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EQUITY
UNDER THE
JUDICATURE ACT,
OR THE
Relation of Equity to Common Law:
WITH AN
APPENDIX,
CONTAINING THE
HIGH COURT OF JUDICATURE ACT, 1873,
AND THE
Schedule of Rules.

BY
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WERE UNDERTAKEN AND DELIVERED.
INTRODUCTION.

At no period has the progress of Equity Jurisprudence as a science been so rapid and so remarkable as during the last few years of its separate existence; the Reports for those years contain a series of valuable judgments delivered by Lord Hatherley, Lord Cairns, Lord Selborne, Sir G. Giffard, Sir J. Rolt, Sir W. James, Sir J. Wickens and Sir G. Jessel, which have settled, expounded and illustrated most of the important doctrines of Equity in so clear and admirable a manner that it is now a comparatively easy task to define and expound, in a few lines, doctrines and principles which formerly, after pages of descriptions and the citation of numerous cases, could only be pronounced to be still unsettled and obscure.

I may refer for examples to the following judgments, from each of which (to apply the words of Justice Willes in Hinton v. Sparkes, L. R., 3 C. P. 166) a fuller view of the cases and of the principles and reasoning applicable to them is to be found than in all the books put together:—Richards v. Delbridge (p. 32, post), as to the creation of voluntary trusts; Hall v. Hall (p. 37), as to the effect of the absence of a power of revocation from a voluntary settlement;
Topham v. Duke of Portland (p. 54), on the connection between fraud on a power and the general doctrine of undue influence; Earl of Aylesford v. Morris (p. 57), on unconscionable bargains; Beall v. Smith (p. 66), on the Chancellor's jurisdiction in lunacy; Andrews v. Salt (p. 70), on the jurisdiction over infants; Bain v. Sadler (p. 93), as to equitable assets; Fothergill v. Rowland (p. 115), as to the specific performance of contracts; Mackenzie v. Coulson (p. 143) and Druiff v. Lord Parker (pp. 125, 147), as to rescission and rectification of instruments for mistakes; and Elmer v. Creasy (p. 188), as to the discretion of the Court in enforcing discovery and production of documents.

It seemed that a sketch of modern Equity Jurisprudence which should bring into the foreground these admirable expositions of the most prominent features, and illustrate by their aid the general outlines of the subject, might not at this moment be superfluous.

My first aim, therefore, has been, not to enter into such details of administration as the Adjustment of Partnership Accounts, the Redemption and Foreclosure of Mortgages, Conversion, Reconversion, Election, and the like, for which the volumes of Lindley, Fisher, Seton and Lewin, are scarcely sufficient, but to point out concisely the principles on which all the doctrines depend, and to illustrate
fully the rules of Equity which commonly cause
difficulty to the uninitiated, such for example as
Rescission of Contracts by mistake, and the alleged
violation of the Statute of Frauds in connection
with Specific Performance.

Secondly, I have attempted the task of defining
the relation of Equity to the Common Law.

The practical effect of the Supreme Court of
Judicature Act is to reunite Equity to the Common
Law, from which it has been for 500 years un-
naturally divorced, to strengthen and harmonize by
such reunion its concurrent jurisdiction, and to sim-
plify and consolidate its exclusive jurisdiction.

This, therefore, seemed a fitting opportunity to
endeavour to trace the points of contact between the
two systems; and I have accordingly attempted to
trace back the tangled streams of Equity juris-
prudence to their two diverse and principal sources—
(1) the trust, the creature of Equity, which has
developed into a system of administration altogether
separate from the rights and remedies of Common
Law; (2) the powerful preventive and mandatory
procedure of the Court of Chancery which induced
suitors for the sake of the remedy to bring Common
Law rights into Chancery.

I have attempted thus to bring out the relation
which Equity bears to the Common Law, and to
show that it never did and will not now assume in any way to alter and correct the principles and doctrines of the Common Law on common law subjects; that it has indeed undertaken the humbler function of occupying a region (that of trusts) which the Common Law had left unoccupied; and that in cases where it did and does provide a remedy which the Common Law could not provide, it always respected and followed the Common Law in all points except the remedy.

I have, I hope, succeeded in showing that, while in respect of trusts (which are thus outside the Common Law) Equity has, no doubt, assumed to carry out the "intention of the parties" to "leave no wrong without a remedy," and to "soften the rigour of the Common Law"; in respect of all other rights Equity follows the Common Law, and only gives greater effect to its remedies. So that the fusion which is now decreed by the Legislature will not be a mingling in confusion of two systems differing in principle as well as in procedure, but a reuniting, in one connected framework, of two systems, which by the accidents of history have for five hundred years been separated from each other to the disadvantage of both.
$$\text{TABLE OF CASES.}$$

<table>
<thead>
<tr>
<th>A.</th>
<th>PAGE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Abinger (Lord) v. Ashton</td>
<td>116</td>
</tr>
<tr>
<td>Ackroyd v. Smithson</td>
<td>102</td>
</tr>
<tr>
<td>Adams v. Fisher</td>
<td>185</td>
</tr>
<tr>
<td>Agar v. Fairfax</td>
<td>20</td>
</tr>
<tr>
<td>Aldrich v. Cooper</td>
<td>97</td>
</tr>
<tr>
<td>Alexander v. Alexander</td>
<td>54</td>
</tr>
<tr>
<td>Aley v. Belcher</td>
<td>54</td>
</tr>
<tr>
<td>Amherst's Trusts</td>
<td>78</td>
</tr>
<tr>
<td>Ancaster (Duke of) v. Mayer</td>
<td>96</td>
</tr>
<tr>
<td>Andrews v. Salt</td>
<td>70</td>
</tr>
<tr>
<td>Anon.</td>
<td>87</td>
</tr>
<tr>
<td>Antrobus v. Smith</td>
<td>34</td>
</tr>
<tr>
<td>Ashburner v. Macquaire</td>
<td>99</td>
</tr>
<tr>
<td>Att.-Gen. v. Colney Hatch Lunatic Asylum</td>
<td>173</td>
</tr>
<tr>
<td>Ayles v. Cox</td>
<td>129</td>
</tr>
<tr>
<td>Aylesford (Earl of) v. Morris</td>
<td>57</td>
</tr>
<tr>
<td>Aylwin's Trusts</td>
<td>78</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>B.</th>
<th>PAGE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bain v. Sadler</td>
<td>93</td>
</tr>
<tr>
<td>Barclay v. Messenger</td>
<td>128</td>
</tr>
<tr>
<td>Bassett v. Nosworthy</td>
<td>64</td>
</tr>
<tr>
<td>Batchelor (Re)</td>
<td>85</td>
</tr>
<tr>
<td>Bateson v. Gosling</td>
<td>107</td>
</tr>
<tr>
<td>Baysprole v. Collins</td>
<td>36</td>
</tr>
<tr>
<td>Beall v. Smith</td>
<td>66, 68</td>
</tr>
<tr>
<td>Beckett v. Buckley</td>
<td>61</td>
</tr>
<tr>
<td>Bellairs v. Bellairs</td>
<td>101</td>
</tr>
<tr>
<td>Betts v. Burch</td>
<td>131</td>
</tr>
<tr>
<td>Beyfus v. Bullock</td>
<td>36, 162</td>
</tr>
<tr>
<td>Billson v. Crofts</td>
<td>78</td>
</tr>
<tr>
<td>Birch Wolfe v. Birch</td>
<td>171</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>C.</th>
<th>PAGE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bloomer v. Spittle</td>
<td>144</td>
</tr>
<tr>
<td>Boyse v. Rossborough</td>
<td>193</td>
</tr>
<tr>
<td>Briggs v. Penny</td>
<td>46</td>
</tr>
<tr>
<td>Brown v. Gellatly</td>
<td>103</td>
</tr>
<tr>
<td>Browne’s Will (Re)</td>
<td>79</td>
</tr>
<tr>
<td>Brownsword v. Edwards</td>
<td>183</td>
</tr>
<tr>
<td>Brunswick (Duke of) v. King of Hanover</td>
<td>158</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th></th>
<th>PAGE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Caballero v. Henty</td>
<td>62</td>
</tr>
<tr>
<td>Carrow v. Ferrier</td>
<td>163</td>
</tr>
<tr>
<td>Carver v. Pinto Leite</td>
<td>188</td>
</tr>
<tr>
<td>Charlton v. Durham (Earl of)</td>
<td>103</td>
</tr>
<tr>
<td>Chesterfield v. Janssen</td>
<td>57</td>
</tr>
<tr>
<td>Chichester v. Coventry</td>
<td>100</td>
</tr>
<tr>
<td>--- v. Donegall</td>
<td>182</td>
</tr>
<tr>
<td>City of London Brewery case</td>
<td>173</td>
</tr>
<tr>
<td>Clark v. School Board for London</td>
<td>19</td>
</tr>
<tr>
<td>Clover v. Royden</td>
<td>19</td>
</tr>
<tr>
<td>Codrington v. Lindsay 101, 102</td>
<td>170, 182</td>
</tr>
<tr>
<td>Colborne and Strawbridge (Ex parte)</td>
<td>64</td>
</tr>
<tr>
<td>Commissioners of Sewers v. Glass</td>
<td>138</td>
</tr>
<tr>
<td>Cooper v. Phibs</td>
<td>36</td>
</tr>
<tr>
<td>Cornish v. Clark</td>
<td>45</td>
</tr>
<tr>
<td>Cowbridge Rail. (Re)</td>
<td>61</td>
</tr>
<tr>
<td>Cowes v. Gale</td>
<td>127</td>
</tr>
<tr>
<td>Cragoe v. Jones</td>
<td>107</td>
</tr>
<tr>
<td>TABLE OF CASES.</td>
<td></td>
</tr>
<tr>
<td>-----------------</td>
<td></td>
</tr>
<tr>
<td><strong>Crampton v. Varna Rail.</strong></td>
<td>117, 120</td>
</tr>
<tr>
<td><strong>Craven v. Brady</strong></td>
<td>74</td>
</tr>
<tr>
<td><strong>Crossley v. Lightowler</strong></td>
<td>173</td>
</tr>
<tr>
<td><strong>Cuddee v. Rutter</strong></td>
<td>113</td>
</tr>
<tr>
<td><strong>De la Touche's Settlements</strong></td>
<td>150</td>
</tr>
<tr>
<td><strong>Dering v. Winchelsea (Earl of)</strong></td>
<td>14, 15, 105</td>
</tr>
<tr>
<td><strong>Dixon v. Holden</strong></td>
<td>6</td>
</tr>
<tr>
<td><strong>Dolphin v. Aylward</strong></td>
<td>36</td>
</tr>
<tr>
<td><strong>Druiff v. Lord Parker</strong></td>
<td>125, 147</td>
</tr>
<tr>
<td><strong>Dugdale v. Dugdale</strong></td>
<td>95</td>
</tr>
<tr>
<td><strong>Duncombe v. Greenacre</strong></td>
<td>82</td>
</tr>
<tr>
<td><strong>Dyer v. Dyer</strong></td>
<td>27</td>
</tr>
<tr>
<td><strong>Dyke's Estate (Re)</strong></td>
<td>151</td>
</tr>
<tr>
<td><strong>Edwards (Ex parte)</strong></td>
<td>19</td>
</tr>
<tr>
<td><strong>— (Re)</strong></td>
<td>78</td>
</tr>
<tr>
<td><strong>Elibank (Lady) v. Montolieu</strong></td>
<td>82, 83</td>
</tr>
<tr>
<td><strong>Elliot v. Merriman</strong></td>
<td>89</td>
</tr>
<tr>
<td><strong>Elliott's Trusts (Re)</strong></td>
<td>40</td>
</tr>
<tr>
<td><strong>Ellis v. Barker</strong></td>
<td>60</td>
</tr>
<tr>
<td><strong>— v. Silber</strong></td>
<td>161</td>
</tr>
<tr>
<td><strong>Ellis's Trusts</strong></td>
<td>77</td>
</tr>
<tr>
<td><strong>Ellison v. Ellison</strong></td>
<td>76</td>
</tr>
<tr>
<td><strong>Elmer v. Creasy</strong></td>
<td>186, 188</td>
</tr>
<tr>
<td><strong>Erskine v. Adeane</strong></td>
<td>90</td>
</tr>
<tr>
<td><strong>Evans v. Bremridge</strong></td>
<td>165</td>
</tr>
<tr>
<td><strong>Eyre v. Countess of Shaftesbury</strong></td>
<td>69</td>
</tr>
<tr>
<td><strong>Fells v. Read</strong></td>
<td>114</td>
</tr>
<tr>
<td><strong>Ferguson v. Gibson</strong></td>
<td>92</td>
</tr>
<tr>
<td><strong>Fletcher v. Ashburner</strong></td>
<td>102</td>
</tr>
<tr>
<td><strong>Flight v. Booth</strong></td>
<td>128</td>
</tr>
<tr>
<td><strong>Forbes v. Moffatt</strong></td>
<td>105</td>
</tr>
<tr>
<td><strong>Fothergill v. Rowland</strong></td>
<td>18, 115, 119, 122</td>
</tr>
<tr>
<td><strong>Fox v. Mackreth</strong></td>
<td>49</td>
</tr>
<tr>
<td><strong>France v. France</strong></td>
<td>106</td>
</tr>
<tr>
<td><strong>Garth v. Colton</strong></td>
<td>171, 172</td>
</tr>
<tr>
<td><strong>— v. Townsend</strong></td>
<td>151</td>
</tr>
<tr>
<td><strong>Gibbins v. Eyden</strong></td>
<td>97</td>
</tr>
<tr>
<td><strong>Giffard v. Williams</strong></td>
<td>21</td>
</tr>
<tr>
<td><strong>Girdlestone v. N. B. Mercantile Insurance Co.</strong></td>
<td>179</td>
</tr>
<tr>
<td><strong>Gladstone v. Mesnus Boy</strong></td>
<td>158</td>
</tr>
<tr>
<td><strong>Glenorchy (Lord) v. Bosville</strong></td>
<td>38, 39</td>
</tr>
<tr>
<td><strong>Goldsmid v. Tunbridge Wells Commissioners</strong></td>
<td>173</td>
</tr>
<tr>
<td><strong>Gourley v. Plimsoll</strong></td>
<td>180, 183</td>
</tr>
<tr>
<td><strong>Graham v. Johnson</strong></td>
<td>145</td>
</tr>
<tr>
<td><strong>Great Western Rail. v. Tucker</strong></td>
<td>188</td>
</tr>
<tr>
<td><strong>Green v. Wynn</strong></td>
<td>107</td>
</tr>
<tr>
<td><strong>Guest v. Cowbridge Rail.</strong></td>
<td>61</td>
</tr>
<tr>
<td><strong>Hall v. Hall</strong></td>
<td>37</td>
</tr>
<tr>
<td><strong>Hamilton v. Hector</strong></td>
<td>70</td>
</tr>
<tr>
<td><strong>Hammersley v. De Biel</strong></td>
<td>45</td>
</tr>
<tr>
<td><strong>Harding v. Glyn</strong></td>
<td>37</td>
</tr>
<tr>
<td><strong>— (Ex parte)</strong></td>
<td>59</td>
</tr>
<tr>
<td><strong>Hardman v. Elham</strong></td>
<td>185</td>
</tr>
<tr>
<td><strong>Harris v. Pepperell</strong></td>
<td>183, 146</td>
</tr>
<tr>
<td><strong>Harrison v. Good</strong></td>
<td>173</td>
</tr>
<tr>
<td><strong>Harvey v. Hall</strong></td>
<td>154</td>
</tr>
<tr>
<td><strong>Hatton v. Heywood</strong></td>
<td>61</td>
</tr>
<tr>
<td><strong>Haygarth v. Wearing</strong></td>
<td>175</td>
</tr>
<tr>
<td><strong>Heathcote v. North Staffordshire Rail. Co.</strong></td>
<td>122, 158</td>
</tr>
<tr>
<td><strong>Helling v. Lumley</strong></td>
<td>8</td>
</tr>
<tr>
<td><strong>Hensman v. Fryer</strong></td>
<td>95</td>
</tr>
<tr>
<td><strong>Hepworth v. Hepworth</strong></td>
<td>27, 99</td>
</tr>
<tr>
<td><strong>Herman v. Hodges</strong></td>
<td>114</td>
</tr>
<tr>
<td><strong>Hervey v. Smith</strong></td>
<td>167</td>
</tr>
<tr>
<td><strong>Higgs v. Dorkis</strong></td>
<td>106</td>
</tr>
<tr>
<td><strong>Hill v. Hibbit</strong></td>
<td>193</td>
</tr>
<tr>
<td><strong>— v. Lane</strong></td>
<td>43</td>
</tr>
<tr>
<td><strong>— v. Wilson</strong></td>
<td>175</td>
</tr>
<tr>
<td><strong>Hindson v. Weatherill</strong></td>
<td>52</td>
</tr>
<tr>
<td><strong>Hinton v. Sparkes</strong></td>
<td>132</td>
</tr>
<tr>
<td><strong>Holden (Henry's) case</strong></td>
<td>63</td>
</tr>
<tr>
<td><strong>Holland (Ex parte) Re Heneage</strong></td>
<td>87</td>
</tr>
<tr>
<td><strong>Hopgood v. Parkin</strong></td>
<td>41</td>
</tr>
<tr>
<td>TABLE OF CASES.</td>
<td>PAGE</td>
</tr>
<tr>
<td>----------------</td>
<td>------</td>
</tr>
<tr>
<td>Howard v. Earl of Shrewsbury</td>
<td>166</td>
</tr>
<tr>
<td>Huguenin v. Baseley</td>
<td>51, 56</td>
</tr>
<tr>
<td>Hulme v. Tenant</td>
<td>76</td>
</tr>
<tr>
<td>Huntingdon v. Huntingdon</td>
<td>151</td>
</tr>
<tr>
<td>Hurst v. Beach</td>
<td>27</td>
</tr>
</tbody>
</table>

I.

| Imperial Land Co. of Marseille (Re) | 64 |
| Inchbald v. Robinson | 173 |

J.

| James v. Lichfield | 62 |
| Jenner v. Jenner | 56 |
| Johnson v. Gallagher | 86 |
| Jones v. Bradley | 47, 178 |
| — v. Gregory | 193 |
| — v. Lloyd | 67 |

K.

| Kaye (Re) | 69 |
| Keech v. Sandford | 49 |
| Kekewich v. Manning | 34 |
| Kellock’s case | 207 |
| Kelsey v. Kelsey | 164 |
| Kent v. Riley | 36 |

L.

| Lake v. Craddock | 28 |
| Lamb v. Eames | 37 |
| Lancefield v. Iggulden | 95 |
| Latham v. Chartered Bank of India | 18 |
| Lea v. Whitaker | 132 |
| Leech v. Schweder | 173 |
| Lehman v. M’Arthur | 8 |
| Le Neve v. Le Neve | 63 |
| Lester v. Foxcroft | 123, 124 |
| Levy v. Crichton | 36 |
| Lilford v. Keck | 97 |

| Liverpool Marine Credit Co. v. Hunter | 158 |
| Lloyd v. Attwood | 36 |
| — v. Lloyd | 101 |
| — v. Leasing | 115 |
| Lockett v. Lockett | 186 |
| London and N. W. Rail. v. Lancashire and Yorkshire Rail | 167 |
| Lovett v. Lovett | 193 |
| Lumley v. Wagner | 118 |
| Lyon v. Home | 91 |

M.

| Mackay v. Douglas | 36 |
| Mackenzie v. Coulsdon | 143 |
| Mackreth v. Symmons | 97 |
| M’Cormick v. Grogan | 46, 48 |
| Magee v. Lavell | 132 |
| Martin v. Fowning | 160 |
| Maxfield v. Burton | 62 |
| Miller v. Knox | 155 |
| Milroy v. Lord | 33 |
| Minet v. Morgan | 184 |
| Morgan v. Matteson | 31, 32 |
| Morley v. White | 160 |
| Murray v. Lord Elibank | 82 |

N.

| Nokes v. Gandy | 160 |
| Norris (Ex parte) | 41 |
| Northern Assam Tea Co. (Re) | 64 |

O.

| Owen v. Delamere | 88 |
| Owens v. Dickenson | 87 |
| Oxford’s (Earl of) case | 7, 43, 157 |

P.

| Palmer v. Flower | 101 |
| Peachey v. Earl of Somerset | 130 |
TABLE OF CASES.

<table>
<thead>
<tr>
<th>Case</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pearce v. Pearce</td>
<td>184</td>
</tr>
<tr>
<td>Peek v. Gurney</td>
<td>90</td>
</tr>
<tr>
<td>Pemberton v. Barnes</td>
<td>106</td>
</tr>
<tr>
<td>Penn v. Lord Baltimore</td>
<td>157</td>
</tr>
<tr>
<td>Perrin v. Blake</td>
<td>38</td>
</tr>
<tr>
<td>Perry-Herrick v. Attwood</td>
<td>36</td>
</tr>
<tr>
<td>Phillips v. Miller</td>
<td>62</td>
</tr>
<tr>
<td>Picard v. Hine</td>
<td>86</td>
</tr>
<tr>
<td>Pickering v. Stephenson</td>
<td>164</td>
</tr>
<tr>
<td>Portland (Duke of) v. Top- ham</td>
<td>55</td>
</tr>
<tr>
<td>Powell Duffryn Steam Coal Co. v. Taff Vale Rail. Co.</td>
<td>118</td>
</tr>
<tr>
<td>Powell v. Smith</td>
<td>142</td>
</tr>
<tr>
<td>Pride v. Bubb</td>
<td>77</td>
</tr>
<tr>
<td>Prole v. Soady</td>
<td>80, 81</td>
</tr>
<tr>
<td>Prudential Assurance Co. v. Thomas</td>
<td>161</td>
</tr>
<tr>
<td>Pusey v. Pusey</td>
<td>114</td>
</tr>
<tr>
<td>Pye (Ex parte)</td>
<td>34, 100</td>
</tr>
<tr>
<td>Sharp v. Fry</td>
<td>86</td>
</tr>
<tr>
<td>Shaw v. Foster</td>
<td>110</td>
</tr>
<tr>
<td>Silk v. Prime</td>
<td>93, 95</td>
</tr>
<tr>
<td>Skilbeck v. Hilton</td>
<td>144</td>
</tr>
<tr>
<td>Slim v. Croucher</td>
<td>43</td>
</tr>
<tr>
<td>Small v. Attwood</td>
<td>141</td>
</tr>
<tr>
<td>Smith v. Brownlow</td>
<td>169</td>
</tr>
<tr>
<td>v. Weguelin</td>
<td>158</td>
</tr>
<tr>
<td>Somerset (Duke of) v. Cook- son</td>
<td>114</td>
</tr>
<tr>
<td>South Blackpool Hotel Co.'s case</td>
<td>64</td>
</tr>
<tr>
<td>Spencer (Earl) v. Peek</td>
<td>191</td>
</tr>
<tr>
<td>Springhead Spinning Co. v. Riley</td>
<td>6</td>
</tr>
<tr>
<td>Stanford v. Hurlstone</td>
<td>19</td>
</tr>
<tr>
<td>Stapilton v. Stapilton</td>
<td>56</td>
</tr>
<tr>
<td>Steele v. Metropolitan Rail. Co.</td>
<td>158</td>
</tr>
<tr>
<td>Stock v. M.A.voyy</td>
<td>27</td>
</tr>
<tr>
<td>Strathmore (Countess of) v. Bowes</td>
<td>73</td>
</tr>
<tr>
<td>Streatfield v. Streatfield</td>
<td>102</td>
</tr>
<tr>
<td>Stretton v. G. W. R. Co.</td>
<td>6, 171</td>
</tr>
<tr>
<td>Sturgis v. Champneys</td>
<td>82</td>
</tr>
<tr>
<td>Sumner v. Powell</td>
<td>151</td>
</tr>
<tr>
<td>Sutton v. Wilders</td>
<td>41</td>
</tr>
<tr>
<td>T.</td>
<td></td>
</tr>
<tr>
<td>Talbot (Earl) v. Hope Scott</td>
<td>166</td>
</tr>
<tr>
<td>Tayleur (Re)</td>
<td>192</td>
</tr>
<tr>
<td>Taylor v. Meads</td>
<td>77</td>
</tr>
<tr>
<td>Tidd v. Lister</td>
<td>84</td>
</tr>
<tr>
<td>Tilley v. Thomas</td>
<td>127</td>
</tr>
<tr>
<td>Tollett v. Tollett</td>
<td>151</td>
</tr>
<tr>
<td>Topham v. Duke of Port- land</td>
<td>53, 54</td>
</tr>
<tr>
<td>(Lady Mary) v. Duke of Portland</td>
<td>55</td>
</tr>
<tr>
<td>Torrance v. Bolton</td>
<td>139</td>
</tr>
<tr>
<td>Townshend (Marquis of) v. Stangroom</td>
<td>125</td>
</tr>
<tr>
<td>Trappes v. Meredith</td>
<td>78</td>
</tr>
<tr>
<td>Tyler v. Yates</td>
<td>57</td>
</tr>
<tr>
<td>U.</td>
<td></td>
</tr>
<tr>
<td>United States v. Prie?leau</td>
<td>158</td>
</tr>
<tr>
<td>TABLE OF CASES.</td>
<td>PAGE</td>
</tr>
<tr>
<td>-----------------</td>
<td>------</td>
</tr>
<tr>
<td><strong>V.</strong></td>
<td></td>
</tr>
<tr>
<td>Vane (Earl) v. Rigden</td>
<td>91</td>
</tr>
<tr>
<td>Vansittart v. Vansittart</td>
<td>113</td>
</tr>
<tr>
<td>Vaughan v. Vanderstegen</td>
<td>86</td>
</tr>
<tr>
<td>Victoria Permanent Building Society (Re)</td>
<td>136</td>
</tr>
<tr>
<td><strong>W.</strong></td>
<td></td>
</tr>
<tr>
<td>Walker v. Brewster</td>
<td>173</td>
</tr>
<tr>
<td>Walter v. Selfe</td>
<td>173</td>
</tr>
<tr>
<td>Ward v. Wolverhampton Waterworks Co.</td>
<td>128</td>
</tr>
<tr>
<td>—— (Re)</td>
<td>101</td>
</tr>
<tr>
<td>Warde v. Warde</td>
<td>72</td>
</tr>
<tr>
<td>Warrick v. Queen’s College</td>
<td>168, 182</td>
</tr>
<tr>
<td>Wason v. Wason</td>
<td>84</td>
</tr>
<tr>
<td>Wellesley v. Duke of Beaufort</td>
<td>65</td>
</tr>
<tr>
<td>White v. Barker</td>
<td>187</td>
</tr>
<tr>
<td>—— v. White</td>
<td>150</td>
</tr>
<tr>
<td><strong>X.</strong></td>
<td></td>
</tr>
<tr>
<td>Whitney v. Smith</td>
<td>50</td>
</tr>
<tr>
<td>Whittle v. Henning</td>
<td>85</td>
</tr>
<tr>
<td>Wilcocks v. Wilcocks</td>
<td>29, 100</td>
</tr>
<tr>
<td>Wilkinson v. Jobers</td>
<td>106</td>
</tr>
<tr>
<td>Wilson v. Northampton and Banbury Junction Railway</td>
<td>116</td>
</tr>
<tr>
<td>Wolverhampton and Walsall Rail. Co. v. London and North Western Rail. Co.</td>
<td>118</td>
</tr>
<tr>
<td>Wooldridge v. Norris</td>
<td>134</td>
</tr>
<tr>
<td>Woollam v. Hearn</td>
<td>125</td>
</tr>
<tr>
<td>Wyatt v. Coope</td>
<td>57</td>
</tr>
<tr>
<td>Wycombe Railway v. Donnington Hospital</td>
<td>137</td>
</tr>
<tr>
<td><strong>Y.</strong></td>
<td></td>
</tr>
<tr>
<td>Yates v. Jack</td>
<td>173</td>
</tr>
<tr>
<td>York (Mayor of) v. Pilkinson</td>
<td>169</td>
</tr>
</tbody>
</table>
TABLE OF CONTENTS.

CHAPTER I.

"EQUITY Follows THE LAW." PAGE

There is no conflict in principle between Equity and Common Law  1, 2
Where there is no trust and the Common Law remedy is not inadequate, Equity follows the Law  2
Meaning of the phrase "Equity follows the Law"  2
Equity, a portion of law accidentally severed from the Common Law  3
The separate jurisdiction dates from Richard II., five hundred years ago  3, 4
The Court of Chancery then provided a better remedy for matters remedial at Common Law  5
Court of Chancery a defence against intimidation  5, 6
Different opinions of three Lord Chancellors as to the relation of Equity towards the Common Law  7
"Hard cases" no longer make bad law in Chancery  8
ADMINISTRATIVE Equity follows the analogy of law as to trusts and equitable interests, so far as the law provides an analogy  9, 10
And follows the law as to other rights while it adjusts them  10
REMEDIAL Equity follows legal principles as to contracts and torts, except where there is a trust, but in proper cases gives better relief  10, 11
Trusts are outside the Common Law, e.g., equitable assets  11
Rights not outside the Common Law Equity does not alter but adjusts, e.g., marshalls assets and surety's rights  13
MAXIMS apparently opposed to the rule that Equity follows the Law (1) Equity is equality; (2) suffers no wrong to be without a remedy; (3) he who seeks equity must come with clean hands; (4) must do equity  14—16
A Court of Equity is not a Court of honour  17
## TABLE OF CONTENTS.

**CHAPTER I.**—continued.

<table>
<thead>
<tr>
<th>Equation has exclusive jurisdiction over trusts—concurrent jurisdiction over other rights by giving a different remedy</th>
<th>17</th>
</tr>
</thead>
<tbody>
<tr>
<td>Fusion partly effected already by Common Law questions coming into Equity</td>
<td>17—19</td>
</tr>
<tr>
<td>Lord Cairns and Sir John Holt's Act</td>
<td>19, 20</td>
</tr>
<tr>
<td>Inconvenience of double jurisdiction partition, <em>Giffard v. Williams</em> (L.R., 5 Ch. 546)</td>
<td>21</td>
</tr>
<tr>
<td>Inviolability of the trust reasserted by <em>Judicature Act</em></td>
<td>22</td>
</tr>
</tbody>
</table>

---

**CHAPTER II.**

**TRUSTS.**

- Trusts differ in principle from Common Law rights | 23 |
- As to them Equity regards the substance and not the letter merely | 23 |
- *Æquitas agit in personam* | 24 |
- Trusts exemplify the maxim, "Equity suffers no right to be without a remedy" | 24 |
  - (a) Express trusts are within sect. 7 of *Statute of Frauds* | 25 |
  - (b) *Resulting uses and trusts* | 26 |
- **TRUSTS IMPLIED or constructive are excepted by sect. 8** | 25 |
  - (a) *Purchase in the name of another,* *Dyer v. Dyer* (1 White & Tudor) | 27 |
  - (b) *Joint tenancy of partnership property a constructive tenancy in common in Equity* | 27 |
  - *Lake v. Craddock* (1 White & Tudor) | 28 |
  - Maxim "Equity is equality," illustrated | 28 |
  - Clause in mortgage where mortgagees are trustees | 29 |
  - (c) *Presumption in favour of performance of obligation,* *Wilcocks v. Wilcocks* (Rep. 2 White & Tudor) | 29, 100 |
- **EXPRESS TRUSTS** | 30 |
- *Voluntary trust, when created* | 30 |
- Difference between transaction amounting to—
  - (a) "This is henceforth yours," coupled with the most complete transfer, legal or equitable, that can be made, *Ellison v. Ellison* (1 White & Tudor) | 31 |
  - (b) "I will give this property to you," and equivalent expressions | 33—35 |
### TABLE OF CONTENTS.

**CHAPTER II.**—continued.

<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Trust depending on representation amounting to engagement</td>
<td>35</td>
</tr>
<tr>
<td>Voluntary trust of reality or personalty when void as against creditors (embarrassment of settlor)</td>
<td>35</td>
</tr>
<tr>
<td>Voluntary trusts of reality when void as against purchasers, 27 Eliz. c. 4 (Fraudulent Conveyances)</td>
<td>36</td>
</tr>
<tr>
<td>Voluntary deed, without powers of revocation, when voidable by settlor</td>
<td>37</td>
</tr>
<tr>
<td>Creation of trust by precatory words, Harding v. Glyn (Rep. 2 White &amp; Tudor)</td>
<td>37</td>
</tr>
<tr>
<td>Power in nature of a trust</td>
<td>37</td>
</tr>
<tr>
<td>Creation of trust by executory instrument</td>
<td>37</td>
</tr>
<tr>
<td>Lord Glenorchy v. Bosville (1 White &amp; Tudor)</td>
<td>38</td>
</tr>
<tr>
<td>Trustee Relief Act, costs of unnecessary payment into Court</td>
<td>39</td>
</tr>
<tr>
<td>Trustee Act, appointment of new trustees</td>
<td>40</td>
</tr>
<tr>
<td>Lord St. Leonards and Lord Cranworth's Acts</td>
<td>40</td>
</tr>
<tr>
<td>Responsibility of trustees</td>
<td>41</td>
</tr>
</tbody>
</table>

### CHAPTER III.

**EQUITABLE FRAUD.**

<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Meaning of EQUITABLE FRAUD (equitable waste)</td>
<td>42</td>
</tr>
<tr>
<td>Fraud subject of concurrent jurisdiction, even where money damages are adequate relief</td>
<td>43</td>
</tr>
<tr>
<td>(1) Fraud as it affects TRUSTS PROPER—</td>
<td></td>
</tr>
<tr>
<td>(a) Representations or engagements amounting to trusts</td>
<td>45</td>
</tr>
<tr>
<td>Representations on another person’s marriage</td>
<td>45</td>
</tr>
<tr>
<td>Secret trust, fraud on testator</td>
<td>46</td>
</tr>
<tr>
<td>Will fraudulently obtained</td>
<td>47</td>
</tr>
<tr>
<td>Using Statute of Frauds fraudulently</td>
<td>47, 48</td>
</tr>
<tr>
<td>(b) Constructive fraud of trustee benefiting by trust</td>
<td>49</td>
</tr>
<tr>
<td>(2) Fraud as it affects persons in FIDUCIARY POSITION</td>
<td>50</td>
</tr>
<tr>
<td>Undue influence, Huguenin v. Basely (1 White &amp; Tudor)</td>
<td>50, 51</td>
</tr>
<tr>
<td>Solicitor and client</td>
<td>52</td>
</tr>
<tr>
<td>Solicitor taking gift by deed or will prepared by himself</td>
<td>52, 53</td>
</tr>
<tr>
<td>Fraud upon a power is undue influence, Aleyn v. Belcher (1 White &amp; Tudor)</td>
<td>53</td>
</tr>
</tbody>
</table>
# TABLE OF CONTENTS

## CHAPTER III.—continued.

(2) Fraud as it affects persons, &c.—continued.

| Topham v. Duke of Portland | 54 |
| Family arrangements and compromises | 56 |
| Dealings with reversioners (31 Vict. c. 4) | 57 |

(3) Fraud in respect of *equitable assignments*, Ryall v. Rowles (2 White & Tudor) | 57, 58 |

| Fraud by concealment. What is notice? | 59 |
| Assignment of policies (30 & 31 Vict. c. 144) | 59 |

A mortgagee of real estate not postponed for not giving notice | 60 |

| Judgments (27 & 28 Vict. c. 112) not to be secret charges | 61 |
| Taking with actual notice of another's title | 63 |
| Notice of lease when constructive notice of its contents | 62 |
| Want of inquiry constructive receipt of notice | 63 |

Le Neve v. Le Neve (2 White & Tudor) | 63 |

Equitable assignments are subject to equities | 63 |

Qui prior est tempore potior est jure, Rice v. Rice (2 Drew. 73) | 64 |

Legal estate where equities are equal, Bassett v. Nosworthy (2 White & Tudor) | 64 |

## CHAPTER IV.

**LUNATICS, INFANTS, MARRIED WOMEN.**

Protective Equity in favour of persons under disability | 65 |

(1) **LUNATICS:**

| Jurisdiction in Lunacy | 66 |
| Persons of unsound mind not found a lunatic | 67 |

(2) **INFANTS:**

| Jurisdiction to protect property of infants | 69 |
| Ward of Court, Eyre v. Contess Shaftesbury (2 White & Tudor) | 69 |

| Payment of money into Court makes Court a trustee | 69 |
| Parental responsibility recognized in Equity | 70 |
| Forfeiture of parental rights | 70, 71 |

| Custody of Infants Act (2 & 3 Vict. c. 54), extended by 36 & 37 Vict. c. 14 | 71 |
| Infants Settlement Act (18 & 19 Vict. c. 43) | 72 |
CHAPTER IV.—continued.

(3) MARRIED WOMEN:

Jurisdiction over property of married women where express trust

Marital right recognized in Equity, Lady Strathmore v. Bowes

Where there is trust property, Equity softens rigour of Common Law

(a) Trusts of settlement enforced
1. Separate use
2. Forfeiture of husband's interest on bankruptcy
3. Covenant to settle after-acquired property
(b) Court a trustee independently of settlement

Equity to a settlement out of trust or equitable choses in action if not reduced into possession by husband

E.g. out of legacy

Maxim: "He who comes into Equity must do Equity"

Equity to a Settlement as against husband's assignee

out of life interest

Equitable chose in action in reversion, merger for purpose of depriving wife of interest not permitted

Married Women's Property Act

Liability of wife for her own engagements, Vaughan v. Vanderstegen (2 Drewry)

Is separate property of married women equitable assets?

CHAPTER V.
ADMINISTRATION.

Concurrent jurisdiction for purpose of adjustment or in case of trust

Executor when a trustee?

Equity follows rules of Law: actio personalis moritur

Executor may prefer or retain debt

Except in case of equitable assets

Order of application of assets

Exoneration

Marshalling, Aldrich v. Cooper (2 White & Tudor)

In favour of legacies against vendor's lien

No marshalling against Mortmain Act
**TABLE OF CONTENTS.**

**CHAPTER V.—continued.**

<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Payment of legacies</td>
<td>99</td>
</tr>
<tr>
<td>Provision for contingent debts and liabilities (22 &amp; 23 Vict. c. 35</td>
<td>99</td>
</tr>
<tr>
<td><em>Ademption</em> of legacies</td>
<td>99</td>
</tr>
<tr>
<td>Rule against double portions</td>
<td>100</td>
</tr>
<tr>
<td>Ademption distinguished from satisfaction and performance</td>
<td>100</td>
</tr>
<tr>
<td>Chichester v. Coventry (L. R., 2 H. L.)</td>
<td>100</td>
</tr>
<tr>
<td>E.g., for purchase in army: purchase abolished</td>
<td>101</td>
</tr>
<tr>
<td>Equitable doctrine of <em>election</em></td>
<td>101</td>
</tr>
<tr>
<td>Distribution of residue</td>
<td>102</td>
</tr>
<tr>
<td>Land converted into personality, Fletcher v. Ashburner, and Ackroyd v. Smithson (1 White &amp; Tudor)</td>
<td>102</td>
</tr>
<tr>
<td>Duties of trustee and executor to convert <em>perishable property</em></td>
<td>102</td>
</tr>
<tr>
<td>Carrying on trade</td>
<td>103</td>
</tr>
<tr>
<td><em>Joining in receipts</em> of co-executor or co-trustee</td>
<td>103</td>
</tr>
<tr>
<td>Jurisdiction as to account, mortgages, apportionment, <em>contribution</em>, partnership, partition, companies</td>
<td>104—106</td>
</tr>
<tr>
<td>Sureties’ release by indulgence to debtor</td>
<td>106—107</td>
</tr>
</tbody>
</table>

**CHAPTER VI.**

**SPECIFIC PERFORMANCE.**

<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Remedial Equity</td>
<td>108</td>
</tr>
<tr>
<td>Trust between vendor and purchaser accounts for some equitable rules as to contracts</td>
<td>109—112</td>
</tr>
<tr>
<td>Inadequacy of damages is foundation of relief by way of specific performance</td>
<td>112</td>
</tr>
<tr>
<td>Court will grant specific performance—</td>
<td></td>
</tr>
<tr>
<td>(a) If better than damages</td>
<td>113</td>
</tr>
<tr>
<td>Not of contracts as to personality, lending of money, &amp;c.</td>
<td>113, 114</td>
</tr>
<tr>
<td>Pusey v. Pusey; Duke of Somerset v. Cookson (1 White &amp; Tudor)</td>
<td>114</td>
</tr>
<tr>
<td>(b) Where specific performance can be carried into effect by the Court</td>
<td>117</td>
</tr>
<tr>
<td>Injunction against breach of negative agreement, Lumley v. Wagner (1 D. M. G.)</td>
<td>118</td>
</tr>
<tr>
<td>Not of contract to build, &amp;c., Crampton v. Varna Railway (L. R., 7 Ch. Ap.)</td>
<td>120—122</td>
</tr>
</tbody>
</table>
### TABLE OF CONTENTS.

**CHAPTER VI.---continued.**

<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Statute of Frauds in Equity</td>
<td>123</td>
</tr>
<tr>
<td>Part performance of parol agreement takes it out of the statute</td>
<td>123-125</td>
</tr>
<tr>
<td>Lester v. Foxcroft (1 White &amp; Tudor), &quot;the contract being no longer in fieri&quot;</td>
<td>123-125</td>
</tr>
<tr>
<td>Parol variation as a defence (for &quot;the statute says a parol contract shall not bind, not that a written contract shall bind&quot;)</td>
<td>125</td>
</tr>
<tr>
<td>Specific performance of contract as to land, with compensation,</td>
<td>126</td>
</tr>
<tr>
<td>for there is a trust as to the land, and the statute shall not be an instrument of fraud</td>
<td>126-127</td>
</tr>
<tr>
<td>Matters not of the essence of the contract, Seton v. Slade (2</td>
<td>129</td>
</tr>
<tr>
<td>White &amp; Tudor); provision in Judicature Act</td>
<td>127</td>
</tr>
<tr>
<td>Time when of the essence: other matters held of the essence</td>
<td>128, 129</td>
</tr>
<tr>
<td>Forfeiture and penalties relieved against</td>
<td>129</td>
</tr>
<tr>
<td>Mortgages</td>
<td>130</td>
</tr>
<tr>
<td>This doctrine is imported into the Common Law</td>
<td>130-132</td>
</tr>
</tbody>
</table>

---

**CHAPTER VII.**

**RESCISSIO AND RECTIFICATION OF CONTRACTS.**

Equity does not rescind contracts for mistake, but rescinds instruments which misrepresent contracts.. 133

(1) **Rescission** is a preventive remedy.. 134

Jurisdiction quia timet.. 134

Mistake means mistake in the writing not in the agreement, the plaintiff must show that the alleged contract was not assented to.. 135-137

In cases of mutual mistake or accident there is no contract, and there will be rescission of the instrument stating one.. 137, 138

Ignorantia juris does not include private rights.. 139

Non-assent leading to mistake in writing may also occur through incapacity of one party.. 139

Or through fraud of one party.. 141

Mistake in the meaning of a contract is no ground for rescission.. 142

Nor mistake in the sense of carelessness.. 143

And vigilantibus non dormientibus equitas subvenit.. 144

Can an instrument be rescinded as against assignees.. 145
CHAPTER VII.—continued.

(2) **Rectification**, or correction, or reformation of instruments 146

 Plaintiff must prove (a) mistake in the writing; 146
 (b) what was the real agreement 146
 All parties must consent in order to get rectification, or 147
 the case must be so plain that no defence is possible. 147
 Rectification of marriage settlements 149
 The evidence should be documentary 149
 Special examples of rectification 150
 (A) Partnership joint debt read as several 151
 (B) Mortgage by husband and wife of wife’s land—proviso 151
 for redemption read as not affecting wife’s estate, 151
 Huntington v. Huntington (2 White & Tudor) 151
 (C) Defective execution of power supplied, Tollett v. Tollett 151
 (1 White & Tudor) 151
 These may be considered also as implied or constructive trusts 152

CHAPTER VIII.

**INJUNCTIONS AND RECEIVERS.**

Injunction—preventive procedure, “in personam” 153

Power of committal to prison not affected by Debtors Act 154

Does Magna Charta affect this power of committal 155

Under Judicature Act injunctions or receivers may be granted

where convenient 156

Injunction respecting property out of jurisdiction 158

Contracts or laws of foreign country 158

Will the Court restrain application to Parliament 158

Under new law one Court is not to restrain another, but pro-
ceedings may be stayed. 160

When are bankruptcy proceedings stayed by Court of Chancery 161

Interpleader suit 162

Interlocutory injunctions 162

Appointment of a receiver, but not upon ejectment bill 163

Injunction to restrain in equitable acts 165

Injunction to restrain illegal acts 166

Ancillary jurisdiction—equitable remedy 166

Because (1) either the injury is irreparable 167
 (2) or injury is continuous 168
### TABLE OF CONTENTS.

**CHAPTER VIII.**—continued.

| Cases as to Commons—*Bills of peace* | 168 |
| Warwick v. Queen’s College | 169 |
| Commissioners of Sewers v. Glasse | 170 |

(3) or a public body is abusing *parliamentary powers* | 171 |

| Injunction against *waste*, Garth v. Cotton (1 White & Tudor) | 171 |
| Equitable waste | 172 |
| Injunctions against nuisance | 173 |
| Pollution of rivers | 173 |
| Interference with light and air | 173 |
| Discomfort | 173 |
| Injunctions against breach of covenant | 173, 174 |

### CHAPTER IX.

**DISCOVERY.**

| Bill of discovery in aid of Common Law | 176 |
| Common injunctions to stay action | 177 |
| Plaintiff and defendant may both call for discovery | 177 |
| Discovery with the object of amending bill | 177 |

**(A)** The rules by which the right to discovery is qualified | 178 |

No one can compel discovery of—

1. Imperfect obligations | 179 |
2. Matters *irrelevant to the issue* | 180 |
   - Or not relevant to his own case | 181—183 |
3. Matters tending to *criminate* | 183 |
4. Professional communications | 184 |
5. Official secrets | 184 |

**(B)** Discovery and *production of documents* | 184 |

Rule founded on Hardman v. Ellamea as to documents referred to in pleadings... | 185 |

Plaintiff calling for documents which will be his if he wins and no use if he loses | 186 |

Discretion of Court in such cases | 186—188 |

Lockett v. Lockett (L. R., 4 Ch. 336) | 186
### TABLE OF CONTENTS.

**Chapter IX.—continued.**

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>(C) He who answers must <em>answer fully</em>, but particular discovery may be protected</td>
<td>188</td>
</tr>
<tr>
<td>Effect of demurring</td>
<td>189</td>
</tr>
<tr>
<td>Meaning of word ‘answer’</td>
<td>189 (note)</td>
</tr>
<tr>
<td>Defence by plea</td>
<td>190</td>
</tr>
<tr>
<td>(D) Jurisdiction to examine <em>witnesses abroad</em></td>
<td>190</td>
</tr>
<tr>
<td>to perpetuate testimony</td>
<td>191</td>
</tr>
<tr>
<td>to <em>establish wills</em></td>
<td>192</td>
</tr>
<tr>
<td>to take evidence de bene esse</td>
<td>193</td>
</tr>
<tr>
<td>Conclusion</td>
<td>194</td>
</tr>
</tbody>
</table>
EQUITY

UNDER THE JUDICATURE ACT,

OR THE

Relation of Equity to Common Law.

CHAPTER I.

EQUITY Follows THE LAW.

The new Judicature Act (36 & 37 Vict. c. 66), enacts (sect. 24), that in every civil cause or matter commenced in the High Court of Justice, Law and Equity shall, after the 2nd November, 1874, be administered concurrently, and (sect. 25, subs. (11)) that in all matters in which there is any conflict or variance between the rules of Equity and the rules of Common Law with reference to the same matter, the rules of Equity shall prevail. My intention is to give such an analysis and description of the existing system of Equity as shall point out precisely its relation to the Common Law, and the limits within which the conflicts or variances above mentioned may be expected to arise.

I am not aware that any treatise on Equity has attempted to distinguish the proper sphere of Equity from that of Common Law—indeed, it has generally
been treated as a special science, dealing with the same subjects as the Common Law, but conflicting with it in principle,—whereas I shall attempt to show that Equity does not differ in principle from the Common Law, excepting where, on the one hand, it deals with a different subject-matter, viz., trusts and fiduciary relations, and, on the other hand, applies in certain cases a more appropriate remedy than that of damages to ordinary common law rights.

Wherever there is no trust, and the legal remedy is not inadequate, the maxim placed at the head of this Chapter will be found to apply, i.e., that "Equity follows the Law." Some, indeed, jocosely interpret this maxim in the sense that Equity is always following but never finds the Law. Others have a vague idea that Equity only follows the Law when it holds it equitable to do so; and that exceptions to the rule are constantly occurring, because Equity regards the intention rather than the strict sense of instruments and agreements. If these statements were true, it would follow that there is no doctrine of Law which may not, under the new fusion, find itself in conflict and at variance with some equitable doctrine, no action in which the two systems of Law and Equity will not be jostling for supremacy.

The definitions of Equity given by the ordinary text-books do not seem to throw much light on the subject. Mr. Josiah Smith, for example, whose Work is founded on the best authorities, "believes it is impossible to give a short definition of Equity
jurisprudence without either failing to convey any accurate and definite knowledge, or else positively misleading the student” (a).

But if those writers who have attempted to give to their readers a general conception of the principles and province of Equity have failed in framing definitions of their subject, it was not their fault so much as the result of the conditions under which they wrote. Equity has hitherto been treated as a separate science, and not as that which it really is, namely, a portion of Law accidentally severed from the Common Law: and so it was necessary for those writers to try to explain its position as a separate science, and they naturally failed in attempting to justify that which rested upon an unreal and unnatural basis.

But we, through the legislature of last year decreeing the re-union of Equity and Law in England, are freed from this embarrassment. We start at length, in the year 1874, with this difficulty, this unnatural divorce of two kindred systems, for the first time removed out of our path. Equity, which for exactly 500 years since the reign of Richard II. has been like a branch dissociated from its parent stock, is now to be grafted back into the Common Law of the land; and we, instead of troubling ourselves to find reasons and definitions to justify the separation of the two branches, have the pleasanter and more profitable task of finding the points of contact between them, and illustrating the one by the other.

I have called Equity a portion of Law accidentally severed from the Common Law, and a very short account of the origin of Equity will show that this is a correct statement, and that the separation of the two jurisdictions is not due to any difference in principle, but solely to historical circumstances.

The history of the separate jurisdiction dates from the reign of Richard II., who became king almost exactly 500 years ago (1377). In his reign the Chancery records begin (b).

It was a reign of change, in which the people were banding themselves together against oppression, when the humbler classes sought to recover their Anglo-Saxon rights, when Wat Tyler rose against over-taxation, and Wickliffe preached against abuses in the Church. And in this same reign poor suitors took courage to appeal to the prerogative jurisdiction of the chancellor, as the representative of the king, for that redress which they could not get at Common Law.

But even in its beginning Equity was (with the exception, perhaps, of "trusts" (c)) no new law, but only the Common Law more efficaciously administered; for we find that in the majority of instances where the chancellor was thus appealed to, it was admitted that the Common Law recognized the plaintiff's rights, but by reason of the special circumstances the redress there would be inadequate (d).

(b) Adams on the Doctrine of Equity, p. xxxi.
(c) See a note on John de Waltham and his writ of subpoena in Campbell's Lives of the Chancellors, i. 258.
(d) See on this subject Adams on the Doctrine of Equity, p. xxxv.
The common lawyers soon saw the mischief this new jurisdiction was likely to do them, and we find a perpetual struggle going on against the chancellor's authority; in the 13th year of Richard II. (1389) the commons petitioned that no man might be brought before the chancellor or the king's council for matters remedial at the Common Law; but the only answer given by the king was that he would keep his regality as his predecessors had done before him. In four years afterwards a second petition was presented to the same effect, and again in six years (in 1399) a similar petition was presented to the new king Henry IV., who answered that the statutes should be kept, except where one party was so great and rich and the other so poor that he could not otherwise have remedy. The complaint always was, not that the chancellor was introducing new law, but that he was usurping and supplanting the jurisdiction of the Common Law Courts.

In the reign of Victoria, as in the days of Richard II., Equity is still appealed to, to supply the frequent deficiency of Common Law to grant an appropriate remedy, but this is only for convenience and not because the Common Law refuses to give redress "on the ground of the wealth and power of nobles surrounded by men of their maintenance" as in those good old times. And yet there is one class of cases in which Equity interferes, not merely because the remedy by way of injunction or specific performance is more adequate than damages, but also partly on the ground of the potency of the defendant; but such has been the alteration of social
circumstances in the course of 500 years, that it is no longer the intimidation of great men and noble suitors against which the chancellor's protection is invoked, but the tyranny of railway companies, trades unions and similar creations of the nineteenth century, against which the Court of Chancery often grants relief, to prevent their violent user of those powers with which the legislature has clothed them. To this effect Lord Hatherley spoke in giving judgment in Stretton v. Great Western Railway Company (5 L. R., Ch. 751, 760); and the case of Springhead Spinning Company v. Riley (L. R., 6 Eq. 551), where a trades union was the aggressor, and Dixon v. Holden (L. R., 7 Eq. 488), where an abuse of the power of the press to the destruction of a reputation was restrained, are curious instances of this alteration in society, which has subjected us to the tyranny no longer of the great noble, but of the trade union, the printing press, and the railway company.

Enough has been said to account historically for the rise of that portion of Equity jurisprudence which does not conflict with the Common Law, except so far as it anticipates it on its own domain by providing a more efficacious remedy. The other portion of Equity jurisprudence, which deals with trusts, a separate subject-matter, took its origin about the same time, because the Common Law would not recognize mere fiduciary obligations, nor provide appropriate writs to enforce their observance (e).

The greatest authorities of this day have differed

(e) See Haynes on Equity, p. 12, and Lord Campbell, i. 258, above cited in note (e).
on the subject of the relation which Equity has borne to the Common Law during its separation from it: Lord Hatherley and Lord Cairns, on the one hand, have declared that there is no antagonism in principle between the two, and that it is entirely a question of difference of procedure and judicature, while Lord Westbury and Lord Romilly have asserted that they are not only different but opposed (f).

Lord Westbury and Lord Romilly perhaps spoke with a little of the exaggeration of reformers, and aimed at bringing out in as strong relief as possible the existing evils of separation, so that lawyers might be induced to look with favour on attempts for reuniting the two, and, as a matter of fact, I think we can show (as we might certainly expect to be able to show) that the view of Lord Hatherley and Lord Cairns is a sound and sensible one, and that the difference between Law and Equity is accidental and historical and not in any way essential.

When we read Lord Ellesmere's judgment in the Earl of Oxford's case (1 Ch. Rep. 1) (g), which he begins by saying, "the law of God speaks for the plaintiff (Deut. xxviii.)," we must own that formerly Chancery judges were carried away by the grandeur of the name of Equity, and administered Law too much according to their individual ideas; and so Selden (as quoted by Lord Campbell) says, that, "as the conscience of the chancellor is larger or narrower, so is the Equity

(f) See for this an interesting letter by Mr. W. Finlason in the Law Journal for 1870, p. 263, on the union of Law and Equity.

(g) Reported 2 White & Tudor's Leading Cases.
administered in his Court, which is as absurd as if they were to make the chancellor's foot a standard for the foot measure. One chancellor has a long foot, another has a short foot, and so do their consciences differ." But this state of things has long passed away and Equity has become, in fact, as it will hereafter be in name, a part of Law, as I have defined it, deciding in its own sphere according to precedents and fixed rules.

There is a story told of Horne Tooke, that having failed in a case at Law, which he thought very unjust to himself, he rushed into Court where Lord Kenyon was sitting, crying out "Justice, my Lord, I want justice;" to which the judge quietly replied, "I am not sitting to administer justice, I am sitting at Nisi Prius." And so it is with Equity; for the charge of uncertainty in Equity, I venture to say, has long ceased to be a true one; the time has passed, if ever there was one, when Equity aimed at relieving hard cases, with or without precedent, and when the proverb was true that "HARD CASES MAKE BAD LAW." Persons need no longer hope to be relieved in Equity from contracts which they have thoughtlessly entered into, simply because it would be a hardship to make them carry them out, for unless the hardship is so great that the Court thinks the alleged contract must have been induced by fraud or must be a mis-statement of the real contract, contracts are as binding in a Court of Equity as in a Court of Law (h).

(h) See Chapter VIII. on Mistake (post), and Helling v. Lumley, 3 De G. & Jones, 493, 496; Lehman v. McArthur, L. R., 3 Ch. 496, 503.
The following I venture to propose as an accurate definition, or rather description, of Equity as administered in Courts of Chancery:—

That part of the law which, having power to enforce discovery, (1) administers trusts, mortgages and other fiduciary obligations; (2) administers and adjusts common law rights where the Courts of Common Law have no machinery; (3) supplies a specific and preventive remedy for common law wrongs where Courts of Common Law only give subsequent damages.

Now let us see in each of these branches how far and in what sense it is true that “Equity follows the Law.”

(1) The exceptions to the rule will be found to occur principally in the Administrative branch of Equity.

We should expect to find that exceptions to the rule occur in this branch of Equity, which is much occupied with trusts; for in administering and adjusting trusts Equity is dealing with a subject outside the Common Law—but even here, in dealing with trusts, the maxim that “Equity follows the Law”

(i) See Chapter IX., post.
(k) See Chapters II., III., IV., V., post.
(l) See Chapters VI., VII., VIII., post.
(m) Mr. Smith in his Manual divides Equity as follows:—
1. Remedial. 2. Executive. 3. Adjustive. 4. Protective generally. 5. Protective of infants and married women. According to the division made in the text, Administrative Equity nearly corresponds with Mr. Smith's 2nd, 3rd and 5th titles. Remedial Equity with his 1st and 4th.
has a clear meaning; viz. that wherever the trusts or the equitable estates are so simple that an analogy can be found in the Common Law, that analogy is followed; for example, the rule in Shelley's case is applied by analogy to equitable limitations. But the analogy of the Common Law goes but a little way in the adjustment of complicated trusts; and when we come to questions of conversion, election, marshalling of assets, and the like, there is nothing parallel at Common Law, and here we do find Equity laying down its own rules, and regarding the intention of parties, not indeed following the Common Law, but only because there is no Common Law to follow.

(2) Many matters come into Equity on this its administrative side, not on the ground of any trust, but only for the adjustment of ordinary rights and contracts, and then Equity will be found following Common Law principles, the only distinction being the complete remedy and adjustment of rights which the decree in an administration suit gives as opposed to a judgment at Law.

(3) That part of Equity which we may call Remedial (to distinguish it from administrative) Equity, dealing mainly with ordinary Common Law contracts and rights, follows the familiar rules of Law—and here the only distinction is that it applies a more efficacious remedy by way of specific performance and injunction where damages would be inadequate relief.

No doubt the charge is brought against Courts of Equity that in dealing with contracts they disregard
the provisions of the Statute of Frauds, and thus in attempting to do Equity break the Law. In the Chapter on Specific Performance I shall examine this charge, and endeavour to show that in those cases where a contract appears to be enforced in Chancery, though not properly enforceable within the Statute of Frauds, it is because there is a complete obligation no longer resting in fieri: it is enforced as a trust binding the conscience, the breach of which may not be measured in damages.

And now let me illustrate by example what I have thus laid down, viz., that Equity, though differing in the remedy, generally follows the Common Law as to the right; the only exception being where there is a trust, in which case Equity "agit in personam," binds the conscience of the parties to carry out their genuine intention. By way of illustration, I will take points which will be more fully treated of in a later chapter, viz., Equitable Assets and Marshalling.

First, I say, that where there is a trust Equity does not follow the Common Law, because trusts are outside the Common Law.

Now **equitable assets** we shall find to be an excellent example of this. Equitable assets are nothing else than *real property devised for or charged with payment of debts*, so that the executor, or the court administering for him, takes it as a trust, and not by the Common Law; while every other kind of assets is called legal assets, because it comes to be administered by the executor independently of any trust; *i.e.*, the personalty goes to
the executor by the Common Law, and realty became assets by the statute 3 & 4 Will. 4, c. 104, which statute excepted real property devised for or charged with payment of debts from its operation, and left them equitable assets as before.

It will be found that in administering legal assets the Court of Chancery always followed the Common Law rules,—paid, for example, specialty creditors before simple contract creditors, and allowed an executor or administrator to retain his own debt or prefer any other creditor's debts according to his Common Law rights,—but that these inequalities were not allowed to prevail with regard to the equitable assets, or trust assets as they might be called. In dealing with these the trustee was not allowed to retain or prefer a debt, nor was one class of creditors paid in priority to another, but the creditors being looked upon as cestui que trusts were all paid rateably.

It is worthy of note, that Equity having set the example and refused in the case of trusts to agree with the Common Law rule of inequality, the legislature said, "If Equity will not follow Common Law, it shall follow Equity:" and 32 & 33 Vict. c. 46 set specialty and simple contract debts on an equality as to all assets. The principle of equal payment is carried still further by the Judicature Act (36 & 37 Vict. c. 66, s. 25), which provides (subs. (1)) that in the administration of insolvent assets the law of bankruptcy is to be applied.

Secondly, I say that in other cases where there is no trust, Equity follows the Common Law in taking
the same view of *rights*, but it manages to give more effective *remedies*, *e. g.* to adjust different rights by one decree. Of this the doctrine of *marshalling* is an instructive example, marshalling being an adjustment of assets so as to pay as many claims as possible:—Thus, to take a simple instance: There is an estate to be administered, real and personal, the personalty being worth (say) 100l. There is a creditor, A., who has a claim for 100l. binding the heir: then A. can sue for his 100l. either from the real estate or personal estate. There is also a legatee, B., whose legacy is 100l. Therefore the estate is liable for 200l. But suppose A. with his charge chooses, instead of going on the land, to go on the personalty, which we have supposed only worth 100l., then the legatee would be excluded; but Equity says, if A. does this, it is no hardship on the estate to put B. into A.’s place and let him take the amount which A. might have claimed from the realty (100l.) out of the realty.

Equity thus not only acknowledges Common Law rights, but gives greater effect to them than the Common Law is able to give.

Here, also, as in the case of the equality of debts, it is worthy of note that the Common Law has been compelled to follow Equity by a statute which practically enacts the marshalling of assets in such a case as I have supposed above; for 30 & 31 Vict. c. 69, extending Locke King’s Act to a vendor’s lien, says in effect that at Law as well as in Equity a vendor with a lien shall henceforth go on the land for his lien and leave the personalty for legatees.
Another instance of Equity adjusting Common Law rights, so as to give greater effect to them, is the case of a surety who, having paid the creditor, was allowed in Equity to make use of the creditor's remedies to recoup himself, though at Common Law those remedies having once been used were extinct. See Dering v. Winchelsea, 1 Cox, 318 (n).

I may here with advantage notice some of the maxims which seem to give a wider scope to Equity than I have claimed for it, and to ascribe to it the function of correcting the Common Law rather than that of enforcing it more fully and effectively.

First, the maxim that "Equity is equality" does not, as we have already seen, imply that Equity levels all the distinctions which Common Law has made. But the true explanation of the maxim is this, that in cases of trust or fiduciary obligation there is to be equality among the cestui que trusts. Thus, as we have seen, creditors were always rateably paid out of trust (or equitable) assets.

A second maxim that Equity suffers no wrong to be without a remedy does not mean to say that those rights, which a high morality or a sense of honour would dictate, can be enforced in Equity. The word right must be understood in the sense of "legal right," including, however, not only Common Law rights but also fiduciary obligations. And so the maxim comes to be limited, as Mr. Smith explains it, to those rights which can with "advantage be recognized in a Court of Law instead of being left to people's conscience and sense of honour."

(n) Reported with notes, 1 White & Tudor's Leading Cases.
These two maxims are met by the maxim that Equity is not a court of honour, of which I will give as an example the case of Dering v. Earl Winchelsea, already quoted (p. 14): there Thomas Dering was appointed to a responsible post, the collection of certain custom duties, where public money would pass through his hands; his probity not being above suspicion, his brother, Sir Edward Dering, and the Earl of Winchelsea and another became sureties for him: after which, the young man being, as it seems, encouraged by Sir Edward in gambling and betting, made away with the monies, and 3,000l. had to be paid to the government; then Sir Edward, the brother, having to pay on his bond the whole 3,000l., called on the Earl of Winchelsea as his co-surety to share the loss; the earl replied that it was inequitable that he should bear any part of it, because it was Sir Edward who had encouraged the young clerk, his brother, in racing and gambling. But the judge said that Equity was not a court of honour, it might be very indecorous that Sir Edward should first encourage his brother in dissipation and then come upon others for contribution towards the loss; but such considerations could not be noticed in a Court of Law, and he decreed contribution.

This case exemplifies and explains a third of those general maxims I have referred to, namely, that He who seeks Equity must come with clean hands, which, as was said in Dering v. Winchelsea, only means that he must be legally innocent in the transaction before the Court; it does not mean to say that every plaintiff in Equity must be of irreproachable
character in other transactions, and in general life. And so the maxim that he who comes into Equity must do Equity means *Equity in relation to the matter before the Court*: thus, he who comes to set aside a contract as not binding on him must, as the price of the decree, pay what he is properly bound to pay; and he who asks for specific performance of a contract must prove that he is ready and willing to do his part.

Another recent case exemplifying that a Court of Equity is not a court of honour is Ramsden v. Dyson (L. R., 1 H. L. 130).

In that case a number of small householders at Huddersfield held their tenements under Sir James Ramsden: they had no leases, but what they said was that Sir James had encouraged them in the expectation that they could at any time have leases, and that so long as they paid their rent they would never be turned out. In short, the question was put upon the honour of the Ramsden family. When Sir James' son came to the property he resolved to try whether the tenant right, as it was called, was valid at law. So he ejected one of his tenants, who at once, with a hundred more at his back, filed a bill in Chancery to restrain the ejectment, and before Sir J. Stuart the tenants succeeded, on the ground that it was a fraud in Equity to encourage expectations and let tenants lay out money and then refuse a lease; but, on appeal, the decision was reversed on the ground that there was no legal right proved, and the Court would not enforce an obligation which, if it existed at all, was only one of honour.
And now to look at what I have said from a different point of view, let us see if my observations will enable us to answer another question especially important in respect of the fusion of Law and Equity, i.e., in what cases Equity has an exclusive jurisdiction, and in what cases a concurrent jurisdiction with Common Law?

In order to answer this question accurately and yet concisely, a three-fold division must be made. And we must divide the subject of equitable jurisdiction thus:—

1. Trusts: over these Equity has had and has still exclusive jurisdiction. I include under trusts mortgages and the protection of infants, lunatics and married women.

2. Administration apart from trust: over this Equity has exclusive jurisdiction in respect of the remedies, viz., complete adjustment in one suit; though Common Law Courts have concurrent jurisdiction over the rights, e.g., debts and contracts.

3. Specific performance, injunction, discovery in respect of Common Law rights: Equity had formerly exclusive jurisdiction in respect of these remedies, though late statutes have given similar powers to the Common Law Courts.

Of the probable effects of fusion I will say this only, that, though the doctrines of trusts and administration will be new to some of the Divisions of the High Court of Justice, still those doctrines—as, for
example, conversion and election—have now become so firmly settled and well understood, that they are little more than questions of adjustment and account, which are worked out in Chambers, and will continue to be worked out by the chief clerks or some body corresponding to them. Common Law doctrines, on the other hand, will not be strange to Chancery practitioners; for on this side the fusion has in practice commenced long ago, and purely legal questions already form a large part of the business of the Courts of Equity in its remedial jurisdiction. Taking, for example, the Equity Reports for one month (March, 1874), I find that all the cases, with the exception of three, relate to Common Law questions of contract and wrong. Thus there are several cases where the Court is asked to enforce or set aside *contracts* instead of leaving the parties to seek damages at Common Law; one raises some very interesting questions on a contract for raising and getting coal (which we shall find it useful to discuss when we come to the subject of Specific Performance), and another involves important mercantile questions on securities appropriated to meet bills of exchange (o); and there are a number of cases where the Court is asked to restrain by injunction a threatened *wrong*, for which damages would be an insufficient compensation; thus, there is one case where a towing-path was obstructed and the question of right of way was decided (p); another, where a person, claiming another

(o) Fothergill v. Rowland, L. R., 17 Eq. 133; Latham v. Chartered Bank of India, *ibid.* 205.

(p) Selby v. Nettlefold, L. R., 9 Ch. 111.
man's wood, went and took up his residence close to it, turned cattle into it and cut the brambles and trees, and the question of trespass had to be tried (q). In another case the School Board of London was defendant, on the ground that in taking land for their schools they trespassed upon certain easements (r). In another a bishop was defendant, on the ground that he was prosecuting a clergyman without regarding the provisions of the Church Discipline Act (s); and, most remarkable of all, was a case of Clover v. Royden (t), where the subscribers to a shipping registry moved for an injunction against the Committee of the Association, on the ground that they had not registered their ship in the highest class as good and seaworthy, which was a question of slander of title, and depended upon whether malice and falsehood was proved.

These are only samples of Common Law questions which constantly come into Equity; and the result seems to be that since the Courts of Equity and of Common Law are already to so large an extent occupied with the same subject-matters, there can be no reason why the two jurisdictions should not easily coalesce when the artificial barrier between them is removed, as waters find their level when a sluice is lifted by which they were kept apart.

The Supreme Court of Judicature Act supersedes and practically repeals two important acts, which must

(q) Stanford v. Hurlstone, L. R., 9 Ch. 116.
(r) Clark v. School Board for London, ibid. 120.
(s) Ex parte Edwards, ibid. 138.
(t) L. R., 17 Eq. 190.
not, however, be forgotten or passed over, since to them is due whatever there has been of practical fusion between the two jurisdictions, so far at least as the Chancery Courts are concerned. The two acts I refer to are those of Lord Cairns and of Sir John Rolt (21 & 22 Vict. c. 27, and 25 & 26 Vict. c. 42), the former of which empowered the Courts of Equity to try questions of fact with or without a jury; while the latter enacted that "the Court shall determine every question of law or fact incident to the relief sought."

But there were two reservations even in Sir J. Rolt's apparently peremptory Act, viz.—

(a) Sect. 2 reserved to the Courts the power to send an issue out of Chancery, where it was more convenient that it should be tried at the assizes, or in a Superior Court of Common Law.

(b) Sect. 4 provided that the Court need not decide a legal question where the matter had been improperly brought into Equity.

These reservations, as the event showed, were sufficient to prevent a great deal of the benefit of the acts; and often when suitors applied to Equity for relief, and some Common Law title arose, they were told that it was more convenient that the question should be tried at Common Law, and so all their evidence and all their expense in Equity was wasted. To take one conspicuous example: the Court of Chancery always had a jurisdiction in matters of partition (see Agar v. Fairfax (u), 17 Ves. 533),

(u) 2 White & Tudor's Leading Cases.
but if a tenant in common came and asked for a partition he had formerly either to show that he had good legal title, or else he would be turned over to Common Law to prove it. After Sir J. Rolfs's Act it might have been thought this would be no longer so, but the point was tried in Giffard v. Williams (L. R., 5 Ch. 546), where V.-C. Stuart heard evidence and admitted the plaintiff's title, but was reversed on appeal, and the whole suit was money and labour lost. But now, as we have seen, by 36 & 37 Vict. c. 66, s. 24, it is enacted that Law and Equity shall be concurrently administered in the new High Court of Justice, and though by sect. 35 a power is reserved of transferring causes or matters from one division of the Court to another, yet all steps and proceedings taken by any party, and all orders made by any judge before such transfer, are to be valid and effectual to all intents and purposes, in the same manner as if the same respectively had been taken and made in the proper division to which such cause or matter ought to have been assigned.

Thus I have shortly, and I hope clearly, traced the history of the growth of the Court of Chancery as a separate jurisdiction, and have endeavoured to show that there is no essential difference between the two; but merely that the Courts of Equity have, owing to their recognition of trusts and the completeness of their administrative machinery, on the one hand acquired an immense non-litigious administrative business, which, being conducted on settled principles, may easily be carried out by any division of the new High Court of Judicature, and on the
other hand, provided certain efficacious remedies for legal wrongs, which, now that Parliament has so decreed, may henceforth be as easily provided by the whole Court of Judicature as by one particular branch of it. It will then be seen how Equity follows the Law as a coping-stone follows a wall, crowning it, and adding to it strength, solidity and completeness.

I will close this chapter by pointing out that the legislature has taken remarkable care, in providing for the fusion of Common Law and Equity, to hedge round and preserve trusts, which, as I have endeavoured to show, constitute the essence of Equity. For the enactment in the Judicature Act (sect. 25, subs. (2)) that "no claim of a cestui que trust against his trustee for any property held on an express trust, or in respect of any breach of such trust shall be held to be barred by any statute of limitations" is a mere declaratory clause, re-enacting what has always been recognized in Equity, and indeed was already sufficiently provided for by the Statute of Limitations (3 & 4 Will. 4, c. 27, s. 25) (v), and the clause can only have been inserted for the purpose of asserting prominently before every branch of the new Court of Justice the sacred inviolability of trusts which we shall now proceed in the next chapter to consider.

(v) See Sugden on the Statutes relating to Property, p. 97.
CHAPTER II.

TRUSTS.

The greater part of the separate jurisdiction of Courts of Equity may be summed up in this one fact, that Equity recognizes and enforces trusts. And this, indeed, seems to me to constitute the sole difference in principle between Equity and Common Law. The difference of principle consists in this, that in interpreting trusts, Equity considers the intention; so much so, that Mr. Haynes takes as one of the four leading maxims of Equity (a), that "Equity regards the substance or spirit and not the letter merely." I think his statement as he makes it is too wide, and that it ought to be limited to the subject-matter of trusts; for it is by such broad unqualified maxims as this that people get their notions of an Equity opposed to the Common Law, the truth being that Equity, as we have seen, when not dealing with trusts, adopts the Common Law rules of right and contract almost without exception. Some remarkable instances of this, in respect of the legal priority of debts in administration and the power of the executor or administrator to retain his own debt or prefer that of another creditor, were noticed in the last chapter.

(a) His other three are (p. 18) "No wrong without a remedy," see ante, p. 14; "Equity acts in personam," see pp. 11, 24; and "Equity follows the Law," see last chapter, passim.
But Mr. Haynes' maxim is perfectly truthful and characteristic of Equity so far as it is concerned with the interpretation of trusts. Not that Equity interferes with the possession or devolution of what is called the legal estate, but it binds the conscience of a trustee or fiduciary owner to use his legal estate in conformity with the intention of his trust. Thus, in the case of the trust, as in other instances which we shall meet with hereafter, Equity enforces its jurisdiction by directing the conscience of the individual, or, as the maxim says, "ÆQUITAS AGIT IN PERSONAM," but it will only direct the conscience in accordance with precedents; for, as we have seen, Equity as administered in Chancery is not honour or morality, but a portion of Law.

Trusts, as I said in the last chapter, are the only rights over which Equity has had and still has an exclusive jurisdiction; and though Mr. Haynes includes in the exclusive jurisdiction also administration, married women's property, and mortgages, yet these may all be said to come under the general head of trusts; and we shall, I think, find it both simpler and more accurate in speaking of the exclusive jurisdiction of Equity to confine it to trusts and their administration as stated ante, p. 17.

The recognition of trusts in Equity is one of the best examples of the maxim, that "Equity suffers no right to be without a remedy," for the word "right" means (as was explained in the last chapter, p. 14) not every right, but every right which a Court of Judicature can conveniently and expeditiously take cognizance of; and this meaning of the maxim is
well illustrated by the subject of trusts, which are just on the border line; the Common Law thought it not advisable to treat them as rights, Equity took a contrary view, and enforces them if well created.

Trusts are either express or implied. Express trusts of real estate must be evidenced by writing (sect. 7 of Stat. of Frauds), and this law, of course, Equity obeys; but we shall find that many trusts are implied in Equity in the absence of writing; is this then an infraction of the statute? we shall find it is not so, for that sect. 8 of the same statute excepts trusts arising by implication or construction of law from the provisions of the former section (b).

First, then, to deal with implied or constructive trusts, which do not require to be created in writing. I shall give three instances, viz.: (1) Resulting trusts; (2) Implication of tenancy in common; (3) Performance of obligation.

Before doing so, I will stop to make one observation about the distinction which has been made between trusts implied and constructive. Mr. Smith calls those trusts constructive which are altogether constructed by a rule of law without reference to the nature of the transaction and the presumable intention of the parties, while by implied trusts he means those which, though not expressly declared, are implied from the surrounding circumstances and the probable intention. Such a distinction it may be convenient to make, but we

(b) 29 Car. 2, c. 3, ss. 7, 8.
must not confuse definitions made by one writer with those of general acceptation; this distinction, for example, between implied and constructive trusts is not universally recognized, and the two expressions are practically synonymous and convertible terms.

(1.) A RESULTING TRUST is one of the simplest examples of an implied trust, and is of a purely equitable origin, as is shown in the beginning of Mr. Joshua Williams's Chapter on "Uses and Trusts." If A. conveyed to B., and no use was declared, Equity decided that B. held to the use of A. the conveying party; in other words the use resulted; and so, if I give lands to some person upon trust to sell and divide the proceeds, then if after performing the trust so far as possible there are any surplus proceeds over, the trustee cannot keep the surplus, but there is a trust, a resulting trust for me or my representatives; Equity, in short, will not let a man who was clearly intended to be only a trustee, and only to have a legal or naked or bare estate, to keep the beneficial estate also. If from any cause the beneficial interest or any part of it fail, it goes back, results to the grantor.

This is the simplest case, but the principle also applies when, though there is no trust at all declared, the law presumes that the person holding the legal estate was intended not to take beneficially but merely as trustee.

The two well known presumptions on this point are—(1) If A. pays for property but puts it into B.'s name, B. holds the property on trust for A., that is, where A. and B. are strangers; but (2) If
A. is "in loco parentis" to B., then the purchase is a gift or advancement to B. These are the presumptions, but they may be rebutted by evidence, even by parol evidence, which may always be admitted in favour of the apparent intention to rebut a legal presumption. See Hurst v. Beach, 5 Madd. 351.

I will quote two recent examples to show that rules like the above are more easily stated than applied. In Hepworth v. Hepworth (L. R., 11 Eq. 10), a person of great age, over ninety, who was living with his son, transferred 3,000l. stock into the son's name—he died aged ninety-four, leaving no stock in his name; but by his will (which was never revoked) he had purported to settle 3,000l. stock on his son’s children. Not unnaturally a claim (argued by Mr. Joshua Williams) was put in, that the gift to the son, by which the legacy to the grandchildren was deemed, was meant to be on trust for them; but V.-C. Malins decided that the ordinary presumption applied; and the son held the 3,000l. as an advancement. See Dyer v. Dyer, 2 Cox, 92 (c).

In Stock v. M’Avoy (L. R., 15 Eq. 55), on the other hand, before V.-C. Wickens, there was a purchase of copyholds in a son’s name, so that the legal presumption was advancement, but as the father did acts evidencing ownership and gave notice to a tenant, it was held that the son was a trustee for him, just as if he had bought a shop in his son’s name but had put his own name over the door.

(2.) Another example of a trust implied by opera-

(c) 1 White & Tudor's Leading Cases.

C 2
tion of law occurs in the well known rule of partnership, that the **survivor of joint partners is a trustee for the representatives of deceased partners**: the Common Law joint tenancy is held a tenancy in common in Equity. This implied trust is not purely of an equitable origin, but is founded upon an ancient Common Law maxim or rule, that “*inter mercatores jus accrescendi locum non habet.*” So that here again “Equity” is only following the Common Law. The above Common Law maxim may be found quoted from Coke in the leading case, Lake *v.* Craddock (3 Peere Williams, 158) (d); therefore this partnership doctrine, usually given as an example of the maxim mentioned in the first chapter, that *Equity delights in equality*, is another example of Equity doctrines having their equivalent at Common Law. Lake *v.* Craddock was a case where lands in Essex having been flooded by the Thames, the owners did not think it worth while to keep them, being subject to heavy burdens for drainage, and they were sold, and Lake, Craddock and others purchased them, the conveyance being to them in joint tenancy. It was, however, held to be a joint speculation of improving land on a hazard of profit and loss in the nature of merchandize, and the survivors had to account to the representatives of the deceased partners.

This principle of non-survivorship between traders explains a special clause in an ordinary mortgage to trustees. Such a mortgage is drawn with a proviso of redemption “on repayment to the trustees

(d) 1 White & Tudor’s Leading Cases.
A., B. and C., or the survivors or survivor.” Then, if A. and B. die, can C. receive the money and give a good discharge? He could, according to the frame of the instrument; but Equity holds that the representatives of A. and B. are interested; and so, in order to save the expense of joining all these in the receipt, a proviso is put in the mortgage that the survivor’s receipt shall be a good discharge in Equity as well as at Law.

(3.) The third instance I shall here give of a trust implied or constructed by operation of Law is one of the more refined doctrines of Equity, that which is called “performance of an obligation,” which is illustrated by the ordinary case of a man who covenants by his marriage settlement to buy land worth so much, and to settle it; the trustees, being probably relatives, do not press him to perform his covenant, and he dies without doing so: the result is, that of course the trustees can sue his representatives on the covenant, and must do so, in order to save themselves. But, suppose land worth about the sum covenanted was bought by such deceased person and not settled, shall the heir take it beneficially? or shall it be impressed with the trust, so as to relieve the trustees from the necessity of repairing the loss? Now, in this case, Equity, according to the usual presumption against a grantor or covenantor, implies that the creation of a trust was intended. (Wilcocks v. Wilcocks, 2 Vernon, 558 (e).) This doctrine of “performance of obliga-

(e) 2 White & Tudor's Leading Cases.
tion" applies wherever a man binds himself by an obligation, and does so much towards its fulfilment that Equity holds that he has done what he promised to do in deed, though not in word.

Performance is a different thing from satisfaction of obligation, as we shall see hereafter in the Chapter on Administration; for Performance is doing the very thing which ought to be done, but Satisfaction is providing an equivalent.

We next come to the subject of express trusts, and the creation of these, in the case of real property, must be evidenced by writing, though there is no such provision in the case of personal property.

The practitioner will often meet with a real difficulty in advising as to the creation of voluntary trusts; that a man may create a trust of pure bounty, there is no doubt; but there are a great number of cases turning on the question whether a trust has or has not been completely declared in favour of the person who claims it.

If it be asked why voluntary trusts raise the difficulty more than others, the answer is, that if the person who claims the benefit of the trust can prove he gave valuable consideration for the trust he claims, then there is a contract if not a trust; whereas, if there was no consideration, Equity follows the Common Law rule, that "ex nudo pacto non oritur actio:" in other words, it will declare and enforce a voluntary trust, if previously and completely created, but not a voluntary engagement to create one.

Suppose, then, to take an example, a client comes and says, "a relative of mine is dead, leaving a chose
in action (say 1,000l. Bank Stock) behind him, which his executors claim, but he in his lifetime told me that it was mine: I cannot sue for it at law because he never transferred the stock legally, and in short the legal ownership is no doubt with the executors, but is not there an Equity to make him or the executors trustees for me?"

We should first ask him: "was there no consideration so that you can treat it as a legal contract and get specific performance in Equity or damages at Law?" If he says no to this, we must ask to see the writing or evidence he relies on; and then, if the transaction he can prove amounts to this, that the alleged donor declared "This is yours beneficially henceforth," and did all he could to make it so, then Equity holds that a trust was created, and declares it accordingly: but if it amounts only to a declaration, I will give this to you, then Equity refuses, on a nudum pactum, to give effect to a mere intention, and the gift is considered imperfect in Equity as well as at Law.

Obviously, the line between the cases is very difficult to draw. Morgan v. Malleson (L. R., 10 Eq. 475) is a crucial instance; there an Indian Bond was held to have been given by a dying man to his medical attendant, by way of voluntary trust, though there was no deed of trust but merely a memorandum:—"I give and make over to Dr. Morris an Indian Bond, D 506, value 1,000l., as some token of his very kind attention to me during illness." Notwithstanding the memorandum, the testator kept the bond in his possession, and the
executors claimed it; but it was held to be a sufficient declaration of trust. Morgan v. Malleson, however, was remarked on unfavourably by Sir George Jessel, M. R., in Richards v. Delbridge (L. R., 18 Eq. 11; April 16, 1874); here the bill stated that John Delbridge, deceased, being possessed of a leasehold mill, where he carried on the business of a bone manure manufacturer, in March 1873 (about a month before his death), handed over to his married daughter the lease of the premises, upon which he had endorsed and signed the following memorandum:—"This deed, and all thereto belonging, I give to Edward Richards (the daughter's infant son, his grandson) from this time forth, with all the stock in trade." The bill prayed that it might be declared that the memorandum and the delivery of the lease to the daughter created a valid trust in favour of the grandchild of the lease and the interest of John Delbridge in the mill and the business therein carried on. It was argued on the other hand that the memorandum was a mere nullity, for the mill could only pass by an instrument under seal, and the stock in trade only by actual delivery, and there was no Equity to perfect a voluntary intended gift; while in support of the bill it was admitted that there was no Equity to perfect an imperfect gift, but it was contended that the memorandum was equivalent to a declaration of trust, and Morgan v. Malleson (ubi sup.), and Richardson v. Richardson (L. R., 3 Eq. 686), were relied on, where promissory notes were held to pass under similar circumstances.
The Master of the Rolls, Sir G. Jessel, said the decisions in Morgan v. Malleson and Richardson v. Richardson were in his opinion opposed to the principle laid down by the Court of Appeal in Milroy v. Lord (Law Journal, 31 Ch., N. S. 799), and the judgment which he delivered certainly makes the boundary line more clear and definite than before, for he appears to distinguish three cases, (1) where a man without consideration has legally assigned his property to another as trustee, in which case Equity follows the Common Law and holds the assignment complete; (2) where the legal owner, without a transfer of the legal title (which from the equitable or inalienable nature of the property it might be impossible to effect), so deals with the property as to deprive himself of the beneficial ownership, and declares that he will hold it from that time forward on trust for another, in which case Equity declares and enforces the trust; (3) where a man by a document insufficient to pass a legal interest has said, "I give or grant certain property to A. B.," in which case the Court will not hold the intended transfer to operate as a declaration of trust, for then every imperfect instrument would be made effectual by being converted into a perfect trust.

In Milroy v. Lord, ubi sup. (which the Master of the Rolls thus cited as his guide), Mr. Milroy executed a voluntary deed by which he purported to transfer certain bank shares to Mr. Lord on trust for his daughter. And it was held that as he might have actually transferred the shares by handing over the certificates, but never had done so, it would be

C 5
departing from the very wholesome rule that "Equity follows the Law," if the Court construed an imperfect legal gift of what might have been given completely at law to be an irrevocable declaration of trust. From these cases we see that Equity will declare a voluntary trust, because then there is no conflict with legal rules of transfer, but will not declare a gift in opposition to Law. I will mention on this point only three other illustrative cases.

(1.) Ex parte Pye (18 Ves. 140) (f) was a case where the sending a power of attorney to transfer stock into the name of a lady in France, which could not be legally carried out (because the owner of the stock died before the stock was transferred), coupled with other documents, was held to be equivalent to a declaration of trust for the lady.

(2.) Kekewich v. Manning (1 D., M. & G. 176) (f) was a case where a person having only an equitable reversion in stock, so that no legal transfer could be intended, assigned the interest on trusts by deed, and it was held a sufficient declaration, being the most effectual transfer that could be made.

(3.) In Antrobus v. Smith (12 Ves. 39) (f), one Mr. Crawford made the following endorsement upon a share certificate which was assignable at law, "I assign to my daughter, Anna Crawford, all my right and interest in the inclosed," and this not being a legal assignment, Sir Samuel Romilly argued that the father meant to make himself a trustee for his daughter of these shares; but Sir W. Grant, Master

(f) These three cases are cited in the notes to Ellison v. Ellison, the leading case on this subject in 1 White & Tudor.
of the Rolls, observed, "Mr. Crawford was no otherwise a trustee than as any man may be called so who professes to give property by an instrument incapable of conveying it. He was not in form declared a trustee, nor was that mode of doing what he proposed in his contemplation. He meant a gift. He says he assigns the property. But it was a gift not complete. The property was not transferred by the act. Could he himself have been compelled to give effect to the gift by making an assignment? There is no case in which a party has been compelled to perfect a gift, which, in the mode of making it, he has left imperfect. There is locus pænitentiae as long as it is incomplete."

The only other difficulty, perhaps, which is likely to occur upon this head of express trust is in those cases where property is assigned and no trust is declared, but a contention is raised that the person to whom the property is assigned was expressly requested to take it, and undertook to hold it, in a fiduciary character. This class of cases may, perhaps, be best considered as REPRESENTATIONS AMOUNTING TO ENGAGEMENTS, and will be found treated of in Chapter III., post, p. 46, amongst other instances of fraud in respect of equitable or fiduciary obligations.

In preparing a voluntary settlement there are certain points to which the intending settlor's attention should be called.

(1.) If he is embarrassed in circumstances when he makes the settlement, it may be held void as against creditors under 13 Eliz. c. 5. This doctrine
is most fully treated in Kerr on Fraud, p. 145. See also Cornish v. Clark, L. R., 14 Eq. 184; Kent v. Riley, ib. 190; Mackay v. Douglas, ib. 106, for the latest law on the subject.

(2.) If the settlement is of real property it will not prevent the settlor making a good sale or mortgage to purchasers or mortgagees for value under 27 Eliz. c. 4, the effect of that statute being that now every voluntary settlement is understood to be subject to this power. (See Kerr on Fraud, p. 168, and Dolphin v. Aylward, L. R., 4 H. L. 486.) The chief difficulty under this head arises upon the question of fact whether or not there was some consideration (which in these cases may be proved by parol evidence) sufficient to set up the settlement, though voluntary on its face, as against a subsequent sale or mortgage. Bayspoole v. Collins (L. R., 6 Ch. 228) is the strongest case in which a settlement has been so supported; but there the subsequent mortgage seemed to have been made with the express object of getting rid of the settlement; and under similar circumstances where this was not the case the Lords Justices refused to follow Bayspoole v. Collins. (Levy v. Crichton, March 25th, 1874, noted in W. N. for the year, p. 89.) See also Perry-Herrick v. Attwood, 2 De G. & J. 21, and Lloyd v. Attwood, 3 De G. & J. 614; Beyfus v. Bullock, 7 Eq. 391.

(3.) By the Bankruptcy Act (32 & 33 Vict. c. 71, s. 91) any settlement made by a trader (which does not include a barrister, attorney, clergyman, or physician), not being a settlement previous to mar-
riage, or for value, or of property coming from the wife, shall be void against the trustees in bankruptcy if the settlor becomes bankrupt within two years after the date of the settlement, and even if he becomes bankrupt within ten years, unless he can prove that he was at the date of the settlement able to pay all his debts without the aid of the property comprised in the settlement.

(4.) "In a voluntary settlement the absence of a power of revocation will be a circumstance to be taken into account," if a suit should afterwards be instituted to set aside the settlement as "not having been the free determined act of the settlor," but as having been induced by undue influence. The case of Hall v. Hall (L. R., 8 Ch. 430, 438) may be taken as settling the law on this point, which was previously in a state of transition if not of uncertainty.

For the creation of a trust it is not necessary that the word trust should be used: it may be created by precatory words, e.g., by giving property in the hope or confidence that it will be applied in some suggested manner, and this is called a PRECATORY TRUST: thus in Harding v. Glyn (1 Atkyns, 469 (q)) a man gave his property to his widow, but desired her at her death to give it to such of his own relations as she thought most desirable, and it was held a power in the nature of a trust; but in Lamb v. Eames (L. R., 6 Ch. 597) a shopkeeper gave his property to his widow to be at her disposal "in any way she may think best for the benefit of her-

(q) 2 White & Tudor.
self and family,” and it was held no trust for the family (i. e., children), but that she could give a share to a stranger.

These two cases decided in opposite ways show how nice the distinction is in such cases as the above, and exemplify the maxim that in dealing with trusts Equity regards the intention.

Another kind of trust is known by the technical name of an EXECUTORY TRUST, i. e., where a person evidently meaning to create a trust, does so by a document which does not constitute a formally executed or complete trust, but gives instructions to the trustees stating what he wishes to be done.

Thus suppose a document of this nature, “I wish this property to be taken in trust for my son for life, and after his death for the issue of his body.” If this be strictly construed it is an entail on the son, which he can bar at once and become absolute owner; but if this is clearly not intended to be a complete executed trust, but only instructions for a formal instrument, the Court will first expand and then construe the trust. See Smith, 16, 131; Lord Glenorczy v. Bosville, Cas. temp. Talbot, 3 (h).

The general rule, however, that where a man has completely and finally created estates, legal or equitable,—has been his own conveyancer, as the phrase is,—the technical rules must prevail, is aptly illustrated by the curious instances given in Mr. Joshua Williams’ Real Property in the Chapter on Wills (Perrin v. Blake, 1 Dougl. 343), where a testator declared his intention that his son should have his estate

(h) 1 White & Tudor’s Leading Cases, 1.
for life only, and proceeded to give it to his son for life, and after his decease to the heirs of his body.

Mr. Joshua Williams' words are, "The Court of King's Bench held, as the reader would no doubt expect, that the son only took an estate for life, but this decision was reversed by the Exchequer Chamber, and it is now well settled that the decision of the Court of Queen's Bench was erroneous—the testator unwarily made use of technical terms, which always require a technical construction." Now that Equity construes equitable estates by analogy to legal estates is perfectly well settled (see the arguments for the plaintiff in Lord Glenorchy v. Bosville, above cited), and an executory trust is not really an exception, or, if so, it is one of those exceptions which prove the rule, because, as I have said, that which is called an executory trust is in fact no more than a minute or a letter giving instructions for an instrument, and the only way of carrying such a trust into effect is by first drawing the instrument and then interpreting it by legal rules.

There are three principal sets of statutes relating to trustees:—

(1.) The Trustee Relief Act (10 & 11 Vict. c. 96), by which trustees are enabled to pay funds into Court in cases of real difficulty, leaving the rival claimants to petition for the payment out, but they must take care not to make use of the Act in an improper case, or they may have to pay the costs of all parties (i), as in Re Elliott's Trusts (L. R., 15 Eq.

(i) See a note on this point in Morgan's Chancery Acts and Orders, p. 68.
TRUSTS.

195), where a Mr. George Elliott, who was clearly entitled to certain money left by a will dated in 1846, if he was the man he said he was, came home after an absence of thirteen years in Australia, during which time nothing had been heard of him, and claimed the fund. The trustees frightened, after the great Tichborne case, by the name of a "claimant," paid the fund into Court; but as all the relatives acknowledged this claimant, they were decreed to pay the costs of their over-much caution.

(2.) The Trustee Act (13 & 14 Vict. c. 60) is useful where the bare trust or legal estate has to be transferred, but the owner of it is under disability; and sect. 32 provides for the appointment of new trustees.

(3.) Lord St. Leonards' Act (22 & 23 Vict. c. 35), Lord St. Leonards' Act (23 & 24 Vict. c. 38), and Lord Cranworth's Act (23 & 24 Vict. c. 145) (j), contain a variety of provisions for the assistance and security of trustees.

The law as to the duties and responsibilities of trustees is fully discussed in Mr. Lewin's work, generally acknowledged to be one of the most scholarly of law books. It is a subject of paramount importance and not to be treated cursorily, nor otherwise than in a book specially devoted to it as Mr. Lewin's is. If any one wishes to understand the responsibility of the office and the danger of taking it in hand lightly or unadvisedly, he should refer to

(j) The provisions of these acts, which are of importance to the Equity practitioner, are set out in Mr. Morgan's work: see the table of contents thereof.
the cases of Ex parte Norris (L. R., 4 Ch. 280); Hopgood v. Parkin (L. R., 11 Eq. 74), and Sutton v. Wilders (L. R., 12 Eq. 373), which show that if a solicitor appointed to be the agent of trustees misconducts himself, even through ignorance or negligence, so as to cause loss to the trust estate, they cannot throw any of the loss thereby occasioned on their *cestui que trusts*.
CHAPTER III.

EQUITABLE FRAUD.

The expression equitable fraud may seem a strange one, but I use it in order to convey the idea of what I wish to speak of in this chapter, namely, that kind of fraud against which Equity alone makes provision and gives relief. And I may justify the expression by the term "equitable waste," which, as we shall hereafter see, means that kind of waste which will be restrained only in a Court of Equity. I thus limit the definition of fraud for the purpose of this chapter, because it is sufficient to say that in respect of all fraud, not being "equitable fraud," the ordinary rules of Common Law apply, and Equity follows the Law.

The two rival systems of Law and Equity are fused into one body of jurisprudence, and it is no longer necessary to repeat in a treatise on pure Equity what is to be found fully discussed in text books upon Common Law.

I therefore set aside all fraud which is subject, concurrently, to the equitable and Common Law jurisdiction; as, for example, simple MISREPRESENTATION AND CONCEALMENT, or contracts in restraint of trade or otherwise constructively fraudulent as being against PUBLIC POLICY. In respect of all these, Equity, though in many cases it provides more appropriate relief, does not assume to depart from
the rules laid down in Selwyn's Nisi Prius or Smith and Chitty upon Contracts.

But before passing away from this common-place fraud, which is subject to the concurrent jurisdiction of Law and Equity, I must remind the reader that every kind of fraud known to the Common Law might also be the subject of a suit in Equity, being thus an exception to a general rule of practice. For in ordinary cases, as we shall see, Courts of Equity refuse to give relief where ordinary Courts of Law already provide adequate relief; but cases of fraud were always an exception. The prevention and correction of fraud being part of the original and proper office of the Court of Equity (a), it was always ready to interfere for that purpose; and that not only where discovery or a specific or preventive remedy was wanted, but even where the relief sought was a mere money demand, and therefore within the power of Common Law to grant adequate relief. This was on the principle (stated in the Earl of Oxford's case, 1 Ch. Rep. 1) (b), that "the Chancellor, as keeper of the king's conscience, will correct men's consciences for frauds, breaches of trusts, wrongs and oppressions of whatsoever nature they be." Thus, in Hill v. Lane (11 Eq. 229), 600£ was sought to be recovered from directors who had concocted a scheme to sell the good-will of an insolvent business, and V.-C. Stuart made the decree prayed for. In so doing he followed the decision in Slim v. Croucher (1 D., F. & J. 518), where a land-

(a) See Kerr on Fraud, p. 1.
(b) 2 White & Tudor's Leading Cases.
owner having by carelessness given two leases to the same builder, on both of which the builder raised money by mortgage, he was compelled in Equity to indemnify the mortgagees of the second null and void lease against their loss. Lord Campbell said, "The defence set up in this suit is that there was a remedy at law, and that that is the only remedy competent to the plaintiff. Now, that there was a remedy at law I think is quite clear. Here was a misrepresentation made by the defendant of a fact which ought to have been within his knowledge; it was made with the intention of being acted upon, it was acted upon, and thereby a loss accrued to the plaintiff; and there is no doubt in my mind that an action would lie, and that it would be for a jury to assess the damages. I am of opinion, however, that this belongs to a class of cases over which Courts of Law and Courts of Equity have a common jurisdiction, and in which the procedure of both jurisdictions is adapted for doing justice. I do not regret that there is such a class of cases, nor should I be sorry to see it extended."

Having thus shown to how great an extent the doctrines of Equity with respect to fraud coincide with the doctrines of Common Law, I pass on to speak of that residuum which is left outside this common ground, and to treat only of fraud so far as it is not known to the Common Law.

Under this head I propose to discuss fraud as it affects—

1. **Trusts proper.**
2. **Persons in a fiduciary position.**
3. **Property of a trust or equitable nature.**
The discussion of these will involve the consideration of

1. **Engagements amounting to trusts.**
   
   1. **a.** The incapacity of a trustee to receive personal benefit from his trust.
   2. **b.** Undue influence arising out of fiduciary position.
   3. The doctrine of notice, arising from the necessity of guarding against concealment and deception when equitable property is dealt with.

1. First I take fraud as it affects trusts proper.
   
   (a) As to engagements amounting to trusts, it is clearly a fraud to enter into such engagements, thereby altering another person's position, and then refuse to carry out the engagement; but considerable difficulty generally arises in these cases because the decision of each case must rest upon evidence, and generally upon evidence of intention.

   One ordinary example occurs where previously to a marriage a father has by letter stated his intention to settle property upon his daughter in the event of the marriage taking place, and in each separate case the question is one of evidence. Was the letter merely an expression of present intention, which was liable to alteration as circumstances might change, or was it a definite representation inducing another person to alter his position irrevocably? It may be sufficient on this subject to refer to the recent case of Coverdale v. Eastwood (L. R., 15 Eq. 122), where the leading case of Hammersley v. De Biel (12 Cl. & Fin. 45), and the other authorities, are cited.

   Such questions also arise where a gift is made by
will, and the donee is suspected to have taken the gift upon a secret trust. I will refer to three recent cases on the point. The first is Briggs v. Penny (3 Macn. & Gor. 546), where an executrix had a legacy of 6,000l. for her trouble, and the testatrix gave her also the residue, "as well knowing she will make good use of it and dispose of it in a manner in accordance with my views and wishes."

The executrix thought she could best further those views and wishes by putting the residue in her own pocket. But it was held that this would be a fraud on a trust, and that there was a resulting trust for the testatrix's representatives. On the other hand, in a more recent case in the House of Lords (McCormick v. Grogan, L. R., 4 H. L. 82), a similar gift was held no trust, but to belong to the donee beneficially. There a Mr. Craig left all his property to the defendant Grogan, and told him where he would find the will and a letter containing his wishes. Some persons were named in the letter who were to have legacies at Grogan’s discretion; but, said the testator, "he was not to mention the letter to any one, and then no one could find fault with him."

Grogan did not pay the legacies to all who were named in the letter, and they filed a bill to have him declared a trustee.

The House of Lords held that Grogan was intended to stand in the shoes of the testator, and to act entirely as he thought fit, and to give to such of the plaintiffs as he thought they deserved; in short there was no proof of any engagement by Grogan to act as a trustee.
The third case is Jones v. Badley (L. R., 3 Eq. 635 and 3 Ch. 362), where a lady gave real estate to Mr. Badley, her medical man, and his son, and the devise was impeached on the ground that there was a secret engagement to hold it in trust for charities, and the bill prayed that the gift might be declared void, or that Badley and his son might be held trustees, the property being realty, for the representatives of the testatrix. Evidence was given to show she had quarrelled with her relations and wanted to give her property to a charity for decayed gentlewomen. Her solicitor had told her she could not do that by will; even if she gave the property to persons she had confidence in, it would not bind them. She had, however, confidence in Badley, and gave it him, it was alleged, on a trust, which he, if not in words at any rate by silence, engaged himself to execute. The question was, had the Badleys assented to such a request? if so, they must be held trustees and be directed to hold the property on trust for the plaintiffs. Lord Romilly, M. R., held they were trustees and had assented to the trust; but Lord Cairns,—though he agreed that if a person, by an express promise or by silence, implies he will be a trustee, and property is left on the faith of such promise, it is a trust, and the Statute of Frauds or Wills shall not be set up as an instrument of fraud,—held, that in this particular case the evidence did not show any trust communicated, much less one assented to.

In all these cases, it will be observed, the Court of Chancery has not undertaken JURISDICTION AS TO
WILLS (c), but has left that to the Court of Probate (formerly represented by Courts of Law as to realty and the Ecclesiastical Court as to personalty); but if the person in whose favour probate was granted was guilty of concealing a trust which he had undertaken, then Equity laid hold of the conscience of the fraudulent trustee or executor and prevented him from using the Statute of Frauds or Wills for a fraudulent purpose. As Lord Westbury said in M'Cormick v. Grogan (ubi sup.), "The Court of Equity has, from a very early period, decided that even an Act of Parliament shall not be used as an instrument of fraud; and if, in the machinery of perpetrating a fraud, an Act of Parliament intervenes, the Court of Equity, it is true, does not set aside the Act of Parliament, but it fastens on the individual who gets a title under that Act and imposes upon him a personal obligation, because he applies the Act as an instrument for accomplishing a fraud. In this way the Court of Equity has dealt with the Statute of Frauds, and in this manner, also, it deals with the Statute of Wills. It is, in fact, an example of the maxim that Equity 'agit in personam'; but (as Lord Hatherley said in the same case) this doctrine evidently requires to be carefully restricted within proper limits. It is in itself a doctrine which involves a wide departure from the policy which induced the Legislature to pass the

(o) As we shall see in Chapter IX., the Court of Chancery sometimes put the proper Court in motion on a bill filed to establish testimony, and such suits being similar to a suit for perpetuation of testimony, I have mentioned them under that head.
Statute of Frauds, and it is only in clear cases of fraud that this doctrine has been applied—cases in which the Court has been persuaded that there has been a fraudulent inducement held out on the part of the apparent beneficiary in order to lead the testator to confide in him the duty which he so undertook to perform."

(b) I pass from the actual fraud of ignoring an engagement or trust, to constructive frauds connected with trusts.

It is an axiom that a trustee shall not derive any personal benefit from his trust, such precaution being considered necessary in order to prevent a trustee having any temptation to abuse his trust; it is, therefore, a rule that a trustee can only charge his cestui que trust for actual expenses out of pocket, unless there is some particular provision varying the general rule (Robinson v. Pett, 3 Peere Williams, 132) (d); and he can derive no benefit either by obtaining a renewal of a lease (Keech v. Sandford, Select Cases in Chancery, 61) (e), or by purchasing from his cestui que trust (Fox v. Mackreth, 2 Brown's Ch. Ca. 400; 2 Cox, 320) (e). A case lately occurred in which, 100 years ago, a trustee innocently bought from his cestui que trust some London property for 500l.; the property passed from hand to hand, getting every year more valuable, and in each sale fetching more money, until a recent purchaser, about to give 1,000l. for the property, found out what had been done, and

(d) 2 White & Tudor's Leading Cases.
(e) 1 White & Tudor's Leading Cases.
asked for the concurrence of the representatives of the *cestui que trust* from whom the original purchase had been made, and they demanded a considerable portion of the purchase-money as the price of their concurrence; this was a hard case, but the rule is a salutary one, because of the power a trustee would otherwise have to distress his *cestui que trust*. It follows that a solicitor, who is a trustee, may not derive any professional advantage from his trust, and may charge only for expenses out of pocket, unless there is a clause in the instrument exempting him from the general rule. The Court will not, however, carry this rule to an unfair extent; thus, where a solicitor was a trustee (Whitney v. Smith, *L. R.*, 4 Ch. 513), and carried out a loan of the trust funds which led to further custom in his profession, the Lords Justices held he should not be charged with that.

2. Secondly, I come to fraud as it affects persons *in a fiduciary position*, which involves the doctrine of **undue influence**.

The jealous precautions which the Court takes to prevent a trustee benefiting himself at the expense of his trust, have already been spoken of; the following case goes farther, and shows that where the relation of trustee and *cestui que trust* exists, the Court is particularly careful to prevent a trustee from using the influence belonging to his position in such a manner as to *force* the *cestui que trust* to do something which he was not legally bound to do. Such conduct will be undue influence, even though the trustee does not aim at any benefit for himself. In Ellis v. Barker (*L. R.*, 7 Ch. 104), a testator
left to trustees a farm and farming stock, and desired that if the landlord would take his eldest nephew (the plaintiff) as tenant, he was to have the farm and stock; he also gave the plaintiff's brothers and sisters certain legacies, which, however, failed eventually, and they took nothing under the will. One of the trustees was steward to the landlord, and told him of this hardship, and prevailed on him not to consent to take the plaintiff as tenant, unless he agreed to pay the brothers and sisters the legacies which they would otherwise lose. Thus he put pressure on the plaintiff by practically saying, "If you do not sign a deed, providing for these legacies, we will break up your farm." And the plaintiff, on filing his bill afterwards, obtained relief, and the deed was set aside on the ground that it was obtained by pressure and undue influence.

The Courts have extended the principles on which they protect cestui que trusts against the pressure of their trustees to all persons in a position of trust, and to all cases where influence is acquired and abused, or where confidence is reposed and betrayed. (Kerr on Fraud, 132.)

The leading case on undue influence is Huguenin v. Baseley, 14 Vesey, 273 (f), where a clergyman ingratiated himself with a lady of property and represented to her that her solicitors were mismanaging and neglecting her affairs, until by a remarkable letter, quoted in the report, she withdrew her affairs from them and eventually settled

(f) Reported 2 White & Tudor's Leading Cases.
her property on the defendant. Sir S. Romilly's famous argument in reply in the case contains most that can be said on this doctrine of Equity, and the Lord Chancellor set the deed aside on the ground of general public policy. Other parties who are considered in a position of dominion, so as to make the Court careful that they take no advantage of their confidential position, are parents, guardians, solicitors and agents (g).

The influence of a solicitor over his client is held to be such, that if he takes a gift from his client, or contracts to take a gross sum in lieu of fees for past or future services, the onus is upon him to show that the agreement is fair and reasonable, which duty is recognized and declared in the Attorneys and Solicitors' Remuneration Act, 33 & 34 Vict. c. 28, s. 4.

It is stated on the authority of Hindson v. Weatherill (5 D., M. & G. 301), that a solicitor can take a gift under a will prepared by himself, which he could not take if the instrument were a deed, and this, if it were so, would be a singular anomaly; but it seems doubtful if the Lords Justices intended to decide this in Hindson v. Weatherill. What they said was, that the Ecclesiastical Court (the Probate Court now) was the proper tribunal to look into the question of fraud of this kind, and reference was made by L. J. Knight Bruce to a case where Dr. Lushington said, referring to the case of wills made in favour of medical men, that the Ecclesiastical Court would be on its guard against undue

(g) See the notes to Huguenin v. Baseley in 2 White & Tudor's Leading Cases.
influence (note to p. 307 of the report of Hind-son v. Weatherill); therefore the anomaly was not that a solicitor could take a gift under a will which he could not take under a deed, but merely that one Court had jurisdiction in the case of a will and another in the case of a deed. In both Courts the same rule would be applied, that the burden of proving the fairness of the gift would fall upon the solicitor.

This case so understood is another example of the rule above stated (h), that the question whether a will should be admitted to probate belongs to the Probate (formerly the Ecclesiastical) Court. If there had been some engagement on the part of the person obtaining probate to hold the property on some trust, which engagement he kept secret or refused to fulfil, that would have been a case, as we have already seen, for fixing a trust upon the beneficial interest.

A special instance of undue influence, which, though not generally explained as coming under this head, undoubtedly does so (i), is what is called “FRAUD ON A POWER,” e.g., if a parent having a power exercises it in favour of a son whom he persuades at the same time to apply the portion appointed for the benefit of some one outside the power, it is as much a fraud by construction of law, though of course not morally, as if a parent, having a power to appoint among children, appointed to a

(h) Ante, pp. 47, 48.

(i) See the passage quoted below from Sir G. M. Giffard’s judgment in Topham v. Duke of Portland.
son upon his death-bed, with a view of reaping the benefit in case of his death as his personal representative.

And any kind of arrangement which the donor of the power did not intend is a fraud on the power, e.g., an appointment on the understanding that the appointee shall hold the fund in trust for a person not an object of the power: for instance, if a tenant for life has power to appoint to children, it is well known it would be wrong to draw a deed by which he should appoint to children and grandchildren; the appointment to grandchildren would be clearly void. But the appointor must know this also, that if he appoints to any child a large sum, having made such child promise to share the money with grandchildren, this too is void for fraud. Aleyn v. Belcher, 1 Eden, 132 (k), and Topham v. Duke of Portland, 1 D., J. & S. 17, and L. R., 5 Ch. 40, are the leading cases on this subject.

The judgment of Lord Justice Giffard in Topham v. Duke of Portland concisely expresses the effect of that decision and the ground of the doctrine as coming under the general head of undue influence. He says (L. R., 5 Ch. 60), speaking of the two deeds of appointment which the plaintiffs sought to set aside, "On the face of them they are in conformity with the powers they refer to (l), and are

(k) Reported 1 White & Tudor's Leading Cases.
(l) This of course distinguishes the cases we are considering from those like Alexander v. Alexander (2 Ves. 640), where the excessive execution is patent on the face of the instrument of appointment.
executed by the Duke of Portland. Previous deeds, also executed by the Duke (purporting to be in exercise of the same powers), in favour of Lady Harriett Bentinck to the exclusion of her sisters, were the subject of a suit, which came first before the Master of the Rolls, then before the Lords Justices, and afterwards before the House of Lords (m). The result of that suit was to set aside those deeds as invalid, because their real object and purpose was not to benefit Lady H. Bentinck as they professed, but to bring about a state of things resulting in an arrangement not warranted by the powers. . . . The evidence shows that . . . the arrangement was founded on what this present Duke believed to be the late Duke’s wishes, and that Lady Harriett assented and was willing to assent to everything which he or his advisers considered conducive to the end of carrying out of those wishes. In this state of circumstances no new appointment by the Duke in favour of Lady Harriett can stand, unless the effect and influence of this previous arrangement can be proved to have been obliterated . . . . the burden of the proof requisite to support a second appointment rests and ought to rest on the appointee. The reasons which in the case of a dealing between a solicitor and client throw the onus of proof on the solicitor, between a trustee and cestui que trust on the trustee, between a parent and child on the parent, and in the

class of cases to which Huguenin v. Baseley (n) belongs, on the persons seeking to sustain the gift, apply with equal force between the appointee in such a case as this and the person entitled in default of appointment. I am satisfied from Lady H. Bentinck's statements in her answer and her cross-examination that this original influence and obligation have existed, still exist, and are likely to exist. . . . It follows therefore that the appointments cannot stand."

There is another class of cases depending on the doctrine of undue influence, namely, where a resettlement of a family estate is made, and the parent, by his influence and authority over the son, gains some advantage which he did not previously possess. But the principle laid down in Stapilton v. Stapilton (1 Atk. 2) (o), that the leaning of the Court is to support reasonable family arrangements and to lay hold of any just ground to carry them into execution, applies to these cases of resettlement; and in order to make a case of undue influence in such a case, the onus is on the plaintiff; it has to be proved that the father induced the son to bar the entail for his own purposes, not for the benefit of the family. See Jenner v. Jenner, 2 D., F. & J. 359.

Dealings with reversioners come within the same rules. We are all acquainted with those friends in need who write from various parts of London to inform us that "money can be raised by

(n) Ante, p. 51.
(o) Reported with notes, 2 White & Tudor's Leading Cases.
them on reversionary interests at moderate rates;” and we all know how tenderly they deal with those who take advantage of such offers. The judgment of Lord Hardwicke in the case of Chesterfield v. Janssen (2 Ves. 125) {p), lays down clearly the principles on which the Court formerly acted in dealing with usurious contracts or catching bargains, and on which it still acts where there is what is called an unconscionable bargain, from which fraud and undue influence can be presumed. (Tyler v. Yates, L. R., 11 Eq. 265; 6 Ch. 665; Wyatt v. Coope 16 W. R. 502.) See also Lyon v. Home (L. R., 6 Eq. 655), and the judgment of Lord Selborne in the Earl of Aylesford v. Morris (L. R., 8 Ch. 484).

The effect of 31 Vict. c. 4, is simply to prevent undervalue from being conclusive in the case of any purchases not impugned before 1st January, 1868, and not to shift the burden of proof from the purchaser to the seller. See L. R., 8 Ch. 490. The presumption is still in favour of the reversioner seeking to set aside the sale, and he will succeed in his suit unless the defendant proves that he has acted fairly: the Court still requires the defendant in this, as in other cases of personal influence, to disprove unfair use of that influence.

3. The third kind of equitable fraud is that which arises in connection with trust estates and equitable assignments.

We can easily perceive that in this particular the Common Law rule that nothing should be assignable

{p} Reported 1 White & Tudor’s Leading Cases.
which could not be assigned by actual delivery, was preventive of fraud; thus, in the case of goods, every one could see who was the owner of them by seeing in whose possession they were; and even in the case of lands, though the title deeds might prove no more than a life tenancy in the holder thereof, still to that extent the possession of the deeds proved ownership (q); but when Equity, no doubt to the great convenience and advantage of commerce, introduced the principle of allowing choses in action and equitable interests to be assigned in Equity, it is clear that a road was opened for a new kind of fraud. In the case of most choses in action there is no badge of ownership by which it can be known whether there has or has not been a transfer, and thus it is easy to see how the assignment of choses in action and of equitable estates, being abstractions not capable of actual physical possession, as is the case with ownership of personal chattels, and even (through the title deeds) of real property, opens the way to fraud upon third parties.

Ryall v. Rowles (1 Ves. 348) (r) is a most instructive and interesting case on this subject, and shows that if a man buys any equitable property or chose in action transferable only in Equity, or takes a mortgage thereof, and does not give notice, but leaves the former owner in reputed ownership thereof, thus allowing him a delusive personal credit derived from that apparent possession, such purchaser or

(q) See on this point Mr. Justice Burnett's judgment in Ryall v. Rowles, 1 Ves. 348; 2 White & Tudor's Leading Cases.

(r) Reported with notes in 2 White & Tudor's Leading Cases.
mortgagee is postponed not only in bankruptcy(s), but generally. Therefore an equitable assignee of choses in action or equitable interests cannot be safe as against subsequent assignees without putting, so far as the nature of the property admits, his mark on the property, or, in other words, giving notice.

Thus, in the case of a trust fund being assigned in Equity, notice must be given to the trustee; in the case of a debt, to the debtor, in the case of a policy of assurance, to the office; where stock held in trust is assigned, a distringas (t) must be obtained, and where the chose in action is a fund in Court, the assignee must get a stop-order (u). See the notes to Ryall v. Rowles, ubi sup.

30 & 31 Vict. c. 144, was a statutory recognition, in the case of policies, of the right of assignment of choses in action, and provided that all assignees of life assurance policies may sue in their own names for the recovery of the monies assured, but no assignment is to give such right to sue, until a written notice of the date and purport of such assignment shall have been given to the assurance company in the manner prescribed by the Act.

The High Court of Judicature Act contains a special declaratory recognition of this equitable doctrine (36 & 37 Vict. c. 66, s. 25, subs. (6)), providing that any absolute assignment by writing of “any debt or legal chose in action of which express

(a) 32 & 33 Vict. c. 71, s. 15, subs. (5); Ex parte Harding, L. R., 15 Eq. 223.

(t) See Morgan's Chancery Acts and Orders, 508.

(u) Ibid. 506.
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."

This doctrine of notice, i.e., that an assignee, to save his priority, must give notice to the debtor, trustee, &c. (see supra), does not apply to real estate (Rooper v. Harrison, 2 K. & J. 86); and prior assignees of interests in land will only be postponed to subsequent assignees for negligence amounting to fraud, i.e., for extreme culpability in not inquiring for title deeds. The reason of this is, that estates in realty, and even, by analogy, equities of redemption, are held to pass by the conveyance, and to be carved out of the inheritance according to priority, and there is no question of reputed ownership. Everyone knows that the apparent owner of land may have mortgaged it legally or equitably; hence it follows that "a mortgagee will not be postponed because he has not given notice, whatever may have been his motive in omitting to do so, but he will be postponed if there has been any conduct with reference to the title deeds, actually or by inference fraudulent." (Fisher on Mortgages, 587.)

As Vice-Chancellor Wood said, in Rooper v. Harrison (2 K. & J. 100), if inconvenience arises from the absence of a rule requiring notice in the case of real estate, it can only be removed by the legislature introducing some system, by registration
or otherwise, by which persons may have notice of the charges existing upon real estate.

In respect of judgments, however, the doctrine of notice has practically been extended to real estate, and, in general, this policy of not letting equitable incumbrancers or transferees leave the former owner a delusive credit, gives the key to the JUDGMENT ACTS, the most recent of which "assimilates the law affecting real property to that affecting personal property in respect of judgments" (x), and allows no lien to be obtained until a return to the writ is made by the sheriff, and the land is actually delivered in execution (y).

The phrase in the section quoted (p. 60, ante), from the Judicature Act, that an absolute assignment of choses in action shall be effectual in Law, subject to Equities, leads us to a second aspect of the doctrine of notice, namely, that if any person, taking an assignment or conveyance of any property, has in fact notice that some one else has a legal or equitable interest in the same property, he cannot shut his eyes and his ears and take the property free from such interest, except in cases within stat. 27 Eliz.

(x) 27 & 28 Vict. c. 112, s. 1; Fisher on Mortgages, 91; Morgan's Chancery Acts and Orders, 355.

(y) If there is any obstacle preventing the land from being delivered in execution, e. g. if the debtor's interest is an equity of redemption, the creditors' remedy is to file a bill to remove the obstacle. (Re Cowbridge Rail. Co., L. R., 5 Eq. 413, and cases there cited; Guest v. Cowbridge Rail. Co., L. R., 6 Eq. 619; Hatton v. Haywood, L. R., 9 Ch. 229; Beckett v. Buckley, L. R., 17 Eq. 435.)
c. 4 (z). As to what is construed to be notice for this purpose, James v. Lichfield (L. R., 9 Eq. 50) and Phillips v. Miller (L. R., 9 C. P. 197) are good cases to show the need of careful inquiry for leases and for agreements contained in leases. The rule is that a purchaser of land, which he knows to be in the hands of a tenant, cannot after he has completed his purchase get rid of his bargain, or get compensation, because he finds afterwards that the tenant has a lease or certain rights of which he was not informed; but a recent case before the Master of the Rolls and Lords Justices has established, that as between vendor and purchaser, previously to the completion of the purchase, the doctrine does not apply to the same extent; if there is anything in the nature of the tenancies which affects the property sold, the vendor is bound to tell the purchaser and to let him know what it is which is being sold, and the vendor cannot afterwards say to the purchaser "if you had gone to the tenant and inquired you would have found out all about it." (Caballero v. Henty, L. R., 9 Ch. 447, 450.)

The cases on priority being lost by having constructive equitable notice are numerous (a). Maxfield v. Burton (L. R., 17 Eq. 15) is a very recent one, where the owner of real estate had mortgaged it by a pledge of the title deeds to his bankers, and on his marriage he did not tell the intended wife's solicitor of the charge, and the solicitor was satisfied

(z) See ante, p. 36, as to assignments void against purchasers under this Statute of Elizabeth.

(a) See Dart on Vendors and Purchasers, 783.
without making inquiry. Jessel, M. R., said he was sorry for the wife, but considered that as between the bankers and the wife, who took her husband for better or for worse, there was no Equity other than the ordinary one. She had constructive notice through her legal adviser, and could only take subject to the bankers' charge.

The leading case on the subject of taking with notice, and especially with constructive notice, is Le Neve v. Le Neve (Ambler, 436) (b), where it was held that a registered conveyance must be postponed to a previous unregistered conveyance, of which the later purchaser had notice. But it requires a strong case thus to infringe upon the policy of the Registration Acts. See the recent case of Re Wright's Mortgage Trust, L. R., 16 Eq. 41, and the authorities therein cited.

When the assignment is of an equitable nature, the rule that it must be taken subject to equities applies with greater force, for he who comes into Equity must do Equity. Several cases on this subject will be found under the last head of the note in 2 White & Tudor's Leading Cases to Ryall v. Rowles, and they have been very frequent of recent years, the question having frequently arisen whether securities issued by a company to a contractor or other person, and negotiated by him, remained in the hands of the transferee subject to the equities attaching on them as between the contractor and the company. See Henry Holden's case, L. R., 8 Eq.

(b) Reported with notes in 2 White & Tudor's Leading Cases.
444, 448; South Blackpool Hotel Company, *ibid.* 225; Re Northern Assam Tea Company, L. R., 10 Eq. 458; Rodger *v.* Comptoir d'Escompte de Paris, L. R., 2 Priv. Counc. 393, 405; Re Imperial Land Company of Marseilles, Ex parte Colborne and Strawbridge, L. R., 11 Eq. 478, and cases there cited.

It follows from these cases as to fraud and notice that the maxim "*QUI PRIOR EST TEMPORE POTIOR EST JURE*" must be understood in a carefully qualified sense, and that priority of time only avails in deciding on priorities if equities are equal. See Rice *v.* Rice (2 Drewry, 73), with the judgment in which every aspirant to a knowledge of Equity ought to be perfectly familiar.

Finally, if equities are equal as between two claimants of the same estate, but one of them having purchased for value without notice has also the *legal estate*, he will not be interfered with in Equity, which simply remains passive. The principle is, that he who has innocently paid his purchase-money is as favourably considered as he who has by some other Equity a claim to the same property; and if the former has the legal estate also, he shall not be deprived of it or of the advantage thereof. Basset *v.* Nosworthy (Rep. temp. Finch) (c) is the leading case on this point, and with that we may fitly end our discussion of Equitable Fraud, for we are brought back to our original point, that where there is no paramount trust obligation, Equity follows the Law.

(c) Reported 2 White & Tudor's Leading Cases.
CHAPTER IV.

LUNATICS, INFANTS, MARRIED WOMEN.

I propose in this chapter to speak of what Mr. Smith calls "protective Equity in favour of persons under disability" (a); in other words, the jurisdiction of Equity to protect lunatics, infants, and married women. Mr. Haynes (b) treats the subject as belonging to the exclusive Chancery jurisdiction, but treats it separately from the ordinary jurisdiction over trusts; but we shall find that this jurisdiction is seldom, if ever, called into exercise unless there is some trust to be executed (c). Thus, though the care of the persons of infants is said to belong to the sovereign and to be delegated to the Court of Chancery, yet it is admitted in Wellesley v. Duke of Beaufort (2 Russ. 21), that this jurisdiction will only be exercised where the Court has the means of applying property for the use and maintenance of the infant.

1. First, as to LUNATICS.

It is well known that the Court of Chancery has no jurisdiction as a Court over lunatics; we cannot take questions about their property or guardianship before the Vice-Chancellors; for lunatics are assigned

(a) See Smith's M dissolved, Table of Contents, title 5.
(b) Lectures, pp. 100, 129, 130.
(c) Smith's Manual, 434.
to the protection of the Lord Chancellor personally. It seems that the origin of this jurisdiction is a statute by which the Crown is made trustee of the property of lunatics (d); but at any rate it speaks well for the Christianity and charity of the laws of England, that these terribly afflicted persons who are under this most pitiable of all disabilities should be placed under the tender care of the highest and most responsible officer of the state, and that the charge is deemed so personal and so important that it cannot be delegated even to the Court of Chancery, but is given by statute only to those who sit on the same bench with the Chancellor—the Lords Justices of Appeal (e).

There is a recent and very important case which forcibly illustrates the peculiar nature of the Chancellor's jurisdiction in lunacy, and at the same time contains a serious warning for the lawyer, namely, Beall v. Smith (L. R., 9 Ch. 85).

In that case the facts were as follows:—

The lunatic, a Mr. Beall, was found by the police wandering about the streets; he was taken before the magistrates, examined by medical men, and placed in an asylum as a person of unsound mind, who, it was thought, had better be under supervision for a while; but his family hoped he would recover, and therefore did not at first get an inquisition to declare him a lunatic in the eye of the law, so as to

(e) See 15 & 16 Vict. c. 87, ss. 14 and 15, set out in Morgan's Chancery Acts and Orders, pp. 227, 229.
LUNATICS, INFANTS, MARRIED WOMEN.

bring him within the Lord Chancellor's jurisdiction. Mr. Beall was a shopkeeper and had property worth about 4,000l., and this put his manager and agent into an embarrassing position. He wanted to render accounts, but there was no one who could give him a discharge.

If Beall had been found a lunatic by inquisition, then the Lord Chancellor and Lord Justices would have had the personal care of him and would have appointed a committee in the regular course to take care of his property, and an application could have been made to the Chancellor or Justices, sitting in lunacy, by which the manager and agent could have been discharged and released from responsibility.

But as there was some hope that it would not be necessary to take proceedings in lunacy, it was determined for the present to treat Mr. Beall as an ordinary cestui que trust, and a bill was filed to take the accounts of the business and release the manager from his agency, and V.-C. Wickens made an order in Chancery appointing a receiver and manager of the business. So far this was nothing but an ordinary trustee suit, nothing to do with the lunacy; otherwise the Vice-Chancellor could have had no jurisdiction. It was said in the judgment in this case, and it will be well to remember, that though the Court of Chancery will act in the affairs of a person of unsound mind not found a lunatic, just as in the case of an infant, yet anybody taking such proceedings on behalf of the person unable to act for himself does so at his own risk and must be prepared to vin-

\(f\) See Jones v. Lloyd (May 4, 1874), 22 Weekly Reporter, 785.
dicate the necessity and propriety of his proceeding, just like any other guardian, and must bear the consequences of any unnecessary proceedings; and if the person for whom he is acting recovers his reason there is the risk that the proceedings may be objected to and any unnecessary expense repudiated.

But, even supposing the proceedings were so far right in this case of Beall v. Smith, the solicitors were not content with this short and simple proceeding, but even after Beall had been properly found a lunatic by inquisition, which very soon happened, the solicitors continued the suit on his behalf—and in this they were held to be doing what was entirely unjustifiable—and had to pay all the costs of the suit personally and as between solicitor and client, which are the heaviest costs that can be imposed. The reason of this was, that after the inquisition the Crown by its proper tribunal having the lunatic and all his affairs under its exclusive care and guardianship, the power of any person to commence or prosecute any proceedings for his protection was taken away, and, as Lord Justice James said, "there is no inconvenience or injustice in this,—application can at all times be made to the Court for anything that may require or may be just to be done; and no doubt if any person who had interfered for the protection of a lunatic could satisfy the Court that he had acted bona fide and for the benefit of the lunatic, the Court would reimburse him as it would reimburse any other person who had rendered services to the lunatic."

The Court therefore decided that any attempt to
deal with a lunatic's property after the inquisition in an ordinary suit amounts to a gross contempt of the Court in Lunacy.

2. Secondly, as to infants.

There is no question that the principle on which the Court takes infants under its protection is as trustee and guardian of their property, so that this also must be considered as part of its trust jurisdiction.

There is also no question that when once the judge has made an infant his own cestui que trust, or what is ordinarily called a ward of court, he will proceed to take cognizance of other matters relating to the infant's welfare. For example, he will appoint a personal guardian for the infant if necessary (Eyre v. Countess of Shaftesbury, 2 Peere Williams, 103)\(^{(g)}\). But the right to appoint guardians of children belongs at Common Law to the father only; and with this as with other Common Law rights, unless it be waived or neglected by him, the Court will not interfere; it is only when the father appoints no guardian, or when the father has by misconduct and neglect lost his right, that the Court will, if there is property which it can undertake the trusts of, appoint a guardian, as in Re Kaye (L. R., 1 Ch. 387), a case in which the jurisdiction is carefully pointed out and the principles of selection stated.

Where there is no trust property in Court, upon which to found an exception to general rules, it will be found that the manner in which the Court treats infants very strongly exemplifies the maxim that

\(^{(g)}\) 2 White & Tudor's Leading Cases.
"Equity follows the Law," for not only in respect of the guardianship, but in all other respects, the Court of Equity takes the same view of the responsibility of a father as the Common Law does, and will not allow him to renounce his duties, which are to care for and see to the due education of his children.

Thus, in a recent case, Hamilton v. Hector (L. R., 6 Ch. 701), it was very seriously considered by Lord Hatherley whether a father could even contract with his wife (from whom he was unfortunately separated owing to differences between him and her), that the children should pass a certain part of their holidays with her instead of with him. Lord Romilly, M. R., had refused to assist the wife to enforce the agreement, but Lord Hatherley held, upon consideration, that this was not a substantial waiver of his paternal responsibility, but only a proper provision under the circumstances: this then was one of those exceptions which test and prove the rule.

Andrews v. Salt (L. R., 8 Ch. 622) is an important case, showing, first, how the Court only deals with infants as trustee of their property, and so having once became their trustee, then as their general guardian if necessary; and, secondly, in what manner a father may waive his paternal right and responsibility. It was a case where a father had by will directed that his girl should be educated as a Roman Catholic, and that his brother, a Roman Catholic, should be her guardian, but she was allowed by this uncle to live with her mother till the age of ten, in accordance with an agreement between the father and mother that the boys should be educated in the
father's religion, and the girls in the mother's, and for this ten years neither the father, nor after him the father's brother as guardian, had interfered.

After the ten years' however, the uncle thought fit to claim the custody of the girl, and at Common Law his authority as appointed guardian was not to be denied: he came to the Queen's Bench, and that Court reluctantly held that they had no discretion to refuse him a writ to take the child from the mother (L. R., 8 Q. B. 153). What did the mother's advisers then do? They put 20l. into the names of trustees for the child, and then filed a bill to make her a ward of Court, and to administer the trusts of this vast property. This of course was a legal fiction, and the reason of it is clear, because a trust being once created and the Court made the guardian of the infant, the Court of Equity was no longer dealing with mere legal rights, and therefore was not in conflict with the Law if it as paramount guardian took a more liberal view of what was for the benefit of the infant. This fiction then having been gone through, and the Court of Chancery having jurisdiction, the Lords Justices (affirming V.-C. Malins) held that the father and the guardian appointed by him must be held to have waived or neglected the Common Law guardianship, and that it would be prejudicial to the happiness and prospects in life and health of the girl to take her away from the mother.

The Custody of Infants Act (2 & 3 Vict. c. 54, repealed and extended by 36 & 37 Vict. c. 12), is a statutory recognition of this equitable prin-
ciple, and gives the Court jurisdiction upon petition to let mothers have access to or the custody of their children under sixteen years of age, instead of the fathers, in proper cases: and a provision giving the custody of children to mothers is not ipso facto to make a separation deed invalid. See Lord Cottonham's words in Warde v. Warde, 2 Phill. 787 (h).

I quote another statute about infants, providing for infant settlements, 18 & 19 Vict. c. 43, as a connecting link between the jurisdiction over infants and that over married women. By that statute (i) it is provided, that infants (if male not under twenty, if female not under seventeen years of age) may, with the approbation of the Court, make valid settlements of real and personal estate upon marriage.

3. As to married women.

This is a large subject, and can only be slightly touched upon; I shall, however, endeavour to show that here also Equity follows the Law, excepting where it deals with property subject to a trust; but where there is property of the wife in its hands as trustee, or in trustees' hands, then it takes the wife's rights under its special care, and corrects the harsh doctrines of the Common Law.

The Common Law rule (which Equity follows in the absence of any contrary trust), is that the husband takes all the wife's personal property in possession, and all her choses in action (i.e., per-

(h) Quoted Morgan's Chancery Acts and Orders, p. 8.
(i) Morgan's Chancery Acts and Orders, 233.
sonal property not in possession) which he can reduce into possession, as his own property, on the presumption that he will duly support and maintain her and the children of the marriage.

The Court of Equity not only does not dispute but even assists actively this Common Law right of the husband, and goes so far as to say, that at the date of the betrothal the young man agrees to take the young woman with all her incidents. And therefore, that if during the course of the treaty for marriage the intending wife makes away with any of the property which the intending husband agreed to take as part and parcel of herself, such transaction is a fraud on the marital rights and will be set aside: but of course the Court will not interfere in favour of the husband unless it considers that there really was a fraud upon him, a scheme, in fact, to deprive him of his Common Law rights. The well-known leading case on this subject is Countess of Strathmore v. Bowes (1 Vesey, jun. 23) (k). Lady Strathmore was a very wealthy person and agreed to marry a Mr. Grey. She conveyed and assigned all her property to trustees, with Mr. Grey's approbation, on the usual trusts for her separate use, in the event of that or any other coverture. A few days later she heard that Mr. Bowes had fought a duel for her with the editor of a newspaper who had traduced her character, and this so won the lady's affections, that with that impulsiveness of generosity which characterizes many

(k) 1 White & Tudor's Leading Cases.
of the female sex, without waiting to ask whether
the duel had been fought for herself or for her
fortune, or indeed whether the duel had been fought
at all, she threw over poor Mr. Grey, and threw
herself and her fortune into the arms of this valiant
duellist and married him the next day. As a matter
of fact the duel was a sham one, and was invented
as an artifice in order to obtain this lady's fortune.
Mr. Bowes did not know anything of the above-
mentioned settlement of the lady's fortune, and no
doubt expected to find her free and unfettered in
purse as well as in person, and when he discovered
what had been done, he was indignant at this having
been done without his knowledge, and tried to set
aside the settlement as a fraud on the marital rights;
but Lord Thurlow held, that the question was whe-
ther there was fraud in what Lady Strathmore had
done, and he decided that there was none; the
reason that the settlement was not communicated to
Bowes was the hurry and confusion which his own
iniquitous conduct had produced, and it was im-
possible for a man marrying in the way Bowes did,
to come into Equity and talk of fraud; indeed, this
is a real example of the maxim mentioned, p. 15,
ante, that "He who comes into Equity must come
with clean hands."

Craven v. Brady (L. R., 4 Ch. 296) is another
strong example of Equity following the Law, and
merging the wife in her husband. A man left pro-
erty to his widow for her life; but if she did any-
thing whereby she should be deprived of the rents
and profits or the right to receive them, her life
estate should cease. This proviso being made, the lady married one Charles Brady, and no settlement was made. No doubt Mr. Brady thought he had made a very successful venture, but never was a greater instance of a slip between the cup and the lip; for it was decided in a suit that the lady having married without a settlement, her husband took the rents, and she was, therefore, under the proviso deprived of the control of the property; and both the Master of the Rolls and Lord Chancellor on appeal were obliged to come to the conclusion that this neglect to execute a deed on the second marriage, by which the rents should be secured to her alone, created a forfeiture of the estate. It is to be hoped that Mr. Brady was not tempted to tie himself up in this particular matrimonial chain under the impression that it was a golden chain; if it was so, the result was a very unfortunate example to him of the old proverb that "all is not gold that glitters."

Equity, however, while following Common Law rules, in the absence of any trust to the contrary, takes advantage of the existence of a trust where it can to soften the rigour of the Common Law; and this it does—

(A.) By encouraging and enforcing settlements of married women's property.

(B.) By protecting their property in certain instances independently of any settlement, on the ground of property of the wife being in the hands of the Court as trustee.
(A.) The Court enforces settlements of the wife's property on marriage, of which the ordinary provisions are—

(1.) Certain part of the property goes to the trustees for the wife's separate use.

(2.) Other part perhaps goes to trustees for the husband for life, but with a gift over for the wife and children, if he does anything to forfeit or alienate it.

(3.) After-acquired property which may fall in for the wife during the marriage is settled so as to go, not to the husband, but to the trustees for the wife and children.

Such settlements the Court of Chancery will protect, even if the settlement is after marriage, and therefore voluntary; for the case of Ellison v. Ellison (6 Vesey, 656) (k) shows that as between a husband and his wife and children such a settlement is irrevocable, though as between him and his creditors or subsequent purchasers it is voidable under the statutes of Elizabeth (l).

I take these three common provisions in order.

(1.) As to her separate use.

The leading case on this point is Hulme v. Tenant (1 Brown's Ch. Cases, 16) (m). Mr. Lewin points out that the separate use is not an instance of Equity refusing to follow the Law (n), for modus et conventio vincunt legem; and a stranger may make a gift to

(k) 1 White & Tudor's Leading Cases.
(l) See ante, pp. 35, 36.
(m) 1 White & Tudor's Leading Cases.
(n) Lewin on Trustees, 537.
the wife even during marriage, and if he clearly expresses that it is to be for her separate use, it will be so.

The usual way of settling property to a lady's separate use is, as we know, for her to have the income for life, and not to have power to anticipate such income: this is in order to prevent her from mortgaging or selling future income under persuasion of her husband or any one else, and at her death the corpus is divided among the children. A new point arose in Ellis's Trusts (L.R., 17 Eq. 409), viz., whether an absolute gift to a married woman could be legally qualified by a proviso restraining anticipation during coverture; and Sir G. Jessel, M.R., held that even in such a case the restraint on anticipation was valid.

If, however, property be absolutely given or secured to a married woman for her separate use, without a proviso restraining her from anticipating the income, it is settled that she is to all intents and purposes in the position of a feme sole, so as to be able to dispose of that estate by will or deed; and this applies even to real property, notwithstanding the general rule that the heir of a married woman cannot be affected by any instrument except a duly-acknowledged conveyance in which both husband and wife concur. See Taylor v. Meads, 34 L. J., Ch., N. S. 203; Pride v. Bubb, L. R., 7 Ch. 64.

(2.) As to the proviso for FORFEITURE of the husband's life interest on BANKRUPTCY, I may refer to a valuable note on Settlements in Prideaux's
LUNATICS, INFANTS, MARRIED WOMEN.

Conveyancing, Vol. II., where the subject is discussed, and to the following recent cases: Trappes v. Meredith, L. R., 9 Eq. 229; 10 Eq. 604; 7 Ch. 248; Amherst’s Trusts, L. R., 13 Eq. 464; Billson v. Crofts, 15 Eq. 314; Aylwin’s Trusts, L. R., 16 Eq. 585.

(3.) As to the COVENANT TO SETTLE THE FUTURE PROPERTY of a wife (o): the object of that is to prevent its falling under the sole control of the husband, and therefore it primā facie does not apply to property falling in after the coverture, i. e., after the husband’s death. Thus, in Re Edwards (L. R., 9 Ch. 99), the covenant was, “in case after the marriage the wife, or husband in their right, should become entitled to any property, such property should be vested in the trustees of the settlement.” The clause was not worded as it would have been if correctly drawn, “during” the marriage, but “after” it. So that when money fell in for the wife after her husband’s death, this was strictly “after” the marriage, and it was doubted whether the money ought not to be settled so as to give the wife only the income; but the Court (on the principle that the written deed did not represent the real contract between the parties) (p) held that the wife took what fell into her possession after the husband’s death free from any liability to settle it.

And, as the covenant does not include property falling in after the termination of the coverture, so it

(o) See the Dissertation on Settlements in Vol. II. of Prideaux’s Conveyancing for some valuable notes on this subject.
(p) See Chapter VIII. on Mistake.
does not include property which in any sense was in the lady's possession before the coverture began.

Re Browne's Will (7 Eq. 231) is an instance of this. There a lady owned a tontine debenture—a tontine is an arrangement by which an annual income, say the profits of a bridge, is divided among all the people who paid for the building of the bridge for their lives, and as the lives drop off the survivors take the profits, till, at last, the longest liver takes the whole income—this lady, having a tontine share, married, and her settlement contained a covenant to settle all property which vested in her by transmission, gift or otherwise; her tontine share grew in course of years, till from being worth only 7l. 10s. a year it became a very valuable property, and the question arose, ought not the accretions to be settled?

Lord Romilly, M. R., held the clause did not include the tontine share; it pointed to after-acquired property, i.e., property which she should become possessed of after the marriage; but before her marriage she was possessed of the property, and the fact, that from the nature of the property and the circumstances which happened, it became more valuable year by year, did not affect the question any more than if she had been possessed of a mine at the time of the settlement which subsequently became of very great value.

Thus, it appears that the Court will not make these covenants include more than is consistent with the general intention, because they are exceptions to the Common Law rule, giving the husband the control
of the wife's property, as being her natural supporter and protector.

(B.) Independently of settlement the Court of Chancery protects married women's property, on the ground that such property is in the hands of the Court as trustee.

The species of property to which the protection of the Court is most usually given are EQUITABLE CHOSES IN ACTION, in respect of which,—

(1.) The wife is entitled to her EQUITY TO A SETTLEMENT, in case she asks for it, or if the husband has to apply to the Court.

(2.) The wife has a right in a REVERSIONARY CHOSE IN ACTION by survivorship which she cannot generally destroy.

(1.) As to the EQUITY TO A SETTLEMENT.

Equity, like Common Law, permits the wife's chose in action to belong to the husband if he can reduce it into possession: if not, it goes to the wife at the dissolution of the marriage, whether such dissolution takes place by death or by divorce, as in Prole v. Soady (L. R., 3 Ch. 220), in which case a Mrs. Jeyes was entitled, absolutely, to a share in £15,000 consols which was in Court to the credit of a suit—and this equitable chose in action the husband mortgaged, his wife joining in the mortgage.

The money was carried over to the account of Mr. and Mrs. Jeyes, but as it was not paid out to them, the effect of that was simply to leave the money subject to any rights which the husband and wife might have over it.

Soon after that a divorce was sued for by Mrs. Jeyes
LUNATICS, INFANTS, MARRIED WOMEN.

and a decree made, and she claimed her ordinary right to the consols as not having been reduced into possession.

Stuart, V.-C., decided that the mortgagee ought to have his charge, but Lord Cairns overruled the decision, and said, "It was argued that it is a dishonest and unjust thing that the lady should be allowed to assert her right of survivorship, but the law says, that married women shall bind their property by alienation in certain specified methods, and if those methods are not resorted to it is at the peril of those who act without resorting to them. The Court cannot entertain the question of justice or injustice in such a case."

But if the husband does get a chose in action into his possession then it belongs to him, and Equity will not interfere to prevent this being done.

But will the Court of Equity allow him to reduce it into possession if it is an equitable chose in action? That depends—an equitable chose in action may be either personal property vested in trustees for the married woman (and not settled by her previously to marriage when she was a feme sole), or personal property which cannot be got into possession without application to the Court of Chancery, the money being in Court, as in Prole v. Soady (loc. cit.); and the rule is, if the husband needs the arm of the Court to reduce this property into possession for him, then the judge says, "I am a trustee for your wife of this property, and will not assist you unless you do Equity and make a proper settlement." See
Sturgis v. Champneys, 5 Mylne & Cr. 105 (q). But as to property vested in a trustee, it is of course possible that the trustee may, without the knowledge of the Court, pay it to the husband, and in that case the husband's right is not controlled by the Court.

A legacy left to a married woman, even though there be a legal remedy by distress to recover it, comes (if it gets into the Court of Chancery) sufficiently within the power of the Court as trustee to make it subject to this Equity.

In Duncombe v. Greenacre (2 De G., F. & J. 509), Mr. Ames left all his land to his son, but charged a legacy of 1,000l. on it for the benefit of his daughter, Mrs. Duncombe, to be paid on his widow's death, and he gave Mrs. Duncombe legal power to raise the 1,000l. by distress and entry. Mr. Duncombe was a spendthrift and a reckless husband, and raised money on the 1,000l. legacy, by mortgaging it to the Family Endowment Society for 580l., and then became bankrupt.

The Family Endowment Society claimed the 1,000l. assigned to them, on the ground at which I have hinted, that the legacy could be recovered by legal remedies of distress and entry, and there could be no interference of the Court with a Common Law right.

But the Master of the Rolls, and Lord Campbell affirming him, held, that a legacy is a kind of interest which can be sued for in Equity, and that the additional legal remedy here given did not take away the

(q) Cited in the notes to Lady Elibank v. Montolieu and Murray v. Lord Elibank, 1 White & Tudor's Leading Cases.
jurisdiction of the Court of Equity over the *legacy as a trust fund*, when once a suit in the nature of an administration suit was commenced, and he decided that the wife should have her settlement.

The Equity to a settlement applies to **all kinds of property**, as well as to choses in action (though they are the most usual instance of it); *i.e.* all property which must be got at in Equity, and it is always given as one of the best examples of the maxim **he who comes into Equity must do Equity**; the Court of Chancery will not assist or in general allow the husband to recover or receive any property of his wife which he has to recover in that Court without settling a due proportion on his wife and children.

The right is *personal* to the wife and may be waived by her, and if she dies before decree the children cannot enforce it; if, however, she dies after decree, the settlement will be made for their benefit.

The leading case on the subject of the Equity to a settlement is *Lady Elibank v. Montolieu* (*5 Ves. 737*) (*r*), where it was decided, that though if the husband can get the trustees or executor to pay him the fund, he can give a good receipt for it, and the Court of Chancery will not interfere with him (just as we shall see in the next Chapter, that if a creditor can persuade an executor to prefer his debt to other debts, the Court of Equity will not afterwards interfere with such *Common Law* right) (*s*), *yet* (as the mere filing of an administration suit will prevent

(r) 1 White & Tudor's Leading Cases.
(s) Post, p. 91.
such powers of preference), the wife may take proceedings to enforce her equity to a settlement if she suspects that the trustee of her fund will not make the claim on her behalf.

But suppose the husband, instead of claiming the trust fund to be paid to himself, assigns it in Equity to a third party? Can she claim her Equity against the third party, the assignee?

Certainly she can, as a general rule, and more especially if the assignee is the trustee in bankruptcy of the husband, for then it is clear the husband is not supporting her, and it is on the presumption of his supporting her that he has the legal right to her property.

But there is one exception to the rule that the wife may assert this Equity as against the husband and his assignees, which is, that unless the husband is bankrupt, which effectually rebuts the presumption of his supporting her, and gives the wife a clear Equity to a settlement, she is not generally allowed a settlement out of a life interest only, for then the principal argument for a settlement—i.e., a provision for the children after her death—is wanting. See Tidd v. Lister, 10 Hare, 140.

The proper form of settlement is laid down in Walsh v. Wason, L. R., 8 Ch. 482.

(2.) If the equitable chose in action be in reversion, the Court of Equity will not permit any arrangement with the life tenant for the purpose of merging the particular interest with the reversion and then assigning it as an interest in possession. In short, the Court thus preserves to the wife her con-
tingent interest in the chose in action in the case of her survivorship; for so long as the reversion remains a reversion the husband cannot assign it, because his assignment would always be subject to be defeated by his death before it became a present interest capable of being reduced into possession, and the feme covert cannot of course deal with it, having no interest in personalty apart from her husband, excepting, indeed, in certain cases under the provisions of Malins' Act, 20 & 21 Vict. c. 57. The important case of Whittle v. Henning (11 Beav. 222; 2 Phil. 731), decided that the Court would not allow any merger of the particular estate with the reversion to destroy this contingent interest of the married woman in the case of a fund in the hands of the Court.

Lord Cottenham said, that "the Court would not by analogy to law establish an equitable merger for the sole purpose of depriving the wife of this protection to her reversionary interest, which would be to permit a supposed analogy to the rules of (Common) Law to defeat the rules and practice of the Court in the protection it affords to married women, though in all other cases it disregards the rules of (Common) Law, and the rights of husbands when they interfere with such rules and practice; what this Court protects is the reversionary life interest of the wife, and for that purpose it will consider it still as reversionary, notwithstanding other parties interested in the fund may, for the purpose of de-

(t) See, as to this Act, Lord Selborne's judgment, Re Batchelor, L. R., 16 Eq. 481.
priving her of such reversionary interest, by enabling her to dispose of it, endeavour to unite in her person all the other interests in it.”

It is worthy of note, that the 25th section of the Judicature Act, subs. (4), expressly provides, that there shall not after the commencement of this Act be any merger by operation of law only of any estate the beneficial interest in which would not be deemed to be merged or extinguished in Equity.

Having thus treated of the protection afforded by Courts of Equity to married women, it only remains to point out that she does not acquire the aforesaid right without becoming subject to corresponding liabilities. Thus, though she cannot be bound by her contracts or frauds personally, it was held that her separate estate might be made liable to satisfy her engagements in writing, by Vice-Chancellor Kindersley, in Vaughan v. Vanderstegen, 2 Drewry, 165, of which report pages 179—184 should be read. This case was followed and extended in Sharp v. Foy, L. R., 4 Ch. 35, and in Picard v. Hine, L. R., 5 Ch. 276, where Lord Hatherley and Lord Justice Giffard, referring to the judgment in Johnson v. Gallagher (30 L. J., N. S., Ch. 298), said, “When a married woman allows the supposition to be made that she intends to perform an agreement out of her own property, she creates a debt which may be recovered not by reaching her, but by reaching her property.

The legislature has now recognized in the Married Women’s Property Act, and adopted (33 & 34 Vict. c. 93) the doctrine of Equity, that a married
LUNATICS, INFANTS, MARRIED WOMEN. 87

woman's separate property can be made subject to her debts. Sect. 12 of the statute provides, that a husband is not to be liable for the debts of the wife before marriage, but the separate property of the wife (including her earnings, her deposits, stocks, shares, interests in benefit societies, property acquired after marriage, policies of assurance) (ss. 1—10) is made liable to them, and for the purpose of reaching it she is to be subject to the ordinary process of Law or Equity.

It seems, however, that there is no process provided by way of bankruptcy or otherwise for reaching the separate property of a married woman before her death for the purpose of equitable, i.e. rateable, division, but each creditor must sue for himself alone. And it was decided by Lord Cairns and the Lord Justice James, in Ex parte Holland, re Heneage (L. R., 9 Ch. 307), that a married woman cannot be adjudicated a bankrupt at all; Lord Justice Mellish, however, preferring to leave it undecided whether she might not become bankrupt in respect of separate property.

After the death of the married woman a bill may be filed to administer the separate estate for the benefit of creditors; Owens v. Dickenson (Cr. & Ph. 48); and then the debts are paid pari passu, the reason apparently being not that such assets are trust or equitable assets (u), but that the circumstance of a debt contracted by a married woman being secured by specialty gives the creditor no priority. (Anon., 18 Ves. 258.)

(u) Ante, p. 11; post, p. 92.
CHAPTER V.

ADMINISTRATION.

In this Chapter we shall speak of Administration (a) generally. Administration may be either of trusts or of Common Law rights.

The administration of trusts belongs of course to the exclusive jurisdiction of the Court of Chancery, and will be new to the divisions of the High Court of Justice, other than the Chancery division; but as regards the administration of Common Law rights a distinction must be made; for though where such administration involves complication and difficulty the Court of Chancery has exclusive jurisdiction to grant a complete remedy by way of adjustment, yet the rights, being Common Law rights, are, in cases not so complicated, equally subject to Common Law jurisdiction.

Let us take a case illustrating the concurrent nature of this jurisdiction. In Owen v. Delamere (L. R., 15 Eq. 134), a bill was filed for administration, the plaintiff alleging himself to be a creditor of the business of the testator; but it was held, that the debt was only a debt against a portion of the estate severed from the rest, and that there was no case for

(a) Corresponding to Mr. Smith's title "Adjustive Equity," and including the adjustment of accounts in general, mortgages, apportionments, partnerships and sureties.
a general administration; this is an example clearly illustrating how those rights which Courts of Equity administer where there is complication, Courts of Common Law can and ought to administer when they come singly and without complication; in other words, the right is a Common Law right, but if adjustment is needed, that peculiar remedy can only be had in Equity.

And why is this? Is it simply because the Courts of Equity acquired a machinery for dealing with adjustments in general by reason of their jurisdiction to deal with trusts? or is it because, as Mr. Josiah Smith suggests, there is in cases of administration (especially of assets) a constructive trust? Probably both reasons are partially true.

For example, the administration of deceased persons’ estate, if it is complicated, comes into the Court of Chancery, in order to obtain more complete relief and adjustment of claims than a Common Law action or actions would give; and having once been taken in hand for this reason, the further proceedings are carried on under the ordinary trust jurisdiction; for the executor or administrator having once submitted to the jurisdiction is viewed by the Court as a trustee instead of the absolute owner which he is at law, and is assisted and protected accordingly.

An executor indeed, though not strictly a trustee (since at law he can deal with the personal assets as absolute owner and can give receipts to purchasers without any necessity on their part to see to the application of the purchase-money) (b), is held to be

(b) See notes to Elliot v. Merriman, 1 Barnardiston, 78; 1 White & Tudor’s Leading Cases.
a trustee of the residue when he has paid debts and assented to debts and legacies, even though there be no suit; also he becomes a trustee in effect by filing a bill for administration; and it need hardly be mentioned that in a great majority of instances he is made trustee by the will.

Having prefaced this much as to the reason of Courts of Equity undertaking the administration or adjustment of Common Law rights, let us first speak of the **Administration of Deceased Persons' Estates**, and see in what manner such Common Law rights are dealt with in suits for that purpose.

It is obvious that such rights must be constantly under consideration in the course of winding-up estates.

For instance, in *Erskine v. Adeane* (L. R., 8 Ch. 757), it became necessary for the Court of Chancery to determine whether a landlord was liable for letting his yew leaves be eaten by his tenants' cattle, and whether he was bound under certain covenants in a lease to keep down his hares and rabbits: both peculiarly Common Law questions, and as to both of which the Court of Appeal in Chancery differed from the Court of First Instance.

As a remarkable example of the care which the Court of Equity takes to "follow the Law," to adopt Common Law rules in dealing with assets where there is no special trust, I may refer to *Peek v. Gurney* (L. R., 6 H. L. 377), where the Common Law maxim "*actio personalis moritur cum persona*" was adopted in a suit in Equity. The shareholders in Overend & Gurney wished to make the estate of Mr. Gibbs, who had been a director,
liable for alleged misrepresentations; and it was held, that the principle of the above-mentioned rule applied, and they could not do so.

Lord Chelmsford said: "This being a proceeding to recover damages for a wrong done, there can be no doubt that if an action at Law had been brought by the plaintiff instead of this proceeding in Equity, the executors could not have been made liable; and in the exercise of a concurrent jurisdiction by Courts of Common Law and Equity, both Courts ought to proceed upon the same principles."

One other decision I will refer to as showing how Equity binds itself to follow the Common Law in administering legal rights, viz., Earl Vane v. Rigden (L. R., 5 Ch. 670), where the Court had to consider the power of an executor or administrator to prefer one creditor to another (i.e. one of equal degree; Williams on Executors, 964).

Mr. Rigden, a trader, died, and left his widow, Jane Rigden, his executrix: her brother came to her and asked her to pay him his debt, which, in fact, would exhaust nearly all the assets. She agreed so to do, and gave him all the ledgers and books as a security, thus practically sweeping all the assets into her brother's pocket and depriving other creditors of any remedy. Thereupon Earl Vane, who was a creditor for 1,000L., filed a bill to administer and to set aside the transaction, and Vice-Chancellor Malins held, that it was dishonest and could not stand; but Lord Hatherley and Lord Justice James reversed this decree on appeal, and Lord Justice James, in giving judgment, said: "It
appears to me that there are some very simple propositions which dispose of the whole case. By the law of the land the legal personal representative is entitled to give preference to one creditor over another in equal degree, and it appears to me that that right of giving preference cannot be affected by the fact which seems to have weighed with the Vice-Chancellor: that the legal personal representative is a woman and a widow, and the brother of the creditor, without due delicacy or without proper feeling, pressed his sister in her early widowhood to give him this preference. In a matter of relation between debtor and creditor, this Court has no right to require delicacy or proper feeling where the creditor is only exercising his legal right" (c).

If, however, one creditor of the deceased commence an action or suit against the executor or administrator of which he has notice, he is restrained from making a voluntary payment to any other creditor of equal degree. (Williams on Executors, 965.)

Another Common Law priority which is recognized and admitted even in an administration in Equity, so far as legal assets (d) are concerned, is the priority which an executor or administrator can give to himself: his power of retainer. (As to which, see Williams on Executors, 971; Ferguson v. Gibson, L. R., 14 Eq. 379.)

But these powers of preference and retainer do not apply to equitable (i. e. trust) assets, as has

(c) See on this point Williams on Executors, 966.
(d) Ante, p. 11.
been already stated (e). In the case of trust assets, as in other cases of trust, Equity could apply its own rule without interfering with any Common Law doctrines, and accordingly it applied the maxim that "EQUITY DELIGHTS IN EQUALITY," and held that all creditors of every degree should receive payment rateably. See Williams on Executors, 1552; Silk v. Prime, 1 Brown's Chanc. Ca. 138 (f).

Until the legislature decreed that the Common Law should follow Equity in this matter, by passing 32 & 33 Vict. c. 46, and subsequently enacting in the Judicature Act (g), that "insolvent estates should be administered as in bankruptcy," this curious anomalous result occurred. If a man was insolvent, and an adjudication in bankruptcy was obtained, all creditors were paid rateably; but if he died before adjudication could be obtained, specialty creditors would have priority, and might exhaust all the assets; but henceforth the rule of Equity will prevail universally.

The inability of an executor to retain his own debt out of equitable assets was recently considered in Bain v. Sadler (L. R., 12 Eq. 570), where John Sadler, as executor, claimed to retain for his own debt 900£ out of an estate of 4,000£, which was partly the proceeds of realty devised in trust for sale. Vice-Chancellor Wickens held, that, though he might retain so much as he could of his debt out of the legal assets, i.e. assets which he took as

(e) Ante, p. 12.
(f) 2 White & Tudor's Leading Cases.
(g) 36 & 37 Vict. c. 66, s. 25, subs. (1).
executor, he had no right to be paid anything out of 2,000l., which was real estate left in trust for debts, and which must therefore be administered as trust assets, until all other creditors were paid up to an equality with the executor, “the trustee of an estate devised for sale had no right analogous to that of an executor who is a creditor, and the union of the characters of trustee for sale and executor in one and the same person could not give to the executor rights over the estate he took as trustee which in his character of trustee he would not have.”

But though debts are to be paid rateably, certain parts of the assets will be applied towards the payment before others; and a few words may be said on the order of assets. The rules for deciding which funds are first liable for debts are in themselves simple; they are these, that the personalty is taken before the realty, and property not given beneficially by the will before property which is so given. So that personalty and realty not bequeathed, or, in other words, descending to the executor or heir respectively, are the first two funds, and personalty bequeathed and realty devised, the last two funds resorted to, and the simplest order is,

1. Personalty descending to the executor (and a residuary bequest of the personalty of course makes no difference; so much as is wanted for debts descends to the executor).

2. Realty descending to the heir.

3. General bequests of personalty (i.e. general or pecuniary legacies).

4. Devises of realty (and specific legacies).
As to classes 3 and 4 it must be noted that specific legacies are taken out of the class of general bequests of personalty and lifted up into the same class with specific devises, and also that a residuary devise of realty is still held to be specific, for the purpose we are now considering. (Gibbins v. Eyden, L. R., 7 Eq. 371, following on this point Hensman v. Fryer, L. R., 3 Ch. 420 (h).) The decision in Lancefield v. Iggulden (L. R., 17 Eq. 556) does not seem consistent with this settlement of the law.

When, however, we look into the books for an account of the order of administration of assets, we find more than four classes distinguished (Smith’s Manual, 272) (i), which is to be accounted for in the following manner.

A testator can vary the regular order of assets by his will; thus, he may devise the whole or part of his real estate for payment of debts, in which case such real estate is resorted to next to the general personalty; or he may, in making specific gifts, say, that what he gives to A. shall be liable for debts before that which he gives to others.

Then the order will be as follows:—

1. General personalty.
2. Realty devised for debts.

(h) Some confusion will be found in the text-books (see Smith’s Manual, 273) as to the effect of Hensman v. Fryer. There were two points decided in it—1, that a residuary devise remains specific, and this has been followed, as stated above in the text; 2, that a general legacy and a residuary devise of realty must contribute pro rata, and on this second point only the case has not been followed. (Dugdale v. Dugdale, L. R., 14 Eq. 234.)

(i) See also notes to Silk v. Prime, 2 White & Tudor’s Leading Cases.
3. Realty descending.
4. Specific gifts, real or personal, charged with debts.
5. General or pecuniary legacies.
6. Specific devises of reality (residuary devises being considered specific), and specific legacies.
7. Personalty and reality appointed under a general power. (Williams on Executors, 1562, note (g).)

This is the usual order of assets, liable still further to be altered by special directions in the will; e.g. if the testator chooses to direct the EXONERATION OF THE PERSONALITY and make his reality primarily liable; but very clear and unambiguous words are required in order to effect this complete inversion of the usual order. See Duke of Ancaster v. Mayer, 1 Brown, Ch. Cases, 454 (k).

The Court will vary the order by the process of MARSHALLING, where, without such variation and adjustment of the assets, some just claims would have been altogether unsatisfied (l). The marshalling of assets was required more frequently in the old time, when specialty creditors had priority over other creditors, and the real estate was not assets for payment of debts; for then one large creditor, with a specialty binding the whole estate, could, if he chose to come on the personalty, sweep the simple contract creditors out of the field, and leave them no assets. In such a case the Court could not, indeed, say to the specialty creditor, "You can prove against

(k) 1 White & Tudor's Leading Cases.
the reality, which the other creditors cannot do, therefore you shall not prove against the personalty, being their ewe-lamb.” But if the specialty creditor, to save himself trouble, did prove against the personalty, the Court said that the others should not lose by his choice, but should go in his place on the reality. See Aldrich v. Cooper, 8 Ves. 382 (m).

The doctrine of marshalling also applies between mortgagees: if I have a mortgage on two estates and a second mortgagee has a mortgage on only one of these, the Court says I, having power to take my security out of either, shall not proceed against that which is the only security of the other creditor, but shall so far as possible take my debt out of the estate not mortgaged to him.

A recent example of marshalling in administration was Lilford v. Keck (L. R., 1 Eq. 347), where the case was this:

A man bought an estate, but did not pay the purchase-money, and died; the seller had a lien on the land in the hands of the purchaser’s heir, according to the doctrine of vendor’s lien (Mackreth v. Symmons, 15 Ves. 329) (n), and he had a claim, of course, against the executor also; the point to be noted is that he had both charges; he had (1) a mortgage on the estate; and (2) a claim on the personalty; he could go either against this land or against the personal assets; if he did the latter he would defeat (not indeed creditors, for they, under the modern law, can proceed against the heir, but) legatees, for

(m) 2 White & Tudor’s Leading Cases.
(n) 1 White & Tudor’s Leading Cases.
legacies are only paid out of personalty; and it was held, that if the vendor exhausted the personalty, the legatees might stand in his place and go against the land. This case was decided before the statute 30 & 31 Vict. c. 69, by which Locke King’s Act was extended to vendor’s lien so as to make the purchased land bear its own burden, and therefore leave the personalty free for legacies.

The process of marshalling is still applicable as between legatees and creditors; and another instance of marshalling the assets in favour of legatees is given in Williams on Executors, 1589, viz., where one or more legacies are charged on the real estate, and there is another legacy which is not so charged; there the legatee, whose legacy is not so charged, shall stand in the place of the former legatees, to be satisfied out of the real assets.

There is no marshalling to defeat a statute, e.g., the Mortmain Act, and though complaint is made that the Court of Equity acts improperly in refusing to marshal assets in favour of charities (o), we may see in this anxiety not to evade the statutes of mortmain, one more example of our leading maxim that “Equity follows the Law.”

Supposing all known debts to be paid, the next duty of the personal representative is to pay the legacies so far as there is personal estate available, and here it may be remarked that a difficulty formerly arose; suppose there were debts not known to the executor, or contracts on which a liability might

(o) Smith’s Manual, p. 290.
arise, then there must be some arrangement with the legatees to refund in case of necessity; but now the Court can give a complete indemnity if the administration is carried on in Chancery, and if not, Lord St. Leonards' Act (22 & 23 Vict. c. 35) provides an indemnity as to covenants in leases if the leases be properly assigned (p) by sections 27 and 28, and as to unknown creditors when certain specified notices have been issued (q).

Of legacies the best kind to have is a demonstrative legacy, which is a general legacy, but with a suggestion of the fund or source from which it shall, if possible, be paid. Such legacy is not deemed if the fund be called in or fail, but is paid out of the general assets, and it is so far specific that it does not abate with general legacies on a deficiency of assets. See on this subject, Ashburner v. Macguire, 2 Brown's Ch. Ca. 108 (r).

The ademption of legacies occurs where a legacy is given by will, but the property given is made away with between the date of the will and the death of the testator, as occurred in Hepworth v. Hepworth, cited p. 27, ante.

This brings us to that peculiar kind of ademption of legacies, which takes place by way of satisfaction of portions; e.g., a man gives 1,000l. by his will to

(p) See as to the duty of executors before this Act to assign a lease if the landlord refused to accept a surrender, even to a pauper, so as to relieve the estate from the burden, Rowley v. Adams, 4 Mylne & Cr. 534.

(q) Morgan's Chancery Acts and Orders, 278, 280.

(r) 2 White & Tudor's Leading Cases.
each of his children; one daughter marries in his lifetime, and has a portion of 1,000l. given her; then, as Equity delights in equality, and leans against a double portion to any child, this is held a satisfaction or ademption of the legacy by the portion; but this doctrine only holds in cases where the giver stands in loco parentis. See Ex parte Pye, 18 Ves. 140 (s). It was pointed out very lucidly in Chichester v. Coventry (L. R., 2 H. L. 71), that this satisfaction of a legacy by a settlement is more properly called Ademption, while the name Satisfaction is more properly applied where, vice versâ, a father covenants by settlement or other deed to settle a certain sum on his child upon certain trusts as a portion, and subsequently gives that or a similar sum upon similar trusts by his will or otherwise. In this case, also, the similarity of the two gifts may be so great as to give rise to the presumption that the child was not intended to have both portions, but it is clear that the satisfaction of a legacy by a settlement, being the ademption of a revocable gift, is more easily presumed than the converse case of the satisfaction of an irrevocable settlement. The latter doctrine is a strong instance of the Court of Chancery construing trusts according to what it presumes to be the true intention (t).

**CONDITIONAL LEGACIES** sometimes cause a diffi-

(s) 2 White & Tudor's Leading Cases.
(t) For the somewhat similar doctrine of performance, and the distinction between performance and satisfaction, see ante, p. 29, and Wilcocks v. Wilcocks, 2 Vern. 558; 2 White & Tudor's Leading Cases.
culty, as, for example, where money was to be raised and paid for a testator's nephew for obtaining his promotion in the army—and before it was so raised and paid the purchase of commissions in the army was by royal warrant abolished—in this case the legacy was held to go free from the condition. (Palmer v. Flower, L. R., 13 Eq. 250; compare Re Ward, L. R., 7 Ch. 727.)

It is said that the rules as to conditions applied to legacies are more liberal in Equity than at Common Law, and in the case of conditions in restraint of marriage this is no doubt so, for Equity, following the Civil Law, regards such conditions as void and of no effect (see Scott v. Tyler, 2 Brown, Ch. Cas. 431 (u); Lloyd v. Lloyd, 2 Sim., N. S. 255; Bellairs v. Bellairs, before Sir G. Jessel, M. R., 16 July, 1874); but where, in future, there is any such conflict or variance, the rules of Equity are to prevail under sect. 25 of the Judicature Act, 1873.

The doctrine of election arises where a legacy is given on a condition of a special kind, i.e., where a man gives property to A. (say a house) on condition (generally implied) that A. gives some of his own property (say another house) to B., then Equity does not insist on A. giving his house to B., but it does say, "if you take the testator's gift you must accept the condition and take the will as a whole; you must not approbate and reprobate. So, if you take the house by the will you must either give B. your house or give him some equivalent in value out of the testator's gift to you." See Codrington

(u) 2 White & Tudor's Leading Cases,
v. Lindsay, L. R., 8 Ch. 578, and Streatfield v. Streatfield, Cas. temp. Talbot, 176 (x). The case is not always so plain as that, and it is generally a nice point on the construction of the will, whether the gift was intended to be conditional on the devisee giving up his own property or not.

After debts and legacies are paid the next thing is to distribute the residue, and the principal thing to remember here is the equitable doctrine of conversion, by which, if the land is directed to be sold by the executors or trustees and the proceeds divided among legatees, it is held converted into personalty, and will possess all the incidents of personalty (Fletcher v. Ashburner, 1 Brown, Ch. Cas. 497 (x); but if it is considered that the sale was only meant to pay debts, or for some other specific purpose, any surplus land after such purpose is effected will not be taken from the heir. (Ackroyd v. Smithson, ibid. 503 (y).)

This doctrine of Conversion must not be confused with a rule of Equity bearing the same name, and also relating to administration, but which is entirely different, the conversion of what is called wasting or perishable property.

This rule is, that all investments bringing in a large income at present for a tenant for life, but which are hazardous and speculative, or even will wear out in course of time (as is the case with leaseholds and some government annuities), must be converted into

(x) 1 White & Tudor's Leading Cases.
(y) Ibid. The subject of conversion is treated in detail in Haynes' Outlines of Equity, 374—433.
investments authorized by the will or by the Court, for the equal benefit of the persons taking in succession. This is, of course, subject to the power of a testator to direct that the rule shall be excluded, or to give his trustees a discretion, as in Re Sewell, L. R., 11 Eq. 80. A case lately occurred where a testator had invested many thousands of pounds in a brewery partnership, and after his death his widow, who was also his administratrix, received, as tenant for life, the full profits of her husband's share in the brewery, instead of capitalizing them, and at the end of fifteen years, on one of her daughters marrying, the trustees of the marriage settlement had to raise the question, and the widow was ordered by a decree to make good to the estate all the profits beyond what she would have received if she had taken the money out of the partnership and reinvested it in the funds. See, for a similar case, Brown v. Gellatly, L. R., 2 Ch. 751.

The last doctrine of Equity in connection with the administration of assets which I will mention is that which relates to the liability of co-executors joining in receipts, as to which it can only be said that a co-executor should not join unless he actually receives money, for he need not join (one executor's receipt being a discharge), and if he does he is doing more than he need do. Co-trustees, on the other hand, must give joint receipts, and the signing such receipt is therefore more commonly held a formality in the case of a trustee, and does not necessarily expose him to liability if he has not actually received the trust money. See Charlton v. Earl of Durham, L. R., 4 Ch. 433.
Having thus referred to most of the doctrines of Equity relating to the administration of assets, it remains to say a very few words on those other cases where both equitable and Common Law rights are brought into Courts of Equity for the sake of the remedy which they only can give, viz. administration and adjustment.

1. Account. “In matters of account, based on equitable claims, Equity has universal and exclusive jurisdiction, but in matters of account, growing out of privity of contract, and cognizable at Common Law, Courts of Equity have a general jurisdiction where there are complicated and intricate accounts, or a remedy which is, or was, peculiar to a Court of Equity is required.” Such is Mr. Josiah Smith's statement, based upon Story's Commentaries, and I have quoted it as exactly coinciding with the view I have taken of equitable jurisdiction in general.

2. Mortgages and Liens. For particulars as to this branch of administration I can only refer to Mr. Fisher's Work on the Law of Mortgage and other Securities. Some remarks on the doctrine of priority, as depending on notice, actual or constructive, will be found in the Chapter on “Equitable Fraud,” ante, p. 57—64.

3. Apportionment and Contribution. “In several cases under these heads assistance may be had at Common Law; but even in these cases it may be necessary to resort to Equity in order to avoid a multiplicity of suits.” An example of contribution

(z) See sect. 25, subs. (5) of the Judicature Act (36 & 37 Vict. c. 66), providing that generally a mortgagor may sue in his own name for rent or to prevent trespass.
has already been given in the case of co-sureties (p. 15, ante), where Dering v. Earl of Winchelsea (1 Cox, 318) (a) was cited; and it is said in the judgment in that case, "If we take a view of the cases in Common Law and Equity we shall find that contribution is fixed on general principles of justice, and does not spring from contract, though contract may qualify it," so that here, again, the equitable doctrine is only following the Common Law.

Another example of apportionment and contribution occurs where a tenant for life of realty subject to a charge, who is only bound to keep down the interest of the charge, pays it off out of his own money, for then the Court of Equity holds that the remainderman must contribute to the payment, and therefore the charge is not held to be merged in the estate, unless the intention to let it do so is apparent. See Forbes v. Moffatt (18 Vesey, 384), and the provision in the Judicature Act, 36 & 37 Vict. c. 66, s. 25, subs. (4), "There shall not, after the commencement of this Act, be any merger by operation of law only of any estate the beneficial interest in which would not be deemed to be merged or extinguished in Equity."

4. Partnership and Companies. "Courts of Equity exercise a full concurrent jurisdiction with Courts of Common Law in all matters of partnership; indeed, practically speaking, they exercise an exclusive jurisdiction in all cases of any complication or difficulty" (b). The right, therefore, being the

(a) 1 White & Tudor's Leading Cases.
(b) Smith's Manual, 352.

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same as at Common Law, reference need only be made to Mr. Lindley's great work on the subject of Partnership and Companies.

5. Partition. This subject has already been mentioned in respect of the jurisdiction (ante, pp. 20, 21), and it will be sufficient here to refer to the recent Partition Act, 31 & 32 Vict. c. 40, by which the Court is empowered, in cases where a sale would be more beneficial than partition, to order a sale on the request of any of the parties interested, and notwithstanding the dissent or disability of any other of them. Recent cases on the act are France v. France, L. R., 13 Eq. 173; Higgs v. Dorkis, ibid. 280; Pemberton v. Barnes, L. R., 6 Ch. 685; Wilkinson v. Joberns, L. R., 16 Eq. 14.

6. Sureties. The position of a surety is one which requires various adjustments, which the Courts of Equity formerly carried out, and which have been since adopted by Courts of Common Law. The doctrine of contribution between co-sureties, one of whom has discharged the whole debt, we have already spoken of ante, p. 15.

Then, again, as to the release of a surety by the creditor giving time to the debtor, a surety may or may not be so released according to the nature of the indulgence. (See Rees v. Berrington, 2 Ves. jun. 540 (c).) For indulgence may be given in two ways, and the cases on the subject may be reconciled by attending to the following distinctions.

The position of suretyship is that the surety as well

(c) 2 White & Tudor's Leading Cases.
as the creditor can at the right time save himself from loss by suing the debtor on his bond or other security (ante, p. 14). This being so, the creditor can indulge the debtor in two ways—(a) either he can say "no one shall sue you, neither I nor the surety;" in this case he discharges the surety, for the surety's right can only be discharged together with the discharge of his liability; (b) or he may say, "I will not sue you; but, as I want to reserve the surety's liability, I cannot help it if he sues you to save himself." In this case the surety is not discharged, and the debtor cannot complain, for he is party to the arrangement by which the rights against the surety and so of the surety are preserved.

The recent cases on this point, which on the principles so understood will all be found consistent, are Green v. Wynn (L. R., 4 Ch. 204), before Lord Hatherley; Bateson v. Gosling (L. R., 7 C. P. 9), and Cragoe v. Jones (L. R., 8 Ex. 86), at Common Law. These two last were cases of composition deeds, where the creditor, in accepting a composition, reserved his rights against sureties; and it was held, that if the composition deed amounted to a release of the debt altogether, it was within case (a) above and the surety was released; if it was only a covenant not to sue, it was within case (b), and the surety was not released.
CHAPTER VI.

SPECIFIC PERFORMANCE OF CONTRACTS.

Referring back to the description given of Equity as administered in Courts of Chancery (p. 9, ante), it will be found that we have now discussed two heads out of three, namely, (1) trusts, which in respect both of the right and the remedy exclusively belong to Equity; and (2) administration of rights which may be recognized at Common Law, but which come into Courts of Equity for the remedy which their machinery alone can supply, viz., complete adjustment of several cross demands and complicated rights in one suit. We have now to speak of (3) Remedial Equity (so called to distinguish it from Administrative Equity), which deals with Common Law contracts and Common Law torts on Common Law principles, but gives a distinctive remedy, decreeing specific contracts and preventing wrongs by way of injunction, instead of waiting, as the Common Law Courts do, till the wrong is done, and endeavouring to compensate by money damages for a loss which may then be irreparable.

In this, therefore, and the following chapters, the principal difference we shall find between the system of Equity and that of Common Law will be in respect of the remedy. And yet we shall no doubt
find certain doctrines as to contracts in which it may appear at first sight that Courts of Equity adopt arbitrary principles of construction, and try to construe agreements according to the intention rather than according to settled rules. But we shall find (1) that this is not the case to any great extent, and that for the most part, if there is no undue influence (see p. 50, ante), Equity, like Common Law, will respect and uphold contracts as they were made; (2) that the cases where Equity does regard the substance or spirit and not the letter merely, are cases where the parties are considered under the circumstances to stand in the relation of trustee and cestui que trust (a).

For although we have now passed away from relief founded on the obligation of trusts proper to relief unconnected with trusts or their administration, we shall find that, for some purposes and under certain circumstances, i.e., when a contract is definite and complete and the position of the parties has been altered, Equity holds that there is a trust between the vendor and the purchaser of land, one for the other.

Mr. Josiah Smith, though in Tit. 2, Ch. 8 (heading), he says he is about to deal with "specific performance of agreements and duties not arising from trusts," states in the same Chapter (Sect. iv.) that "in Equity, from the time of a contract for the sale of land, the vendor, and his heirs, and any one claiming as a subsequent purchaser under him, become, as

(a) See ante, pp. 11, 23.
to the land, trustees for the purchaser, and his heirs, devisees, or vendees; and the purchaser and his personal representatives become, as to the money, trustees for the vendor and his personal representatives."

A recent and leading authority on this point is Shaw v. Foster (L. R., 5 H. L. 321), where Sir William Foster agreed to sell the lease of the Alhambra Palace to Mr. Pooley, who, after paying 12,500l., but leaving some purchase-money still unpaid, assigned his contract to the plaintiffs. The simple question arose, and was carried to the House of Lords, whether Sir William Foster, the seller, was trustee for the plaintiffs, who had given him notice that the contract was assigned to them, so that he was doing wrong in conveying to Pooley when Pooley paid the residue of the purchase-money.

I quote the case, not for the actual point decided, but for the law laid down in the judgment at p. 333, as follows:—

"According to the well-known rule in Equity, when the contract for sale was signed by the parties, Sir W. Foster became a trustee of the estate for Pooley, and Pooley a trustee of the purchase-money for Sir W. Foster; and it was competent to Pooley to assign the benefit of his contract, or to charge his equitable interest in the property in favour of another person, and upon notice given to Sir W. Foster of such assignment or charge, he would have been bound to protect and give effect to it. To the extent of the 12,500l. paid by Pooley, it cannot be reasonably doubted that, according to what was said by Lord Cranworth in Rose v. Watson (10 H. L. C.
Pooley acquired a lien 'exactly in the same way as if upon payment of the money Sir W. Foster had executed a mortgage to him to this extent.' Nor can there be any ground for doubting that the interest Pooley had so acquired he was entitled to transfer or to create a charge upon, and that upon proper notice to Sir William Foster of Pooley's having done so, Foster would have become a trustee for the transferee or the person to whom the charge was given.

"This being the clear law upon the subject, the only questions open for discussion in the case are; In what manner Pooley dealt with his interest under the contract; and whether Sir W. Foster had proper notice of any binding interest or right which any other person had obtained in it."

As a matter of fact in this case the House of Lords came to the conclusion that the only notice that Sir W. Foster had was, that the plaintiffs were to have an assignment of the contract, not absolute but on certain contingencies; so that Sir W. Foster remained trustee for Pooley and not for the plaintiff, but the statement of the law is precise and valuable.

Lord Cairns also said on the main point, "I apprehend there cannot be the slightest doubt of the relation subsisting in the eye of a Court of Equity between the vendor and the purchaser. The vendor was a trustee of the property for the purchaser; the purchaser was the real beneficial owner in the eye of a Court of Equity of the property, subject only to this observation, that the vendor, whom I have called the trustee, was not a mere dormant trustee;
he was a trustee having a personal and substantial interest in the property, a right to protect that interest, and an active right to assert that interest if any thing should be done in derogation of it. The relation, therefore, of trustee and cestui que trust subsisted, but subsisted subject to the paramount right of the vendor and trustee to protect his own interest as vendor of the property."

Having thus shown the trust which for certain purposes exists between vendor and purchaser, we pass to consider (1), the foundation of the jurisdiction to grant specific performance of contracts; and (2), the conditions on which the High Court of Justice, being now a Court of Equity, will grant it.

(1) The foundation of the jurisdiction is the INADEQUACY OF DAMAGES AS A REMEDY FOR BREACH OF CONTRACT. The Common Law (says Mr. Fry, p. 6) "treats as universal a proposition which is for the most part, but not universally, true, namely, that money is a measure of every loss:" to take a simple instance, a journey from here to Paris may cost me 2L., but if the railway breaks its contract to take me, my loss, according to the nature of the business I was going on, may be 500L., and it would be impossible to get adequate damages at Common Law for the breach of this contract, because damages are founded on the market price of the thing contracted for. This is the foundation of the equitable doctrine of specific performance, by virtue of which, subject to certain conditions, Equity will enforce contracts recognized at law, instead of leaving the plaintiff to recover damages for the breach. The
right to have the contract performed is admitted both in Law and Equity, but this specific remedy can only be got in Equity.

(2) What are the conditions on which the Courts will grant specific performance? Suits will not be dismissed hereafter for asking the wrong relief, for when the new Judicature Act comes into force, the High Court, including both Equity and Law, will relieve on every contract, and will give damages or specific performance as may be most convenient; but it may be laid down that if the present rules continue to guide the Courts, specific performance of a contract which is definite and mutual, and made for valuable consideration, will be granted.

(A) If specific performance is a more adequate remedy than damages.

(B) If the performance is practicable, i.e., can be carried out by the Court.

(A) Specific performance must be the more adequate remedy.

In cases where specific performance is not better than damages, Equity considers it has no need to interfere; and therefore in such cases it leaves the suitor to his Common Law remedy, e.g., if the defendant contracted to sell me stock which is always to be bought in the market (Cuddee v. Rutter, 5 Vin. Abr. 538 (c)); or if he agreed to borrow my money and pay me interest for it (Rogers v. Challis, 27 Beav. 175); in both these cases Equity holds

(b) As to mutuality, see Vansittart v. Vansittart, 4 K. & J. 64.
(c) 1 White & Tudor's Leading Cases.
I can go into the market for as good an investment for my money;

Therefore, the market price is a good measure of damages:

Therefore, the remedy is in damages.

But though for this reason Equity will not enforce specific performance of agreement to borrow a sum of money on mortgage (Rogers v. Challis, 27 Beav. 175), yet, if I have lent money on the faith of a promise that I shall have land as a security, Equity will give specific performance of the agreement to mortgage. (Hermann v. Hodges, L. R., 16 Eq. 18.)

And though generally the market value is adequate remedy in the case of personalty, unique articles may be recovered specifically—as in the case of the Pusey horn (Pusey v. Pusey, 1 Vernon, 273) and the altar-piece, which being found on property belonging to the Duke of Somerset, belonged to him as lord of the manor, and he recovered it by suit in Chancery from a jeweller to whom it had been sold with notice that it was treasure trove. (Duke of Somerset v. Cookson, 3 Peere Williams, 389 (d).)

And in Fells v. Read (3 Ves. 70), the members of a club called "The Past Overseers of St. Margaret's Parish, Westminster," having been for a long period in possession of a silver tobacco box, inclosed in two large silver cases, all which were adorned with several engravings of public transactions and heads of distinguished persons, sought in Equity to recover it from the defendant, and the lord chancellor said, "The Pusey horn, the patera

(d) 1 White & Tudor's Leading Cases.
of the Duke of Somerset, were things of that sort of value that a jury might not give twopence beyond the weight. In all cases where the object of the suit is not liable to a compensation by damages, it would be strange if the law of this country did not afford any remedy.” And he declared the plaintiffs entitled to the possession of the box.

So in Lloyd v. Loaring (6 Ves. 773), the plaintiffs were companions of a lodge of Freemasons, and stated that their dresses and decorations, books and papers, tools and implements, having been sent to the Freemasons' Tavern, the defendant Loaring had taken them; and without the books and original warrant or charter no meetings of the said chapter or society could be properly and regularly convened or held, nor the business or ceremonies or functions of the said chapter or society performed; and if the said constitution or charter or warrant should be lost or destroyed, the said chapter or society would either be wholly dissolved and lose its ranks and privileges among the several different lodges or chapters, or be prejudiced or degraded.

Lord Eldon hesitated to grant relief, because the association of Freemasons had no corporate existence in Law, but he had no doubt about the jurisdiction upon chattels between man and man.

Fothergill v. Rowland (17 Eq. 132) is a recent case, useful as an example of the cases where the Court of Equity declines to interfere, damages being as good a remedy as specific performance. There the defendant had undertaken to sell all the coals out of his mine to the plaintiffs, and then, without
giving any reason but his own convenience, simply declared his intention to break his contract and sell to some one else. The plaintiff asked for specific performance, but Sir G. Jessel, M. R., though he remarked that no honest man, whether on the Bench or off it, could approve the defendant's conduct, said that coal was an ordinary commodity which had its market price, and the plaintiffs would incur an amount of damage to be measured by the market price which they might have to pay for the coal of the same description as that agreed to be supplied by the defendant; therefore, as the damages could well be measured by the market price, there was nothing gained by coming into Equity, and he had no jurisdiction. See Lord Abinger v. Ashton, L. R., 17 Eq. 358.

Indeed, sometimes money damages are even better for the plaintiff than a bare unwilling performance of a contract. Thus, in Wilson v. Northampton and Banbury Junction Railway (L. R., 9 Ch. 279), the question was whether the Court could direct the railway company to build a station, which they had agreed to do, but without saying anything in the agreement about the character of the station or the use to be made of it.

V.-C. Bacon thought it more to plaintiff's advantage to leave him to compensation, and the Court of Appeal took the same view and said, that in Equity a vague contract could only be performed so far as it was expressed on the deed, and, therefore, the plaintiff would get only a minimum of justice,—any stopping-place, perhaps where the trains only stopped once a day and even more seldom, would satisfy the
words of the agreement. Lord Selborne, in giving judgment, said that "in estimating damages the plaintiff would be entitled to the benefit of those presumptions which are made against persons who are wrongdoers, *e.g.*, do not perform their contracts. In assessing damages every reasonable presumption may be made as to the benefit which might have been obtained by *bona fide* performance of the agreement. On that principle, where a diamond had disappeared from its setting and was not forthcoming, the jury was directed to presume the cavity had contained the most valuable diamond possible. So here a jury might with propriety assume that the station would have attracted traffic and made the plaintiff's ground more valuable;" and according to the general rule the plaintiff was left to his remedy in damages.

Henceforth the operation of this rule will not have such serious consequences as it has at present; for one and the same tribunal will give a plaintiff either a decree for specific performance or for damages, whichever may be proper; whereas when the tribunals of Common Law and of Chancery were separate, it was held that if the Court had no jurisdiction to give specific performance it would not give damages, but turn him over to the Court of Law, notwithstanding Lord Cairns and Sir J. Rolt's Acts, quoted p. 20, *ante*. See Crampton v. Varna Railway, p. 120, *post*.

(B) **Specific performance must be capable of being carried out by the Court.**

There are cases where the Court of Chancery will not interfere because it cannot practically enforce the
performance of the contract; for instance, a Common Law Court will give damages for a breach of promise to marry, but it would be ridiculous to try to enforce an agreement to marry, the reason, of course, being that the Court cannot induce the parties to consent, and consent is the essence of the marriage contract.

Numerous examples might be given of contracts of this sort, where, if specific performance were decreed, the Court could not carry out its decree. Thus, an agreement for the sale of a goodwill will not be enforced, which depends on introduction to customers, nor, generally, an agreement to repair, because the Court cannot superintend repairs. See Wolverhampton and Walsall Railway Company v. London and North Western Railway Company, L. R., 16 Eq. 433, and Powell Duffryn Steam Coal Company v. Taff Vale Railway Company, L. R., 9 Ch. 331, for other instructive instances.

Lumley v. Wagner (1 D., M. & G. 604) was a case of this sort. The defendant agreed to sing at Her Majesty's Opera and nowhere else.

She soon after determined to break her engagement with Lumley, and to sing for Mr. Gye at Covent Garden. Mr. Lumley asked for specific performance; at any rate of that clause by which she bound herself to sing nowhere else than at his theatre. It was held, that the Court could not enforce her agreement to sing, but an injunction was granted to prevent her infringing the negative stipulation by singing elsewhere. Lord St. Leonards said in his judgment (p. 619 of the Report): "Wherever this Court has not proper jurisdiction
to enforce specific performance, it operates to bind men's consciences, as far as they can be bound, to a true and literal performance of their agreements; and it will not suffer them to depart from their contracts at their pleasure, leaving the party with whom they have contracted to the mere chance of any damages which a jury might give. The exercise of this jurisdiction has, I believe, had a wholesome tendency towards the maintenance of that good faith which exists in this country to a much greater degree perhaps than in any other; and although the jurisdiction is not to be extended, yet a judge would desert his duty who did not act up to what his predecessors have handed down as a rule for his guidance in the administration of such an Equity."

It may be asked, why would not the Court thus interfere to prevent the coal owner from breaking his contract in the same way in the case of Fothergill v. Rowland (p. 115, ante), by preventing him from selling to anyone else? The answer is, that the Court would not do in a roundabout way what there was no jurisdiction to do by a straightforward decree, enforce performance of a contract to sell personal property. Lord St. Leonards would not have granted an injunction in Lumley v. Wagner but for the negative covenant which he found there. (See p. 622 of the Report.) Sir G. Jessel, M. R., says on this point in Fothergill v. Rowland,—"I must follow what Lord St. Leonards says in Lumley v. Wagner (1 D., M. & G. 604) is the proper conduct for a judge, and not extend this jurisdiction;" and he refused to grant the injunction. So in
Crampton v. Varna Railway (L. R., 7 Ch. 562), a peculiarly hard case, the above rules were followed, for the damage was measurable in money, and the Court could not superintend the performance of the contract. There a railway company had agreed (or rather their agent was stated to have by letter engaged) with the plaintiff Crampton, who was making their line, that if he would build good cottages instead of huts for his workmen, they would take them on for 5,000l. He built them and left them, and they refused eventually to pay. The contract of the railway was not under the corporate seal, so there was no remedy at Law.

The case came before Lord Romilly and then Lord Hatherley, who both held that it was a mere money demand, as to which this Court had no jurisdiction; and the mere fact that there was no remedy at Law, except against the agent of the company, was not a reason for the interference of Equity.

Lord Hatherley said (Law Journal, 41 Ch., N. S. 821): "The truth is, when it comes to be analyzed, it appears to me, looking at the case how you will, that it can only come to a contract to build houses on another person's land, and to be paid so much for the building. That really is a money contract not enforceable in this Court. You cannot have specific performance of a builder's contract of that sort in the manner in which specific performance is usually decreed in this Court, and of course you cannot call to your aid in that respect the Act of 21 & 22 Vict. c. 27, commonly called Lord Cairns' Act, because it has been settled conclusively
that unless the Court has original jurisdiction to compel specific performance, it cannot give damages instead. If the Court has jurisdiction to compel specific performance, and yet specific performance is inconvenient and damages would be more convenient, then, having the option of the two, the Court is enabled to exercise that option at the request of the plaintiff. But here the question is, first, whether there are any means of compelling specific performance of this contract by the plaintiff, supposing he had been the person unwilling to perform it, and after having engaged to build the cottages, had declined to do so? I apprehend clearly not.

"Then this being a mere money engagement, the plaintiff suggests another view, which was very ingeniously argued. He says it comes within the range of that class of cases in which a person standing by and allowing another to spend money upon his property under the belief that it is his own, has been held to be precluded from taking advantage of that misapprehension. That class of cases is numerous, and it has not been allowed to corporations any more than to individuals to take the benefit of a misapprehension, on the faith of which the other person has expended money on the property (d). But that class of cases has no application to the present: they are all founded on the ignorance of the person who has been allowed to proceed as if he were himself the owner, and the Court assumes

(d) See ante, p. 45, on engagements amounting to trusts.

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that the person who has allowed him so to treat himself has entered into an engagement that he shall be what he supposes himself to be. But when two persons enter into a contract, they know exactly what their position is. The plaintiff knew the land was not his, and that he was dealing with another person. He knew that what the company had to do was to pay him 500l. a-year for what he was doing in building these cottages. The Master of the Rolls said it was reduced to a mere money contract. I believe he is right in that, and being a mere money contract and not a case for specific performance, the Court cannot give relief by way of damages."

The last case I shall refer to on this subject is one cited by Sir G. Jessel, in deciding the case of Fothergill v. Rowland (ante, p. 115), viz., Heathcote v. North Staffordshire Railway Company (2 Mac. & G. 100, 112), where Lord Cottenham decided, that if the Court could not enforce a contract affirmatively, it would not attempt to do so by a negative injunction (e), and said: "If A. contract with B. to deliver goods at a certain time and place, will Equity interfere to prevent A. from doing anything which may or can prevent him from so delivering the goods? If, indeed, A. had contracted to sell an estate (i. e., land) to B., and then proposed to deal with the estate so as to prevent him from performing his contract, Equity would interfere, because in that case B.

(e) In Heathcote v. North Staffordshire Railway, the contract was to make a certain line of railway; the company applied to parliament for power of abandonment: the plaintiff asked the Court to restrain the application to parliament, and this the Court refused to do.
would by the contract have obtained *an interest in the estate itself, which in the case of the goods he would not.*"

This brings us back to our original statement, that, in the case of a contract to buy and sell lands, Equity considers the parties to be as it were trustees for each other, and this accounts for some of the doctrines which we now proceed to consider, and which are sometimes looked upon as evasions of the Statute of Frauds.

Is it true that the *Statute of Frauds* is treated with neglect in Equity in connection with specific performance? There is no doubt that Equity will not allow this statute to be made an instrument of fraud; but is it true that it ever entirely disregards the provisions of the statute?

The important words of the 4th section are, that—"No action shall be brought on any contract or sale of lands unless the agreement is in writing and signed by the party to be charged."

(1.) The most familiar instance of the enforcement in Equity of a contract outside the statute is that of *part performance*, on which Lester v. Foxcroft (1 Colles’s P. C. 108) (f) is the leading case.

The rule is, if a parol contract is made, and the purchaser is let into possession under it and lays out money, the contract, though parol, can be enforced in Equity.

The principle of this doctrine appears to be that, if the Court having jurisdiction to deal with the

(f) 1 White & Tudor's Leading Cases.

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contract, finds that one of the contracting parties induce the other so to act, that, if the contract be abandoned, he cannot be restored to his former position, the Court must consider it no longer a contract "in fieri" but a trust in Equity, and a refusal to complete it at law is in the nature of a fraud or breach of trust. (See pp. 45 and 109, ante.) Such, for instance, is the case, where, upon a parol agreement for the purchase of an estate, a party, not otherwise entitled to the possession, is admitted thereto; and if the agreement be invalid, he is made by the owner's act liable to answer as a trespasser, which would be unfair.

The Equity is still stronger if, after being let into possession, he has been allowed to build and otherwise to expend money on the estate. If the possession may be referred to an independent title, e. g., where it is held under a previously-existing tenancy, the same principle does not apply, unless the parties so conduct themselves, as to show that they are acting under the contract, nor does it apply to any acts which do not alter the position of the parties. Such, for instance, are the taking of surveys, the preparation of conveyances, the payment of earnest, and even the payment of purchase-money itself; for, although all these acts are in some sense a performance of the contract, yet their consequences may be set right by damages at law, and they do not place the parties in a position from which they can only be extricated by its completion.

These cases, especially Lester v. Foxcroft, may well be compared with the Varna Railway Case
(ante, p. 120), where this Equity was not allowed to be applied to the case of a contract which was not an agreement as to land with its special burdens and obligations. The Court will only enforce the agreement, as an engagement or implied trust, in cases where it relates to some subject-matter not to be measured in damages. Otherwise the contract is recognized at law, where no trust is recognized, and the statute being a fatal bar, Equity will not interfere.

(2.) Equity permits a parol variation of a written contract to be set up; but only as a defence; (see Woollam v. Hearn, 7 Ves. 211 (g)); and this is really no violation to the Statute of Frauds, for the statute does not say “a written contract shall in all cases bind,” but only “a parol contract shall not bind.” Even at Common Law a defendant can plead that the plaintiff is attempting to enforce an agreement which he never really entered into, and in support of such a plea of a defendant, parol evidence has been admitted to contradict a written instrument. See Lord Hatherley’s judgment in Druiff v. Lord Parker, L. R., 5 Eq. 131, 137, 138; Marquis of Townshend v. Stangroom, 6 Ves. 328.

Some good authorities on Equity are, however, of opinion, that since there is undoubted jurisdiction in Equity to correct the letter of an instrument, where there is clear proof that the agreement is not correctly reduced into writing (see next Chapter), this right of proving a parol variation might, in proper cases, be granted to a plaintiff as well as to a defendant; but at present the rule that such a variation can

(g) 2 White & Tudor’s Leading Cases.
only be set up by way of defence is strictly adhered to (h).

3. The strongest case of violence apparently done to the Statute of Frauds by the decisions of Equity judges is where specific performance is decreed in favour of a plaintiff, with compensation, that is to say, a plaintiff who cannot carry out his contract to the letter is allowed to enforce specific performance, with variation, if such variation or defect is so small that the Court holds that it ought not to cause a forfeiture of the contract, but ought to be compensated by abatement of the price. The question, in fact, is, whether the defect is or is not of the essence of the contract. The principle of this doctrine, no doubt, is, that, in the case of a contract as to land, the agreeing parties are considered so far trustees for each other that they shall not break their agreement or trust on slight unessential pretexts.

As Mr. Fry says (p. 2), quoting Lord Eldon, who in his turn was quoting Lord Thurlow: “It is scarcely possible that there may not be some small mistake or inaccuracy; as, that a leasehold interest represented to be for twenty-one years, may be for twenty years and nine months; some of those little circumstances that would defeat an action at Law, and yet lie so clearly in compensation that they ought not to prevent the execution of the contract. On this ground the jurisdiction rests in all cases where specific performance is decreed with compensation.”

(h) Fry on Specific Performance, 217; Taylor on Evidence, 988.
By the Judicature Act, 36 & 37 Vict. c. 66, s. 25, subs. (7), stipulations in contracts which would not be deemed of the essence of the contract in Equity, "shall receive in all Courts the same construction and effect as in Equity.

Mr. Smith (i) states the doctrine thus:—"If the terms of an agreement have not been complied with in particulars which do not pertain to the essence of the contract, or if there has been a slight misdescription, Courts of Equity will nevertheless decree a specific performance in favour of the party chargeable with the noncompliance or misdescription, if compensation can be made for an injury that may have been occasioned by the noncompliance or for the misdescription of the property." Seton v. Slade, 7 Ves. 265 (k), is the leading case on this head.

One particular, which is generally considered as not of the essence of the contract, is time. The same book (l) states, that "at Law, time is of the essence of the contract. But in Equity it is held to be of the essence of the contract only in cases of direct stipulation that it shall be so; (see the judgments of Lord Cairns and Sir J. Rolt in Tilley v. Thomas, L. R., 3 Ch. 61;) or where it is obviously so from the nature of the case; as where a reversion is sold, or where the property sold is required for some immediate purpose as trade (m), or is of a fluctuating

(k) 2 White & Tudor's Leading Cases.
(m) Thus, upon the sale of a public-house as a going concern, time is of the essence. Cowles v. Gale, L. R., 7 Ch. 12.
value" \( (n) \). And even where time is of the essence, a default may be waived by proceeding in the purchase after the time has elapsed \( (o) \).

This doctrine of Equity secures for all vendors and purchasers of land that fair construction of their contracts which is ordinarily secured by a common condition of sale, for it is often provided that any misdescription or error in the particulars shall not avoid the sale but shall be the subject of compensation. Such condition is, like many others, only declaratory of the equitable rule, and will prevent the forfeiture of a contract for slight misdescriptions to the same extent as, and no further than, a Court of Equity would do if no such written condition existed; and neither the rule in Equity nor the condition above mentioned will prevent a purchaser from avoiding the contract if the misdescription is in a material and substantial point, so far affecting the subject-matter of the contract, that it may reasonably be supposed that but for such misdescription the purchaser might never have entered into the contract at all. Judgment of Tindal, C. J., in Flight v. Booth, 1 Bing. N. C. 377.

The Courts of Equity do not carry this doctrine of making a purchaser accept compensation for the loss of part of his bargain to an unreasonable extent;

\( (n) \) Where property is sold, but with a right of repurchase, the option to repurchase must generally be exercised promptly. See cases cited in Ward v. Wolverhampton Waterworks Co., L. R., 13 Eq. 243.

\( (o) \) See the judgment of Sir G. Jessel, M. R., in Barclay v. Messenger, 25th March, 1874, reported 43 L. J. (N. S.) Ch. 449.
thus, for example, a misdescription of tenure is always considered a ground for avoiding the contract. A crucial instance of this is the case of Ayles v. Cox (16 Beavan, 23), where property sold as copyhold turned out to be partly freehold; there was the usual condition that errors in the description should not avoid the sale but should be matter of compensation, and it was contended that though the Court would not force copyhold on a purchaser who bought as freehold, still the converse did not hold good, for freehold tenure was far better than copyhold. But Lord Romilly, M. R., adopted the view of the defendant's counsel, who said there might be persons who preferred copyhold to freehold, and a purchaser might say "it is my humour." It is impossible, he said, to enter into a consideration of the different motives which may induce a person to prefer property of one tenure to another. The motives and fancies of mankind are infinite. . . I am of opinion that the vendor cannot compel the purchaser to complete his contract.

Courts of Equity have not only established this principle, that a contracting party may make compensation for breaches or defects which are so unessential that the contract ought not in fairness to be forfeited, or any extreme penalty to be incurred on account of them; but they have gone so far as in many cases to restrain persons from exacting penalties and forfeitures even where there is a special proviso in an agreement that such and such a breach shall be followed by a penalty or by forfeiture.
In Peachy v. Earl of Somerset (1 Strange, 447) (p), it was laid down that the true ground of relief against penalties is from the intention of the parties, where the penalty was designed only to secure money, and the Court can give by way of recompense all that was expected or desired.

A mortgage is a well-known example of the doctrine now under discussion, for when the mortgaged estate was by the terms of the deed forfeited for non-payment of the money lent, Equity, holding that this was not the intention of the parties, considered the mortgagee a trustee and allowed the mortgagor to redeem.

The 25th section of the Judicature Act, subs. (5), allows a mortgagor in most cases to sue as owner for possession of the land or the recovery of rent.

So also the ordinary Courts of Law have for a long time recognized by virtue of several statutes other doctrines relating to the remission of penalties and forfeitures, which would otherwise have been exceptions to the rule that "Equity follows the Law."

The statute 23 & 24 Vict. c. 126, granting to lessees relief, upon certain conditions, against forfeiture for nonpayment of rent and default in insuring, is well known; and some recent cases at Common Law have brought prominently forward the statutes of 8 & 9 Will. III. c. 11 and 4 & 5 Anne, c. 3 (q), which provide that a bond with a penalty

(p) 2 White & Tudor's Leading Cases.
(q) Chap. 16 in the common printed editions.
shall be held satisfied, and the penalty remitted on payment of damages and costs.

Betts v. Burch (4 H. & N. 506; 28 L. J., Exch. 267), is one of the cases to which I refer; Baron Bramwell, in giving judgment in an action for the recovery of a penalty, said:—

"The question is whether the statute, 8 & 9 Will. III. c. 11, has not made an alteration.

"That statute, in effect, makes the bond a security only for the damages really sustained. That seems to me the fundamental principle which we ought to state in all those cases. In order to make the argument intelligible, it is necessary to see how the matter originated. This was a debt at Law, and is still a debt at Law; then Courts of Equity thought they could do substantial justice in respect of the bargains persons had made, by instead of allowing them to be recovered upon, awarding what they thought was the true amount of damages. The result of that was, that no action could be brought for a penalty without the action being restrained. That induced the legislature to interfere, by the 8 & 9 Will. III. c. 11, s. 8, and to provide that, in those cases, no more shall be recoverable at Law than would be allowed to be recovered in Equity. That was the origin of that statute. I quite agree with my Brother Martin in thinking the best possible thing would be to let people make agreements and keep to them, according to their words, till they are tired of it. But you will find out that this little piece of paternal legislation has introduced a great deal of mischief, because, owing to this legislation, persons have got into the
loose habit of putting down large sums as penalties which they never contemplated paying."

These remarks were referred to with approval in Hinton v. Sparkes, L. R., 3 C. P. 161, and Lea v. Whitaker, L. R., 8 C. P. 70, 377. In the latter case, where the defendant had agreed to sell public-house fixtures to the plaintiff on certain terms; and it was provided that, by way of making the agreement binding, the defendant and the plaintiff should each deposit 40£, which was to be forfeited as and for *liquidated damages* by the party failing to complete his agreement. The defendant did eventually refuse to sell, and the plaintiff claimed to recover, not merely the deposited 40£ but the real damage he had incurred for loss of bargain; and the Court held, that the intention of the parties was to assess their own damages, and that the plaintiff should recover the 40£ and no more.

On the other hand, in the recent case of Magee v. Lavell (L. R., 9 C. P. 107), also a case of a contract to sell the goodwill of a public-house, and the party failing to perform his agreement was to pay to the other party "the sum of 100£ as damages," it was held, that the sum mentioned must be considered as a penalty and not liquidated damages, and that only 30£, the real damage sustained, could be recovered. As Lord Coleridge said, "The Courts refuse to hold themselves bound by the mere use of the words 'liquidated damages,' and will look to what must be considered, in reason, to have been intended by the parties in relation to the subject-matter."
CHAPTER VII.

RESCISSION AND RECTIFICATION FOR MISTAKE.

No part of the jurisdiction of Courts of Equity requires to be more carefully stated and understood than that relating to the rescission and rectification of contracts for mistake. There is an ambiguity in the phrase itself, which must at once be pointed out and explained. Equity does not rescind or rectify a contract for mistake (a), but it rescinds an instrument which states a contract which does not exist in fact, or rectifies an instrument which misstates a contract which does exist in fact.

This explanation (which I shall now endeavour in this Chapter to prove and illustrate) accords with the theory that Equity is no corrector of the Common Law, but that its interference is generally founded on some circumstance which obstructs relief at Common Law. The jurisdiction over mistakes which we are about to consider is exercised in cases where a defendant would be able to plead truly to an action of contract at Common Law, that the alleged contract sued upon was never agreed to by him, but in answer to his plea of non assumpsit the instrument would be produced, and would at any

(a) See ante, p. 8, note (h), and p. 144, post.
rate obstruct the defence; therefore the Court of Equity, which, as we have already seen, permits a *parol variation of a written contract to be set up by way of defence* (b), will by way of precaution assist a person who fears the future embarrassment of a righteous defence, and order the instrument proved to be founded upon mistake to be rescinded or rectified.

Thus, it will be seen that the jurisdiction we are about to consider is not in contradiction to, but in aid of, Common Law rights. In this, as in other cases, Courts of Equity have a procedure better adapted than that of the ordinary Courts for giving effect to those rights; they act by way of *prevention* of wrong, while other Courts do not act till the wrong is done, when it may be too late to give any effectual remedy. As Lord Redesdale (quoted by Sir G. Giffard in a case of Wooldridge v. Norris, L. R., 6 Eq. 410), says, "A Court of Equity will prevent injury in some cases by interposing before any actual injury has been suffered, by a bill which has been sometimes called a bill *quia timet*."

I proceed to deal separately with the doctrines of rescission and rectification for mistake.

1. **Rescission**: Equity will rescind an instrument which states a contract which does not exist in fact.

It is a valid defence even at Common Law, to an action brought upon a written instrument, to show that by reason of some misunderstanding, or fraud or misrepresentation, there was no valid *assent*; and

(b) *Ante*, p. 125.
this valid defence Equity will aid, and if it is proved that the real consent between the parties differed from the instrument or writing; so that to perform the agreement in accordance with the writing would be a fraud, the Court will decree rescission of the instrument, so as to prevent future actions on it.

The mistake, therefore, which a plaintiff who seeks to rescind an instrument must prove, is a *mistake in the instrument itself*. The gist of his case must be, that the agreement set forth in the writing was never assented to.

The ground, therefore, of all the decisions for rescission or cancellation of instruments will be found to be *want of assent*, as will appear by the following cases:

In *Harris v. Pepperell* (L. R., 5 Eq. 1), there was an agreement for the sale of certain land, but a slip of land was inserted in the parcels of the conveyance, which the vendor showed he did not agree to sell, for he could make no title to it; therefore, after execution of the conveyance he filed a bill for rescission, on the ground that he had never assented to the alleged agreement. The purchaser, however, said there was no mistake on his part; he agreed to buy the whole; but the Master of the Rolls (being satisfied by evidence that the only obligation to which the seller had assented was to convey the land scheduled to the deed *minus* the plot in question), decreed in effect that the obligation should not be interfered with by the erroneous deed, and that the indenture which stood in the way of the real agreement or obligation should be rescinded.
He gave the purchaser the option to have the contract which the plaintiff had agreed to performed, i. e., to have the real obligation of the vendor carried into effect, but he could not force rectification unless both agreed to it (c). All he could do was to rescind the agreement, which did not represent the real obligation.

Another case of rescission on the ground of actual non-assent was Re Victoria Permanent Building Society (L. R., 9 Eq. 597), where Mr. Empson, being an officer of the society, agreed to buy land of the company on the condition that they were to take a mortgage for the purchase-money. The solicitor of the company drew deeds, which Mr. Empson signed without perusing them, the effect of which was to make him a member of the company for several shares, and on a winding up he was put on the list of contributories. He filed a bill to have the deed rescinded as representing an agreement which he had never entered into, and Sir R. Malins, V.-C., in giving judgment in favour of the plaintiff, said, “It is very true, that if a man will have the folly to execute deeds which he has not looked at, he must suffer the consequences.”

“But Mr. Empson says, ‘The deed does not represent the transaction at all. I had confidence in those who prepared it. I was asked to sign that deed by the trustees.’ . . . Now, the recital in that deed is obviously incorrect, and I am quite satisfied that it does not represent the real transaction, and

(o) See post.
that Mr. Empson never did intend to become a member of the society.” This then was rescission of an instrument as alleging a contract which was not assented to.

Again, in Wycombe Railway v. Donnington Hospital (L. R., 1 Ch. 268), the hospital corporation agreed to sell land and the railway to buy it, but the vendors swore that they assented to the sale only on the condition that a rent-charge existing on the land was borne by the company; therefore, when the railway prayed for specific performance by a conveyance free from incumbrances, Lord Romilly, M. R., in the first instance, and the Lords Justices on appeal, held that the contract was never a complete and final contract, and dismissed the bill; this, though a case not of rescission but of defence to a bill for specific performance, depended on the same principles, and is an important illustration of the proposition that a defence on the ground of mistake must be a mistake in the instrument, and not a mistake as to the effect of it.

Again, it is clear that a person who enters into an agreement founded upon a state of circumstances altogether imaginary, misapprehended by all parties, cannot be said to have assented to anything—in such a case, the contract is said to be void on the ground of mutual mistake; but to avoid confusion, it seems better to keep prominently forward the general idea that here, as in other cases of rescission, there is no contract, because no assent, and, therefore, the mistake is that the writing does not represent the agreement.

If, for example, a man agrees to sell an estate which at the time is actually swept away by a flood,
that would be an agreement which was in reality no agreement, because the subject-matter had no existence, and the written agreement would not be allowed to stand, because it did not correctly represent the real agreement between the parties, the real obligation, which was to sell an estate, and there was no estate.

Cooper v. Phibbs (L. R., 2 H. L. 168), was an instance of such mutual mistake. There a Mr. Cooper was under a settlement tenant for life of large Irish estates, including a salmon fishery, and at his death, as he had no male heirs, the property went to his nephew. Mr. Cooper had found the salmon fishery was unprofitable, because there were rocks in the way at a spot where the salmon tried to get up the river, so that they were unable to ascend the falls from the shallowness of the water preventing them making their spring, and they returned into the ocean without spawning. So Mr. Cooper got a Private Act of Parliament, which gave him power to remove these obstructions and make a private way for the salmon to go up, and the Act, not taking notice that Mr. Cooper was tenant for life only, limited the fishery to him in fee. When the nephew came into the estates, he obtained a lease of the fishery from Mr. Cooper's heirs; in so doing, he was renting what in law belonged to himself. And on finding it out he petitioned to have the lease set aside, and delivered up to be cancelled as made under a mistake of fact.

It was answered, that if there was any mistake it was a mistake as to his legal position under the
settlement and the act of parliament taken together, and a mistake in law could give no ground for relief. But Lord Westbury said, that in the maxim "Ignorantia juris haud excusat," Jus means the general law of the land, and not a private right. Private ownership is a matter of fact not within the maxim. The parties had contracted under a mutual mistake and misapprehension as to their rights; and so the agreement was not in fact any real obligation, therefore the lease was a mistake, and must be set aside.

Another example of non-assent is where outward assent is no assent in law, no assensus animi, on account of some incapacity, physical or mental, of the assenting party.

Thus, in Torrance v. Bolton (L. R., 8 Ch. 118), property was put up for sale by auction, the particulars saying nothing about incumbrances. In the auction room the auctioneer read a long statement about the existence of three mortgages on the property. The plaintiff, who was seventy-three and very deaf, and did not hear the auctioneer's statement, began to bid, and continued his biddings till he was declared the purchaser of the property for 2,500l.; he signed the contract, and paid 250l. earnest money; but when he found out about the mortgages he filed his bill for rescission of his contract, and the Lords Justices held that the description of the property in the particulars had misled the plaintiff, so that his assent was void—his obligation, in fact, was to buy the property as the particulars described it, free from mortgages; the signed contract was a mistake.
In giving judgment in this case, Lord Justice James said:—"It was very strongly impressed upon us that Lord St. Leonards had said in his book (d) that contracts for sale, although they might not be enforced in this Court, could only be set aside on the ground of fraud. The word 'fraud' there is non-men generalissimum, and it must not be construed so as to mislead persons into the notion that contracts for the sale and purchase of lands are in any respect privileged, so as to be free from the ordinary jurisdiction of the Court to deal with them as it deals with any other instrument or any other transactions, in which the Court is of opinion that it is unconscientious for a person to avail himself of the legal advantage which he has obtained. Indeed, the books are full of cases in which the Court has dealt with contracts of that kind—contracts obtained by persons from others over whom they have dominion—contracts obtained by persons in a fiduciary position—contracts for the sale of shares obtained by directors through misrepresentation contained in the prospectus, in respect of which it was never necessary to allege or prove that the directors were wilfully guilty of moral fraud in what they had done. A contract for sale, like every other contract, is subject to the ordinary rules and jurisdiction of the Court; and that passage of Lord St. Leonards must be understood as meaning that the same kind of case must be made when a party comes here to set aside a contract for sale as must be made

(d) Vendors and Purchasers, 14th edition, 244.
in setting aside any other contract or dealing between the parties."

This case, therefore, shows that undue advantage taken by one party over another will induce the Court to hold that the assent of the latter party is no assent for the purpose of binding him.

There is yet another kind of non-assent, namely, where a person, though not incapacitated by deafness or other disadvantage, physical or mental, has been actually deceived; for assent, induced by deceit, is no assent in law. A leading case on this point is Small v. Attwood (6 Cl. & Fin. 232), a case which, as Lord Brougham said, by its prolixity and weight of materials and mass of evidence exhausted, if it did not confound, the judges who had to decide it. It was a bill to rescind for fraud an agreement to buy a property with valuable mines. There was a hearing of twenty-one days, followed by a year's deliberation, after which Lord Lyndhurst decided there was sufficient fraud to vitiate the assent. Then the House of Lords heard the case on appeal for sixteen days in 1837 and for thirty days in 1839, and eventually Lord Cottenham and two other lords (including Lord Brougham) reversed the decision of Lord Lyndhurst, while he adhered to his decision. The printed papers amounted to 2,600 folio pages, and the notes of arguments in the House of Lords to 10,000 brief papers. Lord Brougham observed, that if it had had to be again re-argued, from the illness of the lords who heard it, it was (see p. of Report, 477—8) difficult for the imagination to scan the bounds which would have been the limits of this
extraordinary cause. The result was a very important statement of the law, commented on by Lord St. Leonards in his Treatise on Vendors and Purchasers. His remarks on this case are those alluded to by Lord Justice James, in his judgment in Torrance v. Bolton above quoted (p. 140).

Having thus given examples of cases where Equity rescinds an instrument which by mistake sets forth as a contract that which was never assented to, it remains to show that Courts of Equity like Common Law refuse to rescind contracts, because the parties made a mistake when they assented to them.

Thus, a party to a contract cannot have it rescinded, on the ground that though it represents his agreement, he made a mistake, not understanding the effect of what he assented to, or not knowing the law: for instance, in Powell v. Smith (L. R., 14 Eq. 85), a landowner, by his agent, agreed to let a farm “for seven or fourteen years,” and thought that he reserved himself an option to determine the lease in seven years; but the legal construction of his agreement was to create a lease which was determinable at the option of the tenant only, and not at the option of the landlord. Lord Romilly, M. R., held that there was no ground for rescinding the agreement, for the document correctly represented what the parties had assented to: there was no mistake in the writing.

Neither can a party to a contract have it rescinded because he assented to it through carelessness, for a Court of Equity respects the solemnity of a contract once really assented to as much as Courts of Common Law.
Thus, in Mackenzie v. Coulson (L. R., 8 Eq. 368), Mackenzie & Co. had insured some hoops which Coulson & Co., iron merchants, sent by sea from Gloucester to Plymouth. In the course of the voyage, many of the hoops were damaged by sea water, and Messrs. Coulson claimed 150£ on the policy; but Mackenzie & Co. filed this bill to stay the action, on the ground that the policy was a mistake and misrepresented the real contract, which was, as they contended, to insure f. p. a. (free of particular average), i.e., free from recovery for partial loss, and they referred to a slip or paper signed preliminary to the insurance on which the letters f. p. a. appeared, but which were not in the insurance policy.

Sir W. James, V.-C., held that the policy represented the contract; that the slip, if he could look at it at all as evidence, was no evidence of a concluded agreement, anything binding by way of trust, obligation or anything else. He said, "In this case, a bill has been filed which possesses the merits of novelty, and, certainly, of some degree of courage. It seeks what is called the 'rectification' of a policy of insurance, by making it conformable to a thing called a 'slip,' which was a piece of paper on which something was written, pending a negotiation for the effecting of a policy of insurance.

"But if this contract be a good contract at Law, what is there to vary it in Equity? If all that the plaintiffs can say is, 'We have been careless, whereas the defendants have not been careless,' it is useless for them to apply to this Court for relief. The de-
fendants positively say they would not have accepted the policy on any other terms.

"Indeed, the whole theory of the bill is founded on a misapprehension. Courts of Equity do not rectify (nor rescind) contracts; they may and do rectify (and rescind) instruments purporting to have been made in pursuance of the terms of contracts."

It is necessary here to add a caution, that any person wishing to have an instrument rescinded must come promptly. If a person "sleeps upon" his rights, or for a long time acquiesces in the assertion of adverse rights, the Court will often refuse to interfere on his behalf, especially if by his laches he has rendered it impossible to restore all parties to their original status: this is the meaning of the maxim "VIGILANTIBUS NON DORMIENTIBUS ÆQUITAS SUBVENIT" (f).

It is important then to remember that if a plaintiff wishes to rescind an instrument stating a contract against any person who avers, and in the opinion of the Court truly avers that he assented to the instrument as it stands and wishes it to stand, the plaintiff must not have altered such person’s position by his laches, otherwise his suit will be dismissed, unless such conditions can be attached to the decree as will restore the parties to their rights. See Bloomer v. Spittle, L. R., 13 Eq. 427.

Skilbeck v. Hilton (L. R., 2 Eq. 587), was an example of this, where the plaintiff had signed a part-

nership release, thinking that the books remained as they were when his accountant had last looked at them, whereas his partner had secretly taken out 575l. in the meanwhile. Lord Romilly, M. R., said, "that he might have destroyed the arrangement as not representing the statement of account he had agreed to, but by his own acts he had precluded himself from obtaining such relief: he had proceeded to realize the partnership assets, and the parties could not be restored to the position in which they stood when the deed was executed. If he wished to insist on not being bound by the transaction, he should have left the matter exactly where it was and then the concern would have been wound up by the Court." And the bill was dismissed without costs.

It should also be remembered, that if an instrument which is assignable in Equity only is able to be rescinded as between the original parties to it, it can also be rescinded as against assignees or subsequent holders, for equitable assignees take subject to equities (g). Thus, in Graham v. Johnson (L. R., 8 Eq. 36), Johnson was a barrister, who having done services for Graham, an officer, persuaded him to sign a bond for the payment of certain moneys in token of those services. Graham afterwards said he was unduly influenced, and did not really understand what he was doing, and claimed to rescind the bond; but in the meanwhile Johnson had assigned the bond for the valuable consideration of 10,000 rupees to B.,

(g) See p. 63, ante.
telling B. that the bond was given for value to him. B. knew nothing of any deception, if any there was; but it was held, nevertheless, that the plaintiff was entitled to have the bond cancelled on the ground of undue influence \((h)\); and though B. was a *bona fide* assignee of the bond, and had given valuable consideration for it, yet the assignee of a bond takes it, subject to all the equities subsisting between the obligor and the obligee, and B. therefore could not be allowed to enforce the bond against Graham.

2. The other subject to be considered in this Chapter is Rectification. The rule is \((p. 133, \textit{ante})\), that the Court will rectify an *instrument* which misstates a contract which has a real existence.

In order, therefore, to succeed, in rectifying an instrument, a plaintiff must prove not only that by mistake the written agreement does not represent the real agreement, but he must also prove, or have it admitted, that he and the other parties duly assented to another agreement.

Thus, in Harris v. Pepperell \((\textit{ante})\), Lord Romilly, M. R., offered to rectify the instrument which the defendant proved to contain more than he had really agreed to, if the plaintiff would submit to accept the more restricted agreement, but as he refused to do so, the Court would not decree rectification. The rectification of written agreements is clearly an infringement of the Common Law rule that *parol testimony* cannot be admitted to contradict, vary, add to, or subtract from the terms of a valid written

\((h)\) \textit{Ante}, p. 52.
instrument (i), and in some cases of the Statute of Frauds also.

But if it must be confessed that a doctrine of Equity is for once discovered to be in actual opposition to a doctrine of Common Law, yet upon close inspection I think we shall find that the exception is rather apparent than real, for rectification will only be granted (so far as I can find) by consent or submission of all parties.

Thus, Druiff v. Lord Parker (L. R., 5 Eq. 131), was a case where the mistake was obvious, and there was no defence to the rectification of the deed, the only contention of the defendant being that relief might have been had at Common Law.

William Druiff, a pawnbroker, had lent Lord Parker, a young officer in the Life Guards, money on a bill drawn by Lord Parker on Frederick Granville, a brother officer. The form of the bill was—"Pay to my order 500l. three months after date, value received." Frederick Granville accepted the bill, and was, of course, first liable on it, and if he did not pay, Mr. Druiff could go against Lord Parker, who had drawn it. But Mr. Druiff died, and his widow and daughter carried on the business, and then this remarkable mistake occurred. It was agreed that the bill should be renewed. Druiff's daughter drew out a new bill, but by a blunder she put her mother's name where the drawer's signature should be (Lord Parker's name being below it), so that when all was done, and the loan renewed, there

(i) Taylor on Evidence, p. 981.
was a formal bill of exchange, stating, on the face of it, that Mrs. Druiff was the person who had been borrowing money, and who was liable on the bill if Frederick Granville did not pay. Frederick Granville did not pay, but went abroad, and Mrs. Druiff sued at law Lord Parker upon the bill. The suit in Equity was to rectify the bill and restrain the action: the question argued was not whether Mrs. Druiff's name was rightly inserted where it was; all parties admitted the mistake, patent as it was on the face of the instrument, and the only contention was, that the mistake was so glaring that even Common Law would have given relief.

But Lord Hatherley, then Vice-Chancellor, said, "It is to be observed that all the Common Law cases cited were cases of a defendant defending himself (k). No single instance has been produced in which a plaintiff, bringing forward a document on which he founds his right, has been allowed to say that the instrument which he himself produces to the Court does not express the real agreement into which he has entered. But the case stands higher for the plaintiff than I have put it. There is a jurisdiction in this Court to correct mistakes in instruments. The plaintiff alleges that she has a right to have her agreement performed in the manner in which it was entered into, namely, that she was to have an exactly similar bill to the one she had before. Instead of that, she has a bill with her own name inserted by mistake above that

(k) Compare the rule in Equity, p. 125, ante.
of the drawer. She claims a right not to be embarrassed by this mistake. The former bills had not the name of Druiff upon them at all. She therefore wants to have the instrument rectified in that respect. She claims to have an instrument which shall be free from all doubt and embarrassment. It appears to me that if no action had been brought upon this bill of exchange, and if the bill had been filed simply for rectification of the instrument, so as to render it such an instrument as the parties agreed should be given by one to the other, the plaintiff would have been entitled to have it rectified by striking out the name 'A. Druiff,' and putting it in the position in which it was intended to be, namely, a mere renewed bill of exchange."

This, then, was a case where not only was there no defence on the merits, but there was a previous bill of exchange which the Court could use as written evidence of what the new one should be; and so, the cases where settlements are rectified are generally cases where written instructions to the solicitor, or a rough draft of the agreement or articles are produced, and all that the Court is asked to do is, by consent of all parties, to rescind the instrument which does not carry out those instructions, and draw a new deed in accordance therewith. As has been said, "If the defendant denies the case as set up by the plaintiff, and the latter simply relies on the verbal testimony of witnesses and has no documentary evidence to adduce, the plaintiff's position will be well-nigh desperate, though even here, as it seems, the parol evidence may be so con-
exclusive in its character as to justify the Court in granting the relief prayed" (l).

In White v. White (L. R., 15 Eq. 247), it was proved by the affidavits of the plaintiffs and of the solicitor employed in the preparation of the deed, who explained how the mistake arose that there had been an agreement to convey certain cement works, and that by mistake of the solicitor the deed conveyed only a moiety. All parties who were sui juris consented to the decree. V.-C. Bacon made a decree for rectification and held, that the order being endorsed on the deed, would pass the legal estate without a new conveyance. In De la Touche's Settlement (L. R., 10 Eq. 599), an order was made for payment out to the child of a marriage, though excluded by the settlement as it stood, on clear proof that the intention of all parties to the deed was that he should be entitled, and on an admission by the solicitor that the mistake was his. The head note of the report says the fact of mistake was not admitted by all parties; but it appears that all parties sui juris admitted the mistake, and Sir W. M. James, V.-C., said that inspection of the deed itself was sufficient to lead to a presumption of the mistake.

There are, indeed, some cases where the Court rectifies or reforms an instrument because it presumes a mistake from the nature of the transaction. (A.) Thus, a partnership debt evidenced by an

(l) Taylor on Evidence, p. 988.
instrument, which at Common Law would create only a joint liability, will be reformed in Equity, so as to make the obligation joint and several. Sumner v. Powell (2 Mer. 36) is the leading case on the point, which is fully discussed in Williams on Executors and Lindley on Partnership (m).

(B.) So, again, where a husband and wife have mortgaged the wife's land to secure the husband's debt, though the mortgage deed limits the equity of redemption to the husband, it is settled that, the presumption being that the mortgage was not intended to alter the respective rights of the husband and wife, when the mortgage is paid off, the deed will be so rectified, as to make the husband, on redeeming the land, hold it *jure mariti* as before, and not for his own absolute benefit. See Huntingdon v. Huntingdon, 2 Brown, Parl. Cas. 1 (n).

(C.) A third example is where the Court will, on the ground of mistake, supply the defect in the execution of a power, but only in favour of a purchaser, a creditor, a wife, or a legitimate child. See Tollet v. Tollet (2 Peere Williams, 489)(o), and the recent cases of Garth v. Townsend (L. R., 7 Eq. 220), Re Dyke's Estate (*ibid.*) (p).

These examples, however, are not cases where

(m) The pages will be found by turning to Sumner v. Powell in the Table of Cases in the above-mentioned works.

(n) 2 White & Tudor’s Leading Cases.

(o) 1 White & Tudor’s Leading Cases.

(p) See for these three instances of rectification on the ground of presumptions, Kerr on Fraud and Mistake, pp. 354, 356, 370.
instruments are rectified upon parol evidence, but should rather be considered as coming within that class of cases which was considered in the Chapter upon Trusts (q), where Equity imports and engrafs an implied trust upon an interest which is in terms beneficial.

(q) Pages 25—30, ante.
CHAPTER VIII.

INJUNCTIONS AND RECEIVERS.

The jurisdiction of Courts of Equity to grant injunctions and appoint receivers, the one for the prevention of wrong, the other for the preservation of property, was exercised by them because it was a great hardship in many cases that a plaintiff should be left to the uncertain reparation of damages at Common Law, which the personal estate of a defendant might, perhaps, not be able to satisfy.

It was for this reason, as we have seen, that Courts of Equity, where there was a sufficient consideration, compelled specific performance of contracts, not in contradiction to but in aid of the Common Law; and for the same reason they provided relief, by way of injunction, in respect of all kinds of rights, including Common Law rights, if the remedy at Common Law is insufficient.

The Common Law Courts might, indeed, boast, as Horace did of Roman justice,—

"Raro antecedentem scelestum
Deseruit pede pæna clando,"

i.e., "the offender may have the start, but justice follows with no halting foot;" but it was this start, this "antecedentem scelestum" which Equity was reluctant to allow, and therefore, to use another
Horatian metaphor, by granting an injunction it suspended its process like a sword over the head of the intending wrongdoer, as Dionysius did over Damocles. And if he broke the injunction he snapped the thread by which the sword was hung, and underwent all the results of contempt of Court, including committal to prison.

This power of committal to prison, then, is the essence of procedure by injunction. And the abolition of imprisonment in most cases by the Debtors Act, 1869 (32 & 33 Vict. c. 62), has not interfered with this power of committal for contempt, as is shown by Harvey v. Hall (L. R., 11 Eq. 31), where a partner having submitted to an injunction restraining him from dealing with the partnership moneys, and assets, and bills of exchange, committed a breach of the order and was promptly committed; though the act above cited was relied on as exempting him from imprisonment for making default in payment of a sum of money.

It is sometimes asked how this process of contempt by way of attaching and imprisoning the person is consistent with Magna Charta, 25 Edw. 1 (a), which provides, that “No freeman shall be taken or imprisoned, or be disseised of his freehold, or liberties, or free customs, or be outlawed, or exiled, or any otherwise destroyed; nor will we pass upon him, nor send upon him, but by lawful judgment of his peers, or by the law of the land (‘Nisi per legale judicium parium suorum vel per legem terræ’).”

(a) 9 Hen. 3, in the ordinary printed editions.
INJUNCTIONS AND RECEIVERS. 155

Mr. Hallam (b) tells us that the alternative clause has been by some referred to the *process of attachment for contempt*, but, he himself doubts whether that was in contemplation of the framers of the statute. However that may be, the power of punishing by process of contempt those who, being bound to obey, nevertheless disobey the process, orders, or decrees of a Court, is *inherent to the Court by the Common Law of the land* for the support of its authority and dignity, and does not depend upon any statute, although various statutes recognize such jurisdiction.

In Miller v. Knox, before the House of Lords (4 Bing. N. C. 574), Justice Patteson said (p. 596): “It seems to be understood that at all times the Court had power to punish disobedience to its process, orders, and decrees, by process of contempt; and there is nothing in any statute which can in any way be construed to give any such power, though he thought the Statute of Westminster probably recognized it.” And Justice Williams says (p. 587): “That the Superior Courts of Record, especially, have been in the habit of issuing such process, is past a doubt. The issuing of attachments by the Supreme Courts of Westminster Hall for contempts out of Court (as is observed by Lord Chief Justice Wilmot in his prepared but not delivered judgment in the case of Rex v. Almon), stands upon the same immemorial usage as supports the whole fabric of the Common Law. It is as

(b) Middle Ages, ch. viii., pt. ii.
much the *lex terrae*, and within the exception of Magna Charta, as the issuing of any other legal process whatsoever."

By the Common Law Procedure Act, 1854, it was enacted, that in all cases of injury, where the party injured was entitled to maintain and had brought an action, he might claim a writ of injunction against the repetition or continuance of such injury, or injury of a like kind relating to the same right (17 & 18 Vict. c. 125, s. 79), and such injunction might be obtained ex parte (sect. 82).

It is now enacted by the new Judicature Act, 36 & 37 Vict. c. 66, s. 25 (subs. 8), with respect to all the divisions of the High Court of Justice, that "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*."

This seems the proper place to consider more particularly the nature of the jurisdiction in personam, formerly peculiar to the Court of Chancery, but now given by the above enactment to every branch of the High Court of Justice, by which the Court can bind the person of him who threatens and intends a wrong, and anticipate and prevent the injury, though intended to be committed outside its own jurisdiction.

We saw, when we were considering the jurisdiction over trustees, and especially over fraudulent trustees (p. 48, ante), that the Court does not under this jurisdiction interfere with statutory rights, but fastens on the individual who has those rights, and prevents him from using them for a fraudulent purpose; and similarly in granting injunctions as to matters outside its own jurisdiction, the Court never pretended to interfere with the privileges of other jurisdictions, but will prevent individuals from putting those jurisdictions in motion. (See Earl of Oxford’s Case, 1 Ch. Rep. 1) (c).

There may still be occasions for the application of the doctrine which was first laid down in Penn v. Lord Baltimore (1 Ves. sen. 444) (c), (where a decree was made as to boundaries of two provinces in America) that an English Court of Equity (and all branches of the High Court are henceforth Courts of Equity), as it acts primarily in personam, and not merely in rem, may, where a person against whom relief is sought is within the jurisdiction, make a

(c) 2 White & Tudor’s Leading Cases.
INJUNCTIONS AND RECEIVERS.

decree, upon the ground of a contract, or any equity between the parties respecting property situated out of the jurisdiction.

The English Court will not, however, interfere with the contracts of a foreign government (d), because some of the contracting parties are within the jurisdiction. See Smith v. Weguelin (L. R., 8 Eq. 198); where Duke of Brunswick v. King of Hanover (2 H. L. C. 1); Gladstone v. Musurus Bey (1 H. & M. 495); and United States v. Prioleau (2 H. & M. 559), were considered; nor will an English Court interfere to prevent an English subject getting an advantage by the laws of another country, which it would be unconscientious for him to have by the laws of England. Liverpool Marine Credit Co. v. Hunter, L. R., 3 Ch. 479.

It has been said, that a person can be restrained from applying to Parliament for a private act which would unrighteously affect his contracts or liabilities towards another person; but Lord Cottenham said, in Heathcote v. N. Staffordshire Rail. Co. (2 Macn. & Gord. 100, 110), that it is hard to conceive what would be a proper case for such interference, seeing that every act of parliament provides, or intends to provide, compensation to the party injuriously affected. See the judgment of Lord Chelmsford in Steele v. Metropolitan Railway (L. R., 2 Ch. 237), to the same effect.

The new Judicature Act, 36 & 37 Vict. c. 66, s. 24, enacts that—

No cause or proceeding at any time pending in

(d) 2 White & Tudor's Leading Cases.
the High Court of Justice, or before the Court of Appeal, shall be restrained by prohibition or injunction; but every matter of Equity on which an injunction against the prosecution of any such cause or proceeding might have been obtained, if this act had not passed, either unconditionally or on any terms or conditions, may be relied on by way of defence thereto: provided always, that nothing in this act contained shall disable either of the said Courts from directing a stay of proceedings in any cause or matter pending before it, if it shall think fit; and any person, whether a party or not to any such cause or matter, who would have been entitled, if this act had not passed, to apply to any Court to restrain the prosecution thereof, or who may be entitled to enforce, by attachment or otherwise, any judgment, decree, rule or order, contrary to which all or any part of the proceedings in such cause or matter may have been taken, shall be at liberty to apply to the said Courts respectively, by motion in a summary way, for a stay of proceedings in such cause or matter, either generally, or so far as may be necessary for the purposes of justice; and the Court shall thereupon make such order as shall be just.

Such stay of proceedings will be granted in cases where under the former practice the Court which is asked to stay its own proceedings would have had to submit to an injunction from another Court (e),

(e) For the practice, when two suits for the same object were instituted in different branches of the Court of Chancery, Morgan's Chancery Acts and Orders, p. 393, note (a).
but probably a stay of proceedings will be more readily obtained than an injunction was under the old practice; for example, in the case of administration suits, though they were encouraged in order to prevent the exercise of preference and retainer by executors (p. 92, ante), as a decree was a judgment for the benefit of all the creditors, it was only after the decree that proceedings by any of the creditors in other Courts would be restrained by injunction. See Kerr on Injunctions, p. 107; Nokes v. Gandy, L. R., 17 Eq. 297.

As to the principles upon which one branch of the Court will stay its proceedings, on the ground of proceedings commenced in another branch of the Court, reference may be made to Martin v. Powning (L. R., 4 Ch. 356), where the Court of Chancery refused (even before the recent Bankruptcy Act, 32 & 33 Vict. c. 71, s. 72) to interfere with the administration of a deed registered under the Act of 1861; also to Morley v. White (L. R., 8 Ch. 214), where a deceased person's estate, which was being administered in Chancery, having also fallen into the hands of a trustee in bankruptcy, the deceased person having been a partner, and having both joint and separate liabilities, it was held that proceedings must be taken in bankruptcy before the administration in Chancery could go on; and Lord Justice James said (p. 218): "It is true that there may be important questions to be determined before it can be ascertained how the distribution is to be made; but the Court of Bankruptcy is armed for that purpose with every power of a Court of Law and a Court of
Equity, and there is not a single question stated to us, as an important and difficult question arising in this matter, which cannot be litigated and determined by that Court of Bankruptcy which the legislature has thought to be the proper tribunal for the determination of it; and those questions, if decided in Bankruptcy, would come on appeal before the same Court as if they had been determined in Chancery, that is, before the same judges sitting under one name instead of under another.

"Under these circumstances, I am of opinion that the proper forum to determine every one of these questions is the Court of Bankruptcy."

It was held, however, in Ellis v. Silber (L. R., 8 Ch. 83), that when the trustee in bankruptcy has a demand against a stranger to the bankruptcy in respect of the bankrupt's estate, that claim may be prosecuted at Common Law or in Equity.

If an interpleader suit (the object of which is to prevent the holder of money claimed by two persons from being vexed by two suits) is instituted in one branch of the Court, another branch will stay proceedings in respect of the same matter. Prudential Assurance Company v. Thomas (L. R., 3 Ch. 75), is a good example of an interpleader suit. In that case, an insurance company owed the representatives of James Black, who had insured his life, £200, and a dispute arose between his widow, as his executrix, and a Mr. Thomas, who claimed that it had been assigned to him. Mr. Thomas filed his bill against the company, as trustee for him, and did
not make the widow party, though he knew of her claim. Thereupon a new suit of interpleader was filed by the company against both claimants that they might interplead, and an injunction was granted by Lord Justice Rolt to restrain Thomas from proceeding on his old suit in Equity or at Law.

Let us now refer back to the clause in the Judicature Act of last year (p. 156, ante), which provides that injunctions or receivers may be granted by any branch of the Court wherever it is just; and consider in what cases, and in respect of what wrongs, injunctions or receivers will be granted.

An injunction may be either before, or at, or after the hearing of any cause or matter (p. 156, ante), i.e., there may be granted an interlocutory injunction pending the trial of the right; the jurisdiction to grant the latter is obviously a very important power, for it may happen that the cause is not ripe for trial, that the evidence is not complete so as to enable the Court to try once for all whether the plaintiff has a right to an injunction to restrain a defendant from infringing an equitable or a Common Law obligation, and yet, if the plaintiff shows a fair prima facie case, it will be very desirable that there should be an interim injunction to restrain the dealing with the property until the right is tried.

An instructive case on this point is Beyfus v. Bullock (L. R., 7 Eq. 393), where a person was restrained from exercising a power and conveying to a purchaser for value without notice.

The power was contained in a voluntary settlement
made by a son upon his father, which settlement was impeached by the trustees in bankruptcy of the son. The plaintiff's counsel said, "It is in the power of the father, by means of the deed which is now impeached, to convey the legal estate in such a manner as to defeat the plaintiff's rights; and we, therefore, ask that he may be restrained until the hearing from exercising the power of appointment contained in that deed in favour of a purchaser for value, but we do not ask the Court to restrain the exercise of the power in favour of volunteers." V.-C. Malins said: "If I see on the allegations in the bill that there is a question to be tried at the hearing, however unimportant it may be, it is my duty to extend the usual protection of the Court to the property in the meantime," and he granted the injunction as asked.

So the Court will generally provide for the safety of property pending litigation, by ordering the property to be brought into Court, or to be collected by a receiver.

But it has generally been held, that the Court would not appoint a receiver at the instance of a person claiming by a title which he might enforce by ejectment; such a bill was called an ejectment bill, and would be dismissed, and the plaintiff would be turned over to the Common Law Court. Thus, where there were three persons claiming real property by three independent titles, and one of them asked for a receiver pendente lite, it was held, on appeal, that the Court had no jurisdiction to grant one. (Carrow v. Ferrior, L. R., 3 Ch. 719.) So, where the plaintiff, entitled to an annuity payable out of lease-
hold property, came to ask for a receiver of his annuity, it was held that as he had a power of distress by 4 Geo. II. c. 28, to recover the annuity, the Court would give no relief; but it was said, that "if an annuity has been long in arrear, and a distress would not enable the annuitant to raise the amount due, a receiver might be necessary." (Kelsey v. Kelsey, L. R., 17 Eq. 495.) A plaintiff will no more have his suit dismissed for coming to the wrong Court, but a receiver will be granted, if just and convenient, whether the estate claimed be legal or equitable.

Leaving the consideration of ex parte Injunctions, we come to consider Injunctions in general:—

Injunctions are founded (1) on equitable rights, chiefly trust or fraud, such as spoken of in Chap. III., p. 42, ante; (2) on Common Law rights, where the sole question is, whether a Common Law right exists; and the sole difference between Equity and Common Law, and now to be imported from Equity into the High Court of Justice is, that Equity, recognizing the Common Law right, gives a better remedy.

There are very few bills, perhaps, of a hostile nature which do not ask for an injunction; thus, a suit to declare a trust and prevent a breach of trust, the bill would include a prayer for injunction to restrain the trustee from making improper use of his legal estate. Let us take an instance from a suit against directors of a company who are for some purposes trustees. In Pickering v. Stephenson (L. R., 14 Eq. 339), there was a company formed to make a line of railway from Smyrna: the directors
gave dissatisfaction to some of the shareholders, who formed a committee, and complained vigorously of their direction. An action for libel was brought by the directors against the leader of these shareholders, and the company's funds were used to pay the costs. A suit was instituted to try the question whether the funds of the company could be used for any other purpose than for making the railway; and it was held, that as it was a case of a majority and minority who differed on a question of internal administration, it was contrary to the spirit of partnership that the expense of such litigation should be paid out of the general fund, and an injunction was granted restraining the directors from such payment.

If a partner is excluded by his co-partners from the management of the affairs of the partnership, he may obtain an injunction to restrain them from preventing him from transacting the business of the partnership, as a partner. The injunction in such cases is often accompanied by the appointment of a receiver to do what the trustee or partners ought to have done; but the Court of Equity will not take the affairs of the partnership out of the hands of all the partners and entrust them to a receiver and manager of its own appointment, except with a view to a dissolution of the partnership; as it winds up companies, but will not carry them on.

Injunctions on equitable grounds include, of course, all the matters hereinbefore discussed; e.g., an action against a surety who is released in Equity may be restrained; (see p. 106, ante, and Evans v. Bremridge, 2 K. & J. 174;) and a person will be re-
strained from suing on an instrument when it is void for mistake (see p. 133, ante).

Next we come to INJUNCTIONS ANCILLARY OR AUXILIARY TO THE COMMON LAW: cases where the right enforced is a Common Law right.

We have seen that the Court of Equity would not and, therefore, we may foresee that the High Court of Judicature will not, generally, appoint a receiver of rents where the plaintiff is in a position to sue out an ejectment, or to put in force a distress. And, similarly, it is not, and we may assume will not be (f), the practice to grant an injunction to restrain an alleged trespasser from continuing in possession, or committing waste, unless the right of the plaintiff, being out of possession, is established (g). See Earl Talbot v. Hope Scott (4 K. & J. 96), where V.-C. Wood observed (p. 112), that “where there is an entire want of privity or equity to affect the conscience between a plaintiff entitled at Law and a defendant in wrongful possession, and the defendant is simply a wrongdoer at Law, this Court does not take upon itself to interpose unless in certain very exceptional cases; such as where a mere trespasser invades property by mining, by cutting down timber without a colour or shadow or pretence of

(f) But the clause of the Judicature Act, quoted ante, p. 156, provides that an injunction may be granted, whether the person against whom such injunction is sought is or is not in possession under any claim of title or otherwise.

(g) The case of an infant kept out of his possession is an exception to this rule against ejectment bills. (Howard v. Earl of Shrewsbury, L. R., 17 Eq. 378.)
INJUNCTIONS AND RECEIVERS. 167

title, so that the property may be destroyed before you can arrest his proceedings at Law."

The cases where an injunction will, if the present practice is preserved, be granted before the plaintiff's right to eject the defendant is tried, are:—

(1.) If the injury is irreparable, as in the case of cutting down trees.

(2.) If the injury is continuous, and, the plaintiff's right having been already proved in one action, the wrong ought to be stopped once for all in order to prevent incessant actions, the continuous character of the wrong making it grievous and intolerable.

(3.) In some cases where railway companies, or other corporations of a similar nature, are alleged to be abusing parliamentary powers (see p. 6, ante).

(1.) A good example of irreparable damages being stopped by injunction is the case of the London and North Western Railway v. Lancashire and Yorkshire Railway (L. R., 4 Eq. 174), where the North Western Railway wanted to enlarge their station at Wigan, and made a gate out of an adjoining lane to their station, which gate the Lancashire and Yorkshire Railway, who were near but not friendly neighbours, blocked up. Lord Hatherley, then Vice-Chancellor, considered it a case of irremediable damage and granted the injunction, and, among other cases, referred to Hervey v. Smith (1 K. & J. 389), where he had felt no hesitation in granting a
mandatory injunction, where a man had placed a tile upon his neighbour's chimney-pot.

(2.) Injunctions against wrongful acts so continuous and vexatious that they ought to be stopped by injunction \((h)\), are exemplified by BILLS OF PEACE, which are bills filed for securing an established legal title against the vexatious recurrence of litigation, whether the vexation comes from a numerous class insisting on the same right, or from an individual reiterating an unsuccessful claim. It is held, that if the right be established at law it is entitled to adequate protection. Thus, a person having established his tithe, and resisted a modus against one parishioner or more singly, could quiet his title by restraining further modus suits; or a lord of a manor, having resisted encroachments against one copyholder, could do likewise with the rest: and, similarly, one patentee may save himself many suits by trying out the question once for all against many infringers.

Cases where one lord of a manor has had his rights settled in a suit brought against many trespassers, have been numerous of late; and of course, vice versa, the right may be settled in a similar suit against the lord. E.g., in Warrick v. Queen's College (L. R., 10 Eq. 105; 6 Ch. 716), one commoner having instituted his suit for common rights, the lords of the manor contended that the various claims of common rights could not be included in one suit; but Lord Romilly, M. R., and Lord Chancellor Hatherley, having found

\((h)\) Adams on Equity, p. 199.
a probable legal origin for the rights claimed, granted an injunction against the lord, as upon a bill of peace, to end the matter in dispute.

The Master of the Rolls said (p. 124): “Assume that it was proved by the production of the grants that similar grants of common of pasture had been made to a hundred freehold tenants. In that case two or three of the tenants might sue on behalf of themselves and all others for the preservation of their rights, even if they varied in degree—as, for example, in the number of beasts to be depastured.

“When I look at the cases decided in Equity upon this subject, they seem to me all to support this view of the case. I had to consider the point in Smith v. Brownlow (L. R., 9 Eq. 241), and I came to the same conclusion as I still do that the case of the Mayor of York v. Pilkington (1 Atk. 282), which I referred to, establishes the jurisdiction.

“Does not this case of the Mayor of York v. Pilkington establish that the lord may file a bill against them all, or against some to represent the rest? and if so, is there to be no reciprocity in such case? May the lord comprise them all in one suit, and yet must they each file a separate bill against him to establish their rights? There is, in fact (as Lord Hardwicke says), a privity between them” (h).

(h) It may be worth while to note Lord Hatherley’s words as to the commoners’ claim by prescription. He said, “As to the statute 2 & 3 Will. 4, c. 71, and the question whether there has been any interruption which might prevent the right being asserted, I do not think it necessary to inquire into that part of the case, because the prescription may be proved. The statute only applies to cases
This case was followed by The Commissioners of Sewers v. Glasse (L. R., 7 Ch. 464), where the plaintiffs filed a bill on behalf of themselves and all other the owners and occupiers of lands within the forest of Essex, other than the waste lands of the forest (except such of them as were defendants or alleged to be represented by the defendants), against the lords of the several manors within the forest and two persons who claimed to be owners and occupiers of portions of the waste lands which had been inclosed; and the Attorney-General and Lord Justice James said: “It is far better that the whole case should be tried in a Chancery suit, in which all persons interested in disputing the right claimed by the bill can join in making a defence—the costs of which, if they combine, cannot be very oppressive, and when the general right can be tried once for all, as between the persons interested on the one side, and the persons interested on the other side—than that it should be tried by the only other proceedings I know of. One of such proceedings would be the bringing actions against every one of the trespassers for the disturbance of the rights of common. If it was done in that way there might be thousands of actions brought, because every one of the occupiers claiming the right of common could bring an action against every one of the persons who has made an encroachment.”

where you want to stand upon thirty years' user; but here, where the title is one of 200 or 300 years, that statute is not needed, and the title can be rested upon the original right before the passing of the statute.”
(3.) The practice of granting injunctions more readily against persons and corporations who have been authorized by the Legislature to do certain acts which, without such authority, they would be incompetent to do (i), e. g., RAILWAY COMPANIES, is illustrated by Stretton v. Great Western Rail. Co. (L. R., 5 Ch. 760), where the company took Stretton's land and would not pay him, as they said he had not made out his title; he put a rope across the line which the first train of course broke through, and he then moved for an injunction to restrain the railway company from trespass. Malins, V.-C., refused the injunction, but Lord Hatherley, on appeal, held that the plaintiff was entitled to the relief he asked, and said, "the Court has often in the case of railway companies granted relief to prevent the violent user of those powers with which the Legislature has clothed them, and takes care to do what is right between the parties."

Waste is prevented, in cases of fraud, as in Garth v. Cotton (1 Ves. sen. 524, 546) (k), which (as V.-C. James said in Birch Wolfe v. Birch (L. R., 9 Eq. 690)) decided this, that "the law being that the first person entitled to an immediate estate of inheritance is the only person who can recover, and that he is entitled to recover, for his own benefit, the value of all timber cut improperly by a tenant impeachable for waste; where by fraudulent collusion and wrong doing between the tenant for life and the

(i) See Adams on Equity, 211, 212.
(k) 1 White & Tudor's Leading Cases.
owner of the inheritance in remainder such timber is cut, the Court, by its general jurisdiction to repress fraud, will interfere, notwithstanding it is a legal wrong, and there should have been a legal remedy entitling the remainderman to the value of the timber."

And besides these cases, where there is collusion and fraud, Courts of Equity would interfere to prevent what is called EQUITABLE WASTE, i. e., waste which the Court of Equity restrained even where the life tenant was not impeachable for waste; and henceforth by sect. 25, subs. (3), of the Judicature Act (l), an estate for life, without impeachment of waste, shall not confer, or be deemed to have conferred upon the tenant for life, any legal right to commit waste of the description known as equitable waste, unless an intention to confer such right shall expressly appear by the instrument creating such estate.

As to the difference between legal and equitable waste, see the notes to Garth v. Cotton (ubi sup.), in 1 White & Tudor's Leading Cases, and Seagram v. Knight, L. R., 2 Ch. 628.

Similar principles will apply to the exercise of the jurisdiction to grant injunctions in other cases, as NUISANCE, infringement of PATENTS, COPYRIGHTS, or TRADE-MARKS, and BREACHES OF COVENANT; in all these cases injunctions are granted, in aid of the legal right, only where it is necessary to preserve and protect property from irreparable or at least from substantial or material damage, pending the trial of the right.

(l) 36 & 37 Vict. c. 66.
If the case made out is such that the recovery of damages will give a full and adequate compensation for the injury, no foundation will be laid for the interference by way of injunction. If, on the other hand, the injury is of so material a nature that it cannot be well or fully compensated by the recovery of damages, or be such as from its continuance and permanent mischief might occasion a constantly-recurring grievance, an injunction will be granted.

Nuisances of a modern kind, which have been restrained by injunction, are the pollution of rivers by sewage. (See Goldsmid v. Tunbridge Wells Commissioners, L. R., 1 Ch. 349; Crossley v. Lightowler, L. R., 2 Ch. 478; Att.-Gen. v. Colney Hatch Lunatic Asylum, L. R., 4 Ch. 146.) The collection of noisy crowds. (See Walker v. Brewster, L. R., 5 Eq. 25; Inchbald v. Robinson, L. R., 4 Ch. 388.) Interference with light and air. (See Yates v. Jack, L. R., 1 Ch. 298; City of London Brewery Case, L. R., 9 Ch. 212; Leech v. Schweder, ibid. 463.) Brick-burning, and other causes of discomfort; see Walter v. Selfe, 4 De G. & S. 322; where Sir J. L. Knight Bruce said, “The question of interference with comfort must be estimated according to the plain and simple notions entertained by persons in ordinary life, and not according to those held by persons accustomed to elegant and dainty habits of living.” And in Harrison v. Good (L. R., 11 Eq. 338), it was decided that the establishment of a district National School next a residence is not a legal nuisance.

Similarly, injunctions to restrain breaches
OF COVENANT have for their object the protection of the property from irreparable damage pending the trial of the right. Instances of this kind of injunction, and of injunctions in copyright, patent, and trade-mark cases, will be found in great abundance, and carefully arranged and digested, in Chapters XIX. to XXII. of Mr. Kerr's Book on Injunctions.
CHAPTER IX.

DISCOVERY.

Though the Courts of Equity agreed with the Courts of Common Law in excluding the testimony of parties to the record or other interested witnesses, on their own behalf (a) (a restriction which is now removed, though evidence from an interested source is watched with cautious suspicion, see Haygarth v. Wearing, L. R., 12 Eq. 320; Hill v. Wilson, L. R., 8 Ch. 888), they differed from Courts of Common Law in allowing discovery to be enforced upon oath.

Courts of Chancery not only compelled defendants in ordinary suits in Equity to discover and set forth on oath every fact and circumstance within his knowledge, information or belief, material to the plaintiff's case, but also allowed bills of discovery in aid of proceedings before other tribunals.

It was not until the passing of certain acts of the present reign, and especially the Common Law Procedure Act of 1854 (17 & 18 Vict. c. 125, ss. 51—57), that the judges were authorized to order that any party to an action at law shall, prior to the

(a) See Daniell's Chancery Practice, 821; Adams' Doctrine of Equity, 363; Taylor on Evidence, Chapter on “Competency of Witnesses,” p. 1160.
trial, be examined by his opponent upon all matters relating to the question in dispute (d).

Since the Court of Chancery thus allowed a plaintiff, whose case might rest on facts lying only in the knowledge of a defendant, to interrogate the defendant (subject to proper safeguards which we shall consider), and put him on his oath (e), which the Common Law Courts did not allow; it often happened that matters which would otherwise have been proper for the Common Law Courts, e.g., actions for rent, came into Equity solely for the purpose of making a defendant give proper discovery, just as other Common Law rights were brought into Equity solely for the purpose of getting an injunction; and it was formerly a matter of course to stay an action at Common Law which the defendant at Common Law alleged to be inequitable, until discovery in answer to his allegations was given in Equity. Such stay of the proceedings at Common Law was called a common injunction, because granted as a matter of course, but as it was often applied for merely in order to delay justice at Common Law, it was provided by 15 & 16 Vict. c. 86, s. 58 (f), that common injunctions should be granted upon their merits as shown in the plaintiff's affidavits.

It is now provided by that part of the schedule to

(d) See Taylor on Evidence, p. 489.
(e) See Lewin on Trustees, p. 1, as to the subpoena by which a trustee could be summoned into Chancery, and compelled to answer on oath the allegations of his costui que trust.
(f) Morgan's Chancery Acts and Orders, 221.
the Judicature Act which relates to Discovery (g), that subject to any Rules of Court, a plaintiff in any action shall be entitled to exhibit interrogatories to, and obtain discovery from, any defendant, and any defendant shall be entitled to exhibit interrogatories to, and obtain discovery from, a plaintiff or any other party. Any party shall be entitled to object to any interrogatory on the ground of irrelevancy, and the Court or a judge, if not satisfied that such interrogatory is relevant to some issue in the cause, may allow such objection.

It is obvious, that unless a plaintiff had the power of getting discovery justice would often be defeated (h); but having this power, a plaintiff may first state his case generally as against a defendant, as a foundation for interrogatories, and then having obtained an (i) answer from such defendant he will be able to alter or amend his statement of claim, which at first he could only state in general terms, because the defendant has by fraud or otherwise kept from him all the information on which his case rests. Cases frequently occur, for example, where a money lender taking advantage of another person's necessity, and probably also of his inexperience, induces him to put his signature to deeds, representing them to be securities for the money at a fair rate of interest, and as he keeps the documents in his hands, always hanging over the borrower in terrorem, the latter

(g) 36 & 37 Vict. c. 66, Schedule, Rule 25.
(h) See Taylor on Evidence, 490.
(i) See Schedule to the Judicature Act (36 & 37 Vict. c. 66), Rule 18.
not having any knowledge as to what he has signed, could do nothing at Common Law, but wait until the lender comes to enforce them, and he will no doubt choose his time when it is most inconvenient to the borrower and most convenient to himself; but under the jurisdiction we are considering the borrower can state his case generally, then file interrogatories and obtain discovery what the securities are, and then amending his statement, can have them dealt with according to the justice of the case.

I will consider in this chapter—

(A.) The rules by which the right to discovery is qualified.

(B.) Rules relating to discovery of documents.

(C.) The rule that he who answers must answer fully.

(D.) The jurisdiction to examine witnesses abroad; to perpetuate testimony; to establish wills; and to take evidence de bene esse.

(A.) Rules by which the right to discovery is qualified.

1. The first qualification I shall mention is perhaps an obvious one—that no person will be compelled to disclose or make discovery of any obligations other than such obligations as the Court can give relief upon.

Thus, in Jones v. Badley (L. R., 3 Eq. 635) (p. 47, ante), the defendants John and James Badley were interrogated both as to any engagement amounting to a trust which they might have
entered into with the testatrix, and also as to their intentions with regard to the disposal of the money left to them. By their answer they absolutely denied that they were under any obligation to dispose of the property according to the views entertained by the testatrix, or that they directly or indirectly promised, agreed, or consented to undertake any charitable trust. And as they thus denied the alleged trust, it was held that the Court would not take any notice of any imperfect obligation, nor compel them to give any further account of what they intended to do under the circumstances with the money which the testatrix had given them to deal with according to their discretion.

So, as a purchaser for valuable consideration has an equal claim to the protection of the Court to defend his possession as a plaintiff who relies upon some counter equity has to the assistance of the Court to assert his right (p. 64, ante), the Court will not in general compel a purchaser for valuable consideration, without notice of the plaintiff's title, to make any discovery which may affect his own title (k).

Girdlestone v. N. B. Mercantile Insurance Co. (L. R., 11 Eq. 197) was a case on the border line, a question which would seem to be one more of honour and discretion than of right; but discovery was decreed nevertheless. The circumstances were as follows: A policy of assurance had been granted upon the life of the plaintiff, a Civil servant,

(k) Fonblanque on Equity, II. 490.
who went to reside in India, and, on account of his bad health, an additional premium was charged, but not the Indian extra rate. A premium having been delayed so as to forfeit the policy, the Company declined to reinstate it, except upon payment of the extra Indian rate; and the plaintiff filed his bill for a declaration that he was entitled to the benefit of his policy upon payment of the premium originally charged, and interrogated the Company thus: "What did you do with regard to similar cases at the time my policy was issued? take ten policies immediately preceding and immediately subsequent to the date of my policy upon the lives of the persons about to start for India in the Civil Service, and state whether such extra payments were made in respect of such policies." Bacon, V.-C., held, that the plaintiff’s charge being that the Company’s contention was contrary to the whole course of the conduct of all parties, he ought to have discovery of the circumstances under which he said the literal construction of the policy should not prevail.

2. Another objection which a party who is called upon to give discovery may make, is, that the discovery asked for is not relevant to the issue or not material to the case of the person seeking it. In illustration of this, we may take a recent case at Common Law on Discovery (Gourley v. Plimsoll, L. R., 8 C. P. 362), which was the well-known action against Mr. Plimsoll for libel. There Mr. Plimsoll, being in some difficulty as to getting facts to support his charges, and defend himself against the action for libel, took out a summons calling upon
the plaintiff, Mr. Gourley, to make discovery of his own practices as a shipowner. Mr. Plimsoll had pleaded truth in answer to the action for libel, and was ordered to deliver in three weeks particulars of the several matters he intended to rely on, and the substance of each case he alleged. Thereupon he took out the above-mentioned summons, and applied for leave to administer interrogatories to Mr. Gourley, by which means only he would be enabled to set forth the particulars ordered, such as the causes of the loss of each of the said respective ships, and the insurances on each, which were both matters peculiarly within the plaintiff's knowledge. It was argued that Mr. Plimsoll had no right to interrogate the plaintiff in order to make up his case, but only to support his case when he knew what it was; and it was held, that he must disclose his defence substantially before he could be entitled to file the interrogatories. To allow the interrogatories first would be to invert the order of things.

It will be observed, that the right of exhibiting interrogatories is reciprocal, and that both the plaintiff and defendant may obtain discovery (see the rule quoted, ante, p. 177): the case just quoted was an example of the defendant interrogating the plaintiff in aid of his defence. Under the present practice a defendant has this right, by 15 & 16 Vict. c. 86, s. 19 (l), whereby in certain cases a defendant, after answer, may file interrogatories for the examination of the plaintiff.

(l) Morgan's Chancery Acts and Orders, 177.
A consideration of Mr. Plimsoll's case will make it clear, that though it is very desirable that a bonâ fide plaintiff should be able to make a general statement of his case, and amend his case by getting discovery, yet strict rules are necessary to prevent a suitor who does not show a bonâ fide case from filing what are called fishing interrogatories, and getting at his adversary's defence before the proper time; if such care were not taken, speculative litigation would be encouraged, and some plaintiffs might even frame a false case of their own to meet that of the other side. On all that relates to his own case a suitor is entitled to make the adversary answer, but all matters which are only part of the defence need not be disclosed till the hearing. A man cannot say in general terms, "I am entitled to such-and-such property, you are not—now show me your title-deeds and defence" (m). Thus, though a tenant of a manor may see the Court rolls and documents, being part of his own case (Warrick v. Queen's College, L. R., 3 Eq. 683), on the other hand, in Commissioners of Sewers v. Glasse (L. R., 15 Eq. 302), it was held, that the defendant could not make the commissioners produce their own evidence of custom and user before the time. A well-known example of the doctrine that discovery, which is not material to the plaintiff's title, need not be given, is the rule that a mortgagee need not produce his deed until actual payment of all that is due (n). See Chichester v. Donegall (No. 2) (L. R., 5 Ch. 497),

(m) Wigram, 212.
(n) Fisher on Mortgage and other Securities, 340.
where a tenant for life had mortgaged property, and a remainderman, who wanted to raise money on his interest but could not do so without the deeds, asked for them, but was told that if he liked to redeem the existing mortgage he might do so and have the deeds, but if not, the mortgagee need not expose his security to the risk of having a flaw found in the deed.

3. Matters tending to criminate are privileged from discovery. Thus, in Brownswor v. Edwards (2 Ves. sen. 243), a plaintiff claimed land through the son of Anne Edwards, and that son's legitimacy being disputed, interrogated Anne Edwards as to "when she was married, in whose presence, and where, and whether she had not issue thereby?" To this discovery Anne Edwards put in a plea, that her alleged husband was before married to her own sister, by whom he had children, who survived him; and consequently, if she was married to him afterwards, it would be an incestuous marriage contrary to law, and would subject her to penalties in the Ecclesiastical Court. Against the plea, it was argued that the discovery was in favour of legitimacy, and that there were precedents where "on bills suggesting wilful loss of a ship, for that the owner had insured to twenty times value, though it was felony, yet where defendant was required to set forth insurances he must do so" (o); but the Lord Chancellor allowed the plea to discovery. So to a bill seeking discovery whether a person was a papist,

(o) I quote these words on account of the curious recurrence of the same point in Gourley v. Plimsoll, p. 181, ante.
the defendant pleaded successfully statute 11 & 12 Will. III., disabling papists.

4. **Professional communications** are privileged: *i.e.*, (1) No layman need discover legal advice which has been given him by his professional advisers, or statements of fact which have passed between himself and them in reference to the dispute in litigation; (2) No lawyer need discover any matters disclosed in the ordinary scope of professional employment, communicated in his professional capacity in the transaction of his business whether disclosed in reference to the dispute in litigation or not.

I have stated this rule as it has been usually stated, but whether the privilege is at this day different as it affects a lawyer and the client is very doubtful; and the case of Minet v. Morgan (L. R., 8 Ch. 367), following Pearse v. Pearse (therein cited) seems to show that the client ought equally with the solicitor to be able to protect business done in private confidence.

5. **Official secrets** are privileged, *i.e.*, official persons need not disclose matters of state, the publication of which might be prejudicial to the community.

(B.) **Discovery and production of documents** can also be enforced, and this discovery is regulated by the same principles which regulate the right to discovery in the answer.

The Judicature Act (36 & 37 Vict. c. 66, Schedule,

(p) See Daniell’s Chancery Practice, 528; Taylor on Evidence, 802—808.

(q) Adams’ Doctrine of Equity, 7, 8.
Rule 27) provides, that it shall be lawful for the Court or a judge, at any time during the pendency therein of any action or proceeding, to order the production by any party thereto, upon oath, of such of the documents in his possession or power relating to any matter in question in such suit or proceeding as the Court or judge shall think right; and the Court may deal with such documents, when produced, in such manner as shall appear just.

The present practice is that the party desiring production of documents takes out a summons for the purpose, and the other party makes a schedule of deeds and documents, with a statement, on oath, that bundle A. is material, bundle B. is not, and the adversary may read the one set of documents, but not the other, and take extracts (r).

One important rule which has been laid down as to production of documents is, that where a party states in his pleadings the effect of a document on which he relies, and which he has in his possession, and craves leave to refer to it for greater certainty, he is bound to produce it (Hardman v. Ellames, 5 Sim. 640). The decision is criticised by Wigram on Discovery (ed. 1836), pp. 121—144, but was approved by Lord Cottenham in Adams v. Fisher (3 Myl. & Cr. 526, 548). It is now provided, that any party to an action or proceeding may give notice to any other party in whose pleadings or affidavits reference is made to any document to produce such document for inspection, and any party not complying with such notice shall not be at liberty to put

(r) See Morgan's Chancery Acts and Orders, p. 172.
such document in evidence on his behalf in such action or proceeding unless he shall satisfy the Court that such document relates only to his own title, or that he had some other sufficient cause for not complying with such notice. (36 & 37 Vict. c. 66, Sched., Rule 26.)

Considerable difficulty sometimes arises on the question of materiality, i.e., when the plaintiff asks for documents which will be no use to him if he loses, and which, if he wins, will be his as a matter of course. (See Elmer v. Creasy, L. R., 9 Ch. 69.)

If, for example, he says, "I am your partner or cestui que trust, show me the accounts and the books, they will help me in my case," then the first thing for him to show clearly is that he is a partner or cestui que trust, and the defendant often contends in such cases that he ought not to be put to useless expense.

In such cases the Court has a discretion, and will consider whether the documents called for do or do not fairly constitute a part of the plaintiff's case.

Thus, in Lockett v. Lockett (L. R., 4 Ch. 336), it was said that the principle upon which the Court has always acted is to consider the circumstances of the case and see what useful object could be served by compelling such an account; and the more strict the Court is in compelling a full answer, the more necessary it is that the Court should be vigilant in seeing that the process of the Court is not made use of in an oppressive manner. Lord Redesdale is quoted as saying, that "In the case of an account required, wholly independent of the title, the Court has
declined laying down any general rule, and decides, ordinarily, upon the circumstances of the particular case. Thus, to a bill stating a partnership, and seeking an account of the transactions of the alleged partnership, the defendant, by his answer, denied the partnership, and declined setting forth the accounts required, insisting that the plaintiff was only his servant; and the Court, conceiving the account sought not to be material to the title, overruled exceptions to the answer for not setting forth the account.” “That case, therefore,” said the judges in Lockett v. Lockett, “is an authority in point upon the present case; and if the rule is taken to be as expressed by Lord Redesdale, that in these cases of laborious accounts the Court must look at the particular circumstances of each case, or, as expressed by Sir James Parker, that we must inquire what object would be gained by compelling the defendant to do that which he is required at great expense and trouble to do; then, if we look at the circumstances of the present case, we find the circumstances stronger in favour of the defendant than those which existed in White v. Barker (5 De G. & Sm. 746). The plaintiff says in his bill, that nothing but a careful investigation of the books and accounts by a professed accountant would have enabled the plaintiff to discover how the affairs of the partnership itself stood. If we look at the object to be gained by the plaintiff, one can understand that if he had asked any precise and particular questions, as mentioned before, he might, and probably would, have obtained
something which was material for the purpose of the suit; but he has not so done.”

So, in Carver v. Pinto Leite (L. R., 7 Ch. 90, 97), a trade-mark case, it was said that “Where the defendant cannot protect himself from giving discovery, he must give a full discovery of accounts material to the plaintiff’s case, which may be produced without overwhelming amount of injury to the defendant, the Court will not generally weigh in golden scales the materiality; but there are cases in which it is important that the Court should so weigh it, for the plaintiff, failing at the hearing, might afterwards use such discovery prejudicially to the defendant. In such cases, it is important to consider, is it material to establish his case at the hearing, or material only for the subsequent purposes of the suit in case the plaintiff should succeed?” See further, as to the discretion of the Court in such cases, Saull v. Browne, L. R., 17 Eq. 402; 9 Ch. 364; Elmer v. Creasy, L. R., 9 Ch. 69; Great Western Rail. Co. v. Tucker, ibid. 376.

(C.) The cases above cited will have sufficiently explained and illustrated the rule that “HE WHO ANSWERS MUST ANSWER FULLY.”

Vice-Chancellor Wigram (r) states the rule thus, that where a defendant who might defend himself by demurrer or plea (both of which shall be considered) submits to answer, he cannot, except in the case of a purchaser for value without notice (ante, pp. 64 and 179), protect himself against discovery, upon the

ground only that a demurrer or plea might have been sustained, but must give a full answer(s) to the bill.

An answer (t) is to be deemed full where it is so, with reference to the restrictions imposed upon the right to discovery in general. In other words, a plaintiff may by answer protect himself against any particular discovery which is improperly called for by the bill, on the ground that it is immaterial, or otherwise privileged.

If a party wishes to protect himself from putting in any answer at all, he should demur.

A party who demurs in effect says, "Supposing, for argument's sake, that the facts are as you state them, you have no case in law, and, therefore, no right to interrogate me," and so the dispute is fought out on the simple point of law. Thus, in the case of Fothergill v. Rowland (p. 115, ante), where the suit was instituted for the purpose of compelling coal owners to keep their contract to sell all the coals they

(s) The word "answer" is here, and will under the new practice be used in its natural and proper sense, of the discovery given in answer to interrogatories calling for discovery. Much confusion was caused by applying the term not only to this discovery, but also to the defendant's own case in reply, the defendant's examination and the defendant's case being generally comprised in one document. See Wigram's Points in the Law of Discovery, Introductory Chapter. The word "answer" will no longer, under the Judicature Act, include the defendant's case, by which he accounts for his conduct, or raises a counter-case for relief against the plaintiff: for the Act calls that part of the defence "the defendant's statement," and keeps quite separate the discovery which must be given, from the counter-case which may or may not be set up, by the defendant. (36 & 37 Vict. c. 66, Schedule, Rules 18—24.)

got to the plaintiff: the defence was; "Admitting the contract to have been as you say, you have no case in Equity; this Court will not enforce a contract to deliver personalty—the law is against you on your own showing." Sir G. Jessel, M. R., decided it was so, and said, "It is a great benefit to all parties to have the questions and cases speedily and cheaply determined, and the practice of demurring ought if possible to be encouraged."

The Judicature Act (36 & 37 Vict. c. 66, Sched., Rule 18) provides, that "a demurrer to any statement may be filed in such manner and form as may be prescribed by rules of Court."

The principle of defence by plea is, that the defendant avers some one matter of avoidance, and reduces his defence to some single issue. A plea is founded on some matter or rule of law not stated in the bill; otherwise the defence would be by demurrer. The defence by plea is not noticed in the schedule to the Judicature Act, but it is provided (ibid., Rule 19), that "where in any action it appears to a judge that the statement of claim, or defence, or reply, does not sufficiently disclose the issues of fact in dispute between the parties, he may direct the parties to prepare issues, and such issues shall, if the parties differ, be settled by a judge."

(D.) Finally, I will mention some special modes in which Courts of Equity give assistance towards the taking and preservation of evidence.

1. The jurisdiction to examine witnesses abroad originated in the incapacity of the Common Law Courts to issue a commission for the purpose, with-
out the consent of both parties (t). Such commissions were issued by Courts of Chancery, both for the purpose of suits there instituted, and also in aid of the Common Law process; but now the practice is to appoint a special examiner for such examination (u), or to take the evidence required before one of her Majesty's consuls, or other persons named in 15 & 16 Vict. c. 86, s. 22 (x).

2. Bills to perpetuate testimony enable persons to take evidence for the purpose of quieting their title in cases where the facts likely to come into dispute cannot be immediately investigated by legal process, e. g., where the person has merely a future interest, or is himself in possession, and is afraid of disturbance at a future time.

It was decided in Earl Spencer v. Peek (3 L. R., Eq. 415), that if a suit is actually pending respecting certain rights, another suit to perpetuate testimony in favour of such rights is improper and must be stayed. This was one of those cases involving rights of common, some of which we have discussed in the last Chapter on Injunctions. A suit had been commenced by Peek, one of the tenants of Wimbledon manor, on behalf of himself and others to enforce rights of digging clay; and Earl Spencer filed a counter-bill for the purpose of perpetuating the testimony of several old inhabitants, alleging that Peek's suit would not come to a hearing for a long time, perhaps never, and meantime his witnesses might

(t) Adams' Doctrine of Equity, 23.
(u) Morgan's Chancery Acts and Orders, 186.
(x) Ibid. 179.
probably die; but Lord Romilly, M. R., held, that such a bill could only be filed where no suit was commenced involving the right—and as there was a suit pending, the witnesses must be examined *de bene esse* in the suit. (See p. 193, *post*.)

Formerly, this jurisdiction of perpetuating testimony was only exercised where future invasion of *property* was apprehended; but it was enacted by 5 & 6 Vict. c. 69, that such a bill may be filed by any person alleging a title "on the happening of a future event to any *honour, title, dignity or office, or any estate or interest in any property, real or personal*.

Re Tayleur (L. R., 6 Ch. 416) raises a curious question whether persons named as beneficiaries in the will of a lunatic, which they knew was likely to be attacked as made by him when of unsound mind, could file such a bill—for they had no interest until the death of the testator. The Lords Justices did not decide that the suit would be improper, but rather lent a sanction to it by giving directions as to the expense of it.

*Suits for the establishment of wills* in Chancery, or rather by the aid of Chancery, are similar to these. The Probate Court, by 20 & 21 Vict. c. 77, took the place of the Ecclesiastical Courts, which formerly tried the title of an executor as to personalty, or decided who should be administrator. And wills of real estate are also now proved in solemn form in the same Court. (See Williams on Executors, pp. 308, 320.) The Court of Chancery never interfered with this jurisdiction, but only
assisted the proper Court by allowing a devisee to file his bill to perpetuate the testimony of a deceased testator's soundness of mind and thus establish the will; and such a suit would be allowed if a devisee taking under a will knew that the heir was waiting only till evidence in favour of the will was gone, as the cases of Boyse v. Rossborough (Kay, 71, 102), and Lovett v. Lovett (3 Kay & J. 1) show; but, as we have seen already, a Court of Equity would not itself try the validity of a will, not even in case of fraud, though it would declare a trust where the devisee's conscience ought to be so affected. See Jones v. Gregory, 2 De G., J. & S. 83, and p. 48, ante.

The jurisdiction to examine witnesses de bene esse is a jurisdiction for permitting evidence to be taken in a suit, which may be lost by delay because the witness is infirm; so called in law Latin because the evidence, being taken ex parte, is read de bene esse, —"for what it is worth."

Hill v. Hibbit (L. R., 7 Eq. 421) is a case which shows how strict the Court is that evidence which has been taken de bene esse for the purpose of a pending suit must be taken over again, if when the suit comes to a hearing the witness whose evidence was so taken is still alive and able to be examined and cross-examined. As Sir W. M. James said, in deciding the application in Hill v. Hibbit (ubi sup.), one of the conditions under which evidence is taken de bene esse is, that it is not to be used, unless and until it becomes necessary that it shall be used.
The points relating to the law of discovery, which we have now been considering, will no doubt be directly imported into the practice of the High Court of Judicature, excepting where the rules to be hereafter issued shall provide to the contrary, and if in the course of these chapters it may appear that some rules and doctrines of Equity, which are now to be done away, have been dwelt upon to the exclusion of more important matters, it must be remembered that, even in cases where new rules shall be made, their interpretation will greatly depend upon the analogy of the old system, and that (pp. 209, 210, post) "where there is any conflict or variance between the rules of Equity and the rules of Common Law, with reference to the same matter, the rules of Equity shall prevail."

THE END.
APPENDIX.

SUPREME COURT OF JUDICATURE ACT, 1873.

36 & 37 Vict. c. 66.

An Act for the constitution of a Supreme Court, and for other purposes relating to the better Administration of Justice in England; and to authorize the transfer to the Appellate Division of such Supreme Court of the Jurisdiction of the Judicial Committee of Her Majesty's Privy Council. [5th August, 1873.]

Whereas it is expedient to constitute a Supreme Court, and to make provision for the better administration of justice in England:

And whereas it is also expedient to alter and amend the law relating to the judicial committee of Her Majesty's privy council:

Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, as follows:

Preliminary (a).

1. This Act may be cited for all purposes as the "Supreme Court of Judicature Act, 1873."

2. This Act, except any provision thereof which is declared to take effect on the passing of this Act, shall

(a) For the interpretation of terms, see sect. 100, post.

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commence and come into operation on the second day of November, 1875 (b).]

APPENDIX.

PART I.

Constitution and Judges of Supreme Court.

3. From and after the time appointed for the commencement of this Act, the several Courts hereinafter mentioned, (that is to say,) the High Court of Chancery of England, the Court of Queen's Bench, the Court of Common Pleas at Westminster, the Court of Exchequer, the High Court of Admiralty, the Court of Probate, the Court for Divorce and Matrimonial Causes, and the London Court of Bankruptcy, shall be united and consolidated together, and shall constitute, under and subject to the provisions of this Act, one Supreme Court of Judicature in England.

4. The said Supreme Court shall consist of two permanent divisions, one of which, under the name of "Her Majesty's High Court of Justice," shall have and exercise original jurisdiction, with such appellate jurisdiction from inferior Courts as is hereinafter mentioned, and the other of which, under the name of "Her Majesty's Court of Appeal" (c), shall have and exercise appellate jurisdiction, with such original jurisdiction as hereinafter mentioned as may be incident to the determination of any appeal.

5. Her Majesty's High Court of Justice shall be constituted as follows:—The first judges thereof shall be the Lord Chancellor, the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, the Lord Chief Baron of the Exchequer, the several Vice-Chancellors of the High Court of Chancery, the judge of the Court of Probate and of the Court for Divorce and Matrimonial Causes, the several puisne justices of the Courts of Queen's Bench and Common Pleas respectively, the several junior barons of the Court of Exchequer, and the judge of the High Court of Admi-

(b) This date was fixed by the Supreme Court of Judicature (Commencement) Act, 1874.

(c) It is now proposed to constitute a Court to be called "Her Majesty's Imperial Court of Appeal," in place of the Court of Appeal mentioned in the text.
ralty, except such, if any, of the aforesaid judges as shall be appointed ordinary judges of the Court of Appeal.

Subject to the provisions hereinafter contained, whenever the office of a judge of the said High Court shall become vacant, a new judge may be appointed thereto by her Majesty, by letters-patent. All persons to be hereafter appointed to fill the places of the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, and the Lord Chief Baron, and their successors respectively, shall continue to be appointed to the same respective offices, with the same precedence, and by the same respective titles, and in the same manner, respectively, as heretofore. Every judge who shall be appointed to fill the place of any other judge of the said High Court of Justice shall be styled in his appointment "judge of her Majesty's High Court of Justice," and shall be appointed in the same manner in which the puisne justices and junior barons of the Superior Courts of Common Law have been heretofore appointed: provided always, that if at the commencement of this Act the number of puisne justices and junior barons who shall become judges of the said High Court shall exceed twelve in the whole, no new judge of the said High Court shall be appointed in the place of any such puisne justice or junior baron who shall die or resign while such whole number shall exceed twelve, it being intended that the permanent number of judges of the said High Court shall not exceed twenty-one (d).

All the judges of the said Court shall have in all respects, save as in this Act is otherwise expressly provided, equal power, authority, and jurisdiction; and shall be addressed in the manner which is now customary in addressing the judges of the Superior Courts of Common Law.

The Lord Chief Justice of England for the time being shall be president of the said High Court of Justice in the absence of the Lord Chancellor.

[Sect. 6 provides for the constitution of a Court of

(d) i.e., "exclusive of the Lord Chancellor," as was explained in the bill introduced and withdrawn, 1874.
APPENDIX.

Appeal, but it is proposed to bring in an Act in 1875 to constitute an Imperial High Court of Appeal.]

The ordinary and additional judges of the Court of Appeal shall be styled Lords Justices of Appeal. All the judges of the said Court shall have, in all respects, save as in this Act is otherwise expressly mentioned, equal power, authority and jurisdiction.

Whenever the office of an ordinary judge of the Court of Appeal becomes vacant, a new judge may be appointed thereto by her Majesty by letters-patent.

The Lord Chancellor for the time being shall be president of the Court of Appeal.

[Sect. 7 provides that the office of any judge may be vacated by resignation and for the effect of vacancies generally.]

[Sect. 8 provides the qualifications of judges.]

[Sect. 9 provides for the tenure of the office of the judges, and their oaths of office, and that the judges shall not sit in the House of Commons.]

[Sect. 10 provides for the precedence of judges.]

[Sect. 11 saves the rights and obligations of existing judges.]

12. If, in any case not expressly provided for by this Act, a liability to any duty, or any authority or power, not incident to the administration of justice in any Court, whose jurisdiction is transferred by this Act to the High Court of Justice, shall have been imposed or conferred by any statute, law, or custom upon the judges or any judge of any such Courts, save as hereinafter mentioned, every judge of the said High Court shall be capable of performing and exercising, and shall be liable to perform and empowered to exercise every such duty, authority, and power, in the same manner as if this Act had not passed, and as if he had been duly appointed the successor of a judge liable to such duty, or possessing such authority or power, before the passing of this Act. Any such duty, authority or power, imposed or conferred by any statute, law or custom, in any such case as aforesaid, upon the Lord Chancellor, the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, or the Lord Chief Baron, shall continue to be performed and exercised by them respectively,
APPENDIX.

and by their respective successors, in the same manner as if this Act had not passed.

[Sect. 13 provides for the salaries of future judges.]

[Sect. 14 provides for the retiring pensions of future judges of the High Court of Justice, and the ordinary judges of Court of Appeal.]

[Sect. 15 provides how the salaries and pensions are to be paid.]

PART II.

Jurisdiction and Law.

16. The High Court of Justice shall be a Superior Court of Record, and, subject as in this Act mentioned, there shall be transferred to and vested in the said High Court of Justice the jurisdiction which, at the commencement of this Act, was vested in, or capable of being exercised by, all or any of the Courts following; (that is to say,)

(1.) The High Court of Chancery, as a Common Law Court as well as a Court of Equity, including the jurisdiction of the Master of the Rolls, as a judge or master of the Court of Chancery, and any jurisdiction exercised by him in relation to the Court of Chancery as a Common Law Court;

(2.) The Court of Queen’s Bench;

(3.) The Court of Common Pleas at Westminster;

(4.) The Court of Exchequer, as a Court of Revenue, as well as a Common Law Court;

(5.) The High Court of Admiralty;

(6.) The Court of Probate;

(7.) The Court for Divorce and Matrimonial Causes;

(8.) The London Court of Bankruptcy;

(9.) The Court of Common Pleas at Lancaster;

(10.) The Court of Pleas at Durham;

(11.) The Courts created by commissions of assize, of oyer and terminer, and of gaol delivery, or any of such commissions:

The jurisdiction by this Act transferred to the High Court of Justice shall include (subject to the exceptions hereinafter contained) the jurisdiction which, at the com-
mencement of this Act, was vested in, or capable of being exercised by, all or any one or more of the judges of the said Courts, respectively, sitting in Court or chambers, or elsewhere, when acting as judges or a judge, in pursuance of any statute, law, or custom, and all powers given to any such Court, or to any such judges or judge, by any statute; and also all ministerial powers, duties, and authorities, incident to any and every part of the jurisdictions so transferred.

17. There shall not be transferred to or vested in the said High Court of Justice, by virtue of this Act,—

(1.) Any appellate jurisdiction of the Court of Appeal in Chancery, or of the same Court sitting as a Court of Appeal in Bankruptcy:

(2.) Any jurisdiction of the Court of Appeal in Chancery of the county palatine of Lancaster:

(3.) Any jurisdiction usually vested in the Lord Chancellor or in the Lords Justices of Appeal in Chancery, or either of them, in relation to the custody of the persons and estates of idiots, lunatics, and persons of unsound mind (e):

(4.) Any jurisdiction vested in the Lord Chancellor in relation to grants of letters-patent, or the issue of commissions or other writings, to be passed under the great seal of the United Kingdom:

(5.) Any jurisdiction exercised by the Lord Chancellor in right of or on behalf of her Majesty as visitor of any college, or of any charitable or other foundation:

(6.) Any jurisdiction of the Master of the Rolls in relation to records in London or elsewhere in England.

18. The Court of Appeal established by this Act shall be a Superior Court of Record, and there shall be transferred to and vested in such Court all jurisdiction and powers of the Courts following; (that is to say,)

(1.) All jurisdiction and powers of the Lord Chancellor and of the Court of Appeal in Chancery,

(e) It is intended that this jurisdiction shall be exercised by such Judges as may be intrusted by the sign manual of Her Majesty or her successors with such care, and meanwhile by the Lords Justices.
in the exercise of his and its appellate jurisdiction, and of the same Court as a Court of Appeal in Bankruptcy:

(2.) All jurisdiction and powers of the Court of Appeal in Chancery of the county palatine of Lancaster, and all jurisdiction and powers of the chancellor of the duchy and county palatine of Lancaster when sitting alone or apart from the Lords Justices of Appeal in Chancery as a judge of re-hearing or appeal from decrees or orders of the Court of Chancery of the county palatine of Lancaster:

(3.) All jurisdiction and powers of the Court of the Lord Warden of the Stannaries assisted by his assessors, including all jurisdiction and powers of the said Lord Warden when sitting in his capacity of judge:

(4.) All jurisdiction and powers of the Court of Exchequer Chamber:

(5.) All jurisdiction vested in or capable of being exercised by her Majesty in council, or the Judicial Committee of her Majesty’s Privy Council, upon appeal from any judgment or order of the High Court of Admiralty, or from any order in lunacy made by the Lord Chancellor, or any other person having jurisdiction in lunacy.

[Sects. 19—21 provide for appeals from the High Court, but it is proposed to amend these provisions on the constitution of the Imperial Court of Appeal, p. 196, note (c).]

22. From and after the commencement of this Act the several jurisdictions which by this Act are transferred to and vested in the said High Court of Justice and the said Court of Appeal respectively shall cease to be exercised, except by the said High Court of Justice and the said Court of Appeal respectively, as provided by this Act; and no further or other appointment of any judge to any Court whose jurisdiction is so transferred shall be made except as provided by this Act: Provided, that in all causes, matters and proceedings whatsoever which shall have been fully heard, and in which judgment shall not have been given, or having been given shall not have

[k 5]
been signed, drawn up, passed, entered or otherwise perfected at the time appointed for the commencement of this Act, such judgment, decree, rule or order may be given or made, signed, drawn up, passed, entered or perfected respectively, after the commencement of this Act, in the name of the same Court, and by the same judges and officers, and generally in the same manner, in all respects as if this Act had not passed; and the same shall take effect, to all intents and purposes, as if the same had been duly perfected before the commencement of this Act; and every judgment, decree, rule or order of any Court whose jurisdiction is hereby transferred to the said High Court of Justice or the said Court of Appeal, which shall have been duly perfected at any time before the commencement of this Act, may be executed and enforced, and, if necessary, amended or discharged by the said High Court of Justice and the said Court of Appeal respectively, in the same manner as if it had been a judgment, decree, rule or order of the said High Court or of the said Court of Appeal; and all causes, matters and proceedings whatsoever, whether civil or criminal, which shall be pending in any of the Courts whose jurisdiction is so transferred as aforesaid at the commencement of this Act, shall be continued and concluded, as follows (that is to say), in the case of proceedings in error or on appeal, or of proceedings before the Court of Appeal in Chancery, in and before her Majesty’s Court of Appeal; and, as to all other proceedings, in and before her Majesty’s High Court of Justice. The said Courts respectively shall have the same jurisdiction in relation to all such causes, matters and proceedings as if the same had been commenced in the said High Court of Justice, and continued therein (or in the said Court of Appeal, as the case may be) down to the point at which the transfer takes place; and, so far as relates to the form and manner of procedure, such causes, matters, and proceedings, or any of them, may be continued and concluded, in and before the said Courts respectively, either in the same or the like manner as they would have been continued and concluded in the respective Courts from which they shall have been transferred as aforesaid, or according to the ordinary course of the said High Court of Justice and
the said Court of Appeal respectively (so far as the same may be applicable thereto), as the said Courts respectively may think fit to direct.

23. The jurisdiction by this Act transferred to the said High Court of Justice and the said Court of Appeal respectively shall be exercised (so far as regards procedure and practice) in the manner provided by this Act, or by such rules and orders of Court as may be made pursuant to this Act; and where no special provision is contained in this Act or in any such rules or orders of Court with reference thereto, it shall be exercised as nearly as may be in the same manner as the same might have been exercised by the respective Courts from which such jurisdiction shall have been transferred, or by any of such Courts.

24. In every civil cause or matter commenced in the High Court of Justice, Law and Equity shall be administered by the High Court of Justice and the Court of Appeal respectively according to the rules following:

(1.) If any plaintiff or petitioner (f) claims to be entitled to any equitable estate or right, or to relief upon any equitable ground against any deed, instrument, or contract, or against any right, title, or claim whatsoever asserted by any defendant or respondent in such cause or matter, or to any relief founded upon a legal right, which heretofore could only have been given by a Court of Equity, the said Courts respectively, and every judge thereof, shall give to such plaintiff or petitioner such and the same relief as ought to have been given by the Court of Chancery in a suit or proceeding for the same or the like purpose properly instituted before the passing of this Act.

(2.) If any defendant claims to be entitled to any equitable estate or right, or to relief upon any equitable ground against any deed, instrument, or contract, or against any right, title, or claim asserted by any plaintiff or petitioner in such

(f) Including every person making application by petition, motion or summons, sect. 100, p. 287, post.
cause or matter, or alleges any ground of equitable defence to any claim of the plaintiff or petitioner in such cause or matter, the said Courts respectively, and every judge thereof, shall give to every equitable estate, right, or ground of relief so claimed, and to every equitable defence so alleged, such and the same effect, by way of defence against the claim of such plaintiff or petitioner, as the Court of Chancery ought to have given if the same or the like matters had been relied on by way of defence in any suit or proceeding instituted in that Court for the same or the like purpose before the passing of this Act.

(3.) The said Courts respectively, and every judge thereof, shall also have power to grant to any defendant in respect of any equitable estate or right, or other matter of equity, and also in respect of any legal estate, right, or title claimed or asserted by him, all such relief against any plaintiff or petitioner as such defendant shall have properly claimed by his pleading, and as the said Courts respectively, or any judge thereof, might have granted in any suit instituted for that purpose by the same defendant against the same plaintiff or petitioner; and also all such relief relating to or connected with the original subject of the cause or matter, and in like manner claimed against any other person, whether already a party to the same cause or matter or not, who shall have been duly served with notice in writing of such claim pursuant to any rule of Court or any order of the Court, as might properly have been granted against such person if he had been made a defendant to a cause duly instituted by the same defendant for the like purpose; and every person served with any such notice shall thenceforth be deemed a party to such cause or matter, with the same rights in respect of his defence against such claim, as if he had been duly sued in the ordinary way by such defendant.
APPENDIX.

(4.) The said Courts respectively, and every judge thereof, shall recognize and take notice of all equitable estates, titles and rights, and all equitable duties and liabilities appearing incidentally in the course of any cause or matter, in the same manner in which the Court of Chancery would have recognized and taken notice of the same in any suit or proceeding duly instituted therein before the passing of this Act.

(5.) No cause or proceeding at any time pending in the High Court of Justice, or before the Court of Appeal, shall be restrained by prohibition or injunction (g); but every matter of equity on which an injunction against the prosecution of any such cause or proceeding might have been obtained, if this Act had not passed, either unconditionally or on any terms or conditions, may be relied on by way of defence thereto: provided always that nothing in this Act contained shall disable either of the said Courts from directing a stay of proceedings in any cause or matter pending before it if it shall think fit (h); and any person, whether a party or not to any such cause or matter, who would have been entitled, if this Act had not passed, to apply to any Court to restrain the prosecution thereof, or who may be entitled to enforce, by attachment or otherwise, any judgment, decree, rule, or order, contrary to which all or any part of the proceedings in such cause or matter may have been taken, shall be at liberty to apply to the said Courts respectively, by motion in a summary way, for a stay of proceedings in such cause or matter, either generally, or so far as may be necessary for the purposes of justice; and the Court shall thereupon make such order as shall be just.

(6.) Subject to the aforesaid provisions for giving effect to equitable rights and other matters of equity

(g) See ante, p. 158.
(h) See ante, p. 159.
in manner aforesaid, and to the other express provisions of this Act, the said Courts respectively, and every judge thereof, shall recognize and give effect to all legal claims and demands, and all estates, titles, rights, duties, obligations, and liabilities existing by the Common Law or by any custom, or created by any statute, in the same manner as the same would have been recognized and given effect to if this Act had not passed by any of the Courts whose jurisdiction is hereby transferred to the said High Court of Justice.

(7.) The High Court of Justice and the Court of Appeal respectively, in the exercise of the jurisdiction vested in them by this Act in every cause or matter pending before them respectively, shall have power to grant, and shall grant, either absolutely or on such reasonable terms and conditions as to them shall seem just, all such remedies whatsoever as any of the parties thereto may appear to be entitled to in respect of any and every legal or equitable claim properly brought forward by them respectively in such cause or matter; so that, as far as possible, all matters so in controversy between the said parties respectively may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided.

25. And whereas it is expedient to take occasion of the union of the several Courts whose jurisdiction is hereby transferred to the said High Court of Justice to amend and declare the law to be hereafter administered in England as to the matters next hereinafter mentioned: be it enacted as follows:

(1.) In the administration (i) by the Court of the assets of any person who may die after the passing of this Act, and whose estate may prove to be insufficient for the payment in full of his debts and liabilities, the same rules shall prevail and be observed as to the respective rights of secured

(i) See pp. 12, 93, ante.
and unsecured creditors \((j)\), and as to debts and liabilities proveable, and as to the valuation of annuities and future or contingent liabilities respectively, as may be in force for the time being under the law of bankruptcy with respect to the estates of persons adjudged bankrupt; and all persons who in any such case would be entitled to prove for and receive dividends out of the estate of any such deceased person may come in under the decree or order for the administration of such estate and make such claims against the same as they may respectively be entitled to by virtue of this Act.

(2.) No claim of a cestui que trust against his trustee for any property held on an *express trust* \((k)\), or in respect of any breach of such trust, shall be held to be barred by any statute of limitations.

(3.) An estate for life without impeachment of waste shall not confer or be deemed to have conferred upon the tenant for life any legal right to commit waste of the description known as *equitable waste* \((l)\), unless an intention to confer such right shall expressly appear by the instrument creating such estate.

(4.) There shall not, after the commencement of this Act, be any *merger* \((m)\) by operation of law only of any estate, the beneficial interest in which would not be deemed to be merged or extinguished in equity.

(5.) A *mortgagor* \((n)\) entitled for the time being to the possession or receipt of the rents and profits of any land as to which no notice of his intention

\((j)\) That is, a secured creditor can prove only for the balance due after realizing or valuing his security. In winding up companies the Court of Chancery allowed a secured creditor to prove for his whole debt. See Fisher on Mortgages, 539; Kellock's case, L. R., 3 Ch. 769.

\((k)\) See p. 22, *ante*.

\((l)\) See p. 172, *ante*.

\((m)\) See pp. 86 and 105, *ante*.

\((n)\) See pp. 104 and 130, *ante*.
APPENDIX.

to take possession or to enter into the receipt of the rents and profits thereof shall have been given by the mortgagee, may sue for such possession, or for the recovery of such rents or profits, or to prevent or recover damages in respect of any trespass or other wrong relative thereto, in his own name only, unless the cause of action arises upon a lease or other contract made by him jointly with any other person.

(6.) Any absolute assignment, by writing under the hand of the assignor (not purporting to be by way of charge only), of any debt or other legal chose in action (o), 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 (p) 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 (q) 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 (r).

(o) See pp. 59, 60, ante.
(p) See pp. 61 and 145, ante.
(q) See p. 161, ante.
(r) See p. 30, ante; and Morgan’s Chancery Acts and Orders, p. 64.
(7.) Stipulations in contracts, as to time or otherwise, which would not before the passing of this Act have been deemed to be or to have become of the essence of such contracts in a Court of Equity shall receive in all Courts the same construction and effect as they would have here-tofore received in Equity.

(8.) A mandamus or an injunction may be granted or a receiver appointed by an interlocutory order of the Court in all cases in which it shall appear to the Court to be just or convenient that such order should be made (s); 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 (t) 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.

(9.) In any cause or proceeding for damages arising out of a collision between two ships, if both ships shall be found to have been in fault, the rules hitherto in force in the Court of Admiralty, so far as they have been at variance with the rules in force in the Courts of Common Law, shall prevail.

(10.) In questions relating to the custody and education of infants the Rules of Equity shall prevail (u).

(11.) Generally in all matters not hereinbefore particularly mentioned, in which there is any con-

(s) See p. 156, ante.
(t) Formerly, where an action for ejectment would lie, an injunction would be refused (pp. 163, 166, ante).
(u) See p. 69, ante.
APPENDIX.

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.

PART III.

Sittings and Distribution of Business.

26. The division of the legal year into terms shall be abolished so far as relates to the administration of justice; and there shall no longer be terms applicable to any sitting or business of the High Court of Justice, or of the Court of Appeal, or of any commissioners to whom any jurisdiction may be assigned under this Act; but in all other cases in which, under the law now existing, the terms into which the legal year is divided are used as a measure for determining the time at or within which any act is required to be done, the same may continue to be referred to for the same or the like purpose, unless and until provision is otherwise made by any lawful authority. Subject to Rules of Court, the High Court of Justice and the Court of Appeal, and the judges thereof respectively, or any such commissioners as aforesaid, shall have power to sit and act, at any time, and at any place, for the transaction of any part of the business of such Courts respectively, or of such judges or commissioners, or for the discharge of any duty which by any Act of Parliament, or otherwise, is required to be discharged during or after term.

27. Her Majesty in Council may from time to time, upon any report or recommendation of the judges by whose advice her Majesty is hereinafter authorized to make rules before the commencement of this Act, and after the commencement of this Act upon any report or recommendation of the council of judges of the Supreme Court hereinafter mentioned, with the consent of the Lord Chancellor, make, revoke, or modify, orders regulating the vacations to be observed by the High Court of Justice and the High Court of Appeal, and in the offices of the said Courts respectively; and any Order in Council made pursuant to this section shall, so long as it continues
in force, be of the same effect as if it were contained in this Act; and Rules of Court may be made for carrying the same into effect in the same manner as if such Order in Council were part of this Act. In the meantime, and subject thereto, the said vacations shall be fixed in the same manner, and by the same authority, as if this Act had not passed. This section shall come into operation immediately upon the passing of this Act.

28. Provision shall be made by Rules of Court for the hearing, in London or Middlesex, during vacation by judges of the High Court of Justice and the Court of Appeal respectively, of all such applications as may require to be immediately or promptly heard.

29. Her Majesty, by commission of assize or by any other commission, either general or special, may assign to any judge or judges of the High Court of Justice or other persons usually named in commissions of assize, the duty of trying and determining within any place or district specially fixed for that purpose by such commission, any causes or matters, or any questions or issues of fact or of law, or partly of fact and partly of law, in any cause or matter depending in the said High Court, or the exercise of any civil or criminal jurisdiction capable of being exercised by the said High Court; and any commission so granted by her Majesty shall be of the same validity as if it were enacted in the body of this Act; and any commissioner or commissioners appointed in pursuance of this section shall, when engaged in the exercise of any jurisdiction assigned to him or them in pursuance of this Act, be deemed to constitute a Court of the said High Court of Justice; and, subject to any restrictions or conditions imposed by Rules of Court and to the power of transfer, any party to any cause or matter involving the trial of a question or issue of fact, or partly of fact and partly of law, may, with the leave of the judge or judges to whom or to whose division the cause or matter is assigned, require the question or issue to be tried and determined by a commissioner or commissioners as aforesaid, or at sittings to be held in Middlesex or London as herein-after in this Act mentioned, and such question or issue shall be tried and determined accordingly.

A cause or matter not involving any question or issue
APPENDIX.

of fact may be tried and determined in like manner with the consent of all the parties thereto.

30. Subject to Rules of Court, sittings for the trial by jury of causes and questions or issues of fact shall be held in Middlesex and London, and such sittings shall, so far as is reasonably practicable, and subject to vacations, be held continuously throughout the year by as many judges as the business to be disposed of may render necessary. Any judge of the High Court of Justice sitting for the trial of causes and issues in Middlesex or London, at any place heretofore accustomed, or to be hereafter determined by Rules of Court, shall be deemed to constitute a Court of the said High Court of Justice.

31. For the more convenient despatch of business in the said High Court of Justice (but not so as to prevent any judge from sitting whenever required in any Divisional Court, or for any judge of a different division from his own), there shall be in the said High Court five divisions consisting of such number of judges respectively as hereinafter mentioned. Such five divisions shall respectively include, immediately on the commencement of this Act, the several judges following; (that is to say,)

(1.) One division shall consist of the following judges; (that is to say,) The Lord Chancellor, who shall be President thereof, the Master of the Rolls, and the Vice-Chancellors of the Court of Chancery, or such of them as shall not be appointed ordinary judges of the Court of Appeal:

(2.) One other division shall consist of the following judges; (that is to say,) The Lord Chief Justice of England, who shall be President thereof, and such of the other judges of the Court of Queen’s Bench as shall not be appointed ordinary judges of the Court of Appeal:

(3.) One other division shall consist of the following judges; (that is to say,) The Lord Chief Justice of the Common Pleas, who shall be President thereof, and such of the other judges of the Court of Common Pleas as shall not be appointed ordinary judges of the Court of Appeal:

(4.) One other division shall consist of the following judges; (that is to say,) The Lord Chief Baron
of the Exchequer, who shall be President thereof, and such of the other Barons of the Court of Exchequer as shall not be appointed ordinary judges of the Court of Appeal:

(5.) One other division shall consist of two judges who, immediately on the commencement of this Act, shall be the existing judge of the Court of Probate and of the Court for Divorce and Matrimonial Causes and the existing judge of the High Court of Admiralty, unless either of them is appointed an ordinary judge to the Court of Appeal. The existing judge of the Court of Probate shall (unless so appointed) be the president of the said division, and subject thereto the senior judge of the said division, according to the order of precedence under this Act, shall be president.

The said five divisions shall be called respectively the Chancery Division, the Queen's Bench Division, the Common Pleas Division, the Exchequer Division, and the Probate, Divorce, and Admiralty Division.

Any deficiency of the number of five judges for constituting, in manner aforesaid, immediately on the commencement of this Act, any one or more of the Queen's Bench, Common Pleas, and Exchequer divisions, may be supplied by the appointment, under her Majesty's royal sign manual, either before or after the time fixed for the commencement of this Act, of one of the puisne justices or junior barons of any Superior Court of Common Law from which no judge may be so appointed as aforesaid to the Court of Appeal, to be a judge of any division in which such deficiency would otherwise exist. And any deficiency of the number of three vice-chancellors or of the two judges of the Probate and Admiralty divisions at the time of the commencement of this Act may be supplied by the appointment of a new judge in his place in the same manner as if a vacancy in such office had occurred after the commencement of this Act.

Any judge of any of the said divisions may be transferred by her Majesty, under her royal sign manual, from one to another of the said divisions.

Upon any vacancy happening among the judges of the
said High Court, the judge appointed to fill such vacancy shall, subject to the provisions of this Act, and to any Rules of Court which may be made pursuant thereto, become a member of the same division to which the judge whose place has become vacant belonged.

32. Her Majesty in Council may from time to time, upon any report or recommendation of the Council of Judges of the Supreme Court hereinafter mentioned, order that any reduction or increase in the number of divisions of the High Court of Justice, or in the number of the judges of the said High Court who may be attached to any such division, may, pursuant to such report or recommendation, be carried into effect; and may give all such further directions as may be necessary or proper for that purpose; and such order may provide for the abolition on vacancy of the distinction of the offices of any of the following judges, namely, the Chief Justice of England, the Master of the Rolls, the Chief Justice of the Common Pleas, and the Chief Baron of the Exchequer, which may be reduced, and of the salaries, pensions, and patronage attached to such offices, from the offices of the other judges of the High Court of Justice, notwithstanding anything in this Act relating to the continuance of such offices, salaries, pensions, and patronage; but no such Order of her Majesty in Council shall come into operation until the same shall have been laid before each House of Parliament for thirty days on which that House shall have sat, nor if, within such period of thirty days, an address is presented to her Majesty by either House of Parliament, praying that the same may not come into operation. Any such order, in respect whereof no such address shall have been presented to her Majesty, shall, from and after the expiration of such period of thirty days, be of the same force and effect as if it had been herein expressly enacted: provided always, that the total number of the judges of the Supreme Court shall not be reduced or increased by any such order.

33. All causes and matters which may be commenced in, or which shall be transferred by this Act to, the High Court of Justice, shall be distributed among the several divisions and judges of the said High Court, in such manner as may from time to time be determined by any
Rules of Court, or orders of transfer, to be made under the authority of this Act; and in the meantime and subject thereto, all such causes and matters shall be assigned to the said divisions respectively, in the manner hereinafter provided. Every document by which any cause or matter may be commenced in the said High Court shall be marked with the name of the division, or with the name of the judge, to which or to whom the same is assigned.

34. There shall be assigned (subject as aforesaid) to the Chancery Division of the said Court:

(1.) All causes and matters pending in the Court of Chancery at the commencement of this Act:

(2.) All causes and matters to be commenced after the commencement of this Act, under any Act of Parliament by which exclusive jurisdiction, in respect to such causes or matters, has been given to the Court of Chancery (x), or to any judges or judge thereof respectively, except appeals from County Courts (y):

(3.) All causes and matters for any of the following purposes:
- The administration of the estates of deceased persons (z);
- The dissolution of partnerships, or the taking of partnership or other accounts (a);
- The redemption or foreclosure of mortgages (b);
- The raising of portions (c), or other charges on land;

(x) e.g., the Trustee Act, 1850 (13 & 14 Vict. c. 60); Infants' Settlement Act (18 & 19 Vict. c. 43); Leases and Sales of Settled Estates Acts (19 & 20 Vict. c. 120; 21 & 22 Vict. c. 77; 27 & 28 Vict. c. 45); Lord St. Leonards' Act, 1859 (22 & 23 Vict. c. 35); Lord St. Leonards' Act, 1860 (23 & 24 Vict. c. 14); Lord Cranworth's Act (23 & 24 Vict. c. 145); Custody of Infants' Act (36 & 37 Vict. c. 12) and others set out in Morgan's Chancery Acts and Orders.

(y) See sect. 45, post.

(z) See pp. 88-103, ante.

(a) See pp. 104, 105, ante.

(b) See p. 104 and note.

(c) See p. 100, ante, as to the leaning of Equity against double portions.
The sale and distribution of the proceeds of property subject to any lien or charge (d);
The execution of trusts, charitable or private (e);
The rectification, or setting aside, or cancellation of deeds or other written instruments (f);
The specific performance of contracts between vendors and purchasers of real estates, including contracts for leases (g);
The partition or sale of real estates (h);
The wardship of infants and the care of infants' estates (i).

There shall be assigned (subject as aforesaid) to the Queen's Bench division of the said Court:
(1.) All causes and matters, civil and criminal, pending in the Court of Queen's Bench at the commencement of this Act:
(2.) All causes and matters, civil and criminal, which would have been within the exclusive cognizance of the Court of Queen's Bench in the exercise of its original jurisdiction if this Act had not passed.

There shall be assigned (subject as aforesaid) to the Common Pleas division of the said Court:
(1.) All causes and matters pending in the Court of Common Pleas at Westminster, the Court of Common Pleas at Lancaster, and the Court of Pleas at Durham, respectively, at the commencement of this Act:
(2.) All causes and matters which would have been within the exclusive cognizance of the Court of Common Pleas at Westminster if this Act had not passed.

(d) See p. 97 as to vendor's lien.
(e) See Chap. II., pp. 23—41.
(f) See Chap. VII., pp. 133—152.
(g) See Chap. VI., pp. 108—132.
(h) See pp. 20, 106.
(i) See pp. 69—102.
There shall be assigned (subject as aforesaid) to the Exchequer division of the said Court:

(1.) All causes and matters pending in the Court of Exchequer at the commencement of this Act:

(2.) All causes and matters which would have been within the exclusive cognizance of the Court of Exchequer, either as a Court of Revenue or as a common Law Court, if this Act had not passed:

(3.) All matters pending in the London Court of Bankruptcy (k) at the commencement of this Act:

(4.) All matters to be commenced after the commencement of this Act under any Act of Parliament by which exclusive jurisdiction in respect to such matters has been given to the London Court of Bankruptcy.

There shall be assigned (subject as aforesaid) to the Probate, Divorce, and Admiralty division of the said High Court:

(1.) All causes and matters pending in the Court of Probate, or in the Court for Divorce and Matrimonial Causes, or in the High Court of Admiralty, at the commencement of this Act:

(2.) All causes and matters which would have been within the exclusive cognizance of the Court of Probate, or the Court for Divorce and Matrimonial Causes, or of the High Court of Admiralty, if this Act had not passed.

35. Subject to any rules of Court, and to the provisions hereinbefore contained, and to the power of transfer, every person by whom any cause or matter may be commenced in the said High Court of Justice shall assign such cause or matter to one of the divisions of the said High Court, not being the Probate, Divorce, and Admiralty divisions thereof, as he may think fit, by marking the document by which the same is commenced, with the name of such division, and giving notice thereof to the proper officer of the Court; provided that all interlocutory and other steps and proceedings in or before the said High Court, in any cause or matter subsequent to the commencement thereof, shall be taken (subject to any

(k) A clause in the Amendment Bill of 1874 proposed to abrogate this provision and to make a separate bankruptcy division.
rules of Court and to the power of transfer) in the division of the said High Court to which such cause or matter is for the time being attached; provided also, that if any plaintiff or petitioner shall at any time assign his cause or matter to any division of the said High Court to which, according to the rules of Court or the provisions of this Act, the same ought not to be assigned, the Court, or any judge of such division, upon being informed thereof, may, on a summary application, at any stage of the cause or matter, direct the same to be transferred to the division of the said Court to which, according to such rules or provisions, the same ought to have been assigned, or he may, if he think it expedient so to do, retain the same in the division in which the same was commenced; and all steps and proceedings whatsoever taken by the plaintiff or petitioner, or by any other party in any such cause or matter, and all orders made therein by the Court or any judge thereof before any such transfer, shall be valid and effectual to all intents and purposes in the same manner as if the same respectively had been taken and made in the proper division of the said Court to which such cause or matter ought to have been assigned.

36. Any cause or matter may at any time, and at any stage thereof, and either with or without application from any of the parties thereto, be transferred by such authority and in such manner as rules of Court may direct, from one division or judge of the High Court of Justice to any other division or judge thereof, or may by the like authority be retained in the division in which the same was commenced, although such may not be the proper division to which the same cause or matter ought, in the first instance, to have been assigned.

37. Subject to any arrangements which may be from time to time made by mutual agreement between the judges of the said High Court, the sittings for trials by jury in London and Middlesex, and the sittings of judges of the said High Court under commissions of assize, oyer and terminer, and gaol delivery, shall be held by or before judges of the Queen’s Bench, Common Pleas, or Exchequer division of the said High Court; provided that it shall be lawful for her Majesty, if she shall think fit, to include in any such commission any ordinary judge of
the Court of Appeal or any judge of the Chancery division to be appointed after the commencement of this Act, or any serjeant-at-law, or any of her Majesty's counsel learned in the law, who, for the purposes of such commission, shall have all the power, authority, and jurisdiction of a judge of the said High Court.

[Sect. 38 provides a rota of judges for election petitions.]

39. Any judge of the said High Court of Justice may, subject to any rules of Court, exercise in Court or in chambers, all or any part of the jurisdiction by this Act vested in the said High Court, in all such causes and matters, and in all such proceedings in any causes or matters, as before the passing of this Act might have been heard in Court or in chambers respectively, by a single judge of any of the Courts whose jurisdiction is hereby transferred to the said High Court, or as may be directed or authorized to be so heard by any rules of Court to be hereafter made. In all such cases, any judge sitting in Court shall be deemed to constitute a Court.

40. Such causes and matters as are not proper to be heard by a single judge shall be heard by Divisional Courts of the said High Court of Justice, which shall for that purpose exercise all or any part of the jurisdiction of the said High Court. Any number of such Divisional Courts may sit at the same time. A Divisional Court of the said High Court of Justice shall be constituted by two or three, and no more, of the judges thereof; and, except when through pressure of business or any other cause it may not conveniently be found practicable, shall be composed of three such judges. Every judge of the said High Court shall be qualified and empowered to sit in any of such Divisional Courts. The president of every such Divisional Court of the High Court of Justice shall be the senior judge of those present, according to the order of their precedence under this Act.

41. Subject to any rules of Court, and in the meantime until such rules shall be made, all business belonging to the Queen's Bench, Common Pleas and Exchequer divisions respectively of the said High Court, which, according to the practice now existing in the Superior

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Courts of Common Law, would have been proper to be transacted or disposed of by the Court sitting in banc, if this Act had not passed, may be transacted and disposed of by Divisional Courts, which shall, as far as may be found practicable and convenient, include one or more judge or judges attached to the particular division of the said Court to which the cause or matter out of which such business arises has been assigned; and it shall be the duty of every judge of such last-mentioned division, and also of every other judge of the High Court who shall not for the time being be occupied in the transac-
tion of any business specially assigned to him, or in the business of any other Divisional Court, to take part, if required, in the sittings of such Divisional Courts as may from time to time be necessary for the transaction of the business assigned to the said Queen’s Bench, Common Pleas, and Exchequer divisions respectively; and all such arrangements as may be necessary or proper for that purpose, or for constituting or holding any Divi-
sional Courts of the said High Court of Justice for any other purpose authorized by this Act, and also for the proper transaction of that part of the business of the said Queen’s Bench, Common Pleas, and Exchequer divisions respectively, which ought to be transacted by one or more judges not sitting in a Divisional Court, shall be made from time to time under the direction and superin-
tendence of the judges of the said High Court; and in case of difference among them, in such manner as a majority of the said judges, with the concurrence of the Lord Chief Justice of England, shall determine.

42. Subject to any rules of Court, and in the mean-
time until such rules shall be made, all business arising out of any cause or matter assigned to the Chancery or Probate, Divorce and Admiralty division of the said High Court shall be transacted and disposed of in the first instance by one judge only, as has been heretofore accustomed in the Court of Chancery, the Court of Probate, and for Divorce and Matrimonial Causes, and the High Court of Admiralty respectively; and every cause or matter which, at the commencement of this Act, may be depending in the Court of Chancery, the Court of Probate, and for Divorce and Matrimonial Causes, and
the High Court of Admiralty respectively, shall (subject to the power of transfer) be assigned to the same judge in or to whose Court the same may have been depending or attached at the commencement of this Act; and every cause or matter which after the commencement of this Act may be commenced in the Chancery division of the said High Court shall be assigned to one of the judges thereof, by marking the same with the name of such of the said judges as the plaintiff or petitioner (subject to the power of transfer) may in his option think fit: provided that (subject to any rules of Court, and to the power of transfer, and to the provisions of this Act as to trial of questions or issues by commissioners, or in Middlesex or London), all causes and matters which, if this Act had not passed, would have been within the exclusive cognizance of the High Court of Admiralty, shall be assigned to the present judge of the said Admiralty Court during his continuance in office as a judge of the High Court.

43. Divisional Courts may be held for the transaction of any part of the business assigned to the said Chancery division, which the judge, to whom such business is assigned, with the concurrence of the president of the same division, deems proper to be heard by a Divisional Court.

44. Divisional Courts may be held for the transaction of any part of the business assigned to the Probate, Divorce and Admiralty division of the said High Court, which the judges of such division, with the concurrence of the president of the said High Court, deem proper to be heard by a Divisional Court. Any cause or matter assigned to the said Probate, Divorce, and Admiralty division may be heard at the request of the president of such division, with the concurrence of the president of the said High Court, by any other judge of the said High Court.

45. All appeals from petty or quarter sessions, from a County Court (I), or from any other inferior Court, which might before the passing of this Act have been divided to business of the Chancery division. Divisional Courts for business belonging to the division. Divisional Courts for business of the Chancery division. Appeals from inferior Courts to be determined by Divisional Courts.

(I) See 28 & 29 Vict. c. 99, s. 18, for the present system of appeal from County Courts.
brought to any Court or judge whose jurisdiction is by this Act transferred to the High Court of Justice, may be heard and determined by Divisional Courts of the said High Court of Justice, consisting respectively of such of the judges thereof as may from time to time be assigned for that purpose, pursuant to rules of Court, or (subject to rules of Court) as may be so assigned according to arrangements made for the purpose by the judges of the said High Court. The determination of such appeals respectively by such Divisional Courts shall be final unless special leave to appeal from the same to the Court of Appeal shall be given by the Divisional Court by which any such appeal from an inferior Court shall have been heard.

46. Subject to any rules of Court, any judge of the said High Court, sitting in the exercise of its jurisdiction elsewhere than in a Divisional Court, may reserve any case, or any point in a case, for the consideration of a Divisional Court, or may direct any case, or point in a case, to be argued before a Divisional Court; and any Divisional Court of the said High Court shall have power to hear and determine any such case or point so reserved or so directed to be argued.

47. The jurisdiction and authorities in relation to questions of law arising in criminal trials which are now vested in the justices of either bench and the barons of the Exchequer by the Act of the session of the eleventh and twelfth years of the reign of her present Majesty, chapter seventy-eight, intituled "An Act for the further amendment of the administration of the Criminal Law," or any Act amending the same, shall and may be exercised after the commencement of this Act by the judges of the High Court of Justice, or five of them at the least, of whom the Lord Chief Justice of England, the Lord Chief Justice of the Common Pleas, and the Lord Chief Baron of the Exchequer, or one of such chiefs at least, shall be part. The determination of any such question by the judges of the said High Court in manner aforesaid shall be final and without appeal; and no appeal shall lie from any judgment of the said High Court in any criminal cause or matter, save for some error of law apparent upon the record, as to which no question shall have been
reserved for the consideration of the said judges under the said Act of the eleventh and twelfth years of her Majesty's reign.

48. Every motion for a new trial of any cause or matter on which a verdict has been found by a jury, or by a judge without a jury, and every motion in arrest of judgment, or to enter judgment non obstante veredicto, or to enter a verdict for plaintiff or defendant, or to enter a nonsuit, or to reduce damages, shall be heard before a Divisional Court; and no appeal shall lie from any judgment founded upon and applying any verdict unless a motion has been made or other proceeding taken before a Divisional Court to set aside or reverse such verdict, or the judgment, if any, founded thereon, in which case an appeal shall lie to the Court of Appeal from the decision of the Divisional Court upon such motion or other proceeding.

49. No order made by the High Court of Justice or any judge thereof, by the consent of parties, or as to costs only, which by law are left to the discretion of the Court, shall be subject to any appeal, except by leave of the Court or judge making such order (m).

50. Every order made by a judge of the said High Court in chambers, except orders made in the exercise of such discretion as aforesaid, may be set aside or discharged upon notice by any Divisional Court, or by the judge sitting in Court, according to the course and practice of the division of the High Court to which the particular cause or matter in which such order is made may be assigned; and no appeal shall lie from such order, to set aside or discharge which no such motion has been made, unless by special leave of the judge by whom such order was made, or of the Court of Appeal (n).

51. Upon the request of the Lord Chancellor, it shall be lawful for any judge of the Court of Appeal, who may consent so to do, to sit and act as a judge of the said High Court or to perform any other official or

(m) See, for the present practice on these points, Morgan's Chancery Acts and Orders, s. 21, note (b).
(n) See, for the present practice of appealing from orders made in chambers, ibid. p. 150.
APPENDIX.

ministerial acts for or on behalf of any judge absent from illness or any other cause, or in the place of any judge whose office has become vacant, or as an additional judge of any division; and while so sitting and acting any such judge of the Court of Appeal shall have all the power and authority of a judge of the said High Court.

52. In any cause or matter pending before the Court of Appeal, any direction incidental thereto, not involving the decision of the appeal, may be given by a single judge of the Court of Appeal; and a single judge of the Court of Appeal may at any time during vacation make any interim order to prevent prejudice to the claims of any parties pending an appeal as he may think fit; but every such order made by a single judge may be discharged or varied by the Court of Appeal or a Divisional Court thereof.

[Sects. 53—55, relate to the Divisional Courts of Court of Appeal, and the arrangements for the business of the Court of Appeal, and for hearing appeals transferred from the judicial committee of the privy council, which it is proposed to amend.]

PART IV.

Trial and Procedure.

56. Subject to any rules of Court and to such right as may now exist to have particular cases submitted to the verdict of a jury, any question arising in any cause or matter (other than a criminal proceeding by the Crown) before the High Court of Justice or before the Court of Appeal, may be referred by the Court or by any Divisional Court or judge before whom such cause or matter may be pending, for inquiry and report to any official or special referee, and the report of any such referee may be adopted wholly or partially by the Court, and may (if so adopted) be enforced as a judgment by the Court. The High Court or the Court of Appeal may also, in any such cause or matter as aforesaid in which it may think it expedient so to do, call in the aid of one or more assessors specially qualified, and try and hear such cause
or matter wholly or partially with the assistance of such assessors. The remuneration, if any, to be paid to such special referees or assessors shall be determined by the Court.

57. In any cause or matter (other than a criminal proceeding by the Crown) before the said High Court in which all parties interested who are under no disability consent thereto, and also without such consent in any such cause or matter requiring any prolonged examination of documents or accounts, or any scientific or local investigation which cannot, in the opinion of the Court or a judge, conveniently be made before a jury, or conducted by the Court through its other ordinary officers, the Court or a judge may at any time, on such terms as may be thought proper, order any question or issue of fact or any question of account arising therein to be tried either before an official referee, to be appointed as hereinafter provided, or before a special referee to be agreed on between the parties; and any such special referee so agreed on shall have the same powers and duties and proceed in the same manner as an official referee. All such trials before referees shall be conducted in such manner as may be prescribed by rules of Court, and subject thereto in such manner as the Court or judge ordering the same shall direct.

58. In all cases of any reference to or trial by referees under this Act the referees shall be deemed to be officers of the Court, and shall have such authority for the purpose of such reference or trial as shall be prescribed by rules of Court or (subject to such rules) by the Court or judge ordering such reference or trial; and the report of any referee upon any question of fact on any such trial shall (unless set aside by the Court) be equivalent to the verdict of a jury.

59. With respect to all such proceedings before referees and their reports, the Court or such judge as aforesaid shall have, in addition to any other powers, the same or the like powers as are given to any Court whose jurisdiction is hereby transferred to the said High Court with respect to references to arbitration and proceedings before arbitrators and their awards respectively, by the Common Law Procedure Act, 1854.
APPENDIX.

60. And whereas it is expedient to facilitate the prosecution in country districts of such proceedings as may be more speedily, cheaply, and conveniently carried on therein, it shall be lawful for her Majesty, by Order in Council, from time to time to direct that there shall be district registrars in such places as shall be in such order mentioned for districts to be thereby defined, from which writs of summons for the commencement of actions in the High Court of Justice may be issued, and in which such proceedings may be taken and recorded as are hereinafter mentioned.

[The remainder of sect. 60, and sects. 61—63, provide for the appointment of district registrars, the seals of district registries, the powers of district registrars, and the fees to be taken by district registrars.]

64. Subject to the rules of Court in force for the time being, writs of summons for the commencement of actions in the High Court of Justice shall be issued by the district registrars when thereunto required; and unless any order to the contrary shall be made by the High Court of Justice, or by any judge thereof, all such further proceedings, including proceedings for the arrest or detention of a ship, her tackle, apparel, furniture, cargo, or freight, as may and ought to be taken by the respective parties to such action in the said High Court down to and including entry for trial, or (if the plaintiff is entitled to sign final judgment or to obtain an order for an account by reason of the non-appearance of the defendant) down to and including final judgment, or an order for an account, may be taken before the district registrar, and recorded in the district registry, in such manner as may be prescribed by rules of Court; and all such other proceedings in any such action as may be prescribed by rules of Court shall be taken and if necessary may be recorded in the same district registry.

65. Any party to an action in which a writ of summons shall have been issued from any such district registry shall be at liberty at any time to apply, in such manner as shall be prescribed by rules of Court, to the said High Court, or to a judge in chambers of the division of the said High Court to which the action may be assigned, to remove the proceedings from such district
registry into the proper office of the said High Court; and the Court or judge may, if it be thought fit, grant such application, and in such case the proceedings and such original documents, if any, as may be filed therein shall upon receipt of such order be transmitted by the district registrar to the proper office of the said High Court, and the said action shall thenceforth proceed in the said High Court in the same manner as if it had been originally commenced by a writ of summons issued out of the proper office in London; or the Court or judge, if it be thought right, may thereupon direct that the proceedings may continue to be taken in such district registry.

66. It shall be lawful for the Court, or any judge of the division to which any cause or matter pending in the said High Court is assigned, if it shall be thought fit, to order that any books or documents may be produced, or any accounts taken or inquiries made, in the office of or by any such district registrar as aforesaid; and in any such case the district registrar shall proceed to carry all such directions into effect in the manner prescribed; and in any case in which any such accounts or inquiries shall have been directed to be taken or made by any district registrar, the report in writing of such district registrar as to the result of such accounts or inquiries may be acted upon by the Court, as to the Court shall seem fit.

67. The provisions contained in the fifth, seventh, eighth, and tenth sections of the County Courts Acts, 1867, shall apply to all actions commenced or pending in the said High Court of Justice in which any relief is sought which can be given in a County Court.

68. Subject to the provisions of this Act, her Majesty may, at any time before the commencement of this Act, by and with the advice of the Lord Chancellor, the Lord Chief Justice of England, and the other judges of the several Courts intended to be united and consolidated by this Act, or of the greater number of them (of whom the Lord Chancellor and the Lord Chief Justice of England shall be two), cause to be prepared rules, in this Act referred to as Rules of Court, providing as follows:

(1.) For the regulation of the sittings of the High Court of Justice and the Court of Appeal, and of any Divisional or other Courts thereof

Accounts and inquiries may be referred to district registrars.

30 & 31 Vict. c. 142, ss. 5, 7, 8 and 10 to extend to actions in High Court.

Rules of Court may be made by Order in Council before commencement of the Act.
APPENDIX.

respectively, and of the judges of the said High Court sitting in chambers;

(2.) For the regulation of circuits, including the times and places at which they are to be holden and the business to be transacted thereat;

(3.) For the regulation of all matters consistent with or not expressly determined by the rules contained in the schedule hereto, which, under and for the purposes of such last-mentioned rules, require to be, or conveniently may be defined or regulated by further rules of Court;

(4.) And, generally, for the regulation of any matters relating to the practice and procedure of the said Courts respectively, or to the duties of the officers thereof, or to the costs of proceedings therein, or to the conduct of civil or criminal business coming within the cognizance of the said Courts respectively, for which provision is not expressly made by this Act or by the rules contained in the schedule hereto.

All rules of Court made in pursuance of this section shall be laid before each House of Parliament within forty days next after the same are made, if Parliament is then sitting, or if not, within forty days after the then next meeting of Parliament; and if an address is presented to her Majesty by either of the said Houses, within the next subsequent forty days on which the said House shall have sat, praying that any such rules may be annulled, her Majesty may thereupon by Order in Council annul the same; and the rules so annulled shall thenceforth become void and of no effect, but without prejudice to the validity of any proceedings which may in the meantime have been taken under the same. This section shall come into operation immediately on the passing of this Act.

69. The rules contained in the schedule to this Act (which shall be read and taken as part of this Act) shall come into operation immediately on the commencement of this Act, and, as to all matters to which they extend, shall thenceforth regulate the proceedings in the High Court of Justice and the Court of Appeal respectively, unless and until, by the authority hereinafter in that
behalf provided, any of them may be altered or varied; but such rules, and also all rules to be made before the commencement of this Act, as hereinbefore mentioned, shall for all the purposes of this Act be rules of Court capable of being annulled or altered by the same authority by which any other rules of Court may be made, altered, or annulled after the commencement of this Act.

70. All rules and orders of Court which shall be in force in the Court of Probate, the Court for Divorce and Matrimonial Causes, the Admiralty Court, and the London Court of Bankruptcy respectively at the time of the commencement of this Act, except so far as they are hereby expressly varied, shall remain and be in force in the High Court of Justice and in the Court of Appeal respectively in the same manner in all respects as if they had been contained in the schedule to this Act until they shall respectively be altered or annulled by any rules of Court made after the commencement of this Act.

71. Subject to any rules of Court to be made under and by virtue of this Act, the practice and procedure in all criminal causes and matters whatsoever in the High Court of Justice and in the Court of Appeal respectively, including the practice and procedure with respect to Crown cases reserved, shall be the same as the practice and procedure in similar causes and matters before the passing of this Act.

72. Nothing in this Act or in the schedule hereto, or in any rules of Court to be made by virtue hereof, save as far as relates to the power of the Court for special reasons to allow depositions or affidavits to be read, shall affect the mode of giving evidence by the oral examination of witnesses in trials by jury, or the rules of evidence, or the law relating to jurymen or juries.

73. Save as by this Act, or by any rules of Court (whether contained in the schedule to this Act, or to be made under the authority thereof), is or shall be otherwise provided, all forms and methods of procedure which at the commencement of this Act were in force in any of the Courts whose jurisdiction is hereby transferred to the said High Court, and to the said Court of Appeal respectively, under or by virtue of any law, custom, general orders, or rules whatsoever, and which are not inconsis-
tent with this Act or with any rules contained in the said schedule or to be made by virtue of this Act, may continue to be used and practised in the said High Court of Justice, and the said Court of Appeal respectively, in such and the like cases, and for such and the like purposes, as those to which they would have been applicable in the respective Courts of which the jurisdiction is so transferred, if this Act had not passed.

74. From and after the commencement of this Act, the Supreme Court may at any time, with the concurrence of a majority of the judges thereof present at any meeting for that purpose held (of which majority the Lord Chancellor shall be one), alter or annul any rules of Court for the time being in force, or make any new rules of Court, for the purpose of regulating all such matters of practice and procedure in the Supreme Court, or relating to the suitors or officers of the said Court, or otherwise, as under the provisions of this Act are or may be regulated by rules of Court: provided, that any rule made in the exercise of this power, whether for altering or annulling any then existing rule, or for any other purpose, shall be laid before both Houses of Parliament, within the same time, and in the same manner and with the same effect in all respects, as is hereinbefore provided with respect to the said rules to be made before the commencement of this Act, and may be annulled and made void in the same manner as such last-mentioned rules.

75. A council of the judges of the Supreme Court, of which due notice shall be given to all the said judges, shall assemble once at least in every year, on such day or days as shall be fixed by the Lord Chancellor, with the concurrence of the Lord Chief Justice of England, for the purpose of considering the operation of this Act and of the rules of Court for the time being in force, and also the working of the several offices and the arrangements relative to the duties of the officers of the said Courts respectively, and of inquiring and examining into any defects which may appear to exist in the system of procedure or the administration of the law in the said High Court of Justice or the said Court of Appeal, or in any other Court from which any appeal lies to the said High Court or any judge thereof, or to the said Court of
Appeal: and they shall report annually to one of her Majesty's principal Secretaries of State what (if any) amendments or alterations it would in their judgment be expedient to make in this Act, or otherwise relating to the administration of justice, and what other provisions (if any) which cannot be carried into effect without the authority of parliament it would be expedient to make for the better administration of justice. Any extraordinary council of the said judges may also at any time be convened by the Lord Chancellor.

76. All Acts of Parliament relating to the several Courts and judges, whose jurisdiction is hereby transferred to the said High Court of Justice and the said Court of Appeal respectively, or wherein any of such Courts or judges are mentioned or referred to, shall be construed and take effect, so far as relates to anything done or to be done after the commencement of this Act, as if the said High Court of Justice or the said Court of Appeal, and the judges thereof respectively, as the case may be, had been named therein instead of such Courts or judges whose jurisdiction is so transferred respectively; and in all cases not hereby expressly provided for in which, under any such Act, the concurrence or the advice or consent of the judge or any judges, or of any number of the judges, of any one or more of the Courts whose jurisdiction is hereby transferred to the High Court of Justice is made necessary to the exercise of any power or authority capable of being exercised after the commencement of this Act, such power or authority may be exercised by and with the concurrence, advice or consent of the same or a like number of judges of the said High Court of Justice; and all general and other commissions, issued under the Acts relating to the Central Criminal Court or otherwise, by virtue whereof any judges of any of the Courts whose jurisdiction is so transferred may, at the commencement of this Act, be empowered to try, hear or determine any causes or matters, criminal or civil, shall remain and be in full force and effect, unless and until they shall respectively be in due course of law revoked or altered.
APPENDIX.

PART V.

Officers and Offices.

[Sect. 77 provides for the transfer of the existing staff of officers to the Supreme Court.]
[Sect. 78 contains provisions as to the officers of the Courts of Pleas at Lancaster and Durham.]
[Sects. 79—82 contain provisions as to the personal officers of future judges. As to compensation for abolitions of offices, &c. As to doubts as to the status of officers to be determined by rules of Court.]

82. Every person who at the commencement of this Act shall be authorized to administer oaths in any of the Courts whose jurisdiction is hereby transferred to the High Court of Justice shall be a commissioner to administer oaths in all causes and matters whatsoever which may from time to time be depending in the said High Court or in the Court of Appeal.

83. There shall be attached to the Supreme Court permanent officers, to be called official referees, for the trial of such questions as shall under the provisions of this Act be directed to be tried by such referees. The number and the qualifications of the persons to be so appointed from time to time, and the tenure of their offices shall be determined by the Lord Chancellor, with the concurrence of the presidents of the divisions of the High Court of Justice, or a majority of them (of which majority the Lord Chief Justice of England shall be one), and with the sanction of the Treasury. Such official referees shall perform the duties entrusted to them in such places, whether in London or in the country, as may from time to time be directed or authorized by any order of the said High Court, or of the Court of Appeal; and all proper and reasonable travelling expenses incurred by them in the discharge of their duties shall be paid by the Treasury out of moneys to be provided by Parliament.

84. Subject to the provisions in this Act contained with respect to existing officers of the Courts whose jurisdiction is hereby transferred to the Supreme Court, there shall be attached to the Supreme Court such officers
as the Lord Chancellor, with the concurrence of the presidents of the divisions of the High Court of Justice, or the major part of them, of which majority the Lord Chief Justice of England shall be one, and with the sanction of the Treasury, may from time to time determine.

Such of the said several officers respectively as may be thought necessary or proper for the performance of any special duties, with respect either to the Supreme Court generally, or with respect to the High Court of Justice or the Court of Appeal, or with respect to any one of the divisions of the said High Court, or with respect to any particular judge or judges of either of the said Courts, may by the same authority, and with the like sanction as aforesaid, be attached to the said respective Courts, divisions, and judges accordingly.

All officers assigned to perform duties with respect to the Supreme Court generally, or attached to the High Court of Justice or the Court of Appeal, and all commissioners to take oaths or affidavits in the Supreme Court, shall be appointed by the Lord Chancellor.

All officers attached to the Chancery division of the said High Court, who have been heretofore appointed by the Master of the Rolls, shall continue, while so attached, to be appointed by the Master of the Rolls.

All other officers attached to any division of the said High Court shall be appointed by the president of that division.

All officers attached to any judge shall be appointed by the judge to whom they are attached.

Any officer of the Supreme Court (other than such officers attached to the person of a judge as are heretofore declared to be removable by him at his pleasure), may be removed by the person having the right of appointment to the office held by him, with the approval of the Lord Chancellor, for reasons to be assigned in the order of removal.

The authority of the Supreme Court over all or any of its officers, may be exercised in and by the said High Court and the said Court of Appeal respectively, and also in the case of officers attached to any division of the High Court by the president of such division, with respect to any duties to be discharged by them respectively.
[Sect. 85 provides how the salaries and pensions of officers are to be determined.]

[Sect. 86 relates to patronage not otherwise provided for.]

87. From and after the commencement of this Act all persons admitted as solicitors, attorneys, or proctors of or by law empowered to practise in any Court, the jurisdiction of which is hereby transferred to the High Court of Justice or the Court of Appeal, shall be called solicitors of the Supreme Court, and shall be entitled to the same privileges and be subject to the same obligations, so far as circumstances will permit, as if this Act had not passed; and all persons who from time to time, if this Act had not passed, would have been entitled to be admitted as solicitors, attorneys, or proctors of or been by law empowered to practise in any such Courts, shall be entitled to be admitted and to be called solicitors of the Supreme Court, and shall be admitted by the Master of the Rolls, and shall, as far as circumstances will permit, be entitled as such solicitors to the same privileges and be subject to the same obligations as if this Act had not passed.

Any solicitors, attorneys, or proctors to whom this section applies shall be deemed to be officers of the Supreme Court; and that Court, and the High Court of Justice, and the Court of Appeal respectively, or any division or judge thereof, may exercise the same jurisdiction in respect of such solicitors or attorneys as any one of her Majesty's Superior Courts of Law or Equity might previously to the passing of this Act have exercised in respect of any solicitor or attorney admitted to practise therein.

**Part VI.**

*Jurisdiction of Inferior Courts.*

88. It shall be lawful for her Majesty from time to time by Order in Council to confer on any inferior Court of civil jurisdiction, the same jurisdiction in Equity and in Admiralty respectively, as any County Court now has, or may hereafter have, and such jurisdiction, if and when conferred, shall be exercised in the manner by this Act directed.
APPENDIX.

89. Every inferior Court which now has or which may after the passing of this Act have jurisdiction in Equity, or at Law and in Equity, and in Admiralty respectively, shall, as regards all causes of action within its jurisdiction for the time being, have power to grant, and shall grant in any proceeding before such Court, such relief, redress, or remedy, or combination of remedies, either absolute or conditional, and shall in every such proceeding give such and the like effect to every ground of defence or counter-claim, equitable or legal (subject to the provision next hereinafter contained), in as full and ample a manner as might and ought to be done in the like case by the High Court of Justice.

90. Where in any proceeding before any such inferior Court any defence or counter-claim of the defendant involves matter beyond the jurisdiction of the Court, such defence or counter-claim shall not affect the competence or the duty of the Court to dispose of the whole matter in controversy so far as relates to the demand of the plaintiff and the defence thereeto, but no relief exceeding that which the Court has jurisdiction to administer shall be given to the defendant upon any such counter-claim: provided always, that in such case it shall be lawful for the High Court, or any division or judge thereof, if it shall be thought fit, on the application of any party to the proceeding, to order that the whole proceeding be transferred from such inferior Court to the High Court, or to any division thereof; and in such case the record in such proceeding shall be transmitted by the registrar, or other proper officer, of the inferior Court to the said High Court; and the same shall thenceforth be continued and prosecuted in the said High Court as if it had been originally commenced therein.

91. The several rules of law enacted and declared by this Act shall be in force and receive effect in all Courts whatsoever in England, so far as the matters to which such rules relate shall be respectively cognizable by such Courts.
APPENDIX.

PART VII.

Miscellaneous Provisions.

[By sect. 92, certain books and papers are to be transferred to the Supreme Court.]

[Sect. 93 contains a saving as to circuits until new commissions are issued.]

94. This Act, except so far as herein is expressly directed, shall not affect the office or position of Lord Chancellor; and the officers of the Lord Chancellor shall continue attached to him in the same manner as if this Act had not passed; and all duties, which any officer of the Court of Chancery may now be required to perform in aid of any duty whatsoever of the Lord Chancellor, may in like manner be required to be performed by such officer when transferred to the Supreme Court, and by his successors.

95. This Act, except so far as is herein expressly directed, shall not affect the offices, position, or functions of the Chancellor of the county palatine of Lancaster.

[Sects. 96 and 97 contain savings as to Chancellor of the Exchequer and sheriffs, the lord treasurer and office of the receipt of Exchequer.

98. When the great seal is in commission, the Lords Commissioners shall represent the Lord Chancellor for the purposes of this Act, save that as to the presidency of the Court of Appeal, and the appointment or approval of officers, or the sanction to any order for the removal of officers, or any other act to which the concurrence or presence of the Lord Chancellor is hereby made necessary, the powers given to the Lord Chancellor by this Act may be exercised by the senior Lord Commissioner for the time being.

99. From and after the commencement of this Act, the counties palatine of Lancaster and Durham shall respectively cease to be counties palatine, so far as respects the issue of commissions of assize, or other like commissions, but not further or otherwise; and all such commissions may be issued for the trial of all causes and matters within such counties respectively in the same manner in all respects as in any other counties of England and Wales.
100. In the construction of this Act, unless there is anything in the subject or context repugnant thereto, the several words hereinafter mentioned shall have, or include, the meanings following; (that is to say,)

"Lord Chancellor" shall include Lord Keeper of the Great Seal.

"The High Court of Chancery" shall include the Lord Chancellor.

"The Court of Appeal in Chancery" shall include the Lord Chancellor as a judge on rehearing or appeal.

"London Court of Bankruptcy" shall include the chief judge in bankruptcy.

"The Treasury" shall mean the Commissioners of her Majesty's Treasury for the time being, or any two of them.

"Rules of Court" shall include forms.

"Cause" shall include any action, suit or other original proceeding between a plaintiff and a defendant, and any criminal proceeding by the crown.

"Suit" shall include action.

"Action" shall mean a civil proceeding commenced by writ, or in such other manner as may be prescribed by rules of Court, and shall not include a criminal proceeding by the Crown.

"Plaintiff" shall include every person asking any relief (otherwise than by way of counter-claim as a defendant) against any other person by any form of proceeding, whether the same be taken by action, suit, petition, motion, summons or otherwise.

"Petitioner" shall include every person making any application to the Court, either by petition, motion or summons, otherwise than as against any defendant.

"Defendant" shall include every person served with any writ of summons or process, or served with notice of, or entitled to attend, any proceedings.

"Party" shall include every person served with notice of or attending any proceeding, although not named on the record.

"Matter" shall include every proceeding in the Court not in a cause.
"Pleading" shall include any petition or summons, and also shall include the statements in writing of the claim or demand of any plaintiff, and of the defence of any defendant thereto, and of the reply of the plaintiff to any counter-claim of a defendant.

"Judgment" shall include decree.

"Order" shall include rule.

"Oath" shall include solemn affirmation and statutory declaration.

"Crown cases reserved" shall mean such questions of law reserved in criminal trials as are mentioned in the Act of the eleventh and twelfth years of her Majesty's reign, chapter seventy-eight.

"Pension" shall include retirement and superannuation allowance.

"Existing" shall mean existing at the time appointed for the commencement of this Act.

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**SCHEDULE.**

**Rules of Procedure.**

**Form of Action.**

1. All actions which have hitherto been commenced by writ in the Superior Courts of Common Law at Westminster, or in the Court of Common Pleas at Lancaster, or in the Court of Pleas at Durham, and all suits which have hitherto been commenced by bill or information in the High Court of Chancery, or by a cause in rem or in personam in the High Court of Admiralty, or by citation or otherwise in the Court of Probate, shall be instituted in the High Court of Justice by a proceeding to be called an action.

All other proceedings in and applications to the High Court may, subject to rules of Court, be taken and made in the same manner as they would have been taken and made in any Court in which any proceeding or application of the like kind could have been taken or made if this Act had not passed.
APPENDIX.

Writ of Summons.

2. Every action in the High Court shall be commenced by a writ of summons, which shall be endorsed with a statement of the nature of the claim made, or of the relief or remedy required in the action, and which shall specify the division of the High Court to which it is intended that the action should be assigned.

3. Forms of writs and of endorsements thereon, applicable to the several ordinary causes of action, shall be prescribed by rules of Court, and any costs incurred by the use of any more prolix or other forms shall be borne by the party using the same, unless the Court shall otherwise direct.

4. No service of writ shall be required when the defendant, by his solicitor, agrees to accept service, and enters an appearance.

5. When service is required the writ shall, wherever it is practicable, be served in the manner in which personal service (o) is now made, but if it be made to appear to the Court or to a judge that the plaintiff is from any cause unable to effect prompt personal service, the Court or judge may make such order for substituted (p) or other service, or for the substitution of notice for service, as may seem just.

6. Whenever it appears fit to the Court or to a judge in a case in which the cause of action has arisen within the jurisdiction, or is properly cognizable against a defendant within the jurisdiction, that any person out of the jurisdiction of the Court should be served with the writ or other process of the Court, the Court or judge may order such service, or such notice in lieu of service, to be made or given in such manner and on such terms as may seem just (q).

7. In all actions where the plaintiff seeks merely to recover a debt or liquidated demand in money, payable by the defendant, with or without interest, arising upon a contract, express or implied, as, for instance, on a bill of

(o) See the present practice, Morgan's Chancery Acts and Orders, 417, 418.
(p) Ibid. 419.
(q) Ibid. 424.
exchange, promissory note, cheque, or other simple contract debt, or on a bond or contract under seal for payment of a liquidated amount of money, or on a statute where the sum sought to be recovered is a fixed sum of money or in the nature of a debt, or on a guaranty, whether under seal or not, where the claim against the principal is in respect of such debt or liquidated demand, bill, cheque, or note, or on a trust, the writ of summons may be specially endorsed with the particulars of the amount sought to be recovered, after giving credit for any payment or set-off.

In case of non-appearance by the defendant where the writ of summons is so specially endorsed, the plaintiff may sign final judgment for any sum not exceeding the sum endorsed on the writ, together with interest, if any, to the date of the judgment, and a sum for costs, but it shall be lawful for the Court or a judge to set aside or vary such judgment upon such terms as may seem just.

Where the defendant appears on a writ of summons so specially endorsed, the plaintiff may, on affidavit verifying the cause of action, and swearing that in his belief there is no defence to the action, call on the defendant to show cause before the Court or a judge why the plaintiff should not be at liberty to sign final judgment for the amount so endorsed, together with interest, if any, and costs; and the Court or judge may, unless the defendant, by affidavit or otherwise, satisfy the Court or judge that he has a good defence to the action on the merits, or disclose such facts as the Court or judge may think sufficient to entitle him to be permitted to defend the action, make an order empowering the plaintiff to sign judgment accordingly. Permission to defend the action may be granted to the defendant on such terms and conditions, if any, as the judge or Court may think just.

8. In all cases of ordinary account, as, for instance, in the case of a partnership or executorship or ordinary trust account, where the plaintiff, in the first instance, desires to have an account taken, the writ of summons shall be endorsed with a claim that such account be taken.

In default of appearance on such summons, and after
APPENDIX.

appearance unless the defendant, by affidavit or otherwise, satisfy the Court or a judge that there is some preliminary question to be tried, an order for the account claimed, with all directions now usual in the Court of Chancery in similar cases, shall be forthwith made.

Parties.

9. No action shall be defeated by reason of the misjoinder of parties, and the Court may in every action 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, in the manner prescribed by rules of Court, and on such terms as may appear to the Court or a judge to be just, order that the name or names of any party or parties, whether as plaintiffs or as defendants, improperly joined be struck out, and that the name or names of any party or 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 action, 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 thereto. All parties whose names are so added as defendants shall be served with a summons or notice in such manner as may be prescribed by rules of Court or by any special order, and the proceedings as against them shall be deemed to have begun only on the service of such summons or notice.

10. Where there are numerous parties having the same interest in one action, one or more of such parties may sue or be sued, or may be authorized by the Court to defend in such action, on behalf or for the benefit of all parties so interested (r).

11. Any two or more persons claiming or being liable as co-partners may sue or be sued in the name of their respective firms, if any; and any party to an action may

(r) See for this practice 15 & 16 Vict. c. 86, s. 42; Morgan's Chancery Acts and Orders, 195—199.
in such case apply by summons to a judge in chambers for a statement of the names of the persons who are co-partners in any such firm, to be furnished in such manner, and verified on oath or otherwise, as the judge may direct.

12. Where a defendant is or claims to be entitled to contribution or indemnity, or any other remedy or relief over against any other person, or where from any other cause it appears to the Court or a judge that a question in the action should be determined not only as between the plaintiff and defendant, but as between the plaintiff, defendant, and any other person, or between any or either of them, the Court or a judge may, on notice being given to such last-mentioned person, in such manner and form as may be prescribed by rules of Court, make such order as may be proper for having the question so determined.

13. Where in any action, whether founded upon contract or otherwise, the plaintiff is in doubt as to the person from whom he is entitled to redress, he may, in such manner as may be prescribed by rules of Court, or by any special order, join two or more defendants, to the intent that in such action the question as to which, if any, of the defendants is liable, and to what extent, may be determined as between all parties to the action.

14. Trustees, executors, and administrators may sue and be sued on behalf of or as representing the property or estate of which they are trustees or representatives, without joining any of the parties beneficially interested in the trust or estate, and shall be considered as representing such parties in the action; but the Court or a judge may, at any stage of the proceedings, order any of such parties to be made parties to the action, either in addition to or in lieu of the previously-existing parties thereto (s).

15. Married women and infants may respectively sue as plaintiffs by their next friends, in the manner practised in the Court of Chancery before the passing of this Act; and infants may, in like manner, defend any action by their guardians appointed for that purpose. Married women may also, by the leave of the Court or a judge,

(s) See Morgan, 104, 197, 245.
sue or defend without their husbands and without a next friend, on giving such security (if any) for costs as the Court or a judge may require (t).

16. The plaintiff may, at his option, join as parties to the same action all or any of the persons severally, or jointly and severally, liable on any one contract, including parties to bills of exchange and promissory notes (u).

17. An action 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.

In case of the marriage, death, or bankruptcy, or devolution of estate by operation of law, of any party to an action, the Court or a judge may, if it be deemed necessary for the complete settlement of all the questions involved in the action, order that the husband, personal representative, trustee, or other successor in interest, if any, of such party be made a party to the action, or be served with notice thereof in such manner and form as may be prescribed by rules of Court, and on such terms as the Court or judge shall think just, and shall make such order for the disposal of the action as may be just.

In case of an assignment, creation, or devolution of any estate or title pendente lite, the action may be continued by or against the person to or upon whom such estate or title has come or devolved.

Pleadings.

18. The following rules of pleading shall be substituted for those heretofore used in the High Court of Chancery and in the Courts of Common Law, Admiralty and Probate.

Unless the defendant at the time of his appearance shall state that he does not require the delivery of a statement of complaint, the plaintiff shall within such time and in such manner as shall be prescribed by rules of Court, file and deliver to the defendant after his

(t) See Morgan's Chancery Acts and Orders, 166, note (t).
(u) See Consol. Ord. VII., Rule 2, Morgan, 399.
appeal a (printed) (x) statement of his complaint and of the relief or remedy to which he claims to be entitled. The defendant shall within such time and in such manner as aforesaid file and deliver to the plaintiff a (printed) statement of his defence, set-off or counter-claim (if any), and the plaintiff shall in like manner file and deliver a (printed) statement of his reply (if any) to such defence, set-off or counter-claim. Such statements shall be as brief as the nature of the case will admit, and the Court in adjusting the costs of the action shall inquire at the instance of any party into any unnecessary prolixity and order the costs occasioned by such prolixity to be borne by the party chargeable with the same.

A demurrer to any statement may be filed in such manner and form as may be prescribed by rules of Court (y).

The Court or a judge may, at any stage of the proceedings, allow either party to alter (z) his statement of claim or defence or reply, or may order to be struck out or amended any matter in such statements respectively which may be scandalous (a), or which may tend to prejudice, embarrass or delay the fair trial of the action, and all such amendments shall be made as may be necessary for the purpose of determining the real questions or question in controversy between the parties.

19. Where in any action it appears to a judge that the statement of claim or defence or reply does not sufficiently disclose the issues of fact in dispute between the parties, he may direct the parties to prepare issues, and such issues shall, if the parties differ, be settled by the judge.

20. A defendant may set-off, or set up, by way of counter-claim against the claims of the plaintiff, any right or claim, whether such set-off or counter-claim sound in damages or not, and such set-off or counter-claim shall have the same effect as a statement of claim in a cross

(x) It is intended that pleadings shall only be required to be printed of more than three folios of seventy-two words each.
(y) See ante, p. 189.
(z) See ante, p. 177.
(a) See Morgan’s Chancery Acts and Orders, 461; Rubery v. Grant, L. R., 13 Eq. 443; Christie v. Christie, L. R., 8 Ch. 499.
APPENDIX.

245

action, so as to enable the Court to pronounce a final judgment in the same action, both on the original and on the cross claim. But the Court or a judge may, on the application of the plaintiff before trial, if in the opinion of the Court or judge such set-off or counter-claim cannot be conveniently disposed of in the pending action, or ought not to be allowed, refuse permission to the defendant to avail himself thereof.

21. Where in any action a set-off or counter-claim is established as a defence against the plaintiff's claim, the Court may, if the balance is in favour of the defendant, give judgment for the defendant for such balance, or may otherwise adjudge to the defendant such relief as he may be entitled to upon the merits of the case.

22. Subject to any rules of Court, the plaintiff may unite in the same action and in the same statement of claim several causes of action, but if it appear to the Court or a judge that any such causes of action cannot be conveniently tried or disposed of together, the Court or judge may order separate trials of any of such causes of action to be had, or may make such other order as may be necessary or expedient for the separate disposal thereof.

23. It shall not be necessary that every defendant to any action shall be interested as to all the relief thereby prayed for, or as to every cause of action included therein; but the Court or a judge may make such order as may appear just to prevent any defendant from being embarrassed or put to expense by being required to attend any proceedings in such action in which he may have no interest.

24. If it appear to the Court or a judge, either from the statement of claim, or defence, or reply or otherwise, that there is in any action a question of law, which it would be convenient to have decided before any evidence is given or any question or issue of fact is tried, or before any reference is made to a referee or an arbitrator, the Court or judge may make an order accordingly, and may direct such question of law to be raised for the opinion of the Court, either by special case or in such other manner as the Court or judge may deem expedient, or as may be prescribed by rules of Court, and all such further pro-
ceedings as the decision of such question of law may render unnecessary may thereupon be stayed.

**Discovery.**

25. Subject to any rules of Court, a plaintiff (b) in any action shall be entitled to exhibit interrogatories to, and obtain discovery from, any defendant, and any defendant (c) shall be entitled to exhibit interrogatories to, and obtain discovery from, a plaintiff or any other party. Any party shall be entitled to object to any interrogatory on the ground of irrelevancy, and the Court or a judge, if not satisfied that such interrogatory is relevant to some issue in the cause, may allow such objection (d). No exceptions shall be taken to any answer, but the sufficiency or otherwise of any answer objected to as insufficient shall be determined by the Court or a judge in a summary way.

The Court in adjusting the costs of the action shall at the instance of any party inquire or cause inquiry to be made into the propriety of exhibiting such interrogatories, and if it is the opinion of the taxing master or of the Court or judge that such interrogatories have been exhibited unreasonably, vexatiously, or at improper length, the costs occasioned by the said interrogatories and the answers thereto shall be borne by the party in fault.

26. Every party to an action or other proceeding shall be entitled, at any time before or at the hearing thereof, by notice in writing, to give notice to any other party, in whose pleadings or affidavits reference is made to any document, to produce such document for the inspection of the party giving such notice, or of his solicitor, and to permit him or them to take copies thereof (e); and any party not complying with such notice shall not afterwards be at liberty to put any such document in evidence on his behalf in such action or proceeding, unless he shall satisfy the Court that such document relates only to his own title, he being a defendant to the action, or that he had some other sufficient cause for not complying with such notice.

(b) See p. 177, ante.
(c) See p. 181, ante.
(d) See p. 180, ante.
(e) See p. 185, ante.
27. It shall be lawful for the Court or a judge at any time during the pendency therein of any action or proceeding, to order the production by any party thereto, upon oath, of such of the documents in his possession or power, relating to any matter in question in such suit or proceeding, as the Court or judge shall think right; and the Court may deal with such documents, when produced, in such manner as shall appear just (f).

Place of Trial.

28. There shall be no local venue for the trial of any action, but when the plaintiff proposes to have the action tried elsewhere than in Middlesex, he shall in his statement of claim name the county or place in which he proposes that the action shall be tried, and the action shall, unless a judge otherwise orders, be tried in the county or place so named. Where no place of trial is named in the statement of claim, the place of trial shall, unless a judge otherwise orders, be the county of Middlesex. Any order of a judge, as to such place of trial, may be discharged or varied by a Divisional Court of the High Court.

29. The list or lists of actions for trial at the sittings in London and Middlesex respectively shall be prepared and the actions shall be allotted for trial in such manner as may be prescribed by rules of Court, without reference to the division of the High Court to which such actions may be attached.

Mode of Trial.

30. Actions shall be tried and heard either before a judge or judges, or before a judge sitting with assessors, or before a judge and jury, or before an official or special referee, with or without assessors.

31. The plaintiff may give notice of trial by any of the modes aforesaid, but the defendant may, upon giving notice, within such time as may be fixed by rules of Court, that he desires to have any issues of fact tried before a judge and jury, be entitled to have the same so

(f) See p. 185, ante.
tried, or he may apply to the Court or a judge for an order to have the action tried in any other of the said ways, and in such case the mode in which the action is to be tried or heard shall be determined by such Court or judge.

32. In any action the Court or a judge may, at any time or from time to time, order that different questions of fact arising therein be tried by different modes of trial, or that one or more questions of fact be tried before the others, and may appoint the place or places for such trial or trials.

33. Every trial of any question or issue of fact by a jury shall be held before a single judge, unless such trial be specially ordered to be held before two or more judges.

34. Where an action or matter, or any question in an action or matter, is referred to a referee, he may, subject to the order of the Court or a judge, hold the trial at or adjourn it to any place which he may deem most convenient, and have any inspection or view, either by himself or with his assessors (if any), which he may deem expedient for the better disposal of the controversy before him. He shall, unless otherwise directed by the Court or a judge, proceed with the trial in open Court, de die in diem, in a similar manner as in actions tried by a jury.

35. The referee may, before the conclusion of any trial before him, or by his report under the reference made to him, submit any question arising therein for the decision of the Court, or state any facts specially, with power to the Court to draw inferences therefrom, and in any such case the order to be made on such submission or statement shall be entered as the Court may direct; and the Court shall have power to require any explanation or reasons from the referee, and to remit the action or any part thereof for re-trial or further consideration to the same or any other referee.

Evidence.

36. In the absence of any agreement between the parties, and subject to any rules of Court applicable to any particular class of cases, the witnesses at the trial of any
cause or at any assessment of damages, shall be examined *vivâ voce* and in open Court, but the Court or a judge may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing or trial, on such conditions as the Court or judge may think reasonable, or that any witness whose attendance in Court ought for some sufficient cause to be dispensed with, be examined by interrogatories or otherwise before a commissioner or examiner; provided that where it appears to the Court or judge that the other party *bonâ fide* desires the production of a witness for cross-examination, and that such witness can be produced, an order shall not be made authorizing the evidence of such witness to be given by affidavit.

37. Upon any interlocutory application evidence may be given by affidavit; but the Court or a judge may, on the application of either party, order the attendance for cross-examination of the person making any such affidavit.

38. Affidavits shall be confined to such facts as the witness is able of his own knowledge to prove, except on interlocutory motions, on which statements as to his belief, with the grounds thereof, may be admitted. The costs of every affidavit which shall unnecessarily set forth matters of hearsay, or argumentative matter, or copies of or extracts from documents, shall be paid by the party filing the same.

39. Any party to an action may give notice, by his own statement or otherwise, that he admits the truth of the whole or any part of the case stated or referred to in the statement of claim, defence, or reply of any other party.

Either party may call upon the other party to admit any document, saving all just exceptions; and in case of refusal or neglect to admit, after such notice, the costs of proving any such document shall be paid by the party so neglecting or refusing, whatever the result of the action may be, unless at the hearing or trial the Court certify that the refusal to admit was reasonable; and no costs of proving any document shall be allowed unless such notice
be given, except where the omission to give the notice is,
in the opinion of the taxing officer, a saving of expense.

**Interlocutory Orders and Directions.**

40. Any party to an action may at any stage thereof
apply to the Court or a judge for such order as he may,
upon any admissions of fact in the pleadings, be entitled
to, without waiting for the determination of any other
question between the parties.

41. The Lord Chancellor, with the concurrence of the
Lord Chief Justice of England, may order any question
of law or of fact which may arise in any action or matter
to be transferred from any judge to any other judge, or
to be tried or heard by any other judge of the said High
Court, and may confer on such judge power to deal with
the whole or any part of the matters in controversy.

42. The Court or a judge may, at any stage of the
proceedings in an action or matter, direct any necessary
inquiries or accounts to be made or taken, notwithstanding
that it may appear that there is some special or
further relief sought for or some special matter to be
tried, as to which it may be proper that the cause should
proceed in the ordinary manner.

43. When by any contract a *prima facie* case of
liability is established, and there is alleged as matter of
defence a right to be relieved wholly or partially from
such liability, the Court or a judge may make an order
for the preservation or interim custody of the subject-
matter of the litigation, or may order that the amount in
dispute be brought into Court or otherwise secured.

44. It shall be lawful for the Court or a judge, on the
application of any party to any action, to make any order
for the sale, by any person or persons named in such
order, and in such manner, and on such terms as to the
Court or judge may seem desirable, of any goods, wares,
or merchandize which may be of a perishable nature or
likely to injure from keeping, or which for any other just
and sufficient reason it may be desirable to have sold at
once.

45. It shall be lawful for the Court or a judge, upon
the application of any party to an action, and upon such

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<th>Power for party to apply for order before termination of action.</th>
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<td>Power to transfer questions arising in actions.</td>
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<td>Accounts and inquiries.</td>
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<td>Interim orders as to subject-matter of litigation.</td>
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<td>Power to make orders for sale of goods.</td>
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<td>Power for Court to make interim</td>
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APPENDIX.

251
terms as may seem just, to make any order for the detention, preservation, or inspection of any property, being the subject of such action, and for all or any of the purposes aforesaid to authorize any person or persons to enter upon or into any land or building in the possession of any party to such action, and for all or any of the purposes aforesaid to authorize any samples to be taken, or any observation to be made or experiment to be tried, which may seem necessary or expedient for the purpose of obtaining full information or evidence. The Court or a judge may also, in all cases where it shall appear necessary for the purposes of justice, make any order for the examination upon oath before any officer of the Court, or any other person or persons, and at any place, of any witness or person, and may order any deposition so taken to be filed in the Court, and may empower any party to any action or other proceeding to give such deposition in evidence therein on such terms, if any, as the Court or a judge may direct.

46. The plaintiff may, at any time before receipt of the defendant's statement of defence, or after the receipt thereof before taking any other proceeding in the action (save any interlocutory application), by notice in writing, wholly discontinue his action or withdraw any part or parts of his alleged cause of complaint, and thereupon he shall pay the defendant's costs of the action, or, if the action be not wholly discontinued, the defendant's costs occasioned by the matter so withdrawn. Such costs shall be taxed in the manner prescribed by rules of Court, and such discontinuance or withdrawal, as the case may be, shall not be a defence to any subsequent action. Save as in this rule otherwise provided, it shall not be competent for the plaintiff to withdraw the record or discontinue the action without leave of the Court or a judge, but the Court or a judge may, before, or at, or after the hearing or trial, upon such terms as to costs, and as to any other action, and otherwise as may seem fit, order the action to be discontinued, or any part of the alleged cause of complaint to be struck out. The Court or a judge may, in like manner, and with the like discretion as to terms, upon the application of a defendant, order the whole or any part of his alleged grounds of defence
APPENDIX.

or counter-claim to be withdrawn or struck out, but it shall not be competent to a defendant to withdraw his defence, or any part thereof, without such leave. Any judgment of nonsuit, unless the Court or a judge otherwise directs, shall have the same effect as a judgment upon the merits for the defendant; but in any case of mistake, surprise or accident, any judgment of nonsuit may be set aside on such terms, as to payment of costs and otherwise, as to the Court or a judge shall seem just.

Costs.

47. Subject to the provisions of this Act, the costs of and incident to all proceedings in the High Court shall be in the discretion of the Court; but nothing herein contained shall deprive a trustee, mortgagee or other person of any right to costs out of a particular estate or fund to which he would be entitled according to the rules hitherto acted upon in Courts of Equity.

New Trials and Appeals.

48. A new trial shall not be granted on the ground of misdirection or of the improper admission or rejection of evidence, unless in the opinion of the Court to which the application is made some substantial wrong or miscarriage has been thereby occasioned in the trial of the action; and if it appear to such Court that such wrong or miscarriage affects part only of the matter in controversy, the Court may give final judgment as to part thereof, and direct a new trial as to the other part only.

49. Bills of exceptions and proceedings in error shall be abolished.

50. All appeals to the Court of Appeal shall be by way of re-hearing, and shall be brought by notice of motion in a summary way, and no petition, case or other formal proceeding other than such notice of motion shall be necessary. The appellant may by the notice of motion appeal from the whole or any part of any judgment or order; and the notice of motion shall state whether the whole or part only of such judgment or order is complained of, and in the latter case shall specify such part.
51. The notice of appeal shall be served upon all parties directly affected by the appeal, and it shall not be necessary to serve parties not so affected; but the Court of Appeal may direct notice of the appeal to be served on all or any parties to the action or other proceeding, or upon any person not a party, and in the meantime may postpone or adjourn the hearing of the appeal upon such terms as may seem just, and may give such judgment and make such order as might have been given or made if the persons served with such notice had been originally parties. Any notice of appeal may be amended at any time as to the Court of Appeal may seem fit.

52. The Court of Appeal shall have all the powers and duties as to amendment and otherwise of the Court of First Instance, together with full discretionary power to receive further evidence upon questions of fact, such evidence to be either by oral examination in court, by affidavit, or by deposition taken before an examiner or commissioner. Such further evidence may be given without special leave upon interlocutory applications, or in any case as to matters which have occurred after the date of the decision from which the appeal is brought. Upon appeals from a decree or judgment upon the merits, at the trial or hearing of any action or matter, such further evidence (save as aforesaid) shall be admitted on special grounds only, and not without special leave of the Court. The Court of Appeal shall have power to give any judgment and make any decree or order which ought to have been made, and to make such further or other order as the case may require. The powers aforesaid may be exercised by the said Court, notwithstanding that the notice of appeal may be that part only of the decision may be reversed or varied, and such powers may also be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have appealed from or complained of the decision. The Court of Appeal shall have power to make such order as to the whole or any part of the costs of the appeal as may seem just.

53. It shall not, under any circumstances, be necessary for a respondent to give notice of motion by way of cross appeal, but if a respondent intends, upon the hearing of
the appeal, to contend that the decision of the Court below should be varied or altered, he shall, within such time as may be prescribed by rules of Court or by special order, give notice of such intention to any parties who may be affected by such contention. The omission to give such notice shall not diminish the powers by this Act conferred upon the Court of Appeal, but may, in the discretion of the Court, be ground for an adjournment of the appeal, or for a special order as to costs.

54. When any question of fact is involved in an appeal, the evidence taken in the Court below shall be brought before the Court of Appeal in such manner as may be prescribed by rules of Court or by special order.

55. If, upon the hearing of an appeal, a question arise as to the ruling or direction of the judge to a jury or assessors, the Court shall have regard to verified notes or other evidence, and to such other materials as the Court may deem expedient.

56. No interlocutory order or rule from which there has been no appeal shall operate so as to bar or prejudice the Court of Appeal from giving such decision upon the appeal as may seem just.

57. No appeal from any interlocutory order shall, except by special leave of the Court of Appeal, be brought after the expiration of twenty-one days, and no other appeal shall, except by such leave, be brought after the expiration of one year. The said respective periods shall be calculated from the time at which the judgment or order is signed, entered or otherwise perfected, or, in the case of the refusal of an application, from the date of such refusal, or from such time as may be prescribed by rules of Court. Such deposit or other security for the costs to be occasioned by any appeal shall be made or given as may be prescribed by rules of Court or directed under special circumstances by the Court of Appeal.

58. An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from, except so far as the Court appealed from, or any judge thereof, or the Court of Appeal, may so order; and no intermediate act or proceeding shall be invalidated, except so far as the Court appealed from may direct.
GENERAL INDEX.

ABATEMENT
  of legacies. See 99.
  of action, 243.

ACCOUNT, 104.
  interlocutory, 250.

ACTION. See Registrar.
  interpretation of word, 237.
  form of, 238.
  discontinuance of, 251.
  abatement of, 243.
  pleadings in, 244.
  plaintiff may choose where to bring, 218.
  power to transfer, 218.
  things in, 31, 58, 72, 80. See Choses in Action.

ADEMPTION,
  of legacies generally, 99.
  of legacy by subsequent portion where the giver stands in loco parentis, 100. See Satisfaction.

ADJUSTMENT,
  remedies by way of, 88.

ADMINISTRATION,
  of insolvent estates, 206.
  jurisdiction as to, 88, 89.
  in Chancery, division of High Court, 215.
  of legal and equitable assets, 11, 92.
  order of administration of assets, 94.
  order of satisfaction, 93.
  marshalling of assets, 13, 96. See Marshalling.

ADMINISTRATOR. See Executor.

ADVANCEMENT,
  presumption as to purchase in another's name being, or resulting trust, 27.

AFTER-ACQUIRED PROPERTY,
  covenant to settle, 78.

AGREEMENT. See Contract.
AMENDMENT
of plaintiff's or defendant's case, 177, 244.

ANNUITY,
when receiver appointed of, 164.

ANSWER,
meaning of word, 189 (note).
no exceptions to, 246.
"he who answers must answer fully," 188.

ANTICIPATION,
restraint on, 77.

APPEAL, 252—254. See Court.
what orders are not to be subject to, 223.

APPOINTMENT. See Power.
 fraudulent, 53, 108.

APPORTIONMENT,
jurisdiction as to, 104, 105.

ARRANGEMENT,
family settlement supported unless undue influence shown, 56.

ASSESSORS,
for hearing causes, 224, 247.

ASSETS,
legal and equitable, 11, 92.
whether wife's separate property is equitable assets, 87.

ASSIGNMENT,
voluntary, 33.
of choses in action and equitable interests, 58, 208.
with notice, 59.
assignee takes subject to equities of assignor, 60—64, 145.

B.

BANKRUPTCY,
forfeiture of husband's interest on, 77.
insolvent estates to be administered as in, 93.
jurisdiction of Court of, 161.

BILL OF DISCOVERY, 175.

BILL OF EXCHANGE,
mistake in form of, 149.

BILL OF PEACE, 168, 171.
INDEX.

BOND,
assignment of, 31. See CHOSE IN ACTION.
penalty of, when relieved against, 130, 131.

BUILD,
covenant to, not specifically enforced, 120. See p. 118.

CANCELLATION,
of deeds, 133.
jurisdiction as to, in Chancery Division of High Court, 216.

CATCHING BARGAINS, 57.

CAUSE. See ACTION.
interpretation of word, 237.

CHANCELLOR, LORD,
how far affected by Judicature Act, 236.
jurisdiction of, in lunacy, over patents, colleges, charities, 200.

CHANCERY DIVISION,
of High Court of Justice, business of, 215.

CHARGE,
paid off by tenant for life, when merged, 105.
on land, to be raised by Chancery Division of High Court, 215, 216.

CHARITIES,
no marshalling in favour of, 78.

CHATTELS,
delivery of, 114, 116.

CHILDREN. See INFANTS.
removal of, from their parents, 7, 71.

CHOSE IN ACTION,
creation of voluntary trust of, 31.
assignment of, in equity, 58. See ASSIGNMENT.
of married women, 72.
equity to a settlement out of, 86.

COMMittal TO PRISON,
power of Court, how consistent with Magna Charta, 155.

COMMON,
right of commoner or lord, bill of peace to try, 169, 171.

COMPENSATION,
specific performance with, 127.
for a breach of covenant or condition, instead of penalty or forfeiture, 130, 132.
COMPROMISE OR FAMILY ARRANGEMENT, 56.

CONDITION,
in restraint of marriage, 101.
relief against breach of, 130, 132.

CONSCIENCE,
how far bound in Equity, 24, 48. See Person.

CONSIDERATION,
inadequate, in dealing with reversioner, 57.
conveyance without, 35, 37. See Voluntary Trust.
valuable, agreement not enforced in the absence of a, 31, 34.
parol proof of, where settlement is voluntary on the face of it, 36.

CONTRACT,
construction of, in Equity and at Common Law, 109.
of foreign governments, how dealt with, 158.
mutuality of, 113 (note).
what matters are of the essence of, 127, 209.
rescission and rectification of, 133, 152, only for mistake in the
writing, not for mistake as to the effect, 142.

CONTRIBUTION,
between sureties, 15, 105.

CONVERSION,
(1) of produce of real estate into personalty, 102.
(2) of hazardous investments and perishable property, 102.

CONVEYANCE, VOLUNTARY, 3, 37.
with notice of another's title, 61.
in another's name, 26.

COPYRIGHT,
injunctions to restrain infringements of, 172.

COSTS, 252.
solicitor taking gross sum for, 52.

COUNTY COURT. See Court, Inferior; District Registry.

COURT. See Action; District Registry.
Supreme, constitution and judges of, 196.
jurisdiction of, 199.
divisions and divisional courts of, 213, 219, 220.
Appeal, constitution of, 106.
Palatine, of Lancaster, 200, 201.
County, appeals from, 221.
Inferior, 234.
COVENANT,
performance of, 29.
to lease property, or to purchase and to settle lands, how implied, 29.
as to after-acquired property in marriage settlement, 78.
injunction granted against breach of, 174.

CREDITORS. See DEBTS.
favoured by supplying defective execution of powers, 151.
frauds on, by voluntary settlement in case of embarrassment, 35.
preferences of, 12, 91—93.
payment of legatees before, 98.

D.

DAMAGES,
when proper remedy for breach of contract, 114, 116.
when given under Lord Cairns and Sir John Rolt's Act, 120, 121.
when assessed instead of penalty, 131.
liquidated, when recoverable, 132.

DEBTS,
retainer or preference of, by executor, 12, 91, 93.
equal payment of, 12, 92.
order of administration of different properties in payment of, 95.

DEEDS,
production of, by mortgagee not required till mortgage is paid, 182.
jurisdiction to cancel and rectify, 135, 1:2.
discovery as to, and copies of, 184, 246, 247.

DEMURRER, 189, 190, 244.

DIRECTORS OF COMPANIES,
fraud of, 43.
breach of trust of, 164.

DISABILITY. See INFANTS; LUNATICS; MARRIED WOMEN.
persons under, 65.
suing by next friend, 241.

DISCOVERY, 175, 246.

bill of, 175.
not compelled as to matters of imperfect obligation, 178.
not matters irrelevant, generally, 180, 186, 246 ; or not relating to parties' own case, 182.
not criminating matters, 183.
not professional communications, 184.
not official secrets, 184.
DISTRICT REGISTRY,
   establishment of, and proceedings in, 226.
      accounts and inquiries may be referred to, 227.

DISTRINGAS, 59.

DOCUMENTS,
   discovery as to, 184, 246, 247.
      jurisdiction to cancel and rectify, 133—152.

E.

EJECTMENT,
     when necessary before suit in equity, 166.
        "ejectment bill," 166 (note).

ELECTION, 101.
     as to benefit given by will, 102.

ENGAGEMENTS,
     amounting to trusts, 8, 16, 35, 45, 53, 122.

EQUITABLE ASSETS, 11, 92. See 87.

EQUITABLE ASSIGNMENTS, 57.
     subject to equities, 60, 61, 63, 64, 145.

EQUITY,
     history of, 4—7.
        description or definition of, 9.
        to be administered concurrently with Common Law, 1, 203.
        rules of, to prevail, 209.
        "follows the law," 2, 9, 34, 39, 42, 90, 91, 98.
        equality is, 14, 93.
        he who seeks, must do, 63, 83.
        he who seeks, must come with clean hands, 15.
        to a settlement, 80. See MARRIED WOMEN.
        suffers no right to be without a remedy, 14.
        exclusive and concurrent jurisdiction of, 17, 24.
        not a Court of honour, 15, 178.
        how far regards the substance and not the letter, 23.
        jurisdiction of, over fraud, 43.
        on account of the inadequacy of the legal relief, 108.
        or to avoid circuity of action or multiplicity of suits, 89.
        or on account of the necessity for a discovery, 176.
        auxiliary jurisdiction, 166.

EVIDENCE. See DISCOVERY; WITNESS,
     rules as to *vivâ voce* and affidavit, 248.
INDEX.

EXECUTOR or ADMINISTRATOR,
    distinction between, and trustee in regard to the effect of join-
    ing in receipts, 108.
    how far trustee, 88—90.
    to sue and be sued on behalf of trust estate, 242.
    right of, to retain or prefer debt, 12, 91—93.
    but not out of equitable assets, 93.

EXECUTORY TRUST, 38.

EXONERATION
    of personal estate from debts, 96.

EXPECTANT HEIRS,
    dealings with, 57.

F.

FAMILY,
    meaning of word, 38.
    arrangement, 56.

FOREIGN,
    contract or law, not interfered with by equity, 158.

FORFEITURE,
    jurisdiction as to, 130, 132.
    of husband's interest in wife's property, 77.

FRAUD. See ENGAGEMENT; NOTICE; REPRESENTATION.
    concurrent jurisdiction in cases of, 43.
    misrepresentation or concealment leading to avoidance of con-
    tract, 140, 142.
    equitable, 42.
    on marital rights, 73.
    on a power, 54.
    on public policy, 42.
    agreements to influence testators, 47.
    by way of undue influence of parent, guardian, solicitor, trustee,
    &c., 50—52.
    in dealings with reversioners, 56.

FRAUDS, STATUTE OF,
    operation of, with regard to trusts, 25.
    contracts, 123.
    not to be an instrument of fraud, 47.

G.

GUARDIAN. See INFANTS
    constructive fraud of, 52.
HEIR,
right to undisposed-of produce of real estate, 102.
bargains with expectant, 56.

HUSBAND AND WIFE. See MARRIED WOMEN.
fraud on marital rights, 73.

IN LOCO PARENTIS, 27.

INFANTS,
jurisdiction as to, 65, 69.
in Chancery, division of High Court, 216.
rules of Equity as to, to prevail, 209.
appointment of guardians for, 69.
religion of, 70.
removal from their father, 70, 71.
wards of Court, 69—71.
fratulent appointment to, 54.
custody of, act as to, 71.
settlement on marriage of, 72.
how to sue and defend actions, 242.

INJUNCTIONS, 153—174.
when to be granted, 167, 209.
interlocutory, 162.
to restrain proceedings at common law, 176.
to restrain proceedings on other courts abolished, 159, 160, 204.
See STAY OF PROCEEDINGS.
after judgment in administration suit, 160.
not against a foreign suit, 158.
to preserve property, 172.
not where ejectment could be brought, 167.
against trespass, 167.
against waste, 171.
against nuisance, 172, 173.
against infringement of patent, copyright and trade-mark, 172.
application to parliament, 158.
breach of covenant, 172.

INTERPLEADER,
suit for, 161.

INTERROGATORIES, 176, 246.
fishing, i.e., not relating to parties' own case, 182.

INVESTMENT,
of perishable property, 102, 103.

ISSUES,
power for judge to settle, 244.
trial of, 247, 248.
INDEX.

JOINT TENANCY,
when presumption is against, 28.

JUDGES. *See* Assessors; Reference.
appointment of, 197.
extraordinary duties of, 198.
powers of single, 219.
absence or vacancy of office of, 223.

JUDGMENT,
no lien in respect of, until land is delivered in execution, 61.

JURISDICTION,
property out of, jurisdiction *in personam* as to, 157, 158.

L.

LACHES,
consequences of, 144.

LAND,
specific performance of contracts as to, 123.

LEASE,
renewal of, by a trustee, 49.
notice of, when notice of contents, 62; not as between vendor and purchaser, 62.
duty of executors to assign, 99.
“for seven or fourteen years,” meaning of, 142.

LEGACY,
demonstrative, 99.
equity to settlement out of, 82.
refunding, to pay debts, 98.
for a condition which cannot be accomplished, 100.
abatement of, 99.
ademption of, 99.

LEGAL ASSETS, 11, 12.

LEGAL ESTATE,
transfer of, under Trustee Act, 40.

LIBEL,
restrained, 6.

LIEN,
sale and distribution of proceeds of property subject to, in Chancery Division of High Court, 216.
of a vendor, 13, 97, 98. *See* Vendor’s Lien.
INDEX.

LIGHT AND AIR, 173.

LIMITATIONS, STATUTE OF,
operation of, as regards trusts, 22, 207.

LOCKE KING'S ACT, 13.

LUNATICS,
jurisdiction as to, 65—69, 200.

MAGNA CHARTA,
attachment of person notwithstanding, 155.

MAINTENANCE,
of suits in early times, 2—5.

MARITAL RIGHTS,
fraud on, 73.

MARRIAGE,
representations leading to, when amount to trust, 45.
conditions in restraint of, 101.
frauds on marital rights, 73.
articles, execution of, 38.

MARRIAGE SETTLEMENT,
ordinary trusts of, 76.

MARRIED WOMEN,
common law rights of, 72.
choSES in action of, 80.
mortgage of estate of, 151.
separate estate, 76. See SEPARATE USE.
   by gift during marriage, 77.
   by separate earnings under the Married Women's Property Act, 87.
liability of, 86, 87.
equity to a settlement of, out of her own property, 80.
   as plaintiff or defendant against her husband, 83, 84.
   as against husband's assigns, 84.
   not out of life interest, 84.
   how lost by act of trustee, 82; or waived, 83.
right of survivorship of, in regard to reversionary interest, 84.
deeds of separation, custody of child under, 72.
how to sue and defend action, 242.

MARSHALLING,
of assets, 13, 96.
as between legacies charged on land and vendor's lien, 97.
in the case of charitable legacies, 98.
of securities and mortgages, 97.
INDEX.

MASTER OF ROLLS,
    jurisdiction of, over records, 200.

MATERIALITY,
    of discovery, 180, 186.

MAXIMS,
    actio personalis moritur cum personâ, 90.
    æquitas agit in personam, 24—48.
    equity regards the substance and not the letter, 23.
    ex nudo pacto non oritur actio, 30.
    hard cases make bad law, 8.
    equity follows the law, 2, 9, 34, 39, 90, 91, 98.
    equity is equality, 14.
    he who answers must answer fully, 188.
    inter mercatores jus accrescendi locum non habet, 28.
    ignorantia juris haud excusat, 139.
    no right without a remedy, 14, 24.
    vigilantibus non dormientibus æquitas subvenit, 144.
    who comes into equity must have clean hands, 15.
    who comes into equity must do equity, 16.
    qui prior est tempore potior est jure, 64.
    modus et conventio vincunt legem, 76.

MERGER,
    of wife’s reversionary interest, not permitted, 84.
    of charges paid off by tenant for life, 105.
    none by operation of law, unless beneficial estate merged in equity, 207.

MISJOINDER,
    of parties, 241.
    of causes of action, 245.

MISREPRESENTATION,
    slight, 127.
    substantial, e.g., as to tenure, 129.
    leading to avoidance of contract, 139.
    by a man standing by and letting others expend money on his property, 124.

MISTAKE,
    jurisdiction to relieve for, in respect of a written instrument, 133—152.
    ignorance of law, 138, 142.

MONEY DEMAND,
    no relief in equity for, 43, 120.
    except in cases of fraud, 43.

MORTGAGE,
    clause in, that survivors of trustees may give receipts, 28.
    production of deeds by mortgagee not compelled, 182.

C.      N
MORTGAGE—continued.
  priorities as to, under doctrine of notice, 58.
    how far apply to real estate, 60.
  mortgagor's estate and rights, 104, 207.
  equity of redemption, 130.
  of wife's estate for husband's debt, 151.
  a mortgage and a pledge distinguished, 58.

MUTUAL MISTAKE,
  therefore no contract, 137.

NOTICE,
  constructive, 62.
    what is, 59.
  purchase with notice of another's title, 61.
  of assignment should be given to prevent delusive credit, 58.
  not applicable to real estate, 60.

NUISANCE,
  injunctions to restrain, 173.

OATHS,
  commissioners of, 232.

OBLIGATION,
  implied performance of, 29, 30.

OPTION OF RE-PURCHASE, 128, note (n).

ORDER OF ADMINISTRATION,
  of assets, 95.

PALATINE COURT, 200, 201.

PARENT,
  undue influence of person standing in loco parentis, 53, 56.

PARLIAMENT,
  abuse of powers given to companies by application, restrained, 
    167, 171.
  application to, whether restrained, 158.

PAROL,
  contracts enforced in cases of part performance, 123.
  evidence to rebut a presumption of law, 27.
  variations, by way of defence in Equity, 125, 134.
    at Common Law, 125.
PART PERFORMANCE,
document of, 123.

PARTITION,
  jurisdiction as to, 20, 106.
    in Chancery Division of High Court, 216.
  statute allowing sale in place of, 106.
  title to be shown, 20.

PARTNERS,
  how to sue or be sued, 241.

PARTNERSHIP,
  concurrent jurisdiction as to, 105.
  dissolution and accounts in Chancery Division of High Court,
    215.
  injunctions in matters of, 165.
  property for partnership purposes held in tenancy in common, 28.
  obligation joint and several, 151.

PARTY,
  interpretation of word, 237.
  rules as to parties, 241—243.

PATENT,
  injunctions to restrain infringements of, 168, 172.
  jurisdiction of Lord Chancellor as to, 200.

PEACE,
  bills of, 168—171.

PENALTIES AND FORFEITURES,
  jurisdiction as to, 130—133.

PENDING BUSINESS,
  transfer of, 201.

PERFORMANCE,
  of obligation, 29.
    distinguished from satisfaction, 30.

PERPETUATION OF TESTIMONY,
  bill for, 191.

PERSON,
  jurisdiction in personam as to trusts, 24—48.
    by injunction, 157, 158.

PERSONALITY. See CHATTELS—CHOSE IN ACTION.
  creation of voluntary trust concerning, 32.
  in what case specific performance decreed of contracts relating
to, 114, 115.

PLEA, 190.

PLEADINGS,
  rules as to, 243.
POLICY OF ASSURANCE,
  maritime, 143.
  assignment of, 59.

PORTION,
  or other charge on land to be raised in Chancery Division of
  High Court, 215.
  equity leans against double, 100.
  satisfaction of, 99. See ADEMPTION.

POWER,
  fraud on, 53, 108.
  of revocation should be inserted in voluntary settlement, 37.
  relief in cases of the defective execution of, 151.
  in the nature of a trust, 37.

PRECATORY TRUSTS, 37.

PREFERENCE,
  of a particular creditor by executor or administrator, 12.

PRESCRIPTION ACT, 169, note.

PRESERVATION OF PROPERTY (see INJUNCTIONS), 172, 250.

PRESS,
  restraint of libellous use of, 6.

PRESUMPTION,
  against covenantor or grantor, 29.
  parol evidence to contradict, 27, 36.

PROBATE COURT,
  jurisdiction of, 53.

PROCEDURE,
  saving of existing, 229.
  councils of judges as to, 230.

PROCESS,
  to enforce decree by committal to prison, 155.

PROMISE. See ENGAGEMENT—REPRESENTATIONS.

PROMISSORY NOTE. See CHOSE IN ACTION.

PUBLIC POLICY,
  fraud against, 42.

PURCHASE,
  with notice of another’s title, 61.
  in another’s name, 26.
  covenant to purchase lands, performance of, 29.
  of an estate by a trustee, 49.
PURCHASE—continued.
with right of re-purchase, 128, note.
seeing to the application of purchase money, 89.

PURCHASER. See REVERSIONER.
for valuable consideration, 64, 163.
need not make discovery, 179, 188.
right of, as against beneficiaries under voluntary settlement, 36.

Q.
QUESTIONS OF LAW AND FACT IN EQUITY, 20.
issues as to, 244, 247, 248.
preliminary decisions of, 245.

QUIA TIMET,
jurisdiction so called, 134.

R.
RAILWAY COMPANIES,
abuse of parliamentary powers by, restrained, 171.

RECEIPT,
distinction between trustees and executors as regards joining in, 103.

RECEIVER,
not appointed of property from which defendant could be ejected at common law, 163, 166.

RECTIFICATION OF INSTRUMENTS,
to be carried out in Chancery Division of High Court, 216.
only with consent, 136.
or complete proof, 147—149.

REDUCTION INTO POSSESSION,
of chose in action, 80.

REFERENCE,
of questions to official or special referees, 224, 225, 248.
appointment of official referees, 232.

REGISTRARS (see DISTRICT REGISTRY), 226, 227.

REGISTRATION ACTS,
how affected by notice, 63.

RELEASE,
rectifying, 145.

REMEDY,
equity provides for Common Law rights, 11.
only when Common Law remedy of damages is inadequate, 153—173.

N 3
REMAINDERMAN, 
bargain with, 57.

RENEWAL OF LEASE, 
by a trustee, 49.

REPAIRS, 
contract to do, not specifically enforceable, 118.

REPRESENTATIONS, 
or engagements amounting to trusts, 16, 35, 45—48, 53—122.

RE-PURCHASE, 
purchase with right of, 128, n.

RESCISSION, 
of contract, 133.

RESIDUARY DEVISE, 
still specific for some purposes, 95.

RESTRAINT ON ANTICIPATION, 
of income of wife's separate property, 77.

RESULTING USES, 
or trusts, 26.

REVERSIONER, 
bargain with, 57.

REVOCATION, 
want of power of, 37.

RIGHT, 
"none without a remedy" in Equity, 14, 24.

RULES OF COURT, 
how to be made, 227—230.

SALE, 
with option of re-purchase, 128, n. 
by a trustee, 29.

SATISFACTION, 
of portion secured by settlement or ademption of portions left 
by will, 99, 100.

SCANDAL, 
striking out matters of, 244.

SECURED CREDITOR, 
how to prove his debt, 207.
INDEX.

SECURITY,
mutual right to the benefit of, between creditor and sureties, 14, 106, 107.

SEPARATE PROPERTY,
of married women, 76.
effect on, of Married Women's Property Act, 86.
restraint on anticipation of income, 77.
power of disposal over, 77.
liability of, to debts and engagements, 86.

SEPARATION,
deed of, between husband and wife, 72.

SERVICE OF WRIT,
substituted or out of jurisdiction, 239.
on parties added by judge, 241.

SET-OFF,
by counter-claims of defendant, 244, 245.

SETTLEMENT,
equity to, 83.
on marriage of infant, 72.
rectification of, 150.
voluntary, 35, 37.

SOLICITOR,
of High Court, 234.
what communications by or to, privileged from discovery, 184.
gifts to, by will or deed, 52.
being a trustee to charge only money out of pocket, 50.
taking gross sums for fees, 52.

SPECIFIC PERFORMANCE,
remedy in Chancery Division of High Court, 216.
only in cases where damages would not afford compensation, 108, 112; and if the performance can be carried out by the court, 113, 118.
not of money contracts, 113—117; but of contracts as to real property, 123.
not of contracts to build or repair, 118, 120.
with compensation as to terms not of the essence, or as to slight misdescriptions, 127.
with parol variations or additions, 125.
of agreement to borrow, 113, 114.
in case of negative agreements, by way of injunction, 118.

STANNARIES,
jurisdiction of warden of, 201.

STATUTES,
25 Edw. 1 (Magna Charta), 154.
17 Edw. 2, c. 10 (Property of lunatics), 66.
STATUTES—continued.

13 Eliz. c. 5 (Voluntary settlement, creditors), 35, 76.
27 Eliz. c. 4 (Voluntary settlement, purchasers), 56, 61.
29 Car. 2, c. 3, s. 4 (Statute of Frauds, contract as to land), 11, 123, 125, 126.

ss. 7, 8 (Creation of trusts), 25.
8 & 9 Will. 3, c. 11 (Relief against penalties in bonds), 130, 131.
4 & 5 Anne, c. 3 (Relief against penalties in bonds), 130.
4 Geo. 2, c. 28 (Recovery of annuity), 164.
2 & 3 Will. 4, c. 71 (Limitations, trusts), 22.
3 & 4 Will. 4, c. 27 (Limitations, trusts), 22.

s. 104 (Real property—legal assets), 12.
2 & 3 Vict. c. 54 (Custody of infants), 71.
5 & 6 Vict. c. 69 (Perpetuation of testimony), 192.
10 & 11 Vict. c. 96 (Trustee Relief Act), 39.
13 & 14 Vict. c. 60 (Trustee Act), 40.
15 & 16 Vict. c. 86, s. 19 (Chancery improvement; defendant's interrogatories), 181.
s. 22 (Chancery improvement; witnesses abroad), 191.
s. 58 (Chancery improvement; common injunction), 176.
c. 87 (Jurisdiction in lunacy), 66.

17 & 18 Vict. c. 125, ss. 79, 82 (Common law procedure; writ of injunction), 156.

ss. 51—57 (Common law procedure; evidence of parties), 175.

18 & 19 Vict. c. 43 (Infant settlements), 72
19 & 20 Vict. c. 120 (Leases and sales of settled estates), 215.
20 & 21 Vict. c. 77 (Probate Court; jurisdiction), 192.
21 & 22 Vict. c. 27 (Lord Cairns'; Chancery amendment, 1858), 20, 117, 120.
c. 77 (Leases and sales of settled estates), 215.

22 & 23 Vict. c. 35 (Lord St. Leonards'; property and trustee's relief), 40, 99, 215.
23 & 24 Vict. c. 38 (Lord St. Leonards'; law of property), 40.
c. 126 (Relief against forfeiture of lease), 130.
c. 145 (Lord Cranworth's), 40, 215.
25 & 26 Vict. c. 42 (Sir J. Rolt's; questions of law and fact), 20, 117, 120.

27 & 28 Vict. c. 45 (Leases and sales of settled estates), 215.
c. 112, s. 1 (Judgments), 61.
30 & 31 Vict. c. 69 (Locke King's; extension), 13, 98.
c. 144 (Assignment of policies), 59.
31 Vict. c. 4 (Sales of reversions), 57.
31 & 32 Vict. c. 40 (Partition), 106.
32 & 33 Vict. c. 46 (Equality of debts), 12, 93.
c. 62 (Imprisonment for debt), 154.
c. 71, s. 15 (Bankruptcy; reputed ownership), 59.
s. 72 (Bankruptcy; injunction), 160.
STATUTES—continued.

32 & 33 Vict. c. 71, s. 91 (Bankruptcy; voluntary settlement), 36.
33 & 34 Vict. c. 93 (Married Women's Property), 71.
36 & 37 Vict. c. 12 (Custody of infants), 71, 215.
c. 66 (Judicature), 1, 12, 21, 22, 59, 101, 104, 105, 113, 127, 156, 158, 172, 177, 184, 186, 189, 190, 114—238.

STAY OF PROCEEDINGS,
in place of injunction to restrain other Courts, 159, 205.

STOP ORDER, 59.

SURETY,
rights of, as to co-surety, 14, 105—107.
release of, by giving time to creditor, 106.

T.

TESTIMONY,
bill to perpetuate, 191.

TIME,
when held of the essence of a contract, 127.

TITHES,
or modus suit, 168.

TITLE-DEEDS,
how far proof of ownership, 58.

TRANSFER OF CAUSE
to other branch of Court, 21, 218. See ACTION.

TRESPASS,
when restrained by injunction, 167.

TRIAL,
place and mode of, 247, 248.

TRUST,
(1) EXPRESS,
to be executed in Chancery Division of High Court, 216.
first recognized under Richard II., 6.
to be evidenced by writing, 25.
    if of realty, 30.
by what precatory words created, 37.
device or bequest may be verbally impressed with, 46—48.
voluntary, creation of, 30, 34.
intended, though void, excludes donee from taking beneficially, 47.
TRUST—continued.
(1) EXPRESS—continued.
executed and executory, 38.
how far governed by the same rules as legal estates, 39.
secret, 46.
engagement or representation amounting to, 45, 48.
declaration of, in favour of a volunteer, how far voidable,
35.
no bar of, by Statute of Limitations, 22, 207.

(2) IMPLIED. See ENGAGEMENT.
sometimes called constructive, 25.
need not be in writing, 25.
on conveyance without a consideration as a resulting use or
trust, 26.
on purchase or transfer in another's name, 26.
on limitations which would create a joint tenancy at law, 28.
on covenant or trust to purchase and settle lands, 29.
of wife's mortgaged property, 151.

TRUSTEE,
payment into Court by, 40.
no personal benefit allowed to, 49.
care and diligence necessary, 41.
conversion of terminable and speculative investments by, 102.
distinction between, and executors in regard to the effect of
joining in receipts, 103.
appointment of new, 40.
suing and sued on behalf of trust estate, 242.

TRUSTEE ACT, 40.
TRUSTEE RELIEF ACT, 39.

U.

UNDUE INFLUENCE, 50.
by trustee, 50.
by other persons in confidential position, 51, 52.

UN SOUND MIND,
persons of, 67.

V.

sittings in, 211.

VALUABLE CONSIDERATION. See PURCHASER.

VENDOR,
lien of, primarily a charge on the land, 13, 98.
marshalling as against, 97.
and purchaser, trust between, 109.
notice as between, 62.
INDEX.

VOLUNTARY,
trusts, creation of, 30—37.
settlements, how far voidable by purchaser's creditors and bank-
ruptcy trustees, 35—37.
    rights of cestui que trust under, 176.

W.
WARD OF COURT, 69—71. See INFANTS.
WASTE,
    injunctions to restrain, 171.
equitable, 42, 172.
    not to be committed by tenant for life, 207.
WIFE. See MARRIED WOMAN.
WILL,
    agreements to influence a testator, 47.
suit in chancery to establish, 48, 192.
    fraud in regard to, how far remedied in equity, 47.
WITNESSES,
    jurisdiction to examine abroad, 190.
    order for interlocutory examination of, 251.
WRIT OF SUMMONS,
    endorsement, service, and special endorsement of, 239.
"Now for the Laws of England (if I shall speak my opinion of them without partiality either to my profession or country), for the matter and nature of them, I hold them wise, just and moderate laws: they give to God, they give to Caesar, they give to the subject what appertaineth. It is true they are as mixt as our language, compounded of British, Saxon, Danish, Norman customs. And surely as our language is thereby so much the richer, so our laws are like wise by that mixture the more complete."—Lord Bacon.
<table>
<thead>
<tr>
<th>Index to Catalogue</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Accounts, Law of Billings ...</td>
<td>43</td>
</tr>
<tr>
<td>Actions at Law, Browne ...</td>
<td>44</td>
</tr>
<tr>
<td>Kerr ...</td>
<td>25</td>
</tr>
<tr>
<td>Williams ...</td>
<td>37</td>
</tr>
<tr>
<td>Administration Bonds, Chadwick ...</td>
<td>24</td>
</tr>
<tr>
<td>Admiralty, Practice. Coote ...</td>
<td>23</td>
</tr>
<tr>
<td>Aliens, Cutler ...</td>
<td>23</td>
</tr>
<tr>
<td>Arbitrations, Redman ...</td>
<td>13</td>
</tr>
<tr>
<td>Articled Clerk, Moseley ...</td>
<td>16</td>
</tr>
<tr>
<td>Attachment, Foreign, Brandon ...</td>
<td>42</td>
</tr>
<tr>
<td>Awards, Redman ...</td>
<td>13</td>
</tr>
<tr>
<td>Banking, Grant ...</td>
<td>12</td>
</tr>
<tr>
<td>Keyser ...</td>
<td>43</td>
</tr>
<tr>
<td>Bankruptcy, Rosson ...</td>
<td>30</td>
</tr>
<tr>
<td>Neal's Bulley &amp; Bund ...</td>
<td>15</td>
</tr>
<tr>
<td>In County Courts, Davis ...</td>
<td>9</td>
</tr>
<tr>
<td>Indexes Linklater ...</td>
<td>44</td>
</tr>
<tr>
<td>Bar, Examination Journal ...</td>
<td>7</td>
</tr>
<tr>
<td>Law Students' Guide ...</td>
<td>45</td>
</tr>
<tr>
<td>Smith ...</td>
<td>42</td>
</tr>
<tr>
<td>Pearce ...</td>
<td>44</td>
</tr>
<tr>
<td>Barbados, Laws of ...</td>
<td>44</td>
</tr>
<tr>
<td>Belligerents, Hamel ...</td>
<td>43</td>
</tr>
<tr>
<td>Bills of Exchange, Grant ...</td>
<td>12</td>
</tr>
<tr>
<td>Bills of Sale, Hunt ...</td>
<td>6</td>
</tr>
<tr>
<td>Blackstone, Stephen's ...</td>
<td>4</td>
</tr>
<tr>
<td>Blockade, Deane ...</td>
<td>44</td>
</tr>
<tr>
<td>Bookkeeping, Solicitors, Coombs ...</td>
<td>39</td>
</tr>
<tr>
<td>Boundaries, Hunt ...</td>
<td>30</td>
</tr>
<tr>
<td>Brokers, Keyser ...</td>
<td>43</td>
</tr>
<tr>
<td>Carriers, Inland, Powell ...</td>
<td>28</td>
</tr>
<tr>
<td>Railway, Shelford ...</td>
<td>10</td>
</tr>
<tr>
<td>Chamber Practice, Com. Law, Parkison ...</td>
<td>29</td>
</tr>
<tr>
<td>Chancery Practice, Goldsmith ...</td>
<td>21</td>
</tr>
<tr>
<td>Hunter ...</td>
<td>6</td>
</tr>
<tr>
<td>Drafting, Lewis ...</td>
<td>14</td>
</tr>
<tr>
<td>Charitable Trusts, Tudor ...</td>
<td>81</td>
</tr>
<tr>
<td>Church Building, Trover ...</td>
<td>39</td>
</tr>
<tr>
<td>Peurs, Heales ...</td>
<td>11</td>
</tr>
<tr>
<td>Civil Law, Tomkins &amp; Jencken ...</td>
<td>28</td>
</tr>
<tr>
<td>Collieries, Bainbridge ...</td>
<td>6</td>
</tr>
<tr>
<td>Colonial Law, Barbados ...</td>
<td>44</td>
</tr>
<tr>
<td>Colonial Law, Stephen's Blackstone ...</td>
<td>4</td>
</tr>
<tr>
<td>Philimore's ...</td>
<td>17</td>
</tr>
<tr>
<td>Common Law, Law of Equity, Chute ...</td>
<td>7</td>
</tr>
<tr>
<td>Practice, Dixon ...</td>
<td>13</td>
</tr>
<tr>
<td>Lush ...</td>
<td>13</td>
</tr>
<tr>
<td>Kerr ...</td>
<td>25</td>
</tr>
<tr>
<td>Companies, Grant ...</td>
<td>10</td>
</tr>
<tr>
<td>Sheldon ...</td>
<td>11</td>
</tr>
<tr>
<td>Compensation, Law of ...</td>
<td>33</td>
</tr>
<tr>
<td>Ingram ...</td>
<td>10</td>
</tr>
<tr>
<td>Conspiracy, Law of, Wright ...</td>
<td>21</td>
</tr>
<tr>
<td>Consolidation Acts, Sheldon ...</td>
<td>10</td>
</tr>
<tr>
<td>Constitution, May ...</td>
<td>5</td>
</tr>
<tr>
<td>Stephen ...</td>
<td>4</td>
</tr>
<tr>
<td>Contraband of War, Moseley ...</td>
<td>42</td>
</tr>
<tr>
<td>Deane ...</td>
<td>44</td>
</tr>
<tr>
<td>Contracts, Specific Performance, Fry ...</td>
<td>37</td>
</tr>
<tr>
<td>Conveyancing, Introduction, Lewis ...</td>
<td>15</td>
</tr>
<tr>
<td>Practice, Barry ...</td>
<td>19</td>
</tr>
<tr>
<td>Smith ...</td>
<td>14</td>
</tr>
<tr>
<td>Tudor ...</td>
<td>20</td>
</tr>
<tr>
<td>Forms, Crabb ...</td>
<td>22</td>
</tr>
<tr>
<td>Christie ...</td>
<td>12</td>
</tr>
<tr>
<td>Kelly ...</td>
<td>8</td>
</tr>
<tr>
<td>Sheldon ...</td>
<td>22</td>
</tr>
<tr>
<td>House ...</td>
<td>26</td>
</tr>
<tr>
<td>Convictions, Synopsis of Oke ...</td>
<td>31</td>
</tr>
<tr>
<td>Forms, Oke ...</td>
<td>34</td>
</tr>
<tr>
<td>Co-operation, Brabrook ...</td>
<td>39</td>
</tr>
<tr>
<td>Copyholders, Enfranchisement, House ...</td>
<td>41</td>
</tr>
<tr>
<td>Law of, Scriven ...</td>
<td>33</td>
</tr>
<tr>
<td>Coroner, Baker ...</td>
<td>44</td>
</tr>
<tr>
<td>Corporations in General, Grant ...</td>
<td>40</td>
</tr>
<tr>
<td>Costs, Law of, Gray ...</td>
<td>48</td>
</tr>
<tr>
<td>County Courts, Practice, Davis ...</td>
<td>9</td>
</tr>
<tr>
<td>Practice in Equity, Bankruptcy, Coote ...</td>
<td>23</td>
</tr>
<tr>
<td>Criminal Law, Davis ...</td>
<td>31</td>
</tr>
<tr>
<td>Oke ...</td>
<td>34</td>
</tr>
<tr>
<td>Curates, Field ...</td>
<td>40</td>
</tr>
<tr>
<td>Deeds, Tudor ...</td>
<td>20</td>
</tr>
<tr>
<td>Descents, Fare ...</td>
<td>45</td>
</tr>
<tr>
<td>Divorce, Practice, Browning ...</td>
<td>20</td>
</tr>
<tr>
<td>Domestic Servants, Baylis ...</td>
<td>3</td>
</tr>
<tr>
<td>Kelly ...</td>
<td>8</td>
</tr>
<tr>
<td>Drainage, Wilson ...</td>
<td>45</td>
</tr>
<tr>
<td>Woolrych ...</td>
<td>46</td>
</tr>
<tr>
<td>Ecclesiastical, Practice, Coote ...</td>
<td>45</td>
</tr>
<tr>
<td>Judgment, Bayford ...</td>
<td>45</td>
</tr>
<tr>
<td>Burdor &amp; Heath ...</td>
<td>45</td>
</tr>
<tr>
<td>Long's Cape Town ...</td>
<td>45</td>
</tr>
<tr>
<td>Philimore ...</td>
<td>46</td>
</tr>
<tr>
<td>Hebbert's Purchase ...</td>
<td>46</td>
</tr>
<tr>
<td>Election, Law, Davis ...</td>
<td>29</td>
</tr>
<tr>
<td>England, Laws of Blackstone ...</td>
<td>4</td>
</tr>
<tr>
<td>Francillon ...</td>
<td>45</td>
</tr>
<tr>
<td>Stephen ...</td>
<td>4</td>
</tr>
<tr>
<td>English Bar, Pearce ...</td>
<td>44</td>
</tr>
<tr>
<td>Smith ...</td>
<td>42</td>
</tr>
<tr>
<td>Equity, County Courts, Davis ...</td>
<td>9</td>
</tr>
<tr>
<td>Doctrine and Practice, Goldsmith ...</td>
<td>21</td>
</tr>
<tr>
<td>Draftsman, Lewis ...</td>
<td>14</td>
</tr>
<tr>
<td>Equity &amp; Law, Chute ...</td>
<td>7</td>
</tr>
<tr>
<td>Pleader, Drewry ...</td>
<td>36</td>
</tr>
<tr>
<td>Suit in, Hunter ...</td>
<td>6</td>
</tr>
<tr>
<td>Evidence, County Court, Davis ...</td>
<td>9</td>
</tr>
<tr>
<td>Law of, Powell ...</td>
<td>47</td>
</tr>
<tr>
<td>Wills, Wigram ...</td>
<td>38</td>
</tr>
<tr>
<td>Circumstantial, Wills ...</td>
<td>39</td>
</tr>
<tr>
<td>Examinations, Bar Examination Journal ...</td>
<td>7</td>
</tr>
<tr>
<td>Benham's (Preliminary) Guide ...</td>
<td>48</td>
</tr>
<tr>
<td>Law Examination, Journal ...</td>
<td>32</td>
</tr>
<tr>
<td>Mosely's Articled Clerks' Handy Book ...</td>
<td>16</td>
</tr>
<tr>
<td>Fence, Hunt ...</td>
<td>30</td>
</tr>
<tr>
<td>Fisheries, Bund ...</td>
<td>5</td>
</tr>
<tr>
<td>Oke ...</td>
<td>35</td>
</tr>
<tr>
<td>Foreshores, Hunt ...</td>
<td>30</td>
</tr>
<tr>
<td>Williams, Nicholson ...</td>
<td>45</td>
</tr>
</tbody>
</table>
INDEX TO CATALOGUE.

Forms,
Conveyancing. Crabb 22
Rouse 26
Magisterial. Oke 34
Pleading. Chitty 19
Greening 44
Probate. Chadwick 24
Frauds. Hunt 6
Game Laws. Oke 35
Gas Companies Acts.
Michael and Will 27
Guarantees. De Colyar 7
Highways. Glen 47
House of Lords,
Digest. Clark 18
Practice. May 5
Indian Penal Code.
Analysis. Cutler & Griffin 21
Indian Statutes, Index.
Field 42
Industrial Societies.
Brabrook 39
Institutes of English
Public Law.
Nasmith 18
Intermediate Examination.
Bedford 14
International Law.
Deane 44
Hamel 43
Phillimore 17
Intoxicating Liquors
Act. Oke 34
Joint Stock Companies.
Shelford 11
Accounts. Pulling 43
Jurisprudence.
Holland on Form of the
Law 40
Justice of Peace. Oke 34
Landlord and Tenant.
Fawcett 7
Lands Clauses Acts.
Ingram 33
Shelford 10
Law Student's Mag. 32
Law Studies, Mosely 16
Smith 42
Leading Cases,
Real Property. Tudor 20
Leases. Crabb 22
Rouse 26
Legacy Duties.
Shelford 29
Libel. Starkie 47
Licensing Laws. Oke 34
Lights (Window).
Latham 25
Local Government.
Glen 35
Lunacy. Phillips 37
Magisterial Law. Oke 34
Magisterial Law.
Forms. Oke 34
Maritime Warfare.
Deane 44
Hamel 43
Masters and Servants.
Baylis 12
Davis 17
Masters and Workmen.
Lovesy 18
Mayor's Court Practice.
Brandon 42
Memoirs of—
Lyndhurst 43
Talfourd 43
Military Law.
Franklyn 45
Military Laws. Dwyer 45
Mines and Minerals.
Bainbridge 16
Mortgages. Fisher 47
Rouse 26
Naturalization. Cutler 23
Negligence. Saunders 27
Parliamentary.
Clifford & Stephens 23
May 5
Partnership. Dixon 27
Tudor's Pothier 45
Patents. Norman 45
Petty Sessions. Oke 34
Pews. Heales 11
Pleading.
Common Law.
Chitty 19
Greening 44
Williams 37
Equity. Drewry 36
Lewis 14
Poor Law. Orders. Glen 37
Precedents,
Conveyancing. Crabb 22
Rouse 26
Pleading. Chitty Jun 19
Preliminary Examination Journal 48
Principal and Surety.
De Colyar 7
Priority. Fisher 47
Private Bills.
Clifford & Stephens 25
May 5
Prize Law. Lushington 39
Probate,
Practice. Coote 47
Forms. Chadwick 24
Duties. Shelford 29
Provident Societies.
Brabrook 39
Public Health. Glen 35
Public Law. Nasmith 18
Railways. Shelford 10
Compensation. Ingram 33
Real Property. Tudor 20
Chart. Fearne 45
Seaborne 36
Referees' Court.
Clifford & Stephens 25
Registration. Davis 29
Religious,
Doctrine.
Burdett & Heath 46
Discipline.
Long e. Cape Town 46
Ritual. Bayford 46
Hamel 46
Roman Law. Gaius 24
Oortalan's 24
Tomkins 36
Tomkins & Jenken 28
Salmon Fisheries.
Bund 5
Servants. Baylis 12
Sewers. Woolrych 28
Sheriff's Court. Davis 9
Short Hand. Gurney 43
Slander. Starkie 47
Specific Performance.
Fry 37
Stock Exchange.
Keyser 43
Student's Guide.
Benham 41
Succession Duty.
Shelford 29
Suit in Equity. Hunter 6
Summary Convictions.
Oke 34
Tithes. Schomberg 46
Torts. Underhill 25
Treaties. Hertslet 31
Trusts, Charitable.
Tudor 31
Turnpike Laws. Oke 35
Vendors & Purchasers.
Seaborne 35
Water Companies Acts.
Michael and Will 27
Wills. Crabb 22
Tudor 20
Wigram 38
Winding-up. Shelford 11
Window Lights.
Latham 25
Wrongs. Underhill 25

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