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TOGETHER WITH THE

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BY

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PREFACE.

It has been said that there is no other species of property with which Courts and lawyers are more frequently called upon to deal than choses in action. One illustration in support of this will suffice. There has been no century comparable with the present for the conduct of business upon collective and co-operative lines. And the limitation of liability provided by statute has given the greatest impetus to the formation of an infinite variety of enterprises, commercial and otherwise, into companies which are at once commanding and progressive, and afford increased facility for the investment of an incredible amount of capital representing a great multitude of interested individuals. And when it is remembered how incessantly and increasingly the Courts are invoked to decide upon company matters, the claims of shareholders, the conduct of directors, the rights of companies and the general control or disposal of their affairs, and that company law is but one branch of choses in action, it will be needless to enlarge upon the importance of the subject of this work.

The author has treated at some length the subject of assignability in equity with a view to showing how wide and varied is the scope of equitable jurisdiction. He has also thought fit to illustrate assignment by statute in order

to point out that while important results were effected by the Judicature Act, 1873, particular choses in action were being made transferable before that enactment, and the transfer of others has been provided for since the operation of that Act.

To the Judicature Act one Book has been specially devoted, and it is hoped that the collection of cases cited and suggestions made therein, together with the "matters affecting particular persons" and the division on Practice, may prove to be of some service. Judgments in cases, and the weighty authority of many text-writers, have been reproduced throughout *verbatim*, and the references given in each instance.

The author is indebted to the learned writers and editors of every authority which he has cited in this work, and not least of all to the careful industry of the law reporters; whilst his special thanks are personally due to the learned Recorder for Winchester, Dr. W. BLAKE ODGERS, Q.C., for his kindly interest in the progress of this work, and for his calling attention to several cases of paramount importance.

WALTER R. WARREN.

2, HARE COURT, TEMPLE, E.C.

June, 1899.

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RELATING TO

CHoses IN ACTION.

Book I.

CHoses IN ACTION DESCRIBED. *fa*

CHAPTER I.

THE NATURE OF CHoses IN ACTION.

IN the recent important case of *Colonial Bank v. Whinney* (a), Fry, L.J., said: "According to my view of the English law, all personal things are either in possession or in action. The law knows no *tertium quid* between the two." And in the same case Lindley, L.J., said: "It is difficult to find out the exact meaning of the expression chose in action. One has to look back and see what the interpretation to be put upon these words is, and it is impossible, I think, to look into the authorities upon this subject without seeing that the meaning attributed to the expression has been expanded from time to time. So far as I can make out, the words 'chose in action' were originally used to denote a mere right to sue for a debt or for damages. I take that not to be so much a definition as a description, and, as I understand it, the original idea was that a chose in action was not property of a particular class,

(a) 30 Ch. D. 285.

but was no property at all. . . . It was not that property was divided into choses in action and choses in possession, but that a chose in action was only a right to sue as distinguished from property." After deducing authorities in support of this statement, the learned judge continues: "The term chose in action has, then, no doubt, whatever its original meaning may have been, come to be used as denoting a certain class of property. There being no word to denote incorporeal personal property, the meaning of the expression choses in action was gradually extended for the purpose of denoting it. . . . No little confusion has arisen from this extended use of the expression chose in action, and where these words are used it is necessary to be careful in ascertaining whether they are used in the wide sense of incorporeal personal property, or in the narrow and strict sense of a right to sue for a debt or damages. Though debts, money in the funds, shares in companies, copyrights and patents, are all incorporeal personal property, they are so different in their nature and legal incidents that care must be taken not to be misled by giving them all a common name which conceals their differences. We all know that our law has not been put into a very scientific shape, and there is often considerable difficulty in determining in what sense a particular expression, such as choses in action, is used" (b).

And, indeed, it may be said here, in passing, that this difficulty is one which extends not only to the whole law of contract (c), but to English law in general, owing to the irregular way in which it has grown; and, in connection with the particular subject of choses in action, this difficulty has been enhanced by misconception of the combination of words, and by the further fact that until within most recent times choses in action

(b) 30 Ch. D. 282—284.

(c) Pollock, Contracts, 704.

have been regarded by writers rather as incident to some other branch of law than as a subject by themselves (*d*).

The term chose in action has been interpreted in various ways, and has been employed to describe many kinds of proprietary interests differing very widely from one another in their nature.

It has been used to denote :—

- (1) The *right* to obtain something not in possession or enjoyment.
- (2) The property or some corporeal thing in regard to which the right is exerciseable.
- (3) A *document* evidencing a right, or title.
- (4) An interest in some fund or other property (or the document evidencing such an interest), the right to enjoy which, strictly speaking, is not legally enforceable at all.

Such being the uses to which the term chose in action has been applied, it may be well to cite here the main attempts which have been made to define, or to describe, the nature of choses in action.

“Things in action, as a right or title of action that doth only depend in action, and things of that nature, as rights and titles of entry to any real or personal thing . . . are not grantable at all, but by way of release to the tenant of the land, &c., by which means it may be extinguished; but this may not be neither without deed. . . . Things in action, as debts and the like” (*e*).

“Chose in action is incorporeal and only in right . . . as a right or title of entry into land. An action of debt on an obligation, or an annuity, or for rent, or action of covenant on a covenant, or an assise upon a disseisin, *ejectione firmæ* upon an ejectment, trespass for goods taken away, beating and the like. . . . Some also of

(*d*) L. Q. R. x. 303.

(*e*) Shep. Touch. 2nd ed. [1648], pp. 231, 430.

them are said to be personal, as debt and the like; some real, as rights and titles to land, either of entry or action; or mixed, as was wardship" (f).

"Chose in action is, when a man hath cause, or may bring an action for some duty due to him; as an action for debt upon an obligation, annuity, or rent, action of covenant or ward, trespass of goods taken away, beating, or such like; and because they are things whereof a man is not possessed, but for recovery of them is driven to his action, they are called things in action" (g).

"Chose in action is a thing incorporeal, and only a right, as an annuity, obligation for debt, &c. And generally all causes of suit for any debt, duty, or wrong, are to be accounted choses in action. When a man may bring an action for some duty, viz., debt upon bond, or for rent; or action of covenant, or trespass for goods taken away, or such like; these are choses in action. And as they are things whereof a person is not possessed, but is put to his action for recovery of them, they are therefore called choses in action. . . . And a condition and power of re-entry into land upon a feoffment, gift or grant, before the performance of the condition, is of the nature of a chose in action. If one have an advowson, when the church becomes void the presentation is but as a chose in action. Where a man hath a judgment against another for money, or a statute, these are choses in action. . . . A possibility of an interest or estate in a term for years is near to a chose in action" (h).

"Property, in chattels personal, may be either in *possession*, which is where a man hath not only the right to enjoy, but hath the actual enjoyment of, the thing; or else it is in *action*: where a man hath only a bare right, without any occupation or enjoyment" (i).

(f) Shepp. Abr. [1675], tit. Choses in Action.

(g) Termes de la Ley [1708], tit. Choses in Action.

(h) Jacob's Law Diet. [1729].

(i) 2 Bl. Comm. [1765—1769], 389.

"Property in *action*, or such where a man hath not the occupation, but merely a bare right to occupy the thing in question; the possession whereof may however be recovered by a suit or action at law: from whence the thing so recoverable is called a thing, or chose in action. Thus money due on a bond is a chose in action; for a property in the debt vests at the time of forfeiture mentioned in the obligation, but there is no possession till recovered by course of law. If a man promises, or covenants with me, to do any act, and fails in it, whereby I suffer damage, the recompense for this damage is a chose in action; for though a right to some recompense vests in me at the time of the damage done, yet what and how large such recompense shall be, can only be ascertained by verdict; and the possession can only be given me by legal judgment and execution. In the former of these cases the student will observe, that the property, or right of action, depends upon an *express* contract or obligation to pay a stated sum: and in the latter it depends upon an *implied* contract, that if the covenantor does not perform the act he engaged to do, he shall pay me the damages I sustain by this breach of covenant. And hence it may be collected, that all property in action depends entirely upon contracts, either express or implied; which are the only regular means of acquiring a chose in action. Upon all contracts or promises, either express or implied, and the infinite variety of cases into which they are and may be spun out, the law gives an action of some sort or other to the party injured in case of non-performance; to compel the wrongdoer to do justice to the party with whom he has contracted, and, on failure of performing the identical thing he engaged to do, to render a satisfaction equivalent to the damage sustained. But while the thing, or its equivalent, remains in suspense, and the injured party has only the right and not the occupation, it is called a chose in action; being

rather *in potentia* than *in esse*: though the owner may have as absolute a property in, and be as well entitled to, such things in action, as to things in possession" (j).

"Chose in action is a thing incorporeal, and only a right: as an annuity, obligation for debt, a covenant, voucher by warranty, and generally all causes of suit for any debt or duty, trespass or wrong, are to be accounted choses in action. And it seems that chose in action may also be called chose in suspense, because it has no real existence or being, nor can properly be said to be in our possession" (k).

"The term choses in action appears to have been applied to things, to recover or realize which, if wrongfully withheld, an action must have been brought: things, in respect of which a man had no actual possession or enjoyment, but a mere right enforceable by action. The more important things recoverable by action only were money due from another, the benefit of a contract, and compensation for a wrong or damages: and these have always been the most prominent choses in action, though not the only things included in the term.

"In modern times also several species of property have sprung up which were unknown to the common law. The Funds now afford an investment of which our forefathers were happily ignorant, whilst canal and railway shares and other shares in joint stock companies and patents and copyrights are evidently modern sources of wealth. These kinds of property are all of a personal nature, many of them having been made so by the Acts of Parliament under the authority of which they have originated. For want of a better classification these subjects of personal property are now usually spoken of as choses in action. They are, in fact, personal

(j) 2 Bl. Comm. 396, 397.

(k) Blount, Law Dict. tit. Chose in Action.

property of an incorporeal nature, and a recurrence to the history of their classification amongst choses in action will help to explain some of their peculiarities" (l).

In a subsequent chapter (m) is set forth a list of things which have from time to time been deemed to be choses in action; upon reference to that list, and upon comparing the foregoing descriptions with one another, it may be noted that the latter are all deficient in some respects. Indeed, it is to be observed that the task of defining the term choses in action is not only difficult but impossible, and that the only adequate and satisfactory method of ascertaining a true knowledge of their nature and incidents is by a study of the things which have been brought within their classification. For, while all the above-mentioned writers agree in saying that a chose in action is something not in possession but obtainable by taking proceedings, they differ in describing the denotation of the *thing* in action. According to Blackstone (n) it may be a *corporeal* thing, such as money, but the term is limited by him to the subject-matter of contracts, whereas all the other definitions or descriptions include a right of action for tort, and exclude *corporeal* chattels, stating that the term is confined to things "incorporeal and only in right."

The case authorities show, however, that while the term comprehends rights of action arising upon contract, it is undoubtedly of much broader significance, and includes not only the right to procure payment of a sum of money, to recover pecuniary damages for non-

(l) Williams, Pers. Pro. 1st ed. [1848].

(m) *Post*, Bk. I. Chap. II.

(n) Blackstone's definition is almost worthless. It excludes not only rights of action for tort,

but such *choses* as stock in the funds, and in trading companies which had been decided to be choses in action before Blackstone wrote; he also ignores choses in action real: L. Q. R. x. 315.

performance or for a wrong inflicted either upon one's person or property, but also embraces many other matters among which are certain proprietary interests vesting in their owner without conferring upon him any right of action or other legal proceedings.

When we are considering the import of the term chose in action it is necessary to observe that "chose" or "thing" in this connection is by no means necessarily synonymous with "*corporeal thing*" or with "*chattel personal*" (o), and that the words "in action" are not restricted to proceedings in a Court of Law or Equity, but may include a petition and other similar steps, and in case of some choses in action the two words "in action" have no other significance than that of their being opposed to the words "in possession" in the correlative term of choses in possession. Further, whatever may have been the prevailing opinion at one time, there is no doubt to-day that choses in action are property, and often property of a very valuable and substantial kind; for, as Blackstone says, the owner may have as absolute a property of choses in action, as of things in possession. And this value has been materially increased by the facility of assignment afforded by the legislature during the present century. So divergent are various choses in action in their incidents and different in the matters with which they deal, that probably the only one characteristic which they may all be said, with safety, to have in common is that which seems too obvious to mention, namely, that they are, one and all, kinds of property not in possession. Yet this was one of the main facts pointed out in the recent decision of *Colonial Bank v. Whinney* which has been already quoted (p). It is believed that there is no allusion to any classification of things as

(o) Yet Blackstone commits this mistake, see 2 Bl. Comm. 434 *et seq.*

(p) *Ante*, pp. 1, 2; *Colonial Bank v. Whinney*, 30 Ch. D. 285, *per Fry*, L.J.

being in possession or in action in early writers, such as Glanville, Bracton, Britton or Fleta, although in the works of the three last mentioned there is a clear distinction drawn between *corporeal* things in their owner's possession and *mere rights* (of action or otherwise) (*q*). Perhaps the earliest reference to such a division is in 22 Ass. pl. 37, where it was said that the lord might seize what is in possession of a villein, but not what remained in action to the villein, as if obligation of debt, or covenant, or warranty be made to him (*r*). However, the summary of cases in Brooke's Abridgement [Choses in Action] (*s*) makes it sufficiently evident that the term was well established before Coke's time, who, with his contemporaries, seems to have considered a chose in action as equivalent to a right incapable of being assigned or granted over (*t*). But assignability or non-assignability has never been a comprehensive or satisfactory test of what are or are not choses in action, for the king has always been able to assign his choses in action which are *certain*; and bills of exchange, one of the most important choses in action, were from an early date assignable at law by the custom of merchants; as also was stock in the first joint stock trading companies; and after the repeal of the Bubble Act in 1825, transfers of shares in unincorporated joint stock companies were recognized by the Courts (*u*). And, as it has been already stated, many choses in action, such as promissory notes, and bail and replevin bonds and debts, &c., have from time to time been, by statute, made expressly assignable. Here again may be remarked a further distinction in the nature of different kinds of choses in action, for in questions of priority between claimants, the law relating to the transfer of shares

(*q*) L. Q. R. x. 143.

(*r*) Bro. Abr. Chose in Action; and L. Q. R. x. 144.

(*s*) Brooke died in 1558.

(*t*) Co. Litt. 120a; 292a; 292b;

351; cited in L. Q. R. (*supra*).

(*u*) *Walburn v. Ingilby* [1832], 1 M. & K. 61; 36 R. R. 246; *Re Mexican, &c. Co.* [1859], 4 De G. & J. 544, cited in L. Q. R. x. 312.

differs materially from that which regulates the assignment of an ordinary debt or other similar chose in action, formal registration being an all-important requisite in the transfer of shares.

It has been suggested that a proper test as to what are choses in action is by discovering whether the things in question are capable of being stolen, or seized by the sheriff under a *fi. fa.*, or not. By the common law you could not be punished for stealing a bond, or a bank-note, or a Treasury-warrant, or anything of that sort until stealing such things was made a larceny and punishable by 2 Geo. II. c. 25, s. 3 (v). Neither could they be seized under a *fi. fa. (w)*.

"There was always a difference between personal property, such as to be capable of being stolen, taken, carried away, and so to be the subject of larceny at common law, and to be capable of being seized by the sheriff under a *fi. fa.*, and other kinds of personal property. Personal property of the first sort, when belonging to a married woman, vested at once in the husband. The others the husband might reduce into possession, but did not have until he had done so. And when new kinds of property, like stock in the funds, or in more modern times shares in companies, were created, questions arose as to whether they were within the principle of being in possession or not, but till the phrase was used in the Act of 1869 it never became important to inquire whether they were to be called things in action or not. But it is noticeable that, in *Dundas v. Dutens* (x), Lord Thurlow, speaking of stock or the funds, said: 'Those things, such as stock, debts, &c. being choses in action are not liable. They could not be taken upon a *levari facias*.' The reason was the same as that for which they could not be the

(v) *Russell on Crimes*, 217.

(w) *Knight v. Criddle* [1807], 9 East, 48.

(x) 1 Ves. Jun. 196; 1 R. R. 112.

subject of larceny at common law, because they could not be seized" (y) www.btool.com.cn

But again it may be urged that this is no test as to what things are or are not choses in action. Some choses in action are physically impossible of being taken away or seized under *fi. fa.* because they have no corporeal existence. A thief cannot steal an advowson, nor a sheriff seize a shareholder's right to claim against a director for misfeasance; on the other hand, a bond, a bill of exchange, and mortgage deeds are all capable of being stolen or seized—yet they are all choses in action.

Again, upon considering the list of things which are choses in action, it cannot be said that *all* choses in action are things "the possession whereof may be recovered by a suit or action at law." For, in the first place, many choses in action are not reducible into possession, either in the strict sense of the term or in any sense at all. It is true that a debt or the money due on a bill of exchange may be recovered by action, but what right of action or procedure is there to reduce into possession the right of the next presentation to a church, or the ancient right of the king to the marriage of his ward? There could be no recovery, no reduction into possession in either of the two last mentioned cases. Probably the owner of the right of presentation to a benefice might, if obstructed in the exercise of his right, be able by proceedings to restrain the wrongdoer and to be protected in the execution of his right. But that would not be reducing into possession, or obtaining the enjoyment of anything which he had not as fully before; it would be rather in the nature of a negative exercise of his powers.

Supposing, in violation of the king's right, his ward married without first obtaining the king's consent;

probably the marriage might be void, or, any way, the king might annul it. But what proceedings at law or in equity would have been available to him to reduce into possession what he had already got, namely, a mere right? The enjoyment of this right was exerciseable, if at all, without any legal or other like proceedings; and "if wrongfully withheld," it was absolutely impossible of reduction into possession (s). Both these illustrations of choses in action have been selected because they not only demonstrate the inadequacy of the definitions given, but exemplify that there were and are choses in action which denote rather a right of doing something than any necessary connection with legal proceedings. Perhaps, as further instances of the same class may be cited, a right of entry, a use, and (if we agree that they are choses in action) patent rights, copyrights, &c. And, secondly, there are many choses in action in relation to which there is not only nothing capable of being reduced into possession, but no proceedings of any kind whatsoever are available in such cases, on peculiar and proper grounds. Strictly speaking, the king has no *rights*, he is above the law, and consequently to apply to his case of wardship the words "right of action or other proceeding" is a contradiction in terms, it is not "of right" that the king ever comes into Court as a party to any proceedings. Further, take the case of patents, if we accept them as being in the nature of choses in action, there is no known right of action against the Crown for withholding a patent; or what room is there for right of action against the Crown by a *patentee*? The

(s) The heir of the king's tenant *in capite* was a ward during non-age. By a charter of Henry I. a daughter of any of the king's tenants was not, even in the lifetime of her father, to be married without the king's privity; because otherwise she might marry

a public enemy. But the king was to take nothing for his consent; nor could he restrain the father from marrying her to any that was not such enemy; but this charter says nothing about the marriage of *males*: Tomlins, Law Dict.

privilege being granted by the Crown, there is nothing more to come. There is no privity between the Crown and a patentee.

The patentee has no right against the Crown. The rights of owners of patents, copyrights or trade-marks are not rights *in personam*, but they are rights *in rem*, which at once differentiates them fundamentally from the general class of choses in action. Shares, too, in joint stock and other companies are choses in action; so also are stocks and debts payable *in futuro*. What is the nature of such shares? They are simply a right to participate in the management, profits and assets of a particular property or undertaking. Shares are not a liberty of proceeding or a right of proceeding in a Court of law to recover damages or a debt (a). A man has the ownership of a share, and "he cannot get anything more than he has got already. If he is kept out of his *dividends* he can bring his action for those dividends. They may be choses in action, that I can understand, but he cannot sue for the *share*, as he has it already" (b).

The ownership of shares in a company does not confer a right to take proceedings against the company to recover the face value of the shares. The company may never declare a dividend, but the owner of the shares has not any remedy at law.

Nor is the owner of stock in the public funds in any better position. No action will lie to recover the interest upon Government stock if default is made by the Government, while the principal is a purely fictitious amount; it is merely a cipher by which the interest is computed (c). But, perhaps, a stronger illustration still is that of bonds of foreign Governments. It is quite clear from the authorities that negotiable bonds and

(a) *Colonial Bank v. Whinney*,
30 Ch. D. 276.

(b) *Id.* pp. 284, 286.

(c) L. Q. R. x. 303.

scrips of foreign Governments are choses in action; and it is equally certain that no possible legal remedy exists for their enforcement or reduction into possession. In *Ex parte Huggins* (d), Jessel, M.R., in the course of an interesting judgment, says: There are many cases in which property arises from a contract, quite independently of the fact that no judicial tribunal can enforce it. Take the case of the bond of a foreign Government, which is a contract by the foreign Government to pay a sum of money. Such a contract is not enforceable in the Courts of this country, and probably it is not enforceable anywhere (e). The contract of a Government is not enforceable in the Courts of another country, because they have no jurisdiction over a foreign Government, and no sovereign power would allow itself to be sued in the Courts of its own country without its own consent. Still no one would say that the bond of a foreign country is not property. . . . The mere fact that you cannot sue for the thing does not make it not "property." I am not going to attempt to define "property," that would be too dangerous. But there can be no doubt that these foreign bonds, both in common language and in the language of lawyers, are "property." Nor can I doubt that if a man had a bond for 10,000*l.* of the British Government it would be "property." The annuities which were granted by the kings of England in former days, charged on the tonnage and poundage dues, were always dealt with as property, and they formed the subject of numerous decisions of the Courts. But you could not sue the Crown for them, and they could not even be made the subject of a petition of right, because they were granted out of the voluntary

(d) 21 Ch. D. 90, 91.

(e) According to the strict acceptance of the term such a set of circumstances would not be

called a "contract" at all, but an *agreement*; a contract being generally defined as "an agreement enforceable by law." Pollock, Principles of Contract, 2.

bounty of the Crown. But still they were property and were assignable.

So, with regard to debts payable at a certain future time, a mere expectancy, or possibility of an interest, or estate in a term of years, all of which are choses in action; but to none of them does a right of proceeding attach to recover immediately anything outstanding, for nothing is immediately payable or recoverable, yet they are called choses in action, not upon the vesting of the right to proceed immediately but, before ever any right of action is exerciseable in respect of them.

There remains for consideration the question whether choses in action include corporeal things not in our possession. It is quite certain that the term has been applied to things in our possession which are at once things corporeal in themselves and representative of incorporeal things; such are policies, bonds, bills of exchange, deeds of mortgage, &c., but this use of the term has been said to be made by a confusion of language, and, at best, is but a figure of speech (*f*), as it is possible for the parchment or paper to belong to one man and the money secured by it to another (*g*). To this it may be answered that the rights over and occupation of the incorporeal and corporeal "thing" are not always thus severed, and that the incorporeal "thing" is dependent upon the corporeal "thing" to so great a degree as to render the two "things" or interests separately incomplete, and hence the use of the term chose in action as applied to such things as bonds, policies, and the like, is not inappropriate; and further, that we are not historically justified in restricting the meaning of the term in the manner indicated and desired, the judicial tribunals having been of a different opinion in applying the term to things corporeal in themselves but which

(*f*) Elphinstone & Clark, Intro. to Conveyancing, 183; L. Q. R. ix. 314.

(*g*) Co. Litt. 232a.

are at the same time instruments evidencing a right to something else.

It has been observed that a chose in action is sometimes used to signify a right of bringing an action, and at other times the *thing* itself which forms the subject-matter of that right, or with regard to which that right is exercised; but it more properly includes the idea both of the thing itself and of the right of action as annexed to it. Thus, when it is said that a debt is a chose in action, the phrase conveys the idea not only of the thing itself, *i.e.*, the debt, but also of the right of action or of recovery possessed by the person to whom the debt is due (*h*). And the same may be said of a deed of mortgage, a bill of exchange, a bond and similar choses in action.

As to corporeal chattels not in our possession. Is the term chose in action in any way applicable to these? Blackstone's answer is clearly in the affirmative, for he says *money* due on a bond is a chose in action (*i*). And the learned editors of "The Modern Law of Personal Property" also adopt that view: "Choses in action consist of corporeal chattels not in possession of the owner, as, for example, when hired or lent to a stranger, and of incorporeal chattels" (*j*).

The attempt to restrict the term choses in action to "a thing incorporeal and only of right" is futile and contrary to the authority of past judicial decisions; futile, because it is the result of a prior attempt to divide all property into two classes, corporeal and incorporeal, after the manner of the Roman law system. In so doing they who have attempted it have employed terms which render it impossible for them to carry out their design. For, as it has been well pointed out (*k*), they must either include among choses in possession

(*h*) Brown, Law Dict. Chose.

(*i*) 2 Bl. Comm. 396.

(*j*) Goodeve, Pers. Prop. 2nd ed. p. 2.

(*k*) L. Q. R. xi. 68.

things which are not in possession, actual or constructive, or they must create a third category for that kind of property which is of the nature peculiar to choses in action.

Moreover, Mr. Joshua Williams, in his work on Personal Property, clearly uses the term chose in action as including corporeal things, as well as incorporeal (*l*). And we have the further dictum of Lord Justice Fry that personal property is either in possession or in action, and that the law knows no *tertium quid* (*m*); from which it would appear that all corporeal chattels of which an owner is not in possession but which he is entitled to reduce into possession, must be included among choses in action. In the old case of *Walswyn v. Smith* (*n*) we find the following facts and decision: A. was outlawed for treason. The king made a grant to B. who brought a bill in Chancery for certain goods of such a value against C. who had A.'s goods in his possession. It was objected, that their remedy was at law by detinue; but it was answered, that no action lay at common law until seizure, or finding by matter of record; but, however, that the king had election to proceed at common law, or in equity. And the Court held, that subpoena lay, and ordered C. to make an inventory against the next day, or that he should be sent to the Fleet (*o*). Here, it is submitted, is a case of choses in action signifying specific chattels which vested in the king by outlawry, and were by him granted over to B. who could not be said to be in possession or enjoyment, and who brought his action not for damages but for the delivery of the specific corporeal chattels (*p*). In the case of *Franklin v. Neate* (*q*) Parke, B., spoke of a *pledge* as a chose in action.

(*l*) Pers. Prop. 9, n. (*g*), and 10.

(*m*) *Colonial Bank v. Whinney*,
supra.

(*n*) 39 H. VI. 26b; 17 Viner,
Abr. 5.

(*o*) See also *Foord v. Pomroy*
[1610], Noy, 136.

(*p*) The question of the value of rights independently of corporeal things has been well discussed in L. Q. R. xi. pp. 70—71.

(*q*) *Franklin v. Neate*, 13 M. & W. 481.

So, too, a reversionary interest in particular pictures (*r*), and the interest in specific chattels (*e.g.*, *engravings*) of a person who dies intestate have been held to be choses in action (*s*). And choses in action have further been held to be included in the expression "goods and chattels" in all the Bankruptcy Acts from the time of James I. downwards (*t*); and so it is submitted that this use of the term chose in action is also justified upon good authority. Hence, it will be seen that the term chose in action to-day includes some kinds of property (such as shares and stock) which did not exist when the term was first fashioned, while it formerly comprised some rights and interests (such as the king's right of marriage of his ward) which have ceased to occupy a place in our modern law. So that the result of the foregoing consideration of choses in action leads to the conclusion that choses in action are property not in possession of the owner, not always reducible into possession, not always conferring a right or liberty of proceeding in respect of them; that they are mostly of an incorporeal nature, but may be corporeal, or instruments evidencing a right to something beyond the document itself; and that they include various kinds of property so different from one another in their nature and incidents that they have little else in common but the name which characterizes them all by the one fact of their being property not in actual possession.

(*r*) *Ex parte Singleton* [1889], 61 L. T. 301.

(*s*) *Widgery v. Tepper* [1878], 26 W. R. 647; *Re Barber, Dardier v. Chapman*, L. R. 11 Ch. D. 442;

27 W. R. 813; *Bates v. Dandy* [1741], 2 Atk. 207.

(*t*) *Colonial Bank v. Whinney*, *supra*.

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THINGS WHICH ARE CHOSSES IN ACTION.

In this chapter it is proposed to set forth a list of those things which on good authority have been deemed to be choses in action; although it is not suggested that the list is exhaustive.

The following things have been considered choses in action :—

The right to or property in title-deeds in the hands of a third person (*a*).

Debts (*b*), whether due by specialty or simple contract, and whether debts of record or on judgment (*c*).

An obligation, and the power and right of action to sue for the same (*d*).

Annuities (*e*), in fee, for life, or years (*f*).

The right or title of entry into land of which a person is disseised; or the right of action or suit for it (*g*).

(*a*) Y. B. 9 H. VI. 6 pl. 64. Brooke says *the deeds are choses in action*. "Les chartres sont choses in accio" (Abr. tit. Choses in Action), but the report itself does not warrant such a statement. Cp. also, *Hobson v. Melton*, 2 M. & Rob. 342.

(*b*) Y. B. 37 H. VI. 13; Co. Litt. 292b.

(*c*) Bro. Abr. [1586], Choses in Action; *Brice v. Bannister* [1878], 3 Q. B. D. 569; *Buck v. Robson*, *Id.* 686; *Ex parte Hall* [1879], 10 Ch. D. 615; *Walker v. Bradford Bank* [1884], 12 Q. B. D. 511; *Webb v. Smith* [1885], 30 Ch. D. 192; *Drew v. Josolyne* [1887], 18 Q. B. D. 590; *Tailby v. Official Receiver* [1888], 13 Ap. Ca. 523; *Re Coleman* [1888], 39 Ch. D. 443; *Re Turcan* [1889], 40 Ch. D. 7; *Wilmut v. Alton*, (1897) 1 Q. B. 17.

NOTE.—As a debt must be an ascertained sum, damages recoverable in an action are not a debt until the amount is ascertained by judgment: *Re Irving*, 37 L. T.

N. S. 507; *Goodman v. Robinson*, 18 Q. B. D. 332. A contract to lend money creates no debt. It may constitute a cause of action, but it is not a chose in action: *May v. Lane*, 64 L. J. Q. B. 236 (*sed quare*); see also *Western Waggon Co. v. West*, (1892) 1 Ch. 271.

(*d*) Bro. Abr. Choses; Tomlins, Law Dict.

(*e*) Y. B. 21 Edw. IV. 84 [1481]; Blount, Law Dict. Choses; *Gerard v. Boden* [1628], Hetley, 80; *Priddy v. Rose* [1817], 3 Mer. 86; 17 R. R. 24; *Wiltshire v. Rabbits* [1844], 14 Sim. 76.

(*f*) 5 Reports, 89; Fitz. tit. Grant, 45; Shepp. Abr. [1675], Choses; *Norcutt v. Dodd*, Cr. & Ph. 100 [1841]; Blount, Law Dict. Choses in Action.

(*g*) Bro. Abr. Choses, 141, pl. 14; Shepp. Touch. [1648], 231; 1 Brownl. 33; Tomlins, Law Dict. Choses; Viner, Abr. Asst.

Right of action for trespass for goods taken away (*h*).

Action for assault (*i*) ; for trespass (*j*).

Taxes and customs are choses in action if unpaid (but *in possession* if paid). The king acquires and the subject loses as property in them the instant they become due (*k*).

A condition and power of re-entry into land upon a feoffment, gift, or grant before the performance of the condition, is of the nature of a chose in action (*l*).

If one have an advowson, when the church becomes vacant, the presentation is a chose in action (*m*).

A judgment against another for money; or a statute (*n*).

An ordinary bond (*o*), and money due upon a bond (*p*).

Goods forfeited to the Crown, &c. (*q*).

The king's right of marriage of his ward (*r*).

Forfeiture of a marriage (*r*).

Tithes (*r*).

A right of action (*s*).

A condition of re-entry for non-payment of rent (*t*).

Uses and trusts (*u*).

Rent (*x*), and an action for rent (*w*).

Action on a covenant (*v*).

(*h*) Jacob's Law Dict. [1744], Choses; 1 Brownl. 33; *Cohen v. Mitchell* [1890], 25 Q. B. D. 262.

(*i*) *Termes de la Ley* [1708], Choses.

(*j*) Y. B. 5 Edw. IV. 8, pl. 22; Bro. Abr. Choses; *Rogers v. Spence* [1846], 12 Cl. & Fin. 705.

(*k*) 2 Bl. Comm. 408.

(*l*) Co. Litt. 214; 6 Rep. 50; Dyer [1513-82], 244.

(*m*) *Stephens v. Wall* [1569], Dyer, 282b, pl. 28 and 29; *Brooksie's Case* [1589], Cro. Eliz. 174; 1 Leon. 167; Co. Litt. 90a; Co. Litt. 212a, 351a; *Ryall v. Rowles*, 1 Wh. & Tu. Eq. [1897], 96; Shep. Touch.

(*n*) Tomlins, Law Dict. Choses; Shepp. Abr. [1675], Choses.

(*o*) Co. Litt. 120a, 232; Tomlins, Law Dict. Asst.

(*p*) Bl. Comm. 396, 397.

(*q*) Bro. Abr. Choses; *Food v. Pomroy* [1610], Noy. 136.

(*r*) Y. B. 5 Edw. IV.; Bro. Abr. Choses.

(*s*) Shepp. Touch. [1648], 2nd ed. 231.

(*t*) Shepp. Abr. [1675], Choses.

(*u*) Co. 4 Inst. 85; Gilbert on Uses, 198; Holmes: The Common Law, 407.

(*v*) *Ex parte Rowell*, 39 L. T. N. S. 259.

(*w*) Jacob's Law Dict. [1744], Choses.

Voucher by warranty (*x*).

The benefit of an obligation arising under a contract (*y*).

Presumably, a copyhold fine (*z*); reliefs (*a*); and heriots (*a*).

Bills of exchange, promissory notes, cheques, and negotiable instruments generally (*b*).

Exchequer bills to bearer, or tallies (*c*), and, presumably, navy bills, dividend warrants of the bank, East India bonds, &c. (*d*).

Bank-notes (*e*).

Government tallies (*f*).

A fund payable out of the Exchequer for public services (*g*).

Stock in the public funds (*h*).

Policies of insurance and assurance of every kind (*i*).

A share in an ascertained fund (*j*).

A share in stock (*k*), and a reversionary interest in a sum of stock (*l*).

Shares in a joint stock company (*m*), a contract for

(*x*) Blount, Law Dict. Choses; Co. Litt. 117a.

(*y*) 2 Bl. Comm. 397, 436; *Brice v. Bannister*, 3 Q. B. D. 569; *Walker v. Bradford Bank*, 12 Q. B. D. 511.

(*z*) *Shuttleworth v. Garnet* [1689], 3 Lev. 261, 262.

(*a*) *Andrew Ognet's Case*, 4 Co. 49b; Co. Litt. 47b, 83a, b, 162b; 1 Watk. Cop. 322, note (*f*); 1 Wms. Exors. 732.

(*b*) *Ryall v. Rowles*, 1 Wh. & T. Eq. 96, and notes; *Master v. Miller*, 4 Term. Rep. 340-1; 2 R. R. 399; *Williams, Pers. Prop.*; Goodeve, *Pers. Prop.*; L. Q. R. x. 310; *Colonial Bank v. Whinney*, 30 Ch. D. 270.

(*c*) *Wookey v. Pole*, 4 B. & Al. 1; 22 R. R. 594.

(*d*) 2 Geo. II. c. 25, s. 3.

(*e*) *Id.*; and 1 Hawk. P. C. 339.

(*f*) *Snelgrave v. Bayley* [1745],

Cases, t. Hardwicke, 202; 3 Atk. 214.

(*g*) *Row v. Dawson* [1749], 1 Ves. 331.

(*h*) *Dundas v. Dutens* [1790], 1 Ves. Jun. 197; 1 R. R. 112; *Wildman v. Wildman* [1803], 9 Ves. Jun. 177; 7 R. R. 153; *Rex v. Copper* [1817], 5 Price, 217, 266; 19 R. R. 568.

(*i*) 1 T. R. 26; 1 R. R. 141; *Ex parte Ibbetson* [1878], 8 Ch. D. 520; *King v. Victoria Insurance Co.*, 65 L. J. P. C. 38; (1896) Ap. Ca. 250; Goodeve, *Pers. Prop.* 150, 155, 157, &c.

(*j*) *Honner v. Morton* [1823], 3 Russ. 68; 27 R. R. 15.

(*k*) *Curtis v. Sheffield* [1836], 8 Sim. 176; *In re Butler's Trusts*, 38 Ch. D. 289, 295; *R. v. Copper*, 5 Price, 217; 19 R. R. 568.

(*l*) *Id.*

(*m*) *Humble v. Mitchell* [1839], 11 A. & E. 205, 208; 2 Rail. Ca. 70; 3 P. & D. 141.

railway shares (*m*), canal and railway shares (*n*), and, now presumably all shares in any kind of company (*o*), but Bacon, C.J., is reported to have held that shares in a company are not "things in action" within sect. 15 of Bankruptcy Act, 1869, although it is difficult to discover any ground on which such a decision could be supported, since the individual shareholders have no interest in possession in the property of an incorporated company (*p*).

The question whether particular shares were or were not choses in action has generally been determined by the construction to be placed upon certain statutes whereby they receive their force or existence, or within the operation of which it has been sought to bring the shares, *e.g.*, 7 & 8 Vict. c. 110; sect. 15, sub-sect. 5, Bankruptcy Act, 1869 (*q*); and it is submitted that each case must still stand upon its own merits.

Share in a partnership (*r*).

A dividend on a share (*s*).

A dividend warrant (*t*).

Generally speaking, debentures, mortgage debentures, and debenture stock (*u*).

(*m*) See note (*m*) *ante*, p. 21.

(*n*) Williams, Pers. Prop. 13.

(*o*) *Colonial Bank v. Whinney*, 11 Ap. Ca. 426; 30 Ch. D. 261, &c.; see, also, cases quoted therein; and *Robinson v. Jenkins*, 24 Q. B. D. 279, 280; *Tempest v. Kilner*, 2 C. B. 308.

(*p*) *Ex parte Union Bank of Manchester*, L. R. 12 Eq. 354; but see also *Ex parte Barry*, L. R. 17 Eq. 113; *Ex parte Rensburg*, 4 Ch. D. 685.

(*q*) *Id.*; and also *Société Générale de Paris v. Tramways Union Co.*, 14 Q. B. D. 424, 451; *Ex parte Richardson*, Mont. & Ch.

43; *Ex parte Agra Bank*, L. R. 3 Ch. 555.

(*r*) *Ex parte Fletcher*, *In re Bainbridge*, 8 Ch. D. 218; *Small v. Oudley*, 2 P. Wms. 427; *Tempest v. Kilner*, 3 D. & L. 407; 2 C. B. 300; *Darby v. Darby*, 3 Drew. 495, 503.

(*s*) *Colonial Bank v. Whinney*, 30 Ch. D. 261.

(*t*) *Id.*; *Dalton v. Midland Counties Railway* [1853], 13 C. B. 478.

(*u*) *In re Northern Assam Tea Co.*, *Ex parte Universal Life Assurance Co.*, L. R. 10 Eq. 462, 463; *In re Pryce*, *Ex parte Rensburg*, L. R. 4 Ch. D. 685.

Dividends on bank stock (v).

In a recent case *Jessel, M. R.*, expressed his doubts as to whether French or Italian bonds were choses in action. He said: If a man died possessing nothing but French or Italian bonds no one would say that he had died without any property. Such bonds are not choses in action in the ordinary sense (w). But it is submitted that this *obiter dictum* cannot be cited as an authority against foreign bonds being brought under the category of choses in action, and certainly since the decision in *The Colonial Bank v. Whinney* (x) it may with much show of reason be maintained that foreign bonds come within the designation of choses in action. For bonds of foreign governments, payable to bearer, have been held to be negotiable instruments where a custom was proved to treat them as such in English markets (xx).

A fund in Court has been held to be a chose in action (y), so, also, the right of a fund-holder in the public funds (z).

Trust funds are choses in action (a).

As debentures are issued for a fixed amount, e.g., 50*l.* or 100*l.*, many companies, for the convenience of lenders, issue debenture stock instead, which is issued for any amount. Railway and other companies, constituted under Acts incorporating the Companies Clauses Acts, are empowered to raise part of their authorized loan capital by issuing "debenture stock" in prescribed form. See 8 & 9 Vict. c. 16, ss. 45—47, 49; 26 & 27 Vict. c. 118, ss. 22, 34; 29 & 30 Vict. c. 108, ss. 10, 14—18; 30 & 31 Vict. c. 127, s. 26; 32 & 33 Vict. c. 48, ss. 1—4.

(v) *McCarthy v. Goold*, 1 Ball & Beat. 337, 339.

(w) *Ex parte Huggins, In re Huggins*, 21 Ch. D. 90.

(x) 11 Ap. Ca. 426.

(xx) *Gorgier v. Mieville*, 3 B. & C. 45; 27 R. R. 290; *Goodwin v. Roberts*, L. R. 10 Ex. 76, 337; 1 Ap. Ca. 476.

(y) *Cockell v. Taylor*, 15 Beav. 103; 21 L. J. Ch. 545; *Mangles v. Dixon*, 3 H. L. C. 702; *Barnard v. Hunter*, 2 Jur. N. S. 1215.

(z) *Dundas v. Dutens* [1790], 1 Ves. Jun. 196; 7 R. R. 153; *Rex v. Capper* [1817], 5 Price, 217; 19 R. R. 568.

(a) *Williams*, Pers. Prop. 6; *Figgott v. Stewart* [1895], W. N. 69.

Legacies (*b*), and, *semble*, claims against the estate of deceased persons generally.

A mere expectancy, or possibility of an interest, or estate in a term of years (*c*).

Mortgage deeds, being securities for the payment of money, are choses in action (*d*).

A charter-party (*e*).

A bill of lading (*f*).

A ticket in a Derby sweepstakes (*g*).

The right of a lessee in equity to be relieved against a forfeiture of the lease is a chose in action, within the meaning of sect. 50, Bankruptcy Act, 1883, which vests in his trustee in bankruptcy, by whom it may be sold and assigned (*h*).

An equitable interest in a fund under a will, is a chose in action (*i*).

So, too, a reversionary share of a trust fund (*j*).

A reversionary interest in pictures under a will (*k*).

The rights and remedies of a letter-to-hire under a hiring agreement have been deemed to be a chose in action (*l*).

An assignor's right to be indemnified by an assignee against the covenants in a lease assigned, is a chose in action (*ll*).

(*b*) *Grosvenor v. Lane*, 2 Atk. 180; *Jennings v. Bond*, 8 Ir. Eq. R. 755; *Seys v. Price*, 9 Mod. 217.

(*c*) *Hobson v. Trevor* [1723], 2 P. Williams, 191; Tomlins, Law Dict. Choses; *Flower v. Buller* [1880], L. R. 15 Ch. D. 665.

(*d*) *R. v. Powell*, 21 L. J. M. C. 79; 2 C. C. R. 403.

(*e*) *Boyd v. Mangles* [1847], 16 M. & W. 342; *Mangles v. Dixon*, 1 Mac. & G. 437.

(*f*) Williams, Pers. Prop. 119, 513; Goodeve, Pers. Prop. 69, 185; and see *R. v. Powell*, *supra*; *Caldwell v. Ball*, 1 T. R. 205, 216; 1 R. R. 187.

NOTE.—If a bill of lading, or mortgage deed, why not a pawn-ticket? See *per Parke*, B., 13 M. & W. 481.

(*g*) *Jones v. Carter* [1845], 8 Q. B. R. 138; but see *May v. Lane* [1894], 64 L. J. Q. B. 236.

(*h*) *Howard v. Fanshawe*, (1895) 2 Ch. 581.

(*i*) *In re Freshfield's Trust*, 11 Ch. D. 200; *Dearle v. Hall*, 3 Russ. 11; 27 R. R. 1.

(*j*) *In re Bright's Settlement*, 13 Ch. D. 413; *Hobly v. Collins*, 4 De G. & Sm. 289.

(*k*) *Ex parte Singleton* [1889], 61 L. T. 301.

(*l*) *Ex parte Rawlings, Rawlings v. Pipe* [1889], 60 L. T. 158; *Re Davis, Ex parte Rawlings* [1889], 22 Q. B. D. 195, but distinguished from *In re Isaacson, Ex parte Mason*, (1895) 1 Q. B. 333.

(*ll*) *In re Perkins, Poyser v. Beyfus*, (1898) 2 Ch. 182.

Claims against directors for misfeasance have been held to be choses in action, within the meaning of the Companies Act, 1862, s. 95, sub-s. 3 (m).

The reversionary interest under a will or settlement (n).

A bare right to file a bill in equity (o).

A share in the personal estate (for example, *engravings*) of a person who dies intestate (p).

The income of a *feme covert's* life estate in certain funds (q).

A right of action for tort is also a chose in action (r).

A right of action for breach of contract (s). Blackstone says: Upon all contracts or promises, either express or implied, and the infinite variety of cases into which they are and may be spun out, the law gives an action of some sort or other to the party injured in case of non-performance; to compel the wrongdoer to do justice to the party with whom he has contracted, and, on failure of performing the identical thing he engaged to do, to render a satisfaction equivalent to the damage sustained . . . the recompense for this damage is a chose in action (t).

And presumably, pensions, full-pay, and half-pay (u).

So, too, the better opinion classifies patents, copyrights, [trade-marks?], and similar rights among choses in action (v).

(m) *In re Park Gate Waggon Works Co.*, 17 Ch. D. 234; 44 L. T. 901; 30 W. R. 20.

(n) *Le Vasseur v. Scrutton*, 14 Sim. 116; *Hornsby v. Lee*, 2 Madd. 16; *Re Insole*, L. R. 1 Eq. 470; *Robinson v. Bavasor*, 3 Viner, Abr. 155, pl. 29.

(o) *Prosser v. Edmonds*, 1 Y. & Coll. 481.

(p) *Widgery v. Tepper* [1878], 28 W. R. 547; *Re Barber, Dardier v. Chapman*, L. R. 11 Ch. D. 442; 27 W. R. 813; *Bates v. Dandy*, 2 Atk. 207.

(q) *Wilkinson v. Charlesworth* [1847], 10 Beavan, 328.

(r) Blount, Law Dict. Choses; *Gibbon v. Dudgeon*, 45 J. P. 748; *Williams, Pers. Prop.* 9; *Goodeve, Pers. Prop.* 93.

(s) 2 Bl. 397.

(t) 2 Bl. 397, 398.

(u) *Goodeve, Pers. Prop.* 94, 95.

(v) *Williams, Pers. Prop.* 7, where it is said: "In modern times, also, several species of property have sprung up which were unknown to the common law. The funds now afford an invest-

And generally, says a writer of the last century, for all causes of suit for any debt, duty, or wrong (*w*).

ment, of which our forefathers were happily ignorant, whilst canal and railway shares, and other shares in joint stock companies, and patents and copyrights, are evidently modern sources of wealth. These kinds of property are all of a personal nature, many of them having been made so by Acts of Parliament, under the authority of which they have originated. For want of a better classification, these subjects of personal property are now usually spoken of as choses in action. They are,

in fact, personal property of an incorporeal nature, and a recurrence to the history of their classification amongst choses in action will, as we shall hereafter see, help to explain some of their peculiarities."

See, also, Goodeve, *Pers. Pro.* 180 *et seq.*, 210 *et seq.* But see *L. Q. R.* ix. 311, 314; x. 314 *et seq.*; xi. 71—75, 238—240; *Rap and Lawrance, Law Dict.*

(*w*) *Jacob, Law Dict.* [1744], Choses in Action.

CHAPTER III.

KINDS OF CHOSSES IN ACTION.

CHOSSES in action have been divided according to the mode of procedure adopted for reducing them into possession. Hence we have—

- (i.) Legal choses in action; and
- (ii.) Equitable choses in action.

(i.) Legal choses in action are said to be those enforceable by action at law, such as debts, promissory notes, bills of exchange, bonds, judgments, charter-party (as freight), indorsed bills of lading, policies of life and marine insurance, debts due to bankrupts, &c. Since the Judicature Act, 1873, the term *legal chose in action* has acquired a special meaning under the statute, as will be seen hereafter (*a*), but for present purposes the above description is sufficient to distinguish legal choses from—

(ii.) Equitable choses in action, or, as they are sometimes styled, choses in equity, which comprise choses enforceable only by suit in equity, of which kind are the following :—a legacy, and generally any beneficial interest in personalty under a will or intestacy; a beneficial interest in stock standing in the name of another; the beneficial interest in money in the Supreme Court; a share in a partnership; a mortgage security; judgments, if enforceable in equity; beneficial interest in money settled or held in trust.

It should be remembered that this division of choses

(a) *Post*, Bk. III. Chaps. I. and II.

in action was never deliberately made, since it does not exhaust the whole category of choses in action, but that it was merely used by lawyers to denote a main characteristic which distinguished the two *chief* kinds of the *majority* of choses in action.

For there are choses in action in respect of which no proceedings either at law or in equity are applicable, and which, strictly speaking, are not enforceable in any courts of justice at all, but the satisfaction of which depends upon expediency, or grace, or some other condition or quality not appreciable in set terms. Reference having been made to these in a former chapter, there is no need to do more than mention here, as instances of such choses in action, bonds of foreign and colonial governments, and some kinds of pensions.

Choses in action have also been divided according to whether they were :—

- (i.) Immediately reducible into possession ; such as a debt due and payable *in præsentia* ; or
- (ii.) Not immediately reducible into possession, but reversionary ; such as a reversionary interest in Consols.

A reversionary chose in action is said to be a future right of action to obtain possession of the property at some future time ; for example, the right to recover or obtain property after the death of a person now living.

Thus, property held upon trust by trustees to pay the fund issuing thereout to A. for life, and after A.'s death to transfer the fund to B. During A.'s life B.'s interest is a *reversionary* chose in action.

As long as a chose in action remained reversionary, a husband could not reduce into possession, nor would an assignment of it by him operate as a reduction into possession (b) ; neither would such an assignment defeat

(b) *Purdow v. Jackson*, 1 Russ. 1, 54, 57 ; 25 R.R. 1. And see *Heard v. Stamford*, Ca. t. Talbot, 173 ; *Goodeve*, Pers. Pro. [1892], 404.

her right of survivorship, which being a legal right would prevail over the mere equitable right of the assignee.

Such an assignment would only pass the assignor's right to reduce the chose into possession if at any time it should become so reducible; beyond this the assignee could take nothing, since, at most, he could but have the qualified and contingent right of his assignor.

Attempts were made, however, to surmount this difficulty by persuading the persons who had the prior interests to assign them to the wife, so that they could coalesce with her reversionary interest and make it a *present* interest reducible into possession; but Courts of Equity decided that in such cases the wife's interest remained reversionary so as to protect her in it (c).

Consequently, reversionary choses in action were formerly of importance from this fact, that when they belonged to a married woman they could not be disposed of by her or her husband, or both together (c). Now, however, a married woman can dispose of any reversionary interest in personalty (with certain exceptions) by deed acknowledged (d).

(c) *Whittle v. Henning*, 2 Ph. 731; *Elphinstone*, Intro. [1894], 199.

NOTE.—It is to be observed in connection with reversionary choses in action that an expression of self-contained contradiction has been introduced, presumably with a view to employing an opposite to reversionary choses in action, viz., chose in action in possession. But such an expression is not only inelegant, incorrect, and calculated to cause confusion, but it is wholly unnecessary; the term chose in action being quite sufficient to indicate an ordinary chose in action, while "reversionary" is

sufficient to show that a particular chose in action is subject to the termination of a prior interest before it can be more fully enjoyed or realised by the person whose right is in reversion. See *In re Butler's Trusts*, 38 Ch. D. 292.

(d) 20 & 21 Vict. c. 57; Married Women's Property Acts, 1870 and 1882; *Watson's Comp. Eq.* 334; *Williams, Pers. Pro.* 379; 2 *David. Prec.*, Pt. I. 223 *et seq.*, and cases there cited; *Re Elcom*, (1894) 1 Ch. 303; see, also, *Williams v. Mayne*, 16 W. R. 173, overruling *Wall v. Wall*, 15 Sim. 521.

Formerly, also, choses in action were classified according to their mode of assignability :—

- (i) Those which were assignable at law, such as bills of exchange and other negotiable instruments, and those which were assignable by the device of authorising the assignee to sue in the name of the assignor.
- (ii) Those which were only assignable in equity.

And this division is still of some practical importance, for every assignment not falling within the operation of the Judicature Act, 1873, s. 25, sub-s. 6, remains subject to the rules and procedure which obtained generally in that behalf prior to the above enactment. Therefore, an absolute assignment of an *equitable* chose in action, or an assignment of a legal or equitable chose in action *by way of charge*, is still effectual only in equity. As, however, the High Court is bound to give relief in all cases in which it would, before the Judicature Act came into operation, have been given by a Court of Equity (*e*), the distinction between the two kinds of choses in action is not, perhaps, of greater practical importance than in determining the division of the Court in which relief should be sought (*f*).

Another and, perhaps, a correct classification of choses in action according to the subject-matter they affected was recognized as early as 33 Hen. VIII. In this way they were divided into Personal, Real, and Mixed, *i.e.*, according as they arose out of personal or real rights and obligations, or a combination of both.

And so a 17th century writer says of choses in action :—Some also of them are said to be Personal, as *debt* and the like ; some Real, as *rights and titles to land*, either of entry or action ; or Mixed, as was *wardship* (*g*).

(*e*) Judic. Act, 1873, s. 24.

(*f*) Sweet, Law Dict. Choses.

(*g*) Shepp. Abr. [1675], Chose.

Book II.

ASSIGNABILITY OF CHOSSES IN ACTION PRIOR TO THE JUDICATURE ACT OF 1873.

CHAPTER I.

ASSIGNMENT AT COMMON LAW.

CHOSSES in action were generally not assignable at common law. According to Sir Edward Coke, the reason for this was the tendency of public policy to discourage maintenance (a). Another view, confirmed by examination of the earlier authorities, is that it was the logical consequence of the old idea that a contract created a strictly personal obligation and relation between creditor and debtor; and that the credit being a personal right of the creditor, the debtor being obliged towards *that* person could not, by a transfer of the credit which was not an act of his, become obliged to another (b).

It was further suggested that it was the duty of a

(a) "The great wisdom and policy of the sages and founders of our law have provided, that no possessory right, title, nor *thing in action*, shall be granted or assigned to strangers, for that would be the occasion of multiplying of contentions and suits, of great oppression of the people, and chiefly of terre-tenants, and the subversion of the due and equal execution of justice. And as they cannot be granted by the act of the party; so a right in

action shall not be transferred by act in law." In describing how the common law rule was avoided Blackstone designates the above reason "a nicety": 2 Bl. Comm. 442; *Lampet's Case* [1613], 10 Rep. 48a; *Termes de la Ley*, tit. Chose in Action; Com. Dig. Chancy, 2 H. Op. 2 Cruise, Dig. p. 4, § 15; p. 33, § 46.

(b) Spence, 2 Eq. Jur. 850; Pollock, Contr. 204, and App. Note F.

debtor to find out his creditor, if he were within the realm (c); and that this duty would be difficult of performance if choses in action were assignable (d). While yet another suggestion is that at common law ownership of lands or chattels could be transferred only by delivery of possession, and that, therefore, it could not be transferred at all where the would-be transferor had not possession, except in the singular instance of its being transferred to the person already in possession (e). Such was the condition of choses in action at common law, and any such assignment was invalid, the assignee not being able to sue upon it in his own name. There were, however, a few notable exceptions to the general rule, which will be hereinafter considered. On the other hand, the Courts of Equity from the earliest times viewed the doctrine on which the common law proceeded as too absurd for them to adopt (f), and, consequently, held that a man might bind himself to do anything which was not in itself impossible (g), and that he ought to perform his obligations (h).

Hence, as far back as their records reach, the Courts of Chancery have always supported and enforced the assignment of choses in action when made upon valuable consideration (i); and subsequently the Courts of law adopted the doctrines of the Courts of Chancery in this respect (j). This statement, however, must be taken

(c) Litt. 340; Co. Litt. 210b, 690b; Bro. Abr. tit. Tender, pl. 20.

(d) *Kepp v. Wiggett* [1848], 6 C. B. R. 290, n. (a).

(e) "The Mystery of Seisin," 2 L. Q. R. 481.

(f) *Master v. Miller*, 4 T. R. 340; 2 R. R. 399.

(g) Heinnecc. Jur. Nat. et Gent. c. 14, § 397; 1 Fonbl. 213.

(h) 1 Roll. Abr. 419; 5 Vin. Abr. 110.

(i) *Spence*, 2 Eq. Jur. 852; *Anon.*, 2 Freem. 145; *Squib v.*

Wyn, 1 P. Wms. 381; *Wright v. Wright*, 1 Ves. 411. Further, in *Lord Carteret v. Paschal*, 3 P. Wms. 199, it is stated (*obiter*) that a chose in action may be assigned without consideration, although, if treated only as a contract, the assignment would require a consideration. See 2 Vern. 595; 3 Ch. Rep. 50; *Anon.*, Freem. 145. As to voluntary assignments, see *Spence*, 2 Eq. Jur. chap. x. sect. 4.

(j) *Master v. Miller*, 4 T. R. 340, 341; 2 R. R. 399.

subject to the consideration hereinafter of those choses in action which, by various rules of Equity, and judicial decisions formed upon the broad basis of public policy, have always been held to be incapable of assignment.

Besides the exceptions to the general rule at common law as to non-assignability of choses in action, and the attitude adopted by Courts of Equity in respect thereof, certain choses in action have been from time to time specially made assignable by various statutes, in consequence of which the assignees of such choses in action were enabled to sue at law in their own name.

And so the law stood until the Judicature Act of 1873 came into operation upon the 1st November, 1875, which provided for the assignment of any debt or other *legal* chose in action upon certain conditions which are hereinafter considered.

Although the Judicature Act of 1873 wrought such a great change in the assignability of certain kinds of choses in action, there were others which it did not affect, and, consequently, it is still of practical importance to consider in what circumstances choses in action were assignable before the 1st November, 1875, and then to consider the effect of that statute upon the law as it then stood in relation to such assignments.

Prior to the 1st November, 1875, there were four classes of choses in action :—

- (1) Those assignable at common law ;
- (2) Those assignable in equity only ;
- (3) Those assignable in virtue of statutory enactments ; and
- (4) Those incapable of being assigned either at law or in equity (*k*).

(*k*) Goodeve, *Pars. Pro.* 137.

And first—

✓ *Of Choses in Action assignable at Common Law.*

Although choses in action were not generally assignable at common law, there were, however, a few important exceptions.

(i) The Crown has always been able to assign choses in action that are *certain*, such as an ascertained debt; but not those that are uncertain, such as unliquidated damages (*l*). It has been forcibly suggested that this exception in favour of the Crown may perhaps be derived from the universal succession accruing to the Crown on forfeitures (*m*). And where the king could assign his chose in action the grantee could sue in his *own* name (*n*), or he might prosecute an extent in the king's name, for the grant was a warrant to him to prosecute in the king's name.

This is amply exemplified by the following instances:—

The king granted an annuity, and the grantee brought an action in his own name (*o*).

The king had a bond by outlawry of an obligee, and granted it over; the grantee sued in his own name, and it was held good (*p*).

A. was outlawed for treason, whereby his goods were forfeited to the Crown. The king made a grant to B., who brought a bill in Chancery for certain goods of such a value against C. who had A.'s goods in his possession.

(*l*) Com. Dig. Asst. D.; Bro. Abr. tit. Chose in Action; Termes de la Ley.

(*m*) Pollock, Contracts, 702. "This would naturally include rights of action, and it is easy to understand how the practice of assigning over such rights might spring up without much examination of its congruity with the legal principles governing transactions between subjects."

(*n*) Y. B. 39 H. VI. 26; Vin. Abr. tit. Prerog. of the King (M. b. 9); Poulton, 228; Saville, 3, 133; Bro. Abr. Prerog. 45; *Breverton's Case* [1537], Dy. 30b; *Wendman's Case* [1606], Cro. Jac. 82; *Lambert v. Taylor* [1825], 4 B. & C. 138.

(*o*) Y. B. 3 H. IV. 8; Bro. Abr. tit. Choses in Action, pl. 1.

(*p*) Y. B. 19 H. VI. 47; Bro. Abr. tit. Choses in Action, pl. 2.

It was objected that their remedy was at law by detinue; but it was answered, that no action lay at common law till seizure or finding by matter of record; but, however, that the king had election to proceed at common law or in equity. The Court ordered C. to make an inventory against the next day, or that he should be sent to the Fleet (g).

A. recovered *damages in an action upon the case* and then was outlawed. The king granted these **damages** over. The grantee may levy this debt by action *in his own name, or by extent in the king's name*, though he has no words in his grant to sue it in the king's name as is usual in such cases. But an *assignment over of this debt by the grantee* to another is void (r).

The king can grant over his rent and his condition of re-entry upon non-payment, and his action and chose in action (s).

The king had, by forfeiture, a right to the marriage of a ward. A grant of this right by him is good, "for the king can grant his chose in action, which is certain" (t).

Obligations or recognizances made or forfeit to him the king may assign at his pleasure (u).

The king may also grant over his rent, and his condition of re-entry for non-payment, and any other real or mixed chose in action (v).

And, generally, choses in action which are certain are grantable by and to the Crown (w).

But there are some choses in action which even the king could not grant over nor could they be granted to the king. For example:—

(g) *Walswyn v. Smith*, 39 H. VI. 26; Bro. Abr. Choses in Action, pl. 5.

(r) *R. v. Twine and others* [1608], Cro. J. 179.

(s) Y. B. 2 H. VII. 8; Bro. Abr. tit. Choses, pl. 6.

(t) Y. B. 5 Edw. IV. 8; Bro. Abr. Choses in Action, pl. 11.

(u) Fitz. Grant, 50; 33 H. VIII. cap. 39; Shep. Abr. 338.

(v) Shep. Abr. Choses in Action, fo. 338; Bro. Abr. Choses in Action, 6, 10, 11.

(w) Shep. Abr. fo. 339.

The king may not grant any chose in action which is uncertain, as an action of trespass, or for uncertain damages, and the like (*x*).

If it be a contract only (*i.e.*, a simple contract) on which the debt is raised, and not upon a specialty, the king may not grant it (*y*).

It seems, also, that *part* of a debt cannot be assigned to the king (*z*).

It is also a matter of doubt whether the king can *generally* grant *choses real*, such as rights of action, &c., relative to land, so as to vest them at law in the grantee (*a*).

But the king may, by special words, grant a right of entry and a real action (*b*).

And, further, owing to the abuse of assignment of debts to the Crown, it was enacted by Statute 7 Jac. I. c. 15, that:—

“No debt shall be assigned to the king, by or from any debtor or accountant to his majesty, other than such debts as did before grow due originally to the king’s debtor or accountant *bonâ fide*, and that all grants and assignments of debts to the king, which shall be had or made contrary to the true intent of that Act, shall be void” (*c*).

Moreover, the king cannot grant an obligation, &c., forfeited to him before seizure (*d*).

And even at common law the assignee of a chose in action from the Crown has not the power of assigning it to another subject, so as to enable the latter to sue in his own name (*e*).

(*x*) Shep. Abr. fo. 338. But a debt might be assigned to the king for a debt due to him, although the assigned debt were not ascertained, for example, a debt upon a bond for performance of covenants: Com. Dig. Asst. D. R. ; 2 Leon. 55.

(*y*) Shep. Abr. fo. 338.

(*z*) Owen, R. 2.

(*a*) Vin. Abr. ; Bro. Abr. Pateints, pl. 98 ; Choses in Action, pl. 14 ; 11 Co. R. 12. See Leon. 21 ; Chitty, Prerog. 388.

(*b*) 17 Vin. Abr. 79 ; Prerog. G. b. 3.

(*c*) Chitty, Prerog. 388.

(*d*) R. 1, Rol. 7 ; cited Com. Dig. Asst. D.

(*e*) Cro. Jac. 180 ; Skin. 6, 26.

Nor could the king grant land "when it shall escheat," nor the next lapse of the church of D. (before it happens) "when it shall happen" (*f*).

It is said, also, that the king cannot grant an annuity in every case, for his person is not chargeable, but he may if it be charged on any of his possessions (*g*).

(ii) By the Law Merchant (*h*), which is part of the law of England, bills of exchange (*i*), cheques (*j*), and exchequer bills to bearer, promissory notes and the like are not only assignable but negotiable (*k*). So, too, bills of lading are assignable. It is a rule of the law merchant that the property in the goods shipped under a bill of lading may pass by indorsement and delivery of the bill of lading (*l*).

(*f*) T. Raym. 241; Chitty, Prerog. 388.

(*g*) Salk. 58; pl. 1; Freeman. 331; Chitty, Prerog. 389.

(*h*) Co. Litt. 182a; "The law merchant forms a branch of the law of England; and those customs which have been universally and notoriously prevalent amongst merchants, and have been found by experience to be of public use, have been adopted as part of it upon a principle of convenience, and for the benefit of trade and commerce; and, when so adopted, it is unnecessary to plead and prove them." *Barnett v. Brandao*, 6 Man. & Gr. 666; see, also, *Eddie v. East India Co.*, 2 Burr. 1226.

"The law merchant is a system of equity, founded on the rules of equity, and governed in all its parts by plain justice and good faith. In *Pillans v. Van Mierop*, 3 Burr. 1663, Lord Mansfield said, 'If a man agree to do what, if finally executed, would make him liable, as in a Court of Equity, so in mercantile transactions, the law looks on the act as done.'" *Master v. Miller*, 4 T. R. per Buller, J., p. 342; 2 R. R. 399. See, also, for history and interesting customs of *lex mercatoria*, Smith's

Mercantile Law, Intro. by Macdonnell, 10th ed.

(*i*) *Master v. Miller*, *supra*.

(*j*) *Hopkinson v. Forster*, L. R. 19 Eq. 76.

(*k*) *Wookey v. Pole*, 4 B. & Ald. 1; 22 R. R. 594.

NOTE.—There is, of course, a great difference between negotiability and assignability; the former being a transfer in the widest sense, and often giving to the transferee a better title than that of his transferor. So that a transferee of a negotiable instrument for which he has given value, and which he has taken in good faith and without notice of any defect or fraud—in other words, one who is a *holder in due course*—acquires a right of action independently of privity of contract with the obligor, is not prejudiced by any defects in the title of the immediate or of any previous transferor, and cannot be met with any of those "equities" to which a claim under a mere ordinary assignment of a chose in action may be subject by way of defence.

(*l*) *Goodeve*, Pers. Prop. 69; see, also, Bills of Lading Act, 1855, by which the transfer of a bill of lading operates as an assign-

It seems, also, that other choses in action, such as policies of insurance, were assignable by the law merchant before the statutory regulations respecting them were introduced.

The customary course, prior to the statute, was to make the policy in the name of the broker, but the owner of the goods maintained an action upon it (*m*).

The scrip of a foreign government, issued by it on negotiating a loan, (which scrip promises to give to the bearer, after all instalments have been duly paid, a bond for the amount paid, with interest,) is by the custom of all the stock markets of Europe a negotiable instrument, and passes by mere delivery to a *bonâ fide* holder for value. English law follows this custom, and any person taking it in good faith obtains a title to it independent of the title of the person from whom he took it (*n*).

The same may be said of all instruments negotiable by the custom of merchants, they thereby become assignable so as to give the assignee a right to sue upon them in his own name (*o*).

ment of the contract expressed in the bill of lading, and confers on the assignee a right to sue upon that contract:—

Sect. 1. "Every consignee of goods named in a bill of lading, and every indorsee of a bill of lading to whom the property 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." 18 & 19 Vict. c. 111; see "*The Freedom*" v. *Simmonds*, L.R. 3 P. C. 594.

(*m*) *Master v. Miller*, *supra*; and see *Re Twrcan*, 40 Ch. D. 10; 1 *Arnould, Marine Insurance*, 6th ed. 107.

(*n*) *Goodwin v. Roberts* [1876], 1 App. Ca. 476; see also *Rumball v. Metropolitan Bank* [1877], 2 Q. B. D. 194; but note *Fine Art Society v. Union Bank of London* [1886], 17 Q. B. D. 705.

(*o*) Negotiable instruments owe their origin to the law merchant, which was in earlier times not a part of the common law as it is now, but a concurrent and co-existent law, administered in its own Courts in the Staple. As the Courts of the Staple decayed, those parts of the law merchant which differed from the common law, either fell into disuse or were adopted into the common law as the custom of merchants (*Smith's Manual of Common Law*, 330-1; *Blackburn*, 317). Bills of exchange were the earliest form of negotiable instruments recog-

But the original contracting parties could not make a chose in action assignable if it was not so by the custom; nor was it competent for them by any means to make negotiable an instrument which was not so by the law merchant, nor contrary to the general law (*p*). And an instrument that is negotiable by the law of a foreign country is not necessarily a negotiable instrument by the law of England, so as to give a *bonâ fide* holder for value a good title against a transferor of the instrument, in the absence of any evidence of a custom of merchants in this country to treat it as negotiable (*q*).

Yet it has been recently held that the custom of merchants which will render an instrument negotiable need not be an ancient custom, nor does it matter whether the instrument be English or foreign. It is enough if the custom be clearly defined, well understood, and habitually acted on *now*. So it was said: The general rule of law is that a chose in action cannot be transferred at law at all, and parties cannot merely by their own act annex to a contract the incidents of negotiability; that is to say, a right of action thereon in the holder for the time being in his own name, and a title both to the document containing the contract and to all rights under the contract, irrespective of defect in title of

nized in England. In the time of Holt, C.J., a controversy arose between the Courts and the merchants as to whether the customary incidents of negotiability were to be recognized in the case of promissory notes. The dispute was settled by 3 & 4 Anne, c. 9, which confirmed the negotiability of notes. In a recent case it was held that documents, other than bills or notes, could not be endowed by custom with the incidents of negotiability (*Crouch v. Crédit Foncier of England*, L. R. 8 Q. B. 374); but the efficacy of custom was again upheld in a later case of *Goodwin v. Roberts* (L. R. 10 Ex. 337; 1 App. Ca.

476), where it was determined that foreign scrip might be rendered negotiable by custom, so as to pass with a good title and free from all equities to a *bonâ fide* purchaser. The Court declared that the novelty of a general usage is no objection to its being incorporated into the law merchant.

(*p*) *Crouch v. The Crédit Foncier of England* [1873], L. R. 8 Q. B. 374; *London & County Banking Co. v. London & River Plate Bank* [1887], L. R. 20 Q. B. D. 232.

(*q*) *Picker v. The London and County Banking Co.* [1887], L. R. 18 Q. B. D. 515.

the person from whom the holder acquired it. Such incidents can be annexed to a contract only by virtue either of statute or of the ancient usage of merchants which has been adopted by and forms part of the law. The modern usage of merchants cannot annex such incidents to a contract if the instrument containing it be made by an English company in England which does not come within the category of negotiable instruments created by statute or adopted by the common law from the ancient law merchant. The modern usage of merchants may annex the character of negotiability to bonds and like instruments of a foreign or colonial government (s).

So *respondentia bonds* were transferable, at least, where the obligor beforehand engaged by an endorsement on the bond to pay to any assignee. It was said that *respondentia bonds* were found essentially necessary for carrying on the Indian trade. *But it would clog these securities, and be productive of great inconvenience, if they were obliged to remain in the hands of the first obligee (t).* Again, A. being indebted to B. for brokerage, and B. indebted to C. for money lent, B. gave an order to A. to pay C. the sum due from A. to B. as a security, on which C. lent B. a further sum, and the order was accepted by A. On A.'s refusal to comply with the order, C. could, and did successfully, maintain an action against A. for money had and received (u). But, as the learned editor of the above report says, this authority was subsequently only considered law with qualifications (u). Indeed, this virtually would amount to a new contract, in which original debtor and creditor and the latter's assignee would all take part. The debtor would be released by the assignor in consideration of

(s) *Bechuanaland Exploration Co. v. London Trading Bank* [1898], 14 T. L. R. 587.

(t) *Fenner v. Meares*, 2 Bl. Rep.

1271.

(u) *Israel v. Douglas*, 1 H. Bl. 239; see, also, *Tatlock v. Harris* [1789], 3 T. R. 174.

his agreeing to become liable to the assignee (*v*). Still, the above illustrations, cited in the judgment of Buller, J., in *Master v. Miller*, give some point to the statement that besides the exceptions in favour of the Crown, and the peculiar and universal custom as to bills of exchange and other negotiable instruments, there were circumstances in which, by the law merchant, and apart from any statutory enactment, some choses in action were, and still remain, assignable to a stranger in such manner as to enable the assignee to sue thereon in his own right and name.

(iii) But beyond these exceptions, prior to the Judicature Act, 1873, it had long been the general practice for many other choses in action to be assigned—

(a) By obtaining, *at the time of the formation of the contract*, the debtor's consent to fulfil his obligation to the creditor *or the creditor's assignee*; or, where this was not accomplished, by *subsequently* obtaining the debtor's consent to be bound to his creditor's assignee in consideration of the extinguishment of the obligation existing between debtor and assignor. This was novation. Or,

(b) More frequently, by the creditor giving a letter of attorney in favour of a third person (the assignee).

The letter of attorney directed the person to whom it was intended to assign the chose to take proceedings against the debtor in the name of the owner of the chose in action (the assignor) for the recovery of what was due from the debtor to the assignor, and to retain for his (the assignee's) own use the proceeds of the suit. This seems to have been the mode of assignment of

(*v*) *Tatlock v. Harris*, *supra*; *Fairlie v. Denton* [1828], 8 B. & C. 895; *Kemp v. Watt* [1846], 15 M. & W. 672; 1 Encycl. Laws, Eng. [1897], Asst. 353.

choses in action for a very considerable period in the past prior to the Judicature Act. It is said: "A statute merchant or staple, or bond, &c. cannot be assigned over to another so as to vest an interest whereby the assignee may sue in his own name, but they are every day transferred by letter of attorney, &c." (w). The same writer goes on to say: "Those assignments to receive the money to the assignee's own use, with covenants not to revoke, and also with a letter of attorney in them, although they do not vest an interest, yet have so far prevailed in all Courts, that the grantee hath such an interest, that he may sue in the name of the party, his executors or administrators" (x).

Illustrations of such letters of attorney will be found set out in the Appendix hereto (y).

Further, in the reign of H. VII. it was decided that a chose in action may be assigned over for a lawful cause as a just debt, but not for maintenance, and that where a man is indebted to me in 20*l.*, and another owes him 20*l.* by bond, he may assign this bond and debt to me in satisfaction, and *I may justify for suing for it in the name of the other at my own costs* (z). Mr. J. Williams, in 1848, citing the above decision, proceeds to say: "Choses in action, having now become assignable, became an important kind of personal property; and their importance was increased by an Act of the following reign (Stat. 37 H. VIII. c. 9), whereby the taking of interest for money, which had previously been unlawful, was rendered legal to a limited extent.

(w) 1 Lilly, [1719] Abr. Assignment, 103.

(x) *Id.* 103, citing *Deering v. Carrington* (or *Farrington*), 3 Keb. 304. And for assignments of debt, see *Baker v. Edmonds*, Style's Rep. 62; ——— v. ———, Style's Rep. 93; *Fowke v. Boyle* [1662], Style's Rep. 348, 349.

NOTE also, that the assignment of a judgment for a just debt is not revocable by letter of attorney so as to acknowledge satisfaction by the plaintiff. *Carrington v. Harway* [circa 1664], 1 Keb. 803.

(y) App., Forms 1, 2.

(z) Y. B. 16 H. VII. 2; Bro. Abr. Choses in Action, pl. 3.

Loans and mortgages soon became common, forming a kind of incorporeal property unknown to the ancient law. In the reign of Queen Anne, promissory notes were rendered, by Act of Parliament, assignable by indorsement and delivery in the same manner as inland bills of exchange. *But* other choses in action continue to this day assignable at law only by empowering the assignee to sue in the name of the assignor" (a).

It was not necessary that the power of attorney should be by deed (b), it might be by writing unsealed (b), or even by parol (c).

The above learned authority in the same work says :—"The assignment of debts by means of powers of attorney is now recognized and protected by the courts of law. Thus, in a case where the original creditor became bankrupt after he had assigned his debt, it was held that an action against the debtor might still be properly brought *in the name of such original creditor by virtue of the power of attorney which he had given to his assignee*; although if no assignment had been made the assignees of the creditor under the bankruptcy would have been the proper parties to sue" (d).

The power thus obtained of indirectly assigning choses in action was considered in early times to be detrimental and to savour of maintenance. Consequently, in many instances, where they were made not for the benefit of a creditor of the assignor, but in favour of a purchaser or donee only, they were held to be void (e). And it appears that this state of things

(a) Williams, Pers. Pro., 1st ed. [1848], 5.

(b) 1 Saund. 210; *Howell v. McJeers* [1792], 4 T. R. 690; 2 R. R. 500.

(c) *Heath v. Hall*, 4 Taunt. 326; 13 R. R. 610.

(d) Williams, Pers. Pro. [1848], 1st ed. 101.

(e) 3 Harv. L. Review, 341.

"The Lord Keeper Bridgman will not protect the assignment of any chose in action, unless in satisfaction of some debt due to the assignee; but not when the debt or chose in action is assigned to one to whom the assignor owes nothing precedent, so that the assignment is voluntary or for money then given." *Freem. Chy. C.* 144.

existed from at least the beginning of the fifteenth until the end of the seventeenth century (*f*). But, as Buller, J., said:—"Circulation and the transfer of property are the life and soul of trade, and must not be checked in any instance;" and after citing a number of cases, he continues: "All these cases prove that the remedy shall be enlarged, if necessary, to attain the justice of the case; and that if the plaintiff has justice and conscience on his side, and the defendant has notice only, the plaintiff shall recover in action for money had and received" (*g*). And so the idea of maintenance and other grounds for avoiding assignments having fallen gradually into desuetude, it was firmly established that legal choses in action were generally assignable at common law by the execution of a power of attorney enabling the assignee to sue in the name of the assignor.

Finally, it may be shortly stated here, that it was always incumbent upon the assignee to give notice to the debtor of such assignment in order to complete his (the assignee's) title to the chose in action, otherwise the debtor might lawfully pay his debt to the assignor and obtain a discharge, which would thus defeat the object of the assignment. Before such notice was effected, the property remained the *apparent* property of the assignor, and *could formerly, in such case, pass to his* (the assignor's) *assignees in bankruptcy* as property which remained in the ordering and disposition of the bankrupt within the statute, if the assignor became bankrupt prior to notice of assignment being given (*h*).

It must be here stated that this method of assignment

(*f*) Y. B. 9 H. VI. 64, pl. 17; *Horn v. Foster*, Y. B. 34 H. VI. 30, pl. 15; Y. B. 37 H. VI. 13, pl. 3; Y. B. 15 H. VII. 2, pl. 3; *Harvey v. Bateman* [1600], Noy, 52; *Loder v. Chesleyn* [1665], 1 Sid. 212, and other cases cited.

3 Harv. L. R. 341, n. (1), and Pollock, Contr., App. F.

(*g*) *Master v. Miller*, 4 T. R. 342, 344; 2 R. R. 399.

(*h*) *Ex parte Monro*, In the *Matter of Frazer*, Buck's Rep. 300. But note this has now been altered by Bkcy. Act, 1883.

first received support from the Courts of Equity. As has been said, the Courts of Law at first refused to recognize any assignments of choses in action other than the notable exceptions above referred to, and the assignee had to seek relief in Chancery, where assignments of choses in action were, for the most part, upheld and enforced. Subsequently the Courts of Equity effected a remedy on behalf of the assignee by compelling the assignor to allow his name to be used in an *action at law* brought to recover the subject-matter of the assignment. But in the absence of any actual or threatened obstruction or wrong on the part of the assignor, the assignee was not entitled to seek relief *in equity*, because he had his remedy at common law, namely, to enforce payment of his claim by virtue of his power of attorney (i). But if the assignor obstructed the assignee's right, or manifested any intention of hindering or defeating the assignee's claim under the power of attorney, then, upon these circumstances being proved, the assignee had sufficient and substantial grounds for obtaining such relief in equity as would enable him to effect a recovery of the claim assigned.

And this was how the assignment of all *legal* choses in action which were capable of assignment was effected at common law prior to the operation of the Judicature Act of 1873.

(i) *Cator v. Burke*, 1 Brown, C. C. 434; *Hammond v. Messenger*, 9 Sim. 327; 1 Harv. L. R. 7.

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CHAPTER II.

ASSIGNMENT IN EQUITY.

"THOUGH the law does not admit an assignment of a chose in action, this Court does; and any words will do, no particular words being necessary thereto" (a).

The Court of Chancery gave effect to assignments of choses in action and to assignments of trusts, and possibilities of trusts and of every kind of future and contingent interests, and possibilities in both real and personal property, when made for valuable consideration (b).

"An assignment," said Lord Hardwicke, in reference to this kind of cases, "always operates by way of agree-

(a) *Row v. Dawson* [1749]. Cp. also:—"In the Courts of Equity this rule [of non-assignability] was never followed, and those Courts have always considered and treated the rule as unjust, and have supported assignments of rights of action. Experience has fully shown, not only that no evil results from the assignments of rights of action, but that the public good is greatly promoted by the free commerce and circulation of property in action, as well as property in possession." *Thalheimer v. Brinckerhoff*, 20 Johnson (N. Y.), 386; see, also, *Warmstrey v. Tanfield*, 1 Rep. in Ch. 16; *Wright v. Wright*, 1 Ves. R. 411; *Bispham's Eq.* 214.

(b) *Warmstrey v. Tanfield* [1629], *supra*; 1 Wh. & T. 91; *Goring v. Bickerstaffe* [1673], 1 Ch. Ca. 8; see, also, *Burn v. Carvalho*, 4 Myl. & C. 690; *Wind v. Jekyl*, 1 P. Wms. 573, 574;

Kimpland v. Courtney, 2 Freem. 251; *Thomas v. Freeman*, 2 Vern. 563; *Wright v. Wright*, 1 Ves. 411, 412; *Jones v. Roe*, 3 T. R. 93, 94; 1 R. R. 656; *Stokes v. Holden*, 1 Keen, 145; *Prosser v. Edmonds*, 1 Y. & Col. 481, 496; *Langton v. Horton*, 1 Hare, 549, 556, 557.

NOTE 1.—An interest which is little more than a *spes successionis*, e.g., an interest under a limitation to the next of kin of a person then alive, will not pass under a general assignment for the benefit of creditors. *In re Duggon's Trusts*, L. R. 8 Eq. 697.

NOTE 2.—Courts of Equity will establish assignments of contingent interests against executors, administrators, or heirs-at-law, even where such assignments are made, not for consideration of money, but in consideration of love and affection, and advancement of children. *Wright v. Wright*, 1 Ves. 409.

ment or contract; amounting in the consideration of this Court to this, that one agrees with another to transfer, and make good that right or interest: and like any other agreement, the Court will cause it to be specifically performed, not leaving the assignee to his action for damages when the assignor is in a condition to transfer the property, or to cause it to be transferred to the assignee" (c).

And similar language has been used in many cases, the Courts of Equity concurring in the opinion that the act of the assignor is binding upon his conscience, and thus upon his property, on the equitable principle that that which ought to be done is regarded in equity as actually done; and so a trust was created in favour of the assignee (d).

If the assignment related to property concerning which the Courts of Equity had special jurisdiction (such as the beneficial interest in personal property under a will, or in case of intestacy, or money in Court, &c.), the assignee of such interest could sue in his own name in equity in respect of such property. But if the property were such as could only be recovered at law, and an equitable assignment thereof were made, then the assignee could not sue in his own name, but he was obliged to sue in the name of the assignor. If the assignor refused or obstructed the employment of his name for that purpose, a Court of Equity would compel him to consent thereto.

In other words, there were two distinct kinds of assignments of choses in action to which Courts of Equity gave their support, conditionally upon their being for value and not contrary to its own rules or to public policy (e), namely, assignments of property in relation

(c) *Wright v. Wright* [1749-50], 1 Ves. 412.

(d) *Legard v. Hodges*, 1 Ves. Jun. 478; 2 R. R. 146; *Tailby v. Off. Receiver*, 13 Ap. Ca. 546; see,

also, *Lord Carteret v. Paschal*, 3 P. Wms. 199; *Duke of Chandos v. Talbot*, 2 P. Wms. 603.

(e) *Squib v. Wyn*, 1 P. Wms. 378; *Collyer v. Isaacs*, 19 Ch. D. 342.

to which all proceedings were properly instituted in equity, because Courts of Law did not deal with them; and those assignments which the judges of Courts of Law would not countenance or enforce (because of the common law rule to the contrary) although such assignments affected property usually dealt with in their tribunals.

And this equitable support of assignments has been found to embrace a very wide and miscellaneous area of interests. For example, a mere expectancy, such as that of an heir-at-law to the estate of his ancestor (*f*), or a contingent interest (*g*), or the interest which a person may take under the will of a person who is living (*h*); an interest under marriage articles (*i*); an interest in money which may come to any one by virtue of a power in trustees to allow him maintenance (*j*); an interest in personal estate as the possible next of kin of a person who is living (*k*).

So, too, in equity there may be a valid assignment of property not yet in existence but to arise hereafter, provided it be sufficiently specified (*l*), as the future freight of a ship (*m*), future patent rights (*n*), profits of the future working of a patent by licensees (*o*), future dividends upon proof in bankruptcy (*p*), future building materials to be brought on premises (*q*), the future cargo of a ship (*r*), machinery to be hereafter added to

(*f*) *Hobson v. Trevor*, 2 P. Wms. 191; *Withered v. W.*, 2 Sim. 183, 192; 29 R. R. 77; *Smith v. Baker*, 1 Y. & C. C. C. 229; yet see *Carleton v. Leighton*, 3 Mer. 671.

(*g*) *Wind v. Jekyl*, 1 P. Wms. 672.

(*h*) *Bennett v. Cooper* [1845], 9 Beav. 252; *Beckley v. Newland*, 2 P. Wms. 182; *Lyde v. Mynn*, 1 My. & K. 693; *Pope v. Whitcomb*, 3 Russ. 124; 28 R. R. 32; *Musprat v. Gordon* [1792], 1 Anst. 34; 3 R. R. 641.

(*i*) *Bennett v. Cooper*, *supra*.

(*j*) *Re Coleman*, 39 Ch. D. 443.

(*k*) *Hinde v. Blake*, 3 Beav. 234; *Meek v. Kettlewell*, 1 Ph. 347.

(*l*) *Holroyd v. Marshall* [1862], 10 H. L. C. 191.

(*m*) *Brown v. Tanner*, 3 Ch. Ap. 697; *Wilson v. Wilson*, L. R. 14 Eq. 32.

(*n*) *Printing, &c. Co. v. Sampson* [1875], L. R. 19 Eq. 462.

(*o*) *Bergmann v. Macmillan*, 17 Ch. D. 423.

(*p*) *Re Irving*, 7 Ch. D. 419.

(*q*) *Brown v. Bateman*, L. R. 2 C. P. 272.

(*r*) *Re Ship Warre*, 8 Price, 269 n.;

or substituted for machinery now in existence (*rr*), goods and chattels now in or about a particular messuage or house, or which shall be so hereafter (*s*). So, too, an assignment of "all the book debts due and owing, or which might, during the continuance of the security, become due and owing to the said mortgagor," is a good assignment, though not limited to book debts in any particular business, and is sufficiently defined and passes the equitable interest in book debts incurred after the assignment, whether in the particular business carried on by the mortgagor at the time of the assignment, or in any other business (*t*). But it is to be remembered that an assignment may be so indefinite and uncertain in its terms that the Courts will not give effect to it because of the impossibility of ascertaining to what it is applicable (*u*). A description is too vague only if the Courts cannot see what the parties intended to deal with. There is no difference in the description required of things in action then in existence and of those not then in existence. There can be, also, a valid assignment in equity of "all the growing and other crops which at any time thereafter should be in or about the same or any other premises" of the said assignor (*v*).

The rule of equity which applies to the assignment of property not yet in existence, and often called future choses in action, is this, that as soon as the property comes into existence, assignees who have given valuable consideration will, if the new chose in action is in the

Curtis v. Auber, 1 J. & W. 526; *Douglas v. Russel*, 4 Sim. 524; 33 R. R. 135; *Langton v. Horton*, 1 Ha. 549; *Lindsay v. Gibbs* [1856], 22 Beav. 522; *Gardner v. Cazenove*, 1 H. & N. 423.

(*rr*) See note (*a*), *ante*, p. 46.

(*s*) *Ex parte Games*, 12 Ch. D. 314.

(*t*) *Tailby v. Official Receiver*,

13 App. Ca. 523; see, also, *Re D'Epineuil* (2), 20 Ch. D. 758; *Re Turcan* [1888], 40 Ch. D. 5; *Re Coleman*, 39 Ch. D. 443; *Bloomer v. Union Coal and Iron Co.*, L. R. 16 Eq. 383.

(*u*) *Tailby v. Official Receiver*, 13 App. Ca. 529.

(*v*) *Clements v. Matthews*, 11 Q. B. D. 808.

disposal of their assignor, take precisely the same right and interest as if it had actually belonged to him, or had been within his disposition and control at the time when the assignment was made. There is but one condition which must be fulfilled in order to make the assignee's right attach to a "future chose in action," which is, that, on its coming into existence, it shall answer the description in the assignment, or, in other words, that it shall be capable of being identified as the thing, or as one of the very things assigned. When there is no uncertainty as to its identification, the beneficial interest will immediately vest in the assignee. Mere difficulty in ascertaining all the things which are included in a general assignment, whether *in esse* or *in posse*, will not affect the assignee's right to those things which are capable of ascertainment or are identified (*w*). So, effect was given to an equitable mortgage by a debtor of "all sums of money then or thereafter to become due to him, and all legacies or bequests which had already or might thereafter be given or bequeathed to him or his wife, by any person whomsoever" (*x*), and it was held that legacies subsequently bequeathed to the mortgagor were bound. Vagueness comes to nothing if the property is definite at the time when the Court is asked to enforce the contract. Legacies are capable of being as readily identified as anything that can be mentioned (*y*). A future book debt is quite as capable of being identified as a legacy. When the consideration has been given, and the debt has been clearly identified as one of those in respect of which it was given, a Court of Equity will enforce the covenants of the parties, and will not permit the assignor, or those in his right, to defeat the assignment upon the plea that it is too com-

(*w*) *Tailby v. Official Receiver*, 13 App. Ca. 533.

(*x*) *Bennett v. Cooper*, 9 Beav. 252.

(*y*) *In re Clarke*, 36 Ch. D. 353, 355.

prehensive (z). The truth is that cases of equitable assignment or specific lien, where the consideration has passed, depend on the real meaning of the agreement between the parties. The difficulty, generally speaking, is to ascertain the true scope and effect of the agreement. When that is ascertained you have only to apply the principle that equity considers that done which ought to be done, if that principle is applicable under the circumstances of the case (a). There is nothing in the Companies Act, 1862, or in the subsequent amending Acts, expressly or by necessary implication prohibiting a limited company from mortgaging its unpaid-up capital; consequently, where power to mortgage future or unpaid-up capital is given by the memorandum or articles of association, a mortgage by the company of its future or uncalled capital is valid, even as against creditors in a winding-up, the calls in a winding-up being part of the "assets" or "capital" of the company (b); so that in such cases the calls to be made by the liquidator in the winding-up, including the calls on the shares of such of the mortgagees as were shareholders, are bound by the mortgages, and the several mortgagees will be entitled to have the calls applied in payment of their mortgage debts in priority to the general creditors (c). And for ascertaining the powers of the limited company it has been held that the apt and proper words, or sufficient context, need not be found in the memorandum of association, and that it is sufficient if they are contained in contemporaneous articles of association. "The memorandum and articles," said Jessel, M. R., "are contemporaneous documents, and the rule of construction is, that if contemporaneous

(z) *Tailby v. Official Receiver, Steel Co.*, 44 L. J. Ch. 683; 13 App. Ca. 536. *Howard v. Patent Ivory Manufacturing Co.*, 38 Ch. D. 156.

(a) *Id.* 547.

(b) *In re The Phoenix Bessemer*

(c) *In re Pyle Works*, 44 Ch. D. 534.

documents can be read in two ways, in one of which they appear consistent, and in the other inconsistent, the construction is to be preferred which will render them consistent. Another principle is, that if one of two contemporaneous documents is ambiguous in its terms, but the other is clear, then force is to be given to the one whose terms are clear, so as to interpret the one containing ambiguous terms (*d*). So far from forbidding mortgages the Act of 1862, sect. 43, requires limited companies to keep a register of all mortgages and charges of their property; from which it is obvious that such mortgages were contemplated. The members are left to decide for themselves what powers of mortgaging they will confer on their directors. All mortgages and charges by limited companies under powers conferred by their articles ought to be registered (under sect. 43), whether what is mortgaged or charged is, at the date of the mortgage or charge, existing property of the company or property which the company has only a power of acquiring and of equitably charging. The liability to pay up uncalled-up capital does not depend on the contingency of liquidation. The power to call it up can be exercised by the directors, and all money raiseable in respect of it is an asset of the company. When calls are made by the directors it is the capital which they call up; and when calls are made by liquidators it is capital that they call up, so long as there is capital to call.

In ordinary limited companies they can require payment of nothing else; in other companies they can; and it is unnecessary to distinguish the calls in respect of capital from calls in respect of further liability (*e*).

(*d*) *In re Phoenix Bassener Steel Co.*, 44 L. J. Ch. 685.

(*e*) *In re Pyle Works*, 44 Ch. D. 583, 584; see, also, *Newton v. Debenture Holders and Liquidators of Anglo-Australian Investment*,

£c. Co., 11 T. L. R. 279; *Pickering and another v. Ilfracombe, £c. Rail. Co.*, L. R. 3 C. P. 235; *In re Sankey, £c. Co.*, L. R. 9 Eq. 721.

Where a man who is not the owner of property purports to assign it, the attempted assignment cannot operate as a conveyance of the legal interest in the property, but it may operate as a contract to assign it when he becomes owner of it; and in this case, if he has received the consideration, the instant that the property belongs to him equity fastens on the property, and the contract to assign becomes an assignment (*f*), but an assignment of the *equitable* interest only; so that if, before the assignee acquires the legal interest, some other person acquires the legal interest as a purchaser for value without notice, his rights have priority over the assignee of the equitable interest (*g*). For the Judicature Acts of 1873 and 1875 have not abolished the distinction between legal and equitable interests;—those Acts merely enable the High Court to administer legal and equitable remedies. So that where by a bill of sale a jeweller for valuable consideration assigns to plaintiff his after-acquired stock in trade subject to a proviso for redemption, but before the plaintiff takes possession of the after-acquired stock in trade the jeweller pledges a portion of it with the defendant, who has no notice of the bill of sale, the defendant is entitled to retain the stock in trade pledged with him as against the plaintiff, and no action of detinue or conversion will lie (*h*). Such an assignee's equitable interest is also further subject to the title of the assignor's trustee in bankruptcy, in the event of the assignor's bankruptcy occurring before the expectancy actually vests. As, where bankers advance money upon their customer's giving them a letter addressed to his tenant of a certain farm, by which he authorizes and requests the tenant, when the next rent shall

(*f*) *Collyer v. Isaacs*, 19 Ch. D. 342; *Re Clarke*, 36 Ch. D. 348; *Tailby v. Official Receiver*, 13 App. Ca. 523.

(*g*) *Goodeve*, Pers. Pro. 139;

Joseph v. Lyons [1884], 15 Q. B. D. 280; *Hallas v. Robinson* [1885], 15 Q. B. D. 288.

(*h*) *Joseph v. Lyons*, *supra*.

become due, to pay the bankers 200*l*. (the letter containing no reference to the loan, and not showing that any consideration had been given for the authority), the bankers cannot recover the rent from the tenant if their customer has, before the rent becomes due, been adjudicated a bankrupt. The letter amounts only to a revocable authority to pay the rent to the bankers, and that authority is revoked by the bankruptcy of the customer giving the charge (*i*). And where a debtor by bill of sale assigned for value to a creditor certain specified chattels at his place of business, "and all other chattels which might be or at any time thereafter be brought thereon in addition to or in substitution thereof," and then became bankrupt, and after his order of discharge brought other chattels upon the premises, it was held that the assignment of these afterwards-acquired chattels, although absolute in form, amounted merely to a contract to assign, for the breach of which the assignor incurred a liability proveable in his bankruptcy (in which the creditor did not prove for his debt), and that he was released from this liability by the order of discharge; and consequently, the goods brought on the premises after the order of discharge could not be seized by the creditor under his bill of sale (*j*).

An assignment by a trader of the future receipts of his business, even if made for value, is inoperative against the title of his trustee in bankruptcy *as regards the receipts which accrue after the bankruptcy*. It is a mere assignment, for the breach of which no doubt an action would lie, but which cannot prevail against the title of the trustee. Such payments as accrue after

(*i*) *Ex parte Hall, In re Whiting* [1878], 10 Ch. D. 616; see, also, *Collyer v. Isaacs* [1881], 19 Ch. D. 342; *Ex parte Nichols* [1883], 22 Ch. D. 782; *Wilmot v. Alton*,

(1896) 2 Q. B. 254; and distinguish *Ex parte Rawlings* [1888], 22 Q. B. D. 193.

(*j*) *Collyer v. Isaacs*, 19 Ch. D. 342.

the date of bankruptcy become due to the trustee (*k*). But a debt due at the date of the assignment is capable of being validly assigned as against the trustee in a subsequent bankruptcy, though the payment be deferred until some future time (*l*); whereas in the last-mentioned case of *Ex parte Nichols* (*m*) nothing was due to the bankrupt at the date of the assignment, but an attempt was there made to assign a debt which might become due to the trustee in bankruptcy at a future time. He had really nothing to assign. And, further, where there is an assignment of chattels and an assignment of an agreement by one and the same deed, the assignments are severable (*n*). This is of great practical importance when it is remembered that the assignment of the chattels may be void under the Bills of Sale Acts for non-registration, or because it does not comply with the statutory form; yet the remaining part of the assignment which transfers rights under an agreement or otherwise may be still valid, if it is possible to sever the security upon the personal chattels from that upon the other property (*o*).

On the other hand, a garnishee order binds only so much of the debt owing to the debtor from a third person, as the debtor could honestly deal with at the date when the garnishee order *nisi* was obtained and served (*p*). Hence, an assignor's judgment creditor, who has obtained a garnishee order without any notice of the assignment, can only attach such property of the debtor as the debtor could himself deal with properly and without violation of the rights of the assignee (*q*).

(*k*) *Ex parte Nichols*, *In re Jones* [1883], 22 Ch. D. 782, 787.

(*l*) *In re Davis*, *Ex parte Rawlings*, 22 Q. B. D. 193.

(*m*) 22 Ch. D. 782.

(*n*) *In re Isaacson*, *Ex parte Mason*, (1895) 1 Q. B. 333; and see *London and Yorks Bank v. White*, 11 T. L. R. 570.

(*o*) *In re Burdett*, *Ex parte Byrne*, 20 Q. B. D. 310, which distinguishes *Davies v. Rees*, 17 Q. B. D. 408.

(*p*) *Davis v. Freethy*, 24 Q. B. D. 519, 522.

(*q*) *Ex parte Whitehouse*, 32 Ch. D. 512; *Badeley v. Consolidated Bank*, 38 Ch. D. 238.

Consequently, the judgment creditor's claim, in such a case, is postponed to a prior equitable assignment of the debt due from the third person.

To make good, as against trustee in bankruptcy and others in a similar position, the assignment of a debt, all must be done which the nature of the circumstance will permit, to complete the effect of the assignment so as to give the assignee a perfect title, the assignee must do what is tantamount to obtaining this by placing every person who has, within his knowledge, an equitable or legal interest in the matter under an obligation to treat it as his (the assignee's) property. For this purpose he must give notice to the holder of the fund or other property in question, that the right to it vests in him (the assignee).

Contingent interests, expectancies, and mere possibilities and the like may not only be transferred in equity, but be the subject of a contract (*e. g.*, a contract of sale) of which Courts of Equity will enforce the performance after the event has happened; but, until the event has happened, the party contracting to purchase has nothing but the contingency, a very different thing from a right immediately to recover and enjoy the property (*r*).

An agreement between a debtor and a creditor that the debt owing shall be paid out of a *specific* fund coming to the debtor, or an order 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, will operate as an equitable assignment of such debt or funds (*s*). Where A., having goods in the hands of B. as his agent at a foreign port, and being under liabilities to

(*r*) *Stone v. Lidderdale* [1793],
2 Anstr. 541; 3 R. R. 622;
Stokes v. Holden [1836], 1 Keen,
152, 153; *Langton v. Horton*
[1842], 1 Hare, 549, 556.

(*s*) *Rodick v. Gandell* [1852],
1 De G. M. & G. 776; *Brown*,
Shipley & Co. v. Kough [1885],
29 Ch. D. 848.

C., by letter to C. promised that he would direct, and by a subsequent letter to B. did direct, B. to deliver over the goods to D. as the agent of C. at that port; but, before the delivery of the goods, a commission of bankruptcy issued against A., under an act of bankruptcy committed while his letter was on its way to B., and the goods were delivered by B. to D. in ignorance of the bankruptcy; it was held that C. had a good title, in equity, to the goods (*t*).

The consent of the person to whom the order is given is not necessary (*tt*).

What is usually termed a stock mortgage is effected by the mortgagee selling out his stock, the price of it being paid to the mortgagor, who in general covenants to replace it. In such cases, though the Funds may fall, the mortgagee is only entitled to have the stock replaced (*u*). In a mortgage of the stock itself, when it is transferred to the mortgagee he cannot deal with it, as by selling when high and repurchasing when low, so as to make a profit of it for himself (*v*).

The Statute of 47 Geo. III. c. 25, making void the assignment of military pensions, does not apply to a pension granted by the late East India Company, and an assignment, upon mortgage, of "all that pension or annual allowance which, under a general order or resolution of the council of directors of the Honourable East India Company, was made on or about ——— payable to S. H. during his life," and all and every sums and sum of money which should become payable in respect thereof, was held to be a valid and effectual charge or mortgage for the repayment of a loan of 1,500*l*. and interest (*w*). In like manner, a pension for *past services* may be assigned; but a pension for

(*t*) *Burn v. Carvalho* [1839], 4 My. & C. 690.

(*tt*) See note (*s*), *ante*, p. 56.

(*u*) *Blyth v. Carpenter*, L. R. 2 Eq. 501.

(*v*) *Langton v. Waite*, L. R. 4 Ch. 402.

(*w*) *Heald v. Hay* [1862], 3 Giff. 467; *Carew v. Cooper*, 4 Giff. 619; 10 Jur. N. S. 429.

supporting the grantee in the performance of *future duties* is not assignable (x). It will depend, in many cases of grants by statute, &c., upon the words of the grant. It may be, in some instances, that the legislature, while making a grant for the support of dignities then created, has not used words sufficient to prevent alienation of the rents and profits issuing from the estate granted (y). Formerly, when commissions in the army were saleable, if an officer sold his commission, he could make an equitable assignment of the purchase-money in the agent's hands (z). So, it seems, a pension given by way of compensation for the loss of a place in the Customs is assignable (a). An assignment of the emoluments of a fellow of a college in the university is valid in equity, and effect will be given to a security thereon, out of the dividends appointed to such fellow, from time to time, in respect to his fellowship (b); and a receiver may be appointed of such sums as may be thereafter appropriated to the assignor, or any other mode may be adopted for securing the assignee's interest which may be more satisfactory to the particular college (c). The emoluments of a canon of a cathedral where there is no cure of souls are assignable. Thus, a canon of Windsor granted the canonry and the profits, &c. to assignees to secure a sum of money. So far as it appeared the estates were vested in the corporation, and the canon was entitled to an aliquot share of the profits. *There was no cure of souls*, and the only duties were residence within the castle, and attendance in the chapel twenty-one days a year. It was held, under these circumstances, that the security was valid, and a

(x) *Davis v. Duke of Marlborough*, 1 Sw. 79.

(y) *Id.* 83.

(z) *Collyer v. Fallon* [1823], T. & R. 459; *Somerset v. Cox* [1865], 33 Beav. 634.

(a) *Tunstall v. Boothby*, 10 Sim. 542; and see *Wells v. Foster*, 8 M. & W. 149.

(b) *Feistel v. King's College, Cambridge* [1847], 10 Beav. 491.

(c) *Id.* 509.

receiver of the profits was appointed (d). An interest in the Customs Annuity and Benevolent Fund (established by Act of Parliament, 56 Geo. III. c. 73 [local]) is assignable. Where a subscriber to the fund irrevocably assigned, by instrument duly executed and deposited with the directors, two-thirds of the portion payable on his death to mortgagees to secure an advance made to him, and the mortgagees were duly admitted by the directors as his nominees, it was held that the mortgage was valid as against the widow, children, and relations of the subscriber (e). An assignment, by a puisne judge of the Supreme Court of Madras, of the sum "equal to the amount of six months' salary," directed by 6 Geo. IV. c. 85, to be paid to the "legal personal representatives" of such judge, in case he shall die, in and after six months' possession of office, is a valid assignment, being a vested contingent interest in such judge, and, *not being payable in the lifetime of the judge*, is not an assignment of salary within 5 & 6 Edw. VI. c. 16, and 49 Geo. III. c. 126, and consequently such assignment is not contrary to public policy (f).

And, generally, it seems that such assignments are valid when the office is a sinecure or the duties have ceased, *unless* by the express terms subject to which the payment is granted it is rendered inalienable (g), or unless such original grant of payment be a voluntary grant subject to withdrawal or discontinuance (h). But the salary of a workhouse chaplain, which is payable out of the poor rates, is assignable (i).

(d) *Grenfell v. The Dean and Canons of Windsor* [1840], 2 Beav. 544; see, also, *Willcock v. Terrell* [1878], 3 Exch. D. 323; *In re Ward, Ex parte Ward*, (1897) 1 Q. B. 266.

(e) *In re Maclean's Trusts*, L. R. 19 Eq. 274.

(f) *Arbuthnot v. Norton* [1846], 5 Moore, P. C. C. 219.

(g) *Lucas v. Harris*, 18 Q. B. D. 127; *In re Saunders*, (1895) 2 Q. B. 424.

(h) *Ex parte Webber*, 18 Q. B. D. 111.

(i) *In re Mirams*, (1891) 1 Q. B. 594.

The proprietor of a newspaper has the right to prevent any other person from adopting the same name for any other similar publication, and this right is a chattel interest capable of valid assignment (*j*). A patent right for the exclusive exercise of an invention obtained from the Crown is an assignable interest (*k*); so is a share of partnership assets and profits (*l*). When a partner mortgages his share in the partnership and the mortgagee brings an action to realize his mortgage, the proper order is to direct an account of what the mortgagor's interest in the partnership was at the date when the mortgagee proceeded to take possession under his mortgage, *i.e.*, at the date of the writ; but if a dissolution of the partnership has previously taken place the date of dissolution is the date at which the account is to be taken (*m*), in order to ascertain what proportion of the debts and liabilities as between the mortgagor and the other partners is properly attributable to the mortgaged share. There must also be an account ordered as to what is due to the mortgagee in respect of his mortgage security (*n*). So there may be a good equitable assignment of a debenture of a joint stock company by a mere indorsement in blank, and such indorsement will confer a good title on the assignee as against the trustee in bankruptcy of the assignor, notwithstanding that the assignee gives no notice to the company until after the commencement of the bankruptcy (*o*).

A misfeasance claim against directors is assignable in equity for valuable consideration.

In an action to realize debentures granted by a company which was afterwards ordered to be wound

(*j*) *Longman v. Tripp* [1805], 2 N. R. Bos. & Pul. 70, 71; 9 R. R. 617; *Ex parte Foss*, 2 De G. & J. 230.

(*k*) *Hease v. Stevenson* [1803], 3 Bos. & Pul. 565.

(*l*) *Kelly v. Hatton*, L. R. 3 Ch. 703.

(*m*) *Whetham v. Davey*, 30 Ch. D. 574.

(*n*) *Id.* 580.

(*o*) *In re Pryce, Ex parte Rensburg*, 4 Ch. D. 685; and see, also, *In re Jenkinson*, 15 Q. B. D. 441.

up, a summons was taken out by the official receiver and liquidator asking for the leave of the Court to take misfeasance proceedings against the directors and auditors of the company, and that the costs might be provided by the receiver in the action. The debenture holders were opposed to the proceedings being taken at their expense, and they also objected to the abandonment of the claims of the debenture holders to any sums which might be recovered in the misfeasance proceedings. It was suggested, however, that the right to step into the debenture holders' shoes should be transferred to someone who would pay a substantial sum therefor. *Held*, that an order must be made directing the receiver to sell by auction the claim against the directors and auditors (*p*). So, too, there may be a valid assignment in some cases of the subject-matter of a suit (*q*). Thus, a solicitor was the assignee of the amount of a verdict recovered by the assignor, and the deed of assignment contained a covenant for further assurance of the amount of the verdict or other the sum or sums of money which might become payable in the action to the assignor. A new trial was obtained, and the assignee became the solicitor in that new action, which terminated in a verdict for the plaintiff for the same amount as before. A judgment creditor of the assignor obtained a garnishee order attaching the amount recovered in that new action. In an interpleader to determine whether the assignee or judgment creditor as garnishee was entitled to the fruits of the judgment in the new action, *it was held*, that the rule that a solicitor conducting an action cannot purchase the subject-matter of the suit did not apply, as the assignment preceded the employment as solicitor, and that whether the assignment of the first verdict covered the amount of the second verdict or not, the

(*p*) *Wood v. Woodhouse & Rawson United* [1896], W. N. 4.

(*q*) *Knight v. Bowyer* [1858], 2 De G. & Jo. 421; *Cockell v. Taylor* [1852], 15 Beav. 103.

intention of the assignment and covenant was to secure to the assignee the fruits of the litigation; and that the assignor ~~could not deal with the~~ amount recovered without violating the rights of the assignee; and that, therefore, the assignment took priority over the garnishee order (r).

F. had overdrawn his banking account, but had an interest in certain chattels then deposited with G. for sale. In conversation with the bank's manager F. agreed on the 7th December to assign to the bank his interest in the said chattels by way of security for the payment of the overdraft. Accordingly, on the 9th December F. sent a notice to G., stating that he (F.) had assigned his interest in the chattels to the bank, and requesting G. to pay the bank the proceeds of sales from time to time. In these circumstances, it was held that there was a complete equitable assignment to the bank on the 7th December, that the notice to G. on the 9th December was not necessary in order to complete the title, and that the said notice was not a bill of sale. The Lord Chief Justice said: In this case the right to possess the goods was complete before the (written) assignment. The document was not an agreement between the parties, but a notification that the goods had been assigned to the bank. It was not intended that the bank should have physical possession of the goods. The document did not contemplate changes of possession, and was not an authority to take possession of personal chattels. If that right existed, it took place on the 7th December. The Bills of Sale Acts were directed against documents, and not transactions (s). But it is to be observed that a cheque is not an equitable assignment of money in the hands of a banker: it is a bill of exchange payable at a banker's (t).

A covenant to charge, dispose of, or affect lands

(r) *Davis v. Freshy* [1890], 24 Q. B. D. 519. *White*, 11 T. L. R. 570.
 (t) *Hopkinson v. Forster*, L. R. 19 Eq. 76.

thereafter to be acquired operates in equity upon lands subsequently so acquired. In the year 1811 an incumbent duly charged his then present benefice with the payment of an annuity, and covenanted that if he should afterwards be preferred to any other benefice he would fully charge the same with the said annuity, and that in the meantime the same should be charged and chargeable with the annuity. In the year 1814 the incumbent was preferred to another benefice, but no legal charge upon it was executed until the year 1818; and it was held that the deed of 1811 constituted a good equitable charge, which attached upon the new benefice as soon as it was acquired (u).

And so, in another case, A. granted an annuity to B. and covenanted to charge it upon all such property as, in the event of C. dying before him, he might become possessed of at C.'s death either by will or otherwise. A. afterwards became bankrupt, and obtained his certificate; and then C. died, having bequeathed an annuity in trust for A.: it was held, that B. was entitled to a decree for specifically charging his annuity upon the annuity bequeathed in trust for A. And it was further decided that a claim founded on a covenant to charge a particular debt upon a specific fund, in which the covenantor has no present interest, but merely an expectancy, is not barred by the bankruptcy and certificate of the covenantor before he acquires an actual interest in the fund; and that an agreement, of which the subject is an expectancy contingent upon the will of a living person, is not illegal, but will be enforced in equity (v). And so, generally, it seems that if a person covenants that he will, on or before a certain day, secure an annuity, by a charge upon freehold estates or by investment in the Funds, or by the best means in his

(u) *Metcalf v. Archbishop of York* [1836], 1 My. & C. 547.

(v) *Lyde v. Mynn* [1833], 1 My. & K. 683.

power, such covenant will create a lien upon any property to which he becomes entitled between the date of the covenant and the day so limited for its performance (w). But no charge will be created unless the covenant either refers to particular property, or property has been acquired with a presumed intention of performing or satisfying the covenant (x). And in an unreported case (recorded by Molesworth) it is said to have been held that marriage articles, charging the real and personal estate of which the husband might die seised or possessed, had, in consequence of registration, priority over a mortgage without notice (y). A covenant in a marriage settlement, to settle or charge after-acquired as well as present personal property, will operate in equity to bind such property even as against creditors (z); but such a covenant must not include the whole of the covenantor's future property (a), and is further subject to the provisions of the Bankruptcy Act, 1883, s. 47 (b).

Practically, all legal choses in action arising *ex contractu* or in the nature of debt, equity permitted to be assigned so as to give the assignee a right to sue in the name of the assignor. And it has been laid down that "where there is a contract for value between the owner of a chose in action and another person, which shows that such person is to have the benefit of the chose in action, that constitutes a good charge" (c). So, in that case, a limited company wrote to a creditor: We hold at your disposal the sum of 425*l.*, due from C. for goods

(w) *Wellesley v. Wellesley* [1839], 4 My. & C. 561; and see *Freemount v. Dedire*, 1 P. Wms. 429; *Roundell v. Breary*, 2 Vern. 482; *Deacon v. Smith*, 3 Atk. 323, 327.

(x) *Mornington v. Keane*, 2 De G. & J. 292; *Roundell v. Breary* (*supra*); *Cleary v. Fitzgerald*, 6 L. R. Ir. 351.

(y) *Rodger v. Tuthill* [1829], Molesworth, 34.

(z) *Lyster v. Burroughs*, 1 Dr. & W. 149; *White v. Anderson*,

1 Ir. Ch. R. 419; *Galavan v. Dunne*, 7 L. R. Ir. 144; *Belding v. Read*, 3 H. & C. 955; *Re D'Epineuil*, 20 Ch. D. 758; *Tailby v. Official Receiver*, 13 App. Ca. 523; *Re Turcan*, 40 Ch. D. 5.

(a) *Mitchell v. Reynolds*, 1 P. Wms. 181; *Sm. L. C.*

(b) *Williams, Bankruptcy*. [1898], 230—235.

(c) *Gorrings v. Ircell Co.*, 34 Ch. D. 128. See also *Re Casey's Patents*, (1892) 1 Ch. 118.

delivered by us to them up to December, 1884, until the balance of our acceptance for 660*l.* has been paid; and it was held that this constituted an immediate equitable assignment, complete as between the company and its creditor without notice (*d*).

Choses in action, such as policies of insurance, and contingent interests and possibilities may be the subjects of settlement, and of every kind of disposition of which a trust is capable. But an act *intended* to be an assignment, but which is not perfected, will not amount to an appropriation of any fund or property.

In equity, the assignment of a debt did not require even the assent of the debtor, in any manner thereto (*e*).

A debt due to an attorney for costs may be assigned, and the assignee may be entitled to a dormant lien for that debt as an additional security (*f*). A seaman assigned his wages as a security for money, and died indebted to other persons. The assignment specifically bound the wages, and the money secured thereby must be paid preferably to all other debts (*g*).

J. S. being indebted, sold his lands and took the purchaser's bond, which he assigned to one of his creditors. It was held to be a good equitable assignment (*h*). A solicitor being employed to prosecute a suit for the recovery of an annuity, afterwards took an assignment of a moiety thereof. The plaintiff in the cause employs another solicitor, and gives notice to the former solicitor to deliver his bill to be taxed, and obtains an order, upon payment, to deliver up books and papers; it was objected that the books and papers belonged to the solicitor, the assignee of the moiety of the annuity, as much as to the plaintiff; and that he could employ and hand them over to another solicitor, to prosecute the

(*d*) *Gorrings v. Irwell Co.*, 34 Ch. D. 128.

(*e*) *Ex parte South*, 3 Swanst. 393; 19 R. R. 227.

(*f*) *Bull v. Falkner*, 13 Jur. 93.

(*g*) *Crouch v. Martin*, 2 Vern. 595.

(*h*) *Munn v. East India Co.*, Rep. temp. Finch, 298.

suit for his interest, and that they could not be given up without his consent. But it was held that the assignment of the moiety of the annuity did not assign the books and papers. There was assignment of the deeds (i). There was an earlier case similar to this, in which the Court also held that a person claiming an assignment of this sort had no right to deeds and papers (j). A husband could not *at law* assign his wife's possibility, nor a possibility of his own, but a Court of Equity would support such an assignment for a valuable consideration (k). One of the presumptive next of kin assigned the share to which he might become entitled in the personal estate of a lunatic who was then living, upon trust to pay the costs, and any sums which might be advanced for the purposes of the trust, then to pay an annuity to the assignee, and afterwards to pay his debts. No creditor was a party to the deed. The trustees made some payments in advance. On the death of the lunatic, the trustees of the deed filed a bill against the administrator and the assignor for payment of the assignor's share, alleging that the assignor was desirous that it should be paid to them: *Held* that a general demurrer by the administrator could not be supported upon these allegations, and that there was a sufficient consideration for the deed (l). So, too, there could be a good assignment of a judgment, and it seems, the assignee could sue out execution upon it in his own name, when it had been revived within a year, and assigned since the revival, without its being revived in the name of the assignee; but the execution should state the special matter (m).

But many assignments, though valid in equity, would

(i) *Fraser v. Pippard* [1839], 3 Jur. 815.

(j) *Yea v. Field* [1788], 2 T. R. 708; 1 R. R. 603.

(k) *Grey v. Kentish*, 1 Atk.

280; *Bates v. Dandy*, 2 Atk. 207.

(l) *Hinde v. Blake* [1840], 3 Beav. 234.

(m) *Fitzgerald v. Dalton*, 1 L. & T. 662; 4 Ir. Eq. R. 697.

not generally be carried into effect in favour of *mere volunteers*; and if the assignee were a mere nominal holder, and had no interest in the assigned chose in action, he was deemed not entitled to sue in his own name in equity, but the suit had to be brought in the name of the real party interested. Nor would equity assist a volunteer by making effectual an incomplete gift (*n*). Nor would it, *generally*, decree performance of voluntary agreements (*o*). So, equity would not assist the donee of a bond to recover the amount of it, if the gift were made without consideration (*p*); and in like manner, an intended gift, which, for the lack of the necessary formalities, was not completed during the intending donor's life, will not be carried into effect by treating him as a trustee of the subject-matter of the intended gift, if there is no proof that he meant to retain such subject-matter as a trustee for the intended donee (*q*). And, it is to be remembered that an executor is never called upon to do any act to perfect a gift *inter vivos*,—except the particular cases of supplying a defective execution of a power, and the want of a surrender of a copyhold (*r*). On the other hand, a parol declaration of trust may, in the absence of fraud, be perfectly good, and when it amounts to a trust executed, it will be enforced in equity, although in favour of a volunteer (*s*).

The delivery of a bond on which judgment has been entered is not sufficient to constitute a valid *donatio inter vivos* (*t*). A. made a voluntary assignment of turnpike bonds and shares in companies to B. in trust for himself for life, and after his death for his nephew. A. delivered the bonds and shares to B., but did not observe the for-

(<i>n</i>) <i>Wcale v. Ollive</i> , 17 Beav.	W. R. 374.
252.	(<i>r</i>) <i>Antrobus v. Smith</i> [1806],
(<i>o</i>) <i>Wycherley v. Wycherley</i> , 2	12 Ves. Jun. 47; 8 R. R. 278.
Eden, 177.	(<i>s</i>) <i>Jones v. Lock</i> [1865], L. R.
(<i>p</i>) <i>Edwards v. Jones</i> , 7 Sim.	1 Ch. 25.
325.	(<i>t</i>) <i>Patterson v. Williams</i> , Ll. &
(<i>q</i>) <i>Heartley v. Nicholson</i> , 23	G. temp. Plunk. 95.

malities required by the Turnpike Road Act, and the deeds by which the companies were formed, to make the assignment effectual. *Held*, on his death, that no interest in either bonds or shares passed by the assignment, and that B. ought to deliver them to his executors (*u*). A bond was assigned to trustees, in trust as a married woman should appoint, and in default thereof to her separate use. She afterwards, by deed of indenture, appointed her interest in the bond to certain persons, as an indemnity to them for the fraudulent appropriation made by her husband, who was their solicitor, of certain sums belonging to them. *Held*, that the assignment would be supported, though without consideration, as a trust executed (*v*). And the voluntary assignment of a chose in action, such as a promissory note, by indenture which also contained a provision appointing the assignee the irrevocable attorney of the assignor for the recovery of the amount due on the note, will be carried into effect, as the transaction is complete by the execution of the deed (*w*). So, equity would not enforce the transfer of stock in favour of a volunteer to whom it has been merely assigned. Some consols belonging beneficially to A. for life, with remainder to B., stood in the names of two trustees, of the survivor of whom B. was the representative. B. voluntarily assigned the stock to A., but no transfer was made. The Court refused either to declare B. a trustee of the stock for A. or to compel her to transfer it (*x*). The distinction between an assignment for the benefit of a volunteer and a declaration of trust in his favour, though a very thin distinction, yet pervades the cases (*y*).

(*u*) *Searle v. Law* [1846], 15 Sim. 95.

(*v*) *Collinson v. Patrick*, 2 Keen, 123.

(*w*) *Blakely v. Brady*, 2 Dr. & Wal. 311; *Gannon v. White*, 2 Ir. Eq. R. 207.

(*x*) *Beech v. Keep* [1854], 18 Beav. 285.

(*y*) See *Bridge v. Bridge*, 18 Beav. 315; *Ellison v. Ellison*, 6 Ves. Jun. 662; 6 R. R. 19; and see *Kekewich v. Manning*, 1 De G. M. & G. 176.

For, if a person possessed of stock execute a declaration of trust of ~~that stock in~~ favour of a volunteer, he would constitute himself a trustee for the volunteer, and equity would execute the trust, and compel a transfer of the stock to the *cestui que trust*; but if the same person executed an assignment of the stock in favour of the volunteer, and no transfer of the stock took place, this would be considered as no more than an imperfect gift, in which the donor had not done all that it was in his power to do, and the donee would get no assistance from a Court of Equity to compel a transfer of the stock (z). But if the beneficial owner of stock standing in the name of trustees assign it in favour of a volunteer, and notice is given to the trustees, *who act upon it*, equity will enforce the performance of the trust in favour of the volunteer (a). The Court of Equity, in the administration of assets, has also enforced voluntary assignments made by the testator of annuities, mortgage debts, and policies of assurance, of which assignments no notice had been given in his lifetime to the mortgagors or grantors, *such assignments containing covenants for further assurance by the testator, his executors and administrators* (b). But it has been also held that neither a voluntary assignment by deed of a mortgage debt, accompanied by a grant not specifying the particular estate, but of all estates held in mortgage, and accompanied by a covenant for further assurance, and without delivery of the mortgage deed or notice to the mortgagor, nor the voluntary assignment of a policy of assurance retained in the hands of the assignor, and without notice given to the grantor, though accompanied by a covenant for further assurance, can be considered as a complete and effectual assignment to be acted upon and enforced by the

(z) *Bridge v. Bridge, supra.*
(a) *Id.*

(b) *Cox v. Barnard* [1850], 8 Hare, 310.

assignee without any further or other act to be done by the assignor (c). The assignment by deed of an equitable reversionary interest in personal property is a valid assignment in equity, and not to be treated as a mere agreement; and although it be voluntary, it is not an incomplete gift, but is a transfer of the beneficial interest of the assignor (d). Yet this case has to be distinguished from the following case, similar to the former in some respects:—An owner of an equitable reversionary interest under a settlement executed a voluntary assignment of it. No person had notice of the deed except the solicitor who prepared it, and who was also the solicitor to the trustees of the settlement. The settlor retained the deed in her own possession, and subsequently destroyed it. She disposed of the property by will. It was held that the deed was ineffectual to pass the property without some further act on the settlor's part; and the destruction of the deed was treated as immaterial in the judgment of the Court (e). So that it comes to this: if the voluntary settlor transfers all the interest that he is in a position to transfer at the time, it is an effectual act (f). P. voluntarily assigned certain personal property, including four debts, to trustees, with power to sue for the debts, upon trust to sell and convert into money the trust premises, and execute and do such assurances and things as should be expedient, and to apply the proceeds for the benefit of his wife and other relatives. But he did not expressly assign the securities for them, and no notice was given to the debtors; P. himself receiving payment of the debts and dying intestate, it was held that the voluntary assignment of debts was complete

(c) *Ward v. Audland* [1845], 8 Beav. 201.

(d) *Voyle v. Hughes* [1853], 2 Sm. & G. 18.

(e) *Re Way's Trusts* [1864], 10 Jur. N. S. 836.

(f) See *Nanney v. Morgan*, 37 Ch. D. 346; and notes to *Ellison v. Ellison*, 2 Wh. & Tud. [1897]; and op. *Harding v. Harding*, 17 Q. B. D. 442.

in equity, and that the trustees could prove as creditors against the estate of the intestate in respect of the debts received by him (g).

Policies of insurance were, also, assignable in equity (h); and such assignments would be enforced in such Courts if the dealing with the policy were such as that a Court of Equity would compel the assured to permit the assignee to use his name in bringing an action on the policy.

A. insured his life, and afterwards assigned the policy to B. for a nominal consideration. B. died and B.'s executors then sold and assigned the policy to D. for valuable consideration; D. died and then D.'s executors sold and assigned it to E. It was held that there was a good title made out by D.'s executors and that E. was bound to complete his purchase (i). In that case it was said that no objection could be made to such a transaction unless it were affected by the Act of Parliament, 14 Geo. III. c. 48, and that statute has not a word as to assignments of policies. The policy was good at the time it was effected, and a purchaser for valuable consideration was entitled to stand in the place of the original assignor, so as to bring an action in his name for the sum insured. The assignee of a person who has insured his own life is not required by the above-mentioned statute to have any interest in the life of such person.

But if a person who has insured his own life should afterwards put an end to his life, or die by the sentence of the law, the insurance will be void in the hands of his executors, and *a fortiori*, in respect of the assignee of such policy.

No provision to the contrary contained in the policy will be of any avail. Thus in 1815 F. effected a policy

(g) *In re Patrick, Bills v. Tatham*, (1891) 1 Ch. 82.

(h) *Delany v. Stoddart*, 1 T. R. 26; 1 R. R. 139.

(i) *Ashley v. Ashley* [1829], 3 Sim. 149.

of insurance upon his life. In 1820 he assigned all his interest under the policy, without consideration, upon certain trusts for a nominee in the indenture of assignment. In 1824 F. was convicted of felony and was executed, having the day before his conviction been declared a bankrupt. Upon a bill filed by his assignees against the society, the nominee, and the trustees, claiming the benefit of the policy: it was held that the contract was against public policy, and must be considered and construed as if a clause had been inserted in terms insuring against the event of the committing of a capital felony by the party insured (j). It is the same with regard to self-destruction; but in that case if the self-destruction occurs while the insured is of unsound mind and not accountable for his conduct, the rule arising from public policy does not apply, and his representatives or assignees are entitled to the policy money (k).

A creditor has an insurable interest in the life of his debtor to the extent of his debt, but if the debt should be satisfied from any other source, it used to be held that that would invalidate the policy thenceforth for want of interest (l); and consequently it might happen that an assignee of the policy might find his title subsequently gone which was good when he acquired it. Still, it was the practice of companies not to adhere strictly to their legal rights, and they generally paid without an inquiry into the extent of the interest of the party insured in the life of the person on whom the insurance had been effected. And later cases overruling the doctrine that a contract for life assurance was a contract for indemnity only (m), it became an established rule

(j) *Amicable, &c. Life Assurance v. Bolland* [1830], 4 Bligh, N. S. 194; 33 R. R. 22; see, also, *Chift v. Schwabe* [1846], 3 C. B. R. 437.

(k) *Horn v. The Anglo-Austra-*

lian and Universal, &c. Co., 30 L. J. Ch. 511; see, also, *Bunyon on Life Insurance* [1891], 94—104.

(l) *Godsall v. Boldero* [1808], 9 East, 72; 2 Sm. L. C.

(m) *Dalby v. India and London*

which has ever since been upheld that if the person insuring another's life has an insurable interest *at the time of effecting the policy* the subsequent loss or cessation of that interest will not invalidate the policy. An interest as trustee will suffice to support a life policy (*n*).

And an Act of Parliament, 1867, was passed to enable assignees of life policies to sue thereon in their own names, if complying with the formalities required by that statute (*o*); and by the Stamp Act, 1891, every assignment of life policies must be duly stamped (*p*).

Marine insurance policies were assignable by the custom of merchants (*q*); but, presumably, a policy of insurance against fire was formerly not even assignable in equity. It seems to have been considered that fire policies were personal contracts, and contracts of indemnity only, and that the consent of the insurers was always necessary to the assignment thereof. And the insurance companies and similar individuals seem from the earliest times to have been careful to prevent fire policies from being assigned without express licence by inserting conditions to that effect in the body of the policy. Yet it is submitted that, apart from express restrictions to the contrary in the policy itself, there appears to be no reason why a fire policy should not be assignable in equity as readily as a marine or life policy (*r*). The Judicature Act, 1873, effects no change in the assignability of fire policies. It is necessary that the party injured should have an interest in the property insured at the time the policy is made out

Life Assurance Co. [1854], 15 C. B. R. 365; *Law v. The London Indisputable Life Policy Co.* [1855], 1 K. & J. 223.

(*n*) *Collett v. Morrison* [1851], 9 Hare, 162, 176; *Tidswell v. Ankerstein* [1792], 1 Peake, N. P. Cases, 204.

(*o*) 30 & 31 Vict. c. 144.

(*p*) 54 & 55 Vict. c. 39, s. 118.

(*q*) *Delany v. Stoddart*, 1 T. R.

26; 1 R. R. 139; *Park, Insurance*, 107; see, also, *Arnould on Marine Insurance*; *Abbott on Shipping*; *Smith's Mercantile Law*.

(*r*) *Porter on Insurance*, 321; and see *Lynch v. Datzell*, 4 Bro. P. C. 431; *Sadlers' Co. v. Badcock*, 2 Atk. 554; *Miall v. Western Insurance Co.*, 19 U. C. C. P. 270.

and at the time the fire happens, and, therefore, after the lease of a house has expired, the fact that the insured assigned the policy does not oblige the insurers to make good the loss to the assignee (s). If the assignment of the property insured against fire be an assignment of the insured's whole interest, the assignor (*i. e.*, the insured) cannot recover on the policy for himself, since he has no longer any interest in the property; if the assignment of the property be only partial, the assignor can recover for himself only so far as any remaining interest of his in the subject-matter insured has suffered by the fire. On the other hand, the assignee of the property cannot recover anything under the policy effected by the vendor, unless vendor and purchaser contracted that the purchaser (*i. e.*, assignee) should have the benefit of the policy as between themselves, and the policy company consented to hold the assignee of the property assured either by the express terms of the policy or upon notice of the intention to assign before actual assignment of the property, and unless the particular form (if any) for the consent of the company has been strictly complied with.

Further, a vendor cannot recover on his policy for the benefit of the purchaser after he has received the purchase-money in full, although he has not conveyed, and this is so even if it be part of the vendor's contract of sale that he shall keep alive the policy for the purchaser's benefit and assign it to him (*t*). On the sale of a thing insured, no interest in the policy passes to the purchaser unless at the time of the sale the policy be assigned either expressly or impliedly (*u*).

(s) *Sadlers' Co. v. Badcock*,
supra.

(t) Porter on Insurance, 319;
The Bank of New South Wales v.
North British & Mercantile Insur-

ance Co. (No. 2), 3 N. S. W.
Law, 60.

(u) *North of England Oilseeds*
Co. v. Archangel, &c. Co., L. R.
10 Q. B. 255.

The policy if assigned at all before the loss, must be assigned with the property which it covers; such assignment will operate only by consent of the insurers, and the insurers will not consent without proof of the assent of the original assured (v).

In certain circumstances, however, it appears that a policy of fire insurance may in equity be assigned, so as to give another person a right to sue upon it (w); but this right is subject to the special stipulation of the particular contract, and no right to assign before loss so as to bind the insurer can arise under a policy against fire in the ordinary form by which insurers bind themselves to pay the insured, his executors and administrators, and contains a condition that no assignment will be valid unless accepted by the insurers (x).

The insurer cannot be made to accept any assignee (y). It is a pure matter of favour for the insurer to continue the insurance after property is assigned, and the contract is a new contract. The fire policy does not run with the land, although some of our judges would have it do so (z). The French law is otherwise, and holds the policy to be accessory and to pass with the property (a).

On the other hand, where the insured property is only mortgaged, the insured does not lose his interest therein and is entitled to the policy money in the event of loss by fire during the existence of the mortgage.

And by virtue of the Conveyancing Act, 1881, without prejudice to any obligation to the contrary imposed by law, or by special contract, a mortgagee may require that all money received on an insurance be applied in

(v) Porter, 320.

(w) *Rayner v. Preston* [1881], 18 Ch. D. 10.

(x) Porter, 320, 321.

(y) *Bank of N. S. Wales v. N. Brit. Merc. Co.*, 3 N. S. W. Law, 60.

(z) *Rayner v. Preston*, *supra*, p. 12.

(a) *Stanton v. Home Ins. Co.*, 24 Lr. Can. Jur. 38; Canada Civil Code, arts. 2483, 2576; Porter, 324.

or towards discharge of the money due under his mortgage (b). www.libtool.com.cn

Mercantile policies on goods, &c., usually called *floating policies*, are assignable by permission of the insurers in the same way as ordinary fire policies (c).

The above illustrations will sufficiently show the variety of interests which have been and still are the subject-matter of equitable assignments of choses in action.

In concluding this section, it may be well to note that all agreements and covenants receive their force from the capability of the parties to perform them, subject, of course, to the fact that the impossibility of one party only will not exempt him from personal liability; for, although it may liberate him from specifically performing, he may still be mulcted in damages for undertaking to do what he alone knew to be an impossibility (d). An agreement to do a thing *in itself* impossible, or beyond human power, is void in all cases (e). But a man may, otherwise, bind himself to do anything which is not in itself impossible or contrary to the law or public policy (f); and there is no legal or equitable distinction between a near and remote possibility. But there were some contracts which equity would not assist, as, for example, a bottomry-bond which carries an unreasonable interest (g), but would leave

(b) 44 & 45 Vict. c. 41, s. 23
(4); Elph. Introd. 154.

(c) Porter, 327.

(d) *Thornborrow v. Whitacre*, 2 Lord Raym. 1164.

(e) Co. Litt. 206a, note (1); *Hargrave & Butler's* edn.

(f) 1 Rolle's Abr. 419; 5 Viner, Abr. 110; Pothier, *Traité des Obligations*, partie 2, c. 3, art. 1, § 2, 204; Puff. b. 5, c. 7, § 6; Heinecc. J. N. & G. c. 14, s. 398. See also *Brian v. Acton*, 5 Vin. Abr. 533, pl. 33; *Earl Kingston v. Pierrepont*, 1 Vern. 5; *Walker v. Gascoigne*, 13 Vin.

Abr. 544, pl. 13; *Durston v. Sandys*, 1 Vern. 411; *Hawkins v. Turner*, Pro. Ch. 513; *Taylor v. Bell*, 2 Vern. 170; *Watts v. Brooks*, 3 Ves. Jun. 612; *Knollys v. Houghton*, July, 1805, Ch., cited in *Fonblanque Eq.*, 5th ed. i. 236; *Firebrass v. Brett*, 2 Vern. 70.

(g) *Dandy v. Turner*, 1 Eq. Ca. Ab. 372, pl. 7; but see *Park, Ins.* 470 *et seq.*; see, also, *Western v. Wildy*, Skin. 59, 152; *Williams v. Steadman*, Holt's R. 126; *Anon.*, 1 Eq. Ca. Ab. 372, pl. 5. 2 Ch. Ca. 130; *Harman v. Vanhatton*, 2 Vern. 717.

the holder to recover what he could at law. The like may be said as to a bond in common form for payment of money, but proved to be an agreement that the obligor should marry such-and-such a man, or should pay the money due on the bond (*h*). And so a bond to procure marriage between certain persons is void; and equity will not only not enforce, but will give relief against such bonds (*i*). There is, also, the question of laches and indolence, the Courts of Equity presuming that, after a great length of time, some composition or release has been made; but this is subject to the usual exceptions, which are fully dealt with in the many able treatises upon equity jurisdiction.

The validity of assignments of choses in action being thus firmly established in equity gave rise to a distinct and important class of equitable interests. Choses in action, such as policies of insurance, and contingent interests and possibilities, came to be the subjects of settlement, and, indeed, of every kind of disposition of which a trust estate is capable.

It is very common in settlements to introduce a covenant on the part of the husband to effect a policy of insurance, and to assign it to trustees, so that the amount, when recovered, may be settled on the wife and issue of the marriage; and not infrequently the money to be recovered on a bond is settled in the same manner (*j*).

Finally, equity could never wholly disregard the law. "If the assignee were allowed to sue in equity and

(*h*) *Key v. Bradshaw*, 2 Vern. 102; *Drury v. Hooke*, 1 Vern. 412; *Griseley v. Lother*, Hob. 10; *Hall v. Potter*, 3 Lev. 411; Show. P. C. 76; *Law v. Law*, Eq. Ca. t. Talbot, 3rd ed. Williams, 140; *Collins v. Blantern*, 2 Wils. 347.
(*i*) *Arundel v. Trevillian*, 1 Ch. Rep. 47; *Glanville v. Jennings*, 3 Ch. Rep. 18; Toth. 27; *Cole v. Gibson*, 1 Ves. 503; *Smith v.*

Aykwell, 3 Atk. 566; see, also, *Baker v. White*, 2 Vern. 215; *Woodhouse v. Shepley*, 2 Atk. 535; *Lowe v. Peers*, 4 Burr. 2225; and lastly, see *Mitchell v. Reynolds*, 1 P. Wms. 181; *Davis v. Mason*, 5 Term. Rep. 118; 2 R. R. 562; *Chesman v. Nainby*, 1 Bro. P. C. [2nd ed.] 234; *Harrison v. Gardner*, 2 Maddock's Rep. 198; 17 R. R. 207.
(*j*) *Spence*, 2 Eq. Jur. 855.

recover the debt behind the back of the assignor, the unfortunate debtor might be subjected to a second action at common law, and be compelled to pay the debt over again. If the assignor had given a power of attorney authorizing the assignee to sue for the debt in the name of the assignor, and that course was adopted, the judgment would bind the assignor (as it would stand in his name), and be a good discharge to the debtor at law as well as in equity. But if the assignee sued in his own name in equity, the decree in his favour would be no bar to an action by the assignor at common law. If the chose in action was of a purely equitable nature, this would not matter, as the assignor could never sue for it at law. But in all other cases the equity judges very properly required the assignee to bring the assignor before the Court, so that he should be bound by their decree. If he would not consent to join as a co-plaintiff with the assignee, he was made a defendant, but he had to be a party to the proceedings on one side or other of the record" (k).

Having illustrated the kinds of choses in action assignable in equity, we now proceed to consider what are the

Requisite Formalities of a Valid Assignment in Equity.

We do not here discuss the requisites as to capacity of the parties, or lawfulness of consideration, or the subject-matter assigned, or any such questions; but merely those requisites which must attend the actual formality of the transaction involved.

And first, as to the form or mode of assignment.

General Rule. Speaking, no particular form is necessary (l), indeed, no form whatever, in many instances, is required. When a person agrees, for valuable consideration,

(k) 1 Encyc. 5 Asst. p. 354.

(l) *Morrell v. Woollen*, 16 Beav. 197; *Rodick v. Gandell*, 1 De G. M. & G. 763; *Att. Irving*, 7 Ch. D. 419.

to assign to another his interest in certain specified property, either in existence or to come into existence, an equitable assignment is then and there effected (*m*). No writing is generally necessary (*n*), unless compliance with some statute, as the Statute of Frauds (*o*), or the Companies Acts, be required.

Any words which show a clear and definite intention of transferring or appropriating the chose in action to or for the use of the assignee for valuable consideration will be sufficient (*p*), and will create a valid charge upon the fund or other chose in action (*q*).

A writing in the following form, "For value received, I hereby sell, assign, transfer, and set over unto A. B. all my right, title, and interest in and to the balance due to me on sale of goods, &c. to C. D., in the sum of £ , less a payment of £ , leaving due from C. D. to me the full sum of £ , " has been held, in America, to be an absolute assignment (*r*). Again, A. owed B. on account, and B. owed C. on account, and desired further credit. The three agreed that what A. owed B. should be paid by him to C. on B.'s account. *Held*, that this was an oral assignment to C. of B.'s debt against A., with constructive delivery and sufficient consideration (*s*). Indeed, it has been held that *acts* merely, as the delivery of written evidence of a debt, may be sufficient to constitute an assignment of the debt itself (*t*); but that an agreement to pay a collector a certain part

(*m*) *Field v. Megaw* [1869], L. R. 4 C. P. 660; *Rodick v. Gandell*, *supra*; *Percival v. Dunn*, 29 Ch. D. 128; and see *Row v. Dawson*, 1 Ves. 331; *Tibbitts v. George*, 5 Ad. & El. 115.

(*n*) *Gurnell v. Gardiner*, 9 Jur. N. S. 1220; *Riccard v. Prichard*, 1 Kay & J. 277, 279; *Field v. Megaw*, L. R. 4 C. P. 660; *Heath v. Hall*, 4 Taunt. 328; 13 R. R. 610; *Tibbitts v. George*, *supra*.

(*o*) *Ex parte Hall*, 10 Ch. D. 615; *Re Richardson*, 30 Ch. D.

396.

(*p*) *Row v. Dawson*, 1 Wh. & Tud. Eq. Ca. 107.

(*q*) *Gorrings v. Irwell*, 34 Ch. D. 134; *Crowfoot v. Gurney*, 9 Bing. 372; 35 R. R. 557; *Smith v. Everett*, 4 Bro. Ch. C. 64.

(*r*) *Wallingsford v. Burr*, 17 Neb. 137.

(*s*) *White v. Kilgore*, 77 Me. 571; *Ex parte Agra Bank* [1868], L. R. 3 Ch. Ap. 555.

(*t*) *Mowry v. Todd*, 12 Mass. 281.

of a sum for collecting it, is *not* an equitable assignment, and does not give the collector a right of action against the debtor (u).

"The mode or form is absolutely immaterial, provided the intention of the parties is clear" (v). An order given by A. to B. is addressed to C., who is indebted to A., or who holds money belonging to A., and the order directs C. to pay B. a definite portion of that specific debt or fund in his hands. This is a valid assignment of a portion of that debt or fund (w). If the order be by deed or for valuable consideration, it is immediately binding on A., and irrevocable (x). So, indorsing and delivering a bond to an assignee for valuable consideration amounts to an assignment of the bond (y). It is usual, and generally advisable, in assigning a chose in action, as a debt or bond, to do so by deed in proper form, with a power of attorney to sue in the name of the assignor. Such an order as above will also bind A.'s trustee in bankruptcy, and be good against any execution creditor of A. (z). But if there were no consideration for the assignment, or it was not under seal, it is competent for the assignor to revoke it any minute, although, until it be revoked, it is both valid and binding on A. and C., and any payment made thereunder by C. is a good payment as against A., and

(u) *Plater v. Meag*, 30 Fed. Rep. 308.

(v) *Tailby v. Official Receiver* [1888], 13 App. Ca. 543; see, also, *Burn v. Carvalho* [1839], 4 My. & C. 690; *Malcolm v. Scott* [1849], 3 Mac. & G. 29; *Myers v. United, &c. Co.* [1855], 7 De G. M. & G. 112; *Choune v. Baylis* [1862], 31 Beav. 351; *Gurnell v. Gardner* [1863], 4 Gif. 626, 630; *Frith v. Forbes* [1862], 4 De G. F. & J. 409; *Ex parte Montagu* [1876], 1 Ch. D. 554; *Ranken v. Alfaro* [1877], 5 Ch. D. 786; *Re Irving* [1877], 7 Ch. D. 419; *Webb v. Smith* [1885], 30 Ch. D.

192; *Stephens v. Green*, (1896) 2 Ch. 148; and 1 Wh. & Tud. 107, where the above cases are also cited.

(w) *Burn v. Carvalho*, 4 My. & C. 690; *Brown v. Kough*, 29 Ch. D. 848; *Rodick v. Gandell*, 1 De G. M. & G. 776.

(x) *Fortescue v. Barnett* [1834], 3 My. & K. 36; Bro. Abr. Choses.

(y) *Row v. Dawson*; *Ryall v. Rowles*, 1 Wh. & Tud. 93, 96; *Townsend v. Windham*, 2 Ves. 6; *Ex parte Alderson*, 1 Mad. 53; 15 R. R. 208.

(z) *Gorringe v. Irwell* [1886], 34 Ch. D. 128.

the receipt of the assignee, B., is a good discharge for the amount so paid and assigned (a). C.'s consent to the order is not necessary (b); nor is it essential for C. to attorn to B. (c). For it is unnecessary for a man to promise a second time to do what he is already bound to do; and C. must pay over to B., even if B. refuses to indemnify him (d). For if C. pays A. instead of B., under such circumstances he can still be compelled to pay B., and thus to pay over again (e).

But where there is a document, its terms must be sufficiently imperative to impose a duty upon the debtor or fund-holder to perform the request (f); a mere suggestion or optional offer to pay either the assignor or assignee, leaving the obligor to exercise his own discretion, is not sufficient to create an assignment (g).

Again, the debt or fund must be specified distinctly (h); nor is that enough; there must be a clear intention to deal with the debt or fund in such a way as to give to the intending assignee a beneficial interest in it. To inform a creditor that he shall be paid as soon as a particular debt comes to hand, does not create an assignment of that debt, or of any part of it (i). And so, to draw a bill of exchange on a merchant, or a cheque payable at a particular bank, does not assign any part of the drawer's balance in the hands of the merchant or bankers (j). But in another case, the debtor's executor

(a) 1 Encycl. Asst. 357; *Burn v. Carvalho*, &c., *supra*.

(b) *Burn v. Carvalho*, *supra*.

(c) *Yeates v. Groves* [1791], 1 Ves. Jun. 281; *Burn v. Carvalho*, *supra*; *Bell v. L. & N. W. Rail. Co.* [1852], 16 Beav. 548.

(d) 1 Encycl. Asst. 357.

(e) *Jones v. Farrell* [1857], 1 De G. & J. 208.

(f) *Lett v. Morris* [1831], 4 Sim. 607; 33 R. R. 156; *Diplock v. Hammond* [1854], 2 Sm. & G. 141; *M'Gowan v. Smith* [1856], 26 L. J. Ch. 8.

(g) *Watson v. D. of Wellington*

[1830], 1 Russ. & M. 602; 32 R. R. 293.

(h) *Percival v. Dunn* [1885], 29 Ch. D. 128; *Brice v. Bannister* [1878], 3 Q. B. D. 569; *Harding v. Harding* [1886], 17 Q. B. D. 442; *Yeates v. Groves*, 1 Ves. Jun. 281; but see *Webb v. Smith*, 30 Ch. D. 194.

(i) *Malcolm v. Scott*, 3 Hare, 39; *Jones v. Starkey* [1852], 16 Jur. 510; *Field v. Megaw*, L. R. 4 C. P. 660; 1 Encycl. Asst. 358.

(j) *Shand v. Du Buisson*, L. R. 18 Eq. 283; *Hopkinson v. Forster*, L. R. 19 Eq. 74; *Schroeder v.*

was held bound under the following circumstances:—R., being pressed to discharge a debt in August, 1813, gave to two creditors a draft on the executor of a debtor of hers, *which draft the executor promised to discharge in November, 1814*. Upon a petition being presented by the two creditors, it was *held* that they were entitled to the sum for which the draft was given, as against the assignees in bankruptcy. And upon appeal, Lord Eldon said, that the debtor would be bound by the order being shown to him, and that a contract on his part to pay was, in equity, not necessary (*k*).

So, a mere indorsement in blank of a debenture of a joint-stock company is a valid assignment in equity (*l*).

Where the chose in action is not yet vested in the assignor, due care must be taken that the document assigning such interest be so worded as to transfer, by virtue of its own force, the assignor's interest as completely as it is possible, under the circumstances. Nothing should be left to be done subsequently either by the assignor or assignee to complete the title when the chose in action comes into existence or vests (*m*); and this may be done in very simple and general terms (*n*).

So, too, an assignment of "all the book-debts due and owing, or which may during the continuance of this security, become due and owing to the mortgagor," is a valid assignment and is sufficiently specific, although not restricted to the book-debts of any particular business, and it will fix the assignee's title to *all* the book-debts arising after the assignment, whether incurred in the particular business carried on by the assignor at the date of the assignment, or in any other business subse-

Central Bank, 24 W. R. 710;
Brown & Co. v. Kough, 29 Ch. D.
848.

(*k*) *Ex parte Alderson*, 1 Mad.
53; 3 Swan. 392; 15 R. R. 208.

(*l*) *Re Pryce*, 4 Ch. D. 685;
Re Jenkinson, 15 Q. B. D. 441.

(*m*) *Reeve v. Whitmore* (1864),
4 De G. J. & S. 1.

(*n*) *In re Irving*, 7 Ch. D. 419.

quently acquired and carried on by him during the existence of the security (*o*). And this applies equally to an assignment of future debts as such, whether rent, &c. (*p*), or sums of money due under building and all similar contracts (*q*). Nor is an assignment too vague which purports to assign "all moneys of or to which the assignor now is or may during the security become entitled, under any settlement, will, or other document, either in his own right, or as the devisee, legatee, or next of kin of any person" (*r*); but an assignment also of all real and personal property "of, in, or to which he is or during this security shall become beneficially seised, possessed, entitled or interested, for any vested, contingent, or possible estate or interest," *might* be too wide, but on that point the Court gave no decision, as it held that such an assignment was divisible and that the assignment for valuable consideration of all moneys to which he should become entitled under a will operated as a contract which the Court would enforce (*s*).

It was said, "It may be that the Court cannot ascertain the property, in that case it will refuse to enforce the contract on the ground of vagueness. That the property cannot be identified at the time when the contract is made does not signify if it can be identified at the time when the Court is asked to carry the contract into effect. . . . Vagueness comes to nothing if the property is definite at the time when the Court is asked to enforce the contract" (*t*).

Yet, however precise the words of the assignment

(*o*) *Tailby v. Official Receiver* [1888], 13 App. Ca. 523, overruling *Belding v. Read*, 3 H. & C. 955; see also *Re D'Epineuil*, 20 Ch. D. 758.

(*p*) *Southwell v. Scotter*, 49 L. J. Q. B. 356; *Knill v. Prowse*, 33 W. R. 163.

(*q*) *Brice v. Bannister*, 3 Q. B.

D. 569; *Buck v. Robson*, 3 Q. B. D. 686; *Ex parte Moss*, 14 Q. B. D. 310; *Drew v. Joselyne*, 18 Q. B. D. 590.

(*r*) *In re Clarke*, 36 Ch. D. 348.

(*s*) *Id.*

(*t*) *Id.* 352, 353.

may be, if there is clear evidence that neither party intended the document to be an assignment, for example, evidence of fraud or mistake, it will be competent for the Court to go behind the literal meaning and give effect, as far as possible, to the true intentions of the parties (*u*).

Again, care must also be taken not to make the document an informal bill of sale, and invalid as not complying with the statutory requirements, or inadmissible as evidence because not properly stamped (*v*).

And a mere mandate from a principal to his agent, but not communicated to a third person, will not give the third person any right or interest in the subject-matter of the mandate. Such a mandate may be revoked at any moment prior to its execution, or before any engagement has been entered into with the third person to execute it for his benefit; and it will be revoked by any disposition of the property inconsistent with the carrying out of such mandate (*w*).

The bankruptcy or death of the principal operates as such a revocation (*x*).

But, once communicated to the third person and assented to by him, it becomes irrevocable (*y*), and so where consignments had been made from abroad to answer an annuity which the owner of the consigned property was liable to pay, and the consignee in this country gave notice of the arrangement to the annuitant, and made payments in pursuance of it, it was *held*, that the consignee was not afterwards at liberty to discontinue making such payments, so long as he had any proceeds of the consignments in his hands (*z*).

(*u*) *In re Sheward*, (1893) 3 Ch. 502.

(*v*) *Diplock v. Hammond*, 2 Sm. & G. 141; *Ex parte Shellard*, L. R. 17 Eq. 109.

(*w*) *Scott v. Porcher*, 3 Mer. 652, 664; 17 R. R. 161; 1 Wh. & Tud. 111; *Murrell v. Wooten*,

16 Beav. 197.

(*x*) *Ex parte Hall*, 10 Ch. D. 615; *In re Russell*, 37 Sol. J. 212; *Lambe v. Orton*, 1 Dr. & Sm. 125.

(*y*) *Greenway v. Atkinson*, 29 W. R. 560; *Fitzgerald v. Stewart*, 2 Russ. & M. 457.

(*z*) *Fitzgerald v. Stewart*, *supra*.

On the other hand, an authority to a person to receive money and not addressed to the debtor, but directing the receiving person to pay it to a creditor of the party giving the authority, is not sufficient. A railway company was indebted to the defendant, who was their engineer, and who in his turn was greatly indebted to his bankers. The bankers pressed for payment, or good security. The engineer addressed a letter to the *solicitors to the company*, and authorized them to receive the money due to himself from the company, and to pay the same to his bankers. The solicitors wrote to the bankers promising to pay them such money on receiving it from the company. It was *held*, that in these facts, there was no equitable assignment, since "it was a mere authority to receive, which might or might not be acted upon; it was not directed to the company, nor to any officer or representative of the company, in any sense to make it available against the company" (a). It was therefore decided upon the actual construction of the conduct and documents of the parties, which did not amount to a compliance with the dictum of Lord Eldon, that where a creditor gives an order on his debtor to pay a sum in discharge of his debt, and that order is shown to the debtor, it binds him (b). Probably the decision would have been otherwise had the engineer addressed his letter to the company themselves, or sent the order to the bankers for them to deal directly with the company. It seems a thin line, yet is of sufficient importance to guard interested parties against departing from the orthodox procedure in such cases. For the conclusion which might be drawn is stated by Lord Truro: "It rather seems to have been intended that the bank should have no title or interest in the debts until the amount of the debts should have

(a) *Rodick v. Gandell*, 1 De G. M. & G. 778, 779.

(b) *Ex parte South*, 3 Swan. 392; 19 R. R. 227; see also 12 Beav. 325.

been adjusted, and some definite portion adjusted and realized" (c).

Moreover, it is necessary to the validity of some assignments that due regard should be paid to the stamp duties. For, where a document needs stamping in some particular way, as under 55 Geo. III. c. 184, Sch. Pt. I., or the Bills of Sale Acts, 1878 and 1882, it might not be enforced in equity (d).

It is also to be again observed, that equity will not enforce an agreement which fails to comply with the statutory requirements properly affecting it, and that accordingly it is necessary always to inquire whether all such provisions have been satisfied before seeking the support of the Court.

It may also be well to note that the common course adopted in relation to general assignments of *choses in action* is, for the assignor to draw the assignment addressed to the assignee who retains the original, and notifies its contents to the debtor or fund-holder affected thereby. But this course is not absolutely necessary. For the assignor may address the assignment to his debtor or fund-holder, and despatch it direct to him by way of assignment and notice combined; and this will be sufficient (e).

NOTICE OF ASSIGNMENT.

But an assignment may have complied with all the foregoing general observations, and be a perfectly valid

(c) 1 De G. M. & G. 779. See also *Bell v. L. & N. W. Rail. Co.*, 15 Beav. 548; *Thayer v. Lister*, 30 L. J. Ch. N. S. 427; *Flint v. Walker*, 5 Moo. P. O. C. 179; *Re Foster*, 7 Ir. R. Eq. 294, and 1 Wh. & Tud. notes to *Eyall v. Rowles*, 112.

(d) *Braybrooke v. Meredith*, 13 Sim. 271; *Parsons v. Middleton*, 6 Hare, 261; *Pott v. Lomas*, 6 H. & N. 529; but see *Diplock v.*

Hammond, 5 De G. M. & G. 320; *Brice v. Bannister*, 3 Q. B. D. 569; *Ex parte Hall*, 10 Ch. D. 615; *Webb v. Smith*, 30 Ch. D. 192. See also *Alpe*, Stamp Duties.

(e) *Ex parte South*, 3 Swan. 392; 19 R. R. 227; *Lett v. Morris*, 4 Sim. 607; 33 R. R. 156; *Brice v. Bannister*, *supra*; *Buck v. Robson*, 3 Q. B. D. 686; *Harding v. Harding*, 17 Q. B. D. 442. See also 1 Encycl. 357.

assignment, and enforceable in equity, and yet fail of its purpose by reason of the fact that the person obliged to pay the debt, or hand over the fund to the assignee, has never been informed of the transaction, and acting upon his primary obligation has paid, or handed over, the debt or fund to the assignor since the date of the assignment thereof. It is quite true that, in some cases though not in all (*f*), the assignee might have his remedy against the assignor, who, in such a case, might be considered as a trustee for the assignee; but it is equally true that the assignor's condition may be one of insolvency, or he may have disappeared, or other circumstances may have arisen which render it either impracticable or impossible to pursue one's remedy against him. Yet, on the other hand, the debtor or fund-holder acting *bona fide* and without notice of the assignment, may be exonerated from all liability by his having discharged the prior duty imposed upon him.

Consequently, the general rule in all equitable assignments is, that it is necessary to give to the person who has to pay the fund notice of the assignment, so as to prevent payment being made to the assignor (*g*), or a subsequent assignee obtaining a prior claim (*h*), or to avoid the subject-matter assigned coming within the operation of the reputed-ownership clause of the Bankruptcy Act (*i*).

But it must be clearly understood that want of notice to the debtor of an assignment does not affect the validity of the assignment *as between the assignor and the assignee*, whether for valuable consideration (*j*) or merely

(*f*) *In re Patrick*, (1891) 1 Ch. 82.

(*g*) *Foster v. Blackstone*, 1 My. & K. 297; *Meux v. Bell*, 1 Haro, 73; *Green v. Ingham*, L. R. 2 C. P. 525; *Story*, Eq. Jur. 700; *Williams v. Sorrell*, 4 Ves. Jun. 389; *In re Patrick*, *supra*.

(*h*) *Story*, Eq. Jur. 700; 1

Encycl. 360; *Spence*, Eq. Jur.; *Walker v. Bradford Bank*, 12 Q. B. D. 517.

(*i*) 46 & 47 Vict. c. 52, s. 44 (iii); *Colonial Bank v. Whinney*, 30 Ch. D. 261; 11 Ap. Ca. 426.

(*j*) *Burn v. Carvalho*, 4 My. & C. 702; *Gorringe v. Irwell*, 34 Ch. D. 129.

voluntary (k); nor does the notice complete the title of the assignee, and ~~was not~~, at one time, a requisite in the title. The contract is complete by assignment, and, if for value, the Court will enforce it (l).

In a recent judgment it has been laid down thus:—It has been said that notice is necessary in order to “perfect” the title of the assignee—in order to “complete” his title. Those expressions have been frequently used; but they are, I venture to think, little more than mere phrases. Notice does not render the title perfect. Notice was not even a step in the title until it was made so by the decision in *Foster v. Cockerell* (3 Cl. & Fin. 456). Apart from the rule in *Dearle v. Hall* (3 Russ. 1), an assignee of an equitable interest from a person capable of disposing of it has a perfect equitable title, though the title is no doubt subject to the infirmity which attaches to all equitable titles. And that infirmity is not, and cannot be, wholly cured or removed by notice to the trustees. . . . The trustee of the fund is trustee for the persons entitled to the fund, whether he knows their names or not. The notice, no doubt, places him under a direct responsibility to the person who gives the notice. If he disregards the notice, he does so at his peril. But before notice given he is just as much a trustee for the persons rightfully entitled as he is after he receives the notice, though of course, in the absence of notice, he would be safe in paying away the fund to those who appear by the instrument constituting the trust, or by title properly deduced from them, to be the true owners. . . . If the rule in *Dearle v. Hall* had never been invented, it still would have been necessary for an equitable assignee, for his own protection, to give notice to the legal holders of the fund the subject of the

(k) *Donaldson v. Donaldson*, Kay, 711; *Re Way's Trust*, 2 De G. J. & S. 385; *Roberts v. Lloyd*, 2 Beav. 376.

(l) *Jones v. Gibbons*, 9 Ves. Jun. 407; 7 R. R. 247; *Priddy v. Rose*, 3 Meriv. 107; 17 R. R. 24.

assignment. A solicitor employed in such a transaction would still have incurred serious liability if he neglected so obvious a precaution. And I rather doubt whether the existence of the rule has led to notice being given in any case in which it would not have been given if the rule had been unknown (*m*).

Furthermore, no notice is necessary to third persons who stand in the same place as the assignor. Thus, no notice to the debtor is necessary as against those who claim under a subsequent assignment as volunteers; that is to say, the Court will not protect either of two volunteers by reason of the mere fact that one of them has given notice to the debtor and the other has not. Notice does not affect the rights of volunteers nor create any priority of claim (*n*). Presumably, the doctrine of *Dearle v. Hall* only applies in favour of a purchaser for value. And a judgment creditor is not a purchaser in this sense, so that the question of notice or no notice does not affect the position of a creditor who obtains a charging order upon some chose in action which the judgment debtor has previously voluntarily assigned away without notice; for the judgment creditor stands in the place of the assignor, and is equally bound by the prior assignment (*o*). And so it has been said, "A judgment creditor is in no analogy with a second mortgagee who has been deceived into taking, as unincumbered, a security that was incumbered. The judgment creditor has trusted to no particular security: he has rights, which may be made to charge all the available assets of the debtor, and, amongst the rest, the stock; but he has advanced nothing on the stock, and has been in no way deceived in respect thereof; and the judgment debtor, by suffering judgment, has not used deception, nor been guilty of any fraud. The

(*m*) *Ward v. Duncombe*, (1893)
Ap. Ca. 392, 394.

(*n*) *Justice v. Wynne* [1860], 12

Ir. Ch. R. 289.

(*o*) *Beavan v. Oxford* [1855],
6 De G. M. & G. 507.

reason, therefore, for giving priority to a second mortgagee over the first wholly fails in respect of a judgment creditor" (p). In like manner, pending a suit for the administration of a testator's estate, a *cestui que trust* of a share of the proceeds of the residuary realty and personalty assigned his share by way of security, and the assignee immediately gave notice to the trustees of the will. Afterwards, the real estates were sold, and the proceeds paid into Court to the credit of the cause generally. The assignee did not then obtain a stop order; but a creditor who had entered judgment against the assignor (i.e., the *cestui que trust*) subsequently to the assignment obtained an order charging the fund in Court, with respect to which the assignee had not obtained a stop order, or taken any other proceeding. It was held that the judgment creditor did not thereby acquire a priority over the assignee; and for similar reasons, namely, that the judgment creditor's rights were not the same as those of a purchaser for value, and it must be said, also, because he stood in the place of his judgment debtor, the assignor (q). The same remarks apply to the case of a creditor who obtains a garnishee order without notice of a previous assignment of the chose in action in respect of which the garnishee order has been made (r); for a creditor can only attach by a garnishee order such property of his debtor as the debtor could deal with properly and without violation of the rights of other persons. So that an equitable charge, obtained before a garnishee order, takes priority of the order, even where no notice of the charge was given (s). And again, a judgment creditor cannot, by

(p) *Watts v. Porter* [1854], 3 Ellis & Bl. 761; see, also, *Kinderley v. Jarvis*, 22 Beav. 1; *Eyre v. M'Dowell*, 9 H. L. Cas. 619.

(q) *Brearecliff v. Dorrington*, 4 De G. & Sm. 122.

(r) *Pickering v. Ilfracombe Railway* [1868], L. R. 3 C. P. 235; *Robinson v. Nesbitt*, *Id.* 264; overruling *Watts v. Porter*, *supra*; *Scott v. Hastings*, 4 Kay & J. 633.

(s) *Badeley v. Consol. Bank*, 38 Ch. D. 238.

giving notice to the trustee, put himself in a better position than the judgment debtor; and a judgment creditor who has obtained equitable execution by the appointment of a receiver subject to existing incumbrances was held to have obtained no priority by giving notice of the appointment to the trustee of the judgment debtor (*f*).

Notice is looked upon as equivalent to reducing the thing into possession, and often, to avoid giving notice, may bring the chose in action within the operation of the reputed-ownership clause of the Bankruptcy Act, or is likely, by thus neglecting to do all that might be done to protect one's interest, to result in seriously prejudicing one's rights, and, in many instances, will cause an assignee to be displaced and subjected to the priority of an otherwise subsequently interested party, and not infrequently the assignee may be deprived of all the fruits of his assignment (*u*). The effect of not giving notice where required is also "to let in all equities which may exist or be created prior" and right up to notice being actually given (*v*).

But the Bankruptcy Rules as to reputed ownership do not apply to the winding-up of companies (*w*), and equitable charges on shares in registered companies are not thus affected by notice, since they have priority in order of *date* and not of notice (*x*).

It is doubtful whether the rule in *Dearle's Case* had been applied in equity prior to the decision in that case. The facts in that case are thus stated:—"A person

(*f*) *Arden v. Arden*, 29 C. D. 702.

(*u*) *Williams v. Sorrell*, 4 Ves. Jun. 389; *Walker v. Bradford Old Bank*, 12 Q. B. D. 517; Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 44 (iii); *Norriah v. Marshall*, 5 Madd. 475; *Stocks v. Dobson*, 4 De G. M. & G. 11; *Cothay v. Sydenham*, 2 Bro. Ch. 391; *Leslie v. Baillie*, 2 Y. & C.

C. 91; see, also, *Dearle v. Hall*, 3 Russ. 1; *Brice v. Bannister*, 3 Q. B. D. 569; *Johnstone v. Cox*, 16 C. D. 571.

(*v*) *Walker v. Bradford Old Bank*, *supra*.

(*w*) *Gorringe v. Iruell* [1886], 34 C. D. 128.

(*x*) *Société Générale de Paris v. Walker* [1885], 11 Ap. Ca. 20.

having a beneficial interest in a sum of money invested in the names of trustees, assigns his interest to A., who gives no notice thereof to the trustees; afterwards the same person proposes to sell his interest to B.; B. makes inquiries of the trustees, and receiving no intimation of any prior incumbrance, completes the purchase, and gives notice to the trustees. B. has a better equity than A. to the possession of the fund, and the assignment to B., though posterior in date, is to be preferred to the assignment to A." (y).

But it had been held, in 1814, that mere neglect of notice was not sufficient to postpone a prior incumbrancer; that in order to deprive him of his priority, it was necessary that there should be such laches as, in a Court of Equity, amounted to fraud (s). However, the argument adopted in *Dearle v. Hall* is stated thus:—The owner might sell the property to a dozen different persons successively; and if notice to the trustees be not required or do not confer a higher title, none of them would have any means of knowing whether the property had been sold or incumbered. By requiring a purchaser who desires to be safe to give notice to the trustees, the vendor is deprived of committing a fraud. The trustees are converted into a register; and, by applying to them, everyone who proposes to negotiate for the purchase of the fund (except in the very improbable event of the trustees incurring personal responsibility by lending themselves to the vendor's dishonest purposes) is enabled to ascertain whether any prior incumbrances exist which will prevail over the title that is to be conveyed to him. The loss must be borne either by the first purchaser or by the second. The latter has taken every precaution which prudence suggested, to protect himself from fraud, and to deprive the vendor of the means of defrauding others. The

(y) [1823-8], 3 Russ. 1.

(s) *Cooper v. Fynnmore*, 3 Russ. 64.

former has omitted to take a step which would have prevented all the mischief that has ensued; it is his negligence which has enabled the vendor to commit the fraud, the consequences of which must fall on the one or the other.

Is it not reasonable that the loss should be borne by him whose negligence has occasioned it, rather than by an innocent party who has exercised a degree of diligence which would have saved him from being entangled in the difficulty if the other had done all that a prudent purchaser ought to do (a)? And, again, it was said:—If the assignee means to make his right attach on the subject-matter of the contract, it is necessary to give notice; and unless he gives notice he does not do that which is essential in all cases of transfer of personal property. He must do that which is tantamount to obtaining possession by placing every person who has an equitable or legal interest in the matter under an obligation to treat it as his (the assignee's) property (b). Notice to one of several trustees or to one of several obligors is generally sufficient (c). The notice may be informal, and received by the trustee otherwise than from the assignee or incumbrancer (d), as, for example, reading the fact in a newspaper. It does not matter why the notice was given (e). Where there was actually no notice of the prior assignment at the time of the second or other subsequent assignment, it is of no importance whether such later assignee did, or not, make inquiries of the trustees as to any prior assignment (f). Finally, the rule in *Dearle's Case* has no

(a) *Loveridge v. Cooper*, 3 Russ. 44, &c. per Mr. Sugden.

(b) *Dearle v. Hall*, 3 Russ. 23, per Sir T. Plumer; *Meux v. Bell*, 1 Hare, 73; *Jones v. Jones*, 8 Sim. 633; *In re Freshfield's Trust*, 11 C. D. 202; *Arden v. Arden*, 29 C. D. 708; but see *Lloyd v. Banks*, L. R. 3 Ch. Ap. 488.

(c) *Willes v. Greenhill*, 4 D. F. & J. 147; *Smith v. Smith*, 2 Cr. & M. 231; *Ward v. Duncombe*, (1893) Ap. Ca. 369.

(d) *Lloyd v. Banks*, *supra*.

(e) *Smith v. Smith*, *supra*.

(f) *Foster v. Cockerell*, 3 Cl. & F. 456.

application to assurances or mortgages of realty or of chattel interests in land (g).

It has been well said that these "later decisions have given the go-by to all considerations founded upon the conduct of the parties. The application of the rule in *Dearle v. Hall* at the present day depends not on the negligence or diligence of the competing assignee, but on the mere fact of notice, however informal or accidental" (h).

Yet, however true that may be, the rule obtains and we have to consider its present-day application as shaped and extended by the various cases to which reference has already been made; the main point being that of "fixing" the fund in the holder's hands so as to secure it in favour of that person in respect of whose beneficial interest the fund-holder first has any knowledge. The "notice" is said to be tantamount to taking possession of the fund.

In another case (i), A. conveyed estates to trustees, on trust to sell and pay the creditors of B., and subject thereto, on trust for A. for life, remainder to B. in fee. A. died, and B. granted annuities charged on the estate, and then mortgaged the estate without notice of these annuities. The trustees sold the estate, and the mortgagees, who had not made any inquiries of the trustees, gave notice to them of the mortgage five years after it was created, and it was held that the mortgagees had priority over the annuitants by reason of such notice. "This case unquestionably lays down that the rule in *Dearle v. Hall* is independent of any consideration of the conduct of the competing assignees, where the assignee second in date has no notice of the earlier assignment. Priority in such cases depends simply and solely on priority of notice" (j).

(g) *Jones v. Jones*, 8 Sim. 639.

Cl. & Fin. 456.

(h) L. Q. R. xi. 342.

(j) *Ward v. Duncombe*, (1893)

(i) *Foster v. Cockerell* [1835], 3

Ap. Ca. p. 390. See also 1 Wh.

And the right to priority which a second assignee of an equitable interest in a fund, who has given notice of his assignment to the trustees, possesses over a first assignee who has failed to give notice, subsists equally where the second assignee has taken his assignment from the legal personal representative of the *cestui que trust*, and not from the *cestui que trust* himself (k).

A., a woman, was entitled in remainder under a will to a share in a personal fund. There were two trustees of the will, S. and E. A. married B. and settled her share, reserving a life interest. S. knew of this settlement, but E., the other trustee of the will, did not. A. and B. proposed to mortgage A.'s share without disclosing the settlement. The intending mortgagees inquired of S. and E. about incumbrances. S. returned an evasive answer; E. replied that he knew of no incumbrance. The mortgagees, without making any further inquiries of S., completed the mortgage, advanced their money, and gave formal notice of their security both to S. and E. The latter acknowledged the notice; S. did not. Then S. died, and another trustee was appointed in his place. In administering the testator's estate, by virtue of which A. had the aforesaid share, a question of priority arose. It was held: that the trustees of the settlement were entitled in priority to the mortgagees; for the death of S. could not deprive the trustees of the settlement of the priority which they had already acquired during his life (l).

A question of great interest was raised in the last-mentioned case. It was asked, supposing the trustee

& Tud. 119; and *Timson v. Ramsbottom*, 2 Keen, 49; *Meux v. Bell*, 1 Hare, 73; *Lloyd v. Banks*, L. R. 3 Ch. Ap. 488; *English, &c. Trust v. Brunton*, (1892) 2 Q. B. 8.

(k) *In re Freshfield's Trust* [1879], 11 Ch. D. 198.

(l) *Ward v. Duncombe*, (1893) Ap. Ca. 369. In this case, all the principal decisions relating to notice on the assignment in equity of a chose in action were reviewed, and the scope of the doctrine of notice, as laid down in *Dearle's Case*, was examined.

who had notice died, or resigned, then another trustee was appointed, and after that a further incumbrance was created and notice thereof given to the *present trustees*, neither of whom knew anything about the former settlement, would such subsequent incumbrancers have gained priority to the settlement? It was suggested in the arguments at the bar in that case, that they would, on the authority of *Timson v. Ramsbottom* (m), but Lord Macnaghten doubted whether they would, and further considered the case just cited in support, as not being one of much weight (n). Moreover, might it not be said that notice of such a matter given to one trustee was notice to all, and that each trustee was, so to speak, affected immediately a co-trustee had knowledge; if so, then the death of the one who had notice would not make any difference to the position and presumed knowledge of the surviving trustees. Anyway, the suggestion of a duty being imposed upon an assignee or mortgagee by which he should be for ever hunting down new trustees and giving fresh notices of an old assignment or mortgage, already notified to the then proper authorities to take cognizance thereof and be bound thereby, seems one too alarming in its consequences to be stated with any desire of support. And such a duty would be, as Lord Macnaghten says, fraught with inconvenience. "It may be that when an assignee or mortgagee has once discharged that duty (of notice) he has done all that the rule requires of him, and that for the rest the law holds as Lord Cairns lays it down, and that he is not, on a change of trustees, to be deprived of his pre-existing equitable title by the diligence or by the happy thought of a subsequent incumbrancer. Certainly, I can imagine nothing more inconvenient than that it should be possible to have a scramble for priorities on the appointment of new trustees. Nothing, I think,

(m) 2 Keen, 35.

(n) (1893) Ap. Ca. 394, 396.

would be less likely to conduce to the security of equitable titles " (o).

It is to be here observed that it is no part of a trustee's duty to assist his *cestui que trust* in selling or incumbering his beneficial interest by telling him what incumbrances he, the *cestui que trust*, has created, nor which of his incumbrancers have given notice of their respective charges; and it follows that the trustee is under no obligation to answer the inquiries of a stranger about to deal with the *cestui que trust* (p).

If the trustee takes upon himself to answer the inquiries of a stranger about to deal with the *cestui que trust*, he is not under any legal obligation to do more than to give honest answers to the best of his actual knowledge and belief. He is not bound to make inquiries himself. Provided he answers honestly, he incurs no liability to the inquirer, unless he binds himself by a statement amounting to a warranty, or so expresses himself as to be estopped from afterwards denying the truth of what he has said (p).

A statement by the trustee to operate as an estoppel must be clear and unambiguous (p).

If the trustee declined to give an intending assignee or mortgagee any information, the latter would take the risk upon himself of whatever prior incumbrances there might chance to be. He would be dealing with property which he had no sufficient ground for concluding was at the disposal of the *cestui que trust*. He would not be deceived by any apparent possession (q).

But in all cases, a prudent assignee or incumbrancer will take very good care himself to give direct and distinct notice, and to give it in writing to the trustees of the property of or on which he has obtained his assignment or incumbrance; and if he does not do

(o) (1893) Ap. Ca. 395.

(p) *Low v. Bouverie*, (1891) 3 Ch. 82. See also *In re Tylott, Lee*

v. Wilson, (1892) 1 Ch. 86.

(q) *Ward v. Duncombe*, *supra*, p. 383.

that, he will be at very great peril, because he will have to encounter, first, the danger of the trustee being left in entire ignorance of the security, and next, if he attempts to prove knowledge of the trustee *aliunde*, the difficulty which the Court will always feel in attending to what are called casual conversations, or in attending to any kind of intimation which will put the trustee in a less favourable position as regards his mode of action than he would have been in if he had got distinct and clear notice from the incumbrancer (r). And it has been further laid down by the same great authority, that apart from such direct and clear notice the Court would expect to find that those who alleged that the trustee had knowledge of the incumbrance had made it out, not by any evidence of casual conversations, much less by any proof of what would only be constructive notice—but by proof 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. And if it could be shown that in any way the trustee had got knowledge of that kind—knowledge which would operate upon the mind of any rational man, or man of business, and make him act with reference to the knowledge he had so acquired—that then the end will be attained, and that there would be fixed upon the conscience of the trustee, and through that upon the trust fund, a security against its being parted with in any way that would be inconsistent with the incumbrance which had been created (s).

The notice must be given to every person, trustee or debtor or otherwise, who is lawfully capable of dealing

(r) *Lloyd v. Banks* [1868], L. R. 3 Ch. Ap. 490.

(s) *Id.* 490-1.

with the fund so as to affect the interest therein of the assignee or incumbrancer (t).

But where funds assigned are affected by successive trusts, notice of an assignment, in order to be effectual, should be given to the *trustees for the assignor*, not to the trustees of the original settlement, although the latter may have the actual control of the funds. Thus, a son was entitled under the will of his father to a contingent interest in a fund paid into Court in an action to administer the father's estate. The son died while the interest was still contingent, having bequeathed a share of such interest to his daughter, who, in her turn, assigned such bequeathed share successively to A. and B. B., who had no notice of A.'s prior assignment, obtained a stop-order on the fund in Court. A. gave notice of his assignment to the son's legal personal representative. Upon the interest falling into possession, it was *held*: That for the purpose of determining the priority between A. and B. the stop-order had the same effect as notice to the father's executors would have had if the fund had not been in Court; that the proper person to receive notice of the assignments was the trustee of the assignor, namely, the legal personal representative of the son; and that, consequently, A. had priority over B. (u).

It does not matter whether notice is given to one or all of the co-trustees (v), nor whether to an acting or non-acting trustee (w).

But assignees may not be always perfectly secure when they have given notice to *all* the trustees, and the

(t) *Re Hall, Nolan v. O'Brien*, 7 L. R. Ir. 180.

(u) *Stephens v. Green, Green v. Knight*, (1895) 2 Ch. 148, overruling *In re Booth's Settlement Trusts*, 1 W. R. 444. See, also, *Bridge v. Beadon*, L. R. 3 Eq. 664; *Holt v. Dewell*, 4 Hare, 446.

(v) But see *dicta* in *Ward v. Duncombe*, (1893) Ap. Ca. 394, 395; *Ex parte Hennessey*, 1 Con. & Law. 562; *Ex parte Rogers*, 8 De G. M. & G. 271; *Re Hall*, 7 L. R. Ir. 180, and 1 Wh. & Tud. 121-2.

(w) *Smith v. Smith*, 2 C. & M. 233.

cases and authorities upon this are in anything but a satisfactory condition (x).

The assignee might, however, have his deed, or a memorandum of it, indorsed on the original trust deed or other document (y), or renew his notice to new trustees; and so do all possible to protect himself against subsequent assignees or incumbrancers. But, as it has been observed, it remains doubtful whether such scrupulous and perpetual care and diligence be necessary.

Again, notice to one co-trustee is not sufficient if he happens also to be a beneficiary, for as it is to his interest to conceal such assignment, such notice will not be construed as notice to his co-trustees (z); but if such trustee assign his beneficial interest to a co-trustee, the notice which that co-trustee acquires as assignee is valid notice to the other co-trustees (during his life, at all events), since it is not to his interest as assignee to conceal the assignment, and consequently such notice and assignment will prevail over subsequent incumbrancers with notice (a).

And a trustee who himself advances money to a beneficiary, and has taken from the *cestui que trust* an equitable assignment of the trust fund, may be entitled to priority over anyone who takes a subsequent assignment (b); nor will such trustee lose his right of priority

(x) *Phipps v. Lovegrove*, L. R. 16 Eq. 80; *Newman v. Newman*, 28 Ch. D. 678; *Hallows v. Lloyd*, 39 Ch. D. 692; *Meux v. Bell*, 1 Hare, 97; *Re Durand's Trust*, 8 W. R. 33; *Etty v. Bridges*, 2 Y. & C. C. 492; *Browne v. Savage*, 4 Dr. 635; *Ward v. Duncombe*, (1893) Ap. Ca. 394-5; 1 Wh. & Tud. [1898] 122.

(y) 1 Wh. & Tud. 122.

(z) *Ex parte Hennessey*, 1 Con. & Law. 559; *Martin v. Sedgwick*,

9 Beav. 333; *Powles v. Page*, 3 C. B. R. 16.

(a) *Browne v. Savage*, 4 Dr. 635; *Willes v. Greenhill*, 29 Beav. 376, 391; *Commissioners v. Harby*, 23 Beav. 508; *Re Selby*, 8 De G. M. & G. 271. But see *Ex parte Stewart*, 34 L. J. (Bk.) N. S. 6; *Ex parte Boulton*, 1 De G. & J. 163.

(b) *Elder v. Maclean*, 5 W. R. 447; *Thompson v. Tomkins*, 2 Dr. & Sm. 8, and cases cited in note (a), *supra*.

by merely omitting to inform a subsequent incumbrancer ~~or assignee that he has~~ a prior charge (c).

Moreover, on a purchase from a mortgagee of a fund standing in the name of trustees, it is not an essential blot on the title that notice of the incumbrance was not given to the trustees, if it can be shown that no notice has been given by any incumbrancer subsequent to such mortgage; but otherwise the title may be bad (d). Notice will not generally be effective beyond the amount, if any, named in the notice (e).

A subsequent assignee's knowledge of a prior incumbrance may preclude him from priority over the former assignee who did not give notice of assignment. Thus A. advanced money on a policy which was deposited with him, but gave no notice to the company. B. afterwards advanced money on the policy, which the assignor promised to deliver to him, and it was further expressed in writing that the policy was to be assigned to B. B. gave notice to the company of his loan and memorandum of deposit. B. frequently applied to the policy-holder (assignor) for the policy, but the latter made various excuses, and died, leaving it in the possession of A. It was *held*, that the circumstances of the case were such as to put B. on inquiry at the time of the loan, and to fix him with constructive notice of A.'s security, and that the title of A., as in possession of the policy, must prevail over that of B., although B. gave notice to the company and A. did not (f).

Where there are rival assignees, and both give notice of their assignments at the same time, the assignees will rank in order of date of their respective assignments (g), or, as it has been put, "the notices being simultaneous,

(c) *Ex parte Garrard*, 5 Ch. D. 61.

(d) *Hobson v. Bell*, 2 Beav. 17, 24, 25.

(e) *Woodburn v. Grant*, 22 Beav. 483.

(f) *Spencer v. Clarke* [1878], 9 Ch. D. 137.

(g) *Calisher v. Forbes*, L. B. 7 Ch. Ap. 109.

the elder must be preferred to the younger security" (h). When there are conflicting rights, for the determination of which it is necessary to ascertain the actual priority, the law will take notice of the fractions of a day (i).

It is not sufficient, for the purposes of displacing or obtaining priority over another incumbrancer or assignee, that notice should have been given to a person who *may* become a trustee, even though he subsequently does become such trustee. He must actually be trustee at the time notice is given to him (j). Nor will notice to a trustee's general agent, or legal adviser, be a sufficient notice, unless such agent be expressly or impliedly authorized to act in that manner and matter on the principal's behalf (k).

Again, where debts due to a partnership firm were assigned, upon the dissolution, by the retiring partners to the continuing partner, and no notice of the assignment was given to the debtors, it was *held*: upon the bankruptcy of the partners, that such debts remained within the order and disposition of the partnership within the Statute of James (l); nor was a mere notice to the debtors to pay to one of the partners deemed a sufficient notice to take the case out of the Statute of James (m).

Again, where an assignee is unable to give the necessary notice, but has otherwise done all in his power

(h) *Johnstons v. Cox* [1880], 16 Ch. D. 576.

(i) *Tomlinson v. Bullock*, 4 Q. B. D. 230, 232.

(j) *Somerset v. Cox*, 33 Beav. 634; *Webster v. Webster*, 31 Beav. 393; *Buller v. Plunket*, 1 Jno. & H. 441; *Yates v. Cox*, 17 W. R. 20; *Addison v. Cox*, L. R. 8 Ch. Ap. 79; *Roxburghe v. Cox*, 17 Ch. D. 520.

(k) *Willes v. Greenhill*, 29 Beav. 392; *Rickards v. Gledstones*, 3 Gilf. 298; *Saffron Walden, &c. Bdg. Soc. v. Rayner*, 14 Ch. D.

406; *Re Russell's Policy Trust*, L. R. 15 Eq. 26; *Arden v. Arden*, 29 Ch. D. 702; *Re Cousins' Trust*, 31 Ch. D. 671; *Hester v. Hester*, 34 Ch. D. 616; *Re Hall*, 37 Ch. D. 712; *Tate v. Hyslop*, 15 Q. B. D. 368; *Re Frewen*, 60 L. T. 953; *English Investment Co. v. Brunton*, (1892) 2 Q. B. 706.

(l) *Ex parte Burton* [1822], 1 G. & J. 207; *Ex parte Usborne*, *Id.* 358.

(m) *Ex parte Sprague*, 4 De G. M. & G. 866.

towards what is tantamount to taking possession, he will not lose his priority over a subsequent assignee by reason of such inability. *Lex neminem cogit ad vana seu inutilia peragenda* (n). And so, it seems, the same holds good where the assignee, through infancy or otherwise, is unable to give the necessary notice, his priority will not thereby be defeated; at any rate, not by the assignor's trustee in bankruptcy (o).

But the equitable doctrine of notice, as laid in *Dearle's Case*, does not apply to shares in companies registered under the Companies Act, 1862 (p), nor does it appear to apply to shares in companies not so registered. And although it is not applicable to assignments of chattel interests in realty (q), yet it does affect the assignment of the proceeds of the sale of real estate (r), and of moneys secured by debentures chargeable on real estate (s); and where a person is equitably entitled to moneys secured on real estate (t), or to a portion to be raised out of real estate, whether by sale, mortgage or otherwise (u), such interest is not deemed to be an interest in real estate, and consequently the assignees of such choses in action must give the requisite notice.

If the fund or other chose in action affected be in Court, no such notice is needed; but the proper course is to obtain a stop-order on the fund, which will have the same effect as notice (v).

(n) *Feltham v. Clark* [1847], 1 De G. & Sm. 313; *Langton v. Horton*, 1 Hare, 549; *Johnstone v. Cox*, 16 Ch. D. 571.

(o) *In re Mills*, (1895) 2 Ch. 564.

(p) *Société Générale v. Tramways Union*, 11 Ap. Ca. 20; *Colonial Bank v. Whinney*, *Id.* 426; *Bradford Banking Co. v. Briggs*, 12 Ap. Ca. 29; *Simpson v. Molsons' Bank*, (1895) Ap. Ca. 270.

(q) *Wiltshire v. Rabbits*, 14 Sim. 76.

(r) *Lee v. Howlett*, 2 K. & J.

531; *Arden v. Arden*, 29 Ch. D. 702.

(s) *Christie v. Taunton*, (1893) 2 Ch. 175.

(t) *Daniel v. Freeman*, 11 Ir. Rep. Eq. 233.

(u) *Lee v. Howlett*, 2 Kay & J. 531; *Consol. Co. v. Riley*, 1 Gif. 371.

(v) *Greening v. Beckford*, 5 Sim. 195; *Warburton v. Hill*, Kay, 470; *Pinnock v. Bailey*, 23 Ch. D. 497; *Mack v. Postle*, (1894) 2 Ch. 449.

But it is not necessary to register a legacy charged upon ~~land situated in a~~ register county, and such non-registration will not affect the assignee's priority (c).

It has been held that the assignees in *bankruptcy* who neglected to give notice lost their priority equally with particular assignees (x).

SUBJECT TO EQUITIES.

The assignee of a chose in action generally takes it subject to all the equities which obtain against the assignor as affecting or attaching to the subject-matter (y). In other words, whatever defence, counter-claim, set-off, or other partial or full answer the debtor or fund-holder would be entitled to raise and set up against the assignor's claim, he may also prefer against the assignee; and this right extends up to the time when the person who is bound, under the assignment, to pay has notice of the assignment or incumbrance.

Thus, where a son upon his marriage was to receive from his mother, as a portion with his wife, exactly as much as his intended father-in-law was to allow to his daughter upon the marriage, and privately, without the knowledge of his mother, who treated respecting the marriage, the son gave a bond to the intended father-in-law to pay back seven years after 1,000*l.* of the intended wife's portion in consideration of the father-in-law making the wife's portion 3,000*l.* instead of 2,000*l.* only; and the bond was subsequently assigned

(w) *Malcolm v. Charlesworth*, 1 Keen, 63; *Arden v. Arden*, *supra*.

(x) *In re Barr's Trusts*, 4 K. & J. 219; *Stuart v. Cockerell*, L. R. 8 Eq. 607; *In re Russell's Trusts*, L. R. 15 Eq. 26.

(y) *Turton v. Benson* [1718], 1 P. Wms. 496; *In re Milan Tramways, Ex parte Theys*, 22 Ch. D. 122; see also *Winch v. Keeley*, 1 T. R. 619; *Row v. Dawson*,

1 Ves. 331; *Pope v. Onslow*, 2 Vern. 286; *King v. Lacey*, Bunb. 337; *Whitacre v. Pawlin*, 2 Vern. 229; *Brown v. Heathcote*, 1 Atk. 162; *Mangles v. Dixon*, 3 H. L. Ca. 702; *Smith v. Parkes*, 16 Beav. 119; *Rolt v. White*, 31 Beav. 520; *Chartered Bank of India v. Henderson*, L. R. 5 P. C. 601; 2 Spence, 863—865; *Ord v. White*, 3 Beav. 357.

by the father-in-law for the benefit of his creditors; it was *held*: that the bond being void in equity in the hands of the father-in-law, could not be made a better bond by assignment in the hands of his creditors, although taken without notice of the son-in-law's fraud (z). The bond was void in the hands of the assignor, and consequently equally void in the hands of the assignee (z). In another case, debentures under the common seal of a joint stock company incorporated under 7 & 8 Vict. c. 110, were given to A. in July, 1854, in pursuance of an arrangement made between A. and the chairman of the directors, which was a fraud on the company. These debentures were afterwards purchased by B. in the market in the ordinary course of business. The transfer to B. was registered in the books of the company, and interest was paid to July, 1855, inclusive, but the matter was not made known to the shareholders till December in that year, when an investigation of the affairs of the company took place, in consequence of which the directors resigned, and the further payment of interest was refused. It was *held*: that although B. was a *bonâ fide* purchaser for value without notice, yet being the purchaser of only a chose in action not assignable at law, he must take it subject to the equities attaching to it, and that, under the above circumstances, neither the registration nor the payment of interest had the effect of a confirmation of B.'s title, and that he ought to be restrained from suing at law upon the debentures (a).

Again, some legatees (who were also the testator's next of kin) commenced an action in the Probate Division against the executor of the will, claiming a revocation of the probate, and while that action was pending

(z) *Turton v. Benson*, *supra*; see also *Barnett v. Sheffield*, 1 De G. M. & G. 371.

(a) *Athenæum Life Assurance Soc. v. Pooley* [1858], 3 De G. & Jo. 294; *Graham v. Johnson*, L. R. 8 Eq. 36.

they assigned (some of them by way of purchase and the rest of them by way of mortgage) all their shares or interests, whether as legatees or as next of kin; and subsequently they had their action dismissed, with costs to be paid to the defendant (the executor of the will). Afterwards the legatees brought an action against the executor in the Chancery Division for the administration of the estate. It was held: that the executor was entitled to set-off the costs in the probate suit against the legacies, notwithstanding the assignments and incumbrances, and that the assignees and mortgagees of the legacies took their assignments subject to such set-off (*b*). Further, the assignee of a residue (or of any share of a residue) takes subject to the burden of paying the general costs of an action for the administration of the estate, and subject also to the payment of all the testamentary expenses as well as of the testator's debts, properly so called. And, generally speaking, the provision contained in Ord. LXV. r. 14b, that the costs of ascertaining the persons entitled to legacies are to be paid out of such legacies, and not out of the residue (unless the Court so directs), is of little practical advantage to the residuary legatee or his assignee (*c*).

In like manner, if a release for a debt be given by the assignor to the debtor, after assignment thereof, but before any notice to the debtor of such assignment, the assignee cannot recover (*d*). And if the debt be payable upon a condition, the condition binds the assignee (*e*); and so, also, the assignee takes subject to the state of accounts between the assignor and debtor, at the date of the assignment (*f*). So that if a creditor

(*b*) *In re Knapman, Knapman v. Wreford* [1881], 18 Ch. D. 300.

(*c*) *Booby v. Groom*, (1897) 2 Ch. 407; cited Snell, Eq. 93. See, also, *Hooper v. Smart* [1875], 1 Ch. D. 90.

(*d*) *Stocks v. Dobson* [1853], 4

De G. M. & G. 11; 22 L. J. Ch. 884.

(*e*) *Tooth v. Hallett* [1869], L. R. 4 Ch. Ap. 242; *Drew & Co. v. Jocelyne* [1887], 18 Q. B. D. 590.

(*f*) *Bergmann v. Macmillan* [1881], 17 Ch. D. 423.

assigns a debt which has been previously satisfied in part, the assignee, although without notice, will take subject to this state of things (g); and if the assignee neglects to give notice of the assignment, the debtor will be entitled to deduction from the debt of all amounts *bond fide* paid by him to the assignor between the dates of assignment and of receipt of notice thereof (h). In like manner, the assignee of a mortgage generally takes it entirely at his risk as to what is due between the mortgagor and mortgagee (i). And registration of the assignment of a mortgage is not notice to the mortgagor (j). It has, also, been already shown that debentures of a company are taken by an assignee subject to all equities between the assignor and the company. This, of course, does not hold good of those debentures which are so framed as to be negotiable instruments; but of all others. Thus, in a recent case, A. held shares and debentures in a company, and in March, 1890, deposited with B. debentures to secure the payment of a debt. The debentures were not, on the face of them, payable until 31st December, 1890, but by the indorsed conditions, in the event of the winding-up of the company, the principal moneys secured by the debentures became immediately due and payable. On the 3rd November, 1890, a call was made on A.'s ordinary shares, payable on the 20th November. By the articles of the company this call was deemed to have been made at the time when the resolution to make it was passed. On 6th November, 1890, B. gave the company notice of A.'s assignment, and such notice was entered by the company on the register

(g) *Ord v. White*, 3 Beav. 357; *Smith v. Parkes*, 16 Beav. 115; *Rolt v. White*, 31 Beav. 520.

(h) *Norrish v. Marshall*, 5 Madd. 475; *Stocks v. Dobson*, 4 De G. M. & G. 11.

(i) *Matthews v. Wallwyn*, 4 Ves.

Jun. 127; *Chambers v. Goldwin*, 9 Ves. Jun. 264, 268; 7 R. R. 181; *Norrish v. Marshall*, 5 Mad. 479, 481.

(j) *Williams v. Sorrell*, 4 Ves. Jun. 389; *Berney v. Sewell*, 1 Jac. & Walk. 650; 21 R. R. 265.

of debentures. On the 12th November B. commenced a debenture-holder's action against the company, and on the 19th November the company went into voluntary liquidation. In the winding-up further calls were made upon A.'s shares. Upon a summons taken out by B., in the action and in the winding-up the company claimed the right to set off the calls due from A. as against the sums due upon the debentures. It was *held*: that in respect of the call made *before* the winding-up, the company were entitled to set-off; but in respect of the calls made in the winding-up they were not so entitled (*k*).

The debtor cannot set off against the assignee a debt which has *accrued due* to him from the assignor since the notice of assignment, though resulting from a contract entered into previously to such notice, unless from the nature of the transaction it appears to have been intended between the original parties that the one should be set off against the other (*l*). Thus, the assignees of a Lloyd's bond sued the makers in the name of the original bondholder; the makers sought to set off arrears of rent due from the original bondholder, which had accrued due since the notice of the assignment upon a lease granted *after* the making of the bond, but before notice of assignment. It was *held*: that the arrears of rent could not be set off (*m*). And in that case it was suggested that if the defendants had wished to preserve the security of the debt, they might have required the bond to be so expressed, or have subsequently indorsed the condition upon the

(*k*) *Christie v. Taunton, &c. Co.*, (1893) 2 Ch. 175.

(*l*) *Jeffries v. Agra and Masterman's Bank* [1866], L. R. 2 Eq. 674; *Stephens v. Tenables*, 30 Beav. 625; *Wilson v. Gabriel* [1863], 4 B. & S. 243, 248; *Re*

Agra, &c. Bank, L. R. 2 Ch. Ap. 391, 397; *Re Commercial Bank, Corporation, &c.* L. R. 1 Ch. Ap. 538; *Legh v. Legh* [1799], 1 Bos. & Pul. 447.

(*m*) *Watson v. Mid Wales Railway* [1867], L. R. 2 C. P. 593.

bond; but it was thought that no such thing was originally intended (n).

In 1877 a company was ordered to be wound up. In 1879 A. took assignments for value of the debts proved by, and certified to be due to, several creditors. On the 23rd January, 1880, the liquidator took out a summons that A., who had been a director, might be ordered to pay 2,000*l.*, the nominal value of certain shares in the company received by him from the promoter, or to make compensation on the ground of misfeasance. On the 25th February, 1880, A. assigned the above debts to B. for value, B. knowing nothing of the claims against A., and notice of the assignment was at once given to the liquidator. In July, 1880, an order was made on the summons for A. to pay 2,000*l.* to the liquidator. On the 4th August, 1881, an order was made giving the liquidator liberty to declare a dividend of 11*s.* in the *£* on the debts of the company. B. applied for payment of this dividend on the debts assigned to him, but the liquidator claimed to retain the dividend by way of set-off against the 2,000*l.* It was held: that the liquidator had no such right of set-off, and that B. was entitled to receive the dividend (o). The two claims concerned two entirely separate and independent matters, and equity will not permit a debt to be set off against an assignee which has arisen between the original parties since the notice of assignment, and having no connection with the debt claimed by the assignee.

Where the plaintiff sued as assignee by deed of a debt due from the defendant to the assignor on a building contract, and the defendant pleaded, by way of set-off and counterclaim, that he was entitled to damages for breaches of contract by the assignor, it

(n) *Watson v. Mid Wales Railway* [1867], L. R. 2 C. P. 601.

(o) *Re Milan Tramways* [1884], 25 Ch. D. 587.

was held: that the defendant was not entitled to recover any damages from the plaintiff (the assignee), but was entitled by way of set-off or deduction from the plaintiff's claim to the damages which he had sustained by the non-performance of the contract by the assignor, and that the form of the defence must be amended accordingly (*p*).

When a company's articles of association provide that the company should have a prior and permanent lien, available at law and in equity, on every share, for all debts due from the shareholders to the company, the company cannot claim priority over subsequent incumbrances on the shares in respect of moneys which become due from the shareholders to the company *after* the latter has received notice of such incumbrances (*q*).

Again, a trustee or executor assigns a beneficial interest which he has taken under a trust or will, the assignee takes it subject to whatever equities attached to or affected the assignor. So that, if the trustee or executor, whether previously or subsequently to the assignment, commits a breach of trust in consequence of which a debt becomes due to the estate, the assignee will not be able to claim the beneficial interest until he has satisfied this newly-incurred debt (*r*). And the same holds good in respect of the assignee of a *cestui que trust* who is indebted to the estate through his having profited by a breach of trust; that is, the assignee must first make good the debt incurred by the breach (*s*).

(*p*) *Young v. Kitchin* [1878], L. R. 3 Ex. D. 127. See, also, *Dickson v. Swansea Rail. Co.*, L. R. 4 Q. B. 44; *Newfoundland v. Newfoundland Rail. Co.*, 13 Ap. Ca. 199; *Cavendish v. Geaves*, 24 Beav. 163; *Story*, Eq. 1436; *Re Whitehouse*, 9 Ch. D. 597; *Ex parte Branwhite*, 48 L. J. Ch. 463; *Roxburghe v. Cox*, 17 Ch. D. 526; *Pellias v. Neptune*, 5 C. P. D. 34; *Stumore v. Campbell*, (1892) 1 Q. B. 314; R. S. C. Ord. XIX. r. 3;

Re Gregson, 36 Ch. D. 223; *Hallett v. Hallett*, 13 Ch. D. 232; *Ex parte Morier*, 12 Ch. D. 491.

(*q*) *Hopkinson v. Rolt*, 9 H. L. Ca. 514; *Bradford Banking Co. v. Briggs*, 12 Ap. Ca. 29.

(*r*) *Clack v. Holland*, 19 Beav. 262; *Barnett v. Sheffield*, 1 De G. M. & G. 371; *Re Knapman*, 18 Ch. D. 300; *Cole v. Muddle*, 10 Hare, 186; *Morris v. Lirie*, 1 Y. & C. C. O. 380.

(*s*) *Willes v. Greenhill*, 29 Beav.

Where a legacy is assigned, the executor cannot set off a debt due to himself from the legatee which was incurred without reference to the legacy (*t*).

Finally, it must be clearly stated that the debtor is entitled to have *all* accounts under that one contract or transaction taken together once for all, and may avail himself of any set-off, counterclaim, or deduction which arises, even after notice of assignment but without any fresh act on his part, out of the same contract or other transaction which effected the debt or liability assigned (*u*). But the debtor is entitled to set off or deduct any and every claim which he had against the assignor up to the time of his receiving notice of assignment, and that holds good whether such "equity" arose out of the same transaction as is the subject-matter of the assignment, or something totally different from and independent of that transaction. But he cannot raise against the assignee any matter which arises subsequently to notice of assignment and out of some contract or dealing between himself and the assignor, which was quite independent of the matter assigned; and in reference thereto it makes no difference whether such independent transaction was entered into before or after notice of assignment of the other transaction (*v*).

The rule that a defaulting trustee cannot claim, as against his *cestui que trust*, any beneficial interest in the trust estate until he has made good his default, and that his assignee is in no better position, even where

376; *Re Knapman*, *supra*; *Stephens v. Venables*, 30 Beav. 625; *Friddy v. Rose*, 3 Mer. 86; 17 R. R. 24; 1 Wh. & Tud. Eq. 135; but see *Cavendish v. Geaves*, 24 Beav. 163, 173; *Moore v. Jervis*, 2 Coll. Ch. R. 60.

(*t*) *Whitaker v. Rush*, Amb. 407.

(*u*) *Bergmann v. Macmillan*

[1881], 17 Ch. D. 423; *Newfoundland v. Newfoundland Railway* [1888], 13 Ap. Ca. 199.

(*v*) *Watson v. Mid Wales Railway* [1867], L. R. 2 C. P. 593; *In re Milan Tramways Co.* [1884], 25 Ch. D. 587; *Webb v. Smith* [1885], 30 Ch. D. 192; *In re Asphaltic Pavement Co.* [1885], 30 Ch. D. 216.

the default has been committed after the assignment, applies not only to shares taken by the trustee under the instrument creating the trust, but also to derivative interest acquired by him in the trust estate (*w*).

A., an executor and trustee entitled under a will to a life interest in a trust fund, took assignments from two of the beneficiaries of their reversionary shares in the fund, and mortgaged the two shares so acquired to B. A. was afterwards found a defaulter, and died insolvent. It was *held*: that B. took subject to all the equities against mortgagor, and that the beneficiaries under the will were entitled to have the default of A. made good out of the shares in the estate which had been acquired by A. in priority to the claims of A.'s mortgagees (*x*).

But it is also to be repeated that, whatever counter-claim or set-off the debtor may have against the assignee by virtue of his "equities" against the assignor, he (the debtor) is never entitled to put the assignee so far into the position of the assignor as to be able to claim from him any sum, whether by way of damages, contra account, or otherwise, in excess of the amount which the assignee is entitled to demand from the debtor in right of the assignment. The amount recoverable under the assignment is the limit of the debtor's right of set-off or other contrary claim; for any further balance which might have been due to the debtor under the contract, assigned or otherwise, from the assignor, he must sue the assignor independently (*y*).

But there are a few instances of choses in action which are generally assigned *free from all equities*. This is sometimes due to the peculiar circumstances of the case, and sometimes, to the nature of the particular

(*w*) *Jacobs v. Rylands* [1874], L. R. 17 Eq. 341, 342; *Hooper v. Smart*, 1 Ch. D. 90, 98; *Doering v. Doering* [1889], 42 Ch. D. 203.

(*x*) *Doering v. Doering*, *supra*; see, also, *In re Moss Bay Hematite*

Co. [1892], 8 T. L. R. 63, 475; *Nelson v. Roberts* [1893], 69 L. T. 352; *Christie v. Taunton*, (1893) 2 Ch. 175.

(*y*) *Young v. Kitchen* [1878], 3 Ex. D. 127.

chooses in action forming the subject-matter of the assignment.

For example, length of time and similar circumstances will occasionally exempt the case of the assignee from the general rule.

A., at the age of twenty-four, in 1720, gave to B. a bond for 520*l.*, to be paid within six months of the death of A.'s father, if A. survived him; if not, the bond to be void. The father was then seventy. In the same year, 1720, B. died; and in 1722 B.'s executor assigned the bond to C. In 1731, A.'s father died; and after C. had also died letters were written to A. demanding payment. A. did not dispute the bond, but denied any knowledge of C.'s executors. A. died in 1734, before action brought. Then application was made to A.'s widow and executrix; and finally, action brought against her for the sum. But before judgment A.'s executrix brought a bill in Chancery for relief on the ground that the bond was given under suspicious circumstances and for a much larger sum than the value received. The Court said that as a rule relief would be given against such a bond, the creditor being put to his strict proof, and the amount reduced to the sum actually advanced. But that here was delay in seeking relief.

"Why did not the son bring a bill for relief in his life upon the demand against him? The rule is right, that whoever takes the assignment of a bond, being a chose in action, takes it subject to all the equity in the hands of the original obligee; but length of time and circumstances may vary that, and make the case of the assignee stronger; for why was not the bill brought when the facts were recent?"^(z)

Again, *Lloyd's* bonds payable in three years, with interest in the meantime, were given by a company to

(z) *Hill v. Caillovel* [1748], 1 Ves. Sen. 122, 123.

their contractor as compensation for the surrender of the contract. Two of these bonds were purchased for value from the contractor, without notice of the arrangement between him and the company. The bonds and the transfers were registered in the company's books. The transferee sued the company for eighteen months' interest, and recovered the amount due. Subsequently proceedings at law were taken against the company to recover principal and interest, and judgment was entered up by consent against the company, which was then ordered to be wound up. Upon an adjourned summons it was *held*, that, whether the bonds were valid or invalid in the hands of the contractor, the official liquidator was precluded by the subsequent conduct of the company from questioning their validity in the hands of a purchaser for value without notice. The transferee was therefore admitted as a creditor of the company for principal, interest, and costs (a).

In like manner the rule does not apply where by the nature or terms of the contract it was clearly intended by the original contracting parties that the transaction should be regarded and performed irrespective of any "equities" which might subsist between them. Thus, debentures made payable to *bearer* were held to bind the company issuing them, independently of any "equities" between the company and the original holders (b).

For documents which are not negotiable instruments in the strict sense of the term (c), may, nevertheless, become negotiable as between the parties by estoppel (d).

(a) *In re South Essex Estuary Co., Ex parte Chorley* [1870], L. R. 11 Eq. 157.

(b) *In re Blakely Ordnance Co.*, L. R. 3 Ch. Ap. 154; *Crouch v. Crédit Foncier*, L. R. 8 Q. B. 374; *Re Agra, &c. Bank* [1867], L. R. 2 Ch. Ap. 391.

(c) *London and County Bank v. River Plate Bank*, 20 Q. B. D. 232.

(d) *Goodwin v. Roberts*, 1 Ap. Ca. 476; *Fenables v. Baring Bros.*, (1892) 3 Ch. 527; *Burkinshaw v. Nicolls*, 3 Ap. Ca. 1016.

But the estoppel must be consistent with the terms of the document (e). libtool.com.cn

And so a person entitled to "equities" may surrender his claim to them expressly, by words or writing, or impliedly by his course of conduct (f).

In some instances a defendant may forfeit his right to enforce his "equities" against the assignee by his own negligence, in not giving proper notice of any event or other fact to which such "equities" have been accessory, and so the debtor may have been the means of his misleading the assignee as to the actual interest which the assignor had, or have deprived the assignee of the opportunity of availing himself of a timely remedy (g).

And, consequently, if the defendant has a secret equity and stands by and permits the apparent owner to deal with the assignee, as if he (the assignor) were absolute owner, and as if the property were not affected by any such secret equity, such defendant (or any other such person) will not be allowed to set up such secret equity against the innocent assignee (h).

And again, negotiable instruments form an exception to the rule, and in the hands of *bonâ fide* holders for value, they are free from all equities obtaining between the original parties. For negotiable instruments pass from hand to hand as freely as cash by delivery or by indorsement, and may be sued upon in the name of the

(e) *Sheffield v. L. J. S. Bank*, 13 Ap. Ca. 333; 34 Ch. D. 59; *London and Joint Stock Bank v. Simmons*, (1892) Ap. Ca. 201; *Bentinck v. London Joint Stock Bank*, (1893) 2 Ch. 120.

(f) *Re Agra, &c. Bank*, L. R. 2 Ch. Ap. 391; *Re Blakely Ordnance Co.*, L. R. 3 Ch. Ap. 154; *Re General Estates Co.*, *Id.* 758; *Re Northern Assam Tea Co.*, L. R. 10 Eq. 458; *Re Hercules Insurance Co.*, 19 Eq. 303; *Higgs v. Assam Tea Co.*, L. R. 4 Ex. 387; *Re Agra, &c.*

Bank, L. R. 2 Ch. Ap. 391; *Leake, Contracts*, 1181; *Pollock, Contracts*, 213.

(g) *Ex parte City Bank*, L. R. 3 Ch. Ap. 762; *Mangles v. Dixon*, 3 H. L. Ca. 702.

(h) *Lewin's Trusts*, 1891, p. 809; and *Troughton v. Gilley*, *Ambl.* 633; *Cornforth v. Pointon*, W. N. 1866, p. 189; *Ex parte Bolland*, 9 Ch. D. 312; *Re Blackford*, W. N. 1884, p. 141; *Ramcoomar Koondoo v. Maqueen*, L. R. Ind. Ap., *Supp.* Vol. p. 40.

bond fide holder. It was said that a contrary rule would tend to destroy trade by lessening a creditor's security (i).

A negotiable instrument has been defined as being a document embodying a contract to pay money to a person named, or his order (which is signified by an indorsement on the instrument), or to the bearer of the document, and as possessing certain peculiar qualities which render it possible for a person to transfer to another a better title to the instrument than he himself possesses, and to assign the instrument and all its benefits freely so as to give to the assignee a right to sue on the contract in his own name (j). For such documents are part of the currency, and are almost entirely treated as subject to the same rules as money. And the right to money is inseparable from the possession of it (k). What constitutes negotiability is often a question of great difficulty in its solution; but the following are certainly negotiable instruments:—bank notes (l), bills of exchange, promissory notes, cheques drawn on bankers (m), foreign scrip (n), bills of lading when indorsed (o), exchequer bills (p), foreign bonds (q), foreign scrip issued by an agent in England (r), an American railway bond with a collateral mortgage (s), dividend warrants issued by the Bank of England on government stock (t). And debentures are frequently

(i) *Anon.*, Com. Rep. 43; *London and County Bank v. Ricer Plate*, 21 Q. B. D. 535.

(j) *Goodeve's Pers.* Pro. 181.

(k) *Wookey v. Pole*, 4 B. & Ald. 6 and 11, &c.; 22 R. R. 594; *Campb. Sale*, 2nd ed. 86; *Miller v. Race*, 1 Burr. 452.

(l) *Miller v. Race*, *supra*.

(m) Bills of Exchange Act, 1882, ss. 8, 38, 73, 89.

(n) *Goodwin v. Robarts*, 1 Ap. Ca. 476.

(o) *Rodger v. Comptoir, &c. de Paris*, L. R. 2 P. C. 405; *Chartered Bank v. Henderson*, L. R. 5 P. C.

501; *Kemp v. Falk*, 7 Ap. Ca. 581.

(p) *Wookey v. Pole*, *supra*.

(q) *Gorgier v. Mievill*, 3 B. & C. 45; 27 R. R. 290; *A.-G. v. Bouwens*, 4 M. & W. 171; *Haseltine v. Siggers* [1848], 1 Ex. Rep. 856.

(r) *Goodwin v. Robarts*, *supra*; *Lang v. Smyth*, 7 Bing. 284; 33 R. R. 462.

(s) *Tenables v. Baring*, (1892) 3 Ch. 527.

(t) National Debt Conversion Act, 1888 (51 Vict. c. 2), s. 30 (5); and see 45 & 46 Vict. c. 61, s. 95. But see *Partridge v. B. of Eng.* [1846], 9 Q. B. R. 396.

framed so as to confer on them the main incidents of negotiability, including the one now under discussion, namely, freedom from equities (*u*).

But the indorsee of an *overdue* bill of exchange or promissory note takes it subject to all the defects of title which affected it at maturity (*v*).

Again, a person who without inquiry takes from another an instrument signed in blank by a third party, and fills up the blanks, cannot—even in the case of a negotiable instrument—claim the benefit of being a purchaser for value without notice, so as to acquire a greater right than the person from whom he himself received it. And if a debtor delivers to his creditor a blank transfer by way of security, that does not enable the creditor to delegate to another person authority to fill it up for purposes foreign to the original contract (*w*).

In equity, a transfer of goods for valuable consideration by a consignee for a limited purpose, does not destroy the consignor's right of stoppage *in transitu*, *ultra* the particular lien of the transferee (*x*). The mere fact that the purchaser of goods has resold them, and that the bill of lading has been made out in the name of the sub-purchaser, does not put an end to the *transitus*, or destroy the right of the original vendor to stop the goods *in transitu*. The rule being that effect will be given to a vendor's right of stoppage *in transitu*, so far as the exercise of that right will not interfere with the rights of third parties acquired for value, it follows that an unpaid vendor, who has given a valid notice to stop *in transitu* before his vendee has received the purchase-

(*u*) *Re Blakely Ordnance Co.*, L. R. 3 Ch. Ap. 154; *Re General Estates Co.*, L. R. 3 Ch. Ap. 758; *Crouch v. Crédit Foncier, &c.*, L. R. 8 Q. B. 374; *Goodeve's Pers.* Pro. 317—323; *Pollock, Contracts* [1894], 212.

(*v*) 45 & 46 Vict. c. 61, s. 36 (2); *Re European Bank*, L. R. 5 Ch. Ap.

358; *Ex parte Swan*, L. R. 6 Eq. 359. See, also, *London, &c. Banking Co. v. Groome*, 8 Q. B. D. 288.

(*w*) *France v. Clark*, 26 Ch. D. 257; *Williams v. Colonial Bank*, 38 Ch. D. 388; *Hatch v. Searles*, 2 Sm. & G. 147.

(*x*) *Spalding v. Ruding*, 6 Beav. 376.

money of the goods from the sub-purchaser, is entitled to have the original purchase-money satisfied out of the unpaid purchase-money of the sub-purchaser. But if the original purchaser re-sells the goods whilst *in transitu*, and receives the price from the sub-purchaser, and then becomes insolvent, not having paid the original vendor, the latter may stop the goods at any time before they have come into the *possession* of the sub-purchaser, unless the sub-purchaser claims as indorsee and holder of a bill of lading for value and without notice of the indorser's insolvency, for then the original vendor has no right against the indorsee, the bill of lading being free from all equities, in such circumstances (y).

The first vendor by indorsing and delivering a bill of lading to his immediate purchaser, accredits the title of the latter to the goods, and holds him out to the mercantile world as the owner of them; and the *bond fide* indorsement and delivery by such purchaser of such bill of lading to a second purchaser deprive the first vendor of all power and control over the goods, and destroy his right to stop *in transitu* as against the latter. If the assignee, however, has given no consideration for the indorsement of such bill of lading, or if he knew of the insolvency of his vendor at the time he took the bill, he will be in no better situation than the latter (z).

(y) *Ex parte Golding Davis*, 13 Ch. D. 628; *Kemp v. Falk*, 7 Ap. Ca. 573; *Lickbarrow v. Mason*, 6

East, 20; 1 R. R. 425.

(z) *Addison, Contracts* [1892], 539.

CHAPTER III.

CHoses IN ACTION MADE ASSIGNABLE BY STATUTE.

APART from the rule at Common Law as to assignability of choses in action and the exception thereto in equity already considered, and apart also from the Judicature Act, 1873, hereinafter to be considered, legislative enactments have, from time to time, expressly rendered certain choses in action assignable. In the majority of cases the special statute has also provided the manner in which the particular kind or kinds of choses in action dealt with may be transferred; and wherever a new kind of chose in action has been created by statute, it has generally been expressly made transferable at law thereby in a specified manner.

We shall now consider the chief instances in which choses in action have been rendered assignable by statute prior to the Judicature Act, 1873.

Contracts between landlord and tenant concerning the land demised were, by 32 Hen. VIII. c. 34, annexed to the reversionary estate therein, so that the assignee of both landlord and tenant might both sue and be sued upon them, as the original parties to the transaction (*a*).

Promissory Notes, if not assignable previously, were made so by 3 & 4 Anne, c. 9, which provided that promissory notes might be assigned or indorsed over in the same manner as inland bills of exchange were or

(*a*) 32 Hen. VIII. c. 34, Pt. I. 4—6; Pt. II.; and see, now, Conveyancing Act, 1881, ss. 10—12.

might be, according to the custom of merchants, and that the person or persons to whom such sum of money should be by such note made payable, or his or their indorsee or assignee, might maintain an action for such sum of money in his or their own name, and recover costs thereon. This Act was to continue in force for three years; it was made perpetual by 7 Anne, c. 25, s. 3, and repealed by Bills of Exchange Act, 1882, which regulated the transfer of promissory notes (b).

Bail-bonds, taken by the sheriff, &c., were made assignable by 4 Anne, c. 16, s. 20, which provided that where a person was arrested by any writ, bill or process issuing out of any of the courts of record at Westminster, at the suit of any common person, and the sheriff, &c., took bail from such person against whom the process issued, the sheriff, &c., at the request and cost of the plaintiff in such action or suit, should assign to the plaintiff the bail-bond or other security taken from such bail, by indorsing the same, and attesting it under his hand and seal in the presence of at least two witnesses, which might be done without any stamp; provided the assignment so indorsed were duly stamped before any action were brought thereon; and in case of forfeiture the plaintiff in the original action or suit might, after the assignment, bring an action and suit thereon *in his own name*, against the principal and the bail.

Replevin Bonds were made assignable by 11 Geo. II. c. 19, s. 23. The *action of replevin* was founded upon a wrongful taking of goods, and was a re-delivery of the thing taken to the owner; or upon his giving security to buy the right of the taking-away, and to restore it if the right be adjudged against him; after which the taker may keep it till tender made of sufficient amends, but then must re-deliver it to the owner (c). By the

(b) 44 & 45 Vict. c. 61, ss. 83—
89.

(c) Co. Litt. 145; 8 Rep. 147;
3 Bl. Comm. 147.

section of the Act now cited, it was provided to prevent vexatious replevins of distresses taken for rent that all sheriffs and officers authorized to grant replevins were, in every replevin of a distress for rent, to take, in their own names, from the plaintiffs and two responsible securities a bond in double the value of the goods distrained, and conditioned for prosecuting the suit without delay, and for duly returning the goods and chattels distrained, in case a return should be awarded, before any deliverance be made of the distress. And further, that the officer taking the bond should, at the request and cost of the avowant (*i.e.*, the defendant in the suit to try the right to the goods) assign the same to him, by indorsement attested under his hand and seal, &c. (as in the case of bail-bonds); and that in case of forfeiture the avowant or defendant could sue thereupon *in his own name*.

East India Bonds.—By 51 Geo. III. c. 64, s. 4, it is provided that all bonds issued under the common seal of the East India Company shall be assignable and transferable by delivery of the possession thereof; and upon every such assignment or transfer, the money secured on the bond assigned “shall be absolutely vested as well at law as in equity in the assignee or transferee, who shall be able to maintain his action thereon in like manner as the obligee or obligees named in the bond.”

Mortgage Bonds of a company are assignable by virtue of 8 & 9 Vict. c. 17. This was an Act for consolidating certain provisions usually inserted in Acts with respect to the constitution of companies. The Act provides that where a company has power under the special Act to borrow money by mortgage or bond, every such security shall be by deed under the common seal of the company, duly stamped and the consideration truly stated (*d*); that a register of the mortgage deeds

and bonds shall be kept, and a full entry made therein of every such transaction within fourteen days of the date thereof *(e)*. It then further provides—"Any party entitled to any such mortgage or bond may from time to time transfer his right and interest therein to any other person; and every such transfer shall be by deed duly stamped, wherein the consideration shall be truly stated; and every such transfer may be according to the form in the schedule (E.) to this Act annexed, or to the like effect" *(f)*. The transfer must be produced to the company's secretary within thirty days of the date of its execution, and the secretary is to make an entry or memorial of the same as in the case of the original mortgage; and after such entry every such transfer shall entitle the transferee to the full benefit of the original mortgage or bond in all respects, and no transferor shall have power to make void, release, or discharge the same or any money thereby secured. But until such entry of transfer the company shall not be in any manner responsible to the transferee in respect of such mortgage *(g)*. Further, the interest on any such mortgage was made transferable by deed duly stamped *(h)*. By the same Act, proprietors of stock of a company were enabled to transfer their stock under similar provisions, as well as shares in the company *(i)*.

Unclaimed Dividends.—When any dividends on stock remained unclaimed for ten years, it was provided by 8 & 9 Vict. c. 62, that the same should be paid and transferred to the Commissioners for the Reduction of the National Debt, and if subsequently claimed by person entitled, notice was to be given by advertisement before re-transfer of any stock or dividend to claimant; and before re-transfer, any one might apply to rescind

(e) Sect. 48.
(f) Sect. 49.
(g) Sect. 50.

(h) Sect. 52.
(i) Sects. 14—16, 19, 20, 65, 66.

the order for such re-transfer. This Act was repealed by 33 & 34 Vict. c. 69, and the above provisions re-enacted by 33 & 34 Vict. c. 71, s. 51.

Public Stock.—By 8 & 9 Vict. c. 97, s. 1, it was enacted that all shares or interest in public stocks standing in the name of any person may be transferred by the executors. The transfer of stock in public funds is effected by signing the books at the Bank of England in manner prescribed by statute. The transfer may be effected by the transferor personally or by attorney, lawfully authorized under seal, attested by two witnesses. This is provided by 33 & 34 Vict. c. 71, s. 9. When stock is standing in the name of a trustee, the beneficial owner may transfer his equitable interest in any manner he pleases. (See, also, 26 Vict. c. 28, and 33 & 34 Vict. c. 71, ss. 26 *et seq.*)

Right of Entry, “whether immediate or future, and whether vested or contingent, into or upon any tenements or hereditaments in England, of any tenure, may be disposed of by deed.” This was provided by 8 & 9 Vict. c. 106, s. 6.

But it has been held that this section does not apply to the right of re-entry on condition broken before alienation of the reversion. It does not relate to a right to re-possess or re-enter for a condition broken, but only to an original right where there has been a dis-seisin, or where the party has a right to recover lands, and his right of entry and nothing but that remains (*j*); it means a right of entry in the nature of an estate or interest (*k*). And the reason given for this restriction of the section is, that it was at the election of the person entitled to enter whether he would take advantage of the breach of the condition (*l*).

(*j*) *Hunt v. Bishop* [1853], 8 Ex. Rep. 676, *per* Pollock, C. B. See, also, *Hunt v. Remnant*, 9 Ex. Rep. 635.

(*k*) *Hunt v. Remnant* (*supra*), p. 640, *per* Maule, J.

(*l*) *Jenkins v. Jones*, 9 Q. B. D. 131, *per* Jessel, M. R. But see 44 & 45 Vict. c. 41, s. 10.

The same Act and section rendered assignable a contingent, an executory, and a future interest, and a possibility coupled with an interest, in any tenements or hereditaments of any tenure, whether the object of the gift, or limitation of such interest, or possibility be or be not ascertained. It also enacted that dispositions by married women must be in conformity with 3 & 4 Will. IV. c. 74, and 4 & 5 Will. IV. c. 92.

But it must be observed that this Act did not render assignable at law contingent interests or possibilities *in chattels*, or mere naked possibilities *not coupled with an interest*; and that the equitable jurisdiction as to such assignments remained unaffected by the Act (*m*).

Bills of Lading.—It was possible at common law for the transfer and delivery of a bill of lading to pass the property in the goods, but such transfer did not operate as an assignment of the *contract* expressed in the bill of lading, and consequently such transfer at common law conferred no right upon the assignee to sue upon that contract.

But, by the Bills of Lading Act, 1855 (18 & 19 Vict. c. 111), s. 1, it was enacted 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."

Administration Bonds are made assignable on breach by order of Court. By the Probate Act, 1857 (20 & 21 Vict. c. 77), it is provided that persons to whom grant of administration is committed shall give a bond

(*m*) 1 Wh. & Tnd. Eq. 107.

to the judge of the Court of Probate to enure for the benefit of the judge for the time being, with a condition for proper administration of the personal estate of the deceased (n) ; such bond shall be in a penalty of double the amount under which the estate and effects of the deceased shall be sworn, unless reduced by order (o). And further :

“ The Court may, on application made on motion or petition in a summary way, and on being satisfied that the condition of any such bond has been broken, order one of the registrars to assign the same to some person, to be named in such order, and such person, his executors or administrators, shall thereupon be entitled to sue on the said bond, *in his own name*, both at law and in equity, as if the same had been originally given to him instead of to the judge of the Court, and shall be entitled to recover thereon as trustee for all persons interested the full amount recoverable in respect of any breach of the condition of the said bond ” (p). And by the Amending Act, 1858 (21 & 22 Vict. c. 95) :—

“ Bonds given to any archbishop, bishop, or other person exercising testamentary jurisdiction in respect of grants of letters of administration made prior to 11th January, 1858, or in respect of grants made in pursuance of the Court of Probate Act or of this Act, . . . shall enure to the benefit of the judge of the Court of Probate, and, if necessary, shall be put in force in the same manner and subject to the same rules (so far as the same may be applicable to them) as if they had been given to the judge of the said Court subsequently to that day ” (q).

Railway Bonds.—By the Companies Clauses Consolidation Act, 1845, it is enacted: “ Every mortgage and bond for securing money borrowed by the company

(n) Sect. 81.
(o) Sect. 82.

(p) Sect. 83.
(q) Sect. 15.

shall be by deed under the common seal of the company, duly stamped, and wherein the consideration shall be truly stated; and every such mortgage deed or bond may be according to the form in the Schedule C. or D. to this Act annexed, or to the like effect" (r). And also: "Any party entitled to any such mortgage or bond may from time to time transfer his *right and interest* therein to any other person; and every such transfer shall be by deed, duly stamped, wherein the consideration shall be duly stated; and every such transfer may be according to the form in the Schedule E. to this Act annexed, or to the like effect" (s). And "Within thirty days after the date of every such transfer . . . it shall be produced to the secretary, and thereupon the secretary shall cause an entry or memorial thereof to be made in the same manner as in the case of the original mortgage; and, after such entry, every such transfer shall entitle the transferee to the full benefit of the original mortgage or bond in all respects; and no party having made such transfer shall have power to make void, release or discharge the mortgage or bond so transferred or any money thereby secured, &c." (t). And this Act has been incorporated by various Special Railway Acts (u).

Shares.—By the Act for the Registration, Incorporation, and Regulation of Joint Stock Companies, 1844 (7 & 8 Vict. c. 110), it was enacted that, subject to the regulations therein contained, it should be lawful for every shareholder to transfer his shares in such a company, by deed duly stamped stating consideration, and in form in the schedule to the Act (v). The deed was to be registered with the company by a memorial of it being entered in the company's register of transfers,

(r) 8 & 9 Vict. c. 16, s. 41.

(s) *Id.* s. 46.(t) *Id.* s. 47.(u) *Fertue v. East Anglian Rail. Co.* [1851], 5 Ex. Rep. 280.

(v) Sect. 54.

and the entry thereof to be indorsed on the instrument of transfer. Transferee not entitled to profits of the company, or to vote, before such production; and generally, no transfer of shares not paid up.

This Act applied to all joint stock companies established for any commercial or profitable purpose, or for insurance purposes, with certain well-known exceptions. And "joint stock company" included, amongst other things, every partnership whose capital was divided, or agreed to be divided, into shares, and so as to be transferable without the express consent of all the co-partners. But this Act has been replaced by the Companies Act, 1862, which repealed and consolidated all the former Acts relating to joint stock companies, and which, together with the various subsequent amending Acts, now regulates the affairs and existence of joint stock companies.

This later Act of 1862 provides that shares in companies formed and registered under that Act shall be capable of transfer in the manner provided by the regulations of the particular company (*w*). Table A. contains a form of transfer, and requires it to be executed both by the transferor and transferee (*x*). Whether that means sealed and delivered is doubtful (*y*). But shares in these companies cannot be made transferable by delivery only, except under the provisions of the Companies Act, 1867 (30 & 31 Vict. c. 131, s. 27, &c.), which applies only to fully paid-up shares in limited companies.

The Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16, s. 18), requires executors to be registered.

The transfer of shares in other companies is not,

(*w*) 25 & 26 Vict. c. 89, Pt. II. s. 22.

(*x*) See Table A. (in the Act), Nos. 8—16.

(*y*) Lindley, Companies [1889]; *Re Tahiti Cotton Co., Ex parte Sargent*, L. R. 17 Eq. 273, points to a deed being not necessary.

generally speaking, regulated by statutes now in force.

The forms of transfer given by the various Acts regulating companies are short, and are framed with a view to ease in registration; and while shares may be transferred by instruments differing therefrom, if they are complicated and substantially different from the forms prescribed, the company need not register them (z).

A transferee of a share does not become a shareholder until those forms and ceremonies which by the constitution of each company are necessary to be observed, have been either duly complied with or waived by competent authority (a).

When any company is being wound up by the Court, or subject to the supervision of the Court, all transfers of shares in it subsequent to the presentation of the petition, and prior to the winding-up order, are invalid unless otherwise ordered by the Court (b).

Transfers *after* the winding-up order are not expressly prohibited, but the transfer does not exonerate the transferor from liability as a present member (c).

After a resolution to wind up voluntarily, transfers of shares are generally invalid (d).

By the Companies Act, 1867, a company limited by shares may issue share warrants in respect of shares fully paid up, or in respect of stock. These share or stock warrants entitle the bearer to the shares or stock specified in them, and such shares or stock may be transferred by delivery of the warrant (e).

Copyright in Dramatic Works is assignable by the consent in writing of the author. This was provided

(z) Lindley, Companies, 468;
Copeland v. N. E. Rail., 6 E. & B.
277; *R. v. General Cemetery Co.*,
Id. 415.

(a) Lindley, Companies, 469.

(b) 25 & 26 Vict. c. 89, s. 153.

(c) *Id.* ss. 38, 78, 84.

(d) Sect. 131.

(e) 30 & 31 Vict. c. 131, ss. 27—

by 3 & 4 Will. IV. c. 15, s. 2. And it has been decided that the writing of the agent of an author will be sufficient evidence of assignment (*f*); that no witness to written consent is necessary (*g*); nor need the assignment be under seal (*h*); and that a part owner cannot assign the whole copyright without consent of co-owners (*i*).

By 5 & 6 Vict. c. 45, s. 22, an assignment of copyright does not transfer the playright unless such intention is clearly and expressly entered on the register; registration of the assignment being a condition precedent to the bringing of an action for infringement of copyright. The copyright may be assigned by entering in the register the assignment and the name and address of the assignee (*j*); but an assignee by a written instrument outside the register need only enter himself as proprietor in the register, without entering his assignment, or seeing that his assignor is registered (*k*).

And this applies generally to literary copyrights (*l*).

Copyright in Engravings.—In order to bind the assignor, an assignment of copyright in engravings must be in writing, and signed by the proprietor, in the presence of at least two credible witnesses (*m*).

Copyright in Paintings, &c.—Before the assignee can sue for infringement he must be registered as proprietor or assignee (*n*). The Act of 1862 differs from 5 & 6 Vict. c. 45, in requiring registration to precede the infringement complained of, instead of simply preceding the suing for such an infringement. When once registration has been effected, all subsequent assignments must be registered also (*o*). And if an assignment is

(*f*) *Morton v. Copeland* [1855], 16 C. B. R. 517.

(*g*) *Cumberland v. Copeland*, 1 Hurl. & C. 194.

(*h*) *Marsh v. Conquest*, 17 C. B. N. S. 418.

(*i*) *Powell v. Head*, 12 Ch. D. 686.

(*j*) 5 & 6 Vict. c. 45, s. 13.

(*k*) *Scrutton, Copyright* [1896], 88.

(*l*) *Id.* p. 146.

(*m*) 17 Geo. III. c. 57.

(*n*) 25 & 26 Vict. c. 68, ss. 3, 4.

(*o*) *Id.*, s. 4; and *Scrutton*, p. 176.

registered it must contain: date of assignment, names of parties, name and address of assignee, the same of the author, description of the name and subject of work (*p*).

Letters-patent.—It would appear that patent-rights have long been freely assignable. But by 15 & 16 Vict. c. 83, s. 35, it was enacted expressly that a “register of proprietors” should be kept, wherein should be entered the assignment of any letters-patent, or of any share or interest therein, any licence under letters-patent, and the district to which such licence relates, with the names of any person becoming assignee, licensee, &c., and any other matter relating to or affecting the proprietorship in such letters-patent or licence. And that a copy of this entry should be *prima facie* proof of the assignment, &c. And that until such entry be made the grantee or grantees of such letters should be deemed to be the sole and exclusive proprietor or proprietors of such letters-patent, &c. (*q*).

It was questioned whether a deed was necessary for any such assignment; but the terms in the grant forbade the use of the invention “without the consent, licence, or agreement of the said patentee *in writing under his hand and seal*.” But it has been settled now that the legal interest in a patent can only be conveyed by a deed (*r*), since a deed is necessary for its creation (*s*). An assignment not under seal, but purporting to pass the patent-right, will effectively transfer the equitable interest in it if made for value, and if properly registered as a document affecting the proprietorship of the letters-patent (*t*).

(*p*) Scrutton, p. 176.

(*q*) See also *Walton v. Lavater*, 8 C. B. N. S. 162.

(*r*) *Re Casey's Patents*, (1892) 1 Ch. 104.

(*s*) Co. Litt. 9b, 172 a; Shep. Touch. 229—231; *Lincoln College*

Case, Co. Rep. Pt. III. 63 a.

(*t*) *Re Casey's Patents*, *supra*; and *Edmund's Patents*, Chap. X. “Assignments and Licences,” written by Mr. D. M. Kerly, where all the authorities, statutory and otherwise, are ably stated.

Further, a patent is made assignable by the express terms of the grant in the form which is now employed (*u*), and the whole subject of grant and protection, and assignment and registration thereof, of patents is now fully dealt with by the amending and consolidating Act, the Patents, Designs and Trade Marks Act, 1883 (46 & 47 Vict. c. 57) (*v*).

Debts.—As debts were choses in action, they were not assignable at common law, nor could the debts due to a debtor be taken in execution by his judgment creditor. But by an Act for amending the remedies of creditors against the property of debtors, it was provided that under the writ of *fi. fa.* the sheriff might seize not only money and bank notes, but also cheques, bills of exchange, promissory notes, bonds, specialties, or other securities for money which belonged to the debtor, and might sue in his (the sheriff's) own name for the recovery of the sum or sums secured thereby, if and when the time of payment should have arrived. But sheriff was not obliged to sue on such securities without indemnity by the judgment creditor for whom he had levied (*w*).

And by the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), the Court has jurisdiction to order that debts owing to a judgment debtor may be attached to answer the judgment (*x*). The jurisdiction created by this Act was extended by the Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126, ss. 28—31); and the provisions of both these Acts relating to attachment of debts were substantially reproduced in the Rules of Court in the schedule to the Supreme Court of Judicature Act, 1875 (38 & 39 Vict. c. 77, Sched. I. Ord. XLV.).

And they are incorporated in the Rules of 1883 by

(*u*) This is Form D. of the 1st Schedule to Act 1883. See, also,

2 Dav. i. 629.

(*v*) See especially sects. 33, 36,

87.

(*w*) 1 & 2 Vict. c. 110, s. 12.

(*x*) 17 & 18 Vict. c. 125, ss. 60,

61.

which this subject is now regulated (*y*). Such debts must be existing debts, not unliquidated damages or an unascertained sum.

Moreover, by 1 & 2 Vict. c. 110 (above quoted), a judgment creditor can now obtain a charging order upon his debtor's interest in any government stock, funds, or annuities, or any stock or shares in a public company in England, or on the dividends or interest thereof, whether funds in Court or not, and whether standing in the debtor's name in his own right, or in the name of a trustee for him, in order to charge the same with the amount due on the judgment debt and costs (*z*).

Debts and other things in Action of a Company.—By the Companies Act, 1862, it is enacted:—

“Any person to whom anything in action belonging to the Company is assigned in pursuance of this Act may bring or defend any action or suit relating to such thing in action in his own name” (*a*).

Mortgage Debentures.—By the Mortgage Debenture Act, 1865 (28 & 29 Vict. c. 78), which enabled certain companies to issue mortgage debentures founded on securities upon or affecting lands, rates, or other property therein set forth (*b*), it was enacted:—

“Every mortgage debenture may be transferred by indorsement in the form (E) in the Schedule to this Act, or to the like effect” (*c*).

The Act also provides for the production to and entry by the company's secretary of such transfer in company's

(*y*) Ord. XLIII. r. 2. The two Common Law Procedure Acts were repealed by 46 & 47 Vict. c. 49, saving the jurisdiction thereby established, with the power to make rules of Court, as to the same matters.

(*z*) Sects. 14, 15; also 3 & 4 Vict. c. 82; R. S. C. Ord. XLVI. r. 1; *Hulkes v. Day*, 10 Sim. 41;

Cooper v. Griffin, 36 S. J. 325; *Fuller v. Earle*, 7 Ex. Rep. 796; *Re Blakely Ordnances*, 25 W. R. 111; *Brereton v. Edwards*, 21 Q. B. D. 488.

(*a*) 25 & 26 Vict. c. 89, s. 157. See, also, sects. 8, 43.

(*b*) 28 & 29 Vict. c. 78, s. 5.

(*c*) *Id.* s. 37.

register, and for its being duly stamped, &c. (*d*), and the usual proviso of non-recognition by the company of the transferee until such production and entry have been effected (*e*).

Life Policies.—In 1867 the Policies of Assurance Act (30 & 31 Vict. c. 144) was passed to enable the assignee of a policy of life assurance to sue on his assignment in his own name. It enacts that any person entitled by assignment or other derivative title to a policy of life assurance, and who possesses, when the action is brought, the right in equity to receive, and the right to give an effectual discharge to the assurance company liable under such policy for moneys thereby assured or secured, shall be at liberty to sue at law in the name of such person to recover such moneys (*f*). And that in any action on the policy a defence or reply, on equitable grounds, may be pleaded (*g*). That no such assignment made after the passing of the Act shall confer on the assignee, or his representatives, any right to sue for the amount of such policy, or the moneys assured or secured thereby, until a written notice of the date and purport of such assignment shall have been given to the assurance company, liable under such policy, at their principal place of business for the time being; and the date on which such notice shall be received by the company regulates the priority of all claims under any assignment; and a *bonâ fide* payment in respect of any such policy by the company before notice shall be as valid against the assignee giving notice as if the Act had not been passed (*h*). The company's principal place of business is to be specified on policies (*i*), and notices of assignments are to be acknow-

(*d*) 28 & 29 Vict. c. 78, ss. 38, 39.

(*e*) *Id.* s. 39. This Act was amended by 33 & 34 Vict. c. 20.

(*f*) 30 & 31 Vict. c. 144, s. 1.

(*g*) *Id.* s. 2.

(*h*) *Id.* s. 3.

(*i*) *Id.* s. 4.

ledged by the company upon the written request of the person giving notice, and upon payment of a prescribed fee (*j*). It also provides (*k*) that the Act shall not apply to any policy of assurance granted or to be granted, or to any contract for a payment on death entered into, or to be entered into, in pursuance of the provisions of 16 & 17 Vict. c. 45, and 27 & 28 Vict. c. 43, or either of those Acts (*l*), or to any engagement for payment on death by any friendly society (*m*). By 51 Vict. c. 8, s. 19, it was enacted, that no assignment of a policy of life assurance should give the assignee any right to sue for the amount assured, &c. in his own name, or to give a valid discharge therefor, unless such assignment were duly stamped. This provision was repealed and re-enacted by the Stamp Act, 1891 (54 & 55 Vict. c. 39, s. 118). A written agreement to execute, on request, an effectual mortgage of a policy deposited as a security for a loan is not an assignment within the meaning of the Act of 1867 (*n*). See also Life Assurance Companies Act, 1872 (35 & 36 Vict. c. 41, s. 7), as to transfer of liability under a policy.

That Act is only intended to apply to the relations between the assurance company and the persons interested in the policy, and in no way affects the rights of those persons *inter se*. So that, where a first incumbrancer has not given the statutory notice, and a second incumbrancer, with knowledge of the first incumbrance, gave the statutory notice, it was *held* that the second incumbrancer did not thereby gain priority (*o*). And a condition providing against the assignment of a policy in any case, and a clause that the company are not to be bound to recognize any equitable dealings with the

(*j*) 30 & 31 Vict. c. 144, s. 6.

(*k*) *Id.* s. 8.

(*l*) These statutes are partly repealed by 45 & 46 Vict. c. 51.

(*m*) *Scottish, &c. Soc. v. Fuller*, Ir. R. 2 Eq. 53.

(*n*) *Spencer v. Clarke*, 9 Ch. D. 187.

(*o*) *Newman v. Newman*, 28 Ch. D. 674; *Re Holmes*, 29 Ch. D. 786.

policy, does not prevent a policy-holder dealing with the beneficial interest (*p*).

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Marine Policies.—In 1868 the Policies of Marine Assurance Act (31 & 32 Vict. c. 86) was passed to enable assignees of marine policies to sue in their own names. It enacted that the assignment might be made by indorsement on the policy in the words of the form in the Schedule to the Act, or to the like effect (*q*). And that when a policy is so assigned as to transfer the beneficial interest in it to any person entitled to the property insured, the assignee may sue in his own name, and any defence which might have been made to an action brought in the name of the person by whom or on whose account the policy was effected, shall be available against the assignee (*r*). But the right of an assignee is restricted to such cases in which the assignee could have sued in the assignor's name. Where, on a contract of sale of goods insured, the policy was not assigned, nor agreed to be assigned, an effective assignment could not be made after the assignor's interest had ceased (*s*). But an assignee will not be debarred from suing under the statute by the mere fact of the assignment having been made *after* the loss occurred (*t*).

Bankrupt's Choses in Action.—The first introduction of bankruptcy law was by 34 & 35 Hen. VIII. c. 4, which was directed against all debtors who fraudulently sought to evade payment of their debts and liabilities. This statute empowered the Lord Chancellor and others to seize the estates of bankrupts and distribute them rateably among the creditors. By 13 Eliz. c. 7, the

(*p*) *Re Turcan*, 40 Ch. D. 5. 10 Q. B. 249; but see, *per* Lush,

(*q*) 31 & 32 Vict. c. 86, s. 2. J., p. 254.

(*r*) Sect. 1.

(*s*) *N. of England Oil Cake Co. v. Archangel Insurance Co.*, L. R. 4 Q. B. 299.

(*t*) *Lloyd v. Fleming*, L. R. 7

Lord Chancellor was authorized to appoint commissioners to deal as they might think fit with the body and property of bankrupts; and by this statute the law of bankruptcy was restricted to traders. By 4 Anne, c. 17, and 10 Anne, c. 15, provision was made for relieving a debtor of his debts, &c., upon his surrendering to the commission and conforming with the directions of the bankruptcy law. The bankrupt was enabled then to obtain a certificate from the commissioners, with the consent of the creditors, which discharged him from debts, &c., owing by him at the time of his bankruptcy.

By 6 Geo. IV. c. 16, the previous enactments relating to bankrupts were consolidated and amended. By this statute was first introduced the principle of *deeds of arrangement*, by which the property of an insolvent trader was made available for the common benefit of his creditors without the debtor incurring the odium of bankruptcy, but the assent of all the creditors was necessary. Under this Act, as before, trustees, commonly called "assignees," were chosen and appointed by the creditors, and to these trustees or "assignees," the bankrupt's property was assigned by the commissioners, under powers vested in them for that purpose (u).

By 1 & 2 Will. IV. c. 56, *official assignees* were introduced, and substituted for those hitherto chosen by the creditors, and a Court of Bankruptcy was instituted. This statute also abolished the necessity for a deed of assignment of the bankrupt's property by the commissioners to the assignees, and caused all the debtor's estate to vest in the official assignees by virtue of their appointment (v).

By a statute passed in 1844 (7 & 8 Vict. c. 70) arrangements for composition and liquidation, between the debtor and a majority of the creditors, were greatly

(u) 5 Geo. II. c. 30.

(v) Robson, Bankruptcy, Intro.

facilitated and made binding, subject to certain conditions. But this Act only applied to traders. Further provisions were made by the Bankrupt Law Consolidation Act, 1849 (12 & 13 Vict. c. 106, s. 224), and ultimately by the Act of 1861, which applied to all debtors, whether traders or not, other provisions were made.

The Bankruptcy Act, 1861 (24 & 25 Vict. c. 134) enacted that every deed or other instrument by which a debtor, not being a bankrupt, conveyed or agreed to convey his effects and estate, or the main part thereof, for the benefit of his creditors, or made any arrangement for dealing generally with his affairs, &c., &c., should be *registered* in the Court of Bankruptcy within twenty-eight days (*w*). Deed must be duly stamped (*x*), and a memorandum of registration indorsed thereon (*y*).

But this Act was repealed in 1869 (*z*), and the assignment for benefit of creditors dealt with in the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), by which Act such an assignment was treated as an act of bankruptcy (*a*).

But that Act regulated the *liquidation by arrangement* of the affairs of a debtor, without proceedings in bankruptcy, and provided for the acceptance of a composition, in satisfaction of the creditor's claims (*b*).

The Act of 1869 has been repealed, and all matters relating to bankruptcy are now governed by and contained in the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52) as principally amended by the Act of 1888 (51 & 52 Vict. c. 62) and the Act of 1890 (53 & 54 Vict. c. 71), and in the Bankruptcy Rules, 1886 (*c*), made in conformity with the Act of 1883 (*d*).

The assignees in bankruptcy were formerly empowered to sue for debts owing to the debtor in their own names

(*w*) 24 & 25 Vict. c. 134, ss. 192, 194.

(*x*) *Id.* s. 195. (*y*) *Id.* s. 196.

(*z*) By 32 & 33 Vict. c. 83.

(*a*) 32 & 33 Vict. c. 71, s. 6, par. (1).

(*b*) *Id.* ss. 125, 126; and Bankruptcy Rules, 1870, rr. 252, 253, 315.

(*c*) W. N. 30th Oct. 1886, Supplement.

(*d*) 46 & 47 Vict. c. 52, s. 127.

for the benefit of creditors (*e*). And by the Bankruptcy Act of 1883, the property of a bankrupt vests in the trustees in bankruptcy, as has been stated, and in that Act "property" is expressly stated to include choses in action (*f*).

For further references see foot-note (*g*).

County Debentures.—By the County Debentures Act, 1873 (36 & 37 Vict. c. 35), it is enacted:—

"Any person entitled to any nominal debenture may at any time transfer his interest therein to any other person, by deed duly stamped, and every such transfer may be according to the form in the Schedule to this Act or to the like effect, and may either be indorsed on the debenture or be made by a separate deed" (*h*).

Such transfer must be registered by an entry thereof in the register for that purpose of the county authority; and transferee has no claim in respect of the debenture until such entry is effected (*i*).

Judgments by Cognovit (Ireland).—By two Irish statutes, 9 Geo. II. c. 5, and 25 Geo. II. c. 14, conusees of judgments were permitted to assign them, and the assignees were allowed to sue in their own names.

Statute 9 Geo. II. c. 5, after reciting that judgments, statutes staple, and statutes merchant are frequently assigned for valuable considerations and to protect the purchase of estates, but are no more than equitable securities in the hands of the assignees, and that assignees of such judgments, &c., as the law then stood, could not revive or discharge the same in their own names, but in the name of the conusees of such judgments, &c., or their representatives, which was often

(*e*) 12 & 13 Vict. c. 106, s. 141; 32 & 33 Vict. c. 71, ss. 4, 15, 22, 83.

(*f*) 46 & 47 Vict. c. 52, s. 168.

(*g*) *Id.* ss. 50 (1)—(4), 52, 53, 82, 43 (amended by 53 & 54

Vict. c. 71, s. 20). See, also, Williams, Bankruptcy; Robson, Bankruptcy.

(*h*) 36 & 37 Vict. c. 35, s. 13.

(*i*) *Id.* s. 14.

attended with very great inconveniences, and the conusee might, after such assignment, enter satisfaction on the record of such judgments, &c., without the knowledge or consent of the assignee, it enacts: "That where any conusee or conusees of a judgment or judgments, statute staple or statute merchant, his, her, or their executors or administrators shall assign the same, such conusee or conusees, his, her, or their executors or administrators shall also perfect a memorial of such assignment," with such formalities as therein are mentioned (j). "That after such memorial enrolled, *such assignee or assignees, and no others, may, in their own names, revive such judgment, statutes, &c., and take out execution, discharge the same, and enter satisfaction on the record; and that the conusor or conusors of such judgment, &c., his, her, or their executors, administrators, or assigns may, upon payment to such assignee or assignees, plead payment specially to such assignee or assignees*" (k).

The statute 25 Geo. II. c. 14, explained and amended the former Act, and enacted "that every assignee of every judgment, &c., his, her, or their executors, administrators, or assigns may also bring an action of debt or otherwise proceed or sue thereon, in his, her, or their own name or names, and be considered to all intents and purposes in the place, stead, and condition, either in law or equity, of the assignor or assignors" (l). And by virtue of the above enactments it has been *held*, that the assignee of an Irish judgment by cognovit may sue in this country in his own name (m).

(j) 9 Geo. II. c. 5, s. 1.

(k) Sect. 2.

(l) 25 Geo. II. c. 14.

(m) *O'Callaghan v. Thomond*

[1810], 3 Taunt. 82.

Book III.

ASSIGNABILITY OF CHoses IN ACTION SINCE THE JUDICATURE ACT, 1873.



CHAPTER I.

WHAT CHoses IN ACTION ARE WITHIN THE ACT.

HAVING dealt with the assignability of choses in action at common law, and in equity, and by virtue of various statutory enactments prior to the operation of the Judicature Act, 1873 (36 & 37 Vict. c. 66), we now proceed to consider what changes have been wrought by that Act in respect of the assignability of things in action, what choses in action are affected thereby, what are the requisites of an assignment thereunder, and what consequences ensue from failure to comply therewith.

It is provided by the Supreme Court of Judicature Act, 1873, that:

Any absolute assignment, by writing under the hand of the assignor (not purporting to be by way of charge only), of any debt or other legal chose in action, 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: Provided always, that if the debtor, trustee, or other person liable in respect of such debt or chose in action shall have had notice that such assignment is disputed by the assignor or any one claiming under him, or of any other opposing or conflicting claims to such debt or chose in action, he shall be entitled, if he think fit, to call upon the several persons making claim thereto to interplead concerning the same, or he may, if he think fit, pay the same into the High Court of Justice under and in conformity with the provisions of the Acts for the relief of trustees (a).

Upon analysing this section it will be found that it applies only to such assignments as fulfil the following conditions:—

1. The assignment must be an absolute assignment; and not purporting to be by way of charge only.
2. It must be in writing, signed by the assignor.
3. It must be an assignment of a *legal* chose in action.
4. Express written notice of the assignment must be given to the debtor, or other person obliged to pay.

The assignee's title is not complete until notice given; his legal right to the chose in action dates from notice. And when these conditions are complied with,

(a) 36 & 37 Vict. c. 66, s. 25 (6).

the assignee takes the assignment subject to all the equities capable of being enforced against the assignor by the debtor or other such obligor at the date of the notice of the assignment.

Before proceeding to discuss the various points which arise under the sub-section above quoted, it is important to state generally the effect of it upon the assignment of choses in action.

This sub-section makes provision for the assignment of certain choses in action, and somewhat modifies the enactment of sect. 24. For sects. 24 and 25 remove what was for a long time looked upon as an anomaly; that different Courts recognized different rights and duties, applied different remedies to the same case, and in some instances enforced rules of law which were in conflict with one another.

The effect of sect. 24 has been summarized thus :—

The plaintiff may assert an equitable claim in any Court.

The plaintiff may obtain an equitable remedy in any Court.

The defendant may raise, in any Court, anything which would formerly have been good by way of answer if the suit had been brought in Chancery, or would have afforded ground for an injunction if the action had been brought at law.

The defendant may assert by way of counterclaim against the plaintiff, any claim, legal or equitable, which he might have raised by a cross-suit at law or in equity.

The defendant may obtain relief relating to or connected with the original subject of the action against other persons, whether already parties or not.

Every Court is to recognize equitable rights incidentally appearing.

No cause is to be restrained by injunction; but what would have been ground for injunction is to be raised by way of defence, or upon an application to stay proceedings; or if more convenient the cause may be transferred to another Division.

Subject to these provisions common law rights and duties are to be recognized.

Every Court is to apply all appropriate remedies, and dispose of all matters in controversy (b).

And sect. 25 (11) has removed the conflict between rules of law and rules of equity by enacting that: "Generally, in all matters not hereinbefore particularly mentioned, in which there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity shall prevail."

In construing the sub-sections of sect. 25, it may be said generally, that where the rule expressly provided by the Act is less extensive than the former rule of the system from which it is borrowed, such rule must be taken to be modified to the extent indicated by each sub-section itself.

By the sub-section under discussion it is intended that if a charge is made by way of absolute assignment, the assignee should have power to recover the subject-matter so charged and to give a receipt for it. And as it has been already pointed out, such a power was always given him in such cases in good conveyancing.

The sub-section relates to procedure, and does not make anything an assignment which was not an assignment before, either at law or in equity. It gives no new right of action which did not exist before (c). It gives no new rights, but only a new mode of enforcing

(b) Wilson, Judicature Act,
p. 15.

(c) *Schroeder v. Central Bank of
London* [1876], 24 W. R. 710.

old rights (*d*). It does not apply to assignments which are not absolute, or which purport to be by way of charge only; it does not apply to choses in action which are not legal choses in action. There are assignments of choses in action which were not valid at law, but valid in equity, *before* the Act, yet are not now within this sub-section, and consequently still need the old procedure formerly in use in equity when it is necessary to enforce such assignments. So that in an action by an *equitable* assignee of a debt or other chose in action (*i.e.*, where the case does not come within the operation of the section), an application under Ord. XVI. r. 2, to add the name of the assignor as plaintiff, will only be granted upon proof of his consent, or upon proof that he has been communicated with, and all terms necessary for his protection from liability offered to him (*e*). And in all cases which come within the statute, the old principle of the assignment being subject to equities still prevails, and operates against the assignee and in favour of the debtor as before the Act. For the debtor is entitled to the same rights by way of defence and counterclaim as he was formerly (*f*).

And in like manner, the old rule in bankruptcy, that where the legal owner of a debt is a mere trustee for a beneficial owner, the legal owner cannot sustain a petition for adjudication in bankruptcy against the debtor without the concurrence of the beneficial owner in the petition, was unaffected by this sub-section (*g*). But the sub-section does transfer the debt or other legal chose in action, by the assignment, to the assignee, and, by also transferring to him all the legal and other remedies for the same, it gives him the power to sue

(*d*) *Walker v. Bradford Old Bank* [1884], 12 Q. B. D. 515; *Read v. Brown* [1888], 22 Q. B. D. 132.

(*e*) *Turquand v. Fearon* [1879], 4 Q. B. D. 280.

(*f*) *Walker v. Bradford Old Bank*, *supra*; *Hudson v. Fernyhough* [1889], 61 L. T. 722.

(*g*) *In re Adams, Ex parte Culley* [1878], 27 W. R. 28.

for the subject-matter *in his own name*, and to give a good discharge for it, without the concurrence of the assignor. And therefore the assignee of a judgment debt may issue garnishee proceedings and all such proceedings as execution, judgment summons, attachment, and attachment of debts generally (*h*). But, as it has been above pointed out, the assignee must be both legal and equitable owner of the chose in action in order to present a petition in bankruptcy, *in his own name*, against the debtor (*i*).

The proviso to the sub-section will be specially dealt with under "Practice" (*j*).

Let us here consider—

What choses in action are within the purview of the Act?

The answer clearly is, debts or other *legal* choses in action. But what are *legal* choses in action within the meaning of the statute? We know that *before* the Act legal choses in action were such choses as were recoverable only in a court of law, and such as were not equitable choses in action.

Examples of these legal choses in action have been already given in an earlier chapter, and need not be here repeated.

It was formerly contended by some that the new Act meant legal choses in action to be such as had generally been so described; and that it would have been inconsistent to have included thereunder *equitable* choses in action (as generally understood) because the *owner*, or assignor, himself could not recover them at law, and there would have been an absurdity in allowing his assignee to do so (*k*). Might it not also be contended

(*h*) See, also, *Goodman v. Robinson* [1886], 18 Q. B. D. 332.

(*i*) See note (*g*), *ante*, p. 144.

(*j*) *Post*, Bk. VII.

(*k*) *Goode v. Pers. Pro.* [1892], 148. And see 1 Wh. & Tud. Eq. 140, 141; 1 Encycl. 355; *Colonial Bank v. Whinney* [1886], 11 Ap. Ca. 426.

that "debt or other legal chose in action" meant choses in action of a kind similar to debt, &c. according to the *ejusdem generis* construction? There is some doubt whether the word was opposed to "equitable" rather than to any other word, or was used as synonymous with "lawful." But, as we are aware, by this same Act the fusion of law and equity was effected, and in the light of that fact it is difficult to ascertain with anything like precision what choses come within the operation of the statute. The Act gives no definition, as it should have done; and we are left to obtain what illumination is possible from the context in the sub-section, and from judicial decisions upon cases coming within the operation of the Act. There seems to be some hint in the context that a wider interpretation is to be put upon the term "legal chose in action" than was attached to it prior to the Act, for it speaks of notice to the *trustee*, which would imply an assignment of funds in the hands of a trustee in respect of which the assignee would have a beneficial interest by virtue of the assignment. But then such a claim brought against a trustee would have been an *equitable* claim before the Act, and for that the assignee would, quite apart from the statute, have been entitled to bring the proceedings in his own name in a Court of Equity.

Indeed, as we have seen already, such an assignment need not be in writing. But under this Act it would appear that the assignment of such an interest is the assignment of a *legal* chose in action. If that be so, it must follow that the sub-section is not restricted to that class of choses in action which, prior to the Act, were known as legal, in opposition to equitable. Indeed, it seems certain, on many grounds, that the expression used is not so limited as only to be applicable to such choses in action as were recoverable at law, prior to 36 & 37 Vict. c. 66, and that it must extend, at least, to all those choses in action which the *owner* could now

recover by an action in the Queen's Bench Division, independently of any question of assignment. Yet legacies, trust funds, and claims against the estate of a deceased which is being administered in the Chancery Division, are presumably still considered *equitable* chosses in action, and consequently not within the operation of the statute. Yet in a case where the subject-matter of the assignment was the balance of a share due to a residuary legatee from the trustees and executors under a will, it was held that the assignment came within the sub-section. The facts were as follows:—The defendants, who were executors and trustees under a will, sent to A., who was a residuary legatee, a statement of account showing a balance due to A. on account of his share in a residuary estate. A., who lived in Australia, sent this account to his daughter B., the plaintiff, with a direction on it in his handwriting instructing the trustees to pay B. the said balance. B. gave notice in writing, as required by statute, to the defendant trustees, who refused to be bound by the assignment. It was held that the document was a valid assignment of the balance in the hands of the defendant trustees, and that B. was entitled to recover it, under the assignment, either at law or in equity (*k*). Indeed, acting under the new powers conferred by sect. 24 of this Act, the Court were quite prepared to, and indeed did, give effect to the assignment, whether considered as coming within the sub-section or not. "Everything has been done necessary to make a voluntary assignment a completed act, and a Court of Law, as well as a Court of Equity, will complete the assignment" (*l*). And that action was brought and determined in the Queen's Bench Division. On the other hand, a case of an assignment of a mortgage debt was brought in the

(*k*) *Harding v. Harding* [1886], 17 Q. B. D. 446.

(*l*) *Id.* 447.

Chancery Division, and was also determined to be within the statute.

In that case the facts were shortly these :

The action was brought on covenants entered into by one, A. The plaintiff, B., was the assignee of the debts covenanted to be paid, and of the benefit of the covenants. The defendant, C., was the surviving executor and trustee of the will of A. The covenants sued upon were contained in two mortgage deeds. The object of the action was to recover payment of the balance owing on account of the debts out of the assets of the estate of the deceased, A., which were retained by the defendant for his own use as a beneficiary under the will. The assignment, moreover, was made before the passing of the Act of 1873 ; but before commencing action, and after the Act of 1873 came into operation, B., the assignee, gave notice in writing as required by statute. It was *held*, that the assignment was within the statute, and that the statute was retrospective, so as to apply to a debt assigned before the passing of the Act (*m*). A solicitor's bill of costs is a chose in action within the section. The facts of a case deciding this are of interest. A., a solicitor, had a bill of costs against B. for professional work done. Before delivering a bill to B. signed as required by statute (*n*), A. assigned to C. the bill of costs and the right to recover on it. C., more than a month before he commenced action, delivered to B. the bill of costs enclosed in a letter signed by C. Upon these facts it was contended against the plaintiff assignee that he was not an assignee within the Solicitors Act, 1843 (*n*) ; that " assignee " in that Act meant " assignee in bankruptcy " ; that it was sought to make the word include assignee of a chose in action who before the Judicature Acts could not have brought an action in

(*m*) *Dibb v. Walker*, (1893) 2 Ch. 432.

(*n*) Solicitors Act (6 & 7 Vict. c. 73), s. 37.

his own name, and consequently could not have been contemplated as a person who was to sign a bill of costs; and further, that there was no debt which the solicitor could assign till he was himself in a position to recover a debt—that is, till he had complied with the conditions imposed by the statute; and as he never delivered a signed bill, the assignment was not one that came within the terms of sect. 25, sub-sect. 6, of Judicature Act, 1873, as an absolute assignment of a debt or other legal chose in action. But it was *held*, that C., the assignee, was an assignee within the Solicitors Act, 1843; that he had complied with the conditions of that Act; and that the assignment was within sect. 25, sub-sect. 6, of the Judicature Act, 1873, so as to enable him to sue and recover the amount in his own name. It was further said that if C. could not sue it would come to this, that no one was in a position to sue for the bill of costs, for A. had assigned his right of action, and was not the person suing, and the general result would be that the right to recover a bill of costs could never be assigned (o).

Again, a landlord borrowed money of the plaintiff, and gave him a letter addressed to B. (the landlord's tenant) directing B. to pay to the plaintiff the rent until the order should be countermanded by the plaintiff. The plaintiff posted this letter to B., together with a further letter written by himself stating the facts. It was contended against the plaintiff that the assignment was by way of security, and not absolute, and that the case was not within the sub-section. *Held*, that it was an absolute assignment, and within the operation of sub-sect. 6, sect. 25, Judicature Act, 1873, and that the plaintiff could sue the tenant for the rent (p).

(o) *Ingle v. McCutchan* [1884], 12 Q. B. D. 518. See, also, *Penley v. Anstruther* [1883], 52 L. J. Ch. 367; *Lester v. Lazarus* [1835],

2 C. M. & R. 665; *Englehart v. Moore* [1846], 15 M. & W. 548.
(p) *Knill v. Prouse* [1884], 33 W. R. 163.

The section, moreover, applies to debts not due at the date of the assignment. For instance, A. agreed to build a vessel for B., the price of which was to be paid by instalments. Before the vessel was finished, A., being in debt to C., directed B., by an instrument in writing, to pay to C. 100*l.* out of moneys due or to become due from B. to A. At the time of giving this direction all the instalments which were due had been paid by B. to A. Notice in writing of the above-mentioned instrument was given to B., but he refused to be bound by it, and afterwards paid to A. the balance of the price of the vessel, amounting to more than 100*l.* It was held, that C. was entitled to recover 100*l.* from B., notwithstanding that B. had made the subsequent payments to A. Coleridge, C.J., said: "The Legislature uses the words 'any absolute assignment,' and it may be said that absolute assignment does not include what in strictness is rather an agreement to assign a debt when it arises than the present assignment of a debt that has arisen. When, however, the general object of this section is looked at, and when one remembers that the reason of it was to give a right to an action at law in cases which would have been the subject-matter of a bill in equity, and when it is recollected that an agreement in equity to assign a future debt would have been enforced, it appears to me that it is no straining of the words of this section to construe the request to pay as an absolute assignment of a debt or chose in action, the words of the enactment being not merely 'a debt,' but also a 'chose in action,' and I think that it was intended to include a case of this kind. I do not think I am straining the words of this section in holding that this order is within their meaning" (q). Another case similar in kind was where a building

(q) *Brice v. Bannister* [1878], 3 Q. B. D. 574, 575; *Buck v. Robson* [1878], 3 Q. B. D. 686. But see *post*, pp. 154 *et seq.*

contract provided that payments should be made, as the work proceeded, ~~of such sums~~ on account of the price of the work as should be stated in the certificates of an architect, such certificates to be given at the architect's discretion at the rate of 80 per cent. upon the contract value of the work done at the dates of such certificates, and that the remaining 20 per cent. should be retained till the completion of the work. The contract empowered the building owners, in the event of the contractors committing an act of bankruptcy, to discharge them from the further execution of the work, and employ some other person to complete it, and to deduct from the contract price the amount paid to such other person for completing the same.

The contractors assigned a definite portion of the retention moneys (*i.e.*, the remaining 20 per cent. unpaid) due and owing to them, or to become thus due and owing, to the plaintiffs *by way of mortgage*, and notice of the assignment was given to the building owners. At the date of such assignment the architect had certified to an amount treble as great as that assigned. Further assignments were subsequently made for further advances in a similar manner. After making such assignments the contractors filed a petition for liquidation, the works then remaining incomplete.

A trustee in liquidation and a committee of inspection were appointed. The trustee, in pursuance of a resolution of the committee, completed the work, himself advancing money for that purpose, of which an amount exceeding that of the retention moneys assigned as aforesaid was still unpaid. There were no other assets from which the trustee could be recouped in respect of his outlay. The trustee and the assignees (the mortgagees) both claimed from the building owners the amount of the retention moneys assigned as aforesaid. The building owners interpleaded. It was *held*, that in the absence of anything to show that the building

owners had exercised their power of taking the work out of the contractors' hands, the trustee must be considered to have completed the work under the original contract as trustee of the contractors' estate, and not as a person employed to complete the work in substitution for the contractors; that the assignment of the retention moneys held good as against the trustee; and that the mortgagees were therefore entitled to succeed (r).

This case and another cited in the footnote (r) are interesting to note, for both are assignments not within the section, since they purport to be by way of charge only, and therefore were equitable assignments, and yet the proceedings are taken upon such assignments in the Queen's Bench Division.

A balance at the bank is a chose in action within the section. Thus, by a deed of assignment A. assigned all moneys then or thereafter to be standing to the credit of A. at a bank to a trustee, upon trust for A. for life, and after A.'s death on other trusts. At the date of the assignment A.'s balance at the bank was 48*l.*; at his death it was 217*l.*

Notice was not given until after A.'s death. In an action to recover from the bank 217*l.*, *held*, that at the time of A.'s death the balance was a debt or legal chose in action within the meaning of the Act, and that the notice was sufficient (s).

In like manner, an interest in maintenance under a will may fall within the operation of the section (t); and a judgment debt will, of course, come within the Act (u), and so will a debt certified as due from a com-

(r) *Drew v. Josolyne* [1887], 18 Q. B. D. 590. See, also, *Ex parte Moss*, 14 Q. B. D. 310.

(s) *Walker v. Bradford Old Bank* [1884], 12 Q. B. D. 511. See, also, *Burlinson v. Hall*, 12 Q. B. D. 347;

Tailby v. Official Receiver [1888], 13 Ap. Ca. 523.

(t) *In re Coleman* [1888], 39 Ch. D. 443. Cp. *Re Turcan*, 40 Ch. D. 5.

(u) *Goodman v. Robinson* [1886], 18 Q. B. D. 332.

pany in liquidation (v); so, too, moneys to become due on a policy of assurance (x).

The assignment of instalments which accrued due from time to time under a hiring agreement would also be within the section, for that is a debt due at the date of assignment, though not payable until a future time; and such an assignment would be good against the trustee in bankruptcy arising subsequently to the assignment (x).

But a mere *agreement to lend* money does not give rise to "a debt or other legal chose in action" within the meaning of the Act. Thus, A. owned some building land, and entered into an agreement with B., a builder, whereby B. was to erect certain houses *at his (B.'s) own expense* on A.'s land, and when they were completed A. was to grant to B. leases of the same at a certain rent. After B. had commenced to build, a verbal agreement was made between A. and B. by which A. promised to make certain advances to B. up to the sum of 250*l.*, and such advances were to be made at the discretion of A. Some considerable portion of this agreed amount of loan had been advanced by A.; but before the houses were completed B. directed a letter to C. (to whom B. was indebted for materials supplied) in which B. authorized and requested A. to pay to C. 50*l.* out of the moneys due or to become due to B. Notice in writing of this letter was given to A., and upon this C. brought action against A. for the 50*l.* Although not so stated in the report, it would seem there were no moneys referred to in the letter other than the balance of the 250*l.* which had been promised by A., and the question was, whether such a promise constituted a debt or other legal chose in action? It was *held*, that it did not (y). It will be seen

(v) *In re Moss Bay, &c. Co.*
[1891], 8 T. L. R. 63, 475.

(w) *Re Turcan*, 40 Ch. D. 5.

(x) *In re Davis* [1888], 22 Q. B. D. 193.

(y) *May v. Lane*, (1894) 64 L. J. Q. B. 236.

that such a decision was good on two grounds: First, there was no consideration to support the promise, and a mere agreement to lend money could not be enforced (z), nor would specific performance of a mere promise to lend money be decreed in equity (a); secondly, the advances were to be made entirely at A.'s discretion. And it is quite clear that the exercise of his discretion was manifested in his refusal to pay in terms of the letter.

This case is, of course, to be distinguished from the earlier one cited (b), where the payment by instalments of certain sums of money was a term in the contract, and enforceable at law by the contractor against the person who promised, and consequently was enforceable by the contractor's assignee. But even in respect of this case (*Brice v. Bannister*), it has lately been questioned whether such a transaction came within the operation of the sub-section, owing to the fact that if it were an assignment (which also is doubted) it was an assignment not of a debt, but of only a *part* of a debt; and the Act does not say "or any part of a debt or chose in action." Hence it is questionable whether an assignment of *part* of an entire debt is within the enactment. If it be, it would seem to leave it in the power of the original creditor to split up the single legal cause of action for the debt into as many separate legal causes of action as he might think fit (c). At least, so it has been suggested; but was this not also possible and permissible in equity? and would it not be still allowed to-day, beyond doubt, in cases of equitable assignment and all other valid assignments not falling within the Act?

Nevertheless, there is another point to be considered

(z) *Western Wagon Co. v. West*, (1892) 1 Ch. 271.

(a) *Rogers v. Challis*, 27 Beav. 175; *Larios v. Gurety*, L. R. 5 P. C. 346; *Sichel v. Mosenthal*, 30

Beav. 371.

(b) *Brice v. Bannister*, 3 Q. B. D. 569.

(c) *Durham v. Robertson*, (1898) 1 Q. B. 774.

in connection with the case mentioned, namely, the question of assignability of a claim for an unliquidated amount. Supposing the nature of the agreement entered into between A. and B. in respect of the loan had been such as to be, while not specifically enforceable, yet actionable for damages for breach by non-performance, and that when such breach had been committed B. had assigned his right of action in respect thereof to C. Question, would C. have been able to sue A. upon such assignment? Lord Esher, M. R., was decidedly of opinion that "such a right of action is not assignable" (d). It is respectfully submitted this statement in itself is not of great weight, no ground being given for it. But in his judgment, in the same case, Rigby, L.J., goes farther and says: "A legal chose in action is something which is not in possession, but which must be sued for in order to recover possession of it. It does not include a right of action, such as, for instance, a right to recover damages for a breach of contract, or a legal right to recover damages arising out of an assault, for if the argument on behalf of the plaintiff be correct, such a right would be assignable, and this sub-section of the Judicature Act would materially affect the law of champerty and maintenance" (e). It is submitted that this dictum is not tenable in the face of many judicial decisions. The dictum declares three things—(i) that a right of action is not a legal chose in action; (ii) that if it were, it would be assignable under the Act; and (iii) that if it were so, the Act would affect the law of champerty and maintenance.

In respect of (i) it is enough to say briefly, in this place, that a legal chose in action has always been considered as one which was enforceable at law; that Blackstone and many other writers of authority (cited and discussed in an earlier part of the present work)

(d) *May v. Lane*, *supra*, p. 237.

(e) *Id.* p. 238.

have included among choses in action a right of action for breach of contract, a right of action for damages for assault or *de bonis asportatis*, among many other tortious acts. The remedy for these was, and is, by proceedings in a court of law, and not, certainly, in a court of equity. If this be so, such rights are *legal* choses in action. Whether they would be *legal* choses in action within the meaning of the sub-section is a different and independent question; but *legal* choses in action they certainly must be, or not *choses in action* at all.

In regard to (ii) it may be said it is not certain what choses in action are actually included, but it is submitted that the probability is in favour of the statutory phraseology comprising even a wider range of *choses in action* than such as were formerly enforceable at law. And if so, then, as the dictum of Lord Justice Riggby lays down, such *choses in action*, as a right of action for breach of contract, would fall within the operation of the sub-section.

- Moreover, it has been recently declared *obiter*, by the learned judges of the Supreme Court of Queensland, and not dissented from by the Judicial Committee of the Privy Council, that the term "legal chose in action" includes all rights the assignment of which a court of law or equity would before the Act have considered lawful (f).

The case came before the Queensland Court under a section of a Judicature Act there in force (40 Vict. No. 6, sect. 5, sub-sect. 6), which repeats *verbatim* the sub-sect. 6, sect. 25, of the English Judicature Act of 1873; and the judgment of the Court of Queensland is so lucid and directly bearing upon the point under discussion that it is thought desirable to reproduce the important part of it in this place. Griffith, C.J., said: "The term 'legal chose in action' used in the section

(f) *King v. Victoria Insurance Co.*, (1896) Ap. Ca. 254.

is, I think, large enough to include all kinds of actions, including actions for damages, whether for personal injury, injury to property, or any other course [(sic) *query*, cause]. Yet it seems manifest that it was not intended by the Act to allow a claim for damages, say, for defamation or breach of promise of marriage, to be assigned to a stranger. I think that the true construction is this. The Judicature Act, as has been often said, is a procedure Act, and does not alter substantive rights or substantive law. It does not alter the law as to assignment of 'choses in action' so far as regards the lawfulness of such an assignment, but it removes all formal difficulties which formerly stood in the way of the assignee, preventing him from asserting his substantive rights by action in his own name. An assignment of a 'chose in action,' which was formerly not obnoxious to any rule of public policy, but which was ineffectual, or not completely effectual, by reason of the technical rule of Court of Common Law which would not allow an assignee of 'a chose in action' to sue in his own name, or by reason of the want of jurisdiction of the Court of Equity over the subject-matter of the assignment, is now made completely effectual by the removal of all formal obstacles. But I do not think that an assignment which was before unlawful, as distinguished from being merely ineffectual or not completely effectual, is made lawful or effectual by the Act. In my opinion, the rule of common law which forbade trafficking in law suits is not abrogated. It is true that exceptions have been engrafted upon that rule by the insolvency laws and the Companies Acts. But these are necessary exceptions, having regard to the objects of those Acts. Apart from statutory exception, I think that the law as declared in the cases of *Prosser v. Edmunds* (1 Y. & C. 481); *Dickinson v. Burrell* (L. R. 1 Eq. 337); *Hill v. Boyle* (L. R. 4 Eq. 260), and many older cases, is still the law of the land. I think, there-

fore, the test to be applied for determining the validity of an assignment of a 'chose in action,' which in form is in accordance with the provisions of sect. 5, subsect. 6, of the Judicature Act (*g*), is whether the subject-matter, or the assignment and the circumstances under which it is made, are such that before the Act a court of law or equity would have considered the assignment a lawful one, and would have given in respect of it such relief as, according to the practice of the Court, was appropriate. For instance, in a Court of Equity the assignor, if he received the debt or damages, the subject of the assignment, might be declared a trustee of them for the assignee. Or the assignor might be compelled to allow the use of his name as plaintiff in an action, or might be controlled in the conduct of an action brought by himself, so as to avoid prejudice to the rights of the assignee (*h*). In a court of common law conflicting claims to the debt or damages awarded might be determined (*i*), or an action might be brought for a breach of a covenant contained in the assignment. But, if neither Court would have treated the assignment as a lawful agreement, I think that it still remains ineffectual, not because it is not in form an assignment of a 'legal chose in action,' but because it is an attempt to assign that which the law does not allow to be assigned. It is no doubt a weighty argument against this construction that no instance is to be found in the English reports of an attempt to assign a 'chose in action' in respect of damages unless the case of *Cohen v. Mitchell* (*i*), where the point was not raised, is to be considered one. But on the whole I think the construction I have indicated must prevail" (*j*).

(*g*) This is the Colonial Act (40 Vict. No. 6, s. 5, sub-s. 6) above referred to.

(*h*) *Commercial Union Assurance Co. v. Lister*, L. R. 9 Ch. Ap. 483.

(*i*) *Cohen v. Mitchell*, 25 Q. B. D. 262.

(*j*) *Victoria Insurance Co. v. King* [1895], Queensland L. J. Rep. vol. 6, pp. 203, 204.

The above case was one in which an insurance company insured certain wool belonging to the Bank of Australasia from Townsville to London. The wool was damaged through punts, the property of the Government, negligently running into the lighter on which the wool was being carried. The insurance company paid the Bank of Australasia for the damage done, believing they were bound to do so, and the Bank of Australasia assigned to the insurance company the bank's cause and rights of action which it had against the Government in respect of the collision with the lighter and damage done to the wool, so that the insurance company might stand in the shoes of the bank as regards the tort-feasors. Here, clearly, was the assignment of a right of action, &c. for tort; and the question was whether such an assignment could be supported in law and was within the Judicature Act, and whether the assignees were entitled to sue in their own name. And a judgment was given by the Court of First Instance in favour of the insurance company, and upon appeal to the Supreme Court of Queensland the judgment was affirmed. Of course, it was urged against the assignment that it savoured of champerty and maintenance and the rest of it. But it is submitted that the view taken by the Australian Court, as cited above, is the common-sense and correct one. Griffith, C.J., in his judgment also said that in order to determine the validity of the assignment the Court must consider whether it was a case of mere trafficking in lawsuits, or a transaction which a court of law or equity would have considered free from anything "savouring of champerty"; that the Court ought to consider all the circumstances of the case. "And, just as I have no doubt that an assignment of the cause of action to insurers who are entitled to be subrogated to the rights of the assured would be perfectly valid within the meaning of the section of the Judicature Act, so I

think the same rule must be applied when, though they are not, strictly speaking, entitled to be subrogated, both parties honestly believe that they are so entitled. I think that the objection on the score of public policy fails, and that this assignment was therefore one that could not be held unlawful either before or since the passing of the Judicature Act" (k).

But the Government were persistent, and carried the case across the seas for the consideration of the Judicial Committee of the Privy Council, who only affirmed the judgments of both Courts below. In delivering the judgment of that body, Lord Hobhouse said: "To their Lordships it seems a very startling proposition to say that when insurers and insured have settled a claim of loss between themselves, a third party who caused the loss may insist on ripping up the settlement, and on putting in a plea for the insurers which they did not think it right to put in for themselves, and all for the purpose of availing himself of a highly technical rule of law which has no bearing upon his own wrongful act. . . . (It was said) that no instance is to be found in the reports where the Court of Chancery has bound a defendant to give his name to be used in an action of tort. Nevertheless it cannot be doubted that insurers often have used the names of the insured to recover damages in tort, and have not heeded whether the payment made on their contracts of indemnity did or did not fall within their strict terms. If the reports are silent, the more probable explanation is that the kind of defence raised in the present case has not commended itself to lawyers. . . . Their Lordships do not express any dissent from the views taken in the Court below of the construction of the Judicature Act with reference to the term 'legal chose in action.' They

(k) *Victoria Insurance Co. v. King* [1895], Queensland L. J. Rep. vol. 6, p. 204.

prefer to avoid discussing a question not free from difficulty, and to express no opinion what limitation, if any, should be placed on the literal meaning of that term" (l).

Upon the above *dicta* it is submitted that the preponderating balance of opinion is in favour of a broader and more liberal interpretation and construction of the Judicature Act than that which is expressed in the judgments enunciated in the case of *May v. Lane* which we have here cited, or that, at any rate, the latter must be taken subject to much modification. Perhaps, while upon this topic, it may not be considered out of place to say that as long ago as 1875, when the new Act was just in operation, it was said by learned editors of the Act that, at least in theory, there seemed no reason why, if a man had been libelled or assaulted, he should not under this sub-section assign his right to damages, and notice being given to the defendant, the assignee bring the action in his own name (m).

And this view was also held by the majority of the editors of the Act in question, adding that chosses in action include rights to recover *damages* for a *tort*, though a contract is the most usual instance (n), and that the section prevents all the unnecessary circumlocution which was previously involved in the course of recovery (o).

On the other hand, it has been *held*, that a mere "equity of redemption" is not a legal chose in action within the Act (p). But upon what principle such decision was based it is difficult to conceive, and perhaps may be said to be subject to review. Further, a bare promise to make "further advances" to a borrower creates no

(l) *King v. Victoria Insurance Co.*, (1896) Ap. Ca. 254—256.

(m) *Lely & Foulkes, The Judicature Acts, 1873 and 1875* (1st ed. 1875), p. 27.

(n) *Colquhoun, Judic. Acts*, 19;

Chitty, Practice, 99, n.; *Mackesson & Forbes, Judic. Act*, 34; 2 *Spence, Eq.* 852.

(o) *Rogers, Judic. Act*, 114.

(p) *Cronk v. McManus* [1892], 8 T. L. R. 449.

debt or legal chose in action within the sub-section, if such a promise is not enforceable, and simply one of imperfect obligation (q).

And so, in another case, where a trader, who carried on the business of a theatrical costumier, contracted with a company to supply dresses for a ballet and keep them in repair for the sum of 40*l.* a week for twelve weeks, commencing from a certain date; and the trader subsequently gave a charge upon such right and interest under the contract in favour of B. as security for an advance by B.; and the dresses were duly supplied to the company, *but before any moneys became payable under the contract the trader became bankrupt*; it was held, that the charge in favour of B. gave no title as against the trustees in bankruptcy of the trader, so far as it concerned moneys which might become due after the commencement of the bankruptcy. There was no debt due (r).

Upon the cases above cited and authorities given, together with the general convenience and reasonableness of such interpretation, it is submitted that the expression "debt or other legal chose in action" may be open to a generous interpretation so as to include within its meaning that wide class of interests which can, with any adequate show of reasoning, be brought under the operation of this sub-section.

(q) *Western Wagon, &c. Co. v. West*, (1892) 1 Ch. 271.

(r) *Wilmot v. Alton*, (1897) 1 Q. B. 17. See, also, *Ex parte Nichols*, 22 Ch. D. 782.

CHAPTER II.

REQUISITES OF A VALID ASSIGNMENT WITHIN THE ACT.

ASSUMING we are satisfied that the particular interest with which we may be dealing falls within the category of a "debt or other legal chose in action," it will yet remain for us to consider whether the transaction which was intended to transfer the interest from its owner to another was such as to satisfy fully the terms of the Act.

In other words, what constitutes a valid assignment under the Act? What are the requisites of the sub-section which must be complied with in order that the assignee may have recourse to the rights and remedies thereby conferred, and the debtor or other obligor may be protected, in the event of his paying the assignee, against all claims by the assignor or any other person, in respect of the subject-matter of the assignment?

The requisites are four:—

- (1) The assignment must be absolute.
- (2) It must not purport to be by way of charge only.
- (3) It must be by writing under the hand of the assignor.
- (4) Express notice in writing must be given of the assignment, to the person from whom the debt or other chose in action is to be recovered.

(1) *The Assignment must be Absolute.*

Again, the Act does not define the term, which it should have done. What is an *absolute* assignment?

What is an assignment within the meaning of the Act? No particular form is prescribed or suggested. No statement is made as to whether it should be under seal or not. Further, the mode of transfer under the Act appears to be permissive, not imperative, so that assignments of legal choses in action *may* be made as before the Act. And a further question arises as to whether legal choses in action, which were previously assignable at law by the modes indicated by their special enactments, may not be legally assigned by a mere writing under the sub-section, which is universal in its language, and, being subsequent in date, may override prior Acts (a). But it would appear that any writing which can be construed into a transfer of the subject-matter will do, provided it is in effect an out-and-out transfer of the benefit in the chose in action, and provided, also, the particular chose in action is not governed in its mode of transfer by some other statutory enactment. For, it will not be safe to conclude, apart from either a clear declaration by the legislature, or judicial decision, that any previous or subsequent Act is in any way to be affected by this sub-section of the Judicature Act in respect of any particular class of choses in action with which such Act specially deals. It is not necessary to use the word "assign" nor any other particular words, so long as the effect of the writing is to transfer the interest to the assignee. It may be by deed, or simple writing, declaring or directing that the subject-matter shall thereby vest in the person to whom it is intended to transfer it. It might be thought that an "absolute" assignment meant one which was wholly unconditional and complete; but this is not so. An assignment may contain a clause providing for the re-vesting of the chose in action, or the fruits or part of the fruits thereof, in the assignor upon the happening of some event or the

(a) Trower, Judic. Act, 48.

fulfilment of some condition, and yet such an assignment may be *absolute* (b). An assignment may be absolute within the meaning of the sub-section although a *trust* is created by it in respect of the fruits of the subject-matter of the assignment for the benefit of the assignor. Thus a deed was executed by creditors of B., by which, after recital of an agreement that their debts should be assigned to A. on the terms that he should proceed to recover the same, and pay to them respectively, out of the aggregate amount recovered, such proportionate part thereof as should represent the individual debt due to them respectively, or such part thereof as might have been recovered, it was witnessed that they assigned their respective debts to A., to hold the same absolutely. *Held*, this was an absolute assignment within the meaning of the sub-section. It was said, further, the *legal property* in the debts was intended to pass, leaving only a trust; and that therefore there was an assignment which purported to be absolute, and which the parties intended to be so. There was nothing enabling the Court to limit the plain words of the Act. The assignment, in question, was intended to give the assignee all the rights conferred by the sub-section, and did, not only in point of form (for it used the word "absolutely"), but also in intention of the parties, operate as an absolute assignment (c). So, too, a mortgage may be within the sub-section, as being an absolute assignment, although subject to a proviso for redemption (d); but it must transfer the property to the mortgagee. Previously to this Act, it was held that a cheque was not an equitable *assignment* of the drawer's

(b) *Burlinson v. Hall* [1884], 12 Q. B. D. 347; *Ibberson v. Neck* [1886], 2 T. L. R. 427. See, also, *Buck v. Robson*, 3 Q. B. D. 686; *Ex parte Hall*, *In re Whitting*, 10 Ch. D. 615; *Walker v. Bradford Bank*, 12 Q. B. D. 511.

(c) *Comfort v. Betts*, (1891) 1 Q. B. 737; *Wiesener v. Rackow*, 76 L. T. 448. And see *In re Bell*, *Jeffery v. Sayles*, (1896) 1 Ch. 1.

(d) *Tancred v. Delagoa Bay Rail. Co.* [1889], 23 Q. B. D. 239.

balance at his banker's (*e*), and it has been held, since the Act came into operation, that the law in respect of a cheque not being an assignment, is not altered by the Act (*f*). A cheque is not an assignment of money in the hands of a banker; it is a bill of exchange payable at a banker's. The banker is bound by his contract with his customer to honour the cheque, when he has sufficient assets of the customer in his hands; and if he does not fulfil his contract he is liable to an action by the drawer for damages. A cheque is a request to pay, and nothing more; it does not purport to be an assignment. There is no contract and no privity between the banker and the payee.

And so in respect of bills of exchange; generally, it is expressly enacted by the Bills of Exchange Act as follows:—

- (1) A bill, of itself, does not operate as an assignment of funds in the hands of the drawee available for the payment thereof, and the drawee of a bill who does not accept as required by this Act, is not liable on the instrument. This sub-section shall not extend to Scotland.
- (2) In Scotland, where the drawee of a bill has in his hands funds available for the payment thereof, the bill operates as an assignment of the sum for which it is drawn in favour of the holder, from the time when the bill is presented to the drawee (*g*).

But such an assignment can be effected by a collateral agreement, with that express purpose, in respect of the bill of exchange. In such cases, when such a collateral agreement is intended to be relied on as creating a

(*e*) *Hopkinson v. Forster* [1874],
L. R. 19 Eq. 74.

(*f*) *Schroeder v. Central Bank of
London* [1876], 34 L. T. 735.

(*g*) 45 & 46 Vict. c. 61, s. 53.

Cp. Shand v. Du Buisson [1874],
L. R. 18 Eq. 283.

specific charge on any part of property of the drawer, it is most important that the words creating such collateral agreement should be clear, precise, and authoritative (*h*).

Of course, a *future* debt, or moneys not yet become due, may be absolutely assigned within this sub-section (*i*). Formerly, it was held that the assignment of a mortgage by the mortgagee to his trustees, with a proviso for the re-assignment of the mortgage to him in a certain event, was *not* an absolute assignment within the meaning of the Act (*j*); but this view is no longer held, as will be seen immediately (*k*).

The expression "absolute assignment" has to be taken, however, in conjunction with another condition or requisite of a valid assignment under the Act, namely,

(2) *The Assignment must not purport to be by way of Charge only.*

The words are "not purporting to be by way of charge only." The assignment must be absolute, that is, it must not be conditional. The Act does not mean that it must not be defeasible on repayment. The fact that the assignment is by way of mortgage does not prevent its being absolute; and an assignment by way of mortgage gives an absolute right to sue, although there may be a proviso for redemption. The sub-section says nothing about a mortgage; but simply "not by way of charge only." A "charge" indicates only a particular property, and is a mere appropriation, and not a

(*h*) *Thomson v. Simpson* [1870], L. R. 5 Ch. Ap. 662.

(*i*) *Brice v. Bannister* [1878], 3 Q. B. D. 569; *Buck v. Robson*, 3 Q. B. D. 687.

(*j*) *National Provincial Bank v. Harle* [1881], 6 Q. B. D. 626; see, also, *Re Sutton's Trusts*, 12

Ch. D. 175; *Southwell v. Scotter*, 49 L. J. Q. B. 356; *Knill v. Procter*, 33 W. R. 163; *Walker v. Bradford Bank*, 12 Q. B. D. 511.

(*k*) *Tancred v. Delagoa Bay Rail. Co.* [1889], 23 Q. B. D. 239; *Durham v. Robertson*, (1898) 1 Q. B. 765. And see also *post*, pp. 168 *et seq.*

transfer of the property. For a *charge* is created when real or personal property is expressly or constructively made liable or is specially appropriated to the discharge of some burthen, or is declared to be subject to a lien for securing the same, but does not pass the property in the subject-matter of the security to the creditor. And neither an equitable right of redemption nor a liability to account prevents an assurance from being absolute (1). But it was asked, what is the meaning of the words "purporting to be by way of charge only"? Do they mean an assignment which expresses *on the face* of it that it is made "by way of charge only," or do they mean an assignment which, *coupled with all the surrounding circumstances*, shows that it is by way of charge only? It was said, cases might arise which would require a careful consideration of that question. And now, after considerable conflict of authority, it has been decided that a mortgage of a debt or chose in action made in the ordinary form of an assignment with a proviso for redemption, or in the form of an assignment by way of trust, is "an absolute assignment (not purporting to be by way of charge only)" within the meaning of the sub-section. And further, where there is an absolute assignment of a debt, *but by way of security*, a right to a re-assignment on redemption will be implied, and the sub-section is applicable to such an assignment.

In the most recent case upon the point in question, a firm of builders delivered to a creditor a document in the following terms:—"Re Building Contract, South Lambeth Road.—In consideration of money advanced from time to time we hereby charge the sum of 1,080*l.*, which will become due to us from J. R. on the completion of the above buildings, as security for advances, and we hereby assign our interest in the above-men-

(1) Fisher, Mortgage, 3rd ed. pp. 3, 77.

tioned sum until the money with added interest be repaid to you." The creditor gave notice to J. R., and subsequently brought his action against him to recover the amount. *Held*, that the above document was not an "absolute assignment (not purporting to be by way of charge only)" within the sub-section, and that the creditor (the plaintiff) could not recover in the action.

The assignment was not absolute, but was an assignment until the happening of an event. And it was said that it is requisite that the assignment should be, or at all events purport to be, absolute, but it will not suffice if the assignment *purport* to be by way of charge only (*m*).

In an earlier case, as it has been pointed out, it was decided that a mortgage of debts due to the mortgagor, made in the ordinary form with a proviso for redemption and reconveyance upon repayment to the mortgagee is an absolute assignment within the Act (*n*). In that case attention was drawn to an important point, namely, that by the Conveyancing Act, 1881, the receipt of a mortgagee is sufficient discharge for any money comprised in his mortgage or arising thereunder (*o*); and that this shows that the mortgagee is entitled to demand payment of the mortgage money from the person liable to pay that money. It was further stated that a document given "by way of charge" is *not* one which absolutely transfers the property with a condition for reconveyance, but is a document which only gives a right to payment out of a particular fund or particular property, without transferring that fund or property (*n*).

In a well-known judgment, the difference between lien, pledge, and mortgage has been distinguished, and

(*m*) *Durham v. Robertson*, (1898) 1 Q. B. 765. *Co.*, *supra*. And see *Burlinson v. Hall*, 12 Q. B. D. 347.
 (*n*) *Timercd v. Delagoa Bay Rail.* (*o*) 44 & 45 Vict. c. 41, s. 22.

there a mortgage was referred to as passing the property out and out (p).

A mortgage is not mentioned in the sub-section of the Act; but where there is an absolute assignment of the debt, the limiting words of the Act as to a charge only are not sufficient to exclude a mortgage from the benefit of the sub-section.

A conditional assignment is one in which the repayment of the money is often contingent upon the happening of an uncertain event.

On the other hand, where the Judicature Act applies (and is complied with) it does not leave the original debtor in any uncertainty as to the person to whom the legal right is transferred; nor does it involve him in any question as to the state of accounts between the mortgagor and the mortgagee. The legal right is transferred and is vested in the assignee. There is no machinery provided by the Act for the reverter of the legal right to the assignor dependent on the performance of a condition; the only method within the provisions of the Act for the reversion in the assignor the legal right is by a re-transfer to the assignor followed by a notice in writing to the debtor, as in the case of the first transfer of the right. The question is not one of mere technicality or of form; it is one of substance, relating to the protection of the original debtor and placing him in an assured position (q).

In respect of valid assignments not falling within the operation of the statute, the position of the original debtor is still likely to be anything but assured, as may be seen in the former chapter on "Assignments in Equity."

(p) *Halliday v. Holgate* [1868],
L. R. 3 Ex. 299.

(q) *Durham v. Robertson*, (1898)
1 Q. B. 773, *per* Chitty, L.J.

(3) *The Assignment must be by Writing, under the hand of the Assignor.*

Under the Judicature Act the assignment must be in writing signed by the assignor; although in equity, as we have seen, the assignment might have been and still may be by parol (*r*). The whole sub-section refers only to debts and other legal choses in action which have been assigned in writing (*s*). And an assignee in order to show that the debt or other legal chose in action is his and that he may sue upon it must, under the Act in question, prove the assignment in writing; he must prove the assignment to be to himself, if suing upon it, in order to recover judgment. The assignment is part of the cause of action. Indeed it is necessary for the assignee to allege expressly in his statement of claim (*inter alia*) that the assignment was made to him by writing under the hand of the assignor (*t*).

Presumably, any informal writing will be sufficient if it otherwise complies with the sub-section (*u*). But the words of the writing must show a clear intention to transfer the subject-matter to the assignee; and it must be sufficiently imperative in its phraseology to impose upon the original debtor or other fund-holder the duty of payment, when the date of payment arrives, to the assignee and not to the assignor. It must be authoritative and decisive; a mere suggestion or optional request, or any words which render its purport reasonably uncertain may be held not to bind the debtor (*v*).

(*r*) *Heath v. Hall*, per Mansfield, L.C.J. [1812], 4 Taunt. 328; 2 Rose, 271; 13 R. R. 610.

(*s*) *In re Sutton's Trusts*, 12 Ch. D. 175.

(*t*) *Blake - Odgers*, Pleading [1897], 80. See, also, *Seear v. Lawson*, 15 Ch. D. 426; 16 Ch. D. 121; *Wallis v. Smith*, 51 L. J. Ch. 577; *Re Richardson*, 30 Ch. D.

396, 397.

(*u*) *Brice v. Bannister*, 3 Q. B. D. 569; *Buck v. Robson*, *Id.* 686; *Drew v. Josolyne*, 18 Q. B. D. 590; *Ingle v. McCutchan*, 12 Q. B. D. 519.

(*v*) *Lett v. Morris*, 4 Sim. 607; 33 R. R. 156; *McGowan v. Smith*, 26 L. J. Ch. 8; *Watson v. Duke of Wellington*, 1 Russ. & M. 602; 32 R. R. 293.

A mere promise to pay the creditor when a particular fund or debt is recovered, is no assignment of that fund or debt (*u*). The debt or other chose in action must be clearly indicated and identifiable (*x*). Care should be taken to avoid making the assignment in the shape of either a bill of exchange, promissory note, cheque, bill of sale or of any other formal document, whereby it may either cease to be within the operation of the sub-section or be invalid because not all the formalities necessary for the particular instrument have been adequately complied with. But it may be here stated, incidentally to the question of assignments in general, that the presence in a contract of an express condition, that it "shall not be assignable in any case whatever," will not prevent the assignment of the beneficial interest derivable therefrom (*y*). The Act speaks of "writing," and, unless any statute requires it to be under seal, it would appear that any writing not under seal will do. But nothing is said as to the assignment being contained in one document. And the question may arise as to whether it would be permissible for the assignee to make out the assignment by the assignor to him, by connecting several documents, such as a course of correspondence, which, taken together, might be construed as effecting the transfer of a debt or other legal chose in action? Might the assignee be allowed the same liberty in proving the written assignment as is given to one who has to make out a memorandum in writing under the Statute of Frauds? Or, does the Act contemplate only one document directly drawn up for the purpose of transfer, with an intention therein

(*u*) *Jones v. Starkey*, 16 Jur. 510; *Field v. Megaw*, L. R. 4 C. P. 660.

(*x*) *Percival v. Dunn* [1885], 29 Ch. D. 128; *In re Irving*, 7 Ch. D. 419; *Tailby v. Official Receiver*, 13 Ap. Ca. 523; *Southwell v.*

Scotter, 49 L. J. Q. B. 356; *Buck v. Robson*, 3 Q. B. D. 386; *Drew v. Josolyne*, *supra*; *In re Clarke*, 36 Ch. D. 348; *In re Sheppard*, (1893) 3 Ch. 502.

(*y*) *In re Turcan*, 40 Ch. D. 5.

clearly set out to that effect? It is submitted that this question, which might at any time arise, is open to the consideration of the Courts.

Again, the Act expressly says "under the hand of the assignor," and does not, as is so often the case in similarly constructed enactments, go on to say "or his agent thereunto lawfully authorized." And it is submitted that the sub-section may be directly and intentionally aimed at excluding the signature of every other person save the assignor personally. It may well be thought that while the legislature conferred on the assignee the convenience of his bringing the action in his own name, and desired to render the original debtor's position more sure by compelling express, written notice of the assignment to be sent to him, it also may have contemplated the desirability of relieving the debtor from the anxiety of discovering whether the person (other than the owner-assignor) who signed the assignment on behalf of the actual assignor was or was not duly authorized so to act. For, supposing there were an assignment by writing under the hand of a person presumably acting on behalf and by the authority of the assignor, and notice thereof were duly given to the debtor, and the debtor, unable to discover the assignor, and not knowing if the signature were authorized and yet undesirous of being sued, should pay the debt to the apparent assignee, it might happen that his creditor, or his creditor's executor or administrator, might lawfully demand payment of the debt from him, in consequence of the signature of the agent not having been duly authorized; or, what would amount to the same thing, because the signature was disputed by the creditor or his representatives, and the debtor could not show that it was authorized.

To avoid this and many other difficult and uncertain positions in which the original debtor might be placed, it may have been the intention of the legislature to say

to the assignee, "You must get the actual signature in some shape or other of the assignor himself, and no other will be effectual"; to the original debtor, "You shall not be disturbed or bound by any other signature than that of the assignor"; and to the assignor, "You shall not be deprived of your debt, &c., by any other writing than that under your *own* hand." At least, it is possible, and as the question has not yet arisen in any case known to the present writer, it is considered of sufficient importance to be mentioned in this place.

There is yet a further question of some interest. The Act says "under the hand of the assignor," not "signed by the assignor."

Supposing the assignor took an ordinary business memorandum form, or invoice, or bill-head, or any other slip of paper and on which his name was written or printed, and then wrote out upon it words which would be a valid assignment under the Act, *but did not otherwise sign it*. Could such a document be said to be "under the hand of the assignor" within the meaning of the sub-section? We know that a memorandum in writing, as required by the Statute of Frauds to be *signed*, may sometimes be sufficient if made in such a manner as just indicated, but would it do for the Judicature Act? Do not the words of the sub-section actually require *the signing* of his name by the assignor personally and expressly? By the Bankruptcy Act, 1869, the leaseholds of a debtor liquidating under that Act (s), were absolutely vested in the trustees on their appointment, subject to their right to disclaim, and the trustees were personally liable on the covenants unless they had made a valid disclaimer. The words authorizing the right of disclaimer were (a), "the trustee . . . may, *by writing under his hand*, disclaim, &c."

(s) Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), ss. 17, 23, 24.

(a) *Id.* s. 23.

A letter signed by the *solicitor* of the trustees in his own name was *held* to be not a writing under the hand of the trustees sufficient for the purposes of disclaimer within sect. 23 of that Act (b). And it was said in that case that to hold otherwise would be to modify the language of the section by reading for "under his hand," "under his hand or under the hand of his agent."

And in an earlier case, it was said there may be cases in which a statute may require *personal signature* (c). For example, it was so held in a case within Lord Tenterden's Act, which requires the acknowledgment or promise to be contained "in some writing to be signed by the party chargeable thereby" (d). An *agent* of a debtor signed an acknowledgment. *Held*, not a signature sufficient to satisfy the statute, and that the debtor must sign it himself (e). And it was said that the omission of the word *agent* from the enacting part could not be esteemed accidental. That statute meant, it was said, to exclude the question of agency altogether. Similar distinctions are made in the Statute of Frauds. Sections three, four, five, and seventeen of that Statute, provide for signature by an agent; but section seven says that a declaration of trusts of any lands shall be in writing "*signed by the party*." And these various sections, to go no further, clearly indicate that the legislature well knows how to express the distinction, not only between a signature by the party and a signature by his agent, but also to describe the *different modes* by which agents for different purposes are to be appointed (f).

By 6 & 7 Vict. c. 18, s. 100, every person sending a notice of objection under the Registration Acts was required to send it in certain form, and "every notice of

(b) *Wilson v. Wallani and others* [1879, 1880], 49 L. J. Ex. 437; 5 Ex. Div. 155.

(c) *Reg. v. Justices of Kent* [1873], L. R. 8 Q. B. 307.

(d) 9 Geo. IV. c. 14, s. 1.

(e) *Hyde v. Johnson* [1838], 2 Bing. N. C. 776.

(f) *Id.* 779. See, also, *Whippy v. Hillary*, 3 B. & Ad. 399; 37 R. R. 450.

objection *shall be signed by the person objecting.*" *Held*, that such notice must be signed *personally* by the objector, ~~that being the intention~~ of the legislature (g).

Similar remarks apply to the statutes 21 Jac. 1, c. 16; 3 & 4 Will. IV. c. 2, s. 42, and 3 & 4 Will. IV. c. 42, s. 5, and to many others.

The words of Tindal, C.J., in a case above quoted may be aptly placed here: "Some inconveniences have been pressed in the course of the argument upon our attention, in cases where a total inability of parties to sign may exist; but the nature of the signature which is necessary to comply with the requisites of the statute, is such, as to make it almost impossible to suppose a case in which a party could not make such a signature as would satisfy the statute. And, after all, in construing a statute, we must not look to cases of very rare and singular occurrence, but to those of every day's experience; and whatever may be the consequence, we must interpret the statute according to the plain import of the language employed in it" (h).

It is, of course, obvious that "assignor" means the person actually assigning the subject-matter of the assignment, and that this does not necessarily imply the actual beneficial owner. It may be a trustee, executor, administrator, trustee in bankruptcy; but it may, equally, be a prior assignee, or any of the legal representatives of the foregoing, among many others.

The next and last requisite of a valid assignment under this sub-section is—

- (4) *Express notice in writing of the assignment must be given to the person from whom the assignor would have been entitled to claim the chose in action.*

That is to say, the notice must be given to the person against whom the assignor would have been entitled

(g) *Toms v. Cuming*, 7 M. & G. 88. (h) *Hyde v. Johnson*, *supra*, 780.

(had he not assigned his interest) to have demanded the payment of the debt or to have reclaimed the chose in action or the full benefit of or arising therefrom.

The important effect of this part of the sub-section cannot be over-estimated. As we have already seen, in equity notice to the debtor or other obligor was not necessary to make the assignment perfect as between the assignor and assignee (*i*); nor, indeed, was it essential as between assignee and debtor. If the debtor had not paid the assignor and had not received any notice from anyone at all, he would be bound by the assignment in equity (*j*). It was only to protect the assignee against subsequent assignments by the assignor, and to insure the debtor against possible claims by other persons, that the notice was required to be given. And if no notice and no claims, the assignor and debtor were always bound by the assignment.

Again, in equity, any kind of notice, verbal or written, or constructive, was sufficient. If the assignment had come to the knowledge of the debtor, however casually or remotely, in any slipshod or side-way manner, such knowledge was held to affect his conscience; of which there may be doubt, but it is quite certain it was often made to affect his purse by compelling him to pay twice.

But by the Judicature Act not only is notice compulsory, but it must be express, in writing, and given to the debtor; and, what is most important of all, the Act confers no title or right upon the assignee *until* the statutory notice has been given.

The term "express notice" is doubtless employed by way of opposition to notice arising by implication or operation of law, and to what was known in equity as constructive notice. It means a notice which indi-

(*i*) *Newman v. Newman*, 28 Ch. D. 678; *Gorrings v. Iruell*, 34 Ch. D. 128; *Donaldson v. Donald-*
w.

son, Kay, 711; *Re Patrick*, (1891) 1 Ch. 82.

(*j*) *Ward v. Duncombe*, (1893) Ap. Ca. 369.

cates an express intention—a direct and definite statement of a thing, as distinguished from supplying materials from which the existence of such a thing may be inferred (*k*). But does it not necessarily mean knowledge? The two terms “notice” and “knowledge” are often opposed and distinguished in law (*l*). The present Act does not say that the assignment is to be brought to the knowledge or understanding of the debtor, but that notice of it is to be given to him. But what is meant by “given”? Does it mean that the notice must be proved to reach the debtor, or will it be sufficient to show that the notice was sent in a proper way? Would it do to send a notice by telegram to the debtor? or by post, not registered? Would it be sufficient to send the notice to the debtor’s last known address? Supposing the assignor had given an address at which the debtor had not resided or carried on business, and the assignee sent notice to that address, which notice was not returned, but which subsequently was clearly shown never to have come into the hands of the debtor, would it be said that statutory notice had been given to the debtor? When an offer is accepted, and communication of that acceptance is properly sent by post, both parties to the contract are bound by the acceptance, although the notice of acceptance may never reach the offeror; as, for example, the vessel carrying it may be lost, or the letter intercepted and stolen (*m*). Would a notice of the assignment be sufficient to effectually satisfy the statute if it were thus properly addressed, directed, prepaid and dispatched to the debtor, and yet subsequently proved conclusively never to have reached

(*k*) See *Burgh v. Legge*, 5 M. & W. 420; *Vallée v. Dumergue*, 18 L. J. Ex. 398.

(*l*) See 45 & 46 Vict. c. 39, s. 3; *Mildred v. Maspons*, 53 L. J. Q. B. 38, 40; *May v. Chapman*, 16 M. & W. 355; *Raphael v. Bank of*

England, 17 C. B. 161; *Re Cousins*, 31 Ch. D. 671.

(*m*) *Household Insurance Co. v. Grant* [1879], 4 Ex. Div. 216; *Henthorn v. Fraser*, (1892) 2 Ch. 27.

him? Could it be said to be "*given* to the debtor, &c."? or does "*given*" here mean "*received by*"? A very difficult case might easily arise.

Notice otherwise adequately fulfilling the statutory requirements might be sent by the assignee to the debtor by registered post, and through miscarriage never reach the debtor; a subsequent notice of a similar kind might be sent by a subsequent innocent assignee of the same subject-matter and reach the debtor. Supposing the debtor, acting upon the second notice, paid the debt to assignee No. 2, not having received the first notice, would he be able successfully to plead payment to assignee No. 2, by way of defence to an action against him for the debt by assignee No. 1? It is submitted, that this is a question of very great importance, and may, at any time, affect grave issues. We are dealing not with an equitable principle, but with the language of an Act, and consequently have to construe strictly the import of the sub-section. In the hypothetical case above stated, the debtor or trustee would be in a dilemma, and might be hit whichever way he moved. If, before paying to assignee No. 2, he learned the real facts, perhaps his best course would be to pay the fund into Court, and interplead under the proviso that might relieve him; but the assignees *inter se* would be in the same muddle, each contending that the other had a prior claim. On the other hand, if the statute means that the debtor is not to be bound until the notice *reaches* him, it practically imposes upon the assignee the necessity of personal service of the notice of assignment, or the duty of proving otherwise that the debtor has actually received the notice. The matter is a serious one, for until the statute has been complied with in this respect, it would appear that the legal right to the chose in action still remains in the assignor. It may be that the legislature intended that "*given to*" should mean "*reach,*" and

that the notice must be brought to the debtor's knowledge, so as to affect his conduct in regard to dealing with the fund. It would seem the more reasonable to suppose that that was what *ought* to be done; but it has not said so, and the answer to the question must remain in doubt. It is submitted, under the circumstances, that no assignee may be safe in his title unless and until he can show that the debtor has actually *received* the notice; and if that be so, nothing short of personal service, or the debtor's actual acknowledgment of the notice, may be sufficient to safeguard the assignee against another and subsequent claimant of the fund.

It is to be regretted that, upon so important a point, the language of the sub-section is not more precise and explanatory as to its meaning and requirement.

Again, it does not limit the time within which the notice is to be given, and therefore, apart from any other matters affecting it, it may be given presumably at any time; it has been decided, that the mere death of the assignor before notice given does not affect the validity of the notice (*n*). But, it is submitted, that if the assignee neglected to give notice before the assignor's death, and the assignor by his will *bequeathed* the debt, or chose in action (which had been the subject-matter of the assignment) to a third person, the assignee might probably be entitled, under the Act, to nothing from the debtor in consequence of the legatee having acquired a perfect title before the assignee completed his by notice. The same difficulties might have arisen against the assignee before 1882 in regard to an assignment under the Act by a *feme sole* who married after the date of such assignment, but before notice given. Trouble still may arise in relation to the assignor's bankruptcy before notice given. Consequently,

(*n*) *Walker v. Bradford Old Bank*, 12 Q. B. D. 511; and see *Dibb v. Walker*, (1893) 2 Ch. 429.

it is advisable for the assignee to make it his business to give statutory notice to the debtor at the earliest moment, and to obtain, at the same time, satisfactory evidence that the notice has *reached* the debtor's knowledge.

The Act does not say who is to give the notice, but it is usual for the assignee to do so. It should be some person of authority, although there is nothing in the Act to prohibit an express notice being given by some third person so as to be binding on the debtor.

Yet it is submitted that the proper person to give the statutory notice is the assignor, assignee, or the duly authorized agent of either of them. It must, at least, be someone of such authority as to put the debtor on inquiry, and impose upon him the duty of holding the money on behalf of the assignee. Upon the whole question of notice and title it may be that the Courts would still be inclined to take the same view as was formerly regarded by Courts of Equity, and hold that although as between the debtor and assignee the notice may be given, and is effectual, at any time before action brought, yet, if by the death of the assignor, or by any act of his during his lifetime, the subject-matter of the assignment is transferred to the debtor or to any other person who completes his legal title, before the original assignee gives notice, the original assignment will be ineffectual, on the ground that everything has not been done which might and should have been done to perfect the original assignee's legal title, and upon the principle expressed by the equitable maxim *Vigilantibus non dormientibus jura subveniunt* (o). Book debts can only

(o) *Lee v. Magrath* (1882), 10 L. R. Ir. 46, 313; *Harding v. Harding*, 17 Q. B. D. 442; *Read v. Brown*, 22 Q. B. D. 128; *Sewell v. Moxey*, 2 Sim. N. S. 189; *Hudson v. Fernyhough*, 61 L. T. N. S. 722; *Godefroi on Trusts* [1891], 73. See, also, *Nanney v. Morgan*

[1887], 37 Ch. D. 346; *Fortescue v. Barnett*, 3 My. & K. 36; *Gason v. Rich*, 19 L. R. Ir. 391; *Donaldson v. Donaldson*, Kay, 711; *Re Lucan*, 45 Ch. D. 470; *Re Patrick*, (1891) 1 Ch. 82; *Re Seaman*, (1896) 1 Q. B. 412.

be taken out of the "order and disposition" of the assigning creditor by notice (on behalf of the assignee) to the respective debtors (*p*). And again, where A. assigned to B. a debt; and B. gave no notice, but brought action against the debtor, and then applied for leave to amend the writ by joining the assignor as a party, the application was refused, for in the meantime the Statute of Limitations had run out in favour of the debtor (*q*).

And notice to a debtor who has given a negotiable instrument in payment of his debt, that the debt has been assigned by the creditor, may be disregarded, if the creditor still retains the instrument (*r*).

There is one other point that should be noted in this connection. Upon action being brought by the assignee alone against the debtor, trustee, &c., the assignee must expressly allege that such express notice in writing of the assignment has been given to the debtor, trustee, &c. Otherwise, the case is not brought within the statute, and the plaintiff has no right of action (*s*).

We have seen that formerly it was generally essential to the validity of an equitable assignment that it should be supported by valuable consideration, and the same still holds good in respect of assignments not falling within the operation of the Act. Without such consideration there was no ground for the interference of a Court of Equity, which seldom intervened on behalf of volunteers.

A *voluntary* transfer of a chose in action was formerly held to be in the nature of an executory contract without consideration to support it, and thus incomplete (*t*).

(*p*) *Tailby v. Official Receiver*, 13 Ap. Ca. 534; *Re Seaman*, (1896) 1 Q. B. 412; *Re Gostz*, (1898) 1 Q. B. 794.

(*q*) *Hudson v. Fernyhough*, 61 L. T. 722.

(*r*) *Bence v. Shearman* [1898],

78 L. T. 804.

(*s*) *Blake-Odgers on Pleading* [1897], 80; *Sear v. Lawson*, 16 Ch. D. 121; *Wallis v. Smith*, 51 L. J. Ch. 577; *Read v. Brown*, 22 Q. B. D. 128.

(*t*) *Meek v. Kettlewell*, 1 Harc.

But it is now decided that a binding and effectual voluntary disposition may be made, whether the property be capable or not of manual delivery, whether it be in possession, in reversion, in expectancy, or otherwise situated. The Court, however, still requires that if the subject-matter of the intended gift be capable of legal transfer, all the formalities necessary to vest a complete legal title in the donee shall be strictly complied with (*u*); and that if it be incapable of legal transfer, the assignor shall have done everything in his power to complete the assignment, and have left undone nothing material thereto (*v*).

But in all cases of assignments within the operation of the Judicature Act, 1873, sub-s. 6, s. 25, which are valid in all other respects, valuable consideration is not necessary, and, therefore, need not be proved (*w*).

Having reviewed the requisites of a valid assignment under the Act, let us briefly consider the effects of fully complying with the statute; and the consequences of failing to do so.

The sub-section says that an assignment of a chose in action coming within its operation is effectual in law:—

- (1.) To pass and transfer *the legal right* to such chose in action to the assignee from the date of notice given to the debtor, &c.;
- (2.) To pass and transfer similarly *all legal and other remedies* for such chose in action; and
- (3.) To confer upon the assignee the power to give a good discharge for the same,

without the concurrence of the assignor. But that such

464; *Holloway v. Headington*, 8 Sim. 324; *Ward v. Audland*, 8 Beav. 201; *Kekewich v. Manning*, 1 De G. M. & G. 176; *Foyle v. Hughes*, 2 Sm. & G. 18; *Godefroi on Trusts* [1891], 65.

(*u*) *Bentley v. Mackay*, 15 Beav. 18.

(*v*) *Kekewich v. Manning*, *supra*; *Harding v. Harding*, 17 Q. B. D. 442, 445; *Lee v. Magrath*, 10 L. R. Ir. 49; *Godefroi*, 65.

(*w*) *Lee v. Magrath*, *supra*; *Walker v. Bradford Old Bank* [1884], 12 Q. B. D. 511.

assignment shall be subject to certain rights on the part of the debtor, trustee, or other person liable in respect of such chose in action, namely,—

- (4.) The debtor, &c. may set off against such assignment all equities which would have been entitled to priority over the right of the assignee if the Act had not passed.
- (5.) Where the debtor, &c. has had notice that such assignment is disputed by the assignor, or any one claiming under him, or notice of any other opposing or conflicting claim to such chose in action, he (the debtor, &c.) shall, if he think fit, be entitled,—
 - (a) To make the claimants interplead concerning the chose in action; or
 - (b) To pay the sum into the High Court in conformity with the provisions of the Acts for the relief of trustees.

(1.) As we have already pointed out, the Act transfers the *legal right* to the chose in action, and places the assignee in the same position as the assignor was previously to the assignment. Consequently, the assignee can assign or transfer it to another in his own name, and without the concurrence of the original assignor; and in like manner he can sue for its recovery, or dispose of it by will, &c. as freely as if it had originally been created in his favour and he privy to the original transaction.

(2.) The legal and other remedies transferred by the Act will be considered in a later division of this work (x).

(3.) This is of the greatest value and importance to the assignee and the debtor alike, for it protects the debtor against any further claim by reason of the non-concurrence of the assignor in such receipt; and it also benefits the assignee by removing the necessity for such con-

(x) See "Practice," *post*, Bk. VII.

currence, and by inducing the debtor to part with the fund in return for such discharge.

(4.) Little need be said upon this. The effect of it is simply to place the debtor, &c. upon exactly the same equitable footing in relation to the statutory assignee as he was, previously to the Act, in respect of an assignee in equity. What that position is has been fully dealt with in an earlier division of this work, and to it reference may be made. The effect of the statute is to let in all "equities" up to the time of giving the statutory notice.

(5.) In regard to this, all that is necessary to state here is the fact that the protection given only refers to cases where there has actually been a written assignment under the Act; it does not, presumably, relate to conflicting claims where no *assignment* of the chose in action has been effected (*y*). The practice and procedure involved in this proviso will be found fully set forth in the final division of this work.

What are the consequences of an assignment of a chose in action where either the subject-matter does not fall within the sub-section of the Act, or the requirements of the Act have not been complied with?

They may be briefly stated thus. It is obviously useless for the assignee to sue under the Act; he must proceed in the same manner and take such steps as were available, in the circumstances, before the passing of the Act. He must sue in the name of the assignor if the subject-matter of the suit is a *legal* chose in action, and if it is an *equitable* chose in action, then he may sue in his own name and join the assignor either as a co-plaintiff or defendant in the proceedings.

The modes of procedure in such cases will also be found in the final division of this work.

(*y*) *Re New Hamburg & Brazilian Rail. Co.*, [1875] W. N. 239 : *Lacey v. Ireland*, [1876] W. N. 24.

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CHAPTER III.

CHOSSES IN ACTION MADE ASSIGNABLE BY STATUTE, SINCE THE ACT.

IN a former Chapter we set out the chief statutes affecting the assignability of choses in action before the Judicature Act of 1873. And in that Chapter many of the statutory enactments subsequent to the Judicature Act were anticipated for the sake of convenience. In the present place it is proposed to cite those statutes (not dealt with in the former Chapter) enacted since the Act of 1873, which render certain choses in action assignable.

Local Loan Debentures.—By the Local Loans Act, 1875, local authorities may raise loans by the issue of debentures payable to bearer and transferable by delivery.

“The principal sum may be made payable to the bearer of the debenture, or to a person to be named therein, his executors, administrators, or assigns.

“A debenture in which the principal sum is made payable to bearer shall be transferable by delivery.

“A debenture in which the principal sum is made payable to a person named therein, his executors, administrators, or assigns, is in this Act referred to as a nominal debenture, and shall be transferable by writing in manner directed by the local authority.

“There may be attached to a debenture under this Act, or be thereafter issued in respect thereof, or partly

in one way and partly in the other, coupons making the interest as therein mentioned payable to the bearer of each coupon, or to the person named in each coupon or his order, or the interest on a debenture may be made payable to the owner for the time being of such debenture, or may be otherwise made payable in such manner as in the said debenture mentioned.

“A coupon making the interest therein mentioned payable to the person named therein or his order is in this Act referred to as a coupon payable to order” (a).

“The title of any person to any share in debenture stock shall be evidenced by the entry in the register as in this Act mentioned of the name of such person as owner of such share.”

“Debenture stock shall have all the incidents of personal estate, and shall, subject to the provisions of the Act, be transferable by writing in manner directed by the local authority.

“The interest on any share of debenture stock shall be recoverable by the owner of such share in the same manner in all respects as if such interest were an annuity of like amount secured to him by an annuity certificate under this Act.”

“The local authority may, if it thinks fit, on the application of the owner of any share in debenture stock, grant to him a certificate of title to his share in such stock, or any part of such share, with coupons attached entitling the bearer of the coupons to the interest on the share or part of a share specified in such certificate.

“A certificate of title to a share in debenture stock under this section (in this Act called a stock certificate to bearer) shall entitle the bearer to the stock therein described, and to the interest thereon, and shall be transferable by delivery.

"Any share in stock in respect of which a stock certificate to bearer has been issued shall, so long as such certificate is outstanding, cease to be dealt with through the medium of the register" (b).

"An annuity certificate under this Act shall be an instrument taking effect as a deed, and charging the local rate or property in such certificate specified with payment, as in the certificate mentioned, of the annual sum therein specified."

"The annual sum may be made payable to the bearer of the certificate or to a person to be named therein, his executors, administrators, or assigns."

"An annuity certificate in which the annual sum is made payable to the bearer shall be transferable by delivery."

"An annuity certificate in which the annual sum is made payable to a person named therein, his executors, administrators, or assigns, is in this Act referred to as a nominal annuity certificate, and shall be transferable by writing in manner directed by the local authority" (c).

The Act also provides that the remedy for non-payment is to be by action and mandamus and the appointment of a receiver (d).

And further enacts, "A coupon payable to order, which, when presented for payment, purports to be indorsed by the person named therein, shall be a sufficient authority to the person paying the money to pay the amount due in respect of such coupon to the bearer thereof, and it shall not be incumbent on the person paying such coupon to prove that such indorsement or any subsequent indorsement was made by or under the direction or authority of the person who is named in the coupon, or to whom the coupon was made payable by any indorser."

"Where a coupon bears across its face an addition in

(b) 38 & 39 Vict. c. 83, s. 6. (c) *Id.* s. 7. (d) *Id.* ss. 11, 12.

written, printed, or stamped letters of the name of any banker or of the words 'and company' in full or abbreviated, between two transverse lines, such addition shall be deemed to be a material part of the coupon, and have the force of a direction to the person by whom such coupon is to be paid that the same is to be paid only to or through the banker named, or if none is so named, to or through some banker, and the same shall be payable only to or through the banker named, or some banker" (e).

"A local authority issuing nominal debentures, nominal debenture stock, or nominal annuity certificates under this Act shall cause a register of such securities to be kept in one or more book or books, and there shall be entered in such register—

- (1.) The names and addresses and the descriptions of the owners for the time being of every such security, with a statement of the securities held by each person registered; and
- (2.) The date at which the name of any person was entered in the register in respect of any such security.

"The register under this section shall be evidence of any matters by this Act directed or authorized to be inserted therein" (f).

"If any security issued under this Act is lost, mislaid, or destroyed, the local authority shall, on such indemnity being given as they may require, and on payment of the expense of the issue, issue a fresh security in the place of the security so lost, mislaid, or destroyed" (g).

This Act also repealed the County Debentures Act, 1873 (36 & 37 Vict. c. 35) (h).

It must be observed that a debenture or bond of a company or other corporate body does not import any

(e) 38 & 39 Vict. c. 83, s. 18.

(f) *Id.* s. 23.

(g) *Id.* s. 33.

(h) *Id.* s. 35.

charge upon the corporation property, unless it is expressly so charged; and that a debenture which charges ~~all the current property~~ of the company for the time being gives no *specific* charge upon any portion, which would prevent the company dealing with that portion in accordance with their powers (i).

Shares, &c. in Building Societies.—By the Building Societies Act, 1874, it was provided that rules should be drawn up, submitted to the registrar and registered; and

“Any society under this Act, in a schedule to its rules, may describe the forms of conveyance, mortgage, transfer, agreement, bond, security for deposit or loan, or other instrument necessary for carrying its purposes into execution” (j).

And the rules for a terminating building society generally include such as the following:—

Transfer of Shares.

- (i) Any member shall be at liberty to sell or transfer his or her share or shares, or any of them, to any other member or to any other person, on payment of 2s. 6d. per share as a bonus to the funds of the society, and on paying all fines and subscriptions then due to the society in respect of such share or shares, with all other liabilities and engagements on account thereof, and on receipt of such 2s. 6d. per share the manager shall register the same in a book to be kept for that purpose, and the transferor shall cease to be a member.
- (ii) In like manner any member may transfer his or

(i) *Wheatley v. Silkstone Coal Co.*, L. R. 29 C. D. 715; *Re Horne*, *id.* 736; *Norton v. Florence Land Co.*, L. R. 7 C. D. 332;

Brunton v. Electrical Engineering Corporation, [1891] W. N. 203.
(j) 37 & 38 Vict. c. 42, ss. 17 and 19.

- her bidding for shares to any other member on payment of 2s. 6d. per share to the funds of the society on registration of such transfer.
- (iii) On the transfer of the share or shares as also on the transfer of the bidding of any member who has agreed to purchase capital of the society in respect thereof, the manager shall certify in writing to the party to whom such share or bidding is about to be transferred, the amount of the premium at which such society capital has been agreed to be sold, and that the share or bidding is transferred on condition that the said purchase shall be made good, and premium (as agreed) deducted in conformity with the rules of this society, and the transfer shall be made only on such conditions (k).

And similar rules are framed for the transfer of shares in co-operative building and land societies, &c. The instrument of transfer is generally required to be executed both by the transferor and the transferee, and in form provided, and the transferor is to be deemed to be the holder of such shares until the transferee's name is entered in the society's register; and is subject to the consent of the committee of management (l).

The Act of 1874 also provided:—

- “All rights of action and other rights, and all estates and interests in real and personal estate whatsoever now belonging to or held in trust for any society certified under the repealed Act, shall, on the incorporation of the society under this Act, vest in the society without any conveyance or assignment whatsoever, save and except in the case of stocks and securities in the public funds of Great Britain and Ireland, &c.” (m).

It was also enacted, by the same statute, that two or

(k) Davis on Building Societies [1896], 514.

(l) *Id.* 621.

(m) 37 & 38 Vict. c. 42, s. 27.

more societies might unite and the one transfer its engagements to the other. "But no such transfer shall prejudice any right of any creditor of either society. Notice of every such union or transfer shall be sent to the registrar, and registered by him" (n).

Further Acts were passed in 1875, 1877, 1884, and 1894 with respect to building societies; and by the Act of 1894 building societies have been brought within the provisions of the Companies (Winding-up) Act, 1890 (o).

Interests in Friendly Societies.—By the Friendly Societies Act, 1875 (p), it was enacted that—

"A member of a society (other than a benevolent society or working men's club) not being under the age of sixteen years, may, by writing under his hand delivered at or sent to the registered office of the society, nominate any person, *not being an officer or servant of the society* (p), to whom any moneys payable by the society on the death of such member, not exceeding 50*l.*, shall be paid at his decease, and may from time to time revoke or vary such nomination by writing under his hand similarly delivered or sent; and on receiving satisfactory proof of the death of a nominator, the society shall pay to the nominee the amount due to the deceased member, not exceeding the sum aforesaid.

"If any member of a society entitled from the funds thereof to a sum not exceeding 50*l.*, dies intestate and without having made any nomination under this Act which remains unrevoked at his death, such sum shall be payable, *without letters of administration*, to the person who appears to the majority of the trustees, upon such evidence as they may deem satisfactory, to be entitled by law to receive the same" (q).

(n) 37 & 38 Vict. c. 42, s. 33.

(o) See Building Societies Act, 1894, s. 8; and Companies (Winding-up) Act, 1890, s. 10.

(p) 38 & 39 Vict. c. 60, s. 15, sub-s. (3); but by an amending

Act, the nomination might be in favour of an officer, &c. of the society, if such nominee were a relative of the nominator (39 & 40 Vict. c. 32, s. 10).

(q) *Id.* s. 15, sub-s. (4).

"Whenever the society, after the decease of any member, pays any sum of money to the person who appears to the trustees to be entitled under this section, the payment is valid and effectual against any demand made upon the trustees or the society by any other person" (r).

The same Act (and section) provides for the transfer of stock, in the event of the absence, bankruptcy, &c., &c., of any of the trustees, into the names of any other persons as trustees for the society (s).

By an amending Act, the amount of the nomination sum was extended from 50*l.* to 100*l.* (t); and it was enacted that the nomination might be partly printed, and if made in a book kept at the office shall be taken to be delivered at such office (u); and "moneys payable by the society at the death of such member" were made to include deposits and moneys accumulated for his use, together with interest on such deposits, &c., if any.

But all the enactments regulating friendly societies were repealed, and the whole law thereupon consolidated by the Friendly Societies Act, 1896. By that Act—

A member of a registered society, not under sixteen years of age, may dispose of any sum of money payable by the society to him at death, *not exceeding* 100*l.*, by written nomination registered in the society's books.

The sum of money shall include sums contributed or deposited, and sums accumulated.

The nomination may be revoked and varied in a similar manner by a similar document under the hand of the nominator, delivered, sent, &c., as aforesaid.

Marriage of the nominator revokes the nomination; but the nominee's receipt for payment by the society when the nominator has married subsequently to the nomination, but unknown to the society, will validly discharge the society from liability.

(r) Sect. 15, sub-s. (5).

(s) Sect. 15, sub-s. (6).

(t) 46 & 47 Vict. c. 47, s. 3.

(u) *Id.* s. 4.

Similarly, the Act provides that upon the death of a member intestate and without having made any nomination, the society may, *without letters of administration*, distribute not more than 100% (due to the deceased member) among such persons as appear to the society's trustees to be lawfully entitled thereto; and in the event of the member being illegitimate, then among such persons as would have been entitled thereto if the deceased member had been legitimate.

In all such cases of payment the society shall be free from liability by reason of the receipt which it holds from the person or persons to whom it paid.

Where possible, certificates of death are to be produced to the society, or such other evidence thereof as is available (v).

It is to be observed that a nomination must be signed by the nominator and sent or delivered to the society, during the lifetime of the nominator, and if by will, the will must be delivered into and left in the hands of the society; but a nomination not conforming with the Act herein and yet executed in accordance with the Wills Act, might be effectual as a testamentary disposition of the money (w).

Forms of nomination, revocation, and variation will be found in the Appendix hereto.

The Act of 1896 also provides for the vesting of the society's property in its trustees, and for the transfer, without conveyance, assignment, or other usual mode of alienation of property, to succeeding trustees in certain events, and for all proceedings to be carried on in their name and against them as representing the interests of the society (x).

(v) 59 & 60 Vict. c. 25, ss. 56—67.

(w) *Wright v. Darkhouse Friendly Society*, F. S. Cas. 407; *Hughes v. Hardy*, F. S. Cas. 402; *Fielding v. Rochdale Equitable Pioneers' Society*, 92 L. T. 431. Other

cases of interest are:—*M'Kee v. Meikle*, 27 Ir. L. T. R. 100; *Lavin v. Howley*, 102 L. T. 560. See, also, F. Baden Fuller on *The Law of Friendly Societies* [1898].

(x) 59 & 60 Vict. c. 25, ss. 49—53.

Interests affected by the Conveyancing Act, 1881.—

By sect. 36 (1) the receipt in writing of any trustees or trustee for any moneys, securities, or other personal property or effects payable, transferable, or deliverable to them or him under any trust or power shall be a sufficient discharge for the same, and shall effectually exonerate the person paying, transferring, or delivering the same from seeing to the application or being answerable for any loss or misapplication thereof.

By sect. 34 (1), where a deed by which a new trustee is appointed to perform any trust contains a declaration by the appointor to the effect that any estate or interest in any land subject to the trust, or in any chattel so subject, or the right to recover and receive any debt or other thing in action so subject, shall vest in the persons who, by virtue of the deed, become and are the trustees for performing the trust, that declaration shall, without any conveyance or assignment, operate to vest in those persons, as joint tenants, and for the purposes of the trust, that estate, interest, or right (*y*).

Sect. 50. Freehold land, or a thing in action, may be conveyed by a person to himself jointly with another person, by the like means by which it might be conveyed by him to another person; and may, in like manner, be conveyed by a husband to his wife, and by a wife to her husband, alone or jointly with another person (*z*).

Deposits, &c. in Savings Banks.—By the Provident Nominations and Small Investments Act, 1883, the mode of nominating in favour of another person, previously in use as to friendly and co-operative societies and trade unions, was extended to savings banks. Such nomination may be made by any depositor not under sixteen; may be made by writing delivered at, or sent

(*y*) But see also sub-sects. (2)—(5).

(*z*) See also sect. 61.

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to the office of a trustee savings bank, or of the General Post Office Savings Bank, or in a book kept at either place.

It may be revoked or varied, by writing under the hand of the nominator and similarly delivered. The nomination is limited to 100*l*.

Payments thereunder are to be valid as against next of kin or lawful representatives of deceased depositor. The nomination vests the sum nominated in the nominee exclusively. The nomination must not contain instructions as to the disposal of the sum nominated. Two or more nominees may be named by the same form (a).

Government Annuities.—By the Government Annuities Act, 1882, and the Savings Banks Regulations, 1884, combined, certain kinds of Government annuities are created and made transferable upon conditions, even where the person or persons during whose life or lives the annuity is payable is or are incapacitated by mental or bodily infirmity from joining in the transfer. Provided that no such transfer shall be permitted when the person on whose life the annuity is payable is not one of the persons to whom the annuity is granted (b).

Married Women.—By the Married Women's Property Act, 1882, a married woman is enabled, in accordance with the provisions of the Act, to acquire, hold, and dispose by will or otherwise, of any real or personal property as her separate property in the same manner as if she were a *feme sole*, without the intervention of any trustee (c).

A married woman may, moreover, by virtue of the power of making contracts contained in the Act, effect a policy upon her own life or the life of her husband

(a) 46 & 47 Vict. c. 47, s. 5; and see Forbes on Law relating to Post Office Savings Banks [1884].

(b) 45 & 46 Vict. c. 51, ss. 1, 5, 6—9; Savings Banks Regulations, 1884, sect. vi.

(c) 45 & 46 Vict. c. 75, s. 1, sub-s. (1).

for her separate use; and the same and all benefit thereof shall enure accordingly (d).

Bills of Exchange, Promissory Notes, &c.—By the Bills of Exchange Act, 1882, which consolidated the law of bills, &c., it was enacted—

“A bill is negotiated when it is transferred from one person to another in such a manner as to constitute the transferee the holder of the bill.

“A bill payable to bearer is negotiated by delivery.

“A bill payable to order is negotiated by the indorsement of the holder completed by delivery.

“Where the holder of a bill payable to his order transfers it for value without indorsing it, the transfer gives the transferee such title as the transferor had in the bill, and the transferee in addition acquires the right to have the indorsement of the transferor.”

“An indorsement in order to operate as a negotiation must comply with the following conditions:—

- (1.) It must be written on the bill itself and be signed by the indorser.
- (2.) It must be an indorsement of the entire bill. A partial indorsement, that is to say, an indorsement which purports to transfer to the indorsee a part only of the amount payable, or which purports to transfer the bill to two or more indorsees severally, does not operate as a negotiation of the bill.
- (3.) Where a bill is payable to the order of two or more payees or indorsees who are not partners all must indorse, unless the one indorsing has authority to indorse for the others.
- (4.) An indorsement may be made in blank or special. It may also contain terms making it restrictive.”

“Where a bill purports to be indorsed conditionally the condition may be disregarded by the payer, and

payment to the indorsee is valid whether the condition has been fulfilled or not."

"An indorsement in blank specifies no indorsee, and a bill so indorsed becomes payable to bearer.

"A special indorsement specifies the person to whom, or to whose order, the bill is to be payable."

Provisions as to payee apply to indorsee.

"A restrictive indorsement gives the indorsee the right to receive payment of the bill and to sue any party thereto that his indorser could have sued, but gives him no power to transfer his rights as indorsee unless it expressly authorize him to do so.

"Where a restrictive indorsement authorizes further transfer, all subsequent indorsees take the bill with the same rights and subject to the same liabilities as the first indorsee under the restrictive indorsement."

"Where a bill is negotiable in its origin it continues to be negotiable until it has been (i) restrictively indorsed, or (ii) discharged by payment or otherwise."

"Where an overdue bill is negotiated, it can only be negotiated subject to any defect of title affecting it at its maturity, and thenceforward no person who takes it can acquire or give a better title than that which the person from whom he took it had."

"Except where an indorsement bears date after maturity of the bill, every negotiation is *prima facie* deemed to have been effected before the bill was overdue.

"Where a bill which is not overdue has been dishonoured, any person who takes it with notice of the dishonour takes it subject to any defect of title attaching thereto at the time of dishonour, but nothing in this sub-section shall affect the rights of a holder in due course."

"Where a bill is negotiated back to the drawer or to a prior indorser, or to the acceptor, such party may, subject to the provisions of this Act, re-issue and further

negotiate the bill, but he is not entitled to enforce payment of the bill against any intervening party to whom he was previously liable.

"The rights and powers of the holder of a bill are as follows :—

- (1.) He may sue on the bill in his own name.
- (2.) Where he is a holder in due course he holds the bill free from any defect of title of prior parties, as well as from mere personal defences available to prior parties among themselves, and may enforce payment against all parties liable on the bill.
- (3.) Where his title is defective—
 - (i) if he negotiates the bill to a holder in due course, that holder obtains a good and complete title to the bill ; and
 - (ii) if he obtains payment of the bill, the person who pays him in due course gets a valid discharge for the bill" (e).

Patents, &c.—By the Patents, Designs, and Trade Marks Act, 1883, it is provided that a register of patents shall be kept at the Patent Office containing, among other entries, "notifications of assignments and of transmissions of patents, of licences under patents," and "such other matters affecting the validity or proprietorship of patents as may from time to time be prescribed" (f).

"A patentee may assign his patent for any place in or part of the United Kingdom, or Isle of Man, as effectually as if the patent were originally granted to that place or part only" (g).

In like manner provision is made for the patentee or his legal representatives or assignee to assign all the

(e) 45 & 46 Vict. c. 61, ss. 31—38 ; and see Chalmers on Bills of Exchange, &c. [1892].

(f) 46 & 47 Vict. c. 57, s. 23. See, also, sect. 22.

(g) Sect. 36.

benefit, &c. of any improvement in instruments or munitions of war to the Secretary of State (either for or without ~~valuable~~ consideration) on behalf of Her Majesty, and the Secretary of State may be a party to the assignment.

The assignment shall effectually vest the benefit of the invention and patent in the Secretary of State for the time being on behalf of Her Majesty (*h*).

Trade Mark.—By the same Act it is provided that: "A trade mark when registered shall be assigned and transmitted only in connection with the goodwill of the business concerned in the particular goods or classes of goods for which it has been registered, and shall be determinable with that goodwill" (*i*). Further, "a series of trade marks shall be assignable and transmissible only as a whole" (*j*).

Where a person becomes entitled by assignment, transmission, or other operation of law to a patent, or to the copyright in a registered design, or to a registered trade mark, the comptroller shall on request, and on proof of title to his satisfaction, cause the name of such person to be entered as proprietor of the patent, copyright in the design, or trade mark, in the register of patents, designs, or trade marks, as the case may be. The person for the time being entered in such register as proprietor shall, subject to any rights appearing from such register to be vested in any other person, have power absolutely to assign, grant licences as to, or otherwise deal with, the same, and give effectual receipts for any consideration for such assignment, licence, or dealing. Provided that any equities in respect of such patent, design, or trade mark may be enforced in like manner as in respect of any other personal property (*k*).

The registration of a person as proprietor of a trade

(*h*) Sect. 44.

(*i*) Sect. 70.

(*j*) Sect. 66.

(*k*) Sect. 87.

mark shall be *prima facie* evidence of his right to the exclusive use of the trade mark, and shall, after the expiration of five years from the date of the registration, be *conclusive* evidence of his right to the exclusive use of the trade mark, subject to the provisions of this Act (*l*).

Debts of a Bankrupt.—It should perhaps be repeated here, that by the Bankruptcy Act, 1883, upon the appointment of a trustee in bankruptcy, the property of a bankrupt passes to and vests in such trustee, and that the property passes from trustee to trustee and vests in the trustee for the time being during his continuance in office, without any conveyance, assignment, or transfer whatever; and the trustee's certificate of appointment shall, for all purposes of enrolment, &c., be deemed to be a conveyance, &c., and may be enrolled, &c. accordingly (*m*).

And "property" in this Act includes, generally, "money, goods, things in action, and every description of property, whether real or personal, whether situate in England or elsewhere; also obligations, easements, and every description of estate, interest, and profit, present or future, vested or contingent, arising out of or incident to property as above defined" (*n*).

And this applies to after-acquired property (*o*).

Debts, generally.—By the Rules of the Supreme Court which have the force and effect of statutory enactments, provision is made for the attachment (by a judgment creditor) of all debts owing or accruing from third persons to the judgment debtor to answer the judgment or order, and the garnishee may be ordered to appear before the Court to show cause why he should not pay to the judgment creditor (*p*). So, too, the same rules provide for the charging of stock or shares in favour of a creditor of the holder of stock or shares; and such charging has the

(*l*) Sect. 76.

(*m*) 46 & 47 Vict. c. 52, s. 54.

(*n*) Sect. 168.

(*p*) Ord. XLV. r. 1.

(*o*) Sect. 28.

same effect as 1 & 2 Vict. c. 110, ss. 14 and 15, and 3 & 4 Vict. c. 82, s. 1 (*g*).

And where any moneys or securities are in Court to the general credit of any cause or matter or to the account of any class of persons, an order may be made to prevent the transfer or payment of such moneys or securities on behalf of a judgment creditor of the persons entitled to such moneys or securities (*r*).

Unclaimed Stock, &c., and Dividends.—By the East India Unclaimed Stock Act, 1885 (48 & 49 Vict. c. 25), provision is made for the payment to the Secretary of State of all money arising from redemption of stock which has remained unclaimed for a period of ten years or more (*s*); and for the transfer of all such unclaimed stock to an “account of the Secretary of State in Council of India” to be held by him subject to the claims of parties entitled thereto (*t*); every such transfer is to be signed by the accountant-general or some other special official of the bank in whose books the stock stands at the time of transfer, “and shall be as effectual to all intents as if signed by the person in whose name the stock was then standing” (*u*). Similar provision is also made for the re-transfer and payment to parties showing title; three months’ notice by advertisement or otherwise must be given of such intention to transfer before re-transfer or payment of such stock and dividends thereon (*v*). The same Act deals similarly with East Indian Railway Annuities unclaimed, and in respect of unclaimed Indian Railway debentures (*w*). No stamp duty is chargeable on such transfer (*x*).

(*g*) Ord. XLVI. r. 1; and see text of Acts cited, set out in the *Annual Practice* [1899], pp. 641, 642, and notes thereto. And for further observations, see “Practice,” Bk. VII., *post*.

(*r*) Ord. XLVI. rr. 12, 13;

Annual Practice [1899], 650, 651.

(*s*) 48 & 49 Vict. c. 25, s. 3.

(*t*) Sect. 4.

(*u*) Sect. 6.

(*v*) Sects. 8—10.

(*w*) Sect. 17, 18.

(*x*) Sect. 21.

Indian Railway Debentures.—The same Act (48 & 49 Vict. c. 25) empowers any Indian railway company to issue, with the sanction of the Secretary of State, debenture bonds payable to bearer and negotiable by delivery; like bonds payable to order and negotiable by indorsement of the holder; debenture bonds payable in rupee currency (*y*).

The issue of such bonds, &c., is further regulated by the East India Loan Act, 1893 (56 & 57 Vict. c. 70).

By the Metropolitan Board of Works (Money) Act, 1885, similar provisions are made and powers given in respect of stock created by the Board of Works, and all shares or interest therein (*z*).

Share in Partnership.—By the Partnership Act, 1890 (53 & 54 Vict. c. 39) it is enacted:—"An assignment by any partner of his share in the partnership, either absolute or by way of mortgage or redeemable charge, does not, as against the other partners, entitle the assignee, during the continuance of the partnership, to interfere in the management or administration of the partnership business or affairs, or to require any accounts of the partnership transactions, or to inspect the partnership books, but entitles the assignee only to receive a share of profits to which the assigning partner would otherwise be entitled, and the assignee must accept the account of profits as agreed to by the partners."

In case of a dissolution, whether as respects all the partners or as respects the assigning partner, the assignee is entitled to receive the share of the partnership assets to which the assigning partner is entitled as between himself and the other partners, and, for the purpose of ascertaining that share, to an account as from the date of the dissolution (*a*).

(*y*) Sect. 23.

(*a*) 53 & 54 Vict. c. 39, s. 31.

(*z*) 48 & 49 Vict. c. 50, ss. 27—43.

Book IV.

ASSIGNABILITY OR TRANSFER, MAINLY BY OPERATION OF LAW.



CHAPTER I.

(I) TRANSFER BY DEATH.

IN the preceding pages we have considered the assignability of choses in action by the direct intention and voluntary act of the parties concerned.

We shall now deal with the occasions and circumstances in which mainly—though not entirely—the transfer of rights and privileges in respect of choses in action is due to the operation of various rules of law.

And in the first place let us consider the manner in which death of a person affects his rights, duties, or liabilities.

Generally speaking, by the death of a person all his personal estate, all rights of action affecting his personal estate, as well as all liabilities chargeable upon it, pass to his executors or administrators.

Transfer by operation of law consequent upon death may be considered according to whether the chose in action accrued to the deceased's estate during his lifetime or after his death; whether the subject-matter of the chose in action be *ex contractu* or *ex delicto*; whether the deceased's estate be the estate to receive the benefit or bear the burden of such chose in action; and, lastly, according to whether the deceased has by testament

disposed of the chose in action or died intestate in respect thereof.

(i) **CHOSSES IN ACTION WHICH ACCRUE during the lifetime OF THE OWNER AND SURVIVE TO THE EXECUTOR OR ADMINISTRATOR.**

The general principle is, as stated, that where the deceased had rights of action on which he might have sued in his lifetime, such rights survived him, and were transmitted to his executor or administrator (a). But sometimes a person has a right of action which, upon his death, does not go to his personal representative; and there are some interests which a person may not assign *inter vivos*, yet may dispose of freely by testament.

The personal representatives can recover all lawful debts due to the deceased, whether debts of record, such as judgments; or specialty debts, such as bonds and covenants; or simple contract debts, such as bills of exchange for goods sold and delivered (a).

No action of account, however, lay for an executor at common law, because, it was said, account rested in the privity and knowledge of the testator only (b). But this was remedied by the Statute of Westminster II. (13 Edw. I. stat. 1, c. 23), which gave to executors the power to bring an action of account. By 25 Edw. III. stat. 5, c. 5, this power was extended to the executors of executors; and by 31 Edw. III. stat. 1, c. 11, to administrators.

The executor of an assignee of a bail-bond might have brought an action upon it (c). The same holds good in respect of all covenants and, indeed, nearly all contracts made in favour of the testator and broken in

(a) 1 Saund. 216, a, n. (1) to *Wheatley v. Lane*. See, also, *Orme v. Broughton*, 10 Bing. 533; 38 R. R. 544; *Knight v. Quarles*, 4 Moo. 532; 22 R. R. 659; *Bishop v. Curtis*, 18 Q. B. 878; *Timmis v. Platt*, 2 M. & W. 720; *Murray v. E. I. Co.*, 5

B. & Al. 216; 24 R. R. 325; *Watkins v. Maule*, 2 Jac. & Walk. 243; *Bradshaw v. Lanes. & Yorks. Rail.*, L. R. 10 C. P. 189.

(b) Co. Litt. 89b; 2 Inst. 404.

(c) Com. Dig. Administration (B. 13); Vin. Abr. Exors.

his lifetime; because the executor or administrator was said to be in law the *assignee* of the deceased (*d*). Yet, if a bond is conditioned to pay money to some person whom the testator shall appoint by will, and the testator do not appoint by will, it appears his legal representative has no claim to the money (*e*). Nor can the legal representative have an action for a breach of promise of marriage to the deceased, where no special damage to the personal estate can be set forth on the record (*f*), for such a right of action is neither assignable during the lifetime, nor transmissible at death.

Formerly, the heir might have had an action on a covenant real, although nothing had descended to him from the ancestor with which the covenant could run (*g*). If such covenants were broken in the lifetime of the deceased, it seems, according to the old authorities mentioned, that the benefit of suing in respect thereto would vest in the executor or administrator, although in these cases upon the point, it seems to have been a question of whether or not the *ultimate damage* was sustained in the lifetime of deceased (*h*). But it is conceived that all the rights upon covenants, real or personal, as above mentioned, would, since the Land Transfer Act, 1897, now vest in the executor or administrator of the deceased covenantee (*i*).

Moreover the decision in *Raymond v. Fitch* (*h*), was fully confirmed in a subsequent case in which it was held that an executor of a tenant for life may sue for a breach of covenant to repair committed by the lessee in the testator's lifetime, without stating upon

(*d*) *Raymond v. Fitch*, 2 Crompt. Mees. & Rosc. 588, 597.

(*e*) *Pease v. Mead*, Hob. 9.

(*f*) *Chamberlain v. Williamson*, 2 M. & S. 415, 416; 15 R. R. 295.

(*g*) *Fitz. N. B.* 145; *C. Touchst.* 175; *Wooton v. Cooke*, Jenk. 241; *Lougher v. Williams*, 2 Lev. 92; *Fivian v. Campion*, 1 Salk. 141.

(*h*) See, also, Com. Dig. Covenant (B. 1); *Lucy v. Levington*, 2 Lev. 26; but see *Kingdon v. Nottle*, 1 M. & S. 355; 14 R. R. 462; *King v. Jones*, 5 Taunt. 418; 4 M. & S. 188; 15 R. R. 533; *Raymond v. Fitch*, 2 Crompt. M. & R. 588.

(*i*) 60 & 61 Vict. c. 65, ss. 1—4, &c.

the record that there was any damage to the personal estate (j).

In like manner the executor or administrator may bring an action upon a promise made to the deceased for the exclusive benefit of a third party. Thus, A. promised to B. that if B. would pay 50*l.* to C. (B.'s son) who was married to D. (the daughter of A.), that then he (A.) would pay to D. 100*l.* on a certain day. B. paid the 50*l.* to C., and A. failed to pay D. 100*l.* B. died intestate and his administrator brought an action upon the case upon *assumpsit*, upon the promise made to B. It was held that B.'s administrator could rightly do so, although he would have no benefit by such action if he recovered (k).

Wherever the reversion is for years, the executor or administrator is of course the only person capable of suing on a covenant made with the lessor, whether it run with the land or be in gross.

An executor of a tenant for years is expressly within the statute of 32 Hen. VIII. c. 34, and may maintain covenant against the assignee of the reversion (l).

When an annuity was granted with words of inheritance it was descendible, and went to the heir (m); otherwise it would go to the personal representatives (n).

The cases of personal annuities in fee apparently form an exception to two general rules, viz. :—

- (1.) That before the Wills Act (1 Vict. c. 26) came into operation, what would devolve upon the heir could not be devised away from him, but by a will attested according to the Statute of Frauds; and

(j) *Ricketts v. Weaver*, 12 M. & W. 718. See, also, 1 Williams on Exors. [1893] 717.

(k) *Basfield v. Collard*, Sty. 6.

(l) Williams on Exors. 717; Roscoe on Actions, 442; *Mackay v. Mackreth*, 2 Chitt. Rep. 461.

(m) *Turner v. Turner*, Ambl. 782, 783; *Stafford v. Buckley*, 2 Ves. Sen. 179. But see now Land Transfer Act, 1897 (60 & 61 Vict. c. 65).

(n) *Parsons v. Parsons*, L. R. 8 Eq. 260.

- (2.) That although personalty be specifically bequeathed, it will in the first instance vest in the executor and form part of his estate (o).

The ground on which certain annuities were held to be personal property was that they were not connected with land.

But where an inheritance is granted which arises out of or is connected with land, it is generally deemed to be real property and formerly would not, even in the first instance, go to the personal representative.

Thus, shares in the navigation of the river Avon, under the statute 10 Anne, are realty (p). And so are the following real property: shares in the Bath Navigation (q) and shares in the New River Co. (r). But shares in the Chelsea Waterworks have been held personal estate (s).

The legislative tendency of late years has been to make all such shares personal property; and hence, by the Companies Act, 1862, it is enacted that "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 regulation of the company" (t).

By statute 1 Geo. I. c. 19, stock, annuities, &c., in the public funds are personal estate (u), assignable only according to the Act (v), but devisable by writing duly attested by two witnesses (w). This and other Acts of similar provisions have raised the question whether the legislature intended the devisee to take such interests direct, or through the executor as assets in the latter's

(o) 1 Wms. Exors. 719, 720.

(p) *Buckeridge v. Ingram*, 2 Ves. Jun. 653; *Portmore v. Bunn*, 1 B. & C. 699, 702.

(q) *Howse v. Chapman*, 4 Ves. Jun. 543; 4 R. R. 292.

(r) *Drybutler v. Bartholomew*, 2 P. Wms. 127; *Davall v. New*

River Co., 3 De G. & Sm. 394.

(s) *Bligh v. Brent*, 2 Y. & Coll. Exch. 268; *Hayter v. Tucker*, 4 Kay & J. 248; 1 Wms. Exors. 720.

(t) 25 & 26 Vict. c. 89, s. 22.

(u) 1 Geo. I. c. 19, s. 9.

(v) *Id.* s. 11.

(w) *Id.* s. 12.

hands (x); modern decisions have established that stock having been made personally vests as such in the executor with all the results consequent thereupon (y). And by 33 & 34 Vict. c. 71, s. 23, the interest of a deceased stockholder in stock is transferable by the executor or administrator notwithstanding any specific bequest thereof.

The executors of a deceased shareholder in a company are entitled to claim from the company whatever is payable by it at the time of testator's death in respect of the deceased's shares, and whatever becomes payable in respect of them as long as they remain part of his estate (z).

And executors who are on the list of contributories of the company are entitled to petition for the winding-up of the company (a).

So, too, the deceased's copyright or other similar interest in literary works and works of art may vest in the executor or administrator in accordance with several statutes. Thus, the copyright, &c. in books (b), the interest in busts and sculptures (c), in engravings and prints (d), in printed linens, muslins, &c. (e), in paintings, drawings, and photographs (f), all vest, on the death of the owner, in the personal representative. The deceased's interests in patents will also vest in his personal representative (g).

Again, where one *seised in fee* made a gift in tail, or

(x) *Pearson v. Bank of England*, 2 Bro. C. C. 529; *Bank of England v. Lunn*, 15 Ves. Jun. 572, 578.

(y) *Bank of England v. Moffat*, 3 Bro. C. C. 260; *Bank of England v. Parsons*, 5 Ves. Jun. 665; *Bank of England v. Lunn*, 15 Ves. Jun. 569; *Franklin v. Bank of England*, 1 Russ. Ch. Ca. 575; *Churchill v. Bank of England*, 11 M. & W. 323. See, also, 1 Wms. Exors. 721, where the above cases are cited.

(z) *Lindley on Companies*, 536;

Walker & Elgood on Exors. 123.

(a) *Re Norwich Farn Co.*, 12 Beav. 366.

(b) 5 & 6 Vict. c. 45.

(c) 54 Geo. III. c. 56.

(d) 7 Geo. III. c. 38; 17 Geo. III. c. 57; 6 & 7 Will. IV. c. 59.

(e) 5 & 6 Vict. c. 100; 6 & 7 Vict. c. 65.

(f) 25 & 26 Vict. c. 68.

(g) *Toller*. 162; *The Patents, &c. Act*, 1883 (46 & 47 Vict. c. 57), s. 34, &c.

granted a lease for life or years, reserving rent, the whole rent which became due after his death went with the reversion to the heir (*h*); and it made no difference that the rent was expressly reserved to the lessor, his *executors* and assigns, without mentioning the heir (*i*). On the other hand, if a *lessee for years* made an under-lease, reserving rent to himself and heirs (and no mention of executors), the rent accruing due after his death would go to his executor or administrator notwithstanding (*j*). But where no reversion remained in the lessor and the rent was reserved to his executors, administrators and assigns, it went to the personal representatives and not to the heir (*k*).

In all these cases, however, the interest would now vest, in the first instance, in the personal representatives (*l*).

But all *arrearages* of rent of whatever nature, incurred and payable during the lifetime of the deceased, go to the personal representatives as part of the deceased's personal estate (*m*); and they can distrain or bring an action for the same, although formerly they could not distrain for such arrearages (*n*).

This being so, it was once a matter of some importance to ascertain when rent became due, so as to go to the executor or administrator; and in this connection the non-apportionment of rent conferred great hardship. The same principle applied, also, to annuities, pensions, dividends, compositions, &c., becoming due at *fixed* periods. And legislation dealt only partially with these difficulties prior to the Apportionment Act, 1870

(*h*) Co. Litt. 47a; 3 Bac. Abr. 62, Exors. (H. 3). And see Godolph. Pt. 2, c. 24, s. 13, p. 119.

(*i*) Co. Litt. 47a; and 1 Wms. Exors. 725, n. (*u*).

(*j*) 2 Saund. 371, n. (7) to *Sacheverell v. Froggatt*. But see *Norris v. Elsworth*, 1 Freem. 463;

1 Wms. Exors. 725, 726.

(*k*) 3 Cruise's Dig. 321 (3rd ed.).

(*l*) Land Transfer Act, 1897, *supra*.

(*m*) 3 Bac. Abr. 63, Exors. (H. 3); 1 Wms. Exors. 727.

(*n*) Co. Litt. 162b; 32 H. VIII. c. 37.

(33 & 34 Vict. c. 35), which enacted "that all rents, annuities, dividends, and other periodical payments in the nature of income shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly" (o); and that all persons and their respective heirs, executors, administrators, and assigns, and also the executors, administrators, and assigns respectively of persons whose interests determine with their own deaths, shall have such or the same remedies for recovering such apportioned parts when payable as aforesaid for entire parts (p).

But the Act does not apply to policies of assurance, nor where there is a stipulation made to the contrary (q).

Again, where a fine is set on admitting a copyholder, and the lord dies before payment thereof, the fine will go to the executors, who can recover the same by action; for it is a fruit fallen, and shall not go with the inheritance (r). The same holds good in regard to reliefs and heriots (s).

No *chose in action* can go in succession in a corporation sole, such as a bishop, parson, vicar, hospital, &c.; "for the successors shall no more have them than the heirs of a private man; since succession in a body politic is inheritance in case of a body private" (t).

But *by custom* a *chose in action* may go in succession to a corporation sole; thus, in London, the Chamberlain is a corporation for taking bonds for the benefit of the Orphanage Fund (u); but he cannot take a bond to himself or his successors for any other purpose (v).

Similarly, if the President of the College of Physicians

(o) 33 & 34 Vict. c. 35, s. 2.

(p) *Id.* s. 4.

(q) *Id.* ss. 6, 7.

(r) *Shuttleworth v. Garnet*, 3 Lev. 261, 262.

(s) 4 Co. 49b; Co. Litt. 47b, 83a, b, 162b; 1 Watk. Copy.

322, n. (f); 1 Wms. Exors. 732.

(t) *Fulwood's Case*, Co. Pt. IV.

65a; *Howley v. Knight*, 14 Q. B. R. 240.

(u) *Byrd v. Wilford*, Cro. Eliz.

464, 682; *Fulwood's Case*, *supra*.

(v) 2 Bl. Comm. 432.

obtain judgment on a debt against an offender, and die before satisfaction, his successor may sue out a *scire facias* on the judgment recovered by his predecessor, the latter having recovered in right of the corporation (*u*).

It is the general rule that survivorship obtains equally in regard to joint tenants of chattel property in possession or in action, as between joint tenants of inheritance or freehold (*x*); consequently, any interest which a testator might have in a *choses in action* jointly with another would not pass to his executor (*y*). But, by the law merchant, an exception prevailed in favour of merchants, and was extended to all traders and persons engaged in joint enterprise, by which the joint interest in wares, merchandise, debts, or duties, does not survive to the co-trader, but goes, so far as the deceased's interest is concerned, to his executors (*z*).

But with respect to *choses in action* though the right of the deceased joint tenant devolves on his personal representative, the *remedy* survives to his co-partner, who alone must enforce the right by action, and will be liable, on recovery, to account to the personal representative for the deceased's share. And, formerly, it was doubted whether this rule could be enforced elsewhere than in a Court of Equity (*a*); the Court of Exchequer, however, held that the title to partnership chattels does *not* survive *at law*; that the surviving partners had a *jus disponendi* as to the partnership chattels for winding up the partnership debts, but that they have no power to dispose of the deceased's share otherwise than for the purpose of paying the debts of the partnership (*b*).

(*u*) *Atkins v. Gardner*, Cro. Jac. 169.

(*x*) Co. Litt. 182a.

(*y*) *Southcote v. Hoare*, 3 Taunt. 87; 12 R. R. 600.

(*z*) *Buckley v. Barber*, 6 Exch. R. 164; *Hamond v. Jethro*, 2 Brownl. & Gold. 99; *Jeffereys v. Small*, 1 Vern. 217; *Vickers v. Coucell*, 1 Beav. 529; *Lake v. Gibson*, 1 Eq.

Cas. Abr. 291, pl. 3; *Harrison v. Barton*, 1 Johns. & H. 287.

(*a*) Smith's *Mercantile Law* (3rd ed.) 149; *Abbott on Shipping* (7th ed.) 97; 1 Wms. Exors. [1893] 571.

(*b*) *Buckley v. Barber*, *supra*. See, also, *Partnership Act*, 1890 (53 & 54 Vict. c. 39); *Pollock on same* [1895], 119 *et seq.*

Of course, it is also to be remembered that formerly, owing to the common law rule against assignment, *choses in action* generally vested in the executor or administrator although they had been assigned by the deceased in his lifetime.

As it has been remarked previously, there are instances of *choses in action* concerning which the owners might exercise their rights during their lifetime, but failing such exercise no rights are transmitted to their executors or administrators. The case of breach of promise of marriage has been mentioned in this connection; and to this may be added the case of arrears of pin-money, to which a wife may be personally entitled, but in regard to which her executors or administrators have no claim (c), for the right dies with her.

Nor, *semble*, can the legal representatives of a wife enforce payment of the arrears of alimony against the husband (d) for the same reason.

Again, when the contract is founded upon the personal skill, particular intellectual abilities, special knowledge, or cunning, or other capacities equally personal, of the deceased, or upon any other peculiarly personal relation in consideration of which the contract was formed, such contract is terminated by the death of either party thereto.

Thus, it has been *held* that the personal representatives have no interest in an apprentice bound to the deceased, so that they cannot maintain an action for debt upon a bond given for performance of the indentures of apprenticeship, because the covenant was only to serve the master, there being no mention of personal representatives. The interest of the master in the apprenticeship is an individual interest coupled with a

(c) *Howard v. Digby*, 2 Cl. & Fin. 634, &c.; *Jodrell v. Jodrell*, 9 Beav. 46.

(d) *Stones v. Cooke*, 8 Sim. 321, n. (q); *De Blaquièrre v. De Bla-*

quièrre, 3 Hagg. 322; *Wilson v. Wilson*, *id.* 329, n. (c); *Vander-gucht v. De Blaquièrre*, 5 M. & Cr. 229, &c.; 1 Wms. Exors. 735.

purely personal trust which is not assignable, and which is determined by the master's death like that of a guardian; and besides this the covenant to instruct is personal and cannot extend to the executors who may not be capable of instructing (e).

It is, however, different where a person binds himself as apprentice to another, *his executors and administrators*, such executors or administrators *carrying on the same trade or business*, and in the town of W., and with him and them to serve for the term of seven years, and the master, in consideration of the service of the apprentice, covenants to teach and instruct him or cause him to be taught and instructed during the term. In such a case it was held that on the death of the master the apprentice was bound to serve the widow of the deceased, who was his executrix, whilst she carried on the same business in the town of W., and that she was bound to instruct the apprentice (f).

And in regard to *parish apprentices* it was enacted by 32 Geo. III. c. 57, that where the premium paid does not exceed 5*l.*, upon the death of the master, the apprentice shall serve the executors of the master or their appointee for three months, and, if application to two justices be made to that effect, for the remainder of the term of apprenticeship (g).

Other contracts of apprenticeship are regulated by statute, or by the custom of the trade in particular districts; and, in some places, the personal representatives are bound to assign the apprentice to another master.

If the master has covenanted, in the usual way, to find the apprentice in meat, drink, and other necessities during the term of apprenticeship, the death of the

(e) *Horns v. Drake*, H. T. 8 Ann.; 1 Wms. Exors. 723; *Baxter v. Burfield*, 1 Bott. P. L. pl. 696 (6th ed.); *Rex v. Peck*, 1 Salk. 66.

(f) *Cooper v. Simmons*, 7 H. & N. 707.

(g) 32 Geo. III. c. 57, ss. 1—3.

master is no discharge of the covenant, but the personal representatives are bound to perform it, so far as they have assets (*h*).

In the case, too, of any ordinary servant, by the death of the master the servant is discharged, and the executors cannot bring an action to enforce the contract of service after his death (*i*).

Other illustrations of the same rule are: contracts by authors to write a book for a publisher; contracts by physicians to cure a patient of a particular disease; contracts by teachers to instruct their pupils; and all contracts similar thereto and founded upon personal relations (*j*).

These contracts being strictly personal to the deceased the executors cannot enforce them, nor be called upon to perform them.

A contract made by two partners for the employment of an agent in their business for a term of years, was held to be terminated by the death of one partner before the expiration of the term (*k*).

Where A. hired B. to serve as farm-bailiff at weekly wages, the hiring to be determinable by a six months' notice, or by payment of six months' wages, and A. died during the hiring, it was held that A.'s personal representative was not bound to continue hiring B., nor to pay six months' wages in lieu of notice (*l*). So, where A. instructed B. to sell A.'s picture and promised him 100*l*. for his trouble in the event of sale; but before the picture was sold A. died, and after A.'s death B. sold the picture and claimed the 100*l*. from A.'s administrator. It was held, that the authority to sell was

(*h*) *Wadsworth v. Gye*, 1 Sid. 216; *R. v. Peck*, 1 Salk. 65; *Walker v. Hull*, 1 Lev. 177.

(*i*) *Wentw. Off. Ex.* (14th ed.) 141; 1 Wms. Exors. 722.

(*j*) *Baxter v. Burfield*, 2 Str. 1266; *Chamberlain v. Williamson*, 2 M. & S. 408; 15 R. R. 295; *Taylor v. Caldwell*, 3 B. & S. 836;

Finlay v. Chirney, 20 Q. B. D. 494; 57 L. J. Q. B. 247.

(*k*) *Tasker v. Shepherd*, 6 H. & N. 575; 30 L. J. Ex. 207.

(*l*) *Farrow v. Wilson*, L. R. 4 C. P. 744; 38 L. J. C. P. 326. And see *Whincup v. Hughes*, L. R. 6 C. P. 78; *Robinson v. Davison*, L. R. 6 Ex. 269; 40 L. J. Ex. 172.

revoked by A.'s death, and that his administrator was not bound to pay the 100%. (m).

If a publisher agrees to pay an author a fixed sum of money for a treatise, and the author dies before completing the task, the contract is absolutely determined, and the publisher is not bound to pay any part of the sum agreed upon, *unless* he has accepted and used some portion of the work, in which case he will be liable upon an implied promise in respect of the benefit actually received (n).

But in all these cases, although the contract is determined by death, it is not to be understood that that implies the determination of any rights in respect thereof which had already vested before death.

Thus, where an engineer was appointed to construct certain works, during a probable period of fifteen months, and was to be paid for his services, in the interval, the sum of 500*l.* by equal quarterly instalments, and he died shortly after the third quarter, two of such quarterly instalments being at that time unpaid, it was held that although his death terminated the contract, it did not divest the right to those two instalments which had already accrued to him, and that, consequently, his administrator was entitled to recover them, and not merely to sue upon a *quantum meruit* for the value of the amount of the work actually done by the deceased (o).

The personal representatives are entitled to the benefits of all such executory contracts, as they can fairly and efficiently perform and fulfil; for example, the completion of a house partly built by the deceased; the executors may finish the work and deliver it up and sue for work and labour done by them as executors (p).

(m) *Campanari v. Woodburn*, 15 C. B. 400; 24 L. J. C. P. 16.

(n) 1 Addison, Contracts [1892], 226.

(o) *Stubbs v. Holywell Rail. Co.*, L. R. 2 Ex. 311; 36 L. J. Ex. 166.

(p) *Werner v. Humphreys*, 2 M.

Hitherto this Chapter has treated of choses in action which give rise to rights of action *ex contractu*, and which accrue during the deceased's lifetime.

It is now proposed to state the law as to those choses in action which consist of rights of action *ex delicto* or *quasi ex delicto*, and which accrue during the lifetime of the deceased. We have now to consider how the death of the person wronged affects the liability of the wrong-doer. It has been said with good cause that this is one of the least rational parts of our law (*q*). The maxim at common law is *actio personalis moritur cum persona*, which means that a right of action for tort is determined by the death of either party, even if an action has been instituted in his lifetime.

It may, therefore, be taken that apart from the exception to be hereinafter mentioned, the estate of the person wronged has not, generally speaking, any claim, and that the estate of the wrong-doer is not liable in the event of the death of either party.

Where an action for tort has been referred to arbitration, and one party dies after the hearing but before the award is made, the cause of action is extinguished, although a clause in the order of reference is made providing for delivery of the award to the personal representatives of either party dying before the award is completed. The agreement for reference is merely as to mode of trial, and does not alter the rights of the parties (*r*).

It is supposed that the rule was due in its inception to the vindictive and *quasi*-criminal character of the ancient suits for civil injuries (*s*).

Certainly it is a rule reaching out of a barbarous age, and its continued existence is a signal token not only of

& G. 853; 3 Sc. N. R. 226;
Marshall v. Broadhurst, 1 Cr. & J.
 405; *Collinson v. Lister*, 20 Beav.
 365.

(*q*) Pollock on Torts [1890], 54.

(*r*) *Bowker v. Evans* [1885], 15
 Q. B. D. 565; 54 L. J. Q. B.
 421.

(*s*) Pollock on Torts, 55.

the tenacity with which ancient rules and customs struck root, but also of their almost hopeless ineradicability when the purpose they served has no longer any place in our system. No hardship would in any way be imposed upon any person, while great good would accrue to many, by complete abrogation of the rule and by a simple enactment that the personal representatives of either party should stand in the shoes of the deceased in *all respects* both as to rights and liabilities, so far as the assets of the deceased's estate extended.

Meanwhile we have to consider the effect of the rule and its exceptions in various cases.

It is allowed that personal wrongs may operate to the temporal injury of the personal estate, but the Court will not so hold or entertain the matter unless such damage is specially pleaded (*t*); but where the wrong is not strictly personal, it will be sufficient if damage to the personal estate appears by necessary implication (*u*). But in either case, why should not the burden rather lie on the tort-feasor to prove that the estate has not suffered appreciable damage (*x*). Indeed, the rule goes so far as to hold that the death of a person cannot be a cause of action in a civil court for an individual not claiming through or representing the person killed, who, if death had not resulted from the injury, would himself have been entitled to sue.

Thus a master can sue for injuries done to his servant wrongfully, whereby the master loses his service; but, if the injury causes the death of the servant, it is held that the master's right to compensation is gone (*y*). Could anything be more ridiculous or anomalous? Had it been an ape or an ass, a cock or a horse, the master would unquestionably have had his right of

(*t*) *Chamberlain v. Williamson*,
2 M. & S. 414; 15 R. R. 295.

(*u*) *Twyecross v. Grant* [1878],
4 C. P. D. 40; 48 L. J. C. P. 1.

(*x*) Pollock on Torts, 57.

(*y*) *Osborn v. Gillett* [1873], L.
R. 8 Ex. 83; 42 L. J. Ex. 53.
Bramwell, B., diss.

action against the wrongdoer; but it was a human being—there's the rub!

By the rule the dead man's right of action is gone; but the master's action surely is totally independent of the mere fact of death; the action is for loss of service. It is not the master nor the wrongdoer who is dead, and how can even so rigorous a rule be made to extend to a claim different from what the servant's would have been, for a different injury, and upon another and totally different estimation of damages. Yet it is alleged that the policy of the law refuses to recognize the interest of one person in the death of another (z)—a reason which would set aside Lord Campbell's Act and would make life insurances and leases for lives illegal (a), to say nothing of all interests arising under wills, or, in case of intestacy and other interests, contingent upon the death of another.

Wherever the action was founded on any malfeasance or misfeasance, was a tort, such as trespass for taking goods, &c., trover, false imprisonment, assault and battery, slander, deceit, diverting a watercourse, obstructing lights, escape, and many other similar cases, where the *declaration* imputed a tort done either to the person or the property of another, and the *plea* under the old pleading must have been "not guilty," the rule was *actio personalis moritur cum persona* (b).

The first amendment was made as long ago as 1330 by the statute 4 Edw. III. c. 7, *de bonis asportatis in vita testatoris*, which, after reciting that in times past executors had not had actions for a trespass done to their testators, as of the goods and chattels of the same testators carried away in their life, and so such trespasses had hitherto remained unpunished, enacts, that the executors in such cases shall have an action against the

(z) L. R. 8 Ex. 90.

(a) Pollock on Torts, 58.

(b) 1 Wms. Exors. 697.

trespassers, and recover their damages in like manner as they, whose executors they be, should have had if they were living.

This remedy was further extended to the executors of executors by 25 Edw. III. stat. 5, c. 5, and, by an equitable construction of the former statute, to administrators (c). The Act 4 Edw. III. being a remedial Act has always been freely interpreted and made to extend to cases other than those of trespass, to cases within the meaning and intent of the statute (d).

Lord Ellenborough said: "It is a very ancient statute passed at a period when no great precision of language prevailed, and the body of the Act does not speak of *actions* on trespass, though the instance put is proper for such an action; but it speaks of actions *for a trespass* done to the testator's goods; and it enacts that executors in such cases shall have an *action against the trespassers*, apparently using the word *trespass* as meaning a wrong done generally, and the *trespassers* as wrongdoers" (e).

Therefore, by an equitable construction of the statute, an executor or administrator will now have the same actions for any injury done to the *personal estate* of the deceased during his lifetime, *whereby it has become less beneficial to the executor or administrator*, as the deceased might have had, whatever the form of action may be (f). Thus, the executor or administrator may bring an action of trespass or trover (g); or an action against the sheriff for a false return or a non-return in the lifetime of the testator (h); an action for debt on a

(c) 1 Saund. 217; note to *Pinchon's Case*, 9 Co. 88a (vol. v. p. 161).

(d) *Emerson v. Emerson*, 1 Vent. 187; *Le Mason v. Dixon*, Sir W. Jones, 174; *Wilson v. Knubley*, 7 East, 134.

(e) *Wilson v. Knubley*, 7 East, p. 134.

(f) 1 Saund. 217, n. (1); *Lockier v. Paterson*, 1 Carr. & K. 271; 1 Wms. 698.

(g) *Russell's Case*, Co. Pt. V. 27a; *Rutland v. Rutland*, Cro. Eliz. 377.

(h) *Williams v. Cary*, 4 Mod. 403; 3 Bac. Abr. 98, Exors. (Pt. 2); *Spartow v. Prince*, Cro. Car. 297.

judgment against an executor suggesting a *devastavit* (*i*); an action to restrain the infringement of a registered trade mark with the usual claim for an account of profits, and for damages (*k*); an action for misrepresentation and to recover the price paid by the deceased for worthless shares on the faith of a fraudulent prospectus (*l*); an action for removing goods taken in execution before the deceased (the landlord) was paid a year's rent (*m*); an action for falsely and maliciously publishing a statement calculated to injure the right of property of the deceased in a trade mark (*n*); for *quare impedit* for a next avoidance (*o*); for not setting out tithes due to the testator (*p*) provided the tithes were demanded by the deceased (*q*); an action for ejectment where the deceased had a lease for years, or from year to year, whether the ouster was before or after his death (*r*); and for other similar actions for injuries done to the personal estate of the deceased during his lifetime (*s*).

But if the cause of action is in substance an injury to the person, the personal representative cannot maintain an action merely because the injured person incurred during his lifetime some money outlay in consequence of the personal injury (*t*). Hence an executor or administrator has no action for assault and battery, false imprisonment, libel (*u*), slander, deceit.

Nor do such actions extend to injuries done to the

(*i*) *Berwick v. Andrews*, 1 Salk. 314.

(*k*) *Oakey v. Dalton*, 35 C. D. 700.

(*l*) *Twyeross v. Grant*, 4 C. P. D. 40.

(*m*) *Palgrave v. Wyndham*, 1 Stra. 212; *Chace v. Chace*, Fortesc. 359; *Waring v. Duberry*, *id.* 360.

(*n*) *Oakey v. Dalton*, 35 C. D. 700.

(*o*) *Smallwood v. Bishop of Coventry*, Cro. Eliz. 207; *Wentw. Off. Exor.* (14th ed.) 164.

(*p*) *Moreton's Case*, 1 Vent. 30.

See *Holl v. Bradford*, 1 Sid. 88.

(*q*) *Cart v. Hodgkin*, 3 Sw. 160.

(*r*) *Slade's Case*, Co. Pt. IV. 95a; *Moreton's Case* (*supra*); *Doe v. Porter*, 3 T. R. 13; 1 R. R. 626; Bro. Abr. Exors. 45; *Russell v. Pratt*, 1 And. 243; *Peytoe's Case*, Co. Pt. IX. 78b.

(*s*) 1 Saund. 217, n. (1); 1 Wms. Exors. 699.

(*t*) *Pulling v. G. E. R.*, 9 Q. B. D. 110.

(*u*) *Hatchard v. Mège*, 18 Q. B. D. 771.

freehold. Hence the personal representative has no action for diverting a watercourse, obstructing lights, or other actions of the like kind (apart from a statute presently to be mentioned); for such causes of action still die with the injured person (*x*). Apart, also, from those cases which fall within the statute 3 & 4 Will. IV. c. 42 (to be cited hereinafter) the personal representatives of a deceased person had no action for trespass *quare clausum fregit* (*y*), nor for merely cutting down trees (*z*), nor for other waste committed in the lifetime of the deceased on his freehold (*a*), for the executor had no right to recover the place wasted, the inheritance of which had descended to the heir (*b*). And if a man out growing corn and let it remain, the executor could maintain no action (*c*); but if the corn were cut and carried away, the executor could bring an action *de bonis asportavit* on the statute (although he could not bring an action of trespass *quare clausum fregit* and *blada asportavit*) (*c*). If the grass were cut and carried away at the same time, no action would lie for the executor because the grass was part of the freehold, but corn growing is a chattel (*d*). The same distinction is made between a trespass in destroying or taking away corn growing, and a trespass in grass or wood growing; for although the deceased died before severance, the corn would have gone to the executor (*e*).

But an executor may bring an action against a person who has wrongfully cut down and carried away the trees of the deceased (*f*). The executor may, also, bring an action for trover and conversion against one

(*x*) 1 Saund. 217a, n. (1); 1 Wms. Exors. 700.

(*y*) Bro. Exor. pl. 120.

(*z*) *Williams v. Breedon*, 1 Bos. & Pul. 329.

(*a*) Godolph. Pt. 2, c. 22, s. 2.

(*b*) Wentw. Off. Exor. (14th ed.) 163.

(*c*) *Emerson v. Emerson*, 1 Vent. 187.

(*d*) *Evans v. Roberts*, 5 B. & C. 829; 29 R. R. 421; *Scorell v. Boxall*, 1 Y. & J. 398; 30 R. R. 807; *Jones v. Flint*, 10 A. & E. 753; 1 Wms. Exors. 701.

(*e*) Wentw. Off. Exor. (14th ed.) 166.

(*f*) *Williams v. Breedon*, 1 Bos. & Pull. 330.

who has trespassed, mowed the grass, and carried it away as hay (*g*).

In 1833 an Act was passed which confers upon the executor or administrator the right and power of proceeding to recover in respect of injuries done to the deceased's real property (*h*). It enacted that an action of trespass, or trespass on the case, may be maintained by the executors or administrators of any person deceased for any injury to the real estate of such person, committed in his lifetime, for which an action might have been maintained by such person, so as such injury shall have been committed within six calendar months before the death of such deceased person, and provided such action shall be brought within one year after the death of such person; and the damages, when recovered, shall be part of the personal estate of such person (*i*).

Thus, by this Act, executors and administrators have a certain statutory power of bringing actions for injury done to the real estate of the deceased.

In an action for a mandatory injunction and damages for obstruction to the access of light to a freehold house where the sole plaintiff died more than six months after the issue of the writ, the executor who was also devisee obtained the common order to carry on the proceedings. Upon a motion to discharge this order on the ground of irregularity because the cause of action did not continue, and there was no transmission of interest to the executor, it was held that although an action by the executor for injury to the plaintiff's *real estate* might, under this section, be limited to the six months prior to the plaintiff's death, still he could recover damages to this extent, and that the peculiar equitable remedy by mandatory injunction devolved on the devisee (*k*).

(*g*) Wentw. Off. Exor. 167.

(*h*) 3 & 4 Will. IV. c. 42.

(*i*) *Id.* s. 2.

(*k*) *Jones v. Simes*, 43 C. D. 607.

And so, where an action was brought to recover from the promoters of a public company the price paid by the plaintiff for shares which were proved valueless, and, after judgment for the plaintiff and pending an appeal to the House of Lords, the plaintiff died, it was held that his interest survived, and was capable of transmission to his personal representatives, who had obtained leave to carry on and prosecute the action against the defendants (*l*). But it must be remembered that an executor who obtains such an order to continue his testator's action becomes personally responsible for costs of the other party (*m*).

On the other hand, where a person had been injured by the negligence of a railway company, and had commenced an action in his lifetime, and then died, it was held that his administratrix was not entitled to carry it on in respect of damage to the estate from loss of wages and medical and nursing expenses; for the injury to the real estate must be a wrong direct against the realty, and not through the intermediate source of an injury to the person of the deceased; but it would be maintainable if brought for breach of contract (*n*).

Nothing in the above-mentioned enactments touches the case of personal injury resulting in death. According to the general maxim obtaining at common law there is no remedy for this at all. Nor could such injuries be brought within the statute of Edw. III., as affecting the funds of the estate through expenditure consequent upon the personal injury.

The constant occurrence of railway accidents towards the middle of the present century, directed public attention to the hardship inflicted by the operation of the common

(*l*) *Twycross v. Grant*, 4 C. P. D. 40; *Walker on Exors.* 128.

(*m*) *Boynton v. Boynton*, 4 App. Ca. 733; *Walker on Exors.* 128.

(*n*) *Pulling v. G. E. R.*, 9 Q. B. D. 110. But see *Bradshaw v.*

Lancs., &c. Rail., L. R. 10 C. P. 189; *Daly v. Dublin, &c. Rail.*, L. R. (Ir.) 30 Q. B. D. 514; *Leggott v. G. N. Rail.*, 1 Q. B. D. 599.

law maxim. For any accident short of death the injured person might recover heavy damages, but if the accident caused death, his relatives and those directly dependent upon him might be plunged into ruin without any remedy for their loss (o). Consequently, in 1846, a most important alteration in this state of things was effected by an "Act for compensating the Families of Persons killed by Accidents," otherwise known as Lord Campbell's Act (9 & 10 Vict. c. 93). This Act confers a right of action on the personal representatives of a person whose death has been caused by a wrongful act, neglect, or default, such that if death had not ensued that person might have maintained an action; but the right conferred is not for the benefit of the personal estate, but for the benefit of the wife, husband, parent, and child of the person whose death shall have been so caused.

The Act extends to an alien so injured and killed on board a foreign vessel on the high seas (p); the benefit does not extend to illegitimate children of the deceased (q).

"Parent" includes father and mother, grandfather and grandmother, stepfather and stepmother.

"Child" includes son and daughter, grandson and granddaughter, stepson and stepdaughter (r).

The action is to be brought by and in the name of the personal representative. The damages have to be assessed by the jury according to the injury resulting to the parties for whose benefit the action is brought, and the amount so recovered is to be divided amongst the beneficiaries in such shares as the jury by their verdict shall find and direct (s).

The compensation must be for pecuniary loss only (t),

(o) Pollock on Torts, 60.

(p) *The Explorer*, L. R. 3 Adm.

289.

(q) *Dickinson v. N. E. Rail.*,
2 H. & C. 735.

(r) 9 & 10 Vict. c. 93, s. 5.

(s) *Id.* s. 2.

(t) *Dalton v. S. E. Rail.*, 4
C. B. R. N. S. 296; *Blake v.*
Mid. Rail., 18 Q. B. R. 93.

but the reasonable expectation of pecuniary advantage by the relation remaining alive may be taken into account by the jury, and damages may be given in respect of that expectation being disappointed, and the probable pecuniary loss thereby occasioned (u).

And where a sum of money was received from a railway company by way of compensation by the executors of a person whose death had resulted from injuries received in an accident on the railway, and the money was so received without any action having been brought under Lord Campbell's Act, the executors instituted an action in the Chancery Division, to which all the relatives of the deceased referred to in sect. 2 of Lord Campbell's Act were parties, asking for a declaration as to the persons entitled to the money, it was held: That the Court could distribute the fund amongst such of the relatives of the deceased as suffered damage by reason of the death, in the same manner as a jury could have done in an action under the Act (x).

Under the Act only one action is available, and that must be commenced within twelve months after the death of such deceased person (y); and the plaintiff must deliver a full particular of the person for whom such damages are claimed (z).

By an Amending Act, 1864, it is provided that if there is no personal representative of the deceased, or if no action is brought by the personal representative within six months, all or any of the persons for whose benefit the right of action is given by Lord Campbell's Act may sue in their own names; and money paid into Court may be paid in one sum without regard to its division into shares (a).

(u) *Franklin v. S. E. Rail.*, 3 H. & N. 211; *Dalton v. S. E. Rail.*, *supra*; *Duckworth v. Johnson*, 4 H. & N. 653; *Pym v. G. N. Rail.*, 2 B. & S. 759; 4 B. & S. 396; *Sykes v. N. E. Rail.*, 44 L. J. C. P. 191; *Hetherington v. N. E.*

Rail., 9 Q. B. D. 160; *Read v. G. E. Rail.*, L. R. 3 Q. B. 555.

(x) *Bulmer v. Bulmer* [1883], 25 C. D. 409.

(y) 9 & 10 Vict. c. 93, s. 3.

(z) *Id.* s. 4.

(a) 27 & 28 Vict. c. 95.

The mere fact of an action having been brought and judgment and satisfaction obtained under Lord Campbell's Act for damages for the loss sustained by reason of the death of the deceased does not bar a further action being instituted in respect of any of the assets and estate of the deceased, since the two actions are totally different and are brought in different rights (*b*).

Further, the right of action conferred upon the representatives of the deceased is not the same as that which the deceased would have had if he had survived, but a totally new right of action on different principles (*c*), although the cause of action is so far identical that if the injured person during his lifetime accepts satisfaction for the injuries sustained, his representatives cannot subsequently maintain an action (*d*).

By the Employers' Liability Act, 1880, where a workman suffers injury in any of the ways indicated by the Act, the workman, or, in case the injury results in death, the legal personal representatives of the workman, and any persons entitled in case of death, shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of, nor in the service of, the employer, nor engaged in his work (*e*); but the cases in which such compensation and remedies are given are restricted by the Act (*f*), and the amount of the compensation is limited to such sum as may be found to be equivalent to the estimated earnings of the three years preceding the injury, of a person in the same grade employed during those years in the like employment and district in which the injured workman was employed at the time of the injury (*g*). The action must be commenced within six months of the accident causing the injury,

(*b*) *Leggott v. G. N. Rail.* [1876], L. R. 3 Q. B. 555; 37 L. J. Q. B. 278.
1 Q. B. D. 599.

(*c*) *Blake v. Mid. Rail.* [1852], (*e*) 43 & 44 Viot. c. 42, s. 1.
18 Q. B. R. 110. (*f*) *Id.* s. 2.

(*d*) *Read v. G. E. Rail.* [1868], (*g*) *Id.* s. 3.

or in case of death within twelve months from date of death. And no action at all is maintainable by any-one under the Act, unless **notice of the injury** be given within six weeks of its occurrence, except the judge think, in case of death, there was reasonable excuse for want of notice (*h*). All actions under this enactment are to be instituted in the County Court (*i*). By the Workmen's Compensation Act, 1897, it is provided that where death results to an injured person entitled to claim under that Act—

- (i) if the workman leaves any dependants wholly dependent upon his earnings at the date of his death, a sum equal to his earnings in the employment of the same employer during the three years next preceding the injury, or the sum of 150*l.*, whichever of those sums is the larger, but not exceeding in any case the sum of 300*l.*, shall be the amount of compensation;
- (ii) if there are no dependants as under (i), but there are dependants partly dependent upon his earnings, such sum as may be agreed upon or determined by arbitration under this Act (but in no case exceeding the amount payable under (i));
- (iii) if no dependants whatever, the reasonable expenses of his medical attendance and burial, but not exceeding 10*l.*

And payment is to be made to the legal personal representative of the workman; failing such, to or for the benefit of his dependants; failing such, to the person to whom the expenses are due. And if made to the legal personal representative shall be paid by him to or for the benefit of the dependants or other person entitled thereto under the Act (*k*).

(*h*) 43 & 44 Vict. c. 42, ss. 4, 7.

(*k*) 60 & 61 Vict. c. 37, Sched. I.

(*i*) *Id.* s. 6.

A weekly payment, or a sum paid by way of redemption thereof, by virtue of this Act, shall not be capable of being assigned, charged or attached, and shall not pass to any other person by operation of law, nor shall any claim be set off against the same (*l*).

But, as it has been observed, a sum paid by way of redemption on the death of the workman intestate would pass by operation of law to his next of kin (*m*).

Presumably, by this enactment, weekly payments would not vest in the trustee in bankruptcy.

The language of the rule is not clear. What is meant by "a sum paid"? Does it mean a sum that has been paid, or a sum to be paid but not yet handed over? If the former, it is incredible that the statute should mean that the workman is to be incapable of disposing of that specific sum by will or otherwise, or that in case of intestacy it should not pass as any other personalty to his legal personal representatives. On the other hand, if the workman dies intestate, does the legislature mean that although the claim and its amount have been agreed upon, but the money has not actually changed hands, that the legal personal representatives are to have no right to recover the sum on behalf of the persons entitled to benefit thereby, or that there are no such persons in that event? Further, does the legislature really intend thereby to take away the individual's right to dispose of, by will, what is in fact part of his estate? These questions must be left for the determination of the proper tribunals, but, in the meantime, it is a matter of regret that the language of the Act in this respect was not more precise and explanatory.

(*l*) 60 & 61 Vict. c. 37, Sched. I.
r. 14.

(*m*) Beven on the Workmen's
Compensation Act, 1897, p. 280.

- (ii) CHOOSES IN ACTION TO WHICH THE LEGAL PERSONAL REPRESENTATIVE IS ENTITLED, BUT WHERE THE RIGHT TO RECOVER ACCRUES **after** THE DEATH OF THE OWNER.

The legal personal representative of a deceased person may sue *as such*, as well as in his own name, upon a contract made with him in his representative capacity; and not only where the consideration flowed from the deceased, but also where it emanates directly from himself as the representative of the deceased. For legal personal representatives are, in point of law, the owners of the personal assets of the deceased, and can bring the same actions in respect of rights accruing after the deceased's death as if they were the owners in fact (*n*).

Consequently, they could declare, *as such*, in *assumpsit*, both on an account stated with the deceased, and on the like with them (the legal personal representatives) *as such* (*o*). So an executor may sue for money lent by him as executor (*p*). He may also sue to recover from the principal debtor money paid by him compulsorily under the deceased's joint obligation with another (*q*). Obviously, an executor may sue for goods sold and delivered by him in his representative capacity after the death of the deceased (*r*), or for work or labour done or completed (*s*).

In like manner, a legal personal representative may sue *as such*, upon negotiable instruments affecting his

(*n*) 1 Wms. Exors. 762; *Hollis v. Smith*, 10 East, 293; Walker on Exors. 131.

(*o*) *Needham v. Croke*, 1 Freem. 538; *Thompson v. Stent*, 1 Taunt. 322. And see *Fortwist v. Tremaine*, 2 Saund. 212.

(*p*) *Webster v. Spencer*, 3 B. & A. 365; 22 R. R. 427; *Ord v. Fenwick*, 3 East, 104.

(*q*) *Ord v. Fenwick*, *supra*. See,

also, *Clarks v. Hougham*, 2 B. & C. 149.

(*r*) *Cowell v. Watts*, 6 East, 405.

(*s*) *Marshall v. Broadhurst*, 1 Cr. & Jer. 403; *Edwards v. Grace*, 2 M. & W. 190; *Aspinall v. Wake*, 10 Bing. 51; *Werner v. Humphreys*, 2 M. & Gr. 853; *Mossley v. Rendell*, L. R. 6 Q. B. 338; *Crawford v. Whital*, 1 Dougl. 4, n. (1).

deceased's estate (*t*), although, formerly, it was held otherwise. It used to be thought that if an executor took a bill of exchange from a debtor of the testator, a new debt was thereby created which must be declared on as such. But modern cases have gone to establish firmly the more rational rule that wherever the money recovered will be assets, the executor may sue for it, and declare in his representative capacity (*u*); but not *all* the executors may always join in suing on such a contract, whether they *all* made the contract or not (*v*).

Further, it appears that if a legal personal representative takes a *bond* from a simple contract debtor of the estate, he may not sue upon it in his representative capacity although it be given to him *as such*, for the *bond* extinguishes the debt and creates a new and personal obligation of a higher kind (*x*).

And so, where a covenant is entered into with the deceased for the covenantor to perform certain duties by a given date and the covenantee dies before the time for performance, his legal personal representative generally has a right of action on the covenant (*y*).

If A. contract to deliver a horse to B. or *his assigns* on a given day, and B. dies before the day, his executor can sue for breach (*z*). Further, a right may vest in the personal legal representative which the deceased could not claim, since it was not, in any sense, in existence. Thus, where a lease is made to B. for life, the

(*t*) *King v. Thom*, 1 T. R. 487; *Partridge v. Court*, 5 Price, 412; *Catherwood v. Chabaud*, 1 B. & C. 150; 25 R. R. 339.

(*u*) *Cowell v. Watts*, 6 East, 410-412; *Heath v. Chilton*, 12 M. & W. 637; *Abbott v. Parfitt*, L. R. 6 Q. B. 346.

(*v*) *Heath v. Chilton*, 12 M. & W. 632; 1 Wms. Exors. 764-5, where the above cases are also cited.

(*x*) *Hosier v. Arundell*, 3 Bos. & Pull. 7; *Partridge v. Court*, *supra*;

Price v. Moulton, 10 C. B. 561. And see, also, *Murray v. E. I. Co.*, 5 B. & A. 204; 24 R. R. 325.

(*y*) *Chapman v. Dalton*, Plowd. 286; Wentw. Off. Ex. 188, 215; 1 Wms. Exors. 767; *Husband v. Pollard*, cited in 2 P. Wms. 467; Vin. Abr. Exors. (X) pl. 10.

(*z*) *Chapman v. Dalton*, *supra*. But see, also, Bro. Abr. Deputy; *Anon.*, 1 Leon. 316; 1 Roll. Abr. 915, Exors. (X) pl. 2; 1 Wms. Exors. 768, 769.

remainder to his executors for years (a); or where a lease for years is bequeathed by will to C. for life and afterwards to D. who dies before C. Here, although D. never had the term in himself, yet it shall devolve upon his executors, who may maintain an action in respect of it (b).

It has been held that if no time be set for the redemption of a pledge, the pledgor must redeem during his life, and that his executors cannot, generally, redeem (c).

With regard to torts the law is much the same.

If an injury is done to the estate of the deceased after his death, his legal personal representative can generally claim damages against the wrong-doer therefor, and in such case he may bring the action in his own name or in his representative capacity. Nor does it matter whether the property has been in his actual possession or not (d).

Consequently, he may bring trover against a person having effects of the deceased in his possession, and can insist on such person surrendering them without an inventory or receipt (e); and even if a legatee takes possession of the thing bequeathed without the executor's assent, he is liable to an action for trespass by the executor (f).

And an executor, as such, can maintain *quare impedit* for a disturbance in his own time, or ejectment, where the deceased had a lease for years, or from year to year,

(a) Wentw. Off. Exors. 189; Co. Litt. 54 b; 1 Wms. Exors. 769.

(b) Wentw. Off. Exors. 181.

(c) *Ratcliff v. Davies*, 1 Bulstr. 29; *Kemp v. Westbrook*, 1 Ves. Sen. 278. But see Story's Equity, § 1032; Story on Bailments, § 348; and 1 Wms. Exors. n. (c), pp. 769, 770.

(d) *Bollard v. Spencer*, 7 T. R. 358; *Hollis v. Smith*, 10 East,

294; *Grimstead v. Shirley*, 2 Taunt. 117. And see Bro. Trespass, 303; *Hudson v. Hudson*, Latch, 214.

(e) *Cobbett v. Clutton*, 2 Car. & P. 471.

(f) Bac. Abr. Exors. (L) 3. See, also, *Adams v. Cheverel*, Cro. Jac. 113; *Wilbraham v. Snow*, 2 Saund. 47, n.; *Hole v. King*, Com. Rep. 163; *Jenkins v. Plombe*, 6 Mod. 181; *Fraser v. The Swansea Canal Co.*, 1 Ad. & El. 354.

upon an ouster after his death (*g*). And since the Land Transfer Act, 1897, it would seem that similar power may be now exercisable in respect of the realty (*h*). But in respect of all the above rights it is to be remembered that the legal personal representative may lose his rights by suffering them to become statutebarred.

For the purposes of the Statute of Limitations relating to realty, an administrator claiming the estate or interest of a deceased person, of whose chattels he shall be appointed administrator, shall be deemed to claim as if there had been no interval of time between the death of such deceased person and the grant of letters of administration (*i*). Accordingly, with regard to the deceased's leaseholds, time begins to run from the date of death, not from the date of grant of letters of administration (*j*); and, since the Land Transfer Act, 1897, the same rule will now hold in regard to the real estate (*k*).

But under the other Statutes of Limitations, if time had not commenced to run during the deceased's life, it does not begin to run against the administrator before the grant of the letters of administration (*l*); but in the case of an executor it runs from the date of the testator's death, or the earlier or later date on which the cause of action arose (*m*).

If a creditor dies intestate on the day a debt becomes payable to him, and there is no evidence to show whether he died before or after the moment when the debt became payable, the Statute of Limitations does not run against his administrator until letters of administration have been taken out (*n*).

(*g*) *Smallwood v. Bp. of Coventry*, Cro. Eliz. 207; *Slade's Case*, Co. Pt. IV. 95 a; *Morston's Case*, 1 Ventr. 30; *Doe v. Porter*, 3 T. R. 13; 1 R. R. 626.

(*h*) 60 & 61 Vict. c. 67, ss. 1—4.

(*i*) 3 & 4 Will. IV. c. 27, s. 6.

(*j*) *Davies v. Williams*, 34 Ch. D. 558.

(*k*) 60 & 61 Vict. c. 67, s. 2 (2).

(*l*) *Murray v. E. I. Co.*, 5 B. & Ald. 204; 24 R. R. 325; *Burdick v. Garrick*, L. R. 5 Ch. Ap. 241.

(*m*) *Burdick v. Garrick*, *supra*; *Hickman v. Walker*, Willes, 27; Walker on Exors. 132.

(*n*) *Atkinson v. Bradford Bdg. Soc.*, 25 Q. B. D. 377.

And even where one's suit is not barred by the statute, relief may be refused on the ground of acquiescence, or upon some other equitable ground (*o*); but lapse of time will not itself bar an executor's executor of his right to have an account of the original testator's estate taken with a view to ascertain his own liabilities as an accounting party (*p*).

Where there are several executors, on the death of one, whether before or after probate, the entire right of representation survives to the others.

When the surviving executor, or when a sole executor, dies after probate, *his* executor, and the executor of such executor, becomes in point of law the executor of the original testator, and is accordingly entitled to all the benefits of contracts entered into with such original testator. But if the sole or surviving executor of a testator dies before probate, the executor of such deceased executor does not become executor to the original testator, for he cannot prove the will, and, therefore, cannot recover debts due to the estate (*q*). In such a case administration of the goods, &c., of the original testator, *cum testamento annexo*, must be taken out.

An administrator *durante minore ætate* of the executor of an executor is the representative of the original testator; for such administrator is *in loco executoris* (*r*).

When an administrator dies, or when a sole or surviving executor dies intestate after taking out probate of his testator's estate, no right of representation passes to his administrator; in such a case administration *de bonis non* must be obtained (*s*). The administrator *de bonis non* becomes the sole representative of the original

(*o*) 3 & 4 Will. IV. c. 27, s. 27.

(*p*) *Smith v. O'Grady*, L. R. 3 P. C. 311; *Walker on Exors.* 132.

(*q*) *Wankford v. Wankford*, 1 Salk. 308.

(*r*) *Anon.*, Freem. 283, pl. 335.

(*s*) *Tingrey v. Brown*, 1 B. & P. 310; 4 R. R. 805; *Elliott v. Kemp*, 7 M. & W. 311; *Moseley v. Rendell*, L. R. 6 Q. B. 338; 40 L. J. Q. B. 111. See, also, 1 Addison on Contracts [1892], 236.

testator, and consequently stands in the same position as to the exercise of rights as the original legal personal representative (*t*).

A married woman may be appointed executrix, and, by the Married Women's Property Act, 1882, she has all the powers of a *feme sole*, and may act as executrix or administratrix without reference to her husband, nor does he become liable unless he acts or intermeddles in the administration (*u*).

Besides those rights and benefits which arise directly out of contract or tort, there are many choses in action and interests closely akin thereto which also pass upon the death of the person intended to be benefited thereby to his legal personal representative.

Thus, contingent and executory interests, whether in real or personal estate, pass to the representative of the person dying before the contingency on which they take effect arises (*v*).

Thus, a devise to B., if B. die without issue then living, or *en ventre sa mère*, then 3,500*l.* to C. on marriage or attaining twenty-one, such legacy being charged on the real estate. C. married (having attained twenty-one) and died in lifetime of B., who afterwards died without issue. It was decreed that the legacy should be raised for the benefit of C.'s administrator (*w*).

This and other cases cited below establish the principle that contingent and executory interests, although they do not vest in possession, may vest in right so as to be transmissible to executors or administrators (*x*).

(*t*) *Hirst v. Smith*, 7 T. R. 182; 4 R. R. 415; *Suncerkrop v. Day*, 8 Ad. & E. 624.

(*u*) 45 & 46 Vict. c. 76, ss. 18, 24.

(*v*) *Fearn. Cont. Remd.* 554; 2 Saund. 380, note to *Purefoy v. Rogers*.

(*w*) *King v. Withers*, Cas. temp. Talb. 117.

(*x*) *Pinbury v. Elkin*, 1 P. Wms. 564; *Chauncey v. Graydon*, 2 Atk. 616; *Peck v. Parrott*, 1 Ves. Sen. 236; *Barnes v. Allen*, 1 Bro. C. C. 181; 3 Ves. Jun. 208; *Perry v. Woods*, 3 Ves. Jun. 204; *Massey v. Hudson*, 2 Meriv. 130; 16 R. R. 158. See, also, 1 Wms. Exors. 771—773, where all the above cases are referred to.

(iii) TRANSFER OF LIABILITY UPON CHOSSES IN ACTION.

The personal representative of a deceased lessee or termor is the assignee in law of the term and liable as such upon all the covenants running with the land annexed to leases and chattel interests (*y*) to the extent of assets in his hands, although he never enters upon or takes possession of the demised premises (*z*). If the executor has entered and taken possession of leasehold premises, he will become personally liable, *de bonis propriis*, to the extent of the entire damage resulting from the breach of a covenant to repair by his testator, whether the profits derived from the premises are or are not adequate to meet the costs of repairing (*a*). But the executor is not personally liable to pay rent on the deceased's contract (*b*).

Nor does assignment of the lease, by the lessee or his executor, discharge the executor from liability as executor to the extent of assets in his hands. For he remains liable upon the privity of contract, and may be sued as executor upon the covenants contained in the lease, notwithstanding the assignment of the term (*c*).

But the personal representative of an assignee of a lease is exonerated from all liability after an assignment of the term. The assignee may get rid of liability by simply assigning his estate, and his executor has the same power (*d*).

And, similarly, in regard to other contracts, the personal representative is generally liable, to the extent of

(*y*) *Spencer's Case*, Co. Pt. V. 17 b.

(*z*) *Houae v. Webster*, Yelv. 103; *Rubery v. Stevens*, 4 B. & Ad. 241; 38 R. R. 242; *Wollaston v. Hake-well*, 3 M. & Gr. 297; *Hopwood v. Whaley*, 6 C. B. R. 744.

(*a*) *Tremeere v. Morrison*, 4 M. & Sc. 613; *Sleap v. Newman*, 12

C. B. R. N. S. 116.

(*b*) *Woodfall*, L. & T. Ch. vii. sect. 10.

(*c*) *Helier v. Casebert*, 1 Lev. 127; *Coghil v. Freshlove*, 3 Mod. 326.

(*d*) *Rowley v. Adams*, 4 Myl. & Cr. 542.

assets in his hands, upon all contracts of the deceased, whether they are made under seal, by record, or are simple contracts, and whether the representatives are named in the contracts or not, and whether the breach has been made during the deceased's lifetime or not. They are even liable where the heir is named and the executors are not named, in the contract (e).

So, if a purchaser orders goods and dies before time for delivery, his representative must accept delivery and pay for them, or make good the damage sustained by the breach, to the extent of assets in his hands (f).

Where a person contracts to build a house by a certain day or pay a certain sum as liquidated damages for default, and dies, his executor must either build or pay (g). But an executor is not liable for the deceased's breach of promise of marriage unless special damage is pleaded, and such special damage (if any) must be damage to the personal estate and not to the person of the promisee, and must have been within the contemplation of both parties at the time of the promise (h).

Indeed, performance of those contracts which are of a purely personal nature depending on peculiar relations, personal skill, service, and so forth, of the deceased cannot be demanded of his representatives, nor can they (the representatives), as we have already seen, insist upon offering such performance. Such contracts virtually expire with the death of either party.

With regard to the torts committed by a deceased. At common law no action lay against the legal representatives to recover damages for injury inflicted by the tort-feasor; such remedies ceased at the tort-feasor's

(e) *Wills v. Murray*, 4 Exch. Rep. 863; *Birkenhead, Lane., &c. v. Cotesworth*, 5 Exch. Rep. 226; *Heward v. Wheatley*, 22 L. J. Ch. 435.

(f) *Wentworth v. Cock*, 10 Ad. & E. 42; *Cooper v. Jarman*, L. R. 3 Eq. 98, 100; 36 L. J. Ch. 85.

(g) *Quick v. Ludborough*, 3 Bulstr. 30; *Marshall v. Broadhurst*, 1 Cr. & J. 405; *Collinson v. Lister*, 20 Beav. 365.

(h) *Finlay v. Chirney*, 20 Q. B. D. 494; 57 L. J. Q. B. 247. And see *Chamberlain v. Williamson*, 2 M. & S. 408; 15 R. R. 295.

death. So that no action would lie against the deceased tort-feasor's representatives for his having committed waste (i), nor for cutting down another's tree, nor for trespass and knocking down hedges or fences, nor for wrongfully digging on another's land (where the tort-feasor gained nothing thereby). But if the tort-feasor acquired any property by the wrongdoing, an action for such property would lie against his executor or administrator. Hence, where coals, trees, minerals, and the like are severed by a man from another's soil, and the wrongdoer has sold them, and died, his estate is answerable for the price (j). The same remark applies to conversion or unlawful detention by the deceased of another's chattels, the wrong itself died with the deceased; but whenever his estate gained any benefit thereby, his representatives were answerable (k). As it is said, trover does not lie against an executor for a conversion by his testator. But where the cause of action is money due either by express promise or implied (or for money had and received), it will be maintainable against the executors, so that, if a man takes a horse from another and subsequently returns it, and dies, there will be no action against his executor for *conversion*, but for use and hire of the horse (l).

In like manner, no action is maintainable against the executor of a deceased sheriff, or other officer, who permitted his prisoner to escape, or who neglected to give evidence under subpœna (m); nor for deceased's negligence (n), or fraud, wherefrom his estate derived no benefit (o).

(i) 2 Inst. 301.

(j) Addison, Torts; *Powell v. Rees*, 7 Ad. & E. 428; *Batthyany v. Walford*, 36 Ch. D. 269; 56 L. J. Ch. 881.

(k) *Ashley v. Taylor*, 10 Ch. D. 768; *Phillips v. Homfray*, 24 Ch. D. 439; 52 L. J. Ch. 833; 11 App. Ca. 466.

(l) *Hambly v. Trott*, 1 Cowp.

375; *Baily v. Birtles*, Raym. 71; *Perkinson v. Gifford*, Cro. Car. 539.

(m) 2 Wms. Exors. 1601.

(n) *Overend, &c. Co. v. Gurney*, L. R. 4 Ch. Ap. 701; 39 L. J. Ch. 45.

(o) *Peck v. Gurney*, L. R. 6 H. L. 377; 43 L. J. Ch. 19. See, also, *Story v. Sheard*, (1892) 2 Q. B. 515; Addison, Torts, 61.

By 3 & 4 Will. IV. c. 42 (1833), after reciting that there was no remedy provided by law for certain wrongs done by a deceased person in his lifetime to another in respect of his property, real or personal, it was enacted that an action for trespass or case may be maintained against the legal representatives of any deceased person, for any wrong committed by him in his lifetime to another in respect of that other's property, real or personal, provided such injury shall have been committed within six calendar months before the death of the tort-feasor, and provided also that such action be brought within six calendar months after such executors or administrators shall have taken upon themselves the administration of the estate and effects of such deceased person. And the damage to be recovered in such actions shall be payable in like order of administration as the simple contract debts of such deceased person (*p*).

Where a watch was shown to be in the possession of a deceased person more than six months before her decease, and she was asked *within* the six months to give it up and wrongfully refused to do so, it was held that this was evidence of conversion within the statutory time (*q*).

A devise of premises for life provided that the tenant for life should keep the premises in repair.

The tenant for life entered upon and enjoyed the premises, but left them at her death out of repair. The remainderman in fee brought an action against the executor of the tenant for life in respect of the non-repair of the premises within the period of limitation prescribed by 3 & 4 Will. IV. c. 42, s. 2, and it was held that an action for tort in respect of the permissive waste by non-repair of the premises would have lain at common law against the tenant for life in her lifetime

(*p*) 3 & 4 Will. IV. c. 42, s. 2.

(*q*) *Richmond v. Nicholson*, 8 Sc. 137.

and consequently lay under the above-mentioned statute against her executor after her death (*r*).

The action must be brought within the statutory limit of time (*s*); but if the injury is of a continuing nature and creates a continuing cause of action, it is immaterial that nothing active was done for six months before the death (*t*).

(iv) CIVIL DEATH.

In case of a person being outlawed, he is civilly dead and cannot enforce a contract entered into with him (*u*), but he is still liable to be sued thereon (*x*).

When outlawed for a capital offence he forfeits all his lands and tenements; and in all cases of outlawry, he loses his goods and chattels including *choses in action*, which henceforth vest in the Crown, and the Crown or its grantee, as we have seen, may bring an action thereon in his own name (*y*).

When the outlawry is reversed the person does not thereby regain his rights to the goods and chattels which have become forfeited and vested in the Crown; but, since his lands are not divested out of him and transferred until office found, he can sue the lessees and tenants of such lands on their covenants, and grant leases and deal generally as owner unless restrained by the Crown (*z*). But an outlaw may always sue in a

(*r*) *Woodhouse v. Walker*, 5 Q. B. D. 404; 49 L. J. Q. B. 609.

(*s*) *Kirk v. Todd*, 21 Ch. D. 484; 52 L. J. Ch. 224.

(*t*) *Jenks v. Viscount Clifden*, (1897) 1 Ch. 694; 66 L. J. Ch. 338.

(*u*) *Hawk*. P. C. Bk. II. c. 49, s. 9.

(*x*) *Ramsey v. Macdonald*, Foster, 61; Sid. 60; Cro. Jac. 426.

(*y*) Com. Dig. Forfeiture, B. 2; *Slade's Case*, Co. Pt. IV. 95a; *Ford's Case*, Co. Pt. XII. 2; *Bullock v. Dodds*, 2 B. & Ald. 276; 20 R. R. 420; *Roberts v. Walker*, 1 Russ. & M. 753; 32 R. R. 318; *Hawk*. P. C. Bk. II. c. 49, s. 10; *Earl of Somerset's Case*, Hob. 214; 1 Addison, Contracts, 238, 239.

(*z*) *Doe v. Evans*, 5 B. & C. 587; *Doe v. Pritchard*, 5 B. & Ad. 765; *Clerk v. Scroggs*, 2 Lutw. 1513.

representative capacity; and a mayor and commonalty may also sue, notwithstanding he is outlawed (*a*).

Formerly the same law applied to felons, but by 33 & 34 Vict. c. 23, forfeiture or escheat for felony has been abolished (*b*), but nothing in this Act is to affect the law of forfeiture consequent upon outlawry. By the same Act it is provided that the *property* of a felon may be committed to the custody and management of an administrator to be appointed by the Crown, or failing such appointment, to the management of an *interim* curator, who may be appointed by the magistrates on an application made in the interest of the felon or his family. Such appointee must pay the felon's debts and other liabilities and support his family, and preserve the residue of the property for the felon or his legal representatives on the termination of his punishment (*c*).

(*a*) Co. Litt. 128a.

(*b*) 33 & 34 Vict. c. 23, s. 1.

(*c*) 33 & 34 Vict. c. 23, ss. 9, 18,

21, 24. For a further mode of transfer by death, see *Donationes mortis causâ, post*, pp. 302—305.

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CHAPTER II.

TRANSFER BY (II.) MARRIAGE; (III.) BANKRUPTCY;
(IV.) LUNACY; (V.) PAUPERISM; (VI.)
VARIOUS OTHER MODES.

(II.) TRANSFER BY MARRIAGE.

WHERE a woman has been married since the Married Women's Property Act, 1882, the choses in action owned by her in her own right at the time of marriage remain exclusively her property after marriage, so far, at least, as operation of law is concerned, and apart from any settlement or other assignment to the contrary.

At common law, however, the act of marriage transferred to and vested in the husband a qualified property in his wife's choses in action. That is to say, they remained her property until such time as he exercised the right of dealing with them in such a manner as to perfect his title in them; this was cumbrously called "reducing the choses into his possession." If he omitted so to reduce them into his possession during his lifetime, the choses in action survived to the wife solely and exclusively for her benefit, and would not go to the husband's representatives (*a*). But the husband alone was entitled during the coverture to the benefits of covenants running with his wife's land, and could sue for all breaches thereof, even after wife's death, which were not in the nature of continuing

(*a*) *Milner v. Milnes*, 3 T. R. 627, 628; *Sherrington v. Yates*, 12 M. & W. 865; *Mason v. Morgan*,

2 Ad. & E. 30; *Connor v. Martin*, cited 3 Wils. 5; *Hart v. Stephens*, 6 Q. B. R. 937.

breaches, where the ultimate damage had accrued during his wife's lifetime (b).

As regards the relation of husband and wife in respect of her choses in action, it was said (c) that the husband had not on the marriage any *immediate* property in the chose in action; he had only the right to reduce it into possession if it were in a state capable of being so reduced. Reduction into possession was a necessary and indispensable preliminary to the husband's having any right of property in himself or to his being able to convey any right of property to another. If he died without having been able or willing to perform this condition, the right of the wife continued unaltered exactly as if she had never married. Her title was the same after her husband's death as it was before her marriage.

The husband had a power, but he might never have exercised it; or the chose in action was so circumstanced, for example where it was of a reversionary nature, that he could not exercise it so as to fulfil the condition upon which his title so depended (d).

There was no general rule as to what constituted "reduction into possession," but it must be some act done which would have the effect of changing the property in the chose in action, or giving the husband control over it without taking action (e) or enabling him to sue for it as had and received to his use (f). For example, actual receipt by him of the money due to wife (g);

(b) *Aleberry v. Walby*, 1 Str. 229; *Dunstan v. Burwell*, 1 Wils. 224; Bro. Abr. Cov. p. 110; *Brett v. Cumberland*, 3 Bulstr. 163; *Nurse v. Wills*, 4 B. & Ad. 739; and 1 Addison, Contracts, p. 240, where the above and other cases are cited.

(c) *Purdew v. Jackson*, 1 Russ. 66; 25 R. R. 1.

(d) *Re Butler's Trust*, 38 Ch. D. 291; *Re Barton's Will*, 10 Ha. 12; *Seawin v. Blunt*, 7 Ves. Jun. 294; *Langham v. Nenny*, 3 Ves.

Jun. 467.

(e) *Re Barber*, 11 Ch. D. 442; *Nicholson v. Drury Bds. Est. Co.*, 7 Ch. D. 55; 2 Spence, Eq. Jur. 478.

(f) *Aitchison v. Dixon*, L. R. 10 Eq. 589.

(g) *Rees v. Keith*, 11 Sim. 388; *Nash v. Nash*, 2 Madd. 133, 139; *Scrutton v. Patillo*, L. R. 19 Eq. 369; *Parker v. Lechmere*, 12 Ch. D. 256; *Gaters v. Madeley*, 6 M. & W. 423; *Day v. Pargrave*, cited in 2 M. & S. 396.

transfer of stock into his name; transfer of stock into names of trustees upon trusts inconsistent with the wife's title by survivorship (*h*). If the wife owned choses in action, even such as negotiable instruments given to her *before marriage*, unless the contracts thereon were altered (as by taking a new security) (*i*), the husband was bound to bring an action upon them in his own and his wife's names jointly, and if he obtained judgment and issued execution, he thereby reduced the chose into possession (*j*); but his death after judgment and before execution would give the benefit of the judgment solely to the wife (*k*). But if the chose in action accrued to the wife *during coverture*, and the husband disagreed to his wife's interest by instituting a suit in his own name only, his representatives would be entitled in the event of his dying after judgment (*l*). Where the husband failed to reduce the wife's choses in action into possession during her lifetime, he was permitted, upon her predeceasing him, to obtain them on taking out letters of administration to her (*m*). And even where the husband failed in such a case to take out letters of administration in his lifetime, since the right had thus survived to him, his personal representative was entitled to the choses in action upon taking out letters of administration to the deceased's wife (*n*).

If the wife left a will, the executors were merely trustees of the beneficial interest in her choses in action

(*h*) *Wildman v. Wildman*, 9 Ves. Jun. 174; 7 R. R. 153; *Ryland v. Smith*, 1 My. & Cr. 53; 1 Bright's Husband & W. 54; *Hansen v. Miller*, 14 Sim. 22; *Burnham v. Bennett*, 2 Coll. Ch. R. 254.

(*i*) *Yard v. Ellard*, 1 Salk. 117, pl. 8.

(*j*) *Hardy v. Robinson*, 1 Keb. 440; *Milner v. Milnes*, 3 T. R. 627; *Sherrington v. Yates*, 12 M. & W. 855; *Tyrell v. Bennet*, 2 Keb. 89; *Rumsey v. George*, 1 M.

& S. 176.

(*k*) *Bond v. Simmons*, 3 Atk. 21.

(*l*) *Oglander v. Baston*, 1 Vern. 396; 1 Wh. & T. 160, which see, for further illustrations.

(*m*) 1 Wh. & T. 161; *Proudley v. Fielder*, 2 My. & K. 57; *Re Lambert*, 39 Ch. D. 626.

(*n*) *Partington v. Att.-Gen.*, L. R. 4 H. L. 109; *Re Harding*, L. R. 2 P. & D. 394; *Re Price*, 12 P. D. 137; *Re Williams*, 67 L. T. 502; 1 Wh. & T. 161.

for her surviving husband, and he, or, if dead, his personal representatives, might sue her executors in respect thereof (o).

Where a married woman, domiciled abroad, was entitled to reversionary interests in personal property, her rights or powers thereover, or those of her husband, were regulated by the law of their domicile (p).

An Act known as Malins' Act, 1857 (20 & 21 Vict. c. 57), enabled married women in certain cases to dispose of reversionary interests in personal estate in the same manner as they could dispose of their real estate (q).

Mere intention on a husband's part to reduce his wife's choses in action into possession was insufficient; and so also mere appropriation by him of the fund was insufficient (r).

The general result of the Married Women's Property Act, 1882, as to a woman married *after* the Act, with regard to her choses in action, is that the husband no longer has even a qualified gift in or right to his wife's choses in action, whether they accrued to her before or during coverture, and is no longer able, if he survive her, to claim such property *jure mariti*, but only as administrator of her estate. But if a woman married *before that date*, a title, whether vested or contingent, in reversion or remainder, to any property, such property is not made her separate estate by the Act, and consequently falls under the operation of the law as it was in force prior to 1st January, 1883, a full account of which is given in the authorities cited below (s).

(o) *Smart v. Tranter*, 43 Ch. D. 587; 1 Wh. & T. 161.

(p) *Guepratte v. Young*, 4 De G. & S. 217; *Duncan v. Cannan*, 18 Beav. 128.

(q) 20 & 21 Vict. c. 57, ss. 1—5; *Wetherby v. Rackham*, 39 W. R. 363; *Re Newton*, 23 Ch. D. 181; *Re Bennett*, 99 L. T. J. 112; *Re Briant*, 39 Ch. D. 478; *Tennent*

v. Welch, 37 Ch. D. 622; *Clarke v. Green*, 2 Hem. & M. 474.

(r) *Aitchison v. Dixon*, *supra*; *Scrutton v. Patillo*, L. R. 19 Eq. 369; *Scarpellini v. Atcheson*, 7 Q. B. R. 864; *Harrison v. Andrews*, 13 Sim. 595; *Blount v. Bestland*, 5 Ves. Jun. 515. See, also, 1 Wms. Exors. pp. 737—759.

(s) 1 Wh. & T. notes to *Hornaby*

It may be added that as regards cases falling under the old law, so long as a wife's chose in action is reversionary, there can of course be no reduction into possession by the husband. If he assigned his wife's reversionary chose in action such assignment would not operate to reduce it into possession, nor would it defeat the wife's right by survivorship which is a legal right and not affected by the equitable right (if any) of the assignee (*t*). Such assignment could not pass more than the husband's right to reduce the chose into possession if he should be able to do so, *i.e.*, if it should fall into possession before the husband's death. If the husband died while the chose in action was still reversionary the assignee could take nothing, for all he obtained by the assignment was the qualified and contingent right of his assignor (*u*). If the wife died while the chose in action was still reversionary the husband would take it, as her administrator, subject to any previous assignment by him, and therefore it would belong to the assignee, subject, however, to the payment of the wife's debts (*v*).

If the chose in action fell into possession by the death of the tenant for life, during the lives of both husband and wife, the rights of the husband or of his assignee would be subject to the assertion of the wife's "equity to a settlement" out of it, *i.e.*, her equitable right, where property was in Court or in the hands of trustees, to require that a reasonable and proper settlement out of it should be made on her and her children notwithstanding the husband's right (*w*).

v. Lee; 1 Wms. Exors. pp. 737—759; Spence, Eq. Jur.; Story, Eq. Jur., together with all the cases already cited in the notes to this section.

(*t*) *Purdew v. Jackson*, 1 Russ. 54, 57; 25 R. R. 1.

(*u*) Goodeve, Pers. Pro. 406; *Purdew v. Jackson*, *supra*.

(*v*) *Heard v. Stamford*, Ca. t. Talbot, 173.

(*w*) Goodeve, Pers. Pro. 406; Vaizey on Settlements, 271; *Elisbank v. Montolieu*, 1 Wh. & T. 621.

(III.) TRANSFER BY BANKRUPTCY.

Immediately a receiving order is made against a person, his choses in action, *inter alia*, are thereby divested from him and vested in the official receiver, and upon the appointment of a trustee such choses in action pass to and vest in the trustee in bankruptcy (*x*). They are to be deemed to have been duly assigned to such trustee so as to give him the same power as the debtor formerly had to institute an action for their recovery (*y*). The trustee has the same rights of action in respect of any matter affecting the interest of the debtor's estate as the debtor would have had apart from his bankruptcy (*z*). Further, the trustee in bankruptcy may recover money received by the debtor's agent, and paid over to the debtor after the act of bankruptcy; or from a creditor who has received payment of his debt after an act of bankruptcy by way of fraudulent preference, or even from one who has enforced payment in a foreign country of a debt due to him from the bankrupt, after he had received notice of the bankruptcy (*a*).

The trustee has a right to sue upon all executory contracts entered into with the debtor, whether for non-delivery of goods, allotment of stocks or shares, or non-acceptance of property sold by the debtor (*b*).

But there are some executory contracts, sometimes called "personal contracts," which depend on the personal skill, &c., of the bankrupt, or upon a mutuality of obligation and liability, which bankruptcy completely

(*x*) 46 & 47 Vict. c. 52, ss. 9, 54.

(*y*) *Id.* s. 50 (5); *Wright v. Fairfield*, 2 B. & Ad. 727.

(*z*) *Hill v. Smith*, 12 M. & W. 630; *Beckham v. Drake*, 2 H. L. C. 616; *Wetherell v. Julius*, 10 C. B. R. 280; *Stanton v. Collier*, 3 El. & Bl. 274; *Ashdown v. Ingamells*, 5 Ex. D. 280, C. A.; *Emden v. Curte*, 17 Ch. D. 768, C. A.

(*a*) *Doc v. Ball*, 11 M. & W.

533; *Russell v. Bell*, 10 M. & W. 352; *Hunter v. Potts*, 4 T. R. 182; 2 R. R. 353; *Sill v. Worwick*, 1 H. Bl. 665; 2 R. R. 816; *Phillips v. Hunter*, 2 H. Bl. 403; 2 R. R. 353; *Brandon v. Pate*, 2 H. Bl. 308; *Holmes v. Walsh*, 7 T. R. 458.

(*b*) *Gibson v. Carruthers*, 8 M. & W. 333; *Boorman v. Nash*, 9 B. & C. 152; *Tripp v. Armitage*, 4 M. & W. 699.

discharges when nothing has been done under them (c); but if the debtor execute the contract the trustee can sue on it upon completion of the work (d).

Where the debtor previously to his bankruptcy has assigned his interest in a *chose in action* so as to pass to the assignee an *equitable* claim over the subject-matter at the time of the assignment, the law does not operate to vest any right thereto in the debtor's trustee in bankruptcy. Nor does it matter whether the right given to such assignee be exerciseable immediately or at some future time, wholly or partially, conditionally or unconditionally. The law looks to the whole transaction and the general effect and purport of the assignment (e).

But the assignment must be as complete and effectual as possible; and where it is imperfect, and therefore does not properly vest the equitable right in the assignee, the *chose in action* will pass, on bankruptcy, to the assignor's trustee (f).

Where a bankrupt has delivered a bill for valuable consideration to another, so as to pass to the latter the beneficial interest therein, it has been held: That the bankrupt may, after his bankruptcy, indorse the bill, and so complete the legal title (g), and that he may similarly indorse all notes and bills which he holds with the requisite authority as agent or trustee (h). But, of course, wherever the bankrupt himself has a

(c) *Beckham v. Drake*, *supra*; *Knight v. Burgess*, 33 L. J. Ch. 727.

(d) *Whitmore v. Gilmour*, 12 M. & W. 808.

(e) *Ex parte Moss*, 14 Q. B. D. 310; *Drew v. Josolyne*, 18 Q. B. D. 590; *In re Davis*, 22 Q. B. D. 193; *In re Pryce*, 4 Ch. D. 685; *Wallace v. Hardacre*, 1 Campb. 46; 10 R. R. 629; *Willis v. Freeman*, 12 East, 660; *Ex parte Greening*, 13 Ves. Jun. 206.

(f) *Ex parte Nicholls*, 22 Ch. D. 782; 52 L. J. Ch. 635. See, also, *Buck v. Lee*, 1 Ad. & E. 804. Cp. 46 & 47 Vict. c. 52, s. 44 (3); *Carvalho v. Burn*, 4 B. & Ad. 393; 1 Ad. & E. 883; *Doe v. Steward*, 1 Ad. & E. 300.

(g) *Watkins v. Maule*, 2 Jac. & Walk. 243; *Ex parte Greening*, *supra*.

(h) *Gibson v. Carruthers*, 8 M. & W. 333.

beneficial interest in negotiable instruments, held by him in due course, such beneficial interest passes to and vests in his trustees upon bankruptcy (i). When *Dearle v. Hall* (j) was decided, the law affecting reputed ownership in bankruptcy embraced *all* choses in action. To-day the "reputed ownership" clause only applies to "*debts due or growing due to the bankrupt in the course of his trade or business*" (k).

But if the bankrupt has assigned such debts, the assignee's right will only be secure if he has done everything to substantiate his ownership, *i.e.*, he must obtain an assignment and delivery of the security (if any) and duly give notice of the assignment to *the person by whom such debt is payable* (l). A mere notice, however, to pay debts to *one* of the partners of a firm will not take the debts out of the order and disposition of the firm of which he is a member, and consequently, in case of bankruptcy of the firm, such debts will vest in the trustees in bankruptcy of such firm and be assets distributable among the creditors of the bankrupt firm. Thus, a dissolution of partnership was advertised in the Gazette, and a circular sent in the name of the dissolved firm requesting the debtors to the firm to pay their debts to one partner B. It was *held*: That such notice was insufficient to take the debts out of the reputed ownership of the firm (m).

All railway shares transferable only by deed, all debentures in joint stock companies, and policies of life assurance are exempt from the operation of the reputed ownership clause (n).

(i) *Willis v. Freeman*, 12 East, 656.

(j) [1823], 3 Russ. 1; 27 R.R. 1.

(k) Bkcy. Act, 1883, s. 44 (3); *Ward v. Duncombe*, (1893) A. C. 393; *Re Jenkinson*, 15 Q. B. D. 441; 1 Wh. & T. 128.

(l) *Jones v. Gibbon*, 9 Ves. Jun. 409; 7 R. R. 247; *Re Davis*, 60 L. T. 156; *Re Tillett*, 60 L. T.

575; *Gardner v. Lachlan*, 4 My. & Cr. 129; *Buck v. Lee*, 3 Nev. & Man. 580.

(m) *Ex parte Sprague, Re Brewster*, 4 De G. M. & G. 866; *Ex parte Woodgate*, 2 M. D. & De G. 394. And see *Ex parte Osborne*, 1 G. & J. 358; *Ex parte Tennyson*, 1 Mont. & B. 67.

(n) *Colonial Bank v. Whinney*,

In such cases as still exist, where a husband has any disposable interest in his wife's choses in action, and where such property is not settled upon her for her separate use, such interest will pass to and vest in his trustee in bankruptcy (*o*). And in such cases the trustee must bring an action jointly in his own name and in that of the bankrupt's wife in order to reduce such choses in action into possession, and must also obtain judgment and issue execution thereunder before the death of the husband in order to perfect the title as against the wife in case she should survive her husband (*p*). But where the wife, before her marriage, has assigned to a trustee a chose in action for the benefit of herself, the right to sue on that chose in action will not pass to the husband's trustee in bankruptcy (*q*).

Upon a member of a partnership concern becoming bankrupt, the share in the partnership which he had at the time of his bankruptcy passes to and vests in his trustee in bankruptcy (*r*); and the Court may empower such trustee to institute and conduct any legal civil proceedings jointly in his name (*i.e.*, the trustee's) and that of the bankrupt's partner, and such partner is unable to grant any release of the debt or demand to which the proceedings relate; but notice of the application for authority to commence the action must be given to the bankrupt's partner, and he may show cause against it, and on his application the Court may, if it thinks fit, direct that he shall receive his proper share of the proceeds of the action, and if he does

11 App. Ca. 426; *Re Pryce*, 4 Ch. D. 685; *Ex parte Ibbetson*, 8 Ch. D. 519; 1 Wh. & T. 128.

(*o*) *Doe v. Steward*, 1 Ad. & E. 311; *Ex parte Dever*, 18 Q. B. D. 660; 56 L. J. Q. B. 552; *Ex parte Coysegame*, 1 Atk. 192.

(*p*) *Mitford v. Mitford*, 9 Ves. Jun. 99; *Pierre v. Thornley*, 2 Sim.

177; *Purdew v. Jackson*, 1 Russ. 26; 25 R. R. 1; *Honner v. Morton*, 3 Russ. 68; 27 R. R. 15; 1 Addison, Contracts, 250, 251. See, also, *Sherrington v. Yates*, 12 M. & W. 864.

(*q*) *Parnham v. Hurst*, 8 M. & W. 750.

(*r*) *Eckhardt v. Wilson*, 8 T. R. 142; 4 R. R. 618.

not claim any benefit therefrom he shall be indemnified against costs in respect thereof as the Court may direct (s).

Equally, the whole property, separate and joint, of each of the partners of a bankrupt firm vests in the trustee of a firm in bankruptcy, who may in one and the same action recover debts due to all the partners jointly, and the separate debts due to each partner individually; for the proceeds of each kind go into one and the same fund for division among the creditors (t). Similarly, a trustee in bankruptcy may sue on all contracts entered into with the bankrupt during the bankruptcy, except those made in respect of the personal services, &c., of the bankrupt for the earning of his necessary subsistence (u).

And, generally, in regard to all contracts made by the debtor during his bankruptcy, his trustee may adopt such transactions and treat the bankrupt as his agent in respect thereto. He can claim the fruits of the debtor's trading, or of his carrying on business as a general medical practitioner, or of his inventions and discoveries, the profit of his patent rights, and any sum awarded to him as compensation for breach of contract (v). But if the trustee does not intervene in time, he cannot follow money received and paid away by the bankrupt in course of such transactions, although such money may have been paid to a person possessing notice of the bankruptcy (w). For, apart from such

(s) Bkcy. Act, 1883, s. 113.

(t) *Graham v. Mulcaster*, 12 So. 327.

(u) Addison on Contracts, 252.

(v) *Crofton v. Poole*, 1 B. & Ad. 568; 35 R. R. 380; *Kitchen v. Bartsch*, 7 East, 53; *Hesse v. Stevenson*, 3 B. & P. 578; *Elliott v. Clayton*, 16 Q. B. R. 584; *Wadling v. Oliphant*, 1 Q. B. D. 145; *Emden v. Carter*, 17 Ch. D. 169; *In re Douling*, 5 Ch. D.

689; *Ex parte Ford*, 1 Ch. D. 521; *Whitmore v. Gilmour*, 13 L. J. Ex. 201; *Evans v. Mann*, 2 Cowp. 569; 1 Addison, Contracts, 252.

(w) *Ex parte Deuchirst*, L. R. 7 Ch. Ap. 185; 41 L. J. Bank. 18; *Ex parte Payne*, 15 Q. B. D. 616; *Ex parte Edwards*, 13 Q. B. D. 747; *Re Ryley*, 15 Q. B. D. 329; 54 L. J. Q. B. 420; *Collins v. Stimson*, 11 Q. B. D. 142; 62 L. J. Q. B. 440; 1 Addison, Contracts, 252.

intervention, a bankrupt may sue on contracts made during bankruptcy (x).

Where any part of the property of a bankrupt consists of stock, shares in ships, shares, or any other property generally transferable in the books of a company, office, or person, the trustee may exercise the right to transfer such property to the same extent as the bankrupt might have done if he had not become bankrupt (y).

But the bankrupt's right to sue for damages in respect of personal wrong committed against him does not pass to his trustee in bankruptcy, unless the cause of action be a direct pecuniary loss to the bankrupt's estate (z). Where the right of action is in respect of injuries wholly done to the person or feelings of the bankrupt, such right of action will not pass to the trustee in bankruptcy, even though the estate of the bankrupt may thereby necessarily suffer (a).

Similarly, rights of action in respect of breaches of contract which wholly result in injury to the bankrupt's feelings, &c. (such as breach of contract to cure, or to marry), do not pass to the trustee, even though the estate of the bankrupt may have been injured in consequence of such breach (b).

Presumably, a right of action, whether *ex contractu* or *ex delicto*, resulting immediately in injury to the estate and to the person of the bankrupt, will be split so as to pass to the trustee so far as it concerns the estate, and to remain in the bankrupt so far as the personal matter is concerned (c).

(x) *Cohen v. Mitchell*, 25 Q. B. D. 262; 59 L. J. Q. B. 409; *Webb v. Fox*, 7 T. R. 391; 4 R. R. 472; *Jameson v. Brick Co.*, 4 Q. B. D. 208; *Drayton v. Dale*, 2 B. & C. 293; 26 R. R. 356; *Chippendall v. Tomlinson*, 4 Doug. 318; *Coles v. Barrow*, 4 Taunt. 754; 14 R. R. 658; 1 Addison, Contracts, 253.

(y) *Ringwood*, Bkcy. [1895]

124.

(z) *Lee & Wace*, Bkcy. 3rd ed. 311.

(a) *Wms. Bkcy.* [1898] 200; *Stanton v. Collier*, 23 L. J. Q. B. 116, 120.

(b) *Beckham v. Drake*, 2 H. L. C. 579.

(c) *Id.* pp. 629, 634. But see *Knights v. Quarles*, 2 Bro. & B. 102, 104; 22 R. R. 659; *Alton v. Mid.*

Consequently, an action for assault and battery, or libel or slander, or seduction of a child or servant, does not pass to the trustee in bankruptcy (*d*). Nor can the trustee intercept the proceeds of such actions, unless converted by the bankrupt into property (*e*).

In like manner, it has been held that the bankrupt's right of action for trespass, &c., for entering his house, seizing his goods and wrongfully dealing with them, does not pass to the trustee in bankruptcy (*f*). Nor does a right of action for negligence against an attorney in conducting litigation for the bankrupt (*g*).

On the other hand, a right of action against a solicitor for negligence in omitting to make material alterations in an agreement for a tenancy, whereby the bankrupt was deprived of certain reservation rights and his estate reduced considerably on that account, was held to pass to the trustee in bankruptcy as part of the debtor's personal estate (*h*). And it was held similarly in respect to a right of action by the bankrupt for misrepresentation in consequence of which he had been induced to part with 2,000*l.*, and sustained great loss and became bankrupt (*i*).

In the case of bankruptcy, the assignment of the bankrupt's choses in action to the trustee is merely a means of continuing, for certain purposes, the legal *persona* of the debtor. The trustee in bankruptcy takes no personal benefit by the assignment; nor is he, except in extraordinary circumstances, personally a loser by the enforcement of a contract against him by the other party to the transaction, the trustee merely repre-

Rail. Co., 34 L. J. C. P. 292;
Brewer v. Dew, 11 M. & W. 625;
Howard v. Crowther, 8 M. & W.
601; *Clark v. Calvert*, 8 Taunt.
742; 21 R. R. 528.

(*d*) *Howard v. Crowther*, *supra*;
Ex parte Vine, 8 Ch. D. 364.

(*e*) *Ex parte Vine*, *supra*.

(*f*) *Rogers v. Spence*, 13 M. &

W. 571; 12 Cl. & Fin. 700; cp.
Brewer v. Dew, *supra*.

(*g*) *Wetherell v. Julius*, 10 C. B.
267.

(*h*) *Re Daines*, 16 L. T. N. S.
127; *Crawford v. Cinnamon*, 16
W. R. 996.

(*i*) *Hodgson v. Sidney*, L. R.
1 Ex. 313. And see *Morgan v.*
Steele, L. R. 7 Q. B. 611.

senting the original contracting party (the debtor) to the extent of his estate and no more.

The trustee may, within twelve months of his appointment, disclaim any unprofitable contracts, and so discharge the debtor's estate of their burden. Thus, where any part of the bankrupt's property consists of land with onerous covenants, of shares or stock in companies, of unprofitable contracts, or of any other property that is unsaleable or not readily saleable by reason of its binding the possessor to the performance of any onerous act, &c., the trustee may, by writing signed by him, at any time within twelve months (or such other extension of time as the Court may grant) after the first appointment of a trustee, disclaim the property. If the trustee has no knowledge of such property within one month after his appointment, he may disclaim within the twelve months' limit or extension, starting from the time of his knowledge of the existence of such property.

The disclaimer operates to determine the rights, interests, and liabilities of the bankrupt and his property in or in respect of the property disclaimed, and discharges the trustee from all personal liability in respect thereof, but does not, except so far as is necessary for the purpose of releasing the bankrupt and his property and the trustee from liability, affect the rights or liabilities of any other person.

But for the purpose of disclaiming a lease, the trustee is generally obliged to apply to Court with proper notice to all parties concerned therein.

Where any person interested in any of the aforesaid property writes to the trustee putting him to his election of adopting or rejecting the property, the trustee must decide one way or the other within twenty-eight days from such notice, or he will be deemed to have adopted it.

Any person injured by the operation of such a dis-

claimant is deemed to be a creditor of the bankrupt to the extent of the injury, and may prove the same as a debt under the bankruptcy (*j*).

If the trustee elects to take the bankrupt's leases and interests in land, he becomes chargeable upon the covenants annexed to such estates and running with the land; and the same applies to all executory contracts (*k*).

The trustee's right of disclaimer is not restricted to "property" under sect. 44, but extends to any property under sect. 168, from which no benefit can accrue to the bankrupt's estate (*l*); and the provisions as to disclaimer are binding on the Crown (*m*).

Upon disclaiming, the trustee does not become personally liable to the lessor in respect of the period between the time when his actual occupation ceases and the date when the disclaimer is executed (*n*).

(IV.) TRANSFER BY LUNACY.

The Lunacy Act, 1890, empowers the Lord Chancellor to require, from the parties concerned with the care and maintenance of a lunatic, a written statement of the particulars of the lunatic's property and of its application (*a*).

The Commissioners may also, whenever they think it expedient, make inquiries as to the property of any person detained as a lunatic (*b*). Reports are then made by the Commissioners to the Lord Chancellor, and if

(*j*) 46 & 47 Vict. c. 52, s. 55;
53 & 54 Vict. c. 71, s. 13.

(*k*) *Gibson v. Carruthers*, 8 M.
& W. 328; *Boorman v. Nash*, 9 B.
& C. 145.

(*l*) *In re Maughan*, 14 Q. B. D.
956.

(*m*) *In re Thomas*, 21 Q. B. D.
380; 57 L. J. Q. B. 574.

(*n*) *Lowry v. Barker*, 5 Ex. D.
170.

(*a*) 53 & 54 Vict. c. 5, s. 50 (1),
re-enacting 16 & 17 Vict. c. 96,
s. 23.

(*b*) 53 & 54 Vict. c. 5, s. 50 (2).

the existing administration of the property is not thought to be for the benefit of the lunatic, an inquisition is ordered (c).

Where an inquisition would be too costly in respect of the amount of the property, power is given to judges of county courts to authorise the clerk of the guardians or relieving officer, or such other person as the judge by his order appoints, to take possession of, and sell and realise the real and personal property of a lunatic, and to exercise all the powers which could be exercised by the legal personal representative of the lunatic if he were dead; and the receipt of the person so authorized shall be a valid discharge to any person who pays any money or delivers any property of the lunatic to such person.

This only applies to cases where the total value of the lunatic's property is under 200*l.*, and no relative or friend is willing to undertake the management thereof, and an order has been made for receiving him into an institution for lunatics (d).

The powers and provisions now to be mentioned relating to the management and administration of property apply to:—

- (i) Lunatics so found by inquisition.
- (ii) Lunatics not so found, but for the protection of whose property an order was made before Act 1890.
- (iii) Every person lawfully detained as a lunatic though not so found.
- (iv) Every person not so detained and not found a lunatic by inquisition, but with regard to whom it is proved to the satisfaction of the judge in lunacy that such person is, through mental infirmity arising from disease or age, incapable of managing his affairs.

(c) 53 & 54 Vict. c. 5, s. 100.

(d) *Id.* s. 132 (1).

- (v) Every person with regard to whom it is similarly proved that such person is of unsound mind and incapable of managing his affairs, and that his property does not exceed 2,000*l.* in value, or that the income thereof does not exceed 100*l.* per annum.
- (vi) Every person with regard to whom the judge is similarly satisfied that such person is or has been a criminal lunatic and continues to be insane and in confinement (*e*).

In the case of any of the above-mentioned persons not being lunatics so found, such of the powers of the Act as are made exerciseable by the committee of the estate under order of the judge shall be exercised by such person in such manner as the judge may direct, and the authority to act may be special or general, and subject to the jurisdiction and direction of the judge (*f*). The judge may order any of the lunatic's property to be dealt with in any way for the following purposes (*g*):—

- (i) Payment of lunatic's debts or engagements (*h*);
- (ii) Discharge of any incumbrance on his property (*i*);
- (iii) Payment of any debt, &c. incurred for his maintenance or otherwise for his benefit (*j*);
- (iv) Payment of or provision for the expenses of his future maintenance (*k*).

The judge may authorize and direct the committee

(*e*) 53 & 54 Vict. c. 5, s. 116 (1).
 (*f*) *Id.* s. 116 (2), (3).
 (*g*) *Id.* s. 117.
 (*h*) *Re Whitaker*, 42 Ch. D. 119;
 58 L. J. Ch. 487; *Re Frost*, L. R.
 5 Ch. Ap. 699; 39 L. J. Ch. 808;
Re Strickland, L. R. 6 Ch. Ap.
 226; 24 L. T. N. S. 530.
 (*i*) *Re Wade*, 1 H. & T. 202;
Re Melly, 53 L. J. Ch. 248.
 (*j*) *Re Fox*, 33 Ch. D. 37; 55
 L. T. N. S. 39; *Re Rhodes*, 44 Ch.

D. 94; 59 L. J. Ch. 298; *Re*
Marman's Trusts, 8 Ch. D. 256;
Re Harrie, 49 L. J. Ch. 327; *Re*
Weaver, 21 Ch. D. 615.
 (*k*) *Re Winkle*, (1894) 2 Ch.
 519; 63 L. J. Ch. 541; *Re Dar-*
ling, 39 Ch. D. 208; 57 L. J. Ch.
 891; *Re Evans*, 21 Ch. D. 297;
 46 L. T. N. S. 785; *Re Frost*,
supra; *Re Sparrow*, 20 Ch. D.
 320; 51 L. J. Ch. 497; *Re Ber-*
idge, 50 L. T. 653.

of the estate of a lunatic to do (*inter alia*) any of the following things (*l*) :—

- (i) Sell any of the lunatic's property (*m*) ;
- (ii) Carry on any trade or business of the lunatic ;
- (iii) Grant or surrender leases, and accept new leases ;
- (iv) Perform any contract relating to his property entered into by the lunatic before his lunacy (*n*) ;
- (v) Surrender, assign, or otherwise dispose of, with or without consideration, any onerous property belonging to the lunatic ;
- (vi) Exercise any power or give any consent required for the exercise of any power where the power is vested in the lunatic for his own benefit, or the power of consent is in the nature of a beneficial interest in the lunatic (*o*).

The Act further empowers the committee, or such other person as the judge approves, to execute in the name and on behalf of the lunatic all assurances, &c. for giving effect to any order under the Act as the judge directs, and every such assurance, &c. is to be valid and effectual and to take effect accordingly (*p*). Such committee or other person may also exercise the lunatic's rights of re-entry to copyholds, and the remedies consequent upon the lord's refusal of such rights (*q*). He may also exercise such powers as are vested in the lunatic as trustee or guardian (*r*).

(*l*) 53 & 54 Vict. c. 5, s. 120.

(*m*) *Re Ware*, (1892) 1 Ch. 344 ; 61 L. J. Ch. 279 ; *Re X*, (1894) 2 Ch. 415 ; 63 L. J. Ch. 613 ; *Re Gaitskell*, 40 Ch. D. 416 ; 58 L. J. Ch. 262 ; *Re Taylor*, 52 L. J. Ch. 728 ; 49 L. T. N. S. 420 ; *Re Ray's Settled Estates*, 25 Ch. D. 464 ; 53 L. J. Ch. 205 ; 40 & 41 Vict. c. 18, s. 49 ; Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18) ; *Re Taylor*, 1 H. & T. 432 ; *Re Milnes*, 1 Ch. D. 28 ; 34 L. T. N. S. 46 ; *Re Buckingham*, 2 Ch. D. 690 ; *Re Ryder*, 37 Ch. D. 595 ; 57 L. J. Ch. 495 ; *Re Brewer*, 1 Ch. D. 409 ; 34 L. T.

N. S. 466 ; 8 & 9 Vict. c. 18, s. 7 ; *Re Tugwell*, 27 Ch. D. 309 ; 53 L. J. Ch. 1006. See, also, *Re Mary Smith*, L. R. 10 Ch. Ap. 79 ; 23 W. R. 297 ; *Re Weld*, 28 Ch. D. 514 ; 52 L. T. N. S. 703 ; *Re Corbett*, L. R. 1 Ch. Ap. 516 ; 35 L. J. Ch. 793 ; *Re Tomkins*, 60 L. T. N. S. 402.

(*n*) *Affleck v. Affleck*, 3 Sm. & G. 394.

(*o*) *Re Harwood*, 35 Ch. D. 470 ; 56 L. J. Ch. 974.

(*p*) 53 & 54 Vict. c. 5, s. 124.

(*q*) *Id.* s. 126 (4), (5).

(*r*) *Id.* ss. 128, 129.

The powers of management and administration of the property of lunatics, without an inquisition or other proceedings in Ireland, extends to the personal property in Ireland of a lunatic so found by inquisition in England where such personal property does not exceed 2,000*l.* in value, or the income thereof does not exceed 100*l.* a year; and the like powers conferred by the Lunacy Regulation (Ireland) Act, 1871, without an inquisition or other proceedings in England, extend to the personal property in England of a lunatic so found by inquisition in Ireland where such personal property or the income thereof does not exceed such amount as aforesaid. And, similarly, as to property in Scotland of a lunatic so found in England or Ireland; and as to property in England or Ireland of a Scotch lunatic (*s*).

Power is also given for transfer of a lunatic's stock into the name of another person, whether that of the committee or otherwise, as occasion may require and the judge may direct (*t*); and for vesting lands and the releasing contingent rights of a lunatic trustee or mortgagee (*u*). And, where a lunatic is solely entitled to any stock or chose in action upon trust or by way of mortgage, the judge in lunacy may by order vest in any person or persons the right to transfer or call for a transfer of the stock, or to receive the dividends thereof, or to sue for the chose in action.

Where any person or persons are jointly entitled with a lunatic to any stock or chose in action upon trust or by way of mortgage, the judge may make an order vesting the right to transfer or call for a transfer of the stock, or to receive the dividends thereof, or to sue for the chose in action, either in such person or persons alone or jointly with any other person or persons. And it is similarly provided in regard to a lunatic personal representative (*v*).

(*s*) 53 & 54 Vict. c. 5, s. 131.

(*t*) *Id.* ss. 133, 134.

(*u*) *Id.* s. 135.

(*v*) *Id.* s. 136.

In all such cases, if it is more convenient, the judge may appoint some proper person to make or join in making the transfer; and, in either case, the person or persons in whom such rights are vested may execute and do all powers of attorney, assurances, and things to complete the transfer to himself or themselves, or any other person or persons according to the order, and the bank and all other companies and their officers and all other persons shall be bound to obey every such order according to its tenor; and a written notice of such order binds the bank or any other company (v).

The person appointed to transfer or join in transferring stock is to be some proper officer of the bank or other company, &c., whose stock is to be transferred (w).

The powers conferred by this Act as to vesting orders may be exercised for vesting any land, stock, or chose in action, in the trustee or trustees of any charity or society over which the High Court would have jurisdiction upon suit duly instituted, whether the appointment of such trustee or trustees was made by instrument under a power, or by the High Court under its general or statutory jurisdiction (x).

The judge may direct the manner in which the right to any stock or chose in action vested under the provisions of this Act is to be exercised (y).

All transfers and payments made in pursuance of this Act under an order or a master's certificate shall be valid and binding on all persons.

An order may be made by a judge of county courts upon an application by the guardians of any union for payment of the expenses incurred by them under this Act in relation to a lunatic, and such order may be

(v) 53 & 54 Vict. c. 5, s. 136.

(w) *Id.* s. 137.

(x) *Id.* s. 138.

(y) *Id.* s. 139. And see *Re*

Thornton's Trusts, 9 W. R. 475;

Re Draper's Settlement, 9 W. R.

805; *Re Parby's Settlement*, 29

L. T. O. S. 72.

enforced against any property of the lunatic in the same way as a judgment of the county court (s).

Where a lunatic, who is a pauper and maintained at the expense of the guardians, becomes entitled to the estate and effects, or part thereof, of a sane person who has died intestate, the guardians can, generally, obtain an order from the justices to seize and sell the property of the lunatic; and may subsequently apply for and obtain a grant of administration to their clerk for the use and benefit of the pauper lunatic, citing his next of kin. The Court can make the grant thus prayed for under the powers conferred by the Probate Act, 1858, for the use and benefit of the lunatic, and limited to the period of lunacy, requiring an inventory, and that the sureties should justify (a).

By the Rules in Lunacy made in 1892, provision is made whereby the masters may order maintenance of a person of unsound mind not so found. Where, pending the appointment of a person to exercise, in relation to the property of any person of unsound mind not so found by inquisition, any of the powers of a committee of the estate, it appears to the masters desirable to make temporary provision for the maintenance, &c. of the lunatic or of any member of his family, out of any cash or available securities belonging to him in the hands of his bankers or of any other person, the masters may authorise by certificate such banker, &c. to pay to the person to be named in such certificate such sum as they certify to be proper (b).

And in all cases not otherwise specially provided for

(s) 53 & 54 Vict. c. 5, s. 300. And op. 299.

(a) 12 & 13 Vict. c. 103, s. 16; 20 & 21 Vict. c. 71, s. 73; *Guardians of Mile End Old Town v. Findlay*, 3 Sw. & Tr. 265; 9 L. T. N. S. 346; 9 Jur. N. S. 1253; *Southwell v. Findlay*, 33 L. J. P. & M. 21; 27 J. P. 760; *In the Goods of Eccles*, 15 P. D. 1;

61 L. T. N. S. 652; 54 J. P. 55; *In the Goods of Everley*, [1892] P. 50; 61 L. J. P. & D. 53; 65 L. T. 765; *Re Slumbers*, 4 Sw. & Tr. 32; 34 L. J. P. & M. 93; 12 L. T. N. S. 582. And see Archbold's Lunacy, pp. 415, 416.

(b) Rules in Lunacy [1892], r. 54.

by the rules, the provisions of the rules relating to lunatics so found by inquisition, and the other general provisions of these rules, shall apply to applications relating to the property of persons of unsound mind not so found by inquisition (c) : and to the property of persons who, though not lunatic, are incapable through disease or age of managing their affairs (d).

For further and fuller information upon this branch of law the reader is referred to Archbold's Lunacy (e), and to Elmer's Lunacy Practice (f).

It may here be observed, however, that a lunatic cannot commit an act of bankruptcy (g).

But bankruptcy proceedings will not be stayed solely on the ground that the bankrupt after adjudication has become insane (h). A committee of the estate of a lunatic so found may, however, obtain leave to consent to an adjudication in bankruptcy against the lunatic (i); or to file, in the name of the lunatic, a declaration of his inability to pay his debts; or to present a bankruptcy petition against the lunatic in his own name (j).

(V.) TRANSFER IN RESPECT OF PAUPERS, &C.

Where any pauper shall have in his possession or belonging to him any money or valuable security for money, the guardians of the union or parish within which such pauper is chargeable may take and appropriate so much of such money or the produce of such security, or recover the same as a debt before any local

(c) Rules in Lunacy [1892], r. 55.

(d) *Id.* r. 56.

(e) 4th Ed. [1895].

(f) 7th Ed. [1892].

(g) *Ex parte Stamp*, 1 De G. 345.

(h) *Anon.*, 13 Ves. Jun. 590.

See also *Ex parte Cahen*, 10 Ch. D. 183; 27 W. R. 387; 39 L. T. N. S. 645.

(i) *Re Lee*, 23 Ch. D. 216; 48 L. T. N. S. 193; 31 W. R. 802.

(j) *Re James*, 12 Q. B. D. 332; 53 L. J. Q. B. 575; 50 L. T. N. S. 471; *In re Farnham*, (1895) 2 Ch. 799, and cases there cited.

court, as will reimburse the said guardians for the amount expended by them, whether on behalf of the common fund or of any parish, in the relief of such pauper, during the period of twelve months prior to such taking and appropriation, or prior to such proceeding for the recovery thereof (as the case may be): and in the event of the death of any pauper having in his possession or belonging to him any money or property, the guardians of the union or parish wherein such pauper shall die may reimburse themselves the expenses incurred by them in and about the burial of such pauper, and in and about the maintenance of such pauper, at any time during the twelve months previous to the decease (*k*).

(VI.) OTHER MODES: WHEN COUPLED WITH AN INTEREST;
ESTOPPEL, LEASE AND RELEASE, AND FINE.

Contingent rights and interests were not ordinarily assignable at law; and yet they might sometimes be assigned at law if coupled with a present interest (*l*). It has been said the law allows releases of rights which are in the nature only of possibilities, that a man may release to him who has the possession a possible right only, though it does not allow him to transfer or convey away to a stranger such a right; and that is why the law allows a man to release an executory interest in a term which he has devised to him, and is in the nature only of a possibility; but yet he cannot assign it away to a third person, though he may release this right to the possessor of the land by way of extinguishment (*m*).

Again, at common law, covenants affecting leasehold interests in land are said to "run with the land and not

(*k*) Poor Law Amendment Act 238, 239, 322; Com. Dig. Asst.
(12 & 13 Vict. c. 103), s. 16. A. (c. 3).

(*l*) *Story, Eq. 688; Shep. Touch.* (*m*) *Arthur v. Bokenham*, 11 Mod. 152.

with the reversion." In other words, such covenants pass to the assignee upon assignment of the lease, but not upon the assignment of the reversion.

It is not necessary that the covenantor should be possessed of any estate in the land, but that the covenantee should be clothed with some transferable interest therein, to which the covenant can be attached; otherwise it is only a *personal* covenant and does not run with the land (*n*).

Covenants in a lease which "touch and concern the thing demised" pass to the assignee of the lessee, whether they are expressed to have been made with the lessee "*and his assigns*" or not; such are covenants to repair, to leave in good repair, to deal with the land in a specified manner (*o*). But by 32 Hen. VIII. c. 34, the assignee of the reversion takes the benefit, and is subject to the liability of the covenants entered into with his assignor; these covenants must, however, "concern the thing demised" in accordance with the rules governing covenants which run with the land. The Act only applies to lease under seal, but in the case of leases from year to year, payment and acceptance of rent is held to be evidence from which a jury may infer "a consent to go on, on the same terms as before" (*p*). If the covenant has not been for the covenantor *and his assigns*, and is to do with something *not in existence* at the time the lease is made, the assignee is not bound (*q*).

When the covenant extends to a thing *in esse*, parcel of the demise, the thing to be done by force of the covenant is in a manner annexed and appurtenant to the thing demised, and shall run with the land, and

(*n*) Co. Litt. 385a.

(*o*) *Spencer's Case*, 1 Sm. L. C. 52.

(*p*) *Cornish v. Stubbs*, L. R. 5 C. P. 339. And see *Thomas v. Hayward*, L. R. 4 Exch. 311; *Clegg*

v. Hands, 44 Ch. D. 503.

(*q*) *Spencer's Case*, 1 Sm. L. C. 52; *Doughty v. Bowman*, 11 Q. B. 444; 17 L. J. Q. B. 111. But see *Minshull v. Oakes*, 2 H. & N. 793; 27 L. J. Ex. 194.

shall bind the assignee, although he be not bound by express words (*r*); www.stool.com.cn

The following covenants seem to run with the land so as to bind the assignee, whether of the reversion or of the term, although not named (*s*): a covenant to pay rent (*t*) or taxes, or to repair (*u*) or leave in repair (*v*); to maintain a sea-wall *in esse* (*w*); to repair, renew, and replace tenant's fixtures and machinery fixed to the premises (*x*); not to plough (*y*); to use the land in a husbandlike manner (*z*); to lay dung on the demised land annually (*a*); to reside on the demised premises during the term (*b*); to permit the lessor to have access to two rooms excepted from the demise (*c*); to carry all the corn produced on the demised land to the lessor's mill to be ground (*d*); to leave the land as well stocked with game at the end of the term as it was found to be at the beginning of it (*e*); to supply demised houses with good water (*f*); for quiet enjoyment (*g*); to produce title-deeds (*h*); to make further assurance (*i*); to renew the lease (*j*); to endeavour to procure a renewal

(*r*) *Bally v. Wells*, 3 Wils. 25.

(*s*) Woodfall [1898], L. & T. 173.

(*t*) *Parker v. Webb*, 3 Salk. 5.

(*u*) *Dean & C. of Windsor's Case*, Co. Pt. V. 24; *Conan v. Kemise*, W. Jon. 245; *Smith v. Arnold*, 3 Salk. 4; *Martyn v. Clue*, 18 Q. B. R. 661.

(*v*) Vin. Abr. *Covenant* (K. 19); *Doe d. Strobe v. Seaton*, 2 C. M. & R. 730; *Martyn v. Clue*, *supra*.

(*w*) *Morland v. Cook*, L. R. 6 Eq. 252; 37 L. J. Ch. 825.

(*x*) *Williams v. Earl*, L. R. 3 Q. B. 739; 37 L. J. Q. B. 231.

(*y*) *Cookson v. Cook*, Cro. Jac. 125.

(*z*) *Walsh v. Watson*, Esp. N. P. 295.

(*a*) *Walsh v. Davis*, MS. M. T. 42 Geo. III.

(*b*) *Tatem v. Chaplin*, 2 H. Bl. 133; 3 R. R. 360.

(*c*) *Cole's Case*, 1 Salk. 196; S. C. *sub nom. Bush v. Coles*, 1 Show. (2nd Ed.) 389; Carth. 232.

(*d*) *Vyeyan v. Arthur*, 1 B. & C. 410; 2 D. & R. 670; 1 L. J. K. B. 138; 25 R. R. 437. See *Hemingway v. Fernandes*, 13 Sim. 228.

(*e*) *Hooper v. Clark*, L. R. 2 Q. B. 200; 36 L. J. Q. B. 79; 16 L. T. 162; 15 W. R. 347.

(*f*) *Jourdain v. Wilson*, 4 B. & A. 266; 23 R. R. 268.

(*g*) *Lewis v. Campbell*, 8 Taunt. 715; 21 R. R. 516; *Campbell v. Lewis*, 3 B. & A. 392; 21 R. R. 520; *Noke v. Awdler*, Cro. Eliz. 376, 436.

(*h*) *Barclay v. Rains*, 1 Sim. & Stu. 449; 24 R. R. 206.

(*i*) *Middlemore v. Goodhall*, Cro. Car. 503; *Kingdon v. Nottle*, 4 M. & S. 53; 14 R. R. 462; *King v. Jones*, 5 Taunt. 418; 4 M. & S. 188; 15 R. R. 533.

(*j*) *Isteed v. Stoneley*, 1 And. 82; *Brooks v. Bulkeley*, 2 Ves. Jun. 498; *Roe v. Hayley*, 12 East, 464; 11 R. R. 455.

of the lease for another life (in an underlease by lessees for lives) (*k*); to build a new smelting mill in lieu of an old one in a lease of mines (*l*); in a public-house lease, to conduct the business so as to afford no ground whereby the licence should be suspended, &c., or be in danger of being suspended, &c. (*m*), or not to sell liquor not bought of the lessors (*n*), their successors or assigns (*o*). There is also authority that the covenant to insure (*p*), the covenant not to assign or sub-let without licence (*q*), and the covenant not to carry on a particular trade (*r*), run with the land (*s*); and all implied covenants run with the land.

Where the lessee expressly covenants for himself *and his assigns*, the assignee is generally bound by the lessee's covenants, unless they be either purely personal or collateral to the demised premises (*t*).

But even where the relation of landlord and tenant does not exist, covenants made by a person (who is not a tenant) *with* the owner to do something in respect of the land run with the land, so that each successive transferee, who is in the same estate as the original covenantee was, may enforce such covenants (*u*).

On the other hand, covenants made *by* the owner of land to do something in respect of the land do not generally run with the land (*v*).

(*k*) *Simpson v. Clayton*, 4 Bing. N. C. 768; 6 Scott, 469.

(*l*) *Sampson v. Easterby*, 9 B. & C. 606; 6 Bing. 644; 1 C. & J. 105; 33 R. R. 239.

(*m*) *Fleetwood v. Hull*, 23 Q. B. D. 35; 58 L. J. Q. B. 141; 60 L. T. 35; 37 W. R. 714.

(*n*) *Clegg v. Hands*, 44 Ch. D. 503; 59 L. J. Ch. 477; 62 L. T. 502; 38 W. R. 433.

(*o*) *White v. Southend Hotel Co.*, (1897) 1 Ch. 767; 66 L. J. Ch. 387; 76 L. T. 273; 45 W. R. 434.

(*p*) *Vernon v. Smith*, 5 B. & A. 1; 24 R. R. 267.

(*q*) *Williams v. Earle*, L. B. 3

Q. B. 739; 37 L. J. Q. B. 231.

(*r*) *Mayor of Congleton v. Pattison*, 10 East, 130.

(*s*) Woodfall, L. & T. [1898], 174, where all the above-mentioned cases upon this point are cited.

(*t*) See Woodfall, L. & T. [1898], 175—177.

(*u*) *Kingdon v. Nottle*, 4 M. & S. 53; 16 R. R. 379; *Sharp v. Waterhouse*, 7 E. & B. 816; 3 Jur. N. S. 1022; *Shirley, Com. Law* [1896], 300.

(*v*) *Keppel v. Bailey*, 2 My. & K. 517; 39 R. R. 264. But see *Tulk v. Moxhay*, 2 Ph. 774; *Spencer*

So, at common law, contingent rights and interests might pass by way of estoppel, by lease and release, or by fine (w). For if a grantor had, at the time of making the grant, no estate sufficient to support such grant, but was estopped from denying as against the grantee that he had such estate, and he afterwards acquired an estate in the land, the estate so acquired was said to "feed the estoppel," and the grantee became entitled as if the grantor had originally possessed it (x).

Or, as it has been otherwise stated, the title of a person derived from one who has no title, or whose title is imperfect, is validated in the former person by a conveyance or act in the law whereby the right would have become completely vested in the latter person. This principle has been summarised in the maxim *jus superveniens auctori accrescit successori* (y).

Again, a chose in action may pass to another by operation of law as in the case of equitable execution, which is not like legal execution, but is an equitable relief given by the Court because execution at law cannot be had. It is, in fact, a substitute for execution (z), and is exerciseable in various ways, such as by attachment of a debt due by a third person to the judgment debtor, by the appointment of a receiver of the debtor's estate or interest, or to receive a fund in Court, payable to the judgment debtor, and by an application for an injunction re-

v. *Bailey*, 69 L. T. 179; *Patman v. Harland*, 17 Ch. D. 353; 50 L. J. Ch. 642; *Haywood v. Brunswick, &c. Bdg. Soc.*, 8 Q. B. D. 403; 51 L. J. Q. B. 73; *Tucker v. Fowles*, (1893) 1 Ch. 195; *Tindall v. Castle*, 62 L. J. Ch. 555; *Meredith v. Wilson*, 69 L. T. 336; *Everett v. Remington*, (1892) 3 Ch. 148; *Hall v. Ewin*, 37 Ch. D. 74.
(w) *Story*, Eq. [1892], 688; *Doe d. Christmas v. Oliver*, 10 B.

& C. 181; 34 R. R. 358; *Weale v. Lower*, Pollerf. 54; *Bensley v. Burdon*, 2 Sim. & Stu. 519; 25 R. R. 258.

(x) *Co. Litt.* 47b; *Rawlyn's Case*, Co. Ft. IV. 52a; *Doe v. Oliver*, 5 Man. & R. K. B. 202; 34 R. R. 358; *Sturgeon v. Wingfield*, 15 M. & W. 224.

(y) 1 *Ruling Cases*, 480.

(z) *Re Shephard*, 43 Ch. D. 137.

straining the debtor from dealing with the property in question (a).

There may also be transfer of a chose in action by operation of law by virtue of the principle of *jus accrescendi*, or survivorship, as for example, in cases of some partnership interests, and choses in action enjoyed jointly; similarly, a surety who has satisfied the principal debtor's liability becomes entitled to all the creditor's rights in respect of such indebtedness, and, in his own name, may sue and recover from the principal debtor the amount so paid.

(a) R. S. C. Ord. XLV., L., &c.

CHAPTER III.

SOME CHOSSES IN ACTION NEVER ASSIGNABLE.

APART from the particular kinds of choses in action already dealt with herein, there are some choses in action which have never been assignable by reason of their nature and the general circumstances investing them.

Broadly speaking, it may be said that the general ground of their non-assignability is denoted by that comprehensive phrase, public policy.

Thus, public policy forbids that effect should be given to assignments of pensions and salaries of public officers, payable to them for the purpose of maintaining the dignity of their office, or to assure a due discharge of its duties, *e.g.*, the pay of an officer in the army (*a*).

As it has been said: The public is interested not only in the performance from time to time of the duties, but also in the fit state of preparation of the party having to perform them. Such is the reason in the cases of half-pay where there is a sort of retainer, and where the payments which are made to officers, from time to time, are the means by which they, being liable to be called into public service, are enabled to keep themselves in a state of preparation for performing their duties. If, therefore, they were permitted to deprive themselves of their half-pay, they might be rendered unable promptly to enter upon their duties when called upon, and the public service would be thereby greatly injured. So, also, where a pension or remuneration is given for a

(a) *Stone v. Lidderdale*, 2 Anstr. 533; 3 R. R. 622.

purpose which tends less directly to the public benefit, as, for instance, the pension given to the Duke of Marlborough, as a memento of the gratitude of the nation, and as a reward for his distinguished services. It was there the intention of the legislature that it should be kept in mind that it was for those great services it was given. In that case the pension was held inalienable, because it was considered that one of the objects of giving the pension, namely, for having a perpetual memorial of national gratitude for public services, would be entirely lost; and so in the course of that case Lord Eldon said, in the way of illustration, and in allusion to the pension of a great public officer, that it could not be aliened, because that public officer must not be allowed to fall into such a situation as to make it difficult for him, in consequence of any pecuniary embarrassment, to maintain the dignity of his office (*b*). But the office must be a public one, or in some way connected with the public service (*c*). To make the office a public office, the pay must come out of *national* and not out of local funds, and the office must be public in the strict sense of that term. It is not enough that the due discharge of the duties of the office should be for the public benefit in a *secondary and remote sense* (*d*), for, if the office is a sinecure, and the duties have ceased, the pensions or annuities in respect thereof are assignable (*e*).

On these grounds it has been held that the salary of a clerk of the peace—a freehold office connected with the administration of justice—cannot be assigned (*f*). Nor can the salary of an assistant parliamentary counsel

(*b*) *Grenfell v. The Dean & Canons of Windsor*, 2 Beav. 544; *Davis v. Duke of Marlborough*, 1 Swan. 79; *Ex parte Huggins*, 21 Ch. D. 85.

(*c*) *Grenfell v. The Dean, &c. of Windsor*, 2 Beav. 549.

(*d*) *In re Mirams*, (1891) 1 Q.

B. 596.

(*e*) *Arbuthnot v. Norton*, 5 Moo. P. C. C. 219; *Grenfell v. Dean, &c. of Windsor*, 2 Beav. 544, 550.

(*f*) *Palmer v. Bate*, 2 Brod. & B. 673; 23 R. R. 535; *Hill v. Paul*, 8 Cl. & Fin. 295.

to the Treasury (*g*). Nor can the half-pay of an officer in the army or navy (*h*); for, further, an officer has no certain interest in his half-pay; for the king may at any time strike him off the list (*i*). Much less can an officer in the army assign his full pay; for military pay is not assignable (*j*). The pension allowed to a retired clerk under the Incumbents' Resignation Act, 1871 (34 & 35 Vict. c. 44), s. 10, is not assignable (*k*); for it is made a charge upon the revenues of the benefice and "shall not be transferable at law or in equity" (*l*).

Formerly, none of these choses in action passed on bankruptcy to the bankrupt's assignees in bankruptcy: but the law has since been altered in this respect, and, generally speaking, the trustee in bankruptcy takes the pension or other similar income, and must thereout set aside so much for the bankrupt's support (*m*). But it was held that an annuity awarded to a country commissioner on the abolition of the office was assignable and passed to the assignees of the bankruptcy of the party to whom it had been awarded (*n*). So the profits of a college fellowship were held assignable in equity (*o*).

It has been held that a clergyman having the cure

(*g*) *Cooper v. Reilly*, 2 Sim. 560.

(*h*) *Stone v. Lidderdale*, 2 Anstr. 533; 3 R. R. 622; *Flarty v. Odium*, 3 T. R. 681; 1 R. R. 791; *Lidderdale v. Duke of Montrose*, 4 T. R. 248; 2 R. R. 375; *Barwick v. Read*, 1 H. Bl. 627; 2 R. R. 808; *McCarthy v. Gould*, 1 Bal. & B. 389; *Price v. Lovett*, 20 L. J. Ch. 270.

(*i*) *Flarty v. Odium*, *supra*.

(*j*) *Collyer v. Fallon*, 1 Turn. & R. 459, 474. See, also, *Crouch v. Martin*, 2 Vern. 595; *Law v. Law*, Cas. temp. Talbot, 140; *Stuart v. Tucker*, 2 W. Bl. 1137; *Mouys v. Leake*, 8 T. R. 414; *Davis v. Edgar*, 4 Taunt. 63; 1 Geo. II. st. 2, c. 14; and 1 Geo. IV. c. 119, s. 38; *Fridley v. Rose*, 3 Mer. 86; 17 R. R. 24; *Cathcart v. Black-*

wood, Cooke's B. L. (8th ed.) 318; *Ex parte Hawker, Re Keeley*, L. R. 7 Ch. 214.

(*k*) *Gathercole v. Smith*, 17 Ch. D. 1.

(*l*) 34 & 35 Vict. c. 44, s. 10. But see Bkey. Act, 1883, s. 52 (2); *Re Saunders*, (1895) 2 Q. B. 117; *Lucas v. Harris*, 18 Q. B. D. 127; *Ex parte Chick*, 11 Ch. D. 738.

(*m*) Bkey. Act, 1883, ss. 44, 52, 53. See, also, (*n*).

(*n*) *Ex parte Corser*, 11 Jur. 212; *Spooner v. Payne*, 11 Jur. 963; 21 L. J. Ch. 791; *Willcock v. Terrell*, 3 Ex. Div. 323.

(*o*) *Feistel v. King's Coll.*, 10 Beav. 491. But see *Berkeley v. King's Coll.*, 10 Beav. 602.

of souls is not a public officer, and there has been no decision against the assignment of his interest (*p*). At common law a beneficed clergyman can charge his benefice; and, although this was made unlawful by 13 Eliz. c. 20, yet when that Act was repealed in 1803 by 43 Geo. III. c. 84, a charge given between 1803 and 1817 (when 43 Geo. III. c. 84, was repealed and 13 Eliz. c. 20, was revised by 57 Geo. III. c. 99) was held valid (*q*).

And it was held in the recent case above quoted, that the assignment of the salary of the chaplain to a work-house payable out of the poor rate is valid (*p*).

A distinction has been made between half-pay and a retiring pension; the former, as we have seen, is inalienable, but the latter has been held to be assignable unless such assignment be forbidden by statute (*r*). The Army Act, 1881, for example, and the Indian Pensions Act, 1871, render all pensions to which those Acts refer non-assignable (*s*).

The salary of a judge is not assignable (*t*); but the pension of a county court judge is assignable (*u*). It was said: Where a pension is granted by the Crown to one who, though not for the time engaged in any active duties, is still liable to be called to active service, is therefore to be considered in the service of the Crown, the pension is to be considered as to some extent granted in order to maintain the grantee, until he is called on to serve again (*u*). But, as stated by Parke, B.: A man may assign a pension given to him entirely for past

(*p*) *In re Mirams*, (1891) 1 Q. B. 596.

(*q*) *Metcalf v. Archbp. of York*, 1 My. & Cr. 647.

(*r*) *Dent v. Dent*, L. R. 1 P. & D. 366; 1 Wh. & T. [1897], 142. But see *Birch v. Birch*, 8 P. D. 163; and the Army Act, 1881, s. 141; *Lucas v. Harris*, 18 Q. B. D. 135, 136; *Crowe v. Price*, 22 Q. B. D. 429.

(*s*) But see Bankruptcy Act, 1883, s. 53 (2); and *Re Saunders*, (1895) 2 Q. B. 424.

(*t*) *Arbuthnot v. Norton*, 5 Moore, P. C. C. 219; *Flarty v. Odium*, 3 T. R. 681; 1 R. R. 791; *Tunstall v. Boothby*, 10 Sim. 640; *Grenfell v. Duke of Marlborough*, *supra*.

(*u*) *Willcock v. Terrell*, 3 Ex. D. 323.

services, whether granted to him for life or during pleasure (*v*).

And so a pension which has been awarded to a person for services in the legal department of the government is attachable, and consequently assignable (*w*). And, in like manner, the pension of a retired judge of a Crown colony, granted by the Secretary of State for the Colonies, and voted annually by the legislature of the colony, vests in the creditor's trustee upon his becoming bankrupt (*x*). And the right to the annuity awarded as compensation to a commissioner of bankruptcy, whose duties were abolished by law, passes to his assignee in insolvency, although the annuity depends upon the annuitant's making an affidavit of certain facts before each payment (*y*).

Thus, it will be seen that there is no sound and invariable principle upon which the assignability or non-assignability of pensions is based. And, further, it is doubted whether a pension or reward, granted during pleasure and not for any certain period, and in its very nature revocable at any time, is properly assignable (*z*). But military prize-money, although resting in the mere bounty of the Crown, is held to be different in its nature and objects from military pay (*a*).

But the profits of a public office, it seems, are not assignable (*b*).

Moreover, *arrearages* of half-pay or full-pay are assignable, since the right thereto has become, so to speak, absolute (*c*).

(*v*) *Wells v. Foster*, 8 M. & W. 149, 152. But see *supra* as to *Duke of Marlborough's Case*.

(*w*) *Sansom v. Sansom*, 4 P. D. 70.

(*x*) *Ex parte Huggins*, 21 Ch. D. 85.

(*y*) *Spooner v. Payne*, 1 De G. M. & G. 383.

(*z*) *Flarty v. Odum*, 3 T. R. 681; 1 R. R. 791; *King v. The Lords Commrs. of the Treasury*, 4 Ad. & El. 976, 984; *Ex parte Ricketts*, 4 Ad. & El. 999; *Tun-*

stall v. Boothby, *supra*; *Wells v. Foster*, *supra*.

(*a*) *Alexander v. Duke of Wellington*, 2 Rus. & Myl. 35; 34 R. R. 1; *Stevens v. Bagwell*, 15 Ves. Jun. 139, 152; 10 R. R. 46.

(*b*) *Hill v. Paul*, 8 Cl. & F. 295, 307; *Palmer v. Bate*, 2 Bro. & B. 673; 23 R. R. 535. See also *Nichols v. Davis*, L. R. 4 C. P. 80; but note *Arbuthnot v. Norton*, *supra*.

(*c*) *Ellis v. E. of Grey*, 6 Sim.

And, generally, it appears that the pension of a retired officer, whether naval, military, or civil, is assignable, unless made not so by statute (*d*). The following are non-assignable (subject to certain exceptions): deferred pay, or military reward payable to any officer or soldier of the army, Royal Marines, and Her Majesty's Indian forces, and the Royal Malta Fencible Artillery, or any pension, allowance, or relief payable to any such officer or soldier, or his widow, child, or other relative, or to any person in respect of military service (*e*); naval pensions payable to an officer in the navy, seaman, or marine, or to an officer's widow, allowances from the compassionate fund, marine half-pay, payments, &c. in respect of services in the navy and marines to a subordinate officer, seaman, or marine (*f*).

But while, as we have seen, an assignment of a pension under the Incumbents Resignation Act, 1871, is invalid (*g*), an annuity granted to a retiring incumbent under the Union of Benefices Act, 1860, is valid (*h*).

Alimony granted to a wife is not assignable. Alimony is an allowance which, having regard to the means of the husband and wife, the Court thinks right to be paid for her maintenance from time to time, and the Court may alter it or take it away whenever it pleases. It is not in the nature of property, but only money paid by the order of the Court from time to time to provide for the maintenance of the wife, and therefore it is not assignable by her (*i*).

214. See also *Tunstall v. Boothby*, *supra*; *Grenfell v. D. of Windsor*, *supra*.

(*d*) *Goodeve*, Pers. Pro. [1887], 95; 1 Wh. & T. [1897], 142; *sed. quare*.

(*e*) The Army Act, 1881 (44 & 45 Vict. c. 58), ss. 141, 190; *Lucas v. Harris*, 18 Q. B. D. 127; *Crowe v. Price*, 22 Q. B. D. 429.

(*f*) The Naval and Marine Pay and Pensions Act, 1865 (28 & 29 Vict. c. 73), s. 4.

(*g*) 34 & 35 Vict. c. 44; *Gathercole v. Smith*, *supra*.

(*h*) 23 & 24 Vict. c. 142; *McBean v. Deane*, 30 Ch. D. 620; *Goodeve*, Pers. Pro. [1892], 149 *et seq.*

(*i*) *In re Robinson*, 27 Ch. D. 164. See *Vandergucht v. De Blaquièr*, 5 My. & Cr. 243.

So, where a contract involves personal skill or confidence, such as a contract between an author and publisher that the one shall write and the other publish a book, it is not assignable (*j*). But an agreement by the vendor of a patent to assign to the purchaser of future patents rights which the vendor might thereafter acquire of a like nature to the patent sold, is not contrary to public policy (*k*), for nothing is more common in intellectual pursuits than for men to sell beforehand the future intellectual product before it is made or even conceived, and such an assignment is valid (*k*). But a personal licence, *e.g.*, a licence to enter a house and seize goods, is not assignable (*l*).

Again, policies of fire assurance are not, in the nature of them, assignable, nor intended to be assigned from one person to another, without the consent of the office (*m*), nor have they been made assignable by statute (*n*).

It has been held that a *bare right* to bring an action for fraud committed upon the assignor is not assignable, as being contrary to public policy (*o*); and that a *mere right* of action for a tort is also not assignable (*p*). And the principle upon which this is said to be based is that the party assigning the right must have some substantial possession—some capability of personal enjoyment, and not a mere naked right to overset a legal instrument or to maintain a suit; and that the mere right to purchase does not give a man a right to legal remedies (*q*). In fact, it has been thought the reason

(*j*) *Gibson v. Carruthers*, 8 M. & W. 343; *Stevens v. Benning*, 1 K. & J. 168; *Robson v. Drummond*, 2 B. & Ad. 303; 36 R. R. 569; Goodeve, Pers. Pro. [1892], 149.

(*k*) *Printing, &c. Co. v. Sampson*, L. R. 19 Eq. 462, 466.

(*l*) *Re Davis*, 22 Q. B. D. 193; *Brown v. Metropolitan, &c. Soc.*, 28 L. J. Q. B. 236; *Reeve v. Whitmore*, 4 De G. J. & S. 1; *Brown v. Bateman*, L. R. 2 C. P.

272, 283, 284.

(*m*) *Lynch v. Daltzell*, 4 Bro. Par. Ca. 431; *Sadlers' Co. v. Badcock*, 2 Atk. 557.

(*n*) Goodeve, Pers. Pro. [1892], 165.

(*o*) *Prosser v. Edmonds*, 1 Y. & Coll. 481, 496—499.

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

(*q*) *Prosser v. Edmonds*, *supra*; *Wood v. Downes*, 18 Vcs. Jun. 120; 11 R. R. 160.

for preventing the assignment of *choses in action* at law is founded on the principle of the law not permitting a sale of a right to litigate (*q*). But it is submitted that since the Judicature Act, 1873, the judgments in these cases may be open to reconsideration (*r*).

There is a class of cases which fall within certain statutory restrictions as to assignment, and such choses in action apparently are only transferable at death, by nomination or otherwise in some special manner indicated by the particular Act in question.

There is not any statutory provision made for the assignment of interests in friendly societies for example, and it would appear that such choses in action are not transferable *inter vivos*. In a recent case, interesting in this respect, it was held that policies of friendly societies are not assignable, but that the legal representative of a nominee who predeceases the nominator stands in the place of the deceased nominee and is entitled to recover on behalf of the nominee's estate the amount of the policy from the society upon the death of the nominator (*s*). The facts are as follows:—

The action was brought by Edward Caddick, executor of Joseph Caddick, against the trustees of the Liverpool Victoria Legal Friendly Society to recover 100*l.* on a policy of insurance, effected in 1881 with the defendants on the life of one Mary Gordon, who, in 1887, assigned it to Joseph Caddick. Notice of assignment was given to the defendants, who refused to recognize it, observing that if Mary Gordon desired the amount to be paid at her death to J. Caddick she must fill up the usual nomination form. A nomination form was accordingly filled up, appointing J. Caddick as the person entitled to receive the amount of the policy.

(*q*) *Prosser v. Edmonds*, *supra*;
Wood v. Downes, 18 Ves. Jun.
120; 11 R. R. 160.

(*r*) See *ante*, Bk. III.

(*s*) *Caddick v. Highton and
others*, *Law Times*, 18 Feb. 1899,
p. 367.

J. Caddick died in March, 1891, after which date his executor, the plaintiff, paid the premiums due on the policy until Mary Gordon's death in November, 1896. For the plaintiff it was submitted that the assignment by Mary Gordon to J. Caddick was valid; that even if it were not the plaintiff was entitled to recover as executor, because the rights of a nominee did not lapse at his death; that the defendants, by taking the premiums from the executor, were estopped from disputing his right to recover; and that in any event the plaintiff was entitled to recover the premiums which he had paid, as money paid without consideration.

On behalf of the defendants, it was said that they were perfectly ready to refund to the plaintiff the amount which he had paid in premiums since the death of Joseph Caddick. But that it was of vital importance to all friendly societies that the law should be made clear as to whether or not these policies were assignable. That these societies were established for the purpose of encouraging thrift among the poorer classes; and that the object of the legislature would be defeated if such policies were made marketable securities, and people were allowed to raise money upon them. That before a person could claim to be paid the amount of such a policy as nominee, he must show to the society that he was the person mentioned in the nomination paper. If he could not do that he could not succeed in his claim. As to the question of estoppel, that the society had done nothing to prevent them from denying that under the policy the plaintiff was entitled to the whole amount assured. It was pointed out that, in addition to refunding the premiums which had been paid by the plaintiff, the society would have to pay the whole amount of the policy to the next of kin or legal representative.

Phillimore, J., said, in his opinion, the defendants had established their contention that the policies of

friendly societies could not be assigned. He, however, did not see why the estate of a nominee of a policy should be deprived of the benefit intended to be conferred by the nominator simply because the nominee died during the lifetime of the nominator, and, therefore, he held that the legal personal representative of a nominee was entitled to stand in the position of the nominee, and to obtain the amount of the policy from the society. And on this ground he gave judgment for the plaintiff for the amount claimed.

The mere insertion in a contract (*e.g.*, in a policy of life insurance) of an express condition that it shall not be assignable in any case whatever, does *not* prevent the assignment of the beneficial interest in such contract (*r*).

There are choses in action which are not assignable on the ground of public policy, more particularly known as maintenance, which arises where a person, having no interest in the subject-matter of an action brought by another, interferes by assisting either party by money or otherwise to prosecute or defend it (*s*).

The object clearly is the discouragement of vexatious and oppressive litigation by restricting the right of proceedings as far as possible to the persons immediately concerned in the subject-matter, by saddling them solely with the costs of such proceedings (*t*). It is the principle of keeping "new blood" out of people's disputes and differences.

There is a species of maintenance called champerty, which arises where a person bargains for a share in the subject-matter of the suit of another in consideration of

(*r*) *In re Turcan*, 40 C. D. 5. Cp. *Brunton v. Electrical Eng. Corp.*, (1892) 1 Ch. 434; (1892) 2 Q. B. 700; *Robson v. Smith*, (1895) 2 Ch. 118.

(*s*) 4 Bl. Comm. c. 10, s. 12. See also Co. Litt. 368b; Co. 2

Inst. 212, 484; Bacon's Abr.; Viner's Abr.; Com. Dig.; Termes de la Ley, *sub nom. Maintenance*; Story, Contract, c. 7, s. 578; Jacob's Law Dictionary.

(*t*) *Wallis v. Portland*, 3 Ves. Jun. 494; 4 R. R. 78.

supplying funds or other means of maintaining that suit. Champerty is, where a person agrees to supply another with the sinews of war in return for a share in the spoil.

Generally speaking, the Courts disallow all assignments which savour of maintenance and champerty. As, for example, where one-fifth part of the share of prize-money, the subject of a suit then depending, was assigned by the executrix of one of the captors, and her husband, to navy agents, in consideration of their indemnifying the assignors from all costs in respect of any suit for the prize-money, and also paying the assignors the remaining four-fifths if it should be recovered, the assignment was held to be void (u). Similarly, the purchase of an estate in order to set aside, on the ground of fraud, a previous agreement affecting the property, partakes of champerty and is not enforceable (v).

And on this ground, too, the assignment of a bare right to file a bill in equity for fraud was held void (w). And so the following assignments have been held void on the same grounds: assignment of the mere right to sue a trustee on the chance of recovering from him interest or profits of part of the trust funds which were for a certain period in his hands (x); of a creditor's debt against a company coupled with the right to proceed with a petition against the company already filed by the assignor (y). And so a bill to enforce a title acquired by a conveyance from a person out of possession, in consideration of money advanced and to be

(u) *Stevens v. Bagwell*, 15 Ves. 139; 10 R. R. 46.

(v) *De Hoghton v. Money*, L. R. 2 Ch. Ap. 164.

(w) *Prosser v. Edmonds*, *supra*. See also *Powell v. Knowler*, 2 Atk. 226; *Kenney v. Browne*, 3 Ridg. P. C. 462, 498, 501; *Bayly v. Tyrrell*, 2 Ball & B. 363; 12 R. R.

99; *Stanley v. Jones*, 7 Bing. 369; 33 R. R. 513; *Sprye v. Porter*, 7 El. & Bl. 68; *Twiss v. Noblett*, 4 Ir. R. Eq. 64; *Keogh v. M'Grath*, 5 L. R. Ir. 478; 1 Wh. & T. 146. (x) *Hill v. Boyle*, L. R. 4 Eq. 260, 263.

(y) *Re Paris Skating, &c. Co.*, 5 Ch. D. 969.

advanced on suits respecting the recovery of the estate, was dismissed on the ground of maintenance (s), and that it was buying a pretended title (a). An agreement to advance funds or supply evidence with or without professional assistance for the recovery of property in consideration of a remuneration contingent on success and proportional to or to be paid out of the products of the proceedings is void (b); and, consequently, an assignment of such an agreement is invalid. Similarly, an agreement whereby a solicitor was to have a percentage of the fund recovered in a suit, was held to be void notwithstanding that the solicitor was not the solicitor in the suit but employed another (c); but an agreement by a solicitor not to charge anything for costs in a particular action is not champerty (d).

A solicitor cannot purchase the subject-matter of a pending suit from his client in that suit (e); but he may take a security upon it for advances already, and costs already, incurred in the suit (f).

But subject to the exception just cited, the purchase of property the title to which is in dispute, or which is the subject-matter of a *lis pendens*, is not in itself unlawful (g); yet it may become so if the real object of the purchaser is merely to maintain a suit in respect thereof (h). It is not champerty, however, to agree to

(s) *Burke v. Greene*, 2 Ball & B. 517; *Wood v. Downes*, 18 Ves. 120; 1 Swanst. 56; 11 R. R. 160.

(a) *Burke v. Greene*, 2 Ball & B. 521, 522; *Marquis of Cholmondeley v. Clinton*, 2 Jac. & Walk. 135, 136; 22 R. R. 84; *Bayly v. Tyrrell*, *supra*.

(b) *Stanley v. Jones*, 7 Bing. 369; 33 R. R. 513; *Reynell v. Sprye*, 1 D. M. G. 660; 21 L. J. Ch. 633; *Sprye v. Porter*, 7 E. & B. 58; 26 L. J. Q. B. 64; *Hutley v. Hutley*, L. R. 8 Q. B. 112; 42 L. J. Q. B. 52; *Earle v. Hopwood*, 9 C. B. N. S. 566; 30 L. J. C. P. 217.

(c) *Strange v. Brennan*, 15 Sim. 346.

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

(e) *Wood v. Downes*, *supra*; *Simpson v. Lamb*, 7 E. & B. 84; 26 L. J. Q. B. 121. But see *Knight v. Bowyer*, 2 De G. & J. 443; *Davis v. Freethy*, 24 Q. B. D. 519; *Rees v. De Bernardy*, (1896) 2 Ch. 437.

(f) *Anderson v. Radcliffe*, E. B. & E. 806; 29 L. J. Q. B. 128; *James v. Kerr*, 40 Ch. D. 449.

(g) *Hunter v. Daniel*, 4 Ha. 420; *Knight v. Bowyer*, *supra*; *Dickinson v. Burrell*, L. R. 1 Eq. 337, 342; 35 L. J. Ch. 371.

(h) *Prosser v. Edmonds*, *supra*;

help the *bond fide* purchaser of an estate to recover for rent due or injuries done to such estate previously to his purchase thereof (*i*).

Moreover, it is maintenance to purchase shares in a company for the purpose of instituting a suit at the purchaser's risk to restrain the governing body of the company from performing acts unwarranted by its constitution (*j*). The sale of a contingent right or a mere expectancy, not being in the nature of a claim adverse to any existing possession is not contrary to the statute 32 Hen. VIII. c. 9.

And the sale of a man's possible interest as devisee of a living owner, on the terms that he shall return the purchase-money if he does not become the devisee, is not invalid either at common law as creating an unlawful interest in the present owner's death, or as a bargain for a pretended title under the statute (*k*).

But the rules against champerty do not apply to proceedings in lunacy, which are pre-eminently for the protection of the person and property of the lunatic, which is in itself to be encouraged (*l*).

Where a person sues for a statutory penalty as a common informer, it is maintenance to indemnify him against costs (*m*). But the principles applicable to cases of maintenance and champerty are subject to certain qualifications dependent upon particular conditions and circumstances.

They cannot apply, for example, to a person having an interest in or honestly believing that he has an interest in the subject-matter in dispute, and honestly

Harrington v. Long, 2 My. & K. 590; 39 R. R. 304; *Hoghton v. Money*, L. R. 2 Ch. Ap. 164; *Seour v. Lawson*, 15 Ch. D. 426; *Guy v. Churchill*, 40 Ch. D. 481; 56 L. J. Ch. 670.

(*i*) *Williams v. Protheroe*, 5 Bing. 309, 314; 30 R. R. 608.

(*j*) *Bloxam v. Met. Rail. Co.*, 3 Ch. 353.

(*k*) *Cook v. Field*, 15 Q. B. R. 480; 19 L. J. Q. B. 441. But cp. Just. C. 2, 3, *de pactis*, 30; D. 18, 4.

(*l*) *Perse v. Perse*, 7 Cl. & F. 279, 316.

(*m*) *Bradlaugh v. Newdegate*, 11 Q. B. D. 1; 52 L. J. Q. B. 454; *Alabaster v. Harness*, (1895) 1 Q. B. 339.

acting on that belief (*n*); nor to a person who charitably assists a suitor in his action, believing him to be a poor man oppressed by a rich man (*o*). Nor do the rules apply where certain peculiar relations obtain between the parties to the transaction; such as that of father and child, or of an heir apparent (*p*), or of the husband of an heiress (*q*), or of master and servant (*r*), and the like.

Nor is it maintenance for a creditor, who has instituted proceedings at law and in equity against his debtor, to agree with such debtor to abandon those proceedings, and to surrender his securities, in consideration of the debtor's giving him a lien on other securities in the hands of another creditor, with authority to sue the latter, and agreeing to use his best endeavours to assist in adjusting his accounts with the holder, and in recovering those securities. For there was no bargain, or colour of bargain, that the assignee should maintain the suit, instituted in the assignor's name, against the creditor who had the other securities, in consideration of sharing in the profits to be derived from that suit. Such an agreement is, in effect, nothing more than an assignment of the equity of redemption of the assignor in the securities held by such creditor in exchange for the prior securities held by the assignee. And the authority, given to the assignee to sue such creditor, was the common legal provision in the case of an ordinary assignment of debt or security (*s*).

A bankrupt whose adjudication has not been set

(*n*) *Findon v. Parker*, 11 M. & W. 675, 682; *Pechell v. Watson*, 8 M. & W. 691; *Hunter v. Daniel*, 4 Ha. 420; *Flight v. Leman*, 4 Q. B. R. 883.

(*o*) *Harris v. Briaco*, 17 Q. B. D. 504.

(*p*) *Burke v. Green*, 2 Ball & B. 521.

(*q*) *Moore v. Usher*, 7 Sim. 384; *Story, Eq.* [1892], 703.

(*r*) 4 Bl. Comm. 135; *Elborough v. Ayres*, L. R. 10 Eq. 367, 371, 375; *Wallis v. Portland*, 3 Ves. Jun. 503; 4 R. R. 78; *Vin. Abr., Maintenance, K.*; *Wilson v. Short*, 6 Ha. 366; *Dickinson v. Burrell*, 35 Beav. 257.

(*s*) *Hartley v. Russell*, 2 Sim. & Stu. 244; 25 R. R. 196. *Cp. Williams v. Protheroe, supra; Harrington v. Long*, 2 My. & K. 591 *et seq.*; 39 R. R. 304.

aside, cannot maintain an action for maintenance on the ground that the defendant incited and supported bankruptcy in which he had no common interest, since the cause of action (if any) passed to the trustee in bankruptcy; and such action may be summarily dismissed as frivolous and vexatious (*t*); and a corporation in liquidation as distinct from the individual liquidation is, it seems, incapable of committing such an act of maintenance (*t*).

By the Bankruptcy Act, 1883, the trustee can assign the subject-matter of an action which he has already commenced without being subject to a charge of maintenance (*u*).

By the Companies Act, 1862, claims which a company may have against its directors for improper dealings with the assets of the company (as, for example, improper sales or purchases by them as fiduciaries), are choses in action which may be sold by the liquidator, even although the existence of the claim was not known when the assignment was executed (*v*).

But an agreement by a shareholder in a company which is being compulsorily wound up that, in consideration of a pecuniary equivalent, he would endeavour to postpone the making of a call, or would support the claim of a creditor, was held to be invalid (*w*).

But an assignment of a debt even to an attorney, after a judge's order for payment, but before the order was made a rule of Court, was held to be valid if there were no other objection to the transaction (*x*).

Where a legatee, too poor to sue, assigned the legacy for less than its value to the plaintiff, who bought it in

(*t*) *Met. Bank v. Pooley*, 10 App. Ca. 210; *Whitworth v. Hall*, 2 B. & Ad. 695; 36 R. R. 715; 1 Wh. & T. 147.

(*u*) Ss. 44, 56; *Secar v. Lawson*, 15 C. D. 426; *Guy v. Churchill*, 40 Ch. D. 481.

(*v*) *Re Park Gate, &c. Co.*, 17

Ch. D. 234. Cp. *New Westminster Brewery v. Hannah*; W. N. [1876], 215; [1877], 35.

(*w*) *Elliott v. Richardson*, L. R. 5 C. P. 744, 748; 1 Wh. & T. 148.

(*x*) *Smith v. Selwyn*, 5 W. R. 682.

order to sue therefor, it was *held*, that this was not maintenance or champerty (y).

Formerly, actions for tort were never assignable, and, generally speaking, they are not so now. How far such *choses in action* are or may be assignable it is very difficult to say, but the subject has already been referred to in the previous chapters on the Judicature Act, where authorities will be found cited (yy).

Here, it is sufficient to say that, generally speaking, actions for injuries, not to property, but to the person either physical or moral, are still deemed to be not assignable; while injuries to property are, in some qualified and restricted degree, often assignable where the measure of damages is able to be estimated by the injury done to the estate.

Finally, every right of action, in tort or otherwise, which vests in a bankrupt's trustee, is assignable by the *latter*, even though it might have been not assignable by the bankrupt himself (z).

The Judicature Act in no way affects or alters the law as to maintenance and champerty (a).

(y) *Tyson v. Jackson*, 30 Beav. 384; 1 Wh. & T. 150. See also Pollock, Contracts.

(yy) *Ante*, Bk. III.

(z) *Seear v. Lawson*, 15 C. D.

426; *Guy v. Churchill*, 40 Ch. D. 481.

(a) *Ball v. Warwick*, 50 L. J. C. P. D. 382; *James v. Kerr*, *supra*; *Guy v. Churchill*, *supra*.

Book V.

**SOME STATUTES AFFECTING THE OWNERSHIP
AND DISPOSITION OF CHoses IN ACTION.**

CHAPTER I.

FRAUDULENT AND VOLUNTARY CONVEYANCES.

By 13 Eliz. c. 5, a statute for the avoiding of feigned, covinous, and fraudulent feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments, and executions, as well of lands as of goods and chattels, contrived of malice, fraud, &c. to delay, hinder, or defraud creditors and others of their just and lawful actions, suits, debts, accounts, damages, &c., &c., it was enacted that all and every feoffment, gift, grant, alienation, bargain, and conveyance of lands, tenements, hereditaments, goods, and chattels, or any of them, or of any lease, rent, common or other profit or charge out of the same lands, tenements, hereditaments, goods, and chattels, or any of them, by writing or otherwise, and all and every bond, suit, judgment, and execution at any time had or made to or for any intent or purpose before declared and expressed, shall be from henceforth deemed and taken (only as against that person or persons, his or their heirs, successors, executors, administrators, and assigns, and every of them, whose actions, suits, debts, accounts, penalties, forfeitures, heriots, mortuaries, and reliefs, by such guileful, covinous, or fraudulent devices and practices as is aforesaid, are,

shall, or might, be in anywise disturbed, hindered, or defrauded) to be clearly and utterly void, frustrate, and of none effect; any pretence, colour, feigned consideration, expressing of use, or any other matter or thing to the contrary notwithstanding (a).

Every party to such a fraudulent conveyance shall incur the forfeiture of one year's value of such lands, and the whole value of such goods and chattels and the money contained in such bond, &c., and also being convicted thereof, shall suffer imprisonment for one half-year (b).

The Act not to extend to any assurance made upon good consideration and *bond fide* to any person not having at the time of such assurance any notice or knowledge of covin, fraud, or collusion (c).

The gift or conveyance must be *with intent to defraud creditors* (d). Volunteers who are creditors, for instance, under bonds or obligations given without valuable consideration, are nevertheless creditors within the meaning of the Act (e).

The statute applies equally to real and personal property. With regard to personal property the statute applies only to such things as can be *taken in execution* (f); and only in this respect do assignments of choses in action fall within the statute (g).

A valuable consideration will not be effectual if there be *mala fides* and an intent to delay or defraud creditors, or to place the property beyond reach of process (h).

(a) 13 Eliz. c. 5, ss. 1, 2.

(b) *Id.* s. 3.

(c) *Id.* s. 6.

(d) *Gooch's Case*, Co. Pt. V. 60a; *Nunn v. Wilshire*, 8 T. R. 521; 5 R. R. 434; *Doe v. Ball*, 11 M. & W. 531.

(e) *Adames v. Hallett*, L. R. 6 Eq. 468.

(f) *Rider v. Kidder*, 10 Ves. Jun. 360; 1 & 2 Vict. c. 110, ss. 12, 14, 15, 18; 3 & 4 Vict. c. 82; and R. S. C. 1883; *Warden v. Jones*, 2 De G. & J. 76; *Norcutt*

v. Dodd, Cr. & P. 100; *Barrack v. McCulloch*, 3 K. & J. 110; *Stokoe v. Cowan*, 29 Beav. 637.

(g) *Noreutt v. Dodd*, *supra*.

(h) *Harman v. Richards*, 10 Ha. 89; *Strong v. Strong*, 18 Beav. 408; *Bott v. Smith*, 21 Beav. 511; *Colombine v. Penhall*, 1 Sm. & G. 228; *Barling v. Bishopp*, 29 Beav. 417; *Reese River Co. v. Attwell*, L. R. 7 Eq. 347; *Blenkinsopp v. Blenkinsopp*, 1 D. M. & G. 495; *Pauncefoot's Case*, Lane, 44, 45;

Yet it was held that a mortgage, if executed as a security for money actually lent, is not fraudulent within the Act, although its object was to defeat an expected execution of a judgment creditor (i).

Policies of assurance are securities for money within 1 & 2 Vict. c. 110, and are therefore seizable by the sheriff (j).

Voluntary conveyances have been held to be within the statute if made to hinder or defraud creditors; but the mere fact that it is voluntary will not invalidate it; but the solvency or insolvency at the time of the transaction will be taken into account (k).

On the other hand, the mere fact that the grantor may be solvent and able to meet all his just debts at the time of the grant will not necessarily validate the conveyance (l); for the grantor may be indebted at the time, and yet the conveyance be good (m). The conveyance is only void to the extent that may be necessary to satisfy the grantor's creditors (n). It will still be good against the grantor (o); parties who are privy to it (p); volunteers claiming under the grantor, e.g., devisees (q); and also against mere strangers (r).

Ward v. Lant, Pr. Ch. 182; *Raleigh's Case*, Lane, 48; *Saunders v. Watson*, 4 Giff. 179; *Choune v. Baylis*, 31 Beav. 351; *Wood v. Dixie*, 7 Q. B. R. 892.

(i) *Darvill v. Terry*, 6 H. & N. 807; *Hale v. Saloon Omnibus Co.*, 4 Drew. 492; *Allon v. Harrison*, L. R. 4 Ch. Ap. 622.

(j) *Stokoe v. Cowan*, *supra*; *Lau v. The Indisputable Life Assurance Soc.*, 1 K. & J. 223; *Robinson v. McCreight*, 25 Beav. 272; *Freeman v. Pope*, L. R. 9 Eq. 206; *Taylor v. Coenen*, 1 Ch. D. 636.

(k) *Lush v. Wilkinson*, 5 Ves. Jun. 384; *Holmes v. Penney*, 3 K. & J. 90; *Skarf v. Souby*, 1 Mac. & G. 364, 375; *Thompson v. Webster*, 4 De G. & J. 600; *Kent v. Riley*, L. R. 14 Eq. 190; *Taylor v. Coenen*, L. R. 1 Ch. D. 636; *Spencer v. Slater*, 4 Q. B. D. 13.

(l) *Spiro v. Willows*, 3 D. G. J. & S. 293; *Freeman v. Pope*, L. R. 5 Ch. Ap. 538; *Mackay v. Douglas*, L. R. 14 Eq. 106; *Cornish v. Clark*, L. R. 14 Eq. 184; *Crossley v. Elworthy*, L. R. 12 Eq. 158; *Barling v. Bishopp*, *supra*.

(m) *Stephens v. Olive*, 2 B. C. C. 90; *French v. French*, 6 D. G. M. & G. 95; *Neale v. Day*, 4 Jur. N. S. 1225.

(n) *Curtis v. Price*, 12 Ves. Jun. 103; 8 R. R. 303; *Bill v. Cureton*, 2 M. & K. 503; *De Hoghton v. Money*, L. R. 2 Ch. Ap. 164.

(o) *Robinson v. McDonnell*, 2 B. & Al. 134.

(p) *Olliver v. King*, 2 Jur. N. S. 312.

(q) *Fillers v. Beaumont*, 1 Ver. 100.

(r) *Dessey v. Windham*, 6 Q. B. R. 166.

If the conveyance is voidable, the voluntary grantee may, before it is avoided, make a valid transfer to a purchaser for value (s) ; but the consideration must not be grossly inadequate, or a presumption of fraud and collusion will arise (t). When the subsequent conveyance is a mortgage, the voluntary grantees will be entitled subject to the mortgage (u).

Where a specialty creditor brought an action to set aside a conveyance as fraudulent under the Act nearly ten years after the death of the grantor, and the creditor had been aware of the facts during the whole of that period, it was *held*, that as the creditor sought to enforce a legal right his mere delay to take proceedings was no defence against him, as it had not continued long enough to bar his legal right, the case standing on a different footing from a suit to set aside on equitable grounds a deed which was valid at law (v).

A conveyance will not be taken out of the operation of the statute *merely* in consequence of the fact that the consideration given is not for the benefit of the grantor, but for that of a third person, *e.g.*, an annuity to the grantor's wife (w). Again, although there were actually no creditors at the date of the execution of the deed, yet if the deed were in fact fraudulent, and executed with the express intention of delaying and defeating the claims of future creditors, such deed may be impeached by such future creditors (x).

Moreover, the creditor may bring his action to impeach the validity of such a document without having previously obtained a judgment, lien, order, or decree of any kind in respect of his claim against the grantor ;

(s) *Morewood v. S. Yorks. Rail. Co.*, 3 H. & N. 798 ; *Daubeny v. Cockburn*, 1 Mer. 626 ; 15 R. R. 174.

(t) *Doe v. Routledge*, Cowp. 705 ; *Metcalf v. Pulvertoft*, 1 V. & B. 184.

(u) *Hales v. Cox*, 32 Beav. 118.

(v) *In re Maddever*, 27 Ch. D.

523 ; *Golden v. Gillam*, 20 Ch. D. 389.

(w) *French v. French*, 6 D. G. M. & G. 95 ; *Neale v. Day*, 4 Jur. N. S. 1225.

(x) *Barling v. Bishopp*, 29 Beav. 417 ; *Reese River Co. v. Attwell*, L. R. 7 Eq. 347.

but in the absence of such a lien or charging order the Court will not apply the property in satisfaction of the creditor's claim. It would appear, also, that a bill to set aside such a conveyance ought to be on behalf of all the creditors of the grantor (y).

An assignment of *part* of his property by a man, who cannot pay all his debts, to a trustee for the benefit of a particular class of creditors may still be within the operation of the statute, although the grantor may have been heavily pressed by those particular creditors (z).

But a *creditor* for valuable consideration, who has no notice or suspicion that his debtor is insolvent at the time when payment or transfer is effected by way of fraudulent preference to him, may be protected from attack (a).

Where A. is indebted to B. and to C., if, after B. has obtained judgment against A. and issued but delayed the levy of execution, A. goes to C. and voluntarily gives to C. a warrant of attorney to confess judgment, on which judgment is immediately entered and execution levied on the same day on which B. would have been entitled to execution and had threatened to sue it out, the preference thus given by A. to C. is not unlawful, nor fraudulent, within the meaning of the statute 13 Eliz. c. 5 (b).

Similarly, a debtor expecting that a writ of sequestration would issue against him for non-payment of a sum of money ordered to be paid by him in the Court of Chancery, executed a deed of mortgage, which was registered as a bill of sale, vesting substantially all his property in trustees for the benefit of five (some only) of his creditors. The deed contained a proviso that the

(y) *Reese River Co. v. Attwell*, *supra*. But see *Colman v. Croker*, 1 Ves. Jr. 161; *Collins v. Burton*, 4 D. G. & J. 612.

(z) *Ex parte Saffery*, 4 Ch. D. 555.

(a) *Ex parte Butcher*, L. R. 9 Ch. Ap. 596.

(b) *Holbird v. Anderson*, 5 T. R. 236. Cp. *Wood v. Dixie*, 7 Q. B. R. 892.

debtor should remain in possession of his property for six months, but not so as to let in any execution or sequestration, and in case any such should be enforced his possession was to cease. A writ of sequestration was subsequently issued. It was held: That the deed was not void under 13 Eliz. c. 5, notwithstanding the fact that it conveyed the *whole* of the debtor's property for the benefit of *some* of his creditors, and that it contained the above-mentioned proviso (c). Further, the *onus probandi* is on those who impeach the deed (d).

A bill of sale of all the grantor's then existing and after-acquired property, by way of mortgage to secure an existing debt and future advances, is not necessarily void under 13 Eliz. c. 5, unless made *malâ fide* and as a mere cloak for retaining a benefit to the grantor (e).

Where possession of goods has been taken under a bill of sale, *part* of the consideration for which is money advanced for the *bonâ fide* purpose of obtaining security for a pre-existing debt, the transaction is not invalid, although the creditor be aware, at the time of the advance, that the debtor has committed felony and intends to leave the country and to apply a portion of the money advanced for that purpose (f).

An assignment of funds (*e.g.*, stock, reduced annuities) by a prisoner on a charge of felony to secure payment of an antecedent debt, and costs to be incurred in his defence, is perfectly valid notwithstanding his subsequent conviction (g).

A clerk robbed his employers of money, and upon the discovery of his frauds and previously to his prose-

(c) *Alton v. Harrison*, 20 L. T. N. S. 1001; L. R. 4 Ch. Ap. 622. See also *Allen v. Bonnet*, 18 W. R. 183; *Ex parte Games*, 12 Ch. D. 314; *Bittlestone v. Cooke*, 4 W. R. 493; 6 E. & B. 296; *In re Colmere*, 14 W. R. 318; L. R. 1 Ch. 128; *Bell v. Simpson*, 5 W. R. 688; 2 H. & N. 410.

(d) *Allen v. Bonnet*, 18 W. R. 183.

(e) *Ex parte Games*, 12 Ch. D. 314.

(f) *Bagot v. Arnott*, 2 Ir. Rep. C. L. 1.

(g) *Perkins v. Bradley*, 1 Hare, 219.

oution therefor, he gave to the employers security upon policies and ~~land for the amount~~ of the deficit. Notice was duly given to and received by the insurance company; but the employers failed to obtain possession of the policies themselves; but they afterwards obtained a transfer of the legal estate in the land. The clerk subsequently assigned the policies to a third person by way of security for payment of costs of his defence; and executed a voluntary conveyance of the land aforesaid to a trustee in trust for his wife and children. Held, that the deficit was a debt due to the first assignees (the employers) and was a good consideration for the securities, and that the assignment to them was a valid equitable assignment as against the subsequent assignee of the policies, who had, in addition, obtained possession of them. - After the commission of a felony and before his conviction, a felon may sell or assign over his personal property for valuable consideration; and a debt existing at the time of the commission of the offence is a sufficient consideration to support such an assignment. But the sale must be *bonâ fide*, and not colourable and merely for the purpose of avoiding the forfeiture on conviction. The civil remedies for suing the felon, which belong to the person whose property has been feloniously taken, are suspended, after discovery of the commission of the offence, until the conviction of the felon, in order that the dignity of the law may be vindicated by the prosecution and conviction of the felon. But it is indifferent by whom the felon is prosecuted (*h*).

With regard to the question of property liable to be seized in execution, it is to be observed that although, by 1 & 2 Vict. c. 110, power is given for the seizure in execution of any money, bank notes, bonds, negotiable

(*h*) *Chowne v. Baylis*, 31 Beav. 351. See also *Whitaker v. Wisbey*, 12 C. B. R. 44. But see now, as to forfeiture, 33 & 34 Vict. c. 23, ss. 9, 12, 13-16, 18, 21-26.

instruments, specialties, and other securities, and by way of charge over other choses in action such as stocks, shares, annuities, &c., yet the sheriff may not, under 1 & 2 Vict. c. 110, s. 12, seize money or securities for money while in the hands of a third person as trustee for the debtor (*i*).

Formerly, policies of assurance were exempt from seizure under *f. fa.*; but it has been held that such policies are securities for money within 1 & 2 Vict. c. 110, s. 12, and that they are seizable (*j*).

A conveyance which is fraudulent and void against the creditors of the conveying party, within 13 Eliz. c. 5, is void also as against his trustee in bankruptcy, who represents the creditors; and he may recover back the property (*k*).

No creditor who was privy or assented to a fraudulent assignment can set it aside (*l*); nor can he raise it as an act of bankruptcy (*m*).

(ii) 27 ELIZ. c. 4.

By an Act against Covinous and Fraudulent Conveyances (27 Eliz. c. 4), which recites the great loss and prejudice resulting from such conveyances, &c. made with intent to deceive *purchasers*, it is enacted that all and every conveyance, grant, charge, lease, estate, incumbrance and limitation of use or uses, of, in, or out of any lands, tenements, or other hereditaments whatsoever had or made for the intent and of purpose to

(*i*) *France v. Campbell*, 6 Jur. 105; *In re Womersley*, 29 Ch. D. 557.

(*j*) *Stokoe v. Cowan*, 29 Beav. 637; *Freeman v. Pope*, L. R. 9 Eq. 206; *Taylor v. Coenen*, 1 Ch. D. 636.

(*k*) *Doe d. Grimsby v. Ball*, 11 M. & W. 531; *Ex parte Butters*,

14 Ch. D. 265; *Ex parte Russell*, 19 Ch. D. 588.

(*l*) *Steel v. Brown*, 1 Taunt. 381; 9 R. R. 795; *Bamford v. Baron*, 2 T. R. 594, n.; 1 R. R. 551, n.; *Olliver v. King*, 8 De G. M. & G. 110.

(*m*) *Ex parte Alsop*, 1 De G. F. & J. 289; *Ex parte Stray*, L. R. 2 Ch. Ap. 374.

defraud and deceive such person or persons, bodies politick or corporate, as have purchased or shall afterwards purchase in fee simple, fee tail, for life, lives, or years, the same lands, tenements, and hereditaments, or any part or parcel thereof, so formerly conveyed, granted, leased, charged, incumbered, or limited in use; or to defraud and deceive such as have or shall purchase any rent, profit, commodity in or out of the same, or any part thereof, shall be deemed and taken only as against that person and persons, &c., his and their heirs, successors, executors, administrators, and assigns, and against all and every other person and persons lawfully having or claiming by, from or under them, or any of them, which have purchased or shall hereafter purchase for money or other good consideration, the same lands, &c., or any part or parcel thereof, or any rent, profit, or commodity in or out of the same, to be utterly void, frustrate, and of none effect; any pretence, colour, feigned consideration, or expressing of any use or uses to the contrary notwithstanding (n).

The penalty of the parties to such fraudulent conveyances who do avow the same is the forfeiture of one year's value of the said lands, &c., half to the Crown and half to the persons aggrieved, to be recovered in any of the Courts of record by an action of debt, bill, plaint, or information; and on conviction, imprisonment for one half-year (o).

The Act does not affect conveyances, &c. made upon good consideration and *bond fide* (p).

Where a mortgage was retained by a mortgagor, and

(n) 27 Eliz. c. 4, s. 2.

(o) *Id.* s. 3. See *Doe v. Routledge*, Cowper, 705, 710; *Olliver v. King*, 8 De G. M. & G. 110. By 22 Vict. c. 32, Crown may remit the penalty. See also *Butcher v. Harrison*, 4 B. & Ad. 129; *Doe d. Grimsby v. Ball*, 11 M. & W. 531; *Cresswell v. Cokes*,

2 Leon. 8; *Twyne's Case*, Co. Pt. III. 80b; *Allen v. Stear*, Cro. Eliz. 645; *Calliford v. Blawford*, 1 Shower, 353; *Robinson v. Currey*, 7 Q. B. D. 465.

(p) 27 Eliz. c. 4, s. 4. The rest of the statute was repealed by Statute Law Revision Act, 1863 (26 & 27 Vict. c. 125).

there was nothing to show that the mortgagee knew of its execution for three years thereafter, and the mortgagor intended the same to be at his own free disposition, so that if he did not wish to bring it forward he could keep it secret and obtain an advance of money or forbearance by conveying the estate, either by way of mortgage or sale to other parties, it was held to be void under 27 Eliz. c. 4, as against a subsequent mortgagee for value (*g*).

Mortgagees, legal or equitable, are purchasers *pro tanto* within the Act (*r*); so are lessees (*s*); but no mere judgment creditors (*t*). Pure personal estate is not within the statute (*u*).

When the subsequent conveyance was a mortgage, the previous voluntary grantees will take subject to the mortgage (*v*).

A voluntary endowment of a charity, however, would not necessarily be defeated by a subsequent conveyance for value (*x*).

In any case the voluntary conveyance, &c. would be defeated only so far as was necessary to give effect to the subsequent *bonâ fide* conveyance for value (*y*).

But a voluntary conveyance was not necessarily void merely because it was voluntary; and now by a recent statute, such a voluntary disposition of lands, &c. is not to be deemed fraudulent, &c. by reason of a subsequent purchase for value (*z*).

By the Voluntary Conveyances Act, 1893 (56 & 57 Vict. c. 21), it is enacted, subject as therein mentioned,

(*g*) *Cracknell v. Janson*, 11 Ch. D. 1.

(*r*) *Doe v. Webber*, 1 A. & E. 733; *Dolphin v. Aylward*, L. R. 4 H. L. 486.

(*s*) *Doe d. Goodright v. Moses*, 2 W. Bl. 1019. But see *Upton v. Bassett*, Cro. Eliz. 445.

(*t*) *Beavan v. Oxford*, 6 D. M. & G. 507.

(*u*) *Jones v. Croucher* [1822], 1 Sim. & Sta. 315.

(*v*) *Hales v. Cox*, 32 Beav. 118. See also *In re Walhampton Estate*, 26 Ch. D. 391.

(*x*) *Corp. Newcastle v. Att.-Gen.*, 12 Cl. & F. 402.

(*y*) *Croker v. Martin*, 1 Bl. N. S. 573.

(*z*) 56 & 57 Vict. c. 21, s. 2.

that no voluntary conveyance of any lands, tenements, or hereditaments, *whether made before or after the passing of this Act*, if, in fact, made *bonâ fide* and without any fraudulent intent, shall thereafter be deemed fraudulent or covinous within the meaning of 27 Eliz. c. 4, by reason of any subsequent purchase for value, or be defeated under any of the provisions of the said Act by a conveyance made upon any such purchase, any rule of law notwithstanding (a). But this Act does not affect cases in which voluntary grants of lands, &c. made before the Act were followed by a disposition of the same lands, &c., to or in favour of a purchaser for value, if the second transaction was also before the operation of the Act (b).

The expression "conveyance" includes every mode of disposition mentioned or referred to in 27 Eliz. c. 4 (c).

(iii) BANKRUPTCY ACTS.

By the Bankruptcy Act, 1883, it is enacted that a debtor commits an act of bankruptcy if he makes a conveyance or assignment of his property to a trustee or trustees for the benefit of his creditors generally, or makes a fraudulent conveyance, gift, delivery, or transfer of his property, or any part thereof; or makes any conveyance, &c., 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 (d).

The word "assignment" here does not include a mere declaration of trust, agreement or other disposition which does not operate as an assignment (e).

(a) 56 & 57 Vict. c. 21, s. 2.

(b) *Id.* s. 3.

(c) *Id.* s. 4.

(d) 46 & 47 Vict. c. 52, s. 4.

(e) *Rs Spackman*, 24 Q. B. D. 728. But see *Ex parte Hughes*, (1893) 1 Q. B. 595; 62 L. J. Q. B. 358; 68 L. T. 629.

No creditor who has assented to, or in any way acquiesced in, such assignment can rely on it, as an act of bankruptcy, unless the deed be fraudulent as against him (*f*).

The fact that the deed was insufficiently stamped or imperfectly executed is immaterial as concerns an act of bankruptcy; but it will not be an act of bankruptcy if only intended to be delivered as an escrow (*g*). If three months elapse from the execution of the deed without any bankruptcy proceedings being taken, the deed cannot be impeached as an act of bankruptcy (*h*).

Upon the conveyance of the whole of a debtor's property for a past debt, and a further advance, the question is whether the creditor made such further advance to enable the debtor to carry on his business, and with a reasonable belief that the advance would have that effect (*i*).

An assignment for a past debt by a partner in an insolvent firm of all his separate assets is fraudulent, even though it does not include the partnership assets (*j*).

In estimating the whole of a person's property the value of his book debts is to be taken into account (*k*).

If there be a *present* consideration, not so small as to be merely colourable, it will be treated as if there were a substantial exception to the assignment of the whole; so that an assignment of *all* of a person's property and effects by way of mortgage, partly for a past debt and

(*f*) *Ex parte Stray*, L. R. 2 Ch. Ap. 374; *Re Clement*, 3 Morr. 153; *Ex parte Marshall*, 1 M. D. & D. 575; *Ex parte Milner*, 15 Q. B. D. 605; 54 L. J. Q. B. 425; 53 L. T. 652; *Ex parte Perrier*, 37 W. R. 480; 60 L. T. 270.

(*g*) *Re Hollingshead*, 58 L. J. Q. B. 297; *Ex parte Squire*, L. R. 4 Ch. 47; *Bowker v. Burdakin*, 11 M. & W. 128. See also *Dutton v. Morrison*, 17 Ves. Jun. 193; 11 R. R. 56.

(*h*) *Ex parte Games*, 12 Ch. D.

325; 40 L. T. 789.

(*i*) *Ex parte Johnson*, 26 Ch. D. 338; 53 L. J. Ch. 762; *Adm. v. Lascelles*, (1894) Ap. Ca. 135. See also *Re Colemere*, L. R. 1 Ch. 128.

(*j*) *Ex parte Trevor*, 1 Ch. D. 297. See also *Ex parte Snowball*, L. R. 7 Ch. 534.

(*k*) *Ex parte Burton*, 13 Ch. D. 102; *Ex parte Field*, *id.* 106, n. See also *Browne v. Fryer*, 46 L. T. 636.

partly for a present advance, is not necessarily an act of bankruptcy (*l*).

Similarly, an assignment of all the grantor's property, both present and future, including what he may purchase by the advance, does not necessarily constitute an act of bankruptcy (*m*).

The Act further provides that 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 such making, &c., be deemed fraudulent and void as against the trustee in the bankruptcy. But 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 (*n*).

Where there is real and genuine pressure on the part of the creditor, which exercises an appreciable influence on the debtor's mind, and the wish to prefer is not the substantial desire, the transaction cannot be considered a fraudulent preference (*o*).

The property of the bankrupt divisible among his

(*l*) *Pennell v. Reynolds*, 11 C. B. R. N. S. 709; *Lomax v. Buxton*, L. R. 6 C. P. 107; 24 L. T. 137.

(*m*) *Ex parte Hauzwell*, 23 Ch. D. 626; *Lomax v. Buxton*, *supra*. See also *Ex parte Stubbins*, 17 Ch. D. 58; *Ex parte Pearson*, L. R. 8 Ch. 667; *Smith v. Cannan*, 22 L. J. Q. B. 290.

(*n*) 46 & 47 Vict. c. 52, s. 48. See *Re Liverpool & London Guarantee Co.*, 30 W. R. 378; *Hall v. Wallace*, 7 M. & W. 363; *Ex*

parte Lancaster, 25 Ch. D. 311; *Re Washington Diamond Co.*, (1893) 3 Ch. 95; *Ex parte Cooper*, L. R. 10 Ch. 510.

(*o*) *Brown v. Kempton*, 19 L. J. C. P. 169; *Re Fletcher*, 9 Morr. 8; *Ex parte O. R.*, *Re Wilkinson*, 1 Morr. 65; *Re Brown*, L. R. 16 Eq. 391; *Ex parte Palmer* [1882], W. N. 130; *Ex parte Reader*, L. R. 20 Eq. 763; *Ex parte Wheatley*, 45 L. T. 80.

creditors, and in this Act referred to as the property of the bankrupt, shall comprise (*inter alia*)—

- (i) All such property as may belong to or be vested in the bankrupt at the commencement of the bankruptcy, or may be acquired by or devolve on him before his discharge.
- (ii) The capacity to exercise and to take proceedings for exercising all such powers in or over or in respect of property as might have been exercised by the bankrupt for his own benefit at the commencement of his bankruptcy or before his discharge, except the right of nomination to a vacant ecclesiastical benefice; and
- (iii) 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 (*p*).

Under the Bankruptcy Statutes prior to that of 1869, bills of exchange and promissory notes were held to be subject to the reputed ownership doctrine (*q*).

The reputed ownership clause in the present Act is governed, however, by the trustee's right of disclaimer of onerous property (*r*).

Law as to *choses in action* in relation to bankruptcy may be put shortly thus:—

- A. Subject to the exceptions indicated in a previous part of this work (*s*), *choses in action* which are

(*p*) 46 & 47 Vict. c. 52, s. 44.

(*q*) *Hornblower v. Proud*, 2 B. & Al. 327; 20 R. R. 456.

(*r*) 46 & 47 Vict. c. 52, s. 55.

See *Ex parte Allen, Re Fussell*, 20 Ch. D. 341; 30 W. R. 601; 47 L. T. 65.

(*s*) Bk. II., c. ii., Bk. III.

actually the property of the bankrupt generally pass to and vest in his trustee in bankruptcy under sect. 44 (i).

B. *Choses in action* which consist of debts due or growing due to the bankrupt in the course of his trade or business, although they be actually not his property, pass to and vest in his trustee in bankruptcy if they be found to be within his possession, order, or disposition under such circumstances that he is the reputed owner thereof.

C. No *choses in action* (other than those mentioned in B.), which are not the property of the bankrupt, pass to or vest in his trustee in bankruptcy, although they be found to be in his possession, order or disposition, under such circumstances that he is the reputed owner thereof (t).

As to what are debts growing due, see the cases cited below (u).

The debts must be debts connected with the bankrupt's business, otherwise they are not within B., for it is not intended that *all* debts should be included, although they happen to be within his order or disposition, and to be due to him during the period of his trading. So that where a person invests money in a joint stock company, and receives in exchange therefor the company's debenture charging their undertaking and property with the payment thereof, and the debenture holder assigns such debenture to a third person by indorsement in blank and then becomes bankrupt, the assignee will have a good title thereto as against the assignor's trustee in bankruptcy, notwithstanding that

(i) *Colonial Bank v. Whinney*, 11 Ap. Ca. 426; 56 L. J. Ch. 43; 55 L. T. 362; 34 W. R. 705; 3 Morr. 207; *Re Stevenson* [1891—1892], 27 L. R. Ir. 309. See the older cases: *Ex parte Union Bank of Manchester*, *Re Jackson*, L. R.

12 Eq. 354; *Ex parte Barry*, *Re Fox*, L. R. 17 Eq. 113; 29 L. T. 620.

(u) *Ex parte Kemp*, *Re Fastnedge*, L. R. 9 Ch. Ap. 383; 22 W. R. 462; *Ex parte Rawlings*, *Re Davis*, 37 W. R. 142; 60 L. T. 156.

the assignee neglects to give notice to the company until after the commencement of the bankruptcy.

The mere fact that the assignor happens to be a trader does not make the debenture a debt due to him in the course of his trade. The result of such an argument would be that every investment made by a man engaged in trade would be a debt due to him in the course of his trade. The debenture may have nothing whatever to do with his trade (*v*).

Similarly, money charged on land may not be within the reputed ownership clause (*w*); and, it seems, money charged on chattels in America or elsewhere (*v*). As to what is a "trade or business," see references given below (*x*).

A person who takes in lodgers has been held to carry on a "business," though he does not provide them with board (*y*); but an occupation of premises by a gentleman who sells his surplus farm and garden produce does not constitute a "business" within this section (*z*). Merely acting as a trader, &c. on an isolated occasion is insufficient, there must be the intention to continue the occupation and gain a livelihood thereby (*a*).

Furthermore, it seems necessary that the business should be actually in course of prosecution at the commencement of the bankruptcy, so that where a bankrupt had ceased to trade actively prior to that date, the clause would not apply, although he might have trade debts left unpaid (*b*). Whether a bankrupt has permanently, or only temporarily, discontinued his business, and the

(*v*) *In re Pryce, Ex parte Rensburg*, 4 Ch. D. 685, 687, 688.

(*w*) *Jones v. Gibbons*, 9 Ves. 407.

(*x*) Baldwin, *Bankruptcy* [1895], pp. 263—265.

(*y*) *Re Harrison, Ex parte O. R.*, 67 L. T. 600.

(*z*) *Re Wallis, Ex parte Sully*, 14 Q. B. D. 950; 33 W. R. 733; 52 L. T. 625.

(*a*) *Bartholomew v. Sherwood*, 1 T. R. 573, n.; *Ex parte Stewart*, 18 L. J. Bank. 14; *Re Griffin, Ex parte Board of Trade*, 60 L. J. Q. B. 235; 39 W. R. 156.

(*b*) *Ex parte McGeorge, Re Stevens*, 20 Ch. D. 697; 30 W. R. 817; *Ex parte Reynolds*, 52 L. J. Ch. 431; 31 W. R. 323; *Dave v. Vergara*, 11 Q. B. D. 241; 49 L. T. 41.

question of his real intention in connection therewith are matters of fact (c).

The "goods" within this section, moreover, must be not merely in the possession, order, or disposition of the bankrupt, but it must also be proved that they are in his possession for the purposes of that trade or business (d). The "goods" must be in the sole possession, &c. of the bankrupt (e).

As to when they cease to be in his possession, &c., see reference below (f).

If an assignment or mortgage of trade debts be not followed by a notice to the persons who owe the debts, it may be evidence of the assignee's consent to the reputation of ownership remaining in the bankrupt assignor (g); but if the person or persons owing the debts have such knowledge as to render a payment by them to the assignor wrongful and a breach of trust, that might be sufficient to terminate the order and disposition of the bankrupt assignor though no direct notice had been given (h).

If the notice to the assignor's debtor, however, is given at any time before the assignee has notice of an available act of bankruptcy, and before the date of the receiving order, the transaction will be protected by sect. 49 (i).

Although the notice may not be received by the person owing until after the receiving order has been made, the consent of the true owner (the assignee) being determined by the mere transmission of the notice, the

(c) *Ex parte Salaman, Re Taylor*, 21 Ch. D. 394; 47 L. T. 495; 31 W. R. 282.

(d) *Colonial Bank v. Whinney*, 30 Ch. D. 261; *Re Jenkinson, Ex parte Nottingham Bank*, 15 Q. B. D. 441.

(e) *Ex parte Dorman*, L. R. 8 Ch. Ap. 51; *Re Bainbridge, Ex parte Fletcher*, 8 Ch. D. 218; *Colonial Bank v. Whinney, supra*;

Ex parte Hare, 1 Des. 16; *Ex parte Hayman*, 8 Ch. D. 11.

(f) *Baldwin, Bankruptcy*, 267—271.

(g) *Ex parte Stewart, Re Shelley*, 34 L. J. Bank. 6.

(h) *Tibbits v. George*, 5 A. & E. 107; *Lloyd v. Banks*, L. R. 3 Ch. Ap. 488; *Arden v. Arden*, 29 Ch. D. 702.

(i) *Ex parte Kingscote, Re Tillet*, 60 L. T. 575.

transaction under similar circumstances will be protected (j).

The presumption of reputed ownership will be rebutted where there is evidence of a well-known custom or usage to the contrary (k).

If trust property be dealt with, by the consent of the *cestui que trust*, in a manner inconsistent with the provisions of the trust, the reputed ownership clause applies (l).

To determine the reputed ownership no particular act is necessary; an express demand is not necessary. It will be sufficient if the "true owner" clearly indicates by his conduct that the property is no longer in the possession, order, or disposition of the debtor by his permission (m).

Lastly, it must be borne in mind that property and interests which are *choses in action* in the general acceptance of the term may not be *choses in action* "within the meaning of the Act" (n).

Before closing this Chapter it may be well to say a word about another subject which, perhaps, more properly belongs to an earlier portion of this work (nn), as it is also a mode of transfer which largely takes effect by operation of law—

Donationes Mortis Causâ.

It was formerly the opinion that no *donatio mortis causâ* could be effected in respect of property which does not pass by delivery; and that, *e.g.*, such a gift of a

(j) *Belcher v. Bellamy*, 17 L. J. Ex. 219; *Brevin v. Short*, 24 L. J. Q. B. 297.

(k) *Priestley v. Pratt*, L. R. 2 Ex. 101; *Ex parte Watkins*, L. R. 8 Ch. 520.

(l) *Fox v. Fisher*, 3 B. & Ald. 135; 22 R. R. 324; *Kitchen v. Ibbetson*, L. R. 17 Eq. 46; *Re Fells*,

Ex parte Andrews, 4 Ch. D. 509.

(m) *Ex parte Ward*, L. R. 8 Ch. 144; *Re Tillett*, *Ex parte Kingscote*, 60 L. T. 575; *Re Eslick*, 4 Ch. D. 496.

(n) *Colonial Bank v. Whinney*, 30 Ch. D. 261, and cases therein cited.

(nn) See *ante*, p. 241, n. (c).

policy of assurance, negotiable instrument, &c., was invalid and ineffectual (o). But it is now settled that where there is an actual transfer of a bond, policy, deeds, or other securities a trust will be created in favour of the donee, enforceable in equity against the executors of the donor (p). Where the thing itself is not delivered, or is not capable of being delivered, there must still be a delivery of some effective means of obtaining the thing given. But the mere delivery of some ineffective symbol is not sufficient. For example, it will be sufficient for the purpose of creating a *donatio mortis causa* to deliver some document which is essential to and by means of which recovery of a *chose in action* can be effected; thus, upon a loan the borrower gave the lender a receipt in certain terms, and it was held: That the delivery of that receipt to an agent of the borrower by the lender on her death-bed, stating she wished that debt to be cancelled, was a sufficient *donatio mortis causa* (q). The delivery of the key of a box has been held to be a sufficient *donatio mortis causa* of the contents of the box (r).

Upon a testator's death ten bonds were found, amongst other securities, in a box at his house, with the following indorsement, "The first five numbers of these Austrian bonds belong to and are the property of H. D.," signed by the testator. H. D. was the testator's housekeeper, and the key of the box was given into her custody by him. Held, that there had been no actual transfer or delivery of the bonds to H. D., and that they still remained part of the testator's property (s).

(o) Roper, Legacies [1847], 10 et seq.

(p) *Clement v. Cheesman*, 27 C. D. 631; *Ward v. Turner*, 2 Ves. Sen. 431; *Moore v. Moore*, L. R. 18 Eq. 474; *Moore v. Darton*, 20 L. J. Ch. 626; *Hewitt v. Kaye*, L. R. 6 Eq. 198; *Beak v. Beak*, L. R. 13 Eq. 489; *Rolls v. Pearce*, 6 Ch. D. 730; *In re Mead*,

15 Ch. D. 654; *Cain v. Moon*, (1896) 2 Q. B. 283; *Morgan v. Malleon*, L. R. 10 Eq. 475; *Pethybridge v. Burrow* [1886], W. N. 83.

(q) *Moore v. Darton*, 4 De G. & Sm. 519.

(r) *Jones v. Selby*, Prec. in Ch. 300.

(s) *Trimmer v. Danby*, 25 L. J.

In the case of stock, &c., delivery of the receipts, &c. is not sufficient to constitute a *donatio mortis causâ* (t). Similarly, where a husband, two years before his death, gave to his wife a railway debenture subsequently converted into railway stock, which remained in his name, and on which the dividends were received by him but paid to his wife. He handed the certificates to his wife, and they remained in her possession until he required them in order to replace a lost dividend warrant. While on his death-bed he handed the certificates to his wife, saying, "These are yours," and also gave her a deposit note. Held, that the gift of stock failed as incomplete, and could not be supported as a declaration of trust, the intention to make an immediate gift being inconsistent with a declaration of trust, and that railway stock or South Sea Annuities cannot be the subject of a *donatio mortis causâ*; but that the gift of a deposit note was a good *donatio mortis causâ* (u). For moneys due on a policy and on a banker's deposit note pass as *donationes mortis causâ* by the delivery of the policy and note (x).

A cheque drawn on a man's bankers and given by him in last illness to a third person is not a *donatio mortis causâ* (y), unless cashed in the donor's lifetime or otherwise negotiated (z). So that a cheque drawn by a testator payable to his wife or her order, given to her shortly before his death, indorsed by her and paid into a foreign bank against the amount of which she drew, was held to be a good *donatio mortis causâ*, although the cheque was not presented for payment at the bank on which it was drawn till after the death of the testator (a). But the delivery of a promissory note, though unin-

Ch. 424. Cp. *Powell v. Hellicar*, 26 Beav. 261; *Hawkins v. Blewitt*, 2 Esp. 663.

(t) *Ward v. Turner* [1752], 2 Ves. Sen. 431.

(u) *Moore v. Moore* [1874], L. R. 18 Eq. 474.

(x) *Amis v. Witt* [1863], 33

Beav. 619.

(y) *Tate v. Hilbert*, 4 Bro. C. C. 286; *In re Mead*, 15 Ch. D. 651;

Hewitt v. Kaye, L. R. 6 Eq. 198.

(z) *Boutts v. Ellis*, 4 De G. M. & G. 249.

(a) *Rolls v. Pearce*, 5 Ch. D. 730.

dorsed (b), and of a third person's cheque payable to order though not indorsed (c), and of a bill of exchange payable to donor or order (d), have been held to pass the property therein as *donationes mortis causa*. Similarly, there may be a good *donatio* by delivery of a bond (e); and of a mortgage debt on real estate by delivery of the mortgage deeds (f); but the delivery of title deeds will not effect a conveyance of the estate.

(b) *Veal v. Veal*, 27 Beav. 303.

(c) *Clement v. Cheesman*, 27 Ch. D. 631. See also *Boutts v. Ellis*, 4 De G. M. & G. 249.

(d) *Rankin v. Weguelin*, 27 Beav. 309. And see *Gardner v. Parker*, 3 Madd. 184; 18 R. R. 213;

Lawson v. Lawson, 1 P. Wms. 441.

(e) *Moore v. Moore*, *supra*; *Snellgrove v. Baily*, 3 Atk. 214; *Gardner v. Parker*, *supra*.

(f) *Duffield v. Elwes*, 1 Bligh, N. S. 497.

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CHAPTER II.

OTHER STATUTES AFFECTING OWNERSHIP, AND HEREIN OF CRIMINAL OFFENCES.

(iv) THE BILLS OF SALE ACTS.

By the Bills of Sale Act, 1878, it is enacted that the expression "bill of sale" **shall include** bills of sale, assignments, transfers, declarations of trust without transfer, inventories of goods with receipt thereto attached, or receipts for purchase-moneys of goods, and other assurances of personal chattels, and also powers of attorney, authorities, or licences to take possession of personal chattels as security for any debt, and also 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, assignments for the benefit of the creditors of the person making or giving the same, marriage settlements, 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.

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 such bill of sale (a).

The Bills of Sale Act (1878) Amendment Act, 1882, does not affect bills of sale or other documents given otherwise than by way of security for the payment of money (b).

But although all choses in action are excluded from the operation of the Bills of Sale Acts, may not a bill of sale itself be a chose in action? As to whether a document is a bill of sale or not, see references below (c).

(a) 41 & 42 Vict. c. 31, s. 4. See also s. 3. See also *Colonial Bank v. Whinney*, 30 Ch. D. 261; *Re Bainbridge, Ex parte Fletcher*, 47 L. J. Bank. 70; 8 Ch. D. 218; *Re Davis, Ex parte Rawlings*, 22 Q. B. D. 193; *Re Isaacson, Ex parte Mason*, (1896) 1 Q. B. 333; *Re Tritton, Ex parte Singleton*, 6 Mor. 250; 61 L. T. 301.

(b) 45 & 46 Vict. c. 43, s. 3.
(c) Reed, Bills of Sale [1897], pp. 43 et seq. And see *London & Yorkshire Bank, Ltd. v. White*, 11 T. L. R. 570; *Re Hall, Ex parte Close*, 14 Q. B. D. 386; *Ex parte Hubbard*, 17 Q. B. D. 690; *N. C. Wagon Co. v. Manchester, &c. Rail. Co.*, 35 Ch. D. 191; *Ramsay v. Margrett*, (1894) 2 Q. B. 18.

(v) THE CONVEYANCING ACT, 1881.

By this Act it is enacted that a chose in action may be conveyed by a person to himself jointly with another person, by the like means by which it might be conveyed by him to another person; and may, in like manner, be conveyed by a husband to his wife, and by a wife to her husband, alone or jointly with another person (*d*).

(vi) MARRIED WOMEN'S PROPERTY ACTS, 1882 & 1893.

As it has been well stated (*e*), the general result of these Acts, so far as the form and effect of documents are concerned, is as follows:—

A. As regards the disposal of her property or *choses in action*—

(i) Every woman married *after* 1882, and

(ii) In respect of her property and *choses in action* acquired *after* 1882, every woman married *before* 1883,

can convey as if she were *feme sole*, and the concurrence of her husband in any disposition of such property is not necessary (*f*).

B. A trust for the separate use of a married woman appears to be no longer necessary.

C. Acknowledgment of deeds by a married woman is only necessary where the property was acquired and the woman was also married before 1883, and in such case the mode of acknowledgment is now simplified (*g*).

(*d*) 44 & 45 Vict. c. 41, s. 50.

(*e*) Wolstenholme and others, *Conveyancing*, &c. Acts [ed. 1895], 245 *et seq.*

(*f*) 45 & 46 Vict. c. 75, ss. 1—3, 5—9. See *Re Cuno*, 43 Ch. D. 12, 16; *Hope v. Hope*, (1892) 2

Ch. 336, 341, 342; *Weldon v. Winslow*, 13 Q. B. D. 784; *Beasley v. Roney*, (1891) 1 Q. B. 509; *Hood-Barra v. Cathcart*, (1894) 2 Q. B. 559, 570; *Whittaker v. Kershaw*, 45 Ch. D. 320.

(*g*) 45 & 46 Vict. c. 39, s. 7.

D. A married woman may be made executrix or trustee without any inconvenient consequences of power to deal with property (h).

It must be observed that the Married Women's Property Act, 1893, only applies to transactions entered into subsequently to the passing of the Act, and that it repeals sub-sects. 3 and 4 of sect. 1 of the Act 1882 (i).

Under the Act 1882, she may effect a policy upon her own life or that of her husband for her separate use, and the same and all benefit thereof shall enure accordingly (j).

By virtue of the Act 1893, all contracts entered into by a married woman otherwise than as agent are deemed to be made in respect of, and shall bind, whatever separate property she may have at the time of making such contracts or at any time subsequently, and shall be enforceable against all property which she may thereafter while discoverd be possessed of or entitled to (k).

And sect. 24 of Wills Act, 1837 (by which a will *prima facie* speaks from the death of the testator), is to apply to the will of a married woman made during coverture, whether she is or is not possessed of or entitled to separate property at the time of making it, and such will is not to require to be re-executed or republished after her husband's death (l).

Neither Acts 1882, 1893, afford any assistance by which a woman married before 1883 can dispose of property also acquired by her before 1883. Malins' Act, 1857 (20 & 21 Vict. c. 57), which only applies to *reversionary interests* in personal estate, did not make it

(h) 45 & 46 Vict. c. 75, s. 18;
Re Hawksworth [1887], W.N. 113.

(i) 56 & 57 Vict. c. 63, s. 4.

(j) S. 11; *Cleaver v. Mutual Reserve, &c. Assn.*, (1892) 1 Q. B. 147; *Re Davies' Policy Trusts*, (1892) 1 Ch. 90.

(k) 56 & 57 Vict. c. 63, s. 1;
Beckett v. Tasker, 19 Q. B. D. 7.

(l) 56 & 57 Vict. c. 63, s. 3;
Willock v. Noble, L. R. 7 H. L. 580; *Re Price*, 28 Ch. D. 709; *Re Cuno*, 43 Ch. D. 12; *Re Bowen*, (1892) 2 Ch. 291.

clear that either she or her husband, separately or together, could assign a simple legal *chose in action*, such as a debt or policy of assurance effected in her name, as distinguished from an *equitable chose in action*, such as a legacy or other trust money (*m*). But it has been decided that the words in this Act "any personal estate whatsoever" were wide enough to include and did include a legal *chose in action* such as a policy of assurance effected in a married woman's own name (*n*).

(vii) CRIMINAL OFFENCES IN REGARD TO CHOSSES IN ACTION.

There is no remedy at common law by criminal procedure for interference with the ownership by another of a chose in action as such, except by prosecution for conspiracy to cheat and defraud, or for a common law cheat, or common law forgery (*o*). And this rule extends to documentary evidence of title to choses in action.

By 24 & 25 Vict. c. 96, it is enacted that every one who steals, or, for any fraudulent purpose, cancels or obliterates the whole or any part of any valuable security, other than a document of title to land, commits felony of the same nature and in the same degree, and punishable in the same manner as if he had stolen any chattel of the like value with the share, interest, or deposit to which the security so stolen may relate, or with the money due on the security so stolen or secured thereby and remaining unsatisfied, or with the value of the goods or other valuable thing represented, mentioned, or referred to in or by the security. Provided that no

(*m*) *Re Jenkinson*, 24 Beav. 64, 73; *Fryer v. Morland*, 3 Ch. D. 676, 685, 686.

(*n*) *Witherby v. Rackham* [1891],

W. N. 57.

(*o*) 3 Encycl. of Laws, 7; *Calys's Case*, Co. Pt. VIII. 33; *R. v. Watts*, 23 L. J. M. C. 56.

person who commits any such offence is liable to be convicted thereof by any evidence whatever in respect of any act done by him, if, previously to being charged with such offence, he first discloses such act on oath in consequence of any compulsory process of any Court which, on the 6th May, 1861, was a court of law or equity, in any action, suit, or proceeding *bonâ fide* instituted by any party aggrieved, or if he first discloses same in any examination or deposition before any Court upon the hearing of any matter in bankruptcy or insolvency (p).

“Valuable security” includes any order, exchequer acquittance, or other security whatsoever entitling or evidencing the title of any person or body corporate to any share or interest in any public stock or fund, whether of the United Kingdom, or of Great Britain, or of Ireland, or of any foreign State, or in any fund of any body corporate, company, or society, whether within the United Kingdom or in any foreign State or country, or to any deposit in any bank, and shall also include any debenture, deed, bond, bill, note, warrant, order, or other security whatsoever for money or for payment of money, whether of the United Kingdom, or of Great Britain, or of Ireland, or of any foreign State, and any document of title to lands or goods (q).

“Document of title to lands” includes any deed, map, paper, or parchment written or printed, or partly written and partly printed, being or containing evidence of the title, or any part of the title, to any real estate, or to any interest in or out of any real estate.

The term “document of title to goods” includes

- (p) 24 & 25 Vict. c. 96, s. 27.
 (q) *Id.* s. 1; *R. v. Yates*, 1 Moo. C. C. 170; *R. v. Walsh*, Russ. & Ry. 215; *R. v. Metcalf*, 1 Moo. C. C. 433; *R. v. Heath*, 2 Moo. C. C. 33; *R. v. Pooley*, Russ. & Ry. 12; *R. v. Morrison*, Bell, C. C. 158; *R. v. Perry*, 1 Den. C. C. 69; *R. v. Powell*, 2 Den. C. C. 403; *R. v. Mead*, 4 C. & P. 535; *R. v. John*, 7 C. & P. 324.

any bill of lading, India warrant, dock warrant, warehouse keeper's certificate, warrant or order for the delivery or transfer of any goods or valuable thing, bought and sold note, or any other document 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 any goods thereby represented or therein mentioned or referred to (q).

Bailees fraudulently taking or converting to their own use or that of any person other than the owner any bailed chattel, money, or valuable security, shall be guilty of larceny. The section, however, does not extend to offences punishable on summary conviction (r).

It is a felony punishable upon conviction by penal servitude :—

To steal, or for any fraudulent purpose to destroy, cancel, obliterate, or conceal the whole or any part of any document of title to lands (s) ;

To steal, or fraudulently destroy, cancel, obliterate, or conceal either during the life or after the death of the testator, the whole or any part of any will, codicil, or testamentary instrument, whether relating to real or personal property, or to both : and civil remedies are not affected by the criminal proceedings (t), but subject to the same proviso as in sect. 27 (u).

To steal, or fraudulently remove, or unlawfully and maliciously injure, obliterate, &c. records, writs, affidavits, orders, or other original documents belonging to a court of record, or relating to any

(q) See n. (q) on previous page.
 (r) 24 & 25 Vict. c. 96, s. 3 ;
R. v. Bunkall, L. & C. 371 ; *R. v.*
Hassall, L. & C. 58 ; *R. v. Oxen-*
ham, 46 L. J. M. C. 126 ; Arch.

Cr. Pl. (21st ed.) 396.
 (s) 24 & 25 Vict. c. 96, s. 28.
 (t) *Id.* s. 29.
 (u) *Supra*, p. 310. See also
R. v. Skeen, Bell, C. C. 97.

matter, civil or criminal, depending in any such court, or any document relating to the business of any office, or employment under Her Majesty, and being in any office appertaining to any court of justice, or in any government or public office (*v*);

To steal in any dwelling-house (*w*) any chattel, money, or valuable security, to the value in the whole of 5*l.* or more (*x*); and by menace or threat put any one being therein in bodily fear (*y*);

For a clerk or servant, or being employed for the purpose or in the capacity of clerk or servant, To steal any chattel, money, or valuable security belonging to or in the possession or power of his master or employer (*z*); or, To embezzle the like when given into his possession on behalf of his master or employer (*a*);

For a person in the public service, or for a constable or similarly employed person to do the like (*b*);

For officers of the Bank of England or Ireland to do the like (*c*).

It is a misdemeanour, punishable upon conviction by

(*v*) 24 & 25 Vict. c. 96, s. 30; *R. v. Bailey*, L. R. 1 C. C. R. 347; 41 L. J. M. C. 61.

(*w*) *R. v. Andrews*, Car. & M. 121.

(*x*) 24 & 25 Vict. c. 96, s. 60; *R. v. Petrie*, 1 Leach, C. C. 294; *R. v. Hamilton*, Id. 348; *R. v. Jones*, 4 C. & P. 217; *R. v. Dunn*, 1 Moo. C. C. 146; *R. v. Smith*, Id. 295; *R. v. Bowden*, 2 Moo. C. C. 285; *R. v. Taylor*, Russ. & Ry. 418.

(*y*) Id. s. 61; *R. v. Jackson*, 1 Leach, C. C. 269; *R. v. Etherington*, 2 Leach, C. C. 671.

(*z*) Id. s. 67; *R. v. Haydon*, 7 C. & P. 445; *Quarman v. Burnett*, 6 M. & W. 499.

(*a*) Id. s. 68; *R. v. Leech*, 3 Stark. N. P. C. 70; *R. v. Bayley*, 1 Dear. & B. 121; *R. v. Batty*, 2 Moo. C. C. 257;

R. v. White, 2 Moo. C. C. 91; *R. v. Jenson*, 1 Moo. C. C. 434; *R. v. Miller*, 2 Moo. C. C. 249; *R. v. Tongue*, Bell, C. C. 289; *R. v. Bowers*, L. R. 1 C. C. 41; *R. v. Negus*, L. R. 2 C. C. 34; *R. v. Harris*, 5 R. 402; 69 L. T. 25; *R. v. Burton*, 1 Moo. C. C. 237; *R. v. Townsend*, 1 Den. C. C. 167; *R. v. Tyrre*, L. R. 1 C. C. 177; *R. v. Carpenter*, L. R. 1 C. C. 29; *R. v. Foulkes*, L. R. 2 C. C. 150; *R. v. Hunt*, 8 C. & P. 642; *R. v. Hartley*, Russ. & Ry. 139; *R. v. Tite*, 30 L. J. M. C. 142; *R. v. Stuart*, (1894) 1 Q. B. 310.

(*b*) 24 & 25 Vict. c. 96, ss. 69, 70.

(*c*) Id. s. 73. In all the above instances, the term of punishment varies with the offence and office of the person.

penal servitude, for any banker, merchant, broker, attorney, or other agent intrusted with any money or security for the payment of money to deal therewith [to embezzle money or sell the securities], in violation of good faith, otherwise than in accordance with the directions of the person by whom he is so intrusted, subject, however, to certain rights (*d*).

Similarly, as to factors and other agents [or their clerks] obtaining advances on the property of their principals (*e*).

Similarly, as to trustees fraudulently disposing of trust property (*f*).

Similarly as to directors, &c. of any body corporate or public company fraudulently appropriating any property of such body, &c. (*g*), or keeping fraudulent accounts (*h*), or wilfully destroying books, &c. (*i*), or publishing false statements (*j*).

Similarly, it is a misdemeanour to obtain for one's self or another, by false pretences, any chattel, money, or valuable security with intent to defraud (*k*).

Similarly, to induce others by fraud to execute deeds and other instruments (*e.g.*, negotiable instruments, &c. (*l*)).

It is a felony or misdemeanour (according to the principal offence) to receive stolen chattels, money, or valuable security (*m*).

The owner of such stolen, &c. property, prosecuting

(*d*) 24 & 25 Vict. c. 96, ss. 75, 76. Cp. s. 77.

(*e*) *Id.* s. 78.

(*f*) *Id.* s. 80.

(*g*) *Id.* s. 81. See also Companies (Winding-up) Act, 1890 (53 & 54 Vict. c. 63), s. 10.

(*h*) 24 & 25 Vict. c. 96, s. 82.

(*i*) *Id.* s. 83.

(*j*) *Id.* s. 84.

(*k*) *Id.* ss. 88, 89; *R. v. Goodhall*, Russ. & Ry. 461; *R. v. Wickham*, 10 Ad. & E. 34; *R. v. Woolley*, 1 Den. C. C. 559; *R. v.*

Flint, Russ. & Ry. 460; *R. v. Barnard*, 2 C. & P. 784; *R. v. Kenrick*, 5 Q. B. R. 49; *R. v. Abbott*, 1 Den. C. C. 273; *R. v. Ball*, Carr & M. 249; *R. v. Goss*, Bell, C. C. 208; *R. v. Bryan*, Dears. & B. C. C. 265; *R. v. Adamson*, 2 Moo. C. C. 286; *R. v. Butcher*, Bell, C. C. 6; *R. v. Mills*, Dears. & B. C. C. 205; *R. v. Naylor*, L. R. 1 C. C. 4.

(*l*) 24 & 25 Vict. c. 96, s. 90; *R. v. Gordon*, 23 Q. B. D. 354.

(*m*) *Id.* ss. 91—99.

the thief, &c. to conviction, shall have restitution of his property, provided, however, that if it shall appear before any award or order made that any valuable security shall have been *bond fide* paid or discharged by some person or body corporate liable to the payment thereof, or, being a negotiable instrument, shall have been *bond fide* taken or received by transfer or delivery, by some person or body corporate as a holder in due course, in such case the Court shall not award or order the restitution of such security. And, further, the section does not apply to prosecutions of trustees, bankers, &c. (n).

It is a felony to take reward under pretence or on account of helping any person to obtain back any stolen chattel, money, valuable security or other property whatsoever, unless he shall have used all due diligence to cause the offender to be brought to trial for the same (o). To advertise a reward, &c. for the return of stolen property, and purposely to abstain from prosecuting inquiries about the person, &c. returning the same, &c., &c., renders the advertiser liable to a penalty of 50*l.* for every such offence, recoverable by anyone by action of debt (p).

It is a misdemeanour and punishable by imprisonment and hard labour for anyone, being a seller or mortgagor of land, or of any chattels, real or personal, or *chooses in action* conveyed or assigned to a purchaser or mortgagee, or being the solicitor or agent of any such person, to conceal from the purchaser any settlement, deed, will, or other instrument material to the title, or any incumbrance, or to falsify any pedigree on which the title does or may depend, in order to induce him to accept the title offered or produced to him, and with intent to defraud (q).

(n) 24 & 25 Vict. c. 96, s. 100.

(o) *Id.* s. 101.

(p) *Id.* s. 102.

(q) 22 & 23 Vict. c. 35, s. 24;

Everyone is guilty of a misdemeanour who wilfully makes or causes to be made any false entry in the registry book of the Stationers' Company (r).

Making, or knowingly having, without lawful authority or excuse, plates or other implements in imitation of those peculiarly used in the manufacture of such bills, &c., as exchequer, treasury or metropolitan bills, bonds, debentures, is a felony punishable by penal servitude (s); or making or having paper in imitation of that used for such bills, &c., or taking any impression from any plate, &c., as aforesaid (t). Purchasing, receiving, or having in possession, paper or plates made by authority for the purpose of such bills, &c., is a misdemeanour punishable by imprisonment (u).

Similar provisions are made as to bank notes (u).

It is a felony, punishable by penal servitude or imprisonment, to forge, alter, offer, utter, dispose or put off (knowing the same to be forged or altered), a transfer of stock or power of attorney for transferring stock or for receiving dividends (v); attestation to any such power of attorney (w); false entry or alteration in the books of the public funds, or transfer of public stock (x); false dividend warrant by *employés* of Bank of England or of Ireland (y), East India bonds or assignments thereof (z), exchequer bills, bonds or debentures, or assignments thereof, or receipts for interest thereon (a); bank notes or bank bills, or the indorsement or assignment thereof (b); deeds, bonds, assignments of bonds, or names of attesting witnesses thereto (c); wills or codicils (d); bills of exchange or

23 & 24 Vict. c. 38, s. 8. See also 38 & 39 Vict. c. 87, s. 101; 25 & 26 Vict. c. 53, ss. 105, 138; 25 & 26 Vict. c. 67, ss. 44, 45.

(r) 5 & 6 Vict. c. 45, s. 12.

(s) 24 & 25 Vict. c. 98, s. 10; 40 & 41 Vict. c. 2, s. 10; 41 & 42 Vict. c. 37, s. 20.

(t) 24 & 25 Vict. c. 98, s. 10.

(u) *Id.* ss. 11, 13—19; 29 & 30

Vict. c. 25, ss. 20, 21.

(v) 24 & 25 Vict. c. 98, s. 2.

(w) *Id.* s. 4.

(x) Sect. 5.

(y) Sect. 6.

(z) Sect. 7.

(a) Sect. 8.

(b) Sect. 12.

(c) Sect. 20.

(d) Sect. 21.

any acceptance, indorsement or assignment thereof; promissory notes, or any indorsement or assignment thereof (*e*); undertakings, warrants, orders, receipts, &c. for payment of money (such as cheques on bankers), delivery or transfer of goods, &c. (*f*); obliterating or altering crossings on cheques (*g*); debentures (*h*); proceedings, &c. of courts of records, or documents intended to be used as evidence therein (*i*); false copies or certificates of record by an officer of the Court (*j*); instruments made evidence by statute (*k*); court roll or copy thereof relating to copyhold estates (*l*); certificates and other writings relating to the registry of deeds (*m*); stock certificates or coupons, &c. issued by the Bank of England for the payment of interest on the National Debt (*n*); trade marks and trade mark registers (*o*); money orders issued under the Post Office Money Orders Act, 1880 (*p*).

Independently of the above and many more statutory provisions, forgery at common law is a misdemeanour, punishable by fine or imprisonment, or both.

Offences relating to trade marks are dealt with by the Merchandise Marks Act, 1887 (50 & 51 Vict. c. 28).

To falsely and deceitfully personate the owner of any share or interest in any stock, annuity, or public fund, which is transferable at the Bank of England or of Ireland; or the owner of any share or interest in any capital stock of any body corporate, company, or society established by charter or Act of Parliament; or the owner of any dividend or money payable in respect of any such share or interest; and thereby to transfer, or endeavour to transfer, any such share or interest, or

(*e*) 24 & 25 Vict. c. 98, ss. 22,
24.

(*f*) Sect. 23.

(*g*) Sect. 25.

(*h*) Sect. 26.

(*i*) Sect. 27.

(*j*) Sect. 28.

(*k*) Sect. 29.

(*l*) Sect. 30.

(*m*) Sect. 31.

(*n*) 33 & 34 Vict. c. 58, ss. 3, 6.

(*o*) 50 & 51 Vict. c. 28; 46 & 47
Vict. c. 57, s. 93.

(*p*) 43 & 44 Vict. 23.

receive, or endeavour to receive, any money so due, as if the offender were the true and lawful owner, is a felony, punishable by penal servitude to the extent of life (q).

To falsely and deceitfully personate any person or his heir, or personal representative, or any of his relatives, with intent fraudulently to obtain any land, chattel, money, valuable security or property, is a felony, punishable by penal servitude (r).

(q) 24 & 25 Vict. c. 98, s. 3; 33 & 34 Vict. c. 58, s. 4; 26 & 27 Vict. c. 73, s. 14; 30 & 31 Vict. c. 131, s. 35.

(r) 37 & 38 Vict. c. 36, ss. 1, 2.

Book VI.

MATTERS AFFECTING PARTICULAR PERSONS
DEALING WITH THINGS IN ACTION.

CHAPTER I.

OF EXECUTORS AND ADMINISTRATORS.

A PROMISE by an executor or administrator to pay a debt of the testator, or to answer damages, will not render him personally liable, unless there be a valuable consideration, to support such promise; for the executor's mere promise goes no further than to render the testator's assets liable therefor in the executor's hands (a). If there be no such assets, the promise is *nudum pactum* (b); a promissory note to pay given by the executor is bad, if upon no consideration (c). To ask and receive time for payment is sufficient consideration to support the executor's promise and make him personally liable to pay *de bonis propriis* (d). So an executor's undertaking to pay interest on a debt not carrying interest in consideration of forbearance by the creditor, will make the executor personally liable for principal and interest, provided the undertaking otherwise conform to the demand of the

(a) *Reech v. Kennegal*, 1 Ves. Sen. 126.

(b) *Pearson v. Henry*, 5 T. R. 6; 2 R. R. 523; *Rann v. Hughes*, 7 T. R. 350, n. (a).

(c) *Nelson v. Searle*, 4 M. & W. 796; *Ridout v. Bristow*, 1 Cr. &

J. 231.

(d) *Chambers v. Loversage*, Cro. Eliz. 644; *Davis v. Reyner*, 2 Lev. 3; *Hawes v. Smith*, Id. 122; *Goring v. Goring*, Yelv. 11; *Trewinian v. Howell*, Cro. Eliz. 91; *Rann v. Hughes*, 7 T. R. 350, n. (a).

Statute of Frauds (*e*). Similarly, if the promise be given in consideration of the creditor sending in more goods, the executor becomes liable for both testator's and his own orders (*f*).

An attorney delivering up to an executor documents, which he was not obliged so to deliver till his bill was paid, and these documents being of great use to the executor in several suits then pending, is a sufficient consideration to make the executor personally liable for the whole of the attorney's bill, whether there were assets or not (*g*).

Even where a person promises that if the widow of the intestate will permit him to be joined with her in the letters of administration, he will make good any deficiency of assets to pay debts; such a promise will be binding and not within the Statute of Frauds (*h*). And it was held that such a promise would be enforceable by the creditors, in a Court of equity, through the widow, because it was to be considered as made to her in trust for them.

And wherever the executor or administrator is personally responsible, the judgment will be *de bonis propriis*, though he be charged as promising *as executor* (*i*).

By the Statute of Frauds, however, in order that an executor's promise may render him personally liable "to answer damages out of his own estate," the agreement so to do must be in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized (*j*). Agreement meant consideration for the promise as well as the

(*e*) *Bradly v. Heath*, 3 Sim. 543, 548; *Russell v. Haddock*, 1 Lev. 188.

(*f*) *Wheeler v. Collier*, Cro. Eliz. 406.

(*g*) *Duchess of Hamilton v. Ingleton*, 4 Bro. P. C. 4. See also *Forth v. Stanton*, 1 Wms. Saund. 210.

(*h*) *Tomlinson v. Gill*, Amb. 330; *Griffith v. Sheffield*, 1 Eden. 77; *Gregory v. Williams*, 3 Mer. 590; 17 R. R. 136.

(*i*) *Powell v. Graham*, 7 Taunt. 585; 18 R. R. 593; *Wigley v. Ashton*, 3 B. & Al. 101; *Corner v. Shew*, 3 M. & W. 350.

(*j*) 29 Car. II. c. 3, s. 4.

promise itself (*k*); but now it *seems* unnecessary to state in writing the consideration for the promise (*l*).

An executor's making, accepting, drawing, or indorsing a bill or note, without words of qualification, renders him personally liable thereon (*m*), and it is immaterial whether he indorses it *as executor* or not (*n*).

On a contract to borrow money by the executor, he alone is personally liable (*o*); similarly, for goods sold and delivered to him, and work and materials done, &c., for him (*p*). A decree has been made against an executor for payment of legacies, without reference to the state of the testator's assets, on the ground that he had by his acts and admissions rendered himself personally liable therefor (*q*).

The following have been held to amount to an admission: executor's admitting that he was debtor to the testator at time of death (*r*); payment of interest on a legacy from time to time (*s*); regular payment for several years of annuities (*t*); or of interest to a tenant for life (*u*). If executors refuse to admit assets, and the accounts when taken show that there were assets at the date of the judgment declaring the testator's liability to pay the amount then due, the executors may be ordered to pay personally all the costs occasioned by their refusal to admit (*v*).

If the executor of a mortgagee receives a sum of

(*k*) *Wain v. Warlters*, 5 East, 10; 7 R. R. 645; *Saunders v. Wakefield*, 4 B. & Al. 595; 23 R. R. 409.

(*l*) Merc. Law Amendment Act, 1858 (19 & 20 Vict. c. 97), s. 3.

(*m*) Chitty (11th ed.), 252; Bkcy. Act, 1882, s. 19.

(*n*) *Childs v. Monins*, 2 Br. & B. 463; 23 R. R. 513; *Bowerbank v. Monteiro*, 4 Taunt. 844; 14 R. R. 679; *Lucas v. Williams*, 3 Giff. 151; *King v. Thom*, 1 T. R. 489.

(*o*) *Farhall v. Farhall*, L. R. 7 Ch. Ap. 126.

(*p*) *Corner v. Shew*, *supra*. Cp. *Wigley v. Ashton*, *supra*.

(*q*) *Barnard v. Punsfrett*, 5 My. & Cr. 63; *Rogers v. Soutten*, 2 K. 598; *Jeffer v. Wood*, 2 P. Wms. 131.

(*r*) *Rothwell v. Rothwell*, 2 S. & St. 218; *Mortlock v. Leathes*, 2 Mer. 491; *Richardson v. Bank of England*, 4 My. & Cr. 174.

(*s*) *Att.-Gen. v. Chapman*, 3 Beav. 255.

(*t*) *Payne v. Little*, 22 Beav. 69.

(*u*) *Payne v. Tanner*, 55 L. J. Ch. 611.

(*v*) *Christian v. Adamson* [1869], W. N. 208.

money supposed to be due on a mortgage and it subsequently turns out that the mortgage debt was discharged in the testator's lifetime, the executor may be called on to refund such sum so paid to him under mistake, although he has paid it away in the satisfaction of claims upon the estate, to meet which he had no other assets (*w*). Similarly, if the executor pays debts of the testator with money received under a decree which is reversed upon appeal, he must refund; but it would be otherwise if the appeal were delayed (*x*). If they carry on the testator's trade, executors become personally liable to creditors of a partnership business, regardless of the state of the testator's assets. And in such capacity they become personally liable to be made bankrupt (*y*).

If after the death of the testator executors purchase (*z*), or apply for (*a*), further shares in a company, they are personally liable as between themselves and the company.

If they have accepted shares they must be entered on the list of contributories in their personal, and not their representative, character. The fact of the shares being offered to and accepted by them in their representative capacity, and that the directors had no power to offer the shares to them otherwise than as executors, does not preclude them from being personally liable as between themselves and the other contributories (*b*).

(*w*) *Pooley v. Ray*, 1 P. Wms. 355.

(*x*) *Pickering v. Stamford*, 2 Ves. Jun. 583.

(*y*) *Ex parte Garland*, 10 Ves. 110, 119; 7 R. R. 352; *In re Johnson*, 15 Ch. D. 548; *Wightman v. Townros*, 1 M. & S. 412; 14 R. R. 475; *Labouchere v. Tupper*, 11 Moo. P. C. 198; *Lucas v. Williams*, 3 Giff. 150; *Ex parte Nutt*, 1 Atk. 102; *Ex parte Richardson*, 3 Madd. 138; 18 R. R. 204; *Strickland v. Symonds*, 26 Ch. D. 245; *Evans v. Evans*, 34 Ch. D. 597;

Dowse v. Gorton, (1891) Ap. Ca. 190; *Brooke v. Brooke*, (1894) 2 Ch. 600. But see *Garrett v. Noble*, 6 Sim. 504; *Cox v. Hickman*, 8 H. L. C. 268; Partnership Act, 1890, s. 2 (3). But see *Alliott v. Smith*, (1895) 2 Ch. 111; *In re Gasquoine*, (1894) 1 Ch. 470.

(*z*) *Spence's Case*, 17 Beav. 203.

(*a*) *Re Cheshire Banking Co., Duff's Exors.*, 32 Ch. D. 301.

(*b*) *Re Leeds Banking Co., Fernside & Dean's Case*, L. R. 1 Ch. Ap. 231. See, also, *James v. May*, L. R. 6 H. L. 328.

But the mere receipt of *dividends* by the executor of a deceased shareholder does not make the executor personally liable (c).

It is always open for an executor to make his election between two courses.

He may apply for the shares to be transferred into his own name, becoming to all intents and purposes a partner in the company, and thus be personally liable upon them. He may, on the other hand, not wish to do so, and he ought in that case to have a reasonable time allowed him to sell the shares and produce a purchaser who will take a transfer of them (d).

In any case where the bank transfers into the name of the executor, the House of Lords would require to be satisfied that the transfer had been authorized by a distinct and intelligent request on the part of the executor.

The case of *trustees* who make a transfer of shares in their names differs in principle from that of executors, who merely intimate to a company their title as executors in order to claim and exercise the rights which belong to them as the legal representatives of their testator. Trustees have not, in any proper sense of the word, a representative character, but executors have. Having representative rights, it is impossible that they should not be entitled to produce the legal evidence of them to the company, for the purpose of having their title in some way recorded and recognized, without making themselves personally liable (e).

The executor is also personally liable to replace funds paid to a person who is not entitled to them, with interest at 4 per cent.; but he is not liable for interest

(c) *Ex parte Doyle*, 2 H. & T. 221; *Bulmer's Case*, 33 Beav. 435; *Hamer's Devisees' Case*, 2 De G. M. & G. 371. Cp. *Buchan's Case* [1879], 4 App. Ca. 549, 588.

(d) *Buchan's Case*, *supra*. But see Companies Clauses Act, 1845; and *Barton v. L. & N. W. Rail. Co.*, 24 Q. B. D. 86.

(e) *Buchan's Case*, *supra* (pp. 595, 596).

to the legatee to whom, with full knowledge on his part and in common mistake, the erroneous payment has been made (f). He is not liable for acting or paying money in good faith under or in pursuance of a power of attorney, by reason of the fact that at the time of the payment or act the person who gave the power was dead or had done some act to avoid the power, if the fact were unknown to him (g).

The executor's personal liability in cases where the executor gives a person a power of attorney to act for him as executor, and such attorney accepts bills of exchange, seems to be questionable (h).

An executor who submits to arbitration will generally be personally liable for the award, whether he has assets or not (i). For if an executor thinks fit to refer generally all matters in dispute to arbitration without protesting against the reference being taken as an admission of assets, it will amount to such an admission (j). So, where an administrator bound himself as administrator to abide by an award to be made touching matters in dispute between his intestate and another, and the arbitrators awarded that he as administrator should pay, &c., he cannot plead *plene administravit* to the debt on the bond; for the bond was a personal engagement to perform the award (k). Similarly, where an administratrix referred to the final award of an arbitrator certain disputes between the plaintiff and herself as executrix, to be finally settled by the said arbitration, and the arbitrator found a balance due to the plaintiff from the defendant, and, without finding assets, awarded her to pay it on or before a fixed day, it was held: That

(f) *In re Hulkes* [1886], 33 Ch. D. 552.

(g) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 23; Conveyancing Act, 1882 (45 & 46 Vict. c. 39), ss. 8, 9.

(h) *Gardner v. Baillie*, 6 T. R. 591; 3 R. R. 531. Cp. *Howard v. Baillie*, 2 H. Bl. 618; 3 R. R. 531.

(i) *Pearson v. Henry*, 5 T. R. 7; 2 R. R. 523.

(j) *Robson v. —*, 2 Rose, 50; *Wansborough v. Dyer*, 2 Chitt. R. 40.

(k) *Barry v. Rush*, 1 T. R. 691; 1 R. R. 360. See also *Worthington v. Barlow*, 7 T. R. 453; 4 R. R. 489.

plene administravit was no bar to an action on the award (*l*). www.libtool.com.cn

But the personal liability of the executor or administrator may depend not only on the terms of the submission, but also on those of the award (*m*).

An executor or administrator is also personally liable for *devastavit* (i.e., a wasting of the deceased's assets), as far as he had or might have assets (*n*). For he is personally liable for the ordinary trusts which are deemed to arise from his office as executor (*o*).

Devastavit may be committed by direct act, as by appropriating the trust funds to his own use or by selling under value; or indirectly, as by paying debts out of their due order, or by payment of legacies to the prejudice of creditors (*p*).

Devastavit is committed by payments being made which the executor is not bound to make. Yet generally he may pay a statute-barred debt, not being bound to plead the statute by way of defence, unless such debt has been *judicially* declared to be statute-barred (*q*).

But it is a *devastavit* to pay or retain (on behalf of his own claim) a debt barred by the Statute of Frauds; so it may be *devastavit* in not paying debts bearing interest or in not getting in debts due to the estate.

An executor cannot be charged personally with assets stolen or lost by accident, without some wilful default on his part (*r*).

(*l*) *Riddell v. Sutton*, 5 Bing. 200; 30 R. R. 569.

(*m*) *Worthington v. Barlow*, *supra*; *Love v. Honeybourne*, 4 Dowl. & Ry. 814; 27 R. R. 517; *Re Joseph & Webster*, 1 Russ. & M. 496.

(*n*) *Bac. Abr. Exors.* (1) 1.

(*o*) 2 Wms. Exors. 1691; *In re Marsden*, 26 Ch. D. 783, 789.

(*p*) See executor's protection under 22 & 23 Vict. c. 35, s. 29; and R. S. O. Ord. LV. rr. 44—61; Judicial Trustee Act, 1896

(59 & 60 Vict. c. 35), s. 3, the last-named of which enables the Court to relieve a trustee from personal liability for a breach of trust, where he has acted honestly and reasonably, and ought fairly to be excused. See also *In re Kay, Mosley v. Kay*, (1897) 2 Ch. 518; Conveyancing Act, 1881, s. 37.

(*q*) *Midgley v. Midgley*, (1893) 3 Ch. 282.

(*r*) *Job v. Job* [1877], 6 Ch. D. 562.

It is a *devastavit* to invest funds improperly. It is an executor's duty to invest funds not otherwise required in authorized investments (s), and if he does so he will not be responsible for any decrease in value.

Similarly, it may arise from the omission to convert property bequeathed for life with remainder over (t); or from not calling in money on improper or unauthorized securities or in the hands of bankers. But if an executor has exercised an honest discretion as to conversion under difficult circumstances, he will not be liable for loss from not having sold within a year of the testator's death (u).

The executor will generally be liable for the default of his agents. But when a broker or other such agent is employed in the ordinary course of business as by ordinary prudent men, the executor will not be liable apart from his own misconduct (v).

Generally, an executor is not personally liable for the acts of his co-executor, unless he has intentionally contributed to it, or where by his act assets have come into the hands of the co-executor (for which he will be generally answerable) (w), or he stands by and acquiesces in a committal of a breach of trust by the other.

Otherwise he is only chargeable for money and securities actually coming into his own hands and possession; and is generally only accountable for his own acts, commissions and omissions (x).

Acquiescence or concurrence by the injured person will release an executor from liability for a *devastavit* (y).

(s) And *cp. Trustee Act, 1893, s. 1, &c.*

(t) *Howe v. Lord Dartmouth*, 7 Ves. 137; 6 R. R. 96.

(u) *Marsden v. Kent*, 5 Ch. D. 598.

(v) *Speight v. Gaunt*, 9 Ap. Ca. 1; *Robinson v. Harkin*, (1896) 2 Ch. 415; *Clough v. Bond*, 3 Myl. & Cr. 490, 496; *Helling v. Merton*, (1893) 3 Ch. 269; *Trustee*

Act, 1893, ss. 17, 24; Conveyancing Act, 1881, s. 56.

(w) *Chambers v. Minchin*, 7 Ves. 186, 198; 6 R. R. 111; *Bacon v. Bacon*, 5 Ves. 331; 5 R. R. 52.

(x) *Trustee Act, 1893, s. 24.*

(y) *Griffith v. Hughes*, (1892) 3 Ch. 105; *In re Somerset*, (1894) 1 Ch. 231; *Mara v. Browne*, (1895) 2 Ch. 69; (1896) 1 Ch. 199; *Trustee Act, 1893, s. 45.*

And, in general, where an executor does not act with that same care and forethought which characterises an ordinary prudent business man, he will be liable for his conduct to answer the damage done out of his own estate; and, in not a few cases, mere inadvertence, and in some instances merely honest and innocent action, will not be sufficient to excuse him from liability for the detrimental consequences of his acts as executor.

Where an executor, without special authority, applied the testator's assets for several years in insuring the life of a debtor to the estate, and then dropped the policy without consulting the parties beneficially interested, and without seeking the direction of the Court, in a suit then pending for the administration of the estate, it was held that he was personally liable for the whole sum which would have been recovered if he had kept the policy alive (s).

And similarly, where executors for upwards of a year after the testator's death allowed a large portion of the assets to remain unproductive in a banker's hands, and the banker then failed, the executors were held personally liable for the loss occasioned thereby (a). And where an executor deposited a trust fund with his bankers, accompanied by a written order to invest the money in consols, which the bankers did not do, and the executor made no subsequent inquiry respecting it until five months afterwards, when the bankers failed, he was held liable for the loss (b).

Although generally acting strictly within the line of his duty and exercising reasonable care and diligence, he will not be liable for the failure or depreciation of

(s) *Garner v. Moore*, 3 Dr. 277. 160; *Finch v. Marcon* [1871], W. N. 148; *Wilks v. Groom*, 25 L. J. Ch. 728.
 (a) *Moyle v. Moyle*, 2 Russ. & M. 710; 34 R. R. 186. But see *Fenwick v. Clarke*, 31 L. J. Ch. 728; *Johnson v. Newton*, 11 Ha. 555.
 (b) *Challen v. Shippam*, 4 Ha. 555.

funds, or for the insolvency or misconduct of any person who may have possessed them; yet, if that line of duty be not strictly pursued, and any part of the property be invested in funds or upon securities not authorised, or be put within the control of persons who ought not to be entrusted with them, and any loss be thereby eventually sustained, the executor will be liable to make it good however unexpected the result, however little likely to arise from the course adopted, and however free such conduct may have been from any improper motive (c).

A *devastavit* is within the Statute of Limitations (21 Jac. I. c. 16), and an executor sued by a creditor of the testator for a *devastavit* may plead the statute (d).

As it has been pointed out, the Court can now grant such relief from liability for such breaches honestly and reasonably committed as it thinks fit (e).

Liability for breaches of trust is joint and several.

It is furthermore to be observed, that executors will not be protected from personal liability on the ground of having acted under the advice of counsel. If, under the best advice he could procure, he acts wrongly, it is his misfortune; but public policy requires that he should be the person to suffer (f). The Court can never sanction the proposition that a party, having acted in a manner the Court has decided to be improper, can protect himself by showing that he received bad advice, however eminent the person may be who gave it (g).

(c) *Clough v. Bond*, 3 Myl. & Cr. 496. And see *Phillips v. Phillips*, 2 Freem. 11; *Fry v. Fry*, 27 Beav. 144; *Powell v. Evans*, 5 Ves. 839; *Langford v. Gascoyne*, 11 Ves. 333; 8 R. R. 170. And see 2 Wms. Exors. p. 1724, and cases cited in note (y).

(d) *Thorne v. Kerr*, 2 Kay & J. 54; *In re Gale*, 22 Ch. D. 820.

And see *In re Marsden*, 26 Ch. D. 783; *In re Hyatt*, 38 Ch. D. 609.

(e) Judicial Trustee Act, 1896, ss. 1 (2) and 3.

(f) *Doyle v. Blake*, 2 Sch. & Lef. 243; 9 R. R. 76; *Re Knight's Trusts*, 29 Beav. 49.

(g) *Peers v. Cookey*, 15 Beav. 211. But see the exceptional case of *Ves v. Emery*, 5 Ves. 144.

But the advice so acted upon *may* protect the executor from costs (*h*), and the other consequences of the act may be mitigated (*i*).

(*h*) *Angier v. Stannard*, 3 M. & K. 566; *Devey v. Thornton*, 9 Ha. 232; *Boulton v. Beard*, 3 De G. M. & G. 608.

(*i*) Judicial Trustee Act, 1896, ss. 1 (2) and 3. For full and

exhaustive information on the subject of this chapter, see 2 Wms. Exors. [1893], pp. 1661 *et seq.*; Walker & Elgood, Exors. [1897], 232 *et seq.*

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CHAPTER II.

OF DEBTORS, TRUSTEES, AND FUNDHOLDERS GENERALLY.

Two things are obvious, and yet sufficiently important to be mentioned, even at the cost of repetition. Every debtor is bound to pay his debt to the person legally entitled to recover it from him; and every debtor is bound to discover who is the person so legally entitled, at the risk of having to pay more than once.

And every trustee, holder of funds, and all other individuals or companies, who are, so to speak, the passive depositors of funds, &c., are bound to pay over the funds or perform their similar obligations in accordance with the principle above stated. Since they all are, in the widest sense of the term, debtors.

Consequently, where there has been any such alteration of circumstances as to shift the right to recover from the *original* creditor and to vest it in some other person or persons representing the original creditor, either in the capacity of assignee or in that of legal representative or otherwise by operation of law, the "debtor" may always be placed in a dilemma. He must pay or perform to the person rightfully entitled to exact payment or other performance; yet he may not be sure of the validity of the new "creditor's" right to claim, and if he pay through error, he may find it impossible or inconvenient to recover, whilst he is simultaneously liable to perform to the rightful person. Nor may he always find release by way of an interpleader issue. As soon as a "debtor" receives notice

of the assignment or transfer by operation of law, he is bound to hold the fund in his hands for the benefit of the new "creditor"; the notice fixes the money in his hands, and he can no longer pay the "debt" to the original "creditor" without first satisfying the new "creditor."

If no consideration were given for the assignment, and it were not by deed, it may be revocable on the part of the assignor; but until it is revoked, it is valid and binding on the "debtor," who may pay to the assignee or other new "creditor" in compliance with the assignment, and such payment will be good against the assignor or original "creditor."

But it is always necessary for the "debtor" to assure himself that the assignment is the act of the original "creditor," or that the person otherwise standing in the shoes of such original "creditor" is the legal representative of or substitute for him, to whom performance should be rendered.

The "debtor" must also be clear that the fund is sufficiently well indicated, otherwise he may pay wrongfully.

Further, he cannot demand an indemnity from the assignee or other "creditor"; and if he pays the assignor, he can be compelled to pay over again to the assignee (a).

If a document relied on as an assignment be addressed by the assignor neither to his creditor nor to his "debtor," but only to some agent of his own, such as a solicitor, rent-collector, or bailiff, bidding him to pay a certain debt out of a certain fund, it is not an assignment at all, but only a power of attorney (b). It is a mere mandate and gives the "creditor" no definite

(a) *Jones v. Farrell*, 1 De G. & J. 208.

(b) *Rodick v. Gandell*, 1 De G. M. & G. 763; *Bell v. L. & N. W. Rail. Co.*, 15 Beav. 548; *Morrell*

v. Wootton, 16 Beav. 197. Cp. *Malcolm v. Scott*, 3 Ha. 39; *Jones v. Starkey*, 16 Jur. 510; *Field v. Megaw*, L. R. 4 C. P. 660; *Percival v. Dunn*, 29 Ch. D. 128.

charge upon or right to that specific fund, and until it is communicated to the creditor, and assented to by him, it is revocable. (c) The bankruptcy or death of the principal will operate as such a revocation (d).

As to whether and when an assignment is valid or not, see the cases cited in the former chapters on the Assignability of Choses in Action (e).

But it is to be observed here, the presence of a term in a contract, that "it shall not be assignable in any case whatever," will not prevent an assignment of all the beneficial interest thereunder being effected (f). Further, it must be remembered that in respect of all cases not falling within the operation of the Judicature Act, 1873, or that of some other statutory enactment regulating the assignment of choses in action, no formal notice in writing is necessary to the "debtor"; and he will be bound by the assignment (which, also, need not be in writing, or if in writing, in no particular form) by the merest notice possible as in the old days and under the old cases. That is to say, a chance report in a newspaper, a casual conversation with someone long ago and long forgotten, may render the "debtor" responsible to the new "creditor," and liable to pay twice if he has paid another.

As to what notice and other formalities are requisite in cases under the Judicature Act, see reference thereto in Bk. III., Ch. II. (g).

As to the "debtor's" right of set-off and other defences known as "the equities," see Bk. II., Ch. II. (h).

Generally speaking, where there are adverse claims, the "debtor" may pay the money into Court, or bring the claimants to an issue (i).

(c) *Scott v. Porcher*, 3 Mer. 652; 17 R. R. 161; *Greenway v. Atkinson*, 29 W. R. 560.

(d) *Ex parte Hall*, 10 Ch. D. 616; *In re Russell*, 37 Sol. J. 212. But see *Fitzgerald v. Stewart*, 2 Russ. & M. 457.

(e) *Ante*, Bk. II.—Bk. IV.

(f) *In re Turcan*, 40 Ch. D. 5.

(g) *Ante*, p. 163.

(h) *Ante*, p. 104.

(i) *Post*, "Practice," Bk. VII., Ch. II.

The subject of priority of notice treated herein (*j*) is of great importance, and sometimes of difficulty, to the "debtor," and care must be taken in determining aright who is the person entitled to priority by reason of priority of such notice. And here let it be remembered that matter of priority is not affected by the question as to whether the interest of the assignor is vested or contingent, present or reversionary (*k*). Priority in such cases depends simply and solely on priority of notice (*l*).

A second assignee giving notice of his assignment will be equally entitled to priority when he has taken such assignment from the legal personal representative of the *cestui que trust* who made the assignment to a first assignee (*m*).

Neither debtors, fundholders, nor trustees of any kind are under any obligation to answer inquiries as to existing incumbrances (*n*).

Notice of an assignment need not be given by any particular person; neither by the assignor nor assignee; it will be sufficient by whomsoever it be given, and will bind the "debtor" (*o*).

When the assigned funds are affected by successive trusts, notice must be given to the trustees for the assignor, not to the trustees of the original settlement, although it may happen that the latter have the actual control of the funds (*p*).

Notice of assignment of personalty vested in trustees, or of debts, should be given to *all* the trustees or debtors in writing (*q*).

New trustees are not affected by the notice of an assignment of the funds comprised in the settlement

(*j*) Bk. II., Ch. II., p. 86; Bk. III., Ch. II., p. 176.

(*k*) *Dearle v. Hall*, 3 Russ. 1; 27 R. R. 1.

(*l*) *Ward v. Duncombe*, (1893) Ap. Ca. 390. But see references in n. (*j*), *supra*.

(*m*) *Re Freshfield's Trusts*, 11 Ch. D. 198.

(*n*) *Low v. Bouverie*, (1891) 3 Ch. 82; *Re Tillott*, (1892) 1 Ch. 83.

(*o*) *Lloyd v. Banks*, L. R. 3 Ch. Ap. 488. And see "Notice" under Judicature Act, *supra*.

(*p*) *Stephens v. Green*, (1895) 2 Ch. 148.

(*q*) *Re Hall*, 7 L. R. Ir. 180.

given to their predecessors, nor are they bound to inquire from them whether they have received notice of any incumbrances; nor will the new trustees incur any liability if they, without fresh notice of the assignment, &c., distribute the trust funds before receiving any such notice; and a subsequent incumbrancer who gives notice to them may gain priority over a former incumbrancer who merely gave notice to the new trustees' predecessors (*r*).

A trustee who receives notice of an assignment of the trust fund effected by the *cestui que trust*, is not, in the absence of inquiry, bound to inform the person giving him the notice, that he himself has a prior assignment; and merely omitting to give such information will not postpone the trustees' right of priority (*s*).

Where notices of assignment are simultaneous, the assignments will take priority according to their respective dates of execution (*t*).

Notice of assignment given to the *solicitors* of trustees will only be effectual and valid if the former are actually authorized as agents to receive such notice (*u*).

The principle laid down in *Dearle v. Hall*, as to the effect of notice in the determination of priority of equitable rights, does not affect or apply to joint stock companies registered under the Companies Act of 1862 (*v*); on the other hand, the directors and secretary of a company might possibly be held personally liable if, disregarding a notice of a trust as to shares, they permitted such shares to be transferred contrary to such notice (*w*).

Notice given to the proper officers of the company,

(*r*) *Phipps v. Lovegrove*, L. R. 16 Eq. 80; *Newman v. Newman*, 28 C. D. 678. Cp. *Ward v. Duncombe*, *supra* (pp. 394, 395).

(*s*) *Re Lewer*, 5 Ch. D. 61.

(*t*) *Calisher v. Forbes*, L. R. 7 Ch. Ap. 109; *Johnstone v. Cox*, 16 Ch. D. 671.

(*u*) *Saffron Walden, &c. Co. v. Rayner*, 14 Ch. D. 406, 410; *Arden v. Arden*, 29 Ch. D. 702; *Re Frewen*, 60 L. T. 953; *English, &c. Investment Co. v. Brunton*, (1892) 2 Q. B. 706.

(*v*) Companies Act, 1862, s. 30.

(*w*) *Healy on Companies*, cited 1 Wh. & T. 126.

such as the secretary (*x*), or a director and actuary (*y*), or a director and auditor (*z*), has been held to be good. Even a verbal notice to a board of directors in the way of business has been held good (*a*); but not in course of a casual conversation with a clerk in the company's service (*b*).

The Rules of the Supreme Court direct that—

Service of an order that debts, due or accruing to the 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 (*c*).

If a garnishee neither forthwith pays the amount due from him to the debtor into Court (or an amount equal to the judgment or order), nor disputes the debt alleged to be due from him, nor appears upon summons, the Court or judge may order execution to be levied against him for the amount alleged to be due from him, or for the amount necessary to satisfy the judgment or order (*d*).

If the garnishee disputes his liability the Court or judge may order an issue to try such liability (*e*).

If the garnishee suggests that the debt due by him is due to someone else, the Court or judge may order that third person to appear and state the nature of his claim (*f*); with which matter the Court or judge may deal and direct as is fit (*g*).

Payment made by, or execution levied upon, the garnishee under any such proceeding as aforesaid, shall be a valid discharge to him as against the debtor,

(*x*) *Société Générale de Paris v. Tramways, &c.*, 14 Q. B. D. 424.

(*y*) *Ex parte Hennessy*, 1 Con. & Law. 559.

(*z*) *Ex parte Waithman*, 4 Deac. & Ch. 412.

(*a*) *Re Agra Bank*, L. R. 3 Ch. Ap. 555; *Alleton v. Chichester*, L. R. 10 C. P. 319.

(*b*) *Ex parte Carbis*, 4 Deac. & Ch. 354; *Société Générale de Paris v. Tramways*, *supra*.

(*c*) Ord. XLV. r. 2.

(*d*) *Id.* r. 3.

(*e*) *Id.* r. 4.

(*f*) *Id.* r. 5.

(*g*) *Id.* r. 6.

liable under a judgment or order, to the amount paid or levied, although such proceeding may be set aside, or the judgment or order reversed (*h*).

Costs of such proceedings are in the discretion of the Court or judge (*i*).

The judgment or order (by virtue of which garnishee proceedings are permissible) must be one for "recovery or payment of money"; an order for mere payment into Court is not one which can be enforced by garnishee proceedings (*j*). Equitable as well as legal debts are attachable (*k*).

The debt must be actually due from the garnishee, either presently payable, or presently due, though payable at a future day, *i.e.*, *debitum in presenti, solvendum in futuro* (*l*).

Money paid into Court is not attachable (*m*); but money in the hands of the sheriff is (*n*); debts due jointly are not attachable (*o*); nor an income of trust funds for a married woman which she is restrained from anticipating (*p*); nor wages of servants, labourers, and workmen (*q*); nor wages of seamen (*r*); nor, generally, pensions (*s*), for pensions not assignable are not attachable (*s*).

(*h*) Ord. XLV. r. 7.

(*i*) *Id.* r. 9.

(*j*) *In re Greer*, (1895) 2 Ch. 217. See *Holby v. Hodgson*, 24 Q. B. D. 103.

(*k*) *In re Cowan's Estate*, 14 Ch. D. 638; *Webb v. Stenton*, 11 Q. B. D. 518.

(*l*) *Webb v. Stenton*, *supra*; *Jones v. Thompson*, El. B. & E. 63; *Tapp v. Jones*, L. R. 10 Q. B. 591.

(*m*) *Stevens v. Phillips*, L. R. 10 Ch. Ap. 417; *Dolphin v. Layton*, 4 C. P. D. 130; *Prout v. Gregory*, 24 Q. B. D. 281.

(*n*) *Murray v. Simpson*, 8 Ir. R. C. L. App. xlv; *In re Greer*, *supra*.

(*o*) *Macdonald v. Tacquah Gold*

Mine Co., 13 Q. B. D. 535. But see *Beasley v. Roney*, (1891) 1 Q. B. 509; and Ord. XLVIII. r. 9.

(*p*) *Chapman v. Biggs*, 11 Q. B. D. 27. But see *Galmoye v. Cowan*, 58 L. J. Ch. 769; *Hood-Barra v. Heriot*, (1896) Ap. Ca. 174.

(*q*) 33 & 34 Vict. c. 30; *Gordon v. Jennings*, 9 Q. B. D. 45; *Booth v. Trail*, 12 Q. B. D. 8.

(*r*) 57 & 58 Vict. c. 60, s. 163.

(*s*) 28 & 29 Vict. c. 73, s. 4; 34 & 35 Vict. c. 44; 44 & 45 Vict. c. 58, s. 141. See also *Apthorpe v. Apthorpe*, 12 P. D. 192; *Lucas v. Harris*, 18 Q. B. D. 127, 135, 136. See also Bk. IV., Ch. III., on Choses in Action never Assignable, *ante*, p. 269. For the general

The order for attachment does not *transfer* the debt in the sense of making the garnishor a creditor and the garnishee his debtor; consequently a debt attached is not attachable by a judgment creditor of the garnishor (*t*).

The garnishee is bound the moment he is served by the order *nisi*, and not until then (*u*).

The attachment is completed by the *actual* receipt of the debt (*v*).

A garnishee order absolute is not a "final judgment" within Bankruptcy Act, 1883, sect. 4 (1) (g), upon which a bankruptcy notice can be grounded (*w*).

The lien of a solicitor for his costs of recovering or preserving the property takes priority over a garnishee order (*x*); but otherwise, as to *general* lien (*y*).

Lastly, it is to be observed that the garnishee is unconditionally released from all liability by paying the amount attached into Court under and in compliance with the order *nisi*; that if he omits to do so an order for execution may issue against him; and that if he contests the claim he may be held liable for all the costs occasioned by his disputing the liability to pay.

subject of debts attachable or not, see Cababé, Attachment of Debts; Anderson, Execution; Edwards, Execution.

(*t*) *Chatterton v. Watney*, 17 Ch. D. 259; *In re Combined Weighing & Advertising Machine Co.*, 43 Ch. D. 99, 105, 106; *Cooper v. Lawson*, 6 T. L. R. 34.

(*u*) *In re Stanhope Silkstone Collieries Co.*, 11 Ch. D. 160; *Hamer v. Giles*, 11 Ch. D. 942.

(*v*) Bkcy. Act, 1883, s. 45 (1),

(2); *Butler v. Wearing*, 17 Q. B. D. 182; *In re Trehearne*, 63 L. T. 323.

(*w*) *Ex parte Chinery*, 12 Q. B. D. 342; *In re Connan*, 20 Q. B. D. 690; *In re Combined Weighing, &c. Co.*, *supra*.

(*x*) *Dallow v. Garrold*, 13 Q. B. D. 543; *The Leader*, L. R. 2 Ad. & Ec. 314; *Birchall v. Pugin*, L. R. 10 C. P. 397.

(*y*) *Hough v. Edwards*, 26 L. J. Ex. 64.

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CHAPTER III.

OF ASSIGNEES ; AND HEREIN OF TITLE.

As the previous chapters of this work will have demonstrated, there are many questions to which an intending assignee will need an answer previously to entering into a contract for the assignment of a chose in action.

Doubtless the first question will be, Is the chose in action assignable? and this must be answered in the light of the foregoing cases. Next he will wish to know what title the intending assignor has in the subject-matter ; with this point we shall deal subsequently in this chapter. Assured of the assignability of the chose in action and that the assignor has a good title thereto, the assignee will require to know whether the person by whom payment is to be made is reasonably solvent, and what chances there are of recovery in the event of the necessity to have recourse to proceedings, and to what equities (if any) the assignment will or may be subject. He may also think it well to consider whether the chose in action is one which has been or may be held to fall within the operation of the Judicature Act, 1873, and therefore to need strict compliance with all the formalities therein enacted. The intending assignee will also be desirous of ascertaining whether there is already any charge effected in respect of the subject-matter of the proposed assignment, and, if any, the amount and terms and conditions of such charge.

With regard to title, it is, of course, obviously necessary for the intending assignee to satisfy himself

as to the assignor's stability, *bona fides* and position generally, and to remember the effect of the various statutory enactments herein contained affecting the disposition of choses in action. The following points are also worthy to be considered.

Anyone who has a *voidable* title to goods may, before his title is avoided, dispose of them for value to another, who takes them in good faith, without notice of defect in the assignor's title, and the assignee will thereby acquire a valid title to such goods (a).

A valid title may be acquired from one who is not their owner, by reason of the law of estoppel (b).

A good title may also be acquired to chattels in a foreign country by any transaction in respect of them, which, by the law of that place, confers a good and valid title to them *in rem*; and this title will be valid even if the chattel be brought to England (c).

Similarly, a *bona fide* indorsement and delivery for value of a bill of lading by a buyer of goods forwarded by sea, confers a good title on the indorsee innocent of the imperfect title of the indorser who has not paid for them. For such an indorsement defeats the unpaid vendor's right of stoppage *in transitu* (d).

By the Statute of Limitations all actions for trespass, detainue, and replevin for goods or cattle must be brought within six years next after the cause of action, subject to the following extension of time. If the person entitled to any such action be under age, *feme covert*, or *non compos mentis*, such person shall be at liberty to bring the same action within six years after the removal of the disability (e). The time within which actions

(a) *White v. Garden*, 10 C. B. R. 919. And see *Cundy v. Lindsay*, 3 App. Ca. 459; *Filmont v. Bentley*, 18 Q. B. D. 322; 56 & 57 Vict. c. 71, s. 23.

(b) *Pickard v. Sears*, 4 A. & E. 448; *Goodwin v. Roberts*, 1 App. Ca. 476. And see Bkoy. Act

(46 & 47 Vict. c. 52), s. 44.

(c) *Williams* [1894], Pers. Pro. 513.

(d) *Lickbarrow v. Mason*, 2 T. R. 63; *Ex parte Golding, Davis & Co.*, 13 Ch. D. 628.

(e) Stat. 21 Jac. I. c. 16, ss. 3, 7; 19 & 20 Vict. c. 97, ss. 10,

may be brought on choses in action, generally, depends partly upon the nature of the chose in action and partly upon that of the document of title, or kind of security relied on by the owner of the chose in action. Thus, to enforce payment of money secured by mortgage deeds, judgment (*f*) or lien, or charged upon or payable out of any real estate, or any legacy (*g*), the action must be brought within twelve years (*h*) next after a present right to receive the same should have accrued to some person capable of giving a discharge for or release of the same. But if in the meantime there be payment of principal or part thereof, or of interest, or a written acknowledgment of the liability, then twelve years from such payment or other acknowledgment (*i*).

It seems that a period of twenty years is similarly given for recovery of the personal estate or any share in the personal estate of a person dying intestate (*j*).

For an action of debt for rent secured upon an indenture of demise, or money secured by bond or other specialty, but not charged upon or payable out of any land or rent (*k*), or money secured by a recognizance, a similar period of twenty years with similar extensions (*l*).

But actions for arrears of dower, and damages on account thereof, can only be brought within six years after such were due (*l*), and no provision is made for an

12; *Wilkinson v. Verity*, L. R. 6 C. P. 206; *Miller v. Doll*, (1891) 1 Q. B. 468.

(*f*) *Watson v. Birch*, 15 Sim. 523.

(*g*) *Sheppard v. Duke*, 9 Sim. 567; *Re Davis*, (1891) 3 Ch. 119.

(*h*) 37 & 38 Vict. c. 57, ss. 8, 12.

(*i*) *Lord St. John v. Boughton*, 9 Sim. 219; *Blair v. Nugent*, 3 Jones & Lat. 673, 677.

(*j*) *Williams* [1894], Pers. Pro.

518, 519; *Darby & Bosanquet*, Statute of Limitations [1893], 172.

(*k*) *Freeman v. Stacy*, Hutton, 109; *Re Powers*, 30 Ch. D. 291; 3 & 4 Will. IV. c. 42, ss. 3, 4; 19 & 20 Vict. c. 97, s. 10; *Pardo v. Bingham*, 17 W. R. 419; *Roddam v. Morley*, 1 De G. & J. 1; *Moodie v. Banister*, 4 Drew. 432; *Coops v. Cresswell*, L. R. 2 Ch. Ap. 112; *Dibb v. Walker*, (1893) 2 Ch. 429.

(*l*) 3 & 4 Will. IV. c. 27, s. 41.

extension of time in consequence of written acknowledgment (*m*). www.libtool.com.cn

Actions for *arrears* of rent or of *interest* in respect of any sum of money charged upon or payable out of any real estate or in respect of any legacy must be brought within *six* years next after the same shall have become due or next after a written acknowledgment of liability (*n*).

But if such arrears were secured to the claimant (*o*) by indenture of demise (*p*), or by bond or other specialty (*q*), then *twenty* years was formerly the period, but now it seems questionable whether or not the period has been reduced to *twelve* years (*r*).

A mortgagee's remedy on the mortgagor's covenant for payment in the mortgage deed may now be barred in twelve years as well as his remedy against the land (*s*); and the same observation applies to the case of the mortgagor's contract for payment being contained in a separate deed (*t*). Payment of interest by a mortgagee keeps alive the remedy against a surety (*u*). The recovery of a legacy is barred in twelve years, unless it be secured by an *express* trust (*v*); and any judgment, it would seem, may now be barred in twelve years, though it do not operate as a charge on land (*w*).

Where a mortgagee or other incumbrancer has been in possession of any real estate within one year next

(*m*) *Darby & Bosanquet*, 218.

(*n*) 3 & 4 Will. IV. c. 27, s. 42; *Hodges v. Croydon Canal Co.*, 3 Beav. 86; *Francis v. Grover*, 5 Ha. 39; *Humfrey v. Gery*, 7 C. B. R. 567; *Bowyer v. Woodman*, L. R. 3 Eq. 313.

(*o*) *Hughes v. Kelly*, 3 Dru. & W. 482.

(*p*) *Paget v. Foley*, 2 Bing. N. C. 679.

(*q*) 3 & 4 Will. IV. c. 42, s. 3; *Sims v. Thomas*, 12 Ad. & El. 536; *Hunter v. Nockolds*, 1 Mac. & Gord. 640; *Elry v. Norwood*, 6

De G. & Sm. 240; *Sinclair v. Jackson*, 17 Beav. 405; *Williams*, Pers. Pro. 521, and note thereto.

(*r*) *Sutton v. Sutton*, 22 Ch. D. 511; *Fearnside v. Flint*, 22 Ch. D. 579; *Donegal v. Neil*, 16 L. R. Ir. 309; *Darby & Bosanquet*, 141, 168.

(*s*) *Sutton v. Sutton*, *supra*.

(*t*) *Fearnside v. Flint*, *supra*.

(*u*) *Re Frisby*, 43 Ch. D. 106.

(*v*) *Re Davis*, (1891) 3 Ch. 119.

(*w*) *Jay v. Johnstone*, (1893) 1 Q. B. 189.

before the proceedings of a subsequent mortgagee or incumbrancer, the latter may recover the arrears of interest which may have become due to him during the whole time that the prior mortgagee or incumbrancer was in possession (*x*).

Choses in action consisting of simple contract debts must be sued for within a period of six years next after the cause of action arose, or within the extended time allowed for removal of disabilities (*y*); and the period may date from part payment of principal or interest, as well as from written acknowledgment (*z*).

Actions for debt upon any award where the submission is not by specialty, or for any fine due in respect of copyholds, or for an escape, or for money levied on a *fi. fa.*, where not claimed under seal, must be brought within *six* years, or similarly extended period (*a*).

For actions for penalties, damages, or sums of money given to a person grieved by any statute now or hereafter to be in force, the limit is *two* years after right to bring them has arisen, subject to proviso for disabilities, and subject also to the provision as to any other period which may be mentioned in any particular enactment (*a*).

Actions for slander where the words are not of themselves actionable without special damage must be brought within *six* years of happening of the damage (*b*), otherwise *two* years (*c*); for assault, battery, wounding, or imprisoning, within *four* years (*d*).

Death of the creditor makes no difference to the

(*x*) 3 & 4 Will. IV. c. 27, s. 42; Wms. Pers. Pro. 521.

(*y*) 21 Jac. I. c. 16, ss. 3, 7; 19 & 20 Vict. c. 97, ss. 10, 12, 13. See also 9 Geo. IV. c. 14, s. 1; Darby & Bosanquet, 3, 7, 65, 107.

(*z*) See n. (*y*); and *Waugh v. Cope*, 6 M. & W. 824, 839; *Morgan v. Rowlands*, L. R. 7 Q. B. 493.

(*a*) 3 & 4 Will. IV. c. 42, ss. 3, 4.

(*b*) *Saunders v. Edwards*, 1 Sid. 95; *Broune v. Gibbons*, 1 Salk. 206; *Topsall v. Edwards*, Cro. Car. 163; Darby & Bosanquet, 5; Odgers, Libel, 520.

(*c*) 21 Jac. I. c. 16, ss. 3, 7; amended by 19 & 20 Vict. c. 97, s. 10.

(*d*) *Id.*; Darby & Bosanquet, 5.

running of the statute if the cause of action accrued in lifetime of the deceased; but if it does not arise until after his decease, the time will only begin to count from grant of letters of administration (e). Death of debtor makes no difference either way (f).

Formerly, if, by his will, a debtor charged his real estate with the payment of his debts, or if he did so by an *express* trust, he would thereby prevent the operation of the statute against all such debts as had not been barred thereby during his lifetime (g); but now they will be barrable after twelve years from operation of the statute (h).

If dividends upon any stock subject to the National Debt Act, 1870, remain unclaimed for *ten* years, the stock and dividends will be transferred to the account of the commissioners for the reduction of the National Debt (i), but re-transferable on proof of title (j).

Similar provisions have been made with respect to unclaimed dividends and stock of India Stock and Consolidated Stock of the Metropolitan Board of Works, and East Indian Railway Annuities, and East Indian Railway Debentures (j).

For other matters affecting the limitations of rights of action, &c., reference should be made to the authorities cited below (k).

It is obviously of the utmost importance that an intending assignee should, as far as he is able, satisfy himself as to whether there has been any prior assignment by way of charge or otherwise, and whether the

(e) Williams, Pers. Pro. 522, and cases cited; Darby & Bosanquet, 49.

(f) *Rhodes v. Smethurst*, 6 M. & W. 361; *Freaks v. Cranefeldt*, 3 My. & Cr. 499; *Swindell v. Bulkeley*, 18 Q. B. D. 250.

(g) *Burke v. Jones*, 2 V. & B. 276; 13 R. R. 83; *Crallan v. Oulton*, 3 Beav. 1; *Hughes v. Wynne*, T. & R. 307, 309; Williams, Pers. Pro. 523.

(h) *Jacquet v. Jacquet*, 27 Beav.

332; *Dickinson v. Teasdale*, 31 Beav. 511; 37 & 38 Vict. c. 57, ss. 8, 10.

(i) 33 & 34 Vict. c. 71, ss. 3, 51, 54, 68.

(j) See *ante*, pp. 119 *et seq.*, 181 *et seq.*

(k) Darby & Bosanquet, *Statute of Limitations* [1893]; Williams, Pers. Pro. [1894]; Pollock, *Torts & Contracts*; Leake, *Contracts*; Addison, *Torts & Contracts*; Goodeve, Pers. Pro.

choses in action is at the present moment free from all incumbrance or not. He may obtain this from the assignor, and in some cases he may, for many reasons, be obliged to rely upon his word and run the risk of the contrary; but wherever it is possible and practicable, the intending assignor should ascertain in writing (1) from the person or persons liable to pay whether the subject-matter of the proposed assignment is owing or payable by him or them, and whether he or they have received notice of any prior charge upon, disposition of, or dealing with the same. When he has obtained this, he should see that the assignment is drawn by the assignor in such manner as to effect, as far as an assignment can, a transfer of all those rights in respect of the subject-matter which the assignee desires to enforce against the person liable to perform the corresponding obligations, and that it is coupled with a power of attorney sufficiently comprehensive to cover all emergencies and to clothe him with full power to sue for, demand, and appropriate to his own use the subject-matter of the assignment, and an indemnity against all loss in the event of his failing to prove the claim to the subject-matter.

When the assignment is completed the assignee should make it his immediate business to communicate the purport of the transaction to the person or persons liable to pay. And here let it be said that nothing less than actually bringing the matter before such person or persons should be relied upon as sufficiently safe. For this purpose a written notice clearly reciting the date, parties, and purport (anyway, so far as the subject-matter, the choses in action, is concerned) of the assignment, should be drawn. This notice should be signed, if possible, by the assignor, and served, if possible, upon the "debtor" or "debtors" *personally*; and a copy of the

(1) *Low v. Bouverie*, (1891) 3 W. 101; *Swann v. Phillips*, 8 Ad. Ch. 82; *Lyde v. Bernard*, 1 M. & E. 457.

same kept and indorsed by the server of the original. This appears to be the most direct and effectual manner of bringing the assignment to the knowledge of such person with a view of fixing the funds in his hands. There are, of course, many other modes, viz., by sending the notice by registered letter, and obtaining an acknowledgment of the same, or by embracing the notice in an application for payment, and seeking to get the debtor's reply letter. But anything short of personal service will probably necessitate proving the handwriting of such debtor or the questionable and rebuttable assumption that he received the notice because not returned, &c.

If the chose in action assigned be a trust fund, notice must be given to the proper trustee or trustees; if it be a debt, then to the debtor; if a policy of assurance, then to the office, and an indorsement thereof effected on the policy by the society, coupled with possession of the policy. If it be money, stock, or securities now in Court, the assignee should generally obtain a stop order. If shares, the assignee should obtain a transfer into his own name, or otherwise mark his ownership of them; but see prior reference to this (*m*).

If the title to the chose in action depends upon any deed, will or other document, the intending assignee will be entitled to an abstract of the document in question, and the original deeds must be produced, or office copies of the wills for verification, as if dealing with purely real property (*n*). The assignee will also either be entitled to the possession of the deeds, or a written acknowledgment of his right to their production and to delivery of copies of the same.

In short, whatever the nature of the chose in action, the assignee is bound to do all he can to perfect and assert his ownership over the chose in action as against all other persons, in order to protect any subse-

(*m*) Bk. II., Ch. II. & III.

(*n*) *Hobson v. Bell*, 2 Beav. 17;

Williams, Pers. Pro. 531; *R. Pro.* 542.

quent person from being deceived as to the owner ; and to hinder the assignor from fraudulently assigning his interest over again to another person.

And for that purpose one of the absolutely indispensable duties incumbent upon him is that of acquainting the individual, whoever he may be, from whom "payment" is to be demanded, with the fact of the change of ownership of the right to recover the money or enforce the duty obligatory upon him.

The assignee is generally entitled to all the remedies of the assignor. If there be collateral securities, the assignee will be entitled to the possession and benefit of them, unless it be otherwise arranged between the parties. And the assignee should see to it that everything is done whereby the assignor's rights and remedies are fully vested in him, and this may include the right to use the assignor's name as a party to an action for recovery of the subject-matter of the assignment.

Book VII.

PRACTICE.

CHAPTER I.

PARTIES.

FORMERLY if the interest assigned were an *equitable* chose in action, the assignee could always sue for its recovery in *his own name* in a Court of Chancery, and by filing a bill against the trustee could compel him to convey the legal estate to him (the assignee) without making the *cestui que trust*, who sold to him, a party to the suit (a).

So, if the assignment of a personal contract be defective in form merely, any promise by the person liable upon the contract to pay the demand or satisfy the claim in consideration that the assignee will give him time for payment, or forbear for a particular period from suing him, will enable the assignee to maintain an action in *his own name* upon such new contract or promise (b).

(a) *Goodson v. Ellison* [1826], 3 Russ. 583. Op. *Jones v. Farrell* [1857], 1 De G. & J. 208. See also *Blake v. Jones*, 3 Anstr. 651; *Cator v. Croydon Canal*, 4 Y. & C. Ex. 405, 419; 8 Jur. 277, L. C.; *Padwick v. Platt*, 11 Beav. 503; *Fulham v. McCarthy*, 1 H. L. Ca. 703; *Bagshaw v. Eastern Union Rail. Co.*, 7 Hare, 114; 13 Jur. 602; 14 Jur. 491; *Pigott v.*

Stewart [1875], W. N. 69.

(b) *Addison, Contracts* [1892], 208; *Morton v. Burn*, 7 Ad. & E. 19; *Reynolds v. Prosser*, Hardr. 71; *Forth v. Stanton*, 1 Saund. 210, n. 1, n. (a); *Jeffs v. Day*, L. R. 1 Q. B. 372; *Tatlock v. Harris*, 3 T. R. 174, 180; *Fairlie v. Denton* [1828], 8 B. & Cr. 395; *Kemp v. Watt* [1886], 15 M. & W. 672.

Or, if the debtor were a party to, or in any other definite manner assented to, the transfer of the debt, the assignee ~~could then, in his own name~~, sue the debtor upon an express or implied promise to pay (c).

And, of course, the *bond fide* holder for value of a negotiable instrument, could always sue for the sum in his own name.

Similarly, the various statutory enactments authorizing the transfer of certain choses in action have coupled therewith the right for the transferee to sue for the same *in his own name* (d).

But apart from the foregoing it was generally necessary and indispensable for the assignee to sue *in the assignor's name*, or, at any rate to make the assignor a party to the proceedings on one side or the other (e).

Even where the assignor had become bankrupt the action was obliged to be brought in *his name*, and not in that of the bankrupt's assignee in bankruptcy, for the latter could only sue on contracts in which the bankrupt was beneficially interested (f); and if after a charter-party the owner assigned and then became bankrupt, he still should sue (g).

If the assignor were dead, his *executor* or *administrator* had to sue (h).

The principle upon which this practice rested was that the Court of Chancery aimed at doing complete justice by deciding upon and settling the rights of all persons interested in the subject of the suit, so as to

(c) *Israel v. Douglas*, 1 H. Bl. 239; *Baron v. Husband*, 4 B. & Ad. 611; 1 Wh. & T. Eq. 130.

(d) 4 Anne, c. 16, s. 20; 11 Geo. II. c. 19, s. 23; *Page v. Eamer*, 1 B. & P. 381, n. (a); *Phillips v. Price*, 3 M. & Sel. 180; 61 Geo. III. c. 64, s. 4; *Glyn v. Baker*, 13 East, 509; 12 R. R. 414. But see *Williamson v. Thomson*, 16 Ves. 443; *O'Callaghan v. Thomond*, 3 Taunt. 82; 3 & 4 Anne, c. 9, s. 1; 10 Geo. IV. c. 56, s. 21.

(e) *Winch v. Keeley*, 1 T. R. 619; *De Pothonier v. De Mattos*, El. B. & E. 467; *Master v. Buller*, 4 T. R. 340.

(f) *Winch v. Keeley*, *supra*; *Chalmers v. Page*, 3 B. & Ald. 697.

(g) *Splidt v. Bowles*, 10 East, 279; *Morrison v. Parsons*, 2 Taunt. 407; *Chitty*, Pleading [1844], 17.

(h) *Brandt v. Hentig*, 2 Moore, C. P. 184.

make the performance of the order of the Court perfectly safe to those who were compelled to obey it, and to prevent future litigation (i). For this purpose, it was necessary that all persons materially interested in the subject should generally be made parties to the suit either as plaintiffs or defendants, however numerous they might be (k). And consequently any person coming to the Court for relief should bring before the Court all such persons as were necessary to enable it to do complete justice; and should so far bind the rights of all persons interested in the subject as to render the performance of the judgment which he claims safe to the party called upon to perform it, by preventing his being sued or molested again respecting the same matter, and should for this purpose bring before the Court, either as co-plaintiffs with himself, or as defendants, or by serving them with notice of the judgment (l), all persons so circumstanced that, unless their rights were bound by the judgment of the Court, they might cause future molestation or inconvenience to the party against whom the relief was sought.

In general, where a plaintiff had only an equitable right in the thing demanded, the person having the legal right to demand it should be a party to the action; for if he were not, his legal right would not be bound by the judgment (m), and he might, notwithstanding the success of the plaintiff, have it in his power to annoy the defendant by further proceedings (n).

So, a trustee or other person in whom the legal estate is vested, must be made a party in all suits

(i) *Richardson v. Hastings*, 7 Beav. 323, 326; *Hare v. L. & N. W. Rail. Co.*, 1 J. & H. 262; *Daniel's Ch. Prac.* [1882], 194.
(k) *Mitford, Pleading*, 163, 164; *Partington v. Bailey*, 6 L. J. N. S. Ch. 179; *Cator v. Croydon Canal*

Co., *supra*.

(l) *Daniel's Ch. Prac.* [1882], 197, 275—282.

(m) *Mitford, Pleading*, 179.

(n) *Daniel, Ch. Prac.* [1882], 202.

respecting the trust property, whether the trust be express or implied (o).

But it seems that a specific legatee, suing trustees for his legacy, need not make the executor a party, if he alleges that he has his assent (p). And an administratrix of an intestate, although she had assigned his interest in a partnership concern to his next of kin, was held to be the proper person to file a bill against the surviving partners to have the partnership accounts taken (q).

But it was not necessary that a person who had a legal interest should in every case be a party, where the whole equitable estate was assigned over (r). But this was by far rather the exception than the rule which stands (s). And so it was held that an assignor of a judgment was a necessary party to a suit by the assignee respecting it, although a power of attorney to sue were contained in the assignment (t); and so, formerly, it seems that the persons by whom shares were assigned to the plaintiff in a suit against directors alleging fraud, were obliged to have been made parties (u).

And again, A. effected two policies on his life for the purpose, as he expressly informed the company, of enabling him to give B. a security for a debt which exceeded the amount of the policies, and he deposited them with B., at the same time asking him by letter to instruct his, B.'s, solicitor "to prepare the necessary assignment," and B., however, never took any actual assignment. A. died insolvent, having made a will

(o) 9 Mod. 80; *Wood v. Williams*, 4 Mad. 186; 20 R. R. 291; *Hichens v. Kelly*, 2 Sm. & G. 264; *Scott v. Nicoll*, 3 Russ. 476; Dan. Ch. Prac. 203.

(p) *Smith v. Brooksbank*, 7 Sim. 18, 21. But see *Moor v. Blagrove*, 1 Ch. Ca. 277.

(q) *Clegg v. Fishwick*, 1 Mac. & G. 294, 299; 12 Jur. 993.

(r) *Brace v. Harrington*, 2 Atk. 235.

(s) *Ray v. Fenwick*, 3 Bro. C. C. 26.

(t) *Partington v. Bailey*, 6 L. J. N. S. Ch. 179; *Cathcart v. Lewis* [1792], 1 Ves. Jun. 463.

(u) *Walburn v. Ingilby* [1832], 1 My. & K. 61, 78; 36 R. R. 246.

appointing executors, but no representation was taken out to his estate. B. then gave notice to the company in writing of A.'s death, and that he, B., held the policies as security for his debt, and the company acknowledged the receipt of the notice in terms of the Policies of Assurance Act, 1867, s. 6. Proper evidence of A.'s death having been subsequently produced to the company, they wrote to B. that the claim under the policies would be paid at the expiration of three months, but that the assent of A.'s legal personal representative would be required before settlement.

After the expiration of the three months, B. being unable to obtain payment of the policy moneys (although his debt was admitted by A.'s executors, and he offered the company an indemnity), brought an action for that purpose against the company, insisting that A.'s deposit and letter constituted an equitable assignment of the policies within the Policies Act, 1867, and therefore enabled him to give a valid discharge for the moneys. It was held that there had been no equitable assignment of the policies *within the Act*, and that the company were justified in refusing to pay him in the absence of A.'s legal personal representative (*x*). The same principle was applied to suits by leasees by parol for tithes (*y*).

In all such cases the assignor was generally made a co-plaintiff with the assignee, who indemnified him against all costs and charges. But if the assignor, when a proper indemnity had been offered him, refused to allow his name to be used in such a suit, or obstructed the assignee when so using it, the Court of Chancery would intervene with its assistance on behalf

(*x*) *Crossley v. City of Glasgow Life Assurance Co.*, 4 Ch. D. 421. But it was held that the Court had power to dispense with the necessity for the legal personal representative, and to order pay-

ment of the policy moneys, which it did, under 15 & 16 Vict. c. 86, s. 44.

(*y*) *Henning v. Willis*, 3 Wood, 29; *Jackson v. Benson*, M'Lel. 62.

of the assignee. But the assignee could not generally sue alone for a legal chose in action in a Court of Chancery, unless the assignor did so refuse or do some act to prevent the assignee from recovering it at law, in the assignor's name (z).

It was open for the assignee, upon the assignor's refusal to be joined as a co-plaintiff, to make the assignor a co-defendant with the debtor or other person from whom satisfaction was sought (a).

And, it is submitted, that in all cases not falling within any customary usage or statutory enactment to the contrary, the old Chancery practice of necessarily making the assignor a party to the proceedings on one side or the other is still the proper and only mode of procedure in the recovery by the assignee of an assigned chose in action. But before joining the assignor it is still essential either to obtain his consent or to communicate with him and offer all terms necessary for his protection from liability (b).

And this may be done after action has been commenced. It is provided that—

“Where an action has been commenced in the name of the wrong person as plaintiff, or where it is doubtful whether it has been commenced in the name of the right plaintiff, the Court or a judge may, if satisfied that it has been so commenced through a *bond fide* mistake, and that it is necessary for the determination of the real matter in dispute so to do, order any other person to be substituted or added as plaintiff upon such terms as may be just” (c).

“No cause or matter shall be defeated by reason of the misjoinder or nonjoinder of parties, and the Court

(z) *Hammond v. Messenger* [1838], 9 Sim. 327.

(a) *Cholmondeley v. Clinton*, 4 Bligh. 123; 22 R. R. 83; *Sayer v. Wagstaffe*, 2 Y. & C. C. C. 230;

Ryan v. Anderson, 3 Mad. 174; *Blair v. Bromley*, 5 Hare, 564.

(b) *Turquand v. Fearon*, 4 Q. B. D. 280.

(c) Ord. XVI. r. 2; *The Duke of Buccleugh*, (1892) P. 211.

may in every cause or matter deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. The Court or a judge may, at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court or a judge to be just, order that the names of any parties improperly joined, whether as plaintiffs or as defendants, be struck out, and that the names of any parties, whether plaintiffs or defendants, who ought to have been joined, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, be added. No person shall be added as a plaintiff suing without a next friend, or as the next friend of a plaintiff under any disability, without his own consent in writing thereto. Every party whose name is so added as defendant shall be served with a writ of summons or notice in manner hereinafter mentioned, or in such manner as may be prescribed by any special order, and the proceedings as against such party shall be deemed to have begun only on the service of such writ or notice" (d).

Rule 2, above cited, has been held to apply to cases where, after action brought, it was discovered that some person ought to have been included as plaintiff, but that it was not meant to confer upon the judge unlimited discretion to remodel the proceedings, and that it was not meant to leave the party whom it is proposed to add as plaintiff, to apply to have terms inserted in the order for his own protection; and that it is for the original plaintiff himself in the first instance to show that the omission was owing to a *bonâ fide* mistake, and that he has complied with any terms which a judge under the circumstances would think proper to impose (e). But a

(d) Ord. XVI. r. 11; *Ayscough v. Bullar*, 41 Ch. D. 341.

(e) *Turquand v. Fearon*, *supra* (p. 282).

new plaintiff would not generally be allowed, if the result were to introduce a new cause of action (f).

A plaintiff company purported to be the assignees of all the rights of an old and dissolved company, and, amongst others, of a right of action against the defendant. It was held: that this right had not passed, and the plaintiffs were not allowed to add the directors of the old company as plaintiffs, for *where the original plaintiff has no right of action he cannot by amendment under this rule introduce a plaintiff in whom there is a right of action and so make an entirely new case* (g).

A. recovered a debt in an action against B. A judgment creditor of A. obtained a garnishee order against A. It was held he was entitled to be joined as co-plaintiff with A. in the action against B. (h).

But where the plaintiffs had advanced money to building contractors on the security of claims which the building contractors had against the defendant, and the action was in respect of disputed extras, and had been referred for accounts to be taken, the defendant was not allowed to add the contractors as parties in order that they might be bound by the accounts. It was held that the contractors could not be made defendants in an action in the Queen's Bench Division, because their claims did not conflict with those of the plaintiffs, and that they could not be made plaintiffs against their will and in their absence (i).

It is to be remembered that a new party will not be

(f) *Dalton v. Guardians of St. Mary Abbots*, 47 L. T. 319.

(g) But see Ord. XXVIII. r. 1; *Carswell v. Hyland*, 3 T. L. R. 708; *Ayscough v. Bullar*, 41 C. D. 341; *N. Westminster Brewery Co. v. Hannah* [1876], W. N. 216; [1877] 35; *Walcott v. Lyons*, 29 C. D. 584; *Cupples v. Strahan*, 29 L. R. Ir. 120; *Dixon v. Mayor of Limerick*, 26 Ir. L. T. 324; *Showell v. Winkup*, 60 L. T. 391.

(h) *Wallis v. Smith*, 46 L. T. 473.

(i) *Sanders v. Peek* [1884], 32 W. R. 462. See also *Van Gelder v. Sowerby*, 44 Ch. D. 375; *Sheehan v. G. E. Rail. Co.*, 16 Ch. D. 59; *Richards v. Butcher*, 62 L. T. 867; *Emden v. Carter*, 17 Ch. D. 169; *Dix v. G. W. Rail. Co.*, 34 W. R. 712; *Dixon v. Mayor of Limerick*, 26 Ir. L. T. 324.

allowed to be added as a co-plaintiff when the Statute of Limitations has barred the plaintiff's claim (*k*).

If a necessary party, such as the assignor, refuse to be joined as co-plaintiff, he should be joined, as has been said, in the capacity of co-defendant (*l*).

CHANGE OF PARTIES BY DEATH, ETC.

It is further provided that—

"A cause or matter shall not become abated by reason of the marriage, death, or bankruptcy of any of the parties, if the cause of action survive or continue, and shall not become defective by the assignment, creation, or devolution of any estate or title *pendente lite*; and, whether the cause of action survives or not, there shall be no abatement by reason of the death of either party between the verdict or finding of the issues of fact and the judgment, but judgment may in such case be entered, notwithstanding the death (*m*).

"In case of the marriage, death, or bankruptcy, or devolution of estate by operation of law, of any party to a cause or matter, the Court or a judge may, if it be deemed necessary for the complete settlement of all the questions involved, order that the husband, personal representative, trustee, or other successor in interest, if any, of such party be made a party, or be served with notice in such manner and form as hereinafter prescribed, and on such terms as the Court or judge shall

(*k*) *Hudson v. Pernyhouse*, 61 L. T. 722.

(*l*) *Cullen v. Knowles*, (1898) 2 Q. B. 380; *Luke v. S. K. H. Co.*, 11 Ch. D. 121; *Gandy v. Gandy*, 30 Ch. D. 57; *Turgand v. Fearon*, *supra*. Cp. Ord. XVI. r. 8, and notes thereon generally in Annual Practice.

(*m*) Ord. XVII. r. 1. But see *Twyeross v. Grant*, 4 C. P. D. 40; *Phillips v. Homfray*, 24 Ch. D. 456; *Batthyany v. Walford*, 36 Ch. D. 281; *Davison v. Reres*, 8 T. L. R. 391; *Concha v. Murietta*, 40 Ch. D. 553; *Re Sharpe*, (1892) 1 Ch. 154.

think just, and shall make such order for the disposal of the cause or matter as may be just (n).

"In case of an assignment, creation, or devolution of any estate or title *pendente lite*, the cause or matter may be continued by or against the person to or upon whom such estate or title has come or devolved" (o).

(n) Ord. XVII. r. 2. But see
M. W. P. Act, 1882, s. 1 (2).

(o) Ord. XVII. r. 3. And see
Campbell v. Holyland, 7 Ch. D.
166; *Caton v. Hancock*, 88 L. T.

Jo. 138; *Guy v. Churchill*, 40
Ch. D. 481; *James v. Kerr*, 40
Ch. D. 449; *Barker v. Johnson*,
60 L. T. 64; *Selig v. Lyon*, (1891)
1 Q. B. 513.

CHAPTER II.

PROCEDURE UNDER THE JUDICATURE ACT, 1873.

IN an action by an assignee suing alone to recover upon the assignment of an interest falling within the operation of the Judicature Act, 1873, s. 25, sub-s. 6, the statement of claim must expressly allege—

- (1) That the assignment is absolute ;
- (2) That it is in writing ;
- (3) That *written* notice of such absolute assignment has been given to the person or persons by whom payment is to be made.

These are the requisites of the sub-section, and without compliance therewith, the assignee has no right of action (a).

In other words, the plaintiff assignee must show his title, and, apart from satisfying the demands of the statute, he cannot succeed under the statute.

If neither the assignment nor the statutory notice of assignment be admitted, it will be best to give the defendant notice to inspect and admit the assignee's document of title, and the copy of the notice sent to him if sent otherwise than by hand.

And strict proof of both assignment and notice of assignment may be required upon trial of the action.

The question of stamping may arise, and the assignee must see that his assignment has been duly stamped (b), and the proof of the assignor's title to the subject-matter assigned.

(a) *Seear v. Lawson*, 15 Ch. D. 426; 16 Ch. D. 121; *Wallis v. Smith*, 51 L. J. Ch. 577; *Dean v. James*, 1 N. & M. 393; 1 A. & E. 809; *Odgers, Pleading* [1894], 63.

(b) *Buck v. Robson*, 3 Q. B. D. 686; *Ex parte Shellard*, L. R. 17 Eq. 109. And see *Alpe on Stamp Duties*.

It must be remembered that nothing less than notice to the actual person who is to be compelled to pay may be sufficient notice of an assignment.

Notice to the *solicitors* of trustees will *not* be sufficient, *unless* they are actually authorized, expressly or impliedly, as the trustees' agents to receive such notices (*b*). The same observation would apply to any individual other than the actual person liable to pay.

And where there are more persons than one liable to pay, similar notice should be served upon *each* and every one (*c*); and *new* persons succeeding to the liability to pay should have a fresh notice of the assignment, notwithstanding that due notice thereof was given to their predecessors.

Notice to trustees as regards assignment of a fund in Court will be ineffectual; the priorities of assignees thereof will be determined by priority in date of the stop-order. Consequently a second assignee of a fund in Court who has obtained a stop-order will be entitled to priority over a previous assignee (of whose assignment he had no notice) who had not himself obtained a stop-order, but had given notice to the trustees before the date of the second assignee's stop-order (*d*).

Where notice of an incumbrance upon a trust fund was given to the trustee *after* the fund had been transferred by him into Court; such notice was held to be operative, *even without a stop-order*, to confer priority over a previous assignment, of which no notice had been given to the trustee, and on foot of which no stop-order had been obtained (*e*); and notice of assignment of a trust fund, effected by the *cestui que trust*, was given to

(*b*) *Saffron Walden Bldg. Soc. v. Rayner*, 14 Ch. D. 406, 410; *Re Russell's Policy*, L. R. 15 Eq. 26; *Arden v. Arden*, 29 Ch. D. 702; *Tate v. Hyslop*, 15 Q. B. D. 368; *Re Freuchen*, 60 L. T. 953; *English, &c. Investment Co. v. Brunton*, (1892) 2 Q. B. 706.

(*c*) But see *Meux v. Bell*, 1 Ha. 73; *Willes v. Greenhill*, 31 L. J. Ch. 1; *In re Hall*, 7 L. R. Ir. 180.

(*d*) *Mutual Life Assurance Soc. v. Langley*, 26 Ch. D. 686; 51 L. T. 284; 32 W. R. 792.

(*e*) *In re Hall*, 7 L. R. Ir. 180.

only one of two co-trustees, who afterwards died during the lifetime of his co-trustee, it was held: that such notice was ineffectual to give priority over a subsequent assignment, of which notice was given to the surviving trustee (*f*).

Notice to an official liquidator of the assignment of a debt due from the company is sufficient, and upon the subsequent bankruptcy of the assignor the debt does not vest in his trustee in bankruptcy (*g*).

For the "equities" raisable by way of set-off or counterclaim by the defendant in an action for recovery upon an assignment under the statute, see references cited below (*h*).

INTERPLEADER UNDER THE STATUTE.

A remedy given by the sub-section in question to the person liable to pay is sometimes overlooked in dealing with the general subject of assignment of interests under the statute.

The sub-section concludes thus:—

"Provided always, that if the debtor, trustee, or other person liable in respect of such debt or chose in action shall have had notice that such assignment is disputed by the assignor or any one claiming under him, or of any other opposing or conflicting claims to such debt or chose in action, he shall be entitled, if he think fit, to call upon the several persons making claim thereto to interplead concerning the same, or he may, if he think fit, pay the same into the High Court of Justice under

(*f*) *In re Hall*, 7 L. R. Ir. 180.

(*g*) *In re Breech-Loading Armoury Co.*, *Wragge's Case*, L. R. 5 Eq. 284. And see, for Notice

generally, *ante*, Bk. II., Ch. II., and Bk. III., Ch. II.

(*h*) See *ante*, Bk. II., Ch. II. And see *Annual Practice* [1899], Vol. II. 411; 1 Wh. & T. Eq. Ca. 132; Lewin [1891], 781.

and in conformity with the provisions of the Acts for the relief of trustees" (h).

Before leave to interplead will be granted, it must be shown that there was a sufficient notice of an absolute assignment in writing within the sub-section (i).

A debtor against whom an action has been brought, and who has had notice of assignment of the debt, may interplead as to part only of the claim, and may dispute the residue. His application for relief may be made, either in the action under Order LVII., or by a separate proceeding under the sub-section in question. If under the *latter* jurisdiction, the judge making the order has no power to stay proceedings in an action already commenced against the debtor (j).

A party may interplead where one of the claimants claims damages for the detention of the subject-matter in dispute (k).

A fundholder interpleading, who acts in good faith, is entitled, although not a defendant in an action, to deduct from the fund in dispute the costs of the interpleader proceedings (l).

As above stated, relief by interpleader may be had under this sub-section before action brought; but there must have been an *assignment*; it is not enough that there were conflicting claims only (m).

"Relief by way of interpleader may be granted,—

"Where the person seeking relief (in this order called the applicant) is under liability for any debt, money, goods, or chattels, for or in respect of which he is, or expects to be, sued by two or

(h) Judicature Act, 1873, s. 25 (6); *Buck v. Robson*, 3 Q. B. D. 686.

(i) *In re New Hamburg and Brazilian Rail. Co.* [1875], W. N. 239, 240. See, also, reference therein to Wilson on Judicature Act.

(j) *Reading v. London School Board*, 16 Q. B. D. 686.

(k) *Attenborough v. St. Katharine's Docks*, 3 C. P. D. 450; *Ingham v. Walker*, 3 T. L. R. 448.

(l) *Clench v. Dooley*, 56 L. T. 122.

(m) *Re Hamburg, &c. Soc.*, *supra*; *Lacey v. Wieland* [1876], W. N. 24.

more parties (in this order called the claimants) making adverse claims thereto" (n).

The acceptors of a bill of exchange fall within this Order (o); so do shares in a public company (p); but not separate claims for commission by rival house-agents on the sale of the same house (q).

Where there are no proceedings the proper course is by originating summons, to which no appearance is required (r).

Further, the applicant for the interpleader must satisfy the Court or a judge by affidavit or otherwise,—

- (i) That he claims no interest in the subject-matter in dispute, other than for charges or costs;
- (ii) That he does not collude with any of the claimants;
- (iii) That he is willing to pay or transfer the subject-matter into Court, or dispose of it as the Court or judge may direct (s).

If the application is made by a *defendant in an action*, the Court or a judge may stay all further proceedings in the action (t).

"If the claimants appear in pursuance of the summons, the Court or a judge may order either that any claimant be made a defendant in any action already commenced in respect of the subject-matter in dispute in lieu of or in addition to the applicant, or that an issue between the claimants be stated and tried, and in the latter case may direct which of the claimants is to be plaintiff, and which defendant" (u).

(n) R. S. C. Ord. LVII. r. 1 (a).

(o) *Gerhard v. Montague*, 38 W. R. 76.

(p) *Robinson v. Jenkins*, 24 Q. B. D. 275.

(q) *Greator v. Shackle*, (1895) 2 Q. B. 249.

(r) *Annual Practice* [1899], 815, 817; 1 & 2 Will. IV. c. 53, s. 1.

(s) Ord. LVII. r. 2. And see *Muriel v. South Amer. Co.*, 62 L. J. Q. B. 396; *De Rothschild v. Morrison*, 24 Q. B. D. 750; *Thompson v. Wright*, 13 Q. B. D. 632.

(t) Ord. LVII. r. 6.

(u) *Id.* r. 7; *Gerhard v. Montague*, *supra*; *Hamlyn v. Betteley*, 6 Q. B. D. 63; *James v. Ricknell*, 20 Q. B. D. 164.

After an issue has been directed it is now the usual practice to entitle all proceedings in the issue and not in the action (r). btool.com.cn

"The Court or a judge may, with the consent of both claimants or on the request of any claimant, if, having regard to the value of the subject-matter in dispute, it seems desirable so to do, dispose of the merits of their claims, and decide the same in a summary manner and on such terms as may be just (r).

"Where the question is a question of law, and the facts are not in dispute, the Court or a judge may either decide the question without directing the trial of an issue, or order that a special case be stated for the opinion of the Court. If a special case is stated, Order XXXIV. shall, as far as applicable, apply thereto" (x).

Order XXXIV. says:—

"The parties to any cause or matter may concur in stating the questions of law arising therein in the form of a special case for the opinion of the Court. Every such special case shall be divided into paragraphs numbered consecutively, and shall concisely state such facts and documents as may be necessary to enable the Court to decide the questions raised thereby. Upon the argument of such case the Court and the parties shall be at liberty to refer to the whole contents of such documents, and the Court shall be at liberty to draw from the facts and documents stated in any such special case any inference, whether of fact or law, which might have been drawn therefrom if proved at a trial (y).

"Every special case shall be printed by the plaintiff, and signed by the several parties or their counsel or solicitors, and shall be filed by the plaintiff. Three

(r) Annual Practice, p. 818.

(w) Ord. LVII. r. 8. See *Lyon v. Morris*, 19 Q. B. D. 139; *Victor v. Cropper*, 3 T. L. R.

110; *Topham v. Greenside*, 37 Ch. D. 294.

(x) Ord. LVII. r. 9.

(y) Ord. XXXIV. r. 1.

printed copies for the use of the judges shall be left therewith" (z).

With respect to the interpleader issue, it is further provided that—

"If a claimant having been duly served with a summons calling on him to appear and maintain, or relinquish, his claim, does not appear in pursuance of the summons, or, having appeared, neglects or refuses to comply with any order made after his appearance, the Court or a judge may make an order declaring him, and all persons claiming under him, for ever barred against the applicant, and persons claiming under him, but the order shall not affect the rights of the claimants as between themselves (a).

"Except where otherwise provided by statute, the judgment in any action or on any issue ordered to be tried or stated in an interpleader proceeding, and the decision of the Court or a judge in a summary way, under rule 8 of this Order, shall be final and conclusive against the claimants, and all persons claiming under them, unless by special leave of the Court or judge, as the case may be, or of the Court of Appeal (b).

"Orders XXXI. and XXXVI. shall, with the necessary modifications, apply to an interpleader issue; and the Court or judge who tries the issue may finally dispose of the whole matter of the interpleader proceedings, including all costs not otherwise provided for" (c).

For fuller detail upon the subject of interpleader, see reference cited in note (d).

Under the Act the debtor or fundholder has a

(z) *Id.* r. 3.

(a) Ord. LVII. r. 10.

(b) *Id.* r. 11. And see *Re Tarn*, (1893) 2 Ch. 280. But see *Webb v. Shaw*, 16 Q. B. D. 658; *Clench v. Dooley*, 56 L. T. 122; *Bryant v. Reading*, 17 Q. B. D. 128.

(c) Ord. LVII. r. 13. The Orders referred to (Ords. XXXI. and XXXVI.) deal with the practice of discovery and inspection, and the place and mode of trial generally.

(d) Cababé, Interpleader.

further alternative: he may, if he think fit, pay the same (if money) into the High Court of Justice under and ~~in conformity with the~~ provisions of the Acts for the relief of trustees (e).

But if the money is paid into Court hereunder, the Court cannot stay the action (f).

The Life Assurance Companies (Payment into Court) Act, 1896 (59 Vict. c. 8), enables any life assurance company to pay into Court any moneys payable under a policy in respect of which the company's directors think no sufficient discharge can be otherwise obtained (g).

(e) See Trustee Act, 1893; Lewin on Trusts [1898]; *Re Haycock's Policy*, 1 Ch. D. 611; *Re Carroll's Policy*, 29 L. R. Ir. 86.

(f) *Reading v. School Board*, *supra*.

(g) Annual Practice [1899], Vol. I. Ord. LIV. (C.), 764.

CHAPTER III.

THE ASSIGNEE'S LEGAL AND OTHER REMEDIES.

IN transferring the legal right to the subject-matter of the assignment to the assignee, the statute also provides that the assignment shall be deemed effectual to pass and transfer also "all legal and other remedies for the same."

The effect of this is to place the assignee in exactly the same position with respect to the chose in action as the assignor was prior to the assignment.

Consequently the assignee may institute garnishee proceedings under Order XLV. (a), which runs thus:—

"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, either before or after any oral examination of the debtor liable under such judgment or order, and upon affidavit by himself or his solicitor stating that judgment has been recovered, or the order made, and that it is still unsatisfied, and to what amount, and that any other person is indebted to such debtor, and is within the jurisdiction, order that all debts owing or accruing from such third person (hereinafter called the garnishee) to such debtor shall be attached to answer the judgment or order; and by the same or any subsequent order it may be ordered that the garnishee shall appear before the Court or a judge or an officer of the Court, as such Court or judge shall appoint, to show cause why he

(a) *Goodman v. Robinson*, 18 Q. B. D. 332.

should not pay to the person who has obtained such judgment or order the debt due from him to such debtor, or so much thereof as may be sufficient to satisfy the judgment or order (b).

"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 (c).

"If the garnishee does not forthwith pay into Court the amount due from him to the debtor, liable under a judgment or order, or an amount equal to the judgment or order, and does not dispute the debt due or claimed to be due from him to such debtor, or if he does not appear upon summons, then the Court or judge may order execution to issue, and it may issue accordingly, without any previous writ or process, to levy the amount due from such garnishee, or so much thereof as may be sufficient to satisfy the judgment or order (d).

"If the garnishee disputes his liability, the Court or judge, instead of making an order that execution shall issue, may order that any issue or question necessary for determining his liability be tried or determined in any manner in which any issue or question in an action may be tried or determined (e).

"Whenever in proceedings to obtain an attachment of debts it is suggested by the garnishee that the debt sought to be attached belongs to some third person, or that any third person has a lien or charge upon it, the Court or a judge may order such third person to appear, and state the nature and particulars of his claim upon such debt (f).

"After hearing the allegations of any third person under such order, as in rule 5 mentioned, and of any

(b) Ord. XLV. r. 1.
(c) Rule 2.

(d) Rule 3.
(e) Rule 4.

(f) Rule 5.

other person whom by the same or any subsequent order the Court or a judge may order to appear, or in case of such third person not appearing when ordered, the Court or judge may order execution to issue to levy the amount due from such garnishee, or any issue or question to be tried or determined according to the preceding rules of this Order, and may bar the claim of such third person, or make such other order as such Court or judge shall think fit, upon such terms, in all cases, with respect to the lien or charge (if any) of such third person, and to costs, as the Court or judge shall think just and reasonable (g).

"Payment made by or execution levied upon the garnishee under any such proceeding as aforesaid shall be a valid discharge to him as against the debtor, liable under a judgment or order, to the amount paid or levied, although such proceeding may be set aside, or the judgment or order reversed" (h).

But in all such proceedings the assignee will be governed by whatever course the assignor had previously taken in respect of the chose in action (i).

Order *nisi* should be served personally, although such service is not absolutely necessary; service two clear days before return day is sufficient.

An equitable debt is attachable under this order (j); so is a debt *due*, but payable *in futuro* (k); a debt due to one of three joint debtors (l); rent (m); a debt undoubted though unascertained in amount (n); a debt due to the judgment debtor as executor (o); an annuity

(g) Rule 6.

(h) Rule 7.

(i) *Jones v. Jenner*, 25 L. J. Ex. 319; *Haytor v. Beall*, 29 W. R. 333, but see 44 L. T. 131; *Jauradale v. Parker*, 30 L. J. Ex. 237; *Re Hatahan*, 11 W. R. 10; *Cababé*, Attachment, 13.

(j) *Wilson v. Dundas* [1875], W. N. 232; *Webb v. Stenton*, 11 Q. B. D. 626.

(k) *Tapp v. Jones*, L. R. 10

Q. B. 591; *Jones v. Thompson*, E. B. & E. 63.

(l) *Miller v. Mynn*, 28 L. J. Q. B. 324; 7 W. R. 524.

(m) *Mitchell v. Lee*, L. R. 2 Q. B. 259; *Barnett v. Eastmann*, 67 L. J. Q. B. 517.

(n) *Daniel v. McCarthy*, 7 Ir. C. L. R. 261.

(o) *Burton v. Roberts*, 29 L. J. Ex. 484; *Fowler v. Roberts*, 8 W. R. 492.

payable to a widow by the trustees of her husband's will (*p*); generally, money in the hands of third persons for the use and benefit of the judgment debtor (*q*); money paid into Court and standing to the credit of a party to a cause (*r*); a pension given purely for past services (*s*).

But a pension not merely given for past services is not attachable (*t*); nor is the pay or half-pay of officers and the like in the army, navy, or civil service (*u*); nor the amount awarded by a verdict upon which judgment has not been signed (*r*); nor, of course, debts *bonâ fide* assigned by the judgment debtor before the judgment is obtained against him (*w*); nor is a legacy in the hands of an executor attachable for the legatee's debts (*x*); nor a salary not yet payable and only partly earned (*y*); nor the surplus of a bankrupt's estate in the trustee's hands (*z*); nor a married woman's separate income restrained from anticipation (*a*); nor

(*p*) *Nash v. Pease*, 47 L. J. Q. B. 766; *Webb v. Stenton*, 11 Q. B. D. 519.

(*q*) *Ex parte Turner*, 30 L. J. Ch. 92; *Webb v. Stenton*, 11 Q. B. D. 518; *Tapp v. Jones*, L. R. 10 Q. B. 591; *In re Cowans*, L. R. 14 Ch. D. 638; *O'Neill v. Cunningham*, 6 Ir. R. C. L. 503. But see *Williams v. Reeves*, 12 Ir. Ch. R. 173; *Seymour v. Corporation of Brecon*, 29 L. J. Ex. 243; *Dolphin v. Layton*, L. R. 4 C. P. D. 131; *Bouch v. Sevenoaks, &c. Rail. Co.*, L. R. 4 Ex. 133. But see *M'Dowell v. Hollister*, 26 L. T. Ex. 185; *Ballard v. Marsden*, 14 Ch. D. 374.

(*r*) *Adam v. Gillem*, 9 Ir. R. C. L. 140, *sed quære*. See *Jones v. Brown*, 29 L. T. 79; *Williams v. Reeves*, *supra*.

(*s*) *Willcock v. Terrell*, 3 Ex. D. 323; *Sansom v. Sansom*, L. R. 4 P. D. 69; *Booth v. Trail*, 12 Q. B. D. 8; *Dent v. Dent*, L. R. 1 P. & D. 366.

(*t*) *Lucas v. Harris*, 18 Q. B. D. 127; *Birch v. Birch*, L. R. 8

P. D. 163; *Innes v. East India Co.*, 25 L. J. C. P. 154; *Ex parte Hawker*, L. R. 7 Ch. Ap. 214.

(*u*) *Apthorpe v. Apthorpe*, L. R. 12 P. D. 192; *Flarty v. Odium*, 3 T. R. 681.

(*v*) *Jones v. Thompson*, 27 L. J. (N. S.) Q. B. 234. Cp. *Shaw v. Shaw*, 18 L. T. Ir. Q. B. 420; *Dresser v. Jones*, 28 L. J. C. P. 281; *In re Newman*, *Ex parte Brooke*, 3 Ch. D. 494; *Randall v. Lithgow*, 12 Q. B. D. 525.

(*w*) *Hirsch v. Coates*, 25 L. J. C. P. 315; *Wise v. Birkenshaw*, 29 L. J. Ex. 240; *Pickering v. Ilfracombe Rail. Co.*, L. R. 3 C. P. 235; *Robinson v. Nesbitt*, L. R. 3 C. P. 264.

(*x*) *M'Dowell v. Hollister*, *supra*.
(*y*) *Hall v. Pritchett*, 3 Q. B. D. 215.

(*z*) *Hunter v. Greenhill*, L. R. 8 C. P. 24; *Boyes v. Simpson*, 8 Ir. C. L. R. 523; *Ex parte Turner*, 30 L. J. Ch. 92.

(*a*) *Chapman v. Biggs*, 11 Q. B. D. 27. But see *Stevens v. Phelps*, L. R. 10 Ch. Ap. 417.

money *in custodia legis* (b); nor purchase-money of land compulsorily taken by a railway company before executing a conveyance of the land; nor a judgment for specific performance to purchase lands (c); nor money not yet due on a negotiable instrument (d); nor wages (e).

EXECUTION.

Another remedy given to the assignee under the Judicature Act, 1873, is that of execution, in its widest sense, against the interest of a person who, being liable to pay upon a judgment or order, has omitted to comply therewith.

Where any person is by any judgment or order directed to pay any money, or to deliver up or transfer any property real or personal to another, it shall not be necessary to make any demand thereof, but the person so directed shall be bound to obey such judgment or order upon being duly served with the same without demand (f).

A judgment for the recovery by or payment to any person of money may be enforced by any of the modes by which a judgment or decree for the payment of money of any Court whose jurisdiction is transferred by the principal Act might have been enforced at the time of the passing thereof (g).

This enforcement may be by—

- (i) writ of *fi. fa.* or *elegit*;
- (ii) garnishee;

(b) *Dolphin v. Layton*, L. R. 4 C. P. D. 133; *Westhead v. Riley*, 25 Ch. D. 413; *De Winton v. Brecon*, 28 Beav. 200; *Stevens v. Phelps*, L. R. 10 Ch. Ap. 417.

(c) *Howell v. Met. Dist. Rail. Co.*, 19 Ch. D. 515.

(d) *Pine v. Kinna*, 11 Ir. R. C. L. 40.

w.

(e) 17 & 18 Vict. c. 104, s. 233; 33 & 34 Vict. c. 30. See, also, *Cababé, Attachment of Debts*, and cases there cited.

(f) Ord. XLII. r. 1.

(g) *Id.* r. 3. See *Re Woodfin and Wray*, 30 W. R. 422; *Swyny v. Harland*, (1894) 1 Q. B. 707.

(iii) appointment of a receiver ;

(iv) writ of sequestration ;

(v) writ of *ca. sa.* ;

according to the particular circumstances and subject-matter of the case (*h*).

A judgment for the payment of money into Court may be enforced by writ of sequestration, or, in cases in which attachment is authorized by law, by attachment (*i*).

A judgment for the recovery or for the delivery of the possession of land may be enforced by writ of possession (*k*).

A judgment for the recovery of any property other than land or money may be enforced—

(a) By writ for delivery of the property ;

(b) By writ of attachment ;

(c) By writ of sequestration (*l*).

A judgment requiring any person to do any act other than the payment of money, or to abstain from doing anything, may be enforced by writ of attachment, or by committal (*m*).

In these rules the term “writ of execution” shall include writs of *fieri facias*, *capias*, *elegit*, sequestration, and attachment, and all subsequent writs that may issue for giving effect thereto. And the term “issuing execution against any party” shall mean the issuing of any such process against his person or property as under the preceding rules of this order shall be applicable to the case (*n*).

(*h*) For (i) see *infra*, Ord. XLII.

r. 17 ; Ord. XLIII. rr. 1—5 ; for

(ii) see *ante*, pp. 365—369 ; for

(iii) see *post*, pp. 379—383, Ord. L.

r. 16 ; for (iv) see *infra*, Ord. XLII.

r. 31 ; Ord. XLIII. rr. 3, 6 ; for

(v) see *post*, pp. 376—379, Debtors

Act, 1869 (32 & 33 Vict. c. 62),

ss. 4 (3), (4), 5 ; Ord. XLIV.

(i) Ord. XLII. r. 4.

(k) *Id.* r. 5.

(l) Rule 6.

(m) Rule 7. But see 47 & 48

Vict. c. 68, s. 2 ; *Weldon v. Weldon*,

54 L. J. P. 60. See, also, *Hearn*

v. Tennant, 14 Ves. 136 ; 9 R. R.

253 ; *Acery v. Andrews*, 51 L. J.

Ch. 414 ; *Callow v. Young*, 56

L. J. Ch. 690 ; *Smith v. Day*, 13

Ch. D. 651.

(n) Ord. XLII. r. 8 ; *Norburn*

v. Norburn, (1894) 1 Q. B. 448.

Where a judgment or order is to the effect that any party is entitled to any relief subject to or upon the fulfilment of any condition or contingency, the party so entitled may, upon the fulfilment of the condition or contingency, and demand made upon the party against whom he is entitled to relief, apply to the Court or a judge for leave to issue execution against such party. And the Court or judge may, if satisfied that the right to relief has arisen according to the terms of the judgment or order, order that execution issue accordingly, or may direct that any issue or question necessary for the determination of the rights of the parties be tried in any of the ways in which questions arising in an action may be tried (o).

The *præcipe* for the writ of execution must be signed by the party or his solicitor issuing it, together with all particulars as to date of judgment, parties, and the names, &c. of the persons against whom, or of the firm against whose goods, the execution issues (p). And further—

Every writ of execution shall be indorsed with the name and place of abode or office of business of the solicitor actually suing out the same, and when the solicitor actually suing out the writ shall sue out the same as agent for another solicitor, the name and place of abode of such other solicitor shall also be indorsed upon the writ; and in case no solicitor shall be employed to issue the writ, then it shall be indorsed with a memorandum expressing that the same has been sued out by the plaintiff or defendant in person, as the case may be, mentioning the city, town, or parish, and also the name of the hamlet, street, and number of the house of such plaintiff's or defendant's residence, if any such there be (q).

Every writ of execution for the recovery of money

(o) Ord. XLII. r. 9.

(p) Rule 11.

(q) Rule 13.

shall be indorsed with a direction to the sheriff, or other officer or person to whom the writ is directed, to levy the money really due and payable and sought to be recovered under the judgment or order, stating the amount, and also to levy interest thereon, if sought to be recovered, at the rate of 4l. per cent. per annum from the time when the judgment or order was entered or made, provided that in cases where there is an agreement between the parties that more than 4l. per cent. interest shall be secured by the judgment or order, then the indorsement may be accordingly to levy the amount of interest so agreed (r).

Upon any judgment or order for the recovery or payment of a sum of money and costs, there may be, at the election of the party entitled thereto, either one writ or separate writs of execution for the recovery of the sum and for the recovery of the costs, but a second writ shall only be for costs and shall be issued not less than eight days after the first writ (s).

A party who has obtained judgment or an order, not being a judgment for payment of money or costs, or for the recovery of land, may issue execution in fourteen days, unless the Court or a judge shall order execution to issue at an earlier or later date with or without terms (t).

An unexecuted writ of execution remains in force for one year only from date of issue, unless renewed as provided by the rules (u); but it is more usual in such cases to issue a new writ on the solicitor's certificate as to no levy under the first writ.

As between the original parties to a judgment or order, execution may issue at any time within six years from the recovery of the judgment, or the date of the order (x).

(r) Rule 16.

(s) Rule 18.

(t) Rule 19.

(u) Rule 20.

(x) Rule 22. See *Fellows v. Thornton*, 14 Q. B. D. 335.

In the following cases, viz. :—

- (a) Where ~~six years have elapsed~~ since the judgment or date of the order, or any change has taken place by death or otherwise in the parties entitled or liable to execution ;
- (b) Where a husband is entitled or liable to execution upon a judgment or order for or against a wife ;
- (c) Where a party is entitled to execution upon a judgment of assets *in futuro* ;
- (d) Where a party is entitled to execution against any of the shareholders of a joint stock company upon a judgment recorded against such company, or against a public officer or other person representing such company ;

the party alleging himself to be entitled to execution may apply to the Court or a judge for leave to issue execution accordingly. And such Court or judge may, if satisfied that the party so applying is entitled to issue execution, make an order to that effect, or may order that any issue or question necessary to determine the rights of the parties shall be tried in any of the ways in which any question in an action may be tried. And in either case such Court or judge may impose such terms as to costs or otherwise as shall be just (*y*).

Application for leave to issue in such cases should be made to a master in chambers *ex parte* on an affidavit setting out the facts ; and the master may thereupon grant leave, or order a summons to issue to bring the parties concerned before him.

Every order of the Court or a judge in any cause or matter may be enforced against all persons bound

(*y*) Ord. XLIII. r. 23. And see *Ex parte Hyde*, 20 Q. B. D. 690 ; *Ex parte Dennis*, 60 L. T. 348 ; *Jones v. Jaggard*, 64 L. T. 731 ; *Davis v. Andrews* [1884], W. N. 91 ; *Jay v. Johnstone*, (1893) 1

Q. B. 26, 189 ; *Hobblethwaite v. Peever*, (1892) 1 Q. B. 124 ; *Re Shephard*, 43 Ch. D. 137 ; *East End, &c. Building Soc. v. Slack*, 60 L. J. Q. B. 359.

thereby in the same manner as a judgment to the same effect (z).

The order in which the different writs of execution may be issued is unaffected by Order XLII. (a).

If a mandamus, granted in an action or otherwise, or a mandatory order, injunction, or judgment for the specific performance of any contract be not complied with, the Court or a judge, besides or instead of proceedings against the disobedient party for contempt, may direct that the act required to be done may be done so far as practicable by the party by whom the judgment or order has been obtained, or some other person appointed by the Court or judge, at the cost of the disobedient party, and upon the act being done the expenses incurred may be ascertained in such manner as the Court or a judge may direct, and execution may issue for the amount so ascertained, and costs (b).

Any judgment or order against a corporation wilfully disobeyed may, by leave of the Court or a judge, be enforced by sequestration against the corporate property, or by attachment against the directors or other officers thereof, or by writ of sequestration against their property (c).

Application under this rule may be by motion or summons (d).

An award may, with the leave of the Court or a judge, and on such terms as may be just, be enforced at any time, though the time for moving to set it aside has not elapsed (e).

Discovery in Aid of Execution.

When a judgment or order is for the recovery or payment of money, the party entitled to enforce it may

(z) Ord. XLII. r. 24.

(a) Rule 29.

(b) Rule 30.

(c) Rule 31.

(d) *Selous v. Croydon Local Board*,

53 L. T. 209.

(e) Ord. XLII. r. 31A.

apply to the Court or a judge for an order that the debtor liable under such judgment or order, or, in the case of a corporation, that any officer thereof, be orally examined, as to whether any and what debts are owing to the debtor, and whether the debtor has any and what other property or means of satisfying the judgment or order, before a judge or an officer of the Court as the Court or judge shall appoint; and the Court or judge may make an order for the attendance and the examination of such debtor, or of any other person, and for the production of any books or documents (f).

The summons for examination does not require personal service, but the order should be personally served (g). All such examinations are taken by a master in chambers.

Where it appears, upon the return of any writ of *feri facias* or any writ of *elegit*, that the person against whom such writ was so issued is a beneficed clerk, and has no goods or chattels nor any lay fee in the bailiwick of the sheriff to whom such writ was directed, the person to whom the sum of money or costs mentioned in such writ is or are payable shall, immediately after such writ with such return shall have been filed as of record, be at liberty to sue out one or more writs of *feri facias de bonis ecclesiasticis*, or one or more writs of sequestration (h).

Such writs as in the last preceding rule mentioned, when sealed, shall be delivered to the bishop to be executed by him, and such writs, when returned by the bishop, shall be delivered to the parties or solicitors by whom respectively they were sued out, and shall thereupon be filed as of record in the Central Office; and for

(f) Ord. XLII. r. 32; *Republic of Costa Rica v. Strousberg*, 16 Ch. D. 8.

(g) *Lady de la Pole v. Dick*, 29 Ch. D. 351.

(h) Ord. XLIII. r. 3; *Rabbitts v. Woodward*, 20 L. T. 693, 778.

the execution of such writs the bishop or his officers shall not take or be allowed any fees other than such as are or shall be from time to time allowed by lawful authority (i).

Where any person is by any judgment or order directed to pay money into Court or to do any other act in a limited time, and after due service of such judgment or order refuses or neglects to obey the same according to the exigency thereof, the person prosecuting such judgment or order shall, at the expiration of the time limited for the performance thereof, be entitled, without obtaining any order for that purpose, to issue a writ of sequestration against the estate and effects of such disobedient person. Such writ of sequestration shall have the same effect as a writ of sequestration in Chancery had before the commencement of the principal Act, and the proceeds of such sequestration may be dealt with in the same manner as the proceeds of writs of sequestration were before the same date dealt with by the Court of Chancery (k).

ATTACHMENT AND COMMITTAL.

A writ of attachment shall have the same effect as a writ of attachment issued out of the Chancery Division has heretofore had (l).

No writ of attachment shall be issued without the leave of the Court or a judge, to be applied for on notice to the party against whom the attachment is to be issued (m).

Application for such leave should be made, in the Queen's Bench Division, by motion or by summons in chambers before a judge (n).

(i) Ord. XLIII. r. 4.

(k) Rule 6.

(l) Ord. XLIV. r. 1; *Roberts v. Ball*, 1 Jur. N. S. 585

(m) Ord. XLIV. r. 2.

(n) See Ord. LII. rr. 2, 3; Ord. LIV. r. 12; *Davis v. Gal-moye*, 39 Ch. D. 322; 40 Ch. D. 355.

Imprisonment for non-compliance with decrees and orders for ~~payment or recovery of~~ any sum of money is now abolished save as to certain cases reserved by the Debtors Act, 1869 (32 & 33 Vict. c. 6, s. 4), which provides that—

“With the exceptions hereinafter mentioned, no person shall, after the commencement of this Act, be arrested or imprisoned for making default in payment of a sum of money.

“There shall be excepted from the operation of the above enactments:

1. Default in payment of a penalty, or sum in the nature of a penalty, other than a penalty in respect of any contract;
2. Default in payment of any sum recoverable summarily before a justice or justices of the peace;
3. Default by a trustee or person acting in a fiduciary capacity and ordered to pay by a Court of equity any sum in his possession or under his control;
4. Default by an attorney or solicitor in payment of costs when ordered to pay costs for misconduct as such, or in payment of a sum of money when ordered to pay the same in his character of an officer of the Court making the order;
5. Default in payment for the benefit of creditors of any portion of a salary or other income in respect of the payment of which any Court having jurisdiction in bankruptcy is authorized to make an order;
6. Default in payment of sums in respect of the payment of which orders are in this Act authorized to be made.

“Provided, first, that no person shall be imprisoned in any case excepted from the operation of this section for a longer period than one year; and, secondly, that nothing in this section shall alter the effect of any

judgment or order of any Court for payment of money except as regards the arrest and imprisonment of the person making default in paying such money" (o).

The Debtors Act, 1878 (41 & 42 Vict. c. 54), enacts that—

"In any case coming within the exceptions numbered 3 and 4 in the fourth section of the Debtors Act, 1869, and in the fifth section of the Debtors Act (Ireland), 1872, respectively, or within either of those exceptions, any Court or judge, making the order for payment, or having jurisdiction in the action or proceeding in which the order for payment is made, may inquire into the case, and (subject to the provisos contained in the said sections respectively) may grant or refuse, either absolutely or upon terms, any application for a writ of attachment, or other process or order of arrest or imprisonment, and any application to stay the operation of any such writ, process, or order, or for discharge from arrest or imprisonment thereunder" (p).

By the Debtors Act, 1869, provision is made for the committal to prison for a term *not exceeding six weeks*, or until payment of the sum due, of any person who makes default in payment of any debt or instalment of any debt due from him in pursuance of any order or judgment of a competent Court (q). This power was formerly exercised by the High Court of Chancery, by the Common Law Courts, and by the Probate Court. But the jurisdiction of the High Court under sect. 5 of the Debtors Act, 1869, has now been transferred to the judge and registrars in bankruptcy (r). An appeal from an order of the judge in chambers respecting the

(o) 32 & 33 Vict. c. 62, s. 4; *Buckley v. Crawford*, (1893) 1 Q. B. 105; *De Loasy v. De Loasy*, 15 P. D. 115; *Re Smith*, 2 Ex. D. 47; *Litchfield v. Jones*, 36 Ch. D. 530; *Piddocks v. Burt*, (1894) 1 Ch. 343; *Preston v.*

Etherington, 37 Ch. D. 104.

(p) 41 & 42 Vict. c. 54, s. 1; *Marria v. Ingram*, 13 Ch. D. 338.

(q) 32 & 33 Vict. c. 62, s. 5.

(r) Bkey. Rules, 1883, rr. 355—362; *Williams*, Bankruptcy, 629, 630.

commitment of a judgment debtor must be made to the Court of Appeal and not to a Divisional Court (s).

APPOINTMENT OF RECEIVER.

The Judicature Act, 1873, provides as follows :—

“ 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 ; and if an injunction is asked, either before or at, or after the hearing of any cause or matter, to prevent any threatened or apprehended waste or trespass, such injunction may be granted, if the Court shall think fit, whether the person against whom such injunction is sought is, or is not, in possession under any claim of title or otherwise, or (if out of possession) does or does not claim a right to do the act sought to be restrained under any colour of title ; and whether the estates claimed by both or by either of the parties are legal or equitable ” (t).

An application for an order under sect. 25, sub-sect. 8, of the principal Act, or under rules 2 or 3 of this order, may be made to the Court or a judge by any party. If the application be by the plaintiff for an order under the said sub-sect. 8 it may be made either *ex parte* or with notice, and if for an order under rules 2 or 3 of this order it may be made after notice to the defendant at any time after the issue of the writ of summons, and if it be by any other party, then on

(s) *Geness v. Lascelles*, 13 Q. B. D. 901 ; *Scott v. Morley*, 20 Q. B. D. 120.

(t) 36 & 37 Vict. c. 66, s. 25 (8).

notice to the plaintiff and at any time after appearance by the party making the application (u).

In every case in which an application is made for the appointment of a receiver by way of equitable execution, the Court or a judge in determining whether it is just or convenient that such appointment should be made shall have regard to the amount of the debt claimed by the applicant, to the amount which may probably be obtained by the receiver, and to the probable costs of his appointment, and may, if they or he shall so think fit, direct any inquiries on these or other matters before making the appointment (x).

Where an order is made directing a receiver to be appointed, unless otherwise ordered, the person to be appointed shall first give security, to be allowed by the Court or a judge and taken before a person authorized to administer oaths, duly to account for what he shall receive as such receiver, and to pay the same as the Court or judge shall direct; and the person so to be appointed shall, unless otherwise ordered, be allowed a proper salary or allowance. Such security shall be by recognizance in the Form No. 21 in Appendix L, unless the Court or a judge shall otherwise order (y).

Where any judgment or order is pronounced or made in Court appointing a person therein named to be receiver, the Court or a judge may adjourn to chambers the cause or matter then pending, in order that the person named as receiver may give security as in the last preceding rule mentioned, and may thereupon direct such judgment or order to be drawn up (z).

When a receiver is appointed with a direction that he shall pass accounts, the Court or judge shall fix the days upon which he shall (annually, or at longer or shorter periods) leave and pass such accounts, and also

(u) Ord. L. r. 6.
(x) Rule 15A.

(y) Rule 16.
(z) Rule 17.

the days upon which he shall pay the balances appearing due on the accounts so left, or such part thereof as shall be certified as proper to be paid by him. And with respect to any such receiver as shall neglect to leave and pass his accounts and pay the balances thereof at the times so to be fixed for that purpose as aforesaid, the judge before whom any such receiver is to account may from time to time, when his subsequent accounts are produced to be examined and passed, disallow the salary therein claimed by such receiver, and may also, if he shall think fit, charge him with interest at the rate of 5% per cent. per annum upon the balances so neglected to be paid by him during the time the same shall appear to have remained in the hands of any such receiver (a).

Receivers' accounts are to be in the form prescribed by the Rules of the Supreme Court (b).

Every receiver shall leave in the chambers of the judge to whom the cause or matter is assigned his account, together with an affidavit verifying the same in the Form No. 22 in Appendix L., with such variations as circumstances may require. An appointment shall thereupon be obtained by the plaintiff or person having the conduct of the cause for the purpose of passing such account (c).

In case of any receiver failing to leave any account or affidavit, or to pass such account, or to make any payment, or otherwise, the receiver or the parties, or any of them, may be required to attend at chambers to show cause why such account or affidavit has not been left, or such account passed, or such payment made, or any other proper proceeding taken, and thereupon such directions as shall be proper may be given at chambers or by adjournment into Court, including the discharge

a) Rule 18.

(b) Rule 19. See Appendix.

(c) Rule 20.

of any receiver and appointment of another, and payment of costs (*d*).

A certificate of the chief clerk stating the result of a receiver's account shall from time to time be taken (*e*).

A receiver has been appointed where the debtor's interest was an equity of redemption (*f*); where the writ of attachment could not be served (*g*); where there was a fund in Court due to the judgment debtor (*h*); where the judgment debtor's interest was a reversionary interest under a will (*i*); where the debtor was entitled for life to dividends on consols, &c. in the names of trustees of her husband's will; and for receiving the income of trust funds (*k*); over the separate estate of a married woman (*l*); over the estate of a deceased co-respondent condemned in costs of divorce proceedings (*m*); over a deposit receipt held in the joint names of the debtor and another, even though the whole beneficial interest in the fund be in the judgment debtor (*n*); as to furniture and household effects of a defendant not complying with an order to pay money into Court (*o*).

The procedure is by a judge's summons in chambers in the action for the appointment of a receiver of the particular property sought to be taken in equitable execution (*p*); the summons must be supported by an

(*d*) Rule 21.

(*e*) Rule 22.

(*f*) *Anglo-Italian Bank v. Davies*, 9 Ch. D. 275; *Ex parte Evans*, 13 Ch. D. 252; *Salt v. Cooper*, 16 Ch. D. 544; *Smith v. Cowell*, 6 Q. B. D. 75; *Wells v. Kilpin*, L. R. 18 Eq. 298.

(*g*) *Re Coney*, 29 Ch. D. 993.

(*h*) *Westhead v. Riley*, 25 Ch. D. 413.

(*i*) *Fuggle v. Bland*, 11 Q. B. D. 711. See, also, *Macnicoll v. Parnell*, 35 W. R. 773; *Tyrrell v. Paynton*, (1895) 1 Q. B. 202; *Re M'Nulty*, 31 L. R. Ir. 391.

(*k*) *Bryant v. Bull*, 10 Ch. D. 153; *Oliver v. Lowther*, 28 W. R. 381; *Webb v. Stenton*, 11 Q. B. D. 518.

(*l*) *Bryant v. Bull*, *supra*; *Re Peace & Waller*, 24 Ch. D. 405; *Bird v. Argent*, 4 T. L. R. 12. But see *Hood-Barra v. Heriot*, 64 L. J. Q. B. 717, C. A.; *Whitaker v. Cohen*, 69 L. T. 451.

(*m*) *Waddell v. Waddell*, (1892) P. 226.

(*n*) *O'Donovan v. Goggin*, 30 L. R. Ir. 579.

(*o*) *Re Whiteley*, 56 L. T. 846.

(*p*) Ord. LIV. r. 12 (b).

affidavit stating that the judgment is unsatisfied, and that the debtor either has no property otherwise seizable, or that such property is practically inconvenient to be reached, and setting out the nature of and the debtor's interest in the property in respect of which a receiver is required.

A party to the action is only rarely appointed as the receiver.

The Court will, where necessary, grant an injunction in aid of the execution, to restrain the debtor dealing with the property to the prejudice of the creditor (*g*).

In case of the appointment being opposed or objected to by a third person, the best course is for the matter to be referred to the master for him to determine the question in dispute and report thereon to the Court or judge who referred the matter (*r*).

The effect of the appointment of a receiver is to put the creditor, by means of the receiver, into the same position as the debtor with respect to the beneficial interest in the subject-matter of the appointment (*s*).

The rights and duties of a receiver appointed by way of equitable execution are the same as when he is appointed for other purposes.

(*g*) *Oliver v. Lowther*, 28 W. R. 381; *Archer v. Archer* [1886], W. N. 66.

(*r*) *Walmesley v. Mundy*, 13 Q. B. D. 807.

(*s*) *Whitworth v. Gaugain*, 3 Ha. 426.

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CHAPTER IV.

CHARGING ORDERS, STOP ORDERS, ETC.

BESIDES the various remedies mentioned in the last chapter, the assignee has the right, as well as the necessity often, to obtain various orders whereby he may secure to himself the enjoyment of the full benefits sought to be transferred to him by means of the assignment of the chose in action.

Amongst such are charging orders, stop orders, and the once prevalent but now obsolete process known as *distringas*.

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 (a).

The sections referred to in this rule provide as follows:—

“And be it enacted, that if any person against whom any judgment shall have been entered up in any of her Majesty’s Superior Courts at Westminster shall have 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, it shall be lawful for a judge of one of the superior

(a) Ord. XLVI. r. 1.

Courts, on the application of any judgment creditor, to order that such stock, funds, annuities, or shares, or such of them or such part thereof respectively as he shall think fit, shall stand charged with the payment of the amount for which judgment shall have been so recovered, and interest thereon, and such 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" (b).

"And in order to prevent any person against whom judgment shall have been obtained from transferring, receiving, or disposing of any stock, funds, annuities, or shares, hereby authorized to be charged for the benefit of the judgment creditor under an order of a judge, be it further enacted, that every order of a judge charging any government stock, funds, or annuities, or any stock or shares in any public company, under this Act, shall be made in the first instance *ex parte*, and without any notice to the judgment debtor, and shall be an order to show cause only; and such order, if any government stock, funds, or annuities standing in the name of the judgment debtor in his own right, or in the name of any person in trust for him, is to be affected by such order, shall restrain the Governor and Company of the Bank of England from permitting a transfer of such stock in the meantime and until such order shall be made absolute, or discharged; and if any stock or shares of or in any public company, standing in the name of the judgment debtor in his own right, or in the name of any person in trust for him, is or are to be affected by any such order, shall in like manner restrain such public company from permitting a transfer thereof; and that if, after

(b) 1 & 2 Vict. c. 110, s. 14.

notice of such order to the person or persons to be restrained thereby, or in case of corporations to any authorized agent of such corporation, and before the same order shall be discharged or made absolute, such corporation or person or persons shall permit any such transfer to be made, then and in such case the corporation or person or persons so permitting such transfer shall be liable to the judgment creditor for the value or amount of the property so charged and so transferred, or such part thereof as may be sufficient to satisfy his judgment; and that no disposition of the judgment debtor in the meantime shall be valid or effectual as against the judgment creditor; and further, that, unless the judgment debtor shall within a time to be mentioned in such order show to a judge of one of the said superior Courts sufficient cause to the contrary, the said order shall, after proof of notice thereof to the judgment debtor, his attorney or agent, be made absolute: provided that any such judge shall, upon the application of the judgment debtor, or any person interested, have full power to discharge or vary such order, and to award such costs upon such application as he may think fit" (c).

And by 3 & 4 Vict. c. 82, it is provided:—

"The aforesaid provisions of the said Act (*i.e.*, 1 & 2 Vict. c. 110, s. 14) shall be deemed and taken to extend to the interest of any judgment debtor, whether in possession, remainder, or reversion, and whether vested or contingent as well in any such stocks, funds, annuities, or shares as aforesaid as also in the dividends, interest, or annual produce of any such stock, funds, annuities or shares; and whenever any such judgment debtor shall have any estate, right, title or interest, vested or contingent, in possession, remainder, or reversion, in, to, or out of any such stocks, funds, annuities or shares as

aforesaid, which now are, or shall hereafter be, standing in the name of ~~the~~ *Accountant-General of the Court of Chancery*, or the Accountant-General of the Court of Exchequer, or in, to, or out of the dividends, interest, or annual produce thereof, it shall be lawful for such judge to make any order as to such stock, funds, annuities, or shares, or the interest, dividends, or annual produce thereof, in the same way as if the same had been standing in the name of a trustee of such judgment debtor: Provided always, 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 the Accountant-General of the Court of Exchequer, or as to the interest, dividends, or annual produce thereof, shall prevent the Governor and Company of the Bank of England, or any public company, from permitting any transfer of such stocks, funds, annuities, or shares, or payment of the interest, dividends, or annual produce thereof, in such manner as the Court of Chancery or the Court of Exchequer respectively may direct, or 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" (d).

So that by this section the provisions of the former statute (1 & 2 Vict. c. 110, s. 14) are extended to contingent interests in stock and the dividends of such stock, and also to stock, funds, &c., in Court.

It is further to be observed that, by later enactments, the Paymaster-General has been substituted for the Accountant-General of the Court of Chancery (e). The stock, &c., must be standing for the beneficial

(d) 3 & 4 Vict. c. 82, s. 1. 6; and the Supreme Court of
 (e) See Chancery Funds Act, Judicature (Funds, &c.) Act,
 1872 (35 & 36 Vict. c. 44), ss. 4, 1883 (46 & 47 Vict. c. 29), s. 2.

interest of the debtor, and not merely in trust for another (*f*).

Application for a charging order is usually made by summons (*g*) in the Queen's Bench Division before a master in chambers, who will make an order *nisi*, upon an application *ex parte*, supported by affidavit setting forth the title of the applicant to the debt, and that of the debtor to the property sought to be charged.

The order *nisi* must be served on the company, bank, &c., whose shares are charged, and also upon the judgment debtor or his solicitor (*h*). The application for the order *absolute* must be made to a judge in chambers (*i*).

If the order is made absolute, it takes effect as from the date of the order *nisi* (*j*).

Every summons by a separate judgment creditor of a partner for an order charging his interest in the partnership property and profits under sect. 23 of the Partnership Act, 1890 (53 & 54 Vict. c. 39), and for such other orders as are thereby authorized to be made, shall be served in the case of a partnership other than a cost book company on the judgment debtor and on his partners, or such of them as are within the jurisdiction, or in the case of a cost book company on the judgment debtor and the purser of the company; and such service shall be good service on all the partners or on the cost book company as the case may be, and all orders made on such summons shall be similarly served.

The section in the Partnership Act, 1890, referred to in the above rule, runs as follows:—

“(1.) After the commencement of this Act a writ of

(*f*) *Cooper v. Griffin*, (1892) 1 Q. B. 740; *Howard v. Sadler*, (1893) 1 Q. B. 1; *S. W. Loan & Discount Co. v. Robertson*, 8 Q. B. D. 17; *Cragg v. Taylor*, L. R. 2 Ex. 131; *Horne v. Pountain*, 23 Q. B. D. 264; *Re Cathcart*, (1893) 1 Ch. 466.

(*g*) Dan. Ch. Prac. 939.

(*h*) 1 & 2 Vict. c. 110, s. 15; *Re Paragon, &c. Co.*, 8 Jur. N. S. 11.

(*i*) Ord. LIV. r. 12; *Finney v. Hinde*, 4 Q. B. D. 102.

(*j*) *Haly v. Barry*, L. R. 3 Ch. 452.

execution shall not issue against any partnership property except ~~on a judgment against~~ the firm.

“(2.) The High Court, or a judge thereof, or the Chancery Court of the County Palatine of Lancaster, or a County Court, may, on the application by summons of any judgment creditor of a partner, 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, and may by the same or a subsequent order appoint a receiver of that partner’s share of profits (whether already declared or accruing), and of any other money which may be coming to him in respect of the partnership, and direct all accounts and inquiries, and give all other orders and directions which might have been directed or given if the charge had been made in favour of the judgment creditor by the partner, or which the circumstances of the case may require.

“(3.) The other partner or partners shall be at liberty at any time to redeem the interest charged, or in case of a sale being directed, to purchase the same.

“(4.) This section shall apply in the case of a cost book company as if the company were a partnership within the meaning of this Act.

“(5.) This section shall not apply to Scotland (k).”

The application is made by summons to a judge in chambers, asking for a charge upon the debtor’s said partnership interest, and for the appointment, as receiver, of the person named in the summons.

The summons and order thereon must be served on the judgment debtor, and on all of the partners who are within the jurisdiction.

If the debtor is likely to dispose of his interest pending the hearing of the summons, an application may be made *ex parte* supported by an affidavit to restrain him from so doing (l).

(k) 53 & 54 Vict. c. 39, s. 23.

(l) Ann. Prac. [1899], 646.

Every application which shall be made by any partner of the judgment debtor under the same section shall be made by summons, and such summons shall be served in the case of a partnership other than a cost book company on the judgment creditor and on the judgment debtor, and on such of the other partners as shall not concur in the application, and as shall be within the jurisdiction, or in the case of a cost book company on the judgment creditor and on the judgment debtor and on the purser of the company, and such service shall be good service on all the partners or on the cost book company as the case may be, and all orders made on such summons shall be similarly served (m).

In the following rules of this order the expression "company" includes the Governor and Company of the Bank of England and any other public company, whether incorporated or not, and the expression "stock" includes shares, securities, and *dividends thereon* (n).

Any person claiming to be interested in any stock standing in the books of a company may, on an affidavit by himself or his solicitor, in the Form No. 27 in Appendix B. with such variations as circumstances may require, and on filing the same in the Central Office with a notice in the Form No. 22 in the same Appendix, with such variations as circumstances may require, and on procuring an office copy of the affidavit and a duplicate of the filed notice authenticated by the seal of the Central Office, serve the office copy and duplicate notice on the company (o).

There shall be appended to the affidavit a note stating the person on whose behalf it is filed, and to what address notices (if any) for that person are to be sent (p).

All such notices shall be deemed to have been duly sent if sent through the post by a prepaid letter

(m) Ord. XLVI. r. 1s.

(n) *Id.* r. 3.

(o) Rule 4.

(p) Rule 5.

directed to that person at the address so stated or at any such substituted address as hereinafter mentioned, whether the person to whom the notice is sent is living or not (*g*).

The address so stated may, from time to time, be altered by the person by or on whose behalf the affidavit is filed, but no notice sent by post before the alteration to the address originally given or for the time being substituted therefor shall be affected by any subsequent alteration. Any such alteration of address may be made by service of a memorandum thereof on the company in the manner required for service of a notice under this order (*r*).

The service of the office copy of the affidavit and of the duplicate of the filed notice shall have the same force and effect against the company as a writ of *distringas* duly issued under the Act 5 Vict. c. 5, s. 5, would have had against the Bank of England if these rules had not been made (*s*).

A notice filed under rule 4 of this order may at any time be withdrawn by the person by whom or on whose behalf it was given on a written request signed by him, or its operation may be made to cease by an order to be obtained by motion on notice or by petition or by summons at chambers duly served by any other person claiming to be interested in the stock sought to be affected by the notice (*t*).

If, whilst a notice filed under rule 4 of this order continues in force, the company on whom it is served receive from the person in whose name the stock specified in the notice is standing, or from some person acting on his behalf or representing him, a request to permit the stock to be transferred or to pay the divi-

(*g*) Rule 6.
 (*r*) Rule 7.
 (*s*) Rule 8. And see *Wilkins*
v. Sibley, 4 Giff. 446; *Re Blakesley*,

23 Ch. D. 549; *Re Prynn*, 53
 L. T. 465; *Hobbs v. Wayet*, 36
 Ch. D. 256.
 (*t*) Ord. XLVI. r. 9.

dends thereon, the company shall not, by force or in consequence of the service of the notice, be authorized without the order of the Court or a judge, to refuse to permit the transfer to be made or to withhold the payment of the dividends for more than eight days after the date of the request (u).

If the person who files a notice under rule 4 of this order desires to correct the description of the stock referred to in the filed notice, he may file an amended notice and serve on the company a duplicate thereof sealed with the seal of the Central Office, and in that case the service of the notice shall be deemed to have been made on the day on which the amended duplicate is so served (v).

STOP ORDERS.

Where any moneys or securities are in Court to the general credit of any cause or matter, or to the account of any class of persons, and an order is made to prevent the transfer or payment of such moneys or securities, or any part thereof, without notice to the assignee of any person entitled in expectancy or otherwise to any share or portion of such moneys or securities, the person by whom any such order shall be obtained on the shares of such moneys or securities affected by such order shall be liable, at the discretion of the Court or a judge, to pay any costs, charges, and expenses which, by reason of any such order having been obtained, shall be occasioned to any party to the cause or matter, or any persons interested in any such moneys or securities (w).

Any person presenting a petition or taking out a summons for any such order as aforesaid shall not be required to serve such petition or summons upon the

(u) Ord. XLVI. r. 10.

(v) Rule 11.

(w) Rule 12.

parties to the cause or matter, or upon the persons interested in such parts of the moneys or securities as are not sought to be affected by any such order (*x*).

A stop order may be obtained in the Chancery Division without first obtaining a charging order in the particular division in which judgment was obtained: and even though the fund has not actually been paid into Court, although ordered so to be paid in (*y*).

The application for a stop order may generally be made by summons (*z*); or by petition in particular cases (*a*). Upon the application, evidence of the title of the assignor generally must be forthcoming (*b*).

PROCEEDINGS UNDER THE TRUSTEE ACT, 1893.

All proceedings in the High Court commenced under the Trustee Act, 1893 (in this order called "the Act"), shall be assigned to the Chancery Division of the Court (*c*).

All applications under the Act may be made by petition except as otherwise provided under Order LV. (*d*).

Any of the following applications under the Trustee Act, 1893, may be made by summons:—

- (a) An application for the appointment of a new trustee with or without a vesting or other consequential order.
- (b) An application for a vesting order or other order consequential on the appointment of a new

(*x*) Rule 13.

(*y*) *Shaw v. Hudson*, 48 L. J. Ch. 689.

(*z*) *Wrench v. Wynne*, 17 W. R. 198; *Waleh v. Wason*, 22 W. R. 676.

(*a*) *Re Day's Trusts*, 49 L. T. 499; *Re Toogood*, 56 L. T. 703.

(*b*) *Wood v. Vincent*, 4 Beav. 419; *Quarman v. Williams*, 5 Beav.

133.

(*c*) Ord. LIVb. r. 1.

(*d*) *Id.* r. 2.

trustee, whether the appointment is made by the Court or a judge, or out of Court.

- (c) An application for a vesting or other consequential order in any case where a judgment or order has been given or made for the sale, conveyance, or transfer of any land or stock [or the suing for or recovering any chose in action].
- (d) An application relating to a fund paid into Court in any case [coming within the provisions of rule 2 of this order] (c).

An application under sect. 44 of the Act may be made by the trustees authorized to dispose of the land as in the said section mentioned (d).

By the Trustee Act, 1893, power is given to the Court to sanction a trustee with powers of sale, &c., disposing of land or minerals separately. Any such trustee, with such sanction previously obtained, may, unless forbidden by the instrument creating the trust, from time to time, without any further application to the Court, so dispose of such land or minerals. Nothing in the section derogates from any power which a trustee may have under the Settled Land Acts, 1882 to 1890, or otherwise (e).

“(1.) Where a trustee desires to make a lodgment in Court under section forty-two of the Act, he shall make and file an affidavit intituled in the matter of the trust (described so as to be distinguishable) and of the Act, and setting forth:—

- (a) A short description of the trust and of the instrument creating it.
- (b) The names of the persons interested in and entitled to the money or securities, and their places of residence to the best of his knowledge and belief.

(c) Ord. LV. r. 13a.

(d) Ord. LIVs. r. 3.

(e) Trustee Act, 1893, s. 44.

- (e) His submission to answer all such inquiries relating to the application of the money or securities paid into Court, as the Court or judge may make or direct.
- (d) The place where he is to be served with any petition, summons, or order or notice of any proceeding relating to the money or securities.

"Provided that if the fund consists of money or securities being, or being part of, or representing a legacy or residue to which an infant or person beyond seas is absolutely entitled, and on which the trustee has paid the legacy duty, or on which no duty is chargeable, the trustee may make the lodgment (without an affidavit) on production of the Inland Revenue certificate in manner prescribed by the Supreme Court Funds Rules for the time being in force.

"(2.) Where the lodgment in Court is made on affidavit—

- (a) the person who has made the lodgment shall forthwith give notice thereof, by prepaid letter through the post, to the several persons whose names and places of residence are stated in his affidavit as interested in or entitled to the money or securities lodged in Court ;
- (b) no petition or summons relating to the money or securities shall be answered or issued unless the petitioner or applicant has named therein a place where he may be served with any petition or summons, or notice of any proceeding or order relating to the money or securities or the dividends thereof :
- (c) service of any application in respect of the money or securities shall be made on such persons as the Court or judge may direct" (f).

Applications to deal with funds lodged in Court

under the Act shall be intituled in the same manner as the affidavit or request on which the funds were lodged. All other applications under the Act, not made in any pending cause or matter, shall be intituled in the matter of the trust (described so as to be distinguishable) and of the Act. Every petition or summons for a vesting order, or the appointment of a person to convey, shall state the section or sections of the Act under which it is proposed that the order shall be made (g).

The Trustee Act, 1893, provides that trustees, or the majority of trustees, having in their hands or under their control money or securities belonging to a trust, may pay the same into the High Court; and the same shall, subject to Rules of Court, be dealt with according to the orders of the High Court (h).

(g) Ord. LIV. r. 4A.

(h) Trustee Act, 1893, s. 42.
Cp. Trustee Relief Act, 1847
(10 & 11 Vict. c. 96), s. 1. For
the practice under the Trustee

Relief Acts, see Morgan, 56—61;
D. C. P. 2065—85; D. C. F.
pp. 884—889; Seton, 1010—1016;
Ann. Pract. [1899], 761.

CHAPTER V.

PROCEDURE IN THE COUNTY COURT.

Most of the rights and remedies exercisable by an assignee, and by the other parties concerned in an assignment of a chose in action, may be equally enforced in the County Court.

By virtue of the Judicature Act, 1873, similar powers to those of the High Court are conferred upon the County Court. The interpleader remedy given to debtors, trustees, &c. by sect. 25 (6) of that Act is also available in the County Court (*a*). The party applying for interpleader must apply to the registrar within five days of the service of the summons for a summons against the assignor or other claimant. The application must be supported by affidavit stating that the applicant claims no interest in the subject-matter in dispute, &c., and is willing to submit to the order, &c. of the Court, and at the same time copies of this affidavit for the plaintiff and the claimant must be filed with the registrar (*b*). On filing this affidavit, &c., or subsequently to the issue of the interpleader summons, the defendant may pay the debt or money, or bring the chose in action, &c. into Court to abide its decision (*c*).

Upon the registrar being satisfied upon the above matters, the trial will be adjourned pending the

(*a*) Judicature Act, 1873, s. 89; County Court Rules [1889], Ord. XXVII. r. 13A.
 (*b*) C. C. R. Ord. XXVII. r. 13A (2).
 (*c*) *Id.* r. 13A (6).

hearing of the interpleader for which an early day will be appointed, and notice, &c. thereof given by him to all parties concerned (d).m.cn

Provisions are similarly made whereby the claimant must deliver particulars of his title, &c. to the subject-matter in the action, and copies thereof will be sent by the registrar to the other parties (e).

But the interpleader issue may still be tried by consent, or by the direction of the judge without consent, though the claimant has not filed the particulars of his claim, &c. (e). Discovery and inspection apply to these proceedings as far as possible (f).

And further, similar provisions are made as to trial of the issue, barring claim, &c., as obtain in the corresponding proceedings in the High Court (g).

ATTACHMENT OF DEBTS.

Garnishee proceedings are also available in the County Court.

A judgment creditor may apply to the judge or registrar of the County Court for an order that the judgment debtor or any other person be orally examined as to what debts are owing to the judgment debtor, and for the production of any books or documents (h).

The judgment creditor may then file with the registrar an affidavit stating that the judgment debt is unsatisfied, and setting forth the names and addresses of the persons who owe money to the judgment debtor, together with the respective amounts of such debts,

(d) C. C. R. Ord. XXVII.
r. 13A (4).

(e) *Id.* r. 13 (5).

(f) *Id.* r. 13 (8).

(g) *Id.* r. 13 (7b), (7c), (8).
And see Ann. C. C. Prac. I. 146
—148.

(h) C. C. R. [1889], Ord. XXV.
r. 52.

and that the same are within the jurisdiction of the Court (*i*); if without the jurisdiction, similar steps must be taken in the garnishee's Court, coupled with filing therein a certificate of the judgment or order made in the judgment creditor's Court (*j*). This affidavit will be sufficient if it states on information and belief that the said person or persons are so indebted to the judgment debtor.

The garnishee or garnishees are thereupon summoned to show cause (*k*); the summons must generally be served personally on the garnishee (*l*), unless upon a firm or company (*m*).

If the garnishee pays the amount into Court five clear days before the return day, he will be free from all costs incurred by the judgment creditor (*n*).

Similar provisions as to the determination of the liability by trial, and enforcement of orders, &c., are made as apply in the High Court (*o*).

It was formerly held that a garnishee had no right of appeal against the order fixing him with liability as he was not actually an original party to the proceedings (*p*); but by the County Courts Act, 1888, a right of appeal is afforded to any party in any action or matter, including a garnishee (*q*).

COMMITTAL.

The Debtors Act, 1869, gives power of committal to prison for default in payment in compliance with an

(i) C. C. R. Ord. XXVI. r. 1.	Ord. XXV. r. 1. See, also, Ord. XXVI. rr. 11, 12, 14.
(j) <i>Id.</i> r. 2.	(p) <i>Mason v. Wirral Highway Board</i> , 4 Q. B. D. 459. And see <i>Beswick v. Boffey</i> , 9 Ex. 315.
(k) Rules 1, 2.	(q) 61 & 62 Vict. c. 43, ss. 120, 186.
(l) Rule 3.	
(m) Rule 4.	
(n) Rule 5. See, also, rule 6.	
(o) Rules 7, 8, 9; C. C. R.	

order of the Court; and most of what has been herein-before stated with respect to this procedure applies to the County Court (r).

In such cases the proceedings are generally these: A judgment summons is issued and served upon the judgment debtor calling him to Court to show cause why he should not be committed to prison for default in complying with the Court order for payment. Upon the return day this summons imposes upon the *judgment creditor* the duty of proving to the satisfaction of the judge that the judgment debtor has, since the day of the judgment or order, had the means of complying with the judgment or order.

Upon the judge being satisfied, he may order a committal forthwith against the judgment debtor, sending him to prison for a term not exceeding six weeks; or he may, if he thinks fit, *suspend* the operation of such committal pending payment by the debtor by instalments or otherwise; but the judge cannot add to an order to pay by instalments, which he may make *instead of* committal, a direction that in default of payment the debtor do stand committed (s).

EQUITABLE EXECUTION AND RECEIVERS.

The remedies as to equitable execution generally, and by appointment of a receiver in particular, of the fund in question, are also within the jurisdiction of the County Court by virtue of the Judicature Act, 1873 (t). The appointment of a receiver in the County Court may be made before or at the trial, and whether asked for or not (u).

(r) Debtors Act, 1869, s. 5. B. D. 213.
 See *ante*, p. 376. (t) Judicature Act, 1873, s. 89.
 (s) *Stonor v. Fowle*, 13 Ap. Ca. (u) C. C. R. [1889], Ord. XIII.
 20; *R. v. Brompton C. C.*, 18 Q. r. 1.

The order may be made whenever it is just or convenient, but it should never be made unless there is some real hindrance to obtaining ordinary execution by ordinary legal means (x); and the amount of the judgment debt, the amount which could probably be obtained by a receiver, and the costs of such an appointment, amongst other things, should help to determine whether the appointment would be just and convenient (y).

(x) *Re Shephard*, 43 Ch. D. 131. (y) See R. S. C. Ord. L. r. 15A, r. 16.

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APPENDIX.

**Form 1.**

Letters of Attorney referred to on p. 42.

"KNOW YE that I do assign and attorn in my stead E., my dear partner, to demand and receive the same rent of forty shillings with the arrears, and by distress the same to levy in my name . . . and all things to do as to the same matter FOR HER OWN PROFIT as well as ever I myself could have done in my own proper person" (a).

Form 2.

A Letter of Attorney to recover and retaine a Debt.

BE it knowne, &c., That whereas W. P., &c., is bound unto J. R. by one Obligation or writing obligatory, bearing date the, &c., in the sum of three hundred pounds, to be paid to the said J. R. his executors or administrators, or some of them, with condition thereupon indorsed, as thereby appeareth, That now the said J. R. for and in consideration of a certaine summe of money to him the said J. R. by R. S. before-hand payd, hath bargained and sold, and by these presents doth bargain and sell unto the said R. S. his executors, administrators, and assignes the said Obligation, or writing obligatory, of three hundred pounds aforesaid, and also doth by these presents make, constitute, and in his place put the said R. S. his true and lawfull Attorney, in his name and place to aske, demand, levy, recover and receive of the said W. P. his heires, executors, and administrators, and every of them, the said three hundred pounds, in the said writing obligatory mentioned and expressed. And also doth by these presents give and grant unto the said R. S. his executors and administrators, and every of

(a) Dated 1309. Riley, Memorials of London, 68.

them, full and whole power and authority in the name of him the said J. R. to sue, arrest, imprison, and condemne, and ~~cause to be sued, arrested~~, imprisoned, and condemned, the sayd W. P. his heires, executors, and administrators, upon the same writing obligatory of 300. li. And also to procure judgement and execution to be had and made against the said W. P. his heires, executors, and administrators for the same three hundred pounds. And also for, and in the name of him the said J. R. to release and acquite the said W. P. his heires, executors, and administrators, and every or any of them for the same three hundred pounds. And release or releases, acquittance or acquittances to make, seale, and deliver unto them, and every or any of them of the same sum of three hundred pound, and of every or any part thereof. And one attorney or moe for the doing of the premisses to make and the same at his pleasure to revoke, and new in their place to substitute, and to doe, performe, execute all and singular things which shall be expedient or necessary concerning the premisses, so fully, as hee the said J. R. might or could doe the same being personally present at the doing thereof. And further the said J. R. doth by these presents give and grant unto the said R. S. his executors and administrators, good and lawful authority to receive, retaine and keepe to his and their owne proper use and behoofe the said sum of three hundred pounds, in the said Obligation mentioned, without any accompt to be rendered to him the said J. R. his executors or administrators, for the same, or any part thereof. And the said J. R. for himselfe, his executors and administrators, and every of them doth by these presents covenant, grant, promise, and agree, to, and with the said R. S. his executors and administrators, and every of them, that he the said J. R. his executors and administrators, and every of them shall and will justifie, allow, ratifie, and performe all and whatsoever he the said R. S. his heires, executors and administrators, shall lawfully doe or cause to be done, in, or about the premisses. And that neither he the sayd J. R. his heires, executors nor administrators, nor any of them, will revoke, nor make voyd this letter of Atturney, nor any authority thereby given to him the said R. S. And that the said J. R. hath not heretofore released, nor made voyd the said Obligation, nor the said sum of three hundred pounds therein contained, nor any part thereof: nor hath done, nor suffered to be done, nor hereafter wil do, nor suffer or assent to be done any act or acts, thing or things, wherby the said summe of three hundred pounds, in the said obligation mentioned may not be recovered,

obtained, and had by the said R. S. his executors, administrators, or assigns, or some of them, according unto the true meaning hereof. And for the performance of all articles, covenants, grants, and agreements herein contained, he the said J. R. doth by these presents bind himselfe, his heires, executors, and administrators, and every of them to the said R. S. his executors and administrators, in foure hundred pounds of lawfull money, &c., to be payed to the said R. S. his executors and administrators. In witnesse, &c. (a).

Form 3.

Form of Letters Patent.

VICTORIA, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith :
To all to whom these presents shall come greeting :

Whereas John Smith, of 29 Perry Street, Birmingham, in the county of Warwick, Engineer, hath by his solemn declaration represented unto us that he is in possession of an invention for "Improvements in sewing machines," that he is the true and first inventor thereof, and that the same is not in use by any other person to the best of his knowledge and belief :

And whereas the said inventor hath humbly prayed that we would be graciously pleased to grant unto him (hereinafter together with his executors, administrators, and assigns, or any of them, referred to as the said patentee), our royal letters patent for the sole use and advantage of his said invention :

And whereas the said inventor hath by and in his complete specification particularly described the nature of his invention :

And whereas we being willing to encourage all inventions which may be for the public good, are graciously pleased to condescend to his request.

Know ye, therefore, that we, of our especial grace, certain knowledge, and mere motion, do by these presents, for us, our heirs, and successors, give and grant unto the said patentee our especial licence, full power, sole privilege, and authority, that the said patentee by himself, his agents, or licensees, and no others, may at all times hereafter during the term of years herein mentioned,

(a) West, Symbol [1647], sect. 521.

make, use, exercise and vend the said invention within our United Kingdom of Great Britain and Ireland, and Isle of Man, in such manner as to him or them may seem meet, and that the said patentee shall have and enjoy the whole profit and advantage from time to time accruing by reason of the said invention, during the term of fourteen years from the date hereunder written of these presents: and to the end that the said patentee may have and enjoy the sole use and exercise and the full benefit of the said invention, we do by these presents for us, our heirs and successors, strictly command all our subjects whatsoever within our United Kingdom of Great Britain and Ireland, and the Isle of Man, that they do not at any time during the continuance of the said term of fourteen years either directly or indirectly make use of or put in practice the said invention, or any part of the same, nor in anywise imitate the same nor make or cause to be made any addition thereto or subtraction therefrom, whereby to pretend themselves the inventors thereof, without the consent, licence or agreement of the said patentee in writing under his hand and seal, on pain of incurring such penalties as may be justly inflicted on such offenders for their contempt of this our Royal command, and of being answerable to the patentee according to law for his damages thereby occasioned: Provided that these our letters patent are on this condition, that, if at any time during the said term it be made to appear to us, our heirs, or successors, or any six or more of our Privy Council, that this our grant is contrary to law, or prejudicial or inconvenient to our subjects in general, or that the said invention is not a new invention as to the public use and exercise thereof within our United Kingdom of Great Britain and Ireland, and Isle of Man, or that the said patentee is not the first and true inventor thereof within this realm as aforesaid, these our letters patent shall forthwith determine, and be void to all intents and purposes, notwithstanding anything hereinbefore contained: Provided also, that if the said patentee shall not pay all fees by law required to be paid in respect of the grant of these letters patent, or in respect of any matter relating thereto at the time or times, and in manner for the time being by law provided: and also if the said patentee shall not supply or cause to be supplied, for our service all such articles of the said invention as may be required by the officers or commissioners administering any department of our service, in such manner, at such times, and at and upon such reasonable prices and terms as shall be settled in manner for the time being by law provided, then, and in any of the said cases, these our

letters patent, and all privileges and advantages whatever hereby granted, shall determine and become void, notwithstanding anything hereinbefore contained: Provided also, that nothing herein contained shall prevent the granting of licences in such manner and for such considerations as they may by law be granted: And lastly, we do by these presents for us, our heirs and successors, grant unto the said patentee that these our letters patent shall be construed in the most beneficial sense for the advantage of the said patentee. In witness whereof we have caused these our letters to be made patent this — one thousand eight hundred and — and to be sealed as of the — one thousand eight hundred and —

(Seal of Patent Office.)

Form 4.

Form of Marine Policy.

S.G. _____ £ _____ Delivered the _____ of _____ 186 . _____ No. _____	BE IT KNOWN that — as well in — own name, as for and in the name and names of all and every other person or persons to whom the same doth, may, or shall appertain, in part or in all, doth make assurance and cause — and them and every of them, to be insured, lost or not lost, at and from —, upon any kind of goods and merchandise, and also upon the body, tackle, apparel, ordnance, munition, artillery, boat, and other furniture, of and in the good ship or vessel called the —, whereof is master, under God for this present voyage, — or whosoever else shall go for master in the said ship, or by whatsoever other name or names the same ship, or the master thereof, is or shall be named or called, beginning the adventure upon the said goods and merchandises from the loading thereof aboard the said ship —, upon the said ship &c. —, and shall so continue and endure, during her abode there, upon the said ship, &c.; and further, until the said ship, with all her ordnance, tackle, apparel, &c., and goods and merchandises whatsoever, shall be arrived at — upon the said ship, &c., until she hath moored at anchor twenty- four hours in good safety, and upon the goods and merchandises until the same be there discharged and safely landed; and it shall be lawful for the said ship,

&c., in this voyage to proceed and sail to and touch and stay at any ports or places whatsoever without prejudice to this insurance. The said ship, &c., goods and merchandises, &c., for so much as concerns the assured, by agreement between the assured and assurers in this policy, are and shall be valued at —.

Touching the adventures and perils which we the assurers are contented to bear and do take upon us in this voyage, they are, of the seas, men-of-war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, surprisals, takings at sea, arrests, restraints and detentions of all kings, princes, and people of what nation, condition, or quality soever, barratry of the master and mariners, and of all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the said goods and merchandises and ship, &c., or any part thereof; and in case of any loss or misfortune it shall be lawful to the assured, their factors, servants, and assigns, to sue, labour, and travel for, in, and about the defence, safeguard, and recovery of the said goods and merchandises and ship, &c., or any part thereof, without prejudice to the insurance; to the charges whereof we, the assurers, will contribute each one according to the rate and quantity of his sum herein assured. And it is agreed by us, the insurers, that this writing or policy of assurance shall be of as much force and effect as the surest writing or policy of assurance heretofore made in Lombard Street, or in the Royal Exchange, or elsewhere in London. And so we, the assurers, are contented, and do hereby promise and bind ourselves, each one for his own part, our heirs, executors, and goods to the assured, their executors, administrators, and assigns, for the true performance of the premises, confessing ourselves paid the consideration due unto us for this assurance by the assured — at and after the rate of —.

IN WITNESS whereof, we the assurers have subscribed our names and sums assured in —.

N.B.—Corn, fish, salt, fruit, flour, and seed are warranted free from average, unless general, or the ship be stranded; sugar, tobacco, hemp, flax, hides, and skins are warranted free from average under five pounds per cent.; and all other goods, also the ship and freight, are warranted free from average under three pounds per cent. unless general, or the ship be stranded.

Form 5.*Form of Bill of Lading.*

SHIPPED IN GOOD ORDER AND CONDITION by — in and upon the good ship called the — whereof — is master for this present voyage and now riding at anchor in — and bound for — fifty casks of — being marked and numbered as in the margin weight and contents unknown and are to be delivered in the like good order and condition, the act of God, the Queen's enemies, pirates, robbers by land or sea but not pilferage, restraint of princes, rulers, or people, fire, jettison, barratry, the neglect and default of pilot, master, or crew in the navigation of the ship, and all and every the dangers and accidents of the seas, rivers, and navigation of whatever nature or kind excepted, unto — or to his assigns, they paying freight for the said goods, and all other conditions as per charterparty, with primage and average accustomed. The ship is not liable for leakage or breakage, loss or damage by heat, sweat, rust, or decay, unless occasioned by improper stowage or for any damage to any goods which is capable of being covered by insurance.

IN WITNESS whereof the master or purser of the said ship hath affirmed to — bills of lading all of this tenor and date, the one of which bills being accomplished, the other [—] to stand void.

Dated —.

Form 6.*Form of a Charterparty.*

IT IS THIS DAY MUTUALLY AGREED between A. B., owner of the good ship or vessel, called the — A 1 of the measurement of — tons or thereabouts, now in the port of — [or now at sea having sailed weeks ago], and C. D. on behalf of E. F., merchants; that the said ship being tight, staunch and strong, and every way fitted for the voyage shall with all convenient speed sail and proceed in the usual and customary manner with usual dispatch according to the custom of the port [or in regular turn] [or shall sail from — on or before the —] except in the case of accidents beyond the charterer's control to —, or so near thereunto as she may safely get, and there shall load from the factors of the said — a full and complete cargo, say about — tons not exceeding what she can

reasonably stow and carry, over and above her tackle, apparel, provisions, and furniture (the charterer's stevedore to be employed by the ship), and being so loaded shall therewith proceed to —, or so near thereunto as she may safely get and deliver the same in the usual and customary manner on being paid freight as follows: viz., — shillings per ton delivered (the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind soever during the said voyage, always excepted). The freight to be paid on unloading and right delivery of the cargo, running days are to be allowed the said merchant (if the ship is not sooner dispatched), for loading the said ship at —, and — days on demurrage over and above the said lying-days at £— per day, days of detention by ice not to be reckoned as lying-days. It is further agreed that the liability of the charterers shall cease as soon as the cargo is on board, but the owners of the ship to have an absolute lien on the cargo for all freight, dead freight, and demurrage. Penalty for non-performance of this agreement, £—.

Form 7.

Friendly Societies Act, 1896.

(i) *Nomination.*

— Friendly Society, registered pursuant to the Friendly Societies Act.

I hereby nominate —, of —, in the county of —, to receive the money payable at my death under the rules of the society above named.

Witness —.

(Signed) —.

Dated this — day of —, 18—.

(ii) *Revocation.*

I hereby revoke the nomination made by me in favour of —.

[Or, where written on same paper as nomination, I hereby revoke the above nomination.]

Witness —.

(Signed) —.

Dated this — day of —, 18—.

(iii) *Variation.*

I hereby vary the nomination made by me in favour of —, as follows:—

[*Or, where written on same paper as nomination, I hereby vary the above nomination as follows:—*]

I nominate — of —, in the county of —, to receive the money payable at my death as aforesaid in lieu of —.

Witness —.

(Signed) —.

Dated this — day of —, 18—.

Form 8.

Notice as to Stock under Order XLVI. (O. 46, r. 4).

To the [*here add the name of the company*].

TAKE NOTICE that the stock comprised in and now subject to the trusts of the [*settlement, will, &c.*] referred to in the affidavit to which this notice is annexed consists of the following (that is to say) [*here specify the stock*].

This notice is intended to stop the transfer of the stock only, and not the receipt of dividends [*or, the receipt of the dividends on the stock as well as the transfer of the stock*].

(Signed) A. B.

[*Note.*—This notice must in every case be signed by the deponent to the affidavit to which it is annexed; see Form 11, *infra*.]

Form 9.

Affidavit in support of Garnishee Order (O. 45, r. 1).

In the High Court of Justice, 18—, No. —.
— Division.

Between —, Judgment Creditor,
and
—, Judgment Debtor.

I, —, of —, the above-named judgment creditor [*or, solicitor for the above-named judgment creditor*], make oath and say as follows:—

1. By a judgment of the Court given in this action, and dated the — day of —, 18—, it was adjudged that I

[or, the above-named judgment creditor] should recover against the above-named judgment debtor — the sum of £—, ~~and costs to be taxed,~~ and the said costs were by a master's certificate dated the — day of —, 18—, allowed at £—.

2. The said — still remains unsatisfied to the extent of —, and interest amounting to £—.

3. *— is indebted to the judgment debtor —, in the sum of £— or thereabouts.

4. The said — is within the jurisdiction of this Court.

Sworn, &c.

[*Note.*—It is sufficient if paragraph 3 runs: "I am informed and verily believe that *A. B.* is indebted," &c., and it is not necessary to state the amount of the debt sought to be attached.

If garnishees are partners, the words should be "carry on business within the jurisdiction."]

* Name, address, and description of garnishee.

Form 10.

Affidavit on Interpleader (O. 57, r. 2).

I, —, of —, the defendant in the above action, make oath and say as follows:—

1. The writ of summons herein was issued on the — day of —, 18—, and was served on me on the — day of —, 18—.

2. The action is brought to recover —. The said — * in my possession, but I claim no interest therein.

3. The right to the said subject-matter of this action has been and is claimed † by one — who ‡ —.

4. I do not in any manner collude with the said —, or with the above-named plaintiff, but I am ready to bring into Court or to pay or dispose of the said — in such manner as the Court may order or direct.

Sworn, &c.

* "is" or "are."

† If claim in writing make the writing an exhibit.

‡ State expectation of suit, or that he has already sued.

Form 11.

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Affidavit as to Stock under Order XLVI. (O. 46, r. 4).

In the matter of [*here state the nature of the document comprising the stock, and add the date and other particulars, so far as known to the deponent, sufficiently to identify the document*];
and

In the matter of the Act of Parliament, 5 Vict. c. 5.

I, —, of —, make oath and say that according to the best of my knowledge, information, and belief, I am [*or, if the affidavit is made by the solicitor, A. B., of —, is*] beneficially interested in the stock comprised in the [*settlement, will, &c.*] above-mentioned, which stock, according to the best of my knowledge and belief, now consists of the stock specified in the notice hereto annexed.

This affidavit is filed on behalf of A. B., whose address is [*state address for service*].

Form 12.

Summons (General Form). (O. 54, r. 10.)

In the High Court of Justice, 18—.
— Division.

Between —, Plaintiff,
and
—, Defendant.

LET all parties concerned attend the judge [*or master*] in Chambers [*Central Office, Royal Courts of Justice, Strand, London*], on — day, the — day of —, 18—, at — o'clock in the — noon, on the hearing of an application on the part of —.

Dated the — day of —, 18—.

This summons was taken out by — of —, solicitor for —.

To —.

Form 13.**General Form of Originating Summons** (O. 54, r. 4B).

In the High Court of Justice,
 ——— Division.

18—.

If in the Chancery Division add the name of the judge to whom the matter is assigned.

If the question to be determined arises in the administration of an estate or a trust entitle it also in the matter of the estate or trust.

Between *A. B.*, Plaintiff,
 and
C. D., Defendant.

LET ——— of ———, in the county of ———, within eight days after service of this summons on him, inclusive of the day of such service, cause an appearance to be entered for him to this summons, which is issued upon the application of ——— of ———, in the county of ———, who claims to be [*state the nature of the claim*], ——— for the determination of the following questions: [*State the questions.*]

Dated the ———.

This summons was taken out by ———, solicitor for the above-named ———.

The defendant may appear hereto by entering appearance either personally or by solicitor at the Central Office, Royal Courts of Justice.

Form 14.**Notice of Appointment to hear Originating Summons**
(O. 54, r. 4D).

[*Title, &c., as in Form 13.*]

To [*insert the name of the defendant or respondent*]. Take notice that you are required to attend the judge [*or master*] in Chambers [*or at the Chambers of Mr. Justice ———*], [*or at the Admiralty Registry*] at the Royal Courts of Justice on ——— day of ———, 18—, at ——— o'clock in the ——— noon, for the hearing of the originating summons issued herein on the ——— day of ———, 18—, and that if you do not attend in person or by solicitor at the time and place mentioned, such order will be made and proceedings taken as the judge [*or master*] may think just and expedient.

(Signed) ———.

Solicitor for the Plaintiff [*or Applicant*].

Form 15.

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Form of Ex Parte Originating Summons.

18—. B. No. —.

In the High Court of Justice,
Chancery Division.

In the matter of *A. B.*, an infant [*Or, as may be*].

LET all parties concerned attend at the Chambers of Mr. Justice —, at the Royal Courts of Justice, Strand, Middlesex, at the time specified in the margin hereof, on the hearing of an application on the part of the above-named *A. B.*, an infant, by *C. D.* his next friend, that, &c.

This summons was taken out by — of — in the county of — [agents for —, of —, in the county of —], solicitors for the applicant.

Form 16.*Order charging Stock—Nisi (O. 46, r. 1).*

UPON hearing — and upon reading the affidavit of —, filed the — day of —, 18—, whereby it appears — that the plaintiff recovered a judgment against the defendant on the — day of —, 18—, for the sum of £— and £— costs, that the said defendant is still indebted to the plaintiff in the said sums so recovered, and that there is standing in —.

It is ordered that unless sufficient cause be shown to the contrary before the Judge in Chambers, Central Office, Royal Courts of Justice, Strand, London, on — day the — day of —, 18—, at — o'clock in the forenoon, the defendant's interest in the — so standing as aforesaid shall, and that it in the meantime do, stand charged with the payment of the above-mentioned amount due on the said judgment.

Dated the — day of —, 18—.

Form 17.**Order charging Stock—Absolute** (O. 46, r. 1).

Upon hearing — and upon reading the affidavit of —, filed the — day of —, 18—, and an order *nisi* made herein on the — day of —, 18—, reciting the affidavit of —, whereby it appeared that — *the plaintiff recovered a judgment against the defendant on the — day of —, 18—, for the sum of £— and £— costs, that the said defendant is still indebted to the plaintiff in the said sums so recovered, and that there is standing in —.*

It is ordered that the defendant's interest in the — so standing as aforesaid stand charged with the payment of the above-mentioned amount due on the said judgment.

Dated the — day of —, 18—.

Form 18.**Garnishee Order (Attaching Debt)** (O. 45, r. 1).

In the High Court of Justice, 18—.
 — Division.
 — in Chambers.

Between —, Judgment Creditor,
 and
 —, Judgment Debtor.
 —, Garnishee.

Upon hearing — and upon reading the affidavit of —, filed the — day of —, 18—, and —.

It is ordered that all debts owing or accruing due from the above-named garnishee to the above-named judgment debtor be attached to answer a judgment recovered against the said judgment debtor by the above-named judgment creditor in the High Court of Justice on the — day of —, 18—, for the sum of —, on which judgment the said sum of £— remains due and unpaid.

And it is further ordered that the said garnishee attend the — in Chambers, *Central Office, Royal Courts of Justice, Strand, London*, on — day the — day of —, 18—, at — o'clock in the — noon, on an application by the said judgment creditor, that the said garnishee pay the debt due from him to the said judgment debtor, or so much thereof as may be sufficient to satisfy the judgment [and that the costs of this application be —].

Dated the — day of —, 18—.

Form 19.

Garnishee Order (Absolute) (O. 45, r. 3).

UPON hearing the solicitors for the judgment creditor and the garnishee, and upon reading the affidavit of —, filed the — day of —, 18—, and the order nisi made herein, dated the — day of —, 18—, whereby it was ordered that all debts owing or accruing due from the above-named garnishee to the above-named judgment debtor should be attached to answer a judgment recovered against the said judgment debtor by the above-named judgment creditor in the High Court of Justice on the — day of —, 18—, for the sum of £—, on which judgment the said sum of £— remained due and unpaid.

It is ordered that the said garnishee do forthwith pay the said judgment creditor £—, the debt due from him to the said judgment debtor (or so much thereof as may be sufficient to satisfy the judgment debt), and that in default thereof execution may issue for the same [and that the costs of this application be —].

Dated the — day of —, 18—.

Form 20.

Order for Issue between Judgment Creditor and Garnishee
(O. 45, r. 4).

UPON hearing the solicitors for the judgment creditor and the garnishee, and reading the affidavit of —, and the order nisi herein, dated the — day of —, 18—.

It is ordered that the judgment creditor and the garnishee proceed to the trial of an issue wherein the said judgment creditor shall be plaintiff and the said garnishee shall be defendant, and that the question to be tried shall be whether the said garnishee was indebted to the judgment debtor in any and what amount at the time the said order nisi was served. And it is further ordered that the issue be prepared and delivered by the plaintiff therein within ten days from this date and be returned by the defendant therein within seven days and be tried at —, and that the question of costs and all further questions be reserved until the trial of the said issue.

Dated the — day of —, 18—.

Form 21.

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Order for Examination touching Means.

In the High Court of Justice,
 — Division.

18—.

Master in Chambers, —.

Between —, Judgment Creditor,
 and

—, Judgment Debtor.

UPON hearing the solicitor for the judgment creditor and the judgment debtor.

It is ordered that the above-named judgment debtor attend before one of the masters of the Supreme Court of Judicature at such time and place as such master may appoint, and be orally examined as to whether any and what debts are owing to him and whether he has any and what other property or means of satisfying the judgment signed herein; and that the said judgment debtor produce any books or other documents in his possession or power relating to the same before the said master at the time of the examination.

Dated, &c.

Form 22.*Receiver's Recognizance (O. 50, r. 16).*

—, of —, of —, and —, of —.

Mr. Justice —, the judge to whose Court this cause is attached, has approved of and allowed this recognizance.

Chief Clerk.

BEFORE our Sovereign Lady the Queen in her High Court of Justice personally appearing, do acknowledge themselves, and each of them doth acknowledge himself, to owe to — and —, two of the chief clerks of the Chancery Division, the sum of —, to be paid to the said — and —, or one of them, or the executors or administrators of them, or one of them, and unless they do pay the same, they, the said —, do grant, and each of them doth grant for himself, his heirs, executors, and administrators, that the said sum of — shall be levied, recovered, and received, of and from them and each of them, and of and from all and singular the manors, messuages, lands, tenements, and

hereditaments, goods and chattels, of them and each of them wheresoever the same shall or may be found. Witness our said Sovereign Lady Victoria, by the Grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, and so forth, at the Royal Courts of Justice, the — day of —, 18—.

Whereas, by an order of the High Court of Justice made in a cause wherein — are plaintiffs and — defendants, and dated the — day of —.

It was ordered that a proper person should be appointed to receive [or that upon the above bounden — first giving security he should be appointed receiver of] the rents and profits of the real estate, and to collect and get in the outstanding personal estate of — in the said order named. And whereas the judge to whom this cause is assigned hath [*approved of the said — as a proper person to be such receiver, and hath*] approved of the above bounden — and — as sureties for the said —, and hath also approved of the above-written recognizance with the under-written condition as a proper security to be entered into by the said — and — pursuant to the said order and the general orders of the said Court in that behalf, and in testimony of such approbation the chief clerk of the said judge hath signed an allowance in the margin hereof.

Now the condition of the above-written recognizance is such that if the said — do and shall duly account for all and every the sum and sums of money which he shall so receive on account of the rents and profits of the real estate, and in respect of the personal estate of the said —, at such periods as the said judge shall appoint, and do and shall duly pay the balances which shall from time to time be certified to be due from him as the said Court or judge hath directed or shall hereafter direct, then the above recognizance shall be void and of none effect, otherwise the same is to be and remain in full force and virtue.

Taken and acknowledged by the above-named, &c.

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