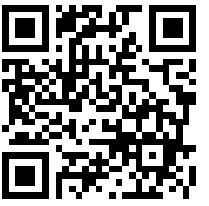

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A

CONCISE TREATISE

ON

MORTGAGES,

PLEDGES, AND LIENS.

BY

WALTER ASHBURNER, M.A.,

OF LINCOLN'S INN, BARRISTER-AT-LAW;

LATE FELLOW OF MERTON COLLEGE, OXFORD.

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PREFACE.

THE object of this Work is to present, within the limits of a handy volume, the existing law relating to the different classes of securities on property. The subject embraces mortgages, legal and equitable, including bills of sale, pledges, common law liens, equitable charges and liens, liens created by statute, and maritime securities.

The difficulty of comprehending so many distinct branches of law within the limits which the Author has set himself will excuse, he hopes, in some degree the imperfections of the performance.

By means of the Addenda, the cases are brought down to the end of February, 1897. Irish cases are included.

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ADDENDA.

Pages 38, 205.—A power in a mining lease to distrain goods of the lessee on adjoining or neighbouring mines worked with the seam of coal demised is not a license to take possession within sect. 4 of the Bills of Sale Act, 1878; nor is it within sect. 6 of the same Act. *In re Roundwood Colliery Co.*, 13 T. L. R. 175 (C. A.).

Page 49.—Where a bill of sale purports to be given in consideration of a sum "now owing" by the grantors under a promissory note, and the only liability of the grantors is to pay that sum by instalments at future dates, the consideration is not truly stated. *Darlow* v. *Bland*, (1897) 1 Q. B. 125.

Pages 92, 428.—A company has no lien on shares standing in the name of a trustee for a debt due from him as against beneficiaries of whose rights the company has notice when the debt is incurred; and probably it cannot by its articles give itself such a lien. *Rearden* v. *Provincial Bank*, (1896) 1 I. R. 532.

Page 123.—*Currie* v. *McKnight* is reported in the Law Reports, (1897) A. C. 97.

Pages 158, 256.—A distress put in after an order had been made in a debenture-holders' action appointing a receiver, subject to his giving security, but before the receiver had given security or taken possession was held valid as against the debenture-holders, the order never having been drawn up and the landlord having no notice of it. *In re Roundwood Colliery Co.*, 13 T. L. R. 175 (C. A.).

Pages 159, 420.—*Governments Stock Investment Co.* v. *Manila Ry. Co.*, has been affirmed in the House of Lords, (1897) A. C. 81.

Page 159.—The right to inspect the register of mortgages under section 43 of the Companies Act, 1862, includes the right to take copies. *Nelson* v. *Anglo-American Land Mortgage Co.*, (1897) 1 Ch. 130.

Page 164.—As to the authority of an agent to receive payment by cheque, see *Blumberg* v. *Life Interests Corporation*, (1897) 1 Ch. 171.

Page 260.—A receiver and manager may be appointed at the instance of debenture-holders, although no default has been made under the debentures, where a creditor has presented a petition to wind up the company. *Re Victoria Steamboats Ld.*, (1897) 1 Ch. 158.

Page 275.—See further, on the doctrine that the Statute of Frauds cannot be set up to cover a fraud, *De la Rochefoucauld* v. *Boustead*, 13 T. L. R. 118; 75 L. T. 502; 66 L. J. Ch. 74; (1897) 1 Ch. 196.

Page 332.—As to the mortgagee's liability to pay interest on surplus proceeds of sale, see *Eley* v. *Read*, 102 Law Times, 317 (C. A.).

Page 425.—*Northern Counties Fire Insurance Co.* v. *Whipp* was followed in *Garside* v. *Liverpool Railway Building Society*, 13 T. L. R. 189 (C. A.).

Page 500.—As to when the right accrues to recover land in the case of a reversionary interest, see *Barcroft* v. *Murphy*, (1896) 1 I. R. 590.

Page 539.—As to the form of judgment in a foreclosure action where the mortgagee submits to be charged with a certain sum, see *Simmons* v. *Blandy*, (1897) 1 Ch. 19.

Page 554.—Where a solicitor is ordered to deliver up papers pending taxation, he is entitled to an undertaking by the client to return them in the event of a further sum being found due upon taxation. *In re Hanbury, Whitting, & Nicholson*, 75 L. T. 449; 13 T. L. R. 91.

A CONCISE TREATISE

ON

MORTGAGES, PLEDGES, AND LIENS.

CHAPTER I.

INTRODUCTORY—LEGAL MORTGAGES.

AN ordinary creditor has no claim against, or charge upon, any part of his debtor's property. His only right is a right of action against his debtor when solvent, or of proof in his bankruptcy. Distinction between secured and unsecured creditors.

But a creditor may, as part of the contract by which the relation of debtor and creditor is constituted, or by virtue of a subsequent contract for value, acquire a right, either to hold specific property of the debtor or a third person until the debt is discharged, or to make specific property of the debtor or a third person available towards satisfaction of the debt. The present treatise deals with the rights and remedies of creditors of the latter class.

A. LEGAL MORTGAGES OF LAND.

The following are the principal forms of legal mortgage of land, the first being the most usual:—

1. A mortgage, according to Blackstone (2 Comm. 157) is "where a man borrows of another a specific sum (*e.g.* 200*l.*) and grants him an estate in fee, on condition that, if he, the mortgagor, shall repay the mortgagee the said sum of 200*l.* on a certain day mentioned in the deed, that then the 1. Mortgage in fee.

mortgagor may re-enter on the estate so granted in pledge; or, as is now (1766) the more usual way, that the mortgagee shall re-convey the estate to the mortgagor."

2. Mortgage by creation of long term.

2. Owing to certain doubts, he continues, "it became usual to grant only a long term of years by way of mortgage, with condition to be void on repayment of the mortgage money."

3. Mortgage by way of trust for sale.

3. A mortgage is sometimes made in the form of "a conveyance reciting the loan and the intended security, and then a grant or re-lease of the land to the mortgagee, upon trust when he thought fit to sell, or to sell or mortgage, with a declaration of the trusts of the money and a further declaration that, whenever he chose, he might enter and take the rents and apply them in keeping down the interest." *Per* Jessel, M.R. in *In re Alison*, 11 Ch. Div. 284, 294.

Such a conveyance is in substance an ordinary mortgage security, whether it is made to the mortgagee himself or to a third person as trustee. *Bell* v. *Carter*, 17 B. 11; *Wicks* v. *Scrivens*, 1 J. & H. 215; *Kirkwood* v. *Thompson*, 2 H. & M. 392; 2 D. J. & S. 613; *Locking* v. *Parker*, 8 Ch. 30; *In re Alison, supra.*

4. Welsh mortgage.

4. "A Welsh mortgage is a conditional sale; under it the lender goes into possession of the rents, and continues to receive them, until the party who borrowed the money chooses to redeem." *Balfe* v. *Lord*, 2 D. & War. 410, 487.

5. Statutory mortgages.

5. The Land Transfer Act, 1875 (38 & 39 Vict. c. 87), enables (sec. 22) every registered proprietor of freehold or leasehold land to charge such land with the payment of a principal sum with or without interest, and with or without a power of sale. The charge is completed by entering on the register the person in whose favour it is made, and its particulars. Secs. 23 to 27 deal with the covenants implied in the charge, and the powers of the registered proprietor.

The Conveyancing Act, 1881 (44 & 45 Vict. c. 41), enables (sec. 26) a mortgage of freehold or leasehold land to be made in the form prescribed by the Act, and provides what covenants and provisoes are to be implied therein.

What property cannot be

A bare possibility (such as the expectation which an heir has of succeeding to his ancestor) and *a fortiori* an interest

in hereditaments to be acquired by the grantor cannot be disposed of at law. Perk., sec. 65; Bacon's Maxims, 14; *Lampet's Case*, 10 Rep. 46*b*. mortgaged at law.

By secs. 2 and 3 of the Real Property Act, 1845 (8 & 9 Vict. c. 106), the immediate freehold of corporeal hereditaments can be conveyed either by feoffment or by deed; but a feoffment made after October 1, 1845 (other than a feoffment made under a custom by an infant), is void at law unless evidenced by deed. Legal mortgages of land must be by deed.

By the common law, reversions and vested remainders in corporeal hereditaments, and all interests, whether immediate, reversionary, or in remainder, in incorporeal hereditaments, can only be conveyed by deed. Co. Lit., 9*a*; Shep. Touchst., 229 *seq.*

By sec. 6 of the Real Property Act, 1845, contingent interests in corporeal or incorporeal hereditaments may be disposed of by deed.

By sec. 3 of the Real Property Act, 1845, leases of hereditaments, corporeal or incorporeal (except leases of corporeal hereditaments for a term not exceeding three years from the making thereof, where the rent is not less than two-thirds of the value), can only be created by deed.

By the same section, assignments of chattel interests (not being copyhold) in any tenements or hereditaments are void at law unless made by deed. See *Pollock* v. *Stacy*, 9 Q. B. 1033.

It follows that a deed is required to convey a legal interest in hereditaments, corporeal or incorporeal, except in the case of a lease for a term not exceeding three years.

"Every agreement put in writing, sealed, and delivered, becometh a deed." Shep. Touchst., 51. Definition of deed.

The better opinion appears to be that the provisions of the Statute of Frauds requiring signature do not apply to deeds. Shep. Touchst., 56, Preston's note; *Cooch* v. *Goodman*, 2 Q. B. 580, 596; *Cherry* v. *Heming*, 4 Ex. 631, 636; Williams' Real Prop., 17th ed. 149. Signature.

Neither wax nor wafer is necessary in order to constitute a seal, but there must be something in the nature of an Seal.

impression on the deed to denote that it has been sealed. *National Provincial Bank of England* v. *Jackson*, 33 Ch. Div. 1, doubting *In re Sandilands*, L. R. 6 C. P. 411.

In the case of a common law corporation, the seal may only be lawfully affixed by the authority of a majority of the corporators corporately assembled. *Mayor of Merchants of the Staple* v. *Bank of England*, 21 Q. B. D. 160, 165.

As to the sealing by a company under the Companies Clauses Act, 1845, see *D'Arcy* v. *Tamar Railway Co.*, L. R. 2 Ex. 158.

In the case of a company under the Companies Acts, where the articles of association prescribe no special formalities, whoever as a matter of practice manages the affairs of the company may lawfully use the seal for those acts which he is authorized to perform. *In re Barned's Banking Co.*, L. R. 3 Ch. 105, 116.

The American cases on sealing are collected in 3 Gray's Cases on Property, 628.

Delivery.

A deed takes effect from its delivery. Shep. Touchst., 57.

Two deeds executed on same day.

When two deeds are executed on the same day, the Court must inquire which was in fact executed first; but if there is anything in the deeds themselves to show an intention either that they shall take effect *pari passu* or even that the later deed shall take effect in priority to the earlier, the Court will presume that the deeds were executed in such order as to give effect to the manifest intention of the parties. *Taylor d. Atkyns* v. *Horde*, 2 Smi. L. C. 632, 699; *Gartside* v. *Silkstone Coal Co.*, 21 Ch. D. 762.

Delivery by corporation.

Where the grantor is a corporation, sealing is equivalent to delivery, if the seal is affixed with the intention of giving an immediate operation to the deed. It is not equivalent, if an intention is shown to suspend the operation of the deed until some further act is performed. *Anon.*, 1 Vent., 257; *Derby Canal Co.* v. *Wilmot*, 9 East, 360; *Gartside* v. *Silkstone Coal Co.*, 21 Ch. D. 762, 768; *Mowatt* v. *Castle Steel Works Co.*, 34 Ch. Div. 58.

Retention by grantor.

Where a deed is effectually delivered, the retention of it by the grantor in his own possession does not prevent it from

taking effect from the delivery. *Doe d. Garnons* v. *Knight*, 5 B. & C. 671; *Exton* v. *Scott*, 6 Sim. 31; *Hall* v. *Palmer*, 3 Ha. 532; *Xenos* v. *Wickham*, L. R. 2 H. L. 296; *Evans* v. *Grey*, 9 L. R. Ir. 539.

Delivery as escrow.

The delivery of a deed may be qualified. The grantor may declare that it shall not take effect until the happening of some event or performance of some condition. In that case, the delivery becomes absolute upon the happening of the event or performance of the condition. Until then, the instrument is an escrow. *Fagg* v. *James*, 6 L. T. 675; *Xenos* v. *Wickham*, L. R. 2 H. L. 296, 323.

The question whether a deed is delivered as an escrow or not is a question of intention. The surrounding circumstances may show that it was intended as an escrow though the delivery is absolute in form. *Johnson* v. *Baker*, 4 B. & A. 440; *Murray* v. *Earl of Stair*, 2 B. & C. 82; *Bowker* v. *Burdekin*, 11 M. & W. 128; *Gudgen* v. *Besset*, 6 E. & B. 986.

Delivery of a deed to the grantee is inconsistent (*a*), but delivery to his solicitor is not inconsistent (*b*), with its being an escrow. (*a*) Co. Lit., 36*a*; *Holford* v. *Parker*, Hob. 246. (*b*) *Millership* v. *Brookes*, 5 H. & N. 797; *Watkins* v. *Nash*, 20 Eq. 262.

Re-delivery.

Where a deed is invalid when executed, it has been held that conduct by the grantor treating the deed as valid may amount to a re-delivery, though the deed has not come back into his possession. *Goodright* v. *Straphan*, 1 Cowp. 201; doubted in *London & Provincial Bank* v. *Powell*, (1893) 2 Ch. 555.

Execution by agent.

An agent to seal or deliver a deed must be appointed under seal. *Berkeley* v. *Hardy*, 5 B. & C. 355; *Hibblewhite* v. *McMorine*, 6 M. & W. 200; *In re Whitley Partners*, 32 Ch. Div. 337, 340; *Powell* v. *London & Provincial Bank*, (1893) 1 Ch. 610; 2 Ch. 555.

Where a deed is executed by an agent appointed by parol, the deed may be valid as against the principal under the doctrine of estoppel. *King* v. *Inhabitants of Longnor*, 4 B. & Ad. 647; *Tupper* v. *Foulkes*, 9 C. B. N. S. 797.

Conveyancing

The Conveyancing Act, 1881 (sec. 46), enables an attorney

Act, 1881, sec. 46.

to "execute or do any assurance, instrument, or thing in and with his own name and signature and his own seal, where sealing is required, by the authority of the donor of the power."

This section does not mean that the attorney may execute in his own name without anything to show that he executes as attorney. *Per* Cotton, L.J., in *In re Whitley Partners*, 32 Ch. Div. 337, 338.

Under the law before the Act, where an attorney described himself as an attorney, professed to grant as an attorney, and executed as an attorney, but did not execute in the name and on the behalf of his principal, the execution was bad. *Combe's Case*, 9 Rep. 75, 76*b*; *Frontin* v. *Small*, 2 Ld. Raym. 1418; *White* v. *Cuyler*, 6 T. R. 176; *Wilks* v. *Back*, 2 East, 142.

As to execution by the committee of a lunatic, see *Lawrie* v. *Lees*, 14 Ch. Div. 249; 7 App. Cas. 20.

Partial execution.

An execution of a deed in part only is no execution. *Wilkinson* v. *Anglo-Californian Gold Mining Co.*, 18 Q. B. 728; see *Exchange Bank of Yarmouth* v. *Blethen*, 10 App. Cas. 293.

Material omissions.

A deed having material omissions when sealed and delivered is void at law. Perk., sec. 118; Shep. Touchst., 54; *Weeks* v. *Maillardet*, 14 East, 568; *Sellin* v. *Price*, L. R. 2 Ex. 189.

Date.

A date is not a material part of a deed. Shep. Touchst., 55.

Hence a mortgage deed is valid where the date and the date of the proviso for redemption are subsequently filled in. *Adsetts* v. *Hives*, 33 B. 52.

Name of grantee.

As to the necessity of naming the grantee, see *Maugham* v. *Sharpe*, 17 C. B. N. S. 443; *Simmons* v. *Woodward*, (1892) A. C. 100.

Transfer of shares.

A deed of transfer of shares is void at law unless it contains when delivered the name of the transferee, and identifies the shares to be transferred. *Hibblewhite* v. *M'Morine*, 6 M. & W. 200; *Tayler* v. *Great Indian Peninsular Ry. Co.*, 4 De G. & J. 559; *Swan* v. *North British Australasian Co.*, 7 H. & N. 603; 2 H. & C. 175; *France* v. *Clark*, 26 Ch. Div. 257; *Société Générale de Paris* v. *Walker*, 14 Q. B. Div. 424; 11 A. C. 20.

Debenture.

A debenture with the name of the payee in blank is void at law. *Enthoven* v. *Hoyle*, 13 C. B. 373; *In re Queensland Land & Coal Co.*, (1894) 3 Ch. 181.

When re-delivery is inferred.

Where blanks in a deed are filled in in the presence and with the assent of the grantor, a re-delivery may be inferred. *Hudson* v. *Revett*, 5 Bing. 368.

Possibly, a re-delivery may be inferred where the blanks are filled in with his knowledge and acquiescence, though not in his presence. *Powell* v. *London & Provincial Bank*, (1893) 1 Ch. 610; 2 Ch. 555.

A re-delivery will not be inferred merely from the fact that the grantor knew that the deed was being acted on as a perfect deed, there being no evidence that he knew how it had been filled up. *Société Générale de Paris* v. *Walker*, 14 Q. B. Div. 424; 11 App. Cas. 20; *Powell* v. *London & Provincial Bank*, (1893) 1 Ch. 610; 2 Ch. 555.

Material alterations.

As to the effect of subsequent alterations in a deed, see Shep. Touchst., 68, 69; *Master* v. *Miller*, 1 Smi. L. C. 824; *Doe d. Lewis* v. *Bingham*, 4 B. & Ald. 672; *Adsetts* v. *Hives*, 33 B. 52; *Lowe* v. *Fox*, 12 App. Cas. 206, 216.

Effect of fraud.

If a person who seals and delivers a deed is misled, as to its actual contents, by the misstatements or misrepresentations of the person procuring its execution, the deed is void. *Thoroughgood's Case*, 2 Rep. 9; *Pigot's Case*, 11 Rep. 27*b*; Com. Dig. Fait, B. 2; *Vorley* v. *Cooke*, 1 Giff. 230; *Ogilvie* v. *Jeaffreson*, 2 Giff. 353; *Lee* v. *Angus*, 15 L. T. 380; *Foster* v. *Mackinnon*, L. R. 4 C. P. 704; *Favell* v. *Wright*, 64 L. T. 85.

Negligence of grantor.

It is probably not void if the person executing it has himself been guilty of negligence, *e.g.* by not making any inquiry as to the contents. *Hunter* v. *Walters*, 7 Ch. 75, 87.

In *Favell* v. *Wright* (64 L. T. 85) it was held that a woman was not negligent in executing a deed without reading it, but relying upon the statements of her solicitor as to the contents. See *National Provincial Bank of England* v. *Games*, 33 Ch. Div. 1, 10.

Collateral misrepresentations.

Misrepresentations to avoid a deed must be misrepresentations respecting its actual contents. A collateral misrepresentation, *e.g.* as to the legal consequences of the deed, does not make it void *ab initio*, although it would be voidable as against the person making such misrepresentation. *Lewis* v. *Jones*, 4 B. & C. 506; *Mason* v. *Ditchbourne*, 1 Moo. & R. 460;

Edwards v. *Brown*, 1 Cr. & J. 307; *Feret* v. *Hill*, 15 C. B. 207; 23 L. J. C. P. 185.

Thus, where a grantor knows the contents of the deed which he executes, or even where he executes it without inquiring into the contents, in reliance upon the good faith of the person procuring its execution, the deed is not void, although the grantor has been induced to execute it by a collateral misrepresentation. *Hunter* v. *Walters*, 7 Ch. 75; *National Provincial Bank of England* v. *Games*, 33 Ch. Div. 1; *Onward Building Society* v. *Smithson*, (1893) 1 Ch. 1; *Lloyds Bank* v. *Bullock*, (1896) 2 Ch. 192.

What estate passes by the conveyance.

When a person having several estates and interests in land joins in conveying all his estate and interest in the lands to a purchaser, every estate or interest vested in him passes by the conveyance, although not vested in him in the character in which he became a party to it. *Drew* v. *Earl of Norbury*, 3 J. & Lat. 267, 284; *Carter* v. *Carter*, 3 K. & J. 617, 634; distinguishing *Fausset* v. *Carpenter*, 2 Dow & Cl. 232.

Execution by one of three joint tenants.

Where a deed purporting to convey property is executed by one of three joint tenants, the execution operates to sever the joint-tenancy, and the legal estate in one-third of the property passes. *Boursot* v. *Savage*, L. R. 2 Eq. 134.

Legal estate passing by estoppel.

Where a mortgagor who has not the legal estate purports to convey it and subsequently acquires it, he and all persons claiming under him will be estopped as against the mortgagee from denying that the legal estate passes by the conveyance. *Right d. Jefferys* v. *Bucknell*, 2 B. & Ad. 278; *Carpenter* v. *Buller*, 8 M. & W. 209; *Stroughill* v. *Buck*, 14 Q. B. 781.

In order to raise an estoppel, the deed must contain a precise and specific averment that the conveying party has the legal estate. *Right d. Jefferys* v. *Bucknell*, 2 B. & Ad. 278; *Crofts* v. *Middleton*, 2 K. & J. 194; *Onward Building Society* v. *Smithson*, (1893) 1 Ch. 1.

The operative words in an innocent conveyance, such as a grant or a lease, do not (*a*), but a demise does (*b*), create an estoppel. (*a*) *Right d. Jefferys* v. *Bucknell*, *supra*; *Stackpoole* v. *Stackpoole*, 4 D. & War. 320; *Heath* v. *Crealock*, 10 Ch. 22; (*b*) *Crofts* v. *Middleton*, 2 K. & J. 194.

A recital that the party conveying is seised in fee creates an estoppel. *Bensley* v. *Burdon*, 8 L. J. O. S. Ch. 85.

But a recital that he is legally or equitably seised (*Right d. Jefferys* v. *Bucknell, supra*), or that he is seised of or otherwise well entitled to an estate in fee simple (*Heath* v. *Crealock, supra*), creates no estoppel.

Covenants for title do not create an estoppel. *General Finance Company* v. *Liberator Building Society*, 10 Ch. D. 15; *Onward Building Society* v. *Smithson, supra.*

There can be no estoppel where the true state of the grantor's title appears on the face of the conveyance. *Right d. Jefferys* v. *Bucknell, supra*; *Crofts* v. *Middleton, supra.*

Mortgages of copyholds.

As to legal mortgages of copyholds, see Elton on Copyholds, 67, 79.

Mortgages of term of years.

A term of years may be mortgaged at law, either by assignment or by sub-demise.

A legal mortgagee of a lease by assignment is liable to the lessor for rent and upon the covenants until he assigns over. A mortgagee by sub-demise incurs no liability under the original lease. *Walters* v. *Northern Coal Mining Co.*, 5 D. M. & G. 629, 640; *Galbraith* v. *Cooper*, 8 H. L. C. 315, 326; *In re Gee*, 24 Q. B. D. 65.

Effect of mortgagor's bankruptcy.

The Bankruptcy Act, 1883, sect. 55, enables a trustee in bankruptcy, with the leave of the Court, to disclaim leaseholds of the bankrupt "burdened with onerous covenants;" and the Court may, on the application of any person interested in any disclaimed property, make an order vesting the property in him.

The Act provides [sect. 55 (6)] that "where the property disclaimed is of a leasehold nature, the Court shall not make a vesting order in favour of any person claiming under the bankrupt as mortgagee by demise, except upon the terms of making such person subject to the same liabilities and obligations as the bankrupt was subject to under the lease in respect of the property at the date when the bankruptcy petition was filed, and any mortgagee declining to accept a vesting order upon such terms shall be excluded from all interest in and security upon the property."

The effect of this section is considered in *In re Cock*, 20 Q. B. Div. 343; *In re Finley*, 21 Q. B. Div. 475; *In re Morgan*, 22 Q. B. Div. 592; *In re Smith*, 25 Q. B. Div. 536.

Bankruptcy Act, 1890, s. 13.

The Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), provides (sect. 13) that the Court may, if it thinks fit, make the person in whose favour the vesting order may be made subject only to the same liabilities and obligations as if the lease had been assigned to him at the date when the bankruptcy petition was filed, and (if the case so requires) as if the lease had comprised only the property comprised in the vesting order.

B. Legal Mortgages of Personal Chattels.

At common law, a personal chattel may be validly mortgaged—that is, it may be made the subject of a security without being delivered to the lender. *Maugham* v. *Sharpe*, 17 C. B. N. S. 443; *Cookson* v. *Swire*, 9 App. Cas. 653, 664; *Seath* v. *Moore*, 11 App. Cas. 350, 370; *Cochrane* v. *Moore*, 25 Q. B. Div. 57, 70.

A mortgage of personal chattels is analogous to a mortgage of land. The entire property at law in the chattels passes by the mortgage to the mortgagee. The only right of the mortgagor (apart from rights expressly given him by the mortgage contract) is a right in equity to redeem. *Sewell* v. *Burdick*, 10 App. Cas. 74, 92, 95; *Ex parte Hubbard*, 17 Q. B. Div. 690, 698; *In re Morritt*, 18 Q. B. Div. 222, 232, 234; *Johnson* v. *Diprose*, (1893) 1 Q. B. 512.

Deed not required.

A mortgage of personal chattels may be created without deed. Litt., sect. 365; Shep. Touchst., 120; *Flory* v. *Denny*, 7 Ex. 581.

After-acquired chattels.

A transfer of personal chattels not belonging to the transferor at the time of the transfer is void in law. *Grantham* v. *Hawley*, Hob. 132; *Robinson* v. *Macdonnell*, 5 M. & S. 228; *Lunn* v. *Thornton*, 1 C. B. 379; *Holroyd* v. *Marshall*, 10 H. L. C. 191.

Novus actus interveniens.

Where there are words which purport to transfer after-acquired chattels, these words may become operative at law by virtue of a subsequent act (*novus actus interveniens*) done

by the grantor with the view of carrying his former disposition into effect. Bacon's Maxims, 14; *Lunn* v. *Thornton, supra.*

The mere acquisition by the grantor of property which comes within the scope of the ineffectual grant is not such an act. *Lunn* v. *Thornton, supra; Joseph* v. *Lyons,* 15 Q. B. Div. 280.

The taking possession by the grantee, with the consent of the grantor, of after-acquired property of the grantor is such an act, and vests the legal title to the property in the grantee. *Congreve* v. *Evetts,* 10 Ex. 298; *Hope* v. *Hayley,* 5 E. & B. 830; *Reeve* v. *Whitmore,* 4 D. J. & S. 1, 18; *Reeves* v. *Barlow,* 12 Q. B. Div. 436; *Hallas* v. *Robinson,* 15 Q. B. Div. 288.

As to the effect of the Bills of Sale Acts upon such transactions, see p. 38.

Mortgage of ship.

The Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), provides:—

Sect. 31 (1) A registered ship or a share therein may be made a security for a loan or other valuable consideration, and the instrument creating the security (in this Act called a mortgage) shall be in the form marked B in the first part of the First Schedule to this Act, or as near thereto as circumstances permit, and on the production of such instrument the registrar of the ship's port of registry shall record it in the register book.

(2) Mortgages shall be recorded by the registrar in the order in time in which they are produced to him for that purpose, and the registrar shall, by memorandum under his hand, notify on each mortgage that it has been recorded by him, stating the day and hour of that record.

Certificates of mortgage.

Sects. 39 to 43 enable a registered owner, who is desirous of mortgaging his ship or share at any place out of the country in which the port of registry is situate, to obtain from the registrar a certificate of mortgage.

The guardian of a registered infant owner cannot validly mortgage the ship. *Michael* v. *Fripp,* 7 Eq. 95.

C. Legal Assignments of Choses in Action.

Before the Judicature Act, 1873, debts and other legal choses in action were not, except in special cases, assignable at law. See *per* Fry, L.J., in *Colonial Bank* v. *Whinney*, 30 Ch. Div. 261, 287.

Judicature Act, 1873, s. 25 (6).

The Judicature Act, 1873 (36 & 37 Vict. c. 66), provides:—

Sect. 25 (6) Any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal chose in action, of which express notice in writing shall have been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be, and be deemed to have been, effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed) to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same without the concurrence of the assignor.

The section extends to an assignment made before the passing of the Act. *Dibb* v. *Walker*, (1893) 2 Ch. 429.

What debts are within Act.

The right to recover damages for breach of contract is not a debt or other legal chose in action within the section. *May* v. *Lane*, 43 W. R. 193.

A debt to arise *in futuro* is within the section. *Brice* v. *Bannister*, 3 Q. B. Div. 569; *Walker* v. *Bradford Old Bank*, 12 Q. B. Div. 511.

Notice.

Notice may be validly given after the death of the assignor. *Walker* v. *Bradford Old Bank*, 12 Q. B. Div. 511.

Absolute assignment what.

An assignment may be absolute, though creating a trust of moneys to be recovered under it by the assignee (*a*), or containing a proviso for reassignment (*b*). (*a*) *Comfort* v. *Betts*, (1891) 1 Q. B. 737; (*b*) *Burlinson* v. *Hall*, 12 Q. B. Div. 347; *Tancred* v. *Delagoa Bay Ry. Co.*, 23 Q. B. Div. 239; disapproving *National Provincial Bank of England* v. *Harle*, 6 Q. B. Div. 626; see *Knill* v. *Prowse*, 33 W. R. 163.

Assignment

An assignee must prove the assignment in order to sue for

the recovery of the debt. The assignment, therefore, is part of his cause of action, and must be set out in his statement of claim. *Read* v. *Brown*, 22 Q. B. Div. 128; *Satchwell* v. *Clarke*, 66 L. T. 641. is part of cause of action.

The Policies of Assurance Act, 1867 (30 & 31 Vict. c. 144), enables (sect. 1) assignees of policies of life assurance, who, at the time of action brought, have the right in equity to receive and the right to give a discharge for the policy moneys, to sue at law in their own name to recover such moneys. Policies of life assurance.

No assignment made after the 20th of August, 1867, enables the assignee to sue at law until a written notice of the date and purport of the assignment has been given to the assurance company at their principal place of business (sect. 3).

Any assignment may be made either by endorsement on the policy or by a separate instrument in the words or to the effect set forth in the schedule to the Act (sect. 5).

A letter by a debtor enclosing a policy on his life, and requesting the creditor to instruct his solicitor to prepare the necessary assignment (*a*), or a memorandum accompanying a deposit of a policy by which the borrower agrees to execute a valid mortgage upon request (*b*), is not an assignment within the Act. (*a*) *Crossley* v. *City of Glasgow Life Assurance Co.*, 4 Ch. D. 421; (*b*) *Spencer* v. *Clarke*, 9 Ch. D. 137. What constitutes assignment.

As to companies governed by the Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16)— Shares in railway companies.

This Act provides (sect. 14) that every transfer of shares or stocks shall be by deed duly stamped, in which the consideration shall be truly stated; and such deed may be according to the form in the schedule (B) to the Act annexed, or to the like effect.

Sect. 15 provides that the deed of transfer (when duly executed) shall be delivered to the secretary, and be kept by him; and the secretary shall enter a memorial thereof in a book to be called "The Register of Transfers," and shall endorse such entry on the deed of transfer, and shall on demand deliver a new certificate to the purchaser. . . .

Sect. 62 provides that stock shall be transferred in the same manner as shares.

In the form in the schedule the transfer is signed and sealed by transferor and transferee.

A transfer is not invalidated by a misstatement of the consideration or an erroneous stamp. *Powell* v. *London & Provincial Bank*, (1893) 1 Ch. 610; 2 Ch. 555.

A transfer executed by one of several joint holders has no effect. *Sloman* v. *Bank of England*, 14 Sim. 475; *Taylor* v. *Midland Ry. Co.*, 28 B. 287; 8 H. L. C. 751.

Transfer by one of several executors.

Where several executors are on the register (whether with or without the addition of the words "as executors"), a deed of transfer is ineffectual unless executed by all. *Barton* v. *North Staffordshire Ry. Co.*, 38 Ch. D. 458; *Barton* v. *L. & N. W. R. Co.*, 24 Q. B. Div. 77.

Delivery to secretary.

A transfer has no effect in passing the legal ownership of shares or stock until it has been left with the secretary and accepted by him as properly left. *Nanney* v. *Morgan*, 35 Ch. Div. 398; 37 Ch. Div. 346.

Registration.

Where the deed of transfer is invalid, registration of the transferee does not give him any title. *France* v. *Clark*, 26 Ch. Div. 257; *Powell* v. *London & Provincial Bank*, (1893) 2 Ch. 555, 566.

Shares in trading companies.

As to companies under the Companies Act, 1862 (25 & 26 Vict. c. 89)—

The Act provides (sect. 22) that "the shares or other interest of any member in a company under this Act shall be personal estate, capable of being transferred in manner provided by the regulations of the company."

Deed is not required.

A transfer of shares need not be made by deed, unless a deed is required by the articles of association. *In re Tahiti Cotton Co.*, 17 Eq. 273.

Where a transfer of shares may validly be made by writing not under seal, and it is made by deed, the fact that the transferee's name is left blank does not invalidate the transfer. *Ortigosa* v. *Brown*, 47 L. J. Ch. 168.

When transferee gets legal title.

A transferee does not acquire a legal title until all conditions required by the articles have been fulfilled to give the transferee, as between himself and the company, a present, absolute, and unconditional right to have the transfer registered. *Société Générale de Paris* v. *Walker*, 11 App. Cas. 20, 28;

Roots v. *Williamson*, 38 Ch. D. 485; *Moore* v. *North-Western Bank*, (1891) 2 Ch. 599.

Company when estopped from denying transferee's title.

Where a transferee under an invalid transfer has received a certificate from the company stating that he is the proprietor of shares, the company is estopped from denying that he is the proprietor, either as against him if, on the faith of the certificate, he has entered into onerous contracts with regard to the shares, or as against persons who, on the faith of the certificate, have purchased the shares or lent money on the security of them. *In re Bahia & San Francisco Ry. Co.*, L. R. 3 Q. B. 584; *Hart* v. *Frontino & Bolivia Co.*, L. R. 5 Ex. 111; *Simm* v. *Anglo-American Telegraph Co.*, 5 Q. B. Div. 188; *Balkis Consolidated Co.* v. *Tomkinson*, (1891) 2 Q. B. 614; (1893) A. C. 396; *In re Ottos Kopje Diamond Mines*, (1893) 1 Ch. 618.

Copyright.

The assignment of copyright in books is governed by the Copyright Act, 1842 (5 & 6 Vict. c. 45), sects. 11 and 13.

An assignment, unless made by entry, must be in writing. *Leyland* v. *Stewart*, 4 Ch. D. 419.

The assignment of copyright in engravings is governed by 8 Geo. II. c. 13, sect. 2; in sculptures, by 54 Geo. III. c. 56, sect. 4; and in paintings, drawings, and photographs, by 25 & 26 Vict. c. 68, sects. 3 and 4.

As to the last Act, see *Graves' Case*, L. R. 4 Q. B. 715.

Patents.

The assignment of patents is governed by the Patents, Designs, and Trade Marks Act, 1883 (46 & 47 Vict. c. 57), sects. 23, 85, and 87.

See *In re Casey's Patents*, (1892) 1 Ch. 104.

Designs.

The assignment of designs is governed by the Patents, Designs, and Trade Marks Act, 1883, sects. 55, 85, and 87.

Trade marks.

The assignment of trade marks is governed by the same Act, sects. 70, 78, 81, 85, and 87.

See as to trade marks, *Hall* v. *Barrows*, 4 D. J. & S. 150; *Bury* v. *Bedford*, 4 D. J. & S. 352, 369.

The right of the proprietor of a newspaper to prevent any other person from adopting the same name for any other similar publication is capable of assignment. *Longman* v. *Tripp*, 2 Bos. & P. N. R. 67; *Ex parte Foss*, 2 De G. & Jo. 230; *Kelly* v. *Hutton*, L. R. 3 Ch. 703.

CHAPTER II.

EQUITABLE MORTGAGES AND CHARGES.

A. Equitable Securities in General.

Equitable mortgage.

A MORTGAGE is created in equity by an agreement to give a legal mortgage.

The right of the equitable mortgagee is to have his security perfected by the execution of a legal mortgage; and he can combine this remedy with an action for foreclosure. *Matthews* v. *Goodday*, 31 L. J. Ch. 282; *Marshall* v. *Shrewsbury*, 10 Ch. 250, 254.

Equitable charge.

An equitable mortgage must be distinguished from an equitable charge, the validity of which does not depend on the right to specific performance, and which entitles the creditor to sale, and not to foreclosure. *Matthews* v. *Goodday*, 31 L. J. Ch. 282.

The question whether the parties intended to create an equitable mortgage or equitable charge is a question of fact.

Deposit of title-deeds.

Cases are conflicting on the question whether a deposit of title-deeds without more is to be treated as evidence of an agreement to give a mortgage or merely a charge. The better opinion appears to be that it merely constitutes a charge. See *Parker* v. *Housefield*, 2 My. & K. 419; *Metcalfe* v. *Archbishop of York*, 1 My. & Cr. 547, 557; *Sporle* v. *Whayman*, 20 B. 607; *Roberts* v. *Croft*, 2 De G. & Jo. 1.

Contract for value to give charge

A binding agreement for value between A. & B. to give a security on specific property (whether real or personal) of A. creates a valid equitable charge in favour of B. *Legard* v. *Hodges*, 1 Ves. J. 477; *Rolleston* v. *Morton*, 1 D. & War. 171, 195; *Whitworth* v. *Gaugain*, 3 Ha. 416, 424; *Abbott* v. *Stratten*, 3 J. & Lat. 603, 614; *Rodick* v. *Gandell*, 1 D. M. & G. 763;

Gorringe v. *Irwell India Rubber Works*, 34 Ch. Div. 128; *Tailby* v. *Official Receiver*, 13 App. Cas. 523.

An offer to give a charge which is not accepted does not create a charge. *In re Beetham*, 18 Q. B. Div. 380, 766.

The validity of such an agreement does not depend on the right to specific performance. A charge may be binding in equity on property, of which a legal mortgage could not be made. *Metcalfe* v. *Archbishop of York*, 1 My. & Cr. 547; *Tailby* v. *Official Receiver*, 13 App. Cas. 523, 545.

Distinction between charge and trust.

Where A. entrusts B. with money for investment generally, B. may, by representations to A. that he has appropriated the money to a particular property, make himself a constructive trustee for A. of any interest which he has in the property; and A. has, in equity, a charge or lien on such interest. *Middleton* v. *Pollock*, 4 Ch. D. 49; *Harpham* v. *Shacklock*, 19 Ch. Div. 207; *In re Vernon, Ewens & Co.*, 32 Ch. D. 165; 33 Ch. Div. 402; *London & Westminster Bank* v. *Turquand*, 4 T. L. R. 454; *In re Richards*, 45 Ch. D. 589.

The charge or lien depends, in these cases, not upon contract, but on the right of the *cestui que trust* to follow trust funds misappropriated by the trustee.

Where a borrower represented in a letter to the lender that the loan was secured on a mortgage to the borrower of land, and the land had been sold before the date of the letter, but the borrower had a charge on the purchase-money, it was held that the lender had a charge on the borrower's interest in the purchase-money. *Ex parte Rogers*, 8 D. M. & G. 271.

Distinction between charge and covenant.

An agreement by a settlor in a Scotch marriage contract, out of the first and readiest of his means, estate, and effects, to pay a free life-rent annuity, has been held a mere personal covenant. *Bannatyne* v. *Ferguson*, (1896) 1 I. R. 149.

A provision in a policy of insurance to the effect that the capital stock, and funds of the company shall be subject and liable to pay the policy-moneys, or to a similar effect, does not give the policy-holder a charge. *Re State Fire Insurance Co.*, 1 H. & M. 457; 1 D. J. & S. 634; *Bell's Case*, 9 Eq. 706; *In re Sovereign Life Assurance Co.*, (1892) 3 Ch. 279.

See p. 157 on the question whether debentures of a company create a charge.

A contract for value to give a charge on property may, on the principle that Equity regards that as done which ought to be done, create an immediate charge.

1. Contract to charge ascertainable property.

1. A covenant to charge property which can be ascertained by reference to existing facts and circumstances, *e.g.* a covenant to charge all the property which the covenantor has at the time of the contract, or may have at a future time, or which he may take under a particular will, creates a charge, which binds the property as soon as it is ascertained. *Fremoult* v. *Dedire*, 1 P. W. 429; *Legard* v. *Hodges*, 1 Ves. J. 477; 3 B. C. C. 531; 4 B. C. C. 421; *Watson* v. *Sadleir*, 1 Moll. 585; *Lyde* v. *Mynn*, 4 Sim. 505; 1 My. & K. 683; *Metcalfe* v. *Archbishop of York*, 6 Sim. 224; 1 My. & Cr. 574; *Ravenshaw* v. *Hollier*, 7 Sim. 3; *Mornington* v. *Keane*, 2 De G. & Jo. 292; *Montagu* v. *Earl of Sandwich*, 32 Ch. Div. 525; *Bannatyne* v. *Ferguson*, (1896) 1 I. R. 149.

Thus, an agreement by a person under disability to convey lands, in case he should at any time thereafter be qualified by law so to do, binds the lands from the moment that he becomes qualified. *Kennedy* v. *Daly*, 1 Sch. & L. 355.

A covenant that the covenantor or his heirs or devisees would charge an annuity of 1000*l.* upon a sufficient part of the real estate of which he should die seised in fee was held (having regard to other parts of the deed) to charge all the real estate of which the covenantor died seised, until the execution of a new instrument which should charge an adequate part thereof. *Montagu* v. *Earl of Sandwich*, 32 Ch. Div. 525.

An agreement by a debtor that, if he failed to pay his promissory note when due, he would execute a mortgage on all his houses and lands, was held to create a charge on the houses and lands belonging to him at the time when the note matured and was unpaid. *In re Hurley's Estate*, (1894) 1 I. R. 488.

2. Contract contemplating further act.

2. A covenant to charge which contemplates the doing of some further act before the charge is to arise does not of itself create a charge.

Thus, a promise to pay a note on demand, and give a security by mortgage of lands for the same when required (*a*); an agreement, on request, to execute a valid assignment of a contract for purchase of leaseholds by way of mortgage for further securing a sum for which the same agreement gave an immediate charge on other property (*b*); an agreement on demand to assign a business and lease, which had been deposited by way of equitable charge (*c*); were held not to create charges until the request or demand was made. (*a*) *Williams* v. *Lucas*, 2 Cox, 160; (*b*) *Shaw* v. *Foster*, L. R. 5 H. L. 321; (*c*) *Ex parte Izard*, 9 Ch. 271, 275. Contract to charge on request.

On the other hand, an agreement when required to execute a legal mortgage (*a*), and an agreement on demand to execute a mortgage (*b*), have been held to create immediate charges, the request or demand being treated as a condition precedent, not to the creation of an equitable charge, but to the execution of a legal mortgage. (*a*) *Dighton* v. *Withers*, 31 B. 423; (*b*) *In re Hurley's Estate*, (1894) 1 I. R. 488.

A covenant to charge, not all or a definite portion of the covenantor's estate, but only that which is worth a definite sum or sufficient to secure a definite sum, does not of itself create a charge. *Fremoult* v. *Dedire*, 1 P. W. 429; *Gardner* v. *Marquis of Townshend*, G. Coop. 301; *Ravenshaw* v. *Hollier*, 7 Sim. 3; *Mornington* v. *Keane*, 2 De G. & Jo. 292; *Montagu* v. *Earl of Sandwich*, 32 Ch. Div. 525. Contract to charge land of certain value.

It is immaterial that a definite time is fixed within which the covenant is to be performed. *Mornington* v. *Keane*, 2 De G. & Jo. 292.

Roundell v. *Breary* (2 Vern. 482; 2 De G. & Jo. 319 *n.*) is explained by Turner, L.J., in *Mornington* v. *Keane* (2 De G. & Jo. 292, 318), on the ground that an intention was shown to charge specific lands by reason of a schedule having been prepared for the purpose of the settlement.

Where, however, after the covenant, the covenantor purchases lands of the prescribed value (whether in one or in several purchases), the presumption arises that they were purchased in satisfaction of the liability under the covenant, and the lands are bound as from the time of the purchase.

Tooke v. *Hastings*, 2 Vern. 97; *Wilcocks* v. *Wilcocks*, 2 Vern. 558; *Deacon* v. *Smith*, 3 Atk. 323; *Lechmere* v. *Lechmere*, Ca. t. Talb. 80, 93; *Sowden* v. *Sowden*, 1 B. C. C. 582; 1 Cox, 165; *Wellesley* v. *Wellesley*, 4 My. & Cr. 561.

The presumption arises, although the covenantor has the option of satisfying his liability otherwise than by the purchase of lands. *Deacon* v. *Smith*, *supra*; *Wellesley* v. *Wellesley*, *supra*.

The presumption may be rebutted, *e.g.* if the covenantor sells or mortgages the lands so purchased. *Deacon* v. *Smith*, *supra*.

Invalid mortgage enforced as charge.

Where a valid contract is entered into to create a charge, but the acts done in pursuance of the intention are for some reason ineffectual to create it, Equity, treating that as done which ought to be done, enforces the charge. *Re Strand Music Hall Co.*, 3 D. J. & S. 147; *Ross* v. *Army & Navy Hotel Co.*, 34 Ch. Div. 43.

Thus, a mortgage by feoffment, which was void as being without livery, was enforced against a judgment creditor of the mortgagor. *Burgh* v. *Francis*, 1 Eq. Abr. 320, pl. 1.

A surrender of copyholds to secure a debt was enforced against the assignee in bankruptcy of, and against a purchaser with notice from, the mortgagor, although the surrender was void for want of presentment. *Taylor* v. *Wheeler*, 2 Vern. 564; *Jennings* v. *Moore*, 2 Vern. 609.

A loan to a limited company upon a written agreement, stating the security to be a deposit of mortgage bonds constituting a security upon all the property of the company, and a further loan on a similar deposit of other like bonds, accompanied by a letter stating that the securities were to be held on the same terms as those held under the agreement, were held to give the lenders a charge in equity on the property of the company, although the bonds were void at law. *Re Strand Music Hall Co.*, 35 B. 153; 3 D. J. & S. 147; *In re Queensland Land Co.*, (1894) 3 Ch. 181.

Debentures, one of the conditions of which provided that the holders should be entitled to the benefit of a covering deed, which purported to give a charge on the undertaking of the company, were held to create a charge in equity, although the covering deed was assumed to be void for want

of registration under the Bills of Sale Act, 1878. *Ross* v. *Army & Navy Hotel Co.*, 34 Ch. Div. 43; *Brown, Shipley & Co.* v. *Commissioners of Inland Revenue*, (1895) 2 Q. B. 598.

This principle does not apply to cases where a charge on property, not made in a prescribed form, or not accompanied by certain formalities, is declared by statute to be void both at law and in equity. Equity will not enforce a charge which does not comply with the statute, even though the want of compliance is due to the fraud of the mortgagor. *Thompson* v. *Leake*, 1 Madd. 39; *Hughes* v. *Morris*, 2 D. M. & G. 349; *McCalmont* v. *Rankin*, 2 D. M. & G. 403; *Liverpool Borough Bank* v. *Turner*, 1 J. & H. 159; 2 D. F. & J. 502.

Charge on future property.

In cases not affected by the Bills of Sale Act, 1882, a valid charge can be created in equity on property not belonging to the borrower at the date of the contract. *Beckley* v. *Newland*, 2 P. W. 182; *Hobson* v. *Trevor*, 2 P. W. 191; *Wright* v. *Wright*, 1 Ves. S. 409; *Curtis* v. *Auber*, 1 J. & W. 526; *Alexander* v. *Duke of Wellington*, 2 R. & M. 35; *Douglas* v. *Russell*, 1 My. & K. 488; *Lyde* v. *Mynn*, 1 My. & K. 683; *Metcalfe* v. *Archbishop of York*, 1 My. & Cr. 547; *Holroyd* v. *Marshall*, 10 H. L. C. 191; *Tailby* v. *Official Receiver*, 13 App. Cas. 523, 543.

A conveyance or assignment of after-acquired property operates as a contract to convey or assign, which binds all property coming within its terms as soon as it is acquired. *Collyer* v. *Isaacs*, 19 Ch. Div. 342; *Joseph* v. *Lyons*, 15 Q. B. Div. 280; *Tailby* v. *Official Receiver*, 13 App. Cas. 523, 543.

Effect of bankruptcy on assignments of future property.

The liability under the contract is a liability now provable in bankruptcy. Therefore an assignment of after-acquired property does not attach to property acquired by the assignor after he has obtained his discharge. *Thompson* v. *Cohen*, L. R. 7 Q. B. 527; *Cole* v. *Kernot*, L. R. 7 Q. B. 534 *n.*; *Collyer* v. *Isaacs*, 19 Ch. Div. 342.

It would seem that the principle of *Collyer* v. *Isaacs* applies equally to the case of a marriage settlement containing a covenant to settle after-acquired property, though Jessel, M.R., guarded himself (p. 352) from being supposed to decide that point.

Lyde v. *Mynn* (4 Sim. 505; 1 My. & K. 683) only decided that where there was a debt provable in bankruptcy and an assignment of after-acquired property to secure the debt, the fact that the assignor obtained his certificate under the Bankruptcy Act, 1826, did not destroy his liability under the contract to assign, such liability not being then provable.

Robinson v. *Ommaney* (21 Ch. D. 780; 23 Ch. Div. 285) was a case under the Bankruptcy Act, 1849.

Charge on future property may be void for uncertainty.

An assignment of after-acquired property may be void for uncertainty, *i.e.* because it cannot be predicated of any item of property that it comes within the terms of the assignment.

A covenant, if the covenantor should at any time obtain or become entitled to any property exceeding a sum left blank in the deed, to assign the same to trustees has been held valid and enforceable as to any capital sum. *Fyfe* v. *Arbuthnot*, 1 De G. & Jo. 406.

Charge on future property not void by being extensive.

An assignment of after-acquired property is not void merely because it is wide in the sense of covering a large area, and it will be enforced as to any specific item of property which comes within its terms. *Randall* v. *Willis*, 5 Ves. 262; *Lewis* v. *Madocks*, 8 Ves. 150; 17 Ves. 48; *Bennett* v. *Cooper*, 9 B. 252; *Hardey* v. *Green*, 12 B. 182; *Lyster* v. *Burroughs*, 1 D. & Wal. 149; *In re Stack*, 13 Ir. Ch. 213; *Clements* v. *Matthews*, 11 Q. B. Div. 808; *In re Clarke*, 35 Ch. D. 109; 36 Ch. Div. 348; *In re Turcan*, 40 Ch. Div. 5; *Tailby* v. *Official Receiver*, 13 App. Cas. 523 (overruling *Belding* v. *Read*, 3 H. & C. 955; *In re D'Epineuil*, 20 Ch. D. 758).

It has been suggested that an assignment would not be enforceable in equity if its operation might, by sweeping in all the assignor's property, deprive him of the power of maintaining himself. See *Tailby* v. *Official Receiver*, 13 App. Cas. 523, 530; *In re Turcan*, 40 Ch. Div. 5, 9; *Bannatyne* v. *Ferguson*, (1896) 1 I. R. 149.

Even such an assignment, however, if divisible, will be enforced as to any item of property coming within a defined division; *e.g.* a covenant by a settlor that, if, at any time during marriage, he should become possessed or entitled by devise, payment, purchase, or otherwise, of or to any property

or estate, whether real or personal, he would convey or assign his estate or interest therein, has been held to attach to policy-moneys on the ground that they came within the class of property acquired by purchase. *In re Turcan*, 40 Ch. Div. 5.

See, however, as to the supposed distinction between divisible and indivisible covenants, the observations of Lord Macnaghten in *Tailby* v. *Official Receiver*, 13 App. Cas. 523, 550.

The inconvenience of giving a literal interpretation to a covenant to settle all after-acquired property may induce a Court to construe it as having a more limited sense.

A settlement of all and singular the personal estate of the settlor of what nature or kind soever has been held to attach to all the personal estate possessed by the settlor at his death; and it was also held that personal estate which the settlor had laid out in land in order to disappoint the beneficiaries under the settlement, was subject to the settlement. *Randall* v. *Willis*, 5 Ves. 262, 274; see *Galavan* v. *Dunne*, 7 L. R. Ir. 144.

Floating charges.

Assignments by limited companies of all their present and after-acquired property have been construed on the same principle as constituting what is called a floating charge, as to which, see p. 158.

B. Equitable Securities on Land.

Statute of Frauds, s. 4.

The Statute of Frauds (29 Ch. II. c. 3) provides (sect. 4) that no action shall be brought whereby to charge any person upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.

This section applies to mortgages, as well as sales, of real estate. *Lacon* v. *Mertins*, 3 Atk. 1.

"Interest in lands."

A charge on rent to accrue due (*a*) or on trade fixtures (*b*) is within the section. (*a*) *Ex parte Hall*, 10 Ch. Div. 615; (*b*) *Jarvis* v. *Jarvis*, 63 L. J. Ch. 10.

Written offer,

An offer in writing to give a security signed by the party

accepted by parol.

to be charged, followed by parol acceptance, satisfies the requirements of the statute. *Coleman* v. *Upcot*, 5 Vin. Abr. 527; *Warner* v. *Willington*, 3 Drew. 523; *Smith* v. *Neale*, 2 C. B. N. S. 67; *Liverpool Borough Bank* v. *Eccles*, 4 H. & N. 139; *Reuss* v. *Picksley*, L. R. 1 Ex. 342; *In re Beetham*, 18 Q. B. Div. 380, 766.

No particular words necessary.

No particular words are necessary to create a charge. It is sufficient if the Court can gather from the instrument or instruments containing the contract an intention to create a charge. *Cradock* v. *Scottish Provident Institution*, 63 L. J. Ch. 15.

Thus a power of attorney to receive the rents of land until repayment of a loan (*a*), or a deed appointing a receiver of the rents and profits to secure an annuity (*b*), may create a charge on the land. (*a*) *Wilkinson* v. *Wilkinson*, 3 Sw. 515; *Spooner* v. *Sandilands*, 1 Y. & C. C. 390; *Abbott* v. *Stratten*, 3 J. & Lat. 603; *Re Parkinson's Estate*, 13 L. T. 26. (*b*) *Cradock* v. *Scottish Provident Institution*, 63 L. J. Ch. 15.

Where a borrower from A. made a lease of premises to B., and assigned the rent reserved on the lease to A., reciting in the assignment the intention to make a security, and covenanting for further assurance, it was held that A. had a charge on the lease. *Ex parte Wills*, 2 Cox, 233.

Where an authority is given to a banker to receive rent to become due to the customer, parol evidence is not admissible to show that the authority was given in consideration of a loan. *Ex parte Hall*, 10 Ch. Div. 615.

Where A. by writing directs persons who are conveying land to him to make the conveyance in B.'s name, parol evidence is admissible to show that the direction is to convey to B. in the character of a creditor. *Card* v. *Jaffray*, 2 Sch. & L. 374.

A letter to a creditor authorizing him to retain title-deeds of an estate until the writer got his affairs settled, in reply to a letter from the creditor asking for an authority to retain them as security for a debt, satisfies the requirements of the statute. *Fenwick* v. *Potts*, 8 D. M. & G. 506.

A writing within the statute constitutes a valid security,

whether it is accompanied by a deposit of deeds or not. *Ex parte Sheffield Union Banking Co.*, 13 L. T. 477; *Dixon* v. *Muckleston*, 8 Ch. 155.

Part performance as excluding statute.

Acts of part performance may exclude the operation of the statute and let in parol evidence of the contract to which they are referable. *Maddison* v. *Alderson*, 8 App. Cas. 467, 476.

Payment of loan.

Payment by the lender of the amount agreed to be lent is not such an act of part performance. *Ex parte Hooper*, 19 Ves. 477; *Ex parte Hall*, 10 Ch. Div. 615.

Transfer of possession.

A transfer of the possession of a house has been held to be an act of part performance. *Crone* v. *Hegarty*, 3 L. R. Ir. 50.

Deposit of title-deeds.

Deposit of title-deeds of the property agreed to be mortgaged is such an act of part performance. *Russel* v. *Russel*, 1 B. C. C. 269; *Maddison* v. *Alderson*, *supra*; *In re Beetham*, *supra*.

Land Registry Act, 1862, s. 73.

The Land Registry Act, 1862 (25 & 26 Vict. c. 53), provides (sect. 73) that the deposit of the land certificate shall, for the purpose of creating a lien on the estate and interest of the depositor, have the same effect as a deposit of the title-deeds of the estate would have had before the passing of the Act.

Sect. 63 of the same Act provides that no equitable mortgage or lien on registered land shall be created by a deposit of title-deeds.

Land Transfer Act, 1875, s. 81.

The Land Transfer Act, 1875 (38 & 39 Vict. c. 87), provides (sect. 81) that, subject to any registered estates, charges, or rights, the deposit of the land certificate in the case of freehold land, and of the office copy of the registered lease in the case of leasehold land, shall, for the purpose of creating a lien on the land to which such certificate or lease relates, be deemed equivalent to a deposit of the title-deeds of the land.

All deeds need not be deposited.

It is not necessary that all the deeds which relate to the property charged should be deposited, or that the deeds deposited should show a complete title in the depositor. *Roberts* v. *Croft*, 24 B. 223; *Lacon* v. *Allen*, 3 Drew. 579; see *In re Roche's Estate*, 25 L. R. Ir. 58, 284.

Copyholds.

In the case of copyholds, a deposit of copy of Court Roll is sufficient. *Ex parte Warner*, 19 Ves. 202.

As to what is a sufficient change of possession:—

What is sufficient change of possession.

Deposit with the debtor's wife is not sufficient. *Ex parte Coming*, 9 Ves. 115.

Deposit with the debtor's solicitor as trustee for the creditor is sufficient. *Lloyd* v. *Attwood*, 3 De G. & Jo. 614, 652.

Where a third party already has possession of title-deeds for another purpose, an oral communication from a part owner of the property to which the deeds relate, purporting to make such third person a trustee of the deeds for a creditor, is not an act of part performance. *In re Beetham*, 18 Q. B. D. 380, 766.

A deposit by a solicitor mortgagor in a box in his office, belonging to and containing papers of the mortgagee, is sufficient. *Mason* v. *Morley* (No. 2), 34 B. 475.

Deposit not in itself a charge.

A deposit of title-deeds does not of itself create a charge. It is in itself evidence of an intention to create a charge, and it lets in other evidence of the intention, which would otherwise be inadmissible.

Therefore the mere possession by a creditor of deeds belonging to a debtor, where there is no evidence to connect the debt with the possession, does not create a charge. *Chapman* v. *Chapman*, 13 B. 308; *Wardle* v. *Oakley*, 36 B. 27; *Dixon* v. *Muckleston*, 8 Ch. 155.

As to what evidence is required to raise the implication of a charge, see *Ex parte Langston*, 17 Ves. 227, 230; *Burgess* v. *Moxon*, 2 Jur. N. S. 1059; *Maugham* v. *Ridley*, 8 L. T. 309; *McMahon* v. *McMahon*, 55 L. T. 763.

Charge given on A. where deeds of B. deposited.

Where deeds belonging to one estate are deposited, evidence is admissible to show an intention to give a charge on another estate as well. *Daw* v. *Terrell*, 33 B. 218.

But a deposit of the title-deeds of A., accompanied by representations of the depositor that they were the title-deeds of B., does not give any charge on B. *Jones* v. *Williams*, 24 B. 47.

When charge extends to further advance.

Where deeds are deposited to secure an advance, evidence is admissible of a subsequent parol agreement that the deeds shall stand security for further advances. *Ex parte Langston*, 17 Ves. 227; 1 Rose, 26; *Ex parte Kensington*, 2 V. & B. 79; 2 Rose, 138; *James* v. *Rice*, 5 D. M. & G. 461.

But evidence is not admissible of a further advance on the

security of the deeds to a person other than the original creditor with whom they were deposited. *Ex parte Whitbread*, 19 Ves. 209.

Evidence is not admissible of a further advance where, in addition to a deposit, a legal mortgage was originally given. *Ex parte Hooper*, 19 Ves. 477; 1 Mer. 7.

Where a lease was deposited as a security, evidence was not admitted of an agreement to deposit a new lease as security for a further advance. *Ex parte Coombe*, 4 Madd. 249.

Charge includes whole interest of depositor.

Where the intention to give a charge is proved, the charge extends to every estate and interest which the depositor possesses or may hereafter acquire in the property, the title-deeds of which are deposited. *Ex parte Bisdee*, 1 M. D. & D. 333; *Bank of New South Wales* v. *O'Connor*, 14 App. Cas. 273, 282; *In re Roche's Estate*, 25 L. R. Ir. 58, 284.

Deposit for purpose of preparing formal mortgage.

Where the parol evidence shows that the title-deeds were merely deposited in order that a legal mortgage might be prepared, the deposit does not of itself create a security. *Norris* v. *Wilkinson*, 12 Ves. 192; *Lloyd* v. *Attwood*, 3 De G. & Jo. 614, 651.

But these cases must be distinguished from others where the evidence shows that it was intended to give an immediate security, although the execution of a legal mortgage was in contemplation. *Edge* v. *Worthington*, 1 Cox, 211; *Ex parte Bruce*, 1 Rose, 374; *Hockley* v. *Bantock*, 1 Russ. 141; *Keys* v. *Williams*, 3 Y. & C. 55; *Lloyd* v. *Attwood*, 3 De G. & Jo. 614, 651; *Bulfin* v. *Dunne*, 12 Ir. Ch. 67.

Deposit accompanied by written charge.

Where the deposit is accompanied by an actual written charge, no implication which might be raised from the deposit alone will be allowed to contradict the terms of the written document. *Ex parte Coombe*, 17 Ves. 369; *Ex parte Kensington*, 2 V. & B. 79, 83; *Shaw* v. *Foster*, L. R. 5 H. L. 321, 340.

Effect of parting with deeds.

The effect of the deposit is not destroyed if the mortgagee parts with the deeds to enable a sale to be effected (*Ex parte Morgan*, 12 Ves. 6), or if the mortgagor wrongfully removes them (*Mason* v. *Morley* (No. 2), 34 B. 475).

No separate lien on deeds.

The deposit of title-deeds by way of equitable mortgage gives no lien on the deeds as apart from the charge on the

lands. *In re Girdwood*, 5 L. R. Ir. 45; *In re Richardson*, 30 Ch. Div. 396.

Loss of deeds.

As to what evidence is required of the deposit where the deposited deeds have been lost, see *Baskett* v. *Skeel*, 11 W. R. 1019.

Liability of equitable mortgagee of lease to landlord.

An equitable mortgagee of a lease is not liable in equity to the lessor either for the rent or upon the covenants, and he does not become liable by taking possession. *Moores* v. *Choat*, 8 Sim. 508; *Walters* v. *Northern Coal Mining Co.*, 5 D. M. & G. 629; *Cox* v. *Bishop*, 8 D. M. & G. 815.

Hence, a receiver who has taken possession on behalf of debenture-holders of a company is not liable for the rent of railway waggons held on lease by the company. *Hay* v. *Swedish & Norwegian Ry. Co.*, 8 T. L. R. 775.

An equitable mortgagee of a lease cannot be compelled by the lessor to take a legal assignment of the lease, even though he has paid rent and taken possession. *Moore* v. *Greg*, 2 Ph. 717, overruling *Lucas* v. *Comerford*, 1 Ves. J. 235; 3 B. C. C. 166; and *Flight* v. *Bentley*, 7 Sim. 149.

C. Equitable Securities on Personal Property.

Charge on personal property may be created by parol.

An equitable charge on personal property may validly be created by agreement without writing. *Tibbits* v. *George*, 5 Ad. & E. 107; *Gurnell* v. *Gardner*, 4 Giff. 626; *Riccard* v. *Prichard*, 1 K. & J. 277; *Brown, Shipley & Co.* v. *Kough*, 29 Ch. Div. 848, 854; *Parish* v. *Poole*, 53 L. T. 35.

Ship may be mortgaged in equity.

A ship may be validly mortgaged in equity.

The Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), provides—

Sect. 57. The expression "beneficial interest," when used in this part of this Act, includes interests arising under contract and other equitable interests; and the intention of this Act is, that, without prejudice to the provisions of this Act for preventing notice of trusts from being entered on the register book or received by the registrar, and without prejudice to the powers of disposition and of giving receipts conferred by this Act on registered owners and mortgagees,

and without prejudice to the provisions of this Act relating to the exclusion of unqualified persons from the ownership of British ships, interests arising under contract or other equitable interests may be enforced by or against owners and mortgagees of ships in respect of their interest therein in the same manner as in respect of any other personal property.

Choses in action.

Choses in action, such as a debt or fund in the hands of trustees, have always been assignable in equity.

Assignment complete as between parties without notice.

An assignment of a debt (*a*) or fund in the hands of trustees (*b*) is complete as between assignor and assignee, although no notice of the assignment is given to the debtor or trustees. (*a*) *Rodick* v. *Gandell*, 1 D. M. & G. 763, 780; *Pickering* v. *Ilfracombe Ry. Co.*, L. R. 3 C. P. 235; *Robinson* v. *Nesbitt*, L. R. 3 C. P. 264; *In re Irving*, 7 Ch. D. 419; *Gorringe* v. *Irwell India Rubber Works*, 34 Ch. Div. 128; (*b*) *Ward* v. *Duncombe*, (1893) A. C. 369, 392.

This rule applies to voluntary assignments as well as to assignments for value. *Donaldson* v. *Donaldson*, Kay, 711; *In re Patrick*, (1891) 1 Ch. 82.

Equitable assignment must be for value.

1. The appropriation of a specific chattel or fund must, in order to constitute an equitable assignment, be made in pursuance of a contract for value.

A voluntary direction by A. to B., specifically appropriating property of A. in the hands of B. towards payment of C., does not, whether communicated to C. or not, create an equitable assignment of the property, and may be countermanded by A. In order to create an equitable assignment, the benefit of the appropriation must be transferred for value to C. *Ex parte Heywood*, 2 Rose, 355; *Scott* v. *Porcher*, 3 Mer. 652; *Williams* v. *Everett*, 14 East, 582; *Garrard* v. *Lord Lauderdale*, 3 Sim. 1; 2 R. & M. 451; *Malcolm* v. *Scott*, 3 Ha. 39, 46; affd. 14 L. J. Ch. 57; *Ex parte Hall*, 10 Ch. Div. 615; *Brown, Shipley & Co.* v. *Kough*, 29 Ch. Div. 848.

In *Fitzgerald* v. *Stewart* (3 Sim. 333; 2 R. & M. 457) the property was held bound, by Brougham, C., on the ground, not of equitable assignment, but because the person to whom the mandate was given had raised an equity against himself by partially complying with it.

A direction to a debtor to pay his debt to an agent of the creditor is not an equitable assignment of the debt to the agent, although the agent is also a creditor of his principal. *Bell* v. *L. & N. W. Ry. Co.*, 15 B. 548.

There must be specific appropriation.

2. The contract must appropriate a specific chattel or fund for the satisfaction of the creditor. *Hoare* v. *Dresser*, 7 H. L. C. 290, 317, 324; *Citizens' Bank of Louisiana* v. *First National Bank of New Orleans*, L. R. 6 H. L. 352.

Thus, a mere enumeration by a debtor of cargoes, the proceeds of sale of which "will enable him to adjust the account" (*a*); or a promise to pay the debt when he receives the proceeds of a cargo (*b*); or an engagement that he would place in the hands of the lender, who was a broker, for sale sugars which he was expecting home from two quarters, and that the lender should repay himself his loan out of the proceeds (*c*); or a representation to the purchaser of a bill of exchange drawn by A. on B., that the bill was drawn against funds to a much larger amount remitted by A. to B. (*d*); does not create an equitable assignment. (*a*) *Jones* v. *Starkey*, 16 Jur. 510; (*b*) *Field* v. *Megaw*, L. R. 4 C. P. 660; (*c*) *Dean* v. *Byrnes*, 13 W. R. 299; (*d*) *Citizens' Bank of Louisiana* v. *First National Bank of New Orleans*, L. R. 6 H. L. 352; see *Ex parte Imbert*, 1 De G. & Jo. 152.

Cheque is not equitable assignment.

A cheque is not an equitable assignment. It is a revocable request. *Hopkinson* v. *Forster*, 19 Eq. 74; *Schroeder* v. *Central Bank of London*, 34 L. T. N. S. 735; 24 W. R. 710.

Where contract is wholly in writing.

Where the evidence of the contract is wholly in writing, it is clear that the document or documents relied on to prove the contract must show that it was of such a character as is stated above.

Fund or debt must be specified.

Thus, where a writing is relied on to prove an equitable assignment, the writing must specify the fund or debt out of which the payment is to be made. *Row* v. *Dawson*, 1 Ves. S. 331, 332; *Percival* v. *Dunn*, 29 Ch. D. 128.

A letter from foreign merchants to their London correspondent, hoping that he will shortly have realized a large portion of their consignments and remittances, to enable him to dispose of a specified sum from their general account with

him, and requesting him, should he be in possession of funds, to hold that sum at the disposal of a creditor, does not create an equitable assignment. *Malcolm* v. *Scott*, 3 Mac. & G. 29.

A letter from a debtor to a creditor on an acceptance in the following terms: "We hold at your disposal the sum of 425*l.* due from X. for goods delivered by us to them up to the 31st of December, 1884, until the balance of our acceptance for 660*l.* has been paid"—was held an immediate assignment of all debts due from X. up to the limit of 425*l.* *Gorringe* v. *Irwell India Rubber Works*, 34 Ch. Div. 128.

Order given by debtor to creditor upon person holding funds of debtor.

An equitable assignment is created by an order in writing given by a debtor to his creditor upon a person owing money or holding funds belonging to the giver of the order, directing such person to pay such funds to the creditor. *Row* v. *Dawson*, 1 Ves. S. 331; *Yeates* v. *Groves*, 1 Ves. J. 280; *Ex parte Alderson*, 1 Madd. 53, S. C. *Ex parte South*, 3 Sw. 392; *Lett* v. *Morris*, 4 Sim. 607; *Crowfoot* v. *Gurney*, 2 Moo. & Sc. 473; *Burn* v. *Carvalho*, 4 My. & Cr. 690; *Rodick* v. *Gandell*, 12 B. 325; 1 D. M. & G. 763; *Diplock* v. *Hammond*, 5 D. M. & G. 320; *Myers* v. *United Guarantee Co.*, 7 D. M. & G. 112, 124; *McGowan* v. *Smith*, 26 L. J. Ch. 8; *Addison* v. *Cox*, 8 Ch. 76; *Buck* v. *Robson*, 3 Q. B. D. 686; *Fisher* v. *Calvert*, 27 W. R. 301; *Greenway* v. *Atkinson*, 29 W. R. 560; *Webb* v. *Smith*, 30 Ch. Div. 192.

Where A., being indebted to B., who was pressing him for payment, and having claims against a railway company, wrote to the solicitors of the company, requesting them to pay to B. all moneys due to A. from the company, and authorizing them to receive such moneys for the purpose, and the solicitors promised B. to pay him the moneys on receiving them, it was held that there was no equitable assignment. *Rodick* v. *Gandell*, 12 B. 325; 12 D. M. & G. 763.

A letter from A. to a person having a fund belonging to A. in his hands, stating that B., a creditor of A., is a claimant on the fund for a bond debt with interest, is not an equitable assignment. *Watson* v. *Duke of Wellington*, 1 R. & M. 602.

A letter from a banker stating that he has opened a credit under instructions in favour of the person to whom the letter

is addressed is not an equitable assignment. *Morgan* v. *Larivière*, L. R. 7 H. L. 423.

Assignment of balance of fund.

As to the effect of an assignment of the balance of a fund, see *Ex parte Garrard*, 5 Ch. Div. 61.

Want of notice.

In determining whether a transaction constitutes an equitable assignment, the fact that no notice was given to the debtor or person holding the fund may be evidence that it was not intended to assign the debt or fund. *Rodick* v. *Gandell*, 1 D. M. & G. 763, 780; *Field* v. *Megaw*, L. R. 4 C. P. 660, 663; *In re Sheward*, (1893) 3 Ch. 502, 509.

Lien on goods of bill of exchange holders.

The holder of a bill of exchange which is drawn against goods acquires, as a rule, no charge on the goods, unless the bill of lading is annexed to the bill of exchange. *Robey & Co.'s Perseverance Ironworks* v. *Ollier*, 7 Ch. 695.

Where the bills of lading were attached to the bills of exchange, but the letter of credit given to the drawer and shown to the holder of the bills provided that the bills of lading should be surrendered to the acceptors against their acceptances, it was held that the bill-holders had no charge. *Ex parte Dever*, 13 Q. B. Div. 766.

The fact that the bill of exchange purports to be drawn against a particular cargo does not give the holder a charge on the cargo. *Robey & Co.'s Perseverance Ironworks* v. *Ollier*, 7 Ch. 695; *In re Entwistle*, 3 Ch. Div. 477; *Phelps, Stokes & Co.* v. *Comber*, 29 Ch. Div. 813; *Brown, Shipley & Co.* v. *Kough*, 29 Ch. Div. 848; distinguishing *Frith* v. *Forbes*, 4 D. F. & J. 409.

Deposit of documents of title.

A deposit of documents of title to personal property, *e.g.* certificates of shares, policies of insurance, is evidence of a contract to create a charge upon them in favour of the depositee. *Ferris* v. *Mullins*, 2 Sm. & G. 379.

Blank transfer of shares.

A blank transfer of shares, *i.e.* a transfer with the date, the consideration, and the name of the transferee in blank, signed by the registered holder and accompanying a deposit of the share certificates, is evidence that the deposit was intended as a security. *Colonial Bank* v. *Whinney*, 11 App. Cas. 426, 433.

The depositee is entitled, as against the depositor, to fill in

the blanks and to have his transfer registered. *In re Tahiti Cotton Co.*, 17 Eq. 273; *France* v. *Clark*, 26 Ch. Div. 257.

Proviso in life policy against assignment.

A proviso in a policy of insurance that "this policy shall not be assignable in any case whatever," was held, the policy also containing a condition that the company should not be affected by notice of any trust, equitable charge, or lien, merely to exclude the operation of the Policies of Assurance Act, 1867, and not to prevent the policy-holder from executing a declaration of trust of the policy in favour of another person. *In re Turcan*, 40 Ch. Div. 5.

Patent.

An equitable assignment of a patent or share in a patent, may be entered on the Register of Patents under sect. 23 of the Patents, Designs, and Trade Marks Act, 1883 (46 & 47 Vict. c. 57). *In re Casey's Patents*, (1892) 1 Ch. 104.

CHAPTER III.

BILLS OF SALE.

THE law as to mortgages of, and charges on, personal chattels is governed (subject to the exceptions mentioned pp. 39, 40) by the Bills of Sale Act, 1882 (45 & 46 Vict. c. 43) which (sect. 2) came into operation on the 1st of November, 1882, and which (sect. 3) is, so far as is consistent with the tenor thereof, to be construed as one with the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31).

Acts avoid documents, not transactions.

The Bills of Sale Acts avoid documents and not transactions. Hence, where a lender has a title to goods by a transaction independently of any document, and a document is executed, either at the time of the transaction or afterwards, which would, if his title depended upon it, come within the definition of a bill of sale, the non-registration of that document does not deprive him of his independent title. *Woodgate* v. *Godfrey* 5 Ex. Div. 24; *North Central Wagon Co.* v. *M. S. & L. Ry. Co.*, 35 Ch. Div. 191; *Beckett* v. *Tower Assets Co.*, (1891) 1 Q. B. 638; *Charlesworth* v. *Mills*, (1892) A. C. 231.

Pledge not within Act.

Thus, where there is a pledge (*a*), or where goods are delivered to an auctioneer, with authority to sell them and to retain an advance out of the sale moneys (*b*), the title of the pledgee or auctioneer is not impaired by the fact that the terms of the pledge or the trusts of the sale moneys are reduced to writing, which is not registered. (*a*) *Ex parte Close*, 14 Q. B. D. 386; *Attenborough's Case*, 28 Ch. D. 682; *Ex parte Hubbard*, 17 Q. B. Div. 690; *Grigg* v. *National Guardian Assurance Co.*, (1891) 3 Ch. 206; *Morris* v. *Delobbel-Flipo*, (1891) 2 Ch. 352. (*b*) *Charlesworth* v. *Mills*, (1892) A. C. 231.

Documents on which title depends.

The distinction must be kept in mind between a document to which the lender must have recourse in order to establish his title, and a document to which he must have recourse merely if there is a controversy about the terms of the transaction. See *Charlesworth* v. *Mills*, (1892) A. C. 231, 239.

Where the terms of an agreement for giving a security on chattels, under which the lender is entitled to take possession, have been reduced to writing, parol evidence of the agreement is inadmissible. The title of the lender depends on the written agreement, which is a bill of sale, and he does not improve his position by taking possession, which he can only maintain by reference to the written agreement. *Ex parte Parsons*, 16 Q. B. Div. 532.

Where a similar agreement has not been reduced into writing, and the lender takes possession, he may maintain his possession against the borrower, as he is not obliged to rely on a void document. *Newlove* v. *Shrewsbury*, 21 Q. B. Div. 41.

What Documents are within the Act.

The question whether the document, upon which the plaintiff's title depends, was given by way of security for the payment of money, is a question of fact.

Form of document not conclusive as to transaction.

The form of the document is not conclusive. The defendant is entitled to show what the real nature of the contract between the parties was. If the contract was in reality for a loan upon security, the document is a security for the payment of money, and void if unregistered.

Thus, the grantor of a bill of sale, which is absolute in form, is entitled to show that it was given by way of security for the payment of money. *In re Watson*, 25 Q. B. Div. 27; *Madell* v. *Thomas & Co.*, (1891) 1 Q. B. 230; *Beckett* v. *Tower Assets Co.*, (1891) 1 Q. B. 638.

Where A. *bonâ fide* sells chattels to B. on condition that A. shall have a right of repurchasing the chattels on certain terms, the result of the transaction, if A. exercises the right, may be the same as if A. had mortgaged the chattels to B. and

subsequently redeemed them; but the transactions are entirely distinct.

Hire-purchase agreements.

Thus, if A. *bonâ fide* sells chattels to B., and B., as part of the same transaction, enters into a written agreement for the hire and purchase of the same chattels by A., although upon terms which enable B. to seize the chattels in default of some payment under the contract, the agreement is not a bill of sale. *Yorkshire Railway Wagon Co.* v. *Maclure*, 19 Ch. D. 478; 21 Ch. Div. 309; *M. S. & L. Ry. Co.* v. *North Central Wagon Co.*, 32 Ch. D. 477; 35 Ch. Div. 191; 13 App. Cas. 554; *Redhead* v. *Westwood*, 59 L. T. 293; *In re Jones*, 61 L. T. 84; *In re Yarrow*, 59 L. J. Q. B. 18; *United Forty Pound Loan Club* v. *Bexton*, (1891) 1 Q. B. 28 *n.*

Loan transaction under cover of sale.

On the other hand, where the evidence shows that the parties did not intend a sale, either absolute or conditional, but that the forms of a sale were gone through to conceal a loan transaction, a hire-purchase agreement, enabling the supposed vendee to take possession of the chattels on default, is a bill of sale within the Act. *Cochrane* v. *Matthews*, 10 Ch. Div. 80 *n.* 1; *Ex parte Odell*, 10 Ch. Div. 80; *French* v. *Bombernand*, 60 L. T. 48; *In re Watson*, 25 Q. B. Div. 27; *Beckett* v. *Tower Assets Co.*, (1891) 1 Q. B. 1, 638.

Definition of bill of sale.

The Act of 1882 provides (sect. 4) that the expression "bill of sale" and other expressions in the Act of 1882 have the same meaning as in the Act of 1878, except as to bills of sale or other documents mentioned in sect. 4 of the Act of 1878, which may be given otherwise than by way of security for the payment of money, to which last-mentioned bills of sale and other documents the Act of 1882 shall not apply.

The Act of 1878 provides—

Bills of Sale Act, 1878, s. 3.

Sect. 3. This Act shall apply to every bill of sale executed on or after the first day of January, 1879 (whether the same be absolute, or subject or not subject to any trust), whereby the holder or grantee has power, either with or without notice, and either immediately or at any future time, to seize or take possession of any personal chattels comprised in or made subject to such bill of sale.

Sect. 4. In this Act the following words and expressions

shall have the meanings in this section assigned to them respectively, unless there be something in the subject or context repugnant to such construction: (that is to say,)

The expression "bill of sale" shall include bills of sale, assignments, (1) transfers, declarations of trust without transfer, (2) inventories of goods with receipt thereto attached, or (3) receipts for purchase-moneys of goods, and (4) other assurances of personal chattels; and also powers of attorney, authorities, or (5) licenses to take possession of personal chattels as security for any debt and also (6) any agreement, whether intended or not to be followed by the execution of any other instrument, by which a right in equity to any personal chattels, or to any charge or security thereon, shall be conferred, but shall not include the following documents; that is to say, (7) assignments for the benefit of the creditors of the person making or giving the same, (8) marriage settlements, (9) transfers or assignments of any ship or vessel or any share thereof, transfers of goods in the ordinary course of business of any trade or calling, bills of sale of goods in foreign parts or at sea, bills of lading, India warrants, warehouse-keepers' certificates, warrants or orders for the delivery of goods, or any other documents used in the ordinary course of business as proof of the possession or control of goods, or authorizing or purporting to authorize, either by indorsement or by delivery, the possessor of such document to transfer or receive goods thereby represented.

As to the relation between sect. 3 and sect. 4, see *Ex parte Hubbard*, 17 Q. B. Div. 690.

Transfers.

1. A transfer must be a document which assumes to transfer the property in goods in the same way as a bill of sale would. *Ex parte Hubbard*, 17 Q. B. Div. 690.

Inventories and receipts.

2, 3. An inventory or receipt, to be within the Act, must be part of the bargain to pass the property in the goods. A mere receipt given after the completion of a sale is not within the Act. *Woodgate* v. *Godfrey*, 5 Ex. Div. 24; *Marsden* v. *Meadows*, 7 Q. B. Div. 80; *Preece* v. *Gilling*, 53 L. T. 763; *North Central Wagon Co.* v. *M. S. & L. Ry. Co.*, 35 Ch. Div. 191, 13 App. Cas. 554; *Shepherd* v. *Pulbrook*, 59 L. T.

288; *Haydon* v. *Brown*, 59 L. T. 810; *In re Hood*, 42 W. R. 23; *Ramsey* v. *Margrett*, (1894) 2 Q. B. 18.

Assurances.

4. An agreement to execute a bill of sale is an assurance within the Act. *Ex parte Mackay*, 8 Ch. 643.

A memorandum, without which a transaction of sale and purchase is void under the Statute of Frauds, is an assurance within the Act. *In re Roberts*, 36 Ch. D. 196.

Licenses to take possession.

5. A license, to be within the Act, must be a license by the owner of the property to a lender to take possession of chattels which remain in the owner's custody. *United Forty Pound Loan Club* v. *Bexton*, (1891) 1 Q. B. 28 *n.*; *McEntire* v. *Crossley Brothers*, (1895) A. C. 457.

A license to take immediate possession is within the Act. *Ex parte Parsons*, 16 Q. B. Div. 532.

Power to distrain for debt other than rent.

The debt may be a contingent future debt. For instance, a clause in an agreement for a lease, empowering the landlord to distrain for recovery of the amount due for goods to be supplied by him, is a license within the Act. *Ex parte Hopcraft*, 14 W. R. 168; *Pulbrook* v. *Ashby & Co.*, 56 L. J. Q. B. 376; *Stevens* v. *Marston*, 60 L. J. Q. B. 192.

Assignment of personal license.

An assignment of the vendor's rights under a hire-purchase agreement, which entitles him to take possession on default of payment, is not within the Act, as a personal license to seize cannot be assigned. *In re Davis & Co.*, 22 Q. B. Div. 193.

Power to sell fixtures apart from land.

A power for a mortgagee of land, with fixtures or building materials upon it, to sell them apart from the land, in default of payment, is a license within the Act. *In re Yates*, 38 Ch. Div. 112; *Climpson* v. *Coles*, 23 Q. B. D. 465.

Agreements giving right in equity.

6. This clause does not apply to documents which create or regulate the exercise of a legal right in personal chattels, *e.g.* agreements which provide that materials brought on land are to become the landlord's property (*a*), or which determine the rights of pledgor and pledgee (*b*). (*a*) *Brown* v. *Bateman*, L. R. 2 C. P. 272; *Blake* v. *Izard*, 16 W. R. 108; *Ex parte Newitt*, 16 Ch. Div. 522; *Reeves* v. *Barlow*, 11 Q. B. D. 610; 12 Q. B. Div. 436; *Climpson* v. *Coles*, 23 Q. B. D. 465; see *Church* v. *Sage*, 67 L. T. 800. (*b*) *Ex parte Hubbard*, 17

Q. B. Div. 690; *Morris* v. *Delobbel-Flipo*, (1892) 2 Ch. 352; *Charlesworth* v. *Mills*, (1892) A. C. 231.

A mortgage by a builder to a stranger of his interest in a building agreement is within the Act. *Church* v. *Sage*, 67 L. T. 800.

Lien on goods for unpaid purchase-money.

A proviso on the sale of a business by trustees to a beneficiary giving them a lien for unpaid purchase-money is within the clause. *Coburn* v. *Collins*, 35 Ch. D. 373; see *Re Webber*, 64 L. T. 426; *McEntire* v. *Crossley Brothers*, (1895) A. C. 457, 466.

Assignments for benefit of creditors.

7. An assignment, to be within this clause, must be for the equal benefit of all the creditors, but it is not outside the protection of the clause because a time is fixed within which creditors who have notice of it must assent. *General Furnishing Co.* v. *Venn*, 2 H. & C. 153; *Ashford* v. *Tuite*, 7 Ir. C. L. 91; *Paine* v. *Matthews*, 53 L. T. 872; *Hadley & Son* v. *Beedom*, (1895) 1 Q. B. 646.

Marriage settlements.

8. A memorandum of agreement for a marriage settlement is within this clause (*a*), but a post-nuptial settlement is not (*b*).
(*a*) *Wenman* v. *Lyon & Co.*, (1891) 1 Q. B. 634; 2 Q. B. 192.
(*b*) *Fowler* v. *Foster*, 28 L. J. Q. B. 210.

Mortgages of ships.

9. This clause is not confined to ships or vessels, the registration of which is provided for by the Merchant Shipping Acts. *Union Bank of London* v. *Lenanton*, 3 C. P. D. 243; *Gapp* v. *Bond*, 19 Q. B. Div. 200.

Mortgages of incorporated companies.

The mortgages or charges of any incorporated company for the registration of which statutory provision is made, either by the Companies Clauses Act, 1845, or the Companies Act, 1862, are not within the Bills of Sale Act, 1878. *In re Standard Manufacturing Co.*, (1891) 1 Ch. 627.

The Act of 1882 provides—

Bills of Sale Act, 1882, s. 17.

Sect. 17. Nothing in this Act shall apply to any debentures issued by any mortgage, loan, or other incorporated company, and secured upon the capital stock or goods, chattels, and effects of such company.

Incorporated company, what.

The words "or other incorporated company" include every incorporated company which is authorized to raise money on loan or mortgage. *Read* v. *Joannon*, 25 Q. B. D. 300; *In re*

Standard Manufacturing Co., (1891) 1 Ch. 627, overruling *Jenkinson* v. *Brandley Mining Co.*, 19 Q. B. D. 568.

It has been held, however, that debentures issued by a society registered under the Industrial and Provident Societies Act, 1876, are subject to the Bills of Sale Acts. *Great Northern Ry. Co.* v. *Coal Co-operative Society*, (1896) 1 Ch. 187.

Debentures, what.

A distinction has been drawn in several cases between debentures and other securities of limited companies. Thus it has been held or assumed that a bill of sale (*a*), a covering deed to secure debentures (*b*), and a memorandum accompanying a deposit of title-deeds to secure a banker's balance (*c*), are not protected by sect. 17. (*a*) *Attenborough's Case*, 28 Ch. D. 682; *contra*, *In re Royal Marine Hotel Co.*, (1895) 1 I. R. 368; (*b*) *Ross* v. *Army & Navy Hotel Co.*, 34 Ch. Div. 43; (*c*) *Topham* v. *Greenside Glazed Fire-brick Co.*, 37 Ch. D. 280.

The better opinion, however, appears to be that no security issued by a company which is outside the Act of 1878 can be within the Act of 1882, and that therefore a covering deed to secure debentures is not a bill of sale within the latter Act. *Richards* v. *Overseers of Kidderminster*, (1896) 2 Ch. 212, 221.

Debenture is a wide term, and is not confined to debentures issued in a series. *Edmonds* v. *Blaina Furnaces Co.*, 36 Ch. D. 215.

"A debenture means a document which either creates a debt or acknowledges it." *Per* Chitty, J., in *Levy* v. *Abercorris Slate Co.*, 37 Ch. D. 260.

"A debenture is an acknowledgment or declaration of a present or future right to receive payment of a certain sum out of a given property, so as not to make the person issuing it personally responsible." *Per* Sugden, C., in *Phillips* v. *Eastwood*, Ll. & G. t. Sugd. 270, 292; see also New English Dictionary, *s.v.*

Securities on imported goods.

The Bills of Sale Act, 1890 (53 & 54 Vict. c. 53), as amended by the Bills of Sale Act, 1891 (54 & 55 Vict. c. 35), excludes securities on imported goods from the operation of the Acts of 1878 & 1882.

What Property is within the Act.

The Act of 1882 adopts (sect. 3) the definitions in the Act of 1878.

The Act of 1878 defines (sect. 4) personal chattels as follows:—

The expression "personal chattels" shall mean goods, furniture, and other articles capable of complete transfer by delivery, and (when separately assigned or charged) fixtures and growing crops; but shall not include chattel interests in real estate, nor fixtures (except trade machinery as hereinafter defined), when assigned together with a freehold or leasehold interest in any land or building to which they are affixed, nor growing crops when assigned together with any interest in the land on which they grow, nor shares or interests in the stock, funds, or securities of any government or in the capital or property of incorporated or joint stock companies, nor choses in action, nor any stock or produce upon any farm or lands which by virtue of any covenant or agreement or of the custom of the country ought not to be removed from any farm where the same are at the time of making or giving of such bill of sale.

Trade machinery.

The Act provides (sect. 5) that trade machinery as therein defined shall, for the purposes of the Act, be deemed to be personal chattels.

After-acquired chattels.

The better opinion appears to be that the expression "capable of complete transfer by delivery" refers to goods and furniture as well as to other articles, and restricts the definition to existing chattels. *Brantom* v. *Griffits*, 1 C. P. D. 349; *Thomas* v. *Kelly*, 13 App. Cas. 506, 518.

An assignment, in the body of a bill of sale, of after-acquired chattels is not in accordance with the form prescribed by the Act of 1882, and avoids the bill of sale. *Thomas* v. *Kelly*, 13 App. Cas. 506.

Sect. 5 of the Act of 1882 avoids a bill of sale, except as against the grantor, in respect of any after-acquired personal chattels specifically described in the schedule thereto. See

Thomas v. *Kelly, supra*; *Tuck* v. *Southern Counties Deposit Bank*, 42 Ch. Div. 471.

Sect. 6, (2) of the Act of 1882 excepts from the operation of sect. 5 any fixtures, plant, or trade machinery substituted for any fixtures, plant, or trade machinery specifically described in the schedule. See *Thomas* v. *Kelly*, 13 App. Cas. 506, 521; *Seed* v. *Bradley*, (1894) 1 Q. B. 319.

Covenant to replace damaged articles.

A covenant in a bill of sale to replace any articles damaged or worn out with any others of equal value to be included in the security is a covenant for the maintenance of the security, and may be inserted in a bill of sale. *Seed* v. *Bradley*, (1894) 1 Q. B. 319.

Remainder in personal chattels.

A remainder in personal chattels is a chose in action, and therefore excepted from the Bills of Sale Act. *Re Tritton*, 61 L. T. 301.

As to the effect of the Act on fixtures and growing crops, see pp. 173, 175.

When a Bill of Sale is Void except as against the Grantor.

Non-compliance with the requirements of the Act of 1882 may avoid a bill of sale *either* except as against the grantor (sects. 4, 5, 6), *or* in respect of the personal chattels comprised therein (sect. 8), *or* altogether (sects. 9, 12).

The Act of 1882 provides—

Bills of Sale Act, 1882, s. 4.

Sect. 4. Every bill of sale shall have annexed thereto or written thereon a schedule containing an inventory of the personal chattels comprised in the bill of sale; and such bill of sale, save as hereinafter mentioned, shall have effect only in respect of the personal chattels specifically described in the said schedule, and shall be void, except as against the grantor, in respect of any personal chattels not so specifically described.

S. 5.

Sect. 5. Save as hereinafter mentioned, a bill of sale shall be void, except as against the grantor, in respect of any personal chattels specifically described in the schedule thereto of which the grantor was not the true owner at the time of the execution of the bill of sale.

Sect. 6. Nothing contained in the foregoing sections of this Act shall render a bill of sale void in respect of any of the following things: (that is to say,) S. 6.

(1) Any growing crops separately assigned or charged where such crops were actually growing at the time when the bill of sale was executed.

(2) Any fixtures separately assigned or charged, and any plant, or trade machinery where such fixtures, plant, or trade machinery are used in, attached to, or brought upon any land, farm, factory, workshop, shop, house, warehouse, or other place in substitution for any of the like fixtures, plant, or trade machinery specifically described in the schedule to such bill of sale.

Sects. 4 and 5 deal only with the description in the schedule. Although a bill of sale follows the form given by the Act, it is avoided by these sections, except as against the grantor, in respect either of chattels imperfectly described in the schedule or of chattels of which the grantor was not the true owner. *Kelly* v. *Kellond*, 20 Q. B. Div. 569, 574, S. C. *Thomas* v. *Kelly*, 13 App. Cas. 506.

Specific description, what.

A description to be specific must be such as to enable any person, taking the schedule in his hand and applying it to the subject-matter, to identify the chattels assigned without the aid of any other document. *Roberts* v. *Roberts*, 13 Q. B. Div. 794; *Ex parte Hill*, 17 Q. B. D. 74; *Witt* v. *Banner*, 19 Q. B. D. 276; 20 Q. B. Div. 114; *Carpenter* v. *Deen*, 23 Q. B. Div. 566; *Hickley* v. *Greenwood*, 25 Q. B. D. 277; *Davidson* v. *Carlton Bank*, (1893) 1 Q. B. 82.

Grantor when true owner.

A grantor is not the true owner of after-acquired chattels, or of chattels over which he has given an absolute bill of sale which has not been registered. *Tuck* v. *Southern Counties Deposit Bank*, 42 Ch. Div. 471.

He is the true owner of chattels over which he has given a bill of sale by way of security (*a*), or of which he is the legal owner subject to a trust (*b*), or in which he has only a limited or defeasible interest (*c*). (*a*) *Thomas* v. *Searles*, (1891) 2 Q. B. 408; (*b*) *In re Sarl*, (1892) 2 Q. B. 591; (*c*) *Re Feild*, 63 L. T. 289.

Where one of two partners purports to convey the whole of certain partnership chattels, he is the true owner of an undivided moiety. *In re Tamplin*, 59 L. J. Q. B. 194.

When a Bill of Sale is void in Respect of the Goods assigned.

The Act of 1882 provides—

Bills of Sale Act, 1882, s. 8.

Sect. 8. Every bill of sale shall be duly attested, and shall be registered under the principal Act within seven clear days after the execution thereof, or if it is executed in any place out of England, then within seven clear days after the time at which it would, in the ordinary course of post, arrive in England if posted immediately after the execution thereof; and shall truly set forth the consideration for which it was given; otherwise such bill of sale shall be void in respect of the personal chattels comprised therein.

Covenant to pay.

The avoidance of a bill of sale for non-compliance with the requirements of this section does not avoid the covenant to pay. *Heseltine* v. *Simmons*, (1892) 2 Q. B. 547.

(a) Attestation.

(*a*) The Act of 1882 provides (sect. 10) that the execution of every bill of sale by the grantor shall be attested by one or more credible witness or witnesses, not being a party or parties thereto.

An agent of the grantee is a competent witness. *Peace* v. *Brookes*, (1895) 2 Q. B. 451.

A bill of sale may be validly executed by attorney, and the grantee may be the grantor's attorney to execute a bill of sale which has been submitted to and approved by the grantor. *Furnivall* v. *Hudson*, (1893) 1 Ch. 335.

(b) Registration.

(*b*) The Act of 1878 provides (sect. 10, (2)) that every bill of sale with every (1) schedule or inventory thereto annexed or therein referred to, and also (2) a true copy of such bill and of every such schedule or inventory, and of every attestation of the execution of such bill of sale, together with an (3) affidavit of the time of such bill of sale being made or given, and of its due execution and attestation, and a description of the (4) residence and (5) occupation of the person making

or giving the same . . . and of every attesting witness to such bill of sale, shall be presented to and the said copy and affidavit shall be filed with the registrar within seven clear days after the making or giving of such bill of sale.

Schedule or inventory.

1. "Referred to therein" means referred to in the body of the bill of sale. An inventory referred to in the schedule does not require to be registered. *Davidson* v. *Carlton Bank*, (1893) 1 Q. B. 82.

True copy.

2. A true copy is not necessarily an exact copy. Immaterial errors, which could not mislead a creditor, do not make a copy untrue. *Elliott* v. *Freeman*, 7 L. T. N. S. 715; *Hollingsworth* v. *White*, 10 W. R. 619; *Gardnor* v. *Shaw*, 24 L. T. N. S. 319; 19 W. R. 753; *Lamb* v. *Bruce*, 24 W. R. 645; *In re Hewer*, 21 Ch. D. 871; *Sharp* v. *McHenry*, 38 Ch. D. 427.

Affidavit.

3. Order XXXVIII., *r.* 16, applies to this affidavit. Hence, swearing it before the grantee's solicitor avoids the registration. *Baker* v. *Ambrose*, (1896) 2 Q. B. 372.

Residence.

4. The place of business of the grantor or witness is a residence within this section, although he may sleep elsewhere. *Blackwell* v. *England*, 8 E. & B. 541; *Attenborough* v. *Thompson*, 2 H. & N. 559; *Hewer* v. *Cox*, 3 E. & E. 428.

If a grantor has several places of business, at one of which he resides, only that one need be mentioned, although chattels at all are comprised in the security. *Greenham* v. *Child*, 24 Q. B. D. 29.

As to the limits within which an error in the grantor's address is immaterial, see *Hewer* v. *Cox*, 3 E. & E. 428; *Murray* v. *Mackenzie*, L. R. 10 C. P. 625; *Ex parte McHattie*, 10 Ch. Div. 398.

The residence must be the residence at the time of swearing the affidavit, and not of executing the bill of sale. *Button* v. *O'Neill*, 4 C. P. Div. 354; overruling *London & Westminster Loan Co.* v. *Chace*, 12 C. B. N. S. 730.

It has been held that an imperfect description in the affidavit may be cured by reference to the description in the copy of the bill of sale. *Banbury* v. *White*, 2 H. & C. 300; *Jones* v. *Harris*, L. R. 7 Q. B. 157; *Ex parte Mackenzie*, 42 L. J. Bkcy. 25.

Occupation.

5. Occupation means the business in which a man is usually engaged to the knowledge of his neighbours. *Luckin* v. *Hambyn*, 18 W. R. 43; *Ex parte National Mercantile Bank*, 15 Ch. Div. 42; *In re Fitzpatrick*, 19 L. R. Ir. 206.

Where a man has a substantive and ancillary occupation, only the substantive occupation need be described. *Ex parte National Deposit Bank*, 26 W. R. 624.

Gentleman.

Gentleman is a sufficient description of a person without occupation in any but the humblest rank (*a*), but not of a clerk in a public office (*b*), an attorney's clerk (*c*), or a buyer of silk (*d*). (*a*) *Sutton* v. *Bath*, 3 H. & N. 382; *Smith* v. *Cheese*, 1 C. P. D. 60. (*b*) *Allen* v. *Thompson*, 1 H. & N. 15. (*c*) *Tuton* v. *Sanoner*, 3 H. & N. 280; *Beales* v. *Tennant*, 29 L. J. Q. B. 188; *Brodrick* v. *Scalé*, L. R. 6 C. P. 98. (*d*) *Adams* v. *Graham*, 33 L. J. Q. B. 71.

"Gentleman of no occupation" is a sufficient description of a country gentleman who is also a sleeping partner in several mercantile concerns. *Feast* v. *Robinson*, (1894) W. N. 14.

Accountant.

Accountant is a sufficient description of an accountant's clerk (*a*), but not of a clerk in the accountant's department of a railway (*b*). (*a*) *Briggs* v. *Boss*, L. R. 3 Q. B. 288. (*b*) *Larchin* v. *North-Western Deposit Bank*, L R. 8 Ex. 60; 10 Ex. 64.

"Grocer." "Financial agent."

Grocer is a good description of a grocer who is also a greengrocer (*a*) and contractor and financial agent of a person who has had those occupations, though he has not been employed for some years (*b*). (*a*) *Throssell* v. *Marsh*, 53 L. T. 321; (*b*) *Sharp* v. *McHenry*, 38 Ch. D. 427.

Misdescription as partner.

It is immaterial that the grantor is wrongly described as carrying on business in partnership. *Ex parte Popplewell*, 21 Ch. Div. 73.

"Tutor." "Wine merchant."

"Tutor" is a bad description of a schoolmaster (*a*), and "wine merchant" of the paid manager of a wine merchant's business (*b*). (*a*) *Lee* v. *Turner*, 20 Q. B. D. 773. (*b*) *Cooper* v. *Davis*, 31 W. R. 721; 32 W. R. 328.

"Wife." "Widow."

"Wife" is not an occupation (*a*), but the executrix and residuary legatee of a farmer, who was carrying on the farm with a view to a sale, was rightly described as "widow" only (*b*).

(*a*) *Downs* v. *Salmon*, 20 Q. B. D. 775; (*b*) *Luckin* v. *Hambyn*, 18 W. R. 43.

A grantor is rightly described by his true name, although he is usually known by another. *Ex parte McHattie*, 10 Ch. Div. 398.

As to the description of the grantor by an assumed name, see *Lee* v. *Turner*, 20 Q. B. D. 773; *Downs* v. *Salmon*, 20 Q. B. D. 775; *Central Bank of London* v. *Hawkins*, 62 L. T. 901. Assumed name.

The Act of 1878 provides—

Sect. 10, (3). If the bill of sale is made or given subject to any (1) defeasance or (2) condition, or (3) declaration of trust not contained in the body thereof, such defeasance, condition, or declaration shall be deemed to be part of the bill, and shall be written on the same paper or parchment therewith before the registration, and shall be truly set forth in the copy filed under this Act therewith and as part thereof, otherwise the registration shall be void. Bills of Sale Act, 1878, s. 10, (3).

1, 2. This section applies to conditions, whether in favour of the grantor or of the grantee. *Edwards* v. *Marcus*, (1894) 1 Q. B. 587, overruling dicta in *Ex parte Collins*, 10 Ch. 367. Defeasance or condition.

Rules and regulations sent by the grantee to the grantor after the contract is completed and falsely asserted by him to be part of the bargain are not a condition or defeasance. *Linfoot* v. *Pockett*, (1895) 2 Ch. 835.

A proviso in a promissory note given to secure the debt secured by a bill of sale that, in default of payment of any of the instalments by which, by both instruments, the debt was made payable, the whole amount unpaid should become due (*a*), or a proviso for compound interest in a mortgage of a reversionary interest under a will, given to secure the debt secured by the bill of sale (*b*), is a condition within the section. (*a*) *Simpson* v. *Charing Cross Bank*, 34 W. R. 568; *Counsell* v. *London & Westminster Discount Co.*, 19 Q. B. Div. 512; (*b*) *Sharp* v. *McHenry*, 38 Ch. D. 427, 453; *Edwards* v. *Marcus*, (1894) 1 Q. B. 587.

A parol agreement not to enforce the bill of sale, if the grantor paid the debt by certain instalments, is a condition within the Act. *Ex parte Southam*, 17 Eq. 578.

A memorandum making the principal sum secured by the bill of sale payable as from its execution, although part of that sum was bonus and interest, is not a condition. *Ex parte Collins*, 10 Ch. 367.

A parol agreement not to register the bill of sale (*a*), or giving a collateral security for the same debt (*b*), is not a condition or defeasance. (*a*) *Ex parte Popplewell*, 21 Ch. Div. 73; (*b*) *Carpenter* v. *Deen*, 23 Q. B. Div. 566.

The avoidance of a bill of sale from the non-registration of a promissory note given for the same debt does not affect the promissory note. *Monetary Advance Co.* v. *Cater*, 20 Q. B. D. 785.

Declaration of trust.

3. It is unnecessary to state that the grantee is trustee for the actual lender. *Robinson* v. *Collingwood*, 17 C. B. N. S. 777.

An agreement that the loan should be partly applied by the grantor in paying off an existing debt is not within the sub-section. *Thomas* v. *Searles*, (1891) 2 Q. B. 408.

Re-registry.

Sect. 11 of the Act of 1878 provides that bills of sale shall be re-registered once at least every five years, and that the registration shall become void after a period of five years. Omission to re-register avoids the bill of sale under sect. 8 of the Act of 1882. *Fenton* v. *Blythe*, 25 Q. B. D. 417.

Sect. 11 goes on to provide that the renewal of a registration shall be effected by filing with the registrar an affidavit stating the date of the bill of sale and of the last registration thereof, and the names, residences, and occupations of the parties thereto as stated therein, and that the bill of sale is still a subsisting security.

The registration is void if the residence of the grantee is stated otherwise than as in the bill of sale, although it was there wrongly stated. *Ex parte Webster*, 22 Ch. Div. 136.

Power of Court to rectify register.

Under sect. 14 of the Act of 1878, the Court may cure omissions to register or re-register within the prescribed time, or omissions or misstatements of the name, residence, or occupation of any person, by rectifying the register or extending the time for registration, if satisfied that the omission or misstatement was accidental or due to inadvertence.

This section does not apply to bills of sale which, at the

commencement of the Act of 1878, were void for want of renewal of registration. *Askew* v. *Lewis*, 10 Q. B. D. 477; *In re Emery*, 21 Q. B. Div. 405.

This section only allows the rectification of particulars required under sect. 12 to be put on the register. Hence the Court cannot cure an omission in the affidavit to be filed under sect. 10, (2). *Crew* v. *Cummings*, 20 Q. B. D. 535; 21 Q. B. Div. 420.

The Court will not rectify a blunder after some third person, *e.g.* an execution creditor or trustee in bankruptcy, has acquired a vested interest in the chattels subject to the bill of sale. *Crew* v. *Cummings*, 21 Q. B. Div. 420; *In re Parsons*, (1893) 2 Q. B. 122, overruling *In re Dobbin's Settlement*, 56 L. J. Q. B. 295.

Transfer of bill of sale.

The Act of 1878 provides (sect. 10) that a transfer or assignment of a registered bill of sale need not be registered.

An equitable sub-mortgage by deposit of a bill of sale, accompanied by a memorandum, does not require registration. *Ex parte Turquand*, 14 Q. B. D. 636.

Where a bill of sale, the amount of which has been partly paid off, is transferred, and the transferee makes a further advance, the transfer, though unregistered, is good—at least up to the amount due on the original security at the date of the transfer. *Horne* v. *Hughes*, 6 Q. B. D. 676.

(*c*) Statement of consideration.

(*c*) Where the consideration is stated to be a present advance from the grantor to the grantee, it is truly stated if part is paid to creditors of the grantor by his direction (*a*), or if part (*b*), or even the whole (*c*), is retained to satisfy an existing debt due to the grantee. (*a*) *Hamlyn* v. *Batteley*, 5 C. P. D. 327. (*b*) *Ex parte National Mercantile Bank*, 15 Ch. Div. 42. (*c*) *Credit Co.* v. *Pott*, 6 Q. B. Div. 295; *Ex parte Bolland*, 21 Ch. Div. 543; *Ex parte Johnson*, 26 Ch. Div. 338; *Ex parte Allam*, 14 Q. B. D. 43; *Re Hockaday*, 55 L. T. 819.

It is truly stated, though there may be a collateral agreement as to the application of the money by the grantor. *Thomas* v. *Searles*, (1891) 2 Q. B. 408.

It is not truly stated if anything is retained to meet debts accruing but not actually due (*a*), or in discharge of the costs

of preparing the bill of sale (*b*), or by way of bonus or commission (*c*). (*a*) *Ex parte Rolph*, 19 Ch. Div. 98; *Richardson* v. *Harris*, 22 Q. B. Div. 263; see *Mayer & Fulda* v. *Mindlevich*, 59 L. T. 400. (*b*) *Ex parte Firth*, 19 Ch. Div. 419; *Cohen* v. *Higgins*, 8 T. L. R. 8; not following *Ex parte Challinor*, 16 Ch. Div. 260. (*c*) *Hamilton* v. *Chaine*, 7 Q. B. Div. 1, 319; *Ex parte Charing Cross Bank*, 16 Ch. Div. 35.

The consideration is truly stated if it is clear from the whole deed what it was, though the bill of sale is expressed to be in consideration of a covenant which is not explicitly given. *Roberts* v. *Roberts*, 13 Q. B. Div. 794.

Where a bill of sale was expressed to be given in consideration of the grantee having become guarantee and signed a promissory note for the payment of 45*l.* of which 32*l.* or thereabouts remained owing, it was held that the addition of the words "or thereabouts" did not necessarily make the statement untrue. *Hughes* v. *Little*, 17 Q. B. D. 204; 18 Q. B. Div. 32.

Where it was recited in a bill of sale that the grantee had lent 340*l.* (part of the consideration) to the grantor in June, 1878, whereas in fact part of that sum had been previously lent to a partnership, of which the grantor was a member, and the retiring partners of which he had, in June 1878, agreed to indemnify, it was held that the consideration was not truly stated. *Ex parte Carter*, 12 Ch. D. 908.

Where the consideration was stated to be "600*l.* now paid by A.," it was held to be truly stated, although the amount was in fact contributed by six persons, including A., and paid to the debtor, partly through A. and partly directly. *In re Smith*, 43 W. R. 206.

Sect. 9 of the Act of 1878 provides—

Duplicate bills of sale.

Where a subsequent bill of sale is executed within or on the expiration of seven days after the execution of a prior unregistered bill of sale, and comprises all or any part of the personal chattels comprised in such prior bill of sale, then, if such subsequent bill of sale is given as a security for the same debt as is secured by the prior bill of sale, or for any part of such debt, it shall, to the extent to which it is a security

for the same debt or part thereof, and so far as respects the personal chattels or part thereof comprised in the prior bill, be absolutely void, unless it is proved to the satisfaction of the Court having cognizance of the case that the subsequent bill of sale was *bonâ fide* given for the purpose of correcting some material error in the prior bill of sale, and not for the purpose of evading this Act. See *Ex parte Hauxwell*, 23 Ch. Div. 626.

When a Bill of Sale is altogether void.

The Act of 1882 provides—

Bill of sale for less than 30*l.*

Sect. 12. Every bill of sale made or given in consideration of any sum under thirty pounds shall be void. See *Davis* v. *Usher*, 12 Q. B. D. 490.

Bill of sale not in accordance with the form.

Sect. 9. A bill of sale made or given by way of security for the payment of money by the grantor thereof shall be void unless made in accordance with the form in the schedule to this Act annexed.

This section avoids the covenant to pay as well as the assignment of personal chattels. *Davies* v. *Rees*, 17 Q. B. Div. 408.

Power of distress.

A power of distress within sect. 6 of the Act of 1878, though it is to be treated as a bill of sale for the purpose of registration, is not within sect. 9. It need not, therefore, be in the scheduled form. *Green* v. *Marsh*, (1892) 2 Q. B. 330.

This section is not confined to bills of sale to secure money lent by the grantee to the grantor, but applies to all bills of sale to secure payments to be made by the grantor to the grantee. *Hughes* v. *Little*, 18 Q. B. Div. 32.

This section applies though the transaction is such that the bill of sale cannot be brought within the form. *Ex parte Parsons*, 17 Q. B. Div. 532.

Assignment of land or hiring agreement not avoided.

Where a deed assigns, in conjunction with personal chattels, something which might have been assigned by a different instrument, *e.g.* land (*a*), or chattels real (*b*), or the benefit of an agreement for the hire and purchase of the chattels (*c*), sect. 9 only avoids the deed in respect of the personal

chattels. (*a*) *Re London & Lancashire Paper Mills Co.*, 58 L. T. 798; *In re Bansha Woollen Mills Co.*, 21 L. R. Ir. 181. (*b*) *In re Burdett*, 20 Q. B. Div. 310; *In re O'Dwyer*, 19 L. R. Ir. 19; *Stevens* v. *Marston*, 60 L. J. Q. B. 192. (*c*) *In re Isaacson*, (1895) 1 Q. B. 333.

"In accordance with the form."

As to the meaning of "in accordance with the form," see *Ex parte Stanford*, 17 Q. B. Div. 259, 270; *Thomas* v. *Kelly*, 13 App. Cas. 506, 519.

A bill of sale is not in accordance with the form unless all particulars are filled up which the form requires to be filled up, *e.g.* the address and description of the attesting witness. *Parsons* v. *Brand*, 25 Q. B. Div. 110.

A bill of sale is not bad merely because the judges differ as to its meaning. *Haslewood* v. *Consolidated Credit Co.*, 25 Q. B. Div. 555; *Weardale Coal Co.* v. *Hodson* (1894) 1 Q. B. 598.

A bill of sale is void which is made between the grantor and several other parties for securing to each of them separately different debts, of different amounts, payable at different times, and under different conditions. *Melville* v. *Stringer*, 13 Q. B. Div. 392.

An agreement to perform the covenants contained in a deed which is merely recited avoids the bill of sale. *Lee* v. *Barnes*, 17 Q. B. D. 77.

Form of bill of sale.

The Form of Bill of Sale given in the Schedule is as follows:—

This Indenture made the day of , between A.B. (1) of of the one part, and (2) C.D. of of the other part, witnesseth that in (3) consideration of the sum of £ now paid to A.B. by C.D., the receipt of which the said A.B. hereby acknowledges [*or whatever else the consideration may be*], he the said A.B. doth hereby assign (4) unto C.D., his executors, administrators, and assigns, (5) all and singular the several chattels and things specifically described in the schedule hereto annexed by way of security for the payment of the sum of £ , and (6) interest thereon at the rate of per cent. per annum [*or whatever else may be the rate*]. And the said A.B. doth further agree and

declare that he will duly pay to the said C.D. (7) the principal sum aforesaid, together with the interest then due, by equal payments of £ on the day of [*or whatever else may be the stipulated times or time of payment*]. And the said A.B. doth also agree with the said C.D. that he will [*here insert* (8) *terms as to insurance, payment of rent, or otherwise, which the parties may agree to for the maintenance or defeasance of the security.*

(9) Provided always, that the chattels hereby assigned shall not be liable to seizure or to be taken possession of by the said C.D. for any cause other than those specified in section seven of the Bills of Sale Act (1878) Amendment Act, 1882.

In Witness, &c.

Signed and sealed by the said A.B. in the presence of me E.F. [*add* (10) *witness' name, address, and description*].

Address.

1. It is sufficient here to put an address, letters sent to which will reach the grantor. *Dolcini* v. *Dolcini*, (1895) 1 Q. B. 898.

Grantee's name.

2. If the name or description of the grantee, though ambiguous, be such as would be held sufficient without the aid of extrinsic evidence in a mercantile document, the bill of sale is good. *Simmons* v. *Woodward*, (1892) A. C. 100; *Monson* v. *Milner*, 8 T. L. R. 447.

Untrue consideration.

3. An untrue statement of the consideration is not a deviation from the form. *Heseltine* v. *Simmons*, (1892) 2 Q. B. 547.

Assignment "as beneficial owner."

4. An assignment by the grantor "as beneficial owner" is not in accordance with the form. *Ex parte Stanford*, 17 Q. B. Div. 259.

Description of chattels.

5. The description in the body of the bill of sale of the personal chattels comprised therein (*a*), or the insertion in the schedule of chattels real as well as chattels personal (*b*), is not in accordance with the form. (*a*) *Thomas* v. *Kelly*, 13 App. Cas. 506. (*b*) *Cochrane* v. *Entwistle*, 25 Q. B. Div. 116.

Rate of interest.

6. It must be possible to ascertain from the bill of sale what the rate of interest is. *Myers* v. *Elliott*, 16 Q. B. Div. 526.

A proviso making interest payable at the rate of one shilling in the pound per month is valid. *Lumley* v. *Simmons*, 34 Ch. Div. 698.

But a proviso making interest payable "at the rate of 17*l.* 10*s.* for three years" is bad. *Blankenstein* v. *Robertson*, 24 Q. B. D. 543, not following *Thorpe* v. *Cregeen*, 55 L. J. Q. B. 80; *Wilson* v. *Kirkwood*, 48 L. T. 821.

Repayment of principal.

7. The entire principal, together with interest at the agreed rate, may be made payable in a single payment at any fixed time after the execution of the bill of sale. *Watkins* v. *Evans*, 18 Q. B. Div. 386.

Time of payment uncertain.

The bill of sale is bad if the time of payment is uncertain, *e.g.* if the loan is made payable on demand (*a*), or at an interval after demand (*b*), or if the liability to pay depends on an event which may or may not happen, as in a bill of sale given by way of indemnity against liability on a guarantee (*c*). (*a*) *Hetherington* v. *Groome*, 13 Q. B. Div. 789; (*b*) *Sibley* v. *Higgs*, 15 Q. B. D. 619; (*c*) *Hughes* v. *Little*, 18 Q. B. Div. 32.

But the bill of sale is good where the time of payment is fixed, but the grantee is given more favourable terms if he observes the covenants. *Re Coton*, 56 L. T. 571.

Repayment by instalments.

Where the loan is made payable by instalments, the instalments may consist of principal only, interest being payable on so much of the principal as is unpaid from time to time (*a*), or of interest only, the whole principal being payable with the last instalment (*b*), or partly of principal and partly of interest (*c*). (*a*) *Goldstrom* v. *Tallerman*, 18 Q. B. Div. 1. (*b*) *Edwards* v. *Marston*, (1891) 1 Q. B. 225. (*c*) *In re Bargen*, (1894) 1 Q. B. 444; *Linfoot* v. *Pockett*, (1895) 2 Ch. 835.

The instalments need not be equal (*a*), and, where the bill of sale provides for equal instalments, it is not avoided by the fact that the last instalment will be less than the others (*b*). (*a*) *In re Cleaver*, 18 Q. B. Div. 489. (*b*) *Simmons* v. *Woodward*, (1892) A. C. 100; *Linfoot* v. *Pockett*, (1895) 2 Ch. 835.

Where the instalments consist of principal, a covenant to pay interest on the principal sum will be construed to mean on so much of it as is unpaid. *Weardale Coal Co.* v. *Hodson*, (1894) 1 Q. B. 598.

Interest on instalments.

Where the instalments consist of principal only, a proviso giving interest on unpaid instalments until actual payment is good (*a*); but where they consist partly of interest, such a

proviso is probably bad, as giving compound interest (*b*). (*a*) *Goldstrom* v. *Tallerman*, 18 Q. B. Div. 1; *In re Cleaver*, 18 Q. B. Div. 489; *Haslewood* v. *Consolidated Credit Co.*, 25 Q. B. Div. 555. (*b*) *In re Bargen*, (1894) 1 Q. B. 444.

Penalties on default.

A proviso that, upon non-payment of any instalment, the entire principal then due shall become immediately payable is good (*a*), but a proviso that the entire interest to become due during the continuance of the security shall become immediately payable is bad (*b*). (*a*) *Lumley* v. *Simmons*, 34 Ch. Div. 698. (*b*) *Davis* v. *Burton*, 11 Q. B. Div. 537; *Myers* v. *Elliott*, 16 Q. B. Div. 526; *Roe* v. *Mutual Loan Association*, 56 L. T. 631.

Terms for maintenance or defeasance of security.

8. It follows that the insertion of terms which are not "for the maintenance or defeasance" of the security avoids a bill of sale.

A term may be "for the maintenance of the security" without being "necessary for maintaining the security." *Topley* v. *Corsbie*, 20 Q. B. D. 350.

The following terms have been held to be for the maintenance of the security:—

Covenant to replace damaged articles,

A covenant to replace any articles damaged or worn out with any others of equal value to be included in the security, and similar covenants. *Consolidated Credit Co.* v. *Gosney*, 16 Q. B. D. 24; *Furber* v. *Cobb*, 18 Q. B. Div. 494; *Seed* v. *Bradley*, (1894) 1 Q. B. 319.

to produce receipts,

A covenant by the grantor to produce his receipts for rent, rates, and taxes upon a verbal demand. *Topley* v. *Corsbie*, 20 Q. B. D. 350; *Cartwright* v. *Regan*, (1895) 1 Q. B. 900.

for further assurance.

A covenant for further assurance at the grantor's cost. *In re Cleaver*, 18 Q. B. Div. 489.

Power to grantee to insure,

Provisoes enabling the grantee to insure or to pay rents, rates, taxes, and outgoings, if the grantor made default, and to charge the premiums or other sums on the chattels assigned, and making the amount so charged repayable on demand. *Ex parte Stanford*, 17 Q. B. Div. 259; *Goldstrom* v. *Tallerman*, 18 Q. B. Div. 1; *Topley* v. *Corsbie*, 20 Q. B. D. 350; *Briggs* v. *Pike*, 61 L. J. Q. B. 418; see *Real & Personal Advance Co.* v. *Clears*, 20 Q. B. Div. 304.

to break open doors,

A power, if the grantee became entitled to seize, to break open doors and windows. *Lumley* v. *Simmons*, 34 Ch. Div. 698.

to sell goods,

A power to sell the goods by private treaty or public auction on or off the premises. *Bourne* v. *Wall*, 64 L. T. 530.

to retain proper costs.

A power to retain out of the proceeds of sale costs properly incurred by the grantee in defending and maintaining his rights under the bill of sale. *Lumley* v. *Simmons*, 34 Ch. Div. 698.

The following terms have been held not to be for the maintenance or defeasance of the security:—

Covenant to pay interest on mortgages,

A covenant by the grantor to pay all interest on mortgages (if any) of the premises in which the goods assigned were, or to which they might be removed. *Watson* v. *Strickland*, 19 Q. B. Div. 391.

not to borrow without grantee's consent.

An agreement by the grantor, during the existence of the security, not to obtain credit to the extent of 10*l.* without the grantee's consent. *Peace* v. *Brookes*, (1895) 2 Q. B. 451.

Power to affix bills on premises,

A power to the grantee, at any time during the subsistence of the security, to affix bills having reference to the goods secured on any premises in the grantor's occupation. *Bardell* v. *Daykin*, 3 T. L. R. 526.

to purchase goods at valuation,

A power to the grantee to purchase the goods at a valuation and receive the moneys to arise from such purchase. *Lyon* v. *Morris*, 19 Q. B. D. 139.

to retain expenses,

A power to the grantee to retain out of the sale moneys "the expenses attending such sale or otherwise incurred in relation to this security." *Calvert* v. *Thomas*, 19 Q. B. Div. 204.

to retain professional charges,

A power to the grantees, who were auctioneers, to pay themselves the costs of the sale, including their full charges and commission as auctioneers. *Furber* v. *Cobb*, 18 Q. B. Div. 494.

to keep bill of sale after payment.

A stipulation that the bill of sale should remain the property of the grantee after payment. *Watson* v. *Strickland*, 19 Q. B. Div. 391.

Proviso exonerating purchaser.

A proviso that upon a sale the purchaser should not be bound to see or inquire whether default had been made by

the grantor authorizing the grantee to sell. *Blaiberg* v. *Parsons*, 17 Q. B. D. 336; *Blaiberg* v. *Beckett*, 18 Q. B. Div. 96.

Power to seize.

9. It follows that a bill of sale is not in accordance with the form and is void unless the power to seize is confined to the cases specifically mentioned in sect. 7.

Sect. 7 provides:—

Bills of Sale Act, 1882, s. 7.

Personal chattels assigned under a bill of sale shall not be liable to be seized or taken possession of by the grantee for any other than the following causes:—

(1) If the grantor shall make default in payment of the sum or sums of money thereby secured at the time therein provided for payment, or in the performance of any covenant or agreement contained in the bill of sale and necessary for maintaining the security;

(2) If the grantor shall become a bankrupt, or suffer the said goods or any of them to be distrained for rent, rates, or taxes;

(3) If the grantor shall fraudulently either remove or suffer the said goods, or any of them, to be removed from the premises;

(4) If the grantor shall not, without reasonable excuse, upon demand in writing by the grantee, produce to him his last receipts for rent, rates, and taxes.

(5) If execution shall have been levied against the goods of the grantor under any judgment at law.

"Sum or sums secured."

(1) "The sum or sums secured" are confined to the principal moneys and interest. Hence, a proviso charging sums paid by the grantee in respect of rent, rates, taxes, and outgoings, with interest, on the goods assigned, and making them recoverable in the same manner as the principal moneys and interest thereby secured, is not protected by this sub-section. Neither is it necessary for the maintenance of the security. Its insertion therefore avoids the bill of sale. *Bianchi* v. *Offord*, 17 Q. B. D. 484; *Real & Personal Advance Co.* v. *Clears*, 20 Q. B. Div. 304; see *Briggs* v. *Pike*, 61 L. J. Q. B. 418.

A bill of sale is void which contains a power to seize and

sell the goods on non-payment of any one instalment, and to retain the whole sum secured out of the proceeds of sale. *Davis* v. *Burton*, 11 Q. B. Div. 537; *Myers* v. *Elliott*, 16 Q. B. Div. 526.

"Necessary for maintaining the security."

A covenant "for the maintenance of the security" may not be "necessary for maintaining the security."

The insertion of a power to seize on breach of a covenant "for the maintenance of the security" avoids the bill of sale, unless the covenant is also "necessary for maintaining the security." *Real & Personal Advance Co.* v. *Clears*, 20 Q. B. Div. 304; *Topley* v. *Corsbie*, 20 Q. B. D. 350.

Covenants, whenever any of the goods are destroyed, injured, or deteriorated, forthwith to replace, repair, and make good the same (*a*), and to insure the goods, and forthwith after payment produce the receipt to the grantee (*b*), are necessary for maintaining the security. (*a*) *Furber* v. *Cobb*, 18 Q. B. Div. 494; (*b*) *Hammond* v. *Hocking*, 12 Q. B. D. 291.

Power to seize on insolvency.

(2) A power to seize if the grantor shall take the benefit of any bankruptcy act (*a*), or compound with his creditors (*b*), avoids the bill of sale. (*a*) *Gilroy* v. *Bowey*, 59 L. T. 223; (*b*) *Barr* v. *Kingsford*, 56 L. T. 861.

Power to seize if grantor removes goods.

(3) A power to seize, if the grantor shall remove the goods, without adding the word "fraudulently," is perhaps valid. *Furber* v. *Cobb*, 18 Q. B. Div. 494, 505.

Power to seize for non-production of receipt.

(4) A power to seize on breach of a covenant by the grantor to produce his last receipt on a verbal demand avoids the bill of sale. *Davis* v. *Burton*, 11 Q. B. Div. 537; *Barr* v. *Kingsford*, 56 L. T. 861.

As to the omission in the covenant for production of the words "without reasonable excuse," see *Weardale Coal Co.* v. *Hodson*, (1894) 1 Q. B. 598.

Where a bill of sale contains a power to seize inconsistent with sect. 7, the insertion of this proviso does not remedy the defect. *Davis* v. *Burton*, 11 Q. B. Div. 537; *In re Williams*, 25 Ch. D. 656; *Bianchi* v. *Offord*, 17 Q. B. D. 484; *Furber* v. *Cobb*, 18 Q. B. Div. 494; *Real & Personal Advance Co.* v. *Clears*, 20 Q. B. Div. 304.

Address and

10. A bill of sale cannot be supplemented by reference to

description of witness.

the affidavit filed on the registration, but the address and description of the attesting witness must appear in the attestation clause. *Blankenstein* v. *Robertson*, 24 Q. B. D. 543; *Parsons* v. *Brand*, 25 Q. B. Div. 110.

But where the same witness is attesting several signatures, he need only set out his address and description once, if the handwriting shows that the person attesting is the same person. *Bird* v. *Davey*, (1891) 1 Q. B. 29.

The address is sufficiently given if the place is given where the witness is generally to be found during business hours. *Simmons* v. *Woodward*, (1892) A. C. 100.

Where the witness has no occupation, the bill of sale is void, unless he is described by his addition or style. *Sims* v. *Trollope*, (1897) 1 Q. B. 24.

CHAPTER IV.

PAWNS AND PLEDGES.

Pawn or pledge, what.

A CONTRACT of pawn or pledge is a contract by which money is advanced on the security of goods or chattels which are delivered into the possession of the lender. *Coggs* v. *Bernard*, 1 Smi. L. C. 201, 207; *Halliday* v. *Holgate*, L. R. 3 Ex. 299, 302; *Burdick* v. *Sewell*, 10 Q. B. D. 362, 366; *In re Morritt*, 18 Q. B. Div. 222, 232, 234; *Mills* v. *Charlesworth*, 25 Q. B. Div. 421, 424.

Special property passes to pledgee.

A contract of pledge passes to the pledgee a special property in the goods pledged, leaving the general property in the pledgor. *Ratcliff* v. *Davis*, Yelv. 178; Cases, *supra*.

Contract to pledge.

A mere contract to pledge, although the goods to be pledged are ascertained and the money is advanced upon the faith of the contract, only gives the intended pledgee a right of action and no interest in the thing itself. *Howes* v. *Ball*, 7 B. & C. 481.

Such a contract must be distinguished from an immediate mortgage. See *Flory* v. *Denny*, 7 Ex. 581.

Change of possession.

In law, possession of goods may be changed by agreement without any physical change in their position or in the position of the person who actually guards them. The right to possession may be transferred by agreement, and the character in which the custodian holds them may be changed by attornment. *Reeves* v. *Capper*, 5 Bing. N. C. 136; *Meyerstein* v. *Barber*, L. R. 2 C. P. 38, 661; 4 H. L. 317; *Young* v. *Lambert*, L. R. 3 P. C. 142; *Hilton* v. *Tucker*, 39 Ch. D. 669; *Mills* v. *Charlesworth*, 25 Q. B. Div. 421; (1892) A. C. 231.

Pledgor agent of pledgee.

The possession may be changed while the pledgor retains the goods or some of them in his own custody, if he retains

them as agent for the pledgee. *Reeves* v. *Capper*, 5 Bing. N. C. 136; *Martin* v. *Reid*, 11 C. B. N. S. 730.

Delivery of symbol.

Possession of goods may be changed by the delivery of a symbol of the goods, *e.g.* the key of the warehouse in which they are stored. *Ryall* v. *Rolle*, 1 Atk. 165, 176; *Gough* v. *Everard*, 2 H. & C. 1; *Meyerstein* v. *Barber*, L. R. 2 C. P. 38; *Ancona* v. *Rogers*, 1 Ex. Div. 285, 290; *Burdick* v. *Sewell*, 13 Q. B. Div. 159, 174; *Hilton* v. *Tucker*, 39 Ch. D. 669.

Deposit of bill of lading.

The deposit of a bill of lading of goods by way of security for a loan is equivalent to a pledge of the goods, both while the goods are at sea, and until delivery of possession of the goods has been made to some person claiming under the bill of lading. *Barber* v. *Meyerstein*, L. R. 2 C. P. 38, 661; 4 H. L. 317, 329; *Sewell* v. *Burdick*, 10 App. Cas. 74; see *Glyn, Mills & Co.* v. *East and West India Dock Co.*, 7 App. Cas. 591.

Possession when attached to title.

Where the possession of goods is doubtful, it is attached by law to the title. *Ramsay* v. *Margrett*, (1894) 2 Q. B. 18.

Effect of Bills of Sale Act.

The Bills of Sale Act does not apply to transactions of pledge. See p. 34.

An agreement in writing between A. and B. that A. shall be covered and secured for advances made to B. by the stock of goods of B. which shall be in his hands is not within the Bills of Sale Act, and gives A. a valid security on the goods in his possession. *Morris* v. *Delobbel-Flipo*, (1892) 2 Ch. 352.

Deposit of title-deeds of land.

On an equitable mortgage of land by deposit of title-deeds, there is no separate pledge of the deeds, but the deeds are held by the equitable mortgagee merely as incident to the charge on the land. *In re Richardson*, 30 Ch. Div. 396.

Deposit of share certificates.

A deposit of certificates of shares or other documents of title to personal property to secure a loan may be treated either as a pledge of the documents, or as evidence of an intention to give a charge on the property which they represent. *Carter* v. *Wake*, 4 Ch. D. 605; *France* v. *Clark*, 22 Ch. D. 830; 26 Ch. Div. 257.

Pawnbrokers Act, 1872.

The Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93) applies (sect. 10) to every loan by a pawnbroker (1) of 40*s.* or under; (2) of above 40*s.* and not above 10*l.*, except where a special contract (as to which see sect. 24) is made between the pawner

and the pawnbroker at the time of the pawning. The Act does not apply to a loan by a pawnbroker of above 10*l.*

The Act prescribes (sect. 15) the profit and charges which a pawnbroker is entitled to take.

Pledgee must take reasonable care of pledge.

A pledgee is bound to take such reasonable care of the chattel pledged as a prudent owner would take. He is entitled to use it, and is not liable for its loss without his default. *Mores* v. *Conham*, Owen, 123; *Coggs* v. *Bernard*, 1 Smi. L. C. 201, 213; *Anon.*, 2 Salk. 522; *Syred* v. *Carruthers*, E. B. & E. 469.

The Pawnbrokers Act, 1872, regulates the liability of pawnbrokers (sect. 27) where a pledge is destroyed or damaged by or in consequence of fire, and (sect. 28) where it has depreciated through the default, neglect, or wilful misbehaviour of the pawnbroker.

Rights of pledgee against true owner.

A pledgee acquires, as a general rule, no better title to the property pledged than his pledgor could lawfully give him. *Hoare* v. *Parker*, 2 T. R. 376; *Wilson* v. *Anderton*, 1 B. & Ad. 450; *Cundy* v. *Lindsay*, 3 App. Cas. 459, 463; *London Joint Stock Bank* v. *Simmons*, (1892) A. C. 201, 215.

This rule is subject to the following exceptions:—

Pledgee may acquire good title by estoppel.

1. A pledgee may acquire a good title against the true owner by estoppel, *i.e.* if the true owner has so acted as to mislead him into the belief that his pledgor had authority to pledge. *Williams* v. *Barton*, 3 Bing. 139; *Dyer* v. *Pearson*, 3 B. & C. 38; *Colonial Bank* v. *Cady*, 15 App. Cas. 267, 283; *London Joint Stock Bank* v. *Simmons*, (1892) A. C. 201, 215; *Henderson & Co.* v. *Williams*, (1895) 1 Q. B. 521. As to pledges by factors, see p. 145.

Pledgee from person to whom property passed by fraud.

2. A pledgee of goods from a person to whom the property in the goods has passed under a contract induced by fraud, and therefore voidable by the true owner, acquires a good title as against the true owner. *White* v. *Garden*, 10 C. B. 919; *Cundy* v. *Lindsay*, 3 App. Cas. 459; *Babcock* v. *Lawson*, 4 Q. B. D. 394; 5 Q. B. Div. 284.

True owner, when entitled to recover goods.

Where the true owner prosecutes to conviction the person whose fraud has induced the contract, the property in the goods revests in the true owner upon conviction by virtue of

24 & 25 Vict. c. 96, sect. 100, and he is entitled to recover the goods from a *bonâ fide* purchaser who was in possession at the time of the conviction, but he is not entitled to damages for any dealing with them before the conviction. *Horwood* v. *Smith*, 2 T. R. 750; *Lindsay* v. *Cundy*, 1 Q. B. D. 348; *Bentley* v. *Vilmont*, 18 Q. B. Div. 322; 12 App. Cas. 471; see *Payne* v. *Wilson*, (1895) 1 Q. B. 653.

Pledgee of negotiable instruments.

3. A pledgee of negotiable instruments acquires a good title against the true owner if he takes *bonâ fide*, and without notice of any infirmity in the pledgor's title. *Foster* v. *Pearson*, 1 C. M. & R. 855; *Bank of Bengal* v. *Fagan*, 7 Moo. P. C. 61, 72; *Raphael* v. *Bank of England*, 17 C. B. 161, 175; *Colonial Bank* v. *Cady*, 15 App. Cas. 267, 283; *London Joint Stock Bank* v. *Simmons*, (1892) A. C. 201; *Bentinck* v. *London Joint Stock Bank*, (1893) 2 Ch. 120; *Hone* v. *Boyle*, 27 L. R. Ir. 137; *Melville* v. *Munster Bank*, 27 L. R. Ir. 379; *Collis* v. *Hibernian Bank*, 31 L. R. Ir. 361.

The doctrine of market overt does not extend to a pledge. *Hargreave* v. *Spink*, (1892) 1 Q. B. 25, 30; see, however, *Demainbray* v. *Metcalfe*, 2 Vern. 698.

Action by true owner against pledgee.

Where a chattel is unlawfully pledged, the cause of action against the pledgee does not accrue to the true owner until demand of the chattel by him, and refusal by the pledgee to return it. *Spackman* v. *Foster*, 11 Q. B. D. 99; *Miller* v. *Dell*, (1891) 1 Q. B. 468.

Sect. 25 of the Pawnbrokers Act does not afford a defence to an action by the true owner for the recovery of property improperly pawned. *Wilson* v. *Anderton*, 1 B. & Ad. 450; *Singer Manufacturing Co.* v. *Clark*, 5 Ex. D. 37.

A contract of pledge contains an implied undertaking on the part of the pledgor that the property pledged is his own, or that he has the authority of the owner to pledge it. Hence he is liable in damages to a pledgee, who is deprived of the pledge by the true owner. *Singer Manufacturing Co.* v. *Clark*, 5 Ex. D. 37.

CHAPTER V.

COMMON LAW LIENS—PARTICULAR LIENS.

A LIEN at common law is a personal right to hold the goods of another party until a debt is paid. *Legg* v. *Evans*, 6 M. & W. 36.

No power of sale.

Such a lien does not at common law entitle the person holding it to sell the goods, although he may be put to expense in preserving them. *Clark* v. *Gilbert*, 2 Bing. N. C. 343; *Legg* v. *Evans*, 6 M. & W. 36; *Thames Ironworks Co.* v. *Patent Derrick Co.*, 1 J. & H. 93; *Mulliner* v. *Florence*, 3 Q. B. Div. 484.

The innkeeper has been given such a right by statute, as to which, see p. 65.

Origin of common law lien.

A particular lien arises at common law in two cases: (1) in favour of a person who is under an obligation to receive goods; (2) in favour of a person who has expended labour and skill in improving goods.

Wherever the law imposes an obligation to receive goods, it gives a lien for the expenses incurred in respect of them. *Naylor* v. *Mangles*, 1 Esp. 109.

Innkeeper's lien.

An innkeeper has a lien on the goods of his guest for the expense of keeping them, as well as for the cost of the guest's food and entertainment. *Robins & Co.* v. *Gray*, (1895) 2 Q. B. 78, 501.

Innkeeper, what.

As to what constitutes an innkeeper, see *Thompson* v. *Lacy*, 3 B. & A. 283; *Cunningham* v. *Philp*, 12 T. L. R. 352.

What charges it covers.

The innkeeper has a lien on each part of the guest's luggage for the whole bill incurred by the guest; *e.g.* he has a lien on the guest's horse or carriage, not merely for the keep of the horse or standing of the carriage, but for the

guest's board and lodging. *Mulliner* v. *Florence*, 3 Q. B. Div. 484.

Over what goods it extends.

The lien is not limited to goods which the innkeeper is obliged to accept. It extends to all goods which the innkeeper takes in as luggage of the guest, whether he was obliged to accept them or not, and whether he took them in when the guest arrived or in the course of his stay. *Threfall* v. *Borwick*, L. R. 7 Q. B. 711; 10 Q. B. 210; *Robins & Co.* v. *Gray*, (1895) 2 Q. B. 78, 501.

But the lien is confined to goods received by the innkeeper in his character as innkeeper. Thus, there is no lien where the owner of a carriage and horses, which have been taken at livery in an inn, subsequently comes as a guest to the inn (*a*); or where goods are furnished to a guest at an inn for a temporary purpose, *e.g.* a piano sent him on hire (*b*). (*a*) *Binns* v. *Pigot*, 9 C. & P. 208; *Smith* v. *Dearlove*, 6 C. B. 132. (*b*) *Broadwood* v. *Granara*, 10 Ex. 417.

Duty to take care of goods detained.

An innkeeper detaining goods in order to enforce his lien is not bound to be more careful in keeping them than he is as to his own. *Angus* v. *McLachlan*, 23 Ch. D. 330.

This case is doubted in 1 Smi. L. C., p. 141. The cases, however, with which it is there said to be inconsistent were cases as to the innkeeper's liability while the relation of guest and innkeeper subsists (as to which, see *Medawar* v. *Grand Hotel Co.*, (1891) 2 Q. B. 11), and are not necessarily authorities as to his liability after that relation has determined.

Power of innkeepor to sell goods.

The Innkeepers Act, 1878 (41 & 42 Vict. c. 38), sect. 1, enables the landlord, proprietor, keeper, or manager of any hotel, inn, or licensed public-house, subject to the restrictions of the Act, to sell by public auction any goods, chattels, carriages, horses, wares or merchandise, deposited with him or left in the house he keeps, or in the coach-house, stable, stable-yard, or other premises appurtenant or belonging thereunto, where the person depositing or leaving them is indebted to the innkeeper, either for board or lodging, or for the keep and expenses of any horse or other animals left with or standing at livery in the stables or fields occupied by the innkeeper.

Carrier's lien.

A common carrier has a lien for the carriage price of the

particular goods in respect of which the lien is claimed, but none for his general balance. *Skinner* v. *Upshaw*, 2 Ld. Raym. 752; *Rushforth* v. *Hadfield*, 7 East, 224; *Hirst* v. *Page & Co.*, 7 T. L. R. 537.

Where separate parcels of goods are carried under one contract, the carrier has a lien on each parcel for the carriage of the whole. *Sodergren* v. *Flight*, cit. 6 East, 622; see *Mulliner* v. *Florence*, 3 Q. B. Div. 484.

Railway company's lien for cloak-room charges.

A railway company has a lien for cloak-room charges. *Singer Manufacturing Co.* v. *L. & S. W. Ry. Co.*, (1894) 1 Q. B. 833.

Statutory lien of railway companies.

The Railway Clauses Consolidation Act, 1845, (8 & 9 Vict. c. 20) provides—

Sect. 97. If, on (1) demand, any person fails to pay the (2) tolls due in respect of any carriage or goods, it shall be lawful for the company to (3) detain and sell such carriage, or all or any part of such goods, or, if the same shall have been removed from the premises of the company, to (4) detain and sell any other carriages or goods within such premises belonging to the party liable to pay such tolls, and out of the moneys arising from such sale to retain the tolls payable as aforesaid, and all charges and expenses of such detention and sale, rendering the overplus, if any, of the moneys arising by such sale, and such of the carriages or goods as shall remain unsold, to the person entitled thereto, or it shall be lawful for the company to recover any such tolls by action at law.

1. A demand of a sum in gross, which includes the sum due in respect of tolls, is not a demand within this section. *Field* v. *Newport Ry. Co.*, 3 H. & N. 409.

2. It has been held that "tolls" here only include tolls for the use of the railway by persons carrying goods in their own carriages. *Wallis* v. *L. & S. W. Ry. Co.*, L. R. 5 Ex. 62; disapproved in *Caledonian Ry Co.* v. *Guild*, 1 Rettie, 198.

3. Under this part of the section the company can only detain a carriage for tolls due in respect of the carriage, and goods for tolls due in respect of the goods. *M. S. & L. Ry. Co.* v. *North Central Wagon Co.*, 35 Ch. Div. 219; 13 App. Cas. 554.

And no right exists under this part in respect of tolls payable before the carriages or the goods last came into the possession of the company. *Case, supra.*

4. Under this part of the section, the company can only sell such interest as the party liable to pay the tolls has in the carriages or goods sold. *Case, supra.*

As a passive lien is an imperfect remedy, it cannot be meant, when given by Act of Parliament, to be an exclusive one. *G. W. Ry.* v. *Sharman*, 61 L. J. Q. B. 600.

Contractual lien of railway companies.

A railway company which has by contract a general lien on goods cannot detain goods by virtue of its lien until it has carried them to their destination. *Wiltshire Iron Co.* v. *G. W. Ry. Co.*, L. R. 6 Q. B. 776, 780.

A railway company which has by contract a general lien cannot detain goods consigned to a company after an order for winding-up, in respect of a debt due from the company when solvent (*a*); or goods belonging to a receiver in a liquidation, in respect of a debt due from the liquidating debtor (*b*). (*a*) *Wiltshire Iron Co.* v. *G. W. Ry. Co.*, L. R. 6 Q. B. 101, 776. (*b*) *Ex parte Bushell*, 22 Ch. Div. 470.

Shipowner's lien at common law.

The shipowner has a lien at common law, enforceable through the possession of the master, on goods safely carried by him for the freight due for their carriage. *Bristow* v. *Whitmore*, 4 De G. & Jo. 325, 334; *Kirchner* v. *Venus*, 12 Moo. P. C. 361.

The lien is based on the fact that masters of ships, bargemen, and lightermen are in law common carriers. *Cannan* v. *Meaburn*, 1 Bing. 243.

No lien for advanced freight

The freight in respect of which the master has a lien is the reward payable for the safe carriage and delivery of the goods, and is not payable till delivery. A sum made payable under the bill of lading at the port of shipment, whether to the shipowner or to a third person, is not freight, and the master cannot, by virtue of his common law lien, detain the goods to enforce its payment. *Blakey* v. *Dixon*, 2 B. & P. 321; *Andrew* v. *Moorhouse*, 5 Taunt. 435; *How* v. *Kirchner*, 11 Moo. P. C. 21; *Kirchner* v. *Venus*, 12 Moo. P. C. 361.

or for dead freight.

The lien is confined to freight actually earned. There is

no lien, apart from contract, for dead freight. *Phillips* v. *Rodie*, 15 East, 547; *Birley* v. *Gladstone*, 3 M. & S. 205.

Lien on each parcel for whole freight.

Where part of the goods have been delivered to a consignee, the master has a lien on the goods remaining on board for the whole freight payable under the bill of lading. *Sodergren* v. *Flight*, cit. 6 East, 622.

Lien for passage money.

The shipowner has also a lien, enforceable through the master, on the luggage of a passenger for his passage money. *Wolf* v. *Summers*, 2 Camp. 631.

Shipowner's lien by contract.

A charterparty usually gives the owner a lien for freight, dead freight, and demurrage.

Lien for freight.

A lien for freight in a charterparty does not give a lien for a sum made payable by the charterparty in advance. *Ex parte Nyholm*, 22 W. R. 174.

Lien for dead freight.

Dead freight is the freight which would have been payable for that part of the vessel which, under the terms of the charterparty, ought to have been, but has not been, occupied by merchandise. *Phillips* v. *Rodie*, 15 East, 547; *McLean* v. *Fleming*, L. R. 2 H. L. Sc. 128.

A lien for dead freight is not confined to cases where the amount payable in respect of dead freight is specified in the charterparty or ascertainable by reference to the charterparty alone. It extends to cases where the claim is for unliquidated damages for breach of a covenant in the charterparty to supply a full cargo. *McLean* v. *Fleming*, L. R. 2 H. L. Sc. 128.

This decision cannot be reconciled with *Pearson* v. *Goschen*, 17 C. B. N. S. 352, or *Gray* v. *Carr*, L. R. 6 Q. B. 522.

Lien for demurrage.

Demurrage properly signifies the agreed additional payment (generally per day) for an allowed detention beyond a period either specified in or to be collected from the instrument. *Lockhart* v. *Falk*, L. R. 10 Ex. 132.

Demurrage at port of loading.

Where the charterparty specifies the time within which the ship is to be loaded and unloaded, and there is a demurrage clause at an agreed rate per day, the lien for demurrage includes demurrage at the port of loading as well as at the port of discharge. *Francesco* v. *Massey*, L. R. 8 Ex. 101; *Kish* v. *Cory*, L. R. 10 Q. B. 553.

Where the charterparty provides that the ship is to load in the customary manner or as customary, and to be unloaded in a specified time, and that demurrage is to be at a fixed rate per day, the lien for demurrage is confined to demurrage at the port of discharge. *Lockhart* v. *Falk*, L. R. 10 Ex. 132; *Dunlop & Sons* v. *Balfour, Williamson & Co.*, (1892) 1 Q. B. 507. Demurrage at port of discharge.

Where the clause fixing demurrage in the charterparty is expressly confined to demurrage at the port of discharge, the lien clause will be similarly confined. *Clink* v. *Radford & Co.*, (1891) 1 Q. B. 625.

Demurrage may also be used in the wider sense of compensation for undue detention through the default of the charterer. *Lockhart* v. *Falk*, L. R. 10 Ex. 132. See *Harris* v. *Jacobs*, 15 Q. B. Div. 247. Demurrage meaning undue detention.

Where a charterparty provided that the cargo was to be loaded and discharged with all dispatch, and contained no clause fixing demurrage, but a lien was given for demurrage, it was held that the lien applied to an unreasonable detention as well at the port of loading as at the port of discharge. *Bannister* v. *Breslauer*, L. R. 2 C. P. 497.

There is a strong presumption, however, against extending a lien to a claim for unliquidated damages. *Clink* v. *Radford & Co.*, (1891) 1 Q. B. 625, 631; *Dunlop & Sons* v. *Balfour, Williamson & Co.*, (1892) 1 Q. B. 507, 519.

Where the demurrage clause is confined to a certain number of days, the lien for demurrage may extend to damages for detention beyond those days. *Kish* v. *Cory*, L. R. 10 Q. B. 553; *Sanguinetti* v. *Pacific Steam Navigation Co.*, L. R. 2 Q. B. Div. 238, 252; *contra*, *Gray* v. *Carr*, L. R. 6 Q. B. 522.

In this case the claim in respect of detention beyond the prescribed time is strictly a claim for unliquidated damages, but the rate payable under the demurrage clause, in respect of detention during the prescribed time, would in most cases be applicable to detention beyond that time.

The charterparty is the controlling contract as between the shipowner and the charterer; and the charterer cannot, where the charterparty was entered into by him or by agents on his behalf, claim any rights as indorsee for value of the bills of Charterer cannot claim rights inconsistent with charterparty.

lading inconsistent with his liabilities under the charterparty. *Pearson* v. *Goschen*, 17 C. B. N. S. 352; *McLean & Hope* v. *Fleming*, L. R. 2 H. L. Sc. 128.

Indorsee of bill of lading not bound by charterparty.

The *bonâ fide* indorsee for value of a bill of lading, who has no notice of any freight to be paid except that which is expressed in the bill of lading, is entitled to delivery of the goods comprised in the bill of lading on payment of the freight stipulated for therein. *Mitchell* v. *Scaife*, 4 Camp. 298; *Howard* v. *Tucker*, 1 B. & Ad. 712; *Gilkison* v. *Middleton*, 2 C. B. N. S. 134; *Foster* v. *Colby*, 3 H. & N. 705; *Shand* v. *Sanderson*, 4 H. & N. 381.

In *Kern v. Deslandes* (10 C. B. N. S. 205), the indorsee of the bill of lading had notice of the terms of the charterparty, and was therefore held to be bound by them.

Bill of lading may incorporate charterparty.

The bill of lading may, however, incorporate the provisions of the charterparty, which gives a lien for freight, dead freight, and demurrage.

A proviso in a bill of lading "other conditions as per charterparty" incorporates all conditions of the charterparty to be performed by the consignee of the goods which are consistent with the bill of lading, but not conditions which are inconsistent with its express provisions. *Wegener* v. *Smith*, 15 C. B. 285; *Gray* v. *Carr*, L. R. 6 Q. B. 522; *Porteus* v. *Watney*, 3 Q. B. Div. 534; *Gullischen* v. *Stewart Brothers*, 11 Q. B. D. 186; 13 Q. B. Div. 317; *Gardner and Sons* v. *Trechmann*, 15 Q. B. Div. 154; *Serraino & Sons* v. *Campbell*, 25 Q. B. D. 501; (1891) 1 Q. B. 283.

Where the charterparty gives a lien for demurrage, and the bill of lading contains "other conditions as per charterparty," the lien for the whole demurrage is enforceable against the holder of a bill of lading of part of the cargo. *Porteus* v. *Watney*, 3 Q. B. Div. 534.

A proviso in a bill of lading "freight as per charterparty" (*a*), or "paying for the said goods as per charterparty" (*b*), merely incorporates the provision of the charterparty as to the rate of freight. (*a*) *Chappel* v. *Comfort*, 10 C. B. N. S. 802; *Fry* v. *Chartered Mercantile Bank of India*, L. R. 1 C. P., 689. (*b*) *Smith* v. *Sieveking*, 4 E. & B. 945; 5 E. & B. 589.

"The principle seems to be well laid down in *Bevan* v. *Waters* (M. & M. 235) by Lord Chief Justice Best, that where a bailee has expended his labour and skill in the improvement of a chattel delivered to him, he has a lien for his charge in that respect. Thus, the artificer to whom the goods are delivered for the purpose of being worked up into form, or the farrier by whose skill the animal is cured of a disease, or the horsebreaker by whose skill he is rendered manageable, have liens on the chattels in respect of their charges." *Per* Parke, B., in *Scarfe* v. *Morgan*, 4 M. & W. 270, 283.

Common law lien for labour and skill.

Apparently, in order to support a lien under this principle, it is not enough that the value of the subject-matter in respect of which the lien is claimed should be increased, but its condition must be altered. *Hollis* v. *Claridge*, 4 Taunt. 807; *Steadman* v. *Hockley*, 15 M. & W. 553; *Castellain* v. *Thompson*, 13 C. B. N. S. 105.

Condition of chattel must be altered.

A ship is a chattel within this principle. An artificer has a lien on a ship for repairs done (*Ex parte Bland*, 2 Rose, 91; *Franklin* v. *Hosier*, 4 B. & A. 341), and an engineer for machinery supplied to it (*Ex parte Willoughby*, 16 Ch. D. 604).

Labour on ship gives lien.

Where a number of articles are sent under one contract, the workman has a lien on each article for the debt incurred in respect of the whole. *Chase* v. *Westmore*, 5 M. & S. 180; *Mulliner* v. *Florence*, 3 Q. B. Div. 484, 489.

An auctioneer has a lien both on goods delivered to him for sale and on the proceeds of sale for the charges of the sale and his commission. *Williams* v. *Millington*, 1 H. Bl. 81; *Coppin* v. *Craig*, 7 Taunt. 243; *Robinson* v. *Rutter*, 4 E. & B. 954; *Webb* v. *Smith*, 30 Ch. Div. 192.

Auctioneer's lien.

An auctioneer has no lien where the work in respect of which the lien is claimed was not done in the course of his business as auctioneer. *Sanderson* v. *Bell*, 2 C. & M. 304.

A livery stable keeper has no lien on a horse for the expenses of its keep. *Yorke* v. *Greenaugh*, 2 Ld. Raym. 866; *Jacobs* v. *Latour*, 5 Bing. 130; 2 M. & P. 201; *Judson* v. *Etheridge*, 1 C. & M. 743; *Orchard* v. *Rackstraw*, 9 C. B. 698; 19 L. J. C. P. 303.

Livery stable keeper.

Agister.

A person receiving cattle to agist has no lien. *Chapman* v. *Allen*, Cro. Car. 271; *Jackson* v. *Cummins*, 5 M. & W. 342.

A person who has possession but no lien cannot claim a lien in respect of a sum paid by him to another for services which would entitle the person rendering them to a lien. *Orchard* v. *Rackstraw*, *supra*.

Whether lien for expenses of detention.

A person detaining goods in order to enforce a lien has no lien for the expenses incident to their detention. *British Empire Shipping Co.* v. *Somes*, E. B. & E. 353, 367; 8 H. L. C. 338.

A master who is unable to deliver the cargo without default of his own has a lien upon it for the reasonable expenses of preserving it. *Cargo ex Argos*, L. R. 5 P. C. 134, 164; *G. N. Ry. Co.* v. *Swaffield*, L. R. 9 Ex. 132, 138.

A common carrier probably has a lien for expenses reasonably incurred by him in keeping a chattel which he is unable, without default of his own, to deliver to the owner. *G. N. Ry. Co.* v. *Swaffield*, L. R. 9 Ex. 132, 138.

General average lien of shipowner,

The shipowner has a lien on cargo, enforceable through the possession of the master, for the proportion of loss due from cargo in respect of extraordinary sacrifices made, or expenses incurred, for the preservation of ship and cargo. *Cargo ex Galam*, Brow. & Lush. 167, 181; *Svendsen* v. *Wallace*, 13 Q. B. Div. 69; 10 App. Cas. 404.

of owner of goods.

The owner of goods sacrificed in a case which gives rise to general average contribution has a lien upon each parcel of goods salved belonging to a separate consignee for a due proportion of his individual claim. The cargo not being in his possession or subject to his control, his right of lien can only be enforced through the ship-master, whom the law regards as his agent for that purpose. *Strang, Steel & Co.* v. *A. Scott & Co.*, 14 App. Cas. 601.

Enforcement of general average lien.

The master is entitled to refuse to deliver goods to any consignee until payment or tender of the proportion of general average to which the consignee is liable, and he is not bound to accept security for the amount due in lieu of immediate payment. *Simonds* v. *White*, 2 B. & C. 805; *Huth* v. *Lamport*, 16 Q. B. Div. 442, 735.

A master who neglects to enforce the lien is liable in damages to an owner of goods jettisoned for the amount of contribution to which he is entitled; and might be restrained by injunction at the suit of such owner from delivering the cargo without receiving payment or taking security. *Crooks & Co.* v. *Allan*, 5 Q. B. D. 38; *Strang, Steel & Co.* v. *A. Scott & Co.*, 14 App. Cas. 601, 606, explaining *Hallett* v. *Bousfield*, 18 Ves. 190.

Liability of consignee.

A consignee of goods, not being their owner, is under no personal liability to pay general average, unless either he receives them in pursuance of a bill of lading in which it is expressed that the goods are to be delivered to him, he paying general average, or he takes them after previous notice by the master that, if he takes them, he must pay it. *Scaife* v. *Tobin*, 3 B. & Ad. 523.

Particular average lien.

The shipowner has a possessory lien on cargo for the amount of loss arising from extraordinary sacrifices made or expenses incurred for the preservation of the cargo alone. *Hingston* v. *Wendt*, 1 Q. B. D. 367; see *Notara* v. *Henderson*, L. R. 7 Q. B. 225, 233.

Lien of unpaid vendor of goods.

The lien of the unpaid vendor of goods is now regulated by the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), which provides—

Sect. 39. (1) Subject to the provisions of this Act and of any statute in that behalf, notwithstanding that the property in the goods may have passed to the buyer, the unpaid seller of goods, as such, has by implication of law—

(*a*) A lien on the goods or right to retain them for the price while he is in possession of them;

(*b*) In case of the insolvency of the buyer, a right of stopping the goods *in transitu* after he has parted with the possession of them;

(*c*) A right of re-sale as limited by this Act.

(2) Where the property in goods has not passed to the buyer, the unpaid seller has, in addition to his other remedies, a right of withholding delivery similar to and co-extensive with his rights of lien and stoppage *in transitu* where the property has passed to the buyer.

Sects. 41 to 43 deal with the unpaid seller's lien, sects. 44 to 46 with stoppage *in transitu*, and sects. 47 and 48 with the effect of re-sale by buyer or seller.

Lien when available against true owner.

1. A possessory lien is available against the true owner of the goods, where the person claiming the lien is bound to receive the goods over which he claims it. *Lee* v. *Irwin*, 4 Ir. Jur. 372.

Hence, the innkeeper's lien (*a*), the carrier's lien (*b*), and the railway company's lien for cloak-room charges (*c*), are available against the true owner. (*a*) *Robinson* v. *Walter*, 3 Bulst. 269; *Stirt* v. *Drungold*, 3 Bulst. 289; *Yorke* v. *Greenaugh*, 2 Ld. Raym. 866; *Johnson* v. *Hill*, 3 Stark. 172; *Turrill* v. *Crawley*, 13 Q. B. 197; *Snead* v. *Watkins*, 1 C. B. N. S. 267; *Threfall* v. *Borwick*, L. R. 7 Q. B. 711; *Gordon* v. *Silber*, 25 Q. B. D. 491; *Robins & Co.* v. *Gray*, (1895) 2 Q. B. 78, 501. (*b*) *Exeter Carrier's Case*, cit. 2 Ld. Raym. 866. (*c*) *Singer Manufacturing Co.* v. *L. & S. W. Ry. Co.*, (1894) 1 Q. B. 833.

It is immaterial that the innkeeper knows that the goods which he takes in as the guest's luggage may not or do not belong to the guest, *e.g.* luggage of a commercial traveller. *Robins & Co.* v. *Gray*, (1895) 2 Q. B. 78, 501.

But an innkeeper (*a*) or carrier (*b*) cannot enforce his lien against goods where he knew that the guest who brought them was wrongfully in possession of them. (*a*) *Johnson* v. *Hill*, 3 Stark. 172. (*b*) *Waugh* v. *Denham*, 16 Ir. C. L. 405.

2. An artificer's lien may be available against the true owner on the principle of agency, *e.g.* on the ground that the bailee of a chattel has an implied authority to have it repaired. *Williams* v. *Allsup*, 10 C. B. N. S. 417; see *Singer Manufacturing Co.* v. *L. & S. W. Ry. Co.*, (1894) 1 Q. B. 833, 837.

CHAPTER VI.

COMMON LAW LIENS—GENERAL LIENS.

A COMMERCIAL or general lien is a right to retain for the general balance of an account.

A general lien is merely a right to detain the chattels in respect of which it is claimed until payment. It cannot be actively enforced. *Bozon* v. *Bolland*, 4 My. & Cr. 354; *Molesworth* v. *Robbins*, 2 J. & Lat. 358; *Pelly* v. *Wathen*, 1 D. M. & G. 16, 23. Right of detention.

A general lien is based on implied contract. Hence, it can only be claimed as arising from dealings in a particular trade or line of business, in which the custom of a general lien has been judicially proved and acknowledged, or upon express evidence being given that, according to the established custom in some other trade or line of business, a general lien is claimed and allowed. *Gladstone* v. *Birley*, 2 Mer. 401; *Bock* v. *Gorrissen*, 2 D. F. & J. 434. Based on implied contract.

A general lien is not available against the true owner. *Wright* v. *Snell*, 5 B. & A. 350; *Oppenheim* v. *Russell*, 3 B. & P. 42; *Leuckhart* v. *Cooper*, 3 Bing. N. C. 99. Not available against true owner.

Bankers have a lien on all securities deposited with them by a customer for the general balance of his account. *Davis* v. *Bowsher*, 5 T. R. 488; *Bolland* v. *Bygrave*, Ry. & Moo. 272; *Brandao* v. *Barnett*, 12 Cl. & F. 787; *London Chartered Bank of Australia* v. *White*, 4 App. Cas. 413. Banker's lien.

The lien is confined to banker's securities, *e.g.* promissory notes, bills of exchange, exchequer bills, coupons, bonds of foreign governments—what the Court in *Davis* v. *Bowsher* (5 T. R. 488) call paper securities. *Wylde* v. *Radford*, 33 To what securities lien extends.

L. J. Ch. 51; *Jeffryes* v. *Agra & Masterman's Bank*, L. R. 2 Eq. 674; *Re Williams*, I. R. 3 Eq. 346.

A banker has no lien on securities deposited with him for safe custody merely and not under his control, *e.g.* kept in a box of which the customer has the key, or in a sealed-up parcel. *Brandao* v. *Barnett*, 12 Cl. & F. 787; *Leese* v. *Martin*, 17 Eq. 224.

He has a lien if he has control over the securities, *e.g.* if they are deposited with the banker's own securities in the banker's strong box. *In re United Service Co.*, 6 Ch. 212, 217.

Where A. deposited a lease with bankers in respect of a special advance to the firm of which he was a member, it was held that they could not retain it to meet the general indebtedness of the firm. *Wolstenholm* v. *Sheffield Union Banking Co.*, 54 L. T. 746.

Broker's lien. A broker has a general lien on securities delivered to him for sale. *Jones* v. *Peppercorne*, Joh. 430.

Insurance broker. An insurance broker has a general lien on policies effected by him for his commission and for premiums paid by him. *Hewison* v. *Guthrie*, 2 Bing. N. C. 755; *Fisher* v. *Smith*, 4 App. Cas. 1.

Consignee of West Indian estate. As to the lien of the consignee of a West Indian estate, see *Bertrand* v. *Davies*, 31 B. 429; *Fraser* v. *Burgess*, 13 Moo. P. C. 314; *In re Leith's Estate*, L. R. 1 P. C. 296.

Factor's lien. A factor has a general lien against his principal on goods or securities entrusted to him for sale. *Kruger* v. *Wilcox*, Ambl. 252; *Drinkwater* v. *Goodwin*, Cowp. 251; *Frith* v. *Forbes*, 31 L. J. Ch. 793; *In re Pavy's Patent Felted Fabric Co.*, 1 Ch. D. 631; *In re Fawcus*, 3 Ch. D. 795.

He does not cease to be a factor, and, as such, entitled to a general lien, because he is bound to sell in the principal's name and at a price fixed by the principal. *Stevens* v. *Biller*, 25 Ch. Div. 31.

Packer's lien. A packer had in the last century, and probably still has, a general lien. *Ex parte Deeze*, 1 Atk. 228; *Green* v. *Farmer*, 4 Burr. 2214; *Savill* v. *Barchard*, 4 Esp. 53; *In re Witt*, 2 Ch. Div. 489.

Solicitor's lien. The solicitor's lien on documents is a general lien, extending

to all his bills of costs. *Ex parte Sterling*, 16 Ves. 258; *Ex parte Pemberton*, 18 Ves. 282; *Ex parte Nesbitt*, 2 Sch. & L. 279; *Bozon* v. *Bolland*, 4 My. & C. 354; *Mackenzie* v. *Macintosh*, 64 L. T. 706.

What costs it covers.

The lien extends to all those items which are properly included in the bill of costs, that is, to all such claims against the client as the taxing master has a right to moderate. *In re Taylor, Stileman & Underwood*, (1891) 1 Ch. 590.

It does not extend to ordinary advances or loans made by the solicitor (*a*), or, where the client is a company, to costs incurred before incorporation, though made by Act of Parliament a debt from the company (*b*). (*a*) *In re Taylor, Stileman & Underwood*, (1891) 1 Ch. 590; (*b*) *In re Galland*, 31 Ch. Div. 296.

To what papers it extends.

A solicitor cannot acquire a lien upon his client's will. *Georges* v. *Georges*, 18 Ves. 294; *Lord* v. *Wormleighton*, Jac. 580.

An official liquidator can give no lien on the file of proceedings in the winding-up. *In re Union Cement Co.*, L. R. 4 Ch. 627.

The directors of a company who employ a solicitor can give him no lien on such books as, by Act of Parliament or by the constitution of the company, ought to be kept at the registered office of the company or be dealt with in a particular way, *e.g.* the register of shareholders or the minute-book. *In re Capital Fire Assurance Association*, 24 Ch. Div. 408, 418; *In re Anglo-Maltese Hydraulic Dock Co.*, 54 L. J. Ch. 730.

A solicitor has no lien on a deed of mortgage from his client to himself. He holds it, not as solicitor to the mortgagor, but as mortgagee. *Sheffield* v. *Eden*, 10 Ch. Div. 291.

The solicitor's lien on a policy of assurance is not lost by his omission to give notice of the lien to the insurance office. *West of England Bank* v. *Batchelor*, 51 L. J. Ch. 199.

A solicitor, by producing as evidence in an action a deed upon which he has a lien, acquires no lien on the fund realized in the action. *Bozon* v. *Bolland*, 4 My. & Cr. 354.

Against whom it is available.

The solicitor's lien is available against the trustee in bankruptcy of the client (*a*), or (where the client is a company)

against the liquidator of the company (*b*). The Bankruptcy Act, 1883, sect. 50 (6), preserves the right of lien. (*a*) *In re Leah*, 6 Jur. N. S. 387. (*b*) *In re Oxford & Worcester Ry. Co.*, 1 Dr. & Sm. 728; *In re Capital Fire Insurance Association*, 24 Ch. Div. 408, 420.

Solicitor of executor or trustee.

The solicitor of a person acting in a representative capacity, *e.g.* as executor, trustee of a will or trustee in bankruptcy, has a lien against the estate coextensive with the right of his client to indemnity out of it. *Hicks* v. *Keate*, 3 Jur. 1024; *Warburton* v. *Edge*, 9 Sim. 508; *Francis* v. *Francis*, 5 D. M. & G. 108; *Turner* v. *Letts*, 7 D. M. & G. 243; *Ex parte Yalden*, 4 Ch. Div. 129.

Lien subject to all equities.

The solicitor's lien is subject to all rights to the possession of the documents deposited with him which are paramount to the right of his client. *Marsh* v. *Bathoe*, Ridg. t. Hardw. 256; *Ex parte Nesbitt*, 2 Sch. & L. 279; *Hollis* v. *Claridge*, 4 Taunt. 807; *Smith* v. *Chichester*, 2 D. & War. 393; *Blunden* v. *Desart*, 2 D. & War, 405; *Molesworth* v. *Robbins*, 2 J. & Lat. 358; *Pelly* v. *Wathen*, 7 Ha. 351; 1 D. M. & G. 16.

Solicitor must get possession as solicitor for client.

The papers in respect of which a lien is claimed must come into the possession of the solicitor as solicitor for the person against whom it is claimed. *Champernown* v. *Scott*, 6 Madd. 93; *Pelly* v. *Wathen*, 7 Ha. 351.

A solicitor has no lien on title-deeds of a client which come into his possession, not as solicitor of the client, but as assignee of a mortgage made by the client. *Pelly* v. *Wathen*, 7 Ha. 351, 363, 364; *Vaughan* v. *Vanderstegen*, 2 Drew. 409.

Solicitors have no lien against a mortgagor on title-deeds of the mortgaged property deposited with them by the mortgagee. *Ex parte Fuller*, 16 Ch. D. 617.

But where title-deeds come into the possession of a solicitor as solicitor for A., his lien as against A. is not lost because he subsequently holds possession as solicitor for B. *In re Messenger*, 3 Ch. D. 317; *In re Harvey's Estate*, 17 L. R. Ir. 65; *Re Walker*, 68 L. T. 517. See, however, *Ex parte Quinn*, 53 L. J. Ch. 302.

Effect of changes in firm.

The bill of costs in respect of which the deeds are held must be due to the person who holds them. Thus, a solicitor

has no lien on deeds delivered to him for costs previously incurred to a firm of which he is a member. *Vaughan* v. *Vanderstegen*, 2 Drew. 409.

And there is no lien on papers which come into the possession of a firm consisting of A., B., and C. in respect of costs due from a client while the firm was composed of A. and B. only. *In re Forshaw*, 16 Sim. 121; *Pelly* v. *Wathen*, 7 Ha. 351, 362.

Where papers come into the possession of a firm consisting of A. and B., and C. is subsequently admitted, the firm has a lien on the papers for costs incurred, both while the firm consisted of A. and B., and while it consisted of A., B., and C. *Pelly* v. *Wathen*, 7 Ha. 351, 362.

Separate retainer.

Where the members of a firm of solicitors are retained separately, one of them has no lien on papers for costs due to another. *In re Galland*, 31 Ch. Div. 296.

Lien only available against client.

The lien can only be claimed against the person who has retained the solicitor, although another person has benefited by the solicitor's exertions. *Pelly* v. *Wathen*, 1 D. M. & G. 16, 26.

Where a mortgage has been paid off, the mortgagee's solicitor has no right to retain the title-deeds of the mortgaged property as against the mortgagor, even for costs due to the solicitor from the mortgagee for work done relating to the mortgaged property pending the mortgage. *Hollis* v. *Claridge*, 4 Taunt. 807; *Wakefield* v. *Newbon*, 6 Q. B. 276; *In re Llewellin*, (1891) 3 Ch. 145.

Lien cannot be acquired by neglect of duty.

A solicitor cannot insist on a lien which he can only acquire by neglect of duty to the person against whom he claims it. *Macfarlane* v. *Lister*, 37 Ch. Div. 88, 94.

Where a solicitor acts for both mortgagor and mortgagee in the preparation of a mortgage, he has no lien against the mortgagee on the mortgage deed, or title-deeds of the mortgaged property, for the costs of preparing the mortgage. *In re Snell*, 6 Ch. D. 105; *In re Mason & Taylor*, 10 Ch. D. 729.

But a solicitor acting for mortgagor and mortgagee can claim a lien against the mortgagee on documents which would

not normally pass into the mortgagee's possession, *e.g.* where the mortgage is a floating security. *Brunton* v. *Electrical Engineering Corporation*, (1892) 1 Ch. 434.

Where a solicitor prepares a marriage settlement on the retainer of the settlor, the trustees of the settlement employing no independent solicitor, the solicitor has no lien on the settlement against the trustees for the costs of its preparation. *In re Lawrance*, (1894), 1 Ch. 556, not following *Re Gregson*, 26 B. 87.

Where an infant plaintiff on coming of age repudiated the suit, the solicitor of the next friend of the infant was held to have no lien on deeds which a defendant had brought into Court, admitting that the infant was entitled to their possession. *Dunn* v. *Dunn*, 7 D. M. & G. 25.

Limitations on right of detainer.

The right of the solicitor to withhold documents on which he claims a lien is subject to the following limitations:—

1. As to all documents.

1. Where the client might be compelled to produce a document for the benefit of a third person, the solicitor cannot resist production on the ground that he has a lien for costs against his client. *Furlong* v. *Howard*, 2 Sch. & L. 115; *Brassington* v. *Brassington*, 1 Si. & St. 455; *Thompson* v. *Mosely*, 5 C. & P. 501; *Hope* v. *Liddell*, 20 B. 438; 7 D. M. & G. 331; *In re Cameron's Coalbrook Ry. Co.*, 25 B. 1; *Vale* v. *Oppert*, 10 Ch. 140.

What right to inspect includes.

The right to inspect includes the right to take copies. *Pratt* v. *Pratt*, 47 L. T. 249; not following *Lockett* v. *Cary*, 10 Jur. N. S. 144.

Bankruptcy Act, 1883, s. 27, (1).

Sect. 27, (1) of the Bankruptcy Act, 1883, enables the Court, on the application of the official receiver or trustee, at any time after a receiving order has been made against a debtor, to require the debtor's solicitor to produce any documents in his custody or power relating to the debtor, his dealings or property. See *In re Toleman & England*, 13 Ch. D. 885.

Companies Act, 1862, s. 115.

Sect. 115 of the Companies Act, 1862, enables the Court, after it has made an order for winding up a company, to enforce production by the solicitor of the company, without prejudice to his lien, of any documents in his custody or power relating to the company. See *In re South Essex Estuary Co.*,

L. R. 4 Ch. 215; *In re Capital Fire Insurance Association*, 24 Ch. Div. 408, 420.

Where documents of a company come into the hands of their solicitor after the presentation of the winding-up petition, but before the winding-up order, he will be ordered to deliver the documents to the liquidator subject to his lien, if any. *In re Capital Fire Insurance Association*, 24 Ch. Div. 408.

2. As to papers in an action.

2. Where the relation of solicitor and client is broken off during the pendency of an action, the following rules apply to papers received by the solicitor in the course of and for the purpose of the action.

The same rules apply where the relation of solicitor and client is broken off during the pendency of any business undertaken by the solicitor, *e.g.* conveyancing business, as regards papers of the client come into his hands for the purposes of the business. *Rawlinson* v. *Moss*, 30 L. J. Ch. 797.

(a) Solicitor discharging himself.

(*a*) Where the solicitor discharges himself, he will be ordered to deliver to the new solicitor all papers connected with the action, the new solicitor undertaking to receive them without prejudice to the lien of the original solicitor, and to return them after the termination of the action. *Commerell* v. *Poynton*, 1 Sw. 1; *Colegrave* v. *Manley*, T. & R. 400; *Cane* v. *Martin*, 2 B. 584; *Heslop* v. *Metcalfe*, 8 Sim. 622; 3 My. & Cr. 183; *In re Rose Marie Gold Mining Co.* (1896), W. N. 76.

The client is entitled to delivery although the solicitor discharges himself for good cause, *e.g.* because he is not paid in accordance with the terms of a contract providing that he should receive payments from time to time. *Cane* v. *Martin*, 2 B. 584; *Wilson* v. *Emmett*, 19 B. 233; *Robins* v. *Goldingham*, 13 Eq. 440; *Bluck* v. *Lovering*, 35 W. R. 232.

The bankruptcy of a solicitor or firm of solicitors gives the client a right to delivery of the papers in the cause; but the bankruptcy of one partner in a firm, the firm remaining solvent, does not. *In re Moss*, 35 B. 526; L. R. 2 Eq. 345.

The imprisonment of the solicitor entitles the client to delivery of the papers relating to the action. *Scott* v. *Fleming*, 9 Jur. 1085; *Re Williams*, 28 B. 465.

The dissolution of a firm of solicitors or a change in its members entitles the client to delivery of papers in a pending action. *Griffiths* v. *Griffiths*, 2 Ha. 587; *Rawlinson* v. *Moss*, 30 L. J. Ch. 797.

It has been held that where a solicitor dies during the progress of an action, his representative will not be ordered to deliver the papers in the action except on payment of the solicitor's bill. *Redfearn* v. *Sowerby*, 1 Sw. 84.

(*b*) Solicitor discharged by client.

(*b*) Where the solicitor is discharged by the client, the solicitor is not required, as a general rule, either to produce for inspection or to deliver to the client papers relating to the action. *Lord* v. *Wormleighton*, Jac. 580; *Boson* v. *Bolland*, 4 My. & Cr. 354, 358; *Griffiths* v. *Griffiths*, 2 Ha. 587, 592; *In re Faithfull*, 6 Eq. 325.

The client is entitled to delivery even where he discharges the solicitor, if he discharges him by reason of the solicitor's misconduct. *Bennett* v. *Baxter*, 10 Sim. 417; *In re Smith*, 4 B. 309.

Where the solicitor was discharged by the client after the passing of an order in an action, the solicitor was obliged to produce it for enrolment; or if documents are in evidence in an action, he must produce them to enable the decree to be drawn up. *Clifford* v. *Turrill*, 2 De G. & Sm. 1; *Simmonds* v. *G. E. Ry. Co.*, L. R. 3 Ch. 797.

(*c*) Solicitor retained by person taking representative proceedings.

(*c*) Where a solicitor is retained by a party taking representative proceedings (*e.g.* an action for administering the estate of a deceased person or the trusts of a deed, a debenture holder's action, or a partition action) and is subsequently discharged, he cannot retain documents received by him during the proceedings so as to interfere with their due prosecution. *Baker* v. *Henderson*, 4 Sim. 27; *Belaney* v. *Ffrench*, 8 Ch. 918; *In re Boughton*, 23 Ch. D. 169; *Batten* v. *Wedgwood Coal Co.*, 28 Ch. D. 317, 320; *Hutchinson* v. *Norwood*, 54 L. T. 842; *Boden* v. *Hensby*, (1892) 1 Ch. 101; *Gerty* v. *Mann*, 29 L. R. Ir. 7.

He will therefore be ordered to deliver to the new solicitors such of the documents come to his hands during the progress of, and for the purposes of, the action, as may from time to

time be required for the carrying on of the proceedings. *In re Boughton*, 23 Ch. D. 169; *Boden* v. *Hensby*, (1892) 1 Ch. 101.

It has been held that, where the client becomes bankrupt, his solicitor is obliged to produce papers in the action to the solicitor of the trustee in bankruptcy for the purposes of the action. *Ross* v. *Laughton*, 1 V. & B. 349; *Simmonds* v. *G. E. Ry. Co.*, L. R. 3 Ch. 797. See, however, *Lord* v. *Wormleighton*, Jac. 580, p. 582; *In re Moss*, 35 B. 526, 528.

Lien of town agent.

The lien of the town agent on documents is, as against the country solicitor, general. *Ward* v. *Hepple*, 15 Ves. 297; *Ex parte Steele*, 16 Ves. 161, 164; *Bray* v. *Hine*, 6 Pri. 203; *Lawrence* v. *Fletcher*, 12 Ch. D. 858.

But the town agent has no greater lien as against the client than the country solicitor could give him. He has no lien, therefore, against a client who has paid the country solicitor in full. *Farewell* v. *Coker*, 2 P. W. 460; *Ward* v. *Hepple*, *supra*; *White* v. *Royal Exchange Assurance*, 1 Bing. 20; *Dicas* v. *Stockley*, 7 C. & P. 587; *Waller* v. *Holmes*, 1 J. & H. 239.

Lien of parliamentary agent, town clerk.

As to the lien of a parliamentary agent, see *Ridgway* v. *Lees*, 25 L. J. Ch. 584; and of a town clerk, see *Rex* v. *Sankey*, 5 A. & E. 423; *Newington Local Board* v. *Eldridge*, 12 Ch. Div. 349.

Wharfinger's lien.

A wharfinger has a general lien for his warehouse charges upon goods in his possession. *Naylor* v. *Mangles*, 1 Esp. 109; *Moet* v. *Pickering*, 8 Ch. Div. 372.

The remedies given to dock companies by sect. 45 of the Harbours, Docks, and Piers Clauses Act, 1847 (10 & 11 Vict. c. 27), have, it appears, superseded their implied lien as wharfingers. *Dresser* v. *Bosanquet*, 4 B. & S. 460, 486; 32 L. J. Q. B. 57, 374.

A lien for warehouse rent has in some cases been denied, while the lien for wharfage was admitted. *Rex* v. *Humphery*, M'Cl. & Y. 173; *Holderness* v. *Collinson*, 7 B. & C. 212.

CHAPTER VII.

WHEN COMMON LAW LIENS DO NOT ARISE.

A LIEN, whether particular or general, cannot be claimed, so as to intercept the performance of the actual contract between the parties, whether that contract is express or is to be inferred from a certain course of dealing. *Crawshay* v. *Homfray*, 4 B. & A. 50; *Bock* v. *Gorrissen*, 2 D. F. & J. 434; *Kirchner* v. *Venus*, 12 Moo. P. C. 361; *In re Leith's Estate*, L. R. 1 P. C. 296; *Fisher* v. *Smith*, 4 App. Cas. 1; *London Chartered Bank of Australia* v. *White*, 4 App. Cas. 413.

1. No lien on property delivered for special purpose.

1. No lien can arise on property delivered for a special purpose, there being an implied contract in such a case that the property is to be returned when the purpose is effected. *Brandao* v. *Barnett*, 12 Cl. & F. 787; *Gibson* v. *May*, 4 D. M. & G. 512; *Symons* v. *Mulkern*, 30 W. R. 875; *Stumore* v. *Campbell & Co.*, (1892) 1 Q. B. 314.

Solicitor's lien.

Where a client, who has given papers to his solicitor for a particular purpose, does not recover them when the purpose is satisfied, the presumption is that they are retained subject to the solicitor's lien. *Ex parte Sterling*, 16 Ves. 258; *Colmer* v. *Ede*, 40 L. J. Ch. 185.

Banker's lien.

Where a customer delivered exchequer bills to his banker to be exchanged against other exchequer bills, which were to be returned to the customer, it was held that the banker had no lien, either on the original bills or on the bills received in exchange. *Brandao* v. *Barnett*, 12 Cl. & F. 787.

Where a partner deposited certificates of shares with his bankers, charging them in writing with his indebtedness in respect of his separate account, and the shares afterwards became the property of the partnership, it was held that the

bankers had no lien on them for the debt due on the partnership account. *City Bank Case*, 3 D. F. & J. 629, 638.

Where A. gave B. an order to purchase bonds, to be paid for by drafts on A. and to be held at his disposal, and A. subsequently requested B., who had bought the bonds, to keep them for safe custody until the drafts were honoured, which B. consented to do, it was held that B. could not set up a general lien on the bonds. *Bock* v. *Gorrissen*, 2 D. F. &. J. 434.

Consignee's lien.

A consignee, who has accepted a consignment with express directions to apply it or its proceeds in a particular mode, cannot set up his general lien in opposition to these directions. *Frith* v. *Forbes*, 4 D. F. & J. 409.

2. Property made security by express contract.

2. Where property is made a security by virtue of an express contract, there is a strong presumption that the rights of the parties were intended to be exclusively regulated by the contract, and that the owner of the property, on performing his obligations under the contract, is entitled to have the property returned to him.

Banker's lien.

Where deeds relating to two properties were deposited with a banker, accompanied by a written memorandum, from which it appeared that the deposit was for the purpose of pledging one of the properties to which the deeds related, it was held that the banker had no general lien upon the other property. *Wylde* v. *Radford*, 33 L. J. Ch. 51.

Where a customer deposited a policy of life assurance with a banker, accompanied by a memorandum of charge to secure overdrafts not exceeding 4000*l.*, it was held that the banker could not hold the policy in respect of the customer's indebtedness to him beyond that amount. *In re Bowes*, 33 Ch. D. 586.

Broker's lien.

Where bonds were deposited with a broker with instructions to raise a specific sum upon them, it was held that the brokers retained their general lien on the bonds. *Jones* v. *Peppercorne*, Joh. 430.

Contract fixing price does not affect lien.

The mere existence of a special contract between the parties, *e.g.* a contract fixing the price, does not prevent the lien from arising. *Chase* v. *Westmore*, 5 M. & S. 180; *Franklin* v. *Hosier*, 4 B. & A. 341; *Ex parte Willoughby*, 16 Ch. D. 604.

3. No lien where property is to be returned before payment.

3. No lien can arise on property which, by contract express or implied from the course of dealing between the parties, is to be returned to the owner before payment of the amount in respect of which a lien might be claimed. *Fisher* v. *Smith*, 4 App. Cas. 1.

Particular lien.

Thus, there can be no lien where the owner of the chattel is entitled under the contract to resume possession of it at any time or from time to time. *Jackson* v. *Cummins*, 5 M. & W. 342; *Forth* v. *Simpson*, 13 Q. B. 680; see *Allen* v. *Smith*, 12 C. B. N. S. 638; 31 L. J. C. P. 306.

There can be no lien where the contract provides for giving credit, or a time for payment is fixed, which may not arrive till after the redelivery of the chattel. *Raitt* v. *Mitchell*, 4 Camp. 146; *Scarfe* v. *Morgan*, 4 M. & W. 270.

Wharfinger's lien.

A wharfinger was held to have no lien upon goods, which, by the course of business between him and the owner, he parted with from time to time, receiving payment at the end of six months or at the end of every year for his dues. *Crawshay* v. *Homfray*, 4 B. & A. 50.

Lien for freight.

Where under the terms of a charterparty the charterer gives a bill of exchange for the freight, which does not mature till after the arrival of the ship, the master cannot detain the goods for such freight, although the charterer becomes bankrupt in the mean time. *Horncastle* v. *Farran*, 3 B. & Ald. 497; *Alsager* v. *St. Katherine's Dock Co.*, 14 M. & W. 794; *Foster* v. *Colby*, 3 H. & N. 705; *Tamvaco* v. *Simpson*, 19 C. B. N. S. 453; L. R. 1 C. P. 363.

CHAPTER VIII.

EQUITABLE LIENS.

THERE is no distinction, in their effect, between an equitable lien and an equitable charge; but the word "lien" is generally, though not always, used to express an equitable security which does not arise under an express contract.

The use of the world "lien" in this connection is somewhat misleading, as there is no analogy between a common law lien, which is based on possession, and which, except as modified by statute, gives merely a right of detention, and an equitable lien, which is not based on possession, and which entitles the creditor to a judicial sale.

VENDOR'S LIEN ON LAND, AND SIMILAR LIENS.

1. Vendor's lien on land for unpaid purchase-money.

1. A vendor of land has an equitable lien upon the land for so much of his purchase-money as is unpaid at the time fixed for the completion of the contract. *Hearle* v. *Botelers*, Cary, 35; *Chapman* v. *Tanner*, 1 Vern., 267; *Mackreth* v. *Symmons*, 15 Ves. 329; *Lysaght* v. *Edwards*, 2 Ch. D. 499, 506; *Kettlewell* v. *Watson*, 26 Ch. Div. 501.

The lien extends to copyholds. *Winter* v. *Lord Anson*, 3 Russ. 488, 492.

A lessor, who grants a lease in consideration of rent and a premium, has a lien for the premium unpaid. *Elliot* v. *Edwards*, 3 B. & P. 181; *Shepheard* v. *Beetham*, 6 Ch. D. 597.

Where a legacy is given to A. on condition that he conveys land to B., who is a residuary legatee and executor, and A. conveys the land, he has no lien upon it for the legacy. *Barker* v. *Barker*, 10 Eq. 438.

Vendor to railway company.

A vendor of land to a railway company has a lien on the land for the unpaid purchase money. *Walker* v. *Ware, Hadham & Buntingford Ry. Co.*, L. R. 1 Eq. 195; *Wing* v. *Tottenham & Hampstead Junction Ry. Co.*, L. R. 3 Ch. 740.

The vendor's lien against a railway company extends to money payable as compensation for severance (*Walker* v. *Ware, Hadham & Buntingford Ry. Co.*, L. R. 1 Eq. 195), damages for non-construction of accommodation works (*Earl St. Germans* v. *Crystal Palace Ry. Co.*, 11 Eq. 568), and the costs of a suit for specific performance (*Bishop of Winchester* v. *Mid-Hants Ry. Co.*, L. R. 5 Eq. 17), but not to the vendor's costs of arbitration when payable by the company (*Earl Ferrers* v. *Stafford & Uttoxeter Ry. Co.*, 13 Eq. 524).

Sale by railway company.

It is doubtful whether a railway company selling superfluous lands can enforce a lien for the unpaid purchase money. *In re Thackwray & Young's Contract*, 40 Ch. D. 34.

The Court has jurisdiction to declare a lien for instalments of purchase money which, under the terms of the contract, are not yet due. *Nives* v. *Nives*, 15 Ch. D. 649.

No lien where consideration is a security.

The contract between the parties may show an intention that the vendor should have no lien. Where the consideration for the sale is not money, but a security to be given by the purchaser for the payment of money, the vendor, if he gets the security, gets the consideration that he bargained for, and cannot claim in addition a lien for the money, the payment of which is secured to him. *Winter* v. *Lord Anson*, 1 Si. & St. 434; 3 Russ. 488; *Parrott* v. *Sweetland*, 3 My. & K. 655; *Buckland* v. *Pocknell*, 13 Sim. 406; *Dixon* v. *Gayfere*, 21 B. 118; 1 De G. & Jo. 655; *In re Albert Life Assurance Co.*, 11 Eq. 164, 179; *Re London & Lancashire Paper Mills Co.*, 58 L. T. 798.

Thus, where the consideration expressed in the agreement for sale was the transfer into the name of the vendor of so much long annuities as would produce 100*l.* per annum, and the purchaser agreed that, in case the market value of the stock so to be transferred should not rise within two years to 2200*l.*, he would pay the vendor that sum on having a re-transfer of the stock, it was held that the vendor had no lien

for the difference between the market value of the stock and 2200*l.* *Nairn* v. *Prowse*, 6 Ves. 752.

Where the conveyance was made in consideration of the purchaser entering into covenants for paying an annuity of 60*l.* to the vendor during his life, and, if the vendor should marry, the sum of 3000*l.* to the persons therein mentioned (*a*), and where a conveyance was made in consideration of two several annuities having been granted to the vendor (*b*), it was held that there was no lien. (*a*) *Clarke* v. *Royle*, 3 Sim. 499; (*b*) *Buckland* v. *Pocknell*, 13 Sim. 406. Where consideration is annuity.

Where the consideration was the grant of an annuity for three lives to be secured by bond, it was held that there was no lien for the annuity, the ground being that the parties could not have intended to subject the estate to a burden which could not be got rid of for so long. *Dixon* v. *Gayfere*, 21 B. 118; 1 De G. & Jo. 655; see *Mackreth* v. *Symmons*, 15 Ves. 329.

The vendor has been held in several cases to have a lien where the consideration was an annuity for his own life. *Tardiffe* v. *Scrughan*, cit. 1 B. C. C. 423; *Remington* v. *Deverall*, 2 Anst. 550; *Matthew* v. *Bowler*, 6 Ha. 110.

Where land was agreed to be sold to a railway company at and subject to an annual rent-charge and royalties, it was held that the vendor had no lien for arrears of the rent-charge. *Earl of Jersey* v. *Briton Ferry Floating Dock Co.*, 7 Eq. 409.

Where the conveyance was expressed to be in consideration of 3000*l.* advanced upon the terms expressed in a bond, and the endorsed receipt was for a bond for 3000*l.*, being the full consideration expressed to be given by the purchaser, it was held that there was no lien. *Parrott* v. *Sweetland*, 3 My. & K. 655. Where consideration is bond.

Where the consideration was expressed to be a specified sum, and it was agreed that the sum, with interest, should be secured by the purchaser's bond, and should remain so secured during the vendor's life on regular payment of interest, it was held that the lien remained. *Winter* v. *Lord Anson*, 3 Russ. 488.

And where a railway company agreed to give the vendor

cash or, at the option of the company, such securities as should be agreed on, and the company gave him their bond, it was held that the lien remained. *Pell* v. *Midland & South Wales Ry. Co.*, 17 W. R. 506.

Where the consideration for a sale to a limited company was expressed to be 6000*l.*, to be paid as thereinafter mentioned, namely, 50 per cent. of the proceeds of sale of shares and 50 per cent. upon all borrowed capital until the payments amounted to 6000*l.*, it was held that there was no lien. *In re Brentwood Brick Co.*, 4 Ch. Div. 562, distinguishing *Gore & Durant's Case*, L. R. 2 Eq. 349.

The form of the deed of conveyance does not conclude the parties. Where the consideration was expressed to be 150*l.* paid, and the purchaser's acceptance for 300*l.* at three months, it was held upon the evidence that the vendor executed the conveyance upon the faith of having the 300*l.* secured by mortgage, and that he retained his lien for that amount. *Frail* v. *Ellis*, 16 B. 350.

2. Purchaser's lien for purchase-money prematurely paid.

2. Where a contract for sale of land goes off without any default of the purchaser, he is entitled to a lien on the vendor's interest in the land for all sums paid under the contract on account of purchase-money, with interest thereon at four per cent. *Burgess* v. *Wheate*, 1 Ed. 177, 211; *Wythes* v. *Lee*, 3 Drew. 396; on appeal, 2 Jur. N. S. 130; *Westmacott* v. *Robins*, 4 D. F. & J. 390, 399; *Rose* v. *Watson*, 10 H. L. C. 672; *Aberaman Ironworks* v. *Wickens*, 4 Ch. 101; *Rodger* v. *Harrison*, (1893) 1 Q. B. 161.

The lien extends to sums paid under the contract as interest on the unpaid balance of purchase-money (*a*), and to the costs of a suit for specific performance (*b*). (*a*) *Rose* v. *Watson*, 10 H. L. C. 672. (*b*) *Middleton* v. *Magnay*, 2 H. & M. 233; *Turner* v. *Marriott*, L. R. 3 Eq. 744.

Where a good title was not shown to property contracted to be sold, the Court, on a summons under the Vendor and Purchaser Act, charged the purchaser's costs of the summons, including the costs of investigating the title, on the vendor's interest in the property. *In re Yeilding & Westbrook*, 31 Ch. D. 344.

The lien of the purchaser who pays in advance arises at the time when the contract of sale becomes incapable of performance. *Rodger* v. *Harrison*, (1893) 1 Q. B. 161.

Purchaser of unfinished ship.

The purchaser of an unfinished ship, to be completed by the vendor under a contract by which an advance made to the vendor was to be taken as part payment of the purchase-money, was given a lien for the advance as against the trustee in bankruptcy of the vendor. *Swainston* v. *Clay*, 4 Giff. 187; 3 D. J. & S. 559, 569.

Partner entitled to rescind partnership.

A partner, entitled to rescind the contract of partnership, has a lien for the price paid by him for his share in the partnership upon the surplus assets of the partnership, after satisfying the partnership debts and liabilities. *Mycock* v. *Beatson*, 13 Ch. D. 384.

The lien of an unpaid vendor, or of a purchaser who pays in advance, is an equitable charge on the land, or on the vendor's interest in the land, as the case may be, giving precisely the same rights as an equitable charge arising under a contract. *Mackreth* v. *Symmons*, 15 Ves. 329; *Rose* v. *Watson*, 10 H. L. C. 672; *Shaw* v. *Foster*, L. R. 5 H. L. 321, 333.

A party to a contract who has expended money in part performance of it, and who subsequently, owing to the default of the other party, declines to carry it out, has no lien for his expenditure on a fund appropriated under the contract for making payments to him on events which have not arrived. *Wilson* v. *Church*, 13 Ch. Div. 1, 30.

Partner's Lien and Similar Liens.

Partner's lien on surplus assets.

A partner, on the dissolution of the partnership, has a lien on the surplus assets for whatever is due to him from his co-partner in respect of the partnership. *Ex parte King*, 17 Ves. 115; *Kelly* v. *Hutton*, L. R. 3 Ch. 703; *Mycock* v. *Beatson*, 13 Ch. D. 384; *Binney* v. *Mutrie*, 12 App. Cas. 160, 165.

The lien is confined to the assets of the partnership existing at the date of the dissolution. *Payne* v. *Hornby*, 25 B. 280.

In the absence of special contract, an incorporated trading

company has no lien on the shares of a member for a debt due from him to the company. *Pinkett* v. *Wright*, 2 Ha. 120, 130; *In re Kingstown Yacht Club*, 21 L. R. Ir. 199.

Lien of company under its articles of association.

A company under the Companies Acts is generally given by its articles of association a lien on any shares for all moneys due to the company from the shareholder, either alone or jointly with any other person. Such a lien is in effect an equitable charge arising from express contract. *In re General Exchange Bank*, 6 Ch. 818; *Everitt* v. *Automatic Weighing Machine Co.*, (1892) 3 Ch. 506.

Sums received by a shareholder in respect of his shares on a sale of the assets in a winding-up are subject to the lien. *In re General Exchange Bank*, 6 Ch. 818.

Power of forfeiting or refusing to transfer shares.

Powers given by the articles to a company of forfeiting shares for non-payment of debts due from the shareholder, or of refusing to transfer the shares of an indebted shareholder, do not give the company an equitable charge on the shares. *In re Dunlop*, 21 Ch. Div. 583.

"First and paramount lien."

There is no difference between a "lien" and a "first and paramount lien." A company which has a first and paramount lien has no priority over a mortgagee of shares for advances made to the shareholder after notice of the mortgage. *Bradford Banking Co.* v. *Briggs*, 12 App. Cas. 29.

Lien for moneys "due."

Where a company had a lien for all moneys due to them, and they discounted bills of exchange at three months, it was held that the amount of the bills became due when they were discounted. *In re London Banking Co.*, 34 B. 332.

Where a company had a lien for all moneys due to them from a member, and a power to sell any shares registered in the name of such debtor, it was held that due meant payable. *In re Stockton Malleable Iron Co.*, 2 Ch. D. 101.

Lien where shareholder is trustee.

The company has a lien for a debt of a registered shareholder, incurred after the registration of the shares, although he is only trustee of them. *New London & Brazilian Bank* v. *Brocklebank*, 21 Ch. Div. 302.

Presumably, a company could not claim a lien for a debt incurred by the shareholder after they had notice that he was a trustee. See *Bradford Banking Co.* v. *Briggs*, 12 App. Cas. 29.

A company has no lien for a debt due from a *cestui que trust* of the shares. *In re Perkins*, 24 Q. B. Div. 613. No lien for debt due from *cestui que trust.*

A company had a lien on shares for debts due from the shareholder alone or jointly with any other person. Shares standing in A.'s name became property of a partnership, of which A. was member, and which subsequently incurred a debt to the company. It was held that the company could not prove against the joint estate of the partnership without deducting the value of the shares, although they had no notice, when the debt was incurred, that the shares were partnership property. *In re Collie*, 3 Ch. Div. 481.

A transferee of shares upon which a company stops the dividend in order to satisfy its lien against the transferor is only entitled to rank as an ordinary creditor upon the transferor's estate. *In re M'Murdo*, 8 T. L. R. 507, (1892) W. N. 73.

Lien of Beneficiaries under a Trust.

An equitable lien may arise from the right of a *cestui que trust* to follow trust funds.

1. Where a trustee has mixed trust funds with his own, the *cestui que trust* is entitled to a charge on the aggregate mass for the amount of the trust funds so misapplied. *In re Knatchbull's Estate*, 13 Ch. Div. 696, 709. 1. Trustee mixing trust funds with his own.

Thus, where a trustee expends trust funds, together with money of his own, in the purchase of lands (*a*), or of post obit securities (*b*), the *cestui que trust* is entitled to a charge on the property purchased to the extent of the trust funds applied. (*a*) *Lewis* v. *Madocks*, 17 Ves. 48, 57; *Price* v. *Blakemore*, 6 B. 507; *Scales* v. *Baker*, 28 B. 91; *Hopper* v. *Conyers*, L. R. 2 Eq. 549; *Cave* v. *Cave*, 15 Ch. D. 639: *In re Pumfrey*, 22 Ch. D. 255; *In re Vernon, Ewens & Co.*, 32 Ch. D. 165; 33 Ch. Div. 402. (*b*) *Harford* v. *Lloyd*, 20 B. 310.

The onus lies on the trustee of showing how much of his own property went into the mass. *Lupton* v. *White*, 15 Ves. 432; *Frith* v. *Cartland*, 2 H. & M. 417.

The *cestui que trust* is also entitled to the excess in value

of the purchased property over the actual purchase-money. *Phayre* v. *Peree*, 3 Dow, 116; *In re Pumfrey*, 22 Ch. D. 255.

The right of the *cestui que trust* is an equitable estate in the land, and not merely a right of suit in equity. *Cave* v. *Cave*, 15 Ch. D. 639.

Rule applies to all persons in fiduciary position.

This rule is not confined to trustees, but applies to all persons in a fiduciary position, *e.g.* agents, bailees, collectors of rents, dealing with the property of the person towards whom they stand in that position. *In re Knatchbull's Estate*, 13 Ch. Div. 696; *Harris* v. *Truman*, 7 Q. B. D. 340; 9 Q. B. Div. 264; *New Zealand & Australian Land Co.* v. *Watson*, 9 Q. B. Div. 374; *Lyell* v. *Kennedy*, 14 App. Cas. 437, 457.

A stockbroker employed to sell stock is probably in a fiduciary position to his customer. *Taylor* v. *Plumer*, 3 M. & S. 562; *Ex parte Cooke*, 4 Ch. Div. 123.

Solicitor misapplying his client's moneys.

Where a solicitor represents to his client, from whom he has received money for investment generally, that it is invested in a particular security, he becomes a trustee for the client of any interest which he has in the security. *Middleton* v. *Pollock*, 4 Ch. D. 49; *Harpham* v. *Shacklock*, 19 Ch. D. 207; *In re Vernon, Ewens & Co.*, 33 Ch. Div. 402; *In re Richards*, 45 Ch. D. 589.

Where a solicitor employs moneys of his client in paying off a mortgage on the solicitor's estate, the client has a charge on the estate for the moneys employed. *Hopper* v. *Conyers*, L. R. 2 Eq. 549; *Re Crowdy*, 46 L. T. 71.

Agent receiving bribes.

Where an agent employed to buy goods receives bribes from vendors, he does not become a trustee of the moneys so received for his principal, although the principal can recover them by action. *Lister & Co* v. *Stubbs*, 45 Ch. Div. 1.

2. Trustee making improper investment.

2. Where a trustee makes an improper investment of trust funds, the *cestui que trust* can either adopt or repudiate the investment. If he repudiates it, he has a lien on the property produced by the investment for the amount of the trust funds invested. *Francis* v. *Francis*, 5 D. M. & G. 108, 120; *Trevillian* v. *Mayor of Exeter*, 5 D. M. & G. 828, 834; *In re Whiteley*, 33 Ch. Div. 347, 354.

3. Impound-

3. Where a trustee misappropriates trust money and has an

equitable interest under the trust-deed, the Court will not allow him to receive any part of the trust property in which he is equitably interested until he has made good his default as trustee. *In re Brown*, 32 Ch. D. 597.

ing equitable interest of trustee in trust property.

This rule extends to interests in the trust property taken by the trustee as next of kin of an intestate, or purchased by him. *Brandon* v. *Brandon*, 3 De G. & Jo. 524; *Jacubs* v. *Rylance*, 17 Eq. 341; *Doering* v. *Doering*, 42 Ch. D. 203.

The right to retain the beneficial interest of a trustee to satisfy a breach of trust committed by him may be enforced against a purchaser for value without notice from the trustee, and it may be enforced in respect of a breach of trust committed after the purchase. *Priddy v. Rose*, 3 Mer. 86, 104; *Morris* v. *Livie*, 1 Y & C. C. 380; *Barnett* v. *Sheffield*, 1 D. M. & G. 371; *Doering* v. *Doering*, 42 Ch. D. 203.

Where a trustee has under the instrument creating the trust a legal interest, which is not bound by the trust at all, a Court of Equity has no power to lay hold of that legal interest, or to assert anything in the nature of a lien or charge upon it in order to recoup the breach of trust. *Ex parte Barff*, De G. 613; *Egbert* v. *Butter*, 21 B. 560; *Fox* v. *Buckley*, 3 Ch. Div. 508; see *In re Brown*, 32 Ch. D. 597.

Legal interest cannot be impounded.

4. The Trustee Act, 1893 (56 & 57 Vict. c. 53), sect. 45, enables the Court, where a trustee commits a breach of trust at the instigation, or request, or with the consent in writing of a beneficiary, notwithstanding that the beneficiary is a married woman entitled for her separate use and restrained from anticipation, to impound all or any part of the interest of the beneficiary in the trust estate by way of indemnity to the trustee.

4. Impounding interest of beneficiary.

In order to bring a case within the section, the *cestui que trust* must instigate, or request, or consent in writing to some act or omission which is itself a breach of trust, and not to some act or omission which only becomes a breach of trust by reason of want of care on the part of the trustee. *In re Somerset*, (1894) 1 Ch. 231.

The words "in writing" in this section apply only to "consent." *Griffith* v. *Hughes*, (1892) 3 Ch. 105; *In re Somerset*, (1894) 1 Ch. 231, 265.

The right may be enforced against the assignee of a beneficiary under an assignment made before the order of the Court is obtained. *Bolton* v. *Curre*, (1895) 1 Ch. 544.

Impounding interest of married woman.

As to the exercise of the judicial discretion where the beneficiary is a married woman, see *Mara* v. *Manning*, 2 J. & Lat. 311; *Sawyer* v. *Sawyer*, 28 Ch. D. 595; *Ricketts* v. *Ricketts*, 64 L. T. 263; *Griffith* v. *Hughes*, (1892) 3 Ch. 105; *Bolton* v. *Curre*, (1895) 1 Ch. 544. In the three last cases, she was also restrained from anticipation.

As to the right to indemnity of a trustee who has concurred with his co-trustee in a breach of trust, where the co-trustee is also a *cestui que trust*, see *Chillingworth* v. *Chambers*, (1896) 1 Ch. 685.

5. Lien on life estate for arrears of interest.

5. Where a tenant for life has failed to keep down the interest on mortgages affecting the inheritance, the remainderman has a lien on his life estate (apparently, even where it is a legal estate) for the deficiency. *Waring* v. *Coventry*, 2 M. & K. 406; *Coote* v. *O'Reilly*, 1 J. & Lat. 455.

Liens arising from Right of Indemnity.

Lien of trustee on trust property.

A trustee has a right to indemnity out of the trust fund, and to a lien upon it, for expenses properly incurred by him in the execution of his trust and the preservation of the fund. For instance, he has a lien on policy-moneys of which he is trustee for premiums paid by him. *A. G.* v. *Mayor of Norwich*, 2 My. & Cr. 406, 424; *Morison* v. *Morison*, 7 D. M. & G. 214; *In re Leslie*, 23 Ch. D. 552, 560; *Staniar* v. *Evans*, 34 Ch. D. 470, 477; *Sewell* v. *Bishopp*, 62 L. J. Ch. 985.

Costs, charges, and expenses, in respect of which he has a lien, include costs incurred to solicitors, although statute-barred, and whether the trustee has or has not yet paid them. *Budgett* v. *Budgett*, (1895) 1 Ch. 210.

Tenant for life renewing leaseholds.

A tenant for life of leaseholds who renews the leaseholds or purchases the reversion is a constructive trustee of the renewed lease or the reversion for the benefit of those who claim under the settlement. He is therefore entitled to a lien upon the

renewed lease (*a*), or the reversion (*b*), for so much of the purchase-moneys as represents expenditure of which the remaindermen have the benefit. (*a*) *Nightingale* v. *Lawson*, 1 B. C. C. 440; *White* v. *White*, 9 Ves. 554; *Giddings* v. *Giddings*, 3 Russ. 241; *Bradford* v. *Brownjohn*, L. R. 3 Ch. 711; *In re Lord Ranelagh's Will*, 26 Ch. D. 590. (*b*) *Phillips* v. *Phillips*, 29 Ch. Div. 673.

A trustee, who spends money of his own and money belonging to the trust in buying property which is within the terms of the trust, is entitled (subject to the right of the beneficiaries to have the trust funds replaced) to a lien on the property for his own expenditure. Any profit on the transaction goes to the trust. *Mathias* v. *Mathias*, 3 Sm. & Giff. 552; *In re Pumfrey*, 22 Ch. D. 255.

A trustee upon trust to raise money by mortgage has no lien on the estate for his costs of getting a transfer of the mortgage, though the original mortgagees are threatening to call in the money. *Sewell* v. *Bishopp*, 62 L. J. Ch. 615.

Trustees of voidable settlement.

The trustees of a voluntary settlement, which is avoided under the bankruptcy law, have a lien on the trust funds for their costs of an unsuccessful action by the settlor to set aside the settlement on the ground of undue influence (*a*), but not for their costs of defending the settlement against the trustee in bankruptcy (*b*). (*a*) *In re Holden*, 20 Q. B. D. 43. (*b*) *Elsey* v. *Cox*, 26 B. 95; *Ex parte Russell*, 19 Ch. Div. 588; see *Dutton* v. *Thompson*, 23 Ch. Div. 278.

Trustee of void settlement.

The trustee of a settlement which is void *ab initio*, *e.g.* as being an act of bankruptcy, has no lien upon the trust funds for expenses incurred in relation to the trust. *Smith* v. *Dresser*, L. R. 1 Eq. 651.

Lien of executor carrying on business.

An executor carrying on business under the terms of the testator's will is entitled to be indemnified for expenses properly incurred by him in carrying it on out of the assets specifically appropriated by the will to carry it on, or acquired by the executor in the course of carrying it on, as against the beneficiaries under the will. *Ex parte Garland*, 10 Ves. 110; *Dowse* v. *Gorton*, (1891) A. C. 190.

He is entitled to a like indemnity as against the creditors of

his testator, if they have assented to his carrying on the business. *Dowse* v. *Gorton*, (1891) A. C. 190.

As to the right to indemnity of a receiver carrying on business, see p. 261.

No lien for expenditure which could have been met out of trust funds.

A trustee has no lien on policy-moneys of which he is trustee for premiums paid by him out of his own pocket, and can give no lien to a person who has paid the premiums at his request, if he was, or ought to have been, in possession of trust funds available for payment of the premiums. *Clack* v. *Holland*, 19 B. 262, 275.

Lien is confined to property on which expenditure is made.

The right of a trustee to a lien for expenditure is confined to the fund in respect of which the expenditure is incurred. *Fraser* v. *Murdoch*, 6 App. Cas. 855; *In re Earl of Winchilsea's Policy Trusts*, 39 Ch. D. 168.

An executor carrying on business under a will has no right to indemnity out of the general assets of the testator. He is confined to the assets appropriated by the testator to carrying on the business. *Ex parte Garland*, 10 Ves. 110; *Ex parte Richardson*, Buck, 202; *Cutbush* v. *Cutbush*, 1 B. 184; *McNeillie* v. *Acton*, 4 D. M. & G. 745.

A trustee of two legacies has no right to indemnity out of the fund set apart to answer one legacy for calls on shares in an unlimited company, which have been appropriated in respect of the other legacy. *Fraser* v. *Murdoch*, 6 App. Cas. 855.

Lien is confined to property subject to trust.

A trustee of a term of years in land who was bound to apply the rents (*inter alia*) in paying the premiums on a policy effected by the tenant for life of the land on his own life, and who, the rents being insufficient, paid a premium out of his own moneys, was held to have no lien on the policy-moneys as against the tenant for life for the premium so paid. *In re Earl of Winchilsea's Policy Trusts*, 39 Ch. D. 168,

Right to be indemnified by beneficiary.

The right of a trustee to indemnity out of the trust fund must be distinguished from his personal right of indemnity as against a *cestui que trust*, at whose request he has undertaken the duties of trustee. This right may exist though there is no specific trust fund out of which he can be indemnified. *Balsh* v. *Hyham*, 2 P. W. 453; *Ex parte Chippendale*, 4 D. M. &

G. 19; *Labouchere* v. *Tupper*, 11 Moo. P. C. 198; *Jervis* v. *Wolferstan*, 18 Eq. 18; *Strickland* v. *Symons*, 26 Ch. Div. 245.

Subrogation to trustee's right of indemnity.

Any person who is employed by a trustee in reference to the trust property, or who at his request has advanced money to preserve it, is subrogated to the trustee's right of indemnity. He has no higher right than the trustee himself would have had, and is subject to all equities available against the trustee. *Todd* v. *Moorhouse*, 19 Eq. 69; *Staniar* v. *Evans*, 34 Ch. D. 470; *Patten* v. *Bond*, 60 L. T. 583.

Creditors of an executor in respect of debts incurred by him in carrying on the testator's business are subrogated to his right of indemnity. They only stand in the place of the executor. Their right to payment out of the assets is subject to all equities of the beneficiaries against the executor. *Ex parte Garland*, 10 Ves. 110; *Cutbush* v. *Cutbush*, 1 B. 184; *Ex parte Edmonds*, 4 D. F. & J. 488, 498; *In re Johnson*, 15 Ch. D. 548; *In re Evans*, 34 Ch. Div. 597; *Dowse* v. *Gorton*, (1891) A. C. 190.

Solicitor employed by trustees.

A solicitor employed by trustees with respect to the trust estate has no lien on the trust estate for his costs. *Worrall* v. *Harford*, 8 Ves. 4; *Hall* v. *Laver*, 1 Ha. 571, 577; *Staniar* v. *Evans*, 34 Ch. D. 471, 477.

Owners of trade-mark.

Owners of a trade-mark have no lien on goods which bear a fraudulent trade-mark for the costs of proceedings to enforce their rights. *Moet* v. *Pickering*, 8 Ch. Div. 379, disapproving *Upmann* v. *Elkan*, 12 Eq. 140; 7 Ch. 130.

Liens for Expenditure on Another's Property.

Expenditure on property by a stranger, or liabilities incurred by him in respect of it, give him (in the absence of contract) no lien on the property as against the owner. *Burridge* v. *Row*, 1 Y. & C. C. 183; *In re Leslie*, 23 Ch. D. 552; *Falcke* v. *Scottish Imperial Insurance Co.*, 34 Ch. Div. 234; *Strutt* v. *Tippett*, 61 L. T. 460; 62 L. T. 475.

Salvage expenditure gives no lien.

It is immaterial that the expenditure is for the preservation of the property. The doctrines of salvage and general average are doctrines of maritime law, and apply only to ships

and goods at peril on sea. *Hartfort* v. *Jones*, 1 Ld. Raym. 393; *Nicholson* v. *Chapman*, 2 H. Bl. 254; *Castellain* v. *Thompson*, 13 C. B. N. S. 105; *Aitchison* v. *Lohre*, 4 App. Cas. 755, 760; *Falcke* v. *Scottish Imperial Insurance Co.*, 34 Ch. Div. 234.

Although expenditure by a stranger does not give him any active lien, the Court may refuse to assist the owner to recover the property, except on the terms of his making an allowance for the expenditure. See *per* Lord Macnaghten in *Peruvian Guano Co.* v. *Dreyfus Brothers & Co.*, (1892) A. C. 170 *n.*, 174 *n.*

Expenditure by part owner gives no lien.

Expenditure on property or liabilities incurred in respect of property by a part owner, *e.g.*, a tenant for life, give him no lien on the property as against the other owners. *Caldecott* v. *Brown*, 2 Ha. 144; *Pennell* v. *Millar*, 23 B. 172; *Floyer* v. *Bankes*, 8 Eq. 115; *Norris* v. *Caledonian Insurance Co.*, 8 Eq. 127; *In re Leslie*, 23 Ch. D. 552.

As to the lien of mortgagees for expenditure on the mortgaged property, see *Gill* v. *Downing*, 30 L. T 157.

Expenditure by mortgagor,

Expenditure by the mortgagor on the mortgaged property does not give him any charge upon it in priority to the mortgagee. *Langton* v. *Langton*, 7 D. M. & G. 30, 41; *Saunders* v. *Dunman*, 7 Ch. D. 825; *Falcke* v. *Scottish Imperial Insurance Co.*, 34 Ch. Div. 234; *Drew* v. *Josolyne*, 18 Q. B. Div. 590.

Similarly, a mortgagor paying premiums on a policy acquires no charge against the mortgagee. *Falcke* v. *Scottish Imperial Insurance Co.*, *supra*, overruling *Shearman* v. *British Empire Assurance Co.*, 14 Eq. 4; see also *Norris* v. *Caledonian Insurance Co.*, 8 Eq. 127.

A mortgagor of renewable leaseholds who buys the reversion is not entitled to a lien for the purchase-money as against the mortgagee of the lease. *Leigh* v. *Burnett*, 29 Ch. D. 231.

by puisne mortgagee,

The same rule applies to all persons claiming under the mortgagor. Thus, a second mortgagee in possession who expends money in improving or protecting the mortgaged property, has no lien for his expenditure against the first mortgagee. *Landowners West of England Co.* v. *Ashford*, 16 Ch. D. 411, 433.

A liquidator of a company, who, under the sanction of the Court, spends money to secure a fund which the company has mortgaged, has no claim against the mortgagees for the money spent. *Lee & Chapman's Case*, 30 Ch. Div. 216, 225; see *In re Ormerod, Grierson & Co.*, (1890) W. N. 217. by liquidator of company.

And an equitable mortgagee of a reversion, in the purchase of which his advance has been applied, has no lien as against a mortgagee of a renewable lease, to which the reversion is an accretion. *Leigh* v. *Burnett*, 29 Ch. D. 231.

As to how far a consignee of a West Indian estate appointed by the mortgagor can acquire a lien as against the mortgagee, see *Fraser* v. *Burgess*, 13 Moo. P. C. 314; *Bertrand* v. *Davies*, 31 B. 429, 443. Consignee of West Indian estate.

One tenant in common has no lien on the share of another for moneys expended on, or liabilities incurred in respect of, the property held in common. *Ex parte Young*, 2 V. & B. 242; *Ex parte Harrison*, 2 Rose, 76; *Green* v. *Briggs*, 6 Ha. 395, 401; *Kay* v. *Johnston*, 21 B. 536, overruling *Doddington* v. *Hallett*, 1 Ves. S. 479. Expenditure by tenant in common.

The cases must be distinguished in which, in a partition action, the Court will not allow one tenant in common to take the benefit of improvements and repairs done by another without making an allowance to the extent to which the value of his share has been thereby increased. *Swan* v. *Swan*, 8 Pri. 518; *Teasdale* v. *Sanderson*, 33 B. 534; *Leigh* v. *Dickeson*, 15 Q. B. Div. 60; *In re Jones*, (1893) 2 Ch. 461; *In re Cook's Mortgage*, (1896) 1 Ch. 923.

In Ireland a different doctrine prevails as to salvage expenditure. It has been held there, on the authority of *Hibbert* v. *Cooke* (1 S. & St. 552) and *Dent* v. *Dent* (30 B. 363), that the Court had jurisdiction to give a charge to a tenant for life in respect of salvage expenditure. *Gilliland* v. *Crawford*, I. R. 4 Eq. 35; *Ferguson* v. *Ferguson*, 17 L. R. Ir. 552; see *In re De Teissier's Trusts*, (1893) 1 Ch. 159. Irish doctrine of salvage expenditure.

Even in Ireland, expenditure by a stranger gives him no lien. A salvage lien can only be obtained by a person who has an interest in the property salved. *Angell* v. *Bryan*, 2 J. & Lat. 763; *Fetherstone* v. *Mitchell*, 11 Ir. Eq. 35; *Locke*

v. *Evans*, 11 Ir. Eq. 52; *O'Geran* v. *McSwiney*, I. R. 8 Eq. 500; *O'Loughlin* v. *Dwyer*, 13 L. R. Ir. 75.

Lien by estoppel.

Expenditure by a stranger may give him a lien on the principle of estoppel.

In order that this principle may apply, first, the stranger must make the expenditure in the erroneous belief that he has a title to the property on which it is made, and, secondly, the person against whom the estoppel is raised must know, (*a*) that the stranger acts in the belief that he has a title, and (*b*) that the title on the faith of which he is acting is a bad one. *East India Co.* v. *Vincent*, 2 Atk. 83; *Dann* v. *Spurrier*, 7 Ves. 231; *Duke of Beaufort* v. *Patrick*, 17 B. 60; *Dillwyn* v. *Llewelyn*, 4 D. F. & J. 517; *Unity Banking Association* v. *King*, 25 B. 72; *Ramsden* v. *Dyson*, L. R. 1 H. L. 129; *Plimmer* v. *Mayor of Wellington*, 9 App. Cas. 699; *Falcke* v. *Scottish Imperial Insurance Co.*, 34 Ch. Div. 234, 242.

CHAPTER IX.

LIEN OF BILL-HOLDERS UNDER A DOUBLE INSOLVENCY.

"WHERE, as between the drawer and the acceptor of a bill of exchange, a security has by virtue of the contract between them been specifically appropriated to meet that bill at maturity, and has been lodged for that purpose by the drawer with the acceptor, then, if both drawer and acceptor become insolvent, and their estates are brought under a forced administration, the bill-holder, though neither party nor privy to the contract, is entitled to have the specifically appropriated security applied in or towards payment of the bill." Eddis on the Rule in *Ex parte Waring*, p. 5, cited by Esher, M.R., in *Ex parte Dever*, 14 Q. B. Div. 611, 620. Rule in *Ex p. Waring* (2 Rose, 182; 19 Ves. 445).

The rule applies although the bill-holders, when they discounted the bills, had no knowledge of the existence of the securities, the benefit of which they claim. *In re General Rolling Stock Co.*, 4 Ch. 423, 429.

The rule apparently does not apply if, on taking the account between the drawers and the acceptors, the balance is against the drawers. *Hickie & Co.'s Case*, 4 Eq. 226.

The rule applies, not only where a security is appropriated to meet a particular bill, but also where there has been a general appropriation of securities to meet all the bills drawn by A. upon B. *City Bank* v. *Luckie*, 5 Ch. 773; *Ex parte Dever*, (No. 2) 14 Q. B. Div. 611. Rule applies where there is general appropriation.

As to what amounts to a specific appropriation, see *Inman* v. *Clare*, Joh. 769; *Ex parte Ackroyd*, 3 D. F. & J. 726; *Trimingham* v. *Maud*, 7 Eq. 201; *Ex parte Smart*, 8 Ch. 220; *Ex parte Gomez*, 10 Ch. 639; *Ex parte Banner*, 2 Ch. Div. 278; *In re Gothenburg Commercial Co.*, 29 W. R. 358; *Ex*

parte Broad, 13 Q. B. Div. 740; *Ex parte Dever*, (No. 2) 14 Q. B. Div. 611.

Rule only applies where there is double insolvency.

In order that the rule may apply, there must be a double insolvency, and both estates must be in course of administration by the Court, but it is not necessary that the administration should be in bankruptcy. *Powles* v. *Hargreaves*, 3 D. M. & G. 430; *Hickie & Co.'s Case*, 4 Eq. 226, 231; *Ex parte General South American Co.*, 10 Ch. 635; *Ex parte Gomez*, 10 Ch. 639, 647; *Ex parte Dever*, (No. 2) 14 Q. B. Div. 611.

Until the double insolvency takes place, the parties to the contract under which the securities are specifically appropriated are entitled to deal with them as they think fit. The bill-holders are only entitled to securities remaining in specie at the time of the insolvency. *In re General Rolling Stock Co.*, 4 Ch. 423; *Ex parte Lambton*, 10 Ch. 405; *Ex parte Dever*, (No. 2) 14 Q. B. Div. 611; see *Ex parte Carrick*, 2 De G. & Jo. 208.

Rule only applies where there is right of double proof.

The rule does not apply unless the bill-holders have a right of double proof. It does not apply, therefore, where the depositee has not accepted the bills. *Vaughan* v. *Halliday*, 9 Ch. 561.

But the rule is not confined to cases where the right of proof is on the bills. It has been applied where the holder was himself the drawer, and where he was entitled to prove both against the acceptor, who had accepted for the accommodation of a firm to whom the drawer of the bill had sold goods, and against the firm for goods sold and delivered. *Ex parte Smart*, 8 Ch. 220.

Rule applies though securities are insufficient.

The rule applies although the securities in the hands of the depositee are insufficient to meet the whole demand of the bill-holders, and they may prove against the insolvent estates for the difference. *Powles* v. *Hargreaves*, 3 D. M. & G. 430; *In re Barned's Banking Co.*, 10 Ch. 198; see *Royal Bank of Scotland* v. *Commercial Bank of Scotland*, 7 App. Cas. 366.

Where the drawers and acceptors are engaged in a joint adventure, the right of the bill-holders is subject to the right of the joint creditors of the aggregate of the two firms to be paid their debts out of the aggregate estate. *Ex parte Dewhurst*, 8 Ch. 965.

CHAPTER X.

LIENS CREATED BY JUDGMENTS.

THE Judgments Act, 1838 (1 & 2 Vict. c. 110), provides in effect (sect. 13), that a judgment thereafter entered up against any person in any of the superior courts at Westminster shall operate as a charge upon all real property to which he shall then or afterwards be entitled for any estate or interest, or over which he shall have any disposing power for his own benefit, and shall be binding as against him and all persons claiming under him or whom he might debar from any interest in the property; and every judgment creditor shall have the same remedies in a court of equity against the hereditaments charged by virtue of the Act as he would be entitled to in case the person against whom such judgment shall have been so entered up had power to charge the hereditaments, and had by writing under his hand agreed to charge the same with the amount of such judgment debt and interest thereon. Judgments Act, 1838, s. 13.

Sect. 18 provides that all decrees and orders of courts of equity, and all rules of courts of common law, and all orders of the Lord Chancellor in matters of lunacy, whereby any sum of money, or any costs, charges, or expenses, shall be payable to any person, shall have the effect of judgments in the superior courts of common law. S. 18.

An order, declaring that a defendant is liable to make good to an estate in course of administration in another suit a specific sum, but not ordering payment of that sum by the defendant (*a*), an order for payment into Court (*b*), an order for payment of costs out of a fund in Court (*c*), an award of money by an arbitrator, when the agreement for reference has been made a rule of Court (*d*) are not, but a decree for specific What orders are within the section.

performance, ordering the defendant to pay purchase-money, interest, and taxed costs (*e*), and an order directing payment of costs, to be taxed, by one person to another (*f*), are within the section. (*a*) *Garner* v. *Briggs*, 27 L. J. Ch. 483. (*b*) *Ward* v. *Shakeshaft*, 1 Dr. & Sm. 269. (*c*) *A. G.* v. *Nethercote*, 11 Sim. 529; *In re Marsden's Estate*, 40 Ch. D. 475. (*d*) *Jones* v. *Williams*, 8 M. & W. 349. (*e*) *Duke of Beaufort* v. *Phillips*, 1 De G. & Sm. 321. (*f*) *Taylor* v. *Roe*, (1894) 1 Ch. 413.

Judgment creditor takes subject to equities.

A judgment creditor takes subject to all equities. His charge under this Act is confined to such interest in the land charged as the debtor could honestly deal with at the creation of the charge. *Whitworth* v. *Gaugain*, 3 Ha. 416; 1 Ph. 728; *Beavan* v. *Earl of Oxford*, 6 D. M. & G. 507; *Kinderley* v. *Jervis*, 22 B. 1.

Judgments Act, 1864, s. 1.

The Judgments Act, 1864 (27 & 28 Vict. c. 112), provides (sect. 1) that no judgment, statute, or recognizance to be entered up after the 29th of July, 1864, shall affect any land (of whatever tenure) until such land shall have been actually delivered in execution by virtue of a writ of elegit or other lawful authority in pursuance of such judgment, statute, or recognizance.

The effect of the Judgments Act, 1864, is practically to repeal the Judgments Act, 1838, in regard to interests in land which cannot be delivered in execution. *In re Hamilton*, 31 Ch. Div. 291, 294; *Hood Barrs* v. *Cathcart*, (1895) 2 Ch. 411.

Delivery by writ of elegit.

The return of the sheriff to the writ is delivery in execution within the Act. *Champneys* v. *Burland*, 19 W. R. 148.

Where two judgment creditors issue writs of elegit, the writ first put into the hands of the sheriff has priority. *Guest* v. *Cowbridge Railway Co.*, 6 Eq. 619.

After an extent under one writ, the sheriff can take nothing under a subsequent writ. *Carter* v. *Hughes*, 2 H. & N. 714.

Delivery in execution means such delivery in execution as the subject-matter is capable of.

Receiver by way of equitable execution.

A writ of assistance, or sequestration, or the appointment of a receiver by way of equitable execution, is delivery in

execution within the section. *In re Rush*, 10 Eq. 442; *Hatton* v. *Haywood*, 9 Ch. 229; *Wells* v. *Kilpin*, 18 Eq. 298.

A receiver is regularly appointed by way of equitable execution, where a judgment creditor is unable to reap the benefit of his judgment at law by reason of the debtor's interest being equitable only. *Neate* v. *Duke of Marlborough*, 3 My. & Cr. 407; *Rhodes* v. *Lord Mostyn*, 17 Jur. 1007; *Anglo-Italian Bank* v. *Davies*, 9 Ch. Div. 275; *Cadogan* v. *Lyric Theatre, Limited*, (1894) 3 Ch. 338.

A receiver will be appointed by way of equitable execution, although the creditor has not issued a writ of elegit. *Ex parte Evans*, 13 Ch. Div. 252.

A receiver has also been appointed by way of equitable execution where the debtor's interest was legal, but there was a prior equitable incumbrancer. *In re Pope*, 17 Q. B. Div. 743.

But, as a rule, equitable relief will not be given by the appointment of a receiver where the creditor is able to issue execution at law. *In re Shephard*, 43 Ch. Div. 131, 136; *Holmes* v. *Millage*, (1893) 1 Q. B. 551; *Harris* v. *Beauchamp Bros.*, (1894) 1 Q. B. 801.

A receiver will not be appointed by way of equitable execution as against a person who is not a party to the action. *In re Shephard*, 43 Ch. Div. 131.

An order appointing a receiver upon his giving security operates as a delivery in execution as at the date when it is made, if it is afterwards perfected by the receiver giving security. *Ex parte Evans*, 13 Ch. Div. 252.

A receiver may now be appointed in proper cases by all divisions of the High Court on a motion or summons, without the necessity of a fresh action or suit on the judgment. *Anglo-Italian Bank* v. *Davies*, 9 Ch. Div. 275; *Smith* v. *Cowell*, 6 Q. B. Div. 75; *Salt* v. *Cooper*, 16 Ch. D. 544; *In re Peace & Waller*, 24 Ch. Div. 405.

In exceptional cases, a receiver may be appointed on an *ex parte* application. *Minter* v. *Kent and General Land Society*, 72 L. T. 186.

Order XLVI. of the Rules of the Supreme Court provides Charging

orders under the Judgments Acts.

(rule 1) that an order charging stock or shares may be made by any divisional court or by any judge, and the proceedings for obtaining such order shall be such as are directed, and the effect shall be such as is provided by the Acts 1 & 2 Vict. c. 110, ss. 14 and 15, and 3 & 4 Vict. c. 82, s. 1.

Judgments Act, 1838, s. 14.

The Judgments Act, 1838 (1 & 2 Vict. c. 110), provides (sect. 14) that a charging order shall entitle the judgment creditor to all such remedies as he would have been entitled to if such charge had been made in his favour by the judgment debtor, provided that no proceedings shall be taken to have the benefit of such charge until after the expiration of six calendar months from the date of such order.

Judgments Act, 1840, s. 1.

The Judgments Act, 1840 (3 & 4 Vict. c. 82), provides (sect. 1) that no order of any judge as to any stock, funds, annuities, or shares standing in the name of the accountant-general of the Court of Chancery, or as to the interest, dividends, or annual produce thereof, shall have any greater effect than if such debtor had charged such stock, funds, annuities, or shares, or the interest, dividends, or annual produce thereof, in favour of the judgment creditor with the amount of the sum to be mentioned in any such order.

A charging order may be made under the Judgments Act, 1838, sect. 14, and the Judgments Act, 1840, sect. 1, on the interest of any judgment debtor in any government stock, funds, or annuities, or any stock or shares of or in any public company in England (whether incorporated or not), standing in his name, in his own right, or in the name of any person in trust for him, or of the accountant-general of the Court of Chancery, or in the dividends, interest, and annual produce thereof.

"In his own right."

As to the meaning of "in his own right," see *Gill* v. *Continental Gas Co.*, L. R. 7 Ex. 332; *Re Blakely Ordnance Co.*, 25 W. R. 111; *Cooper* v. *Griffin*, (1892) 1 Q. B. 740; *Howard* v. *Sadler*, (1893) 1 Q. B. 1.

"In trust for him."

As to the meaning of "in the name of any person in trust for him," see *Cragg* v. *Taylor*, L. R. 9 Ex. 131; *Dixon* v. *Wrench*, L. R. 4 Ex. 154.

Charging

The Partnership Act, 1890 (53 & 54 Vict. c. 39), sect. 23,

enables the Court, on the application by summons of any judgment creditor of a partner, to make an order charging that partner's interest in the partnership property and profits with payment of the amount of the judgment debt and interest thereon. orders under the Partnership Act, 1890.

Under this section the Court has a jurisdiction to direct accounts, but the jurisdiction ought not to be exercised except in special circumstances. *Brown, Janson & Co.* v. *Hutchinson & Co.*, (1895) 2 Q. B. 126.

The Court has power, under its general jurisdiction, to make a charging order on cash standing to the credit of the debtor in an action in the Chancery Division. *Brereton* v. *Edwards*, 21 Q. B. Div. 488. Charging orders under general jurisdiction.

A charging order is confined to the debtor's beneficial interest in the property charged, and is subject to all equities available against him when the order *nisi* is made. *Scott* v. *Lord Hastings*, 4 K. & J. 633; *Gill* v. *Continental Gas Co.*, L. R. 7 Ex. 332; *Re Bell*, 54 L. T. 370; *In re Leavesley*, (1891) 2 Ch. 1. Charging order subject to equities.

A charging order, when made absolute, takes effect as from the date of the order *nisi*. *Haly* v. *Barry*, L. R. 3 Ch. 452 (correcting *Warburton* v. *Hill*, Kay, 470); *Brereton* v. *Edwards*, 21 Q. B. Div. 488.

Where notice of a charging order *nisi* has been given to the Paymaster-General, it is unnecessary to obtain a stop-order. *Brereton* v. *Edwards*, 21 Q. B. Div. 488.

A charging order can only be given for an ascertained sum, and not for costs, charges, and expenses, until they have been taxed. *Jones* v. *Williams*, 8 M. & W. 349; *Chadwick* v. *Holt*, 8 D. M. & G. 584; *Widgery* v. *Tepper*, 6 Ch. Div. 364.

A charging order may be validly made upon property of a lunatic, but it does not deprive the Court of its power to dispose for the benefit of the lunatic of the funds under its control and belonging to him when the order is made. *Horne* v. *Pountain*, 23 Q. B. D. 264; *In re Leavesley*, (1891) 2 Ch. 1; *In re Plenderleith*, (1893) 3 Ch. 332. Charging order on lunatic's property.

A charging order cannot be obtained upon a judgment for

a debt which was not due, *e.g.* money lent to an infant. *In re Onslow's Trusts*, 20 Eq. 677.

Garnishee orders.

Order XLV., rule 1, of the Rules of the Supreme Court, provides, in effect, that the Court or a judge may, upon the *ex parte* application of any person who has obtained a judgment or order for the recovery or payment of money, order that all debts owing or accruing from any third person indebted to the debtor liable under such judgment or order (thereinafter called the garnishee) to such debtor, shall be attached to answer the judgment or order.

Rule 2 provides—

Service of an order that debts, due or accruing to a debtor liable under a judgment or order, shall be attached, or notice thereof to the garnishee, in such manner as the Court or judge shall direct, shall bind such debts in his hands.

"Debts owing or accruing."

As to the meaning of "debts owing or accruing," see *Jones* v. *Thompson*, E. B. & E. 63; *Richardson* v. *Elmit*, 2 C. P. D. 9; *Hall* v. *Pritchett*, 3 Q. B. D. 215; *Howell* v. *Metropolitan District Ry. Co.*, 19 Ch. D. 506.

A garnishee order cannot be made on money in Court. *Stevens* v. *Phelips*, 10 Ch. 417; *Dolphin* v. *Layton*, 4 C. P. D. 130.

A garnishee order *nisi*, when served on the garnishee, creates a lien on the debt, and the garnishor is, as from that time, a secured creditor of the judgment debtor within the Bankruptcy Act, but the judgment creditor is not entitled to recover payment from the garnishee until the order is made absolute. *Holmes* v. *Tutton*, 5 E. & B. 65; *Emanuel* v. *Bridger*, L. R. 9 Q. B. 286; *Ex parte Joselyne*, 8 Ch. Div. 327; *In re Stanhope Silkstone Collieries Co.*, 11 Ch. Div. 160.

A garnishee order does not effect a transfer of the debt. The garnishor does not become a creditor of the garnishee. *Chatterton* v. *Watney*, 17 Ch. Div. 259; *In re Combined Weighing Machine Co.*, 43 Ch. Div. 99.

Garnishee order subject to equities.

A garnishee order binds only so much of the debt due from the garnishee as the judgment debtor can honestly deal with at the time of the service of the order *nisi*. *Hirsch* v. *Coates*, 18 C. B. 757; *In re General Horticultural Co.*, 32 Ch. D.

512; *Badeley* v. *Consolidated Bank*, 34 Ch. D. 536; 38 Ch. Div. 238; *Hancock* v. *Smith*, 41 Ch. Div. 456; *Davis* v. *Freethy*, 24 Q. B. Div. 519.

Hence, it is postponed to an equitable charge on the garnished debt, no notice of which has been given to the garnishee. *In re General Horticultural Co., supra.*

Receiver by way of equitable execution.

An order, appointing a receiver by way of equitable execution of a debt or fund in the hands of trustees, does not create a charge or lien on the fund, although notice of the order is given to the debtor or trustees. *In re Dickinson*, 22 Q. B. Div. 187; *Flegg* v. *Prentis*, (1892) 2 Ch. 428; *In re Potts*, (1893) 1 Q. B. 648; *Tyrrell* v. *Painton*, (1895) 1 Q. B. 202, 206.

Bankruptcy Act, 1883, ss. 45, 46.

The Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), restricts, in certain cases, the rights of creditors under an execution or attachment, as against the trustee in bankruptcy of the debtor (see sects. 45, 46).

An order *nisi* charging shares under the Judgments Act, 1838, is not within sect. 45. *In re Hutchinson*, 16 Q. B. D. 515.

S. 49.

Garnishee orders (*a*) and charging orders (*b*) are not "dealings or transactions" within sect. 49 of the Bankruptcy Act, 1883, and are therefore not protected by that section. (*a*) *Ex parte Pillers*, 17 Ch. Div. 653; (*b*) *In re O'Shea's Settlement*, (1895) 1 Ch. 325; *Wild* v. *Southwood*, 75 L. T. 388.

CHAPTER XI.

STATUTORY LIEN OF SOLICITORS.

Solicitors Act, 1860, s. 28.

THE Solicitors Act, 1860 (23 & 24 Vict. c. 127), provides—

Sect. 28. In every case in which an attorney or solicitor shall be employed to prosecute or defend any suit, matter, or proceeding in any court of justice, it shall be lawful for the Court or judge, before whom any such suit, matter, or proceeding has been heard or shall be depending, to declare such attorney or solicitor entitled to a charge upon the property recovered or preserved; and upon such declaration being made such attorney or solicitor shall have a charge upon and against and a right to payment out of the property, of whatsoever nature, tenure, or kind the same may be, which shall have been recovered or preserved through the instrumentality of any such attorney or solicitor, for the taxed costs, charges, and expenses of or in reference to such suit, matter, or proceeding; and it shall be lawful for such Court or judge to make such order or orders for taxation of and for raising and payment of such costs, charges, and expenses out of the said property as to such Court or judge shall appear just and proper; and all conveyances and acts done to defeat, or which shall operate to defeat, such charge or right shall, unless made to a *bonâ fide* purchaser for value without notice, be absolutely void and of no effect as against such charge or right: Provided always, that no such order shall be made by any such Court or judge in any case in which the right to recover payment of such costs, charges, and expenses is barred by any Statute of Limitations.

Sect. 3 of The Legal Practitioners (Ireland) Act, 1876 (39 & 40 Vict. c. 44), is identical with this section.

"Employed."

The solicitor must be employed by a party to the proceedings. *Greer* v. *Young*, 24 Ch. Div. 545; *Macfarlane* v. *Lister*, 37 Ch. Div. 88.

Thus, the town agent of the country solicitor who is employed cannot obtain a charging order. *Macfarlane* v. *Lister*, 37 Ch. Div. 88.

As to the rights of town agents apart from the Act, see *Peatfield* v. *Barlow*, 8 Eq. 61; *Cockayne* v. *Harrison*, 15 Eq. 298; *Lawrence* v. *Fletcher*, 12 Ch. D. 858.

A solicitor is employed within the Act if he is employed by a next friend on behalf of an infant who, when he comes of age, adopts the proceedings. *Baile* v. *Baile*, 13 Eq. 497; see *Bonser* v. *Bradshaw*, 30 L. J. Ch. 159; 4 Giff. 260; on appeal, 9 Jur. N. S. 1048; 10 W. R. 481; *Pritchard* v. *Roberts*, 17 Eq. 222.

"In any court of justice."

A charging order cannot be made for costs of an arbitration. *Macfarlane* v. *Lister*, 37 Ch. Div. 88.

"It shall be lawful."

The power to make an order is discretionary, and will not be exercised where the application is made after a great lapse of time. *Harrison* v. *Harrison*, 13 P. Div. 180, 185; *Roche* v. *Roche*, 29 L. R. Ir. 339.

As to procedure under the section, see p. 551.

A solicitor will not be given a charging order if his client is solvent and able to pay him (*a*); or where the solicitor has, pending the action, accepted a security for his costs on the fund to be recovered (*b*). (*a*) *Harrison* v. *Cornwall Minerals Ry. Co.*, 53 L. J. Ch. 596; *Jackson* v. *Smith*, 53 L. J. Ch. 972; *Harrison* v. *Harrison*, 13 P. Div. 180. (*b*) *Groom* v. *Cheesewright*, (1895) 1 Ch. 730.

Where costs in a suit have been ordered to be paid to a solicitor personally out of a fund in Court, he cannot afterwards obtain a charging order, unless, subsequently to the order, he has been discharged by his client. *In re Viney's Trust*, 18 L. T. N. S. 853; *Pilcher* v. *Arden*, 7 Ch. D. 318.

A charging order may be made in favour of a solicitor though he has ceased to be solicitor before judgment was delivered. *Clover* v. *Adams*, 6 Q. B. D. 622; *In re Wadsworth*, 29 Ch. D. 517.

The right to a charging order may be enforced by the personal representative of the solicitor (*a*), or by an assignee of the costs due (*b*). (*a*) *Baile* v. *Baile*, 13 Eq. 497; (*b*) *Briscoe* v. *Briscoe*, (1892) 3 Ch. 543.

"Such solicitor."

Where several solicitors are employed in the course of proceedings, they rank for costs inversely to the order of their employment. The solicitor who is employed when the fund is recovered is entitled to a charge in priority to his predecessor. *Cormack* v. *Beisly*, 3 De G. & Jo. 157; *In re Wadsworth*, 34 Ch. D. 155; *In re Knight*, (1892) 2 Ch. 368.

Charge not confined to client's interest.

The charge is not necessarily confined to the interest of the party who employs the solicitor. Where property is recovered or preserved by reason of the employment of a solicitor, he will be given a charge as against all persons for whose benefit it is recovered or preserved, although his client has only a partial or even no interest in it, and although some of the persons interested in it are not parties to the action, or are infants. *Bailey* v. *Birchall*, 2 H. & M. 371; *Bulley* v. *Bulley*, 8 Ch. Div. 479 (doubting *Berrie* v. *Howitt*, 9 Eq. 1); *Greer* v. *Young*, 24 Ch. Div. 545; *Charlton* v. *Charlton*, 49 L. T. 267; *Shevlin* v. *McGrane*, 17 L. R. Ir. 271; *Jackson* v. *Smith*, 53 L. J. Ch. 972; *Re Nicholas & Paine*, 61 L. T. 87; *Keeson* v. *Luxmoore*, 61 L. T. 199; *Pelsall Coal Co.* v. *L. & N. W. Ry. Co.*, 8 Ry. & Can. Tr. Cas. 146; *Scholey* v. *Peck*, (1893) 1 Ch. 709.

Where a solicitor is given a charge upon the beneficial interest of his client in trust property, the charge is subject to the right of the trustees to impound the beneficial interest in satisfaction of breaches of trust. *Faithfull* v. *Ewen*, 7 Ch. Div. 495, 499; *In re Harrald*, 52 L. J. Ch. 435; 53 L. J. Ch. 505.

Where a charging order is made upon property in which several parties are interested, the Court has no jurisdiction to throw the charge upon the interest of a person whose default has led to the costs being incurred. *Catlow* v. *Catlow*, 2 C. P. D. 362.

"Property."

A charge cannot be given on property not under the control of the Court. *Savage* v. *James*, I. R. 9 Eq. 357.

Property here includes property of all kinds, real and personal, corporeal and incorporeal, in possession and in remainder

or reversion. *Birchall* v. *Pugin*, L. R. 10 C. P. 397; *Foxon* v. *Gascoigne*, 9 Ch. 654, 660; *Dallow* v. *Garrold*, 14 Q. B. Div. 543, 546.

Money received by way of compromise is subject to the solicitor's lien. *Davies* v. *Lowndes*, 3 C. B. 808, 823; *White* v. *Pearce*, 7 Ha. 276; *Slater* v. *Mayor of Sunderland*, 33 L. J. Q. B. 37; *Ross* v. *Buxton*, 42 Ch. D. 190. Money received by way of compromise.

A charging order may be made on an annuity, settled to the separate use of a married woman, without power of anticipation. *In re Keane*, 12 Eq. 115.

A gross or annual sum payable to a divorced wife by her late husband, under sect. 32 of the Divorce and Matrimonial Causes Act, 1857, is property within the Act. *Harrison* v. *Harrison*, 13 P. Div. 180.

But the charge does not extend to alimony *pendente lite* which has been paid over to the wife's solicitor for the purpose of her maintenance. *Leete* v. *Leete*, 48 L. J. Mat. 61; *Cross* v. *Cross*, 43 L. T. 533, distinguishing *Ex parte Bremner*, 1 P. & D. 254. Alimony *pendente lite*.

Property is recovered where the plaintiff claims property and establishes a right to its ownership. *Jones* v. *Frost*, 7 Ch. 773; *Foxon* v. *Gascoigne*, 9 Ch. 654. "Recovered."

Where judgment is obtained in an action of detinue and execution issued without result, the plaintiff's solicitor in the action is entitled to a charging order upon the property, if it subsequently comes into the hands of his client. *Catlow* v. *Catlow*, 2 C. P. D. 362.

Where an action was brought by beneficiaries against trustee A. in respect of breaches of trust for which he was liable with his co-trustee B., and new trustees were appointed in the action, to whom a dividend was paid out of B.'s estate, which was being administered by the Court, it was held that the dividend was not recovered in the action, there being no evidence that A. would have misapplied it, if it had been paid to him. *Greer* v. *Young*, 24 Ch. Div. 545.

The defendant to an action presented a petition in bankruptcy against the plaintiff, and the registrar in bankruptcy ordered 300*l.* to be brought into Court by the plaintiff to abide

the orders of the Bankruptcy Court. The action was referred, and the order of reference provided that the arbitrator was to determine what should be done with the 300*l.* He ordered it to be paid out to the plaintiff. It was held that it was not recovered or preserved by the action. *Pierson* v. *Knutsford Estates Co.*, 13 Q. B. Div. 666.

Money paid into Court by a defendant as a condition of leave to defend is recovered by the plaintiff, although before judgment the parties enter into a collusive compromise. *Moxon* v. *Sheppard*, 24 Q. B. D. 627.

Money paid into Court by a defendant with a denial of liability and taken out by the plaintiff is recovered within the Act (*a*). It is not recovered, if the plaintiff proceeds with his action, and only part of the money in Court becomes payable to him (*b*). (*a*) *Clover* v. *Adams*, 6 Q. B. D. 622; *Emden* v. *Carte*, 19 Ch. Div. 311. (*b*) *Westacott* v. *Bevan*, (1891) 1 Q. B. 774.

Costs paid under order of the Court below, and ordered by the Court of Appeal to be refunded, are recovered within the Act. *Guy* v. *Churchill*, 35 Ch. Div. 489.

The attorney of the master of a ship in a suit for wages and disbursements against the registered owner was given a charge on certain shares in the ship, which the master had agreed to purchase, for the amount recovered in the suit. *Philippine*, L. R. 1 A. & E. 309; see *Pelsall Coal Co.* v. *L. & N. W. Ry. Co.*, 8 Ry. & Can. Tr. Cas. 146.

"Preserved." Property is preserved where the right of the defendant to its ownership is disputed, and that right has been vindicated by the proceedings. *Scholefield* v. *Lockwood*, 7 Eq. 83; *Foxon* v. *Gascoigne*, 9 Ch. 654.

Where property is not properly taken care of, but is liable to destruction or attack by third persons, proceedings taken by a plaintiff may result in its preservation. *Foxon* v. *Gascoigne*, 9 Ch. 654.

As to the preservation of property by an administration suit, see *Baile* v. *Baile*, 13 Eq. 497, 508; *Pinkerton* v. *Easton*, 16 Eq. 490.

The appointment of a receiver upon an interlocutory motion

before decree has been held to be a preservation of the property over which he was appointed. *Twynam* v. *Porter*, 11 Eq. 181.

Money paid into Court by a plaintiff as a security for the defendant's costs is not preserved in the action, if the plaintiff succeeds. *In re Wadsworth*, 29 Ch. D. 517.

Suit relating to easement.

Where a suit relates to some incident to property, *e.g.* a right of way or other easement, which the plaintiff seeks to establish, no property is recovered if the plaintiff establishes his claim, and no property is preserved if the defendant succeeds in resisting it. *Foxon* v. *Gascoigne*, 9 Ch. 654.

"Taxed costs."

A charging order can only be made for taxed costs. Where a solicitor delivered his bill in March, 1871, obtained a charging order on a fund in Court in January, 1873, and applied for payment out in April, 1874, it was held that his costs must be taxed. *De Bay* v. *Griffin*, 10 Ch. 291.

"Such suit, matter, or proceeding."

The charge will be confined to the costs of the particular action in which the property is recovered or preserved. *Hall* v. *Laver*, 1 Ha. 571, 577; *Ex parte Thompson*, 3 L. T. N. S. 317; *Wilson* v. *Round*, 4 Giff. 416.

The charging order must be limited to costs properly incurred for the recovery or preservation of the property. *Emden* v. *Carte*, 19 Ch. Div. 311; *Mackenzie* v. *Mackintosh*, 64 L. T. 318, 706.

"All conveyances and acts."

The effect of the decisions has been to give this proviso a retrospective operation, and to postpone all persons, who, with notice of an action, took an interest in property, the subject of the action, to the solicitor's claim for costs. Some doubt has been thrown on these decisions by expressions in *North* v. *Stewart*, 15 App. Cas. 452.

Assignments of subject-matter of action.

An assignee who has notice that the subject-matter of the assignment is the subject-matter of a suit is deemed to have notice of the existence of the solicitor's right to a lien. *Faithfull* v. *Ewen*, 7 Ch. Div. 495; *Cole* v. *Eley*, (1894) 2 Q. B. 180, 350.

Thus, assignments of a reversionary interest in property, a previous sale of which the assignor is seeking to set aside (*a*); of a beneficial interest under the will of a testator, whose

estate is being administered by the Court (*b*); of the equity of redemption in lands, the subject of a redemption action (*c*); of moneys payable under the terms of a compromise in an action (*d*), have been held void as against a charging order subsequently obtained by the solicitor of the assignor. (*a*) *Jones* v. *Frost*, 7 Ch. 773. (*b*) *Faithfull* v. *Ewen*, 7 Ch. Div. 495. (*c*) *Macfarlane* v. *Lister*, 37 Ch. Div. 88. (*d*) *Cole* v. *Eley*, (1894) 2 Q. B. 180, 350; *Paris*, (1896) P. 77.

The solicitor may, by his conduct at the time of the assignment, be estopped from enforcing his charge against the assignee. Compare *Faithfull* v. *Ewen*, 7 Ch. Div. 495, with *Macfarlane* v. *Lister*, 37 Ch. Div. 88.

A charging order on the proceeds of sale of a ship is subject to all maritime liens which could have been enforced in the suit by third persons, but has priority over a lien enforceable by the client. *Livietta*, 8 P. D. 209, explaining *Soblomsten*, L. R. 1 A. & E. 293; *Heinrich*, L. R. 3 A. & E. 505.

Claims of creditors against subject-matter of action.

All claims of creditors against property under the jurisdiction of the Court at the time when the charging order is made are postponed to the claim of the solicitor. *Shippey* v. *Grey*, 49 L. J. Q. B. 524; *Dallow* v. *Garrold*, 14 Q. B. Div. 543; *In re Suffield & Watts*, 20 Q. B. Div. 693.

A charging order *nisi* on a fund in Court (*a*), a garnishee order *nisi* on a fund in Court (*b*), on moneys in the hands of a receiver in an action (*c*), on a judgment debt (*d*), on an execution in the hands of a sheriff (*e*), and a claim of a landlord for payment of rent out of moneys in the hands of a receiver in an action (*f*), are postponed to a subsequent charging order under the Solicitors Act. (*a*) *Haymes* v. *Cooper*, 33 B. 431. (*b*) *Jeff Davis*, L. R. 2 A. & E. 1. (*c*) *Hamer* v. *Giles*, 11 Ch. D. 942, 945. (*d*) *Birchall* v. *Pugin*, L. R. 10 C. P. 397; *Leader*, L. R. 2 A. & E. 314; *Eisdell* v. *Coningham*, 28 L. J. Ex. 213; *Shippey* v. *Grey*, 49 L. J. Q. B. 524. (*e*) *Dallow* v. *Garrold*, 13 Q. B. D. 543; 14 Q. B. Div. 543. (*f*) *In re Suffield & Watts*, 20 Q. B. Div. 693.

A charging order under the Solicitors Act does not avoid a previous arrestment *ad fundandam jurisdictionem* in Scotland of a judgment debt due to the solicitor's client

from a domiciled Scotchman. *North* v. *Stewart*, 15 App. Cas. 452.

Order LXV., rule 14, provides— Order LXV., rule 14.

A set-off for damages or costs between parties may be allowed, notwithstanding the solicitor's lien for costs in the particular cause or matter in which the set-off is sought.

As to set-off of damages recovered in different actions, see *Ex parte Cleland*, L. R. 2 Ch. 808; *In re Bank of Hindustan*, L. R. 3 Ch. 125; *Mercer* v. *Graves*, L. R. 7 Q. B. 499; *Edwards* v. *Hope*, 14 Q. B. Div. 922. Set-off of damages recovered in different actions.

Where a claim and counterclaim are founded upon the same contract, the amounts recovered in both may be set off without regard to the solicitor's lien. *Westacott* v. *Bevan*, (1891) 1 Q. B. 774; but see *Stumore* v. *Campbell*, (1892) 1 Q. B. 314, 317.

Costs arising in the same action will be set off without regard to the solicitor's lien. *Bawtree* v. *Watson*, 2 Kee. 713; *Cattell* v. *Simons*, 6 B. 304; *Robarts* v. *Buèe*, 8 Ch. D. 198; *Pringle* v. *Gloag*, 10 Ch. D. 676; *McCormack* v. *Ross*, (1894) 2 I. R. 545. Set-off of costs in same action.

The Court will not allow costs in different actions to be set off to the prejudice of the solicitor's lien. *Wright* v. *Mudie*, 1 Si. & St. 266; *Collett* v. *Preston*, 15 B. 458; *Throckmorton* v. *Crowley*, L. R. 3 Eq. 196; *Ex parte Griffin*, 14 Ch. Div. 37; *Edwards* v. *Hope*, 14 Q. B. Div. 922; *Blakey* v. *Latham*, 41 Ch. D. 518; *Hassell* v. *Stanley*, (1896) 1 Ch. 607, 610. No set-off of costs in different actions.

A *bonâ fide* compromise between the parties to an action will not be interfered with, although it operates to deprive the solicitor of a fund for payment of costs. *Brunsdon* v. *Allard*, 2 E. & E. 19; *Ex parte Morrison*, L. R. 4 Q. B. 153; *Hope*, 8 P. Div. 144. Effect of *bonâ fide* compromise.

It is immaterial that the compromise was made without the knowledge and acquiescence of the solicitor. *Hope*, 8 P. Div. 144.

In *Twynam* v. *Porter* (11 Eq. 181), the compromise was made after the preservation of the property by the appointment of a receiver.

Where a *bonâ fide* compromise has been entered into, under

which a sum of money is coming to A. from B., and A.'s solicitor, after the compromise, gives notice to B. that he has a lien for costs, B., if he pays over the money to A. in disregard of that notice, will be liable to pay it again to A.'s solicitor. *Welsh* v. *Hole*, 1 Doug. 238; *Read* v. *Dupper*, 6 T. R. 361; *Ormerod* v. *Tate*, 1 East, 463; *White* v. *Pearce*, 7 Ha. 276; *Ross* v. *Buxton*, 42 Ch. D. 190.

Effect of collusive compromise

A collusive compromise made in order to defeat the solicitor's lien is void as against him. *Ex parte Games*, 3 H. & C. 294; *Hope*, 8 P. Div. 144; *Moxon* v. *Sheppard*, 24 Q. B. D. 627; *Price* v. *Crouch*, 60 L. J. Q. B. 767.

"barred by any Statute of Limitations."

The Statute of Limitations does not run against the solicitor while the proceedings are going on, and he is the solicitor on the record. *Harris* v. *Quine*, L. R. 4 Q. B. 653; *Baile* v. *Baile*, 13 Eq. 497, 509.

CHAPTER XII.

MARITIME LIENS.

Definition of maritime lien.

"A MARITIME lien does not include or require possession. The word is used in maritime law, not in the strict legal sense in which we understand it in courts of common law—in which case there could be no lien where there was no possession, actual or constructive, but to express, as if by analogy, the nature of claims which neither presuppose nor originate in possession. This was well understood in the civil law, by which there might be a pledge with possession, and a hypothecation without possession, and by which, in either case, the right travelled with the thing into whosesoever possession it came. Having its origin in this rule of the civil law, a maritime lien is well defined by Lord Tenterden to mean a claim or privilege upon a thing to be carried into effect by legal process; and Mr. Justice Story explains that process to be a proceeding *in rem*, and adds that wherever a lien or claim is given upon the thing, then the Admiralty enforces it by a proceeding *in rem*, and, indeed, is the only Court competent to enforce it." *Bold Buccleugh*, 7 Moo. P. C. 267, 284.

Maritime lien adheres to ship.

A maritime lien adheres to the ship from the time that the events happen that gave rise to the lien, and continues binding on the ship until it is discharged. *Bold Buccleugh*, 7 Moo. P. C. 267; *Two Ellens*, L. R. 4 P. C. 161, 169; *Sara*, 14 App. Cas. 209.

It is, however, not indelible, and may be lost by negligence or delay, by which the rights of third parties may be compromised. *Europa*, Br. & Lush, 89; 2 Moo. P. C. N. S. 1; *Charles Amelia*, L. R. 2 A. & E. 330; *Fairport*, 8 P. D. 54; *Kong Magnus*, (1891) P. 223.

A maritime lien is not enforceable against the public vessel of a foreign state, though it may be used for trading purposes. *Parlement Belge*, 4 P. D. 129; 5 P. Div. 197.

There can be no lien on freight unless there is also a lien on ship. *Smith* v. *Plummer*, 1 B. & Ald. 575; *Castlegate*, (1893) A. C. 38, 54.

Lien based on owner's liability.

A proper maritime lien (with the exception of the lien for wages of master and crew) must have its root in the personal liability of the ship-owner at the time when it arises. *Castlegate*, (1893) A. C. 38.

Lien enforceable by proceedings *in rem*.

A maritime lien is enforceable by proceedings *in rem*. A proceeding *in rem* is "a proceeding directed against a ship or other chattel, in which the plaintiff seeks either to have the *res* adjudged to him in property or possession, or to have it sold under the authority of the Court, and the proceeds or part thereof adjudged to him in satisfaction of his pecuniary claims." *Henrich Björn* 11 App. Cas. 270, 276; see also *Castrique* v. *Imrie*, L. R. 4 H. L. 414; *City of Mecca*, 5 P. D. 28; 6 P. Div. 106; *Dictator*, (1892) P. 304.

Although a maritime lien is enforceable by proceedings *in rem*, it does not follow that every claim enforceable by proceedings *in rem* is based upon a maritime lien. *Mary Ann*, L. R. 1 A. & E. 8; *Two Ellens*, L. R. 4 P. C. 161; *Pieve Superiore*, L. R. 5 P. C. 482; *Henrich Björn*, 10 P. D. 44; 11 App. Cas. 270; *Cella*, 13 P. Div. 82; *Sara*, 14 App. Cas. 209.

Rights of creditors in unsecured claim.

Where the remedy by proceedings *in rem* is given to creditors of the ship owner for maritime debts which are not secured by lien, the attachment of the ship by process of the Court has the effect of giving the creditor a legal nexus over the proprietary interest of his debtor as from the date of the attachment. "The position of the creditor who has a proper maritime lien differs from that of a creditor in an unsecured claim in this respect—that the former, unless he has forfeited the right by his own laches, can proceed against the ship, notwithstanding any change in her ownership, whereas the latter cannot have an action *in rem* unless at the time of its institution the *res* is the property of his debtor." *Henrich Björn*, 11 App. Cas. 270, 277.

The creditor in an unsecured claim acquires a lien at the time when the ship is seized, subject to all incumbrances then existing on the ship, but prior to any claims subsequently arising. *Cella*, 13 P. Div. 82.

Salvage creates a maritime lien when the salvage arises on the high seas, and perhaps the lien extends, since 3 & 4 Vict. c. 65, to cases where the salvage arises within the body of a county. *Henrich Björn*, 11 App. Cas. 270, 282. Salvage lien.

As to what may be the subject-matter of a salvage claim, see *Gas Float Whitton No. 2*, (1896) P. 42.

As to life salvage, see sect. 544 of the Merchant Shipping Act, 1894.

The property actually benefited is alone chargeable with the salvage recovered. Hence, ship is not liable for the salvage of cargo. *Pyrennee*, Br. & Lush. 189; *Mary Pleasants*, Swa. 224; *Raisby*, 10 P. D. 114.

No claim for salvage can arise where services, in themselves of a salvage nature, are performed by persons bound by a pre-existing contract or pre-existing duty to perform them (*a*), or where persons are employed to perform them under an ordinary contract, the remuneration for which does not depend on success (*b*). (*a*) *Neptune*, 1 Hagg. Adm. 227; *Hannibal*, L. R. 2 A. & E. 53. (*b*) *Solway Prince*, (1896) P. 120.

As to the validity of an agreement to abandon the salvage lien, see sect. 554 of the Merchant Shipping Act, 1894.

There is no lien for towage, as distinguised from salvage services. *Westrup* v. *Great Yarmouth Steam Carrying Co.*, 43 Ch. D. 241, not following *Isabella*, 3 Hagg. Adm. 427; *Constancia*, 4 N. of C. 512; *St. Lawrence*, 5 P. D. 250. No lien for towage.

Damage by collision creates a maritime lien on the ship causing the collision (*a*), and the lien probably arises even if the collision takes place in the body of a county (*b*). (*a*) *Bold Buccleugh*, 7 Moo. P. C. 267; *Stoomvaart Maatschappy Nederland* v. *P. & O. Steam Navigation Co.*, 7 App. Cas. 795, 817; *Currie* v. *M'Knight*, 13 T. L. R. 53. (*b*) *Henrich Björn*, 11 App. Cas. 276, 282; *Sara*, 14 App. Cas. 209, 216. Lien for damage by collision.

There can be no lien on the ship unless the owners, at the

time of the collision, are personally liable. *Castlegate*, (1893) A. C. 38, 52; *Utopia*, (1893) A. C. 492, 499.

Thus, there can be no lien on the ship if those in charge of her were not the servants of her then owner; if, for example, she was in charge of a compulsory pilot or the port authority. *Druid*, 1 W. Rob. 391; *Orient*, 3 Mar. L. C. (O.S.) 321; *Halley*, L. R. 2 P. C. 193, 201; *Parlement Belge*, 5 P. Div. 197, 218; *Utopia, supra.*

But charterers, in whom the control of the ship has been vested by the owners, are deemed to have derived their authority from the owners so as to make the ship liable for their negligence. *Ticonderoga*, Swa. 215; *Lemington*, 2 Aspinall, N. S. 475; *Tasmania*, 13 P. D. 110.

Seaman's lien for wages.

A seaman has a lien for his wages on ship, freight, and cargo. *Louisa Bertha*, 14 Jur. 1006.

A seaman has, since the Admiralty Court Act, 1861 (24 Vict. c. 10), a lien for his wages, whether the same be due under a special contract or otherwise. *Mary Ann*, L. R. 1 A. & E. 8.

The seamen's lien extends to freight payable by sub-charterers. *Andalina*, 12 P. D. 1.

Definition of seaman.

The lien is enforceable by every person who is connected with the ship as a ship, whether he or she is under articles or not, and is enforceable in respect of services rendered by such persons in harbour just as much as in respect of services rendered by them at sea. *Wells* v. *Osman*, 2 Ld. Raym. 1044; *Jane and Matilda*, 1 Hagg. Adm. 187; *Re The Great Eastern Steamship Co.*, 5 Aspinall, N. S. 511; *Queen* v. *Judge of City of London Court*, 25 Q. B. D. 339.

The Merchant Shipping Act, 1894, provides [sect. 156, (1)], that a seaman shall not by any agreement forfeit his lien on the ship, and [sect. 157, (1)] that the right to wages shall not depend on the earning of freight.

Expenses of sending home seaman.

Expenses incurred in maintaining and sending home a seaman, who is in distress abroad, are charged by sect. 193 of the Merchant Shipping Act, 1894, upon the ship to which the seaman belonged, and made recoverable in the same manner as seamen's wages. See *Livietta*, 8 P. D. 202.

The Merchant Shipping Act, 1894, provides—

Sect. 167, (1). The master of a ship shall, so far as the case permits, have the same rights, liens, and remedies for the recovery of his wages as a seaman has under this Act, or by any law or custom. Master's lien for wages.

The Admiralty Court Act, 1861 (24 Vict. c. 10), by extending the seaman's lien to wages due under a special contract, extends by implication that of the master.

It is immaterial that the master is also part owner. *Feronia*, L. R. 2 A. & E. 65.

The master's lien is lost if he allows his wages to remain in the owners' hands. *Rainbow*, 5 Aspinall, N. S. 579.

The lien for wages, both of master and crew, attaches to ships independently of any personal obligation of the owners, the sole condition required being that such wages shall have been earned on board the ship. *Edwin*, Br. & Lush. 281; *Castlegate*, (1893) A. C. 38, 52.

The Merchant Shipping Act, 1894, provides—

Sect. 167, (2). The master of a ship, and every person lawfully acting as master of a ship, by reason of the decease or incapacity from illness of the master of the ship, shall, so far as the case permits, have the same rights, liens, and remedies for the recovery of disbursements or liabilities properly made or incurred by him on account of the ship, as a master has for the recovery of his wages. Master's lien for disbursements.

This sub-section reproduces sect. 1 of the Merchant Shipping Act, 1892, which was passed in consequence of the decision in *The Sara* (14 App. Cas. 209), and which restored what was believed to be the law before that decision, as laid down in *The Feronia*, L. R. 2 A. & E. 65; *The Fairport*, 8 P. D. 48.

The master's lien for disbursements is confined to disbursements for which, by virtue of his general authority, he could pledge his owners' credit. He can only pledge his owners' credit for things necessary for the ship for the purposes of navigation, and when he cannot have recourse to his owners before ordering them. *Watkinson* v. *Bernardiston*, 2 P. W. 367; *Castlegate*, (1893) A. C. 38; *Orienta*, (1894) P. 271, (1895) P. 49.

He cannot pledge his owners' credit for disbursements made

for purposes for which the charterers ought to have made provision. *Turgot*, 11 P. D. 21; *Castlegate*, (1893) A. C. 38.

Sect. 167, (3), enables a set-off or counter claim to be set up in an Admiralty proceeding in answer to a master's claim in respect of wages or disbursements.

Material man has no lien.

No maritime lien is created by repairs done or necessaries supplied to a ship. *Neptune*, 3 Knapp, P. C. 94.

No lien is acquired, under 3 & 4 Vict. c. 65, s. 6, by the supply of necessaries to a foreign ship (*a*); or, under the Admiralty Court Act, 1861 (24 Vict. c. 10), sect. 5, by the supply of necessaries to a ship elsewhere than in the port to which the ship belongs (*b*); or, under the Vice-Admiralty Courts Act, 1863 (26 & 27 Vict. c. 24), sect. 10, by the supply of necessaries in the possession in which a Vice-Admiralty Court is established to a ship of which no owner is domiciled in the possession (*c*). (*a*) *Henrich Björn*, 10 P. D. 44, 11 App. Cas. 270, overruling *West Friesland*, Swa. 454; *Ella A. Clark*, Br. & L. 32. (*b*) *Pacific*, Br. & L. 243; *Troubadour*, L. R. 1 A. & E. 302; *Two Ellens*, L. R. 3 A. & E. 345; 4 P. C. 161. (*c*) *Rio Tinto*, 9 App. Cas. 356.

CHAPTER XIII.

BOTTOMRY AND RESPONDENTIA BONDS.

A BOTTOMRY bond is an instrument by which the owner or master of a vessel hypothecates the ship, or the ship and freight, or the ship, freight, and cargo, to a lender of money advanced to him for the purpose of paying for repairs of the ship. A bottomry bond is an instrument of hypothecation. It does not transfer the property in the ship, but gives the bondholder a right to be enforced against the ship at the end of the voyage by process of attachment in an Admiralty Court. *Stainbank* v. *Fenning*, 11 C. B. 51; *Stainbank* v. *Shepard*, 13 C. B. 418; *Energie*, I. R. 9 Eq. 58.

Bottomry bond, definition of.

A bottomry bond may be validly given by the owner; but when it is given by the owner, it would appear that it cannot validly be given in a home port. This incapacity, however, is merely based on the limited jurisdiction of the English Admiralty Court. *Royal Arch*, Swa. 269, 277; *Heligoland*, Swa. 491.

It may be given by the owner,

Bottomry bonds, as a rule, are given by the master acting within the scope of his authority.

but is generally given by the master.

The implied authority of the master to hypothecate the ship (*a*), or cargo (*b*), arises from his position as agent of necessity. It is therefore limited by that necessity. (*a*) *Karnak*, L. R. 2 A. & E. 289, 299; *Gaetano and Maria*, 7 P. Div. 137, 145. (*b*) *Cargo ex Hamburg*, 2 Moo. P. C. N. S. 289, 321.

When master's authority arises.

As to circumstances under which the master is agent, not of the owner, but of the charterers, see *Baumwoll Manufactur* v. *Furness*, (1893) A. C. 8; *Manchester Trust* v. *Furness*, (1895) 2 Q. B. 539.

The authority of the master to bind the cargo exists by

virtue of the contract which is created by shipment of the goods between the shipowner and the cargo-owner. *Gaetano and Maria*, 7 P. Div. 137.

A bond made by the master of a foreign ship hypothecating a cargo laden on board ship is enforced in England, if valid according to the law of the ship's flag. *Gaetano and Maria*, 7 P. Div. 1, 137.

To constitute a person agent of necessity, he must be unable to communicate with his principal. *Gwilliam* v. *Twist*, (1895) 2 Q. B. 84.

Master must be unable to communicate with owner,

Hence, the master cannot validly bottomry the ship in a home port, or if the owner is on the spot, or has an agent there whose duty it is to pay for repairs. *Arthur* v. *Barton*, 6 M. & W. 138; *Beldon* v. *Campbell*, 6 Ex. 886; *Nuova Loanese*, 17 Jur. 263; *Faithful*, 31 L. J. P. 81; *Gunn* v. *Roberts*, L. R. 9 C. P. 331; *Pontida*, 9 P. Div. 102, 176.

Even in a home port the master may validly bottomry the ship, if he is unable to communicate with the owner. *Oriental*, 7 Moo. P. C. 398.

Where communication with the owner is practicable, the master cannot bottomry the ship without communicating with him; and where communication with the cargo-owner is practicable, he cannot bottomry the cargo without communicating with him; and the communication must be such as to show that it will probably be necessary to resort to a bottomry bond. *Oriental*, 7 Moo. P. C. 398; *Bonaparte*, 8 Moo. P. C. 459; *Olivier*, Lush. 484; *Hamburg*, Br. & Lush. 253; 2 Moo. P. C. N. S. 289; *Lizzie*, L. R. 2 A. & E. 254; *Panama*, L. R. 2 A. & E. 390; 3 P. C. 199; *Onward*, L. R. 4 A. & E. 38; *Staffordshire*, L. R. 4 P. C. 194; *Australasian Steam Navigation Co.* v. *Morse*, L. R. 4 P. C. 222; *Kleinwort, Cohen & Co.* v. *Cassa Marittima of Genoa*, 2 App. Cas. 156.

The insolvency of the owner does not relieve the master from the necessity of communicating with him. *Panama*, L. R. 3 P. C. 139.

For the purpose of a bottomry bond, the sanction of the managing owner binds his co-owners. *Royal Arch*, Swa. 269, 282.

A master has no authority to raise money on bottomry where he can raise it on the personal credit of the owners. *Stainbank* v. *Fenning*, 11 C. B. 51; *Oriental*, 7 Moo. P. C. 398; *Staffordshire*, L. R. 4 P. C. 194. or to borrow on owner's personal credit.

The lender is bound to make a reasonable inquiry as to the necessity which authorizes the master to hypothecate. Absence of inquiry is evidence of *mala fides*, but the fact that the lender has made inquiries does not necessarily validate the bond to the whole extent of the advance. *Prince of Saxe Cobourg*, 3 Moo. P. C. 1; *Royal Stuart*, 2 Spk. 258; *Onward*, L. R. 4 A. & E. 38; *Pontida*, 9 P. Div. 102, 177. Lender bound to inquire as to necessity.

A bottomry bond may be made to the owner's agent, so far as he is under no obligation to make advances on the owner's personal credit. *Hero*, 2 Dods. 144; *Staffordshire*, L. R. 4 P. C. 194; see *Royal Stuart*, *supra*. When bond may be made to owner's agent.

The master cannot, as agent of necessity, create any security on the ship except by bottomry. *Stainbank* v. *Shepard*, 13 C. B. 418.

A bottomry bond cannot make the owner personally liable. *Stainbank* v. *Fenning*, 11 C. B. 51; *Stainbank* v. *Shepard*, 13 C. B. 418; *Energie*, I. R. 9 Eq. 58. Owner cannot be made personally liable.

A bottomry bond may be given as collateral security for bills of exchange drawn on the owner. If the bills of exchange are honoured, the bottomry bond is discharged, and, though the ship arrive, maritime interest is not payable; if they are dishonoured, the amount is payable on arrival by means of the remedy against the ship, and in that case with maritime interest. *Atlas*, 2 Hag. Adm. 48; *St. Catherine*, 3 Hag. 250; *Emancipation*, 1 W. Rob. 124; *Stainbank* v. *Shepard*, 13 C. B. 418; *Onward*, L. R. 4 A. & E. 38; *Staffordshire*, L. R. 4 P. C. 194. Bond may be collateral security for bills of exchange.

For a bond to be valid, whether maritime interest is required or not, the lender must take the maritime risk, the bond only coming into effect on the safe arrival of the ship. *Nelson*, 1 Hag. Adm. 169; *Atlas*, 2 Hag. Adm. 48; *Emancipation*, 1 W. Rob. 124; *Stainbank* v. *Fenning*, 11 C. B. 51; *Stainbank* v. *Shepard*, 13 C. B. 418; *Indomitable*, Swa. 446; *Mary Ann*, L. R. 1 A. & E. 13; *Henrich Björn*, 10 P. Div. 44. Lender must take maritime risk.

Bond need not provide for maritime interest.

A bond is valid although it does not provide for maritime interest. *Simonds* v. *Hodgson*, 3 B. & Ad. 50; *Nelson*, 1 Hagg. Adm. 177; *Laurel*, Br. & L. 317; *Cecilie*, 4 P. D. 210.

What may be subject of bond.

A bond may be given on ship, or on ship and freight without cargo, but not on cargo alone, or on ship and cargo without freight. *Constancia*, 2 W. Rob. 405; 10 Jur. 845; *Edmond*, Lush. 57; *Karnak*, L. R. 2 A. & E. 289, 309.

Where a bond is given on ship and freight, ship and freight must be resorted to *pro ratâ*. *Dowthorpe*, 2 N. of C. 264; 7 Jur. 609.

Where a bond purports to be given on cargo alone, or on ship and cargo alone, ship and freight must be exhausted in satisfaction of the bond before cargo is resorted to. *Prince Regent*, 2 N. of C. 272 *n.*; *Constancia, supra.*

When cargo can be bound.

The master cannot bind the cargo for repairs to the ship, which produce no benefit or prospect of benefit to the cargo. *Gratitudine*, 3 C. Rob. 240, 261; *Karnak, supra; Onward*, L. R. 4 A. & E. 38, 58.

But the fact that the cargo eventually derives no benefit from the bottomry bond does not of itself invalidate that instrument. *Benson* v. *Chapman*, 2 H. L. C. 696, 720; *Lizzie*, L. R. 2 A. & E. 254.

Nothing can be hypothecated which is not in danger of perishing by maritime risk during the time that the bond is running. Hence, freight to be earned after the bond has become payable cannot be hypothecated. *Staffordshire*, L. R. 4 P. C. 194; distinguishing *Jacob*, 4 Rob. 245.

Right of bond-holder in respect of freight.

The hypothecation of the chartered freight to the obligee in bottomry does not give him a right to more freight than the obligor had a right to demand from the charterer. Hence, advances of freight, whether made in pursuance of the charterparty or not, are exempt from the bond. *John*, 3 W. Rob. 170; *Salacia*, Lush. 545; *Karnak*, L. R. 2 A. & E. 289; 2 P. C. 505.

For what expenses it may be given.

The money must be raised to defray the expenses of necessary supplies or repairs of the ship. *Prince George*, 4 Moo. P. C. 21; *Royal Stuart*, 2 Spk. 258; *Osmanli*,

7 N. of C. 322; 3 W. Rob. 198; *North Star*, Lush. 45; *Edmond*, Lush. 57, 211; *Karnak*, L. R. 2 A. & E. 289; *Orienta*, (1895) P. 49.

The master cannot bottomry the ship for charges relating to the outward cargo, unless the ship could be arrested for such charges, even though they constitute debts properly owing from the owner. Cases, *supra*.

A threat to arrest the ship for an existing debt does not validate a bond given to the creditor. *Ida*, L. R. 3 A. & E. 542.

A valid bond is only valid to the extent to which money was needed for the actual necessities of the ship. *Pontida*, 9 P. Div. 102, 177.

Loan must have been made on credit of ship.

The money which forms the consideration for the bond must have been advanced in contemplation of a bottomry security, *i.e.* upon the credit of the ship. *Alexander*, 1 Dods. 278; *Karnak*, L. R. 2 A. & E. 289.

A bond given after advances have been made is valid if they were made in pursuance of an agreement to give a bond; and, where there is no previous agreement, the presumption is that the foreign lender made the advances in contemplation of a bottomry security. *Alexander*, 1 Dods. 278; *Laurel*, Br. & Lush. 191; *Karnak*, L. R. 2 A. & E. 289.

Where money is originally advanced upon the personal credit of the owner, a bottomry bond cannot afterwards be given to secure the same advance. *Augusta*, 1 Dods. 283; *Vibilia*, 1 W. Rob. 1; *Wave*, 15 Jur. 518; *North Star*, Lush. 45.

But a bottomry bond, for the purpose of obtaining money for the payment of debts for necessaries previously incurred on personal credit, may be legally given to a person who has not supplied the necessaries. *Hebe*, 4 N. of C. 361; 10 Jur. 227; *North Star*, Lush. 45.

An agent of the owner, who has advanced money on his personal credit, may take a bottomry bond for subsequent advances. *Karnak*, L. R. 2 A. & E. 289.

Nothing but total loss discharges obligor.

Nothing but an absolute total loss of the subject hypothecated will discharge the borrower on bottomry. *Thomson*

v. *Royal Exchange Assurance Co.*, 1 M. & S. 30; *Catherine*, 15 Jur. 231; *Elephanta*, 15 Jur. 1185; *Dante*, 2 W. Rob. 427; *Great Pacific*, L. R. 2 A & E. 381; 2 P. C. 516; *Broomfield* v. *Southern Insurance Co.*, L. P. 5 Ex. 192.

If the vessel is sold at an intermediate port or lost at sea, the lender is entitled to the whole proceeds of sale or the whole of what is saved, if included in his security. *Great Pacific, supra.*

Rate of interest where default in payment.

Interest is allowed at four per cent. from the date from which the amount secured on bottomry ought to have been paid until actual payment, and a provision in the bond giving a higher rate will not be enforced. *Edmond*, Lush. 211; 30 L. J. P. 128; *D. H. Bills*, 4 P. D. 32 *n.*; *Sophia Cook*, 4 P. D. 30; *Cecilie*, 4 P. D. 210.

Premature arrest of ship.

Bond-holders who arrest the vessel before the bond is payable may be liable in damages, and will be condemned in costs. *Eudora*, 4 P. D. 208.

Respondentia bond.

A respondentia bond is a bond which hypothecates the cargo only for expenses properly incurred in preserving it. *Cargo ex Sultan*, Swa. 504; *Cargo ex Galam*, 2 Moo. P. C. N. S. 216.

CHAPTER XIV.

SECURITIES BY EXECUTORS AND ADMINISTRATORS.

Mortgage of personal assets of testator or intestate.

AN executor (*a*), or administrator (*b*), including an administrator *durante minore ætate* (*c*), may mortgage or pledge any part of the personal assets of his testator or intestate. (*a*) *Scott* v. *Tyler*, 2 Dick. 712; *McLeod* v. *Drummond*, 14 Ves. 353; 17 Ves. 152; *Earl Vane* v. *Rigden*, 5 Ch. 663. (*b*) *Russell* v. *Plaice*, 18 B. 21; *Barclay* v. *Owen*, 60 L. T. 220. (*c*) *In re Cope*, 16 Ch. D. 49; *In re Thompson & McWilliams' Contract*, (1896) 1 I. R. 356.

As to the power of one executor to deal with the assets without the consent of his co-executors, see *Lepard* v. *Vernon*, 2 V. & B. 51; *Sneesby* v. *Thorne*, 7 D. M. & G. 399; *In re Ingham*, (1893) 1 Ch. 352.

The executor's power is not destroyed by a decree for administration in a creditor's suit. *Berry* v. *Gibbons*, 8 Ch. 747; *Lonergan* v. *Hoban*, (1896) 1 I. R. 401, 414.

For what debts security may be given.

A mortgage may be made to secure a debt due from the testator (*a*), or advances previously made to the executor on his personal security for the purposes of the administration (*b*). (*a*) *Hepworth* v. *Heslop*, 6 Ha. 561; *Earl Vane* v. *Rigden*, 5 Ch. 663. (*b*) *Miles* v. *Durnford*, 2 D. M. & G. 641.

An executor can give a valid mortgage for rates due since the testator's death in respect of premises occupied by the executor in his representative capacity. *Douglas* v. *Douglas*, 9 L. R. Ir. 548.

Mortgage may contain power of sale.

The mortgage may contain a power of sale. *Russell* v. *Plaice*, 18 B. 21; *In re Chawner's Will*, 8 Eq. 569; *Cruikshank* v. *Duffin*, 13 Eq. 560; not following *Sanders* v. *Richards*, 2 Coll. 568.

It may be made to building society.

A mortgage may be made to a building society, which will be valid to the extent of the money actually advanced and reasonable interest. *Cruikshank* v. *Duffin*, 13 Eq. 560; *Thorne* v. *Thorne*, (1893) 3 Ch. 196.

Executor is personally liable.

Where the executor borrows for the purposes of administration, he is liable personally, and cannot be sued as executor. *Farhall* v. *Farhall*, 7 Ch. 123.

Lender may assume that executor is acting *bonâ fide*.

A mortgagee is entitled to assume that the executor or administrator is borrowing for due purposes of administration. His security will be valid if he has no notice that the executor is acting *mala fide*, although the executor in fact misapplies the loan. *Ewer* v. *Corbet*, 2 P. W. 148; *Bedford* v. *Woodham*, 4 Ves. 40 *n.*; *Keane* v. *Robarts*, 4 Madd. 332; *Gray* v. *Johnston*, L. R. 3 H. L. 1; *Gavin* v. *Hadden*, L. R. 3 P. C. 707; *Berry* v. *Gibbons*, 8 Ch. 747; *Oceanic Steam Navigation Co.* v. *Sutherberry*, 16 Ch. Div. 236, 244.

The fact that the mortgage includes private property of the executor does not negative the presumption that the loan is raised for purposes of administration. *Barrow* v. *Griffith*, 13 W. R. 41.

Where the executor states that part of the loan is required for payment of debts, the onus lies on the lender of showing how much was required. *Carter* v. *Sanders*, 2 Eq. R. 891.

Mortgage of leaseholds more than twenty years after death.

Where an executor mortgages leaseholds or other personal assets, the fact that more than twenty years have elapsed from the testator's death does not necessarily raise the presumption that the estate has been fully administered. The case would be different if a beneficiary had been in possession of the property. *In re Whistler*, 35 Ch. D. 561; *In re Venn & Furze's Contract*, (1894) 2 Ch. 101; explaining *In re Molyneux & White*, 13 L. R. Ir. 382; 15 L. R. Ir. 383.

Mortgage to secure private debt of executor.

A mortgage by an executor is not valid as against the testator's estate, if the mortgagee has notice that it is given to secure a private debt of the executor (*a*), or for any other purpose not required in due course of administration (*b*). (*a*) *Hill* v. *Simpson*, 7 Ves. 152; *Watkins* v. *Cheek*, 2 Si. & St. 199; *Connolly* v. *Munster Bank*, 19 L. R. Ir. 119. (*b*) *Collinson*

v. *Lister*, 7 D. M. & G. 634; *Gavin* v. *Hadden*, L. R. 3 P. C. 707; *Ricketts* v. *Lewis*, 20 Ch. D. 745.

Where an executor, not known to be such, borrows money for his private purposes on the mortgage of that which appears to be his own property, but is really the testator's, the mortgage is invalid as against the testator's estate. *In re Morgan*, 18 Ch. Div. 93.

Mortgage to secure debt incurred in carrying on business.

A power to executors to carry on a business only authorizes them to employ the assets engaged in it at the testator's death, or appropriated to it by his will. Hence, a mortgage of freeholds not engaged in a business to secure a debt incurred in carrying it on is invalid. *McNeillie* v. *Acton*, 4 D. M. & G. 744.

Where a testator carried on his business in freehold premises, the title-deeds of which he had deposited with a bank to secure an advance, and he authorized his executrix to carry on the business, but did not devise the freehold premises to her, it was held that the bank's security included further advances made to the executrix to carry on the business. *Devitt* v. *Kearney*, 11 L. R. Ir. 225; 13 L. R. Ir. 45.

Waiver of security against estate.

Where an executor borrowed money for the purposes of administration at the usual rate of interest, and subsequently mortgaged a legacy under the testator's will and debts due to him from the testator to secure an amount, including the money borrowed, with interest at 3 per cent. per month, it was held that the lender had abandoned his claim against the testator's estate. *Brettle* v. *Burdett*, 2 D. J. & S. 244.

Mortgage by executor who is also legatee.

A mortgage by an executor, who is a specific or residuary legatee, of an asset comprised in his specific legacy (*a*), or in the residuary personal estate (*b*), to secure a private debt, is valid, as against creditors of the testator, in favour of a mortgagee who has no notice that there are creditors unsatisfied. (*a*) *Taylor* v. *Hawkins*, 8 Ves. 209; *Spackman* v. *Timbrell*, 8 Sim. 260. (*b*) *Nugent* v. *Gifford*, 1 Atk. 463; *Mead* v. *Lord Orrery*, 3 Atk. 235; *Andrew* v. *Rigley*, 4 B. C. C. 136; *Whale* v. *Booth*, 4 T. R. 625 *n.*; *Williams* v. *Massy*, 15 Ir. Ch. 47, 66; *Graham* v. *Drummond*, (1896) 1 Ch. 968.

This principle applies to equitable as well as legal assets,

and to mortgages which confer an equitable as well as those which confer a legal interest. *Graham* v. *Drummond*, (1896) 1 Ch. 968.

Mortgage amounts to assent to legacy.

The mortgage is equivalent to assent by the executor to the legacy. A mortgagee from him is in the same position as a mortgagee from any other legatee whose legacy has passed out of the executor's control. See *Cole* v. *Muddle*, 10 Ha. 186; *Noble* v. *Brett*, 24 B. 499; *Graham* v. *Drummond*, (1896) 1 Ch. 968.

It has been held in Ireland that a deposit of title-deeds of leaseholds by an executor, who was also residuary legatee, was not equivalent to assent on his part to the legacy, and the depositee was postponed to pecuniary legatees, who had no charge on the leaseholds. *In re Queale's Estate*, 17 L. R. Ir. 361.

CHAPTER XV.

SECURITIES UNDER TESTAMENTARY AND OTHER POWERS.

A POWER to mortgage authorizes a mortgage containing a power of sale. *Bridges* v. *Longman*, 24 B. 27; *In re Chawner's Will*, 8 Eq. 569.

A power to raise a certain sum by mortgage implies a power to raise the incidental costs. *Parker* v. *Watkins*, Joh. 133; *Armstrong* v. *Armstrong*, 18 Eq. 541.

A power to mortgage is given to tenants for life by the Settled Land Act, 1890, sect. 11. See *Hampden* v. *Earl of Buckinghamshire*, (1893) 2 Ch. 531.

When trust to sell authorizes mortgage.

A trust for absolute sale and conversion does not authorize a mortgage. *Haldenby* v. *Spofforth*, 1 B. 390; *Stroughill* v. *Anstey*, 1 D. M. & G. 635; *Page* v. *Cooper*, 16 B. 396; *Devaynes* v. *Robinson*, 24 B. 86.

A trust to sell for the purpose of raising a particular charge, subject to which the estate is devised or settled (*a*), or an implied trust arising from a charge of debts upon an estate (*b*), authorizes a mortgage. (*a*) *Mills* v. *Banks*, 3 P. W. 1; (*b*) *Ball* v. *Harris*, 4 My. & Cr. 264.

Power to lease may authorize mortgage.

A power to grant leases may authorize a lease at a peppercorn rent subject to redemption. *Mostyn* v. *Lancaster*, 23 Ch. Div. 583.

Lord St. Leonards' Act, ss. 14, 15, 16.

Lord St. Leonards' Act (22 & 23 Vict. c. 35) provides that, where by any will which comes into operation after the 13th of August, 1859, real estate is charged with the payment of debts, or of any legacy, or other specific sum of money, then (1) if the estate charged is devised to trustees for the whole of the testator's estate or interest, and no express provision is made for raising the charge out of the estate, the trustees may

raise it by mortgage of the hereditaments (sects. 14, 15); and (2) if the hereditaments are not so devised as that the testator's whole estate and interest is vested in trustees, his executors may similarly raise the charge (sect. 16).

An administrator cannot sell under sect. 16. *In re Clay & Tetley*, 16 Ch. Div. 3.

S. 17. Mortgagees are not bound to inquire whether the powers conferred by sects. 14, 15, and 16 have been duly and correctly exercised by the persons acting in virtue thereof (sect. 17).

S. 18. Sects. 14, 15, and 16 do not extend to a devise to any person or persons in fee, or in tail, or for the testator's whole estate and interest, charged with debts or legacies, nor do they affect the power of any such devisee or devisees to mortgage as he or they may by law now do (sect. 18).

Sect. 18 applies to cases where the devisee can make a good title, and not to cases where an estate is devised in settlement. *In re Wilson*, 34 W. R. 512.

In cases not falling within the Act, there is some conflict of authority. The distinction must be kept in mind between the power to mortgage and the power to give a receipt for the mortgage-money. The two powers are not necessarily vested in the same person. As to who can exercise the power to mortgage—

General charge of debts on all real estate.

1. The better opinion appears to be that, where there is a general charge of debts, either express or implied, upon all the real estate, and no definite provision is made by whom the debts are to be raised, the executors have an implied power of sale or mortgage. *Forbes* v. *Peacock*, 11 M. & W. 630; *Gosling* v. *Carter*, 1 Coll. 644; *Robinson* v. *Lowater*, 17 B. 592, 601; *Wrigley* v. *Sykes*, 21 B. 337; *Sabin* v. *Heape*, 27 B. 553; *Hodkinson* v. *Quinn*, 1 J. & H. 303; *Cook* v. *Dawson*, 29 B. 123.

It is clear that where there is a general charge of debts upon all the real estate, and a specific estate is devised to trustees for special purposes, the trustees and executors together can make a good title. *Shaw* v. *Borrer*, 1 Kee. 559; *Ball* v. *Harris*, 4 My. & Cr. 264; *Mather* v. *Norton*, 21 L. J. Ch. 15; *Greetham* v. *Colton*, 34 B. 615.

The executors in such a case, though they cannot, it appears, convey the legal estate (*a*), can compel the concurrence of any person in whom it is vested (*b*). (*a*) *Doe d. Jones* v. *Hughes*, 6 Ex. 223; (*b*) *Hodkinson* v. *Quinn*, 1 J. & H. 303.

Specific charge of debts on specific real estate devised in fee.

2. Where there is a specific charge of debts upon specific real estate, which is then devised in fee, either upon trusts or beneficially, the devisee in fee may raise the debts by sale or mortgage of the estate charged.

Where there is a general charge of all the real estates with the payment of debts, and a specific charge upon a specific property, the legal estate in which is devised in fee, the power of the legal devisee in fee to provide for the debts by mortgage of the property devised to him is not overridden by an implied power in the executors. *Corser* v. *Cartwright*, 8 Ch. 971; 7 H. L. 731.

Where there is an implied power in the executors arising from a general charge, and by the same will specific lands are devised to trustees upon trust to sell at a prescribed date for purposes including the payment of debts, the trustees can exercise the power when the date arrives without the concurrence of the executors. *Hodkinson* v. *Quinn*, 1 J. & H. 303.

Where real estate charged with the payment of a legacy is devised to trustees during the lives of two tenants for life, the trustees can bind the equitable interests in the real estate by a sale or mortgage for the purpose of raising the legacy. *Eidsforth* v. *Armstead*, 2 K. & J. 333.

It is doubtful whether the devisee can give a receipt for the mortgage money. In most cases, he has also been an executor, and a devisee, who is also an executor, having real estate charged with the payment of debts, has practically the same power over the real estate that an executor has over the personal. *Watkins* v. *Cheek*, 2 Si. & St. 199; *Colyer* v. *Finch*, 5 H. L. C. 905; *Corser* v. *Cartwright*, L. R. 7 H. L. 731; *In re Tanqueray-Willaume & Landau*, 20 Ch. Div. 465; *West of England Bank* v. *Murch*, 23 Ch. D. 138.

Where the devisee is not an executor, he can only give a discharge on the ground that he is a trustee for payment of the debts, as to which see *post*.

Specific charge of debts on specific estate, where devisee cannot make title.

3. Where there is a specific charge of debts upon a specific estate, which is then devised under such circumstances that the devisees cannot make a good title, *e.g.* to a tenant for life with contingent remainders over, the executors have an implied power of sale or mortgage. *Robinson* v. *Lowater*, 5 D. M. & G. 272.

As to the necessity of seeing to the application of the mortgage money—

Distinction between indefinite and definite trust.

A mortgagee from a trustee or person in a fiduciary position is not bound to see to the application of his loan, where the trust is indefinite and involves the whole administration of an estate; but he is bound to see to its application, where the trust is limited to specific objects, and its extent may be gathered from the instrument which creates it. *Storry* v. *Walsh*, 18 B. 559; *Colyer* v. *Finch*, 5 H. L. C. 905, 922; *In re Rebbeck*, 42 W. R. 473.

When lender not bound to see to application of loan.

Thus, he is not bound to see to the application of his loan where there is a charge of debts (*a*), or of debts generally, including debts specifically mentioned (*b*), or of debts and legacies (*c*), or of debts and annuities (*d*). (*a*) *Elliot* v. *Merryman*, Barn. 78; *Shaw* v. *Borrer*, 1 Kee. 559; *Robinson* v. *Lowater*, 17 B. 592; *Storry* v. *Walsh*, 18 B. 559. (*b*) *Robinson* v. *Lowater*, 17 B. 592. (*c*) *Rogers* v. *Skillicorne*, Ambl. 188; *Robinson* v. *Lowater*, 17 B. 592; *Storry* v. *Walsh*, 18 B. 559; *Howard* v. *Chaffers*, 2 Dr. & Sm. 236. (*d*) *Page* v. *Adam*, 4 B. 269.

Payment must be made to executor.

Of course, the lender is bound to see, even in these cases, that the loan gets into the hands of the person who is charged with the duty of making the payments, to provide for which it was raised; and this person will always be the executor, except in cases in which a devisee of land subject to a specific charge of debts can be treated as a trustee for payment of the debts.

Whether devisee is trustee for payment of debts.

There is a distinction between a devise subject to debts, or of property charged with debts, and a devise after payment of debts, the latter constituting the devisee an express trustee for their payment. See *Dillon* v. *Cruise*, 3 Ir. Eq. 70; *Cunningham* v. *Foot*, 3 App. Cas. 974.

When lender bound to see to application of loan.

The lender is bound to see to the application of his loan where there is a charge of scheduled debts only (*a*), or of a specific legacy (*b*), or of legacies in general (*c*). (*a*) *Elliot* v. *Merryman*, Barn. 78; *Robinson* v. *Lowater*, 17 B. 592; *Storry* v. *Walsh*, 18 B. 559; *Howard* v. *Chaffers*, 2 Dr. & Sm. 236. (*b*) *In re Rebbeck*, 42 W. R. 473. (*c*) *Horn* v. *Horn*, 2 Si. & St. 448; *Johnson* v. *Kennett*, 3 My. & K. 624, 630; *Robinson* v. *Lowater*, 17 B. 592; *Storry* v. *Walsh*, 18 B. 559; *Howard* v. *Chaffers*, 2 Dr. & Sm. 236.

Estate charged with debts and legacies, debts being paid.

Where an estate is charged with debts and legacies, a mortgagee is not bound to see to the application of his loan, although the debts were in fact paid when he made it, if the fact of their payment was unknown to him; but, if he knew that the debts were paid, he is bound to see to the application of the money as much as if the estate had been originally charged with legacies only. *Johnson* v. *Kennett*, 3 My. & K. 624; *Eland* v. *Eland*, 4 My. & Cr. 420; *Forbes* v. *Peacock*, 1 Ph. 717; *Howard* v. *Chaffers*, 2 Dr. & Sm. 236; see *Stroughill* v. *Anstey*, 1 D. M. & G. 635, 648.

Mortgage with notice that borrower is acting *mala fide*.

Even in cases where a mortgagee is not bound to see to the application of his loan, he will be liable if he had notice that the person to whom he paid it was not raising the money for payment of the debts, or intended to misapply it. *Watkins* v. *Cheek*, 2 Si. & St. 199; *Haynes* v. *Forshaw*, 11 Ha. 93; *McNeillie* v. *Acton*, 4 D. M. & G. 743, 754; *Howard* v. *Chaffers*, 2 Dr. & Sm. 236; *Burt* v. *Trueman*, 6 Jur. N. S. 721; *Corser* v. *Cartwright*, L. R. 7 H. L. 731.

Mortgagee not bound to inquire.

But he is not bound to inquire whether the mortgage is made for the purpose of enabling the debts to be paid, and the fact that the mortgagor contracts as beneficial owner does not raise the presumption that he intends to misapply the money. *Colyer* v. *Finch*, 5 H. L. C. 905; *Collingwood* v. *Russell*, 10 Jur. N. S. 1062; *Farhall* v. *Farhall*, 7 Eq. 286; *In re Venn & Furze's Contract*, (1894) 2 Ch. 101, 112.

Charge on beneficial interest of executor.

The form of the mortgage may show that the executor-devisee intended to charge merely his beneficial interest in the estate after payment of debts. *Ridgway* v. *Newstead*, 3 D. F. & J. 488.

Mortgage of real estate more than twenty years after death.

Where real estate is devised to executors charged with payment of debts, a presumption arises at the expiration of twenty years from the testator's death that the debts have been paid and a mortgagee from the executors is put on inquiry. *In re Tanqueray-Willaume & Landau*, 20 Ch. Div. 465; *In re Molyneux & White*, 10 L. R. Ir. 382; 15 L. R. Ir. 383; *In re Ryan & Cavanagh's Contract*, 17 L. R. Ir. 42.

CHAPTER XVI.

SECURITIES BY AGENTS.

I. In General.

The authority of an agent may be express, *i.e.* based on a written instrument, or implied from his position, *e.g.* the authority of a partner to bind his co-partners.

Power of attorney, how construed.

A power of attorney must be construed strictly. *Bryant, Powis & Bryant* v. *La Banque du Peuple*, (1893) A. C. 170, 177.

As to how far the operative part of a power of attorney is controlled by a recital, see *Danby* v. *Coutts & Co.*, 29 Ch. D. 500.

As to whether powers of attorney which authorize a sale also authorize a mortgage or pledge, see *De Bouchout* v. *Goldsmid*, 5 Ves. 211; *Bank of Bengal* v. *Macleod*, 7 Moo. P. C. 35; *Jonmenjoy Coondoo* v. *Watson*, 8 App. Cas. 561.

Principal, when bound by estoppel.

Where a principal clothes an agent with apparent authority (*a*), or where an agent has known powers according to law (*b*), a secret limitation put upon those powers by the principal has no effect as against persons who, without notice of the limitation, deal with the agent on the footing of his implied authority. (*a*) *Freeman* v. *Cooke*, 2 Ex. 654; *Duke of Beaufort* v. *Neeld*, 12 Cl. & F. 248, 290; *Miles* v. *McIlwraith*, 8 App. Cas. 120. (*b*) *Hawken* v. *Bourne*, 8 M. & W. 703; *Sandeman* v. *Scurr*, L. R. 2 Q. B. 86; *Ex parte Dixon*, 4 Ch. Div. 133; *Baumwoll Manufactur* v. *Furness*, (1893) A. C. 8, 21.

Principal entrusting agent with title-deeds.

Thus, where a principal places his title-deeds under the control of an agent, and instructs him verbally to borrow a certain sum by their means, bankers, who in good faith have advanced to the agent a sum in excess of the amount which

his principal authorized him to raise, are entitled to hold the deeds as against the principal for the whole amount advanced. *Brocklesby* v. *Temperance Building Society*, (1893) 3 Ch. 130; (1895) A. C. 173.

But a person dealing with an agent who is known to have only a limited authority is put upon inquiry as to its extent. *Chapleo* v. *Brunswick Building Society*, 6 Q. B. Div. 696; *Cooke* v. *Eshelby*, 12 App. Cas. 271.

As to the obligations of persons dealing with directors or other agents of corporations, see p. 149.

II. Special Cases.

Authority of partner over partnership assets.

A partner is entitled, during the continuance of the partnership, to mortgage or pledge the partnership assets for purposes within the ordinary scope of the partnership business. *Butchart* v. *Dresser*, 4 D. M. & G. 542; *In re Cunningham & Co.*, 36 Ch. D. 532.

Authority subsists after dissolution.

He is entitled to mortgage or pledge them after the dissolution, either in consideration of an advance for the purpose of the winding-up (*a*), or to gain time from a creditor of the dissolved partnership (*b*). (*a*) *Butchart* v. *Dresser*, 10 Ha. 453; 4 D. M. & G. 542. (*b*) *In re Clough*, 31 Ch. D. 323.

Directors of building societies under the Act of 1836.

The effect of the Building Societies Act, 1836 (6 & 7 Wm. IV. c. 32), upon building societies certified thereunder is to fix persons dealing with a society with notice of the limits imposed by its rules upon its directors. *Per* Lord Blackburn in *Murray* v. *Scott*, 9 App. Cas. 519, 547.

By the Building Societies Act, 1894 (57 & 58 Vict. c. 47) [sect. 25, (2)], the Act of 1836 is repealed as from the 25th of August, 1896, as to all societies certified thereunder after 1856.

Directors may be given unlimited power to borrow.

The directors of building societies under the Act of 1836 have no power to borrow unless the rules give it, but the rules may give an unlimited power. *Murray* v. *Scott*, 9 App. Cas. 519, explaining *Laing* v. *Reid*, 5 Ch. 4; *In re National Building Society*, 5 Ch. 309; *In re Victoria Land Society*, 9 Eq. 605; *In re Mutual Aid Building Society*, 29 Ch. D. 182; 30 Ch. Div. 434.

Borrowing from bankers stands on the same footing as any other form of borrowing. *Brooks & Co.* v. *Blackburn Benefit Society*, 22 Ch. D. 61; 9 App. Cas. 857.

Directors may be given power to pledge specific property of society,

A rule would apparently be lawful which gave the directors of the society power to pledge specific property of the society. *Murray* v. *Scott, supra*, pp. 556, 559; see *Wilson's Case*, 12 Eq. 521.

A provision in the rules that borrowed moneys are a first charge upon the society's funds and property is inconsistent with a lender obtaining a specific charge on specific assets. *Murray* v. *Scott, supra; Small* v. *Smith*, 10 App. Cas. 119, 131.

but not personal credit of members.

A power given to directors to pledge the individual credit of members of the society is *ultra vires*. *Murray* v. *Scott, supra; In re Mutual Aid Building Society, supra; In re West London Building Society*, (1894) 2 Ch. 352, 371.

Persons in possession of goods. Factors.

"At common law, a person in possession of goods could not confer on another, either by sale or by pledge, any better title to the goods than he himself had. To this general rule there was an exception of sales in market overt, and an apparent exception where the person in possession had a title defeasible on account of fraud. But the general rule was that, to make either a sale or a pledge valid against the owner of the goods sold or pledged, it must be shown that the seller or pledger had authority from the owner to sell or pledge as the case might be. If the owner of the goods had so acted as to clothe the seller or pledger with apparent authority to sell or pledge, he was at common law precluded, as against those who were induced *bonâ fide* to act on the faith of that apparent authority, from denying that he had given such an authority, and the result as to them was the same as if he had really given it. But there was no such preclusion as against those who had notice that the real authority was limited." *Per* Blackburn, J., in *Cole* v. *North-Western Bank*, L. R. 10 C. P. 354, 362.

Factors Act, 1889.

The Factors Act, 1889 (52 & 53 Vict. c. 45), makes the possession, either personally or by a servant [sect. 1 (2)], of goods or documents of title by a mercantile agent (*a*) with the consent of the owner [sect. 2, (1)], which consent is presumed

from the possession [sect. 2, (4)]; or (*b*) after the consent has been determined [sect. 2, (2)]; or (*c*) where the agent has obtained possession of documents of title by reason of being or having been, with the consent of the owner, in possession of the goods represented thereby or other documents of title thereto [sect. 2, (3)], equivalent to an express authority by the owner of the goods to pledge them, in favour of a *bonâ fide* pledgee of the goods (sect. 2), or documents of title (sect. 3), without notice of any irregularity.

A factor who has pledged goods for less than their full value can make a valid disposition, as against his principal, of the surplus proceeds of sale. *Portalis* v. *Tetley*, 5 Eq. 140.

Mercantile agent, who.

Mercantile agent is defined [sect. 1, (1)] as a mercantile agent having, in the customary course of his business as such agent, authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods.

A person employed by jewellers to sell goods on commission at private houses is not within this definition. *Hastings* v. *Pearson*, (1893) 1 Q. B. 62.

What consideration supports a pledge.

Any valuable consideration supports a pledge against the owner to the extent of the value given [sect. 1, (5); sect. 5], but not an antecedent debt due from the mercantile agent (sect. 4). As to antecedent debts, see *Kaltenbach* v. *Lewis*, 10 App. Cas. 617.

Documents of title.

As to documents of title, see sect. 1, (4), and as to the mode of transferring them, see sect. 11.

Lien of consignee for advances.

A consignee of goods has a lien, as against the owner, for advances made without notice to a person to whom the owner has given possession for the purpose of consignment or sale, or in whose name he has shipped the goods (sect. 7).

Sale of Goods Act, 1893, s. 25.

The Sale of Goods Acts, 1893 (56 & 57 Vict. c. 71), protects a *bonâ fide* pledgee without notice of goods or documents of title from a seller who continues or is in possession after sale [sect. 25, (1)], and from a person who, having bought or agreed to buy goods, obtains, with the consent of the seller, possession before payment [sect. 25, (2)]. This section is a repetition of the Factors Act, 1889, sects. 8, 9.

Consent.

As to consent, see *Robinson* v. *Restell*, 12 T. L. R. 174.

It has been held that a pledge by a seller to a warehouseman who had possession of the goods, before and after the sale, as agent of the pledgor, is not protected by the section. *Nicholson* v. *Harper*, (1895) 2 Ch. 415.

Pledge by hirer under hire-purchase agreement.

A hirer under a hire-purchase agreement, who has bound himself to pay all the instalments upon payment of which the chattel hired is to become his property, has "agreed to buy" within this section (*a*); but he has not "agreed to buy" where he retains the right of terminating the agreement and returning the chattel (*b*). (*a*) *Lee* v. *Butter*, (1893) 2 Q. B. 318; *Hull Rope Works Co.* v. *Adams*, 73 L. T. 446. (*b*) *Helby* v. *Matthews*, (1895) A. C. 471, overruling in effect *Shenstone* v. *Hilton*, (1894) 2 Q. B. 452; *Payne* v. *Wilson*, (1895) 2 Q. B. 537.

As to what fixes a pledgee with notice under the Factors Acts, see *Navulshaw* v. *Brownrigg*, 2 D. M. & G. 441.

CHAPTER XVII.

SECURITIES BY TRADING CORPORATIONS.

I. In General.

The powers of a statutory corporation, whether incorporated by special Act of Parliament, as a railway company, or under the provisions of a general Act, as companies under the Companies Acts, are those which are expressly given it by the Act of Incorporation, and those which are reasonably required to carry out the objects for which it was created. *Ashbury Railway Carriage Co.* v. *Riche*, L. R. 7 H. L. 653; *A. G.* v. G. *E. Ry. Co.*, 5 App. Cas. 473; *Baroness Wenlock* v. *River Dee Co.*, 10 App. Cas. 354.

A corporation cannot be estopped, by deed or otherwise, from showing that it had no power to do that which it purports to have done. *Fairtitle* v. *Gilbert*, 2 T. R. 169; *Ex parte Watson*, 21 Q. B. D. 301.

Express power negatives implied power.

A power given by statute to borrow to a limited extent, or in a particular way, negatives the existence of an implied power to borrow to a larger amount, or in another way. *Chambers* v. *Manchester & Milford Ry. Co.*, 5 B. & S. 588; *In re Pooley Hall Colliery Co.*, 18 W. R. 201; *Landowners West of England Co.* v. *Ashford*, 16 Ch. D. 434; *Baroness Wenlock* v. *River Dee Co.*, 10 App. Cas. 454; see *English Channel Steamship Co.* v. *Rolt*, 17 Ch. D. 715.

Person dealing with corporation has notice of conditions under which it acts,

A person dealing with a corporation is deemed to have notice of the conditions under which it acts, *e.g.* in the case of a railway company, of its special act, and, in the case of a company under the Companies Acts, of its memorandum and articles, and he cannot avail himself of a security created in contravention of these conditions. *D'Arcy* v. *Tamar Ry. Co.*,

L. R. 2 Ex. 158; *Irvine* v. *Union Bank of Australia*, 2 App. Cas. 366, 379.

But he is not deemed to have notice of any irregularities occurring in the internal management of the corporation. He is entitled to assume *omnia rite esse acta*. *Ernest* v. *Nicholls*, 6 H. L. C. 401; *Royal British Bank* v. *Turquand*, 5 E. & B. 248; 6 E. & B. 327; *Fountaine* v. *Carmarthen Ry. Co.*, 5 Eq. 316; *Mahony* v. *East Holyford Mining Co.*, L. R. 7 H. L. 869; *County of Gloucester Bank* v. *Rudry Merthyr Colliery Co.*, (1895) 1 Ch. 629; *Biggerstaff* v. *Rowatt's Wharf*, (1896) 2 Ch. 93. but not of irregularities in its internal management.

An officer of a corporation, however, is deemed to have notice of its proceedings, and cannot avail himself of a security informally created. *Howard* v. *Patent Ivory Manufacturing Co.*, 38 Ch. D. 156, 170.

II. Companies under the Companies Clauses Acts.

The Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), provides (sect. 38) that a company authorized by its special Act to borrow money on mortgage, may, subject to the restrictions of the special Act, borrow on mortgage such sums as a general meeting shall from time to time authorize, not exceeding in the whole the sum prescribed by the special Act, and, for securing their repayment with interest, mortgage the undertaking and future calls. Companies Clauses Act, 1845, s. 38.

Debentures and debenture stock may be issued at a discount. *Webb* v. *Shropshire Rys. Co.*, (1893) 3 Ch. 307.

Where a company's special Act enables it to raise money by mortgage so soon as the first division of the line is completed, mortgages are valid which are not issued until after the completion, although authorized by a general meeting held before it. *In re Bagnalstown & Wexford Ry. Co.*, I. R. 1 Eq. 275.

Sect. 39 enables the company to re-borrow any amounts paid off, but not without the authority of a general meeting, unless the money is re-borrowed to pay off an existing mortgage or bond. Power to re-borrow (s. 39).

A debenture is paid off within this section when it is satisfied out of the proceeds of sale of property of the company sold under an execution by the debenture creditor. *Fountaine* v. *Carmarthen Ry. Co.*, 5 Eq. 316.

Evidence of fulfilment of conditions (s. 40).

Sect. 40 provides what shall be evidence that a definite portion of the capital has been subscribed, or paid up, or that an order for borrowing money has been made by a general meeting.

Provisions forbidding directors to borrow or re-borrow without the authority of a general meeting are directory only. *Fountaine* v. *Carmarthen Ry. Co.*, 5 Eq. 316; *Landowners West of England Co.* v. *Ashford*, 16 Ch. D. 434.

Mortgages to be by deed (s. 41).

Every mortgage for securing money borrowed by the company shall be by deed under the common seal of the company duly stamped, and wherein the consideration shall be truly stated (sect. 41).

An untrue statement or omission of the consideration does not affect the validity of the mortgage. *Landowners West of England Co.* v. *Ashford*, 16 Ch. D. 434; see *Powell* v. *London & Provincial Bank*, (1893) 2 Ch. 555.

Mortgages made charge on net earnings (s. 42).

Sect. 42 provides that the respective mortgagees shall be entitled to their respective proportions of the tolls, sums, and premises comprised in such mortgages, and of the future calls (if comprised therein), according to the respective sums in such mortgages mentioned to be advanced by such mortgagees respectively, and to be repaid the sums so advanced, with interest, without any preference by reason of priority of the date of the mortgage or of the meeting at which it was authorized.

Mortgages or debentures of a public statutory undertaking give only a charge on the net earnings of the undertaking after the expenses of management have been provided for. *Doe* v. *St. Helens & Runcorn Gap Ry. Co.*, 2 Q. B. 364; *Hart* v. *Eastern Union Ry. Co.*, 7 Ex. 246; *Gardner* v. *L. C. & D. Ry. Co.*, L. R. 2 Ch. 201.

A proviso in a railway lease, that interest on the bonds and debentures of the lessor company should be a first charge on the gross receipts, was held to give a charge on the gross traffic

receipts, in priority to working expenses and outgoings. *Proffitt* v. *Wye Valley Ry. Co.*, 64 L. T. 669.

Sect. 23 of the Railway Companies Act, 1867, does not create any charge in favour of holders of debentures or debenture stock on the proceeds of sale of surplus lands of the company. *In re Hull, Barnsley, & West Riding Junction Ry. Co.*, 40 Ch. Div. 119.

Every mortgagee who comes in under the Act, whatever the property charged in his mortgage may be, must bring that property into hotchpot with the other mortgagees. *Landowners West of England Co.* v. *Ashford*, 16 Ch. D. 434.

Mortgagees of a railway company have a right of action against the company in respect of principal or interest in default. *Hart* v. *Eastern Union Ry. Co.*, 7 Ex. 246.

Right of mortgagees to inspect books (s. 45).

The company must keep a register of mortgages and bonds, which may be perused at all reasonable times by any shareholder, mortgagee, bond creditor, or person interested in any mortgage or bond, without fee or reward (sect. 45).

Under this section and sect. 28 of the Companies Clauses Act, 1863, a mortgagee or debenture holder is entitled to see, not merely the names and addresses of the other mortgagees and debenture holders, but also the amounts held by them, and he is entitled to take copies of whatever he has a right to inspect. He is not bound to give a reason for his application. His remedy in case of refusal is by injunction, to which the fact that he is nominee of a rival company does not disentitle him. *Holland* v. *Dickson*, 37 Ch. D. 669; *Mutter* v. *Eastern & Midlands Ry. Co.*, 38 Ch. Div. 62.

Under sect. 55, a mortgagee may, at all reasonable times, inspect the account books of the company and take extracts, without fee or reward.

Interest when payable (s. 48).

Interest is payable on mortgages or bonds at the periods appointed therein or half-yearly, in preference to dividends (sect. 48).

Principal, when repayable (ss. 50, 51).

The company may fix a period for repayment of the principal sum borrowed, with interest (sect. 50). If no time is fixed, the mortgagee may, at or after twelve months from the date of the mortgage, demand payment, upon giving six months'

previous notice; and, in the like case, the company may pay off the mortgage, on giving the like notice (sect. 51).

Cesser of interest (s. 52).

Sect. 52 deals with the cesser of interest at the expiration of notice by the company to pay off the mortgage.

Companies Clauses Act, 1863, s. 22.

The Companies Clauses Act, 1863 (26 & 27 Vict., c. 118), enables (sect. 22) any company incorporated for the purpose of carrying on an undertaking, which is authorized by its special Act to create and issue debenture stock, to raise all or any part of the money which they have raised or are authorized to raise on mortgage or bond by the creation and issue of debenture stock. See the Companies Clauses Act, 1869 (32 & 33 Vict. c. 48), sects. 1 and 2.

Debenture stock made charge on undertaking (s. 23).

Debenture stock, with the interest thereon, is a charge upon the undertaking, prior to all shares or stock, and is transmissible and transferable in the same manner as other stock (sect. 23).

Priority of interest on debenture stock (s. 24).

The interest on debenture stock has priority over all dividends or interest on any stock or shares, and ranks next to the interest on mortgages or bonds granted before the creation of the stock, but the holders of debenture stock rank *pari passu* (sect. 24; see also sect. 30).

Registration and certificates of debenture stock (ss. 28, 29).

Sect. 28 provides for the registration of debenture stock-holders, and sect. 29 for certificates of debenture stock.

Debenture stock-holders have rights of mortgagees (s. 31).

Debenture stock-holders have the rights and powers of mortgagees of the undertaking, other than the right to require repayment of the principal money paid up in respect of the debenture stock (sect. 31).

Companies Clauses Act, 1869, s. 3.

The Companies Clauses Act, 1869 (32 & 33 Vict. c. 48), provides in effect (sect. 3) that any company, which has power under its special Act to raise money by mortgage or bond, may create and issue debenture stock. See *In re Mersey Ry. Co.*, (1895) 2 Ch. 287.

This section extends to all companies within the Companies Clauses Acts provisions which the Railway Companies Act, 1867 (30 & 31 Vict. c. 127), had confined to railway companies (see sect. 24).

As to the nature of debenture stock, see *Attree* v. *Hawe*, 9 Ch. Div. 337.

Creation of

The creation of debenture stock, as distinct from its issue, is

the resolution which authorizes the issue, fixes the rate of interest, and prescribes the other conditions on which it is to be held. *In re Burry Port Ry. Co.*, 54 L. J. Ch. 710. Debenture stock, what.

As to the construction of provisions in special Acts determining the priority of mortgages, debentures, and debenture stock, see *Harrison* v. *Cornwall Minerals Ry. Co.*, 16 Ch. D. 66; 18 Ch. Div. 334; 8 App. Cas. 780; *In re Burry Port Ry. Co.*, 54 L. J. Ch. 710; *In re Mersey Ry. Co.*, (1895) 2 Ch. 287. Relative priority of mortgages, debentures, and debenture stock.

The company may take power to redeem debenture stock. *Whitehaven Joint Stock Banking Co.* v. *Reed*, 54 L. T. 360. Power to redeem debenture stock.

The Railway Companies Securities Act, 1866 (29 & 30 Vict. c. 108), provides (sect. 10) that it shall not be lawful for any railway company at any time to borrow any money on mortgage or bond, or to issue any debenture stock, under any Act of the present session, or passed after the end of the half-year to which their then last registered loan capital half-yearly account relates, unless and until they have first deposited with the Registrar of Joint Stock Companies in England a statement, certified and signed by the company's registered officer as a true statement, specifying the particulars described in the First Schedule to this Act, Part II. Railway Companies Securities Act, 1866 (s. 10).

Sect. 11 imposes a penalty on any railway company which borrows any money on mortgage or bond, or issues any debenture stock, without obeying the requirements of sect. 10. Penalty for non-compliance (s. 11).

Sect. 14 provides that a declaration, in the form given in the second schedule to the Act, shall be put on every mortgage deed or certificate for debenture stock, given by a railway company after the 21st of January, 1867, and sect. 15 imposes a penalty on a company which omits the declaration. Declaration to be put on mortgages, etc. (s. 14).

Where an untrue declaration was indorsed upon certificates of debenture stock, to the effect that it was within the amount authorized, the measure of damages in an action against the directors is the difference between what would have been the value of the debenture stock if it had not been *ultra vires* and its actual value when the indorsement was made. *Whitehaven Joint Stock Banking Co.* v. *Reed*, 54 L. T. 360; *Firbank's Executors* v. *Humphreys*, 18 Q. B. Div. 54.

Sect. 18 provides that nothing in the Act shall affect in any

action or suit any question respecting any loan, debt, liability, mortgage, bond, or debenture stock, as between a railway company or any director or officer of it on the one side, and any person or class of persons on the other.

Railway Companies Act, 1867, s. 23.

The Railway Companies Act, 1867 (30 & 31 Vict. c. 127), provides in effect (sect. 23) that all money borrowed by a railway company on mortgage, or bond, or debenture stock shall have priority against the company and their property over all other claims on account of debts incurred, or engagements entered into by the company after the 20th of August, 1867; but this priority is not to affect any claims against the company in respect of any rent-charge granted by them, or rent under a lease made to them, or any claim for land taken or injuriously affected.

The effect of sect. 23 is considered in *In re Hull, Barnsley, & West Riding Junction Ry. Co.*, 40 Ch. Div. 119.

Where a railway has been sold as a going concern under the provisions of a private Act, mortgagees of the undertaking are entitled to be paid out of the proceeds of sale in priority to judgment creditors. *Furness* v. *Caterham Ry. Co.*, 27 B. 358; *In re Bagnalstown & Wexford Ry. Co.*, I. R. 1 Eq. 275.

Holders of rent-charges have a first charge on the net earnings in priority to debenture holders. *Eyton* v. *Denbigh, Ruthin, & Corwen Ry. Co.*, 7 Eq. 439.

A debenture-holder is probably entitled to restrain a company from selling its rolling stock for payment of debts which rank after the debentures. *Yorkshire Ry. Wagon Co.* v. *Maclure*, 21 Ch. Div. 309, 314.

III. Companies under the Companies Acts.

Powers are limited by memorandum.

The powers of a company under the Companies Acts are limited by the memorandum of association. *Ashbury Ry. Carriage Co.* v. *Riche*, L. R. 7 H. L. 653.

Relation of articles to memorandum.

As to the power of referring to the articles to explain ambiguities or fill up omissions in the memorandum, see *Harrison* v *Mexican Ry. Co.*, 19 Eq. 358; *Anderson's Case*, 7 Ch. Div. 75; *In re Phœnix Bessemer Steel Co.*, 44 L. J. Ch. 683;

Guinness v. *Land Corporation of Ireland*, 22 Ch. Div. 349; *Smith* v. *Chadwick*, 9 App. Cas. 187.

Power of altering memorandum.

Where a condition in the memorandum of association is an essential part of the constitution of the company, it cannot be altered except under sect. 12 of the Companies Act, 1862, although it is not one of the conditions required by sect. 8 of the Act to be inserted in the memorandum. *Ashbury* v. *Watson*, 28 Ch. D. 56; 30 Ch. Div. 376.

A company may be given a power to raise borrowed capital under the Companies (Memorandum of Association) Act, 1890. *In re Reversionary Interest Society*, (1892) 1 Ch. 615.

Mortgage Debenture Acts, 1865 and 1870.

The Mortgage Debenture Act, 1865 (28 & 29 Vict. c. 78), and the Mortgage Debenture (Amendment) Act, 1870 (33 & 34 Vict. c. 20), enable such companies under the Companies or any other Act, as are entitled to advance money on the security of land, to issue mortgage debentures founded on the securities mentioned in sect. 4 of the Amendment Act.

Implied power to borrow and give security.

A power to borrow, for the purposes of its business, and to give security for repayment of the loan, is implied in every trading company. *Australian Auxiliary Steam Clipper Co.* v. *Mounsey*, 4 K. & J. 733; *Bryon* v. *Metropolitan Saloon Omnibus Co.*, 3 De G. & Jo. 123; *Gibbs & West's Case*, 10 Eq. 312; *In re Hamilton's Windsor Ironworks*, 12 Ch. D. 707; *General Auction Estate Co.* v. *Smith*, (1891) 3 Ch. 432; see *In re Lough Neagh Ship Co.*, (1895) 1 I. R. 533.

Where the memorandum of association is silent as to borrowing, and the articles give a limited power, they may be altered by special resolution to give a more extensive power. *Jackson* v. *Rainford Coal Co.*, (1896) 2 Ch. 340.

Power to issue negotiable instruments.

As to the power of a company under the Companies Acts to issue negotiable instruments, see *In re Peruvian Railways Co.*, L. R. 2 Ch. 617.

The cases are conflicting as to whether negotiable instruments can be issued under seal. It appears to be clear that negotiability cannot be attached to a charge on property of the issuing corporation. See *Crouch* v. *Credit Foncier of England*, L. R. 8 Q. B. 374.

to mortgage

A company can create an equitable mortgage by deposit of

by deposit of title-deeds,

title-deeds. *In re Patent File Co.*, 6 Ch. 83; *In re General Provident Assurance Co.*, 14 Eq. 507.

to create irredeemable debenture stock.

It is clear that a power to mortgage would not enable a company to issue perpetual debenture stock, and it is doubtful whether a company can give itself power to create a security which shall be irredeemable.

Where a company gives a share to every subscriber to a debenture, the share is liable to be paid up in full. *In re Ry. Time Tables Co.*, 62 L. J. Ch. 935.

Power to mortgage after-acquired property.

A company can give itself power to mortgage the whole of its property (*a*), including after-acquired property (*b*). (*a*) *In re Marine Mansions Co.*, 4 Eq. 601; *In re Panama Royal Mail Co.*, 5 Ch. 318; *In re General South American Co.*, 2 Ch. D 337. (*b*) *Bloomer* v. *Union Coal & Iron Co.*, 16 Eq. 383; *Anderson* v. *Butlers' Wharf Co.*, 48 L. J. Ch. 824; *Ex parte Cox*, 13 L. R. Ir. 174.

Power to mortgage future calls.

It can give itself power to mortgage future calls, including calls to be made in the winding-up (*a*), but not to mortgage that part of its capital which, under sect. 5 of the Companies Act, 1879, can only be called up in the event of a winding-up (*b*). (*a*) *In re Phœnix Bessemer Steel Co.*, 44 L. J. Ch. 683; *In re Pyle Works*, 44 Ch. Div. 534; *Newton* v. *Debenture Holders of Anglo-Australian Investment Co.*, (1895) A. C. 244. (*b*) *In re Pyle Works, supra.*

Debenture may be issued at discount.

A company can issue debentures at a discount. *In re Anglo-Danubian Steam Navigation Co.*, 20 Eq. 339; *In re Regent's Canal Ironworks Co.*, 3 Ch. Div. 43; *Campbell's Case*, 4 Ch. D. 470.

Verbal security may be created.

Power to borrow by the issue of securities permits the creation of a verbal security. *In re Tilbury Portland Cement Co.*, 62 L. J. Ch. 814; (1893) W. N. 141.

What words authorize mortgage of future calls.

Future calls, including calls to be made in the winding-up, may be mortgaged under a power to mortgage all or any part of the company's properties and rights (*a*), or to receive money upon any security of the company, or upon the security of any property of the company (*b*), but not under a power to mortgage the property or property both present and future (*c*), property and funds (*d*), or property and effects (*e*), of the

company. (*a*) *Howard* v. *Patent Ivory Manufacturing Co.*, 38 Ch. D. 156. (*b*) *Newton* v. *Debenture Holders of Anglo-Australian Investment Co.*, (1895) A. C. 244. (*c*) *Bank of South Australia* v. *Abrahams*, L. R. 6 P. C. 265; *Holme* v. *Drachenfels Syndicate*, 2 Manson, 146; *In re Streatham Estates Co.*, (1897) 1 Ch. 15. (*d*) *Stanley's Case*, 4 D. J. & S. 407. (*e*) *In re Sankey Brook Coal Co.*, 9 Eq. 721; 10 Eq. 381.

In *Jackson* v. *Rainford Coal Co.* [(1896) 2 Ch. 340] it was held that uncalled capital might be mortgaged under a power to mortgage "in such other manner as the company may determine."

A mortgage of assets (*a*) includes, but a mortgage of real and personal estate (*b*) does not include, uncalled capital. (*a*) *Page* v. *International Agency*, 62 L. J. Ch. 610. (*b*) *In re Colonial Trusts Corporation*, 15 Ch. D. 465.

What words include after-acquired property.

A mortgage of the undertaking (*a*) or property (*b*) of the company includes its after-acquired property. (*a*) *In re Marine Mansions Co.*, 4 Eq. 601; see *In re New Clydach Co.*, 6 Eq. 514. (*b*) *Bloomer* v. *Union Coal & Iron Co.*, 16 Eq. 383.

A charge on the undertaking covers moneys recovered by proceedings for misfeasance under sect. 10 of the Companies (Winding-Up) Act, 1890. *In re Anglo-Austrian Printing Union*, (1895) 2 Ch. 891.

Where debentures are given in lieu of debentures which are supposed to be defective, the presumption is that they are intended to charge the same property as that included in the original debentures. *Ross* v. *Army & Navy Hotel Co.*, 34 Ch. Div. 43.

Power to give security for existing debt.

A power to borrow or raise money on mortgage, or by the issue of debentures, enables a company to give security for an existing debt. *In re Inns of Court Hotel Co.*, 6 Eq. 82; *In re Patent File Co.*, 6 Ch. 83; *Landowners West of England Drainage Co.* v. *Ashford*, 16 Ch. D. 411; *Howard* v. *Patent Ivory Manufacturing C.*, 38 Ch. D. 156; *General Auction Estate Co.* v. *Smith*, (1891) 3 Ch. 432; *Seligman* v. *Prince & Co.*, (1895) 2 Ch. 617; see *In re Pyle Works* (No. 2), (1891) 1 Ch. 173.

When debentures constitute charge.

A debenture primarily imports a personal liability only. *Ex parte Moor*, 10 Ch. Div. 530.

As to the meaning of debenture, see p. 40.

As to whether a debenture which purports to bind the company and their estate, property, and effects, or their real and personal estate creates a charge, see *Norton* v. *Florence Land Co.*, 7 Ch. D. 332; *Ex parte Moor*, 10 Ch. Div. 530.

A proviso that debenture-holders shall be entitled to payment *pari passu* shows that the debentures create a charge. *In re Colonial Trusts Corporation*, 15 Ch. D. 465.

Floating security, what.

A charge by a company on its undertaking, and all sums of money arising therefrom (*a*), its estate, property, and effects (*b*), or its real and personal estate (*c*), constitutes a floating security, (*a*) *In re Panama Mail Co.*, 5 Ch. 318. (*b*) *Ex parte Moor*, 10 Ch. Div. 530. (*c*) *Ex parte Bradshaw*, 15 Ch. D. 465.

To what property it attaches.

A floating security attaches to all the property of the company in existence at the time when it becomes specific. Until then, the company is entitled to deal with its property in the ordinary course of business. *In re Panama Royal Mail Co.*, 5 Ch. 318; *Ex parte Moor*, 10 Ch. Div. 530; *Ex parte Pitman & Edwards*, 12 Ch. D. 707; *Tailby* v. *Official Receiver*, 13 App. Cas. 523, 541; *Driver* v. *Broad*, (1893) 1 Q. B. 744; *Biggerstaff* v. *Rowatt's Wharf*, (1896) 2 Ch. 93.

Goods taken in execution.

A floating security attaches on goods which have been taken in execution, but not sold at the time when the security becomes specific. *In re Standard Manufacturing Co.*, (1891) 1 Ch. 627; *In re Opera Limited*, (1891) 3 Ch. 260; *Taunton* v. *Sheriff of Warwickshire*, (1895) 1 Ch. 734; 2 Ch. 319.

But overseers of the poor can distrain for rates on goods comprised in debentures, the holders of which have obtained a receiver. *In re Marriage, Neave & Co.*, (1896) 2 Ch. 663.

A debtor to a company, which has created debentures by way of floating security over all its property, can set off debts which accrue due from the company after the creation of the debentures, but before a receiver is appointed at the instance of the debenture holders. *Biggerstaff* v. *Rowatt's Wharf*, (1896) 2 Ch. 93.

As to the power of the company to create charges on specific parts of its property in priority to a floating security, see p. 419.

When floating

In the absence of special provisions in the debentures, a

floating security does not become specific until the company is wound-up or stops business, or a receiver is appointed at the instance of the debenture holders. *In re Panama Royal Mail Co.*, 5 Ch. 318; *Ex parte Moor*, 10 Ch. Div. 530; *Ex parte Bradshaw*, 15 Ch. D. 465; *Robson* v. *Smith*, (1895) 2 Ch. 118; *Government Stock Investment Co.* v. *Manila Ry. Co.*, (1895) 2 Ch. 551. Security becomes specific.

A floating security becomes enforceable at the commencement of the winding-up, although the debt is not repayable until a later date. *Hodson* v. *Tea Co.*, 14 Ch. D. 859; *Wallace* v. *Universal Automatic Machines Co.*, (1894) 2 Ch. 547.

As to the rights of debenture holders, who have placed money in the hands of trustees for a purpose which it becomes impossible to carry out, to a return *pari passu* of their unspent subscriptions, see *Wilson* v. *Church*, 13 Ch. Div. 1, S. C. *National Bolivian Co.* v. *Wilson*, 5 App. Cas. 176, 185; *Collingham* v. *Sloper*, (1893) 2 Ch. 96. Right of lenders for object incapable of fulfilment.

As to the rights of some holders of an issue of debentures to contest the validity of other debentures of the same issue, see *In re Regent's Canal Ironworks Co.*, 3 Ch. Div. 43; *Mowatt* v. *Castle Steel Co.*, 34 Ch. Div. 58; *In re Queensland Land & Coal Co.*, (1894) 3 Ch. 181. Right of holders of some debentures to contest validity of others.

IV. Other Trading Corporations.

Power is given to incorporated building societies to borrow money, within the limits therein mentioned, by sect. 15 of the Building Societies Act, 1874, (37 & 38 Vict. c. 42), and sect. 14 of the Building Societies Act, 1894 (57 & 58 Vict. c. 47). Incorporated building societies.

No power is given to secure loans by mortgage or charge, and it is conceived that no such power exists. The provision in sect. 19 of the Act of 1874, that any society in a schedule to its rules may describe the forms of "security for deposit or loan," is not enough to give such a power by implication.

In *Andrew* v. *Swansea Building Society* (50 L. J. Q. B. 428), a building society gave a bond declaring that "all the funds, assets, and effects of the society shall be held liable for repayment of the loan." It was held by C. A. that the

bondholder had not a mortgage entitling him to foreclosure, but, at most, an equitable charge entitling him to be paid out of the assets in priority to other creditors. The question whether such a charge could be validly given did not arise.

Industrial and provident societies.

Industrial and provident societies are empowered, by sect. 36 of the Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), if their rules do not direct otherwise, to hold land and mortgage the same, and no mortgagee shall be bound to inquire as to the authority for any such mortgage, and the receipt of the society shall be a discharge for all moneys arising from, or in connection with, such mortgage.

Friendly societies.

The Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), empowers (sect. 47) a registered society, if its rules provide, to hold and mortgage land. The mortgagee is not bound to inquire as to the authority for such mortgage, and the receipt of the trustees is a discharge for the mortgage moneys.

CHAPTER XVIII.

PRELIMINARIES OF THE SECURITY.

A. Specific Performance of the Contract of Loan.

Contract to lend or borrow is not specifically enforced.

A CONTRACT to make or take a loan of money, whether the loan is to be on security or not, will not be specifically enforced, but the parties will be left to their remedy in damages, the measure of damages being the loss sustained by the breach. *Rogers* v. *Challis*, 27 B. 175; *Sichel* v. *Mosenthal*, 30 B. 371; *Larios* v. *Bonany y Gurety*, L. R. 5 P. C. 346; *Western Wagon Co.* v. *West*, (1892) 1 Ch. 271.

Contract to give security is specifically enforced.

But a contract to give security in consideration of a loan will be specifically enforced (*a*), even where the agreement is to execute a mortgage with an immediate power of sale (*b*). (*a*) *Hermann* v. *Hodges*, 16 Eq. 18; Seton, 1694. (*b*) *Ashton* v. *Corrigan*, 13 Eq. 76; *Hermann* v. *Hodges*, *supra*.

What provisions will be inserted.

Where there is an agreement to execute a mortgage, including all powers, covenants, and clauses, incidental and necessary thereto, the mortgage should contain a covenant for payment. *Saunders* v. *Milsome*, L. R. 2 Eq. 573.

Subject-matter of security cannot be enlarged.

Where an agreement charging a hotel, which was construed to mean the physical building, provided for the execution of a valid mortgage, which was to be in such form and to contain such powers, covenants, and provisions as the mortgagee's solicitor should advise or require, it was held that these words would not permit the subject-matter of the security to be enlarged by including the hotel business and goodwill. *Whitley* v. *Challis*, (1892) 1 Ch. 64.

Form of ordinary power of sale.

As to the form of the power of sale to be inserted in an ordinary mortgage, see *Cockburn* v. *Edwards*, 18 Ch. Div. 449; *Pooley's Trustee* v. *Whetham*, 33 Ch. Div. 111.

Agreement not to call in principal.

An agreement not to call in the principal money for some years will be made conditional on punctual payment of interest. *Seaton* v. *Twyford*, 11 Eq. 591.

Where a debtor agreed in writing with his creditor to execute a mortgage at 5 per cent. in four years to secure a debt, it was held that the mortgage must be of a sufficient portion of the debtor's real estate to secure the debt. *In re Fitzgerald*, 6 Ir. Jur. N. S. 180.

B. Payment of the Loan.

There is no distinction, as regards the agent's authority, between cases of purchase and of mortgage. *Viney* v. *Chaplin*, 2 De G. & J. 468, 483.

Agent must have express or implied authority to receive payment.

1. Where payment is not made to the principal personally, the payer is only discharged if it is made to an agent, who has either a special written authority to receive it on the occasion in question, or a general authority incident to his office to receive payment on the principal's behalf.

Conveyancing Act, s. 56.

The Conveyancing Act, 1881, provides—

Sect. 56, (1). Where a solicitor produces a deed, having in the body thereof, or indorsed thereon, a receipt for consideration money or other consideration, the deed being executed or the indorsed receipt being signed by the person entitled to give a receipt for that consideration, the deed shall be sufficient authority to the person liable to pay or give the same for his paying or giving the same to the solicitor, without the solicitor producing any separate or other direction or authority in that behalf from the person who executed or signed the deed or receipt.

(2) This section applies only in cases where consideration is to be paid or given after the commencement of this Act.

Production of deed by solicitor.

The solicitor within this section must be a solicitor acting for the party to whom the money is expressed to be paid, the effect of the section being to make a deed in the form pointed out equivalent to a special written authority, and the solicitor must actually produce the deed, his mere possession of it not being enough. *Day* v. *Woolwich Building Society*, 40

Ch. D. 491; *In re Hetling and Merton's Contract*, (1893) 3 Ch. 269.

Cases where the principal is trustee.

Trustees cannot, except in cases of moral necessity, *e.g.* where a trustee is abroad, authorize a solicitor or other agent or one of their own number to receive money on their behalf. *In re Bellamy and Metropolitan Board of Works*, 24 Ch. Div. 387; *In re Flower and Metropolitan Board of Works*, 27 Ch. D. 592, overruling *Webb* v. *Ledsam*, 1 K. & J. 385; *Hope* v. *Liddell*, 21 B. 183; *Robertson* v. *Armstrong*, 28 B. 123.

The law has been altered on this point with regard to solicitors.

Trustee Act, 1893, s. 17.

The Trustee Act, 1893 (56 & 57 Vict. c. 53), provides—

Sect. 17, (1). A trustee may appoint a solicitor to be his agent to receive and give a discharge for any money or valuable consideration or property receivable by the trustee under the trust, by permitting the solicitor to have the custody of, and to produce, a deed containing any such receipt as is referred to in section 56 of the Conveyancing and Law of Property Act, 1881; and a trustee shall not be chargeable with breach of trust by reason only of his having made or concurred in making any such appointment; and the producing of any such deed by the solicitor shall have the same validity and effect under the said section as if the person appointing the solicitor had not been a trustee.

(4) This section applies only where the money or valuable consideration or property is received after the 24th day of December, 1888.

(5) Nothing in this section shall authorize a trustee to do anything which he is in express terms forbidden to do, or to omit anything which he is in express terms directed to do, by the instrument creating the trust.

The solicitor acting under this section must be appointed by the trustee himself, and the trustee must himself permit the production in the section mentioned. He cannot delegate the power of appointment to an attorney. *In re Hetling and Merton's Contract*, (1893) 3 Ch. 269.

Payment must be in cash.

As a rule, an authority to an agent to receive payment implies that he is to receive it in cash; and if, instead of

paying cash, the payer writes off a debt due to him from the agent, such a transaction is not payment as against the principal. *Todd* v. *Reid*, 4 B. & A. 210; *Russell* v. *Bangley*, 4 B. & A. 395, 398; *Bartlett* v. *Pentland*, 10 B. & C. 760; *Scott* v. *Irving*, 1 B. & Ad. 605; *Young* v. *White*, 7 B. 506; *Sweeting* v. *Pearce*, 7 C. B. N. S. 449; 9 C. B. N. S. 534; *Williams* v. *Evans*, L. R. 1 Q. B. 352; *Pearson* v. *Scott*, 9 Ch. D. 198; *McDevitt* v. *Connolly*, 13 L. R. Ir. 207; *Coupe* v. *Collyer*, 62 L. T. 927.

A return to the agent of his cheque, which the payer has cashed for him a few days before, is not a good payment as against the principal. *Underwood* v. *Nicholls*, 17 C. B. 239.

Payment by cheque.

In a transaction of any magnitude payment by cheque, which is duly honoured, is equivalent to payment in cash, even though the cheque is crossed to the agent's bankers. *Thorold* v. *Smith*, 11 Mod. 87; *Bridges* v. *Garrett*, L. R. 4 C. P. 580; 5 C. P. 451; *Farrer* v. *Lacy, Hartland & Co.*, 25 Ch. D. 636; 31 Ch. Div. 42.

Principal indebted to agent.

Where the agent has authority from the principal to retain part of the money to be paid, in satisfaction of a debt due to him from the principal, he may receive payment, to that extent, in any way which he thinks fit. *Barker* v. *Greenwood*, 2 Y. & C. Ex. 414.

Payment under special custom.

By the custom of a particular business, or attaching to special classes of agents, payment to the agent may discharge the payer, the agent being substituted as debtor to the principal. Such a custom will bind those who have notice of it, and have consented to be bound by it. *Stewart* v. *Aberdein*, 4 M. & W. 211; *Catterall* v. *Hindle*, L. R. 1 C. P. 186; 2 C. P. 368.

Agent of borrower holding moneys of lender.

Where A.'s agent, who has authority to receive money for him, has money of B. in his hands, which he is able and ready to pay over to B., and B. agrees to lend part of it to A., that is a good payment as against A. *Perry* v. *Holl*, 2 D. F. & J. 38, 52.

But it is not payment where A.'s agent is merely indebted to B. *Young* v. *Guy*, 8 B. 147.

Where B. puts money into the hands of an agent for investment, and the agent, after the money has left his hands, gets

authority from A. to receive money for him, there is no payment binding A. *Wall* v. *Cockerell*, 3 D. F. & J. 737; 10 H. L. C. 229; *Gordon* v. *James*, 30 Ch. Div. 249, 256.

Principal bound by estoppel.

2. The principal may be estopped by his conduct from disputing that a good payment has been made him.

Execution of deed with receipt before payment.

Thus, if A. entrusts B. with money to invest in a transfer of a mortgage from C., and C., without receiving payment, executes a deed with receipt indorsed, and delivers it to B., so that B. is enabled to represent to A. that the money has reached C.'s hands, C. is estopped from setting up a vendor's lien as against A., who has the legal estate. *Gordon* v. *James*, 30 Ch. Div. 249.

In *Vandaleur* v. *Blagrave* (6 B. 565) the deed of release, which was relied on as an estoppel, had no receipt except in the body of the deed. The distinction between an indorsed receipt and a receipt in the body of the deed is now done away with by sect. 54 of the Conveyancing Act, 1881.

Where, A. and B., trustees, having agreed to lend C. money on mortgage, B. receives from A., to the knowledge of C., the whole of the money, in order that it may be paid over to C., and C., before receiving the whole, executes a deed with receipt endorsed, C. is estopped as against A. from denying that the deed is a security for the whole amount agreed to be lent. *West* v. *Jones*, 1 Sim. N. S. 205.

But a deed with a receipt indorsed will not operate as an estoppel where the person receiving the deed is himself guilty of negligence, *e.g.* where the deed represents a state of facts which differs from representations made by the agent as to the employment of the money advanced. *Wall* v. *Cockerell*, *supra*.

C. Costs of preparing the Mortgage.

The mortgagee is primarily liable to his own solicitor for the expenses incident to the mortgage transaction.

Liability of mortgagor for mortgagee's costs.

When the mortgage is completed, the mortgagor is liable to pay over to the mortgagee what the mortgagee has paid to his solicitor; but there is no debt till the transaction is

completed; and if the transaction falls through, the intending mortgagee cannot recover the expenses from the intending mortgagor. *Rigley* v. *Daykin*, 2 Y. & J. 83; *Pratt* v. *Vizard*, 5 B. & Ad. 808; *Wilkinson* v. *Grant*, 18 C. B. 319; *Ex parte Firth*, 19 Ch. Div. 419, 427.

Reasonable costs, what.

Where an intending mortgagor agreed to pay the reasonable costs of the mortgagee's solicitors if the matter went off, it was held that the costs did not include a commission charged by the lender's bankers for withdrawing the loan from his deposit account at Leeds and remitting it to London. *Re Blakesley and Beswick*, 32 B. 379.

Mortgagees' Legal Costs Act, 1895, s. 2.

The Mortgagees' Legal Costs Act, 1895 (58 & 59 Vict. c. 25), which passed on the 6th of July, 1895, provides—

Sect. 2, (1). Any solicitor to whom, either alone or jointly with any other person, a mortgage is made, or the firm of which such solicitor is a member, shall be entitled to receive for all business transacted and acts done by such solicitor or firm in negotiating the loan, deducing and investigating the title to the property, and preparing and completing the mortgage, all such usual professional charges and remuneration as he or they would have been entitled to receive if such mortgage had been made to a person not a solicitor, and such person had retained and employed such solicitor or firm to transact such business, and do such acts; and such charges and remuneration shall accordingly be recoverable from the mortgagor.

(2) This section applies only to mortgages made after the commencement of this Act.

This enactment repeals the law as laid down in *In re Roberts*, 43 Ch. D. 52; *Field* v. *Hopkins*, 44 Ch. D. 524, 529.

Delivery of bill of costs to mortgagor.

The mortgagor is not entitled to tax the mortgagee's solicitor's bill of costs unless it has been delivered to him. Delivery to the mortgagee is not a constructive delivery to the mortgagor. *In re Robertson*, 42 Ch. D. 553.

Solicitors' Remuneration Act, 1881, s. 8, (1).

An intending mortgagor can make a binding agreement with his solicitor under sect. 8, (1), of the Solicitors' Remuneration Act, 1881, for payment of the mortgagee's costs of preparing the mortgage as well as his own. *In re Palmer*, 45 Ch. Div. 291.

D. Stamps.

As to the duty on mortgages, see the Stamp Act, 1891, sects. 86 to 89, and Schedule I., *s.v.* Mortgage. Duty on mortgages,

Mortgages of any ship or vessel, or any part, interest, share, or property of, or in any ship or vessel are, by the same Schedule, exempted from all stamp duties.

As to the duty on marketable securities, see sects. 82 to 85, Schedule I., *s.v.* Marketable Securities and *Brown, Shipley & Co.* v. *Commissioners of Inland Revenue*, (1895) 2 Q. B. 598. marketable securities,

As to the duty on bills of sale, see sect. 41. bills of sale.

CHAPTER XIX.

ELEMENTS OF THE SECURITY.

A. The Lender.

Joint lenders are tenants in common in equity.

WHERE several lenders advance money on mortgage in equal shares, then, although the conveyance is made to them as joint tenants, they are treated in equity as tenants in common of the mortgage moneys. *Petty* v. *Styward*, 1 Ch. Rep. 31; *Rigden* v. *Vallier*, 3 Atk. 731, 734; *Robinson* v. *Preston*, 4 K. & J. 505, 511; see *Matson* v. *Dennis*, 4 D. J. & S. 345, 349.

Evidence is admissible to show that a tenancy in common was intended, although the mortgage contains a declaration that the mortgage money belongs to the mortgagees on a joint account in equity as well as at law. *In re Jackson*, 34 Ch. D. 732.

B. The Secured Debt.

Loan creates debt.

1. A loan, either on mortgage (*a*), or pledge (*b*), creates a debt, which may be recovered by action. (*a*) *King* v. *King*, 3 P. W. 358; *Goodman* v. *Grierson*, 2 Ba. & Be. 274; *Yates* v. *Aston*, 4 Q. B. 182; *Hopkins* v. *Worcester & Birmingham Canal*, 6 Eq. 437; *Sutton* v. *Sutton*, 22 Ch. Div. 511. (*b*) *Jones* v. *Marshall*, 24 Q. B. D. 269.

Covenant to pay out of fund.

But a covenant in a mortgage deed to pay out of a specific fund prevents a personal liability from being implied, and an action for money lent does not lie against the covenantor. *Mathew* v. *Blackmore*, 1 H. & N. 762.

No debt in Welsh mortgage.

In a Welsh mortgage, the borrower is under no personal obligation to pay the loan (*a*), but the existence of a covenant to repay on demand has been held not to be inconsistent with

the nature of such a mortgage (*b*). (*a*) *Lawley* v. *Hooper*, 3 Atk. 278, 280; *Cassidy* v. *Cassidy*, 24 L. R. Ir. 577. (*b*) *Teulon* v. *Curtis*, Younge, 610; see *Balfe* v. *Lord*, 2 D. & War. 480.

Perpetual loan.

2. The contract of loan may expressly provide that the principal is not to be repaid; but such a term will not be readily implied. *Hopkins* v. *Worcester & Birmingham Canal*, 6 Eq. 437.

As to the debenture stock of railway companies, see p. 152.

Whether debt is specialty or simple contract.

3. A person named as a party to a deed cannot be charged under it as a specialty debtor unless he has executed the deed, even though he has acted under it. *Richardson* v. *Jenkins*, 1 Drew. 477.

An implied promise to pay may be, according to the character and construction of the document, a simple or a specialty contract.

An acknowledgment of a debt by deed, without any other object declared by the deed, amounts to a covenant by the debtor to pay. *Turner* v. *Wardle*, 7 Sim. 80; *Saltoun* v. *Houstoun*, 1 Bing. 433; *Saunders* v. *Milsome*, L. R. 2 Eq. 573.

An acknowledgment made for a collateral purpose has not that effect. Thus, a recital that a debt is due in a deed, the object of which is to create a security for the debt, does not make the debt a specialty debt, and a proviso for redemption does not amount to a covenant to pay. *Courtney* v. *Taylor*, 7 Scott, N. R. 749; 6 M. & G. 851; *Marryat* v. *Marryat*, 28 B. 224; *Isaacson* v. *Harwood*, L. R. 3 Ch. 225; *Jackson* v. *N. E. Ry. Co.*, 7 Ch. D. 573; see *Holland* v. *Holland*, 4 Ch. 449.

Construction of covenants to pay.

4. A covenant in a mortgage to pay every other sum which should hereafter become owing to the mortgagee by the mortgagors, or either of them, does not include costs due from one of the mortgagors to the solicitor mortgagee for business done after the mortgage, but not in connection with it. *Field* v. *Hopkins*, 44 Ch. Div. 524; see *Eyre* v. *Wynn-Mackenzie*, (1894) 1 Ch. 218.

A covenant in a bill of sale to pay the loan by equal payments on the 5th July and the 5th January, without stating the year, was held to refer to the 5th July and the 5th

January next after the date of the bill of sale. *Grannell* v. *Monck*, 24 L. R. Ir. 241.

Measure of damages in stock mortgages.

Where the mortgagor covenants to replace stock on a fixed day, the measure of damages, in an action at law for breach of the covenant, is the price on the day when the stock ought to have been replaced or at at the day of the trial, at the option of the mortgagee. *Forrest* v. *Elwes*, 4 Ves. 492; *McArthur* v. *Seaforth*, 2 Taunt. 257; see *Blyth* v. *Carpenter*, L. R. 2 Eq. 501.

Interest, where not expressly provided.

5. Upon a contract for the payment of money borrowed for a fixed period on a day certain, with interest at a certain rate down to that day, there is no implied term in the contract for the continuance of interest at the same rate, or of interest at all, after that day. Interest is given in such cases, not as part of the debt payable under the contract, but by way of damages for detention of the debt. *Cook* v. *Fowler*, L. R. 7 H. L. 27, 32, 37.

This principle extends to debts secured by mortgage. 1 Wms. Saund. 201 *n.*; *In re European Central Ry. Co.*, 4 Ch. Div. 33; *In re Roberts*, 14 Ch. Div. 49; *Goldstrom* v. *Tallerman*, 18 Q. B. Div. 1.

Lord Tenterden's Act, s. 28.

Interest, therefore, can only be given in such cases under the provisions of Lord Tenterden's Act (3 & 4 Wm. IV. c. 42), which (sect. 28) enables a jury to allow interest at a rate not exceeding the current rate upon all debts or sums certain, payable at a certain time or otherwise, from the time when they were payable, if they be payable by virtue of some written instrument at a certain time, or, if payable otherwise, then from the time when demand of payment, giving notice that interest will be claimed, shall have been made in writing.

"Certain time."

A time is certain within the Act if it is fixed with reference to an event which must happen, *e.g.* death (*a*), but not if it is fixed with reference to an event which may or may not happen, *e.g.* the safe arrival of a ship (*b*). (*a*) *Knapp* v. *Burnaby*, 9 W. R. 765; *In re Horner*, (1896) 2 Ch. 188. (*b*) *Merchant Shipping Co.* v. *Armitage*, L. R. 9 Q. B. 99.

Interest will be payable under the Act from the time that the principal becomes due, although there is no legal hand

to receive the money. *Crossley* v. *City of Glasgow Life Assurance Co.*, 4 Ch. D. 427.

The damages will be measured by the rate of interest prescribed by the mortgage, if it is not above 5 per cent., and if it is above 5 per cent., they will be calculated at 5 per cent. *In re Roberts*, 14 Ch. Div. 49; *Mellersh* v. *Brown*, 45 Ch. D. 225. Interest will be given at 5 per cent.

In the older cases, the right to interest was founded on an implied contract for the continuance of interest at the same rate as that prescribed by the mortgage. *Price* v. *G. W. Ry. Co.*, 16 M. & W. 244; *Morgan* v. *Jones*, 8 Ex. 620; *Gordillo* v. *Weguelin*, 5 Ch. Div. 287, 303.

These cases are no longer law, if, as it appears, the doctrine of *Cook* v. *Fowler* is applicable to mortgages.

Where an equitable security, for the payment on a prescribed day of 1000*l.* with interest at 7½ per cent., provided for the execution on request of a legal mortgage, with such provisions as the mortgagees might require for further securing payment of the principal then owing, "with interest for the same after the rate aforesaid," it was held that interest at 7½ per cent. continued to be payable after the prescribed day. *Ex parte Furber*, 17 Ch. D. 191.

If, where the mortgage deed provides for the payment of interest for a limited time, there is no implied contract for interest after that time, *a fortiori* there is no implied contract for interest where the mortgage deed makes no provision for interest, or where the mortgage is effectuated by a deposit of deeds without writing. Interest under deposit of title-deeds.

Now interest, where it is not payable under Lord Tenterden's Act, can only be payable on the footing of contract, express or implied. *Higgins* v. *Sargent*, 2 B. & C. 348; *Page* v. *Newman*, 9 B. & C. 378; *Foster* v. *Weston*, 6 Bing. 709; *L. C. & D. Ry. Co.* v. *S. E. Ry. Co.*, (1892) 1 Ch. 120; (1893) A. C. 429.

It has been held, however, that a deposit of title-deeds to secure a loan carries interest, in Ireland at 5, and in England at 4 per cent. *Carey* v. *Doyne*, 5 Ir. Ch. 104; *In re Kerr's Policy*, 8 Eq. 331.

It has been suggested that interest may be given in equity Interest in

redemption action.

as a condition of allowing the mortgagor to redeem in cases where it would not be recoverable at law. *Robinson* v. *Cumming*, 2 Atk. 409; *Booth* v. *Leycester*, 3 M. & Cr. 459, 467; *In re Roberts*, 14 Ch. Div. 49.

C. Property passing under the Security.—I. Fixtures.

Mortgage in fee carries fixtures.

A mortgage in fee of land, whether legal or equitable, carries with it without special words all fixtures annexed to the land at the date of the mortgage, including tenant's fixtures, *i.e.* fixtures which, if the mortgagor were a tenant, he could remove as against his landlord. *Mather* v. *Fraser*, 2 K. & J. 536; *Climie* v. *Wood*, L. R. 3 Ex. 257; 4 Ex. 328; *Longbottom* v. *Berry*, L. R. 5 Q. B. 123; *Holland* v. *Hodgson*, L. R. 7 C. P. 328.

As to the meaning of fixtures, where they are expressly mortgaged, see *Smith* v. *Maclure*, 32 W. R. 459.

Mortgage of leaseholds carries fixtures.

A mortgage of a leasehold interest in land, whether by assignment or sub-demise, and whether legal or equitable, carries with it without special words all fixtures annexed to the land at the date of the mortgage, including tenant's fixtures. *Ex parte Broadwood*, 1 M. D. & D. 631; *Ex parte Bentley*, 2 M. D. & D. 591; *Ex parte Barclay*, 5 D. M. & G. 403; *Ex parte Astbury*, 4 Ch. 630; *Meux* v. *Jacobs*, 7 H. L. 481; *Southport Banking Co.* v. *Thompson*, 37 Ch. Div. 64.

As to charge by deposit of title-deeds.

It has been held that a deposit of the title-deeds of leaseholds by way of security, without any memorandum, gives the depositee no interest in tenant's fixtures. *In re Trethowan*, 5 Ch. D. 559, 567.

This case seems inconsistent with the cases cited above, and with *Williams* v. *Evans*, 23 B. 239, and *Re Lusty*, 60 L. T. 160.

A mortgage by sub-demise of a leasehold interest without special words gives the mortgagee no right to sever and sell the trade fixtures. On the other hand, the mortgagor cannot remove them during the continuance of the mortgage. *Southport Banking Co.* v. *Thompson*, 37 Ch. Div. 64.

An express assignment, in a mortgage of land, of the fixed motive powers and the fixed power machinery, does not prevent

the other trade machinery from passing as incident to the land. *Southport Banking Co.* v. *Thompson*, 37 Ch. Div. 64.

As to the effect of the Bills of Sale Acts—

Bills of Sale Act, 1878, s. 4.

The Act of 1878 provides (sec. 4) that the expression "personal chattels" shall mean fixtures, when separately assigned or charged, but shall not include fixtures (except trade machinery as therein defined) when assigned together with a freehold or leasehold interest in any land or building to which they are affixed.

S. 7.

Sect. 7 provides that no fixtures shall be deemed to be separately assigned or charged, by reason only that they are assigned by separate words, or that power is given to sever them from the land or building to which they are affixed without otherwise taking possession of or dealing with such land or building, if by the same instrument any freehold or leasehold interest in the land or building to which such fixtures are affixed is also conveyed or assigned to the same persons or person.

The rule of construction here laid down applies to instruments executed before as well as after the Act. See *Ex parte Moore & Robinson's Banking Co.*, 14 Ch. D. 379.

S. 5.

Sect. 5 provides that, from the 1st of January, 1879, trade machinery, as defined by the section, shall, for the purposes of the Act, be deemed to be personal chattels, "and any mode of disposition of trade machinery by the owner thereof, which would be a bill of sale as to any other personal chattels, shall be deemed to be a bill of sale within the meaning of the Act."

The proviso as to dispositions of trade machinery is apparently only intended to exclude from the Act such dispositions as, if they related to ordinary personal chattels, would not be within the Act. *In re Yates*, 38 Ch. Div. 119, 128.

Relation of Act of 1878 to Act of 1854.

The effect of the Act of 1878 is to place trade machinery in the same position as fixtures in general were under the Act of 1854. If the Act of 1854 only applied to tenant's fixtures, as appears the better opinion, the effect of both Acts on fixtures is practically the same. See *In re Yates*, 38 Ch. Div. 112.

Mortgages of trade machinery,

A mortgage which passes trade machinery is not within the Act unless the mortgagee has power to sever the trade

when within Act,

machinery from the land and sell it separately. *Ex parte Daglish*, 8 Ch. 1072; *Ex parte Barclay*, 9 Ch. 576; *Civil Service Building Society* v. *Mahony*, I. R. 10 C. L. 363; *In re Yates*, 38 Ch. Div. 112.

in case of mortgages in fee,

Hence, a mortgage in fee of land to which trade machinery is affixed is not within the Act, even though the trade machinery is conveyed by express words. *Mather* v. *Fraser*, 2 K. & J. 536; *In re Yates*, 38 Ch. Div. 112; *In re Brooke*, (1894) 2 Ch. 600, 609.

But where, in a mortgage in fee, the trade machinery is expressly assigned together with the moveable plant, the mortgage is void as to the trade machinery. The grouping of the fixed with the moveable plant shows an intention to give the mortgagee the same rights over the fixed as were intended to be conferred over the moveable plant. *Small* v. *National Provincial Bank of England*, (1894) 1 Ch. 686.

in case of mortgages of leaseholds.

A mortgage by sub-demise of a leasehold interest in land to which trade machinery is annexed is not within the Act, unless it either purports to pass an absolute interest in the trade machinery to the mortgagee (*a*), or to give him the right to sell the trade machinery apart from the land (*b*). It is not within the Act merely because the mortgagee has power to sell the land (together with the trade machinery) for the original term (*c*). (*a*) *Begbie* v. *Fenwick*, 8 Ch. 1075 *n.*; *Hawtry* v. *Butlin*, L. R. 8 Q. B. 290 (not following *Boyd* v. *Shorrock*, 5 Eq. 72); *Ex parte Brown*, 9 Ch. Div. 389, 393. (*b*) *Ex parte Daglish*, 8 Ch. 1072. (*c*) *Ex parte Barclay*, 9 Ch. 576.

Where, in a mortgage by assignment of a leasehold interest in land, the trade machinery on the land is absolutely assigned, the assignment of the trade machinery is void under the Act. *In re Eslick*, 4 Ch. D. 503.

Bills of Sale Act, 1878, s. 5.

Sect. 5 of the Bills of Sale Act, 1878, further provides that certain machinery or effects, excluded by the section from the definition of trade machinery, shall not be deemed to be personal chattels within the meaning of the Act.

This proviso takes the excluded machinery out of the Act for all purposes. Hence, an assignment of such excluded

machinery does not require registration, although they are not assigned with either a freehold or leasehold interest in the land to which they are affixed. *Topham* v. *Greenside Fire-Brick Co.*, 37 Ch. D. 281, 293.

II. Growing Crops.

A mortgage of land passes the growing crops, which while growing are part of the inheritance, but it does not empower the mortgagee to sever them while the mortgagor remains in possession. *Brantom* v. *Griffits*, 1 C. P. D. 349; *Ex parte National Mercantile Bank*, 16 Ch. Div. 104; *Clements* v. *Matthews*, 11 Q. B. Div. 808.

Bills of Sale Act, 1878, s. 4.

The Bills of Sale Act, 1878, extends (sect. 4) to growing crops when separately assigned or charged, but not when assigned together with any interest in the land on which they grow.

See also sect. 7.

III. Goodwill.

Mortgage of business premises carries goodwill.

A mortgage of premises on which a trade is carried on, carries, as a rule, the goodwill attaching to the premises. Thus, the deposit of the lease of a house in which the mortgagor carried on an upholsterer's business (*Chissum* v. *Dewes*, 5 Russ. 29), the mortgage of a graving-dock (*Pile* v. *Pile*, 3 Ch. Div. 36), a public-house (*Ex parte Punnett*, 16 Ch. Div. 226), or a baker's shop (*King* v. *Midland Ry. Co.*, 17 W. R. 113), carries the goodwill. See *Bompas* v. *King*, 33 Ch. Div. 279.

Publican's license.

A mortgagee of a public-house and the goodwill, by a mortgage containing a covenant for further assurance (*a*), or a mortgagee, under an equitable mortgage by deposit, of a licensed public-house (*b*), is entitled to an assignment of the license. (*a*) *Rutter* v. *Daniel*, 30 W. R. 724, 801. (*b*) *In re O'Brien*, 11 L. R. Ir. 213.

Personal goodwill.

The goodwill attaching to a particular house, and passing with that house to the mortgagee, must be distinguished from

the goodwill attaching to the personal reputation of the owner or occupier of a house, which, of course, does not pass under a mortgage of the house. *Cooper* v. *Metropolitan Board of Works*, 25 Ch. Div. 472, 479.

Mortgage of hotel.

The mortgage of a hotel, where it was clear from the deed that the word was confined to the building, was held not to charge the goodwill or business. *Whitley* v. *Challis*, (1892) 1 Ch. 64.

Mortgage of colliery.

But a mortgage of premises comprised in colliery leases, which were subject to a condition that, unless the seams of coal were worked, the lessor might re-enter, was held to charge the business. *County of Gloucester Bank* v. *Rudry Merthyr Colliery Co.*, (1895) 1 Ch. 629; see also *Campbell* v. *Lloyd's Bank*, (1891) 1 Ch. 136 *n.*

IV. Appurtenances to Ship.

A mortgage of a ship carries all articles, necessary to the navigation of the ship, which are on board at the time of the mortgage, or are afterwards substituted for them. *Coltman* v. *Chamberlain*, 25 Q. B. D. 328.

As to what are appurtenances to a ship, see *In re Salmon & Woods*, 2 Morr. Bkcy. 137.

V. Benefit of Fire Insurance.

Insurance by mortgagor under his covenant.

Where a bill of sale of machinery to secure a loan contained a covenant by the mortgagors to insure, but no provision as to the application of the policy moneys, and the machinery was burnt, it was held that the mortgagee had no claim to the benefit of the policy as against the mortgagors. *Lees* v. *Whiteley*, L. R. 2 Eq. 143.

Where a lease contained a covenant that the premises should be insured in the names of the lessor and lessee, and that the moneys secured by the policy should be applied in reinstating them, a mortgagee of the lease, under a mortgage containing no mention of the insurance, who restored the premises which had been destroyed by fire, was held entitled

to the policy moneys. *Garden* v. *Ingram*, 23 L. J. Ch. 478; see *Rayner* v. *Preston*, 18 Ch. Div. 1, 8.

Where a mortgagor, who had covenanted to lay out the insurance moneys in rebuilding the mortgaged premises, expended part of them in building on adjoining property, it was held that the mortgagee had no charge on the adjoining property in respect of the moneys so employed as against a mortgagee on that property with notice of the covenant. *Harryman* v. *Collins*, 18 B. 11.

Insurance by mortgagee.

A mortgagee who insures the mortgaged property is not entitled to retain the amount of the loss for his own use, if the property is destroyed or damaged by fire during the subsistence of the security; but the insurers can claim, on payment, to have the whole or a proportionate part of the mortgage debt assigned to them. *Castellain* v. *Preston*, 8 Q. B. D. 613; 11 Q. B. Div. 380.

Insurance by both mortgagor and mortgagee.

As to the right of contribution where both mortgagor and mortgagee insure, see *per* Mellish, L. J., in *North British Insurance Co.* v. *London Globe Insurance Co.*, 5 Ch. Div. 569, 583.

Insurance by successive incumbrancers.

Where separate policies covering the same property are effected by separate incumbrancers, payment to a first incumbrancer of a sum which is sufficient to reinstate the premises, but which does not represent the difference between the insurable value of the property and its value after deterioration by fire, does not prevent a puisne incumbrancer from recovering on his policy. *Westminster Fire Office* v. *Glasgow Provident Investment Society*, 13 App. Cas. 699.

14 Geo. III. c. 78, s. 83.

By 14 Geo. III. c. 78, sect. 83, insurance offices are required, upon the request of any person interested in, or entitled to any house or other building burnt down or damaged by fire, to apply the insurance money in reinstating or repairing such house or building.

It is doubtful whether this provision has a universal application or only extends to property within the bills of mortality, and also whether it applies as between mortgagor and mortgagee. See *Ex parte Gorely*, 4 D. J. & S. 477; *Westminster Fire Office* v. *Glasgow Provident Investment Society*, 13 App. Cas. 699, 713, 716.

Conveyancing Act, 1881, s. 23.

The Conveyancing Act, 1881, provides—

Sect. 23, (3). All money received on an insurance effected under the mortgage deed or under this Act shall, if the mortgagee so requires, be applied by the mortgagor in making good the loss or damage in respect of which the money is received.

(4) Without prejudice to any obligation to the contrary imposed by law, or by special contract, a mortgagee may require that all money received under an insurance be applied in or towards discharge of the money due under his mortgage.

VI. Accretions to the Security.

All accretions to the property in mortgage during the subsistence of the mortgage enure to the benefit of the mortgagee. *Ex parte Punnett*, 16 Ch. Div. 226.

Enfranchised copyholds.

When an enfranchisement is made under the Copyhold Act, 1894 (57 & 58 Vict. c. 47), every mortgage of the copyhold estate in the land becomes, by sect. 21 (*e*) of the Act, a mortgage of the freehold for a corresponding estate.

Same estate under new title.

If a mortgagor's title is defeated, but he subsequently acquires the same lands under another title, the mortgage attaches to the new title. *Seabourne* v. *Powell*, 2 Vern. 11; *Noel* v. *Bewley*, 3 Sim. 103.

Accretions to manor.

If the lord of a manor mortgages it in fee, and afterwards purchases and takes surrenders to himself in fee of copyholds held of the manor, they enure to the mortgagee's benefit. *Doe* v. *Pott*, 2 Doug. 709.

Renewed lease and reversion.

The mortgagor of a renewable lease, who renews the lease or acquires the reversion, whether after the expiration of the original lease or not, and whether he is under any obligation to the mortgagee or not to renew the lease or acquire the reversion, can only hold the new lease or the reversion subject to the mortgage. *Jones* v. *Kearney*, 1 D. & War. 134; *Leigh* v. *Burnett*, 29 Ch. D. 231; see *Hughes* v. *Howard*, 25 B. 575.

Fixtures attached to land.

Under a mortgage of the fee simple (*a*), or of a leasehold interest, either by assignment (*b*), or by sub-demise (*c*), all fixtures, including tenant's fixtures, attached to the land by

the mortgagor after the creation of the mortgage, form part of the mortgagee's security. (*a*) *Ex parte Belcher*, 4 Deac. & Chit. 703; *Ex parte Reynal*, 2 M. D. & D. 443; *Ex parte Price*, 2 M. D. & D. 518; *Walmsley* v. *Milne*, 7 C. B. N. S. 115; *Ackroyd* v. *Mitchell*, 3 L. T. N. S. 236; *Longbottom* v. *Berry*, L. R. 5 Q. B. 123. (*b*) *Meux* v. *Jacobs*, L. R. 7 H. L. 481, 491, 493; *Civil Service Building Society* v. *Mahony*, I. R. 10 C. L. 363; *Ex parte Punnett*, 16 Ch. Div. 226; *Gough* v. *Wood*, (1894) 1 Q. B. 713.

Trappes v. *Harter* (2 C. & M. 153) and *Waterfall* v. *Penistone* (6 E. & B. 876), which appear to be *contra*, are considered in *Walmsley* v. *Milne* (7 C. B. N. S. 115), and in *Cullwick* v. *Swindell* (L. R. 3 Eq. 249).

Where a mortgagor has attorned tenant to the mortgagee, and has then attached tenant's fixtures to the property in mortgage, he is not entitled to remove them as against the mortgagee. *Ex parte Punnett*, 16 Ch. Div. 226, 234, 236.

Trade fixtures put up after a mortgage by a firm in which the mortgagor is a partner form part of the mortgagee's security. *Ex parte Cotton*, 2 M. D. & D. 725; *Cullwick* v. *Swindell*, L. R. 3 Eq. 249; see *Gough* v. *Wood & Co.*, (1894) 1 Q. B. 713, 718.

D. Right to the Title-deeds.

Legal mortgage in fee.

The right to the possession of the title-deeds is at law incident to the immediate legal freehold in the land.

A legal mortgagee in fee of land is, therefore, entitled to possession of the title-deeds, and he may recover them in trover or detinue. *Strode* v. *Blackburne*, 3 Ves. 222, 225; *Smith* v. *Chichester*, 2 D. & War. 393, 401; *Newton* v. *Beck*, 3 H. & N 220.

Legal mortgage of term.

Where the mortgage is for a term, however long, the mortgagee is not entitled to the title-deeds of the fee. *Wiseman* v. *Westland*, 1 Y. & J. 117; *Hunt* v. *Elmes*, 2 D. F. & J. 578.

Conveyancing Act, s. 21 (7).

The Conveyancing Act, 1881, provides—

Sect. 21, (7). At any time after the power of sale conferred by this Act has become exerciseable, the person entitled to

exercise the same may demand and recover from any person, other than a person having in the mortgaged property an estate, interest, or right in priority to the mortgage, all the deeds and documents relating to the property or to the title thereto, which a purchaser under the power of sale would be entitled to demand and recover from him.

Deed in which several have an interest.

Where several persons have an interest in a deed, he who first gets possession of it has a right to keep it from the others so long as he actually retains it in his custody and control, but no longer. If the deed is in a stranger's hands, all persons interested must join in an action to recover it. *Foster* v. *Crabb*, 12 C. B. 136; *Wright* v. *Robotham*, 33 Ch. Div. 106.

Hence, an owner of part of an estate and assignor of a mortgage of another part is entitled to hold the title-deeds of the whole estate as against his assignee. *Yea* v. *Field*, 2 T. R. 708; *Davies* v. *Vernon*, 6 Q. B. 443.

Equitable mortgagee.

An equitable mortgagee is entitled in equity to the custody of the title-deeds of the mortgaged property. *Bank of New South Wales* v. *O'Connor*, 14 App. Cas. 273.

The Conveyancing Act, 1881, provides—

Conveyancing Act, 1881, s. 16.

Sect. 16, (1). A mortgagor, as long as his right to redeem subsists, shall, by virtue of this Act, be entitled from time to time, at reasonable times, on his request, and at his own cost, and on payment of the mortgagee's costs and expenses in this behalf, to inspect and make copies or abstracts of or extracts from the documents of title relating to the mortgaged property in the custody or power of the mortgagee.

(2) This section applies only to mortgages made after the commencement of this Act, and shall have effect notwithstanding any stipulation to the contrary.

See *Burn* v. *London & South Wales Coal Co.*, (1890) W. N. 209.

Mortgagor had no right, before Act, to inspect deeds.

In cases not within this section, the rule is that, if a mortgagor executes a mortgage and hands over the title-deeds to the mortgagee, he cannot, after the mortgage has become absolute, see either the mortgage deed or the other documents of title without paying the mortgagee his principal, interest, and costs; and the same rule applies to persons claiming under

the mortgagor. *Browne* v. *Lockhart*, 10 Sim. 420; *Chichester* v. *Marquis of Donegall*, 5 Ch. 497.

It is immaterial that the mortgagee also claims to be purchaser of the equity of redemption. *Greenwood* v. *Rothwell*, 7 B. 291.

Where the mortgagee has purchased the equity of redemption from a trustee to whom it was devised in trust for sale, he must, in a redemption action, produce the agreement for sale and the conveyance. *Smith* v. *Barnes*, 35 L. J. Ch. 109.

There appears to be no difference between the mortgage deed and the other documents of title. *Patch* v. *Ward* (L. R. 1 Eq. 436) is contrary to the current of authority. See *Carter* v. *Hubback*, 24 W. R. 354.

A mortgagor has no right to production merely because the mortgagee in his answer craves leave to refer to the deeds. *Glover* v. *Hill*, 2 Ph. 484, 490, explaining *Latimer* v. *Neate*, 4 Cl. & F. 570; *Howard* v. *Robinson*, 4 Drew. 522; see *Phillips* v. *Evans*, 2 Y. & C. C. 647.

And a mortgagor does not entitle himself to production merely by alleging fraud in his bill. *Crisp* v. *Platel*, 8 B. 62; *Dendy* v. *Cross*, 11 B. 91; *Republic of Costa Rica* v. *Erlanger*, 19 Eq. 33.

When mortgagor entitled to production.

But production will be ordered of a deed forming a link in the mortgagee's title where fraud is apparent on the face of the deed (*a*), where fraud is alleged, and the mortgagee, at the time of the execution of the mortgage, was the mortgagor's solicitor (*b*), and where a defendant to a suit for redemption sets up that the instrument which the plaintiff treats as a mortgage is really an absolute conveyance (*c*). (*a*) *Kennedy* v. *Green*, 6 Sim. 6; (*b*) *Davis* v. *Parry*, 27 L. J. Ch. 294; (*c*) *Latimer* v. *Neate*, 4 Cl. & F. 570.

A puisne mortgagee has been held entitled to inspect bills of exchange and promissory notes given by the mortgagor to the mortgagee. *Gibson* v. *Hewett*, 9 B. 293.

CHAPTER XX.

MORTGAGOR IN POSSESSION.

A. Mortgagor in Possession of Land.

Right to possession of land.

"The possession of the mortgaged land by the mortgagor, during the subsistence of the security, and while the mortgagee did not choose to take possession, was held (at law as well as in equity) to be 'at the will,' or by the 'sufferance,' or 'permission' of the mortgagee, under a 'tacit agreement,' which the mortgagee might determine at his pleasure. It was of the nature of the transaction that the mortgagor should continue in possession. His possession was rightful and not by wrong." *Per* Curiam in *Heath* v. *Pugh*, 6 Q. B. Div. 345, 359.

As to the relation between mortgagor in possession and mortgagee, see also *Birch* v. *Wright*, 1 T. R. 378; *Thunder* v. *Belcher*, 3 East, 451; *Doe* v. *Maisey*, 8 B. & C. 767.

Right to title-deeds.

The mortgagor is also entitled to the custody of the title deeds except as against his mortgagee. *Davies* v. *Vernon*, 6 Q. B. 443.

If it is expressly agreed in the mortgage deed that the mortgagor shall remain in possession for a time certain, he has an interest, in the nature of a term of years, during the prescribed period; upon its expiration, he becomes a mere tenant at sufferance. *Keech* v. *Hall*, 1 Dougl. 21; *Gibbs* v. *Cruikshank*, L. R. 8 C. P. 454, 461; *Moore* v. *Shelley*, 8 App. Cas. 284.

Mortgagor's possession wrongful after demand.

After demand of possession has been made by the mortgagee, the possession of the mortgagor is wrongful. *Bagnall* v. *Villar*, 12 Ch. D. 812.

Where a receiver is appointed in a foreclosure action, the mortgagor being in possession, and the order appointing the

receiver does not direct that the mortgagor should attorn tenant or deliver up possession, the possession of the mortgagor is rightful until demand by the receiver. *Randfield* v. *Randfield*, 7 W. R. 651; *Yorkshire Banking Co.* v. *Mullan*, 35 Ch. D. 125.

Right to rents and profits.

The mortgagor in possession is entitled to the rents and profits of the mortgaged property. He receives them for his own use, and not as agent or bailiff of the mortgagee, and, when he has received them, he is absolutely entitled to keep them as his own. *Trent* v. *Hunt*, 9 Ex. 14; *Jolly* v. *Arbuthnot*, 4 De G. & Jo. 224, 236; *Heath* v. *Pugh*, 6 Q. B. Div. 345, 359; *Markwick* v. *Hardingham*, 15 Ch. Div. 339, 349.

Right to sever crops.

He is entitled to sever the crops, which, when severed, belong to him. *Ex parte National Mercantile Bank*, 16 Ch. Div. 104.

Right to cut underwood.

He may cut underwood in the ordinary course, in a husband-like manner, at the usual seasons, and of the usual growth. *Hampton* v. *Hodges*, 8 Ves. 105; *Humphreys* v. *Harrison*, 1 J. & W. 581.

Mortgagee not entitled to mesne profits.

The mortgagee cannot bring an action at law against the mortgagor for mesne profits (*a*), and he is not entitled in equity to an account of rents and profits received by the mortgagor before he demands possession (*b*). (*a*) *Hicks* v. *Sallitt*, 3 D. M. & G. 782, 808. (*b*) *Higgins* v. *York Buildings Co.*, 2 Atk. 107; *Colman* v. *Duke of St. Albans*, 3 Ves. 25; *Ex parte Wilson*, 2 V. & B. 252; *Hele* v. *Lord Bexley*, 20 B. 127; *In re Marquis of Anglesey's Estate*, 17 Eq. 283; see *Turkington* v. *Kearnan*, Ll. & G. t. Sugd. 35.

Where a mortgagor recovered the mortgaged property with arrears of interest, the mortgagee was held to have no claim against the arrears. *Life Association of Scotland* v. *Siddal*, 3 D. F. & J. 271.

A first mortgagee, who has not entered into possession, is not entitled to an account of rents and profits from a second mortgagee who has been in possession. *Garfitt* v. *Allen*, 37 Ch. D. 48.

Leases before the mortgage.

Tenants under leases granted before the mortgage are bound to pay their rents to the mortgagor until the mortgagee

interferes to stop them. *Rose* v. *Watson*, 10 H. L. C. 672, 684.

Mortgagor may distrain for rent,

The mortgagor may distrain for such rents in the name of the mortgagee. *Trent* v. *Hunt*, 9 Ex. 14; *Snell* v. *Finch*, 13 C. B. N. S. 651; *Reece* v. *Strousberg*, 54 L. T. 133.

but cannot determine tenancies.

The mortgagor cannot determine, or take surrenders of, tenancies created before the mortgage without the mortgagee's consent. A notice to quit by the mortgagor is not valid unless it is also signed by the mortgagee. *Miles* v. *Murphy*, I. R. 5 C. L. 382; *Cadle* v. *Moody*, 30 L. J. Ex. 385.

But circumstances may show that the mortgagee has given the mortgagor a general authority to determine such tenancies. *Stacpoole* v. *Parkinson*, I. R. 8 C. L. 561.

Judicature Act, 1873, s. 25, (5).

The Judicature Act, 1873, sect. 25, (5), enables a mortgagor in possession to sue for possession, or for the recovery of rents or profits in his own name only, unless the cause of action arises upon a lease made by him jointly with any other person.

Right to sue before Judicature Act.

Before the Judicature Act, when the legal estate was in the mortgagee, the mortgagee only, or the mortgagor using his name, could sue for rent due, or for breach of covenant to repair, under a lease made before the mortgage. *Doe d. Marriott* v. *Edwards*, 5 B. & Ad. 1065; *Trent* v. *Hunt*, 9 Ex. 14.

But a covenantor would be restrained in equity from setting up against the mortgagor a release by the mortgagee alone of claims under the covenant. *Thornton* v. *Court*, 3 D. M. & G. 293.

Leases after the mortgage.

The Conveyancing Act, 1881, sect. 18, gives a mortgagor of land while in possession power, as against every incumbrancer, to make, from time to time, an agricultural or occupation lease for any term not exceeding twenty-one years, and a building lease for any term not exceeding ninety-nine years of the mortgaged land, or any part thereof.

Every such lease must take effect in possession not later than twelve months after its date, must reserve the best rent that can reasonably be obtained without taking a fine, must contain a covenant by the lessee for payment of rent and a condition of re-entry on non-payment, and, in the case of a building lease, must be made in consideration of the lessee

having erected, improved, or repaired buildings, or having executed on the land leased an improvement in connection with building purposes, or agreeing to do one of these things within not more than five years from the date of the lease.

This power may be excluded or restricted by the mortgage deed or by a written contract; it may be extended by the mortgage deed; and it applies only in case of a mortgage made after the 31st of December, 1881; but it may be applied by agreement to mortgages made before that date.

A lease by a mortgagor under this section has the same effect as if the mortgagee had joined in it.

The mortgagee, on giving notice to the tenant and going into possession, is entitled to enforce the covenants and conditions in the lease, and is not bound by any collateral agreement between the mortgagor and the tenant, *e.g.* an agreement that the tenant should retain the rent as it fell due towards repayment of an advance made by him to the mortgagor. *Municipal Building Society* v. *Smith*, 22 Q. B. Div. 70.

The mortgagee and his assigns cannot deal with the surrounding mortgaged property so as to interfere with the rights granted by the lease. *Wilson* v. *Queen's Club*, (1891) 3 Ch. 522.

A mortgagor, who has power under the mortgage to grant leases while in possession, may grant a lease in accordance with the power to a trustee for himself. *Bevan* v. *Habgood*, 1 J. & H. 222.

Cases not within Conveyancing Act.

In cases not within the Conveyancing Act or governed by a power, a lease made by a mortgagor in possession is binding as between him and his tenant, who is estopped from denying that the lessor had such an estate at law as would warrant the lease. Hence, the mortgagor may sue on the covenants or distrain for rent in his own name, and the benefit of the estoppel passes to an assignee of the equity of redemption. *Trent* v. *Hunt*, 9 Ex. 14; *Cuthbertson* v. *Irving*, 4 H. & N. 742; 6 H. & N. 135; 28 L. J. Ex. 306; 29 L. J. Ex. 485; *Hassard* v. *Fowler*, 32 L. R. Ir. 49.

But the lease does not bind the mortgagee. Cases, *supra*.

A mere notice by the mortgagee to pay the rent to him is

not enough to terminate the estoppel arising by tenancy, and the mortgagor can sue the tenant for rent accruing due after the notice. *Hickman* v. *Machin*, 4 H. & N. 716.

But where the mortgagee by threatening eviction has compelled the tenant to pay the rent to him, the tenant can set up such payment in answer to the mortgagor's claim for rent. *Johnson* v. *Jones*, 9 A. & E. 809; *Boodle* v. *Cambell*, 7 M. & G. 386; *Underhay* v. *Read*, 20 Q. B. Div. 209.

Rights over inheritance.

A mortgagor in possession is entitled to cut down and sell timber trees, provided he does not impeach the sufficiency of the security; he will be restrained by injunction if the security is insufficient. *Hippesley* v. *Spencer*, 5 Madd. 422; *Humphreys* v. *Harrison*, 1 J. & W. 581; *Morgan* v. *Lewes*, 4 Dow, 29, 50; *King* v. *Smith*, 2 Ha. 239; *Kekewich* v. *Marker*, 3 Mac. & G. 311, 329; *Ex parte Phillips*, 16 Ch. Div. 104, 106; *Harpin* v. *Aplin*, 54 L. T. 383.

The question is, whether the security is worth so much more than the money advanced that the act of cutting timber is not to be considered as substantially impairing the value which was the basis of the mortgage contract at the time it was entered into. *King* v. *Smith*, *supra*.

The owner of a rent-charge cannot obtain an injunction to restrain waste. *Sandeman* v. *Rushton*, 61 L. J. Ch. 136.

Right to unfix tenant's fixtures.

A mortgagor in possession of land to which tenant's fixtures are attached may be entitled to unfix them by virtue of an authority, express or implied, from the mortgagee, but not otherwise. *Gough* v. *Wood*, (1894) 1 Q. B. 713; *Huddersfield Banking Co.* v. *Henry Lister & Son*, (1895) 2 Ch. 273, 282, 286.

Thus, trade fixtures put in by a tenant holding under an agreement made by the mortgagor in possession, and acquiesced in by the mortgagee, may be removed by the tenant. *Sanders* v. *Davis*, 15 Q. B. D. 218.

An article affixed to land in mortgage for the purposes of the mortgagor's trade upon the hire and purchase system may be removed by the owner, if it is not paid for before the mortgagee takes possession. *Cumberland Union Banking Co.* v. *Maryport Hematite Co.*, (1892) 1 Ch. 715; *Gough* v. *Wood*, (1894) 1 Q. B. 713.

As to implying in a mortgage a power to substitute new trade fixtures for old, see *In re Brooke*, (1894) 2 Ch. 600, 614.

A mortgagor in receipt of rent and profits of land charged with repair of a sea-bank is liable for default of reparation. *Reg.* v. *Baker*, L. R. 2 Q. B. 621.

Where a mortgagor in possession commits trespasses on adjoining property, his mortgagee is under no liability to the owners. *Powell* v. *Aiken*, 4 K. & J. 343.

Parliamentary franchise.

The statute 8 Henry VI. c. 7, requires the voter to have free land or tenement to the value of forty shillings by the year above all charges (*outre les reprises*).

The Parliamentary Voters Registration Act, 1843 (6 & 7 Vict. c. 18, sect. 74), enacts that no mortgagee of any lands shall have any vote by reason of any mortgage estate therein, unless he be in the actual possession or receipt of the rents and profits thereof; but that the mortgagor in actual possession or in receipt of the rents and profits thereof may vote for the same notwithstanding such mortgage.

Under 28 Geo. III. c. 36, sect. 6, the interest of any money secured by mortgage is a charge to be deducted from the annual value of the land.

Where several estates are liable to one mortgage, the interest on the mortgage may be apportioned for the purpose of ascertaining the value of each estate. *Moore* v. *Carisbrooke*, 12 C. B. 661; *Barrow* v. *Buckmaster*, 12 C. B. 664.

Yearly interest actually paid by agreement, where the principal alone was secured by the mortgage, is a charge to be deducted within the statute. *Lee* v. *Hutchinson*, 8 C. B. 16.

Where instalments payable under the mortgage consist partly of principal and partly of interest, so much of the instalment as represents interest should alone be deducted. *Robinson* v. *Dunkley*, 15 C. B. N. S. 478; *Rolleston* v. *Cope*, L. R. 6 C. P 292, overruling *Copland* v. *Bartlett*, 6 C. B. 18, and *Beamish* v. *Stoke*, 11 C. B. 29, so far as inconsistent.

B. Mortgagor in Possession of Ship.

Merchant Shipping Act, 1894, s. 34.

The Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), provides—

Sect. 34. Except as far as may be necessary for making a mortgaged ship or share available as a security for the mortgage debt, the mortgagee shall not, by reason of the mortgage, be deemed the owner of the ship or share, nor shall the mortgagor be deemed to have ceased to be owner thereof.

This section reproduces, with verbal variations, sect. 70 of the repealed Act of 1854. See sect. 43, (6), as to certificates of mortgage.

Mortgagor in possession can make binding contracts,

Until the mortgagee of a ship takes possession, the mortgagor, as the registered owner subject to the mortgage, retains all the rights and powers of ownership; and his contracts with regard to the ship and its employment are valid and effectual, so far as they do not materially impair the mortgagee's security. *Collins* v. *Lamport*, 4 D. J. & S. 500; 34 L. J. Ch. 196; *Keith* v. *Burrows*, 2 App. Cas. 636, 645; *Fanchon*, 5 P. D. 173.

and is entitled to earnings.

The mortgagor is entitled to all earnings of the ship due and received by him before the mortgagee takes possession, *Gardner* v. *Cazenove*, 1 H. & N. 423; *Willis* v. *Palmer*, 7 C. B. N. S. 340; 29 L. J. C. P. 194.

But he cannot, as against the mortgagee, assign the freight to become due. See p. 247.

A ship cannot be taken in execution, as against the mortgagee, by a judgment creditor of the registered owner. *Dickinson* v. *Kitchen*, 8 E. & B. 789.

Where a mortgagor in possession of a ship delivers it to a shipwright to be repaired, the shipwright can assert his lien as against the mortgagee. *Williams* v. *Allsup*, 10 C. B. N. S. 417; 30 L. J. C. P. 353.

A mortgagee not in possession cannot maintain an action of restraint. *Highlander*, 2 W. Rob. 109; *Innisfallen*, L. R. 1 A. & E. 72.

CHAPTER XXI.

RECEIVER APPOINTED UNDER THE CONTRACT.

THE Conveyancing Act, 1881 (44 & 45 Vict. c. 41), gives a mortgagee, under a mortgage made by deed after the 31st of December, 1881, so far as a contrary intention is not expressed therein, power, when the mortgage money has become due, to appoint a receiver of the income of the mortgaged property, or of any part thereof [sect. 19, (1), (iii.)]. Conveyancing Act, s. 19.

The Act provides—

Sect. 24, (1). A mortgagee entitled to appoint a receiver under the power in that behalf conferred by this Act shall not appoint a receiver until he has become entitled to exercise the power of sale conferred by this Act, but may then, by writing under his hand, appoint such person as he thinks fit to be receiver. Conveyancing Act, s. 24.

(2) The receiver shall be deemed to be the agent of the mortgagor; and the mortgagor shall be solely responsible for the receiver's acts or defaults, unless the mortgage deed otherwise provides.

(3) The receiver shall have power to demand and recover all the income of the property of which he is appointed receiver by action, distress, or otherwise, in the name either of the mortgagor or of the mortgagee, to the full extent of the estate or interest which the mortgagor could dispose of, and to give effectual receipts, accordingly, for the same.

(4) A person paying money to the receiver shall not be concerned to inquire whether any case has happened to authorize the receiver to act.

(5) The receiver may be removed, and a new receiver may be appointed, from time to time by the mortgagee by writing under his hand.

(6) deals with the remuneration of the receiver.

(7) empowers him to insure if directed by the mortgagee.

(8) The receiver shall apply all money received by him as follows (namely):—

(i.) In discharge of all rents, taxes, rates, and outgoings whatever affecting the mortgaged property; and

(ii.) In keeping down all annual sums or other payments, and the interest on all principal sums, having priority to the mortgage in right whereof he is receiver; and

(iii.) In payment of his commission, and of the premiums on fire, life, or other insurances, if any, properly payable under the mortgage deed or under this Act, and the cost of executing necessary or proper repairs directed in writing by the mortgagee; and

(iv.) In payment of the interest accruing due in respect of any principal money due under the mortgage;

and shall pay the residue of the money received by him to the person who, but for the possession of the receiver, would have been entitled to receive the income of the mortgaged property, or who is otherwise entitled to that property.

Receiver is agent of mortgagor.

The receiver is for all purposes the agent of the mortgagor. Therefore, payments made by him to the mortgagee are payments by a mortgagor continuing in possession. *Jones* v. *Smith*, 1 Ha. 43, 71; *Law* v. *Glenn*, L. R. 2 Ch. 634.

The mortgagor or any person claiming under him, *e.g.* a subsequent incumbrancer, may file a bill against the receiver alone, treating him as his agent, bound to account for all his receipts after keeping down the interest due to the mortgagee. *Lord Kensington* v. *Bouverie*, 7 D. M. & G. 134, 157; *Jefferys* v. *Dickson*, L. R. 1 Ch. 183.

Where the receiver is appointed by a deed in which prior incumbrancers concur, and under which trusts are created in their favour, with an ultimate trust of the surplus for the mortgagor, the prior incumbrancers are necessary parties to any proceeding by a puisne incumbrancer to have the trusts of the surplus executed. *Ford* v. *Rackham*, 17 B. 485; *Jefferys* v. *Dickson*, L. R. 1 Ch. 183.

Where the receiver neglects to collect the rents, the mortgagor cannot distrain for them. *Bayly* v. *Went*, 51 L. T. 764.

Receiver is not personally liable.

A receiver appointed by the parties is an agent, not a principal, and is not personally liable on contracts entered into by him unless he holds himself out as principal. *Owen & Co.* v. *Cronk*, (1895) 1 Q. B. 265.

Receiver let into possession on winding-up.

The Court will, as a rule, where the mortgagor is a limited company which is being wound up, let into possession the receiver appointed by the mortgagees under a power in the mortgage. *In re Henry Pound, Son, & Hutchins*, 42 Ch. Div. 402.

When receiver ceases to be agent of mortgagor.

Where the debenture trust-deed of a company empowered the trustees to appoint a receiver, with power to carry on the company's business, and provided that he should be the company's agent, it was held that a receiver appointed by the trustees became, on the winding-up of the company, agent for the trustees, and that they were liable for the price of goods ordered by him in carrying on the business. *Gaskell* v. *Gosling*, (1896) 1 Q. B. 669.

The decision went on two grounds: (1) that the appointment was not within the terms of the power, as the trustees reserved a control over the actions of their appointee which was inconsistent with his position as receiver (p. 679); and (2) that it was a necessary implication of the contract that the power should determine when the company ceased to be a going concern, and that the trustees, not having then annulled the appointment, must be taken to have elected to carry on the business themselves (pp. 680, 684). Rigby, L. J., who dissented, was of opinion: (1) that, as the company gave up possession to the receiver, his appointment must be treated as in conformity with the power (p. 698); and (2) that the winding-up could not affect rights arising under an existing contract for value (p. 699).

Change of occupation on receiver taking possession.

Where a receiver appointed by trustees under a power in a debenture trust-deed, which provides that he is to be deemed to be the agent of the company, enters into possession of the company's premises, there is a change of occupation within sect. 16 of the Poor Rate Assessment and Collection Act, 1869 (32 & 33 Vict. c. 41). *Richards* v. *Overseers of Kidderminster*, (1896) 2 Ch. 212.

CHAPTER XXII.

THE POWER OF SALE.

A. Pledgee's Power of Sale.

Power where a time is fixed for repayment.

WHERE a time is fixed for repayment of the loan, the pledgee is entitled to sell the article pledged after default, without giving notice to the pledgor. *Pothonier* v. *Dawson*, Holt, N. P. 383; *Pigot* v. *Cubley*, 15 C. B. N. S. 701; *Donald* v. *Suckling*, L. R. 1 Q. B. 585, 604; *France* v. *Clark*, 22 Ch. D. 850; *In re Richardson*, 30 Ch. Div. 396, 403; *Ex parte Hubbard*, 17 Q. B. Div. 690, 698; *In re Morritt*, 18 Q. B. Div. 222.

Power where no time is fixed.

Where no time is fixed for repayment of the loan, the pledgee is entitled to sell the article pledged after giving the pledgor reasonable notice of his intention to do so. Cases, *supra*.

Notice is bad if the pledgee claims a larger sum than is due to him. *Pigot* v. *Cubley*, 15 C. B. N. S. 701.

The implied authority of the pledgee to sell may of course be varied by agreement between the parties.

A pledgee selling is trustee of the surplus proceeds of sale for the pledgor. *Donald* v. *Suckling*, L. R. 1 Q. B. 585, 604; *Harper* v. *Godsell*, L. R. 5 Q B. 422, 428.

The pledgee has no right to sell the goods pledged (unless by virtue of special contract between himself and the pledgor) except after default or notice. *Langton* v. *Waite*, 6 Eq. 165; *Burdick* v. *Sewell*, 10 Q. B. D. 362, 367; 13 Q. B. Div. 159, 162.

Effect of unauthorized sale by pledgee.

An unauthorized dealing by the pledgee with the article pledged, *e.g.* an unauthorized sale, does not revest the immediate right of possession in the pledgor, and therefore does not enable him to recover the article in trover or detinue. His

remedy is an action for breach of the contract of pledge, in which he can only recover the damages actually sustained. *Johnson* v. *Stear*, 15 C. B. N. S. 330; *Donald* v. *Suckling*, L. R. 1 Q. B. 585; *Halliday* v. *Holgate*, L. R. 3 Ex. 299; see *Mulliner* v. *Florence*, 3 Q. B. Div. 484.

Pawnbrokers Act, 1872, ss. 19 to 22.

The Pawnbrokers Act, 1872, regulates (sects. 19 to 22) the sale of pledges within the Act, and the rights of the pawner in the surplus proceeds of the sale.

B. Mortgagee's Power of Sale.

Mortgages of personal chattels.

A mortgagee of personal chattels of which he has taken possession has, after default in payment, and after he has given the mortgagor a reasonable time to pay the money due, a power of sale. *Dyson* v. *Morris*, 1 Ha. 413, 422; *In re Morritt*, 18 Q. B. Div. 222, 233.

Bills of sale.

The grantee of a bill of sale has an implied power of sale arising after the expiration of the five days mentioned in sects. 7 and 13 of the Bills of Sale Act, 1882. *In re Morritt*, 18 Q. B. Div. 222; *Watkins* v. *Evans*, 18 Q. B. Div. 386.

The provisions of the Conveyancing Act as to sale do not apply to bills of sale under the Act of 1882. *Calvert* v. *Thomas*, 19 Q. B. Div. 204.

An illegal sale of part of the chattels secured does not avoid the bill of sale as to the rest. The grantor has only a remedy in damages. *Monson* v. *Milner*, 8 T. L. R. 447.

Mortgages of stock.

A mortgagee of stock is entitled to sell without special powers. *Tucker* v. *Wilson*, 1 P. W. 261; 5 B. P. C. 193; *Lockwood* v. *Ewer*, 2 Atk. 303; *Kemp* v. *Westbrook*, 1 Ves. S. 278; Belt. 141.

The Merchant Shipping Act, 1894, provides—

Mortgages of ships.

Sect. 35. Every registered mortgagee shall have power absolutely to dispose of the ship or share in respect of which he is registered, and to give effectual receipts for the purchase money; but where there are more persons than one registered as mortgagees of the same ship or share, a subsequent mortgagee shall not, except under the order of a court of competent

jurisdiction, sell the ship or share, without the concurrence of every prior mortgagee.

Power of sale under the Conveyancing Act, 1881.

The Conveyancing Act, 1881, gives a mortgagee, under a mortgage made by deed after the 31st of December, 1881, so far as a contrary intention is not expressed therein, power, when the mortgage money has become due, to sell, or to concur with any other person in selling, the mortgaged property or any part thereof, either subject to prior charges or not, and either together or in lots, by public auction or by private contract, subject to such conditions respecting title, or evidence of title, or other matter, as he (the mortgagee) thinks fit, with power to vary any contract for sale, and to buy in at an auction, or to rescind any contract for sale, and to re-sell, without being answerable for any loss occasioned thereby [sect. 19, (1), (i.)].

The power of sale conferred by the Act does not affect the right of foreclosure [sect. 21, (5)].

Under this power, a mortgagee of land on which there are fixtures cannot sell the fixtures apart from the land. *In re Yates*, 38 Ch. Div. 112; see *Ex parte Barclay*, 9 Ch. 576.

Conveyancing Act, 1881, s. 44.

A power is given, by sect. 44 of the Conveyancing Act, 1881, to a person entitled to an annual sum charged on land or its income to demise the land charged to a trustee for a term upon trust to raise the annual sum and all arrears by mortgage, sale, or demise of the land charged or any part thereof.

Sale of land and minerals separately.

By the Trustees Act, 1893, as amended by 57 Vict. c. 10, sec. 3, the Court may authorize donees of powers of sale of land, unless expressly forbidden, to sell the land without the minerals, or the minerals apart from the land.

This provision applies to mortgagees. *In re Beaumont's Mortgage Trusts*, 12 Eq. 86; *In re Wilkinson's Mortgaged Estates*, 13 Eq. 634.

These sections reproduce sect. 2 of the repealed Act, 25 & 26 Vict. c. 108.

The power of sale given by the Conveyancing Act, 1881, does not apply to debentures of a company under the Companies Acts. *Blaker* v. *Herts & Essex Waterworks Co.*, 41 Ch. D. 399.

Who may exercise the power of sale.

The power of sale conferred by the Conveyancing Act may be exercised by any person for the time being entitled to receive and give a discharge for the mortgage money [sect. 21, (4)].

Where the power of sale was, in a mortgage in fee, given to the mortgagee, his heirs, executors, administrators, or assigns, it was held that the administrator of a transferee of the mortgage, with the concurrence of a trustee to whom the heir of the transferee had conveyed the legal estate in trust for the administrator, could exercise the power. *Saloway* v. *Strawbridge*, 1 K. & J. 371; 7 D. M. & G. 594.

Where a mortgage conveys the legal fee to the mortgagees, and contains a declaration that the loan is made out of moneys belonging to them on a joint account, the survivor can sell. *Hind* v. *Poole*, 1 K. & J. 383.

As to the power of sale, where the mortgagee is lunatic, see the Lunacy Act, 1890, sects. 135, 136.

As to the exercise of a power of sale vested in an unincorporated building society which is being wound up, see *In re Ebsworth & Tidy's Contract*, 42 Ch. Div. 23.

Where the power of sale in a mortgage is made exercisable by the mortgagees *nominatim*, the fact that they are partners does not give one of them an implied authority to sell on behalf of all. *Warr* v. *Jones*, 24 W. R. 695.

The Conveyancing Act, 1881, provides—

What the mortgagee can convey.

Sect. 21, (1). A mortgagee exercising the power of sale conferred by this Act shall have power, by deed, to convey the property sold, for such estate and interest therein as is the subject of the mortgage, freed from all estates, interests, and rights to which the mortgage has priority, but subject to all estates, interests, and rights which have priority to the mortgage; except that, in the case of copyhold or customary land, the legal right to admittance shall not pass by a deed under this section unless the deed is sufficient otherwise by law, or is sufficient by custom, in that behalf.

Sale by a mortgagee under a power of sale defeats the rights of all subsequent incumbrancers against the mortgaged property. Their only remedy is against the surplus moneys

in the hands of the vendor. *S. E. Ry. Co.* v. *Jortin*, 6 H. L. C. 425, 435.

An equitable mortgagee by deed cannot under this section convey the legal estate. *In re Hodson & Howes' Contract*, 35 Ch. Div. 668.

Lord Cranworth's Act, s. 15.

Lord Cranworth's Act (23 & 24 Vict. c. 145) provides (sect. 15) that the person exercising the power of sale thereby conferred shall have power by deed to convey or assign to and vest in the purchaser the property sold, for all the estate and interest therein, which the person who created the charge had power to dispose of, except that in the case of copyhold hereditaments the beneficial interest only shall be conveyed to and vested in the purchaser by such deed.

Under this section an equitable mortgagee by deed of leaseholds by way of underlease can sell the nominal reversion, and an equitable mortgagee in fee by deed can sell the dry legal estate. *Hiatt* v. *Hillman*, 19 W. R. 694; *In re Solomon & Meagher's Contract*, 40 Ch. D. 508.

The repeal of this section by the Conveyancing Act, 1881, sect. 71, does not affect the operation of a power of sale exercised after the commencement of the Act, but arising under an instrument made before it. *In re Solomon & Meagher's Contract, supra.*

The Conveyancing Act, 1881, provides—

When the power comes into operation.

Sect. 20. A mortgagee shall not exercise the power of sale conferred by this Act unless and until—

(i.) Notice requiring payment of the mortgage money has been served on the mortgagor or one of several mortgagors, and default has been made in payment of the mortgage money, or of part thereof, for three months after such service; or

(ii.) Some interest under the mortgage is in arrear and unpaid for two months after becoming due; or

(iii.) There has been a breach of some provision contained in the mortgage deed or in this Act, and on the part of the mortgagor, or of some person concurring in making the mortgage, to be observed or performed, other than and besides a covenant for payment of the mortgage money or interest thereon.

See sect. 67 as to what is a sufficient notice under the Act.

Power of sale in mortgage to solicitor mortgagee.

Where a solicitor takes a mortgage from his client, and wishes to insert a power of sale on unusual terms, he must explain to his client how far these terms differ from the terms on which a power of sale is usually made exercisable. *Cockburn* v. *Edwards*, 18 Ch. Div. 449.

If, without such explanation, he gives himself a power of sale on unusual terms, which he afterwards exercises, he is liable in damages to his client for the loss sustained by the wrongful sale. *Cockburn* v. *Edwards*, 18 Ch. Div. 449.

A power of sale in a first mortgage was, before the Act, usually made exercisable only after six months' default in payment after notice, or after some interest is three months in arrear. *Cockburn* v. *Edwards*, 18 Ch. Div. 449.

A more stringent power of sale may perhaps be properly inserted in a second mortgage. *Cockburn* v. *Edwards*, 18 Ch. Div. 449, 456; see, however, *Thorpe* v. *Gartside*, 2 Y. & C. 730; *Ashworth* v. *Mounsey*, 9 Ex. 175, 188.

The rule in *Cockburn* v. *Edwards* is confined to ordinary mortgage transactions. It does not apply where the solicitor takes a security for a debt due and payable to him by the client, which the client is unable to pay, or where the property is of a nature which may require immediate realization, *e.g.* an interest in a railway subject to a heavy debenture debt. *Pooley's Trustee* v. *Whetham*, 33 Ch. Div. 111.

As to the exercise of the power of sale by a solicitor mortgagee, see *Craddock* v. *Rogers*, 53 L. J. Ch. 968.

Notice to puisne mortgagee.

Under a provision requiring notice to be given to the mortgagor or his assigns, a second mortgagee, of whose security the first mortgagee has notice, is entitled to receive notice, and may recover damages from him for exercising the power of sale without notice to him. *Hoole* v. *Smith*, 17 Ch. D. 434.

As to notice to a second mortgagee, see *Tozer* v. *Buxton*, 5 T. L. R. 7.

Provisos requiring notice.

A sale under a power requiring notice will not be valid if there is no person in existence to whom notice can be given. *Parkinson* v. *Hanbury*, 1 Dr. & Sm. 143.

As to the construction of provisos requiring a special form of notice, see *Metters* v. *Brown*, 33 L. J. Ch. 97; 9 Jur. N. S. 958; *Selwyn* v. *Garfit*, 38 Ch. Div. 273.

A proviso requiring notice to be given to the heir is satisfied by notice to his guardian, if he is an infant. *Tracey* v. *Lawrence*, 2 Drew. 403.

Waiver of notice.

Waiver of notice is consent to dispense with notice. Delay is not waiver. Inaction is not waiver, although it may be evidence of waiver. *Selwyn* v. *Garfit*, 38 Ch. Div. 273, 284; *In re Thompson & Holt*, 44 Ch. D. 492, 500.

A mortgagor cannot waive notice as against assignees from him of the equity of redemption. *Forster* v. *Hoggart*, 15 Q. B. 155; *Selwyn* v. *Garfit*, 38 Ch. Div. 273.

Where a mortgagee had a power of sale if default was made for seven days after notice requiring payment, and the mortgagee, on the sixth day after giving notice, took a bill from the mortgagor, which was dishonoured, it was held that the running of the notice revived on the dishonour. *Wood* v. *Murton*, 47 L. J. Q. B. 191.

Specific performance can be enforced against a purchaser where a vendor is able to show a good title in himself before the day fixed for completion. Therefore, specific performance will be enforced of a contract to purchase from mortgagees under a power of sale, although notice required by the power has not been given, if the persons to whom notice should have been given concur in the conveyance. *In re Thompson & Holt*, 44 Ch. D. 492; see *Forster* v. *Hoggart*, 15 Q. B. 155.

A sale is good, though the contract to sell was entered into before the power became exercisable, if it was not carried into execution until the power became exercisable. *Farrar* v. *Farrars, Limited*, 40 Ch. D. 395; see *Major* v. *Ward*, 5 Ha. 598.

Mortgagee cannot sell to himself,

1. A mortgagee with a power of sale cannot sell to himself, either alone or with others, nor to a trustee for himself. *Downes* v. *Grazebrook*, 3 Mer. 200; *Robertson* v. *Norris*, 1 Giff. 421; 4 Jur. N. S. 155, 443; *National Bank of Australasia* v. *United Hand-in-Hand Co.*, 4 App. Cas. 391, 404.

"A sale by a person to himself is no sale at all, and a

power of sale does not authorize the donee of the power to take the property subject to it at a price fixed by himself, even although such price be the full value of the property. Such a transaction is not an exercise of the power, and the interposition of a trustee, although it gets over the difficulty so far as form is concerned, does not affect the substance of the transaction." *Per Curiam* in *Farrar* v. *Farrars, Limited*, 40 Ch. Div. 395, 409.

or to agent conducting sale.

2. A mortgagee cannot sell to any one employed by him to conduct the sale. *Whitcomb* v. *Minchin*, 5 Madd. 91; *Orme* v. *Wright*, 3 Jur. 19; *In re Bloye's Trust*, 1 Mac. & G. 488, 494; *Lawrance* v. *Galsworthy*, 3 Jur. N. S. 1049; *Martinson* v. *Clowes*, 21 Ch. D. 857.

Sale to corporation of which mortgagee is member.

3. A sale by a mortgagee to a corporation of which he is a member is not, on that account alone, voidable by the mortgagor. *Farrar* v. *Farrars, Limited*, 40 Ch. Div. 395.

But where the company is promoted by the mortgagee, and he is its solicitor, and a substantial shareholder in it, the burden is thrown upon those who sustain the sale of proving that it was made *bonâ fide* and not at an undervalue. *Farrar* v. *Farrars, Limited*, 40 Ch. Div. 395.

Puisne mortgagee may purchase.

4. A puisne mortgagee, whether his mortgage take the form of a trust for sale or not, may purchase from a first mortgagee selling under his power of sale. *Parkinson* v. *Hanbury*, 1 Dr. & Sm. 143; 2 D. J. & S. 450; *Kirkwood* v. *Thompson*, 2 H. & M. 392; 2 D. J. & S. 613.

or one of several co-mortgagors.

5. A sale to one of several co-mortgagors, tenants in common of the mortgaged property, is valid, although the sale is made for principal, interest, and costs, and without the consent of the other co-mortgagors. *Kennedy* v. *De Trafford*, (1896) 1 Ch. 762.

Mortgagee not trustee of the power.

"A mortgagee with a power of sale, though often called a trustee, is in a very different position from a trustee for sale. A mortgagee is under obligations to the mortgagor, but he has rights of his own which he is entitled to exercise adversely to the mortgagor. A trustee for sale has no business to place himself in such a position as to give rise to a conflict of interest and duty. But every mortgage confers upon the

mortgagee the right to realize his security and to find a purchaser if he can, and if in exercise of his power he acts *bonâ fide*, and takes reasonable precautions to obtain a proper price, the mortgagor has no redress, even although more might have been obtained for the property if the sale had been postponed." *Per Curiam* in *Farrar* v. *Farrars, Limited*, 40 Ch. Div. 395, 410; see also *Cholmondeley* v. *Clinton*, 2 J. & W. 1, 182; *Matthie* v. *Edwards*, 2 Coll. 465; 10 Jur. 347; S. C. on appeal *Jones* v. *Matthie*, 11 Jur. 504; *Davey* v. *Durrant*, 1 De G. & Jo. 535; *Marriott* v. *Anchor Reversionary Co.*, 3 D. F. & J. 177, 190; *Warner* v. *Jacob*, 20 Ch. D. 220; *Nash* v. *Eads*, 25 Sol. Jo. 95; *Colson* v. *Williams*, 61 L. T. 71; *Kennedy* v. *De Trafford*, (1896) 1 Ch. 762; *Field* v. *Debenture Corporation*, 12 T. L. R. 416.

Sale must be *bonâ fide*.

But the sale to be valid must be *bonâ fide*. A sale made, not for the purpose of recovering the mortgage debt, but for some indirect purpose, will be set aside. *Robertson* v. *Norris*, 1 Giff. 421; *Jenkins* v. *Jones*, 2 Giff. 99; 6 Jur. N. S. 391; *Pooley's Trustee* v. *Whetham*, 33 Ch. Div. 111; see, however, as to the limitations of this doctrine, *per* Jessel, M.R., in *Nash* v. *Eads*, 25 Sol. Jo. 95.

Sale at undervalue.

The mere fact that a larger amount might have been obtained for the property if the mortgagee had waited is not sufficient to entitle the mortgagor to set aside the sale. But if a larger amount might have been obtained at the time of sale, the sale is fraudulent as against the mortgagor.

A contract to sell at a future time at a price fixed by the contract does not of itself invalidate the sale, although, if the value of the property has risen in the mean time, the mortgagee is perhaps chargeable on the footing of wilful default. *Major* v. *Ward*, 5 Ha. 598; *Farrar* v. *Farrars, Limited*, 40 Ch. Div. 395.

Sale under depreciatory conditions.

A sale under depreciatory conditions may be set aside by the mortgagor.

A power, entitling the vendor to rescind the sale in case an objection or requisition is made which he is unwilling or unable to comply with, is not depreciatory in this sense. *Faulkner* v. *Equitable Reversionary Interest Society*, 28 L. J. Ch. 132; 4 Drew. 352; see *Hobson* v. *Bell*, 2 B. 17.

Part of purchase-money may be left on mortgage.

A mortgagee with a power of sale is at liberty to effect a sale, of which one of the terms shall be that even a considerable portion of the purchase-money shall be allowed to remain on mortgage of the property, that mortgage being, as between the mortgagee and the mortgagor, at the mortgagee's risk, that is, he charging himself with the whole amount of the purchase-money in account with the mortgagor. *Davey* v. *Durrant*, 1 De G. & Jo. 535; *Thurlow* v. *Mackeson*, L. R. 4 Q. B. 97; *Bettyes* v. *Maynard*, 30 W. R. 793; 31 W. R. 461; *Farrar* v. *Farrars, Limited*, 40 Ch. Div. 395.

First and second mortgagees may join in sale.

First and second mortgagees may join in a sale, and each may give a good receipt for the proportion of purchase-money paid him. *M'Carogher* v. *Whieldon*, 34 B. 107.

Mortgagees of different properties may join.

A mortgagee with a power of sale may lawfully join with the owner or mortgagee of another property in selling the two together, if a higher price can thus be obtained. *Hiatt* v. *Hillman*, 25 L. T. 55; *In re Cooper & Allen's Contract for Sale to Harlech*, 4 Ch. D. 802.

Mortgagee is trustee of surplus proceeds of sale.

When a mortgagee sells and has a balance in his hands, he is a trustee of the balance for the persons beneficially interested. *Matthison* v. *Clarke*, 3 Drew. 3; *In re Bell*, 34 Ch. D. 462; *Charles* v. *Jones*, 35 Ch. D. 544; *Magnus* v. *Queensland National Bank*, 36 Ch. D. 25; 37 Ch. Div. 466; *Thorne* v. *Heard*, (1893) 3 Ch. 530; (1894) 1 Ch. 599; (1895) A. C. 495.

The Conveyancing Act provides—

Application of proceeds of sale.

Sect. 21, (3). The money which is received by the mortgagee, arising from the sale, after discharge of prior incumbrances to which the sale is not made subject, if any, or after payment into Court under this Act of a sum to meet any prior incumbrance, shall be held by him in trust to be applied by him, first, in payment of all costs, charges, and expenses, properly incurred by him, as incident to the sale or any attempted sale, or otherwise; and, secondly, in discharge of the mortgage money, interest, and costs, and other money, if any, due under the mortgage; and the residue of the money so received shall be paid to the person entitled to the mortgaged property, or authorized to give receipts for the proceeds of the sale thereof.

When mortgagee is express trustee.

Where the mortgage deed contains a trust of the surplus proceeds of sale for the mortgagor, his heirs, or assigns, the mortgagee is an express trustee of such surplus proceeds for the persons interested in the equity of redemption. *In re Bell*, 34 Ch. D. 462; *Thorne* v. *Heard*, *supra*.

Where the mortgage is by way of a conveyance on trust to sell, the mortgagee is an express trustee of the surplus proceeds, although not of the power of sale. *Locking* v. *Parker*, 8 Ch. 30.

A mortgagee incurs no liability to puisne incumbrancers without reference to whose claims he distributes the surplus proceeds of sale, if he has no notice of their claims at the time of distribution. *West London Commercial Bank* v. *Reliance Building Society*, 29 Ch. Div. 954; *Thorne* v. *Heard*, (1895) A. C. 495, 500, 505.

When mortgagee is constructive trustee.

Where there is no express trust, he is a constructive trustee of such surplus proceeds. *Banner* v. *Berridge*, 18 Ch. D. 254; *Charles* v. *Jones*, 35 Ch. D. 544.

He may become an express trustee, although no express trust of the surplus proceeds has been created, for a puisne mortgagee by arrangement with whom the sale is effected. *Tanner* v. *Heard*, 23 B. 555, explained in *Banner* v. *Berridge*, *supra*.

Liability of mortgagee's agent.

The mortgagee's solicitor who receives the purchase-moneys is a trustee of them for the mortgagee. *In re Bell*, 34 Ch. D. 462.

As to the liability of the mortgagee's agent in respect of the surplus proceeds to persons for whom the mortgagee is a trustee of such proceeds, and as to the mode of enforcing this liability, see *Robertson* v. *Armstrong*, 28 B. 123; *Soar* v. *Ashwell*, (1893) 2 Q. B. 390, 398, 403.

Liability of mortgagee where mortgagor sells with his concurrence.

Where, on a sale by the mortgagor, with the concurrence of the mortgagee, a deposit is paid to the vendor's agent, and is lost, the mortgagee is bound to give credit for the amount in account with the purchasers (*a*), but not in account with the mortgagor (*b*). (*a*) *Rowe* v. *May*, 18 B. 613; (*b*) *Barrow* v. *White*, 2 J. & H. 580.

Where, on a sale by the mortgagor, the first mortgagee, with notice of a second mortgage, joins in conveying the property

to a purchaser free from incumbrances, and allows the mortgagor to receive the balance of the purchase-money, after satisfying the first mortgage, he is liable to that extent to the puisne mortgagee. *West London Commercial Bank* v. *Reliance Permanent Building Society*, 29 Ch. Div. 954.

The Conveyancing Act provides—

Protection of *bonâ fide* purchaser.

Sect. 21, (2). Where a conveyance is made in professed exercise of the power of sale conferred by this Act, the title of the purchaser shall not be impeachable on the ground that no case had arisen to authorize the sale, or that due notice was not given, or that the power was otherwise improperly or irregularly exercised; but any person damnified by an unauthorized or improper or irregular exercise of the power shall have his remedy in damages against the person exercising the power.

Sect. 22, (1), makes the receipt in writing of the mortgagee a discharge for any money arising under the power of sale conferred by the Act. See also sect. 61, (1).

Sect. 21, (2), of the Conveyancing Act, and similar provisions in mortgage deeds, do not relieve purchasers who have notice of an irregularity or impropriety in the sale. *Parkinson* v. *Hanbury*, 1 Dr. & Sm. 143; *Jenkins* v. *Jones*, 2 Giff. 99; *Selwyn* v. *Garfit*, 38 Ch. Div. 273; *Bailey* v. *Barnes*, (1894) 1 Ch. 25.

Purchaser protected, though nothing due on mortgage.

A proviso protecting a *bonâ fide* purchaser under a sale purporting to be made in pursuance of the power, notwithstanding any impropriety or irregularity whatsoever in the sale, protects a purchaser although the mortgage has been paid off. *Dicker* v. *Angerstein*, 3 Ch. D. 600.

Purchaser may assume *omnia rite esse acta*.

A purchaser is perhaps entitled to assume *omnia rite esse acta*, and therefore he may be protected although he knows that the requisite notice has not been given, if the mortgagor was in a condition to waive such notice. *Selwyn* v. *Garfit*, 38 Ch. Div. 273, 285.

Where a mortgagee with a power of sale joins with the owner or mortgagee of another property in selling the two together, the purchase-money must be apportioned before the completion of the sale, but a purchaser is not bound to ascertain whether the apportionment was rightly made. *In re Cooper & Allen's Contract for Sale to Harlech*, 4 Ch. D. 802.

Purchase by co-mortgagor.

One of several co-mortgagors may buy the mortgaged property for his own benefit on a sale under the power, although he has received the rents as agent for his co-mortgagors, and he is not obliged to account to them for a profit made by him out of the transaction. *Kennedy* v. *De Trafford*, (1896) 1 Ch. 762.

Purchaser of land registered under Land Registry Act, 1862.

Where a mortgagor, registered with an indefeasible title under the Land Registry Act, 1862 (25 & 26 Vict. c. 53), made three successive mortgages, all of which were entered on the register of incumbrances, and the first mortgagee sold under his power of sale, it was held that the purchaser was entitled to be registered with an indefeasible title, though the second and third mortgagees remained on the register of incumbrances. *In re Richardson*, 12 Eq. 398; 13 Eq. 142.

Where the owner of an equity of redemption is entered on the register of estates with an indefeasible title subject to a mortgage, a purchaser from the mortgagee is entitled, after his conveyance has been entered on the register, to have the property bought by him and all entries relating thereto removed from the register without the mortgagor's consent. *In re Winter*, 15 Eq. 156.

Determination of power of sale.

A mortgagee's power of sale is not extinguished by an ineffectual attempt to exercise. *Henderson* v. *Astwood*, (1894) A. C. 150, 162.

A power of sale is not destroyed or suspended by a demise of the mortgaged property by mortgagor and mortgagee to a receiver, upon trust, at the request of the mortgagee during the continuance of the security, and at the request of the mortgagor after satisfaction of the sums secured, to grant leases of the premises in such manner as the person making such request should appoint, but to permit the mortgagor to receive the rents until default was made in payment of the mortgage money or interest, and upon trust after default to receive the rents and apply them in keeping down the interest upon the mortgage. *King* v. *Heenan*, 3 D. M. & G. 890.

As to whether a power of sale is extinguished on a transfer of the mortgage or by a sub-mortgage, see *Young* v. *Roberts*, 15 B. 558; *Cruse* v. *Nowell*, 2 Jur. N. S. 536; *Boyd* v. *Petrie*, 7 Ch. 385.

CHAPTER XXIII.

THE RIGHT OF DISTRESS.

In cases not affected by the Bills of Sale Act, 1878, a mortgagee of land may, by contract with the mortgagor, acquire a power of distress, either as incidental to the relation of landlord and tenant, or apart from that relation.

Attornment to the mortgagee.

"A mortgagor and a mortgagee have a right to insert in their mortgage deed a clause making the mortgagor attorn as tenant to the mortgagee, and thus by contract constituting the relation of landlord and tenant between the two." *Per* Cotton, L.J., in *Ex parte Jackson*, 14 Ch. Div. 725, 739.

Express power of distress.

"Sometimes a mortgage deed is made without any attornment clause, but it contains an express power for the mortgagee to enter and distrain. Such a power is not so beneficial to the mortgagee as the power of distress, which is by law incident to an attornment clause. Under an express power of distress the mortgagee can only take the mortgagor's goods; under the implied power of distress the mortgagee can, as a landlord, take any goods he finds on the demised premises." *Per* Lindley, L.J., in *In re Willis*, 21 Q. B. Div. 384, 395.

An attornment clause is not a licence to take possession of personal chattels as security for any debt within sect. 4 of the Bills of Sale Act, 1878. *In re Stockton Iron Furnace Co.*, 10 Ch. Div. 335.

The Bills of Sale Act, 1878, provides—

Bills of Sale Act, 1878, s. 6.

Sect. 6. Every attornment, instrument, or agreement, not being a mining lease, whereby a power of distress is given or agreed to be given by any person to any other person by way of security for any present, future, or contingent debt or advance, and whereby any rent is reserved or made payable

as a mode of providing for the payment of interest on such debt or advance, or otherwise for the purpose of such security only, shall be deemed to be a bill of sale within the meaning of this Act of any personal chattels which may be seized or taken under such power of distress.

Provided that nothing in this section shall extend to any mortgage of any estate or interest in any land, tenement, or hereditament which the mortgagee, being in possession, shall have demised to the mortgagor as his tenant at a fair and reasonable rent.

This section applies both to implied and to express powers of distress. *In re Willis*, 21 Q. B. Div. 384.

Effect of the section.

The instruments struck at by this section are not made bills of sale. Sect. 9 of the Act of 1882, therefore, does not apply to them, and they need not be according to the form prescribed by that Act. But they are to be treated as bills of sale for the purpose of registration, and therefore, if unregistered, are void as to the chattels comprised in them under sect. 8 of the Act of 1882. *Green* v. *Marsh*, (1892) 2 Q. B. 330.

The power of distress is avoided altogether, and the mortgagee cannot seize the chattels of a stranger. *Green* v. *Marsh, supra.*

The operation of an attornment clause is not affected by the Acts in so far merely as it creates the relation of landlord and tenant. *Mumford* v. *Collier*, 25 Q. B. D. 279.

The proviso at the end of sect. 6 of the Act of 1878 applies only to cases in which the mortgagee has first taken possession of the mortgaged premises and then demised them to the mortgagor. The attornment clause is not in itself such a taking of possession as to support a subsequent demise. *In re Willis*, 21 Q. B. Div. 384; *Green* v. *Marsh*, (1892) 2 Q. B. 330.

Mortgages of trading companies are outside the Act.

The mortgages of companies within the Companies Acts are not within the Bills of Sale Act, 1878. See p. 39.

Attornment clauses may therefore be validly inserted in such mortgages.

Power of owner of rent-charge to distrain.

A power of distress is given in certain events by sect. 44 of the Conveyancing Act, 1881, to a person entitled to receive

out of any land or the income of any land any annual sum, whether charged on the land or on the income.

Attornment to receiver or puisne mortgagee.

Attornment to a receiver appointed by the mortgagor and mortgagee, or to a second mortgagee, creates the relation of landlord and tenant between the parties, to which the right to distrain is incident. It is immaterial that the want of a legal estate in the mortgagee appears in the instrument by which the tenancy is constituted, or that the mortgagor has previously attorned to a first mortgagee, whose security is subsisting. *Jolly* v. *Arbuthnot*, 4 De G. & Jo. 224; *Morton* v. *Woods*, L. R. 3 Q. B. 658; 4 Q. B. 293; *Ex parte Punnett*, 16 Ch. Div. 226.

A tenancy is created where the mortgagor mortgages by way of underlease, and attorns tenant to the mortgagee. *Kearsley* v. *Phillips*, 11 Q. B. Div. 621.

Where the son of a mortgagor, who was tenant at will, continues in possession after his father's death, paying interest on the mortgage, he does not become tenant to the mortgagee, although a tenancy would have been created if the payments had been made expressly in respect of rent. *Scobie* v. *Collins*, (1895) 1 Q. B. 375.

Attornment where mortgagee does not execute mortgage.

Where a mortgage containing an attornment clause is not executed by the mortgagee, attornment to him by deed executed by the tenant in possession and delivered to him is sufficient evidence of the creation of a tenancy between the parties. It is not necessary, in order to constitute evidence of the tenancy, that rent should be paid. *West* v. *Fritche*, 3 Ex. 216; *Morton* v. *Woods*, L. R. 3 Q. B. 658; 4 Q. B. 293; *Ex parte Voisey*, 21 Ch. Div. 442.

Duration of tenancy.

The Statute of Frauds provides (sect. 1) that leases which are not in writing, signed by the parties making the same, shall operate as tenancies at will; but this provision only applies (sect. 2) to tenancies which of necessity exceed three years.

A tenancy which, at the time of the contract, may last for less than three years is not within the statute. *Ex parte Voisey*, *supra*.

A proviso giving the mortgagee a right to enter at any time after default is valid, and is not inconsistent with a

yearly or monthly tenancy. *Doe d. Garrod* v. *Olley*, 12 A. & E. 481; *Doe d. Snell* v. *Tom*, 4 Q. B. 615; *Metropolitan Counties Assurance Company* v. *Brown*, 4 H. & N. 428.

A tenancy from year to year or from month to month remains a yearly or monthly tenancy, although the mortgage contains a proviso that it may be determined at any time by will of the mortgagee. *In re Threlfall*, 16 Ch. Div. 274; *Ex parte Voisey, supra*; see *Kemp* v. *Lester*, (1896) 9 Q. B. 162.

There may be a tenancy at will though a yearly rent is reserved. *Doe d. Dixie* v. *Davies*, 7 Ex. 89.

No tenancy unless rent is certain.

There can be no tenancy where the rent is uncertain. But a fluctuating rent is not an uncertain rent. A rent is certain if, by calculation and upon the happening of given events, it becomes certain. *Ex parte Voisey*, 21 Ch. Div. 442, 458.

Where the proviso is that the mortgagor shall become tenant to the mortgagee upon making default in any of the payments which he was liable to make to him, the mortgagee has no right to distrain without giving previous notice to the mortgagor that he intends to treat him no longer as mortgagor in possession, but as tenant. *Clowes* v. *Hughes*, L. R. 5 Ex. 160.

Attornment to evade bankruptcy laws.

Where the attornment clause is merely a device to evade the bankruptcy laws, by enabling the mortgagee in case of bankruptcy to seize upon the goods which should be then on the premises, and not a *bonâ fide* contract intended to be acted upon whether there is a bankruptcy or not, no tenancy is created, and none of the incidents of a tenancy arise. The mortgagee, therefore, is not entitled to distrain either before or after the bankruptcy of the mortgagor. *Ex parte Jackson*, 14 Ch. Div. 725.

The amount of rent reserved by the mortgage is one of the *criteria* whether the attornment clause was meant to be acted on only in case of the mortgagor's bankruptcy.

Where the rent is out of all proportion to the annual value of the property, the inference is that the contract is not a *bonâ fide* contract for the creation of a tenancy. But the contract will be upheld if the rent, though large, is a rent which a tenant might honestly agree to pay and a landlord

honestly expect to receive. *Ex parte Williams*, 7 Ch. Div. 138; *In re Stockton Iron Furnace Co.*, 10 Ch. Div. 335; *Ex parte Jackson*, 14 Ch. Div. 725; *Ex parte Voisey*, 21 Ch. Div. 442.

Creation of tenancy does not alter equitable relation of parties

The creation of a tenancy by express agreement does not alter the equitable relation between mortgagor and mortgagee.

Rent, if paid, is in equity paid on account of principal and interest due under the mortgage, and is the subject-matter of account between mortgagor and mortgagee. *Per* Jessel, M.R., in *Ex parte Isherwood*, 22 Ch. Div. 384, 392.

And just as the mortgagor retains his rights as mortgagor, so the mortgagee remains mortgagee with all the incidents which attach to that position. Hence, trade fixtures added by the mortgagor after the mortgage pass to the mortgagee. *Ex parte Punnett*, 16 Ch. Div. 226.

The creation of a tenancy may of course interfere with the mortgagee's right to take possession, unless he retains the power to determine the tenancy at any time. *In re Stockton Iron Furnace Co.*, 10 Ch. Div. 335, 357.

On the other hand, a valid attornment clause gives the mortgagee the full rights of a landlord, and entitles him to distrain upon the goods of third persons. *In re Stockton Iron Furnace Co.*, 10 Ch. Div. 335, 357; *Kearsley* v. *Phillips*, 11 Q. B. Div. 621.

Special endorsement of writ by mortgagee.

In actions for the recovery of land, by a landlord against a tenant whose term has expired or has been duly determined by notice to quit, or against persons claiming under such tenant, the writ may be specially endorsed under Order III., Rule 6 (F), so that Order XIV. will apply. This provision applies in favour of a mortgagee with an attornment clause. *Daubuz* v. *Lavington*, 13 Q. B. D. 347; *Hall* v. *Comfort*, 18 Q. B. D. 11.

Where the mortgagor attorns tenant from year to year to the mortgagee, but the mortgagee has power at any time, without previous notice, to take possession of the mortgaged premises and determine the tenancy, the mortgagee may at any time bring an action for the recovery of the mortgaged land and specially endorse his writ. *Kemp* v. *Lester*, (1896) 2 Q. B. 162.

Determination of tenancy under attornment clause.

As to the determination of the tenancy—Where the tenancy is a tenancy at will, it determines with the death of the mortgagor. *Turner* v. *Barnes*, 2 B. & S. 435; *Scobie* v. *Collins*, (1895) 1 Q. B. 375.

A tenant at will does not determine his tenancy by assigning over his interest to another unless the lessor at will have notice. *Carpenter* v. *Colins*, Yelv. 73; *Pinhorn* v. *Souster*, 8 Ex. 763.

8 Anne, c. 14, ss. 6, 7.

A distress can only be made during the tenancy, and, by virtue of 8 Anne, c. 14, sects. 6, 7, within six months after its determination, the tenant remaining in possession. See *Turner* v. *Barnes*, 2 B. & S. 435.

An assignee of a mortgage cannot distrain for arrears of rent due before the assignment. *Brown* v. *Metropolitan Counties Life Assurance Society*, 1 E. & E. 832; 28 L. J. Q. B. 236.

Right to distrain in winding-up.

A mortgagee of a limited company, with power of distraining for interest in arrear, will not be allowed to distrain after a winding-up for arrears accrued before the winding-up. *In re Brown, Bayley & Dixon*, 18 Ch. D. 649.

And mortgagees with an attornment clause will not be allowed to distrain for rent accrued after the winding-up, unless either it is inequitable for the company in possession to insist on sect. 163 of the Companies Act, 1862, or the rent ought to be paid as part of the costs of the winding-up. *In re Lancashire Cotton Spinning Co.*, 35 Ch. Div. 656; *In re Higginshaw Mills Co.*, (1896) 2 Ch. 544; 65 L. J. Ch. 771.

Disclaimer of leasehold interest of bankupt.

No terms will in general be imposed for the benefit of the mortgagee, where leave is given to a trustee in bankruptcy, under rule 28 of the Bankruptcy Rules, 1871, to disclaim a leasehold interest of the bankrupt, of which the mortgagees were lessors under an attornment clause. *Ex parte Isherwood*, 22 Ch. Div. 384.

Application of proceeds of distress.

Mortgagees may apply the proceeds of a distress in payment *pro tanto* of whatever is due to them, whether for principal or interest. A contrary intention is not shown by the fact that the amount fixed for the rent coincides exactly with the amount which is made payable for interest on the same days. *Ex parte Harrison*, 18 Ch. Div. 127, overruling *Hampson* v. *Fellows*, 6 Eq. 575.

CHAPTER XXIV.

ACTIONS IN RESPECT OF PROPERTY MORTGAGED OR PLEDGED.

A. Proceedings in Equity.

Right of mortgagor to sue in equity.

A MORTGAGOR, whether of land or of personal property, is entitled, without the concurrence of the mortgagee, to prevent any one from injuring the mortgaged property or acquiring an adverse right against it. Thus, a mortgagor of land may sue to restrain its user inconsistently with a restrictive covenant, and a mortgagor of a patent may sue for an infringement. *Fairclough* v. *Marshall*, 4 Ex. Div. 37; *Van Gelder, Apsimon & Co.* v. *Sowerby Bridge Flour Society*, 44 Ch. Div. 374.

The principle applies to all persons in the position of mortgagors. *Fairclough* v. *Marshall, supra.*

When mortgagee must be joined.

It would be necessary to join the mortgagee, (1) if the action was one in which it was necessary that all persons having an interest should join; (2) if the mortgagee was in possession; (3) if the result of the action might be to impair the mortgagee's security. Cases, *supra.*

And if an account had to be taken, the presence of the mortgagees, or at any rate of the first mortgagee, would be necessary in order to bind the mortgagees by the account. Cases, *supra.*

Where A. made a legal mortgage of property which he had purchased with a covenant for quiet enjoyment, his vendor, who had paid off the mortgage and taken a release from the mortgagee of all claims under the covenant, was restrained in equity from setting up the mortgage deed or the release, in an action by A. for breach of the covenant. *Thornton* v. *Court*, 3 D. M. & G. 293.

When mortgagee may take proceedings.

A mortgagee in fee in possession of land has a sufficient interest to entitle him to apply for an injunction to restrain the breach of a restrictive covenant, the benefit of which runs with the land. *Lord Manners* v. *Johnson*, 1 Ch. D. 673, 681.

A mortgagee of the goodwill of a business and the right to use the same, who has not used and does not intend to use it, cannot obtain an injunction to restrain persons claiming under the mortgagor from using it. *Beazley* v. *Soares*, 22 Ch. D. 660.

A railway Act provided that if the line were not opened for traffic within five years, the parliamentary deposit should be applied "towards compensating any landowners or other persons whose property may have been rendered less valuable by the commencement, construction, or abandonment of the railway." It was held that mortgagees of a landowner had a right to an inquiry as to damages, though they would have no right to compensation unless it was shown that their security was deficient. *In re Potteries, Shrewsbury, & North Wales Ry. Co.*, 25 Ch. Div. 251.

Mortgagees of a house licensed for the sale of beer are persons "aggrieved" within sect. 27 of 9 Geo. IV. c. 61, by the refusal of the justices to grant a license to their mortgagor. *Garrett* v. *Justices of Middlesex*, 12 Q. B. D. 620.

B. Proceedings at Law.

In respect of land.

In a legal mortgage of land, the mortgagee after default has the absolute property at law. In equity, the mortgage is treated merely as an incumbrance, and the equity of redemption as an estate in the land. *Casburne* v. *Scarfe*, 1 Atk. 603; 2 J. & W. 194 *n.*; *Blake* v. *Foster*, 2 Ba. & Be. 387, 402; *Heath* v. *Pugh*, 6 Q. B. Div. 345, 360.

Judicature Act, 1873, s. 25, (5).

Now the Judicature Act, 1873 (36 & 37 Vict. c. 66), provides—

Sect. 25, (5). A mortgagor, entitled for the time being to the possession or receipt of the rents and profits of any land as to which no notice of his intention to take possession or to enter into the receipt of the rents and profits thereof shall

have been given by the mortgagee, may sue for such possession, or for the recovery of such rents or profits, or to prevent or recover damages in respect of any trespass or other wrong relative thereto, in his own name only, unless the cause of action arises upon a lease or other contract made by him jointly with any other person.

It is doubtful whether a mortgagor can sue under this section for breach of covenant. *Fairclough* v. *Marshall*, 4 Ex. Div. 37, 45.

In respect of chattels.

The common law actions for the recovery of a chattel unlawfully taken or withheld or its value were trespass, trover and detinue.

Possessory actions, what.

Trespass (*a*), trover (*b*), and detinue (*c*) were possessory actions, that is, actions in which the plaintiff was required to show either that he had possession, actual or constructive, of the chattel taken or withheld at the time of the act complained of, or that he had a legal right to the immediate possession. (*a*) *Smith* v. *Milles*, 1 T. R. 475; *Lotan* v. *Cross*, 2 Camp. 464; *Johnson* v. *Diprose*, (1893) 1 Q. B. 512. (*b*) *Gordon* v. *Harper*, 7 T. R. 9; *Fenn* v. *Bittleston*, 7 Ex. 152. (*c*) *Gordon* v. *Harper*, 7 T. R. 9; *Nyberg* v. *Handelaar*, (1892) 2 Q. B. 202.

A legal right to the immediate possession of a chattel can only arise out of a general or special property in the chattel. *Nyberg* v. *Handelaar*, (1892) 2 Q. B. 202.

From these principles the following results follow:—

Right of action in case of mortgage,

1. Where an assignment of goods by way of mortgage provides that the mortgagor shall remain in possession of the goods until a prescribed event, *e.g.* default in payment of the debt upon demand, the mortgagor is alone entitled to bring an action for conversion of the goods until the event happens. *Bradley* v. *Copley*, 1 C. B. 685; *Fenn* v. *Bittleston*, 7 Ex. 152.

An unauthorized sale of the goods by the mortgagor before the event happens determines his right to possession, and revests in the mortgagee the immediate right to possession. The mortgagee, therefore, can bring an action for conversion upon such sale. *Fenn* v. *Bittleston*, 7 Ex. 152.

2. Where goods are assigned to the mortgagee upon trust

to permit the mortgagor to hold the goods until demand of payment, the possession is in the mortgagee, and he can, therefore, maintain an action for conversion of the goods before making any demand. *White* v. *Morris*, 11 C. B. 1015; see *Barker* v. *Furlong*, (1891) 2 Ch. 172.

in case of pledge,

3. During the continuance of the contract of pledge the pledgee is the only person entitled to bring an action for recovery of the chattel pledged or its value. *Ayers* v. *South Australian Banking Co.*, L. R. 3 P. C. 548, 554; *Glyn* v. *East & West India Dock Co.*, 6 Q. B. Div. 475, 490; *Sewell* v. *Burdick*, 10 App. Cas. 74, 92.

The assignee of a pledgee can maintain an action for conversion, although the conversion took place before the assignment. *Bristol & West of England Bank* v. *Midland Ry. Co.*, (1891) 2 Q. B. 653.

The pledgor after a pledge retains a qualified property in the article pledged, which he can transfer at law to a purchaser. *Rich* v. *Aldred*, 6 Mod. 216; *Franklin* v. *Neate*, 13 M. & W. 481.

It follows that, even before the Judicature Act, the assignee of the pledgor was the proper plaintiff in an action against the pledgee for conversion of the property pledged, although, before that Act, only the original pledgor could sue for a breach of the contract of pledge. *Franklin* v. *Neate*, 13 M. & W. 481.

in case of lien.

4. Where goods are in the possession of a person who has a lien upon them, he alone can maintain an action for conversion of the goods. *Lord* v. *Price*, L. R. 9 Ex. 54.

Measure of damages for conversion by stranger,

In an action against a stranger for conversion of chattels subject to a mortgage or pledge, the person entitled to bring the action can recover the market value of the chattels converted at the time of the conversion. *Heydon & Smith's Case*, 13 Rep. 67, 69; *Nicolls* v. *Bastard*, 2 C. M. & R. 659, 660; *Brierly* v. *Kendall*, 17 Q. B. 937; *Chinery* v. *Viall*, 5 H. & N. 288.

by the mortgagee.

Where the conversion complained of is a seizure of goods by the mortgagee before the event happens which determines the mortgagor's right to retain possession, the measure of damages is the actual damage sustained by the mortgagor.

Brierly v. *Kendall*, 17 Q. B. 937; *Chinery* v. *Viall*, 5 H. & N. 288; *Toms* v. *Wilson*, 4 B. & S. 442; *Massey* v. *Sladen*, L. R. 4 Ex. 13, 18; *Moore* v. *Shelley*, 8 App. Cas. 285, 294.

Actions for injury to chattels.

It is not necessary, in order to maintain an action for injury to a chattel, that the plaintiff should have possession or an immediate right to the possession.

Where goods are injured while in the possession of a mortgagee, pledgee, or person having a lien upon them, the owner is entitled to maintain an action if he has suffered actual damage, *i.e.* if the injury is a permanent one affecting his reversionary interest in the goods. *Mayhew* v. *Herrick*, 7 C. B. 229; *Tancred* v. *Allgood*, 4 H. & N. 438; *Mears* v. *L. & S. W. Ry. Co.*, 11 C. B. N. S. 850; 31 L. J. C. P. 220; *Claridge* v. *South Staffordshire Tramway Co.*, (1892) 1 Q. B. 422.

The mortgagee, pledgee, or person having a lien would be entitled, by virtue of his possession, to maintain trespass, but he could only recover damages in so far as his security was diminished, or in so far as he was under any liability to the owner to keep the goods uninjured. *Lotan* v. *Cross*, 2 Camp. 464; *Claridge* v. *South Staffordshire Tramway Co.*, (1892) 1 Q. B. 422.

Bills of Lading Act, s. 1.

The Bills of Lading Act, 1855 (18 & 19 Vict. c. 111), provides (sect. 1) that every consignee of goods named in a bill of lading, and every indorsee of a bill of lading to whom the property in the goods therein mentioned shall pass, upon or by reason of such consignment or indorsement, shall have transferred to, and vested in him, all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself.

The indorsement and delivery to the indorsee of a bill of lading by way of security for a loan does not of itself transfer the property in the goods to the indorsee. He is, therefore, not within this section. He probably brings himself within this section by taking delivery of the goods. *Sewell* v. *Burdick*, 10 App. Cas. 74, 86.

The question whether the security given was intended to operate by way of pledge or by way of mortgage is probably immaterial. *Sewell* v. *Burdick*, 10 App. Cas. 74, 85, 96.

CHAPTER XXV.

THE RECOVERY OF THE SECURED DEBT.

Incumbrancer has two sets of remedies.] A PERSON holding a mortgage or charge on property as security for a loan has two sets of remedies. He has the rights of an ordinary creditor. He can bring an action against the debtor, present a bankruptcy petition against him, and prove in his bankruptcy. If the debtor is a corporation, the lender has corresponding remedies; and if the corporation to which he made the loan was incapable of contracting a debt to him, he will be subrogated to the rights of creditors who have been paid off out of his advance. His other set of remedies is peculiar to his position as incumbrancer, and varies with the nature of the incumbrance. He may take possession of the property over which he holds security; he may obtain the appointment of a receiver over it; he may extinguish his debtor's interest in it, and become absolute owner; or he may sell it, and pay himself out of the proceeds of sale.

The rights of the secured creditor, which he has in common with ordinary creditors, may first be considered.

A. ACTIONS AGAINST THE DEBTOR.

When the right of action accrues. Where there is a present debt, whether secured by mortgage or not, and a promise to pay on demand, whether with or without interest, no demand is necessary before bringing an action. *Norton* v. *Ellam*, 2 M. & W. 461; *Jackson* v. *Ogg*, Joh. 397; *In re J. Brown's Estate*, (1893) 2 Ch. 300.

Promise to pay collateral sum on demand. Where there is a promise to pay a collateral sum on demand, *e.g.* a covenant by a surety for the principal debtor, demand must be made before action brought. *Birks* v. *Trippet*, 1 Wms. Saund. 32; *Carter* v. *Ring*, 3 Camp. 459; *In re J. Brown's Estate*, (1893) 2 Ch. 300.

Demand made condition precedent.

It may be made a part of the contract that a demand shall be a condition precedent to enforcing the security.

The co-existence of a covenant to pay the principal on demand, with a covenant to pay interest "in the mean time from the date hereof," shows that "on demand" cannot refer to the date of the deed. *In re J. Brown's Estate*, (1893) 2 Ch. 300.

Demand in writing.

Where the contract requires a demand in writing, the demand is good without its being shown that the person who brought the demand had authority to receive the money. *Toms* v. *Wilson*, 4 B. & S. 442.

Where the contract requires the debtor to pay immediately on demand in writing, or at such time as the creditor should appoint by notice in writing, the debtor must have a reasonable time after demand to enable him to find the money, and to inquire into the authority of the person making the demand, if he is not the creditor. *Brighty* v. *Norton*, 3 B. & S. 305; *Toms* v. *Wilson*, 4 B. & S. 442; *Moore* v. *Shelley*, 8 App. Cas. 285, 293.

Where the demand might be made, either personally upon the debtor or by giving or leaving verbal or written notice at his place of business, there is no default until he has had a reasonable opportunity of receiving the notice. *Massey* v. *Sladen*, L. R. 4 Ex. 13.

No place named for payment.

Where no place is named for payment of a debt, it is the debtor's duty to seek out the creditor and pay him. Co. Litt. 210; Shep. Touch. 136; *Poole* v. *Tunbridge*, 2 M. & W. 223; *Noel* v. *Rochfort*, 4 Cl. & F. 158, 204; *Haldane* v. *Johnson*, 8 Ex. 689; *Bell & Co.* v. *Antwerp Line*, (1891) 1 Q. B. 103; *Eider*, (1893) P. 119.

Where the creditor has gone abroad after the making of the contract, the debtor is excused from following him; but the debtor is bound to seek the creditor out, if the creditor was abroad when the contract was made. *Fessard* v. *Mugnier*, 18 C. B. N. S. 286; *Eider*, (1893) P. 119.

Place named for payment.

Where a place is appointed in the contract for payment, the creditor must make demand at the place before action brought. *Thorn* v. *City Rice Mills*, 40 Ch. D. 347.

Covenant for

A covenant for payment of a loan on a certain day, though

payment on certain day.

in the affirmative, necessarily contains a negative by implication, namely, that the lender of the money is not to sue for it before that day. *Boaler* v. *Mayor*, 19 C. B. N. S. 76; *Munster and Leinster Bank* v. *France*, 24 L. R. Ir. 82; *Bolton* v. *Buckenham*, (1891) 1 Q. B. 278.

As to the rights of debenture-holders whose bonds are payable by periodical drawings, see *Gordillo* v. *Weguelin*, 5 Ch. Div. 287.

Provisions accelerating payment.

A proviso, where the principal is payable on a future day, making it payable before that day if default is made in payment of interest, or a proviso, where the principal is payable by instalments, making all unpaid instalments immediately payable if default is made in payment of one, is not penal, and equity will not relieve against it.

Such a proviso merely accelerates the payment of a sum which was due from the beginning. It does not increase the debtor's burden. It simply deprives him of an indulgence given upon a condition which he has not fulfilled. *Ex parte Bennet*, 2 Atk. 527; *Davis* v. *Thomas*, 1 R. & M. 506; *Ford* v. *Chesterfield*, 19 B. 428; *Sterne* v. *Beck*, 1 D. J. & S. 595; *Thompson* v. *Hudson*, L. R. 4 H. L. 1; *Protector Loan Co.* v. *Grice*, 5 Q. B. Div. 592; *Wallingford* v. *Mutual Society*, 5 App. Cas. 685.

Action for deficit on sale.

Where property mortgaged (*a*), or pledged (*b*), is sold for less than the amount due under the contract of loan, the mortgagee or pledgee may bring an action for the deficit. (*a*) *Barker's Claim*, (1894) 3 Ch. 290; (*b*) *Jones* v. *Marshall*, 24 Q. B. D. 269.

This right extends to pledges within the Pawnbrokers Act, 1872. *Jones* v. *Marshall*, 24 Q. B. D. 269.

The right to recover the deficit is a right implied in the original promise to pay the debt. The expression, therefore, of the right in a mortgage does not give the mortgagee a fresh right of action accruing on the realization of the mortgaged property. *Barker's Claim*, (1894) 3 Ch. 290.

In what currency debt is payable.

Where Irish estates were charged by an English contract with the payment of a jointure of 3000*l.* "of lawful money of Great Britain," it was held that payment must be made in

English money. *Lansdowne* v. *Lansdowne*, 2 Bli. 60; *Noel* v. *Rochfort*, 4 Cl. & F. 158.

Bond imports consideration.

A bond or other instrument under seal requires no consideration. Hence an action may be brought on a voluntary bond or a bond given for a consideration which is in fact null, *e.g.* past cohabitation. *In re Vallance*, 26 Ch. D. 353.

Bond for illegal consideration.

But no right of action arises on a bond or other instrument under seal given to secure a debt due under an illegal contract, *e.g.* in consideration of future cohabitation. *Paxton* v. *Popham*, 9 East, 408; *Gas Light Co.* v. *Turner*, 6 Bing. N. C. 324; *Lightfoot* v. *Tenant*, 1 B. & P. 551; *Fisher* v. *Bridges*, 2 E. & B. 118; 3 E. & B. 642; *Geere* v. *Mare*, 2 H. & C. 339.

Where the illegal consideration does not appear on the face of the instrument, the obligor or covenantor can plead the illegality in defence to an action at law, and he could have obtained discovery in equity in aid of his legal defence, but he cannot get any other equitable relief, such as having the instrument delivered and cancelled, unless it was obtained under circumstances which would give him an independent right to such relief, *e.g.* oppression or fraud. *Simpson* v. *Lord Howden*, 3 My. & Cr. 97; *Benyon* v. *Nettlefold*, 3 Macn. & G. 94; *Ayerst* v. *Jenkins*, 16 Eq. 275; *Jones* v. *Merionethshire Building Society*, (1892) 1 Ch. 173.

Actions by railway mortgagees or debenture stock-holders.

The Companies Clauses Act, 1863 (26 & 27 Vict. c. 118), provides (sect. 27) that if the interest on debenture stock is in arrear for thirty days, the holder may recover the arrears with costs by action against the company.

As to the right of the mortgagee of a company under the Companies Clauses Act, 1845 (8 & 9 Vict. c. 16), to sue for interest in arrear or principal money unpaid, see sect. 53 of the Act.

Debenture-holders suing *pari passu*.

A debenture-holder under the Companies Clauses Act, 1845, who has obtained judgment at law against the company for his principal, interest, and costs, is not entitled to issue execution otherwise than as a trustee for himself and all other debenture holders entitled to be paid *pari passu* with him. *Bowen* v. *Brecon Railway Co.*, L. R. 3 Eq. 541; see *Hope* v. *Croydon Tramways Co.*, 34 Ch. D. 730.

Who can sue on contract.

A contract cannot be enforced at law or in equity by a stranger to the contract and to the consideration. Therefore an agreement between A. and B. that B. shall pay C., when C. is not a party, directly or indirectly, to the agreement, gives C. no right of action against B. *Tweddle* v. *Atkinson*, 1 B. & S. 393; *In re Empress Engineering Co.*, 16 Ch. Div. 125; *Gandy* v. *Gandy*, 30 Ch. Div. 57 (doubting *Touche* v. *Metropolitan Ry. Warehousing Co.*, 6 Ch. 671); see *Davis & Sons* v. *Taff Vale Ry. Co.*, (1895) A. C. 542.

Both trustee and *cestui que trust* can sue.

But where one of the parties to a contract contracts simply as trustee for a third person or constitutes himself in effect a trustee for that person, then the trustee can sue at law and recover substantial damages (*a*), and the *cestui que trust* can sue in equity (*b*). (*a*) *Lamb* v. *Vice*, 6 M. &. W. 467; *Lloyd's* v. *Harper*, 16 Ch. Div. 290. (*b*) *Tomlinson* v. *Gill*, Ambl. 330; *Gregory* v. *Williams*, 3 Mer. 582; *Gandy* v. *Gandy*, 30 Ch. Div. 57.

Whether debenture-holders can sue.

It may appear, however, from the instrument constituting the trust, that the *cestui què trust* was only intended to sue through the trustees, or in default of their exercising their rights under the trust-deed. *In re Uruguay Central Ry. Co.*, 11 Ch. D. 372, 383.

Compare *In re Olathe Silver Mining Co.*, 27 Ch. D. 278, where there were two contracts, one in the trust-deed with the trustees and the other in the debenture with the bearer; and see Buckley, 213.

Amount recoverable in action at law.

The debt due from the mortgagor to the mortgagee, in respect of which an action at law can be maintained, is simply the debt which the mortgagor has expressly contracted to pay, and does not include expenses properly incurred by the mortgagee, which would be allowed him in an action for foreclosure or redemption. *Ex parte Fewings*, 25 Ch. Div. 338.

Bond creditor cannot recover beyond penalty.

A bond creditor cannot recover for principal and interest beyond the penalty of the bond. *Mackworth* v. *Thomas*, 5 Ves. 329; *Clarke* v. *Seton*, 6 Ves. 411; *Mathews* v. *Keble*, 4 Eq. 467, 474; 3 Ch. 691, 699; *In re Knipe's Estate*, 27 L. R. Ir. 412; *S. C. Hatton* v. *Harris*, (1892) A. C. 547.

This rule is subject to the following exceptions:—

1. A bond debtor who obtained an injunction to restrain his creditor from proceeding at law, while the debt was under the penalty, was obliged to do equity by paying all interest due although exceeding the penalty. *Duvall* v. *Terry*, Show. P. C. 15; *Pulteney* v. *Warren*, 6 Ves. 72; *Grant* v. *Grant*, 3 Russ. 598, S. C. 3 Sim. 340.

2. Where there is a mortgage in the form of a trust for sale for securing the payment of a sum of money with interest thereon, the fact that the same sum is also secured by bond does not prevent the creditor from recovering under the mortgage all interest due, although exceeding the penalty of the bond (*a*); but where the mortgage is made expressly to secure all sums secured by certain bonds therein mentioned, and the interest thereof, due and to become due thereon, the principal and interest recoverable under the mortgage are limited to the penalty of the bond (*b*). (*a*) *Clarke* v. *Lord Abingdon*, 17 Ves. 106; (*b*) *Hughes* v. *Wynne*, 1 My. & K. 20.

This distinction, which appears unsubstantial, was recognized in *Mathews* v. *Keble*, 4 Eq. 467, 474.

Relief of obligor in equity.

A bond creditor is entitled at law to sue for the whole penalty, although only part of the debt remains due; but the obligor is entitled to relief in equity on paying the principal, interest, and costs. *Forward* v. *Duffield*, 3 Atk. 555; *In re Graham*, (1895) 1 Ch. 66.

A bond creditor is not entitled as against an insolvent surety to the benefit of counter-bonds or collateral securities given to him by the principal debtor. *In re Walker*, (1892) 1 Ch. 621, explaining *Mawer* v. *Harrison*, 1 Eq. Abr. 93, pl. 5.

B. Actions against the Debtor's Representatives.

Executor sued as such.

1. The creditor has a remedy against the executor, both at law and in equity. When the executor is sued at common law in his character as executor, all payments are disallowed him which, as between the estate and the creditor suing, have been wrongfully made. He cannot set up his own *devastavit*

in order to escape payment. The result is that at law he is considered to hold still in his own hand assets which he has improperly paid away.

The same principle applies in equity. Where an account is directed of the testator's personal estate received by the executor, or by his order, or for his use, he is not entitled to be allowed payments wrongfully made by him more than six years before the summons. *In re Marsden*, 26 Ch. D. 783; *In re Hyatt*, 38 Ch. D. 609.

The executor will be treated as having in hand any legacy or share of residue given to him by the testator. *Blake* v. *Gale*, 31 Ch. D. 196; 32 Ch. Div. 571.

Executor sued personally.

2. The creditor has also a remedy against the executor personally.

It is founded on the *devastavit* of the executor in misapplying assets of the testator available for the creditor's payment. The executor can therefore plead the Statute of Limitations against the *devastavit* so charged. The executor's liability is the same both at law and in equity *Thorne* v. *Kerr*, 2 K. & J. 54; *In re Gale*, 22 Ch. D. 820.

The liability for the *devastavit* of an executor passes to his executor by virtue of 30 Car. II. c. 7.

Estoppel against creditor.

If the creditor misleads the executor so that he is thereby induced to part with the assets in a manner which would be a *devastavit*, the creditor cannot complain of the *devastavit*. This defence is open to an executor, whether he is sued in his representative capacity or personally. *Richards* v. *Browne*, 3 Bing. N. C. 493; *Jewsbury* v. *Mummery*, L. R. 8 C. P. 56; *In re Birch*, 27 Ch. D. 622.

Right to follow legacies.

3. In equity a creditor may follow assets in the hands of legatees, though they have been delivered to the legatees in ignorance of the creditor's demand. *Noel* v. *Robinson*, 1 Vern. 90; 2 Vent. 358; *Hodges* v. *Waddington*, 2 Vent. 360; *Gillespie* v. *Alexander*, 3 Russ. 130; *March* v. *Russell*, 3 My. & Cr. 31; *Ridgway* v. *Newstead*, 2 Giff. 492; 3 D. F. & J. 474; see *In re Brogden*, 38 Ch. Div. 546, 569, 573.

The right to relief is equitable only, and may be refused on equitable grounds.

Relief will be refused if the creditor has actively consented to the distribution of the personal estate, or if he has delayed in bringing forward his claim until the rights and liabilities of the legatees have been varied. *Ridgway* v. *Newstead, supra*; *Blake* v. *Gale*, 31 Ch. D. 196; 32 Ch. Div. 571; see *Leahy* v. *De Moleyns*, (1896) 1 I. R. 206.

The creditor is entitled to follow assets in the hands of a specific legatee, although the personal estate of the testator not specifically bequeathed is more than sufficient to pay his debts, funeral and testamentary expenses, and discharge all his liabilities. *Davies* v. *Nicolson*, 2 De G. & Jo. 693.

But where a creditor has not come in under a decree until the assets have been in part distributed, he is only entitled to recover from each legatee that sum which, as between himself and the other parties interested in the estate, he would be liable to pay. *Gillespie* v. *Alexander*, 3 Russ. 130; *Greig* v. *Somerville*, 1 R. & M. 338.

Rights against alienee for value.

The creditor cannot follow assets which have been alienated by the legatee to a *bonâ fide* purchaser for value without notice of the creditor's claim; and the creditor has no remedy against the legatee personally. *Spackman* v. *Timbrell*, 8 Sim. 253; *Dilkes* v. *Broadmead*, 2 D. F. & J. 566.

The creditor may follow assets in the hands of a purchaser for value from a legatee so long as the legacy remains under the control of the executor, or of the Court in an administration action. *Noble* v. *Brett*, 24 B. 499; *Hooper* v. *Smart*, 1 Ch. D. 90; see *Graham* v. *Drummond*, (1896) 1 Ch. 968, 976.

Where a creditor seeks for administration of the personal estate only, he is not obliged to sue on behalf of himself and all other creditors. *In re Greaves*, 18 Ch. D. 551, 554; *Re Blount*, 27 W. R. 865.

Right of specialty creditor against heir,

4. At common law a creditor by specialty, by which the heirs are bound, has an action of debt against the heir, who is liable to the extent of the debtor's land descended upon him. The land is not liable in the hands of a *bonâ fide* alienee before action brought, but the liability becomes a personal liability of the heir to the extent of the value of the land aliened. 11 Geo. IV. & 1 Wm. IV. c. 47, s. 6; *Mathews* v. *Jones*,

2 Anst. 506; *Richardson* v. *Horton*, 7 B. 112; *British Mutual Investment Co.* v. *Smart*, 10 Ch. 567.

or devisee.

By virtue of the Statute, 11 Geo. IV. & 1 Wm. IV. c. 47, the creditor has the same right against a devisee. The creditor's proper course is to sue the heir, making the devisee co-defendant. The land ceases to be liable in the hands of a *bonâ fide* alienee before action brought, and the debt becomes the personal debt of the devisee to the extent of the value of the land aliened. See sect. 8 of the statute.

Effect of alienation.

An alienation of the legal estate not affecting the beneficial interest is not an alienation within the statute. *Coope* v. *Cresswell*, L. R. 2 Ch. 112.

Although an equitable mortgage by the heir or devisee is not such an alienation as to protect the land from execution by virtue of the statute, equity would protect the interest of the mortgagee. *Coope* v. *Cresswell*, L. R. 2 Ch. 112.

The right of the creditor by specialty, in which the heirs are bound, to sue the heir or devisee at common law, has not been taken away by Hinde Palmer's Act. *In re Illidge*, 27 Ch. Div. 478, 482.

Conveyancing Act, s. 59.

The Conveyancing Act, 1881, provides (sect. 59) that a covenant, and a contract under seal, and a bond or obligation under seal, though not expressed to bind the heirs, shall operate in law to bind the heirs and real estate, as well as the executors and administrators and personal estate of the person making the same as if heirs were expressed.

Specialty creditor in equity.

The creditor by specialty in which the heirs are bound has the same rights in equity; but where he sues in equity, all creditors are entitled *pari passu* to the benefit of the decree. *Morley* v. *Morley*, 5 D. M. & G. 610.

Rights of simple contract creditor in equity.

5. The debtor may by will make the land equitable assets, thereby preventing its exclusive application to the payment of specialty debts, or he may devise it for the payment of a particular debt on simple contract, and so withdraw it from specialty creditors altogether. 11 Geo. IV. & 1 Wm. IV. c. 47, s. 5; *Richardson* v. *Horton*, 7 B. 112, 123.

3 & 4 Wm. IV. c. 104.

By 3 & 4 Wm. IV. c. 104, freeholds and copyholds, which the debtor has not by will charged with or devised subject to

the payment of his debts, are made assets to be administered in courts of equity for the payment of the just debts of such persons, as well debts due on simple contract as on specialty. The heir at law and devisee are made liable to the same suits in equity under this Act as they were before the Act at the suit of creditors by specialty in which the heirs are bound.

The rights given by the statute to simple contract creditors are purely equitable. Therefore, a simple contract creditor can only get a judgment under this statute for the benefit of all the creditors. *In re Illidge*, 24 Ch. D. 654; 27 Ch. Div. 478.

Effect of alienation for value.

Under this Act the land is freed from liability by a *bonâ fide* alienation for value, whether legal or equitable, the heir or devisee becoming personally liable to the extent of the value of the land aliened. *Spackman* v. *Timbrell*, 8 Sim. 253; *Kinderley* v. *Jervis*, 22 B. 1; *Ex parte Baine*, 1 M. D. & D. 492; *British Mutual Investment Co.* v. *Smart*, 10 Ch. 567.

The fact that the alienee has notice that there are debts of the ancestor or devisor remaining unpaid does not expose him to any liability, or bring him within the provisions of 13 Eliz. c. 5. *Richardson* v. *Horton*, 7 B. 112, 124; *Jones* v. *Noyes*, 4 Jur. N. S. 1033; *Kinderley* v. *Jervis*, 22 B. 1.

Hinde Palmer's Act, s. 1.

6. Hinde Palmer's Act (32 & 33 Vict. c. 46) provides—

Sect. 1. In the administration of the estate of every person who shall die on or after the first day of January, 1870, no debt or liability of such person shall be entitled to any priority or preference by reason merely that the same is secured by or arises under a bond, deed, or other instrument under seal, or is otherwise made or constituted a specialty debt; but all the creditors of such person, as well specialty as simple contract, shall be treated as standing in equal degree, and be paid accordingly out of the assets of such deceased person, whether such assets are legal or equitable, any statute or other law to the contrary notwithstanding: Provided always, that this Act shall not prejudice or affect any lien, charge, or other security which any creditor may hold or be entitled to for the payment of his debt.

When creditor must sue on behalf of all.

Where a creditor seeks for administration of the real estate, he must sue on behalf of all, unless the real estate has been

ordered to be sold, or there is a trust for, or power of sale. *Ponsford* v. *Hartley*, 2 J. & H. 736; *Worraker* v. *Pryer*, 2 Ch. D. 109; *In re Royle*, 5 Ch. D. 540; *In re Greaves*, 18 Ch. D. 551, 554; *Re Vincent*, 26 W. R. 94.

C. Actions for Recovery of Rent-Charges.

Remedies of grantee of rent-charge against grantor,

1. The better opinion appears to be, that the grantee of a rent-charge has no personal remedy against the grantor, unless the grantor has entered into a covenant for payment. *Sligo Rail* v. *White*, 31 L. R. Ir. 316.

Lord Campbell was of opinion that, if the power of distress under a rent-charge became unavailing, the remedy of the grantee was the same as if there had been a simple grant of an annuity, which implies a promise to pay and imposes a personal liability. *Per* Lord Campbell in *Monypenny* v. *Monypenny*, 9 H. L. C. 114, 123, 125.

Where the grantor covenanted for himself, his heirs, and assigns, that, if the rent-charge was in arrear, it should be lawful for the grantee to distrain, it was held that, the power to distrain becoming unavailing, the grantee could recover damages from the personal estate of the grantor, equal to the amount which could have been recovered as arrears if there had been a covenant to pay. *Monypenny* v. *Monypenny*, 3 De G. & Jo. 572; 9 H. L. C. 114.

against terre tenant.

2. Where a rent issues out of land, the owner of the rent may sue the terre tenant in debt, whether the terre tenant is the original grantor or not. *Eton College* v. *Beauchamp*, 1 Ch. Cas. 121; *Thomas* v. *Sylvester*, L. R. 8 Q. B. 368; *Christie* v. *Barker*, 53 L. J. Q. B. 537; *Searle* v. *Cooke*, 43 Ch. Div. 519; *Crawford* v. *Annaly*, 23 L. R. Ir. 113; *Swift* v. *Kelly*, 24 L. R. Ir. 107, 478; *Sligo Rail* v. *White*, 31 L. R. Ir. 316.

A tenant for years is not a terre tenant within this principle. *In re Greenwich Herbage Rents Charity*, (1896) 2 Ch. 811.

At law, the terre tenant is liable in debt for the whole amount of the arrears during his tenancy, although exceeding the profits of the land during that period. *Pertwee* v. *Townsend*,

(1896) 2 Q. B. 129, not following *Odlum* v. *Thompson*, 31 L. R. Ir. 394.

The owner of part of the land charged is liable in debt to make good the whole charge, having his remedy over against the tenants of the residue. *Christie* v. *Barker*, 53 L. J. Q. B. 537.

The right arises not out of contract but out of privity of estate. There can be no claim against the terre tenant unless he is in possession when the rent becomes due. *Whitaker* v. *Forbes*, L. R. 10 C. P. 583; 1 C. P. D. 51; *In re Blackburn Building Society*, 42 Ch. Div. 343.

The right does not depend on the existence of a covenant by the grantor. Such a covenant does not run with the land. *In re Blackburn Building Society*, 42 Ch. Div. 343; *Searle* v. *Cooke*, 43 Ch. Div. 519.

The right is the same whether the rent-charge is created by deed or by will. *Booth* v. *Smith*, 51 L. T. 395.

CHAPTER XXVI.

SECURED CREDITOR IN BANKRUPTCY.

A SECURED creditor has, under the Judicature Act, 1875, the same rights in bankruptcy, in winding-up, and in the administration of insolvent estates.

Judicature Act, 1875, s. 10.

Sect. 10 of the Act provides—

In the administration by the Court of the assets of any person who may die after the commencement of this Act, and whose estate may prove to be insufficient for the payment in full of his debts and liabilities, and in the winding-up of any company under the Companies Acts, 1862 and 1867, whose assets may prove to be insufficient for the payment of its debts and liabilities and the costs of winding-up, the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable, and as to the valuation of annuities and future and contingent liabilities respectively, as may be in force for the time being under the Law of Bankruptcy with respect to the estates of persons adjudged bankrupt.

Petitioning creditor.

The Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), after stating [sect. 6, (1)] the conditions under which a creditor is entitled to present a bankruptcy petition against a debtor, provides—

Sect. 6, (2). If the petitioning creditor is a secured creditor, he must in his petition either state that he is willing to give up his security for the benefit of the creditors in the event of the debtor being adjudged bankrupt, or give an estimate of the value of his security. In the latter case, he may be admitted as a petitioning creditor to the extent of the balance of the debt due to him, after deducting the value so estimated, in the same manner as if he were an unsecured creditor.

A debenture holder of a tramway company may present a petition to wind up the company. *In re Borough of Portsmouth Tramways Co.*, (1892) 2 Ch. 362, not following *In re Herne Bay Waterworks Co.*, 10 Ch. D. 42.

It is not necessary that the estimate should be a true estimate. The creditor is bound by it, and, unless he obtains leave to amend, the trustee may take the security at the estimated value. *Ex parte Taylor*, 13 Q. B. D. 128.

The Bankruptcy Act enacts—

Secured creditor, what.

Sect. 168. In this Act, unless the context otherwise requires, "secured creditor" means a person holding a mortgage, charge, or lien on the property of the debtor or any part thereof, as a security for a debt due to him from the debtor.

Creditor of partnership.

The creditor of a partnership is not a secured creditor of the partnership in respect of a security which he holds on the separate estate of one of the partners. *Ex parte Peacock*, 2 Gly. & J. 27; *Ex parte Bowden*, 1 D. & Ch. 135; *Ex parte Caldicott*, 25 Ch. Div. 716.

But he is a secured creditor if the property was in fact partnership property when he took his security, although he was then informed by the firm that it was separate property of one of the partners. *Ex parte Connell*, 3 Dea. 201; 3 Mont. & A. 581; *In re Collie*, 3 Ch. Div. 481.

Conversely, the creditor of a partner is not a secured creditor in respect of a security held by him on the partnership property. *Ex parte Shepherd*, 2 M. D. & D. 204 S. C. *In re Plummer*, 1 Ph. 56.

Where property held by two tenants in common is mortgaged to secure the debt of one, who afterwards becomes bankrupt, the mortgagee is a secured creditor of the bankrupt in respect of his moiety of the mortgaged property. *Ex parte West Riding Banking Co.*, 19 Ch. Div. 105.

Right to vote at meetings of creditors.

The right of secured creditors in bankruptcy to vote at meetings of creditors is governed by Rules 10, 11, and 12 in the First Schedule to the Bankruptcy Act, 1883 [see sect. 15, (2)].

Rules 8, 9, and 10 of the First Schedule to the Companies (Winding-up) Act, 1890 (53 & 54 Vict. c. 63), which, by

sect. 6, (2), of that Act are made applicable to any meeting summoned in pursuance of that section, are substantially identical with Rules 10, 11, and 12 in the First Schedule to the Bankruptcy Act, 1883.

A creditor who votes in respect of his whole debt in the mistaken belief that a security which he holds need not be brought into account, will be allowed, if the mistake arose from inadvertence, to amend his proof by valuing his security and proving for the balance. *Ex parte Clarke*, 67 L. T. 232, 465; *In re Henry Lister & Co.*, (1892) 2 Ch. 417.

Mode of proof by secured creditors.

The right of proof by secured creditors is governed by Rules 9 to 17 of the Second Schedule to the Bankruptcy Act, 1883 (see sect. 39).

The effect of these rules is shortly as follows:—

Creditor realizing his security.

If a secured creditor realizes his security, he may prove for the balance due to him (Rule 9).

A secured creditor within this rule is a creditor who holds a security for his debt at the date of the bankruptcy. A creditor is secured although he has realized his security before he proves. *Quartermaine's Case*, (1892) 1 Ch. 639.

In ascertaining the net proceeds of a security which the mortgagee realizes, he is entitled to deduct from the gross proceeds costs reasonably incurred in defending his title to the security and the costs of enforcing it. *Ex parte Carr*, 11 Ch. Div. 62; *Quartermaine's Case*, (1892) 1 Ch. 639, 650.

Creditor surrendering his security.

A secured creditor who surrenders his security may prove for his whole debt (Rule 10).

Creditor assessing value of security.

A secured creditor, who neither realizes nor surrenders his security, must state in his proof the value at which he assesses it, and shall receive a dividend only in respect of the balance due to him (Rule 11).

A creditor holding several securities is entitled to value them in a lump, against the total amount of his debt, but the trustee may require him to assess the value of each security separately. *In re Smith & Logan*, 43 W. R. 413.

Where a security is valued, the trustee may redeem it on paying the assessed value [Rule 12 (*a*)].

If the trustee is dissatisfied with the assessment, he may

require that the property comprised in the security be offered for sale. If the sale be by public auction, the creditor, or the trustee on behalf of the estate, may bid or purchase [Rule 12 (*b*)].

The creditor may by notice in writing require the trustee to elect whether he will or will not exercise his power of redeeming the security or requiring it to be realized. If the trustee does not, within six months after receiving the notice, signify in writing to the creditor his election to exercise the power, he shall not be entitled to exercise it. The equity of redemption vested in the trustee shall then vest in the creditor, and his debt shall be reduced by the amount of the valuation [Rule 12 (*c*)].

Creditor may amend valuation.

A creditor may amend his valuation and proof on showing that they were made *bonâ fide* on a mistaken estimate or that the security has altered in value (Rule 13).

The right to amend the valuation continues, although the trustee has informed the creditor of his intention to redeem the security at the assessed value. It ceases when the trustee has paid the amount of the assessed value. It probably ceases when the trustee has elected to redeem under Rule 12 (*c*). *Ex parte Norris*, 17 Q. B. Div. 728.

But it does not cease if the trustee has tendered the amount and been refused. *In re Newton*, (1896) 2 Q. B. 403.

A mortgagee will be allowed to amend his valuation and proof under this rule, notwithstanding the opposition of a subsequent mortgagee. *Ex parte Arden*, 14 Q. B. D. 121.

Effect of amending valuation.

Where a valuation has been amended, the creditor must repay any dividend received in excess of that to which he would have been entitled on the amended valuation, or, as the case may be, may be paid out of any money available for dividend any dividend which he failed to receive by reason of the inaccuracy of the original valuation (Rule 14).

Effect of realizing security after valuation.

Where a security is realized after valuation, the net amount realized is substituted for the valuation (Rule 15).

A secured creditor who does not comply with the foregoing rules is excluded from all dividends (Rule 16).

Subject to Rule 12, a creditor cannot receive more than twenty shillings in the pound, and interest (Rule 17).

Computation of interest where debt includes interest.

The Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), enacts—

Sect. 23. Where a debt has been proved upon a debtor's estate under the principal Act, and such debt includes interest or any pecuniary consideration in lieu of interest, such interest or consideration shall, for the purposes of dividend, be calculated at a rate not exceeding five per centum per annum, without prejudice to the right of a creditor to receive out of the estate any higher rate of interest to which he may be entitled after all the debts proved in the estate have been paid in full.

Computation of interest where not provided for.

Rule 20 of the Second Schedule to the Bankruptcy Act, 1883, provides—

On any debt or sum certain, payable at a certain time or otherwise, whereon interest is not reserved or agreed for, and which is overdue at the date of the receiving order and provable in bankruptcy, the creditor may prove for interest at a rate not exceeding four per centum per annum to the date of the order from the time when the debt or sum was payable, if the debt or sum is payable by virtue of a written instrument at a certain time, and, if payable otherwise, then from the time when a demand in writing has been made giving the debtor notice that interest will be claimed from the date of the demand until the time of payment.

Interest accruing after receiving order.

As a general rule, there can be no proof in bankruptcy for interest accruing due after the date of the receiving order. *Ex parte Robinson*, 31 L. J. Bkcy. 12; *In re Summers*, 13 Ch. D. 136; *Ex parte Bath*, 22 Ch. Div. 450; *Ex parte Ador*, (1891) 2 Q. B. 574.

A premium covenanted to be paid in a mortgage to a building society is not interest. *Ex parte Bath*, 27 Ch. Div. 509.

The Bankruptcy Act, 1883, enacts in effect [sect. 40, (5)] that any surplus shall be applied in payment of interest from the date of the receiving order at the rate of four pounds per centum per annum on all debts proved in the bankruptcy. See *Bower* v. *Marris*, Cr. & Ph. 351.

Debts payable at a future time.

Rule 21 of the Second Schedule to the Bankruptcy Act, 1883, provides—

A creditor may prove for a debt, not payable when the debtor committed an act of bankruptcy, as if it were payable presently, and may receive dividends equally with the other creditors, deducting only thereout a rebate of interest at the rate of five pounds per centum per annum computed from the declaration of a dividend to the time when the debt would have become payable, according to the terms on which it was contracted.

Debts payable *in futuro*, with interest.

Where a debt is payable at a future date with interest under an express contract, the proper course is to prove the debt as a present debt and apply Rule 21 to the dividend payable on it, and then to value the liability to pay interest and prove for that value, dividends on which will be payable without rebate. *Ex parte Ador*, (1891) 2 Q. B. 574; *Wallace* v. *Universal Automatic Machines Co.*, (1894) 2 Ch. 547.

Right to allocate security to non-provable part of debt.

As a general rule, a secured creditor has the right to allocate his security to that part of his debt in respect of which he has no right of proof. *Ex parte Hunter*, 6 Ves. 94; *Ex parte Johnson*, 3 D. M. & G. 218, 235.

Thus, where a mortgage debt consists of principal and interest at a rate above 5 per cent., and the mortgagee values his security, he may allocate a sufficient part of the assessed value of the security to cover the interest due to him, and prove for the whole unpaid balance of the principal, less only so much of the assessed value as remains after satisfying the claim for interest. *In re Fox & Jacobs*, (1894) 1 Q. B. 438.

There is an exception to this rule in the case of interest accruing due after the date of the receiving order.

Where a mortgagee realizes his security, he must apply the proceeds of sale in reduction of principal and interest to the date of the receiving order. He cannot apply any part of the proceeds in satisfaction of interest after that date. *Ex parte Ramsbottom*, 2 Mont. & A. 79; *Ex parte Penfold*, 4 De G. & Sm. 282; *Ex parte Lubbock*, 9 Jur. N. S. 854; *In re Savin*, 7 Ch. 760; *Quartermaine's Case*, (1892) 1 Ch. 639; *Ross* v. *Ross*, 25 L. R. Ir. 362.

As to *In re Talbott* (39 Ch. D. 567), see *Quartermaine's Case*, (1892) 1 Ch. 639, 649, and *Ross* v. *Ross*, 25 L. R. Ir. 362.

The accruing income of the mortgaged property after the date of the receiving order may, however, be applied towards payment of interest after that date. *Ex parte Ramsbottom*, 2 Mont. & A. 79; *Ex parte Penfold*, 4 De G. & Sm. 282 *Quartermaine's Case*, (1892) 1 Ch. 639, 649.

CHAPTER XXVII.

SUBROGATION.

Ultra vires borrowing by corporation.

WHERE money is borrowed by a corporation in excess of its borrowing powers, the loan creates no debt, legal or equitable, from the corporation.

By unincorporated building societies.

The same rule applies to unincorporated building societies. The effect of the Act 6 & 7 Wm. IV. c. 32, is to fix persons dealing with the society with notice of its rules, and of any limitation which they impose upon the authority of its agents. *Chapleo* v. *Brunswick Building Society*, 6 Q. B. Div. 696; *Murray* v. *Scott*, 9 App. Cas. 519, 547.

Where a loan is *ultra vires*, a deposit of title-deeds to secure it is *ultra vires*, and they may be recovered by the depositor. *In re Guardian Building Society*, 23 Ch. Div. 440.

Money of a corporation or society applied in repayment of an *ultra vires* loan can be recovered by them from the lender. *Blackburn Building Society* v. *Cunliffe, Brooks & Co.*, 29 Ch. Div. 902.

Ratification of invalid loan.

In the case of a corporation, ratification by all the corporators cannot make a debt binding on the corporation which it could not validly contract. *Ashbury Railway Carriage Co.* v. *Riche*, L. R. 7 H. L. 653.

Where the agent of an unincorporated building society borrows in excess of his authority, the borrowing cannot be ratified as against the society except by the concurrence of all the members. *Blackburn Building Society* v. *Cunliffe, Brooks & Co.*, 29 Ch. Div. 902, 910; see *Chapleo* v. *Brunswick Building Society*, 6 Q. B. Div. 696.

Where an unincorporated building society borrowed money *ultra vires*, and afterwards was incorporated and acquired

borrowing powers, it was held that a deposit note given to secure the original loan was invalid, although it might have been supported if it had been given in consideration of the lender abandoning his claim to subrogation. *Ex parte Watson*, 21 Q. B. D. 301, doubting the dictum of Wood, V.C., in *Fountaine* v. *Carmarthen Ry. Co.*, 5 Eq. 316, 324.

Right of subrogation.

Where a loan, which cannot be recovered against a corporation (*a*), or society (*b*), has been applied in discharging their just debts, the lender is entitled to stand in the place of the creditors whose debts have been paid off, and has in equity the same rights against the corporation or society which the original creditors had at law. (*a*) *Baroness Wenlock* v. *River Dee Co.*, 19 Q. B. Div. 155; *In re Lough Neagh Ship Co.*, (1895) 1 I. R. 533. (*b*) *Blackburn Building Society* v. *Cunliffe, Brooks & Co.*, 22 Ch. Div. 61.

Origin of doctrine of subrogation.

This doctrine is based on the old cases in which a lender to a deserted wife (*a*), or infant (*b*), of money applied in paying for necessaries was subrogated in equity to the rights of those who supplied the necessaries, although he had no remedy at law. (*a*) *Harris* v. *Lee*, 1 P. W. 482; *Jenner* v. *Morris*, 3 D. F. & J. 45. (*b*) *Marlow* v. *Pitfeild*, 1 P. W. 558; see also *Ex parte Chippendale*, 4 D. M. & G. 19; *In re Cork & Youghal Ry. Co.*, 4 Ch. 748; *In re National Building Society*, 5 Ch. 309.

So a mortgagee from trustees of real estate, who have no power to mortgage, but only to sell, is entitled to be recouped out of the purchase-money of the estate so much of his loan as is properly applied in administration. *Devaynes* v. *Robinson*, 24 B. 86, 97.

The doctrine of subrogation does not apply unless there is a direct loan to the corporation. *Portsea Island Building Society* v. *Barclay*, (1895) 2 Ch. 298.

Extent of quasi-lender's rights.

The lender is entitled to stand as a creditor of the corporation in respect of advances applied, both in payment of debts and liabilities actually payable by the corporation at the date of the advances, and in payment of debts and liabilities which became payable at dates subsequent to the advances, with interest at 4 per cent. from the respective dates of such

application; but not in respect of debts and liabilities which were discharged out of so much of the loan as was validly borrowed by the corporation. *Baroness Wenlock* v. *River Dee Co.*, 19 Q. B. Div. 155; *In re Lough Neagh Ship Co.*, (1895) 1 I. R. 533.

The lender is entitled to follow his money into a debt or liability of the corporation whether the pursuit be through one or more hands. *Baroness Wenlock* v. *River Dee Co.*, 19 Q. B. Div. 155.

Where the lender is a banker, he is not entitled to the benefit of the rule in *Clayton's Case*. *Blackburn Building Society* v. *Cunliffe, Brooks & Co.*, 22 Ch. Div. 61.

Where a corporation had an unlimited power of borrowing for purposes prescribed by statute, and it applied part of a loan, not to those purposes, but in paying off mortgages on its property, the lender was given a lien on the property for the amount of his moneys so applied. *Trevillian* v. *Mayor of Exeter*, 5 D. M. & G. 828.

Where part of the loan to an unincorporated building society has been employed in paying off members who in a winding-up would have priority as against other members, the lender is entitled to the same priority to the extent of the moneys so employed. *Walton* v. *Edge*, 10 App. Cas. 33, 40; *Blackburn Building Society* v. *Cunliffe, Brooks & Co.*, 29 Ch. Div. 902, 911.

Where a corporation has applied an *ultra vires* loan in making advances to third persons, and has obtained security in respect of the advances, the lender is entitled to the benefit of the securities (*a*), and he may hold them for the whole amount expressed to be secured, though part was retained as a bonus by the corporation (*b*). (*a*) *Blackburn Building Society* v. *Cunliffe, Brooks & Co.*, 22 Ch. Div. 61; *Blackburn Building Society* v. *Cunliffe, Brooks & Co.*, 29 Ch. Div. 902. (*b*) *Neath Building Society* v. *Luce*, 43 Ch. D. 158.

CHAPTER XXVIII.

THE RIGHT OF THE INCUMBRANCER TO TAKE POSSESSION.

A. LAND.

Legal mortgagee of land may take possession at any time.

IN the absence of an express provision that the mortgagor should remain in possession until default, a legal mortgagee acquires a right at law to take possession or bring ejectment immediately on the execution of the mortgage and before the arrival of the day fixed for redemption. *Doe d. Roylance* v. *Lightfoot*, 8 M. & W. 553; *Rogers* v. *Grazebrook*, 8 Q. B. 895; *Green* v. *Burns*, 6 L. R. Ir. 173.

Wheeler v. *Montefiore* (2 Q. B. 133), which appears to be *contra*, is explained in *Doe d. Parsley* v. *Day*, 2 Q. B. 147.

He may maintain ejectment against the mortgagor without any previous notice or demand of possession. *Keech* v. *Hall*, 1 Doug. 21; *Jolly* v. *Arbuthnot*, 4 De G. & Jo. 224, 236; *Lows* v. *Telford*, 1 App. Cas. 414; *Gibbs* v. *Cruikshank*, L. R. 8 C. P. 454.

Covenant not to enter until default.

A mortgage may contain a covenant, express or implied, that the mortgagee will not take possession till after default. Such a covenant, though not amounting to a demise, will be enforced in equity by injunction. *Doe d. Lyster* v. *Goldwin*, 2 Q. B. 143.

A power of sale given to a mortgagee after default does not raise an implied covenant that he will not take possession till default. *Green* v. *Burns*, 6 L. R. Ir. 173.

Welsh mortgage.

In the case of a Welsh mortgage, the only right of the mortgagee is to enter and hold until he be satisfied. *Orde* v. *Heming*, 1 Vern. 418; *Balfe* v. *Lord*, 1 D. & War. 480.

Unpaid vendor.

A vendor of land is entitled to retain possession of the land after the time fixed for completion and until the purchase-money is paid. *Phillips* v. *Silvester*, 8 Ch. 173.

Equitable mortgage.

An equitable mortgagee cannot bring ejectment. He has no legal right, therefore, to take possession. His only remedy is the appointment of a receiver. *Hodgens* v. *O'Donoghue*, 28 Ir. L. T. R. 98; *Garfitt* v. *Allen*, 37 Ch. D. 48.

But an equitable mortgagee may be entitled to take possession by contract between himself and his mortgagor; and, where he takes possession under the contract, he has the same right to receipt of the rents as a legal mortgagee who takes possession by virtue of his legal estate.

Thus, where a puisne mortgagee, entitled under his mortgage to take possession, served notice on the tenants to pay their rents to him, it was held that a judgment obtained against the mortgagor after service of the notice could not be enforced by garnishee proceedings against the rents. *Campion* v. *Palmer*, (1896) 2 I. R. 445.

The assignee of a legal mortgagee, who has sub-mortgaged and conveyed away the legal estate, cannot maintain ejectment against the mortgagor. *Feehan* v. *Mandeville*, 28 L. R. Ir. 90.

Rent-charges and other annual sums.

Under sect. 44 of the Conveyancing Act, 1881, where a person is entitled to receive out of any land or out of the income of any land any annual sum, payable half-yearly or otherwise, whether charged on the land or on the income of the land, and whether by way of rent-charge or otherwise, not being rent incident to a reversion, if at any time the annual sum or any part thereof is unpaid for forty days next after the time appointed for any payment in respect thereof, then, although no legal demand has been made for payment thereof, the person entitled to receive the annual sum may enter into possession of, and hold the land charged or any part thereof, and take the income thereof, until thereby or otherwise the annual sum and all arrears thereof due at the time of his entry, or afterwards becoming due during his continuance in possession, and all costs and expenses occasioned by non-payment of the annual sum, are fully paid; and such possession when taken shall be without impeachment of waste.

This power exists only where the instrument under which the annual sum arises comes into operation after the 31st of

December, 1881, and may be negatived or restricted by that instrument.

Withdrawing receiver.

Where a receiver has been appointed at the instance of a puisne mortgagee, the Court will withdraw him upon the requisition of a prior mortgagee who desires to go into possession. *Langton* v. *Langton*, 7 D. M. & G. 30.

Where a receiver has been appointed in an action, without prejudice to the rights of any prior incumbrancers, and has wrongfully taken possession of the mortgaged property, a prior mortgagor who wishes to take possession should apply in the action in which the receiver was appointed for an order directing him to withdraw, and should not bring a fresh action against the receiver. *Searle* v. *Choat*, 25 Ch. Div. 723.

Mortgagee of property devoted to particular purpose.

A mortgagee, who takes his mortgage with notice that the mortgaged property is devoted to particular objects, is bound by acts done by the mortgagor in accordance with these objects. *E.g.* a mortgagee of a burial-ground cannot interfere with rights of burial, whether temporary or permanent, acquired under the mortgagors. *Moreland* v. *Richardson*, 24 B. 35.

Mortgagee entitled to rents.

The mortgagee is entitled to the rents and profits of the mortgaged property accruing due from the time of his entry into possession. *Cockburn* v. *Edwards*, 18 Ch. Div. 449, 457.

Tenancies prior to the mortgage.

Where a tenancy is created by lease under seal before the mortgage, the mortgagee becomes by the mortgage assignee of the reversion, and can sue for rent due at the commencement of the action. *Burrowes* v. *Gradin*, 1 D. & L. 213; *Wyse* v. *Myers*, 4 Ir. C. L. 101.

A mortgagee taking possession is not bound by a collateral agreement between his mortgagor and a tenant under a lease created before the mortgage, authorizing the tenant to remove tenants' fixtures after the expiration of the lease. *Thomas* v. *Jennings*, 12 T. L. R. 637.

4 Anne, c. 16, s. 10.

Where the tenant holds under a lease made before the mortgage, it is provided by 4 Anne, c. 16, s. 10, that the tenant shall not be prejudiced or damaged by payment of any rent to the mortgagor, or by breach of any condition for non-payment of rent, before notice shall be given to him of such

mortgage by the mortgagee. As to what notice is required, see *Cook* v. *Guerra*, L. R. 7 C. P. 132.

Rents accrued due.

In the case of rents issuing out of land, the mortgagee on entering into possession is entitled to rents then accrued due but not paid over. *Pope* v. *Biggs*, 9 B. & C. 245; *Rogers* v. *Humphreys*, 4 Ad. & E. 299; *Anderson* v. *Butler's Wharf Co.*, 48 L. J. Ch. 824. See, however, *Rusden* v. *Pope*, L. R. 3 Ex. 269, 275.

This rule does not apply to sums receivable by wharfingers for warehousing goods, although called rents in an Act of Parliament and recoverable by distress and sale. *Anderson* v. *Butler's Wharf Co.*, 48 L. J. Ch. 824.

Rent paid in advance.

Where the tenant has paid in advance on account of rent due for a period, in the course of which notice is given by the mortgagee, the prepayment is good as to so much of the rent as accrued due before notice was given, but bad as to the remainder. *De Nicholls* v. *Saunders*, L. R. 5 C. P. 789; *Cook* v. *Guerra*, L. R. 7 C. P. 132.

Tenancies posterior to the mortgage.

In the case of tenancies created after the mortgage, and not binding on the mortgagee by virtue of the Conveyancing Act or under a power in the mortgage, the mortgagee may at any time maintain ejectment against the tenant without any previous demand of possession, and treat him as a mere tort-feasor, and the tenant cannot maintain trespass against the mortgagee for entering. *Gibbs* v. *Cruikshank*, L. R. 8 C. P. 454; *Lows* v. *Telford*, 1 App. Cas. 414, 426; *Corbett* v. *Plowden*, 25 Ch. Div. 678.

The mortgagee cannot, however, distrain upon, or bring an action for rent against tenants holding under tenancies created subsequently to the mortgage. *Rogers* v. *Humphreys*, 4 Ad. & E. 299, 313; *Evans* v. *Elliot*, 9 A. & E. 342; *Burrowes* v. *Gradin*, 1 D. & L. 213.

And under the old law, he could not maintain an action for use and occupation against them without previously bringing ejectment, as such an action was an action of trespass, and therefore based on an interference with possession. *Turner* v. *Cameron's Steam Coal Co.*, 5 Ex. 932; *Litchfield* v. *Ready*, 5 Ex. 939; *Wyse* v. *Myers*, 4 Ir. C. L. 101.

But now, by virtue of Order XVIII., r. 2, he may join a claim for mesne profits with an action for recovery of possession. *Dunlop* v. *Macedo*, 8 T. L. R. 43.

53 & 54 Vict., c. 57, s. 2.

The Tenant's Compensation Act, 1890 (53 & 54 Vict. c. 57), gives, in effect, to a tenant under a tenancy not binding on the mortgagee the right to compensation for crops, improvements, tillages, etc., as against the mortgagee taking possession which he has or would have against the mortgagor under the Agricultural Holdings Act, 1883, the Allotments and Cottage Gardens Compensation for Crops Act, 1887, or the custom of the country.

The amount due to the tenant for compensation and costs may be set off against his rent. A tenant from year to year, or for a term of years not exceeding twenty-one at a rack rent, cannot be deprived of possession by the mortgagee unless after six months' notice in writing; and, if he is so deprived, he is entitled to compensation for his crops and for unexhausted improvements.

Mortgagee purchasing equity of redemption.

Where a mortgagee took a conveyance of the equity of redemption with notice of a lease made by the mortgagor, and without doing anything to preserve his rights under the mortgage, it was held that he was bound by the lease. *Smith* v. *Phillips*, 1 Kee. 694; *O'Loughlin* v. *Fitzgerald*, I. R. 7 Eq. 483.

Adoption of lease by mortgagee.

Where a mortgagor enters into an agreement for a lease, the mortgagee may before entering adopt the lease and obtain specific performance against the tenant. *Corbett* v. *Plowden*, 25 Ch. Div. 678.

Creation of tenancy as against mortgagee.

The mere fact that the mortgagor submits the rental of tenancies to the mortgagee, who raises no objection, does not create a tenancy as against the mortgagee. *In re O'Rourke's Estate*, 23 L. R. Ir. 497.

Receipt of rents by a receiver in a foreclosure action does not create a new tenancy between the mortgagee and the tenant. *In re O'Rourke's Estate*, 23 L. R. Ir. 497.

Where a mortgagee intervenes by virtue of his paramount title and claims rent, which he has a right to do without setting up any lease whatever, the rent, if paid, will be the

previously existing rent under a new tenancy from year to year under the mortgagee. *Corbett* v. *Plowden*, 25 Ch. Div. 678.

Where the mortgagee claims to receive the rent as agent of the mortgagor, payment by the tenant is evidence of consent to the continuance of the old tenancy. *Partington* v. *Woodcock*, 6 Ad. & E. 690, 695; *Wyse* v. *Myers*, 4 Ir. C. L. 101; *Corbett* v. *Plowden, supra; In re O'Rourke's Estate*, 23 L. R. Ir. 497.

But the mortgagee cannot by the mere fact of giving the mortgagor's tenant a notice cause him to hold of the mortgagee. There must be a consent by the tenant to hold of the mortgagee; and the mere continuance in possession of the tenant is not evidence of such consent. *Evans* v. *Elliot*, 9 A. & E. 342; *Wilton* v. *Dunn*, 17 Q. B. 294; *Towerson* v. *Jackson*, (1891) 2 Q. B. 484, overruling, so far as *contra*, *Brown* v. *Storey*, 1 M. & G. 117; see *Wyse* v. *Myers*, 4 Ir. C. L. 101.

Rents received by sequestrators.

Although a mortgagee is not entitled to an account of back rents against the mortgagor in possession, he is entitled to rents which he has been prevented from receiving by the act of the Court. Thus, he is entitled to rents received by sequestrators, which are *in custodia legis*. *Walker* v. *Bell*, 2 Madd. 21; see *Tatham* v. *Parker*, 1 Sm. & G. 506.

Rents received by receiver in an action.

The same rule, perhaps, applies where a receiver is appointed in an action to ascertain the incumbrancers on a particular property and their priorities, or to settle a dispute as to title. *In re Hoare*, (1892) 3 Ch. 94, 103.

But where a receiver is appointed in an action to administer the trusts of the mortgagor's will, or of a settlement under which he is tenant for life, then, although the receiver is directed to keep down the interest on incumbrances, his possession will be the possession of the mortgagor; and the mortgagee can only take possession and entitle himself to the accruing rents by getting the receiver discharged. *Bertie* v. *Lord Abingdon*, 3 Mer. 560, 567; *Gresley* v. *Adderley*, 1 Sw. 573; *Thomas* v. *Brigstocke*, 4 Russ. 64; *Flight* v. *Camac*, 25 L. J. Ch. 654; *In re Hoare*, (1892) 3 Ch. 94, not following

Delany v. *Mansfield*, 1 Hog. 234; *In re Lands Securities Co.*, 13 Mews' Rep. 48.

Growing crops.

A mortgagee taking possession is entitled to the growing crops. *Bagnall* v. *Villar*, 12 Ch. D. 812; *Re Gordon*, 61 L. T. 299.

A mortgagee in possession who lets the property to the mortgagor may distrain for the rent. *Dawson* v. *Johnson*, 1 F. & F. 656.

Conveyancing Act, 1881, s. 18.

The Conveyancing Act, 1881, sect. 18, empowers a mortgagee of land while in possession, as against all prior incumbrancers, if any, and as against the mortgagor, to make from time to time the leases mentioned in the section.

The power may be abridged or negatived by the expression of a contrary intention by the mortgagor and mortgagee in the mortgage deed or otherwise in writing [sect. 18, (13)]; it may be varied or extended by the mortgage deed [sect. 18, (14)]; it is only implied in a mortgage made after the 31st of December, 1881, but may by agreement in writing between mortgagor and mortgagee be included in a mortgage made before that date [sect. 18, (15)].

In cases not within the Conveyancing Act or governed by a power, a lease granted by the mortgagee in possession without the concurrence of the mortgagor cannot, after redemption, stand good as against the mortgagor. Hence, specific performance will not be enforced of an agreement by a mortgagee to grant a lease, where the mortgagor refuses to concur. *Franklinski* v. *Ball*, 10 Jur. N. S. 606; 33 B. 560.

Timber.

Among the powers conferred on mortgagees, where the mortgage is made by deed after 31st December, 1881, by sect. 19 of the Conveyancing Act, 1881, is [sect. 19, (1), (iv.)] "a power, while the mortgagee is in possession, to cut and sell timber and other trees ripe for cutting, and not planted or left standing for shelter or ornament, or to contract for any such cutting and sale, to be completed within any time not exceeding twelve months from the making of the contract."

This power may be varied or extended by the mortgage deed [19, (2)], and applies only so far as a contrary intention is not expressed in the deed [19, (3)].

Mines and quarries.

In cases not within this section, the mortgagee is only entitled to dispose of part of the inheritance, *i.e.* by cutting timber, working mines, if his security is insufficient; otherwise, he will be restrained by injunction. *Farrant* v. *Lovel*, 3 Atk. 723; *Thorneycroft* v. *Crockett*, 16 Sim. 445; 2 H. L. C. 239; *Millett* v. *Davey*, 31 B. 470.

As to the mortgagee's right with respect to mines or quarries opened and worked by the mortgagor while in possession, see *Elias* v. *Snowdon Slate Quarries Co.*, 4 App. Cas. 454, 460.

Presentation to living.

A mortgagee cannot present to a living, though he be in possession, though there be no other security than the advowson, and though the mortgagor neglects to pay the interest. The presentation is a profit arising from the mortgaged estate, for which the mortgagee cannot give credit in account upon a redemption. *Amhurst* v. *Dawling*, 2 Vern. 401; *Mackenzie* v. *Robinson*, 3 Atk. 559; *Gubbins* v. *Creed*, 2 Sch. & L. 214, 218; see *Welch* v. *Bishop of Peterborough*, 15 Q. B. D. 432.

Mortgagee of business.

A mortgagee in possession of a business may carry it on for a reasonable time to enable him to sell it as a going concern, and may use the name of the mortgagor's firm. *Cook* v. *Thomas*, 24 W. R. 427.

Where the mortgagee of a business takes possession, his entry amounts to a dismissal of the servants of the business; and a servant who is entitled to notice has a right of action against the mortgagor. *Reid* v. *Explosives Co.*, 19 Q. B. Div. 264.

B. Ships.

First mortgagee, when entitled to take possession.

The first mortgagee of a ship can take possession, (1) after default has been made in payment of any principal or interest, or (2) if his security is being impaired. *Cathcart*, 1 A. & E. 314; *Wilkes* v. *Saunion*, 7 Ch. D. 188; *Blanche*, 6 Asp. 272.

Puisne mortgagee cannot take possession.

A second or subsequent mortgagee of a ship has no legal right to take possession; but he may obtain a receiver. *Liverpool Marine Credit Co.* v. *Wilson*, 7 Ch. 507; *Keith* v. *Burrows*, 1 C. P. D. 722, 736.

Contracts prior to the mortgage.

A mortgagee of a ship, with notice that the vessel has been chartered for a particular voyage, will be restrained by

injunction from using his powers as mortgagee to interfere with the completion of the contract; he will not be restrained where the mortgagor has shown himself unable to fulfil the terms of the contract. *De Mattos* v. *Gibson*, 1 J. & H. 79; 4 De G. & Jo. 276.

A mortgagee, who took his mortgage shortly after the registration of the ship, was held entitled to sell it free from the obligations of a contract entered into by the mortgagor while the ship was building, which affected its user for a number of years, and of which the mortgagee had no notice. *Celtic King*, (1894) P. 175.

Contracts after the mortgage.

The mortgagee taking possession is subject to the burden, and entitled to the benefit of contracts validly entered into by the mortgagor, and will be restrained by injunction from acting inconsistently with them. *Collins* v. *Lamport*, 4 D. J. & S. 500; *Johnson* v. *Royal Mail Steam Packet Co.*, L. R. 3 C. P. 38; *Cory* v. *Stewart*, 2 T. L. R. 508.

Payments by mortgagee under compulsion.

A mortgagee who, in order to get possession, is compelled to pay wages in arrear which charterers were bound by contract to pay (*a*), or a mortgagee of forty-eight sixty-fourths who, in order to get possession jointly with the owners of the remaining sixteen sixty-fourths, is compelled to pay master's disbursements which they were liable to pay (*b*), can recover the amount from the persons primarily liable. (*a*) *Johnson* v. *Royal Mail Steam Packet Co.*, L. R. 3 C. P. 38; (*b*) *Orchis*, 15 P. Div. 38.

Mortgagee in possession entitled to freight.

The mortgagee has no right to earnings of the ship before he takes possession. He is entitled to all earnings after he takes possession. *Chinnery* v. *Blackburne*, 1 H. Bl. 117 *n.*; *Kerswill* v. *Bishop*, 2 C. & J. 529; *Gardner* v. *Cazenove*, 1 H. & N. 423; *Willis* v. *Palmer*, 7 C. B. N. S. 340; *Brown* v. *Tanner*, 3 Ch. 597; *Liverpool Marine Credit Co.* v. *Wilson*, 7 Ch. 507; *Keith* v. *Burrows*, 2 App. Cas. 636, 645.

The mortgagee of a majority of shares in a ship, on taking possession, becomes entitled to demand the whole of the freight due from the receivers of the cargo. *Japp* v. *Campbell*, 57 L. J. Q. B. 79.

An ordinary mortgage of a ship does not carry with it an

assignment of the freight. The right of the mortgagee in possession to freight arises from his ownership. *Keith* v. *Burrows*, 2 App. Cas. 636; *Benwell Tower*, 72 L. T. 664.

Constructive taking possession.

Where the mortgagee cannot take physical possession, it is sufficient if he does anything else which indicates a clear intention to assume the rights of ownership, *e.g.* gives notice to the charterer to pay the freight to him. *Cato* v. *Irving*, 5 De G. & Sm. 210; *Rusden* v. *Pope*, L. R. 3 Ex. 269; *Wilson* v. *Wilson*, 14 Eq. 32; *Beynon* v. *Godden*, 3 Ex. D. 263; *Benwell Tower*, 72 L. T. 664.

He is entitled to the freight, if he takes possession after it is due and before it is actually paid. *Rusden* v. *Pope*, L. R. 3 Ex. 269.

He is entitled to the freight accruing at the end of a voyage, if he takes possession before the whole of the cargo has been delivered. *Cato* v. *Irving*, 5 De G. & Sm. 210; *Brown* v. *Tanner*, L. R. 3 Ch. 597.

Mortgagee entitled to whole freight.

Freight is not apportionable. The mortgagee, therefore, taking possession before the freight is due is entitled to the whole freight accruing due, which will be, where the charter-party specifies the rate, the amount specified, and where no rate is specified, the amount due on a *quantum meruit* for the whole voyage. *Gumm* v. *Tyrie*, 4 B. & S. 680; 6 B. & S. 298; *Keith* v. *Burrows*, 2 App. Cas. 636, 646.

Mortgagee cannot claim on *quantum meruit*.

But where the mortgagor's own property is on board, and consequently there is nothing to be paid for freight, or where the charterparty provides for a merely nominal freight, the fact of the mortgagee taking possession does not create a contract to pay freight on a *quantum meruit*, either for the whole voyage, or for the part during which the mortgagee is in possession. *Keith* v. *Burrows*, 2 App. Cas. 636.

Freight cannot be assigned as against prior mortgagee.

Freight cannot be assigned as against a prior mortgagee of the ship. *Cato* v. *Irving*, 5 De G. & Sm. 210; *Dobbyn* v. *Comerford*, 10 Ir. Ch. 327; *Brown* v. *Tanner*, L. R. 3 Ch. 597; *Tanner* v. *Phillips*, 42 L. J. Ch. 125; *Keith* v. *Burrows*, 2 C. P. Div. 163, 172.

A fortiori, persons who have merely a personal claim against the captain and ship's husband, cannot claim a right to freight

as against the mortgagee. *Japp* v. *Campbell*, 57 L. J. Q. B. 79.

But an equitable mortgagee of a ship, who obtains the appointment of a receiver, does not thereby entitle himself to freight as against an assignee. *Ward* v. *Royal Exchange Shipping Co.*, 6 Asp. 239.

A mortgagee receiving the freight due under a charter-party must pay the master expenses reasonably incurred by him in putting the vessel in a condition to earn the freight. *Bristow* v. *Whitmore*, Joh. 96; 4 De G. & Jo. 325; 9 H. L. C. 391.

Mortgagee may employ ship.

A mortgagee taking possession ought to sell as soon as possible; but he is not bound to sell immediately, and until sale he has the right, prudently and properly, and exercising the sound discretion which a prudent owner would exercise, to employ the ship at the risk of the mortgagor. *European & Australian Royal Mail Co.* v. *Royal Mail Steam Packet Co.*, 4 K. & J. 676; *Marriott* v. *Anchor Reversionary Co.*, 3 D. F. & J. 177.

Where a mortgagee took possession of a ship by putting a man on board and giving notice to the master, and the master, by order of the mortgagor, took the ship to sea with the man in possession on board, the master was held not to be entitled, as against the mortgagee, either to wages accruing after the mortgagee took possession, or to compensation for wrongful dismissal. *Fairport*, 10 P. D. 13.

C. Personal Chattels.

Bills of Sale Act, 1882, s. 7.

The Bills of Sale Act, 1882, provides—

Sect. 7. Personal chattels assigned under a bill of sale shall not be liable to be seized or taken possession of by the grantee for any other than the following causes:—

(1) If the grantor shall make default in payment of the sum or sums of money thereby secured at the time therein provided for payment, or in the performance of any covenant or agreement contained in the bill of sale and necessary for maintaining the security;

(2) If the grantor shall become a bankrupt or suffer the

said goods or any of them to be distrained for rent, rates, or taxes;

(3) If the grantor shall fraudulently either remove or suffer the said goods or any of them to be removed from the premises;

(4) If the grantor shall not, without reasonable excuse, upon demand in writing by the grantee, produce to him his last receipts for rent, rates, and taxes;

(5) If execution shall have been levied against the goods of the grantor under any judgment at law.

The proviso at the end of the section is set out, p. 350.

As to the meaning of "without reasonable excuse," see *Ex parte Cotton*, 11 Q. B. D. 301.

Sect. 13. All personal chattels seized, or of which possession is taken after the commencement of this Act, under or by virtue of any bill of sale (whether registered before or after the commencement of this Act), shall remain on the premises where they were so seized or so taken possession of, and shall not be removed or sold until after the expiration of five clear days from the day they were so seized or so taken possession of. S. 13.

As to the right to relief within the five days, see *Ex parte Cotton*, 11 Q. B. D. 301.

As to the right after the expiration of the five days, see *Johnson* v. *Diprose*, (1893) 1 Q. B. 512; *In re Wood*, (1894) 1 Q. B. 605.

Sect. 13 is for the benefit of grantors only, and does not give third parties a right of action if goods are removed before the expiration of the five days. *Lane* v. *Tyler*, 56 L. J. Q. B. 461; *Tomlinson* v. *Consolidated Credit Corporation*, 24 Q. B. Div. 135.

Where goods liable to be seized are taken possession of in a public highway, they may be removed to a proper place of keeping. *O'Neil* v. *City Finance Co.*, 17 Q. B. D. 234.

Sects. 7 and 13 give an implied power to seize, which renders it unnecessary to insert an express power in the bill of sale. *In re Morritt*, 18 Q. B. Div. 222, 241.

CHAPTER XXIX.

RECEIVER APPOINTED BY THE COURT.

Judicature Act, 1873, s. 25, (8).

THE Judicature Act, 1873 (36 & 37 Vict. c. 66), enacts—

Sect. 25, (8). A mandamus or an injunction may be granted or a receiver appointed by an interlocutory order of the Court in all cases in which it shall appear to the Court to be just or convenient that such order should be made; and any such order may be made either unconditionally or upon such terms and conditions as the Court shall think just.

The question, how far this section has enlarged the jurisdiction of the Court, was considered in *Manchester & Liverpool District Banking Co.* v. *Parkinson*, 22 Q. B. Div. 173; *Holmes* v. *Millage*, (1893) 1 Q. B. 551; *Harris* v. *Beauchamp Bros.*, (1894) 1 Q. B. 801.

Interlocutory order.

Interlocutory order means an order other than an order made by way of final judgment at the hearing of a cause. *Smith* v. *Cowell*, 6 Q. B. Div. 75.

A receiver may be appointed in an action commenced by originating summons. *Gee* v. *Bell*, 35 Ch. D. 160; *In re Francke*, 57 L. J. Ch. 437.

A receiver will not be appointed after judgment for foreclosure absolute. *Wills* v. *Luff*, 38 Ch. D. 197.

Action to enforce vendor's lien.

In an action to enforce a vendor's lien on land, a receiver of the rents and profits will be appointed after (*a*), but not before (*b*), judgment. (*a*) *Munns* v. *Isle of Wight Ry. Co.*, 5 Ch. 414; (*b*) *Latimer* v. *Aylesbury & Buckingham Ry. Co.*, 9 Ch. Div. 385.

Ex parte applications for a receiver ought not to be granted, even after judgment, except in case of emergency. *Lucas* v. *Harris*, 18 Q. B. Div. 127, 134; see *Minter* v. *Kent and General Land Society*, 72 L. T. 186.

Formerly, legal mortgagee not entitled to receiver.

Before the Judicature Act, the Court never granted a receiver on the application of a person who had a legal right to possession. It therefore never granted a receiver at the instance of a legal mortgagee. *Berney* v. *Sewell*, 1 J. & W. 647; *Ackland* v. *Gravener*, 31 B. 482; *Sollory* v. *Leaver*, 9 Eq. 22, 25; *In re Pope*, 17 Q. B. Div. 743, 749.

Mortgagee of tolls.

A mortgagee of tolls was, however, held entitled to a receiver, although the mortgagee might have recovered possession at law. *Knapp* v. *Williams*, 4 Ves. 430 *n.*; *Dumville* v. *Ashbrooke*, 3 Russ. 98 *n.*; *Gibbons* v. *Fletcher*, cit. 11 Ha. 251; *Lord Crewe* v. *Edleston*, 1 De G. & Jo. 93, 109; *De Winton* v. *Mayor of Brecon*, 28 L. J. Ch. 598; see Seton, 650.

Legal mortgagee may now obtain receiver.

A legal mortgagee may now obtain the appointment of a receiver. *Pease* v. *Fletcher*, 1 Ch. D. 273; *Anglo-Italian Bank* v. *Davies*, 9 Ch. Div. 275, 293; *In re Pope*, 17 Q. B. Div. 743, 749.

Mortgagee in possession may have receiver.

The fact that a mortgagee has taken possession does not of itself disentitle him to have a receiver appointed. *Tillett* v. *Nixon*, 25 Ch. D. 238; *Mason* v. *Westoby*, 32 Ch. D. 206; *In re Prytherch*, 42 Ch. D. 590, 598; *County of Gloucester Bank* v. *Rudry Merthyr Colliery Co.*, (1895) 1 Ch. 629.

Receiver at instance of puisne mortgagee.

Where a prior mortgagee is not in possession and declines to take possession, a receiver will be appointed at the instance of a puisne mortgagee, without prejudice to the right of the prior mortgagee to take possession. *Newman* v. *Newman*, 2 B. C. C. 92 *n.*; *Bryan* v. *Cormick*, 1 Cox, 422; *Dalmer* v. *Dashwood*, 2 Cox, 378; *Davis* v. *Duke of Marlborough*, 2 Sw. 108, 137, 165; *Berney* v. *Sewell*, 1 J. & W. 647; *Tanfield* v. *Irvine*, 2 Russ. 149; *Rhodes* v. *Lord Mostyn*, 17 Jur. 1007; *Liverpool Marine Credit Co.* v. *Wilson*, 7 Ch. 507, 511; *Underhay* v. *Read*, 20 Q. B. Div. 209, 218; *Cadogan* v. *Lyric Theatre*, (1894) 3 Ch. 338.

Receiver not appointed as against prior mortgagee in possession.

But a receiver will not be appointed at the instance of a puisne mortgagee as against a prior mortgagee who is in possession, unless the prior mortgagee is paid off or refuses to accept what is due to him. *Quarrell* v. *Beckford*, 13 Ves. 377; *Codrington* v. *Parker*, 16 Ves. 469; *Berney* v. *Sewell*, 1 J. & W. 647; *Hiles* v. *Moore*, 15 B. 175.

Right to receiver where interest in arrear.

An equitable mortgagee, whose interest is in arrear, has a *primâ facie* right to a receiver. *Strong* v. *Carlyle Press*, (1893) 1 Ch. 268.

A debenture-holder, whose interest is in arrear, is entitled to a receiver, although the principal is not yet payable. *Bissill* v. *Bradford Tramways Co.*, (1891) W. N. 51.

Right to receiver where security is in jeopardy.

A receiver may be appointed at the instance of equitable mortgagees, *e.g.* debenture-holders, if their security is in jeopardy, although the principal is not due, and no interest in arrear. *Wildy* v. *Mid-Hants Ry. Co.*, 16 W. R. 409; *McMahon* v. *North Kent Ironworks Co.*, (1891) 2 Ch. 148; *Edwards* v. *Standard Rolling Stock Syndicate*, (1893) 1 Ch. 574; *Thorn* v. *Nine Reefs, Limited*, 67 L. T. 93.

Companies Clauses Act, 1845, ss. 53, 54.

The Companies Clauses Consolidation Act, 1845, (8 & 9 Vict. c. 16) (sect. 53), enables mortgagees of a company, whose interest is in arrear or whose principal has not been repaid, to obtain, under the circumstances therein mentioned, the appointment of a receiver. (Sect. 54) Every application for a receiver must be made to two justices, who may appoint a receiver of the tolls or sums liable to the payment of the interest, or principal and interest. On the receiver's appointment, the tolls become receivable by him and applicable to payment of the mortgagee on whose behalf he was appointed. His power ceases when he has received the amount due with costs.

The remedy given by these sections does not prevent a mortgagee from applying to the Court for a receiver. *Fripp* v. *Chard Ry. Co.*, 11 Ha. 241.

Companies Clauses Act, 1863, ss. 25, 26.

Similar provisions in favour of debenture stock-holders whose interest is in arrear are contained in sects. 25 and 26 of the Companies Clauses Act, 1863 (26 & 27 Vict. c. 118).

When liquidator is appointed receiver.

Where the Court is applied to to appoint a receiver, and the mortgagor is a limited company which is in course of winding up, either compulsorily or under supervision, the Court as a rule appoints the liquidator to be receiver. *Perry* v. *Oriental Hotels Co.*, 5 Ch. 420; *In re Henry Pound, Son, & Hutchins*, 42 Ch. Div. 402, 419, 422.

And where a receiver has been appointed in a debenture-

holder's action, and the company is subsequently ordered to be wound up, the Court will as a rule displace the receiver originally appointed, and appoint the liquidator to be receiver. *Tottenham* v. *Swansea Zinc Ore Co.*, 32 W. R. 716; *Bartlett* v. *Northumberland Avenue Hotel Co.*, 53 L. T. 611; *In re Joshua Stubbs, Limited*, (1891) 1 Ch. 187, 475; *British Linen Co.* v. *South American & Mexican Co.*, (1894) 1 Ch. 108, 121.

These rules do not apply where the winding-up is voluntary. *Boyle* v. *Bettws Llantwit Colliery Co.*, 2 Ch. D. 726.

A receiver appointed in a debenture-holders' action will not be simply discharged, without any provision being made for the benefit of the debenture-holders. *Strong* v. *Carlyle Press*, (1893) 1 Ch. 268; *British Linen Co.* v. *South American & Mexican Co.*, (1894) 1 Ch. 108, 124, 127. *Campbell* v. *Compagnie Générale de Bellegarde* (2 Ch. D. 181), must be regarded as overruled.

Rule is rule of convenience.

The rule in both cases is a rule of convenience, and its application may be excluded by the special circumstances of the case.

As a rule, where there are calls to be made and outstanding assets to be got in, the liquidator will be appointed receiver. *Bartlett* v. *Northumberland Avenue Hotel Co.*, 53 L. T. 611; *In re Joshua Stubbs, Limited*, (1891) 1 Ch. 187, 475; *British Linen Co.* v. *South American & Mexican Co.*, (1894) 1 Ch. 108, 129.

The liquidator will not be appointed receiver of mortgaged assets which can only be realized advantageously by the exercise of special care and by persons having special knowledge. *British Linen Co.* v. *South American & Mexican Co.*, (1894) 1 Ch. 108.

But the liquidator will as a rule be appointed receiver where there is a business to carry on. *Perry* v. *Oriental Hotels Co.*, 5 Ch. 420; *In re Joshua Stubbs, Limited*, (1891) 1 Ch. 475, 483.

The liquidator will not be appointed receiver where the assets are admittedly insufficient to cover the mortgagee's security. *Strong* v. *Carlyle Press*, (1893) 1 Ch. 268, see (1894) 1 Ch. 116.

The Companies (Winding-up) Act, 1890 (53 & 54 Vict. c. 63), enacts—

Companies (Winding-up) Act, 1890, s. 4, (6).

Sect. 4, (6). Where an application is made to the Court to appoint a receiver on behalf of the debenture-holders or other creditors of a company, the official receiver may be so appointed.

Delivery of possession by mortgagor.

On the appointment of a receiver of the rents and profits of land, the mortgagor, if in possession, will be directed to deliver up possession, and the tenants to attorn and to pay their rents in arrear and growing due to the receiver. *Davis* v. *Duke of Marlborough*, 2 Sw. 116; Seton, 639; *Wells* v. *Kilpin*, Seton, 640; *Hawkes* v. *Holland*, W. N., (1881) 128; see *Taylor* v. *Soper*, 62 L. T. 828.

Occupation rent.

In *In re Burchnall* (W. N. (1893) 171), the mortgagor was directed to attorn tenant to the receiver at an occupation rent as from the date of the order.

Where a reference is directed to chambers to fix an occupation rent and appoint a receiver, the liability to pay rent commences as from the appointment. *Lloyd* v. *Mason*, 2 My. & Cr. 487.

Where the order does not direct the mortgagor to attorn tenant or to deliver up possession, liability to pay rent commences as from demand by the receiver. *Randfield* v. *Randfield*, 7 W. R. 651; *Yorkshire Banking Co.* v. *Mullan*, 35 Ch. D. 125.

Rent in arrear.

Under an order appointing a receiver and manager of a West India Estate, the receiver is not entitled to produce which, at the date of the order, had been severed and sent away to the mortgagor's consignee, but had not been received by him. *Codrington* v. *Johnstone*, 1 B. 520.

Attornment to receiver.

Attornment to a receiver constitutes a tenancy by estoppel between the tenant and the receiver, but it does not enable a person who is afterwards proved to have the legal title to treat the tenant as his tenant and to distrain for rent. *Evans* v. *Mathias*, 7 E. & B. 590, 602.

Receiver of undivided share.

A receiver may be appointed of an undivided share (*a*), and a receiver has been appointed over the whole of property at the instance of a mortgagee of an undivided share (*b*). (*a*) *Fall* v. *Elkins*, 9 W. R. 861; (*b*) *Sumsion* v. *Crutwell*, 31 W. R. 399.

Receiver of chattels.

A writ of assistance may be issued to put a receiver in possession of chattels directed to be delivered to him. *Wyman* v. *Knight*, 39 Ch. D. 165.

As to his liability to give security, see Seton, 654.

Receiver not agent of parties.

A receiver is an officer of the court, and is not in any sense an agent to the party on whose application he is appointed. *Corporation of Bacup* v. *Smith*, 44 Ch. D. 395, 398; *Burt, Boulton, & Hayward* v. *Bull*, (1895) 1 Q. B. 276.

Duties of receiver.

A receiver merely receives rents or other income and pays ascertained outgoings. He has no powers of management. *In re Manchester & Milford Ry. Co.*, 14 Ch. D. 645.

As to the functions of a receiver of a public statutory undertaking, see *Gardner* v. *L. C. & D. Ry. Co.*, L. R. 2 Ch. 201; *Attree* v. *Hawe*, 9 Ch. Div. 337, 348.

Receiver of real estate.

As to the duty of a receiver of real estate with respect to repairs, insurance, etc., see *A.-G.* v. *Vigor*, 11 Ves. 563; *Tempest* v. *Ord*, 2 Mer. 55; *Thornhill* v. *Thornhill*, 14 Sim. 600; *In re Graham*, (1895) 1 Ch. 66; and the orders in Seton, 671, 672.

In *Duke of Grafton* v. *Taylor* (7 T. L. R. 588), a receiver and manager of real estate was appointed.

As to his power to grant leases and to distrain, see Seton, 675.

Application for directions.

A receiver ought not to originate any proceedings in the cause in which he is receiver. Any necessary application should be made by the parties to the suit. If they decline to make an application on being requested by the receiver, he may then apply himself. *Ireland* v. *Eade*, 7 B. 55; *Parker* v. *Dunn*, 8 B. 497.

Actions by receiver.

As a general rule, a receiver cannot maintain an action to compel obedience to an order for the delivery of goods or the payment of money to him. *In re Sacker*, 22 Q. B. Div. 179.

He can only maintain an action if he has an independent cause of action. Thus, he can maintain an action if he is the holder of a bill of exchange (*a*), or to recover title-deeds of which he is in possession as bailee and which are unlawfully detained from him (*b*). (*a*) *Ex parte Harris*, 2 Ch. D. 423; (*b*) *Hills* v. *Reeves*, 31 W. R. 209.

Receiver

Therefore, he is not a good petitioning creditor in respect

cannot be petitioning creditor, though he may prove.

of a debt due to him as receiver (*a*), but he is perhaps entitled to prove in respect of such a debt (*b*). (*a*) *Ex parte Muirhead*, 2 Ch. Div. 22; *In re Sacker*, 22 Q. B. Div. 179; (*b*) *Armstrong* v. *Armstrong*, 12 Eq. 614; *Ex parte Hare*, 10 Ch. 218.

When his title arises as against third parties.

Where a receiver of chattels is appointed conditionally on his giving security, he cannot set up his title as against third parties until he has completed his security or taken possession. It is not a contempt, therefore, for an execution creditor to seize chattels after an order has been made appointing a receiver on his giving security, but before the security has been given or possession taken. *Defries* v. *Creed*, 34 L. J. Ch. 607; *Edwards* v. *Edwards*, 2 Ch. Div. 291; *Smart* v. *Flood*, 49 L. T. 467.

But a party to an action in which a receiver is appointed on giving security cannot take advantage of his not having given security to intercept property which the receiver on giving security would be entitled to receive. *Wickens* v. *Townshend*, 1 R. & M. 361; *In re Birt*, 22 Ch. D. 604.

Where the order appointing the receiver directs him to take possession, but does not direct him to give security, an execution creditor cannot seize chattels of which he has taken possession. *Morrison* v. *Skerne Ironworks Co.*, 60 L. T. 588.

An order appointing a receiver of the rents and profits of land upon his giving security operates as an immediate delivery of the land in execution. *Ex parte Evans*, 13 Ch. Div. 252.

Interference with receiver's possession.

Where a receiver is in possession of property, or in receipt of the rents, profits, or income of property, any person who disturbs his possession or interferes with his receipt without leave of the Court is guilty of contempt. *Angel* v. *Smith*, 9 Ves. 335; *Johnes* v. *Claughton*, Jac. 573; *Evelyn* v. *Lewis*, 3 Ha. 472; *Russell* v. *East Anglian Ry. Co.*, 3 Macn. & G. 104; *Ames* v. *Trustees of Birkenhead Docks*, 20 B. 332, 353; *De Winton* v. *Mayor of Brecon*, 6 Jur. N. S. 1046; *Defries* v. *Creed*, 34 L. J. Ch. 607.

It is not a contempt to intercept rents payable to a receiver if the order appointing him does not show that he is to receive them. *Crow* v. *Wood*, 13 B. 271.

Libel on business carried on by receiver is contempt.

It is not necessary, in order to constitute a disturbance of the receiver's possession, that there should be a personal interference or an interference with receipt of some definite debt or thing which he was entitled to receive. Thus, a libel on a business carried on by the receiver is a contempt of court. *Helmore* v. *Smith* (2), 35 Ch. Div. 449; see *Hawkins* v. *Gathercole*, 21 L. J. Ch. 617; *Whadcoat* v. *Shropshire Ry. Co.*, 9 T. L. R. 589.

Application for leave to enforce rights against receiver.

Any person not a party to the action who has rights in the property, which are not the subject of the administration then going on, must, if he wishes to enforce those rights, apply in the action for leave to enforce them. *Brooks* v. *Greathed*, 1 J. & W. 176; *Smith* v. *Effingham*, 2 B. 232; *Evelyn* v. *Lewis*, 3 Ha. 472; *In re Henry Pound, Son, & Hutchins*, 42 Ch. Div. 402.

Where such an application is made, leave will be granted unless it is clear that the claim is without foundation. *Angel* v. *Smith*, 9 Ves. 335; *Gooch* v. *Haworth*, 3 B. 428; *Empringham* v. *Short*, 3 Ha. 461; *Russell* v. *East Anglian Ry. Co.*, 3 Mac. & G. 104, 117; *Randfield* v. *Randfield*, 3 D. F. & J. 766; *In re Henry Pound, Son, & Hutchins*, 42 Ch. Div. 402; *Lane* v. *Capsey*, (1891) 3 Ch. 411.

Application for payment of money by receiver.

A person not a party to an action in which a receiver has been appointed cannot apply in the action for payment of money to him by the receiver out of the funds in his hands. *Wastell* v. *Leslie*, 15 Sim. 453 *n.*; *Brocklebank* v. *East London Ry. Co.*, 12 Ch. D. 839, explaining *Neate* v. *Pink*, 15 Sim. 450, 3 Mac. & G. 476.

Appointment without prejudice to prior incumbrancers.

Where a receiver is appointed without prejudice to the rights of prior incumbrancers, a prior incumbrancer who, without leave of the Court, either takes possession (*a*), or, being in possession, distrains for rent (*b*), is not guilty of contempt. (*a*) *Underhay* v. *Read*, 20 Q. B. Div. 209, 218; (*b*) *Engel* v. *South Metropolitan Brewing Co.*, (1891) W. N. 31.

Where a receiver is appointed in similar terms and intercepts rents and profits, of which a prior mortgagee is in receipt, the prior mortgagee should not commence a separate action against the receiver, but should apply for relief against him

in the action in which he was appointed receiver. *Searle* v. *Choat*, 25 Ch. Div. 723.

Liability of receiver to account.

A receiver is bound to account for sums received by him from the time when he begins to act as receiver, although before his appointment is completed by the execution of the bond. *Smart* v. *Flood*, 49 L. T. 467.

Every sum of money due from a receiver, whether an ascertained balance or not, is a debt of record, so long as the recognizance exists. *Seagram* v. *Tuck*, 18 Ch. D. 296.

A receiver is a trustee for the persons entitled to any money due from him and not brought into account, whether through mistake or fraud. *Seagram* v. *Tuck*, 18 Ch. D. 296.

Receiver, when liable for losses.

A receiver is not, as a rule, liable for the loss of money deposited by him in a bank. He is, however, liable if he pays the moneys in to his private account (*Wren* v. *Kirton*, 11 Ves. 377), or receives interest upon them (*Drever* v. *Maudesley*, 8 Jur. 547), or places them out of his exclusive control (*Salway* v. *Salway*, 2 R. & M. 215; *S. C. White* v. *Baugh*, 3 Cl. & F. 44), or is in default in passing his accounts (*Drever* v. *Maudesley*, 8 Jur. 547).

Debtors Act, 1869, s. 4.

A receiver who, after he has been discharged, is ordered to pay a balance into Court is within the third exception to sect. 4 of the Debtors Act, 1869. *In re Gent*, 40 Ch. D. 190.

Relief against personal representatives of receiver.

Relief against the personal representative of a receiver cannot, it appears, be obtained by applying in the action in which he was appointed, but must be sought by an independent proceeding. *Ludgater* v. *Channell*, 15 Sim. 479; 3 Mac. & G. 175.

Liability of sureties.

Sureties, who are liable to account for what the receiver should receive and become liable to pay as such receiver, are liable for receipts by him before the completion of the security. *Smart* v. *Flood*, 49 L. T. 467.

Where there has been any breach of the condition of the recognizance, the penalty is the debt at law, but equity gives relief on the terms of the surety paying whatever sum of money, whether principal, interest, or costs, the receiver has become liable for, including the costs of his removal and the appointment of a new receiver. *Greenside* v. *Benson*, 3 Atk.

248; *Dawson* v. *Raynes*, 2 Russ. 466; *In re Lockey*, 1 Ph. 509; *Keily* v. *Murphy*, Sau. & Sc. 479; *Maunsell* v. *Egan*, 3 J. & Lat. 251; *In re Graham*, (1895) 1 Ch. 66.

A surety may be made to account, although the amount due from the receiver has not been ascertained. *Ludgater* v. *Channell*, 3 Mac. & G. 175.

As to the right of the sureties to indemnity out of any balance due to the receiver, and out of any property administered in the action in which he is beneficially interested, see *Glossup* v. *Harrison*, 3 V. & B. 134; *Brandon* v. *Brandon*, 3 De G. & Jo. 524.

Discharge of receiver.

A receiver is appointed for the benefit of all parties interested. Therefore, he will not be discharged merely on the application of the party at whose instance he was appointed. *Bainbrigge* v. *Blair*, 3 B. 421.

Receiver and Manager.

Receiver and manager of business,

Mortgagees are entitled to a receiver and manager of the mortgaged property only when a business carried on by the mortgagor is, in terms or by implication, included in the mortgage security. *Chaplin* v. *Young*, 6 L. T. 97; *Truman & Co.* v. *Redgrave*, 18 Ch. D. 547; *Whitley* v. *Challis*, (1892) 1 Ch. 64.

of ship,

A statutory mortgagee of a steamship is entitled to a receiver with power to manage. *Fairfield Shipbuilding Co.* v. *London & East Coast Steamship Co.*, (1895) W. N. 64.

of collieries.

A receiver and manager will be appointed at the instance of a mortgagee of collieries, although the business and goodwill are not expressly transferred. *Peek* v. *Trinsmaran Iron Co.*, 2 Ch. D. 115; *Campbell* v. *Lloyd's Bank*, (1891) 1 Ch. 136 *n.*; *County of Gloucester Bank* v. *Rudry Merthyr Colliery Co.*, (1895) 1 Ch. 629.

A receiver and manager has been appointed on the application of an unpaid vendor of collieries sold to a company. *Boyle* v. *Bettys Llantwit Colliery Co.*, 2 Ch. D. 726.

Debenture-holders.

A receiver and manager has been appointed, on the authority of *Peek* v. *Trinsmaran Iron Co.* (2 Ch. D. 115), at the instance

of debenture-holders who had a charge on all the property, both present and future, including the uncalled capital, of a limited company. *Huntington* v. *Coal Consumers' Association*, Seton, 648; *Makins* v. *Percy Ibotson & Sons*, (1891) 1 Ch. 133; *Edwards* v. *Standard Rolling Stock Syndicate*, (1893) 1 Ch. 574.

The Court has no jurisdiction, where the business carried on by the mortgagor is not comprised in the mortgage, to direct the receiver to carry on a new business upon the mortgaged premises. *Whitley* v. *Challis*, (1892) 1 Ch. 64.

Manager is only appointed with view to sale.

A manager of a business or undertaking is only appointed with a view to the sale of the business or undertaking as a going concern. *Gardner* v. *L. C. & D. Ry. Co.*, L. R. 2 Ch. 201, 212; *Whitley* v. *Challis*, (1892) 1 Ch. 64, 69, 70.

Manager not appointed of public undertaking.

Therefore, a manager will not be appointed where the subject of the security is an undertaking of a public nature, which the mortgagee has no power to sell. *Blaker* v. *Herts & Essex Waterworks Co.*, 41 Ch. D. 399, 408. *Bartlett* v. *West Metropolitan Tramways Co.* [(1893) 3 Ch. 437] has been overruled. See *Marshall* v. *South Staffordshire Tramways Co.*, (1895) 2 Ch. 36.

Duties of manager.

As to the distinction between a receiver and a manager, see *per* Jessel, M.R., in *In re Manchester & Milford Ry. Co.*, 14 Ch. D. 645, p. 653.

A receiver and manager is entitled to carry on the business which he manages in the way in which it is ordinarily carried on. *Taylor* v. *Neate*, 39 Ch. D. 538, 544.

The appointment of a receiver and manager of a business operates as a dismissal of the servants employed by the mortgagor. *Reid* v. *Explosives Co.*, 19 Q. B. Div. 264.

A receiver of a company established under the Mortgage Debenture Act, 1865 (28 & 29 Vict. c. 78), is not entitled to the possession of the securities, on which the mortgage debentures are founded, and which are deposited with the Registrar of the Land Registry. *Somerset* v. *Land Securities Co.*, (1894) 3 Ch. 464.

Manager personally liable on contracts.

A receiver and manager is personally liable on contracts made by him in carrying on a business, unless he stipulates to the contrary in the contract. *Sargant* v. *Reed*, 1 Ch. D.

600; *Taylor* v. *Neate*, 39 Ch. D. 538; *Burt, Boulton, & Hayward* v. *Bull*, (1895) 1 Q. B. 276.

The appointment by the Court of a receiver and manager of a company's business by an order which does not direct him to take possession does not effect a change of occupancy within sect. 16 of the Poor Rate Assessment and Collection Act, 1869. *In re Marriage, Neave & Co.*, (1896) 2 Ch. 663.

Receivers and managers of a business appointed by the Court at the instance of debenture-holders are not entitled to enforce against a gas company its statutory obligation to supply gas, except on the terms of paying arrears due in respect of gas supplied to the mortgagors while the debenture-holders permitted them to carry on business. *Paterson* v. *Gas Light & Coke Co.*, (1896) 2 Ch. 476.

Right to indemnity.

A receiver and manager is entitled to be paid his just charges and expenses out of the assets of the business, and to be indemnified thereout for liabilities incurred in carrying it on in priority to the claim of all persons for whose benefit it was carried on. *Courand* v. *Hanmer*, 9 B. 3; *Bertrand* v. *Davies*, 31 B. 429, 436; *Ex parte Izard*, (No. 1) 23 Ch. Div. 75; *Batten* v. *Wedgwood Coal Co.*, 28 Ch. D. 317; *Strapp* v. *Bull, Sons, & Co.*, (1895) 2 Ch. 1.

He is entitled to be indemnified out of the assets for advances properly made by him to carry on the business, although made without the authority of the Court. Where he applies to the Court before making the advance, he is generally allowed interest at 5 per cent. and given a charge on the assets for the advance and interest. *Ex parte Izard, supra.*

His right to indemnity is subject to the costs of realizing the assets, including the costs of an abortive sale. *Batten* v. *Wedgwood Coal Co.*, 28 Ch. D. 317.

When allowed to raise money in priority to debentures.

The receiver and manager in a debenture-holders' action will be authorized to raise money by a first charge on the mortgaged property in priority to the debentures, where the money is required to preserve the mortgaged property from destruction. *Greenwood* v. *Algesiras Ry. Co.*, (1894) 2 Ch. 205. See *Securities Investment Corporation* v. *Brighton Alhambra*, 62 L. J. Ch. 566.

As to the priority of debenture-holders who have made advances to the receiver and manager to enable him to carry on the business, see *Strapp* v. *Bull, Sons, & Co.*, (1895) 2 Ch. 1; *Lathom* v. *Greenwich Ferry Co.*, 72 L. T. 790.

A receiver and manager who retires will not be restrained from soliciting orders from, or doing business with, the customers of the business which he managed. *In re Irish*, 40 Ch. D. 49.

Form of order continuing manager.

On the form of the order continuing a receiver and manager, see *Davies* v. *Vale of Evesham Preserves*, 73 L. T. 150; (1895) W. N. 105.

Term of manager should be limited.

The judgment in a debenture-holders' action should contain a proviso limiting the time during which the receiver and manager is to carry on the company's business. *Day* v. *Sykes, Walker & Co.*, 55 L. T. 763.

Receiver and manager under the Railway Companies Act, 1867.

Sect. 4. of the Railway Companies Act, 1867 (30 & 31 Vict. c. 127), which is made perpetual by 38 & 39 Vict. c. 31, after providing that the rolling stock and plant of a company shall not, after their railway or any part thereof is open for public traffic, be liable to be taken in execution, where the judgment on which execution issues is recovered in an action on a contract entered into after the 20th of August, 1867, or in an action, not on a contract, commenced after that date, enables the judgment creditor to obtain the appointment of a receiver, and, if necessary, of a manager, of the undertaking of the company, on application by petition in a summary way to the Court of Chancery; "and all money received by such receiver or manager shall, after due provision for the working expenses of the railway and other proper outgoings in respect of the undertaking, be applied and distributed, under the direction of the Court, in payment of the debts of the company, and otherwise according to the rights and priorities of the persons for the time being interested therein; and on payment of the amount due to every such judgment creditor as aforesaid the Court may, if it think fit, discharge such receiver or such receiver and manager."

Definition of company.

Sect. 3. In this Act the term Company means a railway company; that is to say, a company constituted by Act of

Parliament or by certificate under Act of Parliament for the purpose of constructing, maintaining, or working a railway (either alone, or in conjunction with any other purpose).

A company authorized by statute to make a railway, which is merely ancillary to its purposes as a dock company, is within this definition. *Great Northern Ry. Co.* v. *Tahourdin*, 13 Q. B. Div. 320; *In re East & West India Dock Co.*, 38 Ch. Div. 576.

Protection of rolling stock and plant.

The rolling stock and plant are protected so long as they continue the property of the company, although the railway is closed for traffic. *Midland Waggon Co.* v. *Potteries Ry. Co.*, 6 Q. B. D. 36.

As to what articles are protected, see *Great Northern Ry. Co.* v. *Tahourdin*, 13 Q. B. Div. 320.

Receiver, when appointed.

A receiver will not be appointed where the company has not commenced to acquire the lands or construct the railways authorized by their Act. *In re Birmingham & Lichfield Junction Ry. Co.*, 18 Ch. D. 155.

But a receiver may be appointed although part of the railway is not yet opened for traffic. *In re Southern Ry. Co.*, 5 L. R. Ir. 165.

A receiver will be appointed of the whole undertaking, where a railway forms part of the common undertaking, and is not a separate undertaking. *In re East & West India Dock Co.*, 38 Ch. Div. 576.

A manager will be appointed under this section whenever the company is carrying on its own business. *In re Manchester & Milford Ry. Co.*, 14 Ch. Div. 645.

Powers of receiver and manager.

As to the powers of a receiver and manager, see *Re Eastern & Midlands Ry. Co.*, 66 L. T. 153.

The receiver cannot get in unpaid calls. *In re Birmingham & Lichfield Junction Ry. Co.*, 18 Ch. D. 155.

As to what are "working expenses" and "proper outgoings," see *Re Cornwall Minerals Ry. Co.*, 48 L. T. 41; *In re Eastern & Midlands Ry. Co.*, 45 Ch. Div. 367; *Re Mersey Ry. Co.*, 72 L. T. 535.

Receiver must have regard to priorities.

The receiver, in making a distribution, must have regard to the priorities given by section 23 of the Act. *In re Hull,*

Barnsley & West Riding Junction Ry. Co., 40 Ch. Div. 119; *In re East & West India Dock Co.*, 44 Ch. Div. 38, 49.

Rights of judgment creditors *inter se.*

An order for a receiver gives no priority to the judgment creditor who obtains it. *In re Mersey Ry. Co.*, 37 Ch. Div. 610.

The Court will not discharge the receiver until all the future judgment creditors, who have obtained judgment before the order of discharge, have been satisfied. *In re Mersey Ry. Co.*, 37 Ch. Div. 610.

CHAPTER XXX.

THE RIGHT TO REDEEM AT LAW.

I. Mortgages.

The right of the mortgagor under his contract with the mortgagee to redeem the mortgaged premises on payment of the amount due under the mortgage at the prescribed time must be distinguished from the right to redeem given him in equity after he has made default in payment of the mortgage money under his contract.

Where the mortgagee has contracted to restore the mortgaged property to the mortgagor upon terms which the mortgagor fulfils, the mortgagee cannot insist, as a condition of restoring it, upon any of the terms imposed upon mortgagors who are obliged to come into equity to recover the property which they have forfeited at law. *Crickmore* v. *Freeston*, 40 L. J. Ch. 137; *Cummins* v. *Fletcher*, 14 Ch. Div. 699.

Right to redeem before time fixed.

Where there is a proviso for redemption on payment of the principal with interest at the expiration of a year from the date of the mortgage, the mortgagor cannot bring an action to redeem before the expiration of the year. *Brown* v. *Cole*, 14 Sim. 427. See *Harding* v. *Tingey*, 34 L. J. Ch. 13.

But he may redeem before the date fixed for redemption if the mortgagee has taken possession. *Bovill* v. *Endle*, (1896) 1 Ch. 648.

Where the mortgage contained a proviso for redemption thirty-one years after its date, the mortgagor was allowed to redeem before the time fixed. *Talbot* v. *Braddill*, 1 Vern. 183, 394.

Redemption of Welsh mortgage.

In a Welsh mortgage there is no forfeiture. The mortgagor, therefore, is always entitled to redeem, and the mortgagee can

never foreclose. *Orde* v. *Heming*, 1 Vern. 418; *Fenwick* v. *Reed*, 1 Mer. 114; *Cassidy* v. *Cassidy*, 24 L. R. Ir. 577.

Redemption of mortgages to building societies.

The contract of mortgage, where the mortgagee is a building society, is generally to be gathered from two instruments, the mortgage itself and the rules of the society.

How far mortgagee is bound by altered rules.

Where the mortgagor covenanted to pay to the society, at the times and in manner prescribed by the rules for the time being applicable thereto respectively, the several sums of money payable in respect of his shares, it was held that he was entitled to redeem, on payment only of those sums which he was liable to pay according to the rules in force at the date of the mortgage. *Smith's Case*, 1 Ch. D. 481.

Where the mortgagor covenanted to pay all subscriptions and other moneys which, according to the rules for the time being of the society, should from time to time become due and payable, it was held that he was bound by any rules which the society might from time to time make, although they imposed an additional liability upon him. *Wilson* v. *Miles Platting Building Society*, 22 Q. B. Div. 381 *n.*; *Rosenberg* v. *Northumberland Building Society*, 22 Q. B. Div. 373.

The mortgagor was also held bound by an alteration in the rules where he covenanted to pay the several sums which, under the constitution of the society and the rules and regulations thereof, ought to be paid by him. *Bradbury* v. *Wild*, (1893) 1 Ch. 377.

Terms of redemption in mortgages to building societies.

A mortgage by an advanced member to a terminating building society, to secure all payments to become due in respect of his shares, is a security for the payments stipulated for by the society as the consideration for the shares, and the mortgagor cannot redeem on payment of the excess of the loan over the subscriptions paid by him and his share of profits. *Mosley* v. *Baker*, 6 Ha. 87, 3 D. M. & G. 1032 *n.*; *Seagrave* v. *Pope*, 1 D. M. & G. 783.

Where the mortgage to a terminating society was to secure all sums of money which the mortgagor might become liable to pay under the rules, by one of which he was entitled to redeem on paying the full amount expressed to be secured by the mortgage, less the same proportion of profits per share as

was allowed on the withdrawal of unadvanced shares and the amount of subscriptions paid in by him, it was held that he must be debited with all subscriptions and redemption money which would become due and payable by him, assuming the society to endure for the longest period during which it might possibly last (such subscriptions and redemption money to be treated as a debt presently payable), and be credited with the bonus which would be payable to a withdrawing member at the time when he gave notice to withdraw on the number of shares held by him. *Fleming* v. *Self*, Kay, 518; 3 D. M. & G. 997; *Archer* v. *Harrison*, 7 D. M. & G. 404; *Smith* v. *Pilkington*, 1 D. F. & J. 120.

Where the prospectus of a society declared that a borrower receiving an advance would be charged a fixed premium of two shillings per share per annum, and that mortgages might be at any time redeemed by payment of the balance of the amount of capital with interest to the date of redemption, it was held that the society might, consistently with the prospectus, (1) add all the premiums which would be payable during the subsistence of the security to the principal sum advanced, and (2) charge interest upon the aggregate amount. *Harvey* v. *Municipal Building Society*, 26 Ch. D. 273.

Where the proceeds of sale of the mortgaged property were to be applied in satisfaction of all moneys due or to become due from the mortgagor in respect of subscriptions or otherwise under the rules of the society or the mortgage, it was held that the mortgagor was not entitled to a discount upon the amount of subscriptions not due at the time of the sale, although the rules provided that a discount should be made where a mortgagor redeemed before the expiration of the time specified in the mortgage deed. *Matterson* v. *Elderfield*, 4 Ch. 207.

Where the mortgage debt was to be repaid by monthly instalments, composed partly of principal and partly of interest, during seven years, and the society was to retain, in case of a sale, out of the proceeds all such subscriptions, fines, and other sums of money and payments which shall be then due or which would afterwards become due in respect of the said

shares during the remainder of the seven years, it was held that the society was entitled to retain (1) whatever was due in respect of monthly instalments and fines at the time of the sale, (2) so much of the unpaid instalments as represented principal. *Ex parte Osborne*, 10 Ch. 41.

Where the rules of a society imposed fines at the rate of 60 per cent. for non-payment of the monthly instalments of principal and interest payable by an advanced member under his mortgage, it was held that equity would not relieve against the fines, but that they did not carry interest. *Parker* v. *Butcher*, L. R. 3 Eq. 762.

Effect of winding-up of the society.

The liability of an advanced member to repay the loan and his liability upon his shares are not, in the absence of special provisions, to be treated as independent liabilities. The shares are the loan; and instalments paid upon the shares operate *pro tanto* in extinguishing the liability under the mortgage.

Advanced member not liable to contribute to losses.

A winding-up of the mortgagee society does not, in the absence of outside creditors, affect the rights of the advanced member. He is still entitled to redeem on the same terms on which he was entitled while the society was a going concern. It is not an implied term of the contract of membership that he is to contribute to the losses of the society *pari passu* with the unadvanced members. The implication does not arise even when, under the rules of the Society, he is credited with a proportion of the profits. *In re Doncaster Building Society*, L. R. 3 Eq. 158; *Tosh* v. *North British Building Society*, 11 App. Cas. 489 (societies under the Act of 1836); *Brownlie* v. *Russell*, 8 App. Cas. 235 (society under the Act of 1874).

Where under the rules an advanced member could withdraw upon paying up the whole of his debt, interests, and penalties, after deducting the amount of the monthly instalments paid upon his shares with interest thereon, it was held that he was entitled to redeem in a winding-up on payment of the difference between the sum lent him and the monthly instalments already paid by him; and that, though the allowance of interest in the rules would not apply in a winding-up, yet, as he had been erroneously charged with interest on the whole loan, he should

be credited with interest at the same rate on the instalments paid by him. *Brownlie* v. *Russell, supra.*

Where profits are properly credited to an advanced member, the fact that losses have been subsequently made does not affect his right to be credited with profits. *Tosh* v. *North British Building Society, supra.*

Rules may make advanced member liable to contribute to losses.

The rules of a society may make an advanced member liable to contribute to losses, as between himself and the unadvanced members. Where the rules provided that, if the directors determined that there was a deficiency of income by which the society might be prevented from meeting its liabilities, the amount of such deficiency should be equally apportioned by the directors between the investing and borrowing members, it was held that the borrowing members were liable to contribute in favour of the investing members and that the clause remained effective under a winding-up, although the directors could not ascertain the loss. *In re Albion Mutual Building Society*, 43 Ch. D. 410 *n.*; *In re West Riding of Yorkshire Building Society*, 43 Ch. D. 407.

An advanced member who has paid up in full before the winding-up is not liable to be put on the list of contributories. *Ex parte Pullman*, 45 Ch. D. 463.

The Building Societies Act, 1894, provides—

Building Societies Act, 1894, s. 10.

Sect. 10. When a society under the Building Societies Acts is being dissolved and wound up, a member to whom an advance has been made under any mortgage or other security or under the rules of the society, shall not be liable to pay the amount payable under the mortgage or other security or rules, except at the time, or times, and subject to the conditions therein expressed. This section shall come into operation immediately after the passing of this Act (25th of August, 1894). See *Kemp* v. *Wright*, (1895) 1 Ch. 121.

This section overrules *London Provident Building Society* v. *Morgan*, (1893) 2 Q. B. 266.

Redemption of rent-charges.

As to the redemption of rent-charges, see sect. 45 of the Conveyancing Act, 1881.

Where the grantee of a rent-charge in arrear has taken possession of the land subject to the charge, the owner has a

legal right to recover possession on payment of all arrears, and he cannot in equity be put upon terms of repaying to the grantee reasonable expenditure by him while in possession. *Hooper* v. *Cooke*, 20 B. 639; affd. 25 L. J. Ch. 467.

II. Pledges.

Right of pledgor is legal right.

The right of the pledgor of goods to restoration of the goods pledged, on payment of principal and interest, is a legal right. The right is only destroyed by a sale by the pledgee in accordance with the contract of pledge. The pledgor has no further or other right of redemption in equity. *Ratcliff* v. *Davis*, Yelv. 178; *Coggs* v. *Bernard*, 1 Smi. L. C. 201, 214; *Singer Manufacturing Co.* v. *Clark*, 5 Ex. D. 37, 42; *In re Morritt*, 18 Q. B. Div. 222, 232, 234; *Bank of New South Wales* v. *O'Connor*, 14 App. Cas. 273, 282.

Where goods are pledged by four, three of them are not entitled to redeem the whole. *Harper* v. *Godsell*, L. R. 5 Q. B. 422.

A pledgee from a person whose title is defective incurs no liability to the true owner if he restores the property pledged to his pledgor, without notice of the infirmity of his title. *Heald* v. *Carey*, 11 C. B. 977; *Alexander* v. *Southey*, 5 B. & A. 247.

Pledgee must restore pledge to pledgor.

A pledgee is bound as a general rule to restore or account for the property pledged to him from whom he received it. *Biddle* v. *Bond*, 6 B. & S. 225; *Ex parte Davies*, 19 Ch. Div. 86.

This rule is subject to two exceptions.

Pledgee evicted by title paramount.

1. The pledgee may defend himself against his pledgor by showing that the bailment has determined by what is equivalent to an eviction by title paramount without default on his part. *Shelbury* v. *Scotsford*, Yelv. 22; *Cheesman* v. *Exall*, 6 Ex. 341; *Delaney* v. *Fox*, 2 C. B. N. S. 768; *Sheridan* v. *New Quay Co.*, 4 C. B. N. S. 618; *European & Australian Royal Mail Co.* v. *Royal Mail Steam Packet Co.*, 30 L. J. C. P. 247; *Biddle* v. *Bond*, 6 B. & S. 225; *Singer Manufacturing Co.* v. *Clark*, 5 Ex. D. 37; *Ross* v. *Edwards*, 73 L. T. 100.

2. The pledgee may show that the pledgor's title has expired since the creation of the pledge. *Delaney* v. *Fox*, 2 C. B. N. S. 768; *Thorne* v. *Tilbury*, 3 H. & N. 534. Expiration of pledgor's title.

Where the pledgee retains possession of the goods, he can only set up the right of the true owner, if he defends his possession upon the right and title, and by authority of the true owner. *Betteley* v. *Reed*, 4 Q. B. 511; *Biddle* v. *Bond*, 6 B. & S. 225; *Rogers, Sons, & Co.* v. *Lambert & Co.*, (1891) 1 Q. B. 318.

The pledgee cannot set up the title of the true owner if, knowing the infirmity of the pledgor's title, he entered into an unqualified contract to restore the goods to him. *Ex parte Davies*, 19 Ch. Div. 86.

The Pawnbrokers Act, 1872, prescribes (sects. 16, 17, 18) the length of time during which, and (sects. 25, 26, 29) the conditions on which, pledges within the Act are redeemable. Pawnbrokers Act, 1872.

The right to recover chattels subject to a pledge or possessory lien may be affected by the application of the maxim, *In pari delicto potior est conditio possidentis.* *In pari delicto potior est conditio possidentis.*

Thus, where a lien arose under a contract made and executed on Sunday (*a*), where half of a bank-note was pledged to secure a debt incurred by a prostitute in her vocation (*b*), where title-deeds were deposited as consideration for stifling a criminal prosecution (*c*), it was held that the owner could not recover his property. (*a*) *Scarfe* v. *Morgan*, 4 M. & W. 270; (*b*) *Taylor* v. *Chester*, L. R. 4 Q. B. 309; (*c*) *Jones* v. *Merionethshire Building Society*, (1892) 1 Ch. 173, 187.

It would appear, on principle, that payment or tender of the amount due under the illegal contract cannot make any difference.

Shares deposited as security for the payment of stock exchange differences may be recovered by the depositor. The Gaming Act, 1845 (8 & 9 Vict. c. 109), merely makes the wagering contracts null, not illegal, and sect. 18 does not apply. *Strachan* v. *Universal Stock Exchange*, (1895) 2 Q. B. 329; (1896) A. C. 166. Gaming Act, 1845.

CHAPTER XXXI.

THE RIGHT TO REDEEM IN EQUITY.

After the mortgagor has made default in payment of the mortgage money at the time fixed by the contract, or, if no time has been fixed, at a reasonable time after demand by the mortgagee, the right of the mortgagee to the mortgaged property becomes absolute at law.

In equity, however, the mortgagor is still allowed to redeem the mortgaged property, or recover the surplus proceeds of sale, if the mortgagee has sold under his power.

Mortgages of personal chattels.

This principle extends to mortgages of personal chattels. After default in payment, the property in the chattels vests indefeasibly in the mortgagee at law, and the only right of the mortgagor is to redeem in equity. *Maugham* v. *Sharpe*, 17 C. B. N. S. 443; *Sewell* v. *Burdick*, 10 App. Cas. 74, 95; *Johnson* v. *Diprose*, (1893) 1 Q. B. 512; *In re Wood*, (1894) 1 Q. B. 605.

Mortgages to secure annuity or by way of indemnity.

"Where a mortgage is made to secure an annuity for the life of another, or to indemnify against contingent charges, or for any other object not capable of immediate pecuniary valuation, redemption is impossible: a security can only be redeemed where the party redeeming is able to do the thing intended to be secured; and where the thing secured is the payment of an annual or a monthly sum during an uncertain period, no one can say how long the payments may continue, and it is therefore impossible for the party who has given the security to redeem it by an immediate payment of a fixed sum." *Per* Cranworth, C., in *Fleming* v. *Self*, 3 D. M. & G. 997, 1024.

Right to

A mortgagor may be precluded by the mortgage contract

from redeeming for a fixed period, such as five or seven years. *In re Hone's Estate*, I. R. 8 Eq. 65; *Teevan* v. *Smith*, 20 Ch. Div. 724, 729. redeem may be postponed.

The Court will not give effect to a stipulation in a mortgage by a client to his solicitor which precludes the client from redeeming for twenty years. *Cowdry* v. *Day*, 29 L. J. Ch. 39.

Under the statute 4 and 5 W. & M. c. 16, a mortgagor who grants a second mortgage without giving the second mortgagee notice in writing of the first mortgage is deprived of his right to redeem in equity. 4 & 5 W. & M. c. 16.

The statute only applies to mortgages properly so called, and not to equitable charges. *Kennard* v. *Futvoye*, 2 Giff. 81; 29 L. J. Ch. 553.

It cannot be taken advantage of by a second mortgagee who has used fraud in obtaining his mortgage. *Stafford* v. *Selby*, 2 Vern. 589; see *James* v. *Kerr*, 40 Ch. Div. 449, 455.

A mortgagor or grantor of a bill of sale cannot recover the surplus proceeds of sale of the mortgaged property from the mortgagee or grantee, where the security was given for an illegal consideration. *In re Mapleback*, 4 Ch. Div. 150 156. Security for illegal consideration.

Apart from the provisions of the statute, the equity of redemption cannot be cut off except by lapse of time or by the order of the Court. The Court does not permit any stipulation in a mortgage by which the mortgaged property is, upon any event, to become the absolute property of the mortgagee. *Jennings* v. *Ward*, 2 Vern. 520; *Mellor* v. *Lees*, 2 Atk. 494; *Toomes* v. *Conset*, 3 Atk. 261; *Spurgeon* v. *Collier*, 1 Ed. 55; *Vernon* v. *Bethell*, 2 Ed. 110; *Seton* v. *Slade*, 7 Ves. 265, 273; *Marquess of Northampton* v. *Pollock*, 45 Ch. Div. 190, 210. Equity of redemption cannot be cut off.

No proviso is valid which limits the right of redemption to a specified time, *e.g.* the life of the mortgagor [*Price* v. *Perrie*, 2 Freem. 258; *Salt* v. *Marquess of Northampton*, (1892) A. C. 1], or to a specified class of persons, *e.g.* the mortgagor or the heirs males of his body (*Howard* v. *Harris*, 1 Vern. 33, 190).

An agreement in a mortgage by the mortgagor to sell in

a certain event part of the mortgaged premises at a fixed sum is void. *In re Edwards' Estate*, 11 Ir. Ch. 367.

Leases made by mortgagor to mortgagee.

As to the circumstances under which a lease made by mortgagor to mortgagee will be set aside, see *Gubbins* v. *Creed*, 2 Sch. & L. 218; *Webb* v. *Rorke*, 2 Sch. & L. 661; *Hickes* v. *Cooke*, 4 Dow, 16.

Lord Redesdale was of opinion, in the last case, that no agreement between mortgagor and mortgagee for a beneficial interest out of the mortgaged premises (such as a lease), where the mortgage continues, ought to stand if impeached within a reasonable time; but Lord Eldon thought that a lease from mortgagor to mortgagee would not be set aside, if fair, merely because it was foolish. Lord Redesdale's language doubtless only applies to beneficial leases, *i.e.* leases at less than a rack rent, but *quære* whether it is not even then too strong, where there is no oppression.

Mortgagor may show that apparent sale was really mortgage.

Where the parties to a transaction of mortgage execute instruments which purport to convey the property as on an absolute sale, the mortgagor is not estopped from setting up the real nature of the transaction, and may bring forward parol evidence to support his case. *Francklyn* v. *Fern*, Barn. Ch. 30; *Scottish Union Insurance Co.* v. *Marquis of Queensberry*, 1 Bell. App. 183; *Barton* v. *Bank of New South Wales*, 15 App. Cas. 379, 380.

The right of the mortgagor to bring forward parol evidence in support of his claim to redeem is distinguishable from (1) the right of a defendant to an action for specific performance to set up that the contract was not conformable to the real intention of the parties; or (2) the right of the Court to rectify a deed, where parol evidence is only admissible in case of fraud, mistake, or surprise in the transaction itself.

Parol evidence admissible where conveyance intentionally made absolute.

Parol evidence is admissible in support of the right to redeem in cases where the form of the conveyance was intentionally made absolute. *Baker* v. *Wind*, 1 Ves. S. 160; *Vernon* v. *Bethell*, 2 Ed. 110; *Douglas* v. *Culverwell*, 4 D. F. & J. 20; *Barton* v. *Bank of New South Wales*, 15 App. Cas. 379.

Lord Irnham v. *Child* (1 B. C. C. 92) is explained in

Marquis Townshend v. *Stangroom*, 6 Ves. 328, 332, and *Phillips* v. *Eastwood*, Ll. & G. t. Sugd. 270, 287.

Mortgagee cannot set up Statute of Frauds.

Where the mortgage transaction relates to land, the mortgagee cannot set up the Statute of Frauds in answer to a claim by the mortgagor, as the statute cannot be set up to cover a fraud. *Lincoln* v. *Wright*, 4 De G. & Jo. 16, 22; *Heseltine* v. *Simmons*, (1892) 2 Q. B. 547, 554; see *In re Duke of Marlborough*, (1894) 2 Ch. 133.

Bills of sale.

Parol evidence is also admissible where the object of an Act of Parliament would be defeated by excluding it. Thus, the grantor of a bill of sale which purports to be an absolute assignment may show by parol evidence that it was given as a security for money. *In re Watson*, 25 Q. B. Div. 27; *Madell* v. *Thomas & Co.*, (1891) 1 Q. B. 230.

Mortgages of ships.

In the case of a ship, the Court may look behind the register to the real character of the transaction, and if a person to whom an absolute bill of sale has been delivered is proved to have been really a mortgagee, he will be treated as mortgagee, and not as owner. *Myers* v. *Willis*, 17 C. B. 77; 18 C. B. 886; *Gardner* v. *Cazenove*, 1 H. & N. 423; *Ward* v. *Beck*, 32 L. J. C. P. 113; 13 C. B. N. S. 668; *Innisfallen*, L. R. 1 A. & E. 72.

What evidence is admissible.

"Where there is simply a conveyance and nothing more, the terms upon which the conveyance is made not being apparent from the deed itself, collateral evidence may easily be admitted to supply the considerations for which the parties interchanged such a deed; but where, in the deed itself, the reasons for making it and the considerations for which it is granted are fully and clearly expressed, the collateral evidence must be strong enough to overcome the presumption that the parties in making the deed had truly set forth the causes which led to its execution." *Per* Lord Watson in *Barton* v. *Bank of New South Wales*, 15 App. Cas. 379, 381.

External evidence.

Declarations of the apparent purchaser made after the date of the supposed purchase are admissible. *Vernon* v. *Bethell*, 2 Ed. 110; *Alderson* v. *White*, 2 De G. & Jo. 97, 107.

Evidence derived from the transaction.

The fact that the costs were paid by the apparent vendor has sometimes been relied on to show that the transaction was

a mortgage transaction, but it is not conclusive. *Barrell* v. *Sabine*, 1 Vern. 268; *Alderson* v. *White*, 2 De G. & Jo. 97, 107; *Douglas* v. *Culverwell*, 4 D. F. & J. 20, 26.

A proviso that the vendor shall give authority to the tenant to pay the rents to the purchaser is evidence that the transaction is one of mortgage. *Douglas* v. *Culverwell*, 4 D. F. & J. 20, 26.

The fact that the alleged mortgagee has not the remedies of a mortgagee is evidence that the transaction was a sale.

Thus, a conveyance of lands in lieu and satisfaction of a portion, with a proviso for redemption limited in time, was held to be a sale and not a mortgage. *Goodman* v. *Grierson*, 2 Ba. & Be. 474; *Williams* v. *Owen*, 5 M. & Cr. 303, 307; *Alderson* v. *White*, 2 De G. & Jo. 97, 108.

On the other hand, the fact that the purchaser retains the right to sue the vendor for the consideration money shows that the transaction was a mortgage. *Murphy* v. *Taylor*, 1 Ir. Ch. 92.

An agreement to repay a loan (which was not secured) at a specified time, and, in case of default, to assign a leasehold farm to the lender without further consideration, and make over the farming stock to him at a valuation, was held to be a conditional sale and not a mortgage. *Tapply* v. *Sheather*, 8 Jur. N. S. 1163; 7 L. T. 298.

A proviso giving the vendor a right of repurchase at an amount equal to the consideration for the sale, with 6 per cent. compound interest, is evidence that the transaction was a mortgage. *In re South City Market Co.*, 13 L. R. Ir. 245.

Absolute sale with right of repurchase.

An absolute sale with a right of repurchase exercisable on certain conditions must be distinguished from a mortgage. Such a transaction is valid. *Newcomb* v. *Bonham*, 1 Vern. 7, 214, 232; *Manlove* v. *Bale*, 2 Vern. 84; *Floyer* v. *Lavington*, 1 P. W. 268; *Mellor* v. *Lees*, 2 Atk. 494; *Williams* v. *Owen*, 5 My. & Cr. 303; *Shaw* v. *Jeffery*, 13 Moo. P. C. 432; *Alderson* v. *White*, 2 De G. & Jo. 97; *Gossip* v. *Wright*, 32 L. J. Ch. 648; affd. in H. L. 17 W. R. 1137; *M. S. & L. Ry. Co.* v. *North Central Wagon Co.*, 13 App. Cas. 554, 568.

It was no objection to such a sale, while the Usury Laws

were in force, that it was made to evade them. *Douglas* v. *Culverwell*, 4 D. F. & J. 20, 23.

Vendor must comply with terms of repurchase.

The vendor, to obtain the benefit of the right of repurchase, must comply strictly with the terms of its exercise. *Barrell* v. *Sabine*, 1 Vern. 268; *Davis* v. *Thomas*, 1 R. & M. 506; *Joy* v. *Birch*, 4 Cl. & F. 57, 89.

Equity will allow the vendor to repurchase after the time limited by the contract has expired, if he was prevented from exercising his right within that time by the fraud of his purchaser. *Spurgeon* v. *Collier*, 1 Ed. 55. See *L. C. & D. Ry. Co.* v. *S. E. Ry. Co.*, (1892) 1 Ch. 120, 142, 143.

Cases where sale is set aside.

Cases where a mortgage transaction takes the form of a sale must also be distinguished from cases, the result of which is very similar, where the parties intend a sale, but the sale is set aside by the Court on the ground of fraud or oppression, the purchaser being given a lien on the property for the consideration paid by him. *Fulthrope* v. *Foster*, 1 Vern. 476; *Alderson* v. *White*, 2 De G. & Jo. 97, 107.

Annuity transactions.

Grants of an annuity for the life of the grantor, accompanied by a proviso giving the grantor the right of repurchase or redemption on prescribed terms, were at one time common.

Effect of Usury Laws upon grants of annuities.

While the Usury Laws were in force such transactions were often entered into to evade those laws. A *bonâ fide* sale of an annuity, whether for life or for a time certain, did not come within the scope of the Usury Laws. The question was, not whether the grantee ran a risk or not, but whether the transaction was a *bonâ fide* sale or a loan under cover of a sale.

If the transaction was a sale, the fact that the grantee would necessarily receive more than his consideration money, with legal interest thereon, did not invalidate the transaction. *Kenny* v. *Lynch*, 2 J. & Lat. 319.

If the transaction was in reality a loan, the question of risk or no risk became decisive in determining whether the transaction was usurious or not. *Doe* v. *Gooch*, 3 B. & A. 366; *Doe* v. *Chambers*, 4 Camp. 1; *Fereday* v. *Wightwick*, 1 R. & M. 45; *Chillingworth* v. *Chillingworth*, 8 Sim. 404.

A loan which took the form of a grant of an annuity for

life was held to be not usurious, although the grantee in fact protected himself against risk by insuring the grantor's life. *Phillips* v. *Eastwood*, Ll. & G. t. Sugd. 270, 287.

Of course, it became usurious if the principal lent was recoverable from the grantor.

There was a tendency at one time in Equity to treat such transactions as loans, whenever the annuity was made redeemable, and to give the grantor a larger right of redemption than that prescribed by the grant. *Lawley* v. *Hooper*, 3 Atk. 278; *Longuet* v. *Scawen*, 1 Ves. 402; *Floyer* v. *Sherard*, Ambl. 18; *Verner & Boyton* v. *Winstanley*, 2 Sch. & L. 393; *Phillips* v. *Eastwood*, Ll. & G. t. Sugd. 270; *Bulwer* v. *Astley*, 1 Ph. 422.

Grantee of annuity can only redeem on terms of grant.

This doctrine is now antiquated, and the grantor will not be given any right to redeem other than that which he has under the grant. *Knox* v. *Turner*, 5 Ch. 515; *Preston* v. *Neele*, 12 Ch. D. 760; *Secretary for India* v. *British Empire Life Assurance Co.*, 67 L. T. 434.

Who may Redeem.

1. Persons beneficially interested in property.

1. Any person beneficially interested in the equity of redemption is entitled to redeem. *Pearce* v. *Morris*, 5 Ch. 227; *Tarn* v. *Turner*, 39 Ch. Div. 456.

Thus, a pernor of the profits, tenant by elegit, statute merchant or staple, tenant by the curtesy or in dower, may redeem. *Jones* v. *Meredith*, Bunb. 346.

Tenant for life.

A tenant for life can redeem, and the remainderman cannot redeem him during the subsistence of the tenancy for life. *Ravald* v. *Russell*, Younge, 9; *Raffety* v. *King*, 1 Kee. 601, 617; *Wicks* v. *Scrivens*, 1 J. & H. 215; *Prout* v. *Cock*, (1896) 2 Ch. 808.

But an assignee of the life interest cannot redeem after it has determined. *Riley* v. *Croydon*, 2 Dr. & Sm. 293.

Tenant in common.

One tenant in common is entitled to redeem. *Wynne* v. *Styan*, 2 Ph. 303.

Judgment creditor.

It was held by Romilly, M.R., that a judgment creditor is entitled to redeem if he has acquired a charge on the land before the time fixed by the decree for redemption. *Mildred* v. *Austin*, 8 Eq. 220; see *Beckett* v. *Buckley*, 17 Eq. 435.

See, however, *Earl of Cork* v. *Russell*, 13 Eq. 210, where Malins, V.C., held that judgment creditors who had not issued execution were not necessary parties to a foreclosure suit.

Lessee for years.

A lessee for years under a lease granted by the mortgagor after the mortgage is entitled to redeem. *Keech* v. *Hall*, 1 Doug. 21; *Tarn* v. *Turner*, 39 Ch. Div. 456.

Person who has contracted to purchase or lease.

A person who has entered into a binding contract to purchase or take on lease the equity of redemption or part of it is entitled to redeem. He is not entitled so long as the contract remains conditional. *Tasker* v. *Small*, 3 My. & Cr. 63; *Pearce* v. *Morris*, 5 Ch. 227; *Tarn* v. *Turner*, 39 Ch. Div. 456.

Lord of manor or Crown.

The lord of a manor or the Crown taking by escheat may redeem a mortgage for a term (*a*), and, since the 14th of August, 1884, a legal mortgage in fee (*b*) created by the tenant. (*a*) *Viscount Downe* v. *Morris*, 3 Ha. 394; *Catley* v. *Sampson*, 33 B. 551; (*b*) Intestates Estate Act, 1884 (47 & 48 Vict. c. 71), sect. 4; altering the law as laid down in *Beale* v. *Symonds*, 16 B. 406.

Widow.

A widow is not entitled to redeem in respect of an inchoate right of dower which has been destroyed at law. *Dawson* v. *Bank of Whitehaven*, 6 Ch. Div. 218.

2. Persons liable to pay debt.

2. Any person liable to pay the principal or interest of the mortgage debt is entitled to redeem. *Green* v. *Wynn*, 4 Ch. 204.

Thus, a surety for the interest due under the mortgage may redeem. *Green* v. *Wynn*, 4 Ch. 204; *Forbes* v. *Jackson*, 19 Ch. D. 615.

And a mortgagor may redeem if the mortgagee sues him on his covenant after a decree for foreclosure absolute. *Perry* v. *Barker*, 8 Ves. 527; *Lockhart* v. *Hardy*, 9 B. 355.

The mortgagor may redeem if sued on his covenant, although he has absolutely assigned his equity of redemption. *Palmer* v. *Hendrie*, 27 B. 349; 28 B. 341; *Kinnaird* v. *Trollope*, 39 Ch. D. 636.

3. Two properties subject to one mortgage.

3. Where real and personal property are subject to the same mortgage, a person who would be entitled to redeem

either property, if mortgaged by itself, is entitled to redeem both. *Hall* v. *Heward*, 32 Ch. Div. 430.

The heir at law cannot redeem real estate mortgaged, the equity of redemption in which has been converted by the mortgagor in his lifetime into personalty. *Griffith* v. *Ricketts*, 7 Ha. 299.

Where real estate only is mortgaged, whether in fee (*a*), or for a term (*b*), the personal representative of the mortgagor as such cannot redeem. (*a*) *Duncombe* v. *Hansley*, 3 P. W. 333 *n.*; *Fray* v. *Drew*, 11 Jur. N. S. 130; (*b*) *Bradshaw* v. *Outram*, 13 Ves. 234; *Catley* v. *Sampson*, 33 B. 551.

Priority of rights of redemption.

Persons are admitted to redeem in the order in which they have acquired rights in the equity of redemption. Thus a second mortgagee is entitled to redeem before the third. *Beevor* v. *Luck*, 4 Eq. 537, 547; *Loveday* v. *Chapman*, 32 L. T. 689.

The same rule applies where persons are interested in the equity of redemption of different properties. Thus, if A. mortgages 1st, Whiteacre to B., 2ndly, Blackacre to B., 3rdly, Blackacre to C., and 4thly, Whiteacre to D., C. is admitted to redeem before D., his right to redeem having accrued first, although the property in which D. has the equity of redemption was the first to be mortgaged. *Bradley* v. *Riches*, 39 L. T. 78; *Mills* v. *Jennings*, 13 Ch. Div. 639, 650.

Where the equity of redemption is in settlement, the tenant for life is admitted to redeem before the remainderman. *Wicks* v. *Scrivens*, 1 J. & H. 215; *Gleaves* v. *Paine*, 1 D. J. & S. 87, 96; *Ex parte Paine*, 3 D. J. & S. 458, 462.

What may be Redeemed.

Right to redeem entirely.

Where a mortgagee has a right to consolidate, any person, as against whom he has a right to consolidate, is entitled to redeem him entirely. The mortgagee cannot elect whether he will be redeemed in whole or in part. *Jennings* v. *Jordan*, 6 App. Cas. 698, 704; *Mutual Life Assurance Society* v. *Langley*, 32 Ch. Div. 460; *Griffith* v. *Pound*, 45 Ch. D. 553, 565.

Transfer of

Any person redeeming is entitled to a transfer of a personal

judgment obtained against the mortgagor for the mortgage debt. *Greenough* v. *Littler*, 15 Ch. D. 93. personal judgment.

Where the mortgagee of a renewable lease procures from the landlord a new term to commence from the expiration of the old one, the new term is subject to the old equity of redemption. *Rakestraw* v. *Brewer*, 2 P. W. 511; see 6 Ind. Ap. 159. Renewed lease.

This principle only applies, either where the mortgagee by being in possession obtains the renewal, or where it is done behind the back, or in fraud of the persons interested in the equity of redemption of the old lease. *Nesbitt* v. *Tredennick*, 1 Ba. & Be. 29.

The *primâ facie* effect of an agreement between debtor and creditor, in a transaction where the only security for the loan consists of the debtor's life interest or of a contingent reversion, that the creditor shall effect a policy to protect himself against the risk of the debtor's death or his death before the reversion becomes vested, and that the debtor shall pay the premiums, is to vest the equitable property in the policy, subject to the creditor's security, in the debtor; the principle being that what the debtor pays or agrees to pay for is *primâ facie* his, subject to the security for the purpose of which it was brought into existence. *Holland* v. *Smith*, 6 Esp. 11; *Phillips* v. *Eastwood*, Ll. & G. t. Sugd. 270; *Morland* v. *Isaac*, 20 B. 389; *Drysdale* v. *Piggott*, 22 B. 238; 8 D. M. & G. 546; *Marquess of Northampton* v. *Pollock*, 45 Ch. Div. 190; S. C. *Salt* v. *Marquess of Northampton*, (1892) A. C. 1. Policies of insurance effected by creditor.

It is immaterial that the debtor does not in fact pay the premiums, or any of them, if he has bound himself to do so, and is chargeable with them as between himself and his creditor. *Salt* v. *Marquess of Northampton*, (1892) A. C. 1. Non-payment of premiums by debtor.

Where the expenses of effecting the first premium were included in the loan, but the debtor refused to pay subsequent premiums, which were paid by the creditor, it was held that the refusal was not a repudiation of the policy, and that the debtor was entitled to redeem it on repaying the premiums with interest. *Drysdale* v. *Piggott*, 8 D. M. & G. 546.

But where it is clear that the policy was effected for the Policy effected

for creditor's benefit.

creditor's benefit, subject only to an option for the debtor to make it his own in the event of his paying off the debt, the fact that the debtor undertook the obligation of paying the premiums does not necessarily make it the property of the debtor, contrary to the contract. *Salt* v. *Marquess of Northampton*, (1892) A. C. 1.

Policy effected without debtor's knowledge.

In order to entitle the debtor to redeem a policy, it must have been effected in pursuance of a contract under which the creditor was bound to insure, and the debtor to pay the premiums. Where the creditor effects a policy without the debtor's knowledge, the fact that he charges the debtor in account with the premiums does not of itself entitle the debtor to redeem. *Henson* v. *Blackwell*, 4 Ha. 434; *Ex parte Lancaster*, 4 De G. & Sm. 524; *Freme* v. *Brade*, 2 De G. & Jo. 582; *Bruce* v. *Garden*, 5 Ch. 32. *Ex parte Andrews* (2 Rose, 410; 1 Madd. 573), which appears *contra*, was a case of proof in bankruptcy.

Of course, the fact that the principal or interest repayable by the creditor is fixed at an amount sufficient to cover premiums, or that the creditor charges the debtor with premiums, may be evidence of the existence of such a contract. *Freme* v. *Brade*, 2 De G. & Jo. 582, 594.

Lea v. *Hinton* (19 Beav. 324; 5 D. M. & G. 823) was a case between principal debtor and surety, in which it was held that the policy was effected merely for the surety's indemnity. See 2 De G. & Jo. 593, 595.

Policy effected by creditor without insurable interest.

It does not assist the debtor to show that the transaction of loan was fraudulent and void as against him, and that therefore the creditor had no insurable interest in his life. The question of insurable interest is a question solely between the insurance office and the person insuring. If the office chooses to pay the policy, the debtor cannot claim it on the ground that the insurable interest was only acquired under a transaction fraudulent as against him. *Henson* v. *Blackwell*, 4 Ha. 434; *Freme* v. *Brade*, 2 De G. & Jo. 582.

Where the mortgagor of a reversion covenanted to pay premiums on policies, and the mortgage was set aside as fraudulent, it was held that the mortgagee, who had himself

paid the premiums, was entitled to the policies, and that he could not charge the mortgagor with the premiums, which amounted to more than the sum received on the policies. *Pennell* v. *Millar*, 26 L. J. Ch. 699.

Policies effected by grantee of annuity.

The right of the mortgagor redeeming to policies effected by the mortgagee only arises in cases where the relation of debtor and creditor exists between the parties.

Where the grantee of an annuity, which is redeemable in certain events by the grantor, insures the grantor's life, the grantor on redeeming has no right to the policy. *Law* v. *Warren*, Dru. t. Sugd. 31; *Gottlieb* v. *Cranch*, 4 D. M. & G. 440; *Knox* v. *Turner*, 5 Ch. 515; *Preston* v. *Neele*, 12 Ch. D. 760.

It is immaterial that the purchase deed contains provisions which show that it was in the contemplation of the parties that an insurance should be effected, or which throw the expenses of effecting it, directly or indirectly, upon the grantor. *Cases supra.*

The grantor may, by the express terms of the deed, be entitled on redeeming to a policy effected by the grantee; but he will only be entitled on complying exactly with the terms. *Williams* v. *Atkyns*, 2 J. & Lat. 603; *Bashford* v. *Cann*, 33 B. 109.

Where grantee of annuity is also creditor.

The grantor and grantee may stand at the same time in the relation of debtor and creditor, the grantor remaining liable for the consideration money. In this case, he will be entitled on redeeming to a policy effected by the creditor under his authority and at his expense. *Phillips* v. *Eastwood*, Ll. & G. t. Sugd. 270; *Courtenay* v. *Wright*, 2 Giff. 337.

Surety redeeming entitled to all securities held by creditor.

Where the creditor is a party to or has notice of the contract of suretyship, the surety on redeeming is entitled to the benefit of all securities given by the principal debtor to his creditor, either at the creation of the contract or during its subsistence. *Newton* v. *Chorlton*, 10 Ha. 646; *Lake* v. *Brutton*, 8 D. M. & G. 441; *Pearl* v. *Deacon*, 24 B. 186; 1 De G. & Jo. 461; *Gedye* v. *Matson*, 25 B. 310; *Pledge* v. *Buss*, Joh. 663; *Heyman* v. *Dubois*, 41 L. J. Ch. 224; *Forbes* v. *Jackson*, 19 Ch. D. 615. See also the *Mercantile Law Amendment Act*, 1856 (19 & 20 Vict. c. 97), sect. 5.

No tacking or consolidation as against surety.

In such a case, therefore, the mortgagee cannot tack or consolidate as against a surety. *Bowker* v. *Bull*, 1 Sim. N. S. 29; *Drew* v. *Lockett*, 32 B. 499; *In re Kirkwood's Estate*, 1 L. R. Ir. 108; *Forbes* v. *Jackson*, 19 Ch. D. 615 (not following *Williams* v. *Owen*, 13 Sim. 597; *Farebrother* v. *Wodehouse*, 23 B. 18).

Where surety is not known to be such to creditor.

The right of the surety to the securities held by the creditor does not exist where, though the surety is, as between himself and the principal debtor, a surety only, the creditor has no notice of the existence of that relation. *Duncan Fox & Co.* v. *North and South Wales Bank*, 6 App. Cas. 1, 12.

A mortgagee, therefore, can consolidate, as against a surety, where the suretyship is not disclosed by the mortgage deed or otherwise known to the mortgagee when the right to consolidate arises. *In re Toogood's Legacy Trusts*, 61 L. T. 19.

CHAPTER XXXII.

TERMS OF REDEMPTION IN EQUITY.

WHERE a plaintiff comes into equity to redeem, he will only be permitted to do so upon equitable terms.

The rights of the mortgagee, which arise upon the mortgagor's default, are the right to receive notice, or six months interest in lieu of notice, to tack, to consolidate, and to add to his security his costs, charges, and expenses.

The rights of the mortgagee are, in principle, the same whether the action is brought for redemption or to recover surplus proceeds of sale.

A. NOTICE OR INTEREST IN LIEU OF NOTICE.

After a mortgagor has made default in payment of the principal and interest in accordance with the proviso for redemption contained in the mortgage deed, he must either give the mortgagee six calendar months' notice of his intention to pay off the mortgage, or at his option pay the mortgagee six months' interest in advance in lieu of notice. *Browne* v. *Lockhart*, 10 Sim. 420, 424; *Bartlett* v. *Franklin*, 15 W. R. 1077; 36 L. J. Ch. 671; *Johnson* v. *Evans*, 61 L. T. 18; *Smith* v. *Smith*, (1891) 3 Ch. 550.

Equitable mortgagee by deposit not entitled to notice or interest.

An equitable mortgagee by deposit is not entitled to six months' notice or interest, even though the deposit is accompanied by an agreement to execute a legal mortgage. *Fitzgerald's Trustee* v. *Mellersh*, (1892) 1 Ch. 385.

Rule applies to mortgage of reversion in fund.

There is no exception to the rule requiring notice arising out of the nature of the mortgaged property. The rule applies as well to a mortgage of a reversionary interest in a fund in

Court as to a mortgage of land. *Smith* v. *Smith*, (1891) 3 Ch. 550.

No notice required where mortgagee has demanded payment.

If the mortgagee has himself demanded payment of the debt, or has taken any steps to compel payment of it, no notice by the mortgagor and no payment of interest in lieu of notice is required. *Matson* v. *Swift*, 5 Jur. 645, 647; *Paynter* v. *Carew*, Kay, App. xxxvi., xliii.; 18 Jur. 417; *Letts* v. *Hutchins*, 13 Eq. 176; *In re Alcock*, 23 Ch. Div. 372; *Bovill* v. *Endle*, (1896) 1 Ch. 648.

Where, after the mortgagee has commenced proceedings to enforce payment, the mortgagor gives him a notice to pay off the mortgage in six months, and he accepts the notice, he is not thereby relieved from his obligation to accept interest up to the time of payment, though made within the six months. *In re Alcock*, 23 Ch. Div. 372.

Where interest was payable on a mortgage half-yearly in advance, and the mortgagee, before a half-yearly payment became due, contracted to sell the mortgaged property, and received the price, which was more than sufficient to pay off the mortgage, two days after a payment became due, he was only allowed interest down to the time when he received the price. *Banner* v. *Berridge*, 18 Ch. D. 255, 278.

Mortgagor failing to pay after notice.

Where a mortgagor gives notice to pay off the mortgage and does not make the payment on the appointed day, the mortgagee is entitled to a fresh six months' notice or to six months' interest in lieu of notice. *In re Moss*, 31 Ch. D. 90.

Mortgagee party to order for payment.

But where the mortgagee has been a party to an order for the payment of his debt out of a fund in Court, and the payment is not made until after the day fixed by the order, he is only entitled to interest till actual payment. *In re Moss*, 31 Ch. D. 90; see *Day* v. *Day*, 31 B. 270.

B. Tacking.—I. Unsecured Debts.

No tacking as against mortgagor.

Neither specialty nor simple contract debts could be tacked as against the mortgagor himself. *Jones* v. *Smith*, 2 Ves. J. 372, 376; *Du Vigier* v. *Lee*, 2 Ha. 326, 339.

Debts by bond or covenant.

Debts by bond or covenant in which the heirs were bound

could always be tacked against the heir or devisee redeeming. *Coleman* v. *Winch*, 1 P. W. 775; *Elvy* v. *Norwood*, 21 L. J. Ch. 716.

Simple contract debts.

And a mortgagee of a term could tack simple contract debts, as against the executor redeeming. *Coleman* v. *Winch*, 1 P. W. 775.

Where a testator charged his land with debts or devised them for payment of debts, simple contract debts could have been tacked as against the heir or devisee redeeming. *Price* v. *Fastnedge*, Ambl. 685.

And now, since the Statute 3 & 4 Wm. IV. c. 104, simple contract debts may be tacked as against an heir or devisee redeeming; but not when there is personal estate unadministered. *Rolfe* v. *Chester*, 20 B. 610; 25 L. J. Ch. 244; *Thomas* v. *Thomas*, 22 B. 341; *Pile* v. *Pile*, 23 W. R. 440.

No tacking against assignee of equity of redemption.

But there can be no tacking of an unsecured debt as against an assignee of the equity of redemption. *Coleman* v. *Winch*, 1 P. W. 775; *Troughton* v. *Troughton*, 1 Ves. S. 86; *Richardson* v. *Horton*, 7 B. 112, 123.

No tacking to prejudice of creditors.

Tacking of an unsecured debt can have no further effect than to prevent circuity of action. An unsecured debt can never be tacked to the prejudice of creditors having debts of equal degree. *Heames* v. *Bance*, 3 Atk. 630; *Adams* v. *Claxton*, 6 Ves. 226; *Irby* v. *Irby*, 22 B. 217; *Pile* v. *Pile*, 23 W. R. 440.

Where an action is brought to recover surplus proceeds of sale of mortgaged property, the mortgagee cannot set off debts due to him from the mortgagor, if the effect of such set-off would be to give him a preference over creditors of the mortgagor in an equal degree, *e.g.* if the mortgagor's estate is insolvent. *Talbot* v. *Frere*, 9 Ch. D. 568; *In re Gregson*, 36 Ch. D. 223 (not following *Spalding* v. *Thompson*, 26 B. 627; *In re Haselfoot's Estate*, 13 Eq. 327; or *Ex parte National Bank*, 14 Eq. 507).

These cases, in both of which the mortgagee claimed to set off debts due from the mortgagor against proceeds of policies on the mortgagor's life, also went on the ground that there could be no set-off of a debt due from a testator against a debt which first accrues due to his executor.

II. Secured Debts.

Tacking against puisne incumbrances.

A legal mortgagee who, subsequently to his mortgage, makes advances upon the security of the mortgaged property, is entitled to tack them as against intervening incumbrancers of which he had no notice when he made his advances. *Morret* v. *Paske*, 2 Atk. 52; *Tenison* v. *Sweeny*, 1 J. & Lat. 710.

A lender to a person in possession of property under a forged will who, on the occasion of his loan, acquires the legal estate, is protected thereby, both as to the original loan and as to further advances, against the true owner of the property. *Jones* v. *Powles*, 3 My. & K. 581.

It has been held that an advance made to the mortgagor's heir at law, who was in possession of the mortgaged property as agent of the true owner, may be tacked as against the true owner. *Young* v. *Young*, L. R. 3 Eq. 801.

Tacking is confined to legal mortgages

The doctrine of tacking is based on the protection given by the legal estate. One equitable incumbrance cannot be tacked to another so as to acquire any priority. *Brace* v. *Duchess of Marlborough*, 2 P. W. 491.

A transferee of a legal mortgage and of subsequent equitable incumbrances can tack them as against an equitable incumbrance prior to the legal mortgage. *Lloyd* v. *Attwood*, 3 De G. & Jo. 614, 657.

A transferee of an equitable mortgage, who obtains the legal estate on the occasion of a further advance, can tack all his advances as against an equitable charge made after the equitable mortgage but before the transfer. *Cooke* v. *Wilton*, 29 B. 100.

A purchaser of an equity of redemption, who takes a transfer of a legal mortgage, can tack his purchase-money to the mortgage debt as against an equitable incumbrance created before the purchase. *Hipkins* v. *Amery*, 2 Giff. 292; 6 Jur. N. S. 1047.

A transferee of a legal mortgage, who at the time of the transfer makes a further advance to the mortgagor, may tack the further advance as against an equitable incumbrance

created before the date of the transfer. *Wyllie* v. *Pollen*, 3 D. J. & S. 596; *Carlisle Banking Co.* v. *Thompson*, 28 Ch. D. 398; *Hosking* v. *Smith*, 13 App. Cas. 582.

Tacking by trustee.

A trustee, who has the legal estate under a mortgage in the form of a trust for sale, can tack a charge created by the mortgagor in his favour as against a prior charge of which he has no notice given to the original mortgagee. *Wilmot* v. *Pike*, 5 Ha. 14, 21; *Spencer* v. *Pearson*, 24 B. 266.

So a trustee can tack to his legal estate a charge on the equitable interest given him by his *cestui que trust*, as against a prior charge on the equitable interest of which he has no notice. *Phipps* v. *Lovegrove*, 16 Eq. 80, 88; *Newman* v. *Newman*, 28 Ch. D. 674.

But where the facts were, (1) a legal mortgage to A. with a power of sale and a declaration of trust of the sale moneys for the persons entitled to the equity of redemption; (2) a mortgage to B.; (3) a mortgage to C., and A. died, having devised his mortgage and trust estates to C., who sold under the power, it was held that C. could not, out of the proceeds of sale, retain the amount due under his mortgage as against B. *Rooper* v. *Harrison*, 2 K. & J. 86.

Receipt of building society carries legal estate.

A receipt given by a building society, whether under the Act of 1836 or the Act of 1874, carries the legal estate for all purposes. A transferee acquiring the legal estate by virtue of such a receipt is entitled to tack. *Marson* v. *Cox*, 14 Ch. D. 147; *Hosking* v. *Smith*, 13 App. Cas. 582, overruling *Pease* v. *Jackson*, L. R. 3 Ch. 576, and *Robinson* v. *Trevor*, 12 Q. B. Div. 423, so far as *contra*.

Vendor and Purchaser Act, 1874, s. 7.

The effect of the Vendor and Purchaser Act, 1874, sect. 7 (which was repealed by the Land Transfer Act, 1875, sect. 129), was considered by Baggallay, L.J., in *Robinson* v. *Trevor*, 12 Q. B. Div. 423, 432. The effect of the two sections appears to be that a legal estate acquired after the 7th of August, 1874, and before the 1st of January, 1876, would not entitle the holder to tack.

Advance must be made on security of estate,

A subsequent advance to entitle the lender to tack must have been made on the security of the mortgaged property. *Lacey* v. *Ingle*, 2 Ph. 413.

A loan made on the personal security of the borrower cannot be tacked.

But, even before the Judgments Act, 1838, where a legal mortgagee made a further advance to the mortgagor on a judgment, there was a presumption that it was made on the security of the land, and the judgment might have been tacked. *Brace* v. *Duchess of Marlborough*, 2 P. W. 491; *Ex parte Knott*, 11 Ves. 609, 617; *Baker* v. *Harris*, 16 Ves. 397.

and without notice of prior equity.

The subsequent advance which it is proposed to tack must have been made without notice of any prior equitable incumbrance. *Brace* v. *Duchess of Marlborough*, 2 P. W. 491, 495; *Morret* v. *Paske*, 2 Atk. 52; *Lacey* v. *Ingle*, 2 Ph. 413.

Effect of Registry Acts on right to tack.

The English Registry Acts do not, except as hereinafter stated, affect the right to tack.

A legal mortgagee, whose mortgage is registered, may tack an unregistered further charge against an intermediate registered security of which he has no notice, although the unregistered further charge would be fraudulent and void as against a subsequent registered security. *Bedford* v. *Backhouse*, 2 Eq. Abr. 615; *Wrightson* v. *Hudson*, 2 Eq. Abr. 609; *Credland* v. *Potter*, 10 Ch. 8.

Yorkshire Registries Act, 1884, s. 16.

The Yorkshire Registries Act, 1884 (47 & 48 Vict. c. 54), sect. 16, abolishes tacking as from the 1st of January, 1885, except as against any estate or interest existing prior to that date.

Mortgagee of ship tacking as against assignee of freight.

A first registered mortgagee of a ship who takes possession and receives the freight is entitled to retain thereout the amount due on a subsequent mortgage of the ship, as against an intermediate incumbrancer on the freight of which he had no notice when he took his subsequent mortgage. *Liverpool Marine Credit Co.* v. *Wilson*, 7 Ch. 507.

C. Consolidation.

Consolidation, defined.

"A mortgagee who holds several distinct mortgages under the same mortgagor, redeemable, not by express contract, but only by virtue of the right which (in English jurisprudence) is called equity of redemption, may, within certain limits and

against certain persons (entitled to redeem all or some of them), consolidate them, that is, treat them as one, and decline to be redeemed as to any unless he is redeemed as to all." *Per* Selborne, C., in *Jennings* v. *Jordan*, 6 App. Cas. 698, 700.

Mortgagee may consolidate in foreclosure action.

The right to consolidate may be exercised in a foreclosure as well as in a redemption action. *Watts* v. *Symes*, 1 D. M. & G. 240; *Selby* v. *Pomfret*, 3 D. F. & J. 595; *Cummins* v. *Fletcher*, 14 Ch. Div. 699 (overruling *Holmes* v. *Turner*, 7 Ha. 367 *n.*; *Smeathman* v. *Bray*, 15 Jur. 1051).

Right to consolidate arises on default.

The right of the mortgagee to consolidate only arises when the mortgagor is obliged to come into equity to redeem. There can be no consolidation of a mortgage upon which no default has been made (*a*), or of a security by deposit of deeds where the depositor has a legal right, on payment of the amount secured, to recover the deeds (*b*). (*a*) *Cummins* v. *Fletcher*, 14 Ch. Div. 699; (*b*) *Crickmore* v. *Freeston*, 40 L. J. Ch. 137.

Conveyancing Act, 1881, s. 17.

The Conveyancing Act, 1881 (44 & 45 Vict. c. 41), enacts—

Sect. 17, (1). A mortgagor seeking to redeem any one mortgage shall, by virtue of this Act, be entitled to do so without paying any money due under any separate mortgage made by him, or by any person through whom he claims, on property other than that comprised in the mortgage which he seeks to redeem.

(2) This section applies only if, and as far as, a contrary intention is not expressed in the mortgage deeds or one of them.

(3) This section applies only where the mortgages or one of them are or is made after the commencement of this Act.

What debts can be consolidated.

It has been held that a security given by a partner for his own private debt could be consolidated with a security given by two or more partners for a partnership debt. *Beevor* v. *Luck*, 4 Eq. 537; doubted by James, L.J., in *Cummins* v. *Fletcher*, 14 Ch. Div. 699, 710.

James, L.J., was of opinion that a mortgagee could not consolidate a mortgage by three persons with a mortgage by two in trust for the three. *In re Raggett*, 16 Ch. Div. 117.

The grantee of a registered bill of sale cannot, as against

an execution creditor of the grantor, retain out of the proceeds of sale of the chattels comprised in the bill of sale money due on a mortgage of land made to him by the grantor. *Chesworth* v. *Hunt*, 5 C. P. D. 266.

No consolidation where one of the mortgages has determined.

There can be no consolidation between two mortgage debts where one of the estates mortgaged, *e.g.* a leasehold interest or a life estate, has ceased to exist, or where one of the mortgages has been redeemed. *Mayor of Brecon* v. *Seymour*, 26 B. 548, 554; *Jennings* v. *Jordan*, 6 App. Cas. 693, 707; *In re Raggett*, 16 Ch. Div. 117; *In re Gregson*, 36 Ch. D. 223.

Where a mortgagee has a right to consolidate as against some, but not as against others, of the persons entitled to the equity of redemption, and he is redeemed as to one mortgage by a person as against whom he cannot consolidate, he cannot consolidate the mortgage so redeemed as against persons entitled to ulterior rights of redemption, as against whom he would (but for the prior redemption) have been able to consolidate it. *Jennings* v. *Jordan*, 6 App. Cas. 698, 706.

Mortgagee can consolidate where he sells under power.

The mortgagee can apply the surplus arising from the sale of one mortgaged property under the power given by the mortgage in payment of the debt due under another mortgage. But the right to consolidate ceases if the mortgagee parts with one of the properties mortgaged, except under powers conferred by the mortgage-deed. *Selby* v. *Pomfret*, 3 D. F. & J. 595; *Cummins* v. *Fletcher*, 14 Ch. Div. 699, 714; *In re Raggett*, 16 Ch. Div. 117, 120.

Transfer of right to consolidate.

A mortgagor mortgaged Whiteacre to A. and deposited with him securities to secure another debt. He then mortgaged Whiteacre and Blackacre to B. B. sold Whiteacre for less than the amounts due to him and A. under their mortgages, and was compelled by A. to pay him out of the proceeds of sale the amount due under the deposit of securities. It was held that the mortgagor could not redeem Blackacre without paying B. the amount so paid by him to A. *Cracknall* v. *Janson*, 11 Ch. Div. 1, 17.

A mortgagee does not lose the right to consolidate by giving notice to the mortgagor under sect. 20 of the Conveyancing

Act, 1881, requiring payment of the money due on one mortgage. *Griffith* v. *Pound*, 45 Ch. D. 553.

An assignee cannot claim a right to consolidate which his assignor had consented to forego. *Bird* v. *Wenn*, 33 Ch. D. 215.

Consolidation as against volunteers.

1. Where an owner of two properties mortgages one to A. and the other to B., and then becomes bankrupt, and the two mortgages subsequently vest in the same person, he can consolidate as against the mortgagor's trustee in bankruptcy. *Selby* v. *Pomfret*, 1 J. & H. 336; 3 D. F. & J. 595.

2. Where an owner of two properties mortgages one to A. and the other to B., and then devises the equity of redemption in one property to C., and the two mortgages subsequently vest in the same person, he cannot consolidate as against C. *White* v. *Hillacre*, 3 Y. & C. Ex. 597.

Where A., having made a voluntary settlement of Whiteacre, mortgaged it to B., to whom he afterwards mortgaged Blackacre, it was held that B. could not consolidate the mortgages on Whiteacre and Blackacre as against the persons claiming under the voluntary settlement. *In re Walhampton Estate*, 26 Ch. D. 391.

As against purchasers for value.

1. Where two mortgages made by a mortgagor of different properties become vested in A., an assignee for value of the equity of redemption in one or both properties under an assignment made after the mortgages have vested in A. takes subject to A.'s right to consolidate. *Willie* v. *Lugg*, 2 Ed. 78; *Cator* v. *Charlton*, cit. in *Jones* v. *Smith*, 2 Ves. J. 272, 277; *Ireson* v. *Denn*, 2 Cox, 425, as explained 6 App. Cas. 717; *Watts* v. *Symes*, 1 D. M. & G. 240.

2. Where an owner of two properties mortgages one to A. and another to B., and then assigns for value (either by way of sale or mortgage) the equity of redemption in both properties to C., and subsequently to the assignment the mortgages of A. and B. become vested in one person, that person is entitled to consolidate his mortgages as against C. *Bovey* v. *Skipwith*, 1 Ch. Ca. 201; *Tweedale* v. *Tweedale*, 23 B. 341; *Vint* v. *Padget*, 1 Giff. 446; 2 De G. & Jo. 611; *Squire* v. *Pardoe*, W. N. 1890, 153; *Pledge* v. *Carr*, (1894) 2 Ch. 328; (1895) 1 Ch. 51 S. C. *Pledge* v. *White*, (1896) A. C. 187.

It is immaterial that the transferee of A. and B.'s mortgages has notice when he takes his transfer that the equity of redemption has been assigned. *Vint* v. *Padget, supra.*

3. But where an owner of two properties mortgages one to A. and the other to B., and then assigns for value the equity of redemption in one of the two properties to C., and the mortgages of A. and B. subsequently become vested in one person, that person cannot consolidate as against C. *Harter* v. *Colman,* 19 Ch. D. 630; *Minter* v. *Carr,* (1894) 2 Ch. 321; 3 Ch. 498, overruling *Beevor* v. *Luck,* 4 Eq. 537.

The right of a transferee from C. to resist consolidation is not affected by reason of such transferee being a puisne incumbrancer on both properties when C.'s interest vests in him. *Minter* v. *Carr, supra.*

4. Where an owner of two properties mortgages one to A. and then assigns the equity of redemption to B., and subsequently mortgages the other to C., and A. and C.'s mortgages become vested in the same person, that person cannot consolidate as against B. *Baker* v. *Gray,* 1 Ch. D. 491; *Mills* v. *Jennings,* 13 Ch. Div. 639; *S. C. Jennings* v. *Jordan,* 6 App. Cas. 698, overruling *Tassell* v. *Smith,* 2 De G. & Jo. 713; see *Andrews* v. *City Building Society,* 44 L. T. 641.

5. Where an owner of two properties mortgages both to A., and then mortgages one to B., and subsequently mortgages the other to C., and A. and C.'s mortgages become vested in the same person, that person can consolidate, as against B., the mortgage on both properties originally made to A., but he cannot consolidate the mortgage originally made to C. *Ford* v. *Tynte,* 41 L. J. Ch. 758; *Mutual Life Assurance Society* v. *Langley,* 32 Ch. Div. 460; *Flint* v. *Howard,* (1893) 2 Ch. 54.

Principle governing cases.

The cases are governed by two principles—one, that the assignee of an equity of redemption takes subject to all equities available against his assignor; the other, that a mortgagor who has assigned the equity of redemption cannot by any subsequent dealing with it prejudice the rights of his assignee. *Harter* v. *Colman,* 19 Ch. D. 630; *Mutual Life Assurance Society* v. *Langley,* 32 Ch. Div. 460.

CHAPTER XXXIII.

TERMS OF REDEMPTION—ACCOUNTS.

I. ACCOUNTS IN REDEMPTION AND FORECLOSURE ACTIONS.—A. WHAT IS CREDITED TO THE MORTGAGEE.

Mortgagee entitled to indemnity.

THE Court, as a condition of allowing the mortgagor to redeem, requires him to indemnify the mortgagee. The mortgagee is, therefore, entitled to charge the mortgaged property with (1) the principal debt, (2) the interest thereon, (3) all proper costs, charges, and expenses incurred by the mortgagee in relation to the mortgage debt or the mortgage security, (4) the costs of litigation properly undertaken by the mortgagee in reference to the mortgage debt or the mortgage security, (5) the mortgagee's costs of the redemption or foreclosure action. *In re Wallis*, 25 Q. B. Div. 176.

Terms are the same whether in redemption or in foreclosure,

The terms upon which the mortgagor is entitled to redeem are the same whether he brings an action for redemption or whether he redeems in an action brought by the mortgagee for foreclosure. *Du Vigier* v. *Lee*, 2 Ha. 326, 334; *Sober* v. *Kemp*, 6 Ha. 155, 160.

and whether there is an attornment clause or not,

The principle upon which the account is taken between mortgagee and mortgagor is not altered by the existence of an attornment clause in the mortgage, and rent payable under that clause must be brought into account by the mortgagee. *Ex parte Isherwood*, 22 Ch. Div. 384, 392.

and whether the mortgagor or a puisne mortgagee is redeeming.

An account against the first mortgagee at the instance of a second mortgagee must be taken in all respects as though the mortgagor himself were taking it. Any equity which the mortgagor has to exclude any item in the account may be asserted by the second mortgagee, and the second mortgagee is bound by any equity available against the mortgagor.

Sober v. *Kemp*, 6 Ha. 155; *Melbourne Banking Corporation* v. *Brougham*, 7 App. Cas. 307; *Mainland* v. *Upjohn*, 41 Ch. D. 126, 136, 143.

Mortgagee is not prejudiced by settlement of equity of redemption.

A mortgagee is not affected by the settlement of the equity of redemption. He may suffer interest to fall in arrear during a tenancy for life and recover the whole of the arrears against the inheritance. *Aston* v. *Aston*, 1 Ves. S. 264, 267; *Loftus* v. *Swift*, 2 Sch. & L. 642; *Wrixon* v. *Vize*, 2 D. & War. 192; *Makings* v. *Makings*, 1 D. F. & J. 355; *In re Morley*, 8 Eq. 594.

But the mortgagee cannot retain his demand for arrears against the inheritance if he takes a security for them from the tenant for life, by which he disables himself from compelling immediate payment. *Loftus* v. *Swift*, 2 Sch. & L. 642, 651.

If the tenant for life of leaseholds in mortgage neglects to pay the rent, the mortgagee may pay it and add the amount to his security. *Hill* v. *Browne*, Dru. t. Sugd. 426.

Transferee paying interest in arrear.

On the same principle, the transferee of a mortgage who pays arrears of interest to the transferor, in order to prevent a forced sale of the mortgaged property, is entitled to charge the arrears paid against the inheritance, although they had arisen by the default of a trustee who held the property upon trust to pay interest on the mortgage out of the rents. *Cottrell* v. *Finney*, 9 Ch. 541.

1. The Principal Debt.

Proviso limiting amount recoverable.

Where a mortgage to secure 700*l.* and further advances provided that the total amount to be recovered by the mortgagee should not exceed 900*l.*, it was held that the proviso only applied to the principal moneys due under the mortgage, and not to interest thereon nor to the mortgagee's costs, charges, and expenses. *White* v. *City of London Brewery Co.*, 39 Ch. D. 559; 42 Ch. Div. 237.

But where a mortgage is expressly made to secure not only the loan, but also the costs of preparing the mortgage and all other costs incurred under the trusts, powers, and provisions of the mortgage, a proviso that the total moneys recoverable

shall not exceed 1200*l.* extends to such costs. *Blackford* v. *Davis*, 4 Ch. 304, 309.

Security for definite sum or running balance.

Where a security is given for a definite sum, the burden of proof lies on those who seek to establish that it was intended to be a running security for the balance of an account. *Henniker* v. *Wigg*, 4 Q. B. 792; *Williams* v. *Rawlinson*, 3 Bing. 71; *In re Boyes*, 10 Eq. 467.

A charge on a policy of insurance, in case of death, "for any notes of hand or bills of exchange you may have cashed for me," was held to cover notes and bills cashed for the mortgagor at his death. *Jones* v. *Consolidated Investment Co.*, 26 B. 256.

A charge "for any further sum or sums that you may advance, or for which I may be liable to you," was held to be confined to direct liabilities arising from contract between the lender and the borrower, and not to include the liability on a bill bought by the lender in the market. *Calisher* v. *Forbes*, 7 Ch. 109, 114.

As to the construction of a mortgage to secure debts due or growing due, see *Merchants Bank of London* v. *Maud*, 18 W. R. 312; 19 W. R. 657.

As to the construction of a proviso that a mortgage of a freehold public-house is to be a continuing security for all sums to be due from the mortgagor, his executors, administrators, or assigns, see *In re Watts*, 22 Ch. Div. 5.

Where property was mortgaged to a bank "as collateral and continuing security for my advances from them," parol evidence was admitted to show that the security included past as well as future advances. *Hibernian Bank* v. *Gilbert*, 23 L. R. Ir. 321.

Security covering further advances.

Where a security, whether legal or equitable, is given to cover a present loan and further advances, whether expressly limited in amount or not, further advances made without notice of an intermediate incumbrance are protected by and retain the priority of the original loan. *Hopkinson* v. *Rolt*, 9 H. L. C. 514; *Calisher* v. *Forbes*, 7 Ch. 109; *In re O'Byrne's Estate*, 15 L. R. Ir. 189, 373.

But advances made after notice of an intermediate incumbrance are postponed to that incumbrance, whether the

intermediate incumbrancer had notice of the prior charge or not. *Hopkinson* v. *Rolt*, 3 De G. & Jo. 177; 9 H. L. C. 514, over-ruling *Gordon* v. *Graham*, 2 Eq. Abr. 598; *Daun* v. *City of London Brewery Co.*, 8 Eq. 155; *Menzies* v. *Lightfoot*, 11 Eq. 459; *London & County Banking Co.* v. *Ratcliffe*, 6 App. Cas. 722.

As to the appropriation of payments made by the borrower to the original incumbrancer, see *Hipkins* v. *Amery*, 2 Giff. 292; 6 Jur. N. S. 1047; *London & County Banking Co.* v. *Ratcliffe*, 6 App. Cas. 722.

The principle of *Hopkinson* v. *Rolt* applies to registered mortgages of ships. *Benwell Tower*, 72 L. T. 664.

Lien of company on shares.

Where the articles of association of a limited company gave the company "a first and permanent lien and charge . . . upon every share for all debts due from the holder thereof," and a shareholder pledged the share certificates with a bank to secure the balance due and to become due on his current account, it was held that the company had no priority over advances made by the bank, in respect of monies which became due from the shareholder to the company after the company had notice of the pledge. *Bradford Banking Co.* v. *Briggs*, 12 App. Cas. 29.

Fines to building society.

Fines secured by covenant in a mortgage to a building society form part of the principal and bear interest. *Provident Building Society* v. *Greenhill*, 9 Ch. D. 122.

Security for more than actual advance.

Since the repeal of the Usury Laws, a mortgage may, in the absence of fraud or oppression, stand as a security for the amount of the loan as stated in the deed, although a smaller sum was in fact advanced. *Potter* v. *Edwards*, 26 L. J. Ch. 468; *Wallingford* v. *Mutual Society*, 5 App. Cas. 685, 702, 709; *Mainland* v. *Upjohn*, 41 Ch. D. 126.

Debentures issued at a discount.

A limited company may validly issue debentures at a discount or make them redeemable at a premium. *In re Anglo-Danubian Co.*, 20 Eq. 339; *In re Regent's Canal Ironworks Co.*, 3 Ch. Div. 43; *Campbell's Case*, 4 Ch. D. 470.

Contract for commission.

Where the mortgagee is entitled under the mortgage deed to charge a commission of 2½ per cent. upon any renewals of a promissory note, given as a collateral security, which the

mortgagee may accept, the mortgagee may claim the commission, either in taking the account of what is due under the mortgage, or under the head of just allowances. *Bucknell* v. *Vickery*, 64 L. T. 701 (P. C.), where, however, it was held that no renewal had taken place.

These cases must be distinguished from *Edwards' Estate* (11 Ir. Ch. 367), *Broad* v. *Selfe* (11 W. R. 1036), and *James* v. *Kerr* (40 Ch. D. 449), which went on the ground that a mortgagee could not contract for a collateral advantage. The doctrine that a mortgagee cannot make the mortgaged property a security for sums due to him for professional services in connection with the property is independent of the Usury Laws, though it may have originated in them.

Where on a loan of 200*l.* the mortgagees, who were auctioneers, were authorized to sell the mortgaged property, and out of the proceeds to retain 200*l.* with interest, and a commission of 5 per cent. on the amount realized, and the mortgagor agreed to pay a commission of 5 per cent. on the value of the property if he redeemed it before sale, it was held that he could redeem without paying the commission. *Broad* v. *Selfe*, 11 W. R. 1036.

Evidence admissible of actual advance.

During the subsistence of the Usury Laws, a mortgagor was entitled to bring forward parol evidence to show that a less amount was advanced than appeared by the deed; and this rule still holds good. *Mainland* v. *Upjohn*, 41 Ch. D. 126, 136.

Covenant to replace stock.

Where the mortgagor covenants to replace on a specified day an amount of stock lent him by the mortgagee, and the mortgage is allowed to continue beyond the date fixed, the mortgagor may redeem on transferring to the mortgagee the original amount of stock, and is not bound to pay the amount which it would have cost him to replace the stock on the prescribed day. *Blyth* v. *Carpenter*, L. R. 2 Eq. 501.

Principal payable at distant date

Where a debenture-holder, whose principal is made payable at a distant date, becomes entitled, by reason of the winding-up of the company, to realize his security, the realization must be for the full amount of the principal, as though the debt was then due. *Hodson* v. *Tea Co.*, 14 Ch. D. 859; *Wallace* v. *Universal Automatic Machines Co.*, (1894) 2 Ch. 547.

2. Interest.

Reduction of interest on punctual payment.

A clause in the mortgage providing that interest at a lower rate than the rate reserved will be accepted if paid within a limited time after interest becomes due, is valid, and must be strictly complied with. *Davis* v. *Thomas*, 1 R. & M. 506.

The mortgagor is entitled to the benefit of such a clause whenever interest becomes due, although on a previous occasion he neglected to avail himself of it. *Stanhope* v. *Manners*, 2 Ed. 197; *Wayne* v. *Lewis*, 3 Eq. R. 1021.

Such a clause ceases to apply when the mortgagee takes possession, although he takes possession by agreement and when there is no interest in arrear. *Stains* v. *Banks*, 9 Jur. N. S. 1049; revd. on appl., see 16 Ch. D. 55; *Union Bank of London* v. *Ingram*, 16 Ch. D. 53; *Cockburn* v. *Edwards*, 18 Ch. Div. 449, 463; *Bright* v. *Campbell*, 41 Ch. D. 388.

Clause raising interest on default.

A clause raising the rate of interest in default of punctual payment imposes a penalty, and equity will relieve against it. *Holles* v. *Wyse*, 2 Vern. 289; *Strode* v. *Parker*, 2 Vern. 316; *Nicholls* v. *Maynard*, 3 Atk. 519; *Stanhope* v. *Manners*, 2 Ed. 197; *Wallingford* v. *Mutual Society*, 5 App. Cas. 685, 702.

Proviso for fines or commission.

But a stipulation is valid which makes the mortgaged premises a security for fines payable to a building society (*a*), or for a commission of 1 per cent. per month on the instalment due (*b*), in default of punctual payment of instalments of principal and interest payable under the mortgage. (*a*) *Parker* v. *Butcher*, L. R. 3 Eq. 762; (*b*) *General Credit Co.* v. *Glegg*, 22 Ch. D. 549.

And the mortgagee of a ship may lawfully contract for a commission of 2 per cent. on any cash advance remaining unpaid for four months or less. *Benwell Tower*, 72 L. T. 664.

No provision for interest after first year.

Where a mortgage did not expressly provide for interest after the first year, a covenant by the mortgagor not to transfer the mortgaged property until payment in full of principal and interest was held to imply a contract to pay interest at the prescribed rate until repayment of the principal. *Mathura Das* v. *Raja Narindar Bahadur Pal*, 12 T. L. R. 609.

No provision for interest.

Where the mortgage contains no provision for interest,

interest will be allowed as against the mortgagor seeking redemption. *Ex parte Hirtzel*, 3 De G. & Jo. 464 (5 per cent.); *In re Kerr's Policy*, 8 Eq. 331 (4 per cent.).

Where the mortgagee contracts to re-convey the mortgaged property on payment of the amount lent, he cannot claim interest on that amount in a suit for redemption. *Thompson* v. *Drew*, 20 B. 49; see, however, *Ashwell* v. *Staunton*, 30 B. 52.

Interest where sale is set aside.

Where a sale is set aside on equitable grounds and the property sold is treated merely as a security for the amount advanced, interest will be allowed on that amount, apparently at 5 per cent. *Wood* v. *Abrey*, 3 Madd. 417; *Douglas* v. *Culverwell*, 4 D. F. & J. 20; *In re Unsworth's Trust*, 2 Dr. & Sm. 337; *Macleod* v. *Jones*, 53 L. J. Ch. 534.

The question as to the rate to be allowed must be a matter in each case for the discretion of the judge, having regard to the nature of the security and the fact that the rate is continually falling.

Rate of interest where none specified.

Where a mortgage provides for the payment of interest at a specified rate for a limited time, it has been suggested that the mortgagor might not be allowed to redeem except on the terms of paying interest at the specified rate, however high, during the continuance of the security. *In re Roberts*, 14 Ch. Div. 49, 52; *Mellersh* v. *Brown*, 45 Ch. D. 225, 230.

It is conceived that no distinction ought to be made between the rate payable in such a case in an action on the covenant and in a redemption action. If there is no implied contract to pay interest at the higher rate after the prescribed time, there can be no equitable ground for imposing payment at that rate as a condition of redeeming.

Where the mortgagor, under an agreement dated the 24th of March, 1876, agreed to repay the loan with interest at 5 per cent. per month on the 24th of April, 1876, and charged a reversionary interest with payment of the loan and interest at the rate aforesaid, and also agreed to execute a legal mortgage, interest was only allowed at 5 per cent. per annum after the 24th of April, 1876. *Wallington* v. *Cook*, 47 L. J. Ch. 508.

Contract for compound interest formerly invalid,

Under the old law, founded on the Usury Acts, a mortgagee could not, in the original contract of mortgage, stipulate for compound interest; but, when interest was due, a fresh agreement could be made turning it into principal. *Lord Ossulston* v. *Lord Yarmouth*, 2 Salk. 449; *Brown* v. *Barkham*, 1 P. W. 653; *Thornhill* v. *Evans*, 2 Atk. 331; *Bosanquett* v. *Dashwood*, Ca. t. Talb. 38; *Ex parte Bevan*, 9 Ves. 223; *Chambers* v. *Goldwin*, 9 Ves. 254, 271; *Mainland* v. *Upjohn*, 41 Ch. D. 126, 136.

except in mercantile transactions.

This had no application to mercantile transactions. In mercantile transactions, compound interest could be given, either expressly or by contract implied from the usage of trade. *Morgan* v. *Mather*, 2 Ves. J. 15.

Therefore, a mortgage of land made to a banker to secure the floating balance of a customer's account was allowed to stand as a security for a balance composed partly of interest upon interest. *Lord Clancarty* v. *Latouche*, 1 Ba. & Be. 420; *Rufford* v. *Bishop*, 5 Russ. 346; see *Thomas* v. *Cooper*, 18 Jur. 588.

Compound interest may now be stipulated for,

Now, compound interest may be stipulated for by the mortgage deed. *Clarkson* v. *Henderson*, 14 Ch. D. 348.

The question, therefore, whether compound interest is payable is a question of construction.

but is not implied,

In the absence of contract, express or implied, simple interest only can be charged on a mortgage account. *Daniell* v. *Sinclair*, 6 App. Cas. 181.

except in mortgages to bankers.

Compound interest is incidental to the relation between banker and customer.

1. Therefore, where a mortgage is given to secure the fluctuating balance of a banking account, the banker is entitled to charge compound interest, with yearly or even half-yearly rests. *Clancarty* v. *Latouche*, 1 Ba. & Be. 420; *Rufford* v. *Bishop*, 5 Russ. 346; *Crosskill* v. *Bower*, 32 B. 86; *National Bank of Australasia* v. *United Hand-in-Hand Co.*, 4 App. Cas. 391, 409.

The right of a banker to charge compound interest only exists so long as the relation of banker and customer exists. Therefore, after the customer's death or insolvency, the banker

is only entitled to charge simple interest upon the amount then due. *Fergusson* v. *Fyffe*, 8 Cl. & F. 121; *Crosskill* v. *Bower*, 32 B. 86; *Williamson* v. *Williamson*, 7 Eq. 542; *Barfield* v. *Loughborough*, 8 Ch. 1, 7.

2. Where a mortgage is given by a customer to a banker for a fixed sum and not for a general balance, at a fixed or specified rate of interest, the banker cannot include that sum in the banking account so as to charge compound interest upon it. *Mosse* v. *Salt*, 32 B. 269; *London Chartered Bank of Australia* v. *White*, 4 App. Cas. 413, 424; *Stewart* v. *Stewart*, 27 L. R. Ir. 351.

Tender stops interest running.

A proper tender stops the running of interest on the mortgage debt if the mortgagor keeps the money ready to pay over to the mortgagee. *Gyles* v. *Hall*, 2 P. W. 377; *Cliff* v. *Wadsworth*, 2 Y. & C. C. 598; *Kinnaird* v. *Trollope*, 42 Ch. D. 610; *Bank of New South Wales* v. *O'Connor*, 14 App. Cas. 273, 284.

As to tender, see p. 504.

It is doubtful whether Order XXII. r. 3, imposes on a defendant in a foreclosure action who relies on a tender the obligation of payment into Court. See *Kinnaird* v. *Trollope*, 42 Ch. D. 610, 618.

A mortgagee is not entitled to interest on interest in arrear paid by him on taking a transfer of the mortgage. *Cottrell* v. *Finney*, 9 Ch. 541.

Interest under foreclosure decree.

Where there are successive mortgages, and a decree is made for the foreclosure of the subsequent mortgagees and the mortgagor, which directs the computation of subsequent interest upon the amount found due to the prior incumbrancer, interest must be calculated upon the total amount certified as due, and not merely on so much as consists of principal, or principal and costs. *Bickham* v. *Cross*, 2 Ves. S. 471; *Perkyns* v. *Baynton*, 1 B. C. C. 574; *Elton* v. *Curteis*, 19 Ch. D. 49.

3. Costs, Charges, and Expenses.

The mortgagee is entitled to all that his contract or the legal or equitable consequences of it entitle him to receive, and all the costs properly incurred in ascertaining or defending

such rights whether at law or in equity. *Detillin* v. *Gale*, 7 Ves. 583; *Dryden* v. *Frost*, 3 My. & Cr. 670; *Cotterell* v. *Stratton*, 9 Ch. 514; *National Provincial Bank of England* v. *Games*, 31 Ch. Div. 582.

Costs, charges, and expenses do not constitute debt.

The mortgagee's right to add his proper charges and expenses to his security is not founded on an implied contract by the mortgagor to pay them, and they do not constitute a debt of the mortgagor in respect of which an action can be brought. *Ex parte Fewings*, 25 Ch. Div. 338, 352.

Charges and expenses of a mortgagee which he would be entitled to add to his security in a redemption action do not give him any right against the mortgagor inconsistent with the terms of the mortgage deed. Thus, if he has agreed not to enforce his security for a specified time, he cannot enforce any lien for salvage payments before the expiration of that time. *Burrowes* v. *Molloy*, 2 J. & Lat. 521, 528; *Haywood* v. *Gregg*, 24 W. R. 157; see also p. 340.

Costs of proceedings between mortgagee and mortgagor.

The right of the mortgagee to add his charges and expenses to his security extends to the costs of proceedings between mortgagee and mortgagor. *National Provincial Bank of England* v. *Games*, 31 Ch. Div. 582.

Costs of preparing the mortgage.

It is doubtful whether costs incurred by the mortgagee before the completion of the contract, *e.g.* the costs of preparing the mortgage deed, can be charged on the mortgaged property, although, when the contract is completed, they constitute a debt from mortgagor to mortgagee.

Counsel's fees.

It would appear that the mortgagee's fees to counsel for settling the mortgage are strictly mortgagee's costs. *Nicholson* v. *Jeyes*, 22 L. J. Ch. 833.

Valuation of property.

A fee paid to an auctioneer mortgagee by his co-mortgagee for a valuation of the property before the mortgage cannot be charged against the mortgagor. *Field* v. *Hopkins*, 44 Ch. Div. 524.

Costs of preparation by solicitor mortgagee.

Where the mortgagee was a solicitor and himself prepared the mortgage deed, it was held that the costs of preparing it could not be added to the security, the mortgagee being under no liability to pay them. *Gregg* v. *Slater*, 22 B. 314; 25 L. J. Ch. 440.

A solicitor mortgagee is now, under sect. 2 of the Mortgagees Legal Costs Act, 1895, entitled to recover from the mortgagor the costs of preparing the mortgage. See p. 166.

Costs of perfecting the security.

It is clear that when the relation of mortgagor and mortgagee has once been constituted, the mortgagee is allowed the costs of perfecting his security.

Where copyholds were mortgaged by deposit of copies of court roll, with a memorandum by which the mortgagor engaged to make a formal surrender when required, it was held that the mortgagor must bear the expenses of the surrender. *Pryce* v. *Bury*, (on appl.) 23 L. J. Ch. 678; 18 Jur. 967; see *Lane* v. *King*, Seton, 1622 *n.*

The mortgagee of a fund in Court is allowed the expense of obtaining a stop order on the fund when he is empowered by the mortgage deed to apply to the Court for that purpose. *Waddilove* v. *Taylor*, 6 Ha. 307.

An equitable mortgagee under a mortgage containing an agreement to execute a legal mortgage of all the mortgagor's estate and interest in the mortgaged premises is entitled to the costs of preparing the legal mortgage and of correspondence with the mortgagor as to granting it, but not to the costs of investigating the mortgagor's title. *National Provincial Bank of England* v. *Games*, 31 Ch. Div. 582.

Compensation for enfranchisement.

Any compensation or consideration money or expenses paid by a mortgagee under the Copyhold Act, 1894 (57 & 58 Vict. c. 46), in respect of an enfranchisement of, or redemption of a rent-charge on, the mortgaged property shall, by sect. 39 of that Act, be added to his mortgage.

Salvage payments.

A mortgagee can add to his charge any moneys paid by him to preserve the property, *e.g.* rent, renewal fines, premiums on life policies. *Lacon* v. *Mertins*, 3 Atk. 1, 4; *Hamilton* v. *Denny*, 1 Ba. & Be. 199, 202; *Bishop* v. *Mantell*, Seton, 1622 *n.*; *In re Leslie*, 23 Ch. D. 552, 560.

As to the right to add premiums on life policies, where the mortgagees are also the insurers, see *Grey* v. *Ellison*, 2 Jur. N. S. 511; *Fitzwilliam* v. *Price*, 4 Jur. N. S. 889.

Fire insurance premiums.

The Conveyancing Act, 1881, sect. 19, empowers a mortgagee, where the mortgage is made by deed after the 31st of

December, 1881, at any time after the date of the mortgage deed, to insure and keep insured against loss or damage by fire any building, or any effects or property of an insurable nature, whether affixed to the freehold or not, being or forming part of the mortgaged property. The premiums are made a charge on the mortgaged property, with the same priority, and with interest at the same rate, as the mortgage money.

This power may be varied, extended, or negatived by the mortgage deed [sect. 19, (2), (3)].

The amount of the insurance must not exceed the amount specified in the mortgage deed, or, if no amount is specified, two-thirds of the amount required to restore the property [sect. 23, (1)]. An insurance may not be effected, (1) where the mortgage deed declares that none is required, (2) where the mortgagor insures in accordance with the mortgage deed, or (3) where he insures to the amount in which the mortgagee is authorized to insure [sect. 23, (2)].

Where a mortgagee is not entitled by contract to insure the premises against fire at the mortgagor's expense, or to require the mortgagor to insure them, he cannot add to his security the premiums on policies effected by him. *Dobson* v. *Land*, 8 Ha. 216; S. C. 4 De G. & Sm. 575; *Bellamy* v. *Brickenden*, 2 J. & H. 137; see, however, *Scholefield* v. *Lockwood*, 9 Jur. N. S. 738.

Where a mortgagor has covenanted to insure against fire, but neglected to do so, the mortgagee cannot, as against a puisne mortgagee, himself insure the mortgaged premises and add the premiums to his security. *Brooke* v. *Stone*, 34 L. J. Ch. 251.

Salaries and commissions.

A mortgagee in possession is in general entitled to charge the salary of a bailiff employed in managing the property, or the commission of an agent employed in collecting the rents. *Bonithon* v. *Hockmore*, 1 Vern. 316; *Godfrey* v. *Watson*, 3 Atk. 517; *Davis* v. *Dendy*, 3 Madd. 170; *Leith* v. *Irvine*, 1 My. & K. 277, 296; *Union Bank of London* v. *Ingram*, 16 Ch. D. 53; *In re Wallis*, 25 Q. B. Div. 176, 182.

Expenses of management.

As against profits, all expenditure must be allowed which was incidental and necessary for the purpose of obtaining

them, but it can only be charged, as a rule, against the profits which it has produced. *Bompas* v. *King*, 33 Ch. Div. 279, 288.

Thus, the loss on opening and working a mine, which the mortgagee has properly opened, cannot be charged against the inheritance. *Hughes* v. *Williams*, 12 Ves. 493; *Millett* v. *Davey*, 31 B. 470.

Necessary repairs.

The mortgagee is entitled to a charge for necessary repairs under the head of just allowances. *Sandon* v. *Hooper*, 6 B. 246; *Tipton Green Colliery Co.* v. *Tipton Moat Colliery Co.*, 7 Ch. D. 192.

Permanent improvements.

A mortgagee is entitled to a charge on the property for reasonable expenditure which results in permanently improving it. *Sandon* v. *Hooper*, 6 B. 246; 14 L. J. Ch. 120; *Hipkins* v. *Amery*, 2 Giff. 292; 6 Jur. N. S. 1047; *Shepard* v. *Jones*, 21 Ch. Div. 469.

Notice to mortgagor of proposed expenditure.

Where the improvement is reasonable and produces a benefit, it is immaterial that no notice of it was given to the mortgagor. Where the mortgagee gives the mortgagor notice of proposed expenditure, and the mortgagor either expressly agrees to or acquiesces in it, the mortgagee is not obliged to show that the expenditure was reasonable. *Shepard* v. *Jones*, 21 Ch. Div. 469. See *Lord Trimleston* v. *Hamill*, 1 Ba. & Be. 377, 385; *Powell* v. *Trotter*, 1 Dr. & Sm. 388; 7 Jur. N. S. 206.

Where a purchase from a mortgagee is set aside, the mortgagor will not be allowed to recover the property without allowing for sums expended by the purchaser in lasting improvements—at any rate, if the mortgagor has acquiesced in them. *Davey* v. *Durrant*, 1 De G. & Jo. 535, 554; see also *Spurgeon* v. *Collier*, 1 Ed. 55, 63.

Interest on expenditure.

A mortgagee is allowed interest at the rate prescribed in the mortgage, if not exceeding the current rate, upon all charges and expenses, such as lasting improvements (*a*), expenditure in working mines (*b*), premiums on life policies (*c*), which he is entitled to add to his security. (*a*) *Quarrell* v. *Beckford*, 1 Madd. 269, 281; *Townley* v. *Moore*, Seton, 1621; *Glencross* v. *Pulman*, Seton, 1623; *Stephenson* v. *Green*, Seton,

1732. (*b*) *Norton* v. *Cooper*, 25 L. J. Ch. 121. (*c*) *Shand* v. *Stansfeld*, Seton, 1701; *Bellamy* v. *Brickenden*, 2 J. & H. 137.

On the question whether he is entitled to interest on necessary repairs, see Seton, 1640.

Costs of transfer.

Where a mortgagee assigns his mortgage without the concurrence of the mortgagor, and without calling on him to redeem, the costs of the transfer cannot be added to the mortgage debt. *In re Radcliffe*, 22 B. 201.

4. Costs of Litigation.

Costs of ejectment, etc.

1. The mortgagee is entitled to the costs of an ejectment brought to recover the mortgaged premises, whether from the mortgagor or from a stranger (*a*), and of seizing and holding a ship of which he has rightly taken possession (*b*). (*a*) *Millar* v. *Major*, 1 Coop. t. Cott. 550; *Horlock* v. *Smith*, 1 Coll. 298; *Sandon* v. *Hooper*, 6 B. 246. (*b*) *Samuel* v. *Jones*, 7 L. T. 760; *Wilkes* v. *Saunion*, 7 Ch. D. 188.

Costs of defending mortgagee's title.

The mortgagee is entitled to his costs of defending his mortgage at law. *Ramsden* v. *Langley*, Vern. 536.

The distinction taken in *Parker* v. *Watkins* (Joh. 133) between costs of defending the title for the benefit of all parties interested in the equity of redemption and costs of defending the mortgage title—the latter of which, it was stated, the mortgagee could not add to his security—does not appear consistent with principle.

An equitable mortgagee was not allowed the costs of an unsuccessful defence of an action at law for recovery of the mortgaged premises. *Dryden* v. *Frost*, 3 My. & Cr. 670.

A mortgagee of chattels from a person who represents himself as the true owner is entitled, as against his mortgagor, to the costs of unsuccessfully defending an action for damages brought by the true owner, but not to the costs of an appeal. *Ex parte Carr*, 11 Ch. Div. 62.

Where the mortgagee has properly instituted an action against a stranger, and has been given party and party costs, he will be entitled to have the difference between party and

party costs and solicitor and client costs allowed as charges and expenses. *In re Love*, 29 Ch. Div. 348.

Costs of abortive sale.

The mortgagee is entitled to the costs of an abortive sale. *Sutton* v. *Rawlings*, 3 Ex. 407.

But a mortgagee was not allowed the costs of an unsuccessful suit for specific performance of a contract to purchase the mortgaged property. *Peers* v. *Ceeley*, 15 B. 209; *Burke* v. *O'Connor*, 4 Ir. Ch. 418.

A person having a lien on a ship belonging to a company which was being wound up was held entitled to the costs of an application in the winding-up for leave to take proceedings in Admiralty. *In re Rio Grande Do Sul Steamship Co.*, 5 Ch. Div. 282.

Costs of proceedings to recover mortgage debt.

2. The costs of proceedings, whether by action or otherwise, to recover the mortgage debt or any part of it, and whether from the mortgagor or from a surety, may be added to the security. *Ellison* v. *Wright*, 3 Russ. 458; *Aberdeen* v. *Chitty*, 3 Y. & C. 382; *National Provincial Bank of England* v. *Games*, 31 Ch. Div. 582 (overruling *Lewis* v. *John*, 9 Sim. 366; and *Merriman* v. *Bonney*, 12 W. R. 461).

Thus, costs of a fruitless action against a surety, and costs of correspondence with a surety who has given a promissory note for part of the debt, may be added to the security. *National Provincial Bank of England* v. *Games*, 31 Ch. Div. 582.

Appeal from order allowing charges and expenses.

A mortgagor may appeal from an order in the redemption action allowing the mortgagee his charges and expenses incurred in other proceedings. *In re Chennell*, 8 Ch. Div. 492; *In re Beddoe*, (1893) 1 Ch. 547, 555.

Mortgagee's costs as against strangers.

An incumbrancer is always entitled to add to his security the costs of proceedings to which he is properly made party in respect of his incumbrance. In determining how far he can recover his costs from other parties to the proceedings, the following rules apply:—

Administration action.

1. In an administration action, where some of the residuary legatees have incumbered their shares, one set of costs only is allowed out of the estate in respect of each incumbered share, namely, the costs which the legatee would have got if

he had not incumbered his share. These costs are paid over to the incumbrancer. Any surplus after paying the incumbrancer's costs goes to the legatee. If there is a deficiency, the incumbrancer is entitled to be paid the residue of his costs out of the incumbered share. *Greedy* v. *Lavender*, 11 B. 417.

Partition action.

2. The same rule was adopted with regard to costs in a partition action in *Catton* v. *Banks*, (1893) 2 Ch. 221, and *Ancell* v. *Rolfe*, (1896) W. N. 9, not following *Belcher* v. *Williams* (45 Ch. D. 510), in which the costs of incumbrancers were paid out of the estate.

Proceedings under Lands Clauses Act.

3. On a petition, to which incumbrancers are parties, for payment out of court either to them or to the mortgagor (*a*), or for re-investment in land (*b*), of the purchase money of land taken compulsorily by a corporation under the Lands Clauses Consolidation Act, 1845, the incumbrancers are entitled to be paid by the corporation two guineas in respect of their costs of appearance, and add the rest of their costs to their security. (*a*) *In re Halstead United Charities*, 20 Eq. 48; *Ex parte Jones*, 14 Ch. D. 624. (*b*) *In re Gore Langton's Estates*, 10 Ch. 328.

This rule extends to incumbrancers under mortgages created after the compulsory taking. *In re Brooshooft's Settlement*, 42 Ch. D. 250; *In re Olive's Estate*, 44 Ch. D. 316.

Where the amount due under the mortgage is in dispute, the corporation must pay the costs of taking the account. *In re Bareham*, 17 Ch. Div. 329.

Proceedings under Settled Land Act.

4. On a sale by a tenant for life under the Settled Land Act, the costs of obtaining the concurrence of mortgagees of the life estate ought not, as a general rule, to be allowed out of capital. *Cardigan* v. *Curzon-Howe*, 40 Ch. D. 338; 41 Ch. Div. 375.

5. Costs of Redemption or Foreclosure Action.

A mortgagee is entitled, as part of his right of indemnity, to his general costs of suit, as between solicitor and client, in an action for foreclosure or redemption. *Dunstan* v. *Patterson*, 2 Ph. 341; *Cotterell* v. *Stratton*, 8 Ch. 295, 302; *Johnstone* v. *Cox*, 19 Ch. Div. 17; *In re Love*, 29 Ch. Div. 348; *Bank of*

New South Wales v. *O'Connor*, 14 App. Cas. 273, 278; see *Wickenden* v. *Rayson*, 25 L. J. Ch. 641.

Costs on County Court scale.

A mortgagee, who brings an action in the High Court to foreclose a mortgage to secure 50*l.* and interest, is entitled to his costs of the action, and not merely to such costs as he would have had if he had brought his action in the County Court. *Brown* v. *Rye*, 17 Eq. 343.

But in an action to foreclose a mortgage for 65*l.*, where both plaintiff and defendant lived at the same place, costs were only allowed on the County Court scale. *Crozier* v. *Dowsett*, 31 Ch. D. 67.

Order for personal payment of costs by mortgagor.

Where the security is insufficient, a mortgagor or puisne mortgagee who raises an untenable defence to an action for foreclosure will be ordered to pay the costs personally so far as increased by his defence. *Sharples* v. *Adams*, 1 N. R. 460; *Guardian Assurance Co.* v. *Lord Avonmore*, I. R. 7 Eq. 496; *Liverpool Marine Credit Co.* v. *Wilson*, 7 Ch. 507, 512.

Costs of action for sale.

An equitable mortgagee, whether by mere deposit of deeds or otherwise, is entitled to add to his security the costs of an action for sale. *Ex parte Barclay*, 5 D. M. & G. 403, 417; *Ward* v. *Wade*, 4 Drew. 602.

Costs of representative plaintiff.

Where one debenture-holder is substituted for another as plaintiff in the course of a debenture-holder's action, the costs of both are payable *pari passu*. *Batten* v. *Wedgwood Coal & Iron Co.*, 28 Ch. D. 317.

Costs of appeal.

Where a mortgagee appeals from the decision of a Court below, and the decision is reversed, he may add the costs of the appeal to his security. *Addison* v. *Cox*, 8 Ch. 76.

Where a mortgagor brings an action to redeem two estates, but is held entitled to redeem one only, the mortgagee may add to his security on the redeemable estate the costs of the action as to both properties. *Batchelor* v. *Middleton*, 6 Ha. 86.

Apportionment of costs.

The costs of an action to foreclose two mortgages of two distinct estates, where the mortgages are not liable to be consolidated, must be apportioned rateably between the two estates. *De Caux* v. *Skipper*, 31 Ch. Div. 635, overruling *Clapham* v. *Andrews*, 27 Ch. D. 679.

Interest on costs.

Costs of the action for redemption or foreclosure do not

carry interest, unless they are directed to be added to the security. The Judgments Act, 1838 (1 & 2 Vict. c. 110), sects. 17, 18, only gives interest on costs which one party is directed to pay to another, and not on costs directed to be paid out of an estate. *A.-G.* v. *Nethercote*, 11 Sim. 529; *Eardley* v. *Knight*, 41 Ch. D. 537.

Where a judgment directs costs to be added to the security, they carry interest at 4 per cent. from the date of the taxing-master's certificate. *Lippard* v. *Ricketts*, 14 Eq. 291; *Eardley* v. *Knight*, 41 Ch. D. 537.

Costs of persons claiming under mortgagee.

Costs of the foreclosure or redemption action to which the mortgagee is entitled include the costs of all persons claiming under him and made necessary parties by his act, *e.g.* the trustees of a settlement made by him or sub-mortgagees under him. *Wetherell* v. *Collins*, 2 Madd. 255; *Bartle* v. *Wilkin*, 8 Sim. 238; *Smith* v. *Chichester*, 2 D. & War. 393, 402.

Costs of assignment by a second mortgagee to the first mortgagee, after the institution of a foreclosure action by the first mortgagee, may be added to the security. *Coles* v. *Forrest*, 10 B. 552.

But where a mortgagee has assigned his interest after a decree for accounts in a redemption action, or after the institution of a foreclosure action, the extra costs occasioned by such assignments will not be charged on the mortgaged estate. *Barry* v. *Wrey*, 3 Russ. 465; *Coles* v. *Forrest*, 10 B. 552.

Costs of getting necessary parties.

A mortgagee is allowed the costs of procuring administration to an annuitant under the mortgagor's will as a necessary party to the foreclosure, the annuity being in arrear at the annuitant's death. *Hunt* v. *Fownes*, 9 Ves. 70.

In *Ward* v. *Barton* (11 Sim. 534) the ground on which the mortgagee was not allowed the costs of taking out administration to the mortgagor was, that the costs, having been incurred before the institution of the suit, were not costs of the action, and that therefore a special case ought to have made out for them.

Mortgagee's costs prior to costs of all

The mortgagee's right to costs cannot be affected by the acts of the mortgagor. He is entitled to his costs out of the

mortgaged property or the proceeds of sale in priority to the costs of all persons claiming under the mortgagor.

claimants under mortgagor.

Thus, he is entitled to his costs in priority to the provisional assignee of the mortgagor under the Insolvent Debtors' Act, although the assignee is without assets of the insolvent (*a*), or to the infant heir of the mortgagor (*b*). (*a*) *Hunter* v. *Pugh*, 1 Ha. 307 *n.*; *Appleby* v. *Duke*, 1 Ha. 303; 1 Ph. 272; *Clarke* v. *Wilmot*, 1 Ph. 276 (overruling *Peake* v. *Gibbon*, 2 R. & M. 354; *Woodward* v. *Haddon*, 4 Sim. 606; *Weaving* v. *Count*, 6 Sim. 439; *Boswell* v. *Tucker*, 1 B. 493). (*b*) *Wade* v. *Ward*, 4 Drew. 602.

Commissioners under the Commissioners' Clauses Act, 1847, who are mortgagors, are entitled, by virtue of sect. 60 of that Act, to be paid their costs out of the mortgaged property in priority to the claims of the mortgagees. *Batten, Proffitt & Scott* v. *Dartmouth Harbour Commissioners*, 45 Ch. D. 612.

Costs of Commissioners under Commissioners' Clauses Act, 1847.

The general rule, where there are successive mortgagees, is that the costs of each mortgagee of the redemption action are payable in the same priority as his principal and interest. This rule applies where there is a dispute as to priorities. *Barnes* v. *Racster*, 1 Y. & C. C. 401; *Wright* v. *Kirby*, 23 B. 463; *Johnstone* v. *Cox*, 19 Ch. Div. 17; *Harpham* v. *Shacklock*, 19 Ch. Div. 207, 215; *Pollock* v. *Lands Improvement Co.*, 37 Ch. D. 661, 668.

Priority of costs.

The priority of the mortgagee's costs over the costs of other parties to the redemption action is not affected by the fact that the mortgaged property is sold in the action. The proceeds of sale are applicable to payment of principal, interest, and costs of the several mortgagees, according to their priorities. *Wild* v. *Lockhart*, 10 B. 320; *Wade* v. *Ward*, 4 Drew. 602; 29 L. J. Ch. 42; *Cutfield* v. *Richards*, 26 B. 241; *Cook* v. *Hart*, 12 Eq. 459; *Pinchard* v. *Fellows*, 17 Eq. 421, not following *Macrae* v. *Ellerton*, 4 Jur. N. S. 967.

Where mortgaged property is sold in action.

As to cases where the same persons are first, third, and fifth mortgagees, see *Mutual Life Assurance Society* v. *Langley*, 32 Ch. Div. 475.

Where a judgment fixing priority between two incumbrancers is reversed on appeal, the successful plaintiff adds

Costs where judgment fixing priority

is reversed on appeal.

to his security so much of the costs of the action in the Court below as would have been incurred if the action had been a simple action for foreclosure, and no question of priority had been raised, and the defendant pays to the plaintiff the residue of the plaintiff's costs in the Court below and the whole of the costs of the appeal. *Northern Counties Insurance Co.* v. *Whipp*, 26 Ch. Div. 482, 496.

Where a puisne incumbrancer institutes a suit to redeem prior and foreclose subsequent incumbrancers and the mortgagor, his costs are added to his security, and have no priority over earlier charges. *Wright* v. *Kirby*, 23 B. 463.

In an action by a second mortgagee to redeem the first mortgagee and to foreclose the mortgagor, in default of the plaintiff redeeming, the action is dismissed with costs as against both defendants. *Hallett* v. *Furze*, 31 Ch. D. 312.

Exceptions to rule as to priority.

The general rule as to priority is subject to the following qualifications:—

Costs of salvage proceedings.

1. Where a puisne mortgagee institutes proceedings, the result of which is to preserve and realize the mortgaged property for the benefit of prior incumbrancers as well as his own, his costs, in so far as prior incumbrancers have had the benefit of them, are payable to him out of the mortgaged property in priority to their mortgage debts, and he adds his other costs to his security. *Ford* v. *Chesterfield*, 21 B. 426; *Wright* v. *Kirby*, 23 B. 463; *Batten, Proffitt & Scott* v. *Dartmouth Harbour Commissioners*, 45 Ch. D. 612; *Re Barne*, 62 L. T. 922; *Carrick* v. *Wigan Tramways Co.*, (1893) W. N. 98.

Costs of general administration.

2. Where the mortgagee institutes a suit for the general administration of the assets of the mortgagor, including the mortgaged premises, the costs of administration, including the costs of all necessary and proper parties, are payable out of the fund realized in priority to all debts, including that of the mortgagee. *Armstrong* v. *Storer*, 14 B. 535; *Walter* v. *Stanton*, 10 W. R. 570; *White* v. *Gudgeon*, 31 B. 545; *In re Spensley's Estate*, 15 Eq. 16; *Leonard* v. *Kellett*, 27 L. R. Ir. 418.

Proceedings for sale and administration.

3. Where a mortgagee, whether legal or equitable, institutes a suit, both to realize his mortgage security by sale, and also

for the general administration of the mortgagor's estate, he is entitled to the entire produce of the mortgaged property towards payment of his debt and costs, subject to the expenses of realization, but in priority to other costs; as regards the general assets, the costs of all parties are paid as in a general administration. *Tipping* v. *Power*, 1 Ha. 405; *Tuckley* v. *Thompson*, 1 J. & H. 126; 29 L. J. Ch. 548; *In re Marine Mansions Co.*, 4 Eq. 601; *Pinchard* v. *Fellows*, 17 Eq. 421; *Leonard* v. *Kellett*, 27 L. R. Ir. 418.

Consent to sale in administration action.

4. Where, in an administration action, a mortgagee comes in and consents to a sale of the mortgaged property free from incumbrances, he is entitled to be paid his principal, interest, and costs out of the proceeds of sale, subject to the actual costs of the sale, but in priority to the general costs of the action, including the costs of the sale incurred by other parties to the action. The language of the cases is, however, not quite uniform. *Hepworth* v. *Heslop*, 3 Ha. 485; *Re Mackinlay*, 2 D. J. & S. 358; *Dighton* v. *Withers*, 31 B. 423; *Wonham* v. *Machin*, 10 Eq. 447; *Millar* v. *Johnston*, 23 L. R. Ir. 50; *Hilliard* v. *Moriarty*, (1894) 1 I. R. 316.

Debenture-holders coming in under winding-up.

5. Where debenture-holders come in under the winding-up, or where they take proceedings to enforce their security, and the liquidator under the winding-up is appointed receiver, and the property is realized by the liquidator, the debenture-holders are entitled to their principal, interest, and costs out of the fund realized, subject to the expenses of realization, but in priority to the general costs of the winding-up. *In re Marine Mansions Co.*, 4 Eq. 601; *In re Oriental Hotels Co.*, 12 Eq. 126; *In re Regent's Canal Ironworks Co.*, 3 Ch. Div. 411, 426.

Expenses of realization, what.

Expenses of realization include the costs of an abortive attempt to sell (*a*), and apparently the costs of preserving the property until sale, *e.g.* repairs, rates and taxes, and wages of caretaker, but not the costs of carrying on a business as a going concern (*b*). (*a*) *Batten* v. *Wedgwood Coal Co.*, 28 Ch. D. 317. (*b*) *In re Regent's Canal Ironworks Co.*, 3 Ch. Div. 411, 427. See *Lathom* v. *Greenwich Ferry Co.*, 72 L. T. 790.

In *In re Oriental Hotels Co.* (12 Eq. 126), the costs of

carrying on the business were given priority to the mortgagee, on the ground that they had been incurred under a consent order.

Order LXV., Rule 1, provides—

Order LXV., Rule 1.

"Subject to the provisions of the Acts and these Rules, the costs of and incident to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the court or judge: Provided that nothing herein contained shall deprive an executor, administrator, trustee, or mortgagee who has not unreasonably instituted or carried on or resisted any proceedings, of any right to costs out of a particular estate or fund to which he would be entitled according to the rules hitherto acted upon in the Chancery Division."

Mortgagee may lose right to costs, or be made to pay them.

A mortgagee's right to costs of suit may be lost, or he may be compelled to pay costs, through misconduct, such as resisting the right to redeem, making unfounded claims, or causing vexatious delays and costs during the progress of the account. *Detillin* v. *Gale*, 7 Ves. 583; *Morony* v. *O'Dea*, 1 Ba. & Be. 109, 121; *Harvey* v. *Tebbutt*, 1 J. & W. 197; *Cotterell* v. *Stratton*, 8 Ch. 295; *Cottrell* v. *Finney*, 9 Ch. 541, 551; *National Bank of Australasia* v. *United Hand-in-Hand Co.*, 4 App. Cas. 391, 412; *Bank of New South Wales* v. *O'Connor*, 14 App. Cas. 273, 278.

The mortgagee cannot be deprived of his costs or made to pay costs where the original decree directs the taxation of the mortgagee's costs; but he can where the costs are reserved by the judgment. *Quarrell* v. *Beckford*, 1 Madd. 269; *Wilson* v. *Metcalfe*, 1 Russ. 530; *Ashworth* v. *Lord*, 36 Ch. D. 545.

When costs not disallowed.

A mortgagee is not disallowed his costs merely because he makes a *bonâ fide* claim for more than is due to him (*a*), or because he refuses to furnish special accounts except at the mortgagor's expense (*b*), or because the mortgage deed is endorsed with a receipt for a larger amount than the actual loan (*c*). (*a*) *Cotterell* v. *Stratton*, 8 Ch. 295; *Cottrell* v. *Finney*, 9 Ch. 541, 551; *In re Watts*, 22 Ch. Div. 5; *Stone* v. *Lickorish*, (1891) 2 Ch. 363, 370. (*b*) *Norton* v. *Cooper*, 5 D. M. & G. 728. (*c*) *Dunstan* v. *Patterson*, 2 Ph. 341.

Mortgagee must pay costs of litigation after tender.

If the mortgagee has been paid off before suit, or if the mortgagor before suit makes a tender of the full amount then due, the mortgagee must bear the expense of subsequent litigation; and a direction may be inserted in the decree ordering him to pay costs contingently upon its turning out that he was paid off, or that less was due than the amount tendered. *Shuttleworth* v. *Lowther*, cit. 7 Ves. 586; *Cliff* v. *Wadsworth*, 2 Y. & C. C. 598; *Roberts* v. *Williams*, 4 Ha. 129; *Wilson* v. *Cluer*, 4 B. 214; *Harmer* v. *Priestley*, 16 B. 569; Seton, 1594; *Barlow* v. *Gains*, 23 B. 244; *Hosken* v. *Sincock*, 34 L. J. Ch. 435; *Ashworth* v. *Lord*, 36 Ch. D. 545; *Bank of New South Wales* v. *O'Connor*, 14 App. Cas. 273, 283; *Greenwood* v. *Sutcliffe*, (1892) 1 Ch. 1; Seton, 1895.

Misconduct of the mortgagee puts the costs within the discretion of the Court. The following cases illustrate the exercise of the judicial discretion.

Mortgagee, when made to pay costs.

A mortgagee who denied the right of the plaintiff to redeem (*a*), or set up a collusive decree of foreclosure (*b*), or that the mortgage was an absolute conveyance (*c*), or that he was entitled as purchaser under a sale to himself (*d*), or asserted an unfounded claim to tack (*e*), or to consolidate (*f*), or refused to furnish any accounts (*g*), has been made to pay the costs of the redemption action so far as occasioned by his improper conduct. (*a*) *Tomlinson* v. *Gregg*, 15 W. R. 51; *Hall* v. *Heward*, 32 Ch. Div. 430, 436; *Tarn* v. *Turner*, 39 Ch. Div. 456, 467. (*b*) *Harvey* v. *Tebbutt*, 1 J. & W. 197. (*c*) *Baker* v. *Wind*, 1 Ves. S. 160. (*d*) *Henderson* v. *Astwood*, (1894) A. C. 150, 162. (*e*) *Lacey* v. *Ingle*, 2 Ph. 413, 424; *Forbes* v. *Jackson*, 19 Ch. D. 615, 622. (*f*) *Squire* v. *Pardoe*, 66 L. T. 243; 40 W. R. 100. (*g*) *Snagg* v. *Frizell*, 3 J. & Lat. 383; *Powell* v. *Trotter*, 1 Dr. & Sm. 388; *Cassidy* v. *Sullivan*, 1 L. R. Ir. 313.

He has been made to pay costs in such a case, although the mortgagor made unsubstantiated charges of fraud. *Hayward* v. *Kersey*, 14 W. R. 999.

Where the mortgagee claimed too much under the mortgage contract, but the mortgagor offered too little, each party paid his own costs. *Fleming* v. *Self*, 3 D. M. & G. 997, 1029.

A mortgagee was not allowed the costs of taking accounts, when he only admitted that a certain sum was due from him, and the result of the accounts was that a much larger sum was due. *Charles* v. *Jones*, 35 Ch. D. 544.

Mortgagee, when disallowed costs.

Where the mortgagee's claim, although unfounded, was not frivolous, he was merely disallowed his costs (*a*), and even allowed to add them to his security (*b*). (*a*) *Credland* v. *Potter*, 10 Ch. 8; *Kinnaird* v. *Trollope*, 42 Ch. D. 610. (*b*) *Bird* v. *Wenn*, 33 Ch. D. 215.

Where the costs of the redemption action are directed to be paid by the mortgagee, the Court, where anything is coming to the mortgagee, does not order the costs to be paid to the mortgagor, but directs them to be taken in part discharge of what may be found due to the mortgagee. *Wheaton* v. *Graham*, 24 B. 483; *Forbes* v. *Jackson*, 19 Ch. D. 615.

Where the plaintiff in a redemption action proceeds by writ instead of originating summons, and the mortgagee is made to pay the costs, he will only be made to pay such costs as would have been incurred if the action had been commenced by summons. *Johnson* v. *Evans*, 60 L. T. 29.

Mortgagee can appeal from decree disallowing costs.

A decree in a redemption action which disallows the costs of the mortgagee, or orders him to pay costs, is of right appealable, and if it is reversed on appeal, the costs of the appeal will be added to the security. *Owen* v. *Griffith*, 1 Ves. S. 250; Ambl. 520; *Norton* v. *Cooper*, 5 D. M. & G. 728; *Cotterell* v. *Stratton*, 8 Ch. 295; *Turner* v. *Hancock*, 20 Ch. Div. 303; *In re Sarah Knight's Will*, 26 Ch. Div. 82, 90; *McDonnell* v. *McMahon*, 23 L. R. Ir. 283.

The cases of *Taylor* v. *Dowlen* (4 Ch. 697) and *In re Hoskin's Trusts* (6 Ch. Div. 281) are no longer authorities. See *Turner* v. *Hancock*, *supra*.

Mortgagor cannot appeal from order allowing costs.

The mortgagor cannot appeal from an order allowing the mortgagee his costs of the redemption action, except by leave of the judge making the order. *Charles* v. *Jones*, 33 Ch. Div. 80; see *In re Beddoe*, (1893) 1 Ch. 547.

A puisne mortgagee cannot appeal from an order in a suit for ascertaining priorities directing him to pay the costs of two prior incumbrancers. *Harpham* v. *Shacklock*, 19 Ch. Div. 207, 215.

Mortgagor can tax costs of mortgagee's solicitor.

As the mortgagor is liable to pay all costs which the mortgagee is liable to pay, he is a person liable under sect. 38 of the Solicitors Act, 1843 (6 & 7 Vict. c. 73), and can tax the costs of the mortgagee's solicitor, but the pendency of the foreclosure action is not such pressure as to entitle the mortgagor to taxation after payment. *In re Griffith, Jones & Co.*, 53 L. J. Ch. 305.

B. Personal Services of the Mortgagee.

Mortgagee entitled to indemnity only.

The contract between mortgagor and mortgagee gives the mortgagee a right to indemnity merely. Hence, a mortgagee cannot, in the absence of special provisions in the mortgage contract, charge against his mortgagor, as part of his costs, charges, and expenses properly incurred, remuneration for work done or labour undertaken by himself personally. *Bonithon* v. *Hockmore*, 1 Vern. 316; *Godfrey* v. *Watson*, 3 Atk. 517, 518; *Sclater* v. *Cottam*, 3 Jur. N. S. 633; *In re Wallis*, 25 Q. B. Div. 176; *In re Doody*, (1893) 1 Ch. 129.

Mortgagee collecting rents.

A mortgagee in possession cannot charge a commission for his trouble in collecting the rents. *Langstaffe* v. *Fenwick*, 10 Ves. 405; *Nicholson* v. *Tutin*, 3 Jur. N. S. 235; *Barrett* v. *Hartley*, L. R. 2 Eq. 789.

Where the mortgagee is a corporation, a director appointed by them to collect the rents cannot charge a commission. *Kavanagh* v. *Workingman's Benefit Building Society*, (1896) 1 I. R. 56.

Auctioneer mortgagee selling.

An auctioneer mortgagee, who sells the mortgaged property under a power of sale, cannot charge for personal trouble in effecting the sale and preparing the particulars, nor for commission. *Matthison* v. *Clarke*, 3 Drew. 3; *Furber* v. *Cobb*, 18 Q. B. Div. 494, 509.

Sale under authority of court.

Brokers, who were mortgagees of ships and cargoes under a mortgage in the form of a trust for sale, were disallowed their commission as brokers on a sale made by them as mortgagees, but allowed it on sales made under the authority of the Court in an action to realize their securities. *Arnold* v. *Garner*, 2 Ph. 231.

Mortgagees given benefit of discount.

Mortgagees, who insured ships for the mortgagor, were allowed to charge the full premiums paid with interest against him, although the insurance company allowed them 5 per cent. commission and 10 per cent. discount for cash. *Baring* v. *Stanton*, 3 Ch. Div. 148.

Where the mortgagee was entitled to add to his security premiums paid by him on a policy on the mortgagor's life, and the insurance office allowed a commission to an agent for all parties, who paid the premiums, it was held that the mortgagor was not entitled to deduct the commissions from the amount secured. *Leete* v. *Wallace*, 58 L. T. 577.

Mortgagee's Legal Costs Act, 1895. s. 3.

The Mortgagees Legal Costs Act, 1895 (58 & 59 Vict. c. 25), provides—

Sect. 3, (1). Any solicitor to or in whom, either alone or jointly with any other person, any mortgage is made or is vested by transfer or transmission, or the firm of which such solicitor is a member, shall be entitled to receive and recover from the person on whose behalf the same is done or to charge against the security for all business transacted and acts done by such solicitor or firm subsequent and in relation to such mortgage or to the security thereby created or the property therein comprised, all such usual professional charges and remuneration as he or they would have been entitled to receive if such mortgage had been made to and had remained vested in a person not a solicitor, and such person had retained and employed such solicitor or firm to transact such business and do such acts, and accordingly no such mortgage shall be redeemed except upon payment of such charges and remuneration.

(2) This section applies to mortgages made and business transacted and acts done either before or after the commencement of this Act.

Sect. 4. In this Act the expression "mortgage" includes any charge on any property for securing money or money's worth.

The Act does not affect judgments given before it passed. *Eyre* v. *Wynn-Mackenzie*, (1896) 1 Ch. 135.

This Act overrides the decisions by which a solicitor

mortgagee was only allowed costs out of pocket in respect of costs, charges, and expenses incurred by him in relation to the mortgage debt or security [*In re Wallis*, 25 Q. B. Div. 176; *Eyre* v. *Wynn-Mackenzie*, (1894) 1 Ch. 218], litigation undertaken by him in reference to the mortgage debt or security (*Sclater* v. *Cottam*, 3 Jur. N. S. 630), or the costs of the redemption action [*Stone* v. *Lickorish*, (1891) 2 Ch. 363].

The following cases, which, so far as they relate to solicitors, are no longer law, are still binding with respect to other agents employed by the mortgagor in reference to the mortgaged property.

Agent acting for himself and co-mortgagee.

1. A solicitor acting as solicitor for himself and a co-mortgagee is not entitled to profit costs. *Sclater* v. *Cottam*, 3 Jur. N. S. 630; *In re Doody*, (1893) 1 Ch. 129, overruling *In re Donaldson*, 27 Ch. D. 544.

Agent member of firm.

2. Where work is done by a firm of which the solicitor mortgagee is a member, his partners will be allowed the same share of the profit costs in the specific matter as they are entitled to in the general profits of the partnership business. *In re Doody*, (1893) 1 Ch. D. 129; *Wellby* v. *Still*, (1893) W. N. 98; *Eyre* v. *Wynn-Mackenzie*, (1894) 1 Ch. 218.

Whether mortgagee can by contract charge for professional services.

It is not so clear that a mortgagee cannot, by the original contract, give himself the right to charge for professional services in connection with the mortgage.

It has often been said that a mortgagee cannot stipulate for any collateral advantage beyond his principal, interest, and costs.

The only English cases in which the rule formed the *ratio decidendi* are *Broad* v. *Selfe* (11 W. R. 1036), stated above, p. 299, and *Benwell Tower* (72 L. T. 664), where it was held that the mortgagee of a ship could not contract for a commission of 2½ per cent. on the sale.

It has been held in Ireland that a proviso in a mortgage that the mortgagee should have 100*l.* a year for the trouble of management is void. *Comyns* v. *Comyns*, I. R. 5 Eq. 583; see also *Edwards' Estate*, 11 Ir. Ch. 367.

The rule has, however, often been recognized. *French* v. *Baron*, 2 Atk. 120; *Scott* v. *Brest*, 2 T. R. 238; *Chambers* v.

Goldwin, 9 Ves. 254, 271; *Browne* v. *O'Dea*, 1 Sch. & L. 115; *Drew* v. *Power*, 1 Sch. & L. 182; *Gubbins* v. *Creed*, 2 Sch. & L. 214; *Leith* v. *Irvine*, 1 M. & K. 277; *James* v. *Kerr*, 40 Ch. D. 449, 459; *Field* v. *Hopkins*, 44 Ch. D. 524, 530; *Eyre* v. *Wynn-Mackenzie*, (1894) 1 Ch. 218, 227.

Origin of rule.

It has sometimes been based on the Usury Laws, and sometimes on the protection which Equity gives to persons contracting at a disadvantage. The latter ground may be justifiable where, as in *Eyre* v. *Hughes* and *James* v. *Kerr*, the mortgagee is the mortgagor's solicitor at the time of the transaction. It may have been justifiable in the past on the grounds stated in *Gossip* v. *Wright* (32 L. J. Ch. 648, 653).

Borrowers are not now, necessarily and in the absence of special circumstances, at such a disadvantage in contracting with lenders as to make it expedient to continue as a rule of law applicable to every mortgage transaction a doctrine which impedes the freedom of contract.

The doctrine must be distinguished from two others which are closely connected with it: (1) the doctrine, which is no longer law, that a mortgagee cannot stipulate that the mortgaged property shall be charged with a larger amount than the actual loan; (2) the doctrine, which is still law, that no provision can be inserted in a mortgage to limit the right of redemption to a specified period or a specified class.

Solicitor mortgagee.

A stipulation in a mortgage prepared by a solicitor mortgagee giving him a commission for receiving the rents was held invalid. *Eyre* v. *Hughes*, 2 Ch. D. 148; see *James* v. *Kerr*, 40 Ch. D. 449.

Mortgagee of West India estate.

Even while the Usury Laws were in force, a mortgagee of a West India estate might stipulate for a commission on consignments while out of possession; but he could not stipulate for such a commission during his possession. *Bunbury* v. *Winter*, 1 J. & W. 255; *Leith* v. *Irvine*, 1 My. & K. 277, not following *Sayers* v. *Whitfield*, 1 Knapp, P. C. 133; *Faulkner* v. *Daniel*, 3 Ha. 199, 218.

C. What is debited to the Mortgagee.

Mortgagee must account for all sums received by virtue of mortgage.

The mortgagee is bound to bring into account all sums received by him by virtue of his mortgage security, *e.g.* rents and profits or proceeds of sale of the mortgaged property, and he cannot, as against the mortgagor's trustee in bankruptcy or subsequent incumbrancers, appropriate such sums in satisfaction of other claims by him against the mortgagor. *Johnson* v. *Bourne*, 2 Y. & C. C. 268; *Young* v. *English*, 7 B. 10; *Knight* v. *Bowyer*, 4 De G. & Jo. 619, 629; *Sawyer* v. *Goodwin*, 1 Ch. Div. 351, 358.

But where a mortgagor paid to a first mortgagee additional interest under a charge created after the mortgagee had notice of subsequent incumbrancers, it was held that they could not insist on having the additional interest brought into account in reduction of the principal due under the first mortgage. *Law* v. *Glenn*, L. R. 2 Ch. 634.

Dividends received by a first mortgagee from the estate of his solicitor who, without authority, invested in the mortgage must, if it proves a sufficient security, be returned to the solicitor's estate, and do not enure to the benefit of subsequent mortgagees. *Sawyer* v. *Goodwin*, 1 Ch. Div. 351.

Interest on balance.

Where there turns out to be a balance in the mortgagee's hands on taking the account, he will be charged with interest on that balance, even though he has not been in possession. *Smith* v. *Pilkington*, 1 D. F. & J. 120, 136.

Account on footing of wilful default.

A mortgagee who, in that character, enters into possession or receipt of the rents and profits of the mortgaged property is bound to account, not only for what he has received but for what, without wilful default, he might have received. *Sherwin* v. *Shakspear*, 5 D. M. & G. 517, 536; *Lord Kensington* v. *Bouverie*, 7 D. M. & G. 134, 157; *Parkinson* v. *Hanbury*, L. R. 2 H. L. 1; *Mayer* v. *Murray*, 8 Ch. D. 424.

He is bound to account on the footing of wilful default, though no charge of wilful default has been made on the pleadings and there has been no proof of it at the trial. *Mayer* v. *Murray*, 8 Ch. D. 424.

Rule charging wilful default extends to a business or debts.

The rule is not confined to land. It extends to a business of which the mortgagee has taken possession (*a*), or to debts of which the assignee has assumed control (*b*). (*a*) *Chaplin* v. *Young*, 33 B. 330, 337. (*b*) *Ex parte Mure*, 2 Cox, 63; *Williams* v. *Price*, 1 Si. & St. 581; *Glyn* v. *Hood*, 1 D. F. & J. 334, 349; *Mayer* v. *Murray*, 8 Ch. D. 424.

The rule has been applied, perhaps wrongly, where a purchaser, whose purchase was set aside, was held to have notice by his purchase deed that his vendor had no title. *Neesom* v. *Clarkson*, 2 Ha. 163; see *Parkinson* v. *Hanbury*, L. R. 2 H. L. 1, 17.

Rule only applies where mortgagee enters *qua* mortgagee.

The rule does not apply where the mortgagee enters into possession not as mortgagee but in another character. A person who takes possession, honestly believing himself to have a title as purchaser, and who, on his purchase being afterwards set aside, is given a lien on the estate for his purchase-money, is not to be treated as mortgagee in possession within the rule. *Morony* v. *O'Dea*, 1 Ba. & Be. 109; *Parkinson* v. *Hanbury*, L. R. 2 H. L. 1 (overruling *Adam* v. *Sworder*, 2 D. J. & S. 60; 33 L. J. Ch. 325).

A mortgagee of the fee who enters into possession as purchaser of a life estate in the property is not liable to account as mortgagee in possession while the life estate continues. *Whitbread* v. *Smith*, 3 D. M. & G. 727, 741.

A mortgagee cannot, by contract with his mortgagor, go into possession as agent of the mortgagor, and thereby escape the liabilities of mortgagee in possession as against puisne incumbrancers. *In re McKinley's Estate*, I. R. 7 Eq. 467.

Where a prior mortgagee, who has obtained a lease of the mortgaged premises after the creation of a puisne mortgage, enters into possession, he becomes liable to the puisne mortgagee as mortgagee in possession. *Gregg* v. *Arrott*, Ll. & G. t. Sugd. 246.

If a solicitor, with or without the consent of his client, pays off a mortgage debt of the client, he does not thereby alter the relation between them, nor, if he receives the rents, is he accountable as mortgagee in possession. *Ward* v. *Carttar*, L. R. 1 Eq. 29.

A person who enters into possession not as mortgagee may perhaps afterwards become mortgagee in possession with the attendant liabilities. *Morony* v. *O'Dea*, 1 Ba. & Be. 109; *Parkinson* v. *Hanbury*, L. R. 2 H. L. 1, 14.

Effect of attornment clause.

Authority is conflicting on the question whether, where a tenancy is created between mortgagor and mortgagee by an attornment clause, the mortgagee is to be treated as mortgagee in possession, as between himself and puisne incumbrancers, and as liable to account upon that footing.

In favour of treating the mortgagee as mortgagee in possession are dicta in *In re Stockton Iron Furnace Co.*, 10 Ch. Div. 335, 353, 356, 357; *Ex parte Jackson*, 14 Ch. Div. 725, 745; *Ex parte Punnett*, 16 Ch. Div. 226, 235; *Marsh* v. *Green*, (1892) 2 Q. B. 330, 336.

Bacon, V.C., however, declined to take an account on the footing of wilful default. *Stanley* v. *Grundy*, 22 Ch. D. 478.

It seems clear that a mortgagee with an attornment clause is not liable to account, as against his mortgagor, on the footing of wilful default. *Per* Selborne, C., in *Ex parte Harrison*, 18 Ch. Div. 127, 135.

Judgment creditor.

A judgment creditor who has been in possession under an elegit must account as mortgagee in possession. *Bull* v. *Faulkner*, 1 De G. & Sm. 685.

What amounts to taking possession.

When the mortgagor has been left in occupation of the estate by the mortgagee, any act which puts an end, constructively or by express agreement between the parties, to the mortgagor's tenancy determines his occupation and leaves it in the hands of the mortgagee. *Noyes* v. *Pollock*, 32 Ch. Div. 53.

Where an estate is let to tenants, notice given by the mortgagee to the tenants not to pay the rents to the mortgagor is a taking possession. *Heales* v. *M'Murray*, 23 B. 401.

But intercepting the rents after they have been received by the mortgagor's agent, though the mortgagee gets the actual cheques or cash paid by the tenants, is not a taking possession. To constitute a taking possession, the mortgagee must deprive the mortgagor of the control and management of the estate. *Noyes* v. *Pollock*, *supra*; see *Horlock* v. *Smith*, 6 Jur. 478.

The fact that the mortgagee insures the mortgaged property does not show that he is in possession. *Ward* v. *Carttar*, L. R. 1 Eq. 29.

Mortgagee may take possession of part.

A mortgagee may take possession of part of the mortgaged property without taking possession of the whole. *Soar* v. *Dalby*, 15 B. 156; *Simmins* v. *Shirley*, 6 Ch. D. 173.

Mortgagee cannot give up possession when he pleases.

A mortgagee in possession cannot give up possession when he pleases. *In re Prytherch*, 42 Ch. D. 598.

But the Court will, in exceptional cases, relieve him by appointing a receiver under sect. 25, (8) of the Judicature Act, 1873. *Tillett* v. *Nixon*, 25 Ch. D. 238; *Mason* v. *Westoby*, 32 Ch. D. 206; *County of Gloucester Bank* v. *Rudry Merthyr Colliery Co.*, (1895) 1 Ch. 629.

Mortgagee in possession transferring security.

Where a mortgagee in possession voluntarily transfers his security, he is liable for any future wilful neglect or default of the transferee, but he is not liable where the transfer is made under an order of the Court. *Hall* v. *Heward*, 32 Ch. Div. 430.

And a mortgagee in possession is accountable, on the footing of wilful default, for whatever is received by a purchaser under a power of sale which, as against the mortgagor, was invalidly exercised. *National Bank of Australasia* v. *United Hand-in-Hand Co.*, 4 App. Cas. 391, 409.

Occupation rent.

A mortgagee of houses or lands who occupies the houses or farms the lands is chargeable with an occupation rent, which will be the highest rent that could have been obtained for the property. *Lord Trimleston* v. *Hamill*, 1 Ba. & Be. 377, 385; *Marriott* v. *Anchor Reversionary Co.*, 3 D. F. & J. 177, 193.

The mortgagee will not be charged with an occupation rent unless he is in occupation, either personally or by his servants. *Trulock* v. *Robey*, 15 Sim. 265.

A mortgagee who sells and lets the purchaser into possession before the time fixed for completion is not liable as occupying through the purchaser. *Shepard* v. *Jones*, 21 Ch. Div. 469.

A mortgagee will not be charged a higher occupation rent on account of improvements made by him unless he is credited with his expenditure on the improvements. *Bright* v. *Campbell*, 54 L. J. Ch. 1077.

Rents.

A mortgagee in receipt of rents is answerable, not only for what the tenants pay, but for not letting the property, if he could have let it, and for not getting the full rents from the tenants, if they could have paid them. *Hughes* v. *Williams*, 12 Ves. 493; *Brandon* v. *Brandon*, 10 W. R. 287; *Noyes* v. *Pollock*, 32 Ch. Div. 53, 61; *White* v. *City of London Brewery Co.*, 42 Ch. Div. 237.

If mortgagees in possession of a public-house let the premises with a restriction that the tenant should only take beer of their brewing, they must account for such additional rent as might have been got if the premises had been let without restriction. *White* v. *City of London Brewery Co.*, 39 Ch. D. 559; 42 Ch. Div. 237.

A mortgagee is not bound to distrain for rent due from a tenant, nor is he answerable if he does not realize property of a third person taken under a distress, but restores it, under threats of legal proceedings, to the owner. *Cocks* v. *Gray*, 1 Giff. 77.

Receipts by agent.

Everything which the mortgagees receive by their agent is an item for which they are liable to account. *Noyes* v. *Pollock*, 30 Ch. Div. 336; *Young* v. *Jarvis*, Seton, 1580.

Where mortgagees, who are also lessees, authorize sub-lessees to take coal contrary to the terms of the lease, they are chargeable with the value of the coal taken, as much as if they had received it themselves. *Taylor* v. *Mostyn*, 33 Ch. Div. 226.

Profits.

A mortgagee is chargeable with profits, such as fines or heriots, which he receives in respect of the mortgaged premises, but not with profits disconnected with the mortgaged premises, such as profits made by him as lessee of the property or made in supplying beer to a public-house in mortgage to him. *Taylor* v. *Mostyn*, 33 Ch. Div. 226, 232; *White* v. *City of London Brewery Co.*, 39 Ch. D. 559; 42 Ch. Div. 237.

An owner of one-half of a patent, who is also mortgagee of another half, is not liable to account to his mortgagor for profits made by him in working the patent. *Steers* v. *Rogers*, (1892) 2 Ch. 13; (1893) A. C. 232.

Profits obtained in working mines by a mortgagee who, by reason of his security being insufficient when he enters, is entitled to work them, must go in reduction of the mortgage debt. *Millett* v. *Davey*, 31 B. 470.

Damage and loss.

A mortgagee in possession is bound to act as a provident owner, and is chargeable with any damage or loss to the property in mortgage which has been caused by his improper conduct. *Wragg* v. *Denham*, 2 Y. & C. Ex. 117; *Sandon* v. *Hooper*, 6 B. 246; *Perry* v. *Walker*, 24 L. J. Ch. 319; 1 Jur. N. S. 746; 3 Eq. R. 721; *Taylor* v. *Mostyn*, 33 Ch. Div. 226, 234.

Thus, he is chargeable for loss through his neglect to perform the covenants in a lease where he is mortgagee of the term. *Perry* v. *Walker*, *supra*.

A mortgagee in possession who, his security being sufficient, destroys part of the inheritance is chargeable with its value. *Millett* v. *Davey*, 31 B. 470.

Where mortgagees are also lessees, they are chargeable with what they receive either as mortgagees or as lessees independently and in contravention of the terms of the lease, *e.g.* with the value of coal wrongfully taken by them. *Taylor* v. *Mostyn*, 33 Ch. Div. 226.

A mortgagee of land under which there were seams of coal, who allowed strangers to enter and work the mine for the purpose of exploring it, was charged with the value of coal taken by them, although they exceeded the authority which he gave them. *Hood* v. *Easton*, 2 Jur. N. S. 729; dissented from on appeal 2 Jur. N. S. 917.

In ascertaining the value, the mortgagee will be allowed the costs of bringing the coal to the surface, but not of severing it from the mine. *Taylor* v. *Mostyn*, 33 Ch. Div. 226; not following *Thorneycroft* v. *Crockett*, 16 Sim. 445, or *Hood* v. *Easton*, 2 Jur. N. S. 729, cases in which neither expense was allowed.

Mortgagee using ship recklessly.

In an exceptional case, a mortgagee who took possession of a ship and employed it in a reckless manner was charged with its value when he took possession. *Marriott* v. *Anchor Reversionary Co.*, 2 Giff. 457; 3 D. F. & J. 177.

A bill of sale holder is chargeable with injury done to the mortgaged chattels by him in removing them after seizure. *Johnson* v. *Diprose*, (1893) 1 Q. B. 512. Grantee of bill of sale injuring chattels.

An account against a mortgagee in possession may be taken either with or without annual rests.

Where no annual rests are directed, the account is taken as follows. All the mortgagee's receipts, whether arising from rents, profits, or accidental payments, are set down in one column; the interest due and his costs, charges, and expenses are set down in the second column, and the capital debt in the third. The difference between the aggregate of the first column and the aggregate of the second and third columns is the sum due to or from the mortgagee. *Thompson* v. *Hudson*, 10 Eq. 497; *Union Bank of London* v. *Ingram*, 16 Ch. D. 53; *Cockburn* v. *Edwards*, 18 Ch. Div. 449. Account where rests are not directed.

Where the mortgagee sells part of the mortgaged property and the purchase-money is more than sufficient to pay all interest and costs due up to the sale, the surplus must go in discharge of the principal. *Thompson* v. *Hudson*, 10 Eq. 497.

A direction to take an account with annual rests is equivalent to a direction to charge the accounting party with compound interest. If the rents and profits of the mortgaged premises in any year exceed the interest due to the mortgagee in that year, and the expenses incurred by him which are properly chargeable in account against income, the surplus of such rents and profits go in discharge of principal, and he is only credited with interest for the following year on the balance of principal found due. When, on making a rest, it appears that the mortgage debt has been fully paid, the surplus of receipts by the mortgagee becomes a debt due from him to the mortgagor, carrying interest at 4 per cent. Interest on the balance found due from him on making a rest will, together with the rents and profits received during the year, be added to such balance at the end of the year, and interest will then be charged on the aggregate sum. *Raphael* v. *Boehm*, 11 Ves. 92; 13 Ves. 407, 590; *Cotham* v. *West*, Seton, 984, 1620; *Heighington* v. *Grant*, 5 My. & Cr. Account with annual rests.

258; *Blackford* v. *Davis*, 4 Ch. 304, 308; *Ashworth* v. *Lord*, 36 Ch. D. 545.

The rate of interest will be 4 per cent. *Quarrell* v. *Beckford*, 1 Madd. 269; *Wilson* v. *Metcalfe*, 1 Russ. 530; *Horlock* v. *Smith*, 1 Coll. 287; *Montgomery* v. *Calland*, 14 Sim. 79; *Ashworth* v. *Lord*, 36 Ch. D. 545.

Under special provisions in a decree, it was held that sums received by the mortgagee in respect of the mortgaged premises at times intermediate between the dates of the annual rests must be applied, when they exceeded the interest, to reduce principal. *Binnington* v. *Harwood*, T. & R. 477; see *Raphael* v. *Boehm*, 11 Ves. 92, 102.

Annual rests are directed in an account of occupation rent, as well as in an account of rents and profits. *Donovan* v. *Fricker*, Jac. 165; *Wilson* v. *Metcalfe*, 1 Russ. 530.

Where annual rests are directed, they are continued after the judgment and until the certificate. *Ashworth* v. *Lord*, 36 Ch. D. 545.

Annual rests directed if no interest in arrear when possession is taken.

Under the following circumstances the account against a mortgagee in possession is directed with annual rests:—

1. Annual rests are directed if no interest was in arrear when the mortgagee took possession. *Shephard* v. *Elliot*, 4 Madd. 254; *Scholefield* v. *Ingham*, Coop. P. C. 477; *Finch* v. *Brown*, 3 B. 70; *Wilson* v. *Cluer*, 3 B. 136; *Horlock* v. *Smith*, 1 Coll. 287; *Nelson* v. *Booth*, 3 De G. & Jo. 119.

This rule does not apply to a mortgagee who takes possession of leaseholds under a reasonable apprehension that they will be forfeited through the mortgagor's default. *Patch* v. *Wild*, 30 B. 99.

If interest was in arrear when the mortgagee took possession, he does not become liable to account with annual rests from the time when the arrear is paid off. *Davis* v. *May*, 19 Ves. 382; G. Coop. 238; *Latter* v. *Dashwood*, 6 Sim. 462; *Wilson* v. *Cluer*, 3 B. 136; *Scholefield* v. *Lockwood*, (No. 3) 32 B. 439; *Cockburn* v. *Edwards*, 18 Ch. Div. 449.

or if rest is made by parties,

But where, after the mortgagee has taken possession, there is a settlement of account between him and the mortgagor, by which it appears either that no interest is due, or that any

interest due has been satisfied as interest by being converted into principal, such settlement must be considered as a rest made by the parties themselves, and the mortgagee continuing in possession after the statement of such an account must be treated as a mortgagee who takes possession, no interest being in arrear. *Wilson* v. *Cluer*, 3 B. 136; *Cockburn* v. *Edwards*, 18 Ch. Div. 449, 458, 463.

or if mortgagee treats mortgage as absolute conveyance,

2. A mortgagee who takes possession on the footing that his mortgage is an absolute conveyance is treated as a mortgagee who took possession when no interest was in arrear, and must account with annual rests. *Donovan* v. *Fricker*, Jac. 165; *Douglas* v. *Culverwell*, 3 Giff. 251; 4 D. F. & J. 20.

or from time when debt is fully paid,

3. Annual rests are directed against a mortgagee in possession from the time at which the mortgage debt was fully paid. *Wilson* v. *Metcalfe*, 1 Russ. 530; *Montgomery* v. *Calland*, 14 Sim. 79; *Ashworth* v. *Lord*, 36 Ch. D. 545. In *Quarrell* v. *Beckford* (1 Madd. 269), simple interest only was given.

or if mortgagee sets up title as owner.

4. Annual rests may be directed against a mortgagee in possession, though no arrear of interest was due when he took possession, if he sets up a title as absolute owner. *Incorporated Society* v. *Richards*, 1 D. & War. 258, 334; *National Bank of Australia* v. *United Hand-in-Hand Co.*, 4 App. Cas. 391, 409.

The old cases (such as *Robinson* v. *Cumming*, 2 Atk. 409; *Gould* v. *Tancred*, 2 Atk. 533, followed in *Carter* v. *James*, 29 W. R. 437) which directed annual rests whenever the rents were largely in excess of interest are no longer law. See *Nelson* v. *Booth*, 3 De G. & Jo. 119.

II. Accounts in an Action to recover Surplus Proceeds of Sale.

The mortgagor, in an action to recover surplus proceeds of sale, is subject to the same equitable terms as in a redemption action.

Improvements.

Where the selling price of property has been increased by the mortgagee's outlay, the mortgagor cannot recover the price without crediting the mortgagee with his outlay, in so far

as it has increased the price. Of course the mortgagee is not entitled to credit for more than he has expended. *Shepard* v. *Jones*, 21 Ch. Div. 469; *Henderson* v. *Astwood*, (1894) A. C. 150, 163.

Expenses of carrying on business.

Expenditure incurred in making profits, which the profits are unable to meet, cannot, in the absence of special provisions in the mortgage, be allowed against proceeds of sale. But where the mortgagor has covenanted to repay such expenditure, he cannot claim any part of the sale moneys without providing for what he would have been compelled to pay under the covenant. *Bompas* v. *King*, 33 Ch. Div. 279.

The Conveyancing Act, 1881, provides—

Involuntary loss.

Sect. 21, (6). The mortgagee, his executors, administrators, or assigns shall not be answerable for any involuntary loss happening in or about the exercise or execution of the power of sale conferred by this Act or of any trust connected therewith.

Mortgagees are answerable for any loss occasioned by a blunder made by their auctioneer at the sale. Where the property is misdescribed in the particulars, and the purchaser is allowed compensation, the measure of liability to the mortgagor is the difference between the price realized, allowing for the compensation, and the price which would have been realized if there had been no misdescription. *Wolff* v. *Vanderzee*, 17 W. R. 547; *Tomlin* v. *Luce*, 43 Ch. Div. 191.

An agent of the mortgagee, selling under his power, is not negligent in accepting a cheque in payment of the deposit; and the mortgagee will not be deprived of the costs of a sale which is rendered abortive by such acceptance. *Farrer* v. *Lacy Hartland & Co.*, 25 Ch. D. 636; 31 Ch. Div. 42.

Interest on surplus proceeds of sale.

A mortgagee is chargeable with simple interest at 4 per cent. on surplus proceeds of sale from the completion of the sale, and it is immaterial that there was no one to whom the money could then have been paid. *Charles* v. *Jones*, 35 Ch. D. 544.

In *In re Bell*, (34 Ch. D. 462) interest was only given from the date of the claim. See also *Burdick* v. *Garrick*, 5 Ch. 233, 241; *In re Sharpe*, (1892) 1 Ch. 154, 169.

A mortgagee was not charged with interest where he offered to pay it to the puisne incumbrancers, whose priority was in dispute, if they could agree. *Mathison* v. *Clark*, 25 L. J. Ch. 29.

III. Accounts in the Case of Welsh Mortgages.

In the case of a Welsh mortgage, the rents and profits are, as a rule, taken in satisfaction of interest; but an account will be directed where they largely exceed what would be a reasonable rate. *Talbot* v. *Braddil*, 1 Vern. 394; *Fulthrope* v. *Foster*, 1 Vern. 476; *Alderson* v. *White*, 3 Jur. N. S. 1316.

IV. Accounts as against Unpaid Vendors of Land.

Where the unpaid vendor of land retains possession after the time fixed for completion, he is under the same liability to the purchaser as a mortgagee in possession would be to his mortgagor. *Phillips* v. *Silvester*, 8 Ch. 173.

Thus, he is liable to account for rents and profits, including an occupation rent, if he has been in possession (*a*); he is liable for deterioration (*b*); and, on the other hand, he is entitled to be credited with proper expenditure in maintaining the property in good condition (*c*). (*a*) *Sherwin* v. *Shakspear*, 5 D. M. & G. 517; *Phillips* v. *Silvester*, 8 Ch. 173; see *Earl of Egmont* v. *Smith*, 6 Ch. D. 469. (*b*) *Foster* v. *Deacon*, 3 Madd. 394; *Ferguson* v. *Tadman*, 1 Sim. 530; *Regent's Canal Co.* v. *Ware*, 23 B. 575, 588; *Phillips* v. *Silvester*, 8 Ch. 173; *Royal Bristol Building Society* v. *Bomash*, 35 Ch. D. 390; *Clarke* v. *Ramuz*, (1891) 2 Q. B. 456. (*c*) *Phillips* v. *Silvester*, 8 Ch. 173.

Account on footing of wilful default.

In *Acland* v. *Gaisford*, (2 Madd. 28), *Wilson* v. *Clapham*, (1 J. & W. 36), and *Phillips* v. *Silvester*, (8 Ch. 173) the account of rents and profits was directed on the footing of wilful default. In *Sherwin* v. *Shakspear* (5 D. M. & G. 517) it was held (p. 531, 536) that a direction to that effect would not be inserted without a special case being made for it, and this view was followed in *Malone* v. *Henshaw* (29 L. R. Ir. 352). See also *Howell* v. *Howell*, 2 My. & Cr. 478, in which the Court

declined to direct an account on the footing of wilful default as against a purchaser evicted by a superior title.

Occupation rent.

The unpaid vendor in possession is not liable for occupation rent in respect of a business carried on by him. *Leggott* v. *Metropolitan Ry. Co.*, 5 Ch. 716.

Deterioration.

Nor is he liable for deterioration, if he has offered to give up possession and the purchaser has refused to take it. *Binks* v. *Lord Rokeby*, 2 Sw. 222; *Minchin* v. *Nance*, 4 B. 332; *Phillips* v. *Silvester*, 8 Ch. 173.

Interest on purchase-money.

As to the date from which interest on the purchase-money is to be computed, see *Sherwin* v. *Shakspear*, 5 D. M. & G. 517.

CHAPTER XXXIV.

RIGHT OF FORECLOSURE.

As Equity enables the mortgagor to redeem in contradiction to the terms of his contract with the mortgagee, so it allows the mortgagee, at any time after the mortgagor has made default under his contract, to insist that the mortgagor shall immediately redeem or for ever lose the right of redemption.

No foreclosure where no forfeiture.

This right of the mortgagee, which is called the right to foreclose, is correlative with the right to redeem in equity. There can be no foreclosure where there is no forfeiture.

Therefore, the right to foreclose can only arise where property of the mortgagor has been regularly assigned to the mortgagee, and the mortgagor has failed to comply with the conditions upon which it was to be restored to him. *Sampson* v. *Pattison*, 1 Ha. 533; *Carter* v. *Wake*, 4 Ch. D. 605.

No foreclosure in case of mere charge,

It can only arise, therefore, where there is either a legal mortgage or an agreement for a legal mortgage. A mere charge cannot give a right to foreclose. *Tennant* v. *Trenchard*, 4 Ch. 537, 542; *Shea* v. *Moore*, (1894) 1 I. R. 158.

A conveyance of land to A. upon trust that the same should be charged with the payment to A. of 1500*l.* does not entitle A. to foreclose. *Sampson* v. *Pattison*, 1 Ha. 533.

or pledge,

There can be no foreclosure in the case of a pledge. The right of the pledgor to recover the property until sale is a legal right. *Carter* v. *Wake*, 4 Ch. D. 605; *In re Morritt*, 18 Q. B. Div. 222, 234; *Fraser* v. *Byas*, 13 Mews' Rep. 452.

or Welsh mortgage,

In the case of a Welsh mortgage, *i.e.* a mortgage under which the lender goes into and remains in possession until by perception of the rents and profits he is fully paid, and in which there is no covenant to repay, the lender cannot

foreclose. "The essence of a Welsh mortgage is, that there is no forfeiture, the principal not being payable at any given time." *Longuet* v. *Scawen*, 1 Ves. 402, 406; *Balfe* v. *Lord*, 2 D. & War. 480.

Where there is a covenant to pay the sum borrowed on demand, there may be forfeiture, and therefore foreclosure. *Balfe* v. *Lord*, 2 D. & War. 380; see, however, *Teulon* v. *Curtis*, You. 610; *O'Connell* v. *Cummins*, 2 Ir. Eq. 251.

or mortgage by way of trust for sale.

A mortgage by way of trust for sale does not give the mortgagee the right to foreclose. *Kirkwood* v. *Thompson*, 2 H. & M. 392; *Locking* v. *Parker*, 8 Ch. 30; *Scweitzer* v. *Mayhew*, 31 B. 37.

But if the mortgagor brings an action for redemption, which is dismissed, he is foreclosed. *In re Alison*, 11 Ch. Div. 284, 293.

Land Transfer Act, 1875, s. 26.

Sect. 26 of the Land Transfer Act, 1875 (38 & 39 Vict. c. 87), enables the registered proprietor of a registered charge under the Act to enforce a foreclosure or sale of the land charged.

Contract to execute legal mortgage.

A contract to execute a legal mortgage gives the parties to it the same remedies in equity as if a legal mortgage had been executed.

Therefore, where there is an equitable mortgage by deposit of title deeds coupled with an agreement to execute a legal mortgage, the mortgagee may foreclose. *Moore* v. *Perry*, 1 Jur. N. S. 126; *Matthews* v. *Goodday*, 31 L. J. Ch. 282; *Underwood* v. *Joyce*, 7 Jur. N. S. 566; *Yeatman* v. *Read*, 36 L. J. Ch. 136; *Marshall* v. *Shrewsbury*, 10 Ch. 250; *York Union Banking Co.* v. *Artley*, 11 Ch. D. 205.

He is also entitled to a sale, now by virtue of the Conveyancing Act, 1881, sect. 25, and formerly by virtue of the Chancery Procedure Act, 1852, sect. 48. *York Union Banking Co.* v. *Artley*, 11 Ch. D. 205.

Deposit of title-deeds.

Whether a deposit of title-deeds as security without a written agreement to give a mortgage entitles the holder to foreclosure is doubtful.

Such a deposit, as constituting a charge, would entitle the depositee to realize the amount of his debt by sale or mortgage

of the property, the title-deeds of which are deposited; and this relief has accordingly been often given. *Pain* v. *Smith*, 2 M. & K. 417; *Brocklehurst* v. *Jessop*, 7 Sim. 438; *Tipping* v. *Power*, 1 Ha. 405, 410; *Tuckley* v. *Thompson*, 1 J. & H. 126; *Matthews* v. *Goodday*, 31 L. J. Ch. 282.

It is not stated whether the deposit in *Parker* v. *Housefield* (2 M. & K. 419) or *Newton* v. *Aldous* (cit. 2 M. & K. 421) was accompanied by an agreement to execute a legal mortgage.

In *Pryce* v. *Bury* (16 Eq. 153 *n.*) the deposit was accompanied by an agreement to make a formal surrender of the copyholds charged. See the report of the case in 23 L. J. Ch. 676.

The case has, however, been treated as an authority for holding that a deposit of title-deeds without more entitles the holder to foreclosure. *Samble* v. *Wilson*, 5 N. R. 395; *James* v. *James*, 16 Eq. 153; *Backhouse* v. *Charlton*, 8 Ch. D. 444.

It can only entitle the holder to foreclosure on the ground that the deposit by itself implies a contract to execute a legal mortgage, as to which see p. 16.

Judgment creditor.

In *Jones* v. *Bailey*, 17 B. 582, and *Messer* v. *Boyle*, 21 B. 569, a judgment creditor was held entitled to foreclose. See, however, *Kennard* v. *Futvoye*, 29 L. J. Ch. 557.

A receipt signed by A. for money lent by B., by which he gives B. as security a contingent reversionary interest in land, entitles B. to foreclose. *Hugill* v. *Wilkinson*, 38 Ch. D. 480.

Mortgagee of personalty may foreclose.

The right to foreclose does not depend upon the nature of the property mortgaged.

Where, in pursuance of an agreement to deposit with A. railway debenture stock and shares as security, the stock and shares have been transferred into the names of trustees for A. and the certificates are held by A., A. is entitled to foreclose. *General Credit Co.* v. *Glegg*, 22 Ch. D. 549, 553.

A mortgagee of chattels (*a*), of cash in court (*b*), of a present (*c*) or reversionary (*d*) interest in consols, of a pension (*e*), or of a share in a partnership (*f*), is entitled to foreclose. (*a*) *Kemp* v. *Westbrook*, 1 Ves. S. 278; Belt, 149; Seton, 1662; *Chisholm* v. *Ferguson*, Seton, 1661. (*b*) (*c*) *Booking* v. *Rendell*, Seton, 1659; *Piper* v. *Coke*, Seton, 1659; *Risca Coal Co.* v. *Lloyd*, Seton, 1659. (*d*) *Slade* v. *Rigg*, 3 Ha. 35;

Wayne v. *Hanham*, 9 Ha. 62. (*e*) *James* v. *Ellis*, 19 W. R. 319; Seton, 1661. (*f*) *Redmayne* v. *Forster*, L. R. 2 Eq. 467.

Uncalled capital.

A debenture of a limited company charging all the property of the company both present and future, including its uncalled capital, gives the registered holder the right to foreclose the uncalled capital as well as the other property comprised in the security. *Sadler* v. *Worley*, (1894) 2 Ch. 170; *Oldrey* v. *Union Works*, (1895) W. N. 77; see *Halifax Banking Co.* v. *Radcliffe*, (1895) W. N. 63.

Legal estate may be left outstanding.

The mortgagee of an equitable interest in property is entitled to foreclose the equity of redemption, leaving the legal title in a third party.

Thus, a second mortgagee can foreclose the mortgagor although he does not redeem the first mortgagee. *Slade* v. *Rigg*, 1 Ha. 35, 38.

Who may not be foreclosed.

Where a married woman mortgaged her contingent reversionary share in a trust fund to secure her husband's debt, it was held, upon the language of the deed, that the mortgagee was only entitled to receive and pay himself out of the share when it fell into possession, and not to a decree for foreclosure or sale. *Stamford Banking Co.* v. *Ball*, 4 D. F. & J. 310.

The Crown cannot be foreclosed. *Hancock* v. *A-G.*, 33 L. J. Ch. 661; *Bartlett* v. *Rees*, 12 Eq. 395.

A tenant for life redeeming a charge on the inheritance cannot compel the remainderman to redeem him or be foreclosed. *Chappell* v. *Rees*, 1 De G. M. & G. 393; *Riley* v. *Croydon*, 2 Dr. & Sm. 293.

When mortgagee may foreclose.

Where there is a proviso for redemption on payment of principal and interest at a distant date, the mortgagee cannot foreclose until after that date. "By a bill to foreclose a man, you shall only bar him of his equitable title, when the estate in law is become forfeited." *Bonham* v. *Newcomb*, 1 Vern. 232; 2 Vent. 364.

Interest in default.

Where there is a proviso for redemption on payment of the principal money at a distant date, with interest thereon half-yearly in the mean time, the mortgagee can foreclose, although the date has not arrived, if default has been made in payment of the interest. *Gladwyn* v. *Hitchman*, 2 Vern. 135; *Ex*

parte Bignold, 3 Deac. 151, 3 M. & A. 477; *Burrowes* v. *Molloy*, 2 J. & Lat. 521, 526; *Edwards* v. *Martin*, 25 L. J. Ch. 284; see *In re Turner*, 43 W. R. 153, where it was held, as a matter of construction, that the mortgagor could redeem on payment of the accumulated interest, although there was a covenant to pay it half-yearly.

Where an agreement for a mortgage contains a stipulation by the mortgagee not to call in the principal till a distant date, the Court, in settling the form of the mortgage, will make the postponement conditional on punctual payment of interest. *Seaton* v. *Twyford*, 11 Eq. 591.

Debentures may be realized on winding-up.

Where the debentures of a limited company contain a covenant for payment of the principal moneys at a distant date, and the company is ordered to be wound up before that date, the debenture-holders are entitled to realize their security upon the winding-up, and the realization will be for the full amount of the principal moneys, as if they had become due at the commencement of the winding-up. *In re Panama Royal Mail Co.*, 5 Ch. 318; *Hodson* v. *Tea Co.*, 14 Ch. D. 859; *Wallace* v. *Universal Automatic Machines Co.*, (1894) 2 Ch. 547.

As to the construction of a proviso in a debenture making the principal immediately payable "if the company commences to be wound up otherwise than for the purpose of reorganization or reconstruction," see *Hooper* v. *Western Counties Telephone Co.*, 68 L. T. 78.

Contract not to call in or pay off principal.

Where it is desired that the mortgage shall remain for a term of years, it is usual to insert a covenant for payment of the principal money with interest at the expiration of six months from the date of the mortgage, and to add a proviso that the mortgagee shall not call in, or the mortgagor pay off the principal moneys for a prescribed time.

The proviso deferring the mortgagee's right to call in the principal money is generally made conditional on punctual payment of interest.

This proviso ceases to be operative if interest is in arrear, and the mortgagee, by subsequently accepting the interest in arrear from the mortgagor, does not thereby waive his right to

call in the principal. *Stanhope* v. *Manners*, 2 Ed. 197; *In re Taaffe's Estate*, 14 Ir. Ch. 347; *Keene* v. *Biscoe*, 8 Ch. D. 201; not following *Langridge* v. *Payne*, 2 J. & H. 423.

Where the proviso is simply that, notwithstanding anything contained in the mortgage deed, the principal sum shall not be called in during the mortgagor's life, the mortgagee cannot foreclose though default has been made in payment of interest under the mortgage. *Burrowes* v. *Molloy*, 2 J. & Lat. 521.

A mortgagee who has covenanted not to realize his security for a specific time cannot, by buying up another incumbrance on the mortgaged property or by making advances which give him a lien on it, acquire a right to foreclose within that time. *Ramsbottom* v. *Wallis*, 5 L. J. N. S. Ch. 92; *Burrowes* v. *Molloy*, 2 J. & Lat. 521.

Where a first mortgage of property contained a covenant by the mortgagee not to take proceedings for recovery of the principal sum without giving six months' notice to the mortgagor, and a second mortgage of the same property made to a transferee of the first mortgage provided that the mortgaged premises should not be redeemed except on payment of the sums due under both mortgages, it was held that the mortgagee could bring an action to foreclose both mortgages without giving notice. *Haywood* v. *Gregg*, 24 W. R. 157, distinguishing *Burrowes* v. *Molloy*, *supra*.

No time limited for repayment.

Where no time is limited for repayment of the debt, as in the case of a mortgage by deposit of title-deeds, the mortgagee may take proceedings to enforce his security at any time after its creation upon giving reasonable notice to the mortgagor of his intention to do so. *Fitzgerald's Trustee* v. *Mellersh*, (1892) 1 Ch. 385.

CHAPTER XXXV.

JUDICIAL SALE.

A. Sale under the General Jurisdiction.

Equitable charge or lien entitles to sale.

The owner of an equitable charge or lien on property as a security for money which is due and payable has the right to a judicial sale of the property in order to satisfy the charge or lien. *Neate* v. *Duke of Marlborough*, 3 My. & Cr. 407, 417; *Sampson* v. *Pattison*, 1 Ha. 533; *Tennant* v. *Trenchard*, 4 Ch. 537, 542; *In re Owen*, (1894) 3 Ch. 220; *Marshall* v. *South Staffordshire Tramways Co.*, (1895) 2 Ch. 36, 50.

Trustee's right to indemnity.

This principle extends to equitable liens which arise, not by express contract between the parties, but by implication, *e.g.* the lien of a trustee arising from his right to indemnity. *In re Pumfrey*, 22 Ch. D. 255.

Deposit of title-deeds as security.

An equitable incumbrancer by deposit of title-deeds, where there is no memorandum giving the right to call for a legal mortgage, comes within this principle. *Tuckley* v. *Thompson*, 1 J. & H. 126; *Green* v. *Biggs*, 52 L. T. 680; Seton, 1699.

And even where there is such a memorandum, it has been held that the incumbrancer may rest upon his charge and obtain a sale. *Matthews* v. *Goodday*, 31 L. J. Ch. 282. See, however, *Cox* v. *Toole*, 20 B. 145; *London Monetary Advance Co.* v. *Brown*, 13 W. R. 490; *Pryce* v. *Bury*, 16 Eq. 153 *n.*

Public undertaking cannot be sold.

The right to a sale does not extend to property, or what is called an undertaking, which has been acquired under statutory powers for public purposes, if those purposes will be defeated or, at all events, seriously affected by a judicial sale. *Potts* v. *Warwick & Birmingham Canal Co.*, Kay, 142; *Gardner* v. *L. C. & D. Ry. Co.*, L. R. 2 Ch. 201; *In re Herne Bay Waterworks Co.*, 10 Ch. D. 42; *Blaker* v. *Herts & Essex*

Waterworks Co., 41 Ch. D. 399; *Marshall* v. *South Staffordshire Tramways Co.*, (1895) 2 Ch. 36.

Debenture-holders of railway companies (*a*), waterworks companies under the Gas and Water Works Facilities Act, 1870 (*b*), and tramway companies under the Tramways Act, 1870 (*c*), are not entitled to a sale of the undertaking. (*a*) *Gardner* v. *L. C. & D. Ry. Co., supra.* (*b*) *Blaker* v. *Herts & Essex Waterworks Co., supra.* (*c*) *Marshall* v. *South Staffordshire Tramways Co., supra;* overruling *Bartlett* v. *West Metropolitan Tramways Co.*, (1893) 3 Ch. 437; (1894) 2 Ch. 286.

Vendor's lien on land.

The lien of an unpaid vendor of land may be enforced by sale (*a*), but not by foreclosure (*b*). (*a*) *Mackreth* v. *Symmons*, 15 Ves. 329; Seton, 1706; *Westmacott* v. *Robins*, 4 D. F. J. 390, 396; *Swainston* v. *Clay*, 3 D. J. & S. 559, 569; (*b*) *Munns* v. *Isle of Wight Ry. Co.*, 5 Ch. 414.

A sale will not be ordered except after a judgment declaring the amount of the lien made in the presence of all persons claiming subsequent charges or entitled to the ultimate equity of redemption. *A.-G.* v. *Sittingbourne Ry. Co.*, L. R. 1 Eq. 636.

Sale as against railway company.

An order for sale may be made even when the purchaser is a railway company, and the land will be sold free from all claims on the part of the company, and of the public as claiming through the company. *Wing* v. *Tottenham Ry. Co.*, L. R. 3 Ch. 740; *Munns* v. *Isle of Wight Ry. Co.*, 5 Ch. 414.

Unpaid vendor also entitled to rescission.

An unpaid vendor of land is entitled to two remedies. His right to a sale arises from his equitable lien, which presupposes a subsisting contract. He is also entitled, if unpaid, to rescind the contract and recover possession of the land. *Lysaght* v. *Edwards*, 2 Ch. D. 499, 506.

A vendor may apply for rescission in an action in which judgment has been given for specific performance (*a*), although the judgment declares that the vendor has a lien, and gives him liberty to apply to enforce it (*b*). (*a*) *Foligno* v. *Martin*, 16 B. 586; *Henty* v. *Schröder*, 12 Ch. D. 666. (*b*) *Baker* v. *Williams*, 62 L. J. Ch. 615.

Where the unpaid vendor of land to a railway company is seeking, not to rescind the contract, but to enforce his lien

by sale, an injunction will not be granted to restrain the company from running trains over the land until sale. *Pell* v. *Northampton & Banbury Junction Ry. Co.*, L. R. 2 Ch. 100; *Munns* v. *Isle of Wight Ry. Co.*, 5 Ch. 414; *Lycett* v. *Stafford & Uttoxeter Ry. Co.*, 13 Eq. 261; *Latimer* v. *Aylesbury & Buckingham Ry. Co.*, 9 Ch. Div. 385.

Where an unpaid vendor of land to a railway company seeks to enforce his lien, and a sale would be abortive, he may have recourse to the alternative remedy of rescission. An order will then be made for putting him in possession, and an injunction granted restraining the company from running trains over the land. *Williams* v. *Aylesbury & Buckingham Ry. Co.*, 28 L. T. 547, 893; 21 W. R. 819; Seton, 1902; *Allgood* v. *Merrybent & Darlington Ry. Co.*, 33 Ch. D. 571.

Where an unpaid vendor seeks to recover possession, a tenant under the purchaser is a proper party to the suit. *Bishop of Winchester* v. *Mid-Hants Ry. Co.*, 5 Eq. 17.

Rent-charge created for value.

Where a rent-charge created for valuable consideration falls into arrear, and cannot be recovered by the exercise of the powers of distress and entry, the Court has jurisdiction to raise the arrears by a sale or mortgage of the corpus of the estate, whether the corpus or merely the annual income is charged. *Cupit* v. *Jackson*, 13 Pri. 721; *White* v. *James*, 26 B. 191; Seton, 1759; *Hall* v. *Hurt*, 2 J. & H. 76; *Horton* v. *Hall*, 17 Eq. 437; *Dawson* v. *Robins*, 2 C. P. D. 38, 42; *Scottish Widows' Fund* v. *Craig*, 20 Ch. D. 208; *Hambro* v. *Hambro*, (1894) 2 Ch. 564.

Rent-charges created by will.

Different considerations apply to rent-charges created by will. Where a rent-charge charged by will upon the corpus of real estate is in arrear, the Court has power to order the arrears to be raised by sale or mortgage of the estate, but the making of such an order is a matter, not of course, but of discretion. *In re Tucker*, (1893) 2 Ch. 323.

It is a question of the testator's intention. The fact that the real estate charged was devised, subject to the charge, in strict settlement has been held a ground for not raising the arrears by sale or mortgage of the corpus until there should

be a tenant in fee. *Graves* v. *Hicks*, 11 Sim. 536, 551; *Taylor* v. *Taylor*, 17 Eq. 324; as explained in *Horton* v. *Hall*, 17 Eq. 437.

But if the testator intended the charge to be a charge on the corpus, it does not seem that his disposition of the estate subject to the charge can have been intended to affect the rights of the person entitled to the charge. Arrears, therefore, have been directed in several cases to be raised out of the corpus of settled estates. *Picard* v. *Mitchell*, 14 B. 103; *In re Tucker*, (1893) 2 Ch. 323.

The necessity of applying to the Court is superseded in the case of instruments coming into operation after the 31st of December, 1881, by sect. 44 of the Conveyancing Act, 1881. See p. 194.

B. Sale under the Judgments Act, 1864.

27 & 28 Vict. c. 112, s. 4.

The Judgments Act, 1864 (27 & 28 Vict. c. 112), provides (sect. 4) that every creditor, to whom any land of his debtor shall have been actually delivered in execution by virtue of any judgment, statute, or recognizance, and whose writ or other process of execution shall be duly registered, shall be entitled forthwith or at any time afterwards, while the registry of such writ or process shall continue in force, to obtain from the Court of Chancery upon petition in a summary way an order for the sale of his debtor's interest in such land, and every such petition may be served upon the debtor only.

Order LV. rule 9 B.

Order LV., rule 9 B, provides that the application of the judgment creditor should be made by originating summons.

As to costs, where the application is made by petition, see *In re Martin & Varlow*, (1894) W. N. 223; 43 W. R. 247.

S. 5.

Other judgment creditors who have charges are bound by service of notice of the order for sale, and the proceeds of sale are to be distributed among the persons entitled according to their priorities (sect. 5).

The Court has jurisdiction to dispense with inquiries under this section. *In re Bithray*, 59 L. J. Ch. 66.

S. 6.

All persons claiming under the debtor after delivery of the land in execution are bound by the order for sale (sect. 6).

As to the form of the order for sale, see *In re Cooper*, 37 W. R. 330; *In re Holder*, W. N. 1890, 55; Seton, 1714. Form of order.

Registration must now be effected under the Lands Charges Registration and Searches Act, 1888 (51 & 52 Vict. c. 51), sect. 5. Registration.

The effect of these sections is to nullify the proviso in the Judgments Act, 1838 (1 & 2 Vict. c. 110), s. 13, which prevents a judgment creditor from enforcing his charge in equity until after the expiration of one year from the time of entering up the judgment.

C. Sale under the Conveyancing Act.

The Conveyancing Act, 1881 (44 & 45 Vict. c. 41), enacts— Conveyancing Act, s. 25.

Sect. 25, (1). Any person entitled to redeem mortgaged property may have a judgment or order for sale instead of for redemption in an action brought by him either for redemption alone, or for sale alone, or for sale or redemption, in the alternative.

(2) In any action, whether for foreclosure, or for redemption, or for sale, or for the raising and payment in any manner of mortgage money, the Court, on the request of the mortgagee, or of any person interested either in the mortgage money or in the right of redemption, and notwithstanding the dissent of any other person, and notwithstanding that the mortgagee or any person so interested does not appear in the action, and without allowing any time for redemption or for payment of any mortgage money, may, if it thinks fit, direct a sale of the mortgaged property on such terms as it thinks fit, including, if it thinks fit, the deposit in Court of a reasonable sum fixed by the Court to meet the expenses of sale and to secure performance of the terms.

(3) But in an action brought by a person interested in the right of redemption and seeking a sale, the Court may, on the application of any defendant, direct the plaintiff to give such security for costs as the Court thinks fit, and may give the conduct of the sale to any defendant, and may give such directions as it thinks fit respecting the costs of the defendants or any of them.

(4) In any case within this section the Court may, if it thinks fit, direct a sale without previously determining the priorities of incumbrancers.

Order LI., rule 1 A.

Order LI., rule 1 A., enables the Court or a judge to authorize a sale to be carried out either by laying proposals before the judge in chambers for his sanction, or by proceedings altogether out of Court.

As to what are proceedings altogether out of Court, see *Cumberland Union Banking Co.* v. *Maryport Iron & Steel Co.*, (1892) 1 Ch. 92.

Order LI., rule 1 B., provides—

Order LI., rule 1 B.

In debenture-holders' actions, where the debenture-holders are entitled to a charge by virtue of the debentures or of a trust deed or otherwise, and the plaintiff is suing on behalf of himself and other debenture-holders, and where the judge in person is of opinion that there must eventually be a sale, he may in his discretion direct a sale before judgment, and also after judgment, before all the persons interested are ascertained, whether served or not.

This order does not apply where the plaintiff is the only holder of an issue of debentures. *Parkinson* v. *Wainwright*, 64 L. J. Ch. 493.

Act applies to equity of redemption.

The Conveyancing Act covers the case where the property to be sold is only an equity of redemption. *Cripps* v. *Wood*, 51 L. J. Ch. 584.

When order will be made.

An order for sale may be made on an interlocutory application (*a*), or after the decree for foreclosure has been passed and entered, and before it has become absolute (*b*). (*a*) *Woolley* v. *Colman*, 21 Ch. D. 169; (*b*) *Union Bank of London* v. *Ingram*, 20 Ch. Div. 463.

Except where the security is insufficient, an order will not be made for sale immediately after the certificate, but the mortgagor will be allowed three months to redeem. *Oldham* v. *Stringer*, 51 L. T. 895; *Green* v. *Biggs*, 52 L. T. 680.

When the plaintiff in a foreclosure action asks for a sale and no defence is made, an account will be taken of what is due to the plaintiff on his security, and on the amount being certified a sale will be ordered of so much of the property

as will satisfy the plaintiff's security. *Wade* v. *Wilson*, 22 Ch. D. 235.

When sale not ordered as against first mortgagee.

A sale will not be ordered, as against a first mortgagee seeking to foreclose, where the security is insufficient (*a*), or where the property mortgaged is in various places and cannot be sold in one lot (*b*). (*a*) *Merchant Banking Co. of London* v. *London and Hanseatic Bank*, 55 L. J. Ch. 479. (*b*) *Provident Clerks Association* v. *Lewis*, 62 L. J. Ch. 89; but see *Norman* v. *Beaumont*, (1893) W. N. 45.

The Court will not order a sale at the instance of the mortgagee where the mortgagor has no notice that the mortgagee intends to ask for a sale. *South-Western District Bank* v. *Turner*, 31 W. R. 113.

Conduct of sale given to mortgagor.

The mortgagor is interested to obtain the best price. If the property is likely to fetch more than the amount secured, the conduct of the sale will be given to him. *Woolley* v. *Colman*, 21 Ch. D. 169; *Davies* v. *Wright*, 32 Ch. D. 220; see, however, *Christy* v. *Van Tromp*, W. N., 1886, 111.

Reserve price.

Where the conduct of the sale is given to the mortgagor, a reserve price will be fixed sufficient to cover what is due to the mortgagee for principal, interest, and costs. *Woolley* v. *Colman*, 21 Ch. D. 169; *Brewer* v. *Square*, (1892) 2 Ch. 111.

The mortgagor will also be required as a rule to deposit a sum in Court to abide any order of the Court as to costs. Cases *supra*.

Sales out of court.

The sale may be made out of Court, but the purchase-money must be paid into Court. *Woolley* v. *Colman*, 21 Ch. D. 169; *Davies* v. *Wright*, 32 Ch. D. 220; *Brewer* v. *Square*, (1892) 2 Ch. 111.

Leave has been given to a mortgagor to sell out of Court within a limited time, although the mortgagee has given notice requiring him to pay and the time limited by the notice has expired. *Brewer* v. *Square*, (1892) 2 Ch. 111.

On a sale by mortgagees under the direction of the Court in a foreclosure action, the mortgagees are ordinary vendors and are not liable for the acts of other parties to the action. *Union Bank* v. *Munster*, 37 Ch. D. 51.

If any of the *cestuis que trust* object, a trustee of an estate,

though also a mortgagee, will not be allowed to bid at a sale of the estate directed by the Court. *Tennant* v. *Trenchard*, 4 Ch. 537, 545.

The Conveyancing Act, 1881, enacts—

Conveyancing Act, 1881, s. 70, (1).

Sect. 70, (1). An order of the Court under any statutory or other jurisdiction shall not, as against a purchaser, be invalidated on the ground of want of jurisdiction, or of want of any concurrence, consent, notice, or service, whether the purchaser has notice of any such want or not.

The section makes an order for sale by a Court of competent jurisdiction binding, and no objection can be taken to it thereafter as against a purchaser by reason of non-concurrence, want of notice, or want of consent. *In re Hall Dare's Contract*, 21 Ch. Div. 41; *Mostyn* v. *Mostyn*, (1893) 3 Ch. 376.

This section applies although the order appears on the face of it to be irregular. *In re Hall Dare's Contract*, 21 Ch. Div. 41.

CHAPTER XXXVI.

RESTRAINING THE MORTGAGEE FROM ENFORCING HIS REMEDIES.

THE mortgagee may be restrained, either temporarily or permanently, from enforcing all or some of his remedies against the mortgagor and the mortgaged property.

A. RESTRAINING THE MORTGAGEE UNDER STATUTORY PROVISIONS.

The Railway Companies Act, 1867 (30 & 31 Vict. c. 127), provides (sect. 7) that, after the filing of a scheme of arrangement under the Act, the Court may, on the application of the company on summons or motion in a summary way, restrain any action against the company on such terms as the Court thinks fit, and (sect. 9) that, after publication in the *Gazette* of notice of filing of the scheme, no execution, attachment, or other process against the property of the company shall be available without leave of the Court, to be obtained on summons or motion in a summary way. Railway Companies Act, 1867, ss. 7, 8.

The power given by these sections is an interim power only, and ceases when the scheme is enrolled. *In re Potteries Ry. Co.*, 5 Ch. 67.

These sections apply not merely to persons assenting to or bound by the scheme, but to outside creditors, including unpaid landowners. *In re Cambrian Rys. Co's. Scheme*, L. R. 3 Ch. 278.

As to the principles on which the Court will exercise its discretion, see *In re Cambrian Rys. Co's. Scheme*, L. R. 3 Ch. 278, 299.

The Companies Act, 1862 (25 & 26 Vict. c. 89) enacts—

Companies Act, 1862, s. 85.

Sect. 85. The Court may, at any time after the presentation of a petition for winding up a company under this Act and before making an order for winding up the company, upon the application of the company or of any creditor or contributory of the company, restrain further proceedings in any action, suit, or proceeding against the company upon such terms as the Court thinks fit.

S. 87.

Sect. 87. When an order has been made for winding up a company under this Act, no suit, action, or other proceeding shall be proceeded with or commenced against the Court except with the leave of the Court and subject to such terms as the Court may impose.

Under these sections leave will be given to a mortgagee to proceed with or commence an action against a company which is being wound up for realizing his security, unless the Court can give him the same relief in the winding-up as he would be entitled to in the action. *In re David Lloyd & Co.*, 6 Ch. Div. 339; *In re Longdendale Cotton Spinning Co.*, 8 Ch. D. 150.

S. 163.

Sect. 163. Where any company is being wound up by the Court or subject to the supervision of the Court, any attachment, sequestration, distress, or execution put in force against the estate or effects of the company after the commencement of the winding-up shall be void to all intents.

Sect. 163 must be read subject to the provisions of sect. 87. The Court has power to authorize a distress. *In re Exhall Coal Mining Co.*, 4 D. J. & S. 377.

As to the circumstances under which leave to distrain will be granted, see p. 210.

Bills of Sale Act, 1882, s. 7.

The Bills of Sale Act, 1882, provides (sect. 7) that, where the grantee of a bill of sale has seized or taken possession of any chattels comprised in the bill of sale, the grantor may, within five days from the seizure or taking possession, apply to the High Court or to a judge thereof in chambers, and such Court or judge, if satisfied that by payment of money or otherwise the said cause of seizure no longer exists, may restrain the grantee from removing or selling the said chattels,

or may make such other order as may seem just. See *Ex parte Cotton*, 11 Q. B. D. 301.

The Bankruptcy Act, 1883, does not affect the power of a secured creditor to realize or otherwise deal with his security. See sect. 9, (2). Bankruptcy Act, 1883, s. 9 (2).

B. Restraining the Mortgagee on Equitable Grounds.

The Court will not stay an action of ejectment brought by the mortgagee, merely because a suit is pending to administer the estate of which the mortgaged premises formed part. *Crowle* v. *Russell*, 27 W. R. 84. Staying ejectment.

The Court will not interfere with the possession of the mortgagee on the ground that a case may be made out for impeaching the mortgage deed. *Ex parte Bayly*, 15 Ch. Div. 223. Interfering with possession.

The Court will not as a rule restrain a mortgagee from selling unless the mortgagor pays into Court or otherwise secures to the mortgagee the amount which he swears to be due to him. *Whitworth* v. *Rhodes*, 20 L. J. Ch. 105; *Ex parte Bayly*, 15 Ch. Div. 223; *Warner* v. *Jacob*, 20 Ch. D. 220, 224; *Hill* v. *Kirkwood*, 28 W. R. 458. Terms on which sale is restrained.

But where the mortgagee swears that an amount is due which on the terms of the security cannot be due, the mortgagor will only be required to pay into Court the maximum amount which can be due under the mortgage. *Hickson* v. *Darlow*, 23 Ch. Div. 690.

And where the mortgagee was solicitor to the mortgagor when he took the mortgage, he will be restrained on the mortgagor paying into Court such a sum as, having regard to the nature of the security, will make the mortgagee safe till the amount actually due is ascertained. *Macleod* v. *Jones*, 24 Ch. Div. 289.

A sale by the mortgagee will not be restrained merely because the mortgagor contests the amount due on the security (*a*), or because the conditions of sale are needlessly stringent (*b*), or where the mortgage provides that the remedy of the mortgagor, in case of an improper sale, shall be in When sale is not restrained.

damages only (*c*). (*a*) *Cockell* v. *Bacon*, 16 B. 158; *Gill* v. *Newton*, 14 W. R. 490; (*b*) *Kershaw* v. *Kalow*, 1 Jur. N. S. 974; (*c*) *Prichard* v. *Wilson*, 10 Jur. N. S. 330.

When sale was restrained.

A sale was restrained where there was evidence that it would be at a great sacrifice (*a*); where a deed of arrangement provided that the power of sale should not be exercised except after notice, which had not been given (*b*); and where the mortgagee had himself presented a petition for winding up the mortgagor company (*c*). (*a*) *Merest* v. *Murray*, 14 L. T. 321; (*b*) *Gill* v. *Newton*, 14 W. R. 490; (*c*) *In re Cambrian Mining Co.*, 50 L. J. Ch. 836.

Restraining trustee from foreclosing.

A trustee will be restrained from enforcing a claim against the trust estate by foreclosure or sale, where the trust would be thereby destroyed. *Drake* v. *Williamson*, 25 B. 622; *Tennant* v. *Trenchard*, 4 Ch. 537.

Restraining transfer of legal estate.

As to restraining a mortgagee from transferring the legal estate, pending a redemption action, see *Rhodes* v. *Buckland*, 16 B. 212; *Whitworth* v. *Rhodes*, 20 L. J. Ch. 105.

The mortgagee is entitled, as a general rule, to pursue all his remedies concurrently. *Mason* v. *Bogg*, 2 My. & Cr. 443; *Kellock's Case*, L. R. 3 Ch. 769, 776.

This rule is subject to two exceptions:—

Mortgagee who has been paid restrained from foreclosing.

1. If the mortgagee obtains full payment by his personal remedy, he loses his right to foreclose the mortgaged estate. *Lockhart* v. *Hardy*, 9 B. 349; *Palmer* v. *Hendrie*, 27 B. 349; 28 B. 341.

But if he obtains only part payment by his personal remedy, he may, on giving credit in account for what he has recovered, foreclose for non-payment of the remainder. Cases *supra*.

Mortgagee restrained from suing where he cannot restore property.

2. The mortgagor, on payment of the mortgage debt, is entitled to have the property restored to him unaffected by any acts of the mortgagee which he has not authorized.

Therefore, where the mortgagee is unable to re-convey the mortgaged property and restore the title-deeds, he will be restrained from enforcing his personal remedy. *Schoole* v. *Sall*, 1 Sch. & L. 176.

If the mortgagee after foreclosure enforces his personal remedy, the foreclosure is opened and the mortgagor let in

to redeem. Therefore, if the mortgagee has sold the estate after foreclosure, he will be restrained from enforcing his personal remedy. *Parry* v. *Barker*, 8 Ves. 527; 13 Ves. 198 (not following *Tooke* v. *Hartley*, 2 B. C. C. 125); *Lockhart* v. *Hardy*, 9 B. 349.

A mortgagor, who has parted with the equity of redemption, acquires, on being sued by the mortgagee, a new right to redeem. Therefore, where the assignee of an equity of redemption had mortgaged the property to the original mortgagee, who subsequently sued the original mortgagor on his covenant, it was held that the original mortgagee was entitled to judgment only on the terms of re-conveying the property to the original mortgagor. *Palmer* v. *Hendrie*, 27 B. 349; 28 B. 341; *Kinnaird* v. *Trollope*, 39 Ch. D. 636.

But the mortgagee will not be restrained from enforcing his personal remedy where he has sold the estate under a power conferred on him by the mortgage deed (*a*), or where he has been deprived of the estate without any default of his own, *e.g.* where a lessor has entered for non-payment of rent which the mortgagee was not bound to pay (*b*). (*a*) *Rudge* v. *Richens*, L. R. 8 C. P. 358; (*b*) *In re Burrell*, 7 Eq. 399.

CHAPTER XXXVII.

TRANSFER OF THE SECURITY.

Every incumbrancer may transfer his security.

EVERY person entitled to a mortgage or charge upon property may transfer the benefit of his security, either absolutely or by way of sub-mortgage or sub-charge. *Taylor* v. *Russell*, (1892) A. C. 244, 255.

Conveyancing Act, 1881, s. 15, (1).

As to the power conferred upon a mortgagor by the Conveyancing Act, 1881, sect. 15, (1), to require his mortgagee to transfer instead of reconveying, see p. 558.

A company which has under its articles a lien on shares for debts due from a shareholder may be required by an indebted shareholder, under sect. 15, (1) of the Conveyancing Act, 1881, to transfer its lien to his nominee on payment of the debt. *Everitt* v. *Automatic Weighing Machine Co.*, (1892) 3 Ch. 506.

Pledgee can transfer his rights.

The pledgee can at any time, after the creation of the pledge, in the absence of special provisions to the contrary, transfer his rights as pledgee, either by assignment or by sub-pledge. *Mores* v. *Conham*, Owen, 123; *Jarvis* v. *Rogers*, 15 Mass. Rep. 389; *Donald* v. *Suckling*, L. R. 1 Q. B. 585.

Possessory lien cannot be transferred.

A person entitled to a possessory lien cannot transfer the benefit of the lien to another. He can only part with the chattel to an agent to hold on his behalf. *M'Combie* v. *Davis*, 7 East, 5.

A. TRANSFER OF THE SECURITY AT LAW.

A security on property consists of two parts, the debt, and the property for which it is made a security.

Transfer of property without debt.

Where the property is transferred at law for value, with the intention of transferring the security, the transferee is entitled to hold the property until payment of the debt,

although the debt itself is not transferred. *Jones* v. *Gibbons*, 9 Ves. 407; *Phillips* v. *Gutteridge*, 4 De G. & Jo. 531.

Effect of receipt by building society in passing legal estate.

The receipt given by a building society on being paid off, whether under the Act 6 & 7 Wm. IV. c. 32, or under the Building Societies Act, 1874 (37 & 38 Vict. c. 32), applies to a transfer as well as to a reconveyance, and has the effect of vesting the estate in the mortgaged property in any person paying off the mortgage, although he is a stranger to the equity of redemption. *Pease* v. *Jackson*, L. R. 3 Ch. 576; *Lawrence* v. *Clements*, 31 L. T. N. S. 670; *Fourth City Building Society* v. *Williams*, 14 Ch. D. 140; *Robinson* v. *Trevor*, 12 Q. B. Div. 423; *Sangster* v. *Cochrane*, 28 Ch. D. 298; *Ulster Building Society* v. *Glenton*, 21 L. R. Ir. 124.

Assignment of secured debt.

The assignment of a secured debt must be accompanied by the same formalities as are essential to make the security effective in its creation. *Jarvis* v. *Jarvis*, 63 L. J. Ch. 10.

Judicature Act, 1873, s. 25, (6).

The Judicature Act, 1873 (36 & 37 Vict. c. 66), sect. 25, (6), enables debts or other legal choses in action to be assigned at law. See p. 12.

Transfer of railway mortgages and bonds.

The Companies Clauses Act, 1845 (8 & 9 Vict. c. 16), provides (sect. 46) that any party entitled to any mortgage or bond may transfer his interest by deed duly stamped, wherein the consideration shall be truly stated. Sect. 47 provides for the registration of transfers.

The effect of these sections is to make a bond transferable at law, and the transferee must sue on it in his own name. *Vertue* v. *East Anglian Rys. Co.*, 5 Ex. 280.

Sect. 49 provides that the interest on any such mortgage or bond shall not be transferable, except by deed duly stamped.

and debenture stock.

The Companies Clauses Act, 1863 (26 & 27 Vict. c. 118) provides (sect. 23) that debenture stock, with the interest thereon, shall be transferable in the same manner and according to the same regulations and provisions as other stock of the company.

Contract for sale of interest in land.

A contract for the sale of a money bond which contains a proviso that the obligee is entitled to the benefit of a mortgage of land (*Toppin* v. *Lomas*, 16 C. B. 145), or for the sale of a debenture which creates a floating charge on leaseholds

[*Driver* v. *Broad*, (1893) 1 Q. B. 539, 744], is a contract for the sale of an interest in land within sect. 4 of the Statute of Frauds.

Transfer of mortgage of ship.

The Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), provides (sect. 37) for the transfer of registered mortgages of a ship or share, and the registration of the transferee as mortgagee.

Statutory mortgage.

As to the transfer of a statutory mortgage under the Conveyancing Act, 1881, see sect. 27 of the Act.

Registered charge.

As to the transfer of a registered charge under the Land Transfer Act, 1875, see sect. 40 of the Act.

Transferor, when estopped from setting up equity.

Where, on a transfer passing the legal estate, payment is made to an unauthorized person, the subsequent production by him of a transfer with receipt endorsed which he has obtained by fraud from the transferor amounts to a representation by the transferor that he has received payment, and prevents him from setting up an equity in the nature of an unpaid vendor's lien against the transferee. *Gordon* v. *James*, 30 Ch. Div. 249.

B. Transfer of the Security in Equity.

Transfer of secured debt in equity.

Legal choses in action were before the Judicature Act assignable in equity, but not, except by the law merchant or under statutory provisions, at law. An action at law could only be brought by the original contractee, but he was compellable in equity to allow his name to be used by the assignee for the purpose of an action, on an indemnity against costs. *Crouch* v. *Credit Foncier of England*, L. R. 8 Q. B. 374.

The question whether the benefit of a mortgage or charge has been transferred is, in equity, a question of intention only; where a transfer is intended and a valuable consideration has passed, the absence of a formal assignment will not prevent effect from being given to the intention.

Stranger paying off charge.

A stranger who pays off a mortgage or charge on property is in equity treated as a transferee of the benefit of the mortgage or charge. *Cracknall* v. *Janson*, 11 Ch. Div. 1, 18; *Patten* v. *Bond*, 60 L. T. 583.

Where a stranger advanced money to the owner of the

equity of redemption to be applied in paying off a first mortgagee, who assigned the mortgaged premises to the brother of the mortgagor without declaring any trusts, it was held that the brother was a trustee for the stranger. *Walcott* v. *Condon*, 6 Ir. Jur. 15.

Where a person entitled to the equity of redemption in A. pays off a mortgage on A. and B., the mortgage, even if it determines as to A., will be kept alive as to B. *Taws* v. *Knowles*, (1891) 2 Q. B. 564, 572.

As to payment by a person interested in the equity of redemption, see p. 475.

Transfer of documents of title.

The benefit of a vendor's lien on land or of an equitable charge by deposit of title-deeds of land (*a*), or documents of title of personal property (*b*), may be transferred by a transfer for value of the deeds or documents of title without writing. (*a*) *Dryden* v. *Frost*, 3 My. & Cr. 670; *Rayne* v. *Baker*, 1 Giff. 241; *Brocklesby* v. *Temperance Building Society*, (1895) A. C. 173, 182. (*b*) *France* v. *Clark*, 26 Ch. Div. 257.

Transfer of charge to firm.

The benefit of an equitable mortgage by deposit to a firm passes to the persons who for the time being constitute the firm. *Ex parte Oakes*, 2 M. D. & D. 234; *In re O'Brien*, 11 L. R. Ir. 213.

Transfer of debt without property.

Where the benefit of the mortgage debt is transferred, but the mortgaged property is retained by the transferor, he is a trustee for the transferee of whatever he recovers from the mortgagor by virtue of his possession of the property. *Morley* v. *Morley*, 25 B. 253, 258.

Voluntary assignment of debt.

A voluntary assignment of a sum of money charged on land, the legal estate in which is retained by the assignor, is incomplete, as the assignees could not recover the money without reconveying the legal estate. *Woodford* v. *Charnley*, 28 B. 96; *Bizzey* v. *Flight*, 24 W. R. 957.

A voluntary assignment of a debt secured by a registered bill of sale of chattels, of which the assignor has not taken possession, is complete, although there is no assignment either of the bill of sale or the chattels, express powers being given to the assignee to get in the debts and do whatever is necessary for the purpose. *In re Patrick*, (1891) 1 Ch. 82.

Voluntary transfer of title-deeds.

A voluntary transfer of title-deeds deposited by way of equitable mortgage with the intention of transferring the security is incomplete, and the administrator of the transferor has been held entitled to recover the deeds from the transferee. *Edwards* v. *Jones*, 1 My. & Cr. 226 ; *In re Richardson* 30 Ch. Div. 396.

Transfer of title-deeds *mortis causâ*.

A delivery of mortgage deeds by A. to B. by way of *donatio mortis causâ* is a good gift of the money secured, and the person holding the land is in equity a trustee for the donee of the mortgage debt. *Duffield* v. *Hicks*, 1 Dow & Cl. 1.

Collateral securities.

On the transfer for value of a mortgage where the transferor holds collateral securities which he retains, he becomes a trustee of those securities for the mortgagor or (if there is an agreement to that effect) for the transferee. *Glasscock* v. *Balls*, 24 Q. B. Div. 13.

Where a mortgagee, who held a promissory note of the mortgagor as collateral security for part of the mortgage debt, transferred the mortgage debt and securities to A., from whom he received the whole amount due thereon, and indorsed the note for value to B., who had no notice of the circumstances, B. was held entitled to recover on the note from the mortgagor. *Glasscock* v. *Balls*, 24 Q. B. Div. 13.

C. What passes by the Assignment.

Rent in arrear does not pass.

The assignment of a mortgage does not pass rent in arrear. The assignee cannot, therefore, on taking possession, claim rent due before the assignment. *Salmon* v. *Dean*, 3 Mac. & G. 344.

Interest in arrear cannot be made principal.

On the transfer of a mortgage, interest in arrear cannot be turned into principal without the concurrence of the mortgagor. *Ashenhurst* v. *James*, 3 Atk. 270; *Matthews* v. *Wallwyn*, 4 Ves. 118, 128; *Cottrell* v. *Finney*, 9 Ch. 541.

Where an intending transferee has paid interest in arrear before the transfer, he will be entitled to a charge on the estate for the amount so paid, without interest. *Cottrell* v. *Finney*, *supra*.

Presumption that powers are kept alive.

On the transfer of a mortgage the presumption is that the powers given to the mortgagee by the old mortgage are

intended to be kept alive. A power of sale, if interest should be three months in arrear, remains exercisable, although by the deed of transfer interest is made payable at a different time. *Young* v. *Roberts*, 15 B. 558; *Boyd* v. *Petrie*, 7 Ch. 385.

Extinction of covenant to pay.

Where, on the transfer of a mortgage, a new covenant is entered into for payment of the old mortgage debt or of a consolidated debt of which the old mortgage debt forms part, the covenant to pay in the old mortgage is extinguished, although the old mortgage debt and the benefit of the covenant for payment are expressly transferred. *Bolton* v. *Buckenham*, (1891) 1 Q. B. 278.

D. Rights as between Mortgagor and Assignee.

Assignee may enforce mortgage for full amount due,

The assignee of a mortgage is in general entitled to enforce it against the mortgagor for the full amount due upon it, although he has given less. *Morret* v. *Paske*, 2 Atk. 52, 54.

Thus, a puisne mortgagee buying up a first mortgage for less than the amount due can hold it for the full amount. *Dobson* v. *Land*, 8 Ha. 216, 220; *Shaw* v. *Bunny*, 2 D. J. & S. 468.

The owner of the reversion in fee of an estate subject to two charges, neither of which he created, may buy in the earlier of the two and hold it, as against the owner of the later one, for the whole amount due, although he gave less. *Davis* v. *Barrett*, 14 B. 542.

The rule is subject to the following exceptions:—

unless he is trustee for mortgagor,

1. A person standing in a fiduciary position to the mortgagor can only hold a mortgage for the amount which he gave for it. *In re Imperial Land Co. of Marseilles*, 4 Ch. Div. 566.

Thus, an executor (*Morret* v. *Paske*, 2 Atk. 52, 54), a tenant for life (*Hill* v. *Browne*, Dru. t. Sugd. 426), or an heir at law (*Lancaster* v. *Evors*, 10 B. 154; 1 Ph. 349), buying up an incumbrance affecting the inheritance can only hold it for the amount actually paid.

The purchaser of an estate buying up an incumbrance on it which the vendor was bound to satisfy can only hold it, as

against the vendor, for the amount actually paid. *Cane* v. *Lord Allen*, 2 Dow, 289.

An agent of the mortgagor, *e.g.* his solicitor, can only hold a mortgage for the amount actually paid. *Reed* v. *Norris*, 2 My. & Cr. 361; *Lawless* v. *Mansfield*, 1 D. & War. 557, 629; *Nelson* v. *Booth*, 27 L. J. Ch. 110, 114; *Macleod* v. *Jones*, 24 Ch. Div. 289, 300.

or takes advantage of former agency,

2. An agent who, after the agency has ceased, takes advantage of information obtained as agent to buy up an incumbrance on the principal's property at less than the amount due can only hold it for the amount paid by him. *Carter* v. *Palmer*, 1 D. & Wal. 722; 8 Cl. & F. 657; *Hobday* v. *Peters*, 29 L. J. Ch. 780.

or can be put on equitable terms.

3. An equitable transferee for value without notice of a debenture of a company transferable at law, which has been irregularly issued, is only entitled to the benefit of the debenture, as against the company, to the amount actually paid by him for it. *In re Romford Canal Co., Pocock's Claim*, 24 Ch. D. 85.

In determining the question whether a transferee takes subject to or free from legal or equitable claims which the assignor had against the transferor, different considerations apply, (1) where the debt is transferable at law, (2) where it is transferable in equity.

As to securities transferable at law—

Irregularity or equity cannot be set up against legal,

1. Where a company have power to issue securities transferable at law, an irregularity in the issue or an equity which the company may have against the original holder cannot be set up against a *bonâ fide* transferee for value without notice who has completed his title at law. *Webb* v. *Herne Bay Commissioners*, L. R. 5 Q. B. 642; *Briggs* v. *Massey*, 42 L. T. 49; *In re Romford Canal Co., Carew's Claim*, 24 Ch. D. 85.

or equitable transferee.

2. Where a company have power to issue securities transferable at law, and issue securities which they represent on the face of them to be so transferable, they cannot set up a legal defence, *e.g.* an irregularity in the issue, against a person who has agreed to take a transfer of them for value, although they are still registered in the name of the original holder

and no transfer has been executed. *In re Cork and Youghal Railway Co.*, 4 Ch. 748; *In re Romford Canal Co., Pocock's Claim, Trickett's Claim*, 24 Ch. D. 85.

A fortiori, they cannot under such circumstances set up against an equitable transferee an equity which they may have against the original holder, *e.g.* an equity arising from an agreement by the original holder to indemnify the company against payment of principal or interest on the bonds transferred. *Dickson* v. *Swansea Vale Ry. Co.*, L. R. 4 Q. B. 44.

As to securities transferable in equity—

Assignee of chose in action takes subject to equities,

"An assignee of a chose in action . . . takes subject to all rights of set-off and other defences which were available against the assignor, subject only to this exception, that, after notice of an assignment of a chose in action, the debtor cannot, by payment or otherwise, do anything to take away or diminish the rights of the assignee as they stood at the time of the notice." *Per* James, L.J., in *Roxburghe* v. *Cox*, 17 Ch. Div. 520, 526.

The rule is not affected by sect. 25, (6), of the Judicature Act, 1873. *In re Milan Tramways Co.*, 22 Ch. D. 122, 127.

although he is also mortgagee.

The rule is not affected by the fact that the assignment of the debt is combined with the assignment of an estate in real, or an interest in personal, property to secure the debt. The assignment of the property is ancillary to the assignment of the debt; and as the assignee takes the debt, so he must take the property, subject to all equities available against his assignor.

The assignee in such a case is not a purchaser for value without notice. Although he may not have notice of the particular equity claimed by the original mortgagor, he has notice, in taking an assignment of a debt, that he takes subject to equities. It follows that, as he cannot claim to take without notice, his position is the same, whether he acquires by the assignment an equitable or legal estate. *Cockell* v. *Taylor*, 15 B. 103, 117; *Smith* v. *Parkes*, 16 B. 115; *Parker* v. *Clarke*, 30 B. 54.

The cases of *Judd* v. *Green*, 45 L. J. Ch. 108, and *Nant-y-glo*

Ironworks Co. v. *Tamplin*, 35 L. T. 125, so far as inconsistent with these principles, cannot be treated as law.

The rule is the same whether the assignment is by way of transfer of the original mortgage or by way of sub-mortgage. *Norrish* v. *Marshall*, 5 Madd. 475; *Cockell* v. *Taylor*, 15 B. 103; *Reeve* v. *Whitmore*, 4 D. J. & S. 1, 19; *In re Lord Southampton's Estate*, 16 Ch. D. 178, 186.

Estoppel.

Of course, the original mortgagor may be estopped, as against a transferee of the mortgage, from setting up an equity which he may have against the transferor; as to which, see p. 364.

Assignee takes subject to state of account.

The assignee takes subject to the state of the account between his assignor and the mortgagor at the date of the assignment. *Matthews* v. *Wallwyn*, 4 Ves. 118, 127; *Chambers* v. *Goldwin*, 9 Ves. 254, 264; *Mangles* v. *Dixon*, 3 H. L. C. 702, 735.

Payments to assignor before notice good as against assignee.

The mortgagor is entitled to treat the assignor as his creditor until he has notice of the assignment. Therefore, payments made on account of the mortgage debt after assignment and before notice are good as against the assignee. *Williams* v. *Sorrell*, 4 Ves. 389; *Ex parte Monro*, Buck, 300; *Cavendish* v. *Geaves*, 24 B. 163; *Wheatley* v. *Bastow*, 7 D. M. & G. 261, 275; *Reeve* v. *Whitmore*, 4 D. J. & S. 1, 19; *In re Lord Southampton's Estate*, 16 Ch. D. 178, 186; *Bickerton* v. *Walker*, 31 Ch. Div. 151, 158.

Whatever is equivalent to payment as between mortgagor and mortgagee is good as against the assignee. *Norrish* v. *Marshall*, 5 Madd. 475; see *Rayne* v. *Baker*, 1 Giff. 241.

In *Withington* v. *Tate* (4 Ch. 288), the payment was made to a person not authorized to receive it on account of the assignor.

Mortgagor's right of set-off.

The mortgagor is entitled to set-off against the assignee of the mortgage debt all debts accruing due from the assignor to him before he has notice of the assignment, whether they are both due and payable before, or due before but not payable till after the assignment. *Wilson* v. *Gabriel*, 4 B. & S. 243; *In re China Steamship Co.*, 7 Eq. 240; *Christie* v. *Taunton, Delmard, Lane & Co.*, (1893) 2 Ch. 175.

But he cannot set-off a debt which does not accrue due

till after notice of the assignment, although the liability out of which it arises existed before notice. *Unity Banking Association* v. *King*, 25 B. 72; *Watson* v. *Mid-Wales Ry. Co.*, L. R. 2 C. P. 593; *In re Milan Tramways Co.*, 22 Ch. D. 122; 25 Ch. Div. 587; *Christie* v. *Taunton, Delmard, Lane & Co.*, (1893) 2 Ch. 175, 184.

Where a contingent debt is assigned, and notice given to the debtor, he is entitled to set-off, as against the assignee, debts becoming due to him from the assignor before the contingent debt becomes a debt certain in respect of liabilities incurred before he received notice; but he cannot set-off debts so becoming due in respect of liabilities incurred after he received notice. *Jeffryes* v. *Agra & Masterman's Bank*, L. R. 2 Eq. 674.

Set-off of unliquidated damages.

Where a company assigned moneys which were to become due to them from time to time under a contract, it was held that unliquidated damages for breach of a term of the contract, incurred after notice of the assignment had been given to the debtors and after all the moneys had become due, could not be set off as against the assignees. *Lee & Chapman's Case*, 26 Ch. D. 624; 30 Ch. Div. 216.

In *Government of Newfoundland* v. *Newfoundland Ry. Co.* (13 App. Cas. 199) it was held that unliquidated damages for non-completion of a railway might be set off as against assignees of an annual subsidy payable in respect of each five miles of the railway completed and operated.

The question is, when does the debt which is assigned become due? When a debt under a contract is unconditionally due, it is clear that the debtor cannot, as against the creditor, set off a claim in respect of a contingent breach, whether of the same or another contract.

But where the debt which is assigned and the claim which it is sought to set off against it arise under the same contract, it may appear that the parties intended to make the fulfilment of the other terms of the contract a condition precedent to the debt becoming due. *Mangles* v. *Dixon*, 3 H. L. C. 702; *Smith* v. *Parkes*, 16 B. 115, 119; *Watson* v. *Mid-Wales Ry. Co.*, L. R. 2 C. P. 593.

The debtor can avail himself of a set-off against the assignee, not only where the assignee is enforcing his personal remedy for the debt, but also where he is enforcing his remedy against the property which forms the subject of the security. *Dodd* v. *Lydall*, 1 Ha. 333; *Christie* v. *Taunton, Delmard, Lane & Co.*, (1893) 2 Ch. 175, 184.

Set-off of debts due from legatee.

As to the rights of executors to set off debts due from a legatee to the estate as against a mortgagee of the legacy, see *Willes* v. *Greenhill*, (No. 1) 29 B. 376; *Re Moore*, 45 L. T. 466; *In re Knapman*, 18 Ch. Div. 300; *Re Langham*, 74 L. T. 611.

Mortgagor estopped from availing himself of equities.

Where a debt is only assignable subject to equities, the debtor may, (1) by his conduct at the creation of the security, or (2) by a subsequent acknowledgment of its validity, be prevented from setting up against a transferee for value a legal defence or an equity which he may have against the original creditor. *Athenæum Life Assurance Society* v. *Pooley*, 1 Giff. 102; 3 De G. & Jo. 294; *Higgs* v. *Assam Tea Co.*, L. R. 4 Ex. 387.

As to the effect of representations at the creation of the security—

Receipt by mortgagor for more than he received.

Where a mortgagor acknowledged in the mortgage deed to have received 250*l.*, and executed an indorsed receipt for that amount, although he received only 91*l.*, he was not allowed to redeem, except on payment of 250*l.*, as against a *bonâ fide* transferee for value who took his assignment before the time fixed for payment of the mortgage money. *Bickerton* v. *Walker*, 31 Ch. Div. 151.

Deposit of certificates of shares, with blank transfer.

Where A. deposited with B. as security for 150*l.* certificates of shares, with a transfer signed by him, but having the date, consideration, and transferee's name in blank, and B. handed them over in the same incomplete state to C. to secure 250*l.*, it was held that A. was entitled to recover them from C. on payment of 150*l.* *France* v. *Clark*, 26 Ch. Div. 257.

On the question how far this case is consistent with *Colonial Bank* v. *Cady* (15 App. Cas. 267), see p. 457.

Debentures payable to bearer.

Where debentures were issued in pursuance of a contract with A. to issue debentures which should be transferable free

from equities, and they were made payable to A., his executors, administrators, or assigns, or to the bearer thereof, it was held that a holder for value might prove on them without regard to any equities between the company issuing them and A. *In re Blakely Ordnance Co.*, L. R. 3 Ch. 154.

But where there was no antecedent contract determining the construction to be put upon the debentures, it was held that debentures in a similar form were only transferable subject to equities, a covenant in the debenture to pay "the holder for the time being of this debenture bond" not excluding the ordinary rule. *In re Natal Investment Co.*, L. R. 3 Ch. 355.

Where a bond is given with the intention that it shall be transferable free from equities, but no evidence of such intention appears on its face, an assignee takes subject to equities. *Graham* v. *Johnson*, 8 Eq. 36.

The right of a holder of debentures payable to bearer to receive payment free from equities may be based upon several principles.

1. The issue of a debenture to bearer may be treated as an offer by the company to the world at large, which is accepted by any person who gives value for a debenture, a valid legal contract thus arising between the company and the transferee on the principle of *Carlill* v. *Carbolic Smoke Ball Co.*, (1893) 1 Q. B. 256. See *In re Agra & Masterman's Bank*, L. R. 2 Ch. 391.

2. The company may be held bound, on the principle of estoppel, to make good their representation in favour of any person who, by taking a debenture, has altered his position on the faith of such representation. See *In re Blakely Ordnance Co.*, L. R. 3 Ch. 154; *Higgs* v. *Assam Tea Co.*, L. R. 4 Ex. 387; *Crouch* v. *Credit Foncier of England*, L. R. 8 Q. B. 347.

3. A company may give itself power to issue negotiable instruments, and a debenture, though under seal, may be treated as having the effect of a promissory note. *In re General Estates Co.*, L. R. 3 Ch. 758; *In re Imperial Land Co. of Marseilles*, 11 Eq. 478. See, however, *Crouch* v. *Credit Foncier of England*, L. R. 8 Q. B. 374.

If an instrument under seal cannot be a promissory note, as appears the better opinion, it is very doubtful whether the incident of negotiability can, either by contract or by long-continued custom, be attached to such an instrument. *Crouch* v. *Credit Foncier of England*, L. R. 8 Q. B. 374.

As to subsequent acknowledgments—

A company by its conduct subsequent to an issue of debentures may preclude itself from setting up equities against a transferee of the debentures. Such subsequent conduct may (*a*) amount to an estoppel as against the company, or (*b*) a ratification of a transaction originally impeachable, or (*c*) be evidence of the terms of the original contract.

Conduct amounting to estoppel.

(*a*) Conduct to amount to an estoppel must precede the transfer, *i.e.* the change of position which renders it inequitable for the company to set up the true state of facts. *Athenæum Life Assurance Society* v. *Pooley*, 3 De G. & Jo. 294.

Conduct of the company after the transfer may amount to an estoppel in favour of the transferee, if he has thereby been induced to abstain from enforcing a right of rescission against the transferor. *Hulett's Case*, 31 L. J. Ch. 293.

Conduct amounting to ratification.

(*b*) Conduct by the company, whether before or after the transfer, may amount to a ratification, in favour of a transferee, of a contract originally voidable by them. *Hulett's Case*, 31 L. J. Ch. 293; *In re South Essex Estuary Co.*, 11 Eq. 157; *In re Hercules Insurance Co.*, 19 Eq. 302.

But where debentures were issued by directors in fraud of the company, it was held that payment of interest to a transferee while the company was under the control of the same directors did not amount to a ratification of the issue. *Athenæum Life Assurance Society* v. *Pooley*, 3 De G. & Jo. 294.

Conduct as evidence of terms of contract.

(*c*) Conduct of the company, whether before or after the transfer, may be evidence of the terms of the original contract. *Higgs* v. *Assam Tea Co.*, L. R. 4 Ex. 387; *In re Northern Assam Tea Co.*, L. R. 10 Eq. 458.

CHAPTER XXXVIII.

TRANSFER OF THE EQUITY OF REDEMPTION.

THE owner of an equity of redemption in property is considered in equity as the owner of the property, and may deal with it as owner. *Casborne* v. *Scarfe*, 1 Atk. 603; 2 J. & W. 194 *n.*; *Heath* v. *Pugh*, 6 Q. B. Div. 345.

Mortgage operating as resettlement.

The mortgage deed may itself operate, not merely as a mortgage, but also as a re-settlement of the property subject to the mortgage. There is no presumption in ordinary cases that the mortgage was intended to have no further effect than to secure the mortgage debt. The question is a question of construction, and each case must be decided on its own circumstances. *Fitzgerald* v. *Fauconberge*, Fitzg. 207; 6 B. C. C. 295; *Barnett* v. *Wilson*, 2 Y. & C. Ch. 407; *Heather* v. *O'Neil*, 2 De G. & Jo. 399; *Plomley* v. *Felton*, 14 App. Cas. 61.

Evidence of an intention to make a new settlement may be collected from the limitations of the mortgage deed. It is not necessary that such intention should be expressed in a recital. *Jackson* v. *Innes*, 4 Bli. 104, 135.

Slight alterations in equity of redemption.

Slight alterations in the equity of redemption, which may be accounted for on the ground of inaccuracy or mistake, are not sufficient to show an intention to alter pre-existing limitations. *Heather* v. *O'Neil*, 2 De G. & Jo. 399, 414; *Plomley* v. *Felton*, 14 App. Cas. 61, 65; *In re Byron's Settlement*, (1891) 3 Ch. 474, 481.

Limitation increasing mortgagor's interest.

Where the reservation of the equity of redemption merely gives the mortgagor a more beneficial interest in, or wider power over his own estate, it will not be treated as due to inaccuracy or mistake. *Anson* v. *Lee*, 4 Sim. 364; *Atkinson*

v. *Smith*, 3 De G. & Jo. 186; *Plomley* v. *Felton*, 14 App. Cas. 61, 68.

Release by widow of dower.

A release by a widow of her dower in a mortgage by her husband's heir at law is presumed to be merely for the purpose of the security. *Meek* v. *Chamberlain*, 8 Q. B. D. 31.

Barring estate tail.

Where it was recited in a mortgage of land in New South Wales that A. was entitled under his father's will to a life estate in the mortgaged property, with remainder to his children as tenants in common in tail general with cross-remainders between them, and that B., a daughter of A., and C., her husband, had agreed to bar the estate tail in remainder vested in her and in him in her right, and the equity of redemption was reserved to A. and C. according to their original respective estates and interest in the mortgaged property, it was held that B.'s estate tail was only barred for the purposes of the mortgage. *Plomley* v. *Felton*, 14 App. Cas. 61.

The question generally arises in one or other of two special cases to which special considerations apply, (1) where a wife's estate is mortgaged to secure the husband's debt, (2) where the mortgage is executed under a general power of appointment. *Plomley* v. *Felton*, 14 App. Cas. 61.

Mortgage of wife's estate to secure husband's debt.

(1) "It must now be admitted as an established principle to be applied in deciding upon the effect of mortgages of this description, whether it be the estate of the wife or the estate of the husband, if the wife joins in the conveyance, either because the estate belongs to her or because she has a charge by way of jointure or dower out of the estate, and there is a mere reservation in the proviso for redemption of the mortgage, which would carry the estate from the person who was owner at the time of executing the mortgage, or where the words admit of any ambiguity, that there is a resulting trust for the benefit of the wife or for the benefit of the husband according to the circumstances of the case." *Per* Lord Redesdale in *Jackson* v. *Innes*, 1 Bli. 104, 126.

Reservation to husband and his heirs.

Thus, where in a mortgage of the wife's real estate the equity of redemption is reserved to the husband and his heirs, a resulting trust will, in the absence of any evidence

of a contrary intention, be implied in favour of the wife. *Broad* v. *Broad*, 2 Ch. Ca. 99, 161; *Earl of Huntington* v. *Countess of Huntington*, 2 Vern. 437; 2 B. P. C. 7; *Ruscombe* v. *Hare*, 6 Dow, 1; *Jackson* v. *Innes*, 1 Bli. 104; *Stansfield* v. *Hallam*, 29 L. J. Ch. 173.

Where land of the wife was limited to the use of trustees upon such trusts as the husband should appoint, and subject thereto upon trusts in favour of the husband and wife and their children, and the husband appointed the land to a trustee upon trust for sale and securing the repayment of the mortgage money, and, subject thereto, upon trust for the husband and his heirs, it was held that the mortgage effected a re-settlement. *Heather* v. *O'Neil*, 2 De G. & Jo. 399.

The case went on the grounds that the mortgage was not an ordinary mortgage, but a conveyance of the estate upon trusts expressly declared, and that the trustees of the old settlement were parties to the mortgage for the purpose of passing the legal estate to the new trustee. *Heather* v. *O'Neil*, 2 De G. & Jo. 399.

Release of jointure rent-charge.

A release by a wife of her jointure rent-charge will be presumed to be a release merely for the purpose of the mortgage. The presumption is strengthened by a recital that she has joined in the mortgage "in order to effect the said mortgage security," or "in manner hereinafter expressed and for the purpose hereinafter appearing." *Wood* v. *Wood*, 7 B. 183; *In re Betton's Trust Estates*, 12 Eq. 553.

Mortgage of property which husband could reduce into possession.

A mortgage by the husband of property of the wife, which the husband was competent to make his own by reducing into possession during her lifetime, will not destroy her right by survivorship beyond the extent of the mortgage debt, although the equity of redemption is reserved to the husband alone. *Clark* v. *Burgh*, 2 Coll. 221; *Pigott* v. *Pigott*, 4 Eq. 549.

Where husband and wife mortgaged by feoffment and fine land of which they were tenants by entireties in fee, and the equity of redemption was limited to the husband and wife and their heirs or to such other persons as they or the survivor should appoint, it was held that the proviso annexed a new quality to the wife's estate by enabling her to dispose of it

without levying a fine, and must be strictly construed. *Atkinson* v. *Smith*, 3 De G. & Jo. 186.

Power to husband to raise further sums.

A surrender of the wife's copyhold estate by husband and wife to such uses, and charged with payment of such sums, as the mortgagee, by the direction of the husband, should appoint, with a proviso for redemption on payment of 100*l.*, was held a valid security for 500*l.* in addition, the mortgagee having, by the direction of the husband, charged it with various sums making up that amount. *Eddleston* v. *Collins*, 3 D. M. & G. 1.

Resettlement distinct from proviso for redemption.

Where the limitations relied upon as making a re-settlement are distinct from the proviso for redemption, they must be given their full effect. *Rowel* v. *Walley*, 1 Ch. Rep. 116; *Jackson* v. *Innes*, 1 Bli. 104; *Reeve* v. *Hicks*, 2 Si. & St. 403.

Thus, where the wife joined her husband in the mortgage of her estate by fine, and the proviso was that, if the husband or wife paid the money at the day, the term created by the deed should cease, and the uses of the fine were declared to enure to the use of the mortgagee during the term, subject to the said proviso, and after the expiration of such term to certain uses therein mentioned, it was held that there was no connection between the mortgage and the new limitations contained in the deed which limited the reversion in fee, and that no resulting trust in favour of the wife could be implied. *Jackson* v. *Innes*, 1 Bli. 104.

Mortgage under joint power of appointment.

(2) Where A. and B. executed a mortgage by virtue of a joint power of appointment in a settlement under which, subject to the exercise of the power, A. was entitled for life, remainder to B. in fee, and the equity of redemption was reserved to A. and B. and their heirs, it was held that the limitations of the settlement were not altered, chiefly on the ground that A. was by the mortgage, as between himself and B., required to keep down the interest during his life. *Hipkin* v. *Wilson*, 3 De G. & Sm. 738.

Where land was limited to such uses as husband and wife should jointly appoint, and in default to husband for life, remainder to wife for life, remainder to son in fee, and the husband and wife, in exercise of the joint power, made a

mortgage which limited the equity of redemption to the husband and wife and their heirs or such other persons as they should direct, it was held that the mortgage made no alteration in the title to the equity of redemption. *Whitbread* v. *Smith*, 1 Drew. 531; 3 D. M. & G. 727.

Proviso for redemption distinct from trusts of proceeds of sale.

Where, in a mortgage of land under a joint power given to husband and wife by the marriage settlement, the equity of redemption was reserved to the uses of the settlement, but there was a direction to pay over the surplus proceeds of sale to the husband, it was held that the husband took the surplus proceeds for his own benefit. *Jones* v. *Davies*, 8 Ch. D. 205; see, however, *Plomley* v. *Felton*, 14 App. Cas. 61, 68.

CHAPTER XXXIX.

ULTIMATE INCIDENCE OF THE MORTGAGE DEBT.

THE election of the mortgagee does not determine the ultimate incidence of the mortgage debt. *Galton* v. *Hancock*, 2 Atk. 424, 435, 438.

And, conversely, no right of indemnity, exoneration, contribution, or marshalling which may arise between persons interested in the equity of redemption or entitled to redeem can affect the power of the mortgagee to select his remedy. *Mason* v. *Bogg*, 2 My. & Cr. 443, 447; *Wrixon* v. *Vize*, 2 D. & War. 192; *Noyes* v. *Pollock*, 32 Ch. Div. 53.

A. INCIDENCE OF THE DEBT AS BETWEEN CO-MORTGAGORS.

Where one of co-mortgagors is surety.

Where there are several mortgagors, of whom one is the principal debtor and the others sureties, the rights of the sureties to exoneration by the principal debtor and to contribution as between themselves belong to the law of principal and surety.

Mortgagee not affected by right of exoneration.

A mortgagee is not affected by any right of exoneration which may exist as between his co-mortgagors.

Where mortgagees of estates A. and B., of which A. was liable to exonerate B., concurred in a sale of A. and allowed the mortgagor to receive 3000*l.*, part of the purchase money, it was held that they were not chargeable with the 3000*l.* as against a person interested in the equity of redemption in estate B. *Noyes* v. *Pollock*, 32 Ch. Div. 53.

Where there are co-mortgagors, parol evidence is admissible to show for whose benefit the money was really advanced. *Gray* v. *Dowman*, 27 L. J. Ch. 702.

Contribution between co-sureties.

The cases as to contribution between co-sureties are collected in *Wolmershausen* v. *Gullick*, (1893) 2 Ch. 514; *In re Parker*, (1894) 3 Ch. 400.

Each surety must bring into hotchpot every benefit which he has received in respect of his suretyship, *e.g.* any counter-security given him by the principal debtor. It follows that such security will be applicable for the benefit of all the sureties to the full extent of the principal debt. *Steel* v. *Dixon*, 17 Ch. D. 825; *In re Arcedeckne*, 24 Ch. D. 709; *Berridge* v. *Berridge*, 44 Ch. D. 168.

Wife's estate charged for husband's debt.

"It has long been settled in this Court that if the wife's estate be charged or pledged for the debts of the husband, she is entitled to have that estate exonerated. Originally, perhaps, it arose in the course of the Court's administration of the husband's estate, the Court giving the wife the benefit of the husband's contract or covenant to pay the money, and by virtue of that transfer of the legal right of the creditor, giving the wife a claim against the husband's estate. But after some time the form of the doctrine assumed a different shape, and then we find the language introduced—that the wife is to be regarded as a surety for the husband, and that in respect of such contract of suretyship she is entitled to the ordinary rights of a surety, namely, to have the debt of the principal thrown upon the property of the principal." *Per* Westbury, C., in *Scholefield* v. *Lockwood*, 4 D. J. & S. 22, 27.

The earlier doctrine is illustrated by *Huntington* v. *Huntington*, 2 Vern. 437; 1 B. P. C. 1; *Pocock* v. *Lee*, 2 Vern. 604; *Tate* v. *Austin*, 1 P. W. 264.

The doctrine is based on suretyship in *Robinson* v. *Gee*, 1 Ves. S. 251, 252; *Earl of Kinnoul* v. *Money*, 3 Sw. 202 *n.*, 217.

A statement in the deed that the money was paid to husband and wife imports payment to the husband; but it may be shown by parol evidence that the payment was for the benefit of the wife. *Clinton* v. *Hooper*, 1 Ves. J. 173; *Hudson* v. *Carmichael*, Kay, 613.

Mortgage of wife's freehold, not settled to her separate use.

It is a question how far the wife's right of exoneration extends. Where the wife's freehold, not settled to her separate use, is mortgaged, it has been held that she cannot compete with

creditors of the husband. *Tate* v. *Austin*, 1 P. W. 264; *Clinton* v. *Hooper*, 3 B. C. C. 201; 1 Ves. J. 173; see, however, *Parteriche* v. *Powlet* 2 Atk. 383; *Robinson* v. *Gee*, 1 Ves. S. 251.

In *Gleaves* v. *Paine* (1 D. J. & S. 87, 96) it is assumed that the wife has the rights of a creditor.

Mortgage of wife's separate estate.

Where separate estate of the wife is mortgaged, she has the ordinary rights of a creditor, and, if she is her husband's executrix, may retain her debt as against his simple contract creditors. *Hudson* v. *Carmichael*, Kay, 613.

Where a mortgage was created by husband and wife under a joint power of appointment, subject to which a moiety of the mortgaged estate stood limited to the wife in fee, it was held that the wife had no right to exoneration. *Scholefield* v. *Lockwood*, 4 D. J. & S. 22.

Where a wife married before the Dower Act joins with her husband in levying a fine of his freehold estate, and they mortgage the estate in fee, her inchoate right to dower is extinguished. She has no right to exoneration as surety, as she has no property to pledge with regard to which the right could arise. *Dawson* v. *Bank of Whitehaven*, 6 Ch. Div. 218.

Mortgage of life policy, where grantee commits suicide.

Where the grantee of a policy of life insurance, which contained a proviso avoiding the policy, except as against an assignee for value, if the grantee committed suicide, mortgaged the policy, together with real estate, for a sum exceeding the policy moneys, and the mortgagee, the grantee having committed suicide, recovered them from the insurance office, it was held that the insurance office had no equity, as against the representatives of the grantee, to indemnity or even to contribution out of the real estate. *Solicitors' Life Assurance Society* v. *Lamb*, 1 H. & M. 716; 2 D. J. & S. 251; *City Bank* v. *Sovereign Life Assurance Co.*, 50 L. T. 565. See *White* v. *British Empire Life Assurance Co.*, 7 Eq. 394.

B. Incidence of the Debt as between Vendor and Purchaser of the Equity of Redemption.

Purchaser bound to indemnify vendor.

On a conveyance for value of lands subject to an incumbrance and expressed to be so conveyed, there is implied an

undertaking by the purchaser to indemnify the vendor against his personal liability under the incumbrance. *Waring* v. *Ward*, 7 Ves. 332; *Crafts* v. *Tritton*, 8 Taunt. 365; *Vandeleur* v. *Vandeleur*, 3 Cl. & F. 82, 99; *Jones* v. *Kearney*, 1 D. & War. 134, 155; *Barry* v. *Harding*, 1 J. & Lat. 475, 485; *Adair* v. *Carden*, 29 L. R. Ir. 469; *Bridgman* v. *Daw*, 40 W. R. 253.

The purchaser is under no personal liability to the incumbrancer. *Woods* v. *Huntingford*, 3 Ves. 128, 132; *In re Errington*, (1894) 1 Q. B. 11.

There may, of course, be a novation by the release of the original mortgagor and the substitution of the purchaser as debtor. *Shore* v. *Shore*, 2 Ph. 378.

C. Incidence of the Debt as between the Property charged and the Personal Estate.

Legatee of chattel entitled to exoneration.

The specific legatee of a chattel or other personal property is entitled to have any charge upon the property created by his testator discharged out of the testator's general personal estate. *Stewart* v. *Denton*, 4 Doug. 219; *Knight* v. *Davis*, 3 My. & K. 358; *Bothamley* v. *Sherson*, 20 Eq. 304.

If the legacy is not redeemed, the legatee is entitled to compensation to the amount of the legacy. Cases *supra*.

The legatee is so entitled, whether the testator is personally liable for the debt secured by the charge or not. *Bothamley* v. *Sherson*, 20 Eq. 304.

This decision cannot be reconciled with the opinion of Leach, M.R., that "the same principle applies to specific legatees as to devisees of real estate in respect of the redemption of the subject of the gift out of the general assets of the testator." *Knight* v. *Davis*, 3 M. & K. 358, 361.

Heir or devisee of land charged or mortgaged.

Under the rules which prevailed before Locke King's Act, the heir or devisee of an estate in mortgage was entitled, where the ancestor or testator was personally liable for the mortgage debt, to have the mortgage paid off out of his general personal estate. *Evelyn* v. *Evelyn*, 2 P. W. 659; *Waring* v. *Ward*, 7 Ves. 332.

The devisee was entitled to exoneration although the land

was devised to him subject to incumbrances, these words being taken as merely descriptive of the subject-matter of the gift. *Serle* v. *St. Eloy*, 2 P. W. 386; *Graves* v. *Hicks*, 6 Sim. 398.

The heir or devisee was not entitled to exoneration unless his ancestor or testator was personally liable for the mortgage debt.

Effect of Locke King's Acts.

The effect of Locke King's Acts, as to which see Theobald on Wills, pp. 135–143, has been to make the land mortgaged or charged liable, in both cases, as between it and the personal estate, to payment of the secured debt.

D. Incidence of the Debt as between the Real and Personal Representatives of Infants and Lunatics.

Infant.

"In the case of the infant it is settled that, as a trustee out of Court cannot change the nature of the property, so the Court, which is only a trustee, must act as the trustee out of Court." *Per* Eldon, C., in *Ex parte Phillips*, 19 Ves. 118, 122.

Therefore, where a charge on the real estate of an infant is paid off out of his personalty, the next of kin will have an equity, if the infant dies under age, to a charge on the real estate to the extent of the personal estate so applied. *Gibson* v. *Scudamore*, 1 Dick. 45; *Witter* v. *Witter*, 3 P. W. 99; *Lord Ashburton* v. *Lady Ashburton*, 6 Ves. 6; *Ware* v. *Polhill*, 11 Ves. 257, 278; *Webb* v. *Lord Shaftesbury*, 6 Madd. 100.

Lunatic.

As regards a lunatic—

Change without authority.

A change in the nature of his property made without authority has no effect. The rights of the persons claiming under him are the same as if no change had been made. *Awdley* v. *Awdley*, 2 Vern. 193 S. C. *Lord Plymouth's Case*, Freem. Ch. 114.

Change by Court.

In the ordinary course of managing a lunatic's estate, the Court pays no regard to the interests or expectations of those who may come after. In matters outside the ordinary course of management, it is the duty of the Court, so far as possible, not to alter the character of the lunatic's property, or to interfere with any rights of succession. *Ex parte Annandale*, Amb. 79; *Ex parte Grimstone*, Amb. 706; 4 B. C. C. 235 *n.*;

Oxenden v. *Lord Compton*, 2 Ves. J. 69; *Ex parte Whitbread*, 2 Mer. 99; *Re Badcock*, 4 My. & Cr. 440; *A.-G.* v. *Marquis of Ailesbury*, 12 App. Cas. 672.

Therefore, where a mortgage created by an ancestor of the lunatic was paid off out of the lunatic's personal estate, but the mortgage was kept alive, it was held on the death of the lunatic intestate that the sum applied in paying off the mortgage should be raised out of the real estate comprised therein, and dealt with as personal estate. *In re Leeming*, 3 D. F. & J. 43.

The earlier cases are conflicting, but the balance of authority is against any equity of the next of kin in such a case to a charge on the real estate. *Ex parte Grimstone*, Amb. 706; *Ex parte Phillips*, 19 Ves. 118; *Newcombe* v. *Newcombe*, 3 Ir. Eq. 414; *Earl of Leitrim* v. *Enery*, Dru. t. Sugd. 330; 6 Ir. Eq. 357, where the cases are collected.

These cases appear to have proceeded on the ground that the payment off of a charge on the lunatic's property was a transaction within the course of ordinary management analogous to expenditure on repairs or cutting timber.

The decision in *In re Leeming* appears to be in accordance with the intentions of the Legislature. See Lunacy Act, 1890 (53 Vict. c. 5), sects. 118 and 123.

Lunacy Act, 1890, ss. 118, 123.

E. Incidence of the Debt as between Different Properties subject to the Same Mortgage.

The general rule is, that where a mortgagor mortgages distinct properties to secure the same debt, these properties must, as between persons claiming under the mortgagor, bear the mortgage debt rateably, in proportion to their respective values. *Aldrich* v. *Cooper*, 8 Ves. 382, 392; *Averall* v. *Wade*, Ll. & G. t. Sugd. 252.

The rule applies where real and personal property are mortgaged to secure the same debt. *Lipscomb* v. *Lipscomb*, 7 Eq. 501; *Trestrail* v. *Mason*, 7 Ch. D. 655.

Realty and personalty mortgaged together.

The rule applies where different properties are mortgaged at different times to secure the same debt. The question is,

Properties mortgaged at different times.

whether the mortgagor treated the loan as one consolidated loan, and it is immaterial that a further advance was made him on the occasion of the subsequent security. *Galton* v. *Hancock*, 2 Atk. 424, 426; *Gwynne* v. *Edwards*, 2 Russ. 289 *n.*; *Leonino* v. *Leonino*, 10 Ch. D. 460, where *Lipscomb* v. *Lipscomb*, 7 Eq. 501, and *De Rochefort* v. *Dawes*, 12 Eq. 540, are discussed.

Properties must be subject to same charge.

The rule only applies where the different properties are subject to one and the same charge. Therefore, where a company has a specific mortgage on real estate of a shareholder, and a general lien on his shares for the same debt, there can be no apportionment. The real estate must bear the whole debt. *In re Dunlop*, 21 Ch. Div. 583.

Expression of contrary intention by mortgagor.

The mortgagor may provide that, as between different properties subject to the same mortgage, one shall bear the whole mortgage debt in exoneration of the other or others. The rights of parties claiming under him are determined by his intention, which may be expressed either in the instruments creating the charge or in his will. *Marquis of Bute* v. *Cunynghame*, 2 Russ. 275, 299; *Leonino* v. *Leonino*, 10 Ch. D. 460, 464; *In re Dunlop*, 21 Ch. Div. 583, 588.

Collateral security.

Property comprised in a mortgage described as a collateral security is not necessarily entilted to exoneration. Collateral is not equivalent to secondary. *Early* v. *Early*, 16 Ch. D. 214 *n.*; *In re Athill*, 16 Ch. Div. 211. See *Marquis of Bute* v. *Cunynghame*, 2 Russ. 275.

Charge in aid.

But where the second estate was charged "in aid" of the first, it was held that the debt was primarily payable out of the first estate. *Stringer* v. *Harper*, 26 B. 33.

F. Incidence of the Debt as between Tenant for Life and Remainderman.

Tenant for life is bound, to the extent of the rents and profits, to keep down the interest of incumbrances affecting the fee; and all rents and profits received during his tenancy are available for the payment of any interest accruing during the tenancy. *Manaton* v. *Manaton*, 2 P. W. 235; *Revel* v.

Watkinson, 1 Ves. S. 93; *Tracy* v. *Lady Hereford*, 2 B. C. C. 128; *Burges* v. *Mawbey*, T. & R. 167; *Caulfield* v. *Maguire*, 2 J. & Lat. 141, 160; *Kensington* v. *Bouverie*, 19 B. 39; 7 D. M. & G. 134; 7 H. L. C. 557; *Makings* v. *Makings*, 1 D. F. & J. 355.

Two estates devised as one property.

Tenant for life of two estates which are settled under a will as one property is bound to apply the surplus rents of one estate in keeping down charges on the other. *Frewen* v. *Law Life Assurance Society*, (1896) 2 Ch. 511.

Where a tenant for life of two estates comprised in the same settlement allowed the interest on a mortgage of one estate to fall into arrear while he paid off part of the principal due on a mortgage of the other, it was held that the two claims formed the subject of set-off. *Scholefield* v. *Lockwood*, 4 D. J. & S. 22.

Assignee of life estate.

A mortgagee buying the life estate cannot charge interest against the inheritance which his vendor had neglected to pay. He is bound to satisfy arrears before the purchase out of the rents and profits accruing due after it. *Lord Penrhyn* v. *Hughes*, 5 Ves. 99.

Mortgage payable by instalments.

As to apportionment between tenant for life and remainderman where the mortgage was payable by instalments of principal and interest, see *O'Rorke* v. *O'Rorke*, 17 L. R. Ir. 376.

Occupation rent.

Tenant for life will be chargeable with an occupation rent, if he has had the benefit of personal occupation or enjoyment. *Kensington* v. *Bouverie*, 7 H. L. C. 557.

Second tenant for life.

A succeeding tenant for life is under no obligation to discharge arrears accruing during the preceding tenancy. Such arrears are, as between him and persons entitled to the inheritance, a charge on the inheritance. *Caulfield* v. *Maguire*, 2 J. & Lat. 141, 158; *Sharshaw* v. *Gibbs*, Kay, 333, not following the dictum in *Lord Penrhyn* v. *Hughes*, 5 Ves. 99, 106.

A tenant for life redeeming a mortgagee in possession, who has received rents in excess of the interest due to him, is entitled to a charge on the inheritance for so much of the principal as is thereby discharged. *Faulkner* v. *Daniel*, 3 Ha. 204 *n.*; *Pawley* v. *Colyer*, 3 D. J. & S. 676.

If tenant for life pays interest on a charge in excess of the rents and profits, he may make himself an incumbrancer on the inheritance for such excess. It is a question of intention. The presumption is that he intended a gift to the inheritance. *Kensington* v. *Bouverie*, 7 H. L. C. 557.

Remainderman, whether entitled to receiver.

Where there is a charge upon the inheritance, the remainderman is entitled to a receiver if the tenant for life fails to keep down the interest out of rents and profits. *Hill* v. *Browne*, Dru. 426, 434; *Kensington* v. *Bouverie*, 19 B. 39, 54; 7 H. L. C. 557; *Makings* v. *Makings*, 1 D. F. & J. 355, 358.

The dictum of Westbury, C., in *Scholefield* v. *Lockwood* (4 D. J. & S. 22, 31), that no right arises to the remainderman until the death or insolvency of the tenant for life, appears to be inconsistent with these authorities.

Remainderman given charge on future rents.

Where the tenant for life lets interest fall into arrear and the mortgagee raises it out of the inheritance, the remainderman has a charge for such arrears upon the future rents and profits payable during the tenancy for life. *Waring* v. *Coventry*, 2 M. & K. 406; *Coote* v. *O'Reilly*, 1 J. & Lat. 455; *Makings* v. *Makings*, 1 D. F. & J. 355.

Whether remainderman can have account.

Romilly, M.R., is reported as having said, in *Kensington* v. *Bouverie* (19 B. 39, 54), that, if the remainderman allows the tenant for life to let interest fall into arrear, he cannot after his death ask for an account of the rents or establish a debt against his assets on the ground that the rents were sufficient to keep down the interest. The report appears to be incorrect. See *Baldwin* v. *Baldwin*, 4 Ir. Ch. 501; 6 Ir. Ch. 156, where the contrary was held.

Tenant by the curtesy (*a*), tenant for life with an absolute power of appointment (*b*), or owner in fee with an executory devise over (*c*), is under the same obligations as tenant for life. (*a*) *Corbett* v. *Barker*, 3 Anst. 755; (*b*) *Whitbread* v. *Smith*, 3 D. M. & G. 727, 741; (*c*) *Butcher* v. *Simmonds*, 35 L. T. 304.

Adult tenant in tail.

An adult tenant in tail is not bound to keep down the interest on incumbrances out of rents and profits. If he does keep down the interest, he is not entitled to charge it against the inheritance. *Amesbury* v. *Brown*, 1 Ves. S. 477; *Burges* v. *Mawbey*, T. &. R. 167.

Infant tenant in tail.

An infant tenant in tail is bound to keep down, out of rents and profits, the interest of incumbrances on the fee. *Sergeson* v. *Sealey*, 2 Atk. 416; *Burges* v. *Mawbey*, T. & R. 167.

The obligation can only be enforced by the reversioner or remainderman. *Bertie* v. *Lord Abingdon*, 3 Mer. 560.

G. Marshalling.

This doctrine has been shortly stated—

Marshalling defined

"If a creditor has two funds, the interest of the debtor shall not be regarded, but the creditor having two funds shall take to that which, paying him, will leave another fund for another creditor." *Per* Eldon, C., in *Aldrich* v. *Cooper*, 8 Ves. 382, 391.

The doctrine is subject to the following limitations:—

Creditor not affected by marshalling.

1. "That principle has never been applied to affect the interest of the creditor or to diminish his rights; it is to be applied only as against the owners of the property charged." *Per* Cottenham, C., in *Mason* v. *Bogg*, 2 My. & Cr. 443, 447.

If A. has control over two funds, on both of which he has a charge, and B. has a charge, of which A. has notice, on one fund only, A. is perhaps under a duty to B. to satisfy his debt out of the other fund so far as it will extend, and might be liable to B. to the extent to which he unnecessarily satisfied it out of the fund charged in favour of B. See *Webb* v. *Smith*, 30 Ch. Div. 192, 202.

Prior creditor must have equal rights over both funds.

2. The doctrine does not apply unless the prior creditor has equal rights over the two funds. Thus, it does not apply if he has a charge on one, but merely a right of set-off as regards the other. *Webb* v. *Smith*, 30 Ch. Div. 192.

Rule applies only as against volunteers.

3. It is only applicable as against the debtor and volunteers under him, including his trustee in bankruptcy. *Flint* v. *Howard*, (1893) 2 Ch. 54, 73.

It is applicable as against an execution creditor of the debtor. A purchaser of shares on which a company has a lien for a debt due to the vendor can throw the debt on other shares of the vendor as against execution creditors who, after

the transfer, have obtained a charging order on the unsold shares. *Gray* v. *Stone*, (1893) W. N. 133.

The following are instances of marshalling:—

Illustrations of marshalling.

1. If a person having two estates mortgages both to A., and then one only to B., B. may, as against the mortgagor, compel the payment of the first mortgage out of the estate on which he had no charge.

To the extent to which A. realizes his charge out of the estate which is also mortgaged to B., B. is entitled to stand in his place against the estate on which he has by contract no security. *Lanoy* v. *Duke of Athol*, 2 Atk. 444, 446; *Aldrich* v. *Cooper*, 8 Ves. 382; *Baldwin* v. *Belcher*, 3 D. & War. 173; *Tidd* v. *Lister*, 10 Ha. 157; 3 D. M. & G. 857, 872; *Gibson* v. *Seagrim*, 20 B. 614; *Lawrance* v. *Galsworthy*, 3 Jur. N. S. 1049; *South* v. *Bloxam*, 34 L. J. Ch. 369.

Equity to apportionment as between two puisne mortgages.

2. If a debtor mortgages two estates to A., and then one to B. and the other to C., the equity between B. and C. is to have the first mortgage apportioned between the two properties according to their respective values. *Barnes* v. *Racster*, 1 Y. & C. Ch. 401; *Bugden* v. *Bignold*, 2 Y. & C. Ch. 377; *Moxon* v. *Berkeley Building Society*, 59 L. J. Ch. 524; *Flint* v. *Howard*, (1893) 2 Ch. 57; *Wood* v. *West*, 40 Sol. Jo. 114.

The equity of C. to have an apportionment probably does not depend on whether he has notice of A.'s mortgage or not. *Per* Kay, L.J., in *Flint* v. *Howard*, (1893) 2 Ch. 57, 73.

It has been held, however, in Ireland that, if C. in such a case, when he took his security, had notice of A.'s mortgage, he has no equity to have it apportioned, and that B. can throw it exclusively upon the property mortgaged to C. *In re Lawder's Estate*, 11 Ir. Ch. 346; *In re Roddy's Estate*, 11 Ir. Ch. 369; *In re Roche's Estate*, 25 L. R. Ir. 271.

Sale with covenant against incumbrances.

3. If a mortgagor deals with part of the estate mortgaged for valuable consideration, and gives the purchaser a covenant against incumbrances or a covenant for further assurance, the purchaser is entitled to be indemnified against the mortgage debt, and to throw it upon the rest of the property mortgaged, so long as that property remains in the hands of the mortgagor or of volunteers under him. *King* v. *Jones*, 5 Taunt.

418; *Averall* v. *Wade*, Ll. & G. t. Sugd. 252; *Handcock* v. *Handcock*, 1 Ir. Ch. 444; *Stock* v. *Aylward*, 8 Ir. Ch. 429; *In re Barker's Estate*, 3 L. R. Ir. 395; *In re Jones*, (1893) 2 Ch. 470.

Volunteers.

Persons claiming under a voluntary settlement made by the mortgagor have the same right to exoneration as against him and volunteers under him, if the settlement contains a covenant against incumbrances (*a*), or for quiet enjoyment (*b*), but not if it merely contains a covenant for further assurance (*c*). (*a*) *Hughes* v. *Williams*, 3 Mac. & G. 683; (*b*) *Hales* v. *Cox*, 32 B. 118; (*c*) *Ker* v. *Ker*, I. R. 3 Eq. 489; 4 Eq. 15.

Apportionment as between two purchasers.

It has been held in Ireland that, if A. mortgages his property and then deals with the equity of redemption in a portion for valuable consideration, a subsequent purchaser from A., at all events with notice, is in no better position than A., and is liable to bear the whole of the mortgage. *In re Roche's Estate*, 25 L. R. Ir. 271. See, however, *Averall* v. *Wade*, Ll. & G. t. Sugd. 252, 261; *Stronge* v. *Hawkes*, 4 De G. & Jo. 632, 652.

Where the facts were: first mortgage of two funds A. and B., second mortgage of A., third mortgage of A. and B. "subject to and after payment of and satisfaction of" the sums secured by the first two mortgages, it was held that, fund A. having been absorbed in payment of the first mortgage, fund B. must be applied in satisfaction of the second mortgage in full in priority to the third mortgage. *In re Mower's Trusts*, 8 Eq. 110.

A judgment creditor has no larger or other rights than the judgment debtor. Therefore, where A. makes a voluntary settlement, under which he takes a life estate, and then mortgages the inheritance, a judgment creditor of A. cannot throw the mortgage exclusively on the interests in remainder under the settlement. *Dolphin* v. *Aylward*, L. R. 4 H. L. 486; see *Anstey* v. *Newman*, 39 L. J. Ch. 769.

CHAPTER XL.

PRIORITIES.

AN incumbrancer for valuable consideration cannot be prejudiced by any subsequent acts of the person who has created the incumbrance.

Incumbrances rank according to date.

It follows that all persons claiming, whether as volunteers or for value, under the creator of an incumbrance, must take subject to the rights of the incumbrancer, and that incumbrances rank for priority according to the order in time of their creation. *Brace* v. *Duchess of Marlborough*, 2 P. W. 491, 495; *Willoughby* v. *Willoughby*, 1 T. R. 763, 773; *Phillips* v. *Phillips*, 4 D. F. & J. 208, 215; *Cory* v. *Eyre*, 1 D. J. & S. 149, 167; *Shropshire Union Rys. Co.* v. *Reg.*, L. R. 7 H. L. 496, 506.

As to priorities where two deeds are executed on the same day, see *Gartside* v. *Silkstone Coal Co.*, 21 Ch. D. 762.

Where there is no provision in an issue of debentures that they are to rank *pari passu*, they have priority according to the date of their execution. *James* v. *Boythorpe Colliery Co.*, 2 Megone, 55.

Where two legal mortgages are delivered at the same time, the mortgagees apparently take the mortgaged property as joint tenants or tenants in common. *Hopgood* v. *Ernest*, 3 D. J. & S. 116.

As to the construction of clauses in two successive Acts of Parliament enacting that any charge under the Act should have priority over every other charge, whether existing at the time or made afterwards, see *Pollock* v. *Lands Improvement Co.*, 37 Ch. D. 661.

Where second debentures are created "subject to the

debentures which have been already issued for securing 10,000*l.* or such of them as are now outstanding," they take subject to all debentures of the first series, whether issued before or after the creation of the second series, except such of them as, having been paid off, are re-issued. *Lister* v. *Henry Lister & Sons*, (1893) W. N. 33.

The general principle of priority is subject to the following exceptions:—

Priority affected by statutes,

1. By the operation of various statutes, trustees in bankruptcy, creditors, and subsequent purchasers for value are enabled to set aside, in the cases provided by the statutes, incumbrances previously created for value.

agency

2. An incumbrancer may make the creator of the incumbrance his agent to borrow money in priority to his own charge.

estoppel,

3. By the application of the doctrine of estoppel, an incumbrancer for value may be prevented from setting up his incumbrance as against a subsequent purchaser or mortgagee.

legal estate,

4. A subsequent purchaser or mortgagee may, either at the time of advancing his money or afterwards, obtain a legal advantage over a previous incumbrancer which will entitle him to priority.

notice to trustees.

5. By an anomalous extension of the doctrine of reputed ownership, a subsequent incumbrancer of a debt or fund in the hands of trustees obtains priority over a previous incumbrancer by giving earlier notice to the debtor or trustee.

Notice affecting conscience.

But equity will not enable the subsequent purchaser or mortgagee to avail himself of his legal advantage or of his earlier notice if, at the time of advancing his money, he had notice of the prior incumbrance.

A. prior to B., B. to C., and C. to A.

Where there are three successive incumbrances, A., B., and C., A., may be prior to B. and B. to C., but at the same time C. may be prior to A. In such a case the rights will be adjusted as follows:—

C. is subrogated to the rights of A. to the extent of A.'s charge, and to that extent will take in priority to B. As to any excess over that amount claimed by C., he comes in after B.

If the property incumbered is a money fund, it will therefore be distributable in this order:—(1) to C. to the extent of A.'s claim; (2) to B. in full; (3) to C. to the extent of the balance remaining due to him; (4) to A. *Beavan* v. *Earl of Oxford*, 6 D. M. & G. 507; *Benham* v. *Keane*, 1 J. & H. 685; *In re Lord Kensington*, 29 Ch. D. 527; *In re Wyatt*, (1892) 1 Ch. 188, 208; see *In re Armstrong*, (1895) 1 I. R. 87.

Property out of jurisdiction.

Where an agreement is made between persons in England with the intention of creating a charge upon immovables out of the jurisdiction, but the charge is invalid under the law of the place where the immovables are situated, a person who, with notice of the agreement, obtains a valid charge on the immovables will not be restrained in equity from availing himself of his charge as against persons claiming under the agreement. *Martin* v. *Martin*, 2 R. & M. 507; *Norton* v. *Florence Land Co.*, 7 Ch. D. 332, 336; see also *Liverpool Marine Credit Co.* v. *Hunter*, 4 Eq. 62; 3 Ch. 479.

CHAPTER XLI.

TRUSTEE IN BANKRUPTCY—REPUTED OWNERSHIP.

Trustee in bankruptcy takes under bankrupt.

"A TRUSTEE in bankruptcy or execution creditor is in privity with the bankrupt or execution debtor. He takes under the bankrupt or execution debtor, not like a purchaser for valuable consideration, and it has been decided over and over again that he only takes what was vested in the bankrupt or execution debtor." *Per* Kay, L.J., in *Madell* v. *Thomas & Co.*, (1891) 1 Q. B. 230, 238.

"Except where there is an offence against the bankrupt law or against some law in favour of creditors, the trustee is merely the legal representative of the debtor, with such rights as he would have had if not bankrupt, and no other." *Per Curiam*, in *In re Mapleback*, 4 Ch. Div. 150, 156.

Assignment of debt due before but payable after bankruptcy valid.

An assignment of a debt becoming due to the assignor before his bankruptcy is valid against the trustee in bankruptcy, although the debt is not payable till after the bankruptcy. *Drew* v. *Josolyne*, 18 Q. B. Div. 590; *In re Davis & Co.*, 22 Q. B. Div. 193.

It is immaterial that the amount due is not ascertained at the date of the bankruptcy, if the work in respect of which it becomes due was then done. *Ex parte Moss*, 14 Q. B. Div. 310.

Assignment of debts due after bankruptcy void.

But an assignment of debts now due and owing and hereafter to become due and owing to the assignor in a business is void, as against his trustee in bankruptcy, so far as regards debts which become due to the trustee after the bankruptcy in the course of carrying on the business. *Ex parte Nichols*, 22 Ch. Div. 782.

A charge on moneys to become due under a contract of

bailment for hire is void, as against the bailor's trustee in bankruptcy, in respect of moneys becoming due after the bankruptcy. *Wilmot* v. *Alton*, (1896) 2 Q. B. 254; affd. (1897) 1 Q. B. 17.

Mortgage of retention moneys in building contract.

Where, under a building contract, part of the amount due from time to time to the builder (called retention moneys) is retained by the building owner, who is entitled on the builder's bankruptcy to terminate the contract and apply the retention moneys in completing the work, and the builder mortgages the retention moneys and then becomes bankrupt, his trustee in bankruptcy, who completes the building under the original contract, is not entitled to the retention moneys as against the mortgagee. *Drew* v. *Josolyne*, 18 Q. B. Div. 590.

But where, under a similar contract, the building owner terminates the contract and employs the trustee in bankruptcy of the builder to complete the work, the trustee in bankruptcy is entitled to be paid out of the retention moneys in priority to the mortgagee. *Tooth* v. *Hallett*, 4 Ch. 242.

Reputed Ownership.

Reputed ownership clause not applicable in administration or winding-up.

The rules in bankruptcy which swell a bankrupt's assets—*e.g.* the reputed ownership clause, the fraudulent preference clause, and the sections which defeat certain settlements and executions—are not applicable to the administration by the Court of the assets of a deceased person, nor (except in cases within sect. 164 of the Companies Act, 1862) to the winding-up of companies. *In re Crumlin Viaduct Works Co.*, 11 Ch. D. 755; *In re Withernsea Brickworks Co.*, 16 Ch. Div. 337, overruling *In re Printing & Registering Co.*, 8 Ch. D. 535; *In re Count d'Epineuil*, (1) 20 Ch. D. 217; *In re Maggi*, 20 Ch. D. 545; *Gorringe* v. *Irwell India Rubber Works*, 34 Ch. Div. 128; *Pratt* v. *Inman*, 43 Ch. D. 175; *In re Baker*, 44 Ch. Div. 262, 271; *In re Leng*, (1895) 1 Ch. 652, 655, 660.

Bankruptcy Act, 1883, s. 44.

The Bankruptcy Act, 1883, enacts (sect. 44) that the property of the bankrupt divisible among his creditors shall comprise "all goods being, at the commencement of the bankruptcy, in the possession, order, or disposition of the

bankrupt, in his trade or business, by the consent and permission of the true owner, under such circumstances that he is the reputed owner thereof; provided that things in action other than debts due or growing due to the bankrupt in the course of his trade or business shall not be deemed goods within the meaning of this section."

Goods by sect. 168, unless the context otherwise requires, includes all chattels personal.

Onus of proof is on trustee,

The existence of the various conditions required by the section is a question of fact, and it lies upon the trustee in bankruptcy to show that these conditions have been fulfilled. *Prismall* v. *Lovegrove*, 6 L. T. 329.

except where bankrupt was originally owner.

But where the bankrupt was originally owner of the goods in dispute and has continued in possession till the bankruptcy, the presumption is raised that he is their reputed owner, and the burden of proof is shifted to those who claim adversely to the trustee. *Lingard* v. *Messiter*, 1 B. & C. 308; *Ex parte Castle*, 3 M. D. & D. 117; *Ex parte Lovering*, (No. 2) 9 Ch. 621.

"Goods."

The law of reputed ownership is now confined to "two classes of things, namely, those outward and visible things of which there may be a visible occupation and enjoyment, and those debts which are part of the property of every ordinary trader." *Per* Fry, L.J., in *Colonial Bank* v. *Whinney*, 30 Ch. Div. 261, 289; see S. C. 11 App. Cas. 426, 438, 446, 447.

"Possession."

The possession of a receiver appointed in an action by the creditor to enforce his security determines the debtor's possession. *Taylor* v. *Eckersley*, 5 Ch. D. 740.

Seizure by sheriff.

Seizure by the sheriff of goods subject to a mortgage does not determine the possession of the bankrupt, except as to those goods of which the sheriff takes physical possession. *Barrow* v. *Bell*, 5 E. & B. 540; *Ex parte Foss*, 2 De G. & Jo. 230; *Ex parte Edey*, 19 Eq. 264.

Such a seizure is *ex hypothesi* wrongful, and where possession is taken wrongfully the possession at law will not be extended beyond the possession in fact. See *Ex parte Fletcher*, 5 Ch. Div. 809, 812; *Meggy* v. *Imperial Discount Co.*, 3 Q. B. Div. 711.

"In his trade or business."

The goods must be in the order or disposition of the bankrupt for the purposes of, or purposes connected with, his trade or business, or with the trade or business of the firm in which he is a partner. *Ex parte Jenkinson*, 15 Q. B. D. 441; *Colonial Bank* v. *Whinney*, 30 Ch. Div. 261.

As to what constitutes a trade or business, see *In re Wallis*, 14 Q. B. D. 950.

"Consent."

There must be active consent or laches equivalent to consent to bring a case within the section.

There can be no consent where the true owner is ignorant of the transaction. *West* v. *Skip*, 1 Ves. S. 239, 243; *In re Rawbone's Trust*, 3 K. & J. 476; *Ex parte Ford*, 1 Ch. Div. 521, 528.

There can be no consent where one of the true owners is from infancy or otherwise incapable of consenting. *In re Mills' Trust*, (1895) 2 Ch. 564.

Determination of consent.

The consent is determined if possession is taken by the true owner with the intention of asserting his rights, whether the possession is hostile or friendly to the debtor. *Ex parte National Guardian Assurance Co.*, 10 Ch. Div. 408.

There may be a merely colourable taking possession; and the motives of the creditor are evidence whether the possession taken was real or sham. *Jackson* v. *Irvin*, 2 Camp. 48; *Vicarino* v. *Hollingsworth*, 20 L. T. N. S. 362.

Notice of assignment of debts.

In the case of debts, notice of the assignment given to the debtor is equivalent to taking possession. *Bartlett* v. *Bartlett*, 1 De G. & Jo. 127.

A bankrupt is not reputed owner of his trade debts where his debtor has knowledge, howsoever acquired, that he has assigned them. It is not necessary that such knowledge should arise from notice given by the assignee. *Ex parte Richardson*, Mont. & Ch. 43; *Thompson* v. *Tomkins*, 2 Dr. & Sm. 8; *Ex parte Stewart*, 4 D. J. & S. 543; *Ex parte Agra Bank*, L. R. 3 Ch. 555; *Colonial Bank* v. *Whinney*, 11 App. Cas. 426, 435.

Debt due from corporation.

On the question to whom notice should be given where the debt is due from a corporation, see *Ex parte Boulton*, 1 De G. & Jo. 163; *Edwards* v. *Martin*, L. R. 1 Eq. 121; *Ex parte*

Agra Bank, supra; Alletson v. *Chichester*, L. R. 10 C. P. 319.

Demand of possession.

If the true owner *bonâ fide* demands possession with a view of taking possession before the bankruptcy, though from no fault of his own he fails to get it, the goods are not in the possession of the bankrupt with his consent.

As to chattels, see *Smith* v. *Topping*, 5 B. & Ad. 674; *Ex parte Foss*, 2 De G. & Jo. 230; *Ex parte Harris*, 8 Ch. 48; *Ex parte Ward*, 8 Ch. 144; *Ex parte Montagu*, 1 Ch. Div. 554.

As to debts, see *Belcher* v. *Bellamy*, 2 Ex. 303; *Rutter* v. *Everett*, (1895) 2 Ch. 872.

A demand of possession made on the bankrupt determines the consent, although the goods are not in his actual possession, but in that of a warehouseman. *Ex parte Ward*, 8 Ch. 144.

Possession taken of part.

The creditor by taking possession of part of the goods revokes his consent as to all. *In re S. J. Eslick*, 4 Ch. D. 496.

Protected transaction under s. 49.

A taking possession or *bonâ fide* demand of possession by the true owner after the commencement of the bankruptcy is a transaction within sect. 49 of the Act, and may therefore be protected under that section. *Graham* v. *Furber*, 14 C. B. 134; *Brewin* v. *Short*, 5 E. & B. 227; *In re Wright*, 3 Ch. Div. 70; *Rutter* v. *Everett*, (1895) 2 Ch. 872; *In re Sills*, 3 Manson, 24.

"True owner."

The section only applies where there is a true as distinct from a reputed owner. *Joy* v. *Campbell*, 1 Sch. & L. 328; *Load* v. *Green*, 15 M. & W. 216.

Mortgagee is true owner.

A mortgagee is true owner, and the mortgagor reputed owner within the section. *Ryall* v. *Rowles*, 1 Ves. S. 348; *Lingham* v. *Biggs*, 1 B. & P. 82; *Reynolds* v. *Bowley*, L. R. 2 Q. B. 474, 480; *In re Crumlin Viaduct Works Co.*, 11 Ch. D. 755; *Colonial Bank* v. *Whinney*, 30 Ch. D. 261, 281.

Effect of Bills of Sale Acts.

This principle applied to registered bills of sale under the Act of 1854, and they were held to be void against the trustee in bankruptcy of the grantor, although the grantor's possession at the time of the bankruptcy was consistent with the terms of the deed. *Spackman* v. *Miller*, 12 C. B. N. S. 659; *Ex parte Harding*, 15 Eq. 223.

Act of 1878. The Bills of Sale Act, 1878, provided (sect. 20) that chattels comprised in a registered bill of sale should not be deemed to be in the possession, order, or disposition of the grantor.

Act of 1882. This section is repealed by sect. 15 of the Bills of Sale Act, 1882, so far as it relates to bills of sale given by way of security for the payment of money. *Ex parte Izard*, 23 Ch. Div. 409; *Swift* v. *Pannell*, 24 Ch. D. 210; *Casson* v. *Churchley*, 53 L. J. Q. B. 335; *Heseltine* v. *Simmons*, (1892) 2 Q. B. 547.

It follows that chattels comprised in a registered bill of sale which is given by way of absolute transfer are not within the reputed ownership clause. Cases *supra*.

It would appear that bills of sale given by way of security for the payment of money are governed by the law as it stood before the Act of 1878.

It has been held, however, in Ireland that chattels comprised in a bill of sale are not within the reputed ownership clause unless the grantee at the commencement of the bankruptcy is entitled to take possession of them under sect. 7 of the Bills of Sale Act, 1882. *In re Stanley*, 17 L. R. Ir. 487, doubted by Cave, J., in *Re Webber*, 64 L. T. 426.

Merchant Shipping Act, 1894, s. 36. Sect. 36 of the Merchant Shipping Act, 1894, provides that a registered mortgage of a ship or share shall not be affected by any act of bankruptcy committed by the mortgagor after the date of the record of the mortgage, notwithstanding that the mortgagor at the commencement of his bankruptcy had the ship or share in his possession, order, or disposition, or was reputed owner thereof.

Lessor. A lessor is true owner and a hirer reputed owner within the section. *Bryson* v. *Wylie*, 1 B. & P. 83 *n.*; *Lingham* v. *Biggs*, 1 B. & P. 82.

Trustees of settlement. Trustees of a settlement are true owners within the section. *Jarman* v. *Woolloton*, 3 T. R. 618; *Darby* v. *Smith*, 8 T. R. 82; *Earl of Shaftesbury* v. *Russell*, 1 B. & C. 666.

Beneficiaries. Where persons named as trustees of a settlement have not accepted the trusts, the beneficiaries are the true owners. *In re Mills' Trusts*, (1895) 2 Ch. 564.

Partnership. Where one of two partners of a firm is a dormant partner,

the goods of the firm are not in the possession of the other with the consent of the true owner, each partner of a firm being equally true owner of all its assets. *Reynolds* v. *Bowley*, L. R. 2 Q. B. 41, 474; *Ex parte Hayman*, 8 Ch. Div. 11, 23; see *Re Webber*, 64 L. T. 426.

"Reputed owner."

The section only applies to goods which are in the possession of the bankrupt under such circumstances that credit might have been obtained upon them. *Ex parte Watkins*, 8 Ch. 520; *Ex parte Wingfield*, 10 Ch. Div. 591; *Colonial Bank* v. *Whinney*, 11 App. Cas. 426.

A bankrupt is not reputed owner of goods on which he could not have obtained credit, without fraud on his part or negligence on the creditor's. *Colonial Bank* v. *Whinney*, 11 App. Cas. 426.

A reputed owner is a person reputed to be owner by persons who deal with him and who might be deceived. *Cooke* v. *Hemming*, L. R. 3 C. P. 334, 353; *Ex parte Watkins*, 8 Ch. 520, 533.

The doctrine of reputed ownership, therefore, does not apply where persons dealing with the bankrupt must know that goods in his possession may not belong to him. *Thackthwaite* v. *Cock*, 3 Taunt. 487.

Factors and agents.

It does not apply to persons known to act as factors and agents. The creditor knows that, by reason of the business carried on, goods in the debtor's warehouse may not belong to him, and it cannot be said that credit is given on the faith that they do. *Ex parte Boden*, 28 L. T. N. S. 174; *Ex parte Bright*, 10 Ch. Div. 366.

Notorious custom excludes reputed ownership.

If there is a custom of trade so notorious that all persons engaged in the trade or who give credit to those who are engaged in it know that the possession of goods by the trader does not necessarily show that he is the owner of them, it cannot be said that the creditor gives credit on the faith of the trader's ownership of the goods which are in his possession, and the doctrine of reputed ownership does not apply. *Knowles* v. *Horsfall*, 5 B. & A. 134; *Priestley* v. *Pratt*, L. R. 2 Ex. 101; *Ex parte Watkins*, 8 Ch. 520; *Ex parte Vaux*, 9 Ch. 602; *Ex parte Wingfield*, 10 Ch. Div. 591.

It is enough to prove the custom of the particular trade. The creditors of a trade are mostly persons engaged in the same trade or acquainted with its customs. *Ex parte Watkins*, 8 Ch. 520; *Ex parte Vaux*, 9 Ch. 602.

In order to establish a custom, it must be proved to have existed so long and to have been so extensively acted upon that the ordinary creditors of the debtor in his trade may be reasonably presumed to have known it. *In re Hill*, 1 Ch. Div. 503 *n.*; *Ex parte Powell*, 1 Ch. Div. 501; *In re Rose*, 4 T. L. R. 255.

Custom excludes doctrine as to all goods within its scope.

Such a trade custom, when proved, excludes the doctrine of reputed ownership as to all the articles which are within the scope of the custom. Thus, a security given by a hotel-keeper over his furniture is good against his trustee in bankruptcy, as no person dealing with the hotel-keeper would be justified in assuming that any part of the furniture which he used belong to him. *Ex parte Turquand*, 14 Q. B. Div. 636.

The doctrine of reputed ownership has been held to be excluded by custom in the case of barges in the possession of coal merchants (*Watson* v. *Peache*, 1 Bing. N. C. 327); barley in the possession of maltsters (*Harris* v. *Truman*, 9 Q. B. Div. 264); books in a bookseller's shop (*Whitfield* v. *Brand*, 16 M. & W. 282); cattle and live stock in the possession of farmers, both on the ground that they remain in possession after selling (*Priestley* v. *Pratt*, L. R. 2 Ex. 10), and that they take cattle to agist (*Ex parte Huggins*, 54 L. T. 683; *In re Burke*, 19 L. R. Ir. 564); clocks at a clockmaker's (*Hamilton* v. *Bell*, 10 Ex. 545); furniture in the possession of hotel-keepers (*Ex parte Powell*, 1 Ch. Div. 501; *Crawcour* v. *Salter*, 18 Ch. Div. 30; *Ex parte Turquand*, 14 Q. B. Div. 636), including the keeper of a temperance hotel (*Re Chapman*, 11 T. L. R. 92); gas-engines [*In re Peel*, (1894) 1 I. R. 235]; hops in the warehouse of hop-merchants (*Ex parte Dyer*, 2 T. L. R. 7); horses in the possession of horse-dealers (*Ex parte Wingfield*, 10 Ch. Div. 591); pianos (*In re Blanshard*, 8 Ch. D. 601; *In re McParland*, 31 L. R. Ir. 465); printing-machinery, but not type, in the possession of printers (*Ex parte Hughes*, 4 T. L. R. 659); wines and spirits in the possession

of wine-merchants (*Ex parte Watkins*, 8 Ch. 520; *Ex parte Vaux*, 9 Ch. 602).

The Court has negatived the existence of a custom for cab-drivers to hire their cabs (*In re Hill*, 1 Ch. Div. 503 *n.*), and of a custom in the furniture trade to deliver goods to dealers on sale or return (*Ex parte Nassau*, 2 T. L. R. 339).

Doctrine does not apply to joint reputed owners.

The section is confined to goods in the sole possession of a bankrupt, of which he is the sole reputed owner.

Therefore, it does not apply where partners are jointly in possession of goods and are jointly reputed owners of them. *Ex parte Cooper*, 1 M. D. & D. 358; *Ex parte Dorman*, 8 Ch. 51; *In re Bainbridge*, 8 Ch. D. 218. *Reynolds* v. *Bowley* (L. R. 2 Q. B. 474) was based by Willes, J., and Bramwell, B., on this principle (pp. 481, 482).

In *Colonial Bank* v. *Whinney* (30 Ch. Div. 261) the bankrupt Blakeway was in sole possession as sole reputed owner; see pp. 268, 274.

The section applies where one partner remains in possession of the assets after dissolution of the partnership. *Ex parte Assignees of Brewster & West*, 22 L. J. Bankr. 62; *Graham* v. *MacCulloch*, 20 Eq. 397.

"Debts."

"Debts" does not include all demands provable in bankruptcy, but only those which have become debts before its commencement. *Ex parte Kemp*, 9 Ch. 383.

Fraudulent trust.

The Bankruptcy Act, 1883, provides (sect. 44) that the property of the bankrupt divisible among his creditors shall not comprise property held by the bankrupt on trust for any other person.

But where the forms of a trust are gone through in order to conceal the true ownership of property, the property is subject to the reputed ownership clause. *Ex parte Watkins*, 2 Mont. & A. 348; *G. E. Ry. Co.* v. *Turner*, 8 Ch. 149, 154.

CHAPTER XLII.

FRAUDULENT PREFERENCE.

Bankruptcy Act, 1883, s. 48.

The Bankruptcy Act, 1883, enacts—

Sect. 48, (1). Every conveyance or transfer of property, or charge thereon made, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any person unable to pay his debts as they become due from his own money in favour of any creditor, or any person in trust for any creditor, with a view of giving such creditor a preference over the other creditors, shall, if the person making, taking, paying, or suffering the same is adjudged bankrupt on a bankruptcy petition presented within three months after the date of making, taking, paying, or suffering the same, be deemed fraudulent and void as against the trustee in the bankruptcy.

(2) This section shall not affect the rights of any person making title in good faith and for valuable consideration through or under a creditor of the bankrupt.

Bankruptcy Act, 1890, s. 20.

The Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), provides (sect. 20) that where a receiving order is made against a judgment debtor in pursuance of sect. 103 of the Act of 1883, sect. 48 shall apply as if the debtor had been adjudged bankrupt on a bankruptcy petition presented at the date of the receiving order.

Bankruptcy Act, 1883, s. 4, (1), (c).

The Bankruptcy Act, 1883, sect. 4, makes it an act of bankruptcy by the debtor "if in England or elsewhere he makes any conveyance or transfer of his property or any part thereof, or creates any charge thereon which would, under this or any other Act, be void as a fraudulent preference if he were adjudged bankrupt."

Mortgagee cannot take advantage of doctrine.

The doctrine of fraudulent preference is not to be taken advantage of by a mortgagee, but only for the benefit of the whole body of creditors. A mortgagee will not be allowed to use the trustee's name unless he is willing to give up his claim on the property recovered for the benefit of all the creditors. *Ex parte Cooper*, 10 Ch. 510; *Willmott* v. *London Celluloid Co.*, 31 Ch. D. 425; 34 Ch. Div. 147.

Payment must be made to creditor.

A payment cannot be a fraudulent preference unless it is made to a creditor. Thus a security given to a co-trustee for the repayment of trust moneys which the debtor has misapplied is not a fraudulent preference. *Sinclair* v. *Wilson*, 20 B. 324; 1 Jur. N. S. 967; *Ex parte Stubbins*, 17 Ch. Div. 58; *Ex parte Taylor*, 18 Q. B. Div. 295; *Seligman* v. *Prince & Co.*, (1895) 2 Ch. 617.

A payment made to a creditor with the object of relieving the debtor's surety, who was not a creditor of the debtor, is not a fraudulent preference. *Re Mills*, 58 L. T. 871.

Creditor in the section includes a contingent creditor, *i.e.* a person who, at the date of the payment, would be entitled, if the debtor became bankrupt, to prove in the bankruptcy in respect of a contingent liability. *In re Paine*, (1897) 1 Q. B. 122.

Payment before debt due.

Payment made before the debt is due is not necessarily fraudulent. *Crosby* v. *Crouch*, 2 Camp. 166; *Cook* v. *Rogers*, 7 Bing. 438; *Strachan* v. *Barton*, 11 Ex. 647.

The law of fraudulent preference was given statutory authority by sect. 92 of the Bankruptcy Act, 1869, the first sub-section of which is repeated in sect. 48, (1), of the Bankruptcy Act, 1883.

Tests of fraudulent preference before Act of 1869.

Before the Act of 1869 it was necessary, in order to constitute fraudulent preference, that two things should concur —the payment must have been voluntary on the part of the creditor, and it must have been in contemplation of bankruptcy.

Contemplation of bankruptcy.

The Act, in place of raising an inquiry whether the preference was done in contemplation of bankruptcy, has provided certain definite tests, namely, that the bankrupt should have been at the time unable to pay his debts as they became due

from his own moneys, and that he should become bankrupt within three months from the payment. *Ex parte Blackburn*, 12 Eq. 358; *Butcher* v. *Stead*, L. R. 7 H. L. 839, 846; *In re Washington 'Diamond Mining Co.*, (1893) 3 Ch. 95, 111, 115.

Voluntariness of payment.

The payment must also have been made "with a view of giving such creditor a preference over the other creditors." It has been said that this provision is equivalent to the doctrine before the Act, which made the voluntariness of the payment the test of its fraudulent character. *Ex parte Bolland*, 7 Ch. 24. See *Ex parte Griffith*, 23 Ch. Div. 69; *Ex parte Taylor*, 18 Q. B. Div. 295.

There must be intention to prefer.

It is not enough to show that the act complained of resulted in giving a preference. It is necessary to show that the debtor's intention was to give a preference. *Ex parte Taylor*, 18 Q. B. Div. 295; *In re M'Innes*, 8 T. L. R. 14.

But preference need not be sole motive.

It is not necessary to show that the debtor's sole motive was to give a preference to the creditor. It is enough if this was the substantial, dominant motive, and the co-existence of other minor motives is immaterial. *Ex parte Hill*, 23 Ch. Div. 695; *Ex parte Lancaster*, 25 Ch. Div. 311; *Ex parte Taylor*, 18 Q. B. Div. 295; *In re Washington Diamond Mining Co.*, (1893) 3 Ch. 95, 106.

Effect of mixture of motives.

It has been laid down in the earlier cases that the desire to prefer the creditor must have been the debtor's sole motive, and that the admixture of any other motive made the preference valid. *Brown* v. *Kempton*, 19 L. J. C. P. 169; *Edwards* v. *Glyn*, 2 E. & E. 29; *Ex parte Tempest*, 10 Eq. 648; 6 Ch. 70; *Ex parte Bolland*, 7 Ch. 24; *Ex parte Blackburn*, 12 Eq. 358; *Ex parte Topham*, 8 Ch. 614; *Ex parte Pearson*, 8 Ch. 667, 675.

These cases can no longer be considered as correctly expressing the law. See *Ex parte Hill*, 23 Ch. Div. 695.

The question, what was the debtor's leading motive, is purely a question of fact.

Payment under pressure.

A payment is not a fraudulent preference if made under pressure. The Act of 1869 did not alter the earlier law on this subject. *Butcher* v. *Stead*, L. R. 7 H. L. 839, 846;

Tomkins v. *Saffery*, 3 App. Cas. 213, 225, 235; *In re Boyd*, 15 L. R. Ir. 521. See *Ex parte Griffith*, 23 Ch. Div. 69.

"The consideration upon which a payment made to an importunate creditor of a debt actually due has been allowed to be valid has not been that he might resort to a suit to enforce payment, but that his demand repels the presumption that the bankrupt upon the eve of bankruptcy made a distinction among his creditors, and spontaneously favoured one of them to the prejudice of the rest. A demand of further security for a debt not yet due has the same effect." *Per* Lord Ellenborough in *Crosby* v. *Crouch*, 2 Camp. 166, 168. See *Bills* v. *Smith*, 6 B. & S. 314.

What amount of pressure required.

The nature and amount of pressure required to prevent a payment from being a fraudulent preference is a question of fact depending on the special circumstances of each case.

It was formerly held that any pressure by the creditor was sufficient to prevent the preference from being fraudulent. This was on the ground, since repudiated, that a preference to be fraudulent must have been made with the sole object of preferring the creditor. *Strachan* v. *Barton*, 11 Ex. 647; *Johnson* v. *Fesemeyer*, 25 B. 88; 3 De G. & Jo. 13, 24; *Ex parte Blackburn*, 12 Eq. 358, 363; *Ex parte Tempest*, 6 Ch. 70; *Ex parte Bolland*, 7 Ch. 24; *Ex parte Topham*, 8 Ch. 614.

Pressure not operating on bankrupt.

Where it is shown that the pressure did not operate on the mind of the bankrupt, the existence of pressure is immaterial. *Cook* v. *Rogers*, 7 Bing. 438; *Cook* v. *Pritchard*, 6 Sc. N. R. 34; *Ex parte Griffith*, 23 Ch. Div. 69.

Debtor known to be insolvent.

A payment under pressure is valid, although the person exerting pressure is aware that the debtor is insolvent. *Johnson* v. *Fesemeyer* 25 B. 88; 3 De G. & Jo. 13; *Ex parte Topham*, 8 Ch. 614, 620; *Smith* v. *Pilgrim*, 2 Ch. D. 127.

A threat to sue the debtor, who is hopelessly insolvent at the time, is not pressure. *Ex parte Hall*, 19 Ch. Div. 580.

The creditor's knowledge of the debtor's circumstances, which was dwelt upon in *Ex parte Hall*, cannot be material in determining whether the debtor was or was not affected by the pressure. It was, however, material in determining whether the creditor came within the subsequently repealed sub-sect.

(2) of sect. 92 of the Bankruptcy Act, 1869, and was probably only referred to by Jessel, M.R., for that purpose.

A director cannot lawfully exert pressure upon a company of which he is director. *Gaslight Improvement Co.* v. *Terrell*, 10 Eq. 168.

Payments in course of business.

A payment made to a creditor in the ordinary course of business is not a fraudulent preference. *Abell* v. *Daniell*, Moo. & M. 370; *Ex parte Blackburn*, 12 Eq. 358; *Tomkins* v. *Saffery*, 3 App. Cas. 213, 235; *Hoole, Jackson, & White's Case*, 9 Ch. Div. 322; *In re Clay*, 3 Manson, 31.

Conscience money.

A payment made in order to relieve the debtor's conscience, or under fear of a criminal prosecution, is not a fraudulent preference. *Ex parte Stubbins*, 17 Ch. Div. 58; *Ex parte Taylor*, 18 Q. B. Div. 295: *Sharp* v. *McHenry*, 38 Ch. D. 427, 447; see *In re Fletcher*, 8 T. L. R. 80.

In *Ex parte Taylor*, the decision seems to have gone more on the ground of pressure by the creditor in the form of a threat to prosecute.

Payment to revive debt.

A merely nominal payment made in order to revive a statute-barred debt is not a fraudulent preference. *In re Lane*, 23 Q. B. D. 74.

Security given in fulfilment of promise.

The giving of a security in pursuance of a former *bonâ fide* undertaking which the debtor has given, and which he is called upon to fulfil, is not a fraudulent preference. *Hunt* v. *Mortimer*, 10 B. & C. 44; *Vacher* v. *Cocks*, 1 B. & Ad. 145; *Bills* v. *Smith*, 6 B. & S. 314; *Ex parte Tempest*, 10 Eq. 648; 6 Ch. 70; *Ex parte Hodgkin*, 20 Eq. 746; see *Ex parte Griffith*, 23 Ch. Div. 69.

The substitution of a new bill of sale for a bill of sale which turns out to be bad is not a fraudulent preference, if the intention of the grantor was only to correct his previous mistake. *Ex parte Hockaday*, 55 L. T. 819; *In re Tweedale*, (1892) 2 Q. B. 216.

The Companies Act, 1862 (25 & 26 Vict. c. 89), enacts—

Companies Act, 1862, s. 164.

Sect. 164. Any such conveyance, mortgage, delivery of goods, payment, execution, or other act relating to property, as would, if made or done by or against any individual trader, be deemed, in the event of his bankruptcy, to have been made

or done by way of undue or fraudulent preference of the creditors of such trader, shall, if made or done by or against any company, be deemed, in the event of such company being wound up under this Act, to have been made or done by way of undue or fraudulent preference of the creditors of such company, and shall be invalid accordingly; and for the purposes of this section the presentation of a petition for winding up a company shall, in the case of a company being wound up by the Court or subject to the supervision of the Court, and a resolution for winding up the company shall, in the case of a voluntary winding-up, be deemed to correspond with the act of bankruptcy in the case of an individual trader; and any conveyance or assignment made by any company formed under this Act of all its estate and effects to trustees for the benefit of all its creditors shall be void to all intents.

Sect. 164 of the Companies Act, 1862, refers to the bankruptcy law in force for the time being. *Mason, Gallagher, & Slater's Case*, 30 W. R. 378.

Under this section an act may be a fraudulent preference in the case of a company which would not be a fraudulent preference in the case of an individual. For instance, any preference by way of set-off of a debtor, who would have no right of set-off after the winding-up, must be treated as it would be treated in bankruptcy if he had no right of set-off after the bankruptcy. *Kent's Case*, 39 Ch. Div. 259, 266; *In re Washington Diamond Mining Co.*, (1893) 3 Ch. 95.

CHAPTER XLIII.

FRAUDULENT CONVEYANCES UNDER THE BANKRUPTCY LAW.

Bankruptcy Act, 1883, s. 4, (1), (*b*).

THE Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), sect. 4, makes it an act of bankruptcy by a debtor "if in England or elsewhere he makes a fraudulent conveyance, gift, delivery, or transfer of his property or of any part thereof."

S. 44.

Sect. 44 provides that the property of the bankrupt divisible among his creditors shall comprise all such property as may belong to or be vested in him at the commencement of the bankruptcy.

Where a deed can only be set aside as being an act of bankruptcy, the lapse of three months before the presentation of the bankruptcy petition makes the deed valid for all purposes. *Mercer* v. *Peterson*, L. R. 2 Ex. 304; *Allen* v. *Bonnett*, 5 Ch. 577; *Ex parte Games*, 12 Ch. Div. 314.

Assignment of whole property to secure past debt.

An assignment by a debtor of all his property to secure a past debt is fraudulent within the Act, and it is not necessary to show that it was made with intent to defeat or delay creditors. *Worseley* v. *De Mattos*, 1 Burr. 467; *Siebert* v. *Spooner*, 1 M. & W. 714; *Lacon* v. *Liffen*, 4 Giff. 75, on appl. 32 L. J. Ch. 315; *In re Wood*, 7 Ch. 302; *Ex parte Ellis*, 2 Ch. Div. 797.

Substantial exception.

This rule only applies where the assignment comprises substantially all the debtor's property. A substantial exception will prevent the assignment from being an act of bankruptcy, in the absence of fraud. *Pennell* v. *Reynolds*, 11 C. B. N. S. 709; *Smith* v. *Timms*, 1 H. & C. 849; *Goodricke* v. *Taylor*, 2 D. J. & S. 135; *Ex parte Foxley*, 3 Ch. 515; *Ex parte Hawker*, 7 Ch. 214; *Ex parte King*, 2 Ch. Div. 256; *Ex parte Dann*, 17 Ch. Div. 26.

Exception of book-debts.

There is no rule that book debts must be left out of

consideration in determining whether an assignment comprises the whole of a debtor's property. An exception of book debts may be a substantial exception. *Ex parte Field*, 13 Ch. Div. 106 *n.*; *Ex parte Burton*, 13 Ch. Div. 102.

Where a debtor agrees to transfer his whole property, and the transfer of the whole would be an act of bankruptcy, the transfer of a part in pursuance of the agreement would probably be an act of bankruptcy. *Tomkins* v. *Saffery*, 3 App. Cas. 213, 234.

Assignment preventing assignor from carrying on business.

An assignment by a person in business, which prevents him or enables the assignee to prevent him from carrying on his business, is also fraudulent within the Act, and it is immaterial in this case whether a substantial part of his property is or is not excepted from the assignment. *Hooper* v. *Smith*, 1 Wm. Bl. 442; *Smith* v. *Cannan*, 2 E. & B. 35; *Ex parte Bailey*, 3 D. M. & G. 534, 546; *Ex parte Bland*, 6 D. M. & G. 757; *Johnson* v. *Fesemeyer*, 3 De G. & Jo. 13, 23; *Young* v. *Fletcher*, 3 H. & C. 732; *Ex parte Foxley*, 3 Ch. 515.

Equivalent given to debtor.

An assignment of all the debtor's property is not necessarily fraudulent if the debtor receives an equivalent at the time of the assignment. *Whitwell* v. *Thompson*, 1 Esp. 67; *Rose* v. *Haycock*, 1 Ad. & E. 460 *n.*; *Baxter* v. *Pritchard*, 1 Ad. & E. 456; *Leake* v. *Young*, 5 E. & B. 955; *Bittlestone* v. *Cooke*, 6 E. & B. 296; *Whitmore* v. *Claridge*, 31 L. J. Q. B. 141; 33 L. J. Q. B. 87; *Woodhouse* v. *Murray*, L. R. 2 Q. B. 634; 4 Q. B. 27; *Ex parte Cooper*, 10 Ch. Div. 313.

The question is, whether the equivalent received enables the assignor to carry on his business. Cases *supra*.

An assignment made in consideration of the assignee paying off pressing creditors of the assignor to a large amount has been sustained on this principle. *Whitmore* v. *Claridge*, *supra*; see *Ex parte Chaplin*, 26 Ch. Div. 319.

The withdrawal of an execution or forbearance to execute a judgment or to seize property under a bill of sale is not an equivalent. *Woodhouse* v. *Murray*, L. R. 2 Q. B. 634; 4 Q. B. 27; *Ex parte Cooper*, 10 Ch. Div. 313 (not following *Philps* v. *Hornstedt*, L. R. 8 Ex. 26; 1 Ex. D. 62); *Ex parte Payne*, 11 Ch. Div. 539.

There is no equivalent where the assignment is made to secure a surety to a composition deed, who has given his acceptances for the amount of the instalments under the deed. *In re Marshall*, 3 M. D. & D. 671; De G. 273; *Leake* v. *Young*, 5 E. & B. 955.

Assignment to secure past debt and present advance.

An assignment made to secure a past debt and a present advance is not necessarily fraudulent. If the advance was merely made for the purpose of obtaining a security for the old debt, the assignment is fraudulent within the Act. If it was made to enable the debtor to carry on his business, and the lender had a reasonable ground for believing that it would so enable him, it is valid. *Hutton* v. *Cruttwell*, 1 E. & B. 15; *Bittlestone* v. *Cooke*, 6 E. & B. 296; *Pennell* v. *Reynolds*, 11 C. B. N. S. 709; *Mercer* v. *Peterson*, L. R. 2 Ex. 304; 3 Ex. 104; *Lomax* v. *Buxton*, L. R. 6 C. P. 107; *Allen* v. *Bonnett*, 5 Ch. 577; *Ex parte King*, 2 Ch. Div. 256; *Ex parte Ellis*, 2 Ch. Div. 797; *Ex parte Greener*, 46 L. J. Bkcy. 76; *Ex parte Wilkinson*, 22 Ch. Div. 788; *Ex parte Johnson*, 26 Ch. Div. 338; *Administrator-General of Jamaica* v. *Lascelles, De Mercado & Co.*, (1894) A. C. 135.

Graham v. *Chapman* (12 C. B. 85) can only be supported on the ground that the terms of the assignment prevented the debtor from deriving any benefit from the advance. See *Hutton* v. *Cruttwell*, 1 E. & B. 15; *Harris* v. *Rickett*, 4 H. & N. 1; *Lomax* v. *Buxton*, L. R. 6 C. P. 107; *Ex parte Hauxwell*, 23 Ch. Div. 626, 638.

Immaterial that borrower intends fraud.

It is immaterial that the intentions of the borrower were fraudulent. The *bonâ fides* of the lender is alone to be taken into account. *In re Colemere*, L. R. 1 Ch. 128; *Ex parte Johnson*, 26 Ch. Div. 338, 342, 347.

Amount of fresh advance not conclusive.

The amount of the fresh advance is an important element in determining the *bonâ fides* of the transaction, but it is not conclusive. *Ex parte Fisher*, 7 Ch. 636; *Ex parte Ellis*, 2 Ch. Div. 797; *Ex parte Johnson*, 26 Ch. Div. 338.

Contract for further advances need not be enforceable.

It is not necessary that the contract of the mortgagee to make further advances should be a contract enforceable at law. It is sufficient if there was a *bonâ fide* agreement. *Ex parte Winder*, 1 Ch. D. 290; S. C. *Ex parte Sheen*, 1 Ch.

Div. 560; *Ex parte Wilkinson*, 22 Ch. Div. 788, explaining *Ex parte Dann*, 17 Ch. Div. 26. *Lindon* v. *Sharp* (6 M. & G. 895), and the dictum in *Ex parte Cooper* (10 Ch. Div. 313, 326), must be considered as overruled.

Advance on faith of bill of sale to be given.

Where money is advanced on the faith of a promise that a bill of sale shall be given, and the bill of sale is subsequently given, it stands on the same footing as if it had been given at the time of the further advance. *Harris* v. *Rickett*, 4 H. & N. 1; *Mercer* v. *Peterson*, L. R. 2 Ex. 304; 3 Ex. 104; *Ex parte Foxley*, 3 Ch. 515; *Ex parte King*, 2 Ch. Div. 256; *In re Jackson*, 4 Ch. D. 682; *Ex parte Hauxwell*, 23 Ch. Div. 626.

Fraudulent postponement of bill of sale.

But where the giving of the bill of sale is purposely postponed until the trader is in a state of insolvency, in order to prevent the injury to his credit which would result from registration, the bill of sale is fraudulent. *Ex parte Cohen*, 7 Ch. 20; *Ex parte Fisher*, 7 Ch. 636; *Ex parte Stevens*, 20 Eq. 786; *In re Gibson*, 8 Ch. D. 230; *Ex parte Payne*, 11 Ch. Div. 539; *Ex parte Burton*, 13 Ch. Div. 102; *Ex parte Kilner*, 13 Ch. Div. 245; *Ex parte Hauxwell*, 23 Ch. Div. 626; *W. Morris* v. *A. Morris*, (1895) A. C. 625, 630.

In *Ex parte Izard* (9 Ch. 271), the mortgagee was not obliged to rely on the bill of sale, as possession of the property comprised in it had been given him under the previous agreement.

Where a document is set up which is on the face of it an act of bankruptcy, and is alleged to be warranted by a prior agreement, the *onus probandi* is on the person setting it up to prove, not only that the agreement did in fact exist, but that it was a *bonâ fide* agreement. *Ex parte Kilner*, 13 Ch. Div. 245.

Bankruptcy Act, 1883, s. 47.

Sect. 47 of the Bankruptcy Act, 1883, avoids certain settlements as against the settlor's trustee in bankruptcy. This section does not vest the property which purported to pass by the settlement in the trustee so as to give him priority over a mortgagee subsequent to the settlement. *Sanguinetti* v. *Stuckey's Banking Co.*, (1895) 1 Ch. 176; *In re Farnham*, (1895) 2 Ch. 799.

CHAPTER XLIV.

FRAUDULENT CONVEYANCES UNDER THE STATUTES OF ELIZABETH.

13 Eliz. c. 5, s. 1.

THE statute 13 Eliz. c. 5 avoids, in effect, as against creditors, every conveyance of real or personal property contrived to the intent to delay, hinder, or defraud such creditors.

The right of creditors under the statute is a legal right. It is, therefore, not lost by laches. *In re Maddever*, 27 Ch. Div. 523.

S. 5.

The statute (sect. 5) excepts from its operation any estate or interest in real or personal property "upon good consideration and *bonâ fide* lawfully conveyed or assured to any person or persons or bodies politic or corporate not having, at the time of such conveyance or assurance to them made, any manner of notice or knowledge of such covin, fraud, or collusion as is aforesaid."

This section protects a purchaser for value without notice of an interest, whether legal or equitable, under a voluntary settlement. *Payne* v. *Mortimer*, 4 De G. & Jo. 447, 452; *Halifax Joint Stock Banking Co.* v. *Gledhill*, (1891) 1 Ch. 31.

Consideration.

1. The section protects an interest conveyed "upon good consideration." A consideration which would have supported a settlement against a subsequent purchaser under the statute 27 Eliz. c. 4, is not necessarily a good consideration within this section.

Thus, the liability of an assignee of leaseholds to pay the rent is not a good consideration within the section. *In re Ridler*, 22 Ch. Div. 74. See *Green* v. *Paterson*, 32 Ch. Div. 95, 104.

But it is not necessary, where the conveyance is part of a

bonâ fide family arrangement, that the consideration should be wholly adequate to the value of the property conveyed. *In re Johnson*, 20 Ch. D. 389, 397.

2. Even where valuable consideration is given, a conveyance is void unless made *bonâ fide*. *Bonâ fides.*

But, in order to avoid an assignment made for valuable consideration, it is necessary to show an express intention to defeat creditors. *Copis* v. *Middleton*, 2 Madd. 410, 430; *Harman* v. *Richards*, 10 Ha. 81, 89; *Holmes* v. *Penney*, 3 K. & J. 90; *Freeman* v. *Pope*, 5 Ch. 538, 544; *In re Johnson*, 20 Ch. D. 389. See, as to voluntary settlements, *Ex parte Mercer*, 17 Q. B. Div. 290. Express intention to defeat creditors must be shown.

It is immaterial that the necessary consequence of the transaction is to defeat creditors. In order to avoid the transaction, it must be shown that that consequence was present to the minds of the parties. Thus a conveyance by A. of all her property to B., in consideration of B. paying A.'s farming debts, has been upheld against a creditor whose debt did not fall within the description, it not having been shown that that debt was present to the minds of A. and B. at the time of the conveyance. *In re Johnson*, 20 Ch. D. 389, 394.

Even the marriage consideration will not support a settlement where the marriage itself is celebrated and the settlement made in execution of a scheme for defeating creditors to which both husband and wife are parties. *Colombine* v. *Penhall*, 1 Sm. & G. 228; *Bulmer* v. *Hunter*, 8 Eq. 46; *Re Pennington*, 59 L. T. 774. See *Campion* v. *Cotton*, 17 Ves. 268; *Fraser* v. *Thompson*, 1 Giff. 49, cases in which the settlement was upheld.

A payment which would be a fraudulent preference in bankruptcy is not necessarily within the statute. A security given to a creditor by a debtor, who knows himself and is known by the creditor to be insolvent, is *bonâ fide*, unless the debtor retains a benefit for himself. *Alton* v. *Harrison*, 4 Ch. 622; *Middleton* v. *Pollock*, 2 Ch. D. 104. Fraudulent preference not necessarily within statute.

It is immaterial that the security comprises all the debtor's property. *Alton* v. *Harrison*, *supra*.

3. The language of the section which protects a purchaser *Mala fides*

must be common to both parties.

without notice of "such covin, fraud, or collusion," implies that *mala fides* to avoid a conveyance must be common to both parties.

Therefore, the *mala fides* of the grantor does not avoid a conveyance if the grantee is free from it. *Kevan* v. *Crawford*, 6 Ch. Div. 29; *In re Johnson*, 20 Ch. D. 389, 394.

27 Eliz. c. 4.

The statute 27 Eliz. c. 4 [which is not affected on this point by the Voluntary Conveyances Act, 1893 (56 & 57 Vict. c. 21)], is not confined to voluntary conveyances, but avoids mortgages which are in fact fraudulent, although given for value, as against a subsequent purchaser for value.

A fraudulent mortgage would be postponed in equity to a subsequent mortgage apart from the statute. The statute would have the additional effect of preventing the legal estate from passing under the fraudulent mortgage. *Perry Herrick* v. *Attwood*, 2 De G. & Jo. 21, 39; *Lloyd* v. *Attwood*, 3 De G. & Jo. 614, 654.

In *Cracknall* v. *Janson* (11 Ch. Div. 1) the decision appears to have gone on the ground that the prior mortgage was in fact without consideration.

CHAPTER XLV.

STATUTES AVOIDING UNREGISTERED MORTGAGES AND CHARGES.

A. Land in General.

Registration of writs and orders affecting land.

The Land Charges Registration and Searches Act, 1888 (51 & 52 Vict. c. 51), which commenced (sect. 2) on the 1st of January, 1889, enacts—

Sect. 4. In this Act "land" includes lands, messuages, tenements, and hereditaments corporeal and incorporeal, of any tenure.

"Purchaser for value" includes a mortgagee or lessee, or other person who for valuable consideration takes any interest in land or in a charge on land, and "purchase" has a meaning corresponding with purchaser.

"Judgment" does not include an order made by a court having jurisdiction in bankruptcy in the exercise of that jurisdiction, but, save as aforesaid, includes any order or decree having the effect of a judgment.

Land Charges Registration and Searches Act, 1888, s. 5.

Sect. 5, (1). There shall be established and kept at the Office of Land Registry a register of writs and orders affecting land, and there may be registered therein, in the prescribed manner, any writ or order affecting land issued or made by any court for the purpose of enforcing a judgment, statute, or recognizance, and any order appointing a receiver or sequestrator of land.

(2) Every entry made in pursuance of this section shall be made in the name of the person whose land is affected by the writ or order registered.

(3) The registration of a writ or order in pursuance of this Act shall cease to have effect at the expiration of five years from the date of the registration, but may be renewed from

time to time, and, if renewed, shall have effect for five years from the date of the renewal.

(4) Registration of a writ or order in pursuance of this section shall have the same effect as, and make unnecessary, registration thereof in the Central Office of the Supreme Court of Judicature in pursuance of any other Act.

S. 6. Sect. 6. Every such writ and order as is mentioned in section five, and every delivery in execution or other proceeding taken in pursuance of any such writ or order, or in obedience thereto, shall be void as against a purchaser for value of the land unless the writ or order is for the time being registered in pursuance of this Act.

Provided that—

(*a*) where the writ or order is at the commencement of this Act registered in pursuance of the Judgments Act, 1864, nothing in this section shall affect the operation of such writ or order until the expiry of the period for which it is so registered;

(*b*) where the proceeding in which the writ or order was issued or made is for the time being registered as a *lis pendens* in the name of the person whose land is affected by the writ or order, nothing in this section shall affect the operation of such registration.

Settled Land Act, 1890, s. 19. The Settled Land Act, 1890 (53 & 54 Vict. c. 69), provides—

Sect. 19. The registration of a writ or order affecting land may be vacated pursuant to an order of the High Court or any judge thereof.

Effect of failure to renew registration. It was decided under 2 & 3 Vict. c. 11, s. 4, that a registered judgment creditor does not lose his priority over incumbrances created within five years after registration by failing to renew it. On the other hand, he does not, by re-registering after the expiration of the five years, gain any priority over incumbrances created while his judgment was off the register. *Beavan* v. *Earl of Oxford*, 6 D. M. & G. 492; *Shaw* v. *Neale*, 6 H. L. C. 581.

Registration of deeds of The Land Charges Registration and Searches Act, 1888, also provides (sects. 7, 8) for the registration of deeds of

arrangement affecting land, and (sect. 10) for the registration of land charges. arrangement, land charges.

Sect. 4 provides—

In this Act "land charge" means a rent or annuity or principal moneys payable by instalments, or otherwise, with or without interest charged, otherwise than by deed, upon land, under the provisions of any Act of Parliament, for securing to any person either the moneys spent by him, or the costs, charges, and expenses incurred by him under such Act, or the moneys advanced by him for repaying the moneys spent, or the costs, charges, and expenses incurred by another person under the authority of an Act of Parliament, and a charge under the thirty-fifth section of the Land Drainage Act, 1861, or under the twenty-ninth section of the Agricultural Holdings (England) Act, 1883, but does not include a rate or scot. "Deed of arrangement" has the same meaning as in the Deeds of Arrangement Act, 1887. Definitions of land charge, deed of arrangement.

See, as to the definition of land charge, *Reg.* v. *Vice-Registrar of Office of Land Registry*, 24 Q. B. D. 178.

The Act (sect. 10) makes an unregistered deed of arrangement, whether made before or after the 1st of January, 1889, void as against a person who, after that date, becomes a purchaser for value of any land comprised therein or affected thereby. Avoidance of unregistered deeds of arrangement.

The Act avoids (sect. 12) an unregistered land charge created after the 1st of January, 1889, and (sect. 13) a land charge created before that date, and unregistered after the expiration of one year from the first assignment by act *inter vivos* occurring after that date, as against a purchaser for value of the land charged therewith, or of any interest in such land. Avoidance of unregistered land charges.

The Judgments Act, 1855 (18 & 19 Vict. c. 15), provides (sect. 12) that any annuity or rent-charge granted after the 26th of April, 1855, otherwise than by marriage settlement, for one or more life or lives, or for any term of years or greater estate determinable on one or more life or lives, shall not affect any lands, tenements, or hereditaments as to purchasers, mortgagees, or creditors, unless registered as therein provided. Registration of annuities, rent-charges.

The Act (sect. 14) does not apply to annuities or rent-charges given by will.

Effect of notice.

The Act does not avoid an unregistered annuity as against a purchaser or mortgagee who has notice of it. *Greares* v. *Tofield*, 14 Ch. Div. 563.

Registration of Crown debts.

The Crown Suits, etc., Act, 1865 (28 & 29 Vict. c. 104) provides—

Sect. 48. Any judgment, decree, or order obtained after the commencement of this Act by or on behalf of the Crown, or any recognizance entered into after the commencement of this Act on the proper account of the Crown, or any inquisition finding after the commencement of this Act a debt due to the Crown, or any obligation or specialty made after the commencement of this Act to the Crown, or any acceptance of office accepted after the commencement of this Act from or under the Crown, shall not affect any land (of whatever tenure) as to a *bonâ fide* purchaser for valuable consideration or a mortgagee (whether such purchaser or mortgagee have or have not notice of the judgment, decree, order, recognizance, inquisition, obligation, specialty, or acceptance of office), unless a writ of extent or of *diem clausit extremum*, or other writ or process of execution, in pursuance of or in relation to such judgment, decree, order, recognizance, inquisition, obligation, specialty, or acceptance of office, has been issued and registered before the execution of the conveyance or mortgage to such purchaser or mortgagee, and the payment by him of the purchase or mortgage money.

Land Registry Act, 1862, s. 74.

The Land Registry Act, 1862 (25 & 26 Vict. c. 53), provides (sect. 74) that no unregistered estate or interest, contract or engagement, for the registration whereof provision is made by the Act, shall prevail against the title of any subsequent purchaser for valuable consideration duly registered under the Act.

Land Transfer Act, 1875, s. 28.

The Land Transfer Act, 1875 (38 & 39 Vict. c. 87), provides (sect. 28) that, subject to any entry to the contrary on the register, registered charges on the same land shall, as between themselves, rank according to the order in which they are entered on the register, and not according to the order in which they are created.

B. Land in Middlesex.

The Middlesex Registry Act, 1708 (7 Anne, c. 20), provides (sect. 1) for the registration of a memorial of all deeds, conveyances, and wills "of or concerning and whereby any honors, manors, lands, tenements, or hereditaments in the said county may be any way affected in law or equity," and avoids unregistered deeds, conveyances, and wills as against any subsequent purchaser or mortgagee for valuable consideration.

Effect of notice.

The Act does not apply where the subsequent purchaser or mortgagee has notice of the prior unregistered incumbrance. *Le Neve* v. *Le Neve*, Amb. 436; 1 Ves. S. 64.

Act confined to dealings with land.

The Act is confined to dealings with the land itself. Hence an assignment of a legacy charged by will upon land (*Malcolm* v. *Charlesworth*, 1 Kee. 63), and of a share of the proceeds of land devised in trust for sale (*Arden* v. *Arden*, 29 Ch. D. 702), are not within the Act.

Act includes instruments not under seal.

The Act includes instruments not under seal. Thus, a memorandum of charge accompanying a deposit of deeds (*Moore* v. *Culverhouse*, 27 B. 639; *Neve* v. *Pennell*, 2 H. & M. 170; see *Copland* v. *Davies*, L. R. 5 H. L. 358, 383), an agreement to give a second mortgage (*In re Wight's Mortgage Trust*, 16 Eq. 41, not following *Wright* v. *Stanfield*, 27 B. 8), and a memorandum of further charge in favour of a registered mortgagee (*Credland* v. *Potter*, 10 Ch. 8), are conveyances within the Act.

Act does not touch interests not created by writing.

The Act does not avoid interests in land not created by writing, *e.g.* a charge by deposit of deeds without memorandum (*Sumpter* v. *Cooper*, 2 B. & Ad. 223; *In re Stephen's Estate*, I. R. 10 Eq. 282; *In re Burke's Estate*, 7 L. R. Ir. 57; 9 L. R. Ir. 24), or a vendor's lien (*Kettlewell* v. *Watson*, 21 Ch. D. 685; 26 Ch. Div. 501).

Registration of wills.

Sects. 8 and 9 of the Act deal with the registration of wills, as to which see also sect. 8 of the Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78).

Discharge of mortgages.

Sect. 17 of the Act of 1708 and sect. 5 of the Land Registry (Middlesex Deeds) Act, 1891 (54 & 55 Vict. c. 64), provide for entering the discharge of mortgages.

Exceptions from Act.

The Act does not extend (sect. 18) to any copyhold estates, or to any leases at a rack rent, or to any lease not exceeding one and twenty years where the actual possession and occupation goeth along with the lease, or to any of the chambers in Serjeants' Inn, the Inns of Court, or Inns of Chancery.

A deed of enfranchisement of copyholds is not within this exemption, and must be registered. *Reg.* v. *Registrar of Deeds for Middlesex*, 21 Q. B. Div. 555.

Judgments need not be registered.

The Land Registry (Middlesex Deeds) Act, 1891, provides—

Sect. 6. It shall not be necessary for the validity of any judgment, statute, or recognizance that a memorial thereof be registered under the Middlesex Registry Act, 1708.

Local Government Act, 1888, s. 96.

The Local Government Act, 1888 (51 & 52 Vict. c. 41), provides (sect. 96) that nothing in the Act shall alter the area to which the enactments relating to the registration of land in the county of Middlesex apply.

C. Land in Yorkshire.

The Yorkshire Registries Act, 1884 (47 & 48 Vict. c. 54), which came into operation on the 1st of January, 1885, provides (sect. 4) that, from and after the commencement of the Act, all assurances executed or made, and all wills of any testators dying after that date, by which any lands in any of the three ridings are affected, may be registered under the Act.

Mode of registration.

Sect. 5 deals with the mode of registration of assurances, wills, or other instruments under the Act, and sect. 6 with the form of memorials.

Unpaid vendor's lien; charge by deposit of deeds.

Sect. 7 provides that a memorandum of lien or charge in respect of any unpaid purchase-money or by reason of any deposit of title-deeds may be registered, and that no such lien or charge shall have any effect or priority as against any assurance for valuable consideration which may be registered, unless and until a memorandum thereof has been registered in accordance with the provisions of the section.

This section applies to charges created by a deposit without a memorandum. *Battison* v. *Hobson*, (1896) 2 Ch. 403.

Registration

The Act provides for the registration (sect. 11) of notices

of wills, (sect. 12) of affidavits of intestacy, and (sect. 13) of affidavits of vesting, in cases where by any Act any lands become vested in any person. of notices of wills, affidavits, caveats.

The Yorkshire Registries Amendment Act, 1885 (48 & 49 Vict. c. 26), provides (sect. 3) for the registration of caveats by any person claiming to be entitled to any interest in land.

Sect. 14 of the Act of 1884 (as altered by sect. 4 of the Act of 1885), provides— Priority to date from registration.

Subject to the provisions of this Act, all assurances entitled to be registered under this Act shall have priority according to the date of registration thereof, and not according to the date of such assurances, or of the execution thereof, and every will entitled to be registered under this Act shall have priority according to the date of the death of the testator if the date of registration thereof be within, or under this Act to be deemed to be within, a period of six months after the death of the testator, or according to the date of registration thereof, if such date of registration be not within, or under this Act to be deemed to be within, such period of six months: Provided that nothing in this Act shall interfere with the priorities as between themselves of any assurances or wills the dates of registration of which may be identical.

All priorities given by this Act shall have full effect in all courts, except in cases of actual fraud, and all persons claiming thereunder any legal or equitable interests shall be entitled to corresponding priorities, and no such person shall lose any such priority merely in consequence of his having been affected with actual or constructive notice, except in cases of actual fraud; but nothing in this section contained shall operate to confer upon any person claiming without valuable consideration under any person any further priority or protection than would belong to the person under whom he claims; and any disposition of land or charge on land, which if unregistered would be fraudulent and void, shall, notwithstanding registration, be fraudulent and void in like manner. Notice abolished, except where actual fraud.

Sect. 16 provides that no priority or protection shall, after the commencement of the Act, be given or allowed to any estate or interest in lands within the three ridings by reason Tacking abolished.

or on the ground of such estate or interest being protected by, or tacked to, any legal or other estate or interest in such lands, except as against any estate or interest existing prior to the commencement of the Act.

Sect. 18 provides for the order in which instruments are to be registered.

Sects. 19 to 23 deal with searches, certificates of search, and certified copies.

Exceptions from Act.

The Act does not extend (sect. 28) to any copyhold hereditaments, nor to any lease not exceeding twenty-one years, or any assignment thereof where accompanied by actual possession from the making of such lease or assignment, nor (sect. 29) to any assurance or will, so far as the same may relate only to shares in any public or private works or undertaking of any corporation, company, or society which, by virtue of any local or other Act of Parliament, may be required to be registered or otherwise entered or minuted in the books of the corporation, company, or society, nor (sect. 30) to any assurances of any lands being parcel of the land revenues of the Crown, or assurances of lands to or in trust for Her Majesty, or other assurances which may be enrolled in "The Office of Land Revenue, Record, and Inrolments."

Sect. 3 of the Act contains the definitions, as to which see *Rodger* v. *Harrison*, (1893) 1 Q. B. 161.

The Middlesex and Yorkshire Registry Acts do not apply to land registered under the Land Registry Act, 1862 (25 & 26 Vict. c. 53, sect. 104), or the Land Transfer Act, 1875 (38 & 39 Vict. c. 87, sect. 127).

D. Personal Chattels. Ships.

Bills of Sale Act, 1878, s. 10.

The Bills of Sale Act, 1878, provides (sect. 10) that in case two or more bills of sale are given, comprising in whole or in part any of the same chattels, they shall have priority in the order of the date of their registration respectively as regards such chattels.

This provision applies to absolute bills of sale as well as to

bills of sale given by way of security. *Tuck* v. *Southern Counties Deposit Bank*, 42 Ch. D. 471.

Mortgages of mining effects in stannaries.

As to the registration of mortgages of mining effects of or on a mine within the stannaries, see sect. 19 of the Stannaries Act, 1887 (50 & 51 Vict. c. 43).

Registration of mortgages of ships.

The Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), enacts—

Sect. 33. If there are more mortgages than one registered in respect of the same ship or share, the mortgagees shall, notwithstanding any express, implied, or constructive notice, be entitled in priority, one over the other, according to the date at which each mortgage is recorded in the register book, and not according to the date of each mortgage itself.

See also sect. 43, (5), as to the priority of mortgages registered on the certificate of mortgage.

The same Act provides (sect. 57) that interests arising under contract or other equitable interests may be enforced by or against owners and mortgagees of ships in respect of their interests therein in the same manner as in respect of any other personal property.

A registered mortgage in the statutory form has priority over a prior unregistered charge of which the mortgagee has notice at the time of registration. *Black* v. *Williams*, (1895) 1 Ch. 408.

CHAPTER XLVI.

PRIORITY AS AFFECTED BY EQUITIES.

I. AGENCY.

Mortgagee may make mortgagor his agent.

A MORTGAGEE may, expressly or by implication, constitute the mortgagor his agent to borrow on the security of the mortgaged property in priority to his own mortgage. *Hooper* v. *Gumm*, L. R. 2 Ch. 282; *Northern Counties Insurance Co.* v. *Whipp*, 26 Ch. Div. 482, 493; *Brocklesby* v. *Temperance Building Society*, (1893) 3 Ch. 130; (1895) A. C. 173.

Secret limitation of mortgagor's authority.

A secret limitation of the mortgagor's authority will not prejudice a subsequent mortgagee who deals with him on the footing of his apparent authority and without knowledge of the limitation. Cases *supra*.

1. Authority from possession of title-deeds.

1. Thus, where a mortgagee, whether legal or equitable, either leaves the title-deeds with, or returns them to, the mortgagor, in order that he may raise money to a definite amount in priority to the mortgage, and the mortgagor creates a mortgage to a larger amount, the later mortgagee has priority for the whole amount advanced by him over the earlier one. *Perry-Herrick* v. *Attwood*, 25 B. 205; 2 De G. & Jo. 21; *Briggs* v. *Jones*, 10 Eq. 92; *Fox* v. *Hawks*, 13 Ch. D. 822; *In re Lambeth's Estate*, 11 L. R. Ir. 534; 13 L. R. Ir. 234. See *Painter* v. *Abil*, 33 L. J. Ex. 60.

But where one of two executors of a mortgagee of leaseholds delivers the title-deeds to the mortgagor to enable him to raise money to pay off the mortgage, and the mortgagor creates an equitable incumbrance, the other executor is not estopped from asserting his priority and recovering the deeds. *In re Ingham*, (1893) 1 Ch. 352.

Where a legal mortgage of leaseholds was made by A. to

B., and A. subsequently made what purported to be a legal mortgage of the leaseholds to C., and handed him over the lease, and there was no evidence as to why the lease had remained in A.'s possession, it was held that there was a presumption that B. had left it with him to enable him to raise money, and that B. must be postponed to C. *Jones* v. *Rhind*, 17 W. R. 1091. See, however, p. 427.

Possession of certificate of debenture stock.

Where a company entrusted a certificate of 8000*l.* debenture stock to A. with authority to raise 3000*l.*, and A. raised 6000*l.* on the deposit of the certificate, which he filled up in the name of the depositee, it was held that the depositee could prove in the winding-up of the company for 8000*l.* until he obtained dividends not exceeding 6000*l.* *Robinson* v. *Montgomery Brewery Co.*, (1896) 2 Ch. 841.

2. Floating charges.

2. A limited company, which has given a floating security over its whole undertaking, has authority, by implication arising from the nature of the security, to create, in the ordinary course and for the purpose of its business, charges on specific parts of its property in priority to the floating charge. *In re Florence Land Co.*, 10 Ch. Div. 530; *In re Hamilton's Windsor Ironworks*, 12 Ch. D. 707; *Tailby* v. *Official Receiver*, 13 App. Cas. 523, 541; *Driver* v. *Broad*, (1893) 1 Q. B. 744, 748.

Determination of implied authority.

The implied authority is determined, either by the appointment of a receiver in a debenture-holder's action or by the commencement of a winding-up. *In re Colonial Trusts Corporation*, 15 Ch. Div. 465, 472; *Government Stock Investment Co.* v. *Manila Ry. Co.*, (1895) 2 Ch. 551.

The implied authority is not determined merely because the company is in difficulties or insolvent, if it continues to carry on its business. *Willmott* v. *London Celluloid Co.*, 34 Ch. Div. 147; *Robson* v. *Smith*, (1895) 2 Ch. 118.

Determination by express provisions.

The debentures constituting the floating charge may contain a provision determining the authority at an earlier date or upon other events.

But it may be inferred from the language of the Court of Appeal in *Government Stock Investment Co.* v. *Manila Ry. Co.*, (1895) 2 Ch. 551, that the Court would hold such a provision

nugatory, and that, so long as debenture-holders permitted a company to carry on its business, the company might create specific charges in priority to the security of the debenture-holders.

The priority of such charges, however, would depend (if it was admitted), not on the authority of the company as agent of the debenture-holders, but on the acquiescence of the debenture-holders.

Where a debenture provided that the charge thereby created should be a floating security until default in payment of the principal or interest secured or some part thereof, it was held that a purchaser of land from the company was entitled to evidence that no default had been made. *In re Horne & Hellard*, 29 Ch. D. 736.

But where a company was given power by its debentures to deal with its property in the course of business until default in payment of some interest for three months, it was held that the company might create a valid security in priority to the debentures, although more than three months had expired after default. *Government Stock Investment Co.* v. *Manila Ry. Co.*, (1895) 2 Ch. 551.

Notice to debtor to company.

Notice by holders of a floating security to a debtor to the company requiring him to pay the debt to them does not make their security specific in respect of that debt, or give them priority over a prior garnishee order. *Hubbuck* v. *Helms*, 56 L. J. Ch. 536; *Ward* v. *Royal Exchange Shipping Co.*, 6 Aspinall, 239; *Robson* v. *Smith*, (1895) 2 Ch. 118.

Proviso forbidding creation of prior charge.

Where debentures, which constitute a floating security, contain a proviso forbidding the company to create a mortgage or charge in priority to the debentures, a subsequent mortgage or charge in favour of a person who has notice of the proviso is postponed to the debentures. It is not postponed if he merely had notice that the company had issued debentures. *English & Scottish Investment Co.* v. *Brunton*, (1892) 2 Q. B. 1, 700; *In re Old Bushmills Distillery Co.*, (1896) 1 I. R. 301.

What is charge within proviso.

A solicitor's lien on papers (*a*), or a garnishee order absolute (*b*), is not a charge within a proviso in a debenture forbidding

a company to create any mortgage or charge in priority to the debenture. (*a*) *Brunton* v. *Electrical Engineering Corporation*, (1892) 1 Ch. 434; (*b*) *Robson* v. *Smith*, (1895) 2 Ch. 118, 126.

A proviso that the debentures are to be a first charge is not inconsistent with their being a floating security. *Wheatley* v. *Silkstone Coal Co.*, 29 Ch. D. 715. "First charge."

3. The doctrine of *Cohen* v. *Mitchell* (25 Q. B. Div. 262) is also based on the principle of agency. See *Herbert* v. *Sayer*, 5 Q. B. 965. 3. Doctrine of *Cohen* v. *Mitchell*.

The doctrine is thus stated: "Until the trustee intervenes, all transactions by a bankrupt after his bankruptcy with any person dealing with him *bonâ fide* and for value, in respect of his after-acquired property, whether with or without knowledge of the bankruptcy, are valid against the trustee." *Cohen* v. *Mitchell*, 25 Q. B. Div. 262, 267.

The doctrine thus stated does not apply to freeholds (*a*), but it applies to leaseholds for years (*b*). (*a*) *Ex parte Woodthorpe*, 8 Morrell, 236; *In re New Land Development Association & Grey*, (1892) 2 Ch. 138. (*b*) *In re Clayton & Barclay's Contract*, (1895) 2 Ch. 212. Doctrine applies to chattels real, but not freeholds.

It only protects dealings by a bankrupt with specific creditors. It does not apply to claims by the trustee in a first bankruptcy against the trustee in a second. *In re Clark*, (1894) 2 Q. B. 393. It does not protect trustee in second bankruptcy.

II. Estoppel.

The priority of an early incumbrancer may also be displaced by virtue of the doctrine of estoppel.

"It is to be observed that in such a case" (*i.e.* postponement of a vested interest) "acts are much stronger in raising an equity than omissions can be. There may be omission or negligence equivalent in practical effect to acts; because, when there is something which a person ought to do, and must be presumed to know that he ought to do, but does not do, the consequence is that the omission may be regarded as due to what is called gross or wilful negligence, which is equivalent to an act. But it must be something which raises Statement of doctrine.

a positive equity against him, upon the principle which in equity, as distinct from law, is conveniently designated by the term 'estoppel.' In other words, the man who has conducted himself in such a manner is not entitled to deny the truth of his own representations, if it be a case of express representation; he is not entitled to deny being bound by the natural consequences of his own acts, if it be a case of positive acts; he is not entitled to refuse to abide by the consequences of his own wilful and unjustifiable neglect, if that is the nature of the case. By one or other of those means he may have armed another person with the power of going into the world under false colours; and if it be really and truly the case that by his act, or his improper omissions, such an apparent authority and power has been vested in that other person, he is bound upon equitable principles by the use made of that apparent authority and power." *Per* Selborne, C., in *Dixon* v. *Muckleston*, 8 Ch. 155, 160.

Conditions required to raise estoppel.

A puisne mortgagee in order to raise an estoppel against a prior mortgagee must show, (1) that the acts, statements, or omissions of the prior mortgagee *either* were intended to induce him to alter his position, *or* had the natural consequence of inducing him to alter his position; and (2) that he altered his position on the faith of such acts, statements, or omissions.

The principle of estoppel is not confined to cases where the prior incumbrancer whom it is sought to estop makes a false representation to, or conceals his security from, or neglects to give notice of it to a definite intending lender. The principle applies equally where the natural consequence of the misrepresentation, concealment, or neglect is to mislead all persons hereafter lending to the mortgagor. But it must be shown, in order to create an estoppel in such a case, that the loan was made in reliance upon that state of facts which the misrepresentation, concealment, or neglect of the prior incumbrancer enabled the mortgagor to represent as true.

1. Estoppel by misrepresentation.

1. A statement which is not true, though believed by the maker to be true, may be relied on as an estoppel, although

it would not support an action for damages. *Hobbs* v. *Norton*, 1 Vern. 136; *Hunsden* v. *Cheyney*, 2 Vern. 149; *Burrowes* v. *Lock*, 10 Ves. 470; *Jorden* v. *Money*, 5 H. L. C. 185; *Low* v. *Bouverie*, (1891) 3 Ch. 82.

A fortiori, a statement which is false to the knowledge of the maker, although made without any fraudulent intent, will operate as an estoppel.

Ordinary conveyancing recitals.

Where mortgage or purchase-deeds made to trustees or to a sole trustee for the mortgagee or purchaser are in the form adopted among conveyancers when it is desired to keep the trusts off the title, the recitals which they contain are not misrepresentations sufficient to displace the equitable title of the mortgagee or purchaser in favour of a subsequent equitable title created by the trustee. *Carritt* v. *Real & Personal Advance Co.*, 42 Ch. D. 263.

Agreement to release charge.

If a person who has a charge on lands enters into a valid agreement with the owner to release his charge for the purpose of enabling the owner to raise money on mortgage, and, on the faith of that agreement communicated to the mortgagee, the mortgage is made, the person who has the prior charge cannot set it up against the mortgagee who has advanced his money in confidence that the prior charge would be released. *Eyre* v. *Burmester*, 10 H. L. C. 90, 106.

Receipt for purchase-money.

A vendor of land who endorses upon the purchase-deed a receipt for the purchase-money, cannot set up a lien for unpaid purchase-money as against a mortgagee for value without notice under the purchaser. *Rice* v. *Rice*, 2 Drew. 73; *Smith* v. *Evans*, 28 B. 59; *Worthington* v. *German*, 16 W. R. 187.

A receipt for the purchase-money in the body of the deed has, by virtue of the Conveyancing Act, 1881, sect. 55, the same effect as an indorsed receipt.

A statement of the consideration, though coupled with a statement that it proceeds from the purchaser, is not a receipt within the section. *Renner* v. *Tolley*, (1893) W. N. 90.

Recital of payment.

A recital in the deed that the purchase-money has been paid does not estop a vendor from claiming his lien. *Bowen* v. *Cobb*, 18 W. R. 911; 19 W. R. 614.

Reconveyance with receipt.

Mortgagees of land who are induced by the fraud of their solicitor to execute to him a reconveyance of the mortgaged property, with a receipt for the purchase-money either indorsed or in the body of the deed, are postponed to a mortgagee for value without notice from the solicitor. *Hiorns* v. *Holtom*, 16 B. 259; *Hunter* v. *Walters*, 7 Ch. 75; see also *Gordon* v. *James*, 30 Ch. Div. 258; *National Provincial Bank* v. *Jackson*, 33 Ch. Div. 1; *Lloyd's Bank* v. *Bullock*, (1896) 2 Ch. 192.

Registration of purchase-deed.

A vendor who, without receiving his full purchase-money, allowed the purchase-deed to be registered in the West Riding Registry, with the knowledge that the purchaser intended to sell the property in lots, was postponed, although he retained the purchase-deed, to sub-purchasers, who bought, to his knowledge, on the faith that there was no vendor's lien. *Kettlewell* v. *Watson*, 26 Ch. Div. 501.

Beckett v. *Cordley* explained.

In *Beckett* v. *Cordley* (1 B. C. C. 353), portioners who had charges on an estate concurred in a legal mortgage for the purpose of releasing their charges, and the mortgagor soon afterwards gave them an equitable charge for the same amount. It was held that their equitable charge was not postponed to a subsequent equitable mortgage. The decision went on the ground that the equitable charge, in respect of which priority was claimed and given, was not the original charge which had been released, but a new and distinct charge.

Representations to intending lender.

A first mortgagee of property who represents to a person about to lend on the security of the property, or who puts it in the power of the mortgagor to represent to lenders generally that it is unincumbered, will be postponed to a person who *bonâ fide* advances his money on the faith of the representation. *Draper* v. *Borlace*, 2 Vern. 370; *Mocatta* v. *Murgatroyd*, 1 P. W. 393; *Stronge* v. *Hawkes*, 4 D. M. & G. 186; *Hooper* v. *Gumm*, L. R. 2 Ch. 282; see *Wright* v. *Horton*, 12 App. Cas. 371, 375.

Representations to subsequent creditors.

Creditors under a bankruptcy will be postponed to subsequent creditors with notice of the bankruptcy, if the subsequent creditors were justified by representations of the early creditors and the trustee in bankruptcy in believing that they waived

their rights. *Ex parte Bolland*, 9 Ch. Div. 312; *Ex parte Allard*, 16 Ch. Div. 505.

2. Omission to get, or return of title-deeds.

2. A prior mortgagee, either by not getting or by relinquishing possession of the title-deeds, may enable the mortgagor to hold himself out as unincumbered owner of the estate, and will be estopped from setting up his title as against a *bonâ fide* incumbrancer under the mortgagor. *Roberts* v. *Croft*, 2 De G. & Jo. 1; *Dixon* v. *Muckleston*, 8 Ch. 155.

No inquiry for title-deeds.

A legal mortgagee and *a fortiori* an equitable mortgagee, who has made no inquiry for the title-deeds, is postponed to a subsequent equitable mortgagee who has used diligence in inquiring for them. *Clarke* v. *Palmer*, 21 Ch. D. 124; *Lloyd's Banking Co.* v. *Jones*, 29 Ch. D. 221; *In re Sloane's Estate*, (1895) 1 I. R. 146.

Negligence of trustee.

Negligence of a trustee in not inquiring for the title-deeds binds his infant *cestuis que trust*. *Lloyd's Banking Co.* v. *Jones*, 29 Ch. D. 221.

Where two mortgagees are joint tenants or tenants in common of the legal estate, and one makes no inquiry for the title-deeds, he is postponed to the other who gets possession of them. *Hopgood* v. *Ernest*, 3 D. J. & S. 116; see, however, *Evans* v. *Bicknell*, 6 Ves. 174, 190.

A legal mortgagee of a reversion who demands the title-deeds as soon as the reversion falls into possession, but does not recover them, is not postponed to an equitable mortgage made a few months after that date. *Tourle* v. *Rand*, 2 B. C. C. 650.

Reasonable excuse for non-delivery.

A legal mortgagee is not postponed if he has made inquiry for the deeds, and has received a reasonable excuse for their non-delivery. *Manners* v. *Mew*, 29 Ch. D. 725.

This proposition is laid down in *Northern Counties Fire Insurance Co.* v. *Whipp*, 26 Ch. Div. 482, 492, upon the authority (as regards postponement to later incumbrancers) of *Barnett* v. *Weston*, 12 Ves. 130, where, however, it does not appear that any excuse was made by the mortgagor to Barnett for their non-delivery.

Title-deeds to be handed

Where an equitable mortgage is made of property, the purchase of which has not been completed, and the mortgagor

over on completion.

agrees to hand over the title-deeds upon, or within a limited time after completion, the mortgagee, if he does not require delivery of the deeds within a reasonable time after he becomes entitled to receive them, is postponed to a subsequent mortgagee who gets possession of them. *Layard* v. *Maud*, 4 Eq. 397; *Farrand* v. *Yorkshire Banking Co.*, 40 Ch. D. 182.

But an equitable mortgagee is not bound to give notice of his interest to the vendor, and if the vendor upon completion hands over the deeds to the purchaser, who immediately deposits them by way of mortgage in fraud of the prior mortgagee, the prior mortgagee is not postponed to the later one. *Union Bank of London* v. *Kent*, 39 Ch. Div. 238.

Where A., an equitable sub-mortgagee, did not require delivery of the original mortgage owing to a recital (which was untrue) in his mortgage that it was deposited as collateral security for the repayment of 1000*l.* to B., and the mortgagor subsequently deposited it with B. to secure that amount, A.'s security was not postponed to B.'s. *Frazer* v. *Jones*, 5 Ha. 475; affd. 12 Jur. 443; see *Jones* v. *Thomas*, 11 W. R. 50.

Mortgagor entitled to retain deeds.

Where trustees in trust to raise 35,000*l.* granted an annuity secured by a term of years for 5000*l.*, and the annuitant left the title-deeds in the hands of the trustees, he was not postponed to a subsequent incumbrancer, as the trustees were bound to retain the title-deeds for the common security of all persons advancing money upon the credit of their trust. *Harper* v. *Faulder*, 4 Madd. 129.

Receipt of part of deeds.

A legal mortgagee is not postponed if he receives part of the title-deeds under the reasonable belief that he is receiving all. *Colyer* v. *Finch*, 19 B. 500; 5 H. L. C. 905; *Hunt* v. *Elmes*, 2 D. F. & J. 578.

Thus, where a legal mortgagee of two properties receives from the mortgagor, who is also his solicitor, a parcel containing deeds which the solicitor represents to be the deeds of both properties, and the mortgagee does not examine the parcel, which in fact contains only the deeds of one property, he is not postponed to a purchaser of the other property. *Hunt* v. *Elmes*, 2 D. F. & J. 578.

Where an equitable mortgage of land is created by writing

signed by the mortgagor, accompanied by a deposit of the earlier title-deeds, which the mortgagee *bonâ fide* believes to be the material deeds, the mortgagee is not postponed to a subsequent mortgagee by deposit of the later title-deeds. *Roberts* v. *Croft*, 24 B. 223; 2 De G. & Jo. 1; *Dixon* v. *Muckleston*, 8 Ch. 155; see *In re Lambert's Estate*, 11 L. R. Ir. 534; 13 L. R. Ir. 234.

Return of title-deeds to mortgagor.

Where a legal mortgagee has received the title-deeds and has subsequently lent them to the mortgagor upon a reasonable representation made by him as to the object in borrowing them, the legal mortgagee is not postponed to a subsequent incumbrancer. *Peter* v. *Russell*, 2 Vern. 726; 1 Eq. Abr. 321; *Evans* v. *Bicknell*, 6 Ves. 174, 193; *Martinez* v. *Cooper*, 2 Russ. 198.

Certificates of shares.

Where A. deposited a blank transfer of shares with B., and subsequently deposited a blank transfer together with the certificates with C., B.'s security was postponed to C.'s. *Kelly* v. *Munster & Leinster Bank*, 29 L. R. Ir. 19.

Allowing deeds to remain with mortgagor.

Where an equitable mortgagee by deposit of title-deeds without a written memorandum gave up the deeds upon the allegation that they were wanted for a temporary purpose, and allowed them to remain in the mortgagor's hands for four years, he was postponed to a subsequent mortgagee. *Waldron* v. *Sloper*, 1 Drew. 193.

In *Dowle* v. *Saunders* (2 H. & M. 242) the prior equitable mortgagee was postponed under similar circumstances, although the deposit to him was accompanied by a formal mortgage.

Possession of title-deeds by later incumbrancer.

The mere possession of the title-deeds by a later equitable mortgagee is not enough to give him priority over an earlier equitable mortgagee. The onus rests on the later mortgagee of showing that the deeds came into his possession by reason of some act or omission on the part of the earlier mortgagee sufficient to raise an equity against him. *Evans* v. *Bicknell*, 6 Ves. 174; *Allen* v. *Knight*, 5 Ha. 272, affd. 11 Jur. 527; *Union Bank of London* v. *Kent*, 39 Ch. Div. 238; see, however, *Jones* v. *Rhind*, 17 W. R. 1091.

Thus, a person who has contracted to purchase land is entitled to priority over a subsequent equitable incumbrancer

without notice who has got possession of the title-deeds. *Flinn* v. *Pountain*, 58 L. J. Ch. 389.

3. Taking mortgage in name of trustee.

3. It is not negligence in a purchaser or mortgagee, whether of real or personal estate, to take his purchase or mortgage in the name of a sole trustee, to leave the *indicia* of title in his hands, and to exercise no supervision over his conduct, although he has to the knowledge of his *cestui que trust* been guilty of a breach of trust. *Stackhouse* v. *Countess of Jersey*, 1 J. & H. 721; *Cory* v. *Eyre*, 1 D. J. & S. 149; *Baillie* v. *McKewan*, 35 B. 177; *Shropshire Union Rys. Co.* v. *Reg.*, L. R. 7 H. L. 496; *Bradley* v. *Riches*, 9 Ch. D. 189; *Carritt* v. *Real & Personal Advance Co.*, 42 Ch. D. 263; *In re Richards*, 45 Ch. D. 589.

Therefore, where A. took a mortgage of land in the name of B., who executed a declaration of trust in A.'s favour, and B. subsequently deposited the mortgage-deed with C. by way of sub-mortgage, A.'s security was not postponed to C.'s. *Cory* v. *Eyre*, 1 D. J. & S. 149; *Bradley* v. *Riches*, 9 Ch. D. 189.

Where a person had standing in his name stock of a railway company, which he held as trustee for the company, and was also entrusted by the company with the certificates of the stock, it was held that an equitable mortgagee from him by deposit of the certificates had no priority over the company. *Shropshire Union Rys. Co.* v. *Reg.*, L. R. 7 H. L. 496.

It is immaterial that the trustee or other persons have advanced part of the mortgage money. *Cory* v. *Eyre*, 1 D. J. & S. 149, 169; *Bradley* v. *Riches*, 9 Ch. D. 189.

Lien of company on shares held by trustee.

Where trustees of a settlement invested in shares of a company, the articles of which gave the company a lien on the shares for all debts due from the shareholder, and the shares were registered in their joint names, it was held that the lien of the company in respect of a debt incurred by one of the trustees long after the registration prevailed over the claim of the *cestuis que trust*. *New London & Brazilian Bank* v. *Brocklebank*, 21 Ch. Div. 302.

4. Whether equitable is postponed

4. There are several dicta to the effect that an equitable mortgagee will be postponed on slighter grounds than are

required to postpone a legal mortgagee. *Northern Counties Fire Insurance Co.* v. *Whipp*, 26 Ch. Div. 482, 487; *National Provincial Bank of England* v. *Jackson*, 33 Ch. Div. 1, 12; *Taylor* v. *Russell*, (1892) A. C. 244, 262. more readily than legal mortgagee.

In *Northern Counties Fire Insurance Co.* v. *Whipp* (26 Ch. Div. 482) the Court of Appeal appears to have been of opinion that a legal mortgagee would not be postponed except in cases where the subsequent incumbrancer might have a personal remedy against him (p. 489).

In harmony with this view is their conclusion that "the Court will postpone the prior legal estate to a subsequent equitable estate where the owner of the legal estate has assisted in or connived at the fraud which has led to the creation of a subsequent equitable estate without notice of the prior legal estate, . . . but the Court will not postpone the prior legal estate to the subsequent equitable estate on the ground of any mere carelessness or want of prudence on the part of the legal owner" (p. 494).

On the other hand, Kay, J., was of opinion that an equitable mortgagee would only be postponed where his negligence was "so gross as to render him responsible for the fraud committed upon the second mortgagee." *Taylor* v. *Russell*, (1891) 1 Ch. 8, 17.

In this conflict of authority, it may be permissible to make the following observations. In the absence of express contract between a prior and a later incumbrancer, or of a duty to be careful, which, as between an earlier and a later incumbrancer, does not exist, a personal remedy against an earlier incumbrancer can only be based on fraud. Personal remedy against prior incumbrancer is based on fraud.

The common law action of deceit is based on fraud. A person who makes a misrepresentation must, in order to be liable in an action of deceit, have made it either knowing it to be false or not believing it to be true, or without caring whether it was true or false. *Derry* v. *Peek*, 14 App. Cas. 337.

Where equity gave corresponding relief, it only gave it where the person against whom relief was sought would have been liable at law. *Low* v. *Bouverie*, (1891) 3 Ch. 82, 112.

The decision in *Slim* v. *Croucher* (1 D. F. & J. 518) was

based on the erroneous belief that an action lay at law for negligent misrepresentation.

Estoppel may be based on honest misrepresentation.

On the other hand, an estoppel may be based on a misrepresentation made in the honest belief that it is true, or on negligence apart from fraud. *Jorden* v. *Money*, 5 H. L. C. 185; *Burkinshaw* v. *Nichols*, 3 App. Cas. 1004, 1026; *Seton* v. *Lafone*, 19 Q. B. Div. 68; *Low* v. *Bouverie*, (1891) 3 Ch. 82.

Lord Selborne was clearly of opinion that the doctrine of estoppel applied to legal as well as to equitable mortgages. *Dixon* v. *Muckleston*, 8 Ch. 155.

It would seem to follow that negligence enabling a mortgagor to hold himself out as unincumbered owner of the mortgaged property would estop a legal as well as an equitable mortgagee from setting up a prior incumbrance; and it is hard to see why the possession of the legal estate should free a mortgagee from the effects of an estoppel by which, if he had not the legal estate, he would be bound.

Moreover, the doctrine that a legal mortgagee will only be postponed in case of fraud seems to do violence to the cases. Negligence and fraud are mutually exclusive conceptions; but the same acts or omissions may be evidence either of the one or of the other. *Le Lievre* v. *Gould*, (1893) 1 Q. B. 491, 500.

A mortgagee who does not inquire for the title-deeds, or who redelivers them to the mortgagor and leaves them in his hands, may either be grossly negligent or may be in a conspiracy with the mortgagor to deceive subsequent lenders.

In order to obtain personal relief against the prior mortgagee, it would be necessary to show either that he had undertaken a duty to subsequent mortgagees to keep the deeds safely, or that his intentions were fraudulent.

It is submitted that, in order to postpone a prior mortgagee, whether legal or equitable, it is not necessary to prove either of these things, but that it is sufficient to show negligence, putting it into the power of the mortgagor to represent himself as unincumbered owner of the property.

5. Estoppel by silence.

5. A first mortgagee who knows that a person is about to lend money on the security of the mortgaged property

in the belief that it is unincumbered, and who, having that knowledge, does not inform the intending lender of his interest, is postponed to the latter incumbrancer. *Berrisford* v. *Milward*, 2 Atk. 49; *Troughton* v. *Gitley*, Amb. 630, 632; *Boyd* v. *Betton*, 1 J. & Lat. 730; *Stronge* v. *Hawkes*, 4 D. M. & G. 186, 196; *Tucker* v. *Hernaman*, 4 D. M. & G. 395, 400; *Cannock* v. *Jauncey*, 27 L. J. Ch. 57, 65; *Ex parte Ford*, 1 Ch. Div. 521; *Sterry* v. *Combs*, 40 L. J. Ch. 595.

Silence can only have the same effect as active representations, either where it is the duty of the party not to be silent or where he might reasonably infer that his silence would be taken by others as sanctioning a particular course of conduct. *Pelly* v. *Wathen*, 1 D. M. & G. 16, 25.

As to the analogous cases of expenditure on another's land with the acquiescence of the true owner, see p. 102.

Creditors permitting bankrupt to go on trading.

Creditors of a bankrupt who permit him to continue in trade are postponed to creditors subsequently dealing with him in ignorance of his bankruptcy. *Troughton* v. *Gitley*, *supra*; *Ex parte Bourne*, 2 Gl. & J. 137; *Ex parte Butler*, 2 M. D. & D. 731; *Tucker* v. *Hernaman*, 4 D. M. & G. 395; *Engelback* v. *Nixon*, L. R. 10 C. P. 645.

In order to raise this equity against the creditors under the bankruptcy, it must be shown either that they actively consented to the bankrupt carrying on business, or that they knew that he was carrying it on, and took no steps to prevent him. *Wadling* v. *Oliphant*, 1 Q. B. D. 145; *Ex parte Ford*, 1 Ch. Div. 521; *In re Clark*, (1894) 2 Q. B. 393.

The equity does not apply where a bankrupt is left in possession of property not forming part of a stock-in-trade. Thus, the possession of household furniture by a bankrupt does not amount to a representation by his trustee in bankruptcy that the bankrupt is unincumbered owner. *Meggy* v. *Imperial Discount Co.*, 3 Q. B. Div. 711.

The assignee of an insolvent debtor who allows him to remain in possession of a copyhold tenement and of the copies of court roll is not postponed to a subsequent mortgagee of the copyhold. *Cole* v. *Coles*, 6 Ha. 517.

6. Who can

6. A release or reconveyance by the mortgaged property

take advantage of an estoppel.

does not operate as an estoppel except in favour of a later incumbrancer who is actually misled thereby.

Thus, where a lender made advances on the faith of assurances by the mortgagor only that a release would be obtained from a prior mortgagee, and the release was subsequently obtained by the fraud of the mortgagor, the prior mortgagee was not postponed. *Eyre* v. *Burmester*, 10 H. L. C. 90.

Where a bank informed a mortgagee of shares, after the mortgage was completed, that they had no claim upon the shares, it was held that they were not thereby estopped from setting up a lien, as the mortgagee had not, on the faith of their statement, abstained from selling the shares. *Horsfall* v. *Halifax Union Banking Co.*, 52 L. J. Ch. 599.

The estoppel against a legal mortgagee arising from his negligence in making no inquiry for the title-deeds may be taken advantage of, not merely by a later incumbrancer who has got possession of the deeds, but by every subsequent incumbrancer who has been diligent in inquiring for the deeds, *e.g.* a third mortgagee who ascertains that they are in the possession of the second. *Clark* v. *Palmer*, 21 Ch. D. 124.

C. Purchaser for Value without Notice.

As between equitable incumbrancers, relief will not be refused to an earlier against a subsequent incumbrancer on the sole ground of the latter being a purchaser for value without notice. *Colyer* v. *Finch*, 19 B. 500; 5 H. L. C. 905; *Phillips* v. *Phillips*, 4 D. F. & J. 208; *Thorpe* v. *Holdsworth*, 7 Eq. 139, 146; *Cave* v. *Cave*, 15 Ch. D. 639, 646.

Distinction between equity and equitable interest.

A distinction must be made between an equity and an equitable interest.

The plea of purchaser for valuable consideration without notice is available as against a plaintiff who claims upon a mere equity, *e.g.* an equity to set aside a deed for fraud or to correct it for mistake. *Phillips* v. *Phillips*, 4 D. F. & J. 208, 218; *Garrard* v. *Frankel*, 30 B. 445; *Cave* v. *Cave*, 15 Ch. D. 639; *Bainbrigge* v. *Browne*, 18 Ch. D. 188, 197.

The plea of purchaser for valuable consideration without

notice is available against creditors seeking to avoid a settlement under 13 Eliz. c. 5 (*a*), and against a trustee in bankruptcy seeking to avoid a settlement under sect. 47 of the Bankruptcy Act (*b*). (*a*) *Halifax Joint Stock Banking Co.* v. *Gledhill*, (1891) 1 Ch. 31. (*b*) *In re Vansittart*, (1893) 2 Q. B. 377; *In re Brall*, (1893) 2 Q. B. 381.

Equitable interests, what

The right of an unpaid vendor of land and the right of *cestuis que trust* to follow trust-moneys into land are equitable interests, and not merely equities. *Mackreth* v. *Symmons*, 15 Ves. 329; *Lewis* v. *Madocks*, 17 Ves. 48; *Rice* v. *Rice*, 2 Drew. 73; *Cave* v. *Cave*, 15 Ch. D. 639.

And a person who has contracted to purchase land is entitled to a conveyance of the legal estate as against an equitable mortgagee without notice from the vendor after the contract. *Flinn* v. *Pountain*, 58 L. J. Ch. 389.

Irish doctrine.

It has been held in Ireland that the right of a *cestui que trust* to follow a trust fund into land is in itself an inferior equity to the claim of an equitable mortgagee of the land. *In re Ffrench's Estate*, 21 L. R. Ir. 283, 312 (dissenting from *Cave* v. *Cave*, *supra*); *In re Sloane's Estate*, (1895) 1 I. R. 146.

This view seems contrary to the current of authority in England.

D. Breach of Trust or Duty.

No priority gained through breach of trust or duty.

It has often been laid down that one equitable interest cannot obtain priority over another through the medium of a breach of trust or duty, unless there has been conduct on the part of the *cestui que trust* sufficient to raise an equity against him. *Manningford* v. *Toleman*, 1 Coll. 670; *Cory* v. *Eyre*, 1 D. J. & S. 149; *Bradley* v. *Riches*, 9 Ch. D. 189; *In re Morgan*, 18 Ch. Div. 93; *Connolly* v. *Munster Bank*, 19 L. R. Ir. 119.

The same principle applies whether the trust is express or constructive, and whether the trustee is solicitor of the *cestui que trust* or not. *Harpham* v. *Shacklock*, 19 Ch. Div. 207; *In re Vernon, Ewens & Co.*, 32 Ch. D. 165; 33 Ch. Div. 402; *In re Richards*, 45 Ch. D. 589.

A client gave 11,000*l.* to his solicitors for investment, and

the solicitors retained it under circumstances which made them trustees of 11,000*l.* part of 55,000*l.* secured by a mortgage to them of Blackacre. The solicitors subsequently released Blackacre from the debt, and as part of the same transaction took a mortgage of Blackacre and Whiteacre for 50,000*l.* They then purchased the equity of redemption in both properties, and sold it to a limited company in consideration of paid-up shares. It was held that the client had a lien on Whiteacre for 11,000*l.* as against the limited company, although, if the limited company had protected themselves against this equitable right by acquiring the legal estate, he would have been restricted to a claim on the shares. *In re Vernon, Ewens & Co.*, 32 Ch. D. 165; 33 Ch. Div. 402.

CHAPTER XLVII.

PRIORITY AS AFFECTED BY LEGAL RIGHTS.

A. The Legal Estate.

A MORTGAGEE of land, who lends his money to the person in possession of the land, and who obtains from him the legal estate, is entitled to priority over earlier equitable interests of which he had no notice at the time of the loan.

His priority arises thus:

Legal mortgagee can recover in ejectment.

A legal mortgagee, whether of the immediate freehold or of a term in possession, can recover the land in ejectment, as against an equitable mortgagee, whether earlier or later in date. *Wallwyn* v. *Lee*, 9 Ves. 24, 33; *Hunt* v. *Elmes*, 2 D. F. & J. 578.

When equity restrains legal mortgagee.

Equity does not restrain a legal mortgagee from enforcing his legal remedies, unless his conscience is affected by notice of a prior equitable interest, or he has been guilty of fraud which disentitles him to assert his rights against a subsequent equitable interest.

Purchaser for value without notice.

On the other hand, equity gives no assistance against a *bonâ fide* purchaser for value without notice, and deprives him of no advantage which he has lawfully acquired. *Pilcher* v. *Rawlins*, 7 Ch. 259.

To support the plea of purchaser for value without notice, it is necessary to prove possession on the part of the professed owner, conveyance of the estate, and absence of notice. *Head* v. *Egerton*, 3 P. W. 280; *Wallwyn* v. *Lee*, 9 Ves. 24; *Ogilvie* v. *Jeaffreson*, 2 Giff. 353; *Pilcher* v. *Rawlins*, 7 Ch. 259.

Such a plea was an absolute defence as against any person having merely an equitable title and claiming relief in equity, whether the legal estate was acquired at the time of the loan

or subsequently. *Phillips* v. *Phillips*, 4 D. F. & J. 208, 216; *Pilcher* v. *Rawlins*, 7 Ch. 259.

But where the legal estate was acquired subsequently to the loan, a purchaser might be restrained from availing himself of its protection under the circumstances stated on p. 438.

Legal estate acquired at time of loan.

Where the legal estate is acquired contemporaneously with the loan, it protects a purchaser for value without notice, even if it is conveyed by a trustee in breach of trust. *Jones* v. *Powles*, 3 M. & K. 581; *Lloyd* v. *Attwood*, 3 De G. & Jo. 614, 656; *Pilcher* v. *Rawlins*, 7 Ch. 259; *Mumford* v. *Stohwasser*, 18 Eq. 556, 563; *Garnham* v. *Skipper*, 55 L. J. Ch. 263.

And the legal estate protects a purchaser, although a deed which, if ejectment were brought against him, he would be bound to produce, discloses the existence of prior equitable interests. *Pilcher* v. *Rawlins*, 7 Ch. 259, overruling *Carter* v. *Carter*, 3 K. & J. 617.

Foreclosure by legal mortgagee.

Equity in determining priorities accepts the priority given by law to the possessor of the legal estate. *Rooper* v. *Harrison*, 2 K. & J. 86, 108.

A legal mortgagee, therefore, is entitled to foreclose equitable incumbrancers, whether prior or posterior to the creation of his security.

The defence of purchaser for value without notice is no bar to such an action. Such an action is not a proceeding for equitable relief. It does not seek to deprive the defendant of any advantage which he has purchased. *Colyer* v. *Finch*, 19 B. 500; 5 H. L. C. 905; *Heath* v. *Crealock*, 18 Eq. 215; 10 Ch. 22, 31.

Legal estate in reversion of term.

It has been held that an assignment of the legal estate in a term of ninety-nine years, subject to an underlease for the whole term less two days, gave priority over a prior equitable mortgage of the term. *In re Russell Road Purchase-Moneys*, 12 Eq. 78; doubted on appl., p. 86.

B. Tabula in Naufragio.

Doctrine stated.

"A man who has *bonâ fide* paid money without notice of any other title, though at the time of the payment he as

purchaser gets nothing but an equitable title, may afterwards get in a legal title if he can, and may hold it; though during the interval between the payment and the getting in the legal title he may have had notice of some prior dealing inconsistent with the good faith of the dealing with himself." *Per* Selborne, C., in *Blackwood* v. *London Chartered Bank of Australia*, L. R. 5 P. C. 92, 111.

Yorkshire Registries Act, 1884, s. 16.

The Yorkshire Registries Act, 1884 (47 & 48 Vict. c. 54), provides (sect. 16) that no priority or protection shall, after the 1st of January, 1885, be given to any estate or interest in lands within the three ridings, even though the party claiming the priority or protection is a purchaser for value without notice, by reason of such estate or interest being protected by or tacked to any legal or other estate or interest in such lands, except as against an estate or interest existing before the 1st of January, 1885.

Loan must have been made on security of land.

The loan which it is sought to protect by the acquisition of the legal estate must have been made upon the security of the land. Thus, a judgment creditor cannot tack his judgment to a legal mortgage as against intervening incumbrancers. *Brace* v. *Duchess of Marlborough*, 2 P. W. 491; *Lacey* v. *Ingle*, 2 Ph. 413.

This doctrine applies in favour of all equitable owners or incumbrancers for value without notice who get in the legal estate from a person who commits no breach of trust in parting with it to them, *e.g.* an unsatisfied mortgagee who is paid off by the puisne mortgagee. *Bailey* v. *Barnes*, (1894) 1 Ch. 25.

Third incumbrancer paying off first.

If there are three incumbrancers, of whom the first has the legal estate, and the third had no notice of the second when he advanced his money, the third, on paying off the first and taking a conveyance of the legal estate, is entitled to tack the third mortgage to the first and exclude the intermediate incumbrancer. *Marsh* v. *Lee*, 2 Vent. 337; *Brace* v. *Duchess of Marlborough*, 2 P. W. 491; *Matthews* v. *Cartwright*, 2 Atk. 347; *Belchier* v. *Butler*, 1 Ed. 523; 6 B. P. C. 28; *Phillips* v. *Phillips*, 4 D. F. & J. 208, 216; *Bailey* v. *Barnes*, (1894) 1 Ch. 25.

Legal estate

A third mortgagee is not prejudiced by notice of a second

may be got in after notice.

mortgage when he acquires the legal estate, if he had no notice when he took his third mortgage. *Belchier* v. *Butler*, 1 Ed. 523, 530; *Taylor* v. *Russell*, (1891) 1 Ch. 8, 27; (1892) A. C. 244, 259.

Hence, he may get in the legal estate *pendente lite*. *Marsh* v. *Lee*, 2 Vent. 337; *Robinson* v. *Davison*, 1 B. C. C. 63; *Bates* v. *Johnson*, Joh. 304; *Bailey* v. *Barnes*, (1894) 1 Ch. 25.

But he cannot protect himself by getting it in after a decree to settle priorities. *Wortley* v. *Birkhead*, 2 Ves. S. 571; 3 Atk. 809; *Ex parte Knott*, 11 Ves. 609, 619.

First mortgagee, with notice of second, may transfer to third.

A first mortgagee, even though he has notice of a second mortgage, may transfer the legal estate to the third mortgagee, and the third mortgagee will be protected by the legal estate against the second mortgage. *Peacock* v. *Burt*, 4 L. J. N. S. Ch. 33; *Bates* v. *Johnson*, Joh. 304; see *West London Commercial Bank* v. *Reliance Building Society*, 29 Ch. Div. 954.

Where first mortgagee submits in his answer to assign upon payment to the second mortgagee, and subsequently assigns to the third mortgagee, the third mortgagee may avail himself of the legal estate thus acquired. *Belchier* v. *Butler*, 1 Ed. 523; 6 B. P. C. 28.

It has sometimes been laid down that, if both a second and a third incumbrancer are equally desirous to redeem the first mortgagee, the first mortgagee can give the preference to which of the two he chooses. *Rooper* v. *Harrison*, 2 K. & J. 86, 109; *Bates* v. *Johnson*, Joh. 304, 314; *Carter* v. *Carter*, 3 K. & J. 617, 640.

These dicta cannot now be considered as law. See *West London Commercial Bank* v. *Reliance Building Society*, 29 Ch. Div. 954, 960.

Legal estate got in from trustee.

Where the legal estate is got in from a trustee or person standing in the position of a trustee, the purchaser is not as a rule entitled to protect himself by it.

1. Where both trustee and purchaser have notice of breach of trust.

1. A purchaser cannot protect himself against an earlier incumbrancer by getting in the legal estate when he has notice, at the time of getting it in, that the person conveying is a trustee, express or constructive, for the earlier incumbrancer, and the trustee knows that by conveying he commits a breach

of trust. *Saunders* v. *Dehew*, 2 Vern. 271; *Allen* v. *Knight*, 5 Ha. 272; affd. 11 Jur. 527; *Carter* v. *Carter*, 3 K. & J. 617; *Prosser* v. *Rice*, 28 B. 68; *Baillie* v. *McKewan*, 35 B. 177; *Mumford* v. *Stohwasser*, 18 Eq. 556; *Harpham* v. *Shacklock*, 19 Ch. Div. 207, 214; *Taylor* v. *Russell*, (1891) 1 Ch. 8, 28.

Trust must be for person against whom legal estate is required.

A trust, to affect the conscience of the person getting in the legal estate, must be a trust in favour of the person against whom the protection of the legal estate is required. Although the trustee for A. commits a breach of trust to A. in conveying the legal estate to B., and B. has notice of the breach of trust, B. is not thereby prevented from availing himself of the legal estate against any persons other than A. *Taylor* v. *Russell*, (1891) 1 Ch. 8, 28.

2. Where trustee has, but purchaser has no notice.

2. There are numerous dicta to the effect that, where a trustee for a prior incumbrancer, of whose interest he has notice, conveys the legal estate in breach of trust to a subsequent incumbrancer, the subsequent incumbrancer cannot avail himself of the legal estate, although he has no notice when he gets it in of the breach of trust. *Carter* v. *Carter*, 3 K. & J. 617; *Bates* v. *Johnson*, Joh. 304; *Sharples* v. *Adams*, 32 B. 213; *Maxfield* v. *Burton*, 17 Eq. 15, 19; *Mumford* v. *Stohwasser*, 18 Eq. 556, 563; see also *Heath* v. *Crealock*, 10 Ch. 22, 33.

Lord Eldon was apparently of the same opinion (*Ex parte Knott*, 11 Ves. 609, 613), dissenting from Lord Hardwicke, who thought that a breach of trust by the trustee, of which the purchaser had no notice, could not affect the conscience of the purchaser, although the persons prejudiced would have a remedy against the trustee. *Willoughby* v. *Willoughby*, 1 T. R. 763, 771.

This doctrine does not apply to cases where the legal estate is conveyed contemporaneously with the advance which gives the beneficial interest. *Pilcher* v. *Rawlins*, 7 Ch. 259, 268.

3. Where purchaser has, but trustee has no notice.

3. According to some authorities, a purchaser can avail himself of a legal estate conveyed in breach of trust where the trustee conveying is ignorant of the breach.

Willoughby v. *Willoughby*.

Thus, a puisne mortgagee was held entitled to the protection of a legal estate got in from trustees of a term held

on an express trust to attend the inheritance, although equitable incumbrancers would be entitled to the benefit of the trust according to their priorities. *Willoughby* v. *Willoughby*, 1 T. R. 763.

Although a trustee of a satisfied term or a satisfied mortgagee would not be liable if he conveyed the legal estate in prejudice of equitable interests of which he had no notice, a person taking the legal estate with notice of such rights would naturally become a trustee of it for the persons entitled. The doctrine of *Willoughby* v. *Willoughby* has been often disapproved. See *Maundrell* v. *Maundrell*, 10 Ves. 246, 261; *Pilcher* v. *Rawlins*, 7 Ch. 259, 268; *Mumford* v. *Stohwasser*, 18 Eq. 556, 562; *Taylor* v. *Russell*, (1891) 1 Ch. 8, 29; (1892) A. C. 244, 259.

The better opinion, therefore, appears to be that knowledge, either on the part of the person to whom the legal estate is conveyed or of the trustee conveying it, that the legal estate is conveyed in breach of trust prevents the legal estate from being made use of against a *cestui que trust*.

Legal estate got in from unsatisfied mortgagee.

There is no analogy between these cases and cases where the legal estate is obtained from an unsatisfied mortgagee. An unsatisfied mortgagee does not stand in a fiduciary position to later mortgagees.

Hence, a purchaser is protected by getting in the legal estate from an unsatisfied mortgagee who, without consideration, releases part of the land subject to his mortgage from the mortgage debt, and conveys the legal estate in it to the purchaser. *Taylor* v. *Russell*, (1891) 1 Ch. 8; (1892) A. C. 244.

Where the legal estate is conveyed to trustees upon the express condition of conveying it to a purchaser, the fact that the purchaser gets it from trustees does not deprive him of the protection which it would otherwise afford. *Taylor* v. *Russell, supra.*

C. Possession of the Title-deeds.

1. At law.

1. The possession of the title-deeds of an estate belongs at law to the person having the immediate freehold interest in

the estate, who is entitled to recover them in trover or detinue. See p. 179.

Recovery of title-deeds in foreclosure action.

Equity gave no assistance, as against a purchaser for value without notice, to a plaintiff applying to the auxiliary jurisdiction of the Court in aid of a legal title. Hence, a legal mortgagee could not recover the title-deeds in equity from a purchaser for value without notice. *Wallwyn* v. *Lee*, 9 Ves. 24; *Gait* v. *Osbaldeston*, 1 Russ. 158; *Joyce* v. *De Moleyns*, 2 J. & Lat. 374; *Phillips* v. *Phillips*, 4 D. F. & J. 208; *Ind, Coope & Co.* v. *Emmerson*, 12 App. Cas. 300.

An order for foreclosure was therefore not accompanied by an order for delivery of title-deeds. *Head* v. *Egerton*, 3 P. W. 280; *Kendall* v. *Hulls*, 11 Jur. 864; *Barnard* v. *Bywater*, 17 W. R. 71; *Heath* v. *Crealock*, 10 Ch. 22.

In *Hunt* v. *Elmes* (2 D. F. & J. 578) the mortgagee had only a term, and therefore no right at law to the title-deeds.

But the defence of purchaser for value without notice was not available in cases where equity had a concurrent jurisdiction with law. *Williams* v. *Lambe*, 3 B. C. C. 264; *Collins* v. *Archer*, 1 R. & M. 284; *Phillips* v. *Phillips*, *supra*.

The result is, that since the Judicature Act a legal mortgagee can recover the title-deeds in a foreclosure action. *In re Cooper*, 20 Ch. Div. 611, 631; *Manners* v. *Mew*, 29 Ch. D. 725; *In re Ingham*, (1893) 1 Ch. 352; see *Ind, Coope & Co.* v. *Emmerson*, 12 App. Cas. 300.

Deed of demise of term.

Under the law before the Satisfied Terms Act (8 & 9 Vict. c. 112), where an outstanding term was held upon trust to attend the inheritance, a puisne equitable mortgagee of the inheritance, who, on the occasion of his loan, got possession of the deed of demise and other deeds relating to the term, was allowed to set up the term as against a prior equitable mortgagee. *Willoughby* v. *Willoughby*, 1 T. R. 763; *Stanhope* v. *Earl Verney*, 2 Ed. 81; *Maundrell* v. *Maundrell*, 10 Ves. 246, 262; see *Eyre* v. *Burmester*, 10 H. L. C. 90, 100.

2. In equity.

2. Where, either in consequence of a fund being in Court or the legal estate outstanding in a trustee, and the beneficial interest being claimed by several adverse but equally innocent purchasers for value without notice, the Court is called upon

to declare the right to the fund or estate in question, the Court will order the title-deeds to be delivered to the claimant to whom it adjudges the whole beneficial interest in the property. *Newton* v. *Newton*, 6 Eq. 135; 4 Ch. 143; *Taylor* v. *Russell*, (1891) 1 Ch. 8, 19. See also *Stackhouse* v. *Countess of Jersey*, 1 J. & H. 731; *Thorpe* v. *Holdsworth*, 7 Eq. 139.

The result appears to be, that possession of the title-deeds of an estate does not by itself give any advantage to the person possessing them.

CHAPTER XLVIII.

NOTICE AS PERFECTING SECURITIES.

A. Debts.

Priority of equitable assignments.

EQUITABLE assignments rank for priority according to the date at which notice of them is given to the debtor or person charged with the duty of making payment.

Policies of assurance.

The Policies of Assurance Act, 1867 (30 & 31 Vict. c. 144), provides (sect. 3) that the date on which notice of an assignment shall be received shall regulate the priority of all claims under the assignment.

To whom notice should be given.

Notice for the purpose of priority should be given to the person by whom payment of the assigned debt is to be made, whether that person is himself liable or is merely charged with the duty of making the payment. *Addison* v. *Cox*, 8 Ch. 76.

Notice to agent.

Notice given to a mere possible agent before he is actual agent has no effect. Thus, notice has no effect if it is given to the agent before the fund, which it will be his duty to pay over to the assignor, comes into his hands (*a*), or if it is given to him after the fund is in his hands, but before it becomes due to the assignor (*b*). (*a*) *Buller* v. *Plunkett*, 1 J. & H. 441; *Webster* v. *Webster*, 31 B. 393; *Somerset* v. *Cox*, 33 B. 634; see *Blake* v. *Halse*, (1892) W. N. 143. (*b*) *Yates* v. *Cox*, 17 W. R. 20; *Boss* v. *Hopkinson*, 18 W. R. 725; *Johnstone* v. *Cox*, 16 Ch. D. 571; 19 Ch. Div. 17; *Roxburghe* v. *Cox*, 17 Ch. Div. 520.

But notice given to the agent after the fund becomes due to the assignor is effectual, although the assignor has not yet signed the receipt, without which the fund is not actually payable. *Addison* v. *Cox*, 8 Ch. 76.

Contemporaneous notices.

Where valid notices are given contemporaneously, the assignments take effect according to their dates. *Boss* v. *Hopkinson*, 18 W. R. 725; *Calisher* v. *Forbes*, 7 Ch. 109; *Johnstone* v. *Cox*, *supra*.

When notice deemed to be given.

A notice for this purpose will be deemed to have been given when in the ordinary course of business it would come before the person for whom it was left. *Calisher* v. *Forbes*, *supra*.

Payment by debtor without notice.

Payment by a debtor without notice of an assignment to his original creditor is a good payment as against the assignee. There is no distinction for this purpose between actual payment and a *bonâ fide* settlement of accounts between debtor and creditor. *Stocks* v. *Dobson*, 5 De G. & Sm. 760; 4 D. M. & G. 11.

The Policies of Assurance Act, 1867 (30 & 31 Vict. c. 144), provides (sect. 3) that a payment *bonâ fide* made in respect of any policy by an assurance company before the date on which such notice shall have been received shall be as valid against the assignee giving such notice as if the Act had not been passed.

Duties of debtor.

As to the duties of a debtor who receives notice of an equitable assignment, see *Jones* v. *Farrell*, 1 De G. & Jo. 208.

Assignment of a debt by way of mortgage does not of itself entitle the debtor to interplead. He is only entitled where there are adverse claims, *e.g.* where the mortgagor asserts that the mortgage has been satisfied. *Desborough* v. *Harris*, 5 D. M. & G. 439.

B. Trust Funds and Funds in Court.

Notice to trustees of fund.

An assignee of an equitable interest in a fund in the hands of trustees, without notice of an existing prior assignment, gains priority over the existing assignee by giving notice before him to the trustees of the fund. *Dearle* v. *Hall*; *Lovegrove* v. *Cooper*, 3 Russ. 1; *Foster* v. *Blackstone*, 1 My. & K. 297; S. C. *Foster* v. *Cockerell*, 9 Bli. N. S. 332; 3 Cl. & F. 456; *Meux* v. *Bell*, 1 Ha. 73; *Ward* v. *Duncombe*, (1893) A. C. 369.

It is immaterial that the later assignment, which thus

obtains priority, is made by the legal personal representative of the *cestui que trust*. *In re Freshfield's Trust*, 11 Ch. D. 198.

It is immaterial that the assignee who gives the first notice has in fact made no inquiry of the trustees. Inquiry by him would *ex hypothesi* have been useless. *Meux* v. *Bell*, 1 Ha. 73, 96; *Ward* v. *Duncombe*, (1893) A. C. 369, 380.

Stop-order on fund in Court.

Where a fund is in Court, a stop-order is equivalent to notice, and notice to the trustees of the fund has no effect. *Greening* v. *Beckford*, 5 Sim. 195; *Warburton* v. *Hill*, Kay, 470; *Elder* v. *Maclean*, 3 Jur. N. S. 283; *Pinnock* v. *Bailey*, 23 Ch. D. 497.

A stop-order, although in point of form affecting the whole fund, will be confined in its operation to the amount on which the order is founded. *Macleod* v. *Buchanan*, 33 B. 234; 4 D. J. & S. 265.

As to the form which a stop-order should take when it is intended to affect income, see *Mack* v. *Postle*, (1894) 2 Ch. 449.

Fund in Court belonging to lunatic.

A stop-order will not be made on a fund in Court belonging to a lunatic in favour of an assignee of one of the next of kin. *In re Wilkinson*, 10 Ch. 73, overruling *In re Moore*, 1 Mac. & G. 103; *In re Pigott*, 3 Mac. & G. 268.

Fund partly in Court, partly in hands of trustees.

Where part of a fund is in Court and part in the hands of trustees, notice to the trustees is ineffectual as regards the part in Court. *Mutual Life Assurance Society* v. *Langley*, 26 Ch. D. 686; 32 Ch. Div. 460.

No trustee.

Where there is no trustee to whom notice can be given, a distringas should be obtained for the purpose of getting priority. *Etty* v. *Bridges*, 2 Y. & C. Ch. 486.

To what trustees should notice be given.

The trustees to whom notice of an assignment should be given are the trustees whose duty it will be to pay over the fund to the assignor, and not the trustees who have dominion over the fund. *Holt* v. *Dewell*, 4 Ha. 446; *Commissioners of Public Works* v. *Harby*, 23 B. 508; *Stephens* v. *Green*, (1895) 2 Ch. 148, overruling *In re Booth's Settlement Trusts*, 1 W. R. 444; 21 L. T. O. S. 239, and explaining *Bridge* v. *Beadon*, L. R. 3 Eq. 664.

Effect of sub-settlement.

Thus, if there is a fund in Court, a share in which has been

settled, notice of an incumbrance on the interest of a person claiming under the settlement should be given to the trustees of the settlement, and a stop-order will have no effect. *Stephens* v. *Green, supra.*

To what property rule in *Dearle* v. *Hall* applies.

The doctrine of *Dearle* v. *Hall* is confined to assignments of choses in action, or of such interests in real estate as can only reach the hands of the beneficiary or assignor in the shape of money. *Jones* v. *Jones*, 8 Sim. 633; *Wilmot* v. *Pike*, 5 Ha. 14; *Rochard* v. *Fulton*, 1 J. & Lat. 413, 439; *Rooper* v. *Harrison*, 2 K. & J. 86; *Lee* v. *Howlett*, 2 K. & J. 531; *Consolidated Investment Co.* v. *Riley*, 1 Giff. 371; *Re Hughes' Trusts*, 2 H. & M. 89; *Phipps* v. *Lovegrove*, 16 Eq. 80, 91; *Daniel* v. *Freeman*, I. R. 11 Eq. 233, 638; *In re Roche's Estate*, 25 L. R. Ir. 58, 284; *In re Wyatt*, (1892) 1 Ch. 188.

It extends to real estate given on trust for sale or to portions raisable out of real estate by sale or mortgage at a time which has not arrived when the assignment takes place. *Lee* v. *Howlett*, 2 K. & J. 531; *Consolidated Investment Co.* v. *Riley*, 1 Giff. 371; *Re Hughes' Trusts*, 2 H. & M. 89.

As to the decision in *Foster* v. *Cockerell* (3 Cl. & F. 456), which has been variously explained, see *per* Lord Macnaghten in *Ward* v. *Duncombe*, (1893) A. C. 369, 390.

Where a trustee invested trust money on mortgage of real estate in his own name, and subsequently deposited the title-deeds of the real estate to secure a private debt, it was held that the depositee did not, by giving prior notice to the mortgagor, gain priority over the *cestui que trust*. *In re Richards*, 45 Ch. D. 589.

The rule in *Dearle* v. *Hall* does not apply to a money fund which, by virtue of a private Act of Parliament, is for the purpose of devolution between the persons interested therein to be deemed in equity of the nature of real estate. *Re Carew's Estate*, 16 W. R. 1077.

It has been held that the doctrine does not apply to an annuity charged by will upon leaseholds. *Wiltshire* v. *Rabbits*, 14 Sim. 76, *sed qu.*

Shares in companies.

The rule in *Dearle* v. *Hall* does not apply to shares in companies governed either by the Companies Clauses

Consolidation Act, 1845, or by the Companies Act, 1862. *Société Générale de Paris* v. *Walker*, 14 Q. B. Div. 424; 11 App. Cas. 20.

The decision in *Bradford Banking Co.* v. *Briggs* (12 App. Cas. 29) is not inconsistent with the decision of the Court of Appeal in the above case. See p. 38.

The rule in *Dearle* v. *Hall* may perhaps apply to shares in companies which are not exonerated from the duty of recognizing beneficial interests in their shares. *Per* Lindley, L.J., in *Société Générale de Paris* v. *Tramways Union Co.*, 14 Q. B. Div. 424, 457.

What amounts to notice.

The question whether a trustee has notice of an incumbrance upon the trust fund is a question of fact.

"An assignee who alleges that a trustee has notice of his assignment must prove that the mind of the trustee has in some way been brought to an intelligent apprehension of the nature of the incumbrance which had come upon the property, so that a reasonable man or an ordinary man of business would act upon the information, and would regulate his conduct by it in the execution of the trust." *Per* Lord Cairns, in *Lloyd* v. *Banks*, L. R. 3 Ch. 488, 490.

Trustees fixed with notice.

In the following cases it has been held that the trustees had notice: *Meux* v. *Bell*, 1 Ha. 73, 87; *Lloyd* v. *Banks*, L. R. 3 Ch. 488; *In re Wyatt*, (1892) 1 Ch. 188, 196.

Notice is sufficient, although the date of the mortgage is wrongly given in the notice. *Whittingstall* v. *King*, 46 L. T. 520.

Trustees not fixed with notice.

In the following cases it has been held that they had no notice: *Re Barr's Trusts*, 4 K. & J. 219; *Saffron Walden Building Society* v. *Rayner*, 14 Ch. Div. 406; *In re Cousins*, 31 Ch. D. 671, 675.

Notice to trustees of a charge contained in a deed is not notice of another charge contained in the same deed. *Re Bright's Trusts*, 21 B. 430.

Notice sufficient to take a chose in action out of the order and disposition of a bankrupt is not necessarily sufficient to give priority as between successive incumbrancers or to fix trustees of a fund with liability to the assignee. *Saffron*

Walden Building Society v. *Rayner*, 14 Ch. Div. 406; *Mutual Life Assurance Society* v. *Langley*, 32 Ch. Div. 460, 470.

Notice to solicitor of trustees.

Notice given to the solicitor of trustees is not effectual, unless he is authorized by them, expressly or by implication, to receive notices. *Rickards* v. *Gledstanes*, 31 L. J. Ch. 142; *Saffron Walden Building Society* v. *Rayner*, 14 Ch. Div. 406; *Arden* v. *Arden*, 29 Ch. D. 702, 709.

Notice to one of several trustees.

Where there are several trustees, notice to one is as effectual for the purpose of priority as if it had been given to all. *Smith* v. *Smith*, 2 Cr. & M. 231; *Meux* v. *Bell*, 1 Ha. 73, 96; *Willes* v. *Greenhill*, 4 D. F. & J. 147.

It is immaterial that the trustee acquires notice by being himself the assignee (*a*), or that the trustee to whom notice is given is husband of the assignor (*b*), but, where a trustee is himself the assignor, and assigns to a stranger, notice to be effectual must be given to one of his co-trustees (*c*). (*a*) *Willes* v. *Greenhill*, (No. 1) 29 B. 376; (*b*) *Willes* v. *Greenhill*, (No. 2) 29 B. 387; 4 D. F. & J. 147; (*c*) *Browne* v. *Savage*, 4 Drew. 635.

Duration of effect of notice.

Where A. gives notice of an incumbrance to X., who is trustee of a fund together with Y., and B. subsequently gives notice of an incumbrance to X. and Y. or to Y., X. still being a trustee, A. does not lose his priority over B. by reason of X.'s death, although Y. has no notice of A.'s incumbrance. *In re Wyatt*, (1892) 1 Ch. 188; S. C. *Ward* v. *Duncombe*, (1893) A. C. 369.

The point is, that B. when he gave notice might, by making inquiries of both X. and Y., have ascertained the existence of A.'s incumbrance. He is, therefore, postponed to it. And no change of circumstances can improve his position. See *Meux* v. *Bell*, 1 Ha. 73, 96; *In re Wyatt*, (1892) 1 Ch. 188, 206; S. C. *Ward* v. *Duncombe*, (1893) A. C. 369, 382.

But where A. gives notice of an incumbrance to X., who is trustee of a fund together with Y., and, after X. has ceased to be trustee, B. gives notice of an incumbrance to Y., who has no notice of A.'s incumbrance, B. has priority over A. The reason is that B. could not, by making inquiries when he gave his notice, have ascertained the existence of A.'s

incumbrance. *Timson* v. *Ramsbottom*, 2 Kee. 35; *Nolan* v. *O'Brien*, 7 L. R. Ir. 180.

The authority of *Timson* v. *Ramsbottom*, which was a case in which notice was given to one of several executors, was doubted by Lord Macnaghten in *Ward* v. *Duncombe*, (1893) A. C. 369, 394. His lordship seems to have been of opinion that notice once given would be valid for all time, and would not become inoperative by reason of a change of trustees.

But the rule supposed to be laid down in *Timson* v. *Ramsbottom* was accepted by the Court of Appeal and by Lord Herschell in *In re Wyatt, supra;* S. C. *Ward* v. *Duncombe, supra.*

Fund paid into Court after notice.

Notice given to the trustees of a fund does not lose its force because the fund is afterwards paid into Court. An assignee who has given such notice has priority over an assignee who subsequently obtains a stop-order. *Livesey* v. *Harding*, 23 B. 141.

In *Swayne* v. *Swayne* (11 B. 463) a trustee who had a charge on a fund, and who paid it into Court without obtaining a stop-order, was postponed to an assignee on the fund, under an assignment made before the fund was paid into Court, who did obtain a stop-order. This case can only be supported on the ground of estoppel.

Fund carried to separate account after stop-order.

A stop-order on an undivided fund does not lose its force because the mortgagor's share in the fund is carried over to the account of him and his incumbrancers. *Lister* v. *Tidd*, 4 Eq. 462.

Stop-order on fund carried to separate account.

Where a fund in Court is carried over to a separate account, an incumbrancer who has obtained a stop-order on the interest of a person named in the account, has priority over all equities available against such person by any one in whose presence the order carrying over the fund was made. *In re Eyton*, 45 Ch. D. 458.

Notice only gives priority in regard to the particular fund as to which notice is given. *Mutual Life Assurance Society* v. *Langley*, 32 Ch. Div. 460, 474.

Notice by execution creditor.

An execution creditor takes subject to all equities. He cannot, therefore, by giving notice gain priority over an

incumbrancer who has not given notice. *Beavan* v. *Earl of Oxford*, 6 D. M. & G. 507, 524, 532; *Brearcliff* v. *Dorrington*, 4 De G. & Sm. 122; *Scott* v. *Lord Hastings*, 4 K. & J. 633; *Arden* v. *Arden*, 29 Ch. D. 702, 709. *Watts* v. *Porter* (3 E. & B. 743) must be considered as overruled.

Notice by trustee in bankruptcy.

On the same principle, a trustee in bankruptcy cannot by giving notice gain priority over an incumbrancer before the bankruptcy who has not given notice.

Under the former law of reputed ownership, under which the assignee of a trust fund had to give notice to the trustees in order to take the fund out of the order and disposition of his assignor, it was held that notice given after the bankruptcy gave the assignee priority over a trustee in bankruptcy who had not given notice. *Stuart* v. *Cockerell*, 8 Eq. 607; *In re Russell's Policy Trusts*, 15 Eq. 26.

The Bankruptcy Act, 1883, provides—

Bankruptcy Act, 1883, s. 50, (5).

Sect. 50, (5). Where any part of the property of the bankrupt consists of things in action, such things shall be deemed to have been duly assigned to the trustee.

Notice by assignee after the bankruptcy.]

This section does not relieve a trustee in bankruptcy from the necessity of giving notice to the trustees of a fund belonging to the bankrupt in order to perfect his title to it. An assignee from the bankrupt after the bankruptcy, who gives notice to the trustees before the trustee in bankruptcy, has priority over him. *In re Stone's Will*, (1893) W. N. 50; 9 T. L. R. 346.

The law was the same under the earlier Bankruptcy Acts, except the Act of 1849. *In re Atkinson*, 2 D. M. & G. 140; *Re Barr's Trusts*, 4 K. & J. 219; *In re Brown's Trusts*, L. R. 5 Eq. 88; *Palmer* v. *Locke*, 18 Ch. Div. 381.

It has been held, under the Act of 1849, that an assignee in bankruptcy who did not give notice had priority over an assignee from the bankrupt who had given notice. *Re Coombe's Trusts*, 1 Giff. 91; *In re Bright's Settlements*, 13 Ch. Div. 413; see, however, *Palmer* v. *Locke*, *supra*.

Duties of trustees with respect to notices.

As to the duties and liabilities of trustees with regard to incumbrances—

Trustees are not bound to make inquiries of retiring trustees

as to the existence of incumbrances on the trust fund, and if they distribute it without regard to an incumbrance of which they have no notice, they incur no liability to the incumbrancer. *Phipps* v. *Lovegrove*, 16 Eq. 80; *Hallows* v. *Lloyd*, 39 Ch. D. 686; *Ward* v. *Duncombe*, (1893) A. C. 369, 392.

Trustees are under no legal obligation to answer inquiries put to them by an intending lender to a beneficiary as to existing incumbrances. *Low* v. *Bouverie*, (1891) 3 Ch. 82, overruling *Browne* v. *Savage*, 4 Drew. 635.

A trustee, therefore, who gives false information which he believes to be true cannot be made liable in damages, although he may be liable on the principle of estoppel. *Low* v. *Bouverie*, *supra*.

A trustee who receives notice of an incumbrance is not bound to inform the incumbrancer of an existing charge in his own favour, and does not lose priority by omitting to do so. *In re Lewer*, 4 Ch. D. 101.

Mortgagee of fund not entitled to payment of whole fund.

An assignee by way of mortgage of a reversionary interest in a fund in the hands of trustees who have notice of subsequent assignments is not entitled, when the reversion falls in, to payment of the whole fund, but only of his principal, interest, and costs. *In re Bell*, (1896) 1 Ch. 1.

As to the effect of notice under the Policies of Assurance Act, 1867 (30 & 31 Vict. c. 144), sect. 3, in regulating priority, see *Newman* v. *Newman*, 28 Ch. D. 674, 680.

CHAPTER XLIX.

NOTICE AS AFFECTING THE CONSCIENCE.

Material time is time of loan.

THE point at which it is material to ascertain whether an incumbrancer has notice of a prior incumbrance is the time when the later incumbrancer advances his money.

An incumbrancer who, when he advances his money, has notice of an existing incumbrance, cannot gain priority over that incumbrance by subsequently perfecting his security.

On the other hand, an incumbrancer who, when he advances his money, has no notice of any earlier incumbrance, is not precluded, if he subsequently acquires notice of an earlier incumbrance, from perfecting his security, and using the advantage which he gains by so perfecting it.

Notice affecting legal mortgagee of land,

1. A mortgagee of land cannot avail himself of the legal estate if, at the time when he advanced his money, he had notice of a prior equitable interest in the land. *Willoughby* v. *Willoughby*, 1 T. R. 763; *Drew* v. *Lockett*, 32 B. 499, 506.

registered mortgagee,

2. He cannot avail himself of registration if, at the time when he advanced his money, he had notice of a prior unregistered interest. *Lord Forbes* v. *Déniston*, 2 B. P. C. 425; *Le Neve* v. *Le Neve*, 1 Ves. S. 64; 3 Atk. 646; Ambl. 436; *Bushell* v *Bushell*, 1 Sch. & L. 90; *Tunstall* v. *Trappes*, 3 Sim. 301; *Greaves* v. *Tofield*, 14 Ch. Div. 563; see *Davis* v. *Earl of Strathmore*, 16 Ves. 419.

This rule does not apply to registration in Yorkshire, as to which, see p. 415.

registered transferee,

A registered transferee (whether legal or equitable) without notice from a transferor with notice is protected by registration against prior unregistered incumbrances. *Chadwick* v. *Turner*, L. R. 1 Ch. 310, 319; explaining *Ford* v. *White*, 16 B. 120.

3. A mortgagee of a debt or fund in the hands of trustees or in Court cannot gain priority by giving notice to the debtor or trustees or by getting a stop-order, if he had notice of a prior interest in the fund when he advanced his money. *Warburton* v. *Hill*, Kay, 470; *In re Hamilton's Windsor Iron-works*, 12 Ch. D. 707, 711; *In re A. D. Holmes*, 29 Ch. Div. 786; *Ward* v. *Royal Exchange Shipping Co.*, 58 L. T. 174. mortgagee of debt or trust fund,

4. An equitable mortgagee of shares transferable at law cannot gain priority by getting a legal transfer if he had notice, when he advanced his money, of a prior equitable interest. mortgagee of shares transferable at law.

In all these cases, notice received after the advance has been made is immaterial, and does not prevent the person who has it from acquiring and availing himself of any legal advantage against the interest of which he has notice. *Essex* v. *Baugh*, 1 Y. & C. C. 620; *Elsey* v. *Lutyens*, 8 Ha. 159 (land in Middlesex); *Taylor* v. *Russell*, (1892) A. C. 244, 259 (land); *Mutual Life Assurance Society* v. *Langley*, 32 Ch. Div. 460 (fund in Court); *Dodds* v. *Hills*, 2 H. & M. 424 (shares); see *Ortigosa* v. *Brown*, 47 L. J. Ch. 168. Notice after loan is immaterial.

A *bonâ fide* purchaser for value without notice can give a good title to a purchaser from him with notice. *Goleborn* v. *Alcock*, 2 Sim. 552, 559; *Freer* v. *Hesse*, 4 D. M. & G. 495, 503; *Barrow's Case*, 14 Ch. Div. 432, 445; *Kettlewell* v. *Watson*, 21 Ch. D. 685, 707; *Nottingham Patent Brick Co.* v. *Butler*, 16 Q. B. Div. 778; *In re Stewart's Estate*, 31 L. R. Ir. 405. Purchaser with, from purchaser without notice.

But a purchaser with notice who sells the property to a purchaser without notice does not, by buying it back from him, acquire a good title. *Barrow's Case*, 14 Ch. Div. 432, 445.

Notice which affects a trustee binds his infant *cestuis que trust*. *Toulmin* v. *Steere*, 3 Mer. 210, 222; *Wise* v. *Wise*, 2 J. & Lat. 403; *Lloyd's Banking Co.* v. *Jones*, 29 Ch. D. 221. Notice affecting trustee.

Notice which affects a tenant for life does not bind those in remainder. *In re McNamara's Estate*, 13 L. R. Ir. 158. Notice affecting tenant for life.

The Conveyancing Act, 1882 (45 & 46 Vict. c. 39), provides— Conveyancing Act, 1882, s. 3.

Sect. 3, (1). A purchaser shall not be prejudicially affected by notice of any instrument, fact, or thing, unless—

(i.) It is within his own knowledge, or would have come to his knowledge, if such inquiries and inspections had been made as ought reasonably to have been made by him; or

(ii.) In the same transaction with respect to which a question of notice to the purchaser arises, it has come to the knowledge of his counsel, as such, or of his solicitor, or other agent, as such, or would have come to the knowledge of his solicitor, or other agent, as such, if such inquiries and inspections had been made as ought reasonably to have been made by the solicitor or other agent.

(2) This section shall not exempt a purchaser from any liability under, or any obligation to perform or observe, any covenant, condition, provision, or restriction contained in any instrument under which his title is derived, mediately or immediately; and such liability or obligation may be enforced in the same manner and to the same extent as if this section had not been enacted.

(3) A purchaser shall not, by reason of anything in this section, be affected by notice in any case where he would not have been so affected if this section had not been enacted.

(4) This section applies to purchases made either before or after the commencement of this Act.

Purchaser in the Act includes a mortgagee or an intending mortgagee [sect. 1, (4), (ii.)].

Constructive Notice.

A purchaser or mortgagee who neglects to make the inquiries into title which a purchaser or mortgagee of ordinary care would make, having regard to the nature of the property, is affected with notice of whatever he would have ascertained if he had made such inquiries. *Ware* v. *Lord Egmont*, 4 D. M. & G. 460; *Parker* v. *Whyte*, 1 H. & M. 167; *Wilson* v. *Hart*, L. R. 1 Ch. 463; *Hooper* v. *Gumm*, L. R. 2 Ch. 282;

Gainsborough v. *Watcombe Terra Cotta Co.*, 54 L. J. Ch. 991; *Bailey* v. *Barnes*, (1894) 1 Ch. 25.

A purchaser or mortgagee who has made no inquiries cannot relieve himself by showing that the person of whom they ought to have been made would probably have given false answers. *Jones* v. *Williams*, 24 B. 47, 62.

Purchaser not bound to go behind documents.

A purchaser or mortgagee is not bound to go behind the documents forming part of the chain of title, or to inquire whether the statements which they contain are true, if there is nothing to suggest that they are not true. *Gainsborough* v. *Watcombe Terra Cotta Co.*, 54 L. J. Ch. 991, distinguishing *Robinson* v. *Briggs*, 1 Sm. & G. 188, where it appeared on the face of the documents that the estate had been sold to a person who was at the time solicitor of the vendors; and see *Cookson* v. *Lee*, 23 L. J. Ch. 473.

A purchaser has not constructive notice of a collateral agreement affecting the property, if the existence of such an agreement does not appear on the face of any document forming part of the chain of title. *Carter* v. *Williams*, 9 Eq. 678; *Patman* v. *Harland*, 17 Ch. D. 353.

Agreement to accept short title.

A purchaser of freeholds who agrees with his vendor to accept a title of less than forty years, is affected with notice of whatever he would have ascertained if he had examined the title for forty years. *Peto* v. *Hammond*, 30 B. 495, 507; *In re Cox & Neve's Contract*, (1891) 2 Ch. 109, 117.

Lessee has notice of lessor's title

A lessee or assignee of a lease has constructive notice of the lessor's title. This doctrine is not affected by sect. 2, (1), of the Vendor and Purchaser Act, 1874. *A.-G.* v. *Backhouse*, 17 Ves. 283, 293; *Robson* v. *Flight*, 4 D. J. & S. 608; *Patman* v. *Harland*, 17 Ch. D. 353; *Mogridge* v. *Clapp*, (1892) 3 Ch. 382, 397.

Notice of covenants of lease.

As between vendor and purchaser, the purchaser of a lease has notice of its covenants, but only where he has had an opportunity of inspecting it. *Reeve* v. *Berridge*, 20 Q. B. Div. 523; *In re White & Smith's Contract*, (1896) 1 Ch. 637.

So, the purchaser of an underlease has notice of the covenants of the original lease, but only where he has an opportunity of ascertaining its provisions. *Cosser* v. *Collinge*, 3 My. & K.

283; *Smith* v. *Capron*, 7 Ha. 185, 189; *Hyde* v. *Warden*, 3 Ex. Div. 72, 80.

Purchaser of land in register county.

A purchaser of land in a register county is not bound to inquire about deeds and documents, memorials of which have not been registered and of which he has no notice; but he is bound to examine the deeds and documents, memorials of which are registered. *Rochard* v. *Fulton*, 1 J. & Lat. 413, 441; *Agra Bank, Limited* v. *Barry*, L. R. 7 H. L. 135; *Kettlewell* v. *Watson*, 26 Ch. Div. 501.

Notice of unregistered claims to affect a registered incumbrancer must be actual notice, brought home to him or his agents. Constructive notice is not enough. *Hine* v. *Dodd*, 2 Atk. 275; *Jolland* v. *Stainbridge*, 3 Ves. 478; *Wyatt* v. *Barwell*, 19 Ves. 435; *Chadwick* v. *Turner*, L. R. 1 Ch. 310, 319; *Lee* v. *Clutton*, 45 L. J. Ch. 43; 46 L. J. Ch. 48; *In re Hall's Estate*, 31 L. R. Ir. 416.

Thus, a purchaser who knew that the title-deeds were not in the vendor's possession, and who made no inquiry where they were, was not postponed to a prior unregistered incumbrancer. *Lee* v. *Clutton*, *supra*. This case appears to overrule *Wormald* v. *Maitland*, 35 L. J. Ch. 69, so far as *contra*.

Yorkshire Registries Act, 1884, s. 14.

The Yorkshire Registries Act, 1884 (47 & 48 Vict. c. 54), provides (sect. 14) that no person shall lose any priority given by the Act merely in consequence of his having been affected with actual or constructive notice, except in cases of actual fraud. See *Battison* v. *Hobson*, (1896) 2 Ch. 403.

Foreign ship.

A purchaser of a foreign ship is bound to make some inquiry into the title. *Hooper* v. *Gumm*, L. R. 2 Ch. 282.

Commercial transactions.

As to the application of the doctrine of constructive notice to commercial transactions, see *Manchester Trust* v. *Furness*, (1895) 2 Q. B. 539, 545.

A reference in a bill of lading to a charterparty does not give holders of the bill of lading constructive notice of all the contents of the charterparty. *Manchester Trust* v. *Furness*, (1895) 2 Q. B. 539.

Negotiable instruments.

A pledgee of negotiable instruments is not affected with notice of an infirmity in his pledgor's title by want of ordinary caution, or by the fact that he once had notice, if it is not

present to his mind at the time of the pledge. *Foster* v. *Pearson*, 1 C. M. & R. 849, 855; *Bank of Bengal* v. *Fagan*, 7 Moo. P. C. 61, 72; *Raphael* v. *Bank of England*, 17 C. B. 161; *London Joint Stock Bank* v. *Simmons*, (1892) A. C. 201; *Venables* v. *Baring Brothers & Co.*, (1892) 3 Ch. 527; *Thomson* v. *Clydesdale Bank*, (1893) A. C. 282; *Collis* v. *Hibernian Bank*, 31 L. R. Ir. 261.

Intentional abstention from inquiry.

A purchaser or mortgagee, who designedly abstains from inquiry for the purpose of avoiding notice, is affected with constructive notice of whatever he would have ascertained if he had inquired. *Whitbread* v. *Jordan*, 1 Y. & C. 303; *Jones* v. *Smith*, 1 Ha. 43.

On the same principle, a pledgee of negotiable instruments is affected with notice if he wilfully shuts his eyes to suspicious circumstances. *In re Gomershall*, 1 Ch. D. 137; S. C. *Jones* v. *Gordon*, 2 App. Cas. 616; *Earl of Sheffield* v. *London Joint Stock Bank*, 13 App. Cas. 333, as explained in *London Joint Stock Bank* v. *Simmons*, (1892) A. C. 201; *Mulville* v. *Munster & Leinster Bank*, 27 L. R. Ir. 379.

France v *Clark.*

It has been held that an equitable mortgagee of shares in a limited company by deposit of the certificates with a transfer signed by the registered owner, but having the date, the consideration, and the name of the transferee in blank, has notice of any infirmity in his mortgagor's title, and cannot, by filling up the blanks, acquire a better title than his mortgagor. *France* v. *Clark*, 26 Ch. Div. 257.

In this case Lord Selborne pointed out that there was no evidence of mercantile usage to the effect that the holders of certificates of shares with blank transfers were treated as having the right to transfer the shares as if they were the owners (p. 264). It would appear, from the decisions in *Hone* v. *Boyle* (27 L. R. Ir. 137) and *Waterhouse* v. *Bank of Ireland* (29 L. R. Ir. 384), and the observations in *Colonial Bank* v. *Cady* (15 App. Cas. 267), that such usage was now admitted, and that the decision in *France* v. *Clark* cannot be regarded as law. See, however, *Fox* v. *Martin*, (1895) W. N. 36; 64 L. J. Ch. 473.

External form of deed.

Where the external form of a deed is such as would naturally

excite suspicion, a purchaser is affected with notice of the circumstances under which it was executed. *Kennedy* v. *Green*, 3 M. & K. 699; see *Greenslade* v. *Dare*, 20 B. 284.

Non-inquiry for title-deeds.

A legal mortgagee who either makes no inquiry for the title-deeds, or who, on being informed that they are in the possession of a stranger, makes no inquiry as to the circumstances under which he holds them, takes subject to any equitable interest which the person in possession of the deeds may have. *Hiern* v. *Mill*, 13 Ves. 114; *Dryden* v. *Frost*, 3 My. & Cr. 670; *Worthington* v. *Morgan*, 16 Sim. 547; *Peto* v. *Hammond*, 30 B. 495; *Maxfield* v. *Burton*, 17 Eq. 15.

But absence of inquiry for the title-deeds does not postpone him to an equitable title created by the fraud of his mortgagor, and not accompanied by possession of the title-deeds. *Hipkins* v. *Amery*, 2 Giff. 292; 6 Jur. N. S. 1047.

Receipt of part of deeds.

He is not postponed if he receives part of the deeds in the reasonable belief that he is receiving all. *Ratcliffe* v. *Barnard*, 6 Ch. 652.

Reasonable excuse for non-delivery.

He is not postponed if he makes inquiry for the deeds, and receives a reasonable excuse for their non-delivery. *Plumb* v. *Fluitt*, 2 Anst. 432; *Hewitt* v. *Loosemore*, 9 Ha. 449; *Espin* v. *Pemberton*, 4 Drew. 333; 3 De G. & Jo. 547; *Brown* v. *Stedman*, 44 W. R. 458.

A legal mortgagee of a moiety of land held in common, who neglected to get possession of the deeds in reliance upon the assertion of the mortgagor, who was his solicitor, that they were in possession of the other tenant in common, was postponed to a prior equitable mortgagee. *Turton* v. *Meacham*, 17 W. R. 429.

Where the holder of a policy of assurance on his own life deposited it with A. to secure a loan, and afterwards executed a charge on the policy in favour of B., in which he alleged that he had deposited it with B., but he did not in fact deposit it, although frequently asked to do so, it was held that B. had constructive notice of the deposit with A., and must be postponed to him. *Spencer* v. *Clarke*, 9 Ch. D. 137.

Notice that property is charged.

Where a person has actual notice that the property in dispute is in fact charged, incumbered, or in some way affected,

he is deemed to have notice of all facts and instruments to a knowledge of which he would have been led by an inquiry after the charge, incumbrance, or other circumstance affecting the property of which he has actual notice. *Jones* v. *Smith*, 1 Ha. 43, 55; *Penny* v. *Watts*, 1 Mac. & G. 150.

Notice that the legal estate is in a third person is notice of the trusts upon which it is held. *Anon.*, 2 Freem. 137, pl. 171.

Notice of a trust affecting the property is notice of all interests under the trust. *Malpas* v. *Ackland*, 3 Russ. 273.

Notice of deed necessarily affecting property.

Notice of a deed which necessarily affects the property mortgaged is notice of its contents, though the mortgagee *bonâ fide* believes the statement of the mortgagor that the deed does not affect it. *Jones* v. *Smith*, 1 Ha. 43, 66; *Patman* v. *Harland*, 17 Ch. D. 353.

Notice that one instrument affects an estate is constructive notice of all other instruments to which an examination of the first would have led. *Bisco* v. *Earl of Banbury*, 1 Ca. in Ch. 287; *Coppin* v. *Fernyhough*, 2 B. C. C. 291; *Davies* v. *Thomas*, 2 Y. & C. Ex. 234.

Notice of a post-nuptial settlement has been held to affect a purchaser with notice that the settlement was supported by an ante-nuptial agreement. *Ferrars* v. *Cherry*, 2 Vern. 383.

Notice that the draft of a deed has been prepared is not constructive notice that the deed has been executed. *Cothay* v. *Sydenham*, 2 B. C. C. 391; see *Williams* v. *Williams*, 17 Ch. D. 437.

Notice of a contract to make an assignment on request is not notice that the request has been made. *Shaw* v. *Foster*, L. R. 5 H. L. 321, 354.

Notice of instrument which may or may not affect property.

Where a mortgagee has notice of an instrument which may, but does not necessarily, affect the mortgaged property, *e.g.* a settlement made by the mortgagor on his marriage, and he is informed that it does not affect the mortgaged property, he is not, if he *bonâ fide* believes the statement to be true, affected with notice of the contents of the instrument. *Jones* v. *Smith*, 1 Ha. 43; 1 Ph. 244; *West* v. *Reid*, 2 Ha. 249, 257; *Dawson* v. *Prince*, 2 De G. & Jo. 41, 50; *Lloyd's Banking Co.* v. *Jones*,

29 Ch. D. 221, 230; *English & Scottish Investment Co.* v. *Brunton*, (1892) 2 Q. B. 1, 700.

If the mortgagee had notice of the instrument and made no inquiries, he would perhaps be affected with notice on the ground that he wilfully shut his eyes. See *per* Kay, L.J., in *English & Scottish Investment Co.* v. *Brunton*, (1892) 2 Q. B. 700, 717.

A mortgagee of a debt due to a limited company who has notice that the company have issued debentures, but is informed by their managing director that the debentures do not affect the property mortgaged is, not deemed to have notice that they do in fact affect it. *English & Scottish Investment Co.* v. *Brunton*, (1892) 2 Q. B. 1, 700.

Notice that person has or claims interest.

Notice that a person has or claims an interest in property is notice of the extent of that interest, although the interest is incorrectly described. *Taylor* v. *Baker*, 5 Pri. 306; *Gibson* v. *Ingo*, 6 Ha. 112, 124; *Montefiore* v. *Browne*, 7 H. L. C. 241.

Thus, notice that A. had a judgment or warrant of attorney affecting the property was held to give notice that A. in fact had a mortgage on the property. *Taylor* v. *Baker*, 5 Pri. 306.

Notice that there are charges affecting the property is notice of all charges which may affect it, although the purchaser *bonâ fide* believes that two, of which he is cognizant, are the only ones affecting it. *Jones* v. *Williams*, 24 B. 47.

Notice that A. had a judgment on estates in Ireland was held notice that A. had a bond with warrant of attorney to confess judgment, which had not been entered up. *Montefiore* v. *Browne*, 7 H. L. C. 241.

Notice of an agreement to execute a mortgage is notice that the mortgage may contain a power of sale. *Leigh* v. *Lloyd*, 2 D. J. & S. 330.

Notice that stranger is in possession of property.

Notice that a person other than the mortgagor is in occupation or receipt of the rents and profits of the land is notice of all rights, legal or equitable, which such person may have in the land. *Taylor* v. *Stibbert*, 2 Ves. J. 437; *Daniels* v. *Davison*, 16 Ves. 249; 17 Ves. 433; *Allen* v. *Anthony*, 1 Mer. 282; *Bailey* v. *Richardson*, 9 Ha. 734; *Barnhart* v. *Greenshields*, 9 Moo. P. C. 18, 32; *Holmes* v. *Powell*, 8 D. M. & G. 572;

Knight v. *Bowyer*, 2 De G. & Jo. 421, 449; *Cavander* v. *Bulteel*, 9 Ch. 79. See *Hughes* v. *Seanor*, 18 W. R. 108, 1122.

This doctrine does not apply as between vendor and purchaser. *Caballero* v. *Henty*, 9 Ch. 447.

Notice that a stranger has been in the occupation of land is not notice of an interest which he may have in the land. *Miles* v. *Langley*, 1 R. & M. 39.

Notice that a tenant is in possession does not, if the tenant is a sub-lessee, affect a purchaser with notice of the covenants of the original lease. *Hanbury* v. *Litchfield*, 2 My. & K. 629

Notice of possible easement.

Notice that a window overlooks land is not notice of an agreement between the owner of the land and the owner of the window giving the latter a right to the access of air and light to the window. *Allen* v. *Seckham*, 11 Ch. Div. 790, where *Hervey* v. *Smith*, 1 K. & J. 389; 22 B. 299; *Morland* v. *Cook*, 6 Eq. 252; *Davies* v. *Sear*, 7 Eq. 427; *Miles* v. *Tobin*, 16 W. R. 465, are considered.

Registry Acts do not create constructive notice.

The Middlesex and Yorkshire Registry Acts do not create constructive notice of instruments registered therein. *Wrightson* v. *Hudson*, 2 Eq. Abr. 609; *Morecock* v. *Dickins*, Amb. 678; *Bushell* v. *Bushell*, 1 Sch. & L. 90, 101; *Galbraith* v. *Cooper*, 8 H. L. C. 315, 330; *Wormald* v. *Maitland*, 35 L. J. Ch. 69; *In re Russell Road Purchase-moneys*, 12 Eq. 78; *In re O'Byrne's Estate*, 15 L. R. Ir. 189, 373.

Sect. 15 of the Yorkshire Registries Act, 1884 (47 & 48 Vict. c. 54), was repealed by sect. 5 of the Yorkshire Registries Amendment Act, 1885 (48 & 49 Vict. c. 26).

Imputed Notice.

Notice to agent affects client.

Notice affecting a solicitor or other agent employed by the mortgagee in the mortgage transaction has always been treated as notice affecting the mortgagee. *Brotherton* v. *Hatt*, 2 Vern. 574; *Sheldon* v. *Cox*, Amb. 624; 2 Ed. 224; *Marjoribanks* v. *Hovenden*, Dru. t. Sugd. 11.

As to the principle upon which this doctrine is based, see *Espin* v. *Pemberton*, 3 De G. & Jo. 547; *Boursot* v. *Savage*, L. R. 2 Eq. 134, 142.

Notice of immaterial matter.

Notice to the agent of a matter which it was not his duty to communicate to the principal, *i.e.* of a matter not material to the transaction in hand, does not affect the principal. *Hooper* v. *Cooke*, 25 L. J. Ch. 467; *Wyllie* v. *Pollen*, 3 D. J. & S. 596; see *Thorne* v. *Heard*, (1895) A. C. 495, 501.

Solicitor employed in part of transaction.

A solicitor or agent employed in an isolated portion of the mortgage transaction is not necessarily agent of the mortgagee so as to affect him with notice. *Wyllie* v. *Pollen*, 3 D. J. & S. 596; *Kettlewell* v. *Watson*, 21 Ch. D. 685, 707.

Where the mortgagee's solicitor employs another solicitor to perform a ministerial act, notice to that other solicitor is not notice to the client. *Foxon* v. *Gascoigne*, 9 Ch. 657 n.

Mortgagor preparing mortgage-deed.

Where the mortgagor is himself a solicitor and prepares the mortgage-deed, the mortgagee employing no other solicitor, the mortgagor is not necessarily agent of the mortgagee. *Espin* v. *Pemberton*, 3 De G. & Jo. 547, dissenting from the dictum in *Hewitt* v. *Loosemore*, 9 Ha. 449, 455.

The knowledge of the solicitor to affect the mortgagee must be acquired in his character as solicitor for the mortgagee.

Both parties employing same solicitor.

Where both mortgagor and mortgagee employ the same solicitor, the knowledge of the mortgagor cannot be imputed to the mortgagee. *In re Cousins*, 31 Ch. D. 677.

Two companies with common officer.

Where two companies have a common officer, knowledge acquired by him as officer of one company is not imputed to the other company, unless he had some duty imposed on him to communicate that knowledge to the other company, and had some duty imposed on him by the second company to receive notice thereof. *Gale* v. *Lewis*, 9 Q. B. 730; *In re Marseilles Extension Ry. Co.*, 7 Ch. 161; *In re Hampshire Land Co.*, (1896) 2 Ch. 743.

Knowledge acquired in past transaction.

The effect of the Conveyancing Act, 1882, is to abrogate the doctrine that knowledge acquired by a solicitor in one transaction might affect the principal in another transaction with notice. *In re Cousins*, 31 Ch. D. 671. The old cases are collected in *Fuller* v. *Benett*, 2 Ha. 394.

Agent party to fraud on principal.

The knowledge of the agent is not imputed to the principal where the agent commits, or is party to, a fraud requiring the suppression of the prior interest, with notice of which it is

sought to affect the principal. *Kennedy* v. *Green*, 3 M. & K. 699, 720; *Thompson* v. *Cartwright*, 33 B. 178; *Sharpe* v. *Foy*, 4 Ch. 35; *Sankey* v. *Alexander*, I. R. 9 Eq. 259; *Waldy* v. *Gray*, 20 Eq. 238; *Cave* v. *Cave*, 15 Ch. D. 639; *Kettlewell* v. *Watson*, 21 Ch. D. 685, 707, 714; *Bouts* v. *Stenning*, 8 T. L. R. 600; see *Boursot* v. *Savage*, L. R. 2 Eq. 134, 142.

These cases may either be based on the principle that evidence of the fraud rebuts the presumption of law that the agent will communicate all material facts to his principal, or that the commission of the fraud is beyond the scope of the agent's authority. *Espin* v. *Pemberton*, 3 De G. & Jo. 547, 55; *Cave* v. *Cave*, 15 Ch. D. 639.

The doctrine of *Kennedy* v. *Green* does not apply where the only ground for charging the agent with fraud would be the concealment of the fact upon which the question of notice depends. *Hewitt* v. *Loosemore*, 8 Ha. 449, 455; *Atterbury* v. *Wallis*, 8 D. M. & G. 454; *Rolland* v. *Hart*, 6 Ch. 678.

The fact that it was against the agent's interest to communicate a fact to his principal raises no presumption that he failed to communicate it. *Bradley* v. *Riches*, 9 Ch. D. 189.

CHAPTER L.

LIS PENDENS.

Doctrine stated.

"It is scarcely correct to speak of *lis pendens* as affecting a purchaser through the doctrine of notice, though undoubtedly the language of the Courts often so describes its operation. It affects him, not because it amounts to notice, but because the law does not allow litigant parties to give to others, pending the litigation, rights to the property in dispute, so as to prejudice the opposite party. Where a litigation is pending between a plaintiff and a defendant as to the right to a particular estate, the necessities of mankind require that the decision of the Court in the suit shall be binding, not only on the litigant parties, but also on those who derive title under them by alienations made pending the suit, whether such alienees had or had not notice of the pending proceedings." *Per* Cranworth, C., in *Bellamy* v. *Sabine*, 1 De G. & Jo. 566, 578. See *Bishop of Winchester* v. *Paine*, 11 Ves. 194; *Metcalfe* v. *Pulvertoft*, 2 V. & B. 200.

The doctrine of *lis pendens* does not apply to personal property other than chattel interests in land. *Wigram* v. *Buckley*, (1894) 3 Ch. 483.

Registration of *lis pendens*.

The Judgments Act, 1839 (2 & 3 Vict. c. 11), provides (sect. 7) that no *lis pendens* shall bind a purchaser or mortgagee without express notice thereof unless registered and re-registered as therein provided.

The provisions in the Conveyancing Act, 1882 (sect. 2), as to searches apply to entries made under the above section.

Power of Court to vacate registration.

The Act 30 & 31 Vict. c. 47, enacts (sect. 2) that the Court before whom the property sought to be bound is in litigation may, upon the determination of the *lis pendens*, or during the

pendency thereof, where the Court shall be satisfied that the litigation is not prosecuted *bonâ fide*, make an order, if it shall see fit, for the vacating of the registration without the consent of the party who registered it.

Alienation *pendente lite* by defendant,

The effect of the doctrine is, that the defendant cannot by alienation *pendente lite* affect the rights of the plaintiff to the property in dispute. *Culpepper* v. *Aston*, 2 Ch. Cas. 115, 221; *Sorrell* v. *Carpenter*, 2 P. W. 482; *Bishop of Winchester* v. *Paine*, 11 Ves. 194; *Gaskell* v. *Durdin*, 2 Ba. & Be. 167; *Bellamy* v. *Sabine*, 1 De G. & Jo. 566.

by plaintiff,

On the other hand, the plaintiff cannot alienate to the prejudice of the defendant where, from the nature of the suit, the defendant may in the result have a right against the plaintiff. *Bellamy* v. *Sabine*, 1 De G. & Jo. 566.

Thus, on a bill by a devisee to establish a will against an heir, alienees of the devisee *pendente lite* are bound by a decree declaring the devise void. *Garth* v. *Ward*, 2 Atk. 174.

An assignee of the equity of redemption during a suit for redemption by the mortgagor is bound by a decree dismissing the suit. *Garth* v. *Ward*, 2 Atk. 174.

by one defendant as against another.

Where the rights of the plaintiff may require that there should be an adjudication between co-defendants, one defendant cannot alienate to the prejudice of the other. *Bellamy* v. *Sabine*, 1 De G. & Jo. 566; *Tyler* v. *Thomas*, 25 B. 47.

In a creditor's suit for administration in which the testator's debts became payable out of two estates, one of which had been devised to the defendant A. and the other to the defendant B., the debts were ordered to be paid out of A.'s estate, without prejudice to his right of contribution against B.'s estate. It was held that a mortgagee from B. *pendente lite* took subject to A.'s claim for contribution. *Tyler* v. *Thomas*, 25 B. 47.

The title of the alienee of a defendant is not affected (except where he has express notice of the suit) by virtue of a claim which does not interfere with the title of the plaintiff, although such claim appears in, or is reasonably deducible from, the suit. *Bellamy* v. *Sabine*, 1 De G. & Jo. 566.

What *lites* bind land.

Lis pendens always implies a claim of right or a claim to charge some specific property. A *lis pendens* does not bind

land unless the land or the profits of the land are directly in demand. *Crofts* v. *Oldfield*, 3 Sw. 278 *n.*; *Worsley* v. *Earl of Scarborough*, 3 Atk. 392; *In re Barned's Banking Co.*, L. R. 2 Ch. 171, 178.

Administration suit by creditor.

Where debts are charged upon a testator's real estate by his will, or as judgment debts under the old law, a suit by a creditor to administer the real and personal estate is a *lis pendens*, giving the plaintiff priority over a purchaser or mortgagee from any defendant entitled to real estate under the will. *Culpepper* v. *Aston*, 2 Ch. Cas. 115, 221; *Walker* v. *Smalwood*, Amb. 676; *Moore* v. *McNamara*, 2 Ba. & Be. 186; *Higgins* v. *Shaw*, 2 D. & War. 356; *Jennings* v. *Bond*, 2 J. & Lat. 720, 744; *Drew* v. *Earl of Norbury*, 3 J. & Lat. 267, 282.

But where the real estate is not charged with debts, a creditor's action for administration is not a *lis pendens* which will bind a purchaser or mortgagee from a defendant devisee, unless the plaintiff has sufficiently indicated an intention to make the specifically devised real estate liable. *Price* v. *Price*, 35 Ch. D. 297.

In both cases, a purchaser or mortgagee is protected where the defendant is in such a position that the purchaser or mortgagee has a right to suppose that he is selling or mortgaging in order to pay the testator's debts. *Walker* v. *Flamstead*, 2 Keny. pt. 2, p. 57; *Price* v. *Price*, 35 Ch. D. 297.

Determination of *lis pendens*.

A *lis pendens* is determined by the final decree or by such earlier order as finally determines the rights of the parties to the suit. *Worsley* v. *Earl of Scarborough*, 3 Atk. 392; *Kinsman* v. *Kinsman*, 1 R. & M. 617.

A decree for an account in a creditor's suit does not determine a *lis pendens*. *Worsley* v. *Earl of Scarborough*, 3 Atk. 392; *Higgins* v. *Shaw*, 2 D. & War. 356.

CHAPTER LI.

PRIORITY OF MARITIME SECURITIES.

THE costs of rendering a fund available are payable in priority to all other claims. *Immacolata Concezione*, 9 P. D. 37.

A. PRIORITY OF MARITIME LIENS INTER SE.

1. Maritime liens rank for priority inversely to the date at which they attach on the *res*. 1. Maritime liens rank inversely to date.

2. This rule is subject to certain exceptions.

A lien for salvage has priority over a lien for wages earned after the salvage operations take place. *Gustaf*, Lush, 506; 31 L. J. P. 207. 2. Exceptions.

The seamen's lien for wages ranks before the master's lien for wages. *Salacia*, Lush. 545.

When a foreign ship is seized in the Admiralty Court for collision, the lien for damages ranks before the seamen's lien for wages. *Linda Flor*, Swa. 309; 6 W. R. 197; *Duna*, 5 L. T. N. S. 217; 1 Mar. L. C. O. S. 159; *Benares*, 7 N. of C. Sup. 1; *Elin*, 8 P. D. 39, 129.

3. Persons who pay claims which would give rise to a maritime lien have the same priorities as the claimants whom they have paid. *William F. Safford*, Lush, 69; *St. Lawrence*, 5. P. D. 350. 3. Transferees of benefit of lien.

This rule does not extend to persons paying seamen's wages after the arrest of the ship, unless they pay with the permission of the Court. *William F. Safford, supra; Cornelia Henrietta*, L. R. 1 A. & E. 51; *Fair Haven*, L. R. 1 A. & E. 67; *Lyons*, 6 Aspinall's M. C. 199.

4. Claims arising on institution of suit.

4. Claims which arise merely on the institution of the suit, *e.g.* a claim for necessaries, are payable *pari passu* out of the proceeds of sale of the ship. No priority is given to such a claim by priority either of writ or of judgment, at least where the judgment is conditional. *Africano*, (1894) P. 141.

B. Priority of Bottomry Bonds inter se.

Bottomry bonds rank for priority inversely to their date. *Cargo ex Galam*, Br. & Lush. 167; 33 L. J. P. 97.

Rights as between ship-owner and cargo owner.

As between the ship-owner and the owner of cargo, ship and freight must be exhausted in payment of a bottomry bond before cargo is resorted to. *Constancia*, 2 W. Rob. 405; 10 Jur. 845; *Prince Regent*, 2 N. of C. 272; *Priscilla*, Lush. 1.

Where cargo is resorted to, the cargo-owner has a remedy over against the ship-owner. *Duncan* v. *Benson*, 1 Ex. 537; 3 Ex. 644; *Energie*, L. R. 9. Eq. 58.

Where a bond was given on ship and freight, and a later one on ship, freight, and cargo, the later bond was paid out of ship and freight, although the result was to leave the earlier unpaid. *Priscilla*, Lush. 1; but see *Edward Oliver*, L. R. 1 A. & E. 379, 382.

C. Priorities as between Maritime and other Claims.

1. Mortgage subject to bonds and liens.

1. A mortgagee takes subject to all bottomry bonds and maritime liens which have attached on the ship before its arrestment. *Royal Arch*, Sw. 269, 282.

But he has priority over all claims which arise only on the institution of the suit. *Troubadour*, L. R. 1 A. & E. 302; *Scio*, L. R. 1 A. & E. 353; *Two Ellens*, L. R. 3 A. & E. 345; 4 P. C. 161.

The master's lien for wages is postponed to so much of the mortgage debt as the master has personally guaranteed. *Bangor Castle*, 74 L. T. 768.

2. Liens prior to bonds.

2. Maritime liens have priority over a bottomry or respondentia bond, although they attach on the ship before the date of the bond. *Madonna d'Idra*, 1 Dods. 40; *William*

F. Safford, Lush. 69; *Union*, Lush. 128; 30 L. J. P. 17; 3 L. T. 280; *Cargo ex Galam*, Br. & Lush. 167; 33 L. J. P. 97.

This rule is subject to a limited exception. The master's lien for wages is postponed to a bottomry bond in cases where the master has by the terms of the bond bound himself, as well as ship and freight, for the payment. *Jonathan Goodhue*, Swa. 355; *Salacia*, Lush. 545. Exception in case of master's lien.

This exception does not extend to cases where the bond-holder would not be prejudiced by the master being paid before him, *i.e.* where the bond extends to ship, freight, and cargo, which are together adequate to satisfy both claims. *Edward Oliver*, L. R. 1 A. & E. 379; *Daring*, L. R. 2 A. & E. 260.

It is immaterial that the owners of cargo have not given bail. *Eugénie*, L. R. 4 A. & E. 123.

3. Maritime liens which have attached before the possession arises under which a common law lien is claimed have priority over it. *Gustaf*, Lush. 506; *Immacolata Concezione*, 9 P. D. 37. 3. Maritime and common law liens.

Thus, seamen's wages earned before the shipwright's lien arises (including their viaticum and costs) have priority over the shipwright's lien; but wages earned subsequently are postponed to it. Cases *supra*.

Maritime liens have priority over the solicitor's statutory lien for costs. *Livietta*, 8 P. D. 209. Solicitor's lien for costs.

But the master's lien for wages has been postponed where he was a part owner and had instructed the solicitor to defend the suit. *Heinrich*, 8 P. D. 209.

A lien for wages has priority over a claim for light and dock dues. *Andalina*, 12 P. D. 1. Light and dock dues.

Light and dock dues have priority over a bottomry bond. *St. Lawrence*, 5 P. D. 250.

CHAPTER LII.

DETERMINATION OF THE INCUMBRANCE.

A. DETERMINATION BY PAYMENT.

A SECURITY is discharged by payment of what is due to its holder on the security. Payment not only discharges the debt but determines the rights of the incumbrancer over the incumbered property.

If the mortgagee procures payment by means of his personal remedy, he cannot enforce his mortgage title; and, if he obtains payment by means of his mortgage title, he cannot afterwards enforce his personal remedy. *Taylor* v. *Waters*, 1 My. & Cr. 267; *Lockhart* v. *Hardy*, 9 B. 349.

Effect of part payment.

But if the mortgagee obtains only part payment by his personal remedy, he may go on with his foreclosure suit, and, giving credit in account for what he has recovered, he may foreclose for non-payment of the remainder. *Lockhart* v. *Hardy*, 9 B. 349; *Palmer* v. *Hendrie*, 27 B. 349.

Authority to receive payment.

The employment of a person to bring a notice demanding payment of the mortgage money does not give him an implied authority to receive it. *Toms* v. *Wilson*, 4 B & S. 442, 455; 32 L. J. Q. B. 33, 382.

Authority to receive interest on a mortgage does not imply an authority to receive the principal. *Wilkinson* v. *Candlish*, 5 Ex. 91; *Kent* v. *Thomas*, 1 H. & N. 473.

Conveyancing Act, s. 61.

The Conveyancing Act, 1881, provides in effect (sect. 61) that where, in a mortgage or transfer, the sum advanced is expressed to be advanced by more persons than one out of money belonging to them on a joint account, or the mortgage or transfer is made to more persons than one jointly and not in shares, the receipt in writing of the survivors or last

survivor of them, or of the personal representatives of the last survivor, shall be a complete discharge for all money or money's worth for the time being due, notwithstanding any notice to the payer of a severance of the joint account.

This section only applies so far as a contrary intention is not expressed, and only applies to a mortgage or transfer made after the 31st of December, 1881. In cases not within the section, where an equitable charge is vested in two persons as joint tenants, payment of the mortgage money to one does not discharge the estate in equity unless that one had a special authority from the other to receive it. *In re Carew*, 4 Ir. Ch. 112; *Matson* v. *Dennis*, 4 D. J. & S. 345.

At law, payment to one of several co-obligees or co-creditors has always been a defence to an action by the others. *Wallace* v. *Kelsall*, 7 M. & W. 264; *Steeds* v. *Steeds*, 22 Q. B. D. 537.

Payment into Court under 7 Geo. II. c. 20.

The Act 7 Geo. II. c. 20 provides (sect. 1) that in any action on a bond given to secure the mortgage debt, or in ejectment to recover the mortgaged premises, no suit then depending to foreclose or redeem the mortgage, payment by a defendant pending the action to the mortgagee or, in case of his refusal, into Court of principal, interest, and costs, shall be a full satisfaction and discharge of the mortgage.

Payment to the attorney of the mortgagee in an action brought to recover the mortgage money discharges the mortgagor. *Bourton* v. *Williams*, 5 Ch. 655.

When Act does not apply.

The Act only applies to cases in which it would be equitable to relieve the mortgagor on payment of principal, interest, and costs of suit. It does not apply, therefore, where the mortgagee has taken possession or attempted to exercise his power of sale. *Sutton* v. *Rawlings*, 3 Ex. 407; *Dowle* v. *Neale*, 10 W. R. 627.

7 Geo. II. c. 20, s. 3.

Sect. 3 excludes the operation of the Act, (1) where the mortgagee gives notice to the mortgagor's solicitor before the money is brought into Court, insisting either that the mortgagor has not a right to redeem or that the premises are charged with other principal sums than the mortgagor admits; or (2) where the right of redemption is controverted as between different defendants.

These sections are in effect reproduced by sects. 219, 220 of the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76).

Notice.

As to what notice is sufficient, see *Goodtitle d. Leon* v. *Lonsdown*, 3 Anst. 937; *Doe d. Harrison* v. *Louch*, 6 D. & L. 270.

Transfer after action brought.

The Act applies where the mortgagee has transferred his security, after action brought, to persons who would be entitled to consolidate as against the mortgagor. *Matthews* v. *Antrobus*, 49 L. J. Ch. 80.

Lands Clauses Act, 1845, ss. 108 to 114.

The Lands Clauses Consolidation Act, 1845 (8 & 9 Vict c. 18), enables (sects. 108 to 114) the promoters of an undertaking within the Act to purchase or redeem the interest of the mortgagee of any lands which may be required for the purpose of the Act.

As to the mortgagee's rights where the undertakers neglect to proceed under these sections, see *Ranken* v. *East and West India Docks Co.*, 12 Eq. 298; *Martin* v. *L. C. & D. Ry. Co.*, L. R. 1 Ch. 501.

Conveyancing Act, s. 5.

Under the Conveyancing Act, 1881, sect. 5, the Court may, where land is sold subject to an incumbrance, on the application of any party to the sale, direct or allow payment into Court of an amount sufficient, in case of an annual sum charged on the land, or of a capital sum charged on a determinable interest in the land, to keep down or provide for the charge, and, in any other case of capital money charged on the land, to meet the incumbrance and interest, together with a further sum in either case to cover contingencies.

Thereupon the Court may declare the land to be freed from the incumbrance, and make any order for conveyance or vesting order proper for giving effect to the sale [sect. 5, (2)]. Sect. 5, (3), enables the Court to deal with the money in Court. See *Milford Haven Ry. Co.* v. *Mowatt*, 28 Ch. D. 402.

The section probably does not apply to a rent-charge secured on land by statute. *In re G. N. Ry. Co. & Saunderson*, 25 Ch. D. 788.

B. Determination by Accord and Satisfaction.

Discharge of specialty debt at law.

At law, a specialty debt cannot be discharged except by payment or by contract under seal, but it may in equity. *Webb* v. *Hewitt*, 3 K. & J. 438; *Steeds* v. *Steeds*, 22 Q. B. D. 537.

Payment of smaller sum on day.

Payment of a smaller sum on or after the day cannot be satisfaction of a larger sum. *Pinnel's Case*, 5 Rep. 117*a*; *Fitch* v. *Sutton*, 5 East, 230; *Foakes* v. *Beer*, 11 Q. B. Div. 221; 9 App. Cas. 605.

The rule does not apply where the demand is unliquidated. *Adams* v. *Tapling*, 4 Mod. 88; *Cooper* v. *Parker*, 15 C. B. 822.

The rule is subject to the following exceptions:—

Possibility of benefit to creditor.

1. Where the matter given and accepted in satisfaction of a debt certain may by any possibility be more beneficial to the creditor than his debt, it is accord and satisfaction. The Court does not inquire into the adequacy of the consideration.

Thus, the gift of a horse, hawk, or robe (*Pinnel's Case, supra*), the payment of a smaller sum before the day (*Pinnel's Case, supra*), or the gift of a cheque or promissory note for a smaller amount, whether made by the debtor or a third person (*Sibree* v. *Tripp*, 15 M. & W. 23; *Curlewis* v. *Clark*, 3 Ex. 375; *Goddard* v. *O'Brien*, 9 Q. B. D. 37; *Bidder* v. *Bridges*, 37 Ch. Div. 406), is a sufficient new consideration to support a plea of accord and satisfaction.

Mutual agreement between creditors.

2. An agreement by any one creditor of a debtor to accept a smaller sum in satisfaction of his demands is a sufficient consideration to support a similar agreement by any other creditor. *Good* v. *Cheesman*, 2 B. & Ad. 328; *Norman* v. *Thompson*, 4 Ex. 755; *Couldery* v. *Bartrum*, 19 Ch. Div. 394; *Société Générale de Paris* v. *Geen*, 8 App. Cas. 606.

Accord and satisfaction equals payment.

Accord and satisfaction is equivalent to payment for all purposes. If the debt is secured, the extinction of the debt by accord and satisfaction determines the security. Where part of the debt is extinguished, the security can only stand for the residue.

Thus, a creditor whose debt has been satisfied under a composition cannot, as against the debtor, retain a security

which he held for the debt, unless he entered into the composition, to the knowledge of the other creditors, on the terms of retaining it. *Cullingworth* v. *Loyd*, 2 B. 385; see *Société Générale de Paris* v. *Geen*, 8 App. Cas. 606.

C. Determination by Release.

A release of a debt without consideration is binding if under seal. *Foakes* v. *Beer*, 9 App. Cas. 605, 612.

Release limited to matters in contemplation of parties.

A release, though general in terms, is, both at law and in equity, limited in operation to matters known to and contemplated by the parties at the time of its execution. *Solly* v. *Forbes*, 2 Brod. & B. 38; *Lindo* v. *Lindo*, 1 B. 496; *Squire* v. *Ford*, 9 Ha. 47; *Lyall* v. *Edwards*, 6 H. & N. 337; *Turner* v. *Turner*, 14 Ch. D. 829.

Delivery of mortgage deed to mortgagor.

A delivery of the mortgage deed by the mortgagee to the mortgagor with the intention of releasing the mortgage debt does not release it. The debt would be released if the mortgagee at the same time declared himself a trustee of the mortgaged premises for the mortgagor. *Re Hancock*, 57 L. J. Ch. 793; 59 L. T. 197; *Edwards* v. *Walters*, (1896) 2 Ch. 157. *Richards* v. *Syms* (2 Eq. Abr. 617) is apparently no longer law.

Release by debenture-holders.

A power given to a majority of debenture-holders to bind the minority is not determined by the dissolution of the company. *Sneath* v. *Valley Gold, Limited*, (1893) 1 Ch. 477.

Power to modify rights.

A power to sanction any modification of the rights of debenture-holders does not include a power to extinguish them, *e.g.* by accepting fully paid shares in a different company in lieu of their debentures (*a*), but it gives power to let in a charge in priority to the debentures (*b*). (*a*) *Mercantile Investment Co.* v. *International Co. of Mexico*, 7 T. L. R. 618; (1893) 1 Ch. 484 *n.* (*b*) *Re Dominion of Canada Timber Co.*, 55 L. T. 347; *Follit* v. *Eddystone Granite Quarries*, (1892) 3 Ch. 75.

Power to compromise rights.

A power to sanction any compromise of the rights of debenture-holders does not arise unless those rights are in controversy, or there is a difficulty in enforcing them. *Mer-*

cantile Investment Co. v. *International Co. of Mexico*, (1893) 1 Ch. 484 *n.*; *Sneath* v. *Valley Gold, Limited*, (1893) 1 Ch. 477; *Mercantile Investment Co.* v. *River Plate Trust Co.*, (1894) 1 Ch. 578, 596.

Power to release premises.

A power to release the mortgaged premises does not give power to release the liability of the company to pay principal and interest. *Mercantile Investment Co.* v. *International Co. of Mexico*, (1893) 1 Ch. 484 *n.*

A clause in a debenture trust-deed, providing that a resolution of a majority of debenture-holders shall bind all the holders "as effectually as if all such holders were competent to consent and had consented thereto in writing for valuable consideration," does not enable a majority to apply a fund set apart under the trust-deed for the payment of interest on the debentures in the payment of other debts of the company. *Hay* v. *Swedish & Norwegian Ry. Co.*, 5 T. L. R. 460.

D. Determination by Merger.

Where a person entitled to the equity of redemption pays off a mortgage, the question arises, whether the charge is extinguished.

Payment by mortgagor.

Where a mortgagor or other person personally liable to pay the mortgage debt pays off a mortgage or purchases the mortgaged property on a sale by the mortgagee under his power, the mortgage is necessarily extinguished, and the mortgagor cannot set it up against a subsequent incumbrance created by him. *Otter* v. *Lord Vaux*, 2 K. & J. 650; 6 D. M. & G. 638; *Platt* v. *Mendel*, 27 Ch. D. 246, 251.

Where the creator of successive mortgages, who has sold the equity of redemption, and who has been discharged by bankruptcy from his personal liabilities under the mortgages, subsequently purchases the first mortgage, he can hold it as against the puisne mortgages, although he repurchases the equity of redemption. *In re Howard's Estate*, 29 L. R. Ir. 266.

Payment by person not

Where a person interested in the equity of redemption, but not personally liable for the mortgage debt, pays off a

personally liable.

mortgage, there is no rule of law that the mortgage is extinguished. The question whether it is or is not, is a question of intention. *Mackenzie* v. *Gordon*, 6 Cl & F. 875, 883; *Adams* v. *Angell*, 5 Ch. Div. 634; *Minter* v. *Carr*, (1894) 3 Ch. 498; *Thorne* v. *Cann*, (1895) A. C. 11.

The second ground upon which the decision in *Toulmin* v. *Steere* (3 Mer. 210, 223) was based is no longer law. Cases *supra*.

Where a person entitled to the equity of redemption in A. pays off a mortgage on A. and B., the mortgage, though it may determine as to A., will be kept alive as to B. *Taws* v. *Knowles*, (1891) 2 Q. B. 564, 572.

Trustee in bankruptcy.

Where a trustee in bankruptcy acquires a mortgage on property of the bankrupt, he is entitled to hold it to the extent of the amount secured for the benefit of the creditors. *Squire* v. *Ford*, 9 Ha. 47, 60; *Adams* v. *Angell*, 5 Ch. Div. 634, 647; *Cracknall* v. *Janson*, 6 Ch. D. 735; *Bell* v. *Sunderland Building Society*, 24 Ch. D. 618.

Purchaser of equity of redemption.

Where a purchaser of the equity of redemption subsequently pays off a charge, the question whether the charge is kept alive or not is a question of intention. *In re Cork Harbour Docks Co.*, 17 L. R. Ir. 515; *Gokuldoss Gopaldoss* v. *Rambux Seochand*, 11 Ind. Ap. 126; *Thorne* v. *Cann*, (1895) A. C. 11.

The same rule applies where the payment of the charge is contemporaneous with the purchase of the equity of redemption, or where the purchaser of the equity of redemption is himself entitled to the charge. *Watts* v. *Symes*, 1 D. M. & G. 240; *Hayden* v. *Kirkpatrick*, 34 B. 645; *Liquidation Estates Purchase Co.* v. *Willoughby*, (1896) 1 Ch. 726. *Toulmin* v. *Steere* (3 Mer. 210), so far as it decides the contrary, is no longer law.

Toulmin v. *Steere*.

Toulmin v. *Steere* can only be supported on the ground that the purchasers of the equity of redemption did not in fact intend to keep alive the mortgages which were paid off out of the purchase-money, or that, if they did so intend, the language of the purchase-deed prevented effect being given to their intention. *Adams* v. *Angell*, 5 Ch. Div. 634, 645; *Thorne* v. *Cann*, (1895) A. C. 11, 16, 18.

Purchaser entitled to have incumbrances kept on foot.

As between vendor and purchaser, where the vendor agrees to sell an estate free from incumbrances, the purchaser can insist on having the incumbrances kept on foot for his benefit. *Barry* v. *Harding*, 1 J. & Lat. 475; *Clark* v. *May*, 16 B. 273; *Cooper* v. *Cartwright*, Joh. 679.

Evidence of intention to keep charge alive or not.

The intention to keep alive or to extinguish a charge may be gathered from the language of the deed and from the circumstances attending the transaction. *Adams* v. *Angell*, 5 Ch. Div. 634; *Thorne* v. *Cann*, (1895) A. C. 11.

Weight to be given to language of deed.

In certain cases the language of the deed purporting to extinguish a charge has been held to outweigh all indications of a contrary intention to be gathered from surrounding circumstances, or to be presumed from the interest which the person paying the charge had in keeping it alive. *Parry* v. *Wright*, 1 Si. & St. 369; 5 Russ. 142; *Brown* v. *Stead*, 5 Sim. 535; *Smith* v. *Phillips*, 1 Kee. 694; *Medley* v. *Horton*, 14 Sim. 222, 226.

Presumption of intention from interest of party.

The intention to keep a charge alive will be presumed when it is for the benefit of the person paying it off or otherwise acquiring it that it should be kept alive, and this presumption may countervail language in the deed pointing to an extinction of the charge. *Irby* v. *Irby* (No. 3), 25 B. 632; *Adams* v. *Angell*, 5 Ch. Div. 634; *Thorne* v. *Cann*, (1895) A. C. 11; *Liquidation Estates Purchase Co.* v. *Willoughby*, (1896) 1 Ch.726.

Tenant for life, paying, or becoming entitled to charge.

1. Where tenant for life pays off or becomes entitled to a charge on the fee, the presumption is that he intended the charge to be kept alive as against the inheritance. *Morgan* v. *Jones*, 1 B. C. C. 206; *Shrewsbury* v. *Shrewsbury*, 1 Ves. J. 227; *Burrell* v. *Earl of Egremont*, 7 B. 205, 232; *Morley* v. *Morley*, 5 D. M. & G. 610, 620; *Pitt* v. *Pitt*, 22 B. 294; *Lindsay* v. *Earl of Wicklow*, I. R. 7. Eq. 192; *In re Harvey*, (1896) 1 Ch. 137.

Tenant for life paying interest in excess of rents.

There is, however, no presumption that a tenant for life paying interest on a charge in excess of rents and profits received by him intends to make himself an incumbrancer on the inheritance in respect of such excess. *Kensington* v. *Bouverie*, 7 H. L. C. 557.

No presumption arises in favour of merger although the

tenant for life has also a general power of appointment. *Smith* v. *Smith*, 19 L. R. Ir. 514.

Omission to take assignment to trustee.

The fact that a person paying off a charge upon an estate in which he has only a partial interest has neglected to take an assignment to a trustee for himself, is not of itself sufficient to rebut the presumption that the charge was intended to be kept alive. *Redington* v. *Redington*, 1 Ba. & Be. 131, 142; *Morley* v. *Morley*, 5 D. M. & G. 610, 619.

Tenant in tail paying or becoming entitled to charge.

2. (*a*) Where tenant in tail in possession pays off a charge, or a charge devolves upon him, the presumption is that he intended the charge to sink for the benefit of the fee. *Jones* v. *Morgan*, 1 B. C. C. 206; *Ware* v. *Polhill*, 11 Ves. 257, 277; *Grice* v. *Shaw*, 10 Ha. 76.

(*b*) Where tenant in tail in remainder, subject to limitations which may defeat his estate tail, pays off a charge, and subsequently becomes entitled in possession, no presumption arises that he intended to exonerate the estate. *Wigsell* v. *Wigsell*, 2 Si. & St. 364; *Horton* v. *Smith*, 4 K. & J. 624.

(*c*) Where a person upon whom the benefit of a charge has devolved subsequently becomes entitled to an estate tail in possession in the property subject to the charge, the presumption arises that he intended the charge to sink. *Horton* v. *Smith*, 4 K. & J. 624.

The presumption in favour of merger in the case of a tenant in tail is based upon his power at any time to make himself owner of the fee. It does not arise, therefore, where the tenant in tail is an infant (*Ware* v. *Polhill*, 11 Ves. 257, 277; *Alsop* v. *Bell*, 24 B. 451, 467), or restrained from barring his estate tail (*Countess of Shrewsbury* v. *Earl of Shrewsbury*, 1 Ves. J. 227).

Tenant in fee paying or becoming entitled to charge.

3. (*a*) Where a tenant in fee in possession pays off or becomes entitled to a charge, the presumption is that he intends the charge to merge in the fee. *Price* v. *Gibson*, 2 Ed. 115; *Hood* v. *Phillips*, 3 B. 513; *Swabey* v. *Swabey*, 15 Sim. 106, 502; *Pitt* v. *Pitt*, 22 B. 294; *Swinfen* v. *Swinfen*, 29 B. 199; *Tyrwhitt* v. *Tyrwhitt*, 32 B. 244.

(*b*) Where a person having a contingent interest in an estate pays off a charge on the estate, and subsequently

becomes entitled to the fee, no presumption arises in favour of merger. *Trevor* v. *Trevor*, 2 My. & K. 675.

(*c*) Where a person entitled to the benefit of a charge subsequently becomes tenant in fee of the estate subject to the charge, the presumption is that the charge is intended to merge in the fee. *Donisthorpe* v. *Porter*, 2 Ed. 162; *Tyler* v. *Lake*, 4 Sim. 351.

Merger not presumed contrary to interest of party.

The presumption in favour of merger only arises where the person entitled both to the charge and to the estate has no interest to keep the charge subsisting.

No presumption, therefore, arises in favour of merger where a charge is paid off by a tenant in fee with an executory devise over (*Drinkwater* v. *Combe*, 2 Si. & St. 340), or by a tenant in fee whose title is disputed [*In re Pride*, (1891) 2 Ch. 135].

No presumption in favour of merger arises where the effect of a merger would be to give priority to intervening incumbrancers. *Forbes* v. *Moffat*, 18 Ves. 384; *Earl of Clarendon* v. *Barham*, 1 Y. & C. C. 688; *Davis* v. *Barrett*, 14 B. 542; *Grice* v. *Shaw*, 10 Ha. 76; see *Johnson* v. *Webster*, 4 D. M. & G. 474, 488.

The doctrine that a charge devolving upon an infant tenant in fee did not merge was based upon the ground that it was for the infant's benefit to swell his personal estate, over which he had (before the Wills Act) a power of disposition while under age. *Thomas* v. *Kemeys*, 2 Vern. 348; *Lord Compton* v. *Oxenden*, 2 Ves. J. 261.

Intention to keep charge alive or not, when ascertained.

The intention to keep a charge alive or to extinguish it is not finally ascertained till the death of the person paying it off. Evidence of intention may be gathered from the will. *Redington* v. *Redington*, 1 Ba. & Be. 131, 142; *Hood* v. *Phillips*, 3 B. 513; *Pitt* v. *Pitt*, 22 B. 294; *Swinfen* v. *Swinfen*, (No. 3) 29 B. 199; *In re Nunn's Estate*, 23 L. R. Ir. 286.

Where a tenant for life pays off a charge on the inheritance with the intention of extinguishing it, it would appear that he cannot subsequently set it up. *Morley* v. *Morley*, 5 D. M. & G. 610, 626.

At any rate, this rule does not apply to a tenant for life who

acquires a charge under a will or as next of kin. *In re Godley's Estate*, (1896) 1 I. R. 45.

Assignment of charge to trustee.

The fact that the person paying the charge has it assigned to a trustee for his benefit is evidence of an intention to keep it alive, but is not of itself conclusive. *Earl of Buckinghamshire* v. *Hobart*, 3 Sw. 186, 199; *Hood* v. *Phillips*, 3 B. 513; *Gunter* v. *Gunter*, 23 B. 571; *Tyrwhitt* v. *Tyrwhitt*, 32 B. 244.

Declarations of the person paying the charge are also admissible as evidence of intention. *Astley* v. *Milles*, 1 Sim. 298, 327.

Absolute interest in charge and estate must unite during life.

The presumption in favour of merger does not arise unless the absolute interest in the charge and in the estate subject to the charge unite in the same person during his life. Thus, no presumption arises where the estate in fee of the person entitled to the charge is subject to limitations which only become incapable of taking effect by his death (*a*), or where the owner of the estate charged has during his life merely a reversionary interest in the charge (*b*). (*a*) *Wyndham* v. *Lord Egremont*, Ambl. 753; (*b*) *Wilkes* v. *Collin*, 8 Eq. 338.

But an owner in fee entitled to a contingent interest in a charge upon the fee may declare an intention that the charge shall merge if his interest hereafter becomes absolute. *Johnson* v. *Webster*, 4 D. M. & G. 474; see *Pears* v. *Weightman*, 2 Jur. N. S. 586.

Judicature Act, 1873, s. 25, (4).

The Judicature Act, 1873 (36 & 37 Vict. c. 66), enacts—

Sect. 25, (4). There shall not, after the commencement of this Act, be any merger by operation of law only of any estate the beneficial interest in which would not be deemed to be merged or extinguished in equity.

Equity has not been guided as to merger by the rules of law. The question whether a charge is extinguished or preserved depends upon the intention of the party in whom the charge and the estate subject to the charge are united. *Donisthorpe* v. *Porter*, 2 Ed. 162; *Forbes* v. *Moffatt*, 18 Ves. 384; *Astley* v. *Milles*, 1 Sim. 298, 340.

Where a tenant in tail (erroneously believing himself to be

tenant in fee) paid off a portion secured by a term, with the intention of extinguishing the charge, it was held that the term still subsisted for his benefit. *Earl of Buckinghamshire* v. *Hobart*, 3 Sw. 186.

E. Determination under Statutory Provisions.

Joint Stock Companies Arrangement Act, 1870.

The Joint Stock Companies Arrangement Act, 1870 (33 & 34 Vict. c. 104), provides in effect (sect. 2) that, where any compromise or arrangement is proposed between a company which is being wound up under the Companies Acts, and its creditors or any class of them, the Court may summon a meeting of such creditors or class of creditors, and if a majority in number representing three-fourths in value of such creditors or class of creditors present either in person or by proxy at such meeting, shall agree to any arrangement or compromise, such arrangement or compromise shall, if sanctioned by an order of the Court, be binding on all such creditors or class of creditors, as the case may be, and also on the liquidator and contributories of the company.

Secured creditors are within Act.

Secured creditors are within the Act, and the Court has jurisdiction to sanction an arrangement or compromise which affects their security. *In re Alabama Ry. Co.*, (1891) 1 Ch. 213.

What compromises sanctioned.

Compromises have been sanctioned which provided for debenture-holders giving up their security on payment of less than was actually due upon it (*Re Madras Irrigation Co.*, Buckley on Companies Act, 5th ed. p. 551), or in exchange for paid-up shares in the new company [*Slater* v. *Darlaston Steel Co.*, W. N. (1877) 139, 165; *In re North Western Co.*, Palmer's Co. Prec. 3rd ed. p. 603; *In re Empire Mining Co.*, 44 Ch. D. 402].

"Three-fourths in value."

"Three-fourths in value" means three-fourths in value of creditors present at the meeting. *In re Bessemer Steel Co.*, 1 Ch. D. 251.

Proxy.

The proxy must be authorized to act by an instrument in writing, but the Court may dispense with the production of the proxy paper at the meeting. *In re English, Scottish & Australian Chartered Bank*, (1893) 3 Ch. 385.

Holders of debentures to bearer.

The holders of debentures to bearer are not entitled to vote unless they produce their debentures at or before the meeting. *In re Wedgwood Coal Co.*, 6 Ch. D. 627.

Order of sanctions.

The order in which the sanctions required by the Act are given is immaterial. *In re Dynevor Collieries Co.*, 11 Ch. Div. 605.

Majority must act *bonâ fide*.

The Court will not sanction a scheme, although the formal provisions of the Act have been complied with, unless it is satisfied, (1) that the majority has acted *bonâ fide*, and without regard to interests which they may have other than as creditors, (2) that the scheme is reasonable and represents a fair compromise between conflicting interests. *In re Wedgwood Coal Co.*, 6 Ch. D. 627; *In re Alabama Ry. Co.*, (1891) 1 Ch. 213; *In re English, Scottish & Australian Chartered Bank*, (1893) 3 Ch. 385; *In re London Chartered Bank of Australia*, (1893) 3 Ch. 540.

Railway Companies Act, 1867.

The Railway Companies Act, 1867 (30 & 31 Vict. c. 127), provides (sect. 6) that where a company are unable to meet their engagements with their creditors, the directors may prepare a scheme of arrangement between the company and their creditors, and file the same in the Court of Chancery.

The scheme is to be deemed to be assented to by each of the following classes when it is assented to in writing by three-fourths in value of such class:—

What assents are required.

(1) Holders of mortgages, bonds, or debenture stock (sect. 10); (2) holders of any rent-charge or other payment charged on receipts of, or payable by the company in consideration of the purchase of the undertaking of another company (sect. 11); (3) guaranteed or preference shareholders (sect. 12); (4) holders of mortgages, bonds, and debenture-stock, and guaranteed or preference shareholders of the leasing company, if the arranging company are lessees of a railway (sect. 14).

The scheme is to be deemed to be assented to by the ordinary shareholders of the company, or of the leasing company, when it is assented to at an extraordinary general meeting of such company specially called for that purpose (sects. 13, 14).

When assent not required.

The assent of a class or company is not requisite in case

the scheme does not prejudicially affect any right or interest of such class or company (sect. 15).

Confirmation of scheme.

The directors may, within a prescribed time, apply to the Court for confirmation of the scheme (sect. 16); and the Court, after hearing the directors, and any creditors, shareholders, or other parties whom the Court thinks entitled to be heard, may, if satisfied that the scheme has been assented to within the prescribed time, and that no sufficient objection to it has been established, confirm the scheme (sect. 17).

Effect of confirmation.

The scheme when confirmed shall be enrolled in the Court, and thenceforth the same shall be binding and effectual to all intents, and the provisions thereof shall, against and in favour of the Company and all parties assenting thereto or bound thereby, have the like effect as if they had been enacted by parliament (sect. 18).

The Court has power to confirm a scheme which converts mortgages and bonds of the company into irredeemable debenture-stock. *In re Irish North Western Ry. Co.*, I. R. 2 Eq. 425; 3 Eq. 190.

As to what companies are within the Act, see p. 262.

Debenture-holder.

A debenture-holder who has obtained judgment is still a debenture-holder, and is bound by the assent of the requisite majority of debenture-holders. *Potteries, Shrewsbury & North Wales Ry. Co.* v. *Minor*, 6 Ch. 621.

Preferred ordinary shareholder.

A "preferred ordinary" shareholder is not a preferred shareholder within the Act. *In re Brighton & Dyke Ry. Co.*, 44 Ch. D. 28.

The assent of a class is required if any existing right or interest of the class is prejudicially affected by the scheme. Their assent cannot be dispensed with on the ground that the scheme, as a whole, is beneficial to them. *In re Neath & Brecon Ry. Co.*, (1892) 1 Ch. 349.

Unpaid vendors, outside creditors.

Unpaid vendors of land and outside creditors are not bound by the scheme unless they individually assent to it. *In re Cambrian Ry. Co.'s Scheme*, L. R. 3 Ch. 278; *In re East & West Junction Ry. Co.*, 8 Eq. 87; *Stevens* v. *Mid-Hants Ry. Co.*, 8 Ch. 1064.

The rights of an outside creditor who has not assented can

neither be prejudiced nor improved by a scheme. He does not by virtue of a scheme gain any priority over secured creditors, the nature of whose securities is altered by it. *Stevens* v. *Mid-Hants Ry. Co.*, 8 Ch. 1064; *In re Navan Ry. Co.*, 17 L. R. Ir. 398.

The Court will not confirm a scheme which in terms purports to bind outside creditors or unpaid vendors of land without their consent. *In re Bristol & North Somerset Ry. Co.*, 6 Eq. 448; *Re Somerset & Dorset Ry. Co.*, 18 W. R. 332; *In re East & West India Dock Co.*, 44 Ch. Div. 38, 64.

A scheme will not be sanctioned which deprives outside creditors of a reasonable prospect of payment. *In re East & West Junction Ry. Co.*, 8 Eq. 87; *In re East & West India Dock Co.*, 44 Ch. Div. 38.

F. Determination as against a Surety.

A consideration of the circumstances under which a surety is released, wholly or partially, belongs to the law of principal and surety. Some points specially bearing on mortgages may here be noticed.

Surety mortgaging property as security.

Where a surety not only covenants to pay a debt, but also mortgages property of his own to secure it, any conduct on the part of the creditor which discharges the personal liability of the surety also releases the security which he has given. *Hodgson* v. *Hodgson*, 2 Kee. 704; *Bolton* v. *Salmon*, (1891) 2 Ch. 48.

The obligations of the creditor to the surety, by the breach of which the surety is or may be discharged, are not confined to cases where the surety enters into the contract as a surety, and is known to be such to the creditor.

1. Surety contracting as principal debtor.

1. The fact that the surety purports to contract as a principal debtor does not affect his rights as against the creditor if the creditor is aware that he is merely a surety. *Pooley* v. *Harradine*, 7 E. & B. 431.

2. Creditor becoming aware of suretyship after contract.

2. Although the creditor believes at the time of the contract that he is contracting with two principal debtors, yet if he afterwards learns that one of them is a surety, he is, as from

that time, affected with all equities in favour of the surety. *Hollier* v. *Eyre*, 9 Cl. & F. 1; *Overend, Gurney & Co.* v. *Oriental Financial Corporation*, L. R. 7 Ch. 142; 7 H. L. 348; *Duncan, Fox & Co.* v. *North & South Wales Bank*, 6 App. Cas. 1, 12.

3. Where a creditor has two joint principal debtors, who subsequently agree between themselves to stand in the relation of principal and surety, the creditor is affected by the agreement if he becomes aware of it, and cannot, after such knowledge, give time to the principal debtor without releasing the surety. *Oakeley* v. *Pasheller*, 4 Cl. & F. 207; 10 Bli. N. S. 548; *Maingay* v. *Lewis*, I. R. 5 C. L. 229; *Rouse* v. *Bradford Banking Co.*, (1894) 2 Ch. 32, A. C. 586, overruling *Swire* v. *Redman*, 1 Q. B. D. 536. 3. Joint principal debtor afterwards becoming surety.

A surety who has mortgaged property to secure a debt is not released if the creditor assigns the debt with the securities for the same. *Wheatley* v. *Bastow*, 7 D. M. & G. 261. Assignment of debt and securities.

A release of the principal debtor releases the surety. The creditor cannot release the principal debtor and reserve his rights against the surety. The debt is gone by the release. *Webb* v. *Hewitt*, 3 K. & J. 438; *Commercial Bank of Tasmania* v. *Jones*, (1893) A. C. 313. Release of principal debtor.

If the creditor takes out execution against the principal debtor and waives it, he discharges the surety. *Mayhew* v. *Crickett*, 2 Sw. 185; *Newton* v. *Chorlton*, 10 Ha. 646, 660.

A release of the principal debtor by operation of law, *e.g.* by a composition in bankruptcy or under the Joint Stock Companies Arrangement Act, 1870, does not release the surety. *Andrew* v. *Macklin*, 6 B. & S. 201; *Megrath* v. *Gray*, L. R. 9 C. P. 216; *Ex parte Jacobs*, 10 Ch. 211; *In re London Chartered Bank of Australia*, (1893) 3 Ch. 540. Release of debtor by operation of law.

Any agreement between the creditor and principal debtor, without the consent of the surety, which alters the terms of the original contract, discharges the surety, unless it is without inquiry evident that the alteration is unsubstantial or must be beneficial to the surety. *Newton* v. *Chorlton*, 10 Ha. 646, 653; *Holme* v. *Brunskill*, 3 Q. B. Div. 495. Alteration of terms of original contract.

Agreement to give time.

Thus, the surety is released if the creditor, without his consent, agrees to give time to the principal debtor. *Samuell* v. *Howarth*, 3 Mer. 272; *Davies* v. *Stainbank*, 6 D. M. & G. 679; *Bolton* v. *Buckenham*, (1891) 1 Q. B. 278.

Reservation of rights against surety.

But the surety will not be released if the creditor, while agreeing to give time to the principal debtor, expressly reserves his rights against the surety. *Boultbee* v. *Stubbs*, 18 Ves. 20; *Ex parte Glendinning*, Buck, 517; *Owen* v. *Homan*, 4 H. L. C. 997; *Webb* v. *Hewitt*, 3 K. & J. 438.

Release construed as agreement not to sue.

An instrument by which the creditor purports to release the principal debtor, and reserves his rights against the surety, will sometimes, in order to make the two clauses consistent, be construed as merely an agreement not to sue the principal debtor. *Solly* v. *Forbes*, 2 Brod. & B. 38; *Green* v. *Wynn*, 7 Eq. 28; 4 Ch. 204.

A surety is not discharged by an agreement to give time to the debtor, where the surety has agreed not to require the debtor to relieve him until the debtor was himself sued. *Rouse* v. *Bradford Banking Co.*, (1894) 2 Ch. 32. See, however, S. C. in H. L., (1894) A. C. 586, 593, 599.

Inaction by creditor.

Mere inaction on the part of the creditor does not discharge the surety. *Eyre* v. *Everett*, 2 Russ. 381; *Creighton* v. *Rankin*, 7 Cl. & F. 325, 346; *Mayor of Durham* v. *Fowler*, 22 Q. B. D. 394.

Release of one of several sureties.

A release of one of two or more sureties who have contracted jointly and severally releases the others. *Bonser* v. *Cox*, 4 B. 379; *Ward* v. *National Bank of New Zealand*, 8 App. Cas. 755, 764; *Mercantile Bank of Sydney* v. *Taylor*, (1893) A. C. 317; *Ellesmere Brewery Co.* v. *Cooper*, (1896) 1 Q. B. 75.

But where two or more sureties are severally liable, a release of one does not necessarily release the others. It will only release another several surety, to the extent to which that other has been deprived by the release of his right to contribution from the surety released. *Ward* v. *National Bank of New Zealand*, 8 App. Cas. 755.

Mercantile Law Amendment Act, s. 5.

By virtue of the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), sect. 5, every surety for the debt of

another who pays such debt is entitled to have assigned to him, or to a trustee for him, every judgment, specialty, or other security which shall be held by the creditor in respect of such debt. This enactment only declared the existing law.

The section does not apply to a surety who joins in a mortgage to convey his interest in the property, but does not covenant to pay the mortgage debt. *Cooper* v. *Jenkins*, 32 B. 337.

Creditor allowing security to perish.

It follows that a creditor who by his laches allows the security or part of it to be destroyed releases the surety *pro tanto*. *Pearl* v. *Deacon*, 24 B. 186; 1 De G. & Jo. 461; *Strange* v. *Fooks*, 4 Giff. 408; *Wulff* v. *Jay*, L. R. 7 Q. B. 756; *Taylor* v. *Bank of New South Wales*, 11 App. Cas. 596.

And where a creditor, after taking a security from the debtor, subsequently releases part of the property comprised in the security, the surety is altogether discharged. *Polak* v. *Everett*, 1 Q. B. Div. 669.

Securities subsequently taken by creditor.

These rules apply only to securities taken on the occasion, and as part of the original contract under which the surety is liable.

Although the surety is entitled on paying off the creditor to securities subsequently given to him for the original debt, it has been held that the creditor is under no obligation to the surety to preserve such securities for his benefit, and that he does not release the surety by dealing with them to his prejudice. *Wade* v. *Coope*, 2 Sim. 155; *Newton* v. *Chorlton*, 10 Ha. 646; *Polak* v. *Everett*, 1 Q. B. Div. 669, 676.

CHAPTER LIII.

DISCHARGE OF THE SECURED DEBT.

THE rights of the incumbrancer as a creditor in respect of his loan, and his rights in respect of the property subject to his security, are not interdependent. The determination of his rights over the incumbered property does not affect his right to recover the debt, to secure which the incumbrance was created.

Tender.

Thus, tender, though it may discharge a pledge or lien, does not discharge the debt in respect of which the pledge or lien arose. *Ratcliff* v. *Davis*, Yelv. 178; *Eider*, (1893) P. 119.

A. MERGER OF THE DEBT.

"It is a general rule of law that a party, by taking or acquiring a security of a higher nature in legal operation than the one he already possesses, merges and extinguishes his legal remedies upon the minor security or cause of action, that is to say, the taking a bond or covenant, or the acquiring a judgment for a simple contract debt merges and extinguishes the simple contract." *Per* Truro, C., in *Owen* v. *Homan*, 3 Macn. & G. 378, 407.

No merger unless remedies are co-extensive.

There will be no merger unless the remedy on the higher security is co-extensive with the remedy on the lower one. *Ansell* v. *Baker*, 15 Q. B. 20; *Sharpe* v. *Gibbs*, 16 C. B. N. S. 527; *Boaler* v. *Mayor*, 19 C. B. N. S. 76; *Westmoreland Slate Co.* v. *Feilden*, (1891) 3 Ch. 15.

No merger where express contract.

A simple contract debt will not be merged in a specialty where the parties expressly contract that no merger shall take place. *Twopenny* v. *Young*, 3 B. & C. 208; *Boaler* v. *Mayor*, 19

C. B. N. S. 76; *Commissioner of Stamps* v. *Hope*, (1891) A. C. 476.

Judgment does not merge collateral remedy.

A judgment only merges the particular cause of action in which it is recovered, and does not affect any collateral remedy which the judgment creditor may have. *Drake* v. *Mitchell*, 3 East, 251; *Wegg Prosser* v. *Evans*, (1894) 2 Q. B. 101; (1895) 1 Q. B. 108.

Judgment does not merge debt for bankruptcy purposes.

A judgment does not extinguish a simple contract debt for the purpose of bankruptcy proceedings. Such a debt is still available as a petitioning creditor's debt. *Bryant* v. *Withers*, 2 M. & S. 123; *Ex parte Griffiths*, 3 D. M. & G. 174; *In re King & Beesley*, (1895) 1 Q. B. 189.

When covenant for interest is merged in judgment for principal.

Where there is a covenant for the payment of a principal sum, and a judgment has been obtained upon the covenant for that sum, the covenant is merged in the judgment, and, if there is a covenant to pay interest which is merely incidental to the covenant to pay the principal debt, that covenant also is merged in a judgment on the covenant to pay the principal debt. *Ex parte Fewings*, 25 Ch. Div. 338.

A covenant to pay interest, so long as the principal or any part thereof shall remain unpaid, is merged in a judgment on the covenant to pay the principal. *Florence* v. *Jenings*, 2 C. B. N. S. 454; *Ex parte Fewings, supra*; *Arbuthnot* v. *Bunsilall*, 62 L. T. 234.

Where there is merely a covenant to pay interest until the date when the principal is made repayable, so that interest thereafter could only be recovered as damages, no claim can be made for interest or damages after judgment recovered on the covenant. *In re European Central Ry. Co.*, 4 Ch. Div. 33.

When covenant for interest is not merged.

Where, during the pendency of an action by the creditor, there is a fresh contract between debtor and creditor for the continuance of the loan at the old rate of interest, judgment recovered in the action does not affect the creditor's rights under the new contract. *In re Agriculturist Cattle Insurance Co.*, 4 Ch. Div. 34 *n.*

Popple v. *Sylvester*.

In *Popple* v. *Sylvester* (22 Ch. D. 98) the headnote is misleading. The creditor's claim was not in an action of debt but in an action to realize the security (see 25 Ch. Div. 345, 346,

350). The covenant was to pay interest at 7 per cent., so long as the principal or any part thereof should remain due on the security of the mortgage, and it was held that the mortgagee was entitled to recover interest at 7 per cent. out of the proceeds of mortgaged policies, although he had recovered judgment against the mortgagor for principal and interest. See also *Lowry* v. *Williams*, (1895) 1 I. R. 274.

B. Limitations on the Recovery of the Debt.

Real Property Limitation Act, 1874, s. 8.

The Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), which came into operation (sect. 12) on the 1st of January, 1879, enacts—

Sect. 8. No action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within twelve years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the mean time some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto, or his agent; and in such case no such action or suit or proceeding shall be brought but within twelve years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one, was given.

This section replaces sect. 40 of the Real Property Limitation Act, 1833 (3 & 4 Wm. IV. c. 27).

The section extends (sect. 10) to sums of money or legacies secured by an express trust.

Action to recover legacy charged on land.

An action to recover a legacy charged on land is within this section, and not within sects. 1 and 2, the only remedy of the legatee being to have his legacy raised by sale or mortgage of the land. *In re Owen*, (1894) 3 Ch. 220.

Judgments

Judgments are within this section although they are no

longer charges on land. Therefore, a judgment cannot be enforced, even as against the personal estate of a judgment debtor, after twelve years. *Watson* v. *Birch*, 15 Sim. 523; *Jay* v. *Johnstone*, (1893) 1 Q. B. 25, 189. are within section.

The section governs the personal remedy against the mortgagor on the covenant in the mortgage deed or on a collateral bond given by him to secure the mortgage debt. *Doe* v. *Williams*, 5 Ad. & E. 291, 296; *Sutton* v. *Sutton*, 22 Ch. Div. 511; *Fearnside* v. *Flint*, 22 Ch. D. 579; *In re England*, (1895) 2 Ch. 820. Actions on covenant or bond are within section.

The better opinion appears to be that the section is confined to proceedings against the mortgagor, *i.e.* the person whose land is charged, and those claiming under him.

This formed the ground of the judgment of Kay, L.J. (then Kay, J.), and Bowen, L.J., in *In re Frisby* (43 Ch. Div. 106), where the action was against a surety on his covenant contained in the mortgage deed. Cotton, L.J., appears to have been of the contrary opinion (p. 116). Action against surety.

In *In re Powers* (30 Ch. Div. 291) it was held that the section did not apply to an action against sureties on a bond by them conditioned to be void if the mortgagor should pay the debt and interest according to his covenant in the mortgage deed.

Even if the section applies to such a bond, the remedy on it will not be barred so long as the mortgage subsists which it is given to secure. *In re Powers, supra;* and see the observations of Kay, J., in *In re Frisby*, 43 Ch. D. 106, 111.

A present right to receive arises when the charge comes into present operation, although the amount receivable has not been ascertained. *Hornsey Local Board* v. *Monarch Building Society*, 24 Q. B. Div. 1. "Present right to receive."

The expression "capable of giving a discharge," is intended to exclude persons under a legal incapacity, such as infants and lunatics. *Hornsey Local Board* v. *Monarch Building Society*, 24 Q. B. Div. 1. "Capable of giving a discharge."

In *Chinnery* v. *Evans* (11 H. L. C. 115) Lord Westbury was apparently of opinion that the words, "by the person by whom the same shall be payable, or his agent," referred to the Payment.

payment as well as to the signature of the acknowledgment (p. 134). At the same time he treated the provision as to payment as identical with the provision in the Real Property Limitation Act, 1837 (7 Wm. IV. & 1 Vict. c. 28), and Lord Cranworth bases his opinion upon the latter enactment. The better opinion, however, appears to be that these words do not refer to the payment. See *Harlock* v. *Ashberry*, 19 Ch. Div. 539, pp. 545, 548, 551; *In re Frisby*, 43 Ch. Div. 106, pp. 116, 117.

Payment is not confined to payment by the person against whom or whose representatives the action is brought. Payment made by any person liable to pay keeps the debt alive as against any other person liable. *In re Frisby*, 43 Ch. Div. 106.

Payments made by a mortgagor who has sold the equity of redemption in one of the mortgaged estates keep the debt alive as against the purchaser of that estate. *Chinnery* v. *Evans*, 11 H. L. C. 115.

Payments made by a receiver appointed by the Court under the Irish statute, 11 & 12 Geo. III. c. 10, are payments within the section. *Chinnery* v. *Evans*, 11 H. L. C. 115.

Payments by a mortgagor after he has assigned the equity of redemption, subject to the mortgages and charges thereon, do not keep the mortgage debt alive as against the assignee. *Newbould* v. *Smith*, 29 Ch. D. 882; 33 Ch. Div. 127; 14 App. Cas. 423, where the Lords reserved their opinion upon the point.

Payment by one of several devisees under a will does not keep the debt alive as against the other devisees. *Dickenson* v. *Teasdale*, 31 B. 511; 1 D. J. & S. 52, 62.

Acknowledgment.

An acknowledgment by trustees of an estate devised in trust for payment of debts keeps a debt alive against the parties beneficially interested. *Lord St. John* v. *Boughton*, 9 Sim. 219; *Toft* v. *Stephenson*, 1 D. M. & G. 28.

Time does not run where same hand has to pay and to receive.

Time does not run under the statute so long as the same person is both liable to pay and entitled to receive interest.

Thus, the statute does not run during the life of a tenant for life or a tenant in common for life who is absolutely entitled

to a mortgage or charge upon the settled estates (*Burrell* v. *Earl of Egremont*, 7 B. 205, 234; *Wynne* v. *Styan*, 2 Ph. 303), or during the life of a tenant for life who has a life interest in the mortgage debt, although there are trustees both of the settled land and of the mortgage debt (*Topham* v. *Booth*, 35 Ch. D. 607).

So, where a wife is beneficially entitled to the mortgage debt, and the husband liable to pay interest to her trustee, time does not run while husband and wife are living together. *In re Hawes*, 62 L. J. Ch. 463.

A devisee in fee is only accountable to creditors of his testator to the extent of the value of the devised estate, and not for any interest received by him before the issue of the writ. Therefore, where a devisee in fee of an estate was also tenant for life of a sum of money which his testator had charged on the estate, it was held that the receipt by the devisee of the rents and profits of the estate was not a payment of interest within the section. *In re England*, (1895) 2 Ch. 100, 820.

Cases not within sect. 8 of the Real Property Limitation Act, 1874, are governed by sect. 3 of 3 & 4 Wm. IV. c. 42, which provides that all actions of covenant or debt upon any bond or other specialty shall be commenced and sued within twenty years after the cause of such actions or suits. 3 & 4 Wm. IV. c. 42, s. 3.

Sect. 5 of the same Act provides that if any acknowledgment shall have been made, either by writing signed by the party liable by virtue of such specialty, or his agent, or by part payment or part satisfaction on account of any principal or interest being then due thereon, it shall be lawful for the person entitled to such actions to bring his action for the money remaining unpaid and so acknowledged to be due within twenty years after such acknowledgment by writing or part payment or part satisfaction as aforesaid. S. 5.

This section differs as to acknowledgment from sect. 8 of the Real Property Limitation Act, 1874. Under this section it is not necessary that the acknowledgment should be made to the party entitled to the money or his agent. *Forsyth* v. *Bristowe*, 8 Ex. 716. Acknowledgment.

An acknowledgment within this section need not amount to a promise to pay. A written statement, although not made to the creditor, that the debt exists is sufficient. *Moodie* v. *Bannister*, 4 Drew. 432.

An acknowledgment revives the debt, although made after the remedy is barred by the Act. *Moodie* v. *Bannister, supra.*

The effect of an acknowledgment is apparently limited to the interest of the person making it. *Coope* v. *Cresswell*, L. R. 2 Ch. 112, 124.

Payment.

Payment by a stranger has no effect. Payment must be made by a person liable to pay. But, subject as above, payment by any person liable keeps the debt alive as against any other person liable. *Roddam* v. *Morley*, 1 De G. & Jo. 1; *Pears* v. *Laing*, 12 Eq. 41; see, however, *Coope* v. *Cresswell*, L. R. 2 Ch. 112.

Mercantile Law Amendment Act, 1856, s. 97.

The Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), provides (sect. 14) that no co-contractor or co-debtor shall lose the benefit of sect. 3 of the Act 3 & 4 Wm. IV. c. 42, by reason only of payment of any principal, interest, or other money by any other co-contractor or co-debtor.

Payment by assignee of equity of redemption or by tenant for life.

Payment by an assignee of the equity of redemption, or by tenant for life under a settlement made by the covenantor, keeps the debt alive as against the assets of the covenantor. *Forsyth* v. *Bristowe*, 8 Ex. 716; *Roddam* v. *Morley*, 1 De G. & Jo. 1; *In re Hollingshead*, 37 Ch. D. 651; *Dibb* v. *Walker*, (1893), 2 Ch. 429; *Leahy* v. *De Moleyns*, (1896) 1 I. R. 206.

Payment by person filling two capacities.

As to the rule to be applied where the person paying fills two characters, *e.g.* executor and beneficial devisee, see *Fordham* v. *Wallis*, 10 Ha. 217; *In re Hollingshead*, 37 Ch. D. 651; *Dibb* v. *Walker*, (1893) 2 Ch. 429; *Shea* v. *Moore*, (1894) 1 I. R. 158, 171.

C. Limitations on the Recovery of Interest in Arrear.

The Real Property Limitation Act, 1833 (3 & 4 Wm. IV. c. 27), enacts—

Real Property

Sect. 42. No arrears of rent or of interest in respect of any

sum of money charged upon or payable out of any land or rent, or in respect of any legacy, or any damages in respect of such arrears of rent or interest, shall be recovered by any distress, action, or suit, but within six years next after the same respectively shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable, or his agent: Provided, nevertheless, that where any prior mortgagee or other incumbrancer shall have been in possession of any land, or in the receipt of the profits thereof, within one year next before an action or suit shall be brought by any person entitled to a subsequent mortgage or other incumbrance on the same land, the person entitled to such subsequent mortgage or incumbrance may recover in such action or suit the arrears of interest which shall have become due during the whole time that such prior mortgagee or incumbrancer was in such possession or receipt as aforesaid, although such time may have exceeded the said term of six years. Limitation Act, 1833, s. 42.

This section is extended, by sect. 10 of the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), to sums of money or legacies secured by an express trust.

This section must be read in connection with sect. 3 of the Act 3 & 4 Wm. IV. c. 42.

The result is that, in an action brought by the mortgagee for foreclosure, six years' arrears of interest only can be claimed, although the mortgagor has covenanted or entered into a collateral bond for payment of the mortgage money. But where the mortgagee brings an action on the covenant or bond, he can, by virtue of sect. 3 of 3 & 4 Wm. IV. c. 42, recover twenty years' arrears. *Strachan* v. *Thomas*, 12 Ad. & E. 536; *Hughes* v. *Kelly*, 3 D. & War. 482; *Hunter* v. *Nockolds*, 1 Mac. & G. 640; *Shaw* v. *Johnson*, 1 Dr. & Sm. 412; *Lewis* v. *Duncombe*, 29 B. 175; *Round* v. *Bell*, 31 L. J. Ch. 127. Arrears in foreclosure action and in action on covenant;

The doctrine that the mortgagee in a personal action against the mortgagor may recover twenty years' arrears is inconsistent with the reasoning in *Sutton* v. *Sutton* (22 Ch. Div. 511), although *Hunter* v. *Nockolds* (1 Mac. & G. 640) may

be distinguished on the ground mentioned by Cotton, L.J., in 22 Ch. D. p. 518.

in redemption action;

The cases of *Du Vigier* v. *Lee* (2 Ha. 326) and *Elvy* v. *Norwood* (5 De G. & Sm. 240) decided that the heir of the mortgagor can only redeem, where the mortgagee is entitled to a bond or covenant in which the heir is bound, on the terms of paying all arrears up to twenty years due under such bond or covenant.

Kindersley, V.C., appears to have been of opinion that if the mortgagor instituted an action for redemption he would be required to pay all arrears due (L. R. 1 Eq. 418, p. 421).

in action to recover proceeds of sale;

The mortgagee is entitled to retain as against the mortgagor, out of the proceeds of sale of the mortgaged property, all arrears due though exceeding six years. *Edmunds* v. *Waugh*, L. R. 1 Eq. 418; *In re Marshfield*, 34 Ch. D. 711, not following *Mason* v. *Broadbent*, 33 B. 296; see *Archdall* v. *Anderson*, 25 L. R. Ir. 433.

Edmunds v. *Waugh* was explained in *In re Stead's Mortgaged Estates* (2 Ch. D. 713, p. 717), as based on the principle of retainer.

in petition for payment out of court.

A petition by a mortgagee for payment out of Court of money paid in under the Lands Clauses Act for purchase of land subject to a mortgage is within the section, and the mortgagee is only entitled to six years' arrears. *In re Stead's Mortgaged Estates*, 2 Ch. D. 713; see *In re Slater's Trusts*, 11 Ch. D. 227.

"Money charged upon land."

Money secured by mortgage of a reversionary interest in real estate devised upon trust for sale is charged upon land within the section. *Bowyer* v. *Woodman*, L. R. 3 Eq. 313.

But a mortgage of the reversionary interest of the mortgagor in a residue of personalty which happens at the time of the mortgage to be invested in a mortgage of land is not within the section. *Smith* v. *Hill*, 9 Ch. D. 143.

Mortgages of personal estate not within section.

The section does not extend to mortgages of personal estate. Therefore, in an action for foreclosure of a reversionary interest in personalty, the mortgagee is entitled to full arrears. *Smith* v. *Hill*, 9 Ch. D. 143; *Mellersh* v. *Brown*, 45 Ch. D. 225.

Clarkson v. *Henderson* (14 Ch. D. 348) was also a case of

personalty, but it seems to have been decided on the ground that the mortgage contained a provision capitalizing interest in arrear.

The proviso at the end of sect. 42 does not apply to the case of a purchaser in possession who, on the occasion of his purchase, has had various old incumbrances assigned to a trustee for him. *Chinnery* v. *Evans*, 11 H. L. C. 115. Effect of proviso.

The section runs against the mortgagee of a reversionary interest in land during the tenancy for life to which it is subject. *Vincent* v. *Going*, 1 J. & Lat. 697; *Sinclair* v. *Jackson*, 17 B. 405; *Bowyer* v. *Woodman*, L. R. 3 Eq. 313; *Smith* v. *Hill*, 9 Ch. D. 143, not following *Wheeler* v. *Howell*, 3 K. & J. 198. Mortgage of reversionary interest in land.

Where a mortgage of a reversionary share in the proceeds of sale of realty and in personalty in Court in an administration action contained a proviso for reconveyance by the mortgagee, if the mortgagor should, on or before the death of the tenant for life, pay the principal sum "with interest for the same in the mean time," and also a covenant by the mortgagor for payment of interest half-yearly, it was held, on the mortgagor's application for payment out in the administration action, that the mortgagee was entitled to all interest unpaid. *In re Turner*, 43 W. R. 153.

The *ratio decidendi* was that the mortgagee could not foreclose till the death of the tenant for life, whether interest was paid or not, and that, therefore, no interest could be in arrear till then.

An acknowledgment under this section is only available as against the person by whom it was given. Therefore, an acknowledgment by the mortgagor does not enable a first mortgagee to recover more than six years' arrears as against a second mortgagee. *Bolding* v. *Lane*, 1 D. J. & S. 122. Acknowledgment.

It has been held in Ireland that an acknowledgment by the tenant for life of a settled estate as to an arrear of interest due under a mortgage of the fee was binding on the remainderman. *In re Fitzmaurice's Minors*, 15 Ir. Ch. 445.

CHAPTER LIV.

DISCHARGE OF THE INCUMBERED PROPERTY.

THE extinction (otherwise than by payment or its equivalent) of a secured debt does not determine the right of the incumbrancer to realize his security.

Security can be realized, although debt statute-barred,

A mortgagee is entitled to realize his security (*a*), and a solicitor to retain papers over which he has a lien (*b*), although the debt is barred by the Statute of Limitations. (*a*) *Seager* v. *Aston*, 26 L. J. Ch. 809. (*b*) *In re Carter*, 55 L. J. Ch. 230; *Curwen* v. *Milburn*, 42 Ch. Div. 424.

A solicitor, who has taken a mortgage from his client for costs, is entitled to foreclose, although, an order for taxation having been obtained against him and no bill delivered, sect. 37 of the Solicitors Act, 1843 (6 & 7 Vict. c. 73), prevents him from suing. *Thomas* v. *Cross*, 13 W. R. 166.

or merged in judgment.

A mortgagee is entitled to realize his security (*a*), and a solicitor to enforce his lien on a fund recovered (*b*), although he has obtained judgment for his debt and taken the debtor in execution. (*a*) *O'Brien* v. *Lewis*, 4 Giff. 396; 3 D. J. & S. 606; *Ex parte Sheil*, 4 Ch. Div. 789. (*b*) *Lloyd* v. *Mason*, 4 Ha. 132; *O'Brien* v. *Lewis*, *supra*.

A solicitor does not lose his lien on deeds by obtaining judgment for his costs (*a*), or by getting an order charging them with interest on stock standing in the client's name (*b*). (*a*) *In re Aikin's Estate*, (1894) 1 I. R. 225; (*b*) *Re Lumley*, 37 Sol. Jo. 83.

Partnership Act, 1890, s. 3.

Sect. 3 of the Partnership Act, 1890 (53 & 54 Vict. c. 39), provides in effect that a lender, under a written contract signed by or on behalf of all the parties, to a person in business at a rate of interest varying with the profits, shall

not be entitled to recover anything in respect of his loan if the borrower is adjudged a bankrupt, enters into a composition with his creditors, or dies insolvent, until the claims of the other creditors for value of the borrower have been satisfied.

This section, though differing in language from the corresponding section of Bovill's Act (28 & 29 Vict. c. 86), is probably intended to have the same effect as that section, under which it has been held that, where such a loan is secured by mortgage, the right of the lender to realize his security is not affected by the Act. *Ex parte Sheil*, 4 Ch. Div. 789; *Badeley* v. *Consolidated Bank*, 34 Ch. D. 536; 38 Ch. Div. 238.

The circumstances which determine the incumbrancer's rights over the property secured differ according as his incumbrance is a mortgage, equitable charge or lien, pledge, or common law lien.

A. Mortgages.

In the case of a mortgage, whether of land or chattels, a tender, properly made and improperly rejected, neither extinguishes the mortgage debt nor determines the mortgagee's property in the security. *Bank of New South Wales* v. *O'Connor*, 14 App. Cas. 273; *Johnson* v. *Diprose*, (1893) 1 Q. B. 512. Tender.

The Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), enacts— Real Property Limitation Act, 1874, s. 1.

Sect. 1. After the commencement of this Act no person shall make an entry or distress, or bring an action or suit, to recover any land or rent, but within twelve years next after the time at which the right to make such entry or distress, or to bring such action or suit, shall have first accrued to some person through whom he claims; or if such right shall not have accrued to any person through whom he claims, then within twelve years next after the time at which the right to make such entry or distress, or to bring such action or suit, shall have first accrued to the person making or bringing the same.

Rent.

Rent here includes rent-charge and rent-seck (*a*), but not rent-service, *i.e.* rent reserved in consideration of a demise (*b*). (*a*) *James* v. *Salter*, 3 Bing. N. C. 544; *Irish Land Commission* v. *Grant*, 10 App. Cas. 14; *Paine* v. *Esdaile*, 13 App. Cas. 613; *Howitt* v. *Earl of Harrington*, (1893) 2 Ch. 497; *Jones* v. *Withers*, 74 L. T. 572. (*b*) *Grant* v. *Ellis*, 9 M. & W. 113.

This section applies to actions of foreclosure, whether the mortgage is legal or equitable, but not to actions for raising a sum of money charged on land by sale or mortgage of the land. *Wrixon* v. *Vize*, 3 D. & War. 104; *In re Owen*, (1894) 3 Ch. 220.

When right accrues in case of future estate.

Sect. 2 provides as to when the right to recover any land or rent shall be deemed to have first accrued in the case of an estate or interest in reversion or remainder, or other future estate or interest.

The right of an equitable mortgagee of a reversionary interest in land first accrues when the reversionary interest falls into possession. *Hugill* v. *Wilkinson*, 38 Ch. D. 480; *In re Conlan's Estate*, 29 L. R. Ir. 199.

Disabilities.

Sects. 3, 4, and 5 provide for the disabilities of infancy, coverture, idiotcy, lunacy, or unsoundness of mind.

Real Property Limitation Act, 1833, s. 3.

The Real Property Limitation Act, 1833 (3 & 4 Wm. IV. c. 27), enacts (sect. 3) that when the person claiming such land or rent, or the person through whom he claims, shall have become entitled by reason of any forfeiture or breach of condition, then such right shall be deemed to have first accrued when such forfeiture was incurred or such condition was broken.

The right to bring an action for foreclosure accrues, under this section, on breach of the condition contained in the mortgage-deed for repayment of the principal. *Wrixon* v. *Vize*, 3 D. & War. 104; *Heath* v. *Pugh*, 6 Q. B. Div. 345, 363; *Kibble* v. *Fairthorne*, (1895) 1 Ch. 219.

Time ceases to run against mortgagee on issue of writ.

Time ceases to run against a mortgagee, whether legal or equitable, when he issues a writ in an action for foreclosure. A mortgagee acquires a new title to the mortgaged land by virtue of the order for foreclosure absolute, and he may bring an action to recover the land within twelve years from that date. *Heath* v. *Pugh*, 6 Q. B. Div. 345; 7 App. Cas. 235.

The Real Property Limitation Act, 1833, enacts—

Acknowledgment.

Sect. 14. When an acknowledgment of the title of the person entitled to any land or rent shall have been given to him or his agent in writing signed by the person in possession or in receipt of the profits of such land or in receipt of such rent, then such possession or receipt of or by the person by whom such acknowledgment shall have been given shall be deemed, according to the meaning of this Act, to have been the possession or receipt of or by the person to whom or to whose agent such acknowledgment shall have been given at the time of giving the same, and the right of such last-mentioned person, or any person claiming through him, to make an entry or distress or bring an action to recover such land or rent shall be deemed to have first accrued at and not before the time at which such acknowledgment, or the last of such acknowledgments, if more than one, was given.

Payment.

The Real Property Limitation Act, 1837 (7 Wm. IV. & 1 Vict. c. 28, as altered by the Real Property Limitation Act, 1874, sect. 9), enacts (sect. 1) that it shall be lawful for any person entitled to or claiming under any mortgage of land . . . to make an entry or bring an action at law or suit in equity to recover such land at any time within twelve years next after the last payment of any part of the principal money or interest secured by such mortgage.

The payment must be on account of principal or interest. Payment of rent by a tenant of the mortgaged land is not payment within the section. *Harlock* v. *Ashberry*, 19 Ch. Div. 539.

A payment not professedly made on account of principal or interest cannot be ratified by the mortgagor. *Harlock* v. *Ashberry*, 19 Ch. Div. 539.

Payment by any person liable keeps alive right to foreclose.

The payment must be made by a person liable to pay principal or interest, but it is not necessary that the payment should be made by the party sought to be charged in the suit or by his agent. Hence, payments made by a principal debtor keep alive the right to foreclose a mortgagor surety. *Chinnery* v. *Evans*, 11 H. L. C. 115; *Harlock* v. *Ashberry*, 19 Ch. Div. 539; *Lewin* v. *Wilson*, 11 App. Cas. 639.

Payments made by a mortgagor, who has sold the mortgaged estate, keep the right alive as against the purchaser. *In re Muskerry*, 9 Ir. Ch. 94.

Payment must be to person entitled.

Payment must be made to the person entitled to receive the money. Where the administrator of the mortgagee, who was also one of several residuary legatees, had appropriated the mortgage in satisfaction of his share of the residue, it was held that the debt was kept alive by payment to his executrix. *Barclay* v. *Owen*, 60 L. T. 220.

Time does not run against the mortgagee while the person entitled to receive interest on the mortgage debt is tenant for life of the mortgaged property. *Lord Carbery* v. *Preston*, 13 Ir. Eq. 455.

Extinction of mortgagee's title.

Sect. 34 of the Act of 1833 provides that, at the determination of the period limited by the Act to any person for making an entry or distress, or bringing any writ of *quare impedit* or other action or suit, the right and title of such person to the land, rent, or advowson for the recovery whereof such entry, distress, action, or suit respectively might have been made or brought within such period, shall be extinguished. See *Dawkins* v. *Lord Penrhyn*, 4 App. Cas. 51.

The right, as well as the remedy, of an equitable mortgagee is barred under this section, although there is a prior outstanding legal estate. *Kibble* v. *Fairthorne*, (1895) 1 Ch. 219.

Payment after title extinguished has no effect.

A payment or acknowledgment made by the mortgagor after the mortgagee's title is extinguished by virtue of sect. 34 has no effect. *In re Alison*, 11 Ch. Div. 284; *Sanders* v. *Sanders*, 19 Ch. Div. 373; *Becher* v. *Delacour*, 11 L. R. Ir. 187; *Kibble* v. *Fairthorne*, (1895) 1 Ch. 219. *Stansfield* v. *Hobson* (3 D. M. & G. 690), so far as *contra*, is overruled.

B. Equitable Charges and Liens.

Merger of charge in mortgage.

An equitable charge on property may be merged in a mortgage of the property. Thus, where a policy of insurance was deposited to secure an amount then due to the depositee, and the depositor afterwards executed a formal mortgage of the policy to secure further advances only, it was held that

the depositee had no right to retain the policy after the mortgage was satisfied. *In re Annesley*, 2 Eq. Rep. 1257.

Company's lien on shares.

Where a company had a lien under its articles on the shares of a member for debts due from him, with a power of selling the shares fourteen days after notice to the shareholder, and a member who was indebted to the company gave them his promissory note for the amount of the debt, and transferred certain of the shares to a trustee for the company with power of selling immediately on default, it was held that the lien under the articles on all the shares was not extinguished. *Bank of Africa* v. *Salisbury Gold Mining Co.*, (1892) A. C. 281.

Unpaid vendor of land.

A vendor of land does not as a rule lose his lien for the unpaid purchase-money by taking a personal security, *e.g.* a bond (*a*), bill of exchange (*b*), or promissory note (*c*), from the purchaser. (*a*) *Saunders* v. *Leslie*, 2 Ba. & Be. 509; *Winter* v. *Lord Anson*, 3 Russ. 488; see *Mackreth* v. *Symmons*, 15 Ves. 329. (*b*) *Grant* v. *Mills*, 2 V. & B. 306; *Ex parte Peake*, 1 Madd. 346, 356; *Teed* v. *Carruthers*, 2 Y. & C. C. 31, 40. (*c*) *Hughes* v. *Kearney*, 1 Sch. & L. 132; *Ex parte Loaring*, 2 Rose, 79.

Where a vendor took a mortgage for part of the purchase-money and a note for the balance, it was held that his lien was lost as to both amounts. *Bond* v. *Kent*, 2 Vern. 381.

The vendor does not lose his lien as against a railway company by accepting a deposit in the names of trustees in lieu of the statutory deposit. *Walker* v. *Ware & Buntingford Ry. Co.*, L. R. 1 Eq. 195.

C. Pledges.

Delivery of pledge to agent.

A pledge is not determined by delivery of the article pledged to an agent, either for safe custody or for sale, although that agent be the pledgor. *North Western Bank* v. *Poynter, Son, & Macdonalds*, (1895) A. C. 56, 68.

But where the pledgor has by fraud got possession of the pledge from the pledgee, the latter cannot maintain trover against a *bonâ fide* purchaser or pledgee from the fraudulent

pledgor. *Babcock* v. *Lawson*, 4 Q. B. D. 394; 5 Q. B. Div. 284.

Tender of amount due.

A pledge is determined, and the special property of the pledgee divested, by a proper tender of the amount due. *Ratcliff* v. *Davis*, Yelv. 178; *Coggs* v. *Bernard*, 1 Smi. L. C. 201, 214; *Donald* v. *Suckling*, L. R. 1 Q. B. 585, 610; *Burdick* v. *Sewell*, 10 Q. B. D. 363, 367; *Bank of New South Wales* v. *O'Connor*, 14 App. Cas. 273; *Yungmann* v. *Briesemann*, 67 L. T. 642.

Tenderor must keep money ready.

The person tendering must not only make the tender, but he must keep the money ready to pay over to the tenderee. *Gyles* v. *Hall*, 2 P. W. 378; *Dixon* v. *Clark*, 5 C. B. 365; *Kinnaird* v. *Trollope*, 42 Ch. D. 610.

The creditor, to do away with the effect of a tender, must demand only the sum previously tendered. *Spybey* v. *Hide*, 1 Camp. 181; *Rivers* v. *Griffiths*, 5 B. & A. 630.

A plea of tender at common law must be accompanied with payment into Court of the amount. *Dixon* v. *Clark*, 5 C. B. 365.

Coin, bank-notes.

As to what coin is legal tender, see The Coinage Act, 1870 (33 Vict. c. 10), sect. 4.

By the Bank of England Act, 1833 (3 & 4 Wm. IV. c. 98), sect. 6, notes of the Bank of England are made a legal tender except by the Bank.

Cheque.

Tender by cheque is good if the creditor does not object on that ground at the time. *Polglass* v. *Oliver*, 2 C. & J. 15; *Jones* v. *Arthur*, 8 Dowl. P. C. 442.

To constitute a valid tender at law, there must be either production or a waiver of production. *Douglas* v. *Patrick*, 3. T. R. 683.

Waiver of production.

A waiver of production is not equivalent to tender, unless the debtor has the money ready and offers to produce it. *Dickinson* v. *Shee*, 4 Esp. 68; *Glasscott* v. *Day*, 5 Esp. 48; *Thomas* v. *Evans*, 10 East, 101; *Ex parte Danks*, 2 D. M. & G. 936, 945.

Demand of more than is due.

A mere demand of more than is due does not dispense with production (*a*), but it does, if it is in such terms as to show that the creditor would not accept any smaller sum, if offered (*b*).

(*a*) *Scarfe* v. *Morgan*, 4 M. & W. 270; *Allen* v. *Smith*, 12 C. B. N. S. 638. (*b*) *Wallis* v. *Glynn*, 19 Ves. 380; *Ex parte Danks*, 2 D. M. & G. 936; *Kerford* v. *Mondel*, 28 L. J. Ex. 303; *Weeks* v. *Goode*, 6 C. B. N. S. 367; *Norway*, Br. & Lush. 377, 396; 404, 409; 3 Moo. P. C. N. S. 245, 266.

Refusal to state amount due.

Where the debt is an unliquidated demand, a refusal to state the amount dispenses the debtor from making a tender. *Ashmole* v. *Wainwright*, 2 Q. B. 845; *Watson* v. *Pearson*, 9 Jur. N. S. 501; *Norway*, Br. & Lush. 377, 396.

Tender of more than is due.

A tender of more than is due is good, if the creditor has only to select the amount of his debt (*a*); it is bad, where the creditor is required to make change (*b*). (*a*) *Wade's Case*, 5 Rep. 114; *Watkins* v. *Robb*, 2 Esp. 710; *Dean* v. *James*, 4 B. & Ad. 546; *Bevan* v. *Rees*, 5 M. & W. 306. (*b*) *Betterbee* v. *Davis*, 3 Camp. 70; *Robinson* v. *Cook*, 6 Taunt. 336.

If a debtor tenders more than is due in a form which requires change to be given, the tender is good if the creditor does not take objection on that account. *Douglas* v. *Patrick*, 3 T. R. 683; *Black* v. *Smith*, Peake, 88; *Cadman* v. *Lubbock*, 5 D. & Ry. 289.

Conditional tender.

A conditional tender is bad. A conditional tender is a tender made on such terms that the creditor, by accepting it, acknowledges that he has received payment in full. *Evans* v. *Judkins*, 4 Camp. 156; *Glasscott* v. *Day*, 5 Esp. 48; *Griffith* v. *Hodges*, 1 C. & P. 419; *Cheminant* v. *Thornton*, 2 C. & P. 50; *Strong* v. *Harvey*, 3 Bing. 304; *Mitchell* v. *King*, 6 C. & P. 237; *Hough* v. *May*, 4 Ad. & E. 954; *Sutton* v. *Hawkins*, 8 C. & P. 259; *Marquis of Hastings* v. *Thorley*, 8 C. & P. 573; *Foord* v. *Noll*, 2 Dowl. N. S. 617.

The old cases which decided that a tender, with a demand for a stamped receipt, was conditional and bad cannot be considered law, having regard to sect. 103 of the Stamp Act, 1891.

An allegation by the person making the tender that no more is due does not make the tender conditional. It merely expresses what is implied in every tender. It does not preclude the creditor from recovering the residue, if due. *Henwood* v. *Oliver*, 1 Q. B. 409; *Bull* v. *Parker*, 2 Dowl. N. S. 345;

Bowen v. *Owen*, 11 Q. B. 130; *Jones* v. *Bridgman*, 39 L. T. 500.

Tender under protest.

A tender under protest is good. *Manning* v. *Lunn*, 2 C. & K. 13; *Thorpe* v. *Burgess*, 8 Dowl. P. C. 603; *Scott* v. *Uxbridge & Rickmansworth Ry. Co.*, L. R. 1 C. P. 596; *Sweny* v. *Smith*, 7 Eq. 324; *Greenwood* v. *Sutcliffe*, (1892) 1 Ch. 1.

Thus, a tender is good which reserves to the person who made it the right to tax the mortgagees' costs and to review their account. *Greenwood* v. *Sutcliffe*, (1892) 1 Ch. 1.

Tender after default.

If money is tendered after it became due and the creditor accepts it, his acceptance is a waiver of the objection. *Norton* v. *Wood*, 1 R. & M. 178.

Tender where debt made up of items.

Where a tender is insufficient to cover the whole of a claim made up of several items, it is (in the absence of express appropriation by the debtor) insufficient to cover any specific part. *Hardingham* v. *Allen*, 12 Jur. 584.

Tender by agent.

Tender by an agent is good, although of a larger sum than he was authorized to offer. *Read* v. *Goldring*, 2 Mau. & S. 86.

Tender to agent.

Tender is good if made to an agent who is authorized, either expressly or by implication, to receive payment (*a*), or if made to a person, whose agency the principal by his conduct has estopped himself from denying, *e.g.* a person found in his place of business and apparently entrusted with its conduct (*b*). (*a*) *Goodland* v. *Blewith*, 1 Camp. 477; *Finch* v. *Boning*, 4 C. P. D. 143. (*b*) *Barrett* v. *Deere*, 1 M. & M. 200; *Wilmott* v. *Smith*, 1 M. & M. 238; *Moffat* v. *Parsons*, 5 Taunt. 307; *Kirton* v. *Braithwaite*, 1 M. & W. 310.

Apparent agent disclaiming authority.

Where the person to whom the tender is made disclaims authority to receive it, the tender is made at the risk of the maker (*a*); but a mere statement by a clerk in the principal's office that he has no instructions is not such a disclaimer (*b*). (*a*) *Watson* v. *Hetherington*, 1 C. & K. 36; *Bingham* v. *Allport*, 1 Nev. & M. 398. (*b*) *Finch* v. *Boning*, 4 C. P. D. 143.

Sale; sub-pledge; assertion of ownership.

A sale by the pledgee of the chattel pledged, unauthorized by the terms of the contract of pledge, a sub-pledge for more than the amount due on the original pledge, or an assertion by the pledgee that he is absolute owner of the chattel

pledged, does not determine the pledge. *Johnson* v. *Stear*, 15 C. B. N. S. 330; *Donald* v. *Suckling*, L. R. 1 Q. B. 585; *Halliday* v. *Holgate*, L. R. 3 Ex. 299; *Yungmann* v. *Briesemann*, 67 L. T. 642; *Neikram Dobay* v. *Bank of Bengal*, 19 Ind. Ap. 60.

D. Common Law Liens.

a. A possessory lien is lost by voluntarily parting with the possession, *e.g.* by a sale. *Ex parte Shank*, 1 Atk. 234; *Kruger* v. *Wilcox*, Ambl. 252; *Ex parte Bland*, 2 Rose, 91; *Jacobs* v. *Latour*, 5 Bing. 130; *Clark* v. *Gilbert*, 2 Bing. N. C. 343; *Mulliner* v. *Florence*, 3 Q. B. Div. 484; *In re Burrowes' Estate*, I. R. 1 Eq. 445. *a.* Loss of possession, when determining lien.

But it is not lost where the person claiming it is wrongfully deprived of possession. *Dicas* v. *Stockley*, 7 C. & P. 587.

Thus, the lien of a firm of solicitors on the deeds is not destroyed if a retiring partner takes them away without the consent of the continuing partners. *In re Carter*, 55 L. J. Ch. 230.

A pledge of the goods for more than the amount in respect of which the lien exists determines the lien. *Daubigny* v. *Duval*, 5 T. R. 604; *M'Combie* v. *Davies*, 7 East, 5. Pledge for more than amount due.

The benefit of a lien may be transferred to a third person with notice of the lien, he being treated as the servant of the person originally entitled. *M'Combie* v. *Davis*, 7 East, 5. Transfer to agent.

Where A., solicitor of a mortgagor, sent the engrossment of a re-conveyance of the mortgaged property to B., the mortgagee's solicitor, requesting B. to hold it on his account as he had a lien upon it, and the mortgagee executed the re-conveyance, it was held that A. retained his lien on the executed deed. *Watson* v. *Lyon*, 7 D. M. & G. 288.

Where a client deposited title-deeds with his solicitor for the purpose of preparing a mortgage, and the solicitor continued to hold the title-deeds as solicitor for the mortgagee, it was held that his lien subsisted as against the mortgagor. *In re Messenger*, 3 Ch. D. 317; *Re Walker*, 68 L. T. 517; see, however, *Ex parte Quinn*, 53 L. J. Ch. 302. Change of capacity in which property is held.

Lien of unpaid vendor of goods.

The loss of the lien of the unpaid vendor of goods is now regulated by the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), which provides—

. Sect. 43, (1). The unpaid seller of goods loses his lien or right of retention thereon—

(*a*) When he delivers the goods to a carrier or other bailee or custodier for the purpose of transmission to the buyer without reserving the right of disposal of the goods;

(*b*) When the buyer or his agent lawfully obtains possession of the goods;

(*c*) By waiver thereof.

(2) The unpaid seller of goods, having a lien or right of retention thereon, does not lose his lien or right of retention by reason only that he has obtained judgment or decree for the price of the goods.

The right of stoppage *in transitu* is regulated by sects. 44 to 46 of the Act.

As to the effect of a sub-sale or pledge by the buyer, see sects. 47 and 48.

Master's lien for freight.

Sects. 492 to 499 of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), which correspond to sects. 66 to 76 of the repealed Merchant Shipping Act, 1862 (25 & 26 Vict. c. 63), provide, (1) for enabling the owner of any ship arriving from foreign parts to land the goods on a wharf or in a warehouse (sect. 493); (2) for preserving his lien for freight and other charges on the goods so landed (sect. 494); (3) for the discharge of this lien, either by the production of a receipt or release from the shipowner, or by a deposit by the owner of the goods of the amount claimed for freight and other charges (sect. 495); (4) for the payment by the warehouseman to the shipowner of the whole deposit in fifteen days, if there is no dispute between the shipowner and the owner of the goods as to the amount properly payable, and for the payment to the shipowner of so much of the deposit as is admitted by the owner of the goods, and for returning the balance to the owner of the goods, unless the shipowner shall within thirty days take proceedings to recover the amount in dispute from the

owner of the goods (sect. 496); (5) for the sale of the goods by the warehouseman, if the lien is not discharged and no deposit is made as aforesaid (sect. 497), and for the application of the proceeds of sale (sect. 498); and (6) for giving the wharfinger or warehouseman a lien on the goods for the rent and expenses (sect. 499). On these sections, see *Miedbrodt* v. *Fitzsimon*, L. R. 6 P. C. 306; *White & Co.* v. *Furness, Withy & Co.*, (1895) A. C. 40.

Apart from these sections, a master landing goods would not lose his lien if he placed them in a warehouse over which he or the consignee of the ship had exclusive control. *Morsle-blanch* v. *Wilson*, L. R. 8 C. P. 227.

Where a lien is waived by giving up possession, it does not revive if the person who had the lien recovers possession of the goods. *Jones* v. *Pearle*, 1 Stra. 557. Recovery of possession.

Where a ship is captured, the master's lien for freight revives upon its recapture. *Ex parte Cheesman*, 2 Ed. 181.

b. A possessory lien is discharged by tender. See *Eider*, (1893) P. 119. *b.* Tender determines lien.

A lien on goods is determined by a refusal to deliver them up on some ground inconsistent with the existence of the lien. *Boardman* v. *Sill*, 1 Camp. 410 *n.*; *White* v. *Gainer*, 2 Bing. 23; *Dirks* v. *Richards*, 4 Man. & G. 574; *Yungmann* v. *Briesemann*, 67 L. T. 642.

c. Whether a lien is waived or not by taking a security depends upon the nature of the lien. Different considerations apply, for instance, to an innkeeper's, a banker's, and a solicitor's lien. *In re Taylor, Stileman, & Underwood*, (1891) 1 Ch. 590. *c.* Lien lost by taking security.

An insurance broker was held to have waived his lien by taking a bill of exchange at twelve months. *Hewison* v. *Guthrie*, 2 Bing. N. C. 755. Insurance broker.

Where a solicitor takes a substantial security, *e.g.* a bond or promissory note, whether payable on demand or at a future time, the presumption is that he intends to waive his lien, and the presumption is still stronger, if the security bears interest. *Cowell* v. *Simpson*, 16 Ves. 275; *Balch* v. *Symes*, T. & R. 87; *Robarts* v. *Jefferys*, 8 L. J. O. S. Ch. 137; *Hanson* v. *Nicholl*, Coop. P. Cas. 493; *Brownlow* v. *Keatinge*, 2 Ir. Eq. Solicitor's lien on papers.

243; *Willens* v. *Tandy*, 5 Ir. Eq. 1; *Kehoe* v. *Hales*, 5 Ir. Eq. 597; *In re Taylor, Stileman, & Underwood*, (1891) 1 Ch. 590; *Bissell* v. *Bradford Tramways Co.*, 9 T. L. R. 337; (1893) W. N. 44; *In re Aikin's Estate*, (1894) 1 I. R. 225.

Taking promissory note which is dishonoured.

Taking a promissory note would apparently not amount to waiver of a lien, if the note was dishonoured before the claim made to enforce the lien. *Stevenson* v. *Blakelock*, 1 M. & S. 535, 544; *Watson* v. *Lyon*, 7 D. M. & G. 288, 299; see *Brydges* v. *Brydges*, 4 Ha. 135 *n.*

Taking security for part.

Where a solicitor took a security for part of his claim, it was held that he could enforce his lien in respect of the other part. *Enniskillen Railway Co.* v. *Collum*, 29 L. R. Ir. 421.

Innkeeper's lien.

The acceptance by an innkeeper of a security from his guest does not of itself amount to a waiver of the lien, unless the terms of the security are inconsistent with the enforcement of the lien. *Angus* v. *McLachlan*, 23 Ch. D. 330.

CHAPTER LV.

DETERMINATION OF THE MORTGAGOR'S RIGHTS.

A. RELEASE OF THE EQUITY OF REDEMPTION.

A RELEASE of the equity of redemption by mortgagor to mortgagee for valuable consideration stands on the same footing as any other sale, and can only be set aside on grounds which would justify rescission as between an ordinary vendor and purchaser. *Knight* v. *Marjoribanks*, 2 Mac. & G. 10; *Melbourne Banking Corporation* v. *Brougham*, 7 App. Cas. 307.

Qualified right of repurchase.

The fact that the mortgagor is given a right of repurchase in certain events or on certain conditions does not invalidate the transaction. *Ensworth* v. *Griffiths*, 5 B. P. C. 184; *Sevier* v. *Greenway*, 19 Ves. 412; *Williams* v. *Owen*, 5 My. & Cr. 303; *Ogden* v. *Battams*, 1 Jur. N. S. 791; *Gossip* v. *Wright*, 32 L. J. Ch. 648; affd. in H. L. 17 W. R. 1137.

What is valuable consideration.

A release in consideration of the mortgage debt is for valuable consideration. *Knight* v. *Marjoribanks*, 2 Mac. & G. 10; *Melbourne Banking Corporation* v. *Brougham*, 7 App. Cas. 307.

The burden of proof rests on the party seeking to impeach the release, and mere inadequacy of price is not a sufficient ground for setting it aside. Cases *supra*.

When release is set aside.

Releases of the equity of redemption have been set aside where the consideration was nominal, and the releasee treated the mortgage as subsisting (*Vernon* v. *Bethell*, 2 Ed. 110), where there was pressure and inequality of position (*Ford* v. *Olden*, 3 Eq. 461), where the mortgagee was a solicitor and the mortgagor a labourer, acting without independent advice (*Prees* v. *Coke*, 6 Ch. 645). See *Kevans* v. *Joyce*, (1896) 1 I. R. 442.

In *Rushbrook* v. *Lawrence* (8 Eq. 25; 5 Ch. 3) it was held that there was no binding agreement for sale.

Release does not necessarily extinguish mortgage.

A release of the equity of redemption to a mortgagee does not necessarily extinguish the mortgage. It is a question of intention whether it is extinguished or not. There is a presumption that it is not extinguished, if it is for the mortgagee's benefit to keep it alive. *Hayden* v. *Kirkpatrick*, 34 B. 645; *Adams* v. *Angell*, 5 Ch. Div. 634.

Thus, where a first mortgagee purchased the equity of redemption from the trustee in bankruptcy of the mortgagor in consideration of 1380*l.* retained by the first mortgagee in full satisfaction of the mortgage debt, from which he released the trustee and the bankrupt, and of 20*l.* paid to the trustee, it was held that, having regard to the surrounding circumstances, the first mortgage was kept alive as against a second mortgagee, subject to whose claim the equity of redemption was conveyed. *Adams* v. *Angell*, 5 Ch. Div. 634.

Smith v. *Phillips* (1 Kee. 694), where, under similar circumstances, the first mortgage was held to be merged, would probably not now be followed.

Merger of term.

Where mortgagees of a term vested in a trustee for them took a conveyance of the fee simple, which was not subject to the mortgage, from the assignees in bankruptcy of the mortgagor, and released them from the mortgage debt, it was held that they could avail themselves of the term against the right of the mortgagor's widow to dower. *Anderson* v. *Pignet*, 8 Ch. 180.

B. Order for Foreclosure Absolute.

The effect of an order for foreclosure absolute is to vest the ownership of, and the beneficial title to, the land in respect of which it is obtained in the person who previously was a mere incumbrancer. The equitable estate of the mortgagor is transferred to the mortgagee as effectually as if it had been conveyed or re-leased. *Casborne* v. *Scarfe*, 1 Atk. 603; 2 J. & W. 194; *Silberschildt* v. *Schiott*, 3 V. & B. 45; *Le Gros* v. *Cockerell*, 5 Sim. 384; *Heath* v. *Pugh*, 6 Q. B. Div. 345, 360.

If, after the order of foreclosure absolute, the mortgagee sues the mortgagor on his covenant or bond, the mortgagor acquires a new right to redeem, even though he has parted with the equity of redemption. *Perry* v. *Barker*, 8 Ves. 527; 13 Ves. 198; *Lockhart* v. *Hardy*, 9 B. 349; *Palmer* v. *Hendrie*, 27 B. 349; 28 B. 341; *Kinnaird* v. *Trollope*, 39 Ch. D. 636. Suing mortgagor after foreclosure.

Even apart from this case, the Court will give the mortgagor a new right of redemption wherever it appears equitable to do so. *Jones* v. *Creswicke*, 9 Sim. 304; *Ford* v. *Wastell*, 6 Ha. 229; 2 Ph. 591; *Thornhill* v. *Manning*, 1 Sim. N. S. 451; *Patch* v. *Ward*, L. R. 3 Ch. 203; *Campbell* v. *Holyland*, 7 Ch D. 166; *Ingham* v. *Sutherland*, 63 L. T. 614. Opening foreclosure.

A sale by the mortgagee after the order for foreclosure absolute to one of the persons entitled to redeem at a price equal to the amount due on the mortgage, and made payable at the expiration of five years, with interest meantime at a lower rate than that secured by the mortgage, does not open the foreclosure. *In re Power & Carton's Contract*, 25 L. R. Ir. 459. Sale after foreclosure.

As to whether a foreclosure is opened by an agreement to sell under the power of sale in the mortgage-deed, see *Watson* v. *Marston*, 4 D. M. & G. 230, 240; *In re Alison*, 11 Ch. Div. 284.

A foreclosure has been opened as against a purchaser from the mortgagee, who contracted to purchase before the order for foreclosure absolute. *Campbell* v. *Holyland*, 7 Ch. D. 166; see *In re Power & Carton's Contract*, 25 L. R. Ir. 459.

The exercise of the power of opening the foreclosure is a matter for the discretion of the Court.

The mortgagor must come promptly in order to entitle himself to this indulgence. *Thornhill* v. *Manning*, 1 Sim. N. S. 451; *Campbell* v. *Holyland*, 7 Ch. D. 166.

The fact that the mortgagor has not paid at the appointed time by reason of inevitable accident (*Nanfan* v. *Perkins*, 9 Sim. 308 *n.*; *Jones* v. *Creswicke*, 9 Sim. 304; *Patch* v. *Ward*, L. R. 3 Ch. 203, 212), or under the reasonable belief that the mortgagee would extend the time for payment (*Thornhill* v. Under what circumstances foreclosure is opened.

Manning, 1 Sim. N. S. 451; *Campbell* v. *Holyland*, 7 Ch. D. 166), that the estate is much more valuable than the mortgage debt (*Ford* v. *Wastell*, 6 Ha. 229; 2 Ph. 291; *Campbell* v. *Holyland*, 7 Ch. D. 166; *Beaton* v. *Boulton*, (1891) W. N. 30), or that it has a special value to the mortgagor (*Campbell* v. *Holyland*, *supra*), are circumstances to induce the Court to open the foreclosure.

A foreclosure has been opened where the mortgagee received rents between the report and the day fixed for redemption (*Joachim* v. *McDouall*, 9 Sim. 314 *n.*), but not where a receiver appointed in the action had received rents for which he had not accounted (*Ingham* v. *Sutherland*, 63 L. T. 614).

Terms on which foreclosure opened.

After the order for foreclosure absolute the mortgagee is entitled to treat the estate as his own. The mortgagor, therefore, will only be allowed to redeem on the terms of repaying expenditure incurred on the estate by the mortgagee. *Thornhill* v. *Manning*, 1 Sim. N. S. 451, 456.

C. Dismissal of Redemption Action.

If a mortgagor brings an action for the redemption of a formal mortgage, and it is dismissed for any reason, except for want of prosecution, the dismissal operates as a decree for foreclosure against him. *Cholmley* v. *Countess Dowager of Oxford*, 2 Atk. 267; *Bishop of Winchester* v. *Paine*, 11 Ves. 194; *Hansard* v. *Hardy*, 18 Ves. 455, 460; *Inman* v. *Wearing*, 3 De G. & Sm. 729; *Marshall* v. *Shrewsbury*, 10 Ch. 250.

This rule applies where the mortgage is in the form of a conveyance on trust for sale. *In re Alison*, 11 Ch. Div. 284, 293.

It does not apply where redemption is sought by an equitable mortgagee by deposit of title-deeds. *Marshall* v. *Shrewsbury*, 10 Ch. 250.

Against whom dismissal operates as foreclosure.

The dismissal of the action operates as a foreclosure only as against the person seeking redemption, and not as against a defendant to the action who is given a permissive right to redeem by the decree, or as against a person having a prior right to redeem who has waived his right in favour of the

plaintiff. *Chappell* v. *Rees*, 1 D. M. & G. 393; *Ex parte Paine*, 3 D. J. & S. 458.

D. Limitation of Redemption Action.

The Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), enacts— Real Property Limitation Act, 1874, s. 7.

Sect. 7. When a mortgagee shall have obtained the possession or receipt of the profits of any land or the receipt of any rent comprised in his mortgage, the mortgagor or any person claiming through him, shall not bring any action or suit to redeem the mortgage but within twelve years next after the time at which the mortgagee obtained such possession or receipt, unless in the mean time an acknowledgment in writing of the title of the mortgagor, or of his right to redemption, shall have been given to the mortgagor or some person claiming his estate, or to the agent of such mortgagor or person, signed by the mortgagee or the person claiming through him; and in such case no such action or suit shall be brought but within twelve years next after the time at which such acknowledgment, or the last of such acknowledgments, if more than one, was given.

The section further provides (1) that an acknowledgment given to one of several mortgagors shall be as effectual as if it had been given to all, (2) that an acknowledgment signed by one or more of several mortgagees shall be effectual only as against the signer or signers, and (3) that, where a signer is entitled to a divided part of the land or rent mortgaged, and not to any ascertained part of the mortgage money, the mortgagor may redeem the divided part on payment, with interest, of an amount bearing the same proportion to the whole of the mortgage money as the value of the divided part bears to the value of the whole property in mortgage.

This section substantially reproduces sect. 28 of the Real Property Limitation Act, 1833.

A mortgage by way of trust for sale is a mere mortgage, and the mortgagor's right to redeem is barred by this section. *Locking* v. *Parker*, 8 Ch. 30; *In re Alison*, 11 Ch. Div. 284. Mortgage on trust for sale.

Time from which Statute runs.

The statute runs from the time when the mortgagee took possession as mortgagee. Possession from an earlier time under another title does not coalesce with the possession as mortgagee. *Markwick* v. *Hardingham*, 15 Ch. Div. 339, 351.

Thus, where a mortgagee takes possession as assignee of a life interest in the equity of redemption, time does not run against the remainderman until the death of the tenant for life. *Corbett* v. *Barker*, 3 Anst. 755; *Reeve* v. *Hicks*, 2 Si. & St. 403; *Raffety* v. *King*, 1 Kee. 601.

The mortgagor's title is barred as to any land of which the mortgagee has been in possession without acknowledgment during the statutory period, although the mortgagor has been in possession within that period of other land comprised in the mortgage. *Kinsman* v. *Rouse*, 17 Ch. D. 104.

Disabilities.

No allowance is made to the mortgagor for disabilities under this section. *Kinsman* v. *Rouse*, 17 Ch. D. 104 (Act of 1833); *Forster* v. *Patterson*, 17 Ch. D. 132 (Act of 1874).

Welsh mortgage.

In the case of a Welsh mortgage, the statute does not run against the mortgagor until the mortgagee has paid himself by perception of rents and profits. *Yates* v. *Hambly*, 2 Atk. 360, 362; *Walters* v. *Webb*, 5 Ch. 531.

Acknowledgment by one of several mortgagees,

The provisions as to acknowledgment by some of several mortgagees apply only where they have separate interests either in the money or in the land. An acknowledgment by one of two joint mortgagees who, on the face of the deed, are shown to be trustees, is wholly inoperative. *Richardson* v. *Younge*, 10 Eq. 275; 6 Ch. 478.

after right is barred,

An acknowledgment made after the statute has barred the right of redemption does not revive it. *In re Alison*, 11 Ch. Div. 284, 296; *Markwick* v. *Hardingham*, 15 Ch. Div. 339, 346; *Sanders* v. *Sanders*, 19 Ch. Div. 373, not following *Stansfield* v. *Hobson*, 16 B. 236; 3 D. M. & G. 620. *Pendleton* v. *Rooth* (1 D. F. & J. 81) was decided upon the law before the Act.

The decisions that an acknowledgment made after the statutory bar has accrued is ineffectual may be supported either on the words "in the mean time" in sect. 7, or on sect. 34 of the Act of 1833.

An acknowledgment to a bankrupt mortgagor has no effect. It cannot be made use of either by the trustee in bankruptcy or by the mortgagor in an action for redemption after the annulment of the bankruptcy. *Markwick* v. *Hardingham*, 15 Ch. Div. 339, 352. to bankrupt mortgagor.

E. Limitation of Right to recover Surplus Proceeds of Sale.

The mortgagee, so far as he is merely a constructive trustee of the surplus proceeds, has always been entitled to the benefit of the Statutes of Limitation. Therefore, evidence cannot be brought, after the expiration of six years from receipt of the sale moneys by the mortgagee, to show that there was a surplus, and thereby impose a constructive trust upon him. *Banner* v. *Berridge*, 18 Ch. D. 254, 269. See *Townshend* v. *Townshend*, 1 B. C. C. 550; *Beckford* v. *Wade*, 17 Ves. 87; *Saar* v. *Ashwell*, (1893) 2 Q. B. 390. Where mortgagee is constructive trustee.

Receipt of sale moneys by the solicitor employed by the mortgagee to conduct the sale is receipt by the mortgagee. *Thorne* v. *Heard*, (1893) 3 Ch. 530; (1894) 1 Ch. 599; (1895) A. C. 495. Receipt by solicitor employed in sale.

Where two mortgagees concur in a sale and employ the same solicitor, each is only deemed to have received so much of the sale moneys as he expressly authorized the solicitor to receive. *West London Commercial Bank* v. *Reliance Building Society*, 29 Ch. Div. 954.

Express trustees are now protected by the Trustee Act, 1888 (51 & 52 Vict. c. 59), which (sect. 8) enables a trustee to set up the Statute of Limitations as if he had not been a trustee, except where the claim, (1) is founded upon any fraud or fraudulent breach of trust to which he was party or privy, or (2) is to recover trust property or the proceeds thereof still retained by him, or (3) previously received by him and converted to his use. See *How* v. *Earl Winterton*, (1896) 2 Ch. 626. Trustee Act, 1888, s. 8.

As to the exceptions in the statute, (1) is confined to cases where the trustee has personally participated in the fraud, and

(2) to cases where, at the date of the writ, he has the property in his hands or under his control. *Thorne* v. *Heard, supra.*

Concealed fraud.

Concealed fraud, in order to take a case out of the Statute of Limitations, must be fraud imputable to the person who seeks the protection of the statute. If the fraud is committed by his agent, the agent must be acting within the scope of his authority and for the benefit of the principal.

Hence, where a solicitor employed by a mortgagee to sell the mortgaged property misapplies the surplus proceeds of sale, the cause of action accrues to the mortgagor as against the mortgagee at the time when the misapplication takes place, and not at the time when it is discovered. *Thorne* v. *Heard, supra.*

CHAPTER LVI.

JURISDICTION.

A. Proceedings in Equity.

The Judicature Act, 1873 (36 & 37 Vict. c. 66), assigns (sect. 34) to the Chancery Division of the High Court of Justice (subject to any rules of Court or orders of transfer to be made under the authority of the Act) all causes and matters for the redemption or foreclosure of mortgages, the raising of portions or other charges on land, and the sale and distribution of the proceeds of property subject to any lien or charge. Judicature Act, 1873, s. 34.

The jurisdiction may be affected by (i.) the local situation of the property mortgaged or charged, (ii.) the amount of the debt, (iii.) circumstances relating to the mortgagor, or (iv.) circumstances relating to the mortgagee.

I. As to the jurisdiction over foreign property—

1. Where movable property is validly transferred, either by way of sale or charge, according to the law of the country where it is situated, whether in pursuance of a contract made in that country or by the judgment of a court of law of that country, the transfer is valid everywhere and as against all the world. *Cammell* v. *Sewell*, 3 H. & N. 617; 5 H. & N. 728; *Hooper* v. *Gumm*, L. R. 2 Ch. 282; *Castrique* v. *Imrie*, L. R. 4 H. L. 414; *Colonial Bank* v. *Cady*, 15 App. Cas. 267; *In re Queensland Mercantile Co.*, (1891) 1 Ch. 536; (1892) 1 Ch. 219; *Alcock* v. *Smith*, (1892) 1 Ch. 238. 1. Movables out of the jurisdiction.

Where a contract is entered into which is valid according to the law of the country in which it is made, with the intention of transferring movable property in another country, the contract will be enforced as between the parties, although

the transfer is invalid according to the law of the country where the property is situated. *Lee* v. *Abdy*, 17 Q. B. D. 309; *Colonial Bank* v. *Cady*, 15 App. Cas. 267.

2. Immovables out of the jurisdiction.

2. The jurisdiction of a Court of Equity is exercised *in personam*. It acts only upon the conscience of the party against whom relief is sought. Its authority over immovables out of the jurisdiction is based on its authority over the person of a defendant within the jurisdiction. *Penn* v. *Lord Baltimore*, 1 Ves. S. 444, 454; *Bushby* v. *Munday* 5 Madd. 297, 307; *Lord Portarlington* v. *Soulby*, 3 My. & K. 104, 108; *British South Africa Co.* v. *Companhia de Moçambique*, (1893) A. C. 602, 626.

Jurisdiction arising from contract.

(*a*) Where an agreement has been entered into between persons within the jurisdiction, with the intention of creating a valid charge upon immovables out of the jurisdiction, a Court of Equity will enforce the charge as between the parties, although the agreement did not in fact create a valid charge under the *lex loci rei sitæ*. *Ex parte Pollard*, Mont. & Ch. 239.

Jurisdiction arising from fraud.

(*b*) Where a person claiming a charge on immovables out of the jurisdiction has an equity to enforce the charge against a person in possession of the immovables who is within the jurisdiction, the Court will enforce the charge against that person, although there is no direct contract between him and the person claiming the charge. *Lord Cranstown* v. *Johnston*, 3 Ves. 170; *Mercantile Investment Co.* v. *River Plate Trust Co.*, (1892) 2 Ch. 303.

Thus, where a company domiciled in Connecticut created a charge on land in Mexico for payment of a debenture debt, which was invalid under Mexican law, and subsequently sold the land to an English company subject to the charge, part of the consideration for the sale being the undertaking of the English company to pay the debentures, it was held that the English company were liable to the debenture-holders for proceeds of such land come to their hands. *Mercantile Investment Co.* v. *River Plate Trust Co.*, (1892) 2 Ch. 303.

In the exercise of this jurisdiction, the Court will appoint a receiver or make an order for sale or foreclosure of land out

of the jurisdiction. *Toller* v. *Cartaret*, 2 Vern. 494; *Beckford* v. *Kemble*, 1 Si. & St. 7; *Paget* v. *Ede*, 18 Eq. 118; *In re Longdendale Cotton Spinning Co.*, 8 Ch. D. 150.

But except in cases of contract or fraud, the Courts will not entertain a claim depending on the title to foreign immovables. *Norris* v. *Chambers*, 29 B. 246; 3 D. F. & J. 583; *In re Hawthorne*, 23 Ch. D. 743.

II. An action cannot be brought in the High Court to enforce a charge for an amount under 10*l*. *Westbury-on-Severn Sanitary Authority* v. *Meredith*, 30 Ch. Div. 387. Jurisdiction as affected by amount of debt.

The County Courts Act, 1888 (51 & 52 Vict. c. 43), sect. 67, confers on county courts all the powers and authority of the High Court in actions for foreclosure or redemption, or for enforcing any charge or lien, where the mortgage, charge, or lien shall not exceed in amount the sum of five hundred pounds. County Courts Act, 1888, s. 67.

Sect. 75 provides that proceedings which relate to the recovery or sale of any mortgage, charge, or lien on lands, tenements, or hereditaments, shall be taken in that court within the districts of which the lands, tenements, or hereditaments, or any part thereof, are situate. S. 75.

III. As to the effect of the mortgagor's bankruptcy upon the jurisdiction—

The Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), enacts— Bankruptcy Act, 1883, s. 102.

Sect. 102, (1). Subject to the provisions of this Act, every court having jurisdiction in bankruptcy under this Act shall have full power to decide all questions of priorities, and all other questions whatsoever, whether of law or fact, which may arise in any case of bankruptcy coming within the cognizance of the Court, or which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case.

Provided that the jurisdiction hereby given shall not be exercised by the county court for the purpose of adjudicating upon any claim, not arising out of the bankruptcy, which might heretofore have been enforced by action in the High Court, unless all parties to the proceeding consent thereto

or the money, money's worth, or right in dispute does not in the opinion of the judge exceed in value two hundred pounds.

The jurisdiction conferred by this section is identical with that conferred by sect. 72 of the Bankruptcy Act, 1869. *In re Lowenthal*, 13 Q. B. D. 238.

There is no similar jurisdiction conferred upon the Court in winding-up. *In re Ilkley Hotel Co.*, (1893) 1 Q. B. 248.

1. Trustee claiming by higher title.

1. Where by the operation of the bankruptcy law the trustee claims by a higher and better title than the bankrupt, where, for instance, a transaction is impeached as a fraudulent preference or an act of bankruptcy, the Court of Bankruptcy has, under this section, jurisdiction, and ought to entertain it. *Ex parte Brown*, 11 Ch. Div. 148.

The Court of Bankruptcy has also jurisdiction where the trustee seeks to set aside a mortgage made by the bankrupt as fraudulent under 13 Eliz. c. 5. It is doubtful whether, if the mortgagee objects, the Court ought to exercise its jurisdiction. *Ex parte Butters*, 14 Ch. Div. 265.

At any rate, the County Court ought not to exercise its bankruptcy jurisdiction, either in cases of fraudulent preference or under 13 Eliz. c. 5, where the mortgagee objects on the ground that the amount at stake is large and that questions of character are involved. *Ex parte Armitage*, 17 Ch. Div. 13; *Ex parte Price*, 21 Ch. Div. 553.

2. Trustee claiming in same right as bankrupt.

2. Where the trustee claims only the same right as the bankrupt himself would have had, the Court of Bankruptcy, even if it has jurisdiction, ought not to exercise it. *Ellis* v. *Silber*, 8 Ch. 83; *Ex parte Dickin*, 8 Ch. Div. 377; *Ex parte Musgrave*, 10 Ch. Div. 94; *Ex parte Brown*, 11 Ch. Div. 148; *In re Champagné*, (1893) W. N. 153.

Where the Court has jurisdiction, and the only question is whether it ought to exercise it, the objection to its exercising it ought to be taken at the earliest opportunity. *Ex parte Swinbanks*, 11 Ch. Div. 525; *Ex parte Butters*, 14 Ch. Div. 265.

3. Proceedings against trustee.

3. The bankruptcy of the mortgagor does not affect the right of the mortgagee, whether legal or equitable, or of his

trustee in bankruptcy, to realize his security, either by foreclosure or sale, in the Chancery Division. *White* v. *Simmons*, 6 Ch. 555; *Ex parte Pannell*, 6 Ch. Div. 335; *Waddell* v. *Toleman*, 9 Ch. D. 212; *Ex parte Hirst*, 11 Ch. D. 278; Bankruptcy Act, 1883, sect. 9, (2).

But where a mortgagee is willing to submit the determination of his rights to the Court in Bankruptcy, the trustee in bankruptcy ought not to raise objections. *Ex parte Fletcher*, 9 Ch. Div. 381.

IV. As to the jurisdiction over mortgages to building and other societies—

1. The Building Societies Act, 1874 (47 & 48 Vict. c. 41), provides (sect. 2) that the word "disputes" in the Building Societies Acts, or in the rules of any society thereunder, shall be deemed to refer only to disputes between the society and a member, or any representative of a member in his capacity of a member of the society, unless by the rules for the time being it shall be otherwise expressly provided; and, in the absence of such express provision, shall not apply to any dispute between any such society and any member thereof, or other person whatever, as to the construction or effect of any mortgage deed, . . . and shall not prevent any society, or any member thereof, or any person claiming through or under him, from obtaining in the ordinary course of law any remedy in respect of any such mortgage . . . to which he or the society would otherwise be by law entitled. Building societies under the Act of 1874.

The words "any such mortgage" in the latter part of the section mean any mortgage, and not merely any mortgage as to the construction or effect of which there is a dispute. Hence, a society may bring an action against a member on the covenant contained in his mortgage, although the rules provide that any dispute arising between the society and a member shall be referred to arbitration. *Western Suburban Building Society* v. *Martin*, 17 Q. B. Div. 609.

As to the law before the Act, see *Municipal Building Society* v. *Kent*, 9 App. Cas. 260.

2. The provisions for arbitration made by the Act 6 & 7 Wm. IV. c. 32, and the Act 10 Geo. IV. c. 56, therewith Building societies under the Act of 1836.

incorporated, apply only to disputes between the society and its members as such, and not to disputes arising out of mortgages made by members of the society. *Morrison* v. *Glover*, 4 Ex. 430; *Fleming* v. *Self*, 3 D. M. & G. 997; *Reg.* v. *Trafford*, 4 E. & B. 122; *Farmer* v. *Giles*, 5 H. & N. 753; *Mulkern* v. *Lord*, 4 App. Cas. 182.

Friendly and other societies.

3. As to the decision of disputes between friendly societies and their members, see sect. 68 of the Friendly Societies Act, 1896 (59 & 60 Vict. c. 25).

As to Industrial and Provident Societies, see sect. 49 of the Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39).

B. Proceedings in Admiralty.

Judicature Act, 1873, s. 34.

The Judicature Act, 1873 (sect. 34), assigns to the Probate, Divorce, and Admiralty Division, subject to any rules of Court or orders of transfer to be made under the authority of the Act, all causes and matters which would have been within the exclusive cognizance of the High Court of Admiralty if the Act had not passed.

Maritime liens.

The High Court of Admiralty had jurisdiction in cases of maritime lien. See, as to seaman's wages and master's wages and disbursements, sect. 10 of the Admiralty Court Act, 1861 (24 Vict. c. 10), as to salvage and towage, sect. 6 of the Admiralty Court Act, 1840 (3 & 4 Vict. c. 65), as to damage done by any ship, sect. 7 of the Act of 1861. See also, as to salvage, sect. 565 of the Merchant Shipping Act, 1894.

As to restrictions on Admiralty proceedings for the recovery of wages not exceeding fifty pounds, see sect. 165 of the Merchant Shipping Act, 1894.

Set-off.

The Court may, under sect. 167, (3), of the Merchant Shipping Act, 1894, adjudicate upon questions of set-off arising in an Admiralty proceeding by a master for wages and disbursements.

Registered mortgages.

The High Court of Admiralty had also jurisdiction, by sect. 11 of the Admiralty Court Act, 1861, over any claim

in respect of any registered mortgage, whether the ship or the proceeds thereof were under arrest of the Court or not.

Jurisdiction of County Courts.

The jurisdiction of County Courts having Admiralty jurisdiction is determined by the County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71), sect. 3, and the County Courts Admiralty Jurisdiction Amendment Act, 1869 (32 & 33 Vict. c. 51), sects. 2, 3, and 4.

Vice-Admiralty Courts.

The jurisdiction of Vice-Admiralty Courts is determined by sect. 10 of the Vice-Admiralty Courts Act, 1863 (26 Vict. c. 24).

Where a company is being wound up, proceedings to enforce a maritime lien against a ship of the company should be taken before the judge to whose Court the winding-up is attached. *In re Australian Steam Navigation Co.*, 20 Eq. 325.

Where a ship is mortgaged and the mortgagee is not a party to the winding-up, the person claiming a lien should apply in the winding-up for leave to proceed in Admiralty. *In re Rio Grande do Sul Steamship Co.*, 5 Ch. Div. 282.

Bottomry and respondentia bonds.

As to the Admiralty jurisdiction over bottomry and respondentia bonds, see *Royal Arch*, Swa. 269; *Helgoland*, Swa. 491; *Cargo ex Sultan*, Swa. 504.

As to the jurisdiction in Chancery, see *Duncan* v. *McCalmont*, 3 B. 409; *Glascott* v. *Lang*, 2 Ph. 310.

General average lien.

The lien for general average was not enforceable in Admiralty, but where the cargo was in the master's possession, the Court of Admiralty would not deprive him of possession without satisfying his lien. *Constancia*, 2 W. R. 487; *North Star*, 1 Lush. 45; *Cargo ex Galam*, Br. & Lush. 167; *Daring*, L. R. 2 A. & E. 260.

CHAPTER LVII.

ACTIONS FOR FORECLOSURE OR REDEMPTION.

Mortgagor cannot make mortgagee party without offering to redeem.

NEITHER the mortgagor nor any one claiming under him can make a mortgagee party to any suit he may entertain without offering to redeem. *Tasker* v. *Small*, 3 My. & Cr. 63, 69; *Dalton* v. *Hayter*, 7 B. 313, 319; *Inman* v. *Wearing*, 3 De G. & Sm. 729; *Gordon* v. *Horsfall*, 5 Moo. P. C. 393; *Knight* v. *Bowyer*, 2 De G. & Jo. 421, 446; *Hughes* v. *Cook*, 34 B. 407; *Jefferys* v. *Dickson*, L. R. 1 Ch. 183, 189.

The rule does not apply to annuities charged upon an estate, whether redeemable or irredeemable. *Knight* v. *Bowyer*, 2 De G. & Jo. 421, 446.

Mortgagor enforcing trusts of equity of redemption.

The rule does not apply where the parties stand in other relations as well as that of mortgagor and mortgagee. Thus if the mortgagee becomes party to a deed whereby trusts are created affecting the equity of redemption, any person interested in those trusts may enforce their due performance without offering redemption. *Jefferys* v. *Dickson*, L. R. 1 Ch. 183.

Plaintiff impeaching mortgage security.

Where the plaintiff impeaches the mortgage security, while the defendant insists on his rights as mortgagee and nothing more, the plaintiff will not be allowed to have a decree for redemption on a bill which disputes the existence of the mortgage relation, and which contains no prayer for redemption. *Martinez* v. *Cooper*, 1 Russ. 198, 215; *Gordon* v. *Horsfall*, 5 Moo. P. C. 393; *Johnson* v. *Fesenmeyer*, 25 B. 88, 96; *Crenver Mining Co.* v. *Willyams*, 35 B. 353.

But where the defendant to such an action sets up a title as absolute owner, the plaintiff will be allowed to redeem in the same action. *National Bank of Australasia* v. *United Hand-in-Hand Co.*, 4 App. Cas. 391.

Application under Order LIV. A. r. 1.

Under Order LIV. A., rule 1, a mortgagor may apply for the determination of a question of construction arising under the mortgage deed without offering to redeem. *In re Nobbs*, (1896) 2 Ch. 830.

Partition action.

A mortgagee of property held in common cannot, without his consent, be made party to an action for partition of the equity of redemption. *Swan* v. *Swan*, 8 Pri. 518; *Waite* v. *Bingley*, 21 Ch. D. 674; *Sinclair* v. *James*, (1894) 3 Ch. 554.

The owner of an undivided share in property who has mortgaged it cannot combine in the same action a claim against his mortgagee for redemption with a claim for partition against another defendant. *Gibbs* v. *Haydon*, 30 W. R. 726; *Sinclair* v. *James*, (1894) 3 Ch. 554.

A prior incumbrancer is not bound to come in under a decree obtained by a puisne incumbrancer, but may institute a suit of his own. *Arnold* v. *Bainbrigge*, 2 D. F. & J. 92.

Commencement of action by originating summons.

As to how the action may be commenced, Order LV., rule 5*a*, provides—

Any mortgagee or mortgagor, whether legal or equitable, or any person entitled to or having property subject to a legal or equitable charge, or any person having the right to foreclose or redeem any mortgage, whether legal or equitable, may take out as of course an originating summons, returnable in the chambers of a judge of the Chancery Division for such relief of the nature or kind following as may by the summons be specified, and as the circumstances of the case may require; that is to say—

Sale, foreclosure, delivery of possession by the mortgagor, redemption, re-conveyance, delivery of possession by the mortgagee.

The Court has no jurisdiction to decide a question of priority between mortgagees on an originating summons. *In re Giles*, 43 Ch. Div. 391.

Parties to the Action.

An action for redemption must be so constituted in respect of parties and otherwise, and the decree made in it must be

such as to enable the Court to do complete justice, not only to the plaintiffs and the incumbrancers whom they seek to redeem, but to all other parties before or behind them, whose redemption or foreclosure may be necessary to work out the equities of the case. *Bishop of Winchester* v. *Beavor*, 3 Ves. 314; *Palk* v. *Clinton*, 12 Ves. 48; *Henley* v. *Stone*, 3 B. 355; *Thorneycroft* v. *Crockett*, 2 H. L. C. 239; *Anderson* v. *Stather*, 2 Coll. 209; *Caddick* v. *Cook*, 32 B. 70; *Jennings* v. *Jordan*, 6 App. Cas, 698, 704.

Foreclosure action.

1. A mortgagee foreclosing must foreclose the ultimate equity of redemption; but a puisne mortgagee who brings an action to foreclose subsequent mortgagees and the mortgagor is not obliged at the same time to redeem prior mortgagees.

Hence, prior incumbrancers are not, but all subsequent incumbrancers are, necessary parties to a foreclosure action. *Rose* v. *Page*, 2 Sim. 471; *Brisco* v. *Kenrick*, 1 Coop. t. Cott. 371; *Slade* v. *Rigg*, 3 Ha. 35, 38; *Richards* v. *Cooper*, 5 B. 304.

Joint mortgagees are necessary parties.

One of several joint mortgagees cannot foreclose without making the others parties. They may be made defendants, if they are unwilling to be joined as plaintiffs, or have done some act which precludes them from being so joined. *Lowe* v. *Morgan*, 1 B. C. C. 368; *Palmer* v. *Earl of Carlisle*, 1 Si. & St. 423; *Davenport* v. *James*, 7 Ha. 249; *Luke* v. *South Kensington Hotel Co.*, 11 Ch. Div. 121.

Redemption action.

2. Where there are several successive mortgagees, the mortgagor or a puisne mortgagee can redeem the mortgagee next before him without redeeming any other, but if he wishes to redeem any anterior mortgagee, he must also redeem all who are between that mortgagee and himself. *Teevan* v. *Smith*, 20 Ch. Div. 724, 729.

3. Where a puisne mortgagee brings an action for redemption, he must also foreclose all persons between him and the ultimate equity of redemption. *Teevan* v. *Smith*, 20 Ch. D. 724, 729.

Hence, where a puisne mortgagee brings an action for redemption, the mortgagor and all incumbrancers subsequent to the mortgagee redeeming are necessary parties. *Fell* v.

Brown, 2 B. C. C. 276; *Palk* v. *Lord Clinton*, 12 Ves. 48, 58; *Farmer* v. *Curtis*, 2 Sim. 466; *Ramsbottom* v. *Wallis*, 5 L. J. N. S. Ch. 92; *Johnson* v. *Holdsworth*, 1 Sim. N. S. 106, 109.

Mortgage of two estates.

Where two different estates are mortgaged, a person entitled to redeem one estate cannot bring an action to redeem without making the persons entitled to the equity of redemption in the other estate parties. *Palk* v. *Lord Clinton*, 12 Ves. 48; *Cholmondeley* v. *Clinton*, 2 J. & W. 1, 134; *Hall* v. *Heward*, 32 Ch. Div. 439.

But a puisne mortgagee of two properties, each of which has previously been mortgaged separately, may redeem either or both of the prior mortgagees; and, according as he redeems one or both, must foreclose his mortgagor as to that one or as to both. *Pelly* v. *Wathen*, 7 Ha. 364.

Tenants in common.

Where two tenants in common mortgage an estate, one cannot bring an action to redeem without making the other a party. *Bolton* v. *Salmon*, (1891) 2 Ch. 48.

Surety.

A surety who mortgages his estate as a collateral security is (*a*), but a surety merely by covenant is not (*b*) a necessary party to an action for foreclosure against the principal debtor. (*a*) *Stokes* v. *Clendon*, 2 B. C. C. 276 *n.*; 3 Sw. 150 *n.* (*b*), *Newton* v. *Earl of Egmont*, 4 Sim. 574; *Gedye* v. *Matson*, 25 B. 310.

Heir, executor.

The heir of a mortgagor of real estate, whether the mortgage is in fee or for a long term of years, is, but the executor is not, a necessary party to a foreclosure action. *Fell* v. *Brown*, 2 B. C. C. 276, 279; *Bradshaw* v. *Outram*, 13 Ves. 234; *Farmer* v. *Curtis*, 2 Sim. 466.

Tenant for life.

Where the tenant for life of an equity of redemption had mortgaged his life estate for a term of two hundred years, and a purchaser from the mortgagee under his power of sale brought an action to redeem incumbrances on the fee, it was held that the tenant for life was a necessary party. *Hunter* v. *Macklew*, 5 Ha. 238.

The personal representative of a tenant for life of a mortgaged estate is not a necessary party to an action for foreclosure against the remainderman, although the mortgagee claims arrears of interest which accrued due during the tenancy for life. *Wynne* v. *Styan*, 2 Ph. 303.

Patron of living.

The patron of a living is not a necessary party to an action for foreclosure of glebe-land charged by the vicar. *Goodden* v. *Coles*, 59 L. T. 309.

Trustees represent the trust estate.

Trustees, executors, and administrators may sue and be sued on behalf of or as representing the property or estate of which they are trustees or representatives, without joining any of the persons beneficially interested in the trust or estate, and shall be considered as representing such persons. . . . This rule shall apply to trustees, executors, and administrators, sued in proceedings to enforce a security by foreclosure or otherwise. Rules of the Supreme Court, Order XVI., rule 8. See *In re Booth & Kettlewell's Contract*, 62 L. J. Ch. 40.

Before the last proviso was added to this rule, it was held that, though trustees sufficiently represented their *cestuis que trust* as plaintiffs in a redemption action (*a*), they did not sufficiently represent them as defendants to an action of foreclosure (*b*), unless it was probable that the trustees, from being executors or otherwise, had funds in hand sufficient to enable them to redeem (*c*). (*a*) *Jennings* v. *Jordan*, 6 App. Cas. 698. (*b*) *Goldsmid* v. *Stonehewer*, 9 Ha. App. xxxviii.; *Coles* v. *Forrest*, 10 B. 557; *Francis* v. *Harrison*, 43 Ch. D. 183; *Wavell* v. *Mitchell*, 64 L. T. 560. (*c*) *Hanman* v. *Riley*, 9 Ha. 41; *Sale* v. *Kitson*, 3 D. M. & G. 119; *In re Mitchell*, 65 L. T. 851.

Inheritance, how represented.

Where a mortgaged estate is in settlement, the person entitled to the first estate of inheritance and the intermediate remaindermen for life must be brought before the Court. *Gore* v. *Stacpoole*, 1 Dow, 18, 31.

The first tenant in tail in being, and, if there is no tenant in tail in being, the first person entitled to the inheritance, and if there is no such person, then the tenant for life sufficiently represents the inheritance. *Lloyd* v. *Johnes*, 9 Ves. 37, 55; *Cockburn* v. *Thompson*, 16 Ves. 321, 326; *Giffard* v. *Hort*, 1 Sch. & L. 386, 408; *Cholmondeley* v. *Clinton*, 2 J. & W. 1, 133; *Gore* v. *Stacpoole*, 1 Dow, 18, 31.

The inheritance is not sufficiently represented by an owner in fee whose estate is subject to be defeated by a shifting use, conditional limitation, or executory devise. *Goodess* v. *Williams*, 2 Y. & C. C. 595.

Numerous persons with same interest.

Order XVI., rule 9, provides that, where there are numerous persons having the same interest in one cause or matter, one or more of such persons may sue or be sued, or may be authorized by the Court or a judge to defend in such cause or matter, on behalf or for the benefit of all persons so interested.

Where an action was brought to foreclose six properties, the equity of redemption in one of which was subject to debentures, it was held that an order under this rule appointing two debenture-holders to defend on behalf of the others did not enable the presence of the others to be dispensed with. *Griffith* v. *Pound*, 45 Ch. D. 553, 564.

Where a debenture-holder is sued in a representative capacity, an order should be obtained authorizing him to defend in that capacity. *Fairfield Shipbuilding Co.* v. *London & East Coast Steamship Co.*, (1895) W. N. 64.

Legal personal representative, when dispensed with.

Order XVI., rule 46, enables the Court, where a deceased person has no legal personal representative, to proceed in the absence of any person representing the estate of the deceased person or to appoint a representative for the purposes of the cause. See *Scott* v. *Streatham Estates Co.*, (1891) W. N. 153; *In re Richerson* (No. 2), (1893) 3 Ch. 146.

The power given by this rule will not be exercised where proceedings are actually pending for the appointment of a personal representative, or where duties would have to be performed by the personal representative if appointed. *Curtius* v. *Caledonian Insurance Co.*, 19 Ch. Div. 534.

An order for foreclosure absolute of leaseholds will not be made in the absence of a properly constituted representative of the mortgagor, although the mortgagor dies insolvent. *Aylward* v. *Lewis*, (1891) 2 Ch. 81.

Bankruptcy *pendente lite*.

Where a mortgagor becomes bankrupt in the course of a foreclosure or redemption action, his trustee in bankruptcy must be made a party. *Wood* v. *Surr*, 19 B. 551.

Assignment *pendente lite*.

Where a party to a redemption or foreclosure action assigns his interest *pendente lite*, the assignee is not a necessary party (*a*), but he is not entitled to object if the other party thinks it right to have him before the Court (*b*). (*a*) *Eades* v. *Harris*, 1 Y. & C. C. 230, 235; *Wood* v. *Surr*, 19 B. 551, 554; *Patch* v.

Ward, L. R. 3 Ch. 203, 208. (*b*) *Solomon* v. *Solomon*, 13 Sim. 516; *Johnston* v. *Thomas*, 11 B. 501; *Campbell* v. *Holyland*, 7 Ch. D. 166.

Stranger to mortgage.

As a rule, only the parties to the mortgage-deed or those claiming under them should be made parties to a foreclosure or redemption action. *Audsley* v. *Horn*, 26 B. 195.

A stranger to the mortgage who, under the authority of the mortgagee, has received and retains part of the mortgaged property, may be made a party to a suit for redemption. *Hood* v. *Easton*, 2 Jur. N. S. 729.

An objection for want of parties to a foreclosure suit ought to be taken in the suit before decree. *Bromitt* v. *Moor*, 9 Ha. 374.

Costs of Disclaiming Defendants.

As to the costs of disclaiming defendants in actions for foreclosure or redemption—

1. Defendant who never had or claimed interest.

1. Where a defendant disclaims in such a manner as to show that he never had and never claimed an interest, at or after the filing of the bill, he is entitled to his costs. *Gabriel* v. *Sturgis*, 5 Ha. 97; *Hiorns* v. *Holtom*, 16 Jur. 1077; *Hurst* v. *Hurst*, 22 L. J. Ch. 546; *Ford* v. *Earl of Chesterfield*, 16 B. 516; *Bellamy* v. *Brickenden*, 4 K. & J. 670; *Ward* v. *Shakeshaft*, 1 Dr. & Sm. 269; *Ridgway* v. *Kynnersley*, 2 H. & M. 565; *Earl of Cork* v. *Russell*, 13 Eq. 210; *Day* v. *Gudgen*, 2 Ch. D. 209.

2. Defendant disclaiming before suit.

2. If a defendant having an interest shows that he disclaimed or offered to disclaim before the institution of the suit, he is entitled to his costs. *Lock* v. *Lomas*, 15 Jur. 162; *Ford* v. *Earl of Chesterfield*, 16 B. 516.

3. Defendant disclaiming by answer.

3. Where a defendant having an interest allows himself to be made a party to the suit, and does not disclaim or offer to disclaim till he puts in his answer or disclaimer, he is not entitled to his costs. *Gibson* v. *Nichol*, 9 B. 403; *Buchanan* v. *Greenway*, 11 B. 58: *Grigg* v. *Sturgis*, 5 Ha. 93; *Ford* v. *Earl of Chesterfield*, 16 B. 516; *Ward* v. *Shakeshaft*, 1 Dr. & Sm. 269; *Furber* v. *Furber*, 30 B. 523; *Howkins* v. *Bennet*, 2 H. & M. 567 *n.*; *Roberts* v. *Hughes*, 6 Eq. 20.

A statement by the defendant in his answer that he would have disclaimed if he had been applied to does not entitle him to his costs. *Collins* v. *Shirley*, 1 R. & M. 638. *Gurney* v. *Jackson* (1 Sm. & G. 97), which appears to be *contra*, is doubted in *Ford* v. *Earl of Chesterfield*, *supra*.

Where a defendant disclaims by his answer, and the plaintiff replies to the disclaimer, and the defendant is in consequence compelled to go into evidence in support of the statement in his answer, the plaintiff must pay his costs of the evidence. *Ford* v. *Earl of Chesterfield*, 16 B. 516.

4. Defendant entitled to costs after disclaimer.

4. Where, after the institution of the suit, a defendant properly made a party offers to convey his interest or to disclaim, and does not ask for costs, he is entitled to his costs subsequently incurred. *Talbot* v. *Kemshead*, 4 K. & J. 93; *Ward* v. *Shakeshaft*, 1 Dr. & Sm. 269; *Davis* v. *Whitmore*, 28 B. 617; *Gowing* v. *Mowberry*, 11 W. R. 851; *Dillon* v. *Ashwin*, 12 W. R. 366; *Greene* v. *Foster*, 22 Ch. D. 566.

But he is not entitled to his costs if, after having disclaimed, he puts in an answer or appears on notice of motion for judgment against him. *Maxwell* v. *Wightwick*, L. R. 3 Eq. 210; *Clarke* v. *Tolman*, 42 L. J. Ch. 23; *Lewin* v. *Jones*, 53 L. J. Ch. 1011.

The doctrine of some of the earlier cases (such as *Silcock* v. *Roynon*, 2 Y. & C. C. 376) that a puisne mortgagee disclaiming is entitled to his costs as against the first mortgagee, who adds them to his security, is no longer correct. See *Ohrly* v. *Jenkins*, 1 De G. & Sm. 543. The form in *Pierson* v. *Grundell*, Seton, 1654, appears, therefore, to be incorrect.

The Judgment.

Form of judgment where mortgage is legal,

The ordinary form of judgment in an action for foreclosure or redemption of a legal mortgage provides that, on the mortgagor paying to the mortgagee the amount certified to be due by the chief clerk's certificate within six months from the date of the certificate, the mortgagee shall re-convey the mortgaged property to the mortgagor free from incumbrances, and deliver up to him (on oath, if required) all deeds and

writings in his custody or power relating thereto, but that in default of payment at the specified time in a foreclosure action, the mortgagor shall be foreclosed from his equity of redemption in the mortgaged property, or in a redemption action the action shall stand dismissed with costs. Seton, 1573, 1593.

Where mortgage is equitable.

In an action to foreclose an equitable mortgage, the judgment should declare that the plaintiff is entitled to a mortgage of the defendant's estate and interest in the property comprised in the deposit and agreement, or in the agreement as the case may be: and should direct that, in default of payment, the defendant will be foreclosed, that the mortgaged property will be discharged from all equity of redemption, and that a conveyance from the defendant to the plaintiff must be executed. *Lees* v. *Fisher*, 22 Ch. Div. 283; Seton, 1695.

A judgment for foreclosure will not be made under Order XV. rule 1. See *Smith* v. *Davies*, 28 Ch. D. 650; *Blake* v. *Harvey*, 29 Ch. Div. 827, 831; *Bissett* v. *Jones*, 32 Ch. D. 635.

The judgment is not an interlocutory order for the purpose of determining the time of appealing from it. *Smith* v. *Davies*, 31 Ch. Div. 595.

As to the practice, where an affidavit of documents is required, see *Weeks* v. *Stourton*, 11 Jur. N. S. 278.

As to the form of the judgment where the mortgage debt is payable by instalments, see *Greenough* v. *Littler*, 15 Ch. D. 93; Seton, 1698.

The judgment should show where one mortgagor, *e.g.* the mortgagor's trustee in bankruptcy, is entitled to redeem for less than others. *Knowles* v. *Dibbs*, 60 L. T. 291; Seton, 1628.

Foreclosure of term of one day in leaseholds.

As to the foreclosure, where leaseholds are mortgaged by sub-demise, of a reversionary term of one day, of which the mortgagor had declared himself trustee, see *British Empire Assurance Co.* v. *Sugden*, 47 L. J. Ch. 691.

Judgment where Crown is defendant.

The Crown cannot be foreclosed. Where the Crown is interested in the equity of redemption, the judgment will direct that, in default of payment, the mortgagee be at liberty

to hold the mortgaged property until the Crown shall think fit to redeem the same. *Hancock* v. *A.-G.*, 33 L. J. Ch. 661; Seton, 1702; *Bartlett* v. *Rees*, 12 Eq. 395.

Conveyance by equitable mortgagor.

The conveyance made by an equitable mortgagor to the mortgagee under an order for foreclosure is a conveyance on sale within sect. 54 of the Stamp Act, 1891, the consideration being whichever of the two amounts is less, the mortgage debt or the value of the mortgaged property. *Huntington* v. *Commissioners of Inland Revenue*, (1896) 1 Q. B. 422.

Where the mortgagor is an infant, the direction should be that he conveys upon attaining twenty-one. *Price* v. *Carver*, 3 My. & Cr. 157; *Mellor* v. *Porter*, 25 Ch. D. 158.

Where the interest of the mortgagor has become vested in the Crown, the Court will make an order for sale with the consent of the Attorney-General, but cannot direct the Crown to convey to a purchaser. *Hancock* v. *A.-G.*, *supra*; *Bartlett* v. *Rees*, *supra*.

Restraining transfer of legal estate

In an action by an equitable mortgagee for foreclosure or sale, an injunction was granted, on an *ex parte* application by the plaintiff, restraining the defendant from parting with the legal estate in the mortgaged premises. *London & County Banking Co.* v. *Lewis*, 21 Ch. D. 490.

Personal remedy of the mortgagee.

Since the Judicature Act the mortgagee may combine his personal remedy against the mortgagor with the action of foreclosure. *Dymond* v. *Croft*, 3 Ch. D. 512, 515; *Farrer* v. *Lacy, Hartland & Co.*, 25 Ch. D. 636; 31 Ch. Div. 42.

Form of judgment.

In such an action, he is entitled, if the debt and interest are proved, admitted, or agreed at the trial, to a judgment for immediate payment of principal, interest to date of judgment, and costs. If the debt and interest are not proved, admitted, or agreed at the trial, he is entitled to an account of what is due for principal and interest, and to judgment for immediate payment of the amount certified and costs. *Farrer* v. *Lacy, Hartland & Co.*, *supra*.

Interest up to certificate.

Where an account is directed, interest is brought down to the date of the certificate. *Earl Poulett* v. *Viscount Hill*, (1893) 1 Ch. 277.

When amount

It is a matter for the judge's discretion whether the

due made payable.

amount due should be made immediately payable or whether payment should be postponed. It is usual to make the amount admitted or found due payable one month from the date of the judgment. *Hunter* v. *Myatt*, 28 Ch. D. 181; *Instone* v. *Elmslie*, 54 L. T. 730; *Farrer* v. *Lacy, Hartland & Co.*, *supra*.

Interest on judgments.

The Judgments Act, 1838 (1 & 2 Vict. c. 110), provides (sect. 17) that judgment debts shall carry interest at 4 per cent. from the time of entering up the judgment.

This section applies to judgments given by way of security. *Knight* v. *Bowyer*, 4 De G. & Jo. 619.

A county court judgment debt does not carry interest under this section. *Queen* v. *County Court Judge of Essex*, 18 Q. B. Div. 704.

Costs personally payable.

The costs made personally payable by the mortgagor will be so much of the mortgagee's costs of the action as would have been incurred if it had been brought for payment only. *Farrer* v. *Lacy, Hartland & Co.*, 31 Ch. Div. 42.

Payment not asked by writ,

Where the plaintiff does not ask for payment by his writ and the defendant has not appeared, the plaintiff cannot, by his statement of claim, enlarge the scope of the action by asking for payment. *Law* v. *Philby*, 35 W. R. 450.

or by statement of claim.

Where the relief asked by the statement of claim does not include an order for payment of the amount due under the covenant, the Court will not make such an order, though the mortgagor does not enter an appearance to the writ. *Wethered* v. *Cox*, W. N., 1888, 165; *Faithfull* v. *Woodley*, 43 Ch. D. 287.

Special endorsement of writ.

A writ endorsed with a claim for foreclosure, and also with a claim for a specific sum under the mortgage covenant, is not specially endorsed under Order III. rule 6, so as to enable the plaintiff to proceed under Order XIV. rule 1 (*a*), but is within Order XIII. rule 3, so as to enable the plaintiff to enter final judgment for the sum endorsed with interest and costs (*b*). (*a*) *Hill* v. *Sidebottom*, 47 L. T. 224; *Imbert-Terry* v. *Carver*, 34 Ch. D. 506. (*b*) *Bissett* v. *Jones*, 32 Ch. D. 635.

The mere appointment of a receiver does not prevent the plaintiff in a foreclosure action from endorsing his writ with

a claim for a liquidated sum so as to enable him to apply for judgment under Order XIV. But where the receiver has been in receipt of rents and profits, and there is a dispute as to what will be found due to the mortgagee on taking the accounts, the judge ought not to give leave to sign judgment under that order. *Earl Poulett* v. *Viscount Hill*, (1893) 1 Ch. 277; *Lynde* v. *Waithman*, (1895) 2 Q. B. 180.

A writ by the transferee of a mortgage is specially endorsed, although it does not mention that notice in writing of the transfer was given by the plaintiff to the defendant. *Satchwell* v. *Clarke*, 66 L. T. 641.

Time Allowed for Redemption.

Six months allowed for redemption.

In a simple case between mortgagor and mortgagee, where there are no other incumbrances, the mortgagor has, whether he is defendant in a foreclosure action or plaintiff in a redemption action, six months only to redeem. *Platt* v. *Mendel*, 27 Ch. D. 246.

The trustee in bankruptcy of the mortgagor will be given six months to redeem, though he admits that he has no other assets than the equity of redemption. *Ex parte Fletcher*, 10 Ch. Div. 610.

An equitable mortgagor by deposit of title-deeds is allowed six months to redeem (*a*), even though, the mortgage debt not carrying interest, there is no compensation for delay (*b*). (*a*) *Parker* v. *Housefield*, 2 My. & K. 419; (*b*) *Mellor* v. *Woods*, 1 Kee. 16.

A mortgagor under a mortgage by way of trust for sale is entitled to six months to redeem. *Bell* v. *Carter*, 17 B. 11.

Where the defendants to a foreclosure action do not appear, one time only is fixed for redemption, whether the statement of claim alleges that they are entitled or only that they claim to be entitled to incumbrances. *Smith* v. *Olding*, 25 Ch. D. 462; *Doble* v. *Manley*, 28 Ch. D. 664.

As to the form of judgment where one time only is fixed for redemption, see Seton, 1628, No. 22, as altered in *Biddulph* v. *Billiter Street Offices Co.*, 72 L. T. 834.

Successive periods fixed for redemption.

Where any subsequent mortgagee appears and claims to have successive periods fixed, the onus lies on him of showing that he is entitled to them. *Doble* v. *Manley*, 28 Ch. D. 664; *Smithett* v. *Hesketh*, 44 Ch. D. 161.

Successive periods were directed where the subject of the security was a reversionary interest which was likely to rise in value. *Bertlin* v. *Gordon*, W. N., 1886, 31.

Former practice.

Under the earlier practice, if the defendants in a foreclosure action put in a defence or appeared at the bar and proved their incumbrances, and there was no question of priority between them, successive periods of redemption were as a rule allowed. *Lewis* v. *Aberdare Co.*, 53 L. J. Ch. 741.

But only one period of redemption was allowed where there was a dispute as to priorities, or where the mortgaged property was deteriorating. *Bartlett* v. *Rees*, 12 Eq. 395; *General Credit & Discount Co.* v. *Glegg*, 22 Ch. D. 549; *Tufnell* v. *Nicholls*, 56 L. T. 152; *Lewis* v. *Aberdare Co.*, 53 L. J. Ch. 741.

Enlarging the Time for Redemption.

1. Receipt of rents between certificate and date of payment.

1. The time originally fixed for redemption by the judgment is enlarged, as of course, where the mortgagee receives rents of the mortgaged property between the date of the certificate finding the amount due and the time fixed for payment. *Garlick* v. *Jackson*, 4 B. 154; *Alden* v. *Foster*, 5 B. 592; Seton, 1647; *Ellis* v. *Griffiths*, 7 B. 83; *Buchanan* v. *Greenway*, 12 B. 355; *Patch* v. *Ward*, L. R. 3 Ch. 203, 208; *Prees* v. *Coke*, 6 Ch. 645, 650; *Allen* v. *Edwards*, 42 L. J. Ch. 455.

The same rule applies where rents have been received by a receiver appointed in the foreclosure action. *Jenner-Fust* v. *Needham*, 31 Ch. D. 500; 32 Ch. Div. 582; Seton, 1649; *Peat* v. *Nicholson*, 54 L. T. 569, overruling *Hoare* v. *Stephens*, 32 Ch. D. 194.

As a rule a fresh account must be taken, and a fresh certificate made. Where the mortgagor waived the taking of the account in chambers the mortgagee was allowed to

file an affidavit bringing down the account to a day fixed, and the time for redemption was fixed a month from that day, no interest being given to the mortgagee after the date of the affidavit. *Jenner-Fust* v. *Needham*, 32 Ch. Div. 582.

Direction excluding rule in *Jenner-Fust* v. *Needham*.

The rule in *Jenner-Fust* v. *Needham* does not apply where the judgment directs that any person redeeming or, in the event of foreclosure, the mortgagee may apply in chambers for the payment or transfer to him of the money which might be in Court or in the hands of the receiver. *Coleman* v. *Llewellin*, 34 Ch. Div. 143.

Where such a direction is inserted, one order will be made for foreclosure absolute and for payment of the money to the mortgagee. *Coleman* v. *Llewellin*, 34 Ch. Div. 143.

When direction inserted.

A direction to this or a similar effect will only be inserted under special circumstances, *e.g.* where the moneys received represent the inheritance, such as proceeds of sale of minerals (*a*), or proceeds of calls on shareholders (*b*), or where they represent the takings of a business, of which the receiver is manager (*c*). (*a*) *Coleman* v. *Llewellin*, 34 Ch. Div. 143. (*b*) *Welch* v. *National Cycle Works Co.*, 55 L. T. 673. (*c*) *Holt & Co.* v. *Beagle*, 55 L. T. 592; *Smith* v. *Pearman*, 58 L. T. 720. See *Cheston* v. *Wells*, (1893) 2 Ch. 151.

The order was made absolute without a further account where the rents received by the receiver were insufficient to cover his out-of-pocket expenses and remuneration. *Ellenor* v. *Ugle*, (1895) W. N. 161.

Mortgagee submitting to be charged with fixed sum.

The receipt of rents by the receiver after the certificate will not enlarge the time for redemption where in the judgment *nisi* the mortgagee submits to be charged with a certain sum in respect of rents and profits in the receiver's hands at the date of the certificate, or to come into his hands prior to the order absolute, and the receiver receives no more than the amount for which credit is given. *Barber* v. *Jeckells*, (1893) W. N. 91; *Christy* v. *Godwin*, 38 Sol. Jo. 10.

The judgment in such a case should give liberty to any party to apply at chambers for payment of any money paid into Court by the receiver or his agent. *Lusk* v. *Sebright*, (1894) W. N. 134.

Rents received after default by mortgagor.

The mortgagor is not entitled to an enlargement of time where rents have been received by the mortgagee after default in payment by the mortgagor at the time fixed by the certificate, but before the affidavit in support of the application for an order absolute, and the order for foreclosure absolute will be granted without a further account. *Constable* v. *Howick*, 5 Jur. N. S. 331; *Prees* v. *Coke*, 6 Ch. 645, 650; *Webster* v. *Patteson*, 25 Ch. D. 626; *National Permanent Building Society* v. *Raper*, (1892) 1 Ch. 54.

Where time is enlarged, not as an indulgence to the mortgagor, but because the mortgagee has received rents after the certificate, the mortgagor is not required to pay arrears of interest and costs. *Buchanan* v. *Greenway*, 12 B. 355.

2. Time enlarged pending appeal.

2. As to the practice, where time is enlarged pending an appeal, see *Finch* v. *Shaw*, 20 B. 555, and the notes to Order LVIII. rule 16.

3. Time enlarged as indulgence to mortgagor,

3. The time originally fixed for redemption by the judgment is sometimes enlarged on a proper case for it being made by a person entitled to redeem. *Nanny* v. *Edwards*, 4 Russ. 124; *Eyre* v. *Hanson*, 2 B. 478; *Patch* v. *Ward*, L. R. 3 Ch. 203, 212.

but not in redemption action.

Time is not enlarged, as an indulgence to the mortgagor, where he is plaintiff in a redemption action. *Novosielski* v. *Wakefield*, 17 Ves. 417; *Faulkner* v. *Bolton*, 7 Sim. 319.

Time was, however, enlarged where the plaintiff, under a *bonâ fide* mistake, failed to lodge the mortgage-money in Court within the period prescribed by the judgment. *Collinson* v. *Jeffery*, (1896) 1 Ch. 644.

Terms on which time enlarged.

Where the Court enlarges the time for redemption as an indulgence to the mortgagor, it generally does so only on the terms of the mortgagor paying all arrears of interest and costs, either at the time originally fixed for redemption or within a short time afterwards. *Monkhouse* v. *Corporation of Bedford*, 17 Ves. 380; *Edwards* v. *Cunliffe*, 1 Madd. 287; *Whatton* v. *Cradock*, 1 Kee. 267; *Brewin* v. *Austin*, 2 Kee. 211; *Eyre* v. *Hanson*, 2 B. 478; *Geldard* v. *Hornby*, 1 Ha. 251; *Coombe* v. *Stewart*, 13 B. 111.

Where the arrears are very large, time has sometimes

been enlarged on condition of the mortgagor paying part on account, *e.g.* 3000*l.* where the arrears were 8000*l.* (*Holford* v. *Yate*, 1 K. & J. 677); 5000*l.* where the arrears were 10,000*l.* (*Forrest* v. *Shore*, 32 W. R. 356).

Where the mortgagor is only required to pay part of the arrears due, subsequent interest will be computed on the aggregate amount due for principal, interest, and costs at the time fixed for redemption. *Holford* v. *Yate*, 1 K. & J. 677. Computation of subsequent interest.

In *Forrest* v. *Shore* (32 W. R. 356), where the mortgage carried interest at 8 per cent., subsequent interest was only computed on the principal due.

Under the earlier practice, time was enlarged without the mortgagor being required to make any immediate payment, and subsequent interest was computed upon the aggregate amount found due for principal, interest, and costs. *Bruere* v. *Wharton*, 7 Sim. 483; *Whatton* v. *Cradock*, 1 Kee. 267; *Brewin* v. *Austin*, 2 Kee. 211. See, however, *Wilkinson* v. *Charlesworth*, 2 B. 470; *Whitfield* v. *Roberts*, 7 Jur. N. S. 1268.

Accounts and Inquiries.

The general rule is, that, where a plaintiff only asks a general account, he is not ordered to give particulars, but he must give particulars when he asks for payment of a definite sum. *Augustinus* v. *Nerinckx*, 16 Ch. Div. 17; *Blackie* v. *Osmaston*, 28 Ch. Div. 119. Mortgagee, when ordered to give particulars.

Where, although the plaintiff in a foreclosure action asks for an account, his claim is in reality for a definite sum, *e.g.* where he states that a definite sum became owing but that he has received divers sums on account, he will be ordered to give particulars. *Kemp* v. *Goldberg*, 36 Ch. D. 505.

Where a mortgagee defendant to a redemption action admits himself to be redeemable, he is bound in answer to interrogatories to state generally the amount due on his mortgage, and what securities he holds for his debt. *Beavan* v. *Cook*, 17 W. R. 872; *Elmer* v. *Creasy*, 9 Ch. 69; *West of England Bank* v. *Nickolls*, 6 Ch. D. 613. When bound to state amount due to him.

Classes of accounts.

Accounts in a foreclosure or redemption action fall into two classes. The first class comprises accounts which are normally incident to the action, namely, an account of the mortgagee's principal and interest, and the costs of the action, an account, where the mortgagee has been in possession, of rents and profits on the footing of wilful default, and an account, where he has sold, of proceeds of sale received or which ought to have been received by him.

The second class comprises accounts which are only given as the result of inquiries, namely, an account of the mortgagee's costs, charges, and expenses, an account of lasting improvements, an account of deteriorations, and an account of the inadequacy of sales effected by him.

1. Account of principal, interest, and costs.

1. The ordinary form of judgment in a foreclosure action only gives the mortgagee an account of his principal and interest and the taxed costs of the action. *Bolingbroke* v. *Hinde*, 25 Ch. D. 795.

Where the mortgage-deed is a security, not only for the loan with interest, but also for costs and charges to be incurred under the powers of or in connection with the mortgage-deed, such costs and charges, if proper to be allowed, will be allowed under an account of principal and interest. *Blackford* v. *Davis*, 4 Ch. 304.

The chief clerk's certificate calculates interest up to the day appointed for payment. Seton, 1651, 1652.

Share in partnership.

As to the form of account where a share in a partnership is mortgaged, see *Redmayne* v. *Forster*, L. R. 2 Eq. 467; Seton, 1697; *Kelly* v. *Hutton*, L. R. 3 Ch. 703; *Whetham* v. *Davey*, 30 Ch. D. 574.

2. Account of costs, charges, and expenses.

2. Where a special case is made out, the mortgagee will be entitled to an inquiry whether anything and what is due to him for any and what costs, charges, and expenses properly incurred by him in respect of his mortgage security, not being costs of the action. Under that inquiry he is entitled to all just allowances. Special inquiries will not be given. *Rees* v. *Metropolitan Board of Works*, 14 Ch. D. 372; *Bolingbroke* v. *Hinde*, 25 Ch. D. 795; see Seton, 1627, 1628.

Necessary repairs.

Necessary repairs are included in just allowances, and will,

therefore, be given under an account of costs, charges, and expenses. *Tipton Green Co.* v. *Tipton Moat Co.*, 7 Ch. D. 192.

It would appear, therefore, that an account of necessary repairs is only proper where there is no account of costs, charges, and expenses. See *Schuldt* v. *Kent*, Seton, 1624; *Townley* v. *Moore*, Seton, 1621; *Glencross* v. *Pulman*, Seton, 1623; *Houghton* v. *Sevenoaks Estate Co.*, 33 W. R. 341; Seton, 1621.

Expenses after certificate.

As to the jurisdiction to allow the mortgagee costs and expenses properly incurred by him after the certificate, see *Barron* v. *Lancefield*, 17 B. 208; *Oxenham* v. *Ellis*, 18 B. 593.

3. Account of lasting improvements.

3. Where a mortgagee, having charged in his pleadings that he has laid out money in lasting improvements, produces evidence that he has laid out money on works which are *primâ facie* improvements, he is entitled to an inquiry. If he proves that the works have improved the property to the extent of the money laid out, he is entitled to an account. *Sandon* v. *Hooper*, 6 B. 246, on appl. 14 L. J. Ch. 120; *Tipton Green Co.* v. *Tipton Moat Co.*, 7 Ch. D. 192; *Shepard* v. *Jones*, 21 Ch. Div. 469; *Houghton* v. *Sevenoaks Estate Co.*, 33 W. R. 341.

Where the mortgagee in a redemption action states that he has made repairs and improvements, the mortgagor, if he wishes to set up that they were improper, must do so in his pleadings. *Powell* v. *Trotter*, 1 Dr. & Sm. 388.

4. Account of rents and profits.

4. The ordinary form of account against a mortgagee in possession is an account of rents and profits received by him, or by his order, or for his use, or which, without his wilful default, might have been so received. *Young* v. *Jarvis*, Seton, 1580.

Occupation rent.

This account includes an occupation rent of property of which the mortgagee has been in actual occupation and enjoyment. *Arthur* v. *Higgs*, Seton, 1623.

5. Account of deteriorations.

5. An account of the extent to which the mortgaged premises have been deteriorated by the wilful neglect of the mortgagee in possession is only given after an inquiry. *Prettyjohn* v. *Pyke*, Seton, 1624; *Batchelor* v. *Middleton*, 6 Ha. 75, 85; *Schuldt* v. *Kent*, Seton, 1624.

6. Account of

proceeds of sale.

possession who has sold is an account of the proceeds of sale received by him, or by his order, or for his use, or which, without his wilful default, might have been so received. The mortgagor is not entitled under such an account to impeach or question the propriety of the different sales or the adequacy of the amounts for which the properties were sold. *Mayer* v. *Murray*, 8 Ch. D. 424; see *King* v. *Kitchener*, Seton, 1622.

Where evidence is brought that the sale was at an undervalue, special inquiries will be directed. *Wolff* v. *Vanderzee*, Seton, 1626; *National Bank of Australasia* v. *United Hand-in-Hand Co.*, 4 App. Cas. 391, 410; *Tomlin* v. *Luce*, 43 Ch. Div. 191; Seton, 1626.

Account, on whom binding.

An account is only binding on parties to the action in which the accounts are taken. *Hall* v. *Heward*, 32 Ch. Div. 430.

But an account taken in the presence of the tenant for life is *primâ facie* binding on the remainderman, whether the remainder is vested or contingent at the time of the proceedings. He is entitled to surcharge and falsify the account, but not to have a new one. *Knight* v. *Bampfeild*, 1 Vern. 179; *Allen* v. *Papworth*, 1 Ves. S. 163; Belt, 92; *Wrixon* v. *Vize*, 2 D & War. 192.

Special matters affecting account.

Any special matter affecting the account, *e.g.* a valuation of the security in bankruptcy, should be raised at the trial, and cannot be raised on taking the account. *Sanguinetti* v. *Stuckey's Banking Co.* (No. 2), (1896) 1 Ch. 502.

Allowance of profit costs to solicitor.

The objection to the allowance to a solicitor mortgagee of profit costs need not be taken at the hearing, but may be taken before the taxing master after judgment in the usual form, containing the common order for taxation of costs, has been given in a mortgagor's redemption action. *Stone* v. *Lickorish*, (1891) 2 Ch. 363, not following *Price* v. *McBeth*, 33 L. J. Ch. 460.

Staying accounts.

Where mortgagees have taken a foreclosure decree directing the usual accounts, the mortgagors can as a rule insist on the mortgagees carrying in those accounts which they must carry in in order that the accounts directed by the decree may be taken. *Taylor* v. *Mostyn*, 25 Ch. Div. 48.

But where it is probable that the balance due to the

mortgagees will considerably exceed the value of the mortgaged property, and the mortgagors have practically no other property, the taking of the accounts will be stayed unless the mortgagors give security for the costs of taking them. *Exchange Warehouses* v. *Association of Land Financiers*, 34 Ch. D. 195.

Opening Settled Accounts.

A party seeking to open a settled account must allege some specific error in the account. *Taylor* v. *Haylin*, 2 B. C. C. 310; *Johnson* v. *Curtis*, 2 B. C. C. 311 *n.*; *Chambers* v. *Goldwin*, 9 Ves. 254, 266; *Parkinson* v. *Hanbury*, L. R. 2 H. L. 1.

Liberty to surcharge and falsify.

Where a single error is alleged and proved, liberty will be given to surcharge and falsify. *Davies* v. *Spurling*, Taml. 199; *Lawless* v. *Mansfield*, 1 D. & War. 557, 603; *Gething* v. *Keighley*, 9 Ch. D. 547.

Liberty will be given to surcharge and falsify where the accounts are taken on a wrong basis under a mistaken view, common to both parties, of the legal effect of the contract between them. *Daniell* v. *Sinclair*, 6 App. Cas. 181.

Opening account generally.

If errors of sufficient number and magnitude are shown, the account may be opened generally, in the absence of fraud. *Clarke* v. *Tipping*, 9 B. 284; *Williamson* v. *Barbour*, 9 Ch. D. 529.

Fraud by accounting party.

Where a single instance of fraud on the part of the accounting party is proved, the account will be opened generally. *Vernon* v. *Vawdry*, 2 Atk. 119; *Wharton* v. *May*, 5 Ves. 27; *Wedderburn* v. *Wedderburn*, 4 My. & Cr. 41; *Allfrey* v. *Allfrey*, 10 B. 353; 1 Mac. & G. 87; *Williamson* v. *Barbour*, 9 Ch. D. 529.

Accounting party in fiduciary relation.

Where the accounting party stood in a fiduciary relation to the person seeking to open the account, *e.g.* as agent, solicitor, trustee, the account will be opened generally on slighter grounds than would be required if there was no such relation between the parties. *Lawless* v. *Mansfield*, 1 D. & War. 557, 605; *Coleman* v. *Mellersh*, 2 Mac. & G. 309; *Williamson* v. *Barbour*, 9 Ch. D. 529; *In re Webb*, (1894) 1 Ch. 73, 84.

The right to open settled accounts may be lost by acquiescence or laches, even as against a trustee. *Lyddon* v. *Moss*, 4 De. G. & Jo. 104; *In re Webb, supra.*

As to pleading a settled account, see Order XX. rule 8, and, as to the old practice, see *Buckeridge* v. *Whalley*, 33 L. J. Ch. 649.

Order for Foreclosure absolute.

Where the order *nisi* allows successive periods of redemption to a second mortgagee and to the mortgagor, the order absolute against the second mortgagee ought to be obtained before proceeding to foreclose the mortgagor. *Whitbread* v. *Lyall*, 8 D. M. & G. 383; *Webster* v. *Patteson*, 25 Ch. D. 626; *Martineau* v. *Yorke*, 38 Sol. Jo. 42.

Affidavit in support of order.

The application for an order absolute must be supported by an affidavit by the mortgagee or his attorney of due attendance at the place appointed for payment, and by the mortgagee of nonpayment of the amount certified to be due. Seton, 1651, 1652; see *Docksey* v. *Else*, 64 L. T. 256.

The mortgagee must make an affidavit that he has not, between the day of attendance and the date of the order absolute, received the mortgage moneys or any part thereof. *Barrow* v. *Smith*, 33 W. R. 743.

Imperfect attendance by mortgagee.

Where an agent of the mortgagee attends at the place fixed for payment of the mortgage money, but without a power of attorney to receive it, and the mortgagor does not appear, the order may be made absolute, but the application for the order absolute must be made to the judge in Court. *Lechmere* v. *Clamp*, (No. 3) 31 B. 578; *London Monetary Advance Society* v. *Brown*, 16 W. R. 782; *Cox* v. *Watson*, 7 Ch. D. 196; *Hart* v. *Hawthorne*, 42 L. T. 79; *Macrae* v. *Evans*, 24 W. R. 55; *Crawley* v. *Fuller*, W. N., 1890, 35; *King* v. *Hough*, (1895) W. N. 60.

The order may be made absolute, although the mortgagee does not attend during the first fifteen minutes of the time prescribed. *Anon.*, 1 Coll. 273; *Bernard* v. *Norton*, 10 L. T. 183.

Order for Delivery of Possession.

Order XVIII. rule 2, after declaring that no cause of action shall, unless by leave, be joined with an action for the recovery of land, provides that nothing in the Order shall prevent any plaintiff in an action for foreclosure or redemption from asking for or obtaining an order against the defendant for delivery of the possession of the mortgaged property to the plaintiff on or after the order absolute for foreclosure or redemption, and that, in case any mortgage security shall be foreclosed by reason of the default to redeem by any plaintiff in a redemption action, the defendant in whose favour such foreclosure has taken place may by motion or summons apply to the Court or a judge for an order for delivery to him of possession of the mortgaged property, and such order may be made thereupon as the justice of the case shall require. Order XVIII. rule 2.

The judgment should provide that, in default of the defendant redeeming, he should deliver up possession. *Williamson* v. *Burrage*, 56 L. T. 702.

Where the judgment provides for delivery of possession, the order absolute should repeat the provision for delivery of possession, and may be made *ex parte*. *Withall* v. *Nixon*, 28 Ch. D. 413.

Where an action for foreclosure is commenced by writ, an order for delivery of possession may be made, though it is not asked for either by the writ or the statement of claim, and though the mortgagor on being served with notice of motion does not appear. *Salter* v. *Edgar*, 54 L. T. 374. Action commenced by writ.

Where the action is commenced by originating summons, an order may be made, though not asked for by the summons, and though the defendant on being served does not appear. *Craven Bank* v. *Hartley*, W. N., 1886, 189; *Lacon* v. *Tyrrell*, 56 L. T. 483; *Best* v. *Applegate*, 37 Ch. D. 42; *Manchester & Liverpool Bank* v. *Parkinson*, 60 L. T. 258; *Jenkins* v. *Ridgley*, 68 L. T. 671. Action commenced by originating summons.

But it cannot be made *ex parte*, if not asked for by the summons or provided for by the order *nisi*. *Le Bas* v. *Grant*, 64 L. J. Ch. 368.

In an action commenced by originating summons to enforce a charge on consols, an order may be made for transfer of the consols to the plaintiff, although neither asked for by the summons nor provided for by the order *nisi*. *Ricketts* v. *Ricketts*, (1891) W. N. 29.

When order may be made.

An order for delivery of possession can be made on an interlocutory application (*a*), or after the order for foreclosure has been made absolute (*b*). (*a*) *Hawkes* v. *Holland*, W. N. 1881, 28; *Edgell* v. *Wilson*, (1893) W. N. 145; *Ind, Coope & Co.* v. *Mee*, (1895) W. N. 8. (*b*) *Keith* v. *Day*, 39 Ch. Div. 452; *Jenkins* v. *Ridgley*, 68 L. T. 671; *Manchester & Liverpool Bank* v. *Parkinson*, 60 L. T. 258.

Writ of possession.

Where the order for foreclosure absolute does not provide for delivery of possession, the plaintiff is not entitled to a writ of possession. *Wood* v. *Wheater*, 22 Ch. D. 281.

Where possession has been given under a writ of possession, attachment will issue against a defendant who has retaken possession, although the order for delivery of possession does not name any time within which possession is to be given. *In re Higg's Mortgage*, (1894) W. N. 73.

The order ought to contain a description sufficient to identify the property, possession of which is to be delivered. *Keith* v. *Day*, Seton, 1656; *Thynne* v. *Sarl*, (1891) 2 Ch. 79.

Order for delivery of title-deeds.

A mortgagee is not entitled to an order for the delivery up by a puisne mortgagee of deeds which show on their face that they deal only with the equity of redemption. *Greene* v. *Foster*, 22 Ch. D. 566.

Day to show Cause.

Where an infant is defendant to a foreclosure action, he will be given a day to show cause, *i.e.* leave will be reserved him in the judgment, on being served with a subpœna, to show cause against it within six months of his coming of age. *Williamson* v. *Gordon*, 19 Ves. 114; *Price* v. *Carver*, 3 My. & Cr. 157.

1. Action to foreclose legal mortgage.

1. In an action for foreclosure by a legal mortgagee, an infant defendant is given a day to show cause. *Newbury* v.

Marten, 15 Jur. 166; *Gray* v. *Bell*, 30 W. R. 606. In *Younge* v. *Cocker* (32 W. R. 359) an order for foreclosure had been made against the ancestor.

2. Action to foreclose equitable mortgage.

2. In an action for foreclosure by an equitable mortgagee, an infant defendant in whom the legal estate is vested is also given a day to show cause. *Price* v. *Carver*, 3 My. & Cr. 157; *Backhouse* v. *Hornsey*, cit. 25 Ch. D. 160; *Mellor* v. *Porter*, 25 Ch. D. 158; see, however, *Foster* v. *Parker*, 8 Ch. D. 147.

Where it appeared that the mortgaged property was not worth the amount due on the mortgage, and the plaintiff offered to pay the costs of the infant, as between solicitor and client, the infant was not given a day to show cause. *Croxon* v. *Lever*, 12 W. R. 237; 10 Jur. N. S. 87; *Bennett* v. *Harfoot*, 19 W. R. 428; *Wolverhampton Banking Co.* v. *George*, 24 Ch. D. 707.

Sect. 31 of the Trustee Act, 1893 (which corresponds to sect. 30 of the Trustee Act, 1850), does not apply, as a decree for foreclosure against an infant only directs him to convey on attaining twenty-one. See *Mellor* v. *Porter*, 25 Ch. D. 158.

3. Judgment or order for sale.

3. Where a judgment is given or order made directing the sale of land, an infant defendant is not given a day to show cause, whether he has a legal or equitable interest. See the Trustee Act, 1893, sect. 30, as altered by the Trustee Act, 1893, Amendment Act, 1894 (57 Vict. c. 10), sect. 1. *Scholefield* v. *Heafield*, 7 Sim. 669; 8 Sim. 470; *Clinton* v. *Bernard*, Dru. t. Sugd. 287; *Hutton* v. *Mayne*, 3 J. & Lat. 586.

CHAPTER LVIII.

ACTIONS TO ENFORCE A CHARGE.

Form of judgment.

THE judgment, in an action to enforce an equitable lien or charge, should declare that the plaintiff is entitled to a charge upon the property comprised in the deposit or agreement, as the case may be, for securing the amount found due. Seton, 1698, 1699.

It should provide for delivery by the plaintiff to the defendant, on payment at the time prescribed, of the security, if any, and all documents in the plaintiff's custody or power relating thereto. Seton, *supra*.

And it should provide, in default of payment, for mortgage or sale (*a*) or for sale (*b*) of the property subject to the charge or a sufficient part thereof with the approbation of the judge, for payment into Court of the proceeds of the mortgage or sale, and for their application in payment to the plaintiff of his principal, interest, and costs. (*a*) *Mackreth* v. *Symmons*, Seton, 1706; (*b*) *Woof* v. *Barron*, Seton, 1698; *Green* v. *Biggs*, 52 L. T. 680; Seton, 1699; *Wade* v. *Wilson*, 22 Ch. D. 235; Seton, 1699.

The plaintiff may be given liberty to bid at the sale. *Carter* v. *Wake*, Seton, 1701.

Action against tenant in tail.

In an action to enforce a charge against a tenant in tail, the Court may order him to execute a disentailing deed. *Lewis* v. *Duncombe*, 20 B. 398.

Form of judgment in debenture-holders' action.

As to whether the judgment in a debenture-holders' action should declare that the debenture-holders are entitled to a charge on the property comprised in the debentures, see *Parkinson* v. *Wainwright*, 64 L. J. Ch. 493; *Brinsley* v. *Lynton Hotel Co.*, (1895) W. N. 53; 2 Manson, 244; *Marwick* v. *Lord Thurlow*, (1895) 1 Ch. 776.

A foreclosure order may be made at the instance of debenture-holders on an originating summons. *Oldrey* v. *Union Works*, (1895) W. N. 77.

Calling up uncalled capital.

The Court has no jurisdiction, on an application in a debenture-holders' action, to make an order on the liquidator in the winding-up to call up the uncalled capital, which is charged by the debentures. The application must be in the winding-up. *Fowler* v. *Broad's Patent Night Light Co.*, (1893) 1 Ch. 724.

As to whether the liquidator, or the receiver in his name, should take proceedings for getting in calls, see *Harrison* v. *St. Etienne Brewery Co.*, (1893) W. N. 108.

Custody of documents of company.

Where a receiver has been appointed in a debenture-holders' action and the company is being wound up, the liquidator is entitled to the custody of documents which relate to the business of the company, such as the directors' minute-book and the share register, and which are not necessary to support the title of the debenture-holders. *Engel* v. *South Metropolitan Brewing Co.*, (1892) 1 Ch. 442.

As to proceedings by an unpaid vendor of land to enforce his charge, see p. 342.

Proceedings to enforce judgment.

As to procedure under the Judgments Acts, see sect. 15 of the Judgments Act, 1838.

As to procedure under the Partnership Act, 1890, see Order XLVI. rules 1A, 1B.

A judgment creditor who has obtained a charging order must institute a separate suit in the Chancery Division in order to make his charging order available. *Leggott* v. *Western*, 12 Q. B. D. 287.

Where a charging order has become absolute, the Court has no jurisdiction to discharge or vary it. *Jeffryes* v. *Reynolds*, 52 L. J. Q. B. 55; *Drew* v. *Willis*, (1891) 1 Q. B. 450.

Enforcement of solicitors' lien for costs.

An application by a solicitor for a charging order may be made in an action which has terminated. *Wilson* v. *Hood*, 3 H. & C. 148; *Jones* v. *Frost*, 7 Ch. 773.

The application may be made either by petition or summons. *Hamer* v. *Giles*, 11 Ch. D. 942, 948; see, however, *Brown* v. *Trotman*, 12 Ch. D. 880.

It must be intituled in the action. It need not be intituled in the matter of the Act or of the solicitor. *Hamer* v. *Giles*, 11 Ch. D. 942, 945.

As to the Court or judge before whom the application should be made (*a*) when the matter has been heard, see *Wilson* v. *Hood*, 3 H. & C. 148; *Heinrich* v. *Sutton*, 6 Ch. 865; *Catlow* v. *Catlow*, 2 C. P. D. 362; *Higgs* v. *Schrader*, 3 C. P. D. 252; *Owen* v. *Henshaw*, 7 Ch. D. 385; (*b*) when it is pending, see *Clover* v. *Adams*, 6 Q. B. D. 622; *Dallow* v. *Garrold*, 14 Q. B. Div. 543, 546.

As to the jurisdiction of the Judge in Bankruptcy to make a charging order, see *In re Wood*, (1896) W.N. 163.

The order declaring a charge should not direct that the taxed costs should be raised by sale, but that either party be at liberty to apply with reference to enforcing the charge by sale or otherwise. *Pilcher* v. *Arden*, 7 Ch. Div. 318.

As to the time for making an order for sale, see *In re Green*, 26 Ch. Div. 16.

A summons for payment out of a fund on which a charging order has been obtained should be served on all parties beneficially interested, but substituted service will be allowed under special circumstances. *Hunt* v. *Austin*, 9 Q. B. Div. 598; *Rowley* v. *Southwell*, 61 L. T. 805.

Where an infant is interested in property recovered or preserved, he is entitled to be represented when the order is applied for. *Greer* v. *Young*, 24 Ch. Div. 545.

CHAPTER LIX.

RECOVERY OF PROPERTY SUBJECT TO A PLEDGE OR LIEN.

Right of pledgor to bring trover or detinue.

WHERE the special property of the pledgee is divested, *e.g.*, by payment or tender of the amount due, the immediate right to possession reverts to the pledgor, and he can, therefore, bring trover or detinue against the pledgee for the article pledged. *Harper* v. *Godsell*, L. R. 5 Q. B. 422; *Bank of New South Wales* v. *O'Connor*, 14 App. Cas. 273; *Yungmann* v. *Briesemann*, 67 L. T. 642.

One of several pledgors cannot, on tendering the whole amount due, maintain trover against the pledgee, if he refuses to deliver the articles pledged to him. *Harper* v. *Godsell*, L. R. 5 Q. B. 422, 428.

Set-off by defendant in trover.

Where the owner of goods subject to a pledge brings detinue to recover them, the pledgee cannot, under the Statutes of Set-off, set off a debt due to him from the pledgor. *Green* v. *Farmer*, 4 Burr. 2214.

Where a limited company, after payment of the amount due on a pledge made by them, bring an action of detinue to recover the goods pledged, the pledgee cannot, if the company is being wound up, set off other debts due to him from them under sect. 38 of the Bankruptcy Act, 1883. *Eberle's Hotels Co.* v. *Jonas*, 18 Q. B. Div. 459.

Set-off by plaintiff in trover.

Where a plaintiff brings trover to recover goods subject to a lien, he cannot set off a debt due to him from the person in possession of the goods against the debt due from him in respect of the lien, unless there has been an agreement to set one claim against the other, or unless the person entitled to the lien has brought an action for the debt. *Clarke* v. *Fell*, 4 B. & Ad. 404; *Pinnock* v. *Harrison*, 3 M. & W. 532.

But where the person claiming the lien is bankrupt, the owner of the goods subject to the lien is entitled, under the mutual dealings clause, to set off the debt due to him against the debt due from him, and if the former exceeds the latter to recover the goods without further payment. *Ex parte Barnett*, 9 Ch. 293.

Order L. rule 8.

Order L. rule 8, enables the Court, in an action to recover specific property other than land from a person who sets up a lien upon it, to order the property claimed to be given up to the claimant upon payment by him into Court, to abide the event of the action, of the amount in respect of which the lien is claimed and a sum to cover interest and costs, if any.

A plaintiff, to get the benefit of the order, must pay in the amount claimed, although it exceeds the value of the property subject to the lien. *Gebruder Naf* v. *Ploton*, 25 Q. B. Div. 13.

Solicitor, when ordered to deliver up papers.

Apart from the jurisdiction conferred by Order L. rule 8 (as to which see *In re Galland*, 31 Ch. Div. 296, 305), the Court has jurisdiction to order a solicitor to deliver up the papers on which he claims a lien on payment into Court of the amount claimed by him, and a sum to answer costs of the taxation. *Clutton* v. *Pardon*, T. & R. 301; *Richards* v. *Platel*, Cr. & Ph. 79; *Blunden* v. *Desart*, 2 D. & War. 405, 423; *Re Bevan & Whitting*, 33 B. 439; *Re Jewitt*, 34 B. 22; *In re Galland*, 31 Ch. D. 296.

This jurisdiction, according to the earlier authorities, should only be exercised in cases of great emergency. See, however, *In re Galland*, 31 Ch. D. 296.

Solicitors Act, 1843, s. 37.

The Solicitors Act, 1843 (6 & 7 Vict. c. 73), enables the Court (sect. 37), in the same cases in which it is authorized to refer a bill for taxation, to make an order for the delivery up by any solicitor or his executor, administrator, or assignee of deeds, documents, or papers in his possession, custody, or power.

On an order for taxation of a bill of costs, the solicitor will not be ordered to deliver up papers of his client where the solicitor is known to have incurred further costs not comprised in the bill. *In re Byrch*, 8 B. 124; *In re Pender*, 8 B. 299,

306; *Ex parte Jarman*, 4 Ch. D. 835, not following *In re Teague*, 11 B. 318. See *In re Ward*, (1896) 2 Ch. 31.

Where an applicant seeks to recover deeds which originally came into the hands of the solicitor as solicitor for the applicant, it is not necessary that an action should be brought; the order can properly be matter in the matter of the solicitor. *In re Llewellin*, (1891) 3 Ch. 145.

CHAPTER LX.

DUTIES OF THE INCUMBRANCER ON PAYMENT.

Mortgagee of land must reconvey on payment.

A MORTGAGEE of land is bound, upon payment by any person entitled to redeem of what is due under the mortgage, to convey to him the mortgaged estate and hand over the title-deeds. His duty is the same whether he is paid off with or without action. *Tasker* v. *Small*, 3 My. & Cr. 63, 70; *Smith* v. *Green*, 1 Coll. 555; *Palmer* v. *Hendrie*, 27 B. 349; 28 B. 341; *Walker* v. *Jones*, L. R. 1 P. C. 50, 62; *Young* v. *Whitchurch Banking Co.*, 37 L. J. Ch. 186; *Pearce* v. *Morris*, 8 Eq. 217; 5 Ch. 227; *Kinnaird* v. *Trollope*, 39 Ch. D. 636.

He is not bound to restore the mortgaged property where he has sold it under a power in the mortgage-deed or been evicted by title paramount. *Rudge* v. *Richens*, L. R. 8 C. P. 358; *In re Burrell*, 7 Eq. 399.

Payment into Court.

"It is now the practice, where a proper tender has been made and refused, to make an order giving the mortgagor liberty to pay into Court a stated sum sufficient to cover the amount of principal and interest and the probable costs of the suit, and then, upon payment into Court, but not till then, the mortgagee is required by the order to deliver up the title-deeds." *Bank of New South Wales* v. *O'Connor*, 14 App. Cas. 273, 283.

Where the mortgagee has made a sub-mortgage, the mortgagor is entitled, on payment into court of what is due under the mortgage, to have a reconveyance executed and the title-deeds delivered by both the mortgagee and sub-mortgagee. *Lysaght* v. *Westmacott*, 33 B. 417.

7 Geo. II. c. 20, s. 1.

By sect. 1 of 7 Geo. II. c. 20, the Court, in an action at law by the mortgagee to recover the mortgage debt or the

mortgaged land, may compel the mortgagee, on payment by the mortgagor to him or into court of the amount due under the mortgage, to reconvey the mortgaged land and deliver the title-deeds to the mortgagor or his nominee. See p. 471.

By whom payment must be made.

A mortgagee is entitled to retain possession except as against a person interested in the equity of redemption. Any person coming to redeem must prove at his own expense that he is so interested. *James* v. *Biou*, 3 Sw. 234.

The mortgagee is bound to accept a tender from a person who has entered into a conditional contract for the purchase of the equity of redemption, but he is not bound to execute a conveyance or deliver the title-deeds until the contract is completed. *Pearce* v. *Morris*, 5 Ch. 227.

As to the right of a puisne incumbrancer made defendant to a foreclosure action to have the action dismissed, contrary to the wish of prior incumbrancers co-defendants, on payment to the plaintiff of his principal, interest, and costs, and the costs of the other defendants to which he was liable, see *Paynter* v. *Carew*, 23 L. J. Ch. 596; *Paine* v. *Edwards*, 8 Jur. N. S. 1200.

Reconveyance without recitals.

The mortgagee is not bound to execute a reconveyance containing incorrect recitals, but he cannot refuse to execute a reconveyance without recitals, if it is concurred in by all persons interested in the equity of redemption. *Hartley* v. *Burton*, L. R. 3 Ch. 365.

Reconveyance to persons having partial interest.

Where the person redeeming has only a partial interest in the equity of redemption, the conveyance should be made expressly subject to the right of any other person interested to redeem. *Pearce* v. *Morris*, 5 Ch. 227.

Reconveyance by annuitant.

Where an annuitant is redeemed, he conveys subject to the annuity, although the mortgagee redeeming also held a first mortgage, which the annuitant has redeemed. *Parry* v. *Parry*, Seton, 1724; *Smithett* v. *Hesketh*, 44 Ch. D. 161.

Transfer to committee of lunatic.

Where the mortgagor is a lunatic, a reconveyance should not be made to him, but the mortgage should be kept on foot by transferring it to the committee to be disposed of as the Court may direct. *Re Leeming*, 3 D. F. & J. 43; *Re Melly*, 49 L. T. 429.

Return of title-deeds.

As to what deeds the mortgagee must return, see *Dobson* v. *Land*, 4 De G. & Sm. 581; *Hudson* v. *Malcolm*, 10 W. R. 720.

A mortgagee, on being paid off, has no right to keep a copy of the mortgage-deed or of any other deeds relating to the mortgaged property. *In re Wade & Thomas*, 17 Ch. D. 348.

On a reconveyance by the mortgagee of an undivided moiety, he was held entitled to retain the deeds relating to the whole estate, of which he was tenant in common, on giving a covenant for production. *Yates* v. *Plumbe*, 2 Sm. & G. 174.

Conveyancing Act, 1881, s. 15.

The Conveyancing Act, 1881 (44 & 45 Vict. c. 41), enacts—

Sect. 15, (1). Where a mortgagor is entitled to redeem, he shall, by virtue of this Act, have power to require the mortgagee, instead of reconveying, and on the terms on which he would be bound to reconvey, to assign the mortgage debt and convey the mortgaged property to any third person, as the mortgagor directs; and the mortgagee shall, by virtue of this Act, be bound to assign and convey accordingly.

(2) This section does not apply in the case of a mortgagee being or having been in possession.

(3) This section applies to mortgages made either before or after the commencement of this Act, and shall have effect notwithstanding any stipulation to the contrary.

Conveyancing Act, 1882, s. 12.

The Conveyancing Act, 1882 (45 & 46 Vict. c. 39), enacts—

Sect. 12. The right of the mortgagor, under section fifteen of the Conveyancing Act of 1881, to require a mortgagee, instead of reconveying, to assign the mortgage debt and convey the mortgaged property to a third person, shall belong to and be capable of being enforced by each incumbrancer, or by the mortgagor, notwithstanding any intermediate incumbrance; but a requisition of an incumbrancer shall prevail over a requisition of the mortgagor, and, as between incumbrancers, a requisition of a prior incumbrancer shall prevail over a requisition of a subsequent incumbrancer.

This section overrides the decision in *Teevan* v. *Smith*, 20 Ch. Div. 724.

Transfer instead of reconveyance.

These sections only empower the mortgagee to transfer the mortgage. Where the mortgagor sold the mortgaged property with the concurrence of first mortgagees, who had notice of a

second mortgage, and the mortgagees conveyed the property discharged from the mortgage debt, they were held liable to the second mortgagee for the balance of purchase-money received by the mortgagor. *West London Commercial Bank* v. *Reliance Building Society*, 27 Ch. D. 187; 29 Ch. Div. 954.

A mortgagee in possession is not bound to transfer his security except under an order of the Court. *Hall* v. *Heward*, 32 Ch. Div. 430.

Apart from these sections, the mortgagor cannot compel the mortgagee, on being paid off, to transfer the mortgage. *James* v. *Biou*, 3 Sw. 234, 241; *Colyer* v. *Colyer*, 3 D. J. & S. 676, 693.

Terms on which transfer made.

Where a mortgagor can only get a reconveyance on terms, a transfer made at his request will only be made on corresponding terms. Thus, where a tenant for life who has let interest fall into arrear requires a transfer, the transferee will only be given a charge on the inheritance for the amount paid to the first mortgagee less the arrears of interest. *Anderson* v. *Elgey*, 26 Ch. D. 567.

Receipt under 6 & 7 Wm. IV. c. 32, s. 5.

The Act 6 & 7 Wm. IV. c. 32, provides (sect. 5) that the trustees of a building society may indorse upon their mortgage a receipt for the moneys thereby secured, "which shall be sufficient to vacate the same and vest the estate of and in the property comprised in such security, in the person or persons for the time being entitled to the equity of redemption, without it being necessary for the trustees of any such society to give any reconveyance of the property so mortgaged."

Reconveyance or receipt under 37 & 38 Vict. c. 42, s. 42.

The Building Societies Act, 1874 (37 & 38 Vict. c. 42), provides (sect. 42) that on payment off of a mortgage or further charge "the society may endorse upon or annex to such mortgage or further charge a reconveyance of the mortgaged property to the then owner of the equity of redemption, or to such persons and to such uses as he may direct, or a receipt under the seal of the society, countersigned by the secretary or manager, in the form specified in the schedule to this Act, and such receipt shall vacate the mortgage or further charge or debt, and vest the estate of and in the property therein comprised in the person for the time being entitled

to the equity of redemption, without any reconveyance or resurrender whatever. . . ."

Similar provisions for the discharge of mortgages are made by the Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), sect. 53, and the Industrial & Provident Societies Act, 1893 (56 & 57 Vict. c. 39), sect. 43.

Effect of receipt by building society.

The effect of a receipt given under either the Act of 1836 (*a*) or the Act of 1874 (*b*) is to vest the legal estate in the person who, at the time of the endorsement, has the best equity to call for it, and it vests in him for all purposes, *e.g.* it protects a further advance made by the transferee of a first mortgage without notice of a second. (*a*) *Pease* v. *Jackson*, L. R. 3 Ch. 576; *Lawrence* v. *Clements*, 31 L. T. N. S. 670; *Robinson* v. *Trevor*, 12 Q. B. Div. 423; *Hosking* v. *Smith*, 13 App. Cas. 582. (*b*) *Fourth City Building Society* v. *Williams*, 14 Ch. D. 140; *Marson* v. *Cox*, 14 Ch. D. 147; *Sangster* v. *Cochrane*, 28 Ch. D. 298.

A receipt under the Act of 1874 precludes the society from making any further claim under the mortgage either in respect of liability on the mortgage or liability on shares. *Harvey* v. *Municipal Building Society*, 26 Ch. Div. 273.

Vesting order where mortgagee is infant.

The Trustee Act, 1893 (56 & 57 Vict. c. 53), provides (sect. 28) that where any person entitled to or possessed of land or entitled to a contingent right in land by way of security for money is an infant, the High Court may make an order vesting or releasing or disposing of the land or right in like manner as in the case of an infant trustee.

This section applies to a lunatic mortgagee who is an infant. See sect. 143 of the Lunacy Act, 1890.

Trustee Act, 1893, s. 29

The Trustee Act, 1893, sect. 29, enables the Court, where a mortgagee of land has died without having taken possession, to make a vesting order, (*a*) where his heir, personal representative, or devisee is out of the jurisdiction or cannot be found, or (*b*) refuses or neglects to convey, or (*c*) where it is uncertain which of several devisees was the survivor, or (*d*) as to the survivor of several devisees or as to the heir or personal representative, whether he is living or dead, or (*e*) where there is no heir or personal representative, or it is uncertain who

is heir, personal representative, or devisee. As to (*e*), see *In re Cook's Mortgage*, (1895) 1 Ch. 700.

An order under the Trustee Act, 1893, concerning any land, stock, or chose in action subject to a mortgage may be made, by sect. 36, (2), of the Act, on the application of any person beneficially interested in the equity of redemption, whether under disability or not, or of any person interested in the money secured by the mortgage.

Lunatic mortgagee.

Sects. 135 and 136 of the Lunacy Act, 1890, deal with vesting orders in the case of a lunatic mortgagee.

Mortgagor must bear costs of reconveyance.

As a rule, the mortgagor must bear the costs of obtaining a reconveyance of his property, including the additional costs occasioned by the mortgagee's putting his interest in settlement. *Wetherell* v. *Collins*, 3 Mad. 255; *Burden* v. *Oldaker*, 1 Coll. 105; *King* v. *Smith*, 6 Ha. 473; *In re Wheeler*, 1 D. M. & G. 434; see *Capper* v. *Terrington*, 1 Coll. 103.

Costs of vesting order, how borne.

The Court may order the costs of obtaining a vesting order, whether under the Lunacy Act, 1890, or under the Trustee Act, 1893, and of carrying it into effect, to be paid, either out of the property in respect of which the order is made, or in such manner and by such persons as the Court thinks fit. See the Lunacy Act, 1890, sect. 142, and the Trustee Act, 1893, sect. 38. These sections alter the law as laid down in *In re Sparks*, 6 Ch. Div. 361.

Mortgagee unable to restore title-deeds.

Where the mortgagee, on being paid off, is unable to restore the title-deeds of the mortgaged property, the mortgagor is entitled to bring an action for the purpose of having the matter investigated, the costs of which must be borne by the mortgagee. *Stokoe* v. *Robson*, 3 V. & B. 51; 19 Ves. 385; *Lord Midleton* v. *Eliot*, 15 Sim. 53; *James* v. *Rumsey*, 11 Ch. D. 398; *Caldwell* v. *Matthews*, 62 L. T. 799.

Where the mortgagor is authorized to bring an action to recover title-deeds from a third party, the costs of that action must be borne by the mortgagee. *James* v. *Rumsey*, 11 Ch. D. 398, 405.

Right of mortgagor to indemnity,

The mortgagor is also entitled to an indemnity from the mortgagee, which will be in the form of the bond given in *James* v. *Rumsey* (11 Ch. D. 398, 400). Cases *supra*;

Luccraft v. *Hite*, 2 Ha. 14 *n.*; *Shelmardine* v. *Harrop*, 6 Madd. 39.

The mortgagor is entitled to an indemnity although the mortgagee has not been guilty of negligence. *James* v. *Rumsey*, 11 Ch. D. 398. *Smith* v. *Bicknell* (3 V. & B. 51 *n.*) and *Woodman* v. *Higgins* (14 Jur. 846), so far as *contra*, are not in accordance with the present practice.

and compensation.

Compensation has also been given to the mortgagor where the loss was occasioned by the wilful default of the mortgagee. *Hornby* v. *Matcham*, 16 Sim. 325; *Brown* v. *Sewell*, 11 Ha. 49.

Where mortgaged policies of insurance were lost by the mortgagee, 100*l.* of the amount due to him was retained in Court to meet the extra expenses of recovering the claims from the insurance offices. *Caldwell* v. *Matthews*, 62 L. T. 799.

Where payment of the mortgage money has been delayed through the inability of the mortgagee to restore the title-deeds, interest will not run on the mortgage debt from the time when the mortgagor was ready to pay, although there was no strict tender. *Woodman* v. *Higgins*, 14 Jur. 846; *Lord Midleton* v. *Eliot*, 15 Sim. 531; *James* v. *Rumsey*, 11 Ch. D. 398, 404.

Mortgagee after payment trustee of legal estate.

After payment and before reconveyance, the mortgagee is trustee for the mortgagor of the legal estate in the mortgaged property and the mortgagor is tenant at will to the mortgagee of the legal estate. The legal estate of the mortgagee determines at the expiration of thirteen years from the payment by the combined effect of sects. 7 and 34 of the Real Property Limitation Act, 1833 (3 & 4 Wm. IV. c. 27). *Sands to Thompson*, 22 Ch. D. 614.

Mortgagee of stock must retransfer on payment.

A mortgagee of stock which has been transferred into his name is bound upon payment to retransfer the stock to the mortgagor. *Magnus* v. *Queensland National Bank*, 36 Ch. D. 25.

Liability where stock retransfered to wrong person.

Where a mortgagee of stock by transfer from three mortgagors retransferred the stock to purchasers from one of them, without the authority of the others, the mortgagee

was held liable for the value of the stock at the time of the transfer. *Magnus* v. *Queensland National Bank*, 36 Ch. D. 25.

Discharge of mortgage of ship.

The Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), provides—

Sect. 32. Where a registered mortgage is discharged, the registrar shall, on the production of the mortgage-deed, with a receipt for the mortgage money endorsed thereon, duly signed and attested, make an entry in the register book to the effect that the mortgage has been discharged, and on that entry being made the estate (if any) which passed to the mortgagee shall vest in the person in whom (having regard to intervening acts and circumstances, if any) it would have vested if the mortgage had not been made. See also sect. 43, (7).

Where the discharge of a mortgage has been duly registered, the mortgage cannot be revived on the ground that the discharge was given by mistake. *Bell* v. *Blyth*, 6 Eq. 201; 4 Ch. 136.

The registrar is not authorized to erase entries of mortgages upon their discharge. *Chateauneuf* v. *Capeyron*, 7 App. Cas. 127, 135.

Duty of pledgee on payment.

As to the duty of a pledgee on payment to restore the property pledged, see p. 270.

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