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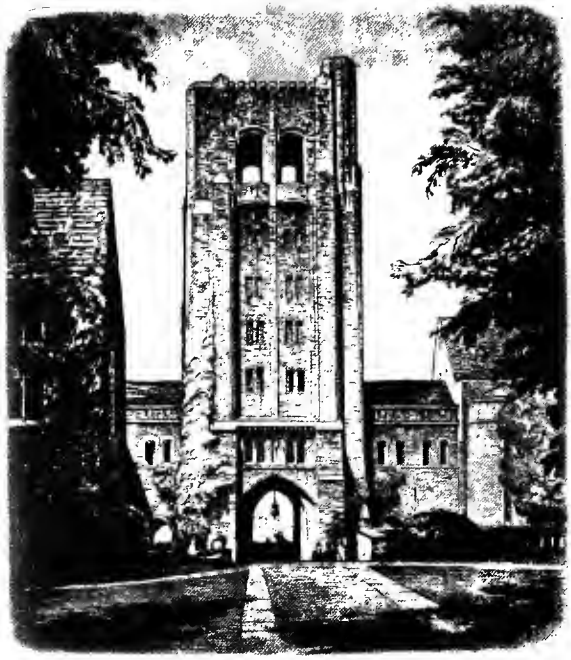

THE

LAW OF ACCOUNT:

BEING

A CONCISE TREATISE

ON

THE RIGHT AND LIABILITY TO ACCOUNT, THE TAKING OF ACCOUNTS, AND ACCOUNTANTS' CHARGES.

BY

SYDNEY E. WILLIAMS,

Author of "The Law relating to Legal Representatives;" "The Law and Practice relating to Petitions;" Forensic Facts and Fallacies," Etc., Etc.

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PREFACE.

The Law of Account seems of sufficient importance to warrant the belief that a separate work on the subject may not be out of place. The subject is continually coming before the Courts, and is being daily dealt with in Judges' Chambers. It is, moreover, one of the most important and most frequent matters with which Solicitors have to deal. There is therefore some ground for thinking that a Concise Treatise on the subject may prove of use to both branches of the Legal Profession, and may also be of service to Liquidators, Receivers, Accountants, and others who are called upon to keep and audit public and other Accounts.

S. E. W.

Lincoln's Inn,
September, 1899.

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A TREATISE

ON

THE LAW OF ACCOUNT.

CHAPTER I.

ACCOUNT GENERALLY.

Right to Account generally.

Action for account.

THE taking of accounts having been assigned to the Chancery Division by the Judicature Act, 1873, s. 34 (3), cases in which a bill for an account would have lain previously should now be brought in the Chancery Division; and cases (not involving the taking of an account) in which an action at law would have been the proper remedy, as, for instance, actions for debt or a balance due, or for liquidated damages or mere set-off or cross demands, may be assigned to any Division of the High Court, including the Chancery Division.

This being so, it may still be desirable to notice the distinctions between the jurisdiction at law and in equity under the old practice, except cases in which the only ground for coming into equity was that there was some question of equitable right of which a court of law could take no notice (for example, equitable set-off), or that some relief which equity alone could give (for instance, discovery) was required.

Prior to the Judicature Act a creditor's usual remedy for a legal debt was at law, and mere inability to enforce it there did not give a remedy in equity. *Kirk* v. *Bromley Union*, 2 Ph. 248; *Crampton* v. *Varna Ry.*, 7 Ch. 562.

The remedy being concurrent, the question of transferring the matter or dealing with it in equity was one of convenience in each particular case. *Foley* v. *Hill*, 2 H. L. C. 28; *Southampton Dock* v. *Southampton Harbour*, 11 Eq. 254; 14 Eq. 595.

Suits for account were entertained in equity where complete justice could not be done between the parties in one ordinary action at law, or only by means of an action of account. *Foley* v. *Hill*, *supra*; *Kennington* v. *Houghton*, 2 Y. & C. C. 620.

A bill for account would lie in equity:—

Mutual accounts.

1. Where there were mutual accounts—by which are meant, not where one party only has received money and made payments on account of the other, but where each of two parties has received and paid on account of the other. *Phillips* v. *Phillips*, 9 Ha. 473; *N. E. Ry.* v. *Martin*, 2 Ph. 758; *Padwick* v. *Hurst*, 18 Beav. 579; *Fluker* v. *Taylor*, 3 Drew. 192; *Kennington* v. *Houghton*, 2 Y. & C. C. 620, 630.

An action on a bond given as security for what might be due on mutual and unsettled accounts was restrained in *Edwards-Wood* v. *Baldwin*, 9 Jur. N. S. 1280.

And as to an account between merchants and their foreign correspondents, see *Darthez* v. *Clemens*, 6 Beav. 165.

Complicated accounts.

2. Where the accounts though not mutual were too complicated to be properly adjusted in a court of law, or could only be settled by a multiplicity of actions, or could be better dealt with in equity. *O'Connor* v. *Spaight*, 1 Sch. & L. 305, 309.

Thus a bill for account lay:—

—by lessees of farms against their landlords. *Kennington* v. *Houghton*, 2 Y. & C. C. 620.

—by contractors against a railway. *Ranger* v. *G. W. Ry.*, 5 H. L. C. 72; *Hill* v. *S. S. Ry.*, 11 Jur. N. S. 192; *M'Intosh* v. *G. W. Ry.*, 2 Mac. & G. 74.

—by one of two contractors against a railway and the

bankrupt assignee of the other. *Taff Vale Ry.* v. *Nixon*, 1 H. L. C. 111.

—by builders against their employers. *Kimberley* v. *Dick*, 13 Eq. 1; *Kemp* v. *Rose*, 1 Giff. 258; *Scrivener* v. *Pask*, 1 C. P. 715.

—by a servant, with salary dependent on profits, against his master, there being no partnership. *D. Marlborough's Case*, 1 Bro. P. C. 175; *Harrington* v. *Churchward*, 6 Jur. N. S. 576.

—against owners of stage coach for an account of town dues. *Corp. Carlisle* v. *Wilson*, 13 Ves. 276.

But a mere general allegation that the accounts were voluminous and intricate was not sufficient, unless there was enough to show that the allegation was true. *Bliss* v. *Smith*, 34 Beav. 508; *Darthez* v. *Clemens*, 6 Beav. 165; *S. E. Ry.* v. *Brogden*, 3 Mac. & G. 8, 22, 23.

Where, therefore, the accounts were not sufficiently complicated, injunctions to stay actions at law were refused in the following cases:—

—insurance broker against his principal. *Dinwiddie* v. *Bailey*, 6 Ves. 136.

—a railway against its surveyors and engineers. *N. E. Ry.* v. *Martin*, 2 Ph. 758.

—a railway against its contractor. *S. E. Ry.* v. *Brogden*, 3 Mac. & G. 8.

—tenant against landlord. *O'Mahoney* v. *Dickson*, 2 Sch. & L. 400, 410.

—customer against banker. *Foley* v. *Hill*, 2 H. L. C. 28; 1 Ph. 399.

—lessee of colliery against lessor for account of rents, royalties and bill transactions. *Moses* v. *Lewis*, 12 Pri. 502.

—bankrupt builder's assignees against the employer, who, on default of the bankrupt, had completed the work. *Ambrose* v. *Dunmow Union*, 9 Beav. 508.

3. A bill for an account also lay where there was a fiduciary relation between the parties, as in the case of

Fiduciary relation.

trustees, executors, solicitors, guardians and agents, all of which are separately treated in subsequent chapters.

But all agents are not in a fiduciary relation towards their principals, as, for instance, bankers and agents for making and selling patented machines. *Foley* v. *Hill*, 2 H. L. C. 28; *Moxon* v. *Bright*, 4 Ch. 292.

And a partner receiving money on account of himself and partner does not receive it in a fiduciary capacity. *Piddocke* v. *Burt*, (1894) 1 Ch. 343.

In the above three classes of cases the action ought now to be brought in the Chancery Division.

4. That plaintiff required discovery which could not then be obtained at law was also formerly in some cases held to give jurisdiction in equity, but this can hardly be the case now. See *Shepard* v. *Brown*, 4 Giff. 208; *Barry* v. *Stevens*, 31 Beav. 258; Ord. 31.

Fraud.

5. A bill also lay for an account where there was fraud, as where the architect or engineer or employee colluded against the contractor or builder. *Kimberley* v. *Dick*, 13 Eq. 1; *Kemp* v. *Rose*, 1 Giff. 258; *Bliss* v. *Smith*, 34 Beav. 508; *M'Intosh* v. *G. W. Ry.*, 2 Mac. & G. 74.

But the mere fact that the engineer was a shareholder was not enough. *Ranger* v. *G. W. Ry.*, 5 H. L. C. 72.

In cases within any of the first three classes above-mentioned it would seem that if the action be brought in any other Division it may in general be transferred to the Chancery Division on the application of the defendant. Jud. Act, 1873, ss. 34 (3), 36; Jud. Act, 1875, s. 11; Seton, 697; *Re Tayler*, 44 C. D. 128, *post*, p. 10.

But it was not in every case, in which it would have entertained jurisdiction over the case if it had been brought into equity in the first instance, that the Court of Chancery would withdraw it from a Court of Law by stopping an action already commenced. *S. E. Ry.* v. *Brogden*, 3 Mac. & G. 8, 23; *N. E. Ry.* v. *Martin*, 2 Ph. 758; *Scott* v. *Corp. Liverpool*, 3 D. & J. 334, 358.

The Court of Chancery could make a decree for account

on information at the instance of the Crown against a subject the paid agent of the Crown. *A.-G.* v. *Edmunds*, 6 Eq. 381; *A.-G.* v. *Corp. London*, 1 H. L. C. 440, 447, 469.

But there is no right to account against the Crown as agent. *Rustomjee* v. *The Queen*, 2 Q. B. D. 69; and see *Kinloch* v. *Sec. of State*, 7 A. C. 619, *post*, p. 235.

A decree for account in a foreign Court is no bar to a suit here. *Pietroni* v. *Transatlantic Co.*, 17 L. T. 303.

Several plaintiffs whose rights are adverse cannot join in an action for account. *Ward* v. *Sittingbourne, &c.*, 9 Ch. 488.

No order for accounts or inquiries concerning the property of a deceased person or other property held upon any trust shall be made except by the judge in person. Ord. 55, r. 15A, *post*, p. 11.

Submitting to Account.

It was usual and proper for a claim for an account to contain a submission by the plaintiff to account himself, and such submission should be recited in the order.

The omission of it in the bill did not, however, make it demurrable, because the submission was implied, or might be made a condition precedent to the making the decree. *Clarke* v. *Tipping*, 4 Beav. 588; *Toulmin* v. *Reid*, 14 Beav. 505; *Kennington* v. *Houghton*, 2 Y. & C. 630; *Fowler* v. *Wyatt*, 24 Beav. 237, *post*, p. 76.

And after a decree or judgment for account the plaintiff may always be ordered to pay the sum found due from him where the liability to pay is mutual. *Toulmin* v. *Reid*, *supra*; *Stowell* v. *Cole*, 2 Vern. 296; *Horwood* v. *Schmedes*, 12 Ves. 316; and see *Stainton* v. *Carron Co.*, 24 Beav. 346.

But not where the amount found due is not a personal liability on the part of the plaintiff. *Hollis* v. *Bulpett*, 13 W. R. 492; *Bodkin* v. *Clancy*, 1 B. & B. 216.

It was for this reason that a defendant could, after an order for account, revive against the plaintiff, and that a writ of *ne exeat* could be obtained against a co-defendant by a defendant in an action for account. *Anon.* 3 Atk. 691; *Horwood* v. *Schmedes*, *supra*; *Sobey* v. *Sobey*, 15 Eq. 200.

The judgment should contain a submission by the plaintiff to account whether the statement of claim does so or not. *Fowler* v. *Wyatt*, *supra*; and see *Hollis* v. *Bulpett*, *supra*.

The assignee of a patent suing the licensee for an account must put himself in the place of the assignor by offering to pay anything which may be due from the latter. *Bergmann* v. *Macmillan*, 17 C. D. 423.

Under the present practice the power of making such judgments as may be necessary for doing complete justice is extended by the Judicature Act, 1873, s. 24; and by Ord. 21, r. 17, where in an action a set-off or counterclaim is established against the plaintiff's claim, the Court may give judgment for the defendant if the judgment is in his favour. See *post*, "Set-off."

This, however, applies to the balance which results upon the hearing of the action. *Rolfe* v. *Maclaren*, 3 C. D. 106.

Account against Plaintiff or Co-defendant.

Generally speaking, an order for account cannot be made against a plaintiff. *Toulmin* v. *Reid*, 14 Beav. 505.

So, in an action for account of rent, where the defendant counterclaimed to set-off money due to defendant on an award and moved under Ord. 33, r. 2, for an account on the ground that the plaintiff by pleading generally had admitted the counterclaim, and thereby entitled defendant to an account of what was due under it, it was held that the case was not one for an account under that order, and motion refused. *Rolfe* v. *Maclaren*, 3 C. D. 106.

But in a foreclosure action the defendant is entitled to have the accounts directed by the judgment brought in, though the plaintiff alleges that the taking of them will be useless; but if the taking of the account turns out to be a reckless expense, the defendant may, it seems, be ordered to pay the costs of it. *Taylor* v. *Mostyn*, 25 C. D. 48.

And where it appeared that the amount due to the plaintiff exceeded the value of the property, the taking of the accounts was on the plaintiff's application stayed. *Exchange, &c.* v. *Ass. of Land, &c.*, 34 C. D. 195.

Accounts between co-defendants may be directed in a proper case. *Chamley* v. *L. Dunsany*, D. P. 2; S. & L. 718.

But they will only be directed where a case is made on the pleadings and proved. *Goodwin* v. *Clewley*, 2 Beav. 30; *Eccleston* v. *L. Skelmersdale*, 1 Beav. 396.

As to contribution between co-defendants, see Ord. 16, r. 55; *Re Holt*, (1897) 2 Ch. 525.

Payment into Court.

After a judgment for account, the defendant, upon his admission or when it has been sufficiently ascertained that a balance is due from him, may be ordered, without certificate, to bring the amount into Court. *London Syndicate* v. *Lord*, 8 C. D. 84; and see *Freeman* v. *Cox*, 8 C. D. 148; but see *contra*, *Nesbitt* v. *Baldwin*, 7 L. R. Ir. 134.

And, generally, where an account has been rendered, and the Court has before it the parties to the account and evidence as to the items in dispute, the Court will look into the facts of the case; and if in the fair exercise of its judicial discretion it can arrive at a conclusion that a sum will be due to the plaintiff on the taking of the account, it will order payment by the defendant of that

amount into Court. *London Syndicate* v. *Lord*, *supra*; *Wanklyn* v. *Wilson*, 35 C. D. 180, 186; and see *Porrett* v. *White*, 31 C. D. 52; *Dunn* v. *Campbell*, 27 C. D. 254, n.; Lewin, 1110.

Failure to answer an affidavit that the money was in defendant's hands was a sufficient admission. *Porrett* v. *White*, *supra*.

Quære whether letters written by a defendant stating that he has received a sum of money are a sufficient admission within Ord. 32, r. 6, to entitle the plaintiff to an order for payment in. *Ibid.*; *Neville* v. *Matthewman*, (1894) 3 Ch. 345.

As to the circumstances under which the Court will order payment into Court upon an interlocutory application, see *Wanklyn* v. *Wilson*, 35 C. D. 180; *Re Benson*, (1899) 1 Ch. 39.

An admission by an accounting party of a sum being due from him is sufficient whether it is made under compulsion or voluntarily, or in what manner—*e.g.*, by an accountant acting on behalf of the accounting party in investigating the accounts. *London Syndicate* v. *Lord*, 8 C. D. 84.

A verbal admission proved by an uncontradicted affidavit is sufficient. *Re Beeny*, (1894) 1 Ch. 499.

The practice of ordering money to be paid into Court ought not to be extended, and there is less reason now than there was for doing so. *Neville* v. *Matthewman*, (1894) 3 Ch. 345, 355.

The order for payment in is confined to moneys actually admitted to be in the hands of the accounting party after deducting payments made by him. *Nutter* v. *Holland*, (1894) 3 Ch. 408; *Crompton* v. *Evans*, *&c.*, (1895) 2 Ch. 711; but see *Re Benson*, (1899) 1 Ch. 39.

If one accounting party only makes admission, the other cannot be ordered to pay into Court. *Boschetti* v. *Power*, 8 Beav. 98.

And the application must be made by all the plaintiffs

in the action, not merely by some. *Re Wright*, (1895) 2 Ch. 747.

Ordinary Accounts—Order 15.

By the Judicature Act, 1873, s. 34 (3), all causes and matters for taking of accounts are assigned to the Chancery Division.

An action for an account in equity is an action for the balance found due on taking the account. It is not a series of actions for the various items included in the account, nor a series of actions for damages for breaches of covenants to make particular payments. *Manners* v. *Pearson*, (1898) 1 Ch. 581.

By Ord. 3, r. 8, in all cases in which the plaintiff in the first instance desires to have an account taken the writ of summons must be indorsed with a claim that such account be taken.

By Ord. 15, r. 1, where a writ has been indorsed for an account, or the indorsement involves taking an account, if the defendant does not appear, or fails to satisfy the Court by affidavit or otherwise that there is a preliminary question to be tried, an order for the proper accounts with all usual and necessary inquiries and directions will be made. Order 15.

The Court must be satisfied by affidavit or otherwise; that is, by some other means than the affidavit of the defendant. *Cf. Shelford* v. *Louth*, *&c.*, 4 Ex. D. 319.

The application is by summons, and may be made at any time after the time for appearance has expired. Ord. 15, r. 2; *Smith* v. *Davies*, 28 C. D. 650; *infra*.

This Order applies to Admiralty actions. See *Gowan* v. *Sprott*, 51 L. T. 266.

The Queen's Bench Division has not the requisite machinery for taking complicated accounts, and no order will be made under Ord. 15 to take such accounts, but the action will be transferred unless the account is quite simple.

Leslie v. *Clifford*, 50 L. T. 590; *York* v. *Stowers*, W. N. (1883) 174; *Re Tayler*, 44 C. D. 128.

If the question in dispute consists wholly or in part of matters of account it may be referred under the Arbitration Act, 1889, s. 14, and in such cases the accounts need not be taken so strictly as before the chief clerk. *Re Tayler*, *supra*.

Wilful default account is not an ordinary account, and so was held not to be within this Order. *Re Bowen*, 20 C. D. 538.

The Order would seem to be applicable only where it is clear that the defendant is an accounting party, and that if the action went to trial an account must be directed. Only such accounts and inquiries can be directed as are specially asked for in the indorsement, or are necessarily involved therein. *Re Gyhon*, 29 C. D. 834.

If there are ordinary accounts which must be taken in any event, and other accounts which depend upon plaintiff's success at the hearing, such ordinary accounts must be directed at once; but if these are involved with the subsequent account which will have to be taken if plaintiff succeeds, then no order will be made. *Ibid.*

So, where the order sought is consequential on an alleged breach of trust, it will not be made. *Ibid.*

And no account will be ordered in a creditor's action until the debt is established. *Batthyany* v. *Walford*, 36 C. D. 269, 276.

The application must be made by summons, and be supported by an affidavit, when necessary, filed on behalf of the plaintiff, stating concisely the grounds of his claim to an account. The application may be made at any time after the time of entering appearance has expired, *supra*.

If the application is made by motion instead of summons, applicant may be made to pay the extra costs. *Smith* v. *Davies*, 28 C. D. 650.

Where the plaintiffs were executors and residuary legatees, a formal affidavit by the solicitor's clerk verify-

ing their title was considered unnecessary to support the summons. *Fenton* v. *Cumberlege*, 52 L. J. Ch. 756.

If the ordinary administration accounts are claimed, the order is now in the discretion of the judge under Ord. 55, rr. 10, 10A. *O'Sullivan* v. *Young*, 29 Sol. Jo. 469; *Re Gyhon*, 29 C. D. 834.

And the Court will not, on the application of a *cestui que trust*, direct accounts to be taken and vouched in chambers, but will order them to be given and vouched out of Court. See *Re Lockwood*, 8 T. L. R. 293, *post*, p. 22.

For an order to bring in accounts within a limited time, see Seton, 282.

For an order adjourning further consideration, and giving liberty to apply, see *Gatti* v. *Webster*, 12 C. D. 771; and see *Re Barratt*, 43 C. D. 70.

No order for general administration, or for the execution of a trust, or for accounts and inquiries concerning the property of a deceased person, or other property held upon any trust, shall be made, except by the judge in person. Ord. 55, r. 15A.

But if the order sought does not come within the prohibition, then it can be made by a master in the C. D. or Q. B. D. or by a registrar in the P. D. Ord. 54, r. 12; *York* v. *Stowers*, W. N. (1883) 174. Or by a district registrar. Ord. 35, r. 6.

For report under Order, *cf. Re Tayler*, 44 C. D. 128; and in Admiralty, *Gowan* v. *Sprott*, 51 L. T. 266.

The action may be set down for trial after an order for account. *Re Michael*, 52 L. T. 609.

The costs of a summons under Ord. 15 ordered to be paid by the plaintiff must be paid before trial can proceed. *Re Neal*, 31 C. D. 437.

But mere non-payment of costs is not enough now to justify an order to stay. *Graham* v. *Sutton*, (1897) 2 Ch. 368.

A general redemption decree will not be made upon a summons for preliminary accounts under this Order.

Clover v. *Wilts, &c.*, 53 L. J. Ch. 622; but *cf. Smith* v. *Davies*, *infra*, and see *post*, p. 97.

A decretal order for an account with all necessary inquiries was made on summons under this Order in a foreclosure action, the facts not being in dispute. *Smith* v. *Davies*, 28 C. D. 650; 31 C. D. 595; *Dyott* v. *Neville*, W. N. (1887) 35; but see *London Loan, &c.* v. *Wall*, 30 Sol. Jo. 338; and *cf. Bissett* v. *Jones*, 32 C. D. 635.

A creditor's action was commenced in the High Court, and a summons taken out for account under this rule. An action had been commenced in the Palatine Court subsequently, and a decree made therein. The chief clerk refused to make an order on the summons, and the judge stayed proceedings in the High Court. *Re Williams*, W. N. (1882) 6.

If the order for an account is the ordinary administration judgment, an action afterwards commenced for administration may be stayed. *Bell* v. *Lowe*, W. N. (1875) 229.

Where, in taking the account, it is desired to refer a decision of the Master in the Chancery Division on an item involving a matter of principle to the judge, a fresh summons need not be taken out. Ord. 55, r. 69; *Upton* v. *Brown*, 20 C. D. 731.

As to the powers of the Court to refer questions of account arising in any cause or matter requiring a prolonged examination of accounts to a special or official referee, see *Rochefoucauld* v. *Boustead*, (1897) 1 Ch. 196.

By the Judicature Act, 1873, s. 66, accounts may be ordered to be taken in the office or by a district registrar, and his written report may be acted upon by the Court as to the Court shall seem fit. And as to taking accounts in district registries, see Ord. 35, r. 6, *post*.

But an official referee is not bound to take accounts and inquiries in the strict way usually adopted before the Master in Chambers. *Re Tayler, Turpin* v. *Pain*, 44 C. D. 128.

Special Directions.

By Ord. 33, r. 2, the Court or a judge may, at any stage of the proceedings in a cause or matter, direct any necessary inquiries or accounts to be made or taken, notwithstanding that it may appear that there is some special or further relief sought for or some special issue to be tried as to which it may be proper that the cause or matter should proceed in the ordinary manner. For form of summons, see D. C. F. p. 258.

This rule does not authorize the sending the whole case to chambers, but only the directing such accounts and inquiries as are subsidiary to determining the rights of the parties, and which would otherwise be directed at the trial. *Garnham* v. *Skipper*, 29 C. D. 566.

Where a defendant moved for an account under this Order because plaintiff, by pleading generally, had admitted the counterclaim, and thereby entitled defendant to an account of what was due under it, it was held that the case was not one for an account under this Order. *Rolfe* v. *Maclaren*, 3 C. D. 106.

Generally an order for account will not be made against a plaintiff. *Toulmin* v. *Reid*, 14 Beav. 505.

And accounts between co-defendants will only be directed where a case is made by the pleadings and proved. *Eccleston* v. *L. Skelmersdale*, 1 Beav. 396, *ante*, p. 7.

Accounts and inquiries may be added to the judgment or order under Ord. 16, r. 40. Thus accounts and inquiries were added after judgment for foreclosure. *Taylor* v. *Mostyn*, 33 C. D. 226.

But an application to add inquiries as to the business carried on after the testator's death was refused. *Re Bach*, W. N. (1892) 108.

Nor could such accounts be ordered as to go beyond the decree, as by charging wilful default or directing annual rests, *infra*, p. 15.

Or by deciding on an alleged admission of assets by the executor. *Re Willshire*, 8 W. R. 133.

Or by directing inquiries as to conversion. *West* v. *Laing*, 3 Drew, 331.

Or adding in a partnership action an inquiry as to return of premium which might have been asked for at the hearing. *Edmonds* v. *Robinson*, 29 C. D. 170.

Ord. 32, r. 6. By Ord. 32, r. 6, any party may at any time apply by motion for such order as he is entitled to on admissions in the pleadings.

An admission of the accounting relationship is enough, although defendant allege that the balance is due to him; in which case he may have to pay costs if balance is found against him. *Turquand* v. *Wilson*, 1 C. D. 85; *Fry* v. *Fry*, 10 Jur. N. S. 983.

As to what is a refusal to account, see *Pince* v. *Beattie*, 11 W. R. 979.

The taking of accounts under the order may enable a party to obtain final judgment without the necessity of reserving further consideration. *Turquand* v. *Wilson*, 1 C. D. 85; and see Ord. 32, r. 6; *Bennett* v. *More*, 1 C. D. 692; *Gilbert* v. *Smith*, 2 C. D. 686.

But it is not necessary to insert in the order, if no further trial is required, a provision to that effect; and it is wrong to insert a proviso that such order is without prejudice to the proceedings in the action being carried on. *Walker* v. *Bunkell*, 22 C. D. 722.

An account having been ordered and taken as to the amount due under a covenant unlimited as to time, the Court refused to continue the account prospectively, with liberty for the plaintiff to apply in case the covenant should be broken in future, and held that fresh actions must be brought for that purpose. *Witham* v. *Vane*, W. N. (1884) 98.

Questions of account requiring a prolonged examination of documents may be referred to a referee. Arb. Act, 1889, s. 14; *Rochefoucauld* v. *Boustead*, (1897) 1 Ch. 196.

Preliminary accounts may also be directed to be taken by an official referee. *Walker* v. *Bunkell, supra.*

But cases ought only to be referred to an official referee to assess damages where the inquiry involves question of detail which it would be wasting the time of the Court to investigate. Per Bowen, L. J., *Wallis* v. *Sayers*, 34 Sol. Jo. 545.

The Court will not act under this Order unless all parties would be bound by the inquiries directed; *e.g.*, where some of the defendants were out of the jurisdiction, or where the defendants objected that certain persons ought to have been made parties. *Darbishire* v. *Home*, 14 Jur. 969; *Logan* v. *Baines*, 10 Sim. 604. Ord. 33, r. 2.

So, where the plaintiff's title was not admitted or was denied, the Court refused to make an order. *Topham* v. *Lightbody*, 1 Ha. 289; *Kinshela* v. *Lee*, 7 Beav. 300; *Belcher* v. *Whitemore*, 7 Beav. 245.

And in general only ordinary accounts will be directed, and such as would plainly have been directed at the hearing. *Meinertzhagen* v. *Davis*, 10 Sim. 289. And not such as were necessary to be proved or might prejudice or decide the question in the cause; *e.g.*, an account would not be directed against an alleged executor *de son tort*. *Frost* v. *Hamilton*, 4 Beav. 33; *Lee* v. *Shaw*, 10 Sim. 369.

But it was held to be no objection that the cause had been set down for hearing. *Strother* v. *Dutton*, 10 Sim. 288.

Where preliminary accounts and inquiries are asked for in an action, it seems that it is not now necessary, even where there are infants interested, to have an affidavit verifying the statement of claim. *Re Bright*, 24 Sol. Jo. 108. But see *Senior* v. *Hereford*, 4 C. D. 494.

As to the prosecution in chambers of a judgment or order directing accounts, see Ord. 55, rr. 28—64, *post*, p. 20.

The judge in chambers cannot direct accounts on a footing inconsistent with the judgment; *e.g.*, he cannot direct an account to be taken with annual rests or on the

footing of wilful default. *Nelson* v. *Booth*, 3 De G. & J. 119; *Partington* v. *Reynolds*, 4 Drew. 253.

Nor can accounts on the footing of wilful default be directed on an originating summons, even though the parties to be charged are plaintiffs submitting to account. *Re Hengler*, W. N. (1893) 37, *post*, p. 30.

Where wilful default is not pleaded no order can be made on that footing, either at the hearing or any subsequent time; but where a case is made for it on the pleadings, an account on that footing may be directed either at the hearing or any subsequent stage. *Barber* v. *Mackrell*, 12 C. D. 538; *Mayer* v. *Murray*, 8 C. D. 424; *Re Symons*, 21 C. D. 757; Seton, 477.

But leave of the Court must still be obtained in order to maintain an action for wilful default against a defendant, against whom a common administration judgment has been previously obtained. *Laming* v. *Gee*, 10 C. D. 715.

When wilful default is pleaded the question ought to be determined at the hearing, and not referred for inquiry in chambers. *Smith* v. *Armitage*, 24 C. D. 727.

As to particulars necessary in a claim for an account with wilful default, and as to proof, see *Anstice* v. *Hibbell*, 33 W. R. 557; *Re Brier*, 26 C. D. 238; *Re Youngs*, 30 C. D. 431; and see *post*, p. 29.

Administration accounts and inquiries should not, it seems, be directed in a creditor's action until plaintiff has established his debt. *Batthyany* v. *Walford*, 36 C. D. 277.

For form of order for account by trustees entitled to the protection of the Trustee Act, 1888, s. 8, against liability to render accounts extending beyond six years from the commencement of the action, see *Re Davies*, (1898) 2 Ch. 142; *How* v. *E. Winterton*, (1896) 2 Ch. 626.

Where a common judgment for dissolution of partnership and for accounts is taken, and no return of premium is claimed by the pleadings, plaintiff cannot afterwards

get relief on that footing. *Edmonds* v. *Robinson*, 29 C. D. 170.

Where there is a partnership at will, one partner cannot obtain an order for partnership accounts without claiming dissolution. *Leybourne-Popham* v. *Spencer-Brown*, 9 Times L. R. 309.

"The Court or a judge may either, by the judgment or order directing an account to be taken or by any subsequent order, give special directions with regard to the mode in which the account is to be taken or vouched, and, in particular, may direct that in taking the account the books of account in which the accounts in question have been kept shall be taken as *primâ facie* evidence of the truth of the matters therein contained, with liberty to the parties interested to take such objections thereto as they may be advised." Ord. 33, r. 3. For form of summons, see D. C. F. p. 523. Ord. 33, r. 3.

The direction if given on summons should be in the form of an order, so that an appeal may lie. *Shaw* v. *Brown*, 44 L. T. 339.

Any special matter affecting the state of the account between mortgagor and mortgagee should be brought forward at the trial, and the judgment should direct the master to have regard to any such matters specifically. Therefore, where the common account was directed with no special directions, it was held that it was not open to the mortgagor in taking the account to bring forward, for the first time, a claim to redeem on payment of the amount at which the mortgagee had valued his security in the mortgagor's bankruptcy. *Sanguinetti* v. *Stuckey's Banking Co.*, (1896) 1 Ch. 502.

Where vouchers have been lost, or the account cannot be taken in the ordinary way, the Court may give special directions, but such directions will not be given unless it appears that the ordinary evidence cannot be had, or merely to save expense. *Lodge* v. *Prichard*, 3 D. M. & G. 906; and see *Ewart* v. *Williams*, 7 D. M. & G. 68.

As to vouching particulars of expenditure by a guardian of an infant, see *Re Evans*, 26 C. D. 58, *post*, Chap. X.

Books of account kept by trustees of a will were ordered to be taken as *primâ facie* evidence for a period of twenty-one years from the testator's death, as against a *cestui que trust* who had had access to but had not actually inspected them. *Banks* v. *Cartwright*, 15 W. R. 417.

And the accounts recorded in the Court of Chancery in Jamaica, in a suit against the executors who had proved the will there, were ordered in a suit against them in England to be taken as *primâ facie* evidence, with liberty to the plaintiff to surcharge and falsify. *Sleight* v. *Lawson*, 3 K. & J. 292.

A similar direction with regard to partnership accounts was given in *Stainton* v. *Carron*, 24 Beav. 346.

But in partnership cases books of account are admissible as *primâ facie* evidence by virtue of the general law, and it would seem, therefore, that a special direction is unnecessary; but in other cases a special direction must be obtained. *Gething* v. *Keighley*, 9 C. D. 547, 551; *Cookes* v. *Cookes*, 3 N. R. 97; *Newberry* v. *Benson*, 2 W. R. 648.

The audited accounts of a building society were ordered to be treated as *primâ facie* correct; but it was held competent for the plaintiffs, in taking the accounts, to impeach such audited accounts for fraud, though liberty was not given to do so in the order. *Holgate* v. *Shutt*, 27 C. D. 111; 28 C. D. 111.

Settled accounts may be set up, though the order does not direct that settled accounts shall not be disturbed. *Ibid.*; and see *post*, "Settled Accounts."

Under special circumstances entries in books, accounts between master and servant, tradesmen and shopmen, and bankers and customers, from necessity, and for general convenience, are admitted as evidence for the person who kept them. *Symonds* v. *Gas Co.*, 11 Beav. 283.

The Court may give special directions where accounts are ordered against a person who has been in possession,

believing himself entitled, and with leave to state specially, in case of lapse of time, loss of documents or evidence, or other difficulty. *Lupton* v. *White*, 15 Ves. 443; *Rowley* v. *Adams*, 7 Beav. 395, 415; *Re Watts*, 7 Beav. 491; *Allfrey* v. *Allfrey*, 10 Beav. 353, 361.

Special directions may also be given where the accounts and vouchers are alleged to be beyond the control of the accounting party. *Turner* v. *Corney*, 5 Beav. 517; *Kirkman* v. *Booth*, 11 Beav. 273, 283.

But not where it appears that there never were any vouchers. *Stainton* v. *Carron Co.*, 24 Beav. 346, 361.

As to the admissibility of entries in bankers' books as *primâ facie* evidence, see Bankers' Books Evidence Act, 1879.

As to the effect of past practice as evidence of an agreement that accounts shall be taken in a particular manner, see *Frank Mills Mining Co.*, 23 C. D. 52.

As to special directions for taking accounts by the Court of Chancery in Ireland, see 30 & 31 Vict. c. 44, s. 159; *Alford* v. *Clay*, Ir. R. 9 Eq. 219.

At the original hearing the Court generally confines itself to determining whether an account ought to be directed, and what, if any, special directions ought to be given for taking the account. *Hill* v. *S. S. Ry.*, 11 Jur. 193.

It does not as a rule deal with or admit evidence on any questions except so far as required for deciding on the right to an account, and will not do anything which would have the effect of taking the account in part. *Hornby* v. *Hunter*, 5 Russ. 149; *Law* v. *Hunter*, 1 Russ. 102; *Walker* v. *Woodward*, 1 Russ. 110; *Tomlin* v. *Tomlin*, 1 Ha. 236, 248.

But it can do so if necessary, and if the particular items are put forward in the pleadings. *Hill* v. *S. S. Ry.*, *supra*; *Smith* v. *Wilkinson*, Seton, 1151; *Abbey* v. *Petch*, 6 Jur. 433.

The plaintiff was bound to state specifically the errors

on which he relied in the accounts rendered by the defendant, his agent, and could not at the hearing give any evidence as to particular errors not so stated. *Shepherd* v. *Morris*, 4 Beav. 252; *Forsyth* v. *Ellice*, 2 Mac. & G. 209; *Hill* v. *S. S. Ry.*, *supra*.

Nor could he, before the hearing, require discovery as to particular items not relevant to the question then to be decided, namely, the right to call for an account. *Adams* v. *Fisher*, 3 M. & C. 526; *A.-G.* v. *Thompson*, 8 Ha. 115; *Tomlin* v. *Tomlin*, 1 Ha. 236.

Prosecuting Accounts in Chambers.

Where any account is directed to be taken, the accounting party, unless the Court or judge shall otherwise direct, shall make out his account and verify the same by affidavit. The items on each side of the account shall be numbered consecutively, and the account shall be referred to by the affidavit as an exhibit and be left in the judge's chambers or with the official or other referee, as the case may be. Ord. 33, r. 4; and see Ord. 38, r. 23, *infra*.

Every judgment or order directing accounts or inquiries shall be brought into the judge's chambers by the party entitled to prosecute the same within ten days after the same shall have been passed and entered; and in default thereof any other party to the cause or matter shall be at liberty to bring in the same, and such party shall have the prosecution of such judgment or order, unless the judge shall otherwise direct. Ord. 55, r. 32, *ante*, p. 15.

Upon a copy of the judgment or order being left a summons shall be issued to proceed with the accounts or inquiries, and upon the return of such summons the judge, if satisfied by proper evidence that all necessary parties have been served with notice of the judgment or order, shall thereupon give directions as to the manner in which each of the accounts and inquiries is to be prosecuted, the

evidence to be adduced, the parties to attend, and the time within which each proceeding is to be taken, and a day will be appointed for the further attendance of the parties. Ord. 55, r. 33.

Every alteration in an account verified by affidavit to be left at chambers shall be marked with the initials of the commissioner or officer before whom the affidavit is sworn, and should not be made by erasure. Ord. 38, r. 22.

Accounts referred to by affidavit should not be annexed to the affidavit, but be referred to as exhibits. Ord. 38, r. 23.

Accounts shall be written upon foolscap paper bookwise, unless impracticable. Ord. 66, r. 2.

The items on each side of the account must be numbered consecutively. And where accounts are brought into chambers in continuation of previous accounts, the numbers of the items should be continued from the foot of the previous account. Ann. Prac. (1899) 456.

The party leaving the account at judge's chambers should on the same day give notice thereof, and of any affidavit filed in support, to such of the other parties as are entitled to attend on the account. And it is usual in practice for the accounting party to hand a copy of the account when left to the opposite parties on payment by them of the costs of the copy. Dan. 1049.

The account should include any sums received or paid since the judgment; and, if necessary, a further account should be brought in, so as to bring down the account to the time of the certificate. *Ibid.*; *Bulstrode* v. *Bradley*, 3 Atk. 582; *Bell* v. *Reed*, *ibid.* 592.

The account may be carried on as long as the suit is pending. *Ibid.*; *Barfield* v. *Kelly*, 4 Russ. 359.

But no sums which have been paid by the accounting party to his solicitor for costs, or costs, charges, and expenses, should be included in the account. These should be applied for when the costs of the action are disposed of. Dan. 1249.

The account is vouched by production of the proper Vouching.

vouchers, such as receipts, which documents, when produced and allowed, are marked by the master or his clerk with his initials as evidence of such production and allowance. It seems that the vouchers will be admitted as evidence and credit given to the accounting party in the account, unless the other side shows some reasonable ground for impeaching the vouchers; but that if any party objects, the affidavit or oral evidence of the person who received the money is required, and if this cannot be had, then proof must be given of his signature. Dan. 1050.

Upon the taking of any account the Court or judge may direct that the vouchers shall be produced at the office of the solicitor of the accounting party, or at any other convenient place, and that only such items as may be contested or surcharged shall be brought before the judge in chambers. Ord. 33, r. 4A, *ante*, p. 11.

The object of this rule is to prevent the enormous expense and delay of taking general accounts in chambers. *Re Fish*, (1893) 2 Ch. 413, 427. And see Ord. 55, r. 10A, which had a similar object, under which an application for administration can be ordered to stand over for proper accounts to be rendered, with an intimation that if this is not done the parties chargeable may be made to pay costs.

Questions as to the allowance or disallowance of the items in an account may be adjourned before the judge without taking out a fresh summons, but unless a question of principle is involved, affecting the mode in which the account is to be taken, the practice is to wait until the taking of the account is completed and then to take an adjournment once for all to the judge. *Upton* v. *Brown*, 20 C. D. 731; *Re Watts*, 22 C. D. 5.

But where the chief clerk had refused to adjourn to the judge the question at which of the two dates an account directed to be taken in chambers was to commence, it was held that a summons dealing with the particular point must be issued and such summons adjourned to the judge. *Re Wall*, 88 L. T. Jo. 218.

No formal order should be drawn up upon an application to the judge. Ann. P. 808.

A solicitor who vexatiously requires every item to be adjourned to the judge may, it seems, be ordered to pay personally the costs of the adjournment. *Upton* v. *Brown*, *supra*.

Strictly speaking, every item of disbursement where it amounts to 40*s*. and upwards must be established by a proper voucher. Sums under that amount may be substantiated by the oath of the accounting party, provided that in his account he mentions to whom, for what, and when the amounts were paid. Dan. 1051.

Where, however, payments under 40*s*. are alleged to have been made by the testator or intestate of the accounting party, the latter may support their allowance by swearing to his belief that they were paid. *Ibid.*

Although it is the general rule that every payment of 40*s*. and upwards must be supported by a proper voucher, there are cases in which a party has been allowed to discharge himself by other means.

Thus, where the evidence produced to charge an accounting party consists of entries in books kept by the party himself, the party has a right to make use of entries in the same book in support of his payments. *Darston* v. *E. Oxford*, 1 Eq. Ca. Ab. 10, pl. 9. But see *Reeve* v. *Whitmore*, 2 D. & S. 446.

So, where an account furnished by a party before any action instituted is produced to charge him with the items on the debit side, he is entitled to resort to the credit side to support his payments. *Boardman* v. *Jackson*, 2 B. & B. 382; *Morehouse* v. *Newton*, 13 Jur. 420.

And where a man by his answer to interrogatories admits that he has received certain sums, which sums he has paid, the statement of the payments will be sufficient to discharge him if in the same sentence, and the discharge forms, as it were, one and the same transaction with the charge. Dan. 1052.

But where a party is charged with one sum of money, he cannot discharge himself by distinct independent items on the other side of the account. *Robinson* v. *Scotney*, 19 Ves. 582.

It seems, also, that where the account is of long standing the Court will sometimes permit the accounting party to discharge himself upon oath of all such matters as he cannot prove by vouchers by reason of their loss.

Thus, where the account in question was of twenty years' standing, it was ordered that the defendant should prove his account by his oath so far as he could not prove it by books or cancelled bonds. And a similar direction was given where the account was of fourteen years' standing. *Holsteom* v. *Rivers*, 1 Ch. Ca. 127. And see *Allfrey* v. *A.*, 10 Beav. 353, 355.

And where no other evidence can be had, old rentals in which bailiffs have admitted money received by them will be received as evidence of the payments. *Manning* v. *Lechmere*, 1 Atk. 453; *Giffard* v. *Williams*, 8 Eq. 494, 498.

There are, moreover, many cases in which, as we have already seen, the Court directs the account to be taken with the admission of certain documents not having the character of legal evidence.

Thus, where parties have been permitted for a long course of years to deal with property as their own, considering themselves under no obligation to keep accounts, though it would not follow that, being unable to give an accurate account, they should keep the income, yet the account would be directed, not according to the strict course, but in such manner as under the circumstances would be fit and proper. *Lupton* v. *White*, 15 Ves. 432, 443.

Surcharge.

Any party who is dissatisfied with the account may enter into evidence to show that the accounting party has received more than he has admitted by his account; but in such case he must give notice thereof to the accounting

party, stating as far as he is able the amount sought to be charged and the particulars thereof in a short and succinct manner. Ord. 33, r. 5; and see *post*, "Surcharging and Falsifying," p. 51.

Cross-examination.

The accounting party is liable to be cross-examined upon his account, but he is entitled to notice of the particular items and points on which he is to be cross-examined. *Wormsley* v. *Sturt*, 22 Beav. 398; *Re Lord*, 2 Eq. 605.

And the plaintiff or charging party is also liable, after like notice, to cross-examination on the particulars of the amount with which he wishes to charge the accounting party. *Bates* v. *Eley*, 1 Ch. D. 473.

The notice should, it seems, specify whether it is intended to dispute any items or the whole account. *Woods* v. *Oliver*, W. N. (1880) 51.

But a general notice that all the items except one will be objected to is not sufficient. *McArthur* v. *Dudgeon*, 15 Eq. 102.

The cross-examination may take place before the account is vouched. *Meacham* v. *Cooper*, 16 Eq. 102.

The accounting party may be ordered to produce all documents in his power at the cross-examination, although there is an existing order for their production elsewhere. *Wormsley* v. *Sturt*, 22 Beav. 398.

Where the ordinary administration accounts have been directed, and a particular part of the estate cannot be traced, an application to charge the personal representative with it cannot, unless it can be proved that it was received by him, be entertained, such an application being in the nature of a charge of wilful default. *Shuttleworth* v. *Bristo*, 12 W. R. 40.

It is competent for the judge to adopt a practice in chambers excluding further evidence by a party after cross-examining on the evidence on the other side. *Re Davies*, 44 C. D. 253.

Interrogatories.

The accounting party may also, by leave of the Court,

be interrogated. *Allfrey* v. *Allfrey*, 12 Beav. 292; and see now Ord. 31, r. 1.

A defendant who had omitted all receipts and payments for a certain period during which plaintiff proved he had received moneys, could not bring in additional accounts or give evidence of payments in discharge. *Maddeford* v. *Austwick*, 11 Sim. 209.

After the evidence has been completed, further evidence can only be allowed under special circumstances. *Winpenny* v. *Courtney*, 5 Sim. 554.

There cannot be any cross-examination after the certificate has been approved by the judge. *Dawkins* v. *Morton*, 10 W. R. 339.

Privileged accounts.

Accounts of transactions between the defendant in an action and a bank, prepared under the direction of the plaintiffs' solicitors for the purposes of the action and also with a view to future litigation, and produced on the examination of the defendant before an examiner, and admitted by such defendant to be correct and made exhibits to the depositions, which depositions and exhibits were entered as read in an order of compromise of the action, are privileged from production in a subsequent action between the plaintiffs and the bank, the use of the documents on the occasion of the order of compromise not amounting to a waiver of the privilege. *Goldstone* v. *Williams, Deacon & Co.*, (1899) 1 Ch. 47.

Accountants.

The judge in chambers may, in such way as he thinks fit, obtain the assistance of accountants and other scientific persons the better to enable any matter at once to be determined, and he may act upon the certificate of any such person. Ord. 55, r. 19.

This does not, it seems, authorise the Court to delegate the power to a master. *Mildmay* v. *Methuen*, 1 Drew. 216.

An accountant employed under this rule is not an officer of the Court. *Re Agricultural Cattle Co.*, 9 W. R. 682.

And his report ought not to be considered as the award of an arbitrator, but only as furnishing materials for the information and guidance of the Court. *Ford* v. *Tynte*, 2 D. J. & S. 127.

The fact that an accountant is employed does not suspend, but is ancillary to, the taking of the accounts in chambers, and the allowance to him is made in addition to the Court fee. *Hutchinson* v. *Norwood*, 32 W. R. 392.

The allowances in respect of fees to accountants to whom any question is referred is regulated by the taxing officers, subject to appeal to the Court or judge, whose decision will be final. Ord. 65, r. 27 (36).

The bankruptcy rule as to their scale of charges was adopted in chambers. *Meymott* v. *Meymott*, 33 Beav. 590.

Certificate.

By Ord. 55, r. 68, the master's certificate is to state the result of the account, and not set it out by way of schedule, but refer to the account verified by the affidavit filed, and shall specify which items have been disallowed or varied, and what additions, if any, have been made by way of surcharge or otherwise. Where the account has been so altered that it is necessary to have a fair transcript, it shall be referred to by the certificate. The accounts and transcript (if any) are to be filed, but no copy of any such account need be taken by any party. Ord. 55, r. 68.

The master's certificate must show what sums he has allowed and what he has disallowed, so that the judgment of the Court may be taken on any particular item in it; but the certificate can only be varied on the ground of clear mistake, or for reasons sufficient for setting aside the verdict of a jury. *Macintosh* v. *G. W. R.*, 6 N. R. 336.

The chief clerk may state special circumstances without a direction for that purpose. *Williamson* v. *Jeffreys*, 9 Ha. App. 56.

Delay in prosecuting accounts.

If it shall appear to the Court or judge, on the representation of any chief clerk or otherwise, that there is any undue delay in the prosecution of any account or inquiry, the Court or judge may require the party having

the conduct of the proceedings, or any other party, to explain the delay, and thereupon may make such order with regard to expediting the proceedings, or the conduct or stay of the proceedings and as to costs, as circumstances may require. Ord. 33, r. 9.

Attachment.

An order requiring an accounting party to leave his account by the time limited and duly served, may, if disobeyed, be enforced by attachment or committal. Dan. 1044; Ord. 42, r. 7; *Re Higgs*, 5 T. L. R. 125.

But Ord. 31, r. 21, as to attachment for non-discovery, does not apply to an order for accounts under Ord. 15, or for disclosure of partners under Ord. 16, r. 14. *Pike* v. *Keene*, 24 W. R. 322.

An application for leave to issue an attachment for disobedience in not leaving an account is made on notice, and must be supported by affidavits showing that the order has been personally served, that search has been made in the register of proceedings kept at chambers, and that it does not appear that the account has been left, that the deponent verily believes that the account has not been left, and the due service of the notice of motion. Dan. 1044.

A like application may be made in case of disobedience to an order for a further account where the account brought in is insufficient, but a strong case would have to be made out. *Cf. Thomas* v. *Palin*, 21 C. D. 360.

Wilful Default.

The practice is to make an accounting party account for what he has actually received and not for what he might have received but for his own default. *Barber* v. *Mackrell*, 12 C. D. 538.

There are, however, cases where the accounting party

may be charged with wilful default, as in accounts against trustees or executors or against mortgagees. See *post*, Chap. IV.

In the case of a mortgagee in possession, he will be charged with what he might have received but for his wilful default whether a case is made out or not, and even where the mortgage deed is in the form of a trust deed. *Mayer* v. *Murray*, 8 C. D. 424; *O'Connell* v. *O'Callaghan*, 15 Ir. Ch. R. 31.

But in all other cases an account on the footing of wilful default will only be directed where a special case is made and at least one act of wilful default is averred and proved. *Barber* v. *Mackrell*, *supra*; *Re Youngs*, 30 C. D. 431; *Re Stevens*, (1898) 1 Ch. 162.

An order charging wilful default can be made at any time during the action on a proper case being shown. *Job* v. *Job*, 6 C. D. 562; *Barber* v. *Mackrell*, *supra*.

So, where wilful default is pleaded, but the judgment gives no relief on that footing, the Court can, at a subsequent stage, if evidence of wilful default is adduced, direct further accounts on that footing. *Re Symons*, 21 C. D. 757.

And on taking the common accounts, executors can be, and often are, charged with a devastavit arising on the accounts themselves. *Re Stevens*, (1898) 1 Ch. 162.

But where a common administration order has been made against a defendant, the leave of the Court must be obtained in order to continue the action against him on the footing of wilful default. *Laming* v. *Gee*, 10 C. D. 715.

Where there are no pleadings, a charge of wilful default can be raised by affidavit. *Barber* v. *Mackrell*, *supra*.

When wilful neglect is pleaded, the question ought to be proved and determined at the hearing, and not referred for inquiry in chambers. *Smith* v. *Armitage*, 24 C. D. 727; *cf. Re Symons*, *supra*.

As to the particulars necessary in a claim for an account

with wilful default, see *Anstice* v. *Hibbell*, 33 W. R. 557; 54 L. J. Ch. 1104. And see Ord. 19, r. 6.

It must be shown not only there is a loss, but a loss under such circumstances as to show default on the part of the accounting party. *Re Brier*, 26 C. D. 238.

And the loss may be too remote. Thus, loss of interest from a debtor's refusal to pay his debt before probate is too remote a consequence of delay in proving the will to render the executor liable to account on the footing of wilful default. *Re Stevens*, (1897) 1 Ch. 422; (1898) 1 Ch. 162.

Accounts on the footing of wilful default cannot be directed on an originating summons, even though the parties to be charged are plaintiffs submitting to account. *Re Hengler*, W. N. (1893) 37; and see *Dowse* v. *Gorton*, (1891) A. C. pp. 192, 202.

Nor can accounts on that footing be obtained under Ord. 15. *Re Bowen*, 20 C. D. 538, *ante*, p. 10.

If a plaintiff with knowledge of it does not charge executors with wilful default, his executors cannot; and a qualified admission, not disputed, will not entitle the plaintiff to such an account. *Garrett* v. *Noble*, 6 Sim. 504; *Pelham* v. *Hilder*, 1 Y. & C. 3; but see *Guidici* v. *Kinton*, 6 Beav. 517.

Default may be wilful though unintentional and through forgetfulness. *Elliott* v. *Turner*, 13 Sim. 477; *Walker* v. *Symonds*, 3 Sw. 69.

But where the accounting party acts *bonâ fide* he may not be visited with the loss. *Garrett* v. *Noble*, 6 Sim. 504; and see *Smith* v. *Chambers*, 2 Ph. 221.

Just Allowances.

Formerly, a direction that in taking the account all just allowances should be made was inserted in the decree.

But now, in taking any account directed by any judg-

ment or order, all just allowances shall be made without any direction for that purpose. Ord. 33, r. 8.

It is not the ordinary course for the Court to say, in the first instance, what is a just allowance, but the matter is left to be decided upon the taking of the accounts. *Brown* v. *De Tastet*, Jac. 284, 294.

It has, however, under special circumstances, been made part of the order that, as to such part of the allowance as should be claimed and objected to, the reasons for allowing or disallowing the same should be stated in the certificate. *Cook* v. *Collingridge*, Jac. 607, 625.

What are just allowances depends very much upon the circumstances of each case, but it is a settled rule that whatever a trustee or legal representative has expended in the fair execution of his trust may be allowed him in passing his accounts. As to allowances to trustees and legal representatives, see *post*, Chap. IV.

Similarly, whatever a mortgagee has properly expended in preserving, protecting or enforcing his security, will be allowed him. As to mortgagees' allowances, see *post*, Chap. III.

The above are the two principal cases in which just allowances are made, and under those headings the subject will be further considered. It will be sufficient here to notice the few cases not falling under those headings, or those having a general application.

Coal trespass.

In cases of coal trespass, where the trespasser has acted in the *bonâ fide* expectation of a contract, and with the knowledge of the real owner, the just allowances to be made the trespasser will include the costs of severance and getting incurred in the period during which the trespasser was acting in the *bonâ fide* expectation of the contract, and with the knowledge of the owner, but not the costs of severance and getting after such knowledge has ceased. *Trotter* v. *Maclean*, 13 C. D. 574.

In a previous case, however, it was held that in taking the account of coal obtained by trespass, all actual dis-

bursements, not including profits or trade allowances, should be allowed. *Re United Merthyr, &c.*, 15 Eq. 46.

Under very special circumstances it was ordered that it be referred to the master to settle a reasonable allowance to a defendant (who had not proved or acted as trustee, but had been named in the will) out of the testator's estate for his time, pains, and trouble in the execution of the trusts. *Marshall* v. *Holloway*, 2 Swans. 432, 453.

In some cases an inquiry has been directed. Thus, where executors had kept up a house in London, a claim by them for the expenses thereof was not disallowed *simpliciter*, it being possible that travelling expenses might have been thereby economised, but an inquiry on the subject was directed. *Browne* v. *Collins*, 21 W. R. 222.

The next friend of an infant is also entitled to his charges and expenses; for, as the infant himself cannot incur charges and expenses, if they could not be claimed as just allowances, and the next friend is to be at the whole expense of the infant beyond his costs, persons would hesitate before they accepted that office. *Fearns* v. *Young*, 10 Ves. 184; and see *Nelson* v. *Duncombe*, 9 Beav. 211; *Palmer* v. *Jones*, 22 W. R. 909.

Sale.

The expenses of a sale may also be allowed under the head of just allowances. *Crump* v. *Baker*, 18 Ves. 285; *Wilkes* v. *Saunion*, 7 C. D. 188.

And even the expense of building. Thus, where trustees for sale had, in the *bonâ fide* exercise of their judgment, laid out, in order to improve the estate, part of the personal estate in building a villa on a portion of the real estate, it was held that they could only be disallowed the amount of loss (if any) occasioned to the estate by the expenditure. *Vyse* v. *Foster*, 8 Ch. 309.

A widow who was trustee for her son of the real estate of which she was dowable, was allowed, in accounting for the rents and profits, to retain so much thereof as she was entitled to for her dower, under the head of just allowances. *Graham* v. *Graham*, 1 Ves. sen. 262.

A trustee who is a solicitor, with power to make professional charges, is not entitled to make charges which are not strictly professional, and in respect of which an executor would not be entitled to charge for the assistance of a solicitor, though, in special cases, compensation may be made him by a fixed allowance. *Bainbrigge* v. *Blair*, 8 Beav. 588.

But where he is authorised to make professional and other proper and reasonable charges, he may charge for business not strictly professional. *Re Ames*, 25 C. D. 72; and see *post*, Chap. IV.

Where a substantive claim for a specific allowance, as for commission, has been made by the pleadings, and no special direction has been founded upon it in the judgment, such an allowance cannot, it seems, be made under the head of just allowances. The proper inference to be drawn from the fact of the claim made by the pleadings not being noticed in the judgment being, that the Court did not think it proper to be allowed or that the party making it had abandoned it. *East India Co.* v. *Keighley*, 4 Madd. 16, 38. And as to specific claims made by mortgagees, see *post*, Chap. III.

It seems, moreover, that claims cannot be allowed under the head of just allowances unless they are immediately connected with the transactions in respect of which the account is adjudged. Thus, in a suit against a steward and land agent, where the decree directed an account to be taken of rents, profits, and timber money received by the defendant on the plaintiff's account, and all just allowances were to be made to the parties, it was held that, under the head of just allowances, the defendant could not be permitted to set off the amount of certain bills of costs due from the plaintiff to him as a solicitor. *Jolliffe* v. *Hector*, 12 Sim. 398; and see *Waters* v. *E. Shaftesbury*, 2 Ch. 231.

Set-off.

"Natural equity says that cross-demands should compensate each other by deducting the less sum from the greater, and that the difference is the only sum that can be justly due." *Green* v. *Farmer*, 4 Burr. 2220.

As to connected accounts of debit and credit the same general principle prevails, that the balance of the accounts only is recoverable; which is, therefore, a virtual adjustment or set-off between the parties. *Dale* v. *Sollet*, 4 Burr. 2133.

The above general principles, which are now embodied in Ord. 19, r. 3, are now subject to certain limitations and restrictions, as we shall presently see.

By that order a defendant in an action may set off or set up, by way of counterclaim against the claims of the plaintiff, any right or claim, whether sounding in damages or not, and such set-off shall have the same effect as 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. 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 cannot be conveniently disposed of in the pending action, or ought not to be allowed, refuse permission to the defendant to avail himself thereof.

This rule has greatly extended the privileges of defendants by enabling them to raise, in one action, all kinds of cross-claims against the plaintiff, and to get judgment upon them. Thus, as the Court of Appeal points out, the remedies given by it are different from set-off under the statutes of set-off, for under these statutes set-off never gave defendant a judgment or enabled him to recover anything against the plaintiff. *Pellas* v. *Neptune, &c. Co.*, 5 C. P. D. p. 40.

But now he can do in one action that which formerly would have required two, subject to the Court being of

opinion that such a course is not inconvenient. *Re Milan Tram. Co.*, 22 C. D. p. 126; *Huggons* v. *Tweed*, 10 C. D. 359.

The rule, however, is only a rule of procedure, and does not alter rights. *Mersey Steel, &c.* v. *Naylor*, 9 Q. B. D. 648; *Re Milan Tram. Co.*, 22 C. D. 122; 25 C. D. 587.

Thus, in answer to a claim for loss on a marine policy, a claim to set off a debt is no more a defence under 31 & 32 Vict. c. 86, s. 1, than it was before the rule was made. *Pellas* v. *Neptune, &c.*, 5 C. P. D. 34.

But under sect. 10 of the Judicature Act, 1875, applying the rule in bankruptcy to the winding-up of companies and administration of insolvent estates, rights are affected as well as procedure. *Tadman* v. *Epineuil*, 20 C. D. 217.

A defendant may set up separate counterclaims for damages against several plaintiffs, if they can be conveniently disposed of in the action. *Manchester, &c.* v. *Brooks*, 2 Ex. D. 243.

Under the old practice a client could set off against his solicitor a claim for negligence, where it went directly to impeach the solicitor's demand; but, in general, an unsettled claim or amount could not be set off against an ascertained debt. *Rawson* v. *Samuel*, Cr. & P. 180.

By Ord. 20, r. 6, a defendant seeking to rely on any facts as supporting a right of set-off, must in his statement of defence state specifically that he does so by way of set-off or counterclaim. See *Rolfe* v. *Maclaren*, 3 C. D. 106.

A third party properly brought in is entitled to set up against the plaintiff any defence which would have been available for the defendant. *Callender* v. *Wallingford*, 53 L. J. Q. B. 569.

Equitable rights of defendant will be given effect to though not raised by counterclaim. *Eyre* v. *Hughes*, 2 C. D. 148; *Breslauer* v. *Barwick*, 24 W. R. 901.

A doubtful question of set-off should be made the subject of a special inquiry. *Lord* v. *Wightwick*, 2 Ph. 110.

Set-off generally.

Set-off at law was founded on statutes. See 2 Geo. II. c. 22; 8 Geo. II. c. 24; 23 & 24 Vict. c. 126, s. 20.

Equitable set-off was derived from the civil law, and was exercised long before any legislation on the subject. *Middleton* v. *Pollock*, 20 Eq. 34; *Peat* v. *Jones*, 8 Q. B. D. 147.

A defendant cannot set off a debt which is not actionable, such as a statute-barred debt or an infant's debt. *Francis* v. *Dodsworth*, 4 C. B. 202; *Rawley* v. *Rawley*, 1 Q. B. D. 460; and see *Rhymney Ry.* v. *Rhymney Iron Co.*, 25 Q. B. D. 146.

And as to set-off in respect of sums wrongly credited in account, see *Daniell* v. *Sinclair*, 6 App. Cas. 181.

Claims in *autre droit*.

Set-off rests on personal demand on both sides, and there is no set-off if the claims are in different rights. *Gale* v. *Luttrell*, 1 Y. & J. 180; *Stammers* v. *Elliott*, 3 Ch. 199; *Ex parte Morier*, 12 C. D. 491; *Newell* v. *Nat. Prov. Bk.*, 1 C. P. D. 496.

Thus an administrator could not set off a debt due to him personally against a legacy. *M'Mahon* v. *Burchell*, 2 Ph. 127.

And there is no set-off between a debt to a testator's estate arising after his death and one due before his death. *Re Gregson*, 36 C. D. 223.

Nor can a creditor of an intestate, purchasing part of the assets from the administrator, set off his debt against the purchase-money. *Lambarde* v. *Older*, 17 Beav. 542.

Nor a mortgagee of a policy, having after the mortgagor's death received the policy-money in satisfaction of the mortgage, retain any balance in respect of a simple contract debt due to him by the deceased. *Re Gregson*, 36 C. D. 223.

Nor a plaintiff set off costs which he has been ordered to pay to executors personally against a debt due to him from their testator's estate. *Re Dickinson*, W. N. (1888) 94.

Nor a person taking a transfer of a mortgage a sum due from him to the solicitor of the transferor who holds

the executed transfer expressing that the money has been paid. *Coupe* v. *Collyer*, 62 L. T. 927.

And to an application by an executor for security for costs of appeal, it is no answer that a sum for costs is due from his testator's estate to the appellant. *Re Knight*, 38 C. D. 108.

Nor can an executor, who is also residuary legatee of A., set off a debt due from B. to A.'s estate against one due by the executor to B., unless he has become entitled to treat the residue as his beneficially. *Jones* v. *Mossop*, 3 Ha. 568; *Bailey* v. *Finch*, L. R. 7 Q. B. 34; *Ex parte Morier*, 12 C. D. 491.

As to set-off of pension of a retired incumbent against a sum due for dilapidations, see 50 & 51 Vict. c. 23, s. 6, and *Gathercole* v. *Smith*, 17 C. D. 1; *S. C.* 7 Q. B. D. 628.

Nor can a debt due to A. from a trader, who makes a general assignment to trustees to carry on his trade for the benefit of creditors, be set off against claims of the trustees upon A. arising out of transactions subsequent to the assignment. *Hunt* v. *Jessel*, 18 Beav. 100.

There is no set-off between a debt due from A. and one payable to the trustees of A.'s settlement. *Jenner* v. *Morris*, 6 W. R. 29; and see *Middleton* v. *Pollock*, 20 Eq. p. 36; *Ex parte Morier*, *supra*.

But a trustee's rights as mortgagee of the trust property or a share of it are liable to set-off for any sums due by him as trustee. *Dodd* v. *Lydall*, 1 Ha. 333.

And generally a trustee can take nothing from the trust until he has made good to the estate his own debt or default. Seton, 967.

Advances by a tenant for life to B. a bankrupt could be set off against debts to B. charged on the estate, but for which the tenant for life was not personally liable. *Baillie* v. *Edwards*, 2 H. L. C. 74.

After an administration order rights of set-off cannot be altered by assignment. *Middleton* v. *Pollock*, 20 Eq. p. 33.

The costs of an action at law and of a suit in equity could not be set off. *Wright* v. *Mudie*, 1 S. & S. 266.

As to set-off of costs generally, and the effect of solicitor's lien in not preventing such set-off, see Seton, 228, 933.

Generally speaking, a joint debt could not be set off against a separate debt, nor a separate debt against a joint debt, either at law or in equity, unless the joint debt was merely a security for the separate one. *Middleton* v. *Pollock*, 20 Eq. 515; *Bowyear* v. *Pawson*, 6 Q. B. D. 540; *Ex parte Hanson*, 12 Ves. 346; 18 Ves. 232.

As to set-off by and against partners, see Lind. 290 *et seq.*

Set-off in bankruptcy is now regulated by the Bankruptcy Act, 1883, s. 38. *Thornton* v. *Maynard*, L. R. 10 C. P. 695; *Re Washington Diamond, &c.*, (1893) 3 Ch. 95.

Winding-up. The Companies Act, 1862, s. 101, governs set-off between a company being wound up and its contributories. *Barnett's Case*, 19 Eq. 449; *Re Washington, &c., supra.*

And as to the right of set-off by the company against the assignees of debentures, see *James' Case*, 8 Eq. 225; *Lishman's Claim*, 23 L. T. 40.

The effect of sect. 10 of the Judicature Act, 1875, is to make the rule in bankruptcy as to debts and liabilities proveable, and the mode of proving them, applicable to companies which are being wound up, so that unliquidated damages due from the company for breach of contract may be set off against payments due under the contract to the company. *Mersey Steel, &c.* v. *Naylor*, 9 A. C. 434; *Peat* v. *Jones*, 8 Q. B. D. 147; *Jack* v. *Kipping*, 9 Q. B. D. 113.

But the section has not affected the rule precluding a contributory from setting off a judgment debt due to him by the company against calls in the winding-up. *Gill's Case*, 12 C. D. 755; *Re Pyle Works*, 44 C. D. 534; *Hoby* v. *Birch*, 59 L. J. Q. B. 247.

And the price of goods (not specific) sold by the com-

pany before, but not delivered until after, the commencement of the winding-up, cannot be set off against an antecedent debt due to the company from the purchaser. *Ince Hall, &c.* v. *Douglas Forge Co.*, 8 Q. B. D. 179.

A director of a company cannot set off a debt due to him by the company against his liability for breach of trust, or on qualification shares wrongfully accepted by him from the promoter. *Re Anglo-French, &c.*, 21 C. D. 492; *Flitcroft's Case*, 21 C. D. 549; *Re Carriage Co-operative, &c.*, 27 C. D. 322.

In applying the rule in bankruptcy under the Bankruptcy Act, 1883, s. 38, the line is drawn at the time of the winding-up, and the rights of parties are not to be varied by subsequent transactions. *Re Milan Tramways*, 25 C. D. 587; *Re Gillespie*, 14 Q. B. D. 963; *Elliott* v. *Turquand*, 7 A. C. 79.

But sect. 38 is only applicable where the claims on each side are such as result in pecuniary liability. *Eberle's Hotel, &c.* v. *Jonas*, 18 Q. B. D. 459.

A mortgage *intra vires* of uncalled capital cannot be treated as a mere grant of a right of set-off. *Re Pyle Works*, 44 C. D. 534.

As to the effect of the Companies Act, 1867, s. 25, requiring the payment of shares in cash, on the right of set-off as between the company and the shareholders, see *Re Jones, Lloyd & Co.*, 41 C. D. 159.

Equitable set-off.

Set-off was allowed in equity:—

—between a judgment debt due to a husband who had deserted his wife and advances made to her for necessaries. *Jenner* v. *Morris*, 3 D. F. & J. 45.

—between a bond debt and a debt due from an assignee of the bond. *Cavendish* v. *Greaves*, 24 Beav. 163, 173. See now Jud. Act, 1873, s. 25 (6).

—between a debt due from A. and a debt to B. upon a simple trust for A. absolutely. *Ex parte Morier*, 12 C. D. 491; *Bailey* v. *Finch*, L. R. 7 Q. B. 34; *Bailey* v. *Johnson*, L. R. 6 Ex. 279; 7 Ex. 263.

—where there was anything from which an agreement for set-off could be implied, as from the mode of keeping the account, or from mutual credit being given. *Jeffs* v. *Wood*, 2 P. W. 128; *Whitaker* v. *Rush*, Amb. 407; *Laing* v. *Campbell*, 36 Beav. 3; Storey, 1436.

—where the person seeking set-off contracted the joint debt in ignorance of the debt against which it is sought to be set off. *Ex parte Stephens*, 11 Ves. 24; *Middleton* v. *Pollock*, 20 Eq. 519.

But fraud is no ground of set-off. *Middleton* v. *Pollock*, *supra*.

Where there were cross demands, one of which was equitable, but which if both had been legal would have been subject of set-off, equity enforced the set-off. *Clark* v. *Cort*, Cr. & P. 154.

But the mere existence of cross demands is not enough; the party seeking the benefit of set-off must show some equitable ground for being protected against his adversary's claim. *Rawson* v. *Samuel*, Cr. & P. 178; *Fisher* v. *Baldwin*, 11 Ha. 352; *Middleton* v. *Pollock*, 20 Eq. 36.

Where a mortgagee purchased the mortgaged estate and took possession, but did not pay the purchase-money, it was presumed after several years that there was an agreement to set off the purchase-money against the mortgage. *Wallis* v. *Bastard*, 4 D. M. & G. 251.

Assignee, how affected by set-off.

An assignee of a chose in action takes subject to all rights of set-off which were available against the assignor, except that after notice of assignment the debtor cannot do anything to take away the rights of the assignee as they stood at the time of the notice. *Roxburghe* v. *Cox*, 17 C. D. 520, 526.

An equitable set-off was enforced against a judgment at law. *Smith* v. *Parkes*, 16 Beav. 115.

In an action by an assignee of a policy of marine insurance the insurers cannot set off a debt incurred by them with the insured after the assignment. *Pellas* v. *Neptune*, *&c.*, 5 C. P. D. 34.

But a claim for unliquidated damages may be set off against an assignee if flowing out of and inseparably connected with the transactions which also give rise to the subject of the assignment. *Govt. of Newfoundland* v. *Newfoundland Ry.*, 13 A. C. 199; and see *Peat* v. *Jones*, 8 Q. B. D. 147.

A landlord is not entitled, as against the tenant's trustee in liquidation, to set off rent accrued due before the appointment of the trustee against allowances due to him as continuing tenant for tillages on the expiration of the lease. *Alloway* v. *Le Steere*, 10 Q. B. D. 22.

The Judicature Act, 1873, s. 25 (6), does not prevent the ultimate assignee from suing in the name of the original creditor free from any equities which attach only on the intermediate assignee. Thus, where a debt proved against a company was assigned by A. to B. and by B. to C., the liquidator could not set off against C. a debt due to the company by B. *Re Milan Tramways*, 25 C. D. 587.

In cases of mutual dealings, the title of the trustee in bankruptcy to money credited in account does not accrue until the holder of the money has notice of the act of bankruptcy, and therefore a right of set-off accruing to him before such notice is available against the trustee. *Elliott* v. *Turquand*, 7 A. C. 79.

As to the right of an executor or administrator to set off a legacy or share of residue against a debt due by the legatee or next of kin, see *post*, Chap. IV.

In a partition action it was held that occupation rent found due from one co-owner, who had mortgaged his share, could not be set off against the co-owner's share of the proceeds of sale to the prejudice of his mortgagee. *Hill* v. *Hickin*, (1897) 2 Ch. 579, *post*, p. 219.

Appropriation of Payments.

On paying money to his creditor the debtor may, at the time of payment, appropriate it to any particular debt, even though the creditor says he takes it in payment of another debt. *Anon.*, Cro. Eliz. 68; *New's Trustee* v. *Hunting*, (1897) 2 Q. B. 19.

If the debtor makes no appropriation to particular items the creditor has the right of appropriation, and may exercise the right up to the last moment by action or otherwise. *The Mecca*, (1897) A. C. 286; *Thompson* v. *Hudson*, 6 Ch. 328; *Re Hamilton*, 25 W. R. 760; and see *Kinnaird* v. *Webster*, 10 C. D. 139.

A creditor may appropriate payments to statute-barred debts. *Mills* v. *Fowkes*, 5 Bing. N. C. 455; *Nash* v. *Hodgson*, 6 D. M. & G. 474; but see *Re Friend*, *Friend* v. *Young*, (1897) 2 Ch. 421; 66 L. J. Ch. 737.

But the remainder of the debts will not be thereby taken out of the statute. *Nash* v. *Hodgson*, *supra*; *cf. Re Friend*, *supra*.

If no express appropriation be made by either the debtor or creditor, it may be implied or presumed. Thus payments to and drawings against a running account are to be attributed to the earliest items on the opposite side of the account. *Clayton's Case*, 1 Mer. 608; *Pennell* v. *Deffell*, 4 D. M. & G. 384, 390; *Re Stenning*, *Wood* v. *Stenning*, (1895) 2 Ch. 433.

So a security for an overdrawn account at a bank, as "the balance" was lost by sums being subsequently paid in and drawn out. *Re Medewe*, 26 Beav. 588, 592.

But as between trustees and their beneficiaries, and as to every person in a fiduciary character, the rule is modified, and so long as the trustee has money standing to his account drawings by him will be attributed to his own money, leaving the trust money intact. *Re Hallett*, *Knatchbull* v. *Hallett*, 13 C. D. 696; *Re Ulster Bldg. Soc.*, 25 L. R. Ir. 24, 29; *Re Murray*, 57 L. T. 223. Lewin.

But as between different trusts, or as between two beneficiaries whose money the trustee has paid into his own banking account, the general rule will prevail, so that the first sum paid in will be treated as the first drawn out. *Re Hallett*, *supra*, per Fry, J.; *Hancock* v. *Smith*, 41 C. D. 456.

So where a solicitor paid into his own account moneys of different clients, but the balance of the account always exceeded the sum first paid in, though less than the amount of other clients' moneys, it was held that the money of the client first paid in must be taken to have been drawn out. *Re Stenning*, *Wood* v. *Stenning*, (1895) 2 Ch. 433.

But a sub-agent, though he knows that his immediate principal is acting as agent, is not in a fiduciary position as regards the ultimate principal. *New Zealand*, *&c.* v. *Watson*, 7 Q. B. D. 374.

The rule in *Clayton's Case* is, however, not a rigid rule of law, but is based on the intention of the creditor, expressed, implied, or presumed. *The Mecca*, (1897) A. C. 286; 66 L. J. P. 86.

It does not apply, therefore, to a case where there is no account current between the parties. Nor where, from an account rendered or other circumstances, it appears that the creditor intended not to make any appropriation, but to reserve the right. *Ibid.*

Nor does the principle apply to two transactions of the same date. *Ibid.*, per Lord Halsbury.

And being founded on intention, the rule may be excluded by closing an account and re-opening a new one. *Re Sherry*, 25 C. D. 692, 702.

—or by the mode of keeping the account. *City Disc. Co.* v. *McLean*, L. R. 9 C. P. 692.

—or by the language and conduct of the parties. *Henniker* v. *Wigg*, 4 Q. B. 792.

Nor does it apply against a creditor in respect of a

fraud committed upon him, and of which he was ignorant. *Lacey* v. *Hill*, 4 C. D. 537.

Payment to a suspension account with the creditor is not a discharge until the creditor has appropriated the money as payment. *Commercial Bank, &c.* v. *Official, &c.*, (1893) A. C. 181.

A cheque or bill is a conditional payment, and if honoured is a payment from the date of the giving of the cheque or bill. *Felix Hadley & Co.* v. *Hadley*, (1898) 2 Ch. 680.

Instalments of a composition for several debts, secured and unsecured, must be attributed to them rateably, though the composition afterwards fails by the debtor's default. *Thompson* v. *Hudson*, 6 Ch. 320.

Payment of interest generally to the holder of three notes, two of which were barred, was appropriated to the other. *Nash* v. *Hodgson*, 6 D. M. & G. 474; see *Friend* v. *Young*, *supra*.

The rule that payments on account are to be appropriated to interest before principal does not apply where, in the case of bankers' accounts, the interest has, upon making up the account half-yearly, been converted into capital. *Parr's Banking Co.* v. *Yates*, (1898) 2 Q. B. 460.

As to appropriation of sums recovered from a defaulting trustee between capital and income, see *Re Grabowski*, 6 Eq. 12.

And as to what is sufficient evidence, after the death of the debtor, of non-appropriation by him, see *Lowther* v. *Heaver*, 41 C. D. 248.

Statute of Limitations.

By 21 Jac. I. c. 16, s. 3, all actions for account must be brought within six years after the cause of action.

And see sect. 7 as to disabilities. *Musurus Bey* v. *Gadban*, (1894) 2 Q. B. 352.

Actions of account between merchants were excepted, although there had been no item on either side for more than six years. *Robinson* v. *Alexander*, 2 Cl. & F. 717.

But the Statutes always ran from the settlement of the account, though the balance of a stated account may, of course, become an item in a following open one; the object being not to divide the account where it was a running account, part of which began long before the time fixed by the Statute, and, the accounts never having been settled, there had been dealings since. *Farrington* v. *Lee*, 2 Mod. 311; *Welford* v. *Liddel*, 2 Ves. 400.

By the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), s. 9, the exception of merchants' accounts was put an end to, so that by the joint effect of that Act and 21 Jac. I. c. 16, all actions of account must be brought within six years after the settlement of the account, or the time when the cause of action arose, or the last acknowledgment or part payment. See *post*, Chap. II.

Under 21 Jac. I. c. 16, a verbal acknowledgment was sufficient to take a debt out of the statute, but Lord Tenterden's Act (9 Geo. IV. c. 14) required the acknowledgment to be in writing, the effect of which was to prevent the adoption of the later items of an account from amounting to a new promise to pay the whole balance due on the account. *Inglis* v. *Haigh*, 8 M. & W. 780, 781.

And in the case of actions of debt or assumpsit, where there is an open account, the earlier items become barred by time, although there are others which are not barred. *Ibid.*; *Jackson* v. *Ogg*, Joh. 397.

But this does not apply to an action for an account when there are items on both sides, and the account is open, unless it is a mere question of debt and set-off.

Foster v. *Hodgson*, 19 Ves. 185; *Williams* v. *Griffiths*, 2 Cr. M. & R. 45.

So, where rent was due on one side and wages on the other, the balance for the previous six years only could be recovered. *Ibid.*

And where there have been no fresh items within the six years the right to an account may be barred, unless there has been an acknowledgment. *Prance* v. *Sympson*, Kay, 678; *Quincey* v. *Sharpe*, 1 Ex. D. 72.

Or unless there is a fiduciary relation. *Burdick* v. *Garrick*, 5 Ch. 233; *Re Sharpe*, *Masonic*, *&c.* v. *Sharpe*, (1892) 1 Ch. 154, 167; *Soar* v. *Ashwell*, (1893) 2 Q. B. 390.

So an agent, who after the death of the owner continues to receive rents, pays them to a separate account, and states that he is acting as agent for the person next entitled, thereby constitutes himself a trustee, and cannot set up the statute. *Lyell* v. *Kennedy*, 14 A. C. 437, 457.

But a sub-agent, though he knows his immediate principal is acting as agent, is not in a fiduciary position as regards the ultimate principal. *New Zealand*, *&c.* v. *Watson*, 7 Q. B. D. 374.

But it appears from a recent case that the existence of a fiduciary relation does not prevent the statute being set up, except where there is an express trust. *Friend* v. *Young*, (1897) 2 Ch. 421, 427, 432; and see *Watson* v. *Woodman*, 20 Eq. 721; *Thompson* v. *Eastwood*, 2 A. C. 215.

The acknowledgment must be such as will lead the Court to infer a promise to pay, and when there is a clear acknowledgment such a promise will be inferred. *Green* v. *Humphreys*, 26 C. D. 474; *Quincey* v. *Sharpe*, 1 Ex. D. 72; *D. Buccleuch* v. *Eden*, 61 L. T. 360.

And an unqualified admission that an account was pending was held to imply a promise to pay the balance. *Banner* v. *Berridge*, 18 C. D. 254, 274; *Re Friend*, *infra*.

But such a promise will not be inferred where the

language used is ambiguous. *Green* v. *Humphreys, supra; Re Bethell*, 34 C. D. 561.

Though it may be inferred from a payment on account, or the payment of an instalment. *Re Friend, Friend* v. *Young*, (1897) 2 Ch. 421; *Re Hale, Lilley* v. *Foad*, 79 L. T. 468; 47 W. R. 174.

But where a balance of debt consists of several items, payments made specifically in respect of particular advances will not prevent the general balance from being barred by the statute. *Re Rainsworth, Gwynn* v. *G.*, 49 L. J. Ch. 5.

A conditional promise is of no avail unless there is proof of substantial fulfilment of the condition. *Meyerhoff* v. *Froehlick*, 4 C. P. D. 63; *Green* v. *Humphreys*, 26 C. D. 474; but see *Pryke* v. *Hill*, 79 L. T. 738.

The time runs from the earliest period at which an action could be brought. *Reeves* v. *Butcher*, (1891) 2 Q. B. 509.

So in the case of a solicitor's costs the cause of action arises when the work is completed, and the statute runs from that time and not from the expiration of a month from the delivery of the bill of costs. *Coburn* v. *Colledge*, (1897) 1 Q. B. 702.

As to the period of time during which the Court upon the recovery of an estate will direct an account of mesne rents and profits, see *Dormer* v. *Fortescue*, 3 Atk. 124; *Hicks* v. *Sallitt*, 3 D. M. & G. 782; *Thompson* v. *Eastwood*, 2 A. C. 215.

An account of royalties under a mining lease may be carried back for twenty years. *Darley* v. *Tennant*, 53 L. T. 257.

Settled Accounts.

Settled accounts are sometimes spoken of as "stated" accounts. This, of course, means stated between the parties, or stated by one side and agreed to by the other.

A mere statement by one side cannot make an account settled. *Jackson* v. *Ogg*, Joh. 397.

The requisites for making an account settled depend on the circumstances of each case and the mode of dealing between the parties. *Hunter* v. *Belcher*, 2 D. J. & S. 194; *Tindall* v. *Powell*, 6 W. R. 850.

That there has been a division is not conclusive that the account is settled. *Dawson* v. *Dawson*, 1 Atk. 1.

Signing the account or taking a security on the foot of it is sufficient; but signing is not necessary, nor is handing over the vouchers, though the fact of that having been done is a strong point. *Drew* v. *Power*, 1 S. & L. 192; *Willis* v. *Jernegan*, 2 Atk. 252.

Mere proof of the delivery of the account is not enough, but if the person to whom it is sent make no objection for a length of time, or, in the case of merchants, for two or three posts or longer, according to the distance between them, the account is settled. *Irvine* v. *Young*, 1 S. & S. 333; *Willis* v. *Jernegan*, *supra*; *Sherman* v. *S.*, 2 Vern. 276; *Tickel* v. *Short*, 2 Ves. 239.

An agreed account binds representatives. *Gee* v. *Lewis*, Colles, P. C. 416; *Carmichael* v. *C.*, 2 Ph. 101.

An account made out between partners in the usual way was binding on the representatives of one who had died two months afterwards without objecting, although he had not signed it or concurred in making the valuation. *Coventry* v. *Barclay*, 3 D. J. & S. 320; 33 Beav. 1; and see *Luckie* v. *Forsyth*, 3 Jo. & Lat. 388.

Acquiescence in accounts furnished does not alone amount to settlement. *Clancarty* v. *Latouche*, 1 B. & B. 428, *post*, p. 78.

But accounts delivered with opportunity for inspection, and duly examined, and no exception taken, must be treated after ten years of acquiescence as settled accounts, and cannot be opened unless upon distinct and specific averment of error properly proved. *Parkinson* v. *Hanbury*, L. R. 2 H. L. 1.

Books being kept by B. while O. was manager were held not binding on the latter, but as O. had free access to the books they were to be taken as *primâ facie* evidence, with liberty to O. to surcharge and falsify. *Ogden* v. *Battams*, 1 Jur. N. S. 791.

To a bill for an account it is no defence to prove a letter acknowledging that matters were settled up to date, the defendant not proving any account to which the letter referred, although he alleged that he had rendered an account. *Croft* v. *Graham*, 5 Giff. 1.

The defence of a settled account was not sufficient where the account was examined and approved, not generally, but for the purpose of a mortgage being given for the balance which never was given. Nor where it contained exorbitant charges of interest which the adviser who approved said he did not observe. *Ibid.*

Items and errors of which both sides were aware when the account was settled, or which have been corrected before action brought, are of no importance, and do not give any right to open the account. *Maund* v. *Allies*, 5 Jur. 860; *Fowler* v. *Wyatt*, 24 Beav. 232; *Davis* v. *Spurling*, 1 R. & M. 64; and see *post*, p. 82.

And intentional omissions, without fraud, are not a ground for opening a settled account. *Cave* v. *Mills*, 7 H. & N. 913.

Under an order for a general account by the treasurer of a building society obtained by members, accounts duly audited under the rules must be accepted as *primâ facie* evidence in taking the account. *Holgate* v. *Shutt*, 27 C. D. 111; 28 C. D. 111.

It has been held that a clause against anticipation, though applicable to the fund when raised, does not prevent a feme covert from adjusting the amount of the fund with the trustees, and that she will be bound by a settlement of accounts executed by her. *Wilton* v. *Hill*, 25 L. J. Ch. 156; Lewin, p. 965.

But a married woman, restrained from anticipation,

cannot release the trustees from a violation of the restraint not instigated by her. *Dickson* v. *Hook*, 14 W. R. 552.

Form of order.

In *Newen* v. *Wetten*, 31 Beav. 315, it was said that in an administration suit the chief clerk might admit a settled account without an order; but *semble*, a special direction is usually necessary, and should be obtained at the hearing, the practice being not to insert the words in the order without the direction of the Court. Seton, 1176; but see O. 20, r. 8.

Under an order directing an account, and not referring to settled accounts, the accounting party may set up settled accounts, though the order does not direct that settled accounts shall not be disturbed, and the opposite party may impeach them, though the order does not expressly give him liberty to do so. *Holgate* v. *Shutt*, 54 L. J. Ch. 436; 28 C. D. 111.

Where defendant sets up a settled account, and plaintiff amends his pleadings, and, though not disputing that there is a settled account, alleges generally that there are errors in it, the form of judgment is not merely to take the account, but to take it from the foot of the account so proved. Seton, 1176.

But if in such a case the plaintiff, without disputing, alleges and proves specific errors in the settled account so set up, the judgment directs the account to be taken on the footing of that account, with liberty to surcharge and falsify. Seton, 1177; *Buckeridge* v. *Whalley*, 13 W. R. 593.

Where the Court, at the hearing, has reason to suppose that there are settled accounts, though none are proved, a general direction is inserted that any accounts found to be settled shall not be disturbed, and liberty to surcharge and falsify may be given without, of course, any errors being specifically proved. *Ibid.*

Not disturbing settled or stated accounts applies only to accounts stated between the parties by which they would be bound *inter se*, and between plaintiff and defendant,

not between co-defendants. *Milford* v. *Milford*, M'Cl. & Y. 156; *Carmichael* v. *C.*, 2 Ph. 101.

Re-opening, Surcharging and Falsifying.

By Ord. 33, r. 5, any party seeking to charge an accounting party, beyond what he has by his account admitted to have received, shall give notice thereof to the accounting party, stating, so far as he is able, the amount sought to be charged, and the particulars thereof, in a short and succinct manner.

To surcharge is to show an omission for which credit ought to have been given; to falsify is to show a charge which has been wrongly inserted. 2 Ves. 565.

But to falsify accounts it must be shown that they contain charges in the nature of fraud or error, and not merely charges which might be disallowed as being too large. *Heighington* v. *Grant*, 1 Ph. 601.

A strong ground is necessary to set aside settled accounts. *Chambers* v. *Goldwin*, 5 Ves. 837.

An old account shall not be unravelled, though settled upon an erroneous principle. *Gray* v. *Minnethorp*, 3 Ves. 103.

A plea of a stated account is a bar to a bill for a general one until specific errors are assigned; but it is not sufficient for the purpose of setting up a stated account merely to prove there has been a dividend between the parties. *Dawson* v. *D.*, 1 Atk. 1.

The Court will not open a settled account where it has been signed, or a security taken on the foot of it, unless the whole transaction appears fraudulent, upon errors specified in the bill and supported by evidence. *Drew* v. *Power*, 1 S. & L. 182.

An account settled ten years before bill filed, although containing gross errors, shall not be opened, but the

plaintiff shall be at liberty to surcharge and falsify. *Brownell* v. *B.*, 2 Bro. C. C. 62.

Fourteen years after accounts had been examined by skilled persons, and a receipt given, an application to re-open, specifying two erroneous items, was refused. *Cuthbert* v. *Edinborough*, 21 W. R. 98.

A party who has once admitted an account to be correct cannot afterwards have it taken in equity on the mere allegation that he had no means of ascertaining that it was correct, without charging specific acts of fraud against the defendant; and it is not necessarily an allegation of fraud to say that the accounting party agreed to deliver up certain chattels demanded by the other upon condition of having his alleged balance admitted and paid. *Darthez* v. *Lee*, 2 Y. & C. 5.

In order to entitle a party to open a settled account, it is not sufficient merely to prove the existence of errors which a court of equity might consider improper charges or admissions without reference to what may have been the conduct of the party in agreeing to such account, because, in the absence of fraud or pressure, every item in an account, of which at the time of settlement the parties are fully cognisant, may be considered as the subject of special agreement between them which neither party is at liberty to repudiate. *Maund* v. *Allies*, 5 Jur. 860.

As to the principles on which the Court deals with settled accounts in granting relief, see *Coleman* v. *Mellersh*, 2 Mac. & G. 309.

Specific errors must be pleaded.

Where a plaintiff seeks to open a settled account, there must be in the bill a distinct statement of some specific error in the account. It is not enough to allege that there are certain errors which escaped his notice. *Parkinson* v. *Hanbury*, L. R. 2 H. L. 1.

Nor is it sufficient to show that the account was signed "with errors excepted." *Johnson* v. *Curtis*, 3 Bro. C. C. 226.

Upon a general allegation of error in a settled account, without specifying particulars, it cannot be surcharged or falsified although particular errors be proved in evidence. *Ibid.*

Nor is it enough to state that the errors appeared in a certain report of an accountant where the bill did not state the report or specifically point out the errors. *Shepherd* v. *Morris*, 4 Beav. 252.

As to the principles upon which settled accounts are opened, see *M'Kellar* v. *Wallace*, 8 Moo. P. C. 378.

But a settled account between attorney and client was opened upon general allegations by the client of error admitted, though no specific errors were pointed out. *Matthews* v. *Wallwyn*, 4 Ves. 118.

In ordinary cases the rule is that one mistake is sufficient to entitle to surcharge and falsify. But where the relation of attorney and client exists, a general allegation is enough. *Lawless* v. *Mansfield*, 1 Dr. & W. 557; but see *Blagrave* v. *Routh*, 2 K. & J. 509.

Where a plaintiff assigned 150 errors an order was made on him to pick out those he would insist on, and, if the Court should think they were not errors, to consent to waive the rest; if the Court thought them errors there would be good cause to open the account or give leave to surcharge and falsify. *Rodney* v. *Hare*, Mos. 296.

Where an error was patent on the face of the account, the account was opened though the error was not stated in the bill. *Holland* v. *Holland*, 6 Ir. Eq. R. 407.

The *onus probandi* is on the party having liberty to surcharge and falsify. *Pit* v. *Cholmondeley*, 2 Ves. 565.

And he may take advantage of errors in law as well as errors in fact. *Roberts* v. *Kuffin*, 2 Atk. 112.

Grounds for opening a settled account, on which plaintiff sues, may now be set up by defence or counterclaim. *Eyre* v. *Hughes*, 2 C. D. 148.

Pleading a release without making discovery of the accounts on which it was founded is not enough. Such

a plea is bad for not showing that the information asked for had been given, or the right to it waived. *Brooks* v. *Sutton*, 5 Eq. 361; *Clarke* v. *Ormonde*, Jac. 116, 121; *cf. Re Webb*, *infrà*.

Unintentional errors and ignorance as to the exact value of shares in dealing with them on the footing of accounts kept by other parties is comparatively immaterial, if there is no unfair conduct. *Knight* v. *Majoribanks*, 11 Beav. 322, 354.

If there are only mistakes and omissions in a settled account, the party objecting is allowed no more than to surcharge and falsify; but where there has been fraud, as, for instance, an overcharge deliberately made, or something in the nature of the errors proved, or the relation of the parties, or the way in which the settlement was obtained, to show that it ought not to be held binding, the whole account will be opened. *Williamson* v. *Barbour*, 9 C. D. 529; *Gething* v. *Keighley*, 9 C. D. 547; *Clarke* v. *Tipping*, 9 Beav. 284.

And in cases of fraud the account will be opened, though of many years' standing and after the death of the person guilty of the fraud, for the fraud makes it void *in toto*. *Vernon* v. *Vawdry*, 2 Atk. 119; *Wedderburn* v. *W.*, 4 M. & C. 41; *Allfrey* v. *A.*, 1 Mac. & G. 87; *Holgate* v. *Shutt*, 28 C. D. 111; *Daniell* v. *Sinclair*, 6 A. C. 181; *Vagliano Bros.* v. *Bank of England*, 22 Q. B. D. 103; *Williamson* v. *Barbour*, 9 C. D. 529, 533; and *cf. Brownell* v. *B.*, *supra*.

And *semble*, if mere errors shown in an account are sufficient in number and importance, the Court will open the account although there is no element of fraud. See *Williamson* v. *Barbour*, *supra*.

But a single fraudulent item is sufficient to justify the opening of an entire account. *Gething* v. *Keighley*, 9 C. D. 547.

A general allegation of fraud is not sufficient, however strong the words used, if there is no statement of the

circumstances relied on, and such an allegation is insufficient even to amount to an averment of fraud of which the Court ought to take notice. *Wallingford* v. *Mutual Soc.*, 5 A. C. 685.

So a charge in the bill that no credit was given for rent, and that defendants ought to set out whether they had received any, was not enough. *Parkinson* v. *Hanbury*, L. R. 2 H. L. 1, 11.

But where fraud against an agent is alleged in general terms the plaintiff is not prevented by Ord. 19, r. 6, from obtaining discovery before giving particulars of the alleged fraud. *Whyte* v. *Ahrens*, 26 C. D. 117.

A defendant against whom an account is opened is not bound by any deductions he had agreed to make. *Osborne* v. *Williams*, 18 Ves. 383; *cf. Cave* v. *Mills*, *ante*, p. 49.

Where a fiduciary relation exists, the rule against opening settled accounts, unless there is fraud, is less strict. *Lawless* v. *Mansfield*, 1 Dr. & W. 557; *Williamson* v. *Barbour*, *supra*, p. 53.

But even then a case must be averred and proved. *Chambers* v. *Goldwin*, 9 Ves. 254, 266; *Davis* v. *Spurling*, 1 R. & M. 64; *Blagrave* v. *Routh*, 2 K. & J. 509; and see *Morgan* v. *Higgins*, 1 Giff. 270; *Barry* v. *Stevens*, 31 Beav. 258; *post*.

The managing committee of an abortive company, having rendered their accounts and paid over the money without objection, the Court refused, three or four years afterwards, to direct an account against them. *Williams* v. *Page*, 24 Beav. 654, 662, 674; and see *Stupart* v. *Arrowsmith*, 3 S. & G. 176.

After the death of a manager of a company, his accounts for twenty-seven years, which had never been properly rendered or settled with the company, were treated as settled except as to certain sums, as to which no vouchers appeared to have ever existed. *Stainton* v. *Carron Co.*, 24 Beav. 346.

A settled account in which a trustee charged a bonus

for great advantages gained was opened. *Barrett* v. *Hartley*, 2 Eq. 789.

And where, in a mortgage account, compound interest was charged under a common mistake as to the effect of the mortgage deed, the account was opened. *Daniell* v. *Sinclair*, 6 A. C. 181.

No weight is given to a release or discharge in full if it is founded on insufficient knowledge, or where the parties are not on equal terms, as, for instance, where a release was given by an infant three days after his coming of age, and purported to have been given after an examination of complicated accounts. *Wedderburn* v. *W.*, 4 M. & C. 50.

So receipts may be ordered to be treated as conclusive evidence of payment of the sums named in them, but not as a general release. *Millar* v. *Craig*, 6 Beav. 443; *Middleditch* v. *Sharland*, 5 Ves. 87; Seton, 1174.

But where legatees approved an account of solicitors and trustees, and executed a release, and nine years afterwards sought to set aside the release and have the costs taxed, it was held that the mere omission to inform the legatees that they had a right to have the costs taxed was not a sufficient ground for opening a settled account, where no error had been shown. *Re Webb*, *Lambert* v. *Still*, (1894) 1 Ch. 73.

Secus, if excessive charges had been shown. *Ibid.*

And general words in a release are limited to matters in contemplation at the time when the release was given. *L. & S. W. Ry.* v. *Blackmore*, L. R. 4 H. L. 610; *Turner* v. *T.*, 14 C. D. 829.

Where a deed containing a release cannot be wholly set aside the judgment should be "notwithstanding" it; but, in general, the release must be set aside before the account can be opened. *Wedderburn* v. *W.*, *supra*; *Pritt* v. *Clay*, 6 Beav. 503; *Fowler* v. *Wyatt*, 24 Beav. 232, 238.

Where a defendant in a foreclosure suit made out a case by his answer, he was held entitled to have the

account opened without filing a cross bill. *Eyre* v. *Hughes*, 2 C. D. 148.

For a judgment to open a settled account, or to surcharge and falsify, the particular errors must be pointed out and proved. *Ante*, p. 53.

When liberty is given to surcharge and falsify, the plaintiff will not be confined in date to the first item alleged in the pleadings, and proved in Court, nor to errors appearing in the books. *Mozley* v. *Cowie*, 47 L. J. Ch. 271; *Gething* v. *Keighley*, 9 C. D. 547.

Interest.

As a general rule interest is not given unless:—

1. There is a contract to pay it, either express or implied, from the custom of dealing between the parties. *Ex parte Champion*, 3 Bro. C. C. 436; *Provincial Bk., &c.* v. *O'Reilly*, 26 L. R. Ir. 313; *Caledonian Ry.* v. *Carmichael*, L. R. 2 H. L. Sc. 56, 66; *Webster* v. *British Empire, &c.*, 15 C. D. 169; *Re Edwards*, 61 L. J. Ch. 22; *Nichol* v. *Thompson*, 1 Camp. 52, n, where it appeared that interest had been allowed on former balances.

Or from mercantile usage. *Higgins* v. *Sargent*, 2 B. & C. 348; *Page* v. *Newman*, 9 B. & C. 378; *Calton* v. *Bragg*, 15 East, 223, 228.

This rule applies to bills and notes so as to make them carry interest from the time of maturity. Byles, 444; *Ex parte Charman*, W. N. (1887) 184.

It also applies to debts for which the debtor has agreed to give a bill or note. *Lowndes* v. *Collins*, 17 Ves. 27; Byles, 306.

A bill or note, silent as to interest and payable on demand, bears interest from demand or the commencement of proceedings, and the demand may be made against a company after a winding-up order. *Re East of*

England Bkg. Co., 4 Ch. 14; and see *Re Cornwall Minerals Ry.*, (1897) 2 Ch. 74.

2. Interest is payable in cases within 3 & 4 Will. IV. c. 42, s. 38, which enacts that a jury may give interest on "all debts or sums certain, payable at a time certain, or otherwise," from the time when payable under some written instrument, 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."

The written instrument must be that under which the debt is payable. *Taylor* v. *Holt*, 13 W. R. 78.

Whether the section is not merely declaratory of the existing law, *quære*. *Webster* v. *British Empire, &c.*, 15 C. D. 169, 178.

By sect. 29 a jury may give damages in the nature of interest in all actions of trover or trespass, for value of goods, and on policies of insurance. *M'Calmont* v. *Rankin*, 2 D. M. & G. 403, 413.

Where a decree was made holding defendants liable for the market value of minerals at the pit's mouth, without allowance for getting or working them, and the suit was continued against their representatives after their death, it could not be regarded as an action of trover or trespass within sect. 29. *Phillips* v. *Homfray*, 44 C. D. 694.

When defendants, after a demand under sect. 28, had paid the money into Court, they had to pay interest. *Hull, &c.* v. *N. E. Ry.*, 5 D. M. & G. 872.

The Court of Chancery has generally adopted and enforced the provision of this section, and allowed the same interest on legal debts as that generally given by juries, namely, 5 per cent. *Re Roberts*, *Goodchap* v. *R.*, 14 C. D. 49; *Rokeby* v. *Elliott*, 7 A. C. 43; *Dreyfus* v. *Peruvian, &c.*, 43 C. D. 316; *Re Horner*, *Fooks* v. *H.*, (1896) 2 Ch. 188.

In one case interest at 4 per cent. was given upon the

submission of the applicant, with an expression of opinion that, in view of the present mercantile rate of interest, 4 per cent. was in general sufficient. *Re Metropolitan Coal, &c.*, 62 L. T. 30; *cf. Re Lambert, Middleton* v. *Moore*, (1897) 2 Ch. 169; *Re Barclay*, (1899) 1 Ch. 674, *post*, 116.

But 5 per cent. must still be regarded as the regular mercantile rate in courts of law, though it seems the Court is not bound to give interest at that rate, but may follow the current rate. *L. C. & D. Ry.* v. *S. E. Ry.*, 40 C. D. 100; (1892) 1 Ch. 120; and see *Peruvian, &c.* v. *Drefus*, (1892) A. C. 166; *Re Lambert, supra.*

Under a covenant to pay money at a time specified, with interim interest at a specified rate, interest after the specified time will be recoverable only as damages and not at the specified rate. *Re Roberts, supra; Arbuthnot* v. *Bunsilall*, 62 L. T. 234.

And a covenant for payment of interest, if merely incidental to the covenant for payment of principal, will be merged in a subsequent judgment and carry interest at 4 per cent. *Ex parte Fewings, Re Sneyd*, 25 C. D. 338.

Secus, if the covenant for payment of interest amounts to an independent stipulation. *Popple* v. *Sylvester*, 22 C. D. 98.

Under the Bankruptcy Act, 1890, s. 23, interest upon a proved debt is for the purposes of dividend to be calculated at a rate not exceeding 5 per cent., without prejudice to the right of the creditor to receive any higher rate to which he may be entitled after all the debts have been paid in full.

Interest being only payable as damages for wrongful detention of money, payment of it was not ordered where there was mere delay without fault, or the delay was caused by the payee, as where he had lost the policy or neglected to clothe himself with a legal title. *A.-G.* v. *Corp. Ludlow*, 1 H. & T. 216; *Bushnan* v. *Morgan*, 5 Sim. 635; *Webster* v. *British Empire, &c.*, 15 C. D. 169.

A day of payment depending on a certain contingent

event is not a time certain within the Act, and such a sum does not carry interest unless there has been a demand for payment with notice that interest would be claimed. The certainty of both time and amount must appear from the contract. *L. C. & D. Ry.* v. *S. E. Ry.*, (1893) A. C. 429; and see *Hill* v. *S. S. Ry.*, 18 Eq. 154, 169.

Nor is a creditor who has neglected to ascertain his claim entitled to interest upon it. *Caledonian Ry.* v. *Carmichael*, L. R. 2 H. L. Sc. 56, 62, 66; see *Webster* v. *British Empire, &c., supra.*

In winding-up companies interest is payable on calls, the notice of which states that interest will be charged independently of any provision in the articles. *Barrow's Case*, 3 Ch. 784; *Re Welsh Flannel, &c.*, 20 Eq. 360; and see *Rhymney, &c.* v. *Rhymney, &c.*, 25 Q. B. D. 146.

Money recovered in an action for money had and received does not carry interest from the time it came to defendant's hands, nor from the time of an express demand for it, except on proof of an express or implied promise to pay interest, or of the defendant having made interest on the money himself. *Tappenden* v. *Randall*, 2 B. & P. 467, 472; *Fruhling* v. *Schroeder*, 2 Bing. N. C. 77.

Or unless there was fraud. *Crockford* v. *Winter*, 1 Camp. 124, 129.

Interest was allowed on a claim in an administration suit for work from the date of the demand. *Mildmay* v. *Methuen*, 3 Drew. 91.

An auctioneer cannot be charged with interest, nor an agent, nor a purchaser liable to be called on for immediate payment. *Harington* v. *Hoggart*, 1 B. & A. 577, 589.

Nor is interest allowed from the time of demand on a sum deposited with bankers under an agreement that during the continuance of the deposit interest should not be paid. *Edwards* v. *Vere*, 5 B. & A. 282.

3. Interest is payable on money wrongfully, fraudulently, or vexatiously withheld. *Meredith* v. *Bowen*, 1 Keen, 270; *Caled. Ry.* v. *Carmichael, supra; Webster* v. *British*

Empire, &c., supra; Craven v. *Tickell*, 1 Ves. 63; *Pearse* v. *Green*, 1 Jac. & W. 135; and see *Rishton* v. *Grissell*, 10 Eq. 393; *Blogg* v. *Johnson*, 2 Ch. 225.

But not where the party claiming interest is himself in default. *L. C. & D. Ry.* v. *S. E. Ry., supra.*

So an agent fraudulently retaining money may be charged with interest. *M. Berwick* v. *Murray*, 7 D. M. & G. 497, 518; *E. Hardwicke* v. *Vernon*, 14 Ves. 504.

But not for merely retaining balances without fraud, nor where the principal had acquiesced in the retainer. *Turner* v. *Burkinshaw*, 2 Ch. 488; *Salisbury* v. *Wilkinson*, 14 Ves. 509.

An agent who had stated that the balance was in his favour was charged with interest from the filing of the bill on the amount found due, or from the date of the chief clerk's certificate. *Fry* v. *Fry*, 10 Jur. N. S. 983; *Turner* v. *Burkinshaw, supra.*

The right of an agent to charge interest on sums paid by him may be shown by the course of dealing. *G. W. R., &c.* v. *Cunliffe*, 9 Ch. 525.

Creditors of a company being wound up can only prove for interest due at the date of the petition, unless there is a surplus. *Re Ebbw Vale Co.*, 5 Ch. 112; *Re Humber, &c.*, 4 Ch. 643.

Where a decree holding the defendants liable for the full value of minerals wrongfully gotten was silent as to interest, interest could not be given on further consideration. *Phillips* v. *Homfray*, 44 C. D. 694.

Upon a contract to indemnify, express or implied, interest by way of damages is allowed on the ground that the person to be indemnified ought to be put in the position in which he would have been if the other party had done what he contracted to do. *Ex parte Bishop*, 15 C. D. 400; *L. C. & D. Ry.* v. *S. E. Ry.*, (1892) 1 Ch. 120.

And on rescission of contract interest is given not by way of damages, but of restoration of the plaintiff to his original position. *Re Met. Coal, &c.*, (1892) 3 Ch. 1.

A legal representative, if he complies with an order for payment into Court of a balance representing payments disallowed, is not, in the absence of special circumstances, chargeable with interest thereon. *Re Jones, Christmas* v. *J.*, (1897) 2 Ch. 190.

Interest on costs.

As a general rule, in the absence of any special order, interest at 4 per cent. is payable on costs of an action from the date of the judgment. *Landowners, &c.* v. *Ashford*, 33 W. R. 41; *Boswell* v. *Coaks*, 57 L. J. Ch. 101.

An interlocutory order in an action for payment of taxed costs falls within 1 & 2 Vict. c. 110, s. 18, and consequently such costs carry interest from the date of the order. *Taylor* v. *Roe*, (1894) 1 Ch. 413.

But not on costs directed to be raised out of an estate. *A.-G.* v. *Nethercote*, 11 Sim. 529; *Hodgson* v. *H.*, 2 Keen, 704.

Nor on the costs of a judgment for foreclosure. *Eardley* v. *Knight*, 41 C. D. 537, *post*, p. 144.

Where a mortgagee's costs are ordered to be added to his security, they carry interest from the date of the allocatur. *Lippard* v. *Ricketts*, 41 L. J. Ch. 595.

Delivery of a bill of costs to the person liable amounts to a demand so as to make interest payable. *Re McMurdo*, (1897) 1 Ch. 119.

As to interest payable by trustees or executors on mortgages, and on debts in administration actions, and as to interest in partnership and other cases, see the chapters on the several subjects.

Costs.

The usual course is to adjourn further consideration, which includes the costs, till the account has been taken; but in simple cases the Court sometimes disposes of the costs, and directs payment of the balance by the original judgment.

Costs generally follow the event of the account, but

where the account is intricate or doubtful there will be no costs. *Pitt* v. *Page*, 1 Bro. P. C. 1; and see *Tanner* v. *Heard*, 23 Beav. 555.

Where the settlement of the account is proved, and no case made out for opening it, the action is of course dismissed with costs. *Endo* v. *Caleham*, 1 Yo. 306.

A plaintiff was allowed costs of suit, he having succeeded substantially, although 2,000*l.* was found due from him. *May* v. *Biggenden*, 24 Beav. 207; and see *ibid.* 214 as to general principles.

On decree for account of tithes the costs cannot be apportioned, unless there are several defences; where there is a common defence the costs must be paid by the defendants generally. *Esdaile* v. *Peacock*, Joh. 216.

Costs up to and including the hearing were given by the decree against an agent who had denied plaintiff's right to an account. *Sellar* v. *Griffin*, 11 W. R. 583.

And a defendant who had refused to account, but had after bill filed offered a sum equal to what was afterwards found due from him, had to pay all the costs. *Collyer* v. *Dudley*, T. & R. 421.

A mortgagee or legal representative, bringing in his accounts, who under a *bonâ fide* mistake makes a claim which is disallowed, ought not to be deprived of costs. *Re Watts*, *Smith* v. *Watts*, 22 C. D. 1; *Re Jones*, *Christmas* v. *Jones*, (1897) 2 Ch. 190.

Where an executor had refused to account, but gave one in his answer which was correct, costs were given to plaintiff up to decree. *Anon.*, 4 Madd. 273.

CHAPTER II.

PARTNERSHIP ACCOUNTS.

The Mode of keeping Partnership Accounts.

It is usual to treat all the accounts of a partnership as accounts of the firm, and to deal with the accounts of each partner as if he were simply a debtor or creditor of the firm. The property brought in is credited to the stock account, and is then distributed through the ledger accounts, in which the several articles and persons are made debtors to stock for the several items passed into these accounts. Each partner has his own separate account opened with the firm, and is credited with everything he brings in and debited with what he draws out. Upon a rest, the net profits are determined and divided, and the share of each partner carried to his separate account. The partners are creditors for all the firm's stock and debtors for all its deficiencies. When they first bring in their capital the firm is made debtor to each for his proportion. Whenever stock is taken the surplus is divided according to the shares and carried to the respective accounts of the partners; and if there is a deficiency the loss is apportioned in the same way. Cory, 71, ed. 2; Lind. 399.

Each partner being thus treated like an ordinary creditor and debtor in respect of what he brings in and what he draws out, the balance to his credit or his debit in the private ledger shows how his account with the firm stands. And upon payment of that balance to him or by him, as the case may be, his account with the firm is closed and settled.

Each partner's share of profit or loss is ascertained by a simple rule of three calculation. If they share equally the share of each is ascertained by dividing the whole profit or loss by the number of partners. If they share in proportion to their respective capitals, then as the united capitals are to the whole profit or loss, so will each partner's share of capital be to his share of profit or loss.

Accountants very properly debit each partner in his account with the firm with the whole of whatever he draws out and credit him with the whole of what he brings in. But, as Lord Cottenham observes, "though these terms debtor and creditor are so used and sufficiently explain what is meant by the use of them, nothing can be more inconsistent with the known law of partnership than to consider the situation of either party as in any degree resembling the situation of those whose appellation has been so borrowed. . . . . The supposed creditor's debt is due from the firm of which he is a partner, and the supposed debtor owes the money to himself in common with his partners." *Richardson* v. *Bank of England*, 4 M. & Cr. 171; and see *Lee* v. *Neuchatel, &c.*, 41 C. D. p. 23.

The Duty to keep and Right to inspect Accounts.

Every partner has a right to have accurate accounts kept and to have free access to them. *Rowe* v. *Wood*, 2 Jac. & W. 558; *Goodman* v. *Whitcomb*, 3 V. & B. 36.

Partnership books are to be kept at the place of business, and every partner may have access to, and inspect and copy any of them. Partnership Act, 1890, s. 24 (9).

Partners are bound to render true accounts and full information of all things affecting the partnership to any partner or his representatives. *Ibid.*, s. 28; and see *Re Bennett*, (1896) 1 Ch. 778.

No partner can deprive his co-partner of his right to

inspect the accounts by keeping them in a private book of his own. *Freeman* v. *Fairlie*, 3 Mer. 43.

But if a person entitled to a share of profits agrees to accept the balance-sheets as correct, and will not investigate the accounts himself, he will be bound by the agreement. *Turney* v. *Bayley*, 4 D. J. & S. 332.

An assignee of a share has no right during the partnership to accounts or inspection. Partnership Act, 1890, s. 31.

If no accounts are kept, or they are unintelligible, or are destroyed or wrongfully withheld, and an account is directed by the Court, every presumption will be made against those responsible for their non-production. *Walmsley* v. *W.*, *post*, p. 87.

If all persons interested in the account are in *pari delicto*, this rule cannot be applied; but it is the duty of continuing or surviving partners so to keep accounts as at any time to show the position of the firm when a change among its members occurred. *Ex parte Toulmin*, 1 Mer. 598, n.; *Toulmin* v. *Copland*, 3 Y. & C. Ex. 655.

As to losing all right to interest by keeping the accounts improperly, see *Boddam* v. *Ryley*, 1 Bro. C. C. 239; 2 *ib.* 2.

Implied Powers of Partners relating to Accounts.

An account rendered by one partner relative to a partnership transaction is equivalent to an account rendered by the firm. *Fergusson* v. *Fyffe*, 8 Cl. & F. 121. As to false accounts, see *post*, p. 71.

Although each partner has power to settle accounts, he has no power to compromise or settle them in any way he thinks fit without payment. *Hogarth* v. *Wherley*, L. R. 10 C. P. 630; *Pearson* v. *Scott*, 9 C. D. 198; *Young* v. *White*, 7 Beav. 506.

And a partner has no implied authority to settle an account of his own by agreeing that it shall be set against

a debt due to his firm. *Piercy* v. *Fynney*, 12 Eq. 69; *Kendal* v. *Wood*, L. R. 6 Ex. 243.

Nor has he any implied power to compromise or settle an account by accepting shares in a company. *Niemann* v. *Niemann*, 43 C. D. 198.

One partner has no implied authority to bind the firm by opening a banking account on its behalf in his own name. *Alliance Bank* v. *Kearsley*, L. R. 6 C. P. 433.

Accounts under Partnership Articles.

The object of taking partnership accounts is to show—1. How the firm stands as regards strangers. 2. How it stands towards its own members.

The articles, therefore, should provide not only for keeping proper books of account and for entry therein of all receipts and payments, but also for the making up yearly of a general account showing the assets and liabilities of the firm and what is due to each partner in respect of capital and profits, or what is due from him, as the case may be.

The articles should also always contain a clause that the accounts when signed shall be treated as conclusive, and shall not be opened except for some manifest error discovered within a given time. *London Fin. Ass.* v. *Kelk*, 26 C. D. 151.

But however stringent such a clause may be, it will not bind any partner who is induced to sign by false representations or in ignorance of material facts concealed by his co-partners. *Oldaker* v. *Lavender*, 6 Sim. 239; *Blisset* v. *Daniel*, 10 Ha. 493.

The usual provision as to manifest errors applies only to errors in figures and obvious oversights and blunders which admit of no difference of opinion, not to errors in judgment, such as treating as good debts which turn out to be bad, or omitting losses not known to have occurred.

Ex parte Barber, 5 Ch. 687. And see *Laing* v. *Campbell*, 36 Beav. 3.

An account, moreover, may be conclusive for one purpose though not for another, *e. g.*, for the purpose of calculating profits to be divided, but not for calculating the amount to be paid to a partner on his expulsion from the firm. *Blisset* v. *Daniel*, 10 Ha. 493; *cf. Coventry* v. *Barclay*, *infra*.

So, although nothing is reckoned for goodwill in taking annual accounts with a view to division of profits, it does not follow that goodwill is not taken into account on a dissolution. *Wade* v. *Jenkins*, 2 Giff. 509; *cf. Steuart* v. *Gladstone*, 10 C. D. 626; *Hunter* v. *Dowling*, (1895) 2 Ch. 223.

Nor does it follow that because profits and losses are annually divided equally, the losses on a final winding-up are to be divided equally without reference to the capital of the partners. *Binney* v. *Mutrie*, 12 A. C. 160; *Wood* v. *Scoles*, 1 Ch. 369.

Where accounts are taken *bonâ fide* in the usual way, and there are no errors, the absence of a deceased partner's signature is of no importance, as he could not properly have refused to sign them. *Coventry* v. *Barclay*, 3 D. J. & S. 320; *Ex parte Barber*, *supra*; *Hunter* v. *Dowling*, 9 Times L. R. 454.

Accountability of Partners for Private Profits.

Every partner must account to the firm for any benefit derived by him without the consent of the other partners from any transaction concerning the partnership or from any use by him of the partnership property, name or business connection. Partnership Act, 1890, s. 29.

This section applies also to transactions undertaken after a partnership has been dissolved by the death of a partner, and before the affairs thereof have been completely wound up, either by any surviving partner or by the representatives of the deceased partner. *Ibid.*

If a partner, without the consent of the other partners, carries on any business of the same nature as and competing with that of the firm, he must account for and pay over to the firm all profits made by him in that business. Partnership Act, 1890, s. 30.

If, therefore, a partner is buying or selling for a firm, he cannot sell to it or buy from it at a profit to himself. *Bentley* v. *Craven*, 18 Beav. 75; *Dunne* v. *English*, 18 Eq. 524; and see *Imp. Merc. &c.* v. *Coleman*, L. R. 6 H. L. 189.

And if a partner is authorised by another to sell at a given price, he must account for a higher price if a higher price is realised. *Dunne* v. *English*, *supra;* and see *Parker* v. *McKenna*, 10 Ch. 96; *De Bussche* v. *Alt*, 8 C. D. 286, 317.

The same principle applies to attempts made by partners to secure for themselves benefits which it was their duty to obtain, if at all, for the firm to which they belong. *Carter* v. *Horne*, 1 Eq. Ab. 7.

Thus they will be accountable for commissions or bribes received by them. See *Williamson* v. *Hine*, (1891) 1 Ch. 390; *Lister* v. *Stubbs*, 45 C. D. 1; but see *Baring* v. *Stanton*, 3 C. D. 502.

So if a partner obtains a renewal of a lease of the partnership property, the new lease will, on taking the accounts, be held to be part of the assets of the firm. *Featherstonhaugh* v. *Fenwick*, 17 Ves. 298; *Alder* v. *Fouracre*, 3 Swans. 489; *Clegg* v. *Fishwick*, 1 Mac. & G. 294; *Clegg* v. *Edmondson*, 8 D. M. & G. 787.

A partner cannot derive any exclusive advantage by the employment of the partnership property or by engaging in transactions in rivalry with the firm, and, if he does so, he must account for any profit so made. Partnership Act, 1890, s. 30, *supra; Burton* v. *Wookey*, 6 Madd. 367; *Gardner* v. *McCutcheon*, 4 Beav. 534; *Williamson* v. *Hine*, *supra; cf. Miller* v. *Mackay*, 34 Beav. 295.

A partner is not allowed to make use of any information obtained by him in the course of transacting the partnership business, or by reason of his connection with the firm, for his own exclusive use in any transaction which is within the scope of the partnership business; and if he does so, he must account for any profits he may derive from the use of such information. See *Dean* v. *Macdowell*, 8 C. D. 345.

But he need not account for any profit derived from the use of such information for purposes which are wholly outside the scope of the partnership business. *Aas* v. *Benham*, (1891) 2 Ch. 244; and see *Lamb* v. *Evans*, (1893) 1 Ch. 218; *Merryweather* v. *Moore*, (1892) 2 Ch. 518.

A partner, moreover, is not allowed to carry on for his own sole benefit any separate trade or business which, were it not for his connection with the partnership, he would not have been in a position to carry on; and if his connection with the firm enables him to acquire gain, he must account for the same. *Russell* v. *Austwick*, 1 Sim. 52; *Lock* v. *Lynam*, 4 Ir. Ch. 188; *cf. Miller* v. *Mackay*, *supra;* and see cases as to renewed leases cited above.

As we have already seen, a partner must, under the Partnership Act, account for all profits made by him in any business which he carries on in rivalry with the firm to which he belongs, *ante*, p. 69. *Glassington* v. *Thwaites*, 1 S. & S. 124; *England* v. *Curling*, 8 Beav. 129.

But where a partner carries on a business not connected with or competing with that of the firm, his partners have no right to the profits he thereby makes, even though he has agreed not to carry on any separate business. *Aas* v. *Benham*, (1891) 2 Ch. 244.

A partner may, however, acquire for himself the share of a co-partner without informing the other partners of the purchase. *Cassels* v. *Stewart*, 6 A. C. 64.

The same obligation to act with good faith exists between persons who have agreed to become partners; and if one of them, in negotiating for the acquisition of

property for the intended firm, receives a bonus or commission, he must account for it to the firm when formed. *Fawcett* v. *Whitehouse*, 1 R. & M. 132.

False accounts.

Whether accounts rendered by one partner in the name of the firm, and showing that money is in the hands of the firm when in fact he has misapplied it, are binding upon the firm seems doubtful; but it is conceived that, if the accounts relate to matters within the scope of the partnership business, the firm is bound by them. Lind. 163; Partnership Act, 1890, ss. 10, 15; *Blair* v. *Bromley*, 5 Ha. 542; *Moore* v. *Knight*, (1891) 1 Ch. 547.

Appropriation of Payments.

The general rules relating to the appropriation of payments will be found elsewhere (*ante*, p. 42). The most important with reference to partnership accounts is that known as the rule in *Clayton's Case*,—that where there is one single open current account between two parties every payment which cannot be shown to be made in discharge of some particular item is imputed to the earliest item standing to the debit of the payer at the time of payment. 1 Mer. 572; *Ex parte Randleson*, 2 D. & Ch. 534; *Copland* v. *Toulmin*, 7 Cl. & F. 349; *Brown* v. *Adams*, 4 Ch. 764; *Laing* v. *Campbell*, 36 Beav. 3; and see *Hancock* v. *Smith*, 41 C. D. 456.

The effect of the rule is to discharge from liability the estates of deceased partners, the estates of sole traders, if their businesses have been carried on by others without any break, and retired partners, whether known or dormant. *Sterndale* v. *Hankinson*, 1 Sim. 393; *Smith* v. *Wigley*, 3 Moo. & S. 174; *Hooper* v. *Keay*, 1 Q. B. D. 178; *Newmarch* v. *Clay*, 14 East, 239.

The rule applies to all accounts of the nature of one entire debit and credit account, without reference to any question of partnership, and is available not only by a

firm against an old creditor, but also against a firm for the benefit of its debtors.

Thus, where a person becomes surety to a firm for a debt owing by a third party, and the debt becomes extinguished by the rule in question, the surety will be discharged, although upon the whole account there may always have been a balance owing to the firm. *Kinnaird* v. *Webster*, 10 C. D. 139; *Bodenham* v. *Purchas*, 2 B. & A. 39; and see *Re Sherry*, 25 C. D. 692, *ante*, p. 43.

The rule applies even as between persons who do not know that they are being affected by it. *Brooke* v. *Enderby*, 2 Brod. & B. 70; *Newmarch* v. *Clay*, *supra*; *Merriman* v. *Ward*, 1 J. & H. 371.

Since a creditor has no right to take the account backwards, so as to make himself appear a creditor in respect of the earlier rather than the later items, so, on the other hand, a debtor, after making general payments in respect of one entire account, is not at liberty to have those payments applied in liquidation of the subsequent rather than of the earlier items. *Beale* v. *Caddick*, 2 H. & N. 329.

If, therefore, an incoming partner allows debts contracted before he joined the firm and others subsequently contracted to form one simple running account, and payments are made generally in respect of it, those payments, although made with the money of the new firm, will be applied to the old debt. *Beale* v. *Caddick*, *supra*; *Scott* v. *Beale*, 6 Jur. N. S. 559.

But the rule cannot be insisted on to the prejudice of a new partner without his consent express or tacit. *Burland* v. *Nash*, 2 Fos. & Fin. 687.

The rule, however, applies only to an entire unbroken account; and if there are distinct accounts, the creditor is at liberty to apply the payment to whichever account he thinks proper. *Peters* v. *Anderson*, 5 Taunt. 596; *Mitchell* v. *Cullen*, 1 M'Qu. 190.

Right to

A creditor of a firm has a right when a change occurs

in a firm to decide for himself whether the sum due to him shall or shall not form an item in his account with the new firm. *Simson* v. *Ingham*, 2 B. & C. 65; *Jones* v. *Maund*, 3 Y. & C. Ex. 347. blend accounts.

But one partner can bind the firm by assenting to a transfer of a debt, due to or by it, from one account to another. *Beale* v. *Caddick*, *supra*.

The rule in *Clayton's Case* is a rule based on the presumed intention of the parties; and if it can be shown that some other appropriation was intended, the rule ceases to be applicable. *Wickham* v. *Wickham*, 2 K. & J. 478; *City Dis. Co.* v. *Maclean*, L. R. 9 C. P. 692; *Hancock* v. *Smith*, 41 C. D. 456.

Upon the same principle, the rule cannot be applied against a creditor in respect of a fraud committed upon him, and of which he is ignorant. So, if one partner fraudulently overdraws his account with the firm, and keeps paying in and drawing out, so that the fraud is never discovered, it will not be treated as made good so long as there is a balance against him. *Lacey* v. *Hill*, 4 C. D. 537; 3 A. C. 94.

Actions for Account—The Right to Account and Discovery.

Partners are bound to render true accounts and full information of all things affecting the partnership to any partner or his legal representatives. Partnership Act, 1890, s. 28. Action for account.

An action for an account may be maintained by partners although the accounts are not complicated. *Cruikshank* v. *M'Vicar*, 8 Beav. 106; and see *Frietas* v. *Dos Santas*, 1 Y. & J. 574.

And although an action for damages may be sustainable. *Wright* v. *Hunter*, 5 Ves. 792; *Blain* v. *Agar*, 2 Sim. 289.

And although the defendant may have stolen or embezzled the money of the firm. *Roope* v. *D'Avigdor*, 10 Q. B. D. 412.

And in taking such account all claims will be adjusted and settled, though they would have formed the subject of an action at law. See *Bury* v. *Allen*, 1 Coll. 589; *Mackenna* v. *Parkes*, 36 L. J. 366.

Persons entitled to.

An account may be had by one partner, or his executors or administrators, against his co-partner, or his executors or administrators. *Hackwell* v. *Eustman*, Cro. Jac. 410; *Beaumont* v. *Grover*, 1 Eq. Ab. 8 (7); Partnership Act, 1890, s. 28.

And by the trustees of a bankrupt partner against a solvent partner or his executors. *Addis* v. *Knight*, 2 Mer. 119.

Or by a solvent partner against the trustee of his bankrupt co-partner. *Whitworth* v. *Davis*, 1 V. & B. 545.

Servant.

An agreement to pay out of profits confers a right to an account. Thus, a servant entitled to a share of profits can maintain an action for account of them. *Rishton* v. *Grissell*, 5 Eq. 326; *Turney* v. *Bayley*, 4 D. J. & S. 332.

Sub-partner.

A sub-partner has no right to an account from the principal firm, but only against the member with whom he is sub-partner. *Brown* v. *De Tastet*, Jac. 284; *Bray* v. *Fromont*, 6 Madd. 5.

Mortgagee.

Nor has a mortgagee or incumbrancer of a partner's share any right to an account from the other partners until dissolution. Partnership Act, 1890, s. 31; *Bergmann* v. *MacMillan*, 17 C. D. 423; but see s. 23.

Unless, by agreement, the partner has the right to make his assignee a partner, in which case the assignee acquires the rights of the assignor. *Fawcett* v. *Whitehouse*, 1 R. & M. 132; *Redmayne* v. *Forster*, 2 Eq. 467.

An assignment by a partner of his share does not, as against the other partners, entitle the assignee during the continuance of the partnership to require accounts. But on a dissolution he is entitled to receive the share, and, for

the purpose of ascertaining that share, to an account as from the dissolution. Partnership Act, 1890, s. 31.

Where a separate judgment creditor of a partner has obtained a charging order, he only has such remedies as if the charge had been made by the partner, and except under special circumstances an order should not be made on the other partners for an account. *Brown, Jansen & Co.* v. *Hutchinson & Co.* (No. 2), (1895) 2 Q. B. 126.

Creditors.

If a partner dies the creditors of the firm can sue the executors and surviving partners. But the separate creditors and legatees, or next of kin, have no *locus standi* against the surviving partners, but only against the representatives of the deceased partner. *Davies* v. *Davies*, 2 Keen, 534; *Travis* v. *Milne*, 9 Ha. 141; *Seeley* v. *Boehm*, 2 Madd. 180.

It is only where there is collusion or when circumstances preclude the representative from himself obtaining an account that they can sue the surviving partners for that purpose. *Ibid.*

The account may be general or limited, that is directed to some particular transaction as to which a dispute has arisen. Lind. 496.

Thus, an account may be taken of what is due upon a policy without taking any general account or seeking for a dissolution. *Bromley* v. *Williams*, 32 Beav. 177; and see *Prole* v. *Masterman*, 21 Beav. 61.

The old rule, therefore, that an account will only be directed with a view to the final determination of all claims and a dissolution, is considerably relaxed though still applicable to partnerships at will, and to cases where there is no sufficient reason for departing from it. *Leybourne-Popham* v. *Spencer-Brown*, 9 T. L. R. 309; Lind. 497; but see *ibid.* 502.

Account without dissolution.

There are three classes of cases in which actions for an account without a dissolution are more particularly common:—

1. Where one partner has sought to withhold from

his co-partner the profit arising from some secret transaction.

2. Where the partnership is for a term of years still unexpired, and one partner has sought to exclude, or expel, his co-partner, or to drive him to a dissolution. *Richards* v. *Davies*, 2 R. & M. 347; *Fairthorne* v. *Weston*, 3 Ha. 387; *cf. Leybourne-Popham* v. *Spencer-Brown*, 9 T. L. R. 309.

3. Where the partnership has proved a failure, and the partners are too numerous to be made parties to an action, and a limited account will result in justice to them all. *Sheppard* v. *Oxenford*, 1 K. & J. 491; *Apperly* v. *Page*, 1 Ph. 779; *Clements* v. *Bowes*, 17 Sim. 167. Such a case, however, cannot often arise now. See Companies Act, 1862, s. 4.

A claim for an account need not contain an offer by the plaintiff to pay what, if anything, may be found due from him on taking such account. *Columbian Gov.* v. *Rothschild*, 1 Sim. 103.

An action for account is not objectionable simply because it relates to several partnerships, if there is no practical inconvenience. *Jefferys* v. *Smith*, 3 Russ. 158; *Rheam* v. *Smith*, 2 Ph. 726.

In an action for account, if the partnership is admitted and there is nothing in dispute except the accounts, an order directing them may be obtained before the trial. R. S. C., Ord. 15, r. 1; Ord. 33, r. 2 *et seq.*; *Turquand* v. *Wilson*, 1 C. D. 85.

Discovery. The right of every partner to discovery from his co-partner is as incontestable as his right to an account. Partnership Act, 1890, ss. 24 (9), 28.

If a partner chooses to mix up partnership accounts with his own private accounts, he must produce the whole, unless he can sever them. *Pickering* v. *Pickering*, 25 C. D. 247.

The partner interrogated is not, however, bound to digest accounts, nor to set out voluminous accounts existing

already in another shape, and which he offers to produce. *Christian* v. *Taylor*, 11 Sim. 401; *Lockett* v. *L.*, 4 Ch. 336.

But he cannot set out the accounts in a book, and refer to the book instead of scheduling the accounts to the answer. *Telford* v. *Ruskin*, 1 Dr. & S. 148.

And where there are specific questions he cannot refer generally to books, but must point out where, in particular, the information can be found. *Drake* v. *Symes*, Johns. 647.

And if it is in his power to obtain information, he must make reasonable efforts to inform himself. *Taylor* v. *Rundell*, 1 Ph. 222.

But a person cannot be compelled to produce books which belong to himself and others, not before the Court, unless the absent parties are in fact represented by the defendant, and have no conflicting interest. *Murray* v. *Walter*, 1 Cr. & Ph. 114; *Glyn* v. *Caulfield*, 3 Mac. & G. 463; and see *Vyse* v. *Foster*, 13 Eq. 602.

If the plaintiff has agreed to accept the defendant's statement of profits, and not to investigate his accounts, the defendant will not be compelled to produce them before the hearing. *Turney* v. *Bayley*, 4 D. J. & S. 332; *ibid.*, 34 Beav. 105.

The common order does not authorise inspection by a professional accountant, but, if necessary, a special order will be made for that purpose. *Lindsay* v. *Gladstone*, 9 Eq. 132; *Swansea Co.* v. *Budd*, 2 Eq. 274; *Bonnardet* v. *Taylor*, 1 J. & H. 383; and see *Re Bennett*, (1896) 1 Ch. 778.

A partner will be restrained, by injunction, from withholding the partnership books, or publishing the accounts of the firm. *Taylor* v. *Davis*, 3 Beav. 388; *Marshall* v. *Watson*, 25 Beav. 501.

Payment into Court.

If in an action for account the defendant-partner admits that he has in hand money belonging to the firm, or it plainly appears that he ought to have, he can be com-

pelled to pay such money into Court before the hearing of the action. *Wanklyn* v. *Wilson*, 35 C. D. 180.

But not if he insists that, on taking the account, a balance will be found due to him. *Richardson* v. *Bank of England*, 4 M. & Cr. 165.

Nor unless the other partners pay in what they have in hand. *Foster* v. *Donald*, 1 J. & W. 252.

Defences to an Action for Account.

Illegality.

An action for account cannot be sustained by one member of an illegal partnership against another in respect of its dealings and transactions. *Sykes* v. *Beadon*, 11 C. D. 170.

But the fact that one partner has been guilty of illegal acts in the conduct of the business is no defence to an action for account by the other partner, where the objects of the partnership were not illegal, and the innocent partner, at the time of entering the business, intended that it should be carried on lawfully. *Thwaites* v. *Coulthwaite*, (1896) 1 Ch. 496.

So a partner was held entitled to an account of a bookmaker's and betting business, though the defendant had acted illegally. *Ibid.*; *Harvey* v. *Hart*, (1894) W. N. 72.

Fraud.

Fraud is also a defence to an action for account.

Laches.

Independently of the Statutes of Limitations a plaintiff may be precluded by his own laches from obtaining equitable relief. *Ante*, p. 48.

So, where an account has been long acquiesced in, unless fraud be proved, a Court will not re-open it, though the account may be shown to be erroneous, and no final settlement was ever come to. *Scott* v. *Milne*, 5 Beav. 215; *Williams* v. *Page*, 24 Beav. 654.

So, charges long ago made or omitted are regarded as

having been made or omitted by agreement, and the question of mistake will not be gone into. *Thornton* v. *Proctor*, 1 Anstr. 94.

So the Court will not aid one who has remained quiet in the hope of being able to evade loss, or to claim a share of gain in case of success. *Cowell* v. *Watts*, 2 H. & Tw. 224; *Norway* v. *Rowe*, 19 Ves. 144; *Clegg* v. *Edmonson*, 8 D. M. & G. 787; *Prendergast* v. *Turton*, 13 L. J. Ch. 238; *Rule* v. *Jewell*, 18 C. D. 660.

But this does not apply to cases where the Court is compelled to make a decree in favour of the plaintiff, or to declare him a trustee of his legal interest. *Hart* v. *Clarke*, 6 D. M. & G. 232; 6 H. L. C. 633; and see *Garden Gully, &c.* v. *McLister*, 1 App. Cas. 39.

Laches, if relied on as a defence to an action, ought to be expressly pleaded. Lind. 477.

Want of proper parties.

The rule is that all the partners must be parties to an action for account if within the jurisdiction of the Court, but subject to the question how far the firm can be treated as representing them all.

So, where a firm creditor sued the executors of the deceased partner, the surviving partners had to be made co-defendants. *Re Hodgson*, 31 C. D. 192.

So the representatives of deceased partners must be parties to actions if they have any interest in the partnership accounts.

But they need not all be parties where the claim for account is by a sub-partner or an assignee. *Supra*, p. 75.

In an action against the executor of a partner for an account of all the profits made by the use of the capital of the deceased in the business of which the executor is a member, it seems necessary to make the other partners parties. *Secus*, if the account is confined to so much of those profits as the executors have themselves received. See *Vyse* v. *Foster*, 8 Ch. 309; *Simpson* v. *Chapman*, 4 D. M. & G. 154.

Denial of partnership.

An action for account may be met by the denial of the

existence of any such partnership. *Drew* v. *Drew*, 2 V. & B. 159.

Whilst, on the one hand, a person denying an alleged partnership must give all such discovery as bears upon the question of partnership or no partnership, he will not be compelled to set out accounts or produce documents which he swears throw no light on that question. See *Re Leigh*, 6 C. D. 256; *Parker* v. *Wells*, 18 C. D. 477; *White* v. *Ahrens*, 26 C. D. 717.

Statute of Limitations.

The statutes, 21 Jac. I. c. 16, s. 3, and 19 & 20 Vict. c. 97, s. 9, enact that all actions of account shall be commenced and sued within six years next after the cause of such action or suit.

All partnership accounts are within the statute, and are barred after six years, unless there has been a breach of an express trust, or fraud, or payment, or an acknowledgment, or unless the partnership articles are under seal. Lind. 512.

The Statute of Limitations does not apply so long as the partnership is continuous. *The Pongola*, 73 L. T. 512.

So, where a father and two sons carried on business in partnership till 1886, when the father died, and the sons continued the business till 1893, when one of them died, and the other alleged concealed fraud by his brother before 1886, it was held that, although the old partnership was terminated by the death of the father, the statute was no bar to taking the accounts before that date, the accounts having been carried on into the new partnership without interruption or settlement. *Betjemann* v. *Betjemann*, (1895) 2 Ch. 474.

It was also held that, if the statute had applied, the concealed fraud would have been a bar to its operation, although such fraud might have been discovered at the time by the use of due caution, a partner being entitled to rely on the good faith of his co-partners. *Ibid.*

The statute begins to run from the dissolution, or the

exclusion or death of a partner. *Knox* v. *Gye*, L. R. 5 H. L. 656; *Noyes* v. *Crawley*, 10 C. D. 31; and see *Friend* v. *Young*, (1897) 2 Ch. 421.

Therefore, in the absence of special circumstances, the statute affords a good defence to an action for account of the dealings of a partnership which has been dissolved more than six years before the commencement of the action. See Partnership Act, 1890, s. 43.

A signed acknowledgment of liability to account in respect of matters more than six years old is sufficient to justify a decree for account, although the acknowledgment did not contain any admission that anything was due, nor any promise to pay what might be found due on taking the account. *Prance* v. *Simpson*, Kay, 678; and see *Banner* v. *Berridge*, 18 C. D. 254; *Skeet* v. *Lindsay*, 2 Ex. D. 314.

Where a partnership account is agreed to be taken, and a receiver is appointed, a payment by him to one of the partners on account of a debt owing to him by another partner will not prevent the statute from being a bar to such debt. *Whitley* v. *Lowe*, 25 Beav. 421; 2 De G. & J. 704.

Formerly the Statute of Limitations did not apply to cases of express trust, but under the Trustee Act, 1888, s. 8, trustees are now allowed the benefit of the statute, except in cases of fraud, or where the trustee still retains the property or has converted it to his use. In such cases there is no limit of time. See *Stainton* v. *Carron Co.*, 24 Beav. 346.

Account stated.

To an action for account, an account already stated and settled between the parties affords a good defence. *Taylor* v. *Shaw*, 2 S. & S. W.; *Kent* v. *Jackson*, 2 D. M. & G. 49.

And an account settled by a majority was held binding on the minority. *Robinson* v. *Thompson*, 1 Vern. 465.

An account stated, unless in writing, is no defence to an action for a further account. But it is not necessary that the account should be signed if it has been acquiesced in.

See *Hunter* v. *Belcher*, 2 D. J. & S. 194; *Willis* v. *Jernegan*, 2 Atk. 252; Lind. 514.

An account may be stated and settled, although a few doubtful items are omitted. *Sim* v. *Sim*, 11 Ir. Ch. 310.

But a verbal account and a receipt in full is not equivalent to a stated account. *Walker* v. *Consett*, Forrest, 157.

An account rendered, but not acquiesced in, does not prevent the account being taken by the Court. *Clements* v. *Bowes*, 1 Drew. 692; *Irvine* v. *Young*, 1 S. & S. 333.

But it must be remembered that, although the principle on which accounts have been kept may have been acquiesced in, the items may not. See *Mosse* v. *Salt*, 32 Beav. 269; *cf. Hunter* v. *Belcher*, *supra*.

A settled account may be impeached, either wholly or in part, on the ground of fraud or mistake. If there be fraud or a mistake affecting the whole account, the whole will be opened and a new account taken. *Williamson* v. *Barbour*, 9 C. D. 529; *Gething* v. *Keighley*, *ib.*, 547.

But if only the correctness of some of the items is in dispute, the account will be acted on as correct, except so far as any item can be shown to be erroneous. *Holgate* v. *Shutt*, 27 C. D. 111; 28 C. D. 111.

In case of fraud an account will be opened *in toto*, even after a considerable lapse of time. *Allfrey* v. *A.*, 1 Mac. & G. 87; *Williamson* v. *Barbour*, *supra*.

But if no fraud be proved, and the account has been long settled, the utmost the Court will do will be to give leave to surcharge and falsify. *Gething* v. *Keighley*, *supra*.

And there are cases in which, in consequence of lapse of time, the Court will only rectify particular items, and not give leave to surcharge and falsify. *Twogood* v. *Swanston*, 6 Ves. 485; *Maund* v. *Allies*, 5 Jur. 860.

The mere fact that items are improperly treated or improperly omitted, if known to the parties, is not sufficient to open a settled account. *Maund* v. *Allies*, *supra*; *Laing* v. *Campbell*, 36 Beav. 3.

But an item omitted by mutual mistake will be set right. *Pritt* v. *Clay*, 6 Beav. 503.

If an account is impeached errors must be proved, although the account is settled "errors excepted." *Parkinson* v. *Hanbury*, L. R. 2 H. L. 1; *Johnston* v. *Curtis*, 2 Bro. C. C. 311, n.

In surcharging and falsifying, errors of law as well as of fact may be set right. *Roberts* v. *Kuffin*, 2 Atk. 112; and see *Daniell* v. *Sinclair*, 6 A. C. 181.

And this may be done, it has been said, by either party. 1 Madd. 144.

Where a release has been given on the retirement or death of a partner, the settled accounts can only be opened on the release being set aside. *Millar* v. *Craig*, 6 Beav. 433; *Fowler* v. *Wyatt*, 24 Beav. 232.

In taking accounts under an ordinary judgment settled accounts are never disturbed unless specially directed. *Holgate* v. *Shutt*, *supra*; *Newen* v. *Wetten*, 31 Beav. 315; but see *Milford* v. *Milford*, M'Cl. & Y. 150.

Award. Another defence to an action for account is that matters have been settled by arbitration; but a mere agreement to refer is not a defence. *Thompson* v. *Charnock*, 8 T. R. 139; *Michell* v. *Harris*, 4 Bro. C. C. 312.

An award, however, is not a defence if the account to which the award applies is different from the account sought, or if the award proceeded on a mistake. *Farrington* v. *Chute*, 1 Vern. 72; *Spencer* v. *Spencer*, 2 Y. & J. 249.

Agreements to refer are now governed by the Arbitration Act, 1889.

Payment. Payment *per se* is not a defence to an action for account, but payment and acceptance in lieu of all demands is equivalent to accord and satisfaction, and is as much a defence as is a release. Lind. 517; *Brown* v. *Perkins*, 1 Ha. 564.

But there must be no uncertainty in the agreement, which must be shown to have been performed. Lind. 518.

Waiver. And an agreement to waive accounts must be shown to

be founded on sufficient consideration, and free from all taint of fraud or undue influence. *Brown* v. *Perkins*, *supra*; *Sewell* v. *Bridge*, 1 Ves. sen. 297.

Release.

A release is of course a good defence to an action for account. But a release to be effectual as such must be under seal. A release not under seal is regarded as a stated account. Mit. Pl. 307.

A release can of course be set aside for fraud or mistake. *Wedderburn* v. *W.*, 2 Keen, 722; *Pritt* v. *Clay*, *supra*.

Judgments for Account.

A judgment for a partnership account in its simplest form is merely a direction to take an account of the dealings and transactions, and to pay what shall be found due. Seton, 1197; and see *Whetham* v. *Davey*, 30 C. D. 580.

The rule as to costs now is to pay the costs of an action for dissolution from the commencement out of the partnership assets, unless there is some good reason to the contrary. *Hamer* v. *Giles*, 11 C. D. 942.

But where the action is to try some disputed right, the unsuccessful party will be ordered to pay the costs up to trial. *Ibid.*; *Norton* v. *Russell*, 19 Eq. 343.

The costs of taking the accounts, although disputed, are usually defrayed out of the partnership assets, or, if necessary, by a contribution between the partners. *Austin* v. *Jackson*, 11 C. D. 942, n.; *Butcher* v. *Pooler*, 24 C. D. 273; *Ross* v. *White*, *infra*.

But all partnership liabilities, including advances to the firm by partners, must be paid before the costs. *Potter* v. *Jackson*, 13 C. D. 845; *Ross* v. *White*, (1894) 3 Ch. 326.

The method of taking the account under a judgment is as follows:—

1. Ascertain how the firm stands as regards non-partners.

2. Ascertain what each partner is entitled to charge in account with his co-partners. *West* v. *Skip*, 1 Ves. sen. 242.
3. Apportion between partners profits or loss, and ascertain what, if anything, each must pay in order that all cross-claims may be settled.

In taking the accounts, regard must be had not only to the partnership articles, but also to the manner in which they have been acted on by the partners. *Watney* v. *Wells*, 2 Ch. 250.

It is said that a partner is not to be charged as such with what he might have received but for his wilful default. *Rowe* v. *Wood*, 2 J. & W. 556.

But *quære* whether a surviving partner could not be made so to account, as he alone can get in the assets.

Just allowances will be made on taking the account, and, if necessary, the order will direct the master to state the facts and reasons upon which he shall adjudge any allowances to be just allowances. See Ord. 33, r. 8; *Crawshay* v. *Collins*, 2 Russ. 347; *Stocken* v. *Dawson*, 6 Beav. 371; *Re Norrington*, 13 C. D. 654, *post*, p. 90.

Period over which Account extends.

The time from which the account begins is the commencement of the partnership or the last settled account. *Cooke* v. *Collingridge*, Jac. 624.

An incoming partner is not entitled to profits made before he became a partner unless there is an agreement to that effect. *Gordon* v. *Rutherford*, T. & R. 373.

Nor can he go behind a settled account unless there is a special direction. *Holgate* v. *Shutt*, *supra*.

Where partners have had dealings together preparatory to the partnership, those dealings must be taken into consideration in taking the accounts. *Cruikshank* v. *McVicar*, 8 Beav. 116.

The time at which the account is to stop will naturally be the date of the dissolution.

But though in one sense it stops at this date, yet it must still be kept open for winding up the partnership. Partnership Act, 1890, s. 38; *Crawshay* v. *Collins*, 2 Russ. 345; *Willett* v. *Blanford*, 1 Ha. 270; *Watney* v. *Wells*, 2 Ch. 250.

The account of profits since the dissolution will be treated later.

Evidence.

The partnership books are *primâ facie* evidence against each of the partners, and therefore also for any of them against the others. *Gething* v. *Keighley*, 9 C. D. 551; *Lodge* v. *Pritchard*, 3 D. M. & G. 906; but see *Stewart's Case*, 1 Ch. 587.

But entries made by one partner without the knowledge of the other do not prejudice the latter as between himself and his co-partners. *Hutcheson* v. *Smith*, 5 Ir. Eq. 117; *Morehouse* v. *Newton*, 3 De G. & S. 307.

So accounts kept by a person may be used against him to show what he has received, though he cannot use them to show what he has paid. *Ibid.*; *Reeve* v. *Whitmore*, 2 Dr. & S. 446.

Where in consequence of the loss of books or documents an account cannot be taken in the usual way, special directions will be given as to the mode in which it shall be taken and vouched. O. 33, r. 3.

The judgment for account usually provides for the production on oath of all books and papers; and they must be produced, whether they relate to other matters or not, if they relate to the accounts which have to be taken. *Pickering* v. *P.*, 25 C. D. 247; *Freeman* v. *Fairlie*, 3 Mer. 43; *Hue* v. *Richards*, 2 Beav. 305; but see *Murray* v. *Walter*, *ante*, p. 77.

Liberty, however, will be given to seal up those parts

which are sworn not to relate to the matters in question. *Mansell* v. *Feeney*, 2 J. & H. 320.

As between partners and their representatives, material documents must be produced, though they may be privileged as between them and other persons. *Brown* v. *Perkins*, 2 Ha. 540.

If a partner will not produce books or accounts in his possession, an account may nevertheless be arrived at by presuming everything against him. *Walmsley* v. *Walmsley*, 3 Jo. & Lat. 556; and see *Gray* v. *Haig*, 20 Beav. 219.

The judge in chambers has power to employ professional accountants, and may act on their report certificate. Arbit. Act, 1889, s. 13 *et seq.*; R. S. C., O. 55, r. 19; *Ford* v. *Tynte*, 2 D. J. & S. 127; *Re London, &c.*, 6 W. R. 141.

The fact that an accountant is employed does not suspend, but is ancillary to, the taking of accounts in chambers, and the allowance to him is made in addition to the Court fee. *Hutchinson* v. *Norwood*, 32 W. R. 392.

The fees to accountants are regulated by the taxing officers, subject to appeal to the Court or judge. O. 65, r. 27 (36); *Meymott* v. *M.*, 33 Beav. 590.

The common order for discovery does not authorise inspection by a professional accountant, though a special order may be made, *ante*, p. 77.

Profits since Dissolution.

It has been already observed that an account of partnership dealings and transactions must be kept open after the date of dissolution, for the purpose of debiting and crediting the proper parties with the moneys payable in respect of fresh transactions incidental to the winding up, as well as in respect of old transactions engaged in prior to the dissolution, *ante*, p. 86.

Where, however, a continuing or surviving partner

continues to carry on the business without coming to any settlement of accounts, and without paying out the share of the late partner, the question arises what are the rights of the latter or his representatives against the former in respect of profits he has made.

If a partner agrees that when he dies or retires his capital shall remain in the business at interest, those who carry on the business will be accountable for the capital and interest and nothing more. *Vyse* v. *Foster*, L. R. 7 H. L. 318; and see *Stroud* v. *Gwyer*, 28 Beav. 130.

But a loan by A. to B., must not be confounded with capital brought by A. into a firm of A. and B. See *Travis* v. *Milne*, 9 Ha. 141; *Flockton* v. *Bunning*, 8 Ch. 323.

Where property is wrongfully used in trade without the consent of the owner, and there is no trust, the owner will be entitled to the profits made by the trader by the use of the property in question, after making the trader all just allowances, including a fair remuneration for his trouble. *Yates* v. *Finn*, 13 C. D. 839; and see 15 Ves. 224; 1 Jac. & W. 132; 15 Beav. 392; 22 Beav. 100.

But if no profit is made, or less than interest at the current rate, the owner has the option to take either interest or profits. *Heathcote* v. *Hulme*, 1 Jac. & W. 122; see now Partnership Act, 1890, s. 42, *post*.

Where the trader is a trustee of the property and employs it in trade contrary to his trust, there is an additional reason for so charging him, since no trustee is allowed to derive profit from the use of the trust property. *Docker* v. *Somes*, 2 M. & K. 655.

Where a trustee employs trust property in a business carried on by himself and others who are not trustees, he is not accountable for all the profits made by the firm by means of the trust property, but only for his own share of such profits. *Vyse* v. *Foster*, L. R. 7 H. L. 318; and see *Jones* v. *Foxall*, 15 Beav. 388, 395; *Palmer* v. *Mitchell*, 2 M. & K. 672; Law Quarterly (1887), 211.

And a trustee who is not a partner and therefore does not share the profits is not accountable. *Vyse* v. *Foster*, *supra*.

But the partners who are not trustees are liable to account if they knew that the employment of the trust money in trade was a breach of trust. *Flockton* v. *Bunning*, 8 Ch. 323.

It is often extremely difficult to ascertain what are the profits made by the use of particular property. Special inquiries are therefore almost always necessary, and if it can be shown that the profits cannot be justly attributed to the property in question the *primâ facie* right of the owner to share such profits is effectually rebutted. *Vyse* v. *Foster*, *supra*; *Simpson* v. *Chapman*, 4 D. M. & G. 154; *Wedderburn* v. *Wedderburn*, 2 Keen, 722; 22 Beav. 84.

No general rule can be laid down as to extent of the liability to account for subsequent profits, and every case must depend on its own circumstances. "The nature of the trade, the manner of carrying it on, the capital employed, the state of the account between the late partnership and the deceased partner at the time of his death, and the conduct of the parties after his death, may materially affect the rights of the parties." *Willett* v. *Blanford*, 1 Ha. 253.

The provisions of the Partnership Act, 1890, which deal with the foregoing questions are contained in the 42nd section, which is as follows:—

"42. Where any member of a firm has died or otherwise ceased to be a partner, and the continuing partners carry on the business with its capital, without any final settlement of accounts as between the firm and the outgoing partner or his estate, then, in the absence of any agreement to the contrary, the outgoing partner or his estate is entitled, at the option of himself or his representatives, to such share of the profits made since the dissolution as the Court may find attributable to the use of his share, or to interest at the rate of 5 per cent.

Provided that where by the partnership contract an option is given to the continuing partners to purchase the interest of a deceased or outgoing partner, and that option is duly exercised, the estate of the deceased partner or outgoing partner is not entitled to any further or other share of profits; but if any partner assuming to act in exercise of the option does not in all material respects comply with the terms thereof, he is liable to account under the foregoing provisions of this section."

In taking an account of subsequent profits it was usual, as before stated, to make the trader all just allowances, including a fair remuneration for his trouble, unless he was guilty of a breach of trust, and it is apprehended that the Partnership Act, 1890, has not altered the law in this respect. See sect. 46.

The legatees or next of kin of a deceased partner are entitled to an account of profits made by the use of the trust property against his executors where they are themselves surviving partners, or have themselves become partners since his death. *Cook* v. *Collingridge*, Jac. 607; *Stocken* v. *Dawson*, 9 Beav. 239; *Townend* v. *T.*, 1 Giff. 201; *Macdonald* v. *Richardson*, 1 Giff. 81; *Flockton* v. *Bunning*, 8 Ch. 323, n.

In special cases, as, for instance, where it is the trustees' duty to call in the money and accumulate the income, they will be charged with compound interest. Lind. 595.

The Partnership Act, 1890, s. 42, confirms the old rule, as above stated, that if the profits are not attributable to the use of the late partner's share the continuing partners will not be liable to account. *Ante*, p. 89.

Final Settlement of Accounts.

The rules to be observed in a final settlement of accounts are contained in the 44th section of the Partnership Act, 1890, which is as follows:—

"44. In settling accounts between the partners after a dissolution the following rules shall, subject to any agreement, be observed:—

(a) Losses, including losses and deficiencies of capital, shall be paid, first, out of profits, next, out of capital, and lastly, if necessary, by the partners individually in the proportion in which they were entitled to share profits.

(b) The assets of the firm, including the sums, if any, contributed by the partners to make up losses or deficiencies of capital, shall be applied in the following manner and order:—

1. In paying debts and liabilities of the firm to persons who are not partners therein.

2. In paying to each partner rateably what is due from the firm to him for advances as distinguished from capital. See *Potter* v. *Jackson*, *infra*.

3. In paying to each partner rateably what is due from the firm to him in respect of capital.

4. The ultimate residue, if any, shall be divided among the partners in the proportion in which profits are divisible."

The repayment of advances under sub-sect. 2 comes before costs of winding-up. *Potter* v. *Jackson*, 13 C. D. 845; *Austin* v. *Jackson*, 11 C. D. 942, n.

It follows, from the above rules, that if the assets are not sufficient to pay the debts and liabilities to non-partners, the partners must make up the loss by contribution *inter se*.

If they are sufficient for that purpose, but not sufficient to repay advances, the latter ought to be treated as a debt

of the firm, but payable to a partner instead of to a stranger. See, before the Act, *Wood* v. *Scoles*, 1 Ch. 369.

If after paying all liabilities and advances the surplus is not sufficient to pay each partner his capital, the capitals remaining unpaid must be met like other losses. See sect. 24 (1).

Equality of loss, and inequality of capital.

Where there is inequality of capital and equality of profit and loss, a deficiency of capital must be treated like any other loss, and the assets, after payment of debts and advances, must be distributed so as to make each partner's loss of capital equal. See *Wakefield Rolling Stock Co.*, (1892) 3 Ch. 165; *Weymouth S. P. Co.*, (1891) 1 Ch. 66; *Ex parte Maude*, 6 Ch. 51.

Or if the assets are not sufficient there must be contribution among the partners, so as to put all on equality. *Binney* v. *Mutrie*, 12 A. C. 160; *Nowell* v. *Nowell*, 7 Eq. 538.

Where, however, it is agreed that all debts shall be paid out of the assets, and that any surplus shall be divided between the partners in proportion to their interests or capitals, effect must be given to the agreement, and those who bring in most capital will lose most. *Wood* v. *Scoles*, 1 Ch. 369; *Eclipse G. M. Co.*, 17 Eq. 490.

Rights of Separate Creditors and Legatees to Account.

The executors of a deceased partner are, under ordinary circumstances, the only persons who have a right to call upon the surviving partners for an account, which right they do not lose by a sale and assignment of the share. *Stainton* v. *Carron Co.*, 18 Beav. 146; *Clegg* v. *Fishwick*, 1 Mac. & G. 294.

And if they wilfully neglect to get in the assets, they

will be made to account for them, although they may not have actually received them. *Grayburn* v. *Clarkson*, 3 Ch. 605; *Sculthorp* v. *Tipper*, 13 Eq. 232.

But, although in an action against the executor of a deceased partner by a separate creditor or legatee, or next of kin, no account can be ordered against the surviving partners, yet it is the common course in such an action to direct an inquiry as to what is due to the estate in respect of such share. *Macdonald* v. *Richardson*, 1 Giff. 81; and see *Pointon* v. *Pointon*, 12 Eq. 547.

Orders 16 and 18 do not, apparently, apply to such a case. Lind. 629.

It has, however, been decided that if the surviving partners seek to obtain payment of a balance from the estate of the deceased on the partnership accounts, these accounts must be taken, although no direction as to them has been given. *Paynter* v. *Houston*, 3 Mer. 297; *Baker* v. *Martin*, 5 Sim. 380.

The general rule above stated is not, however, without exceptions, and under special circumstances the surviving partners may be sued along with the executor or administrator of the deceased. *Yeatman* v. *Yeatman*, 7 C. D. 210.

Such special circumstances are:—

—collusion between the executors and the surviving partners. *Doran* v. *Simpson*, 4 Ves. 651; *Gedge* v. *Trail*, 1 R. & M. 281, n.; *Alsager* v. *Rowley*, 6 Ves. 478.

—refusal by the executors to compel the partners to come to an account. *Burroughs* v. *Elton*, 11 Ves. 29; but see *Yeatman* v. *Yeatman*, *supra*.

—dealings which may have precluded the executors from themselves obtaining an account. *Law* v. *Law*, 2 Coll. 41; 11 Jur. 463; *Braithwaite* v. *Britain*, 1 Keen, 206.

—the fact that the executors are themselves partners. *Beningfield* v. *Baxter*, 12 A. C. 167; *Cropper* v. *Knapman*, 2 Y. & C. Ex. 338.

—and, generally, where the relation between the executors

and partners presents an impediment to an account. *Travis* v. *Milne*, 9 Ha. 150.

Where a final account has been settled between the executors and surviving partners it is binding on the persons interested, and cannot be impeached except on the ground of fraud. *Davis* v. *Davis*, 2 Keen, 534; *Smith* v. *Everett*, 27 Beav. 446; see Conv. Act, 1881, s. 37.

But if the executors are themselves the surviving partners, or some of them, the account is always liable to be disputed on the ground of their fiduciary position. *Wedderburn* v. *Wedderburn*, 2 Keen, 722; 4 M. & Cr. 41.

The profits of an ordinary partnership are not within the Apportionment Act, 1870. *Re Cox*, 9 C. D. 159.

The cases illustrating the right of legatees to an account of profits made since their testator's death, where the executors have continued his assets in the business, have already been adverted to. See *Yates* v. *Finn*, *Brown* v. *De Tastet*, *&c.*, *ante*, pp. 88, 90; and see *Re Bennett*, (1896) 1 Ch. 778, as to employing accountants.

CHAPTER III.

MORTGAGE ACCOUNTS.

SECTION I.

Accounts between Mortgagors and Mortgagees generally.

Reference of Accounts to Chambers.—In all actions relating to mortgages, whether for redemption or foreclosure, the usual order of the Court is, that it be referred to chambers to take an account of what is due to the mortgagee for principal, interest, and costs.

As a rule, where an account is asked for in an action it is not usual to give particulars, as to do so would be to anticipate the account. *Augustinus* v. *Nerinckx*, 16 C. D. 13; *Blackie* v. *Osmaston*, 28 C. D. 119.

But in a foreclosure action particulars may be ordered to be furnished, although an account is asked for. *Kemp* v. *Goldberg*, 36 C. D. 505.

If a mortgagor has applied under the stat. 7 Geo. II. c. 20, for re-conveyance, on payment of what shall be found due for principal, interest, and costs, the reference to chambers must proceed upon admission by the mortgagor of the amount claimed for principal and interest, and it will not be open to the chief clerk to admit evidence to the contrary. *Huson* v. *Hewson*, 4 Ves. 105.

In a foreclosure action the plaintiff, as a rule, is only entitled to principal, interest, and costs of the action; special grounds must be shown for claiming any other costs. *Bolingbroke* v. *Hinde*, 25 C. D. 795.

Any special matter affecting the account in a foreclosure action, such as a claim by the mortgagor to redeem on

payment of the amount at which the mortgagee had valued the security on the mortgagor's bankruptcy, should be pleaded or brought to the notice of the Court before the decree nisi is made, in order that directions may be given to the chief clerk to have regard to such matter in taking the accounts, otherwise no such matter can be raised subsequently on taking the accounts. *Sanguinetti* v. *Stuckey's Bank*, (1896) 1 Ch. 502.

A plaintiff in an action for foreclosure, or for administration, cannot, on an application under Ord. 15, r. 1, for accounts and inquiries in default of appearance, obtain directions for special inquiries, which would cause the questions arising in the action to be determined by the reference to chambers. *Gatti* v. *Webster*, 12 C. D. 771; *Re Gyhon, Allen* v. *Taylor*, 29 C. D. 834; but see *post*, p. 97.

And the same rule applies to the plaintiff in an action for redemption. *Clover* v. *Wilts, &c.*, W. N. (1884) 110.

So, also, if the Court orders preliminary accounts and inquiries under Ord. 33, r. 2, directions cannot be given which would have the effect of sending the question in the action to be tried in chambers. *Garnham* v. *Skipper*, 29 C. D. 566; 52 L. T. 239.

Foreclosure.

Where in a foreclosure action the defendant did not appear at the trial, an affidavit of service of notice of trial was dispensed with, and the ordinary judgment nisi was made for accounts and foreclosure. *Chorlton* v. *Dickie*, 13 C. D. 160; *Baird* v. *East Riding, &c.*, W. N. (1891) 144.

In taking the usual account of what is due on the security in a foreclosure action, where a receiver has been appointed, the plaintiff should be charged with the amount (if anything) paid into Court by the receiver, and such a sum as should be in the receiver's hands at the date of the certificate, and with such a sum (if any) as the plaintiff should submit to be charged with in respect of rents and profits to come into the receiver's hands prior to the order for foreclosure absolute. Form of order in *Barber* v.

Jeckells, Seton, 2142, varied; *Simmons* v. *Blandy*, (1897) 1 Ch. 19.

By Ord. 15, rr. 1, 2, where the indorsement on a writ involves taking an account, and the defendant fails to appear, or to satisfy the Court that there is some preliminary question to be tried, an order for account, with all necessary inquiries and directions, may be made on summons.

Several orders were made in chambers under these rules, amounting, in effect, to orders nisi for foreclosure. *Smith* v. *Davies*, 28 C. D. 650; *Dyott* v. *Neville*, W. N. (1887) 35.

And although some doubt seems to have been thrown on the practice (*Blake* v. *Harvey*, 29 C. D. 827; *Bissett* v. *Jones*, 32 C. D. 635), the most recent case decides that there is jurisdiction to make an order for foreclosure under Ord. 15 in chambers. *Horton* v. *Bosson*, W. N. (1899) 23.

Where a mortgagee has obtained an order nisi for foreclosure, the mortgagor is entitled to insist on the accounts being carried in, in order that the accounts directed by the decree may be taken, although it is alleged that the estate is worth less than the amount due on the mortgage. *Taylor* v. *Mostyn*, 25 C. D. 48.

But where it clearly appears that the value of the property would be quite insufficient to meet the plaintiff's claim, and that the cost of taking the accounts would lead to useless expense, and the defendants refuse to give security for the costs of taking them, the prosecution of the accounts will be stayed. *Exchange, &c.* v. *Ass. of Land, &c.*, 34 C. D. 195.

If for any reason the judgment to account, instead of being made in the usual manner, proceeds upon the undertaking of the mortgagor to pay what shall be found due, the mortgagee relying upon this undertaking cannot avail himself of the right to foreclose if default be made in payment. *Dunstan* v. *Patterson*, 2 Ph. 341.

Set-off.—In taking the accounts between a mortgagee and mortgagor, the latter may be given the benefit of any matters which he is entitled to set off against the amount claimed by the former. *Dodd* v. *Lydall*, 1 Ha. 333.

So a surety who is being sued by a mortgagee may set off a debt which is due by the mortgagee to the principal debtor arising out of the transaction upon which the liability arises. *Bechervaise* v. *Lewis*, L. R. 7 C. P. 372.

The right of set-off in bankruptcy has been extended under successive statutes by the mutual credit clauses.

Under the Bankruptcy Act, 1883, s. 38, if there is no right of set-off at the time of bankruptcy, subsequent dealings cannot create it. *Re Milan Tramways*, 25 C. D. 587.

Where a director of a company assigned his shares and salary to the company by way of security for debts, and empowered the company to retain his salary and dividends and sell his shares, on his bankruptcy the company were held entitled to set off the debt as against the bankruptcy trustee's claim to dividends and salary. *Nelson* v. *London, &c.*, 2 S. & S. 292.

Where a shareholder is also a debenture-holder, the company may set off calls made before the winding-up against the sum due on the debentures. *Christie* v. *Taunton & Co.*, (1893) 2 Ch. 175.

And in the same way the sums payable under a policy of assurance may be set off against the amount due on a mortgage of the policies. *Sovereign, &c.* v. *Dodd*, (1892) 2 Q. B. 573.

Further Accounts.—If an account be taken in chambers and no further proceeding be had, and afterwards a second account is directed, it will be taken from the foot of the first account. *Morris* v. *Islip*, 20 Beav. 654.

After the amount has been certified, the mortgagee should not receive any rents or other moneys on account

of the estate. If the mortgagee, by such receipt before default, vary the amount certified, the account must be carried on, and a new day fixed for redemption. *Ellis* v. *Griffiths*, 7 Beav. 83; *Prees* v. *Coke*, L. R. 6 Ch. 645.

The mortgagee will not be allowed to avoid this by verifying the subsequent receipts and paying over the amount; but he must account by affidavit for such subsequent receipts. *Buchanan* v. *Greenway*, 12 Beav. 355; *Oxenham* v. *Ellis*, 18 Beav. 593.

The receipt, however, of rent or other moneys after default, and before affidavit of default, does not make a further account necessary. *Constable* v. *Howick*, 5 Jur. N. S. 331.

Where an order nisi for foreclosure was made against a puisne mortgagee and the mortgagor with successive periods of redemption, and the mortgagee received rents after default of, but before final judgment against, the puisne mortgagee, and before the expiration of the period of redemption allowed to the mortgagor, it was ordered that the puisne mortgagee be foreclosed absolutely, and that a further account be taken against the mortgagor. *Webster* v. *Pattison*, 25 C. D. 626.

Who are bound by the Accounts.—The account taken in chambers between the mortgagor and first mortgagee will be binding on subsequent incumbrancers, provided the decree necessarily decides the rights between the co-defendants, as in the case of decrees of foreclosure, which provide for the claims of all parties. Robbins, 1140.

But accounts taken in a suit are not binding on co-defendants, as between themselves, unless the taking of such accounts, as between co-defendants, is necessary to the relief sought by the plaintiff. *Cottingham* v. *Shrewsbury*, 3 Ha. 627.

The power given by the Judicature Act, 1873, as to counterclaims and third parties, is discretionary, and will not be exercised so as to bring in matters which could not

formerly have been litigated therein. *Re Scott, Scott* v. *Padwick*, 2 C. D. 736, 742.

Where questions exist between mortgagees and sub-mortgagees, co-defendants, the proper course is to raise them by counterclaim delivered to the co-defendants. *Shephard* v. *Beane*, 2 C. D. 223.

Where there is a decree for costs against co-defendants, one of them cannot, by an independent proceeding, obtain contribution against the other. *Dearsley* v. *Middlewick*, 18 C. D. 236.

But the third party procedure applies between co-defendants, and the Court may direct an inquiry. Ord. 16, r. 55; *Sawyer* v. *Sawyer*, 28 C. D. 595; *Re Holt*, (1897) 2 Ch. 525.

An account stated between the mortgagee and tenant for life was apparently held to be binding on a contingent remainderman coming afterwards into *esse*. *Allen* v. *Papworth*, 1 Ves. sen. 164.

An account stated between the mortgagee and trustees of a bankrupt will be binding on all parties claiming under the bankrupt. *Knight* v. *Bampfield*, 1 Vern. 179.

And an account taken during minority will be binding on the infant. *Badham* v. *Odell*, 4 Bro. C. C. 349.

Opening Accounts.—In every case an account, though settled or stated, is liable to be opened for fraud, or the party impugning the account may be allowed, in case of specific error, alleged or proved, to surcharge and falsify.

Accounts may be opened on discovery of error, even after the judge's certificate is attached thereto. *Re Browne*, 19 L. R. Ir. 132.

A settled account will be opened when gross overcharges are deliberately made. *Williamson* v. *Barbour*, 9 C. D. 529.

Where fraud is proved an account may be opened many years after it has been closed, and even after the death of the person guilty of the fraud. *Ibid.*; *Vernon* v. *Vawdry*,

2 Atk. 119; *Wedderburn* v. *Wedderburn*, 4 M. & Cr. 41.

And a single fraudulent item is sufficient ground for opening an entire account. *Pritt* v. *Clay*, 6 Beav. 503; *Allfrey* v. *Allfrey*, 1 Mac. & G. 87; *Coleman* v. *Mellersh*, 2 Mac. & G. 309.

It would seem, however, that it is not necessary to prove actual fraud if the errors proved in the account are sufficient in number and importance to show such gross negligence as constructively to amount to fraud. *Clarke* v. *Tipping*, 9 Beav. 284; *Williamson* v. *Barbour*, *supra*; *Holgate* v. *Shutt*, 28 C. D. 111.

Under special circumstances a settled account may be opened on the ground of mutual mistake.

So, where a mortgage account had been settled on the footing of compound interest with half-yearly rests, both parties wrongly understanding that this was in accordance with the provisions of the mortgage deed, the account was opened. *Daniell* v. *Sinclair*, 6 A. C. 181.

If the mortgagee stands in a fiduciary relation to the mortgagor, *e.g.* as trustee or solicitor, it is obvious that he must be especially careful that no errors appear in his accounts; and in such a case a less amount of error will justify the Court in opening the account. *Williamson* v. *Barbour*, *supra*; and see *Re Webb*, *Lambert* v. *Still*, (1894) 1 Ch. 73, 84.

Surcharging and Falsifying.—As a rule, unless fraud is proved, or unless one of the parties stands in a fiduciary relation to the other, a settled account will not be opened for mere mistakes or omissions, but the party impugning the account will have leave to surcharge and falsify. *Re Webb*, *supra*; and see *ante*, p. 51.

And even where a fiduciary relation exists, unless actual fraud is proved, the Court will not readily open an account which has long been settled, but will give leave to surcharge and falsify. *Millar* v. *Craig*, 6 Beav. 433; *Gething*

v. *Keighley*, 9 C. D. 547; *Eyre* v. *Wynn-Mackenzie*, (1894) 1 Ch. 218.

If a solicitor-mortgagee charges poundage in his account on the rents received, without informing his client that he has no right so to do, the mortgagor will be allowed to surcharge and falsify, notwithstanding his acquiescence in the charge. *Langstaffe* v. *Fenwick*, 10 Ves. 405; and see *Wragg* v. *Denham*, 2 Y. & C. Ex. 117.

By Ord. 33, r. 5, any party seeking to charge any accounting party beyond what he has by his account admitted to have received, shall give notice thereof to the accounting party, stating the amount sought to be charged, and the particulars thereof, in a short and succinct manner.

If any of the parties can show an omission for which credit ought to be given, that is a surcharge; or, if anything is inserted which is a wrong charge, he is at liberty to show it, and that is falsification. *Pitt* v. *Cholmondeley*, 2 Ves. sen. 565.

A party having liberty to surcharge and falsify is not confined to errors of fact, but may take advantage of errors in law. *Roberts* v. *Kuffin*, 2 Atk. 112.

Where a mortgagor makes claims against a mortgagee in possession on the ground of wilful default, his proper course is to proceed to surcharge and falsify the accounts of the mortgagee. *Noyes* v. *Pollock*, 30 C. D. 336, 342.

So, where a mortgagee in possession made in his accounts a charge for receiving the rents personally, the mortgagor was given leave to surcharge and falsify. *Langstaffe* v. *Fenwick*, 10 Ves. 404.

If a party seeks to open a settled account, or liberty to surcharge and falsify, he must plead and prove some definite act of fraud or error. *Parkinson* v. *Hanbury*, L. R. 2 H. L. 1, 11, 19; *Eyre* v. *Hughes*, 2 C. D. 148.

Where accounts were taken under a purchase by the mortgagee, reserving to the mortgagor a right of re-purchase within a limited time, the mortgagor remaining

manager, books kept by the mortgagee were taken as *primâ facie* evidence of the account of all moneys received and paid by him with liberty to surcharge and falsify, but such books are not binding on the mortgagor. *Ogden* v. *Battams*, 1 Jur. N. S. 191.

Opening Accounts of Solicitor-Mortgagee.—If a solicitor takes a mortgage for future costs, or for an unsettled account, an action for a general account will at any time lie against him. *Detillin* v. *Gale*, 7 Ves. 583; and see *Hiles* v. *Moore*, 17 L. J. Ch. 385.

And although it is a rule that a settled account will only be opened if particular errors are pointed out; yet, if in an action brought by a client against his solicitor alleging error *generally* in an account settled between them, the solicitor admit the fact, the account will be opened. *Matthews* v. *Wallwyn*, 4 Ves. 118; and see *Dundonald* v. *Masterman*, 7 Eq. 518; *Eyre* v. *Hughes*, 2 C. D. 148.

If a client has paid or given a mortgage for his solicitor's bill of costs without pressure or undue influence, and afterwards wishes to have it taxed, he must state and prove that the bill contains such grossly improper charges as furnish evidence of fraud. *Horlock* v. *Smith*, 2 M. & Cr. 495; *Re Lacey*, 25 C. D. 301.

When the security is given after a settlement of accounts, such accounts may be opened, even after a lapse of many years.

So an account stated and signed thirty years previously was opened generally when it appeared that the accounts contained improper charges, and that the client signed them without independent advice or proper explanation. *Ward* v. *Sharp*, W. N. (1884) 5.

But if there have been only mistakes and omissions there will be only liberty to surcharge and falsify. *Vernon* v. *Vawdry*, 2 Atk. 119; *Jones* v. *Moffett*, 3 J. & L. 636.

And if the amount due for costs or advances has never been fixed, or no bill delivered, the amount must be ascer-

tained by taxation, notwithstanding the securities, subject, however, to any signed agreement between the parties as to remuneration. *Sandon* v. *Hooper*, 6 Beav. 246; *Lawless* v. *Mansfield*, 1 Dr. & War. 557; *Re Lewis*, 1 Q. B. D. 724.

If, however, the accounts have been properly investigated and settled, the mortgage will not be disturbed. *Judd* v. *Ollard*, 5 Jur. N. S. 755; *Jones* v. *Roberts*, 9 Beav. 419; *Nelson* v. *Booth*, 5 W. R. 722.

And where the relation of solicitor and client has ceased for several years, and no fraud or special error is alleged, the accounts will not be opened, although no bills were delivered until after the date of the mortgage. *Blagrave* v. *Routh*, 8 D. M. & G. 621; but see *Lyddon* v. *Moss*, 4 De G. & J. 104.

Nor is it any objection to the security, if *bonâ fide*, that it was obtained under pressure from the solicitor, and when money was wanted to meet the urgent necessities of the client. *Johnson* v. *Fesemeyer*, 3 De G. & J. 13; *Pearson* v. *Benson*, 28 Beav. 598; *Cheslyn* v. *Dalby*, 2 Y. & C. Ex. 170.

If no accounts have been kept, or there has been any mis-statement or overcharge in his settled account, the solicitor will be fixed with the costs. *Davis* v. *Parry*, 1 Giff. 174; *Detillin* v. *Gale*, 7 Ves. 583.

Section II.

Of Accounts of Principal.

Right to Payment of Principal.—A mortgagee will be allowed in account the principal sum originally advanced, or so much as remains unpaid, unless the mortgagee has agreed to accept a less sum in satisfaction of his claim in respect of principal.

Where a mortgagee agrees to take a portion of his

debt in satisfaction of the whole upon payment on a fixed day, the Court will not relieve from the effect of non-payment on that day. *Ford* v. *Chesterfield*, 19 Beav. 428; *Thompson* v. *Hudson*, L. R. 4 H. L. 1.

Bonus or Commission for Loan.—As a general rule the mortgagee will not be allowed to increase the principal moneys secured by the mortgage by adding thereto a sum charged by way of bonus or commission for making the advance; and a settled account including a bonus may be set aside. *Barrett* v. *Hartley*, 2 Eq. 789.

So where a mortgagee stipulated with the mortgagor that on sale of the property he should be entitled to a commission on the amount realised, in addition to his principal, interest and costs, the charge was disallowed. *Broad* v. *Selfe*, 9 Jur. N. S. 885.

So, also, where it was agreed that if the mortgagor's title should be established in a pending action he should pay a bonus to the mortgagee, such bonus was held to be illegal. *James* v. *Kerr*, 40 C. D. 449.

But where the mortgagee, with the knowledge and consent of the mortgagor, and without pressure, actually deducted at the time of the advance a sum for commission out of the sum advanced, the Court directed that in taking the account the sums actually deducted for commission at the time of the advance should be allowed, but that all other sums charged for commission should be disallowed. *Mainland* v. *Upjohn*, 41 C. D. 126; and see *Bucknell* v. *Vicary*, 64 L. T. 701; *Eyre* v. *Wynn-Mackenzie*, (1894) 1 Ch. 218, 227.

There is no general and absolute rule that a mortgagor and mortgagee cannot at the time of entering into the mortgage transaction enter into some other agreement from which the mortgagee gets some advantage. *Biggs* v. *Hoddinot*, (1898) 2 Ch. 307.

A mortgagee, therefore, may stipulate for a collateral advantage at the time and as a term of the advance,

provided the equity of redemption is not thereby fettered and the bargain is a fair and reasonable one, entered into between the parties on equal terms, without any improper pressure, unfair dealing or undue influence. *Ibid.*

Even though no sum is actually deducted at the time of the advance, it is competent for the parties to stipulate by the mortgage deed that the mortgage shall be redeemable only on payment of a much larger sum than that originally advanced, even though interest is payable in the meantime; and it may also be stipulated that if a smaller sum is paid at an earlier date the mortgagee shall accept it in satisfaction of the larger sum. *Webster* v. *Cook*, 2 Ch. 542.

An exception is, however, made in this respect in the case of a mortgage by an expectant heir where undue advantage is taken of his necessities, in which case the mortgagee will be allowed only the sum actually advanced with simple interest at 5 per cent. *Beynon* v. *Cook*, 10 Ch. 389.

Where a mortgage debt was repayable at specified dates by instalments, and it was agreed that if default was made in payment a commission of 1*l.* per cent. should be paid for every month from the date at which such instalment became payable till actual payment thereof, it was held in a foreclosure action that this commission was not in the nature of a penalty and that the mortgagee was entitled to charge for it on taking the account. *General Credit, &c.* v. *Glegg*, 22 C. D. 548; and see *The Benwell Tower*, 72 L. T. 664.

Where a mortgagee is entitled to bonus or commission, he may claim it either on taking the account of what is due on the mortgage or under the head of just allowances. *Bucknell* v. *Vicary*, 64 L. T. 701.

Further Advances.—It is a settled rule that a mortgagee shall not be deprived of his security without payment of all sums due to him from the mortgagor which form a

lien on the land; and, therefore, if the mortgagee advance other sums expressly by way of further charge, neither the mortgagor nor, generally speaking, any one claiming under him, though for valuable consideration and without notice, is allowed to redeem without payment of the full amount advanced.

The general principle as to when further advances will be allowed in the mortgagee's account seems to be that they must have been made on the faith of an actual charge on the land, and not on merely personal security.

It is reasonably presumed that a further advance is made on the credit of the land over which the lender has already a hold, provided a security of some sort is taken which, though not an actual charge on the land, may ripen into such a charge. Robbins, 1148.

Further advances, therefore, can be charged in account and added to the principal secured by the mortgage if such advances are made on the security of an equitable mortgage or charge of the same lands. *Hibernian Bank* v. *Gilbert*, 23 L. R. Ir. 321.

So, too, a mortgagee is allowed to charge in account further advances made on the security of a deposit of deeds. *Cooke* v. *Wilton*, 29 Beav. 100.

But a further advance cannot be allowed in account if made on the security of a charge which proves to be invalid, or on the security of a verbal agreement for deposit of a lease when granted. *Ex parte Coombe*, 4 Madd. 249; *Ex parte Hall*, 10 C. D. 615.

A mortgagee may charge in account as against the mortgagor and those claiming under him, and may even tack as against puisne incumbrancers, of whose claims he has no notice, moneys owing to him on the security of a subsequent judgment which forms an actual charge on the land. *Brace* v. *Marlborough*, 2 P. W. 493; *Ex parte Knott*, 11 Ves. 609, 617.

It is thought that a mortgagee is entitled to charge in account a subsequent judgment, notwithstanding the

bankruptcy of the judgment debtor; and this of course if execution had issued prior to the date of the receiving order and without notice of an act of bankruptcy. See *Baker* v. *Harris*, 16 Ves. 397; *Ex parte Boyle*, 3 D. M. & G. 515; Bank. Act, 1869, ss. 12, 40; *Ibid.* 1883, s. 9.

In order to entitle a mortgagee to add to the original debt a sum secured by a judgment, the judgment must have been taken before redemption of the mortgage. *Mayor of Brecon* v. *Seymour*, 26 Beav. 548.

Where a mortgage of a fund in Court was given to secure a debt by a person who was largely indebted to the Crown, it was held that the sums paid by the executor of the mortgagee, who was surety to the Crown for the mortgagor, ought to be treated as further advances and added to the mortgage security. *Foster* v. *Hargreaves*, 1 Keen, 281.

A mortgage to cover advances to the mortgagor and his assigns will cover advances to a tenant for life under the mortgagor's will. *Re Watts*, 22 C. D. 1.

A mortgage to secure a balance of accounts not to exceed a certain sum does not include further advances. *Re Meadows*, 5 Jur. N. S. 421.

Where a mortgage is construed as a running security, the mortgagor can only be charged to the extent of his own admissions, unless the mortgagee proves a larger amount to have been advanced. *Molland* v. *Gray*, 2 Y. & C. 199.

Interest cannot be converted into principal as against a puisne incumbrancer, of which the first mortgagee has notice. *Digby* v. *Craggs*, *post*, p. 119.

Costs, charges, and expenses which properly fall within the security are not treated as further advances, but will be added to the security even against puisne incumbrancers. *Post*, Section IV.

Bond Debts.—It is now settled that the mortgagee can-

not charge in account against the mortgagor sums secured by bond or other specialty. Robbins, 1151.

And it makes no difference whether the bond is prior or subsequent to the mortgage, or whether the mortgage be made to the bond creditor originally or taken by assignment. *Ibid.*

Where a mortgagee makes a further advance on a bond binding the heir, it seems that the heir or devisee would not be allowed to redeem the mortgage without also paying off the debt secured by the bond. See 3 & 4 Will. IV. c. 104.

The last-mentioned statute, however, does not apply where the mortgagor's real estate is by his will charged with or devised subject to his debts. Thus, if the devise be for payment of debts generally, the mortgagee must, as to his bond debt, come in rateably with the other creditors. *Powis* v. *Corbet*, 3 Atk. 556; *Irby* v. *Irby*, 22 Beav. 217; *Price* v. *Fastnedge*, Amb. 685.

A debt secured by bond cannot be added to a mortgage debt as against creditors, whether secured or unsecured. *Adams* v. *Claxton*, 6 Ves. 226; *Coleman* v. *Winch*, 1 P. W. 777.

An assignee from the mortgagor may of course redeem without payment of the bond debt. *Anon.*, 3 Salk. 84.

The mortgagee cannot add a bond debt against the assignee of the heir, or of the beneficial devisee, or of the executor. *Coleman* v. *Winch*, *supra*; *Troughton* v. *T.*, 1 Ves. sen. 87; *Morret* v. *Paske*, 2 Atk. 53; *Vanderzee* v. *Willis*, 3 Bro. C. C. 20.

Simple Contract Debts.—A mortgagee cannot add or tack to his mortgage debt a mere simple contract debt against a mortgagor. So a beer account cannot be added or tacked as against puisne incumbrancers to a debt secured by a deposit of a brewer's lease. *Chilton* v. *Carrington*, 1 Jur. N. S. 89; *Dunn* v. *City, &c.*, 8 Eq. 155; *Menzies* v. *Lightfoot*, 11 Eq. 459.

The balance in hand after sale of the mortgaged premises cannot be retained after the death of the mortgagor against another debt due to the mortgagee, so as to give himself a preference over other creditors. *Talbot* v. *Frere*, 9 C. D. 568, 571; and see *Re Haselfoot*, 13 Eq. 327; *Re Gen. Prov. Ass.*, 14 Eq. 507.

A mortgagee of a lease or other chattel interest may add to his mortgage debt a simple contract debt against the executor, but not against creditors. *Rolfe* v. *Chester*, 20 Beav. 613; *Adams* v. *Claxton*, 6 Ves. 226.

Since 3 & 4 Will. IV. c. 104, a simple contract debt can be added to a mortgage debt against the heir or devisee where there is no devise for payment of debts. *Rolfe* v. *Chester*, 20 Beav. 610; *Thomas* v. *Thomas*, 22 Beav. 341.

This right, prior to 32 & 33 Vict. c. 46, could not be exercised to the prejudice of specialty creditors. And it is thought that the Act has not enlarged the right, and that the mortgagee must, as regards his simple contract debt, come in rateably with other creditors of the same degree. Wms. Real Assets, 26.

Section III.

Of Accounts of Interest.

Right to Interest generally.—Interest on a mortgage, though fixed annually, accrues due from day to day. *Re Rogers' Trusts*, 1 Dr. & S. 338.

As between persons beneficially entitled in succession to interest under a mortgage, there must be an apportionment on the determination of the particular interest. *Edwards* v. *Warwick*, 2 P. W. 171; Apportionment Act, 1870.

A mortgagee of a life interest is not an assign within 4 & 5 Will. IV. c. 22, so as to entitle him to receive an

apportioned part of the rents. *Paget* v. *Anglesey*, 17 Eq. 283.

A mortgagee is entitled to six months' notice before being paid off, or to six months' interest in lieu thereof; and this applies where the mortgagee has required payment on a particular day and the money has not then been paid. *Bartlett* v. *Franklin*, 36 L. J. Ch. 671.

But the rule does not apply when the mortgagee himself takes proceedings to compel payment or enforce the security; and merely taking possession seems to amount to taking proceedings. *Bovill* v. *Endle*, (1896) 1 Ch. 648, per Kekewich, J.

But in a foreclosure action the mortgagor must pay six months' interest from the date of the certificate. *Hill* v. *Rowlands*, (1897) 2 Ch. 361.

On the expiration of the six months' notice by the mortgagor, if he tenders the amount due, interest will stop, provided he keeps the money ready to pay to the mortgagee. *Gyles* v. *Hall*, 2 P. W. 377; *Bank of N. S. W.* v. *O'Connor;* 14 A. C. 273.

Proof of strict tender on the very day the notice expires is requisite, for if strict tender is not made the Court cannot stop the interest. *Bishop* v. *Church*, 2 Ves. sen. 371; as to requisites of tender, see Robbins, 710 *et seq.*

A solicitor having authority from the mortgagees to accept a tender of the amount due under the mortgage has no implied authority to accept the tender of a cheque in lieu of cash, so as to make such a tender good in law as against the mortgagees. *Blumberg* v. *Life Interests, &c.*, (1897) 1 Ch. 171; (1898) 1 Ch. 27.

The mortgagor should also, it is said, be ready to make oath that the money has always been ready, and no profit made of it, which fact may be controverted by the mortgagee, and if he prove the contrary, interest will run on. *Lutton* v. *Rodd*, 2 Ch. Ca. 206; *Gyles* v. *Hall, supra.*

A devisee of an estate in mortgage is not entitled to set off arrears of interest due at the death of the mortgagor

against arrears of interest due on a legacy given by the mortgagee to the mortgagor for life, and not received by the mortgagor who was one of the executors of the mortgagee. *Pettat* v. *Ellis*, 9 Ves. 563.

A sum of money bequeathed by the mortgagor to the same person to whom the estate in mortgage is devised, for the purpose of exonerating the mortgaged estate, will only carry interest as a legacy, though the mortgage carry a higher rate. *Lockhart* v. *Hardy*, 10 Beav. 292; and see 9 Beav. 379.

Where judgment had been taken for less interest than was due, a bill to recover the omitted interest was dismissed. *Darlow* v. *Cooper*, 34 Beav. 281.

Where a debt is to be ascertained under a compromise, interest does not run till the time when the debt is ascertained. *Fowler* v. *Fowler*, 4 De G. & J. 250; *Wallington* v. *Willis*, 10 Jur. N. S. 906; *Caledonian Ry. Co.* v. *Carmichael*, L. R. 2 H. L. Sc. 56.

Where a mortgage contains a proviso that the total amount to be recovered under the mortgage shall not exceed a certain sum, the proviso does not apply to interest but only to principal, and does not prevent the mortgagees claiming interest over and above the sum fixed. *White* v. *City of London Brewery*, 42 C. D. 237.

Where a mortgage and a bond were given to secure the same debt, it was held that the interest recoverable was not limited to the amount of the penalty of the bond. *Clarke* v. *Abingdon*, 17 Ves. 106.

Secus, where the mortgage is made a security only for the bond debt and the interest *to become due on the bond*. *Hughes* v. *Wynne*, 1 My. & K. 20; and see *Clowes* v. *Waters*, 16 Jur. 632.

And it is said that if the bond debt be tacked to another security, interest will be allowed beyond the penalty. Robbins, 1155.

Rate of Interest.—Since the mortgage deed usually fixes

the rate of interest, questions seldom arise in taking the accounts as to what interest is to be allowed.

As a general rule interest may now be made payable at any rate, however high, which may be agreed upon by the parties. *Webster* v. *Cook*, 2 Ch. 542.

But notwithstanding the repeal of the usury laws, an exorbitant rate of interest is an important consideration in setting aside dealings with expectant heirs. *Nevill* v. *Snelling*, 15 C. D. 697.

Sometimes a provision is inserted regulating the rate of interest according to the market rate; and in some cases the rate of interest is made to fluctuate according to fixed rules with the price of stock. Robbins, 1156.

Income tax must be deducted from the interest, whether provided for in the mortgage or not, and such deduction must be allowed under a penalty. 16 & 17 Vict. c. 34, s. 40; 27 Vict. c. 18, s. 15.

And all agreements for payment of interest in full, without allowing the deduction of income tax, are void. 5 & 6 Vict. c. 35, s. 103.

But although such agreements are void, the same object may be obtained by an agreement that upon payment within a specified time interest shall be accepted at such a rate as after deduction of income tax will leave a clear remainder equal to a half-year's interest at four per cent., the interest covenanted to be paid being five per cent. Dav. Conv. Vol. 2, Pt. 2, p. 19.

A stipulation that the rate of interest shall be raised if not punctually paid is void; but a subsequent agreement for interest at an increased rate in consideration of forbearance to call in the debt may be supported.

So where by a subsequent agreement between a first mortgagee and the mortgagor, to which a second mortgagee was not a party, the rate of interest on the first mortgage was increased, and the payments of interest at the increased rate by the receiver were held to bind the second mortgagee until notice had been given by him to the

receiver that his interest was in arrear. *Law* v. *Glenn*, 2 Ch. 634.

Provisoes for reduction of the rate of interest on punctual payment are valid, and will be enforced if the conditions annexed to the proviso, unless waived, are strictly performed. But a mortgagee in possession is entitled in account to charge interest at the unreduced rate. *Union Bank* v. *Ingram*, 16 C. D. 53; *Cockburn* v. *Edwards*, 18 C. D. 449; *Bright* v. *Campbell*, 41 C. D. 388.

Where there is no covenant for payment of interest after the day fixed for payment of principal, the rate of interest to be allowed must be collected from other parts of the deed, as, for instance, from the recitals. *Ashwell* v. *Staunton*, 30 Beav. 52.

Interest on a mortgage will be payable by way of damages when interest is only provided for up to the day fixed for payment of principal, if payment is not made on that day. *Price* v. *G. W. Ry.*, 16 M. & W. 244; and see *Gordillo* v. *Weguelin*, 5 C. D. 303.

The rate of interest after the day will be the rate of interest fixed by the mortgage deed, but if the rate fixed exceeds five per cent. the interest will generally be calculated at five per cent. only. *Cook* v. *Fowler*, L. R. 7 H. L. 27; *Re Roberts*, 14 C. D. 49; *Mellersh* v. *Brown*, 45 C. D. 225; and see *Wallington* v. *Cook*, 47 L. J. Ch. 508.

Interest at a higher rate than five per cent. has, however, in some cases been continued after the day fixed for payment. But see *Morgan* v. *Jones*, 8 Exch. 620; and see *Wallis* v. *Bastard*, 4 D. M. & G. 251; *Dobson* v. *Land*, 4 De G. & S. 575.

But there is no rule that a further contract for the same rate of interest is to be implied. The rate is in the discretion of the Court. *Cook* v. *Fowler*, *supra*; *Re Roberts*, *supra*.

A contract, however, to continue interest at the specified rate has been implied where there was an agreement to

execute a legal mortgage. *Ex parte Furber, Re King*, 17 C. D. 191.

A covenant to pay interest at a specified rate "during the continuance of the security" renders the covenantor liable to pay interest after default so long as any principal money remains unpaid. *King* v. *Greenhill*, 6 M. & Gr. 59.

Formerly interest was not payable unless expressly stipulated for or implied by usage of trade. But by 3 & 4 Will. IV. c. 42, ss. 28, 29, juries were empowered to allow interest.

But where the contract provides for payment of interest, further interest on such interest could not be recovered under this Act. *Attwood* v. *Taylor*, 1 M. & Gr. 279, 300.

Where the day of payment is made to depend upon a future contingent event, such time is not a time certain within 3 & 4 Will. IV. c. 42, s. 28, and interest is not payable unless there has been a demand for payment with notice that interest would be claimed, and interest cannot be given as damages for detention of the debt. *L. C. & D. Ry.* v. *S. E. Ry.*, (1893) A. C. 429.

The Court in the common law divisions will not refer it to the master to compute principal and interest on a debt where the case involves more than mere computation. *Dennison* v. *Mair*, 14 East, 622; *Smith* v. *Nesbitt*, 2 C. B. 286.

It is sufficient if the time fixed for payment by virtue of the instrument is ascertained afterwards. *Duncombe* v. *Brighton Club*, L. R. 10 Q. B. 371.

A demand, to make interest payable, must be for a sum certain or ascertainable; and where the demand was for more than was due, no interest was allowed. *Hill* v. *S. S. Ry.*, 18 Eq. 154; *L. C. & D. Ry.* v. *S. E. Ry.*, (1893) A. C. 429; but see *Mackintosh* v. *G. W. Ry.*, 4 Giff. 683.

Interest after demand was generally given at the

rate of five per cent. *Re East of England Bank*, 4 Ch. 18.

Interest runs after demand, notwithstanding payment into Court. *Hull, &c.* v. *N. E. Ry.*, 5 D. M. & G. 872.

If the mortgage deed does not contain any covenant or agreement for payment of interest, the mortgagee is nevertheless entitled to interest from the date of the deed. *Farquhar* v. *Morris*, 7 T. R. 124.

In such a case the rule was formerly to fix the rate of interest at five per cent. *Ashwell* v. *Staunton*, 30 Beav. 52; *Knapp* v. *Burnaby*, 30 L. J. Ch. 844; *Douglas* v. *Culverwell*, 4 D. F. & J. 20; *Lippard* v. *Ricketts*, 14 Eq. 291.

But, unless there are special circumstances, the rule now is in all cases to allow only four per cent. *Re Dallmeyer*, (1896) 1 Ch. 372, 396; *Wassell* v. *Leggatt*, *ibid.* 554; *Re Hill*, 75 L. T. 477; *ante*, p. 59.

No interest.

Where a mortgage deed contained no covenant or other provision for payment of interest, but contained a proviso that the mortgagee should re-convey the mortgaged property on payment of the principal, it was held that the mortgage carried no interest. *Thompson* v. *Drew*, 20 Beav. 49; and see *Hodge's Case*, 26 L. J. Bky. 77.

Where an award was made under an order of Court of sums payable on two days certain by sale of securities, but no mention was made of interest, it was held that no interest was chargeable on the securities against subsequent assignees thereof, though the sale was delayed thirty years. *Collett* v. *Newnham*, 1 Drew. 447.

Interest is payable at the rate of four per cent. on a deposit of title-deeds to secure a debt, if there is no stipulation for payment of interest in any memorandum accompanying the deposit. *Ashton* v. *Dalton*, 2 Coll. 565; *Kerr's Policy*, 8 Eq. 331.

In the absence of express stipulation, interest on further advances will generally be allowed at the same rate as on the original advance. *Woolley* v. *Drag*, 2 Anst. 551; but

see *Quarrell* v. *Beckford*, 1 Madd. 269, 284, where only the legal rate of interest was allowed.

Where trustees failed to make the necessary payments for keeping on foot a policy, and B. made the requisite payments for keeping it alive, he was held entitled to interest on such payments at four per cent. *Hodgson* v. *Hodgson*, 2 Keen, 704; and see *Bellamy* v. *Brickenden*, 2 J. & H. 137.

Interest will not, as a general rule, be allowed on a debt the payment of which has been delayed by the conduct of the mortgagee. So, where a man had mixed up the character of trustee, mortgagee, and agent, the Court, on a decree for a reconveyance on further directions, refused to allow him interest on the balance originally found due to him by the master's report. *Price* v. *Price*, 15 L. J. Ch. 13; *Thornton* v. *Court*, 3 D. M. & G. 293, 301.

Conversion of Interest into Principal.—The rule now is not to allow interest upon interest certified to be due in the absence of express stipulation that the mortgagee shall be allowed to capitalize arrears of interest. *Brewin* v. *Austin*, 2 Keen, 211; *Daniell* v. *Sinclair*, 6 A. C. 181.

In taking a mortgage account, the rule is that the time for payment is enlarged, upon terms of payment of the interest and costs found due, and the subsequent interest on the principal only, and subsequent costs are directed to be computed and taxed. *Whatton* v. *Cradock*, 1 Keen, 267; *Jones* v. *Creswicke*, 9 Sim. 304.

But though this is so in a foreclosure action, it seems that in the case of a decree for sale the arrear of interest may, after the confirmation of the certificate, be converted into principal and carry interest, but without prejudice to intervening incumbrances. *Harris* v. *Harris*, 3 Atk. 722; *Edwards* v. *Cunliffe*, 1 Madd. 287; *Monkhouse* v. *Bedford*, 17 Ves. 380.

But in the case of a sale in an administration suit it

seems that the order, in the first instance, is to compute interest on the principal only. *Whatton* v. *Cradock, supra; Brewin* v. *Austin, supra.*

An exception, moreover, prevails where a puisne mortgagee pays off a prior mortgage under a foreclosure or redemption decree; in which case, on payment to the prior mortgagee of the principal, interest, and costs found due, he is allowed to claim interest on the aggregate amount as from the time of such payment. Seton, 5th ed. 1609.

And conversely, where successive redemptions are directed, and a puisne mortgagee fails to pay and is accordingly foreclosed; then, in taking the account against the person next entitled to redeem, subsequent interest is computed on the whole sum, including interest found due from him. *Elton* v. *Curteis*, 19 C. D. 49.

If a mortgagee enters into possession, and the rents of any year are not sufficient to keep down the interest, the mortgagee will not be allowed to capitalize the arrears and pay himself interest thereon out of the rents of a subsequent year, but he will be allowed interest on costs and charges out of pocket. *Procter* v. *Cooper*, Prec. Ch. 116.

When interest has once accrued due it becomes a debt immediately recoverable, independently of the principal, by action on the covenant. Accordingly, a mortgagor may agree with the mortgagee that if the latter will forbear to sue or to enforce a sale, the former will pay him interest on the interest in arrear. A mortgagee, therefore, may require in consideration of forbearance that an account may be taken at any time showing what is due for interest and costs, and that the amount so found shall be added to the principal and thenceforth carry interest. *Blackburn* v. *Warwick*, 2 Y. & C. Ex. 92; and see *Tompson* v. *Leith*, 4 Jur. N. S. 1091, as to what amounts to forbearance.

A mortgagee, however, will not be allowed to convert interest into principal as against a subsequent charge of which he has notice at the time of the agreement, since

interest so converted is considered in the light of a further advance; and it seems that this would be so even though the mortgage deed provides for the capitalization of interest. *Digby* v. *Craggs*, Amb. 612; 2 Ed. 290; *West* v. *Williams*, (1899) 1 Ch. 132.

The Court, however, regards stipulations for capitalization of interest with peculiar jealousy, and will interpose to relieve the mortgagor from payment of compound interest, if the agreement to that effect is shown to have been imposed upon the mortgagor by oppressive or unfair dealing on the part of the mortgagee. *Thornhill* v. *Evans*, 2 Atk. 330.

The intention of the mortgagor to convert interest into principal must clearly appear; it is not sufficient that an account be stated between the parties, and, generally speaking, the agreement must be in writing under the hands of the parties. *Brown* v. *Barkham*, 1 P. W. 654; and see *Daniell* v. *Sinclair*, 6 A. C. 181.

Such an agreement will not be implied on the ground of acquiescence, from the fact that a mortgagor makes no objection to a formal notice given by the mortgagee to convert interest into principal if not then paid. *Tompson* v. *Leith*, 4 Jur. N. S. 1091.

Where the principal and interest found due on a judgment debt was decreed to be raised by sale of the estate, against the tenant for life and remainderman, which sale was not made, but the tenant for life continued to pay interest on the gross sum during his life, the Court presumed an agreement between all parties to pay interest on the compound sum in consideration of a forbearance to enforce a sale. *Macarthy* v. *Llandaff*, 1 Ba. & Be. 375; and see *Conway* v. *Shrimpton*, 5 Bro. P. C. 187.

It seems clear that the infant heir of a mortgagor would not be bound by an agreement for capitalization of interest. *Cottrell* v. *Finney*, 9 Ch. 541, 548.

In a case where interest was in arrear and rests were made from time to time on which interest was calculated,

and ultimately a general account of all arrears calculated on the footing of those rests was signed by the mortgagor and confirmed by a deed for securing the balance, although executed three years afterwards, the mortgagor was held liable. *Blackburn* v. *Warwick*, 2 Y. & C. Ex. 92.

An exception to the rule that an agreement for capitalization must be in writing occurs in the case of mortgages to bankers, to secure such balance as may eventually be due from a customer, which by the custom of the trade is made up of principal, and of interest turned into principal by successive rests, and of interest on such interest. *Rufford* v. *Bishop*, 5 Russ. 346; *Morgan* v. *Mather*, 2 Ves. 21; *Blackburn* v. *Warwick*, 2 Y. & C. Ex. 92.

But after an account has been closed between bankers and a customer, compound interest will not be allowed on the balance of such account. *Ferguson* v. *Fyffe*, 8 Cl. & F. 140; and see *Ex parte Bevan*, 9 Ves. 223.

Nor can bankers, if they take a mortgage to secure such balance or any other stated sum, stipulate therein for payment of compound interest. And if securities are deposited with them in respect of specific sums, they are only entitled to simple interest on such amounts. *Attwood* v. *Taylor*, 1 M. & Gr. 300, 301; *London, &c.* v. *White*, 4 A. C. 413.

The mortgagor not being bound by the settlement of account between the mortgagee and a transferee of the mortgage, *à fortiori* cannot be prejudiced by any agreement between them to increase the amount of the principal due, and consequently the arrears of interest cannot, generally speaking, without his concurrence, be converted into principal and added to the mortgage debt. *Porter* v. *Hubbart*, 3 Atk. 271; *Chambers* v. *Goldwin*, 9 Ves. 254; *Mangles* v. *Dixon*, 3 H. L. C. 702.

And even where the transferee paid the whole arrears of interest to preserve the mortgaged property from a forced sale, it was assumed that he could not be allowed interest on the arrears so paid. *Cottrell* v. *Finney*, 9 Ch. 541, 548.

The consent of the mortgagor to the capitalization of arrears of interest paid by the transferee to the original mortgagee may be inferred, though the mortgagor is not actually a party to the deed of transfer, by implication from his conduct. *Ashenhurst* v. *James*, 3 Atk. 371; and see *Macarthy* v. *Llandaff*, *supra*.

As to interest on unpaid rents, see *Page* v. *Broom*, 4 Cl. & F. 437; *Page* v. *Linwood*, *ibid.* 399; *Peers* v. *Sneyd*, 17 Beav. 151.

Interest on Arrears of Annuity.—Interest will not, as a rule, be given on arrears of an annuity, though it is charged on land and secured by judgment, unless a special case is made; but if the annuitant has entered, the Court will not, it seems, oblige him to quit possession without receiving interest on arrears. *Robinson* v. *Cumming*, 3 Atk. 409; and see, now, Ord. 55, r. 63; *Edwards* v. *Warden*, 1 A. C. 305.

So if the delay in payment has arisen from the absence or conduct of the debtor, the Court would allow such interest. *Booth* v. *Leycester*, 3 M. & Cr. 459; and see *Hyde* v. *Price*, 8 Sim. 578.

Interest was also given on arrears of an annuity secured by a bond to the amount of the penalty. *Crosse* v. *Bedingfield*, 12 Sim. 35.

So, too, where an annuity was secured by an assignment of stock. *Colyer* v. *Clay*, 7 Beav. 188; but see *Jenkins* v. *Briant*, 16 Sim. 272.

The Court might, in the administration of assets, give interest on such arrears by analogy to the provisions of 3 & 4 Will. IV. c. 42, before mentioned. *Ante*, p. 115. And now it would seem that the Court has power, in taking the accounts of a deceased person, to allow such interest at the rate of four per cent. from the date of the order. Ord. 55, rr. 62, 63.

But such interest will only be allowed if the assets are sufficient to pay the costs of the administration, the debts

established, and interest on such debts as by law carry interest. *Ibid.* r. 64.

Interest will not be allowed from the date of the order on debts which accrue due subsequently, and consequently not on instalments of an annuity accruing due after the date of the order. *Lainson* v. *Lainson*, 18 Beav. 7.

What Arrears are recoverable.—By the stat. 3 & 4 Will. IV. c. 27, s. 42, it is provided that no arrears of interest in respect of any sum of money charged on land or rent shall be recoverable by distress, action, or suit, for more than six years past.

In an action for foreclosure a mortgagee cannot recover more than six years' interest, even though the mortgage deed contains a covenant for payment of interest, or is secured by a collateral bond conditioned for payment of interest, though in an action on the personal covenant twelve years' arrears might have been recovered. *Hunter* v. *Nockolds*, 1 Mac. & G. 641; *Astbury* v. *Astbury*, (1898) 2 Ch. 111; *Dingle* v. *Coppen*, 79 L. T. 693; 47 W. R. 279.

This also applies to a mortgage of a reversionary interest. Thus, where interest on the money secured by mortgage of a reversion in real estate was sixteen years in arrear, and the mortgagee filed his bill for foreclosure, raising no question on the liability under the covenant, it was held that, in taking the accounts under the foreclosure decree, only six years' interest would be allowed. *Sinclair* v. *Jackson*, 17 Beav. 405; approved in *Smith* v. *Hill*, 9 C. D. 143.

Where a creditor comes in under a suit the six years are reckoned from the time when the claim was carried in. *Hunter* v. *Nockolds*, *supra*; *Henry* v. *Smith*, 2 Dr. & W. 381, 392; *Greenway* v. *Bromfield*, 9 Ha. 201.

It will be noticed that 3 & 4 Will. IV. c. 27, limits the right to recover arrears of interest only in cases where the mortgagee attempts to recover his interest by distress,

action, or suit. In every other case his right is not limited, but is left as it was under the old law. *Re Marshfield, Marshfield* v. *Hutchins*, 34 C. D. 721, 723, per Kay, J.

Accordingly, a mortgagee of land exercising his power of sale is entitled to retain out of the proceeds of sale in his hands whatever arrears of interest may be due to him, though extending over more than six years. *Edmunds* v. *Waugh*, 1 Eq. 421.

So, where first mortgagees sold under their power, and received the proceeds of sale after judgment, in an action for the administration of the estate of the second mortgagee to which the first mortgagees were not parties, it was held that the first mortgagees were entitled to retain more than six years' interest. *Re Marshfield, supra.*

But where mortgaged lands had been compulsorily taken under the Lands Clauses Act, and the purchase-money paid into Court, and a transferee of the mortgage petitioned for payment out of principal, interest from the date of the advance, and costs, it was held that the petition was analogous to a suit for recovery of land, and therefore six years' interest could only be recovered. *Re Stead's Mortgaged Estates*, 2 C. D. 713; and see *Re Slater's Trusts*, 11 C. D. 227.

But a petition for payment out in an administration suit is not such a suit. *Edmunds* v. *Waugh, supra.*

The above Act does not apply to mortgages of personal estate other than leaseholds, and in such a case the mortgagee may claim more than six years' arrears, even in an action for foreclosure. *Mellersh* v. *Brown*, 45 C. D. 225; but see *Re Slater's Trusts*, 11 C. D. 227, 239.

The Act, however, does not apply to redemption actions; and it seems now settled that in a redemption action the mortgagor will only be allowed to redeem on payment of all arrears of interest, and that the mortgagee

will not be limited to six years' arrears. *Dingle* v. *Coppen*, 79 L. T. 693.

In one case the plaintiffs, co-heirs of the mortgagor, were not allowed to redeem except upon payment of twenty years' arrears, but the decision was made on the ground that a mortgagee is allowed as against the heir, though not against the original debtor himself, to tack an unsecured specialty binding the heir, to the mortgage debt. *Elvy* v. *Norwood*, 5 De G. & S. 240; *Thomas* v. *Thomas*, 22 Beav. 341.

Formerly, if a mortgage contained an express trust, the mortgagee in a foreclosure action could recover more than six years' arrears. But now, by the Real Property Limitation Act, 1874, no action can be brought to recover any arrears of interest in respect of any sum of money secured by an express trust, or any damages in respect of such arrears, except within the time within which the same would be recoverable if there were not any such trust. In the case of a mortgage of a reversionary interest in personalty, the right to recover arrears remains alive so long as the interest remains reversionary. *Smith* v. *Hill*, 9 C. D. 143; *Mellersh* v. *Brown*, 45 C. D. 225; and see *Clarkson* v. *Henderson*, 14 C. D. 348, where there was a provision for capitalization of interest.

Interest after Judgment.—Where a mortgagee has obtained judgment against the mortgagor for payment of what shall be found due upon taking the accounts for principal, interest, and costs, the mortgage debt and the covenant (if any) for payment of principal and interest are merged in the judgment, and thenceforth interest on the principal at the rate fixed by the mortgage deed will cease to be payable, but the total amount found due will carry interest as a judgment debt. *Re European Central Ry. Co.*, 4 C. D. 33; and see *Ex parte Higgins*, 3 De G. & J. 33.

Every judgment bears interest at four per cent. from

the date of entering up judgment (1 & 2 Vict. c. 110, s. 17), or, in the case of judgments pronounced in Court, from the date when so pronounced. Ord. 41, r. 3.

And such interest is recoverable as part of the debt. *Re Clagett*, 36 W. R. 653; *Re Lehman*, 62 L. T. 941.

Interest is not payable on the instalments due under a consent order providing for payment of a judgment debt by instalments which have been regularly paid. *Caudery* v. *Finnerty*, 66 L. T. 684.

Nor where money is paid into Court on a judgment is interest payable beyond the time when the money might have been taken out of Court. *Sinclair* v. *G. E. Ry.*, 5 C. P. 391.

The above Act applies as well to judgments for costs payable by one party to another as for the subject-matter of the action; and, on such a judgment, the interest runs from the date of the master's certificate of taxation. *Schroeder* v. *Clough*, 46 L. J. C. P. 365, *post*, p. 144.

But interest is not recoverable on costs directed to be raised out of an estate. *Att.-Gen.* v. *Nethercote*, 11 Sim. 529.

The payment of interest in administration actions is provided for by Ord. 55, r. 62, which provides that "where a judgment or order is made directing an account of the debts of a deceased person, unless otherwise ordered, interest shall be computed on such debts, as to such of them as carry interest after the rate they respectively carry, and, as to all others, after the rate of four per cent. per annum from the date of the judgment or order." See Seton, 1180.

And by rule 63, "A creditor whose debt does not carry interest, who comes in and establishes the same before the judge in chambers, under a judgment or order of the Court or of the judge in chambers, shall be entitled to interest upon his debt at the rate of four per cent. per annum, from the date of the judgment or order, out of any assets which may remain after satisfying the costs of

the suit, the debts established, and the interest of such debts as by law carry interest."

Under the above order a creditor will not be entitled to interest on a debt carrying no interest in preference to the payment of a voluntary debt. *Garrard* v. *Dinorben*, 5 Ha. 213.

A creditor is not entitled to interest from the date of the judgment on a debt which accrues due subsequently. *Lainson* v. *L.* (No. 2), 18 Beav. 7; and see *Wheeler* v. *Gill*, 19 Eq. 316.

Separate creditors are entitled to interest in priority to the joint creditors on the same estate, after the joint creditors have been paid in full. *Whittingstall* v. *Grover*, 35 W. R. 4.

A creditor in an action for the administration of an insolvent estate is only entitled to interest up to the date of the judgment. *Re Summers*, 13 C. D. 136.

Where an estate was supposed to be insolvent, and a certificate was made on that footing, but ultimately there was a surplus, interest was paid on the debts according to the rules of the Chancery Division. *Re Henley*, 75 L. T. 307.

A secured creditor is not entitled to apply the proceeds of his security, first in payment of interest, and then in reduction of principal, and to prove for the balance. *Re London, &c. Hotels Co.*, (1892) 1 Ch. 639.

In some cases special orders were made as to the rate of interest. *Ex parte Lintott*, 4 Eq. 184; *Barrow's Case*, 3 Ch. 784.

As a general proposition, a devise of real estate for payment of debts does not enhance the amount of the demand or entitle the party to interest independently of the devise, but, leaving the amount unaffected, it provides a new fund for the payment of the testator's debts. *Morse* v. *Tucker*, 5 Ha. 88, per Wigram, V.-C.

Section IV.

Accounts of Costs, Charges and Expenses.

Right of Mortgagee to Costs generally.—It is a general rule that, in settling the accounts between mortgagor and mortgagee, the former, before being allowed to redeem, whether the action be for redemption or foreclosure or relate to any other question regarding the mortgage debt or security, shall pay not merely the principal and interest, but also the costs of suit and all such costs as the mortgagee has properly incurred in reference to the protection or preservation of the mortgaged property, the recovery of the debt or otherwise relating to questions between him and the mortgagee. A mortgagee does not in terms contract for costs, but the rule is that all costs which he, as mortgagee, properly incurs in relation to his security are to be allowed to him. *Dryden* v. *Frost*, 3 M. & Cr. 670, 675; *Detillin* v. *Gale*, 7 Ves. 583, 585; *Nat. Prov. Bank* v. *Games*, 31 C. D. 582, 592; *Johnstone* v. *Cox*, 19 C. D. 17; *Re Griffiths, &c.*, 53 L. J. Ch. 303.

Such costs will be added to the principal and interest secured by the mortgage and form one debt, which, as between the particular mortgagee and other incumbrancers, will rank in priority as if such costs had formed part of the moneys originally secured by that mortgage. *Pollock* v. *Lands, &c.*, 37 C. D. 661, 668.

Therefore he can retain them as against subsequent incumbrancers or the trustee in bankruptcy of the mortgagor.

Costs properly incurred are not the subject of an action by the mortgagee, although they are recoverable as the price of redemption. *Ex parte Fewings, Re Sneyd*, 25 C. D. 338.

The costs to which a mortgagee is entitled in an action for foreclosure or redemption must be taxed as between party and party unless otherwise specially directed. *The Kestrel*, L. R. 1 A. & E. 78.

If a mortgagee brings an action on the covenant, and his costs are taxed as between party and party, the Court cannot, in a subsequent action for redemption, review the taxation in the former action, so as to allow costs as between solicitor and client. *Morley* v. *Bridges*, 2 Coll. 621.

Taxation of a mortgagee's bill of costs may be obtained under 6 & 7 Vict. c. 73, ss. 38, 41, either before or after payment.

But in the latter case an *ex parte* order cannot be obtained, but special circumstances must be shown, and statements of errors or overcharges must be specific. *Re Carew*, 8 Beav. 150; *Dunt* v. *Dunt*, 9 Beav. 146.

Nor will slight overcharges support such an application unless there be undue pressure or surprise on the part of the solicitor; and without such ground mere payment under protest will not avail the mortgagor. *Re Wills*, 8 Beav. 416; *Re Jones*, 8 Beav. 479; *Re Harrison*, 10 Beav. 57.

Though where the overcharges are so gross as to amount to fraud or improper conduct, the Court will grant relief after any length of time, though payment be made without protest. *Horlock* v. *Smith*, 2 M. & Cr. 495, 510.

The mere pendency of a foreclosure action does not amount to pressure so as to entitle the mortgagor to tax the costs which he has paid, together with the principal and interest to the mortgagee. *Re Griffiths, Jones & Co.*, 53 L. J. Ch. 303.

But the taxation must be carried on upon the same principle as a taxation between mortgagee and solicitor; and if the action contain charges which the mortgagee cannot support as against the mortgagor, and the mortgagor pays such charges, though under protest, he cannot recover back the amount from the solicitor, but must look to the mortgagee. *Re Wills, supra; Re Jones, supra; Re Harrison, supra.*

The mortgagee's right to costs are not in the discretion of the Court or judge, unless he has been guilty of misconduct. *Cotterell* v. *Stratton*, 8 Ch. 295; *Turner* v. *Hancock*, 20 C. D. 303.

By Ord. 55, r. 1, nothing therein contained shall deprive a mortgagee, who has not unreasonably instituted or carried on or resisted any proceeding, of any right to costs out of a particular estate or fund to which he would be entitled according to the rules of the Chancery Division.

This right, unless lost, is not within the discretion of the judge, and can only be lost by such inequitable conduct on the part of a mortgagee as may amount to a violation or culpable neglect of his duty under the contract. *Cotterell* v. *Stratton*, *supra*.

It follows that if the judge wrongfully deprives him of his costs, charges and expenses properly incurred, on the ground that he has acted improperly, and that his right by contract is lost, then the mortgagee has a right of appeal. *Charles* v. *Jones*, 33 C. D. 80.

But if the judge, notwithstanding misconduct, allows a mortgagee his costs, the mortgagor has no such right of appeal as to costs. *Charles* v. *Jones*, *supra*; and see *Re Beddoe*, *Downes* v. *Cottam*, (1893) 1 Ch. 547, 556.

As a general rule an equitable mortgagee is entitled to the same costs as a legal mortgagee, except in bankruptcy where there is no written memorandum accompanying the deposit. *Ex parte Brightens*, 1 Swans. 3; *Ex parte Trew*, 3 Madd. 372; *Ex parte Horne*, 1 Madd. 622.

Apart from the question of what costs have been improperly incurred by the mortgagee, his right to the costs of a foreclosure or redemption action can only be lost by positive misconduct of a vexatious, oppressive, or fraudulent character, or by improper resistance to the right of the mortgagee to redeem, and the following instances are exceptions to the general rule as to mortgagee's costs:—

Vexatious conduct.

Vexatious, oppressive, or fraudulent acts on the part of

the mortgagee which may deprive him of his costs, and even make him liable for costs, are :—

—refusing to render account. *Powell* v. *Trotter*, 1 Dr. & S. 388.

—impeding taking of account. *Detillin* v. *Gale*, 7 Ves. 586.

—delaying redemption. *Cliff* v. *Wadsworth*, 2 Y. & C. 598.

—claiming more than was due. *Snagg* v. *Frizell*, 1 J. & L. 383.

—making unfounded claim after payment. *Gregg* v. *Slater*, 22 Beav. 314.

—setting up mortgage-deed as a conveyance. *Baker* v. *Wood*. 1 Ves. 160; *National Bank* v. *United, &c.*, 4 A. C. 391.

—making an unsustained charge of fraud. *West* v. *Jones*, 1 Sim. N. S. 218; and see *Cockell* v. *Taylor*, 15 Beav. 127.

—abuse of trust and unfair dealing. *Thornhill* v. *Evans*, 2 Atk. 330; *Morony* v. *O'Dea*, 1 B. & B. 121, n.

—negligence in permitting a fraud. *Hiorns* v. *Holton*, 16 Beav. 259.

—improperly resisting a suit. *Harryman* v. *Collins*, 18 Beav. 11.

—increasing costs by unnecessary parties or evidence. These must be paid by the mortgagee. *Coles* v. *Forrest*, 10 Beav. 552; *Cockell* v. *Taylor*, *supra*; *Audsley* v. *Horn*, 26 Beav. 195; *Perpetual, &c.* v. *Gillespie*, W. N. (1882) 4; and see *Booth* v. *Creswicke*, 8 Sim. 352; but see *Alexander* v. *Simms*, 20 Beav. 123.

Improperly resisting redemption.

Improper resistance of mortgagor's right to redeem may also deprive a mortgagee of his costs, so far as they have been thereby occasioned. *Credland* v. *Potter*, 10 Ch. 8; *Tomlinson* v. *Gregg*, 15 W. R. 51; *Harvey* v. *Tebbutt*, 1 Jac. & W. 197, 203; *Kinnaird* v. *Trollope*, 42 C. D. 610.

And such costs will be set off against the amount due to the mortgagee, or the mortgagee may be ordered to pay

them. *Wheaton* v. *Graham*, 24 Beav. 483; *Baker* v. *Wind*, 1 Ves. 160; and see *Cowdry* v. *Day*, 5 Jur. N. S. 1199.

Overpayment before suit, either for foreclosure or redemption, may render the mortgagee liable to pay the costs, and if it is found that nothing was due to him he will be ordered to pay costs, including those of the reference and taking the accounts. *Binnington* v. *Harwood*, T. & R. 485; *Morris* v. *Islip*, 23 Beav. 244; *Montgomery* v. *Calland*, 14 Sim. 81; *Wilson* v. *Cluir*, 4 Beav. 214. Overpayment.

But a mere overstatement of the balance due will not deprive the mortgagee of costs even when coupled with a refusal to furnish accounts of a special nature gratis. *Cotterell* v. *Stratton*, 8 Ch. 295; *Norton* v. *Cooper*, 5 D. M. & G. 728; and see *Tanner* v. *Heard*, 23 Beav. 556.

And a mortgagee will not be deprived of his costs merely because he sets up a *bonâ fide* claim to something more than the Court holds him entitled to. *Re Watts*, *Smith* v. *Watts*, 22 C. D. 1; *Bird* v. *Wenn*, 33 C. D. 215; and see *Ashworth* v. *Lord*, 36 C. D. 545.

Where overpayment is alleged, the usual course is to reserve costs until the result of the account is certified. Seton.

Refusal to accept an actual tender of the full amount due may also render the mortgagee liable for the costs of a redemption suit thereby occasioned if the amount found due in taking the account does not exceed the sum tendered. *Hosken* v. *Sincock*, 11 Jur. N. S. 477; *Harmer* v. *Priestley*, 16 Beav. 569; *Morley* v. *Bridges*, 2 Coll. 621; *Roberts* v. *Williams*, 4 Ha. 129; *Johnson* v. *Evans*, 60 L. T. 29. Refusal of tender.

The tender must, however, be actual and not merely offered, and must be for the full amount. *Gammon* v. *Stone*, 1 Ves. 339; *Loftus* v. *Swift*, 2 S. & L. 642; but see *Sentance* v. *Porter*, 7 Ha. 426, *ante*, p. 111.

Though a conditional tender is not good, a tender under protest reserving the right of the debtor to dispute

the amount due is a good tender if it does not impose any conditions on the creditor. *Greenwood* v. *Sutcliffe*, (1892) 1 Ch. 1.

Where the costs are unascertained and the security ample, or a sufficient sum is tendered to cover the costs, the mortgagee will proceed at his peril. *Jenkins* v. *Jones*, 2 Giff. 99; *Broad* v. *Selfe*, 9 Jur. N. S. 886.

Where the mortgagee refused a definite offer to redeem and set up a groundless claim to consolidate, it was held that the refusal was the sole cause of the litigation, and that the mortgagee must pay to the mortgagor all his costs of the action up to and including the trial as well as the costs of the appeal. *Squire* v. *Pardoe*, 66 L. T. 243.

Loss of deeds.

In case the title-deeds are lost or destroyed by the mortgagee, the expense and loss caused thereby (upon which a reference will be directed) will be set off against the mortgage debt. *Hornby* v. *Matcham*, 16 Sim. 325; *Woodman* v. *Higgins*, 14 Jur. 846; *Baskett* v. *Skeel*, 11 W. R. 1019.

So, also, the mortgagee will be liable for additional costs of account caused by loss of vouchers. *Price* v. *P.*, 15 L. J. Ch. 13.

But the measure of compensation does not include speculative damages for injury by the absence of the deeds at a sale. *Brown* v. *Sewell*, 11 Ha. 49; *Hornby* v. *Matcham*, *supra*.

Quære, whether the mortgagee would be so liable where he had made an offer of a proper indemnity. See *Macartney* v. *Graham*, 2 R. & M. 353; *Midleton* v. *Eliot*, 15 Sim. 531; *Luccraft* v. *Hite*, 2 Ha. 14, n.

In one case the Court required a bond of indemnity to be given to second mortgagees together with the retention of a small sum in Court to meet possible future costs. *Caldwell* v. *Matthews*, 62 L. T. 799.

Work done by himself.

In the absence of express agreement a mortgagee is not entitled to remuneration for work done by himself, except a solicitor coming within the provisions of the Mortgagees'

Legal Costs Act, 1895. *Furber* v. *Cobb*, 18 Q. B. D. 494, 509; *Re Wallis*, 25 Q. B. D. 176; *Re Doody*, (1893) 1 Ch. 129.

Whether a mortgagee can stipulate for the right to charge for services seems doubtful, but in the absence of a pre-existing fiduciary relationship it is thought that he could. Fisher, 1895.

The Mortgagees' Legal Costs Act, 1895 (58 & 59 Vict. c. 25), provides that a solicitor-mortgagee shall be entitled to the same charges and remuneration as though he were retained by the mortgagee.

But, except as above and in the absence of express agreement, a mortgagee is not entitled to remuneration for work done by himself. *Post*, p. 140.

Priority.

A mortgagee, by amending his pleadings and consenting to a sale of the estate instead of insisting upon his original claim to foreclosure, does not forfeit his right to his costs in priority to the costs of the sale, and until his claim is satisfied nothing can be taken from the estate by the mortgagor or subsequent incumbrancers. *Cook* v. *Hart*, 12 Eq. 459; *Wade* v. *Ward*, 4 Dr. 602; *Cutfield* v. *Richards*, 26 Beav. 241; *Wild* v. *Lockhart*, 10 Beav. 323; *Tipping* v. *Power*, 1 Ha. 405.

If the proceeds of sale prove insufficient to pay the first mortgagee his principal, interest and costs, the whole fund will be paid to him without deduction. *Upperton* v. *Harrison*, 7 Sim. 444; *Wonham* v. *Machin*, 10 Eq. 447; *Hepworth* v. *Heslop*, 3 Ha. 485.

The costs of taking out administration to a wife who had joined her husband in mortgaging her reversionary interest cannot be retained out of the fund as against the mortgagee. *Saunders* v. *Dunman*, 7 C. D. 825.

If, instead of simply suing to enforce his security by foreclosure or sale, a mortgagee commences or adopts proceedings to obtain further benefit than he has contracted for, *e. g.* a suit to administer the deceased mortgagor's estate, the costs follow the rule applicable to

administration suits, and will be paid before the mortgage debt. *Re Spensley*, 15 Eq. 16; *Armstrong* v. *Stone*, 14 Beav. 535; *White* v. *Bp. Peterborough*, Jac. 402; and see *White* v. *Gudgeon*, 30 Beav. 545.

But so far as administration proceedings are necessary to enable mortgagees to realise their security, they will be entitled to add to their security their administration costs in the action so far as they relate to their security, and be paid the same in priority to the administration costs of the mortgagor's executor and devisees. *Re Banks, Daws* v. *Banks*, 45 W. R. 206; *Pinchard* v. *Fellows*, 17 Eq. 421; and see *Re Mackinlay*, 2 D. J. & S. 358.

A puisne incumbrancer who has taken proceedings to realise and distribute a fund which would otherwise have been unavailable is entitled to have his costs out of the fund, and then the costs of the other incumbrancers will be added to their debts and paid according to their priorities. *Wright* v. *Kirby*, 23 Beav. 463; *Ford* v. *Chesterfield*, 21 Beav. 426; *Batten* v. *Dartmouth, &c.*, 45 C. D. 612; and see *Johnstone* v. *Cox*, 19 C. D. 17.

General costs allowed.

Although, where a mortgagee by his misconduct or mismanagement has increased the costs of an action for foreclosure or redemption, he will be fixed with such additional costs, he will as a rule be allowed his general costs of the action. *Whitfield* v. *Parfitt*, 4 De G. & S. 240; and see *Cowdry* v. *Day*, 5 Jur. N. S. 1200.

The mortgagee is entitled to general costs, notwithstanding that rests are directed, if any sum was due when the action was brought, and notwithstanding an overstatement of account or extending his claim too far, or a refusal to furnish accounts. *Barlow* v. *Gains*, 23 Beav. 244; *Norton* v. *Cooper*, 5 D. M. & G. 728; *Cotterell* v. *Stratton*, 8 Ch. 295; *Cottrell* v. *Finney*, 9 Ch. 551; but see *Hall* v. *Heward*, 32 C. D. 430.

Where a mortgagee would if solvent have been fixed with any costs, if he became insolvent and so unable to

pay he would not receive his general costs. *Rider* v. *Jones*, 2 Y. & C. 335.

And where the mortgagee had caused great delay and expense before the accounts could be taken, he was disallowed his general costs. *Detillin* v. *Gale*, 7 Ves. 586.

Costs of Actions for Foreclosure or Redemption.—The mortgagee is entitled to the costs originally falling on himself of and incident to an action for redemption or foreclosure. This includes the costs of his trustee made defendant; also the costs relating to another estate which the mortgagor has wrongfully included in his suit for redemption; and also where two mortgagees are entitled in different proportions to the mortgage-money and one of them is made a defendant, his costs must be paid. *Browne* v. *Lockhart*, 10 Sim. 420, 426; *Batchelor* v. *Middleton*, 6 Ha. 75, 86; *Davenport* v. *James*, 7 Ha. 249.

The mortgagor, on redemption, must also pay the costs of all persons claiming under the mortgagee, although the mortgage be carried by the mortgagee into settlement. *Wetherell* v. *Collins*, 3 Madd. 255; *Bartle* v. *Wilkin*, 8 Sim. 298; *Burden* v. *Oldaker*, 1 Coll. 105.

And upon this principle, in cases not falling within the Conveyancing Act, 1881, s. 30, he must pay the costs of proceedings to establish the infant heir of the mortgagee a trustee, and the costs of a conveyance or vesting order. *Ex parte Ommaney*, 10 Sim. 228; *King* v. *Smith*, 6 Ha. 473; *Ex parte Cant*, 10 Ves. 554.

So the additional costs caused by an assignment by the second mortgagee, pending a foreclosure action by the first mortgagee, will fall on the estate; though otherwise as to the extra costs in such suit occasioned by the assignment by the first mortgagee after institution of the suit, such assignment being of such a nature as to make the suit wholly inefficient. *Coles* v. *Forrest*, 10 Beav. 552.

So, also, a judgment creditor of a mortgagee claiming a sale of the mortgaged property stands in the place of a

mortgagee in respect of the right to costs, and is entitled to be paid his debt and costs in priority to the mortgagor and mortgagee. *Merriman* v. *Bonnor*, 10 Jur. N. S. 534; *Ellison* v. *Wright*, 3 Russ. 458.

A mortgagee will not be allowed his costs against a party claiming by a paramount title. *Shackleton* v. *Shackleton*, 2 S. & S. 242.

If a mortgagor in a redemption suit to redeem two mortgages upon different estates is held entitled to redeem one only, the mortgagee will be allowed to throw the whole of his costs on the latter estate, even though the mortgagor sue *in formâ pauperis*. *Batchelor* v. *Middleton*, 6 Ha. 86.

Where a mortgagee brings an action to foreclose two mortgages of separate properties not liable to be consolidated, his costs will not be charged as a whole against each estate, but must be rateably apportioned between the two mortgages. *De Caux* v. *Skipper*, 31 C. D. 635.

Costs of administration.

The mortgagee will be allowed the costs of taking out letters of administration to the mortgagor as principal creditor, or to an incumbrancer under the will of the mortgagor as a necessary party to foreclosure. *Ramsden* v. *Langley*, 2 Vern. 536; *Lomax* v. *Hide*, 2 Vern. 185; *Hunt* v. *Fownes*, 9 Ves. 70; and see *Re Banks*, *ante*, p. 134, as to the costs of administration proceedings.

Costs of appeal.

A mortgagee was held entitled to the costs of adjournment to the judge where the point raised was arguable, though it was decided against him. *Re Watts*, *Smith* v. *Watts*, 22 C. D. 1, *ante*, p. 131.

So where a mortgagee appeals from the decision of the Court below, he will be allowed to add his costs of appeal to his mortgage charge if his appeal is successful. *Addison* v. *Cox*, 8 Ch. 76. As to appeal for costs, see *ante*, p. 129.

One set of costs.

The owner of a share of an estate and his incumbrancers have but one set of costs, which are received by the first incumbrancer. *Remnant* v. *Hood*, 27 Beav. 613; *Equitable Life Ass.* v. *Fuller*, 7 Jur. N. S. 307; *Ward* v. *Yates*, 1

D. & S. 80; and see *Johnstone* v. *Cox*, 19 C. D. 17, *ante*, p. 134.

And where a solicitor appears for several persons interested in a mortgage, he can only charge for one copy of the mortgage deed. *Re Wade*, 17 C. D. 348.

Costs in debenture-holder's action.

Where, in a debenture-holder's action, a receiver had been appointed and ultimately the property was sold for an amount insufficient to pay principal, interest and costs, it was held that the proceeds of sale must be applied in the following order :—First, in payment of the plaintiff's costs of realisation of the property, including costs of an abortive attempt to sell; next, in payment of the balance due to the receiver for the remuneration and expenses, including his costs of suit; then in payment of the costs of the trustees of the deed; then in payment of the plaintiff's costs of suit; and the balance to be applied towards payment of the debentures. *Batten* v. *Wedgwood, &c.*, 28 C. D. 317.

Where in a debenture-holder's action it was found that the debentures ranked in order of date, so that there would be no money to satisfy the plaintiff's debenture, it was held that he was entitled to his general costs, the action being for the benefit of all the debenture-holders. *Carrick* v. *Wigan Tramways*, W. N. (1893) 98.

Disclaimer.

With respect to the costs in a foreclosure suit of a defendant who disclaims, it is settled that if such defendant shows that he never had and never claimed any interest, or having an interest that he had disclaimed, or offered to disclaim before the institution of the suit, he is entitled to his costs. *Ford* v. *Chesterfield*, 16 Beav. 516; *Teed* v. *Carruthers*, 2 Y. & C. 31; *Long* v. *Storie*, 9 Ha. 542; *Broughton* v. *Key*, W. N. (1882) 3; *Cork* v. *Russell*, 13 Eq. 210.

But if, having an interest, he neither disclaims nor offers to disclaim till he puts in his defence, he is not so entitled. And these rules prevail though the plaintiff never applied to the defendant to disclaim prior to the suit.

Cash v. *Belcher*, 1 Ha. 310; *Appleby* v. *Duke*, 1 Ph. 272; *Grigg* v. *Sturgis*, 5 Ha. 93; *Ohrley* v. *Jenkins*, 1 De G. & S. 543.

The prudent course, however, for a mortgagee before making an incumbrancer a party is to inquire of him whether he claims any interest, and so to give him an opportunity of disclaiming before any costs are incurred. *Hiorns* v. *Holtom*, 16 Beav. 259; *Day* v. *Gudgeon*, 2 C. D. 209.

But where a person is properly made a party in the first instance as having an interest in the mortgage property, the plaintiff is not obliged to make such inquiry, but is entitled to a disclaimer from him if he claims no interest. *Maxwell* v. *Wightwick*, 3 Eq. 210.

And as a general rule a defendant who puts in a defence instead of a simple disclaimer will not be allowed his costs. *Bradley* v. *Borlase*, 7 W. R. 125; *Ford* v. *White*, 16 Beav. 120; and see *Lewin* v. *Jones*, 53 L. J. Ch. 1011.

But where a trustee who had always refused to act put in an answer he was allowed his full costs, on the ground that the bill might have stated circumstances showing that a simple disclaimer would have been sufficient. *Benbow* v. *Davies*, 11 Beav. 369; and see *Higgins* v. *Frankis*, 15 Jur. 277.

But a devisee will not be entitled to his costs unless he has formally disclaimed or released his interest before suit, or put in a disclaimer after suit asking to be dismissed without costs. *Furber* v. *Furber*, 30 Beav. 523; *Davis* v. *Whitmore*, 28 Beav. 617; *Roberts* v. *Hughes*, 6 Eq. 20; and see *Greene* v. *Foster*, 22 C. D. 566.

It seems, however, that as a general rule an offer to disclaim will be sufficient. *Davis* v. *Whitmore*, *supra*; *Gowing* v. *Mowbray*, 11 W. R. 1091; *Dillon* v. *Ashwin*, 12 W. R. 366; *Talbott* v. *Kemshead*, 4 K. & J. 93; *Greene* v. *Foster*, 22 C. D. 566; *Day* v. *Gudgeon*, 2 C. D. 209.

It seems that the disclaimer or offer to disclaim need not expressly submit to dismissal of the action without costs.

But if the disclaiming defendant appears to claim costs they will not be allowed. *Lock* v. *Lomas*, 15 Jur. 162; *Bradley* v. *Borlase*, *supra*; *Maxwell* v. *Wightwick*, *supra*.

The rule applies to subsequent incumbrancers and will be enforced even against prior equitable incumbrancers of whose incumbrances there was no notice. *Joyce* v. *Moleyns*, 3 Dr. & W. 698, 701; *Gabriel* v. *Sturgis*, 5 Ha. 97.

And also against their trustees in bankruptcy and against such trustee and devisees of the mortgagor. *Appleby* v. *Duke*, 1 Ph. 272; *Hughes* v. *Kelly*, 3 Dr. & W. 495; *Ohrley* v. *Jenkins*, 1 De G. & S. 543.

Costs, Charges and Expenses.—Where the mortgagee claims any extra costs or extraordinary expenses, over and above the costs of and properly incident to the suit, the decree must contain an inquiry as to costs, charges and expenses other than costs of suit, and a sufficient ground must be laid for such inquiry. *Merriman* v. *Bonner*, 10 Jur. N. S. 534; *Tipton Green* v. *Tipton Moat*, 7 C. D. 192; *Bolinbroke* v. *Hinde*, 25 C. D. 795.

And where such inquiry has been omitted, it will not be supplied on further consideration or on petition. *Horlock* v. *Smith*, 1 Coll. 287, 298; *Barron* v. *Lancefield*, 17 Beav. 208.

All just allowances, however, are made without any direction in the decree; and the costs of an action have been held to be included in the term just allowances (Ord. 33, r. 8). *Blackford* v. *Davis*, 4 Ch. 304; and see *Wilkes* v. *Saunion*, 7 C. D. 188; *Rees* v. *Metropolitan*, *&c.*, 14 C. D. 372.

The mortgagee's costs of and incident to the negotiation of the loan, the investigation of the mortgagor's title, and the preparation and execution of the security, are usually deducted out of the mortgage-money.

If this is not done, and if such costs remain unpaid when an action for foreclosure or redemption is brought, there is considerable doubt whether the mortgagee will be

entitled to payment of those costs as a condition for redemption by the mortgagor.

In a recent case where an action was brought to foreclose an equitable mortgage, and the mortgagor had agreed to execute a legal mortgage of his estate and interest, the mortgagee claimed—(1) costs of correspondence with the surety; (2) costs of investigating title; (3) costs of preparing a legal mortgage; (4) costs of correspondence with the mortgagor as to the legal mortgage. The Court of Appeal allowed all the items except (2), which it disallowed on the ground that as the mortgagor only agreed to mortgage his estate and interest it was unnecessary to look into the title further than to see in what form the mortgage should be drawn. *Nat. Prov. Bank* v. *Games*, 31 C. D. 582.

But it would seem very doubtful whether in any case, in the absence of special agreement, costs of investigating the mortgagor's title can be charged against the property. *Gregg* v. *Slater*, 22 Beav. 314.

And it is clear that, if the mortgage goes off, the mortgagee cannot maintain an action against the mortgagor for costs of negotiating the loan, or investigating title. Robbins, 49.

A mortgagee will not be allowed costs incurred by him for matters not necessarily connected with the mortgage security; and therefore the costs of a deed, executed by the mortgagee by way of declaration of trust to a person who supplied the money for the advance, were disallowed. *Re Martin*, 5 Bing. 160.

The costs of perfecting an equitable mortgage by conveyance or surrender falls on the mortgagor. *Price* v. *Bury*, 16 Eq. 153, n.; *Nat. Prov. Bank* v. *Games*, *supra*.

Remuneration for personal trouble.

A mortgagee cannot, as a general rule, charge for his personal trouble. *Quære*, whether he may if there is a special stipulation to that effect. *Ante*, p. 133.

There may, however, be an agreement between the mortgagee and mortgagor for the appointment of a re-

ceiver, which will be allowed; or in the absence of such an agreement the mortgagee may, if the mortgage is by deed, appoint a receiver under his statutory power, so soon as his power of sale has become exerciseable, and the remuneration agreed upon or prescribed by statute will be allowed in account as part of the mortgagee's costs, charges and expenses. *Chambers* v. *Goldwin*, 9 Ves. 254.

But if the mortgagee appoints himself as receiver he will not generally be allowed any remuneration, and he will be liable to account as mortgagee in possession. *French* v. *Baron*, 2 Atk. 120; *Scott* v. *Brest*, 2 T. R. 238.

And, *à fortiori*, the commission will be disallowed where the mortgagee, being the mortgagor's solicitor, prepared the mortgage, and inserted therein the stipulation for a commission. *Eyre* v. *Hughes*, 2 C. D. 148; and see *Comyns* v. *Comyns*, Ir. R. 5 Eq. 583.

On the same principle mortgagees who became trustees of a creditor's deed, and appointed one of their number to receive the rents, were not allowed to add his commission to the mortgage debt. *Nicholson* v. *Tutin*, 3 K. & J. 159.

So, too, where a mortgagee with power of sale was a member of a firm of auctioneers who sold for him, it was held they were not entitled to commission unless the sale was under the direction of the Court. *Mathison* v. *Clarke*, 3 Drew. 3; *Broad* v. *Selfe*, 9 Jur. N. S. 885; *Arnold* v. *Garner*, 2 Ph. 231.

Where also a mortgagee purchased the equity, reserving to the mortgagor a right of re-purchase within a limited time, to be barred in any half-year if the profits were not sufficient to pay the interest, in ascertaining profits the mortgagee was not allowed commission. *Ogden* v. *Battams*, 1 Jur. N. S. 791.

And similarly, a mortgagee in possession of the business of a newspaper was not allowed to charge credit prices for printing. *Robertson* v. *Norris*, 1 Giff. 428, 436.

The rule which prohibits payments or allowances to the mortgagee is not affected by the repeal of the usury laws, and is still rigidly adhered to by the Courts with a view to preventing oppressive bargains. *Eyre* v. *Hughes*, 2 C. D. 148; *James* v. *Kerr*, 40 C. D. 449, 459; *Mainland* v. *Upjohn*, 41 C. D. 126, 138.

The same principle formerly applied to a solicitor-mortgagee, who could not consequently charge profit-costs, whether he acted for himself alone, or for himself and a co-mortgagee. *Re Doody*, (1893) 1 Ch. 129; but see now the Mortgagees' Legal Costs Act, 1895, *ante*, p. 133.

Cost of defending and enforcing.

The mortgagee will generally be allowed all costs and expenses reasonably and properly incurred by him in maintaining or defending his rights, or in enforcing his security.

Thus he will be allowed the costs of all actions of ejectment, or for the recovery of land, or otherwise properly incurred, including costs against a surety. *Merriman* v. *Bonner*, 10 Jur. N. S. 534; *Ellison* v. *Wright*, 3 Russ. 458; and see *Nat. Prov. Bank* v. *Games*, 31 C. D. 582, 592.

But an equitable mortgagee was not allowed the costs of an unsuccessful attempt to defend an action at law for the recovery of the premises. *Dryden* v. *Frost*, 3 M. & C. 670.

In a foreclosure action the mortgagee will generally be allowed the costs of an action at law previously instituted by him, in which he has recovered the amount of the debt. *Nat. Prov. Bank* v. *Games*, *supra;* and see *Ellison* v. *Wright*, *supra*.

In a suit for redemption by a second mortgagee, the first mortgagee was allowed extra costs incurred by him in a suit for foreclosing the mortgagor. *Merriman* v. *Bonner*, *supra*.

The mortgagee of a fund in Court is entitled to the costs of obtaining a stop order, though such costs are not

allowed under a common order to tax, but must be specially mentioned. *Waddilove* v. *Taylor*, 6 Ha. 337.

In practice, however, questions of this kind are usually precluded by the costs of obtaining a stop order being retained out of the loan.

A mortgagee will not be allowed the costs of defending an action instituted between persons claiming an interest in the equity of redemption, but in which his interest as mortgagee is not affected. *Doe* d. *Pearson* v. *Roe*, 6 Bing. 447.

Nor will the costs be allowed of an unsuccessful suit by the mortgagee for specific performance when selling under his power of sale which fails from the misdescription of the premises in the contract. *Pears* v. *Ceeley*, 15 Beav. 209.

Nor the costs of defending his title to the mortgage debt against a third party; nor the costs of an unsuccessful defence to a suit against the mortgagee by the tenant for life to set aside the mortgage as against the remainderman. *Parker* v. *Watkins*, 2 Johns. 133; *Re Keane*, 12 Eq. 115, 123.

Costs of surety.

The mortgagor cannot get back the property until he has paid his surety all costs properly incurred by the latter. *Ibid.*

A surety cannot charge, as against a puisne mortgagee, the costs of defending an action by the mortgagee whose security he has paid off, inasmuch as such costs are only a simple contract debt. *South* v. *Bloxham*, 2 H. & M. 457.

General expenses of maintaining security.

The mortgagee will be allowed all costs necessarily incurred by him in maintaining the title to the property, such as the costs of—

—renewing leases. *Lacan* v. *Mertins*, 3 Atk. 4; *Manlove* v. *Bale*, 2 Vern. 84; *Woolley* v. *Drag*, 2 Anst. 551.

—establishing his security. *Pelly* v. *Wathen*, 1 D. M. & G. 16.

—payment of head rent. *Burrowes* v. *Molloy*, 2 J. & L. 521.

—redemption of land tax. Seton, 5th ed., 1639.

—payment of fines and fees on admission to copyholds. *Ibid.*

—procuring a necessary Act of Parliament. *Ibid.*

—fines in a building society mortgage. *Provident, &c.* v. *Greenhill*, 9 C. D. 122; *Parker* v. *Butcher*, 3 Eq. 762.

—discounts on the renewal of bills of exchange. *Fenton* v. *Blackwood*, L. R. 5 P. C. 167.

—costs of his solicitor on paying off mortgage. *Wakefield* v. *Newbon*, 8 Jur. 735.

—cost of order for delivery of title-deeds out of chambers. *Burden* v. *Oldaker*, 1 Coll. 105; but see *Reed* v. *Freer*, 13 L. J. Ch. 417.

Interest on proper expenses.

Interest is allowed on proper advances made by the mortgagee for the benefit or support of the estate or security.

Thus, it has been allowed on fines (*Manlove* v. *Bale*, *supra*); upon premiums on policies (*Bellamy* v. *Brickenden*, 2 J. & H. 137); upon sums expended in support of the title (*Godfrey* v. *Watson*, 3 Atk. 518); or in the redemption of land tax (Seton, 1639); upon costs paid under an indemnity (*Wainman* v. *Bowker*, 8 Beav. 363); and on interest paid under a covenant to indemnify (*Fergus* v. *Gore*, 1 S. & L. 107). As to interest on repairs, see *post*, p. 154.

A mortgagee is not entitled to interest on his taxed costs unless they are directed to be added to his security, in which case the costs will carry interest at four per cent. from the date of the taxing master's certificate, not from the date of the judgment. *Eardley* v. *Knight*, 41 C. D. 537; and see *Lippard* v. *Ricketts*, 14 Eq. 291, *ante*, pp. 62, 125.

If the mortgagor elect to be foreclosed, the mortgagee has no remedy against him for expenses incurred in maintaining the property, nor for legal liabilities attached thereto; but from the time the former elects to redeem

the mortgagee becomes a trustee for him, and as such is entitled to be indemnified against all such expenses and liabilities. *Phene* v. *Gillan*, 5 Ha. 1; *Langton* v. *L.*, 7 D. M. & G. 30.

Where a puisne incumbrancer takes proceedings which have the effect of securing a fund for the benefit of all the incumbrancers, his costs of such proceedings will be first paid out of the fund in priority to the other incumbrancers, the costs of such incumbrancers being added to their securities according to their respective priorities. *Johnstone* v. *Cox; Batten* v. *Dartmouth*, *ante*, p. 134.

Costs of insurance.

Premiums of fire insurance paid by the mortgagee when the mortgagor is under no contract to insure will not be allowed to the mortgagee, whether in possession or not; for the mortgagee insuring for his own benefit, and not being liable to account for the insurance money, cannot charge the mortgage estate. *Dobson* v. *Land*, 4 De G. & S. 575; *Bellamy* v. *Brickenden*, 2 J. & H. 137; *Hodgson* v. *H.*, 2 Keen, 704; *Brooke* v. *Stone*, 34 L. J. Ch. 251.

But when insurance was authorised premiums were allowed to the mortgagee though he had insured in a mode different from the terms of the deed, but as nearly conformable thereto as circumstances would admit. *Dobson* v. *Land*, *supra*.

Even where there is a covenant to insure by the mortgagor, premiums paid by the mortgagee insuring without a power will not be allowed as against puisne incumbrancers, as the sum secured prior to their charge ought not in the absence of express stipulation to be increased as against them. *Brooke* v. *Stone*, *supra*.

The above decisions are, however, subject to the Conveyancing Act, 1881, s. 19, by which a mortgagee has power, unless limited by express stipulation in the security, after any omission by the owner to insure the premises and add the premiums with interest to his security.

Premiums of life insurance due to an insurance office, being mortgagees, which the mortgagor has agreed but

failed to pay, will be allowed the mortgagees, if the policy has actually been effected by the society in its own office; but, without a covenant, the amount paid cannot be recovered in action, though the amount may be added to the mortgage debt. *Brown* v. *Price*, 4 Jur. N. S. 882; *Grey* v. *Ellison*, 1 Giff. 438.

Mortgagees of a policy of life insurance will be allowed sums paid for premiums with interest at 4 per cent., and from the death of the tenant for life at 5 per cent., for the six years before the certificate. *Gill* v. *Downing*, 17 Eq. 316; *Bellamy* v. *Brickenden*, 2 J. & H. 137; Seton, 1638.

Abortive sale.

A mortgagee will generally be entitled to his costs of attempts to realise his security by the proper exercise of his powers and remedies, though such attempts prove ineffectual.

So, where in a foreclosure action by a first mortgagee, the second mortgagee paid a sum into Court in order to obtain a sale in lieu of foreclosure, it was held that the money was applicable to indemnify the mortgagee for his expenses of an abortive sale. *Corsellis* v. *Patman*, 4 Eq. 156.

And the costs of an abortive sale have been allowed without special order, even where the auctioneer accepted a worthless cheque without inquiry. *Webster* v. *Patteson* (W. N.) 1882, 10; *Farrer* v. *Lacey*, *&c.*, 31 C. D. 42.

But a mortgagee will not be allowed costs of an application for leave to bid at the sale of the mortgaged property. *Ex parte Williams*, 1 D. & C. 489.

Section V.

Accounts against Mortgagee in Possession.

Mode of taking the Accounts generally.—Where a mortgagee has entered into possession, whether the action be for redemption or foreclosure, the usual order of the Court

is that an account be taken of the rents and profits of the mortgaged property received by the mortgagee, or by any other person or persons for his use, or which, without his wilful default, might have been so received, and that the amount found due on the footing of such account be deducted from the amount found due to the mortgagee under his mortgage. Seton, 1620.

The mortgagee is subject to an account from the time he takes possession. The usual mode of taking accounts against the mortgagee in possession is to set the total amount of rents and profits received by, or found to be chargeable to, him against the whole amount due upon the mortgage debt, namely, in discharge successively of the interest of the mortgage debt, and of money advanced for costs and improvements, and then of the principal of the same moneys. *Webb* v. *Rorke*, 2 S. & L. 661.

Although interest is in arrear when possession is taken, if there has been a sale of part of the premises, the surplus proceeds of sale, after payment of interest and costs, are applicable in discharge of an equivalent amount of the principal, and the accounts are continued in the ordinary course, but on the footing of the diminished principal. *Thompson* v. *Hudson*, 10 Eq. 497.

Where the debt far exceeds the value of the property, and the accounts are consequently useless, the mortgagor is still entitled to the accounts; but, in order that the mortgagee may fix him with the expense of the accounts, if vexatiously asked for, the order must be prefaced with a statement that the mortgagor required them to be brought in. *Taylor* v. *Mostyn*, 25 C. D. 48, C. A.

Quære, whether this statement would give the Court jurisdiction as to the costs if it turned out that the accounts had been asked for vexatiously. *Ibid.*

Quære, whether the Court would not, on a substantive application by the plaintiff, stay the taking the accounts if it was satisfactorily shown that taking them would be useless. *Ibid.*, *ante*, p. 97.

Wilful default.

A decree for wilful default is ordered against a mortgagee in possession, although there is no charge in the pleadings or proof at the trial. *Mayer* v. *Murray*, 8 C. D. 424; *Job* v. *Job*, 6 C. D. 562; *Williams* v. *Price*, 1 S. & S. 581; and see *Shepard* v. *Jones*, 21 C. D. 469, *post*, p. 150.

And this is said to be the only instance in which the Court directs an account in this form without a special case being made out, though a purchaser, whose purchase has been set aside and ordered to stand as security, is within the rule. *Kensington* v. *Bouverie*, 7 D. M. & G. 134, 156; *Adams* v. *Sworder*, 2 De G. & S. 44.

Such a decree extends to the proceeds of sale; but no question can be raised thereunder as to the validity of the sale or adequacy of price. *Mayer* v. *Murray*, *supra*.

But a judgment creditor in possession under an *elegit* is not, it seems, accountable for wilful default, as between himself and other incumbrancers, in respect of rents which he has permitted the owner to receive before any proceedings have been taken. *Holton* v. *Lloyd*, 1 Moll. 30; *M'Donnell* v. *Walshe*, 2 D. & W. 252; *O'Brien* v. *Mahon*, *ib.* 306.

Whether, in point of fact, the mortgagee has been guilty of wilful default is a matter of inquiry on taking the account. *Noyes* v. *Pollock*, 30 C. D. 336, 342.

Account of Moneys received by Mortgagee.—A mortgagee in possession must account for the full amount of the rents and profits received by him or his agent for his use. *Moroney* v. *O'Dea*, 1 B. & B. 118.

The mortgagee must set out full and particular accounts of rents and profits received by him as mortgagee in possession. *Elmer* v. *Creasy*, 9 Ch. 69.

So where the mortgagees' account only showed a lump sum received by them from their agent, it was held that they were bound to furnish a further account setting out

full particulars of the amounts received. *Noyes* v. *Pollock*, 30 C. D. 336.

Any rents or profits received by the mortgagee subsequent to the decree must be brought into account, although the decree does not expressly extend to future rents and profits. *Penrhyn* v. *Hughes*, 5 Ves. 99, 106.

And where a mortgagee receives rents after the account has been taken, he must account on affidavit for the amount up to the time when the matter is finally settled. *Oxenham* v. *Ellis*, 18 Beav. 593, *ante*, p. 98.

Although a mortgagee in possession who voluntarily transfers his security is liable to account for subsequent rents, he is subject to no such continuing liability when he transfers by the direction of the Court in a redemption suit. *Hall* v. *Heward*, 32 C. D. 430.

At what rate mortgagee chargeable.

A mortgagee in possession accounts for rents according to the rate which has been reserved, and the rate at which the premises were let when he took possession will be taken to be the rate at which it was let during the whole time of his possession, unless the contrary is shown. *Blacklock* v. *Barnes*, S. C. C. 53; *Trimleston* v. *Hamill*, 1 B. & B. 377, 385.

And where a lease by the mortgagor to the mortgagee is set aside, the mortgagee will not be charged with more than the rent reserved by the lease, unless it is proved that a higher rent could have been obtained. *Gubbins* v. *Creed*, 2 S. & L. 214.

The rate reserved will be continued until the first payment after action brought, from which time a fair rent will be fixed by the Court. *Webb* v. *Rorke*, 2 S. & L. 661.

And generally the mortgagee will not be charged with more than he has received, or according to the actual value of the land, unless it can be proved that but for his gross default or fraud he might have received more. *Wragg* v. *Denham*, 2 Y. & C. Ex. 117.

In taking the account, if the mortgagor prove the

estate to have been let at a certain rent at any time during the mortgagee's possession, the onus will be on the latter to show that such was not the rent during the whole period of his possession. *Blacklock* v. *Barnes*, *supra*.

Where mortgagees in possession, who were brewers, let the premises subject to a restrictive covenant by the tenant that he should take his supply of beer exclusively from them, it was held that the mortgagees must account for such additional rent as would have been received if there had been no restriction, but not for the profit made by the mortgagees by the sale of beer to the tenant. *White* v. *City*, *&c.*, 42 C. D. 237; *cf. Biggs* v. *Hoddinott*, (1898) 2 Ch. 307.

Occupation rent.

A mortgagee in actual occupation of the mortgaged property is liable to an occupation rent computed upon its full value; but he will not be charged an increased occupation rent by reason of the value of the property having been increased by lasting improvements made by him, unless the cost of such improvements is allowed to him. *Bright* v. *Campbell*, 54 L. J. Ch. 1077. As to allowances for improvements, see *post*, p. 153.

It seems that the mortgagee will not, in a redemption suit, be charged with an occupation rent, unless the plaintiff alleges that the defendant has been in actual occupation. A mere allegation of possession and receipt of the rents and profits by the defendant is not enough. *Trulock* v. *Roby*, 2 Ph. 395; *Shepard* v. *Jones*, 21 C. D. 469.

And where the mortgage security consists of a lease granted to the mortgagee at a fair rent, to be retained by him in payment of his debt, the profits will be accounted for on the footing of that rent. *Moroney* v. *O'Dea*, 1 B. & B. 109.

Where a mortgagee in possession sold under his power, and allowed the purchaser to go into possession four months before completion, but did not require him to pay any rent, it was held that the mortgagee was not chargeable with an occupation rent for the period during which the

purchaser had been in possession before completion. *Shepard* v. *Jones*, *supra*.

But *quære*, whether in such a case the mortgagee might not be charged with wilful default in not requiring a rent from the purchaser. *Ibid.*

A mortgagor who is precluded from asking for redemption by reason of a sale by a mortgagee in possession may bring an action for account of rents and profits received, or which ought to have been received, by the mortgagee while in possession, as well as of the proceeds of sale. *Mayer* v. *Murray*, 8 C. D. 424; *Shepard* v. *Jones*, *supra*.

A grantor of an annuity cannot maintain an action for account of rents and profits received by the annuitant under a demise for securing the annuity, without an offer to redeem on the terms contained in the deeds, or on equitable terms to be settled by the Court. *Knobell* v. *White*, 2 Y. & C. Ex. 15.

Allowances to Mortgagee for Outgoings.—A mortgagee in possession is entitled, in bringing in his accounts, to credit himself with payments representing outgoings incident to his possession as mortgagee; and a proviso in the mortgage deed limiting the total amount recoverable thereunder will not extend to such outgoings. *White* v. *City of London Brewery*, 42 C. D. 237.

Commission.

Where a mortgagee has entered into possession, though he is not entitled to any personal benefit for himself beyond the interest, and therefore will not be allowed for his trouble in collecting the rents himself, yet if the collection is troublesome he may appoint an agent to collect them at the expense of the estate. *Godfrey* v. *Watson*, 3 Atk. 518; *Davis* v. *Dendy*, 3 Madd. 170; *Union Bank* v. *Ingram*, 16 C. D. 148; and see *Kavanagh* v. *Working Men's, &c.*, (1896) 1 Ir. R. 56.

Compensation to tenants.

A mortgagee in possession is entitled to be allowed, even after account settled, for crops, manure, &c., for which he remains liable to pay to an outgoing tenant of

the mortgaged property according to the custom of the country. *Oxenham* v. *Ellis*, 18 Beav. 593.

And the same rule will, no doubt, apply to compensation which a mortgagee is called upon to pay under the Agricultural Holdings Act, 1883.

Working mines.

If a mortgagee is specially authorised to work mines, he will be allowed the expenses of doing so, with interest. *Norton* v. *Cooper*, 5 D. M. & G. 728.

A mortgagee in possession of open mines is not bound to advance more money on them than a prudent owner would on his own estate; and he will not be removed from management of them except upon clear proof of gross mismanagement. *Rowe* v. *Wood*, 2 J. & W. 553.

A mortgagee will not be allowed his expenses of opening mines or quarries, but must speculate at his own risk. He will be charged with the receipts, but will not be allowed his expenses of severance or otherwise. *Hughes* v. *Williams*, 12 Ves. 493; *Thorneycroft* v. *Crockett*, 2 H. L. C. 239.

So it was held that mortgagees in possession were chargeable with the full value of the coal, subject to deduction of the expense of bringing it to the surface, but not for costs of severance. *Taylor* v. *Mostyn*, 33 C. D. 226.

But a mortgagee with insufficient security may open new or work abandoned mines, and will only be liable to account for the profits or royalty, and not for the value of the ore raised or the damage caused to the surface. *Millett* v. *Davey*, 31 Beav. 470.

Mortgagees permitting strangers to work mines have been held accountable for the proceeds. *Hood* v. *Easton*, 2 Giff. 692; and see *Elias* v. *Griffith*, 8 C. D. 521, 528.

If there is reason to think that mines have been recklessly worked with a view to undue profit, the Court will direct an inquiry as to the working, and will charge the mortgagees with the amount of the loss or damage caused by such improper working. *Mulhallen* v. *Marum*, 3 D. & W. 317; *Taylor* v. *Mostyn*, *supra*.

Before taking possession of mines, mortgagees are not answerable in respect of acts of trespass and improper appropriation of adjoining minerals by their mortgagor. *Powell* v. *Aiken*, 4 K. & J. 343.

Carrying on business.

Where a mortgage of a block of residential chambers contained a power for the mortgagees on default to enter and manage and receive the rents and profits, and default having been made the mortgagees took possession and managed the business at a loss, and subsequently sold the premises, it was held they were entitled to be allowed out of the proceeds of sale the losses incurred in the management. *Bompas* v. *King*, 33 C. D. 279.

A mortgagee in possession is bound to act as a provident owner, and will be liable for wilful default if, being in possession under a mortgage of unfinished leasehold buildings, he neither sells the property nor completes the buildings, whereby the leases are forfeited. *Nat. Bank* v. *United, &c.*, 4 A. C. 391.

Repairs and improvements.

Unless the sanction of the mortgagor has been obtained, the mortgagee will not be allowed for substantial repairs, not being strictly necessary, or for improvements, unless the value of the property has been increased thereby. *Johnson* v. *Bourne*, 2 Y. & C. 268; *Pelley* v. *Wathen*, 16 Jur. 47; *Sandon* v. *Hooper*, 6 Beav. 246; *Tipton Green* v. *Tipton Moat*, 7 C. D. 192.

Indeed, in some of the older cases, even substantial improvements have been disallowed unless done with the consent of the mortgagor or acquiesced in by him after notice. And a mortgagee can hardly be said to be safe in making improvements on the mortgaged property without such consent or acquiescence. *Sandon* v. *Hooper*, 14 L. J. Ch. 120; *Unity Bank* v. *King*, 4 Jur. N. S. 470; *Jortin* v. *S. E. R.*, 6 D. M. & G. 270; *Trimleston* v. *Hamill*, 1 B. & B. 385.

Inquiry as to improvements.

But the tendency of later decisions is more favourable to the mortgagee, and it has been laid down that *primâ facie* a mortgagee who has expended money in improve-

ments is entitled to an inquiry whether the outlay has increased the value of the property, and to be allowed such outlay so far as it has increased the value. *Shepard* v. *Jones*, 21 C. D. 469; *Houghton* v. *Sevenoaks, &c.*, W. N. (1884) 243; *Henderson* v. *Astwood*, (1894) 1 A. C. 150, 163.

And where a mortgagee raised the question of improvements in his pleadings, and supported it by evidence, and the mortgagor did not, in his pleadings, raise any objection to the claim, the outlay was allowed. *Powell* v. *Trotter*, 1 D. & S. 388; and see *Hipkins* v. *Amory*, 2 Giff. 292.

It is not a matter of course to direct an inquiry where no case is made out. And improvements must not be such as to improve the mortgagor out of his property. *Sandon* v. *Hooper*, 14 L. J. Ch. 120.

A second mortgagee will not be allowed improvements against a first mortgagee. *Landowners, &c.* v. *Ashford*, 16 C. D. 412.

A mortgagee will not be allowed improvements in mines. *Thorneycroft* v. *Crockett*, 2 H. L. C. 239.

Interest has in some cases been allowed on expenditure in necessary repairs or lasting improvements as from the time when the expense was incurred. Seton, 1640; *Quarrell* v. *Beckford*, 1 Madd. 281; *Eyre* v. *Hughes*, 2 C. D. 148, 164.

The same principle operates in favour of puisne incumbrancers. So a puisne incumbrancer who had redeemed the first mortgagee, and therefore stood in his place, was allowed only necessary repairs and lasting improvements. *Exton* v. *Greaves*, 1 Vern. 138.

Annuitant. If a grantee of a rent-charge takes possession and incurs expenses in necessary repairs, he has not, like a mortgagee, any equity against the owner of the land, who on payment has a legal right of entry; if he has a right to be reimbursed, it must be under the terms of his grant. *Hooper* v. *Cooke*, 2 Jur. N. S. 527.

Taking Accounts with Rests.—Where in taking the accounts of real estate, it appears that the rents and profits received by a mortgagee in possession materially exceed the interest due on the mortgage debt, the Court may direct a balance to be struck and the surplus rents and profits, after meeting the interest, to be applied yearly, or sometimes half-yearly, in the reduction of the principal. This is called taking the account with rests.

But rests will not be directed if the excess of rents and profits is trifling. *Shephard* v. *Elliot*, 4 Madd. 254.

The principle is that where a mortgagee receives rents and profits in excess of interest, and applies them to his own use, it is not just that the mortgagor should continue to pay interest on the whole mortgage debt, but the excess retained by the mortgagee must be deemed to be so retained in reduction of principal.

The form of a judgment with rests is as follows:— Form of order.

1. Account of principal, interest and costs.
2. Account of rents and profits on the foot of wilful default, &c.
3. And let what shall appear to be due on the said account of rents and profits be applied first in discharging the interest, and then in sinking the principal money secured by the mortgage, and, if the same shall break in upon the principal, then rests are to be made from time to time, and interest to be computed only on the residue thereof. Seton, 1620.

Or the following:—

3. And in taking the said account of the said rents and profits, annual rests are to be made of the clear balance of such rents and profits in the hands of, &c., and interest is to be computed on such respective balances at a rate of 4 per cent. per annum, and, in taking such annual rests, except the first, the interest of each preceding balance is to be

included in such balance, so as to charge the said, &c., with compound interest thereon. *Cotham* v. *West*, 1 Beav. 380; Seton, 1621.

The proper mode of taking the account with rests appears to be that as soon as the mortgagee has received a sum exceeding the amount of interest, a rest should be made, and from that date the subsequent annual rests should be computed, so that, if the date of the mortgage deed be in July, and the mortgagee received sums in February exceeding the interest then due, a rest should be taken in February, and annual rests be thenceforth computed from that time, and not from July. *Binnington* v. *Harwood*, T. & R. 477; *Heighington* v. *Grant*, 5 M. & Cr. 258.

A balance must be struck at each rest by deducting the amount of the payments from the amount of the receipts, and charging interest on the balance up to that time; and the interest of each preceding balance must be included in the balance then stated, and interest computed on the total amount, so as to charge the accounting party with compound interest. *Raphael* v. *Boehm*, 11 Ves. 92, 110; *Yates* v. *Hambley*, 1 Madd. 14.

Special grounds for.

A direction to take accounts with rests is not of course, the usual course being not to give such direction. *Davis* v. *May*, 19 Ves. 382; *Finch* v. *Brown*, 3 Beav. 70; *Donovan* v. *Fricker*, Jac. 168; *Baldwin* v. *Lewis*, 4 L. J. Ch. 113.

And in giving such direction the right of the mortgagee not to be paid off piecemeal will be taken into consideration. *Horlock* v. *Smith*, 1 Coll. 287; and see *Ashworth* v. *Lord*, 36 C. D. 545, 551.

Some special ground, therefore, must be shown, as that the rents and profits have considerably exceeded the interest. *Gould* v. *Tancred*, 2 Atk. 533; *Donovan* v. *Fricker*, Jac. 168; *Scholefield* v. *Ingham*, C. P. Coop. 477.

Or that the mortgagee has set up an unfounded claim to the equity of redemption. *Montgomery* v. *Calland*, 14 Sim.

79; *Douglas* v. *Culverwell*, 4 D. F. & J. 20; *Nat. Bank, &c.* v. *United, &c.*, 4 A. C. 391.

Or that he denies his character as an incumbrancer. *Incorporated Soc.* v. *Richards*, 1 Dr. & W. 258.

Or that he comes to a settlement of accounts by which it appears that no interest is then due, or the interest then due is converted into principal, and he continues in possession. *Wilson* v. *Cluer*, 3 Beav. 136.

If no special grounds are shown for taking annual rests as from the beginning of the account, the Court will not generally direct annual rests as from a later date so long as anything remains due under the mortgage. *Davis* v. *May*, 19 Ves. 382; *Latter* v. *Dashwood*, 6 Sim. 462; *Scholefield* v. *Lockwood*, 32 Beav. 439; but see *Wilson* v. *Metcalfe*, *infra*.

The master cannot take annual rests of rents unless directed by the judgment, and where directions are omitted they cannot afterwards be given in chambers. *Nelson* v. *Booth*, 3 De G. & J. 119.

Where no interest in arrear.

Where there is a material excess of rent, the fact that no interest was in arrear when possession was taken may be regarded by the Court, when taken with other circumstances, as affording a special ground for directing rests to be taken. *Ibid.* 127; *Shephard* v. *Elliot*, 4 Madd. 254; *Scholefield* v. *Lockwood*, *supra*.

But the Court will not generally direct rests if the interest was in arrear when the mortgagee took possession. *Stephens* v. *Wellings*, 4 L. J. Ch. 281; *Wilson* v. *Cluer*, 3 Beav. 136; *Moore* v. *Painter*, 6 Jur. 903.

And with reference to the question of whether interest is in arrear, rents in the hands of a receiver or in Court will be taken as already paid when the mortgagee took possession. *Horlock* v. *Smith*, 1 Coll. 287.

And if interest was in arrear when the mortgagee took possession, the fact that such arrears were subsequently paid off will not be a ground for directing rests: *Finch* v. *Brown*, 3 Beav. 70.

When no rests are directed.

But whether interest is in arrear or not, rests will not generally be directed against the mortgagee where he has been driven to take possession in order to defend his security, as, for instance, where the security is endangered by non-payment of ground rent, or through want of repairs. *Horlock* v. *Smith*, *supra*; *Patch* v. *Wild*, 30 Beav. 99; *Carter* v. *James*, W. N. (1881) 27.

And rests are not directed where the occupation is under an agreement for tenancy with the mortgagor. *Page* v. *Linwood*, 4 Cl. & F. 399.

Where bills were given for the arrears of interest when the mortgagee took possession, which were afterwards dishonoured, no rests were directed, for the interest is in such a case considered to be in arrear when possession was taken. *Dobson* v. *Land*, 4 De G. & S. 575.

If rests have been directed in a redemption suit afterwards abandoned, and a foreclosure suit is commenced by the mortgagee, the accounts will be taken with rests in the new suit, although there is no evidence in the new suit to warrant a decree with rests. *Morris* v. *Islip*, 20 Beav. 654.

Interest charged.

If a mortgagee continues in possession after the rents and profits received by him have fully satisfied the debt, he will be regarded as using another person's money, and ought to be charged with interest. *Ashworth* v. *Lord*, 36 C. D. 545, 551.

Where, therefore, a large balance is found to have been due at the commencement of the action, annual rests will be directed on further consideration from the time the debt was paid off, although no rests were directed by the previous orders, and interest was not prayed in the action. And such rests will be directed as well in the case of an occupation rent as on an account of rents and profits. *Wilson* v. *Metcalfe*, 1 Russ. 530.

But it is only when it appears from the certificate that there is an equitable right to charge an accounting party with interest that the Court directs the computation of

interest when it has not been reserved by the original decree. Dan. 1231.

Where bankers improperly or without title retain money overpaid to them as mortgagees, they are chargeable with interest thereon. *London Chartered, &c.* v. *White*, 4 A. C. 413.

Mortgagee paid off retaining balance.

If the mortgagee was already paid in full at the commencement of the action, he will be charged with interest on the balance then in his hands, and on all subsequent annual balances simple interest at the end of each year as the rents were received, and with costs. *Quarrell* v. *Beckford*, 1 Madd. 269; *Archdeacon* v. *Bowes*, M'Cl. 149.

And in such cases the mortgagee will generally be charged with the ordinary rate of interest, as in the case of executors retaining balances in their hands, namely, four per cent. *Ibid.*; and see *Horlock* v. *Smith*, *supra*.

Where a mortgagee in possession is paid off out of the rents during a suit for redemption before defence, and he by his defence denies such satisfaction, he will be decreed to pay interest on the balances in his hands, since the mortgage was paid off with costs from the filing of the defence. *Montgomery* v. *Calland*, 14 Sim. 79.

And where the debt is so satisfied between the filing of the defence and the certificate, the mortgagee will be charged with interest on the balance in his hands at the date of the certificate, and on the rents subsequently received from the respective times of receiving them. *Lloyd* v. *Jones*, 12 Sim. 491.

Welsh mortgage.

A Welsh mortgage, which is now very rare, is a mortgage in which there is no condition or covenant for repayment, the main incident of the security being possession by the mortgagee of the mortgaged property until he has repaid himself out of the rents and profits the money lent.

A security giving the mortgagee the right to take the rents and profits until payment was held to be a Welsh mortgage notwithstanding a covenant to pay on demand.

Teulon v. *Curtis*, You. 610; *cf. Balfe* v. *Lord*, 2 D. & W. 480.

Where the instrument, which was in form an absolute conveyance, was treated as a security in the nature of a Welsh mortgage, the balance coming due from the mortgagee on the account of rents and profits received was ordered to be applied in discharge of the interest, and then in sinking the principal money, and if the same should break in on the principal, then rests were to be made from time to time and such interest only calculated on the residue. *Douglas* v. *Culverwell*, 4 D. F. & J. 20, 28; and see *Yates* v. *Hambley*, 2 Atk. 360.

In an ordinary Welsh mortgage the mortgagee cannot foreclose or sue for the debt, but the mortgagor may claim to redeem. *Longuet* v. *Scawen*, 1 Ves. 406; *Howel* v. *Price*, 1 P. W. 291; *Yates* v. *Hambley*, *supra*.

Section VI.

Appropriation of Payments.

The subject of appropriation generally has already been treated; it is only necessary here, therefore, to notice such cases as more particularly refer to mortgages.

Where the payments are not specially made, a general payment will be applied in the first place to sink the interest before any part of the principal is discharged.

But the rule by which interest is presumed to be paid before principal is not applicable in the case of interest which has been converted into principal. *Parr's Banking Co.* v. *Yates*, (1898) 2 Q. B. 460.

It is, however, the right of the debtor in the first instance to declare upon what account he pays the money, and when he has so declared, the destination of the payment cannot be changed. *Hammersley* v. *Knowlys*, 2 Esp. 666.

But the declaration need not be in express terms; it is sufficient if it can be inferred from the circumstances that the debtor intended at the time of payment to appropriate it to one account specifically; but if he omits to declare at the time of payment no subsequent declaration by him will be effectual. *Shaw* v. *Picton*, 4 B. & Cr. 715; *Wilkinson* v. *Sterne*, 9 Mod. 427.

If an appropriation has not been declared by the debtor nor can be inferred from the circumstances, the right of appropriation then rests with the creditor, who may make the appropriation any time after payment and before action brought or account settled. *Wilkinson* v. *Sterne*, *supra*; *Simson* v. *Ingham*, 2 B. & C. 65.

This right of a creditor to appropriate will not, however, be exerciseable so as to enable a mortgagee to apply moneys received by him by virtue of the mortgage security in payment of a debt not secured by the mortgage.

Where, therefore, a mortgage is given to secure a current account, but so that the whole amount of the principal shall not exceed a certain sum, any moneys received by the mortgagee from sales of the property must be applied in reduction of the amount secured by the mortgage, and cannot be appropriated by the mortgagee in satisfaction of moneys in excess of that amount owing on the general account between him and the mortgagor. *Johnson* v. *Bourne*, 2 Y. & C. 268.

So where a mortgagee by deposit, being also creditor in respect of a book debt, consents to a sale of the premises, he cannot appropriate an instalment of the purchase-money received by him in payment of the book debt. *Young* v. *English*, 7 Beav. 10.

CHAPTER IV.

TRUSTEES AND EXECUTORS.

Duty to keep accounts.

As an incident to the beneficial enjoyment by the *cestui que trust* of his interest, he has a right to call upon the trustee for accurate information as to the state of the trust. *Gray* v. *Haig*, 20 Beav. 219; *Burrows* v. *Walls*, 5 D. M. & G. 253; *Clarke* v. *Ormonde*, Jac. 120, per Lord Eldon.

It is therefore the bounden duty of the trustee to keep clear and distinct accounts of the property he administers, and he exposes himself to great risks by the omission. *Freeman* v. *Fairlie*, 3 Mer. 43, per Lord Eldon.

The importance of keeping accounts is shown by the fact that although the Court will generally saddle with costs a trustee whose only fault is that he has failed to do so, yet where a trustee has kept and furnished accounts which by an honest mistake turn out to be inaccurate and show an erroneous balance in the trustee's favour, he will be allowed his costs, for he will not have been guilty of any breach of duty but only of a *bonâ fide* mistake. *Smith* v. *Cremer*, 24 W. R. 51.

And it is the first duty of an accounting party, whether an agent, trustee, receiver or executor, not only to keep but to be constantly ready with his accounts. *Pearse* v. *Green*, 1 J. & W. 140.

In taking accounts against a trustee after a long lapse of time, the Court will show every indulgence it can to the trustee for enabling him to clear his accounts. *Banks* v. *Cartwright*, 15 W. R. 417.

And trustees on being requested to furnish accounts are

entitled to demand that they shall be guaranteed against the expense. *Re Bosworth*, 58 L. J. Ch. 432.

Not only is a trustee bound to render accurate accounts, but if he stand by and sanction the rendering of improper accounts by a defaulting trustee, he becomes liable himself for the misrepresentation. *Horton* v. *Brocklehurst*, 29 Beav. 504.

Cestuis que trust have an absolute right to investigate the accounts of their trustees. Trustees cannot settle an account due to one of themselves so as to preclude such an investigation. *Re Fish*, *Bennett* v. *Bennett*, (1893) 2 Ch. 413. Inspection.

A legatee, though his interest be contingent or reversionary, is entitled to have a satisfactory explanation of the state of the assets and an inspection of the accounts, but not to require a copy of the accounts at the expense of the estate. *Ottley* v. *Gilby*, 8 Beav. 602; *Re Tillott*, (1892) 1 Ch. 86; *Re Dartnall*, (1895) 1 Ch. 474.

And where the fund is invested in Consols, he is entitled to an authority from the trustee to the Bank of England to enable him to ascertain for himself whether there is any charging order or *distringas* affecting the fund. *Re Tillott*, *supra*.

If an executor or trustee enter the accounts of the trust in his private books, he is bound to produce them. *Freeman* v. *Fairlie*, 3 Mer. 43; and see *Re Sutcliffe*, 44 L. T. 547, *ante*, p. 76.

And if he, being a partner, is allowed to enter the trust accounts in the partnership books, the Court will not allow the partners to withhold the inspection. *Ibid.*; see *Vyse* v. *Foster*, 13 Eq. 602.

But if an agent be employed to manage an estate, and he keeps the accounts in the same books in which the accounts relating to the estates of other persons are kept, the production, in the absence of those other persons, has been refused. *Airey* v. *Hall*, 12 Jur. 1043.

Trustees are not justified in refusing to allow the solicitor

of the *cestui que trust*, save for some very strong reason, to inspect their accounts, though they offer to show them to the *cestui que trust* or an accountant, and such a refusal having occasioned an action the trustees were ordered to pay costs up to decree. *Kemp* v. *Burn*, 4 Giff. 348; and see *Jefferys* v. *Marshall*, 19 W. R. 94; *Talbot* v. *Marshfield*, 3 Ch. 622.

When the affairs of the trust have been finally settled, the trustees will be entitled to the possession of the vouchers as their discharge to the *cestuis que trust;* but the latter will have a right to the inspection of them, but not to copies without paying for them. *Clarke* v. *Ormonde*, Jac. 120, per Lord Eldon.

If a person appointed a trustee and executor receives money before obtaining probate, he cannot afterwards refuse to render an account by declining to act as a trustee or to prove the will, and in such a case he was made to pay the costs up to decree. *Boynton* v. *Richardson*, 31 Beav. 340.

It is not a sufficient ground for a refusal to account that the beneficiaries have called upon the trustees to act in breach of the trust. *Henry* v. *Macdonald*, 15 W. R. 165.

Nor that the trustees are illiterate persons incapable of keeping accounts, for they should then employ some one to assist them. *Wroe* v. *Seed*, 4 Giff. 425, 429.

If it is alleged by his co-trustees that a deceased trustee has taken an active part in the trust, the account may be ordered against his representative though the plaintiffs make no charge against the deceased trustee. *Elwes* v. *Barnard*, 13 L. T. 426, *post*, p. 169.

Neglect to keep accounts and vouchers of a trust estate which has been finally wound up for a considerable time, though it may not justify the Court in directing the accounts to be taken by reason of the staleness of the demand, may be a sufficient reason for depriving the trustees or their representatives, if dead, of the costs of the action. *Payne* v. *Evens*, 18 Eq. 356.

Trustees must account unconditionally, and not upon any such terms as being allowed expenses not legally chargeable by trustees. *Underwood* v. *Trower*, W. N. (1867) 83; but see *Re Bosworth*, *supra*.

When an account has been furnished, but the beneficiary is not satisfied with it but goes to the Court, and it turns out that by an honest mistake the trustees had not charged themselves with all that was due from them, they will have their costs. *Smith* v. *Cremer*, 24 W. R. 51.

But a refusal to account on the ground that nothing is due from the trustees, which turns out not to be the fact, will render them liable to costs, or at all events to be deprived of them. *Eglin* v. *Sanderson*, 3 Giff. 434; *Att.-Gen.* v. *Brewers' Co.*, 1 P. W. 376.

And if the trustees deny any indebtedness, or pay money into Court and the accounts show that more is due from them, they may have to pay the costs of the accounts. *Payne* v. *Parker*, 17 W. R. 640; *Re Radclyffe*, 50 L. J. Ch. 317.

But where on taking accounts a trustee is found to be indebted in a small amount, he will not be disallowed his costs merely because he denied that he was indebted. *Turner* v. *Hancock*, 20 C. D. 303.

And if the trustee makes good the fund before decree, he will have any subsequent costs. *Hewett* v. *Foster*, 7 Beav. 348; *Peacock* v. *Colling*, 33 W. R. 528.

Furnishing information.

Apart from and in addition to the duty of trustees to keep and furnish accounts, they must afford all information with regard to any matter relating to the trust, and if they give only partial information, that is equivalent to concealment, and the *cestui que trust* would not be bound by acquiescence in acts approved upon such imperfect knowledge. *Ryder* v. *Bickerton*, 3 Sw. 81; *Walker* v. *Symonds*, 3 Sw. 1, 73, 81.

And it is not sufficient for a trustee to say that he has invested the trust money on mortgage, but he must produce the mortgage deeds. *Re Tillott*, *supra*.

But it is not the duty of a trustee to tell his *cestui que trust* what incumbrances the latter has created, nor which of his incumbrancers have given notice of their respective charges. *Low* v. *Bouverie*, (1891) 3 Ch. p. 99.

It is, moreover, incumbent upon trustees to acquaint persons who have just attained majority of their rights. *Burrows* v. *Walls*, 5 D. M. & G. 233.

And the protection given to infants by the Court extends beyond majority until they are fully aware of their rights, and no release or acquiescence can bind them while they remain in ignorance. *Ibid.*; *Walker* v. *Symonds*, *supra*.

But a trustee is not bound to supply information which necessitates expenditure except at the cost of the beneficiary requiring the same. *Re Bosworth*, *supra*.

Practice.

The jurisdiction of the Court with reference to directing the accounts of a trust to be taken is now exercised with the limitations contained in Ords. 55 and 33, *infra*.

A *cestui que trust* claiming some right involving an account against his trustees, may now issue his writ, and, unless there is some preliminary question to be tried at once under Ord. 15, r. 1, obtain an order on summons for the proper accounts with all necessary inquiries and directions.

Only ordinary accounts can be taken under this rule, and if there is a preliminary question to be tried, or part of the relief sought is founded upon an alleged breach of trust so that the common accounts are involved in the subsequent accounts, which must be taken if the plaintiff succeeds at the trial, no order ought to be made under the rule. *Re Gyhon*, *Allen* v. *Taylor*, 29 C. D. 834.

And even if there is ground for making an order on the summons, the rule is to be read with rule 10 of Ord. 55, which gives a discretion as to whether an administration order is to be made where the questions at issue can be determined without it; and the order made on the summons will be limited to accounts and inquiries which must necessarily be made, and to such only as the nature of the

case requires. *Ibid.*; *Re Blake, Jones* v. *Blake*, 29 C. D. 913; and see *Re Wilson*, 28 C. D. 457, 462.

A summons under Ord. 15, r. 1, asking that accounts should be taken on the footing of wilful default is improper. *Re Bowen, Bennett* v. *Bowen*, 20 C. D. 538.

But a district registrar may make an order under the rule, and if the order so directs, may take the account himself; he must, however, report the result in the form of a chief clerk's certificate, stating the parties who attended and the materials upon which he proceeded. *Ibid.*

It seems that the order does not operate to fix the rights of creditors *inter se*. *Re Barratt, Whitaker* v. *Barratt*, 43 C. D. 70.

Where trustees have rendered no accounts or insufficient accounts, an order may be made under Ord. 55, r. 10A, that the application stand over for a certain time and that a proper account be rendered, with an intimation that if this is not done, the trustees may be made to pay the costs of the proceedings. *Re Hayter*, 32 W. R. 26.

It is not the practice of the Court, simply on the application of any *cestui que trust* to direct the accounts of an estate to be carried into chambers and to be there vouched. The present practice is to direct accounts to be furnished and vouched out of Court and only to allow the disputed items to be adjudicated upon in chambers. Ord. 33, r. 4A; *Re Lockwood*, 8 T. L. R. 293; *Re Fish*, (1893) 2 Ch. p. 426.

Special directions may be given as to the mode of taking the accounts, and that in taking them books of account may be taken as *primâ facie* evidence of the matters contained therein. Ord. 33, r. 3.

So old trust accounts to which the *cestuis que trust* had access but of which they had not availed themselves were ordered to be taken as *primâ facie* correct. *Banks* v. *Cartwright*, 15 W. R. 417; and see *Sleight* v. *Lawson*, 3 K. & J. 292.

By Ord. 33, r. 6, every judgment or order for a general Account of debts.

account of the personal estate of a testator or intestate is to contain a direction for an inquiry what part, if any, of such personal estate is outstanding or undisposed of, unless the Court or judge otherwise directs.

The direction for an account of debts includes equitable as well as legal debts. *Paynter* v. *Houston*, 3 Mer. 302.

It was held that the plaintiff was not entitled to a declaration that a particular debt or sum formed an item in the account to be taken, but that evidence to show that defendant should be charged with it was admissible. *Tomlin* v. *T.*, 1 Ha. 236.

In a creditor's action for administration of personal estate, the plaintiff need not sue on behalf of all the creditors to obtain a general account of debts. *Re Blount*, 27 W. R. 865.

Secus if he desires to have the real estate also administered. *Re Greaves*, 18 C. D. 551, 554.

But *quære* whether this is so since the Land Transfer Act, 1897.

Where an account is directed of the debts of the deceased, unless otherwise ordered, interest is to be computed on those carrying interest at the rate they carry, and on all others at four per cent. from the date of the judgment or order. And debts not carrying interest are only allowed interest after satisfying costs, debts, and interest on such debts as carry interest. Ord. 55, rr. 62, 63.

Interest at four per cent. is still payable on debts. See *Re Barclay*, (1899) 1 Ch. p. 683.

For the general rules as to the right to interest, see *ante*, pp. 57, 110.

As to account of rents in a creditor's suit, see *post*, p. 219.

One co-plaintiff in an administration suit being bound by a settled account, the Court would only direct accounts on the footing of that settlement. *Lambert* v. *Hutchinson*, 1 Beav. 277.

An account of annuities involves an account of the arrears, and under this account the certificate now states

what annuities are given and what is due for arrears. Seton, 1247.

All the living executors must be parties to an administration action; but it is not necessary to join the representatives of one who has died, unless it is sought to charge his estate with sums received by him. Seton, 1277, *ante*, p. 164.

But an allegation that he or his executors duly accounted to the surviving executor is sufficient, or a waiver of the account against his estate, or the judgment may be restricted to the account against the survivors though there is no such allegation or waiver. *Ibid.*

As to the Court fees on taking accounts of executors, &c., see Ord. 1884, Sched. 72. *Re Crawshay*, 39 C. D. 552.

And as to the mode of calculating fees where separate accounts are required, see *Armitage* v. *Elworthy*, 13 C. D. 191.

Estate duty.

The persons accountable for estate duty are the executor or administrator or an executor *de son tort;* and the accountability arises when possession is taken of the assets. Finance Act, 1894, ss. 22 (1, d), 23 (11).

But a mere agent or bailiff is not accountable, nor is a purchaser for value without notice. S. 8 (4, 18).

But the liability of the executor is confined to the extent of the assets which come, or might but for his default have come, to his hands as executor. Sects. 6 (2), 8 (3).

Various other persons are accountable for the duty for which the executor is not accountable, viz., beneficiaries, trustees, guardians, committees, voluntary alienees, and purchasers for value with notice. And in the case of each of these persons, except beneficiaries, the liability is limited to the property actually received or disposed of by him. S. 8 (4), and see Finance Act, 1896, s. 20.

The executor must, to the best of his knowledge and belief, specify in the accounts annexed to the Inland Revenue affidavit *all* the property in respect of which estate duty is payable, whether he is accountable for such duty or not. Sect. 8 (3).

The executor is accountable for duty on all free personalty of the deceased. Sect. 6 (2).

And he is now accountable for the duty on freeholds vested solely in the deceased or over which the deceased had a general power of appointment. *Re Adams*, cited Bric. & Sheld. L. T. Acts, p. 250.

The estate duty for which the executor is accountable is not, therefore, necessarily the same as the duty leviable, since estate duty is leviable upon the market value of all property real or personal, settled or not settled, which passes on the death. Sect. 1.

The executor is also accountable for the settlement estate duty; but this, unlike the estate duty, which is payable out of the general personal estate, is payable out of the settled property. Finance Act, 1896, s. 19; *Salt* v. *Locker*, (1898) 2 Ch. 643.

The executor may also pay estate duty for which he is not accountable on any property under his control, or if the persons accountable for the duty request him to pay it. Sect. 6 (2).

Where the executor does not know the value of the property he may make a statement to that effect in his affidavit, and undertake, as soon as the value is ascertained, to bring in an account thereof. Sect. 6 (3).

Allowance against the gross principal value is made for funeral expenses and for debts and incumbrances. Sect. 7.

The duty is due on delivery of the account or at the expiration of six months from the death, whichever first happens. Sect. 6 (7).

Simple interest at three per cent. without deduction for income tax is payable on all estate duty from the death or when the instalments become due. Finance Act, 1896, s. 18.

Accounts are to be verified on oath and by production of all necessary documents. Sects. 8, 14.

Penalties are provided for failure to deliver accounts. Sect. 8 (6) (14).

All the forms can be obtained of any collector of inland revenue, or by personal application at Somerset House, and most of them at any money order post office.

The Inland Revenue affidavit is to be delivered to the Probate Registrar on application for representation; corrective affidavits to Somerset House.

Costs.

If a suit is rendered necessary by the neglect to keep accounts, the trustee will be liable for costs. *Newton* v. *Askew*, 11 Beav. 145, 152.

So, where a bill for administration was dismissed, the trustee had to bear his own costs owing to his not having kept accounts and vouchers. *Payne* v. *Evens*, 18 Eq. 356; *Re Page*, (1893) 1 Ch. 304.

If an administration is rendered necessary solely by the neglect of the trustee to furnish accounts, the judgment should be so framed as to enable the Court to throw the whole costs on the trustee. *Re Hayter*, 32 W. R. 26.

Where the Court set aside a sale to trustees with costs, it allowed them their costs of taking an account which must have been taken had the sale been unimpeachable. *Sanderson* v. *Walker*, 13 Ves. 601.

Though, as a general rule, where a trustee commits a breach of trust he must pay the costs of a suit to repair it, yet he will be entitled to his subsequent costs relating to the ordinary taking of the accounts. *Hewett* v. *Foster*, 7 Beav. 348.

The Court never gives costs to a defaulting trustee so long as he continues in default. *Watson* v. *Row*, 18 Eq. 680; *Re Basham*, 23 C. D. 195; *M'Ewan* v. *Crombie*, 25 C. D. 175.

Where the costs are caused by the trustee's neglect to keep accounts, the plaintiff will not in general be entitled to costs beyond the time when the account is actually rendered or ordered to be rendered, from which time, if the accounts are substantially accurate, the trustee will be entitled to his costs out of the estate. *Ottley* v. *Gilby*, 8 Beav. 602; *Thompson* v. *Clive*, 11 Beav. 475.

However, where trustees have rendered no account, or an insufficient one, the Court frequently orders the application to stand over in order that a proper account may be rendered and vouched out of Court, the costs being reserved. *Re Hayter*, *supra*; *Hilliard* v. *Fulford*, 4 C. D. 389.

If in a suit for an account the defendant states his belief that the plaintiff is considerably indebted to him, and it proves that the defendant is considerably indebted to the plaintiff, the trustee will be ordered to pay the costs. *Parrot* v. *Treby*, Ir. Ch. 254; *Eglin* v. *Sanderson*, 3 Giff. 434.

And if the balance be in favour of the trustee, but far below what he had stated, he will not be entitled to have his costs, or, at least, not the costs of the account itself. *Att.-Gen.* v. *Brewers' Co.*, 1 P. W. 376; *Fozier* v. *Andrews*, 2 Jo. & L. 199.

A trustee will be deprived of costs or may even have to pay them if he refuses to account. *Kemp* v. *Burn*, 4 Giff. 348; *Re Radclyffe*, 50 L. J. Ch. 317.

Or if he wilfully misstate the accounts. *Sheppard* v. *Smith*, 2 B. P. C. 372; and see *Flanagan* v. *Nolan*, 1 Moll. 86.

Or if by any chicanery in his answer he keep the *cestui que trust* from a true knowledge of the accounts. *Avery* v. *Osborne*, Barn. 349; *Reech* v. *Kennegal*, 1 Ves. 123.

Or even if he has kept the accounts in a very confused manner. *Norbury* v. *Calbeck*, 2 Moll. 461.

And an executor will be liable to pay costs if he deny assets and the contrary be established against him. *Sandys* v. *Watson*, 2 Atk. 80.

But an executor, though entitled to have the accounts taken under the direction of the Court, may be ordered to pay costs up to the hearing where he has increased the costs by his litigiousness. *Talbot* v. *Marshfield*, 4 Eq. 661; 3 Ch. 622.

And now, under Ord. 55, r. 1, an executor instituting proceedings to have the accounts taken must satisfy the Court that the action was reasonable to entitle him to costs.

De son Tort.

Trustees *de son tort.*

Upon the principle that any one into whose hands trust property comes with notice of the trust is liable to account for such property, a person who by his own act, or under some erroneous view of his duty, or under an imperfect appointment chooses to take upon himself the character of trustee becomes liable to account for all his receipts while so acting; and such a person cannot be heard to say for his own benefit that he had no right to act as trustee. *Rackham* v. *Siddall*, 1 Mac. & G. 607.

Thus, where a person under the mistaken notion that he as heir or devisee of a trustee is entitled to sell the trust property, sells it and pays the purchase-money to the wrong person, he remains liable for it and cannot deny the trust or repudiate his liability. *Ibid.;* and see *Life Ass.* v. *Siddal*, 3 D. F. & J. 58; *Smith* v. *Smith*, Ir. R. 10 Eq. 273.

And this principle also applies to the case of a person who receives rents for an unknown heir, and he is bound to account as a fiduciary agent or trustee to the heir if the claim is made in due time. *Lyell* v. *Kennedy*, 14 A. C. p. 459.

And generally, if a trustee act in the trusts he cannot excuse himself from a breach of trust on the ground that he did not know who were his *cestuis que trust*, especially where it is one which can only be legalized by the assent of all parties interested. *Ex parte Norris*, 4 Ch. 280.

So, also, a trustee after accepting a trust is liable, though his appointors fail to give legal validity to the appointment by executing the deed, and he is liable if he afterwards allows the trust fund to be wrongly dealt with. *Pearce* v. *Pearce*, 22 Beav. 230; *Hennessey* v. *Bray*, 33 Beav. 96.

But it is otherwise if the trustee has been induced by fraud to accept the office, or if he has accepted a trust under a will on the faith of misleading statements by the

testator. *Fry* v. *Fry*, 27 Beav. 144; *Selby* v. *Bowie*, 9 Jur. N. S. 425; *Youde* v. *Cloud*, 18 Eq. 634; and see *Derbishire* v. *Home*, 3 D. M. & G. 80.

Nor will a solicitor, if he acts only in the character of solicitor to the trustees, be liable as constructive trustee, though he finds investments which are improper and insufficient. *Mara* v. *Browne*, (1896) 1 Ch. 199.

So where trust money was advanced on mortgage, and the same solicitor acted for all parties, the fact of his having been employed to carry out the transaction, and of the money having passed through his bank, did not make him liable for the insufficiency of the security. *Brinsden* v. *Williams*, (1894) 3 Ch. 185.

Executor *de son tort.*

An executor *de son tort* is liable to be sued by the rightful executor, or by creditors, or by the legatees. Walker, 317.

And he is also liable for the due payment of all death duties. Finance Act, 1894, s. 22.

But in an action by a creditor he may plead *plene administravit*. Dyer, 166 b.

And he is not in any event liable for more than the assets which have come to his hands. *Laury* v. *Aldred*, 2 B. & G. 185; *Yardley* v. *Arnold*, Car. & M. 434.

And if he can prove a settled account with the rightful representative before action commenced it is sufficient answer to an action against him for an account. *Hill* v. *Curtis*, 1 Eq. 90.

But he cannot discharge himself by delivering up the assets after action brought, even though no administration was granted till after the action was brought. *Curtis* v. *Vernon*, 3 T. R. 587.

So payments made by an executor *de son tort*, pending an action for an account of an intestate's estate, to a person who took out administration after action brought, were not allowed. *Layfield* v. *Layfield*, 7 Sim. 172.

But an executor *de son tort* cannot, in the absence of the legal personal representative, be sued for the administration

of the estate nor for an account. *Penny* v. *Watts*, 2 Ph. 149; *Rowsell* v. *Morris*, 17 Eq. 20; *Creasor* v. *Robinson*, 14 Beav. 589.

But such an action can be maintained if probate or letters of administration are produced at the hearing, it being immaterial that the action was commenced before the grant. *Horner* v. *Horner*, 23 L. J. Ch. 10; *Bateman* v. *Margerison*, 6 Ha. 496.

An agent of an executor *de son tort* cannot discharge himself by accounting to his principal, since they are both wrongdoers. *Sharland* v. *Mildon*, 5 Ha. 469.

An executor *de son tort* cannot plead a retainer for his own debt, even though the rightful executor assent. *Curtis* v. *Vernon*, 3 T. R. 587.

Wilful Default.

A distinction has been drawn between a charge of wilful default properly so called and a claim for interest on balances retained in his hands by a trustee or executor. *Re Barclay*, (1899) 1 Ch. p. 681.

And with regard to the latter it has been held that, in a proper case, it is competent for the Court, on the further consideration of an action, to charge trustees with interest, whether simple or compound, on balances retained in their hands, although no case of wilful default had been raised by the pleadings, and the question of interest was not referred to in the judgment. *Ibid.*

But as regards wilful default properly so called, though the rule has been somewhat relaxed, it seems still law that if an action be brought for an account, and the plaintiff seeks relief against wilful default, he must in his pleadings allege some specific act of wilful default and pray consequential relief. *Mayer* v. *Murray*, 8 C. D. 424; *Smith* v. *Armitage*, 24 C. D. 727.

And at the hearing must prove some act of wilful default, or at least establish a case for inquiry. *Sleight* v. *Johnson*, 3 K. & J. 292.

And *à fortiori*, where at the original hearing the common accounts only were directed, it is too late to ask relief on further consideration against any wilful act that may have transpired accidentally in the course of other inquiries. *Coope* v. *Carter*, 2 D. M. & G. 292; *Askew* v. *Woodhead*, 28 L. T. 465.

Nor can a trustee be declared liable for wilful default upon a common order made at chambers for the administration of the testator's estate. *Re Fryer*, 3 K. & J. 317; *Partington* v. *Reynolds*, 4 Dr. 253; *Re Delevante*, 6 Jur. N. S. 118; but see *Brooker* v. *Brooker*, 3 Sm. & G. 474.

Nor upon an originating summons otherwise than by consent. *Dowse* v. *Gorton*, (1891) A. C. 190, 202.

But on taking the common account of their receipts executors can properly be, and often are, charged with a *devastavit* arising on the accounts themselves. *Re Stevens*, (1898) 1 Ch. 162, 172.

And if the plaintiff pray an account with interest, and at the original hearing an account is directed, and in the course of the accounts improper balances appear to have been retained, interest on the balances may be asked for at the hearing on further directions. *Shaw* v. *Turbett*, 13 Ir. Ch. Rep. 476; and see *Re Barclay*, *supra*.

If relief against a breach of trust be prayed, and at the original hearing the usual accounts only are directed, but with an inquiry who are the parties interested, it is not too late to ask relief against the breach of trust on further consideration, as before that time the Court was not in a position to deal with the question. *Pattenden* v. *Hobson*, 1 Eq. Rep. 28.

And under the present practice, where the statement of claim alleges wilful default, the Court may at any stage of the proceedings, if evidence of wilful default is adduced,

direct accounts and inquiries upon that footing. *Job* v. *Job*, 6 C. D. 562; *Re Symons*, 21 C. D. 757; *Mayer* v. *Murray*, 8 C. D. 424.

Where a plaintiff has obtained a common administration judgment, he cannot maintain a subsequent action against the same defendant charging him with wilful default in the administration of the same estate without the leave of the Court. *Laming* v. *Gee*, 10 C. D. 715.

Where there are allegations of wilful default or improper conduct on the part of the defendant, it is the duty of the plaintiff to be ready at the hearing to prove such allegations; and where the plaintiff was not in a position at the hearing to go into the charges, the Court would not, unless a strong case were made out for so doing, postpone the inquiry into the conduct of the trustees. *Smith* v. *Armitage*, 24 C. D. 727; and see *Re Stevens*, (1898) 1 Ch. 162, 172.

But the general rule that the charge ought to be disposed of at the trial is not universal, and there may be and are cases where it would be proper to direct an inquiry. *Re Stevens*, (1898) 1 Ch. p. 172.

There is one exception to the rule that wilful default must be pleaded, and that is in an action for account by a mortgagor against a mortgagee in possession. *Mayer* v. *Murray*, 8 C. D. 424, *ante*.

Nor is the case altered if the deed, though in substance a security, be in the form of a deed of trust. *O'Connell* v. *O'Callaghan*, 15 Ir. Ch. R. 31.

And in a case under the old practice, it was held that where executors filed a bill for administration, it was competent for a defendant to allege by his answer a case of wilful default by the executors, and that on proof of it at the hearing the Court would give the necessary directions without obliging the defendant to file a cross bill. *Harvey* v. *Bradley*, 4 Eq. 13.

It is not competent for a remainderman to institute proceedings for relief against wilful default in respect of

the prior life estate, for he has no interest in the income, but only in the corpus. *Whitney* v. *Smith*, 4 Ch. 513.

Interest.

It may be stated as a general rule that if a trustee be guilty of any unreasonable delay in investing the trust fund or transferring it to the hand destined to receive it, he will be answerable to the *cestui que trust* for interest during the period of his laches. *Turner* v. *Turner*, 1 J. & W. 39; *Stafford* v. *Fiddon*, 23 Beav. 286; *Hollingsworth* v. *Shakeshaft*, 14 Beav. 492; *Chugg* v. *Chugg*, W. N. (1874) 185.

And in a proper case, it is competent for the Court, upon the further consideration of an action, to charge trustees with interest, whether simple or compound, on balances retained in their hands, although no case of wilful default was raised by the pleadings, and the question of interest was not referred to in the judgment. *Re Barclay*, *Barclay* v. *Andrew*, (1899) 1 Ch. 674.

But the Court is not in the habit of giving interest on what may be found due for arrears of income. *Blogg* v. *Johnson*, 2 Ch. 225.

An executor or administrator should discharge the testator's liabilities as soon as he has collected assets sufficient for the purpose, and therefore if he keeps money in his hands idle when there is an outstanding debt upon which interest is running, he will himself be charged with interest on a sum equal in amount to the debt, and if the outstanding debt carry interest at five per cent., he will be charged at the same rate. *Tebbs* v. *Carpenter*, 1 Mad. 290, 301; *Hall* v. *Hallett*, 1 Cox, 134; *Turner* v. *Turner*, *supra*.

After payment of debts and legacies, if the executor or administrator be guilty of laches in accounting for the surplus to the residuary legatee or next of kin, he will be charged by the Court with interest for the balance improperly retained. *Ibid.*; *Re Stevens*, (1898) 1 Ch. 162, 172.

So, if the trustee of a bankrupt's estate neglect to pay a dividend to the creditors, he will be ordered to account for the money, with interest from the time when the breach of duty commenced. *Treves* v. *Townshend*, 1 B. C. C. 384; *Re Hilliard*, 1 Ves. jun. 89; *Hankey* v. *Garret*, *ibid.* 236.

And in like manner a receiver of an estate who does not move the Court in proper time to have the rents in his hands made productive, will be ordered to account for the money with interest. *Foster* v. *Foster*, 2 B. C. C. 616; *Hicks* v. *Hicks*, 3 Atk. 274.

And an executor or trustee cannot excuse himself by saying that he made no actual use of the money, but lodged it at his bankers' to a separate account, for it was a breach of trust to retain the money. *Younge* v. *Combe*, 4 Ves. 101; *Franklin* v. *Frith*, 3 B. C. C. 433; *Ashburnham* v. *Thompson*, 13 Ves. 402.

But where an executor conceived himself to be entitled to the residue, and the Court considered his claim to be just in itself, but was obliged from a particular circumstance in the case to give judgment against him, the demand for interest against him was disallowed. *Bruere* v. *Pemberton*, 12 Ves. 386; but see *Sutton* v. *Sharp*, 1 Russ. 146; *Turner* v. *Maule*, 3 De G. & S. 497.

Where trust money has been employed by breach of trust in trade, the *cestui que trust* has the option of taking the actual profits or of charging the executor with interest. *Heathcote* v. *Hulme*, 1 J. & W. 122; *Docker* v. *Soames*, 2 M. & K. 655; *Robinson* v. *R.*, 1 D. M. & G. 257; *post*, p. 182.

And executors cannot disguise the employment of the money in their business under a garb of a loan to one of themselves. *Townend* v. *Townend*, 1 Giff. 201.

And an executor who is a trader is considered to employ the money in trade if he lodge it at his bankers' and place it in his own name. *Treves* v. *Townshend*, 1 B. C. C. 384; *Sutton* v. *Sharp*, 1 Russ. 146; *Rocke* v. *Hart*, 11 Ves. 61; *Re Jones*, 49 L. T. 91; but see *Browne* v. *Southouse*, 3 B. C. C. 107; *Burdick* v. *Garrick*, 5 Ch. 233.

Ordinary rate.

Until very recently an executor or trustee has usually been charged with interest at four per cent. except in those special cases where interest at the higher or mercantile rate of five per cent. has been charged.

It has, however, long been felt that the rates to be charged ought to be reduced from four per cent. to three, and from five per cent. to four. See *Re Goodenough*, (1895) 2 Ch. 537; *Re D. Cleveland*, *ib.* 542; *Re Lambert*, (1897) 2 Ch. 169.

And it seems now settled that three per cent. instead of four will be charged in accordance with the practice adopted by all the judges of first instance in the Chancery Division. *Re Barclay*, (1899) 1 Ch. p. 686.

But the rule, whatever it be, only holds good where it does not appear that the executor has made greater interest, for the Court invariably compels the executor to account for every farthing he has actually received. *Forbes* v. *Ross*, 2 Cox, 116.

It may here be noticed that under the Judicial Trustees Act, 1896, r. 11, a judicial trustee unnecessarily retaining trust money in his hands is liable to pay interest at such rate not exceeding five per cent. as the Court may fix.

Higher rate.

It is not very clear from the decided cases under what circumstances the Court will charge executors and trustees with more than the ordinary rate of interest or with compound interest.

It was laid down by Romilly, M. R., (1) that if an executor retain balances in his hands which he ought to have invested, the Court will charge him with simple interest at four per cent.; (2) that if, in addition to such retention, he has committed a direct breach of trust, or if the fund has been taken by him from a proper state of investment in which it was producing five per cent., he will be charged with interest at five per cent.; (3) that if, in addition to this, he has employed the money in trade or speculation for his own benefit or advantage, he will be charged either with the profits actually obtained from the

use of the money or with interest at five per cent., and also with yearly rests, that is, with compound interest. *Jones* v. *Foxall*, 15 Beav. 392; and see *Saltmarsh* v. *Barrett*, 31 Beav. 349; *De Cordova* v. *De Cordova*, 4 A. C. 692.

The decisions undoubtedly seem to establish, in accordance with the view just quoted, that an executor will be charged with interest at the higher rate where he is guilty not merely of retaining balances, but of improper conduct, or has employed the trust money in trade for his own benefit, or has been guilty of other acts of misconduct. *Tebbs* v. *Carpenter*, 1 Mad. p. 306; *Knott* v. *Cottee*, 16 Beav. p. 79; *Mousley* v. *Carr*, 4 Beav. 53.

Five per cent.

Thus five per cent. interest has been charged against trustees and executors in the following instances:—

—refusing to account. *Wroe* v. *Seed*, 4 Giff. 425.

—showing false balance in accounts. *Stackpoole* v. *Stackpoole*, 4 Dow. 209.

—keeping no accounts and raising money out of the estate and lending it to themselves. *Hooper* v. *Hooper*, W. N. (1874) 174.

—omitting to invest in good securities or at the best interest. *Forbes* v. *Ross*, 2 B. C. C. 430.

—selling stock unnecessarily and keeping money in hand. *Pocock* v. *Reddington*, 5 Ves. 794; *Crackett* v. *Bethune*, 1 J. & W. 588.

—appropriating the money. *Mousley* v. *Carr*, 4 Beav. 49; *Burdick* v. *Garrick*, 5 Ch. 233.

—keeping money in hand with an intention to misappropriate it. *Att.-Gen.* v. *Alford*, 4 D. M. & G. 519.

—calling in money standing on good security at five per cent. *Mosley* v. *Ward*, 11 Ves. 581; *Jones* v. *Foxall*, 15 Beav. 392; *Penny* v. *Avison*, 3 Jur. N. S. 62.

—using testator's farming stock in carrying on a farm. *Walker* v. *Woodward*, 1 Russ. 107.

—unduly retaining money. *M. Berwick* v. *Murray*, 7 D. M. & G. 519; *Dobson* v. *Pattinson*, 5 W. R. 771.

—using balances of rents in trade. *Att.-Gen.* v. *Solly*, 2 Sim. 518.

—mixing trust money with their own at a bank. *Westover* v. *Chapman*, 1 Coll. 177; *Re Jones*, 49 L. T. 91; but see *Melland* v. *Gray*, 2 Coll. 295.

—and where a *devastavit* has been committed. *Bick* v. *Motley*, 2 M. & K. 312; *Docker* v. *Soames*, 2 M. & K. 655; *Ex parte Ogle*, 8 Ch. 711.

But it seems clear that an executor ought not to be charged with the higher rate of interest by way of penalty, and that the Court has no jurisdiction to punish an executor for misconduct by making him account for more than he actually received or ought to have received. *Att.-Gen.* v. *Alford*, 4 D. M. & G. 851; *Vyse* v. *Foster*, 8 Ch. 333; *Penny* v. *Avison*, 3 Jur. N. S. 62.

The true principle, therefore, seems to be to charge him only with the interest which he has received, or which the Court is justly entitled to say he ought to have received, or which it is so fairly to be presumed that he did receive that he is estopped from saying that he did not receive it. *Ibid.*; *Re Barclay*, (1899) 1 Ch. p. 683.

Where money has been employed in trade the rate of interest has, until recently, been almost invariably five per cent., the Court presuming every business to yield a profit to that amount. Lewin, 385; *ante*, p. 179.

Quære whether this is still so. See *Re Barclay*, *supra*.

Whether, where the money has been employed in trade, simple or compound interest shall, as a general rule, be charged is a point upon which the decisions are in conflict, but most of the authorities point to compound interest as the proper measure of liability. *Walrond* v. *W.*, 29 Beav. 586; *Saltmarsh* v. *Barrett*, 31 Beav. 349; *Walker* v. *Woodward*, 1 Russ.107; *Heighington* v. *Grant*, 5 M. & Cr. 258; *Jones* v. *Foxall*, 15 Beav. 388; *Williams* v. *Powell*, *ibid.* 561; cf. *Burdick* v. *Garrick*, 5 Ch. 233; but see *Att.-Gen.* v. *Solly*, 2 Sim. 518; *Vyse* v. *Foster*, L. R. 7 H. L. 318, 347.

But where there is an express trust to accumulate and the executor having the money in his hands disregards the injunction, there is no doubt that compound interest will be decreed. *Raphael* v. *Boehm*, 11 Ves. 92, 107; *Re Emmet*, 17 C. D. 142; *Re Barclay*, *supra*.

And it will in like manner be decreed against an administrator whose duty it is to invest the dividends from time to time in Consols. *Gilroy* v. *Stephens*, 51 L. J. Ch. 834.

An executor will not in general be charged with interest but from the end of a year from the time of the testator's death. It frequently may be necessary for an executor to keep large sums in his hands, especially during the first year after the decease of the testator. But after that, if the Court observes that the executor keeps money in his hands without any apparent reason, but merely for the purpose of using it, then it becomes negligence and a breach of trust, the consequence of which is that the Court will charge the executor with interest. *Forbes* v. *Ross*, 2 Cox, 115; and see *Moyle* v. *Moyle*, 2 R. & M. 710; *Johnson* v. *Prendergast*, 28 Beav. 480.

It will be noticed that in the preceding cases trustees and executors have been decreed to pay interest in respect only of moneys actually come to hand and improperly retained; for when a fund has never been received, but has been inexcusably left outstanding and lost, it seems the Court contents itself with holding the trustees liable for the principal without charging them with interest. *Tebbs* v. *Carpenter*, 1 Mad. 290; and see *Lowson* v. *Copeland*, 2 B. C. C. 156.

Where an executor under a mistaken impression of the law, but acting *bonâ fide*, retained one-third of the residue himself and paid two-thirds to his co-executors he was held accountable to the person entitled for the whole, but with interest only on the one-third retained by himself. *Saltmarsh* v. *Barrett*, 31 Beav. 349; but see *Att.-Gen.* v. *Köhler*, 9 H. L. C. 655.

But this case has been questioned on the ground that the executor ought to have been dealt with as if he had improperly retained the money in his own hands, on the principle that where a trustee has made an improper payment he is still regarded in equity as having the money in his own hands, and that, accordingly, the executor should have been held accountable for interest on the whole fund. *Re Hulkes*, 33 C. D. 552; *Att.-Gen.* v. *Köhler*, *supra*.

On costs.

A trustee will not be allowed interest on costs, though at the time he paid them he had no trust money in his hands. *Gordon* v. *Trail*, 8 Price, 416.

But if he pays off a debt carrying interest, he stands in the place of the creditor *quâ* interest. *Re Beulah Park Estate*, 15 Eq. 43; *Finch* v. *Pescott*, 17 Eq. 554.

And the rate of interest on debts is still four per cent. *Re Lambert*, *Middleton* v. *Moore*, (1897) 2 Ch. 169, p. 180.

Trade profits.

If a trustee or executor use the fund committed to his care in buying and selling land or in stock speculations, or lay out the trust money in a commercial adventure, as in fitting out a vessel for a voyage, or put it into the trade of another person from which he is to derive certain stipulated gains, or employ it himself for the purposes of his own business or trade, in all these cases, while the trustee or executor is liable for all losses, he must account to the *cestui que trust* for all clear profits. *Docker* v. *Soames*, 2 M. & K. 655, 664; *Willett* v. *Blanford*, 1 Ha. 253; *Parker* v. *Bloxam*, 20 Beav. 295; *Wedderburn* v. *W.*, 2 Keen, 722; *Townend* v. *T.*, 1 Giff. 201; *Flockton* v. *Bunning*, 8 Ch. 323, n.

If the trustee or executor be one only of a firm he must account for his share of the profits. *Vyse* v. *Foster*, 8 Ch. 309; L. R. 7 H. L. 318; *Jones* v. *Foxall*, 15 Beav. 388.

And where a trustee retired from his trust in consideration of his successor paying him a sum of money, it was held that the money so paid must be treated as forming

part of the trust estate and be accounted for by the retiring trustee. *Sugden* v. *Crossland*, 3 S. & G. 192.

As to charging the executor with interest instead of taking profits, see *ante*, p. 182.

Allowances.

It is well established as a general rule that a trustee shall have no allowance for his trouble and loss of time. For time and trouble.

And the rule applies not only to trustees in the strict sense of the word, but to all who are virtually invested with a fiduciary character, as executors and administrators, mortgagees, receivers, committees of lunatics' estates, a surviving partner, &c. Lewin, 744.

But there is an exception to the rule where the trust property is abroad, and it is the custom of the local Courts to allow remuneration. *Ibid.*; *Chambers* v. *Goldwin*, 9 Ves. 267.

A person who has carried on business with another man's money under circumstances which make him liable to account for profits will be allowed compensation for his skill and exertions in the management of the concern. *Brown* v. *De Tastet*, Jac. 284; *Wedderburn* v. *W.*, 22 Beav. 84; *Brown* v. *Litton*, 1 P. W. 140.

But a person will not be permitted, except under very special circumstances, to charge anything for his management of a trade or business where he has been clothed in express terms with the character of a trustee or executor. *Forster* v. *Ridley*, 4 D. J. & S. 452; *Stocken* v. *Dawson*, 6 Beav. 371.

But where the trustee refuses to act without it and under special circumstances the Court has allowed remuneration. *Marshall* v. *Holloway*, 2 Swan. 432, 452; *Brocksopp* v. *Barnes*, 5 Mad. 90; *Re Freeman*, 37 C. D. 148.

But the trustee should not take the law into his own hands, and if he retain a salary out of the trust estate, the Court will order him to refund it. *Re Bedingfield*, 57 L. T. 332.

There is no inflexible rule that no remuneration will be allowed a trustee appointed by the Court receiver of the trust estate. *Re Bignell, B.* v. *Chapman*, (1892) 1 Ch. 59.

A solicitor who sustains the character of trustee will not be permitted to charge for his time, trouble, or attendance, but only for his actual disbursements. *New* v. *Jones*, 9 Jarm. Prec. 338; and see *post*, Chap. VIII.

The rule against allowances to trustees is, however, merely a general one in the absence of express directions to the contrary, for there is no objection to the settlor himself directing compensation to the trustee for his services either by the gift of a sum in gross, or by the allowance of a salary. *Webb* v. *E. Shaftesbury*, 7 Ves. 480; *Robinson* v. *Pelt*, 3 P. W. 250; *Willis* v. *Kibble*, 1 Beav. 559.

And if a testator give an executor a salary for his trouble, the allowance will not cease on the institution of a suit. *Baker* v. *Martin*, 8 Sim. 25.

If an executor does not act he cannot claim a legacy given to him for his trouble in the executorship. *Re Hawkins*, 33 Beav. 570; *Slaney* v. *Witney*, 2 Eq. 418.

And an annuity limited to a trustee during the continuance of his office cannot be claimed when the duties of the office have ceased by the absolute vesting of the property. *Hull* v. *Christian*, 17 Eq. 546.

Where the settlor has directed a remuneration to the trustee, but has not declared the amount, a reference will be directed. *Ellison* v. *Airey*, 1 Ves. 111; *Willis* v. *Kibble*, 1 Beav. 559.

The trustee may also at the time of accepting the trust contract for an allowance or remuneration for his services, but bargains of this kind are watched by the Court with exceeding jealousy, and must be freely made and without

pressure. *Ayliffe* v. *Murray*, 2 Atk. 58; *Barrett* v. *Hartley*, 12 Jur. N. S. 426; *Moore* v. *Frowd*, 3 M. & Cr. 48.

Where the contract is valid originally the conditions of it must be fulfilled to the letter, or the trustee is not entitled to his reward. *Gould* v. *Fleetwood*, cited 3 P. W. 251, n.

As a trustee will not be permitted to charge for his trouble and loss of time, he may, on proper occasions, employ agents at the expense of the estate.

Thus he may, if the case require it, employ persons to collect rents or debts. *Re Weall*, 42 C. D. 674; *Re Brier*, 26 C. D. 238.

Or if the accounts be complicated, may employ an accountant at the expense of the trust. *Henderson* v. *M'Iver*, 3 Mad. 275.

So where an outgoing partner left his capital in the business and subsequently died having bequeathed it upon trust to one for life and for others in remainder, it was held that the trustee was at liberty to employ accountants and valuers for an audit and stock-taking once a year, or oftener if special circumstances so required, and that the expenses thereof were payable out of capital and not out of income. *Re Bennett*, *Jones* v. *Bennett*, (1896) 1 Ch. 778.

Allowances for expenses.

Though a trustee is allowed nothing for his trouble he is allowed everything for his expenses out of pocket. It flows from the nature of the office whether expressed in the instrument or not, that the trust property shall reimburse him all charges and expenses incurred in the execution of the trust. *Feoffees of Heriot's Hospital* v. *Ross*, 12 Cl. & F. 512, 515; *Worrall* v. *Harford*, 8 Ves. 8; and see *Morison* v. *Morison*, 7 D. M. & G. 214.

And even where trustees had been wrongfully appointed but had acted *bonâ fide* and believed themselves to have been duly appointed, they were allowed their costs, charges and expenses notwithstanding the defect of title. *Travis* v. *Illingworth*, W. N. (1868) 206.

A trustee or legal representative will be entitled to be reimbursed his travelling expenses if they are properly incurred. *Malcolm* v. *O'Callaghan*, 3 M. & Cr. 62; and see *Bridge* v. *Brown*, 2 Y. & C. 181.

Trustees are justified in employing a solicitor for the better conduct of the trust. And are entitled to be paid all costs properly incurred for which they are liable to the solicitor so employed. *Macnamara* v. *Jones*, Dick. 587; *Watson* v. *Row*, 18 Eq. 680.

But an executor or administrator will not be allowed the charges of his solicitor for doing things which the executor ought strictly to have done himself. *Harbin* v. *Darby*, 28 Beav. 325.

But where one of two executors became bankrupt it was held that the other solvent executor should be allowed only his own proportion of the costs up to the bankruptcy out of the estate, the defaulter's proportion being set off against the debt due from him, but that the costs incurred by both subsequently to the bankruptcy should be allowed in full. *Smith* v. *Dale*, 18 C. D. 516; *M'Ewan* v. *Crombie*, 25 C. D. 175.

But the sums paid will, at the instance of the *cestui que trust*, though not liable to taxation, be looked over and moderated. *Johnson* v. *Telford*, 3 Russ. 477, *infra*.

And trustees, if they employ one of themselves as solicitor, instead of engaging a third person, will be answerable for all the consequences if they are misled by him. Lewin, 751.

If in conveyancing matters the solicitor of the trustees elects to be remunerated according to the old system, it may be matter for the consideration of the trustees whether they should continue to employ him on those terms. *Re United Kingdom, &c.*, 37 W. R. 486.

A trustee will be allowed fees given to counsel. *Poole* v. *Pass*, 1 Beav. 600.

And the costs of opposing a Bill in Parliament which

affects the trust estate. *Re Nicholl*, W. N. (1878) 154; *Re Ormrod*, (1892) 2 Ch. 318.

And all costs properly incurred for the protection of the estate. *Re Earl de la Warr*, 16 C. D. 587; and see 45 & 46 Vict. c. 38, s. 36; *Hamilton* v. *Tighe*, (1898) 1 Ir. R. 123; *Re Davis*, 57 L. J. Ch. 3.

The Settled Land Act, 1882, s. 43, expressly authorises trustees of a settlement to reimburse themselves, or pay and discharge out of the trust property all expenses properly incurred by them.

Costs of suit.

If a trustee be sued by a stranger concerning the trust and have his costs paid him as between party and party, and the *cestui que trust* afterwards institute proceedings for an account, the trustee will be allowed his necessary costs in the former suit and will not be concluded by the amount of the taxation. *Amand* v. *Bradburne*, 2 Ch. Cas. 138.

And if a trustee as defendant be ordered to pay the plaintiff's costs, he will, unless he has forfeited his right by misconduct, be entitled to be reimbursed the costs so paid, and also those which he has himself incurred. *Lovat* v. *Fraser*, L. R. 1 H. L. Sc. 37.

The fact of a trustee having been unsuccessful in litigation will not, in the absence of misconduct, disentitle him to be reimbursed his costs. *Courtney* v. *Rumley*, 6 Ir. R. Eq. 99.

Secus if the proceedings were occasioned by his own negligence, or were improperly instituted by himself. *Caffrey* v. *Darby*, 6 Ves. 497; *Peers* v. *Ceeley*, 15 Beav. 209; *Leedham* v. *Chawner*, 4 K. & J. 458.

And a trustee will not be allowed without question whatever costs he has paid his solicitor, for the bill though not taxed will be moderated by the Court by a deduction of such charges as may appear irregular and excessive. *Johnson* v. *Telford*, 3 Russ. 477; *Allen* v. *Jarvis*, 4 Ch. 616; and see *Brown* v. *Burdett*, 40 C. D. 244, 254; *Re Scowby*, (1897) 1 Ch. 741.

A trustee will not be allowed interest on costs, *ante*, p. 184. And as to taxation, see *post*, p. 194.

Costs of trustee defending his conduct.

A trustee defending, for the benefit of the trust estate, a suit to impeach a compromise on the ground of fraud does not lose his costs because he has also in the same suit to defend his own character. *Walters* v. *Woodbridge*, 7 C. D. 504.

And generally, it seems that a trustee is entitled to recover out of the trust estate all his costs of an action which he has properly defended. *Re Llewellin*, 37 C. D. 317, 327.

But an executor who separately defended an unsuccessful action was not entitled to be indemnified, as the outlay being to protect himself against a charge of *devastavit* was not in the strict line of his duty towards his *cestuis que trust*. *Hosegood* v. *Pedler*, 66 L. J. Q. B. 18.

But a trustee should, in all cases of doubt, obtain the opinion of the Court as to the propriety of defending an action, and if, acting on a doubtful opinion of counsel, he defends a hopeless action, he will not be allowed his costs. *Re Beddoe*, (1893) 1 Ch. 547.

Expenses besides remuneration.

Even a specific remuneration given by the testator to his trustees for their services in the trust is no reason for excluding them from the usual allowance for expenses. *Wilkinson* v. *Wilkinson*, 2 S. & S. 237; and see *Webb* v. *Shaftesbury*, 7 Ves. 480; *Fountaine* v. *Pellet*, 1 Ves. jun. 337.

But where annuities were expressly given to trustees for their services and collecting of rents, it was held that they could not claim the annuities in addition to a commission of greater amount allowed to a collector of rents. *Re Muffit*, 56 L. J. Ch. 600; and *cf. Cox* v. *Bennett*, 39 W. R. 308.

Account of expenses.

A regular account of the expenses should invariably be kept. But where this has not been done, the Court has ordered a reasonable allowance to be made in the gross, at the same time taking care that the remissness of the

trustee in not having kept any account should not meet with any encouragement.

So where a trustee put in a general claim for £2,500, apparently an average estimate of the expenses he had incurred, the Court allowed him £2,000. *Hethersell* v. *Hales*, 2 Ch. Rep. 158.

Extraordinary outlay.

As it is a rule that the *cestui que trust* ought to save the trustee harmless from all damages relating to the trust, so where the trustee has honestly and fairly, without any possibility of being a gainer, laid down money by which the *cestui que trust* is discharged from a loss or from a plain and great hazard of it, the trustee ought to be repaid. *Balsh* v. *Hyham*, 2 P. W. 455; *Benett* v. *Wyndham*, 4 D. F. & J. 259; *James* v. *May*, L. R. 6 H. L. 328.

If trustees make repairs at their own risk and without going to the Court, they may subsequently be called to account in an action; but even where infants are interested the Court would, upon evidence that what had been done had really preserved the property, have jurisdiction to say that it was for their benefit that the property should be taken as improved, and that the trustees or executors ought to be allowed the money expended. *Conway* v. *Fenton*, 40 C. D. 516, 518; *Re Wainman*, 33 Sol. J. 698; *De Cordova* v. *De Cordova*, 4 A. C. 692; *Re Hawker*, *infra*.

So an advance by trustees out of personal estate to the tenant for life for stocking and cultivating a farm forming part of the real estate was allowed, the outlay being beneficial for infant remaindermen. *Re Household*, *H.* v. *H.*, 27 C. D. 553.

So where trustees built a villa on the land in the *bonâ fide* belief that they were improving the estate, they were allowed to take the land themselves, including its value in their general account. *Vyse* v. *Foster*, 8 Ch. 309; L. R. 7 H. L. 318.

And a trustee has been recouped out of a fund in Court money he had expended in rebuilding a mansion-house which had been burnt down. *Jesse* v. *Lloyd*, 48 L. T. 656.

But *quære* whether, apart from the Settled Land Acts, the Court has power to authorise or allow expenditure not in the nature of salvage. *Re Hawker*, 66 L. J. Ch. 341; *Re Montagu*, (1897) 2 Ch. 8.

Expense of carrying on business.

If a trustee is authorised to carry on business and to employ certain specific property for that purpose, the creditors of the business have a right to the benefit of indemnity and lien which the trustee has against the property devoted to the business, but this right is subject to any equities subsisting between the trustee and *cestui que trust* of the specific property. *Re Johnson*, 15 C. D. 548; *Ex parte Garland*, 10 Ves. 110; *Re Blundell*, 44 C. D. 1, 11; *ante*, p. 185.

But where the trustee carries on the business without authority for the benefit of the *cestuis que trust* and incurs liabilities, there is no right in the creditors to come against the trust estate, but they must look to the trustee personally. *Strickland* v. *Symons*, 22 C. D. 666; 26 C. D. 245; and see *Re Evans*, 34 C. D. 597; *Re Gorton*, 40 C. D. 536, 543.

Where the business is carried on in accordance with a general direction and with the assent of the testator's creditors, the executors will be entitled in priority to creditors to be indemnified out of the general estate. *Dowse* v. *Gorton*, (1891) A. C. 190; and see *Re Brooke*, (1894) 2 Ch. 600.

The expenses of a trustee are a first charge or lien upon the estate, and in a suit for administration they will be paid even before costs of suit. *Stott* v. *Milne*, 25 C. D. 710.

The trustee of a void trust deed cannot charge his expenses as against persons who establish the invalidity, though he will be allowed for improvements. *Smith* v. *Dresser*, 1 Eq. 651; *Woods* v. *Axton*, W. N. (1866) 207; and see *Ex parte Russell*, 19 C. D. p. 602; *Dutton* v. *Thompson*, 23 C. D. 278.

Where, however, the deed was only partly set aside or

at the instance of the settlor the trustees were allowed their costs. *Merry* v. *Pownall*, (1898) 1 Ch. 306; *Everitt* v. *E.*, 10 Eq. 405; and see *Re Holden*, 20 Q. B. D. 43; *Re Carter*, (1897) 1 Ch. 776, 782.

Agents of trustees.

Although the trustees themselves are creditors upon the trust fund for their expenses, persons employed by them have no such lien. *Staniar* v. *Evans*, 34 C. D. 470; but see *Blyth* v. *Fladgate*, (1891) 1 Ch. p. 359.

It would be a mischievous principle to hold that every person with whom the trustees had incurred a just and fair demand might come for an account of the whole administration. *Worrall* v. *Harford*, 8 Ves. 8; *Francis* v. *F.*, 5 D. M. & G. 108.

But a solicitor in accounting for his receipts to the trustees may set off his costs. And a positive direction to the trustees to employ a particular person will give him a claim against the trust fund. *Re Sadd*, 34 Beav. 650; *Williams* v. *Corbet*, 8 Sim. 349; *Foster* v. *Elsley*, 19 C. D. 518.

Vice versâ, the agent of a trustee is accountable to the employer only and not to the *cestuis que trust*. *Myler* v. *Fitzpatrick*, 6 Mad. 360; *Maw* v. *Pearson*, 28 Beav. 196; *Re Jackson*, 40 C. D. 495.

Secus, if he has accepted a delegation of the trust or fraudulently mixed himself up with a breach of trust. Lewin, 760.

A trustee can establish no claim to reimbursement where he has incurred the outlay not in the strict line of his duty, and without either the request or the implied assent of the *cestuis que trust*. *Leedham* v. *Chawner*, 4 K. & J. 458; *Collinson* v. *Lister*, 20 Beav. 368; *Hosegood* v. *Pedler*, *supra*, p. 190.

It seems executors are not entitled to their charges and expenses on taxation without an express direction, as they are presumed to retain them and may be allowed them as just allowances. *Humphrys* v. *Moore*, 2 Atk. 108; *Fearns* v. *Young*, 10 Ves. 184; *Blackford* v. *Davis*, 4 Ch. 305.

But executors or trustees are now usually allowed costs of action as between solicitor and client together with any charges and expenses properly incurred relating to the trust beyond costs of action, on the suggestion of counsel that some particular expenses have been incurred, and the case must be supported before the taxing master; it is not the practice in taking the account in chambers to allow those incurred since the action, but they are provided for on further consideration. Lewin, 992.

Set-off.

The general rule is that there can be no set-off where debts are due in different rights. *Bishop* v. *Church*, 3 Atk. 691; *Medlicott* v. *Bowes*, 1 Ves. sen. 207; *Gale* v. *Luttrell*, 1 Y. & J. 180; *Freeman* v. *Lomas*, 9 Ha. 109; and see *Newell* v. *Nat. Prov. &c.*, 1 C. P. D. 496; *Middleton* v. *Pollock*, 20 Eq. 29; *Christison* v. *Bolam*, 36 C. D. 223.

Where money is due *in autre droit*, the only exception which equity has introduced into the principle of a legal set-off is when the money is really and truly the property of one man in the name of another; not when the result of taking the accounts would be to show that the ultimate balance would be his property, but when it is nothing but an account put by one man into the name of another merely for his own convenience. Equitable set-off has always been confined to cases where there was a plain and distinct admission or evidence of there being a simple liquidated and ascertained trust fund. *Re Willis, Percival & Co.*, 12 C. D. 496, 499, per James, L. J.

An executorship account was kept with bankers in the joint names of two executors who were brother and sister. The brother, who was residuary legatee, kept another account of his own at the bank. The bankers filed a liquidation petition, and at the time there was a balance

standing to the credit of the joint account but the other account was overdrawn. Securities had been set apart to answer the legacies, and the testator's debts had been paid, but the executors were jointly liable for some rates and taxes and a solicitor's bill of costs which had not been paid. It was held that the one account could not be set off against the other in the liquidation of the bankers, and that the rules of equitable set-off could not apply unless the brother was so much the person solely beneficially interested in the balance of the joint account, that the Court, without any terms or further inquiry, would have compelled the sister to transfer the account into the brother's name alone. *Re Willis, Percival & Co., supra.*

A debt due from the trust estate to two trustees cannot be set off against a debt due to it by one of the trustees who becomes bankrupt; and unless it clearly appears that the money due to the trustees in fact belongs to the solvent trustee, an inquiry should be asked to ascertain what part of it is, as between the trustees, due to the bankrupt. *M'Ewan* v. *Crombie*, 25 C. D. 175.

But an executor or administrator may set off a legacy or share of personal estate against sums owing and presently payable by the legatee or next of kin either to the testator's estate or to the executor personally. *Jeffs* v. *Wood*, 2 P. W. 128; *Taylor* v. *Taylor*, 20 Eq. 155; *Rees* v. *Rees*, 60 L. T. 260; and *cf. Middleton* v. *Pollock*, 20 Eq. 29.

So where some of the next of kin brought an action against the administrator acting as executor of another estate, and had been ordered to pay the costs of the action which failed, the administrator was entitled to set off the debt due for costs against the shares in the intestate's estate due from him to such next of kin. *Re Jones, Christmas* v. *Jones*, (1897) 2 Ch. 190.

An executor or trustee may set off against a legacy or a share of a mixed fund of residuary real and personal estate a statute-barred debt owing by the legatee to the testator.

Courtenay v. *Williams*, 3 Ha. 539; *Akerman* v. *Akerman*, (1891) 3 Ch. 212; and see *Morley* v. *Sanders*, 8 Eq. 594.

But the principle that executors may set off a legacy as against a statute-barred debt has no application where the debtor is claiming a legal right and not merely seeking the testator's bounty; in such a case the executors have no higher right of set-off than their testator would have had. *Dingle* v. *Coppen*, 79 L. T. 693.

An executor may set off against the legacy of a co-executor the amount of a devastavit committed by the latter. *Sims* v. *Doughty*, 5 Ves. 243; and see *Irby* v. *Irby*, 25 Beav. 632; *cf. Fox* v. *Buckley*, 3 C. D. 508.

An administrator, as we have seen, may set off against a distributive share of a next of kin a debt owing by him to the estate. *White* v. *Cordwell*, 20 Eq. 644; *Re Jones*, *supra*.

But an executor, being also trustee for sale of realty, could not set off a debt due from the heir against a share of the proceeds of the realty which devolved on him by lapse. *Miles* v. *Sherwin*, 33 W. R. 927; but see now Land Transfer Act, 1897.

And where the debt to the estate of a testator could be set off by the executors against a legacy to the debtor, it might also have been set off against a legacy to the wife of the debtor subject to her equity to a settlement; but this can now have a very limited operation. See *M'Mahon* v. *Burchell*, 5 Ha. 325; *Poulter* v. *Shackel*, 39 C. D. 541.

The rule of set-off also applies though the legatee has assigned his legacy for value. *Knapman* v. *Wreford*, 18 C. D. 300; *Re Jones*, *supra;* and see *Cole* v. *Muddle*, 10 Ha. 186.

But a promissory note given to executors by a legatee as a collateral security for the debt of one who is indebted to the testator's estate, does not enable the executors to set off such debt against the legacy to the prejudice of a creditor of the legatee having an express charge upon the legacy. *Smee* v. *Baines*, 31 L. J. Ch. 63.

For the right of set-off must arise out of some contract, express or implied, between the persons to pay and receive the money, or between some persons standing in their position. *Ibid.*, p. 64.

The right of set-off also arises though the legatee has become bankrupt. *Lee* v. *Egremont*, 5 De G. & S. 348; *Bousfield* v. *Lawford*, 1 D. J. & S. 459.

So where a surety for a mortgagor bequeathed to him a share of residue, and after the death of the testator the mortgagor became bankrupt, but neither the mortgagees nor executors proved and the executors made some payments to the mortgagees in pursuance of the testator's liability under his contract of suretyship, it was held that the executors were entitled to retain out of the mortgagor's share of residue the amount of the payments so made with interest at four per cent. *Re Watson*, *Turner* v. *Watson*, (1896) 1 Ch. 925.

But there is no set-off where the bankruptcy of the legatee occurred in the lifetime of the testator. *Cherry* v. *Boultbee*, 4 M. & Cr. 442; *Hodgson* v. *Fox*, 9 C. D. 673.

And if the executor has proved for the debt in the bankruptcy he has abandoned his right of set-off. *Stammers* v. *Elliott*, 3 Ch. 195.

So, also, if the testator be surety for the legatee and the creditor prove in the legatee's bankruptcy, the right of set-off is lost. *Re Binns*, *Lee* v. *Binns*, (1896) 2 Ch. 584.

Where at a meeting of creditors of D., a bankrupt who was indebted to L. his father, a composition was accepted in satisfaction of the debts due to them and the bankruptcy was annulled, and L. who did not prove and was not paid his composition died, having bequeathed to D. a share of his estate, and D. assigned the share to B. and again became bankrupt, it was held that the executors of L. were only entitled to set off the amount of the composition though they had not proved for the debt or composition. *Re Orpen*, *Beswick* v. *Orpen*, 16 C. D. 202.

There cannot, however, be any set-off against a specific legacy. *Akerman* v. *Akerman*, (1891) 3 Ch. 212.

And where executors have set apart and appropriated assets to meet a trust legacy they are trustees of the appropriated fund and cannot claim as executors to set off against the income of it a debt owing from the legatee for life. *Ballard* v. *Marsden*, 14 C. D. 374.

But where executors had in their hands moneys representing profits of the testator's share in a partnership, specifically bequeathed to the debtor, they were held entitled to set them off against the debt. *Re Taylor*, *Taylor* v. *Wade*, (1894) 1 Ch. 671.

An executor does not necessarily lose his right of set-off by paying the legacy into Court. *Knapman* v. *Wreford*, 18 C. D. 300.

The personal interests of a trustee in a trust fund in Court, whether original or derivative, and whether derived voluntarily or by purchase, will be made applicable to the discharge of all claims against him as trustee. *Irby* v. *Irby*, 25 Beav. 632; *Ex parte Parker*, 35 W. R. 595; *Jacubs* v. *Rylance*, 17 Eq. 342.

Statutes of Limitation.

Result of Acts.

It results from the Limitation Acts, 1623, 1833 and 1874, that since 1st January, 1879, twelve years' possession is made a statutory bar to suits in equity in respect of equitable interests; but in case of disability a term of six years is allowed next after the cesser of the disability, subject to the proviso that no suit is to be brought after the lapse of thirty years from the accruer of the right whatever the disabilities.

Express trusts.

In cases of express trusts of land or rent the effect of the Limitation Act, 1833, s. 25, is that as between the trustee and the *cestui que trust* time does not run until

there has been a conveyance to a purchaser for valuable consideration. No possession by a purchaser for valuable consideration short of the statutory period will be a bar. *Att.-Gen.* v. *Flint*, 4 Ha. 147; but see *Carey* v. *Cuthbert*, 7 Ir. R. Eq. 542; 9 *ibid.* 330.

But this does not apparently apply to persons under disability who will be entitled to the full statutory period from the accruer of the right in possession or the cesser of disability. *Att.-Gen.* v. *Magdalen College*, 18 Beav. 239, 250; 6 H. L. C. p. 215; *Life Ass. &c.* v. *Siddal*, 3 D. F. & J. 58.

The 25th section applies only to express trusts, that is, to trusts arising upon the language of some written instrument. Lewin, 1069.

But it is at least doubtful whether an express trust within the statute need be in writing. *Re Sands*, 22 C. D. 614, 617.

And it is clear that such a trust can be *established* by parol evidence where there is also written evidence. *Rochefoucauld* v. *Boustead*, (1897) 1 Ch. 196.

And it is equally clear that a person occupying a fiduciary position who has property deposited with him on the strength of such relation is to be dealt with as an express and not merely a constructive trustee. *Soar* v. *Ashwell*, (1893) 2 Q. B. p. 397.

The true test of an express trust seems to be that the trust arises between the *cestui que trust* and his trustee, and not a stranger: a constructive trust being one which arises when a stranger to a trust already constituted is held by the Court to be bound by the trust in consequence of his conduct and behaviour. *Ibid.*, p. 396.

In other words the intention to create a trust existed from the first in the one case, and in the other an equitable obligation arises although there may have been no intention to create a trust. *Rochefoucauld* v. *Boustead*, (1897) 1 Ch. p. 208.

However this may be, a constructive trust arising from

the acts of parties, or to be made out from circumstances, will not come within the 25th section.

Legacies.

A legacy cannot be recovered under 37 & 38 Vict. c. 57, after twelve years, and neither the fact that the executor has assented to the legacy nor that the legacy is coupled with an implied trust will prevent the operation of the statute. *Re Davis*, (1891) 3 Ch. 119; and see *Re Barker*, (1892) 2 Ch. 491.

But if an express trust of a legacy is declared, and the executor by setting the legacy apart has assumed the character of a trustee, the statute does not run, though he may be protected by the Trustee Act, 1888. *Phillippo* v. *Munnings*, 2 M. & Cr. 309; *Re Swain*, (1891) 3 Ch. 233; and see *Re Smith*, 42 C. D. 302.

Where a legacy was coupled with a trust for the separate use of a married woman, the executor, after assent to the trust, was held to be converted into a trustee. *Hartford* v. *Power*, 2 Ir. R. Eq. 204.

An executor is not a trustee of residue; and by merely signing a residuary account and so assenting to the bequest of residue an executor does not constitute himself trustee of the fund. *Re Rowe*, 58 L. J. Ch. 703; *Re Lacy*, 68 L. J. Ch. 488.

Where a legacy was charged on a contingent reversion, it was held that time ran from the date when the legacy was first payable and not when the reversion fell into possession. *Re Owen*, (1894) 3 Ch. 220.

An executor cannot protect himself by the Statute of Limitations from payment of a debt due from him to the testator by deferring probate of the will. *Ingle* v. *Richards*, 28 Beav. 366.

Nor can he set up his own devastavit as a defence in order to claim the benefit of the statute. *Re Hyatt*, 38 C. D. 609.

Trustee Act, 1888, *s.* 8.

Effect of.

The effect of the Trustee Act, 1888, s. 8, appears to be that in future, whenever an action is brought by a *cestui que trust* against a trustee or person claiming through him, whether in respect of land or money, and whether the defendant is sought to be charged under an express or constructive trust, the defendant will be entitled to the protection of the Statutes of Limitation unless the plaintiff can prove—(1) fraud or fraudulent breach of trust; or (2) that at the time of action brought the trust property or proceeds thereof is or are still retained by the trustee; or (3) that previously to the bringing of the action such property or proceeds were received by the trustee and converted to his use. If the plaintiff brings his case within one of these three exceptions the old law will still apply; if not, the section will take effect. *How* v. *E. Winterton*, (1896) 2 Ch. 626; *Re Gurney*, (1893) 1 Ch. 590; *Whitwam* v. *Watkin*, 78 L. T. 188.

Exceptions.

The first of these three exceptions is confined to fraud to which the trustee was party or privy, and accordingly a trustee will not be deprived of the benefit of the exception because the plaintiff has been defrauded by some other person in respect of the matter complained of. *Thorne* v. *Heard*, (1894) 1 Ch. 599.

The second exception relates to property or the proceeds of property "still retained," and it has been decided that these words must be referred to the point of time when the action is brought, and that the exception is confined to cases in which the trustee at the date of the writ has the trust property or the proceeds thereof either actually in his hands or under his control. If at that date he or any agent for him, as, for example, a banker or solicitor, has the property so that the trustee can get it, the exception applies; but if the property has been lost, whether by negligence or otherwise, or if money which ought to have been accumulated has been paid away, the exception does

not apply. *Thorne* v. *Heard*, (1894) 1 Ch. 599; (1895) A. C. 495; *How* v. *Winterton*, *supra*.

So where the defendant-trustee deposed that he had expended the whole of the trust fund during the plaintiff's minority in maintaining and educating him, he was held entitled to the protection of the Act. *Re Page*, *Jones* v. *Morgan*, (1893) 1 Ch. 304.

Accordingly, the established rule, that when a trustee is proved to have trust property in his possession he must be considered as being in possession for the benefit of the *cestui que trust* until he discharges himself by showing that the property has been duly applied in accordance with the trust, will not assist the plaintiff if the defendant can show that the property at the time of action brought was no longer under his control. *How* v. *E. Winterton*, *supra*.

Where a husband forcibly retained the separate money of his wife, she recovered it nineteen years afterwards from his executors on the ground that he was an implied trustee and had "retained" it within the second exception. *Wassell* v. *Leggatt*, (1896) 1 Ch. 554.

With regard to the third exception: Where money was received by a firm of solicitors for investment, but was never invested, and the firm paid interest on it as though invested and credited themselves in their books with the interest so paid, the Court was of opinion the money was converted to the use of the firm within the meaning of the section. *Moore* v. *Knight*, (1891) 1 Ch. 547.

But where trust money lent on mortgage was, with the concurrence of the mortgagor, applied in payment of a loan due by him to a bank in which one of the trustees was a partner, it was held that the money could not be treated as converted to the use of the trustee. *Re Gurney*, (1893) 1 Ch. 590.

While the old law will still by virtue of the exceptions govern a large number of cases, the operation of the section will extend principally to cases where the relief

sought is in the nature of damages for breach of duty in the conduct of the trust, as, for instance, improper investment or neglect to call in trust moneys, and other cases where he has neither retained nor converted the trust property to his own use. See *Re Bowden*, 45 C. D. 444.

As to the nature of the protection which the statute confers, the effect of the section appears to be that, except in the three specified cases above referred to, a trustee who has committed a breach of trust is entitled to the protection of the several statutes of limitation as if suits for breaches of trusts were enumerated in them. *How* v. *E. Winterton*, *supra*.

The wording of Clause A. of sub-sect. 1 is especially perplexing, and it has been doubted whether it can have any operation at all. *Re Bowden*, *supra*; and see *Mara* v. *Browne*, (1895) 2 Ch. 626, 641. Clause A.

The Legislature appears to have assumed that there might be cases in which, if there were no trust, some action or proceeding might be taken by the plaintiff against the defendant to which some statute of limitations would be a defence. Lindley, L. J., thought that the clause required an answer to the question What action or proceeding, if any, could the plaintiff in the case before him have brought against the defendant in respect of certain accounts complained of if the defendant had not been a trustee? but in answering that question he found himself embarrassed by the consideration that an account in equity, excluding all trust, would have no equitable element in it. *How* v. *Winterton*, *supra*.

In a recent case where one trustee was claiming to enforce a right of contribution against his co-trustee, it was held that as the statutes of limitation would have been defences to such a claim before the Act of 1888 came into operation, Clause A. and not Clause B. was applicable. *Robinson* v. *Harkin*, (1896) 2 Ch. 415.

It will be observed that Clause B. applies to proceedings to which no existing statute of limitation applies. Clause B.

So in an action by residuary legatees against an executor and trustee in respect of a diminution of the legacy caused by delay in realising the estate, it was held that the action was not in substance an action for a legacy within 37 & 38 Vict. c. 57, s. 8, but an action in respect of a breach of trust to which no existing statute of limitations applied, and that therefore the statute could be pleaded and was a bar to the action. *Re Swain, S.* v. *Bringeman*, (1891) 3 Ch. 233.

The time limited.

The cases hitherto decided under the section have generally been treated as falling under Clause B., and accordingly, as that clause introduces the analogy of an action of debt for money had and received, the period has been six years.

Where the action is for an account, Clause A., if it applies to trustees' accounts at all, assumes that some statutes of limitation would be applicable, and therefore puts trustees' accounts on the same footing as other accounts, so that the period would still be six years. But in some cases coming under Clause A. the appropriate statute might possibly be a different one, and the length of period for the running of the statute might be different. *How* v. *E. Winterton*, *supra*.

Whichever clause, therefore, is applicable, the plaintiff is only entitled to an account of the moneys in the hands of the defendant six years before the issue of the writ. *Ibid.*

When time begins to run.

The section has in no way altered the principles which determine the time when the cause of action accrues, which in the case of a breach of trust is from the time when it was committed, except in the case of concealed fraud, when it runs from the discovery. *Thorne* v. *Heard*, (1895) A. C. 495.

Accordingly, where an agent of a trustee acting within the scope of his authority commits a concealed fraud, of which the trustee has the benefit, the trustee though innocent, and although himself not within the first exception above stated, yet time will not begin to run in his favour

until the discovery of the fraud. *Ibid.; British, &c.* v. *Charnwood, &c.*, 18 Q. B. D. 714.

In an action by a deferred annuitant for an account of income which ought to have been accumulated to meet the annuity the statute does not begin to run until his interest has accrued in possession, and if the action is to recover arrears of the annuity it will not run until the time when a payment becomes due. *How* v. *E. Winterton, supra.*

Where the claim is by one trustee against another for contribution, time will not begin to run until the liability is established. *Robinson* v. *Harkin*, (1896) 2 Ch. 415.

By Clause B. the statute is not to begin to run against any beneficiary unless and until the interest of such beneficiary shall be an interest in possession.

And accordingly it may occur that a tenant for life is barred by the lapse of six years from the time when a breach of trust was committed, but that those in remainder are still entitled to sue; and a payment of interest in respect of an improper investment by the trustees to the former will not deprive the latter of the benefit of the statute. *Re Somerset*, (1894) 1 Ch. 231; *Re Turner*, (1897) 1 Ch. 536; *Want* v. *Campain*, 9 T. L. R. 254; *Collings* v. *Wade* (1896), 1 Ir. R. 340, 352.

An estate by implication following an estate by actual gift is a different estate from the former, and the statute does not begin to run under Clause B. till it comes into possession. *Mara* v. *Browne*, (1895) 2 Ch. 69, per North, J.

The Act either does not apply to a trustee in bankruptcy, who is an officer of the Court, or if it does it does not operate to bar the enforcement against such a trustee of an order to account. *Re Cornish*, W. N. (1895) 152.

For form of order for account by trustees entitled to the protection of the Act against liability to render accounts extending beyond six years from the commencement of the action, see *Re Davies, Ellis* v. *Roberts*, (1898) 2 Ch. 142.

Acknowledgment.

An acknowledgment to take a debt out of the statute must be unconditional.

A mere acknowledgment from which no promise to pay can be inferred is not sufficient. Therefore an acknowledgment that the debt is just, couched in terms which prevent a promise to pay from being implied, is not effectual. *Briggs* v. *Wilson*, 5 D. M. & G. 21; *Bethell* v. *Bethell*, 34 C. D. 561.

An acknowledgment by a person filling two characters, executor and devisee, will be attributed to both, but not if he represent two distinct persons. *Fordham* v. *Wallis*, 10 Ha. 217; *cf. Astbury* v. *A.*, *infra*.

Generally an acknowledgment by one trustee does not prevent his co-trustees from setting up the statute. *Dickenson* v. *Teasdale*, 1 D. J. & S. 52; *Richardson* v. *Younge*, 6 Ch. 478; *Astbury* v. *A.*, *infra*; *Barnes* v. *Glenton*, (1899) 1 Q. B. 885.

An acknowledgment of a debt by one of several executors as executor is sufficient to take the case out of the statute, and on his death an order may be made in an administration action for the payment of the debt out of the assets remaining unadministered in the hands of the surviving executors. *Re Macdonald*, *Dick* v. *Fraser*, (1897) 2 Ch. 181.

But an acknowledgment by one of two executors and trustees of real estate, against the wishes of the other, that more than six years' interest is due on a mortgage created by their testator, cannot be treated as the valid act of the two in their capacity of trustees and is not a good acknowledgment within the Real Property Limitation Act, 1833, s. 42. *Astbury* v. *A.*, (1898) 2 Ch. 111.

Laches.

Where an express trust is established, mere lapse of time, if not coupled with other circumstances rendering it unjust to give relief, will not, apart from any statute of limitation, bar the claim of a *cestui que trust*. *Re Cross*, *Harston* v. *Tenison*, 20 C. D. 109; *Rochefoucauld* v. *Boustead*, (1897) 1 Ch. 196.

But after a great length of time which is unaccounted for, the very forbearance may afford a presumption that the claim is relinquished. *Pickering* v. *Stamford*, 2 Ves. jun. 283, 332; *Pattison* v. *Hawkesworth*, 10 Beav. 375; *Sleeman* v. *Wilson*, 13 Eq. 36.

For length of time, where it does not operate as a positive or statutory bar, may operate simply as evidence of assent or acquiescence. *Life Ass.* v. *Siddal*, 3 D. F. & J. 58, 72.

So where there is gross laches, even under an express trust, the Court will not allow a dormant claim to be set up when the means of resisting it have perished, and would not, therefore, cast upon trustees the burthen of proving that rents were collected forty years ago. *Bright* v. *Legerton*, 2 D. F. & J. 606, 617; *Re Cross*, 20 C. D. 109, 121.

So where in an action for account the plaintiff by lying by has rendered it impossible or very inconvenient for the defendant to render an account, he will get no relief. *Pickering* v. *Stamford*, 2 Ves. jun. 283, per Lord Alvanley; and see *Mohan* v. *Broughton*, (1899) p. 211.

So where *cestuis que trust*, knowing their rights, see the estate in possession of others who lay out money in improving it, lie by and make no claim for many years, the Court will be bound to presume a release or waiver. *Chalmer* v. *Bradley*, 1 J. & W. 51, 65.

And though the rules as to stale demands do not apply with equal force, if at all, to express trusts, yet the Court will modify the account against trustees where there has

been delay on the part of the *cestui que trust*, and perhaps presume a release or abandonment of his right. *Knight* v. *Bowyer*, 2 D. & J. 421, 443.

Calling for accounts is always much discouraged after the death of the accounting party if he has lived long enough to have accounted in his lifetime. Therefore, where a *cestui que trust* has lain by after his majority for a long period—nineteen years—the relief will not be granted in the absence of very special circumstances. *Chalmer* v. *Bradley*, 1 J. & W. 51, 62; *Huet* v. *Fletcher*, 1 Atk. 467; *Blair* v. *Ormond*, 1 De G. & S. 428; *Payne* v. *Evens*, 18 Eq. 356.

But the rule now seems to be, not that relief will be granted where there are special circumstances, but *e converso* that it will not be granted except where circumstances render it unjust not to give relief. *Rochefoucauld* v. *Boustead*, (1897) 1 Ch. 196.

And where the relation of trustee and *cestui que trust* continues, the transactions between them not being closed and the delay is attributable to the trustee not having accounted and not having given full information, no time would, at least before the Trustee Act, 1888, have precluded an account from the commencement of the trust. *Wedderburn* v. *Wedderburn*, 4 M. & Cr. 41, 53. And see *Bright* v. *Legerton*, 2 D. F. & J. 606.

Although creditors of a testator lose their right against the executors on the ground of devastavit after six years, their right as against legatees who have been paid without regard to their claims remains; but this right will be lost if they know of the distribution and acquiesce in it so that the position of the legatees is changed in consequence. *Ridgway* v. *Newstead*, 3 D. F. & J. 474; *Blake* v. *Gale*, 32 C. D. 571, 578.

But the executor cannot, when called upon to account, set up his own devastavit as a defence and then claim the benefit of the statute. *Re Marsden*, 26 C. D. 783; *Re Hyatt*, 38 C. D. 609.

Release.

On a final adjustment of the trust accounts it is usual for the trustee on handing over the balance to the parties entitled to require from them an acknowledgment that all claims and demands have been settled.

It is reasonable that when the trustee parts with the whole fund, and so denudes himself of the means of defence, he should be placed by the party receiving the benefit in the utmost security against future litigation; but a receipt in full of all claims extends only to all claims that are then known. *Eaves* v. *Hickson*, 30 Beav. 142.

In practice, therefore, it is usual to require a release under seal, for although an acquittance of this kind may be opened by the *cestui que trust* on showing fraud, concealment or mistake, it is *primâ facie* a solemn, simple, and valid defence, and throws on the releasor the heavy onus of displacing it. *Fowler* v. *Wyatt*, 24 Beav. 232.

In strict right, however, a trustee, in the absence of special circumstances, cannot insist upon a release under seal. *Chadwick* v. *Heatley*, 2 Coll. 137; *Re Wright*, 3 K. & J. 421; *Warter* v. *Anderson*, 11 Ha. 303; *Re Cater*, 25 Beav. 366; *Re Foligno's Mortgage*, 32 Beav. 131.

But it has been held that an *executor*, though he cannot insist on a release from a pecuniary legatee, yet on the estate being wound up has a right to a release from the residuary legatee. *Re Fortune's Trust*, 4 Ir. R. Eq. 251; *King* v. *Mullins*, 1 Dr. 308, 311.

In one case it was held that the trustee was entitled to a release on the ground that the trust was by parol, and that the time of payment was anticipated. *Ibid.*

And in another it was said that every trustee had a right to have some sort of a discharge, perhaps not a release unless the trust was created by an instrument under seal. *Re Wright*, 3 K. & J. 421.

A release of the executors and the estate given by a

pecuniary legatee on payment of part of his legacy, on the footing of the estate being insufficient for the payment of the legacies in full, will not enure for the benefit of the residuary legatee if by reason of additional funds falling in the estate subsequently becomes sufficient to make a further payment to the legatees. *Re Ghost's Trust*, 49 L. T. 588; *Turner* v. *Turner*, 14 C. D. 829.

A trust fund is not unfrequently transferred from the old trustees to new trustees or to executors, and the old trustees insist on a general release before they will part with the fund, while on the other hand the new trustees feel a reluctance to give more than a simple receipt. This request of the old trustees is generally complied with, though it probably could not be enforced, and of course the new trustees could not be called upon to enter into any covenant or indemnity. *Re Cater*, 25 Beav. 366; *Re Hoskin*, 5 C. D. 229; *Re Foligno*, 32 Beav. 131.

The release is drawn by the solicitor of the trustee, and the expense must be paid out of the trust fund. Lewin, 403.

When a trustee pays money under the direction of the Court he is indemnified by the order itself, and is, of course, not entitled to any release from the parties. *Lowndes* v. *Williams*, 24 L. T. 465.

And if trustees pay money into Court they are not entitled to any further release. *England* v. *Tredegar*, 35 Beav. 256.

If *cestuis que trust* refuse to discharge the trustee or to admit the correctness of his accounts he is entitled to have his accounts taken and vouched in Court; but the Court would now probably call upon the *cestui que trust* to examine the accounts out of Court and submit only disputed items to the Court. See *Thomson* v. *Eastwood*, 2 A. C. 215; and *ante*, p. 11.

It has been held that a trustee cannot plead a release without setting out the accounts upon which it is based. *Brooks* v. *Sutton*, 5 Eq. 361.

Accounts against Charity Trustees.

The Real Property Limitation Act, 1833, though applicable to charities, does not limit the liability of express trustees to account, so that charity trustees must (except so far as they may be protected by the Trustee Act, 1888), as express trustees, account upon the same footing as before the Act. *Att.-Gen.* v. *Magdalen College*, 6 H. L. C. 189; *Hicks* v. *Sallitt*, 3 D. M. & G. 816.

But the Court may set a limit to the account on the ground of inconvenience. And where there has been a long period during which a party under an innocent mistake has misapplied a trust fund from the laches of others, and when the accounts have become entangled, the Court while giving relief will fix a period to the account. *Att.-Gen.* v. *Mayor of Exeter*, Jac. 448; 2 Russ. 362.

The period to which the account has been carried back has varied according to the circumstances of each case. Where there is no inconvenience the Court will, as a general rule, carry back the account to the time of the commencement of the misapplication. *Ibid.*

In other cases it was carried back as far as the trustees themselves had stated it (*Att.-Gen.* v. *Corp. of Stafford*, 1 Russ. 547), to the date of a certain Act of Parliament, a period of about thirty years (*Att.-Gen.* v. *Brewers' Co.*, 1 Mer. 495), to the last appointment of new trustees, a period short of ten years (*Att.-Gen.* v. *Mayor of Newbury*, 3 M. & K. 647), to the period when information was first received of the misapplication, or from the time of the filing of the information, or from the date of the decree. See *Att.-Gen.* v. *Drapers' Co.*, 6 Beav. 390.

Occasionally, where the defendant has been in strictness accountable for a very long period, but the right, if enforced, would impose a great hardship, it has been referred to the Attorney-General, as representing the charity, to certify whether, under the circumstances, it might not be proper for the charity to accept a less sum.

Att.-Gen. v. *Mayor of Exeter*, 2 Russ. 370; and see *Att.-Gen.* v. *Corp. of Carlisle*, 4 Sim. 279; *Att.-Gen.* v. *Bretingham*, 3 Beav. 91; *Att.-Gen.* v. *Pretyman*, 4 Beav. 462.

Where the trustees have misapplied the funds through mistake, it is now settled that the Court will not call back any disbursements made before the commencement of the proceedings or before the trustees had notice that the application would be called in question. *Andrews* v. *M'Guffog*, 11 A. C. 311; *Att.-Gen.* v. *East Retford*, 3 M. & K. 35, 37; *Att.-Gen.* v. *Corp. of Exeter*, 2 Russ. 45, 54.

Where the charity funds have been administered by a parish and misapplied, there, as a parish is a fluctuating body and the present ratepayers ought not to pay for past defaults, no retrospective account can be ordered. *Ex parte Fowlser*, 1 J. & W. 70.

The trustees of a Wesleyan chapel which is endowed must render accounts of the endowments to the Charity Commissioners, the exemption of places of worship only applies to the chapel itself. *Re St. John St., &c.*, (1893) 2 Ch. 618. As to accounts to Charity Commissioners, see Tudor Char., 471, 537.

The members of a committee formed to receive subscriptions for charitable purposes are not trustees but agents, and an action for account by some of them against the others cannot be maintained. *Strickland* v. *Weldon*, 28 C. D. 426.

As to costs and useless accounts, see 4 Beav. 71. As to accounts of back rents, see *Att.-Gen.* v. *Davey*, 19 Beav. 521. And as to charging with annual rests, see *Att.-Gen.* v. *Solly*, 2 Sim. 518.

CHAPTER V.

RENTS AND PROFITS.

An account of rents and profits may be sought in equity either (1) independently of relief respecting the corpus of the land, or (2) as incident or collateral to it.

First, where the account is sought independently of other relief.

If the account be sought against an express trustee, then, as the Statute of Limitation does not, in cases not falling within the Trustee Act, 1888, s. 8, run between trustee and *cestui que trust*, it will be directed from the time the rents were withdrawn. *Att.-Gen.* v. *Brewers' Co.*, 1 Mer. 498; *Mathew* v. *Brise*, 14 Beav. 341.

If the claim to the rents rest upon a legal title the plaintiff has then a legal remedy, and under the old practice could not have come into a court of equity at all except in cases where, from the complicated nature of the accounts or other particular circumstances, a court of law would have afforded very inadequate relief. *Jesus College* v. *Bloome*, 3 Atk. 262; *Corp. of Carlisle* v. *Wilson*, 13 Ves. 276. Legal title.

But an infant might have filed a bill for account upon a legal title, as every person entering upon an infant's lands is regarded in the light of a bailiff or receiver for the infant. *Dormer* v. *Fortescue*, 3 Atk. 130; *Wall* v. *Stanwick*, 34 C. D. 763; *Re Hobbs*, 36 C. D. 553; and *post*, p. 215.

The rule, however, did not apply where the infant never had possession, and the land had been held by an adverse party. *Crowther* v. *Crowther*, 23 Beav. 305; but see *Quinton* v. *Frith*, 2 Ir. R. Eq. 414.

The jurisdiction against a person entering during the infant's minority remained, though the bill was not filed until after the infant attained twenty-one, but after six years the statute would be a bar. *Blomfield* v. *Eyre*, 8 Beav. 250; *Wall* v. *Stanwick*, *supra*; *Lockey* v. *Lockey*, Pr. Ch. 518; *Knox* v. *Gye*, L. R. 5 H. L. 674.

And, generally, all persons might have an account upon a legal title in respect of mines, which are a species of trade, but not of timber, without praying an injunction. *B. Winchester* v. *Knight*, 1 P. W. 406; *Jesus College* v. *Bloome*, 3 Atk. 262; *Higginbotham* v. *Hawkins*, 7 Ch. 676; and see *Pulteney* v. *Warren*, 6 Ves. 89; but see *Lee* v. *Alston*, 1 B. C. C. 194.

Executor of pernor.

Although where a remedy lay at law an account could not be had in equity against the pernor of the profits himself, yet after his decease the party entitled to the profits might have considered himself a creditor and have filed a bill in equity for an account of the assets. *Monypenny* v. *Bristow*, 2 R. & M. 117.

Account limited to six years.

Where, as in the preceding cases, a court of equity assumed a concurrent jurisdiction with courts of law, the account was not extended beyond the legal limit of six years, provided the statute were pleaded; but it was otherwise if the defendant did not avail himself of the statute by demurrer, plea, or answer. *Ibid.*

Now the several divisions of the High Court have co-ordinate jurisdiction and matters of account are assigned to the Chancery Division, and it is conceived that the same limit of time will apply to the account as formerly prevailed in Chancery. Under the Rules, Ord. 19, r. 15, the statute must be pleaded if relied upon. Lewin, 1088.

Where legal remedy has expired.

It often happens that a legal remedy *did* exist, but has since, by the death of a party or the determination of the estate, become extinguished. In such a case, as the right was not, but only *is*, without a remedy at law, there seems no ground in general for the interference of a court of

equity. *Barnewell* v. *B.*, 3 Ridg. P. C. 71; *Hutton* v. *Simpson*, 2 Vern. 722; *Norton* v. *Frecker*, 1 Atk. 525, 526.

Where there is mistake;

But if the remedy was lost through mistake the Court upon that principle may interpose. And where the landlord, by reason of a mistake, was not aware of the expiration of the lease and did not enter, the defendant was held liable to account for the mesne profits from the expiration of the lease. *D. Bolton* v. *Deane*, Pr. Ch. 516.

—or fraud.

So equity will relieve where the remedy was prevented by fraud, as where A. was entitled to leasehold estates, but B., concealing the deeds, remained in possession until the term had expired, an account of rents and profits was directed from the time that A.'s title accrued. *Bennett* v. *Whitehead*, 2 P. W. 644.

And generally the Court will in all cases lend its aid where the legal process has been lost, not by any delay on the part of the plaintiff, but through some default of the defendant. *Pulteney* v. *Warren*, 6 Ves. 73.

Secondly, an account may be sought as incident or collateral to relief respecting the *corpus*.

The general rule of equity is, that if the suit for recovery of possession be properly cognisable in a court of equity, and the plaintiff obtains a decree, the Court will direct an account of rents and profits as incident to such relief. *Barnewell* v. *B.*, 3 Ridg. P. C. 66.

In the case of a *cestui que trust* who is following the trust estate into the hands of a person claiming through the trustee under such circumstances that the defendant is himself to be regarded as a trustee, it is clear that the *cestui que trust*, by establishing his claim to the land, has thereby established a right to the mesne rents and profits from the very commencement of his title. *Sturgis* v. *Morse*, 3 De G. & J. 1; *Wright* v. *Chard*, 4 Dr. 673; *Kidney* v. *Coussmaker*, 12 Ves. 158.

And *à fortiori* the rule is so where the plaintiff has been under the disability of infancy during the possession of the defendant, because then the latter is regarded as bailiff

or trustee for the former, or where there has been fraud or suppression on the part of the defendant. *Hicks* v. *Sallitt*, 3 D. M. & G. 782; *Wall* v. *Stanwick*, *ante*, p. 213.

Where the case is that of a plaintiff coming forward not strictly as *cestui que trust*, but still as equitable owner, to recover the estate against one in *bonâ fide* adverse possession, many of the older decisions and *dicta* point to the conclusion that in the absence of special circumstances the account will be directed from the time of the accruer of the title, subject only to the qualification that, by analogy to the legal defence upon the Statute of Limitation, the account will not be carried back beyond six years before the institution of the suit. *Dormer* v. *Fortescue*, 3 Atk. 130; *Hobson* v. *Trevor*, 2 P. W. 191; *Coventry* v. *Hall*, 2 Ch. Ca. 134; *Reade* v. *R.*, 5 Ves. 749; *Harmood* v. *Oglander*, 6 Ves. 215; *Stackhouse* v. *Barnston*, 10 Ves. 470.

The more recent authorities, however, seem to establish that where there is no trust, no infancy, no fraud, and no suppression, where, in short, there is a mere *bonâ fide* adverse possession, the practice of the Court is not to carry back the account beyond the institution of the suit. *Pulteney* v. *Warren*, *supra*; *Hicks* v. *Sallitt*, *supra*; *Morgan* v. *Morgan*, 10 Eq. 99.

Unless there was a demand of possession, or acts equivalent thereto, before proceedings were taken, in which case the account will be carried back to the time of the demand. *Penny* v. *Allen*, 7 D. M. & G. 409.

But it was held by the Court of Appeal in a recent case that in the absence of any special equitable considerations the account should, by analogy to the legal rule, be carried back for such period as the Statute of Limitations allowed. *Hickman* v. *Upsall*, 4 C. D. 144.

In one in which the plaintiff was an infant and the defendant in fact a trustee, but ignorant of his true character, the account was limited to the filing of the bill, except as to money which had been paid into Court.

Drummond v. *D. St. Alban's*, 5 Ves. 433, 439; but see 3 D. M. & G. p. 815.

If the *cestui que trust* or equitable owner be guilty of laches the account will not generally be carried further back than to the time of the institution of the suit, for it was not the plaintiff's own fault that he did not institute his suit at an earlier period. *Dormer* v. *Fortescue*, *supra*; *Pettiward* v. *Prescott*, 7 Ves. 541; *Schroder* v. *Schroder*, Kay, 591. Laches.

And if it be a case of great laches the Court will show its displeasure by not directing an account beyond the date of the decree. *Acherley* v. *Roe*, 5 Ves. 565.

But the Court will in its discretion allow the account to be carried back where the circumstances of the case justify it, and the House of Lords has recently in a case of great laches carried the account back for six years prior to the institution of the suit. *Thomson* v. *Eastwood*, 2 A. C. 215.

It would seem that the Real Property Limitation Act, 1833, has no bearing upon the question how far the account should be carried back, for the action in these cases is not one for recovery of rent within the general purview of the Act. *Grant* v. *Ellis*, 9 M. & W. 113.

Nor is it a suit within the meaning of sect. 42 for the recovery of arrears of rent, which must mean arrears of some definite reserved rent and not mesne profits. If there be any Statute of Limitations applicable by analogy it must be 21 Jac. I. c. 16. See *Hicks* v. *Sallitt*, 3 D. M. & G. 816.

The order to account for mesne rents and profits will not, except in a case of gross fraud, contain the words "which without neglect or default the defendant might have received." *Stacpole* v. *Davoren*, 1 B. P. C. 9.

The assignee who has had the perception of the rents and profits will in the first instance account for them, not however with interest. *Macartney* v. *Blackwood*, 1 R. L. & S. 602.

But if the assignee be insolvent the trustee who

tortiously assigned will then be answerable for the mesne rents and profits personally. *Vandebende* v. *Levingston*, 3 Sw. 625.

If a man have a mere legal title to the possession he has no right to come into equity for the recovery of it, and if he has originally recovered the possession at law he has no manner of right to proceed by bill for an account of rents and profits; as his title to the possession was at law he must proceed for the whole there. *Barnewell* v. *B.*, *ante*, p. 215.

Upon this rule it must be remarked that a dowress and infant were allowed to proceed in equity upon their legal title, and incidentally to the relief pray an account of mesne rents and profits. *Mundy* v. *M.*, 2 Ves. jun. 122.

But by 3 & 4 Will. IV. c. 27, s. 41, the arrears of dower are recoverable for six years only next preceding the commencement of the suit. And the account of an infant will be barred if he does not institute a suit within six years after he has attained his majority. *Lockey* v. *Lockey*, Pr. Ch. 518; and see *Knox* v. *Gye*, L. R. 5 H. L. 674.

If a party be obliged to come into a court of equity for aid to enable him to prosecute his title at law after possession recovered at law, there may be cases in which he may go back for an account of rents and profits in the suit depending in equity. *Dormer* v. *Fortescue*, 3 Atk. 124; *Reade* v. *R.*, 5 Ves. 744.

Or the plaintiff, being obliged to resort to equity on one ground, might, to prevent circuity, have asked complete relief in the first instance in that Court, and if his title were established an account of the rents and profits would have been consequential upon the relief. *Townsend* v. *Ash*, 3 Atk. 336; *Reynolds* v. *Jones*, *infra*.

In these cases the account ought upon principle to be restricted to the same period as that for which the mesne profits were recoverable at law, for the plaintiff recovers from a legal title, and the circumstance of his being

obliged to sue in equity ought not to vary his rights. *Reynolds* v. *Jones*, 2 S. & S. 206.

But in a later case the rule was stated to be that in an adverse suit, in the nature of an ejectment suit, the account is directed only from the filing of the bill. *Thomas* v. *Thomas*, 3 K. & J. 85.

If the plaintiff has been kept out of the estate by the fraud, misrepresentation, or concealment of the defendant, the Court will suppose that had the plaintiff known his just rights he would have commenced his action at law on the first accruer of his title and will then decree an account of the mesne rents and profits against the defendant from that period. *Dormer* v. *Fortescue*, *supra*.

Account against mortgagee.

A mortgagee in possession is constructively a trustee of the rents and profits and bound to apply them in a due course of administration; and it has been held that he is so strictly a trustee that he is liable even after assignment for the rents and profits subsequently accrued, except where the transfer is made by direction of the Court in a redemption action. *Hall* v. *Heward*, 32 C. D. 430.

In creditor's suit.

It is not usual in a creditor's suit for administration to direct an account of rents in the original decree. Mesne rents and profits are never applied unless necessary by reason of a deficiency of other assets; and an account of them will not be directed until, on further consideration, the necessity appears by the insufficiency of the corpus. *Stronge* v. *Hawkes*, 4 D. & G. 655; *Schomberg* v. *Humfrey*, 1 D. & War. 411; *Eardley* v. *Owen*, 10 Beav. 25.

In partition action.

In a partition action, if a defendant one of the tenants in common has been in possession and received more than his share of rents, an account will be directed of rents and profits received by him. *Lorimer* v. *L.*, 5 Madd. 363; *Hyde* v. *Hindley*, 2 Cox, 408.

A defendant may also be charged an occupation rent, but will be allowed all sums properly expended by him in substantial repairs and improvements or laid out on the property with the plaintiff's concurrence. *Pascoe* v. *Swan*,

27 Beav. 508; *Swan* v. *Swan*, 8 Pri. 518; *Watson* v. *Gass*, 51 L. J. Ch. 480.

The accounts are, however, reciprocal, and an allowance for repairs will not be made unless an occupation rent is charged. *Teasdale* v. *Sanderson*, 33 Beav. 534.

In charging a defendant with the balance of the account (of occupation rent and repairs) the amount may be set off against his share, but not against a mortgagee of his share. *Hill* v. *Hickin*, (1897) 2 Ch. 579; Lewin, 1557.

A widow, in accounting for rents and profits received by her as trustee for her son, is entitled, as a just allowance, to her arrears of dower and future payments. *Graham* v. *G.*, 1 Ves. 262.

CHAPTER VI.

PRINCIPAL AND AGENT.

Account against Principal.

GENERALLY speaking an agent has no right to account against his principal in equity since there is no trust or confidence reposed in the principal by the agent, and the principal is in no fiduciary relation towards him. *Padwick* v. *Stanley*, 9 Ha. 627; *Dinwiddie* v. *Bailey*, 6 Ves. 136.

But where an agent is paid a salary or commission in proportion to the profits made or the business done, the question whether he is entitled to have an account taken in a court of equity depends upon whether or not the accounts are of too intricate or complicated a nature to be properly and conveniently gone into by a jury. *Harrington* v. *Churchward*, 29 L. J. Ch. 521; *Smith* v. *Leveaux*, 1 H. & M. 123; *Waters* v. *Shaftesbury*, 14 L. T. 184; *Shepard* v. *Brown*, 11 W. R. 162.

Except in the case of insurance brokers, who may sue their principals for premiums due under policies effected by them even if they have not paid or settled with the underwriters, no agent has any right of action against his principal on any contract entered into on the principal's behalf, whether the agent is himself personally liable on the contract to the other contracting party or not. *Power* v. *Butcher*, 5 M. & R. 327; *Tetley* v. *Shand*, 25 L. T. 658.

Thus, if an agent buy goods and the vendors invoice them to him and take his acceptance for the price, he cannot sue his principal for goods sold and delivered or bar-

gained and sold. His only remedy is an action for indemnity. *Seymour* v. *Pychlau*, 1 B. & A. 14; *White* v. *Benckendorff*, 29 L. T. 475.

A foreign principal cannot be sued on any contract made by a home agent, unless the home agent had authority to establish privity of contract between the principal and the other contracting party, and it clearly appears that it was the intention of the parties to establish such privity. *Malcolm* v. *Hoyle*, 63 L. J. Q. B. 1, *post*.

Account against Agent.

It is the duty of every agent to render just and true accounts to his principal, and to be always ready with them; and in cases of general agency of a fiduciary character the principal has a right to have an account taken in a court of equity. *Makepeace* v. *Rogers*, 4 D. J. & S. 649; *Hemings* v. *Pugh*, 4 Giff. 456; *Finch* v. *Burden*, 12 L. T. 302; *Bowles* v. *Orr*, 1 Y. & C. 464.

In the case of a single agency transaction untainted with fraud, or where the agency is not of a fiduciary character, the agent is not bound to account in equity, unless the accounts are so complicated that they cannot be properly investigated in an action at law. *Navulshaw* v. *Brownrigg*, 2 D. M. & G. 441; *Phillips* v. *P.*, 9 Ha. 471; *Barry* v. *Stevens*, 31 Beav. 258; *Blyth* v. *Whiffin*, 27 L. T. 330.

No principal has a right to have settled accounts reopened unless there is fraud or undue influence, but he may have leave to surcharge and falsify. *Hunter* v. *Belcher*, 2 D. J. & S. 194; *Moziley* v. *Cowie*, 47 L. J. Ch. 271.

But where there is fraud or undue influence they may be opened from the commencement of the agency, and the Statute of Limitations is no defence. *Beaumont* v. *Boultbee*,

7 Ves. 599; *Clarke* v. *Tipping*, 9 Beav. 284; *Middleditch* v. *Sharland*, 5 Ves. 87; *Walsham* v. *Stainton*, 12 W. R. 1863.

The illegality of a transaction entered into by an agent is not a bar to an action for an account in equity unless the contract of agency is itself unlawful. *Williams* v. *Trye*, 23 L. J. Ch. 860; *Knowles* v. *Haughton*, 11 Ves. 168; *Battersby* v. *Smyth*, 3 Madd. 110; *Sykes* v. *Beadon*, 11 C. D. 170.

In all cases of general agency the fiduciary character of the relationship is sufficient to support an action for account, whether the accounts are complicated or not, and even if the receipts and payments are all on one side. *Makepeace* v. *Rogers*, *supra*; *Hemings* v. *Pugh*, *supra*; *Bowles* v. *Orr*, *supra*; *Finch* v. *Burden*, *supra*.

Thus, where an agent is employed to sell property, he may be compelled to account in equity for the proceeds. *Mackenzie* v. *Johnston*, 4 Madd. 373.

A bill for account would always lie against an agent where the matter could not be dealt with properly at law. *Ibid.*; *Foley* v. *Hill*, 2 H. L. C. 28, 35; *King* v. *Rossett*, 2 Y. & J. 33.

But the bare relationship of principal and agent is not enough where there is no fraud and no fiduciary relationship and the matter can be properly investigated at law. To obtain a judgment for account something more than the mere fact of agency must be shown, and the averment that the defendant has received various sums for the plaintiff and has not accounted is not sufficient. *Phillips* v. *P.*, 9 Ha. 471; *Hemings* v. *Pugh*, *supra*; *Barry* v. *Stevens*, *supra*; *Blyth* v. *Whiffin*, 27 L. T. 330; but see *Sellar* v. *Griffin*, 11 W. R. 583.

Thus, bankers are not bound to account in equity to their customers unless the accounts in question are intricate and complicated. *Foley* v. *Hill*, 2 H. L. C. 28.

So it was held that a person who was occasionally employed as a clerk by a solicitor was not bound to account

in equity, though there had been mutual receipts and payments. *Fluker* v. *Taylor*, 3 Drew. 183.

So a mere commission agent, who is not in a fiduciary position, would not be liable to account. See *Kirkham* v. *Peel*, 28 W. R. 941.

A bill for an account against an agent would not lie where he had rendered an account not shown to be incorrect, and had brought an action for the balance. *Barry* v. *Stevens*, 31 Beav. 258; *Shepherd* v. *Morris*, 4 Beav. 252.

Nor where the account consisted of a few simple items easily dealt with in an action for the balance. *Ibid.*; *Moxon* v. *Bright*, 4 Ch. 292.

Nor where, according to the custom of dealing between the parties, the account must be considered to have been settled, although only verbally. *Hunter* v. *Belcher*, 12 W. R. 121, 782; *Tindall* v. *Powell*, 6 W. R. 850.

Nor where there was no contract to keep accounts other than such as had been furnished. *Ibid.*; *Smith* v. *Leveaux*, 2 D. J. & S. 1.

And it would seem that as regards the liability to account there is no distinction between an express trustee and an agent in a fiduciary position. Once establish the fiduciary relationship and accountability follows. Consider *New Zealand*, *&c.* v. *Watson*, 7 Q. B. D. 383, per Baggallay, L. J.

Fraud.

In cases of fraud or undue influence accounts long since settled will be re-opened from the commencement of the agency. And proof of one fraudulent overcharge has been held sufficient to entitle the principal to have the agent's accounts re-opened for a period of twenty years. *Williamson* v. *Barbour*, 9 C. D. 529.

So where there were incorrect entries and amounts unexplained and unaccounted for in the accounts of a deceased agent of a company, who was also a large shareholder, his accounts were re-opened after his death for a period of twenty-five years. *Stainton* v. *Carron Co.*, 24 Beav. 346.

A right of action for an account is barred in equity as well as at law after six years from the time when the right of action accrued. *Knox* v. *Gye*, L. R. 5 H. L. 656. Statute of Limitations.

But the statute does not apply so long as the agency is continuous. *The Pongola*, 73 L. T. 512.

It was formerly held that where an agent was sued in equity in a fiduciary capacity he could not set up the Statute of Limitations. *Burdick* v. *Garrick*, 5 Ch. 233; *Soar* v. *Ashwell*, *ante*, p. 199.

But those cases have been distinguished, and it seems now settled that the existence of the fiduciary relation of principal and agent does not prevent the application of the statute, unless there is an express trust or special circumstances. *Friend* v. *Young*, (1897) 2 Ch. 421; and see *ante*, p. 199.

But where an agent by reason of his fiduciary position is deprived of the benefit of the Statute of Limitations, he will still be entitled to the protection which the Trustee Act, 1888, affords to trustees. *Re Lands Allotment Co.*, (1894) 1 Ch. 616; and see *Whitwam* v. *Watkin*, 78 L. T. 188.

So where it was sought to make directors liable for moneys of the company wrongly employed by them, a summons taken out more than six years afterwards was dismissed, there being no evidence of "fraud or fraudulent breach of trust." *Ibid.*

An agent in accounting for money received to the use of his principal is entitled to take credit for all just allowances, and for any sums expended by him with the authority of the principal, even if they were expended for an unlawful purpose. *Dale* v. *Sollet*, 4 Burr. 2133; *Bayntun* v. *Cattle*, 1 M. & Rob. 265.

Damages for neglect of duty cannot be passed in taking an account, the proper remedy for such damages being an action at law. *G. W. Ins. Co.* v. *Cunliffe*, 9 Ch. 525; and see *Cann* v. *Willson*, 39 C. D. 39.

A principal whose goods his agent had sold to B. with other goods of his own, was entitled to marshall the proceeds of the goods and throw on the proceeds of the agent's own goods advances made to him by B., and so claim a balance due to the agent in account with B. *Broadbent* v. *Barlow*, 3 D. F. & J. 570.

The relation of a commission agent and his principal is not that of vendor and vendee, and therefore the true measure of damages in respect of goods consigned which were not of the description ordered is the loss actually sustained by the principal by reason of the inferior quality of the goods. *Cassaboglow* v. *Gibbs*, 9 Q. B. D. 220.

As to the principles on which accounts are taken at the suit of a manager with a salary varying with the profits, see *Rishton* v. *Grissell*, 5 Eq. 326; 10 Eq. 396.

Disclosure.

No agent is permitted to enter as such into any transaction in which he has a personal interest, in conflict with his duty to his principal, unless the principal, with a full knowledge of all the material circumstances and of the exact nature and extent of the agent's interest, consents. The principal may repudiate any such transaction or recover any profit made by the agent. *Rothschild* v. *Brookman*, 5 Bli. N. S. 165; *Parker* v. *McKenna*, 10 Ch. 96; *Birt* v. *Burt*, 22 C. D. 604; *Tyrrell* v. *Bank of London*, 10 H. L. C. 26.

It is not sufficient for the agent to merely disclose that he has an interest, or to make such statements as would put the principal on inquiry. The burden of proving full disclosure lies on the agent. *Dunne* v. *English*, 18 Eq. 524; *Re Olympia*, (1898) 2 Ch. 153.

It is immaterial that the transaction is a fair one, since it is the duty of an agent to promote the interests of his principal, and he will not be permitted to enter into engagements in which his own interest is in conflict with that duty. *Aberdeen Ry. Co.* v. *Blakie*, 2 Eq. R. 1281; *Gillett* v. *Peppercorne*, 3 Beav. 78.

So where a solicitor purchased property from his client

without disclosing his interest therein, it was held that he must account for the full amount of profit made by him upon the sale with interest at five per cent. *Tyrrell* v. *Bank of London*, 10 H. L. C. 26.

No agent can become a principal and deal on that footing without full disclosure. *Wilson* v. *Short*, 6 Ha. 366; *Williamson* v. *Barbour*, 9 C. D. 529.

Every custom which converts an agent into a principal, or otherwise gives him an interest at variance with his duty, is unreasonable, and will not bind the principal who has not notice thereof. *Hamilton* v. *Young*, 7 L. R. Ir. 289; *De Bussche* v. *Alt*, 8 C. D. 286; *Robinson* v. *Mollett*, L. R. 7 H. L. 802.

Where an agent who is employed to purchase property on behalf of his principal purchases it in his own name or on his own behalf, and it is transferred or otherwise made over to him, he becomes a trustee thereof for the principal. *Lees* v. *Nuttall*, 2 M. & K. 819; *Austin* v. *Chambers*, 6 Cl. & F. 1; *James* v. *Smith*, (1891) 1 Ch. 384.

Where an agent enters into any contract or transaction with his principal or principal's representative, he must act with the most perfect good faith, and make full and fair disclosure of all the material circumstances and everything known to him which would be likely to influence the conduct of the principal or his representative. *Waters* v. *Shaftesbury*, 14 L. T. 184; *Charter* v. *Trevelyan*, 11 Cl. & F. 714; *Savery* v. *King*, 5 H. L. C. 627; *Ward* v. *Sharp*, 53 L. J. Ch. 313.

Where any question arises as to the validity of any such contract or transaction, or of any gift made by a principal to his agent, the burden of proving that no advantage was taken and that there was perfect good faith and full disclosure lies upon the agent. *Ibid.*

Where it is sought to set aside a transaction on the ground of want of disclosure or good faith, proceedings must be taken within a reasonable time after the circum-

stances relied on become known. *Wentworth* v. *Lloyd*, 10 H. L. C. 589.

Secret profits.

No agent is permitted to acquire any personal benefit in the course of his agency without the knowledge and consent of the principal. *Parker* v. *McKenna*, 10 Ch. 96; *Morrison* v. *Thompson*, L. R. 9 Q. B. 480; *Re North Australian, &c.*, 1 Ch. 322; *Imp. Mercantile, &c.* v. *Coleman*, L. R. 6 H. L. 189.

Every agent must account for every benefit, and pay over to the principal every profit acquired by him in the course of the agency without the consent of the principal, even if in acquiring the benefit or profit the agent incurred a possibility of loss, and the principal suffered no injury thereby. *Williams* v. *Stevens*, L. R. 1 P. C. 352; *Parker* v. *McKenna*, *supra*.

Thus an agent who purchases a debt due from his principal to a third person is only entitled to recover from his principal the amount he actually paid. *Reed* v. *Norris*, 2 M. & C. 361, 374; *Carter* v. *Palmer*, 8 Cl. & F. 657.

The employment of a person as confidential agent disables him from obtaining any personal benefit in the course of his employment except with the principal's consent, and the disability continues for so long after the fiduciary relation has ceased as the reasons on which it is founded continue to operate. *Carter* v. *Palmer*, *supra*; *Hobday* v. *Peters*, 28 Beav. 349.

So if an agent instructed to sell at a minimum price sells at a large profit. *De Bussche* v. *Alt*, 8 C. D. 286; and see *Barker* v. *Harrison*, 2 Coll. 546.

So, too, if an agent is instructed to buy at a certain price and buys at much less, he must account for the profit. *Thompson* v. *Meade*, 7 T. L. R. 698.

And where an agent makes a secret profit, and there are no accounts remaining to be taken, he is bound to pay over such profit as money had and received to the use of the principal. *Morrison* v. *Thompson*, L. R. 9 Q. B. 480.

A partner in negotiating a lease on behalf of the firm,

who stipulated for a personal benefit, was held accountable to the firm for that benefit. *Fawcett* v. *Whitehouse*, 1 R. & M. 132; and see *Featherstonhaugh* v. *Fenwick*, 17 Ves. 298.

A. bought shares at 2*l.* and asked B. to authorise him to buy at 3*l.* B. gave the authority, and A. transferred his shares to B. at 3*l.*, representing that C. was the vendor. It was held that A. must account for the profit of 1*l.* per share. *Kimber* v. *Barber*, 8 Ch. 56; see *Cavendish-Bentinck* v. *Fenn*, 12 A. C. 652.

So where an agent obtains discount and charges his principal the full price, he will be disallowed the discount although he did not charge any commission as an agent. *Turnbull* v. *Garden*, 20 L. T. 218.

So a shipmaster must account to the owners for the profit made by the sale of a cargo of his own, and not merely for reasonable freight. *Shallcross* v. *Oldham*, 2 J. & H. 609.

So an agent who supplies goods to his principal is only entitled to charge cost prices and not profit prices. *Ritchie* v. *Couper*, 28 Beav. 344; and see *Williamson* v. *Hine*, (1891) 1 Ch. 390.

But commission agents who sell goods and buy others with the proceeds need only account for the proceeds of the goods sold on the principal's behalf, and are not bound to account for the profit on the sale of the goods bought with the proceeds, because such profit is not made in the course of the agency. *Kirkham* v. *Peel*, 44 L. T. 195.

Misapprehension as to extent of remuneration.

Where a principal knows that his agent will receive remuneration from third persons in the course of the agency, and acquiesces in his so doing under a misapprehension as to the extent of the remuneration, such remuneration is not a benefit or profit acquired without the consent of the principal unless the agent misinformed or intentionally misled him as to the extent thereof, or knowing that he laboured under such a misapprehension neglected to correct it.

It is usual for underwriters to allow insurance brokers for punctual payment of premiums certain discount in addition to the ordinary commission of five per cent. on each re-insurance. This, it has been held, the principal is not entitled to recover. *Great Western Ins.* v. *Cunliffe*, 9 Ch. 525; and see *Norreys* v. *Hodgson*, 13 T. L. R. 421; *Holden* v. *Webber*, 29 Beav. 117.

Every person who employs an agent with the knowledge that the agent receives remuneration from third persons, and who does not choose to inquire what the charges of the agent will be, must allow all the usual and customary charges of such an agent, and is not entitled to dispute them because he was not aware of the extent of the remuneration usually received by such agents. *Baring* v. *Stanton*, 3 C. D. 502; *cf. Queen of Spain* v. *Parr*, 39 L. J. Ch. 73.

Bribes.

Where an agent accepts a bribe he is liable to account for the money or for the highest value of the property while in his possession, and to pay over the amount as money received to the use of the principal, with interest at five per cent. *Mayor of Salford* v. *Lever*, *infra*.

It is immaterial to inquire whether the mind of the agent was biassed or not. *Shipway* v. *Broadwood*, (1899) 1 Q. B. 369.

And where an agent is induced by bribery to depart from his duty to his principal, the person who bribed the agent is liable, jointly and severally with the agent, to the principal for any loss incurred by him in consequence of the breach of duty, without taking into account the amount of the bribe or any part thereof that may have been recovered by the principal from the agent as money received to his use. *Mayor of Salford* v. *Lever*, (1891) 1 Q. B. 168; *Morgan* v. *Elford*, 4 C. D. 352; *Phosphate Sewage Co.* v. *Hartmont*, 5 C. D. 394, 448.

And the person who bribed is liable, though the agent deposits with the principal the amount of the bribe, and the principal agrees to allow him what is recovered from

the person who bribed. *Mayor of Salford* v. *Lever*, *supra*; *cf. Lands Allotment Co.* v. *Broad*, 2 Manson, 470.

So where a person gave an agent a gratuity in order to influence him generally in favour of the giver, and he was in fact so influenced, the contract was voidable by the principal though the gratuity was not given in direct relation to the particular contract. *Smith* v. *Sorby*, 3 Q. B. D. 552, n.; *Hough* v. *Bolton*, 1 T. L. R. 606.

The claim of a principal in respect of a bribe received by his agent is barred by the Statute of Limitations after the expiration of six years from the time when the principal became aware of the bribery. *Metropolitan Bank* v. *Heiron*, 5 Ex. D. 319; but see *The Pongola*, 73 L. T. 512, *ante*, p. 225.

And where the agent invests the money, and the relation between the parties is not that of trustee and *cestui que trust*, the principal is not entitled to follow the money. *Lister* v. *Stubbs*, 45 C. D. 1.

Except in the case of solicitor and client, the general rule is, that a gift *inter vivos* from principal to agent is valid if the agent proves that there was no undue influence on his part. *Hunter* v. *Atkins*, 3 M. & K. 113. Gifts.

Where a banker or other agent, with notice of the trust, deals with trust property coming to his hands in a manner inconsistent with the trust, or is otherwise a party to a breach of trust, he is personally liable to the *cestui que trust* for the property so dealt with, or for such breach of trust. *Att.-Gen.* v. *Corp. of Leicester*, 7 Beav. 176; *Morgan* v. *Stephens*, 3 Giff. 226. Breach of trust.

So where a banker transfers trust money from a trust account to the private account of the trustees, he is liable to the beneficiaries for the amount so transferred, whether he acquired any personal benefit from the transaction or not. *Pannell* v. *Hurley*, 2 Coll. 241; *Foxton* v. *Manchester*, *&c.*, 44 L. T. 406; *Ex parte Kingston*, 6 Ch. 632; *Ex parte Adair*, 24 L. T. 198; *Bodenham* v. *Hoskyns*, 2 D. M. & G. 903.

So where an agent of an executor knowingly applies part of the assets of the testator in satisfaction of advances made to the executor for his own business, he is personally liable to account to the beneficiaries under the will. *Wilson* v. *Moore*, 1 M. & K. 127, 337.

But if the agent has no knowledge that a breach of trust is being committed, he is not liable merely because he acts as agent in a transaction which constitutes a breach of trust. *Barnes* v. *Addy*, 9 Ch. 244.

Accountable for all money received.

Subject to the right to interplead, every agent who receives money to the use of the principal is bound to pay over or account for such money to the principal, notwithstanding claims made by third persons in respect thereof, even if the money was received in respect of a void or illegal transaction. *Bousfield* v. *Wilson*, 16 L. J. Ex. 44; *De Mattos* v. *Benjamin*, 63 L. J. Q. B. 248; *Bridger* v. *Savage*, 15 Q. B. D. 363.

Thus a turf commission agent is bound to pay over to the principal the amount of any winnings received by him in respect of bets, though the bets themselves are void. *Ibid.*

But where money is obtained by an agent wrongfully, or paid to him by mistake or for a consideration which fails, he may show that he has repaid it; and where money is paid to him in respect of a voidable contract he may show that the contract has been rescinded and the money repaid, even though rescinded on the ground of his own fraud. *Newall* v. *Tomlinson*, L. R. 6 C. P. 405.

Thus an agent sells a horse and receives the purchase-money. The sale is subsequently rescinded on the ground of the agent's fraud and the money repaid. The agent is not liable to the principal for the amount of the purchase-money. *Murray* v. *Mann*, 17 L. J. Ex. 256.

An agent who receives money to the use of two or more principals jointly is bound to account to them jointly, and is bound to pay over to one or more of them the whole or any part of such money without the consent of the other or others, whatever may be the rights of the principals in

respect of such money as between themselves. *Hatsall* v. *Griffith*, 2 C. & M. 679; *Heath* v. *Chilton*, 12 M. & W. 632; and see *Lee* v. *Sankey*, 15 Eq. 204.

Accountable to third persons.

Except as stated below, no agent is liable or accountable to any third person in respect of money in his hands which he has been directed or authorised to pay to such third person. *Hill* v. *Royds*, 8 Eq. 290; *Johnson* v. *Robarts*, 10 Ch. 505; *Morrell* v. *Wootten*, 16 Beav. 197.

But where a specific fund in the hands of the agent is assigned or charged by the principal in favour of a third person the agent is bound, on receiving notice to hold the fund, or so much thereof as is necessary to satisfy the charge, to the use of such third person, subject, however, to any lien or set-off the agent may have against the principal at the time when he receives notice. *Webb* v. *Smith*, 30 C. D. 192; *Roxburghe* v. *Cox*, 17 C. D. 520.

There must, however, be an equitable assignment or charge and not a mere authority to pay money out of the fund. *Ibid.*; *Schroeder* v. *Central Bank*, 34 L. T. 735; *Hopkinson* v. *Forster*, 19 Eq. 74; *Ex parte Hall*, 10 C. D. 615.

And where an agent is authorised to pay money in his hands or coming to his hands to a third person, and he expressly or impliedly contracts with such third person to pay him or to hold the money on his behalf, he is personally liable to pay such third person or to hold the money to his use, even if the principal has become bankrupt or has countermanded his authority. *Crowfoot* v. *Gurney*, 9 Bing. 372; *Robertson* v. *Fauntleroy*, 8 Moore, 10; *Griffin* v. *Weatherby*, L. R. 3 Q. B. 753; *Noble* v. *Nat. Dis. Co.*, 29 L. J. Ex. 210.

Stockbrokers.

Where an agent is authorised to deal at a particular place or in a particular market, he is entitled to be indemnified by the principal against all loss and liabilities and to be reimbursed all expenses incurred by him according to the custom of that place or market, provided the custom

was reasonable or the principal had notice of it. *Walter* v. *King*, 13 T. L. R. 270; *Perry* v. *Barnett*, 15 Q. B. D. 388; *Coates* v. *Pacey*, 8 T. L. R. 474.

Thus if a stockbroker incur liabilities in respect of calls or infant transferee or otherwise under the rules and regulations of the Stock Exchange, he is entitled to be indemnified by his principal. *Hodgkinson* v. *Kelly*, 6 Eq. 496; *Peppercorne* v. *Clench*, 26 L. T. 656; *Biederman* v. *Stone*, L. R. 2 C. P. 504; *Chapman* v. *Shepherd*, *ib.* 228.

So, by the usage of the Stock Exchange, a broker who contracts as such to buy stock is justified in immediately re-selling the stock in the event of the death, bankruptcy, or insolvency of the principal, and is entitled to recover from the principal or his representative the amount of any loss incurred on the re-sale. *Lacey* v. *Hill*, *Crowley's Claim*, 18 Eq. 182; *S. C.*, *Scrimgeour's Claim*, 8 Ch. 921; see *Ellis* v. *Pond*, *infra*.

He is also entitled to close his account, but not to close part of it only, if the principal fails to duly pay differences. *Samuel* v. *Rowe*, 8 T. L. R. 488; *Hogan* v. *Shaw*, 5 T. L. R. 613.

Where a stockbroker wrongfully sells the stock of his principal he loses his right of indemnity against the principal, and though he is entitled to recover the money advanced by him in payment of the stock, the principal is entitled to recover from the broker in account damages in respect of the loss sustained by the wrongful sale. *Ellis* v. *Pond*, (1898) 1 Q. B. 426.

Sub-agents.

There is no privity of contract between a principal and sub-agent as such, whether the sub-agent was appointed with the authority of the principal or not, and therefore a sub-agent is not accountable to the ultimate principal. *New Zealand*, *&c.* v. *Watson*, 7 Q. B. D. 374; *Montagu* v. *Forwood*, (1893) 2 Q. B. 350.

And on the same principle that an agent is only liable to account to his own principal, he is not liable to account to persons for whom the principal is trustee. *Att.-Gen.*

v. *Chesterfield*, 18 Beav. 596; *Maw* v. *Pearson*, 28 Beav. 196.

But it seems that the relation of principal and agent may be established by an agent between his principal and a third person if the agent is expressly or impliedly authorised to constitute such relation, and it is the intention of the agent and of such third person that such relation should be constituted. *De Bussche* v. *Alt*, 8 C. D. 286.

Solicitor's town agent.

The same principle applies to the London agent of a country solicitor. There being no privity of contract between the client and the London agent, the client cannot recover the proceeds of a cause from him as money received to the client's use. *Robbins* v. *Fennell*, 17 L. J. Q. B. 77.

So a London agent, in the ordinary course, gives credit to the country solicitor and not to the client, and has no remedy except his lien against the client for costs, and such lien as against the client is limited to the amount due from the client to the country solicitor. *Ex parte Edwards*, 8 Q. B. D. 262; *Waller* v. *Holmes*, 1 J. & H. 239.

So where a client gives money to his solicitor to pay a debt and costs, and the solicitor remits the amount by his own cheque to his London agent for the purpose, and the agent retains the amount in satisfaction of a debt due to him from the solicitor, the agent is not liable to the client for money had and received to the client's use. *Cobb* v. *Becke*, 14 L. J. Q. B. 108; see *Ex parte Edwards*, *supra*.

Crown agents.

A public agent is not accountable to any third person, either at law or in equity, in respect of any money which as a public agent it is his duty to pay to such third person. *Gidley* v. *Palmerston*, 3 B. & B. 275; *Dunn* v. *Macdonald*, (1897) 1 Q. B. 555.

This also applies to agents of foreign States. *Twycross* v. *Dreyfus*, 5 C. D. 605; *Henderson* v. *Rothschild*, *infra*.

The Crown, therefore, cannot be made to account as agent. *Rustomjee* v. *The Queen*, 2 Q. B. D. 69.

Nor can the Lords of the Treasury or Secretaries of State. They are answerable to the Crown and to the

Crown alone. *Reg.* v. *Secretary for War*, (1891) 2 Q. B. 326; *Reg.* v. *Treasury*, L. R. 7 Q. B. 387.

So a Secretary of State is not accountable as a trustee for funds voted by Parliament and received by him from the Treasury for the public service. *Grenville-Murray* v. *Clarendon*, 9 Eq. 11.

And where booty was granted by the Queen to the Secretary of State for India in Council in trust to distribute it among those found entitled to it, it was held that he being merely the agent of the Crown to distribute the fund was not liable to account as a trustee to the persons entitled. *Kinloch* v. *Secretary of State for India*, 7 A. C. 619; and see *Rustomjee* v. *The Queen*, *supra*.

Foreign governments.

Agents for a foreign loan having advertised that interest would be paid in full and having funds in their hands remitted by the foreign government which were sufficient for the purpose, were held not to have constituted themselves trustees for the bondholders, nor specifically appropriated the money, and the government having afterwards changed its mind, they were not liable. *Henderson* v. *Rothschild*, 33 C. D. 459.

A foreign government as standing in the place and suing the agent of a rebel government, after the rebellion had been suppressed could only have such an account as would have been taken between the agent and the rebel government, and with a submission to pay what should be found due from them. *U. S.* v. *McRae*, 8 Eq. 69, 76; *Republic of Peru* v. *Dreyfus*, *infra*.

The acts of a *de facto* and recognised government by their duly authorised agents must be treated by the tribunals of this country as binding on their *de jure* successors. See *Republic of Peru* v. *Peruvian Guano Co.*, 36 C. D. 489.

Where a revolutionary government has been recognised by the government of a foreign State, the restored government must treat a contract between the revolutionary government and a subject of the foreign State as valid. *Republic of Peru* v. *Dreyfus*, 38 C. D. 348.

Where a home agent contracts on behalf of a foreign principal he is presumed to have no authority and to contract personally, unless a contrary intention clearly appears from the terms of the contract or the surrounding circumstances. *Hutton* v. *Bullock*, L. R. 9 Q. B. 572; *Dramburg* v. *Pollitzer*, 28 L. T. 470. Foreign principals.

A foreign principal, therefore, cannot sue or be sued on any contract made by a home agent, unless the agent had authority to establish privity of contract between the principal and other contracting party, and unless it clearly appears that it was the intention of the agent and other contracting party to establish such privity. *Malcolm* v. *Hoyle*, 63 L. J. Q. B. 1; *Die Elbinger* v. *Claye*, L. R. 8 Q. B. 313; and see *Henderson* v. *Rothschild*, *supra*.

An auctioneer who pays a deposit over to a vendor is personally liable to refund the amount on the default of the vendor, because it was his duty to hold it as a stakeholder until the completion of the contract or the purchaser's refusal to complete. *Furtado* v. *Lumley*, 6 T. L. R. 168; *Galland* v. *Hall*, 4 T. L. R. 761. Auctioneer.

But he is not liable to pay interest, however long he may have held the deposit, until it has been demanded and he has improperly refused to pay it over to the person entitled, at all events unless he is shown to have received interest on the money. *Lee* v. *Munn*, 1 Moore, 481; *Gaby* v. *Driver*, 2 Y. & J. 549; *Curling* v. *Shuttleworth*, 6 Bing. 121, 134; and see *post*, p. 242.

Co-agents not being partners are not as such responsible to the principal for the acts or defaults of each other. *Cullerne* v. *L. & S. Bldg. Soc.*, 25 Q. B. D. 485; *Perry's Case*, 34 L. T. 716; *Land Credit Co.* v. *Fermoy*, 5 Ch. 763. Co-agents.

But see now the Directors' Liability Act, 1890, as to the liability of directors, &c. for misrepresentation in a prospectus or notice inviting subscriptions for shares.

An agent of an executor *de son tort* who collects assets and pays them over to his principal is personally liable to Executor *de son tort*.

account for the assets to the rightful executor or administrator, or to the beneficiaries. *Sharland* v. *Mildon*, 5 Ha. 469; *Padget* v. *Priest*, 2 T. R. 97; *Coote* v. *Whittington*, 16 Eq. 534.

But an agent who acts by the authority of a person who is subsequently granted probate or letters of administration is not liable to account as an executor *de son tort*, because the title of the executor or administrator relates back to the death and justifies the acts of the agent *ex post facto*. *Sykes* v. *Sykes*, L. R. 5 C. P. 113; *Hill* v. *Curtis*, 35 L. J. Ch. 133.

Neglect to account.

Where an agent is permitted to retain for investment money belonging to his principal, he is in the position of a trustee, and is liable as such. *Burdick* v. *Garrick*, 5 Ch. 233; *Power* v. *Power*, L. R. 13 Ir. 281.

Where an agent fails to keep and preserve correct accounts, and is called upon for an account of his agency, everything will be presumed against him that is consistent with established facts. *Gray* v. *Haig*, 20 Beav. 219; *Jenkins* v. *Gould*, 3 Russ. 385.

So if he mixes the property of the principal with his own, everything not proved to be his own will be deemed to be the principal's. *Lupton* v. *White*, 15 Ves. 432.

And where an agent pays his principal's money into his own banking account, he is liable for the amount in the event of the failure of the bank, even though acting gratuitously. *Massey* v. *Banner*, 1 Jac. & W. 241.

An agent who improperly refuses to pay over money on request is chargeable with interest from the date of the request. *Harsant* v. *Blaine*, 56 L. J. Q. B. 511.

Where a solicitor and confidential agent neglected to keep regular and proper accounts he was deprived of his costs and charges. *White* v. *Lincoln*, 8 Ves. 363; *cf. Re Lee*, 4 Ch. 43.

Attachment.

Where an agent is ordered by a court of equity to pay over money received by him in a fiduciary capacity, he may be attached on default in such payment, though he

may have parted with the money and become bankrupt. *Marris* v. *Ingram*, 13 C. D. 338; *Crowther* v. *Elgood*, 34 C. D. 691; *Litchfield* v. *Jones*, 36 C. D. 530; *Re Smith, Hands* v. *Andrews*, 9 T. L. R. 238.

Set-off.

If the particular purpose for which money is deposited with an agent fails, or a balance remains after such purpose is fulfilled, he must return the money or balance to the principal, and is not entitled to set off a debt due to him from the principal. *Stumore* v. *Campbell*, (1892) 1 Q. B. 314; *Re Mid-Kent Fruit Factory*, (1896) 1 Ch. 567.

Where an agent is authorised to receive purchase-money and place it to the credit of the principal in an account of mutual dealings between the principal and agent, and the agent receives the money after an act of bankruptcy but without notice and before the receiving order, the money becomes an item in the account between the principal and agent, and may be set off by the agent as against the trustee in bankruptcy. *Elliott* v. *Turquand*, 7 A. C. 79; see 46 & 47 Vict. c. 52, s. 38.

A delivery of property to an agent with authority to convert and receive the proceeds is giving credit to the agent within the meaning of the Bankruptcy Act, 1883, and he is entitled, on the bankruptcy of the principal, to exercise the right of set-off given by the Act though the authority has not been exercised and the property not converted. *Naoroji* v. *Bank of India*, L. R. 3 C. P. 444; *Palmer* v. *Day*, (1895) 2 Q. B. 618.

Every person who, in dealing with an agent, is led by the conduct of the principal to believe that the agent is the principal is discharged from liability by payment to or settlement with the agent, and is entitled as against the principal to set off any debt due from the agent personally, provided that when the debt was incurred he had no notice that the agent was not in fact the principal. *Borries* v. *Imperial Ottoman Bank*, L. R. 9 C. P. 38; *Montagu* v. *Forwood*, (1893) 2 Q. B. 350; *Mildred* v. *Maspons*, 8 A. C. 874; *Cooke* v. *Eshelby*, 12 A. C. 271.

So where an agent pledged the goods to brokers as security for a specific advance, and authorised them to sell, and the brokers sold, but before receiving the proceeds had notice that the principal was the owner, the principal was entitled to the balance of the proceeds after deducting the advance, and the brokers were not entitled to set off such balance against a general account due to them from the agent. *Kaltenbach* v. *Lewis*, 10 A. C. 617.

But where the agent has a lien on the goods as against the principal, the payment to or settlement with the agent will operate as a discharge notwithstanding notice; and such payment or settlement may, to the extent of the lien, be by way of set-off or settlement of accounts between the agent and the person making the payment or settlement. *Warner* v. *M'Kay*, 1 M. & W. 591; *Drinkwater* v. *Goodwin*, Cowp. 251; *Hudson* v. *Granger*, 5 B. & A. 27.

An insurance broker has a right of set-off against the underwriter when he has a personal interest in the payment of the amount claimed to be set off. *Lee* v. *Bullen*, 27 L. J. Q. B. 161; *cf. Elgood* v. *Harris*, (1896) 2 Q. B. 491.

But there is no such right of set-off in an action by the representatives of a deceased underwriter. *Houstoun* v. *Robertson*, 6 Taunt. 448, 451.

In order to constitute a right of set-off as against the principal, each of the debts must be liquidated. *Turner* v. *Thomas*, L. R. 6 C. P. 610.

But, except as above, the principal is not bound by a payment or settlement or set-off with the agent unless made in the ordinary course of business and in a manner actually or apparently authorised by him. *Linck* v. *Jameson*, 2 T. L. R. 206; *Crossley* v. *Magniac*, (1893) 1 Ch. 594; *Catterall* v. *Hindle*, L. R. 2 C. P. 368.

Interest.

An agent is not liable to pay interest on money received to the use of his principal except where he receives or deals with it improperly, or refuses to pay it over on demand. *Harsant* v. *Blaine*, 56 L. J. Q. B. 511; *Pearse* v. *Green*, 1 Jac. & W. 135.

In such cases interest is payable from the time when he so receives or deals with the money, or from the time of the demand, as the case may be. *Wolfe* v. *Findlay*, 6 Ha. 66.

Where an agent at the request of his principal retained large sums in his hands and duly accounted for the same, he was held not liable to pay interest, though he had made use of the money for his own purposes. *Chedworth* v. *Edwards*, 8 Ves. 48.

But, as a general rule, where an agent applies the principal's money to his own use, he is bound to pay interest thereon, it being his duty to act in the agency solely for the principal's benefit. *Rogers* v. *Boehm*, 2 Esp. 704.

So where a solicitor sold property under a power of attorney and paid the proceeds into the account of his firm, who made use of it, he was held liable to pay interest at five per cent. *Burdick* v. *Garrick*, 5 Ch. 233.

And where an agent, who undertook to invest his principal's money, kept large balances in his hands, he was held liable to pay interest on such balances. *Brown* v. *Southouse*, 3 Bro. C. C. 107; *Barwell* v. *Parker*, 2 Ves. 364.

Where an agent had the entire management of his principal's affairs for many years without being called upon for an account, and errors were then discovered, and upon a bill being filed for an account a large sum was found due, he was held, in the absence of fraud, not liable to pay interest. *Turner* v. *Burkinshaw*, 2 Ch. 488.

Interest, where it does not arise from contract, can only be awarded as damages for wrongful detention. *Webster* v. *British Empire, &c.*, 15 C. D. 169.

Where a solicitor at a sale received the deposit as agent of the vendor he was held liable for interest from the date of a demand by the vendor. *Edgell* v. *Day*, L. R. 1 C. P. 80.

In this respect there is an essential difference between

an agent and a stakeholder. A stakeholder is not liable to pay interest, even if he uses and himself obtains interest on the money.

Thus, where an auctioneer received a deposit and invested and obtained interest on the amount, he was not liable to pay over interest on completion of the sale. *Harrington* v. *Hoggart*, 1 B. & Ad. 577; but see *Lee* v. *Munn*, *ante*, p. 237.

An agent is bound to pay interest on all bribes. *Boston Fishing Co.* v. *Ansell*, 39 C. D. 339; *Nant-y-glo Iron Co.* v. *Grave*, 12 C. D. 738.

And on all profits made in the course of his agency without the principal's knowledge. *Benson* v. *Heathorn*, 1 Y. & C. 326; *Tyrrell* v. *Bank of London*, 10 H. L. C. 26.

And in all cases of fraud or wilful concealment. *Hardwicke* v. *Vernon*, 14 Ves. 504.

CHAPTER VII.

DIRECTORS AND PROMOTERS.

Directors. DIRECTORS are in the position of agents, and to some extent of trustees towards the company. *York & N. M. Ry.* v. *Hudson*, 16 Beav. 485, 505; *Imp. Merc. Ass.* v. *Coleman*, L. R. 6 H. L. 189; *Gray* v. *Lewis*, 21 W. R. 925; Buckley, 496.

They are not, however, express or direct trustees, since the property of the company is not vested in them. *Smith* v. *Anderson*, 15 C. D. p. 275; *Re Faure Electric Co.*, 40 C. D. p. 150.

Neither directors nor officers of a company are permitted to retain any pecuniary benefits acquired in the conduct of the company's business unless the particulars of such benefits are fully explained to and approved of by the shareholders. *Gen. Ex. Bank* v. *Horner*, 9 Eq. 480; *Mann* v. *Edinburgh Tramways*, 9 T. L. R. 102; *Re Oxford Bldg. Soc.*, 35 C. D. 502.

So where a director of a company established for acquiring and working ships, with the consent of his co-directors, but without the knowledge of the shareholders, undertook the office of ship's husband, it was held that he must refund to the company with interest all moneys received by him for commission and brokerage. *Benson* v. *Heathorn*, 1 Y. & C. 326.

So a solicitor-director is not permitted to receive any remuneration for his services, professional or otherwise, unless such remuneration is sanctioned by resolution of the shareholders. *N. E. Ry.* v. *Jackson*, 19 W. R. 198.

And where the directors of a company, on the transfer of the business to another company, receive from the

transferees, without the knowledge of the transferors, a large sum by way of compensation, they must pay over such sum to the first-mentioned company. *Gaskell* v. *Chambers*, 26 Beav. 360.

Where a person agreed to become a director of a company on condition that the promoters indemnified him in respect of the amount paid for qualification shares, and he afterwards resigned, and the promoters in pursuance of the agreement purchased the shares, which had become valueless, from him at the original price, it was held that he must account to the company for the value of the indemnity constituted by his secret agreement with the promoters, *i.e.*, for the original price of the shares. *Re North Australian Co.*, (1892) 1 Ch. 322.

So where the first five directors of a company accepted qualification shares from the promoter with the knowledge and approval of each other, they were held jointly and severally liable to pay to the liquidator the original value of such shares. *Re Carriage Supply Ass.*, 27 C. D. 322; and see *Re Postage Stamp, &c.*, (1892) 3 Ch. 566.

But where a reasonable salary had been drawn by a managing director without the authority of any resolution and without any specific notice to the shareholders, but the item appeared in the accounts and every shareholder either knew or had the means of knowing the fact, it was held that the director was not liable to account to the company for the money. *Hadley & Co.* v. *Hadley*, 77 L. T. 131.

Disclosure.

It is the duty of a director to promote the interests of the company, and he will not be permitted to enter into engagements in which his own interest is in conflict with that duty. *Aberdeen Ry.* v. *Blakie*, 2 Eq. R. 1281.

So where a director of a company enters into a contract on behalf of the company with a firm of which he is a member, the contract is voidable in equity by the company quite apart from the question of its fairness or unfairness. *Ibid.*

A director of a railway company purchased on the company's behalf a concession of a line of which he was the concealed owner, and it was held that the company might repudiate the transaction. *Gt. Luxembourg Ry.* v. *Magnay*, 25 Beav. 586.

So where a director sold a vessel to his company as from a stranger, it was held that he must account to the company for the profit made by him with interest. *Benson* v. *Heathorn*, 1 Y. & C. 326.

In such cases the principal may either rescind the transaction or may affirm it and claim the profit made, at his option. *Cavendish-Bentinck* v. *Fenn*, 12 A. C. 652.

Where a director proposes to contract with his company, it being provided by the articles of association that directors may contract with the company on disclosing their interest, it is his duty to declare the full extent and exact nature of his interest and not merely that he has an interest. *Imp. Merc.* v. *Coleman*, L. R. 6 H. L. 189.

And where a director of a railway company contracted with the company to take refreshment rooms, the Court refused to decree specific performance of the contract against the company. *Flanagan* v. *G. W. Ry.*, 19 L. T. 345.

Bribes.

A director who accepts a bribe is liable to account for the money, or for the highest value of the property while in his possession, with interest at five per cent. *Ante*, p. 230.

So where a director of a company, who was a shareholder in two other companies, accepted bonuses from such other companies in consideration of his giving them orders for goods on behalf of the first-mentioned company, and the articles of association provided that the directors might contract with the company, it was held that the bonuses were bribes, and that the director must account to the company for them with interest. *Boston Fishing Co.* v. *Ansell*, 39 C. D. 339; and see *Bulfield* v. *Fournier*, 11 T. L. R. 282.

Where the secretary of a company, when making a contract on behalf of the company with the vendor, stipulated that he should receive, and did receive, from the vendor 600 fully paid-up shares, it was held that he must account to the company for the highest value borne by the shares during the time they were held by him, which in this case was assumed to be the nominal value of the shares. *M'Kay's Case*, 2 C. D. 1.

Where the director of a company, before the transactions between the promoter and the company have been finally completed, accepts his qualification shares from the promoter, the director must account to the company for the highest value attributable to the shares during the time they were held by him, with interest on such value from the date the shares were transferred to him to the date of the action. *Nant-y-glo Iron Co.* v. *Grave*, 12 C. D. 738; *Eden* v. *Ridsdale's Lamp Co.*, 58 L. J. Q. B. 579; *Mitcalfe's Case*, 13 C. D. 169.

So if a director receives the money to pay for his qualification shares, he must account for the amount received, with interest from the date of its receipt. *Hay's Case*, 10 Ch. 593; *McLean's Case*, 55 L. J. Ch. 36.

And where a promoter sold shares to a director, the director was compelled to account for the difference between the nominal value of the shares and the price he paid for them. *Weston's Case*, 10 C. D. 579.

Ultra vires. The directors of a company instructed a broker to purchase on behalf of the company some of the company's own shares. The broker purchased and paid for the shares and the company credited him with the amount. Held, that the transaction being *ultra vires* to the knowledge of the broker, the liquidator was entitled to deduct the amount so credited from the debt for which the broker proved in the winding-up of the company. *Zulueta's Claim*, 5 Ch. 444.

And where directors make unauthorised payments to shareholders in reduction of capital, and the shareholders

receive such payments with full knowledge of all the circumstances, the directors can recover back the unauthorised payments to the extent to which they have been compelled to repay to the liquidator the money so paid by them. *Moxham* v. *Grant*, (1899) 1 Q. B. 480.

And where dividends were wrongly paid out of capital and a director was party to fraudulent misrepresentations of the state of the company's business in annual reports to the shareholders by the directors, the truth of which he had taken no steps to ascertain, it was held that he was liable to repay the amount of the dividends wrongly paid out of capital with interest at five per cent. without deducting income tax. *Re National Bank of Wales, Cory's Case*, 79 L. T. 667.

Promoters.

Promoters are in the position of agents and are also in a fiduciary position towards the company. *Hichens* v. *Congreve*, 1 R. & M. 150, n.; *Foss* v. *Harbottle*, 2 Ha. 489; *Bagnall* v. *Carlton*, 36 L. T. 653; *New Sombrero, &c.* v. *Erlanger*, 3 A. C. 1218.

They are accountable for all moneys secretly obtained by them just as if the relation of principal and agent or trustee and beneficiary had existed between them and the company, although the corrupt transaction is not rescinded. But in estimating the amount of such secret profit allowance is to be made for legitimate expenses of bringing out the company, but not a sum expended in obtaining a guarantee for the taking of shares. *Lydney, &c.* v. *Bird*, 33 C. D. 85; *Emma Silver, &c.* v. *Grant*, 11 C. D. 918.

A secret profit taken by the promoter from the vendor gives rise to a demand arising by reason of contract, provable notwithstanding sect. 31 of the Bankruptcy Act, 1869, and the amount of it is a debt incurred by means of

fraud or breach of trust within sect. 49 of the same Act. *Emma Silver, &c.* v. *Grant*, 17 C. D. 122; and see Bankruptcy Act, 1883, ss. 30, 37; *Ross* v. *Gutteridge*, 52 L. J. Ch. 280.

But promoters are not trustees within the Debtors Act, 1869, s. 4 (3). *Phosphate Sewage Co.* v. *Hartmont*, 25 W. R. 743.

The meaning of the expression promoter is ambiguous, and the judge is not bound to give the jury a definition of it. *Emma, &c.* v. *Lewis*, 4 C. P. D. 396; *Lydney, &c.* v. *Bird, supra.*

But a solicitor acting for a company in its earlier stages is not to be deemed a promoter. *Re Great Wheal Polgooth Co.*, 53 L. J. Ch. 42.

A person who as clerk to a promoter has performed work in relation to obtaining an Act of Parliament, but who has looked only to the promoter, cannot recover as against the company. *Re Kent Tramways*, 12 C. D. 312.

As to accounts between the projectors of an abortive company, see *Denton* v. *Macneil*, 35 Beav. 652.

As to agreements by promoters in fraud of the company, see Seton, Chap. 51.

Where the secretary of a company formed for the purchase of an hotel received from the vendor 250*l.* for forming the company, and the agreement under which he took this profit was known to the directors and referred to in the prospectus, it was held that though the secretary was a promoter, yet there was no legal obligation on him to account to the company for the amount received. *Re Sale Hotel, &c.*, 78 L. T. 368.

A syndicate was formed for the purpose of buying a certain property with a view to a resale to a company to be registered. The syndicate trustees then entered into a contract for the purchase of the property and caused a company to be registered, the object of which was to buy the property in question. Held, that the syndicate trustees were promoters of the company before they bought the

property, and that they must be taken as having bought it in that capacity. *Re Olympia*, (1898) 2 Ch. 153.

The contract contained a clause that the promoters were not to be required to account for any profit made by them in buying up certain charges on the property, and the prospectus referred to the contract but not specifically to the above clause. Held, that knowledge of the above clause could not be imputed to the company and the adoption of the contract by the directors did not make it binding on the company, who could recover from the promoters the profit made in buying up the charges. *Ibid.*

The mere fact that a contract for purchase by a company cannot be rescinded does not preclude the company from obtaining from the vendor if he is a promoter, and still less if he is also a director, a secret profit made by him at its expense. *Ibid.*

A promoter of a company whose duty it is to disclose what profits he has made does not perform that duty by making a statement not disclosing the facts but containing something which if followed up by further investigation will enable the inquirer to ascertain that profits have been made and what they amounted to. *Ibid.*

Where promoters agree to sell a property to a company in course of formation at an agreed price, and there is an independent agreement on the part of the promoters to take so many shares presently payable in cash, the agreement may be legitimately carried out by striking a balance between the sums due from one party to another as a matter of account, that is by the company paying over to the promoters the difference between the whole purchase-money and the amount of the shares to be taken by the promoters, such shares being credited to the promoters as fully paid up. Such an arrangement is a proper fulfilment of a statutory provision requiring all the shares of the company to be paid for in cash. *Larocque* v. *Beauchemin*, 66 L. J. P. C. 59; (1897) A. C. 358; and see *Re Wragg*, (1897) 1 Ch. 796; *Hadley & Co.* v. *Hadley*, 77 L. T. 131.

CHAPTER VIII.

SOLICITOR AND CLIENT.

Before a solicitor can bring any action for the recovery of his fees, charges, or disbursements, he must first deliver to the person chargeable a properly signed bill. Solicitors Act, 1843, s. 37; Legal Practitioners Act, 1875, s. 2.

There is a distinction between a solicitor's bill, which properly includes all disbursements made by him as solicitor, and his cash account, which includes payments made by him as agent rather than solicitor.

Such payments as the solicitor in the due discharge of his duty is bound to make, as, for example, Court fees, counsel's fees, expenses of witnesses, agents, stationers, or printers are properly introduced into the bill. *Re Remnant*, 11 Beav. 603, 611; *Franklin* v. *Featherstonhaugh*, 1 A. & E. 478; *Re Pomeroy*, (1897) 1 Ch. 284.

Cash account.

But payments which the solicitor is not bound either by law or custom to make, as, for example, purchase-moneys or interest paid into Court, damages or costs paid to opponent parties, bills due to the solicitor of trustees, mortgagees, or other parties, legacy and other duties are properly charged in the cash account. *Re Remnant, supra; Woolison* v. *Hodson*, 2 Dowl. 360; *Re Haigh*, 12 Beav. 307; but see *Re Lamb*, 23 Q. B. D. 5.

And the question is not affected by the statement of the cash account between the solicitor and client. Thus counsel's fees would not be less properly introduced into the bill of costs as a professional disbursement because the client may have given money expressly for paying them; and, on the other hand, purchase-money or damages

would not be properly so introduced though the solicitor may have advanced the money out of his own funds. *Re Metcalfe*, 30 Beav. 406; *Harrison* v. *Ward*, 4 Dowl. 39.

So the charges of a London agent are properly included in the bill of costs, and not as a disbursement in the cash account, which the country solicitor delivers to his client, and such charges should be set out in detail. *Re Pomeroy*, (1897) 1 Ch. 284.

Payments made for stamp duty, fees on registration of deeds, probate duty, and now estate duty when payable by the solicitor's client, are disbursements and rightly included in the bill of costs. *Re Lamb*, 23 Q. B. D. 5.

Bills of costs.

Where various matters form one transaction one bill only ought to be made out, and separate bills will be treated as one; but where separate bills are properly made out for separate transactions they will not be treated as one because they are simultaneously delivered. *Doe* d. *Palmer* v. *Roe*, 4 Dowl. 95; *Re Ward*, (1896) 2 Ch. 31; *Re Romer*, (1893) 2 Q. B. 286.

Whether consecutive bills will be treated as one depends on the particular case and the nature of the business. The contract of a solicitor in a common law action is an entire contract to act till the end of the action, and he cannot without reason throw up his retainer and recover costs. *Underwood* v. *Lewis*, (1894) 2 Q. B. 306.

The cause of action arises upon the completion of the work and not at the expiration of one month from the delivery of the bill, and therefore the Statute of Limitations runs from the completion of the work. *Coburn* v. *Colledge*, (1897) 1 Q. B. 702; and see *Harris* v. *Quine*, L. R. 4 Q. B. 653.

The question of finality, however, is one of fact in each case, and where there is a break in the proceedings, as in administration, bankruptcy or winding-up proceedings, or conveyancing business, or agent's bills delivered at regular periods, separate bill may be sent in. Cordery, 297.

The bill must be delivered to the person liable to pay, and such person must be properly charged; but it is enough if the intention appear from a letter or the envelope, or is sufficiently inferable from the bill itself. *Ibid.*; *Re McMurdo*, (1897) 1 Ch. 119.

It must also be signed or accompanied by a signed letter; and if unsigned, it is at the option of the client to consider it well or ill-delivered. Cordery, 298.

The bill must be so stated that the client can obtain advice as to its taxation. The items must therefore be specified. *Wilkinson* v. *Smart*, 33 L. T. 573; *cf. Blake* v. *Hummil*, 51 L. T. 430.

Thus a charge "for attending a great many times" is too vague. *Re Pender*, 10 Beav. 390.

So is a lump sum charged for the costs in an action, though taxed in the action at that sum. *Drew* v. *Clifford*, 2 C. & P. 69.

So is a lump sum in a country solicitor's bill for a London agent's charges. *Re Pomeroy*, (1897) 1 Ch. 284.

And where extra costs, or costs as between solicitor and client, are claimed, they must not be stated without the items of taxed costs or costs as between party and party to which they are extra. *Waller* v. *Lacy*, 8 Dowl. 563; *Pigot* v. *Cadman*, 1 H. & N. 837.

Where a solicitor charges a gross sum he may subsequently furnish an item bill on taxation, but he cannot use it to claim more than the original lump sum. *Re Hellard*, (1896) 2 Ch. 233.

It is too late to object for the first time that items are charged too generally before the judge on appeal. *Re Snell*, 5 C. D. 815, 835.

As to what is sufficient delivery, see Cordery, 300.

In the same cases in which the Court has power to order taxation of a bill it may order delivery. Solicitors Act, 1843, s. 37.

Thus a bill may be ordered to be delivered as of course before verdict and before payment, and only under special

circumstances after verdict or within twelve months after payment. *Ibid.*

But, in order to obtain delivery twelve months after payment, it is not necessary to show such special circumstances as would justify taxation, one of the objects of delivery being to see whether there are such circumstances. *Duffett* v. *McEvoy*, 10 A. C. 300; *Re West*, (1892) 2 Q. B. 102.

And where on payment a solicitor undertakes to deliver a bill, he may be ordered to do so any time after payment. *Re Foljambe*, 9 Beav. 402.

Where the solicitor abandons all his costs, delivery of a bill cannot be ordered under the Act. *Re Griffith*, 7 T. L. R. 268.

And, under the common order for delivery, if the solicitor makes no claim for costs and swears he has not retained any costs out of his client's money in his hands, he is not liable to deliver a cash account. *Re Landor*, (1899) 1 Ch. 818.

But, independently of the Act, the Court has power under its summary jurisdiction to order delivery in such a case. *Ibid.*; *Re Druce*, L. J. (1893) 296.

The general rule is, that a solicitor must abide by his bill as delivered, and is not entitled to reserve power to add to the charges. *Re Heather*, 5 Ch. 694.

There may be cases, however, where the client ought to allow a second bill to be substituted, as if the first is delivered on a fairly stated condition that it contains more than might be allowed on taxation, and that if taxation is intended a second bill will be delivered. *Re Thompson*, 30 C. D. 441, 450.

And where the scale applies, the bill ought to be so taxed, though an item bill has been mistakenly delivered. *Re Negus*, (1895) 1 Ch. 73.

On special application the solicitor has been allowed to add items omitted by mistake and correct undercharges

pending the reference. *Re Whalley*, 20 Beav. 576; *Re Walters*, *ibid.* 299, 302.

But not to withdraw a non-taxable item, nor to add an item belonging to a bill previously paid and settled. *Re Blakesley*, 32 Beav. 379; *Re Gregg*, 10 W. R. 127.

Where a bill is delivered for 80*l.*, "say 70*l.*," it is properly treated as a bill for the larger sum, this being merely an offer to take less; but not if on the true construction the less sum is the real bill. *Re Carthew*, 27 C. D. 485; *Re Hellard*, (1896) 2 Ch. 233.

Accountants preparing a solicitor's bill at a percentage receive it on the bill as taxed, not as delivered. *Brown* v. *Lilly*, 88 L. T. 122.

Settled accounts between solicitor and client will be opened if sufficient cause is shown in the shape of fraud or undue influence (which will not be presumed from the mere relation of solicitor and client), though no error be shown. *Watson* v. *Rodwell*, 11 C. D. 150; *Ward* v. *Sharp*, 50 L. T. 557; *Coleman* v. *Mellersh*, 2 Mac. & G. 309.

But in the absence of unfairness or undue influence, specific items of mistake must be alleged and proved. *Hiles* v. *Moore*, 17 L. J. Ch. 385; *Blagrave* v. *Routh*, 2 K. & J. 509.

Although it is the duty of a solicitor to inform his client that he has a right to have a bill of costs and to have it taxed, the omission to do so is not of itself a sufficient ground to open a settled account. In order to do so, it is necessary to show that injustice would be done by allowing the account to stand, and excessive charges would be ground for re-opening. *Re Webb*, *Lambert* v. *Still*, (1894) 1 Ch. 73.

In case of fraud or undue influence as the account ought never to have been settled at all, it will be re-opened generally; but in case of mere errors, inconsiderable in number and amount, there will be only leave to surcharge and falsify. *Ante*, p. 53.

The power to re-open accounts, including paid bills, on

action brought is not subject to the conditions affecting proceedings under the Solicitors Acts, and the action can be brought in a proper case at any time after payment; but the principles on which a paid bill is opened in an action and on proceedings under the Acts are the same. *O'Brien* v. *Lewis*, 9 Jur. 321; *Blagrave* v. *Routh*, *supra*.

Account against Solicitors as Agents and Trustees.

As agents.

The ordinary relation of solicitor and client is that of agent and principal, and this is so in respect of the client's moneys received by the solicitor in the ordinary course of business.

In the absence of special circumstances, therefore, the Statute of Limitation, 1623, which bars the action in six years, will run from the time of the receipt by the solicitor or last acknowledgment or part payment. *Watson* v. *Woodman*, 20 Eq. 721, 731; and see *ante*, p. 225.

When a solicitor is employed as general agent, auditor, land steward, or manager for his client, it is his duty to keep accounts of his receipts and payments; and his bill of costs is only one item in the cash account, so that he cannot make a demand for professional work without passing his accounts in the other matters. *White* v. *Lincoln*, 8 Ves. 363.

But where the course of business was that the solicitor received money for his client in particular transactions, and after deducting costs paid the balance to the client, he could recover costs for general professional work without rendering accounts of the moneys in the particular transactions. *Re Lee*, 4 Ch. 43.

Where a solicitor retains money which ought to be paid to his client, interest will be allowed at five per cent.; but rests or compound interest will not be directed merely because the client's moneys are mixed with those of the

solicitor. *Burdick* v. *Garrick*, 5 Ch. 233, 241; but see *Re Barclay*, *ante*, p. 175.

Where the solicitor acts as his client's banker, he will not be made to pay interest unless he has improperly withheld accounts and refused to pay money when demanded, or has delivered fraudulent accounts. *Turner* v. *Burkinshaw*, 2 Ch. 488, 493.

The rule that an agent shall not make a gain for himself at his principal's expense, applies equally where the solicitor sells to his client or is employed as agent to buy for him. *Ante*, p. 228.

And where a solicitor employed as agent by his client obtains a secret profit out of the transaction from the other party, he must, according to well-known principles already stated, account for it to the client. *Ante*, p. 228.

This rule applies to a secret commission paid to a solicitor by an insurance company on effecting a policy, or by a company for introducing applications for shares, or by a stockbroker sharing the usual commission. *Copp* v. *Lynch*, 72 L. T. 137; *Re Chatteris*, 49 L. J. Ch. 253; and see L. J. (1889) 170.

It matters not whether the money is taken before or after the retainer, or under what form it is taken. *Burrell* v. *Mossop*, 84 L. T. 212.

Constructive trustee.

Special circumstances are required to raise the relation of trustee and *cestui que trust* between solicitor and client, as where the solicitor receives his client's moneys not for remittance, nor as banker merely, but for a particular purpose, and with the duty of holding it for the benefit of the client and keeping it until it is called for. *Burdick* v. *Garrick*, 5 Ch. 233, 240, 243; *Lyell* v. *Kennedy*, 14 A. C. 437, 456, 463; *Soar* v. *Ashwell*, (1893) 2 Q. B. 390.

Solicitors to trustees, like their bankers and other agents, are answerable to their employers only and not to the *cestui que trust;* and they are not to be made liable as constructive trustees merely because they act as agents for trustees who are guilty of a breach of trust. *Coleman* v.

Bucks, &c., (1897) 2 Ch. 243 ; *Brinsden* v. *Williams*, (1894) 3 Ch. 185 ; *Mara* v. *Browne*, (1896) 1 Ch. 199 ; *Re Spencer*, 51 L. J. Ch. 271 ; and see *ante*, p. 193.

But they will be liable if they act with knowledge of a dishonest and fraudulent design on the part of the trustees, or in other words, if they are parties to a fraud or a breach of trust on the part of the trustees. *Barnes* v. *Addy*, 9 Ch. 244 ; *Re Blundell*, 40 C. D. 370.

And if they deliberately deal with trust property so as to make themselves trustees *de son tort*, they will be made liable as principals, as where they receive trust money and do not account for it. *Soar* v. *Ashwell*, (1893) 2 Q. B. 390.

Or where they pay trust money to one of two trustees only and it is lost. *Lee* v. *Sankey*, 15 Eq. 204.

Or where they hand over assets to an executor *de son tort* with notice of his character. *Sharland* v. *Mildon*, 5 Ha. 469 ; *Ambler* v. *Lindsay*, 3 C. D. 198, 204.

Or make an improper investment of trust money in their hands. *Blyth* v. *Fladgate*, (1891) 1 Ch. 347 ; *cf. Brinsden* v. *Williams*, (1894) 3 Ch. 185.

And a solicitor was held liable for the amount of a debt paid on his advice through him to a creditor notwithstanding it had been judicially declared to be statute-barred. *Midgley* v. *Midgley*, (1893) 3 Ch. 282 ; and see *Stokes* v. *Prance*, (1898) 1 Ch. 212.

Where, however, a solicitor is not shown to have actual notice of a trust, he will not generally be made liable as a constructive trustee on the mere ground of constructive notice. *Williams* v. *Williams*, 17 C. D. 437.

A solicitor, even though guilty of actionable negligence, will generally escape liability as constructive trustee if there are trustees in existence under whose lawful order he acts. *Mara* v. *Browne*, (1896) 1 Ch. 199.

CHAPTER IX.

RECEIVERS AND LIQUIDATORS.

Receivers.

Passing accounts.

WHERE a receiver is appointed with a direction that he shall pass accounts, the Court or judge shall fix the days upon which he shall (annually or at longer or shorter periods) leave and pass such accounts, and also the days upon which he shall pay the balances appearing due on the accounts so left or such part thereof as shall be certified as proper to be paid by him. Ord. 50, r. 18.

And with respect to any such receiver as shall neglect to leave and pass his accounts and pay the balances thereof at the times fixed for that purpose, the judge before whom any such receiver is to account may from time to time, when his subsequent accounts are produced, disallow his salary, and may also, if he thinks fit, charge him with interest at the rate of five per cent. per annum on the balance neglected to be paid during the time it has remained in his hands. Ord. 50, r. 18.

The latter part of this rule has been enforced even where the receiver has been discharged. *Harrison* v. *Boydell*, 6 Sim. 211.

And also after the accounts have been settled. *Hicks* v. *Hicks*, 3 Atk. 273.

And in one case it was held that the Court has jurisdiction to surcharge a receiver on his accounts notwithstanding he has been discharged. *Re Edwards*, 31 L. R. Ir. 242.

A receiver may be directed to bring in his account or pay his balance by a four-day order obtainable on summons

and not by a *fi. fa.* *Whitehead* v. *Lynes*, 34 Beav. 161; 12 L. T. 332, on app.

The order must be endorsed under Ord. 41, r. 5, and served personally, and may be enforced under Ord. 42, r. 7, by attachment or committal, or without any leave from the Court by writ of sequestration against his estate and effects. *Sprunt* v. *Pugh*, 7 C. D. 567; *Re Bell*, 9 Eq. 172, 173.

A receiver bringing in irregular accounts was ordered to bring them in in a stated form and to pay the costs of the application. *Bertie* v. *Abingdon*, 8 Beav. 53; and for inquiry as to former balances, see *ibid.* 60.

Though a receiver passes his accounts and pays his balances regularly he cannot make interest for his own benefit of such sums as may from time to time be in his hands. *Shaw* v. *Rhodes*, 2 Russ. 539.

And if he parts with the control of such moneys by depositing them with a bank he will be answerable for any loss consequent on the failure of the bank. *Salway* v. *Salway*, 2 R. & M. 215.

But if he deposit the money to a separate account he will not be liable for the bank's failure, unless he is in default in passing his accounts or, though not in default, is taking interest. *Drever* v. *Maudesley*, 8 Jur. 547.

He is also answerable for loss where he has knowingly placed the money in improper hands, but not for loss not arising from his wilful default. *Knight* v. *Plymouth*, 3 Atk. 480; and see *Seagram* v. *Tuck*, 18 C. D. 296.

The fraudulent receipt and appropriation of trust money places the receiver under the same liability as the trustee from whom he received it. *Rolfe* v. *Gregory*, 4 D. J. & S. 576.

Persons interested may at once apply to prevent the misapplication by a receiver of funds in his hands, without waiting until he passes his accounts to get the particular items disallowed. *De Winton* v. *Mayor of Brecon*, 28 Beav. 200.

The share of a defaulting bankrupt receiver being unduly

paid into Court his assigns were entitled to receive the whole. *Brandon* v. *Brandon*, 1 D. & S. 16, 19.

After a bill was dismissed or the proceedings ordered to be stayed a receiver was ordered to pass his accounts and pay the balance to the defendant. *Paynter* v. *Carew*, Kay, App. 36; *Pitt* v. *Bonner*, 5 Sim. 577; and see *Hutton* v. *Beeton*, 9 Jur. N. S. 1339.

The objection under Ord. 50, r. 18, to allowing the receiver's poundage and costs must be raised by the parties on taking the account. *Ward* v. *Swift*, 8 Ha. 139.

For order disallowing receiver's poundage and charging him with interest at five per cent. on the balances during the time the same were in his hands, see *Bristowe* v. *Needham*, 11 W. R. 926.

A receiver may be ordered to swear to his accounts. But if he neglects to verify his account he should be disallowed the items charged by him against the estate as disbursements and directed to pay in the full amount of his receipts. Seton, 679.

In passing a receiver's accounts in chambers, when the same solicitor appears for the receiver and one of the parties to the suit, only one copy of the accounts will be allowed between them on taxation. *Sharp* v. *Wright*, 1 Eq. 635.

A receiver's accounts though passed have been ordered to be reviewed on application by a late ward of Court stating errors and neglect. *Wildridge* v. *M'Kane*, 2 Moll. 545.

And a settlement of account between an infant two days after coming of age and the receiver, did not prevent the latter being charged with interest at four per cent. from the decree until the infant came of age on surplus rents omitted to be inserted pursuant to a direction. *Hicks* v. *Hicks*, 3 Atk. 274.

The Court has no jurisdiction to make a summary order to account against the executors of a deceased receiver.

Jenkins v. *Briant*, 7 Sim. 171; *Ludgater* v. *Channell*, 15 Sim. 479.

But if the balance has been ascertained in the receiver's lifetime, an order may be made on petition that his recognizances be put in suit against his real and personal representatives and sureties. *S. C.*, 3 Mac. & G. 175.

And where the executors of a receiver applied to pass his accounts and pay in the balance they were not heard afterwards to say that they had no assets. *Gurden* v. *Badcock*, 6 Beav. 157.

By Ord. 50, r. 19, receivers' accounts shall be in the Form No. 14 in Appendix L. with such variations as circumstances may require.

By r. 20 every receiver shall leave in the chambers of the judge to whom the cause or matter is assigned his account together with an affidavit verifying the same in the Form No. 22 in Appendix L. with such variations as circumstances may require. An appointment shall thereupon be obtained by the plaintiff or person having the conduct of the cause for the purpose of passing such account.

The rule only directs an appointment to be obtained; and it is conceived, therefore, that a summons to proceed on the account is not now necessary.

If a receiver includes in his bill of costs charges for work done in another capacity which he allows the taxing master to deal with and strike out without objection, he cannot afterwards recover the sums so struck out in an action brought for that purpose. *Terry* v. *Dubois*, 32 W. R. 415.

It seems that a surety is not entitled to attend on taking a receiver's accounts except at his own expense. *Re Birmingham Brewery*, 31 W. R. 415.

Receivers' accounts in the Queen's Bench Division are regulated by Central Office Regulations No. 4, under which, when the proper time arrives for passing the receiver's first account, an ordinary appointment must be

made with a master, and notice of the appointment given to the other side as in the case of an appointment to settle the security, except that the order need not be stamped or entered at Room 180. The master will then go through the account, and on the same being properly vouched and stamped will approve it. The receiver on bringing in the account will make and file the usual affidavit verifying it, and the master will, if required, give a certificate of the account having been passed. The account should be left with the master for transmission to the General Filing Department. Where a receiver has received nothing he should bring in a "nil account," with a statement written thereon showing why he has received nothing and verified by affidavit.

The fee in the Queen's Bench Division on passing account in addition to affidavit filing fee is 1*s.* per cent. on amount received and 2*s.* 6*d.* on master's certificate of account being passed. Ann. Prac. 708.

As to costs in Queen's Bench Division, see 34 Sol. Jo. 74, 90.

In case of any receiver failing to leave any account or affidavit, or to pass such account or to make any payment or otherwise, the receiver or the parties or any of them may be required to attend at chambers to show cause why such account or affidavit has not been left or such account passed, or such payment made or any other proper proceeding taken, and thereupon such directions as shall be proper may be given at chambers or by adjournment into Court, including the discharge of any receiver and appointment of another and payment of costs. Ord. 50, r. 21. As to a four-day order, see *Whitehead* v. *Lynes*, *supra*.

"A certificate of the chief clerk stating the result of a receiver's account shall from time to time be taken. Form 3 in the Appendix hereto shall be substituted for Form 22 in Appendix L." Ord. 50, r. 22.

In administration suits a receiver may be discharged on

his passing his accounts, and may be paid his remuneration and costs without waiting to see whether the estate is sufficient to pay all the costs. *Batten* v. *Wedgwood*, 28 C. D. 317; *q. v.* as to receiver's right to priority.

When the receiver has passed his final account and paid his balances his recognizances will be vacated. Ord. 60, r. 4.

But where money due from him has not been brought into account, he is a trustee of the money and cannot (unless possibly under the Trustee Act, 1888, s. 8) set up the Statute of Limitations. *Seagram* v. *Tuck*, 18 C. D. 296.

And after his discharge payment may be enforced against him by attachment. *Re Gent*, 40 C. D. 190.

A discharged receiver not paying in the balance by the time fixed was ordered to pay it and the amount of his salary with interest at five per cent. on both sums from the day appointed, and the costs of the motion. *Harrison* v. *Boydell*, 6 Sim. 211; Dan. 1707.

Salary and Allowances.

The usual allowance was formerly five per cent. on the gross rental of the estate; but three per cent. is now very commonly given. There is, however, no settled scale and the amount must depend on the circumstances of each case. *Prior* v. *Bagster*, 57 L. T. 760; Seton, 653.

Where the rental is very considerable a lower rate has been allowed or a fixed salary given; and if there is any special difficulty in collecting the rents the allowance has been increased. *Day* v. *Croft*, 2 Beav. 488.

The scale allowed to liquidators is no guide. *Prior* v. *Bagster*, *supra*.

By Order as to Supreme Court Fees, Schedule 72, the court fee on taking an account of a receiver or consignee

is 1*s.* for every 100*l.* or portion of 100*l.* of the amount found to have been received without deducting any payment.

A receiver may be entitled to an allowance beyond his salary for extraordinary trouble and expense, but not without previous order. *Potts* v. *Leighton*, 15 Ves. 276; *Re Ormsby*, 1 B. & B. 189.

He is not entitled to expenses of journeys abroad without the Court's sanction; and for the practice of the Court as to extraordinary allowances, see *Malcolm* v. *O'Callaghan*, 3 M. & C. 52; and see *Ex parte Izard*, 23 C. D. 75.

When a trustee is appointed on his own undertaking he is not ordinarily entitled to a salary, though the words "without salary" ought, it seems, to be inserted in the order. *Pilkington* v. *Baker*, 24 W. R. 234.

But there is no inflexible rule that a trustee can only be appointed receiver on the terms of his having no remuneration. *Re Bignell*, (1892) 1 Ch. 59.

And a party interested proposing himself is usually required to act without salary, unless by consent.

In bankruptcy a receiver is entitled to his costs next after the costs of realising the estate. *Ex parte Royle*, 23 W. R. 908.

Sureties.

The surety is answerable to the extent of the amount of the recognizance for whatever sum, principal, interest, or costs the receiver has become liable, and also for the costs of his removal and of appointing a new receiver. *Ex parte Maunsell*, 3 J. & Lat. 251; *Re Lockey*, 1 Ph. 509; *Smart* v. *Flood*, 49 L. T. 467.

Though under the particular circumstances of the case payment of interest was not required from the sureties of a bankrupt receiver. *Dawson* v. *Raynes*, 2 Russ. 466.

It has been held that the recognizance may be enforced

against the surety without the amount due being actually ascertained. *Ludgater* v. *Channell*, 3 Mac. & G. 175.

The recognizance, after it has been allowed by the chief clerk by signing a memorandum in the margin, is sent from Chambers to the Enrolment Office and receipt taken for it from the Clerk of Enrolments. Seton, 680; and see Dan. 1716, as to putting recognizances in suit.

The surety is entitled to stand in the receiver's place and to be indemnified out of the balance in Court due to him. *Glossop* v. *Harrison*, 3 V. & B. 134; *Brandon* v. *Brandon*, 3 D. & J. 524.

Neither receivers nor sureties will be discharged at their own request except under special circumstances. *Griffith* v. *Griffith*, 2 Ves. 400; and see *Mann* v. *Stennett*, 8 Beav. 189; Dan. 1715.

A surety was held answerable for costs of attachment against a receiver for not accounting, and costs of appointing a new receiver and ordering tenants to pay rent to him. *Ex parte Maunsell, supra.*

And a surety who has paid the debt of the receiver is entitled to enforce the recognizance against his co-surety. *Woods* v. *Creaghe*, 2 Hog. 51.

For order for account and payment by one surety, with leave to sue the other surety and the receiver, see Seton, 677.

Liquidators.

A liquidator is an agent of the company and not, strictly speaking, a trustee either for creditors or contributories. *Knowles* v. *Scott*, (1891) 1 Ch. 717.

He may not make any profit by means of the company beyond his remuneration. *Re Devonshire, &c.*, W. N. (1878) 71.

The accounts of liquidators shall be passed and verified in the same manner as is by Ord. 50 directed as to receivers' accounts. Ord. 50, r. 23.

The official liquidator shall, with all convenient speed after he is appointed, proceed to make up, continue, complete and rectify the books of account of the company; and shall provide and keep such books of account as shall be necessary, or as the judge may direct, for the purposes aforesaid, and for showing the debts and credits of the company, including a ledger which shall contain the separate accounts of the contributories, and in which every contributory shall be debited from time to time with the amount payable by him in respect of any call to be made as provided by the Act and these Rules. Gen. Ord., Nov. 1862, r. 17.

A liquidator is not justified in resisting a summons simply calling upon him to bring in an account. Any contributory, however small his interest, is entitled to have the account brought in. *Wright's Case*, 5 Ch. 437.

The official liquidator shall be allowed in his accounts, or otherwise paid, such salary or remuneration as the judge may direct, including any necessary employment of assistants or clerks by the liquidator, to which regard shall be had; and such salary or remuneration may either be fixed at the time of his appointment or at any time thereafter as the judge may think fit. Gen. Ord., Nov. 1862, r. 18; Comp. Rules, 1890, rr. 154, 155; and Comp. Act, 1862, s. 93.

Passing accounts.

The accounts of the official liquidator shall be left at judge's chambers at the times directed by the order appointing him, and at such other times as may from time to time be required by the judge, and such accounts shall, upon notice to such parties (if any) as the judge shall direct, be passed and verified in the same manner as receivers' accounts. Gen. Ord., Nov. 1862, r. 19; Comp. Rules, 1890, rr. 135—144.

Every liquidator shall, at the expiration of six months from the winding-up order, and every succeeding six months until his release, transmit to the Board of Trade a copy of the cash book for such period in duplicate, together with the necessary vouchers and copies of the

certificates of audit by the committee of inspection. He shall also forward with the first accounts a summary of the company's statement of affairs in such form as the Board of Trade may direct, showing thereon in red ink the amounts realised, and explaining the cause of the non-realisation of such assets as may be unrealised. Rules, 1890, r. 136.

When the assets of the company have been fully realised and distributed the liquidator shall forthwith send in his accounts to the Board of Trade, although the six months may not have expired. *Ibid.*

The accounts sent in by the liquidator shall be certified and verified by him. *Ibid.*

Where the liquidator carries on the business of the company, he shall keep a distinct account of the trading, and shall incorporate in the cash book the total weekly amount of the receipts and payments on such trading account. Rules, 1890, r. 137.

The trading account shall from time to time, and not less than once in every month, be verified by affidavit, and the liquidator shall thereupon submit such account to the committee of inspection (if any) or such member thereof as may be appointed by the committee for that purpose, who shall examine and verify the same. *Ibid.*

When the liquidator's account has been audited the Board of Trade shall certify the fact upon the account, and thereupon the duplicate copy shall be filed. *Ibid.*

The liquidator shall transmit to the Board of Trade with his accounts a summary of such accounts in such form as the Board of Trade direct, and on the approval of such summary by the Board of Trade shall forthwith prepare and transmit to the Board so many printed copies, duly stamped and addressed, as may be required for transmitting to each creditor and contributory. Rules, 1890, r. 139.

As to form of cash book, see Palmer, Co. Prec. 235.

Money withdrawn from the bank should not be treated

as receipts from realisations, but should appear only in the "Drawn from Bank" column of the cash book, the application of the money being entered in the "Payments" column. The payment into the bank should appear only in the "Paid into Bank" column. Reg. 9 of Jan., 1893.

In the case of dividends to creditors the total amount of the dividend payable should be charged in the cash book in one sum. See Reg. 11 of Jan., 1893, App. B.

Under no circumstances should unclaimed dividends be credited to the estate without the previous sanction of the inspector-general. Reg. 11.

A statement of the balance shown by the bank columns of the cash book is necessary to obtain the inspector-general's certificate of the balance standing to the credit of the company in the company's liquidation account.

As to accounts of remuneration, see Palmer, Co. Prec. 232.

Accounts under Sect. 15 *of Act of* 1890.

By an order of the Board of Trade of 20th July, 1899, the following directions have been substituted:—

"(1) Every statement must be on sheets 13 inches by 16 inches.

"(2) Every statement must contain a detailed account of all the liquidator's realisations and disbursements in respect of the company. The statement of realisations should contain a record of all receipts derived from assets existing at the date of the winding-up order or resolution and subsequently realised, including balance in bank, book debts and calls collected, property sold, &c.; and the account of disbursements should contain all payments for costs and charges, or to creditors or contributories. Where property has been realised, the gross proceeds of sale must be entered under realisations, and the necessary payments incidental to sales must be entered as disbursements.

These accounts should not contain payments into the Companies Liquidation Account or payments into or out of bank, or temporary investments by the liquidator, or the proceeds of such investments when realised, which should be shown separately:—

"(*a*) by means of the bank pass-book;

"(*b*) by a separate detailed statement of moneys invested, and investments realised.

"Interest allowed or charged by the bank, bank commission, &c., and profit or loss upon the realisation of temporary investments, should, however, be inserted in the accounts of realisations or disbursements, as the case may be. Each receipt and payment must be entered in the account in such a manner as sufficiently to explain its nature. The receipts and payments must severally be added up at the foot of each sheet, *and the totals carried forward from one account to another without any intermediate balance, so that the gross totals shall represent the total amounts received and paid by the liquidator respectively.*

"(3) When the liquidator carries on a business, a trading account must be forwarded as a distinct account, and the totals of receipts and payments on the trading account must alone be set out in the statement.

"(4) When dividends or instalments of compositions are paid to creditors, or a return of surplus assets is made to contributories, the total amount of each dividend, or instalment of composition, or return to contributories actually paid, must be entered in the statement of disbursements as one sum; and the liquidator must forward separate accounts showing in lists the amount of the claim of each creditor, and the amount of dividend or composition payable to each creditor, and of surplus assets payable to each contributory, distinguishing in each list the dividends or instalments of composition and shares of surplus assets actually paid and those remaining unclaimed. Each list must be on sheets 13 inches by 8 inches.

"(5) Credit should not be taken in the statement of

disbursements for any amount in respect of liquidator's remuneration unless it has been duly allowed by resolution of the company in general meeting, or by order of Court."

For form of statement of account and affidavit verifying same, see Order of 20 July, 1899, referred to above. The statement must be in duplicate, but the affidavit need not.

Voluntary winding-up.

Sect. 15 applies to a voluntary winding-up, but it is not enforced with the same strictness when the accounts required by the Act of 1862 have been properly furnished. *Stock and Share, &c.*, (1894) 1 Ch. 736.

The procedure is the same as in a compulsory winding-up, as stated above. See Palmer, 628.

Sect. 15 only applies to an existing liquidator. Accordingly there may be cases in which an order for an ex-liquidator to bring in his accounts may be necessary. *Ibid.*

CHAPTER X.

GUARDIAN AND INFANT.

GUARDIANS are trustees, and the Court will in exercise of its ordinary jurisdiction see that the trust is properly exercised and punish a breach of it; and if there is any suspected mismanagement of the property any one may apply on behalf of the infant. *Lord Dudley's Case*, cited 2 Ves. sen. 484.

An action at law for an account could not be brought while the guardianship continued, but in equity a guardian might have been made to account during minority, and the rule of equity now, of course, prevails. See *Cary* v. *Bertie*, 2 Vern. 342; 2 P. W. 119.

It is the duty of the guardian to apply the sums allowed for maintenance in the way most beneficial to him, and consequently they will generally be ordered to be paid to the person with whom the infant is living. *Re Osborne*, 2 W. R. 85; *Sharman* v. *Heath*, 3 L. J. Ch. 240; *Re Birch*, 15 L. R. Ir. 380.

The general rule is to allow a gross annual sum proportioned to the age and quality of the infant; and the reason for this is the great expense it might be to the infant's estate to take a particular account of the maintenance. *Moor* v. *Lacey*, Macph. App. III.; *Chaplin* v. *Chaplin*, 3 P. W. 368.

In *Bruin* v. *Knott*, 1 Ph. 572, Lord Cottenham said, "I see no reason why a party who has maintained a child without the order of the Court should be allowed more than she has actually expended. It does not follow, however, that the mother is to be put to the proof by voucher of every item she has expended on account of her

child, who has lived with her; that would be most unreasonable. The inquiry should be what was the scale of expenditure and what would be proper to be allowed." See also *Brown* v. *Smith*, 10 C. D. 377; *Re Evans, Welch* v. *Channell*, 26 C. D. 58, *infra*.

To decide what is a reasonable sum to be allowed all the circumstances of each case must be considered, the governing consideration being what is for the interest of the infant. *Barnes* v. *Ross*, (1896) A. C. 625.

In accordance with this principle, if the expenditure has been on too high a scale, part of it will be disallowed. *Hawes* v. *Porter*, 1 W. R. 178; *Bridge* v. *Brown*, 2 Y. & C. 181.

Where a lump sum is paid for past maintenance the Court will see that those who have actually expended money are repaid. *Sirdefield* v. *Thacker*, 18 Beav. 588.

And where an allowance is made for maintenance the Court will of course interfere if the guardian is guilty of misconduct and does not in fact properly maintain the infant, but subject to this he is not called upon to account for the sum he receives. *Jodrell* v. *Jodrell*, 14 Beav. 411.

So where a trustee and guardian of infants pays income to his co-guardian for their maintenance and education, he is not thereby discharged, but if he shows that they have been properly maintained and educated, a proper sum on inquiry ought to be allowed against the balance due from him without vouching details. *Re Evans, Welch* v. *Channell*, 26 C. D. 58.

Equity has always held that the money is paid to the dispensing hand, coupled with a condition, and provided the condition is properly performed the Court requires no account of what (if any) surplus remains. That the guardian derives an advantage is well-known and recognised, but that advantage is considered to be beneficial on the whole to the infant. *Jodrell* v. *Jodrell*, 14 Beav. p. 413.

The rule rests on the impossibility of a guardian keeping

such an account accurately, *e.g.*, calculating the extent to which household expenses are increased, &c. *Ibid.; Leach* v. *Leach*, 13 Sim. 304; *Carr* v. *Liveing*, 28 Beav. 644; *Re French*, 3 Ch. 317; *Brown* v. *Smith*, 10 C. D. 377; *Welch* v. *Channell*, 26 C. D. 58, *post*, p. 285.

Guardianship (other than guardianship in socage, which terminates when the infant is fourteen) ceases when the ward is twenty-one. If the trusteeship is then brought to a close, the accounts should be settled, and the guardian is entitled to an acknowledgment that all claims have been settled.

The accounts of guardians shall be passed and verified in the same manner as is by this Order directed as to receivers' accounts. Ord. 50, r. 24.

In practice a release is often given, but it seems this cannot be insisted on. Lewin.

In order that such a release or acknowledgment of account may be binding it must be made with full information on the part of the ward of the circumstances and what his rights are, and without any undue pressure. *Lloyd* v. *Attwood*, 3 De G. & J. 614; *Allfrey* v. *A.*, 1 Mac. & G. 87.

It is regarded as a suspicious circumstance if the accounts are settled a few days after the ward has attained twenty-one; and in all such cases the release will be set aside and the accounts re-opened unless it can be shown that the ward fully understood the accounts. *Steadman* v. *Pulling*, 3 Atk. 423; *Hicks* v. *Hicks*, 3 Atk. 274; *Wedderburn* v. *Wedderburn*, 4 M. & C. 41.

It should also be shown, where necessary, that the ward had independent advice. *Revett* v. *Harvey*, 1 S. & S. 502.

"If it appears that there was an implicit conforming to the account shown to them, not the fruit of deliberate investigation by the *cestuis que trustent*, without vouching or inquiry, I should consider the agreement and settled account as so much waste paper." Per Hart, L. C., *Kilbee* v. *Sneyd*, 2 Moll. 233.

But accounts settled a reasonable time after twenty-one would be binding unless special circumstances or obvious mistake could be shown. *Lambert* v. *Hutchinson*, 1 Beav. 277; *Aveline* v. *Melhuish*, 10 Jur. N. S. 788; *Gandy* v. *Macaulay*, 31 C. D. 1.

Lapse of time no bar.

A guardian, as we have seen, stands to his ward in the relation of a trustee, and therefore the Statute of Limitations does not apply to accounts between them. *Matthews* v. *Brise*, 14 Beav. 341; *Beckford* v. *Wade*, 17 Ves. 97.

As long as the relation continues lapse of time is no bar, and the account may be taken from the commencement on the footing of guardian and ward. *Aylward* v. *Kearney*, 2 B. & B. 463; *Wedderburn* v. *W.*, 4 M. & C. 41, 52; *Mellish* v. *M.*, 1 S. & S. 138.

Nor is the law in this respect altered by the Trustee Act, 1888, s. 8. Simpson, 460.

During infancy the ward cannot in any way authorise a breach of trust, but he may be bound by acquiescence after twenty-one.

So acquiescence for five years would *primâ facie* be a bar; and after a long lapse of time the Court would not set aside a release merely on proof of errors, but the nature of the errors would have considerable effect in determining whether the release had been fairly obtained. *Steadman* v. *Pulling*, 3 Atk. 423; *Millar* v. *Craig*, 6 Beav. 433; and see *Gandy* v. *Macaulay*, 31 C. D. 1.

So an account was not disturbed though settled soon after the *cestui que trust* attained twenty-one, after being acquiesced in for twenty years. *Portlock* v. *Gardner*, 1 Ha. 594.

There must be full knowledge on the part of the person who waives his right by acquiescence or confirmation. Simp. 461.

Whether the guardian of an infant is a relative or not, strict yearly accounts of the administration of the infant's property ought to be kept. *Barnes* v. *Ross*, (1896) A. C. 625.

A guardian will be allowed in his accounts necessary expenses affecting the infant's land, as for renewal of leases or fines on admission to copyholds. *Ibid.* 382.

A guardian in socage is bound to maintain the heir and see that he is well brought up and his evidences kept. Subject to this he has absolute control of the rents and profits, though of course he receives them to the use and profit of the heir and is bound to account for them. Co. Litt. 88 b.

An infant, whether he has been in actual possession or not, may treat a person who enters upon his estate during minority as his bailiff, guardian or trustee, and make him account on that footing excluding the operation of the Statute of Limitations. *Newburgh* v. *Bickerstaffe*, 1 Vern. 295; *Morgan* v. *Morgan*, 1 Atk. 489; *Quinton* v. *Frith*, I. R. 2 Eq. 396; *Wall* v. *Stanwick*, 34 C. D. 763, 767.

So a widow who re-marries and consequently loses her life interest, if she continues to receive the rents and profits, continues in possession not as guardian by nature, but as bailiff for her infant children, and is liable to account as trustee. *Wall* v. *Stanwick*, *supra*.

So receipt of rents by father as bailiff for infant son does not bar infant's rights. But there must be evidence that the father did receive rents as bailiff or agent. 3 & 4 Will. IV. c. 27, s. 12; *Re Hobbs*, *supra*.

And this fiduciary relation continues until something is done to change the character of the bailiff's possession, and the majority or marriage of the infant is not alone sufficient to effect such change. *Wall* v. *Stanwick*, *supra*; *Re Hobbs*, *Hobbs* v. *Wade*, 36 C. D. 553.

The rule applies, as we have seen, to the infant's father, but whether to a stranger in all cases so as to enable the infant to treat him as bailiff for the purpose of escaping the effect of the Statute of Limitations seems doubtful. See *Thomas* v. *Thomas*, 2 K. & J. 79; *Quinton* v. *Frith*, *supra*.

Wherever it is proper to make a man accountable for

the rents and profits of an infant's estate, and he cannot be shown to have been in possession in some other character than that of bailiff or agent, he must be presumed to be such. *Wall* v. *Stanwick*, *supra*.

The account will not be limited to six years before action, but is given from the time the infant's title accrued or from entry. *Nanney* v. *Williams*, 22 Beav. 452; *Pelly* v. *Bascomb*, 4 Giff. 390; *Dormer* v. *Fortescue*, 3 Atk. 123; *Thomas* v. *Thomas*, *supra*.

A delay of five months after attaining twenty-one did not prejudice the infant's right. *Blomfield* v. *Eyre*, 8 Beav. 250.

To save the right, under the Real Property Limitation Act, 1833, s. 25, of the *cestui que trust* to bring an action to recover possession, the land must be vested in the trustee upon an express trust. Such an action was therefore dismissed on the ground that the appointment by will of trustees and guardians of the estate and person was not an express trust. *Price* v. *Phillips*, (1894) W. N. 213.

CHAPTER XI.

COMMITTEE OF ESTATE OF LUNATIC.

Passing accounts.

THE committee of the estate is required annually, or at such longer or shorter periods as the master fixes, to pass his accounts of receipts and payments in respect of the estate of the lunatic. Rule 73.

In some old cases where the property of the lunatic was small, or where it consisted of funds in court, the Court has on application dispensed with the general rule requiring committees to pass their accounts. *Ex parte Pickard*, 3 V. & B. 127; *Ex parte Lacy*, 1 Coll. Lun. 196; *Re Stephenson*, Shelf. Lun. 238.

On the death of a lunatic also the master may, if he thinks fit, dispense with the taking of accounts. The application should be by summons, supported by an affidavit of death and identity and the production of probate or letters of administration. Pope, 202.

In other cases it has been referred to the master to consider the propriety of passing altogether the accounts of committees for several years, and they have been ordered to be passed accordingly if the master approved. *Re Robinson*, Shelf. Lun. 239; *Re James*, *ibid.*; *Anon.*, 1 R. & M. 113.

Whenever from any cause it is found inexpedient to pass the accounts regularly, an application ought to be made, not it would seem to the master, but to the Court in the first instance for liberty to dispense with the general rule, and the Court will then exercise its discretion on the subject.

And so where the income of the lunatic arises from

funds in court, and the whole is required for maintenance, an order may be made for the payment of the whole of the annual dividends to the committee of the person as the same shall become payable for the maintenance of the lunatic until further order, and the committee of the estate having nothing to do with the property is not required to account. *Re Scarpelain*, Shelf. Lun. 239.

Where an allowance made under an order in lunacy for the maintenance of the lunatic has, as a mere matter of convenience between the committee of the estate and person, been paid quarterly in advance to the committees of the person, the lunatic's executors after his death are entitled as against the committees of the person to an inquiry as to what sum out of the moneys last advanced before the death should be allowed for maintenance up to the date of the death. The committees of the person cannot claim to retain the whole sum without accounting if the lunatic has died before the expiration of the whole period in respect of which the payment was made. *Strangeways* v. *Read*, (1898) 2 Ch. 419.

Persons to attend.

Unless the judge may himself have dispensed with and disallowed the attendance on the proceedings of all or any of the next of kin, either wholly or except at their own expense, or except upon special leave first obtained, the masters are directed, subject to the provisions of the Rules, once in the matter of each lunatic so found by inquisition, and may, as often as they think it expedient, determine which, if any, of the next of kin and what other persons, if any, are to attend the proceedings or any particular proceeding. Lun. R. 1890, rr. 38, 39.

The power of the judge in lunacy to dispense with and disallow the attendance of the next of kin applies now to the heir-at-law. Lun. R. 1890, r. 38.

The person or persons, if any, to whom the masters have given liberty to attend are alone entitled to notice or allowed to attend at the cost of the estate on any proceeding except upon the special leave of the masters first

obtained when the proceeding is before the master, and that of the judge when it is before him. Rules 38, 39.

When the judge dispenses with or disallows the attendance of the heir or next of kin, such notice of attending the proceedings shall be given as shall be conformable with the order of the judge. Rule 38.

The masters must certify the persons to whom they have given leave to attend. Rule 39.

The principal class of proceedings to which the above stated provisions are directed is that of passing the accounts of the committee of the estate. As a general rule but one attendance is allowed for the next of kin, exclusive of the heir, and one for the heir at the passing of the accounts; but any of the next of kin are entitled to attend the proceedings at their own expense, and may direct that notice of all proceedings be served upon them. Elmer, 30; and *cf.* Lun. R. 1890, r. 42.

The masters may direct that the several parties appearing before them by different solicitors shall appear by the same solicitor, or that several parties appearing by the same solicitor shall appear by different solicitors. Lun. R. 1890, r. 42.

And when parties directed to appear by the same solicitor cannot agree upon the solicitor to represent them, the master may nominate the solicitor, and if any of such parties insists upon appearing by a different solicitor he shall do so at his own cost. Lun. R. 1890, r. 42.

When the lunatic has no next of kin, the Attorney-General, who will represent the rights of the Attorney-General of the Duchy of Lancaster, on behalf of the Crown, must have notice of all proceedings in the lunacy following the return of the inquisition. *Re Early*, 2 Coop. T. L. C. 107; *Re Kershaw*, 21 C. D. 613.

On the passing the accounts of a bankrupt committee, besides the persons otherwise authorised to attend, the sureties or surviving surety of the committee, or if there be no surviving surety the trustee in bankruptcy of the

committee, will be entitled to notice of the proceedings. *Re Lacy*, Shelf. Lun. 243.

On passing the accounts of a deceased committee the legal personal representatives of the deceased committee and the new committee are required to attend, and the probate or letters of administration shall be produced. El. 70.

On the final passing of the accounts after the death of the lunatic, besides the persons otherwise entitled to attend the legal personal representative of the lunatic must be present in person or by his solicitor.

First account. The first account of a committee or receiver is usually made out down to the end of the first year from the date of the completion of his security or to the time fixed by the master.

The committee leaves the account at the master's office within the time fixed by the master for its delivery, when a time is appointed for the attendance of the committee and such other persons as have liberty to attend for the purpose of passing the accounts. R. L. 1892, 73.

The account need not be, and rarely is, disposed of at the first attendance, but it should, if practicable, be completed at a single sitting, and for this purpose the appointment will be fixed so as to give sufficient time for all parties interested and entitled to attend to receive notice of it and to be prepared, and the committee should have all the requisite evidence ready for immediate production. Renton, 357; *cf. Re Lacy*, Shelf. 243.

Subject to the general powers of the master with regard to evidence (see rr. 93—99) the committee has to show from the master's certificate of the property that all the property and the income from it is duly accounted for. If any part of the property has been paid into court a transcript of the account, which may be obtained at the Pay Office without fee, and which, if desired, may be authenticated at the Audit Office, should be produced, and if there have been any receipts or payments not included in

the certificate of property, the committee should be prepared to furnish the master with an explanation supported by evidence if necessary in regard to them. Renton, 357.

The master will make to the committee all just allowances, including an allowance of his reasonable and proper costs, charges and expenses of passing the account, and those of the next of kin and other persons having liberty to attend on the passing of the account, at the cost of the estate. R. L. 1892, 73; and see *post*.

The committee is required to satisfy the master that his sureties are living and that neither of them has been adjudicated bankrupt or has compounded with his creditors, and in default of such proof the master will require him to enter into fresh security within such time as he may fix, and if the committee fail to do this, he may proceed to appoint a new committee. Rr. 75, 79, 80.

Accounts, how passed.

If the master is satisfied with the committee's account he allows it to pass. The allowance is signified and sufficiently authenticated by the seal of the master's office being impressed upon the account. R. L. 1893, 8.

The account is then sworn to and engrossed by the office stationers, and the engrossment when ready is sworn to and left at the master's office. Elmer, 107.

An office copy is then obtained by the committee or his solicitor, and the master certifies the balance due by the committee and fixes the time within which it is to be paid into court. Renton, 358.

Default.

Where the committee makes default in bringing in his account, or in having the same passed, or in paying the balance, or in causing the same or any sum of cash in court to be laid out, paid, or received, pursuant to any certificate or direction in that behalf, the master will, unless good cause to the contrary be shown, not only disallow the committee's salary or remuneration, if any, but also charge him with interest at the rate of four per cent. upon any balance or cash for the time during which the

same have been improperly retained or invested. Lun. R. 1892, 78; *cf. Ex parte Catton*, 1 Ves. jun. 156; *Ex parte Clarke*, *ibid.* 295, n.

Interest will be charged to a committee or receiver who takes upon himself the management of the savings of the estate, although he makes no personal use of them, and although all parties are satisfied with his conduct, unless the rule is relaxed under particular circumstances. *Ex parte Chumley*, 1 Ves. jun. 156; *Ex parte Hall*, Jac. 160; and *cf. Fletcher* v. *Dodd*, 1 Ves. jun. 85.

And in some cases the master has been directed to make annual rests. See *Re Middleton*, Shelf. Lun. 239.

It is competent for the committee to bring under the master's notice any circumstance which he deems an excuse for his delay, and if the master is satisfied payment of interest may not be insisted upon. *Re Lockey*, 1 Ph. 509.

And where the committee kept the management of the savings of the estate in his own hands Lord Eldon indicated that it might be an excuse if it appeared that he had made a provident use of them. *Re Chumley*, *supra*.

In addition to the penalties mentioned in the rule above stated, a defaulting committee may be removed from office, deprived of his costs, or even attached for contempt. *Re Lockey*, *supra*; *Ex parte Clarke*, *supra*; *Re Owen*, Shelf. Lun. 240.

Payment of balance.

The certificate is filed in the master's office and an office copy of it is taken and left with the Paymaster-General, who will give directions for the lodgment and investment of the balance in the manner indicated in the Supreme Court Funds Rules, 1894, rr. 29, 69.

The committee must pay in the balance within the time fixed by the master, and the balance so paid in is to be laid out in the purchase of such securities for the time being authorised for the investment of cash under the control of the Court, as the master directs, and the dividends on the securities so purchased, and all accumulations

of dividends are, unless the master otherwise directs, when the same amount to a competent sum, to be laid out in like manner without any request for the purpose. R. L. 1892, 76.

Subsequent accounts.

The subsequent accounts (not including the final account, as to which see *infra*) of the committee of the estate are passed in the same manner, except that (1) the payment into court of the balance on the last preceding account must be proved by the certificate of the Paymaster-General, and (2) the costs of such payment in should be brought in and included in every account passed.

Final account.

A final account is taken on the discharge or death of the lunatic. The procedure is substantially the same as in the case of the first account, but some special points must be noted.

If a balance is certified to be due from the committee or his estate, he or his legal personal representatives must pay the same into court by virtue of the master's certificate or otherwise, within such time as the master directs, or, in the case of *supersedeas*, must pay the same to the person whose lunacy has been superseded, or in the case of the death of the lunatic, must pay it to the lunatic's legal personal representatives. R. L. 1892, r. 81.

Notice of the application for payment out must be served on the committee, although he has passed his accounts and his security has been discharged. *Re Wylde*, 5 D. M. & G. 25.

If the master finds a balance due to the committee or his estate, it is in the case of a discharge to be paid to him or his legal personal representative by the new committee out of the lunatic's estate, or in case of a *supersedeas* by the person whose lunacy has been superseded, or in the case of the death of the lunatic by his legal personal representatives. Renton, 359.

And upon payment of the balance, if any, or if no balance is found due, or the taking of the account is not required, and may in the opinion of the master be properly

dispensed with, the security of the committee is discharged. *Ibid.*

The final passing of the committee's accounts does not relieve him from liability for moneys of the lunatic received by him in another capacity. *Wright* v. *Chard*, 4 Dr. 673.

Allowances.

The committee of the estate has no right, legal or equitable, to any allowance in respect of trouble taken by himself or others whom he employs as agents in the execution of his trust, even if the next of kin consent. *Re Annesley*, Ambl. 78; *Anon.*, 10 Ves. 103; *Re Walker*, 2 Ph. 630; *Re Westbrooke*, *ibid.* 631; *Re Weld*, 20 C. D. p. 462.

The rule must, however, be taken with considerable qualification, as there is a long series of cases in which an allowance has been made to committees for trouble taken and expenditure incurred in the management of the estates of lunatics, although the grant is made for the sake, not of the committees, but of the estates. *Re Walker*, 2 Ph. 630.

In determining whether or not to grant an allowance the Court will have regard to the questions whether (1) the demand for the allowance is reasonable under the circumstances, and (2) the committee absolutely refuses to act without it, and no other suitable committee can be found.

An allowance has been held reasonable where the lunatic's estates were large and lay dispersed in England and Ireland. *Ex parte Annesley, supra;* and see *Re Walker, supra; Re Brown*, 1 Mac. & G. 201; *Re Errington*, 2 Russ. 567.

And where the committee was unconnected with the family and was a very suitable person, and where the work of inspecting the property and receiving and remitting the rents would be attended with considerable trouble. *Ex parte Fermor*, Jac. p. 349.

And remuneration will be allowed to a committee who declines to act without it, where no other proper person can be found to act. *Re Walker*, *supra*; *Re Smith*, Shelf. Lun. 230; and *cf. Re Palmer*, *ibid.* 229.

An allowance may be made to a committee for a given purpose, as, for instance, the maintenance of an establishment suitable to the lunatic's fortune and position in life; and when such an allowance is made no account will be asked so long as the establishment is properly maintained. But the allowance is still an allowance made to a person in a fiduciary character and for a definite purpose, and the Court will see that the purpose is carried out. *Re Weld*, 20 C. D. 451.

Liability of Committee of Person to account.

The orders for maintenance which the Court is in the habit of making are in two forms, (1) an order allowing so much money for maintenance *simpliciter*, and (2) an order which allows to the committee of the person such sum not exceeding a certain fixed amount as shall be applied for maintenance. *Re French*, 3 Ch. 318, per Lord Cairns.

As a general rule an allowance of a fixed sum for maintenance throws no responsibility on the person to whom it is paid of keeping vouchers or passing accounts as to the items expended, and the object of the order in that form is to dispense with such liability to account. *Ibid.*

On the other hand, an order made in the second form above described directly and advisedly imposes on the person who receives the sum allowed the liability to keep his accounts for maintenance to prove how much has been expended for that purpose; and he can be sanctioned in his expenditure so far only as he can show that the money has been actually applied. *Ibid.*

The Court has, however, undoubted jurisdiction, even where the order is in the form of an allowance of so much

money for maintenance *simpliciter*, to require the committee of the person to account. And this jurisdiction may be exercised where it appears that the lunatic has not been properly maintained or the money properly expended by the committee, unless the application for an account is made after a lapse of time or under circumstances that would involve a prolonged and complicated examination of accounts which it would be unfair to expect the committee to have kept. *Ibid.*; *Strangeways* v. *Read*, *infra*.

Committees of the person are also liable to account where they receive an annual sum in advance for maintenance and the lunatic dies before the end of the year. They cannot properly claim to retain the whole sum paid to them without accounting, if the lunatic has died before the expiration of the whole period in respect of which the payment was made. *Strangeways* v. *Read*, (1898) 2 Ch. 419.

Although a committee of the person ordinarily receives no remuneration, an annual allowance for the expenses of visitation may be made to him. *Ex parte Ord*, Jac. 94.

CHAPTER XII.

PATENTS, TRADE MARKS, ETC.

Account or Damages.

In an action for infringement of a patent the Court or a judge may, on the application of either party, make such order for an injunction, inspection, or account, and impose such terms and give such directions respecting the same and the proceedings thereon as the Court or a judge may see fit. Patent and Trade Marks Act, 1883, s. 30.

It is now conclusively settled that a patentee is not entitled, since 21 & 22 Vict. c. 27, both to an account of profits (which amounts to a condonation of the infringement) and an inquiry as to damages, but must elect which he will take. The rule applies generally and without distinction to every case of infringement. *De Vitre* v. *Betts*, L. R. 6 H. L. 319; *Neilson* v. *Betts*, L. R. 5 H. L. 1; *Needham* v. *Oxley*, 11 W. R. 852; *United Horse Shoe Co.* v. *Stewart*, 13 A. C. 401; *Watson* v. *Holliday*, 30 W. R. 747.

The account of profits may extend not only to direct profits, but also to collateral benefits derived by the defendant from using the patented invention.

Thus where a defendant company had made and sold gas-meters in infringement of plaintiff's patent, and had also used them in carrying on their works, an account was directed not only of what profit had been received but of what benefit had been derived from the use of such meters. *Crossley* v. *Derby Gas Co.*, 1 Webs. 119; 3 M. & Cr. 428.

And where the defendant alleged that he had made no

profit, but it appeared that the use of the article had been a saving to him, the plaintiff was held entitled to claim something on account of the pecuniary value of that saving. *Household Co.* v. *Neilson*, 1 Webs. 697, n.

But if such an account be desired it must be alleged in the pleadings and proved. *Bacon* v. *Spottiswoode*, 1 Beav. 382, 387. And see *Crossley* v. *Derby, &c., supra*, as to the practical difficulties of taking such an account.

In a trade mark case, where defendants only sold to middlemen and not to retail purchasers, the plaintiffs were held entitled to an account of the profit made by the defendants by selling the article in the form in which they were not entitled to sell it, without excluding from the account that which the retailers sold to persons who bought it as the defendants' article. *Lever* v. *Goodwin*, 36 C. D. 1; *Saxlehner* v. *Apollinaris Co.*, (1897) 1 Ch. 893.

Although he may be entitled to damages, the plaintiff will not be entitled to an account of profits if it is clear that no profits have been made. *Bergmann* v. *Macmillan*, 17 C. D. 423; *Bacon* v. *Spottiswoode*, 1 Beav. 387.

Nor if the evidence of sale is so small as to make it not worth while. *Sanitas Co.* v. *Condy*, 4 R. P. C. 530.

A defendant having in ignorance infringed the plaintiff's patent, submitted before suit to pay the amount of profits made, which were very trifling; at the hearing, though an injunction was granted, no costs were given, and an account was granted only on the plaintiff's request and at his peril. *Nunn* v. *D'Albuquerque*, 34 Beav. 595.

It was held at common law that no retrospective account of profits made before action would be ordered before final judgment. *Vidi* v. *Smith*, 3 E. & B. 969.

Nor would such an account be ordered where at the trial there had been a verdict with damages, the plaintiff's loss up to that time being compensated by the damages. *Holland* v. *Fox*, 3 E. & B. 977.

The Court had, however, power to order, pending the action, an account of profits to be kept, but the plaintiff

was required to give evidence of infringement and profit, to waive damages, and to undertake, if unsuccessful, to pay expense of keeping the account. *Vidi* v. *Smith*, *supra*.

The amount due under an account of profits is not a demand in the nature of unliquidated damages. *Watson* v. *Holliday*, 20 C. D. 780.

In taking an account of profits the plaintiff is only entitled to an account of the profits made by the defendant. He is not entitled to any account of the loss which he has sustained by the infringement. *Ellwood* v. *Christy*, 18 C. B. N. S. 494; and see *Penn* v. *Jack*, 5 Eq. 81.

Where the invention was for an appliance for operating on large forgings, and an account was directed of all forgings manufactured by the defendants by the use of the invention, and of the profits made by the defendants by reason of such use, it was held that, for the purpose of ascertaining these profits, the defendants were bound to furnish an account of the cost of forgings manufactured by them prior to the use of the invention as well as during such use. *Siddell* v. *Vickers*, 6 R. P. C. 464.

In the prosecution at chambers of the inquiry as to damages the defendant must give full discovery and disclose the number of machines made since the patent, and the names and addresses of the purchasers, but not the names of agents where there is nothing to show that agents were employed. *Murray* v. *Clayton*, 15 Eq. 115, 120; *American Braided Wire Co.* v. *Thomson*, 5 R. P. C. 375.

And the same principles apply on taking an account of profits in trade mark cases. *Powell* v. *Birmingham, &c.*, 14 R. P. C. 1.

Where a defendant had filed an affidavit as to his profits, it was ordered that, if the plaintiff did not succeed in surcharging him to the extent of one-sixth beyond the amount in the affidavit, the plaintiff should pay the costs of the inquiry before the master. *Ellwood* v. *Christy*, 18 C. B. 494.

Where the defendant, a licensee under two patents

belonging to the plaintiffs, was sued for infringing their third patent and for an account of royalties, and for an account of profits of infringement, and did not appear, it was held that under Ord. 15 an account of the royalties, but not of profits, might be granted. *Pneumatic Tyre Co.* v. *Ferguson*, 11 R. P. C. 459.

If a plaintiff lies by and does not prosecute his rights against the defendant the delay, if unexplained, may affect his right to an account of profits. *Beard* v. *Taylor*, 13 L. T. 746; *Crossley* v. *Derby*, *&c.*, *infra*.

And the plaintiff will not be allowed to claim an account if he has tacitly permitted the defendant to infringe his patent, relying upon an ultimate account of profits. *Crossley* v. *Derby*, 1 Webst. P. C. 120.

And in actions to restrain infringement of trade mark, where there is undue delay in taking proceedings the account will only be granted as from the commencement of the action. *Ford* v. *Foster*, 7 Ch. 627.

In trade mark cases where the trade mark is used by the defendant in ignorance of the plaintiff's rights, the account of profit or compensation will only be directed as from the time when the defendant became aware of the prior ownership. *Edelsten* v. *Edelsten*, 1 D. J. & S. 185, 199.

And if a man buys goods from a third party, believing them to be genuine, it is not until he has been told they are spurious that he can be considered guilty of a fraud and liable to account. *Moet* v. *Causton*, 10 L. T. 396, per Romilly, M. R.

But this principle does not apply in patent cases. And where the defendant had purchased in open market and in ignorance of the fact of infringement, the inquiry as to damages was nevertheless ordered to extend to the sale within six years of the filing of the bill. *Davenport* v. *Rylands*, 1 Eq. 308.

It follows from the above considerations that the proper form of the inquiry as to damages in a patent case is

"what damages the plaintiff has sustained," not "what damages, if any, he has sustained." *Ibid.*

And it should be an inquiry as to the particular articles proved in the action as infringements and all others made in infringement of the patent. *Shoe Machinery Co.* v. *Cutlan*, 12 R. P. C. 342, 360.

The measure of damages is the extent to which the sales of the infringing articles interfered with the sales of the plaintiff's own goods, and the plaintiff can only recover compensation for the actual loss he has sustained by the unlawful sales. *United Horse Shoe* v. *Stewart*, 13 A. C. 401, 408; *Ledgard* v. *Bull*, 11 A. C. 648, 654.

The loss must be the natural and direct consequence of the defendant's acts; and loss of profit to the plaintiffs by reason of their having in consequence of defendant's competition reduced their prices is not to be taken into account. *Ibid.*

But this does not apply when the defendants were the first to reduce the prices and the reduction by the plaintiff was made in consequence of the sales of the defendants. *American Braided, &c.* v. *Thomson*, 44 C. D. 274.

Where sales have been made by the defendants and the plaintiffs have reduced their prices in consequence of such competition, the measure of damages to the plaintiffs is the amount of profit which would have been made by them if all the sales had been made by them at original prices after making allowance for the increased sales attributable to the connection and exertions of the defendants and to the reduction in prices. *Ibid.*

But where the reduction in prices is due to the competition of others besides the defendants, the plaintiffs are not entitled to additional damages in respect of the reduction. *United Horse Shoe Co.* v. *Stewart*, 13 A. C. 401.

Where defendant admitted some infringements and denied others, on the plaintiff moving for judgment on admissions the inquiry was confined to damages arising

from the admitted infringements. *United Telephone Co.* v. *Donohoe*, 31 C. D. 399.

In aid of the account an order may be made on the defendants for production and inspection of their books. *Saxby* v. *Easterbrook*, L. R. 7 Ex. 207.

By the Patents Act, 1883, s. 17 (4) (b), if any proceeding is taken in respect of an infringement of patent committed after a failure to make any payment within the prescribed time and before enlargement thereof, the Court may refuse to give any damages in respect of such infringement.

And by sect. 20, where an amendment by way of disclaimer, correction or explanation has been allowed, no damages shall be given in respect of the use of the invention before the disclaimer, correction or explanation, unless the patentee satisfies the Court that his original claim was framed in good faith, and with reasonable skill and knowledge.

The account under a patent being incident to the right to an injunction against future infringement might be lost by its expiration or by delay. *Smith* v. *L. & S. W. Ry.*, Kay, 408; *Price's Patent Co.* v. *Bauwen, &c.*, 4 K. & J. 727; *Bailey* v. *Taylor*, 1 R. & M. 73.

The expiration of the patent during the litigation will not deprive the plaintiff of his relief in damages or by account. *Davenport* v. *Rylands*, 1 Eq. 302; *Fox* v. *Dellestable*, 15 W. R. 194.

But where a bill was filed so immediately before the patent expired that no interlocutory injunction could have been obtained, the Court refused to entertain the bill for the mere purpose of damages. *Betts* v. *Gallais*, 10 Eq. 392.

The account and also the inquiry as to damages extends to sales within six years of the commencement of the action. This, however, will be subject to Patent Act, 1883, ss. 13, 17 (4) (b). *Davenport* v. *Rylands*, *supra*; *Ellwood* v. *Christy*, *supra*.

But where the plaintiff was assignee of a patent, the account of profits was only ordered from the date of the

registration of the assignment. *Ellwood* v. *Christy*, *supra;* but see *Dreyfus* v. *Peruvian*, *&c.*, 43 C. D. 316.

The order for account or damages usually provides that the defendant shall pay the amount found due within a definite time after the filing of the certificate, but this is sometimes left to be dealt with on further consideration.

The costs of an account of profits or inquiry as to damages should be reserved, so that the judge may have control over them; and the rule is the same when the action is undefended. *United Telephone Co.* v. *Fleming*, 3 R. P. C. 282.

But where it was referred to the referee to take the account of profits, the Court gave him jurisdiction over the costs of the reference. *Shaw* v. *Jones*, 6 R. P. C. 428.

There is no right of account between two or more persons to whom a patent is granted jointly. *Mathers* v. *Green*, 1 Ch. 29.

In taking the account against a licensee of all articles made by him under his licence, he is not entitled during the continuance of the licence to adduce documentary evidence for the purpose of showing that the patent was bad for want of novelty. *Adie* v. *Clark*, 2 A. C. 423; *Dangerfield* v. *Jones*, 13 L. T. 142.

Copyright.

The right to an account in cases of literary piracy is incident to the perpetual injunction at the hearing. *Parrott* v. *Palmer*, 3 M. & K. 632; *Bailey* v. *Taylor*, 1 R. & M. 73.

It has been stated that the defendant must account for every copy of his work sold as if it had been a copy of the plaintiff's, and pay plaintiff the profit he would have received from the sale of so many additional copies. *Pike* v. *Nicholas*, 5 Ch. 260, n.

But from previous cases it appears that the plaintiff whose copyright has been infringed is not entitled to more than the net profits of the actual sales. *Colburn* v. *Sims*, 2 Ha. 560; *Delfe* v. *Delamotte*, 3 K. & J. 581.

For the purposes of the account plaintiff may require defendant to set out the number of pirated copies sold by him, and may continue the suit until such discovery is given. *Stevens* v. *Brett*, 12 W. R. 572.

Mines.

In assessing compensation for mineral trespass or wrongful working, a different principle is applied when the minerals have been taken inadvertently and when taken fraudulently or in wilful wrong.

Inadvertently taken.

If taken inadvertently or under a *bonâ fide* belief of title the plaintiff is entitled to be paid the value of the coal or minerals as if the field had been purchased by the defendant at the fair market value of the district, the expenses of winning and getting being allowed to defendant. *Jegon* v. *Vivian*, 6 Ch. 742; *Hilton* v. *Woods*, 4 Eq. 432; and see *Joicey* v. *Dickenson*, 45 L. T. 643; *Ashton* v. *Stock*, 6 C. D. 719; *Livingstone* v. *Rawyards, &c.*, 5 A. C. 25.

So long as the wrongful working can be treated as inadvertent the Statute of Limitations applies and the account will be limited to six years from the issue of the writ. *Trotter* v. *Maclean*, 13 C. D. 574; *Dean* v. *Thwaite*, 21 Beav. 621.

So an inquiry was directed to ascertain the market price or value of all coal improperly taken at the pit's mouth, all just allowances being made to the parties chargeable in respect of their charges and expenses on account of such coal. *Powell* v. *Aiken*, 4 K. & J. 343.

For the mode of calculating the profits and expenses and that interest on expenses is at the rate of five per cent. *Rokeby* v. *Elliot*, 13 C. D. 277; 9 C. D. 685.

Fraudulently.

If taken fraudulently or wilfully after full notice of plaintiff's title, damages will be assessed on a stricter principle; and he will be allowed the costs of bringing

the coal to the pit's mouth only, not of severing or getting. *Phillips* v. *Homfray*, 6 Ch. 770; *Llynvi Co.* v. *Brogden*, 11 Eq. 188.

And the plaintiff is also entitled to an inquiry what is fit and proper to be paid by the defendant for way-leave for minerals carried through the plaintiff's property, and as to damages by reason of the defendant breaking through the plaintiff's boundary. *Ibid.*

As to the right to compensation money for coal wrongfully worked under a settled estate, see *Re Barrington*, 33 C. D. 523.

The inquiry may be extended to damage sustained by plaintiff in respect of coal which, though not worked, has been injured by the defendant's working of the plaintiff's coal. *Williams* v. *Raggett*, 37 L. T. 96.

In case of subsidence, the cause of action arises when the subsidence occurs, and the action may therefore be maintained more than six years after the last working. *Crumbie* v. *Wallsend Local Board*, (1891) 1 Q. B. 503.

An account of royalties under a mining lease may be carried back for twenty years. *Darley* v. *Tenant*, 53 L. T. 257.

CHAPTER XIII.

ACCOUNTS IN BANKRUPTCY.

Record book.

THE official receiver until a trustee is appointed, and thereafter the trustee, shall keep a book to be called "The Record Book," in which he shall record all minutes, all proceedings had and resolutions passed at any meeting of creditors or of the committee of inspection, and all such matters as may be necessary to give a correct view of his administration of the estate; but he will not be bound to insert in the record any document of a confidential nature, such as the opinion of counsel on any matter affecting the interest of the creditors, nor need he exhibit such document to any person other than a member of the committee of inspection. Bankruptcy Act, 1883, s. 80; rule 285.

Cash book.

The official receiver until a trustee is appointed, and thereafter the trustee, shall keep a book to be called the "Cash Book," which shall be in such form as the Board of Trade may from time to time direct, in which he shall, subject to the provisions of these rules as to trading accounts, enter from day to day the receipts and payments made by him. Rule 286.

Inspection.

The trustee shall submit the record book and cash book, together with any other requisite books and vouchers, to the committee of inspection (if any) when required, and not less than once every three months. Rule 287.

And any creditor of the bankrupt may, subject to the control of the Court, personally or by his agent inspect any such books. Bankruptcy Act, 1883, s. 80.

And any creditor with the concurrence of one-sixth of the creditors, including himself, may require the trustee or official receiver to furnish and transmit to the creditors

a statement of the accounts up to the date of the notice, and the trustee shall upon receipt of such notice furnish and transmit such statement of accounts. Provided the person at whose instance the accounts are furnished shall deposit with the trustee or official receiver a sum sufficient to pay the costs of furnishing and transmitting the accounts, such sum to be repaid to him out of the estate if the creditors or Court so direct. Bankruptcy Act, 1890, s. 17; rule 315.

But it is conceived that as a general rule only creditors who have proved will have a right to inspect the books or require a statement of accounts to be furnished. See *Ex parte Kenrick*, 7 L. T. 287.

And it is conceived that a creditor will not be allowed to inspect the books or to call for a statement of accounts if his object is to impeach the validity of the receiving order or adjudication. See *Ex parte Rimell*, 1 D. M. & G. 491.

Audit of cash book.

The committee of inspection must not less than once every three months audit the cash book and certify therein under their hands the day on which it was audited. The certificate shall be in the form No. 128 in the Appendix with such variations as circumstances may require. Rule 288.

Audit of accounts.

The trustee must at such times as may be prescribed, but not less than twice in each year during his tenure of office, send to the Board of Trade or as they direct an account of his receipts and payments as such trustee. Bankruptcy Act, 1883, s. 78.

The Board has power to demand these accounts from a trustee under a scheme of arrangement, even where he has been removed from office, and can enforce such demand under Bankruptcy Act, 1883, s. 102 (5). *Re Rogers*, 4 Mor. 67.

The trustee must at the expiration of six months from the date of the receiving order, and at the expiration of every succeeding six months thereafter until his release, transmit to the Board of Trade a duplicate copy of the cash

book for such period together with the necessary vouchers and copies of the certificates of audit by the committee of inspection. He must also forward with the first accounts a summary of the debtor's statement of affairs in such form as the Board of Trade may direct, showing thereon in red ink the amounts realised, and explaining the cause of the non-realisation of such assets as may be unrealised. Rule 289; and see Bankruptcy Act, 1883, s. 78.

The Board of Trade shall cause the accounts as sent to be audited, and for the purposes of the audit the trustee shall furnish the Board with such vouchers and information as the Board may require, and the Board may at any time require the production of any books or accounts kept by the trustee. Bankruptcy Act, 1883, s. 78.

When the estate has been fully realised and distributed, or if the adjudication is annulled the trustee must forthwith send in his accounts to the Board of Trade although the six months may not have expired. Rule 289.

The accounts sent in by the trustee shall be made in duplicate and shall be certified and verified by statutory declaration in the Form 129 in the Appendix. Bankruptcy Act, 1883, s. 78; rule 289.

Filing. When the account has been audited one copy shall be filed and kept by the Board and one copy shall be filed with the Court. The Board of Trade shall certify that the account has been duly passed, and thereupon the duplicate copy bearing a like certificate must be transmitted to the Registrar who shall file the same with the proceedings in the bankruptcy. Bankruptcy Act, 1883, s. 78; rule 290.

And each copy shall be open to the inspection of any creditor or of the bankrupt or of any person interested. Bankruptcy Act, 1883, s. 78 (4).

A creditor who has proved may also apply to the trustee for a copy of the accounts or any part thereof, as shown by the cash book, on paying for the same at the rate of 3*d.* per folio. Rule 314.

Where a trustee has not since the date of his appointment or since the last audit of his accounts, as the case may be, received or paid any sum of money on account of the debtor's estate, he shall at the period when he is required to transmit his estate account to the Board of Trade forward to the Board an affidavit of no receipts or payments. Rule 291. No receipts.

If the trustee has no assets he must himself provide the stamp. In such a case an unstamped affidavit cannot be accepted, nor can the amount be provided from the bankruptcy estates account. *Re Rowlands*, 4 Mor. 70.

Every trustee in bankruptcy must also from time to time as may be prescribed, and not less than once a year during the continuance of the bankruptcy, transmit to the Board of Trade a statement showing the proceedings in the bankruptcy up to the date of the statement containing the prescribed particulars, and made out in the prescribed form. Bankruptcy Act, 1883, s. 81. No form is prescribed. The accounts under rule 289 seem to meet this section.

The Board shall cause the statements so transmitted to be examined, and shall call the trustee to account for any misfeasance, neglect, or omission which may appear on the said statements or in his accounts, or otherwise, and may require the trustee to make good any loss so sustained to the estate. Bankruptcy Act, 1883, s. 81 (2).

The trustee or official receiver must also, whenever required by any creditor and on payment by such creditor of the prescribed fee (3*d.* per folio and postage), furnish and transmit to such creditor by post a list of the creditors, showing in such list the amount of the debt due to each creditor. Bankruptcy Act, 1883, s. 79; Bankruptcy Act, 1890, s. 16.

Upon a trustee resigning, or being released or removed from his office, he shall deliver over to the official receiver or, as the case may be, to the new trustee all books kept by him and all other books, documents, papers, and New trustee.

accounts in his possession relating to the office of trustee. Rule 292.

A notice by the Board of Trade to comply with this rule served on a trustee who has been removed may be enforced by order of the Court. *Re Hincks and Radcliffe*, 8 Mor. 295; and *cf. Re Rogers*, *ante*.

But if the solicitor of a trustee who has been removed has a lien on any document for the costs of labour expended by him upon it for the benefit of the bankrupt's estate, the solicitor will be entitled to retain such document until the lien is satisfied. *Ex parte Yalden*, *Re Austin*, 4 C. D. 129.

No lien on books.

But no person is, as against the official receiver, entitled to withhold possession of the books of account belonging to the debtor or to set up any lien thereon. Rule 349.

In this rule books of account will be construed strictly, and will not be extended to include cheque books, counterfoils, vouchers, and other papers, and the trustee cannot obtain these, though necessary to him in order to make up the accounts. *Re Winslow*, 16 Q. B. D. 696; *Re West*, 21 C. D. 868; *Re White & Co.*, 1 Mor. 77.

But the existence of a lien will not entitle a solicitor to refuse to produce for the inspection of the trustee any documents of the bankrupt in his possession. *Re Toleman*, *Ex parte Bramble*, 13 C. D. 885.

Joint and separate.

Where a receiving order has been made against debtors in partnership, distinct accounts shall be kept of the joint estate and of the separate estate or estates, and no transfer of a surplus from a separate estate to the joint estate on the ground that there are no creditors under such separate estate shall be made until notice of the intention to make such transfer has been gazetted. Rule 293; and see Bankruptcy Act, 1883, ss. 40 (3), 59.

The Board of Trade may, on the application of the official receiver, direct that the debtor's books of account and other documents given up by him may be sold, destroyed, or otherwise disposed of. Rule 294.

Where property forming part of the debtor's estate is sold by the trustee through an auctioneer or other agent the gross proceeds of the sale shall be paid over by such auctioneer or agent, and the charges and expenses connected with the sale shall afterwards be paid to such auctioneer or agent on production of the necessary allocatur of the taxing officer. Every trustee, by whom such auctioneer or agent is employed, shall be accountable for the proceeds of every such sale. Rule 295.

It is the statutory duty of the trustee to require that the proceeds of sale should be at once paid into the bankruptcy estates account. *Board of Trade* v. *Prov. Clerks, &c.*, 72 L. T. 562.

Allowance to debtor.

The Bankruptcy Act, 1883, provides that the trustee may from time to time, with the permission of the committee of inspection, make such allowance as he may think just to the bankrupt out of his property. Sect. 64.

Such allowance, unless the creditors by special resolution determine otherwise, shall be in money, and the amount allowed shall be duly entered in the trustee's accounts. Rule 296.

Trade account.

Where the trustee carries on the business of the debtor he shall keep a distinct account of the trading and shall incorporate in the cash book the total weekly amount of the receipts and payments on such trading account. Rule 308.

The trading account shall from time to time and not less than once in every month be verified by affidavit, and the trustee shall thereupon submit such account to the committee of inspection (if any) or such member thereof as may be appointed for the purpose, who shall examine and certify the same.

Payment into bank.

The trustee must not pay any sum received by him into his private banking account, but he must, in such manner and at such times as the Board of Trade with the concurrence of the Treasury direct, pay the money received by him into the bankruptcy estates account kept by the Board

at the Bank of England, and the Board will furnish him with a certificate of receipt of the money so paid. Bankruptcy Act, 1883, ss. 74, 75.

But if it appears to the committee of inspection that for the purpose of carrying on the debtor's business or of obtaining advances, or because of the probable amount of the cash balance, or if the committee shall satisfy the Board that for any other reason it is for the advantage of the creditors that the trustee should have an account with a local bank, the Board is, on the application of the committee, to authorise the trustee to make his payments into and out of such local bank as the committee may select. Bankruptcy Act, 1883, s. 74.

Such account must be opened and kept in the name of the debtor's estate; and any interest recoverable in respect of the account will be part of the assets of the estate. *Ibid.;* Forms 136, 137.

And where the debtor at the date of the receiving order has an account at a bank, such account must not be withdrawn until the expiration of seven days from the day appointed for the first meeting of creditors unless the Board of Trade order the withdrawal. *Ibid.*

Every payment out must be by cheque payable to order, and every cheque must have marked or written on the face of it the name of the estate, and be signed by the trustee and countersigned by at least one member of the committee of inspection, and by such other person, if any, as the creditors or the committee of inspection may appoint. Rule 340.

If a trustee at any time retains for more than ten days a sum exceeding 50*l.* or such other amount as the Board of Trade in any particular case authorise him to retain, then, unless he explains his retention to the satisfaction of the Board, he must pay interest on the amount so retained in excess at the rate of twenty per cent. per annum, and he will have no claim for remuneration and may be removed from his office by the Board of Trade and will be

liable to pay any expenses occasioned by reason of his default. Bankruptcy Act, 1883, s. 74 (6).

Unclaimed dividends.

The Board of Trade may at times order the trustee to submit to them an account of unclaimed or undistributed funds or dividends. Bankruptcy Act, 1883, s. 162 (2) (b).

Official receiver.

Every official receiver shall account to the Board of Trade and pay over all money and deal with all securities in such manner as the Board from time to time direct. Bankruptcy Act, 1883, s. 70 (3).

Where a composition or scheme is sanctioned by the Court, the official receiver shall account to the debtor or as the case may be to the trustee under the composition or scheme. Rule 336.

Where a debtor is adjudged bankrupt and a trustee is appointed the official receiver shall account to the trustee. *Ibid.*

If the debtor or trustee is dissatisfied with the account or any part thereof, he may report the matter to the Board of Trade. *Ibid.*

Rules 285 *et seq.* above stated as to trustees and their accounts shall not apply to the official receiver when acting as trustee, but he shall account in such manner as the Board of Trade may from time to time direct. Rule 336 (4).

Trading account of debtor.

The debtor shall on the request of the official receiver furnish him with trading and profit and loss accounts, and cash and goods accounts for such period not exceeding two years prior to the date of the receiving order as the official receiver shall specify; and if ordered by the Court so to do, he shall furnish such accounts for any longer period. Rule 338; *Ex parte Moir*, 21 C. D. 61; *Re Cronmire*, 1 Mans. 79.

Account of after-acquired property.

Where a bankrupt is conditionally discharged it shall be his duty until such condition is satisfied from time to time to give the official receiver such information as he may require with respect to his earnings and after-acquired property and income, and not less than once a year to file

in the Court a statement showing the particulars of any property or income he may have acquired subsequent to his discharge, and such statement shall be verified by affidavit. Rule 244; *cf. Hunt* v. *Fripp*, 77 L. T. 516.

Special manager.

Where a special manager is appointed he shall account to the official receiver, and his accounts shall be verified by affidavit in the prescribed form, and when approved by the official receiver the totals of the receipts and payments shall be added to the official receiver's accounts. Rule 344.

Mortgage.

On motion by a mortgagee of any part of the bankrupt's estate, the Court shall direct such accounts to be taken as may be necessary for ascertaining the amount due for principal, interest and costs, and of rents and profits, if he shall have been in possession, and may direct a sale. Rule 73.

Deeds of Arrangement.

Every trustee under any deed of arrangement must within thirty days of the 1st January in each year transmit to the Board of Trade, or as they direct, an account of his receipts and payments as such trustee in the prescribed form and verified in the prescribed manner. See *infra*. The term trustee in this section includes any person appointed to distribute a composition or to act in any fiduciary capacity under any deed of arrangement. The accounts shall be open to inspection by any creditor on payment of the prescribed fee. Bankruptcy Act, 1890, s. 25; *Re Norman*, *infra*, p. 306.

The account shall be in Form 2 in the Appendix to Deeds of Arrangement Rules, 1890, with such variations as circumstances may require, and shall be on sheets 13 inches by 16, and shall be verified by an affidavit in the Form 3 in the Appendix and shall be transmitted to "The Inspector-General in Bankruptcy, Board of Trade, Whitehall." Rules, 1890, 7.

The trustee must stamp the account out of his own pocket if there are no assets. *Re Hertage*, 3 Mans. 297.

In the account each receipt and payment must be entered in such a manner as sufficiently to explain its nature. Rule 8.

When the trustee carries on a business a trading account must be forwarded as a distinct account, and the totals of receipts and payments on the trading account must alone be set out in the yearly account. The trading account shall be in Form 4 in the Appendix and shall be on sheets 13 by 16 inches. Rule 9.

Petty expenses must be entered in the accounts in sufficient detail to show that no estimated charges are made. Rule 10.

Where property has been realised, the gross proceeds of sale must be entered under receipts, and the necessary disbursements and charges incidental to sales must be entered as payments. Rule 11.

Where dividends or instalments of composition are distributed under the deed, the total amount of each dividend or instalment must be entered as one sum, and the trustee shall forward with his final account a statement in Form 5 in the Appendix showing the amount of the claim and the amount of dividend payable to each creditor, distinguishing the dividends or instalments paid and those remaining unclaimed. Rule 12.

Where the deed has been made by a firm of debtors in partnership, distinct accounts must be transmitted of the joint estate and of each of the separate estates. Rule 13.

Where it appears to the Board of Trade that the account is incomplete or requires amendment or explanation, the Board may require it to be completed or amended or explained, and may enforce such requirement by application to the Court under s. 102 (5) of the Bankruptcy Act, 1883; rule 14.

Where a trustee has not, since the date of his becoming trustee, or since the last time that his accounts have been

transmitted, as the case may be, received or paid any money on account of the debtor's estate, he shall, at the period when he is required to transmit his accounts to the Board of Trade, forward to the Board an affidavit of no receipts or payments. Rule 15.

When a trustee has realised all the property included in the deed of arrangement, or so much thereof as can probably be realised, and has distributed a final dividend or final instalment of composition, or in any other case where the trusts of the deed or the obligations of the trustee have been completely fulfilled, the trustee shall transmit with his yearly account an affidavit in Form 6 in the Appendix, and no further accounts need thereafter be transmitted by him. Rule 16.

In any particular account in which it shall appear to the Board of Trade that an account of receipts and payments in the form and containing the particulars specified in the above rules may for special reasons be dispensed with, the Board of Trade may permit the trustee to transmit, instead of the accounts in the form above specified, such a summary of his accounts or modified statements of accounts as to the Board of Trade shall appear sufficient. Rule 17.

Where a trustee under a deed of arrangement satisfies the Board of Trade by an affidavit or otherwise that the trusts of the deed, or the obligations of the trustee thereunder, were completely fulfilled or discharged prior to the 1st January, 1891, the accounts prescribed by the above rules need not be transmitted. Rule 18.

The last two rules were added on 4th May, 1891, and came into operation on 4th June, 1891.

Section 25, above stated, either does not apply at all to deeds of arrangement executed before 1st January, 1891, or if it does it only requires the trustee to furnish accounts of receipts and payments which took place subsequently to that date. *Re Norman*, (1893) 2 Q. B. 369.

CHAPTER XIV.

ACCOUNTANTS AND AUDITORS.

As to the employment of accountants by the Court, see *ante*, p. 26.

There is no prescribed scale for general auditing of accounts, but there is a recognised scale for ordinary auditing work. See Pixley on Accounts, Ch. II.

And whenever a certain rate or way of charging is usual and general among the most large class of persons carrying on an employment, it may fairly be presumed to be just and reasonable, and ought to be allowed. *Price* v. *Hong Kong Tea Co.*, 2 F. & F. 466, per Pollock, C.J.

Statutes.

The remuneration of auditors is, however, in certain cases, regulated by Acts of Parliament.

Thus by the Companies Act, 1862, Sched. I. Table A., the remuneration of the first auditors shall be fixed by the directors; that of subsequent auditors by a general meeting; and if no auditors are elected, the Board of Trade may appoint one for the current year and fix his remuneration.

So under the Companies Clauses Consolidation Act, 1845, s. 91, and under the Companies Act, 1879, the remuneration is fixed by a general meeting; and under the former Act it has been held that auditors cannot recover more than the amount so fixed. *Page* v. *Eastern, &c.*, Cab. & E. 280.

Under the Regulations of Railways Act, 1868, and under the Metropolitan Water Act, 1871, the Board of Trade may appoint an auditor and fix his remuneration.

Under the Friendly Societies Act, 1875, the Treasury may fix the remuneration of auditors appointed by them.

And under the Industrial and Provident Societies Act, 1876, there is a similar provision and also a scale of fees.

The remuneration of auditors of companies registered under the Act of 1862, with special articles of association, is provided for in the articles, and is either by the directors, which is preferable, or by a general meeting.

The charges for auditing the accounts of executors or trustees are the same as for other audits. Pixley, 10.

Cases.

Where the plaintiff in December, 1885, agreed to audit the defendant's books for 50*l.* a year, and completed the audit for that year in the following March, it was held in the County Court that the 50*l.* was for a year's services and was not due until after a year from the date of the contract. *Litchfield* v. *Marcus*, The Accountant, Vol. XII. 676.

The charges of a chartered accountant employed by an arbitrator by consent of the parties to examine the defendant's books may be costs of the reference. *Hawkins* v. *Rigby*, 29 L. J. C. P. 228.

An executor or trustee may, if the accounts be complicated, employ a chartered accountant to adjust and settle them, and he is entitled to charge the trust estate with the fee under the head of expenses. *Henderson* v. *M'Iver*, 3 Madd. 275; *Re Bennett*, (1896) 1 Ch. 778, *ante*, p. 187.

The allowances in respect of fees to accountants to whom any question is referred by a judge in chambers is regulated by the taxing officers, subject to appeal to the Court or judge. See Ord. 65, r. 36.

The employment of an accountant does not suspend, but is ancillary to the taking of the accounts in chambers, and the allowance to him is made in addition to the Court fee, and therefore cannot be deducted from the Court fee payable on taking accounts, but must be borne by the parties. *Hutchinson* v. *Norwood*, 50 L. T. 486.

It has been held that the Court of Chancery should follow the rule in bankruptcy and allow to accountants

the fees allowed in bankruptcy. *Meymott* v. *Meymott*, 33 Beav. 590; see *infra*.

But after an act of bankruptcy, if an allowance is made to accountants for preparing a statement of affairs, it must be only for services which clearly benefited the creditors. *Re Simonson, Ex parte Ball*, (1894) 1 Q. B. 433.

It has been held in the County Court that an accountant's charges are not entitled to preferential payment by a bankrupt's estate under Bankruptcy Act, 1883, s. 40 (b), for the proportion of his fee during the four months before the date of the receiving order.

An accountant has a lien after a bankruptcy on books entrusted to him before that event for examination and to prepare accounts. *Ex parte Southall, Re Hill*, 12 Jur. 576.

Where the employment of an accountant has been duly sanctioned, and in the absence of any special arrangement with the official receiver or the trustee for a smaller amount, the following charges are allowed in bankruptcy:— Bankruptcy.

For preparing balance sheet, investigating accounts, &c., principal's time exclusively so employed per day of seven hours, including necessary affidavit, 1 to 5 guineas.

Or such other sum as the Court may under special circumstances order.

For chief clerk's time per day, 10*s.* 6*d.* to 1*l.* 11*s.* 6*d.*

For other clerk's time per day, 7*s.* 6*d.* to 16*s.*

These charges shall include stationery, except the forms used.

The above charges may, however, be increased with the sanction of the committee of inspection and the official receiver.

When the official receiver has assessed the fee, he will intimate the amount to the accountant and to the trustee, or, if the estate be kept out of bankruptcy by a composition being accepted or a scheme of arrangement carried

out, due provision will be made for the payment of the fee.

In the event of bankruptcy the fee is a charge upon the assets, and comes immediately after the taxed costs of the petitioning creditors. Bankruptcy Rules, 1886, r. 125.

Winding-up.

The charges of an accountant for making the statement of affairs and affidavit in a winding-up shall be such as the official receiver shall consider reasonable, subject to an appeal to the Court. Companies (Winding-up) Act, 1890, s. 7 (4).

But before incurring any expense he must apply to the official receiver for his sanction, and he will not be allowed any costs incurred before such sanction. Rules, 1890, 62.

Such costs and expenses, subject to any order of the Court, will be paid after the costs of realising the assets, the costs of the petition, and the remuneration of the special manager, if any. Companies (Winding-up) Act, 1890, s. 31.

The charges of an accountant employed by an official receiver or liquidator under the above Act are liable to taxation. Rules, 1890, 23—30.

Liquidator under Act of 1862.

A liquidator shall be allowed in his accounts or otherwise paid such remuneration as the judge may from time to time direct, including any necessary employment of clerks. Unless made on his appointment, or on passing an account, the allowance will be made on the application of the liquidator. Companies Act, 1862, s. 93; G. O., Nov. 1862, r. 18.

A scale of remuneration was fixed by Order of May, 1868, which in the absence of special circumstances is adopted by the Court. See *Re Mysore Reefs, &c.*, 34 C. D. 14.

The master, to whom the winding-up is attached, does not usually sanction the payment of remuneration until a dividend has been paid to the creditors.

No remuneration will be given to the liquidator until all the costs of the winding-up are paid, including the costs

of any provisional liquidator who may have been properly appointed.

Under Act of 1890.

The remuneration of a liquidator appointed under the Winding-up Act, 1890, shall, unless the Court shall otherwise order, be fixed by the committee of inspection, and shall be in the nature of a commission of which one part shall be payable on the amount realised, less sums paid to secured creditors, and the other part on the amount distributed in dividend; and if there is no committee it shall be in accordance with the scale payable for realisations and distributions by the official receiver as liquidator. Rules, 1890, 154.

The remuneration where there is no committee will be paid by the Board of Trade. Winding-up Act, 1890, s. 9 (9).

If it is clear that there are sufficient assets the liquidator will generally be paid sums on account. He is entitled to his remuneration before the claims of unsecured creditors, but after the rights of incumbrancers. *Perry* v. *Oriental Hotel Co.*, 12 Eq. 126; *Re Regent's Canal, &c.*, 3 C. D. 411.

The Court may disallow the remuneration if the liquidator retain moneys in hand improperly or uses solicitation in obtaining proxies or procuring his appointment. Companies (Winding-up) Act, s. 11 (4); Rules, 1890, 18.

The costs and remuneration of the liquidator are payable after the costs and expenses of the person making the statement of affairs as above.

Where the assets of a company in compulsory liquidation are insufficient for payment of the costs of winding-up, the liquidator is not entitled to any remuneration; and the costs of realisation are payable out of the assets in priority to costs incurred in internal litigation including those of the liquidator. *Re Dronfield Silkstone Coal Co.*, 23 C. D. 511.

A liquidator's charges have no priority over the claims of debenture-holders on the amount realised by the sale of

the property mortgaged beyond the costs of preservation and realisation of the property itself. *Re Regent's Canal, &c.*, 3 C. D. 411.

When a company is reconstructed, and shares in the new company are issued to shareholders in the old company, it is in the discretion of the judge in fixing the remuneration of the liquidator to take into consideration the value of the shares so issued. *Re Mysore Reefs, &c.*, 34 C. D. 14.

A liquidator may not make any profit by means of the company beyond his remuneration, and if he does so he may be removed. *Re Devonshire Silkstone Coal Co.*, W. N. (1878) 71.

Voluntary liquidator.

The remuneration of a liquidator of a company in voluntary liquidation is fixed by the company in general meeting, and is payable out of the assets in priority to all other claims at the date of the winding-up. Companies Act, 1862, ss. 133 (3), 144.

If the company has been wound up under supervision the liquidator may apply to the chief clerk to fix his remuneration; in which case the regulations as to the remuneration of a liquidator appointed under the Companies Act, 1862, will apply. *Ante*, p. 310.

Receiver.

As to the remuneration of receivers, see *ante*, p. 263. The usual allowance was formerly five per cent. on the gross rental; but three per cent. is now very commonly given. There is, however, no settled scale, and the amount must depend on the circumstances of each case. The scale allowed to liquidators is no guide. *Ante*, p. 263.

Trustee in bankruptcy.

The remuneration of a trustee in bankruptcy is fixed by an ordinary resolution of the creditors, or if the creditors so resolve, by the committee of inspection, and shall be in the nature of a percentage of which one part shall be payable on the amount realised, less sums paid to secured creditors, and the other part on the amount distributed in dividend. Bankruptcy Act, 1883, s. 72.

If one-fourth in number or value of the creditors dissent

from the resolution, or the bankrupt satisfies the Board of Trade that the remuneration is unnecessarily large, the Board shall fix the amount. *Ibid.*; *Re Gallard*, (1892) 1 Q. B. 532; *Re Shirley*, 9 Mor. 147.

The resolution shall express what expenses the remuneration is to cover, and no liability shall attach to the estate or to the creditors in respect of any expenses so covered. Bankruptcy Act, 1883, s. 72 (3).

Where a trustee acts without remuneration he shall be allowed out of the estate such proper expenses as the creditors may with the sanction of the Board of Trade approve. Bankruptcy Act, 1890, s. 15.

The creditors or committee of inspection, as the case may be, in voting the remuneration, shall distinguish between the percentage on the amount realised and that on the amount distributed. Bankruptcy Rules, 1886, 305.

No trustee shall be entitled to receive any remuneration except such as he is entitled to under the Act and Rules. Bankruptcy Rules, 1886, 306.

Where the Board of Trade appoint a trustee he shall receive such remuneration as the Board determines. *Ibid.* 307.

Where joint and separate estates are being administered the remuneration as to the joint estate shall be fixed by the joint creditors or their committee of inspection, and the remuneration as to the separate estate by the separate creditors or their committee. Bankruptcy Rules, 1886, 270.

The Court has power, under clause 20 of the First Schedule of Bankruptcy Act, 1883, to disallow the remuneration where solicitation has been used by the trustee in obtaining proxies or in procuring the trusteeship.

The remuneration is secured by rule 125.

Trustee. An accountant-trustee is, in the absence of express agreement, subject to the general rule that a trustee shall have no allowance for his time and trouble. *Ante*, p. 187.

And in no case will the Court permit a trustee to make professional charges unless the settlor has so directed. *Re Freeman*, 37 C. D. 148.

Arbitrator.

The fees of an arbitrator are as a rule fixed by himself, and he is at liberty to do so. *Threlfell* v. *Fanshawe*, 19 L. J. Q. B. 334.

And he can refuse to deliver up his award or communicate its contents until his fees are paid. *Roberts* v. *Eberhardt*, 28 L. J. C. P. 74.

But he is not at liberty to fix an exorbitant sum, and the excess beyond what is a reasonable fee may be recovered against him. *Fernley* v. *Branson*, 20 L. J. Q. B. 178.

The parties may guard against the arbitrator fixing his own fee by inserting in the submission express terms to that effect. *Re Stephens, &c.*, 36 Sol. J. 464.

The remuneration, where the matter is referred under an order of the Court, is fixed by the Court. Arbitration Act, 1889, s. 15 (3).

In the absence of express agreement, there is an implied contract to pay the arbitrator reasonable remuneration for his services. *Willis* v. *Wakeley Bros.*, 7 T. L R. 604; *Re Crampton, &c.*, 20 Q. B. D. 48.

The Court has no power to compel an arbitrator to submit his costs to taxation. *Withington* v. *Wrexham*, 32 W. R. 1000; but see *Re Prebble*, (1892) 2 Q. B. 602.

Commission.

Although not in the ordinary course of their business, accountants occasionally effect sales and are thereby entitled to a commission according to the recognised scale. *Newman* v. *Richardson*, 1 T. L. R. 348; *Barnett* v. *Isaacson*, 4 T. L. R. 645.

In like manner they sometimes effect loans and introduce partners on commission. *Harris* v. *Petherick*, 39 L. T. 543; *Antrobus* v. *Wickens*, 4 F. & F. 291.

An accountant introducing an intending purchaser who does not, after negotiating, complete the purchase, is not entitled to his commission because the person so introduced

ultimately becomes the purchaser through another agency. *Taplin* v. *Barrett*, 6 T. L. R. 30.

To be entitled to recover his commission he must prove that he has brought about the relation of buyer and seller, but he may earn it by doing nothing more than merely introducing the buyer and though the whole of the negotiations resulting in the sale may have been carried on by another agent. *White* v. *Walker*, 1 T. L. R. 603.

"The duty of the agent is not to arrange the terms of the bargain. His duty is to introduce a purchaser, and if he introduces a purchaser he earns his commission. It is immaterial what is the bargain made between the vendor and the purchaser." *Re Beale*, 5 Mor. 37, per Cave, J.

Liability.

Accountants as servants and agents of trustees are bound to accept as correct their statements with regard to the application of the trust fund; and if the result is that one of the trustees is, by the innocent act of the accountant, enabled to misapply the money or commit a breach of trust, the accountant will not be liable for negligence. *Rodbard* v. *Cooke*, 25 W. R. 555.

As to the liability of auditors of companies, see *Re Kingston Cotton Mill Co.*, (1896) 1 Ch. 6; 2 Ch. 279; *Re Western Counties Steam Bakeries, &c.*, (1897) 1 Ch. 617.

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