create terror and alarm; riding after a man with a whip, threatening to beat him, or shaking a fist in a man's face," are all acts of assault (*d*), for the person in all these cases has the apparent power of doing the act he threatens to do, and the intention of doing it. But if, in the foregoing instances, though the person threatens the act, yet he has not the then present apparent ability to perform what he threatens, *e.g.*, if, holding up his fist, he is yet not near enough to strike, or presenting a gun or pistol, is out of gun-shot or pistol-shot range, here no assault is committed. Again, in any of these instances, even although the person has the ability to do the act he threatens to do, yet, if he shews from his words or conduct that he does not mean to do it, *e.g.*, if he says were it not for some event he would strike or would shoot, here no assault is committed (*e*).

An assault may be committed by a mere touching, however slight.

The definition of assault also shows that a tort may be committed by a mere touching or laying on of hands, and this is so however slight may be the touching, for

(*b*) *Read* v. *Coker* (1853), 13 C. B. 860. (*c*) Ibid.
(*d*) Addison on Torts, 158. (*e*) Addison on Torts, 159.

" the law cannot draw the line between different degrees of violence, and therefore totally prohibits the lowest stage of it, every man's person being sacred, and no other having the right to meddle with it in any, even the slightest manner " (*f*). There are, however, some few acts, consisting in the touching of another person, which from their very nature are not assaults, *e.g.*, if one has to push through a crowd, he has of necessity to touch others, but unless he does it with roughness or violence, this is no tort, but an act which he is justified in doing (*g*).

Except in a few cases.

In the foregoing remarks some instances of assault have already been given. The following acts have also been held to be assaults, and furnish apt instances:—

Instances of acts held to be assaults.

The riding after a person and obliging him to run away into a garden to avoid being beaten (*h*).

The forcing a person to leave premises by threats of violence if he did not do so (*i*).

Where two persons were fighting, and one of them accidentally struck a third person (*k*).

The cutting off of the hair of a pauper in the workhouse by force and against his will (*l*).

The unlawful restraining the liberty of a person (*m*).

A person cannot be guilty of an assault by acting in a merely passive manner; so that where a policeman obstructed persons from entering a room, it was held that this was no assault by him (*n*). A person also is in some cases precluded from complaining of an assault where he has consented to the act complained of (*o*).

Assault not committed by a merely passive act; nor ordinarily where consented to.

(*f*) 2 Bl. Com. 120.
(*g*) Addison on Torts, 159.
(*h*) *Martin* v. *Shoppee* (1829), 3 C. & P. 373.
(*i*) *Read* v. *Coker* (1853), 22 L. J. C. P. 201.
(*k*) *James* v. *Campbell* (1833), 5 C. & P. 472; and see *ante*, p. 360.
(*l*) *Forse* v. *Skinner* (1832), 4 C. & P. 239.
(*m*) *Hunter* v. *Johnson* (1884), 13 Q. B. D. 225; 53 L. J. M. C. 182; 51 L. T. 791; 32 W. R. 857; *Bird* v. *Jones* (1846), 7 Q. B. 742; 15 L. J. Q. B. 82.
(*n*) *Jones* v. *Wylie* (1844), 1 C. & K. 257.
(*o*) *Latter* v. *Bradell* (1881), 50 L. J. Q. B. 448; 29 W. R. 366; 44 L. T. 369.

Distinction between an assault and a battery.

The distinction between the two acts of assault and battery may be said to be, that the assault is a less offence than the other, and that there may be an assault without a battery by simply touching the person of another without any violence, or by a threatening without the carrying out of the threat; but that in every battery, there must have been an assault preceding it, and therefore in cases of battery there is a combination of the two torts, which are rightly described together as assault and battery.

Definition of mayhem, and what will and what will not amount to it.

Assault and battery may sometimes be of such an aggravated kind as to amount to an actual wounding of the person, or to constitute the offence called mayhem. Mayhem has been described as "the violently depriving another of the use of such of his members as may render him the less able in fighting to defend himself, or to annoy his adversary, *e.g.*, the cutting off, or disabling, or weakening a man's hand or finger, striking out his eye or fore-tooth, or depriving him of those parts the loss of which in all animals abates their courage" (*p*).

An action may be brought here for an assault committed abroad.

Mostyn v. *Fabrigas.*

Phillips v. *Eyre.*

Notwithstanding that an assault or battery may have been committed abroad, yet the party injured has his remedy here if the assaulter comes to this country (*q*). Thus, in *Mostyn* v. *Fabrigas* (*r*), it was held that an action might be maintained against the Governor of Minorca for an injury to the person of the plaintiff committed there. But to enable an action to be maintained here in respect of an act done abroad, such act must be one recognised as a wrong in the foreign country in respect of which either criminal or civil proceedings could be taken there, and it must be actionable also in this country (*s*). Where, however, it appeared that a

(*p*) Addison on Torts, 160.

(*q*) *Mostyn* v. *Fabrigas* (1774), 1 S. L. C. 591; Cowp. 161; Order xi. rule 1. An action cannot be maintained here in respect of trespass to land abroad. See *ante*, p. 329, and the case of *British South Africa Co.* v. *Companhia di Moçambique*, there quoted.

(*r*) (1774), 1 S. L. C. 591; Cowp. 161.

(*s*) *Phillips* v. *Eyre* (1871), L. R. 6 Q. B. 21; 40 L. J. Q. B. 28; 22 L. T. 869; *Machado* v. *Fontes* (1897), 2 Q. B. 231; 66 L. J. Q. B. 542;

tort committed abroad could not be sued upon there until certain penal proceedings had been taken in respect of it, it was held that as that only went to matter of procedure it did not affect the remedy here (*t*).

Assault and battery may sometimes be justifiable.

There are, however, many cases in which an assault and battery may, under the circumstances, be justifiable. Such cases of justification may chiefly be ranged under two heads, viz., (1) Where done in defence of person or property; and (2) Where allowed by reason of the defendant's peculiar position.

Justifiable in defence of person.

Defence is a justification of a very extended nature, for not only is a person justified in striking another in his own defence, but also in defence of a husband, wife, child, relative, or even neighbour or friend (*u*); and as these last terms are very wide, it seems almost, if not entirely, correct to say that a person is justified in assaulting another in defence either of himself or others.

But the defence must not be more than is necessary under the circumstances.

But the nature of the assault and battery done in defence must be carefully observed, for some extreme act of defence, being more than was necessary from the nature of the assault it was done in defence of, is not justifiable, *e.g.*, if one attempts to hit another, that other is perfectly justified in warding off the blow, or in striking a blow of the same nature in defence; but he is not justified in using some offensive weapon, and materially injuring the person, as by striking with a sword or knife (*x*). In every case in which justification on this ground is set up as a defence, the original act to prevent which it was necessary to resort to defence must be looked to, for a person is not justified in going beyond mere defence, and avenging himself, as by not being content with warding off a blow, but

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76 L. T. 588. In the last-mentioned case the plaintiff sued for libel published in Brazil. This was a wrong in Brazil as well as here, but in Brazil it could only be proceeded for criminally, and no civil action for damages could be maintained there. It was, however, held that an action, here, for damages would lie.

(*t*) *Scott* v. *Lord Seymour* (1862), 1 H. & C. 219.

(*u*) Addison on Torts, 165.

(*x*) See *Cockcroft* v. *Smith*, 11 Mod. 43, quoted in Addison on Torts, 161, 162.

Son assault demesne.

following it up by fresh and unnecessary blows. Where a justification for an assault and battery is set up on the ground of defence to the person, such defence is called a plea of *son assault demesne.*

Justifiable also in defence of property.

Assault and battery, also, in defence of one's property, whether real or personal, is perfectly justifiable (*y*); for if a person attempts to dispossess another of his goods, that other is fully justified in using means to prevent him doing so, and laying hands on him for that purpose. And so, also, if the attempt is to dispossess another of his land, that other is justified in committing an assault and battery for preventing the attainment of that object. If, however, a person peaceably enters on another's land, the owner is not justified in forthwith assaulting him for the purpose of ejecting him therefrom, but he must first request him to go, and, then, if he will not do so, proceed to eject him, using only as much force as is necessary (*z*).

But here defence must not be greater than necessary.

And here, again, must be noticed—as in cases of defence of the person—that the act in defence of one's property must not be of an excessive character, for if it is more than is necessary under the circumstances, then it is not justifiable, nor is it justifiable to do an act in defence of property which may manifestly tend to injure the other party (*a*). And particularly it is provided by statute (*b*) that any person causing to be set, or knowingly suffering to be set, upon his land, any spring-gun, man-trap, or other engine calculated to destroy life, with the intent of destroying or doing grievous bodily harm to trespassers, shall be guilty of a misdemeanour; unless it be set in a dwelling-house, for protection thereof in the night-time.

Setting man-traps, &c.

Justifiable on account of a person's peculiar position.

As regards assault and battery being justifiable by reason of a person's peculiar position, there are many cases in which the law gives a direct power of laying

(*y*) 3 Bl. Com. 120; Addison on Torts, 162–164.
(*z*) *Polkinhorn* v. *Wright* (1846), 8 Q. B. 197; per Parke, B., in *Harvey* v. *Brydges* (1896), 14 M. & W. 442.
(*a*) *Collins* v. *Renison* (1754), Say. 138.
(*b*) 24 & 25 Vict. c. 100, s. 31; re-enacting 7 & 8 Geo. IV. c. 18.

hands on the person of another and assaulting him, and a primary instance of this may be seen in the chastisement sometimes awarded to offenders by flogging. And, irrespective of any sentence of the law, a person, by the relationship in which he stands towards another, may have a justification for assault and battery committed on that person, *e.g.*, a father has a right to reasonably chastise his children, and so also has a master his apprentices, and a schoolmaster his scholars, but the chastisement must not be excessive (*c*). A master or captain of a ship has also a right, by virtue of his position, to imprison or reasonably chastise any of the sailors who behave in a mutinous or disorderly manner, or refuse or neglect to obey his lawful and proper orders, but any chastisement must be reasonable (*d*). Also a constable, churchwarden, beadle, or other person employed in that capacity, in a place of worship, is justified in laying hands on, and forcibly removing from that place, any person who by his conduct is disturbing the congregation (*e*).

E.g., a father with regard to his child.

It necessarily appears that in actions for assault and battery it is not at all essential that malice should exist. Malice may, of course, be shewn, and may operate to increase the amount of the damages; but a wanton, or thoughtless, or negligent act, without the slightest malicious intent, may equally constitute an assault and battery.

Malice is not an *essential* in assault and battery.

Assault and battery may also be committed indirectly as well as directly; thus, where the defendant threw a lighted squib which fell on a stall in the street, and the keeper of the stall, for his own protection, threw it off, and it then exploded and injured the plaintiff, it was held that the defendant, the original thrower, was liable, for a person is responsible for the natural and

An assault and battery may be committed indirectly.

Scott v. *Shepherd.*

(*c*) See hereon *Winterburn* v. *Brooks* (1846), 2 C. & K. 16; *Cleary* v. *Booth* (1893), 1 Q. B. 565; 62 L. J. M. C. 87; 68 L. T. 349.

(*d*) *Broughton* v. *Jackson* (1852), 21 L. J. Q. B. 265; *Noden* v. *Johnson*, (1851), 20 L. J. Q. B. 95.

(*e*) *Burton* v. *Henson* (1843), 10 M. & W. 105; *Williams* v. *Glenister* (1824), 2 B. & C. 699.

probable consequences of his own act (*f*). A person is liable for an assault committed by his agent or servant by his authority, express or implied, for *qui facit per alium facit per se;* but he is not liable if he has not authorised the act, and it was outside the scope of the servant's duties. Thus, where a person employed to levy a distress committed an assault in doing so, it was held that the employer was not liable, the assault not being directed or authorised, and it not being within the scope of the main authority to commit an assault (*g*).

Remedies in respect of assault and battery.

A person may proceed either civilly or criminally in respect of an assault, and the period of limitation for bringing any action in respect of such a tort is four years (*h*). It has already been noticed, however, in considering the subject of torts generally, that sentence will not be passed in a prosecution for an assault, if an action for the same assault is also pending; that if a conviction on summary proceedings takes place, that bars further civil proceedings; and that if a magistrate dismisses a charge of assault, his certificate of dismissal will operate to bar any further proceedings, civil or criminal, against the person charged, in respect of it (*i*).

A wife cannot sue her husband in respect of a tort committed to her during coverture.

If a man assaults his wife, she has no right of action against him (*k*), her remedy being to prosecute him, or to apply for him to be bound over to keep the peace; or the assault and battery may constitute cruelty sufficient to enable her to obtain a separation order from a Court of Summary Jurisdiction (*l*), or to

(*f*) *Scott* v. *Shepherd* (1772), 1 S. L. C. 454; 2 Blackstone, 892.

(*g*) *Richards* v. *West Middlesex Waterworks Co.* (1885), 15 Q. B. D. 660; 54 L. J. Q. B. 551; 33 W. R. 902.

(*h*) 21 Jac. I. c. 16, s. 3.

(*i*) *Ante*, pp. 321, 322.

(*k*) The Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), though giving all rights in respect of property, specially provides (s. 12) that, further than that, no husband or wife shall be entitled to sue the other in respect of a tort.

(*l*) See 58 & 59 Vict. c. 39 ((Summary Jurisdiction Married Women Act, 1895). This statute, as from January 1, 1896, repeals sect 4. of 41 Vict. c. 19 (Matrimonial Causes Act, 1878), but re-enacts it with variations and additions.

found proceedings for judicial separation. It has been decided that no action is maintainable by a divorced wife against her former husband for an assault and battery committed during the coverture (*m*). What is stated in this paragraph applies not only to assault and battery, but to any tort under such circumstances (*n*).

II. False imprisonment.

False imprisonment may be defined as some unlawful detention of the person, either actually or constructively (*o*). The difference between an actual and constructive detention of the person is this, that while an actual detention is a detention by forcible means, the constructive is not, but may consist in a mere show of authority or force, *e.g.*, if an officer informs a man that he has a legal process against him, and that he must accompany him, and accordingly, although no hand is laid on him, he goes with the officer, this amounts to an imprisonment (*p*).

Distinction between an actual and a constructive detention.

Imprisonment often justifiable.

It being, therefore, understood, what will constitute a false imprisonment, we will proceed to consider particular cases in which imprisonment is allowed by the law, so that it will not be a false, but justifiable and proper imprisonment.

Detention by a person because of his position.

Firstly, it may be noticed that there are various persons who are, from their positions, naturally justified in detaining certain persons to whom they stand in a peculiar relation, *e.g.*, a father his child, or a commanding officer his inferior. A husband has no right to detain the person of his wife, except under very extreme circumstances, *e.g.*, to prevent her committing adultery (*q*).

Reg. v. *Jackson.*

(*m*) *Phillips* v. *Barnett* (1876), 1 Q. B. D. 436; 45 L. J. (Q. B.) 277.

(*n*) But where a husband was a lunatic, though not so found by inquisition, and his wife during his lifetime wrongfully took possession of and sold certain of his chattels, and applied the proceeds to her use, it was held that an action might be maintained by the husband's representatives against the wife's representatives to recover the amount from her estate in her executor's hands (*Re Williams*, *Williams* v. *Stretton* (1881), 50 L. J. Ch. 495; 44 L. T. 600).

(*o*) See Broom's Coms. 823, 824.

(*p*) *Grainger* v. *Hill* (1838), 4 Bing. N. C. 212; *Wood* v. *Lane* (1835), 6 C. & P. 774.

(*q*) *Reg.* v. *Jackson* (1891), 1 Q. B. 671; 60 L. J. Q. B. 346; 64 L. T. 679.

Detention for a criminal offence.

Secondly, for criminal offences persons are liable to be arrested and imprisoned, in some cases only by a warrant from competent authority for that purpose, and in some cases by any one without any warrant at all.

Definition of a warrant, and mode of acting thereunder.

A warrant is a precept, under hand and seal, to an officer to arrest an offender to be dealt with according to due course of law. It is obtained on application to a magistrate or justice, and is then delivered to a constable, who makes the arrest, having it with him at the time to produce if required, as if he has not so got it with him he stands in the same position as if there were no warrant (*r*).

As to the liability of justices.

If a justice does an act within his jurisdiction—*e.g.*, granting a warrant to arrest an offender in respect of an act for which, had he been guilty, the justice would have had full power to grant it—he is not liable to any action in respect of it, unless the act was done maliciously, and without reasonable and probable cause (*s*). But if a justice does an act without jurisdiction—*e.g.*, sending an offender to prison, where he has, even although the offender were guilty, no power to imprison—he is liable quite irrespective of malice; but no action can be brought against him in respect of it until after the conviction has been quashed (*t*). Formerly no action could be brought against a justice for anything done by him in the execution of his office until one calendar month's notice in writing was given to him, with particulars of the intended action (*u*), but this provision was repealed by the Public Authorities Protection Act, 1893 (*v*). With regard to any proceeding (*w*) against any person (*x*) for any act done in

Public Authorities Protection Act, 1893.

(*r*) *Galliard* v. *Laxton* (1862), 31 L. J. M. C. 123.
(*s*) 11 & 12 Vict. c. 44, s. 1.
(*t*) Sect. 2. (*u*) Sect. 9.
(*v*) 56 & 57 Vict. c. 61, s. 2.
(*w*) Including an action under the Fatal Accidents Act, 1846, *Williams* v. *Mersey Docks* (1905), 1 K. B. 604; 74 L. J. K. B. 481; and one for negligence of a county council tram driver, *Parker* v. *London County Council* (1904), 2 K. B. 501; 73 L. J. K. B. 561.
(*x*) This does not include an independent contractor doing the work a public authority is authorised to do, *Tilling* v. *Dick* (1905), 1 K. B. 562; 74 L. J. K. B. 359.

pursuance or execution of any Act of Parliament, or of any public duty or authority, this Act contains the following provisions:—(1) The action must be commenced within six months of the act complained of (*y*). (2) If judgment is obtained by the defendant, it shall carry solicitor and client costs (*z*). (3) Tender of amends before action commenced may be pleaded in lieu of, or in addition to any other plea; and if the action was commenced after the tender, or is proceeded with after payment into court of any money in satisfaction of the plaintiff's claim, and the plaintiff does not recover more than the sum tendered or paid, he shall not recover any costs incurred after the tender or payment, and the defendant shall be entitled to solicitor and client costs incurred after the tender or payment. (4) If the Court thinks the plaintiff has not given the defendant a sufficient opportunity of tendering amends before the commencement of the action, the Court may award the defendant solicitor and client costs (*a*).

As to the liability of constables.

A constable doing an act in pursuance of a legal warrant is not liable to an action for false imprisonment, but if the warrant was granted without jurisdiction, then the law was, formerly, that he, in the same way as the justice granting it, and indeed all persons concerned in its execution, were liable to an action for false imprisonment. A constable is, however, in such a case now protected, it being provided that no action shall be brought against him before making a six days' demand for a copy of the warrant under which he acted, and that if that is given, then, although the person aggrieved may bring his action against the constable and the justice granting the warrant, the production of such warrant shall entitle the constable to a verdict (*b*).

Special provision for their protection when acting under a warrant.

(*y*) See *Markey* v. *Tolworth District Board* (1900), 2 Q. B. 454; 69 L. J. Q. B. 738; 83 L. T. 28.

(*z*) This does not deprive the judge of his discretion to deprive a successful defendant of any costs at all, for good cause shewn (*Bostock* v. *Ramsay Urban Council* (1900), 2 Q. B. 616; 69 L. J. Q. B. 945; 83 L. T. 358). The provision does not apply to costs on interlocutory motions, or to costs on appeals. See Annual Practice (1909), 959, notes to Order lxv. r. 1.

(*a*) 56 & 57 Vict. c. 61, s. 1. (*b*) 24 Geo. II. c. 44, s. 6.

The person obtaining a warrant is not liable for false imprisonment, but may be for malicious prosecution.

A person who lays a complaint before justices, and thereupon obtains a warrant, is not liable to an action for false imprisonment, because he has set a judicial officer in motion as distinct from a ministerial officer. This is so even though it turns out that the complaint was erroneous, or there was no jurisdiction for the granting of the warrant. He may, however, sometimes be liable for malicious prosecution (*c*).

Cases in which a constable may arrest without warrant.

A constable may not generally arrest another without a warrant for that purpose, but there are many special cases in which he may. Particularly he may do so when he sees a felony committed, or has reasonable ground for suspecting that a felony has been committed, and also reasonable ground to suspect that the person he arrests is the committer of the felony; but the suspicion must be a reasonable one, or the constable will be liable (*d*). If a person makes a reasonable charge of felony against another, a constable is justified in arresting such alleged culprit, and is not liable to any action for false imprisonment for so doing, though the person making the complaint and requiring the arrest may be so liable (*e*). The following are also specific cases in which a constable is justified in arresting without a warrant :—Where an assault is committed in his presence; where it is necessary for the purpose of preventing a breach of the peace (*f*); where a person is found committing malicious injury to property (*g*); where a person is found committing an indictable offence in the night between the hours of 9 P.M. and 6 A.M. (*h*); where a person is found collecting a crowd round another's house, or continually ringing another's bell, so as to lead to a breach of the peace (*i*).

A private person is justified in

A private person may also in some cases arrest another, and not be liable to any action for false im-

(*c*) As to which see *post*, p. 382.
(*d*) *Hogg* v. *Ward* (1858), 27 L. J. Ex. 443.
(*e*) Broom's Coms. 826.
(*f*) Ibid., 828.
(*g*) 24 & 25 Vict. c. 97, s. 61.
(*h*) 14 & 15 Vict. c. 19.
(*i*) Addison on Torts, 176.

prisonment. Particularly he may do so if he sees a felony committed; or if a felony has been actually committed, and he has just and reasonable cause for suspecting the person he arrests to be guilty of it. There is, however, a great distinction between an arrest without warrant, in respect of a felony, by a constable and by a private individual, for "in order to justify the private individual in causing the imprisonment, he must not only make out a reasonable ground for suspicion, but he must prove *that a felony has actually been committed* by some one, and that the circumstances were such that any reasonable person, acting without passion or prejudice, would have fairly suspected that the plaintiff had committed it, or was implicated in it; whereas a constable, having reasonable grounds to suspect that a felony has been committed, *although in fact none has been*, is authorised to detain the person suspected until he can be brought before a justice of the peace to have his conduct investigated" (*k*). arresting another in some few cases.

A private person may also arrest another actually fighting in the streets, to prevent the continuance of a breach of the peace (*l*). And if a pawnbroker, to whom any property is offered, has reasonable ground for believing that an offence has been committed in respect of it, he is justified in arresting the person offering such property, and taking him and the property before a justice of the peace (*m*). Special powers of pawnbrokers as to arrest.

Thirdly, in civil cases persons are sometimes liable to be arrested and imprisoned. Detention in civil cases.

Imprisonment by reason of contempt of Court may be placed under this head. Contempt of Court consists in any refusal to obey an order or process of a Court of competent jurisdiction, or in offending against particular statutes which render such offending a contempt of Court, or in interfering with, or violating, established rules of Court, or in behaving in a disrespectful or improper manner towards the Court, or any judge or officer thereof. Instances of contempt Contempt of Court.

(*k*) Addison on Torts, 172. (*l*) Ibid., 175.
(*m*) 24 & 25 Vict. c. 96, s. 103; 35 & 36 Vict. c. 93, s. 34.

are easy to find, *e.g.*, non-obedience to an injunction granted by the High Court of Justice; or the interfering, by marrying or otherwise, with a ward of Court; or threatening a witness, so as to prevent him giving, or to intimidate him in giving, his evidence; or disrespectful behaviour to the Court; or commenting in a newspaper article on a case then pending. In one case a co-respondent in a divorce suit, immediately after the service of the citation, caused advertisements to be published denying the charges made in the petition, and offering a reward for information which would lead to the discovery and conviction of the authors of them, and it was held that these advertisements constituted a contempt of Court (*n*).

Imprisonment for debt may still occur under the Debtors Act, 1869.

Imprisonment for debt is said to be abolished (*o*) but nevertheless it may occur in various cases. The enactment upon this subject is the Debtors Act, 1869 (*p*), which provides that, with the exceptions thereinafter mentioned, no person shall after the commencement of the Act (*q*) be imprisoned for making default in payment of a sum of money (*r*). The exceptions are as follows:—

Six cases of special exceptions.

1. Default in payment of a penalty, or sum in the nature of a penalty, other than a penalty in respect of any contract.

2. Default in payment of any sum recoverable summarily before a justice or justices of the peace.

3. Default by a trustee or person acting in a fiduciary capacity (*s*), and ordered by the Court to pay any sum in his possession or under his control (*t*).

(*n*) *Brodribb* v. *Brodribb* (1886), 11 P. D. 66; 55 L. J. P. 47; 34 W. R. 580.

(*o*) See the title of 32 & 33 Vict. c. 62, "An Act for the Abolition of Imprisonment for Debt," &c. (*p*) 32 & 33 Vict. c. 62.

(*q*) 1st January, 1870. (*r*) 32 & 33 Vict. c. 62, s. 4.

(*s*) As to who is a trustee or a person acting in a fiduciary capacity, see *Murris* v. *Ingram* (1880), 13 Ch. D. 338; 49 L. J. Ch. 123; 28 W. R. 434; *Re Diamond Fuel Co., Metcalf's Case* (1880), 13 Ch. D. 815; 49 L. J. Ch. 347; 28 W. R. 485; and *Crowther* v. *Elgood* (1887), 34 C. D. 691; 56 L. J. Ch. 416; 56 L. T. 415; 35 W. R. 369; in which case an auctioneer neglecting to pay over the proceeds of a sale was held to be in such a capacity and liable to imprisonment.

(*t*) See *Re Walker, Walker* v. *Walker* (1890), 59 L. J. Ch. 386; 62 L. T. 449.

4. Default by a solicitor in payment of costs when ordered to pay costs for misconduct as such, or in payment of a sum of money when ordered to pay the same in his character of an officer of the court making the order (*u*).

5. Default in payment for the benefit of creditors of any portion of a salary or other income, in respect of the payment of which any court having jurisdiction in bankruptcy is authorised to make an order.

6. Default in payment of sums in respect of the payment of which orders are in this Act authorised to be made (*x*).

The imprisonment not to exceed one year.

It is provided, however, that in all or any of these excepted cases no person shall be imprisoned for a longer time than one year, and nothing in the section is to alter the effect of any judgment or order of any court for payment of money, except as regards the arrest and imprisonment of the person making default in paying such money.

Debtors Act, 1878.

With regard, however, to the exceptions numbered 3 and 4, it is now provided by the Debtors Act, 1878, that the court or judge may inquire into the circumstances of the case, and is to have a discretionary power as to imprisoning (*y*). It has been held that under this provision the court will not necessarily refuse to grant an application for a writ of attachment against a defaulting trustee, where, owing to the defaulter being wholly without means, no useful object would be gained thereby, for the imprisonment is to a certain extent meant as a penalty, and to deter others (*z*). But where a trustee, though he has been guilty of negligence, has not been guilty of any criminal or fraudulent

(*u*) See hereon *Re Strong* (1886), 32 Ch. D. 342; 55 L. J. Ch. 553; 34 W. R. 614; 55 L. T. 3.

(*x*) 32 & 33 Vict. c. 62, s. 4.

(*y*) 41 & 42 Vict. c. 54.

(*z*) *Marris* v. *Ingram* (1880), 13 Ch. D. 338; 49 L. J. Ch. 123; 28 W. R.4 34; *Re Gent, Gent-Davis* v. *Harris* (1889), 40 Ch. D. 190; 58 L. J. Ch. 162; 60 L. T. 355; *Re Knowles, Doodson* v. *Turner* (1883), 52 L. J. Ch. 685; 48 L. T. 760.

act, nor of any contumacious refusal to comply with the court's order, the court will not attach him (*a*).

Also power to commit to prison for six weeks on proof of means.

The Debtors Act, 1869, also provides that any person (*b*) making default in payment of any debt, or instalment of any debt, due from him in pursuance of any order or judgment of any competent court, may be committed to prison for a term not exceeding six weeks, on its being proved that he has, or has had since the date of the order or judgment, the means to pay the sum in respect of which he has made default, and has refused or neglected, or refuses or neglects, to pay the same (*c*). The application to commit to prison under this provision is made by a summons called a Judgment summons (*d*). It is provided by the Bankruptcy Act, 1883 (*e*), that on application made under a judgment summons to a court having bankruptcy jurisdiction, the court may, if it thinks fit, decline to commit, and in lieu thereof, with the consent of the judgment creditor, on payment of the prescribed fee, at once make a receiving order against the debtor (*f*); and if the court has not got bankruptcy jurisdiction, it may transfer the matter to the proper court having bankruptcy jurisdiction as regards the particular debtor (*g*).

When a defendant in a civil action may be arrested.

The Debtors Act, 1869, also contains an enactment as to the arrest of a defendant in the course of an action, it being provided (*h*) that where the plaintiff in an action in the High Court of Justice proves at any time before final judgment by evidence on oath to the satisfaction of a judge, that (1) the plaintiff has good cause of action against the defendant to the amount of £50 or upwards; (2) there is probable cause for believing that the defendant is about to

(*a*) *Earl of Aylesford* v. *Earl Poulett* (1892), 2 Ch. 60; 61 L. J. Ch. 406; 66 L. T. 484.

(*b*) This does not apply to a married woman against whom judgment has been signed for a debt contracted during coverture (*Scott* v. *Morley*, 28 Q. B. D. 120; 57 L. J. Q. B. 43; 57 L. T. 919; 36 W. R. 67).

(*c*) 32 & 33 Vict. c. 62, s. 5.

(*d*) As to which see Indermaur's Manual of Practice, 200, 201.

(*e*) 46 & 47 Vict. c. 52.

(*f*) Sect. 103.

(*g*) Bankruptcy Rules, 355–362.

(*h*) 32 & 33 Vict. c. 62, s. 6.

quit England unless he is apprehended; and (3) the absence of the defendant from England will materially prejudice the plaintiff in the prosecution of his action (*i*), the judge may order such defendant to be arrested and imprisoned for a period not exceeding six months, unless and until he has sooner given the prescribed security, not exceeding the amount claimed in the action, that he will not go out of England without the leave of the court. Where the action is for a penalty, or sum in the nature of a penalty, other than a penalty in respect of any contract, it is not necessary to prove that the absence of the defendant from England will materially prejudice the plaintiff in the prosecution of his action, and the security given (instead of being that the defendant will not go out of England) is to be to the effect that any sum recovered against the defendant in the action shall be paid, or that the defendant shall be rendered to prison. Under the above provision, although a debtor may be committed to prison for a fixed period, he cannot be detained in prison after final judgment has been signed (*k*).

Malicious arrest.

If a person obtains an order for arrest under the foregoing provision by any false statement or wrongful suppression of facts, he may, in addition to the false imprisonment, be liable to an action for malicious arrest. Malicious arrest may be described, or defined, as a tortious act consisting in the maliciously (*l*) detaining the person of another without reasonable or probable cause.

Distinction between arrest and imprisonment.

It will be noticed that the provision as to the arrest of a defendant is quite distinct and different from the foregoing provisions as to imprisonment for debt; in the latter, there is a judgment or order for payment, and the object of the imprisonment is to get satisfaction of it; in the former, there is no debt as yet

(*i*) This being a matter very difficult to prove, orders for the arrest of a defendant under this section are not at all frequently granted.

(*k*) *Hume* v. *Druyff* (1873), L. R. 8 Ex. 214; 42 L. J. Ex. 145.

(*l*) Using the word "malicious" in the sense ascribed to malice in law, *post*, p. 384.

adjudged by the Court to be due, and the object is to prevent the defendant from leaving the country. The student should carefully remember this distinction, as it is important.

III. Malicious prosecution.

Malicious prosecution may be defined as a tortious act consisting in the unjust and malicious prosecution of one for a crime, or the unjust and malicious presentation of a bankruptcy petition, without any reasonable or probable cause (*m*).

Essentials in an action for malicious prosecution.

The essential points which a plaintiff has to prove in order to maintain an action for malicious prosecution are—(1) That the law was set in motion against him on a criminal charge by the defendant. (2) That the prosecution was determined in the plaintiff's favour, if from its nature it was capable of being so determined. (3) The absence of any reasonable and probable cause for the prosecution. (4) Malice on the part of the defendant.

A person cannot sue for malicious prosecution if there is a conviction on it standing against him.

It being necessary that the prosecution should have been determined in the plaintiff's favour if it was capable of being so determined, it follows that if a person has been actually convicted, or has been actually adjudicated a bankrupt, he cannot maintain this action whilst the conviction or adjudication stands against him, for that furnishes at once irrebuttable evidence of reasonable and probable cause. To entitle a person, therefore, in such a case, to maintain his action, he must shew that the conviction or adjudication has been reversed or superseded (*n*).

As to reasonable and probable cause.

The question of what is reasonable and probable cause is one to be determined by the judge on the circumstances of every particular case (*o*). There

(*m*) *Quartz Hill Gold Mining Co.* v. *Eyre* (1883), 11 Q. B. D. 674; 52 L. J. Q. B. 488. It seems doubtful, however, whether an action for maliciously presenting a bankruptcy petition will lie without an averment of special damage (*Wyatt* v. *Palmer* (1899), 2 Q. B. 106; 68 L. J. Q. B. 709; 80 L. T. 639).

(*n*) *Metropolitan Bank Limited* v. *Pooley* (1885), 10 App. Cas. 210; 54 L. J. Q. B. 449; 53 L. T. 163. See also *Bynoe* v. *Bank of England* (1902), 1 K. B. 467; 71 L. J. K. B. 208; 86 L. T. 144.

(*o*) *Watson* v. *Whitmore* (1845), 14 L. J. Ex. 41; *Low* v. *Collum*, Ir.

may be many cases in which, though the prosecutor fails to sustain his accusation, yet there may have been very good grounds for the institution of the prosecution; thus, he may have been compelled to withdraw from it by reason of inability to find his witnesses, or the death of a material witness, or, though the accused has been acquitted, yet the circumstances raised a strong suspicion against him (*p*). It is important to here clearly appreciate the different functions of the judge and the jury respectively in such cases. It is for the jury to decide upon the facts which the defendant alleges as constituting reasonable and probable cause, and then it is for the judge to determine whether the facts as found by the jury do or do not amount to reasonable and probable cause (*q*). It should also be noticed that the onus is not on the defendant to prove reasonable and probable cause, but on the plaintiff to prove the absence of any reasonable and probable cause (*r*).

Functions of judge and jury.

Care must be taken, with regard to what is stated in the last paragraph, not to confuse an action for malicious prosecution with one for false imprisonment, for there is this recognised distinction between the two actions, that in false imprisonment the onus lies upon the defendant to plead and prove affirmatively the existence of reasonable cause as his justification, whereas in an action for malicious prosecution the plaintiff must, as stated above, allege and prove affirmatively its non-existence (*s*).

Distinction as to proof in action for false imprisonment.

Although a prosecution at the outset may not be

Reps. 2 Q. B. D. 15. In *Hicks* v. *Faulkner* (1882), 8 Q. B. D. 167; 51 L. J. Q. B. 268, Mr. Justice Hawkins said: "I should define reasonable and probable cause to be an honest belief in the guilt of the accused, based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed."

(*p*) *Willans* v. *Taylor* (1830), 6 Bing. 186.

(*q*) Broom's Coms. 842, 843.

(*r*) *Abrath* v. *North-Eastern Ry. Co.* (1886), 11 A. C. 247; 55 L. J. Q. B. 457; 55 L. T. 63.

(*s*) Per Hawkins, J., in *Hicks* v. *Faulkner* (1882), 51 L. J. Q. B. at p. 270.

A prosecution not at the outset malicious may become so.

malicious, yet it may afterwards become so by reason of the continuance of it after positive knowledge of the innocence of the accused (*t*).

Malice in fact and in law.

The essential of malice requires careful comparison with that of the absence of reasonable and probable cause, and it will be well first to properly understand the meaning of the word. Malice is said to be of two kinds, viz., malice in law, and malice in fact (*u*). The latter means what we ordinarily understand by the term, and consists of some act of spite, either against some particular individual or the public at large; but the former does not mean ill-will against a person or the public at large, but signifies a wrongful act done intentionally without just cause or excuse, *e.g.*, the unwarrantable striking of a blow likely to produce death, for in such cases there is no necessity to prove any particular spite or ill-will, the act speaking for itself.

Is malice in law sufficient, or must there be malice in fact?

It would ordinarily seem, and it is generally true, that if a prosecution is shown to have been without reasonable and probable cause, malice in a sense must be existent, and it has therefore been sometimes stated that malice in law is all that is necessary in an action for malicious prosecution (*x*). But such a statement is not always accurate, and it has indeed been expressly laid down that malice in fact must be shewn, that there must actually be the two essentials existent, of absence of reasonable and probable cause, and actual malice (*y*). This apparent confusion arises thus:— The question of absence of reasonable and probable cause is one for the judge, the question of malice is for the jury. The jury may, if they think fit, infer malice from the very circumstances which have led the judge to the conclusion that there was no reasonable and probable cause, or they may come to the

(*t*) Per Cockburn, C.J., in *Fitz-John* v. *Mackinder* (1861), 30 L. J. C. P. 264.

(*u*) Per Bayley, J., in *Bromage* v. *Prosser* (1825), 4 B. & C. 255.

(*x*) Per Parks, J., in *Mitchell* v. *Jenkins* (1833), 5 B. & A. 588.

(*y*) See per Hawkins, J., in *Hicks* v. *Faulkner* (1882), 8 Q. B. D. 167; 51 L. J. Q. B. 268; 30 W. R. 545.

conclusion that the defendant acted honestly and without ill-will, and with a desire to do right (*a*). On the whole, it seems correct to say that malice in fact is necessary, but that if the judge rules that there was no reasonable and probable cause for the prosecution, the jury are justified in finding, but are not bound to find, that there was malice (*b*).

Corporation or company liable for malicious prosecution.

It has been decided that an action for malicious prosecution will lie against a corporation or limited company (*c*).

No action lies for malicious prosecution of a civil action.

The malicious prosecution of a civil action, though without any reasonable or probable cause, does not have the same effect as a malicious criminal prosecution, or the malicious taking of proceedings in bankruptcy, and no action will lie in respect of it.

Nor for court-martial proceedings

No action, also, for malicious prosecution, will lie by a subordinate against his commanding officer for bringing him to court-martial (*d*).

Otherwise, however, for malicious presentation of a winding-up petition.

An action will, however, lie for falsely, maliciously, and without reasonable and probable cause presenting a petition to wind up a company, such an act being necessarily injurious to the credit of the company (*e*).

(*a*) *Hicks* v. *Faulkner*, supra; *Brown* v. *Hawkes* (1891), 2 Q. B. 718; 65 L. T. 108.

(*b*) See further hereon Ringwood's Torts, 54, 55.

(*c*) *Edwards* v. *Midland Ry. Co.* (1881), 6 Q. B. D. 287; 50 L. J. Q. B. 281; 43 L. T. 694; 29 W. R. 609; *Cornford* v. *Carlton Bank* (1899), 1 Q. B. 392; 68 L. J. Q. B. 196; 80 L. T. 121.

(*d*) Addison on Torts, 3.

(*e*) *Quartz Hill Gold Mining Co.* v. *Eyre* (1883), 11 Q. B. D. 674; 52 L. J. Q. B. 488; 49 L. T. 249; 31 W. R. 668.

CHAPTER V.

OF TORTS AFFECTING THE PERSON—(*continued*).

IV. Libel and slander.

In the same way that the torts of assault and battery are usually classed together, so also frequently are those of libel and slander; but there are many and material distinctions between the two torts, and it will be advisable to consider the subject in the following manner:

1. The law particularly as to libel.
2. The law particularly as to slander.
3. The differences between libel and slander.

Definition of libel.

Libel may be defined as a tortious act, consisting in the malicious defamation of another, made public by writing, printing, pictures, or effigy, in such a manner as to expose him to public hatred, contempt, ridicule, reproach, or ignominy (*a*). As an assistance to this definition, and as tending to shew what acts will be libellous, it may be stated that everything in writing, or printing, or any picture or effigy, which tends to imply reproach to any person, or to in any way derogate from his character by imputing to him any bad actions or vicious principles, or to abridge his comforts or respectability, will amount to a libel, even although practically and substantially the libel complained of may not have caused the plaintiff any special or peculiar damage, or indeed any real damage at all (*b*); by which is meant that, even without proof of special damage, the plaintiff may be entitled to a verdict and nominal damages, though in every case proof of special injury done to him by the libel will

(*a*) See various definitions from which this is compiled given in Folkard on Slander and Libel, 3, 4.

(*b*) Folkard on Slander and Libel, 165–191.

naturally tend to increase the amount of the damages that will be awarded by the jury.

Municipal corporation cannot sue for libel.

A municipal corporation cannot maintain an action for libel unless injury to the corporate property can be shewn (*c*); but a trading corporation or company may maintain such an action in respect of a statement reflecting on its character in the conduct of its business, without proof of special damage (*d*).

Instances of words held to be libellous.

Very many instances of words held to be libellous might be enumerated, and a few may usefully be given. In one case it was held that to write or print of a person that he was a swindler was a libel (*e*); in another, that to write of a person that he was a black sheep or a blackleg was a libel (*f*); in another, that to write of a person that he had been blackballed on an election for members of a club was libellous (*g*), and in another, that to write of a person that he had no experience in work he was employed to do was libellous (*h*). So, it is a libel to write that a person is a hypocrite (*i*), or a man of straw (*j*), or an impostor (*k*). Mere words of suspicion will not, however, be sufficient to constitute libel (*l*). There may be many cases in which the words used by the defendant, and complained of by the plaintiff as libellous, though not apparently on their face so, yet, by the special and peculiar sense in which they may be taken in any particular case, may be actually libellous; thus, in one case the plaintiff complained that the defendant had libelled him by calling him a truck-master, and the court held that this might possibly constitute a

(*c*) *Mayor of Manchester* v. *Williams* (1891), 1 Q. B. 94; 60 L. J. Q. B. 23; 63 L. T. 805.
(*d*) *South Hetton Coal Co.* v. *North-Eastern News Association* (1894), 1 Q. B. 133; 63 L. J. Q. B. 293; 69 L. T. 844.
(*e*) *I'Anson* v. *Stuart* (1787), 1 T. R. 748.
(*f*) *Macgregor* v. *Gregory* (1843), 11 M. & W. 287.
(*g*) *O'Brien* v. *Clement* (1847), 16 M. & W. 159.
(*h*) *Botterill* v. *Whitehead* (1880), 41 L. T. 588.
(*i*) *Thorley* v. *Kerry* (1812), 4 Taunt. 355.
(*j*) *Eaton* v. *Johns* (1842), 1 Dow. 602.
(*k*) *Campbell* v. *Spottiswoode* (1863), 32 L. J. Q. B. 185.
(*l*) *Simmons* v. *Mitchell* (1881), 6 A. C. 156; 50 L. J. P. C. 11; 43 L. T. 710; 29 W. R. 401.

libel, and that it must be for the jury to decide whether or not, under the circumstances, the word complained of was used in a defamatory sense (*m*).

Person may be libelled though not named.

There are also many cases in which a person may be libelled, although he is not actually named, if it clearly appears that he is the person against whom the defamatory matter was aimed (*n*); as, for instance, by describing the plaintiff or his place of residence or business, or giving other particulars which would lead persons to apply the libel to him; and it is not necessary to prove that the whole world would take the matter as applying to the plaintiff, but it is quite sufficient to show that some would (*o*).

Words not libellous.

If, however, the words used are words that no ordinary reader would put a libellous construction on, the plaintiff cannot, by alleging that they have a particular intent, make them libellous. Thus, in one case the libel complained of consisted of an advertisement stating that the plaintiff was not any longer authorised to receive subscriptions for a certain institute, and the plaintiff brought this action, alleging that the meaning of the advertisement was that he had falsely pretended to be authorised to receive subscriptions on behalf of such institute. The court held that no action was maintainable here, as the words made use of would not bear any libellous interpretation (*p*). In some cases, however, although words may not be libellous in their primary sense, yet evidence may be given of facts which, under the particular circumstances, make them defamatory, but there must be some evidence of this nature to make such words as these actionable (*q*); and where a plaintiff in his state-

Mulligan v. *Cole.*

(*m*) *Homer* v. *Taunton* (1860), 29 L. J. Ex. 318.
(*n*) See *I'Anson* v. *Stuart* (1787), 1 T. R. 748.
(*o*) *Bourke* v. *Warren* (1826), 2 C. & P. 307.
(*p*) *Mulligan* v. *Cole* (1875), L. R. 10 Q. B. 549; 44 L. J. Q. B. 153.
(*q*) *Capital and Counties Bank* v. *Henty* (1883), 7 A. C. 741; 52 L. J. Q. B. 232; 47 L. T. 662; 31 W. R. 157; *Ruel* v. *Tatnell* (1881), 29 W. R. 172; 43 L. T. 507; *Williams* v. *Smith* (1889), 22 Q. B. D. 134; 58 L. J. Q. B. 21; 59 L. T. 757; 37 W. R. 93; *Nevill* v. *Fine Arts and General Insurance Co.* (1897), A. C. 68; 66 L. J. Q. B. 195; 75 L. T. 606.

ment of claim annexes a meaning, or *innuendo*, to words complained of, and fails by his evidence to sustain such meaning, he cannot discard that and adopt another (*r*). As regards the *innuendo*, it is the duty of the judge to say whether a publication is *capable* of the meaning ascribed to it; but if he is satisfied that it is capable of it, it must then be left to the jury to say whether in fact it has such meaning (*s*). Innuendo.

To entitle a person to succeed in an action to recover damages for libel, he must prove the publication of the libel to a third party, and indeed this proof must be given before any evidence can be adduced of the contents of the libel (*t*); for it is not sufficient to render a person liable to a civil action for libel, that he wrote the defamatory matter, for if he has kept it in his possession, or only shewn or sent it to the person defamed, and has not in any way published it to a third person, there is no actionable wrong (*u*). For instance, to write a letter to a person containing defamatory matter concerning him, is not actionable if it reaches his hands without being seen by any third person; so that even where such a letter, simply folded and not sealed, was delivered to a third person to carry to the other, and might have been opened and read by him, but was not, it was held that no action was maintainable (*v*). The publication of a libel may occur in many different ways, as by the defendant actually with his own hand giving the libel to another, by inserting a libellous advertisement in a newspaper (*w*), by telegraphing, or writing on a postcard, even to the plaintiff himself (*x*), and *à fortiori* by writing and sending a The publication of a libel must always be proved. What will amount to a publication.

(*r*) *Ruel* v. *Tatnell* (1881), 29 W. R. 172; 43 L. T. 507.
(*s*) See Lord Selborne's remarks in *Capital and Counties Bank* v. *Henty*, 7 App. Cas., at p. 786.
(*t*) Folkard on Slander and Libel, 439.
(*u*) It is different as regards a criminal prosecution for libel, for there it is sufficient, to render a person liable, that he has shewn it to the defamed person only, if it has a tendency to cause a breach of the peace (*Reg.* v. *Adams* (1889), 58 L. J. M. C. 1; see Thwaites' Criminal Law, 7th ed., 47).
(*v*) *Clutterbuck* v. *Chaffers* (1816), 2 Stark, 471.
(*w*) *Brown* v. *Croome* (1816), 2 Stark, 297.
(*x*) *Williamson* v. *Freer* (1874), L. R. 9 C. P. 393; 43 L. J. C. P. 161.

Wenman v. *Ash.*

Wenhak v. *Morgan.*

letter to a third person (*y*), even though such third person is the wife or husband of the person libelled (*z*). But the delivery of a libellous paper by a husband to his wife, or by a wife to her husband, is not *per se* a publication (*a*).

A person ignorantly and unwittingly publishing a libel is not liable to an action.

Emmens v. *Pottle.*

Where a porter, in the course of his business and employment, delivered parcels containing libellous handbills, it was held that, although he was the actual publisher of the libel, yet he was not liable to an action in respect of it, he being ignorant of the contents of the parcel (*b*). Upon the same principle, though the seller of a newspaper is *primâ facie* liable for a libel contained in it, yet he is not liable if he can prove that he did not know it contained a libel, that his ignorance was not due to any negligence on his part, and that he did not know, and had no ground for supposing, that the newspaper was likely to contain libellous matter (*c*). The same principles appear to apply to the keeper of a circulating library who lends out a book containing a libel (*d*).

Malice *in law* is an essential to constitute a libel.

But it is inferred.

Our definition of libel states it to be the *malicious* defamation of another (*e*). Malice, therefore, is an essential to constitute a libel, but by the word malice used here is not meant malice in its ordinary sense of spite or ill-will, but malice in law as before described in treating of malicious prosecution (*f*), viz., the intentional doing of a wrongful act without just cause or excuse. Malice, therefore, is properly said to be an essential of libel, but it is inferred, and need not be proved, for "where words have been uttered or a libel published of the plaintiff, by which actual or pre-

(*y*) *Phillips* v. *Jansen* (1798), 2 Esp. 624.
(*z*) *Wenman* v. *Ash* (1853), 22 L. J. C. P. 190.
(*a*) *Wenhak* v. *Morgan* (1888), 20 Q. B. D. 635; 57 L. J. Q. B. 241; 59 L. T. 28; see generally as to publication, Folkard on Slander and Libel, chap. 19.
(*b*) *Day* v. *Bream* (1837), 2 M. & Rob. 54.
(*c*) *Emmens* v. *Pottle* (1886), 16 Q. B. D. 354; 55 L. J. Q. B. 51; 34 W. R. 116; 53 L. T. 808.
(*d*) *Vizetelly* v. *Mudie* (1900), 2 Q. B. 170; 69 L. J. Q. B. 645.
(*e*) *Ante*, p. 386.
(*f*) *Ante*, p. 384.

sumptive damage has been occasioned, the malice of the defendant is a mere inference of the law from the very act; for the defendant must be presumed to have intended that which is the natural consequence of his act" (*g*).

Circumstances may, however, rebut malice, and make a communication privileged.

There may, however, be cases in which special circumstances rebut the presumption of malice that would otherwise exist; and when there are such special circumstances they prevent the matter complained of being a libel, although had they not existed it would have been, and in such cases the matter is said to be, a privileged communication.

Definition of a privileged communication.

A privileged communication may, therefore, be defined as a communication which on its face would be defamatory and actionable, but is prevented from being so by reason of circumstances rebutting the existence of malice (*h*). Privilege may be (1) Absolute, *i.e.*, when no action will lie although the matter is false and defamatory and published with an improper motive (actual malice), or (2) Qualified, in which case no action lies unless the matter was published with actual malice.

Two sorts of privilege.

Absolute privilege.

Absolute privilege is based on the doctrine that in the public interest it is not considered desirable to consider whether the acts and words of certain persons are malicious or not. The reason is that persons who occupy certain positions should be perfectly free and independent, and that their independence should be secured by preventing their conduct being brought before a tribunal merely on the allegation that they have acted maliciously (*i*).

Statements by judges, advocates, &c.

Judges, magistrates, and others acting in a judicial capacity (*k*) are not liable for defamatory publications made by them in the exercise of their judicial func-

(*g*) Folkard on Slander and Libel, 473.
(*h*) *Wright* v. *Woodgate* (1835), 2 C. M. & R. 573.
(*i*) *Bottomley* v. *Brougham* (1908), 1 K. B. 584; 77 L. J. K. B. 311.
(*k*) As to what is and is not a judicial capacity see *Royal Aquarium* v. *Parkinson* (1892), 1 Q. B. 431; 61 L. J. Q. B. 409; 66 L. T.

tions, even though they may have acted maliciously and contrary to good faith and honesty (*l*). This absolute privilege extends to an official receiver's further report made in the winding-up of a company and charging a person with fraud (*m*). Any statement made by an advocate in the course of his advocacy is also absolutely privileged, and this although uttered by the advocate maliciously, and not with the object of supporting the case of his client, and even though uttered without any justification or excuse, and from personal ill-will or anger towards the person defamed, arising out of a previously existing cause, and even although irrelevant to every issue of fact which is contested before the tribunal (*n*). The advocate's privilege extends to statements made in open court by a party conducting his own case (*o*).

Munster v. *Lamb.*

Statements by witnesses.

The statements of a witness in a court of justice or before a select committee of the House of Lords or House of Commons, are absolutely privileged (*p*), and this even although the witness goes somewhat beyond what he was asked (*q*). And with regard to what will be a court so as to render a witness not liable for his statements, it may be noticed that it has been decided that a court of inquiry instituted by the Commander-in-chief of the army, under the Articles of War, to inquire into a complaint made by an officer of the army, is such a court, and therefore that statements, whether oral or written, made by an officer summoned to attend before such court, are absolutely privileged (*r*).

Seaman v. *Netherclift.*

Dawkins v. *Lord Rokeby.*

513; *Hodson* v. *Pare* (1899), 1 Q. B. 451; 68 L. J. Q. B. 309; 80 L. T. 13.

(*l*) *Anderson* v. *Gorrie* (1895), 1 Q. B. 668; 71 L. T. 382.

(*m*) *Bottomley* v. *Brougham* (1908), supra.

(*n*) *Munster* v. *Lamb* (1883), 11 Q. B. D. 588; 52 L. J. Q. B. 720; 32 W. R. 248.

(*o*) *Hodgson* v. *Scarlett* (1818), 1 B. & Ald. at p. 244.

(*p*) *Goffin* v. *Donelly* (1881), 6 Q. B. D. 307; 50 L. J. Q. B. 303; 29 W. R. 440.

(*q*) *Seaman* v. *Netherclift* (1879), 2 C. P. D. 53; 46 L. J. C. P. 128.

(*r*) *Dawkins* v. *Lord Rokeby* (1873), L. R. 7 H. L. 744; 42 L. J. Q. B. 8. It has also been held that reports made by a military officer for the information of the Commander-in-chief are absolutely privileged (*Dawkins* v. *Lord Paulet* (1870), L. R. 5 Q. B. 94; 39 L. J. Q. B. 53)

Officers of state.

Statements made in the course of official duty by one state official to another are absolutely privileged (*s*).

Members of Parliament.

Statements made by members of inside either House of Parliament are absolutely privileged; but such members may be liable if they subsequently print and publish such statements (*t*); unless, indeed, it is simply a publication of a speech by a member *bonâ fide* for the information of his constituents (*u*).

Parliamentary Papers Act,

The publication of any document by order of either House of Parliament, and any republication thereof in full, enjoy absolute privilege by the Parliamentary Papers Act, 1840 (*v*), though the publication of an abstract thereof or extract therefrom only enjoys qualified privilege.

Qualified privilege.

Qualified privilege exists where any person having an interest to protect, or a legal, moral, or social duty to perform, makes a communication in protection of his interest, or in performance of his duty, to another person having a corresponding interest or duty to receive the same (*w*). Here, although the communication may contain matter that would ordinarily be actionable, yet it is not so if the communication is fairly and honestly made in *bonâ fide* belief of its truth, and without any gross exaggeration (*x*). And where privilege attaches to a defamatory oral statement made, in pursuance of some duty, to persons interested in the subject-matter of such statement, that privilege is not taken away by reason of that statement being made in the presence of other persons not so interested, if the speaker has not the power to prevent the presence of such other

(*s*) *Chatterton* v. *Secretary for India* (1895), 2 Q. B. 189; 64 L. J. Q. B. 676.

(*t*) See Folkard on Slander and Libel, 234 *et seq.*

(*u*) See *Wason* v. *Walter* (1868), L. R. 4 Q. B. at p. 95.

(*v*) 3 & 4 Vict. c. 9.

(*w*) *Hebditch* v. *MacIlwaine* (1894), 2 Q. B. 54; 63 L. J. Q. B. 587; 70 L. T. 826.

(*x*) *Harrison* v. *Bush* (1856), 25 L. J. Q. B. 25; *Whitelcy* v. *Adams* (1864), 33 L. J. C. P. 89; *Allbutt* v. *Medical Council* (1889), 23 Q. B. D. 400; 58 L. J. Q. B. 606; 61 L. T. 585; *Stuart* v. *Bell* (1891), 64 L. T. 633; *Hunt* v. *Great Northern Ry. Co.* (1891), 60 L. J. Q. B. 498; 64 L. T. 418.

An instance of a privileged communication occurs in the case of a master giving a character to his servant.

persons (*y*). A good instance of a communication privileged by reason of being made in discharge of a duty, occurs in the case of a master giving a character to his servant. It is quite true that a servant cannot compel his master to give him a character (*z*), but, although this is so, it is clearly the master's moral, or social, though certainly not his legal, duty to give a character, if he is asked for one; and if he, therefore, on being applied to, gives a character which he *bonâ fide* believes to be true, he is protected, and though it is in reality false, it is a privileged communication (*a*).

Position if character given voluntarily.

And even if a master, without being applied to for a character, honestly makes such a statement because he considers it his duty to do so, this may also be privileged; but when a master volunteers to give the character, stronger evidence will be required that he acted *bonâ fide* than in the case where he has given the character after being requested to do so (*b*).

Statement by solicitor.

As another instance of privilege by reason of discharge of duty may be mentioned the case of a solicitor writing a letter in protection of his client's interests, for if in such letter he merely states what he honestly believes to be true, and in the interest of his client to state, he can be under no liability in respect of the publication to the person to whom he writes it, or to his clerks through whose hands it necessarily passes (*c*). But there is no privilege if a merchant dictates a defamatory letter to his typist and afterwards allows a clerk to copy it in his letter book (*d*).

Reports of proceedings in Parliament, meetings, &c.

Fair reports of proceedings in Parliament (*e*), or in courts of justice—even *ex parte* proceedings (*f*)—enjoy

(*y*) *Pittard* v. *Oliver* (1891), 60 L. J. Q. B. 219; 64 L. T. 758.

(*z*) *Carol* v. *Bird* (1801), 3 Esp. 201; Smith on the Law of Master and Servant, 347. See *ante*, p. 238.

(*a*) *Weatherstone* v. *Hawkins* (1786), 1 T. R. 110; *Fountain* v. *Boodle* (1842), 3 Q. B. 5; *Jones* v. *Thomas* (1885), 53 L. T. 678.

(*b*) Per Littledale, J., in *Pattison* v. *Jones* (1828), 8 B. & C. at p. 586.

(*c*) *Baker* v. *Carrick* (1894), 1 Q. B. 838; 63 L. J. Q. B. 399; 70 L. T. 366; *Boxius* v. *Goblet* (1894), 1 Q. B. 842; 63 L. J. Q. B. 401; 70 L. T. 368.

(*d*) *Pullman* v. *Hill* (1891), 1 Q. B. 524; 60 L. J. Q. B. 299.

(*e*) *Wason* v. *Walter* (1868), 4 Q. B. 73.

(*f*) *Kimber* v. *Press Association* (1893), 1 Q. B. 65; 67 L. T. 515.

qualified privilege, unless the proceedings are of an absolutely scandalous, blasphemous, or indecent nature (*g*); and it has been held that a fair and accurate report of the judgment in an action, published *bonâ fide* and without malice, is privileged, although not accompanied by any report of the evidence given at the trial (*h*). It was formerly held that a report of proceedings at a meeting of poor-law guardians, affecting an individual, could not be privileged (*i*); but with regard to this and certain other reports, the Libel Act, 1888 (*j*), now enacts that a fair and accurate report published in any newspaper of the proceedings of a public meeting (*k*), or (except where neither the public nor any newspaper reporter is admitted) of any meeting of a vestry, town council, school board, board of guardians, board of local authority, and some other bodies mentioned in the Act, and the publication at the request of a Government office or department, officer of state, commissioner of police, or chief constable, of any notice or report issued by them for information of the public, shall be privileged, unless published or made maliciously. But this enactment is not to protect a person who has refused or neglected to insert, on request, in the newspaper in which the report or other publication appeared, a reasonable letter, or statement, explaining the same; and it is not to protect the pub-

Macdougal v. *Knight.*

Libel Act, 1888.

(*g*) *Stevens* v. *Sampson* (1880), 5 Ex. D. 53; 49 L. J. Ex. 120; 41 L. T. 782. But where sect. 3 of the Libel Act, 1888, applies, the privilege may possibly be absolutely privileged. See Fraser on Libel, 126.

(*h*) *Macdougal* v. *Knight* (1886), 17 Q. B. D. 636; 55 L. J. Q. B. 464; 34 W. R. 727; 55 L. T. 274. This case afterwards went to the House of Lords (14 App. Cas. 194; 58 L. J. Q. B. 537; 60 L. T. 762), and was affirmed, but on different grounds, and Lord Halsbury certainly expressed his view to be different from that of the Court of Appeal. The matter was, however, in 1890 further considered by the Court of Appeal in a second case of *Macdougal* v. *Knight* (25 Q. B. D. 1; 59 L. J. Q. B. 517; 63 L. T. 43), and they again distinctly laid down the law to be as stated in the text above.

(*i*) *Purcell* v. *Sowler* (1877), 2 C. P. D. 215; 46 L. J. C P. 308.

(*j*) 51 & 52 Vict. c. 64, s. 4. The previous provision contained in 44 & 45 Vict. c. 60, s. 2, is repealed by this Act (s. 2).

(*k*) The Act defines a public meeting to mean any meeting *bona fide* and lawfully held for a lawful purpose, and for the furtherance or discussion of any matter of public concern, whether the admission be general or restricted (s. 4).

lication of any matter not of public concern, and the publication of which is not for the public benefit (*l*).

The judge decides whether a particular matter is privileged.

In many cases of what are alleged to be privileged communications on the ground of moral or social duty, it is often a difficult matter to decide whether or not there is shewn to have existed such a duty as to render the communication privileged; in all such cases it is for the judge to decide whether the principle can be applied to the particular case (*m*).

Many cases that would *primâ facie* appear to be privileged may yet on particular facts not be.

In all cases of qualified privilege, it is open to the plaintiff to shew that, notwithstanding the communication would ordinarily be privileged, yet the defendant has been guilty of actual malice, *i.e.*, malice in fact (*n*). Thus, it has been pointed out (*o*) that a master is privileged in giving a character to his servant; but if he knowingly gives a false character, here there is actual malice, and there cannot possibly be any privilege.

Distinction between qualified and absolute privilege.

Cases of this character are designated as cases of qualified privilege, as opposed to cases in which no such evidence can be given, which are styled cases of absolute privilege, *e.g.*, statements by judges and advocates in the course of their duties.

Comments and criticisms.

With regard to fair and honest comments on public proceedings, or the conduct of public men, and fair and honest criticisms and reviews, these are not privileged. They may therefore be the subject of an action of libel without there being any indirect or evil motive, which would not be the case if they were privileged, for there would in such a case be the necessity of proving spite, ill-will or the like. Such criticisms or comments, in order to be libellous, must in the opinion of the jury be something more than the expression of the strong opinions and prejudices of a fair man. If the matter

(*l*) See *Kelly* v. *O'Malley* (1888), 6 Times L. R. 62.

(*m*) Erle, C.J., in *Whiteley* v. *Adams* (1863), 15 C. B. (N. S.) 418; *Waller* v. *Lock* (1881), 7 Q. B. D. 619; *Harrison* v. *Fraser* (1881), 29 W. R. 652.

(*n*) *Wright* v. *Woodgate* (1835), 2 C. M. & R. 573. As to malice in fact, see *ante*, p. 384.

(*o*) *Ante*, p. 394.

goes beyond what any fair man would say in making comments or criticisms, then it is libellous and actionable. This is a question of fact for the jury in each particular case (*p*). *Merrivale* v. *Carson*.

The truth of a libellous imputation affords a complete answer to any action for damages, because the action is brought by the plaintiff to free his character from such imputation, which he cannot be entitled to do if the imputation is actually true (*q*); and where the truth of the imputation is not thoroughly and strictly proved, but it is proved substantially, or to a great extent, this, though not sufficient to form a defence, may go in mitigation of damages (*r*). Libel is, however, punishable, not only civilly, but also criminally by indictment, and in some special cases, where the persons libelled are in some public office or position, by criminal information (*s*). In any criminal prosecution the truth of the libel was formerly no defence, for the object of the proceeding is to a great extent the preservation of public peace and good order, which cannot be maintained if one man is allowed to publish of another everything that may chance to be true of that person, so that, whether true or false, the imputation may have equally mischievous results, and consequently be equally a public wrong (*t*). This state of the law is, however, now to a considerable extent altered, it having been provided that the truth of a libel shall form a defence to a criminal prosecution if it is also for the public benefit that the matters complained of should be published (*u*). The truth of a libel affords a complete answer in a civil action. Effect of the truth of a libel in a criminal prosecution. Libel Act, 1843.

The Libel Act, 1888 (*v*), enacts that no criminal

(*p*) *Merrivale* v. *Carson* (1887), 20 Q. B. D. 275; 58 L. T. 331; *M'Quire* v. *Western Morning News* (1903), 2 K. B. 100; 72 L. J. K. B. 612; 88 L. T. 757; *Thomas* v. *Bradbury* (1906), 2 K. B. 627.

(*q*) *M'Pherson* v. *Daniels* (1829), 10 B. & C. p. 272.

(*r*) *Chalmers* v. *Shackell* (1834), 6 C. & P. 475.

(*s*) *Reg.* v. *Labouchere* (1884), 12 Q. B. D. 320; 53 L. J. Q. B. 362; 50 L. T. 177; 32 W. R. 861.

(*t*) See Folkard on Slander and Libel, 21, 22.

(*u*) 6 & 7 Vict. c. 96, s. 6. See *R.* v. *Labouchere* (1880), 14 Cox, 419.

(*v*) 51 & 52 Vict. c. 64, s. 8, repealing 44 & 45 Vict. c. 60, s. 3, which required the fiat of the director of public prosecutions.

Order of judge necessary before prosecuting for libel in a newspaper.

prosecution shall be commenced against any proprietor, publisher, editor, or any person responsible for the publication of a newspaper, for any libel published therein, without the order of a judge at chambers first being obtained, on notice to the person accused, who shall have an opportunity of being heard against it. This provision, however, does not apply to a proceeding by way of criminal information (*w*).

Provision of Libel Act, 1843, as to apology generally.

The Libel Act, 1843 (*x*), also contains two important provisions on the subject of libel, besides the one already mentioned as to the truth of a libel being set up in criminal proceedings in respect of it. The first of such provisions is, that in any action for defamation it shall be lawful for the defendant (after notice in writing of his intention so to do duly given to the plaintiff at the time of filing or delivering the defence in such action) to give in evidence, in mitigation of damages, that he made or offered an apology to the plaintiff for such defamation before the commencement of the action, or so soon afterwards as he had an opportunity of doing so, in case the action shall have been commenced before there was an opportunity of making or offering such apology (*y*).

Provision of Libel Act, 1843, as to libel in a public newspaper, &c.

The other of such provisions is, that in an action for libel contained in any public newspaper, or other periodical publication, it shall be competent for the defendant to plead that such libel was inserted therein without actual malice, and without gross negligence, and that before the commencement of the action, or at the earliest opportunity afterwards, he has inserted in such newspaper, or other periodical publication, a full

(*w*) *R.* v. *Yates* (1885), 14 Q. B. D. 648; 54 L. J. Q. B. 258; 52 L. T. 305. This was a decision under 44 & 45 Vict. c. 60, s. 3, but it still holds good under 51 & 52 Vict. c. 64, s. 8.

(*x*) 6 & 7 Vict. c. 96.

(*y*) 6 & 7 Vict. c. 96, s. 1. The statement above, and the notice required, must not be confused with the seven days' notice that is required to be given under Order xxxvi. rule 37, to entitle a defendant, who does not set up the truth of the libel or slander, to give in evidence at the trial the circumstances under which the libel or slander was published, or evidence as to the character of the plaintiff. See Indermaur's Manual of Practice, 187.

apology for the said libel, or, if such newspaper, or other periodical publication, shall be ordinarily published at intervals exceeding one week, that he has offered to publish the said apology in any newspaper, or other periodical publication, to be selected by the plaintiff in such action; and that every such defendant shall, together with such plea, be at liberty to pay into court a sum of money by way of amends for the injury sustained by the publication of such libel (*z*). This latter provision is not, however, now of the importance it formerly was, as, under the Judicature practice, money may now be paid into court in all actions (*a*).

Provision of Libel Act, 1888, as to mitigation of damages for libel in newspapers.

With regard to any action brought in respect of a libel contained in a newspaper, the Libel Act, 1888 (*b*), further enacts that the defendant may prove, in mitigation of damages, that the plaintiff has already recovered, or brought an action for, damages, or has received, or agreed to receive, compensation in respect of a libel, or libels, to the same purport or effect as the libel for which such action has been brought.

An action for libel must be brought within six years.

An action of libel may be brought at any time within six years of the publication thereof (*c*).

Liability for fresh publication of libel.

If a person, to whom a libel is published, in his turn publishes it again, he is liable in respect of it, as well as the original libeller, even though he believed it to be true (*d*).

Definition of slander.

Slander is the malicious defamation of another person, not in writing, but simply by word of mouth. For ordinary slander, the only remedy of the person slandered is to bring an action for damages, for the injury done him is not so great as by libel, which, being in writing or the like, is more lasting and permanent in

(*z*) 6 & 7 Vict. c. 96, s. 2. By 8 & 9 Vict. c. 75, s. 2, it is provided that it shall not be competent for a defendant to plead an apology as stated in the text, without at the same time making a payment of money into court.

(*a*) Order xxii. Rule 1.

(*b*) 51 & 52 Vict. c. 64, s. 6.

(*c*) 21 Jac. I. c. 16, s. 3.

(*d*) *M'Pherson* v. *Daniels* (1829), 10 B. & C. 273; *Tidman* v. *Ainslie* (1854), 10 Ex. 63; *Botterill* v. *Whitehead* (1879), 41 L. T. 588.

its nature, while slander, being but by word of mouth, is from its very nature fleeting. But in some exceptional cases of slander, *e.g.*, where the words used are seditious, grossly immoral, or blasphemous, or addressed to a magistrate with reference to his duties, or whilst he is performing his duties, or uttered as a challenge to fight a duel, or to provoke such a challenge, a criminal prosecution will lie (*e*).

Cases in which a criminal prosecution will lie for slander.

Instances of slander.

As to what words will be sufficient to enable a person to maintain an action of slander, may be instanced words imputing a crime to any one, as that he is a thief, or that he has committed a certain wrongful act (*f*); but it is not necessary that the words used should be so extreme as that, and, generally speaking, any defamatory words causing damage will give rise to the action. On the other hand, there are many cases of words merely spoken which confer no right of action, although had they been written they would have done so (*g*). Words made use of expressing simply a suspicion (*h*), or charging another with having evil desires and inclinations, but not stating that they have been brought into action, are not actionable (*i*); but if they go beyond that, and charge another with actually having evil principles, then it seems they are (*j*).

Facts to be proved in an action for slander.

The facts to be proved in an action for slander are generally three, viz., (1) The uttering of the slanderous words; (2) The malice of the defendant; (3) The damage caused to the plaintiff.

What words will be defamatory.

The first point involves the question of whether or not the words are really defamatory; and to render them so they must be such that, if not the whole world,

(*e*) See Folkard on Slander and Libel, 794.

(*f*) It is slanderous to call a person a felon who has undergone his sentence and been discharged, for he is then no longer a felon in law, *Leyman* v. *Latimer* (1878), 3 Ex. D. 352; 47 L. J. Ex. 470.

(*g*) *I'Anson* v. *Stuart* (1787), 1 T. R. 748.

(*h*) *Simmons* v. *Mitchell* (1881), 6 A. C. 156; 50 L. J. C. P. 11; 29 W. R. 401.

(*i*) *Harrison* v. *Stratton* (1801), 4 Esp. 218.

(*j*) *Prince* v. *Howe* (1702), 1 Bro. P. C. 64.

at any rate some persons, would have taken them in a defamatory sense (*k*). The question as to the meaning of the words used is—In what sense did the person uttering them mean them to be understood? (*l*). But although words, if they stood by themselves, might be defamatory and actionable, yet it is quite possible that they may be controlled by other words made use of at the same time, so as to prevent their having the ordinary usual and primary meaning that they otherwise would have had (*m*).

The malice that is required is only malice in a legal sense, which is implied if the uttering of the defamatory words is proved (*n*). The malice required is only malice in law.

The third essential of proof in an action for slander is the damage caused by the defamatory words. Generally speaking, unless the slander has been productive of damage, no action lies, in which respect slander differs from libel, for in the latter, as has been pointed out, the plaintiff will at any rate be entitled to a nominal verdict, although he may not give one atom of evidence that the libel has caused him any injury (*o*). In some few cases this is also so in slander, though even in these cases proof of special damage is, when possible, always given, for the purpose of increasing the amount of the damages. The cases in which slanderous words are actionable *per se* are as follows:— Special damage must be proved in an action for slander. Except in four cases.

1. Where a criminal offence (*p*), or actual conviction thereof, is imputed; and it is not necessary that the crime should be technically described, for any words by which it would ordinarily be understood are sufficient (*q*); nor is it necessary to specify particularly any crime, and it is even sufficient if a person says he has a right to have another punished (*r*). General terms 1. Imputing a criminal offence.

(*k*) See *ante*, p. 388.
(*l*) *Read* v. *Ambridge* (1834), 6 C. & P. 308.
(*m*) *Shipley* v. *Todhunter* (1836), 7 C. & P. 680.
(*n*) As to malice in fact and malice in law, see *ante*, p. 384.
(*o*) *Ante*, pp. 386, 387.
(*p*) It need not be an *indictable* offence (*Webb* v. *Bevan* (1883), 11 Q. B. D. 609; 52 L. J. Q. B. 544; 49 L. T. 201).
(*q*) *Coleman* v. *Godwin* (1778), 2 Doug. 90.
(*r*) *Francis* v. *Roose* (1838), 3 M. & W. 191.

of abuse, such as rogue, rascal, scoundrel, &c., are not words actionable in themselves, for they do not impute any precise and definite offence punishable in the courts of justice (*s*).

2. Imputing an infectious disorder.

2. Where the words used impute to the plaintiff a contagious or infectious disorder, which may have the effect of excluding him from society. It seems the diseases must be plague, or leprosy, or venereal disease (*t*). It is not, however, sufficient to say that a person has at some time past had such a disorder (*u*).

3. Imputing incompetence in a trade, profession, or employment.

3. Where the words used impute to the plaintiff some incompetence or misconduct in his office, trade, profession, or calling, or tend to injure or prejudicially affect him therein. Thus, words imputing to a solicitor that he is a knave (*x*), or that he deserves to be struck off the rolls (*y*), come within this category. So, also, to say of a doctor that none of the other medical men in the town will meet him, is in itself actionable (*z*), and so are words imputing indigent circumstances to a banker (*a*). To render words actionable in themselves as coming within this class, it matters not how humble the calling or employment of the plaintiff may be; thus, menial servants have been held entitled to maintain an action for words spoken against them in their employment, without any proof of special damage (*b*). The great criterion to ascertain whether or not words do come within this heading is—Do they directly touch or affect the plaintiff in his office, trade, profession, or calling? If they do, then they are actionable *per se* (*c*). It has been held that words imputing want of integrity, malversation, or dishonesty to a person holding an office of confidence or trust, whether an office of profit or not, are actionable without proof of special damage;

(*s*) Folkard on Slander and Libel, 139.
(*t*) *Bloodworth* v. *Gray* (1844), 7 M. & Gr. 334.
(*u*) *Carslake* v. *Mapledoram* (1788), 2 T. R. 473.
(*x*) *Day* v. *Bullar* (1770), 3 Wils. 59.
(*y*) Per Kenyon, C.J., *Philips* v. *Jansen* (1798), 2 Esp. 624.
(*z*) *Southee* v. *Denny* (1848), 1 Ex. 196.
(*a*) *Robinson* v. *Marchant* (1845), 7 Q. B. 918.
(*b*) *Connor* v. *Justice* (1862), 13 Ir. C. L. R. 451.
(*c*) *Foulger* v. *Newcomb* (1867), 2 Ex. 327; 36 L. J. Ex. 169.

but that words imputing unsuitableness for an office, or want of ability, are not actionable without proof of special damage if the office is merely an honorary one (*d*).

4. Imputing unchastity to a woman.

4. Where the words spoken impute unchastity or adultery to any female. This is by the Slander of Women Act, 1891 (*e*), which however provides that the female shall not recover more costs than damages, unless the judge shall certify that there was reasonable ground for bringing the action.

Costs.

The truth of slanderous matter will form a perfect defence to any action in respect of it, on the like principle that, as has been stated (*f*), the truth of a libel may be set up as a defence to an action for damages. "It is essential to the claim for damages that the imputation should be false; for, as in point of natural justice and equity, no one can possibly have any claim or title to a false character, so also would it be contrary to the principles of public policy and convenience, to permit a man to make gain of the loss of that reputation which he had forfeited by his misconduct. *In foro conscientiæ*, it is no excuse that the slander is true; but in compassion to men's infirmities, and because if the words spoken are true, the individual of whom they are spoken cannot justly complain of any injury, the law allows the truth of the words to be a justification in an action for slander" (*g*).

The truth of slander is an answer to an action for it.

The remarks that have been made under the head of libel on the subject of privileged communications, apply equally to cases of slander (*h*).

Privileged communications.

A special and peculiar kind of defamation occurs in what is called *scandalum magnatum*, of which it is sufficient to say, that it consists in the spreading of false reports against peers and certain high officers of the

Scandalum magnatum.

(*d*) *Booth* v. *Arnold* (1895), 1 Q. B. 571; 64 L. J. Q. B. 443; 72 L. T. 310; *Alexander* v. *Jenkins* (1892), 1 Q. B. 797; 61 L. J. Ch. 634; 66 L. T. 391.

(*e*) 54 & 55 Vict. c. 51.

(*f*) *Ante*, p. 397.

(*g*) Folkard on Slander and Libel, 79, 80.

(*h*) See *ante*, pp. 391-396.

realm, and that it is subjected to peculiar punishments by various ancient statutes.

Limitation for action of slander.

An action for slander may be brought at any time within two years after the uttering of it, if the words are actionable *per se*; and if not, within two years from the time of the special damage occurring (*i*).

Repetition of slander.

A person repeating a slander uttered by another, renders himself liable in respect of it, and cannot discharge himself by giving up the name of the author or first utterer of it, for both are liable (*j*). In an action, however, against the original utterer of the slander, proof of the unauthorized repetition of it is not admissible as proof of special damage, unless such repetition was the natural and probable result of the original uttering (*k*).

Differences between libel and slander.

The differences between libel and slander have appeared in discussing respectively each of those torts, and all that is therefore necessary under this third heading is to summarise those differences. They are as follows:—

1. There is the difference in the very nature of the two torts which appears from their respective definitions (*l*).

2. Libel, from its nature, is of a more lasting, and slander of a more fleeting character, so that libel is a tort of a more serious nature than slander (*m*).

3. It is not essential to prove special damage in an action of libel (*n*), but it is in slander, except in the four cases already given (*o*).

4. Libel is punishable both civilly and criminally, but slander, generally speaking, only civilly (*p*).

(*i*) 21 Jac. I. c. 16, s. 3. See *ante*, p. 278.

(*j*) *M'Pherson* v. *Daniels* (1829), 10 B. & C. 273; *Tidman* v. *Ainslie* (1854), 10 Ex. 63; *Botterill* v. *Whitehead* (1879), 41 L. T. 588.

(*k*) *Ward* v. *Weeks* (1830), 7 Bing. 211; *Speight* v. *Gosnay* (1891), 60 L. J. Q. B. 231; 55 J. P. 501.

(*l*) *Ante*, pp. 386, 400.

(*m*) *Ante*, pp. 400, 401.

(*n*) *Ante*, p. 386.

(*o*) *Ante*, pp. 401–403.

(*p*) *Ante*, pp. 397, 399, 400. An injunction may also be granted in some cases (and even on an interlocutory application) to restrain the publication of a libel. See Indermaur and Thwaites' Manual of Equity, 473.

5. Libel is statute-barred after six, but slander after two years (*q*).

Libel or slander of the dead.

Another, though somewhat out-of-the-way difference may perhaps be usefully referred to, viz., as regards a libel published, or slander uttered, concerning a dead person. No one could here sue in a civil action for damages, and therefore there would be no remedy as regards the slander. Nor generally would there be any remedy as regards the libel; but if it were shewn that the design and effect of the libel was to bring contempt on the family of the dead, and to stir up the public against them, then, and then only, it might be prosecuted for (*r*).

v. Seduction and loss of services.

"An action of seduction is in our law founded upon a fiction—the basis of this action, when brought even by a father, to recover damages for the seduction of his daughter, having been from the earliest times uniformly placed, not upon the seduction itself, which is the wrongful act of the defendant, but upon the loss of service of the daughter, in which service the parent is supposed to have a legal right or interest. It has, accordingly, always been held that in an action for seduction loss of service must be alleged, and must be proved at the trial, or the plaintiff will fail, notwithstanding the production of evidence conclusive as regards the guilt of the defendant; for the wrong done by his act the law does not esteem *per se* as an *injuria*, using that word in its strict sense, but merely as *damnum sine injuriâ*, for which, consequently, an action will not lie" (*s*).

The action of seduction is not for the seduction, but for the loss of service.

The foregoing quotation shows lucidly enough the nature of the action commonly called an action of seduction. From it the student will carefully observe that although the action is said to be "for seduction," yet this is not strictly correct; it is really brought for the

(*q*) *Ante*, pp. 399, 404.

(*r*) *Rex* v. *Topham* (1791), 4 East, 126; and see Mr. Justice Stephen's remarks in *Reg.* v. *Ensor*, 82 L. T. Newspaper, 287.

(*s*) Broom's Coms. 75. As to *damnum sine injuriâ*, see *ante*, pp. 4, 5.

loss of service that ensues from the antecedent act of seduction, and is therefore so called, but a parent, or other person, has no remedy simply because his daughter, or other relative, has been seduced (*t*). This may have injured him substantially in his position or in his feelings, yet it is not what the law considers as a legal injury, but constitutes an instance of the rule already explained (*u*), that *damnum sine injuriâ* will not be sufficient to enable a person to maintain an action.

Volenti non fit injuria.

Again, a woman cannot herself maintain any action in respect of her own seduction, for she has been a consenting party, and the maxim of our law, *Volenti non fit injuria*, deprives her of any remedy she might, but for its existence, have had (*x*).

The fiction upon which an action of seduction is maintainable.

Did the law stop here, there would, therefore, be no remedy for the tortious act of seduction: but this action is, in our law, founded upon a fiction, which is that, although the person seduced cannot maintain any action, nor can a parent simply in his character of parent, yet any person, whether parent or not, between whom and the seduced party the relationship of master and servant exists, may sue for the loss of service that ensues from the pregnancy and illness consequent on the seduction, whereby the person is deprived of the services that should have been rendered to him, and to which he was entitled.

The usual cases of seduction in our courts are when a parent sues.

This action, therefore, can be maintained by a person who is purely and simply a master; but this is not the usual class of case that occurs, for in such, practically, the damages the master would recover would be but small. The actions of seduction usually occurring in our courts are where a parent, or other person, sues for the seduction and subsequent loss of service to him of his daughter, or other relative; and here, though he has to make out a state of service as existing between himself and the person seduced, yet this being made

(*t*) *Satherwaite* v. *Duerst* (1783), 5 East, 47 *n.*
(*u*) *Ante*, pp. 4, 5.
(*v*) See Broom's Legal Maxims, 217 *et seq.*

out technically, substantial damages may be given to the plaintiff very far beyond any real injury done by the loss of service, as a *solatium* to his feelings, and increased in amount according to the conduct of the seducer. The jury also, undoubtedly, in most cases of seduction, look to the fact that, although the action is nominally for loss of service, yet, substantially, or probably, it is chiefly for the benefit of the seduced herself, it being, at any rate, the only means she has of obtaining any redress from the seducer (*y*).

The jury in an action of seduction generally look to the substantial object of the action.

In every action of seduction the points to be proved are three, viz.:—

Points to be proved in an action for seduction.

1. The fact of the seduction, and consequent illness and loss of service.

2. That the relation of master and servant existed between the plaintiff and the party seduced; and

3. The damages sustained.

With reference to the first and third points, it has already been pointed out that it is not the act of seduction which really gives rise to the action, but the illness and loss of service, and that the jury have a very wide discretion in awarding damages. The second point remains, as to what will be sufficient proof of the relationship of master and servant, and as—as has also been pointed out—it is not in simple cases of ordinary service that the action is usually brought, but in other cases, in which it is necessary to establish a technical service, it is sometimes not easy of determination whether or not that relationship can be said to exist.

What will constitute the position of master and servant to enable a person to sue in this action.

It is not necessary to shew that the seduced was actually employed in a regular routine of duty (*z*), for very slight evidence of actual service, such as milking cows, making tea, nursing children, will suffice to prove the fact of actual service. And where a daughter is

It is not necessary to shew that the seduced was in any regular routine of service.

(*y*) Except, indeed, a bastardy summons for the maintenance of the child, as to which see 35 & 36 Vict. c. 65. Also, in an action for breach of promise of marriage, if there has been seduction, that may go to increase the damages.

(*z*) See *Griffiths* v. *Teetgen* (1855), 15 C. B. 344; *Torrence* v. *Gibbins* (1844) 5 Q. B. 297; *Rist* v. *Faux* (1863), 32 L. J. Q. B. 386.

shewn to have been living with her father at the time of the seduction, forming part of his family, and liable to his control and direction, service will be presumed, and proof of acts of actual service will be unnecessary (*a*). Where the plaintiff's daughter was seduced in his house, and service, in Ireland, and the day after left the country, pursuant to prior arrangements, for America, and whilst in service there, finding herself pregnant, returned to Ireland to the house of her sister, where she was confined, and after her confinement she returned to the house of the plaintiff, it was held that there was evidence to go to the jury, of loss of service sufficient to sustain the plaintiff's action (*b*).

The relationship of master and servant must have existed at the time of the seduction.

The relation of master and servant must be shewn to have existed not only at the time of the illness and loss of service, but also at the time of the seduction (*c*), upon the principle that a master taking a servant who has already been seduced, takes her with the injury already done ; it is not an injury committed during the time of his rights over her. Thus where a girl was seduced while living at home and the illness took place shortly after her father's death, no one could sue, for the girl was in her father's service at the date of seduction and in the mother's at the date of the consequent illness (*d*).

An action may be maintained for the seduction of a married woman.

The fact of the seduced party being a married woman does not prevent the action ; for provided she is separated from her husband and living with and serving her parent, or other person who brings the action, without any interference on the part of the husband, the plaintiff's rights are just the same as if she were not married (*e*). But if a daughter is in a house of her own, the fact of her father being there, with her consent, cannot place her in a subordinate position so

(*a*) Addison on Torts, 852, 853 ; and as to the latter statement in the text, see *Maunder* v. *Venn* (1830), M. & M. 323 ; *Jones* v. *Brown* (1794), 1 Esp. 217 ; *Fores* v. *Wilson* (1795), 1 Peake, 77.
(*b*) *Long* v. *Keighley* (1878), 11 Ir. Reps. C. L. 221.
(*c*) *Davies* v. *Williams* (1847), 10 Q. B. 729.
(*d*) *Hamilton* v. *Long* (1905), 2 Ir. R. 252.
(*e*) *Harper* v. *Luffkins* (1837), 7 B. & C. 387.

as to confer on him any right of action (*f*); and if she is away in actual service to some third person, and does not come home regularly, but only occasionally, although she then renders services, this cannot give the parent any right to bring the action (*g*). If, however, she is generally at home, and is simply away making a temporary visit when the seduction or the illness occurs, here the parent has his right of action because he has a right to call for her services (*h*).

Effect of a woman being in the service of her seducer.

If the woman is actually and substantially in the service of her seducer when the seduction takes place, no one will have any right to maintain the action, unless, indeed, she has been fraudulently lured away from her home, and taken into service, with the view of seduction, in which case the parent or person standing *in loco parentis* will still have his remedy, because such a fraudulently arranged service does not put an end to the relationship of master and servant that before existed. In such case it will always be a question for the jury whether there was a *bonâ fide* service between the woman and the defendant (if there was a *bonâ fide* service the verdict must be for the defendant), or whether the service was arranged simply and expressly for the purposes of, and with a view to, the accomplishment of the seduction—if it was so arranged, the plaintiff will still be entitled to a verdict, notwithstanding such service (*i*).

If the plaintiff has by his conduct brought about the seduction, he cannot maintain an action for it.

It will always be a good defence to an action of this kind that the plaintiff has by his own conduct brought about the evil he complains of, *e.g.*, if he has encouraged any improper intimacy between the parties, or has introduced the person seduced to, or encouraged her acquaintance with, persons of a known loose, dangerous, or immoral character (*j*).

(*f*) *Manley* v. *Field* (1860), 29 L. J. C. P. 79.
(*g*) *Thompson* v. *Ross* (1860), 29 L. J. Ex. 1.
(*h*) *Griffiths* v. *Teetgen* (1855), 15 C. B. 344.
(*i*) See Addison on Torts, 854, and remarks of Abbot, C.J., in *Speight* v. *Olivrera* (1819), 2 Stark, 495, there quoted and referred to.
(*j*) See, as an instance of this, *Reddie* v. *Scoolt* (1795), 1 Peake, 316.

Seduction, but defendant not the father of the seduced's child.

If a defendant proves that, although he seduced the woman, yet he was not the father of the child of which she was delivered, no action lies against him (*k*).

An action for loss of services can be maintained quite irrespective of seduction.

There are also cases in which an action can be maintained for loss of services arising otherwise than by seduction, for "every person who knowingly interrupts the relation subsisting between master and servant by procuring the servant to depart from the master's service, or by harbouring him and keeping him as servant after he has quitted his place, and during the stipulated period of service, whereby the master is injured, commits a wrongful act, for which he is responsible in damages" (*l*). And this principle is applied not only in cases in which the strict relation of master and servant actually exists, but to cases in which a person has maliciously procured another to break his contract. Thus, in *Lumley* v. *Gye* (*m*), the plaintiff alleged that he was lessee and manager of the Queen's Theatre, and that he had agreed with one Johanna Wagner to perform in his theatre for a certain time, with a condition that she should not sing or use her talents elsewhere during the term without the plaintiff's consent in writing; and the defendant, knowing these facts, and maliciously intending to injure the plaintiff as lessee and manager of the theatre, whilst the agreement with Wagner was in force, and before the expiration of the term, enticed and procured Wagner to refuse to perform, by means of which enticement and procurement of the defendant she wrongfully refused to, and did not, perform during the term. The Court held that this shewed a good cause of action in the plaintiff, and that an action lies for maliciously procuring a breach of contract to give exclusive personal service for a time certain, equally whether the employment has commenced or is only *in fieri*,

Procuring a person to break his contract.

Lumley v. *Gye*.

(*k*) *Eager* v. *Grimwood* (1847), 16 L. J. Ex. 236.
(*l*) Addison on Torts, 850.
(*m*) (1853), 2 Ell. & B. 224; 22 L. J. Q. B. 463.

provided the procurement be during the subsistence of the contract, and produces damage; and that to sustain such an action it is not necessary that the employer and employed should stand in the strict relation of master and servant. It must be taken as now clearly decided that in all cases, if no sufficient justification can be shewn, an action lies for knowingly inducing a person to break his contract with the plaintiff, and that it is immaterial whether the contract is between a master and servant or not (*n*). However, the mere procurement of a breach of contractual rights is not necessarily actionable; it must be done knowingly and without any sufficient justification (*o*), and any alleged justification must be dealt with on its merits; but the absence of actual malice or of sinister or indirect motive is no defence to the action (*p*).

Bowen v. *Hall.*

Glamorgan Coal Co. v. *South Wales Miners' Federation.*

Where a person does not actually persuade another to break a contract, but merely persuades or induces him not to enter into a contract, or not to employ a certain person, or to discharge a servant in the way he is legally entitled to discharge him, viz., by proper notice, no action ordinarily lies in respect of this, even although the defendant was acting from an improper motive, or was actuated by ill-will towards the plaintiff (*q*). If, however, a person who, by virtue of his position or influence, has power to carry out his design, prevents another from obtaining or holding employment, to his injury, by reason of threats to, or special influence upon, his employers or would-be employers, and the design is spite against such person for the purpose of compelling him to pay a debt, or any similar object not

Inducing a person not to employ another.

Allen v. *Flood.*

Giblan v. *National Labourers' Union.*

(*n*) *Bowen* v. *Hall* (1881), 6 Q. B. D. 333; 50 L. J. Q. B. 305; 44 L. T. 75; *Temperton* v. *Russell* (1883), 1 Q. B. 715; 62 L. J. Q. B. 412; 69 L. T. 78; *Read* v. *Friendly Society of Stonemasons* (1902), 2 K. B. 732; 71 L. J. K. B. 994; 87 L. T. 493.

(*o*) *Glamorgan Coal Co.* v. *South Wales Miners' Federation* (1905), A. C. 239; 74 L. J. K. B. 525; 92 L. T. 710.

(*p*) *Quinn* v. *Leathem* (1901), A. C. 495; 70 L. J. P. C. 76.

(*q*) *Allen* v. *Flood* (1898), A. C. 1; 67 L. J. Q. B. 119; 77 L. T. 717; *Boots* v. *Grundy* (1900), 82 L. T. 769; 48 W. R. 638. See also *ante*, p. 5.

directly connected with his acts, then the person guilty of such conduct is liable for the damage sustained (*r*).

Quinn v. *Leathem.*

And where there is a combination of two or more persons to injure another in any way, then there is generally an actionable wrong, for a conspiracy to injure, if there be damage, gives rise to civil liability, unless there is a sufficient justification. It is a far different and more serious matter than an invasion of civil rights by a single person. This principle is not confined to inducements to break contracts of service, for if any wrongful interference with a man's liberty of action is intended to injure, and, in fact, does injure a third person, such third person has generally a remedy by action (*s*).

Trade Disputes Act, 1906.

But the Trade Disputes Act, 1906 (*t*), has altered the law as laid down in the foregoing cases where there is a trade dispute (*u*). It enacts that an act done by any person in contemplation or furtherance of a trade dispute (*x*) shall not be actionable on the ground only that it induces some other person to break a contract of employment, or that it is an interference with the trade or business or employment of some other person or with the right of some other person to dispose of his capital or labour as he wills (*y*). It also enacts that no action shall lie against a trade union for any tort alleged to have been committed by or on behalf of the trade union (*z*); though

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(*r*) *Giblan* v. *National Amalgamated Labourers' Union* (1903), 2 K. B. 600; 72 L. J. K. B. 907; 89 L. T. 386.

(*s*) *Quinn* v. *Leathem* (1901), A. C. 495; 70 L. J.: P. C. 76; 85 L. T. 289; 50 W. R. 139; *Glamorgan Coal Co.* v. *South Wales Miners' Federation* (1905), A. C. 239; 74 L. J. K. B. 525; 92 L. T. 710.

(*t*) 6 Edw. VII. c. 41.

(*u*) "Trade dispute" means any dispute between employers and workmen or between workmen and workmen which is connected with the employment or non-employment or the terms of the employment or with the conditions of labour of any person; and "workmen" means all persons employed in trade or industry, whether or not in the employment of the employer with whom a trade dispute arises, section 5.

(*x*) See *Conway* v. *Wads* (1908), C. A. 24 T. L. R. 874.

(*y*) Section 3.

(*z*) Section, 4, thus overruling *Taff Vale Ry.* v. *Amalgamated Society of Railway Servants* (1901), A. C. 426.

the actual tort feasor is of course liable unless protected by the previous provision. It also enacts that an act in pursuance of an agreement or combination of two or more persons shall, if done in contemplation or furtherance of a trade dispute, not be actionable unless it would be actionable if done without such agreement or combination (*a*).

(*a*) Section 2.

CHAPTER VI.

OF TORTS ARISING PECULIARLY FROM NEGLIGENCE.

Many matters of negligence have incidentally been treated of in prior pages.

In the foregoing pages many matters depending on negligence have incidentally been touched on, as, for instance, particularly in the chapter on Bailments, and therein of Common Carriers, which subject mostly involves negligent breaches of duties on the part of the bailee (*a*). The design of the present chapter is to treat particularly of the subject of Negligence, introducing some matters that have been before casually mentioned, and some that have not been treated of at all.

Negligence generally, and the functions of judge and jury.

Negligence producing damage to another, is in all cases a ground of action to the party suffering thereby, provided there is some obligation on the part of the negligent person to use care. In cases tried before a judge and jury, in which negligence is alleged, it is for the judge to consider whether any evidence of negligence has been given, or if the circumstances are such that negligence may reasonably be inferred, for there may be many cases in which it is rightly said *res ipsa loquitur*, or the thing speaks for itself, *e.g.*, in the case of a collision between two trains belonging to the same railway company (*b*). If the judge, however, considers that there is no evidence of negligence, and that it is not a *res ipsa loquitur* case, he should not let the case go to the jury, but should nonsuit the plaintiff; but if he thinks there is some such evidence, or it is such a case that negligence may reasonably be inferred, then he should leave the case to the jury as a question

Res ipsa loquitur.

(*a*) As to which see *ante*, Part I. ch. iv. pp. 91–143.

(*b*) *Skinner* v. *L. B. & S. C. Ry.* (1850), 6 Ex. 787; *Kearney* v. *L. B. & S. C. Ry.* (1871), L. R. 6 Q. B. 759; 40 L. J. Q. B. 285.

of fact, subject to rules of law or of common sense, according to which the measure of culpable or actionable negligence varies as the circumstances of each particular case differ; for in some cases a person is liable only for very extreme acts of negligence, in others for very slight acts of negligence. Thus, to again refer to the subject of bailments, we have seen that a remunerated bailee is liable for ordinary negligence, while a merely voluntary bailee is liable only for acts amounting to gross negligence. A person, too, may be liable not only for acts of negligence done in his own proper person, but also by those whom he employs, under the maxim, *Qui facit per alium facit per se* (*c*); and this is only reasonable, for the person employing has the selecting of those whom he employs, and if he employs negligent, careless, or unskilful persons, it is only fair and proper that he should be liable for their negligence, carelessness, or unskilfulness. The burden of proving negligence lies on the plaintiff who alleges it, unless, indeed, the case is one that, as already explained, speaks for itself (*d*).

Mode of considering the subject.

The subject of Negligence may be conveniently considered under the following heads, viz.:—

1. Negligence causing injury to the person.
2. Negligence causing injury to property, real or personal.
3. Defences to an action for negligence.

1. Negligence causing injury to the person.

If a person, through negligent driving, runs over or otherwise injures any person, he is liable for such injury, and this equally so whether the driving is by himself or by his coachman or other servant, and whether he is at the time in the vehicle or not, provided always that, in the case of a servant being the driver, he is acting in the course of his duty; for if this is not so—as if the servant takes out the vehicle contrary to his master's orders, or without any express or implied

(*c*) See Broom's Legal Maxims, 623 *et seq.*
(*d*) *Manzoni* v. *Douglas* (1881), 6 Q. B. D. 145; 50 L. J. Q. B. 289; 29 W. R. 425.

authority to do so—then the master is not liable (*e*). If, however, the servant is out in the course of his duty, and then merely disobeys his master's instructions in some way, as by driving by a different route than that ordered, the master is liable, though it is otherwise if the servant, though originally out in the course of his duty, afterwards starts off on an independent enterprise of his own (*f*). And generally a master, or principal, is liable civilly for all his servant's or agent's acts of negligence, and other torts, committed whilst he was acting under his master's or principal's authority, or in the ordinary course of, or incidental to his employment (*g*), for *respondent superior;* but if the act complained of is not within the scope of the servant's or agent's authority, or incident to the ordinary duties of his employment, the master or principal is not liable (*h*). It is not always easy to apply this principal to particular cases, as will be seen by reference to the authorities quoted below, and to illustrate the difficulty it may be well also to take the facts in the recent case of *Abraham* v. *Bullock* (*i*). There a manufacturing jeweller had hired from the defendant, a job-master, a carriage with a horse and driver for the purpose of sending his traveller with a stock of jewels to go round to his customers. One day, while making his rounds, the traveller, having first locked the door of the carriage, went into an hotel, leaving the vehicle in charge of the driver, with a stock of jewels inside it. The driver then went into a coffee-house, leaving the carriage unattended in the street, and a thief drove it away and stole the jewels. The job-master was held liable, it

Storey v. *Ashton.*

Respondent superior.

Abraham v. *Bullock.*

(*e*) *M'Manus* v. *Crickett* (1801), 1 East, 106.

(*f*) *Storey* v. *Ashton* (1869), L. R. 4 Q. B. 476; 38 L. J. Q. B. 223; *Mitchell* v. *Crasweller* (1853), 22 L. J. C. P. 100; *Rayner* v. *Mitchell* (1877), 2 C. P. D. 357; 25 W. R. 633.

(*g*) *Ruddiman* v. *Smith* (1889), 60 L. T. 708; 37 W. R. 528.

(*h*) *Stevens* v. *Woodward* (1881), 6 Q. B. D. 318; 50 L. J. Q. B. 231; 44 L. T. 153; 29 W. R. 506; *Charleston* v. *London Tramways Co.* (1888), 36 W. R. 367; *Butler* v. *M. S. & L. Ry. Co.* (1888), 21 Q. B. D. 207; 57 L. J. Q. B. 564; 60 L. T. 89; 36 W. R. 726; *Abrahams* v. *Deakin* (1891), 60 L. J. Q. B. 238; 63 L. T. 690; *Hanson* v. *Waller* (1901), 1 Q. B. 390; 70 L. J. Q. B. 231; 84 L. T. 91.

(*i*) (1902), 86 L. T. 796; 50 W. R. 626.

being his duty to provide a driver who would act properly and carefully. But in *Cheshire* v. *Bailey* (*j*), on facts precisely similar except that the driver, during the traveller's absence at lunch, himself stole the contents of the carriage, it was held that the job-master was not liable, as he had taken reasonable care to supply a trustworthy driver, and the theft was an act outside the scope of employment. *Cheshire* v. *Bailey.*

A master or principal is not liable criminally for his servant's or agent's act, unless he directed or sanctioned the same; but he may be liable civilly for his servant's act though it was criminal in its nature, if it was done by the servant in the course of his employment, and in doing that which he believed to be for his employer's interest (*k*). Thus, if A.'s coachman, whilst driving A., wantonly runs over X., no action for damages would lie against A.; but if the coachman is driving very quickly to get A. as soon as possible to his destination, and carelessly runs over and kills X., under such circumstances that he is guilty of manslaughter, A. would be liable to an action for damages by X.'s representatives, notwithstanding that the coachman's act was criminal in its nature. Criminal act of servant. *Limpus* v. *London General Omnibus Co.*

Upon the principle *delegatus non potest delegare*, a master cannot ordinarily be liable for the negligence or misconduct of a person to whom his servant or agent has delegated his authority, or who has chosen to take upon himself the functions of such agent or servant. Thus, in one case, an omnibus-driver was ordered by a policeman to discontinue driving, as he was intoxicated, and a passer-by thereupon volunteered to drive the omnibus home. In doing so he negligently drove over and injured the plaintiff, who sued the proprietor of the omnibus, but the defendant was held not liable (*l*). Injury caused by delegate of agent. *Gwilliam* v. *Twist.*

(*j*) (1905), 1 K. B. 237; 74 L. J. K. B. 176; 92 L. T. 142.
(*k*) *Limpus* v. *London General Omnibus Co.* (1862), H. & C. 526; *Dyer* v. *Munday* (1895), 1 Q. B. 742; 64 L. J. Q. B. 448; 72 L. T. 448.
(*l*) *Gwilliam* v. *Twist* (1895), 2 Q. B. 84; 64 L. J. Q. B. 474; 72 L. T. 579. See also *Beard* v. *L. G. Omnibus Co.* (1900), 2 Q. B. 530; 69 L. J. Q. B. 895; 83 L. T. 362.

But where an effective cause of the damage is the negligence of a servant, the intervention of another person's negligence which is the proximate cause, does not excuse the master from liability (*m*).

Liability in the case of a vehicle let out.

Quarman v. *Burnett.*

Where a vehicle is let out by a job-master to a person who appoints his own coachman, here, generally speaking, the job-master is under no liability, for the coachman is not his servant, but the servant of the person to whom the vehicle is let (*n*). But where the owner of a carriage hires horses of a job-master who also provides a driver, here the job-master is liable, for the job-master in no way places the carriage and coachman under the control of the hirer, except that the hirer may indicate the destination to which he wishes to be driven (*o*). In all cases in which it is desired to make a person liable for the negligent act of another, it is, as a general rule, essential to shew that the person guilty of the negligence actually stood in the position of servant or agent to the other (*p*); but it must be noticed as an exception, that with regard to cabs plying for hire within the City of London and the liberties thereof, and the Metropolitan Police District, the Metropolitan Hackney Carriage Act, 1843 (*q*), renders the proprietor of any such vehicle liable to third persons for the negligence of the licensed driver as if the latter were his servant, although the relation of master and servant does not exist, but the real position, as between the cab owner and the driver, is that of bailor and bailee (*r*). This liability extends to all owners,

Metropolitan hackney carriages.

(*m*) *Engelhart* v. *Farrent* (1897), 1 Q. B. 240; 66 L. J. Q. B. 122; *McDowall* v. *G. W. Ry.* (1903), 2 K. B. 331; 72 L. J. K. B. 652.

(*n*) *Laugher* v. *Pointer* (1826), 5 B. & C. 547.

(*o*) *Quarman* v. *Burnett* (1840), 6 M. & W. 499; *Jones* v. *Corporation of Liverpool* (1885), 14 Q. B. D. 890; 54 L. J. Q. B. 345; 33 W. R. 551. See and compare *Jones* v. *Scullard* (1898), 2 Q. B. 565; 67 L. J. Q. B. 895; 79 L. T. 386.

(*p*) *Butler* v. *Hunter* (1867), 31 L. J. Ex. 214.

(*q*) 6 & 7 Vict. c. 86.

(*r*) *Venables* v. *Smith* (1877), 2 Q. B. D. 279; 46 L. J. Q. B. 470; 25 W. R. 584; *King* v. *London Improved Cab Co.* (1889), 23 Q. B. D. 281; 58 L. J. Q. B. 456; 61 L. T. 34; *Keen* v. *Henry* (1894), 1 Q. B. 292; 63 L. J. Q. B. 211; 69 L. T. 671.

although not actually registered as owners under the Act (*s*).

The case of a sub-contractor.

Upon the same general principle that the relation of principal and agent, or master and servant, must exist, it has been held that where a contractor for building, or other purposes, employs a sub-contractor to carry out the work, who in his turn employs his servants, the original contractor is not liable for the negligence of such servants, unless he interferes and assumes specific control (*t*). The rule is, that he who controls the work is answerable for the workman, and that the remoter employer who does not control it is not answerable (*u*). Thus in one case the defendants had contracted to lend a firm, who were engaged in loading a ship on their wharf, a crane with a man in charge of it. The man received directions from the firm in question, and the defendants had no control in the matter. The plaintiff was injured by this man's negligent working of the crane, and it was held that the defendants were not liable, for though the man remained their general servant, yet they had parted with the power of controlling him with regard to the matter on which he was engaged (*v*).

Donovan v. *Laing, Wharton, & Down's Construction Syndicate.*

Injuries done by builders.

So if a person instructs a builder, or other independent contractor, to pull down or alter his house, or do other work of a lawful and not necessarily dangerous character, he is not liable for acts of negligence committed by such person, or his servant, in the course of the doing of the work (*w*). If, however, the work the contractor is employed to do may naturally involve

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(*s*) *Gates* v. *Bill* (1902), 2 K. B. 38; 71 L. J. K. B. 702; 87 L. T. 288.

(*t*) *Cuthbertson* v. *Parsons* (1852), 12 C. B. 304; *Murray* v. *Currie* (1870), L. R. 6 C. P. 24; 40 L. J. C. P. 26.

(*u*) Pollock's Torts, 80.

(*v*) *Donovan* v. *Laing, Wharton, & Down's Construction Syndicate* (1893), 1 Q. B. 629; 63 L. J. Q. B. 25; 68 L. T. 512. This case must be carefully distinguished from the principle involved in *Quarman* v. *Burnett* (6 W. & W. 499, *ante*, p. 418). The distinction is well explained by Bowen, L.J., in *Donovan* v. *Laing, Wharton & Down's Construction Syndicate*, supra.

(*w*) *Butler* v. *Hunter* (1862), 31 L. J. Ex. 214.

Dangerous work.

Penny v. *Wimbledon District Council.*

risk or injury to another, the person instructing him to do it has a duty cast on him to see that reasonable care or skill is used by the contractor, and he will be liable for any omission in this respect in the same manner as if he were doing the work himself, for he cannot rid himself of responsibility by delegating the performance to a third person (*x*). The person who employs the contractor will also be held liable if he personally interferes (*y*), or if the work is unlawful (*z*), or if some statute imposes an obligation upon him (*a*).

Workmen's Compensation Act, 1906.

Further, by the Workmen's Compensation Act, 1906 (*b*), where any person, in the course of or for the purposes of his trade or business, employs a contractor to execute all or any part of the work undertaken by himself, the contractor's workmen can recover compensation under the Act from such principal; but the principal can in turn claim indemnity from the contractor, and the contractor alone is liable to his own workmen if he provides and uses machinery driven by mechanical power for threshing, ploughing, or other agricultural work.

Completed work.

Francis v. *Cockrell.*

If any work is actually completed, and afterwards, through the negligent way in which it has been done, an injury happens to a person, then the owner may be liable; so that, for instance, where the plaintiff paid money for the privilege of viewing races from a stand erected for that purpose, and was injured through the negligent manner in which it had been constructed, it was held that the defendant, who caused its erection and received the money for admission, was liable in respect of such injuries (*c*). If, however, money is not

(*x*) *Hughes* v. *Percival* (1853), 8 A. C. 443; 52 L. J. Q. B. 719; 49 L. T. 189; 31 W. R. 726; *Hardacre* v. *Idle District Council* (1896), 1 Q. B. 335; 65 L. J. Q. B. 363; 74 L. T. 69; *Holliday* v. *National Telephone Co* (1899), 2 Q. B. 392; 68 L. J. Q. B. 1016; 81 L. T. 252; *Penny* v. *Wimbledon District Council* (1899), 2 Q. B 72; 68 L. J. Q. B. 704; 80 L. T. 615; *The Snark* (1899), P. 74; 68 L. J. P. 22.

(*y*) *Burgess* v. *Gray* (1845), 1 C. B. 578.

(*z*) *Ellis* v. *Sheffield Gas Co.* (1853), 2 E. & B. 767.

(*a*) *Hole* v. *Sittingbourne Ry.* (1861), 6 H. & N. 488.

(*b*) 6 Edw. VII. c. 58, s. 4.

(*c*) *Francis* v. *Cockrell* (1870), L. R. 5 Q. B. 501; 39 L. J. Q. B. 291; 18 W. R. 1205. See also *John* v. *Bacon* (1870), L. R. 5 C. P. 437; 39 L. J. C. P. 365.

paid in such a case, but the persons are received as visitors, it would be the same as a man receiving visitors at his own house, as to which the law is, that they stand in the same position as mere licensees, and the host or licensor is not liable for injuries caused by defects in the construction of premises, or by their being in want of repair, nor is he liable for any injury happening from a defect of which he himself was not aware; though, if he is aware of the defect, and it is not necessarily observable, it is his duty to warn the guest, and if he fails to do so, then he will generally be liable (*d*). Guests and licensees.

If a person deposits with a carrier, or other bailee, goods of a dangerous character, and neglects to disclose to such carrier or other bailee that fact, or indeed any other special defect that exists in them, and even though it may be latent and not known to him, he is liable for the consequences (*e*); and if a person negligently entrusts any machine, implement, or animal to a person unfit to take charge of it, or to manage it, who from his unfitness does some injury, the person entrusting it to him is liable (*f*). And the same principle applies where a person negligently leaves about anything of a dangerous character, or which may do or cause injury, for he is liable for all the reasonable and probable consequences arising from his negligence (*g*). If a person keeps some animal of a naturally ferocious nature, as a lion or a bear, he is liable for any injury such animal may do; but if not naturally of such a nature—*e.g.*, a dog—then to render the owner liable for an injury done to a person, proof not only of the Liability in respect of dangerous goods. *Lynch* v. *Nurdin.* Liability in respect of animals.

(*d*) *Collis* v. *Seldon* (1868), L. R. 3 C. P. 495; *Southcote* v. *Stanley* (1856), 1 H. & N. 247; Ringwood's Torts, 125.

(*e*) *Farrant* v. *Barnes* (1862), 31 L. J. C. P. 139; *Brass* v. *Maitland* (1856), 6 E. & B. 470; *Lister* v. *L. & Y. Ry.* (1903), 1 K. B. 878; 72 L. J. K. B. 385.

(*f*) *Dixon* v. *Bell* (1816), 5 M. & S. 198.

(*g*) *Lynch* v. *Nurdin* (1841), 1 Q. B. 36. See also *Harrold* v. *Watney* (1898), 2 Q. B. 320; 67 L. J. Q. B. 771; 78 L. T. 788, where a boy, four years old, climbed on a dangerous fence abutting on a highway, and it fell and injured him, and he was held entitled to sue for damages.

animal's viciousness must be given, but also of the *scienter* or knowledge of the owner of such viciousness (*h*); and it is not sufficient to shew that the dog is ferocious to the knowledge of the defendant, but it must be shewn that the dog has a ferocious disposition directed towards mankind (*i*). Proof, however, of *scienter* in the case of injuries to "cattle" is not now necessary (*k*).

An action for negligence may be maintained quite irrespective of any privity.

Where the negligence complained of arises out of a contract, persons besides the other contracting party may, nevertheless, sometimes maintain an action in respect of it, which fact depends upon the principle that privity is not requisite to support an action *ex delicto* (*l*): thus, a medical man may be liable for the negligent treatment of his patient, although he was not called in by the patient, and was not to be remunerated by him (*m*). And where a master took a ticket for his servant to travel by rail with him, it was held that the servant might maintain an action in his own name for the loss of his luggage (*n*). In one case, where the servant took his own ticket, for which, however, the master paid, it was held that the master might sue for the loss of certain liveries the property of the master, but which formed part of the servant's personal luggage (*o*).

Meux v. *G. E. Ry. Co.*

Injuries from nuisances.

Nuisances arising from negligence frequently cause direct injury to the person; *e.g.*, if in the course of necessary excavations in public roads, a heap of stones is left lying there, this constitutes a nuisance, and a person falling over such stones and being thereby injured has a right of action in respect of this mis-

(*h*) *Sanders* v. *Teape* (1884), 51 L. T. 263; 48 L. P. 757; *Barnes* v. *Lucille* (1907), 96 L. T. 680.

(*i*) *Osborne* v. *Choequeel* (1896), 2 Q. B. 109; 65 L. J. Q. B. 534; 74 L. T. 786; *Barnes* v. *Lucille* (1907), 96 L. T. 680.

(*k*) 6 Edw. VII. c. 32; see hereon *ante*, pp. 354, 355.

(*l*) *Ante*, p. 323 and cases there cited.

(*m*) *Gladwell* v. *Steggall* (1839), 5 Bing. N. C. 733.

(*n*) *Marshall* v. *York, &c. Ry. Co.* (1852), 21 L. J. C. P. 34.

(*o*) *Meux* v. *G. E. Ry. Co.* (1895), 2 Q. B. 387; 64 L. J. Q. B. 657; 73 L. T. 247.

feasance (*p*). But no action will lie against a road authority for an injury caused by a mere omission to keep the road in repair (*q*). And although a man has certainly a right within due bounds to do what he likes on his own property, yet if he has dangerous holes, shafts, pits, or wells thereon, or in some way there is a danger which he is or ought to be aware of (*r*), it is his duty to protect any one coming lawfully on his premises by his invitation, express or implied, for the purpose of doing work, or for some other purpose that is or may enure for their mutual benefit. If therefore a person so lawfully coming thereon, through not being properly warned, guarded, and protected against the danger, is injured thereby, the proprietor is liable, unless the person with due caution or care might have himself prevented the accident (*s*). In such case a person has a greater duty thrown upon him than he has as regards mere guests or licensees, although even as to them if the danger is not apparent, and it is known to the proprietor of the premises, there is a duty cast on him to warn the guest or licensee (*t*).

Injuries arising from dangerous places.

Doctrine of invitation.

Contrast with position as to licensees.

The Highway Act, 1835 (*u*), makes it unlawful for any person to sink a pit or shaft, or to erect or cause to be erected any steam-engine, gin, or other like machine, or any machinery attached thereto, within the distance of twenty-five yards, and a windmill within fifty yards, and furnaces within fifteen yards, from any part of any carriage-way, or cart-way or turnpike road, unless the same shall be within some house, building, wall, or fence sufficient to screen the same from such way or road, so as to make it not dangerous to passengers,

Liability for an injury arising from an engine, &c., erected near a public road.

(*p*) See *Ellis* v. *Sheffield Gas Co.* (1853), 2 E. & B. 767; *Shoreditch Corporation* v. *Bull* (1904), 2 K. B. 756; 90 L. T. 210.

(*q*) *Cowley* v. *Newmarket Local Board* (1892), A. C. 345; 67 L. T. 486; *Oliver* v. *Horsham Local Board* (1894), 1 Q. B. 332; 63 L. J. Q. B. 181; 70 L. T. 206.

(*r*) *Wright* v. *Lefever* (1903), 51 W. R. 149.

(*s*) *Indermaur* v. *Dames* (1877), L. R. 2 P. C. 211; 36 L. J. C. P. 181; *Burchell* v. *Hickisson* (1880), 50 L. J. Q. B. 101; Ringwood's Torts, 120.

(*t*) See *ante*, p. 421.

(*u*) 5 & 6 Wm. IV. c. 50, s. 70, extended by 27 & 28 Vict. c. 75.

Unfenced quarry.

horses, or cattle. By the Quarry Fencing Act, 1887 (*x*), where any quarry dangerous to the public is in open or unenclosed land within fifty yards of a highway, and is not separated therefrom by a secure and sufficient fence, it must be kept reasonably fenced for the prevention of accidents. Within these prescribed distances it is no answer to an action to shew that the person injured was a trespasser at the time he sustained the injury. Subject, however, to the foregoing, a person is not liable for an injury from a defect or danger on his premises happening to one who is a trespasser at the time (*y*).

Position of trespassers.

Where an injury done by several, one or all may be sued.

Where the injury complained of is caused by the negligence of several persons, the party injured may maintain his action against any one or more of them (*z*); and if he chooses to sue only one of them, that one has no right of contribution against the other or others, although such other or others may have been equally guilty with him (unless, indeed, it is some negligence arising out of contract), for there is no contribution between wrongdoers, the rule being *Ex turpi causâ non oritur actio* (*a*).

Merryweather v. *Nixan.*

The liability of carriers of passengers depends entirely upon the question of negligence.

The liability of carriers of passengers for injuries happening to them in the course of the carrying turns entirely upon the point of negligence, their duty and contract being to carry safely and securely so far as by reasonable care and forethought is possible, and if they in any way fail in this they are liable—in other words, they are not insurers of the safety of their passengers (*b*). Negligence therefore must be proved; but in the case of injuries arising from collisions or other similar occurrences, if the vehicle is, at the time of the injury being done, under the control of the carrier, negligence is *primâ facie* presumed from the very circumstance, and

(*x*) 50 & 51 Vict. c. 19, s. 3.

(*y*) See, however, as to the setting of man-traps, spring-traps, dog-traps, &c., Addison on Torts, 164.

(*z*) *Moreton* v. *Hardern* (1825), 4 B. & C. 223.

(*a*) *Merryweather* v. *Nixan* (1799), 1 S. L. C. 398; 8 T. R. 186; see also *ante*, pp. 326, 327, and exception there mentioned as occurring under the Directors Liability Act, 1890 (53 & 54 Vict. c. 64, s. 5).

(*b*) *Ante*, pp. 137, 138.

the onus of proof will be on the carrier to shew that there was really no negligence on his part (*c*). In many cases of injuries to passengers, the carrier is not liable because the injury cannot be properly said to be caused by his negligence, for he does not warrant a passenger's safety, and when he has done everything that prudence can suggest, an accident may still happen; thus there may be some latent defect in the vehicle which causes the accident, and which it was impossible, with the exercise of all due care, caution, and skill, to have discovered (*d*). On the other hand, with regard to any injury which can be shewn to have happened to a passenger directly by reason of the carrier's negligence, the carrier is liable; *e.g.*, if a railway company's servants put a known lunatic, or a known biting dog, or men known to be drunk or quarrelsome, into a carriage with one of the ordinary public who is injured thereby (*e*). But the injury that occurs to a passenger must be connected with the negligence complained of, for if it cannot be so connected, then the damage is too remote. Thus where the plaintiff claimed damages for the loss of money stolen from his person while travelling in a train of the defendant railway company, founding his claim on two grounds, viz.: (1) negligence of the railway company in not detaining the train when requested to do so, in order to enable the plaintiff to give the men into custody and have them searched; and (2) negligence in permitting overcrowding, and thus facilitating the hustling and robbery of the plaintiff—the House of Lords held that the railway company was not liable (*f*).

Redhead v. *Midland Ry. Co.*

Cobb v. *Great Western Ry.*

(*c*) *Flannery* v. *Waterford & Limerick Ry. Co.* (1877), 11 Ir. Reps. (C. L.) 30. As to what will be evidence of negligence, see *Slattery* v. *Dublin, &c. Ry. Co.* (1878), 3 A. C. 1166.

(*d*) *Redhead* v. *Midland Ry. Co.* (1869), L. R. 4 Q. B. 379; 38 L. J. Q. B. 169. As to the warranty that is implied when a vehicle is let out, that it is fit for the purpose, see *Hyman* v. *Nye* (1881), 6 Q. B. D. 685, See also as to implied warranties, *ante*, pp. 111–113.

(*e*) Per Smith, L.J., in *Pounder* v. *North-Eastern Ry. Co.* (1892), 1 Q. B. 385; 61 L. J. Q. B. 136; 65 L. T. 679.

(*f*) *Cobb* v. *Great Western Ry.* (1893), 1 Q. B. 459; 62 L. J. Q. B. 336, 68 L. T. 483. The decision in the earlier case of *Pounder* v. *North-Eastern Ry.* (1892), 1 Q. B. 385; 61 L. J. Q. B. 136; 65 L. T. 679, is on the same point; but it may well be doubted if the principle

Actio personalis moritur cum personâ

Although a person has always had a right of action for an injury done to him through the negligence of another, yet, if the injury was so extreme as to actually cause his death, the person guilty of or responsible for the negligence escaped from his liability to an action, upon the principle that the action was personal to the individual, and he having died, there was no one to maintain it, the right to bring it having ended with his decease; the maxim being, *Actio personalis moritur cum personâ* (*g*). The law upon this point has, however, been altered by the Fatal Accidents Act, 1846, entituled "An Act for compensating the families of persons killed by accidents" (*h*).

Provisions of the Fatal Accidents Act, 1846.

By that Act: "Whensoever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the person injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to a felony" (*i*). Every such action, the Act provides, shall be brought by the executor or administrator of the person deceased within twelve calendar months after the death (*j*); and shall be for

Time for bringing actions, &c.

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was rightly applied in that case, and in *Cobb* v. *Great Western Ry.* Lords Selborne and Morris expressed their dissent from the decision in *Pounder* v. *North-Eastern Ry.*

(*g*) See Broom's Legal Maxims, 681 *et seq.*

(*h*) 9 & 10 Vict. c. 93 (frequently quoted as "Lord Campbell's Act," amended by 27 & 28 Vict. c. 95). The provisions of these Acts constitute a great exception to the maxim, *Actio personalis moritur cum personâ;* but see other exceptions, *ante*, pp. 6–8. See also the Employers Liability Act, 1880, and the Workmen's Compensation Act, 1906, *post*, pp. 430, 434.

(*i*) 9 & 10 Vict. c. 93, s. 1. This Act has been held to apply to aliens, *e.g.*, a Norwegian sailor killed by a collision between a foreign and a British ship on the high seas (*Davidson* v. *Hill* (1901), 2 K. B. 606; 70 L. J. K. B. 788; 85 L. T. 118).

(*j*) 9 & 10 Vict. c. 93, ss. 2, 3. If the action is against a public authority, it must now be brought within six months, by the Public Authorities Protection Act, 1893, sect. 1 (a); as to which see *ante*, pp. 374, 375 (*Markey* v. *Tolworth District Board* (1900), 2 Q. B. 454; 69

the benefit of the wife, husband, parent (which term is to include father, mother, grandfather, grandmother, stepfather, stepmother), and child (which term is to include son, daughter, grandson, granddaughter, stepson, and stepdaughter) of the deceased (*k*). Only one action is to be brought in respect of the same subject-matter of complaint (*l*), and the plaintiff must deliver to the defendant, or his solicitor, full particulars of the person or persons for the benefit of whom the action is brought, and of the nature of the claim in respect of which damages are sought to be recovered (*m*). All damages awarded, after deducting any costs not recovered from the defendant, are to be divided amongst the before-mentioned relatives in such shares as shall be found and directed by the jury (*n*).

Amendment of the Act, by 27 & 28 Vict. c. 95.

By an amending statute (*o*), if there is no executor or administrator of the deceased, or if the action is not brought by such executor or administrator within six calendar months after the death, then it may be brought in the name or names of all or any of the persons for whose benefit the executor or administrator would have sued. And it has been held that an action can, under this provision, be maintained by any of such persons, though brought within six calendar months of the death, if there be at the time no executor or administrator of the deceased (*p*).

No action lies by deceased's representatives if he could not have sued.

No action can be maintained under the Fatal Accidents Act, 1846, where the deceased, if he had survived, would not have been able to recover; so that where a person entered into a contract with a steam-packet company, under which he became a passenger,

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L. J. Q. B. 738; 83 L. P. 28); *Williams* v. *Mersey Docks* (1905), 1 K. B. 804; 74 L. J. K. B. 481.

(*k*) 9 & 10 Vict. c. 93, ss. 2. 5. The expression "child" in this Act does not include an illegitimate child (*Dickinson* v. *North-Eastern Ry. Co.* (1864), 33 L. J. Ex. 91).

(*l*) 9 & 10 Vict. c. 93, s. 3.

(*m*) Sect. 4. (*n*) Sect. 2.

(*o*) 27 & 28 Vict. c. 95, s. 1.

(*p*) *Holleran* v. *Bagnell* (1879), 4 L. R. Ir. 740.

and which contract provided that the company should not be liable for injuries happening from perils of the sea or default of a pilot or master, and the ship came into collision with another vessel, and the passenger was drowned, it was decided that, as he could not have recovered for any injury had he lived, neither could his personal representatives sue in respect of the damage caused by his death (*q*).

The general rules of law apply.

All the general rules of law which govern ordinary actions for negligence by the person actually injured, apply to this kind of action; so that, for instance, where by reason of the person's contributory negligence (*r*) he could not have himself maintained any action, neither can his representatives (*s*). If the deceased has during his lifetime brought an action and recovered damages for the injury done to him, or has made some arrangement with the causer or causers of the injury, for compensation to him, and received satisfaction thereunder, no action can be brought under the Fatal Accidents Act, 1846, for that statute does not give any new cause of action, but merely substitutes the right of the representatives to sue in place of the deceased (*t*).

No action can be brought if the deceased has during his lifetime received compensation.

Injury from train overshooting platform.

If a person travelling by rail, thinking, on the train stopping, that it has arrived at his station and that he should therefore alight, does so, and by reason of its having overshot the platform, or otherwise, he is thereby injured, the company are liable if he had fair reason for believing that it was at the station, and that he might and ought to get out (*u*). And even if

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(*q*) *Haigh* v. *Royal Mail Steam Packet Co.* (1883), 52 L. J. Q. B. 640; 49 L. T. 802; 48 J. P. 230.

(*r*) Contributory negligence is dealt with *post*, pp. 447–450.

(*s*) *Watling* v. *Oastler* (1871), L. R. 6 Ex. 73; see judgment in *Pryor* v. *Great Northern Ry. Co.* (1868), 2 B. & S. 767.

(*t*) *Read* v. *Great Eastern Ry. Co.* (1868), L. R. 3 Q. B. 555; 16 W. R. 1040. As to the damages recoverable in an action under the Fatal Accidents Act, 1846, see *post*, pp. 470, 471.

(*u*) *Foy* v. *London, Brighton & South Coast Ry. Co.* (1865), 18 C. B. (N. S.) 225; *Cockle* v. *South-Eastern Ry. Co.* (1872), L. R. 7 C. P. 331; 41 L. J. C. P. 140; *Ross* v. *N. E. Ry.* (1876), 2 Ex. D. 248; *Robson* v. *North-Eastern Ry. Co.* (1877), 2 Q. B. D. 85; 46 L. J. Q. B. 50.

the passenger sees the danger, but is justified in believing that the train is about to move on without being backed, or without any official coming to his assistance, he is justified in descending, using due care, and if he is injured the company may be liable (*v*).

A master was not formerly liable for an injury done to a servant by another servant acting in a common employment.

It has been pointed out (*x*) that a person is fully liable for the acts of those whom the law denominates his servants, under the maxim, *Qui facit per alium facit per se*, but to this rule there has been until lately one very important exception, which still exists to a certain extent, viz., that if a person injured was also a servant acting in the course of a common employment with the servant guilty of the negligence, here the master was under no liability (*y*). The reasoning upon which this exception was founded was this: that the servant in entering on his employment, saw and contemplated all the risks he would or might run, and agreed to include them all in his wages, and also that he has identified himself with the other servants acting in the common employment; so that just as where an injury to a servant has happened through his own negligence he can have no remedy against his employer, so although the injury does not happen to him but to his fellow servant, yet it is just the same (*z*). In all such cases as this, however, it is manifestly the duty of the master to provide competent fellow servants, and proper tackle and machinery for the servants to work with, and in so far as he fails in doing this, and through his not doing so the injury occurs, he will be as liable as if the person had been a stranger (*a*),

Reason of this.

The words "common employment" used in the pre-

(*v*) *Robson* v. *North-Eastern Ry. Co.*, *ante*, p. 428.

(*x*) *Ante*, pp. 415–417.

(*y*) *Priestley* v. *Fowler* (1837), 3 M. & W. 1; *Winterbottom* v. *Wright* (1842), 10 M. & W. 109; *Tunney* v. *Midland Ry. Co.* (1866), L. R. 1 C. P. 290.

(*z*) See *Hutchinson* v. *York, &c. Ry. Co* (1850), 5 Ex. 351; *Burtonshill Coal Co.* v. *Reid* (1860), 3 Macq. H. L. 266; *Lovell* v. *Howell* (1876), 1 C. P. D. 161; 45 L. J. C. P. 387.

(*a*) *Wilson* v. *Merry* (1868), L. R. 1 Scotch App. 326; *Roberts* v. *Smith* (1857), 26 L. J. Ex. 319; *Senior* v. *Ward* (1849), 18 L. J. Q. B. 139.

The servants must, however, be acting in a common employment.

ceding paragraph will have been noticed by the student, and from them he must understand that if, although the persons are fellow servants, yet they are not acting in the course of a common employment, *i.e.*, are not employed in duties of something of the like nature, the exception will not apply, and the master will still be liable (*b*). But though servants may occupy totally different grades, yet they may be properly said to be acting in a common employment if engaged in or about the same thing; thus, in one case it was held that the master of a ship is engaged in a common employment with the seamen on board (*c*). There is common employment if the safety of one servant, in the ordinary and natural course of things, depends on the art and skill of the others (*d*).

Provisions of Employers Liability Act, 1880.

However, this former important exception of liability has, to a great extent, been done away with by the Employers Liability Act, 1880 (*e*). This Act provides (*f*) that where, after 1st January, 1881, personal injury is caused to a workman (*g*) by reason of: (1) Any defect in the condition of the ways (*h*), works (*i*), machinery (*j*),

(*b*) *Smith* v. *Steele* (1875), L. R. 10 Q. B. 125; and see *Wilson* v. *Merry*, supra; *Lovell* v. *Howell* (1876), 1 C. P. D. 161; 45 L. J. C. P. 387; *Conway* v. *Belfast Ry. Co.* (1877), 11 Ir. Reps. (C. P.) 345. See also *Johnson* v. *Lindsay* (1891), A. C. 371; 65 L. T. 97, in which case it was held that if a contractor sublets a portion of his work under the contract, the sub-contractor is liable for an injury caused by one of his workmen to a workman of the original contractor.

(*c*) *Hedley* v. *Pinkney & Son's Steamship Co.* (1894), A. C. 222; 63 L. J. Q. B. 419; 70 L. T. 630.

(*d*) Per Blackburn, J., in *Morgan* v. *Vale of Neath Ry.* (1864), 5 B. & S. at p. 580.

(*e*) 43 & 44 Vict. c. 42.

(*f*) Sect. 1.

(*g*) By sec. 8, "workman" in this Act means any railway servant, and any labourer, servant in husbandry, journeyman, artificer, handicraftsman, miner, or person otherwise engaged in manual labour (not being a seaman or a menial or domestic servant). It does not include an omnibus conductor (*Morgan* v. *London General Omnibus Co.* (1884), 13 Q. B. D. 852); 53 L. J. Q. B. 352), or a tram driver (*Cook* v. *North Met. Tramway Co.* (1887), 56 L. J. Q. B. 309) or a grocer's assistant (*Bound* v. *Lawrence* (1892), 1 Q. B. 226; 61 L. J. M. C. 21).

(*h*) See *M'Giffin* v. *Palmer's Shipbuilding Co.* (1883), 10 Q. B. D. 5; 52 L. J. Q. B. 25; 47 L. T. 346; 31 W. R. 118.

(*i*) This means works already completed, and not works in course of construction (*Howe* v. *Finch* (1886), 17 Q. B. D. 187; 34 W. R. 593).

(*j*) This includes original unsuitability of machinery (*Heske* v. *Samuelson* (1884), 12 Q. B. D. 30; 53 L. J. Q. B. 45; 49 L. T. 474;

or plant (*k*) connected with or used in the business of the employer (*l*); (2) The negligence of any person in the service of the employer who has any superintendence entrusted to him whilst in the exercise of such superintendence (*m*); (3) The negligence of any person in the service of the employer to whose orders or directions the workman at the time of the injury was bound to conform (*n*), and did conform, where such injury resulted from his having so conformed; (4) The act or omission of any person in the service of the employer done or made in obedience to the rules or bylaws of the employer, or in obedience to particular instructions given by any person delegated with the authority of the employer in that behalf (*o*); (5) The negligence of any person in the service of the employer who has the charge or control (*p*) of any signal-points, locomotive engine, or train upon a railway (*q*)—the workman, or in case the injury results in death, the legal personal representatives of the workman, and any persons entitled in the case of death, shall have the same right of compensation and remedies against the employer as if the

Cripps v. *Judge* (1884), 13 Q. B. D. 582; 53 L. J. Q. B. 517; 51 L. T. 182; *Paley* v. *Garnett* (1886), 16 Q. B. D. 52; 34 W. R. 295). It also includes a machine which, though effective, is dangerous to the workman using it (*Morgan* v. *Hutchins* (1890), 59 L. J. Q. B. 197; 38 W. R. 412).

(*k*) See *Yarmouth* v. *France* (1888), 18 Q. B. D. 647; 57 L. J. Q. B. 7, where a horse was under the circumstances held to be "plant."

(*l*) See as to what will or will not be such a defect, *Thomas* v. *Quartermaine* (1887), 18 Q. B. D. 685; 56 L. J. Q. B. 340.

(*m*) See *Schaffers* v. *General Steam Navigation Co.* (1883), 10 Q. B. D. 356; 52 L. J. Q. B. 260; 48 L. T. 228; *Osborne* v. *Jackson* (1883), 11 Q. B. D. 619; 48 L. T. 642; *Kellard* v. *Rooke* (1888), 21 Q. B. D. 367; 57 L. J. Q. B. 599.

(*n*) As to this expression see *Bunker* v. *Midland Ry. Co.* (1882), 31 W. R. 231; 47 L. T. 476; *Milward* v. *Midland Ry. Co.* (1885), 14 Q. B. D. 68; 54 L. J. Q. B. 282; 52 L. T. 255; *Wyld* v. *Waygood* (1892), 1 Q. B. 783; 61 L. J. Q. B. 391; 65 L. T. 710.

(*o*) See *Whatley* v. *Holloway* (1890), 62 L. T. 639.

(*p*) See *Gibbs* v. *G. W. Ry. Co.* (1884), 12 Q. B. D. 208; 53 L. J. Q. B. 543; 50 L. T. 7; *Cox* v. *G. W. Ry. Co.* (1882), 9 Q. B. D. 106; 30 W. R. 816.

(*q*) This has been held to include a temporary railway laid down by a contractor for the purpose of the construction of works (*Doughty* v. *Firbank* (1883), 10 Q. B. D. 358; 52 L. J. Q. B. 490; 48 L. T. 530); but a steam-crane fixed on a trolly, and propelled by steam along a set of rails when it is desired to move it, has been held not to be a locomotive engine within the above provisions (*Murphy* v. *Wilson* (1883), 52 L. J. Q. B. 524; 48 L. T. 788).

Proviso by sect. 2.

workman had not been a workman of, nor in the service of, the employer, nor engaged in his work (*r*). But a workman is not entitled, under this Act, to any compensation or remedy against the employer, in any of the following cases, viz.: (1) Under provision above numbered (1), unless the defect therein mentioned arose from, or had not been discovered or remedied owing to, the negligence of the employer, or of some person in the service of the employer, and entrusted by him with the duty of seeing that the ways, works, machinery, or plant were in proper condition; (2) Under provision above numbered (4), unless the injury resulted from some impropriety or defect in the rules, bylaws, or instructions therein mentioned, provided that where a rule or bylaw has been approved of or has been accepted as a proper rule or bylaw by a Principal Secretary of State, or by the Board of Trade, or any other department of the Government under or by virtue of any Act of Parliament, it shall not be deemed an improper or defective rule or bylaw; (3) In any case where the workman knew of the defect or negligence which caused his injury, and failed within a reasonable time to give, or cause to be given, information thereof to the employer or some person superior to himself in the service of the employer, unless he was aware that the employer or such superior already knew of such defect or negligence (*s*). If a servant, knowing of any defect, and appreciating the danger and the risk (*t*), yet consents to encounter them, and continues to work, and by reason of the defect is injured, no action lies against the employer, upon the principle *Volenti non fit injuria*. Mere knowledge of a risk, however, is not sufficient to make this principle of *Volenti non fit injuria* apply, but there must be a consent shewn, though such consent may be inferred from the course of conduct, so that it is by no means always easy to apply the principle to particular cases (*u*). Where a defect consists of the omission by

Volenti non fit injuria.

(*r*) 43 & 44 Vict. c. 42, s. 1.
(*s*) 43 & 44 Vict. c. 42, s. 2.
(*t*) See *Brooke* v. *Ramsden* (1891), 63 L. T. 287.
(*u*) *Smith* v. *Baker* (1891), A. C. 325; 60 L. J. Q. B. 683; 65 L. T.

the employer of a duty imposed upon him by statute for the protection of his servants, the master must, however, always be liable (*x*), and this even although a penalty is imposed for breach of the statutory duty (*y*).

Amount recoverable and mode of procedure.

The amount of compensation that can be recovered under this Act is limited to such sum as may be found to be equivalent to the estimated earnings during the three years preceding the injury, of a person in the same grade employed during those years in the like employment, and in the district in which the workman is employed at the time of the injury (*z*); but this provision does not lay down a measure of damages, but simply limits the maximum damages recoverable (*a*). Every action under the Act must be brought in the County Court, but may, on application of either plaintiff or defendant, be removed into the High Court (*b*).

Notice of injury.

To entitle a person to maintain an action under this Act, notice of the injury must be given within six weeks of its happening, and such notice must give the name and address of the person injured, the cause of the injury, and the date at which it was sustained, and it must be served on the employer, or sent by registered post. Such notice, however, is not to be deemed invalid by reason of any defect or inaccuracy therein, unless the judge who tries the case is of opinion that the defendant in the action is prejudiced thereby in his defence, and that the defect or inaccuracy was for the purpose of misleading (*c*). The action must be com-

467; *Yarmouth* v. *France* (1888), 18 Q. B. D. 640; 57 L. J. Q. B. 7; *Williams* v. *Birmingham Battery & Metal Co.* (1899), 2 Q. B. 328; 68 L. J. Q. B. 918; 81 L. T. 62.

(*x*) *Baddeley* v. *Granville* (1887), 19 Q. B. D. 423; 56 L. J. Q. B. 501; 57 L. T. 268; 36 W. R. 63.

(*y*) *Groves* v. *Lord Wimborne* (1898), 2 Q. B. 402; 67 L. J. Q. B. 862; 79 L. T. 284.

(*z*) 43 & 44 Vict. c. 42, s. 3.

(*a*) *Bortick* v. *Head* (1886), 34 W. R. 102; 53 L. T. 909.

(*b*) 43 & 44 Vict. c. 42, s. 6. It lies upon the party making such application to show distinctly that the case comes within the statute (*Hanrahan* v. *Limerick Steamship Co.* (1885), 18 L. R. Ir. 135).

(*c*) 43 & 44 Vict. c. 42, ss. 4-7; *Carter* v. *Drysdale* (1884), 12 Q. B. D. 91; 53 L. J. Q. B. D. 537; 32 W. R. 171.

Time for bringing action.

menced within six months from the injury, or, in case of death, within twelve months from the death. In case of death, however, the omission to have given such notice is to be no bar to the institution of the action, if the judge shall be of opinion that there was reasonable excuse for such want of notice (*d*). The notice must be in writing (*e*), but need not be in technical language (*f*).

Workmen may contract themselves out of Act.

A workman can lawfully contract with his employer that neither he nor his representatives will claim compensation under the Act (*g*).

The Workmen's Compensation Act, 1906.

A further and very comprehensive statute has now also been passed in connection with this subject, viz., the Workmen's Compensation Act, 1906 (*h*). In the cases to which it applies, it practically abolishes the defences of inevitable accident, *volenti non fit injuria*, contributory negligence, and contracting out, which can be raised to a claim under the Employers Liability Act. This 1906 Act applies to a workman, defined as any person who has entered into or works under a contract of service or apprenticeship with an employer (whether by way of manual labour, clerical work, or otherwise, and whether the contract is expressed or implied, is oral or in writing), but excluding (1) any person not employed in manual labour whose remuneration exceeds £250 a year; (2) a casual employee for purposes other than the employer's trade or business; (3) policemen; (4) out-workers; and (5) members of the employer's family living in his house (*i*). This 1906 Act makes the employer liable to pay compensation if personal injury by accident (*k*) arising out of and

To whom it applies.

Compensation.

(*d*) 43 & 44 Vict. c. 42, ss. 4–7.

(*e*) *Moyle* v. *Jenkins* (1882), 8 Q. B. D. 116; 51 L. J. Q. B. 112. See as to what may be a sufficient notice in writing, *Thomson* v. *Robertson* (1886), 22 Sc. L. R. 97.

(*f*) *Stone* v. *Hyde* (1882), 9 Q. B. D. 76; 51 L. J. Q. B. 453.

(*g*) *Griffiths* v. *Earl Dudley* (1882), 9 Q. B. D. 357; 51 L. J. Q. B. 543.

(*h*) 6 Edw. VII. c. 58. It came into operation on 1 July, 1907, and repealed the previous Acts of 1897 and 1900.

(*i*) Section 13. Seamen (sec. 7), and domestic servants, are within the Act.

(*k*) The word *accident* is to be regarded as used in its popular sense and not in an arbitrary, technical, legal or contractual sense (*Fenton*

in the course of the employment is caused to a workman (*l*). But the employer is not liable unless the injury disables the workman for at least one week from earning his full wages (*m*); and if the incapacity lasts less than two weeks, no compensation is payable for the first week (*n*). If it is proved that the injury to a workman is attributable to his serious and wilful misconduct, no compensation can be had unless the injury results in death or serious and permanent disablement (*o*). If the injury was caused by the personal negligence or wilful act of the employer or of some person for whom the employer is responsible, the workman may either claim compensation under the Act or take proceedings independently of the Act; but if the Act applies, the employer is not liable both under the Act and independently of it, and is not liable to independent proceedings except as in this sentence stated(*p*). Compensation is not recoverable under the Act—unless (1) notice (*q*) of the accident is given as soon as practicable and before the workman has voluntarily left the employment; but the want of, or any defect or inaccuracy in, such notice shall not be a bar to proceedings if the employer is not prejudiced thereby in his defence, or if such want, defect, or inaccuracy was occasioned by mistake or absence from the kingdom or other reasonable cause; and unless (2) the claim is made within six months of the injury, or in the case of death, within six months from the death (*r*), or it is shewn

Notice.

Time for claim.

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v. *Thorley* (1903), A. C. 443; 72 L. J. K. B. 787), *e.g.*, it includes death by lightning of a man working in an exposed position (*Andrews* v. *Failsworth* (1904), 2 K. B. 32); but the accident must be caused as a definite event at a definite time (*Steel* v. *Cammell* (1905), 2 K. B. 232; 74 L. J. K. B. 610). It also includes "industrial" diseases, section 8.

(*l*) 6 Edw. VII. c. 58, s. 1. (*m*) Ibid., sec. 1 (2).

(*n*) Ibid., schedule 1 (1b).

(*o*) Ibid., sec. 1 (2). (*p*) Ibid., sec. 1 (2b).

(*q*) The notice must give the name and address of the person injured and, in ordinary language, the cause and date of the injury; it may be served on the employer personally or by delivering it at or sending it by registered letter to the employer's residence or place of business, ibid., sec. 2 (2, 3, 4).

(*r*) This applies notwithstanding the employer has since the accident voluntarily made such payments as could have been recovered under the Act (*Randall* v. *Hill's Dry Dock Co.* (1900), 2 Q. B. 245; 69 L. J. Q. B. 554; 82 L. T. 521).

that failure to make the claim within that time was occasioned by mistake, absence from the kingdom, or other reasonable cause (*s*). The Act is to apply notwithstanding any contract made after its commencement, subject to a power conferred on the Registrar of Friendly Societies to certify that a scheme for compensation or insurance of workmen is not less favourable to the workmen than the Act, and that, if the workmen contribute, the scheme gives them benefits at least equal to those contributions in addition to what the Act gives them, and that a majority of the workmen decide by ballot in favour of the scheme, in which case a contract that the scheme shall apply instead of the Act, is allowed until the certificate is revoked; and any such certificate may be given to expire at the end of a limited period, not less than five years (*t*). If any person in the course of or for the purposes of his trade or business (styled in the Act "the principal") contracts with any other person to execute all or any part of any work undertaken by the principal, the contractor's workmen can recover compensation under the Act from such principal or from the contractor, but without prejudice to the principal's right to be indemnified by the contractor (*u*). The first schedule to the Act prescribes the scale and conditions of compensation, and the compensation is to be as follows:—If the workman leaves persons totally dependent on him, a sum equal to his earnings during the last three years, or £150, whichever is the larger, but not more than £300. If he has not been in the employ three years, then the amount of his earnings during the last three years shall be deemed to be 156 times his average weekly earnings. If the workman does not leave persons wholly dependent on him, but only partly dependent, such a sum as may be agreed on, or determined by arbitration to be reasonable and proportionate to their loss, not exceeding the amount before mentioned. If

No contracting out.

Sub-contracting.

Scale and conditions of compensation.

(*s*) 6 Edw. VII. c. 58, sec. 2.
(*t*) Ibid., ss. 3, 9, 15.
(*u*) Ibid., sec. 4.

the workman leaves no person dependent on him, the reasonable expenses of his medical attendance and burial, not exceeding £10. Where the workman is injured, but death does not ensue, a weekly payment during incapacity after the first week, not exceeding 50 per cent. of his average weekly earnings during the previous twelve months if he has been employed so long, but if not, then for any less period, such weekly payment not to exceed £1. If the workman is an infant at the date of the injury, and his average weekly earnings are less than £1, during total incapacity the weekly payment is to be such average weekly earnings, but in no case is to exceed ten shillings. The schedule gives four rules for ascertaining average weekly earnings (*v*). Dependants are defined in section 13, and include illegitimate children (*w*). If a dependant makes a claim under the Act, but dies before anything further is done, the statutory right to recover compensation passes to his personal representative and is not barred by the maxim, *Actio personalis moritur cum persona* (*x*).

Mode of settling disputes.

The second schedule contains provisions for settling disputes under the Act by arbitration, it being provided (*y*) that all disputes shall be settled in this way. This schedule contains the details as regards such arbitrations, and provides that the Arbitration Act, 1889, shall not apply, and that an arbitrator may, if he think fit, submit any question of law for the decision of a County Court judge, and the decision of such judge shall be final unless within the time, and in accordance with the conditions prescribed by rules of the Supreme Court, either party appeals to the Court of Appeal (*z*). Finally, it may be noticed that any contract existing at the commencement of the Act,

(*v*) See *Perry* v. *Wright* (1908), 1 K. B. 441; 77 L. J. K. B. 236; *Penn* v. *Spiers and Pond* (1908), 1 K. B. 766; 77 L. J. K. B. 542.

(*w*) As to dependants, see *Kelly* v. *Hopkins* (1908), 2 Ir. R. 84; *Davis* v. *Main Colliery* (1900), A. C. 358; *Rees* v. *Penrikyher Navigation Colliery Co.* (1903), 1 K. B. 259; *French* v. *Underwood* (1903), 19 T. L. R. 416; *Howells* v. *Vivian* (1902), 85 L. T. 529.

(*x*) *Darlington* v. *Roscoe* (1907), 1 K. B. 219; 76 L. J. K. B. 371; 96 L. T. 179.

(*y*) 6 Edw. VII. c. 58, sec. 1 (3).

(*z*) See Order viii. rule 20 as to appeals.

excluding a right to compensation, shall not be deemed to continue after the time at which the workman's contract of service would determine if notice of the determination thereof were given at the commencement of the Act; and that certified schemes in force at the commencement of the Act cease to operate unless re-certified within six months after that date (*a*).

Choice of remedies.

In the case of injuries done to servants or employees it is now necessary, therefore, before commencing any proceedings, to consider whether they shall be brought (1) by a common law action, (2) under the Employers Liability Act, 1880, or (3) under the Workmen's Compensation Act, 1906. This 1906 Act provides that if, instead of proceeding under its provisions, an action is brought within the time for making a claim under that Act, and it is determined that the injury is one for which the employer is not liable in such action, but that he would have been liable under that Act, the action shall be dismissed; but the court shall, if the plaintiff so choose, proceed to at once assess compensation under that Act, but may deduct from such compensation all or part of the costs caused by the plaintiff bringing the action instead of proceeding under the Act (*b*). If a workman sues independently of the Workmen's Compensation Act, 1906, and fails, he is not able to afterwards take fresh proceedings under the Act (*c*). But if a workman fails in proceedings under the Act, there is nothing to prevent him instituting subsequent proceedings independently of the Act, to enforce any previously existing remedy to which he may have been entitled (*d*).

Proceedings wrongly taken by action.

2. Negligence causing injury to property only.

Nuisances existing from negligence cause injury to property even more frequently than to the person; thus, the neglect to cleanse drains, sewers, &c., beyond

(*a*) 6 Edw. VII. c. 58, s. 15. The Act came into operation on July 1, 1907.

(*b*) Sect. 1 (4). See *Cattermole* v. *Atlantic Transports Co.* (1902), 1 K. B. 204; 71 L. J. K. B. 173; 85 L. T. 513; *Isaacson* v. *New Grand Ltd.* (1903), 1 K. B. 539; 72 L. J. K. B. 227; 88 L. T. 291; *Keene* v. *Nash* (1903), 88 L. T. 790.

(*c*) *Edwards* v. *Godfrey* (1899), 2 Q. B. 333; 68 L. J. Q. B. 660; 80 L. T. 672.

(*d*) *Beckley* v. *Scott* (1902), 2 Ir. R. 504.

the injury they may do to health, may also materially depreciate the value of surrounding property, the neglect to clean chimneys, or to repair ruinous houses, may do great injury to property, and many instances of a like character might be enumerated.

Liability from omission to repair property.

In the absence of agreement to that effect, there is no obligation on a landlord of an unfurnished house (*e*), as between himself and his tenant, to repair the demised premises, and he is not even bound to see that the house is let to the tenant in a safe condition at the commencement of the term; so that if the tenant, or a customer or guest of the tenant, suffers injury during the term, by reason of the unsafe condition of the house, no action for negligence will lie against the landlord (*f*).

Duty of landlord.

Todd v. *Flight.*

It is, however, the duty of the landlord so to act as to protect the public at large, and if he lets the house get into such a ruinous condition that it, or some part of it, falls down, he is liable, not only for the injury that may be done to persons, but also for the injury done to neighbouring houses (*g*); unless, indeed, he has demised the premises to a tenant, and at the time of the demise they were not either faulty or ruinous, but have been allowed to become so by the tenant, on whom the obligation to repair rested during the continuance of the tenancy (*h*). And this is equally the case as regards a weekly tenancy, as it is a letting that continues until determined by notice to quit (*i*). With regard to premises let out to different persons, such as flats, chambers, or offices, it has been held that the common landlord is liable for injuries caused to any person properly coming to the premises, by reason of the non-repair or other defect of a general staircase or passage by which access to the different flats, chambers, or offices is obtained (*k*).

Flats, &c.

(*e*) As to furnished houses, see *ante*, p. 89, 90.
(*f*) *Lane* v. *Cox* (1897), 1 Q. B. 415; 66 L. J. Q. B. 193; *ante*, p. 89.
(*g*) *Todd* v. *Flight* (1860), 30 L. J. C. P. 31.
(*h*) *Robbins* v. *Jones* (1864), 33 L. J. C. P. 1; *Chauntlet* v. *Robinson* (1849), 4 Ex. 163.
(*i*) *Bowen* v. *Anderson* (1894), 1 Q. B. 164; 42 W. R. 236.
(*k*) *Miller* v. *Hancock* (1893), 2 Q. B. 177; 69 L. T. 214.

Right to the support of adjoining land or buildings.

Every man has a right to the lateral support of his neighbour's land to sustain his own land unweighted by buildings; and if buildings have been notoriously supported by neighbouring land or buildings for a period of twenty years then a privilege is gained in the nature of a prescriptive right, and, quite irrespective of any negligence, the owner of the supporting land or buildings will be liable if he so deals with his own property as to deprive the buildings of their support, and cause them to fall or be otherwise injured (*l*). In the case, however, of twenty years not having so elapsed, then there can be no such extensive right to the support of the neighbouring land unless there is a grant of such right either express or implied—*e.g.*, where a man grants part of his land specially for building purposes (*m*)—and the owner thereof cannot therefore be compelled to leave sufficient land to support the buildings. But although this is so, yet it is clearly the duty of the owner of the land in dealing with it to act very carefully, and to give the owner of the buildings notice of his intention of acting in such a way as will remove the support, so that the latter may have an opportunity of shoring up his buildings, or doing other acts for their protection; and in so far as the owner of the land fails in acting carefully, and giving such warning, he will be liable for any damage that may ensue (*n*).

Rights when a house is let to different persons.

Where different floors of a house are let to a different persons, each must so act as not to injure the other; and if one places more weight in his rooms than the floor can bear, or could be expected to bear, having reference to the purpose for which the premises were let, and it accordingly gives way, and does injury to a person below, or his property, he is liable (*o*).

(*l*) *Dalton* v. *Angus* (1881), 6 A. C. 740; 50 L. J. Q. B. 689; 30 W. R. 191; *Bower* v. *Peate* (1876), 1 Q. B. D. 321; 45 L. J. Q. B. 446; 35 L. T. 321.

(*m*) *Rigby* v. *Bennett* (1882), 21 Ch. D. 559; 48 L. T. 47; 31 W. R. 222.

(*n*) *Dodd* v. *Holme* (1834), 1 A. & E. 506; *Jones* v. *Bird* (1822), 5 B. & Ald. 837.

(*o*) *Manchester Bonded Warehouse Co.* v. *Carr* (1870), 5 C. P. D. 507; 49 L. J. C. P. 809; 43 L. T. 476.

Liability arising from allowing fences to become defective.

If a person on whom any obligation rests to keep up a fence, or wall, negligently allows it to become defective, he is liable for any injury happening, *e.g.*, by cattle straying and getting killed. There is not, generally speaking, any obligation on a person to fence out his neighbour's cattle for his neighbour's protection, but railway companies are under this obligation as regards land adjoining the railway (*p*). And although a person, or a railway company, may be under an obligation to keep up a fence or a wall, and therefore liable for injuries to cattle straying, through its defective condition, yet such liability does not extend to cattle trespassing on the adjoining land (*q*). If through a person's negligent keeping of his own fences, his horses or cattle stray on to the highway and do injury, he is not liable unless they were vicious to his knowledge (*r*); but if they stray on to adjoining property and do injury, he is always liable (*s*).

If a collision occurs in the public streets the owner must remove the obstruction; but this is not so in the case of collisions at sea, if the obstructing vessel is abandoned.

Although, if a collision occurs in the public streets, it is clearly the duty of the owner of an overturned vehicle to take steps to remove the obstruction, and he will be liable if he negligently allows it to remain there, yet the same rule does not apply to ships. If a vessel, through a collision or otherwise, without any fault or negligence on the part of the person having control of it, sinks at sea, there is no duty or obligation thrown upon the owner to take steps to prevent its being an obstruction to the navigation of other vessels, but he may abandon it and leave it there (*t*). But if the vessel is sunk in a harbour or a public river, without any negligence on the part of those in charge of her, and the owner does not abandon her, but exer-

(*p*) *Ante* p. 332; 8 & 9 Vict. c. 20, s. 68.
(*q*) *Manchester, &c. Ry. Co.* v. *Wallis* (1853), 22 L. J. C. P. 85.
(*r*) *Cox* v. *Burbridge* (1863), 32 L. J. C. P. 89.
(*s*) *Lee* v. *Riley* (1865), 34 L. J. C. P. 212. Distress damage feasant may also be taken for injury done to chattels upon the land, as well as to the land itself, but an action for damages is not maintainable so long as the distress is detained (*Roscoe* v. *Boden* (1894), 1 Q. B. 608; 63 L. J. Q. B. 767; 70 L. T. 450).
(*t*) *Brown* v. *Mallett* (1848), 5 C. B. 599.

cises acts of control over her, *e.g.*, by attempting to raise her, or by sending divers down, or otherwise endeavouring to get up part of the cargo, then this principle does not apply, for a vessel may just as much be in a man's control under water as above water; and in this case it is his duty to act with all due care and prudence, in just the same way as it was his duty when the ship was afloat, to act with all due care and prudence in navigating it: thus, if he is exercising acts of control or ownership, he must take steps to mark out the place where the ship has sunk, so that it may be avoided, and if he fails in doing this he is guilty of negligence, and liable accordingly (*u*). An owner does not abandon, or properly transfer the possession, management, and control of a wreck, by employing an independent contractor to raise it, although the person so employed be placed in the actual physical control of the wreck (*x*).

Liability in respect of injuries from negligent or accidental fires.

In the case of a fire happening on one person's premises, and extending and doing injury to his neighbour's, generally speaking the person on whose premises the fire originated was at common law liable in respect of the damage done. It has, however, been provided by statute, that no action shall be maintained against any person on whose premises a fire accidentally originates (*y*). The law, therefore, now is, that if a fire happens either through any wilful act, or any negligent conduct of a person or his servants, he is liable; but if the fire really happens through pure accident, and cannot be traced to any negligent cause, then the person on whose premises it originated is not rendered liable by reason of the mere fact that it originated there (*z*).

Liability of a railway company for injury arising from sparks.

A railway company, authorised by the legislature to use locomotive engines, was held not to be responsible

(*u*) *The Snark* (1900), P. 105; *Arrow* v. *Tyne Improvement* (1894), A. C. 508; *Manley* v. *St. Helen's Canal & Ry. Co.* (1858), 2 H. & N. 840; *Brown* v. *Mallett* (1848), 5 C. B. 599.

(*x*) *The Snark* (1900), P. 105; 69 L. J. P. 41; 82 L. T. 42.

(*y*) 14 Geo. III. c. 78, s. 86.

(*z*) Addison on Torts, 705–710. See further as to acts done accidentally, *ante*, p. 358.

for damage by fire occasioned by sparks emitted from an engine running on the railway, provided the company had taken every reasonable precaution, and adopted all reasonable means to prevent such injury, and had not been guilty of any negligence in the management of the engine or otherwise (*a*); and the mere fact that the company had not adopted the latest inventions of scientific discovery, was held not sufficient to render it liable (*b*). But now the Railway Fires Act, 1905 (*c*), enacts that, on and after the 1st of January, 1908, if agricultural land (excluding buildings and moorland) or agricultural crops (not led or stacked) be damaged by fire caused by sparks or cinders emitted from a locomotive engine used on a railway, the company may be sued for not more than £100, and it is not to be a defence that the engine was used under statutory powers; but notice of the claim must be given within seven days and particulars of damage within fourteen days. The owner of a traction-engine propelled by steam power along a highway under statutory authority, is liable for damage done by sparks emitted therefrom, upon the ground that it is a dangerous machine, in respect of which an action could have been maintained at common law, and that there is no statute restricting this liability (*d*). But even in the case of a steam traction-engine, or an electrical tramcar, or anything of a similar character, run under statutory authority, if an injury that happens is a natural incident of the exercise of the statutory powers (*e.g.*, a horse being frightened, or a telephone system interfered

Vaughan v. *Taff Vale Railway.*

Railway Fires Act, 1905.

Powell v. *Fall.*

National Telephone Co. v. *Baker.*

(*a*) *Vaughan* v. *Taff Vale Ry. Co.* (1860), 5 H. & N. 679; 29 L. J. Ex. 247; *Canadian Pacific Ry.* v. *Roy* (1902), A. C. 220; 71 L. J. P. C. 51; 86 L. T. 127. As an instance of negligence see *Smith* v. *London & South-Western Ry. Co.* (1871), L. R. 6 C. P. 14; 40 L. J. C. P. 21, where the company's servants had cut grass on the banks adjoining the line, and raked it into heaps, and left it there for longer than was necessary, and sparks from a passing engine set fire to the heaps of dry grass, and the fire spread and consumed the plaintiff's house, and the company were held to be liable to the plaintiff.

(*b*) *National Telephone Co.* v. *Baker* (1893), 2 Ch. 186; 62 L. J. Ch. 699; 68 L. T. 283.

(*c*) 5 Edw. VII. c. 11.

(*d*) *Powell* v. *Fall* (1880), 5 Q. B. D. 597; 49 L. J. Q. B. 428.

with by the discharge of an electrical current into the earth), the proprietors are not liable, as such things must be deemed to have been in the contemplation of the legislature when it gave its sanction (*e*). And no action will lie against a railway company by the owner of a house for compensation in respect of injury done to the house by vibration or smoke (*f*), the principle being that they are only acting in the exercise of their statutory powers (*g*).

Hammersmith & City Ry. Co. v. *Brand.*

Waste.

Waste of that kind called permissive waste, constitutes an injury to property peculiarly arising from negligence. The subject of waste (which pertains more particularly to real property) has been already noticed as far as the scope of the present work permits (*h*).

Negligence by sheriffs' officers.

A sheriff is liable for the negligent acts of his officers acting in the execution of their office; and therefore if a bailiff, having arrested a debtor, afterwards negligently permits him to escape, or if he neglects to arrest him in the first instance when he ought to have done so, or having a writ of *fi. fa.* neglects to levy when he should have done so, or having levied is guilty of any negligence afterwards in realising the goods, whereby the judgment creditor is injured, in all these cases an action lies against the sheriff for the negligence. But a sheriff is not absolutely liable even for goods he has seized, for some negligence must be shewn; thus, where a sheriff seized under a *fi. fa.* and then a mob broke in and injured the goods without fault upon his part, he was held not liable (*i*). It is the duty of the officer, on a warrant being delivered to him, to make all inquiries as to the

(*e*) *National Telephone Co.* v. *Baker*, supra. See also *Eastern & South African Telegraph Co.* v. *Cape Town Tramways* (1902), A. C. 181; 71 L. J. P. C. 122; 86 L. T. 457.

(*f*) *Hammersmith & City Ry. Co.* v. *Brand* (1869), L. R. 4 H. L. 171; 38 L. J. Q. B. 265; 18 W. R. 12.

(*g*) *Truman* v. *London, Brighton & South Coast Ry. Co.* (1884), 25 Ch. D. 423; 53 L. J. Ch. 209; 32 W. R. 364; 50 L. T. 89.

(*h*) *Ante*, p. 342.

(*i*) *Willis, Winder & Co.* v. *Combe* (1885), 1 C. & E. 353.

whereabouts of the debtor or of his goods, and there is no obligation on the plaintiff or his solicitor to furnish him with information and assistance in the execution of the writ (*k*), Should the solicitor give assistance or information, and in fact direct the sheriff to seize particular goods, this is not within his implied authority, so as to render his client, the judgment creditor, liable for the act, unless indeed it was done by his (the client's) direct instructions (*l*). But if all the solicitor does is to indorse on the *fi. fa.* a statement that the debtor resides at a certain place, which is inaccurate, and by reason of it the sheriff is misled and seizes another person's goods, it has been held that to make such an indorsement is within the solicitor's implied authority, and that the client is liable in respect of the wrongful seizure (*m*).

Wrong direction given by solicitor.

If a railway company advertises a certain train to arrive or depart at a specified time, and through their negligence considerable delay occurs, whereby a person is put to expense or otherwise damnified, he may recover from the company, even although one of the company's general conditions is to the effect that the company will not guarantee the punctuality of the trains; and under particular circumstances, but not as a matter of course, a person is justified in taking a special train, and charging the expense thereof to the company (*n*). If, however, a ticket is issued subject to a condition that the company will not be liable for loss or inconvenience for delay unless due to wilful misconduct of there servants, there can be no right of action unless proof is given of such misconduct, as such a condition is not unreasonable (*o*).

Negligence by railway company by reason of the non-arrival of a train at the proper time.

3. In addition to the self-evident defence of a

(*k*) Addison on Torts, 954. See, as to the measure of damages in actions against sheriffs, *post*, p. 474.

(*l*) *Smith* v. *Keal* (1882), 9 Q. B. D. 340; 51 L. J. Q. B. 487.

(*m*) *Morris* v. *Salberg* (1889), 22 Q. B. D. 614; 58 L. J. Q. B. 275.

(*n*) *Hamlin* v. *G. N. Ry. Co.* (1856), 1 H. & N. 408; *Le Blanche* v. *L. & N. W. Ry. Co.* (1876), 1 C. P. D. 286; 45 L. J. C. P. 521.

(*o*) *Woodgate* v. *G. W. Ry. Co.* (1884), 51 L. T. 826; 33 W. R. 428. See also *M'Cartan* v. *N. E. Ry. Co.* (1885), 54 L. J. Q. B. 441.

3. Defences to an action for negligence.

simple denial of the negligence alleged, in which the matter usually resolves itself into a question for the jury of yes or no, there may be two other defences of a rather more complex nature, viz.: (1) That the alleged negligence was really and substantially an inevitable accident; and (2) That there was contributory negligence on the part of the person complaining of the negligence. As to the first of these two defences, that of inevitable accident, this might be put down under the head of a simple denial of the negligence, for if it is an inevitable accident there is no negligence; but a few words are necessary to point out what is such an accident, one or two instances of it, and the distinction between it and an act really amounting to negligence.

What will and will not be an inevitable accident.

An inevitable accident that will form a defence to an action for negligence, may be described as some act quite undesigned and unforeseen, and in respect of which the person committing it has not been guilty of the slightest particle of negligence (*p*). Thus, for instance, a railway accident generally happens through some negligence on the part of the railway company's servants, but, as has been pointed out, an accident may arise in which the ingredient of negligence may be totally wanting, as by lights being obscured by fog or snow, or by there being some latent defect in a wheel, or in machinery, that no care or foresight could have discovered (*q*). So also, if a person being engaged in lawfully shooting game, accidentally and without any negligence shoots some person, he is not liable (*r*). But although an act may apparently result from inevitable accident, yet on close examination some negligence may often be discovered. Thus, if

Stanley v. *Powell*.

(*p*) *Wakeman* v. *Robinson* (1823), 1 Bing. 213. Of course, the "accident" above spoken of is quite distinct from accident in equity, in which the Court gives relief in a limited class of cases against the consequences of an act which has actually occurred, as to which see Indermaur and Thwaites' Manual of Equity, 228.

(*q*) *Ante*, p. 425.

(*r*) *Stanley* v. *Powell* (1891), 1 Q. B. 86; 60 L. J. Q. B. 52; 63 L. T. 809; 39 W. R. 76.

A. puts away a gun belonging to him in a proper and ordinarily secure place, and in some utterly unforeseen way a child gets possession of it and shoots some one, this will be an inevitable accident, and there will be no liability on A.'s part; but if A. has left his gun in a place he should not have done, and it is there got possession of by a child, and an injury done, here this is not an inevitable accident, for there is original negligence on A.'s part in thus carelessly leaving it about (*s*).

Definition of contributory negligence.

Contributory negligence may be defined as such an act of negligence on the part of a person complaining of the negligence of another, as in reality is the proximate cause of the injury complained of, and but for which such injury would not have happened (*t*), *e.g.*, if a person negligently walks upon a railway and a train kills or injures him, here neither he nor his representatives in the case of his death, have any remedy, for his own negligent act has been the proximate cause of the injury. The doctrine seems to be founded upon and to proceed from the maxim *Volenti non fit injuria.*

Instance of contributory negligence.

It is not every mere act of negligence on the plaintiff's part that will preclude him from recovering.

But as to what will constitute contributory negligence so as to preclude a plaintiff from recovering, it is not every mere act of negligence on his part that will suffice; for, in the words of our definition, the act must be such a one "as in reality is the proximate cause of the injury complained of, and but for which such injury would not have happened." The mere fact of there having been negligence on the plaintiff's part does not justify the defendant in having acted anyhow, and if, notwithstanding such negligence, the defendant yet might with reasonable care have avoided doing the injury, then he has been in reality the proximate cause of the injury, and is liable accordingly, not-

Davies v. *Mann.*

(*s*) Per Lord Denman in *Lynch* v. *Nurdin* (1841), 1 Q. B. 29.

(*t*) See per Lord Penzance in *Radley* v. *London & North-Western Ry. Co.* (1876), 1 App. Cas. 759; 46 L. J. Ex. 573.

withstanding the negligence on the plaintiff's part (*u*). Thus, to take the instance given above of contributory negligence by walking on a railway, if the driver of the train chose to start it although he saw the person walking there, here, as he might with due care have prevented the accident, the company would generally be liable.

Onus on plaintiff to prove negligence.

If, in an action for injuries alleged to have been caused through the negligence of the defendants, the evidence discloses a state of facts equally consistent with negligence on the part of the defendants, or contributory negligence on the part of the person injured, the plaintiff cannot succeed, as the onus is on the plaintiff to prove negligence. This is shewn by *Wakelin* v. *London & South-Western Ry. Co.* (*x*), which was an action by a widow under the Fatal Accidents Act, 1846 (*y*), for damages in respect of the death of her husband. The husband was found dead about nine in the evening, near a level crossing on the company's railway, and there was no doubt that he had been knocked down and killed by a passing train. The plaintiff proved that the crossing was peculiarly dangerous owing to a curve in the line, that the man whom the defendants kept on duty at the crossing for the protection of the public left at 8 P.M., and that no whistle was blown, on nearing the crossing, by the engine which appeared to have knocked down and killed her husband. Beyond this there was substantially no evidence as to how the catastrophe happened. The House of Lords held that this evidence was not sufficient to establish the liability of the company for the death of the plaintiff's husband, for where there is more than one possible cause of an accident, the onus is always on the plaintiff to prove that the operating

Wakelin v. London & South-Western Railway Company.

(*u*) *Davies* v. *Mann* (1842), 10 M. & W. 546 (which forms a particularly good instance of this principle); *Tuff* v. *Warman* (1858), 5 C. B (N. S.) 573; *Mayor of Colchester* v. *Brooke* (1845), L. R. 7 Q. B. 339.

(*x*) (1886), 12 App. Cas. 41; 56 L. J. Q. B. 229; 55 L. T. 709.

(*y*) 9 & 10 Vict. c. 93, amended by 27 & 28 Vict. c. 95; see *ante*, pp. 426 *et seq.*

cause was the one for which the defendant would be liable.

A person taking a manifestly dangerous course cannot recover from the person causing the danger.

If a person sees that the way he is taking has been rendered manifestly dangerous by the negligence of another, as, for instance, if he is driving and some obstruction has been left in the road, and he yet chooses to risk the danger, and in doing so is injured, this constitutes contributory negligence on his part, so as to prevent his recovering (*z*). And generally it may be stated that if the injury complained of is really due to the plaintiff's omission to use the care which any reasonable man would have used, this is contributory negligence (*a*).

The doctrine of contributory negligence applies to children, &c.

The doctrine of contributory negligence applies equally to a person not competent to take care of himself—*e.g.*, a young child—as to an ordinary person; for though he himself may not have the capacity to be guilty of what can be styled negligence, yet if the person in charge of him could by such reasonable diligence as is commonly expected of persons having the care of young children, have avoided the consequence of the negligence of the person doing the injury, the needful foundation of liability is wanting, namely, that the negligence, and not something else which there was no reason to anticipate, should be the proximate cause (*b*).

Contributory negligence of a servant.

In the same way that a master is liable for the negligence of his servant under the maxim, *Qui facit per alium facit per se* (*c*), so the contributory negligence of the servant will be the contributory negligence of the master, and prevent him from recovering (*d*). There have been some cases going to shew that this principle

(*z*) *Clayards* v. *Dethick* (1848), 12 Q. B. 439; *Thompson* v. *N. E. Ry. Co.* (1862), 31 L. J. Q. B. 194.

(*a*) *Butterfield* v. *Forrester* (1809), 11 East, 60; *Davey* v. *L. & S. W. Ry. Co.* (1884), 12 Q. B. D. 70; 53 L. J. Q. B. 58; 49 L. T. 739.

(*b*) Pollock's Torts, 472, 473.

(*c*) *Ante*, pp. 415-417.

(*d*) *Child* v. *Hearn* (1874), L. R. 9 Ex. 176; 43 L. J. Ex. 100; *Armstrong* v. *L. & Y. Ry. Co.* (1875) L. R. 10 Ex. 47.

applies to the case of an injury happening to a person being conveyed in some vehicle—*e.g.*, a ship, a train, or a stage-coach—and that such person is so identified with the person having control of the vehicle, that if the injury to him has occurred through the contributory negligence of such person, it is the same as if it had been his (the passenger's) negligence, and that therefore he cannot recover (*e*). This, however, is not now the law, the House of Lords having, in *The Bernina*, *Mills* v. *Armstrong* (*f*), definitely laid it down that there is not necessarily any such identification. In that case two ships came into collision, both being to blame, and the questions involved were whether the representatives of (1) the officer in charge, (2) the chief engineer, who was off duty, and (3), a passenger, could recover compensation. It was held that (1) the representatives of the officer in charge, who was directly responsible for the navigation of the ship at the time of the collision, could recover nothing, but that the representatives of (2) the chief engineer, and (3) the passenger, were entitled to recover.

The Bernina, *Mills* v. *Armstrong*.

(*e*) *Thorogood* v. *Bryan* (1849), 8 C. B. 115.

(*f*) (1888), 13 App. Cas. 1; 57 L. J. P. 67; 58 L. T. 423. This case distinctly overrules *Thorogood* v. *Bryan* (supra).

PART III.

OF CERTAIN MISCELLANEOUS MATTERS NOT BEFORE TREATED OF.

CHAPTER I.

OF DAMAGES.

THE subject of Damages has in the preceding pages been incidentally mentioned, and in this chapter it is proposed to give it such special notice as the scope of the present work admits of. We will consider the subject in the following order :— Mode of considering the subject.

1. Damages generally.
2. The measure of damages generally.
3. Damages in some particular cases.

1. The main object of an action is generally to recover compensation for the injury complained of, that is to say, compensation in respect of some alleged breach of contract, or for some alleged tort, and this compensation is called damages. Damages, therefore, have been rightly defined as a pecuniary compensation, recoverable by action, for breach of contract, or in respect of a tort (*a*). 1. Damages generally. Definition of the term damages.

Damages may be either liquidated or unliquidated. By liquidated damages is meant compensation of a fixed amount agreed and decided on between the parties; by unliquidated damages is meant compensation not so agreed and decided upon, but remaining yet to be ascertained by the means pointed out by law, *i.e.*, ordinarily by a jury. Thus, if one person buys goods of another, and agrees to pay a certain price for them, Difference between liquidated and unliquidated damages.

(*a*) Brown's Law Dict. 158.

which he neglects to do, this is a case of liquidated damages, for the parties have agreed on the amount to be paid, which is fixed and certain; but if in such a case the person agreeing to supply the goods neglects to do so, the buyer here has a claim for damages of an unliquidated nature, to be estimated and ascertained by the proper tribunal according to the recognised rules as to the measure of damages; and so, also, it is the same in all actions of tort, such as libel, slander, and the like—here the person has a claim for unliquidated damages.

Persons may agree what shall be the damages.

But in the case above mentioned of breach of a contract to supply goods, the parties may, and sometimes do, at the time of entering into the contract, consider the possibility of a breach happening, and provide what shall be the compensation or amount of damages to be paid to the injured party (*b*). If this is done, and there is an agreement on breach to pay a certain sum actually by way of agreed and liquidated damages, then that amount is recoverable (*c*), even though it may exceed the actual damage sustained (*d*). In any case such as this, however, the court looks at the contract with great care, and the mere fact that the parties have stipulated that, on breach, a certain sum shall be paid by way of compensation by the one to the other, will not always entitle that other to recover the exact amount, and this even although the parties may have expressly stipulated that the amount agreed to be paid shall be by way of liquidated damages; for in many such cases the sum agreed to be paid may really be a penal sum, and if it is so, then the court will not enforce it, but will relieve against it (*e*). The court, in doing this, does not at all interfere with the power that persons naturally must have of estimating their own damages, but what it does is to seek the real and true intention of the parties (*f*),

But the court will look to see whether the sum agreed to be paid is really liquidated damages or by way of penalty.

The court, in doing this, looks to the true intent of the parties.

(*b*) *Ward* v. *Monaghan* (1895), 59 J. P. 532; 11 T. L. R. 409.
(*c*) *Price* v. *Green* (1847), 16 M. & W. 346; *Hinton* v. *Sparks* (1868), L. R. 3 C. P. 161; 37 L. J. C. P. 8.
(*d*) *Re Earl of Mexborough & Wood* (1883), 47 L. T. 516; 47 J. P. 151.
(*e*) *Kemble* v. *Farren* (1829), 6 Bing. 141.
(*f*) Keating, J., in *Lea* v. *Whitaker* (1873), L. R. 8 C. P. 73; *Wallis* v. *Smith* (1883), 21 Ch. D. 243, 52 L. J. Ch. 145; 47 L. T. 389.

not being bound down by the mere words used by them, but looking at the whole instrument to arrive at the true construction. Thus, in the case (already quoted) of *Kemble* v. *Farren* (*g*), the defendant had engaged with the plaintiff to perform as a comedian at the plaintiff's theatre for a fixed time at a certain remuneration, and it was mutually agreed that if either of the parties should neglect or refuse to fulfil the agreement, or any part of it, such party should pay to the other the sum of £1000, which was thereby declared between the parties to be liquidated and ascertained damages, and not a penalty or penal sum, or in the nature thereof. Yet the court held that the stipulated sum of £1000 was in the nature of a penalty, and therefore not recoverable, but that unliquidated damages only were recoverable. It was indeed but a penalty in the disguise of liquidated damages; for it was to be paid on breach equally by either party, and it was evident that had the breach been by the plaintiff, the utmost extent of the damage sustained by the defendant would have been the fixed remuneration he was to be paid during the time agreed upon, and not such a sum as this. Had this sum been stipulated to be paid only on breach by the defendant, then, as the injury suffered by the plaintiff would manifestly have been of an uncertain nature and amount, the stipulation might have been construed as liquidated damages and good; for the rule has been laid down that where the damage is entirely uncertain, and the parties agree on a definite, and not unreasonable sum by way of liquidated damages, then that sum will be so construed, and will be recoverable (*h*).

Kemble v. *Farren.*

Where a sum is expressed in an agreement to be a penalty, it will, as a rule, but not necessarily (*i*), be

Effect of specifying that a sum agreed

(*g*) 6 Bing. 141.

(*h*) Per Coleridge, J., in *Reynolds* v. *Bridge* (1856), 6 E. & B. 541; *Mercer* v. *Irving* (1858), 27 L. J. Q. B. 291; per Jessel, M.R., in *Wallis* v. *Smith* (1883), 21 Ch. D. 258; 52 L. J. Ch. 149; 47 L. T. 389. See further, as to when a provision will be construed to be in the nature of a penalty *Protector Endowment Loan Co.* v. *Grice* (1880), 5 Q. B. D. 596; 49 L. J. Q. B. 812; 43 L. T. 564; *Catton* v. *Bennett* (1885), 51 L. T. 70.

(*i*) *Re White and Arthur* (1901), 84 L. T. 594; 50 W. R. 81.

to be paid is by way of penalty.

so considered, and on breach the action must generally be brought for unliquidated damages, and not for the fixed amount (*j*). It has been held that where the real damages would be extremely difficult to arrive at, a sum stipulated to be paid, although mentioned as a penalty, may be construed and recovered as liquidated damages (*k*). Whether a sum agreed to be paid is really a penalty, or liquidated and ascertained damages, is in fact a question of law to be decided by the judge upon a consideration of the whole instrument (*l*), even if the sum is called liquidated damages in the contract (*m*).

Whether more than a named penalty can be recovered.

It appears that no more than the amount of penalty and costs can be recovered on a bond, because the penalty ascertains the extreme damages by the consent of the parties, and upon payment of the penalty and costs the court will order satisfaction to be acknowledged. But where the penalty is contained in any other instrument than a bond, it is optional for the plaintiff to sue in default for the penalty, or to proceed upon the contract; and if he adopt the latter course, he is not restricted, in the amount that he may recover, to the sum named as the penalty, but may recover a sum exceeding it (*n*).

Rule where doubtful whether penalty or liquidated damages intended.

"Where it is doubtful from the terms of the contract whether the parties meant that the sum should be a penalty or liquidated damages, the inclination of the court will be to view it as a penalty. But the mere largeness of the amount fixed will not *per se* be sufficient reason for holding it to be so" (*o*). It is for the court to decide, upon a consideration of the whole instrument, whether a sum stipulated to be paid is a penalty or liquidated damages, and the principle to

Intention.

guide the court is the real intention of the parties, to be ascertained from the language they have used (*p*). Where a sum of money is made payable by instalments,

(*j*) *Smith* v. *Dickenson* (1849), 3 B. & P. 630.
(*k*) *Sainter* v. *Ferguson* (1804), 7 C. B. 716.
(*l*) Ibid.
(*m*) *Bradley* v. *Walsh* (1903), 88 L. T. 737.
(*n*) Mayne on Damages, 257, 258.
(*o*) Ibid., 156.
(*p*) Ibid., 155; *Re Earl of Mexborough & Wood* (1883), 47 L. T. 516.

and there is a provision that upon default of any one instalment the whole money shall become due, this is not a penalty (*q*).

Covenant not to do an act, and if done, to pay a certain amount.

Where a person covenants not to do a certain act, and if he does do it to pay a certain amount, or to do an act, and if he omits to do it to pay a certain amount, he cannot elect to do the act, or omit to do it, as the case may be, and make the payment ; and this is so whether the amount stipulated to be paid is a penalty or liquidated damages (*r*). In such a case, however, the aggrieved party is not entitled both to recover damages and to have an injunction, but he must elect between the two remedies (*s*).

Wherever there has been what the law considers an injury, there must be a right of action for it.

Wherever there has been actually what the law considers an injury committed, the party suffering it must always be entitled to maintain an action, for every injury imports damage, although it does not really cost the party anything (*t*) ; but, of course, some injuries may entitle a person to a very different amount of damages from what others would.

Differences between nominal, general, and special damages.

In some cases clearly the party complaining may have sustained no substantial damage, *e.g.*, in the case of a breach of a contract to buy goods where the price of the goods has afterwards gone up, for here there has been no loss to the vendor, and it will be the duty of the judge to direct the jury to award only nominal damages (*u*). In other cases proof may be given of an injury possibly causing some damage, not necessarily nominal, but which cannot be estimated except by ordinary opinion and judgment, *e.g.*, in an action against a banker for not honouring his customer's cheque, where no specific harm can be shewn to have resulted (*v*). In other

(*q*) Per Bramwell and Brett, L.JJ., in *Protector Endowment Loan Co.* v. *Grice* (1880), 5 Q. B. D. 596 ; 49 L. J. Q. B. 812 ; 43 L. T. 564.

(*r*) See Indermaur and Thwaites' Manual of Equity, 414, 415.

(*s*) *General Accident Assurance Corporation* v. *Noel* (1902), 1 K. B. 377 ; 71 L. J. K. B. 236 ; 86 L. T. 555.

(*t*) See *Ashby* v. *White* (1703), 1 S. L. C. 231 ; Lord Raym. 938 ; *ante*, pp. 3, 4.

(*u*) Mayne on Damages, 4, 5.

(*v*) See as to such actions, per Cresswell, J., in *Rolin* v. *Steward* (1854), 14 C. B. 605 ; *Larios* v. *Gurety* (1874), L. R. 5 P. C. 346 ;

cases there are what are called special damages, that is, substantial and real damage, reasonably or probably caused by the act of the defendant. In our second division of the subject of damages, the general rules to be followed by the jury in assessing these special damages will be noticed (*w*).

A person who has recovered damages once, cannot bring another action in respect of the same act.

When a person has suffered injury from the tortious act of another, and has brought an action and recovered damages for it, he cannot, on further damage resulting to him from the same tortious act, bring another action, for it is all presumed to have been contemplated in the original action. Thus, if A. has met with a railway accident, and recovered damages for it, and afterwards the injury turns out more serious, still he cannot bring a fresh action (*x*).

An action, though it usually is, need not necessarily be for damages.

It has been stated that the main object of an action is generally to recover compensation for the injury complained of (*y*), but this is not invariably so; for instance, an action may be brought for an injunction against the commission or continuance of some act by the defendant, such as waste, and although damages may be claimed for the injury already done, yet sometimes the injunction is what is particularly desired. Two cases in which the action need not mainly be for damages may specially be mentioned, viz.: (1) In any action in respect of the wrongful detention of goods or chattels, the plaintiff may, on a verdict being given for him, apply to the court or a judge to order execution to issue for the return of the particular goods, without giving to defendant the option of retaining them on paying their value, and the court may, at discretion, so order (*z*). (2) Under the Sale of Goods Act,

Provision of Order xlviii. rule 1.

Marzetti v. *Williams* (1830), 1 B. & A. 415; *Morris* v. *London & Westminster Bank* (1885), 1 C. & E. 498; Broom's Coms. 84, 85.

(*w*) *Post*, p. 458.

(*x*) Per Best, C.J., *Richardson* v. *Mellish* (1825), 2 Bing. 240. Compare this with the case of *Darley Main Colliery Co.* v. *Mitchell*, *ante*, p. 335. The principle of that decision was that a new tortious act had in fact been committed.

(*y*) *Ante*, p. 451.

(*z*) Order xlviii. rule 1, in substitution for the now repealed provision of 17 & 18 Vict. c. 125, s. 78; see also *ante*, p. 363.

1893 (*a*), the court has power to order the specific performance of contracts for the sale of goods. This provision has already been referred to in a previous part of this work (*b*). Provision of Sale of Goods Act, 1893.

A person against whom damages are awarded is, of course, liable to have the judgment fully enforced against him by execution; but in the case of an executor or administrator defendant, although he is personally liable for the costs, yet he is not for the damages, but only his testator's or intestate's estate, unless he has set up some defence he knew to be false, when on default of the estate he will be personally liable. He will, however, be personally liable to the fullest extent when he has in writing, for valuable consideration, agreed to pay his testator's or intestate's debt (*c*), *e.g.*, where, in consideration of the creditor forbearing to take proceedings for the administration of the estate by the court, the executor promises personally to see him paid; or when he is sued on some contract he has himself entered into, *e.g.*, where he gave instructions for the funeral, he will be personally liable. If an executor or administrator sues and fails in the action, he will be liable for costs in the same way as an ordinary plaintiff, unless the court otherwise orders (*d*). Liability of an executor or administrator in an action.

Damages are, generally speaking, assessed by a jury, but when they are really and substantially a matter of calculation—*e.g.*, in cases of complicated accounts between the parties that cannot be conveniently disposed of by a jury in the ordinary way—they may be referred Assessment of damages.

(*a*) 56 & 57 Vict. c. 71, s. 52.

(*b*) *Ante*, p. 108. Originally Courts of Law had no power of giving specific delivery of chattels. But the Court of Chancery had long had such a power, though only when the chattel was of some special and peculiar value, for which damages would not compensate (see *Pusey* v. *Pusey*, and *Duke of Somerset* v. *Cookson*, 1 White & Tudor's Leading Cases in Equity, 454, 455, and notes). It will be observed that the statutory powers given to the Courts of Law are quite irrespective of any special or peculiar value in the chattel. Under the Judicature Act, 1873, any division of the Court can give specific delivery of chattels, either under these Acts, or on the principle of special and peculiar value formerly acted on by the Court of Chancery.

(*c*) *Ante*, p. 51.

(*d*) 3 & 4 Wm. IV. c. 42, s. 31.

for assessment to one of the masters of the court, or to an official or special referee (*e*). In all cases in which damages are to be assessed (whether at the trial or on an inquiry or reference after interlocutory judgment), they are calculated not merely down to the date of the issuing of the writ, but down to the date of the assessment (*f*).

2. The measure of damages generally.

2. Juries in assessing damages are bound by certain established and recognised rules, which are pointed out to them by the judge in summing up the case, which rules constitute the scale or measure of damages in an action. Some of these rules equally apply whether the action is founded upon contract or upon tort, and some particularly to each class of action.

Damages must not be too remote.

The first and most important rule which applies to all actions is, that the damages must not be too remote, but must be the natural and probable result of the defendant's wrongful act (*g*). "Damage is said to be too remote when, although arising out of the cause of action, it does not so immediately and necessarily flow from it as that the offending party can be made responsible for it" (*h*).

What is meant by this.

One or two illustrations will explain what is meant by this rule, and, firstly, as an instance of its application in an action of contract, we may take the important case of *Hadley* v. *Baxendale* (*i*), which it has been said was a case intended to settle the law upon the subject (*j*). In that case the facts were shortly as follows: The plaintiffs were mill-owners, and the crank shaft of the steam-engine which worked their mill being broken, they sent a servant to the office of the defendants, who were common carriers, who informed the clerk, at their office, that the shaft must be sent at once, the

Hadley v. *Baxendale.*

(*e*) See Indermaur's Manual of Practice, 78.
(*f*) Order xxxvi. rule 58.
(*g*) See per Patteson, J., in *Kelly* v. *Partington* (1822), 5 B. & A. 645.
(*h*) Mayne on Damages, 48.
(*i*) (1854), 9 Ex. 343. See also *Thol* v. *Henderson* (1881), 8 Q. B. D. 457.
(*j*) Per Pollock, C.B., in *Wilson* v. *Newport Dock Co.* (1866), L. R. 1 Ex. 189.

mill being stopped for want of it, and the clerk told him in reply, that if it were sent any day before twelve o'clock it would be delivered the following day. Accordingly the shaft was entrusted to the defendants to carry, and the carriage paid, but through the defendants' neglect it was not delivered in the proper time, and the working of the mill was therefore stopped for several days. The plaintiffs contended that, in estimating the damages, the jury should consider not merely what it would have cost to have procured another shaft, but that the loss of profits caused by the stoppage of the mill should be taken into account; but the court decided that this was not so, for that the rule is, that the damages in respect of breach of contract must be such as may fairly and reasonably be considered as either arising naturally from the breach, or to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it. Here the mere fact of what the servant had told the clerk, in the absence of any express or implied contract on the carrier's part that special diligence should be taken on that account, was not sufficient to make this loss of profits damages that might reasonably be expected to flow from the breach. With regard to this case, it should also be mentioned that, even had the person who delivered the shaft then informed the carriers that loss of profits would ensue from any delay, they would not thereby have been liable in respect of such loss of profits, because being common carriers, they were bound to receive the shaft to carry. The rule that damages must not be too remote is, indeed, in cases of this kind, most difficult of application, and it is very hard, if not impossible, to reconcile all the decisions in which the fact of notice, or knowledge of some special circumstances, has been held sufficient to render damages arising from it recoverable as not being too remote, and different rules have been laid down upon this point; thus in one case: "The damages are to be what would be the natural consequences of a breach under circumstances which both parties were aware

Difficulty of application of the rule as to remoteness of damages.

of" (*k*); but this rule would appear too wide viewed by the side of the following one: "The knowledge must be brought home to the party sought to be charged, under such circumstances that he must know that the person he contracts with reasonably believes that he accepts the contract with the special conditions" (*l*).

Correct rule.

The correct rule appears to be, that where there are any special circumstances connected with a contract which may cause special damage to follow if it is broken, mere notice of such special circumstances given to one party will not render him liable for the special damage, unless it can be inferred from the whole transaction that he consented to become liable for such special damage; and that if the person has an option to refuse to enter into the contract, but still after such notice enters into it, this will be evidence that he accepted the additional risk in case of breach (*m*).

Kelly v. *Partington.*

The case of *Kelly* v. *Partington* (*n*) furnishes an illustration of the rule against remoteness of damages, arising in an action of tort. That was an action by a servant for slander, the words not being actionable in themselves, and the plaintiff sought to prove, as damages, the fact that, in consequence of the slander, a third person had refused to employ her, which he otherwise would have done; but the court held that as the words which were made use of were not such as would have naturally led to such a result, such damages were too remote. So, to take another instance, in *Sharp* v. *Powell* (*o*), the facts were, that the

Sharp v. *Powell.*

(*k*) Per Blackburn, J., in *Cory* v. *Thames Ironworks Co.* (1868), L. R. 3 Q. B. 186.

(*l*) Per Willes, J., in *British Columbia Sawmills* v. *Nettleship* (1869), L. R. 4 C. P. 509.

(*m*) Mayne on Damages, 46; and see the case of *Hadley* v. *Baxendale*, and subsequent cases on the subject collected and dealt with in Mayne on Damages, 12–48.

(*n*) (1834), 5 B. & A. 645.

(*o*) (1872), L. R. 7 C. P. 253; 41 L. J. C. P. 95; 20 W. R. 584; see also *Miller* v. *David* (1874), L. R. 9 C. P. 126; *Chamberlain* v. *Boyd* (1883), 11 Q. B. D. 407; 52 L. J. Q. B. 277. As a recent case in which the question was discussed of whether damages alleged, and proved, were too remote, see *Wilkinson* v. *Downton* (1897), 2 Q. B. 57; 66 L. J. Q. B. 493; 76 L. T. 493; *ante*, p. 6. See also *Dulieu* v. *White*, (1901), 2 K. B. 669; 60 L. J. K. B. 837; 85 L. T. 126.

defendant's servant wrongfully washed a van in a public street, and the water ran down a gutter, and would have run down a drain had it not been obstructed by ice, of which fact he was not shewn to be aware. As it was, the water spread over the road and formed a sheet of ice, on which the plaintiff's horse fell and was injured. It was held that the defendant was not liable for this damage, as it was not the natural consequence of his servant's act, for in the ordinary course of events the water might have been expected to properly pass away.

In actions *ex contractu* the motives of the defendant cannot affect the damages.

In actions on contract the measure of damages does not depend upon the motives which led the defendant to break the contract, for, however evil his intention may have been in breaking it, that fact cannot be taken into consideration. Thus, the defendant may, from motives of annoyance, or even worse, have refused to pay a debt due until actually compelled to do so, yet all that can be recovered is the amount of the debt, with interest in some cases (*p*), which will presently be noticed. To this rule, however, there is one exception, viz., an action for breach of promise of marriage, which, though strictly speaking an action on a contract, yet so strongly pertains to a tort, that the motives of the defendant in committing the breach, and his conduct, are often a most important point, as also his position in life (*q*). In this action, therefore, the principles stated in the next paragraph will generally apply.

Except in breach of promise of marriage.

But it is otherwise in actions *ex delicto*.

In actions of tort, the motives of the defendant in committing the tortious act are all-important, for in such actions any species of aggravation will give ground for additional damages (*r*). Thus, suppose two assaults are committed, the one perhaps unintentionally, or at any rate hastily, or under circumstances of a somewhat excusable nature, and the other premeditated and fully intended, and perhaps accompanied with insult-

(*p*) Mayne on Damages, 43, 44; *post*, pp. 463, 464.
(*q*) Ibid., 43. (*r*) Ibid., 44, 45.

ing or opprobrious expressions, or other circumstances of aggravation; in the latter case very much heavier damages will be given than in the former, although practically the plaintiff may not have sustained any greater or more substantial injury than in the other case. Instances might be multiplied to any extent, for almost every action of tort will be found to constitute an instance in itself more or less striking.

Looser principles are observed in awarding damages in actions *ex delicto* than in actions *ex contractu*.

A jury, therefore, in assessing damages in tort, are governed by far looser principles than in contract (*s*); and in many cases of tort the jury are justified in giving damages quite beyond any possible injury sustained by the plaintiff, on the ground that the action is brought to a certain extent as a public example, and damages, when so awarded, are styled exemplary or vindictive damages (*t*). As an instance of this an action for seduction may be particularly mentioned (*u*).

Vindictive damages.

It is not necessary that damages sustained should be the *legal* consequences of the defendant's act.

It was formerly laid down as a rule in actions of tort, that not only must the damage be the natural and probable result of the defendant's act, but also that the *wrongful* act of a third person, even although it might be the natural and probable result of the defendant's act, could never be taken into consideration in assessing the damages against the defendant; or, in other words, the damages must be the natural *and legal* consequence of the defendant's act (*v*). The practical working of this rule may be well illustrated by an extreme case. Suppose that the defendant had slandered the plaintiff openly before a number of people, by using words leading them to believe the plaintiff guilty of some such disgraceful action that they might naturally have been expected to set upon him and ill-use him in consequence of their belief in such words,

(*s*) Mayne on Damages, 43, 44; *post*, pp. 463, 464.

(*t*) *Emblem* v. *Myers* (1861), 30 L. J. Ex. 71; *Bell* v. *Midland Ry. Co.* (1861), 30 L. J. C. P. 273.

(*u*) Per Wilmot, C.J., in *Tullidge* v. *Wade* (1764), 3 Wils. 18. As to actions of seduction, see *ante*, pp. 406, 407.

(*v*) *Vicars* v. *Wilcocks* (1806), 2 S. L. C. 521; 8 East, 1; *Morris* v. *Langdale* (1807), 2 B. & P. 284.

as, for example, by putting him in an adjacent pond; and suppose this to have been not only what might have been expected, but also what actually occurred, yet as such an act was certainly an unlawful one on the part of such third persons, it could not have been taken into account by the jury in estimating the amount of the damages, as though under the circumstances the natural, it was not the legal consequence of the act (*w*). This former rule was manifestly unjust, and must now be taken as clearly not law (*x*).

When interest recoverable.

In actions on contract interest may properly be awarded by the jury as increasing the amount of the damages in some cases, though not in all, for the law does not allow interest unless the right to it is given by statute, or contract, or the law merchant (*y*), though it may also sometimes be recovered as damages for the wrongful withholding of money (*z*). That interest is allowed in the case of bills of exchange and promissory notes has been noticed in considering those instruments (*a*); also interest may, of course, be recovered where there has been an express contract to pay it, or where a contract can be implied to that effect, as from the custom of a banking-house, known to the defendant, or where it has been paid in like previous transactions between the parties; also where a bill or note has been agreed by the defendant to be given for a debt, and not given, the plaintiff may recover interest from the time it would have become due if given, because then it would have itself carried interest (*b*). By the Civil Procedure Act, 1833 (*c*), upon all debts or

(*w*) See per Lord Wensleydale, in *Lynch* v. *Knight* (1861), 9 H. L. Cas. 577.

(*x*) *Lynch* v. *Knight* (1861), 9 H. L. Cas. 577; *Knight* v *Gibbs* (1834), 1 A. & E. 43; *Green* v. *Button* (1835), 2 C. M. & R. 707; *Lumley* v. *Gye* (1853), 22 L. J. Q. B. 463 (the facts of which latter case are set out *ante*, p. 410); *M'Mahon* v. *Field* (1881), 7 Q. B. D. 591; 50 L. J. Q. B. 552; 45 L. T. 381; *Française des Asphaltes* v. *Farrell* (1885), 1 C. & E. 563; notes to *Vicars* v. *Wilcocks*, 2 S. L. C. 523–557, and cases cited and referred to.

(*y*) *Re Gosman* (1881), 17 Ch. D. 771; 50 L. J. Ch. 624; 29 W. R. 793.

(*z*) *Webster* v. *British Empire Mutual Life Assurance Co.* (1880), 15 Ch. D. 169; 49 L. J. Ch. 769; 28 W. R. 818.

(*a*) *Ante*, p. 195. (*b*) Mayne on Damages, 166, 260.

(*c*) 3 & 4 Wm. IV. c. 42.

Provision of 3 & 4 Wm. IV. c. 42, s. 28.

sums certain, payable at a certain time or otherwise, the jury, on the trial of any issue, or on any inquisition of damages, may, if they think fit, allow interest to a creditor at a rate not exceeding the current rate of interest, from the time when such debts or sums certain were payable, if such debts or sums be payable by virtue of some written instrument at a certain time (*d*), or if payable otherwise, then from the time when demand of payment shall have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the time of payment (*e*). It is also provided that the jury on the trial of any issue, or on any inquisition of damages, may, if they shall think fit, give damages, in the nature of interest, over and above the value of the goods, in actions for wrongful conversion or trespass to goods, and also over and above all money recoverable on policies of insurance made after the Act (*f*).

Sect. 29.

Interest on judgment debt.

A judgment of the High Court carries interest of 4 per cent. from its date (*g*), and where costs are given by a judgment or order, and taxed, interest on such costs runs from the date of the judgment or order, and not merely from the date of the taxing-master's certificate (*h*). A County Court judgment does not carry interest (*i*).

Double and treble damages.

There are some few cases in which it has been provided by statute that double or treble damages shall be recoverable, *e.g.*, in the case of a wrongful distress for rent where no rent was actually due, the party so wrongfully distraining forfeits double the value of the

(*d*) See *Re Horner, Fooks* v. *Horner* (1896), 2 Ch. 188; 65 L. J. Ch. 694; 74 L. T. 686.

(*e*) 3 & 4 Wm. IV. c. 42, s. 28. See Mayne on Damages, 176.

(*f*) Sect. 29. See hereon *Webster* v. *British Empire Mutual Life Assurance Co.* (1880), 15 Ch. D. 169; 49 L. J. Ch. 769; 28 W. R. 818.

(*g*) 1 & 2 Vict. c. 110, s. 17.

(*h*) *Re London Wharfing & Warehousing Co.* (1885), 54 L. J. Ch. 1137; 30 W. R. 836; 53 L. T. 112; *Taylor* v. *Roe* (1894), 1 Ch. 413; 63 L. J. Ch. 282; 70 L. T. 232.

(*i*) *Reg.* v. *Essex County Court Judge* (1887), 18 Q. B. D. 704, 56 L. J. Q. B. 315; 57 L. T. 643; 35 W. R. 511.

chattels distrained on, together with full costs of suit (*k*).

3. Damages in every particular case depend more or less on the general rules as to the measure of damages laid down in the preceding pages. 3. Damages in some particular cases.

Where, on a contract for the sale of land, it turns out that the vendor has no valid title to convey to the purchaser, naturally the latter has a right of action against the former for breach of contract, and he is entitled to recover as his damages any expenses he has properly incurred in investigating the title, and also, if he has paid a deposit, such deposit and interest thereon, but he is not entitled to recover anything for expenses incurred purely on his own behalf, and not actually necessary, *e.g.*, surveying the estate, nor any expense he has incurred before the proper time for doing so, *e.g.*, the preparing of the conveyance in anticipation of the title being satisfactory. There may, however, in some cases, be circumstances justifying an action for fraud and deceit, instead of an action for breach of contract, which will enable the purchaser to recover substantial damages, *e.g.*, if it can be shewn that the vendor knew he had no title and no means of acquiring it (*l*). And if a vendor of land can convey, but refuses and neglects so to do, or to do anything that he reasonably and properly can, and should. to bring about completion, then in an action for breach of contract, in addition to the ordinary damages, the purchaser can recover some reasonable damages for the loss of his bargain (*m*). This does not mean that he necessarily can recover all profit he could have

Damages recoverable by a purchaser on breach of a contract to sell land.

Bain v. *Fothergill.*

Day v. *Singleton.*

(*k*) 2 Wm. & M., sess. 1, c. 5, s. 5.

(*l*) *Flureau* v. *Thornhill* (1780), 2 W. Bl. 1078; *Bain* v. *Fothergill* (1874), L. R. 7 H. L. 158; 43 L. J. Ex. 243; *Rowe* v. *School Board for London* (1887), 36 Ch. D. 619; 57 L. T. 182. The old case of *Hopkins* v. *Grazebrook* (1826), 6 B. & C. 31, is overruled by *Bain* v. *Fothergill* (supra), and the case of *Engel* v. *Fitch* (1868), 37 L. J. Q. B. 145, must be considered a doubtful authority, and is questioned in *Bain* v. *Fothergill* (supra). It is therefore safest to consider *Engel* v. *Fitch* as not being a binding authority, and that the law is correctly stated above.

(*m*) *Day* v. *Singleton* (1899), 2 Ch. 320; 68 L. J. Ch. 593; 81 L. T. 306; *Jones* v. *Gardiner* (1902), 1 Ch. 191.

made on a re-sale, though the fact that he has agreed to re-sell at a profit may constitute evidence in support of his claim to reasonable damages, which claim would apparently be based on the difference between what he agreed to give for the property, and what it is actually worth.

Damages recoverable against a purchaser for refusing to complete.

In an action against a purchaser of land for refusing to complete as he should have done, the damages that the plaintiff is entitled to recover are not the full price agreed to be paid, or the value of the land, but the loss he has actually sustained by the defendant's breach of contract, which will in most cases be the expenses the plaintiff has been put to, and any special inconvenience he has suffered, and the difference between the price agreed upon and the sum produced on a re-sale (*n*). Under the ordinary stipulation, that if the purchaser fails to comply with the conditions of sale the deposit shall be forfeited to the vendor, the vendor is entitled to forfeit it on such an event (*o*); this does not, however, preclude him from bringing an action against the vendee also, but if he does so, the amount of the deposit will be taken into account in calculating the damage (*p*).

Damages recoverable in an action by a landlord for breach of a covenant to repair.

Where an action is, during the continuance of a lease, brought by the landlord for breach of a covenant to repair, the measure of damages is generally considered to be the real injury that has been done to the reversion (*q*); but if the lease has actually expired, then the measure of damages will ordinarily be what it has cost, or would cost, to put the premises in proper repair in accordance with the covenant (*r*).

Damages for trespass, &c., to land, may sometimes

In the case of trespass or other injury done to land, the actual occupier of it is naturally the person entitled

(*n*) *Laird* v. *Pym* (1841), 7 M. & W. 474.
(*o*) *Hinton* v. *Sparkes* (1868), L. R. 3 C. P. 161.
(*p*) *Ockenden* v. *Henly* (1858), 27 L. J. Q. B. 371.
(*q*) Mayne on Damages, 280; *Whitham* v. *Kershaw* (1886), 16 Q. B. D. 613; 34 W. R. 340; 54 L. T. 124. See also and compare *Conquest* v. *Ebbetts* (1896), A. C. 490; 65 L. J. Ch. 808; 75 L. T. 36.
(*r*) Mayne on Damages, 285.

to bring an action, but if the injury is one of a permanent nature that tends to depreciate the value of the inheritance as well as the immediate ownership, not only may the occupier sue, but also the reversioner (*s*). This is well instanced by the case of injury done to trees, where the occupier would have his right of action in respect of the loss of shade from them, and the reversioner for the loss of the timber (*t*). And if the reversioner would have a right of action for damages in respect of the injury done to his reversion, ordinarily he may also sue for an injunction to restrain the doing of the act, but he must shew that his reversionary property has been, or will be, injured (*u*).

be recovered, both by the occupier and the reversioner.

With regard to a contract for the sale and purchase of goods, the Sale of Goods Act, 1893 (*x*), provides that on breach by the buyer, the measure of damages is the estimated loss directly and naturally resulting in the ordinary course of events from the buyer's breach of contract, and that where there is an available market for the goods in question, the measure of damage is *primâ facie* to be ascertained by the difference between the contract price and the market or current price at the time when the goods ought to have been accepted by the buyer, or, if no time was fixed for acceptance, then at the time of the refusal to accept (*y*). If, however, there is not merely a contract for the sale of goods, but the property in them has actually passed to the buyer (*z*), although they may not have been delivered, or if the price was payable on a stated day which has gone by, the seller may recover the full price agreed to be paid by the buyer (*a*).

Damages recoverable against a purchaser of goods for breach of contract.

The Sale of Goods Act, 1893, also provides that

(*s*) *Jesser* v. *Gifford* (1767), 4 Burr. 2141.
(*t*) See *Bedingfield* v. *Onslow* (1697), 3 Lev. 209. See *ante*, p. 330.
(*u*) *Cooper* v. *Crabtree* (1882), 19 Ch. D. 193; 51 L. J. Q. B. 544.
(*x*) 56 & 57 Vict. c. 71.
(*y*) Sect. 50.
(*z*) As to when the property in goods passes, see *ante*, pp. 93–98.
(*a*) 56 & 57 Vict. c. 71, s. 49.

Damages recoverable on breach of contract to deliver goods.

in an action by the buyer of goods against the seller for not delivering them, the measure of damages is the estimated loss directly and naturally resulting in the ordinary course of events from the seller's breach of contract, and that where there is an available market for the goods in question, the measure of damage is *primâ facie* to be ascertained by the difference between the contract price and the market or current price of the goods at the time when they ought to have been delivered, or, if no time was fixed, then from the time of refusal to deliver (*b*). If, however, the goods are of such a kind that they are not procurable in the market, or not at or about the time of the breach, then some other evidence must be given to shew what their value was at the time when the contract was broken; and a variety of circumstances may be looked at to arrive at an answer to the question, What was the article worth at the time? (*c*). Then, ascertaining in some way that value, the measure of damage is the difference between the contract price and such value. A buyer cannot recover the loss of profit which he would have made by carrying out a contract for re-sale at a higher price, made in the interval between the first contract and the time for delivering (*d*). This rule applies equally in the case of the sale of an unmanufactured article (*e*). Still the price that would have been obtained on a re-sale may be evidence of the value of the goods (*f*). And, notwithstanding the rule above stated, where a chattel is bought for a particular purpose of which the seller knows, and for which he expressly sells the article—*e.g.*, to enable the buyer to carry out a sub-contract—on breach, loss of profit may be recovered as well as any damages the buyer may have to pay through not carrying out his contract (*g*).

Case of sub-contract.

(*b*) 56 & 57 Vict. c. 71, s. 51. (*c*) Mayne on Damages, 189.
(*d*) Ibid., 189. See also, as showing that the general rule may be departed from in some cases through the conduct of the defendant himself, *Ogle* v. *Earl Vane* (1868), L. R. 3 Q. B. 272.
(*e*) *Tredegar Iron & Coal Co.* v. *Gielgud* (1885), 1 C. & E. 27.
(*f*) *Stroud* v. *Austin* (1885), 1 C. & E. 119; Mayne on Damages, 190.
(*g*) *Hydraulic Engineering Co.* v. *McHaffie* (1869), L. R. 4 Q. B. 670;

Damages recoverable in cases of breach of warranty.

With regard to an action for the breach of any warranty on a sale of goods, the Sale of Goods Act, 1893, provides that the measure of damages is the estimated loss directly and naturally resulting in the ordinary course of events from the breach of warranty, and that in the case of breach of warranty of quality, the loss is *primâ facie* the difference between the value of the goods at the time of delivery to the buyer, and the value they would have had if they had answered to the warranty (*h*). This of course means that this is the measure of damages where the goods have not been returned; and ordinarily the buyer has no right to return them (*i*), but he may have such a right by express agreement, or the seller may assent to their being returned. In such cases as this, if the buyer has not paid the price, then, if he has not suffered any special injury, he will be entitled to nominal damages only, and if he has paid the price and suffered no injury beyond that, then the measure of damages will be the price paid (*k*).

Damages recoverable against a carrier for delay.

If a carrier is guilty of delay in carrying either passengers or goods, he is liable for the natural consequences of his neglect. Thus, where the contract is to carry a passenger, a failure to do so entitles him to procure another conveyance, if it was reasonable so to do, and to charge the carrier with the expense of the substituted conveyance, and with all other expenses necessarily and properly incurred (*l*). As regards the carriage of goods, where the result of the delay is absolutely to destroy them, if their nature was known to the carrier, the whole value is recoverable; and in the case of goods sent by land, which are or may be supposed to be consigned for immediate sale, the defaulting carrier is liable for any diminution in their value caused by a fall in the ordinary market price. But in the case of goods sent by a long sea-voyage, no

Carriage of goods.

27 W. R. 221; *Hamilton* v. *Magill*, 12 L. R. Ir. 186; *Grebert-Borgnis* v. *Nugent* (1885), 15 Q. B. D. 85; 54 L. J. Q. B. 511.

(*h*) 56 & 57 Vict. c. 71, s. 53.

(*i*) *Ante*, p. 109.

(*k*) Mayne on Damages, 204.

(*l*) Ibid., 319.

such ground of damage is allowed, but only interest on the invoice price of the goods is recoverable (*m*); and the carrier can never be liable for loss of profit on some special contract lost through the delay in carriage, unless such special contract was communicated to him, and he had contracted to be answerable for such special damage (*n*).

Damages recoverable against a carrier of passengers for personal injuries.

With regard to actions against carriers of passengers for some personal injury caused by the defendant's negligence, the measure of damages consists in the substantial injury the plaintiff has suffered by the expenses of his cure, his loss of time and consequent injury to his business, and his inability to continue that business, and the general pain and discomfort he has been put to (*o*). The fact of the plaintiff having through an insurance received compensation for his accident, cannot be set up by the defendant in reduction of damages (*p*),

Insurance.

Damages under the Fatal Accidents Act, 1846.

With regard to actions brought under the provisions of the Fatal Accidents Act, 1846 (*q*), the rule has been stated to be that "the damages should be calculated in reference to a reasonable expectation of pecuniary benefit, as of right or otherwise, from the continuance of the life" (*r*), which means that the jury cannot speculate on mere probabilities of advantages that might possibly have ensued to the persons for whose benefit the action is brought, nor can they look to the grief caused such persons by the death, but they may consider the fair loss of comforts and conveniences to such parties through the death, for this is fairly within the pecuniary loss for which the action is brought (*s*). And

(*m*) Mayne on Damages, 320.

(*n*) *Horne* v. *Midland Ry. Co.* (1871), L. R. 8 C. P. 131 ; 42 L. J. C. P. 59.

(*o*) Mayne on Damages, 488, 489 ; and see, as to how far this principle will be extended, *Armsworth* v. *S. E. Ry. Co.* (1865), 11 Jur. 760 ; *Phillips* v. *L. & S. W. Ry. Co.* (1880), 5 C. P. D. 280 ; 49 L. J. C. P. 233 ; 42 L. T. 6.

(*p*) *Bradburn* v. *G. W. Ry.* (1875), L. R. 10 Ex. 1 ; 44 L. J. Ex. 9.

(*q*) 9 & 10 Vict. c. 93, as to the provisions of which see *ante*, pp. 426–428.

(*r*) Per cur. *Franklin* v. *S. E. Ry. Co.* (1858), 3 H. & N. 211. See as an illustration of the above rule, *Harrison* v. *L. & N. W. Ry. Co.* (1885), 1 C. & E. 540.

(*s*) *Franklin* v. *S. E. Ry. Co.* (1858), 3 H. & N. 211.

in calculating this pecuniary loss the jury may consider any reasonable probabilities of pecuniary benefit capable of being estimated in money, *e.g.*, that the deceased, who had been in the habit of contributing towards the support of a relative, for whose benefit the action is brought, would have continued to have done so (*t*). In awarding damages under this Act it used to be the law that if the deceased was insured, and the person or persons on whose behalf the action is brought has benefited by this insurance, the jury must take the insurance into their calculations in assessing damages, and consider under the whole circumstances the benefit derived from it by the premature death (*u*); but now by the Fatal Accidents Act, 1908 (*v*), the jury in awarding damages under the Fatal Accidents Acts after 1st August, 1908, are not to take into account any money payable on the deceased's death under any contract of assurance or insurance. It has been held that the jury cannot give damages in respect of the funeral expenses of the deceased, there being nothing in the Act to justify their so doing (*w*); and further that a master or father cannot recover funeral expenses at common law (*x*).

Insurance.

Act of 1908.

Funeral expenses.

No action will lie to recover money agreed to be lent, but an action may be maintained for damages for breach of contract, and the ordinary damages recoverable are any excess of interest, and any additional costs and expenses properly incurred; but where special damage results from the breach of the agreement, and the party is deprived of the opportunity of getting money elsewhere, these circumstances may

Damages recoverable on breach of contract to lend money.

(*t*) *Dalton* v. *S. E. Ry. Co.* (1858), 27 L. J. C. P. 227; *Pym* v. *G. N. Ry. Co.* 2 B. & S. 767; 4 B. & S. 396. See Mayne on Damages, 490.

(*u*) *Hicks* v. *Newport, Abergavenny & Hereford Railway* (1862), 1 B. & S. 403; approved in *Bradburn* v. *Great Western Ry. Co.*, cited *ante*, p. 470, and in *Grand Junction Ry. of Canada* v. *Jennings* (1889), 13 App. Cas. 800; 58 L. J. C. P. 1; 59 L. T. 679.

(*v*) 8 Edw. VII. c. 7.

(*w*) *Dalton* v. *S. E. Ry. Co.* (1858), 27 L. J. C. P. 227.

(*x*) *Clark* v. *General Omnibus Co.* (1906), 2 K. B. 648; 75 L. J. K. B. 907.

also be considered, and substantial damages awarded in respect of them (*y*).

Damages recoverable in actions for trespass, or other injury to land.

In an action for trespass or other injury to land, the general measure of damages is the diminished value of the land (*z*); and in cases of trespass, where no real injury has been sustained, and there are no special circumstances of aggravation, nominal damages only will be given. If, however, there are any circumstances of aggravation, or the trespass has been committed after notice not to trespass, exemplary or vindictive damages may be given, quite beyond any real injury that the plaintiff has suffered (*a*).

Damages recoverable in respect of nuisances.

In cases of nuisances where no substantial injury has been done, if it is the first time that an action has been brought in respect of the nuisance, nominal damages generally will only be given; but if it is a occurrence of the same nuisance, exemplary damages second or subsequent action for the continuance or remay be given with a view to compelling its removal (*b*). In any action the plaintiff may also obtain an injunction, either in addition to or instead of damages (*c*).

When a reversioner may obtain damages.

Not only the actual occupier of lands, but also the reversioner may obtain damages if the nuisance is of a permanent nature (*d*).

Mine owner letting down surface.

If the mineral owner lets down the surface, the surface owner can, in addition to the actual damage sustained, recover for future apprehended injury any depreciation in the selling value of his property caused thereby (*e*). If a highway is let down by working minerals, the true measure of damages is the cost of

(*y*) *Manchester & Oldham Bank* v. *Cook* (1884), 49 L. T. 674; see also *South African Territories* v. *Wallington* (1898), A. C. 309; 67 L. J. Q. B. (470; 78 L. T. 426.

(*z*) *Jones* v. *Gooday* (1841), 8 M. & W. 146.

(*a*) *Merest* v. *Harvey* (1814), 5 Taunt, 442. As to trespass to land, see *ante*, pp. 328–333, and as to vindictive damages, *see ante*, p. 462.

(*b*) *Battishill* v. *Reed* (1856), 25 L. J. C. P. 290.

(*c*) 21 & 22 Vict. c. 27. This statute was repealed by 46 & 47 Vict. c. 49, but its principle is preserved by sect. 5 (*Sayers* v. *Collyer* (1885), 28 Ch. D. 103; 54 L. J. Ch. 1; 51 L. T. 723; 33 W. R. 91).

(*d*) See as to nuisances, *ante*, pp. 337–342.

(*e*) *Tunnicliffe* v. *West Leigh Colliery* (1906), 2 Ch. 22; 75 L. J. Ch. 512.

making an equally commodious road without unnecessary expense, and not the cost of restoring the highway to its original level (*f*).

Infringement of patent.

In actions for infringement of patent, the patentee can claim either an account and payment of profits made by the infringement or damages, but he cannot get both against the same defendant (*g*). The measure of damages is the pecuniary loss caused to the patentee by the infringement (*h*), but an infringer who did not know of the patent is not liable for damages (*i*). The patentee is also entitled to an injunction, and to an order for destruction or delivery up of infringing articles.

Damages in actions for breach of promise of marriage.

In actions for breach of promise of marriage the only rule that can be given is that temperate and reasonable damages should be awarded, the jury fairly considering the grief caused by the breach, and the probable pecuniary or social loss sustained by the plaintiff; but any evil motives of the defendant, or circumstances of aggravation, *e.g.*, seduction, may be taken into account.

Damages in actions for assault and battery, and false imprisonment.

The damages to be awarded the plaintiff in an action for assault and battery (*k*) must always depend on the circumstances of the case. In the case of a simple and somewhat excusable assault, nominal damages only will generally be given, but exemplary damages may be given if there has been any special injury, or if the assault has been attended with circumstances of insult, or has been premeditated. In actions, too, for false imprisonment (*l*) the damages must depend on the same principles (*m*).

Damages recoverable in actions for malicious prosecution.

In action for malicious prosecution (*n*) damages may be awarded not only in respect of the actual pecuniary loss the plaintiff may have been put to in defending

(*f*) *Lodge Holes Colliery* v. *Wednesbury Corporation* (1908), 77 L. J. K. B. 847.
(*g*) *De Vitre* v. *Betts* (1873), 6 H. L. 319.
(*h*) *British Motor Syndicate* v. *Taylor* (1901), 1 Ch. 122.
(*i*) 7 Edw. VII. c. 29, s. 33. (*k*) As to which see *ante*, pp. 365–373.
(*l*) As to which see *ante*, pp. 373–382.
(*m*) Mayne on Damages, 461. (*n*) As to which see *ante*, pp. 382–385.

himself, but also in respect of the injury done to his character (*o*).

Damages recoverable against a non-attending witness.

The damages recoverable against a witness who has been served with a subpœna, and whose reasonable expenses have been tendered, consist of a penalty of £10, and such further sum as may be awarded for the injury or loss sustained by the party who subpœnaed him (*p*). If, through the non-attendance of the witness, the party has to get the trial postponed, the proper measure of damages will be the expenses of going to trial, and of getting it postponed, and all costs incidental to such postponement.

Damages against a sheriff for negligence in executing process.

In an action against a sheriff (*q*) for having by his negligence allowed some person arrested by him for debt to escape, although formerly the damages recoverable against him were the full amount of the debt, yet this is not always so now, for the measure of damages is the value of the custody of the debtor at the time of his escape; that is, if he was reasonably or probably able to satisfy the debt, the full amount will be awarded, but if he had no means, or very slight means of doing so, then the damages will be very much less. And if the plaintiff has by his conduct prevented the defendant from re-taking the debtor, or has in any way aggravated or increased his loss, this will naturally affect the amount to be recovered (*r*). In an action against a sheriff for negligence in not having levied on goods when he might and ought to have done so, the damages recoverable are not necessarily the full amount of the debt for which the levy ought to have been made, or the full value of the goods; but the real measure of damages is the benefit that the plaintiff would have probably derived from the levy had it been made (*s*).

(*o*) Mayne on Damages, 481.
(*p*) 5 Eliz. c. 9, s. 12, made perpetual by 26 & 27 Vict. c. 125.
(*q*) As to which see *ante*, pp. 444, 445.
(*r*) *Arden* v. *Goodacre* (1851), 20 L. J. C. P. 184; *Macrae* v. *Clarke* (1866), 35 L. J. C. P. 247.
(*s*) *Hobson* v. *Thellusson* (1867), 36 L. J. Q. B. 302; L. R. 2 Q. B. 642.

In an action by a servant for wrongful dismissal (*t*), the measure of damages is obtained "by considering what is the usual rate of wages for the employment contracted for, and what time would be lost before a similar employment could be obtained. The law considers that employment in any ordinary branch of industry can be obtained by a person competent for the place, that the usual rate of wages for such employment can be proved, and further, that when a promise for continuing employment is broken by the master, it is the duty of the servant to use diligence to find another employment. If, indeed, the particular employment could not be again obtained without delay, and if the wages stipulated for in the contract broken were higher than usual, the damages should be such as to indemnify for the loss of wages during that delay, and for the loss of the excess of wages contracted for above the usual rate," but nothing beyond this (*u*). Therefore it follows that only nominal damages are recoverable for wrongful dismissal if the servant could have at once obtained other employment of a similar kind which a reasonable man would have accepted (*x*).

Damages recoverable in an action by a servant for wrongful dismissal.

(*t*) As to the subject of master and servant generally, see *ante*, pp. 234–237.

(*u*) Broom's Coms. 731, 732.

(*x*) *Macdonnell* v. *Marsden* (1885), 1 C. & E. 281.

CHAPTER II.

OF EVIDENCE IN CIVIL CASES.

HAVING in the previous pages discussed the different rights that a person has in respect of contracts and of torts, and the damages to be awarded him in an action in respect of them, there necessarily remains to be considered the important subject of the evidence to be given by a person in our courts in support of the right that he there sets up. The subject may conveniently be considered in the following order:—

Mode of considering the subject.

1. The nature of evidence generally.
2. The competency of witnesses and the admissibility of particular evidence.
3. Cases of privilege.
4. Some miscellaneous points.

1. As to the nature of evidence generally.

1. *As to the nature of evidence generally.* Evidence may be defined as the proof, or mode of proving, some fact or written document, and in its nature may be direct or indirect (or, as it is more usually styled, circumstantial), primary or secondary, and there may also be admissions which may serve as evidence.

Direct and indirect evidence.

By direct evidence is meant some positive or conclusive proof, *i.e.*, the testimony of witnesses to a particular fact; by indirect or circumstantial evidence, some proof from particular circumstances, *i.e.*, the testimony of witnesses to certain facts from which another fact in question may be inferred. The division of direct and indirect (or circumstantial) evidence, applies more particularly to criminal than to civil cases, and therefore that division will not be further discussed beyond explaining the distinction by an illustration. Thus, let us take the case of a man prosecuted for murder, the death of the deceased having resulted from a pistol-

shot. Proof by some one who saw the prisoner fire the shot would be direct evidence; but if it was not actually seen, but the prisoner was found near the spot with a pistol recently discharged in his hand, and the bullet fitted the barrel of the pistol, this would be indirect or circumstantial evidence that he was the murderer.

Primary and secondary evidence.

Primary evidence may be defined as the highest kind of evidence which the nature of the case admits of (*a*), and secondary evidence as everything falling short of the best or primary evidence (*b*). Thus, where at a trial it is required to prove a certain contract entered into in writing, the production of that writing itself is the best or primary evidence, and a copy or merely oral evidence of what that contract contains is secondary evidence. It is a rule in every case, subject to some exceptions, that the best or primary evidence must be given (*c*); thus, in our instance of proof required to be given of a contract that has been entered into, if it is in the power of the party requiring to prove it, to produce the original contract, he must do so, for if he can, then he is not permitted to give proof of it otherwise than by the very contract itself. "The rule is founded on the presumption that if inferior evidence is offered when evidence of a better and more original nature is obtainable, the substitution of the former for the latter arises either from fraud or from gross negligence, which is tantamount to fraud. Thus, if a copy of a deed or will be tendered when the original exists and is producible, it is reasonable to assume that the person who might have produced the original, but omits to do so, has some private and interested motive for producing a copy in its place" (*d*).

Primary evidence, when possible, must be given.

Reason of the rule.

A person though not having primary evidence in his own possession,

And although a person may not have the best or primary evidence actually in his possession or power, yet if he can by any means cause its production, he is bound to do so (*e*). This is well shewn by the fact

(*a*) Brown's Law Dict. 212.
(*b*) Ibid.
(*c*) Powell's Evidence, 46.
(*d*) Ibid.
(*e*) Ibid., 5.

must do all he can to obtain it.

that if at the trial of an action one of the parties rests his evidence upon some writing in his opponent's possession, before he can give in evidence a copy of it, or parol evidence of its contents, he must give to the other party a notice to produce the original, and then if it is not produced, having done all in his power to get the best or primary evidence, he is allowed to give secondary evidence. This notice to produce is given before the trial of nearly every action, there generally being some documents in the opponent's possession which the other party considers ought to be laid before the jury (*f*).

Notice to produce.

There are no degrees of secondary evidence.

There are no degrees of secondary evidence; when a person has done everything he can to get the best or primary evidence, and has thus entitled himself to give secondary evidence, it may be of any kind (*g*). Thus, if an original writing cannot be produced, the party may give as secondary evidence either a copy of it, or oral evidence of its contents, though naturally in such a case it would always be preferable to give the copy, as being from its greater certainty, entitled to more credence.

When a document requiring to be proved is in a third person's possession, a *subpœna duces tecum* must be issued.

Although if a person gives his opponent notice to produce a deed or other document, and this is not done, he may give secondary evidence of its contents, yet if the document is not in that opponent's possession, but in the possession of a third person, not a party to the action, here his proper course is to issue a *subpœna duces tecum* for such person to attend and produce it. If on such subpœna the witness refuses to produce the deed or document in question, that does not entitle the plaintiff or defendant to give secondary evidence, unless the witness was under no legal obligation to produce the document (*h*) as for instance where it is one of his own title-deeds, or an incriminating document, or one which he holds as trustee or solicitor for another.

(*f*) As to the notice to inspect and admit usually given before going to trial, see *post*, p. 493. See also as to both these notices, Indermaur's Manual of Practice, 178.

(*g*) Powell's Evidence, 498–504.

(*h*) *Jesus College* v. *Gibbs* (1836), 1 Y. & C. 156.

There are, however, some exceptions to the strict rule as to the non-admissibility of secondary evidence, *e.g.*, the probate of a will (*i*); an office copy of a duly enrolled bargain and sale (*j*); various documents in the case of companies (*k*); and in particular copies of entries in bankers' books (*l*). As regards the last-mentioned, it is provided by the Bankers Books Evidence Act, 1879 (*m*), that a copy of an entry in a banker's book (*n*) shall in all legal proceedings be received as *primâ facie* evidence of entries therein, provided that the book was, at the time of the entry, one of the ordinary books of the bank, that the entry was made in the usual course of business, that the book is in the custody and control of the bank, and that the copy is duly proved, either orally or by affidavit, to be a true copy, by some person who has examined the copy with the original entry. In all cases in which the bank is not a party to the action, the banker or officer of the bank cannot be compelled to produce his books unless specially ordered to do so, but this course must be adopted. It is also provided that the court or a judge may order any party to an action to be at liberty to inspect and take copies of any entries in a banker's book for any of the purposes of the proceedings, so that if a banker will not in the course of the proceedings voluntarily produce books or entries to a party to an action, an order may be obtained for production, and for liberty to take copies of entries (*o*), and an application for such an order may in a proper case be made *ex parte*, though ordinarily it should be made by summons (*p*). The court will not, as a rule, make an order under this provision for the inspection by one of the

Exceptions to the rule as to non-admissibility of secondary evidence.

Bankers Books Evidence Act, 1879.

Ordering inspection of bankers' books.

(*i*) See *post*, pp. 495, 496.
(*j*) 27 Henry VIII. c. 16.
(*k*) 40 & 41 Vict. c. 26.
(*l*) 42 Vict. c. 11.
(*m*) Sects. 3, 4, 5.
(*n*) This applies even as regards the accounts of third persons, strangers to the action (*Howard* v. *Beall* (1889), 23 Q. B. D. 1; 58 L. J. Q. B. 384; 60 L. T. 637).
(*o*) 42 Vict. c. 11, ss. 6, 7, 8, 11.
(*p*) *Davies* v. *White* (1884), 53 L. J. Q. B. 275; 32 W. R. 320; *Arnott* v. *Hayes* (1887), 37 Ch. D. 731; 56 L. J. Ch. 844; 59 L. T. 299.

parties to the action, of the banking account of third persons not parties to or concerned in the litigation, for what is manifestly intended is to give facilities for the inspection of the accounts of persons who are parties to the litigation (*q*).

Definition of hearsay evidence.

Another kind of evidence that is sometimes, though not usually, allowed to be given is hearsay evidence, which has been well defined or described as some "oral or written statement of a person who is not produced in court, conveyed to the court either by a witness, or by the instrumentality of a document" (*r*). If a person appears in court, and himself on oath deposes to a certain fact, this evidence is at first hand; but if a witness appears and deposes that a person told him a certain fact, or if a writing by some person stating a fact is produced, this is only at second hand, and is hearsay evidence.

Reason of hearsay evidence not being generally admitted.

The general rule as to hearsay evidence is, that it is not admissible, upon the ground that it really is not on oath at all, and therefore is not entitled to credibility (*s*); so that a witness stating that he was told such and such a fact is at once stopped, and not allowed further to proceed with that testimony. In some cases, however, hearsay evidence is, contrary to the general rule, admitted, apparently upon the principle that were it not, no possible proof of the matters could be given.

Cases in which it is admitted.

The following are the chief cases in which hearsay evidence is so admitted:—

1. In matters of public or general interest.

1. It is admitted in matters of public or general interest, though not in any matter of merely private right (*t*). Here the fact of a popular reputation or opinion upon the matter, or a statement made by some deceased person of competent knowledge, before any dispute arose, may be given in evidence, the particular reason for this being, that matters of public or general

(*q*) *Pollock* v. *Garle* (1898), 1 Ch. 1; 66 L. J. Ch. 788; 77 L. T. 415.
(*r*) Powell's Evidence, 126.
(*s*) Ibid.; *Doe* d. *Didsbury* v. *Thomas* (1811), 2 S. L. C. 353; 14 East, 323.
(*t*) Powell's Evidence, 137–148.

interest are usually of a very ancient date, and consequently there is a great difficulty in obtaining direct testimony as to their existence, and also because a general reputation in a matter in which many are interested, existing when there was no dispute as to that right, is likely to be true (*u*). Thus, traditionary reputation of boundaries between two parishes may be given in evidence, for this is a matter of general interest to the persons dwelling there (*x*). But it must be clearly borne in mind that this case of the admissibility of hearsay evidence does not extend to merely private rights; thus, evidence of reputation of a boundary between two estates has been rejected, because it is a matter which only affects the respective owners (*y*).

2. In questions of pedigree hearsay evidence is sometime admitted (*z*). Here, if no better proof can be found, evidence may be given of the common reputation in the family, or of any declaration or statement of any deceased relatives. Thus, common reputation in a family to prove who was the ancestor of a member of it is admissible, or to prove how many children that ancestor had (*a*); and in a case where it was desired to prove that a member of the family had not been married, Lord Ellenborough said, "What other proof could the plaintiff be expected to produce that such person had not been married than that none of the family had ever heard that he was?" (*b*). Under this head, too, entries in old family bibles or in prayer-books have been held admissible in evidence (*c*), as also has a genealogy made by a deceased member of the family (*d*), and inscriptions on tombstones. (*e*). 2. In matters of pedigree.

(*u*) 2 S. L. C. 360.
(*x*) See note to *Doe* d. *Didsbury* v. *Thomas* (1811), 14 East, 323.
(*y*) Ibid.
(*z*) Powell's Evidence, 154–162.
(*a*) Bull, N. P., 294, cited 15 East, 294 *n*. See also *Re Perton, Pearson* v. *Attorney-General* (1886), 53 L. T. 707.
(*b*) *Doe* d. *Banning* v. *Griffin* (1812), 15 East, 293.
(*c*) See *Berkeley Peerage Case* (1816), 4 Camp. 411; *Sussex Peerage Case* (1845), 11 Cl. & Fin. 85. See also *Re Lambert* (1887), 56 L. J. Ch. 122; 56 L. T. 15.
(*d*) *Monkton* v. *Attorney-General* (1831), 2 Russ. & M. 147.
(*e*) *Haslam* v. *Cron* (1870), 19 W. R. 969.

But a declaration under this head must be from a relative by blood or marriage.

It is important to observe that a declaration made by a person under this head must have been made by a relative either by blood or marriage, and a person who is illegitimate is not considered as a relation (*f*). The person whose declaration or statement is tendered must be proved to be dead, otherwise his declaration cannot be admitted (*g*). It is not necessary that the declaration or statement should have been made at the same time as the event happened (*h*), but it must have been made before the matter came into dispute. Where in an action the direct issue between the parties is a question as to some tolerably recent matter of pedigree, hearsay evidence is not admitted, but strict proof is necessary (*i*).

3. In cases where it forms part of the *res gestæ*.

3. Hearsay evidence is admissible when it forms part of the actual transaction (*res gestæ*) which is the subject-matter of the action (*k*); thus in an action for assault and battery, words or expressions of intention made use of by the defendant at the time of committing an assault may be given in evidence. And generally it may be stated that where any facts are proper evidence upon an issue, all oral or written declarations which can explain such facts may be received in evidence (*l*). Thus where in an action the legitimacy of the plaintiff was in issue, a witness was allowed to state the declarations and conduct of the deceased mother when questioned as to the parentage of the child (*m*). Again in another case where the legitimacy of a child born in wedlock was in issue, previous statements by the mother that the child was a bastard were held admissible as evidence of her conduct, although she could not have been allowed to make such statements in the witness-box (*n*), for the

(*f*) Powell's Evidence, 154, 155.
(*g*) *Butler* v. *Mountgarret* (1860), 7 H. L. C. 33.
(*h*) *Monkton* v. *Attorney-General*, ante, p. 481; and see *Re Thompson* (1887), 12 P. D. 100; 56 L. J. P. 46; 33 W. R. 384.
(*i*) *Berkeley Peerage Case* (1816), 4 Camp. 401.
(*k*) See hereon Powell's Evidence, 129–133.
(*l*) Per Parke, B., in *Doe* v. *Tatham* (1838), 4 Bing. N. C. 548.
(*m*) *Hargrave* v. *Hargrave* (1849), 2 C. & K. 701.
(*n*) *Aylesford Peerage Case* (1886), 11 App. Cas. 1; see also *Re Perton*,

rule is that a parent cannot bastardise his or her issue. And where a claim to a peerage depended on the claimant's legitimacy, and his mother and her husband, who he alleged was his father, were both dead, it was held that a statement made by the husband to the effect that his wife soon after her marriage with him informed him that at the date of her marriage she was already *enceinte* by another, and that he (the husband) had then separated from her, and that he had never had connection with her before marriage, was admissible as evidence shewing the illegitimacy of the claimant (*o*).

Poulett Peerage Case.

4. A declaration or entry by a deceased person who had a competent knowledge of a fact, and no interest to pervert it, and which declaration was against the pecuniary or proprietary interest of the declarant at the time when it was made, is evidence between third parties of everything that is stated in the declaration (*p*). The leading case upon this principle is *Higham* v. *Ridgway* (*q*). In that case it was necessary to prove the precise date of the birth of one William Fowden, and for this purpose an entry in his ledger by a man-midwife (since deceased), who had delivered the mother, of his having done so on a certain day, and referring to the charge for his attendance, *which was marked as paid*, was tendered in evidence. It was decided that, though it was, of course, not testimony on oath, yet it could be received, because the fact of the entry of payment made it an entry against the pecuniary interest of the party (*r*).

4. In the case of an entry made against a person's pecuniary or proprietary interest.

Higham v. *Ridgway.*

It will be noticed that in this case the portion of the entry that was really required as evidence, viz., the fact of the delivery of the mother of the child, was not in any way against the party's interest; the part

Remarks on *Higham* v. *Ridgway.*

Pearson v. *Attorney-General* (1886), 53 L. T. 707; *Barnaby* v. *Bailee* (1889), 42 Ch. D. 282; 58 L. J. Ch. 842; 61 L. T. 634.

(*o*) *Poulett Peerage Case* (1903), A. C. 393; 72 L. J. K. B. 924.

(*p*) Powell's Evidence, 169–177.

(*q*) (1808). 2 S. L. C. 327; 10 East, 109.

(*r*) As illustrative of what is and what is not an entry against interest, see *Vivian* v. *Moat*, *Vivian* v. *Walker* (1881), 29 W. R. 504; 44 L. T. 210. See also *Conner* v. *Fitzgerald*, 11 L. R. Ir. 106, where an entry was admitted on this ground.

that was against his interest was the acknowledgment of the payment of the charge for attendance. The case, therefore, clearly shows that it is quite sufficient for any part of an entry to be against a person's interest, to render the whole of it admissible in evidence (*s*). On this point there is an important distinction between this and the case that will be next mentioned (*t*). Although the case of *Higham* v. *Ridgway* only goes to entries against a person's *pecuniary* interest, yet the rule equally applies where the entry is against a *proprietary* interest, but the interest must be either of a pecuniary or proprietary character (*u*).

As to an entry against interest, forming also the only evidence of that interest.

Where a declaration or entry against interest is also the only evidence of the existence of the interest against which it tends, it was formerly held that the entry was not admissible (*x*). This cannot, however, be considered as good law at the present day, and the rule must be taken simply to be, that where an entry by a deceased person is *primâ facie* a clear entry against interest, it is always admissible in evidence for what it is worth (*y*).

Proof of a declaration.

In the case of a declaration or entry coming within the rule as being an admission against interest, proof of the handwriting of the party, and his death, is enough to authorise its reception, and at whatever time it was made it is admissible (*z*).

5. In the case of an entry made in the course of business, and in discharge of duty.

5. A declaration or entry made by a person, strictly in the course of his trade or business and in performance of his duty, and without any apparent interest on his part to misrepresent the truth, if made at or near the time when the matter in question occurred, is

(*s*) See also per Pollock, C.B., in *Percival* v. *Nanson* (1852), 7 Ex. 1.

(*t*) *Price* v. *Earl of Torrington*, *post*, p. 485.

(*u*) *Sussex Peerage Case* (1845), 11 C. & F. 85; *Bewley* v. *Atkinson* (1880), 13 Ch. D. 283; 49 L. J. Ch. 153; 2 S. L. C. 340.

(*x*) *Doe* d. *Gallop* v. *Vowles* (1836), 1 M. & Rob. 261.

(*y*) *Taylor* v. *Witham* (1866), 3 Ch. D. 605; 35 L. J. Ch. 798; in case Jessell, M.R., expressly disapproved of *Doe* d. *Gallop* v. *Vowles*, 1 M. & Rob. 261; Powell's Evidence, 171.

(*z*) Per Parke, B., in *Doe* v. *Turford* (1832), 3 B. & A. 88.

evidence after his death against third persons (*a*). The entry or declaration must have been made both in the course of business and in discharge of duty (*b*). The leading case upon this principle is *Price* v. *Earl of Torrington* (*c*). The plaintiff there was a brewer, and the action was for beer sold and delivered to the defendant. The evidence given to charge the defendant was, that the plaintiff's drayman, who had since died, had in the usual and ordinary course of his business, and in discharge of his duty, made and signed a note of the fact of the delivery of the beer in a book kept for that purpose. It was held that this was good evidence and admissible.

Price v. *Earl of Torrington.*

This class of cases is entirely distinct from that previously mentioned where the entry is admitted as against interest. Here the entry is not admitted at all on that ground, but simply on the ground of duty and course of business; it must also be carefully noted that here, unlike that other class of cases, only so much of the entry is admitted as it was strictly in the course of the person's ordinary business and duty to make, and no matter extraneous to this can be admitted (*d*).

Distinction between this class of cases and the previous one.

In both this class of cases and that in which the matter is admitted as against interest, not only are statements in writing admitted, but any oral statement made by a person against his interest, or in the course of his business and duty, is also equally admissible (*e*). There is no distinction in principle between the written entries of a deceased person and his verbal declarations. Where the statements are merely verbal, there is reason for watching more carefully the evidence by which those declarations are proved, but if it is

This and the previous class of cases include oral statements.

(*a*) Powell's Evidence, 178–183.

(*b*) *Massey* v. *Allen* (1878), 13 Ch. D. 558; 47 L. J. Ch. 76; *Trotter* v. *Maclean* (1880), 13 Ch. D. 574; 42 L. T. 118; 28 W. R. 244.

(*c*) (1704), 2 S. L. C. 320; Salkeld, 285.

(*d*) *Chambers* v. *Bernasconi* (1835), 1 C. M. & R. 347; *Reg.* v. *Birmingham* (1862), 1 B. & S. 763.

(*e*) See *Sussex Peerage Case* (1853), 11 C. & F. 85; *Stapylton* v. *Clough* (1853), 2 E. & B. 933; and S. L. C. 353.

clearly shewn that they were in fact made, there is no reason whatever why there should be any distinction between the admissibility of the verbal declarations and of the written entries (*f*).

Reputation.

Evidence of general reputation, general character, and general notoriety, is original evidence and not hearsay, so that general evidence is admissible to prove marriage, except in prosecutions for bigamy, or in divorce proceedings (*g*).

Presumptions sometimes furnish evidence.

Presumption as to death after seven years.

Presumptions sometimes furnish evidence. Thus, it is a rule that where a person goes abroad and is not heard of for seven years, the law presumes that such person is dead, but not that he died at the beginning or the end of any particular period during those seven years (*h*). This, however, being only a presumption, is liable to be rebutted, and although, as already stated, there is no presumption of the time of death, such a presumption may arise from particular circumstances (*k*). This is, however, purely matter of evidence, and the onus of proving that the death took place at any particular time within the seven years, lies upon the person who claims the right to the establishment of which the fact is essential. There is also no presumption of law in favour of the continuance of life, though an inference of fact may legitimately be drawn that a person alive and in health on a certain day, was alive a short time afterwards (*l*). It has also been held that where a person has not been heard of for seven years, and during that period—that is, before the expiration of the seven years—a gift is made to him, he must, until the contrary is shewn, be taken to have been in existence at the date of

(*f*) Per Thesiger, L.J., in *Bewley* v. *Atkinson* (1880), 13 Ch. D. 283; 49 L. J. Ch. 153; 28 W. R. 638.

(*g*) Powell's Evidence, 134.

(*h*) *Nepean* v. *Doe* (1837), 2 S. L. C. 558; 2 M. & W. 910; *Re Rhodes, Rhodes* v. *Rhodes* (1887), 36 Ch. D. 586; 56 L. J. Ch. 825; 57 L. T. 652.

(*k*) See *Re Thompson* (1887), 12 P. D. 100; 56 L. J. P. 46.

(*l*) *Wing* v. *Angrave* (1861), 8 H. L. Cas. 183; *Re Phene* (1870), L. R. 5 Ch. 239; 39 L. J. Ch. 316; *Hickman* v. *Upsall* (1875), L. R. 20 Eq. 136.

the gift, and if the contrary cannot be shewn, there is no failure of the gift, but it will go to his representatives (*m*).

Deeds and other documents, until the contrary is shewn, are presumed to have been executed or written at the date they bear (*n*). Deeds, &c., are presumed to have been executed at their date.

Public records and documents (*o*) are evidence of their own authenticity; and deeds or wills which are thirty years old, and come from the proper custody, or from that custody in which it was most reasonable to expect to find them, prove themselves (*p*). The thirty years are computed from the date of the instrument, even in the case of a will (*q*). In connection with this rule it may be noticed that it has been held, that in the case of the execution by an attorney of a deed purporting to be an appointment under a discretionary power, the Court would not assume that the attorney was authorised to, and could lawfully make, the appointment. In other words, the presumption does not go beyond the bare fact of execution (*r*). Deeds and wills prove themselves after a lapse of thirty years. Extent of the rule.

II. *As to the competency of witnesses and the admissibility of particular evidence.* II. As to the competency of witnesses, &c.

As a general rule, every person is a competent witness in an action. Formerly, however, an atheist was incapable of giving evidence, because he was unable to Atheists.

(*m*) *Re Corbishley's Trusts* (1876), 14 Ch. D. 846; 49 L. J. Ch. 266; 28 W. R. 536.

(*n*) Powell's Evidence, 62.

(*o*) As to what are public documents, see *Sturla* v. *Freccia* (1881), 5 App. Cas. 623; 50 L. J. Ch. 86; 29 W. R. 217; *Brooke* v. *Brooke* (1881), 17 Ch. D. 833; 50 L. J. Ch. 528; 30 W. R. 45; *Mayor of Manchester* v. *Lyons* (1883), 22 Ch. D. 299; *Bidder* v. *Bridges* (1886), 34 W. R. 514; 54 L. T. 529, affirmed by Court of Appeal W. N. 1886, p. 148. As to proof of Acts of Parliament, proclamations, &c., see also 45 Vict. c. 9.

(*p*) Powell's Evidence, 64.

(*q*) *M'Kenire* v. *Fraser* (1803), 9 Ves. 5.

(*r*) *Re Airey, Airey* v. *Stapleton* (1897), 1 Ch. 164; 66 L. J. Ch. 132; 76 L. T. 151. On presumptive evidence generally, see Powell's Evidence, 51–85. See also, as to presumption between vendor and purchaser, of correctness of facts recited in deeds twenty years old, 37 & 38 Vict. c. 78, s. 2. See also further, as to the general effect of recitals, as between vendor and purchaser, 44 & 45 Vict. c. 41, s. 3 (3).

take an oath, the rule being that for a person to take an oath it is necessary that he should believe in the existence of a God who will punish in a future state (*s*).

Oaths Act, 1888.

However, it is now provided by the Oaths Act, 1888 (*t*), that every person who objects to be sworn on the ground that he has no religious belief, or that the taking of an oath is contrary to his religious belief, may make a solemn affirmation instead of taking an oath, in all places and for all purposes where an oath is or shall be required by law, and that if such person shall wilfully, falsely, and corruptly affirm anything that, if on oath, would amount to perjury, he shall be liable to prosecution as if he had committed perjury. On this enactment it has been decided that where a witness is desirous of making an affirmation instead of taking an oath, it is the duty of the judge presiding at the trial to himself examine the witness, and ascertain that he objects to be sworn on the ground either that he has no religious belief, or that the taking of an oath is contrary to his religious belief (*u*).

Duty of Judge.

Criminals or persons of infamous character were formerly excluded from giving evidence, but are not now.

Persons who were infamous,—as criminals,—were formerly inadmissible as witnesses, but this was altered by the Evidence Act, 1843, which provided that no person shall be excluded from giving evidence by reason of having been guilty of a crime (*v*). Any person, therefore, whatever he may have been guilty of, is competent as a witness, and it is for the jury to say to what extent they will credit his testimony. In some cases it may be important to bring before the jury the fact of the witness's crime or bad character, to show that he is not worthy of credence; and it has been provided that a witness may be questioned as to whether he has

(*s*) *Omichund* v. *Barker* (1760), Willes, 550 decided that if a witness believed in a God who would punish in this world, that was sufficient, but in subsequent cases the law was laid down as stated in the text.

(*t*) 51 & 52 Vict. c. 46, repealing the previous provision of 32 & 33 Vict. c. 68, s. 4.

(*u*) *Reg.* v. *Moore* (1892), 61 L. J. M. C. 80; 66 L. T. 125.

(*v*) 6 & 7 Vict. c. 85, s. 1 (Lord Denman's Act). In considering this subject the student must be careful not to confuse it with that of a prisoner's giving evidence for himself in a criminal prosecution, which is now permitted by the Criminal Evidence Act, 1898 (61 & 62 Vict. c. 36).

been convicted of any felony or misdemeanour, and upon being so questioned, if he either denies the fact or refuses to answer, it shall be lawful for the opposite party to prove his conviction (*x*); and this may be done although the fact of the conviction be altogether irrevelant to the matter at issue in the cause (*y*). It is also, irrespective of this enactment, quite open to a party to examine a witness on points affecting his character, or tending to discredit him; but if he denies such points, the evidence of other witnesses to contradict him is not admissible, unless the fact sought to be established is material to the issue (*z*).

Discrediting witness.

A party producing a witness who deposes contrary to what was expected, is not allowed to impeach the credit of his own witness by giving general evidence of his bad character; but he may, in case the witness shall, in the opinion of the judge, prove adverse, contradict him by other evidence, or, by leave of the judge, prove that he has made at other times a statement inconsistent with his present testimony, the circumstances of such statement being first mentioned to him, and he being asked whether or not he has made such statement (*a*), and if, on being so asked, he does not admit that he made such statement, proof may be given that he did (*b*). Where any witness has made a previous contrary statement in writing, in cross-examining on it, it is not necessary to shew him the writing, but if it is intended afterwards to contradict him by such writing, then, before the contradictory proof can be given, his attention must first be called to those parts of the writing which are to be used for the purpose of so contradicting him (*c*).

Contradiction of an adverse witness.

Persons were also formerly excluded from giving evidence if in any way interested in the result of the action, either as parties or otherwise (*d*), but this is

Persons interested in the result of an action were formerly

(*x*) 17 & 18 Vict. c. 125, s. 25.
(*y*) *Ward* v. *Sinfield* (1880), 49 L. J. C. P. 696; 43 L. T. 252.
(*z*) See notes in Day's Common Law Procedure Acts to section 25 of 17 & 18 Vict. c. 125.
(*a*) 17 & 18 Vict. c. 125, s. 22. (*b*) Sect. 23.
(*c*) Sect. 24. (*d*) Powell's Evidence, 26.

excluded from giving evidence, but not now.

not so now. The first provision on the subject was made by the Evidence Act, 1843, (*e*), which provided that no person offered as a witness should be thereafter excluded from giving evidence by reason of incapacity from interest, but this was not to extend to render competent any person actually a party to any suit, action, or proceeding (*f*). Next, the Evidence Act, 1851 (*g*), provided that even the parties to any action should be both competent and compellable witnesses (*h*), except in proceedings instituted in consequence of adultery, or in actions for breach of promise of marriage (*i*). Finally, the Evidence Act, 1869 (*k*), provided that the parties to any action of breach of promise of marriage shall be competent to give evidence in such action, provided, however, that no plaintiff in any such action shall recover a verdict unless his or her testimony shall be corroborated by some other material evidence in support of such promise (*l*); and that the parties to any proceedings instituted in consequence of adultery, and the husbands and wives of such parties, shall be competent to give evidence in such proceeding, provided that no witness in any proceeding, whether a party to the suit or not, shall be liable to be asked, or bound to answer, any question tending to shew that he or she has been guilty of adultery, unless such witness shall have already given evidence in the same proceeding in disproof of his or alleged adultery (*m*).

Provision of the Evidence Act, 1869.

Husbands and wives of witnesses.

Not only were the actual parties to actions excluded from giving evidence, but the rule applied to the husbands and wives of such witnesses (*n*), but this is not so now (*o*). The Act upon this subject, however, also

(*e*) 6 & 7 Vict. c. 85. (*f*) Sect. 1.
(*g*) 14 & 15 Vict. c. 99. (*h*) Sect. 2.
(*i*) 14 & 15 Vict. c. 99, s. 4. And in criminal cases the prisoner is also now a competent witness by reason of the Criminal Evidence Act, 1898 (61 & 62 Vict. c. 36).
(*k*) 32 & 33 Vict. c. 68. (*l*) Sect. 2.
(*m*) Sect. 3. (*n*) See Powell's Evidence, 36.
(*o*) 16 & 17 Vict. c. 83, s. 2. Under the Married Women's Property Acts, 1882 (45 & 46 Vict. c. 75, s. 12) and 1884 (47 & 48 Vict. c. 14, s. 1), in any proceeding, civil or criminal, under the Act of 1882, a

provides that no husband shall be compellable to disclose any communication made to him by his wife during the marriage, and no wife shall be compellable to disclose any communication made to her by her husband during the marriage (*p*).

An idiot is incapable of giving evidence (*q*), and so is a lunatic, except during a lucid interval, when, if duly proved that it is a lucid interval, he is a perfectly competent witness (*r*).

An idiot cannot give evidence, nor can a lunatic, except during a lucid interval.

A deaf and dumb person is a competent witness through the means of signs, or by an interpreter, if it seems that he has sufficient understanding (*s*).

A deaf and dumb person can give evidence.

Children may or may not be competent witnesses, the matter entirely depending upon whether they have sufficient intelligence. "Age is immaterial, and the question is entirely one of intelligence, which, whenever a doubt arises, the court will ascertain to its own satisfaction by examining the infant on his knowledge of the obligation of an oath, and the religious and secular penalties of perjury. Although tender age is no objection to the infant's competency, he cannot, when wholly destitute of religious education, be made competent by being superficially instructed just before a trial with a view to qualify him. A judge may, in his discretion, postpone a trial in order that a witness may be instructed in the nature of an oath, but the inclination of judges is against this practice" (*t*).

As to the testimony of children.

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husband and wife are rendered competent to give evidence against each other. As to the omission from the Act of 1882 which gave rise to the Act of 1884, see *Reg.* v. *Brittleton* (1884), 12 Q. B. D. 266.

(*p*) 16 & 17 Vict. c. 83, s. 3. See also as to criminal cases, the Criminal Evidence Act, 1898 (61 & 62 Vict. c. 36), ss. 1, 4.

(*q*) Powell's Evidence, 20.

(*r*) Powell's Evidence, 21. The distinction between an idiot and a lunatic is, that the former has always, even from his birth, been devoid of understanding, whilst the latter has by some subsequent event been deprived of it. Powell's Evidence, 21; see also *ante*, pp. 261, 262.

(*s*) Powell's Evidence, 21.

(*t*) Powell's Evidence, 22. On the hearing of a charge under the Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), s. 4, a child may give evidence though not understanding the nature of an oath, and the child need not be sworn. Such child's evidence must, however, be corroborated.

It has been stated that deeds and other documents thirty years old, and coming from the proper custody, prove themselves (*u*); in cases when this is not so it is important to understand the different ways in which they may be proved.

It is not now necessary to call an attesting witness to prove an instrument not requiring attestation.

"It was a common law principle that where a writing was attested, the witnesses, or one of them, must be called to prove the execution of the instrument; and it was not competent to a party to prove it even by the admission of the persons by whom it was executed" (*x*). The most apt and usual way even now of proving any instrument which has been attested is undoubtedly, in the absence of admission, by calling the attesting witness; but this is not generally absolutely necessary, it having been provided that "it shall not be necessary to prove by the attesting witness any instrument *to the validity of which attestation is not requisite*, and such instrument may be proved by admission or otherwise, as if there had been no attesting witness thereto" (*y*).

Different ways in which such instruments not requiring attestation may be proved.

Instruments, therefore, not requiring attestation may be proved in any of the following ways:—

1. By admission.

2. By calling the attesting witness, if there is one.

3. By calling any person who actually saw the writing or signing, or the party who wrote it or signed it himself.

4. By calling a witness who has acquired a knowledge of the writing in question, by having seen the person write at some other time, even though only once, or by having had correspondence with such person which has been acted upon.

5. By comparison of the writing in question with any writing proved to the satisfaction of the judge to be genuine (*z*).

(*u*) *Ante*, p. 487.
(*x*) Powell's Evidence, 316.
(*y*) 17 & 18 Vict. c. 125, s. 26; see, however, on this enactment, *Re Rice* (1886), 32 Ch. D. 35; 55 L. J. Ch. 799; 54 L. T. 589.
(*z*) Powell's Evidence, 314.

Notice to inspect and admit.

As to the first of the above modes of proof, it may be mentioned that a notice to inspect and admit *i.e.*, a notice to the other party or parties to the action to inspect some document and admit its execution, is usually given just before the trial of most actions; the other party or parties can then inspect the document, and give an admission, and this saves further proof of execution, and in case of refusal or neglect to admit, the costs of proving the document have to be borne by the party so neglecting or refusing, whatever may be the result of the action, unless at the trial the judge certifies that the refusal to admit was reasonable; and no costs of proving any document are allowed if such notice has not been given, unless in the opinion of the taxing-master the omission to give the notice has been a saving of expense (*a*). The object, therefore, of giving this notice is to get the document admitted, or to throw the expense of its proof on the opponent or opponents (*b*).

Meaning of an admission being made "saving all just exceptions."

Any admission made under such a notice as is last mentioned is made "saving all just exceptions" (*c*), that is, the party admits nothing more than the bare execution, so that, for instance, the admission by a person of his handwriting to a bill, has been held not to preclude him from objecting to its admissibility in evidence on the ground of its being unstamped (*d*).

As to proof by comparison of handwriting.

The last of the before-mentioned modes of proof of handwriting, viz., by comparison with other writings by the same person, proved or admitted to be genuine, was not formerly allowed (*e*), but it is now otherwise by the provisions of the Common Law Procedure Act, 1854 (*f*). Under this enactment persons skilled in comparing

(*a*) 15 & 16 Vict. c. 716, s. 117.

(*b*) As to the notice to produce usually given before going to trial, see *ante*, p. 478; and as to both notices, see Indermaur's Manual of Practice, 178. Also as to a notice to admit facts, see Order xxxii. rule 4; Indermaur's Manual of Practice, 119.

(*c*) 15 & 16 Vict. c. 76, s. 117.

(*d*) *Vane* v. *Whittington* (1843), 2 Dowl. (N. S.) 757.

(*e*) *Doe* d. *Mudd* v. *Suckermore* (1836), 5 A. & E. 703.

(*f*) 17 & 18 Vict. c. 125, s. 27.

handwritings may be called, though quite unconnected with the writer, to prove that by a comparison, and a careful observance of the different letters, and the general style, with a document or documents proved or admitted to be genuine, they are of opinion that the handwriting in question is the work of the same person; but this kind of evidence, from its manifest uncertainty, has of late years been much disfavoured. For the purpose of comparison the disputed writing must always be produced in court, so that the enactment does not apply to documents which are not produced, and of which it is sought to give secondary evidence (*g*).

To prove instruments, actually requiring attestation, the attesting witness must be called;

But where attestation is necessary to the validity of an instrument, and proof is required of it, the attesting witness or one of the attesting witnesses, if living, must be called as a witness (*h*). The student is reminded that some of the chief instruments requiring attestation are wills and codicils to wills (*i*), warrants of attorney, and cognovits (*k*), bills of sale (*l*), and appointments under powers, and other instruments which the person giving the authority for their execution has directed shall be attested (*m*). When, however, an attesting witness is dead or abroad, or for some other reason cannot be produced after due efforts to bring him before the Court, evidence of his handwriting may be given; and if there are several attesting witnesses who cannot be produced, generally it is sufficient to prove the handwriting of one of such witnesses (*n*).

unless dead, or abroad, or not to be found.

What it is sufficient for an attesting witness to depose to.

Although an attesting witness, on being called to prove the execution of an instrument, states that he does not remember the actual fact of the execution,

(*g*) See Day's Common Law Procedure Acts, notes to sect. 27 of 17 & 18 Vict. c. 125; Powell's Evidence, 316.

(*h*) *Wyman* v. *Garth* (1853), 8 Ex. 803.

(*i*) 1 Vict. c. 26, s. 9.

(*k*) 1 & 2 Vict. c. 110, s. 9; 32 & 33 Vict. c. 62, s. 24; *ante*, pp. 11, 12.

(*l*) 41 & 42 Vict. c. 31, s. 10; 45 & 46 Vict. c. 43, s. 8; *ante*, pp. 114–122.

(*m*) As to the execution of powers of appointment by will or deed respectively, see 1 Vict. c. 26, s. 10, and 22 & 23 Vict. c. 35, s. 12.

(*n*) Powell's Evidence, 318; and see *Baxendale* v. *De Valmer* (1888), 57 L. T. 556.

but yet he deposes that, seeing his signature to the attestation, he is therefore sure he saw the party execute the deed, or sign the document, this is quite sufficient proof of the execution (*o*).

Mode of proving a will at a trial.

Probate of a will, or, if lost, an examined copy, or an exemplification, is the proper and conclusive evidence of the executors' title, and the validity and contents of the will so far as regards personalty, which includes chattels real (*p*). In the case, however, of an action involving the question of title to land, or any description of realty, it was formerly necessary to produce the original will (*q*), but the Court of Probate Act, 1857, provides that in any action, where necessary to establish a devise of or affecting real estate, it shall be lawful for the party intending to establish such devise, to give to the opposite party, ten days at least before the trial, notice that he intends at the trial to give in evidence, as proof of the devise, probate of the will, or letters of administration with the will annexed, or a copy thereof, stamped with any seal of the Probate Court (*r*); and in every such case such probate or letters of administration, or copy thereof respectively, stamped as aforesaid, shall be sufficient evidence of the will and its validity, notwithstanding the same may not have been proved in solemn form, unless the party receiving such notice shall, within four days after such receipt, give notice that he disputes the validity of such devise (*s*). Even in the absence of a counter-notice, the probate is only sufficient, or *primâ facie* evidence, and therefore, the party omitting to give such counter-notice is not, on his part, precluded from giving evidence against the validity of the will (*t*). If the will has been proved in solemn form, it is provided

Notice.

Effect of absence of counter-notice.

(*o*) Per Bayley, J., *Maugham* v. *Hubbard* (1828), 8 B. & C. 16; Powell's Evidence, 318, 319.

(*p*) Powell's Evidence, 289, 290.

(*q*) Ibid., 291.

(*r*) Now the Probate, Divorce and Admiralty Division of the High Court of Justice.

(*s*) 20 & 21 Vict. c. 77, s. 64.

(*t*) *Barraclaugh* v. *Greenhough* (1867), L. R. 2 Q. B. 612; 36 L. J. Q. B. 251.

that the probate shall not only be sufficient, but conclusive proof (*u*).

Land Transfer Act, 1897.

As regards the proof of a devise of freeholds, it appears, however, now that, by reason of the Land Transfer Act, 1897 (*v*), in the case of deaths on or since January 1, 1898, probate either in common or in solemn form is equally conclusive evidence to prove a devise, and that without giving any notice. The reason is that the Act (*w*) provides that all enactments and rules of law relating to the effect of probate as regards chattels real, shall apply to real estate so far as the same are applicable. The expression "real estate," however, does not include copyholds (*x*), and therefore, as regards a devise of copyholds, the law still remains as stated in the last paragraph.

A person is not allowed to make evidence for himself; so, for instance, a man's books are not evidence for him.

A person is not allowed to make evidence for himself, so that a person's own books are not evidence for him, nor, indeed, is anything written, said, or done by a person having an interest, any evidence for him, for this would be self-serving evidence. But many documents and facts, not in themselves evidence, may be admitted to refresh a witness's memory (*y*), for here he speaks to the facts from separate knowledge, only assisted by this extraneous matter; thus, for instance, a witness may refer to his own books of account for this purpose, or to some entry in a diary or other book, and it is not actually necessary that the entry should have been made at the time, but it is sufficient if made shortly afterwards, so that he may be presumed then to have had accurate memory on the point (*z*). And where any memorandum or entry is produced in court to a witness, such memorandum or entry, or so much thereof as is used to refresh the witness's memory, must be shewn to the opponent, who is entitled to cross-examine on it (*a*).

(*u*) 20 & 21 Vict. c. 77, s. 62.
(*v*) 60 & 61 Vict c. 65.
(*w*) Sect. 2 (2).
(*x*) Sect. 1 (4).
(*y*) Powell's Evidence, 319-323.
(*z*) Powell's Evidence, 322; *Heywood* v. *Dodson* (1866), 14 L. T. 285; *Buxton* v. *Garfit* (1881), 44 L. T. 287.
(*a*) Powell's Evidence, 321.

Witnesses are required to depose to facts, and not to give forth mere matters of opinion, but, notwithstanding this, there are many cases in which the opinion partakes in its nature of fact, and is therefore receivable in evidence. In Mr. Powell's work upon Evidence (*b*) there are stated to be three classes of civil cases in which evidence consisting of matters of opinion is receivable, viz. :— Evidence of matters of opinion.

1. On questions of identification ; *e.g.*, in the case of a long-absent claimant of property, or in the case of identification of handwriting.

2. To prove the apparent condition or state of a person or thing ; *e.g.*, in the case of an assault, to prove from a person's manner his intention, or to prove the state of some building, or of some goods the subject of the action.

3. To prove matters strictly of a professional or scientific character, by skilled or scientific witnesses ; *e.g.*, in cases of terms having, in some business, or amongst a particular class, a special and peculiar meaning, or in cases where words of a scientific or exceptional character are used, or the comparison of handwriting with other handwriting to tell its genuineness. And not only may a witness be called to prove the meaning of terms or matters in his opinion, but even dictionaries or other books may be referred to. The evidence, however, by experts, of matters of opinion, is always received with great caution (*c*).

The foregoing remarks apply generally, not only to oral evidence, but also to affidavits : but on interlocutory applications affidavits may contain statements founded only on the deponent's belief, with the grounds of such belief, so that practically to a certain extent hearsay evidence is here admitted (*d*). Affidavits on interlocutory application may contain statements founded merely on belief.

By the Stamp Act, 1891, a document requiring a stamp cannot (except in criminal proceedings) be given Effect of the non-stamping of an

(*b*) Pages 88, 89.
(*c*) See per Lord Campbell, 10 Cl. & F. 191 ; and see also *ante*, p. 494.
(*d*) Order xxxviii. rule 3 ; Indermaur's Manual of Practice, 240.

Instrument requiring a stamp—time for stamping, &c.

in evidence or be available for any purpose whatever, unless it is duly stamped (*e*). But it seems that such unstamped document can be used to refresh memory, or to prove a collateral fact or fraud, or in proceedings for penalties, or if it is a forgery, or is made for an illegal consideration (*f*). There are some instruments which require to be stamped before execution, *e.g.*, articles of clerkship to a solicitor; but, generally, after execution, fourteen days are allowed within which to stamp an agreement, and thirty days within which to stamp an instrument under seal; and an instrument executed abroad may be stamped within thirty days after being received in the United Kingdom. If not stamped within these times, the unstamped instrument can only be stamped on payment of the unpaid duty, and a penalty of £10, and also by way of further penalty, where the unpaid duty exceeds £10, of interest on such duty at the rate of £5 per cent. per annum from the day upon which the instrument was first executed up to the time when such interest is equal in amount to the unpaid duty (*g*).

Who objects to insufficiency of stamp.

If an instrument is not stamped, or has been insufficiently stamped, the opponent may, when it is tendered in evidence, object to it on that ground; but, strictly, it is the place of the officer whose duty it is to read the instrument, to call the attention of the judge to the fact; and even then, if the instrument is one which may legally be stamped after execution, it may, on payment to such officer of the amount of the unpaid duty and the aforesaid penalty payable on stamping, and also on payment of a further sum of £1, be received in evidence, saving all just exceptions on other grounds (*h*).

III. Cases of privilege.

III. *Cases of Privilege.*—It has been pointed out in discussing the subject of libel and slander, that

(*e*) 54 & 55 Vict. c. 39, s. 14 (4).
(*f*) Alpe's Stamp Duties, 34–39.
(*g*) 54 & 55 Vict. c. 39, s. 15. The Commissioners of Inland Revenue have, however, in special cases, power to remit or reduce the penalty on memorial to them. See *ante*, p. 316, note (*g*).
(*h*) 54 & 55 Vict. c. 39, s. 14.

there are certain circumstances in which a party is privileged to make assertions which in ordinary cases would be libellous or slanderous, but which are from such circumstances prevented from being so (*i*). So, also, in matters of evidence, generally speaking a witness must answer all questions put to him relating to the subject-matter of the action, or in any way relevant to it; but there are certain cases in which, from special circumstances, either the witness is privileged from being obliged to disclose the matter, or some third person has a right to object to his doing so.

There are two chief cases of privilege, viz.:—

1. A witness is not compellable to disclose any matter that may tend to criminate him, or to expose him to a penalty or forfeiture of any kind (*k*); and

1. Facts that may tend to criminate.

2. Professional communications between counsel, solicitors, or their clerks, and their clients, made in confidence, cannot be disclosed without the client's consent, nor can a client be compelled to disclose any communication made in confidence to such professional adviser (*l*).

2. Professional communications.

As to the first case of privilege. The question at once presents itself, who is to be the person to judge of whether or not a question asked has a tendency to criminate the witness or expose him to a penalty—the person asked the question, or the presiding judge? After various conflicting dicta (*m*) the law may be now stated to be as follows: Where a witness refuses to answer a question put to him on the ground that his answer may tend to criminate him, his mere statement of his belief that his answer will have that effect is not enough to excuse him from answering, but the

Who is to determine whether answering a question may tend to criminate witness.

(*i*) See *ante*, pp. 391–396.

(*k*) Powell's Evidence, 94.

(*l*) Ibid., 101; *Eadie* v. *Anderson* (1883), 52 L. J. Ch. 81; 47 L. T. 543. It seems also that statements made at joint consultations between parties, and their counsel, or their solicitors, are privileged; *Rochefoucauld* v. *Boustead* (1896), 65 L. J. Ch. 794; 74 L. T. 783.

(*m*) See *Fisher* v. *Ronald* (1852), 12 C. B. 762; *Reg.* v. *Garbett* (1850), 1 Den. 236; *Reg.* v. *Boyes* (1862), 1 B. & S. 311; and see per Parke, B., in *Osborne* v. *London Docks Co.* (1855), 10 Ex. 698.

court must be satisfied, from the circumstances of the case, and the nature of the evidence which the witness is called upon to give, that there is reasonable ground to apprehend danger to him from his being compelled to answer. But if it is once made to appear that the witness is in danger, great latitude should be allowed to him in judging for himself of the effect of any particular question. Subject to this reservation, the judge is bound to insist on the witness answering, unless he is satisfied that the answer will tend to place him in peril (*n*).

A witness is not always bound to answer a question tending to degrade him.

Where a question is asked a witness which will not actually tend to criminate him or expose him to any penalty, but is yet one the answer to which may tend to degrade him, if it is not actually material to the issue, but merely some point tending to affect his character, and thus reduce damages, or to have some other incidental effect, he is not bound to answer it (*o*).

Distinction in rules of law and equity on the first case of privilege.

This first case of privilege has always been wider in equity than at law; for in equity any question the answer to which might subject the witness to any pains or penalties, or to ecclesiastical censure, or a forfeiture of interest, has been held to be within the rule (*p*); and it is presumed that, as the rules of equity are now generally to prevail (*q*), this is now the case in all divisions of the High Court of Justice.

Privilege of a wife.

The rule of privilege upon this ground extends not only to a man himself, but also to his wife, so that a wife cannot be compelled to answer any question which may expose her husband to such consequences (*r*).

No privilege by reason that answer might expose witness to a civil action.

A witness cannot object to answer any question upon the mere ground that his answer might expose him to a civil action (*s*).

(*n*) *Ex parte Reynolds, re Reynolds* (1882), 20 Ch. D. 294; 51 L. J. Ch. 766; 46 L. T. 508; 30 W. R. 651.
(*o*) Powell's Evidence, 100, 101.
(*p*) Ibid., 101.
(*q*) Judicature Act, 1873, s. 25 (11).
(*r*) *Carturright* v. *Green* (1802), 8 Ves. 410; Powell's Evidence, 97.
(*s*) Powell's Evidence, 97.

A witness may waive his privilege and answer a question tending to criminate him if he chooses.

A witness may, of course, waive his privilege and answer at his peril, for he is the party concerned, and if he chooses to waive the privilege that the law allows him, there is nothing to prevent his doing so (*t*). There are several cases in which it has been expressly provided, by different statutes, that a witness cannot refuse to answer questions as to certain matters on the ground that the answers would criminate him, but that such answers shall not be used against him in a criminal proceeding arising out of the same transaction (*u*). With regard to a bankrupt being examined under the Bankruptcy Act, 1883, as to his property, he is bound to make the fullest disclosure, and is not entitled to any privilege on the ground that his answer may tend to criminate him (*x*).

Bankruptcy.

In the case of professional communications the privilege is the client's.

As to the second chief ground of privilege, this is of a very different nature, for in the first case the privilege is always that of the witness, which he may at his option waive, but in this case, where counsel, solicitors, or their clerks are witnesses, the privilege is not theirs, but that of the client, and it is not in such a case the witness who may waive the privilege, but the client; and if the client does not so waive it, then the witness is not allowed to make any such disclosure (*y*). And for this case of privilege to exist, it is not necessary that the position of solicitor and client should be actually subsisting at the time; it is quite sufficient if it has existed at some past time, and the

In cases of privilege upon this ground the relationship of solicitor

(*t*) Powell's Evidence, 94.

(*u*) Ibid., 97–100. Thus in an inquiry under the Explosive Substances Act, 1883 (46 Vict. c. 3), a witness examined thereunder is not excused from answering any question on the ground that the answer thereto may criminate, or tend to criminate him; but any statement made by any person in answer to any question put to him on such an examination is not, except in the case of an indictment or other criminal proceeding for perjury, admissible in evidence against him in any proceeding, civil or criminal (sect. 6 (2)).

(*x*) *Ex parte Schofield, re Firth* (1877), 6 Ch. D. 230; 46 L. J. Bk. 112. As regards frauds by agents, bankers or factors, it is, however, provided that a statement or admission made by any person in any compulsory examination in bankruptcy shall not be evidence against that person in any proceeding in respect of any such offence (53 & 54 Vict. c. 71, s. 27).

(*y*) *Wilson* v. *Rastall* (1792), 4 T. R. 759.

and client need not be existing at the time.

communication in question took place whilst that relationship existed. This rule of privilege is founded upon principles of public policy, for if some such rule did not exist, no man would know what he was safe in disclosing to his professional adviser (*z*). However, it must be borne in mind that a communication made by a client to his solicitor, not with the view of obtaining advice, but for the purpose of obtaining information upon some matter of fact, or for some purpose other than in the ordinary position of solicitor and client, is not privileged (*a*); and also that professional confidence and professional employment are essential to render communications between solicitors and their clients privileged. Where, therefore, the client has a criminal object in view in his communication with his solicitor, one of these elements must necessarily be absent, and a communication between a solicitor and his client, which was a step preparatory to the commission of a criminal offence, is admissible as evidence in the prosecution of the client for such offence (*b*).

Reg. v. *Cox and Railton.*

Solicitor, an attesting witness, may give evidence.

A solicitor employed to obtain the execution of a deed, and who is one of the witnesses, is not precluded, on the ground of breach of professional confidence, from giving evidence as to what passed at the time of execution, by which the deed may be proved invalid (*c*).

A client also cannot be compelled to disclose confidential communications made to his professional adviser.

The student will observe that part of the rule in this class of cases of privilege is also that a client cannot be compelled to disclose any communication made in confidence to his professional adviser (*d*). This seems to follow naturally upon the same reasoning, and here, of course, the privilege is that of the

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(*z*) See per Lord Brougham in *Bolton* v. *Corporation of Liverpool* (1833), 1 M. & K. 84.

(*a*) See Powell's Evidence, 103, 104; *O'Shea* v. *Wood* (1892), 65 L. T. 30.

(*b*) *Reg.* v. *Cox and Railton* (1885), 14 Q. B. D. 153; 54 L. J. M. C. 41 52 L. T. 25; 33 W. R. 396.

(*c*) *Crawcour* v. *Salter* (1882), 18 Ch. D. 30; 45 L. T. 62.

(*d*) *Ante*, p. 499.

witness. This privilege of the client can always be waived by him, and if waived, a witness who has objected to answer a question on the ground of his client's privilege must then answer it.

It is for a solicitor to decide whether a document he is called on to produce is privileged.

It seems that a solicitor called upon to produce any document of his client's, must exercise his own discretion as to producing it, and that it is not for the judge to decide whether or not it ought to be produced (*e*). Where, however, an inquiry was directed as to what separate estate a married woman was entitled, and the solicitor for the married woman's trustees was subpœnaed on the inquiry to produce documents, and he refused on the ground of privilege to produce a deed under which the married woman was entitled to certain separate property, and also refused to state the names of the trustees, it was held that the privilege could not be claimed, and that he must both produce the deed and state the names of the trustees (*f*).

A document privileged in a solicitor's hands, is not privileged if he parts with it.

Although some document originally in a solicitor's possession would, had it remained in his possession, have been privileged, yet, if he has parted with it to some other person, although he should not have done so, yet the privilege is gone, and it may be given in evidence by the party into whose possession it has come (*g*).

No privilege in the case of medical men and clergymen.

This case of privilege does not extend beyond the persons named (*h*); thus, medical men (*i*) and clergymen (*k*) are not within the rule, though some doubts have been expressed as to the latter (*l*).

(*e*) *Volant* v. *Soyer* (1852), 12 C. B. 231.

(*f*) *Bursill* v. *Tanner* (1886), 16 Q. B. D. 1; 55 L. J. Q. B. 53; 34 W. R. 35; 53 L. T. 446.

(*g*) See *Cleave* v. *Jones* (1852), 21 L. J. Ex. 105.

(*h*) See *ante*, p. 499.

(*i*) *Lee* v. *Hammerton* (1864), 12 W. R. 975.

(*k*) *Broad* v. *Pitt* (1830), M. & M. 233.

(*l*) See Powell's Evidence, 115, 116. A pursuivant of Herald's College is not in the position of a legal adviser, and communications between him and the person employing him are not privileged (*Slade* v. *Tucker* (1880), 14 Ch. D. 824; 49 L. J. Ch. 644; 28 W. R. 807).

Communications "without prejudice."

All communications in or with reference to litigation which are expressed to be "without prejudice," are privileged (*m*). But when an offer is made in a letter written "without prejudice," and such offer is accepted, or when an admission is made in a letter subject to a condition, and such condition has been performed, the letter can be used in evidence against the writer, notwithstanding that it was written "without prejudice" (*n*). A letter cannot be made privileged by being simply marked "private and confidential" (*o*). Anonymous letters sent to a barrister or solicitor with reference to a matter in which he is concerned are privileged, but not anonymous letters sent to a party to the action himself (*p*). Letters between a country solicitor and his town agents are privileged (*q*).

Some other cases of privilege.

In addition to the foregoing may be mentioned two other cases of privilege, which, however, are of much less importance in civil proceedings than the two chief cases that have been given. The first is, that a witness cannot be asked, and will not be allowed to state, any facts, or to produce any documents, the disclosure of which may be prejudicial to the public interest (*r*), *e.g.*,

State documents.

in the case of some high documents of State. The second is, that evidence may sometimes be excluded in a civil case on the ground of indecency (*s*); but the indecency must be something of a very exceptional character, as tending to outrage all conventional propriety, or involving some matter particularly affecting domestic morality. It may, however, be safely stated that this rule is of such a very fine nature as to be practically of very little importance, or perhaps of no importance at all.

(*m*) *Walker* v. *Wilsher* (1889), 23 Q. B. D. 337; 58 L. J. Q. B. 501.
(*n*) Powell's Evidence, 241.
(*o*) *Kitcat* v. *Short* (1883), 48 L. T. 641.
(*p*) *Re Holloway, Young* v. *Holloway* (1887), 12 P. D. 167; 56 L. J. P. 81; 57 L. T. 515; 35 W. R. 751.
(*q*) *Catt* v. *Tourle* (1871), 19 W. R. 56.
(*r*) Powell's Evidence, 119.
(*s*) Ibid., 124, 125.

IV. *Of some miscellaneous points on the law of evidence.*

IV. Miscellaneous points on the law of evidence.

In any action the *onus probandi*, or burden of proof, is on the person who asserts the affirmative side of the question (*t*), that is to say, that any person who asserts a fact is bound to prove that fact to enable him to succeed in his case, and it is not necessary for the person alleging the negative, to prove it in the first instance. At a trial, therefore, it is generally for the person on whom the affirmative lies to begin. In all cases, by the affirmative is not merely meant the affirmative in point of form, but the affirmative in substance, and the true test for determining on whom the affirmative lies is this: If no evidence was offered, who would be unsuccessful in the action? It is for the party who would be unsuccessful in such event to commence (*u*).

The *onus probandi* is on the person asserting the affirmative in an action.

Instances without number to illustrate the foregoing remarks could be easily given. Thus, take an ordinary action for goods sold and delivered: here, if the defendant in his statement of defence denies the sale and delivery, or otherwise puts the question in issue, if the plaintiff offered no evidence the verdict would be for the defendant, so here the *onus probandi* lies on the plaintiff; but if the defendant admits the sale and delivery of the goods, but sets up some counter-claim against the plaintiff, in this case, if the defendant gave no evidence, the verdict would be for the plaintiff, so here the *onus probandi* lies on the defendant.

An instance of this.

But there are numerous cases in which, in consequence of presumptions of the law, the *onus probandi* lies on the party on whom it would not lie but for such presumption. Thus, in an action on any ordinary simple contract, it is for the plaintiff to prove that the essentials of a simple contract exist, unless the

But sometimes a presumption of the law puts the *onus probandi* where it would not otherwise be.

(*t*) See Phipson on Evidence, ch. 4.

(*u*) *Amos* v. *Hughes* (1836), 1 M. & Rob. 464; Indermaur's Manual of Practice, 186–187.

contract is admitted by the defendant (*x*); but as bills of exchange and promissory notes are presumed to have been given for a valuable consideration until the contrary is shewn (*y*), here it lies on the party who denies the consideration to prove his denial. It is, however, sufficient for a defendant to prove something in the nature of fraud in the prior dealings with the instrument, and if he does this, the plaintiff is then bound to shew how he became possessed of it (*z*).

As to the case of a voluntary settlement.

Again, where a person takes an interest under a voluntary settlement, or any other voluntary instrument, and proceedings are instituted to set aside or otherwise question his interest thereunder, the burden of proof lies on the defendant to prove that such voluntary instrument was fairly and honestly made, without any fraud or pressure upon his part, and if he stood in a fiduciary capacity towards the person making such voluntary instrument, he must, in addition, shew how the intention to make it was produced in the other person (*a*).

A child born during wedlock is presumed to be legitimate until the contrary is shewn.

A child born during wedlock is presumed to be legitimate, a presumption which, however, is capable of being rebutted (*b*), though the burden of proof lies on the party who denies the legitimacy (*c*), unless, indeed, the circumstances are such as to rebut the presumption of legitimacy, *e.g.*, non-access between the husband and wife (*d*). There are also many other cases in which the presumption of the law puts the *onus probandi* where it would not be but for that presump-

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(*x*) As to what are the essentials of a simple contract, see *ante*, pp. 33 *et seq.*

(*y*) See *ante*, p. 195.

(*z*) *Smith* v. *Braine* (1851), 16 Q. B. 244; 20 L. J. Q. B. 201.

(*a*) Per Lord Eldon, *Gibson* v. *Jeyes* (1798), 6 Ves. 266; *Hoghton* v. *Hoghton* (1851), 15 Beav. 299; *Cooke* v. *Lamotte* (1851), 15 Beav. 234.

(*b*) *Bosville* v. *Attorney-General* (1887), 12 P. D. 177; 56 L. J. P. 97; 57 L. T. 88; 36 W. R. 79.

(*c*) *Banbury Peerage Case* (1824), 1 S. & S. 155.

(*d*) *Hawes* v. *Draegar* (1883), 23 Ch. D. 173; 52 L. J. Ch. 449; 48 L. T. 518; 31 W. R. 576.

tion, but to go into them is beyond the scope of the present work (*e*).

Right to begin in actions for personal injuries, &c.

It has already been stated that the person on whom the affirmative lies has the right to begin (*f*), but it has long been an established rule at law that in actions of libel, slander, and in respect of other personal injuries, or, indeed, in any action where the plaintiff seeks to recover actual damages of an unascertained amount, he is entitled to begin, although the affirmative of the issue may, in point of form, be with the defendant (*g*).

Leading questions are not allowed in an examination in chief.

Leading questions cannot be put to a witness by the person on whose behalf he is called (*h*). By a "leading question" is meant some question put, or framed, in such a form as to suggest to the witness the answer that is desired (*i*). Thus, if at a trial it is desired to elicit from a witness the effect of a certain conversation, the proper way to put the question is to simply ask the witness what then took place, or to that effect, and it is not allowable to state in the question the conversation, and ask the witness if it did not take place, for this would be a leading question (*k*). The reason of the rule prohibiting leading questions must be apparent to all, and it has been well stated in Mr. Powell's work on Evidence (*l*) to be "because the object of calling witnesses and examining them *viva voce* in open court, is that the judge and jury may hear them tell their own unvarnished tale of the circumstances which they are called to attest."

Aliter in cross-examination,

In cross-examination of a witness, however, or even in examination in chief of an adverse witness, leading

(*e*) See Powell's Evidence, ch. 18; Phipson's Evidence, ch. 4.
(*f*) *Ante*, p. 505.
(*g*) Powell's Evidence, 266; Indermaur's Manual of Practice, 187; Phipson's Evidence, 28.
(*h*) Powell's Evidence, 408.
(*i*) Phipson's Evidence, 453.
(*k*) See an instance of a leading question in a criminal case in Powell's Evidence, 408.
(*l*) Page 408.

or in examination in chief of an adverse witness.

questions may be asked, for the reason of such questions not being ordinarily admitted in the evidence in chief is, because the witness is presumed to be desirous of assisting the person for whom he is called to give evidence, but in cross-examination, or in the examination in chief of an adverse witness, there can be no such presumption, and the reason for the rule failing, it does not apply.

Position of a plaintiff or defendant if his opponent does not appear at the trial.

If, when an action is called on for trial, the plaintiff appears and the defendant does not, the plaintiff does not necessarily have judgment, but he must prove his claim so far as the burden of proof lies on him. And if, when an action is called on for trial, the defendant appears and the plaintiff does not appear, the defendant, if he has no counter-claim, is entitled to judgment dismissing the action; but if he has a counter-claim, then he must prove such counter-claim so far as the burden of proof lies on him. But any verdict or judgment obtained where one party does not appear at the trial, may be set aside by the court or a judge upon such terms as he may see fit, upon an application made within six days after the trial (*m*).

Admissions may do away with the necessity of strict evidence.

Admissions between the parties to an action may frequently do away with the necessity that would otherwise exist for strict evidence. The term "admissions" is here used to denote the mutual concessions which the parties to an action make in the course of their pleadings, and the effect of which is to narrow the area of facts or allegations requiring to be proved by evidence. The most usual case of admissions that occurs in ordinary actions is the admission of documents under a notice to inspect and admit, which has already been noticed (*n*); but there may be many other cases of admission, *e.g.*, admissions of facts in any pleading, or on a notice to admit facts, which may be given by either party not later than nine days before the day for which notice of trial has been given (*o*), and any

(*m*) Order xxxvi. rr. 31, 32; Indermaur's Manual of Practice, 189, 190.
(*n*) *Ante*, p. 493.
(*o*) Order xxxii. rule 4.

admission made in any letter of one of the parties, or of his solicitor or agent, unless such letter has been expressed to have been written "without prejudice." Having reference to the last point, it is usual and proper, in any letter written with a view to the compromise of an action, to state that it is written "without prejudice;" but when any letter has been written with such a statement, then all subsequent letters following thereon are within the rule although not so expressed (*p*).

Effect in one action of an admission made in another action.

If an admission is made by one party in some pleading or other proceeding in one action, it can be given in evidence in another action as a cogent admission on his part, especially if it has been put in on oath, as would be the case as regards an answer to interrogatories (*q*).

Admissions may be by parol or by conduct, &c.

An admission need not necessarily be in writing, but it may be by parol, *e.g.*, in the course of conversation; and acts, conduct, manner, demeanour, and acquiescence, may operate as admissions if they can be so fairly construed (*r*)

Effect of admissions by counsel, agents, &c.

Counsel may at a trial bind their clients by any admissions they in their discretion see fit to make (*s*), and generally they will bind their clients by reason of the authority and power naturally vested in them. But they must not act in direct opposition to their client's instructions, and it has been held that counsel has no authority to agree to the reference of an action in disregard of the conditions imposed by the client on such reference (*t*). Where an order has been made by the consent, or on the admission, of counsel, the party for whom such counsel appeared cannot afterwards arbitrarily withdraw any such consent or admission, but the other party is entitled to perfect the

Neale v. *Gordon-Lennox.*

(*p*) *Hoghton* v. *Hoghton* (1851), 15 Beav. 278. See also *ante*, p. 504.
(*q*) *Fleet* v. *Perrins* (1866), L. R. 1 Q. B. 536.
(*r*) Powell's Evidence, 228.
(*s*) See *Swinfen* v. *Swinfen* (1856), 18 C. B. 485.
(*t*) *Neale* v. *Gordon-Lennox* (1902), A. C. 465; 71 L. J. K. B. 939; 87 L. T. 341.

judgment or order and to proceed thereon, subject to the right of the party objecting to counsel's consent or admission, to apply to the court that made the order, to be relieved from the consent or admission on the ground of mistake or surprise, or for other sufficient reason (*u*). An agent can only bind his principal by admissions when the making of such admissions comes within the scope of his ordinary and usual authority (*x*); and a wife can only bind her husband by her admissions so far as she can be said to have his authority, express or implied, to do so (*y*), so that even in an action against a husband for his wife's tort, her admission of it cannot be given in evidence against him (*z*).

Infants.

An infant cannot make admissions, nor generally can his guardian or next friend do so for him (*a*). But infants, and their guardians and next friends, are now compellable to make discovery of documents, and to answer interrogatories, in the same way as other litigants (*b*).

Function of the judge and jury as to evidence.

We have seen in the foregoing pages that there are many kinds of proof which may be tendered but cannot, or ought not to, be received. It is for the presiding judge to determine as to the admissibility of particular evidence. There is also another and perhaps even more important point, viz., as to the credence to be given to a witness, for very often evidence of a most conflicting character is given at a trial. It is for the jury to decide on the point of credence, for they sit to try the facts of the case, and in exercising their judgment they should regard the whole circumstances connected with a witness; they should look to his demeanour, and see whether he appears to be giving his

(*u*) *Harvey* v. *Croydon Union Sanitary Authority* (1884), 26 Ch. D. 249; 53 L. J. Ch. 707; 50 L. T. 291; 32 W. R. 389.

(*x*) This is simply on the ordinary principle of the power of an agent to bind his principal, as to which see *ante*, p. 147.

(*y*) This, again, is on the ordinary principle of the power of the wife to bind her husband, as to which see *ante*, pp. 252–259.

(*z*) *Dean* v. *White* (1798), 7 T. R. 112.

(*a*) Powell's Evidence, 235.

(*b*) Indermaur's Manual of Practice, 139.

evidence in an honest and straightforward manner, and whether he appears to be an over-zealous witness, unduly anxious to befriend the party on whose behalf he is called, in which case he must be regarded with, at any rate, some suspicion. They should look, also, in cases of conflicting evidence, not only to outward circumstances, but to inner matters, and consider any interest or possible motive that the witness may have, that may tend to weaken his evidence, and look even to his general character and past doings, as some criterion on the all-important question of truth (*c*).

(*c*) As to the mode of taking evidence, and of enforcing the attendance of witnesses, and generally on the practice of the court thereon, the student is referred to Indermaur's Manual of Practice, 181–184.

APPENDIX.

LAW OF DISTRESS AMENDMENT ACT, 1908.
(8 Edw. VII. c. 53.)

Note.—This Act alters and extends the law as to exemptions from distress, as stated on pp. 75 to 77, *ante*.

An Act to amend the Law as regards a Landlord's right of Distress for Rent.

Section 1. *Under-tenant or lodger, if distress levied, to make declaration that immediate tenant has no property in goods distrained.*—If any superior landlord shall levy, or authorise to be levied, a distress on any furniture, goods, or chattels of—

(*a*) any under-tenant liable to pay by equal instalments not less often than every actual or customary quarter of a year a rent which would return in any whole year the full annual value of the premises or of such part thereof as is comprised in the under-tenancy, or

(*b*) any lodger, or

(*c*) any other person whatsoever not being a tenant of the premises or of any part thereof, and not having any beneficial interest in any tenancy of the premises or of any part thereof,

for arrears of rent due to such superior landlord by his immediate tenant, such under-tenant, lodger, or other person aforesaid may serve such superior landlord, or the bailiff or other agent employed by him to levy such distress, with a declaration in writing made by such under-tenant, lodger, or other person aforesaid, setting forth that such immediate tenant has no right of property or beneficial interest in the furniture, goods, or chattels so distrained or threatened to be distrained upon, and that such furniture, goods, or chattels are the property or in the lawful possession of such under-tenant, lodger, or other person aforesaid, and are not goods or live stock to which this Act is expressed not to apply; and also, in the case of an under-tenant

or lodger, setting forth the amount of rent (if any) then due to his immediate landlord, and the times at which future instalments of rent will become due, and the amount thereof, and containing an undertaking to pay to the superior landlord any rent so due or to become due to his immediate landlord, until the arrears of rent in respect of which the distress was levied or authorised to be levied have been paid off, and to such declaration shall be annexed a correct inventory, subscribed by the under-tenant, lodger, or other person aforesaid, of the furniture, goods, and chattels referred to in the declaration; and, if any under-tenant, lodger, or other person aforesaid, shall make or subscribe such declaration and inventory knowing the same or either of them to be untrue in any material particular, he shall be deemed guilty of a misdemeanour.

Section 2. *Penalty.*—If any superior landlord, or any bailiff or other agent employed by him, shall, after being served with the before-mentioned declaration and inventory, and in the case of an under-tenant or lodger after such undertaking as aforesaid has been given and the amount of rent (if any) then due has been paid or tendered in accordance with that undertaking, levy or proceed with a distress on the furniture, goods, or chattels of the under-tenant, lodger, or other person aforesaid, such superior landlord, bailiff, or other agent shall be deemed guilty of an illegal distress, and the under-tenant, lodger, or other person aforesaid, may apply to a justice of the peace for an order for the restoration to him of such goods, and such application shall be heard before a stipendiary magistrate, or before two justices in places where there is no stipendiary magistrate, and such magistrate or justices shall inquire into the truth of such declaration and inventory, and shall make such order for the recovery of the goods or otherwise as to him or them may seem just, and the superior landlord shall also be liable to an action at law at the suit of the under-tenant, lodger, or other person aforesaid, in which action the truth of the declaration and inventory may likewise be inquired into.

Section 3. *Payments by under-tenant or lodger to superior landlord.*—For the purposes of the recovery of any sums payable by an under-tenant or lodger to a superior landlord under such an undertaking as aforesaid, or under a notice served in accordance with section 6 of this Act, the under-tenant or lodger shall be deemed to be the immediate tenant of the superior landlord, and the sums payable shall be deemed to be rent; but where the under-tenant or lodger has, in pursuance of any such undertaking or notice as aforesaid, paid any sums to the superior landlord, he may deduct the amount thereof from any rent due or which may become due from him to his immediate landlord, and any person (other than the tenant for whose rent the distress is levied or authorised to be levied)

from whose rent a deduction has been made in respect of such a payment may make the like deductions from any rent due or which may become due from him to his immediate landlord.

Section 4. *Exclusion of certain goods.*—This Act shall not apply—

(1) to goods belonging to the husband or wife of the tenant whose rent is in arrear, nor to goods comprised in any bill of sale, hire-purchase agreement, or settlement made by such tenant, nor to goods in the possession, order, or disposition of such tenant by the consent and permission of the true owner under such circumstances that such tenant is the reputed owner thereof, nor to any live stock to which section 29 of the Agricultural Holdings Act, 1908, applies;

(2) (*a*) to goods of a partner of the immediate tenant; (*b*) to goods (not being goods of a lodger) upon premises where any trade or business is carried on in which both the immediate tenant and the under-tenant have an interest; (*c*) to goods (not being goods of a lodger) on premises used as offices or warehouses where the owner of the goods neglects for one calendar month after notice (which shall be given in like manner as a notice to quit) to remove the goods and vacate the premises; (*d*) to goods belonging to and in the offices of any company or corporation on premises the immediate tenant whereof is a director or officer, or in the employment of such company or corporation:

Provided that it shall be competent for a stipendiary magistrate, or where there is no stipendiary magistrate for two justices, upon application by the superior landlord or any under-tenant or other such person as aforesaid, upon hearing the parties, to determine whether any goods are in fact goods covered by subsection 2 of this section.

Section 5. *Exclusion of certain under-tenants.*—This Act shall not apply to any under-tenant where the under-tenancy has been created in breach of any covenant or agreement in writing between the landlord and his immediate tenant, or where the under-tenancy has been created under a lease existing at the date of the passing of this Act contrary to the wish of the landlord in that behalf, expressed in writing and delivered at the premises within a reasonable time after the circumstances have come, or with due diligence would have come, to his knowledge.

Section 6. *To avoid distress.*—In cases where the rent of the immediate tenant of the superior landlord is in arrear it shall be lawful for such superior landlord to serve upon any under-tenant or lodger a notice (by registered post addressed to such under-tenant or lodger upon the premises) stating the amount of such arrears of rent, and requiring all future payments of rent, whether the same has already accrued due or not, by such under-tenant or lodger to be made direct to the superior landlord giving such notice until such arrears shall have been duly paid, and such notice shall operate to transfer to the superior landlord the right to recover, receive, and give a discharge for such rent.

Section 7. *Commencement of Act.*—This Act shall come into operation on the first day of July one thousand nine hundred and nine.

Section 8. *Repeal.*—The Lodgers' Goods Protection Act, 1871, shall, wherever and so far as this Act applies, be repealed as from the commencement of this Act.

Section 9. *Definitions.*—In this Act the words "superior landlord" shall be deemed to include a landlord in cases where the goods seized are not those of an under-tenant or lodger; and the words "tenant" and "under-tenant" do not include a lodger.

Section 10. *Act not to extend to Scotland.*—This Act shall not extend to Scotland, and shall only apply in Ireland to a rent issuing out of lands or tenements situate wholly within the boundaries of a municipality or of a township having town commissioners.

Section 11. *Short title.*—This Act may be cited as the Law of Distress Amendment Act, 1908.

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